Is Pinto a Criminal?

Richard A. Epstein

IN THE ANNALS of criminal cases, the prosecution of the Ford Motor Company for reckless homicide in Pulaski County Court, Indiana, had all the elements of high theater. The train of events began, tragically, with the deaths of three young women—Judy Ann Ulrich, age eighteen, her sister Lynn Marie, sixteen, and their cousin Donna, eighteen—on August 10, 1978. The three had (so it now seems) stopped their yellow 1973 Ford Pinto on the right-hand lane of U.S. Highway 33 just south of Elkhart, Indiana. While there, the Pinto was struck in the rear by a speeding Chevrolet van and burst into flames. Lynn Marie and Donna were killed instantly, and Judy Ann was taken to the hospital where she died some eight hours later.

Shortly after their deaths Michael A. Cosentino, the local prosecutor, persuaded the grand jury to indict the Ford Motor Company on criminal charges. The indictment contained two counts with respect to each of the three deaths. The first count alleged that Ford "did through the acts and omissions of its agents and employees . . . recklessly cause the death of [all three women] . . . , did recklessly authorize and approve the design of the 1973 Ford Pinto, and did recklessly design and manufacture the 1973 Pinto in such a manner as would likely cause said automobile to flame and burn upon rear-end impact." The second count rehearsed much the same facts and alleged that Ford did "recklessly create a substantial risk of bodily harm" to the three women. There followed an initial flurry of legal maneuvers as Ford sought to have the indictment thrown out on legal grounds. When these failed Ford was able to transfer the trial some fifty miles away, to the little town of Winamac, Indiana, on the ground that it could not receive a fair trial in Elkhart, Indiana, because of the danger of local prejudice.

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Between the time of the accident and the time of the trial, passions ran high in the case, fueled by a steady release of publicity adverse to Ford. It was said that Ford acted with undue haste in trying to market a car that weighed less than 2,000 pounds and cost less than $2,000; that Ford's own tests showed that the rear-end assemblies of the Pinto prototype (obtained by modifying existing production cars) were vulnerable to rear-end collisions at speeds as low as eighteen or twenty miles per hour; that Ford refused to change the design of the Pinto's rear-end assembly because it might cost $10 to do so; that Ford refused to move the gas tank from its location just behind the rear bumper to a position over the rear axle because such a move would reduce the amount of available luggage space; that Ford had opposed mandatory safety standards which, if in force in 1973, might have prevented the three deaths on Highway 33; that Ford had run cost-benefit studies on the Pinto that assigned specific value to human life—that, in a word, Ford had callously traded dollars for lives, and was prepared to sacrifice human life for corporate profit.

The drama continued unabated into the courtroom. There were major disputes between the parties about the authentication and relevance of documents. And the defense won a major, if questionable, victory in securing a ruling that Ford's own test results on pre-1973

Pintos were not admissible into evidence because of the differences in design between the 1973 Pinto and the earlier models.

The emotions reached their greatest pitch in the testimony of the key witnesses for each side. For the prosecution, one Byron Bloch, age forty-two, a professional plaintiff's witness in products liability actions, complete with his own professional movie photographer and a sawed-up Pinto with the guts of its rear-end exposed, entered into frequent and sharp battles with Ford's chief defense lawyer, James L. Neal. The gist of Bloch's testimony was that the Pinto gas tank, located close to the "cosmetic" rear bumper and in a "hostile" environment of sharp metallic objects, was unreasonably unsafe and defective. The brunt of the cross-examination was that, while some foreign cars had their gas tanks located over the rear axle (as Bloch would have it), well over 90 percent of U.S. standard production cars, including all of General Motors' 55 million units, had their gasoline tanks in the same position as the Pinto's, often in an even more hostile environment. Bloch was followed by one Harley Copp, a former high-level Ford official who had taken part in the development of the Pinto; Copp testified that he had had sharp reservations about the car's design. Then, for the defendant, there was Harold C. MacDonald, Ford's chief engineer on the Pinto, whose salary has been put at close to $400,000 a year. He testified that his father had been killed in a crash when he fell asleep at the steering wheel of a Model A Ford. To MacDonald, the prime factor in achieving fuel-tank safety was to keep the tank as far from the passenger compartment as possible, especially important, he thought, for safety in side collisions.

If most of the expert evidence came in as expected, such could not be said about the evidence relating to the particular circumstances leading to this accident. At the outset the prosecution and the defense both agreed that the speed differential between the van and the Pinto at the time of impact was crucial to the state's case. Here, however, Ford was able to produce the testimony of one Levi Woodard, an orderly at the hospital to which Judy Ann had been brought. Woodard reported that he and Judy Ann, both devout Christians, had talked about the circumstances of the accident just before she died. He account was that the three young women had just filled the gas tank at a self-service station, only to leave the gas cap on the rear of the car; that they had seen the cap fall off the car as they were riding south on Highway 33; that they had turned around on the highway and stopped in order to retrieve it, when their car was struck from behind by the van. The net effect of the testimony made it quite unlikely that the speed differential at impact was only the fifteen miles per hour that the prosecution had claimed, with obvious consequences to the strength of its case.

The battle in the rural courthouse lasted some two months, and it is impossible to summarize all the evidence that was presented. There was more than enough pure theater in a criminal homicide case that carried only a $30,000 fine on conviction. In his summing up, Cosentino urged the jury to "send the message" to Ford. After several days of deliberation, the jury acquitted Ford, leaving the prosecution saddened, the defense elated, and the judge satisfied. The important point here is that neither the drama of the case nor its outcome should be allowed to obscure the essential legal and institutional issues. On the record, this criminal prosecution should never have been brought at all.

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A Civil Suit

The fiery deaths in this Indiana case are commonplace events when the national death toll in highway accidents exceeds 50,000 per year. Yet if this accident had taken place twenty years ago—perhaps even ten—its disposition would have been straightforward enough. A *civil* action would surely have been brought against Robert Duggar, the driver of the van, by the estates of these three young women. The basic case against him would have been simple. At the very least, he was guilty of ordinary negligence, and perhaps some degree of gross negligence or recklessness as well. Not that

such a civil case would have been a walkover for the plaintiffs. Quite simply, substantial evidence suggests that the plaintiffs' recovery for damages could have been barred by their own contributory negligence, especially if (as Ford seemed to have established) they had brought their Pinto to a halt on the highway. This issue in turn would have been complicated by a host of subordinate questions: What was the causal relationship between that negligence, if any, and the ultimate collision? Was that negligence chargeable to all, or only to one or two, of the decedents? Was it neutralized by the recklessness of the defendant, or by his opportunity—in legal parlance, his "last clear chance"—to avoid the accident? It is difficult to evaluate the case, but in all likelihood the outcome would have been a settlement that accurately reflected the hazards of litigation to *both* sides in the case.

A Robert Duggar has, of course, only limited financial means. He may have some insurance but typically has no substantial assets of his own. Surely a civil suit against Ford would have been an attractive financial proposition. Yet such a civil suit would not—and, especially in Indiana, could not—have been brought twenty years ago. As late as 1966, the U.S. Court of Appeals for the Seventh Circuit, applying Indiana law, announced in *Evans* v. *General Motors Corp.* its renewed adherence to the traditional rule that no private cause of action is maintainable by an injured party against an automobile manufacturer solely because of the alleged "uncrashworthiness" of the automobile. The manufacturer was, it was said, under no duty to guard the passenger against the open and obvious risks of transportation, such as those involved in routine collision cases. It might have been another matter if, owing to a missing bolt, the engine had fallen out after 500 miles of ordinary use. But where the harm was caused by a collision with a third party, the plaintiff had to obtain relief from that party or go home empty-handed. The courts were not going to become embroiled in endless disputes over the soundness of alternative automobile designs. The decision in *Evans* did not preclude, of course, the imposition of legislative safety standards upon automobile manufacturers, such as those decreed under the National Highway Traffic and Safety Act. But this common-law rule was, as long as it lasted, an impregnable bulwark against civil liability. And if civil liability was unthinkable, then criminal prosecution was even more so.

Evans, however, proved to be the last expression of the old order in crashworthiness cases. In 1968 the Court of Appeals for the Eighth Circuit, in *Larson* v. *General Motors Corp.*, ushered in a new era of crashworthiness suits against automobile manufacturers. It was, of course, acknowledged that the manufacturer could not be held civilly responsible simply because his automobile was involved in a serious accident. But by the same token it was held improper to wholly excuse the manufacturer on the ground that driver and passenger alike supposedly took the risk of automobile accidents. Collisions occur with some statistical regularity: even if unintended, they are foreseeable. Thus, some precautions could and should be taken by manufacturers to minimize the resulting personal harm. To the courts, therefore, the real question became, which accidents involve uncrashworthy vehicles and which do not.

Naturally, no single test can answer this question precisely. A court committed to the uncrashworthiness doctrine can do no better than announce that "reasonable" precautions must be taken against the expected consequences of highway crashes. Which precautions count as reasonable depends on many things: the type of crash involved, the probable extent of the injuries, the type of precautions that might have been taken, the deleterious effect of the precautions on the overall design and performance of the car, their deleterious effect on price and on the ability of the manufacturer to provide protection against other forms of hazards that arise in other types of accidents (such as the side collisions referred to by Ford's MacDonald), and the relative frequency and severity of the different sorts of accidents that can and do occur. This list is long and complex, but it is representative of the factors today regarded as relevant in design-defect litigation. The technical and economic evidence necessary to resolve such issues leads to titanic courtroom struggles. Simply to say that the bottom line "only" requires the precautions whose expected benefits outweigh their expected costs, or that cars must be made "reasonably safe," is to look at the tip of the iceberg, wholly ignoring the massive structures that lie just below.

It is of little moment today to belabor these difficulties of application as principled objections to civil liability in uncrashworthiness cases. The tort has come of age. Suffice it to say that there is probably no American court today—including, after recantation, the seventh circuit—that is on principle prepared to adhere to the rigorous "no duty" position of *Evans*. The consequent expansion of the manufacturer's duties to its customers has of course made an enormous difference in the pattern of U.S. personal injury litigation. The obvious action against a Duggar will, as often as not, take a subordinate role to the immensely more complicated (and remunerative) action against the automobile manufacturer. Yet one must keep a sure sense of direction in the new legal terrain. All this is *not* to say that Ford is without resources to wage a powerful and effective defense at trial of a civil dispute.

As its initial sally, Ford could argue that the Pinto was (as seems to be the case) manufactured in conformity with all applicable safety regulations and with common industry practices at the time of its manufacture. In the eyes of some, conformity with these dual standards is sufficient in itself to rebut any charges of uncrashworthiness. But the courts, having committed themselves to a general test of "reasonableness under the circumstances," have almost unanimously refused to treat either standard as dispositive, notwithstanding its relative predictability. Instead, the judicial attitude has been one of considered suspicion. The statutes involved might not even cover the type of accident at issue in the case, and if they do, the unallayed fear is that the statutory standards have been tailored to suit the convenience of the industry rather than the consumers of the regulated products. By the same token, the industry standards cannot be decisive, because they are made by the very persons whose conduct must be scrutinized in the civil trial.

Notwithstanding the difficulties, the issue of design defect—or of crashworthiness in the automobile accident context—is ultimately one for the jury. The defendant can argue to the jury with whatever force he commands that conformity with statutes and with common practice ought to excuse him from liability: he can bolster that conclusion with an impressive array of technical and engineering evidence attesting to the merits of the chosen design. But when all is said and done, the jury, virtually without review, is entitled to reject the defense's case, because it agrees with the plaintiff about the necessity for a heavier gauge of metal, a tighter seal, an inflatable bladder.

But the defense of the civil case does not stand or fall solely on the mere existence of a design defect. A related issue concerns the causal connection between defect and injury: assuming there was a design defect, could its elimination have prevented this accident? In a suit against the driver of a vehicle, it is usually wholly immaterial whether the speed at impact was twenty, thirty, or even fifty miles per hour; he can be held responsible in all of these cases. With a crashworthiness suit against a manufacturer, speed at impact is a very different matter. If the plaintiff's proposed design change is one that could have prevented harm in a forty mile-per-hour collision, it becomes quite awkward to argue that its absence made any difference when impact was at fifty miles per hour. What is true for speed is true for place of impact, angle of impact, the configuration of the passenger compartment. The sheer questions of accident reconstruction are always formidable in a crashworthiness case.

Nor does the well-tried design-defect case end with the design-defect issues. Questions of plaintiff's conduct contributing to the accident, relevant in ordinary automobile injury cases, may prove relevant here as well. The issue of damages can be complicated for both medical and economic reasons. And battles can be won and lost on motions to disqualify jurors, to introduce evidence, and to impeach experts.

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It goes without saying that, had the Route 33 Pinto accident been the subject of a civil action, the plaintiffs might well have recovered a judgment if the case had been tried to the finish. But it is also quite likely that Ford could have obtained a jury verdict which, in a well-tried case, could not be reversed upon appeal. The revolution in civil actions may have un-

leashed a barrage of suits against Ford and other manufacturers, but anyone who thinks that these suits today are cakewalks for the plaintiff labors under a gross misapprehension.

A Criminal Case

At this juncture, it might be asked what reason there is to belabor the complications of a civil action when this Pinto case was a criminal trial for reckless homicide. The short answer is that the criminal action can be placed in proper context only after its paired civil action is first understood. The ordinary mugging may form the basis of a tort or a crime, and the same is true with the complicated economic activities governed by the antitrust law. The details of the pairing should not conceal one proposition. It is, and it should be, a lot more difficult to obtain a criminal conviction than to recover damages in a civil action. Most obviously, this difference is reflected in the different burdens of proof. In a civil suit, the plaintiff must normally prove his case by a bare preponderance of the evidence; the criminal prosecution must meet the higher standard of proof beyond a reasonable doubt. Central to the Pinto case, however, were the substantive differences between the civil and criminal rules of responsibility for certain types of acts. Broadly speaking, only in the criminal case is it necessary to prove, in addition to some harmful act, that the accused acted with the requisite guilty mental state—with the so-called *mens rea* or criminal intent. In some cases the importance of criminal intent to the distinction between tort and crime is easy enough to draw: A hunter shoots at a deer in the woods only to wound some unseen hunter. He may well be held civilly responsible for all unintended harm, but his want of any intention to harm completely frees him of criminal responsibility, no matter how serious the consequences of his shooting.

The mental element so germane to the ordinary criminal shooting case is also essential to criminal prosecutions in crashworthiness situations. But with crashworthiness it is far more difficult to pin down what the mental state of the corporation (or at least its principal agents) must be. The problem is not, it must be stressed, that rules of criminal responsibility cannot be applied to manufacturers of dangerous products. If Ford's directors ordered its workers to build cars with bombs set to go off after 10,000 miles of use, it would be a simple case of murder. If the Pinto had that explosive property but Ford refused, out of utter indifference for its customers' safety, to conduct any safety tests to discover it, then a case of reckless disregard could be made out, even if the specific intent to cause harm were absent. Yet here, too, we have nothing in the record that remotely suggests this pattern of behavior.

The pattern of proof in this case was really quite different. In essence, the charge of recklessness rested on two separate types of allegations: first, the knowledge of Ford's officials that some burn injuries could be avoided by redesigning or relocating the gas tanks; second, that with this knowledge, Ford acted in conscious disregard of human life by reducing costs instead of saving lives. My thesis is that the combined force of these two propositions was insufficient to support any criminal prosecution. What was needed at the very least was a showing that Ford acted in *bad faith* by marketing the car as it stood, because its own officials in fact believed that its design was unreasonably dangerous. To require anything less would be to collapse the standards for criminal liability in design cases into those applicable to civil liability.

Our earlier discussion makes the basic point. The main purpose of the recent judicial intervention in design-defect cases is to *force* the manufacturer to make conscious trade-offs between the harm of accidents and the costs of their prevention. The rules of civil liability, as developed, in effect contemplate that there will be—and should be—certain accidents that will certainly take place, but for which the manufacturer will not—and should not—be liable, even though he knows that they must occur. Such are the inescapable consequences of the "balancing" formulas used to judge whether manufacturers have complied with their affirmative duty to prevent automobile occupants from being harmed by the acts of third parties.

When, therefore, the prosecution said that Ford had made a conscious choice to "trade" cost against safety, the answer is that this is precisely what the tort law (with use of the more neutral word "balance") establishes as the limit of its legal obligation—and, as we have seen, a newly extended limit at that. When the prosecution said that the defendant had used

explicit cost-benefit formulas or had assigned monetary values to human life and suffering, the answer is that Ford did so in compliance with court decisions announcing that such computations will avoid civil liability. When the prosecution said that Ford refused to install a $10 part in each of 20,000,000 vehicles in order to prevent an estimated 180 deaths and a like number of injuries, the answer is that it made the right decision, as defined by the rules of civil liability, if the value attached to those deaths and those injuries was less than $200,000,000. It cannot—should not—be the law that Ford may first be permitted (if not required) to make certain cost-benefit calculations under the tort law, only then and for that reason to be held guilty of reckless homicide under the criminal law. Nor, it must quickly be added, should it make the slightest difference to a criminal case if Ford's calculations are regarded as erroneous, so long as they resulted from an honest mistake.

At this point the weight of the evidence presented against Ford can be better assessed. The testimony of the various prosecution witnesses was not, as best as can be told from the popular accounts, any different from the very type of evidence that would be introduced against Ford in an ordinary crashworthiness case. At the most, that evidence might make out the wrongful omission of Ford—its failure to build a reasonably safe car under the applicable social standards. But that is wholly unrelated to the mental element of the case. To establish criminal intent in the narrowest sense, it must be shown *not* that the prosecution's experts knew how to build a car that could resist their own critique, but that the defendants thought they had built a car that was unsafe. To establish reckless disregard, it must be shown *not* that the prosecution's experts thought that Ford should have spent additional sums on safety, but that Ford's own employees knew of the substantial risk that they would make an unreasonably safe car, and refused even to consider how that car might be redesigned to bring it within acceptable safety standards. Neither of these mental elements is made out, for example, by proof that federal automotive officials decided in 1978 that the 1973 Ford Pinto should be recalled for safety modifications. Instead it must be shown that when Ford first marketed the Pinto in 1973, it believed that the car should never have been sold. In this regard, the crucial testimony had to be that of MacDonald, Ford's engineer in the case—which, if believed, required Ford's acquittal. The issue was not whether a relocation of the gas tank was better for all concerned, but whether MacDonald believed that such was the case. The issue was not whether the balancing of risks against costs showed that some bladder should be inserted in the fuel tank, but whether MacDonald believed that such was the case. The fact that Ford's engineers used the cars for their own families, that the car met all federal safety standards when produced, and that it conformed to the general industry standards, might not have saved Ford from onerous civil liability, but it surely had to be dispositive upon the criminal case. It is, in sum, simply wrong to think that "trading" costs for lives or making conscious decisions about the lives to be sacrificed (or, to be more accurate, not saved from third-party harm) establishes all the elements of a criminal case.

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The incurable weaknesses of the prosecution's theory of criminal responsibility can be shown by a closer examination of the allegations in the indictment it procured against Ford. The prosecution's litigation strategy might have been clever in singling out Ford for criminal responsibility; yet there was nothing in the theory of the case that so limited the scope of criminality. A corporation cannot act by itself, but only through its agents. So much was recognized in the indictment, which claimed that Ford's various acts of reckless homicide were done "through the acts and omissions of its agents and employees." These acts in turn would expose Ford to criminal liability only if performed with the same reckless disregard that is then imputed to the corporation as an entity. If therefore Ford was to be subject to criminal fines, it would only have

been because its officers and engineers were subject to both fines and imprisonment for their design choices. It was of course more than prosecutorial squeamishness that kept these Ford officials from prosecution. It was the good faith character of their judgment, which was necessarily decisive in Ford's behalf as well.

Nor did the basic theory allow the prosecution to limit its dragnet to Ford's own officials. Federal automotive officials had clear responsibility for approving the design of the Pinto. They therefore had to make the same cost-benefit analysis required of Ford in order to discharge their statutory duties. They also had to set some value on human life in order to determine what precautions were needed and why. If they did not set standards that could in fact have saved lives, did they not sacrifice human life every bit as much as Ford officials? And since these officials were guilty of criminal conduct, why was not their employer, the United States, as guilty as Ford?

There was yet a second way in which the indictments could have been extended. As will be recalled, the second count of the indictment accused Ford of "recklessly creating a risk of substantial harm" to the three young women who perished in the crash. There is, of course, no reason to suppose that the risks created to these three women were any different in kind from those created by sales of other 1973 Pintos to other consumers. It follows, therefore, that the deaths in these cases and the circumstances that led to them were quite immaterial to the criminality of the Ford Motor Company—and, for that matter, of all others drawn into the sphere of criminal responsibility. By the prosecution's theory, the sale itself became criminal and could be treated as such by a simple amendment of the indictment. The deaths were but a dramatic detail that might aggravate the crime and arouse the passions, but nothing more.

These prosecutions were defective from still another standpoint. Under Indiana law, the jury was charged with deciding for itself the "acceptable" standard of safety for a Ford Pinto. The wide discretion thereby created violates one of the standard precepts of the criminal law, that persons subject to penalty be given fair notice of what conduct is legally forbidden. It has been held, for example, that a court cannot, without statutory basis, punish as a crime the making of obscene phone calls—even though such conduct is grossly indecent. How then was the notice requirement discharged as regards Ford? Surely it cannot be enough that Ford knew that it was under a duty not to make an "unreasonably dangerous" vehicle. That standard would have provided the jury with the enormous latitude of deciding whether this car should have been able to withstand a twenty or forty mile-per-hour rear-end impact. What possible notice is there when any jury can with perfect propriety decide—as is all too often the case in civil crashworthiness cases—any criminal case any way it wants? Adequate notice demands some specificity of the standards that *can* in this context be supplied by statute or regulation, or possibly standard industry practice. We need not enter into the complications that arise when these standards are violated. It is enough to say that compliance with them must give Ford an enormous litigation advantage that was completely denied it under the prosecution's theory of the case.

THE CONSEQUENCES that flow from the prosecution's theory of criminal liability only confirm what should now be evident: the Pinto case should not have been brought within the traditional modes of criminal responsibility. Such is not to rule out all possibility for public control over the production and sale of automobiles. There is nothing, for example, to prevent federal or state governments from bringing suit for *civil* fines in the event that automobile manufacturers do not conform to applicable safety standards. Such civil actions spare the government the need to prove explosive allegations of "reckless disregard and criminal intention," and give it the benefit of the lower standard of proof normally involved in civil cases. Of equal importance, they prevent any corporate defendant from being subjected to the deep moral taint that is associated in the public mind with charges of criminal wrongdoing. It is true that many of the hazards associated with criminal prosecution might be avoided by circumspection in invoking the criminal sanctions. Yet in the current climate of opinion it seems almost fanciful to rely upon notions of prosecutorial self-restraint. Such self-restraint will deny to some what is, after all, the joyous opportunity of both making and seeing the mighty fall. ■