

7-11-2022

## Constitutional Law—Concealing Identity to Record is Not an Interception Under Massachusetts Wiretap Statute—Curtatone v. Barstool Sports, Inc., 169 N.E.3d 480 (Mass. 2021)

Catherine Cardon  
*Suffolk University*

Follow this and additional works at: <https://dc.suffolk.edu/jtaa-suffolk>



Part of the [Litigation Commons](#)

---

### Recommended Citation

27 Suffolk J. Trial & App. Advoc. 321 (2021-2022)

This Comments is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact [dct@suffolk.edu](mailto:dct@suffolk.edu).

**CONSTITUTIONAL LAW—CONCEALING  
IDENTITY TO RECORD IS NOT AN  
INTERCEPTION UNDER MASSACHUSETTS  
WIRETAP STATUTE—*CURTATONE V. BARSTOOL  
SPORTS, INC.*, 169 N.E.3D 480 (MASS. 2021)**

The principles of the Fourth Amendment, along with the Massachusetts Wiretap Statute (“Wiretap Statute”), provide a right to privacy, free from willful interception of oral and wire communications.<sup>1</sup> The focal point of the Wiretap Statute is to prohibit “the secret use of such devices” by individuals to intercept communications that would violate privacy interests.<sup>2</sup> In *Curtatone v. Barstool Sports, Inc.*,<sup>3</sup> the Massachusetts Supreme Judicial Court (“SJC”) examined whether a recording of a telephone communication procured through the use of a false identity constituted an “interception” under the Wiretap Statute.<sup>4</sup> The SJC ultimately held that the recording was not an interception because the recording was not made in “secret.”<sup>5</sup>

In May 2019, a Boston Herald reporter authored an article and published a statement on Twitter criticizing the Boston Bruins for partnering

---

<sup>1</sup> See U.S. CONST. amend. IV (granting right to privacy); MASS. GEN. LAWS ch. 272, § 99(A) (stating interception of oral or wire communication is unlawful); *Commonwealth v. Jackson*, 349 N.E.2d 337, 340 (Mass. 1976) (describing legislative intent for application of Wiretap Statute to instances where individual has privacy expectation); *Commonwealth v. Gordon*, 666 N.E.2d 122, 134 (Mass. 1996) (reaffirming legislative intent of Wiretap Statute). When discussing the initial formation of the Massachusetts Wiretap Statute, the *Gordon* court noted that “it is apparent from the preamble that the legislative focus was on the protection of privacy rights[.]” *Gordon*, 666 N.E.2d at 134; see also *Katz v. United States*, 389 U.S. 347, 351 (1967) (describing protection of private conversations). “What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” *Katz*, 389 U.S. at 351 (citations omitted).

<sup>2</sup> See MASS. GEN. LAWS ch. 272, § 99(A) (acknowledging threat of unrestricted use of technology to privacy); *Jackson*, 349 N.E.2d at 340 (explaining legislative intent in imposing stringent restrictions). Massachusetts imposes strict regulations on the use of recording devices relative to other states. *Jackson*, 349 N.E.2d at 340. In comparison, California’s eavesdropping statute only requires indication that any party desires the communication be confidential, whereas Massachusetts requires strict compliance with two-party consent. *In re Joseph A.*, 106 Cal. Rptr. 729, 731 (Cal. Ct. App. 1973).

<sup>3</sup> 169 N.E.3d 480 (Mass. 2021).

<sup>4</sup> See *id.* at 481 (stating issue on appeal).

<sup>5</sup> See *id.* at 485 (stating SJC’s holding). “The SJC held that a recording made openly and with consent—even if induced under false pretenses of who was recording the communication—is not a ‘secret recording’ so as to give rise to a cognizable claim of unlawful ‘interception’ within the meaning of Section 99.” Ryan E. Ferch, *Secretly Recording Public Officials: Challenges to the Massachusetts Wiretap Statute*, 65 BOSTON BAR J. 43, 45 (2021).

with the defendant, Barstool Sports, Inc. (“Barstool Sports”), in distributing promotional Barstool Sports towels to fans at a Stanley Cup game.<sup>6</sup> Two days after the reporter’s article was published, the plaintiff, Joseph A. Curtatone (“Curtatone”), then mayor of Somerville, Massachusetts, posted a statement on Twitter discouraging the Boston Bruins hockey team and the National Hockey League from further associating with Barstool Sports due to their “crass” reputation.<sup>7</sup> In response to Curtatone’s statement, Barstool Sports’ president, David Portnoy, used both his personal social media accounts and Barstool Sports’ social media accounts to make accusatory statements towards Curtatone, resulting in a public dispute.<sup>8</sup> In light of this public dispute, Kirk Minihane (“Minihane”), an employee of Barstool Sports, requested an interview with Curtatone.<sup>9</sup> Minihane disclosed his true identity and affiliation to Barstool Sports, and Curtatone denied his request to interview; however, Minihane made a second attempt, but this time referred to himself as Kevin Cullen, a reporter for the Boston Globe.<sup>10</sup> Under the impression that he would be interviewed by a Boston Globe reporter, Curtatone agreed to the interview.<sup>11</sup>

On June 6, 2019, Minihane interviewed Curtatone by telephone and, at its outset, Minihane requested for consent to record the interview, to which Curtatone assented.<sup>12</sup> Minihane then altered his normal speaking method to sound like Kevin Cullen and told Curtatone that the interview was being

---

<sup>6</sup> See Brief of Appellees Kirk Minihane and Barstool Sports, Inc. at 9-10, *Curtatone*, 169 N.E.3d 480 (No. SJC-13027) (describing first comment on promotional towels).

<sup>7</sup> See *Curtatone*, 169 N.E.3d at 482 (describing Curtatone’s reaction to article). Curtatone’s tweet read, “[a]s a fairly rabid sports fan one of the more regrettable things I’ve seen is the attempt to disguise misogyny, racism & general right-wing lunacy under a ‘sports’ heading. Our sports teams & local sports fans need to push back to stress that’s not for us . . . .” *Id.* Curtatone issued the statement in response to Barstool Sports’ reputation for “publishing crass content” on its blog. *Id.*

<sup>8</sup> See *id.* (describing Barstool Sports’ response to Curtatone’s tweet). David Portnoy accused Curtatone of “being a ‘professional’ and ‘legitimate’ criminal” and that Curtatone’s family engaged in “rape, extortion, stabbing, and arson.” Brief of Appellant Joseph A. Curtatone at 10-11, *Curtatone*, 169 N.E.3d 480 (No. SJC-13027).

<sup>9</sup> See *Curtatone*, 169 N.E.3d at 482 (describing first request for interview). Minihane reached out to the Somerville public information office to request an interview with Curtatone. *Id.*

<sup>10</sup> See *id.* (noting Curtatone’s response to Minihane’s first and second requests). Minihane, while speaking with the Somerville public information office employee, stated he was Kevin Cullen, a reporter for the Boston Globe. *Id.*

<sup>11</sup> See *Curtatone*, 169 N.E.3d at 482 (stating Curtatone’s assent to interview).

<sup>12</sup> See *id.* (noting interview’s circumstances). “Both ends of the interview between Curtatone and Minihane were audio recorded, and Minihane’s end of the interview was also recorded by video.” Brief of Appellees Kirk Minihane and Barstool Sports, Inc. at 11, *Curtatone*, 169 N.E.3d 480 (No. SJC-13027). Minihane was aware of the consent requirement and stated, “I’m just going to record this so we have it, is that good? Just ‘cause I don’t want to misquote you,” to which Curtatone replied, “no problem.” Brief of Appellant Joseph A. Curtatone at 12, *Curtatone*, 169 N.E.3d 480 (No. SJC-13027).

conducted for a piece to appear in the Boston Globe.<sup>13</sup> The recording of the interview was subsequently published on Barstool Sports' blog where Minihane bragged about concealing his identity.<sup>14</sup> Upon publication of the recording, Curtatone discovered that his interview was not conducted by a Boston Globe reporter, but rather by Minihane.<sup>15</sup> On June 17, 2019, Curtatone filed a complaint against Minihane and Barstool Sports asserting a violation of the Wiretap Statute.<sup>16</sup> Minihane and Barstool Sports filed a motion to dismiss which was subsequently granted by the Massachusetts Superior Court and, on appeal, transferred to the SJC for *de novo* review.<sup>17</sup>

The Massachusetts legislature initially created the Wiretap Statute as a one-party consent statute, aimed at preventing the interception of oral or wire communications to protect an individual's right to privacy under the Fourth Amendment.<sup>18</sup> However, a substantial amendment in 1968 changed the operative standard to two-party consent, creating a wiretapping statute that was stricter than those of other states.<sup>19</sup> There are two main rationales

<sup>13</sup> See *Curtatone*, 169 N.E.3d at 482 (describing defendant's conduct during interview). Throughout the entire interview Minihane maintained that he was Kevin Cullen. Brief of Appellant Joseph A. Curtatone at 12, *Curtatone*, 169 N.E.3d 480 (No. SJC-13027).

<sup>14</sup> See *Curtatone*, 169 N.E.3d at 482 (explaining publication of interview); Brief of Appellant Joseph A. Curtatone at 12, *Curtatone*, 169 N.E.3d 480 (No. SJC-13027) (noting defendant's comments on concealing his identity); Kirk Minihane, *Kirk Minihane AKA "Kevin Cullen from The Boston Globe" Interviews Somerville Mayor Joe Curtatone*, BARSTOOL SPORTS (June 6, 2019, 2:54 PM), <https://perma.cc/CV66-KPRL> (explaining procurement of interview with false identity). "Right on time, the good mayor called 'Kevin Cullen' from the Boston Globe and gave us a 20 minute interview. You'll notice that despite Miniha- I mean Kevin Cullen's dogged questioning. . ." Minihane, *supra*.

<sup>15</sup> See *Curtatone*, 169 N.E.3d at 482 (noting interview was published on Barstool Sports' Blog); Brief of Appellant Joseph A. Curtatone at 12, *Curtatone*, 169 N.E.3d 480 (No. SJC-13027) (stating Curtatone was unaware of interviewer's true identity); Minihane, *supra* note 14 (stating Curtatone induced to schedule interview due to Minihane's misrepresentation of identity).

<sup>16</sup> Complaint at 4, *Curtatone v. Barstool Sports, Inc.*, No. 1981CV017172020, WL 10248574 (Mass. Super. Jun. 17 2019) (No. 2019-01717) (alleging violation of Wiretap Statute).

<sup>17</sup> See *Curtatone*, 169 N.E.3d at 481-82 (outlining case summary and procedural history); Brief of Appellant Joseph A. Curtatone at 7-8, *Curtatone*, 169 N.E.3d 480 (No. SJC-13027) (stating procedural history).

<sup>18</sup> See MASS. GEN. LAWS ch. 272, § 99(A) (stating interception of oral or wire communication unlawful); *Commonwealth v. Hyde* 750 N.E.2d 963, 967 (Mass. 2001) (explaining one-party consent standard). "[U]ntil the 1968 amendments, the law had permitted the recording of one's own conversation, or conversations, with the prior permission of one party (traditionally known as 'one-party consent')." *Hyde*, 750 N.E.2d at 967; see also Rauvin Johl, Article, *Reassessing Wiretap and Eavesdropping Statutes: Making One-Party Consent the Default*, 12 HARV. J. L. & POL'Y REV. 177, 179 (2018) (outlining Fourth Amendment application). In 1967, the Supreme Court held that "wiretapping constituted a search and seizure within the meaning of the Fourth Amendment" and that even "[t]hrough wiretapping did not involve a physical incursion, the results of the practice were such an intrusion on privacy and the 'right to be let alone' that they raised constitutional concerns." Johl, *supra*, at 179.

<sup>19</sup> See § 99(A) (noting two-party consent requirement); *Hyde*, 750 N.E.2d at 967 (comparing amendment to other states' analogues). The Commonwealth amended the statute to reject one-

justifying two-party consent: first, an individual has the liberty to consent, and second, an individual has the right to preserve the distribution of their own speech.<sup>20</sup> Some two-party consent statutes focus on the nature of the conversation as an individual's "proxy for privacy," and such statutes provide broad protection to many types of conversations.<sup>21</sup> Other two-party consent states, such as Massachusetts, expressly authorize a conversation to be recorded without expressed consent if the individual who is being recorded has actual knowledge of the recording but continues to "speak in apparent indifference to the consequences."<sup>22</sup> Therefore, under the Massachusetts Wiretap Statute, expressed consent is not required if an individual is considered to have implicitly consented, which occurs when the individual is aware of the recording and chooses to proceed with the conversation.<sup>23</sup>

The Wiretap Statute's preamble frames the underlying intent of the legislature to protect citizens from "grave dangers to . . . privacy" implicated by "unrestricted use of modern surveillance technology," reasoning that

---

party consent, "thus rejecting the prevalent approach taken by other States, and by the comparable Federal electronic surveillance statute." *Hyde*, 750 N.E.2d at 967; *see also* *Commonwealth v. Thorpe*, 424 N.E.2d 250, at 251 n.7 (stating Federal Wiretap Statute requires one-party consent); *Hyde*, 750 N.E.2d 963 at 967 n.5 (explaining majority approach to Wiretap Statute construction). "The majority contain language that, to some degree, prohibits only the surreptitious recording of another's words when spoken with a reasonable expectation of privacy." *Hyde*, 750 N.E.2d 963 at 967 n.5.

<sup>20</sup> *See* Jake Tracer, Article, *Public Officials, Public Duties, Public Fora: Crafting an Exception To the All-Party Consent Requirement*, 68 N.Y.U. ANN. SURV. AM. L. 125, 134, 141 (2012) (explaining basis of two-party consent). These two rationales in conjunction consider the kinds of conversation that can be protected from recording by looking at the consent of the parties, and the desire of an individual to keep a conversation private between the parties who are privy to that conversation. *Id.*

<sup>21</sup> *See* Tracer, *supra* note 20, at 134 (noting divergence of rationales for two-party consent statutes). Washington, Pennsylvania, California, Nevada, Connecticut, and Maryland rely on the nature of the conversation justification. *Id.* According to the rationale of preserving an individual's right to consent to a conversation, "if other factors suggest that the conversation in question is not private, it should be recordable even without explicit consent." *Id.* However, the inverse of the premise rings true as well, if there are factors that indicate the conversation is private, it should not be recordable. *Id.* at 135; *see also* Johl, *supra* note 18, at 180-81 (stating "[o]ther states focus on expectations of privacy rather than secrecy"). In states that focus on expectation of privacy instead of secrecy, "recordings must be made with the consent of all parties unless the parties do not have a reasonable expectation of privacy, in which case recordings are legal with or without all-party consent." Johl, *supra* note 18, at 180-81.

<sup>22</sup> *See* *Commonwealth v. Jackson*, 349 N.E.2d 337, 340 (Mass. 1976) (acknowledging consent can be implied); § 99(A) (noting two-party consent requirement); *Commonwealth v. Gonzalez*, 688 N.E.2d 455, 457 (Mass. 1997) (highlighting Massachusetts Wiretap Statute prohibits "the secret transmission or recording of oral communications without the consent of all parties").

<sup>23</sup> *See* *Commonwealth v. Jackson*, 349 N.E.2d 337, 340 (Mass. 1976) (explaining implied consent standard); *see also* *Commonwealth v. Alleyne*, 54 N.E.3d 471, 484 (Mass. 2016) (demonstrating actual knowledge versus implied consent standard).

secret use of such devices must therefore be prohibited.<sup>24</sup> To assert the statute's protection, an individual must be subject to an interception, which is expressly defined by the statute as "to secretly hear, secretly record . . . the contents of any wire or oral communication[.]" by any person who has not received "prior authority by all parties to such communication[.]"<sup>25</sup> However, in the context of "interception" under the Massachusetts Statute, the term "secret" is not statutorily defined.<sup>26</sup> When a statute does not expressly define its own words, courts will usually construe a term "in accord with its ordinary meaning" and ensure that the ordinary meaning is consistent with the intent of the statute's enactors, other legal contexts, and dictionary definitions.<sup>27</sup> The SJC follows this procedure, and upholds the ideology that the

<sup>24</sup> See §99(A) ("[The] unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited."); *Commonwealth v. Gordon*, 666 N.E.2d 122, 134 (Mass. 1996) ("It is apparent from the preamble that the legislative focus was on the protection of privacy rights[.]"); *Tracer*, *supra* note 20, at 153 (explaining public officials' have lower expectation of privacy as result of their public duties); see also Carol M. Bast, Abstract, *Privacy, Eavesdropping, and Wiretapping Across the United States: Reasonable Expectation of Privacy and Judicial Discretion*, 29 CATH. U. J.L. & TECH. 1, 14 (2020) (noting "Massachusetts' Constitution safeguards against electronic interception" made secretly).

<sup>25</sup> See § 99(B)(4) (defining interception); see also *Hyde*, 750 N.E.2d at 966 (explaining interception); *Commonwealth v. Tavares*, 945 N.E.2d 329, 335 (Mass. 2011) (describing scope of the term "interception" under the Massachusetts Wiretap Statute). The *Tavares* court described the standard of the Wiretap Statute as any "surreptitious 'interception' of any 'oral communication[.]'" *Tavares*, 945 N.E.2d at 335; see also *Jackson*, 349 N.E.2d at 339 (noting if recordings were not secretly made then there was no interception under §99); *Johl*, *supra* note 18, at 183-84 (explaining secrecy standard of Massachusetts Wiretap Statute); Brief of Appellees Kirk Minihane and Barstool Sports, Inc. at 11, *Curtatone v. Barstool Sports, Inc.*, 169 N.E.3d 480 (Mass. 2021) (No. SJC-13027) ("Massachusetts court have emphasized that the secrecy requirement cannot be ignored and is the 'core' of the act.")

<sup>26</sup> See Brief of Appellant Joseph A. Curtatone at 26, *Curtatone*, 169 N.E.3d 480 (No. SJC-13027) (stating Wiretap Statute does not define "secret" but it prohibits "secretly hear[ing]" or "secretly recording the contents of a communication"); Brief of Appellees Kirk Minihane and Barstool Sports, Inc. at 11, *Curtatone*, 169 N.E.3d 480 (No. SJC-13027) (noting lack of express definition of secret); *Tavares*, 945 N.E.2d at 335 (utilizing term "surreptitious" to describe interception under Wiretap Statute); *Gilday v. Dubois*, 124 F.3d 277, 289 (1st Cir. 1997) (noting "surreptitious" conduct actionable under Wiretap Statute); Taylor Robertson, Article, *Lights, Camera, Arrest: The Stage is Set for a Federal Resolution of a Citizen's Right To Record the Police in Public*, 23 B.U. INT. L.J. 117, 130 (2014) (using surreptitious synonymously with secret to describe interception requirement); see also *Surreptitious*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining surreptitious as "stealthy or fraudulently done, taken away, or introduced").

<sup>27</sup> See *Commonwealth v. Zone Book, Inc.*, 361 N.E.2d 1239, 1242 (Mass. 1977) ("When a statute does not define its words we give them their usual and accepted meanings, as long as these meanings are consistent with the statutory purpose.") (citation omitted); *AIDS Support Group of Cape Cod, Inc. v. Barnstable*, 76 N.E.3d 969, 973 (Mass. 2017) ("Our primary goal in interpreting a statute is to effectuate the intent of the Legislature, and 'the statutory language is the principal source of insight into legislative purpose.'" (quoting *Bronstein v. Prudential Ins. Co.*, 459 N.E.2d 772, 774 (Mass. 1984))); *Commonwealth v. Gomes*, 130 N.E.3d 1234, 1239 (Mass. 2019) ("Where the words of the statute are ambiguous, however, we strive to make it an effectual piece of

meaning must embody the “intent of a statute from all its parts and from the subject matter to which it relates, and must interpret the statute so as to render the legislation effective, consonant with sound reason and common sense.”<sup>28</sup> Therefore, in a practical sense, the ordinary meaning of the statutory language must both honor the underlying intent of the statute and provide a workable application of the statute.<sup>29</sup>

The SJC has previously applied this statutory interpretation framework to the Wiretap Statute.<sup>30</sup> Most notably, in 1976, the SJC in *Commonwealth v. Jackson* was tasked with interpreting the statutory language of the Wiretap Statute to determine whether a secret recording constituted an actionable interception.<sup>31</sup> The SJC focused on the plain language used to define interception in the statute, and reasoned that if the telephone recording was not made secretly, then the interception was lawful under the Wiretap

---

legislation in harmony with common sense and sound reason and consistent with legislative intent.” (quoting *Commonwealth v. Cassidy*, 96 N.E.3d 691, 698 (Mass. 2018))) (citations omitted). To interpret the words of a statute, the SJC first looks to the plain statutory language to determine if the language is clear, unambiguous, and correlates with legislative intent. *City of Worcester v. College Hill Props.*, 987 N.E.2d 1236, 12421 (Mass. 2013). However, if the court is unable to determine the intent of the legislature from the words of the statute, the court will look to dictionary definitions and other “external sources, including the legislative history of the statute, its development its progression through the legislature, prior legislation, on the same subject, and its history of the times.” 81 Spooner Rd., LLC v. Town of Brookline, 891 N.E.2d 219, 224 (Mass. 2008); see also *Secret*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016) (defining secret as “something that remains beyond understanding or explanation”); *Secret*, THE MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2020) (defining “secret” as “something kept hidden or unexplained”); *Secret*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining secret as “something that is studiously concealed”).

<sup>28</sup> See *Harvard Crimson, Inc. v. President & Fellows of Harvard Coll.*, 840 N.E.2d 518, 522 (Mass. 2006); *City of Worcester*, 987 N.E.2d at 1241-42 (noting interpretation must carry out purpose of statute); see also *Bronstein*, 459 N.E.2d at 774 (explaining when extrinsic evidence is unnecessary). When the statutory language is clear it must be given its ordinary meaning, and when the use of the ordinary term achieves a workable result there is no need for extrinsic evidence. *Bronstein*, 459 N.E.2d at 774. However, “the statutory language is the principal source of insight into legislative purpose.” *Id.*

<sup>29</sup> See *AIDS Support Grp. of Cape Cod, Inc.*, 76 N.E.3d at 973-74 (describing proper interpretation of statutory language). The court in *AIDS Support Group of Cape Cod* explained that statutory language that is clear and unambiguous shows the true intent of the legislature. *Id.* at 973. However, when the plain language of the statute would achieve an illogical result, legislative history may be a source of interpretation. *Id.* at 974.

<sup>30</sup> See *Jackson*, 349 N.E.2d at 338 (analyzing Wiretap Statute “interception” requirement); *Commonwealth v. Boyarsky*, 897 N.E.2d 574, 579 (Mass. 2008) (examining “interception” in criminal applications); *Commonwealth v. Ennis*, 785 N.E.2d 677, 678 (Mass. 2003) (considering whether “interception” was lawful under Wiretap Statute).

<sup>31</sup> See *Jackson*, 349 N.E.2d at 338 (stating issue). The court in *Jackson* faced the question of whether a recorded telephone conversation where a defendant stated he knew the phone line was “tapped,” but nonetheless still consented to the recording, fell within the Wiretap Statute’s meaning of a prohibited interception. *Id.* at 338-39; MASS. GEN. LAWS ch. 272, § 99(B)(4) (defining interception).

Statute.<sup>32</sup> As a result, the SJC held that the defendant's actual knowledge of the telephone recording removed the action outside of the scope of the statute, and that "consent could be implied by clear and unequivocal objective manifestations of knowledge" because it is "sufficiently probative of a person's state of mind as to allow an inference of knowledge."<sup>33</sup> The SJC's reliance on the consenting individual's state of mind, rather than the circumstances surrounding the recording, is consistent with the legislative intent derived from the original construction of the Wiretap Statute as a one-party consent statute.<sup>34</sup> In effect, the decision in *Jackson* expanded the scope of the statute concerning consent by looking at the plain language and the underlying legislative intent.<sup>35</sup>

In *Curtatone v. Barstool Sports Inc.*, the SJC addressed whether a recording obtained through the use of a false identity constituted a "secret" recording and thereby an actionable interception within the meaning of the Wiretap Statute.<sup>36</sup> The SJC first reviewed the statutory definition of "interception" and the scope of its meaning, and then proceeded to determine what it means for a recording to be "secretly made" through a textual analysis of the Wiretap Statute.<sup>37</sup> To establish what constituted a "secret" recording, the court relied on the expressly defined term "interception[.]" which provides two independent requirements for an act to be prohibited.<sup>38</sup> The prohibited action must first be "secretly made" and second, the recording must be made

<sup>32</sup> See *Jackson*, 349 N.E.2d at 339 (explaining lower court's reasoning); Tracer, *supra* note 20, at 144 (noting statutory interpretation of interception). "[T]he court reasoned that if the recording was not a secret, it did not fall under the statute." Tracer, *supra* note 20, at 144.

<sup>33</sup> See *Jackson*, 349 N.E.2d at 340 (stating holding); see also *Commonwealth v. Boyarsky*, 897 N.E.2d 574, 579 (Mass. 2008) ("A recording that is made with the actual knowledge of all parties is not an interception, even if they have not affirmatively authorized or consented to it.") The *Jackson* holding highlights the implied consent rule in Massachusetts: when there is evidence of actual knowledge of a recording, knowledge is sufficient to constitute consent. *Jackson*, 349 N.E.2d at 340. As a result, the court interpreted the statute to focus on the state of mind of the individual. *Id.*

<sup>34</sup> See Tracer, *supra* note 20, at 144 (explaining original construction of Wiretap Statute). The construction of an exception-based rule that looks at the state of mind of an individual is a direct result of looking at legislative intent of the Wiretap Statute in its original construction as a one-party consent statute. *Id.* One-party consent statutes seek to act as a proxy for preservation of individual autonomy. *Id.* at 133-34.

<sup>35</sup> See Tracer, *supra* note 20, at 144 (discussing implied consent lessens scope of liability under Wiretap Statute). Despite recordings made without consent or without a warrant, the "SJC has also held that 'actual knowledge of the recording' by the party being recorded is sufficient" to find consent and avoid liability under the statute. Ferch, *supra* note 5, at 43.

<sup>36</sup> See *Curtatone v. Barstool Sports, Inc.*, 169 N.E.3d 480, 483 (Mass. 2021) (addressing initial issue). The majority determined that the Wiretap Statute has two parts and that a secret recording must be found first, before addressing the issue of consent. *Id.*

<sup>37</sup> See *id.* at 483-84 (analyzing statutory language of Wiretap Statute).

<sup>38</sup> See *id.* at 483 (determining order of requirements to analyze).



“without prior authority by all parties.”<sup>39</sup> The court concluded that if a recording is not made “secretly,” there is no need to continue and determine the subsequent consent requirement.<sup>40</sup> The court reasoned that because “the act does not define the term ‘secretly,’ [the court will] give the term its ‘usual and accepted meaning,’” subject to its application being consistent with the statutory purpose of the Wiretap Statute.<sup>41</sup> The court then looked to the statutory enactor’s ordinary meaning of “secretly,” and their use of the word “in other legal contexts and dictionary definitions.”<sup>42</sup>

Next, the SJC turned to the construction of the statute and explained that “secretly” modifies the act of hearing or recording, and therefore, the act of the recording is what must be done secretly for an interception to be prohibited.<sup>43</sup> Accordingly, the court then determined that a recording obtained by using a fraudulent identity was outside the scope of the Wiretap Statute because the defendant had actual knowledge the conversation was being recorded.<sup>44</sup> The court reasoned that the “identity of the party recording the communication or, indeed, the truthfulness with which that identity was asserted is irrelevant” because it is the act of recording that must be “secret” to constitute a prohibited interception, and if there is knowledge of the recording, consent need not be examined.<sup>45</sup> The court then examined the history behind the Wiretap Statute to compare legislative intent to its plain meaning analysis of the term “secret.”<sup>46</sup> The court concluded that the legislators intended to confine the scope of the Wiretap Statute to the use of electronic devices to secretly eavesdrop or record, and therefore, issues akin to the instant matter fall outside the statute’s scope because Curtatone’s knowledge of the recording meant that Minihane was not “secretly” using an electronic device to

---

<sup>39</sup> See *id.* (describing elements required for action under Wiretap Statute).

<sup>40</sup> See *Curtatone*, 169 N.E.3d at 483 (describing first issue); *Commonwealth v. Jackson*, 349 N.E.2d 337, 340 (Mass. 1976) (describing two independent requirements under Wiretap Statute).

<sup>41</sup> See *Curtatone*, 169 N.E.3d at 483 (first citing *Commonwealth v. Matta*, 133 N.E.2d 258, 273 (2019); and then quoting *Commonwealth v. Zone Books, Inc.*, 361 N.E.2d 1239, 1242 (1977)) (explaining application of “usual and accepted meaning”).

<sup>42</sup> See *id.* at 484 (citing dictionary’s meaning of “secret”). The SJC looked to three different dictionary definitions of the word “secret,” but did not look to how the SJC or other courts had previously used the term. *Id.*; see also sources cited *supra* note 27 (outlining definition of “secret” in different dictionaries).

<sup>43</sup> See *Curtatone*, 169 N.E.3d at 484 (explaining implication of word order in act).

<sup>44</sup> See *id.* (applying definition of secret to facts).

<sup>45</sup> See *id.* (explaining irrelevancy of fraudulent identification). Despite obtaining the information on the call by fraudulent means, the SJC held that “[t]he recording at issue was not made secretly” because the interviewer stated the call will be recorded. *Id.*; see also *Commonwealth v. Hyde*, 750 N.E.2d 963, 972-73 (Mass. 2001) (Marshall, C.J., dissenting) (stating no violation of Wiretap Statute when recording party informs of recording).

<sup>46</sup> See *Curtatone*, 169 N.E.3d at 484-85 (explaining history and legislative intent of Wiretap Statute).

record the conversation.<sup>47</sup> The court ultimately held that the Wiretap Statute does not apply when a recording is procured through use of a false identity because the physical act of recording must be made secretly, and that the identity of the recorder has no impact on if a recording is made secretly.<sup>48</sup>

The SJC arrived at the correct decision but failed to accurately analyze the relevant statutory language, which ultimately revealed a misalignment between the court's interpretation and the Wiretap Statute's fundamental goal.<sup>49</sup> The court correctly began with an analysis of the plain meaning of the term "secret" because of the absence of an express definition, but critically failed in its second step of interpreting an undefined word in a way that is consistent with its legislative purpose.<sup>50</sup> When the court looked to the legislative intent to define "secret," it focused on the rise of accessibility of commercial electronic devices in the 1960s which caused the Wiretap Statute to be enacted, however, the court failed to give proper weight to the statute's overarching purpose of protecting the individual's right to privacy.<sup>51</sup> As a result of the court's faulty analysis, a recording is only a "secret" when a party does not have actual knowledge that the communication is being recorded, and the effect of this interpretation allows the courts to disregard all

---

<sup>47</sup> See *Curtatone*, 169 N.E.3d at 484-85 (explaining Minihane's actions fall outside of statute). The court noted that the preamble's language evidences the intent for the Wiretap Statute to prohibit eavesdropping by way of electronic devices. *Id.* The SJC stated the legislators' goals in enacting the Wiretap Statute "are unrelated to the facts at issue here, where the recording, but not the identity of the recorder, was known and agreed upon." *Id.*

<sup>48</sup> See *id.* (holding Wiretap Statute did not apply). The majority noted that the goals of the act are unrelated to the facts at issue, where the recording was known and agreed to, despite that the identity of the recorder was not known or agreed to. *Id.*

<sup>49</sup> See *Johl*, *supra* note 18, at 179 (explaining fundamental basis of Wiretap Statute). The Fourth Amendment's right to privacy lays the foundation for the Wiretap Statute's prohibition of willful interception of communications. *Id.*; see also *Curtatone*, 169 N.E.3d at 483-84 (explaining interpretation of statutory language). The majority stated that even outside the Wiretap Statute analysis, *Curtatone* had a diminished right to privacy in the conversation due to his role as mayor. *Curtatone*, 169 N.E.3d at 485. The majority also noted that the ordinary meaning of the word "secret," alongside the "legal context," rendered Minihane's actions outside the scope of the Wiretap Statute because *Curtatone*'s knowledge of the recording meant that he did not secretly hear or secretly record the conversation. *Id.* Further, the majority stated that the identity of the party recording the communication, even if fraudulent, is irrelevant, because it is the act of recording that must be secretive. *Id.* at 484; see also *Bast*, *supra* note 24, at 14 (explaining Massachusetts' Constitution prohibits electronic interceptions made secretly).

<sup>50</sup> See *Curtatone*, 169 N.E.3d at 483 (addressing plain meaning of "secret"); *City of Worcester v. College Hill Props., LLC*, 987 N.E.2d 1236, 1241 (Mass. 1984) (noting when term is not defined, plain meaning should be applied first); *Commonwealth v. Zone Book, Inc.*, 361 N.E.2d 1239, 1242 (Mass. 1977) ("When a statute does not define its words we give them their usual and accepted meanings, as long as these meanings are consistent with the statutory purpose.") (citation omitted).

<sup>51</sup> See *Curtatone*, 169 N.E.3d at 484-85 (explaining legislative intent). The court stated that legislative intent is apparent in both the history and the language of the act. *Id.* at 484.

surrounding circumstances that could be secretive in nature.<sup>52</sup> This statutory interpretation is directly at odds with the rationales of the two-party consent statute, which is to honor an individual's right to preserve the distribution of their speech and utilize the nature of a conversation as a "proxy for privacy."<sup>53</sup> The court's interpretation narrows the scope of the Wiretap Statute by disregarding an individual's right to preserve the distribution of their speech when a recording is procured through fraudulent acts, and such an interpretation contradicts Massachusetts' focus on the consenting individual's state of mind under a two-party consent statute.<sup>54</sup>

This statutory interpretation is further convoluted by its inconsistency with prior decisions by the SJC.<sup>55</sup> In *Commonwealth v. Tavares*, the SJC described the terms that "frame" the Wiretap Statute in "largely in negative terms," such as a "surreptitious 'interception' of any 'oral communication,' by any person is proscribed, except as specifically provided in a few narrow exceptions."<sup>56</sup> Therefore, when the court sought to interpret the term "secret," it should have accounted for prior legal contexts in which the

<sup>52</sup> See *Curtatone*, 169 N.E.3d at 484 (analyzing statutory language's structure to determine meaning of secret). The SJC utilized its framework in *Jackson* to determine that "it is the act of hearing or recording itself that must be concealed" in order to be a valid interception. *Id.* (relying on definitions and context found in prior case). In *Jackson*, the SJC highlighted the requirement of actual knowledge, but went on to state that "actual knowledge is proved where there are clear and unequivocal objective manifestations of knowledge." *Commonwealth v. Jackson*, 349 N.E.2d 337, 340 (Mass. 1976).

<sup>53</sup> See *Tracer*, *supra* note 20, at 134 (outlining rationale to protect speech distribution in two-party consent statutes). In effect, the SJC interprets actual knowledge like strict liability. *Id.* Therefore, if actual knowledge is present, other circumstances, even if exigent, will not impact the outcome. See *Curtatone*, 169 N.E.3d at 484 (stating recording is not secret if there is actual knowledge of the recording). Further, the SJC explained that "the identity of the party recording the communication or, indeed, the truthfulness with which that identity is asserted is irrelevant." *Id.* But see *Hyde*, 750 N.E.2d at 972-73 (Mass. 2001) (Marshall, C.J., dissenting) (explaining importance of lack of knowledge of identity of recorder). The SJC in *Hyde* noted that one of the circumstances that acted as a catalyst for the 1968 amendment was the new technology allowing interceptions to occur. *Hyde*, N.E.2d at 973. The court further reasoned that upon discovering a secret recording, the identity of the recorder could never be discovered, and therefore, regulation needed to occur. *Id.*

<sup>54</sup> See *Tracer*, *supra* note 20, at 144 (noting carve out that knowledge requirement creates). In *Jackson*, the court "[u]ltimately . . . read the statute to focus on the mental state of the person being recorded because the legislature had focused on individual consent when crafting the contours of the wiretapping law." *Id.*

<sup>55</sup> See *Commonwealth v. Tavares*, 945 N.E.2d 329, 335 (Mass. 2011) (utilizing word surreptitious to describe interception under statute); *Hyde*, 750 N.E.2d at 967 n.5 (explaining majority approach to Wiretap Statute's construction); see also *Gilday v. Dubois*, 124 F.3d 277, 289 (1st Cir. 1997) (describing conduct actionable under statute as "surreptitious"). "The majority contain language that, to some degree, prohibits only the surreptitious recording of another's words when spoken with a reasonable expectation of privacy." *Hyde*, 750 N.E.2d at 967.

<sup>56</sup> See *Tavares*, 945 N.E.2d at 335 (suggesting bounds of Wiretap Statute encompass more actions done without knowledge); see also *Robertson*, *supra* note 26, at 130 (exploring surreptitious inquiry as complicated element of two-party consent wiretap laws).

court used other, similar words interchangeably to describe an interception.<sup>57</sup> Instead, the court should have used both the plain meaning and its own prior interpretations of the word “secret,” such as the word “surreptitious,” to interpret what is an actionable interception.<sup>58</sup> Had this been the case, the court would have likely reasoned that because “surreptitious” means “[s]tealthy or fraudulently done, taken away, or introduced,” and because it had been used in previous decisions to describe a valid interception, the term “secret” should apply to not only mere knowledge of the recorded nature of the conversation, but also *how* the recording was procured.<sup>59</sup> Using this definition and prior interpretations of surreptitious, the *Jackson* framework is clarified by indicating that any form of fraudulent procurement of a recording revokes an individual’s actual knowledge and implied consent to the distribution of their speech, therefore implicating the wiretap statute.<sup>60</sup>

As a result of the court’s failure to take the nature of the conversation approach in interpreting the Wiretap Statute, an individual’s right to privacy is still subject to the “grave risk” of violation.<sup>61</sup> When applying the court’s interpretation, any recorded communication is valid so long as an individual

<sup>57</sup> See *Curtatone*, 169 N.E.3d at 483-84 (analyzing ordinary meaning and history of statute). When describing the history of the Wiretap Statute, the SJC cited to *Tavares* to establish that electronic devices were a driving force of the statute’s creation but failed to note how *Tavares* describes the four corners of the statute as to prevent “surreptitious interceptions.” *Id.* at 484-85; see also Robertson, *supra* note 26, at 130 (noting Massachusetts’ use of surreptitious synonymously with secret to determine interception).

<sup>58</sup> See *Tavares*, 945 N.E.2d at 335 (describing surreptitious conduct within scope of Wiretap Statute); *Hyde*, 750 N.E.2d at 975 (stating intent of Wiretap Statute is to prohibit surreptitious actions).

<sup>59</sup> See *Curtatone*, 169 N.E.3d at 483-84 (interpreting secret according to its plain meaning); *Tavares*, 945 N.E.2d at 335 (utilizing definition of surreptitious to describe interception under Wiretap Statute); Robertson, *supra* note 26, at 130 (describing secret interception as surreptitious); see also sources cited *supra* note 26 (defining surreptitious); sources cited *supra* note 27 (defining “secret”).

<sup>60</sup> See *Curtatone* 169 N.E.3d at 482 (describing Minihane’s conduct to obtain interview). Only when Minihane identified himself as Kevin Cullen was he able to obtain an interview with Curtatone. *Id.*; see also Brief of Appellant Joseph A. Curtatone at 11-12, *Curtatone*, 169 N.E.3d 480 (No. SJC-13027) (explaining Minihane’s conduct during interview). During the interview, “Minihane went so far as to alter his normal method of speaking to sound like Kevin Cullen,” and held himself out to be Kevin Cullen of the Boston Globe throughout the entire interview. Brief of Appellant Joseph A. Curtatone at 11-12, *Curtatone*, 169 N.E.3d 480 (No. SJC-13027) (describing conduct that may be interpreted as surreptitious).

<sup>61</sup> See *Curtatone*, 169 N.E.3d at 485 (stating lack of correlation of facts at issue and intent of statute). Due to the SJC narrowly focusing on one aspect of legislative intent in the preamble to regulate electronic devices, they determined that “[t]hese goals are unrelated to the facts at issue here, where the recording, but not the identity of the recorder was known and agreed upon.” *Id.* However, this is in direct contradiction to the dissent in *Hyde* which looks to the fact that the use of electronic devices can be used to eavesdrop and that the identity of the eavesdropper would remain unknown as a reason for the legislators to amend the statute in 1968. See *Hyde*, 750 N.E.2d at 973 (imploiring court to consider novel approaches to wiretapping as actionable under statute).

knows the communication is recorded, meaning that any recording based off fraudulent procurement or misrepresentation during the recording is considered a properly recorded communication under the Wiretap Statute.<sup>62</sup> Therefore, by dismissing an inquiry into circumstances that impact a consenting individual's state of mind or the circumstances that surround the nature of the recording, the recording individual may still manipulate the circumstances to violate the consenting individual's right to privacy.<sup>63</sup> This result contradicts the purpose of the Wiretap Statute because it is meant to safeguard privacy; the allowance of insidious and fraudulent acts to escape liability demonstrates to citizens that their right to privacy is illusory unless the recording precisely fits within the Statute.<sup>64</sup> Although on its face, the SJC's decision in *Curtatone v. Barstool Sports, Inc.*, appears to be an attempt to adhere to the intent of the legislature, in practice, the court's interpretation of "secret" will likely allow future conduct to fall outside the scope of the statute and render decisions contrary to the Wiretap Statute's aim at mitigating risks to individual's privacy rights.<sup>65</sup>

In *Curtatone v. Barstool Sports, Inc.*, the Massachusetts SJC examined the question of whether a recording obtained using a false identity constituted an "actionable interception under the Wiretap Statute."<sup>66</sup> The court's failure to interpret the word "secret" to include the circumstances of *how* a recording is obtained is problematic because it allows actions of fraud and misrepresentation to undermine the statute. Instead of briefly mentioning how Curtatone had a diminished expectation of privacy due to public office, the SJC should have thoroughly addressed the implications of his role and then turned to an analysis under the Wiretap Statute. As a result, the court's failure to foresee the implications of this reasoning will likely pose future harm to individuals who fall subject to a recording under false pretenses.

Catherine Cardon

---

<sup>62</sup> See *Jackson*, 349 N.E.2d at 340 (stating knowledge can take conduct out of scope of statute); Tracer, *supra* note 20, at 144 (stating framework of *Jackson* "loosens the strict all-party consent rule by allowing the courts to find a kind of implied consent when no explicit authorization exists"); *Curtatone*, 169 N.E.3d at 484 (finding identity of recorder irrelevant).

<sup>63</sup> See *Jackson*, 349 N.E.2d at 340 (explaining actual knowledge encompasses consent of all extenuating circumstances); Tracer, *supra* note 20, at 144 (noting knowledge requirement loosens Wiretap Statute).

<sup>64</sup> See Ferch, *supra* note 5, at 43, 45 (describing holding of *Curtatone v. Barstool Sports Inc.*). "[A] recording made openly and with the speaker's knowledge was not a 'secret recording' even though it was obtained through false pretenses." *Id.*; see also *Curtatone*, 169 N.E.3d at 484 (stating fraudulent conduct is irrelevant in circumstances where consent was given).

<sup>65</sup> See Tracer, *supra* note 20, at 144 (articulating that *Jackson* framework leaves ambiguity).

<sup>66</sup> See *Curtatone*, 169 N.E.3d at 484 (stating holding).