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BOOK REVIEWS

TIME CHANGES: A REVIEW OF *TO THE END OF TIME: THE
SEDUCTION AND CONQUEST OF A MEDIA EMPIRE*
BY RICHARD M. CLURMAN

*Jayne W. Barnard**

Back in the 1950s, Henry Luce, legendary founder of *Time Magazine*, was reviewing a business story for an upcoming issue. Disgusted by the tale of greed which unfolded, Luce scrawled across the top of the page,

I resent the fact that these men are fighting for a huge chunk of the "national estate" without there seeming to be any point to the fight. None seems to stand for a damn thing. This is the sort of thing that turns one against capitalism. I resent having these great companies owned by pointless men like these.¹

Indeed. If there is a theme to Richard Clurman's book on the 1990 marriage between Time, Inc. and Warner Communications, it is that the men involved in making the deal were not only pointless, or at least shallow, as individuals but remarkably obtuse about their fiduciary obligations to the shareholders of their respective companies. Over and over throughout the book, Clurman portrays the toplevel managers of Time, Chairman J. Richard Munro and President N.J. "Nick" Nicholas, and Warner's CEO Steve Ross, as focusing on all the wrong questions as they put together the biggest media merger in history. These men's obsessions turned not on how to generate shareholder value, or even on how to accommodate the conflicting claims of their companies' "other constituencies," but on how to ensure that each would get the best managerial contract, the highest position on the corporate ladder, and the best executive compensation package when the deal was done. Clurman's descriptions of the machinations, tantrums, tears and tea leaves which ultimately led to the Time-

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1. RICHARD CLURMAN, *TO THE END OF TIME: THE SEDUCTION AND CONQUEST OF A MEDIA EMPIRE* 30-31 (1991).

Warner merger² make for sorrowful reading to anyone who values the notion of responsible corporate governance.

The outline of the Time-Warner story is by now well known, having received the full attention of the Delaware Supreme Court³ and lengthy feature coverage in *The New Yorker*.⁴ In 1987, Time's management began paying close attention to the growing number of hostile takeovers in the television industry. Time was, by then, deeply involved in cable franchising and was the owner of HBO and Cinemax. Anxious about their own security, the "Time-incers" set about to find a merger partner that would enhance Time's position in the global media market, strengthen its lackluster management and, not incidentally, serve as a shark-repellent. After considering and rejecting a possible merger with Gannett, Time's management turned to the possibility of a merger with Warner.

Having concluded that Warner would be a good fit,⁵ Time's Munro and Nicholas then undertook a campaign to persuade the board that a Time-Warner combination would not only enhance Time's market position but also could be effectuated without compromising the editorial integrity of the magazines, especially Time. This latter consideration was of special importance to Time director Henry R. Luce III, heir of Henry Jr. and owner of 4 1/2% of the outstanding Time, Inc. stock.

Slowly and methodically, Munro and Nicholas persuaded Time's twelve outside board members to accept the idea of entering into a "transforming transaction."⁶ In July 1988, after months of massaging, the board gave its "go ahead" to actively pursue a merger with Warner. Weeks of negotiations followed, focusing on such issues as the name of the combined companies, the exchange ratio and the formula for

2. The use of the term "merger" is generic. As will be seen, the transaction between Time and Warner was technically something quite different.

3. *Paramount Communications v. Time*, 571 A.2d 1140 (Del. 1989).

4. Connie Bruck, *Deal of the Year*, NEW YORKER, Jan. 8, 1990, at 67.

5. For example,

Warner had just acquired Lorimar and its film studios. Time-Warner could make movies and television for use on HBO. Warner had an international distribution system, which Time could use to sell films, videos, books and magazines. Warner was a giant in the music and recording business, an area into which Time wanted to expand. None of the other companies considered had the musical clout of Warner. Time and Warner's cable systems were compatible and could be easily integrated; none of the other companies considered presented such a compatible cable partner.

Paramount Communications, 571 A.2d at 1144-45.

6. CLURMAN, *supra* note 1, at 147.

corporate governance. This last, "succession" issue, was the deal-breaker, however, as Ross, reportedly in tears, refused to sign on to an agreement that would permit him to act as "co-CEO" of the combined companies but would require him to retire within five years of the merger.⁷ Ross felt this provision reflected Time's lack of confidence in his leadership, when in fact it really reflected Nick Nicholas' insistence that he, the other designated "co-CEO," would be assured the top position before he became too old to make his mark.⁸

Talks between Time and Warner resumed in January 1989. Ultimately, both boards approved a merger to be submitted to the companies' shareholders. The terms of the deal were very similar to those discarded the previous summer. Nicholas and Ross would serve as co-CEO's, with Ross ultimately becoming chairman and Nicholas becoming sole CEO. As the deal neared completion, however, a new and very threatening player arrived on the scene. Sixteen days before the scheduled shareholder vote, Paramount Communications announced a cash tender offer for all the shares of Time at \$175 per share (\$50 above the estimated value of the Warner merger to Time shareholders of \$125),⁹ conditioned upon the termination of the merger agreement.¹⁰

Paramount quickly raised its offer to \$200 per share, the stock market went crazy with desire, and Time responded by quickly cobbling together a new deal with Warner. Instead of *merging* with Warner, or canceling the deal and letting the market take its course (presumably, but not necessarily, in favor of the Paramount offer), Time agreed to borrow close to \$10 billion, virtually overnight, and use the funds to buy a majority of Warner's outstanding stock at \$70 per share, a 55% premium over market.¹¹ The beauty of this deal was that it would not require shareholder approval and could still derail the Paramount offer. The downside, of course, was that the debt incurred to finance the buyout would severely impair the combined companies' ability to grow into the next century.

7. *Id.* at 168.

8. One board member recalls this issue somewhat differently. Not only was Time committed to putting Nicholas into the driver's seat as soon as possible; it was also concerned that, unless forced to do so, Ross might not leave. According to Time director Donald Perkins, "[w]hat we were concerned about was [Ross'] refusal to talk about retirement. It was like getting in bed with Armand Hammer. . . ." *Id.* at 172.

9. *The Monks/Dingman Time Warner Letters*, DIRECTORS & BOARDS, Winter 1989, at 24.

10. *Paramount Communications*, 571 A.2d at 1147.

11. CLURMAN, *supra* note 1, at 237.

The public explanation for Time's choice of Warner over Paramount was that the Warner transaction "offered a greater long-term value for the stockholders and, unlike Paramount's offer, did not pose a threat to Time's survival and its 'culture.'" ¹² Hindsight now tells us that both these beliefs were misplaced, if not knowingly false when advanced. While, as of June 1989, Paramount was offering \$200 *in cash*, the Time-Warner deal could offer only the hope of future price increases as a result of the combined companies' synergy. In fact, that synergy has never paid off. After the merger, Time-Warner's share price never rose above \$124¹³ and as of March 1992, was hovering at \$105.

As for the unique "Time culture," Time's magazine-focused managers never again enjoyed the position of power they had commanded in the post-Luce years. Only a few weeks passed after the merger before Time's executives moved from their dowdy headquarters to the upscale Warner Communications building.¹⁴ More importantly, it was not long after the merger that Warner's financial team outpaced Time's and seized strategic control of the combined companies.¹⁵ This shift in control led ultimately to the forced resignation of Nick Nicholas, the designated heir to the Time-Warner throne, when he found in early 1992 that he could not accept (or, worse, even influence) the Warner-dominated strategic plan.¹⁶

Some themes of Clurman's book do not bear directly on questions of corporate governance. There is, for example, the issue of social class. Clurman, himself an Ivy Leaguer in spirit if not in fact,¹⁷ and a former chief of correspondents at Time, repeatedly points out the gaucheries of the Warner players by comparison to the elegance of the "Time-incers." Steve Ross, for example, "who sees every movie but never reads a book, calls the author of *Madame Bovary* 'Flow Bert.'" ¹⁸

12. *Paramount Communications*, 571 A.2d at 1149.

13. CLURMAN, *supra* note 1, at 271.

14. *Id.* at 198, 315.

15. In addition, the chief financial officer, the general counsel and the corporate secretary were also chosen from Warner's staff. *Id.* at 198.

16. Geraldine Fabrikant, *Heir Apparent at Time Warner is Out Amid Signs of Dissention*, N.Y. TIMES, Feb. 21, 1992, at A1.

17. He is a graduate of the University of Chicago. One of Clurman's non-journalistic claims to fame is his recurring role in the sailing adventures of William F. Buckley. See WILLIAM F. BUCKLEY, *RACING THROUGH PARADISE* (1987); WILLIAM F. BUCKLEY, *ATLANTIC HIGH* (1982) (each recounting transcontinental sailing trips of considerable elan).

18. CLURMAN, *supra* note 1, at 26.

Cheap shots like these, however, reveal a fundamental truth about the Time-Warner merger which Time's directors should have seen from the beginning, and that is that merging vastly differing corporate cultures is likely to come to grief. Time-Warner was not just a "corporate interfaith marriage,"¹⁹ and Ross and Nicholas not merely an "odd couple."²⁰ Rather, the merger of Time and Warner brought together a combustible mixture of personalities and values. Time's board should have recognized that "Warner and Time were as different from each other — in their people and their products — as the scrappy old Brooklyn Dodgers and the haughty old New York Yankees. Different leagues, different managers, different fans — same hometown."²¹

Another recurring theme in Clurman's book is the romantic but misguided notion that a news-gathering organization has some inviolable right of self-determination and should be beyond the reach of corporate discipline.²² Time's traditional separation of "church" (the magazines) and "state" (the company's publishing arm) took this notion far beyond the conventional view that advertisers ought not to influence news judgments. Indeed, Time's editor-in-chief reported directly to the board, and sat on the board, and was insulated by the terms of a written "charter" that ensured complete autonomy in selecting both content and editorial personnel.²³

Rather than recognizing it for what it was — the lowest-common-denominator of American journalism — Time's managers honestly believed that the magazine represented some sort of "mission"²⁴ and that Time held some unique "bond of trust" with the American public.²⁵ The grandiosity of Time's management on this issue colored the negotiations with Warner at every step of the way. Time had to be perceived as the surviving company, the flagship of the media empire;²⁶

19. *Id.* at 15.

20. Roger Cohen, *A Divorce in the Executive Suite*, N.Y. TIMES, Feb. 24, 1992, at D1.

21. CLURMAN, *supra* note 1, at 26.

22. News gatherers at the television networks suffered from the same misapprehension until corporate belt-tightening was imposed on them following the TV takeovers of the mid-1980s. See KEN AULETTA, *THREE BLIND MICE: HOW THE TV NETWORKS LOST THEIR WAY* (1991) (describing the aftermath of the takeovers of CBS by Larry Tisch, of ABC by Capital Cities and of NBC by General Electric).

23. The "Donovan Charter" took effect in 1978, shortly before editor-in-chief Hedley Donovan, who had succeeded Luce, stepped down in favor of Henry Grunwald. CLURMAN, *supra* note 1, at 40.

24. *Id.* at 36.

25. *Id.* at 221. Hedley Donovan took a more poetic view of Time's uniqueness. "This 'company' is not just a legal or business entity," he said. "I am also using the word in the older sense, as in company of scholars, adventurers, or a company of voyagers." *Id.* at 202.

26. *Paramount Communications*, 571 A.2d at 1145.

Time's editor-in-chief had to be assured a seat on the combined companies' board.²⁷ This kind of posturing led Time's directors to overlook some of the more significant features of the deal, such as which of the merger partners would in fact be the surviving company,²⁸ who would control the significant committees of the new board,²⁹ and what the strategic focus of Time-Warner would be.

The real lesson of *To the End of Time* centers on the role of the Time board and its failure to take seriously its fiduciary obligations to Time's shareholders. Clurman complains that the board failed to interview Steve Ross or to demand access to internal Warner documents before signing off on the deal.³⁰ That is not the point. The board's failure has nothing to do with whether or not the directors vetted Warner's CEO. The board's failure lies instead in its unwillingness to recognize the legitimacy of the shareholders' desire to take advantage of Paramount's \$200 offer. The board refused even to meet with Paramount's representatives to see if an acceptable transaction could be worked out.³¹ Contrary to the ruling of the Delaware Supreme Court,³² this was not an exercise of business judgment. It was a demonstration of arrogance.

As arrogant as *he* was, Henry Luce at least had his priorities in order on the issue of corporate control: "I am a Protestant, a Republican and a free enterpriser," he declared. "I am biased in favor of God, Eisenhower and the stockholders of Time. . . ."³³ Obviously, and regrettably, Time's board did not share at least one of Luce's biases.

27. CLURMAN, *supra* note 1, at 204.

28. Warner stockholders ended up owning more than 62 percent of the combined companies. *Id.* at 192.

29. "The chairmen of the board's key compensation committee (three Warner directors, two Time) and audit committee (3-3), were both to come from Warner." *Id.* at 198.

30. *Id.* at 27, 174.

31. *Paramount Communications*, 571 A.2d at 1147.

32. *Id.* at 1152.

33. JAMES L. BAUGHMAN, HENRY R. LUCE AND THE RISE OF THE AMERICAN NEWS MEDIA 173 (1987).

Bidders & Targets: Mergers and Acquisitions in the U.S. By Leo Herzel and Richard W. Shepro. Basil Blackwell, 1990. Pp. x, 523.

David T. Brown*

Bidders & Targets: Mergers and Acquisitions in the U.S. is an exhaustive treatment of both the law and economics of takeovers. Its self-contained text and technical appendixes make it accessible to both beginners and experts. Additionally, the book is extremely current. For example, it contains a lengthy discussion of the Time-Warner agreement which was not completed until late 1989.

The authors, who have worked extensively as legal counsel in takeover contests, divide the book into three parts. Part one describes the current takeover market and how it evolved into its present state, beginning by explaining the legal rights and the economic incentives of directors, shareholders and CEO's. The authors argue that the key role of the directors of the target company is to increase the bargaining power of shareholders. Disorganized shareholders cannot effectively bargain with the bidder especially when faced with a coercive two-tier bid. The authors also discuss the role of anti-takeover charter amendments in overcoming the problems which diffuse shareholders face. Unfortunately, managers may claim to fight an offer because it is inadequate when they actually are attempting to save their own jobs. Traditionally, there has been little legal recourse against target directors. However, in *Smith v. Van Gorkom*,¹ referred to as the "Trans Union" case, the Delaware courts took large steps toward weakening the business judgment rule. The authors provide a lengthy discussion of the implications of this landmark case.

The authors argue in favor of increased scrutiny by institutional investors, and rules which are designed to give shareholders more power over directors. For example, they argue that shareholders of acquiring firms should be required to approve cash and stock offers. Currently, exchange rules only require shareholder approval for stock offers.

Part one continues with a discussion of state and federal takeover laws providing a thoughtful discussion of the (1) legislative intent of

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1. 488 A.2d 858 (Del. 1985).

the laws, (2) political forces that shape the evolving legal climate and (3) potential impact the Reagan appointees to the Supreme Court may have on future litigation over state anti-takeover laws. The authors argue that state takeover statutes tip the legal playing field in favor of targets. Since the takeover boom in the 1960s, many states have acted to protect firms incorporated in their state from hostile takeovers. The authors state that the "first generation" anti-takeover statutes typically required state approval of hostile acquisitions. These laws were held unconstitutional in *Edgar v. Mite Corp.*,² on the grounds that they unreasonably interfered with federal tender offer regulation and interstate commerce.

The resulting "second generation" statutes have mandated strict modifications of the required majorities for approval of acquisitions of companies in particular states. These laws were recently upheld in *CTS v. Dynamics Corp. of America*.³ While these laws clearly violate the spirit of Federal laws, in particular the Williams Act⁴ which governs tender offers, the authors argue that the second generation statutes are quite safe given the unwillingness of the current Supreme Court to interfere with state takeover legislation.

The authors see very little recent change in federal corporate takeover law. The only recent change in the role of the federal government has been a realization of the antitrust standards for approval of horizontal mergers. Part one ends with a complete discussion of various strategies available in corporate control battles including lock-ups, poison pills, squeeze-outs and leveraged buyouts.

The first part of the book is outstanding. The authors distill many complex economic arguments about the incentives of shareholders and managers into an understandable form. Further, they provide a complete discussion of the scientific evidence on these issues gathered by economists. The authors highlight their arguments by a discussion of the applicable law, theoretical economics, scientific evidence and examples from specific transactions.

Part two of the book is titled "Advice for Bidders and Targets." In the introduction, the authors describe this section as "strategic and advisory." The strategies discussed are well developed extensions of the concepts discussed in part one. As a result, this section is both advisory to executives and valuable to other readers. The questions

2. 457 U.S. 624 (1982).

3. 481 U.S. 69 (1987).

4. The Securities Exchange Act of 1934, §§ 13(d)(1) & 14(d)(1, 5-7), (e) as amended 15 U.S.C. §§ 78m(d)(1), 78n(d)(1, 5-7), (e).

that are discussed in this section include "friendly deals, what good is a contract?, should I make a hostile bid?," and "how should we defend against a hostile bid?"

The authors identify the key issue for takeover bidders as avoiding competition from other bidders. Competitive auctions typically result in the bidder paying an inflated price for the target, and thus, the key to avoiding competition is to move quickly when making a bid. Further, the authors point out that the winning bidder in a competitive contest should be aware of the "winner's curse," that is the tendency for the highest bidder in any auction to pay more than the object is really worth. In the authors words, "[a] successful bidder may be a loser."⁵

Part three includes a detailed discussion of the Time-Warner deal. This transaction is rich enough to demonstrate many of the concepts developed earlier in the book. The authors incorporate nearly all of the documents filed during this acquisition, thus giving the reader a good feel for many of the legal technicalities that are critical to a successful outcome.

Finally, the book contains a one hundred page appendix that details the federal securities laws and Delaware and New York state laws that pertain to acquisitions.

5. LEO HERZEL & RICHARD W. SHEPRO, *BIDDERS AND TARGETS: MERGERS AND ACQUISITIONS IN THE U.S.* 119 (1990).