Suffolk Journal of Trial and Appellate Advocacy

Volume 6 | Issue 1 Article 18

1-1-2001

Shooting an Elephant - Massachusetts Maintains Reasonable Suspicion: Protecting Individual Privacy during Traffic Stops and Battling Racial Profiling

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Recommended Citation
6 Suffolk J. Trial & App. Advoc. 215 (2001)

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"SHOOTING AN ELEPHANT[1]" — MASSACHUSETTS MAINTAINS REASONABLE SUSPICION: PROTECTING INDIVIDUAL PRIVACY DURING TRAFFIC STOPS AND BATTLING RACIAL PROFILING

"...[T]o eliminate any requirement that the officer be able to explain that reasons for his actions signals an abandonment of effective judicial supervision...leaves police discretion utterly without limits. Some citizens will be subjected to this minor indignity while others -- perhaps those with more expensive cars, or different bumper stickers, or different-colored skin – may escape it entirely." [2]

I. INTRODUCTION

Almost every American has encountered the police while driving on the American roadways.[3] The pervasiveness of automobile ownership in our culture increases the potential for police-citizen contact.[4] However, the United States Supreme Court views the citizen's expectation of privacy in automobiles as significantly lower than in homes because of a car's inherent mobility, its exposure to public view, and the fact that its use is extensively regulated.[5] In a case not directly relating to automobiles, the

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[1] Title of a George Orwell essay, describing his service as an officer in British controlled Burma. Orwell's first hand account of his encounter with a "must" elephant symbolizes official power and discretionary authority. GEORGE ORWELL, SHOOTING AN ELEPHANT AND OTHER ESSAYS (1978).

[2] Pennsylvania v. Mimms, 434 U.S.106, 122 (1977) (Marshall, J., dissenting).

[3] *See* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 308.

[4] *See* David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556 (1998).

[5] *See, e.g.,.* California v. Carney, 471 U.S. 386, 393 (1985) (discussing mobility rationale); Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (upholding warrantless search of

Court transformed Fourth Amendment jurisprudence in *Terry v. Ohio*,[6] when it permitted for the first time a search and seizure without probable cause.[7] This transformation marked the beginning of a federal trend to shift the balance of interests under the Fourth Amendment from individual liberty to increased law enforcement and public safety.[8]

As our Fourth Amendment rights continue to diminish, the Massachusetts Supreme Judicial Court ("SJC") has utilized an alternative source of protection against unreasonable searches and seizures.[9] This alternative protection has signaled important progress in the battle against racial profiling.[10] Article Fourteen of the Massachusetts Constitution ("Article 14"), the model from which the founding fathers drafted the Fourth Amendment to the United States Constitution, provides Massachusetts citizens with an alternative basis to support unreasonable search and seizure claims.[11]

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motor home). *See generally* Craig M. Bradley, *The Court's "Two Model" Approach to the Fourth Amendment: Carpe Diem!*, 84 J. CRIM. L. & CRIMINOLOGY 429 (1993) (discussing Fourth Amendment jurisprudence with regard to automobiles).

[6] *See* 392 U.S. 1 (1968) (Recognizing need for warrantless searches and seizures).

[7] *See* id. (permitting brief stops and frisks without probable cause).

[8] *See* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 660 (1994) (discussing Fourth Amendment jurisprudence affect on minorities).

[9] *See* U.S. CONST. amend. IV. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

[10] *See Id. See also* Harris, *supra* note 4, at 556; Sklansky, *supra* note 3, at 308.

[11] *See* MASS. CONST. pt. 1, art. XIV (1780). Article Fourteen provides:

> Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All Warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspect places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Id. See also Commonwealth v. Gonsalves, 429 Mass. 658, 668, 711 N.E.2d 108, 115 (1999) (commenting on use of Article Fourteen in drafting Fourth Amendment); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925 (1997) (providing detailed history of Fourth Amendment arguments).

Given the continued weakening of Fourth Amendment rights through federal jurisprudence, Article 14 is an important source for protecting citizens against racial profiling, police practice of targeting suspects based on race.[12]

This note focuses narrowly on an officer's authority to order occupants out of lawfully detained automobiles, Massachusetts' response to the federal constitutional requirements regarding searches and seizures, and the impact this response has on the pervasive and disturbing practice of racial profiling. Part I of this note examines the Supreme Court decisions in *Pennsylvania v. Mimms*[13] and *Maryland v. Wilson*[14]; emphasizing their application of search and seizure law to police exit orders during routine traffic stops.[15] Section II discusses Massachusetts' response to the Supreme Court decisions, in the above-mentioned cases, to weaken search and seizure protections under the Fourth Amendment.[16] Section III compares Article 14 of the Massachusetts Constitution to the Fourth Amendment of the United States Constitution.[17] Section IV analyzes the importance of search and seizure jurisprudence in protecting against racial profiling.[18] Finally, this note concludes by suggesting that Massachusetts provide a national example in the battle against racial profiling by continuing its efforts to preserve strong protections against unreasonable searches and seizures.

II. THE SUPREME COURT AND EXIT ORDERS

The Supreme Court cases *Pennsylvania v. Mimms*[19] and *Maryland v. Wilson*[20] have been integral to the Court's application of Fourth

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[12] *See* Harris, *Supra* note 4, at 556; Sklansky, *supra* note 3 at 308; Abraham Abramovsky and Jonathan I. Edelstein, *Pretext Stops and Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared*, 63 Alb. L. Rev. 725, 730 (2000).

[13] 434 U.S. 106 (1977) (applying Fourth Amendment law to police traffic stops).

[14] 519 U.S. 408 (1997) (applying Fourth Amendment protections to passengers during traffic stops).

[15] *See infra* notes 19-47 and accompanying text.

[16] *See infra* notes 48-87 and accompanying text.

[17] *See infra* notes 88-103 and accompanying text.

[18] *See infra* notes 104-123 and accompanying text.

[19] 434 U.S. 106 (1977) (applying Fourth Amendment law to police traffic stops).

[20] 519 U.S. 408 (1997) (applying Fourth Amendment protections to passengers during traffic stops)

Amendment law to traffic stops.[21] In *Pennsylvania v. Mimms,*[22] a divided Supreme Court held that under the Fourth Amendment an officer may order a driver out of a lawfully detained vehicle without articulable reasonable suspicions.[23] Twenty years later, in *Maryland v. Wilson,*[24] the Court extended the *Mimms* holding to include passengers.[25]

A. Pennsylvania v. Mimms

Two Philadelphia police officers stopped Harry Mimms ("Mimms") for driving his vehicle with an expired license plate.[26] One of the officers ordered Mimms out of his automobile and to produce his owner's card and driver's license.[27] As Mimms complied, the officer noticed a bulge under Mimms' jacket.[28] The officer then frisked Mimms out of fear that the bulge might have been a weapon.[29] The frisk uncovered a loaded revolver, and Mimms was subsequently arrested and indicted on weapons charges.[30] The lower court denied Mimms' request to suppress the revolver as evidence discovered pursuant to an unlawful search and seizure, and the jury ultimately convicted him.[31]

The Supreme Court of Pennsylvania reversed Mimms' conviction, holding that the seizure of the revolver was unreasonable under the Fourth Amendment.[32] On appeal from that decision, the United States Supreme Court reversed, holding the officer's exit order reasonable and permissible under the Fourth Amendment, despite the lack of reasonable suspicion in

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[21] U.S. CONST. amend. IV (providing Constitutional protection from unreasonable searches and seizures); Maryland v. Wilson, 519 U.S. 408 (1997) (providing Fourth Amendment protection to passengers during routine traffic stops); Pennsylvania v. Mimms, 434 U.S. 106 (1977) (applying Fourth Amendment jurisprudence to ordinary traffic stops).

[22] *Cf. Mimms*, 434 U.S. at 106 (holding exit order lawful)

[23] *Cf. Mimms*, 434 U.S. at 109-113 (allowing arbitrary exit orders during lawful traffic stops).

[24] *Wilson*, 519 U.S. at 408.

[25] *Id* at 410.

[26] *Mimms*, 434 U.S. at 107.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Mimms*, 434 U.S. at 112 (holding police exit order reasonable).

[32] *See* Pennsylvania v Mimms, 471 Pa. 546, 552, 370 A.2d 1157, 1160 (1977) (finding officer's exit order lacked reasonable articulable suspicions of threat).

the circumstances.[33] Thus, the Court departed from its longstanding requirement of "reasonable suspicion" for searches and seizures under the Fourth Amendment, reasoning that additional restrictions on personal freedom of movement during lawful traffic detentions were a minor inconvenience when weighed against threats to officer safety.[34]

B. Maryland v. Wilson

Whereas *Mimms* involved additional intrusions into a driver's freedom of movement, *Wilson* focused on additional intrusions into a passenger's freedom of movement.[35] Jerry Lee Wilson ("Wilson") rode in the front passenger seat of a rental car that Officer Hughes pulled over for traveling sixty-four miles per hour in a fifty-five mile an hour zone.[36] Officer Hughes, after noticing Wilson "sweating" and appearing "extremely nervous", ordered him out of the car.[37] As Wilson exited the car, crack cocaine fell to the ground.[38] Wilson was arrested and indicted on drug charges.[39] At the preliminary hearing, Wilson moved to suppress the cocaine, arguing that Officer Hughes' exit order constituted an unreasonable seizure under the Fourth Amendment.[40] The Baltimore County Circuit Court granted Wilson's motion and the Court of Special Appeals of Maryland affirmed.[41] After the Maryland Court of Appeals denied review, the Supreme Court granted certiorari.[42] In a 7-2 decision, the Court reversed and extended the principle set forth in *Mimms* to passengers of law-

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[33] Pennsylvania v. Mimms, 434 U.S. at 111, n.6 (countering dissent's suggestion that Per Curiam opinion allows officer's at will order of drivers from vehicles).

[34] *See id.* at 112; *see also* Terry v. Ohio, 392 U.S. 1, 30 (1968) (allowing "pat frisks" for officer safety where reasonable suspicion of criminal activity exists); Brown v. Texas, 443 U.S. 47, 51 (1979) (requiring specific, objective facts for lawful seizure under Fourth Amendment).

[35] *See* Maryland v. Wilson, 519 U.S. 408 (1997) (allowing officer's authority to demand passengers out of lawfully stopped vehicles).

[36] *Id.* at 410.

[37] *Id.* at 410-11.

[38] *Id.*

[39] *Id.*

[40] Maryland v. Wilson, 519 U.S. 408, 411 (1997).

[41] *Id.; see also* Maryland v. Wilson, 106 Md. App. 24, 664 A.2d 1 (1995) (declining to extend *Mimms* rule to passengers).

[42] Maryland v. Wilson, 340 Md. 502, 667 A.2d 342 (1995); *see also* Maryland v. Wilson, 518 U.S. 1003 (1996) (denying certiorari).

fully stopped vehicles.[43] The Court again found that officer safety outweighed a passenger's liberty interests.[44] The Court suggested that a presumption of serious crime and a motivation to employ violence to prevent apprehension justifies this "minimal change in circumstance" to avert a passenger's possible access to weapons.[45] Coupled with the Court's decision in *Mimms*, the Court's holding in *Wilson* provides police officers with unfettered control over the freedom of movement of all occupants of lawfully detained vehicles enjoy until the officer deems appropriate.[46] Justice Kennedy noted that with the *Wilson* decision "the Court puts tens of millions of passengers at risk of arbitrary control by the police."[47]

III. THE MASSACHUSETTS RESPONSE

Established case law dictates that a traffic stop ends once the driver has produced a valid license and registration, unless the police have sufficient grounds to suspect current or prior criminal activity.[48] Massachusetts courts have cited *Mimms* with approval but they have required some objective grounds for the exit orders during routine traffic stops.[49] In *Com-*

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[43] *Wilson*, 519 U.S. at 415 (reasoning passengers pose greater danger to officers during routine traffic stops).

[44] *See id.* at 413-14 (acknowledging stronger sense of personal liberty for passengers than drivers).

[45] *See id.* at 414-15 (characterizing police traffic stops as conduits to uncover other "serious crimes").

[46] *See id.* at 415; *see also Mimms*, 434 U.S. at 111 (announcing officer's automatic entitlement to give exit orders).

[47] *Wilson*, 117 S. Ct. at 890 (Kennedy, J., dissenting) (commenting on affect of recent Court decision).

[48] *See* Commonwealth v. Torres, 424 Mass. 153, 158, 674 N.E.2d 638, 642 (1997) (holding no reasonable suspicion existed after completion of valid stop to justify continued seizure); *see also* Commonwealth v. Loughlin, 385 Mass. 60, 430 N.E.2d 823 (1982); Commonwealth v. Ferrara, 376 Mass. 502, 381 N.E.2d 141, 142 (1978); Commonwealth v. Alvarez, 44 Mass. App. Ct. 531, 692 N.E. 2d 106 (1998); Commonwealth v. Ellsworth, 41 Mass. App. Ct. 554, 671 N.E.2d 1001 (1996).

[49] *See* Commonwealth v. Santana, 420 Mass. 205, 212-13, 649 N.E.2d 717, 722 (1995) (stating officer exit order reasonable for safety of public or officer); Commonwealth v. Moses, 408 Mass. 136, 557 N.E.2d 14 (1990) (holding officer's actions reasonable precaution for own safety); Commonwealth v. Robbins, 407 Mass. 147, 552 N.E.2d 77 (1990) (allowing officer's exit order where officer noticed possible weapon); Commonwealth v. Ferrara, 376 Mass. 502, 381 N.E.2d 141 (1978) (permitting precautionary steps for officer safety); Commonwealth v. Lantigua, 38 Mass. App. Ct. 526, 649 N.E.2d 1129 (1995) (stating vehicle occupant's concealed movements justifies exit order).

monwealth v. Santana,[50] the SJC restated the *Mimms* holding that Massachusetts police may give exit orders to occupants of lawfully stopped vehicles.[51] However, the SJC required an objective standard for determining whether the perceived threat to an officer or public safety justifies an exit order.[52] In *Commonwealth v. Ferrara,*[53] the SJC ruled that after verification of the license and registration, no reasonable suspicion existed to justify an exit order or further interrogation.[54]

The SJC further demonstrated its unwillingness to follow the Supreme Court's lead in diminishing protection from unreasonable searches and seizures in *Commonwealth v. Gonsalves,*[55] where Justice Greaney explicitly declined to adopt either *Mimms* or *Wilson.*[56] In *Gonsalves,* a Massachusetts State Trooper ("Trooper") immediately ordered Mr. Gonsalves out of the back seat of a lawfully stopped taxicab.[57] The Trooper interrogated Mr. Gonsalves, searched the back seat of the taxicab, and seized a bag of cocaine.[58] The Superior Court granted Mr. Gonsalves' motion to suppress both the cocaine and his statements due to the Trooper's failure to provide an objective basis for his exit order.[59] Relying on Article 14, the Appeals Court affirmed the suppression order and rejected the Commonwealth's request that the SJC follow the *Mimms* and *Wilson* progeny.[60] Justice Greaney acknowledged the SJC's practice of granting greater protections to occupants of vehicles under Article 14 than are recognized under the Fourth Amendment.[61] In his majority opinion, Justice Greaney acknowledged that "[t]he nature of federalism requires that State Supreme

[50] *Santana,* 420 Mass. at 212-13, 649 N.E.2d at 722.

[51] *Id.* (explaining officer's right to order occupants from vehicle so long as objective suspicions exist to determine justification of exit orders).

[52] *Id.*

[53] 376 Mass. at 505, 381 N.E.2d at 144.

[54] *Id.* (accepting *Mimms* principle but further requiring articulable reasonable suspicion for exit order).

[55] *See* Commonwealth v. Gonsalves, 429 Mass. 658, 711 N.E.2d 108 (1999).

[56] *Id.* at 663, 711 N.E.2d at 112 (acknowledging state constitution's power to circumvent Fourth Amendment argument).

[57] *Id.* at 659, 711 N.E.2d at 109.

[58] *Id.*

[59] *Id.*

[60] *See* Commonwealth v. Gonsalves, 46 Mass. App. Ct. 186, 704 N.E.2d 515 (1999); *see generally* MA. CONST. pt. 1, art. 14 (providing Constitutional protection against unreasonable searches and seizures).

[61] *See Gonsalves,* 429 Mass. at 662, 711 N.E.2d at 111 (affirming court's departure from Supreme Court's view of search and seizure protections).

Courts and State Constitutions be strong and independent repositories of authority in order to protect the rights of their citizens."[62] In *Gonsalves*, the SJC outlined an objective test for determining a justifiable exit order as, "whether a reasonably prudent man in the policeman's position would be warranted in the belief that the safety of the police or that of other persons was in danger."[63] The SJC concluded that Article 14 protects Massachusetts motorists by requiring police officers to articulate a reasonable suspicion of danger to safety in order to justify an exit order.[64] This requirement emphasizes the Massachusetts position that an intrusion into an automobile occupant's privacy is significant, and therefore requires judicial protection.[65] The SJC supports a passenger's reasonable expectation of a higher sense of privacy than a driver's.[66] The SJC contemplated the inherent dangers police officers face during routine traffic stops, but stressed the need for specific, articulable facts indicating that danger exists to prevent random, disparate treatment of motorists.[67]

The reasonable suspicion standard does not create a high threshold of factual information.[68] The SJC acknowledged that the objective test is based on professional experience, not just ordinary reasonableness.[69] Furthermore, reasonable suspicion must relate to an officer's heightened awareness of danger to safety, not just potential criminal activity.[70]

The SJC found reasonable suspicion to exist in *Commonwealth v.*

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[62] *Id.* at 668, 711 N.E. 2d at 115 (explaining ability of states to provide greater privacy protection).

[63] *Id.* at 661, 711 N.E.2d at 110, (quoting Commonwealth v. Santana, 420 Mass. 205, 212-13, 649 N.E.2d 717, 722 (1995) quoting Commonwealth v. Almeida, 373 Mass 266, 271, 366 N.E.2d 756 (1977)).

[64] *Id.* at 662-3, 711 N.E.2d at 111-12 (repeating Article Fourteen principles expressed in Massachusetts case law). But Cf. *Loughlin*, 385 Mass. at 62. (stating proper exit orders exist without reasonable suspicion when occur before justified threshold inquiry).

[65] *See Gonsalves*, 429 Mass. at 663, 711 N.E.2d at 112 (balancing private interests of personal autonomy with safety needs of police and public).

[66] *See id.* at 663, 711 N.E.2d at 112-13; *Torres*, 424 Mass. at 157, 674 N.E.2d at 641 (reasoning passengers harbor more privacy concerns because of lack of participation in motor vehicle operation).

[67] *See Gonsalves*, 429 Mass. at 663-664, 711 N.E.2d at 112-13 (addressing social concerns of police abuse based on race, gender, and age).

[68] *See Gonsalves*, 429 Mass. at 664, 711 N.E.2d at 113 (declaring need for more than a hunch).

[69] *See id.* at 661, 711 N.E.2d at 110 (stating justified exit order exists if "reasonably prudent man in policeman's position" would believe threat of safety).

[70] *See id.* at 662-663, 711 N.E.2d at 112-13 (concluding Article Fourteen requires reasonable belief of danger to officer or public safety).

Almeida,[71] where a driver, driving late at night in a known high crime area, failed to supply an officer with the vehicle registration, and cautiously opened the glove compartment only enough to retrieve his wallet.[72] Likewise, the court found reasonable suspicion for an exit order existed in *Commonwealth v. Johnson*[73] when, after a high-speed chase, the officer noticed the driver place something in his pants.[74] The SJC also found reasonable suspicion where a passenger reached between the seats after the driver tried to evade police.[75]

Although applying federal constitutional law, the court in *United States v. Woodrum*[76] explained the necessary requirements for reasonable suspicion.[77] In *Woodrum,* the defendant slouched in the back seat, kept his hand moving inside his jacket, and then placed his other hand inside his jacket.[78] After the appellant refused the officer's request to remove his hands, the officers ordered him out of the vehicle.[79] The court found these objective articulations sufficient to raise reasonable suspicion for a legitimate exit order despite recognizing that *Mimms* permits officers to order passengers out of a vehicle absent reasonable suspicion.[80]

Massachusetts courts concur that an officer's "hunch" fails to adequately satisfy the reasonable suspicion threshold.[81] In *Commonwealth v. Torres,*[82] the court found detentions based upon "hunches" arbitrary and inconsistent with Article 14.[83] Although the passenger in *Torres* exited the

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[71] Commonwealth v. Almeida, 373 Mass. 266, 366 N.E.2d 756 (1977).

[72] *Id.*at 271-72, 366 N.E.2d at 760.

[73] 413 Mass. 598, 600, 602 N.E.2d 555, 556 (1992).

[74] *Id.*

[75] Commonwealth v. Vanderlinde, 27 Mass. App. Ct. 311, 314-15, 534 N.E.2d 811 (1989).

[76] 202 F. 3d 1 (2000) (holding taxi driver's consent legitimized the stop).

[77] *Id.* at 6-8 (finding reasonable suspicion to justify exit order).

[78] *Id.* at 13 (noting objective facts required to show reasonable suspicion).

[79] *Id.* (stating justification for officer's exit order).

[80] *Id.* (finding objective reasonable suspicion for officer's exit order).

[81] *See Gonsalves,* 429 Mass. at 664, 711 N.E.2d at 112-113 (announcing minimum requirement for objective reasonable suspicion to justify exit orders); *see also* Commonwealth v. Kimball, 37 Mass. App. Ct. 604, 605, 641 N.E.2d 1066 (1994) (holding no reasonable suspicion existed to justify further interrogation or vehicle protective search). The court found that the officer stopped the defendant's vehicle because of a hunch that the "disreputable looking jalopy" was stolen. *Id.* at 604, 641 N.E.2d at 1066.

[82] 424 Mass. at 159 (finding lack of objective reasonable suspicion).

[83] *Torres,* 424 Mass. at 160, 674 N.E.2d at 644 (explaining failure of multitude of non-offenses to reach reasonable suspicion threshold); *see also* Commonwealth v. Silva, 366 Mass. 403, 406, 318 N.E.2d 895, 898 (1974) (applying objective test to officer's rea-

vehicle on his own accord, the SJC found his subsequent detention unlawful because exiting the vehicle and a slight delay in responding to the officer did not amount to reasonable suspicion.[84] Accordingly, these cases reinforce the present rule that an officer must justify his exit order with articulable reasonable suspicions that danger to the officer's safety exists.[85] Once the suspicion of danger subsides, any justification for further detention disappears.[86] If no justification exists for further detention, the motorists should be permitted to leave.[87]

IV. HISTORICAL COMPARISON OF THE FOURTH AMENDMENT AND ARTICLE FOURTEEN

The Massachusetts Declaration of Rights, enacted seven years before the enactment of the Federal Constitution, was first in providing protections for citizens from unreasonable searches and seizures.[88] The British general writs of assistance, which permitted the Crown's officers to search and seize at their absolute and unlimited discretion, provoked an anti-British response in Massachusetts.[89] James Otis argued before the

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sonable belief of endangered safety).

[84] *Id.* Torres, passenger in a lawfully stopped vehicle, delayed in responding to the officer after the officer knocked on the passenger window. *Id.* at 155, 674 N.E.2d at 640. His response was to exit the vehicle, suddenly. *Id.* The SJC found reasonable suspicion to have Torres stand behind the vehicle while the officer further inquired the driver. *Id.* at 157, 674 N.E.2d at 641. The SJC held that once the officer decided to interrogate Torres, a seizure occurred and no reasonable suspicion of potential officer danger existed to justify the continued detention. *Id.* at 159, 674 N.E.2d at 642.

[85] *See Woodrum*, 202 F.3d at 5; *Gonsalves*, 429 Mass. at 664, 711 N.E.2d at 112-113; *Torres*, 424 Mass. at 160, 674 N.E.2d at 644; *Almeida*, 373 Mass. at 272, 366 N.E.2d 756; *Johnson*, 413 Mass at 600, 602 N.E.2d at 555.

[86] *See Gonsalves*, 429 Mass. at 664, 711 N.E.2d at 113; *Torres*, 424 Mass. at 160, 674 N.E.2d at 644; *Ferrara*, 376 Mass at 505, 381 N.E.2d at 141; *Kimball*, 37 Mass. App. Ct. at 607, 641 N.E.2d at 1066.

[87] *See Gonsalves*, 429 Mass. at 663, 711 N.E.2d at 112; *Torres*, 424 Mass. at 157, 674 N.E.2d at 644; *Kimball*, 37 Mass. App. Ct. at 607, 641 N.E.2d 1066. *But see* Berkermer v. McCarthy, 468 U.S. 420 (1984) (explaining few motorists willing to defy officer orders without permission).

[88] *See* U.S. CONST. amend. IV; MA CONST. pt. 1, art. 14; *Gonzalves*, 429 Mass. at 667-68, 711 N.E.2d at 114-15; Commonwealth v. Cundriff, 382 Mass. 137, 144, 415 N.E.2d 172, 176.

[89] *See Cundriff*, 382 Mass. at 143 (examining the evolution of Article Fourteen of the Massachusetts Declaration of Rights); *see also* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 54, (1970).

Superior Court of the Massachusetts Bay Colony against the issuances of general writs of assistance in 1761.[90] Otis' argument, where he is said to have condemned the writs as "the worst instrument of arbitrary power...a power that places the liberty of every man in the hands of every petty officer," is generally considered the earliest opposition to the Crown.[91] Article 14 was later enacted in large part to protect Massachusetts' citizens from abuse of these writs of assistance.[92]

In rejecting the Commonwealth's argument in *Gonsalves*, that the SJC must follow the Supreme Court's interpretation of the Fourth Amendment, Justice Greaney explained that Article 14 provided a model for the drafters of the Fourth Amendment.[93] Although Massachusetts maintained Article 14, the Fourth Amendment's protections extended to the states in 1949, through the Fourteenth Amendment.[94] Thus, until recently, state courts primarily relied upon Federal Constitutional interpretations when deliberating privacy matters.[95]

Chief Justice Herbert P. Wilkins of the SJC noted that "the [United States] Supreme Court describ[ed] a common base from which [states] can

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[90] *See* L. ROTH & HILLER ZOBEL, 2 LEGAL PAPERS OF JOHN ADAMS 106, 140-42 (1965).

[91] *See id.* at 140-42.

[92] *See Gonsalves*, 429 Mass. at 669, 711 N.E.2d at 116 (*Ireland J., concurring*) (declaring Supreme Judicial Court's authority under state constitution); *Cundriff*, 382 Mass. at 144, 415 N.E.2d at 176 (discussing development of search and seizure law); *see also* M.H. SMITH, THE WRITS OF ASSISTANCE CASE 1 (1978) (analyzing Writs of assistance case heard in SJC and detailing surrounding history).

[93] *See* Harris v. United States, 331 U.S. 145, 161 (1947) (*Frankfurter, J., dissenting*); Commonwealth v. Upton, 394 Mass. 363, 372, 476 N.E.2d 548, 555 (1985); *Gonsalves*, 429 Mass. at 668, 711 N.E.2d at 115; JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 38 (1966); Remarks of Chief Justice Herbert P. Wilkins to Students at New England School of Law on March 27, 1997, 31 NEW ENG. L. REV. 1205, 1213 (Summer 1997). *But see* LASSON, *supra* note 89, at 79-82 (suggesting Fourth Amendment influence from seven different states' bill of rights); Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 53-54 (1996) (minimizing historical claims of Article Fourteen influence on drafters of the Fourth Amendment).

[94] *See* Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (extending prohibition of unreasonable searches and seizures to states via Fourteenth Amendment); *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493 (1977) (recalling Supreme Court cases extending Federal Bill of Rights provisions to states).

[95] *See* Wilkins, *supra* note 93, at 1212 (asserting state courts previously minimal interest in state constitution); Hans A. Linde, *E Pluribus – Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 166 (1984) (discussing state courts return to state constitution for source of authority); *see* Brennan *supra* note 94, at 489 (discussing rise in state court reliance on state constitution).

go up."[96] In other words, the provisions of state constitutions guaranteeing liberties must therefore not provide fewer protections than those provided by the Federal Constitution.[97] A state court's authority to enforce rights guaranteed by the state constitution requires the justices to interpret the provisions according to their views.[98] State court reliance upon state constitutions in protecting civil liberties does not invalidate the Supreme Court's interpretation of corresponding Federal Constitutional rights.[99] In fact, state courts should faithfully deliberate federal court constitutional decisions and, if opposed, raise state law as an alternative source of protection.[100] The present concern is not *whether* to use state constitutions but *how to use them*.[101] A state's focus on state constitutional provisions may be the result of concerns about the Supreme Court's continuing support for broad police power.[102] As one commentator alleges, "the Supreme Court's Fourth Amendment jurisprudence, as tattered and full of holes as a beggar's winter coat, calls into question whether the remaining protection it offers to citizens against government searches and seizures has any value."[103]

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[96] *See* Wilkins, *supra* note 93, at 1213 (discussing changes in legal profession and substantive law).

[97] *See* Brennan, *supra* note 94, at 491 (observing increase use of state constitutional provisions by state courts as source of additional protection); Wilkins, *supra* note 93, at 1213 (indicating Federal Constitution only affords minimal protection); *see also Gonsalves*, 429 Mass. at 668, 711 N.E.2d at 115 (offering state constitution as source for greater protection).

[98] *See Gonsalves*, 429 Mass. at 668, 711 Mass. N.E.2d at 115 (explaining need for justices to interpret state constitution not solely in-line with United States Supreme Court); *see* Brennan *supra* note 94, at 491 (emphasizing importance of state courts use of state constitutions as source of individual liberties).

[99] *See* Wilkins, *supra* note 93, at 1213 (Summer 1997) (explaining states reliance on state law not contrary to Supreme Court); Brennan, *supra* note 94, at 501-02 (enhancing notion that Supreme Court decisions not dispositive of individual rights).

[100] *See* Brennan, *supra* note 94, at 491; *see also* Wilkins, *supra* note 93, at 1213.

[101] *See* Linde, *supra* note 95, at 166 (discussing state courts returning to state constitutions to resolve liberty issues).

[102] *See* Harris, *supra* note 4, at 556 (criticizing the Supreme Courts failure to protect citizens from unreasonable searches and seizures); Brennan, *supra* note 94, at 495 (considering reasons for states reemphasis on state constitutions).

[103] *See* Harris, *supra* note 4, at 556 (asserting no protection available to motorist in Fourth Amendment).

V. DRIVING UNDER THE LAW

As Fourth Amendment protections diminish, an officer's abuse of his discretional authority evokes real and enduring concerns for motorists and, indeed, all citizens.[104] In fact, Justice Brennan, concerned with the path of the Court's Fourth Amendment jurisprudence, described its balancing of interests as done with "the judicial thumb...planted firmly on the law enforcement side of the scales."[105] Traffic stops based upon race occur frequently and arbitrarily.[106] Racial profiling occurs when police use race as a negative indicator that triggers an officer's suspicion.[107] The general public disapproves of racial profiling and further, they believe it is widespread.[108] An ACLU report found that blacks drove seventy-three percent of cars stopped and searched on Maryland's Interstate 95, despite the fact that blacks only comprise fourteen percent of those driving in that area.[109] Police found no illegal contraband in seventy percent of those vehicles searched.[110] Similarly, on a stretch of Interstate 95 in Florida, blacks make up less than ten percent of drivers but seventy percent of persons stopped and searched.[111]

The pervasiveness of automobile ownership in American culture increases the potential for police-citizen contact.[112] Increased contact results in *de facto* decreased personal privacy.[113] The motorist becomes the target of unfettered police authority, despite the legitimate governmental

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[104] *See Traffic Stops*, 11 HARV. L. REV. 299, 306 (1997) (discussing Supreme Court's ruling in *Mimms* and *Wilson*).

[105] United States v. Sharpe, 470 U.S. 675, 720 (1985) (Brennan, J., dissenting).

[106] *See* David A. Harris, *"Driving While Black" And All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 555 (1997) (discussing pervasiveness of racial based traffic stops); David A. Harris, *Driving While Black: Racial Profiling On Our Nations Highways*, American Civil Liberties Union Freedom Network (June 1999), http://www.aclu.org/profiling/report/index.html; *see also*, *'Profiling' Rates a Look in L.A.*, LOS ANGELES TIMES, Jan. 25, 2000, at B6; John A. Dvorak, *Data on Traffic Stops Sought Racial Profiling Cited by Lawmaker*, THE KANSAS CITY STAR, Jan. 20, 2000, at A1; Jerry Oliver, *Police Target Most Likely Criminals of All Races*, RICHMOND TIMES-DISPATCH, Jan. 30, 2000, at G3.

[107] H.R. Rep. No. 517 (2000).

[108] *Id.*

[109] Report of John Lamberth, PhD., ACLU Freedom Network, www.aclu.org

[110] *Id.*

[111] *See* Harris, supra note 106, at 561-63.

[112] *See* Harris, *supra* note 4 at 576-579.

[113] *See id.*

interest in a traffic stop ending with the completion of a citation.[114] The state's safety interests extend to unnecessary or improper police encounters with citizens.[115]

Many automobile stops are executed for reasons beyond simple traffic law enforcement.[116] In fact, police acknowledge the potential revelation of a more serious crime in every stop.[117] However, in those circumstances where vehicles are stopped under the pretext of a traffic violation, the traffic stop objective changes from routine traffic violation enforcement to drug and violent crime investigations.[118] In an attempt to cure these pretextual stops, the petitioners in *Whren v. United States*[119] unsuccessfully sought to have the Court adopt a Fourth Amendment test of whether a police officer, acting reasonably, would have made the stop for the reasons given in the particular cirsumstance.[120]

The reasonable suspicion requirement demands that officers provide objective articulable reasons for exit orders.[121] "Insisting that police officers explain their decision to single out a particular passenger for questioning would help prevent their reliance on impermissible criteria such as race."[122] However, when the Supreme Court granted officers non-reviewable authority to order drivers and passengers from their vehicles, the Court removed another protective procedure in the war against racial profiling.[123]

V. CONCLUSION

While cities across the country conduct studies and state legisla-

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[114] *See id.*; *Traffic Stops*, *supra* note 104, at 302 (explaining extent of police authority during routine traffic stops).

[115] *See Traffic Stops*, *supra* note 104, at 302.

[116] *See* Harris, *supra* note 4, at 567; *Traffic Stops*, *supra* note 104, at 302.

[117] *See id.*

[118] *See id.*

[119] 517 U.S. 806 (1996)

[120] *Id.* at 809 (holding subjective intent of officers actions inapplicable to traffic stops).

[121] *See Gonsalves*, 429 Mass. at 661, 711 N.E.2d at 110 (stating justified exit order exists if "reasonably prudent man in policeman's position" would believe threat of safety).

[122] Florida v. Bostick, 501 U.S. 429, 450 n.4 (1991) (Marshall, J., dissenting) (describing race-based selection of passengers for questioning in bus sweeps)

[123] *See Mimms*, 434 U.S. at 333-34; *Wilson*, 519 U.S. at 410; Harris, *supra* note 4, at 582-83; *Traffic Stops*, *supra* note 104, at 302.

tures propose bills regarding the use of racial profiling, Massachusetts' courts have maintained a search and seizure procedure that provides a small but effective safeguard against biased and arbitrary police power. The pervasive use of the automobile in American culture results in a figurative collision course between a majority of the citizens and the police. The Supreme Court has continued its trend toward greater police discretion and less privacy protection for motorists. Massachusetts, however, continues to lead a growing number of states that are unwilling to follow the Supreme Court's interpretation of the Fourth Amendment, and are therefore using their own constitutional provisions as an alternate source of protection for motorists. The ultimate benefit of this non-reviewable path is not just broader protection from unreasonable searches and seizures, but also protection from race based crime prevention tactics. The SJC should be commended for its leadership in search and seizure jurisprudence and the protection of citizens' personal autonomy. Massachusetts should be regarded as a model for other states because of its efforts to utilize the state constitution to provide citizens with greater privacy protection in their vehicle.

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