NOTE

A Responsible Approach to Safety Regulation in the Automobile Industry

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ABSTRACT

Automobile safety is an issue of public health and welfare. People die when automobile manufacturers cut corners. Consequently, it is imperative that the federal regulatory agency responsible for automobile safety, the National Highway Traffic Safety Administration ("NHTSA"), impose effective, fair penalties for violations of safety regulations. Current penalties have consisted almost entirely of monetary penalties against corporate entities. This framework has insulated the real decisionmakers—the executives—from liability. As a result, corporate officers have consistently evaded the consequences of negligent actions that threaten public safety. The current framework has allowed them to pad their personal bank accounts while running over driver safety.

To effectively enforce safety regulations, deter infringement, and save lives, NHTSA should utilize individual accountability. Drawing on the resources surrounding the responsible corporate officer doctrine, this Note proposes that NHTSA apply a version of that doctrine to executives within the automobile industry: the imposition of negligence-based civil penalties upon responsible corporate officers.

INTRODUCTION

Seventeen years ago, my mother, my sister, and I were headed southbound on the Florida Turnpike. We were driving seventy miles per

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hour when the back driver-side tire suddenly blew out. Our Ford Explorer was thrown out of control; the car rolled over multiple times and landed in a ditch on the side of the road. When the car finally stopped moving, I was left hanging upside down, suspended in mid-air by my seatbelt.

We were fortunate, all things considered. My sister and I escaped the accident without significant injury, and my mother was hospitalized only briefly. We would soon learn that we had been victims of the Ford-Firestone scandal and that many in our position were not so lucky. During the late 1990s, over 250 people were killed while driving Ford vehicles outfitted with Firestone tires.[1] Investigations revealed that Ford and Firestone were aware of serious tire tread separation problems as early as 1996, but neither company ordered a recall in the United States until 2000.[2] The regulations in the automobile industry were insufficient twenty years ago to stop the executives at Firestone and Ford from putting people in danger.

Sadly, little has changed in the last seventeen years. Executives in the automobile industry are still rarely held accountable for safety failures, and people continue to be harmed by their negligence.[3] Just last year, over one hundred people were killed as a result of ignition switch failures in automobiles manufactured by General Motors ("GM").[4] There is strong evidence that automobile executives often perform cost-benefit analyses before making a profit-driven decision to ignore problems like these.[5] In this case, no corporate executives were held accountable for these tragic, preventable deaths.[6] In fact, the New York Times went so far as to claim that federal law *hindered* prosecutors seeking to indict individual officers.[7] Instead, GM, in its corporate capacity, has agreed to pay monetary penalties to settle both the federal criminal case and numerous private civil

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1 *See* Danielle Ivory & Ben Protess, *Law Hinders Prosecutors in Charging G.M. Employees in Ignition Defect*, N.Y. TIMES (July 19, 2015), http://www.nytimes.com/2015/07/20/business/laws-hinder-prosecutors-in-charging-gm-employees-in-ignition-defect.html?_r=1.

2 Kevin M. McDonald, *Don't TREAD on Me: Faster Than a Tire Blowout, Congress Passes Wide-Sweeping Legislation That Treads on the Thirty-Five Year Old Motor Vehicle Safety Act*, 49 BUFF. L. REV. 1163, 1172–73 (2001).

3 *See infra* Section I.C.

4 *See* Ivory & Protess, *supra* note 1 ("And yet, prosecutors cannot automatically charge G.M., or its employees, for a defect linked to the deaths of at least 124 people.").

5 *See, e.g.*, Ford Motor Co. v. Stubblefield, 319 S.E.2d 470, 482 (Ga. Ct. App. 1984) ("Ford weighed the costs of corrective action against the benefit of profits and deliberately decided to market the 1975 Mustang II with clear knowledge of the danger.").

6 *See* Ivory & Protess, *supra* note 1.

7 *See id.*

suits.[8]

The National Highway Traffic Safety Administration ("NHTSA") routinely imposes penalties on automobile corporations instead of individual executives.[9] Consequently, automobile executives rarely, if ever, internalize external societal costs.[10] In this sense, the corporation acts as a buffer that protects executives from the full force of their decisions.[11] If "the only way in which a corporation can act is through the individuals who act on its behalf,"[12] and the individuals are shielded from the deterring effects of liability, then the corporation will continue to do wrong.[13] Consequently, real change in the automobile industry will come only through individual (executive) accountability.

This issue is, of course, not limited to the automobile industry. It is one that has been discussed at length by many authors.[14] But it has particular salience in this context because when automobile manufacturers cut corners, people die.[15] This Note argues that this direct connection to public health and welfare particularly justifies the imposition of individual accountability in the automobile industry.

In fact, individual accountability has already been employed by other administrative agencies where public health and welfare is similarly at stake. Through the "responsible corporate officer doctrine," the Food and Drug Administration ("FDA") and Environmental Protection Agency ("EPA") have imposed criminal liability upon "responsible" corporate officers.[16] Although this Note argues that officers with a "responsible share

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8 Tom Hays & Tom Krisher, *GM Pays to Settle Ignition Switch Cases*, U.S. NEWS & WORLD REP. (Sept. 17, 2015, 2:35 PM), http://www.usnews.com/news/business/articles/2015/09/17/gm-said-to-settle-criminal-case-over-ignition-switches (reporting that GM and prosecutors reached a settlement agreement wherein GM will pay $900 million to settle the criminal charges and $575 million to settle the civil lawsuits).

9 *See Civil Penalty Settlement Amounts*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., https://www.nhtsa.gov/laws-regulations/civil-penalty-settlement-amounts [https://perma.cc/9943-E4HB] (last visited Aug. 27, 2017).

10 *See* Robert Steinbuch, *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*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 321, 344 (2007).

11 *See id.* at 322, 344.

12 United States v. Dotterweich, 320 U.S. 277, 281 (1943). In *Dotterweich*, the Supreme Court first formulated the responsible corporate officer doctrine. *See infra* Section III.B.

13 *See* Steinbuch, *supra* note 10, at 339–40.

14 *See, e.g.*, *id.* at 323–339 (discussing the fact that executives in many industries rarely internalize external societal costs).

15 *See, e.g.*, Ivory & Protess, *supra* note 1.

16 *See infra* Section III.B.

in the furtherance of [a] transaction which [a] statute outlaws"[17] should be held liable, the framework this Note proposes differs from the regular formulation of the responsible corporate officer doctrine because it does not include criminal liability.[18] Rather, this Note argues *only* for liability in the form of civil penalties. In that sense, this Note promotes a "modified version" of the responsible corporate officer doctrine for executives in the automobile industry.[19]

The imposition of civil penalties upon negligent officers in positions of responsibility is the most desirable solution because it strikes the best balance between effectiveness and fairness.[20] This solution acknowledges two competing realties: (1) traditional criminal liability is not *effective* in the corporate setting, and (2) imposing criminal liability without proving knowledge or intent is *unfair*.

In the corporate setting, the high standard of proof and mental state requirements traditionally associated with criminal liability form nearly insurmountable obstacles to criminal prosecution.[21] In order to assess criminal penalties, the government typically needs to show—beyond a reasonable doubt—that an executive had criminal knowledge or intent.[22] In the context of automobile corporations, layers of corporate bureaucracy, which involve numerous decisionmakers, protect corporate officers.[23]

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17 *Dotterweich*, 320 U.S. at 284.

18 In some instances, the responsible corporate officer doctrine has been used to impose civil liability, but as a general matter it is a tool for criminal liability. *See generally* Amy J. Sepinwall, *Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability*, 2014 COLUM. BUS. L. REV. 371 (2014) (describing the responsible corporate officer doctrine and current issues surrounding it as situated primarily in the criminal context while noting the doctrine's occasional use in the civil context).

19 It is important to distinguish between the responsible corporate officer doctrine and the doctrine of piercing the corporate veil. In responsible corporate officer doctrine cases, an administrative agency imposes a penalty or punishment in its regulatory capacity. *See, e.g.*, *id*. at 375 n.4, 405–06. In piercing the corporate veil cases, a private party (often a creditor) brings a civil lawsuit against a shareholder or officer of a corporation. *See* Sam F. Halabi, *Veil-Piercing's Procedure*, 67 RUTGERS U. L. REV. 1001, 1010 (2015).

20 Effectiveness and fairness are arguably two of the most important values in the area of executive liability. *See, e.g.*, Paul F. Schaaff, Jr., Note, *Indirect Criminal Conduct of Corporate Officers—Law in Search of A Fair and Effective Standard of Liability*, 13 DEL. J. CORP. L. 137 (1988) (arguing both generally); Sepinwall, *supra* note 18, at 415–16, 418 (arguing, despite its perceived unfairness, for a strict liability formulation of the responsible corporate officer doctrine because of its effectiveness).

21 *See infra* Section IV.A.1.

22 *See* JOSHUA DRESSLER & STEPHEN P. GARVEY, CASES AND MATERIALS ON CRIMINAL LAW 9 (6th ed. 2012) (noting that the burden of proof in criminal cases is "beyond a reasonable doubt"); Ivory & Protess, *supra* note 1.

23 *See* Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 322 (1996) (noting states often resort to fining corporations instead of trying to break

Moreover, corporate officers may possess legal knowledge that enables them to tailor their behavior to avoid evidence of wrongdoing.[24] Consequently, criminal liability is very difficult to prove in this context.

Even if the standard was lowered, criminal liability still would not be a desirable solution because imposing a criminal punishment without the high standard of proof or mental state requirements is *unfair*.[25] As the Supreme Court has noted, it is imperative in our justice system that there be a connection between a "mental element" (i.e., knowledge or intent) and criminal punishment.[26] The existing responsible corporate officer doctrine is legally problematic because it has allowed for the FDA and EPA to impose criminal penalties *without* proving knowledge or intent on the part of the guilty officer.[27]

Negligence-based civil penalties, on the other hand, are both fair and effective. They are effective because, unlike traditional criminal liability, they are easily enforceable in the corporate context. They are fair because they would be imposed only on responsible officers whose "breach of duty" has a causal relationship to a subsequent harm or violation of the law. Consequently, NHTSA should impose civil penalties upon negligent corporate officers in positions of responsibility.

To make the case for this proposal, this Note discusses the history of poor regulatory enforcement in the automobile industry in Part I. Part II then presents the current state of the law. Part III establishes that previous enforcement efforts have failed because of a lack of individual accountability. Part III also shows how other federal agencies have used the responsible corporate officer doctrine to impose individual liability in situations where the public health and welfare is similarly affected. Finally, Part IV outlines the specific solution proposed by this Note: negligence-based liability in the form of civil penalties for responsible corporate officers.

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through the "corporate hierarchy"); *cf.* Amy J. Sepinwall, *Crossing the Fault Line in Corporate Criminal Law*, 40 J. CORP. L. 439, 440–43 (2015) (discussing how no corporate officers were held criminally liable after the financial crisis in 2008).

24 *Cf.* Fischel & Sykes, *supra* note 23.

25 *See infra* Section IV.A.1.

26 Morissette v. United States, 342 U.S. 246, 250–51 (1952).

27 *See infra* Section III.B.

I. AUTOMOBILE EXECUTIVES HAVE HISTORICALLY BEEN RESPONSIBLE FOR SERIOUS PROBLEMS THAT HAVE DIRECTLY AFFECTED PUBLIC HEALTH AND WELFARE

A. Safety Troubles Before the 1990s: The Gas Tank Chronicles

There is a long history of safety related problems in the automobile industry.[28] In the 1970s, Ford knowingly manufactured the Mustang with a weak frame.[29] Because the frame was so weak, the gas tank—which was located in the rear of the car—came forward when the vehicle was hit from behind.[30] When Ford crash tested the car, video footage revealed that the gas tanks came forward and leaked into the passenger compartment of the vehicle.[31] Realizing that this defect would not pass federal safety standards, Ford redesigned the frame with stronger reinforcement.[32] It ran tests again with the new frame and the results improved considerably.[33] However, Ford did *not* replace the frame in the cars it actually sold.[34] It merely used the reinforced frame to pass the test, and then used those test results in their report to NHTSA.[35]

When NHTSA investigated the car (presumably due to an influx of accident reports), Ford withheld the results of the original crash tests.[36] Consequently, NHTSA reported that the Ford Mustang had no inherent danger of fire.[37] Around two hundred people were killed as a result of the faulty fuel tank and frame design.[38] As a Georgia court of appeals noted:

> Ford was shown to have actual knowledge before the sale 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

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[28] Although the history of safety failures significantly pre-dates the 1970s, see generally RALPH NADER, UNSAFE AT ANY SPEED (2d ed. 1972), this Note confines its analysis to safety issues that arose during the last half-century.

[29] *See* Ford Motor Co. v. Stubblefield, 319 S.E.2d 470, 476 (Ga. Ct. App. 1984) (noting that Ford knew of the problem as early as 1968, but decided to avoid addressing the problem until 1976 in order to achieve savings of $20.9 million).

[30] Steinbuch, *supra* note 10, at 331–32.

[31] *Id*. at 332.

[32] *See id*.; Baier v. Ford Motor Co., No. C04-2039, 2005 WL 928615, at *1–2 (N.D. Iowa Apr. 21, 2005).

[33] *See Baier*, 2005 WL 928615, at *1–2.

[34] *See id*.

[35] Steinbuch, *supra* note 10, at 332.

[36] *Baier*, 2005 WL 928615, at *2.

[37] Steinbuch, *supra* note 10, at 332.

[38] *Id*. at 333.

> resulting 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 a finding that Ford weighed the costs of corrective action against the benefit of profits and deliberately decided to market the 1975 Mustang II with clear knowledge of the danger.[39]

Just ten years later, GM had its own set of gas-tank-related issues. GM manufactured ten million trucks with "side saddle" style fuel tanks located on the side of the vehicle.[40] These tanks were not protected by the truck's frame and were likely to explode on impact.[41] There is strong evidence that GM executives were aware of the danger these side tanks posed, yet they did not change the design for fifteen years, and eight hundred deaths are now attributed to the design flaw.[42]

Perhaps the worst of the gas-tank-related design defects occurred in the 1979 Chevrolet Malibu, also manufactured by GM. The fuel tank in the Malibu was located a mere eleven inches from the bumper.[43] This close proximity made it more likely that the tanks would explode on impact.[44] As Robert Steinbuch notes:

> Despite thousands of vehicle fires, and hundreds of injuries and deaths that resulted from this design, 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.[45]

Specifically, GM estimated that five hundred fatalities a year would result from its design choice.[46] A report further indicated the cost from fatality-related lawsuits would be $2.40 per vehicle.[47] Because GM believed that this was less than the amount it would cost to fix the problem ($8.59 per vehicle), it chose profit over life.[48]

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39 Ford Motor Co. v. Stubblefield, 319 S.E.2d 470, 482 (Ga. Ct. App. 1984) (citations omitted).

40 Steinbuch, *supra* note 10, at 334.

41 *Id*.

42 *Id*. at 334–35.

43 *Id*. at 335.

44 *See id*.

45 *Id*. (footnote omitted).

46 *Id*. at 336.

47 *Id*.

48 *See id*. Also worth noting is the infamous Ford Pinto. Similar to the Chevrolet

B. Safety Troubles Continued in the 1990s: Ford and Firestone

As reported by NHTSA, 271 people were killed as a result of the Ford-Firestone tire scandal, and over seven hundred were injured.[49] Firestone's "ATX" tire was installed "as original equipment on the Ford Explorer."[50] The ATX tire tread separated at a "statistically significant" rate.[51] The tread separation led to deadly rollover accidents (mostly in Ford Explorers).[52] Although neither company was ultimately convicted, Ford and Firestone accused each other of misconduct related to the accidents.[53]

As early as 1996, Firestone began receiving reports of tread separation and even instituted a limited international recall.[54] However, no U.S. tires were recalled until 2000, when Firestone met with Ford and NHTSA and agreed to recall 14.4 million tires.[55] NHTSA later recommended that Firestone expand the recall to include all "Wilderness AT" tires, which were not fully covered by the 2000 recall.[56] Firestone refused to do so.[57] In the end, Ford recalled the tires itself, leading Firestone and Ford to sever their long-standing business relationship.[58]

C. Safety Troubles Ran Away in the 2000s

As early as 2000, Toyota publicly recognized that some of its vehicles were suddenly accelerating on their own.[59] The company came under

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Malibu, the Pinto's gas tank was positioned in the rear of the car with little protection. *See* Rena Steinzor, *(Still) "Unsafe at Any Speed": Why Not Jail for Auto Executives?*, 9 HARV. L. & POL'Y REV. 443, 465 (2015). "Because the tank was not protected by any barrier, Pintos exploded into flame when hit from the back by a vehicle traveling even at a relatively low speed, killing everyone inside the car." *Id*. The case is still widely regarded as a serious example of corporate misconduct; there is strong evidence that Ford knew the risk this design entailed and refused to change it. *See* W. Kip Viscusi, *Pricing Lives for Corporate Risk Decisions*, 68 VAND. L. REV. 1117, 1133–34 (2015).

49 McDonald, *supra* note 2, at 1174.

50 *Id*. at 1171.

51 *Id*. at 1173.

52 *Id*. at 1174–75.

53 *See id*. at 1183–84. Firestone maintains that Ford was partially responsible for the accidents because the company's vehicles suffered from oversteering problems that made them particularly difficult to control during a tire failure. *Id*.

54 *Id*. at 1172. The fact that NHTSA was not informed of the international recalls would become a major issue in Congress when the tire problems eventually came to light. *See id*. at 1185–86.

55 *Id*. at 1172–73; *see also* Keith Bradsher, *More Deaths Are Attributed to Faulty Firestone Tires*, N.Y. TIMES (Sept. 20, 2000), http://www.nytimes.com/2000/09/20/business/more-deaths-are-attributed-to-faulty-firestone-tires.html.

56 McDonald, *supra* note 2, at 1173.

57 *Id*. at 1173–74.

58 *Id*. at 1174.

59 Joel Finch, *Toyota Sudden Acceleration: A Case Study of the National Highway*

intense public and regulatory scrutiny as customer complaints grew in number and severity over the next ten years.[60] Toyota repeatedly dodged the complaints, however, by claiming that the sudden acceleration was due to improperly installed or defective floor mats and gas pedals.[61] Toyota was eventually forced to issue vast recalls.[62] Many experts have argued that the real cause of the sudden acceleration—a faulty electronic throttle system—would have been prohibitively expensive to fix and that Toyota accordingly avoided addressing it.[63] Toyota was fined $1.2 billion by the Department of Justice in 2014 for knowingly withholding information and lying to the public.[64]

The most recent car safety scandal involves GM and its ignition switch failures. In 2014, GM recalled "2.6 million Chevrolet Cobalts, Saturn Ions and other small cars."[65] While the car was in use, the ignition switch would suddenly and randomly turn off and cut the power to the engine, thus "disabling power steering, power brakes and airbags."[66] GM admitted that it had evidence of the problem for over a decade and did nothing.[67] In 2015, GM signed a deferred prosecution agreement with the Department of Justice and agreed to pay $900 million.[68]

Why do executives in the automobile industry consistently fail to choose life over profit? As the following Part demonstrates, the current system of penalties fails to establish an adequate incentive structure for corporate executives to do otherwise.

II. CURRENT STATE OF THE LAW

Frustrated with the lack of attention given to safety in the automobile industry, Congress passed the Transportation Recall Enhancement,

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Traffic Safety Administration—Recalls for Change, 22 LOY. CONSUMER L. REV. 472, 475 (2010).

60 *See id*. at 475–77.

61 *Id*. at 477–78.

62 *Id*. at 478; *see also* Bill Vlasic & Matt Apuzzo, *Toyota Is Fined $1.2 Billion for Concealing Safety Defects*, N.Y. TIMES (Mar. 19, 2014), http://www.nytimes.com/2014/03/20/business/toyota-reaches-1-2-billion-settlement-in-criminal-inquiry.html?_r=0.

63 *See* Finch, *supra* note 59, at 479.

64 *See* Vlasic & Apuzzo, *supra* note 62; Ivory & Protess, *supra* note 1.

65 Ivory & Protess, *supra* note 1.

66 *Id*.

67 *Id*.

68 Press Release, U.S. Attorney's Office for the S. Dist. of N.Y., Manhattan U.S. Attorney Announces Criminal Charges Against General Motors and Deferred Prosecution Agreement with $900 Million Forfeiture (Sept. 17, 2015), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-criminal-charges-against-general-motors-and-deferred.

Accountability, and Documentation Act ("TREAD Act")[69] in 2000.[70] The Senate version of the bill, proposed by Senator John McCain, would have enacted sweeping reforms.[71] But Congress caved to pressure from the U.S. Chamber of Commerce and the Alliance of Automobile Manufacturers, watering down subsequent versions of the bill.[72]

The TREAD Act, as amended by the Fixing America's Surface Transportation Act ("FAST Act")[73] in 2015,[74] changed the shape of automobile regulation in two important ways. First, the TREAD Act imposed heightened reporting requirements on automobile manufacturers.[75] Specifically, the statute established that

> [a] manufacturer of a motor vehicle or replacement equipment shall notify the Secretary . . . if the manufacturer—(1) learns the vehicle or equipment contains a defect and decides in good faith that the defect is related to motor vehicle safety; or (2) decides in good faith that the vehicle or equipment does not comply with an applicable motor vehicle safety standard prescribed under this chapter.[76]

Second, the TREAD Act strengthened the civil and criminal penalties available to NHTSA for safety violations.[77] Nonetheless, it is still very difficult to secure criminal penalties under the TREAD Act.[78] First, the corporation must have filed an *incorrect* safety report.[79] Second, they must have filed this report *with the specific intention* of misleading NHTSA.[80] Third, the corporation must have not corrected the incorrect safety report—if the corporation did, then it may fall within the "safe-harbor" provision,

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69 Transportation Recall Enhancement, Accountability, and Documentation Act, Pub. L. No. 106-414, 114 Stat. 1800 (2000).

70 *See* McDonald, *supra* note 2, at 1176–83 (discussing legislative history of the TREAD Act).

71 *See* Ivory & Protess, *supra* note 1.

72 *Id*.

73 Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015).

74 The only notable change for purposes of this discussion was the increase in the maximum civil penalty. *See* U.S. Dep't of Transp., *The Fixing America's Surface Transportation Act or "Fast Act*," TRANSPORTATION.GOV, https://www.transportation.gov/fastact [https://perma.cc/385H-LQC6] (last updated Apr. 8, 2016).

75 *See* McDonald, *supra* note 2, at 1186–87.

76 49 U.S.C. § 30118 (c)(1)–(2) (2012).

77 *See* McDonald, *supra* note 2, at 1186–87.

78 *See* Ivory & Protess, *supra* note 1.

79 *See id*.

80 *See id*.

under which no criminal liability for the false report may be imposed.[81] Finally, prosecutors must overcome the difficult criminal burden of proof: they must prove their entire case beyond a reasonable doubt.[82]

It is all but impossible to prove specific intent to mislead in the context of a complicated corporate case.[83] For example, in the recent GM prosecution, the Department of Justice was unable to meet these high standards when it sought to hold individuals accountable for widespread ignition switch failures.[84] Despite the fact that, as stated, GM acknowledged it had possessed evidence of the ignition switch defect for *over a decade*, Department of Justice officials were *still* unable to indict any individuals.[85]

Presumably because criminal penalties are so difficult to secure, NHTSA often instead relies on corporate civil penalties.[86] NHTSA can impose corporate civil penalties for, inter alia, selling equipment that violates a federal safety standard,[87] and failing to provide required information.[88] Under the FAST Act, Congress raised the maximum penalty for these and other related civil violations from $35 million to $105 million.[89] In other words, the entity being fined may attempt to bargain with NHTSA for a lower penalty. Should NHTSA and a corporation fail to reach an agreement, the penalty is likely reviewable by a federal court.[90]

The TREAD Act was Congress's answer to the safety failures of the 1990s. But it created an enforcement scheme that was almost entirely dependent upon *corporate* monetary penalties. Even the criminal cases brought under the TREAD Act nearly always result in monetary penalties for corporations only.[91] As documented above and for reasons discussed below, corporate monetary penalties have been an insufficient deterrent against wrongful, unsafe behavior in the industry.[92] Despite the fact that by

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81 *See id*.

82 *See* DRESSLER & GARVEY, *supra* note 22, at 9.

83 *See, e.g*., Ivory & Protess, *supra* note 1.

84 *See id*.

85 *See id*.

86 *See Civil Penalty Settlement Amounts*, *supra* note 9.

87 *See* 49 U.S.C. §§ 30112, 30165 (2012).

88 *See id*. §§ 30117–30118.

89 49 U.S.C. § 30165(a)(1); Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 24110(a)(1)(B), 129 Stat. 1312, 1709 (2015); *see also* U.S. Dep't of Transp., *supra*, note 74.

90 *See* Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955) (construing the Administrative Procedure Act "to remove obstacles to judicial review of agency action").

91 *See, e.g*., Press Release, U.S. Attorney's Office for the S. Dist. of N.Y., *supra* note 68.

92 When using the term deterrent, this Note largely refers to a general deterrent. *See*

the early 2000s NHTSA had already imposed massive fines on many automobile manufacturers for violating safety regulations, both GM and Toyota still chose to place profit over life.[93] For GM, the ignition switch defects may have caused as many as 303 deaths.[94] And Toyota's sudden acceleration issues may be responsible for as many as eighty-nine deaths.[95] These events are simultaneously tragic and unsurprising. Corporate monetary penalties do not adequately hold corporate officers accountable, as the next Part will discuss.

III. INDIVIDUAL ACCOUNTABILITY AND THE RESPONSIBLE CORPORATE OFFICER DOCTRINE

Individual accountability should be used more frequently by NHTSA because it is more effective than the agency's current dominant practice of imposing civil penalties upon corporations.[96] In fact, other federal agencies such as the Department of Justice have realized the benefits of individual accountability and have started moving towards greater accountability for corporate officers.[97] Section A of this Part describes how the corporate legal climate has historically been averse to individual accountability and how the Department of Justice is attempting to change that climate. Section A also describes how corporate fines (as opposed to individual fines) fail to adequately deter wrongdoing. Section B discusses how other federal agencies have used the responsible corporate officer doctrine to address this problem and effectively deter wrongdoing.

A. Previous Safety Regulation Enforcement Efforts Have Failed Because

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STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 515 (2004) (defining general deterrence as "the tendency of people who have not yet been sanctioned to be deterred by the prospect of sanctions for committing an illegal act"). However, for purposes of this specific discussion, corporate penalties were an insufficient general *and* individual deterrent in the cases of GM and Toyota because NHTSA had imposed civil penalties on both corporations before. *See id*. (defining individual deterrence as "the tendency of a person who has been penalized for committing an illegal act to be more deterred in the future from committing that act than he had been beforehand by the prospect of sanctions"); *Civil Penalty Settlement Amounts (2012–1999)*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., https://one.nhtsa.gov/Laws-&-Regulations/Civil_Penalties_1999–2012 (last visited Aug. 27, 2017) (documenting that Toyota was penalized in 2010, and GM in 2004).

93 *See supra* Section I.C.

94 *See* David Undercoffler, *As Many as 303 Deaths Linked to Faulty Ignition Switches in Recalled GM Cars*, L.A. TIMES (Mar. 13, 2014), http://articles.latimes.com/2014/mar/13/autos/la-fi-hy-autos-303-deaths-linked-to-recall-gm-20140313.

95 *Toyota "Unintended Acceleration" Has Killed 89*, CBS NEWS (May 25, 2010, 7:08 PM), http://www.cbsnews.com/news/toyota-unintended-acceleration-has-killed-89/.

96 *See Civil Penalty Settlement Amounts*, *supra* note 9 (documenting NHTSA's practice of imposing civil penalties upon corporations).

97 *See infra* text accompanying notes 103–109.

They Rarely Involve Individual Accountability

Most corporate prosecutions result in deferred prosecution agreements.[98] Of these deferred prosecution agreements, *very few* result in action against individual employees.[99] Moreover, because many deferred prosecution agreements are not made public, it is very difficult to obtain an accurate measure of how often individuals are actually prosecuted.[100] Perhaps the best study available dates from the 1970s and claims that only "1.5 percent of federal enforcement efforts resulted in the conviction of a corporate officer."[101] This staggeringly low number is indicative of a culture that is averse to individual accountability. Given this culture, it is not surprising that NHTSA rarely imposes civil penalties on executives in their individual capacity.[102]

Fortunately, there is evidence that this culture is changing. Recently, then-Deputy Attorney General of the United States Sally Yates released an internal Department of Justice memorandum outlining a new enforcement strategy focusing on individual accountability.[103] Specifically, the memorandum put forth "six key steps to strengthen [the] pursuit of individual corporate wrongdoing."[104] Of note, these steps included: (1) a new "focus on individuals from the inception of the investigation;" (2) an understanding that "the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation;" (3) a rule that "Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases"; and (4) an emphasis that "civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay."[105]

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98 *See* BRANDON L. GARRETT, TOO BIG TO JAIL 96–98 (2014).

99 *See id*.

100 *See id*.

101 *Id*. at 98.

102 *See Civil Penalty Settlement Amounts*, *supra* note 9.

103 *See* Memorandum from Sally Quillian Yates, Deputy Attorney Gen., U.S. Dep't of Justice, Individual Accountability for Corporate Wrongdoing 1 (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download ("One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.").

104 *Id*. at 2.

105 *Id*. at 2–3. The second statement concerning the release of culpable individuals from liability may have been intended to address the practice of deferred prosecution

The Department of Justice memorandum is strong support for this Note's argument that individual accountability is an effective deterrent.[106] However, it is important to note that the Department of Justice memorandum has no binding legal effect on the issue at hand. NHTSA oversees regulatory enforcement of vehicle safety and is not controlled by the Department of Justice.[107]

Unfortunately, NHTSA almost never imposes civil penalties against individual corporate officers.[108] In fact, most of the cases discussed in Part I ended in monetary judgments against the corporation (either imposed directly by NHTSA or via private tort lawsuits).[109] Despite these hefty corporate fines, the cases clearly did not adequately deter future wrongful action.[110] The underlying reason NHTSA's previous enforcement attempts have been so unsuccessful is that corporate penalties fail to fully *internalize externalities*.[111]

It is a foundational aim of law that penalties should fully internalize externalities.[112] To illustrate this point, consider the following example. To boost profits, Bob, CEO of Specific Motors, decides in 2014 to lay off half of the company's airbag inspection team. As a result, the remaining team members are now able to devote only half the time they usually would to inspecting airbags, and consequently, the quality of their work suffers. In 2015, Mary is driving her Specific Motors "Stallion" car when another driver suddenly pulls out in front of her, cutting her off and causing a crash. Her forward collision airbag does not deploy. She sustains serious injuries, substantial medical bills, and has to take two months off work. These injuries would not have occurred had the airbag properly deployed. Mary successfully brings a lawsuit against Specific Motors and recovers damages for her injuries.

The harm to Mary is *external* to Specific Motors. It may of course indirectly affect the company (e.g., through its reputation), but it does not directly affect the company's interests prior to the lawsuit. An aim of the law is to find a way for Specific Motors to *internalize* the unwanted harms

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agreements.

106 *See infra* Section III.B.

107 NHTSA reports to the Department of Transportation. *See Who We Are and What We Do*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., https://one.nhtsa.gov/About-NHTSA/Who-We-Are-and-What-We-Do (last visited Aug. 27, 2017).

108 *See id*.

109 *See supra* Part I.

110 *See supra* Part I.

111 *See* Steinbuch, *supra* note 10, at 339–40.

112 *See* WARD FARNSWORTH, THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW 37–46 (2007); Steinbuch, *supra* note 10, at 339–40.

that its negligent decision caused (here, Mary's injuries).[113] One way to do this is to make Specific Motors pay damages to Mary.[114] Ideally, Specific Motors will consider its interest in avoiding such damages in the future and not make similar harmful, negligent decisions. This modified behavior will render customers safer and the community better off.[115] However, these results are not achieved if Specific Motors is not actually deterred.[116] To illustrate this point, consider two alternate versions of the Specific Motors story.

In Universe One, Bob is the sole owner of Specific Motors, a pass-through entity. Specific Motors produces a small number of specialty, by-request-only sports cars. He is married and has a large family. Just recently, Specific Motors started turning a profit. Bob uses the company's limited profits to make ends meet at home. Bob made the decision to lay off half the airbag inspection team in order to increase immediate profits. The damages Bob paid to Mary cut into Specific Motor's profits, and consequently lowered his own paycheck by a larger amount than the short-term savings realized by his careless decision.

In Universe Two, Specific Motors is a massive corporation that produces millions of vehicles a year sold worldwide. Specific Motors hauls in over a billion dollars annually in net profits. A vast network of corporate officers manages the corporation, and responsibility is dispersed throughout many layers of corporate bureaucracy. Lawsuits brought against Specific Motors are defended by the corporation itself, and damages are similarly paid by the corporation. Specific Motors paid the damages to Mary, and no action was taken against Bob—the decisionmaker.

In Universe One, the damages Bob pays to Mary will have a strong deterrent effect because the harm is truly being internalized—Bob, the decisionmaker, is forced to pay for Mary's medical bills that were the result of his decision.[117]

On the other hand, in Universe Two, the damages are internalized only

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113 *See* FARNSWORTH, *supra* note 112, at 37–46.

114 *See* SHAVELL, *supra* note 92, at 93 ("Society can . . . make use of financial incentives to reduce harmful externalities.").

115 *See id*. at 92–95.

116 *See* Steinbuch, *supra* note 10, at 339–40.

117 *See* SHAVELL, *supra* note 92, at 504 ("A multitude of observations from everyday life suggests that individuals are discouraged from all manner of undesirable behavior when the likelihood and magnitude of sanctions is sufficiently high: Drivers slow down and tend to obey traffic rules when they see a police car; students' deportment improves under a teacher's gaze; criminals often refrain from acting when they would be easy to identify as responsible. . . . [P]olice strikes have resulted in marked increases in crime, improvements in toxicology have led to declines in the incidence of poisoning, and increases in tax audit rates and sanctions have discouraged tax evasion.").

in a superficial sense. When the corporation pays the damages, the corporation internalizes the external harm done to Mary.[118] However, because the actual decisionmaker, Bob, paid no damages, was not fired or demoted for his decision, and was not even involved in the lawsuit, Bob does not personally internalize the damages from the lawsuit, and thus the damages are unlikely to deter Bob from similar future conduct.[119] If the chief decisionmaker is not deterred, then the corporation is also not deterred.[120]

Admittedly, there could *potentially* be a deterrent effect in Universe Two if the damage award was large enough that it caused the corporation to take actions to change its future conduct (e.g., firing Bob, creating a corporate policy requiring a certain number of airbag inspectors, etc.). However, the speculative and uncertain nature of these consequences lessen their deterrent effect, whereas Bob will almost always be deterred in Universe One.[121] Specifically, Bob's ex ante incentives in Universe One will be stronger than his ex ante incentives in Universe Two, where results harmful to his personal interest are much less likely to come to fruition.[122] In Universe One, Bob knows prior to acting that he will likely personally lose money if he fails to adequately inspect and install airbags and public harm results.[123] But in Universe Two, Bob knows that the corporation he works for will "foot the bill" for any resulting accidents and that his personal bottom line is unlikely to suffer, even if he cuts half the airbag inspection team.[124]

Perhaps the worst part of Universe Two is that not only is the corporation *not* deterred, but the innocent shareholders of Specific Motors will feel the damages of Mary's lawsuit most keenly. Robert Steinbuch explains this perverse reality: "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."[125] The deterrent effects of corporate penalties are probably *even more* diffuse than the Specific Motors illustration reveals:

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118 *See* Steinbuch, *supra* note 10, at 339–40.

119 *See id*.

120 *Cf*. United States v. Dotterweich, 320 U.S. 277, 281 (1943) ("[T]he only way in which a corporation can act is through the individuals who act on its behalf.").

121 *See* SHAVELL, *supra* note 92, at 504 ("In general, there is a great weight of empirical evidence demonstrating that increases in expected sanctions reduce violations.").

122 *See* Steinbuch, *supra* note 10, at 339–40.

123 *Cf. id*. at 339–42 (arguing for criminal liability as a means of internalizing externalities).

124 *Cf. id*. at 339–40 ("This liability system, however, has not sufficiently dissuaded many corporate executives from passing on the risks to consumers . . . .").

125 *Id*. at 339 (footnote omitted).

> 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. 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.[126]

Many years ago, the Supreme Court noted "the only way in which a corporation can act is through the individuals who act on its behalf."[127] That statement is still true today. As the above discussion illustrates, when a corporation—and not the individuals who act on its behalf—is fined, the corporation acts as a shield against the deterring effects of the sanction. The *corporation* (and ultimately its shareholders) internalizes the cost of the actions, not the actual decisionmakers (the executives). To effectively deter safety violations, NHTSA must be prepared to change this paradigm.

B. In Other Contexts, Courts Have Used the Responsible Corporate Officer Doctrine to Impose Individual Liability on Corporate Officers for Violating Regulatory Statutes

Individual accountability has been employed in other areas of the law where public health and welfare issues are similarly implicated. Specifically, the FDA and EPA have used the public health and welfare rationale to impose legal penalties upon corporate officers.[128] These penalties are employed through the responsible corporate officer doctrine.[129] Over the years, this doctrine has expanded and become a

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126 *Id*. at 339–40.

127 United States v. Dotterweich, 320 U.S. 277, 281 (1943).

128 *See, e.g*., *id*. at 278; United States v. White, 766 F. Supp. 873 (E.D. Wash. 1991); *see also* Christina M. Schuck, Note, *A New Use for the Responsible Corporate Officer Doctrine: Prosecuting Industry Insiders for Mortgage Fraud*, 14 LEWIS & CLARK L. REV. 371, 381–82 (2010). It is worth noting that individual accountability has been employed outside of this context. *See* GARRETT, *supra* note 98, at 96–98.

129 Schuck, *supra* note 128, at 373. For a discussion of the history and development of the responsible corporate officer doctrine, see *id*. at 380–82; David E. Frulla et al., *Responsible Corporate Officer Doctrine: Strict Criminal Liability for Regulatory Violations*, KELLEY DRYE (Oct. 24, 2013), http://www.kelleydrye.com/News-Events/Publications/Articles/Responsible-Corporate-Officer-Doctrine-Strict-Cr.

powerful enforcement tool for these agencies.[130]

The doctrine was first introduced in *United States v. Dotterweich*.[131] In that case, the "Buffalo Pharmacal Company, Inc. and Dotterweich, its president and general manager," were prosecuted for violations of the Federal Food, Drug, and Cosmetic Act ("FDCA").[132] A jury found Mr. Dotterweich guilty on two counts of shipping mislabeled drugs and one count of "shipping an adulterated drug."[133] The circuit court reversed "on the ground that only the corporation was the 'person' subject to prosecution unless, perchance, Buffalo Pharmacal was a counterfeit corporation serving as a screen for Dotterweich."[134]

The Supreme Court overturned the circuit court's decision and reinstated Mr. Dotterweich's conviction.[135] The Supreme Court began by noting that "[t]he purposes of [the FDCA] touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection."[136] The Supreme Court reasoned that the statute should be interpreted broadly in light of this important rationale.[137] Furthermore, the Court argued that this rationale justified holding Mr. Dotterweich criminally accountable "[d]espite no evidence of Dotterweich's knowledge of the mislabeling of the shipments."[138] Accordingly, "the Court determined that violation of the FDCA, a misdemeanor, is a crime of strict liability and that the statute imposes a duty upon the officer who was in a position to prevent or rectify violations."[139] The Court realized that this rule would impose hardships on corporate officers.[140] However, this hardship was outweighed by the potential harm to the public health and welfare.[141]

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130 *See* Frulla et al., *supra* note 129 (noting that the responsible corporate officer doctrine began as applying "where the potential criminal penalty was modest" and has now been expanded to cover felonies).

131 320 U.S. 277 (1943); *see* Schuck, *supra* note 128, at 373.

132 Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938); *Dotterweich*, 320 U.S. at 278.

133 *Dotterweich*, 320 U.S. at 278.

134 *Id*. at 279.

135 *Id*. at 285.

136 *Id*. at 280.

137 *Id*. at 282 (noting that the FDCA "was designed to enlarge and stiffen the penal net and not to narrow and loosen it").

138 Schuck, *supra* note 128, at 381.

139 *Id*. at 381.

140 *See Dotterweich*, 320 U.S. at 284–85.

141 *Id*. ("Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of

The Court subsequently upheld and expanded the responsible corporate officer doctrine in *United States v. Park*.[142] In *Park*, the CEO of Acme Markets, Inc. (a national corporation with over thirty-six thousand employees) was prosecuted under the FDCA for shipping food that had been contaminated by rodents while in one of Acme's warehouses.[143] During the jury trial, Mr. Park "conceded that providing sanitary conditions for food offered for sale to the public was something that he was 'responsible for in the entire operation of the company,' and he stated that it was one of many phases of the company that he assigned to 'dependable subordinates.'"[144] The jury convicted Mr. Park on all counts.[145]

In upholding Mr. Park's convictions, the Court emphasized its reasoning from *Dotterweich*, stating that

> the requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.[146]

Consequently, Mr. Park, "like Dotterweich, as a corporate officer, could be held liable for an 'act, default, or omission' because the FDCA imposed a duty not only to seek out and remedy violations, but to prevent them from occurring."[147] The Court did state, however, that if Mr. Park could make an affirmative showing that it would have been objectively impossible for him to have prevented the food contamination, he would not be held liable.[148] Because of this exception and the Court's recognition of an implied duty, *Park* effectively established something akin to a heightened negligence standard of culpability under the responsible corporate officer doctrine.[149]

Like in *Dotterweich*, Mr. Park was charged with a misdemeanor

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consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.").

142 421 U.S. 658 (1975).

143 *Id*. at 660.

144 *Id*. at 664.

145 *Id*. at 666.

146 *Id*. at 672.

147 Schuck, *supra* note 129, at 381–82 (quoting Park, 421 U.S. at 670).

148 *See Park*, 421 U.S. at 673. The Court described the procedure for the impossibility defense in the following way: "If such a claim is made, the defendant has the burden of coming forward with evidence, but this does not alter the Government's ultimate burden of proving beyond a reasonable doubt the defendant's guilt, including his power, in light of the duty imposed by the Act, to prevent or correct the prohibited condition." *Id*.

149 *Cf*. Sepinwall, *supra* note 18, at 388.

violation.[150] However, the misdemeanor violation for which Mr. Park was ultimately convicted carried a potential sentence of one year in prison, "and a subsequent offense [would have constituted] a felony carrying a punishment of up to three years in prison."[151] Justice Stewart, writing in dissent, warned: "[The] conviction approved today can serve in another case tomorrow to support a felony conviction and a substantial prison sentence."[152] He was right—courts have continued to expand the reach of the responsible corporate officer doctrine, and today it can be used to support a felony conviction.

The Tenth Circuit's decision in *United States v. Cattle King Packing Co*.[153] illustrates this development.[154] Notwithstanding the opinion never mentioning the term "responsible corporate officer," the Tenth Circuit used the doctrine to uphold the conviction of the defendants (Rudolph Stanko and Gary Waderich) on multiple felony counts.[155] The defendants had been convicted, in their respective capacities as owner and manager of Cattle King Packing Co., for violating the Federal Meat Inspection Act.[156] Mr. Stanko argued that he could not be held liable because he was no longer directly involved with the company at the time of the illegal activity—he had moved away and was merely an owner.[157] In the alternative, Mr. Stanko argued that the responsible corporate officer doctrine embodied in *Park* should be interpreted as only applying to misdemeanors.[158] But the Tenth Circuit was not persuaded by either argument.[159] It held that Mr. Stanko was responsible for instructing his employees and that *Park* should not be limited to only cases involving misdemeanors.[160] The Tenth Circuit used *Park*'s public welfare reasoning to support a finding that the lower court did not err when it found defendants guilty of *felonies* under the Federal Meat Inspection Act.[161]

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150 *See Park*, 421 U.S. at 682 (Stewart, J., dissenting); United States v. Dotterweich, 320 U.S. 277, 281 (1943); Frulla et al., *supra* note 129.

151 *Park*, 421 U.S. at 682–83 (Stewart, J., dissenting).

152 *Id*. at 683.

153 793 F.2d 232 (10th Cir. 1986).

154 *See* Schuck, *supra* note 128, at 385 (noting that *Cattle King* used *Park*'s public welfare rationale to expand the responsible corporate officer doctrine outside the misdemeanor context).

155 *See Cattle King*, 793 F.2d at 235, 240, 245.

156 Federal Meat Inspection Act, Pub. L. No. 59-242, 34 Stat. 1256 (1907); *see Cattle King*, 793 F.2d at 235.

157 *Cattle King*, 793 F.2d at 240.

158 *Id*. at 240.

159 *See id*. at 240–41.

160 *Id*.

161 *See id*. at 240–41.

In sum, the responsible corporate officer doctrine has now become a form of modified criminal liability. It can be used to make violations of certain statutes (1) a strict liability or negligence-based crime,[162] so long as (2) the individual being prosecuted had "a responsible share in the furtherance of the transaction which the statute outlaws."[163]

IV. A SOLUTION: NHTSA SHOULD USE THE RESPONSIBLE CORPORATE OFFICER DOCTRINE TO IMPOSE CIVIL PENALTIES AGAINST NEGLIGENT CORPORATE OFFICERS

The penalties NHTSA imposes must have a real deterring effect because when car manufacturers cut corners, people die. In other words, the public health and welfare is *directly* affected when deterrence fails. Consequently, NHTSA should consider the lack of deterrent effect posed by civil penalties levied against corporations a major problem. These factors—the public health and welfare, and the ineffectiveness of the current penalties regime—justify individual accountability in this area of the law.

Moreover, the responsible corporate officer doctrine is helpful because it sets the precedent that individual accountability is an appropriate course of action when the public health and welfare is directly implicated. With individual accountability established as an appropriate enforcement mechanism, it is necessary to determine which culpability standard should apply.

A. Negligence Is the Appropriate Culpability Standard

Negligence is the appropriate standard because it is effective and fair. Before looking at the reasons for adopting negligence, it is important to consider the reasons that past attempts at achieving individual accountability in corporate settings have failed. As this Section will demonstrate, they have been largely unsuccessful because (with the exception of the responsible corporate officer doctrine) they have primarily relied on traditional criminal liability.

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[162] It is important to note that there is descriptive and normative confusion about the correct culpability standard. *See* Jennifer Bragg et al., *Onus of Responsibility: The Changing Responsible Corporate Officer Doctrine*, 65 FOOD & DRUG L.J. 525, 528 (2010). Some scholars argue that courts should use a negligence-based approach, some have argued for strict liability, and others argue courts should use statutory intent requirements. *Compare id.* at 531 (arguing courts usually require negligence or more), *and* Sepinwall, *supra* note 18, at 378–84 (arguing that *Dotterweich* employed strict liability and that future courts should do so as well), *with* Schuck, *supra* note 128, at 386–87 (arguing courts generally use statutory intent requirements).

[163] United States v. Dotterweich, 320 U.S. 277, 284 (1943); *see* Sepinwall, *supra* note 18, at 378; Frulla et al., *supra* note 129.

1. Traditional Criminal Liability Is Unworkable in the Corporate Context

Traditional criminal liability is unworkable because the specific intent requirement is almost impossible to prove in the corporate context. NHTSA's experience with traditional criminal liability in the GM case is one illustrative example. As discussed above, GM manufactured approximately 2.6 million vehicles with serious power switch defects.[164] The defects caused power to suddenly cut off while the vehicles were in motion.[165] In 2015, the New York Times reported that "[f]rom the factory floor to the corporate suite, employees at [GM] saw indications of a deadly ignition defect and failed to disclose the problem to the government."[166] Despite mounting evidence that GM employees had knowledge of the defect, "the prospect of sweeping indictments across the company's ranks has faded."[167] Prosecutors have been unable to overcome the substantial legal burdens associated with proving criminal liability.[168] Specifically, prosecutors in the GM case needed to prove beyond a reasonable doubt that individuals acted with *specific intent* to mislead NHTSA.[169] These legal hurdles have proven to be insurmountable.[170]

Another example of the difficulty of proving criminal culpability in the corporate context is the Department of Justice's failed attempt to prosecute Wall Street executives after the financial crisis of 2008. Although "[o]fficial inquiries have found that rampant mendacity and fraud contributed to the meltdown . . . . virtually no *individual* executives at the wrongdoing entities . . . met the force of the criminal law."[171] Like in the GM prosecutions, the lack of accountability for Wall Street executives is attributable to the intent and burden of proof requirements associated with criminal liability.[172] Because prosecutors have so much difficulty pursuing traditional criminal liability in cases against individuals, it is rarely actually imposed.[173] Accordingly, it serves as less of a deterrent to wrongful

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164 Ivory & Protess, *supra* note 1.

165 *Id*.

166 *Id*.

167 *Id*.

168 *See id*.

169 *Id*.; *see* DRESSLER & GARVEY, *supra* note 22, at 9 (noting that "beyond a reasonable doubt" is the standard of proof in criminal cases).

170 *See* Ivory & Protess, *supra* note 1 (discussing the difficulties prosecutors have faced in the GM case).

171 Sepinwall, *supra* note 18, at 440–41.

172 *See id*. at 442.

173 *See* GARRETT, *supra* note 98, at 96–98.

behavior.[174] To illustrate, consider the corporate officers at Toyota who faced the acceleration defects.[175] Ex ante, these corporate officers arguably *knew* that so long as they did not (foolishly) document any illegal plans, the intent and proof requirements would make it nearly impossible for the federal government to bring a successful prosecution against them personally. In other words, criminal liability was not a strong deterrent.[176] Furthermore, as discussed previously, the possibility of having civil penalties imposed upon the corporation itself was likely not a strong deterrent either.[177] Conversely, the corporate officers at Toyota probably had strong incentives to hide the real cause of the gas pedal defects.[178] The real cause of the accidents was expensive to address, and massive recalls would have likely cost a fortune.[179] Such a loss would have detracted from the company's profits, and—more importantly—from the corporate officers' bonuses and the value of their stock options.[180] Thus, their incentives to violate NHTSA regulations were stronger than the deterrents. This was true not only in theory, but in reality. The officers at Toyota did not immediately address the real cause of the acceleration defects—they put their profits first.[181]

2. Negligence: The Best Balance Between Fairness and Effectiveness

A negligence-based standard of culpability is appropriate because it is fair and effective. Negligence has not been clearly defined in the responsible corporate officer cases that have employed it.[182] To avoid confusion, this Note (drawing on relevant case law) proposes the following definition of negligence: (1) unlawful or unreasonable action on the part of an executive (2) that furthers (or in some way causes) an unlawful transaction.[183] In other words, if an executive exercises "neglect where the

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174 *See* SHAVELL, *supra* note 92, at 479–81 (noting that deterrence decreases as the probability of sanction decreases).

175 *See supra* notes 59–64 and accompanying text.

176 *See* SHAVELL, *supra* note 92, at 479–81.

177 *See supra* Section III.A.

178 *See supra* Section I.C.

179 *See supra* Section I.C.

180 *See* Bill Coleman, *Executive Compensation*, SALARY.COM, http://www.salary.com/executive-compensation-it-starts-with-the-ceo/ [https://perma.cc/KWP5-9WNQ] (last visited Aug. 27, 2017) ("Pay philosophies often tie [executive] pay to company performance."); *supra* Section I.C.

181 *See supra* Section I.C.

182 *See* M. Diane Barber, *Fair Warning: The Deterioration of Scienter Under Environmental Criminal Statutes*, 26 LOY. L.A. L. REV. 105, 127 (1992).

183 For cases that employ similar language and standards, see *United States v. Park*, 421 U.S. 658, 670–71, 673–74 (1975); *Morissette v. United States*, 342 U.S. 246, 254–56 (1952); *United States v. Dotterweich*, 320 U.S. 277, 281, 283–85 (1943).

law requires care, or inaction where it imposes a duty"[184] and has a "responsible share in furtherance of [a] transaction which [a] statute outlaws,"[185] he or she should be held liable.

In each of the examples mentioned above in which prosecutors failed to prove criminal liability,[186] the individual executives probably could have been held accountable if this formulation of negligence had been the applicable culpability standard. To illustrate, consider the case of Toyota's acceleration defect again. In that case, the officers "exercised neglect" when they failed to report and correct the true cause of the defect.[187] Furthermore, their neglect constituted "a responsible share in furtherance of [a] transaction which the statute outlaw[ed],"[188] because it led to the filing of an incorrect report with NHTSA (which is almost certainly a violation of 49 U.S.C. § 30118).[189]

Not only is the negligence standard effective, but in this context it also strikes the best available balance between fairness and effectiveness. On the spectrum of levels of culpability, negligence falls somewhere between strict liability and recklessness.[190] Recklessness, like the specific intent standard in criminal liability, is not an effective option because it would be too difficult to enforce. To prove that an executive's actions constitute recklessness, NHTSA would need to show that the "defendant [was] *conscious* of the risk and proceed[ed] without concern for the safety of others."[191] The "conscious of the risk" requirement would likely be difficult to prove in a corporate context. For example, in the case of Toyota's acceleration defect, it would be difficult to affirmatively show individual executives were personally conscious of the immense risk their decisions created for their customers.

On the other hand, strict liability would be very effective because it would be very easy to enforce. It would, however, not be fair in this

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184 *Morissette*, 342 U.S. at 255. Because reasonable care is generally a legal duty required of all people, this phrase encompasses all unreasonable executive conduct. *See* DAN B. DOBBS ET AL., TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 110 (7th ed. 2013). Common law cases should be used to help determine the reasonableness of particular conduct. For example, a departure from customary business practices could be considered unreasonable for purposes of showing negligence. *See, e.g.*, Walski v. Tiesenga, 381 N.E.2d 279, 281 (Ill. 1978) (allowing evidence of "custom" to establish the standard of care in a medical malpractice lawsuit).

185 *Dotterweich*, 320 U.S. at 284.

186 *See supra* Part I.

187 *See supra* Section I.C.

188 *Dotterweich*, 320 U.S. at 284.

189 *See* 49 U.S.C. § 30118 (c)(1)–(2) (2012).

190 *See generally* DOBBS ET AL., *supra* note 184.

191 DAN B. DOBBS, THE LAW OF TORTS 51 (2000) (emphasis added).

context. If individual officers are going to be held individually liable as this Note proposes, fundamental notions of justice require that some link exist between their actions and the unlawful transaction (i.e., that they "furthered" an unlawful transaction). Individuals should only be punished if they actually did wrong (i.e., exercised neglect or inaction where the law required otherwise). Strict liability would remove both of these requirements.[192] Officers in positions of responsibility could be held liable regardless of whether they actually acted unreasonably or their actions actually furthered an unlawful result.[193]

A stark illustration of this difference is the "impossibility defense" articulated in *Park*. Under a negligence standard, an officer can escape personal liability by demonstrating that it would have been objectively impossible for him or her to have prevented the unlawful transaction.[194] However, under a strict liability standard like the one proposed by Amy Sepinwall, the officer would *still* be held liable despite the impossibility of preventing the harm.[195] Sepinwall reasons that, in the same way executives receive bonuses for being part of a profitable corporation, they should also receive punishment for being part of a criminal one.[196] But in the end, Sepinwall's solution amounts to no more than guilt by association.

Guilt by association is not legitimate grounds for holding someone liable.[197] Moreover, at a fundamental level, it is not fair to hold officers liable if they did not act unreasonably in a way that furthered an unlawful transaction.[198] Indeed, the responsible corporate officer doctrine has been repeatedly criticized for this very reason.[199] Consequently, the minimal increase in effectiveness that Sepinwall's strict liability regime offers is not

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192 *See* Sepinwall, *supra* note 18, at 398–402.

193 *See id*.

194 *See* United States v. Park, 421 U.S. 658, 673 (1975).

195 *See* Sepinwall, *supra* note 18, at 398–402.

196 *See id*. (arguing corporate executives and corporations are a "team" and that as team members, executives should be punished for corporate wrongs regardless of the executive's knowledge or participation in the wrongdoing).

197 In the criminal context, courts have even gone as far as banning evidence that constitutes guilt by association. *See, e.g*., United States v. Polasek, 162 F.3d 878, 883 (5th Cir. 1998) (noting guilt by association evidence is prohibited because establishing "[t]hat one is married to, associated with, or in the company of a criminal does not support the inference that that person is a criminal or shares the criminal's guilty knowledge" (quoting United States v. Forrest, 620 F.2d 446, 451 (5th Cir. 1980)).

198 *See* Bragg et al., *supra* note 162, at 529–30.

199 *See, e.g*., Martin Petrin, *Circumscribing the "Prosecutor's Ticket to Tag the Elite"—A Critique of the Responsible Corporate Officer Doctrine*, 84 TEMP. L. REV. 283, 285 (2012) ("From the viewpoint of corporate officials, the [responsible corporate officer] doctrine is dangerous because of its ability to sidestep various requirements that usually apply to holding corporate agents responsible.").

worth the dramatic decrease in legitimacy and fairness.

B. Civil Penalties Are the Appropriate Punishment

Using the proposed negligence framework, NHTSA should impose civil penalties because doing so would further promote the values of fairness and effectiveness. Notably, the imposition of civil penalties is a departure from the FDA and EPA's traditional practice under the responsible corporate officer doctrine.[200] Via the responsible corporate officer doctrine, the FDA and the EPA have utilized what this Note calls "modified criminal liability"—the imposition of criminal penalties under a strict liability or negligence-based standard.[201] But it is well established in American jurisprudence that a crime has two elements: actus reus and mens rea.[202] Strict criminal liability—criminal liability that does not require mens rea—is generally disfavored and has historically been applied only in limited circumstances.[203] In *Morissette v. United States*,[204] the Supreme Court commented on the nature of criminal law:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.[205]

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[200] While instances of civil liability have grown in recent years, the responsible corporate officer doctrine has generally been used to impose criminal liability. *See* Sepinwall, *supra* note 18, at 371, 378, 382, 405–06.

[201] *See supra* Section III.B; *see also, e.g.*, United States v. Weitzenhoff, 35 F.3d 1275, 1282–83, 1286, 1292 (9th Cir. 1993) (using the responsible corporate officer doctrine to impose jail time).

[202] *See* Morissette v. United States, 342 U.S. 246, 251–52 (1952) (noting that the historical concept of crime generally required an "evil-meaning mind" and an "evil-doing hand"); Frulla et al., *supra* note 129 (noting, in the context of the responsible corporate officer doctrine, the importance of requiring both a "bad act and bad intent" before imposing criminal punishment).

[203] *See* Staples v. United States, 511 U.S. 600, 606 (1994) (noting that imposing criminal liability without requiring mens rea is disfavored); DRESSLER & GARVEY, *supra* note 22, at 174–185.

[204] 342 U.S. 246 (1952).

[205] *Id.* at 250–51 (footnote omitted).

With regard to the individual accountability imposed by the responsible corporate officer doctrine, the FDA and EPA have started down the right path. Corporate officers that have "a responsible share in the furtherance of [a] transaction which [a] statute outlaws"[206] *should* be held accountable. But the FDA and EPA have gone too far in imposing criminal liability.[207] Their solution sometimes involves imprisoning corporate officers regardless of their actual knowledge or intent.[208] In fact, it may even allow government officials to punish executives regardless of whether their actual conduct was wrong.[209] Thus, the responsible corporate officer doctrine has the potential to imprison executives without requiring the government to prove actus reus or mens rea.

Morissette stands for the general principle that the punishment should match the crime. When the punishment starts exceeding what prosecutors are required to prove in court—like it does here—then enforcement actions come closer to embodying "retaliation and vengeance," than "deterrence and reformation."[210]

On the other hand, imposing civil penalties for negligent conduct is a fair solution that would not amount to "retaliation and vengeance."[211] A civil penalty is a monetary fine.[212] Monetary judgments are a classic remedy for negligent conduct.[213] Therefore, civil penalties, when appropriately paired with negligent conduct, abide by the general principle from *Morissette* that the punishment match the wrongful act.[214]

Civil penalties are not only reasonable and fair in this context, but when coupled with a negligence standard of culpability, they are effective at deterring wrongful executive behavior. To illustrate this point, consider Specific Motors again.[215] In Universe Two, imagine that instead of fining the corporation, the court fined Bob because he exercised "neglect where

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206 United States v. Dotterweich, 320 U.S. 277, 284 (1943).

207 *See* Petrin, *supra* note 199, at 299–300; Frulla et al., *supra* note 129 (noting the problem of watering down mens rea requirements while still imposing felony liability in responsible corporate officer doctrine cases).

208 *See* Petrin, *supra* note 199, at 299–300; Frulla et al., *supra* note 129.

209 *See* Petrin, *supra* note 199, at 299 ("Contrary to a common approach to establishing individual liability under both tort and criminal law, liability under the [responsible corporate officer] doctrine does not require any personal participation, commission, or authorization of any wrongful conduct."); *see also* Sepinwall, *supra* note 18, at 401–03.

210 *Morissette*, 342 U.S. at 251.

211 *Id*.

212 *See, e.g.*, 49 U.S.C. § 30165 (2012).

213 *See* DOBBS ET AL., *supra* note 184, at 833–35 (discussing the use of monetary damages in tort law).

214 *See Morissette*, 342 U.S. at 251.

215 *See supra* Section III.A.

the law require[d] care"[216] in a way that amounted to "a responsible share in furtherance of the transaction which the statute outlaw[ed]."[217] This court action *would* internalize the externalities in the way described above.[218] Ex ante, Bob would be adequately deterred because he would know that he would *personally* feel the weight of his illegal actions.

C. Implementing the Solution: NHTSA Should Use the Authority It Already Has Under 49 U.S.C. § 30165 to Impose Civil Penalties upon Automobile Executives

In sum, this Note proposes the following fair and effective solution: corporate officers who (1) exercise "neglect where the law requires care, or inaction where it imposes a duty,"[219] and (2) have "a responsible share in furtherance of the transaction which the statute outlaws,"[220] should be held liable through the use of civil penalties.[221]

Arguably, NHTSA *already* has statutory authority to start applying this solution under 49 U.S.C. § 30165, which states that "[a] person that violates [the statute] or a regulation prescribed thereunder[] is liable to the United States Government for a civil penalty."[222] NHTSA should construe the term "person" under § 30165 to apply not only to corporations, but also to individual persons within corporations. Because the U.S. Code defines "the words 'person' and 'whoever,'" to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, *as well as individuals*," this interpretation would be well within the language of the statute.[223] Moreover, § 30165 expressly references 49 U.S.C. § 30112, thus explicitly allowing the imposition of civil fines for selling equipment that violates a federal safety standard.[224] Consequently, NHTSA could immediately begin imposing civil penalties on negligent officers under these provisions. Indeed, because of the highly deferential review courts give to agency interpretations of their organic statutes, it is unlikely that this action would be overturned.[225]

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216 *Morissette*, 342 U.S. at 255.

217 *Dotterweich*, 320 U.S. 277, 284 (1943).

218 *See supra* Section III.A.

219 *Morissette*, 342 U.S. at 255.

220 *Dotterweich*, 320 U.S. at 284.

221 To be clear, if federal officials can prove intent beyond a reasonable doubt, then in those cases criminal liability should be pursued. However, as this Note discusses, this is often impossible. *See supra* Section IV.A.1. Thus, in most cases, NHTSA should pursue civil penalties against the responsible, negligent executives.

222 49 U.S.C. § 30165(a)(1) (2012).

223 1 U.S.C. § 1 (2012) (emphasis added).

224 *See* 49 U.S.C. §§ 30112, 30165.

225 *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844–45

However, should courts disagree that § 30165 and § 30112 authorize individual penalties for negligent corporate officers, Congress should enact the following proposed legislation, which draws on language from the cases previously discussed:[226]

> (a) The National Highway Transportation Safety Administration shall be permitted to impose civil penalties directly upon corporate officers employed by companies under its jurisdiction who—
>
> (1) exercise "neglect where a law requires care, or inaction where it imposes a duty,"[227] and
>
> (2) have "a responsible share in furtherance of [a] transaction which [a] statute outlaws."[228]
>
> (b) The punishment shall be a civil penalty and shall not exceed $105 million for a succession of events or for an isolated event.[229]

In defining "a responsible share," NHTSA and courts should rely on the responsible corporate officer doctrine cases.[230] These cases will likely provide helpful guidance in defining the contours of this rule. Moreover, NHTSA should release a policy statement noting that they will be relying on these cases.[231] In this way, automobile manufacturers and their corporate executives will be on notice of their new liability exposure. Finally, in conjunction with NHTSA, automobile manufacturers should take steps to educate their officers on the liability that their actions may cause to them personally.

D. Prevailing Counterarguments Are Not Persuasive

1. Counterargument 1: Civil Penalties Will Be Ineffective Because Corporate Officers Can Purchase Sanction Insurance

Robert Steinbuch believes that civil penalties will not be an effective means of individual accountability because corporate officers can often purchase insurance against such liability.[232] This "sanction insurance"[233]

(1984).

226 *See* Morissette v. United States, 342 U.S. 246, 255 (1952); United States v. Dotterweich, 320 U.S. 277, 284 (1943).

227 *Morissette*, 342 U.S. at 255.

228 *Dotterweich*, 320 U.S. at 284.

229 This is not an arbitrary number—it mirrors the current civil penalty ceiling in the FAST Act. *See supra* text accompanying note 89.

230 *See supra* Section III.B.

231 Under the Administrative Procedure Act, agencies have authority to issue "interpretative rules" and "general statements of policy." 5 U.S.C. § 553(b) (2012).

232 *See* Steinbuch, *supra* note 10, at 342–43.

could potentially indemnify officers against any civil penalty NHTSA imposes.[234] Steinbuch's belief is premised on the "moral hazard" argument and, intuitively, it makes sense: "[I]f you cushion the consequences of bad behavior, then you encourage that bad behavior."[235] Here, because sanction insurance would act as a "cushion," the deterrent effect of civil penalties on executives would be eliminated.[236]

While this Note does not advocate summarily casting aside the moral hazard concern, it should be noted that the moral hazard theory is probably not as "rock solid" as it first appears.[237] In fact, the doctrine has been critiqued it as "perverse," "incomplete," and presumptive.[238] Moreover, when applied here, the moral hazard theory oversimplifies the dynamics at play. It presumes that individuals with access to insurance will purchase it (which is not always true),[239] and it overlooks the other deterrent features of civil penalties. Specifically, a corporate officer subjected to civil penalties may still face negative publicity, adverse short- and long-term career consequences, difficulty collecting from the insurance company, and higher insurance premiums. Thus, it is not clear that insurance would necessarily have the effect Steinbuch presumes it would.

But even if insurance did lessen the deterrent value of individual sanctions, that would not end the discussion. Lawmakers have previously banned sanction insurance in a variety of contexts.[240] Notably, "[i]nsurers are not permitted to offer coverage against most criminal fines and some civil penalties."[241] If NHTSA discovers that corporate officers are ubiquitously obtaining "sanction insurance," then NHTSA could petition Congress to implement an insurance ban here.

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233 SHAVELL, *supra* note 92, at 526.

234 *See id*. at 526–28.

235 Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 238 (1996) (quoting James K. Glassman, *Drop Budget Fight, Shift to Welfare*, ST. LOUIS POST-DISPATCH, Feb. 11, 1996, at B3).

236 *See* SHAVELL, *supra* note 92, at 527 ("[T]he ownership of sanction insurance will tend to dilute the deterrent effect of sanctions, for violators will be less afraid of sanctions owing to the insurance.").

237 *See* Baker, *supra* note 235, at 238, 290–91 (calling into question the moral hazard doctrine as a whole).

238 *Id*. at 239, 242, 243.

239 *See* W. Jonathan Cardi et al., *Does Tort Law Deter Individuals? A Behavioral Science Study*, 9 J. EMPIRICAL LEGAL STUD. 567, 594 (2012) (referring to the number of uninsured people in the United States as "swelling").

240 *See* SHAVELL, *supra* note 92, at 526.

241 *Id*.

2. *Counterargument 2: Civil Penalties Are Ineffective Because They Are Less Administrable than Corporate Penalties or Criminal Penalties*

The argument that civil penalties will be difficult to administer follows from the belief that the damages should match the harm, i.e., that the damages should be proportionately compensatory. Namely, courts will spend too much time and effort trying to determine the size of the "harm" and how much responsibility the corporate officer bears for that harm.[242] In the context of widespread safety failures—such as the GM ignition switches—calculating the (dollar) amount of the harm is a daunting task. GM and government officials do not even agree how many deaths the ignition switch defect really caused.[243]

This argument is flawed because it conflates two bodies of law: safety regulation and tort law.[244] It assumes that safety regulation is bound by the principles of tort law where damages *are* typically determined based on harm (compensatory damages).[245] But this is not the case. The government did not make GM pay $900 million to compensate the victims; the government fined GM to deter future misconduct and penalize them for the previous wrongdoing.[246] This Note does *not* propose compensatory fines—not only would these be difficult to calculate, they would probably be impossible to implement. For example, in the case of GM, most executives would not be able to afford the cost associated with three hundred deaths. Instead, this Note proposes that NHTSA impose monetary penalties against individuals in exactly the same way it imposes monetary penalties on corporations—within statutory guidelines and for the purpose of deterring misconduct.[247] NHTSA and individuals could bargain on the amount of the penalty, just like NHTSA and corporations already do with corporate civil penalties.[248] The courts would only be involved as a last resort, and thus court-related administrative costs would likely be low.

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242 Compensatory damages are usually awarded based on the harm done. *See* DOBBS ET AL., *supra* note 184, at 833–35.

243 According to the Department of Justice, GM has only acknowledged 15 deaths related to its ignition switch failures; this figure is much lower than others that third parties have reported (around 300). *Compare* Press Release, U.S. Attorney's Office for the S. Dist. of N.Y., *supra* note 68, *with* Undercoffler, *supra* note 94.

244 *Cf.* SHAVELL, *supra* note 92, at 572–75 (distinguishing between tort and regulatory law).

245 *See* DOBBS ET AL., *supra* note 184, at 833–35.

246 This is evident from the fact that the money was paid to the U.S. Government, not the victims. *See* Press Release, U.S. Attorney's Office for the S. Dist. of N.Y., *supra* note 68.

247 *See supra* Part II.

248 *See supra* Part II.

3. Counterargument 3: This Solution Will Allow NHTSA to Unacceptably Aggrandize Its Power

Some might object that NHTSA will abuse the power afforded by this solution to indiscriminately impose fines on unsuspecting corporate officers. But if past experience is any guide, it is unlikely that NHTSA will abuse this power. NHTSA has responsibly imposed monetary penalties on automobile corporations for years.[249] Those penalties are nearly identical in quality to the individual sanctions proposed by this Note.[250] Moreover, if a penalty is wrongly imposed on a corporate officer, there would be procedural safeguards in place, including compromise negotiations and review of the agency action in a local district court.[251] In the unlikely event that NHTSA abuses this power, Congress can rewrite the statute to implement additional procedural safeguards.

CONCLUSION

Unfortunately, many people have become numb to the frequency and severity of car accidents. On the one hand, driving a car is a dangerous activity that should be approached with caution and a certain amount of risk assumption. Yet the inherent danger of the activity should not lessen the amount of attention we give to automobile safety. If anything, it should warrant *increased* attention to automobile safety.

The examples presented in this Note show how automobile executives are willing to violate safety regulations to make a profit. We should be outraged when automobile executives take shortcuts at the expense of public safety. While my family was fortunate to survive a preventable accident, many families were not.

As this Note has addressed, it is not existing regulations themselves that allow this, but the current implementation of those regulations. The regulatory agency we rely on to protect our safety interests in driving automobiles, NHTSA, should take fair, effective measures to enforce vehicle safety regulations against individual executives. Civil penalties levied against the corporation are not effective because the decisionmakers do not internalize externalities. Criminal penalties levied against corporate officers are not reasonable unless the agency can actually prove mens rea. But civil penalties levied against corporate individuals would be both fair and effective. Moreover, if the public health and safety rationale can justify criminal liability under the responsible corporate officer doctrine, then it should also justify civil liability here. In sum, this solution is one that offers

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249 *See Civil Penalty Settlement Amounts*, *supra* note 9.

250 *See id.*; *see also* 49 U.S.C. § 30165 (2012).

251 *See supra* Part II.

meaningful and practical improvements for the implementation of safety regulations in the automobile industry.