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Are we freer than we were 40 years ago?

By **HARVEY SILVERGLATE** | November 15, 2006

The more things change, the more they stay the same. Forty years prove this adage as true as it is trite. When I began practicing law and writing legal and civil-liberties columns for the *Boston Phoenix* (actually, for the *Real Paper*, which was soon acquired by the *Phoenix*) in the late 1960s and early '70s, a confident sense of optimism suffused my work. I believed in progress born of that decade's massive cultural, political, and legal upheavals: history was arcing toward a freer, more just society. Yet as 2006 and the paper's 40th year make their way into the history books, I note that many of the same problems I litigated and wrote about at the start still persist. Without being jaded, I have a more cyclical (but, I hasten to add, not cynical) view of history. Uncomfortable as they can be, cycles save us; they limit the extent to which we go massively and permanently wrong.

Consider police misconduct: the late 1960s and '70s saw courts become more sensitive to abuse by cops, due to the highly visible brutality visited on civil-rights and anti-war protesters. But in recent years, expanded legal immunities for government officials and procedural barriers have made it more difficult to sue the state for poor treatment at the hands of police. Legal impediments thus have partially offset greater public awareness of the issue, but we're still in better shape than when I began. These days, however, police misconduct as we've known it pales in comparison with torture committed by American intelligence agencies in the name of "security" — a different type of abuse, but one that coarsens our entire society.

Constitutional guarantees of privacy have waxed and waned. For a while in the '60s and '70s, Americans enjoyed increased rights of privacy. The courts and Congress, and even state legislatures, expanded freedom from unlawful searches and seizures — a trend that has been largely, although not entirely, reversed since the '80s. Wiretap legislation gave us more privacy in our communications, especially after the infamous eavesdropping uncovered during the

Nixon administration. But legal protections for privacy, which began to erode in the '90s, were utterly eviscerated after the national-security panic set off by the terrorist attacks of 9/11.

Three and four decades ago, the law became more sensitive to the conviction and incarceration of defendants whose rights were violated, even if they may have been guilty. Federal courts started reviewing the constitutionality of both federal and state convictions gained through such legal violations. A clash resulted between Massachusetts courts, which fostered less sensitivity to citizens' rights in the search-and-seizure and coerced-confessions arenas, and the federal courts, which almost routinely threw out state convictions based on unlawfully obtained evidence. But a role reversal set in during the '80s. Federal courts worried much less about such legal niceties as needing a warrant before searching a suspect or his vehicle, for example, or giving adequate warnings before extracting a confession, while Massachusetts state courts headed in the other direction. Somehow, the division of authority between state and federal power seemed to be working more or less as the founders intended.

One of the most hotly contested areas of legal and moral life has been personal liberty: control over one's life, body, mind, and relationships. Just as I began to study and practice law, the Supreme Court invalidated laws against birth control, abortion, premarital sex, pornography (and the right to read even legally obscene materials in the privacy of one's home), and "unnatural" heterosexual and homosexual sex. (I remember one of my earliest cases — defending a Western Massachusetts farmer against a charge of committing "the abominable and detestable crime against nature," with the judge and prosecutor insisting that "everyone knows what that is" and thus refusing to clarify.) Decades of legal and political infighting ensued. Here in Massachusetts, we're doing better than just about anywhere else in the country in living our private lives as we wish, capped by our Supreme Judicial Court's historic gay-marriage decision.

Pervading nearly all areas of modern life, technological advancements have had an incalculable effect — both good and bad — on liberty. It is harder for would-be tyrants to hide in the shadows, given the huge amount of searchable material now residing in cyberspace. But it is easier for potential tyrants to invade citizens' privacy, as demonstrated by President Bush's abusive use of the National Security Agency's vast eavesdropping capabilities.
The war on terror is not the only arena where new technology poses new challenges. Just five years ago, a majority on the Supreme Court invalidated a warrantless search of a private dwelling with heat-sensor equipment that detected marijuana growing inside the building. This invasive use of technology, ruled the court, was no different than busting into the building

without a search warrant. But one worries that the courts will not keep up with the increasingly varied ways in which technology continues to challenge traditional values of privacy.

Perhaps technology's most extraordinary benefit to liberty has been its impact on exposing and reversing wrongful convictions with the help of DNA testing and other advancements in forensic criminology. Insights into the limitations of eye-witness identification and the refinement of ballistic science, as well as the art of fingerprint analysis, have limited the extent to which verities of the past are uncritically accepted by judges and juries.

We've also learned more about the dangers of suggestive interrogation techniques when used against vulnerable witnesses, especially young children. Courts around the nation and in Massachusetts consequently have reviewed and often nullified convictions from our modern equivalent of the Salem witch trials — the prosecutions in the '80s, including several in the Bay State, of childcare workers accused of ritual and mass sexual abuse against very young children. The junk science proffered by phony child-abuse "experts" to support such outlandish conclusions has finally been turned on its head. Scores of the wrongly convicted — in Massachusetts and elsewhere — have been set free. Given the imperfections of the system, we still need a statewide innocence commission in Massachusetts, but we've been successful thus far in staving off Governor Mitt Romney's myopic "errorless death penalty" initiative.

Perhaps the most important recent liberty issue is the executive-branch attack on the power of the federal courts to protect civil liberties during an age of terror. Curtailed under anti-terrorism legislation during the administration of the "liberal" Bill Clinton, federal courts' review powers over state and federal convictions were even more drastically limited under the wartime presidency of George W. Bush. This development prompted the federal courts finally to kick back.

While the courts have tried to hold the line, the White House, abetted by a pliant Congress, is now attempting to severely restrict the ancient writ of habeas corpus by which American courts since the 18th century have sought to remedy unlawful imprisonment. It is possible that the voter backlash demonstrated in the recent midterm elections will blunt this trend and push the pendulum back.

The role of the press in charting the ebbs and flows of liberty over 40 years has never been more important than it is today. Early in this period, the press began to assert itself, even taking down Nixon and all the president's men during Watergate. But long-overlooked powers of

federal law, lying in wait like loaded weapons, suddenly sprang to life in the past decade and began to be used with a vengeance by federal prosecutors and judges. Journalists are now almost routinely forced to choose between disclosing sources or going to prison. Newspapers and reporters are threatened with draconian penalties for "espionage," for reporting official misconduct and violations of the people's liberties. Witness the New York Times' courageous and urgent disclosure of unlawful presidential use of the National Security Agency to conduct warrantless electronic surveillance, which resulted in a criminal investigation into how the paper got the information, and whether the reporters, editor, and newspaper itself committed a crime in reporting it. But if the past is indeed prologue — as I have come to believe it is — we can count on the pendulum swinging back, but only, of course, if we become energized and activated by the extent of the problem.

Pulitzer Prize–winning war correspondent Marguerite Higgins wrote in her 1951 book: "So long as our government requires the backing of an aroused and informed public opinion, it is necessary to tell the hard bruising truth." Amen! This has been — and, with luck, will continue to be — the philosophical and political underpinning of the "Freedom Watch" column. After a two-month sabbatical to work on my long-planned book on the Department of Justice, I'll be back to help launch the Phoenix's 41st year fighting for truth, justice, and the true American way.

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