

## Lawyers Of The Year

# HARVEY A. SILVERGLATE

BOSTON

**H**arvey Silverglate was a familiar face in the Massachusetts legal community long before he became part of the legal team that represented the world's most famous au pair, Louise Woodward.

In *Commonwealth v. Woodward*, the Supreme Judicial Court this year threw both the defense and the prosecution for a loss, or let both sides claim victory, depending on how you want to look at it, by affirming Woodward's manslaughter conviction but upholding a sentence that let her go free.

For reasons that are still difficult for some to fully understand, the Woodward trial and its aftermath put the Massachusetts court system under the spotlight like no case in recent history, perhaps this century.

And the sensation that enveloped the case — while it may ultimately have helped Woodward avoid a long prison sentence — certainly wasn't anticipated by her lawyers. "We were quite surprised that it became an international cause celebre," Silverglate admits.

But Silverglate is hardly the kind of lawyer who shies away from controversy,

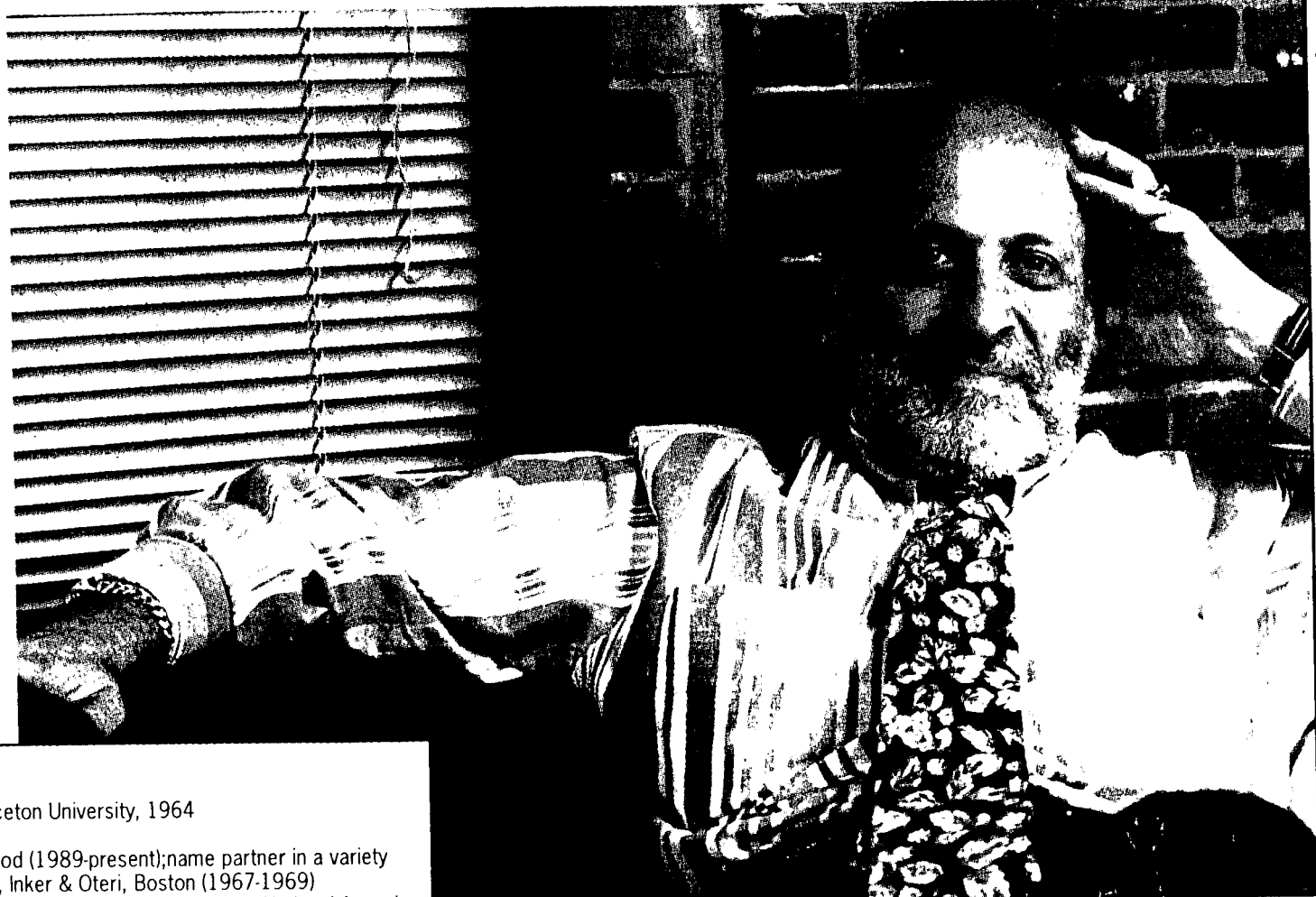


Photo by Vin Catania

**Born:** May 10, 1942, New York City

**Education:** Harvard Law School, 1967; Princeton University, 1964

**Massachusetts bar admission:** 1967

**Legal experience:** Partner, Silverglate & Good (1989-present); name partner in a variety of law firms (1970-1989); associate, Crane, Inker & Oteri, Boston (1967-1969)

**Bar affiliations:** Massachusetts Bar Association, Boston Bar Association, National Association of Criminal Defense Lawyers, Massachusetts Association of Criminal Defense

Lawyers

... the answer is absolutely. I think it is

whether or not he sees it coming.

Indeed, at a time when many contemporaries who "came of age" in 1960s are championing politically correct notions of propriety, Silverglate has thrown himself head-first into the free-speech debate on the very un-PC side of the ring.

This fall, Silverglate co-authored, along with University of Pennsylvania Professor Alan Charles Kors, "Shadow University," which details the dangers of political correctness and speech codes on college campuses. The book focuses largely on the case of Eden Jacobowitz — a Penn student accused of racial insensitivity after he called a group of rambunctious students "water buffalos."

Silverglate, who would never be accused of lacking the courage of his convictions, notes with a smile that both Jacobowitz and Louise Woodward are now studying law. "When I have a client that recognizes that the law can be one's friend, it perks me up a little," he says.



**Q.** Why was the public so captivated by the Louise Woodward case?

**A.** Different people were captivated [for] different reasons. ... There was this issue of child care. A lot of people are working parents and there are a lot of kids who are being taken care of by people other than their grandparents. And everybody's a little nervous about it and a little guilty about it. And there was a lot of class conflict over this. I think a lot of people who were picketing for Louise were upset at Deborah Eappen for working. There was just the human drama of it all. Here's a young innocent-looking girl who is charged with this heinous crime. A beautiful kid who died a horrible death. And you had the specter that the world's leading pediatric hospital is claiming that something happened and our experts, the leading people in the field, said it didn't happen.

The British were vociferous that [Woodward] was picked upon because she was British, so there was a certain amount of nationalism. As the case proceeded, the British were shocked at some of our procedures, and in some cases I agreed with them. I remember the notion that a police

British wouldn't allow that. So we had a sort of re-fighting of the war of 1812.

**Q.** What is the public to make of a system where two sets of highly distinguished medical "experts" completely disagree over a matter?

**A.** The answer lies in having better judicial controls over what constitutes an expert ... I still think this should be decided by juries. But I also think that the way experts are questioned has to change radically. It was clear that the jury didn't understand a lot of this stuff. I would like to have jurors having a conversation with the experts. That way a juror could say to an expert, "Could you put that in English?"

**Q.** Is the public perception of our legal system better or worse off after the intense attention devoted to the Woodward case?

**A.** The trial was never a circus. The circus was all on the outside. Was the trial perfect? No. In retrospect, we would have tried it differently. We tried the case entirely on the basis of the science. We did not try to suggest that someone else did the crime. We thought that that was the wisest thing to do because we thought it was so clear that this was an old injury. What we didn't count on was that, if the jury thought that it was an old injury, as our experts testified, then [they would want to know] who did it.

There's a possibility that we got a conviction on the basis of speculation that, even though it didn't happen when the prosecutor said it did, that [Woodward] was the most likely candidate anyway. That means that we possibly made a mistake not bringing out that the parents were imperfect, that the older brother was imperfect. The older brother in fact was quite a wild kid. We didn't bring that out because we assumed the jury would stick to the science. But, that having been said, I can't say the

**Q.** Were the Eappens "put on trial" here? Or, in fact, should you have attacked them in a more direct fashion?

**A.** We were blamed for putting them on trial anyway. People like [Boston Globe columnist] Eileen McNamara wrote column after column castigating us and I can honestly say that we didn't cast any aspersions, any blemishes on the Eappens. That was our plan. We had loads of witnesses prepared to do it, and we didn't put them on. We were very careful about that. Nonetheless, we got blamed. I don't know how it would have played out. But I can tell you that we had some stuff, and I'm not going to tell you what it was, that any fair person would have said that it's reasonable for us to put it on. [For example,] the issue of whether the older brother is well-behaved or not; well, that's relevant. You're not calling a kid a murderer when you [contend] that this kid might have pushed his brother and he might have hit his head on a doorpost.



**In this society a decision has been made that you cannot reason with someone by telling them to shut up. ... The only [good] speech code is a dead speech code.**



That's relevant. To this day, we believe that Matthew Eappen died from a low-intensity blow. This was not a serious injury. A straight fracture that should not have resulted in his death. Something went awry in the healing process. This was a fluke.

One of the reasons I knew the prosecution's witnesses were all wet was because they were saying that this was a kind of skull fracture that could only be inflicted from dropping a child from a two-story building onto concrete. My son had that [same kind of] injury when he was three weeks old. He fell off a changing table onto a floor and he had a skull fracture. Fortunately it healed and didn't cause any complications. But I knew from personal experience that these people were complete charlatans.

**Q.** Is it fair question to ask you whether

**A.** The answer is absolutely. I think it is an appropriate question and I'm giving you my honest answer. I know Louise Woodward better than anybody knows their babysitter. If you consider the months and months that we spent with her, that's quite a job interview. Nobody had anything bad to say about her. She passed with flying colors. So I would let her babysit for my own child. Of course, now my child is her age. So, so much for that. [Laughs.]

**Q.** In hindsight, was the decision to eliminate the possibility of a manslaughter option a mistake?

**A.** I think it was the right decision and I would do it again. I know many people criticized us for that, and people can differ on it, but I'm amazed at the number of lawyers who said that we were incompetent. Either they didn't understand what we were doing and why — which I doubt —

but I think it was more of the nauseating tendency of lawyers to bash other lawyers even if they know that the bashing is not appropriate.

Now that there are so many lawyers commenting, every

lawyer is a potential talking head. But it does bring out insecure lawyers who feel that in order to look good you have to call other lawyers idiots. But I would absolutely do it again because we had this fear that jurors might accept our science but say that Louise did it three weeks earlier so we were afraid of a compromise verdict. We decided that if we went all-or-nothing it was obviously going to be an acquittal because there was no way 12 out of 12 jurors would say that there was no reasonable doubt. Boy, were we wrong.

**Q.** Would you take the case again?

**A.** I think I would, but it really inflicted a substantial amount of damage on my life. I think it was the single most agonizing case of my life. We represent a fair amount of innocent people, because we

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don't represent people who come in and say they want to plead guilty. The reason is that there are plenty of lawyers out there who love doing that. But we try cases. I went to law school and I spent a lot of time honing my skills, I should waste them?

[But] of all the clients that I've ever had, I was surest of [Woodward's] innocence because of the science. Could she have done it three weeks earlier? Of course. But so could anyone else. She was one of the least likely to be careless with this kid. So I was convinced of her innocence and that made the case much more agonizing. And she was deteriorating in jail because she was a vegetarian. Her parents — though they had a stiff upper lip publicly — were hysterical. And I have a son the same age so I was "transferring." It was agonizing. I would do it again, but it took a lot out of my life.

**Q.** *You apparently have the luxury of picking and choosing cases based upon what "causes" interest you ...*

**A.** We get about 20 cases in for every one we take, so we can cherry-pick the cases that conform best to our own view of why we're lawyers. So we do have a very finely honed caseload.

**Q.** *But shouldn't "guilty" clients have an opportunity to be represented by an expert attorney like yourself?*

**A.** We do not take cases of people who start out wanting to plea guilty or become informants. So the pool we select from is about 50-50 as to who is actually guilty, where the average lawyer handles about 95 percent guilty clients. But there are many cases where the person did it but for a variety of reasons we would take it.

not allowed to say things that will create a hostile learning environment. That divides people up into categories where rights are differentially assigned. That process is inherently unconstitutional. It's not that it isn't a problem. It's that in this society a decision has been made that you cannot reason with someone by telling them to shut up. And therefore [speech codes] are content-based, they assign rights differentially and they are prior restraints. So there's so many problems that I cannot imagine one that is acceptable. The only [good] speech code is a dead speech code.

**Q.** *Shouldn't colleges be doing anything to prevent hateful, offensive behavior?*

**A.** I would say that in the course of a normal day I am offended four or five times. Very few people make it through the day without being offended a couple times. In a free society you get used to it. The notion that there are

whole classes of people who are too delicate to take offense is very insulting and demeaning. Harvard Law School has adopted sexual harassment guidelines which is really a speech code. They adopted it to protect women. Let me tell you something, women at Harvard Law School do not need protection from speech codes, I assure you. A black student at Harvard Law School once said to me, "I was raised in the Bronx. By a miracle, I didn't get killed. I got into Harvard. And I made it through Harvard College with good enough grades to get into Harvard Law School. Here I am in Harvard Law School, and if you think that if I hear someone call me a nigger I'm going to go to my room, pack up my suitcase and go back to the South Bronx, then you don't understand." It made me realize that it is harder to get through society these days if you're black, but nonetheless, somebody who makes into Harvard Law School is probably a little bit tougher. So

the notion that that person needs extra protection is really demeaning.

**Q.** *Many of the "radicals" of the 1960s who were fighting for free speech are now essentially looking to limit speech through vehicles such as speech codes. Are they being hypocritical?*

**A.** It's one of the great mysteries. And the only explanation I have is that it isn't so clear that a lot of these people were fighting for free speech [in the first place]. A lot were fighting for their political view to become the dominant one. And once they came into positions of authority, the chant suddenly changed from "Don't trust anybody over 30" to "Don't trust anybody under 30." Is it hypocrisy? I think it's human nature. There is this tendency for people to fight for liberty but once they get into power they fight for their power. Whatever the explanation, they have to be fought. MLW

— DAVID L. YAS

### REDDINGTON

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*make a jury empathize with your client than in other kinds of criminal cases?*

**A.** I think the jurors are very savvy and are very quick to determine that the person is under the influence if the evidence is there. And I don't want to say that that's a bias against anyone. I think you're just dealing with intelligent people who know what's going on. ... [Also] a lot of these departments and a lot of the academies are truly changing the culture of the police departments. The police officers are writing detailed reports. They're making legitimate observations. They're studying their books.

some sense of justice. But I still can't stomach the concept of the rug-merchant atmosphere of lawyer advertising.

**Q.** *Do you sense the public-esteem problem more acutely as a defense lawyer? After all, you're representing people accused of doing very bad things.*

**A.** I'm representing people accused of very bad things and I'm very proud of that. I feel that defense lawyers serve a definite need in society to protect the rights of people and I don't just mean people that are rich, famous, popular people. I mean to actually go into court and defend a guy like [Salvatore] Sicari

age groups and all of us over 40 are jealous of everybody under 40. But a gentleman once commented to me last month — and I think it's true — he said, "You know, you don't have the problem with older lawyers that you do with younger lawyers." I don't know if that just comes with vigor or excessive ardor in the course of defending or prosecuting a claim or a case. But I think most of the time attorneys are very respectful to each other, the court and their clients and try to show respect for people. ... Basically I think there is civility in the courtroom.

**Q.** *What's the solution to the incivility that is out there?*

**Q.** Let's say a client came to you with an identical case as Louise Woodward, except she says "I admit to you that I caused this baby's death. I just don't think they can prove it." Would you take that case, and would you still be able to publicly state that you believe in her innocence?

**A.** We might very well take such a case but I would never say publicly that she is innocent. Of course, I wouldn't say she's guilty, either. I think it creates a lot of cynicism when criminal-defense attorneys say publicly that they have an innocent client when they know damn well that they don't.

**Q.** Your recently published book outlines how the wave of political correctness has resulted in the troublesome popularity of speech codes on universities. What role has the legal system had in the rise of political correctness and speech codes?

**A.** On campuses, the law has played virtually no role at all. These regimes are springing up despite that on public campuses they are clearly in violation of the First Amendment. And these cases are processed in violation of the 14th Amendment. There's nothing approaching due process. [In] every speech-code case that has come up to the courts, the students have won. And the reason for that is it doesn't take an Oliver Wendell Holmes to understand that [speech codes] are in clear violation of the First Amendment. Despite this, almost every public campus has a speech code, except where students have gotten courts to invalidate the codes. So, to the extent the law has played a role, it's been a positive role. Of course, it takes a lot of guts for a student to bring such a case. If you lose, you get thrown out [of school].

**Q.** Is there such thing as an acceptable speech code?

**A.** No. And the reason is that it's not a question of how clear or vague the code is. The problem is that by their very nature they are unconstitutional. They are constructed to protect historically disadvantaged groups from offense. As such, people from so-called advantaged groups are

And that's the best thing that the government can do to ensure a conviction.

**Q.** You've commented in the past about the lack of public esteem for attorneys. What is the most significant cause?

**A.** Advertising. You can say what you want about the O.J. Simpson case and all that. ... I think the public perception of that trial has certainly hurt us as lawyers, but since then there have been a lot of high-publicity cases like the Oklahoma City bombing case and, in our own state, the au pair trial. We were able to see some superb lawyering on both sides in those cases and very little of the circus atmosphere. I think the public realizes that we can try cases with decorum, that we have decent lawyers who are doing a good job, and I do feel that the public perception of attorneys in the courtroom is changing from the O.J. case to back where it should be — at least understanding that we're all human beings trying to accomplish an end which will bring

that an attorney can marshal. The attorneys defending those kinds of horrid, ghastly cases are serving such a purpose and it takes so much out of you. And the adrenaline letdown after the case is over is what people don't see and don't know. The nervous stomach thing you have in the morning before you handle a case. The way you feel when you go home and you're reading in the news media about the evidence in the case and how overwhelming it is. You know that you're going down the tubes and all you're doing is trying to ensure that before the government gets their conviction that the evidence that they have has been tested in front of a jury, hoping that they give the guy a fair trial.

**Q.** You've spoken out recently about the decline of civility in the profession. Where do you see this coming up the most?

**A.** I don't want to seem as though I'm prejudiced against any particular

**A.** it — which is the same solution to the lawyer advertising. If you suggest that an attorney should not be able to comment about his or her opinion on something, I wouldn't agree with that either because you're interfering with his or her First Amendment rights. I just don't think it's seemly. You should go back to the concept of what would be appropriate standards of conduct. And we ourselves should set that standard. We don't need the [Supreme Judicial Court] to tell us what we can or can't do. We should know enough ourselves. And we don't need the Board of Bar Overseers looking over our shoulders every day of the week. We should, again, be able to know how we should handle each other and litigants in the courts. That means acting as a gentleman or a lady and treating each other with respect. It does not mean speaking to other parties or attorneys in a vulgar sense and being overly combative. MLW

— ERIC T. BERKMAN

## MARTIN

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tain calls but calls of a certain magnitude I want to know about. But if you consider that we are an office of 130 prosecutors and we probably handle about 48,000 cases in the District Court and 2,000, give or take, in the Superior Court, you've got to let other people manage. You can't do it all.

**Q.** You were involved in a flap this year over an arson case where a defense attorney claimed that you were prosecuting the wrong person. Does the occasion ever arise when innocent people get prosecuted? How do you handle that?

**A.** Without buying into that description for [the arson case], there have been instances where we have agreed to dismissals of cases after people have been convicted, some time later after facts have come to light. There's a case we're dealing

with right where I have concerns about the amount of objective investigation that took place. I think prosecutors have a much higher standard than anybody else in that we represent the public and we're really supposed to do what's fair. We really are supposed to do what's right. And we get reminders that we are fallible. For me it's always humbling when that happens, and it ought to make us recommit to adhering to that high standards. I hope we haven't made many mistakes, but every DA I know is very perspective-oriented. And when you talk with them you inevitably talk about things that didn't go well. It's a reminder about who our obligation really is to.

**Q.** You take great pride in diversity at your office, but some would say that all DA's offices are laden with employees who have political connections. How would you respond to that?

**A.** When I got here I specifically recall seeing sons and daughters of people who are politically active or elected officials. I can remember making very snap judgments, i.e., "I know why he's here, I know why she's here." And in virtually every instance my snap judgment was wrong. I can name many names of people who are just terrific young lawyers. And I don't know how they got here. But the important thing to note is that even if a person has a shepherd, so to speak, to get an interview, another thing they often get from the shepherd is a belief in public service. And then they get a chance to prove it here. I get calls from elected officials from time to time but of the people I've hired from those referrals, maybe one or two didn't shake out. But it's not like they're the only ones not to have made the grade. I just don't think you should make wholesale judgments just because they have some connection. MLW

— DAVID L. YAS