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Corporate Crime Under Attack

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BOOK REVIEW

CORPORATE CRIME UNDER ATTACK. Written by Francis T. Cullen, William J. Maakestad and Gray Cavender. Anderson Publishing Co., 1987. Pp. 398 (paperback).

Reviewed By

*D. Christopher Wells**

In the late afternoon of August 10, 1978, Judy Ulrich was driving her sister Lyn and their cousin Donna along State Highway 33 toward Goshen, Indiana. On this clear, mildly warm summer day, the three girls were heading to a church volleyball game. Judy pulled her subcompact car into a self-service gas station to fill up; whoever pumped the gas left the gas cap sitting on the roof of the car. A few minutes down the road, the gas cap rolled off the roof and across the five-lane highway. On the almost deserted road Judy easily made a big U-turn and pulled over near the gas cap, but she was unable to pull her car off the roadway because of its eight-inch curbs. Judy stopped her car in the outermost lane and put the emergency flashers on. Donna, in the passenger seat, opened her door to get out and retrieve the gas cap.

At that moment, a Chevy van travelling at or near the 55-mph speed limit smashed squarely into the back of the girls' car. The impact was sufficient to rocket the small car down the roadway, turn it around, and jump it over the eight-inch curb. The van crushed the car's rear bumper up to just behind the driver's seat; the back end of the car was gone. The car's gas tank, located just ahead of the rear bumper, burst, and the car went up in flames. Lyn and Donna perished horribly in the fire; Judy, burned over most of her body, lived only for a few hours. The three girls had been riding in a 1973 Pinto sedan.¹

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1. F. CULLEN, W. MAAKESTAD & G. CAVENDER, *CORPORATE CRIME UNDER ATTACK* 170 (1987).

One month later, Michael Cosentino, the Elkhart (Indiana) County prosecutor, sought and obtained the indictment of Ford Motor Company for the reckless homicide of the three girls.² Now, nine years after the tragedy on Highway 33, the prosecutor's half brother and two co-authors have undertaken to explain the genesis of that criminal prosecution and to place it in a larger social, historical, and legal context.³ Their book, *Corporate Crime Under Attack*, not only addresses the societal context for the indictment, but extensively describes many of the fascinating pretrial and trial events upon which success and failure hung. The book concludes with some brief observations about the importance of the prosecution as a precedent for further assaults on corporate crime. As one who helped to defend Ford Motor Company in that prosecution, I must commend the three authors for writing the most comprehensive of the Ford criminal prosecution accounts to date.⁴ The book is not without serious flaws, but even so it presents an eminently readable, intriguing summary of what was then an unprecedented indictment and criminal prosecution.

Perhaps the book's greatest success is its explanation of why the rural county prosecutor sought to blame the deaths of these three girls on Ford Motor Company, rather than on the driver of the van, on those who allowed the driver behind the wheel, or even on the designers of the curbed road. That explanation requires most of the book's nearly 400 pages. The three authors inquire into the personal motivations of the prosecutor and his staff; into the influences upon the prosecutor of outsiders interested for one reason or another in a Ford conviction; into recently developed social and psychological attitudes toward "corporate lawlessness"; into the progress of the criminal law as it applies to corporations and other "elites"; and, of course, into the history of the Pinto automobile itself.

The question "Why blame Ford?" has always been easy to answer by those whose only information came from the sketchy, se-

2. *Id.* at 146.

3. *Id.* at x-xi.

4. The other significant book about the Ford Pinto criminal prosecution is *Reckless Homicide?* by Lee Patrick Strobel (And Books 1980). Mr. Strobel's account is more journalistic, focusing largely on the personalities who participated in the trial.

lective (and often inaccurate) news reports about the Pinto and fuel-tank fires. But the question has tended to baffle many of those persons who know the most about the facts of the Ulrich accident, about Ford Motor Company, and about the design and features of the Pinto. That small group eventually came to include the Winamac, Indiana, jurors who judged Ford's conduct in this prosecution. It was Prosecutor Michael Cosentino's failure to disabuse the jurors of their puzzlement about the criminal prosecution that led to Ford's successful defense and acquittal.

Why were those closest to the facts baffled? Is the question "Why blame Ford?" really so difficult? Let's look at two principal points raised by the book. First, one could make a very good case for placing blame on persons other than Ford, particularly the driver of the van or of those who allowed him on the road in August 1987. For example, the prosecutor's investigation revealed overwhelming evidence of recklessness on the part of the van's driver.

The young man driving the Chevy van had a lamentable driving record of carelessness and flouting the law. His very brief driving history included three prior personal injury accidents, citations for failure to yield and for running a stop sign, two prior speeding convictions for driving twenty miles per hour over the posted limits, two license suspensions, and a citation for driving without a license while under suspension. His more recent suspension had been lifted exactly one month before he crashed into the Ulrich's Pinto.⁵

The police search of the van turned up pills in the ashtray, partly empty beer bottles, a bag of marijuana and rolling papers. (He was charged with possessing amphetamines, a charge that was later dropped. No other charges were filed.)⁶

The young driver admittedly made no attempt to brake, stop, or turn his van before the impact. In fact, he did not even see the girls' car until just at the moment of impact. His reason: he was looking around on the floor of his van for something to smoke.⁷

5. *Id.* at 146. Some of this information derives from the driving offense "rap sheet" released to Ford Motor Company's lawyers by the prosecutor prior to trial pursuant to a *Brady* request.

6. *Id.*

7. *Id.* at 170.

If one were to focus on “but for” causes of the accident, the state and its highway design could also share the blame. After all, the roadway, with its eight-inch curbs, was known to be hazardous and of poor design. The curbs prevented disabled vehicles from getting out of harm’s way. They clearly prevented Judy Ulrich from pulling her car off the road. In fact, the grand jury that indicted Ford recommended that the curbs be removed; about ten months after the accident they were.⁸ Had the state spent the money to remove them when it first recognized their danger, the three girls might be alive today.

Second, although the popular press tended to downplay or overlook these facts, the prosecutor knew or could have discovered prior to the indictment a number of facts tending to exonerate Ford. The facts eventually formed the core of Ford’s successful defense of the case: 1. The 1973 Pinto met every governmental fuel-safety standard.⁹ 2. Ford was the *only* automaker to have an internal company standard requiring fuel-system integrity for a rear-end collision for 1973 cars, and it tested its cars to make sure they met the standard.¹⁰ 3. As even the prosecution’s own expert acknowledged, the Pinto fuel-tank placement and design was like “95% of all American cars.”¹¹ 4. A rear-end collision like that in the Ulrich accident involving a two-ton van with an I-beam frame would have caused a fuel tank rupture in virtually any car with the fuel tank in the rear. Crash tests (that the prosecutor sought to exclude) confirmed that a Dodge Colt, a Chevy Vega, a Toyota Corolla, an AMC Gremlin and even one of the largest of American passenger cars—the Chevrolet Impala—would have suffered the same fate in the Ulrich collision.¹²

8. *Id.* at 178.

9. *Id.* at 267.

10. *Id.*

11. *Id.* at 271. One of the principal rationales for putting fuel tanks in the rear of cars is that relatively few collisions are rear-enders. Most collisions involve the front end and many of those are higher speed. For that reason, the cars with the greatest likelihood of fuel tank leaks and fires in collisions are those with front gas tanks, such as the VW Bug or Porsche. Placement of the tank toward the center of the car, particularly a small car, means that rear seat passengers would virtually be sitting on the gas tank. In the late 1960’s, at the time the Pinto was on the drawing board, these considerations seemed to make engineers reluctant to move the tank away from the rear in their designs.

12. *Id.* at 284-85.

5. Even had the Ulrich car's fuel tank been fitted with the filler-pipe "fix" that was available and that Ford was accused of recklessly omitting, it could not have withstood the impact of the magnitude (50 mph or greater) of this crash.¹³ 6. The very Ford engineers and executives whom the prosecutor accused of recklessly designing and selling Pinto sedans used them for their own family vehicles.¹⁴ 7. Government data showed that the Pinto sedan was no more likely than other subcompact cars to suffer from fuel-tank fires.¹⁵

The authors of this book begin their assessment of Cosentino's motivations for blaming Ford with a sociological study of societal response to crisis. They posit the existence of widespread corporate "lawlessness," both criminal and civil, in the United States. In their view, only in the last decade or two has our society developed a genuine concern for corporate wrongdoing and white-collar crime such that we are willing to take it on—legislatively and judicially—especially in criminal, as opposed to civil, actions. In sociological terms (one of the authors is a sociologist), society's concern recently has ripened into a "movement" to regulate and control crimes per-

13. The actual closing speed of the van and the Pinto (the difference between their two velocities) was perhaps the most crucial fact necessary to both the prosecution and the defense. The prosecutor had estimated it to be no more than 30-35 mph. He believed, particularly after he conferred with the leaders of the anti-Pinto "crusade" (see *infra* text accompanying notes 18 - 22) that it was reckless for Ford to have sold and not repaired a vehicle that would not withstand an impact of that magnitude without a fuel-tank leak. On the other hand, if the closing speed were above 40 or 50 mph, it would be difficult if not impossible to prove that the Pinto design, rather than the impact itself, caused the deaths. For his estimate of the Pinto's speed, the prosecutor relied on several eyewitnesses who were travelling from the opposite direction on Highway 33, who believed that the Pinto was moving when struck from behind. For his estimate of the van's speed, Cosentino relied on the word of the van's driver that he was travelling at less than the 55-mph speed limit. *Id.* at 269-70, 280-92.

If the prosecutor had conducted a fuller investigation, he would presumably have interviewed two of the hospital personnel — a nurse and an orderly—who had talked to Judy Ulrich after the crash. Judy told them not only that she had stopped her Pinto and put on her flashers, but why: she had to retrieve the gas cap. Ford's own investigation of the crash turned up these witnesses only after the trial had started. Their testimony also solved several related mysteries that the prosecutor had not: why the gas cap was lying in the road, why the Pinto's passenger door was open and why the girls' car was heading away from their known destination when struck. *Id.* at 276-77, 286-87.

The prosecution team's response to this testimony was to seek to exclude it, asserting an objection based on the "Indiana Dead Man's Statute." Obviously the team meant the dying-declaration exception to the hearsay rule. Had they made the proper objection, the Court might have had to exclude the testimony. It was hearsay, and Judy may not have apprehended her imminent death. She had been told by a physician that she would be all right.

14. *Id.* at 267.

15. *Id.*

petrated by elite groups. This includes both a “revitalization movement” among prosecutors and criminologists toward the ideals of their respective professions and a “symbolic movement” led by government and interest groups to demonstrate that all persons—weak and powerful—are equal before the law.¹⁶ These movements “transformed both Americans’ views of corporations and the government’s possible reactions to the conduct of big business”¹⁷ and they prepared “many people across the nation . . . to believe that Ford had sacrificed safety in pursuit of profits.”¹⁸ In a general way, then, the book demonstrates that by the late 1970’s, these movements had created a psychological environment that not only allowed, but encouraged, prosecutors and others to charge large corporations with all manner of wrongdoing. The authors then focus on Ford Motor Company and the Pinto sedan and address the more specific question of how Prosecutor Cosentino was induced in this environment to blame Ford for these particular deaths.

Given that one of their number had assisted Cosentino in the prosecution against Ford, the authors’ decision to focus on the production of the Pinto and the Indiana prosecution as paradigmatic of corporate lawlessness and of the social movements they describe yielded a significant benefit. Through one of their own, the authors had access to “inside” information about the personal motivations of the prosecutor, increasing the reliability of their account because much of the information had come directly from Cosentino at the time of the actual events. This inside information serves to confirm their thesis that Prosecutor Cosentino’s decision to blame Ford was not merely induced by, but perhaps even made by, external forces, by influences quite apart from an independent analysis of facts and law.

The authors describe Cosentino’s reaction to the girls’ deaths as one of moral outrage spurred by a conviction that Ford had decided “to sacrifice human life for private profit.”¹⁹ Interestingly, this con-

16. *Id.* at 16-22.

17. *Id.* at 147.

18. *Id.*

19. *Id.* at 148.

viction arose from the fact that one of his investigators shortly before the accident had read an article entitled "Pinto Madness" in a magazine called *Mother Jones*. The investigator remembered the article and told Cosentino about it. The assertions in that article—essentially that Ford executives and engineers had decided to put profit before safety—thereafter provided Cosentino and his prosecutorial team a lens through which the facts of the case would focus: "Even today [investigator] Graves cannot say how much that article shaped his investigation of the accident."²⁰ The author of that article put Prosecutor Cosentino in touch with others who then enlisted Cosentino and Graves as part of a "network of people who were crusading against the Pinto."²¹ Plaintiffs' lawyers who would benefit from the precedent of a criminal conviction of Ford suggested expert witnesses and contributed information, theories, and help. From their contributions of documents, Cosentino's office turned into a "'clearinghouse' for Pinto documents."²² These plaintiffs' lawyers and media contacts "sensitized Cosentino to a way of thinking about the accident."²³ In fact, according to these authors, it was only after being so sensitized and being persuaded to join the "crusade" that the prosecution team began to gather, examine, and evaluate the accident-site evidence. In short, Cosentino had his suspect; all he needed to do was to try to prove that a crime had been committed.

Another element that warmed Cosentino to the Ford challenge was what the authors refer to as the "David and Goliath" factor, with Cosentino cast in the role of David against the behemoth Philistine, Ford Motor Company. At first, taking on the huge corporation had a romantic aura; Cosentino liked the idea of "embarking on an adventure."²⁴ A visit by three in-house Ford lawyers solidified Cosentino's resolve:

By the time the Ford lawyers came to dissuade him from pursuing a grand-jury investigation, Mike Cosentino, the epitome of the "American dream," had become a successful man. His civil practice was flourishing; he was a popular elected

20. *Id.* at 172.

21. *Id.* at 173.

22. *Id.* at 174.

23. *Id.*

24. *Id.* at 148.

official. He was also known for his intense, flamboyant courtroom manner. Competitive by nature, he was proud that he had tried twenty-five homicide cases and had won a conviction in every instance. He was not pleased to be told by "slick" corporate lawyers that he didn't know what he was doing. After all, who the hell did Ford and its lawyers think *they* were dealing with?²⁵

But soon the reality of going up against equal or better competition began to seep in. As the book observes, Cosentino was used to prosecuting the indigent and the helpless, those who are outclassed in almost every way by the forces of the State: in budget, in staff, in support services, in investigative capacity, with crime laboratories, with witnesses and by public sentiment.²⁶ In this case, Cosentino would still have most of those advantages,²⁷ plus a special county stipend, free use of state planes, helicopters, and crime lab and the backing of the federal government document archives. He was also able to assemble a team of private and public lawyers and law students who donated much of their time. Despite his creation of perhaps the most talented, hard-working, and well-supported prosecution team of his career, Cosentino still felt he was the underdog in this prosecution. Not one to shirk a challenge, in fact one who was enlivened by one, Cosentino forged ahead with the prosecution.

One of the strongest sections of the book is its treatment of the prosecution itself, from the indictment through the pretrial and trial events, particularly the development and resolution of the many and varied legal issues. Lawyer and layperson alike can enjoy and learn from the necessarily simplified descriptions of the legal history, constitutional law, and regulatory issues that formed the core of the legal, as opposed to factual, battle of the prosecution. As the authors

25. *Id.* at 177.

26. *Id.* at 193.

27. It appeared to me that Cosentino rather quickly lost the advantage of local public sentiment, for several reasons. First, a change of venue moved the trial from his own Elkhart County down to the Pulaski County seat of Winamac, where he was not well known. Second, most of the Ford defense team took up semi-permanent residence in Winamac apartments and became a part of the community, even to the point of being invited into people's homes for dinner and bowling on the weekends at the local lanes. Cosentino's team lived out of town and made appearances only on trial days. In effect, Cosentino and his team became the outsiders. Third, although the book describes Cosentino as driving his Chevrolet Blazer to court each day, my few recollections involve Cosentino, wearing his usual black hat, black overcoat and scowl, driving into town in a long motorcade of police cars. Lead defense counsel, Jim Neal, in particular, presented the townspeople and the jury a striking contrast of geniality and approachability.

show, this trial taxed the legal and financial resources of both sides. On this element of their account, the authors earn their royalties.

The book, however, does disappoint in several respects. First, it is flawed by an understandable but unscientific and unacademic bias. It is understandable that a brother of the prosecutor (and a prosecution team member himself) would weigh in most heavily with the prosecution's views of the facts, law, and personalities involved in the case. The authors recognize the problem of bias in their preface. To be sure, one author's inside role allowed access to information—particularly as to the prosecutor's motivations—that was uniquely revealing. But a book that purports to be academic, written by three professional academicians, who assert they will let the facts speak for themselves, should endeavor more seriously to discover and learn from other viewpoints and sources of information. Little, if any, of their story draws upon community sources, trial witnesses, trial transcript, government sources, defense team members, or Ford Motor Company. It is not as if they fail to acknowledge and often lucidly explain defense points; rather, just as they reveal Cosentino's focus on the Ulrich accident to have been the product of a lens crafted by others, so do they reveal that their own interpretations are the product of their close ties to the prosecution.

One example of this is their discussion of Ford crash tests of prototype and early Pintos and of Ford's discussions with the National Highway Traffic Safety Administration (NHTSA) about federal crashworthiness standards. The authors reconstruct and portray these events, as they acknowledge in a footnote, from one prosecutor's contemporaneous, written trial theories about those events and from a 1986 telephone conversation that elicited that former prosecutor's "best recollections" of the events.²⁸ Put another way, for their characterizations of the facts and meaning of these tests and discussions, they rely almost exclusively on one whose job it was to paint the events in their worst light.

Another disappointment is that the authors fail to take on directly the very sticky issue of how a corporation or any organization

28. *Id.* at 258-60, 301 n.29.

should make rational decisions, particularly where there is the possibility of *criminal* prosecution for a wrong decision. On this issue, their treatment of cost-benefit analysis reveals with irony the difficulty of the task. As the authors report, the "Pinto Madness" article in *Mother Jones* and its author eventually persuaded Costantino to charge Ford in the deaths of the Ulrich girls. The heart of that article was its author's allegation that Ford had used a cost-benefit analysis to conclude that it was economically irrational to fix or recall Pinto sedans. In this alleged cost-benefit appraisal, Ford was widely accused of two wrongs: putting a dollar value on a human life or serious injury; and comparing that loss of life or injury to the costs of improving the Pinto fuel tank. The fact is that Ford did not do this.²⁹ Nonetheless, it goes without saying that manufacturers of products do compare the costs of possible changes or improvements in their product designs with the benefits that will result from the changes. When it comes to safety questions, measurements of costs and benefits are particularly difficult, as are the decisions about whether to implement the proposed improvements. To take a current example, one might wonder whether all cars sold today should include as standard features (or at least as available options) state-of-the-art technologies that enhance safety, such as air bags, computerized braking systems, automatic window de-icers, and body designs and materials that will absorb high-speed collision energy to protect passengers. What about plastic fuel tank bladders, even if the owner will have to have them replaced annually at significant expense because of gasoline-caused deterioration? And given their inherent disadvantages in collisions with larger, heavier vehicles, should we allow manufacturers even to sell subcompact cars (not to say motorcycles and bicycles)? Who—manufacturers, con-

29. *Id.* at 162. The document reproduced in the book and cited by the *Mother Jones* article as evidence of Ford's cost-benefit analysis was prepared by Ford economists (not engineers) at the request of the federal government. The federal government, not Ford, provided the valuations of a human life and serious burn injuries that the analysis was to use. In fact, the authors went so far as to dispute the federal government's assumptions. Even so, the document itself pertained neither to the Pinto nor to rear-end fuel tank fires. Rather, it addressed the issue of some 12.5 million hypothetical small cars and trucks and the effectiveness of a proposed government regulation about *rollover* accidents, not rear-end collisions. The fact that the document had literally nothing to do with any Pinto design or marketing decision seems not to have interested those who thought it made good copy.

sumers or governmental agencies—should decide these questions? And should we countenance the use of cost-benefit analysis—particularly the economists who would place some dollar value on human life and health—in making such decisions?

The great irony in this book is that while decrying the use of cost-benefit calculations by corporate decision makers and suggesting anyone who would do so is heartless, the authors use it repeatedly to justify and explain the actions of other participants in their account, particularly prosecutors. For example, Prosecutor Cosentino employed a cost-benefit calculation to determine the size and nature of his prosecutorial team, deciding to refuse many offers of help he received from law professors around the country.³⁰ Similarly, say the authors, plaintiff's lawyers regularly decide whether to take cases against manufacturers by comparing the estimated costs of discovery (and, presumably, litigation) to the potential returns for them and their clients from the litigation.³¹ This rule applies in general to prosecutors also. They, according to the authors, because of limited resources, are required to "compute the utilitarian value" of prosecuting some cases because of the costs associated with foregoing others.³² That is so even where a decision not to prosecute may leave criminals on the street (or in the suites) and cost citizens their lives or health.

The problems with superficial examination of cost-benefit analyses, which admittedly have serious weakness in some applications, are symptomatic of the extension of criminal law to product liability kinds of problems. To the book's credit, the authors include Ford defense counsel Malcolm Wheeler's reported comments on the general issue, particularly whether product safety standards are better addressed by regulatory and legislative bodies or by lay juries in criminal prosecutions.³³ Unfortunately, the book does not answer adequately Wheeler's implicit assertion that even successful criminal prosecutions, particularly those brought on recklessness theories, may

30. *Id.* at 195.

31. *Id.* at 198.

32. *Id.* at 328.

33. *Id.* at 248-50.

be insufficiently clear in their message about what constitutes non-criminal behavior to be useful either to corporations or society as a whole. Convicted individuals are often imprisoned so that they will not be able to repeat their crimes, the nature of which are usually spelled out clearly in an indictment. Criminal law has no such sanction for corporations, and the message to them is little more than, "go forth and build a 'better' product." Simply put, prosecutors and juries are often not the best sources of safety legislation.