

# Is This Thing On?: Massachusetts Wiretap Act Now Offers Little Protection

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## INTRODUCTION

The Massachusetts Wiretap Act originally created a more restrictive version of the Federal Wiretap Act with a greater focus on individual privacy.<sup>1</sup> While the Federal Wiretap Act allows one party to a conversation to record the conversation without the knowledge or consent of the other party, its Massachusetts counterpart is distinguished by the requirement that both parties must “consent” to recording.<sup>2</sup> Since the enactment of the Massachusetts Wiretap Act, Massachusetts courts have repeatedly focused their analysis of the Act on whether both parties actually knew of the recording, regardless of if they knew the full gravity of the situation.<sup>3</sup> However, the recent Supreme Judicial Court of Massachusetts (“SJC”) decision, *Curtatone v. Barstool Sports Inc.*, is the first time that the Court has held that individuals may affirmatively lie about their identity to obtain consent to record a conversation.<sup>4</sup>

This Comment will analyze how the SJC’s interpretation of the Massachusetts Wiretap Act in *Curtatone* is a dangerous blow to individual

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\* J.D., New England Law Boston (2023). This Comment was written in Fall 2021, prior to the exponential growth and adoption of artificial intelligence in 2022 and 2023. Since this Comment was written, the risks to the privacy and reputation of every Massachusetts citizen posed by advanced technology have only grown more dire. I want to thank my editors Nicole Barrett and Benito Zappia, and the entire New England Law Review staff for their invaluable contributions to this Comment. Finally, I want to thank my wife, Rachel Tucker Bobbitt, for her unwavering support throughout law school and in my future legal career.

<sup>1</sup> See MASS. GEN. LAWS ch. 272, § 99 (2021); *Commonwealth v. Jackson*, 370 Mass. 502, 506 (1976).

<sup>2</sup> Compare MASS. GEN. LAWS ch. 272, § 99, with 18 U.S.C. § 2511(2)(d) (2021).

<sup>3</sup> See, e.g., *Jackson*, 370 Mass. at 502; *Commonwealth v. Boyarsky*, 452 Mass. 700, 704–05 (2008); *Commonwealth v. Rivera*, 445 Mass. 119, 120 (2005).

<sup>4</sup> 487 Mass. 655, 659 (2021).

privacy rights considering society's growing reliance on technology. Part I discusses the legislative intent of the Massachusetts Wiretap Act and how the SJC has refined its meaning. Part II discusses the facts, procedural history, and SJC analysis of *Curtatone v. Barstool Sports*. Part III argues that the SJC came to a reasonable holding in *Curtatone* by considering case precedent but failed to advance any public or governmental interest in further narrowing the scope of protection under the Act. Part IV further argues that this interpretation of the Act is especially dangerous considering the technological advances that have made concealing an identity easier.

## I. Background

The Massachusetts Wiretap Act ("the Act") is considered one of the strictest wiretap laws in the country.<sup>5</sup> Enacted in 1968 in response to "the uncontrolled development and unrestricted use of modern electronic surveillance" and the dangers that the developments posed to citizens' privacy, the Act prohibits any individual from willfully committing an interception or employing someone else to commit an interception.<sup>6</sup> The Act defines "interception" as secretly hearing or recording the contents of any oral communication through the use of a recording device by any person other than the one given prior authority.<sup>7</sup> This definition is often referred to as "two-party consent law" despite that the terms "notice" and "consent" are omitted from the Act altogether.<sup>8</sup> In lieu of an express requirement for either notice or consent, Massachusetts courts have consistently decided cases involving the Wiretap Act with a strict focus on the word "secretly."<sup>9</sup>

### A. Development of "Secretly" Under the Massachusetts Wiretap Act

In the SJC's earliest decision under the Act, *Commonwealth v. Jackson*, the Court held that an interception is not secretly made under the Act if the complaining party implied that it consented to the recording.<sup>10</sup> The defendant in *Jackson* made five phone calls to the kidnapped victim's home to make demands and scare the family.<sup>11</sup> On two of the calls, the defendant

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<sup>5</sup> Jason V. Owens, *The Broad Impact of the Massachusetts Wiretapping Statute*, LYNCH & OWENS P.C. (Sept. 20, 2020), <https://perma.cc/CC5M-KAS6>.

<sup>6</sup> MASS. GEN. LAWS ch. 272, § 99(A), (C)(1) (1968).

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., *Massachusetts Recording Law*, DIG. MEDIA L. PROJECT, <https://perma.cc/LCC9-7XDK> (last updated Sept. 10, 2022); Owens, *supra* note 5.

<sup>9</sup> See Owens, *supra* note 5.

<sup>10</sup> *Commonwealth v. Jackson*, 370 Mass. 502, 507 (1976).

<sup>11</sup> *Id.* at 503.

told the victim's brother that he knew the phone was tapped, but he did not make similar remarks on the other three calls.<sup>12</sup> The Court held that although the defendant believed that the police were recording when in fact it was the victim's brother, the recordings were not "secret" under the Act because the defendant acknowledged that the calls were being recorded and continued to speak.<sup>13</sup> The Court also acknowledged that while the Act originally intended to impose more stringent restrictions on the use of electronic surveillance than other states, the situation in *Jackson* did not fall under those restrictions.<sup>14</sup>

In *Commonwealth v. Gordon*, the SJC held that some literal violations of the Act are so unrelated to the conduct the legislature intended to prohibit that the Court cannot extend liability.<sup>15</sup> The Court was asked to exclude videotapes from the defendant's booking which the prosecutor offered to show the defendant's drunken state at the time of the alleged assaults.<sup>16</sup> The defendant argued that a literal reading of the statute would outlaw recording an inmate during the booking process if the inmate does not have actual knowledge of the recording.<sup>17</sup> The Court pointed to the preamble of the Act (with a specific focus on its protection of citizens from the "uncontrolled development and use of modern surveillance") and held that recording the booking process in jails and prisons was not an act from which the legislature intended to protect citizens.<sup>18</sup> For the first time, the SJC held that even where a recording is a literal violation of the Act, if a citizen's privacy rights are not actually affected, there is no violation of the Act.<sup>19</sup>

In *Commonwealth v. Rivera*, the SJC again decided that a literal violation of the statute did not warrant liability because it would be contrary to legislative intent.<sup>20</sup> The defendant contended that the evidence should exclude a video made illegally by a gas station owner and given to the police, which showed the defendant murdering someone.<sup>21</sup> The Court declined to

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<sup>12</sup> *Id.* at 503–04.

<sup>13</sup> *Id.* at 504, 506–08 (holding the other three recordings were inadmissible because the defendant never expressed knowledge of the recording).

<sup>14</sup> *Id.* at 506.

<sup>15</sup> 422 Mass. 816, 832–33 (1996).

<sup>16</sup> *Id.* at 832.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 832–33 (quoting MASS. GEN. LAWS ch. 272, § 99(A) (1994)) (stating that while a literal reading of the act would make audiotaping the booking process illegal, it does not appear that the legislature intended to extend protection to that situation).

<sup>19</sup> *Id.*

<sup>20</sup> 445 Mass. 119, 134 (2005).

<sup>21</sup> *Id.* at 126.

answer the question of the recording's legality, finding that the legislative intent was not to stop someone with a recording of a murder from going to the police.<sup>22</sup> While the Court did not decide the case on the legality of the recording, it did show the Court's willingness to allow recordings that may appear illegal when privacy rights are not truly affected.<sup>23</sup>

In *Commonwealth v. Hyde*, the SJC ruled that the defendant made a recording "secretly" under the Act because during a traffic stop, he failed to inform the police officer that he was recording.<sup>24</sup> The defendant in *Hyde* argued that the interaction could not fall under the protection of the Act because no expectation of privacy existed when the police officer performed the stop.<sup>25</sup> The SJC held that, unlike its federal counterpart, the Massachusetts Wiretap Act does not consider privacy expectations when differentiating between interceptions and legal recordings.<sup>26</sup> In support, the Court referenced Massachusetts Senate documents about the 1968 amendments showing that the Legislature expressly rejected an amendment allowing for one-party consent.<sup>27</sup> Ultimately, the Court held the recording "secret" with no exception for public officials in the Act, because the defendant never informed the officer of the recording.<sup>28</sup>

The SJC further held that a recording is only considered secret if the defendant makes it willfully.<sup>29</sup> In *Commonwealth v. Boyarsky*, the defendant argued on appeal that recordings of his jailhouse phone calls were secretly recorded under the Act because the person he spoke to was not informed that the call would be recorded.<sup>30</sup> When the defendant first called someone from the jail, an automated message played to inform the person receiving the call that the conversation would be recorded.<sup>31</sup> However, when that person handed the phone off to a third-party, no warning played and the third-party did not have knowledge of the recording.<sup>32</sup> The Court held that the apparent violation of the Act did not amount to a secret recording because the jailhouse did everything within its power to inform all parties

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<sup>22</sup> *Id.* at 127.

<sup>23</sup> *Id.* at 136.

<sup>24</sup> 434 Mass. 594, 598–99 (2001).

<sup>25</sup> *Id.* at 596.

<sup>26</sup> *Id.* at 598–99.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 598.

<sup>29</sup> *Commonwealth v. Boyarsky*, 452 Mass. 700, 707 (2008).

<sup>30</sup> *Id.* at 705.

<sup>31</sup> *Id.* at 704.

<sup>32</sup> *Id.*

of the recording.<sup>33</sup>

### B. *Massachusetts Wiretap Act Today*

The Massachusetts Wiretap Act recently faced constitutional concerns because its ban on secret recordings does not include an exception for recording police officers in public while they are working.<sup>34</sup> In *Project Veritas Action Fund v. Rollins*, a recent First Circuit decision, the Court found that First Amendment considerations require that the Massachusetts Wiretap Act include an exception for the secret recording of police officers while they are performing public functions.<sup>35</sup> While this ruling changed some aspects of the Act, it did not change the SJC's interpretation in any context other than when a public official is involved.<sup>36</sup> The situation in *Curtatone*, discussed below, was widely expected to be decided on constitutional grounds but instead, the Court chose to adhere to its strict interpretation of the Act by only requiring that all parties to a conversation be on notice that the conversation is recorded.<sup>37</sup>

## II. *Curtatone v. Barstool Sports, Inc.: The Court's Opinion*

### A. *Facts & Procedural History*

Barstool Sports, Inc. (Barstool) operates a blog and website known for “publishing crass content.”<sup>38</sup> The Boston Globe published an article admonishing the Boston Bruins hockey team for its affiliation with Barstool after the Bruins distributed Barstool-branded merchandise at a game.<sup>39</sup> Two days later, Somerville mayor Joseph Curtatone tweeted in support of the article, calling Barstool an “attempt to disguise misogyny, racism & general right-wing lunacy under a ‘sports’ heading.”<sup>40</sup> In response to this dispute, Barstool employee Kirk Minihane called Curtatone's office to request an

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<sup>33</sup> *Id.* at 707.

<sup>34</sup> Ryan E. Ferch, *Secretly Recording Public Officials: Challenges to the Massachusetts Wiretap Act*, 65 BOS. BAR J. 43, 44 (2021).

<sup>35</sup> 982 F.3d 813, 844 (1st Cir. 2020).

<sup>36</sup> See Ferch, *supra* note 34, at 43 (explaining that *Project Veritas* essentially invalidated *Hyde* on constitutional grounds although the case has not been overturned).

<sup>37</sup> See *Curtatone v. Barstool Sports, Inc.*, 487 Mass. 655, 658 (2021); see also Ferch, *supra* note 34, at 43.

<sup>38</sup> *Curtatone*, 487 Mass. at 656. See Dennis Young, *Barstool Sports' Racism is Finally Catching up with It*, DAILY NEWS (July 6, 2020, 4:35 PM), <https://perma.cc/E7S4-LFL8> (documenting several instances of racist content from Barstool president David Portnoy).

<sup>39</sup> *Curtatone*, 487 Mass. at 656.

<sup>40</sup> *Id.*

interview, identifying himself truthfully.<sup>41</sup> When Curtatone's office denied his request, Minihane called back to request an interview again, this time identifying himself as Kevin Cullen, a reporter for the Boston Globe that Curtatone is familiar with.<sup>42</sup> Believing Minihane's proclaimed identity, Curtatone agreed to a telephone interview.<sup>43</sup> A few days later Minihane called and interviewed Curtatone with his voice disguised as Kevin Cullen's.<sup>44</sup> At no point in the interview did Curtatone realize he was speaking to Minihane instead of Kevin Cullen.<sup>45</sup> Minihane asked Curtatone if he could record the conversation and Curtatone agreed.<sup>46</sup> Minihane posted the interview on Barstool's website along with an article critical of Curtatone.<sup>47</sup>

Curtatone sued Minihane and Barstool claiming that the interview was a violation of the Massachusetts Wiretap Act.<sup>48</sup> Minihane and Barstool moved to dismiss for failure to state a claim upon which relief can be granted, and the trial judge allowed the motion.<sup>49</sup> Curtatone appealed, and the case was transferred to the Supreme Judicial Court of Massachusetts on the Court's motion.<sup>50</sup>

#### B. *The Court's Holding and Analysis*

The SJC in *Curtatone* ultimately held that the recorded interview did not qualify as an "interception" under the Act.<sup>51</sup> The Court reasoned that in order for an "interception" to occur, a recording must be made both secretly and "without prior authority by all parties."<sup>52</sup> Thus, the Court considered the initial question in the case to be whether Minihane secretly recorded the interview as defined under the Act.<sup>53</sup> Curtatone argued that Minihane had secretly recorded and heard the interview by concealing his identity.<sup>54</sup> The

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<sup>41</sup> *Id.* at 656–57.

<sup>42</sup> *Id.* at 657.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *See Curtatone*, 487 Mass. at 657.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 655–56.

<sup>49</sup> *Id.* at 656.

<sup>50</sup> *Id.*

<sup>51</sup> *Curtatone*, 487 Mass. at 660.

<sup>52</sup> *Id.* at 658.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 657.

Court reaffirmed its position that the term “secretly” as used in the Act only applies to the phrases “hear,” “record,” and “aid another to hear or record,” and held that Minihane did not violate the statute because he informed Curtatone that the interview would be recorded and heard.<sup>55</sup> The Court decided that because under its interpretation of the Act Minihane did not secretly record the interview, it need not address if the recording was made without prior authority by all parties.<sup>56</sup>

The Court held that “[t]he identity of the party recording the communication or, indeed, the truthfulness with which that identity is asserted is irrelevant” under the Act.<sup>57</sup> In its reasoning, the Court noted that the legislature adopted the Act in response to “the commercial availability of sophisticated surveillance devices and the ease with which they facilitated surreptitious recording” and concluded that Curtatone’s situation was not like that which the Act aimed to protect.<sup>58</sup>

## ANALYSIS

In cases brought under the Massachusetts Wiretap Act, the SJC has narrowly interpreted the term “secretly” and allowed surreptitious recordings only when a strong public interest is furthered by doing so, or when the privacy at issue is not like that which the Act sought to protect.<sup>59</sup> The SJC in *Curtatone* broke from this precedent and narrowly construed the term “secretly” without mention of any public interest being furthered, and erroneously found that the Act did not seek to protect Curtatone’s privacy in situations like this.<sup>60</sup> Recent upward trends in society’s reliance on technology, and technology’s ability to be used for fraud, make the privacy violation in *Curtatone* the exact type that the Act sought to prohibit.<sup>61</sup>

### III. The SJC Failed to Further a Public Interest as Other Cases Under the Massachusetts Wiretap Act Have

The Massachusetts Wiretap Act is generally equated to the acts of the other ten states that have enacted laws more restrictive than the Federal

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<sup>55</sup> *Id.* at 659.

<sup>56</sup> *Id.*

<sup>57</sup> *Curtatone*, 487 Mass. at 659.

<sup>58</sup> *Id.* at 659–60.

<sup>59</sup> See, e.g., *Commonwealth v. Boyarsky*, 452 Mass. 700, 705 (2008); *Commonwealth v. Rivera*, 445 Mass. 119, 134 (2005); *Commonwealth v. Jackson*, 370 Mass. 502, 506 (1976).

<sup>60</sup> 487 Mass. at 659.

<sup>61</sup> See MASS. GEN. LAWS ch. 272, § 99(A) (2021).

Wiretap Act.<sup>62</sup> These eleven states' laws (including Massachusetts') are widely referred to as "two-party" or "all-party" consent laws because they do not allow a party to record a conversation simply because they are a party to the conversation.<sup>63</sup> This categorization has been widely criticized for many years as the SJC continues to prove in its decisions that consent from both parties is not required by the Act.<sup>64</sup> *Curtatone* represents a unique development in the SJC's continued refinement of its interpretation of "secretly recording" under the Act; it held that even where a defendant affirmatively lies about his identity, he does not violate the statute so long as the person he is recording knows about the recording.<sup>65</sup> While *Curtatone* is a reasonable holding given precedent on what a "secret recording" is under the Act, it failed to further any public interest and ultimately hindered the legislative intent behind the Act.<sup>66</sup>

The SJC's holding in *Curtatone* is not novel in its rejection of the idea that actual consent is required to make a recording under the Act.<sup>67</sup> Since the Act's inception, the SJC has been firm in its conviction that the legislature only intended for recordings to be illegal if the parties are not informed of the recording.<sup>68</sup> However, the SJC in *Curtatone* went further than any case in the Act's progeny likely imagined; it is the first time that the Court has allowed an ill-gotten recording without a strong public interest in the recording being made.<sup>69</sup> Each case leading up to *Curtatone* can be distinguished by the public or governmental interest furthered in allowing the surreptitious recording.<sup>70</sup>

While *Jackson* is widely understood to stand for the idea that knowledge of the actual recording is all that is necessary for a recording to be legal, the Court also considered the underlying public interest when it found the recording permissible in that case.<sup>71</sup> The Court applied a narrow definition

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<sup>62</sup> See Erin M. Pauley, *Conflicts Among Federal and State Wiretap Statutes Present Practical Challenges for Businesses*, 8 NAT'L L. REV. 269 (2018), <https://perma.cc/3KYJ-77ES>.

<sup>63</sup> Kareem Morgan, *Electronic Surveillance of Police Under the Massachusetts Wiretapping Statute*, M.G.L. c. 272 § 99, SANDULLI GRACE (Oct. 25, 2013), <https://perma.cc/4WCX-RSGV>.

<sup>64</sup> See *id.*

<sup>65</sup> 487 Mass. at 660.

<sup>66</sup> See generally Owens, *supra* note 5 (noting that precedent points to a focus only on the knowledge of the person being recorded).

<sup>67</sup> See *Commonwealth v. Jackson*, 370 Mass. 502, 506–07 (1976).

<sup>68</sup> See Owens, *supra* note 5.

<sup>69</sup> See 487 Mass. at 660.

<sup>70</sup> See, e.g., *Commonwealth v. Boyarsky*, 452 Mass. 700, 705–09 (2008); *Commonwealth v. Rivera*, 445 Mass. 119, 124–26 (2005); *Jackson*, 370 Mass. at 503–06.

<sup>71</sup> See generally 370 Mass. at 506–08 (holding recordings admissible against the kidnapper).



of “secret recording” and, whether it was the Court’s intention or not, made the Act slightly less restrictive in order to allow the recording to be used to convict a kidnapper.<sup>72</sup> The Court acknowledged that the kidnapper knew about the recording and knew how the recording was going to be used, yet continued the call and allowed himself to be recorded.<sup>73</sup> This constituted sufficient knowledge under the Act, especially when considered alongside the public and governmental interests in finding the kidnapper and convicting him.<sup>74</sup>

The Court in *Gordon* properly realized that the Act’s legislative intent would not be furthered by prohibiting the recording of the inmate booking process because the privacy given up in that situation is fundamentally different than anything the legislature wanted to protect.<sup>75</sup> Like the jailhouse phone call recordings considered in *Boyarsky*, the government’s conduct was not malicious and had functional purposes: holding the guards accountable, monitoring inmate and visitor safety, and keeping an accurate record of what happens during bookings.<sup>76</sup> The holding in *Gordon* may have made the Act slightly less restrictive, but the privacy interest of the inmate far outweighed the government and public interest in recording the process.<sup>77</sup>

Similarly, the Court in *Rivera* had a very clear public and governmental interest in catching a murderer, and the Court therefore found the recording permissible, even though the defendant did not know of the recording’s creation.<sup>78</sup> While recognizing that the actual recording may have been made secretly, the Court chose not to rule on the matter because it was not within the legislative intent to protect the murderer’s privacy.<sup>79</sup> The Court continued its well-intentioned mission to not allow the Act to be used as a shield and again put the public and governmental interests above a strict adherence to the letter of the law.<sup>80</sup>

Unlike in *Jackson*, *Gordon*, *Boyarsky*, and *Rivera*, the SJC in *Curtatone* made the Massachusetts Wiretap Act less restrictive without so much as a hint at

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<sup>72</sup> Jake Tracer, *Public Officials, Public Duties, Public Fora: Crafting an Exception to the All-Party Consent Requirement*, 68 N.Y.U. ANN. SURV. AM. L. 125, 144 (2012).

<sup>73</sup> *Jackson*, 370 Mass. at 504.

<sup>74</sup> *See id.* at 507.

<sup>75</sup> *Commonwealth v. Gordon*, 422 Mass. 816, 833 (1996).

<sup>76</sup> *See generally id.*

<sup>77</sup> *See id.*

<sup>78</sup> *Commonwealth v. Rivera*, 445 Mass. 119, 135 (2005).

<sup>79</sup> *Id.*

<sup>80</sup> *See id.*

a countervailing public or government interest.<sup>81</sup> In fact, the public interest seems to be in direct contrast with the outcome in *Curtatone*.<sup>82</sup> During the interview, Minihane claims to have been involved in “investigative journalism” and that is why he recorded Curtatone, but it was nothing more than a quest for revenge.<sup>83</sup> If Barstool investigated corruption or fraud in the Curtatone administration, then an adequate public interest may have been furthered by allowing the recording.<sup>84</sup> Instead, the Court ignored the ill-intent behind Minihane’s actions and allowed Barstool to score another win in its quest to push the boundaries of moral and legal activity.<sup>85</sup>

Even worse, by allowing the recording in *Curtatone*, the SJC ignored the very privacy rights that the legislature intended to protect under the Act.<sup>86</sup> The legislature intended to protect privacy rights from the uncontrolled development and use of recording devices, just like the technology used here.<sup>87</sup> While the legislature in 1968 could not have predicted the type of recording used in this case, the Act anticipated revolutionary technology and a reciprocal expansion of protections to fit the dangers of those technologies.<sup>88</sup> Minihane concealed his identity and recorded the interview because of a heightened availability of technology that the legislature never could have predicted.<sup>89</sup> Some phones existed at the time of the Act (although wildly different than today), but Minihane would not have been able to record the conversation and conceal his identity without easy access to a video camera, the Internet, email, and a cellphone.<sup>90</sup> In *Curtatone*, the SJC

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<sup>81</sup> See *Curtatone v. Barstool Sports, Inc.*, 487 Mass. 655, 660 (2021).

<sup>82</sup> See generally *NPR Ethics Handbook*, NPR, <https://perma.cc/73WP-MDYQ> (last visited Mar. 1, 2023) (stating that only in the rarest of instances should reporter identity and intent be hidden).

<sup>83</sup> See 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/MB3E-RVPV> (admitting that Minihane’s intent was to get back at Curtatone for publicly insulting Barstool).

<sup>84</sup> See Stefanie Chernow, *The Ethics of Undercover Journalism: Where the Police and Journalists Divide*, ETHICAL JOURNALISM NETWORK (Nov. 14, 2014), <https://perma.cc/SFS2-QK2B> (explaining that some situations require reporters to hide their identity).

<sup>85</sup> See *Curtatone*, 487 Mass. at 660.

<sup>86</sup> See MASS. GEN. LAWS ch. 272, § 99 (2021).

<sup>87</sup> See *id.*

<sup>88</sup> See Owens, *supra* note 5.

<sup>89</sup> Cf. Samuel Gibbs, *How Did Email Grow From Messages Between Academics to a Global Epidemic?*, THE GUARDIAN (Mar. 7, 2016, 10:07 AM EST), <https://perma.cc/7Q4Z-F84K> (explaining that the first version of email created in 1965 was intended only to share files and messages for academic purposes).

<sup>90</sup> See Minihane, *supra* note 83 (documenting the cell phone and microphone used).

believed it followed the legislative intent of the Act, but instead it failed to respond to developments in technology and the dangers they pose to individual privacy.<sup>91</sup>

#### IV. Rapidly Advancing Technology Makes It More Important than Ever to Protect Privacy Interests

The Act's development occurred at a time when having a recording device in your pocket at all times happened more in a spy movie plotline than reality.<sup>92</sup> The technology that individuals possess and use daily has developed at a dramatically accelerated pace over the last few decades.<sup>93</sup> Now more than ever, the SJC should seek to further the legislative intent of the Act by finding ways to expand individual protections against the dangers inherent in technological advances.<sup>94</sup>

Phone calls and text messages are the number one way that scammers reached Americans in 2020, keeping with the trend that existed for many years.<sup>95</sup> As evidenced by the record \$1.2 billion in reported losses to imposter scams in 2020, it is now easier than ever for a phone scammer to successfully conceal their identity.<sup>96</sup> However, phone scams are only one of the many ways that people are hiding their identity from unsuspecting citizens.<sup>97</sup> The number of attacks will likely increase as emerging technologies such as Deepfakes and other artificial intelligence continue to grow and perfect at an alarming rate.<sup>98</sup> Deepfake technology allows an individual to create fake but convincing images or videos from scratch, and it has become harder to detect as the technology improves.<sup>99</sup> In a nine-month period in 2019, the number of

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<sup>91</sup> See Janna Anderson & Lee Rainie, *Concerns About the Future of People's Well-Being*, PEW RSCH. CTR. (Apr. 17, 2018), <https://perma.cc/G2LU-FL6T> (stating that technological advances have "some negative effects . . . [such as] more ability to be deceived by bad actors").

<sup>92</sup> See Steve Silverman, *7 Rules for Recording Police*, GIZMODO (Apr. 10, 2012), <https://perma.cc/QX7L-S5PP>.

<sup>93</sup> Paul Scharre, *Making Sense of Rapid Technological Change*, CTR. FOR NEW AM. SEC. (July 19, 2017), <https://perma.cc/8DFK-VMZS>.

<sup>94</sup> See generally MASS. GEN. LAWS ch. 272, § 99 (2021) (explaining legislative intent).

<sup>95</sup> Monica Vaca, *The Top Frauds of 2020*, FED. TRADE COMM'N (Feb. 4, 2021), <https://perma.cc/TK65-Q4TD>.

<sup>96</sup> See *id.*

<sup>97</sup> See generally *What Are Some Common Types of Scams?*, CONSUMER FIN. PROT. BUREAU, <https://perma.cc/Y6EH-QSHG> (last updated Oct. 17, 2022).

<sup>98</sup> Rob Toews, *Deepfakes Are Going to Wreak Havoc on Society. We Are Not Prepared*, FORBES (May 25, 2020, 11:54 PM EDT), <https://perma.cc/3XY2-YTPG>; *Deepfake Fraud: Security Threats Behind Artificial Faces*, PANDA SEC. (Aug. 10, 2021), <https://perma.cc/939X-9J57>.

<sup>99</sup> Ian Sample, *What Are Deepfakes – And How Can You Spot Them?*, THE GUARDIAN (Jan. 13,

Deepfake videos online almost doubled from 7,965 to 14,678.<sup>100</sup> Soon, these Deepfake videos will be so lifelike that they are indistinguishable from reality, allowing scammers to hide their identity with relative ease.<sup>101</sup> While some social media companies distance themselves from the technology, others, such as Snapchat and TikTok, fully embrace it.<sup>102</sup>

As the availability and usability of technology capable of stealing one's identity has increased, so too has society's reliance on that technology.<sup>103</sup> As of September 2021, 85% of Americans own a smartphone capable of recording at a moment's notice.<sup>104</sup> From January to April 2020, Zoom increased its customer base by 180,000, marking a 169% growth over the prior year.<sup>105</sup> Today, there are nearly 300 million Zoom participants every day.<sup>106</sup> America's reliance on technology has increased to a point where only 7% of Americans claim to not use the internet regularly.<sup>107</sup>

Ordinary citizens use technology with the ability to record and be recorded—the likes of which police and legislators could not have fathomed at the time that the Act was passed.<sup>108</sup> While this degree of adoption could not have been anticipated by the Act's framers, the Act itself responded to and anticipated of this exact phenomenon: the uncontrolled development and use of technology and the dangers that it poses to the privacy of Massachusetts citizens.<sup>109</sup> Yet, when faced with a surreptitious recording made possible only by advances in recording technology, the SJC in *Curtatone* misguidedly allowed the recording and ultimately hampered the legislative intent behind the Act.<sup>110</sup> With a vast majority of Americans using the internet every day, the SJC should look for ways to protect citizens from invasions of their privacy, instead of giving wrongdoers the green light to

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2020, 5:00 AM EST), <https://perma.cc/Z7PN-9A42>.

<sup>100</sup> Toews, *supra* note 98.

<sup>101</sup> Toews, *supra* note 98.

<sup>102</sup> Michael Nunez, *Snapchat and TikTok Embrace 'Deepfake' Video Technology Even as Facebook Shuns It*, FORBES (Jan. 8, 2020, 6:30 AM EST), <https://perma.cc/3J2X-PF44>.

<sup>103</sup> See Natalie Sherman, *Zoom Sees Sales Boom Amid Pandemic*, BBC (June 2, 2020), <https://perma.cc/2MRM-UCCU>.

<sup>104</sup> See *Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://perma.cc/BCU7-J44X>.

<sup>105</sup> Sherman, *supra* note 103.

<sup>106</sup> Mansoor Iqbal, *Zoom Revenue and Usage Statistics (2023)*, BUS. OF APPS, <https://perma.cc/K6FA-GZ23> (last updated Jan. 9, 2023).

<sup>107</sup> Andrew Perrin & Sara Atske, *7% of Americans Don't Use the Internet. Who Are They?*, PEW RSCH. CTR. (Apr. 2, 2021), <https://perma.cc/Q235-449D>.

<sup>108</sup> See Owens, *supra* note 5.

<sup>109</sup> See MASS. GEN. LAWS ch. 272, § 99 (2021).

<sup>110</sup> See *Curtatone v. Barstool Sports, Inc.*, 487 Mass. 655, 660 (2021).

record others while assuming a false identity.<sup>111</sup>

### CONCLUSION

In *Curtatone*, the SJC claimed to be furthering the Act's intent by narrowly defining the term "secretly" and allowing Minihane to record his interview with Curtatone, despite lying about his identity. However, when the Act was passed, legislators were not focused on precisely defining what constitutes a "secret recording" but on *protecting the privacy rights of Massachusetts citizens*. Previous SJC wiretap cases which narrowly defined "secret" have always advanced an important public interest or found that the privacy at issue was not the kind sought to be protected by the Act. There is simply no public interest furthered that is more valuable than the individual privacy lost by allowing a recording like that in *Curtatone*, and the privacy at issue is the very kind the Act's framers sought to protect. With today's rapid growth in what technology can do and how often we use it, the SJC should have used *Curtatone* as an opportunity to increase privacy protections and further the true legislative intent behind the Act.

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<sup>111</sup> See *id.*; Perrin & Atske, *supra* note 107.