REHABILITATING CORPORATIONS

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Blockbuster corporate fines grab headlines, but corporate criminal prosecutions have rapidly evolved far beyond using monetary penalties to punish complex organizations. A central goal of federal prosecutors is to rehabilitate corporations, and not simply to fine them. Indeed, some of the largest companies now obtain deferred and non-prosecution agreements that permit them to avoid an indictment and a conviction. In deciding not to fully pursue such companies to a conviction, prosecutors emphasize how they can offer alternatives to prosecution in order to secure positive changes to compliance and ethics programs. Such structural reforms also implicate corporate governance structures, and can involve sustained interventions in the workings of a corporation. Lawrence A. Cunningham's wonderful new article takes the provocative and counterintuitive position that prosecutors should care about rehabilitating corporate governance far more and not less.[1]

Why is the view that prosecutors should more closely engage with corporate governance surprising or controversial? Others have argued that the game is not worth the candle. For example, Judge Jed Rakoff has recently and prominently argued that corporate prosecutions are not particularly worthwhile, where what prosecutors now do largely consists in "imposing internal compliance measures that are often little more than window-dressing."[2] Still others decry undue intrusion in corporate governance by prosecutors who have no business stepping inside the boardroom. Cunningham argues that doing corporate prosecutions right means engaging with corporate governance more carefully, investigating what failures of governance contributed to the criminality, and clearly explaining what governance reforms can correct the problem.[3] The fascinating case studies he provides suggest how insufficiently engaging with governance issues can result in a range of failures, from unnecessarily harming a company, to permitting recidivism, to magnifying governance problems or even creating new ones.[4]

Of course, in most corporate prosecutions no case studies are possible, because we know little about any governance interventions beyond the often-boilerplate quality text of the agreements with prosecutors. We do

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

2. Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, New York Review of Books (January 9, 2014), http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/.

3. Cunningham, *supra* note 1, at 3.

4. *Id.* at 25–40, 61–70.

not know what sort of investigation of governance failures preceded an agreement, whether the company made good-faith efforts to revamp compliance, whether those efforts were successful, or how compliance was assessed before the case was concluded. The investigation, negotiation, and implementation of corporate prosecutions is almost entirely non-transparent—a "black box" like so much of the discretion prosecutors exercise.

How can prosecutors better rehabilitate corporate criminals? Some real improvements can be readily made, if prosecutors choose to make them. As a descriptive matter, there is no doubt that many corporate deferred and non-prosecution agreements do not take governance seriously on their face. That is one of the chief criticisms I levy in a new book examining corporate prosecutions.[5] Indeed, the problem extends even broader than Cunningham's topic, to the larger set of cases resolved each year through plea agreements in which the corporation is convicted. Those plea agreements often contain similarly vague language concerning compliance, if they speak to it at all, and supervised or special probation is not common.

That said, the picture is also not quite so bleak, particularly when one focuses on particular areas in which prosecutors and regulators have paid far more attention to governance. For example, a range of Big Pharma related prosecution agreements (plea agreements, not deferred prosecutions) contain extremely detailed provisions regarding governance that appear to have influenced industry practices quite a bit.[6] As in other corporate prosecution areas in which governance is more of a focus, such agreements are negotiated in close collaboration with regulators, who may know the industry better and be better able to supervise governance reforms.

Conversely, outside areas like securities fraud and other types of financial crimes, there are areas in which governance is simply not as relevant to prosecutors, and for some good reasons. Antitrust is an area in which prosecutors incentivize cartel members to defect and report themselves to prosecutors to earn leniency; the Antitrust Division approach focuses on deterrence and incentivized cooperation, and it has by all accounts been extremely effective. In still other areas, corporate governance is not as much of a focus as is the adoption of compliance programs designed more to supervise lower-level agents than to affect larger issues of governance (such as cases requiring the adoption of e-verify systems to prevent illegal employment of noncitizens).

Whether the compliance revolution itself is working to effect meaningful rehabilitation is a deeper and unresolved question. Prosecutors

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5. Brandon L. Garrett, Too Big to Jail: How Prosecutors Compromise with Corporations 72–75 (2014).

6. *See, e.g., id.* at 73.

cannot make informed interventions in compliance, much less governance, without carefully assessing whether these reforms are working. The DOJ's guidelines note prosecutors should try to assess whether the program is just a "paper program," and should consider "whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts."[7] Far more careful investigation and supervision should accompany such efforts. Examples of recidivist corporations do not offer comfort. And nor do the terms of most corporate prosecution agreements, which typically do not provide that compliance be carefully audited to assess its performance over time (only 22% or 55 of 255 federal corporate deferred and non-prosecution agreements from 2001–2012 included such terms).[8] Few such agreements (only about one-quarter) require firms to hire monitors to supervise compliance. Whether resource-strained federal prosecutors can do so on their own without independent oversight is a real question. And prosecutors may resist providing greater detail in these agreements, since slim agreements may be far more easily negotiated. That said, Cunningham and I are in agreement that such short-term gains are not worth the long-term costs of insufficiently specifying the compliance and governance goals of corporate prosecutions.

Perhaps judges are modestly better suited to serving in the reason-giving role that Cunningham describes than prosecutors, who are not accustomed to providing detailed reasons for decisions, much less supervising complex institutional reforms lasting several years, or at least not without, as in other context, a consent decree that contemplates a judicial role. A few judges have begun to insist that they supervise deferred prosecution agreements, at least by being apprised of the progress of a case that remains on the court's dockets.[9] A consent decree model seems better suited to cases involving complex structural reforms and issues of real public importance.

The rapidly evolving world of corporate prosecutions should itself be rehabilitated. If corporate governance is really a central goal in these prosecutors, then as Cunningham persuasively argues, prosecutors should act like it. I would add that if the goal is not just rehabilitation, but also more severe deterrence and punishment of the worst violators, prosecutors should act like it. If punishing individual wrongdoers is also a goal, prosecutors should act like it. Until these conflicting tendencies in corporate prosecutors are more firmly resolved, critics will continue to wonder whether the largest companies are treated as "Too Big to Jail," in a criminal justice system that has all but rejected the goal of rehabilitating individuals, while embracing lenient deals to rehabilitate the largest of

7. U.S.A.M. 9-28.800.
8. Garrett, *supra* note 5, at 75.
9. *Id*. at 281–284.

corporations.