"Did You Get My Text?": Fourth Amendment Reasonable Expectation of Privacy in Sent Text Messages

Justin W. Stidham[*]

INTRODUCTION

The Fourth Amendment of the U.S. Constitution protects people in "their persons, houses, papers, and effects" from the government conducting "unreasonable searches and seizures" without a warrant supported by probable cause.[1] Many state constitutions, including Massachusetts, contain analogous provisions with similar safeguards.[2] Courts have long interpreted these constitutional guarantees to recognize the important balance between the public interest in criminal prosecution and personal interests in privacy, security, and protection from "arbitrary and oppressive interference" by the government.[3] But courts struggle to determine the precise contours of these rights in this digital age,[4] just as the Massachusetts Supreme Judicial Court ("the SJC") did in *Commonwealth v. Delgado-Rivera*.[5] For the first time in Massachusetts, the SJC considered

[*] Managing Editor, *New England Law Review*, Vol. 57. J.D., New England Law | Boston (2023). B.A., Political Science, University of North Carolina at Chapel Hill (2016). Many thanks to my friends and family for their endless support, and to the *New England Law Review* staff for their incredible work this year. Special thanks to Professor Laura Greenberg-Chao for her mentorship through the writing of this Comment; without her guidance and expertise, this would not have been possible.

[1] U.S. CONST. amend. IV.

[2] *E.g.*, MASS. CONST. art. XIV.

[3] United States v. Martinez-Fuerte, 428 U.S. 543, 554–55 (1976).

[4] *See* Laura Hecht-Felella, *The Fourth Amendment in the Digital Age: How Carpenter Can Shape Privacy Protections for New Technologies*, BRENNAN CTR. FOR JUST. (Mar. 18, 2021), https://perma.cc/CFL2-6CXZ; Devin W. Ness, *Information Overload: Why Omnipresent Technology and the Rise of Big Data Shouldn't Spell the End for Privacy as We Know It*, 31 CARDOZO ARTS & ENT. L.J. 925, 926–27, 955–56 (2013) (examining digital technology and the Fourth Amendment and advocating for a more functional legal framework).

[5] Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1093 (Mass. 2021).

whether an individual could assert an objectively reasonable expectation of privacy in his own sent text messages that were retrieved from another's phone; ultimately, the Court determined that the defendant had no reasonable expectation of privacy and could not suppress the evidence being used against him.[6]

This Comment will argue that the Court in *Commonwealth v. Delgado-Rivera* improperly deemphasized the role that unlawful police conduct played in exposing the defendant's text messages to the public. Part I provides an overview of Fourth Amendment case law with a focus on how courts have historically addressed the reasonable expectation of privacy, the third-party doctrine, and the assumption of the risk. Part II reviews the SJC's opinion and evaluates the Court's reasoning. Part III explains how the SJC failed to distinguish the matter from precedent cases and to account for the unlawful police conduct that underscored those searches, resulting in an interpretation that is inconsistent with the third-party doctrine. Part IV then explores the dangerous downstream effects of this decision. Part V advocates for alternative approaches to determine the objective reasonableness of one's expectation of privacy that the SJC should have taken to more effectively balance the twin aims of individual privacy and the duty of law enforcement.

I. Background

A. *Development of Fourth Amendment Case Law*

To determine what constituted a search under the Fourth Amendment, courts primarily considered whether or not there had been a "physical intrusion" that invaded one's property rights.[7] Thus, law enforcement did not conduct a Fourth Amendment search when they performed "surveillance without any trespass and without the seizure of any material object."[8] This allowed police to place a wiretap on a telephone cable,[9] or a recording device on the outside of a wall, without requiring a warrant.[10] Only when the police could not collect evidence without "trespass upon . . . property" would the physical intrusion be a Fourth Amendment search.[11]

In addition to trespasses, the Supreme Court held in *Katz v. United States* that the police also performed searches when they "violated the privacy upon which [one] justifiably relied," because the Fourth Amendment "protects people -- and not simply 'areas.'"[12] Justice Harlan wrote in his

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[6] *Id.* at 1093–94, 1097.

[7] Katz v. United States, 389 U.S. 347, 353 (1967).

[8] *Id.*

[9] Olmstead v. United States, 277 U.S. 438, 466 (1928).

[10] Goldman v. United States, 316 U.S. 129, 135 (1942).

[11] Silverman v. United States, 365 U.S. 505, 510–11 (1961).

[12] *Katz*, 389 U.S. at 353.

concurrence that he understood there to be two prongs to privacy: an actual, subjective expectation of privacy, and an objective expectation of privacy that "society is prepared to recognize as 'reasonable.'"[13] The Court formally adopted this two-prong test of subjective and objective reasonable expectations of privacy in *Smith v. Maryland*.[14] The objective reasonableness of a search "depends upon all of the circumstances surrounding the search . . . and the nature of the search . . . itself."[15] Specific factors include the character of the item searched, the possessory interest in the item, and the precautions taken to protect its privacy.[16] Furthermore, there is no Fourth Amendment search if an individual has knowingly exposed information to the public, even if this is within a constitutionally protected area.[17]

The third-party doctrine, a natural extension of the *Katz* doctrine, focuses on "information . . . voluntarily turn[ed] over to third parties."[18] An individual has no objectively reasonable expectation of privacy in written records disclosed to third-party companies nor in incriminating information discussed with other parties in whom the individual has "misplaced confidence" that they will not share the information.[19] The rationale underlying the third-party doctrine is that one assumes the risk that the information will be shared when it is voluntarily disclosed to a third party, even if the information itself is private.[20] An individual relinquishes this expectation and "assume[s] the risk of disclosure," even if that person is unaware that there is a risk.[21] But courts have made exceptions for involuntary disclosures of records to third parties when individuals have not reasonably assumed the risk of disclosure with that level of access.[22]

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[13] *Id.* at 361 (Harlan, J., concurring).

[14] Smith v. Maryland, 442 U.S. 735, 740 (1979).

[15] United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985).

[16] Commonwealth v. Pina, 549 N.E.2d 106, 110 (Mass. 1990).

[17] *Katz*, 389 U.S. at 351.

[18] *Smith*, 442 U.S. at 743–44.

[19] *See, e.g.*, *id.* at 742–44 (holding that there is no objective reasonable expectation of privacy in numbers dialed into a telephone since it is reasonable to assume that an individual is aware that this creates a permanent record with the telephone company); United States v. Miller, 425 U.S. 435, 442–43 (1976) (holding that there is no objective reasonable expectation of privacy in information "voluntarily conveyed to the banks . . . in the ordinary course of business"); Hoffa v. United States, 385 U.S. 293, 302 (1966) (holding that there is no objective reasonable expectation of privacy in information voluntarily shared with an accomplice who later revealed the information).

[20] United States v. Jacobsen, 466 U.S. 109, 117 (1984).

[21] *See* United States v. White, 401 U.S. 745, 751–52 (1971) (explaining that an individual who doubts a companion's trustworthiness yet still confides in that person has assumed the risk of disclosure and lost a legitimate expectation of privacy in that communication); Alinovi v. Worcester Sch. Comm., 777 F.2d 776, 784 (1st Cir. 1985).

[22] Carpenter v. United States, 138 S. Ct. 2206, 2218, 2220, 2222–23 (2018) (holding that police required a warrant to request cell phone records containing details about an individual's

B. *Text Messages and the Fourth Amendment*

The Supreme Court has not provided explicit guidance on the objectively reasonable expectation of privacy of text messages.[23] In *Kyllo v. United States*, the Court focused generally on technology's limits and to what extent it could be allowed to "shrink the realm of guaranteed privacy." [24] The Court ultimately adopted an approach that considered whether the technology is publicly available and whether it is being used to access information that would be unknowable without a physical trespass.[25] The *Kyllo* test was first applied to cell phones in *Riley v. California*, where the court noted the "immense storage capacity" of cell phones compared to other pieces of technology.[26] Because a cell phone contains information that extends beyond mere "physical records," such as photographs, calendars, contact lists, and text messages, it is most comparable to a personal diary.[27] Since text messages offer insight into an individual's private life, additional Fourth Amendment protections are necessary, and the Court held that a warrant is generally required before law enforcement can search one's cell phone.[28]

In *City of Ontario v. Quon*, the Court examined whether a government employer's search of an employee's government-provided cell phone was a Fourth Amendment search.[29] The majority held that the search was reasonable on other grounds, assuming that the employee retained a reasonable expectation of privacy in text messages on the phone, without confronting the issue directly.[30] Furthermore, the Court reiterated that the Fourth Amendment exists to protect the "privacy, dignity, and security of persons against certain arbitrary and invasive" searches by the police.[31] Beyond this guidance, the issue of an objectively reasonable expectation of privacy in sent text messages retrieved from a recipient's phone was a matter of first impression in Massachusetts.[32]

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whereabouts since information was not voluntarily disclosed and it would be unreasonable to expect individuals to assume the risk that the police would have access to a "comprehensive dossier of [their] physical movements").

[23] Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1093–94 (Mass. 2021).

[24] Kyllo v. United States, 533 U.S. 27, 34 (2001).

[25] *Id.* at 40.

[26] Riley v. California, 573 U.S. 373, 393 (2014).

[27] *Id.* at 375, 394.

[28] *Id.* at 394, 401, 403.

[29] City of Ontario v. Quon, 560 U.S. 746, 750 (2010).

[30] *Id.* at 760, 764.

[31] *Id.* at 755–56.

[32] Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1093–94 (Mass. 2021).

C. *Interpretations in State Courts and Other Jurisdictions*

State courts are free to interpret constitutional issues and extend individual rights when the Supreme Court is silent on a matter.[33] Justice Brennan argued that state courts have the ability to extend individual liberties even beyond the scope of the U.S. Constitution in order to maintain the "constitutional structure of . . . a free society."[34] While many state constitutions mirror the federal one, many individual rights first originated in state constitutions, so state courts should feel empowered to "breathe new life" into federal protections to safeguard individual freedoms.[35] The "common dialogue" between state and federal courts is essential to federalism, and state constitutional law can be an arena to develop jurisprudence when an issue has never been faced before.[36]

When analyzing new issues under state constitutional law, state courts often look to persuasive authority from other jurisdictions that have decided the issue, just as the SJC did in *Delgado-Rivera*.[37] State courts in Rhode Island and Washington analyzed the objectively reasonable expectation of privacy in sent text messages and applied their own "independent judgment" to these constitutional questions not yet established in federal jurisprudence.[38] In *State v. Patino*, the Supreme Court of Rhode Island held that one's objectively reasonable expectation of privacy does not extend to text messages on another's phone.[39] This holding relied on the sender's relinquishment of control once the text messages were on the recipient's phone, as the sender reasonably assumed the risk of disclosure by voluntarily sending the text message to a third party.[40] In *State v. Hinton*, the Supreme Court of Washington faced similar facts yet came to the opposite conclusion, holding that one maintained an objectively reasonable expectation of privacy in sent text messages even when there were copies on someone else's phone.[41] This decision hinged on the illegal search of the phone since the defendant could not have reasonably assumed the "risk of

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[33] *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 489 (1977) (arguing that state courts can interpret constitutional rights to provide greater protection for individual rights); Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1307, 1332 (2017) (validating Brennan's argument and advocating for the continued importance of state courts developing constitutional jurisprudence).

[34] Brennan, *supra* note 33, at 491, 495.

[35] Brennan, *supra* note 33, at 501, 503.

[36] *See* Liu, *supra* note 33, at 1332–33.

[37] *See Delgado-Rivera*, 168 N.E.3d at 1094, 1096.

[38] *See id.*; Liu, *supra* note 33, at 1338.

[39] State v. Patino, 93 A.3d 40, 57 (R.I. 2014).

[40] *Id.* at 55–56.

[41] State v. Hinton, 319 P.3d 9, 14, 16 (Wash. 2014).

intrusion by the government" when the police conducted an illegal search.[42]

In both cases, the police illegally searched another person's phone and attempted to use that evidence against the defendant.[43] While the Court in *Hinton* focused on the effect of the police action of exposing the messages, the Court in *Patino* did not consider the nature of the search.[44] *Hinton* recognized that privacy cannot be held to such a rigid definition "[g]iven the realities of modern life," justifying an objectively reasonable expectation of privacy in the text messages.[45] But *Patino* adhered to an inelastic definition based primarily on property interest and ownership, and the Court did not find an objectively reasonable expectation of privacy in the text messages.[46] These diverging approaches in different states highlight the important role that state constitutional law plays in the federalist system.[47]

Even outside of the United States, though in another common-law legal system,[48] the Supreme Court of Canada held that an individual enjoys a reasonable expectation of privacy in sent text messages found on another's phone.[49] Under the totality of the circumstances test, the Court did not consider the lack of control of the recipient's phone fatal to the analysis; instead, it considered "the electronic conversation itself" to be the "subject matter of the search" and not the written records that existed on either phone.[50] The Court defined the search area as "a private electronic space accessible" only by the defendant and the text message recipient.[51] Thus, both of them had an objectively reasonable expectation of privacy in the messages regardless of what the police did to gain physical access.[52]

In *Commonwealth v. Delgado-Rivera*, the SJC confronted the same issue of an objectively reasonable expectation of privacy in sent text messages that faced the courts in Rhode Island, Washington, and Canada.[53]

II. The Court's Opinion

A. *Background of Case*

On September 18, 2016, a police officer in McAllen, Texas, followed a

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[42] *Id.* at 15.

[43] *Patino*, 93 A.3d at 60; *Hinton*, 319 P.3d at 11, 14–16.

[44] *Compare Hinton*, 319 P.3d at 11, 14–16, *with Patino*, 93 A.3d at 60.

[45] *Hinton*, 319 P.3d at 15.

[46] *Patino*, 93 A.3d at 55–57.

[47] Brennan, *supra* note 33, at 503.

[48] *Where Our Legal System Comes From*, GOV'T OF CAN., https://perma.cc/WPS5-M6AP (last updated Sept. 1, 2021).

[49] R v. Marakah, [2017] 2 S.C.R. 608 at 611.

[50] *Id.* at 610.

[51] *Id.* at 611.

[52] *Id.*

[53] Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1093–94 (Mass. 2021).

vehicle suspected of containing narcotics.[54] After witnessing the driver, Leonel Garcia-Castaneda, commit a traffic violation, the officer stopped him and conducted canine, physical, and X-ray searches of the vehicle.[55] The officer did not find any contraband, but after searching Garcia-Castaneda's phone, he found text messages exchanged with a phone number in Massachusetts that appeared to discuss narcotics shipments and payments.[56] The officer alerted the police in Massachusetts, who looked into the phone number that sent the texts to Garcia-Castaneda and learned that it belonged to Jorge Delgado-Rivera.[57] A subsequent investigation resulted in indictments against Delgado-Rivera, Garcia-Castaneda, and five other co-defendants based upon the evidence of the text message exchanges revealed during the illegal police search in Texas.[58]

Garcia-Castaneda moved to suppress the evidence from the search because it was warrantless and unsupported by probable cause; accordingly, the judge excluded the evidence from the search because it was illegal.[59] Delgado-Rivera also claimed that the search violated his rights under the Fourth Amendment and sought to join the motion, which the judge allowed.[60] The Commonwealth sought an interlocutory appeal on this ruling, and the SJC heard the case.[61]

Before the SJC was one central issue: whether Delgado-Rivera had an objectively reasonable expectation of privacy in the text messages that he sent to Garcia-Castaneda, thus making the search of the phone a search of Delgado-Rivera under the Fourth Amendment.[62]

B. *Court's Holding and Analysis*

Relying on existing jurisprudence and persuasive opinions from other jurisdictions, the SJC held that there was no Fourth Amendment search, because Delgado-Rivera had no objectively reasonable expectation of privacy in the sent text messages, and allowed the evidence to be admitted against him.[63] To support its holding, the SJC determined that Delgado-Rivera lost control of the text messages once they were delivered to Garcia-Castaneda, effectively exposing those messages to the public.[64] The SJC noted the factual similarities in the *Patino* decision in Rhode Island

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[54] *Id.* at 1089.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1089 n.3 (Mass. 2021).

[60] *Id.* at 1089.

[61] *Id.* at 1089–90.

[62] *Id.* at 1093–94.

[63] *Id.* at 1097.

[64] *Id.* at 1094–95.

demonstrating lack of control, specifically that the "memorialized record of the communication . . . was beyond the control of the sender" just as it would be if it was another form of written correspondence such as letters or email messages.[65] The delivery of a letter terminates the sender's objectively reasonable expectation of privacy, so the same principle would apply to a text message.[66] Like email messages that "create a record beyond the control of the original sender," text messages are "readily and lastingly available," so it would be unreasonable for a sender to continue to claim an expectation of privacy after they are sent.[67] The SJC considered whether text messages were more akin to oral conversation due to their casual and frequent exchange, but the Court determined that they should not be treated any differently than other forms of written communication.[68]

The SJC also connected the lack of control with the exposure to the public, rejecting a counterargument that it should distinguish between private exchanges and "communications that are released 'more generally.'"[69] Because text messages can be easily shared with others, Delgado-Rivera effectively exposed the messages to the public when Garcia-Castaneda assumed control and had the power to "share or disseminate the sender's message."[70] Since the text messages were "almost instantaneously disbursable," Delgado-Rivera assumed the risk that others would be able to see the text messages on Garcia-Castaneda's phone, including the police.[71] This potential exposure frustrated the expectation of privacy and made it no longer reasonable; the "once-private" information became "subject to disclosure" as recipients gained full control of the message from the sender and could show the text message to almost anyone by forwarding the message or posting it on social media.[72] Because Delgado-Rivera assumed the risk that his sent text messages "might be made accessible to others," the SJC applied the third-party doctrine and found that he had lost any reasonable expectation of privacy.[73]

The SJC also explicitly rejected the *Hinton* decision from Washington, which the lower court judge had relied upon in allowing Delgado-Rivera to join the motion to suppress.[74] Further, the SJC noted that most other courts have declined to extend Fourth Amendment protection to similarly sent text

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[65] Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1094 (Mass. 2021).

[66] *Id.* at 1094–95.

[67] *Id.*

[68] *Id.* at 1096 (noting that an objectively reasonable expectation of privacy could be asserted in oral conversations "in very limited circumstances").

[69] *Id.* at 1095.

[70] *Id.* at 1095–96.

[71] Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1095 (Mass. 2021).

[72] *Id.* at 1095–96.

[73] *Id.* at 1095.

[74] *Id.* at 1097.

messages.[75]

ANALYSIS

III. The SJC Erred in Its Decision by Relying Too Heavily on Cases with Factual Distinctions and Deemphasizing the Impact of Wrongful Police Conduct on Defendant's Assumption of the Risk Under the Third-Party Doctrine

A. *The SJC Should Have Noted Factual Distinctions in Other Cases*

The SJC claimed that other courts that have considered the issue "uniformly have concluded that the Fourth Amendment does not protect" sent text messages on someone else's phone.[76] However, the cases cited to support this assertion were factually distinguishable from *Delgado-Rivera*, which dilutes their reliability as precedent.[77]

Unlike Delgado-Rivera, the defendants in several cited cases had a reduced expectation of privacy in their messages even before the police got involved.[78] In *City of Ontario v. Quon*, the Supreme Court ruled that the search did not violate the Fourth Amendment, without deciding the issue of reasonable expectation of privacy.[79] However, because the defendant was a city employee using a government-provided phone, the government had existing access to a transcript of the defendant's text messages as the subscriber to the phone plan.[80] The defendant was also the subject of an "investigation of work-related misconduct," which would have made the search "reasonable and normal" without infringing upon his Fourth Amendment rights.[81] The SJC also cited *United States v. Lifshitz* to support its holding that there was no reasonable expectation of privacy in Delgado-Rivera's electronic communications.[82] However, the defendant consented to police monitoring of his computer usage as a condition of his probation, so his reduced reasonable expectation of privacy is not comparable to Delgado-Rivera.[83]

Additionally, the SJC based its decision on the premise that Delgado-Rivera lost any objectively reasonable expectation of privacy when he relinquished control and sent the text messages, effectively exposing them to the public and assuming the risk that they "might be made accessible to

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[75] *Id.*

[76] *Id.*

[77] *See* Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1094–97 (Mass. 2021).

[78] *See id.* at 1094.

[79] City of Ontario v. Quon, 560 U.S. 746, 749 (2010).

[80] *Id.* at 750–52.

[81] *Id.* at 757, 764.

[82] *Delgado-Rivera*, 168 N.E.3d at 1094–95.

[83] *See* United States v. Lifshitz, 369 F.3d 173, 177 (2d Cir. 2004).

others."[84] However, the SJC cited cases to support this finding where defendants had taken action that showed that they expected—or even encouraged—the recipient of the message to share the content more widely.[85]

The SJC relied on *United States v. Dunning*, where the Court found that the defendant had no objectively reasonable expectation of privacy in a letter he sent to his girlfriend.[86] However, in the letter, the defendant encouraged his girlfriend to share the contents of the letter with her parents, thus relinquishing control of the content and extinguishing any reasonable expectation of privacy that he could subsequently assert.[87] The defendant effectively exposed the message to the public and assumed the risk that others would view the letter, even if he sought to limit access to a small circle.[88] Comparatively, Delgado-Rivera never took additional action to demonstrate that he intended to relinquish control or that he assumed the risk of others sharing his messages since he did not ask Garcia-Castaneda to share the message with anyone else.[89]

The SJC also cited *Alinovi v. Worcester School Committee*, where the Court held that the defendant had no objectively reasonable expectation of privacy in a term paper she wrote for a course.[90] The defendant shared the term paper with her professor for class discussion and with a co-worker who she thought would find it helpful, but she sought to exclude her principal from seeing it.[91] By exposing the content to some and not to others, she lost an objectively reasonable expectation that the paper would remain private and assumed the risk that individuals to whom she directly gave the paper would share it.[92] In contrast, Delgado-Rivera took no action to share his text messages or to authorize the sharing of those messages with anyone other than the recipient.[93] The fact that the defendants in *Dunning* and *Alinovi* were directly responsible for sharing the content of their messages dulls their persuasiveness in *Delgado-Rivera*.[94] Delgado-Rivera never actively encouraged Garcia-Castaneda to share the text messages so it would not be objectively reasonable to expect him to assume the risk that the text

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[84] *Delgado-Rivera*, 168 N.E.3d at 1094–95.

[85] *See id.*

[86] United States v. Dunning, 312 F.3d 528, 531 (1st Cir. 2002).

[87] *Id.*

[88] *See id.* at 530–31.

[89] *See Delgado-Rivera*, 168 N.E.3d at 1089.

[90] Alinovi v. Worcester Sch. Comm., 777 F.2d 776, 786 (1st Cir. 1985).

[91] *Id.* at 778–79.

[92] *Id.* at 786.

[93] *See Delgado-Rivera*, 168 N.E.3d at 1089.

[94] *See* United States v. Dunning, 312 F.3d 528, 530–31 (1st Cir. 2002); *Alinovi*, 777 F.2d at 778–79.

messages would be shared.[95]

Lastly, the SJC considered *United States v. Bereznak*, where the defendant had no objectively reasonable expectation of privacy in text messages sent to a minor whose parents then shared them with the police.[96] Fulfilling the SJC's prediction that the recipient of a text message would gain "full control of whether to share or disseminate" the content,[97] the defendant assumed the risk that the recipient would reveal the contents of the message, thus eliminating an objectively reasonable expectation of privacy.[98] The defendant in *Bereznak* communicated with a minor and should have expected to assume the risk that the minor's parents would have access to the messages and could voluntarily disclose them to the police.[99] However, Delgado-Rivera was not communicating with a minor and Garcia-Castaneda did not voluntarily show the police the text messages.[100] These factual differences give considerably less weight to the application of *Bereznak* and the other cases cited in the SJC decision.[101]

B. *The SJC Failed to Acknowledge the Relationship Between Wrongful Police Conduct and Defendant's Ability to Assume this Risk Under the Third-Party Doctrine*

The Fourth Amendment protects people from "arbitrary and oppressive interference" by the police,[102] and the exclusionary rule prevents evidence from being admitted when the source is unlawful police conduct.[103] By failing to acknowledge the police misconduct in *Delgado-Rivera* and its relationship with the defendant's assumption of the risk, the SJC's decision disregarded the deterrence value of the exclusionary rule.[104]

The SJC applied the third-party doctrine but ignored the police misconduct in *Delgado-Rivera* that exposed the text messages.[105] An individual who has disclosed information to a third party has no reasonable expectation of privacy because that person has assumed the risk of disclosure.[106] However, when the information is disclosed because of police misconduct, the third-party doctrine should not apply because it is

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[95] *See Delgado-Rivera*, 168 N.E.3d at 1089.

[96] United States v. Bereznak, No. 3:18-CR-39, 2018 WL 1993904, at *1–3 (M.D. Pa. Apr. 27, 2018), *aff'd*, 860 F. App'x 805 (3d Cir. 2021).

[97] *See Delgado-Rivera*, 168 N.E.3d at 1096.

[98] *Bereznak*, 2018 Pa. WL at *3.

[99] *See id.* at *1, *3.

[100] *Delgado-Rivera*, 168 N.E.3d at 1089.

[101] *See id.* at 1097.

[102] United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976).

[103] Elkins v. United States, 364 U.S. 206, 220 (1960).

[104] *See id.* at 217.

[105] *See Delgado-Rivera*, 168 N.E.3d at 1094–97.

[106] United States v. Jacobsen, 466 U.S. 109, 117 (1984).

unreasonable to expect an individual to assume the risk of police overreach and government intrusion.[107]

The SJC mentioned both *Patino* and *Hinton* but did not acknowledge the role of police misconduct in those cases.[108] In *Patino*, the police accessed a phone in the defendant's apartment and claimed to check whether someone had called about the injured child; instead, they read numerous messages with the express intention of gathering evidence that the defendant caused the injuries.[109] The owner of the phone was not present during the search nor did she voluntarily share the contents of the messages with police.[110] Ultimately, the Court held that the "defendant did not have an objectively reasonable expectation of privacy" in the sent text messages, despite the unlawful search of the phone.[111] In *Hinton*, the police also conducted an illegal search of the phone, but they also impersonated the recipient and induced the defendant via text message to meet the police for a drug deal.[112] The Court ultimately ruled that there was a reasonable expectation of privacy in the sent text messages.[113] The facts in *Hinton* were similar to *Patino* and *Delgado-Rivera*, though only the Court in *Hinton* recognized that, because of the police misconduct, the defendant had not voluntarily disclosed the text messages.[114]

Delgado-Rivera involved an instance of police misconduct done deliberately and in bad faith, which the SJC should have considered more, just as the *Hinton* Court did, and just as the *Patino* Court failed to do.[115] The police officer was not in a lawful position to access the text message exchange between Delgado-Rivera and Garcia-Castaneda and clearly overstepped his bounds to gather incriminating evidence.[116] Therefore, Delgado-Rivera could not reasonably expect that the police might

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[107] *See* Peter C. Ormerod & Lawrence J. Trautman, *A Descriptive Analysis of the Fourth Amendment and the Third-Party Doctrine in the Digital Age*, 28 ALB. L.J. SCI. & TECH. 73, 145 (2018) (interpreting the third-party doctrine to require that "all information . . . be voluntarily conveyed to a third party before it loses Fourth Amendment protection" so there is no assumption of the risk with police misconduct).

[108] *Delgado-Rivera*, 168 N.E.3d at 1094, 1097.

[109] *See* State v. Patino, 93 A.3d 40, 43–44 (R.I. 2014).

[110] *Id.*

[111] *Id.* at 57.

[112] State v. Hinton, 319 P.3d 9, 11 (Wash. 2014).

[113] *Id.* at 16–17.

[114] *See id.* at 15–16.

[115] *See* Sharon L. Davies, *The Penalty of Exclusion—A Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1326–27 (2000).

[116] *Compare* Commonwealth v. Panetti, 547 N.E.2d 46, 46–47 (Mass. 1989) (finding that police had permission from property owner to access the crawlspace and were in a lawful position to hear the conversation "unaided"), *with* Commonwealth v. Delgado Rivera, 168 N.E.3d 1083, 1088–89 (Mass. 2021) (determining that the police officer was not otherwise in a lawful position to view the text messages).

wrongfully search the recipient's phone and reveal the content of the text messages.[117] Additionally, the SJC would better deter further police misconduct by finding that "deliberately unconstitutional" police misconduct bars evidence from being used against any victim of that illegal search.[118] Text messages may be easy to share with others and some recipients may elect to forward them to others or share them with police, but none of the recipients in these cases took these actions.[119] By finding that Delgado-Rivera assumed the risk of disclosure when it was police misconduct that knowingly exposed his messages to the public, the SJC undercut the security protections of the Fourth Amendment, which should not fall apart merely because there is a potential for involuntary disclosures.[120]

IV. The SJC Decision Will Have Negative Ripple Effects on Fourth Amendment Jurisprudence

In *Delgado-Rivera*, the SJC seemed to ignore the caution from the Court in *Riley v. California*: cell phones contain a huge amount of intimate and private information, and an unlawful search of a cell phone is akin to a ransack of one's house.[121] The principal takeaway of *Riley* is that the police should obtain a warrant before searching a cell phone, regardless of whether the information is requested from the provider or accessed directly through the cell phone itself.[122] Although it left some questions unanswered, *Riley* provided a framework for future decisions about cell phones and the objective reasonableness of an expectation of privacy.[123] But in *Delgado-Rivera*, the SJC departed from this framework and suggested that the police could avoid warrants as long as they access a sender's text messages through the recipient's phone.[124]

This holding will tip the scale in favor of law enforcement to the detriment of the people and contribute directly to structural inequalities in

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[117] *See* Candice Gliksberg, Note, Decrypting the Fourth Amendment: Applying Fourth Amendment Principles to Evolving Privacy Expectations in Encryption Technologies, 50 LOY. L.A. L. REV. 765, 782–83 (2017) (arguing that the mere ability to access content is "not sufficient to extinguish a reasonable expectation of privacy" and that assumption of the risk includes only voluntary disclosures).

[118] *See* Davies, *supra* note 115, at 1326–28.

[119] *See Delgado-Rivera*, 168 N.E.3d at 1089, 1094; State v. Patino, 93 A.3d 40, 43–44 (R.I. 2014); *Hinton*, 319 P.3d at 11.

[120] *Delgado-Rivera*, 168 N.E.3d at 1095; *see Hinton*, 319 P.3d at 15 (". . . the mere fact that an individual shares information with another party and does not control the area from which that information is accessed does not place it outside the realm of . . . protection").

[121] Riley v. California, 573 U.S. 373, 394–96 (2014).

[122] Adam Lamparello & Charles E. MacLean, Riley v. California*: Privacy Still Matters, but How Much and in What Contexts?*, 27 REGENT U. L. REV. 25, 29 (2015).

[123] *See id.* at 27–29.

[124] *Delgado-Rivera*, 168 N.E.3d at 1089, 1097.

the law.[125] Criminal law has largely developed in a way that regulates these "structural imbalances" to ensure that "intrinsically disadvantaged" groups are not overpowered by the government.[126] And while technology has enabled some individuals to more easily protect their private information, law enforcement has also benefited from stronger surveillance tools.[127] Countries with common-law systems may be better equipped than countries with statutory systems to account for these inequities and reinterpret laws and norms, but courts will not address inequality if they are unwilling to follow the *Riley* holding.[128]

Additionally, the SJC ruled that this lack of an expectation of privacy in sent text messages was objectively reasonable without including research to support the finding.[129] Empirical studies are a powerful tool to support court holdings in matters of first impression, but the SJC did not cite research that measures objective reasonableness by societal standards.[130] The effectiveness of empirical research would be especially relevant in this case, as opinion polls suggest that people have a higher expectation of privacy in digital information than what is recognized as objectively reasonable by the courts.[131] Even if relying on case law alone, the SJC should have considered "all of the circumstances surrounding the search . . . and the nature of the search . . . itself" to determine the objectively reasonable expectation of privacy.[132] Yet the SJC disregarded the fact that the search of Garcia-Castaneda's cell phone was ultimately held to be illegal.[133] Thus, the SJC's failure to check the discretionary power of law enforcement in *Delgado-Rivera* poses a threat to all privacy under the Fourth Amendment and not just the privacy of those subject to a few arbitrary searches.[134]

With its implicit disregard of *Riley*, this decision could easily lead to a slippery slope where the lack of an objectively reasonable expectation of privacy in sent text messages on someone else's phone could extend to those

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[125] *See generally* Bert-Jaap Koops, *Law, Technology, and Shifting Power Relations*, 25 BERKELEY TECH. L.J. 973, 974–75 (2010) (exploring how technology has affected power shifts in law enforcement and arguing that case law is one way to address inequality).

[126] *Id.* at 978.

[127] *Id.*

[128] *See id.* at 1027; *see also* Bert-Jaap Koops & Ronald Leenes, '*Code' and the Slow Erosion of Privacy*, 12 MICH. TELECOMMS. & TECH. L. REV. 115, 184, 188 (2005).

[129] *See Delgado-Rivera*, 168 N.E.3d at 1094.

[130] *Id.*; *see generally* Christine S. Scott-Hayward et al., *Does Privacy Require Secrecy? Societal Expectations of Privacy in the Digital Age*, 43 AM. J. CRIM. L. 19, 22 (2015) (arguing that courts should rely more on empirical research when determining objective reasonableness of an individual's expectation of privacy).

[131] *Id.* at 46, 49.

[132] United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985).

[133] *Delgado-Rivera*, 168 N.E.3d at 1089.

[134] *See* Julian Sanchez, *Encryption Originalism*, CATO INST. (July 16, 2021), https://perma.cc/E85E-NCDF.

same messages on one's own phone.[135] Since those text messages are identical copies of the same "memorialized record of the communication" that is technically "beyond the control of the sender," this decision could lead to an untenable shrinking of the reasonable expectation of privacy that could allow the police to access an individual's cell phone without implicating the Fourth Amendment.[136] The SJC likely did not intend to extend the doctrine in such a manner, but if a similar fact pattern were to appear before the Court in the future, the holding in *Delgado-Rivera* could warp the case law against itself.[137]

The SJC referenced encrypted messaging services but acknowledged that the issue is outside the scope of *Delgado-Rivera*.[138] In a separate case, *Commonwealth v. Carrasquillo*, the SJC held that a sender of encrypted messages over Snapchat had no objectively reasonable expectation of privacy over the content because he did not "adequately 'control[] access' to his Snapchat account."[139] Snapchat is one of many encrypted messaging services that are becoming more popular, particularly among people who use them for illegal purposes.[140] Thus, cases involving encrypted messaging may come before courts more frequently, especially as law enforcement asserts a belief in their absolute right to decode and access encrypted messages in the interest of investigating accused criminals.[141] If a court were to side with law enforcement and hold that there is no objectively reasonable expectation of privacy in encrypted messages, even when a sender has taken all possible steps to shield the information from the public, the Fourth Amendment would be manipulated beyond repair, and the SJC's decision in *Delgado-Rivera* will have facilitated that erosion.[142]

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[135] *See* Riley v. California, 573 U.S. 373, 394, 401–03 (2014).

[136] *Delgado-Rivera*, 168 N.E.3d at 1094.

[137] *See id.* at 1097.

[138] *Id.* at 1093, 1095.

[139] Commonwealth v. Carrasquillo, 179 N.E.3d 1104, 1120 (Mass. 2022).

[140] Adi Gaskell, *Cybercriminals Are Using Encrypted Chat Apps as Illegal Marketplaces*, CYBERNEWS https://perma.cc/94PP-FKQD (last updated Sept. 28, 2021) (announcing high growth in downloads of two encrypted messaging applications, Signal and Telegram, but also mentioning that they are ripe with undetectable illegal activity); *see* David Nield, *7 Apps That Will Let You Send Disappearing Messages*, POPULAR SCI., https://perma.cc/TUF4-KWDC (last updated Jun. 27, 2022) (mentioning the most popular encrypted messaging services).

[141] *See* Tonya Riley, *The Cybersecurity 202: Encrypted Messaging App Signal Finds Serious Flaws with a Phone Cracking Tool Favored by Law Enforcement*, WASH. POST (Apr. 22, 2021, 7:46 AM EDT), https://perma.cc/PCM3-5XNX.

[142] *See* Sanchez, *supra* note 134 (supporting the idea that the Founders used encryption and ciphers to secure personal communications against general warrants).

V. The SJC Should Have Adopted a Standard That Appropriately Applies the Principles of the Fourth Amendment

A. *The SJC Should Have Held That Defendants Cannot Assume the Risk of Wrongful Police Conduct Exposing Their Sent Text Messages*

The SJC should have interpreted the Fourth Amendment in *Delgado-Rivera* to recognize an objectively reasonable expectation of privacy when police misconduct is the source of exposure because individuals cannot assume the risk of an arbitrary and illegal government search that unjustifiably encroaches on their privacy.[143] This interpretation of the third-party doctrine ensures that law enforcement assumes the risk of police misconduct rather than the individual who is subject to the search.[144] However, in *Delgado-Rivera*, the SJC wrongfully equated the right of access and the risk of disclosure with the extinguishment of an individual's objectively reasonable expectation of privacy.[145]

A central tenet of the third-party doctrine is the risk that an individual reasonably assumes when sending a written communication and voluntarily disclosing information to someone else.[146] That individual loses any reasonable expectation of privacy and assumes the risk of disclosure when the individual sends a message to someone else, knowing that the content could be revealed by the recipient.[147] The SJC cited *Dunning* and *Alinovi*, both of which display this approach in action, because the defendants had shared the information in their messages and knowingly exposed the content to the public.[148] While not every case under the third-party doctrine would require such overt action, the sender assumed the risk of disclosure by failing to further protect the information, and the recipient of the message did indeed voluntarily disclose the content.[149]

Even voluntary disclosure by the recipient to the police would be within the bounds of the third-party doctrine, since the sender properly assumed

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[143] *See* Brian Frazelle & David Gray, *What the Founders Would Say About Cellphone Surveillance*, AM. C.L. UNION (Nov. 17, 2017, 1:45 PM), https://perma.cc/LXB2-WXNP.

[144] *See* Gliksberg, *supra* note 117, at 782–83.

[145] *See* Gliksberg, *supra* note 117, at 782.

[146] United States v. Jacobsen, 466 U.S. 109, 117 (1984).

[147] *See id.* (requiring action to reveal private information to another in order for the expectation of privacy to be frustrated); Katz v. United States, 389 U.S. 347, 351 (1967) (finding that action taken to "preserve [something] as private" warrants constitutional protection and implying that failure to take that action would justify losing a reasonable expectation of privacy); Commonwealth v. Pina, 549 N.E.2d 106, 110 (Mass. 1990) (implying that there is no reasonable expectation of privacy since one of the factors in the reasonableness analysis is the precaution taken to protect privacy).

[148] United States v. Dunning, 312 F.3d 528, 530–31 (1st Cir. 2002); Alinovi v. Worcester Sch. Comm., 777 F.2d 776, 778–79 (1st Cir. 1985).

[149] *Jacobsen*, 466 U.S. at 117.

the risk that the recipient would voluntarily disseminate the content to others, including the police.[150] This situation occurred in *Bereznak* when the minor-recipient's parents shared the messages with the police out of concern for their child.[151] The defendant had no reasonable expectation of privacy where the third-party doctrine applied because the defendant assumed the risk of voluntary disclosure when sending the text messages.[152] The SJC considered this principle in *Delgado-Rivera* and the Court's holding would have been justified if Garcia-Castaneda had shared Delgado-Rivera's messages with the police.[153] However, Garcia-Castaneda did not share the messages with the police—the police conducted an illegal search of the phone to find the evidence that was used against Delgado-Rivera.[154]

The core of the SJC's ruling is that an individual sending a written message assumes the risk of involuntary disclosure due to police misconduct.[155] This holding is an unjust interpretation of the third-party doctrine that further exacerbates structural inequalities between law enforcement and individuals in the digital age.[156] The SJC improperly interprets the doctrine and forces criminal defendants to be responsible for unlawful searches by the police by allocating the risk to individuals instead of law enforcement, effectively going against the principles of the Fourth Amendment.[157] In both *Patino* and *Hinton*, the source of the disclosure was the police's unlawful search without warrants or alternative justifications, and neither the sender nor the recipient voluntarily shared this content with the police.[158] The defendants should not be required to take additional action to safeguard their messages from police misconduct, and they should not be expected to assume the risk that law enforcement would conduct an illegal search.[159] Just because the police have the ability to access information by conducting an unlawful search, does not mean that the SJC should shrink an individual's Fourth Amendment protection to allow space for this wrongful action.[160] The SJC should have considered the larger context of the unlawful police search in *Delgado-Rivera* when determining the objectively reasonable

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[150] *Id.*

[151] United States v. Bereznak, No. 3:18-CR-39, 2018 WL 1993904, at *1, *3 (M.D. Pa. Apr. 27, 2018), *aff'd*, 860 Fed. App'x 805 (3d Cir. 2021).

[152] *Id.* at *3.

[153] *See* Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1094–96 (Mass. 2021).

[154] *See id.* at 1089.

[155] *See id.* at 1095.

[156] *See* Koops, *supra* note 125, at 978–79.

[157] *See* Gliksberg, *supra* note 117, at 782–83.

[158] State v. Patino, 93 A.3d 40, 43–44, 60 (R.I. 2014); State v. Hinton, 319 P.3d 9, 11, 15–16 (Wash. 2014).

[159] *See* Gliksberg, *supra* note 117, at 782–83.

[160] *See* Gliksberg, *supra* note 117, at 782.

expectation of privacy in sent text messages.[161]

B. *The SJC Should Have Recognized a Reasonable Expectation of Privacy in a Shared Digital Space Between Senders and Recipients of Text Messages*

Courts should rely on evidence-based law and empirical research to determine the contours of constitutional protection in a world where people have a higher expectation of privacy in digital content than that recognized by courts.[162] As society moves further into the digital age, and as changing circumstances force a reconsideration of objective reasonableness, empirical research can offer more clarity, guidance, and assistance to courts as they develop jurisprudence and determine Fourth Amendment protections of technology.[163] Thus, courts should consider the different perspectives that empirical research can offer on objective reasonableness.[164]

The SJC could have taken a novel approach and extended the physical trespass doctrine to include a shared digital space where one's reasonable expectation of privacy and property interest can protect content from warrantless police searches.[165] The Supreme Court of Canada took this approach in *R. v. Marakah*, holding that the subject of the search was the electronic conversation between sender and recipient so that both had a reasonable expectation of privacy in the "private electronic space," independent of the actual phone from which police accessed the messages.[166]

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[161] *See* Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1089, 1097 (Mass. 2021).

[162] *See* Henry F. Fradella, *A Content Analysis of Federal Judicial Views of the Social Science "Researcher's Black Arts,"* 35 RUTGERS L.J. 103, 105 (2003) (noting that empirical evidence is "far richer and more accurate than the suppositions that thoughtful reflection can provide" and arguing that it should be considered an "'equally important source of authority'" for courts (quoting David L. Faigman, "*Normative Constitutional Fact-Finding:" Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 544 (1991)); Scott-Hayward et al., *supra* note 130, at 46, 49, 58–59 (citing a study that determined that people have a higher expectation of privacy in digital content and mentioning that "empirical research . . . can assist judges in . . . constitutional fact-finding" by combining "normative principles and empirical evidence"). *See generally* Jeffrey J. Rachlinski, *Evidence-Based Law*, 96 CORNELL L. REV. 901, 901, 910-14, 923 (2011) (defining evidence-based law and noting the potential impact of empirical studies on court decisions).

[163] *See* Scott-Hayward et al., *supra* note 130, at 46, 49, 58–59 (". . . we sought to be forward-looking by ascertaining what 'society' feels are reasonable expectations of privacy with regard to a range of digital information . . . . Our hope is to provide empirical data upon which the courts can make 'evidence-based law' as they move forward with setting the parameters for moving the Fourth Amendment into the digital age.").

[164] *See* Fradella, *supra* note 162, at 105; Scott-Hayward et al., *supra* note 130, at 46, 49, 58–59.

[165] *See* United States v. Jones, 565 U.S. 400, 407–08 (2012) (contending that both trespassory intrusions and intrusions upon one's reasonable expectation of privacy can violate the Fourth Amendment); *cf.* Riley v. California, 573 U.S. 373, 393–94, 401–03 (2014) (finding that the sheer amount of information contained on cell phones heightens privacy interests and calls for protection from warrantless government searches).

[166] *R v. Marakah*, [2017] 2 S.C.R. 608 at 610–11.

Marakah expanded the jurisprudence in a novel way, but this approach is also consistent with the common-law tradition of judicial systems "adapt[ing] to . . . challenges" of the digital age.[167]

The *Marakah* court's approach is also consistent with Justice Brennan's philosophy that state courts should be a source of independent constitutional protection when federal courts have not faced an issue before or when federal protections fall short.[168] After all, it was not the first time that the SJC declined to follow the federal interpretation of the Fourth Amendment in favor of greater protection for criminal defendants.[169] Until the Supreme Court has an opportunity to reconsider *Quon* and determine the reasonable expectation of privacy in text messages, the SJC and other state courts should do as much as they can to protect individual liberties threatened by government intrusion, something that the SJC failed to do in *Delgado-Rivera*.[170]

CONCLUSION

The SJC held in *Commonwealth v. Delgado-Rivera* that there is no objectively reasonable expectation of privacy in sent text messages because the sender of those messages has relinquished control and assumed the risk that the information could be disclosed to others. By applying the Fourth Amendment precedent to a new fact pattern, the SJC believed that it was following the direction taken in other jurisdictions. Instead, the SJC interpreted the doctrine in a manner that lessens Fourth Amendment protections. Not only are the cited cases factually distinguishable, but the police uncovered the defendant's text messages through an illegal search, and it would be unreasonable to expect the sender to have assumed that risk. The SJC's failure to consider this impact means that *Delgado-Rivera* will have negative effects on future decisions, particularly as people retain a high expectation of privacy in their own digital content, as law enforcement continues to wage a war against privacy in digital information, and as technology remains constantly present in everyone's life.

By interpreting the question in a rigid manner, the SJC missed an opportunity to create a new standard that more appropriately protects private information on someone's cell phone by accounting for unlawful police conduct and its impact on the sender's ability to assume a risk that the recipient would disseminate the information. Alternatively, the SJC could have recognized a property interest in a shared digital space that would be

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[167] *Id.* at 611.

[168] *See* Brennan, *supra* note 33, at 491, 495; Liu, *supra* note 33, at 1333.

[169] *See, e.g.*, Commonwealth v. Gonsalves, 711 N.E.2d 108, 111 (Mass. 1999) (declining to follow federal jurisprudence and requiring police to establish a reasonable safety concern before ordering a driver out of a motor vehicle).

[170] *See* Brennan, *supra* note 33, at 491, 503.

free from unwarranted governmental intrusion, expanding the scope of protection from unlawful searches, just as Canada has done. This decision lessens individual protection while doing nothing to deter police misconduct or disincentivize bad behavior.

Justice Brennan championed a judicial philosophy that encouraged state courts to take individual liberties further than federal courts to assure their citizens of the "full protections of the federal Constitution."[171] Unfortunately, the SJC's decision in *Commonwealth v. Delgado-Rivera* does not take the opportunity to provide more protection for the people of Massachusetts, thus endangering their constitutional rights and contributing to a significant erosion of Fourth Amendment protections in the digital age.

[171] Brennan, *supra* note 33, at 491.