

SHOULD MANUFACTURERS AND SELLERS OF LETHAL PRODUCTS BE SUBJECT TO CRIMINAL PROSECUTION?

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The topic of the symposium is "crimtorts." The term was created by Professors Thomas Koenig and Michael Rustad in a 1998 law review article.¹ It refers to the area between criminal law and torts: those "corporate crimes" (actually torts) where punitive damages are available to the plaintiff.² Crimtorts centers on corporate acts that injure numerous persons,³ such as the Silkwood⁴ plutonium case or the Ford Pinto case.⁵

My paper lies at the heart of the crimtorts debate. The question presented is whether products liability should be criminalized at the federal level. Does it make good sense to fine or imprison employees of manufacturers, dealers, or retailers who sell products that knowingly cause death or serious bodily injury? This specific issue was presented when Senator Specter recently proposed that persons who manufacture lethal products should be imprisoned or fined.⁶

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¹ Thomas Koenig & Michael Rustad, "Crimtorts" as Corporate Just Deserts, 31 U. MICH. J.L. REFORM 289, 293 (1998).

² *Id.* at 291-93.

³ *Id.* at 291-92.

⁴ *Id.* at 316 (citing *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451 (10th Cir. 1985)).

⁵ *Id.* at 312 (citing *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal Ct. App. 1981)); see also Dennis A. Gioia, *Why I Didn't Recognize Pinto Fire Hazards: How Organizational Scripts Channel Managers' Thoughts and Actions*, in *CORPORATE AND GOVERNMENTAL DEVIANCE: PROBLEMS OF ORGANIZATIONAL BEHAVIOR IN CONTEMPORARY SOCIETY* 139, 142-43 (Erman & Lundman eds., 5th ed. 1996) (1978).

⁶ Prof. Vandall was a witness on March 10, 2006, before the Senate Judiciary Committee in regard to the bill. Senator Specter's proposal is:

IN THE SENATE OF THE UNITED STATES

MR. SPECTER introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To amend title 18 of the United States Code to penalize the knowing and reckless introduction of a defective product into interstate commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. DEFECTIVE PRODUCTS.

(a) IN GENERAL.—Part I of title 18, United States Code, is amended by inserting after chapter 27 the following:

CHAPTER 28—DEFECTIVE PRODUCTS

"Sec.

"561. Introducing defective products into interstate commerce

"§ 561. Introducing defective products into interstate commerce

"(a) DEFINITIONS.—As used in this section—

"(1) the term 'defective', with respect to a product, means having a flaw in design, manufacture, assembly, or instruction that renders the product dangerous to human life and limb beyond the reasonable and accepted risks associated with such or similar products lacking such a flaw;

"(2) the term 'introduce into interstate commerce', with respect to a product, means to manufacture, assemble, import, sell, or otherwise produce or transfer the product;

"(3) the term 'person' means the employees of any corporation, company, association, firm, partnership, or other business entity or a sole proprietor; and

"(4) the term 'serious bodily injury' means a bodily injury that involves—

"(A) a substantial risk of death;

"(B) extreme physical pain; or

"(C) protracted impairment of the function of a bodily member, organ, or mental faculty.

"(b) PROHIBITED CONDUCT.—

"(1) CAUSING DEATH.—Any person who introduces into interstate commerce a product known by that person to be defective and capable of causing death because of such defect shall be fined under this title, imprisoned for a term of up to 15 years, or both.

"(2) FAILURE TO DISCLOSE DEFECT.—Any person who has authority to introduce a product from interstate commerce, or who otherwise has authority over the manufacture, assembly, importing, or sale of a product, knows that the product in interstate commerce is a defective

In considering this issue, three important concepts intersect and need to be evaluated. They are preemption, nonenforcement, and political abuse.

I. PREEMPTION

Preemption is based on Article VI of the Constitution of the United States and states that federal law is superior to state law.⁷ If a federal law occupies a field then the state law in conflict is trumped by the federal law.⁸ The concept of preemption has been

product and is capable of causing death or serious bodily injury because of such defect, and intentionally fails to disclose the existence of the defect to the appropriate regulatory agency.—

"(A) if the defective product, after the discovery of the defect and failure to disclose, causes the death of any individual, shall be fined under this title, imprisoned for a term of up to 15 years or both; and

"(B) if the defective product, after the discovery of the defect and failure to disclose, cause serious bodily injury to any individual, shall be fined under this title, imprisoned for a term of up to 5 years, or both.

"(3) SERIOUS BODILY INJURY.—Any person who introduces into interstate commerce a defective product known by that person to be defective that the person reasonably should know is capable of causing serious bodily injury because of such defect shall be fined, under this title, imprisoned for a term of up to 5 years, or both."

(b) CLERICAL AMENDMENT.—The table of chapters for title 18, United States Code, is amended by inserting, after the item relating to chapter 27 the following:

"28 DEFECTIVE PRODUCTS561."
Defective Products: Will Criminal Penalties Ensure Corporate Accountability?: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 11 (2006).

⁷ U.S. CONST. art. VI, cl. 2.

⁸ Under the Federal Constitution's Supremacy Clause, state law that conflicts with federal law is "without effect." Consideration of issues arising under the Supremacy Clause "starts with the assumption that the historic police powers of the States [are] not to be superseded by . . . a Federal Act unless that [is] the clear and manifest purpose of Congress." Accordingly, " ' the purpose of Congress is the ultimate touchstone' " of pre-emption analysis. Congress' intent may be "explicitly stated in the statute's language or implicitly contained in [the statute's] structure and purpose." In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field " 'as to make reasonable the inference that Congress left no room for the States to supplement federal law.' "

expanding over the last several years to the point that it is now a major defense. I argue that there is no clear principle of preemption, and the federal courts use preemption to limit and control the states. The concept is powerful and may be embraced when the statute on point says nothing or even if the statute prohibits preemption of the state cause of action.

In *Medtronic, Inc. v. Lohr*,⁹ the plaintiff was injured because of allegedly defective leads in her pacemaker.¹⁰ She, therefore, brought suit against the manufacturer.¹¹ The statute did not mention preemption.¹² The Supreme Court of the United States, therefore, interpreted the Medical Device Amendments¹³ and held that the state products liability suit was not preempted by the federal law.¹⁴

In contrast, *Geier v. American Honda Motor Co.*¹⁵ involved a battle over air bags, or the lack thereof. Honda had produced a car without air bags and this allegedly caused the plaintiff's injury.¹⁶ The federal statute allowed car manufacturers to select between air bags and motorized shoulder belts.¹⁷ Plaintiff argued that if her Honda had been equipped with air bags, rather than the motorized belts, she would have escaped serious injury.¹⁸ Honda's defense rested on preemption: the Federal Act preempted the state common law cause of action.¹⁹ But there was a problem: the Act had a "saving clause."²⁰ It expressly provided that the state cause of

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

⁹ *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (plurality opinion).

¹⁰ *Id.* at 480-81.

¹¹ *Id.* at 481.

¹² *Id.* at 477; see 21 U.S.C. § 360 (2006).

¹³ Medical Device Amendments of 1976, Pub. L. No. 94-295, 90 Stat. 539 (codified at 21 U.S.C. § 360(k) (2006)).

¹⁴ *Medtronic*, 518 U.S. at 495; see also *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1011 (2008). This statute provided for express preemption of state law. *Riegel*, 128 S. Ct. at 1011 (citing 21 U.S.C. § 360(k) (1996)).

¹⁵ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

¹⁶ *Id.* at 865. The plaintiff was driving her Honda Accord when she collided with a tree and was seriously injured. *Id.*

¹⁷ *Id.* at 864-66.

¹⁸ *Id.* at 865.

¹⁹ *Id.* at 867 (citing *Medtronic*, 518 U.S. at 502-04).

²⁰ *Id.* at 868.

action would *not* be preempted: " '[c]ompliance with' a federal safety standard ' "does not exempt any person from any liability under common law." ' "²¹ Nevertheless, the Supreme Court found that the Act preempted the plaintiff's state common law cause of action.²² Honda could not be sued for following the choice permitted by Congress: the adoption of motorized shoulder belts.

Preemption is a quagmire for the criminalization of products liability. Once the criminalization act is passed, the courts are free to hold, under the preemption concept, that the state common law of products liability is in conflict with the new statute. This could result in the loss of most products liability law.

The point of *Medtronics* and *Geier* is that the continued existence of the state cause of action rests with the interpretive power of the Supreme Court and its desire to control the states. The intent of Congress and the scope of preemption rest with the Supreme Court in the final analysis.

II. NONENFORCEMENT

In deciding what laws to enforce, the new agency or the United States Attorney General will make a selection based on priorities.²³ I am assuming limited funds and a limited number of prosecutorial employees.²⁴ Because of these practical concerns, the

²¹ *Geier*, 529 U.S. at 868 (quoting 15 U.S.C. § 1397(k) (1988)).

²² *Id.*

²³ "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516 (2006).

²⁴ In July of 2006, U.S. Representatives Waxman and Conyers sent a letter to Attorney General Alberto Gonzales detailing the shortage of attorneys in various U.S. Attorneys' offices throughout the country. *See* Letter from Henry Waxman and John Conyers, U.S. Representatives, to Alberto Gonzales, U.S. Attorney Gen. (July 24, 2006), *available at* <http://oversight.house.gov/Documents/20060724095809-74936.pdf>. In the letter, the Representatives suggested that this shortage has resulted in some cases worthy of prosecution being overlooked due to lack of resources. *Id.*

government is forced to make choices as to which laws to enforce. The Attorney General has wide discretion.²⁵

Let us assume that the Attorney General has two choices before him: (1) prosecute terrorists or (2) prosecute a CEO of an automobile company that manufactured a "lethal" car, though he likely has many more prosecutorial demands than this. The factors the Attorney General would likely consider are: the importance of the crime, the President's agenda, the likelihood of success, and the number of other cases.²⁶ Weighing these factors, I would assume, in this political climate, that the Attorney General would prosecute the terrorists ahead of the CEO of the automobile manufacturer.²⁷

Knowledge of the violation is needed if the Attorney General is going to act. If the Attorney General does not know of the "crime," no prosecution will be brought. For example, Ford was sued in Texas shortly after Ford Explorers started rolling over and

²⁵ See UNITED STATES ATTORNEY'S MANUAL 9-27.220 cmt., available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.220. ("Merely because the attorney for the government believes that a person's conduct constitutes a Federal offense and that the admissible evidence will be sufficient to obtain and sustain a conviction, does not mean that he/she necessarily should initiate or recommend prosecution . . .").

²⁶ For example, in its published strategic plan for fiscal years 2003-2008, the Department of Justice stated that "prosecution of persons suspected of terrorist acts is the top priority of U.S. Attorneys." U.S. DEP'T OF JUSTICE, STRATEGIC PLAN: FISCAL YEARS 2003-2008, at 2.9, available at <http://www.usdoj.gov/archive/mps/strategic2003-2008/pdf.html> (follow "Chapter II" hyperlink). Other top priorities of the Department of Justice, as listed in the same publication, include the prevention of violence, especially against children, and the prevention of trafficking in drugs and in human beings. *Id.* at 2.4. While these priorities probably do parallel the concerns of the average American with regard to legal proceedings initiated by the federal government, this does not alleviate the fact that federal prosecutors are a limited resource. See Letter from Waxman & Conyers to Gonzales, *supra* note 24.

²⁷ For example, much of the discussion around the time of the confirmation of current Attorney General Alberto Gonzales focused on the United States' treatment of detainees at Abu Ghraib prison in Iraq and at Guantanamo Bay in Cuba. See Editorial, *The Wrong Attorney General*, N.Y. TIMES, Jan. 26, 2005, at A16. With these concerns in mind at the time of his confirmation, there is little doubt that civil actions against Big Tobacco were far from being at the top of Gonzales' list of priorities.

killing their passengers.²⁸ This was announced around the country on television and in other media reports.²⁹ When the National Highway Traffic Safety Administration ("NHTSA") got into the game, their absence of information was shocking. The head of NHTSA, Dr. Sue Bailey, said that she only learned of the Explorer rollover from the television reports.³⁰ Indeed, Ford had no duty to report the serious problems, that were causing the lethal crashes, to NHTSA.³¹ Without knowledge of the product defects, the Attorney General cannot enforce the law, to be sure. This also illustrates the role of the torts attorney in pinpointing and publicizing defective products.

The government has demonstrated a high level of disdain over the years for suing product manufacturers. For example, Congress recently passed an Act that forbids suits against gun manufacturers

²⁸ See *infra* notes 30-31. See also Manuel A. Gómez, Comment, *Like Migratory Birds: Latin American Claimants in U.S. Courts and the Ford-Firestone Rollover Litigation*, 11 SW. J. L. & TRADE AM. 281, 285-89 (2005) (discussing the origins of the Ford rollover litigation); Orna Rabinovich-Einy, Comment, *Balancing the Scales: The Ford-Firestone Case, the Internet, and the Future Dispute Resolution Landscape*, 6 YALE J.L. & TECH. 1, 7 (2003) (stating that NHTSA only analyzed statistics about deaths and "not about bodily injuries or damages to property, even though a more inclusive definition of 'cases' generally would have facilitated earlier detection of risks and hazards. In this case it was a report by a local television station that triggered NHTSA's investigation . . .").

²⁹ In her testimony before the Commerce Committee, Dr. Bailey stated: "Upon learning of the KHOU story [regarding the death of two persons in a Ford Explorer rollover], we contacted the station to obtain more details . . ." *Firestone Tire Recall: Hearing Before the Comm. on Commerce, Science, and Transportation*, 106th Cong. 20 (2000) (statement of Dr. Sue Bailey, Administrator, National Highway Traffic Safety Administration).

³⁰ *Id.* at 20-21.

³¹ Dr. Bailey stated:

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

Id. at 21. However, in 2002, in response to the Ford Explorer and other litigation, Congress passed the Transportation Recall Enhancement, Accountability, and Documentation ("TREAD") Act, which requires automobile manufacturers to report warning signs of product defects to NHTSA. 49 U.S.C. § 30166 (2006).

unless there was a manufacturing defect.³² It is, at present, legal to manufacture a product that has a well-known side effect of killing 400,000 people each year.³³ Congress forbids the Center for Disease Control and Prevention ("CDC") from engaging in handgun violence research.³⁴ Indeed, the Attorney General has not

³² The Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-03 (2006), was drafted with the purpose of "prohibit[ing] causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for harm solely caused by the criminal or unlawful misuse of firearm products." § 7901(b)(1). The statute bars most civil proceedings against gun manufacturers and sellers for damages suffered from misuse of their products. §§ 7901-03.

³³ The Center for Disease Control and Prevention ("CDC") estimates that tobacco causes approximately 438,000 deaths per year in the U.S. Ctrs. For Disease Control & Prevention, Tobacco—Related Mortality: Fact Sheet, http://www.cdc.gov/tobacco/factsheets/Tobacco_Related_Mortality_factsheet.htm (last visited Apr. 25, 2008) (citing Ctrs. for Disease Control & Prevention, *Annual Smoking—Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 1997-2001*, MORBIDITY & MORALITY WKLY. REP., July 1, 2005, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5425a1.htm>; NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH AND HUMAN SERVS., HEALTH, UNITED STATES, 2005 WITH CHARTBOOK ON TRENDS IN THE HEALTH OF AMERICANS, 178-81 tbl.31 (2005), available at <http://www.cdc.gov/nchs/data/hus/tables/2003/03hus031.pdf>). See Frank J. Vandall, *Constricting Products Liability: Reforms in Theory and Procedure*, 48 VILL. L. REV. 843, 860 (2003) [hereinafter Vandall, *Constricting Products Liability*] (stating that there are over 400,000 tobacco-caused deaths each year and discussing the failure of the Supreme Court to hold manufacturers liable in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 504 (1992), citing Ray Gangarosa et al., *Suits by Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol*, 22 FORDHAM URB. L.J. 81, 116-17 (1994)); Frank J. Vandall, *Reallocating the Costs of Smoking: The Application of Absolute Liability to Cigarette Manufacturers*, 52 OHIO ST. L.J. 405, 405 n.1 (1991) (citing ELIZABETH M. WHELAN, *A SMOKING GUN: HOW THE TOBACCO COMPANY GETS AWAY WITH MURDER* 10 (Stephen Barrett ed. 1984)); Frank J. Vandall, *The Legal Theory and the Visionaries That Led to the Proposed \$368.5 Billion Tobacco Settlement*, 27 SW. U. L. REV. 473, 477-79 (1998); see also Telephone Interview with Richard Daynard, Professor, Ne. Univ. School of Law, in Atlanta, Ga. (Nov. 26, 1997).

³⁴ See Jeffrey L. Katz, *Appropriations: After Noisy Debate, Panel Keeps Family Planning Services Law*, CONG. Q. WKLY, June 29, 1996, at 1874 (discussing H.R. 3755 for the 104th Congress, how the Appropriations Committee cut the \$2.6 million for a CDC research program on injury

sued the manufacturers of lethal products, such as arthritis pain medications Oraflex³⁵ and Vioxx,³⁶ Ford,³⁷ and MacDonald

prevention related to firearms use, and that the Committee report had explicitly prohibited CDC from promoting gun control); Jeffery L. Katz, *GOP Dulls Its Cutting Edge, but Democrats Unsatisfied*, CONG. Q. WKLY, June 15, 1996, at 1675.

³⁵ See Teresa Moran Schwartz, *Regulatory Standards and Products Liability: Striking the Right Balance Between the Two*, 30 U. MICH. J.L. REFORM 431, 449 n.92 (1997) (stating that Eli Lilly "pleaded guilty to 25 misdemeanor counts of failing to notify the FDA" of deaths overseas and only paid a \$25,000 fine, citing RUSSELL MOKHIBER, CORPORATE CRIME AND VIOLENCE: BIG BUSINESS POWER AND THE ABUSE OF THE PUBLIC TRUST 337 (1988)); Teresa Moran Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 VAND. L. REV. 1121, 1138 n.68 (1988) (contrasting the \$25,000 that Eli Lilly & Co. was fined "for failing to report overseas deaths associated with Oraflex" to the \$6 million verdict against the company in a tort action brought for a death caused by Oraflex, citing Howard M. Metzenbaum, *Is Government Protecting Consumers?*, TRIAL, Apr. 1986, at 22, 26); Morton Mintz, *Lilly Case Sent Message to All Pharmaceuticals*, WASH. POST, Nov. 25, 1983, at D8. Oraflex was removed from the market shortly after it was first sold. Michael deCourcy Hinds, *Report Questions Lilly Role on Drug*, N.Y. TIMES, Dec. 4, 1982, at A8.

³⁶ As of February 21, 2007, some Vioxx suits have been won and some have been lost on cause-in-fact issues. See Thomas Ginsberg, *Merck Defeat in Vioxx Verdict: The Drugmaker Hid Risks from the FDA, Jury Ruled*, PHILA. INQUIRER, Apr. 12, 2006, at A01; Lisa Jarvis, *Vioxx Verdict Surprise*, CHEMICAL MARKET REP., Sep. 5, 2005, at 26; *Verdict Bolsters Merck's Vioxx: A New Jersey Jury Finds the Drug Didn't Cause a Woman's Heart Attack, Boosting the Company's Case in Similar Suits*, L.A. TIMES, July 14, 2006, at C3; *Merck's Vioxx Trial Fails to Reach a Verdict*, DAILY MAIL (London), Dec. 13, 2005, at 1; *Merck Vioxx Win Fails to Daunt Britons*, CHEMIST & DRUGGIST (London), Nov. 12, 2005, at 12.

³⁷ The Pinto gas tank often exploded in rear-end collisions. See *Indiana v. Ford Motor Co.*, No. 5324 (Elkhear Super. Ct. Feb. 2, 1979); see also Suzie Larsen, *Safety Last: NEWS: After the Mother Jones Expose', Ford Recalled its Killer Pinto—But that was Just the Beginning of its Safety Troubles*, MOTHER JONES, Jan./Feb. 1998, <http://www.motherjones.com/news/update/1998/02/larsen.html> (discussing "the 1979 landmark case State of Indiana v. Ford Motor Co."). Ford was indicted for reckless homicide for manufacturing and allowing a 1973 Pinto model to remain on the road, which it knew would explode on rear-end impact due to design defects. Ford was eventually acquitted of all criminal charges. *Ford Motor Co.*, No. 5324.

Douglas.³⁸ The House recently passed a bill that insulated fast-food restaurants from suits.³⁹

Even if Congress criminalized products liability, it is likely that the statute would not be enforced. But what about the recent prosecution of Enron executives?⁴⁰ True, high-level executives were prosecuted, but Enron was unique; a high-visibility case.

An ordinary products liability case involving death or serious bodily injury should not have to make the front page of a major newspaper in order to result in a federal prosecution. My position is that access to justice needs to be available for the average person with the average products case. Justice should be accessible to everyone, not merely those who suffer catastrophic injury or death.

A theoretical understanding of the law might suggest that if it became a federal crime to sell a lethal product, the problem would be solved and no more such dangerous products would be sold. That is not the case, however. Recent studies have shown that it is not the *written law* that is critical.⁴¹ The key to crime reduction is the level of *enforcement*.⁴² This means that in order to reduce the number of defective products that are sold, a substantial increase in staff, or, perhaps, a new federal agency, will be needed.

³⁸ The DC 10 airplane had a design defect and crashed, killing 345 persons, in 1974. See Nan Robertson, *345 Killed As Jumbo Jet Dives into French Forest in History's Worst Crash*, N.Y. TIMES, Mar. 4, 1974, at 61.

³⁹ See the definition of "consumer product" in 15 U.S.C. § 2052(a) (2006). See also Carl Hulse, *Vote in House Offers a Shield in Obesity Suits*, N.Y. TIMES, Mar. 11, 2004, at A1 (stating that the legislation formerly known as the Personal Responsibility in Food Consumption Act passed the House); Melanie Warner, *The Food Industry Empire Strikes Back; Obesity Inc.: The Legal Battle*, N.Y. TIMES, July 7, 2005, at C1 (stating bills that would prohibit lawsuits by people claiming a food company made them obese have become law in twenty states and are pending in another eleven).

⁴⁰ See *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

⁴¹ See Melitta Schmideberg, *The Offender's Attitude Toward Punishment*, 51 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 328, 331-32 (1960).

⁴² See *id.* at 331 ("For the threat of punishment to be effective, the offender must fully believe that he will be punished . . .").

III. POLITICAL ABUSE

Along with the Attorney General, U.S. Attorneys are appointed by the President, subject to the approval of the Senate.⁴³ During 2007, several U.S. Attorneys were fired.⁴⁴ The question raised is "why?"

At first, it appeared that the U.S. Attorneys were fired for performance-related issues.⁴⁵ Following a nationwide discussion in the media, it became clear that the firings were political. The fired U.S. Attorneys were either prosecuting Republican legislators too much or not prosecuting Democratic legislators enough.⁴⁶

Although a U.S. Attorney can be fired at will, there are two views as to whether his work is political. On the one hand, former Attorney General Griffin Bell takes the position that politics are left at the door and should not enter into the work of the U.S. Attorneys.⁴⁷ The other view is represented by *The Wall Street Journal* and Kyle Sampson, a former high-ranking member of the Attorney General's staff.⁴⁸ *The Wall Street Journal* argued that since the U.S. Attorneys could be fired for any reason, a political

⁴³ U.S. CONST. art. II, § 2, cl. 2. So strong were Alberto Gonzales' ties to President Bush that New York Senator Chuck Schumer was inclined to suggest that Gonzales was too much of a "blind loyalist" to the President to impartially hold the office of Attorney General. Eric Lichtblau, *Senate Panel Approves Gonzales on a Party-Line Vote*, N.Y. TIMES, Jan. 27, 2005, at A1.

⁴⁴ See Eric Lichtblau & Scott Shane, *Attorney General Held Firm on War Policies and His Loyalty to Bush*, N.Y. TIMES, Aug. 28, 2007, at A1.

⁴⁵ Adam Zagorin, *Why Were These U.S. Attorneys Fired?*, TIME, Mar. 7, 2007, available at: <http://www.time.com/time/nation/article/0,8599,1597085,00.html> ("Gonzales' top deputy later claimed the firings were necessary because of 'performance-related' issues. But it was later revealed that all but two of the dismissed prosecutors had won outstanding evaluations for competence.").

⁴⁶ See Larry Margasak, *Ethics Probes Possible for GOP over Firings*, ATLANTA J.-CONST., Mar. 8, 2007, at A10.

⁴⁷ See R. Robin McDonald, *Griffin Bell: Politics Has No Place at Justice*, DAILY REPORT, Mar. 21, 2007, at A1; see also Jeffrey Scott, *Dismissals of U.S. Attorneys 'Very Serious'*, ATLANTA J. CONST., Mar. 11, 2007, at A5 (statements by former U.S. Attorney Kent Alexander: "Once you get into the office . . . you shed partisanship.").

⁴⁸ See David Stout & Brian Knowlton, *Ex-Aide Says Gonzales Was Involved in Firings*, N.Y. TIMES, Mar. 29, 2007, at A17.

reason would suffice.⁴⁹ Kyle Sampson seemed to agree and stated that he did not draw a line between politics and incompetence: either would be sufficient for termination.⁵⁰ The national debate and media attention directed at this question during 2007 ultimately led to the Attorney General's resignation.⁵¹

The importance of this discussion of political prosecutions is to argue that the prosecution of corporate executives, automobile and pharmaceutical leaders for example, will be a political issue. Whether an accused CEO is criminally prosecuted will depend on the views of the President and the politics of the day. In one year, because of politics, a CEO might be prosecuted, but not in another year. Because corporations (employees) are major donors to political campaigns, their prosecution rests, in large part, on political decisions. This is no way to run a railroad or an economy. There must be a better approach.

Because of the likelihood of nonenforcement and political abuse, as well as preemption of state common law causes of action, the criminalization of products liability is not appropriate. Instead, I urge that the state civil causes of action for products liability should be retained and strengthened. The common law is

⁴⁹ *The Wall Street Journal* endorses the second view:

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

Review & Outlook, *After AG Piñata*, WALL ST. J., Aug. 28, 2007, at A12.

⁵⁰ "The distinction between political and performance-related reasons for removing a U.S. attorney is, in my view, largely artificial," Mr. Sampson said." Stout & Knowlton, *supra* note 48.

⁵¹ After Mr. Gonzales resigned as Attorney General on Monday, August 27, 2007, Eric Lichtblau and Scott Shane wrote for *The New York Times*: "[His] performance as attorney general, especially after the dismissal of seven United States attorneys last year, came under scathing criticism. Many say he leaves a Justice Department that has been tainted by political influence, depleted by the departures of top officials and weakened by sapped morale." Lichtblau & Shane, *supra* note 44.

transparent, efficient, and available to all who suffer injury from a lethal product.⁵²

Assume, for example, that your wife becomes a quadriplegic when she swerves to miss a deer in her SUV and it rolls over. The roof collapses and crushes your wife's spine. In order to obtain justice, your task is clear. Call an attorney and tell her what happened. If she is a products specialist, your search is over. If not, then the attorney will refer you to one who specializes in products liability law. The key to whether the products specialist will take your case is economics: does the likely amount of the settlement or jury verdict (including appeals) exceed the cost of the suit.⁵³ The attorney's political views are irrelevant here. The cost of a products suit, from an attorney's perspective, can exceed \$6 million.⁵⁴ On the other hand, as a result of extensive torts reform, a products suit needs to be worth at least \$100,000 before an attorney will accept it.⁵⁵ Therefore, going forward with a state products suit is a business decision, not a political one.

Compensatory damages are always inadequate because the implementation of the contingent fee means that the attorney's fee is deducted from the jury award.⁵⁶ Punitive damages may help to make the award adequate. The purpose of punitive damages is to punish the defendant,⁵⁷ and in crimtorts this always means a

⁵² See Frank J. Vandall, *Our Product Liability System: An Efficient Solution to a Complex Problem*, 64 DENV. U. L. REV. 703, 709-10 (1988).

⁵³ See Vandall, *Constricting Products Liability*, *supra* note 33, at 871, 873 (In this article, I estimated that the recoverable damages in a products case must exceed a large threshold amount [perhaps \$100,000] before the plaintiff's attorney will agree to take the case.).

⁵⁴ See Henry J. Reske, *Cigarette Suit Dropped*, A.B.A. J., Feb. 1993, at 30 (discussing the famous case of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992)).

⁵⁵ See Vandall, *Constricting Products Liability*, *supra* note 33, at 873.

⁵⁶ See Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 286 (1998) (finding that a contingency fee of 1/3 applied to "92% of those cases. Five percent of the cases called for fees of 25% or less, 2% specified fees around 30%, and 1% specified fees exceeding 33%.").

⁵⁷ PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (W. Page Keaton et al. eds., 5th ed. 1984). "Such damages are given to the plaintiff over and above the full compensation for the injuries, for the purpose of punishing the defendant." *Id.*

corporate defendant, not an individual.⁵⁸ Criminal fines are generally small, for example, \$5,000 to \$10,000.⁵⁹ Small fines will likely be ignored by the large corporation.⁶⁰ In contrast, punitive damages can be sizable and may encourage the product manufacturer to increase the price of the product or to stop manufacturing the defective, lethal product.⁶¹

In fact, punitive damages are generally rare and small. They only occur in three percent of the cases and usually range from \$30,000 to \$40,000.⁶² Nevertheless, the Supreme Court has rewritten the law of punitive awards in recent cases. A substantial punitive award is sure to land your case before the Supreme Court. Justices Scalia and Thomas (dissenters) correctly argue that there is no due process issue in punitive awards, and the question should be left to the states.⁶³ Under Senator Specter's proposal,⁶⁴ punitives

⁵⁸ See Koenig & Rustad, *supra* note 1, at 291-92.

⁵⁹ In *BMW of North America, Inc. v. Gore*, the punitive award was \$2 million and the fine would have been \$5,000 to \$10,000. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583-84 (1996).

⁶⁰ Compare Richard A. Epstein, *Crime and Tort: Old Wine in Old Bottles*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION AND THE LEGAL PROCESS* 231 (Randy E. Barnett & John Hagel III eds. 1977), in which Professor Epstein suggested that criminal sanctions should be confined to intentional wrongs, and tort law should be used to deal with all other deprivations of a victim's rights, with Richard A. Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 1, 21 (1996). In his second article on the subject, Epstein focused on how the legal system should be changed in order to create proper incentives and eventually concluded that there is a need to "shrink both domains simultaneously." Epstein, *The Tort/Crime Distinction*, *supra*, at 21.

⁶¹ But see David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1294-95 (1976). Professor Owen notes that, in some instances, manufacturers will choose to forego adopting a safety measure and simply absorb the costs associated with litigating any injury claims. *Id.*

⁶² The Bureau of Justice Statistics reports that in 1996 punitive damages were awarded in about three percent of tort trials with a plaintiff winner in the nation's seventy-five largest counties and that the median punitive award was \$38,000. Marika F. X. Litras et al., *Tort Trials and Verdicts in Large Counties, 1996*, Aug. 2000, BUREAU JUST. STAT. BULL., at 7, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ttvlc96.pdf>. In 2001, "Punitive damages were awarded to plaintiff winners in 3 of 144 product liability trials." *Id.* at 3.

⁶³ *BMW*, 517 U.S. at 600.

will be deleted from criminal prosecution. All of this suggests that the recent proposal to criminalize products liability is unnecessary and inappropriate.

⁶⁴ See Specter's proposal, *supra* note 6.