2015

Arrests as Regulation

Eisha Jain

Georgetown University Law Center, ej35@law.georgetown.edu

67 Stan. L. Rev. 809-867 (2015)

ARRESTS AS REGULATION

Eisha Jain*

For some arrested individuals, the most important consequences of their arrest arise outside the criminal justice system. Arrests alone—regardless of whether they result in conviction—can lead to a range of consequences, including deportation, eviction, license suspension, custody disruption, or adverse employment actions. But even as courts, scholars, and others have drawn needed attention to the civil consequences of criminal convictions, they have paid relatively little attention to the consequences of arrests in their own right. This Article aims to fill that gap by providing an account of how arrests are systemically used outside the criminal justice system. Noncriminal justice actors who rely on arrests—such as immigration enforcement officials, public housing authorities, employers, licensing authorities, and child protective service providers, among others—routinely receive and use arrest information for their own objectives. They do so not because arrests are the best regulatory tools but because they regard arrests as proxies for information they value, and because arrests are often easy and inexpensive to access. But when noncriminal justice actors rely on arrests, they set off a complicated and poorly understood web of interactions with the criminal justice system. Regulatory bodies and others that make decisions based on arrests can coordinate and pool resources with prosecutors and police officers, achieving a level of enforcement that neither could achieve alone, or they can make decisions that undermine important aspects of the criminal justice process. This Article maps different regulatory interactions based on arrests and illustrates the need for greater oversight over how arrests are used and disseminated outside the criminal justice system.

---

* Law Research Fellow, Georgetown University Law Center. I am grateful to many people for generous discussion and feedback on this project, including Kerry Abrams, Barbara Armacost, Josh Bowers, Darryl Brown, Paul D. Butler, David D. Cole, Sharon Dietrich, Ingrid V. Eagly, Kim Forde-Mazrui, Brandon Garrett, Rachel Harmon, Issa Kohler-Hausmann, Diane L. Houk, Molly Kovel, Stephen Lee, Stephen Legomsky, David A. Martin, Allegra McLeod, Hiroshi Motomura, Alexandra Natapoff, Jenny Roberts, Richard C. Schragger, Louis Michael Seidman, Deborah Thrope, and participants in the 2014 Immigration Law Professors' Conference. Greg Schweizer of the *Stanford Law Review* provided careful editorial work. Special thanks to Kerry Abrams, with whom I co-taught Immigration Enforcement at the University of Virginia School of Law in 2014.

INTRODUCTION

Arrests are more than the point of entry into the criminal justice system. They also drive a host of other decisions. A number of actors outside the criminal justice system, such as immigration enforcement officials, public housing authorities, public benefits administrators, employers, licensing authorities, social services providers, and education officials, among others, routinely receive and review arrest information. These actors use arrest information for their own purposes and in ways that are distinct from the aims of the criminal justice system. Arrests now serve as a significant source of regulation, separate and apart from their role in the criminal justice system.

Immigration enforcement officials use arrests as a screening tool—as a way of winnowing down a population of eleven million unauthorized immigrants and selecting approximately 400,000 for deportation in any given year.[1] Landlords and public housing authorities use arrest information to initiate breach of contract claims. Public employers and licensing authorities use ar-

1. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., FY 2013 ICE IMMIGRATION REMOVALS (2013), *available at* http://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf (citing 368,644 removals in fiscal year 2013); Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All ICE Employees, Civil Immigration Enforcement: Priorities for Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011) [hereinafter Morton Memorandum on Civil Immigration Enforcement], *available at* http://www.ice.gov/doclib/foia/prosecutorial-discretion/civil-imm-enforcement-priorities_app-detn-reml-aliens.pdf.

rests to monitor off-duty workers, such as home health care workers, taxi drivers, public school employees, and private security guards. And in the foster care, social services, and education contexts, arrests are used to monitor potential risks to children. In each of these contexts, it is the fact of an arrest itself—not only a subsequent conviction—that triggers a regulatory decision, such as deportation, eviction, loss of a professional license, or loss of custody.

With the national rollout of an ambitious information-sharing program now known as the Priority Enforcement Program, immigration officials use arrests to check the immigration status of every person arrested anywhere in the country.[2] Immigration enforcement officials use arrests to identify and deport certain noncitizens who come into contact with the criminal justice system, while strategically ignoring those who do not.[3] For immigration enforcement officials, arrests function as a way of determining whether the arrested individual falls within an immigration removal priority. Criminal law determinations of guilt or innocence are distinct from the immigration screening process.[4]

In the public housing context,[5] authorities use arrests to evaluate breach of contract claims and to monitor entry into households.[6] Leases for publicly owned or subsidized housing prohibit criminal activity by any tenant, household member, or guest.[7] Arrests are used as a proxy for determining whether a tenant breached her lease and to predict whether a household is likely to cause future disruptions or damage to the property. Public housing authorities use arrests to initiate eviction proceedings and as negotiating tools. They may use the threat of eviction to leverage an agreement that the household will bar the arrested individual from entry—sometimes permanently. The housing decision

---

2. The program was initially launched as "Secure Communities." *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities (last visited Mar. 30, 2015). On November 20, 2014, Secure Communities was discontinued and replaced with the Priority Enforcement Program. *See* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski et al., Secure Communities (Nov. 20, 2014) [hereinafter Johnson Memorandum on Secure Communities], *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf (discussing the need for a "fresh start and a new program," while maintaining the goal of Secure Communities to "effectively identify and facilitate the removal of criminal aliens").

3. I use the terms "deportation" and "removal" interchangeably, although immigration laws now typically use the term "removal." *See, e.g.*, 8 U.S.C. § 1252 (2013). In addition, this Article uses the term "arrest" to refer solely to criminal arrests and not to civil arrests, such as civil immigration arrests.

4. Immigration enforcement officials decide whether to flag an arrested individual as a removal priority at the time of booking. The immigration enforcement decision is made prior to the adjudication of the criminal charges and may be unaffected by whether or not the arrested individual is convicted. But criminal and immigration goals also overlap in certain ways. For instance, undocumented noncitizens with prior criminal convictions are considered immigration removal priorities. *See infra* Part II.A.

5. Throughout this Article, I use "public housing" to refer to publicly owned or publicly operated housing.

6. *See* discussion *infra* Part II.B.

7. *See* 24 C.F.R. § 966.4(*l*)(5)(iii)(A) (2014); *id.* § 982.553(b).

may take place prior to a criminal trial and may affect innocent tenants; evictions affect the entire household, not only those who come into contact with the criminal justice system.[8]

Other examples abound. In the public employment and licensing context, arrests are used to monitor off-duty workers. Many public employers and licensing agencies automatically receive notifications when certain workers are arrested and booked by local law enforcement agencies.[9] Upon receiving the notification, some employers launch their own investigation, while others reassign or suspend an arrested worker. Employers focus on their own institutional motivations when taking adverse employment actions, including their potential liability for torts such as negligent hiring and retention.[10] They may automatically suspend or terminate workers after learning of the arrest, making a calculated judgment that it is easier to replace a worker than it is to investigate whether she poses a security risk.

In the social services context, child protective services may be notified when a child's caretaker is arrested.[11] The purpose is to provide resources for children who may be at risk, but the notification can trigger unintended consequences. It may embroil caretakers who are innocent or arrested on only petty charges with unnecessary and long-term involvement with social services. In the foster care context, licensing agencies use arrests to monitor foster families and to determine whether a household member poses a risk to a foster child. In the context of schools and universities, arrests are used to monitor whether a student poses a risk to others, to impose discipline, and, in some cases, to evaluate whether to offer counseling or other services to the arrested individual.[12]

In each of these contexts, arrests are used as screening tools or as a relatively low-cost audit mechanism. Arrests provide a way to monitor individuals, to evaluate whether the arrested individual falls into a regulatory priority, and ultimately to determine whether to modify a preexisting social or legal arrangement.

In spite of the extensive effects that arrests have outside the criminal justice context, they remain surprisingly understudied. Even as advocates, criminal law scholars, and courts have drawn greater attention to the civil consequences of criminal convictions,[13] they have paid relatively little attention to the effects of

---

8. *See, e.g.*, Matthew Desmond et al., *Evicting Children*, 92 SOC. FORCES 303, 304 (2013) (finding that families with children were significantly more likely to be evicted than similarly situated families without children).

9. *See infra* Part II.C.1.

10. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, COLLATERAL DAMAGE: AMERICA'S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME 36-37 (2014), *available at* http://www.nacdl.org/restoration/roadmapreport (discussing the role of negligent hiring torts in background checks).

11. *See infra* Part II.C.2.

12. *See infra* Part II.C.4.

13. *See, e.g.*, Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790, 1800-01 (2012); Michael Pinard, *Col-*

arrests—particularly subfelony arrests, such as misdemeanors. Scholars have provided compelling accounts of how aggressive order-maintenance policing and broken misdemeanor courts take a toll on the poor and on communities of color,[14] and chronicled how criminal punishment and the threat of punishment has become a pervasive mechanism of social control.[15] But these accounts—troubling as they are—understate the full consequences of arrests outside of the criminal justice system.[16]

On the noncriminal justice side, immigration scholars in particular have given sustained attention in recent years to how criminal law actors affect civil immigration enforcement. They have argued that partnerships between criminal justice actors and civil immigration enforcement officials cede significant enforcement authority to state and local police[17] and create an enforcement sys-

---

lateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity, 85 N.Y.U. L. REV. 457 (2010); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585 (2006); McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 825 (2011); McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 494-96 (2005); *see also* Padilla v. Kentucky, 559 U.S. 356, 365-66 (2010) (discussing the collateral immigration consequences of convictions); NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, http://www.abacollateralconsequences.org (last visited Mar. 30, 2015) (compiling the results of a congressionally mandated study of collateral consequences of criminal convictions in all U.S. jurisdictions).

14. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979); Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 952-53 (1983) (discussing the "process costs" of misdemeanor court as being so severe that "[a] misdemeanor defendant, even if innocent, usually is well advised to waive every available procedural protection (including the right to counsel) and to plead guilty at the earliest possible opportunity"); K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 297-99 (2009); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 297-300 (2011) (discussing the significant collateral consequences of minor misdemeanor convictions). For a recent analysis of misdemeanor arrests in New York City, see Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014).

15. ALEXANDER, *supra* note 14; DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001).

16. There are recent exceptions that provide a sustained treatment of the effects of subfelony arrests in their own right. *See, e.g.*, Kohler-Hausmann, *supra* note 14; Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351, 351 (2013) (noting that the literature focusing on prison and the consequences of felony convictions fails to account for the full reach of arrests); Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043 (2013) [hereinafter Natapoff, *Aggregation and Urban Misdemeanors*] (focusing on the processing of urban misdemeanors); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012) [hereinafter Natapoff, *Misdemeanors*] (analyzing misdemeanor arrests and convictions); Roberts, *supra* note 14.

17. *See, e.g.*, Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819,

tem in which noncitizens receive a different type of justice than citizens.[18] These scholars typically depict the relationship between police and prosecutors, on the one hand, and civil immigration enforcement authorities, on the other, as collaborative. Indeed, immigration scholars and practitioners not infrequently describe themselves as working in the merged field of "crimmigration"[19]—with the label suggesting that "[i]mmigration enforcement and criminal justice

1858 (2011); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 977-78 (2004); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1090-93 (2004).

18. *See, e.g.*, Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1147-56 (2013); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 202 (2012); *see also* Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 553-58 (2001) (discussing policy objections to various state-based measures to regulate immigration, including the potential for discrimination).

19. The literature is too voluminous to fully cite here. Recent contributions that discuss the merger of criminal and immigration enforcement norms include Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1574-75 (2010) (discussing the "dramatic rise in the prosecution of migration-related criminal offenses within the criminal justice system, increasing reliance on removal as a collateral (or alternative) form of punishing crime or suspected criminality, and the use of quasi-criminal institutions—such as immigration detention and investigatory raids . . . in what are nominally purely civil immigration investigations and proceedings"), Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1420 (2011) (arguing that "deportation and other aspects of immigration status are often key considerations in the disposition of a criminal case"), Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1288 (2010) (analyzing how federal prosecutors and immigration actors coordinate), Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 652 (2004) ("Deportation is now often a virtually automatic consequence of a non-citizen's criminal conviction for even a minor state misdemeanor."), Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 482 (2007) ("Just as more and more immigration violations are culminating in criminal convictions, so too are more and more criminal convictions culminating in deportation or other adverse immigration consequences."), Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012), Teresa A. Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 618 (2003) (arguing that the "'criminalization' of immigration law fails to capture the dynamic process by which both systems converge at points to create a new system of social control that draws from both immigration and criminal justice, but it is purely neither"), Sklansky, *supra* note 18, at 202, Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (discussing the "criminalization" of immigration law), and Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1710 (2011) ("Crimmigration law narrows the decision whether to shut the noncitizen out of the national community to a single moment in time: the moment of the crime that triggers the potential for deportation or incarceration for an immigration-related offense.").

are now so thoroughly entangled it is impossible to say where one starts and the other leaves off."[20]

This Article seeks to supplement this account and to place a number of actors that rely on arrests in relation to each other. I want to suggest that one way of understanding arrests is as a regulatory tool—a means of monitoring, ordering, and tracking individuals. The aim of this type of regulation can be quite distinct from certain criminal law concerns—adjudicating guilt or innocence, maintaining law and order, deterring crime, and meting out punishment.

Noncriminal justice actors rely on arrests not necessarily because they are the best screening tools from the perspective of institutional design. Rather, they value arrests because they are relatively easy and inexpensive to access and because they regard arrests as proxies for information they value, such as the potential for violence, unreliability, or instability. Using arrests in this manner can be a rational administrative decision. If done with appropriate restraints and oversight, it can serve important safety objectives.

But using arrests to monitor, control, and ultimately reach regulatory decisions also has the potential to carry serious costs—ones that the actors who rely on arrests are poorly situated to understand. Reliance on arrests alone magnifies the significance of a police officer's decision to arrest and has important feedback effects on the criminal justice system. Noncriminal justice actors who rely on arrests may act in coordination with police and prosecutors, or they may act autonomously. Coordination has the potential to expand the reach of criminal justice actors. For criminal prosecutors, civil enforcement can serve to supplement, or even supplant, criminal law enforcement. For instance, criminal prosecutors who are unable to proceed with unlawfully obtained evidence in criminal court can present that evidence in civil proceedings, which have more lax evidentiary standards.[21] Deportation, eviction, or other civil consequences can thus serve to supplement or to replace criminal consequences.

But at other times, criminal and noncriminal law actors operate autonomously and at cross-purposes. For instance, immigration officials may deport a cooperating witness in a criminal case.[22] Public housing officials may evict a domestic violence victim along with her abuser.[23] Employers may suspend or fire an arrested worker, even when prosecutors or judges determine that a rogue police officer made a false arrest.[24] These types of enforcement choices can undermine the integrity of the criminal justice system and discourage commu-

---

20. Sklansky, *supra* note 18, at 159.

21. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1034 (1984); *infra* Part III.A.

22. *See* Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1461 (2006) (discussing how the threat of deportation may prevent noncitizens from reporting crime).

23. *See* Lenora M. Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 377, 383 (2003) (discussing battered women who are deterred from calling the police for fear of eviction); *see also* discussion *infra* Part III.B.1.

24. *See infra* Part III.B.2.

nity members from reporting crime or cooperating with law enforcement officers.

Conflict between the way that arrests are used by criminal justice actors—primarily police and prosecutors—and by actors outside of the criminal justice system can arise in a number of ways. Noncriminal justice actors may focus narrowly on their own enforcement priorities and disregard other concerns. Noncriminal justice actors also have imperfect knowledge about how arrests are handled by the criminal justice system. Even when administrative actors and other authorities make good-faith efforts to avoid enforcement against those who have been subjected to false arrests or who are cooperating with police, they all too often lack timely access to the information necessary to exercise discretion. The consequences can be particularly severe for those who are disproportionately likely to be arrested for minor crimes and those who are unable to mitigate the effects of an arrest on their own.

In the criminal justice context, criminal procedure provides important constraints on how arrests ought to be used and processed.[25] But similar constraints do not operate outside of the criminal justice context, leaving the possibility that manifestly unfair, unlawful, or otherwise undesirable arrests may have serious consequences. This Article describes different ways that arrests are used for noncriminal justice ends, maps the regulatory interactions between various actors who rely on arrests, and ultimately argues that there is a need for greater transparency and oversight over how arrest information is used.

This Article proceeds as follows: Part I briefly discusses how arrests are used and regulated in the criminal justice system and lays the foundation for comparing how other actors use arrests. Part II demonstrates how arrests function as the starting point for a host of decisions outside the realm of criminal law. It focuses primarily on immigration enforcement and public housing, and it also examines how arrests trigger decisions in the contexts of public employment, licensing, foster care, social services, and juvenile education. Part III examines how criminal justice actors and others interact in their use of arrests. They may cooperate, both working together to achieve shared regulatory ends, or they may conflict, such as when noncriminal justice actors attach causal consequences to arrests that create undesirable public policy outcomes from the criminal justice perspective. Part IV evaluates civil administrative discretion as a regulatory strategy, and it preliminarily explores alternatives, including re-

25. In theory, an arrest is not meant to be a form of punishment. *See, e.g.*, Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 241 (1957) ("The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense." (footnote omitted)); Michelson v. United States, 335 U.S. 469, 482 (1948) ("Arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty. . . . Arrest without more may nevertheless impair or cloud one's reputation. False arrest may do that."). In practice, the constraints of criminal procedure all too often fall short—*see* discussion *infra* Part I—but they nonetheless present an important way of regulating the effects of arrests.

stricting the sharing of arrest information and exercising greater oversight over how arrest information is used.

I. CRIMINAL LAW USE OF ARRESTS

In order to understand how reliance on arrests shapes civil law decisions, we must first understand how arrests operate in criminal law. The criminal justice process grants broad discretion to individual police officers to make arrests, but criminal procedure interposes an important, though imperfect, set of constraints between the fact of the arrest and its subsequent use.

This Part discusses how arrest patterns unfold, the motivations behind misdemeanor arrests, and the effects of high arrest rates on the poor and on communities of color. It also briefly describes how arrests are processed in criminal proceedings. The following Part then discusses how arrests are used in a variety of noncriminal contexts.

A. *Arrests in the Criminal Justice System*

The United States is the global leader in incarceration,[26] due in part to its staggering arrest rate. Today, one out of every three adults can expect to be arrested by the age of twenty-three.[27] For Latino and African American men, the statistics are even more stark. Approximately forty-nine percent of black men and forty-four percent of Latino men will be arrested by the age of twenty-three.[28] Sixty-five million adults in the United States today have a criminal record.[29]

The reasons for these high arrest rates are complex. Potential explanations include relatively high crime rates,[30] overly broad criminal laws,[31] relatively

26. *See* LAUREN E. GLAZE & ERINN J. HERBERMAN, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012, at 1 (2013) (reporting that, in 2012, approximately one out of every thirty-five adults in the United States, or approximately three percent of the adult population, was under some form of correctional supervision—probation, parole, or incarceration); Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations'*, N.Y. TIMES (Apr. 23, 2008), http://www.nytimes.com/2008/04/23/us/23prison.html.

27. Robert Brame et al., *Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21, 25 (2012).

28. Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471, 478 (2014).

29. Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 963, 964 (2013). Criminal history records are defined as "identifiable descriptions and notations of arrests, detentions, indictments, or other formal criminal charges, and any disposition arising therefrom, including acquittal, sentencing, correctional supervision, or release." 42 U.S.C. § 14616(I)(4)(A) (2013).

30. *See* Olatunde C.A. Johnson, *Legislating Racial Fairness in Criminal Justice*, 39 COLUM. HUM. RTS. L. REV. 233, 256 & n.102 (2007) (discussing the relatively higher crime rate in the United States as compared to other industrialized nations).

31. *See, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 714-18 (2005) (describing overcriminalization as partially the product of superfluous

aggressive prosecution of low-level crimes,[32] reliance on elected prosecutors and judges who are pressured to be tough on crime,[33] and a disproportionate media focus on issues relating to crime.[34] For our purposes, the most relevant fact is that arrest rates are relatively high, making arrests a valuable source of data.

The criminal justice system delegates broad discretion to individual police officers to make arrests. To make a lawful arrest, a police officer need only satisfy the relatively low threshold of probable cause.[35] Probable cause provides a minimum floor for when a police officer may make an arrest, but it does not provide insight into the further question of whether the arrest ought to be made—whether the arrest is necessary to deter crime, maintain the rule of law, or protect communities.[36]

While arrest patterns vary across localities, reflecting local law enforcement priorities, available data indicate that subfelony arrests—misdemeanors, infractions, and violations—vastly outnumber felony arrests.[37] Misdemeanors—minor offenses, such as suspended license charges, disorderly conduct, drug possession, and minor assault, which are generally defined as punishable

---

criminal statutes); Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 170-73 (2003) (describing and critiquing the expansion of criminal codes); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 515 (2001) ("[A]nyone who studies contemporary state or federal criminal codes is likely to be struck by their scope, by the sheer amount of conduct they render punishable.").

32. *See, e.g.*, BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 166-80 (2001) (critiquing public order policing).

33. *See, e.g.*, Harris v. Alabama, 513 U.S. 504, 519 (1995) (Stevens, J., dissenting) (noting that elected judges face pressure to "constantly profess their fealty" to the high-profile issue of capital punishment); Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. REV. 1101, 1103-12 (2006) (collecting examples of how judicial candidates vie to express tough-on-crime rhetoric).

34. *See* Pinard, *supra* note 13, at 472-73 (summarizing various arguments relating to the unique focus on crime in the United States).

35. Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001).

36. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 776-81, 792 (2012) (arguing that constitutional law as a whole does not ensure that arrests are effective in reducing crime, and advocating for "harm-efficient policing").

37. R. LAFOUNTAIN ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 24 (2012), *available at* http://www.courtstatistics.org/~/media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx (showing that misdemeanors significantly outnumber felonies in the criminal caseloads of seventeen selected states); R. LAFOUNTAIN ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 47 (2010) [hereinafter LAFOUNTAIN ET AL., 2008 REPORT], *available at* http://www.courtstatistics.org/Other-Pages/~/media/Microsites/Files/CSP/EWSC-2008-Online.ashx (citing 2008 data from eleven states and describing misdemeanor cases as comprising an "overwhelming majority of criminal caseloads"); *see also* Kohler-Hausmann, *supra* note 16, at 352 n.3 (noting the difficulty of obtaining reliable data on state misdemeanor filings and citing data obtained from the National Center for State Courts to show 5.9 million misdemeanor filings compared to 1.39 million felony filings in 2009 in sixteen jurisdictions).

by no more than one year in jail, and often punished with little or no jail time[38]—constitute a majority of state court caseloads.[39] Alexandra Natapoff writes that in some localities, up to forty percent of the docket may consist of suspended license cases, while other common misdemeanors include disorderly conduct, driving under the influence of alcohol, drug possession, and minor assault.[40] In New York City alone, 35,000 people were arrested in 2012 for criminal possession of marijuana in the fifth degree, a crime that in essence involves possession of marijuana in public view.[41]

Law enforcement officers have powerful incentives to focus on minor arrests. Minor arrests provide opportunities to interrogate suspects, check for prior criminal records and outstanding warrants, and search for evidence of more serious crime.[42] Petty arrests also give law enforcement an opportunity to monitor arrested individuals over time, particularly when arrests remain open for months or even years due to delayed court dates, or when arrested individuals agree to a form of court-ordered monitoring as a condition of dismissal.[43] Arrests can also give police officers the opportunity to respond to incentives that have little to do with crime control—such as seizing property through civil forfeiture laws or responding to arrest quotas.[44]

---

38. *See, e.g.*, N.Y. PENAL LAW § 10.00(4) (McKinney 2014).

39. LAFOUNTAIN ET AL., 2008 REPORT, *supra* note 37, at 47 (showing the proportion of felony to misdemeanor arrests in selected states); *see also* ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 7 (2009) (describing an "explosive growth" in misdemeanor cases), *available at* http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf; Natapoff, *Misdemeanors*, *supra* note 16, at 1321 (noting that in 2009, the Federal Bureau of Investigation (FBI) estimated there were approximately 758,000 arrests for marijuana possession, 655,000 disorderly conduct arrests, and over 112,000 curfew and loitering arrests).

40. Natapoff, *Misdemeanors*, *supra* note 16, at 1321.

41. N.Y.C. CRIMINAL COURT, CRIMINAL COURT OF THE CITY OF NEW YORK: ANNUAL REPORT 2012, at 31 (2013). This was the single most frequent arraignment charge in 2012. *Id.* at 32.

42. *See* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1694-96 (2010); Kohler-Hausmann, *supra* note 14, at 636 ("Records—checking old ones, making new ones, and transmitting and sharing existing ones—were key to these endeavors because they helped the police sort people according to law enforcement encounters over time.").

43. One common form of court-ordered monitoring in New York City courts is an "adjournment in contemplation of dismissal," or ACD, where an arrested individual agrees to keep the arrest open for a period of no more than six months (or, for family offenses, no more than one year); if there are no new arrests in the interim period, the case is dismissed. N.Y. CRIM. PROC. LAW § 170.55 (McKinney 2014). For a detailed discussion of how law enforcement uses open arrests to monitor arrested individuals, see Kohler-Hausmann, *supra* note 14.

44. Bowers, *supra* note 42, at 1695 & nn.183-87; Joseph Goldstein, *Stop-and-Frisk Trial Turns to Claim of Arrest Quotas*, N.Y. TIMES (Mar. 20, 2013), http://www.nytimes.com/2013/03/21/nyregion/stop-and-frisk-trial-focuses-on-claim-of-arrest-quotas.html (describing evidence that police officers were told to meet quotas).

B. *The Consequences of Arrests*

All of these arrests come with a cost. For the arrested individual, the process of being taken into police custody, handcuffed, fingerprinted, and held in jail—particularly for relatively minor and common behavior—can cause significant distress.[45] This is particularly true when the arrest itself is unlawful[46] or perceived as unfair or unjustified.[47] Arrests can also harm communities, particularly when police use public order policing strategies to disproportionately target low-income communities of color.[48] While the proponents of such strategies assert that they make communities safer, their critics argue that they impose unjustified harm, particularly on racial minorities and the poor.[49]

Recent litigation over New York City's stop-and-frisk policy highlights the racial impact that order-maintenance policing can have. After a bench trial, Judge Scheindlin of the Southern District of New York determined that New York City police officers made 4.4 million stops in an eight-year period from 2004 to 2012, and that over eighty percent of those stopped were racial minorities.[50] While the vast majority of those subject to *Terry* stops were not arrested, blacks were thirty percent more likely to be arrested for the same alleged crime than similarly situated whites.[51]

Criminal procedure is intended to place important safeguards between a police officer's decision to make an arrest and its subsequent consequences. Defendants in criminal cases have the right to constitutionally adequate counsel,[52] the right to suppress evidence that was illegally obtained,[53] and the right to cross-examine witnesses, including testifying police officers.[54] Prosecutors evaluate arrests and independently determine what charges should be brought,

---

45. Harmon, *supra* note 36, at 778-79.

46. While emotional harm is inherently difficult to quantify, awards in misdemeanor false arrest cases provide some indication of how significant juries can find the process of being arrested. *See, e.g.*, Martinez v. Port Auth., 445 F.3d 158, 160-61 (2d Cir. 2006) (per curiam) (describing a $360,000 award for a false misdemeanor arrest as within the range of similar cases); Martinez v. Port Auth., No. 01 Civ. 721(PKC), 2005 WL 2143333, at *3, *17-19 (S.D.N.Y. Sept. 2, 2005) (noting that the false misdemeanor arrest involved a total of eighteen hours of incarceration and describing plaintiff's testimony about his emotional harm), *aff'd per curiam*, 445 F.3d 158.

47. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 346-47 (2001) (describing "gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment").

48. *See generally* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004) (discussing how mass imprisonment harms African American communities).

49. Bowers, *supra* note 42, at 1693, 1699.

50. Floyd v. City of N.Y., 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013).

51. *Id.* at 558-60. For *Terry* stops, see Terry v. Ohio, 392 U.S. 1 (1968).

52. Gideon v. Wainwright, 372 U.S. 335, 339 (1963).

53. Mapp v. Ohio, 367 U.S. 643, 655 (1961). *But see* Davis v. United States, 131 S. Ct. 2419, 2426 (2011).

54. U.S. CONST. amend. VI.

if any.[55] A judge must also review the facts of the arrest and determine that probable cause exists.[56] These constraints are meant to ensure that the arrested individual has adequate advice about the nature and seriousness of the charges against him, the opportunity to present a fair defense, and access to a speedy trial.

The constraints of criminal procedure, while important, all too often fail to fulfill their intent. A defendant's treatment in criminal court depends on a variety of factors, such as whether the defendant appears in state or federal court, the seriousness of the arrest, the defendant's personal background and criminal history, the defendant's resources, and the resources of the defense bar.[57] Prosecutors have professional incentives to exercise inadequate discretion and to overcharge.[58] Criminal procedure also does little to address deeper underlying problems in policing, such as arrest practices that disparately target minorities.[59]

Given these dynamics, it is often easier in practice for an arrested individual, particularly one charged with a minor crime, to accept a relatively lenient plea bargain rather than to contest charges and proceed to trial.[60] Any arrest, including for a minor offense, can lead to a chain of civil consequences, such as

---

55. *See* Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 225 (2006) (arguing that "prosecutors have become some of the main de facto adjudicators of U.S. criminal procedure"); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2125 (1998) (describing how prosecutors exercise discretion, including as a result of discussions with defense counsel).

56. Gerstein v. Pugh, 420 U.S. 103, 113-14 (1975).

57. *See, e.g.*, BORUCHOWITZ ET AL., *supra* note 39, at 9 ("In Chicago, Atlanta and Miami, defenders carry more than 2,000 misdemeanor cases per year. With these massive caseloads, defenders have to resolve approximately 10 cases a day—or one case every hour—not nearly enough time to mount a constitutionally adequate defense." (footnote omitted)); John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1101, 1125 (1995) (discussing the relative advantages of federal prosecutions over state prosecutions in organized crime cases); Kohler-Hausmann, *supra* note 14, at 654 (noting that on a typical day in a New York City arraignment courtroom, the court will process between 100 and 200 cases during the course of six hours); Natapoff, *Aggregation and Urban Misdemeanors*, *supra* note 16, at 1059-60 (arguing that defendants typically fail to receive individualized justice in the sense contemplated by criminal procedure in misdemeanor court).

58. *See* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 862-63 (1995) (discussing prosecutorial incentives); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1092 (2013) ("Prosecutors have largely failed to exercise discretion and seek justice in sorting through the huge number of misdemeanor cases that the police send them, instead churning high volumes through the overburdened lower courts.").

59. *See* Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 48-60 (2001) (describing the difficulty in gaining data about and remedying racial profiling).

60. *See generally* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008) (arguing that it is generally better for a typical innocent defendant in a petty criminal case to accept a guilty plea than it is to bear the process costs of going to trial).

lost work, missed school, or expenses relating to child care or transportation, as well as the intangible psychological costs relating to uncertainty or anxiety stemming from the pending trial.[61] These process costs—the costs attendant to being arrested, but not imposed as punishment by the criminal justice system—can play a decisive role in leading arrested individuals to take plea agreements.[62] A 2013 study of low-income defendants facing misdemeanor charges relating to petty marijuana possession in the Bronx, New York, depicts a setting in which defendants routinely take plea agreements because it is too costly to contest charges at trial.[63] According to the report, the typical arrested individual who contested her charges appeared in court an average of five times over the course of eight months.[64] Most of the time, the proceedings ended with the prosecutors requesting an adjournment.[65] Due to backlogs in the court system, these delays rarely count for speedy trial purposes. If a prosecutor requests a weeklong adjournment, knowing that the next available court date is likely months away, only the time actually requested counts for speedy trial purposes.[66] According to the study, the average time for a dismissal of a minor marijuana case was 270 days from the date of arrest.[67]

---

61. PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 3-19 (2009) (discussing the emotional impact of the author's own arrest, prosecution, and ultimate acquittal); Alschuler, *supra* note 14, at 932 (discussing how arrested individuals make tactical decisions to accept plea bargains based on the costs of proceeding to trial, rather than on considerations that are properly related to the objective of criminal proceedings); Bowers, *supra* note 60, at 1132 (describing defendants' process costs as generally constituting "pecuniary loss, inconvenience, and uncertainty"); Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1172 (2004) (discussing how defendants typically return to court "three to six times before there is any real likelihood that a witness will be called and a factual record developed").

62. Malcolm Feeley's classic 1979 study argues that "process costs"—"[t]he time, effort, money, and opportunities lost as a direct result of being caught up in the [lower court criminal justice] system"—"can quickly come to outweigh the penalty that issues from adjudication and sentence." FEELEY, *supra* note 14, at 30-31.

63. BRONX DEFENDERS, NO DAY IN COURT: MARIJUANA POSSESSION CASES AND THE FAILURE OF THE BRONX CRIMINAL COURTS 12-15 (2013), *available at* http://www.bronxdefenders.org/wp-content/uploads/2013/05/No-Day-in-Court-A-Report-by-The-Bronx-Defenders-May-2013.pdf.

64. *Id.* at 3. This statistic is based on a study of fifty-four marijuana possession arrestees represented by the Bronx Defenders who were arraigned in the one-year period from March 2011 to March 2012 and who expressed an interested in contesting the charges against them. *Id.* at 2.

65. *Id.* at 3 ("Prosecutorial delay accounted for over 80% of postponements of hearing and trial dates." (bolding omitted)); *see also id.* at 8 (noting that Bronx prosecutors answered "not ready" for trial seventy-five out of eighty-nine trial dates).

66. For a discussion of delays in misdemeanor adjudication in the Bronx, New York, see William Glaberson, *In Misdemeanor Cases, Long Waits for Elusive Trials*, N.Y. TIMES (Apr. 30, 2013), http://www.nytimes.com/2013/05/01/nyregion/justice-denied-for-misdemeanor-cases-trials-are-elusive.html.

67. BRONX DEFENDERS, *supra* note 63, at 10; *see also* Kohler-Hausmann, *supra* note 16, at 377 (describing the case of a misdemeanor defendant compelled to make eight court appearances from May 2011 to November 2011—taking a full day off of work for most of them—before all charges were dismissed).

Each court appearance exacts costs. Arrested individuals may be compelled to take unpaid leave from work and incur attorneys' fees and other expenses. They also face the emotional uncertainty of the trial outcome. Some can also expect to spend a night or weekend in jail while awaiting arraignment, or they may remain in jail for a longer period of time if bail is set and they cannot afford to pay it.[68] These consequences raise the stakes for arrested individuals, who overwhelmingly make a rational decision to plead guilty or to accept a form of court monitoring, in lieu of proceeding with a trial.[69] Prosecutors, of course, can amplify this dynamic by offering relatively lenient plea bargains in minor cases while seeking maximum penalties for those who choose to proceed with their right to a jury trial.[70]

Arrested individuals also face ongoing consequences from the creation of a criminal record. Absent robust sealing laws, police departments and others may widely disseminate criminal records, including arrests that did not result in conviction.[71] As a matter of constitutional law, the Supreme Court has held that an arrested individual has no right to privacy in his arrest information.[72] In *Paul v. Davis*, the Supreme Court considered whether a photographer's due process rights had been violated after his local police department identified him as an "active shoplifter" in a flyer distributed to local businesses.[73] Shortly after the flyer's distribution, all charges were dismissed.[74] But in the interim, his

68. Mosi Secret, *N.Y.C. Misdemeanor Defendants Lack Bail Money*, N.Y. TIMES (Dec. 2, 2010), http://www.nytimes.com/2010/12/03/nyregion/03bail.html (citing a 2008 study conducted of nonfelony defendants in New York City that showed that in cases where bail was set at $1000 or less, close to ninety percent of defendants remained in jail for an average of over two weeks because they could not pay); *see also* Natapoff, *Misdemeanors*, *supra* note 16, at 1321-23 (discussing the effects of jail time).

69. Bowers, *supra* note 60, at 1132-39 (discussing the process costs involved in seeking to contest a petty criminal charge); Kohler-Hausmann, *supra* note 14, at 663 (noting that misdemeanor defendants in New York City are much more likely to take a plea if they are held in custody than if they are not); Weinstein, *supra* note 61, at 1172 (discussing the advantages to taking a plea where a prosecutor offers to reduce the charge to a violation).

70. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1046 (2006).

71. *See* Smith v. Doe, 538 U.S. 84 (2003) (holding that publicly accessible sex offender registries are constitutional); Patricia L. Bellia, *Designing Surveillance Law*, 43 ARIZ. ST. L.J. 293, 297 (2011); James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 207-10 (2008) (discussing how federal law both permits and mandates certain criminal background checks); Erin Murphy, *Databases, Doctrine & Constitutional Criminal Procedure*, 37 FORDHAM URB. L.J. 803, 804 (2010); Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 489 (2013).

72. Paul v. Davis, 424 U.S. 693, 713 (1976) (rejecting the claim that there is a constitutional right to privacy that prohibits a state from publicizing "a record of an official act such as an arrest").

73. *Id.* at 695.

74. *Id.* at 696.

employer saw the flyer, required him to explain the arrest, warned him against future arrests, and stopped sending him on assignments to local businesses.[75]

The United States Court of Appeals for the Sixth Circuit found a due process violation based on these facts. It held that the flyer "brand[ed]" the photographer as an active shoplifter, imposing the "disgrace of a criminal conviction" without due process of law.[76] The Supreme Court reversed. In a holding that stressed the need to combat crime by publicizing suspect information, the Court held that while the plaintiff might have a state law defamation claim, he had been deprived of neither liberty nor property under the Due Process Clause.[77]

Every state now either requires or permits criminal histories to be released to noncriminal justice agencies, such as those that grant licenses and provide social services.[78] Commercial vendors also collect, store, and search arrest information.[79] A number of states make arrest information publicly accessible, and some allow anyone who pays a fee to access an arrested individual's criminal history.[80] And the Federal Bureau of Investigation's (FBI's) fingerprint database—which was designed to provide law enforcement officials with the criminal histories of arrested individuals—has long been used outside the criminal justice system, such as by employers who conduct background checks.[81]

As a result of the broad use of criminal background checks and the widespread dissemination of arrest information, arrests hold significance separate and apart from their treatment in criminal court.[82] An open arrest may bar an individual from qualifying for public housing or from moving in with a relative

---

75. *Id.*; Davis v. Paul, 505 F.2d 1180, 1184 (6th Cir. 1974), *rev'd*, 424 U.S. 693.

76. *Davis*, 505 F.2d at 1183-84.

77. *Paul*, 424 U.S. at 709.

78. James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 395 (2006) ("[T]here are laws in every state mandating or authorizing the release of individual criminal history records to certain non-criminal justice government agencies—agencies charged with granting licenses to individuals and firms in diverse businesses, ranging from liquor stores and bars to banks and private security firms as well as to agencies that provide programs and services to vulnerable populations including children, the elderly, and the handicapped."); *see also* U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 2 (2006) (noting that most private employers conduct background searches through private enterprises or through commercial databases that aggregate criminal records).

79. Jacobs & Crepet, *supra* note 71, at 185-86 (noting that "[s]ome companies have constructed their own databases by purchasing criminal history records in bulk from courts and state record repositories").

80. Jacobs, *supra* note 78, at 395 ("At least ten (open-records) states treat criminal conviction records as public documents; at least three states provide that any member of the public may, for a fee, obtain any person's rap sheet."); Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1172-73 (1999) (noting that by 1996, every state had a sex offender registry).

81. U.S. DEP'T OF JUSTICE, *supra* note 78, at 3-4.

82. *See, e.g.*, Chin, *supra* note 13, at 1790 (arguing that arrest records and convictions have led to a new "civil death").

who lives in public housing.[83] An arrest may lead to the revocation of probation or parole.[84] Employers regularly require potential employees to disclose any prior arrest history, and they may consider all arrests—regardless of whether or not they resulted in conviction—when making hiring decisions.[85] Arrests may factor into immigration decisions, such as the determination of whether a prospective citizen is of good moral character.[86] Because arrest information is easily accessible when applicants apply for jobs, loans, or public benefits, a criminal history has aptly been described as a "negative curriculum vitae"—one that serves as a barrier to entry in employment, public benefits, and other contexts.[87]

Arrests thus impose significant costs outside the criminal justice system. But as far-reaching and significant as these costs are, they constitute only a portion of the full reach of arrests. The next Part turns to a discussion of how arrests are used as regulatory tools outside of the criminal justice system, often in ways that magnify the effects of policing and arrest decisions.

---

83. 42 U.S.C. § 13661 (2013) (granting authority to deny an application for public housing based on evidence of criminal activity).

84. Tonja Jacobi et al., *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887, 890 (2014) (describing the low standard for reincarceration following a parole violation and noting that "unlike other arrestees, parolees can be held for up to three months awaiting a violation hearing").

85. The U.S. Equal Employment Opportunity Commission states that the fact of an arrest itself may not be a bar to employment, given that this will have a disparate impact on Latinos and African Americans, who are disproportionately arrested. But an employer may use the fact of an arrest to launch its own investigation. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, 915.002, ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 1, 12 (2012).

86. U.S. Citizenship & Immigration Services considers the "[a]bsence or presence of other criminal history" as one factor in the good moral character portion of the citizenship application. U.S. CITIZENSHIP & IMMIGRATION SERVS., USCIS POLICY MANUAL ch. 2 (2014), *available at* http://www.uscis.gov/policymanual/Print/PolicyManual.html. Arrests may also be disclosed during the process of seeking to sponsor an immigrant. *See* Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1654-56 (2007) (describing how certain U.S. citizens who use international matchmaking organizations are legally required to disclose arrests relating to controlled substances or alcohol as a prerequisite to contacting a potential fiancé).

87. Jacobs & Crepet, *supra* note 71, at 177 (describing criminal records as a "negative curriculum vitae," "used to determine eligibility for occupational licenses, social welfare benefits, employment, and housing"); Jacobs, *supra* note 78, at 420 (describing arrests as a "negative curriculum vitae"); *see also* BRONX DEFENDERS, THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE: A GUIDE FOR CRIMINAL DEFENSE ATTORNEYS AND OTHER ADVOCATES FOR PERSONS WITH CRIMINAL RECORDS 3, 27-30, 58 (2014) (discussing how background checks can present barriers in contexts such as employment, licensing, and public housing); U.S. DEP'T OF JUSTICE, *supra* note 78, at 1-5 (discussing the use of criminal background checks for licensing and other positions of trust and describing how such background checks can create barriers to employment).

II. ARRESTS OUTSIDE THE CRIMINAL JUSTICE SYSTEM

A number of actors outside the criminal justice system use arrest information for their own ends. Noncriminal justice actors rely on arrests not because they are necessarily the best screening tools. Rather, they use arrest information because it is easily disseminated and stored, and because they regard arrests as proxies for certain types of information they value. This Part focuses primarily on the role that arrest information plays in immigration enforcement and public housing. It then discusses several other contexts in which arrests serve as the starting point for regulatory decisions: public employment, licensing, foster care, social services, and education.

In the contexts described below, arrest information is used as a screening or audit mechanism; it is not used as a penal tool. Though the use of arrest information varies depending on the circumstance, certain similarities emerge across contexts: Arrest information is used systemically in a process that often begins with reporting by the local precinct. Noncriminal justice actors who rely on arrest information may be unconcerned with questions relating to guilt or innocence or with whether the police officer had probable cause. The arrested individual may be unaware of how her arrest information is being used and may have no ability to contest the facts surrounding the arrest. Ultimately, the arrest is used as a factor in deciding whether to take some type of enforcement action, such as deportation, eviction, or suspension or termination of employment or of a professional license.

A. *Immigration Enforcement*

For immigration enforcement officials, arrests provide a way of conducting immigration screening out of every precinct in the country. In 2013, immigration enforcement authorities completed the nationwide implementation of an ambitious program initially known as Secure Communities,[88] and now known as the Priority Enforcement Program.[89] The program operates principally as an information-sharing arrangement among local police, the FBI, and the Department of Homeland Security (DHS).[90] As a matter of longstanding practice, when an arrested individual is booked, his fingerprints are taken and shared

88. *Secure Communities*, *supra* note 2 (noting that Secure Communities was unrolled on a limited basis starting in 2008 and full implementation was completed on January 22, 2013).

89. Johnson Memorandum on Secure Communities, *supra* note 2.

90. *See Secure Communities*, *supra* note 2 ("[Secure Communities] uses an already-existing federal information-sharing partnership between ICE and the Federal Bureau of Investigation (FBI) that helps to identify criminal aliens without imposing new or additional requirements on state and local law enforcement."); *see also* Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 91-99 (2013) (describing the Secure Communities rollout and the fingerprinting process in detail); David J. Venturella, *Secure Communities: Identifying and Removing Criminal Aliens*, POLICE CHIEF, Sept. 2010, at 40, 43.

with the FBI. The FBI then checks the fingerprints against its own database and alerts the local law enforcement agency about any prior criminal history.[91] The Priority Enforcement Program takes this process one step further. It automatically reroutes the fingerprint information from the FBI to DHS, and DHS officials then compare the arrest information against their own immigration-related fingerprint database.[92]

Immigration screening takes place "behind the scenes" of the criminal arrest; the arresting police officer may or may not be aware that the arrest can trigger immigration consequences.[93] In using arrest information, immigration enforcement officials do not seek to punish the arrested individual or to investigate whether a crime occurred. To the extent U.S. Immigration & Customs Enforcement (ICE) reviews arrest charges, it uses the arrest information as a proxy for its own removal priorities.

To understand how arrests operate as an immigration-screening device, it is important to understand that the United States has long had a de facto practice of tolerating the presence of unauthorized immigrants.[94] ICE formalized this practice in a series of enforcement memoranda that emphasize ICE's capacity to remove only about four percent of the unauthorized population in any given year.[95] The repackaging of "Secure Communities" as the "Priority Enforce-

---

91. Throughout this Part, I refer to custodial arrests generally as "arrests." Individuals who are subject to noncustodial arrests—in which they are ticketed but not fingerprinted—will not be affected, since it is the fingerprinting that triggers the information-sharing process. *See Secure Communities*, *supra* note 2.

92. *Id.*

93. U.S. Dep't of Homeland Sec., Secure Communities Talking Points (Jan. 12, 2010), http://www.ice.gov/doclib/foia/secure_communities/talkingpointsjanuary122010.pdf.

94. David A. Martin, *Eight Myths About Immigration Enforcement*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 525, 544 (2007) (describing interior immigration enforcement as costly, inefficient, and "unglamorous and unpopular work in the eyes of most of Homeland Security's enforcement personnel"); Motomura, *supra* note 17, at 1831 ("A massive and sustained commitment of resources would be necessary—though probably not sufficient—to apprehend the . . . 11.2 million unauthorized migrants who could be apprehended and placed in civil removal proceedings.").

95. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs. et al., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 2 (June 17, 2011) [hereinafter Morton Memorandum on Exercising Prosecutorial Discretion] ("ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as possible, the agency's enforcement priorities . . . ."); Morton Memorandum on Civil Immigration Enforcement, *supra* note 1, at 1 (framing ICE's prosecutorial discretion as a matter of allocating limited resources, stressing that ICE "only has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population in the United States"); *FY 2013 ICE Immigration Removals*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/removal-statistics (last visited Mar. 30, 2015); *see also* David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L.J. ONLINE 167, 185 & n.59 (2012), http://www.yalelawjournal.org/pdf/1119_t3ev663w.pdf (describing "ongoing policy changes meant to

ment Program" further reflects the view that some unauthorized noncitizens—while legally removable—are not administrative removal priorities.[96] While ICE emphasizes that a number of factors are relevant in determining whether any given unauthorized noncitizen falls within a removal priority, until November 2014, ICE agents under the Obama Administration were generally instructed to focus on the following: (1) those with a prior criminal conviction; (2) recent unlawful entrants; and (3) those who had previously been ordered deported.[97] In November 2014, ICE issued new enforcement guidance, but adhered largely to its prior stated goal of focusing on those with prior criminal records, recent unlawful entrants, and those who have overstayed removal orders. The most recent guidelines contain a number of priorities, but generally instruct immigration officials to focus on the following, in order of importance: (1) those who pose a risk to national security, those apprehended while attempting to unlawfully enter, and those convicted of certain felonies or gang-related offenses; (2) those convicted of certain misdemeanors and recent unauthorized entrants; and (3) other immigration violators.[98]

In keeping with these priorities, immigration enforcement officials who review arrests check both whether the arrested individual appears to be legally removable and whether she appears to be an immigration enforcement priority. ICE officials consider factors such as the seriousness of the arrest charges, the noncitizen's prior criminal background, and how recently she arrived in the United States. Under the Priority Enforcement Program, if ICE determines that the arrested individual falls within a removal priority, immigration officials are instructed to send a notification request to the jail, asking that the jail notify ICE before the arrested individual's release so that ICE may assume custody.[99] Previously, under Secure Communities, ICE officials had taken a further step of requesting that local jails hold the noncitizen for up to forty-eight hours after

---

focus most immigration-enforcement resources on criminals, recent border crossers, and serious violators of the immigration laws").

96. Johnson Memorandum on Secure Communities, *supra* note 2 (revoking previous enforcement guidance and explaining the need for a new name that better reflects ICE's focus on certain immigration priorities); Morton Memorandum on Exercising Prosecutorial Discretion, *supra* note 95 (directing the exercise of prosecutorial discretion in removing those regarded as priorities, a practice that continues even though this memorandum was revoked as of November 20, 2014); *FY 2013 ICE Immigration Removals*, *supra* note 95 (discussing immigration removal priorities).

97. *See* Morton Memorandum on Civil Immigration Enforcement, *supra* note 1; *see also Secure Communities*, *supra* note 2 ("In addition to criminal aliens, ICE focuses on recent illegal entrants, repeat violators who game the immigration system, those who fail to appear at immigration hearings, and fugitives who have already been ordered removed by an immigration judge.").

98. *See* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski et al., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014) (establishing priorities effective January 5, 2015).

99. Johnson Memorandum on Secure Communities, *supra* note 2.

she would otherwise be eligible for release, so as to give immigration officials additional time to assume custody.[100]

Arrests play a significant role in shaping how immigration enforcement unfolds today. As of April 2014, ICE reported that close to 300,000 noncitizens had been removed after identification through Secure Communities.[101] ICE also reported overwhelming success in removing noncitizens who fell into one of its general priority areas, with ninety-eight percent of its 2013 removals reportedly fitting into a stated removal priority.[102]

Notably, however, these statistics do not capture how many of those removed are also criminal justice priorities. Focusing just on interior removals—as opposed to those that occur at the border—approximately twenty percent of those deported had no known criminal convictions at the time of removal.[103] Of those with a criminal history, approximately thirty percent had a single misdemeanor conviction.[104] Since unlawful entry itself is a misdemeanor,[105] these statistics do not capture how many of those deported had no criminal record unrelated to their immigration history.

Why have immigration officials chosen to utilize criminal arrests as an immigration enforcement tool? One explanation is that arrests provide an opportunity for immigration enforcement officials to expand the reach of interior enforcement efforts.[106] Border control alone is an ineffective way of achieving immigration enforcement. Large numbers of unauthorized noncitizens enter le-

---

100. The detainer portion of the program was abandoned with the transition from Secure Communities to the Priority Enforcement Program. *See id*.

101. *Secure Communities: Get the Facts*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT http://web.archive.org/web/20140910121059/http://www.ice.gov/secure_communities/get-the-facts.htm (accessed via the Internet Archive index) (archived Sept. 10, 2014) ("Through April 30, 2015, more than 283,000 convicted criminal aliens were removed from the United States after identification through Secure Communities."); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-708, SECURE COMMUNITIES: CRIMINAL ALIEN REMOVALS INCREASED, BUT TECHNOLOGY PLANNING IMPROVEMENTS NEEDED 14 (2012) (stating that approximately twenty percent of ICE removals in 2010 and the early part of 2011 were attributed to Secure Communities).

102. *FY 2013 ICE Immigration Removals*, *supra* note 95.

103. *Id.*

104. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 1, at 2 & n.4 (reporting 52,935 interior removals of those who had committed Level 1 offenses; 26,203 interior removals of those who had previously committed Level 2 offenses; and 30,977 interior removals of those who had previously committed Level 3 offenses, and describing Level 3 offenses as a single misdemeanor conviction); *see also* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., SECURE COMMUNITIES: MONTHLY STATISTICS THROUGH SEPT. 30, 2013, at 2 (2013) (reporting, without making a distinction between interior and border removals, that in FY 2013, Secure Communities was used to identify and remove 22,561 Level 3 offenders, as compared to 18,067 Level 2 offenders and 28,683 Level 1 offenders).

105. *See* 8 U.S.C. § 1325 (2013).

106. *See* U.S. Dep't of Homeland Sec., *supra* note 93, at 1-2 (discussing how sharing data with state, tribal, and local law enforcement will increase the speed with which ICE identifies criminal aliens in local law enforcement custody).

gally, but then overstay their visas.[107] Arrests provide a way for immigration enforcement officials to delegate enforcement responsibilities to state and local police, who, in turn, take responsibility for some of the work of identifying and removing unauthorized noncitizens from the interior of the United States.[108]

In this manner, arrests can be said to function as an ex post immigration screening device. In an influential article, Adam Cox and Eric Posner argue that states can achieve their immigration regulatory goals through either ex ante or ex post screening. Ex ante screening is done "on the basis of pre-entry information, such as the immigrant's race or her educational achievement in her home country," while ex post screening selects noncitizens for removal "on the basis of post-entry information, such as her avoidance of criminal activity or unemployment in the host country."[109] The ex ante approach focuses on border exclusion, and the ex post approach is necessarily based on deportation.[110] In the context of undocumented immigration, Cox and Posner argue that ex post screening allows the state to gather information about noncitizens over time and to selectively focus on deporting certain unauthorized immigrants who are regarded as priorities—such as those who come into contact with the criminal justice system.[111] Arrests serve as a way of selectively examining some noncitizens for removal, while ignoring others.

This approach can also conserve enforcement dollars. As compared to other alternatives—such as street sweeps or workplace raids—arrests give immigration enforcement officials a limited and captive population to screen. If local jails choose to comply with notification requests, immigration enforcement officials need only transfer arrested individuals from criminal to immigration custody prior to their release, rather than invest resources trying to locate them.

Politics provides another explanation. Deportation creates the potential for backlash, particularly when unauthorized immigrants reside in the United States long term, form strong community ties, and raise children in the United States.[112] For immigration officials, forging a link between immigration and

---

107. JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 1, 16 (2006), *available at* http://www.pewhispanic.org/files/reports/61.pdf (finding that in 2006, of the approximately eleven million unauthorized immigrants in the United States, twenty-five to forty percent entered lawfully but overstayed a visa); *see* Martin, *supra* note 94, at 544 ("Border enforcement contributes almost nothing to the deterrence or apprehension of [visa] overstayers.").

108. Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1337-40 (2012) (discussing the benefits of delegating enforcement authority).

109. Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 812 (2007) (emphasis omitted).

110. *See id.*

111. *Id.* at 826-27.

112. *See* Hiroshi Motomura, *Choosing Immigrants, Making Citizens*, 59 STAN. L. REV. 857, 867 (2007) ("[D]eliberate underenforcement [of immigration law] is more a product of political considerations than constitutional ones. Underenforcement . . . is the path of least political resistance."); Pham, *supra* note 17, at 968-69 (discussing the norm of underenforcement of immigration law).

crime control can serve as a way of solidifying political support for immigration enforcement policies. This point is related to Jonathan Simon's observation: "Across all kinds of institutional settings, people are seen as acting legitimately when they act to prevent crimes or other troubling behaviors that can be closely analogized to crimes."[113] In the immigration context, the link between arrests and deportation can serve to legitimate immigration enforcement choices by demonstrating that immigration enforcement officials are focusing on "criminal aliens," and not on those who may be seen as having more compelling claims to membership, such as long-term unauthorized immigrants who have had no contact with the criminal justice system.[114]

Finally, the Priority Enforcement Program and its predecessor, Secure Communities, can be understood as efforts to partner with state and local police, while simultaneously limiting their influence. Immigration enforcement has been subject to trenchant criticism for delegating much of its enforcement power to state and local police, whose interests may diverge from those of federal immigration enforcement officials.[115] The effects of immigration are felt locally and unequally.[116] Six states are home to nearly sixty percent of the nation's unauthorized immigrant population.[117] When state and local police directly enforce immigration law,[118] they have incentives to respond to local sentiment, rather than to federal immigration goals. This creates the potential for

113. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 4 (2007).

114. *Cf.* Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1055 (1994) (arguing that at times, the law treats alienage as an "irrelevant and illegitimate" means of classifying people, and instead looks to other markers of membership); Eagly, *supra* note 18, at 1137 (arguing that "rather than two sharply divided categories of noncitizens ('lawful' and 'unlawful'), noncitizen status can more accurately be understood as existing along a spectrum").

115. *See* Scott H. Decker et al., *Immigration and Local Policing: Results from a National Survey of Law Enforcement Executives*, *in* ANITA KHASHU, POLICE FOUND., THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES app. G at 169, 176 (2009) (discussing variation in local police departments' response to immigration issues); Cox & Posner, *supra* note 108, at 1291 ("In a principal-agent model, the principal hires an agent to perform a task that benefits the principal. The agent's preferences and the principal's preferences are not the same."); Wishnie, *supra* note 17, at 1102 (discussing the potential for racial profiling by local law enforcement to skew immigration outcomes).

116. For a discussion of local responses to immigration, see generally Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

117. Andrea Caumont, *These Six States Were Home to 60% of Unauthorized Immigrants in 2012*, PEW RES. CENTER, http://www.pewhispanic.org/2013/09/23/unauthorized-immigration/2-3 (Sept. 23, 2013) (listing California, Florida, Illinois, New Jersey, New York, and Texas).

118. Direct police enforcement of immigration law can occur through "287(g) agreements" (referring to section 287(g) of the Immigration and Nationality Act). These agreements permit police officers who complete certain training requirements to enforce federal immigration law directly. 8 U.S.C. § 1357(g) (2013). For a discussion of 287(g) agreements, see Chacón, *supra* note 19, at 1582-86.

local police to focus on suspected unauthorized immigrants, rather than on suspected criminals.[119] The Priority Enforcement Program can be understood as an effort to use arrests in service of immigration screening, while also attempting to safeguard against the possibility that local law enforcement will subvert federal immigration enforcement goals to their own agendas.

Arrests thus hold considerable appeal as a means of immigration enforcement. But as a matter of institutional design, reliance on arrests can have important unintended consequences. Arrests themselves can be unreliable proxies. Arrest data may be linked to the wrong person—particularly when arrested individuals have common names or provide false identification at the time of their arrest.[120] Relatedly, given that ICE's stated focus is on identifying and deporting those who commit serious crimes, it is important to recognize that the connection between criminality and unauthorized immigration is mixed at best. Documented immigrants are generally incarcerated at lower rates than U.S. citizens,[121] and the evidence is unclear as to whether there is any link between

119. The potential for abuse has been demonstrated in several lawsuits alleging racial profiling of immigrants by police. *See, e.g.*, Melendres v. Arpaio, 989 F. Supp. 2d 822, 825-26 (D. Ariz. 2013); Letter from Thomas E. Perez, Assistant Att'y Gen., to Joseph Maturo, Jr., Mayor, Town of East Haven, Conn. 2-4 (Dec. 19, 2011), *available at* http://www.justice.gov/crt/about/spl/documents/easthaven_findletter_12-19-11.pdf (noting that shortly after a rapid increase in the Latino population, police engaged in racial harassment and profiling of Latinos); Letter from Thomas E. Perez, Assistant Att'y Gen., to Bill Montgomery, Cnty. Att'y, Maricopa Cnty., Ariz. 8 (Dec. 15, 2011), *available at* http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf (citing police testimony that criminal arrests at day laborer hiring sites were conducted in response to citizen complaints about the presence of "dark-complected people" (internal quotation marks omitted)); *see also* Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1546-50 (2011) (discussing how immigration enforcement legitimizes racial profiling by police).

120. The scope of the problem is difficult to quantify, given that many victims of identity theft are unaware of the theft. For anecdotal evidence, see, for example, Robert Faturechi & Jack Leonard, *ID Errors Put Hundreds in County Jail*, L.A. TIMES (Dec. 25, 2011), http://articles.latimes.com/print/2011/dec/25/local/la-me-wrong-id-20111225 (recounting that in Los Angeles, more than 1480 people were arrested by mistake over the course of five years); Dan Frosch, *Mistaken Identity Cases at Heart of Denver Lawsuit over Wrongful Arrests*, N.Y. TIMES (Feb. 16, 2012), http://www.nytimes.com/2012/02/16/us/lawsuit-in-denver-over-hundreds-of-mistaken-arrests.html (reporting systemic cases of mistaken arrest warrant information, based on common names or misspellings); Robert Patrick & Jennifer S. Mann, *Jailed by Mistake*, ST. LOUIS POST-DISPATCH (Oct. 26, 2013), http://www.stltoday.com/news/multimedia/special/st-louis-wrongful-arrests-mount-as-fingerprint-mismatches-are-ignored/html_b153a232-208f-5d0b-86a1-ba3256f7a941.html (reporting that St. Louis residents who had been mistakenly arrested due to common names collectively spent more than 2000 days in jail from 2005 to 2013, or an average of about three weeks each, and that one man alone was incarcerated 211 days).

121. Sklansky, *supra* note 18, at 190-93 (describing trends in immigrant crime rates). Sklansky also offers evidence that certain border towns with high percentages of undocumented immigrants have relatively low crime rates. *Id.* at 191.

unauthorized immigration and high crime rates.[122] And since the majority of arrests are for minor crimes, immigration screening disproportionately occurs with respect to those arrested for minor alleged offenses, as opposed to the more serious crimes that are ICE's stated focus.

Second, the efficacy of this system is constrained by the scope of the DHS fingerprint database. The DHS database only includes those who previously encountered immigration officials—not those who secretly crossed the border and thus were never in contact with immigration officials.[123] Immigration enforcement officials depict the Priority Enforcement Program and its predecessor as offering a way to conduct immigration screening on everyone who has been arrested, but as a practical matter, reliance on arrests leads immigration enforcement officials to overselect those who overstayed a visa, and to underselect those who secretly crossed the border.

Third, enforcement necessarily depends on whether jails cooperate with ICE notification requests prior to the release of inmates. Widespread refusal to comply with detainers played a role in undermining the efficacy of Secure Communities—a fact that ICE acknowledged in transitioning to the Priority Enforcement Program.[124] If local law enforcement agencies continue to ignore ICE's new requests for notification, then immigration enforcement officials will have limited ability to apprehend suspected unauthorized immigrants, even after reviewing their arrest information.

Despite these limitations, arrests have become a powerful tool for immigration enforcement officials. Thus, arrests for petty offenses and arrests that lead to no further consequences in the criminal justice system can lead to significant immigration consequences, ones that can far outstrip any penalty imposed by the criminal justice system.

B. *Public Housing*

Public housing officials rely on arrests to identify existing tenants who are potentially in breach of their lease. Federal law provides that public housing

---

122. Eagly, *supra* note 18, at 1202 ("We still know little about the criminal propensities of undocumented immigrants, given the obvious difficulty in counting this group both in the offender and general populations.").

123. Of the 11.1 million unauthorized immigrants in the United States, an estimated sixty to seventy-five percent entered without inspection, as opposed to entering lawfully and then remaining without authorization (such as by overstaying a visa). *See* PASSEL, *supra* note 107, at 1, 16; *see also* Martin, *supra* note 94, at 544.

124. Johnson Memorandum on Secure Communities, *supra* note 2, at 2 & n.1 (discussing several court decisions that found ICE detainers to be unconstitutional). Detainers were not supported by probable cause, yet requested that jails hold arrested individuals after they would otherwise be eligible for release. Some courts found detainers to be unconstitutional for this reason. *See, e.g.*, Miranda-Olivares v. Clackamas Cnty., No. 3:12-cv-02317-ST, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014); *see also* Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J.L. & ECON. 937, 963 (2014) (discussing detainer noncompliance).

tenants are subject to eviction if any household member or guest engages in any criminal or drug-related activity. Leases for public housing prohibit a "tenant, member of the tenant's household or guest" from engaging in "any criminal activity . . . that threatens the health, safety, or right to peaceful enjoyment of the [public housing authority's] premises" or from engaging in any "drug-related criminal activity . . . on or off the premises."[125] In a 2002 decision, *Department of Housing & Urban Development v. Rucker*, the Supreme Court interpreted this language to permit eviction in cases where the leaseholder did not know and had no reason to know of drug use or other criminal activity by a guest or household member.[126]

Public housing authorities use arrests as a way to learn of and enforce potential lease violations. Some public housing authorities learn of arrests by monitoring the premises, while others regularly obtain police reports for arrests that take place in public housing.[127]

Public housing authorities rely on arrests for some of the same reasons as immigration enforcement officials. Public housing is a scarce resource, and prospective tenants often spend years on waiting lists before being offered a unit.[128] Applicants are subject to background checks, income verification, and other strict entry requirements.[129] Once admitted, tenants continue to be moni-

125. 24 C.F.R. § 966.4(*l*)(5)(i)-(ii) (2014). In public housing, a tenant may be evicted even without an arrest; the lease may be terminated "regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction." *Id.* § 966.4(*l*)(5)(iii)(A) (stating that in conventional public housing, a public housing agency may terminate assistance); *id.* § 982.553(c) (stating the same in the context of the Section 8 voucher program). The arrest thus provides a practical—but not necessary—way for landlords to learn of conduct that may potentially violate the lease.

126. 535 U.S. 125, 136 (2002).

127. *See* Stevens v. Hous. Auth., No. 3:08-CV-51, 2008 WL 2857470, at *3 (N.D. Ind. July 22, 2008) (noting that eviction proceedings were initiated after the Housing Authority received a police report of a crime in a public housing residence); *see also* OFFICE OF PUB. & INDIAN HOUS., U.S. DEP'T OF HOUS. & URBAN DEV., PIH 96-16 (HA), "ONE STRIKE AND YOU'RE OUT" SCREENING AND EVICTION GUIDELINES FOR PUBLIC HOUSING AUTHORITIES (HAS) 8 (1996) (urging implementing housing authorities to promptly obtain relevant incident reports from police departments to provide for timely evictions); Regina Austin, *"Step on a Crack, Break Your Mother's Back": Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing*, 14 YALE J.L. & FEMINISM 273, 278 n.21 (2002) ("Some housing authorities rely on addresses given by arrestees and recorded in arrest records . . . to identify candidates for eviction . . . .").

128. In New York City alone, there were 247,262 families on the waitlist for conventional public housing and 121,999 families on the waitlist for section 8 housing as of March 17, 2014, and the vacancy rate was reported as less than one percent. *About NYCHA: Fact Sheet*, N.Y.C. HOUSING AUTHORITY, http://www.nyc.gov/html/nycha/html/about/factsheet.shtml (last visited Mar. 30, 2015).

129. 42 U.S.C. § 1437a (2013) (requiring annual reviews of family income to ensure the tenants continue to meet the low-income eligibility requirement); *id.* § 13661(c) (indicating that admission may be denied to those who have "engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents").

tored. They are subject to eviction if they no longer meet the eligibility criteria, or are convicted or charged with certain crimes.[130] In this sense, contact with the criminal justice system serves as the first step in a screening process that may lead to eviction. The stated goals are to reduce drug dealing and to allocate scarce spots to law-abiding tenants.[131]

Arrests provide a way for public housing authorities to learn of conduct that potentially violates the lease. This use of arrests may also be seen as a cost-efficient way of reducing crime. Tenants in public housing—as in other housing—are entitled to privacy, and their homes may not be searched without a warrant. But police need no warrant if they have probable cause for a street arrest, including for minor offenses such as loitering and open container violations. It can be less costly for landlords to learn about drug use through street stops and arrests, rather than through police warrants or gaining permission to search a home.[132] Arrests thus give public housing authorities a relatively inexpensive tool for monitoring the postadmission conduct of tenants and for enforcing breach of contract claims.

That is not to say that public housing's and immigration enforcement's uses of arrests are one and the same. One difference is that crime in public housing is a well-established problem, one that motivated Congress to pass "one-strike" housing eviction laws.[133] Another key difference is that in the housing context, tenants cannot be evicted unless the landlord establishes that a member of the household breached her contract. In contrast, undocumented immigrants are legally removable because of their unauthorized status alone. In addition,

---

130. *Id.* § 13662(a) (listing grounds for termination of tenancy); *see also* Pinard, *supra* note 13, at 491-92.

131. Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 553 (2005) ("Language in HUD's handbook on the 'one strike' policy explicitly addresses the zero-sum nature of public housing choices: 'In deciding whether to admit applicants who are borderline in the PHA's evaluation process, the PHA should recognize that for every marginal applicant it admits, it is not admitting another applicant who clearly meets the PHA's evaluation standards.'" (quoting U.S. DEP'T OF HOUS. & URBAN DEV., DIRECTIVE 7465.1 REV-2, PUBLIC HOUSING OCCUPANCY HANDBOOK § 4-3(b)(3) (1987))); Lisa Weil, *Drug-Related Evictions in Public Housing: Congress' Addiction to a Quick Fix*, 9 YALE L. & POL'Y REV. 161, 169 (1991) (arguing that justifications for one-strike housing policies relate to the desire to keep tenants safe, respect the wishes of law-abiding tenants who support tough-on-crime evictions, and prevent drug dealers from accessing publicly subsidized homes). Former U.S. Department of Housing and Urban Development (HUD) official Laura Blackburne has been quoted as saying, "People who commit crimes have no right to public housing . . . . Why should I keep some creep in there who doesn't care about decent living?" Douglas Martin, *Innocent People Lose Homes: Law's Strange Twist*, N.Y. TIMES, Mar. 11, 1992, at B3 (internal quotation marks omitted).

132. *See generally* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 887-88 (1991) (discussing the costs of obtaining a search warrant relative to other means of investigation).

133. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 127 (2002) ("With drug dealers 'increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants,' Congress passed the Anti-Drug Abuse Act of 1988." (quoting 42 U.S.C. § 11901(3))).

although federal law mandates that the language at issue in *Rucker* be included in lease agreements, there is no nationwide system for sharing arrest information akin to the Priority Enforcement Program. It is also considerably more difficult to obtain data about how many evictions are triggered by arrests. While the U.S. Department of Housing and Urban Development (HUD) publishes significant data on public housing occupants, it does not report how many tenants are evicted following an arrest.[134]

Public housing authorities must comply with certain procedural constraints in seeking eviction, but the procedures applied in housing court and in administrative termination hearings are distinct from those applied in criminal court. In criminal court, an arrest report itself cannot be used to establish that a crime occurred; the arresting officer or another witness must testify to the facts. But housing court and administrative termination proceedings grant considerably more discretion. Some administrative proceedings allow landlords to introduce unverified arrest reports as substantive evidence, even without testimony from the arresting officer.[135] And as a practical matter, tenants who are largely unrepresented by counsel have limited ability to contest the procedures used in housing court or to mount a substantive defense.[136]

In relying on arrests, public housing authorities knowingly make decisions that affect tenants who pose no known risk to others; eviction decisions affect the entire household, not just the arrested individual.[137] Consider the eviction of Pearlie Rucker, one of the plaintiffs in the *Rucker* case. A sixty-three-year-old grandmother, she was evicted with her family when her daughter was arrested for a minor offense several blocks away.[138] At the time of her eviction, she had lived in public housing for thirteen years and provided a compelling example of the broad reach of "one-strike" public housing evictions.[139] She

134. The data collected and published by HUD are available at *Research*, U.S. DEP'T HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/library/bookshelf03 (last visited Mar. 30, 2015).

135. *See* Basco v. Machin, 514 F.3d 1177, 1179-80 (11th Cir. 2008) (discussing section 8 termination proceedings involving a hearsay police report). *But see* Edgecomb v. Hous. Auth., 824 F. Supp. 312, 315-16 (D. Conn. 1993) (finding an informal section 8 hearing that relied on a hearsay police report to be improper because it denied the "tenant the opportunity to confront and cross-examine persons who supplied information upon which the housing authority's action is grounded").

136. *See* Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 88, 123 (2012); Matthew Desmond, Op-Ed., *Tipping the Scales in Housing Court*, N.Y. TIMES (Nov. 29, 2012), http://www.nytimes.com/2012/11/30/opinion/tipping-the-scales-in-housing-court.html.

137. This is true of evictions that are based on a household member's conviction, as well as evictions that are based on arrests. Martin, *supra* note 131 (discussing evictions of mothers based on drug offenses of children).

138. Rucker v. Davis, No. C 98-00781 CRB, 1998 WL 345403, at *2 (N.D. Cal. June 19, 1998).

139. *Id.* For a discussion of "one-strike" public housing evictions, see Remarks Announcing the "One Strike and You're Out" Initiative in Public Housing, 1 PUB. PAPERS 519,

shared her apartment with her mentally disabled adult daughter, Gelinda, two grandchildren, and one great-grandchild.[140] She had no knowledge of drug use in her household and had made good-faith efforts to keep out drugs, such as by searching Gelinda's bedroom regularly for signs of drug use.[141] She also had a son, Michael, who did not live in the apartment.[142]

Gelinda's and Michael's arrests led to Rucker's eviction. Gelinda was arrested after being spotted with an open container. Police found cocaine during the subsequent search.[143] About six months later, an officer arrested Michael after reportedly observing him loitering at a bus stop.[144] When searched, he was also found to be carrying cocaine.[145] At the precinct, Michael gave Rucker's address as his own.[146] Three months later, and about nine months after Gelinda's arrest, an eviction notice was served on Pearlie Rucker.[147] The termination notice cited Michael's and Gelinda's drug-related arrests as evidence of breach of contract.[148] Rucker did not dispute the legality of the arrests or that Michael and Gelinda were using drugs. Instead, she challenged whether she could be evicted for the off-premises conduct of household members.

The *Rucker* Court held that federal law "unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity."[149] The Court stressed that public housing authorities have discretionary authority to evict tenants:

> The statute does not *require* the eviction of any tenant who violated the lease provision. Instead, it entrusts that decision to the local public housing authorities, who are in the best position to take account of, among other things, the degree to which the housing project suffers from "rampant drug-related or violent crime," "the seriousness of the offending action," and "the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action." It is not "absurd" that a local housing authority may sometimes evict a tenant who had no knowledge of the drug-related activity.[150]

---

520 (Mar. 28, 1996) ("If you break the law, you no longer have a home in public housing, 'one strike and you're out.' That should be the law everywhere in America.").

140. *Rucker*, 1998 WL 345403, at *2.

141. *Id.*

142. *Id.*

143. Joint Appendix at 13, U.S. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (Nos. 00-1770, 00-1781), 2001 WL 34093958.

144. *Id.*

145. *Rucker*, 1998 WL 345403, at *2.

146. Joint Appendix, *supra* note 143, at 13.

147. *Id.* at 12.

148. *Id.* at 12-13.

149. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 130 (2002).

150. *Id.* at 133-34 (alteration in original) (citations omitted) (quoting 42 U.S.C. § 11901(2); 66 Fed. Reg. 28,776, 28,803 (May 24, 2001)).

After *Rucker*, HUD issued administrative guidance that urged public housing authorities to consider a number of factors, including "the seriousness of the violation, the effect that eviction of the entire household would have on household members not involved in the criminal activity, and the willingness of the head of household to remove the wrongdoing household member from the lease as a condition for continued occupancy."[151]

In practice, the willingness of the head of the household to "cure" the breach by barring the arrested individual often plays a decisive role in eviction decisions. For instance, the New York City Housing Authority termination of tenancy procedures provide that a hearing officer may allow a tenant to continue to reside in a complex, subject to the "permanent exclusion" of the arrested individual, in lieu of an eviction.[152]

Arrests give public housing authorities a credible basis for threatening eviction. They also provide leverage in obtaining concessions from households, such as an agreement that the tenant will bar the arrested individual from entry. Such stipulations give landlords more control over who enters an apartment than they would otherwise have, and may be far more common than termination proceedings.[153] A typical lease may bar those who are not listed as occupants from residing in an apartment, but it will not restrict who may visit. In contrast, stipulations may bar the arrested individual from merely entering a dwelling for any reason.[154]

In the housing context, the use of arrests as a screening device can in some circumstances satisfy important safety goals. But reliance on arrests can lead to significant and undesirable consequences for an entire household, particularly when tenants lack adequate opportunity to explain why an arrest should not lead to ongoing monitoring or eviction.

C. *Other Contexts*

A number of other actors also rely on arrest information as a way of screening and monitoring arrested individuals, including employers, professional license providers, foster care agencies, social services providers, and educational providers.

---

151. Letter from Michael M. Liu, Assistant Sec'y, U.S. Dep't of Hous. & Urban Dev., to Pub. Hous. Dirs. (June 6, 2002), *available at* http://www.hud.gov/offices/pih/regs/rucker6jun2002.pdf.

152. N.Y.C. Hous. Auth., Termination of Tenancy Procedures 2-3 (1997) (on file with author).

153. *See* Letter from James M. Branden, Chair, Criminal Justice Operations Comm., N.Y.C. Bar Ass'n, to John B. Rhea, Chairman, N.Y.C. Hous. Auth. (Jan. 11, 2011), *available at* http://www.nycbar.org/pdf/report/uploads/20071995-RecommendationsreTerminationofTenancyProceedings.pdf (citing statistics that over half of all cases in 2007 were resolved by stipulation, rather than through a hearing).

154. *See id.* (discussing the need to explain "permanent exclusion" to tenants who choose to enter stipulations to remain in public housing).

1. *Employment*

Employers and professional licensing authorities can use arrest information to monitor off-duty workers. The vast majority of employers require at least some employees to undergo background checks as a condition of employment.[155] A significant number of employers now also receive notifications whenever an employee is arrested and fingerprinted.[156] Every state has a criminal justice repository that maintains databases of fingerprints and criminal records, including the fingerprints of certain public employees or licensees.[157] If an employee is later arrested, her fingerprints are sent to the state law enforcement repository during the booking process, which then may automatically notify the employer or licensing agency.[158]

In New York, arrest data are automatically transmitted to dozens of public employers and licensing authorities, such as the New York City Department of Education, New York State Department of Education, New York City Taxi and Limousine Commission, and others.[159] Home health care workers, security

155. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 85, at 6 ("In one survey, a total of 92% of responding employers stated that they subjected all or some of their job candidates to criminal background checks. Employers have reported that their use of criminal history information is related to ongoing efforts to combat theft and fraud, as well as heightened concerns about workplace violence and potential liability for negligent hiring. Employers also cite federal laws as well as state and local laws as reasons for using criminal background checks." (footnotes omitted)); *see also* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003) (discussing the effect of a criminal record on barriers to employment).

156. Ellen Nakashima, *FBI Prepares Vast Database of Biometrics*, WASH. POST (Dec. 22, 2007), http://wapo.st/1xunkJZ (discussing the FBI's "'rap-back' service, under which employers could ask the FBI to keep employees' fingerprints in the database, subject to state privacy laws, so that if that [sic] employees are ever arrested or charged with a crime, the employers would be notified").

157. Jacobs, *supra* note 78, at 393 ("Every U.S. state has a state-level agency charged with maintaining databases of rap sheets and fingerprints. In New York, for example, that agency is called the Division of Criminal Justice Services. The corresponding California agency is the California Department of Justice, California Justice Information Services Division." (footnote omitted)).

158. For a list of reporting requirements in New York State, see, for example, LEGAL ACTION CTR., NEW YORK STATE: OCCUPATIONAL LICENSING SURVEY (2006), *available at* http://lac.org/doc_library/lac/publications/Occupational%20Licensing%20Survey%202006.pdf; N.Y. State Div. of Criminal Justice Servs., Use and Dissemination Agreement 5 (2009) (on file with author) (stating that the Division of Criminal Justice Services (DCJS) agrees to retain "non-criminal applicant fingerprint cards in its files for the purpose of issuing reports to the User Agency upon the subsequent arrest of the subjects of the retained fingerprint cards").

159. New York City Governmental Agencies Having Use and Dissemination Agreements with New York State Division of Criminal Justice Services (on file with author); New York State Governmental Agencies Having Use and Dissemination Agreements with New York State Division of Criminal Justice Services (on file with author). This information was obtained in response to a Freedom of Information Law request to the New York State Division of Criminal Justice Services. The author thanks Paul Keefe of the Community Service Society of New York.

guards, and taxi drivers are among those whose employers or license providers may automatically be notified of an arrest. Neither the arresting officer nor the jail has a role in initiating the notification, so the arrested individual will not be informed of the notification at the time of her arrest.

The transmission occurs once and contains limited information. In New York, the notification contains the arrested individual's identifying information, the date and location of the arrest, the arrest charges (as listed by the arresting officer), and the penal code section relating to the arrest; the transmission does not contain the alleged factual basis for the arrest.[160]

Licensing authorities and employers have considerable discretion in deciding how to proceed after learning of an arrest.[161] Some employers use arrest notifications in tandem with self-reporting requirements.[162] Failure to comply with this self-reporting requirement may itself be the basis of employee discipline or termination.[163]

Some employers suspend or terminate at-will employees based on the arrest. As a matter of due process, a licensee may be entitled to a hearing before a license is revoked, but not necessarily before an unpaid license suspension.[164] Until 2006, New York City taxi drivers, for instance, had their licenses automatically suspended for a wide range of arrests, including misdemeanor welfare fraud or forgery.[165] Employers also vary in terms of how they disseminate arrest information. The New York City Department of Education, for instance, disseminates employee arrest information to the general counsel's office, human resources, the district superintendent, and to the Special Commissioner of Investigation.[166] Some arrested individuals will never know that they were screened because their employer might take no immediate action—but the em-

160. Nnebe v. Daus, 665 F. Supp. 2d 311, 317 (S.D.N.Y. 2009) (describing the transmission process from the DCJS in the context of a lawsuit challenging automatic license suspensions of arrested taxi drivers), *aff'd in part, vacated in part*, 644 F.3d 147 (2d Cir. 2011).

161. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 85, at 12 ("An arrest, however, may in some circumstances trigger an inquiry into whether the conduct underlying the arrest justifies an adverse employment action."); *cf.* Gilbert v. Homar, 520 U.S. 924, 932 (1997) ("On the other side of the balance, the State has a significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as police officers.").

162. N.Y.C. DEP'T OF EDUC., C-105, BACKGROUND INVESTIGATIONS OF PEDAGOGICAL AND ADMINISTRATIVE APPLICANTS AND PROCEDURES IN CASES OF THE ARREST OF EMPLOYEES 7 (2003), *available at* http://docs.nycenet.edu/docushare/dsweb/Get/Document-55/C-105.pdf (discussing self-reporting requirements).

163. *Id.*

164. *Nnebe*, 644 F.3d at 159 ("[W]e think that in any given case, an arrest for a felony or serious misdemeanor creates a strong government interest in ensuring that the public is protected in the short term, prior to any hearing [for an arrested taxi driver]."); *see* Erwin Chemerinsky, *Qualified Immunity: § 1983 Litigation in the Public Employment Context*, 21 TOURO L. REV. 551, 553-54 (2005).

165. *Nnebe*, 665 F. Supp. 2d at 316-17.

166. N.Y.C. DEP'T OF EDUC., *supra* note 162, at 7-8.

ployer may consider the arrest at a later date when making decisions about whom to promote or terminate.

Depending on the circumstances, an employee might be asked to explain the arrest, or she may be suspended pending the disposition.[167] Employers may have an interest in suspending or reassigning workers because they are concerned about liability for negligence claims—such as negligent hiring and retention—if they do nothing after learning of an arrest.[168]

Like immigration enforcement officials and public housing authorities, employers and licensing agencies use arrests as one potential monitoring tool. They could also rely on a number of other methods. For instance, they could rely on subjective methods, such as the complaints of other workers, or more objective methods, such as a drug screening. When employers rely on these types of methods, they have incentives to ensure fairness and compliance with antidiscrimination laws. If an employer relies on drug screening, for instance, it cannot disproportionately target minorities. But when employers and licensing authorities rely on arrests, they leave front-end decisions about whom to screen to the police, without similar regard for racially disparate impact. Employers may also treat arrests as independently reliable, rather than engage in their own investigation. Reliance on arrests carries the risk that the arrest will be an unreliable proxy, for reasons relating to the inaccuracy of the arrest itself or because the arrest does not correlate to characteristics that the employer values. And even if arrests are a reasonable proxy, they might nonetheless be overly broad and unfairly exclude qualified employees.[169]

When employers and licensing agencies rely on arrests, they might be motivated by rational interests, such as the desire to prevent harm to third parties and others who rely on their services. But without appropriate checks, their use of arrests can result in significant harm, including lengthy unpaid suspensions for workers who were unlawfully arrested or pose no security risk.

2. *Child protective services*

Some police departments now have protocols in place for notifying social services after a custodial parent's arrest.[170] As a matter of due process, police

---

167. *Id.* at 8.

168. U.S. DEP'T OF JUSTICE, *supra* note 78, at 38.

169. A recent class action lawsuit against the U.S. Census Bureau raises some of these concerns. The plaintiffs allege that the Census Bureau's practice of requiring applicants "who have ever been arrested to produce within 30 days the 'official court documentation' for any and all of their arrests—regardless of whether a conviction resulted, the nature of the arrest, its relationship to the job, or when it took place"—eliminated ninety-three percent of applicants from eligibility and had a significantly adverse impact on Latinos and African Americans, who are disproportionately arrested as compared to whites. Second Amended Class Action Complaint at 1-2, Houser v. Blank, 10-cv-3105 (FM) (S.D.N.Y. Sept. 21, 2012).

170. *See* CAL. COMM'N ON PEACE OFFICER STANDARDS & TRAINING, POST GUIDELINES FOR CHILD SAFETY: WHEN A CUSTODIAL PARENT OR GUARDIAN IS ARRESTED 5 (2008), *avail-*

have a relatively minimal obligation to provide for the immediate safety of children if they are aware that children may experience harm as a result of their caretaker's arrest.[171] But due in part to a growing awareness of how parental arrests can affect children, some police departments have expanded their efforts to address the needs of potentially vulnerable children after a caretaker's arrest.

Rising arrest rates have had a devastating effect on families. Between 1991 and 2007, the number of parents in prison increased by close to eighty percent.[172] During the same period, the number of children whose mothers were imprisoned increased by 131%.[173] Since a majority of incarcerated mothers—and a significant minority of incarcerated fathers—live with their children at the time of their arrest,[174] their arrests can have an immediate impact on minor children.[175]

Some local law enforcement officials have responded by taking measures to notify social services in the case of a known caretaker's arrest.[176] The notification seeks to ensure that children are left with adequate care while the caretaker is in police custody. This type of notification can provide a critically important early warning sign that a child might be at risk. Like most parents, arrested caretakers may have no plan in place for care of their minor children in case of an arrest. They may be unable to arrange for care after they have been taken into custody. Or they may be unwilling to discuss the need for a caretaker with the police, out of fear that their custody will be threatened.

---

able at http://www.post.ca.gov/Publications/pdf/child_safety.pdf; DONNA PENCE & CHARLES WILSON, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE ROLE OF LAW ENFORCEMENT IN THE RESPONSE TO CHILD ABUSE AND NEGLECT 3 (1992), *available at* http://www.childwelfare.gov/pubs/usermanuals/law/lawc.cfm; GINNY PUDDEFOOT & LISA K. FOSTER, CAL. RESEARCH BUREAU, CRB 07-006, KEEPING CHILDREN SAFE WHEN THEIR PARENTS ARE ARRESTED: LOCAL APPROACHES THAT WORK app. 2 at 45 (2007), *available at* http://www.library.ca.gov/crb/07/07-006.pdf; *Responses to Children During a Parent's Arrest*, 29 CHILD. L. PRAC. 30, 30-31 (2010).

171. *See, e.g.*, White v. Rochford, 592 F.2d 381, 383 (7th Cir. 1979) (holding that the "unjustified and arbitrary refusal of police officers to lend aid to children endangered by the performance of official duty . . . indisputably breaches the Due Process Clause" where that refusal "ultimately results in physical and emotional injury to the children").

172. LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (2010).

173. *Id.* at 2.

174. *Id.* at 4. An estimated 35.5% of fathers lived with their minor children in the month before their arrest, and an estimated 42.4% of fathers lived with their children immediately prior to incarceration. *See id.* at 4 tbl.7.

175. Roberts, *supra* note 48, at 1284 ("Incarcerating mothers tends to upset family life even more because inmate mothers were usually the primary caretakers of their children before entering prison.").

176. *See* ANNIE E. CASEY FOUND., WHEN A PARENT IS INCARCERATED: A PRIMER FOR SOCIAL WORKERS 6 (2011) (noting that "[t]he potential for harm can be tragic" when local law enforcement officers fail to coordinate with social services and locate caregivers at the time of a parent's arrest); CLARE M. NOLAN, CAL. RESEARCH BUREAU, CRB 03-011, CHILDREN OF ARRESTED PARENTS: STRATEGIES TO IMPROVE THEIR SAFETY AND WELL-BEING 20 (2003), *available at* https://www.library.ca.gov/crb/03/11/03-011.pdf (discussing notification protocols for law enforcement officers to follow when a child's caretaker is arrested).

Reporting of arrests in the child protective services context is intended to provide timely information about whether a child is at risk for neglect. But even this compelling use of arrests can carry serious unintended consequences. An arrest that leads to nothing further in the criminal justice system may lead to lasting and unnecessary involvement with child protective services. Parents who are good caretakers, and who are arrested for minor offenses, may run the risk of having their custody disrupted. Consider the case of Penelope Harris, who was arrested after police discovered a third of an ounce of marijuana in her apartment. As a result of her arrest and the attendant notification to social services, her ten-year-old son was placed in another home for over a week, and her niece, who lived with her as a foster child, was removed from her care and placed in another foster home for over a year.[177] Arrests thus may exacerbate harmful effects of contact with the criminal justice system on children and may unnecessarily disrupt custody arrangements.

3. *Foster care*

In the foster care context, arrests are used to determine whether a household is a good placement for a foster child. Licensing agencies use initial background checks to determine whether a household will be a safe placement for a foster child. Some states require that adult household members submit to background checks, while others require background checks of even some juvenile household members.[178] A household member's subsequent arrest can trigger a reevaluation of whether the family remains a good placement. For the foster care system, the intent is to monitor households and prevent mistreatment of foster children, who are uniquely vulnerable to high rates of abuse and neglect.[179] This type of notification can be particularly valuable when licensing agencies have insufficient funding or resources to conduct in-home inspections.[180] The use of arrests can provide an early warning sign that a home is potentially unsafe for a child, but as with the social services context, it carries the risk of overbroad identifications.

---

177. Mosi Secret, *No Cause for Marijuana Case, but Enough for Child Neglect*, N.Y. TIMES (Aug. 17, 2011), http://www.nytimes.com/2011/08/18/nyregion/parents-minor-marijuana-arrests-lead-to-child-neglect-cases.html (describing the case of Penelope Harris).

178. CHILD WELFARE INFO. GATEWAY, CRIMINAL BACKGROUND CHECKS FOR PROSPECTIVE FOSTER AND ADOPTIVE PARENTS 4 n.10 (2011), *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/background.pdf ("Missouri and New Hampshire require checks of all persons age 17 and older. Alaska, Connecticut, and Washington require checks of all persons age 16 and older. Indiana, Iowa, Massachusetts, and Texas require checks of all persons age 14 and older. Oklahoma requires a check of juvenile justice records for any child age 13 or older.").

179. Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 205-07 (1988) (citing statistics that foster children are found to suffer from abuse and neglect at disproportionately high rates).

180. *See id.* at 208-14 (discussing systemic agency failures to provide adequate monitoring and oversight of children in foster care).

4. *Education*

Similar to how arrests operate in the social services context, police departments may notify schools about a juvenile's contact with the criminal justice system. Some notifications are statutorily mandated,[181] while others are discretionary.[182] The notification may be motivated by the desire to protect other students or to identify the need for counseling or other interventions. But it may also have the effect of stigmatizing the student and undermining the confidentiality of juvenile justice proceedings. Arrested students whose identities are disclosed may be subject to lasting stigma—precisely the result that sealing laws in the juvenile justice context are designed to guard against.[183]

D. *Conclusion*

In a variety of settings, noncriminal actors rely on arrests as a means of achieving their own regulatory agendas. This use of arrests can serve important societal interests. But it can come at a significant cost. It can magnify the effect of unwise or unjustified policing and arrest decisions. Across a number of settings, arrests are an overbroad and imperfect proxy for the information that noncriminal justice actors value. This fact, combined with inadequate oversight and a lack of transparency in how arrest information is used, can create serious consequences for arrested individuals—ones that far outstrip any penalty imposed by the criminal justice system. In the next Part, I explore how criminal justice actors interact with others when they both rely on arrest information as the starting point for their enforcement decisions.

III. ARRESTS, REGULATORY COOPERATION, AND REGULATORY CONFLICT

When actors outside the criminal justice system rely on arrests, they have feedback effects on the criminal justice system. One potential effect is to expand the enforcement powers of both actors. When criminal justice actors cooperate with others, they can engage in coordinated prosecutions that effectively circumvent the checks of criminal procedure. Collaboration can provide opportunities for interrogation and enforcement that neither agency alone would be able to achieve.

---

181. *See, e.g.*, CONN. GEN. STAT. § 10-233h (2014) (requiring that the municipal police department notify the superintendent of schools within one business day if an enrolled student aged seven through twenty is arrested for certain offenses); Packer v. Bd. of Educ., 717 A.2d 117, 121 & n.4, 122 (Conn. 1998).

182. *See, e.g.*, Thompson v. Barnes, 200 N.W.2d 921, 923 (Minn. 1972) (discussing an officer's decision to notify school officials of a student's off-campus arrest for alcohol possession).

183. Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 527-28 (2004) (discussing the case of a student whose identity was protected in juvenile court but who was stigmatized by expulsion after a marijuana arrest).

At other times, however, noncriminal justice actors can work against certain criminal law enforcement goals. Conflict can potentially arise when noncriminal justice actors attach causal consequences to arrests that criminal justice actors do not seek or desire—such as when they deport, evict, or discipline individuals after a demonstrably unlawful arrest. These consequences can undermine the aims of prosecutors and police who seek to encourage witnesses to come forward and report crime. This Part describes how criminal justice actors and others interact in their use of arrest information and discusses the implications of these interactions for arrested individuals.

A. *Cooperative Relationships*

Criminal law actors and other actors may have shared regulatory interests and may choose to coordinate enforcement actions to their mutual benefit. Consider the context of immigration enforcement. Both immigration enforcement officials and criminal law actors have a shared interest in identifying a "criminal alien"—someone who has committed criminal offenses and who is deportable.[184] As a result of coordinated enforcement efforts, unlawful entrants are regularly criminally prosecuted prior to being deported, and a range of criminal convictions result in mandatory deportation.[185]

Collaboration provides opportunities for agencies to pool resources and achieve levels of enforcement that neither would be able to achieve alone.[186] In the immigration context, state and local police engage in raids and arrests in coordination with immigration enforcement officials,[187] work with local police to identify suspected "criminal aliens," such as gang members,[188] and conduct

184. In practice, the label "criminal alien" encompasses a variety of statuses. *See* Eagly, *supra* note 18, at 1137-40.

185. *See* 8 U.S.C. § 1325 (2013) (making unlawful entry a misdemeanor); *id.* § 1546(a) (criminalizing the possession or use of a false immigration document); 42 U.S.C. § 408(a)(7) (2013) (criminalizing false representation of a Social Security number); Legomsky, *supra* note 19, at 476-78.

186. For a discussion of this general dynamic, see Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015).

187. Julia Preston, *Immigration Officials Arrest More than 3,100*, N.Y. TIMES (Apr. 2, 2012), http://www.nytimes.com/2012/04/03/us/immigration-officials-arrest-more-than-3100.html (discussing an operation by ICE that "involved arrests in all 50 states and was coordinated with the local and state police").

188. *See National Gang Unit: Operation Community Shield*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/community-shield (last visited Mar. 30, 2015) (describing Operation Community Shield, which is aimed at "[i]dentify[ing] violent street gangs and develop[ing] intelligence on their membership, associates, criminal activities and international movements" and "[s]eek[ing] prosecution and/or removal of alien gang members from the United States"). For a critique of Operation Community Shield, see Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member,"* 2007 U. CHI. LEGAL F. 317, 320 ("No uniform legal standards govern the identification of criminal street gang members for purposes of ICE enforcement, and while the 'associates' of criminal street gang members are often removed, there are no legal standards defining who constitutes an associate of a criminal street gang member.").

immigration screening out of prisons and jails.[189] Criminal prosecutors rely on evidence gathered by immigration officials and conduct interrogations out of civil immigration detention facilities.[190] This allows criminal prosecutors to rely on deportation as a way to punish crime or suspected criminality, and to minimize the possibility that an unauthorized alien will commit repeat crimes over time.[191]

The merger of certain aspects of immigration enforcement with criminal law—which Stephen Legomsky has aptly described as "asymmetric" in its incorporation of enforcement norms but its rejection of procedural constraints—gives criminal law and immigration actors the opportunity to coordinate to achieve maximum enforcement.[192] As Ingrid Eagly has demonstrated, certain criminal justice and immigration law actors engage in extensive coordination, from investigation, to arrest, to prosecution.[193] For instance, immigration officers may deliberately elicit incriminating statements without *Miranda* warnings, knowing that those statements might subsequently be admitted in criminal court.[194] Criminal law enforcement officers may decide to collect evidence unlawfully because they are aware that such evidence may be admitted in removal proceedings, regardless of whether it would be suppressed in criminal court.[195] Given their relatively lax procedural standards, immigration courts provide an alternative forum for proceeding against a noncitizen when prosecutors lack the evidence needed in criminal court. Noncitizen defendants in practice must nav-

189. *Criminal Alien Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/criminal-alien-program (last visited Mar. 30, 2015).

190. *See* Eagly, *supra* note 19, at 1308-17.

191. Chacón, *supra* note 19, at 1574-75.

192. Legomsky, *supra* note 19, at 472 ("Rather than speak of importation of the criminal *justice* model [to immigration enforcement], then, a more fitting observation would be that immigration law has been absorbing the theories, methods, perceptions, and priorities of the criminal *enforcement* model while rejecting the criminal *adjudication* model in favor of a civil regulatory regime."); *see also* David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 3 (2003) ("[T]he government invokes administrative processes to control, precisely so that it can avoid the guarantees associated with the criminal process."); Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 146-47 (2009), http://www.columbialawreview.org/wp-content/uploads/2009/12/135_Chacon.pdf (discussing due process concerns involved in the Postville prosecutions and in Operation Streamline).

193. Eagly, *supra* note 19, at 1294, 1299-300.

194. *Id.* at 1309-10 (providing examples of evidence obtained by immigration officers being used in criminal proceedings).

195. The Supreme Court has held that since "a deportation hearing is intended to provide a streamlined determination of eligibility to remain in this country, nothing more," unlawfully obtained evidence can be admitted. INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984). There are limited exceptions to this rule, such as in the case of "egregious" Fourth Amendment violations. *See* Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109, 1125 (discussing different standards for "egregiousness"); *see also* Chacón, *supra* note 19, at 1615-19 (describing how *Lopez-Mendoza* and other developments may incentivize state and local law enforcement officers to disregard certain procedural protections).

igate both systems at once.[196] Their status as noncitizens can adversely affect their treatment in criminal court, such as by leading to the denial of bail.[197] Likewise, the existence of a criminal prosecution may adversely affect a noncitizen's treatment in removal proceedings.[198]

Similar dynamics operate in other contexts. A public housing tenant who fails to list all occupants in her apartment, or who fails to report an increase in her income, may not only be evicted, but also face criminal prosecution for crimes such as larceny and filing a false instrument.[199] In the social services context, administrative agencies may mandate home inspections as a condition of receiving aid. If evidence of drug use or other legal violations is discovered during the inspection, that discovery may then form the basis for a criminal prosecution.[200] Some state and local laws further facilitate collaboration. For instance, New York City allows criminal prosecutors to present evidence and seek evictions directly in housing court, even if a landlord refuses to proceed against a tenant.[201]

Civil proceedings provide no access to free court-appointed counsel, no protection against self-incrimination, and generally apply less stringent procedural standards than criminal court. Those who appear pro se and who testify run the risk that their testimony will be used against them in a later criminal proceeding.

Collaboration between noncriminal and criminal justice actors can lead to important changes in the behavior of both actors. It may modify the way that criminal justice actors conduct interrogations, and it may give criminal justice actors incentives to gather unlawful evidence. The threat of a serious noncrimi-

---

196. *See* Eagly, *supra* note 19, at 1306-07.

197. Chin, *supra* note 19, at 1423-24.

198. Eagly, *supra* note 19, at 1305-20 (discussing how hybrid criminal and immigration prosecutions adversely affect noncitizen outcomes across a variety of contexts).

199. McGregor Smyth, *Bridging the Gap: A Practical Guide to Civil-Defender Collaboration*, 37 CLEARINGHOUSE REV. 56, 56 (2003) (discussing the case of a client named "Vicky G.").

200. Wyman v. James, 400 U.S. 309, 323 (1971) ("The home visit is not a criminal investigation, [and] does not equate with a criminal investigation . . . . [I]f the visit should, by chance, lead to the discovery of fraud and a criminal prosecution should follow, . . . that is a routine and expected fact of life and a consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct.").

201. New York City's Narcotics Eviction Program allows police officers and prosecutors to pursue an eviction directly after obtaining a warrant for a home search if the landlord elects not to initiate eviction proceedings on his or her own. Escalera v. N.Y. Hous. Auth., 924 F. Supp. 1323, 1330-31 (S.D.N.Y. 1996) (discussing how the "Bawdy House" laws have been used by the Narcotics Eviction Program to lead to speedy evictions). For a discussion of the Narcotics Eviction Program, see Jeffrey Fagan et al., *The Paradox of the Drug Elimination Program in New York City Public Housing*, 13 GEO. J. ON POVERTY L. & POL'Y 415, 425 (2006) (describing the New York Police Department's Anti-Narcotics Strike Force as receiving funding to "support special prosecution activities primarily to evict tenants with drug arrests"); Scott Duffield Levy, Note, *The Collateral Consequences of Seeking Order Through Disorder: New York's Narcotics Eviction Program*, 43 HARV. C.R.-C.L. L. REV. 539, 545 (2008).

nal action—such as eviction or deportation—also gives prosecutors additional leverage in plea negotiations. Similarly, noncriminal justice actors may have incentives to conduct search and interrogation operations they would not otherwise engage in, with the knowledge that their actions could be of use in criminal proceedings—even if they will not be used in any other proceedings.

Dynamics such as these produce considerable benefits for local law enforcement officers who coordinate with noncriminal enforcement agencies. They effectively expand the scope of each actor's regulatory power by allowing access to additional personnel, more easily introduced evidence, and alternative forums for enforcement.

B. *Conflicting Interactions*

Just as criminal justice actors may cooperate with other actors, they may also come into conflict. Conflict arises because each institutional actor has its own regulatory agenda and its own goals. While some conflict is inevitable when different agencies pursue their own agendas, conflict can be particularly problematic in certain circumstances, such as when a crime victim or cooperating witness faces a steep civil consequence as an unforeseen result of an arrest.

That is not to say that conflict is problematic from the perspective of local law enforcement whenever an arrested individual faces a civil consequence. In any individual case, a prosecutor may well be indifferent to whether an innocent defendant faces a significant noncriminal penalty as the result of an arrest. Indeed, a prosecutor may seek harsher penalties if she is aware that the criminal defendant lacks immigration status or lives in public housing. Eagly has demonstrated that some prosecutors' offices take exactly this approach in the immigration context.[202] Criminal prosecutors in Maricopa County, Arizona, for instance, not only are less likely to exercise discretion if they are aware that a defendant does not have lawful immigration status, but in fact deliberately seek to structure prosecutions and plea agreements so as to maximize the likelihood of deportation.[203]

Similarly, a jury could determine that an arrested noncitizen is not guilty of the charged criminal offense, but also believe, as a separate matter, that the noncitizen should be deported. A juror who believes that prison time is too harsh a punishment for the alleged offense might simultaneously believe that the arrested individual should not remain in her job, take in foster children, or live in a publicly subsidized apartment.

The question of whether conflict arises in any given case depends in part on the local law enforcement agency's own priorities. For instance, in the im-

---

202. *See generally* Eagly, *supra* note 18 (examining three prosecutors' offices with regard to their approach to immigration status, and arguing that they have distinct approaches to immigration status: *alienage neutral*, *illegal-alien punishment*, and *immigration enforcement*).

203. *Id.* at 1180-90.

migration context, does the agency actively seek to deport unauthorized noncitizens, or does it place primary emphasis on encouraging noncitizens to come forward and report crime? In the housing context, does a prosecutor's office prioritize obtaining evictions as well as convictions—or is it indifferent to whether a conviction will affect public housing eligibility? Depending on the locality, police departments and prosecutors' offices have reached very different answers to these questions.

In some cases, use of arrest information outside the criminal justice system can undermine the integrity of the criminal justice process and counter important criminal law enforcement aims. It can erode a community's willingness to trust and cooperate with the police. Cultivating community cooperation is a persistent challenge for local law enforcement, particularly when minority communities are disproportionately arrested and have negative views of the criminal justice system.[204] Between 2006 and 2010, over half of all violent crimes—about 3.4 million a year—were not reported to the police.[205]

Criminal law actors vary in how they respond to these challenges. Some police departments and prosecutors' offices ignore minor crime or seek minimal punishment because they find existing criminal penalties to be unnecessarily harsh and unfair.[206] When actors outside the criminal justice system attach significant consequences to arrests—particularly unjustified and petty arrests—they risk disrupting criminal law actors' efforts to reach out to communities, cultivate witnesses, and tailor criminal law enforcement to community concerns.[207]

---

204. *See, e.g.*, Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 218 (2008) (discussing procedural justice and fairness in perceptions of the police); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 518 (2003) (discussing the need for community cooperation with policing).

205. Press Release, Bureau of Justice Statistics, Nearly 3.4 Million Violent Crimes per Year Went Unreported to Police from 2006 to 2010 (Aug. 9, 2012), http://www.bjs.gov/content/pub/press/vnrp0610pr.cfm.

206. Bruce A. Green & Alafair S. Burke, *The Community Prosecutor: Questions of Professional Discretion*, 47 WAKE FOREST L. REV. 285, 297 (2012) (describing some prosecutors as concerned with considerations about "whether [a] particular punishment would fit the crime and whether the ends of the criminal process can be adequately served without a conviction or imprisonment"); Kohler-Hausmann, *supra* note 14, at 636 (discussing how police can choose to ignore certain low-level offenses); *see also* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 704 (2011) ("[T]he central goal of any system of law enforcement is to promote the right level of deterrence as efficiently as possible.").

207. For this reason, some prosecutors publicly support laws that would expunge criminal records, reasoning that criminal records should not serve as a bar to reentry after a prison term has been completed. *See, e.g.*, Letter from Pa. Dist. Att'ys Ass'n to Senate Appropriations Comm. (June 14, 2013) ("For ex-offenders, a criminal record can be a serious barrier to obtaining gainful employment and resuming life as a law-abiding citizen. Prosecutors recognize that it is important that these individuals be able to find a job once they have paid their debt to society."); *see also* Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV.

Conflict may be particularly problematic from a law enforcement perspective when civil actors attach an undesired consequence to arrest, and that consequence is perceived by community members to be directly and causally related to the arrest. Conflict can change the deterrent effects of criminal law enenforcement, particularly in a way that erodes a community's willingness to cooperate with the police. Suppose an exploitative employer hires undocumented workers and then reports those who complain about wage theft to the police. If a local law enforcement agency prioritizes wage theft over unauthorized employment, the civil immigration decision effectively undermines the criminal law enforcement priority because the arrest itself may lead to deportation.[208] Similar outcomes arise in the domestic violence context, particularly where police have mandatory arrest policies that result in the arrest of both the victim and the alleged perpetrator.[209]

The noncriminal use of arrests can be particularly problematic when it creates public policy outcomes that undermine the integrity of the criminal justice system. I consider four important dynamics below: the systemic penalization of crime victims; the systemic penalization of those who are subject to false arrests; the disruption of important mechanisms of police oversight; and the lack of transparency and accountability with regard to the causal consequences of an arrest.

1. *Crime victims*

Some of the most troubling cases of conflict arise when a crime victim faces a severe penalty as a result of her decision to report crime. Consider the case of Ruth Holiday, who was evicted after her son, Stanley, broke into her home. Holiday had previously obtained multiple orders of protection against Stanley, and she called the police when he arrived.[210] She eventually received police assistance, but not before Stanley broke through two doors and forced his way inside.[211] After the attack, Holiday pressed charges. The police report listed her as the victim, but also erroneously indicated that Stanley lived in Holiday's apartment.[212]

553, 582-83 (2013) (discussing how criminal prosecutors may find that the risk of deportation undermines their efforts to cultivate trust and cooperation with immigrant communities).

208. Stephen Lee, *Workplace Enforcement Workarounds*, 21 WM. & MARY BILL RTS. J. 549, 564 (2012) (providing case studies of exploitative employers who reported undocumented workers to local police).

209. Kittrie, *supra* note 22, at 1451; Shankar Vedantam, *Destined for Deportation?*, WASH. POST (Nov. 2, 2010), http://wapo.st/1IL4jUV (discussing a Secure Communities identification of a domestic violence victim who was subject to a detainer after calling the police).

210. Holiday v. Franco, 709 N.Y.S.2d 523, 524 (App. Div. 2000).

211. *Id.*

212. *Id.*

Three weeks later, Holiday received an eviction notice stating that she was in breach of her lease because Stanley, who was described as an "unauthorized occupant," had been arrested and found with drugs.[213] (Stanley was carrying cocaine when he broke into the apartment—a fact that had been noted in the police report.)

Like most public housing tenants, Holiday did not have a lawyer, and she appeared pro se at the eviction proceeding.[214] She then waived her right to go forward with the hearing, and instead stipulated to a one-year probation of her tenancy, to unannounced inspections, and to permanently bar Stanley from entry.[215] One year later, unannounced inspectors found Stanley in the apartment.[216] According to Holiday, Stanley's presence came as a surprise. Two of her children—neither of whom lived in the apartment—admitted him without her knowledge while she was at work.[217] But she was in breach of the stipulation and was evicted.[218]

Holiday's eviction represents a failure of the criminal justice system. If local law enforcement officers want to encourage victims to come forward and report crime, they must protect those who do so from retaliation. In Holiday's case, the eviction—following closely after her call to the police, and citing details found in the police report—functioned as a retaliatory penalty, one that would deter a similarly situated individual from calling the police or filing a police report in the future.

But from the public housing perspective, Holiday was considered an eviction priority. Crime in public housing is a serious problem.[219] A landlord could view Holiday as an undesirable tenant because she might always be a magnet for Stanley.[220] And as HUD itself has recognized, landlords routinely evict domestic violence victims who call the police or whose abusers cause property

---

213. *Id.* (internal quotation mark omitted).

214. *Id.*

215. *Id.*

216. *Id.* at 524-25.

217. *Id.*

218. *Id.* The Housing Authority's eviction was eventually overturned after Holiday filed a lawsuit in state court. In a pre-*Rucker* decision, the court held that Holiday's particular circumstances shocked the conscience. The court emphasized her absence of a criminal record, her twenty-year tenancy, her efforts to enforce the protective order against Stanley, the presence of a disabled child in the household, and the fact that for her, public housing was a home of "last resort." *Id.* at 526.

219. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 127 (2002) (discussing congressional findings of violence in public housing); Mireya Navarro & Joseph Goldstein, *Policing the Projects of New York City, at a Hefty Price*, N.Y. TIMES (Dec. 26, 2013), http://www.nytimes.com/2013/12/27/nyregion/policing-the-projects-of-new-york-city-at-a-hefty-price.html (reporting that in 2013, twenty percent of New York City's violent crimes took place in public housing projects, which house about five percent of city residents).

220. *Cf.* Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 117-18 (2012) (finding that nearly one-third of nuisance property citations in Milwaukee during a two-year period originated in domestic violence incidents).

damage[221]—although such evictions can run afoul of antidiscrimination laws, the Violence Against Women Act, and HUD's own regulatory guidelines.[222] Landlords may believe that tenants like Holiday are unlikely to succeed in keeping disruptive relatives away, and that it is therefore better to replace them with others from a long waitlist.[223]

The criminal/noncriminal law interaction in Holiday's case magnifies the effect of contact with the criminal justice system. Holiday was forced to cede significant privacy interests by agreeing to unannounced home inspections. Additionally, the stipulation will remain in effect after the criminal justice process is complete, and regardless of whether Stanley is rehabilitated and becomes a source of support for his mother. Hector Monsegur, who was permanently barred from his mother's housing complex after completing his sentence for a drug-related felony, described the lasting effect of his arrest this way: "The courts let me do seven [years], but with them, it's one strike and they give me life."[224]

2. *Unlawful arrests*

Noncriminal justice actors can undermine the integrity of the criminal justice system when they attach consequences to false arrests. Consider the case of Charles Bradley, a lead plaintiff in a recent stop-and-frisk class action in New York City. Bradley, who worked as a security guard, was unlawfully arrested for trespass while on his way to visit his fiancée.[225] Bradley's arrest was demonstrably false; there was no probable cause. The arresting officer—who had a history of lying within the scope of his employment, and who admitted to having previously written a false summons to "help a friend"—also gave con-

---

221. Memorandum from Sara K. Pratt, Deputy Assistant Sec'y for Enforcement & Programs, U.S. Dep't of Hous. & Urban Dev., to FHEO Office Dirs. & FHEO Regional Dirs., Assessing Claims of Housing Discrimination Against Victims of Domestic Violence Under the Fair Housing Act (FHAct) and the Violence Against Women Act (VAWA) (Feb. 9, 2011), *available at* http://www.hud.gov/offices/fheo/library/11-domestic-violence-memo-with-attachment.pdf (acknowledging pervasive problems with the eviction of crime victims from public housing, with victims being evicted "after repeated calls to the police for domestic violence incidents" and because of "property damage caused by their abusers"); *see also* Lapidus, *supra* note 23, at 381 (discussing how zero-tolerance or one-strike housing policies have a disparate impact on women).

222. Memorandum from Sara K. Pratt, *supra* note 221.

223. *Id.* at 6-7 (discussing evictions where landlords believe that a tenant will be unable to prevent a domestic abuser from disrupting the property); *see also* Meister v. Kan. City, Kan. Hous. Auth., No. 09-2544-EFM, 2011 WL 765887, at *1 (D. Kan. Feb. 25, 2011) (noting that an eviction notice cited a domestic violence police report); Bouley v. Young-Sabourin, 394 F. Supp. 2d 675, 678 (D. Vt. 2005) ("It is undisputed that, less than 72 hours after the plaintiff's husband assaulted her, the defendant attempted to evict her [on the basis of breaching the lease].").

224. Manny Fernandez, *Barred from Public Housing, Even to See Family*, N.Y. TIMES (Oct. 1, 2007), http://www.nytimes.com/2007/10/01/nyregion/01banned.html (internal quotation marks omitted).

225. Ligon v. City of N.Y., 925 F. Supp. 2d 478, 497-98 (S.D.N.Y. 2013).

tradictory and implausible testimony about Bradley's arrest.[226] In particular, his testimony materially contradicted his arrest paperwork.[227]

Because Bradley worked as a security guard, the arrest was automatically shared with the authority that issued his security guard license. In order to keep his license, Bradley was required to provide documentation of the status of his prosecution within a month of his arrest.[228]

In Bradley's case, the checks on the criminal justice system ultimately worked. The prosecutor agreed to drop the charges after Bradley's fiancée provided evidence that he was her invited guest. His public defender advocated on his behalf with the prosecutor and with his licensing authority.[229] The licensing authority agreed to an extension, and the prosecutor dropped the charges before his license was suspended.

The outcome in Bradley's case was by some measures a success. The prosecutor made a reasoned judgment not to proceed, which allowed Bradley to avoid a license suspension. But obtaining this result required working against significant organizational barriers—ones that might well be insurmountable for the typical arrested individual in Bradley's situation. First, the arrested individual may be alone in attempting to negotiate with a licensing agency. Criminal defense attorneys—particularly public defenders with heavy caseloads—face significant pressure to prioritize their work on criminal dockets. Relatively few defendants are able to obtain free legal assistance in negotiating civil consequences related to arrests.

Arrested individuals who attempt to mitigate civil consequences face significant constraints. A typical arrested individual in Bradley's situation would have no information from the criminal court that would allow him to demonstrate that his arrest was baseless. In the short window Bradley was initially given to explain his arrest, he had no opportunity to take the police officer's testimony or review his arrest paperwork, much less access the officer's disciplinary history. In fact, a typical defendant in Bradley's circumstances might not have ever received a criminal complaint. Bradley was given a Desk Appearance Ticket after his arrest—a time-saving mechanism that allows an arrested individual to be released after booking, rather than waiting for arraignment.[230] The arraignment occurs at the first court appearance, often scheduled months later. But because the arrested individual does not have a criminal complaint that describes the circumstances of the arrest, he has limited ability to demonstrate to an employer that the charges are minor or unjustified.

---

226. *Id.* at 498-99.

227. *Id.*

228. Complaint at 29, *Ligon*, 925 F. Supp. 2d 478 (No. 12-cv-02274), 2012 WL 1031760.

229. *A Plaintiff Reflects on Judge Scheindlin's Clean Halls Decision*, BRONX DEFENDERS (Feb. 13, 2013), http://www.bronxdefenders.org/a-plaintiff-reflects-on-judge-scheindlins-clean-halls-decision.

230. *See* N.Y.C. CRIMINAL COURT, *supra* note 41, at 10.

These dynamics raise the stakes of an arrest, separate and apart from how that arrest is treated in the criminal justice system. Such interactions can significantly undermine a community's willingness to trust and cooperate with police. For arrested individuals, arrest decisions and their causal consequences are often not clear-cut. Police officers are the most visible government actors that certain communities encounter, and they are the ones likely to face legitimacy consequences if a community perceives the civil consequences of arrests to be excessively harsh or unfair. This possibility is particularly pronounced in communities where residents live close together, such as in immigrant enclaves or in large public housing complexes.[231]

3. *Regulation of police*

Noncriminal consequences of arrests can undermine the ability of law enforcement officers to regulate policing decisions. An arrest needs only a single police officer's determination of probable cause. When a police officer makes an arrest that is perceived as unfair or unjustified, other criminal justice actors have the ability—and an obligation—to dismiss that arrest. Prosecutors, in particular, wield significant oversight through charging discretion.[232] Prosecutors' enforcement choices can reflect their reasoned determination that an arrest lacks factual support, that the law is too harsh, or that "the application of that law to a particular defendant or in a particular context would be unwise or unfair."[233]

---

231. TASK FORCE ON SECURE CMTYS., U.S. DEP'T OF HOMELAND SEC., FINDINGS AND RECOMMENDATIONS 24 (2011) ("When communities perceive that police are enforcing federal immigration laws, especially if there is a perception that such enforcement is targeting minor offenders, that trust is broken in some communities, and victims, witnesses and other residents may become fearful of reporting crime or approaching the police to exchange information.").

232. Barkow, *supra* note 70, at 1048 ("The prosecutor acts with discretion that is almost unmatched anywhere in law."); *see also* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1599-600 (2005) (describing prosecutors as playing an important screening function, one that is more rigorous when they are detached from an investigation).

233. Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1252 (2011) (characterizing "'prosecutorial nullification[]' as those circumstances in which a prosecutor has sufficient evidence to secure a conviction against a defendant for conduct that violates a criminal law, but declines prosecution because of a disagreement with that law or because of the belief that the application of that law to a particular defendant or in a particular context would be unwise or unfair"); *see also* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679-80 (1995) (discussing nullification in the context of juries).

Prosecutors, of course, may decline to prosecute for other reasons as well, such as their pragmatic calculation that the evidence is insufficient to persuade a jury, or the crime is not significant enough to warrant taking resources away from another prosecution.

To the extent police officers regulate their behavior based on how arrest information is used,[234] police may behave differently if they are aware that arrests will be used for a civil purpose, even if they are not used for a criminal law enforcement purpose. For instance, police officers with the goal of detecting unauthorized immigrants may be more likely to engage in unlawful searches and seizures if they expect that those searches will reveal immigration documents that will be admissible in removal proceedings, regardless of whether prosecutions will proceed in criminal court.[235]

Hiroshi Motomura makes a related point, describing criminal prosecutors as having a "tempering" effect on police activity.[236] When officers see that their arrests do not result in prosecution, Motomura argues, they modify their arrest behavior. Prosecutors thus exert a tempering effect on arrest decisions by giving cues about what types of arrests are worthwhile. But police officers who view immigration enforcement as part of their mission might view deportation as a "tangible result that makes the arrest worthwhile," regardless of the outcome in criminal court.[237] Thus, police may have more of an incentive to ignore the cues of criminal prosecutors if they perceive deportation as an alternative way of achieving law enforcement goals.

4. *Transparency*

Regulatory conflict can also inject additional opacity into the management of arrests, preventing arrested individuals from understanding which consequences are imposed by the criminal justice system and which are imposed by other parties. Criminal justice outcomes, of course, are already shaped by a number of factors that are outside the control of an arrested individual. Factors such as the priorities of the local prosecutor's office, the quality of defense counsel, and whether a case proceeds in state or federal court can play a significant role in how any particular defendant is treated.[238]

---

234. Prosecutorial discretion may matter more in terms of setting long-term departmental priorities, rather than governing any individual police officer's behavior. *See* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 377-78 ("[T]he sociological literature strongly suggests that the primary goal of officers in the field in the average case is to get a 'collar.' If they do, they've done their job. It is the prosecutor's job to convict." (footnotes omitted)).

235. *See* David Gray et al., *The Supreme Court's Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7, 35 (2012).

236. Motomura, *supra* note 17, at 1847.

237. *Id.* at 1843-47.

238. Writing about the choice of federal or state jurisdiction, Sara Sun Beale argues that "[d]ual jurisdiction means that offenders are subject to a kind of cruel lottery, in which a small minority of the persons who commit a particular offense is . . . subjected to much harsher sentences—and often to significantly less favorable procedural or substantive standards—than persons prosecuted for parallel state offenses." Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 997 (1995).

Noncriminal justice actors who attach causal consequences to arrests can magnify the sense that criminal justice outcomes are not transparent, and can obscure the work that the criminal justice system is doing.

Assuming that an arrested individual has legal representation, the criminal defense attorney can explain to her client how her case will proceed if prosecuted in state versus federal court. But a criminal defense attorney may not be aware of, much less able to explain or negotiate, noncriminal justice consequences stemming from arrests. As a result, arrested individuals may view their postarrest outcomes as a "cruel lottery,"[239] but hold the arresting police officers or police department responsible for the causal consequences of the arrest, regardless of whether the police have any knowledge or control over what follows.

IV. EXERCISING OVERSIGHT OVER THE USE OF ARRESTS

Arrests have significant consequences outside of the criminal justice system. How should those consequences be regulated? Although police and prosecutors have enormous power to enforce the criminal law, their powers are constrained by the Constitution. Even when criminal procedure falls short—failing to give arrested individuals the right to a speedy day in court, adequate legal representation, and a meaningful opportunity to understand and contest the charges against them—it provides a yardstick for understanding how arrests should be used in the criminal justice system, and how they should not. But outside the criminal law context, similar standards do not apply, even though the stakes may be much higher for the arrested individual.

Much work remains to be done in understanding how and when arrests should trigger regulatory decisions. Noncriminal justice actors do not necessarily need to apply standards that are congruent to those of criminal procedure. Criminal law's use of arrests differs from that of other actors in important ways. For one, noncriminal justice actors do not need to evaluate arrests at all. They rely on arrests because arrest data are readily available and because they regard arrests as a proxy for information they value—but not because arrests are necessary to making regulatory decisions. Noncriminal justice actors also have incentives to focus on their own priorities when using arrest information, rather than seeking more broadly to combat crime.

Since noncriminal justice actors use arrests to achieve their own objectives, in practice, back-end administrative discretion provides a valuable way to manage the effects of arrests. This Part evaluates administrative discretion as a conflict-mediating tool, and argues that it is inadequate alone as a regulatory strategy. Administrative discretion can fail to mitigate some of the most serious noncriminal consequences of arrests. This Part assesses administrative discretion as a regulatory strategy, and preliminarily explores other alternatives, in-

239. *Id.*

cluding restricting how arrest information is used, and putting in place other oversight mechanisms.

A. *Administrative Discretion and Its Limits*

Noncriminal law actors necessarily exercise administrative discretion when they use arrest information. Discretion can be individualized—where civil authorities make a back-end determination about how to proceed in a given case—or it can be systemic, where agencies set general enforcement priorities.[240] For instance, in the immigration context, general guidelines that prioritize the deportation of those with criminal convictions reflect systemic discretion. Whether to deport any particular noncitizen—taking into account factors such as whether the noncitizen is considered an administrative priority and whether mitigating circumstances, such as the presence of U.S. family ties, counsel in favor of exercising discretion—reflects individualized discretion.

Discretionary enforcement decisions are context-specific. In the context of immigration enforcement, authorities must determine whether a noncitizen is legally removable, and then decide on a discretionary basis whether to proceed with deportation. In the context of public housing and licensing, the arrested individual has a legal entitlement to remain in her home or retain her license, and is entitled to due process before an eviction or a license revocation. The arrest serves as the starting point for a fact-based legal inquiry: Is the arrested individual in breach of her lease agreement, or has she met the criteria for a license revocation? After making a threshold legal determination, noncriminal law authorities also take into account equitable considerations. Public housing authorities exercise equitable discretion by looking at factors such as the seriousness of the offense, who would be affected by eviction, and whether there are other alternatives to achieving a similar result (for instance, whether the household is willing to bar the arrested individual from entry).[241]

Like unauthorized immigrants, at-will employees who lack legal entitlements to remain in their jobs can be removed at any time. Employers who rely on arrests may take into account equitable factors when deciding whether to

240. *See* Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 612-18 (2006) (distinguishing between rule-based discretion and administrative discretion). Motomura makes a similar distinction between macro-discretion ("when agencies and officials set enforcement priorities and support them with funds") and micro-discretion ("when agencies and officials decide whether or not to pursue the removal of a noncitizen after she has been identified as . . . removable"). HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 129 (2014).

241. Letter from Michael M. Liu to Pub. Hous. Dirs., *supra* note 151; *cf.* Letter from Shaun Donovan, Sec'y, U.S. Dep't of Hous. & Urban Dev., and Carol J. Galante, Acting Assistant Sec'y for Hous.—Fed. Hous. Comm'r, U.S. Dep't of Hous. & Urban Dev., to Private Owners & Agents of HUD-Assisted Properties (n.d.), *available at* http://nhlp.org/files/HUD%20Letter%203.14.12.pdf (calling on landlords to set discretionary admission policies that balance the need for safety against the interests of allowing family reunification when considering admission of those with criminal records).

take adverse employment action, such as the length of the employee's service. But they may place equal or greater weight on factors such as how easy the worker is to replace and the cost of conducting an inquiry.

Across the board, administrative discretion plays an important role in mediating the consequences of an arrest. Courts also attach significance to administrative discretion. In *Rucker*, the existence of back-end discretion itself—regardless of whether discretion was actually applied in practice—played a key role in the Court's decision to uphold the one-strike eviction policy.[242] Similarly, the Supreme Court emphasized the role of discretionary authority in its 2012 decision upholding one portion of Arizona's Senate Bill 1070 immigration law.[243] The absence of discretion has likewise been central to decisions striking down certain mandatory consequences based on arrests.[244]

Administrative discretion thus plays an important role in mediating the consequences of arrests. But administrative discretion alone is inadequate to avoid the most problematic instances of regulatory conflict. One persistent critique of administrative discretion is that it is prone to error, or applied inconsistently or unfairly.[245] Administrative agencies may not rigorously examine facts that counsel in favor of discretion. In the housing context, domestic violence victims or those who are charged with only minor crimes have been evicted or denied access to housing, despite HUD guidance to the contrary.[246]

---

242. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 133-34 (2002).

243. Arizona v. United States, 132 S. Ct. 2492, 2499 (2012). In upholding the portion of the law that authorized police officers to verify immigration status during the course of a stop or arrest—known colloquially as the "papers please" provision—Justice Alito's separate opinion emphasized that even if Arizona police officers conducted immigration checks, the federal government ultimately retained the discretion over whether to act on that information. *Id.* at 2526-27 (Alito, J., concurring in part and dissenting in part) ("At bottom, the discretion that ultimately matters is not whether to verify a person's immigration status but whether to act once the person's status is known. . . . [T]he Federal Government retains the discretion that matters most—that is, the discretion to enforce the law in particular cases."); *see also* MOTOMURA, *supra* note 240, at 130 (discussing the importance of federal immigration enforcement discretion to the holding in *Arizona v. United States*). For a discussion of the Court's preemption analysis with respect to this provision of S.B. 1070, see Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 626-32 (2013).

244. *See, e.g.*, Johnson v. City of Cincinnati, 119 F. Supp. 2d 735, 736, 740 (S.D. Ohio 2000) (striking down a law banning persons from entering "drug exclusion zones" for ninety days following a drug-related arrest, in part because there was no "case-by-case" determination by courts over whether the individual ought to be excluded); State *ex rel.* Okla. State Bureau of Investigation v. Warren, 975 P.2d 900, 904 (Okla. 1998) (striking down a licensing law that banned applying for a concealed weapons permit for three years after certain arrests, based in part on the blanket nature of the ban).

245. This is particularly true when enforcement agencies rely on private actors and others to conduct front-line screening. *See* Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1109-10 (2009) (arguing that instead of exercising regulatory discretion, employers who are delegated immigration enforcement authority instead collude with undocumented workers and selectively report those who complain of labor violations).

246. *See, e.g.*, Carey, *supra* note 131, at 567-68 (discussing public housing denials for nonviolent crime, such as writing bad checks).

Likewise, advocates point to U.S. citizens who have been wrongly placed in removal proceedings.[247]

But assuming that noncriminal justice actors make a sustained effort to enforce their own administrative priorities, back-end discretion alone still falls short. As a regulatory strategy, back-end discretion privileges the interests of the noncriminal justice actor over others. Noncriminal law enforcement officials may have an institutional interest in collecting a broad swath of information, even when they are aware that the arrest may be inaccurate or insignificant. They then use their own discretionary process to selectively target certain arrested individuals. This approach may benefit the civil actor by providing the most flexibility. Local law enforcement agencies, on the other hand, may value a system of front-end rules. Prosecutors and other criminal law actors may value the ability to tell community members with certainty that an arrest alone will not lead to deportation, eviction, or employment consequences.

Second, the exercise of back-end administrative discretion can be exceedingly opaque. Measured in terms of transparency—"the ease with which the public can discern both the outcome of legal decisions and the inputs that lead to such decisions"[248]—administrative agencies can provide minimal transparency of process. "Transparency of process depends on the ability of the public to know that an issue is being considered, to be involved in the decisionmaking process, to know who else is involved and in what ways, and to understand how a final decision is reached."[249] Administrative agencies that rely on arrests vary greatly in terms of their openness; some provide publicly accessible statistics about their enforcement choices, while others do not.[250] There is even less accountability for private actors, such as employers, who rely on arrest information.

Accurate information about how arrests are used can thus be difficult to find, particularly when arrested individuals have no legal counsel. And even the presence of legal counsel may do little to mitigate the effects of an arrest outside the criminal justice system. Criminal defense attorneys now have an obligation to advise their clients about certain civil consequences of criminal convictions[251] but face no similar constitutional obligation to advise clients about the consequences of an arrest alone. On a practical level, when criminal defense

---

247. *See, e.g.*, Esha Bhandari, *Yes, the U.S. Wrongfully Deports Its Own Citizens*, AM. CIV. LIBERTIES UNION BLOG RTS. (Apr. 25, 2013, 11:48 AM), https://www.aclu.org/blog/immigrants-rights/yes-us-wrongfully-deports-its-own-citizens (discussing U.S. citizens mistakenly identified for removal through Secure Communities); William Finnegan, *The Deportation Machine*, NEW YORKER (Apr. 29, 2013), http://www.newyorker.com/magazine/2013/04/29/the-deportation-machine.

248. Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1949 (2008).

249. *Id*.

250. For instance, ICE publishes data on Secure Communities removals, while HUD does not provide comparable statistics about how many evictions follow from arrest reports.

251. Padilla v. Kentucky, 559 U.S. 356, 360 (2010).

attorneys voluntarily assume the additional work of attempting to negotiate noncriminal consequences, they may have no access to timely, relevant information that will allow them to engage in effective advocacy.

Likewise, some arrested individuals may only have knowledge of the ultimate regulatory decision, such as license suspension, deportation, or eviction, but have no knowledge about the process that led to that decision, other than the fact of their arrest. Regulatory opacity can undermine strategic decisions made by law enforcement officers, particularly decisions designed to encourage immigrant crime victims and witnesses to come forward.

Third, the efficacy of back-end discretion is constrained by idiosyncratic timing and procedure. Even when immigration enforcement officials and others are willing to exercise discretion in favor of crime victims, witnesses, or the wrongfully arrested, they may face persistent barriers to gathering timely information. An arrested individual might be deported before he has a meaningful opportunity to demonstrate that he was wrongfully arrested. And as Bradley's case demonstrates, license suspension or other consequences may occur before any meaningful activity has taken place in the criminal justice process.

Fourth, even if noncriminal actors exercise back-end discretion, they continue to delegate front-end enforcement discretion to police officers. Noncriminal justice actors who rely on arrests do not screen a random population; they screen those whom local law enforcement officers decide to arrest. These dynamics magnify the effects of relatively minor policing decisions on the poor and on racial minorities, who are the most likely to be arrested.[252] By relying on arrests, noncriminal justice actors exacerbate the racial and class-based dynamics that undergird arrest decisions.

Finally, knowledge of the arrest itself can skew how noncriminal justice actors exercise discretion. In the immigration context, Motomura develops a thoughtful analysis of how delegating enforcement discretion to police officers shapes immigration enforcement decisions. Motomura writes: "[A]n individual unauthorized migrant's chances of arrest are very low. Once arrested, however, the chances are high that the federal government will move to deport or even criminally prosecute. Arrest discretion has by far the greatest effect on outcomes."[253] Motomura estimates that of unauthorized migrants who are arrested, sixty-five to ninety-five percent are prosecuted and forced to depart.[254]

---

252. Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2183 (2013) ("The spaces that poor people, especially poor African Americans, live in receive more law enforcement in the form of police stops and arrests."); Howell, *supra* note 14, at 291 ("[A]bout 86% of people arrested for misdemeanors in New York City in the years 2000-2005 were nonwhite. About 48-50% were reported to be black and another 32-34% Hispanic." (footnote omitted)); Motomura, *supra* note 17, at 1857 (discussing how racial profiling can skew immigration policies that rely on arrests); Pinard, *supra* note 29, at 967-68 (noting that African Americans and Latinos are disproportionately arrested); Smyth, *supra* note 199, at 58 (citing statistics that approximately ninety percent of indigent defendants in the Bronx, New York, are African American or Latino).

253. MOTOMURA, *supra* note 240, at 130.

254. *Id.*

The discretion to arrest has thus been "the discretion that matters" in immigration removal decisions.[255] This trend can be explained in light of immigration enforcement officials' institutional concerns. When immigration enforcement officials select which unauthorized noncitizens to remove, they decide from a caseload that has already been shaped by arrest decisions.[256] Once immigration enforcement officials are made aware of the presence of an unauthorized noncitizen, they also have important institutional incentives to proceed with deportation. It is one thing for immigration enforcement officials not to proactively invest resources in finding and deporting some subset of the nation's 11.1 million unauthorized noncitizens; it is another to ignore those who have been arrested and actively brought to the attention of immigration enforcement officials. When immigration officials ignore an arrested unauthorized immigrant, they run the risk of backlash, particularly if that noncitizen is subsequently arrested for another reason.[257]

Other actors face similar concerns. For instance, an employer who is aware of a worker's arrest—particularly a worker who operates independently much of the time, such as a home health care worker or a taxi driver—may face a heightened risk of liability if it knew of an employee's arrest and ignored signs that the employee was potentially negligent or otherwise posed a risk.[258] Back-end administrative discretion thus does not operate independently of the arrest decision; arrest information channels and narrows the grounds for exercising discretion.

B. *Other Policy Alternatives*

Once noncriminal justice actors are aware of arrests, they face significant pressures to take adverse actions. At the same time, they often receive inadequate information to allow for the meaningful exercise of equitable discretion. That raises the question of whether arrest information should be broadly accessible to noncriminal justice actors, particularly for minor subfelony arrests. While the appropriate use and regulation of arrest information is a considerably broad topic that cannot be adequately explored here, I raise two possibilities for how to create more transparency and procedural fairness in the use of arrest information. First, arrest sharing itself can be restricted. Second, other actors, such as criminal defense attorneys, prosecutors, or independent third parties,

255. Motomura, *supra* note 17, at 1822, 1833-34 (arguing that arrest discretion plays a key role in shaping deportation decisions).

256. MOTOMURA, *supra* note 240, at 231.

257. *Id.* ("[O]nce state or local officers identify and detain an unauthorized migrant, any federal decision not to seek removal will prompt much more political exposure and criticism than the systemic, macro-level discretionary federal decisions that make arrests more or less likely in the first place.").

258. *See* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 10, at 36 (discussing the role of negligent hiring torts in leading employers to rely on background checks).

can make concerted efforts to evaluate and address the noncriminal uses of arrests.

1. *Restrict arrest sharing*

The simplest way to address the effects of arrests outside the criminal justice system is to limit arrest sharing, including by automatically expunging arrests immediately after charges are dropped, and by restricting the dissemination of open arrest information outside of the criminal justice system. Today, precisely because arrest records are disseminated widely and stored in a number of databases, regulatory agencies and private actors who want to access arrest information generally have a number of options for obtaining it.[259] Arrest information can be obtained directly from criminal justice agencies or from private sources, which may be more prone to error.[260] In states that do not automatically seal arrests that do not result in a conviction, arrest records are available long after the charges are dismissed, and require considerable effort to expunge.[261] And even jurisdictions that do automatically expunge arrests do so at the time of dismissal,[262] which allows arrest information to be shared while the arrest is open and pending.

Legislators who restrict the use of arrest information will need to react to the many ways that arrests are used outside the criminal justice sphere. This will require a willingness to work against a tendency to frame crime in the abstract. As Joseph Kennedy argues, lawmakers tend to think of the most severe forms of crime, rather than examining how an arrest may affect an "ordinary" arrested individual.[263] They are also unlikely to consider how arrests alone can lead to adverse consequences that outstrip any penalties imposed by the criminal justice system. Lawmakers who pay greater attention to how arrest information is actually transmitted, and to whether arrested individuals have meaningful opportunities to respond, may well choose to restrict the noncriminal uses of arrests, even though doing so may mean denying noncriminal justice actors access to information that they believe is relevant and valuable for their own decisionmaking.

---

259. Jacobs & Crepet, *supra* note 71, at 210-11.

260. *See* U.S. DEP'T OF JUSTICE, *supra* note 78, at 2 (noting that most private employers conduct background searches through private enterprises or through commercial databases that aggregate criminal records that are available to the public from government agencies).

261. *See, e.g.*, SHARON M. DIETRICH, CMTY. LEGAL SERVS. OF PHILA., EEOC'S CRIMINAL RECORD GUIDANCE ONE YEAR LATER: LESSONS FROM THE COMMUNITY 4-5 (2013).

262. *See, e.g.*, N.Y. CRIM. PROC. LAW § 160.50 (McKinney 2014) (requiring that dismissed criminal charges be sealed).

263. Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 830 (2000) (arguing that when people consider crime in the abstract, they focus on the worst offenders, rather than understanding that crimes are also defined in a way that encompasses relatively minor behavior).

Because arrest information is already widely available, thoughtful commentators question whether it is viable at this point to restrict arrest sharing.[264] There are, however, important examples where arrest information has been sealed and the identities of arrested individuals have been protected. Juvenile records provide one precedent. While sealing in the juvenile context is imperfect—with exceptions for educational providers and others—it provides an important example of lawmakers choosing to protect the identities of arrested individuals from widespread dissemination, notwithstanding potential benefits from disclosure.[265]

Short of restricting the use of arrests, lawmakers can also promote transparency with how arrest information is used and stored. Even limited changes—such as timely disclosures about how and when arrest information is disseminated—may help arrested individuals and their counsel have more meaningful opportunities to contest the facts of their arrests. Greater transparency about the effects of arrests will also promote accountability and may prompt noncriminal justice actors to more narrowly tailor their use of arrests. Lawmakers can also encourage or mandate that noncriminal actors provide publicly available and easily accessible information about their use of arrests, including information about what types of arrest charges will be evaluated, the purpose and timing of the evaluation, the relevant decisionmakers, and any appeals process.[266]

2. *Exercise oversight*

Another way to mitigate the noncriminal consequences of arrests is for other actors, either within or outside of the criminal justice system, to exercise oversight over the effects of arrests.

Criminal defense attorneys are an obvious choice. Some defense attorneys already make efforts to attempt to inform defendants of how their arrest may be used outside of the criminal context.[267] A number of organizations encourage defense attorneys to engage in systemic efforts to address noncriminal consequences, and provide resources to help them do so.[268] Interventions by defense attorneys can be an important way to mitigate some adverse consequences of

---

264. *See, e.g.*, Jacobs & Crepet, *supra* note 71, at 211 (arguing that it is now too late to place confidence in policies designed to limit access to criminal records, because "[t]he informational infrastructure is too large, too entrenched, and too useful to too many people to make its contraction even a remote possibility").

265. *See generally* Henning, *supra* note 183, at 522-24 (discussing juvenile arrest sealing, its motivation, and certain exceptions in public housing and education).

266. For a discussion of these types of changes in the context of criminal convictions, see NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 10, at 30-42, 54.

267. *See, e.g.*, Smyth, *supra* note 13, at 480 (providing a roadmap for how criminal defense attorneys can advise clients about collateral consequences and seek outcomes that mitigate their effects).

268. *See, e.g.*, BRONX DEFENDERS, *supra* note 87, at 9; NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 13, at 62.

arrests. In Bradley's case, for instance, his defense attorney played a critical role in preventing his license suspension while his criminal case was proceeding.[269] But defense attorneys also face significant barriers to attempting to address the consequences of arrests. They frequently lack access to relevant information that would allow them to understand how an arrest might impact an arrested individual's job or housing situation. And defense attorneys who are already vastly overburdened with criminal caseloads have limited ability to attempt to mitigate noncriminal consequences.[270]

Another possibility is for criminal prosecutors to play a larger role in evaluating the consequences of arrests outside the criminal justice system. Prosecutors already evaluate cases and make determinations about whether an arrest is justified. They may also have an ethical duty in some cases to work with wrongfully arrested individuals to mitigate the noncriminal consequences of their arrests.

One change that prosecutors' offices can make is to evaluate arrests relatively early and dismiss meritless arrests.[271] Prosecutors have the ethical obligation to seek justice, rather than to routinely pursue convictions.[272] But prosecutors also have strong competing institutional incentives to focus narrowly on the work of seeking convictions or, more routinely, seeking plea bargains. Prosecutors have professional incentives to collect "wins,"[273] and some prosecutors perceive it to be in their interest to book suspects and to keep an arrest open, even if they ultimately intend to drop the charges prior to trial.[274] Relatively few prosecutors engage in early screening of arrests.[275]

Absent external motivation, prosecutors' offices are more likely to dismiss cases early if they perceive it to be in their interest to do so. For instance, after widespread attention to unlawful stops and arrests, the Bronx District Attorney's Office adopted a default policy of not prosecuting public housing trespass arrests unless the prosecutor first interviewed the police officer and was satisfied that there was a basis for the charges.[276] Prosecutors designed the policy after repeatedly determining that police officers engaged in unlawful arrests

---

269. *A Plaintiff Reflects on Judge Scheindlin's Clean Halls Decision*, *supra* note 229.

270. *See, e.g.*, Roberts, *supra* note 58, at 1096-97 (describing excessive workloads faced by public defenders).

271. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002) (arguing in favor of early prosecutorial screening).

272. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2470 (2004).

273. *Id.* at 2471.

274. See Kohler-Hausmann, *supra* note 14, at 614, for an argument that prosecutors and other agents in the criminal justice system use arrest information to monitor arrested individuals over time.

275. Wright & Miller, *supra* note 271, at 104 (noting that early prosecutorial screening "run[s] against deep-seated habits and traditions of prosecutors").

276. Joseph Goldstein, *Prosecutor Deals Blow to Stop-and-Frisk Tactic*, N.Y. TIMES (Sept. 25, 2012), http://www.nytimes.com/2012/09/26/nyregion/in-the-bronx-resistance-to-prosecuting-stop-and-frisk-arrests.html.

and falsified arrest reports. The interview requirement changes the default result; a case will be dropped unless the prosecutor determines that the officer's account is credible. The interview requirement also speeds the process of dismissing cases because the prosecutor must make a charging decision or drop the charges within forty-eight hours of the arrest.

With this policy, arrest information will still be entered into the law enforcement database and create a criminal record that will be transmitted to other actors. But the early dismissal can allow arrested individuals to more quickly demonstrate to an employer or other actor that the arrest was not significant, and that they should not be suspended or face other adverse action.

Prosecutors can also engage in a more coordinated response with other actors, some of whom implicitly expect prosecutorial cooperation. For instance, the New York City Taxi and Limousine Commission allows suspended taxi drivers to return to work prior to the dismissal of arrest charges if a prosecutor explains that the criminal charges will be dropped.[277] Similarly, immigration enforcement officials implicitly relied on prosecutorial intervention when they implemented guidelines designed to prevent the deportation of crime victims or witnesses.[278] This approach combines back-end administrative discretion with the assumption of prosecutorial intervention; noncriminal justice authorities assume that a prosecutor's office will provide the information necessary to show that the arrested individual is entitled to discretion.

This approach, however, has serious flaws. It is not at all clear that prosecutors are willing to reach out to employers, licensing authorities, or immigration officials to explain why that actor should not proceed with its enforcement decision. Some prosecutors may seek harsher penalties if they are aware of the noncriminal consequence; they may actively seek deportation or other civil consequences as a tangible outcome of a prosecution.[279] Similarly, prosecutors who are aware of a potential noncriminal consequence might view that consequence as an additional leverage point in plea negotiations. Thus, any particular prosecutor's willingness to negotiate civil consequences is constrained by how that prosecutor's office defines its institutional role.

Prosecutors may be willing to work to mitigate certain consequences when they have a vested interest in the outcome. For instance, some prosecutors may make efforts to mitigate civil consequences if a defense attorney asks for intervention as part of plea negotiations and offers something in return.[280] Similarly, if prosecutors have an independent reason to keep in touch with the arrested individual, such as in the case of an arrestee who becomes a cooperating wit-

277. *See* Nnebe v. Daus, 665 F. Supp. 2d 311, 318 (S.D.N.Y. 2009), *aff'd in part, vacated in part*, 644 F.3d 147 (2d Cir. 2011).

278. *See* Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs. et al., Prosecutorial Discretion for Certain Victims, Witnesses, and Plaintiffs (June 17, 2011).

279. *See* Eagly, *supra* note 18, at 1180-90.

280. Lee, *supra* note 207, at 578-80 (offering examples of criminal prosecutors who took immigration consequences into account during plea negotiations).

ness, they may make efforts on a case-by-case basis to mitigate the civil consequences of arrests. But in the typical case, a prosecutor may well be unaware of the civil consequence or unwilling to intervene unless she perceives an immediate institutional interest in doing so. For this approach to be effective, noncriminal justice actors who rely on prosecutorial discretion need to ensure that prosecutors are willing to fully assess cases and to contact administrative authorities if they choose not to proceed with a prosecution.

Given that neither criminal nor noncriminal justice actors have incentives to fully consider the effects of arrests outside the criminal justice system, an independent third party tasked with oversight might be a more promising option. Putting in place reporting requirements to a third party would itself be a significant step forward in promoting transparency and accountability. A third party—one that is not committed to either the goals of criminal law enforcement actors or to the interests of the noncriminal actor—may be in the best position to systemically evaluate considerations such as whether the underlying arrest information is accurate, whether it provides a meaningful informational proxy, whether it disproportionately affects certain groups, whether the evaluation process is fair and transparent, and whether the use of arrests has undesirable or unintended public policy consequences.

CONCLUSION

When actors outside the criminal justice system rely on arrests, they delegate front-end screening discretion to individual police officers and magnify the effects of arrest decisions. Across a number of spheres, noncriminal justice actors envision regulating particular types of people: they want to find the "criminal alien" who commits felonies; the tenant who deals drugs and makes his neighbors less safe; the worker who should not be placed in a position of trust; or the student who poses a risk to herself and to others. Arrests can be a valuable tool in meeting these objectives. But using arrests in this way comes with a significant cost, as it necessarily reaches well beyond these priorities. When actors outside the criminal justice system look at arrests as a whole, they overwhelmingly examine subfelony arrests and arrests that do not result in conviction. They magnify the effects of underlying and problematic police practices based on racial profiling. Regulatory decisions based on such arrests can carry devastating costs for arrested individuals and for the criminal justice system as a whole.

Noncriminal justice actors who rely on arrests are driven by their own organizational priorities, and they take an instrumental view of arrests—one that is at odds with the principle that an arrest alone is not indicative of guilt. They also respond to organizational incentives to conduct broad-based screening, even if there is no reason to believe that a particular type of arrest will correlate well with the civil actor's objectives.

In taking this approach, noncriminal justice actors systemically privilege their own interests above other important concerns. This creates a compelling

need to understand how arrests regulate individuals outside the criminal justice sphere, and to evaluate when and whether it is appropriate to allow an individual police officer's decision to arrest to do so much work.