Trial by Press

INSIDER REPORTING

Emile Zola's journalism helped get an innocent Dreyfus out of prison. James B. Stewart and the *Wall Street Journal* helped put Milken inside one. But is he innocent too?

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THE *Wall Street Journal* on October 2 ran an excerpt of James B. Stewart's book on Michael Milken and Ivan Boesky, *Den of Thieves*, under the headline "Scenes from a Scandal." The excerpt presents the thesis that Milken and Boesky, together driven by drooling greed, were conscious partners in criminal schemes to enrich themselves at the expense of the investing public. The piece took up two full newspaper pages, around a line drawing of Milken designed to prepare the *Journal*'s three million readers for a profile of Evil Incarnate. Although the *Journal*'s editors are not conscious of what they have done, the publication of this material in this fashion is the low point in the newspaper's long and illustrious history. Having spent 13 years of my own career at Dow Jones publications, six of them at the *Journal*, on the editorial board and as associate editor, I'm especially saddened at this corruption of journalistic standards.

James B. Stewart, whose book the *Journal* is trumpeting, is the paper's page-one editor. He is a lawyer by training, as is Norman Pearlstine, the paper's executive editor, his boss. Stewart's first book, *The Prosecutors*, was published five years ago as his alliance with federal prosecutors began to flower. It is a celebration of prosecutors—which speaks to the cast of Stewart's mind. Until very recently, the tradition of American journalism had been in celebration of the defense attorneys, the Clarence Darrows of the profession who defended the criminally accused. Journalism first walked down a new path with Watergate. The political prosecutions of the Reagan Administration were similarly fed by prosecutorial tidbits to the press. Until Ivan Boesky came along, the *Journal* had been cut out of this action. The prosecutors had denied its news reporters the spoonfeeding of raw conjecture dressed up as fact, largely because the paper's editorial page opposed trial by press. Prosecutors did not consider the *Journal* to be a reliable ally in a witchhunt.

For some time, there has been an intense, often bitter rivalry between the *Journal*'s editorial pages and its news pages. The *Journal*'s editor, Robert L. Bartley, was unable to halt the corrupting influence on the news pages of the witchhunt against Wall Street led by U.S. prosecutor Rudolph Giuliani. Bartley and his associate L. Gordon Crovitz, author of the "Rule of Law" column and a lawyer in the Darrow tradition, are in a most unusual position, prevented by institutional constraints from saying anything publicly about the news department's role in assisting that corruption. But Pearlstine and Stewart do not care what Bartley and his editorial-page writers privately think of them, knowing they are unable to say anything in public.

Deep Throat

THERE ARE sleazy, envious, openly corrupt newspapermen whom I've known over the years. Stewart is not one of them. Eminently likable, decent and brilliant in his way, he first came to my attention in 1986 as the *Journal*'s mergers-and-acquisitions reporter, which became his stepping stone to a Pulitzer Prize and the page-one editorship. Stewart drove the *Journal*'s competitors crazy because he always seemed to get the big M&A stories before they did. In my 1987 *MediaGuide*, which rates the national press corps, Stewart was awarded the maximum rating of four stars. How did he do it? Was his "Deep Throat"—his most important source of inside news on Wall Street—Ivan Boesky? Boesky was even then manipulating the *Journal* and the rest of the financial press for his own profit. Before he was caught, remember, Boesky was portrayed by the financial press corps as a fiendishly clever expert in arbitrage. The financial press also presented him as a cultured intellect, a man of the world, a philanthropist. Michael Milken, who never, ever socialized with Boesky, an illustrious client

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of Drexel Burnham Lambert, probably believed with the rest of us what he read in the newspapers, including the *Journal*'s news pages, about Boesky.

Drexel Burnham Lambert in these glory years did most of the M&A deals on Wall Street because of Milken's financial prowess. (Ironically, in those very years the record indicates Milken opposed hostile takeovers and tried to discourage Drexel from participating in them.) Stewart makes it appear as if Milken and Boesky were in constant contact, scheming and plotting. Those who worked with Milken have indicated Boesky was considered something of a nuisance, calling Milken a dozen times for each return call he got. Boesky's source of inside information from Drexel was not Milken. It was Dennis Levine, an ambitious young man who was no financial genius but who had ready access to enough of Drexel's inside doings to make him a goldmine of information. Stewart himself reports that when Levine hinted to Boesky he might like to come to work for him, Boesky reminded Levine that he was too

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important to him at Drexel. In due course the feds would collect Levine, but he was much too small a fry to earn Ivan Boesky the sweetheart deal he got from the feds, a sojourn at a federal country club. So Boesky told the feds Milken was his source, and Stewart, stunned that his pal Boesky turned out to be a crook, was only too ready to believe Milken was the evil genius who led Boesky astray. In his book, Stewart clearly views Boesky, a man he knew well, as a victim of Milken, a man he never met. By contrast, Dennis Levine, who knew both men, has written that Milken was taken in by Boesky.

Stewart himself was taken in by both Boesky and Giuliani. In my 1988 *MediaGuide*, published long before I met Michael Milken, I reduced Stewart's rating precisely because we felt his early reports on the Wall Street scandals were overstepping the bounds of traditional journalistic standards. "He pushed a little too hard for our tastes," we wrote, "seeming as if he wanted to hasten indictments in the dealmaker scandals. . . . Author of a new book, *The Prosecutors*, Stewart seemed to be going to trial by press, a breach of journalistic standards that he shares with his editors."

With Stewart as point man in the press corps, Giuliani's campaign against Milken worked like a charm. Now, with Milken sentenced to ten years in a federal penitentiary, almost everyone in the nation who does not know him personally believes him to be the Master Crook of the 1980s (while those of us who know him believe him to be a victim of our epoch). Boesky, now a free man, is viewed as merely a pawn.

Stewart's Just Cause

WHEN Stewart was named page-one editor late in 1988, he persuaded the *Journal*'s news editors that seeing that Milken did not somehow escape the wheels of justice was a Just Cause. For the following two years the newspaper routinely ran unsourced news stories by other reporters under Stewart's direction, alleging felonious activity by Milken involving insider trading, stock manipulation, and bribery.

For three years, the government wrestled with the beans Boesky had spilled, trying to come up with airtight felony counts. Failing on quality, they went for quantity instead, finally delivering a 98-count indictment to the court. At the same time, the *Journal* trained its news guns on the very concept of "junk bonds," inviting a temporary decimation of that market and fueling the congressional demands that something be done. A long string of savings-and-loan companies, forced by the federal bailout law that resulted to sell what had been their most profitable assets, went into federal receivership, adding hundreds of billions of dollars to the federal deficit over time. (Had they been allowed to retain their junk-bond portfolios, the profits would have helped offset the mammoth losses in their real-estate portfolios, the real reason for their failure.) Again, the *Journal*'s editorial-page writers maintained a piquant counterpoint to these grotesque proceedings, but were barred from pointing out that their brethren on page one had been part of the problem here as well—by nurturing the idea that high-yield bonds, the concept born in the evil mind of Michael Milken, were unworthy financial instruments.

In the end, faced with new threats from the prosecutors that he and his brother Lowell would soon face another carload of felony counts in a variety of geographical jurisdictions and would be in the courts until they were old men, Milken caved in. He agreed to plea-bargain when the feds said they would allow his brother to walk away a free man. To avoid a trial with material they knew was questionable, the prosecutors had to allow Lowell Milken his freedom, for he made it plain he would not plea-bargain—even on felony charges that could theoretically have salted him away in a federal slammer for several hundred years. And Michael Milken's plea of guilty to six felony counts was striking in that none of them involved insider trading, stock manipulation, or bribery—the triad of unsourced allegations that Stewart had been running in the *Journal*'s news pages for years. The six counts involved only technical violations of the security laws, none of which, on close examination, would seem to warrant more than the equivalent of a parking ticket. By my reckoning, none of the counts involved the loss by the investing public of a dime, much less billions.

In a post-sentencing proceeding to determine how much these felonies cost the investing public, U.S. District Judge Kimba Wood could stretch logic only enough to find $318,000. Milken's High Yield Bond Department had been charged for commissions paid to Drexel salesmen who sold shares of a fund managed by a Drexel client. In order to recoup those commissions, Milken had agreed with Drexel's client, whose own customers had not paid commissions to the salesmen, to adjust the prices of securities purchased by the client through Drexel, by fractions of a point within the bid/asked spread, until the $318,000 figure was reached. This was logical. It didn't really cost the investing public anything. And it would have been legal if Drexel's client had made the appropriate disclosures to its own customers. I could sympathize with Judge Wood when she identified the $318,000 as the public's loss. Having sentenced Milken to ten years in prison, it would have been awkward if she had been forced to announce that he hadn't stolen a dime from anyone.

Guilty as Not Charged

BEFORE sentencing Milken, however, Judge Wood had invited the prosecutors in special court hearings to go beyond the harmless "crimes" to which Milken had confessed and present the best evidence they had against him on the accusations that had never been brought into court as formal charges but had got wide public attention via the leaks to the *Journal*. The purpose was to help Judge Wood, when sentencing Milken, to determine if the crimes to which he had confessed were or were not part of a broader pattern of criminality. The proceedings were known as the Fatico hearings. For four weeks last October, the federal prosecutors took their best shots—one trying to prove Milken manipulated stock, one trying to prove he engaged in insider trading, and one trying to prove he committed bribery. In each attempt, the government failed miserably. Judge Wood sentenced Milken to ten years in prison, followed by three years of full-time community service, even while acknowledging the prosecution had indeed failed to prove its case.

For instance, in the attempt to prove stock manipulation—a charge based on information supplied to them by Boesky—the government lawyers discovered they were looking in the wrong place. Milken's lawyers demonstrated that while it appeared someone at Drexel was involved, Milken not only was *not* trying to drive up the price of Wickes Co. stock, as the government alleged, but his department had been serious *sellers* of the stock during the period in question. Judge Wood concluded that the government witnesses had failed to show that Milken was even involved in the Wickes transaction. The judge also found that the government failed to prove its charges in the bribery case, involving warrants of Storer Communications.

The attempt to prove insider trading went especially awry. The government had as a key witness an employee of Milken's junk-bond department, James Dahl, who swore before a grand jury that Milken advised him to buy up Caesar's World bonds from Drexel's own customers at a time when Drexel had inside knowledge of impending financing developments that would make the bonds more valuable. To the government, this was a smoking gun. It turned out, however, that Dahl had confused several events, and when the true facts began to emerge, even he was not so sure that his version was correct. Here's what happened.

In June of 1983, a sales meeting was set up by Drexel at Caesar's World, a meeting Milken attended long enough to make his pitch. Coincidentally, a Drexel client wanted to sell Drexel $6 million of Caesar's World bonds. Milken bought $3 million of those bonds for Drexel's profit-sharing account before the meeting, but the government saw only the actual transfer on Drexel's books, which occurred after the meeting. This seemed suspicious. It turned out, however, that while Drexel's books reflected the purchase on the day it was made, the transfer had been delayed because Milken needed Drexel's permission to place the bonds in Drexel's profit-sharing account. That permission came days later.

The government's suspicions did seem confirmed when Dahl told the feds that immediately after the meeting, Milken urged the Drexel salesmen to buy Caesar's World bonds. But no other salesmen remembered such exhortations. The clincher came when Milken's lawyers produced one of Dahl's customers who had sold Dahl his Caesar's World bonds at the time. The client remembered—and produced a contemporaneous memo confirming—that Dahl had called to sell him Texas International, not to buy Caesar's World. He sold the bonds only to raise the cash to buy Texas International. When Dahl was shown the memo on the witness stand, his memory was refreshed as to the swap, and he said he would not dispute that version of the event.

Stewart must have been stunned by Dahl's memory lapse, but he takes no note of this in the material from his book in the October 2 *Journal*. Indeed, in his entire book, Stewart makes barely a mention of the Fatico hearings, which were the only proceedings at which the government's witnesses were exposed to cross-examination by Milken's lawyers. These hearings exonerated Milken on all three of the central charges Stewart had been pressing. On the day the Fatico hearings ended, I called Milken and told him the last small shadow of doubt I had had been expunged by the hearings: "You've now been vindicated by history."

It would have been helpful to the *Journal*'s readers if Stewart had told us something about Dahl's refreshed memory in the Fatico hearings. He ignores it. Instead "Scenes from a Scandal" opens with a dynamite scene, which attempts to leave no doubt that Milken and Boesky were fellow crooks.

The Fatal Phone Call

IT IS a Friday morning in January 1985. The telephone rings in Boesky's office. It is supposedly Milken calling. Witnesses in Boesky's office observe him listening but saying almost nothing. When he hangs up, he shouts orders to *buy* Diamond Shamrock and *sell* Occidental Petroleum. He is clearly trading on inside information of a deal between Occidental Petroleum and Diamond Shamrock, known to Drexel Burnham because of Milken's role in financing the deal.

In Stewart's account, on the other end of the telephone we see Milken doing the talking. An employee of Drexel is sitting next to Milken as he tells his secret partner, Ivan Boesky, to buy Diamond Shamrock on information not available to the investing public. It is a blatant felonious act of insider trading. The employee at Milken's elbow is James Dahl.

The page-one editor of the *Wall Street Journal*, the most important business newspaper in the world, goes on to tell us there was a secret arrangement between Michael Milken and Ivan Boesky to split, fifty–fifty, all the ill-gotten gains from their secret trading, which had been witnessed on both ends of their long-distance telephone scheming by various employees who happened to be sitting around.

Yes, *long-distance* telephone scheming. Milken is in Los Angeles and Boesky is in New York. This detail is the fatal flaw in Stewart's story; indeed, it accounts in large measure for why the federal prosecutors chose not to drag this dynamite story into the special pre-sentencing hearings. Records presented by Milken's attorneys proved conclusively that the three-hour time difference between New York and L.A. meant the Diamond Shamrock info was officially public knowledge when Boesky was supposedly ordering purchase of the company's shares on inside information. According to sign-in sheets presented in evidence, Milken could not have known about the deal until sometime after 9:07 A.M. Pacific time, Friday, January 4, 1985. By then, trading on Shamrock and Oxy stock had been suspended. But Stewart does not relate that in his account. Nor does Stewart report that Boesky had accumulated a large position in Diamond Shamrock in the months prior to this deal with Oxy, and hence that his interest long preceded any merger talk.

"Gee, fellas—junk bonds."

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Stewart does report that on the following Monday, Diamond Shamrock's board unexpectedly rejected the deal. He writes: "Told of the development, Mr. Milken grabbed the phone, called Mr. Boesky, practically screamed: 'The deal didn't go through. We've got to get out of the position.' " In fact, if James Dahl overheard anything, it would have been this Monday call, and it would have been *perfectly lawful*. Dahl told the government simply that he overheard Milken on the telephone advising Boesky how best to unload his position in Diamond Shamrock. Dahl said nothing about who placed the call, let alone that Milken grabbed the phone and started screaming. Dahl never told the government nor testified that he heard the dynamite phone call on the previous Friday with which Stewart opens his article. Indeed, Milken claims that Dahl never sat next to him at any time.

The "Scenes from a Scandal," reported by the *Journal*, *simply did not take place*. Indeed, the government knows this scene could not have taken place as described, which is why it did not drag this dead cat into the Fatico hearings. How can Stewart have gotten it so wrong? More than a year after the feds found the Diamond Shamrock story to be a red herring, it is the lead evidence of Michael Milken's evil empire in the *Wall Street Journal*. Did the U.S. Attorney's office simply forget to inform Stewart that its original surmise did not pan out? Did Stewart's research assistant get mixed up on the times and dates? Did the *Journal* ask anyone in Milken's corner to explain the sinister phone call? If they had done so, they surely would have learned what you are learning here.

What about the fifty–fifty deal between Boesky and Milken? How was Boesky going to pay Milken his half of the millions they were making on the sly, but overheard? Stewart tells us in his book, on page 322, that the government "gained the cooperation" of Charles Thurnher, the chief accountant of Drexel's junk-bond department, in order to find out. Thurnher had kept a list of the trades involving the Boesky organization. Yet by Stewart's own account, Thurnher's cooperation didn't help the government much:

> Like Boesky, Milken had kept his employees largely in the dark. Milken had never told Thurnher why he was having him to do various things, so he was of little use in figuring out Milken's motives and state of mind. Thurnher testified at one point that Milken hadn't even asked him to keep the list; on another occasion, he said Milken had described the list as "all a bunch of bulls--t."

But suppose part of the secret deal was to have the records kept on Boesky's end? An accountant named Mooradian did indeed confess to juggling the books for Boesky, but said nothing of an interface with Milken. The government also targeted Michael Davidoff, Boesky's head trader. But as Stewart reports on page 319 of his book: "Davidoff was of little use on the Drexel–Milken front, since he knew nothing about the secret arrangements beyond some of the trading he oversaw."

For three years, the *Wall Street Journal* waited to hear Ivan Boesky, or at least a Boesky associate, spill the beans on Michael Milken. Yet when Judge Wood at last tells the feds to take their best shot in the presentencing hearings, *the only witness they call who has anything to do with the Boesky organization is Michael Davidoff*, who Stewart acknowledges doesn't know anything! What's going on? Although the stories as described here have been available from government sources for a year, the *Wall Street Journal* still prints the original raw accusations leaked to Stewart by Rudolph Giuliani three years ago.

The Ox-Bow Connection

A REPORTER for the *New York Observer* called me recently. He was doing a profile of Stewart and wanted to "get a dissenting view." The reporter said he had interviewed many journalists who knew Stewart and his work, and all of them said he was a scrupulously careful reporter, above reproach. How did I explain that?

I asked if he was familiar with the 1943 Henry Fonda movie *The Ox-Bow Incident*. In this Western classic, a posse of ranchers and ranch hands is assembled to pursue some cattle thieves. They catch a group of men, who insist they are innocent but who are in possession of a few head of cattle with a local brand. The ranchers hold a trial on the spot. All but Henry Fonda cast "guilty" votes and the thieves are lynched. As the ranchers make their way home, they are met by one of their fellows, whose brand the stolen cattle carry. He tells them that he had in fact sold a few head to a group of men who were heading west to start their own ranch.

The ranchers in *The Ox-Bow Incident* did not consider themselves a "lynch mob." They did not seem irrational, inflamed, bigoted, swept by emotion and angry self-righteousness. They felt strongly enough about justice in this new country to go through the motions of a trial by jury on the stump, and even to permit prayers at the executions. The problem, as with Stewart and the *Journal*'s news pages, is that *they had made up their minds*.

Neither Giuliani nor Stewart had ever met Milken. But they *knew* he was a crook. They *knew the type*.

In his *Journal* article, Stewart tells us: "As early as 1982, Mr. Milken was making $45 million a year, but his aides were struck by how obsessed he was with enhancing his wealth and power. Chatting with Mr. Winnick one day, Mr. Milken looked at the view across Century City and West Los Angeles to the coast and asked, 'What do you think it'd cost to buy every building from here to the ocean?' "

That's real greed, isn't it? But many of Milken's friends remember this as a comment he made in those years whenever someone complained that the Arabs would soon own all of Los Angeles, and then the whole country. It is a rhetorical device I've heard him use in a more recent context when the topic was the Japanese buying up all of America. It becomes a silly fear once you spend a moment putting a price tag on any serious stretch of real estate. Milken made the point numerous times, both in speeches and in casual conversation. Yet one man—Winnick—misunderstands the context, tells the story to Stewart, and it becomes the official version.

Aha! But didn't Milken in 1985 repeatedly complain to Drexel's Chief Executive, Fred Joseph, that he was cheated out of a $15,000 finder's fee? Stewart uses this anecdote to put the finishing touches on his evidence of Milken's drooling greed. And in a billionaire, worrying about a comparatively small sum would be real greed. But those of us who know Milken to be compulsively generous can recognize this story of a trivial record-keeping error as being mock serious, similar to a standing joke among regular golf partners that one of them was cheated on a $5 Nassau. Stewart also tells the *Journal*'s readers that by 1986 Milken had begun wearing "French-cuffed shirts" and demanding to be served on "china" instead of his usual paper plates. Here, Stewart is scrambling to paint Milken as Boesky. I would bet the only time Milken has ever worn a French-cuffed shirt is to a black-tie dinner, and almost every black-tie dinner he has attended has been a charity dinner he was supporting. He might ask for his food on a dinner plate instead of paper, but he would never think of asking for "china." He is oblivious to the trappings of social prestige. For many years prior to his imprisonment, he spent at least one afternoon a week teaching a math class to disadvantaged children at one of the "Help Schools" he and his foundations supported in Southern California. But Stewart had found to his dismay that Ivan Boesky was a criminal, and if you know one Boesky, you know them all.

Mike Milken is not a Jay Gould *type* or a Diamond Jim Fisk *type* or an Ivan Boesky *type*, poised to make a killing in the market through connections. Milken's life and work had been in the tradition of an Andrew Mellon, a John D. Rockefeller, an Andrew Carnegie, an A. P. Giannini, those great men of our nation's business history who each saw a different way of combining capital and labor to produce great leaps in human productivity—thereby enriching the lives of all mankind. Milken's wealth grew *incidentally*, and he gave much of it away in a vast network of charities. Yet for all that, Michael Milken, who has become my friend during this ordeal, is in prison. He will stay there a long time, unless the people who put him there—most particularly the editors of the *Wall Street Journal*—realize what a profound mistake they have made. □