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From the Legal Literature

Francesca Laguardia*

ARREST RECORDS

I. INTRODUCTION

The collateral consequences of criminal justice involvement is receiving more attention in the scholarly conversation on criminal justice.¹ A prior *From the Legal Literature* review focused on the way efforts to reform the criminal justice system had failed, specifically in regards to the effects of records of conviction and, to a lesser extent, records of arrest.² But the effects of arrest records deserve particular attention because arrest is discretionary, heavily influenced by polic-

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¹U.S. COMM'N ON CIV. RTS., COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 1–2 (2019), <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf> [<https://perma.cc/QA8H-92CZ>]; Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012); Gabriel Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 MARQ. L. REV. 233, 234 (2018–19); see also, e.g., Emily Ahdieh, *The Deportation Trigger: Collateral Consequences and the Constitutional Right to A Trial by Jury*, 30 GEO. MASON U. CIV. RTS. L.J. 65 (2019); Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 524 (2020); Jamie Connolly, *Prosecutorial Discretion and Collateral Consequences: Rethinking the Alabama Rules of Professional Conduct*, 43 J. LEGAL PROF. 269 (2019); Zachary Hoskins, *Criminalization and the Collateral Consequences of Conviction*, 12 CRIM. L. & PHIL. 625 (2018); Brian M. Murray, *Retributivist Reform of Collateral Consequences*, 52 CONN. L. REV. 863, 916 (2020); Brian M. Murray, *Are Collateral Consequences Deserved?*, 95 NOTRE DAME L. REV. 1031 (2020); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010); Rafi Reznik, *Retributive Abolitionism* 24 BERKELEY J. CRIM. L. 123 (2019); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670 (2008). This issue has also been addressed in these pages, see Francesca Laguardia, *From the Legal Literature: Disentangling Prison and Punishment*, 56 CRIM. L. BULL. 754 (2020); Francesca Laguardia, *From the Legal Literature: America's Paper Prisons: The Second Chance Gap*, 58 CRIM. L. BULL. 165 (2022) [hereinafter Laguardia, *Paper Prisons*].

²Laguardia, *Paper Prisons*, *supra* note 1, at 167–73 (reviewing Chien, *supra* note 1).

ing patterns and therefore by the influence of racism on policing,³ and—as the collateral consequences of arrest remain for wholly innocent individuals—constitutes punishment in the absence of conviction.⁴ While literature on collateral consequences of conviction has flourished, the consequences of arrest, and the extent to which “collateral consequences” are implicated at the level of arrest, has received less attention.⁵

The two articles reviewed below explore these issues in greater detail. In *The Mark of Policing: Race and Criminal Records*, Eisha Jain highlights the way this very first interaction with the criminal justice system—the arrest—can permanently mark an individual, leaving broader effects on entire communities, and heightening racial disparities.⁶ In *Digitizing and Disclosing Personal Data: The Proliferation of State Criminal Records on the Internet*, Sarah Lageson, Elizabeth Webster, and Juan Sandoval investigate and clarify the specific mechanisms facilitating many of these consequences; namely, the way private data moves from criminal justice agencies and state repositories to publicly searchable online databases.⁷ Together, these articles offer an important window into the effects of criminal justice involvement, and the way these wholly administrative practices and access to data threaten to make innocence, legal innocence, exoneration, and rehabilitation irrelevant.

II. EISHA JAIN, *THE MARK OF POLICING: RACE AND CRIMINAL RECORDS*

The article highlighted here is not Professor Jain’s first contribution to the discussion of arrest and collateral consequences.⁸ In this essay, however, Professor Jain’s focus is on the way the formal record of arrest allows policing decisions to entrench racial inequality.⁹ To facilitate this analysis, Professor Jain looks to the sociological framework of marking, whereby arrest records become a public and negative “credential,” that reappears throughout an

³Eisha Jain, *The Mark of Policing: Race and Criminal Records*, 73 STAN. L. REV. ONLINE 162, 165, 177–78 (2021).

⁴Sarah Lageson, Elizabeth Webster & Juan Sandoval, *Digitizing and Disclosing Personal Data: The Proliferation of State Criminal Records on the Internet*, 46 LAW & SOC. INQUIRY 635, 660 (2021).

⁵Jain, *supra* note 3, at 164.

⁶Jain, *supra* note 3.

⁷Lageson et al., *supra* note 4.

⁸See Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 826 (2015); Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1206–07 (2016) (discussing how prior records of arrest affect plea bargaining); Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1477 (2019) (discussing how arrest can lead to deportation); Eisha Jain, *Jailhouse Immigration Screening*, 70 DUKE L.J. 1703, 1725–31 (2021).

⁹Jain, *supra* note 3, at 165.

individual's life.¹⁰ This framework has been developed in criminological literature, notably by James Jacobs, Tamara Crepet, Devah Pager, Becky Pettit, and Bruce Western.¹¹

As Professor Jain explains, this marker is particularly insidious as its imposition is heavily influenced by the purely discretionary decisions of police officers.¹² Constitutional criminal procedural doctrine allows police considerable discretion in this area, even to the point of arresting for mere violations (that carry no carceral punishment).¹³ The heavily discretionary nature of stops, frisks, searches, and arrests has also facilitated racial profiling, leading to extreme racial disparities in arrest rates, particularly for low level crimes.¹⁴ As examples, Professor Jain cites New York's stop-and-frisk practices (where "more than 80% of those subjected to stops were racial minorities"), as well as arrest, citation, and vehicle stop statistics from Ferguson, Missouri.¹⁵ Criminal justice involvement at the level of simple stops, let alone arrests, can lead to fatal outcomes, as was exemplified by the killings of Eric Garner, Michael Brown, Freddie Gray, Philando Castile, and George Floyd,¹⁶ but Professor Jain wants to bring attention to the marker created by arrest records as well.¹⁷

Professor Jain explains that the lasting marker formed in the course of arrests results in "invisible punishments," and civil

¹⁰Jain, *supra* note 3, at 165.

¹¹Jain, *supra* note 3, at 165 (citing JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 2 (2015) (comparing a criminal record to a "negative curriculum vitae" that "contains only disreputable information"); DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 4–5 (2007) (stating that the "power of the credential lies in its recognition as an official and legitimate means of evaluating and classifying individuals"); James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 177 n.3 (2008); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 939, 942 (2003); see also James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 413 (2006); Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 156, 165 (2004) (discussing how "[h]istorically, going to prison was a marker of extreme deviance, reserved for violent and incorrigible offenders," but that it has turned into a common life marker for low-socioeconomic-status Black men, which leads to diminished life opportunity).

¹²Jain, *supra* note 3, at 166–68.

¹³Jain, *supra* note 3, at 166.

¹⁴Jain, *supra* note 3, at 167–70; see also MICHAEL D. WHITE & HENRY F. FRADELLA, *STOP AND FRISK: THE USE AND ABUSE OF A CONTROVERSIAL POLICING TACTIC* (2016).

¹⁵Jain, *supra* note 3, at 169; see also WHITE & FRADELLA, *supra* note 14, at 3–6.

¹⁶Jain, *supra* note 3, at 166–68; see also WHITE & FRADELLA, *supra* note 14, at 10–12.

¹⁷Jain, *supra* note 3, at 170.

penalties.¹⁸ These penalties are not minor, but rather range from barriers to employment, eviction, and the suspension of professional licenses, to implications in future plea bargain negotiations (involving unrelated arrests) and deportation.¹⁹ Aggravating the problem, those affected may never know that it is their arrest record leading to these difficulties.²⁰ Employers need not explain to job applicants that they are being rejected due to a criminal record, and applicants might therefore assume that they received a poor reference instead of realizing that the potential employer found an arrest record via a background check.²¹ This leaves the applicant no opportunity to address the mark on their record.²² And, like arrests, the poor effects of an arrest record have disparately strong effects on the applications of people of color, particularly Black applicants.²³

The lasting effects of these records makes current judicial perspectives on low level arrests outdated and overly simplistic.²⁴ The availability of criminal records online means that “[a]n arrest is something more permanent and consequential than it has been in the past.”²⁵ Professor Jain reminds us that part of the reason the U.S. Supreme Court has allowed police as much discretion as they have is that the arrest for a low level crime was believed to carry very few and short-lived repercussions.²⁶ If, instead, the arrest by itself will result in lasting and serious repercussions, this analysis must be reconsidered.²⁷ This is only more true in the specific instance of low-level arrest records because low-level arrests are so heavily influenced by biases in policing.²⁸

In this essay, Professor Jain offers very brief recommendations to remedy the problem.²⁹ Specifically, she calls for decriminalization and reduction in policing practices in order to reduce unnecessary arrests for behavior that does not truly implicate moral culpability.³⁰ Noting that it is impossible for prosecutors to affect the creation of

¹⁸ Jain, *supra* note 3, at 170–71.

¹⁹ Jain, *supra* note 3, at 170, 171, 172; *see also* sources cited *supra* note 8.

²⁰ Jain, *supra* note 3, at 171, 172.

²¹ Jain, *supra* note 3, at 172.

²² Jain, *supra* note 3, at 174.

²³ Jain, *supra* note 3, at 172–73.

²⁴ Jain, *supra* note 3, at 174–75.

²⁵ Jain, *supra* note 3, at 174–75.

²⁶ Jain, *supra* note 3, at 174–75.

²⁷ Jain, *supra* note 3, at 174–75.

²⁸ Jain, *supra* note 3, at 175.

²⁹ Jain, *supra* note 3, at 175–77.

³⁰ Jain, *supra* note 3, at 175.

an arrest record, she suggests that instead we “sever the process of criminal arrest from the creation of a criminal record,” allowing for arrests to occur without a criminal record being created.³¹ Additionally, she recommends reducing the visibility of these records by both making expungement easier and encouraging employers and other actors who rely on arrest records to be transparent about their use and consider the racial implications of their actions.³²

As Professor Jain notes, the creation and dissemination of criminal arrest records, which leads to these collateral consequences, is a systemic process.³³ It is this process that is explained by Professors Lageson, Webster, and Sandoval, whose work is reviewed below.³⁴

III. SARAH LAGESON, ELIZABETH WEBSTER, AND JUAN SANDOVAL, *DIGITIZING AND DISCLOSING PERSONAL DATA: THE PROLIFERATION OF STATE CRIMINAL RECORDS ON THE INTERNET*

Where Professor Jain highlights the moral and racial implications of arrest records, Professors Lageson, Webster, and Sandoval explain the processes by which this marking occurs. As they state, the inescapable trap of the criminal arrest marker is created by digital criminal records, “posted online by governmental agencies, sold in bulk through public-private contracts to data brokers and reposted by a variety of private websites.”³⁵ These websites permit the information to spread, leading to greater stigmatization of those marked and all the concordant repercussions outlined by Professor Jain, above.³⁶ Worse yet, the system actually encourages the spread of inaccurate information while leaving barriers in place with regards to more accurate information.³⁷

The scope of the problem is overwhelming. While the U.S. Department of Justice’s Bureau of Justice Statistics reports that state repositories have criminal records on approximately 30% of the population of the United States (110 million people), private data companies claim to have records on 90% of the U.S. population.³⁸ These records include birth dates, physical descriptions, photo-

³¹ Jain, *supra* note 3, at 176.

³² Jain, *supra* note 3, at 176–77.

³³ Jain, *supra* note 3, at 170.

³⁴ Lageson et al., *supra* note 4.

³⁵ Lageson et al., *supra* note 4, at 635.

³⁶ Lageson et al., *supra* note 4, at 636, 639.

³⁷ Lageson et al., *supra* note 4, at 660.

³⁸ Lageson et al., *supra* note 4, at 636 (citing BECKI R. GOGGINS & DENNIS A. DEBACCO, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2016: A CRIMINAL JUSTICE INFORMATION POLICY REPORT (2018). <https://www.ncjrs.gov/pdffiles1/bjs/grants/251516.pdf> [<https://perma.cc/9FJV-M8SH>]). The article also cited to a now defunct webpage on the website of Themis Data Solutions, but that company is now Tes-

graphs, home addresses, and other personal and private data of individuals who have been arrested, charged, or detained—regardless of whether persons were actually convicted and without a way of verifying if the criminal records are outdated or incorrect.³⁹

There are several interests that intersect to lead to the collection and dissemination of criminal records.⁴⁰ The first is that maintaining and allowing access to digital criminal legal records will facilitate government transparency and accountability.⁴¹ Additionally, posting records of bail amounts, court appearances, and the locations of people who are detained facilitates their families' efforts to support them, financially and emotionally.⁴² Some argue, as well, that this information is necessary in order to protect victims, who might otherwise be surprised by a perpetrator's release, or that the release of information itself has a deterrent or retributive effect.⁴³

Legal doctrine has developed to support these interests, providing rights of access to court records and inmate rosters.⁴⁴ The First Amendment protects broad publication of these records and tort law has evolved to protect it as well, even when the information is outdated or a record has been expunged.⁴⁵ These doctrines, developed when such records were kept on paper and therefore far more challenging to reproduce or disseminate, were updated as technology progressed, to encourage the use of online options to increase access to these records.⁴⁶ Now they enable nearly ubiquitous access to private information such as birth dates and home addresses.⁴⁷

Like Professor Jain, Professor Lageson and colleagues highlight the implications these records have for individual's opportunities to obtain jobs and housing, and the fact that these effects are racially

sera Data. Its website now boasts more than 730 million records from more than 3,000 sources, providing data on more than 98% of the U.S. population. *Criminal Databases*, TESSERA DATA, <https://tesseractdata.com/products/national-criminal-record-database/> [https://perma.cc/377A-DF4S] (last visited Apr. 24, 2022); see also *About Us*, DATA DIVER TECH., <https://www.edatadivers.com/about.cfm> [https://perma.cc/A4EJ-9TCF] (last visited Apr. 24, 2022) (claiming its "criminal index contains nearly 500 million individuals" in more than two billion records from more than 1,400 jurisdictions).

³⁹Lageson et al., *supra* note 4, at 636.

⁴⁰Lageson et al., *supra* note 4, at 638–39.

⁴¹Lageson et al., *supra* note 4, at 638.

⁴²Lageson et al., *supra* note 4, at 638.

⁴³Lageson et al., *supra* note 4, at 638.

⁴⁴Lageson et al., *supra* note 4, at 637.

⁴⁵Lageson et al., *supra* note 4, at 637.

⁴⁶Lageson et al., *supra* note 4, at 637.

⁴⁷Lageson et al., *supra* note 4, at 637.

disparate.⁴⁸ They add implications for dating, appeals, and exoneration to the list of negative consequences the data creates, as well as the fact that such information might well cause the public to overestimate the general risk of victimization.⁴⁹ This is particularly true given the spread and permanence of inaccurate information, and contributes to an unnecessary climate of fear among the general public.⁵⁰

The problem is aggravated, or perhaps created, by the personal data industry.⁵¹ While government agencies have been encouraged to make this data available for the sake of transparency, commercial businesses account for five times as many requests for information than do media agencies and journalists, suggesting the information is being used for commercial rather than public education purposes.⁵² Data aggregators are capitalizing on this available information, and employers and potential landlords are willing to pay to obtain it.⁵³

In an effort to grasp the full scope of data available and the processes by which it accumulates and spreads, Professor Lageson and colleagues examined the information released by 200 criminal record repositories, including law enforcement, criminal courts, corrections, and criminal records repositories in each state.⁵⁴ When possible, they relied on the centralized database for the state.⁵⁵ In situations where no centralized database existed they used the repository of the most populous county in the state.⁵⁶

The full breadth of Lageson, Webster, and Sandoval's research is too extensive to be represented in this review, but some few facts can give insight into the depth of private information they found, and the extent of its dissemination. As examples, 52% of states disclosed individuals' full birth dates, 60% of states disclosed individuals' photographs, and 82% of states disclosed individuals' physical characteristics via their corrections agency.⁵⁷ Physical characteristics can include hair color, eye color, scars, tattoos, and even build type

⁴⁸Lageson et al., *supra* note 4, at 639.

⁴⁹Lageson et al., *supra* note 4, at 639–40.

⁵⁰Lageson et al., *supra* note 4, at 639–40.

⁵¹Lageson et al., *supra* note 4, at 640.

⁵²Lageson et al., *supra* note 4, at 641.

⁵³Lageson et al., *supra* note 4, at 641.

⁵⁴Lageson et al., *supra* note 4, at 635.

⁵⁵Lageson et al., *supra* note 4, at 642.

⁵⁶Lageson et al., *supra* note 4, at 642.

⁵⁷Lageson et al., *supra* note 4, at 651.

and skin tone.⁵⁸ Prisoners' full names are disclosed by every state, but worse, the names of arrestees are disclosed in 82% of states, and the names of defendants are disclosed in 64% of states.⁵⁹ Arrestees' year of birth is disclosed by 72% of states, and full birth date is disclosed in 44% of states.

Having given an overview of the types of information disclosed by criminal justice agencies and courts, the authors move on to discuss the volume of data disclosures.⁶⁰ Inferring from the number of arrests in the largest county of each of the states that automatically publish arrest records, they estimate that 4.57 million mug shots and over 10 million arrest records are released publicly every year.⁶¹ Using caseload data from the Court Statistics Project of the National Center for State Courts, they estimate that 14.7 million criminal records are released and made freely available on the internet every year, and another 5 million records are released and made available for a fee.⁶² Additionally, 1.3 million current prison inmate records are available online, 2.4 million individual records of persons on probation and parole are available, and 12.4 million people have a felony conviction record that is publicly accessible.⁶³

This numbers highlight one of the most shocking conclusions of this research, which is that actual criminal histories are the *least* publicly available information, whereas arrest records are the *most* publicly available.⁶⁴ As the authors emphasize, the online availability of mug shots and arrest records makes it highly likely that legally innocent people are presumed guilty by those who find their record.⁶⁵ These records remain, and are often duplicated across multiple websites, even when the charges they relate to are dismissed or expunged.⁶⁶ Meanwhile, criminal histories which are more accurate, and likely more up-to-date, are more difficult for the public to find.⁶⁷ This means that the system not only enables inaccurate information to proliferate, it hampers the ability of the public to check or correct that information.⁶⁸

Additionally, Lageson, Webster, and Sandoval warn of the privacy

⁵⁸Lageson et al., *supra* note 4, at 655.

⁵⁹Lageson et al., *supra* note 4, at 652.

⁶⁰Lageson et al., *supra* note 4, at 656.

⁶¹Lageson et al., *supra* note 4, at 658.

⁶²Lageson et al., *supra* note 4, at 658.

⁶³Lageson et al., *supra* note 4, at 658–59.

⁶⁴Lageson et al., *supra* note 4, at 660.

⁶⁵Lageson et al., *supra* note 4, at 660.

⁶⁶Lageson et al., *supra* note 4, at 660.

⁶⁷Lageson et al., *supra* note 4, at 660.

⁶⁸Lageson et al., *supra* note 4, at 660.

violations that are involved in disclosure of this highly personal data, and note both that this release of information turns the “government transparency” rationale for public access to information on its head—information access and government transparency is supposed to provide oversight of *government*, not violate individuals’ privacy.⁶⁹ In fact, the authors note, technological innovation has increased encryption of government information, and government agencies have reduced the amount of information available on issues such as police shootings and police disciplinary files.⁷⁰

To fix these issues, the authors recommend limiting the amount of information that criminal justice agencies release, restricting bulk downloads and web scraping, requiring users to register with the government agency before downloading data, and perhaps limiting the release of pre-conviction arrest records.⁷¹ Additionally, they recommend making agency data about the agency and its own actors more freely available.⁷²

IV. CONCLUSION

Together, the two articles reviewed in this column offer important insight into the ramifications of arrest and how to approach those ramifications. As Professor Jain underscores, arrest is a highly discretionary activity, often occurring in response to little or no moral misstep by the arrestee, but its ramifications are severe. It is also highly impacted by racial discrimination, and then reinforces racially disparate outcomes. But the processes by which these outcomes are realized are complicated, highly technical, and involve numerous agencies and market incentives, as well as established legal rights and public interests, as is described by Professors Lageson, Webster, and Sandoval. Correcting this problem will require more than simple attention, instead it calls for a detailed and experienced view on the ways criminal justice agencies and corporate actors interact.

⁶⁹Lageson et al., *supra* note 4, at 661

⁷⁰Lageson et al., *supra* note 4, at 661.

⁷¹Lageson et al., *supra* note 4, at 661.

⁷²Lageson et al., *supra* note 4, at 661–62.