Book Notes: Pay Without Performance: The Unfulfilled Promise of Executive Compensation, by Lucien Bebchuk and Jesse Fried

Geoff Mowatt

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/ohlj
Book Note

Citation Information
http://digitalcommons.osgoode.yorku.ca/ohlj/vol43/iss4/5

This Book Note is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.
This book contributes to the understanding of current compensation arrangements as shaped by managerial power and influence—the subject of increasing debate in the past few years due to recent corporate governance scandals. By examining the shortcomings in the current compensation landscape, the authors critically evaluate active corporate governance reforms that focus on increasing board independence, and also put forth their own reforms involving increased director accountability to shareholders.

The authors provide a comprehensive discussion of executive compensation by first addressing the traditional view, whereby the board operates at arm’s length from executives and devises pay arrangements with an increase in shareholder value in mind—known as the “arm’s-length bargaining” approach. Part I of the book introduces this paradigm—characterizing it as neat, tractable, and reassuring—but also discusses its limited malleability to deal with “anomalies” that are found in actual firm practices. Notably, the author’s own analysis reveals that, in reality, market forces are insufficient to constrain boards to comply with executive pay similar to that produced through arm’s length bargaining.

Part II discusses how managerial governance that permits substantial executive power can be correlated to higher compensation, while less sensitive to performance. This is limited by shareholder perception, based on what the authors term “outrage” costs. The authors provide evidence of camouflaging practices in managerial approach to executive pay to legitimize such compensation, thereby minimizing shareholder dissatisfaction. In part III, the authors use the concept of camouflage to explain the decoupling of executive pay and performance. In this context, for example, equity-based compensation has been an avenue by which managers reap substantial rewards despite mediocre or poor performance. According to the authors, it is not the amount of compensation they take issue with, but believe whatever pay arrangement is in place should, through its incentive effects, serve shareholders.

Finally, in part IV, the authors assess the implications of their analysis. They assert that, although recent reforms to enhance board independence from executives are beneficial, there must also be an increase in director dependence on shareholders. This can be accomplished by...
removing arrangements that entrench directors and insulate them from shareholders.


By Adriel Weaver

In *The Hateful and the Obscene*, Wayne Sumner first constructs a theoretical framework for understanding free expression and its limits, and then applies it to two of the most troublesome forms of speech: hate propaganda and pornography. In so doing, Sumner challenges both his own pretheoretical convictions and the state of Canadian law and policy.

Sumner begins by reviewing J.S. Mill’s utilitarian approach to expression, from which he draws two conditions necessary for any coercive limitation: first, that the expression must cause harm to others (Harm Principle) and, second, that the limitation must result in a better balance of benefits over costs (Consequentialist Principle). Sumner argues that, unlike the U.S. Supreme Court, which distinguishes categories of speech that merit different degrees of protection, the Canadian Supreme Court has adopted an approach that is more in keeping with Mill’s approach. This is evident in the landmark cases of *Keegstra*, in which the Court used the *Oakes* proportionality test to engage in an explicitly consequentialist balancing of competing rights and *Butler*, where it affirmed that restrictions on pornography must be harm-based rather than morality-based.

Sumner is critical of the latter decision, however, insofar as it defines harm by reference to community standards of tolerance. Taking the Harm Principle seriously requires abandoning moralistic or paternalistic justifications for limits on free expression and attending carefully to the kinds and evidence of harm resulting from hate speech and pornography. Sumner takes up this task in chapter 5, and finds that the social scientific evidence of harm is scarce and unreliable, particularly where the harm is systemic and diffuse. Applying a normative framework that is both harm-centred and evidence-based, Sumner concludes that legislation that prohibits or authorizes censorship of hate propaganda and obscenity ought to be struck down, and child pornography defined more narrowly.

*The Hateful and the Obscene* combines philosophical depth and analytical rigour with lucid and engaging prose. Readers of the book will be unsurprised to learn that it was recently short-listed for the Donner Prize, awarded annually in recognition of excellence in Canadian public policy writing.