■ **CIVIL LIBERTIES**

Who gets to do the taping?

By Harvey A. Silverglate SPECIAL TO THE NATIONAL LAW JOURNAL

In theory, the government operates in the open, and citizens are entitled to privacy from official snooping. However, the recent rash of worrisome news in the privacy arena has at least some of us wondering if the founders' message as to how a constitutional republic is supposed to operate hasn't reached the right ears.

Take, for example, the 4-2 opinion issued by the Supreme Judicial Court of Massachusetts on July 13 in *Commonwealth v. Hyde*. Michael Hyde was driving his white Porsche in the town of Abington, Mass., when he was stopped by three policemen. An ugly confrontation ensued. Unbeknown to the officers, Hyde had secretly activated a hand-held tape recorder, which captured the entire contretemps. He promptly turned the tape over to police internal affairs to support his complaint of abusive conduct.

Unsurprisingly, the officers were exonerated, but Hyde was flabbergasted when the cops turned the tables and charged him with criminal violation of the Massachusetts anti-wiretap statute. Massachusetts is a "two-party consent" state, where all participants to a conversation must agree before it may be taped. There is an exception: A law enforcement officer may record a conversation if he is a party to it or has the permission of a participant. Hyde's mistake was that he was a mere citizen, not a cop.

The majority affirmed Hyde's conviction, noting that he did not fall within any exception to the law's prohibition. The dissenting justices were flabbergasted. "The criminal conviction of Michael Hyde is (apparently) the first time that a citizen of Massachusetts has been convicted because he tape recorded an exchange with a police officer performing an official function in a public place in the presence of a third party, potentially within the sight and hearing of any passerby," wrote Chief Justice Margaret Marshall. "In our Republic the actions of public officials taken in their public capacities are not protected from exposure."

Telling dissent

The dissenting chief justice put her finger on precisely what the problem was—this is a republic, after all. In response, the majority accused the dissenters of harboring an "implicit...suggestion that police officers routinely act illegally or abusively, to the degree that public policy strongly requires documentation of details of contacts between the police and members of the public to protect important rights." The whole problem could have been avoided, the majority intoned, apparently seriously, if only "at the outset of the traffic stop, the defendant had simply informed the police of his intention to tape record the encounter." Aside from the breathtaking naiveté of this advice (the imagination strains to picture just how ugly the encounter could have gotten), it failed to answer the dissent's cogent question as to why a police officer has a legitimate expectation of privacy in an official public encounter with a citizen.

The *Hyde* opinion is simply one of the more startling examples of the enormous challenges being posed of late to the citizen's beleaguered and dwindling privacy rights. The Tampa, Fla., police department installed three dozen security cameras with face-recognition technology in a busy city entertainment district, and Virginia Beach, Va., is thinking of following suit. This is the same system that was used in January to scan attendees' faces at the Super Bowl, described by the American Civil Liberties Union of Florida as a "digital lineup" of members of the public. The Colorado Department of Motor Vehicles is preparing to install similar technology along state roads, to record facial data of drivers and compare them to a database, purportedly to ferret out driver's license fraud.

And this past June, it was by only a single vote that the U.S. Supreme Court prohibited police from using, without a search warrant, heat-sensing scanners that could detect goings-on inside of a private home—and even then the court accorded citizens protection only from governmental use of "a device that is not in general public use" and from which the citizen still has an expectation of privacy. Presumably when the device is more ubiquitous, expectations and hence constitutional protections could change.

The outrageous one-sidedness of how courts and legislatures have been dealing with the comparative privacy rights and related interests of citizens vs. government officials is demonstrated most graphically by an earlier opinion of the same court that gave us the *Hyde* ruling. In the 1993 case of *Commonwealth v. Fryar*, 414 Mass. 732, there was a dispute between a defendant and police as to the circumstances under which the defendant gave a statement during interrogation and on the issue of voluntariness. The court refused the defendant's suggestion that it adopt a rule requiring the electronic recording of all custodial interrogations.

Exception for cops, not citizens

Such a practice would, of course, eliminate swearing contests between suspects and their police interrogators on issues not only of voluntariness, but also of the accuracy of the police renditions of precisely what the suspect said or confessed, or whether he confessed at all. Yet the court wrote that while a rule requiring such recordings "would have much to recommend it," it was "not inclined" to exercise its constitutional or common-law authority over the administration of criminal justice to adopt such a rule.

Given the cascade of bad privacy news these days, it's easy for the citizen to wonder how the government has managed to get it so wrong. "We the People of the United States," begins the Preamble to the Constitution, proclaiming at the outset the bedrock principle of popular sovereignty. But sometimes it appears that the concept stops at the Preamble. NLJ

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