

MASSACHUSETTS

BARBERS WEBBY

Wiretapping, Eavesdropping Anomalies In Mass.

BY HARVEY A. SILVERGLATE AND JOSHUA GEWOLB

The Massachusetts courts have lately made important rulings in two separate areas of wiretapping and eavesdropping law, deciding when a secretly recorded conversation is admissible in court, and, separately, when a citizen is criminally liable for making such a recording.

The courts, however, have decided the cases in each of these areas — criminality and admissibility — without reference to the other. This has created an internally inconsistent and contradictory caselaw.

As the law is currently interpreted, illegal eavesdropping and wiretapping can land citizens in prison for five years, but, as has been affirmed in a recent ruling, the

Harvey A. Silverglate is a partner at Silverglate & Good in Boston. Joshua Gewolb, a legal assistant at the firm, is a former staff reporter for The Harvard Crimson.

fruits of illegal wiretaps may still be admissible in court.

The Massachusetts eavesdropping and wiretapping statute, G.L.c. 272, §99, leaves it up to the courts to decide when wiretapped material should be admissible. To fulfill this mandate, courts need to adopt some set of guiding principles.

Instead, in recent wiretapping and eavesdropping cases, the courts have admitted illegally recorded material on the basis of judges' personal sympathies or antipathies toward individual defendants and their motives.

This result-driven statutory interpretation has spiraled into an unprincipled caselaw that excludes illegally taped material recorded by the government, but creates an unpredictable free-for-all with respect to illegal material recorded by private citizens.

In creating such caselaw the courts have overstepped the authority granted them

by the anti-wiretapping statute, which insists that the judiciary consider all illegally wiretapped material for suppression.

Last month in *Commonwealth v. Barboza* (No. 00-P-727), the Appeals Court ruled admissible a surreptitious recording a father made of a phone conversation between his son and a family friend.

The father of 16-year-old "Tom" installed a tape recorder on his son's phone line in the home because he feared, correctly, that Tom was having a sexual relationship with Joseph Barboza, the 57-year-old family friend.

After recording two phone conversations, Tom's parents contacted the police, who listened to the tape recordings but failed to urge Tom's father, in light of the statute, not to record future conversations.

The father recorded two more conversations and went, with his now-cooperating son, to the district attorney, who did warn

him not to record any further calls. A police officer, with one-party's consent, then listened in on, but did not record, two additional calls.

With the accumulated evidence, criminal charges were brought against Barboza, who was convicted on four counts of statutory rape and two counts of indecent assault and battery.

The trial judge admitted the tapes of the first two conversations, made before Tom's father spoke to the police, while throwing out the tapes of the second two conversations that took place after the meeting with the police (but before the DA warned against further taping). The calls that the police officer listened in on were not the subject of a motion to suppress.

The Appeals Court, while concluding that the evidence against Barboza was overwhelming even in the absence of the tapes, upheld the trial judge's decision to admit the first group of tapes while ex-

VIEWPOINT

Wiretapping, Eavesdropping Anomalies In Mass.

Continued from PAGE 11

tapes, upheld the trial judge's decision to admit the first group of tapes while excluding the second batch.

The court based its decision on a 1990 opinion in which the Supreme Judicial Court rejected a defendant's bid to exclude tapes that his partner in crime had secretly made of their telephone conversations.

In that case, *Commonwealth v. Santoro*, 406 Mass. 421 (1990), the court made an unsupported assumption that since exclusionary rules are generally intended to deter government misconduct, the Legislature must have so limited the exclusionary rule in the anti-eavesdropping statute: "Exclusionary rules generally are intended to deter future police conduct in violation of constitutional or statutory rights. ... The exclusionary rule was not designed to protect persons from the consequences of the unlawful seizure of evidence by their associates in crime."

The Appeals Court built on this assumption in deciding to admit the first two tapes in *Barboza*. Writing for a unanimous court in *Barboza*, Judge Scott L. Kafker held that the first two calls, made before Tom's parents spoke to the police, were admissible because they were at that point in time still trying to "figure out what was ... right for their son and their family," not trying to assist law enforcement.

The next two calls were excluded because, even though the police had not advised the parents that such recording was illegal, there somehow was a sufficient

nexus between parents and police to transmute the subsequent recordings into some kind of state action.

The SJC in *Santoro* apparently made a special exception to the wiretapping exclusionary rule because it presented an unusually unsympathetic (for suppression) case of the illegal recording of one alleged criminal by another. However, *Barboza* takes this unfortunate precedent and expands it to the much broader area of wiretaps by purported crime victims and even interested witnesses.

Effectively, the court appears to have defacto established a new rule, or at least a practice, that all surreptitious recordings by private citizens are presumptively admissible.

Such a rule, however, clashes with the text and apparent intent of the anti-eavesdropping statute, which allows defendants to move for the exclusion of any wiretapped material, regardless of whether the wiretap was conducted by the government or a private individual: "Any person who is a defendant in a criminal trial ... may move to suppress the contents of any intercepted wire ... for the following reasons: 1. The communication was unlawfully intercepted."

Within these guidelines, the judiciary has authority to decide what evidence to suppress, but there would appear to be at least a heavy presumption in favor of suppression.

The courts seem obliged to treat equally all recordings meeting the statutory criteria,

ria, and, the court ruled last July in *Commonwealth v. Hyde*, (SJC-08429), that the statute specifically and clearly outlaws all eavesdropping and wiretapping without the consent of all parties to the conversation.

By setting aside a class of illegally recorded material as exempted from suppression, the courts have overstepped their authority and have injected a lawless degree of unbridled discretion into this area.

This is not to say, however, that all privately made surreptitious recordings should be illegal in the first place.

Last year's *Hyde* case provides an example of a type of recording that should be legal and consequently admissible. In *Hyde*, a motorist surreptitiously recorded, from his own car, a police officer's allegedly abusive behavior during a traffic stop.

The preamble to the wiretapping statute justifies the law on the ground that it is necessary to protect citizens from the consequences of eavesdropping by other citizens and by the government. It makes no mention of any legitimate privacy interests of government agents while performing their official duties on the public highways.

As SJC Chief Justice Margaret H. Marshall and Justice Robert J. Cordy wrote in dissent in *Hyde*, it is not good public policy to prosecute citizens for making recordings that reveal misconduct by police officers on the job in public. A peace officer simply should not have an expectation of privacy in such a situation.

The SJC majority's extraordinary rigidity in applying the illegality provisions of the statute in such an inappropriate setting, is in stark contrast to the courts' laxness in enforcing the exclusionary provisions of the law.

The wiretapping in *Santoro* and *Barboza* is illegal — and should be — which makes the courts' decision to admit its fruits inappropriate. Had the SJC ruled that *Hyde* had not violated any law, however, his recordings should have indeed been eligible for admission into evidence in any relevant proceedings against the police officer.

The court's flexibility in *Santoro* and *Barboza* is surprising in the context of its rigidity in *Hyde*: A sensible eavesdropping policy would rigidly exclude all illegally wiretapped material, but would legalize secret recordings by citizens of government agents carrying out their official duties, particularly in a setting where there is, and should be, no legitimate expectation of privacy.

The SJC must rein in the discretion of trial judges in deciding when to admit illegal tapes, and limit the law so that it does not curtail the ability of citizens, particularly on public streets, to protect themselves against abusive law enforcement practices.

If the courts are unable to conform the law more rationally to good public policy and to the Legislature's apparent intent, it will be time for Beacon Hill to revisit the statute. MAV