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America's Injustice System **by George C. Leef**

[Three Felonies a Day: How the Feds Target the Innocent](#)

by Harvey A. Silverglate (Encounter Books, 2009); 325 pages.

It was probably inevitable that as the United States became an increasingly politicized nation, its justice system would be transformed from one that actually sought *justice* into one where prosecutors abuse their power to win cases and advance their careers. From district attorney to attorney general to governor is the path that many have in mind and pursue relentlessly. Abstract concerns about due process and fairness take a back seat to the piling up of convictions, especially if the public can be convinced that those convictions have saved them from some great horror, such as drug dealing or stock manipulation.

Here's how the prosecutor thinks: "If I win, I'll look good to the public and hardly anyone will know or care that I used vicious and underhanded tactics that ruined the lives of people who did little or nothing wrong. If I lose, the case will be quickly forgotten and I can aim at my next trophy. It's no skin off my nose that the defendant is put through legal and financial hell."

Now, that calculus isn't always accurate. The infamous Duke lacrosse case was one case (and the only one I'm aware of) where a prosecutor's "got to win at any cost" tactics boomeranged and cost him his law license. Nevertheless, rogue prosecutors abound and form the nucleus of Harvey Silverglate's book *Three Felonies a Day*. Silverglate is a veteran defense attorney who has been personally involved in a number of outrageous cases and writes knowledgeably about many others. He makes a strong argument that the U.S. legal system is so dysfunctional that almost any American is at risk of criminal prosecution even though he has no idea that he's committed any wrong at all, much less an offense that could win him a long prison sentence.

When he served as attorney general in Franklin Roosevelt's administration, Robert Jackson (later Justice Jackson) warned about the kind of prosecutor who tries to "pick people that he thinks he should get, then searches the law books to pin some offense on him." Regrettably, that kind of prosecutor is now common and poses a grave danger to all of us. Silverglate mentions a

little game that up-and-coming prosecutors like to play among themselves: they try to out-do one another in dreaming up ways in which they could convict famous people under preposterous legal theories (“Here’s how I’d get Mother Theresa”). They think it’s funny, but for Americans who are victimized by prosecutors who aren’t concerned about justice but only want to look “tough” to advance their careers, it’s no laughing matter.

Even when the persons targeted are exonerated — fortunately, the rogue prosecutors don’t always win — defendants are never made whole for the legal agony they’re put through. And with only very rare exceptions, they don’t get the satisfaction of seeing their tormentors face consequences for bad faith and abuse of the legal system. That did happen in the above-mentioned Duke case, where North Carolina prosecutor Mike Nifong was disbarred for having lied to the judge and having suppressed exculpatory evidence in his relentless crusade against the three lacrosse players. Unfortunately, it’s extremely rare for a prosecutor to suffer for his wrongdoing.

In a decent legal system, the people know the boundaries of lawful action. That is, no one would be arrested and tried without having done something with a guilty mind, in legal parlance, *mens rea*. It would not be possible to innocently commit a crime. Conversely, a bad legal system allows government officials to arrest and try people who have no inkling that they have done anything wrong. The Soviet Union, for example, had a notoriously bad legal system, with many vaguely written statutes that prosecutors could twist into a noose for anyone they wanted to get rid of. Silverglate drives home the point that we’re moving in that direction, writing,

The volume of federal crimes in recent decades has exploded well beyond the statute books and into the morass of the Code of Federal Regulations, handing federal prosecutors an additional trove of often vague and exceedingly complex and technical prohibitions, one degree removed from congressional authority, on which to hang their hapless targets.

The book is loaded with frightening cases that prove Silverglate’s point that America’s legal system is dangerous to innocent people. Rather than reviewing a bunch of case details, though, I’ll focus on the disturbing undercurrents that have given rise to prosecutors who act more like Genghis Khan than officers of the court who are sworn to do justice. One of those undercurrents is the increasing use of plea bargains. Prosecutors can bring such overwhelming power to bear against defendants, their assets and businesses (including the despicable tactic of freezing all the defendant’s liquid wealth, thus making it nearly impossible for him to afford the necessary legal assistance), and their families, that many simply give up and take the deal offered to them. Once that happens, the prosecutor declares victory, the “criminal” pays his fines or does

his jail time, and no one ever looks into the case again. Rarely does the public ever find out that a prosecutor employed modern-day equivalents of the rack to induce the defendant to plead guilty.

The stacked deck

Where is the press? That's a second aspect of this problem that Silverglate points to. For the most part, the press is content to write stories that parrot prosecution statements rather than doing any investigative reporting. An excellent example is the Duke case I mentioned earlier, where nearly all of the media bought the line that the defendant students were nasty, privileged white jocks who were clearly guilty of raping a poor, black "dancer." Only a heroic effort by the defense and a few bloggers who smelled a rat and worked frantically to expose the truth eventually caused cracks in the solidly pro-prosecution media phalanx. Even after the prosecution's case was exposed as fraudulent, some of the media still kept up its drumbeat that the students *must* be guilty.

Furthermore, law-enforcement officials often seduce the media by tipping reporters off to flashy, storm-trooper-style raids where the defendants will be arrested. Those make for "hot" stories and reporters don't want to risk alienating their prosecutor friends by writing critically about cases they bring.

Another problem Silverglate sees is that more and more, judges are being chosen from the ranks of prosecutors. Unfortunately, donning a black robe does not necessarily turn them into fair and objective jurists. The book recounts a number of instances where the judge exhibited flagrant bias against the defendant.

And there's also the unsettling fact that prosecutors can usually get away with extreme and very unseemly pressure to get witnesses to testify for them. In this regard, Silverglate recounts the distressing *Singleton* case decided 10 years ago by the Tenth Circuit Court of Appeals. A three-judge panel of that court had overturned a conviction in a money-laundering case on the ground that the prosecution violated the federal statute that prohibits the bribery of witnesses. As a result, Silverglate writes, "A panicked Department of Justice promptly sought further review by the full membership of the court, insisting that the statute must not be interpreted to mean what it says, lest the whole edifice of bought and coerced testimony collapse." The Tenth Circuit, sitting *en banc*, reversed the decision by presuming that Congress couldn't have meant to keep prosecutors from bribing and coercing witnesses — even though the statute was clearly an all-inclusive prohibition against witness tampering.

In short, the deck is terribly stacked in favor of prosecutors who are eager to win cases to advance their careers. If some innocent eggs must be broken for them to enjoy the omelet, so be it.

Securities and drugs

While the legal lightning could strike almost anyone, most of the cases Silverglate writes about fall into just a few areas, especially drugs and securities. Typical of the first are prosecutions against medical doctors for having prescribed pain-killing drugs to patients who were abusing or selling them. Should a doctor's life be ruined just because he wasn't omniscient enough to know when patients were deceiving him regarding their pain? Many prosecutors enthusiastically say "Yes!" and delight in nailing doctors they claim are "drug pushers." The careers of many doctors are now collateral damage in the nation's war on drugs.

Typical of the securities-related cases are the prosecutions of Michael Milken, who did prison time for six contrived offenses and agreed to a guilty plea only after prosecutors threatened to drag family members through their torture chamber, and Martha Stewart. In Martha Stewart's case, the home-fashion maven went to jail because she didn't tell the whole truth to investigators looking into stock sales she made after learning that a company insider was selling some of his shares. Stewart herself was not an insider in that company and was not guilty of the vague crime of "insider trading." But because that law is so ill-defined (and the government likes it that way, Silverglate observes), when prosecutors start investigating any securities dealing, people are apt to panic and invent stories meant to make themselves look clean. When Stewart told federal investigators a fib about the sales, she put her head into the noose. Again, vague laws are good for aggressive and unscrupulous prosecutors, but bad for the rest of us.

This book ought to cause you to lose sleep: *Have I said or done anything that could conceivably violate one of the millions of laws and regulations I must obey? Even if not, is there a prosecutor out there who would like to put me away and will invent some way to do so?*

Come to think of it, favorably reviewing *Three Felonies a Day* could be my own undoing! I'll just have to take my chances. Read the book for yourself and see if you don't agree that America is being transformed into a country where the law is more a sword used against the people than a shield to protect them.

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