SECTION: THE LAWYER'S BOOKSHELF; Pg. 2

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HEADLINE: Payback: The Conspiracy to Destroy Michael Milken And His Financial Revolution

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BODY: By DAniel R. Fischel. HarperBusiness, New York, N.Y. 326 pages. $ 25.

Daniel Fischel's book, Payback: The Conspiracy to Destroy Michael Milken and His Financial Revolution, is a diatribe against the press, public, politicians and the prosecutors of Michael Milken in the wake of the takeover boom of the 1980s. He argues that a knee-jerk, uneducated reaction to the public and press was responsible for the persecution of Milken and several other financiers involved in the hostile takeover of some of the country's largest and most prestigious companies.

Milken's raiders use his high-yield, "junk" bonds to launch the takeovers. Once accomplished, employees were often fired, assets sold and factories and facilities closed, all in the name of greater economic efficiency and the payment of the often enormous debt. Entrenched managements, union and the communities which lost vital employers were outraged. The old-line investment bankers, losing their blue chip clients to Milken's firm, Drexel Burnham Lambert, led the public outcry against the highly leveraged deals.

Fischel analyzes the companies which were targets of junk bond takeovers and finds entrenched and complacent managements, ignored and under-compensated stockholders and bloated and inefficient businesses. But the public didn't care -- there were complaints about overleveraging, the destruction of the public company in the name of immediate profit and the ruination of productive businesses. Something must be crooked!

First, Ivan Boesky, an arbitrageur of takeover stocks, and Martin Siegel and Dennis Levine, investment bankers representing the bidders and targets in many of the battles, were caught trading on confidential information about upcoming hostile tender offers. Fischel concedes they were crooks. But the government struck deals with them so that they would implicate others with Milken, the ultimate target. The problem was that the evidence was, according to Fischel, of mere technical violations, which were "routine accommodations" between business associates.

Siegel met bagmen in hotels to get his cash. In contrast, the violations by Drexel consisted of end runs around the disclosure and anti-manipulation securities laws. Fischel attempts to minimize the seriousness of the violations by accusing the government of criminalizing mere technical violations. But why shouldn't they be criminal? Huge sums depended on the timing and control of these blocks of stock. The actions were clearly intentional and clearly violated the disclosure statute which was intended to give the public full information about the largest stockholders of each public company.

Fischel dissects several of the other allegations against Drexel and takes great pains to show how some statements could be ambiguous. The book relates how Peter Gardiner, a trader working for Milken, testified that late in a particular trading day when the preferred stock of Wickes Corporation was trading just below 6 1/8, which was the minimum price at which Wickes could redeem the stock, Milken directed him to his Quotron screen several times and said, "Peter, Wickes, 6 1/8." Gardiner interpreted the statements to mean that he should buy the stock to manipulate the price higher. Fischel's analysis: "Milken's . . . statement (which other witnesses who were present denied Milken ever made) could have simply reflected Milken's belief or hope, looking at the pattern of price movements on the Quotron machine, that Wickes would close at 6 1/8." Yeah, sure.

But Fischel is more persuasive when introducing the economic context of many of the events. For example, on the same day of the alleged Wickes stock manipulation, Gardiner himself executed a large sale trade of Wickes common stock for a large Drexel customer. Why permit a large customer to sell on the da on which you are trying to manipulate the stock higher?

In the end, however, Fischel's thesis that the government went too far does give the reader pause. Several of the convictions were reversed on appeal for failure to prove a crime. In the appeal of the conviction of John Mulheren, an active junk bond trader, the Second Circuit reversed, stating that "no rational trier of fact could have found the elements of the crimes charged here beyond a reasonable doubt." Surely one of the worst cases of prosecutorial misconduct of the era was the arrest of Richard Wigton by handcuffing him in his office and leading him out in tears before waiting television cameras, only to have the weak charges against him dropped many months later.

But the focus of Fischel's complaint is on the prosecution of Milken, his brother Lowell, and Drexel. The government used the threat posed by the drastic provisional remedies of the RICO statute (Racketeer Influenced and Corrupt Organizations Act) to force Drexel to capitulate. Milken, exhausted from the long battle, pleaded guilty to six felonies and agreed to pay a $ 200 million fine and create a $ 400 million restitution fund.

Several New York lawyers were high-profile members of the conspiracy. Fischel alleges that Otto Obermaier encouraged John Mulheren to cop a plea and tipped off the U.S. Attorney that Mulheren wanted to "kill" Boesky, the arbitrageur who attempted to reduce his own sentence by giving evidence against Mulheren and others. The tip led to Mulheren's arrest and three-month incarceration pending trial. Mulheren grew to distrust Obermaier and finally fired him. Shortly thereafter, Obermaier was appointed the new U.S. Attorney for the Southern District of New York. Mulheren, convicted at trial, was ultimately vindicated by a sweeping reversal from the Second Circuit.

Fischel also criticizes Cravath, Swaine & Moore for shamelessly representing the government in a civil suit against Milken for systematic fraud in the sale of junk bonds to various savings and loan associations. Cravath drafted disclosure documents for the sale of some of the same bonds during its representation of issuers and underwriters in this 1980s.

But the severest words are reserved for Rudolph Giuliani, depicted as a publicity-hungry prosecutor longing for higher office who abused criminal laws to prosecuted selected financiers for fraud when, at most, their violations were minor civil infractions.

Fischel presents persuasive economic arguments that many of the federal securities laws are misguided and were misused and misinterpreted in the case against Milken. For example, the delays caused by the disclosure requirements of the tender offer laws result in the inevitable leak of information regarding a forthcoming tender offer. Fischel believes that the use of inside information by an investment banker to trade in the securities of a takeover target before a public announcement actually benefits the average investor because it provides a run-up period during which the investor may sell into the market at a higher price.

While Fischel's economic theories make fascinating reading, the actions he excuses clearly violate even the most restrictive interpretations of the murky insider trading laws. They also violate most investors' sense of fair play. Why should investment bankers be entitled to reap huge returns by trading in advance of a public announcement?

Perhaps the most troubling political question is the public reaction against Milken for funding the 1980s takeover boom. Clearly, Milken's junk bonds were a major factor in the surge of takeovers in the 1980s. Those who were challenged by Milken and the men he funded were largely members of the old boy network. Fischel may be correct when he says that much of corporate America was entranched and not responsive to stockholders or interested in shaking things up. And those scions of corporate America worked hand in hand with the equally complacent leaders of the large investment banking houses. Milken and his coterie shook things up by challenging the largest corporations in the United States.

Hindsight shows Milken did create a new financing tool. His junk bonds recovered and now constitute an important alternative for investors seeking higher yields, albeit with more risk. But Fischel does not discuss the upheaval that the takeover bonds caused. Is there a place in U.S. law for protection of communities and jobs or should the capitalist system be left to work without restriction even if it means that communities will lost their factories or employees their jobs in cost-cutting moves? And what about consumers? Consolidations in takeovers ultimately reduce competition and permit the behemoth to price at will. Unfortunately, Fischel does not use his considerable skill in economic theory to judge these trade-offs.

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HEADLINE: SUCCESS WAS MIKE MILKEN'S REAL CRIME

BYLINE: BY PAUL CRAIG ROBERTS; Paul Craig Roberts is John M. Olin Fellow of the Institute for Political Economy and Distinguished Fellow of the Cato Institute in Washington, D.C.

BODY: In the 1980s, ''junk-bond king'' Michael Milken was made the symbol of the ''greed decade'' and imprisoned. Now the Milken affair has received the careful attention of a distinguished legal scholar. In his just published book, Payback: The Conspiracy to Destroy Michael Milken and His Financial Revolution, University of Chicago law professor Daniel Fischel concludes that the only party to engage in wrongdoing was the U.S. government, which wrongly persecuted Milken.

Milken was a victim of his success. His financing strategy, which focused on future performance rather than past results, enabled upstart companies and those with weak credit histories to go through reorganizations that made them major players. Although Milken himself did not organize hostile takeovers, junk bonds made them possible, thus exposing the underperforming corporate Establishment to pink slips. Corporate fear and hatred, together with Wall Street's envy of the tremendous profitability of Drexel Burnham Lambert's high-yield bond division, created a lynch mob. CORPORATE REWARDS. As Fischel puts it: ''The Establishment losers in the marketplace, desperate for revenge and to restore their lost positions of dominance, turned to the government for help.'' This opened up opportunities for ''ambitious but unscrupulous government lawyers like Rudy Giuliani.'' Using the press to create a false picture of wrongdoing, U.S. Attorney Rudolph W. Giuliani brought the full power of the government against the target of the corporate and Wall Street ire. Professor Fischel notes that Giuliani was rewarded, in turn, with Establishment financing for his subsequent New York mayoral campaigns.

Fischel writes that there is no evidence that Milken committed any crimes or ''engaged in any conduct that had ever before been considered criminal.'' The case was based on a sudden criminalization of routine trading practices and technical regulatory violations.

Milken contributed to his own demise by accepting legal advice to extricate himself from lengthy and expensive legal proceedings with a plea bargain. This proved to be a strategic mistake, for two reasons: The sentencing judge, Kimba Wood, handed him a stiff prison term for technical infractions that had, in the past, never carried any time behind bars, and by ''copping a plea,'' Milken cast himself in the role of a guilty party.

The pressures on Milken to make a deal were phenomenal. The media were willing accomplices in the pursuit of Milken. In addition, Milken faced a RICO freeze of his assets, the hounding of family members, and a threatened indictment of his brother, Lowell. ''A brother for a brother,'' as then Attorney General Richard L. Thornburgh structured the deal. CAREER BOOST. Fischel says we have much to learn from the persecution of Michael Milken. The key lesson is ''the need to be vigilant to guard against the arbitrary exercise of power by the government against those who are unpopular because they threaten the economic Establishment. We need to be particularly suspicious about the rhetoric of greed. Powerful interest groups and their allies in the government use the rhetoric of greed to discredit and delegitimize the success of others. The more successful the effort, the easier it is for the government to regulate the group out of business or, in the extreme cases that took place back in the 1980s, put them in jail.''

The other important lesson is that prosecutors use their offices to serve their careers rather than justice. Fischel says that ''Rudy Giuliani's win-at-any-cost mentality, and his police-state tactics, were as far removed from the pursuit of justice as is imaginable. Regrettably, Giuliani's election as Mayor of New York will only encourage others to try and follow in his footsteps.''

Fischel's account of government misbehavior is finding resonance in current congressional hearings on Whitewatergate, Waco, and in FBI shakeups following the bureau's excessive use of force against the Weaver family in Idaho in 1992. Law enforcement works best when it is constrained by a commitment to justice. Civil libertarians were ahead of law-and-order conservatives in realizing that justice may play second fiddle to ambition in the public, as well as private, sector.

The necessary law enforcement offices of society are in ever present danger of becoming ramps for personal careers. The function of prosecution, said Supreme Court Justice George Sutherland in 1935, is the impartial service of justice. If law enforcement is reinvigorated by this ethic, the country will be better off.

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