Preventing oversight for police misconduct

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Seven years ago, the Supreme Judicial Court held that the state wiretapping statute prohibits citizens from secretly recording their conversations with police officers during traffic stops. Since then, state and local law enforcement have threatened – and sometimes carried out – prosecutions under an even more expansive interpretation of that law, in order to suppress attempts by citizens to document possible police misconduct. A spate of recent arrests and prosecutions shows how Massachusetts police have deployed that precedent to shield themselves and their departments from criticism.

In that much-criticized case, *Commonwealth v. Hyde*, 434 Mass. 594 (2001), the defendant had secretly recorded his interactions with the police when they pulled over his Porsche for "an excessively loud exhaust system and an unlit rear registration plate light." The defendant, a long-haired musician driving a flashy car, evidently suspected that he would be harrassed by the police – who predictably questioned whether he had cocaine in the car. Hyde hit the "record" button, evidently "intending to use the recording as proof in [a] subsequent complaint of police misconduct." Though he was let off with only a warning, Hyde later lodged a complaint against the officers. The police retaliated with a "wiretapping" charge.

Why "wiretapping"? The statute uses that catch-all phrase to describe any kind of electronic eavesdropping – including, the police figured, using a tape deck to secretly record a face-to-face conversation between yourself and another person.

In upholding Hyde's conviction, the SJC majority rejected his claims that because eavesdropping and wiretap laws require an expectation of privacy, and because police have no privacy interest in their words as public servants, his recording could not have been unlawful. Instead, they reasoned "that the Legislature intended G. L. c. 272, §99, strictly to prohibit all secret recordings by members of the public, including recordings of police officers or other public officials interacting with members of the public, when made without their permission or knowledge."

In other words, the majority remarkably did not recognize the difference between the police – in their capacity as public officials acting as coercive instruments of state power – and the average citizen. But the law, as revised in 1968, was ultimately intended to balance the need for government wiretaps in investigations against concerns about privacy and governmental abuse of that power.

In a vigorous dissent, Chief Justice Margaret Marshall recognized that the law was intended to place different burdens on police and citizens, commensurate with the unequal power distribution between the two groups. Due to the coercive power wielded by police, she wrote, "the potential for abuse … has caused our society … to insist that citizens have the right to

demand the most of those who hold such awesome powers." (Of course, the corollary to the public official/private citizen distinction is that when officers are off-duty, and do not act as agents of the state, they enjoy the same privacy interest in their speech as any other citizen does.) Marshall's dissent stressed that the *Hyde* ruling, in another time and place, would have effectively criminalized recording the Rodney King videotape. From a policy standpoint, *Hyde* provides Massachusetts police with not only a license for misconduct, but also a weapon with which to silence citizens who seek to expose alleged misconduct.

This is not an abstract concern. On January 29, a young Boston lawyer, Simon Glik, will stand trial in Boston Municipal Court because he videotaped a police officer who he considered to be abusing his authority. While walking along the Boston Common last October, Glik watched as police pried open the mouth of a teenage boy, who they suspected was a crack dealer, in order to retrieve a bag he had attempted to swallow.

What happened next fascinated and troubled us. With admirable candor, Glik told us in an interview that while he would not ordinarily have stopped, he thought the arrest he witnessed was itself extraordinary. The juvenile was bent over the back of the bench, with one officer holding him at the throat, appearing to choke him. Glik held his cellphone camera at eye level and walked around the arrest scene, at a distance of about ten feet, recording video of the arrest. (If he was going to make a complaint or become a witness later, he would need evidence – otherwise it would be the cop's word against Glik's, or anyone else's.) One officer told him to move on – that he "had taken enough pictures" – then asked if Glik's cellphone had audio recording capabilities. Glik affirmed that it did.

Glik was arrested and charged with unlawful "wiretapping," aiding an escape of a prisoner from an officer, and disorderly conduct. He denies not only the wiretap charge (as a matter of law) but also the two ancillary charges. The addition of those two charges is particularly disturbing, as it fits an old pattern where the police bring bogus charges to intimidate witnesses to questionable official conduct. Glik denies that he did anything to aid the prisoner, other than to video-record the scene. (Ironically, had another citizen observer recorded Glik's own conduct, it would provide the evidence that would prove the defense to the ancillary charges!)

And the "wiretapping" charge? The statute, and its misleading terminology, applies to any secretive audio recording of oral communications (speech). So to the extent that his cellphone camera recorded audio – like the tape recorder in Hyde – in addition to video, the cops used *Hyde* to tag him with a wiretapping charge.

But the police did not read *Hyde* carefully enough – or thought they could stretch that case's holding. The key distinction in Glik's case is that the recording was not secret. He held the camera openly, at arm's length, several feet away from the officers, who obviously saw the taping since they arrested Glick for it. Even the *Hyde* majority explained that recording an interaction with the police would not have violated the law had "the defendant … held the tape recorder in plain sight." That Glik did nothing wrong, from either a legal or ethical standpoint, seems clear.

The trial court judge in Glik's case has been unsympathetic so far, rejecting Glik's motion to dismiss. Though Glik graduated first in his class from the New England School of Law in 2006, he has been unable to find the job he wants – ironically, as a prosecutor – due to the felony charges pending against him. Of course, if he is convicted for felony wiretapping, or the other charges against him, this young lawyer could be categorically excluded from his chosen profession – more collateral damage for the legal system.

Glik is not the only person to run afoul of the state wiretap statute. Boston University police arrested Newton activist Pete Lowney in 2006 when he videotaped them asking him to stop blocking the entrance to a BU building. Similarly, MBTA police arrested Cambridge activist and citizen journalist Jeffrey Manzelli for videotaping his interactions with an MBTA police officer at an anti-war rally in 2002. Both men were convicted.

Average citizens are not the only ones who should be troubled by this trend. As Marshall wrote in her dissent, "[h]ad Michael Hyde, the defendant in this case, been a news reporter he could have faced the same criminal consequences that the court now sanctions." In an age of bloggers and user-generated YouTube content – the heirs to the legacy of the Rodney King videotaper – protecting every citizens' right to expose abuse of official power sows benefits for all.

The phenomenon of police using wiretapping statutes to prevent citizens from coming forward with recordings of their interactions with cops – whether or not the recordings show police misconduct – is not unique to Massachusetts. In New Hampshire and Pennsylvania, average citizens have turned video-cameras on when they suspected that an interaction with the police might go awry, and have paid for it with felony wiretapping charges.

Most police officers perform their duties ably and honestly. But some do not. If Glik is convicted, it will be a vindication of unfortunate assumptions that police can act however they want because citizens will not be armed with the electronic tools – such as videocameras and cellphones – that provide a meaningful check against misconduct. And, of course, there is the obverse side of the coin: if citizens were to record their contentious encounters with police, it would provide solid exculpatory evidence when police officers are unjustly accused in the course of doing their jobs.

The SJC's misguided decision in *Hyde* was based on a vaguely worded statute. If the courts are unwilling to revisit *Hyde*, then perhaps an ambitious legislator committed to civil liberties and effective deterrents against police misconduct will help fix our state's wiretapping problem. One New Hampshire legislator, spurred by a similarly fraudulent "wiretap" case there, has already taken the first step, introducing legislation that would allow citizens to record conversations – including with police – when they are in their own homes.

How many more lawyers and other citizens need to be charged with wiretapping – for trying to help out a fellow citizen – before we can fix the shield that allows cops to act with impunity?

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