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Entrapped in the Labyrinth: An Interview with Harvey Silverglate

As the book was taking shape, I recognized the broader implications of what I was writing. The federal statutes and regulations (on which the prosecutions discussed in the book were predicated) were impossibly vague and formless. Quite ordinary (and in some cases extraordinary) citizens, who simply went about their daily business in good faith, were put on trial for crimes they couldn't understand. This particular degradation of our federal justice system (and I'm intentionally referring to the federal rather than the varying state criminal justice systems that by and large do not have this problem) started to become acute sometime in the mid-1980s.

Longtime lawyer and writer Harvey Silverglate is the author of Three Felonies a Day: How the Feds Target the Innocent. Previously, he co-authored, The Shadow University: The Betrayal of Liberty on America's Campuses which is one of the most important works ever written concerning political correctness. He is the co-founder of the Foundation for Individual Rights in Education (FIRE) and also an adjunct scholar at the Cato Institute. Over the course of his career, Mr. Silverglate has had extensive experience both as a practicing attorney, a commentator on political and social issues, and as an occasional teacher.

BC: Mr. Silverglate, congratulations on the release of your new book, *Three Felonies a Day: How the Feds Target the Innocent*. First off, what's the biggest change in our legal system over the past sixty years?

Harvey Silverglate: Thank you for your congratulations. I must say that writing a book, while practicing law, was not an easy task. This book took me over four years to complete -- two years longer than I'd initially allocated. At first, I focused on the fact that the federal justice system was ensnaring an unduly large number of citizens whom I considered innocent of any crime properly defined. That is to say, they committed the acts of which they were accused, but for the life of me I could not figure out how and why such acts were deemed criminal.

As the book was taking shape, I recognized the broader implications of what I was writing. The federal statutes and regulations on which the prosecutions discussed in the book were predicated were impossibly vague and formless. Quite ordinary (and in some cases extraordinary) citizens, who simply went about their daily business in good faith, were put on trial for crimes they couldn't understand. This particular degradation of our federal justice system -- and I'm intentionally referring to the federal rather than the varying state criminal justice systems that by and large do not have this problem -- started to become acute sometime in the mid-1980s.

In my research, however, I've found that the trend actually began with the 1952 prosecution of Edward Morissette, a Supreme Court case that has since been studied by generations of law students but, alas, largely ignored by lawmakers and courts. Morissette, a scrap metal dealer, was charged with stealing government property after he uncovered spent bomb casings in rural Michigan, which he believed to be abandoned, and sold them at a junk market. When the case reached the Supreme Court, Justice Robert Jackson, writing for the court, reversed the conviction and emphasized the lack of Morissette's criminal intent.

Morissette v. United States has remained an example of the Anglo-American criminal justice system's moral decision to prosecute only those whose unlawful deed is accompanied by the intention to commit an unlawful act. As my book shows, Morissette was a short-lived victory for those who believed that any criminal justice system worth its salt has to focus efforts on real criminals rather than functioning as a trap for the unwary. Justice Jackson's opinion, in my view, was an attempt to inject, or re-inject, certain common law principles into the federal criminal justice system. In the long run, that effort has largely failed.

BC: Then has the common law tradition been abandoned? Does innocence of intention matter anymore?

Harvey Silverglate: The common law tradition has been essentially abandoned in federal law. Indeed, for a very long time the Supreme Court has ruled that federal law is entirely the product of congressional statutes and administrative regulations, rather than of common law evolution. This presumably was -- in part -- an effort to assure clarity. The law was to mean what Congress wrote and intended, rather than follow the long-standing dictums of common law tradition and interpretation. In theory, this should have produced a body of law with more clarity than the typical state law code.

In practice, despite Morissette's admirable but ultimately failed effort to turn the situation around common law notions were abandoned in the federal criminal justice system and clarity suffered, not to mention the moral content and purpose of the law. Now, people who have done things that most normal folks would not consider a crime, can be sentenced to decades-long stays in federal prison. In truth, any criminal justice system that abandons clarity of obligation and proof of criminal intent has abandoned its moral purpose and hence its legitimacy. And, as my book shows, our federal system of criminal justice has long since lost its legitimacy.

BC: Is vagueness of outmoded statues in particular the primary mechanism by which federal prosecutors vilify and then convict the innocent?

Harvey Silverglate: I have not done a quantitative study to determine what percentage of federal convicts are, by any reasonable definition, innocent of crime. I have not done a study of how many federal statutes are outmoded, that is to say, adopt terms, definitions, and objects that have been left in the dustbin of history. I have, through my owns cases and extensive research, found that an increasing number of federal criminal prosecutions -- with a high percentage of them resulting in pleas of guilty and a few resulting in convictions and affirmance on appeal -- are based upon the kinds of vague statutes that are central to my thesis.

And, caught in the crosshairs of federal prosecutors, most defendants choose a guilty plea and a lenient sentence over fighting the charges in court, even if they are confident of their innocence. In that sense, it does not really matter whether these statutes are the *primary* mechanism for vilifying and convicting the innocent; what really matters is that by the high-profile use of these tactics, federal prosecutors get the vast majority of members of civil society to recognize that the Department of Justice can ruin their lives almost at will, thereby chilling citizens to inaction or compliance with prosecutorial whim. This, in my view, is the definition of tyranny.

BC: How politicized are our federal prosecutors? Do you think that the Obama Administration's attempt to go after the lawyers who consulted on waterboarding is an example of the criminalization of policy differences?

Harvey Silverglate: I think that by and large the phenomenon about which I've written in Three Felonies a Day is not a partisan political development; rather, it is about the tyranny of a department within the executive branch of the federal government. It is a challenge to the notion of checks and balances (in part because to some extent the DOJ terrorizes members of the Congress itself!), and also to the obligation of the government to accord citizens due process of law.

Scores of books and articles have discussed executive power in terms of increased Presidential authority in foreign policy, but rarely is the Justice Department's unchecked expansion included. In reality, these developments are two sides of the same coin, and the latter is arguably more pernicious. That's because this tyranny threatens not only private citizens, but also members of the Congress, as well as state and local politicians (many of whom are of the same party as the President and the Attorney General).

Indeed, the phenomenon has grown under each and every administration since the mid-1980 Republican and Democratic, but what tends to garner more headlines is the periodic politicization of the justice system for partisan ends. To be frank, seeing this trend as a *political* problem is counter-productive to changing the dangerous DOJ culture. This kind of outlook leads one side of the aisle to relax its oversight as administrations change.

I've seen, recently, some of the fiercest critics of the Bush Justice Department blunt their criticism even before Attorney General Eric Holder took the reins. And when it turns into partisan finger-pointing, no side has credibility to force substantial change. That's why my book points to unfair prosecutions of the left, right, and everywhere in between. It affects all of civil society. The problem is an out-of-control prosecutorial arm of the executive branch; it is a structural problem, and a problem of culture, it seems to me.

With regard to the specific issue of federal prosecutors talking about indicting Bush Administration lawyers who issued written opinions on the legality of waterboarding and other enhanced interrogation techniques (or torture, depending upon one's point of view), I have already written widely of my opposition to the attempt to prosecute such people and such activities under then-existing federal statutes (see, for example, *On torture outrage, let's take a step back*, Boston Globe, April 23, 2009).

For one thing, those who followed what they viewed as the legitimate advice of legal counsel (the CIA agents), should not be prosecuted if they followed such advice, even if erroneous, in good faith. For another, it is difficult to envision fair prosecutions of the lawyers who gave the advice, since they would defend -- probably successfully -- by pointing out the unprecedented attack on a civilian population within the nation. Context does, after all, matter.

With regard to the lawyers, this would be a prime example, discussed in my book, of a situation where criminal prosecutions are inappropriate, but where civil proceedings might be well-based and fair. In my view, the lawyers who wrote legal opinions sanctioning some of the more extreme methods of enhanced interrogation might well have written those opinions in bad faith, more for the purpose of giving federal agentscover and a defense in the preconceived event of future legal trouble than for the purpose of honestly clarifying the law.

Thus, while a criminal prosecution of the lawyers might reasonably be seen as a politicized prosecutorial crusade, it might well be that the lawyers' professionalism and good faith could be tested in some civil or administrative proceedings -- for example, in bar disciplinary tribunals. That's an important distinction to make. Federal criminal law is applied in cases where civil proceedings would be much more appropriate, specifically in instances where there was an obvious or at least arguable lack of criminal intent.

BC: Has the constant hyping of social issues by the press (such as with Oxybabies, swine flu, crack cocaine, etc.) caused prosecutors to be more aggressive in targeting the innocent? If so, is it an attempt on their part to be seen as "doing something" about alleged problems? I'm thinking of the pathetic situation you describe with Dr. Hurwitz here.

Harvey Silverglate: The press, which has in so many ways been a watchdog looking out for government abuse of authority, has almost completely caved-in with regard to monitoring whole areas of federal prosecutions. A perfect example is the

infamous perp-walk, in which the accused are arrested and led away in handcuffs, and images of their worst moment are splashed across broadsheets the following day. Well, there's a reason that mobs of photographers are on the scene: the feds tipped them off! And, of course, newspapers fly off the racks, and the sometimes innocent-defendant has already been tried and convicted in the court of public opinion. The media and the feds work together. That's not how the Founders envisioned the so-called Fourth Estate.

Surely the prosecuted physicians engaged in the practice of pain relief medicine have been primary victims of this unholy alliance of reporters and prosecutors. Tantalizing reports of addiction epidemics and scandals are all-too-irresistible for reporters and journalists, and their objectivity is sometimes obscured by the sensational.

Media people can be counted upon to be more aggressive in opposing the Department of Justice when it goes after reporters, but quite lax when prosecutors target other members of civil society, including physicians. So, to return to your question, I'm not sure if there's a linear causal relationship between the media hype of social issues and the intensity of prosecutorial aggression. But it's clear, in many cases, that the feds are given an unfair free pass from press scrutiny.

BC: You address the case of former Boston Mayor Kevin White and the method by which an ambitious prosecutor tried to destroy him. Is it more an issue of political connections and political uniformity (in the case of a city like Chicago) that causes some city governments to be more corrupt than others?

Harvey Silverglate: There is no question that municipal corruption is a big problem in many cities and towns around the country. While the United States ranks fairly low in the world on the political corruption scale, there is still far more corruption than citizens would like. Boston has had its fair share of such corruption, as have Chicago and other major cities. History and culture play some role, of course, as do state and local laws.

My experience tells me that long-entrenched power groups make corruption more likely. For example, one-party rule in the legislatures of Illinois and Massachusetts, and in cities like Chicago and Boston, make for more corruption-friendly environments. It is the responsibility of residents of these localities to insist upon real reform. Under normal circumstances, federal prosecutors should not control state and local politics. Given the long string of successful federal prosecutions in Chicago and Boston, and the seeming persistence of corruption in those cities, it should be obvious that these federal juggernauts have done more to corrupt the federal criminal justice system than to clean up those cities and states.

Still, even if federal prosecutions actually resulted in a change in political culture (which I don't see happening) the corruption in the federal system of criminal justice, allowing prosecutors to pick off any local or state politician of their choice by the use of statutes that no one can understand, is highly dangerous for any society that claims to value liberty. And, I should add, federal prosecutions of state and local politicians pose the real danger, seen time and time again, of confusing real crimes with quirks in local political culture that pass muster under local and municipal laws and standards. Why should the feds put a pol in prison for doing something deemed acceptable in his or her locality?

BC: How was the general public deceived in the case of Michael Milken?

Harvey Silverglate: The prosecutors, along with a very compliant and equally ignorant news media, labeled Milken the disciple of the new greed, a master criminal whose deals were riddled with fraud. No one at the time (with the exception of just a couple of columnists and academics) bothered to closely analyze Milken's deals and come up with the conclusionâ€"absolutely clear in retrospectâ€"that he was a visionary and not a swindler.

Indeed, the irony about the Milken saga is that Milken posed a challenge to the economic powers-that-be (the bankers and the heads of large corporations) by enabling young upstart entrepreneurs to obtain financing from non-traditional sources. Milken's coterie of investors thus challenged the established banking system, while the start-up companies' finances challenged the entrenched but self-satisfied and often ossified industry giants.

For example, without Milken there would not have been a Cable News Network to challenge the monopoly enjoyed by the then-three major broadcast networks. Milken found financing for such genius entrepreneurs as Ted Turner whose Cable News Network challenged broadcast news, and he financed the first serious challenge to the telecommunications monopoly of AT&T and the â€œbaby bells.â€ True believers in capitalism, as well as vehement critics of capitalism, should have seen Michael Milken as their hero rather than the king of fraud as he was depicted by the Department of Justice and their news media toadies.

Milken, in the end, was pressured by atrocious tactics (detailed in *Three Felonies a Day*) to give up the fight to defend his demonstrable innocence and to plead guilty to "crimes" that were, in fact, not crimes by any reasonable definition. Unfortunately, his case, and his decision to acquiesce, is hardly unique to thewhite-collar realm, nor, indeed, to any area of federal prosecutorial involvement.

BC: How "black and white" was the Enron case?

Harvey Silverglate: Given the vague nature of so many securities and financial reporting statutes and regulations, it was alarmingly easy for federal prosecutors to twist some lawful corporate action into a federal crime. The heart and soul of the federal assault on Enron (that it was operated as a fraud by virtue of the non-reporting, to the investing public, of the true financial condition of the enterprise) was, in fact, the true fraud on the public.

You would have thought that the financial reporting press, in particular, would have picked apart the federal charges against Enron and its top echelon officers. Instead, the Fourth Estate became the feds' cheering gallery. Someday I think a new history will be written of the Enron affair, and I suspect that many reputations will be resurrected, and many others

destroyed. While I think that Enron was probably an atrociously run company, I have trouble seeing the real criminality of many of the indictments brought.

BC: What impact has the Patriot Act had on the personal freedoms of your average American?

Harvey Silverglate: The Patriot Act was probably one of the least read pieces of legislation enacted in the history of Congress. It was long and complex, and was reportedly read by no more than a couple of members of Congress before being overwhelmingly enacted. It is an object lesson that we should not forget: When there is a high-profile national disaster, Congress should move deliberately rather than in panic, because otherwise long-term legislative disaster will long outlive the problem that ill-advised legislation was meant to remedy.

After the terrorist attacks of September 11, 2001, federal law enforcement and national security officials quickly cobbled together a collection of a long-standing wish-list that had been rejected by past Congresses, both Republican and Democratic. These proposals were kept in the top-drawer of the federal law enforcement and intelligence agencies for the opportunity to move them forward, and 9/11 provided that opportunity.

As a result, citizen privacy was compromised, and the collection of impossibly vague federal statutes and regulations grew substantially. Endlessly malleable statutes providing "material assistance" to terrorists being just one small example will remain on the books for a very long time. The Patriot Act was made possible by the long history of Congress enacting vague statutes that no one really understood but that no one was willing to admit they did not understand.

BC: Lastly, your book is quite compelling, but would you agree that many of the injustices you cite are simply a product of our federal government being too large? There appear to be no checks and balances on its power anymore.

Harvey Silverglate: It is absolutely true that the size of the federal government, and its increased intervention in all sectors of American life, have vastly augmented the number of instances in which innocent citizens find themselves indicted, convicted, and imprisoned for engaging in conduct that ordinary law-abiding citizens would deem to be lawful.

In the case of Morissette v. United States, discussed in the book and earlier in this interview, Morissette was indicted for stealing from a federal property used for military target practice. The immediate problem in the case was the wrong-headed application of federal larceny statutes to the case of a citizen who had no way of knowing that the materials he was gathering were not just abandoned junk. But it is also true that many more such cases could be brought today because the feds not only own vastly more properties, but they fund infinitely more programs and undertakings.

And so there is vastly more federal jurisdiction -- opportunities to apply the vague federal statutes that increasingly rob the criminal justice system of its moral underpinnings. When the scales of power are so heavily weighted to one side, any notion of checks-and-balances becomes a joke. It will require a coordinated effort from the citizenry to rise up against the federal prosecutorial juggernaut; I'm hoping my book will be the catalyst. The thing that gives me great hope that this uprising will come to pass is that all sectors of civil society today find themselves in the same boat. When that occurs, concerted citizen action is a real possibility.

BC: Thanks so much for your time, Mr. Silverglate.

Bernard Chapin wrote Women: Theory and Practice and Escape from Gangsta Island, along with a series of videos called Chapin's Inferno. You can contact him at veritaseducation@gmail.com.

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