Governance by the Sword

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Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform*, 66 **Fla. L. Rev.** 1 (2014).

Etiquette guides suggest that one has a year from the wedding to send a gift. I just read Larry Cunningham's elegant article published precisely a year ago. So I'm on time to comment.

This piece addresses the explosion in the federal government's use of deferred prosecution agreements (DPAs) in combatting corporate crime, a phenomenon that has increasingly become the subject of debate, at least in part because of the extraordinary fines that typically constitute a part of these deals. The corporate (or, as Larry corrects the record, partnership) death of Arthur Andersen, and enforcement in the pharmaceuticals industry (where conviction can lead to exclusion from federal health care programs to the detriment of patients) have made prosecutors sensitive to the collateral damage they can cause by indicting and trying (or obtaining guilty pleas from) corporations suspected of misconduct. Much of the literature focuses on the potential abuses inherent in the use of DPAs, which have a fitful history of prescribed guidelines and standards, and which present significant potential for prosecutorial abuse due to the one-sided nature of the bargain. (Among the abuses have been mandated—sorry, bargained-for—waivers on behalf of employees of work product and attorney-client privileges.) Further concern has been their secrecy, precluding interested corporations from tailoring compliance to address prosecutor's concerns. While commentators see the utility of these agreements in avoiding litigation costs and achieving some measure of deterrence (in addition to avoiding collateral damage), much of the analysis has been negative.

Larry has taken a practical and sensible approach to the problem. DPAs can be useful, he tells us, but only if prosecutors approach the negotiation and structuring of an agreement as a governance problem. Ever since the 1996 Delaware *Caremark* decision, Delaware law at least formally has required that its corporations structure governance in a manner that discourages unlawful conduct and that makes it detectable when it occurs. Sarbanes-Oxley supplemented this approach with its own regulations. And who better to understand the governance of any particular corporation than its own board and executives? Yet, as Larry shows us, principally through his examination of the travails of AIG during the middle of the first decade of this century, prosecutors can be less than thoughtful about the appropriate, compliance-ensuring governance regime for any particular corporation. He rather convincingly demonstrates that AIG's role in the financial crisis may well have been a direct consequence of the standardized "best practices" corporate governance regime imposed under Arthur Levitt's supervision. (I point out that his knowledge of AIG is as a result of a book he co-authored with Hank Greenberg, who has a dog in this particular hunt, but Larry's careful and scholarly approach give me confidence in the veracity of his reporting.)

I would do a disservice to Larry by attempting to summarize this careful and thorough piece of scholarship, so I suggest that you read it. He does an excellent job of understanding and explicating the theoretical legal place of DPAs (not quite contract, not quite regulation), as well as providing a thorough analysis of the costs and benefits of his own proposal. I will say that he left me with many questions, not least of which are the role of compensation structure, the efficacy of deterrence versus prevention, the role of punishment, and the decision to engage with the corporation rather than prosecute individual malefactors. But this, to me, is a sign that Larry has done a superb job. Indeed he has stimulated me to engage in my own research to address some of these questions. I can think of no higher praise.

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