The Decline and Fall of *Mens Rea*

BY HARVEY A. SILVERGLATE

A little over a half-century ago, an Army veteran named Joseph Edward Morissette settled in small-town Michigan to raise his family. To support his wife and young son, the 27-year-old worked as a fruit stand operator during the summer and as a trucker and scrap iron collector during the winter. His seemingly normal life came to a screeching halt, however, when he was charged with stealing from the U.S. government in 1952.

This article is derived from Harvey Silverglate's book, *Three Felonies a Day: How the Feds Target the Innocent* (Encounter Books 2009). It is printed with permission.

His case would ultimately wend its way through the federal court system and end up at the Supreme Court.

One time when Morissette was out hunting for deer with his brother-in-law, he came across a heap of spent bomb casings on a tract of uninhabited land located about half a mile from a traveled road and about six miles from the main highway. To Morissette, the casings appeared abandoned. There were no signs posted to the contrary, and, having sat in a pile through several harsh Michigan winters, the casings were showing signs of rust and decomposition. When Morissette failed to bag a deer to pay for his hunting trip, he collected some of the casings, crushed them with his tractor, and sold them as scrap metal. The casings yielded him $84.

The land turned out to be Oscoda Air Base, which the military used, according to the later Supreme Court opinion, as "a practice bombing range over which the Air Force dropped simulated bombs at ground targets."[1] A police officer, likely concerned about the large amount of bomb-shaped scrap metal heaped in the bed of Morissette's truck, asked him about the casings and referred the matter to an FBI agent. That, in turn, led to Morissette's being indicted in federal court on the charge that he "did unlawfully, willfully and knowingly steal and convert" property of the United States in violation of a statute that provided that "whoever embezzles, steals, purloins, or knowingly converts" government property is punishable by fine and imprisonment. Morissette was convicted and sentenced to two months in prison or a fine of $200.

Morissette hadn't realized that the casings were the government's property; he had taken them on the assumption that they were abandoned. In fact, he told the police officer who first questioned him that he did not think they were of any use or that anybody would care if he took them. Yet Morissette's "innocent intention" could not save him at trial. Despite the facts, the trial judge forbade Morissette's lawyer to argue to the jury that his client acted with an "innocent intention," because the judge concluded that Morissette's guilt under the statute was obvious and legally irrefutable: the bomb casings were on government property, and Morissette took them without permission. It was irrelevant that Morissette might have reasonably believed the casings were abandoned property, or even that this belief was based upon the government's own failure to post a

notice to the contrary. The question of whether Morissette *believed* he was not stealing, and of the government's complicity in giving him that impression, did not matter.

It is important to note that the judge's interpretation of the law departed from centuries of English common law tradition, an evolving body of judge-made interpretive law with ancient roots, based on human experience and common sense. The common law tradition, with rare and narrow exceptions, does not punish those, like Morissette, who act with innocent intent. This approach to criminal law contains a vital moral component — our society punishes only those who intentionally rather than inadvertently violate the law.[2]

When the U.S. Court of Appeals for the Sixth Circuit heard Morissette's appeal in 1951, it upheld his conviction by a 2-1 vote. By the judges' stated logic, it was a "technicality" that Morissette, who they acknowledged made "no effort at concealment," never intended to steal. When it comes to statutory crimes defined by Congress, the two-judge majority argued, intent or knowledge is irrelevant unless Congress appears to provide otherwise. Morissette wisely sought, and obtained, Supreme Court review.

In its unanimous opinion, the Supreme Court threw out the appellate court's decision and, with it, Morissette's conviction.[3] Justice Robert H. Jackson discussed the historical role of *intent* in criminal cases and "the ancient requirement of a culpable state of mind" that must accompany a culpable act. To convict one of a crime, there must be "an evil-meaning mind with an evil-doing hand" (for the technically minded, the traditional common law notion of the combination of the *actus reus* and the *mens rea*).

Based on these centuries-old requirements, Justice Jackson concluded that the courts could not presume from the silence of Congress that it did away with the criminal intent requirement, as this "would conflict with the overriding presumption of innocence with which the law endows the accused." Jackson noted that, had the jurors been allowed to consider Morissette's state of mind, "[t]hey might have concluded that the heaps of spent casings left in the hinterland to rust away presented an appearance of unwanted and abandoned junk," and from that they might "have refused to brand Morissette as a thief."

Jackson and his fellow justices obviously recognized the importance of their having decided to review the Morissette case, an undertaking extended to a small minority of litigants who seek review by the High Court. "This would have remained a profoundly insignificant case to all except its immediate parties," Jackson noted in the court's opinion, "had it not been so tried and submitted to the jury as to raise questions both fundamental and far-reaching in federal criminal law." And so this seemingly insignificant case had the potential to ensure the continued presence of fundamental principles of fairness and moral content in the federal criminal law. But how long would those positive developments last?

Numerous and Vague Federal Criminal Laws

A few years before he wrote *Morissette v. United States*, Robert H. Jackson was serving as Franklin D. Roosevelt's new attorney general. On April 1, 1940, Jackson assembled his cadre of chief federal prosecutors in Washington.[4] He wanted to speak to them about a matter of grave concern — and it wasn't the evils of crime or the need to use every crime-fighting tool to the fullest. Jackson's subject, instead, was the untoward consequences of excessive prosecutorial zeal.

After explaining why a federal prosecutor must choose cases carefully and recognize that not every crime can be pursued, Jackson turned to the heart of his talk: "If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants." Here one finds "the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted."

Jackson was no soft touch. He knew real crimes when he saw them. After serving as attorney general for less than two years, he would become a Supreme Court justice and serve as well as chief American war crimes prosecutor at Nuremberg. But Jackson also understood the proper limits of power and the dangerous human impulse to exert power over others. The federal law books, explained Jackson, are "filled with a great assortment of crimes," and a prosecutor "stands a fair chance of finding at least a technical violation of some act on the part of almost anyone." Prosecutors can easily succumb to the temptation of first "picking the man and then searching the law books, or putting investigators to work, to pin some offense on him."

Today, in spite of Jackson's warning, it is only a slight exaggeration to say that the average busy professional in this country wakes up in the morning, goes to work, comes home, takes care of personal and family obligations, and then goes to sleep, unaware that he or she likely committed several federal crimes that day. Why? The answer lies in the very nature of modern federal criminal laws, which have become not only exceedingly numerous (Jackson's main fear at the time of his admonition to his prosecutors) and broad, but also, since Jackson's day, impossibly vague. As the Morissette scenario indicated, federal criminal laws have become dangerously disconnected from the English common law tradition and its insistence on fair notice, so prosecutors can find some arguable federal crime to apply to just about any one of us, even for the most seemingly innocuous conduct (and since the mid-1980s have done so increasingly).

A study by the Federalist Society reported that, by the year 2003, the U.S. Code (listing all statutes enacted by Congress) contained more than 4,000 criminal offenses,[5] up from 3,000 in 1980. Even this figure understates the challenge facing honest, law-abiding citizens. Since the New Deal era, Congress has delegated to various administrative agencies the task of writing the regulations that implement many congressional statutes. This has spawned thousands of additional pages of text that carry the same force as congressionally enacted statutes.[6] 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.

This development may sound esoteric to some — until they find themselves at the wrong end of an FBI investigation into, or indictment for, practices they deem perfectly acceptable. It is then that citizens begin to understand the danger posed to civil liberties when our normal daily activities expose us to potential prosecution at the whim of a government official.

The dangers spelled out here do not apply only to "white collar criminals," state and local politicians, and myriad professionals. No field of work or social class is safe from this troubling form of executive branch overreaching and social control, and nothing less than the integrity of our constitutional democra-

cy hangs in the balance. After all, when every citizen is vulnerable to prosecution and prison, then there is no effective counterweight to reign in government overreaching in every sphere. The hallowed notion of "a government of laws" becomes a cruel and cynical joke.

Dorothy Garber

When I began practicing law in 1967, I hung out my shingle as a "criminal defense and civil liberties lawyer." I linked the two practice areas because, during the turbulent 1960s, it seemed that defending people accused of crime often was an exercise in the defense of freedom of speech, freedom of religion, freedom of association, or procedural due process of law. Our firm's typical cases involved what we called "the three Ds": drugs, draft, and demonstrations. A few years later a large number of gender discrimination cases were added to the mix, but much of our work remained focused on the three Ds.

I recognized that I made a good part of my living defending people who did very bad things (assault, robbery, murder, mayhem, larceny, and fraud, for example). Many committed the crimes charged while some did not. However, the charges against them entailed conduct that reasonable people, ordinary citizens and lawyers alike, would rightly regard as criminal, and the indictments were based on statutes that were readily understandable. One could argue that some actions should not be criminal, such as possession of marijuana, but the crimes charged were usually clearly defined.

Then, about 15 years into my law practice, I noticed a shift in the federal courts. More and more of my clients (physicians, bankers, academics, scientists, investors, newspaper reporters, accountants, artists, and photographers [the "three Ds" had by then given way to a more diverse clientele]) were being investigated and prosecuted for conduct that neither they nor I instinctively viewed as criminal. As I prepared to defend against the charges, I could not rid myself of the unsettling notion that the federal criminal laws were becoming vaguer and harder to understand with the passage of time.

Consider the plight of Dorothy Garber. She ran afoul of the federal tax code, widely viewed as a confusing mishmash of arcane, complex, and often conflicting rules and interpretations. As such, tax prosecutions traditionally were to be brought only where the regulation had been sufficiently clarified so that the taxpayer could reasonably be said to have intentionally violated a known legal duty to pay taxes owed. The taxing authorities were supposed to exercise wise discretion in deciding whether to seek to collect a tax in a civil enforcement proceeding, or to seek to punish criminally a tax evader who should have known better.

Dorothy Garber's case reached the Florida federal courts in the late 1970s. This taxpayer was blessed (or perhaps, under the circumstances, cursed) with a rare trait: her body manufactured an extraordinarily valuable antibody used to make blood-typing serum. Garber frequently sold her antibodies to a pharmaceutical company by the process of plasmapharesis, i.e., the removal, treatment, and return of blood plasma from and to her circulation, a procedure that was both uncomfortable and potentially dangerous. She underwent plasmapharesis sometimes as often as six times a month and was handsomely paid for her trouble. In 1972, she earned a weekly salary of $200. In addition, she was provided a leased automobile and a $25,000 bonus. She earned a total of $87,200 that year, and nearly as much in each of the two previous years.

Garber failed to report as income any of this money except her weekly $200 salary. Consequently, she was charged with criminal tax evasion. Her defense was intriguing, more a reflection of the conundrum of the federal tax code perhaps than of her alleged dishonesty. Examples of nontaxable transactions, some of which produce monetary gains, are found scattered throughout the tax code in various contexts. For example, if one owns some physical item, a "capital asset," and sells that asset for one's cost, however calculated, there is no taxable gain. If one is injured in an accident, compensation for pain and suffering is not taxable, in contrast to compensation for lost wages. These special categories of assets and of revenue, many of which get quite technical, often confound even the most experienced tax lawyers and accountants.

Garber, a lay person, argued that her body was a "capital asset" under the Internal Revenue Code, and that when she sold a portion of that asset, the sale was a nontaxable exchange because the tax cost basis of the asset with which she parted, i.e., her blood plasma, was precisely equal to the funds she received. The funds merely replaced the plasma she gave to the laboratory and therefore were neither proceeds of a business nor payment for services, either of which would render the proceeds taxable as "earned income."

The U.S. Court of Appeals for the Fifth Circuit saw the issue as "a unique legal question,"[7] noting that Garber testified "that she thought, after speaking with other blood donors, that because she was selling a part of her body, the money received was not taxable." The trial judge had told the jury that monetary proceeds of such plasma donations were taxable and refused to allow Garber's defense counsel to present expert witnesses who would say otherwise.

In reversing her conviction, the court of appeals decided not only that she had a right to present her capital exchange theory supported by expert testimony, but that "no court has yet determined whether payments received by a donor of blood or blood components are taxable as income." If Garber performed a service, it was taxable; if, on the other hand, "blood plasma, like a chicken's eggs, a sheep's wool, or any salable part of the human body," is tangible property, then her revenues were not taxable. Most importantly, the court declared that, because the law was vague and unsettled, "a *criminal* proceeding … is an *inappropriate vehicle* for pioneering interpretations of tax law."[8] In other words, the government should have brought a civil action against Garber to seek collection of the tax owed, not a criminal one to punish her.

Today, the Justice Department encourages federal prosecutors to do exactly what the *Garber* court condemned. In particular, federal prosecutors' novel use of long-standing but utterly formless "anti-fraud" laws, which cover increasingly vast areas of American life, threaten honest (and apparently law-abiding) business executives and other professionals, as well as other ordinary citizens. In 2003, Michael Chertoff, then second in command of the Justice Department's Criminal Division, even went so far as to boldly declare that federal prosecutors should exploit anti-fraud provisions to indict business executives because "criminal prosecution is a spur for institutional reform."[9]

The federal government's preference for criminal prosecutions (over either civil prosecution or "institutional reform" via the legislative branch) to expand the reach of the law is not limited to vague "anti-fraud" statutes and regulations. The same can be said for other now commonly used statutes — conspiracy, bribery, and extortion, among others. Even the most intelligent and

informed citizen (including lawyers and judges, for that matter) cannot predict with any reasonable assurance whether a wide range of seemingly ordinary activities might be regarded by federal prosecutors as felonies.

Singing and Composing

The trend of ambitious prosecutors exploiting vague federal laws and pursuing criminal charges instead of oftentimes more appropriate civil actions, something that they could not readily get away with in many state courts, has been alarming enough, but it is not the whole story. Indeed, the threat posed by federal prosecutors has become a veritable perfect storm lately due to the convergence of this trend with the commonplace legal tactics that these prosecutors wield in order to get convictions in the vast majority of cases. Prosecutors are able to structure plea bargains in ways that make it nearly impossible for normal, rational, self-interest calculating people to risk going to trial. The pressure on innocent defendants to plead guilty and "cooperate" by testifying against others in exchange for a reduced sentence is enormous — so enormous that such cooperating witnesses often fail to tell the truth, saying instead what prosecutors want to hear. As Harvard Law School professor Alan Dershowitz has colorfully put it, such cooperating defendant-witnesses "are taught not only to sing, but also to compose."[10]

There has been precious little legislative and judicial analysis of the expanded use of destructive coercive practices for "turning" prosecution witnesses, which may involve immunity for loved ones, cash stipends, new identities not encumbered by a criminal record, and other powerful inducements in exchange for "composing" to nail former associates. Although in theory the law requires that the government disclose to defense counsel all inducements given to cooperating witnesses,[11] jurors typically accept prosecutors' claims that such inducements are essential to infiltrate hidden criminal conspiracies. Moreover, as any criminal defense practitioner knows, in practice, many types of inducements and threats often are implied, the subject of a knowing wink of the eye by the prosecutor to the prospective witness's lawyer.

The "cooperation" framework is insidious. Prosecutors long have had the ability to offer witnesses valuable benefits, including money, in exchange for testimony that incriminates associates. Today, federal sentencing guidelines (once mandatory; still strongly suggestive and widely followed by judges) reward defendants who plead guilty and then give the government the testimony it seeks to prosecute others. Vague statutes exacerbate this problem by making it quite easy for one associate to testify that a former collaborator is indeed a crook.

The myriad ways in which federal prosecutors can craft or compose important witness testimony make the prospect of the reduced sentence affiliated with a plea bargain much more palatable to defendants than the risk of a much higher sentence should they be found guilty at trial. The risk-reward ratio that innocent defendants weigh when deciding whether to challenge an indictment by insisting on a trial has tilted decidedly toward risk reduction via a guilty plea and cooperation against others.

The push for more plea bargains also has an effect on how thoroughly — and indeed whether at all — the prosecutions are tested in federal appeals courts to determine whether prosecutors are relying on cockamamie interpretations of federal statutes. When you can scare enough defendants to plead guilty in exchange for less prison time, the government wins by default since there is no real chance that an appeals court will say that the prosecution was wholly phony.

Increases in the number of plea bargains also have the functional result of hiding these prosecutions from the public and avoiding scrutiny by the press, because cases in which defendants take plea bargains receive much less attention than those that go to trial. The problem is exacerbated by a "white collar" criminal defense bar composed largely of former federal prosecutors turned defenders who, by virtue of their experience in the federal government, well understand the risks of going to trial and therefore stress to their clients the benefits of cooperation over confrontation and the increasingly less likely prospect of vindication. While some former prosecutors turn into vigorous and skeptical defense lawyers (a few are among the most talented and principled in the nation, some of whom even left their prosecutorial jobs out of revulsion at the modern practices of the Department of Justice), a culture of assumed guilt, plea-bargaining, and deal-making has developed in defense circles which, more and more, are populated by capitulation-prone former prosecutors, especially at the higher echelons of the profession. The name of the game is to confess and cooperate, thus pleasing prosecutors who, in the not-too-distant past, were the comrades-in-arms of the newly-minted defenders.

Since the late 1980s, the federal bench, too, has been undergoing a transformation that has seriously eroded the extent to which judges can be relied upon to rein in bogus federal prosecutions. Judges, many of whom are former prosecutors, not only buy into the amorphous definitions of federal crimes favored by prosecutors, but they knowingly enable the tactics that allow prosecutors to present witnesses who bolster dubious prosecutions, thereby giving such cases the patina of substance.

In a 1998 case, which served as a road sign in the degradation of the federal justice system, lawyers for a Kansas woman named Sonya Singleton challenged the practice of offering leniency and even monetary rewards to cooperating government witnesses in exchange for their testimony. Prosecutors alleged that Singleton assisted her drug-dealing husband by wiring money for him in her name to a kingpin in California. Before trial, she moved to suppress the testimony of Napoleon Douglas, a co-conspirator who had entered into a plea agreement with the government. The basis for her motion was that the government had impermissibly promised Douglas something of value, in violation of both federal law and the Kansas Rule of Professional Conduct. Specifically, Douglas had been promised that: (1) he would not be prosecuted for any violations of the Drug Abuse Prevention and Control Act, stemming from his activities, other than perjury or related offenses, and (2) prosecutors would advise the sentencing court and parole board of the nature and extent of the cooperation provided.

Singleton's challenge was a shot across the justice system's bow, aiming directly at its increasingly corrupt "business as usual" culture, and she lost.

Not surprisingly, a federal statute makes it a crime to bribe witnesses; it is a felony to give or promise a witness "anything of value" in exchange for testimony.[12] The defendant's theory in *Singleton* was, if it is a felony (and it is) for any *defense* lawyer to promise a benefit to a witness, should it not similarly be a crime for *prosecutors,* by threats, money or other inducements, to coerce or bribe the vulnerable to "cooperate"? Shouldn't *all* untoward pressures and inducements be removed from witnesses so that truth, and not just naked self-interest, governs their testimony? The statute, on its face,

makes no exception whatsoever for government use of bribery.

A three-judge panel of the U.S. Court of Appeals for the Tenth Circuit[13] followed the seemingly (one might even say unusually) clear wording of the witness-bribery statute and found no exception for prosecutors who threaten and then reward government witnesses for their testimony. The court drew the obvious conclusion that doing so is bribery. A panicked Department of Justice promptly sought and obtained further review by the full membership of the court, insisting the statute not be interpreted to mean what it says, lest the whole edifice of bought and coerced prosecution testimony collapse.

The full court reversed the upstart panel that had temporarily rocked the prosecutorial boat.[14] It ruled that "in light of the longstanding practice of leniency for testimony," it must be "presumed" that, had Congress intended to "overturn this ingrained aspect of American legal culture, it would have done so in clear, unmistakable, and unarguable language." Of course, that is precisely what Singleton argued and the three-judge panel found that Congress had done — spoken clearly *against* bribery of witnesses. The full court, however, pretending to know, without any clear evidence, what was on the mind of Congress when it enacted a seemingly all-inclusive prohibition against interfering with the testimony of a witness, found that Congress intended an exception for prosecutors — a double standard if ever there was one.

It was hard for the defense bar to avoid profound disillusionment. The *Singleton* experience demonstrated that, even where Congress seems to have spoken clearly on the definition of witness bribery, the institutional imperative to obtain convictions at any cost prevailed. The combination of *Singleton* and scores of similar stories, in the context of a system of federal laws that so often simply cannot be understood, has paved the way to an inescapable conclusion that the federal criminal justice system has become a crude conviction machine instead of an engine of truth and justice.

Tension Between The Government and The Governed

This phenomenon, the synergy between vague statutes and coercive prosecutorial tactics, explains the anecdote told by Tim Wu in a 2007 article titled "American Lawbreaking," published in the online magazine *Slate*:

> At the federal prosecutor's office in the Southern District of New York, the staff, over beer and pretzels, used to play a darkly humorous game. Junior and senior prosecutors would sit around, and someone would name a random celebrity — say, Mother Theresa or John Lennon. It would then be up to the junior prosecutors to figure out a plausible crime for which to indict him or her. The crimes were not usually rape, murder, or other crimes you'd see on *Law & Order* but rather the incredibly broad yet obscure crimes that populate the U.S. Code like a kind of jurisprudential minefield: Crimes like "false statements" (a felony, up to five years), "obstructing the mails" (five years), or "false pretenses on the high seas" (also five years). The trick and the skill lay in finding the more obscure offenses that fit the character of the celebrity and carried the toughest sentences. The result, however, was inevitable: "prison time," as one former prosecutor told me.[15]

This is precisely the expansion of the criminal code that Justice Jackson warned of more than half a century ago. But there is an added danger that Jackson did not

foresee: as the criminal code became broader, it also became more and more vague, or at least it has been interpreted so by prosecutors and often by courts as well. Because of this vagueness, the federal criminal law has become too often a trap for the unwary honest citizen instead of a legitimate tool for protecting society. There are too many people behind bars today who honestly believed, for good and sufficient reasons, that they acted in conformity with the law. Justice Jackson perceived the very early stages of the transformation (some would say perversion) of federal criminal law into such a trap. He decried the failure to limit federal prosecutions and convictions to people who knowingly and intentionally violated reasonably knowable legal duties, as is the ancient common law tradition.

Let's be clear. All segments of civil society and a wide variety of seemingly innocuous behaviors are at risk of being criminalized by an overzealous Justice Department ("civil society" being defined roughly as the private sector, even if one's work is government-regulated to some degree). The increasing power the federal government exerts over every element of the private sector, as demonstrated by the power to investigate and to prosecute, and even to convict defendants who have not committed a clearly defined crime, is a threat to the nation as a whole. Quite simply, it undermines a critical tension, an essential balance of power, between the government and the governed.

Consider the case of Philip Russell, a lawyer from Greenwich, Conn. He was indicted in 2007 for obstruction of justice because he destroyed child pornography, despite the fact that child porn is illegal to possess ("contraband") and therefore holding, rather than destroying it, arguably would be criminal.

Michael Milken, under threat that the Department of Justice would prosecute his younger brother if the older brother did not take a plea bargain, pled guilty in 1990 to a felony that a judge later ruled (in a trial against a Milken cohort) did not constitute a crime.

The Department of Justice in 2002 indicted, and then convicted Arthur Andersen & Company, at the time one of the nation's "Big Five" accounting firms, for obstruction of justice simply because the firm followed its normal document retention and destruction policy *before* receiving a document production subpoena in connection with the government's investigation of Enron Corporation. By the time the Supreme Court unanimously reversed the conviction (because the jury had been instructed that it could convict even in the absence of any type of dishonesty), the firm had gone out of business. Faced with the threat of a ruinous prosecution on the basis of similarly dubious claims of wrongdoing, KPMG (a member of the then-remaining "Big Four"), believing that discretion was the better part of valor, admitted to readily refutable guilt and betrayed its former partners and employees in order to survive.

We continue to see prosecutions in which well-meaning professionals from all walks of life have been charged (or nearly charged) criminally for engaging in activities that most of us — lawyers and laymen alike — would consider lawful, often quite ordinary, and frequently socially beneficial. How has this happened?

Notes

1. *Morissette v. United States*, 342 U.S. 246, 247-250 (1952); further details available from the opinion of the court of appeals affirming Morissette's conviction, *Morissette v. United States*, 187 F.2d 427 (6th Cir. 1951).

2. *See generally* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791 (1951).

3. Justice Douglas concurred in the result without signing onto Justice Jackson's opinion, and Justice Minton took no part in the decision of the case.

4. Robert Jackson, U.S. Attorney General, *The Federal Prosecutor*, Address Before the Second Annual Conference of U.S. Attorneys (April 1, 1940), *in* 31 AM. INST. CRIM. L. & CRIMINOLOGY 3 (1940-1941).

5. John S. Baker Jr., Federalist Society for Law and Public Policy Studies White Paper (May 2004), *Measuring the Explosive Growth of Federal Crime Legislation*, http://www.fed-soc.org/doclib/20070404_crimreportfinal.pdf. The Federalist Society commissioned this study, the report says, "to ascertain the current number of crimes in the U.S. Code, and to compare that figure against the number of federal criminal provisions in years past." The report analyzed legislation enacted between 1997 through 2003.

6. When Congress enacts a general statute, it sometimes assigns to some administrative agency the authority to write detailed or explanatory regulations that put flesh on the statutory skeleton. Thus, the federal statute that outlaws securities fraud assigns to the Securities and Exchange Commission the authority to write regulations detailing various kinds of securities fraud. Violation of a regulation thus becomes the equivalent of violation of the underlying statute.

7. *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979) (en banc).

8. *Id.* (emphasis added).

9. Proceedings of the 17th Annual National Institute on White Collar Crime, March 6, 2003, *in* John Gibeaut, *Junior G-Men*, 89 A.B.A. J. 46, 48 (June 2003).

10. Prof. Dershowitz has used this formulation on numerous occasions in his Harvard Law School classes. *See* Harvey A. Silverglate, *Ashcroft's Big Con: False Confessions, Coerced Pleas, Show Trials — the Justice Department's Reliance on Soviet-Style Tactics Has Turned the War on Terror Into a Potemkin Village*, THE BOSTON PHOENIX, June 25, 2004, http://bostonphoenix.com/boston/news_features/top/features/documents/03936976.asp. *See also* Paul Craig Roberts, *Fake Crimes*, Feb. 4, 2004, http://www.lewrockwell.com/roberts/roberts29.html.

11. *Giglio v. U.S.*, 405 U.S. 150 (1972).

12. Title 18, United States Code, section 201(c)(2): "Whoever directly or indirectly gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceedings, before any court…, or for or because of such person's absence therefrom, shall be fined under this title or imprisoned for not more than two years, or both."

13. *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998) (panel opinion).

14. *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) (en banc).

15. Tim Wu, *American Lawbreaking: Illegal Immigration*, SLATE, Oct. 14, 2007, http://www.slate.com/2175730/entry/2175733. ■

About the Author

Harvey A. Silverglate is Of Counsel to Boston's Zalkind, Rodriguez, Lunt and Duncan LLP. He concentrates his practice in three areas: criminal defense, students' rights and academic freedom, and civil liberties.

Harvey A. Silverglate
Zalkind, Rodriguez, Lunt & Duncan LLP
65A Atlantic Avenue
Boston, MA 02110
617-742-6020
Fax 617-742-3269
E-MAIL harvey@harveysilverglate.com