GLASS CEILINGS? HOW WARREN PROVIDES INSIGHT INTO STATE COURTS' ABILITY TO PROTECT AGAINST LIMITED CONSTRUCTIONS OF THE CONSTITUTION

Terrence Scudieri*

INTRODUCTION

In 2016, the Massachusetts Supreme Judicial Court held that, in analyzing a suspected felon's flight from and the reasonableness of a subsequent stop by authorities, courts may consider the suspect's race.[1] Citing a Boston Police Department report documenting a longstanding pattern of racial profiling, the Court explained that "whenever a black male is the subject of an investigatory stop [for a crime in progress] . . . flight is not necessarily probative of the suspect's state of mind or consciousness of guilt."[2] *Warren* and its progeny may indicate a larger strategy for state courts to reach different conclusions than their federal counterparts when opining on federal questions over which they share concurrent jurisdiction. Simultaneously, the opinion may demonstrate how states might further expand their citizens' positive rights and liberties under their own constitutions.

This post will briefly review *Warren*, specifically evaluating the unique interplay between the federal and state judiciaries in defining the limits of criminal defendants' constitutional rights. The post will then explore the extent to which *Warren* attempts to expand the contours of its subjects' positive liberties. The post then debates whether the Supreme Judicial Court's efforts are sufficiently rooted in and analyzed under the Commonwealth's Constitution and jurisprudence, which would shield the court's decisions from federal review. To the extent that such efforts may not be, the post discusses ways in which Massachusetts courts could further safeguard citizens' constitutionally guaranteed liberties.

I. *WARREN*: HOW FEDERAL AND MASSACHUSETTS LAW DIFFER

On the evening of December 18, 2011, a police officer responded to a dispatch report of a breaking-and-entering in progress in Boston's Roxbury neighborhood.[3] Arriving near the scene in a marked police

* Georgetown University Law Center, J.D. expected 2019. The author is a featured online contributor for the *American Criminal Law Review*.

[1] Commonwealth v. Warren, 58 N.E.3d 333, 342–43 (Mass. 2016).

[2] *Id.* at 342 (citation omitted).

[3] *Id.* at 335–38.

cruiser, the officer encountered two black men.[4] The officer stated that he had a "hunch" that the two were each suspects to the reported crime in progress, though the officer could not recall a prior interaction with either.[5] He approached the men in his vehicle and asked them to "wait a minute."[6] After each made eye contact with the officer, the pair turned away and ran toward a nearby park.[7]

Two more officers responded to the scene and approached two males matching the first officer's description of the suspects.[8] As the two officers approached the suspects, the defendant, Mr. Warren, ran away from them, ignored their commands to "stop," and apparently clutched his right leg as he continued to flee.[9] The officers believed that Warren was armed because of this behavior.[10] The officers pursued and caught up with the defendant at a residential property,[11] ordered Warren to "get down," and, once Warren complied, the officers searched him.[12] The officers found "no contraband on his person,"[13] but did recover a handgun from the front yard of the property.[14] Defendant did not have a permit to carry firearms.[15]

At trial, Warren was convicted of unlawfully possessing a firearm, after the court denied his Motion to Suppress a Firearm.[16] The Massachusetts Court of Appeals upheld his conviction,[17] but the Supreme Judicial Court reversed the conviction, finding that the officers did not have a sufficient "reasonable suspicion" of wrongful conduct to justify the seizure, and that the trial court's denial of the motion was clear error.[18] The court concluded that the alleged victim's description of

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[4] *Id.* at 336–37.
[5] *Id.* at 337.
[6] *Warren*, 58 N.E.3d at 337.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Warren*, 58 N.E.3d at 337.
[12] *Id.*
[13] *Id.*
[14] *Id.* The court does not state whether the defendant ever crossed through, or had the opportunity to cross through, the front yard of the property before he ultimately surrendered to the officers in the backyard, but notes that that trial judge considered the defendant's Motion for a Required Finding of Not Guilty. *Id.* at 335 n.2; *see also* MASS. R. CRIM. P. 25 (West 2017). The lower court's recitation of the facts omits this material fact, but adds that "[t]he firearm was recovered near the sidewalk on which the defendant ran from police." Commonwealth v. Warren, 31 N.E.3d 1171, 1172 (Mass. Ct. App. 2015), *rev'd, Warren*, 58 N.E.3d 333 (Mass. 2016).
[15] *Id.* at 337–38.
[16] *Warren*, 58 N.E.3d at 335 n.2.
[17] *Warren*, 31 N.E.3d at 1177.
[18] *Warren*, 58 N.E.3d at 338.

the suspects was too vague[19] and that, even though the defendant fled from the police after they commanded him to stop,[20] "based on FIO[21] data [demonstrating that] . . . black men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations,"[22] the police "lacked reasonable suspicion for the investigatory stop."[23]

The court explained that it "reviewed independently the application of constitutional principles to the facts found . . . in deciding whether the seizure was justified by reasonable suspicion that the defendant had committed the [offense]."[24] The opinion rests solely on precedent and other authorities from within Massachusetts,[25] despite well-established, binding Supreme Court jurisprudence that provides guideposts for state courts in determining whether stops, arrests, searches, and seizures are reasonable.[26] The court also did not cite to the Massachusetts Rules of Criminal Procedure.

The run of cases preceding *Warren*, and on which the opinion relies, indicate that Massachusetts courts historically interpret their own constitution to expand the privacy rights of criminal defendants beyond

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[19] *Id.* at 339.
[20] *Id.* at 337.
[21] A "field investigation observation ('FIO')" is an interaction between a police officer and a citizen during which a police officer "finds out that person's business for being in a particular area." Commonwealth v. Lyles, 905 N.E.2d 1106, 1108 n. 6 (Mass. 2009) (citing Commonwealth v. Murphy, 822 N.E.2d 320 (Mass Ct. App. 2005)). "FIOs are deemed consensual encounters because the individual approached remains free to terminate the conversation at will." *Warren*, 58 N.E.3d at 337 n.5 (citing Commonwealth v. Lyles, 905 N.E.2d 1106, 1106 (Mass. 2009)).
[22] *Warren*, 58 N.E.3d at 342.
[23] *Id.* at 336.
[24] *Id.* at 338 (citing Commonwealth v. Scott, 801 N.E.2d 233 (Mass. 2004)).
[25] The court does not cite to any federal authorities or any specific provision of the Massachusetts Constitution.
[26] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 21 (1968) (explaining that whether a search or seizure is reasonable is an objective standard and that either is reasonable when "the facts available to [a law enforcement] officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that [such seizure or search is] appropriate.") (internal quotation omitted); *see also* Illinois v. Wardlow, 528 U.S. 119, 124 (2000) ("[O]fficers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation."). *Cf.* Brown v. Texas, 443 U.S. 47, 52 (1979) ("The fact that the [defendant] was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that [he] was engaged in criminal conduct . . . [A] . . . desire to assert a police presence . . . does not negate Fourth Amendment guarantees."); Delaware v. Prouse, 440 U.S. 648, 663 (1979) ("[E]xcept in those situations in which there is at least articulable and reasonable suspicion" of a concurrent criminal conduct, "stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.").

those that the federal law provides.[27] Indeed, the *Warren* opinion is devoid of any citation to any federal authority. I argue that the court intentionally and strategically cited only Massachusetts law in an attempt to shield it from future review in the U.S. Supreme Court. Notwithstanding this argument, however, the opinion appears to invoke the federal Constitution's Fourth Amendment,[28] even if the court does not directly cite to it. Consequently, factually similar cases appear to have disparate outcomes, whether a case is tried before the United States or Massachusetts District Court in the first instance.

II. SUCH GREAT HEIGHTS: A CONTINUALLY EXPANDING CEILING POST-*WARREN*

In *Commonwealth v. Meneus*, a more recent, procedurally analogous case, the Massachusetts high court vacated a defendant's "various firearms charges," finding that the police "lacked reasonable suspicion for the stop," and that the trial court erred in denying the defendant's motion to suppress.[29] In *Meneus*, the alleged victim "reported to police that a gunshot struck her vehicle as she was driving."[30] Two police officers arrived at the scene and "observed a group of young black males standing on a sidewalk" near the scene.[31] When the police approached the six young men, they were cooperative until officers began to "patfrisk" each of them.[32] When an officer approached Mr. Meneus to conduct a patdown, the defendant objected and ran from the scene,

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[27] *See infra* note 38. One helpful conceptualization of the interaction between the states' and federal constitutions is "the widely accepted notion[] . . . that the federal Constitution and interpretations of that Constitution by the Supreme Court of the United States set a 'floor' for personal liberties. State courts and state legislatures cannot properly go below the federal floor." Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 228 (2008).

[28] *See Terry*, 392 U.S. at 17 ("[T]he Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime . . . [W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."); United States v. McKoy, 428 F.3d 38, 40–41 (1st Cir. 2005) (affirming the decision to suppress evidence of a firearm retrieved as a result of a pat-and-frisk during a routine traffic stop, explaining that "the Fourth Amendment prevents" officers from conducting a "protective frisk for weapons" without "a reasonable inference that the person being searched is armed and dangerous," and that any other interpretation "would be a legal determination that if one commits [a crime] in a high-crime neighborhood he will be subject to a frisk whenever he appears nervous and moves.").

[29] Commonwealth v. Meneus, 66 N.E.3d 1019, 1021 (Mass. 2017).

[30] *Id.*

[31] *Id.*

[32] *Id.*

despite orders to stop.[33] The police eventually apprehended the defendant and "assisted [him] to the ground. . . . As the defendant was brought to his feet, the officers discovered a firearm that had been underneath his body."[34]

The court found that Meneus was "seized" "when one of the police officers advanced toward [him] as he turned to leave the area in an apparent attempt to avoid an imminent patfrisk."[35] The court then relied on *Warren* in determining that there was insufficient evidence to establish reasonable suspicion for the seizure.[36] Employing a *Warren* analysis, the court explained that because the officers had no justification to stop the defendant, his conduct of "backing away to avoid a patfrisk to which he did not consent" was not probative of a "suspicion that he might be armed or involved in illegal activity."[37]

Indeed, the court did not discuss its own precedent,[38] where it has consistently permitted law enforcement personnel to "'escalate a consensual encounter into a protective frisk . . . [upon] a reasonable suspicion that an individual has committed, is committing, or is about to commit a criminal offense *and* is armed and dangerous.'"[39] This may be because the court did not find that the encounter had given the police reasonable suspicion; nonetheless, the *Meneus* opinion seems to suggest that the Massachusetts high court intends to establish the *Warren* analysis as a standard doctrine within its jurisdiction. To do so would limit the reach of both *Terry* and *Wardlow* as they pertain to the similar

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[33] *Id.*
[34] *Id.*
[35] *Meneus*, 66 N.E.3d at 1021.
[36] The court evaluated "the totality of the circumstances leading to the stop of the defendant," including the witness's statements that she heard gunfire and saw a group of individuals flee to the location at which the police encountered the defendant. *Id.* "[T]he fact that the crime under investigation was a shooting, with implications for public safety, was relevant *but not dispositive* in determining the reasonableness of the stop." *Meneus*, 66 N.E. 3d at 1026 (emphasis added).
[37] *Id.*
[38] It is possible that the court did not cite its precedent for either a factual or legal reason. Factually, it may be that the police did not actually believe that the defendant was armed at the time of the stop. Legally, the question may be whether the police had a reasonable suspicion that the defendant had engaged, was engaged, or would soon be engaged in criminal conduct. In either case, that the court did not discuss its precedent is surprising. *See infra* note 44.
[39] Commonwealth v. Narcisse, 927 N.E.2d 439, 445 (Mass. 2010) (emphasis in original). "[A] reasonable belief that an individual *has a weapon* and *appears inclined to use it* acts to satisfy both prongs of the *Terry* analysis." *Id.* at 446 (emphasis added); *see also* Commonwealth v. Foster, 724 N.E.2d 357, 364 (Mass. 2000) (noting that there are "unique and broadly recognized hazards to police officers and the public presented by guns in the streets" and that "[w]hen the officers, then under a duty to investigate, [. . .] reasonably and quickly came upon the defendant, they had little choice but to pat frisk him while determining whether he presented a risk to public safety.") (Jacobs, J., concurring.).

but different constitutional requirements of lawful stops and seizures.

III. The Interaction Between Grounds, Floors, and Ceilings: A Matter of Independent Judgment?

The *Meneus* court explicitly articulates that its holding rests exclusively on its interpretation of Commonwealth law and, like *Warren*, does not cite to any federal authorities, even in dicta.[40] This still does not fully insulate the decision from future review or abrogation by the Supreme Court. Certainly, while *Terry* and *Wardlow* turned on state courts' interpretations of the federal right to privacy under the Fourth Amendment,[41] the Supreme Court has also reversed state courts' decisions based on interpretations of their own state constitutions, explaining that such interpretations were at odds with the Constitution.[42]

To couch its arguments wholly within the scope of the Massachusetts Constitution and its interpretive jurisprudence, the court might have explicitly framed *Warren* and *Meneus* as interpretations of specific positive rights enumerated within the Commonwealth's Constitution itself. The *Meneus* court cites only once to the Commonwealth's Constitution and only during its discussion of whether the defendant was "seized" within the meaning of Article XIV of the Declaration of the Rights of the Inhabitations of the Commonwealth of Massachusetts ("Declaration of Rights").[43] But whether a "seizure" occurs is only one

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[40] Citing in part to Article XIV of Part I of the Massachusetts Constitution (also known as the Massachusetts Declaration of Human Rights), the court explained that a proper analysis of "the constitutional propriety" of a police officer's conduct in the circumstances depends on two questions. First, "whether and when the defendant was seized in a constitutional sense." Second, "whether the facts known to the police at the time of the seizure establish reasonable suspicion that the defendant had committed, was committing, or was about to commit a crime." *Meneus*, 66 N.E.3d at 1023.

[41] *See Terry*, 392 U.S. at 19 (affirming the Ohio Supreme Court's interpretation of the Fourth Amendment as applied to "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."); *Wardlow*, 528 U.S. at 123–25 (reversing the Illinois Supreme Court's interpretation of the Fourth Amendment, explaining that the Amendment permits law enforcement officers to employ "commonsense judgments and inferences about human behavior," along with "the relevant characteristics of a location" and an individual's conduct, including "[h]eadlong flight," and "nervous, evasive behavior" to surmise a "reasonable, articulable suspicion that criminal activity is afoot.").

[42] For an extensive and thought-provoking discussion of these cases, see generally Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1967 (2003).

[43] Part I of the Massachusetts Constitution, conterminous with this Declaration of Rights, consists of thirty Articles. Therein, Article XIV provides that

> 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

element of the court's articulated "analysis of the constitutional propriety of the police officers' conduct."[44] The seizure must also be reasonable.[45] In Massachusetts, a search is reasonable only when the record demonstrates that (1) at the time of a seizure, (2) a law enforcement officer had factual information that (3) established a "reasonable suspicion" that (4) the defendant (5) was recently, presently, or imminently engaged in criminal conduct.[46]

Absent an unequivocal and specified discussion of the state constitutional provisions under which it found each element of the test to be met, however, federal courts may still have wide latitude when interpreting the commonwealth's criminal laws in habeas cases.[47] Thus, because the court in *Warren* and *Meneus* lacked such a discussion, the court's analyses in both cases are left open to a variety of potentially disparate interpretations in the federal courts hearing future habeas cases. The Massachusetts court's decision not to cite to state law specifically is of no small consequence. The Supreme Court has made clear that when a state court renders constitutional decision, it must base its holding both independently and adequately upon state law to remain undisturbed.[48] For example, in *Michigan v. Long*, a criminal case involving a defendant's Fourth Amendment right against an unreasonable search, the Supreme Court explained that it "appear[ed] . . . that the Michigan Supreme Court rested its decision primarily on federal law."[49] The Supreme Court explained that, in such a scenario, it may retain its jurisdiction "in the absence of a *plain statement* that the decision below rested on [an] adequate and independent state ground." The Court explained that without a "plain statement" indicating that its citations to

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> 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 suspected 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.

MASS. CONST., pt. I, art. XIV.

[44] As indicated *supra* note 40, determining whether a "seizure" occurred is only one element of the analysis. *See Meneus*, 66 N.E.3d at 1023.

[45] *Id.*

[46] *Id.*

[47] The court supports the five elements of the second prong of the analysis by citing to its precedent. *See id.* Generally, in habeas cases, "federal courts must look to state law for 'the substantive elements of the criminal offense, but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." Coleman v. Johnson, 132 S. Ct. 2060, 2064 (2012) (quoting Jackson v. Virginia, 443 U.S. 307, 324 n.6 (1979)).

[48] Michigan v. Long, 463 U.S. 1032, 1040 (1983).

[49] *Id.* at 1044.

federal law were merely dicta, it had to assume that the state court "'felt compelled by what it understood to be federal constitutional considerations to construe.'"[50]

Superficially, *Warren* and *Meneus* seem to rest wholly on the Commonwealth's common law and constitution. Under a *Long* analysis, the decisions' holdings may rest independently of federal law.[51] But, are these holdings *adequate*? The Court has explained that "'where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain.'"[52] Further,

> [i]t is fundamental that the state courts be let free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this court of the validity under the federal constitution of state action . . . [S]tate courts will not be the final arbiters of important issues under the federal constitution; and . . . we will not encroach on the constitutional jurisdiction of the states. We therefore adhere to the standard adopted in *Michigan v. Long*.[53]

Despite this attempted clarification, however, the circuits remain split as to when decisions rely on an "adequate state ground doctrine."[54] For example, the Second Circuit recently explained that in criminal cases involving the Fourth Amendment, "the existence of an independent and adequate state ground of decision" does not alone preclude federal courts from reviewing it.[55] Instead, in that court's view, such cases are subject to review when the question on appeal is whether a law enforcement agency's actions were "in violation of the Constitution or laws or treaties of the United States."[56] This seems to suggest that, even if a state court's decision interprets the constitutionality of its own criminal statutes under its own constitutional provisions and common law, federal courts may review the decision because the defendant's federal Fourth Amendment

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[50] *Id.* (citing Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 568 (1977)).

[51] As discussed *supra*, the *Warren* and *Meneus* opinions do not explicitly cite to any federal authority.

[52] Abie State Bank v. Weaver, 282 U.S. 765, 773 (1931) (quoting Enter. Irrigation Dist. v. Farmers' Mut. Canal Co., 243 U.S. 157, 164 (1917)).

[53] Arizona v. Evans, 514 U.S. 1, 9 (1995) (quoting Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940)).

[54] Pierotti v. Walsh, 834 F.3d 171, 176 (2d Cir. 2016).

[55] *Id.* (citing 28 U.S.C. § 2254(a) (1996)).

[56] *Id.* (citing 28 U.S.C. § 2254(a) (1996)).

rights are necessarily implicated, even if the state court does not explicitly say so.

The Ninth Circuit has adopted the opposite perspective, opining that as long as a decision's state law ground is not "'interwoven with the federal law,'" federal courts generally cannot review it.[57] Modifying slightly the definition handed down in *Long*, the court explained that a decision is "interwoven with the federal law" when it depends on "an antecedent ruling on federal law [such as] whether federal constitutional error has been committed."[58] This description indicates that federal courts may not be able to review state court decisions when the state courts rely extensively or exclusively on their own laws.

Given these varying interpretations of the adequate state ground doctrine, and that the First Circuit has not offered guidance on this issue, it is unclear whether *Warren* and *Meneus* are rooted adequately in Massachusetts law so as to preclude review by the Supreme Court. Indeed, while Massachusetts guarantees the "right to be secure from all unreasonable searches, and seizures,"[59] its constitution is devoid of any provision that is analogous to the Fifth Amendment's Due Process Clause.[60] The Massachusetts courts, however, should be more specific in their analyses that they employ when arriving at their decisions. For example, since the Supreme Judicial Court does not regularly cite to specific articles within its constitution in arriving at its conclusions, its decisions tend to protect Massachusetts' constitutional provisions from federal interpretation, but also provide little guidance to federal courts on how to apply state law in analogous cases.

CONCLUSION

The complex and often-muddled interaction between the state and federal judiciaries is a hallmark of our federalist system. In theory, the federal courts should have little, if anything, to say about states' regulation, so long as it comports with the Constitution. Yet, the system becomes further complicated when fifty independent jurisdictions have their own constitutions and independent jurisprudence grounded within the bounds of those constitutions. Massachusetts is no exception.

Warren seems to represent a large expansion of those searches and seizures that are "unreasonable" under the Massachusetts constitution,

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[57] Park v. California, 202 F.3d 1146, 1152 (9th Cir. 2000) (quoting Ake v. Oklahoma, 470 U.S. 68, 75 (1985)) (internal citations and quotations omitted).

[58] *Id.*

[59] MASS. CONST., pt. I, art. XIV.

[60] The provision that is most analogous to the Fifth Amendment's Due Process Clause is Article XII, which reads, in relevant part, "No subject shall be . . . deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." MASS. CONST., pt. I, art. XII.

enhancing the affirmative right to privacy and limiting the applicability of landmark Supreme Court decisions like *Terry* and *Wardlow* to non-federal crimes within the Commonwealth. As it does so, practitioners, Fourth Amendment scholars, and students should understand and monitor the implications of each of Massachusetts's post-*Warren* decisions. We should examine carefully the analyses and doctrines that the Massachusetts's judiciary employs as it continues to sculpt and perfect the contours of those liberties guaranteed by Article XIV of the Declaration of Rights applicable to each of its residents, to see if other states begin to follow suit.