CRIMINAL PROCEDURE — SEARCHES — SUPREME JUDICIAL COURT OF MASSACHUSETTS HOLDS THAT CONTINUOUS, LONG-TERM POLE CAMERA SURVEILLANCE OUTSIDE HOMES IS A SEARCH UNDER STATE CONSTITUTIONAL LAW. — *Commonwealth v. Mora*, 150 N.E.3d 297 (Mass. 2020).

Today's digital world brings advanced police surveillance as never seen before, with more vulnerable communities[1] bearing the brunt of these increased interactions and intrusions.[2] And the stakes are high: repeated police exposure, digital or not, increases the risk of violent outcomes.[3] The Fourth Amendment, which has come to regulate police actions and individual privacy rights, should offer a path forward — yet in our technological age, Supreme Court jurisprudence is woefully behind the curve.[4] Last year, in *Commonwealth v. Mora*,[5] the Massachusetts Supreme Judicial Court confronted a combination of these issues directly, with exciting results. Turning to article 14 of the state constitution's declaration of rights instead of the Fourth Amendment of the U.S. Constitution, the court held that the nonstop video surveillance of a home for an extended period of time was a "search" requiring a warrant.[6] As such, the court deepened privacy protections for poor people and people of color by refusing to link one's expectation of privacy outside the home to one's ability to construct physical barriers to avoid the public gaze.[7] This holding marks a small but important step toward limiting police intrusions on privacy for people of all income levels and races in Massachusetts.

After an informant pegged Nelson Mora as a "large-scale drug distributor" in 2017, police began investigating Mr. Mora and made several controlled purchases of drugs from him.[8] Soon after, investigators mounted a pole camera near his home.[9] Later, police installed a second pole camera near the home of Ricky Suarez, a man who was also suspected of being involved in the drug operation.[10] The cameras outside

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[1] "Vulnerable communities" or "marginalized communities" refers here to low-income communities and communities of color.

[2] *See generally* BARTON GELLMAN & SAM ADLER BELL, CENTURY FOUND., THE DISPARATE IMPACT OF SURVEILLANCE (2017).

[3] *See, e.g.*, Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 129 (2017); Osagie K. Obasogie & Zachary Newman, *Police Violence, Use of Force Policies, and Public Heath*, 43 AM. J.L. & MED. 279, 280 (2017).

[4] *See* Susan Freiwald & Stephen Wm. Smith, *The Supreme Court, 2017 Term — Comment: The* Carpenter *Chronicle: A Near-Perfect Surveillance*, 132 HARV. L. REV. 205, 205–06 (2018).

[5] 150 N.E.3d 297 (Mass. 2020).

[6] *Id.* at 302.

[7] *See id.* at 306.

[8] *Id.* at 302.

[9] *Id.*

[10] *See id.* at 301–02.

the men's residences allowed police to surveil their front doorways.[11] The cameras "recorded uninterruptedly, twenty-four hours a day, seven days a week," capturing footage for 169 days outside Mr. Mora's home and 62 days outside Mr. Suarez's house.[12] They logged "video but not audio recordings," did not have "infrared or night vision capabilities," and could not view inside the houses.[13] However, police could direct and zoom the cameras instantaneously, capturing license plate information on vehicles and all foot traffic outside the homes.[14] Police could access the footage remotely online in real time or review the video later as it was stored on a police server.[15]

In 2018, the footage led investigators to arrest twelve people, including Mr. Mora and Mr. Suarez, and to obtain search warrants for various locations.[16] The searches turned up drugs and money, and Mr. Mora, Mr. Suarez, and another defendant, Lymbel Guerrero, moved to suppress the footage and evidence obtained as a result of it.[17] The trial court judge denied the motions to suppress, finding that the collection of the pole camera footage was not a search under the Fourth Amendment.[18] The judge determined that the camera surveillance recorded only what the public could otherwise view and thus did not infringe upon the defendants' "reasonable expectation of privacy" under *Katz v. United States*.[19] The judge also found that the surveillance was not a search under article 14 of the state constitution's declaration of rights because it did not rise to the level of more intrusive surveillance that would require a warrant.[20] Mr. Mora, Mr. Suarez, and Mr. Guerrero appealed to the Supreme Judicial Court.[21]

The Supreme Judicial Court remanded the motions to suppress.[22] Writing for the unanimous court, Justice Lenk held that the nonstop filming outside Mr. Mora's and Mr. Suarez's homes for an extended period of time was a search under article 14 of the Massachusetts Declaration of Rights.[23] The court declined to decide the case on Fourth Amendment grounds, believing that the "status of pole camera surveillance 'remains an open question'" under the Fourth

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[11] *Id.* at 302. Police also installed pole cameras in three other locations: two outside the homes of two other individuals, and one on a street allegedly used for drug deals. *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 303.

[17] *Id.* The three men were joined by five other defendants. *Id.*

[18] *See id.*

[19] 389 U.S. 347, 360 (1967) (Harlan, J., concurring); *see Mora*, 150 N.E.3d at 303.

[20] *See Mora*, 150 N.E.3d at 303.

[21] *Id.* at 304.

[22] *Id.* at 302.

[23] *Id.*

Amendment.[24] Instead, the court looked to the definition of a search in the state constitution, noting that article 14 "does, or may, afford more substantive protection to individuals" than does the U.S. Constitution.[25] To assess whether a search had occurred under the state constitution, the court inquired whether the three men "manifested a subjective expectation of privacy in the object of the search," and whether "society is willing to recognize that expectation as reasonable."[26]

The court determined that Mr. Mora and Mr. Suarez possessed this subjective belief but Mr. Guerrero did not.[27] Both Mr. Mora and Mr. Suarez attested that "they did not expect to be surveilled coming and going from their homes over an extended period," while Mr. Guerrero, whose house was not surveilled by a pole camera, did not "explicitly" express that he expected his general movements in other spaces to go undetected.[28]

Notably, the court rejected the Commonwealth's argument that a lack of protective barriers surrounding a residence should play a role in assessing whether an individual has a subjective expectation of privacy in their home.[29] First, the court noted that, traditionally, people generally had an expectation of privacy in the areas around their homes because police had neither the time nor the technology to conduct long-term surveillance that could be stored and reviewed in the future — and thus people had no need to build walls or fences to prevent this type of surveillance.[30] Furthermore, the court stressed that assessing a person's expectation of privacy based on physical barriers would unfairly link privacy rights to factors including income, race, ethnicity, land ownership, and wealth.[31] The court emphasized that this "resource-dependent approach" would run afoul of the "long-held egalitarian" values that undergird article 14.[32]

Next, the court examined the second prong of the search test under state law: "Whether [Mr.] Mora and [Mr.] Suarez's expectation of privacy [wa]s one that society would regard as 'reasonable.'"[33] The court contrasted the facts in this case with those in *Commonwealth v.*

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[24] *Id.* at 305 (quoting Commonwealth v. Almonor, 120 N.E.3d 1183, 1192 n.9 (Mass. 2019)).

[25] *Id.* (quoting *Almonor*, 120 N.E.3d at 1192 n.9).

[26] *Id.* (citing Commonwealth v. Augustine, 4 N.E.3d 846, 856 (Mass. 2014)); *cf.* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (creating the Fourth Amendment's reasonable expectation of privacy test, which requires "that a person have exhibited an actual (subjective) expectation of privacy and . . . that the expectation be one that society is prepared to recognize as 'reasonable'").

[27] *Mora*, 150 N.E.3d at 305.

[28] *Id.*; *see id.* at 303, 305–06.

[29] *Id.* at 306.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* (quoting Commonwealth v. One 1985 Ford Thunderbird Auto., 624 N.E.2d 547, 550 (Mass. 1993)); *see id.* at 306–07.

McCarthy,[34] which upheld the warrantless police use of another form of electronic surveillance: automatic license-plate readers.[35] The court distinguished the two cases (decided only months apart) on the ground that a home, the subject of surveillance in *Mora*, is afforded more constitutional protection than is a public highway, the target of surveillance in *McCarthy*.[36] Thus, the court reasoned, when pole cameras are directed at spaces not including houses and record individuals in a "short-term, intermittent, and nontargeted" way, their usage is not a search.[37] The court likened such surveillance to security camera surveillance in public spaces, one of many "conventional surveillance" tools permitted under the Fourth Amendment.[38] Regarding the surveillance *away from the men's homes*, the court held that because it was limited and did not amass comprehensive data, the men could not reasonably claim an expectation of privacy.[39]

By contrast, the court held that the continuous, long-term camera surveillance *directed at the men's homes* was a search that would require a warrant under article 14.[40] The court referenced the intent of the drafters of both the Fourth Amendment and article 14 as well as precedent at the federal and state level to reinforce the higher level of protection afforded to the home as a "constitutionally sensitive location[]."[41] According to the court, it did not matter that the pole cameras could not see into the residences — the long-term tracking of those who enter and exit the home would allow police to piece together sensitive details about the activities of the home's inhabitants.[42] It also did not matter whether the pole cameras surveilled just one home; when done for a "continuous and extended duration," this too was unacceptable.[43]

The court noted that its holding did not hinge on whether the surveillance tracked a person's public movements, but rather, it depended on an aggregate approach, asking whether the generated data would, "in the aggregate, expose[] otherwise unknowable details of a person's life."[44] The court highlighted that video footage is a particularly revealing form of surveillance, as it depicts intimate details like facial expressions and interpersonal interactions in a way that other forms of

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[34] 142 N.E.3d 1090 (Mass. 2020). *McCarthy* upheld the use of electronic surveillance on public highways to capture the license plate number of a driver crossing two bridges in Massachusetts, and was decided five months before *Mora*. *Id.* at 1095.

[35] *See Mora*, 150 N.E.3d at 307–08; *McCarthy*, 142 N.E.3d at 1095.

[36] *Mora*, 150 N.E.3d at 307.

[37] *Id.*

[38] *Id.* (quoting Carpenter v. United States, 138 S. Ct. 2206, 2220 (2018)).

[39] *Id.* at 307–08.

[40] *Id.* at 312–13.

[41] *Id.* at 308 (quoting Commonwealth v. McCarthy, 142 N.E.3d 1090, 1104 (Mass. 2020)); *see id.* at 308–13.

[42] *Id.* at 309.

[43] *Id.* at 310 (quoting Polay v. McMahon, 10 N.E.3d 1122, 1127 (Mass. 2014)).

[44] *Id.*

surveillance, like GPS tracking, do not.[45] The court rejected the argument that the Commonwealth could have collected this information through traditional physical surveillance: pole camera technology far surpasses what officers would be able to do under typical time and resource constraints.[46] Moreover, that the footage was stored and reviewable by the police made it more invasive than direct surveillance, which could not otherwise retain these details.[47]

The court declined to establish a bright-line rule to definitively prohibit the use of pole cameras without a warrant, leaving the door open for their use in a more limited fashion, or directed at a different target than a home.[48] Nevertheless, it held that the continuous, long-term pole camera surveillance directed at the men's homes was a search under article 14 and would therefore require a warrant.[49] Finally, the court concluded its opinion by remanding the case to the Superior Court to offer the Commonwealth an opportunity to determine whether probable cause existed at the time the pole camera surveillance began, which the court indicated should play a role in deciding whether the motions to suppress should be denied or allowed, given the novelty of the rule the court was announcing.[50]

Mora represents a small, but significant way that Massachusetts has deepened state-level privacy protections for the poor and the marginalized, in contrast with current federal Fourth Amendment jurisprudence. In general, Fourth Amendment jurisprudence fails to equally protect people of all races and incomes, and these failures have proven true even in the context of digital privacy rights.[51] The Supreme Judicial Court in *Mora* expressly circumvented the question whether the pole camera surveillance in question was a search under the Fourth Amendment,[52] an issue that the First Circuit had answered in the negative in a similar case months earlier.[53] Instead, the *Mora* court relied on article 14 of the

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[45] *Id.* at 311.

[46] *Id.* at 311–12.

[47] *Id.* at 312.

[48] *See id.*

[49] *Id.* at 312–13.

[50] *Id.* at 313–14.

[51] *See, e.g.*, Alfredo Mirandé, *Is There a "Mexican Exception" to the Fourth Amendment?*, 55 FLA. L. REV. 365 *passim* (2003) (contending that Mexicans are not protected by the Fourth Amendment); Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 394–96, 400–06 (2003) (arguing that the Fourth Amendment fails to protect both undocumented immigrants and poor people from illegal searches and seizures); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265 *passim* (1999) (arguing that Fourth Amendment law affords more privacy protections to the wealthy).

[52] *Mora*, 150 N.E.3d at 302 ("[T]he continuous, long-term pole camera surveillance targeted at the residences of Mora and Suarez well may have been a search within the meaning of the Fourth Amendment, a question we do not reach . . . .").

[53] *See* United States v. Moore-Bush, 963 F.3d 29, 31 (1st Cir. 2020) (holding that warrantless pole camera surveillance outside defendants' home does not violate the Fourth Amendment).

Massachusetts Declaration of Rights to bolster privacy rights with an emphasis on equalizing expectations of privacy along lines of income and race. *Mora* falls in line with similar Massachusetts case law recognizing the realities of economic and racial disparities when regulating privacy rights, and offers other states a blueprint for protecting people from unlawful searches and police intrusions in the mass surveillance age.

Fourth Amendment jurisprudence has long been critiqued for its treatment of people of color, immigrants, and people who are low income — perhaps an unsurprising result for a doctrine with racial origins.[54] Under *Whren v. United States*,[55] the Fourth Amendment effectively permits racial profiling in traffic stops,[56] and under *Terry v. Ohio*,[57] the Fourth Amendment legitimizes racially motivated stop and frisk.[58] Both practices facilitate police violence against people of color.[59] *United States v. Brignoni-Ponce*[60] allows for racial profiling in the immigration context,[61] leading to harmful stigma and tension between law enforcement and immigrant communities.[62] And readings of the Fourth Amendment that link privacy to property afford less protection to those without the means to buy more space, or more privacy.[63] As Professor William Stuntz remarked: "Privacy follows space, and people with money have more space than people without."[64]

These weak points persist as courts grapple with digital privacy rights. The Supreme Court's landmark decision in *Carpenter v. United States*[65] represents one attempt to regulate digital privacy in modern times. It considered whether police could constitutionally access historical cell-site location information (CSLI) conveyed to third-party cell

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[54] *See* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 316–17.

[55] 517 U.S. 806 (1996).

[56] *See, e.g.*, Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882, 884 (2015) ("*Whren v. United States* is notorious for its effective legitimation of racial profiling in the United States." (footnote omitted)).

[57] 392 U.S. 1 (1968).

[58] *See, e.g.*, Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio*'s Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1518–19, 1537–39 (2017).

[59] *See, e.g.*, Jeffrey Fagan, Anthony A. Braga, Rod K. Brunson & April Pattavina, *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 FORDHAM URB. L.J. 539, 556–61 (2016) (linking *Whren* and *Terry* to disproportionately high police stops of Black and Hispanic drivers); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 308–19 (1999).

[60] 422 U.S. 873 (1975).

[61] *See, e.g.*, Kristin Connor, Note, *Updating* Brignoni-Ponce*: A Critical Analysis of Race-Based Immigration Enforcement*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 567, 572–74 (2008).

[62] *See id.* at 607–12.

[63] *See, e.g.*, *Mora*, 150 N.E.3d at 306; Stuntz, *supra* note 51, at 1270.

[64] Stuntz, *supra* note 51, at 1270.

[65] 138 S. Ct. 2206 (2018).

service providers without a search warrant.[66] The Court held that "[t]he Government's acquisition of the [CSLI] records was a search within the meaning of the Fourth Amendment."[67] The case was a turning point for Fourth Amendment doctrine in spite of its admittedly "narrow" holding[68]: it limited the presumption of warrantless government access to the vast amounts of information individuals provide to third parties.[69] Yet considering both the breadth of data collected by third parties[70] and the sophistication of police surveillance technologies[71] in our current age, the decision also created open questions about privacy in contexts outside of CSLI.

Some federal courts have applied *Carpenter*'s logic to bar warrantless collection of other types of digital data,[72] while other federal courts have read *Carpenter* narrowly.[73] The First Circuit's ruling in *United States v. Moore-Bush*[74] illustrates how *Carpenter*'s open-endedness may lead to results that do little to provide marginalized communities robust privacy protections. There, the First Circuit considered a question very similar to the one at issue in *Mora*: whether the use of surveillance cameras attached to utility poles and directed at the defendants' home for continuous, long-term surveillance was a search under the Fourth Amendment.[75] The panel held that the defendants did not have a reasonable expectation of privacy in front of their home.[76] Relying on First

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[66] *See id.* at 2211–12.

[67] *Id.* at 2220.

[68] *Id.*

[69] *See* Eunice Park, *Objects, Places and Cyber-spaces Post-*Carpenter*: Extending the Third-Party Doctrine Beyond CSLI: A Consideration of IoT and DNA*, 21 YALE J.L. & TECH. 1, 5–6 (2019).

[70] *See* Lindsey Barrett, Carpenter*'s Consumers*, 59 WASHBURN L.J. 53, 54 (2020) ("Your Fitbit data, your movements mapped by your connected car, your smart speaker recordings — anything that a company can track and store — the government can obtain, often with only minor procedural hurdles or possibly none at all." (footnotes omitted)).

[71] *See* Rachel Levinson-Waldman, *Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public*, 66 EMORY L.J. 527, 534–49 (2017) (describing the tools available for government surveillance such as facial recognition scanners, GPS tracking devices, drones, license-plate readers, body-worn cameras, and biometric identification technologies).

[72] *See, e.g.*, Naperville Smart Meter Awareness v. City of Naperville, 900 F.3d 521, 527 (7th Cir. 2018) (holding that a city's collection of smart-meter data from residents' homes was a search under the Fourth Amendment).

[73] *See, e.g.*, United States v. Moore-Bush, 963 F.3d 29, 31 (1st Cir. 2020) (declining to extend *Carpenter* to pole camera surveillance). As the different outcomes suggest, *Carpenter*'s holding left it to lower federal courts to flesh out its contours. *See* Matthew Tokson, Lecture, *The Next Wave of Fourth Amendment Challenges After* Carpenter, 59 WASHBURN L.J. 1, 1 (2020).

[74] 963 F.3d 29.

[75] *See id.* at 31, 33. The cameras in *Moore-Bush*, like those in *Mora*, operated nonstop; stored video; and could zoom, tilt, and read license plates. *See id.* They did not capture audio and had limited capabilities at night. *See id.* Police used the cameras for eight months. *Id.* at 34.

[76] *Id.* at 38.

Circuit and Supreme Court precedent to uphold the use of the cameras,[77] the court made no mention of the unequal impact this ruling could have for people of different races and incomes. Indeed, the court reaffirmed its stance that "[a]n individual does not have an expectation of privacy in items or places he exposes to the public,"[78] finding that the defendants "clearly did nothing to seek to preserve [the front areas of their house] as private"[79] — with no consideration for what kinds of people are most able to keep their lives hidden from the public eye, and why.

Faced with this federal precedent that failed to consider the racial and class implications of Fourth Amendment jurisprudence, the Supreme Judicial Court prudently rested its holding on the state constitution.[80] This approach allowed the court to avoid confronting the First Circuit's holding in the negative in *Moore-Bush*, averting any legal conflict while still enhancing privacy protections in Massachusetts. The bolstering of federal protections by turning to state law is not a new phenomenon[81] — especially as it relates to the Fourth Amendment.[82] But this bolstering is needed given Fourth Amendment doctrine's well-documented uneven protections along lines of race and class.[83] And in this age of digital surveillance, the gaps between privacy rights for the rich and poor are growing wider.[84]

The Supreme Judicial Court's focus on the inequitable impacts of an alternate ruling in *Mora* presented a small step toward bolstering state-level privacy protections for people of varying races and income levels. The court recognized that reaching the opposite result would enable widespread police surveillance, while linking a person's privacy rights to their income, because erecting physical barriers requires not only wealth, but also land ownership.[85] This surveillance is subject to

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[77] *See id.* at 38–39.

[78] *Id.* at 43 (quoting United States v. Bucci, 582 F.3d 108, 117 (1st Cir. 2009)).

[79] *Id.* at 44.

[80] *See Mora*, 150 N.E.3d at 302.

[81] *See generally* Arthur Leavens, *Prophylactic Rules and State Constitutionalism*, 44 SUFFOLK U. L. REV. 415 (2011).

[82] *See* Thomas K. Clancy, *The Purpose of the Fourth Amendment and Crafting Rules to Implement that Purpose*, 48 U. RICH. L. REV. 479, 486 (2014) ("A large number of state courts reject [some federal Fourth Amendment holdings] on state constitutional grounds."); Stephen E. Henderson, *Learning from All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 CATH. U. L. REV. 373, 373–74 (2006).

[83] *See, e.g.*, Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 968 (2002); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 338 (1998); sources cited *supra* note 3.

[84] *See generally* VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR (2018).

[85] *See Mora*, 150 N.E.3d at 306; Brief Amicus Curiae of the ACLU et al. at 35–37, *Mora*, 150 N.E.3d 297 (No. SJC-12890). Even among homeowners, wealth still affects privacy rights: "[T]he homes of the rich are larger and more comfortable, making it possible to live a larger portion of life in them [and away from police surveillance]." Stuntz, *supra* note 51, at 1270.

overreach and abuse,[86] and, some scholars have noted, poor people (and especially those living in cities) would bear the brunt of such a rule. Predictably, income and homeownership correspond with race[87] — making the court's ruling especially consequential for people of color. In Massachusetts, less than thirty-three percent of Black, Hispanic, and Asian families are homeowners, compared to almost seventy percent of white families.[88] In the Boston area, this wealth-based difference is even more pronounced: in 2015, the median wealth of nonimmigrant Black families, for example, was just $8; for white families, it was $247,500.[89] These realities would thus render poor people and people of color especially vulnerable to warrantless police surveillance of their homes if not for the court's holding — a small, but important step in limiting increased police surveillance for people already subject to more frequent police exposure.[90]

Mora revealed the Supreme Judicial Court's continued interest in considering the reality of racial and economic disparities when interpreting the extent of privacy rights to expand protections for marginalized communities — an interest that contrasts with much of federal Fourth Amendment doctrine.[91] Indeed, the court made a similar move

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[86] In addition to threatening civil liberties, unfettered police surveillance can give rise to serious privacy violations targeted at marginalized communities. *See* Levinson-Waldman, *supra* note 71, at 552–54. Moreover, the huge amounts of data amassed are vulnerable to hackers, creating more potential privacy breaches. *See Street-Level Surveillance: Surveillance Cameras*, ELEC. FRONTIER FOUND., https://www.eff.org/pages/surveillance-cameras [https://perma.cc/7ERS-VK5U].

[87] *See* NAT'L ASS'N OF REALTORS RSCH. GRP., A SNAPSHOT OF RACE & HOME BUYING IN AMERICA (2020) (finding that homeownership rates for white Americans have hovered around 71%, while rates for Black, Hispanic, and Asian Americans have been much lower at 41%, 45%, and 53%, respectively); Lisa J. Dettling et al., *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RSRV. SYS.: FEDS NOTES (Sept. 27, 2017), https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-wealth-holding-by-race-and-ethnicity-evidence-from-the-survey-of-consumer-finances-20170927.htm [https://perma.cc/2F98-CNLW] (documenting a racial wealth gap between American families and finding that white families' median wealth was $171,000 compared to $17,600 for Black families and $20,700 for Hispanic families).

[88] *See* Anthony Brooks, *How Homeownership Affects Greater Boston's "Immense" Racial Wealth Gap*, WBUR (Sept. 22, 2016), https://www.wbur.org/bostonomix/2016/09/22/boston-wealth-homeownership-gap [https://perma.cc/WWW9-TM2R].

[89] ANA PATRICIA MUÑOZ ET AL., FED. RSRV. BANK OF BOS., THE COLOR OF WEALTH IN BOSTON 20 tbl.9 (2015).

[90] *See, e.g.*, Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 163–64 (2016) (explaining why Black Americans experience more interactions with the police and noting that these interactions overexpose them to police violence); *see also, e.g.*, NAT'L COAL. FOR THE HOMELESS, VULNERABLE TO HATE: A SURVEY OF HATE CRIMES & VIOLENCE COMMITTED AGAINST HOMELESS PEOPLE IN 2013, at 14 (2014), https://www.coloradocoalition.org/sites/default/files/2017-01/Hate-Crimes-2013-FINAL.pdf [https://perma.cc/K7KH-MJXD] (documenting instances of police brutality against people experiencing homelessness).

[91] *See, e.g.*, Terrence Scudieri, Comment, *Glass Ceilings? How* Warren *Provides Insight into State Courts' Ability to Protect Against Limited Constructions of the Constitution*, 54 AM. CRIM.

in *Commonwealth v. Warren*[92] in 2016, that time in regard to the "seizure" element of the Fourth Amendment and its state analog. In *Warren*, the court examined whether police had reasonable suspicion to stop a Black man, Jimmy Warren, in connection with a breaking and entering investigation.[93] The court held that "whenever a [B]lack male is the subject of an investigatory stop . . . flight is not necessarily probative of a suspect's . . . consciousness of guilt," pointing to the long history of racial profiling in Boston police stops and the likelihood that Black men in Boston have good reasons to want to avoid police interactions.[94] This explicit consideration of race was a significant departure from Fourth Amendment law, which typically ignores race as a factor.[95] Notably, the court decided the case entirely based on state precedent, conveniently sidestepping the issue of federal Fourth Amendment law to reach its decision.[96] As in *Mora*, this method allowed the court to expand protections for the people of Massachusetts where federal law did not offer the same relief. When viewing *Mora* and *Warren* together, it seems plausible that the Supreme Judicial Court could apply this approach in additional areas — like traffic stops, welfare checks, and encounters on public transportation — where race and class are undoubtedly at play, yet continually ignored by the Supreme Court in its Fourth Amendment jurisprudence.[97]

The implications of these expanded protections are increasingly important in light of the burden of repeated police interactions,[98] the brunt of which is borne by people of color and poor people. Given that *Carpenter* left many questions about the legality of various surveillance practices unsettled, courts will continue to be asked to decide similar cases. In these cases, state courts should follow the lead of the Supreme Judicial Court in considering and applying the realities of marginalized communities to these situations. A single police interaction can be life-altering[99] — perhaps these considerations can move the needle toward limiting these interactions and the dangerous outcomes that may follow.

L. REV. ONLINE 70, 72–73 ("Massachusetts courts historically interpret their own constitution to expand the privacy rights of criminal defendants beyond those that the federal law provides.").

92 58 N.E.3d 333 (Mass. 2016).

93 *Id.* at 335–36.

94 *Id.* at 342.

95 *See* Carbado, *supra* note 83, at 968–69. When Fourth Amendment doctrine does not adopt a "race-neutral" approach, it is at the expense of people of color. *See, e.g.*, Connor, *supra* note 61, at 569, 577.

96 Scudieri, *supra* note 91, at 73 ("[T]he *Warren* opinion is devoid of any citation to any federal authority.").

97 *See* sources cited *supra* note 83. Regarding traffic stops, months after *Mora*, the court decided *Commonwealth v. Long*, 152 N.E.3d 725 (Mass. 2020), which lowered a driver's burden to establish that an officer's stop was racially motivated. *Id.* at 731.

98 *See* Carbado, *supra* note 3, at 129; Lindsay J. Gus, Comment, *The Forgotten Residents: Defining the Fourth Amendment "House" to the Detriment of the Homeless*, 2016 U. CHI. LEGAL F. 769, 769–72 (discussing relationship between diminished Fourth Amendment protection and police violence for those experiencing homelessness).

99 *See* sources cited *supra* note 3.