Unlawful stops legitimized *after* the fact?

By Marc Rotenberg

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Visitors sitting on the steps of the U.S. Supreme Court building on Capitol Hill in Washington, June 20.

The police officer who stopped Edward Strieff outside a residence in Salt Lake City had neither reasonable suspicion nor *Terry*-like circumstances. But the stop led to a request for identification, which led to a call to a police dispatcher, which led to a search for outstanding warrants, which led to the discovery of an unpaid traffic ticket, which led to an arrest and then a physical search, and then to the discovery of methamphetamine and drug paraphernalia. Strieff moved to suppress the drug evidence arguing that the stop was unlawful.

The attenuation doctrine permits the police to make use of evidence even where the initial stop is unlawful. In *Utah v. Strieff*, 2016 DJDAR 5919 (June 20, 2016), the Supreme Court held 5-3 that because there was no flagrant police misconduct, the drug evidence was admissible. But the ruling also cast in stark relief two competing views of the exclusionary rule and raised significant questions about the future of the attenuation doctrine as technology transforms the policing realm.

Reversing a decision of the Utah Supreme court, Justice Clarence Thomas concluded that the discovery of an outstanding warrant is an "intervening circumstance" that satisfies the attenuation requirement. Thomas, writing for a narrow majority, emphasized the third factor of the attenuation doctrine — the absence of police misconduct — as against the purpose of the exclusionary rule, to deter police misconduct. He also stated that this was an isolated incident, not "part of any systemic or recurrent police misconduct."

Justice Sonia Sotomayor and Justice Elena Kagan wrote separate dissenting opinions. Sotomayor, joined in part by Justice Ruth Bader Ginsburg, stated directly, "This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants — even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant."

Sotomayor provided a resounding defense of the exclusionary rule: "a basic principle lies at the heart of the Fourth Amendment: Two wrongs don't make a right. When 'lawless police conduct' uncovers evidence of lawless civilian conduct, this Court has long required later criminal trials to exclude the illegally obtained evidence." And she underscored the vast number of individuals with outstanding misdemeanor warrants — over 180,000 in Utah. Drawing on reports from the Justice Department, she noted "Salt Lake County had a 'backlog of outstanding warrants' so large that it faced the "potential for civil liability." The states and federal government maintain database with over 7.8 million outstanding warrants, "the vast majority of which appear to be for minor offenses." In Ferguson, Missouri, the Department of Justice found that 16,000 of the 21,000 residents have outstanding warrants.

Kagan, in her dissent, agreed with the court that the application of the exclusionary turns out a balancing analysis, but concluded that the court got the balance wrong. Of particular concern is the intervening event, the uncovering of the warrant. She writes "a circumstance counts as intervening only when it is unforeseeable — not when it can be seen coming from miles away." Even the police officer acknowledges that checking for outstanding warrants during a stop is the "normal" practice of the Salt Lake City police. Following the court's earlier analysis of attenuation in *Brown v. Illinois*, 422 U.S. 590 (1975), should have produced the opposite result.

Kagan also piled up the evidence on outstanding warrants. California leads the nation with 2.5 million outstanding arrest warrants, "a number corresponding to about 9% of the adult population. "

As amicus curiae in this case, EPIC warned the court that in the age of interconnected databases, it will become increasingly trivial for the police to obtain information subsequent to a stop that will justify further inquiry. Thomas suggests that such dragnet searches would produce a different outcome. But Thomas ignored the rapid changes on policing practices — the use of automatic license plate readers and facial recognition — that will make such dragnet searches routine, as well as the institutionalized training procedures, noted in the dissents, in New York City and even Salt Lake City.

The wall between physical world and the digital world is becoming increasingly permeable. It is not difficult to imagine a world, a few years from now, when the identification of individuals in public spaces becomes highly automated. The subsequent search for outstanding warrants, as well as other incriminating information or perhaps high "terrorism risk" scores, will be part of the system, effectively diminishing police discretion while routinizing police surveillance. Police misconduct, understood as the acts of particular officers, will be a less significant concern. But routinized policing functions — the integration of systems for identification, tracking and analysis — will become prevalent. If the purpose of the exclusionary rule is to stop police misconduct and police misconduct is effectively minimized due to routinization, the court will have to pay closer attention to the operation of these systems.

The Fourth Amendment challenge is also made more difficult by the court's decision in *Herring v. U.S.*, 555 U.S. 135 (2009), permitting an arrest and search even when the warrant record check is flawed. As EPIC noted in our amicus briefs for the court in both *Herring* and *Strieff*, the problem of police databases is not simply their scope but also the extent of inaccurate data routinely maintained about Americans.

Now that data provides an after-the-fact justification to uphold a stop that no one in *Utah v. Strieff* argued was permissible.

Marc Rotenberg *is president of the Electronic Privacy Information Center in Washington, D.C. and coauthor (with Anita L. Allen) of Privacy Law & Society (West 2016). EPIC filed an amicus brief in* Utah v. Strieff.

MARC ROTENBERG
EPIC