

# (Still) “Unsafe at Any Speed”<sup>1</sup>: Why Not Jail for Auto Executives?

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## I. “THE YEAR OF THE RECALL”<sup>2</sup>

In 2014, the manufacturers of motor vehicles sold in America recalled sixty-four million vehicles, an astounding number that represented about forty-five percent of all passenger cars registered in 2012, the last year for which numbers are available, and that also exceeded the combined total of cars recalled during the previous three years.<sup>3</sup> The momentum for this bad run began to build in 2009 when motorists reported sudden acceleration problems with Toyota cars, a brand that had been the gold standard for safety.<sup>4</sup> Motorists’ anxiety escalated when General Motors (GM) admitted that faulty ignition switches could cause its compact cars to stall if drivers brushed their key chains with their knees, disabling both the power steering and air bags.<sup>5</sup> The final straw was the discovery that air bags manufactured by the Takata Corporation, which dominates the U.S. market for that essential part, could shoot shrapnel into people’s faces upon deployment.<sup>6</sup>

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<sup>1</sup> This famous phrase is the title of a book published by Ralph Nader in 1965: *Unsafe at Any Speed, The Designed-In Dangers of the American Automobile*, which is largely credited with inspiring the creation of the auto safety regulatory system in the United States.

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<sup>2</sup> Several commentators used this language to describe the behavior of automobile manufacturers in 2014. See, e.g., Paul A. Eisenstein, *After ‘Year of the Recall’ Watchdog Needs an ‘Enforcer’*, NBC NEWS (Dec. 14, 2014), <http://perma.cc/9SH6-86RW> (quoting Mike Rozembajgier, a vice president at Stericycle, which works with car companies to implement safety-related service).

<sup>3</sup> Christopher Jensen, *A Record Year of Recalls: Nearly 64 Million Vehicles*, N.Y. TIMES, Feb. 12, 2015, <http://www.nytimes.com/2015/02/13/business/auto-safety-recalls-set-record-of-nearly-64-million-vehicles-in-2014.html>, <http://perma.cc/6342-Q7VE>. According to the U.S. Department of Transportation, 183 million “light duty” vehicles, a category that includes passenger cars and trucks, were on the road in 2012, the last year for which such statistics are available. Bureau of Transportation Statistics, *Table 4-11: Light Duty Vehicle, Short Wheel Base and Motorcycle Fuel Consumption and Travel*, U.S. DEP’T OF TRANSP., <http://perma.cc/4XVB-3B4V>.

<sup>4</sup> Scott Evans & Angus MacKenzie, *The Toyota Recall Crisis: A Chronology of How the World’s Largest & Most Profitable Automaker Drove into a PR Disaster*, MOTOR TREND (Jan. 2010), <http://perma.cc/TCQ9-X82E>.

<sup>5</sup> See Peter Valdes-Dapena & Tal Yellin, *GM: Steps to a Recall Nightmare*, CNNMONEY (2015), <http://perma.cc/RMG5-QVBN>.

<sup>6</sup> Pete Bigelow, *The Long History Behind Takata’s Massive Airbag Recalls*, AUTOBLOG (June 27, 2014, 4:29 PM), <http://perma.cc/FTT5-PXFU>.

Outraged members of Congress hauled top auto executives and government officials into oversight hearings where blame was dished out in hearty portions. Mary Barra, GM's new chief executive officer (CEO) and the first woman to head a major U.S. automaker, testified four times,<sup>7</sup> doing her best to appease the audience by pledging to make things right.<sup>8</sup> Unfortunately for GM, Takata, and their customers, however, recalls did not provide an immediate solution because replacement parts were in short supply, delaying repairs by as much as two years.<sup>9</sup> Although the media uniformly condemned all three carmakers, none was higher profile nor more controversial than GM. Mary Barra's contrition before Congress contradicted the company's lower-profile behavior in court. GM strongly resisted judicial "park it" orders that would advise consumers to stop using their cars until they were fixed<sup>10</sup> and fought successfully to invoke a liability shield against many consumer damage suits, which it obtained as part of the federal bailout that released it from bankruptcy proceedings in 2009.<sup>11</sup>

The company's split personality did not win it any friends at the Department of Justice (DOJ). As this article goes to press, federal prosecutors have reportedly discovered "criminal wrongdoing" at the company and "are negotiating what is expected to be a record penalty."<sup>12</sup> Anonymous sources briefed on the inquiry said charges could be brought against both the company and individual employees.<sup>13</sup>

Beyond the satisfaction they took in scolding some of the most powerful business people in the world at oversight hearings, members of Congress had what appeared to be the even more gratifying experience of excoriating the civil servants in charge of the National Highway Traffic Safety Administration (NHTSA). The condemnation was bipartisan: Senator Claire McCaskill (D-MO) said that NHTSA was "more interested in singing 'Kumbaya'

<sup>7</sup> Melissa Burden & David Shepardson, *GM CEO Mary Barra Won't Attend Awards Event*, DETROIT NEWS, Nov. 12, 2014, <http://perma.cc/XXC9-NNV8>.

<sup>8</sup> Bill Vlasic & Danielle Ivory, *Barra Faces Scrutiny in House Over G.M. Recalls*, N.Y. TIMES, June 18, 2014, <http://www.nytimes.com/2014/06/19/business/house-hearing-on-general-motors-recalls.html>, <http://perma.cc/PJX3-6L BX>.

<sup>9</sup> Jerry Hirsch, *Many Recalled Vehicles Do Not Get Repaired, Posing a Safety Risk*, L.A. TIMES, Dec. 27, 2014, <http://perma.cc/Z82C-7PAE> (reporting on delays in repairs at GM dealerships); David Sedgwick, *Airbag Inflator Shortage Plagues Industry: With Tight Capacity, 2 Years Needed for Replacements*, AUTOMOTIVE NEWS (Nov. 24, 2014), <http://perma.cc/RF66-2YPH> (explaining that Takata Corporation will not be able to produce an adequate number of replacement airbags to satisfy a Honda recall for two years and that other manufacturers would have to invent such replacements); Hilary Stout & Rebecca R. Ruiz, *Recalled G.M. Cars Remain Unrepaired*, N.Y. TIMES, Nov. 3, 2014, <http://perma.cc/5NTG-A5D4>.

<sup>10</sup> Katie Lobosco, *Judge Won't Force GM to Issue 'Park It Now' Order*, CNNMONEY (Apr. 17, 2014), <http://perma.cc/AGX5-M6LA>.

<sup>11</sup> Mike Spector, *GM Heads Back into Court*, WALL ST. J., Feb. 16, 2015, <http://www.wsj.com/articles/gm-heads-back-into-court-1424128905>, <http://perma.cc/N378-UQ45>.

<sup>12</sup> Danielle Ivory, Ben Protess, & Bill Vlasic, *G.M. Inquiry Said to Find Criminal Wrongdoing*, N.Y. TIMES, May 22, 2015, <http://www.nytimes.com/2015/05/23/business/gm-inquiry-said-to-find-criminal-wrongdoing.html>, <http://perma.cc/FK6R-ZRN2?type=live>.

<sup>13</sup> *Id.*

with the manufacturers than being a cop on the beat.”<sup>14</sup> A report written by staff for Republican members of the House Energy and Commerce Committee attributed the recall crisis to NHTSA’s “lack [of] focus and rigor.”<sup>15</sup>

As this article goes to press in the early summer of 2015, mixed messages prevail. The independent administrator of GM’s victim compensation fund has acknowledged that 104 people were killed in accidents caused by faulty ignition switches.<sup>16</sup> NHTSA says that as many as 89 people were killed in Toyota sudden acceleration accidents.<sup>17</sup> These numbers will almost certainly increase as product liability lawsuits are resolved and the GM-initiated compensation fund processes more claims. Despite the worst safety recall crisis it has endured in many years, GM was quite profitable in 2014, allowing CEO Barra to retain her star status in business media.<sup>18</sup> NHTSA has a new administrator who has pledged extensive reforms although he has yet to receive sufficient additional resources to make many of those changes feasible.<sup>19</sup> A consortium of ten automakers led by Toyota has taken the unusual step of convening to fund an independent engineering firm to develop a permanent fix to the airbag problem.<sup>20</sup> Most noteworthy of all, federal prosecutors have launched criminal investigations at GM and Takata.<sup>21</sup>

As federal prosecutors seem to recognize, criminal prosecutions of individual executives are a promising route to real change in an industry that makes equipment that is as dangerous as it is essential. Although the regulatory system was intended to prevent such deadly outcomes, it has failed, and

<sup>14</sup> Kevin Robillard, *Congress Blasts Auto Safety Regulator*, POLITICO (Sept. 17, 2014, 5:04 AM), <http://perma.cc/Q73Q-JA7S>.

<sup>15</sup> STAFF OF H.R. COMM. ON ENERGY AND COMMERCE, 113TH CONG., STAFF REPORT ON THE GM IGNITION SWITCH RECALL: REVIEW OF NHTSA 44 (2009), <http://perma.cc/6BL2-YFQH>.

<sup>16</sup> David Shepardson, *GM Ignition Switch Fund OKs Compensation for 104 Deaths*, DETROIT NEWS, (May 18, 2015, 10:23 AM), <http://perma.cc/W4BF-KJV7>. The number has increased every week for the past several months.

<sup>17</sup> Jeff Plungis, *Toyota Sudden Acceleration May Be Tied to 89 Deaths, U.S. Says*, BLOOMBERGBUSINESS (May 25, 2010), <http://perma.cc/YSK7-6P4Y>.

<sup>18</sup> Jaclyn Trop, *Is Mary Barra Standing on a “Glass Cliff”?*, NEW YORKER, Apr. 29, 2014, <http://perma.cc/67WM-LYM9> (“Her appointment was a surprise—she hadn’t been considered a front-runner—but a welcome one, for both advocates of gender equality and employees of G.M., where she is well respected. . . . Barra has been on the job for only three months, and has been mired in recalls for two of them, but early signs indicate that she is widely regarded as a strong leader who is adept at navigating difficult circumstances . . .”); Bill Vlasic, *Profit Doubles at G.M., as It Strives to Move Past Its Litany of Recalls*, N.Y. TIMES, Oct. 23, 2014, <http://perma.cc/3R84-EX8U>.

<sup>19</sup> Matthew L. Wald, *Auto Safety Nominee Wants Finer Data Tools*, N.Y. TIMES, Dec. 3, 2014, <http://perma.cc/T6ZK-9E3H>.

<sup>20</sup> Joe White & Paul Lienert, *Carmakers Eye Engineering Firm, Ex-Regulator for Takata Airbag Probe*, REUTERS (Feb. 4, 2015, 5:07 PM), <http://perma.cc/M2PG-PWDJ> (reporting on the efforts by a consortium of ten automakers, led by Toyota Motor Corp., to hire an independent engineering firm and a former NHTSA administrator to investigate the airbag problem).

<sup>21</sup> Fred Meier, James R. Healey, & Todd Spangler, *Feds Open Criminal Probe of GM Switch Recall*, USA TODAY (Mar. 11, 2014, 7:09 PM), <http://perma.cc/X2KR-7ARY>; Maki Shiraki & Mari Saito, *Takata Says It is Subject of U.S. Criminal Probe on Air Bags*, REUTERS (Nov. 13, 2014, 10:34 PM), <http://perma.cc/3QZC-PL9E>.

will continue to be dysfunctional until Congress gives NHTSA significantly stronger legal authority and much more money. Congressional action does not seem likely for the foreseeable future.

Using GM as a case study, I argue here that automakers have grown so complacent that they view billions of dollars in civil penalties and tort damages as unfortunate but routine costs of doing business. When the corporation is targeted as solely responsible for fatal defects, the legal system fails to instill the wariness in top executives that is essential if senior and mid-level managers are to make consumer safety their top priority. Too many companies—and GM is a prime example—have internal cultures of going along to get along that make safety defects recede into the background.<sup>22</sup>

To reverse these troubling trends, individual executives with the power to establish early warning systems and repair defects quickly must perceive a personal threat if they do not act. Individual prosecutions are possible under both federal and state criminal law. Federal statutes authorize felony prosecutions for offenses such as lying to law enforcement officials that may well apply to defect cases. State criminal laws have a long tradition of punishing reckless homicide, also known as willful manslaughter. Rather than allowing the 2014 recall debacle to float past us without inspiring systemic change that will save lives, criminal prosecutions should become an integral part of—even a priority for—both federal and state governments.

This article opens with an explanation of regulatory failure at NHTSA. It examines the evidence made public about GM's mishandling of the ignition switch defect. It concludes with some suggestions regarding the criminal offenses that could be prosecuted.

## II. REGULATORY FAILURE

The fatality rate in traffic accident deaths has been falling steadily and NHTSA can certainly take pride in that outcome.<sup>23</sup> Regardless, the agency's bewildered, even feckless responses to Toyota's sudden acceleration problems, GM's defective ignition switches, and Takata's air bag fiasco have brought the agency back to the forefront of public attention in what can only be described as disgrace. Instead of marching out ahead of manufacturers to discover incipient defects, NHTSA typically lags far behind, appearing incompetent, subject to industry capture, or both.

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<sup>22</sup> See, e.g., Micheline Maynard, *"The GM Nod" & Other Cultural Flaws Exposed by the Ignition Defect Report*, FORBES (June 5, 2014, 1:51 PM), <http://perma.cc/WV43-LBJY> ("The report by attorney Anton Valukas, which GM submitted to the government Thursday morning, is a devastating take down of the inertia and incompetence inside GM over the defects that have killed 13 people, and possibly more.").

<sup>23</sup> NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., FATALITY ANALYSIS RECORDING SYSTEM (FARS) ENCYCLOPEDIA, <http://perma.cc/3P36-GV38> (showing a steady decrease in fatality rate from 1994 to 2012).

This unfortunate dénouement did not arise suddenly. To put the convergence of the auto industry’s failure to prevent safety defects and NHTSA’s acute regulatory dysfunction into some kind of historical perspective, we need only look at Jerry Mashaw and David Harfst’s seminal 1990 book entitled *The Struggle for Auto Safety*.<sup>24</sup> A quarter century later, the book can only provoke a strong sense of “*déjà vu* all over again.”<sup>25</sup> Mashaw and Harfst’s dissection of the internal dynamics within the auto industry, their analysis of NHTSA’s self-inflicted wounds, and their vivid descriptions of the political crosswinds that buffet the agency from both ends of Pennsylvania Avenue are as true today as they were a quarter century ago. The industry and the federal government are in their fifth decade of struggling over auto safety, and the industry still overwhelms the regulators.

Mashaw and Harfst explain that early in its history, NHTSA largely relinquished, with little resistance, the option of writing preventive rules.<sup>26</sup> Instead, the agency embraced the recall as its primary mode of operation. They attribute this shift largely to the hubris of NHTSA engineers. The agency’s first rules attempted to micromanage automotive designs, engendering strong resistance from manufacturers, and NHTSA withdrew in disarray. Over time, it shifted instead to recalls to ameliorate the effects of safety defects rather than trying to forestall them through prescriptive rules. This preference became entrenched by the early 1990s, when Mashaw and Harfst published their definitive analysis, although even then reformers with foresight might have steered the agency in a different direction. These days, the deep-seated polarization between conservative and progressive policymakers regarding the appropriate regulatory role of the federal government makes it difficult to imagine that congressional leaders could ever agree on how to overhaul NHTSA legislatively.<sup>27</sup>

The latest crisis in confidence regarding NHTSA began with its inability to cope with Toyota’s sudden acceleration problems and has yet to culminate.<sup>28</sup> As early as 2000, the agency started to receive consumer complaints that various Toyota models were prone to hurtle out of control, reaching speeds as high as 120 miles per hour as frantic drivers tried without success to turn off the motor or use emergency brakes.<sup>29</sup> Toyota insisted that confused drivers stepped on the gas pedal instead of the brakes, invoking the

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<sup>24</sup> JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990).

<sup>25</sup> Yogi Berra is credited with coining this famous phrase. See YOGI BERRA, *WHAT TIME IS IT? YOU MEAN NOW?* 137 (2002).

<sup>26</sup> MASHAW & HARFST, *supra* note 24, at 10–19. The agency still writes rules, but they take a long time and are few in number.

<sup>27</sup> For an analysis of these tensions, see Rena Steinzor, *The Truth About Regulation in America*, 5 HARV. L. & POL’Y R. 323 (2011).

<sup>28</sup> For an explanation of the immediately preceding crisis, see generally PAUL F. ROTHBERG, *CONG. RESEARCH SERV.*, RL30710, *FIRESTONE TIRE RECALL: NHTSA, INDUSTRY AND CONGRESSIONAL RESPONSES* (2001).

<sup>29</sup> SUZANNE M. KIRCHHOFF & DAVID RANDALL PETERMAN, *CONG. RESEARCH SERV.*, RL-R41205, *UNINTENDED ACCELERATION IN PASSENGER VEHICLES 1* (2010).

traditional first line of defense to defect allegations: the machine is fine and all problems are caused by driver error. The company's critics speculated that a problem in the cars' highly sophisticated computer systems was to blame.<sup>30</sup> No modern car can operate without such "drive by wire" systems, which are complex and prone to errors that are hard to diagnose.<sup>31</sup> Toyota insisted that its software was fine but that poorly placed floor mats could entrap gas pedals, throwing the car into maximum acceleration mode.<sup>32</sup>

As the controversy played out, NHTSA was under heavy pressure to figure out whether a malfunction in affected Toyota models' computer systems was a root cause of sudden acceleration. But it did not tackle the technical issues on its own, instead referring the investigation to scientists at the National Aeronautics and Space Administration (NASA). Department of Transportation (DOT) Secretary Ray LaHood admitted that only two of the agency's 125 engineers specialize in electronics, confirming the worst suspicions that the agency was incompetent with respect to this central aspect of automobile design and construction.<sup>33</sup> After months of study, NASA experts said they could not find a problem with Toyota computer systems, vindicating Toyota's long-standing claims that driver error, floor mats, and pedals were the real culprits.<sup>34</sup> NASA is now so popular among industry executives that GM asked a "special team" to review whether 2.6 million recalled cars with ignition switch problems could be made safer if drivers use only the car key without a key chain and other keys.<sup>35</sup> The implications of having the most sophisticated automotive experts within the federal government housed in an agency that is separate from the one assigned to regulate safety in the industry are painful to contemplate. Allowing those government experts to sell their skills to a regulated party only exacerbates the damage to NHTSA's reputation because it further undermines the core value that the government must remain objective with respect to such disputes.

In August 2009, California Highway Patrolman Mark Saylor and three family members died after their Toyota Lexus slammed into another vehicle

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<sup>30</sup> See, e.g., Ken Bensinger & Ralph Vartabedian, *For Toyota, the Crucial Question is the Electronics*, L.A. TIMES (Feb. 14, 2010), <http://perma.cc/U4EL-DW7Q> ("For Toyota, the crucial question is the electronics. The company vigorously denies that its vehicles' acceleration problems might stem from an electronic or software glitch. But it remains an open question, and any such finding would be devastating.").

<sup>31</sup> See, e.g., Ian Austen, *Drive by Wire, an Aerospace Solution*, N.Y. TIMES, Mar. 29, 2013, <http://perma.cc/R4K6-VK9A>; Lindsay Chappell, *By-wire Age is Coming; What's Missing is Trust*, AUTOMOTIVE NEWS (Dec. 2, 2013, 12:01 AM), <http://perma.cc/7YDV-PUPN>.

<sup>32</sup> Bill Vlastic, *Toyota's Slow Awakening to a Deadly Problem*, N.Y. TIMES, Jan. 31, 2010, <http://perma.cc/9JC6-F9PN> [hereinafter *Slow Awakening*].

<sup>33</sup> Jeff Green & Angela Greiling Keane, *Recalls Triple as Electronics Run Cars, Swamp U.S. Regulators*, BLOOMBERG (Mar. 25, 2010, 7:22 PM), <http://perma.cc/C363-7YXW> ("[NHTSA] lacks regulations for auto electronics, and rules governing accelerators were written in 1973 and last updated in 1995.").

<sup>34</sup> Mark Rehtin, *Toyota Image Surges on NASA Study*, AUTOMOTIVE NEWS (Feb. 14, 2011, 12:01 AM), <http://perma.cc/2D59-KR9T>.

<sup>35</sup> David Shepardson, *GM Seeks NASA Help in Recall Review*, DETROIT NEWS (Apr. 9, 2014, 11:27 PM), <http://perma.cc/MH2F-HRSL>.

and crashed into a dirt embankment. The crash was accompanied by a blood-curdling recording of Saylor’s brother-in-law pleading for help on a 911 call and the screams of the four in their final seconds.<sup>36</sup> Frustrated by Toyota’s continued resistance to a major recall, a delegation of top DOT officials traveled to Japan to confront Toyota executives. But in the same story that described the trip, the *New York Times* reported that “[n]ot once in more than six years of reviews of Toyota’s problems did officials at [NHTSA], which regulates automakers, use their power to subpoena Toyota’s records, even though they said they believed the automaker was withholding crucial information.”<sup>37</sup> The agency’s reputation degenerated further when veteran auto industry reporter Micheline Maynard disclosed the content of a confidential memo written by Toyota’s lobbying team that bragged about saving \$100 million by, in essence, stalling NHTSA’s informal demands that the company initiate recalls.<sup>38</sup>

Finally, after ten years of delay, Toyota agreed in January 2010 to recall millions of cars.<sup>39</sup> NHTSA received little credit for this resolution and instead appeared like a nervous bystander, wringing its hands, sporadically talking tough, but never in control of the effort to force the haughty and secretive Toyota to come to grips with the problem.

The United States has experienced about 150 recalls involving approximately fifteen million vehicles annually over the last several years. Yet, according to the Congressional Research Service (CRS), “NHTSA has estimated that it opens an average of around one hundred defect investigations each year, and that about half the investigations it opens result in a safety recall or other manufacturer action; these represent about one-quarter of all vehicle recalls.”<sup>40</sup> Even where NHTSA is involved in discussions with a company about a safety defect, recalls come only after extensive, drawn-out negotiations. The agency seems inordinately comfortable in its role of cajoler-in-chief. Former administrator David Strickland told Congress in 2010 that NHTSA strongly prefers to go the voluntary route because litigating a recall order can cause extensive delays in getting dangerous cars repaired.<sup>41</sup> This avowed commitment to collaboration creates the perception

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<sup>36</sup> Vlastic, *Slow Awakening*, *supra* note 32 (“The 911 call came at 6:35 p.m. on Aug. 28 from a car that was speeding out of control on Highway 125 near San Diego. The caller, a male voice, was panic-stricken: ‘We’re in a Lexus . . . we’re going north on 125 and our accelerator is stuck . . . we’re in trouble . . . there’s no brakes . . . we’re approaching the intersection . . . hold on . . . hold on and pray . . . pray . . .’ The call ended with the sound of a crash.”).

<sup>37</sup> Eric Lichtblau & Bill Vlastic, *Safety Agency Scrutinized as Toyota Recall Grows*, N.Y. TIMES, Feb. 9, 2010, <http://perma.cc/ZCU6-3L22>.

<sup>38</sup> Micheline Maynard, *Toyota Cited \$100 Million Savings After Limiting Recall*, N.Y. TIMES, Feb. 21, 2010, <http://perma.cc/EE2M-CMER>.

<sup>39</sup> *Id.*

<sup>40</sup> BILL CANIS ET AL., CONG. RESEARCH SERV., R43454, POLICY ISSUES IN THE GENERAL MOTORS VEHICLE RECALL 2 (2014).

<sup>41</sup> KIRCHHOFF & PETERMAN, *supra* note 29, at 4. In fairness, Strickland also asked Congress to strengthen the agency’s legal authority to order recalls, lightening the burden of litigating such disputes. *The Motor Vehicle Safety Act of 2010: Hearing Before the Subcomm. on*

that NHTSA negotiators are afraid to go to court and that manufacturers risk little by stalling recalls.

One reason for NHTSA's hesitance to litigate is that its funding gaps are acute. NHTSA is a small agency, with about 590 employees<sup>42</sup> and a total budget of \$819 million for FY 2014.<sup>43</sup> One additional fact that rarely emerges in media accounts of its ineffectiveness is that the lion's share of the money is devoted to state highway traffic safety grants used to target problems like drunk driving, leaving only about fifteen to twenty percent allocated to the agency's vehicle safety programs. NHTSA's Office of Defects Investigation (ODI)—functionally, the primary unit that carries out the agency's auto safety mission—had a staff of fifty-one in 2014.<sup>44</sup> Expecting that small staff to oversee the design, marketing, and performance of the fifteen million new cars sold annually,<sup>45</sup> not to mention emerging defects in cars already on the road, is patently unreasonable. The White House is now seeking to triple NHTSA's defect investigation budget to \$31.3 million, up from \$9.7 million in the 2015 fiscal year.<sup>46</sup>

The prospects for the revitalization of NHTSA are dim. President Obama is unlikely to achieve steady increases in NHTSA's budget because the Republican majority in Congress is so committed to budget cutting and so vehemently against "job-killing regulation."<sup>47</sup> The agency could also benefit from stronger enforcement tools. For example, civil penalty assessments for late reporting of defect-related information should not be capped at thirty-five million dollars.<sup>48</sup> The safety standard in the statute, which requires the agency to prove that a defect presents an "unreasonable risk," forces it to engage in a burdensome investigation of whether the value of the human lives at stake exceeds the cost of the fix, a grueling and, at times, bizarre

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*Commerce, Trade, & Consumer Protection of the H. Comm. on Energy & Commerce*, 111th Cong. 50 (2010) (statement of David Strickland, Administrator, National Highway Traffic Safety Administration).

<sup>42</sup> *Examining the GM Recall and NHTSA's Defect Investigation Process: Hearing Before the Subcomm. on Consumer Protection, Product Safety, & Insurance of the S. Comm. on Commerce, Science, & Transportation*, 113th Cong. 3 (2014) [hereinafter *Friedman Testimony*] (statement of David J. Friedman, Acting Administrator, National Highway Traffic Safety Administration).

<sup>43</sup> NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, FISCAL YEAR 2015 BUDGET OVERVIEW 14 (2014).

<sup>44</sup> *Friedman Testimony*, *supra* note 42, at 4.

<sup>45</sup> Associated Press, *Auto Sales Reach Six-Year High of 15.6 Million Vehicles Sold, Ford F-Series Takes the Lead*, N.Y. DAILY NEWS (Jan. 6, 2014, 1:20 PM), <http://www.nydailynews.com/autos/auto-sales-reach-six-year-high-demand-peaked-article-1.1567645>, <http://perma.cc/4TNM-FQNG>.

<sup>46</sup> David Shepardson, *White House Seeks to Nearly Triple NHTSA Defect Budget*, DETROIT NEWS (Feb. 2, 2015, 6:57 PM), <http://perma.cc/CRZ4-UXP5>.

<sup>47</sup> See, e.g., John R. Parkinson, *Speaker Boehner: Cut Spending & Job-Killing Regulations Strangling Employers*, ABC NEWS (Feb. 9, 2011, 12:25 PM), <http://abcnews.go.com/blogs/politics/2011/02/speaker-boehner-cut-spending-job-killing-regulations-strangling-employers/>, <http://perma.cc/U4EG-8HVE>; Megan R. Wilson, *Incoming Senate Majority Leader: Jobs, Keystone, & Regulations Top Agenda*, HILL (Jan. 4, 2015, 11:35 AM), <http://perma.cc/TMC8-3YMD>.

<sup>48</sup> See 49 U.S.C. § 30165 (2012).



process.<sup>49</sup> The process for ordering recalls is also excessively cumbersome, requiring the agency to try its case administratively and, if the manufacturer still resists, to go to court to win a judicial order mandating a recall.<sup>50</sup> In the best of all worlds, Congress would raise the penalties several-fold, change the safety standard to ease NHTSA’s burden of proof, and streamline the process by allowing NHTSA to go directly to federal district court to compel a recall.<sup>51</sup> But those improvements would be achievable only if Congress amends the Motor Vehicle Safety Act, a prospect as unlikely as significant budget increases for the same political reasons.

Some critics believe that NHTSA’s central problem is regulatory capture and they undoubtedly have a point.<sup>52</sup> The inspector general of the Department of Transportation reported in April 2011 that from 1999 to 2010, forty officials left NHTSA for industry jobs, including four administrators, two deputy administrators, seven associate administrators, and two chief counsels.<sup>53</sup> During the same period, twenty-three auto industry executives were appointed to top agency jobs. The steady migration of NHTSA officials to the far better compensated ranks of the car companies’ technical and public relations staff cannot help but blunt NHTSA’s regulatory instincts.

Capture, however extensive, is only part of the story. NHTSA suffers from a long-running crisis of confidence. Its timidity results from the sad reality that it cannot afford to hire adequate technical staff and is almost always out-manuevered by regulated parties. As the year of the recall demonstrates, NHTSA’s waning strength has occurred at the same time that automakers appear increasingly unwilling to address the most rudimentary hazards. The causal connection between the two developments and the urgent need for more effective government intervention is illustrated well by GM’s failure over more than a decade to correct the ignition switch problems in the Cobalt, the Ion, and other models. The full details of this odyssey have not yet emerged, but the information disclosed by GM’s own internal investigation of key events suggests that criminal charges may well be appropriate, as explained in this article’s final section.

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<sup>49</sup> See 49 U.S.C. § 30102 (2012).

<sup>50</sup> See NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., SAFETY RECALL COMPENDIUM: A GUIDE FOR THE REPORTING, NOTIFICATION, & REMEDY OF MOTOR VEHICLE AND MOTOR VEHICLE EQUIP. IN ACCORDANCE WITH TITLE 49 OF THE U.S. CODE, CHAPTER 301 & SUPPORTING FED. REGULATIONS (2015), <http://perma.cc/XG2Q-F2Q3>.

<sup>51</sup> See Motor Vehicle Safety Act of 2010, H.R. 5381, 111th Cong. (2010).

<sup>52</sup> See, e.g., Dan Becker & James Gerstenzang, Op-Ed, *Safety Sacrificed in NHTSA Revolving Door*, USA TODAY (Feb. 25, 2015, 8:02 AM), <http://perma.cc/UQG3-ZTCN> (citing an inspector general report).

<sup>53</sup> Letter from Calvin L. Scovel III, Inspector Gen., Dep’t of Transp., to John D. Rockefeller IV, Chairman, S. Comm. on Commerce, Sci., & Transp. & Mark L. Pryor, Chairman, S. Comm. on Consumer Prot., Prod. Safety, & Ins. (Apr. 4, 2011), <http://perma.cc/S9BK-C7QB>.

## III. THE GREAT GM BUNGLER

## A. The “Unvarnished Truth”

The best source of information about GM’s ignition switch defect available when this article went to press was a report commissioned by the company itself and written by Anton Valukas, a former U.S. Attorney and the current Chairman of the Chicago-based law firm Jenner & Block.<sup>54</sup> The Valukas report is labeled “privileged and confidential” and is chock full of information and opinions that would ordinarily never see the light of day. These revelations are so sensitive that it is far from clear whether GM intended from the outset for its results to become public. As a strategy for demonstrating newly installed CEO Barra’s commitment to coming clean with the public and shaking up GM’s dysfunctional internal culture, though, its release worked like a charm.<sup>55</sup>

The 315-page report explains that Barra and the GM Board directed Valukas to embrace two distinctly different goals for the report: finding the “unvarnished truth about what happened” with the ignition switch and determining who knew what when among “specific senior executives, as well as GM’s Board.”<sup>56</sup> The investigators spent their time on document review and interviewing GM employees—they had “unlimited access” to both.<sup>57</sup> They did not make an effort to “reconstruct accidents or determine which injuries or fatalities were or were not caused by the safety defect in the Cobalt and other cars.”<sup>58</sup> And they received only partial disclosure of documents from Delphi Mechatronics, a key player in the drama because it designed and manufactured the switch. With their high-priced billable hours mounting swiftly, the lawyers spared no effort to be thorough, collecting forty-one million documents estimated to contain twenty-three terabytes of data; conducting several levels of document review with the assistance of no fewer than four “forensic [document management, among other services] firms”; and interviewing 230 witnesses, some more than once, for a total of 350 interviews, always with “at least” two lawyers present.<sup>59</sup>

As explained further in the final section of this article, the gist of potential criminal charges under state law is that GM executives were willfully

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<sup>54</sup> The firm has 434 lawyers, annual revenues of \$357 million, and offices in Chicago, Dallas, New York, and Washington, D.C. *Jenner & Block Law Firm Profile*, AMERICAN LAWYER, <http://perma.cc/ZX44-PRM9>.

<sup>55</sup> GM CEO Mary Barra’s Remarks to Employees on Valukas Report Findings (June 5, 2014), <http://perma.cc/G6G7-84AM> (“But as I lead GM through this crisis, I want everyone to know that I am guided by two clear principles: First, that we do the right thing for those who were harmed; and, second, that we accept responsibility for our mistakes and commit to doing everything within our power to prevent this problem from ever happening again.”).

<sup>56</sup> ANTON R. VALUKAS, REPORT TO GENERAL DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS 12 (2014).

<sup>57</sup> *Id.* at 14.

<sup>58</sup> *Id.* at 12.

<sup>59</sup> *Id.* at 14.

blind, or reckless, with respect to the discovery and remediation of the ignition switch defect, and that this behavior had the result that people died who could have been saved. The gist of federal charges is that they lied, or caused others in the company to lie, to the government, and also that they failed to notify NHTSA officials in a timely manner that the ignition switch problem was a safety defect.

Four clusters of facts are most relevant to these potential charges: (1) the ways in which GM policy, written and unwritten, contributed to lengthy delays in fixing the switch and recalling affected vehicles; (2) the fraudulent and deeply destructive actions of Ray DeGiorgio, the engineer in charge of the Cobalt’s ignition switch system; (3) the inept performance of GM engineers in response to mounting evidence that ignition switch problems were killing and injuring people; and (4) the passivity of individual lawyers in GM’s general counsel’s office regarding repeated warnings by outside counsel about the hazards posed by the defective switches. The following is by no means an exhaustive analysis of available public information but rather cherry picks some of the most disturbing scenarios to demonstrate why criminal charges would be appropriate.

### *B. GM’s Stall Phobia*

Ignition switches are designed to have sufficient torque (the force required to rotate an object) to remain in a “run” position when the driver turns the key:

Components within the Ignition Switch control the amount of effort required to turn the switch from one position to another. A plunger cap and coiled spring inside the Ignition Switch sit in a small groove called a ‘detent,’ which holds the switch in the position to which the driver turns the key: Off, Run, Accessory, or Crank. The driver rotates the key by applying a certain amount of torque to overcome the detent, thereby rotating the switch out of one position and into another.<sup>60</sup>

Because the Cobalt and Ion switches did not have sufficient torque, they were prone to slipping the detent and landing in an off or accessory position when the key was jostled with even light pressure (by, for example, the driver’s knee touching the key or the weight of a swinging key ring). As we will see, a GM engineer named Ray DeGiorgio, who was responsible for switch design in the Cobalt, had sufficient advance notice of this problem prior to production of the car to have insisted on a re-design. In fact, DeGiorgio signed an e-mail to a colleague with the ostensibly wry appellation

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<sup>60</sup> *Id.* at 26. For an investigative television report that explains the problem using easily understood visuals accompanied by interviews with the experts outside GM who discovered it, see *GM Recall: The Switch from Hell* (CBC NEWS television broadcast Oct. 31, 2014), <http://perma.cc/ZWU4-XD8F>.

“Ray (tired of the switch from hell) DeGiorgio.”<sup>61</sup> But he said nothing as the new car went into production probably because of internal pressure not to interfere with its 2004 launch date. Once Cobalts hit the road and reports of moving stalls began to filter into the team assigned to oversee it, a different dynamic took over.

In March 2005, Jack Weber, a GM engineer, reported to GM’s Brand Quality group that, while driving a manual transmission Cobalt, his knee “contacted the key fob and key ring,” causing a “pulling on the key to move it to the ‘Off’ position.”<sup>62</sup> Steven Oakley, a Brand Quality Manager, opened a “Field Performance Report” to “address this issue, and the report [was] assigned the lowest severity level,” a four.<sup>63</sup> A severity level four connoted a problem that is viewed as a mere “annoyance [demanding] continuous improvement.”<sup>64</sup> Oakley later explained that “severity level 4” was “the default setting” and that “he did not change it.”<sup>65</sup> He added that he thought the “inadvertent shut-off was a safety issue, but Gary Altman, the PEM [Program Engineering Manager] for the Cobalt program team, and other engineers told him it was not, and he deferred to them.”<sup>66</sup>

By June 2005, despite the company’s obfuscation about the severity of the stalling problem, the problem was sufficiently well known that Christopher Jensen, auto editor of the *Cleveland Plain Dealer*, wrote a biting satiric column entitled “Salamis, key rings and GM’s ongoing sense of humor”:

Just when things look so glum for General Motors, what a relief that somebody at the world’s largest automaker still has a sense of humor.

In this case it comes from a GM news release about the possibility that the engine on its 2005 Chevrolet Cobalt (built by God-fearing and corn-fed Buckeyes in Lordstown) might inadvertently shut off.

The release was issued in response to a short piece in last Sunday’s New York Times that accompanied a generally favorable review of the Cobalt. In the sidebar story, free-lance writer Jeff Sabatini reported that a test Cobalt driven by his wife stalled, apparently after her knee bumped the steering column.

Intrigued, I asked GM in Detroit if there was an official statement. Sure enough there was and it is, please excuse me, a knee slapper,

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<sup>61</sup> Gabe Gutierrez, Rich Gardella & Talesha Reynolds, *GM Report: Engineer Approved ‘Switch From Hell’ Even Though It Didn’t Meet Specs*, NBC NEWS (June 5, 2014), <http://www.nbcnews.com/storyline/gm-recall/gm-report-engineer-approved-switch-hell-even-though-it-didnt-n123791>, <http://perma.cc/U26V-GEKT>.

<sup>62</sup> VALUKAS, *supra* note 56, at 76.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

suggesting that an engine that can be inadvertently turned off is not a safety problem.

‘In rare cases when a combination of factors is present, a Chevrolet Cobalt driver can cut power to the engine by inadvertently bumping the ignition key to the accessory or off position while the car is running. . . . When this happens, the Cobalt is still controllable . . . . The engine can be restarted after shifting to neutral.’ . . .

So, if you’re whisking along at 65 mph or trying to pull across an intersection and the engine stops, that’s what you do. Only a gutless ninny would worry about such a problem. Real men are not afraid of temporary reductions in forward momentum.<sup>67</sup>

In December 2005, as additional reports of moving stalls continued to come in, Oakley drafted a Technical Service Bulletin (TSB) entitled “Information on Inadvertent Turning of Key Cylinder, Loss of Electrical System and No DTCs.”<sup>68</sup> TSBs inform dealers about problems so that they are able to respond to consumer complaints. They are the precursor to a full-fledged recall. But the TSB did not use the word “stall” and gave no hint that they might be a safety issue. Oakley explained to the Valukas investigators that the word “stall” was a “hot” word at GM because it suggests a safety problem that should prompt a recall, as opposed to a mere alert to dealers.<sup>69</sup>

### C. DeGiorgio Goes Under the Bus

The Valukas report apportions most of the blame for GM’s delays in dealing with the ignition switch problem to Ray DeGiorgio, the engineer responsible for the development and manufacture of switches used in GM’s new compact models beginning in the fall of 1999.<sup>70</sup> A fair interpretation of its preoccupation with DeGiorgio is that in the foreseeable event that a federal or state criminal prosecution is brought, DeGiorgio is a large and appealing target, not least because he was among fifteen employees fired by Mary Barra on the same day that GM released the Valukas report.<sup>71</sup> Admittedly, his behavior looks very bad. But he was not solely responsible for GM’s systemic failure to identify moving stalls as a safety defect and prosecuting him alone is unlikely to deter similar behavior across the industry.

DeGiorgio began work as a GM Design Release Engineer in 1991 and spent his career specializing in switches.<sup>72</sup> Documents show that DeGiorgio “finalized” a specification for a Cobalt ignition switch on March 22, 2001,

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<sup>67</sup> Christopher Jensen, *Salamis, Key Rings & GM’s Ongoing Sense of Humor*, CLEVELAND PLAIN DEALER, June 26, 2005, at F1.

<sup>68</sup> VALUKAS, *supra* note 56, at 91.

<sup>69</sup> *Id.* at 92.

<sup>70</sup> *Id.* at 37.

<sup>71</sup> Kyle Stock, *GM’s Mary Barra Fires 15, Says More Recalls are Coming*, BLOOMBERGBUSINESS, (June 5, 2014), <http://perma.cc/PN56-86W7>.

<sup>72</sup> VALUKAS, *supra* note 56, at 37.

in effect assuring switch supplier Delphi that no further changes would be made and it was free to proceed with the construction of a prototype.<sup>73</sup> The DeGiorgio specification included a range of numbers to signify the torque he expected the switch to possess.<sup>74</sup> But the switch made by Delphi had considerably less torque.<sup>75</sup> DeGiorgio approved it anyway, rationalizing that the switch's "low torque would not affect the car's performance."<sup>76</sup> Once reports of moving stalls reached DeGiorgio, he undertook a startlingly audacious subterfuge. He instructed Delphi to re-design the switch without telling anyone within GM.<sup>77</sup> The new switch was installed in models from 2006 onwards and appears to have solved the stalling problem.<sup>78</sup> To cover up this fix—and, presumably, his initial negligence—DeGiorgio did not change the part number on the re-designed switch.<sup>79</sup> The re-design was discovered only when experts working for a plaintiff in a product liability case dismantled pre- and post-2006 switches and compared their insides.<sup>80</sup> Other engineers, as well as the Valukas investigators, asked DeGiorgio about changes to switch design on more than one occasion and he either lied or pretended he did not remember what had happened.<sup>81</sup> Of course, tinkering with the design of an automotive part without changing the part number may be a standard practice in the industry. Regardless, given the growing concern within GM that switch malfunctions were causing stalls and that stalling cars were involved in bad accidents, DeGiorgio's behavior is deceptive and unethical at best, criminal at worst.

The Valukas report makes much of how DeGiorgio's subterfuge derailed the company's efforts to come to grips with the switch problem, claiming that changing the part without changing the number was an "act that violated GM's policies and which would throw GM investigators off the track for years."<sup>82</sup> This statement is an exaggeration. The investigators may well have been thrown off track, but they were already heading with determination in the wrong direction by investigating the problem as one of customer convenience, not safety.

Nevertheless, DeGiorgio knew about problems with switch torque before production of the Cobalt, and recklessly disregarded the implications of the malfunctions that then occurred. He was sufficiently worried about the reports of accidents following stalls that he made an affirmative decision to

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<sup>73</sup> *Id.* at 38.

<sup>74</sup> *Id.* at 39.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 6.

<sup>77</sup> *Id.* at 9–10.

<sup>78</sup> *See id.*

<sup>79</sup> *Id.* at 10 ("DeGiorgio's deliberate decision not to change the part number prevented investigators for years from learning what had actually taken place.").

<sup>80</sup> *See id.* at 188.

<sup>81</sup> *Id.* at 10 ("[W]hen asked in 2009 and in the years that followed whether the ignition switch had changed, DeGiorgio said that it had not. To this day, in informal interviews and under oath, DeGiorgio claims not to remember authorizing the change to the ignition switch or his decision, at the same time, not to change the switch's part number.").

<sup>82</sup> *Id.* at 143.

change the switch and, it seems, did not tell anyone within the company about it. He then lied repeatedly when questioned about what had happened. His lies contributed to GM’s ongoing failure to alert the government to the defect. Absent mitigating facts that have yet to emerge, these acts and omissions should trigger multiple felony counts.

#### D. *The Engineers*

DeGiorgio was the primary engineer assigned to the ignition switch system on the Cobalt and other models. As accident reports increased, however, GM managers assigned several other engineers to the issues.<sup>83</sup> The lengthy, descriptive timeline of GM engineers’ fumbling efforts to come to grips with the switch defect reveals a management structure so devoid of individual accountability that it goes a long way toward explaining why the giant automaker required a taxpayer bailout in 2009.<sup>84</sup> Indeed, Steven Rattner, a Wall Street banker who headed President Barack Obama’s team in charge of the bailout, called the report a “journey down memory lane” that confirmed his personal experience with GM “culture”:

[L]ooking under the hood of G.M. was the most stunningly disappointing dissection of a paid-up member of corporate America in my 30-year Wall Street career. Having such a dysfunctional culture had direct and disastrous consequences for the quality of decision-making . . . . Emblematic of the company’s lack of management accountability was the insistence of its chief executive officer, G. Richard Wagoner Jr., that its problems were all the fault of external forces: its unions, oil prices, the credit crisis and competition from Japanese imports.<sup>85</sup>

According to the Valukas investigators:

The Cobalt Ignition Switch issue passed through an astonishing number of committees. We repeatedly heard from witnesses that they flagged the issue, proposed a solution, and the solution died in a committee or with some other *ad hoc* group exploring the issue. But determining the identity of any actual decision-maker was impenetrable. No single person owned any decision. Indeed, it was often difficult to determine who sat on the committees or what they considered, as there are rarely minutes of meetings.<sup>86</sup>

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<sup>83</sup> *Id.* at 77.

<sup>84</sup> Bill Vlasic & Annie Lowrey, *U.S. Ends Bailout of G.M., Selling Last Shares of Stock*, N.Y. TIMES, Dec. 9, 2013, <http://dealbook.nytimes.com/2013/12/09/u-s-sells-remaining-stake-in-gm/>, <http://perma.cc/T3YE-K4BU>.

<sup>85</sup> Steven Rattner, Op-Ed., *G.M.’s Flawed Culture*, N.Y. TIMES (June 11, 2014, 4:37 PM), <http://www.nytimes.com/2014/06/11/opinion/steven-rattner-gms-flawed-culture.html>, <http://perma.cc/499K-GZJG>.

<sup>86</sup> VALUKAS, *supra* note 56, at 255.

CEO Mary Barra told the Valukas investigators that this behavior, which she calls the “GM nod,” was characterized by rambling, open-ended discussion toward an indefinite conclusion with no assignments for any particular individual arising from the muddle.<sup>87</sup> Such behavior was an open joke among employees. The *New York Times* reported on a February 2009 e-mail sent by engineer Joseph R. Manson to four colleagues: “The [ignition switch] issue has been around since man first lumbered out of sea and stood on two feet. In fact, I think Darwin wrote the first P.R.T.S. [Problem Resolution and Tracking System] on this end included as an attachment as part of his Theory of Evolution.”<sup>88</sup>

These committees included teams of engineers, and the Valukas investigators were disgusted by their collective failure to make any connection between the shift of the key to an accessory position and the disabling of the airbag. The engineers assigned to investigate growing reports of fatal accidents were “neither diligent nor incisive” because they failed to discover the link that was readily apparent in GM’s internal files and in publicly available documents written by outside experts.<sup>89</sup>

Two especially important pieces of outside evidence found this vital connection in 2007: (1) a written analysis prepared by Keith Young, a Wisconsin state trooper who reconstructed a fatal accident in his jurisdiction and (2) a report by Indiana University’s Transportation Research Center.<sup>90</sup> Both documents were in the files of some GM employees but the various committees appointed to natter about the switch issue somehow overlooked them. In sum: “The engineers made a basic mistake. They did not know how their own vehicle had been designed. And GM did not have a process in place to make sure someone looking at the issue had a complete understanding of what the failure of the Ignition Switch meant for a customer.”<sup>91</sup>

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<sup>87</sup> See *id.* at 256.

<sup>88</sup> Matthew L. Wald & Bill Vlastic, *Parts Supplier Delphi is Scrutinized in G.M. Recall*, N.Y. TIMES, June 26, 2014, <http://perma.cc/Y2LR-CYYP>. A case study by the American Society for Quality issued in 2012 explains that the PRTS is “an accessible and readily available system,” which is “used organization-wide to document all issues during a vehicle’s life-cycle.” MEGAN SCHMIDT, ASQ CASE STUDY: GENERAL MOTORS TECHNICAL PROBLEM-SOLVING GROUP DRIVES EXCELLENCE 3 (Nov. 2012), <http://perma.cc/R368-NYBW>. The focus of the case study was the company’s so-called “Red X Team,” an elite group of problem solvers who are supposed to take charge of its most troubling performance issues. Before GM’s 2008 bankruptcy, 150 Red X team members dealt with defects but after the company reorganized, only 32 remained. The newsletter article insisted that “[i]nstead of allowing less manpower to become a roadblock, the team became determined to increase its output of completed projects and strengthen its role in making every GM vehicle better than the last one.” *Id.* at 1. The case study pictures the Red X Masters posed by a new car in red baseball caps, red shirts, and khakis. It turns out that a Red X Team led by “Dan Davis, GM Red X Global Lead” undertook an investigation of the ignition switch problem, although, like so many other internal groups both formal and informal, it ended its investigation without finding a resolution to the problem and without uncovering DeGiorgio’s 2005 redesign of the switch. VALUKAS, *supra* note 56, at 187–88.

<sup>89</sup> VALUKAS, *supra* note 56, at 3.

<sup>90</sup> *Id.* at 115.

<sup>91</sup> *Id.* at 95.



Managers were sufficiently aware of the destructive implications of the GM nod culture that they had engrafted an informal antidote onto its convoluted system for monitoring potential defects: the unofficial appointment of so-called “champions” who were sufficiently senior to push a problem through the layers of bureaucracy to a permanent solution.<sup>92</sup> The ignition switch safety defect had no fewer than three of these, appointed in sequence starting in mid-2012.<sup>93</sup> The first was Terry Woychowski, Vice President of Global Quality and Vehicle Launch and a member of the company-wide committee in charge of recalls, known (as usual, euphemistically) as the Executive Field Action Decision Committee.<sup>94</sup> Woychowski retired in the spring of 2012 for reasons that are unknown, and was replaced by Jim Federico, director of Global Vehicle Integration, a title that meant he was the company’s Chief Engineer.<sup>95</sup> Federico told the Valukas investigators that he did not remember being called a “champion” and instead thought that he was supposed to energize the engineering group to find a solution to the Cobalt airbag deployment problem.<sup>96</sup> When Federico was pulled away by other responsibilities, Gay Kent, the General Director of GM North America Vehicle Safety and Crashworthiness, was asked to take his place as champion, the third change in that designation in ten months. More meetings ensued.<sup>97</sup> But the catalyst that forced GM to get to the bottom of the problem did not arise as the result of any of its time-consuming and extraordinarily ineffective internal activity. Instead, what at last launched GM into effective action was a deposition of Ray DeGiorgio taken by attorneys in a products liability case brought by the parents of Brooke Melton,<sup>98</sup> who died on her 29th birthday when her 2005 Cobalt stalled and drifted into the path of a much larger vehicle.<sup>99</sup>

It may seem like a stretch to suggest that senior executives who are ineffectual should ever be charged with a crime. But the three champions should, at the very least, be considered key targets in any such investigation. How much they knew about why other executives thought the problem demanded the appointment of a champion and the reasons why they failed to respond to the urgent request that they serve as one could indicate the kind of willful blindness that can demonstrate *mens rea* in a criminal case.

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<sup>92</sup> See *id.* at 253.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 171.

<sup>95</sup> *Id.* at 178.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 208.

<sup>98</sup> Bill Vlasic, *G.M. Settles Switch Suit, Avoiding Depositions*, N.Y. TIMES, Mar. 13, 2015, <http://perma.cc/N5KQ-5JRH>. The story characterizes the settlement as a “victory” for GM because it may allow the company’s senior executives, including Barra, to avoid having their depositions taken. See *id.* However, this judgment may be premature because other cases are pending.

<sup>99</sup> Gregory Wallace, Poppy Harlow, & Amanda Hobor, *How Brooke Melton’s Death Led to the GM Recall*, CNNMONEY (June 4, 2014), <http://perma.cc/739R-CKN6>.

*E. The Lawyers*

As early as 2011, GM's general counsel's office had received considerable information indicating serious problems with non-deploying airbags from the outside lawyers they had hired to defend product defect cases.<sup>100</sup> In July of that year, a group of lawyers familiar with the problem "called a meeting to make sure that senior engineering management had 'eyeballs' on the issue" and "[would] not let it flow through the normal process."<sup>101</sup> The matter was then referred to GM's Product Investigation unit, which had the responsibility of "investigating potential safety issues."<sup>102</sup> As time went on, the in-house lawyers continued to receive increasingly urgent and agitated reports from outside counsel.<sup>103</sup>

Then, in May 2013, the DeGiorgio deposition taken in the Melton case provoked a crisis when the plaintiff's attorney dropped the "bombshell" that the switch had been re-designed between 2005 and 2008.<sup>104</sup> Two months later, outside counsel from King & Spalding, who had defended the deposition, sent a "case evaluation" to GM regarding an undisclosed product liability case most likely to be Melton's.<sup>105</sup> "This case needs to be settled," the outside lawyers stated bluntly, because "there is little doubt that a jury here will find that the ignition switch used on [the 2005 Cobalt involved in the plaintiff's case] was defective and unreasonably dangerous, and that it did not meet GM's own torque specifications."<sup>106</sup> The lawyers added that GM's own internal documents allowed plaintiff's counsel "to develop a record from which he can compellingly argue that GM has known about this safety defect from the time the first 2005 Cobalt rolled off the assembly line and has essentially done nothing to correct the problem for the last nine years."<sup>107</sup> Plaintiff's counsel will argue that this record is "proof positive of GM's conscience [sic] indifferent and willful misconduct when it comes to the safety of its vehicles' occupants."<sup>108</sup>

Still, the company would not begin serious recalls for another nine months. Five of the fifteen people fired by Barra in June 2014 were lawyers in the general counsel's office.<sup>109</sup> According to press reports, they were dismissed because they helped to hide the defect for two years before recalls

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<sup>100</sup> VALUKAS, *supra* note 56, at 10.

<sup>101</sup> *Id.* at 211.

<sup>102</sup> *Id.* at 10.

<sup>103</sup> *Id.* at 203–13.

<sup>104</sup> *Id.* at 199.

<sup>105</sup> Names of individual plaintiffs were redacted from the Valukas report to protect their privacy.

<sup>106</sup> VALUKAS, *supra* note 56, at 205.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Bill Vlasic, *In Surprise, Top Lawyer at G.M. Sets Retirement*, N.Y. TIMES, Oct. 17, 2014, <http://www.nytimes.com/2014/10/18/business/michael-millikin-gms-top-lawyer-is-retiring.html>, <http://perma.cc/7LNU-8JG2>.

started.<sup>110</sup> One key player was William Kemp, a senior lawyer who had been orchestrating GM’s legal strategy during that period and who was deeply involved in the selection of at least two of the “champions” who failed so miserably to provoke action.<sup>111</sup> Kemp was forced to quit when the ignition switch defect was unmasked in the media. Valukas found that he did not inform his boss, general counsel Michael Millikin, about the problem until February 2014.<sup>112</sup> Barra also defended Millikin during congressional hearings.<sup>113</sup> Nevertheless, Millikin ended up taking a “voluntary” retirement in October 2014.<sup>114</sup>

The lawyers who were involved in GM’s internal procrastination regarding the switch obviously had the expertise to understand the full ramifications of the ignition switch defect for consumer safety. As GM employees, they stand in the first line of culpable parties who participated actively in a process that delayed mandated NHTSA notifications, stalled recalls, and may well have cost lives. If pursued by prosecutors, they will undoubtedly respond that they were required under legal rules of professional conduct to preserve their clients’ confidentiality.<sup>115</sup> If accepted, this view of their conduct converts it from a potential crime to the benign activity of serving as counselors standing on the sidelines, without any responsibility to stop illegal conduct that endangers lives.

#### IV. CRIMINAL PROSPECTS

##### A. *The Department of Justice Moves Out*

In what has the makings of a trend, or at least a boomlet, U.S. Attorneys in five states have obtained indictments against individual corporate executives in six cases where corporate malfeasance killed and injured workers, consumers, or the environment.<sup>116</sup> The cases involve drinking water

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<sup>110</sup> Bill Vlasic, *G.M. Lawyers Hid Fatal Flaw, From Critics & One Another*, N.Y. TIMES, June 6, 2014, <http://perma.cc/8FRY-X6VP>.

<sup>111</sup> VALUKAS, *supra* note 56, at 212.

<sup>112</sup> Alison Frankel, Op-Ed., *How GM’s Legal Department Failed the Company and its Customers*, REUTERS (June 5, 2014), <http://perma.cc/RG2L-U6QA>.

<sup>113</sup> Vlasic, *supra* note 109.

<sup>114</sup> *Id.*

<sup>115</sup> The professional rules of conduct in most states give attorneys the option of disclosing that a client is about to commit a crime or other illegal act to the extent the lawyer believes it is “reasonably necessary” in order to prevent the “substantial” injury. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT R. 1.6(b) (2013), <http://perma.cc/TF7D-DP4U> (Confidentiality of Information).

<sup>116</sup> In reverse chronological order, the cases involve indictments of individual corporate executives and managers whom the DOJ alleges are culpable for (1) the chemical spill from a Freedom Industries tank farm that jeopardized the drinking water supplies in Charleston, West Virginia, Michael Wines, *Owners of Chemical Firm Charged in Elk River Spill in West Virginia*, N.Y. TIMES, Dec. 17, 2014, <http://www.nytimes.com/2014/12/18/us/owners-of-chemical-company-charged-in-elk-river-spill.html>, <http://perma.cc/NE4V-4LHH>; (2) the shipment of more than 17,000 vials of meningitis-tainted steroid injections by the New England Compounding Pharmacy, Massachusetts that ultimately killed sixty-four patients, Kay Lazar &

contaminated by a rusted chemical tank leak in West Virginia; tainted steroid injections shipped nationwide by a small compounding pharmacy in Massachusetts; a massive explosion in an underground mine owned and operated by now-defunct Massey Energy, again in West Virginia; cantaloupe infected with bacteria at a farm in Colorado; peanut paste laced with salmonella and shipped from Georgia despite positive tests for the bacteria; and the infamous Macondo well blowout that destroyed the Deepwater Horizon oil rig and spilled 205 million gallons of crude oil into the Gulf of Mexico. Altogether, 136 people were killed in these incidents, and hundreds were sickened or injured.

Although the Department of Justice (DOJ) does not maintain a database that keeps tallies of such prosecutions, the cases are unusual, if not unprecedented, for four reasons. They target individuals at the high end of the corporate chain of command. They involve the criminal provisions of statutes that are rarely invoked, including ones that categorize crimes as misdemeanors. They have occurred in such close chronological proximity to each other that they have attracted more attention, especially in the regulated community,<sup>117</sup> than they would if spaced further apart. Most importantly, they have led to the consideration of criminal prosecutions in the automobile safety defect cases considered here.

Of course, all of the cases could be rationalized on the basis that the Obama Administration's DOJ is more aggressive about targeting white collar crime than its predecessors because the President is so liberal. That interpretation is undercut by the Administration's notable and frequently criticized reluctance to prosecute banking executives in the aftermath of the 2008 market crash.<sup>118</sup> Instead, the incidents themselves seem to have motivated U.S. Attorneys embedded in affected communities to try and bring individual ex-

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Todd Wallack, *14 Executives, Staff Charged in Tainted Drug Case*, BOSTON GLOBE, Dec. 17, 2014, <http://www.bostonglobe.com/metro/2014/12/17/feds-arrest-tied-necc-closed-pharmacy-blamed-causing-deaths-with-tainted-drugs/24QytISVdaqXDNsSUOsNYJ/story.html>, <http://perma.cc/UR44-UMKZ>; (3) a massive explosion at Massey Energy's Upper Big Branch mine in Montcoal, West Virginia, that killed twenty-nine, Ken Ward Jr., *Longtime Massey Energy CEO Don Blankenship Indicted*, SUNDAY GAZETTE-MAIL, Nov. 13, 2014, <http://perma.cc/CJ4N-H47L>; (4) the sale of listeria-contaminated cantaloupes by the Jensen Bros. farm that caused thirty-three fatalities, U.S. DEP'T OF JUSTICE, *Eric & Ryan Jensen Charged with Introducing Tainted Cantaloupe into Interstate Commerce* (Sept. 26, 2013), <http://perma.cc/798E-EL8D>; (5) the shipment of peanut paste contaminated with salmonella from the Peanut Corporation of America plant in Blakely, Georgia that caused nine deaths, Dan Flynn, *Parnell Brothers Taken into Custody After Convictions*, FOOD SAFETY NEWS (Sept. 20, 2014), <http://perma.cc/LH4Q-UVJ6>; and (6) the Deepwater Horizon oil rig blowout in the Gulf of Mexico that killed eleven people, Clifford Krauss, *In BP Indictments, U.S. Shifts to Hold Individuals Accountable*, N.Y. TIMES, Nov. 15, 2012, <http://perma.cc/RRV9-N3N6>.

<sup>117</sup> See, e.g., Dan Elliott, Associated Press, *FDA: Criminal Case Shows Food Safety is Paramount*, USA TODAY (Sept. 27, 2013, 4:52 PM), <http://perma.cc/J2Z5-48CE>; Dan Flynn, *Reprieve from Criminal Prosecutions May Be Ending for Food Execs*, FOOD SAFETY NEWS (May 4, 2012), <http://perma.cc/5EWU-UAVH>.

<sup>118</sup> See, e.g., Glenn Greenwald, *The Untouchables: How the Obama Administration Protected Wall Street from Prosecutions*, GUARDIAN (Jan. 23, 2013, 7:27 PM), <http://perma.cc/4AT6-8EFC>; *Moyers & Company: Too Big to Jail?* (Oct. 3, 2014), <http://perma.cc/P9DA-T78S>.

cutives to justice. Only time will tell whether future administrations will continue such prosecutions. Given the growing inability of regulatory agencies to prevent such fatal and destructive incidents, very tempting targets are likely to present themselves.<sup>119</sup>

Taking these cases as precursors if not precedents, what might be the contours of a federal case against GM executives?

The first and most obvious charge is the failure to report a defect under the Motor Vehicle Safety Act.<sup>120</sup> The statute requires a manufacturer to report when it “learns the vehicle or equipment contains a defect and decides *in good faith* that the defect is related to motor vehicle safety.”<sup>121</sup> Given NHTSA’s great difficulty in discovering defects independently despite the time and energy it spends reviewing and investigating consumer complaints, manufacturer notifications become absolutely critical to the maintenance of any semblance of government intervention on behalf of consumers to prevent accidents caused by safety defects.

NHTSA has already settled a civil case with GM for thirty-five million dollars—the most the Act allows it to collect—for failing to file timely notification.<sup>122</sup> The consent order puts GM on a very short leash, with significantly expanded requirements to report defects, change its internal defect identification procedures, and attend frequent meetings with regulators. But the penalty itself must be viewed as a pittance compared to the estimated three billion dollars GM spent in the first half of 2014 on defect-related recalls.<sup>123</sup> The economic dynamics of the situation suggest that penalties for failure to notify assessed against the corporation in such small amounts do not serve any deterrent purpose. Because carmakers know that acknowledging a defect means they must undertake both the research necessary to find a fix and the effort to mount a recall, their clear incentive from an economic perspective is not to go looking for trouble or, as the ignition switch debacle suggests, to avoid coming to grips with a problem for as long as possible. The downside risks of expensive product liability lawsuits and serious reputational damage must of course occur to senior managers. But the incentives created by civil penalties under the statute seem both ineffective and counterintuitive.

On the other hand, the statute authorizes felony charges, including prison time up to fifteen years, against any “person” (including a corporation) who fails to report “with the specific intention of misleading

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<sup>119</sup> I develop these arguments at greater length, in other contexts, in *RENA STEINZOR, WHY NOT JAIL? INDUSTRIAL CATASTROPHES, CORPORATE MALFEASANCE, AND GOVERNMENT INACTION* (2014).

<sup>120</sup> 49 U.S.C. § 30118 (2012).

<sup>121</sup> *Id.* § 30118(c)(1) (emphasis added).

<sup>122</sup> Matthew Deluca, *GM to Pay Feds \$35 Million Fine Over Deadly Ignition Fails*, NBC NEWS (May 16, 2014, 9:22 AM), <http://www.nbcnews.com/storyline/gm-recall/gm-pay-feds-record-35-million-fine-over-deadly-ignition-n107106>, <http://perma.cc/6GZU-DX28>; see also 49 U.S.C. § 30118(c)(1) (2012) (providing legal authority for the consent order).

<sup>123</sup> Bill Vlasic, *Profit Doubles at G.M., as It Strives to Move Past Its Litany of Recalls*, N.Y. TIMES, Oct. 23, 2014, <http://perma.cc/6ETC-NB3V>.

[NHTSA] with respect to motor vehicle or motor vehicle equipment safety related defects that have caused death or serious bodily injury to an individual.”<sup>124</sup> Ray DeGiorgio would appear to be a candidate for this kind of charge. The question of whether any of the other people who were involved in investigating the ignition switch problem for so many years harbored a specific intent to mislead is a more difficult judgment. However, the criminal law typically evaluates intent on the basis of what a “reasonable person” would do in such circumstances.<sup>125</sup> The Valukas report’s extensive narrative on the seemingly endless and certainly pointless internal churning over the ignition switch problem, which was carried out through self-justifying electronic mail and unproductive meetings, provides an unusual roadmap for prosecutors intent on demonstrating such intent.

Unfortunately, the Motor Vehicle Safety Act does not establish criminal culpability for actions that result in harm to motorists beyond the failure to notify regarding a defect.

### B. *Obstruction of Justice*

Federal and state laws protect the integrity of the criminal justice system by imposing criminal penalties for lying to the government, destroying evidence, or interfering with witnesses or juries. Obstruction provisions are spread throughout the federal code, but the most prominent generic version is section 1001 of Title 18, which provides for imprisonment for up to five years for any person who (1) “falsifies, conceals or covers up . . . a material fact”; (2) “makes any materially false, fictitious, or fraudulent statement or representation”; or (3) “makes or uses any false writing or document.”<sup>126</sup> Verbal statements count as much as written ones and the bar for what is a material falsehood is set relatively low: if a statement has the capacity to influence what the government does in response to it, whether or not it actually has an effect, it is deemed material.<sup>127</sup> GM’s lawyers would appear to be especially vulnerable to such charges, especially for acts or omissions that occurred during the period when the lawyers knew the alarming details regarding fatal accidents but continued to countenance both their clients’ failure to notify NHTSA and their misleading assurances to the agency that GM was dealing appropriately with faulty ignition switches.

### C. *Reckless Homicide under State Law*

State laws make it a crime to cause a death by “consciously disregard[ing] a substantial and unjustifiable risk.”<sup>128</sup> Generally, defendants must

<sup>124</sup> 49 U.S.C. § 30170(a) (2012).

<sup>125</sup> See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, §§ 10.02–.04 (6th ed. 2012) (discussing the reasonable person standard in criminal law).

<sup>126</sup> 18 U.S.C. § 1001 (2012).

<sup>127</sup> See *United States v. Gaudin*, 515 U.S. 506, 509 (1995).

<sup>128</sup> See Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 470 (1992).

be aware of the risk and act in a way that is unjustifiable. A classic hypothetical posits a pedestrian who steps into an intersection and is killed when a driver runs her down.<sup>129</sup> If it was a dry and sunny day, the light was red, the walk sign was on, and the driver was speeding in an effort to meet friends for breakfast, prosecutors will consider charging the crime of reckless manslaughter. If, on the other hand, the pedestrian darts into traffic when the light is green, the walk sign red, the weather is bad, and the driver is traveling within the speed limit to deliver his pregnant wife to the hospital, no charges will be brought.

The first criminal prosecution of a major U.S. corporation for a safety defect involved the notorious Pinto, a compact car that had its gas tank positioned in the rear. 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. In 1980, Michael Cosentino, a county prosecutor in Elkhart, Indiana, charged that the Ford Motor Company acted recklessly when it ignored the implications of this design and growing press reports about fatal car crashes like the one that killed three young women in his jurisdiction.<sup>130</sup> The case was a fiasco for the prosecutor, who was outgunned by Ford and hobbled by adverse legal rulings, although it is still studied in business schools as an example of the potentially dire outcomes caused by corrupt corporate ethics.<sup>131</sup> Perhaps because Cosentino lost, and certainly because state and local prosecutors are inundated with street crime cases, white collar prosecutions in health, safety, and environmental cases remain largely the province of the federal government.

Once again, based on the Valukas report, a case possibly could be constructed that at some definable point in time, individual GM executives had sufficient knowledge to understand the imminent threat posed by driving a Cobalt.

#### D. *The Corporation's Crimes*

The Supreme Court first decided in 1909 that corporations could be convicted of crimes committed by their human agents because to immunize

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<sup>129</sup> *Id.* at 482.

<sup>130</sup> *State v. Ford Motor Co.*, Case No. 11-431 (Ind. 1980).

<sup>131</sup> For an explanation of these adverse rulings as well as the prosecutor's theory of the case, see LEE PATRICK STROBEL, RECKLESS HOMICIDE: FORD'S PINTO TRIAL 58 (1980) (“[Judge] Jones ruled that the indictment was constitutional only when read to charge that Ford acted recklessly by failing to repair or warn about the Pinto during the 41-day time period before the [crash at issue]. The elements of the indictment concerning the car's defective and dangerous design were relevant only to establish the reason why Ford should have warned the public or fixed the car during that 41-day period.”). For an example of the reading assigned in business courses, see Dennis A. Gioia, *Pinto Fires and Personal Ethics: A Script Analysis of Missed Opportunities*, 11 J. BUS. ETHICS 379 (1992). For more information about the case in general, see FRANCIS T. CULLEN ET AL., CORPORATE CRIME UNDER ATTACK: THE FORD PINTO CASE AND BEYOND (1987); Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013 (1991).

them would deprive the government of one of its most potent tools for preventing illegal behavior.<sup>132</sup> Despite considerable discourse in the scholarly literature about the logic and equity of corporate culpability,<sup>133</sup> criminal charges against corporate entities are common. Corporations cannot go to jail. Consequently, the most tangible outcome of such cases—other than the public condemnation they inspire—is a monetary fine. For example, BP paid \$4.5 billion to settle criminal charges arising from the Deepwater Horizon disaster.<sup>134</sup>

Over the last several years, though, the DOJ has developed a legal instrument called a “deferred prosecution agreement” (or DPA). Such agreements allow corporations to avoid pleading guilty to crimes and instead subject them to penalties, often in very large amounts, for the privilege until and unless they behave criminally again. In the six years since President Obama has been in office, the number of DPAs has gone up substantially.<sup>135</sup>

The ostensible rationale for such agreements is that forcing corporations to plead guilty to crimes could put them out of business, a supposition that is almost entirely based on the story of Arthur Andersen, the giant accounting firm that went out of business in the wake of Enron’s demise because it was that company’s accountant. Clients left the firm in droves as soon as the travails of the convoluted pyramid scheme that was Enron hit the media in October 2001.<sup>136</sup> In a frantic effort to avoid further trouble with the government, Andersen employees in the Houston office started shredding documents, destroying tons of paper until the Securities and Exchange Commission finally sent it a subpoena a month later. Arthur Andersen was indicted the following spring, fought the case but was convicted at trial, and the conviction was upheld by the Fifth Circuit.<sup>137</sup> One year later, after the company was all but gone, the Supreme Court overturned the conviction on relatively technical grounds.<sup>138</sup> No one familiar with these events could think that the indictment was the only reason the company was pushed out of business. But the saga has taken on the accoutrements of an urban legend, with commentators invoking Arthur Andersen’s name when they report on the latest DPA announced by the DOJ.<sup>139</sup>

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<sup>132</sup> N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494–95 (1909).

<sup>133</sup> See, e.g., Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996).

<sup>134</sup> Clifford Krauss & John Schwartz, *BP Will Plead Guilty and Pay Over \$4 Billion*, N.Y. TIMES, Nov. 15, 2012, <http://perma.cc/S4QG-TC3L>.

<sup>135</sup> For a discussion of these trends, see generally BRANDON GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014).

<sup>136</sup> For an excellent discussion of what happened in the case, see generally Kathleen F. Brickey, *Andersen’s Fall from Grace*, 81 WASH. U. L. Q. 917 (2003).

<sup>137</sup> United States v. Arthur Andersen, LLP, 374 F.3d 281, 284 (5th Cir. 2004).

<sup>138</sup> Arthur Andersen LLP v. United States, 544 U.S. 696, 698, 704–08 (2005).

<sup>139</sup> See, e.g., Richard A. Epstein, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, <http://www.wsj.com/articles/SB116468395737834160>, <http://perma.cc/3ENC-JHKD>. But see Ted Kaufman, *Why DOJ Deemed Bank Execs Too Big to Jail*, FORBES (July 29, 2013, 9:30 AM), <http://perma.cc/M634-ZFUR>.



In December 2012, the DOJ entered into a \$1.9 billion DPA with HSBC, the world’s third-largest publicly held bank. HSBC stood accused of laundering money for violent international drug cartels in Mexico and Colombia and conducting banking business in violation of U.S. sanctions for clients in Burma, Cuba, Iran, Libya, and Sudan. When Attorney General Eric Holder appeared at a congressional hearing on other matters, senators took the opportunity to express their astonishment that HSBC had qualified for such lenient treatment, prompting the *New York Times* to editorialize:

It is a dark day for the rule of law. Federal and state authorities have chosen not to indict HSBC, the London-based bank, on charges of vast and prolonged money laundering, for fear that criminal prosecution would topple the bank and, in the process, endanger the financial system. They also have not charged any top HSBC banker in the case, though it boggles the mind that a bank could launder money as HSBC did without anyone in a position of authority making culpable decisions. Clearly, the government has bought into the notion that too big to fail is too big to jail.<sup>140</sup>

Despite this criticism, the DOJ signed a DPA with Toyota covering its sudden unintended acceleration defects in March 2014, with Toyota agreeing to pay \$1.2 billion in civil penalties.<sup>141</sup> Toyota’s settlement stipulates that if Toyota acknowledges the criminal “information” filed by the government in court, which contains a single charge of wire fraud, and the company behaves itself for three years, the DOJ will dismiss the charge without prosecution.<sup>142</sup>

To be sure, this amount was unprecedented and several orders of magnitude larger than penalties collected by NHTSA for failure to make timely notification of safety defects. Yet this outcome was far better than the fate Toyota employees feared they might face. According to the Statement of Facts posted on the Internet by the DOJ, in a discussion to evaluate a meeting with NHTSA officials in 2010, “one Toyota employee was said to exclaim, ‘Idiots! Someone will go to jail if lies are repeatedly told. I can’t support this.’”<sup>143</sup> The remainder of the statement of facts spells out in disheartening detail Toyota’s systematic effort to stall and deceive NHTSA. Criminal charges have never been brought—or, as far as we know, even considered—against individual Toyota executives.

Perhaps the most important criticism of deferred prosecution agreements is that they establish an extraordinarily corrosive double standard between the well-paid executives employed by multi-billion-dollar, multi-

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<sup>140</sup> Editorial, *Too Big to Indict*, N.Y. TIMES, Dec. 11, 2012, <http://perma.cc/K7QA-4FZ3>.

<sup>141</sup> Bill Vlasic & Matt Apuzzo, *Toyota Is Fined \$1.2 Billion for Concealing Safety Defects*, N.Y. TIMES, Mar. 19, 2014, <http://perma.cc/U4KH-745N>.

<sup>142</sup> Deferred Prosecution Agreement at 1, 3–4, United States v. Toyota Motor Corp., No. 1:14-cr-00186 (S.D.N.Y. March 19, 2014), available at <http://perma.cc/EV35-JUSN>.

<sup>143</sup> *Statement of Facts: United States v. Toyota Motor Corp.*, U.S. DEP’T OF JUSTICE 1 (Mar. 19, 2014), <http://perma.cc/AHA9-6UEW>.

national corporations and their individual consumers. A development that illustrates this double standard in the most troubling way is the criminal conviction of Koua Fong Lee, who drove his Toyota Camry into the rear of another car, killing three people.<sup>144</sup> Lee was charged with criminal vehicular homicide and sentenced to eight years in prison. He had served two and a half years when his claim that the car had suddenly hurtled out of control and that he was unable to brake it to a stop was substantiated by Toyota's recall for a sudden unintended acceleration defect; Lee was then released from prison.

The GM ignition switch scandal produced a second victimized driver. Candice Anderson was twenty-one when she lost control of her Cobalt in a moving stall caused by a defective ignition switch; the car ran into a tree and her fiancé was killed and Anderson severely injured.<sup>145</sup> Two years later, in 2006, Texas police charged her with reckless homicide. Her parents liquidated their retirement account to pay for her defense. She pled guilty, spent five years on probation, paid \$10,000 in fines, and had to live with the shame of the crime on top of the grief of the accident. Five months before she entered her guilty plea, GM had investigated the accident and determined the defect was the cause, but never informed Anderson or local law enforcement. In November 2014, after GM finally acknowledged the defect's role in the fatal accident, a judge cleared her of responsibility for Erickson's death. "It's overwhelming; it's a range of emotions," Anderson told the *New York Times*. "I'm elated. Things are upside down. Or, really, right-side up."

### E. Punishment, Deterrence, and Moral Boundaries

Black letter legal theory holds that the two primary goals of the criminal law are to punish and to deter, although renowned legal historian Lawrence M. Friedman reminds us of a crucial third:

[C]riminal justice tells us where the moral boundaries are; where the line lies between good and bad. It patrols those boundary lines, day and night, rain or shine. It shows the rules directly, dramatically, visually, through asserting and enforcing them. (There are lessons from nonenforcement, too: from situations where the boundaries are indistinct, or the patrol corrupt or asleep; and society is quick to learn these lessons, too.) . . . .

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<sup>144</sup> Emily Gurnon, *St. Paul Man Wrongly Imprisoned in Camry Deaths to be Paid by State*, ST. PAUL PIONEER PRESS (Dec. 2, 2014, 12:01 AM), <http://perma.cc/VY84-W43P>.

<sup>145</sup> Rebecca R. Ruiz, *Woman Cleared in Death Tied to G.M.'s Faulty Ignition Switch*, N.Y. TIMES, Nov. 24, 2014, <http://perma.cc/EB3D-XFSM>.

[T]he history of criminal justice is not only the history of the forms of rewards and punishment; it is also a story about the dominant morality, and hence a history of power.<sup>146</sup>

Viewed from this perspective, the contemporary American criminal justice system is nothing less than an embarrassment to the values that the nation holds dear. Not only does America imprison more people per capita than any other country in the world, the racial disparities in the system are appalling. The nation accounts for five percent of the world’s population but incarcerates twenty-five percent of those jailed; its 5,000 prisons hold about 2.2 million inmates and another 4.7 million people live under the supervision of correctional institutions.<sup>147</sup> African Americans are incarcerated at six times the rate of whites; Hispanics and African Americans compose about one quarter of the nation’s population but constituted fifty-eight percent of the prison population in 2008.<sup>148</sup>

In his book *The Divide, American Injustice in the Age of the Wealth Gap*, Matt Taibbi asks why, in a period when crime has been going down across the country, including in its largest cities, the population in prison has doubled since 1990. He also wonders why, in the wake of the worst economic crash since the Great Depression, none of the prominent financiers who played fast and loose with fraudulent instruments like credit swaps have yet been prosecuted for breaking the criminal law. His conclusion is stark: “Some people go to jail and others just don’t. And we all get it.”<sup>149</sup>

Federal prosecutions of corporate executives in cases where industrial practices killed and injured people have the potential to modify this picture. Federal prosecutors have started to think about launching criminal probes as soon as they learn about a grave malfeasance that threatens public health, kills consumers or workers, or damages natural resources. For the sake of restoring equity in the criminal justice system and deterring what British sociologist Maure Punch calls “suite violence,” we can only hope these instincts wax rather than wane.<sup>150</sup>

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<sup>146</sup> LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 10 (1993).

<sup>147</sup> Comprehensive statistics on prison populations can be found at the Bureau of Justice Statistics website. LAUREN E. GLAZE & DANIELLE KAEBLE, U.S. DEP’T OF JUSTICE, NO. NCJ 248479, *CORRECTIONAL POPULATIONS IN THE UNITED STATES* (2013), <http://perma.cc/85WM-2TAG>. For comparative rates, see Joshua Holland, *Land of the Free? US Has 25 Percent of the World’s Prisoners*, MOYERS & COMPANY (Dec. 16, 2013), <http://perma.cc/VE5K-AX2H>.

<sup>148</sup> *Criminal Justice Fact Sheet*, NAT’L ASS’N FOR THE ADVANCEMENT OF COLORED PEOPLE, <http://perma.cc/4XRW-PKY8>.

<sup>149</sup> MATT TAIBBI, *THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP*, at xix (2014).

<sup>150</sup> Maurice Punch, *Suite Violence: Why Managers Murder and Corporations Kill*, 33 *CRIME, L. & SOC. CHANGE* 243, 245 (2004).

