



Episode 869: Three Felonies a Day: How the Feds Target the Innocent

Guest: Harvey Silverglate

WOODS: All right, this has got to be one of the most compelling titles ever. If you thought of this, then you're an absolute marketing genius. *Three Felonies a Day*? That's just a beautiful title. I have some specific cases I want to discuss with you, but before doing that, why don't you take a minute to explain what's the overall thesis here of the book? What's gone wrong with the legal system and with statutory language and everything else?

SILVERGLATE: Well, first of all, I have to say with all due modesty, I did think of the title. And it sort of came naturally, because when I decided to do the book, the way it came into my mind is I had been practicing criminal defense law since I graduated law school in 1967. And I began seeing — really in the mid '80s I noticed the phenomenon, that in my federal cases — and I did a lot of federal criminal practice — I started to get a number of clients who were indicted for doing things — I would have them come into the office, and I would say, What did you do? I always made it a point to find out what my clients did. I always insisted they tell me truthfully, because otherwise I couldn't effectively defend them. And more and more clients were talking about what they did in terms of they couldn't really understand what they did that was criminal. And I would look at the statute, and more and more I would have to agree with them.

And what started to occur to me was that some of these extraordinarily vague, kind of undefined, limitless federal statutes were so vague that they did not give the average citizen notice as to what it was that was against the law that they should avoid doing. Remember, one of the aims of the criminal law is to clearly establish what one may not do without crossing a line. When the law doesn't perform that function, it becomes a trap for the unwary rather than a good-faith, legitimate guide to the limits of lawful versus unlawful conduct.

And as I proceeded to have a more and more active federal criminal defense practice, this problem became more and more of a worry to me, not only for my clients who were facing years and years in prison for doing things that neither I nor the client would think was illegal, but also I thought just socially this was a very dangerous tool for tyranny, allowing the government to jump in and go after any citizen they wanted. All you had to do was sit down and watch an ordinary citizen go through a full day, and the way I hypothesized it, I could probably pick out three federal felonies that day that the person committed. And that's really how the title came about.

WOODS: Well, the book is — of course it's eye opening, but it's very depressing at parts. There are people whose lives are completely destroyed. Their family life is destroyed; their marriage is in ruins; their finances are gone; their reputation is destroyed totally unjustly. And of course people are inclined to think, I think in a lot of cases, Well, if the person is accused of something, he's probably guilty. And they won't look into the details. Like for example, they think Martha Stewart went to jail for insider trading. They don't even know the details of half the cases.

I want to start with the case of doctors and pain management, simply because it hits close to home. Let's just say I have somebody very close in my family who deals with chronic pain and who observes this close up. The doctors are terrified about giving her the proper regimen. She certainly can't say, I've been called out of town unexpectedly and I still need pain management. I won't be back for my appointment; could you call something in for me at the local pharmacy? They'd rather die a hundred deaths than do that for her. So tell me about that particular thing.

SILVERGLATE: Well, one of the problems — I actually, when I was in college I was thinking of being a pre-med and going to medical school, and I decided to go into law instead. I have to say that I'm very thankful I made that decision. I would not want to be a doctor today, given the tyranny that the federal government exercises over the medical profession. Now, I should say that they also exercise a certain amount of tyranny over the legal profession, but at least as a lawyer I'm aware of this and I can take steps to protect myself proactively.

Because as a doctor, doctors go through their practice either ignorant of the power that the feds are exercising over them, in which case an awful lot of them get indicted, or terrified at what the government is doing. And what they do is they practice medicine defensively in a less effective matter, less effective for their patients. And the prescription of painkillers is a particularly dangerous undertaking for physicians, and what they do is err, if I may put it this crassly, on the side of having the patient suffer pain rather than having the federal bureaucrats enraged against them.

WOODS: And meanwhile, of course, people's quality of life, as I can testify personally, suffers very dramatically. And you tell actual stories of real people, actual doctors who have testimonials from other doctors saying there's nothing wrong with what this person did. It's fine. And this person knows a little bit more about this subject than some schmuck from the DEA, and yet they're overriding the doctors.

SILVERGLATE: Now, you just said something very interesting: "They have testimonials from other doctors." When a doctor is charged criminally and charged with being a drug dealer, essentially, because he prescribed for his very much in-pain patients more opioids than the federal bureaucrats thought was "appropriate" for the good faith practice of medicine, those doctors when they go to trial, if they go to trial rather than plead guilty, those doctors need experts to testify on their behalf, experts to say, No, the appropriate treatment was administered in this case; the amount of opioids prescribed was within reason in the field of pain management medicine. They find an ever-decreasing number of doctors willing to get out there and testify for them because doctors don't like to take on the Department of Justice.

And so the Department of Justice not only de facto sets the standard for what is a good-faith medical practice for pain management, but they also effectively set the limit for how many doctors are going to be willing to testify on behalf of other doctors. So it is a total tyranny, and the fact is the prosecutors should just get out of this business. Let medical associations control the practice of medicine and set proper standards, and if doctors don't follow these standards, let these medical boards take their licenses away. That's how medicine should be practiced and how it should be administered.

WOODS: And I guess the idea is that they're concerned that some doctors are just willy-nilly giving out drugs and that this is feeding into people's addictions and making them worse off. But whether that's true or not, obviously shackling the doctor and making it harder for him to help patients who have real pain management problems, that hurts those people. So there's no utopian solution where nobody gets hurt. All I know is I have somebody very close to me who suffers very badly and who deals with all kinds of roadblocks because of all of the fear and terror that's been put in the hearts of these doctors.

SILVERGLATE: Could I just disagree with one thing you said?

WOODS: Oh, please do.

SILVERGLATE: "There's no utopian solution." Well, I don't know what you mean by utopian, but I can tell you there is a very good practical solution to this, and I mentioned it earlier: get the Department of Justice out of the business of determining what is and is not the good faith practice of medicine and turn it over to state medical societies. That is as close to a utopian solution to this as I think there is.

WOODS: Well, no argument from me there. I want to ask you, are you a lifelong New Yorker?

SILVERGLATE: I was born and raised in Brooklyn. In a fit of fair judgment, my family moved to New Jersey when I was a teenager, so I did spend a few unhappy years in New Jersey, but I never lost my Brooklyn accent and I never lost my Brooklyn loyalty. So thus I am a New Yorker, more specifically a Brooklynite.

WOODS: All right, well, I think you're going to see where I'm going with this, because I am curious to know — a lot of times when you ask people their opinion of Rudy Giuliani, it boils down to, Well, he cleaned up the city, or, He was a tough authoritarian. And they're always thinking about that. They never think that you're asking about his career as a prosecutor and as one who obviously had political ambitions. And I wonder what you would say about him in that capacity.

SILVERGLATE: Well, Giuliani was as bad an offender as a lot of the rest of the Department of Justice. He built his career on prosecuting people for activities that most of us lawyers, anyway, would say did not constitute a crime. So Giuliani was a pretty bad actor in that regard. I know that there are a lot of people who think he's a hero for "cleaning up New York," but you do not become a hero in my book — speaking as a civil libertarian and as a criminal defense lawyer, you don't become a hero by

going after people on the basis of vague statutes where they had no idea that what they were doing could be seen as a federal crime.

WOODS: Well, let's talk, if we may, about the Michael Milken case, because I grew up in the 1980s; I didn't know any of the details of this. I had just been told he was a greedy guy and he got what was coming to him, which is exactly how of course they wanted people to think about the situation. Now I read your book — which, I knew there was something screwy about that, but I never found out the real truth. I knew something was wrong with this and I had heard people say he was railroaded, he hadn't actually done anything wrong, and I didn't know if that was special pleading or not. But to hear that Alan Dershowitz went through the evidence and said, Yeah, he actually pleaded guilty to six non-crimes — would you mind telling people the story? I have a lot of young listeners who might not even know the Michael Milken story.

SILVERGLATE: Okay, well, first of all, it actually starts a little bit for this six non-crimes. Milken was indicted for a whole array of activities while he ran the Drexel Burnham Lambert trading desk. And Milken was indicted for a gigantic insider trading conspiracy claiming that he had gotten insider information and that he made his trades and investments on the basis of that. And I should say that Milken was widely regarded within the industry as an investment genius, and looking at his case very closely — and by the way, I worked on that with Alan Dershowitz, so I speak about the Milken case as a person who's in the first-person, informed observer and participant.

And Milken at a point when he was not represented by Dershowitz and me — we came in after pleaded guilty and was sentenced to ten years. So we come in and we look at the original indictment — which the government, by the way, dismissed in the plea deal, which I'll get to in a minute. We looked at the original indictment and could not see that there was a crime committed at all. In the plea bargain, the government dismissed that huge conspiracy indictment and charged him instead with six deals he was involved in where the government claimed that they were all fraudulent deals. And we looked at each one of them and we got experts to walk us through them, and we concluded that he had pleaded guilty to six non-crimes, that none of the things that he pleaded to and that the judge accepted his plea and sentenced him to ten years — she obviously — this was her first case, by the way, Judge Kimba Wood. She obviously didn't understand what she was doing. She accepted the prosecutors' assurances that these were crimes, and she accepted Milken's plea.

Now, why did Milken plead guilty? Well, the government initially when it indicted Milken, Michael Milken, it indicted his brother, Lowell Milken. Lowell worked at the trading desk for his brother, Michael, his older brother. This was the kid brother who got a job because he knew the boss, his older brother. And Lowell had not even been involved in these deals. So holding aside for whether it was a crime or not, this was a totally innocent victim. Why did the government indict the older brother? Well, we learned as we were told the story that the deal was that if Michael would plead guilty, the government would dismiss the charges against Lowell. To put this in terms that we would all understand, the government took Lowell hostage. Hostage. And they were going to release the hostage younger brother if the older brother took responsibility and pleaded guilty. Being a very close family man and a very decent human being, Michael Milken pleaded guilty to six non-crimes in order to get his brother, Lowell, freed.

When Dershowitz and I came in, Michael was already in prison, and we were asked to look at the charges he pleaded to. Dershowitz and I decided it was very clear that none of them were criminal, and we told Michael that he could if he wanted to move to vacate his plea of guilty. However, at that point, his brother had been freed, he decided that instead what he would do was ask the judge for a reduction of sentence by explaining to her that these were not crimes.

Now, we helped formulate the motion for reduction of sentence, and by then more and more people were starting to look at this case and say, There's really something wrong here. We can't figure out what the crime is. *The Wall Street Journal*, a reporter, a columnist named L. Gordon Crovitz who still writes for *The Journal*, he analyzed a few of these. He was one of the early journalists who bucked the trend in the Fourth Estate, and he said, I don't see any crime here. A professor from the University of Chicago wrote a book, a whole book about it. And the judge started to get the idea that she had been snookered by the prosecutors, without admitting she was snookered. She claimed Milken had been very good since he was serving his sentence, he was cooperative; she was going to reduce him from ten to two years, and he got out very shortly thereafter.

So the Milken case is a — Now, there's one ironic little footnote to this. One of the people who was involved with Milken in one of these deals that resulted in one of the indicted offenses, he went to trial in the U.S. district court in Manhattan. And the judge, after hearing the government's evidence, the judge threw out the charge and declared him not guilty without even sending it to the jury. The judge said the reason he was doing it was there was no crime here. This was one of the felony charges that Michael Milken was serving, at the time, a ten-year sentence on, and the judge in Manhattan says, Hey, what's this all about? There's no crime here. And Milken's co-defendant gets his charges broomed out.

So there's a lot of evidence here that there was something really rotten about the Milken prosecution: the hostage-taking, the charges to which he had pleaded guilty under coercion, which actually did not constitute a crime. So I've written about that in my book.

WOODS: How did it come about, then, if there really was nothing to it, if he hadn't actually done anything? And I realize I sound very naive. Where would the charges have come from to start with? What was the motivation? Was there — because surely it wasn't a dispassionate search for the truth.

SILVERGLATE: Well, it's a really indispasionate search for the truth when you're talking about federal prosecutors. What happened was that Milken was one of the stars in the investment world, had earned huge amounts of money, was worth well north of a million dollars by the time he got the attention of federal prosecutors. And he was obviously seen as a very good vehicle for federal prosecutors to make their name, get a few notches on their belt. And then in the traditional fashion to how these things go, they would leave the Department of Justice after a few years, and they would get multimillion-dollar partnerships in white-shoe Wall Street law firms. And they did. And this goes on even today. These are career-building exercises. There are a few true believers who stay and spend their whole lives in the Department of Justice who I think probably by now actually believe that they're going after criminals. But the

majority, I think, are really much more cynical career-builders than they are good-faith prosecutors.

WOODS: That's really astonishing. Now, you've —

SILVERGLATE: It was astonishing to me as I started to realize it. It was very distressing. I had clients going to prison — sometimes we won, but sometimes we didn't. I had clients going to prison whom I considered to be wholly innocent — not wholly innocent because, you know, they were fingered by an eyewitness for shooting somebody, but that they engaged in a transaction that they agreed that they engaged in that neither the client nor I thought was a crime.

WOODS: Yeah, I remember early on in your book, you're pointing out that this was the change that you noticed over the course of your career, that, all right, maybe somebody was smoking pot and maybe I don't like that law, but at least the law was clear and the guy did it and everybody understands it. It's this whole bizarre world of people doing things that no reasonable person would think they were committing a crime at the time. Like the guy gathering the scrap metal on that property that turned out to be owned by the U.S. government. And it's obviously unusable scrap metal, like old artillery shells or something, and they wanted to put him away. I mean, just crazy stories. Now, you've organized these kinds of —

SILVERGLATE: If I can interrupt you for a moment, that was an early, early case — you're talking about a case in the book —

WOODS: That was back in the '50s, right.

SILVERGLATE: Yeah, Morissette, back in the '40s, actually, the Morissette case. And in that case, in an opinion written by Justice Robert Jackson, the court said, Uh uh, you can't do this. You did not give this guy adequate, clear notice that what he was doing was a federal crime. And the Supreme Court threw out the conviction. One would have thought that that would have been adequate to deter the Department of Justice from going forward with this program of putting people in prison on the basis of vague statutes and non-criminal conduct; however, that line of reasoning actually did not prevail in the long run. The Morissette case became an interesting essay on the role of the importance of criminal intent in enforcing the criminal law, but it was no more than an essay because the reality starting in the mid 1980s was that this kind of prosecutorial tactic came back with a vengeance and it prevails today.

WOODS: Well, let's close on this note: given that we're dealing with a system that is systemically corrupt, then, that it yields outcomes like this, how do you come up with a solution that doesn't involve pathetically demanding that the same people who are oppressing us reform themselves when they have no interest in doing that? Is there anything that we can do or lawyers can do or judges can do to try to buck the system?

SILVERGLATE: Well, there's one obvious thing, and that is — if Congress would enact what is called in Latin *mens rea* legislation, it would go a long way toward preventing these kinds of prosecution. *Mens rea* is the Latin term for criminal intent, and there should be a very clear requirement that in all federal criminal statutes, in order to be

convicted of a crime, it has to be proven that, number one, you intended to commit the act, and that number two, you knew that the act was in violation of the law, and number three, you knowingly, willfully, intentionally violated what we lawyers call a known legal duty. In other words, you could not have these three felonies-type prosecutions in a system where there was a general law enacted — and by the way, *mens rea* legislation is one sentence. It's not very difficult. It would be applied to all federal felony prosecutions, and it would require clarity and knowledge of illegality. If we can get Congress to adopt that, then we will have cured the overwhelming number of these crazy, unjust prosecutions.

WOODS: Well, this being Episode 869, I'm going to be linking at TomWoods.com/869 to *Three Felonies a Day: How the Feds Target the Innocent*, by our guest, Harvey Silverglate. Your website is HarveySilverglate.com. I'll also link to that. It's a great book. It actually lives up to the title, which books don't always do. So tremendous, very important, very glad you did it, and very glad you were able to find time with us today. Thanks so much.

SILVERGLATE: Thank you very much.