

Prisões: para que servem?

*Arrests: What Are They Good For?*¹

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RESUMO: Mesmo os críticos da polícia muitas vezes assumem que as prisões são essenciais para o policiamento. Este artigo confronta essa ideia e argumenta que o aprisionamento deve ser reduzido. As prisões trazem danos aos indivíduos, às famílias e às comunidades. Dados seus custos, devem ser usadas apenas quando servem a um importante interesse do Estado. No entanto, em geral, elas acontecem mesmo quando não há tal interesse. Nos Estados Unidos, o direito constitucional funciona como a principal restrição ao aprisionamento. Mas ele não garante que o Estado tenha um motivo para realizar uma prisão — em vez de iniciar o processo criminal de outra forma. Embora a polícia realize milhões de prisões para iniciar o processo criminal, manter a ordem, coletar provas e detectar crimes, as prisões, geralmente, são desnecessárias para alcançar esses fins. Na maioria dos casos, existem meios alternativos razoáveis e menos invasivos para atingir tais fins, mesmo para alguns crimes graves. Como o Estado pode atingir seus objetivos de aplicação da lei sem tantas prisões, assim como os departamentos de polícia devem realizá-las em volume muito menor do que o atual, do mesmo modo, os estados devem restringir a autoridade legal para a realização de prisões. Embora haja riscos ao reduzir as prisões, esses riscos são menos problemáticos do que continuar essa forma de coerção estatal generalizada e desnecessária.

PALAVRAS-CHAVE: prisões; polícia; persecução penal.

ABSTRACT: Even police critics often assume that arrests are essential to policing. This Article challenges that assumption and argues that arrests should be curtailed. Arrests harm individuals, families, and communities. Given their costs, arrests should be used only when they serve an important state interest. Yet, arrests often happen even when no such interest exists. In United States, constitutional law acts as the primary legal constraint on arrests. But it does not ensure that the state has a reason to make an arrest — as opposed to starting the criminal process in another way. Although the police carry out millions of arrests to start the criminal process, to maintain order, to collect evidence, and to deter crime, arrests are usually unnecessary for these purposes. In most cases, reasonable, less intrusive, alternative means exist for achieving these ends, even for some

1 This article draws in large part on Rachel A. Harmon, *Why Arrest?*, 115 Mich. L. Rev. 307 (2016).

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serious crimes. Because the state can achieve its law enforcement objectives without so many arrests, police departments should conduct far fewer arrests than they currently do, and states should restrict the statutory authority to arrest accordingly. Though there are risks to reducing arrests, those risks are less problematic than continuing this form of widespread and unnecessary state coercion.

KEYWORDS: arrests; police; criminal prosecution

SUMMARY: I – The consequences of arrests; II – The law of arrests; III – Do we need arrests?; A. Arrests to start criminal proceedings; B. Arrests to maintain order; C. Arrests for felonies; D. Arrests to gather evidence; E. Arrests to deter; Conclusion: what to do about arrests.

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“You are under arrest.”

Perhaps no words stand more for what it means to be a police officer than these. It is no exaggeration to say that handcuffing a suspect and taking him to jail is the paradigmatic police activity. Police make arrests to start most criminal prosecutions, to take control of dangerous people, and to solve problems on the street. It is an axiom of criminal justice policy that law enforcement requires arrests.

Although arrests are at the heart of today’s most contentious critiques of criminal justice, critics almost never suggest that the power to arrest is part of the problem. When law enforcement detractors protest that police practices are abusive and discriminatory, they are frequently talking about arrests.

And when they contend that the killings by American law enforcement of Michael Brown, Walter Scott, Eric Garner, Freddie Gray, and George Floyd represent a racist violence analogous to lynching, they are often speaking of force used during arrests. To address these problems, commentators attack the judgment exercised in individual arrests, and they advocate reforms such as eliminating some low-level crimes, lowering sentences, discouraging racial disparities in policing, collecting more data, and prosecuting police officers more often. But they do not question police authority to make an arrest when a crime occurs. Even bitter critics of American criminal justice often accept that arrests are essential to ensuring public safety and order, at least for many crimes, and that the police power to arrest is therefore largely inviolable.

This Article considers whether the axiom is true. Do police need to arrest? Right now, generous law enforcement authority to arrest exists, largely unexamined. Perhaps because United States constitutional doctrine purports to regulate each arrest, Americans take the power to arrest for granted. If anything, when we consider arrests, we tend to assume that arrests are not too costly, at least for most crimes, because they are so briefly intrusive and because – even if not every arrest is legitimate – arrests are critical to law enforcement goals.

These assumptions are flawed. First, arrests are more harmful than they seem, not only to the individuals arrested but also to their families and communities and to society as a whole. Second, the law we use to evaluate arrests cannot fairly weigh these harms. The United States Constitution's restrictions on the state's power to arrest have limited bearing on whether arrests are worthwhile. And third, our traditional justifications for arrests – starting the criminal process and maintaining public order – at best support far fewer arrests than we currently permit. In the United States, we arrest something like ten million people a year and have arrested more than 250 million arrests over the past twenty years. Even this initial look at why we arrest suggests that our existing practice is indefensible.

I – THE CONSEQUENCES OF ARRESTS

By its nature, every arrest diminishes a person's freedom. This alone should lead to caution about arrests. But arrests also have more concrete consequences. In the near term, arrests are often frightening and humiliating. Arrestees lose income during the arrest, and sometimes their jobs when they

do not show up for work³. They pay arrest fees⁴, booking fees⁵, and perhaps attorney's fees, if they hire a lawyer for their first appearance. An arrest can affect child custody rights, it can trigger deportation, and it can get a suspect kicked out of public housing⁶. Over the long term, individuals with arrest records may have worse employment and financial prospects⁷. And all of these consequences can occur even if the arrestee is never convicted of a crime.

As compared to simply charging someone with a crime and giving him a summons to appear in court, arrests may increase the chances that a suspect will be detained prior to trial⁸. That in turn is linked to higher prison sentences, which compound the deprivation of liberty caused by the arrest itself⁹. And arrestees lose privacy: they are questioned; photographed and fingerprinted; often strip searched; and their DNA may be taken.

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- 3 Cf. Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, Wall St. J. (Aug. 18, 2014, 10:30 PM), <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402> (on file with Michigan Law Review) (describing individuals who had difficulty obtaining jobs because of their arrest records, even when the charges against them were ultimately dropped)
 - 4 For states charging police investigation fees for arrests, see, for example, Mich. Comp. Laws Serv. § 769.1f (LexisNexis Supp. 2016), 42 Pa. Stat. and Cons. Stat. Ann. § 9728(g) (West 2014), and Wash. Rev. Code Ann. § 10.01.160 (West Supp. 2016).
 - 5 See Barbara Krauth & Karin Stayton, U.S. Dep't of Justice, *Fees Paid by Jail Inmates: Fee Categories, Revenues, and Management Perspectives in a Sample of U.S. Jails* 30 (2005), <http://static.nicic.gov/Library/021153.pdf> [<https://perma.cc/DQG7-UP65>] (stating that 36 percent of jails responding to the survey imposed a booking fee ranging from \$3 to \$168 before criminal proceedings took place). Some states impose booking fees by statute. See, e.g., Colo. Rev. Stat. § 30-1-104(n) (2014) (authorizing counties to impose up to a \$30 booking fee).
 - 6 See 24 C.F.R. § 966.4(l)(5)(iii)(A) (2016) (stating that a public housing 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"); 24 C.F.R. § 982.553(c) (2016) (analogous provision for Section 8 voucher); Clare M. Nolan, California Research Bureau, *Children of Arrested Parents: Strategies to Improve Their Safety and Well-Being* 11 (2003), <https://www.library.ca.gov/crb/03/11/03-011.pdf> [<https://perma.cc/Q7PE-6R2T>]; Eisha Jain, *Arrests as Regulation*, 67 Stan. L. Rev. 1 (2014) (noting general consequences of arrest, including those related to child custody, deportation, and eviction); FY 2015 ICE Immigration Removals, U.S. Immigr. & Customs Enforcement, <http://www.ice.gov/removal-statistics> [<https://perma.cc/M7ZE-777P>] (implying that 41 percent of deportations involved arrests of individuals with no prior criminal convictions).
 - 7 See, e.g., Fields & Emshwiller, *supra* note 13 (citing a study by Tia Stevens Andersen of the University of South Carolina indicating that those who were arrested, but not convicted, earned \$2,000 less on average and were 8 percent more likely to be in poverty than those from a similar background who were never arrested); Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks and the Racial Hiring Practices of Employers*, 49 J.L. & Econ. 451 (2006); Christopher Uggen et al., *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 Criminology 627 (2014); see also *United States v. Marion*, 404 U.S. 307, 320 (1971) ("Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.").
 - 8 See Terry L. Baumer & Kenneth Adams, *Controlling a Jail Population by Partially Closing the Front Door: An Evaluation of a "Summons in Lieu of Arrest" Policy*, 86 Prison J. 386 (2006).
 - 9 See Christopher T. Lowenkamp et al., Laura & John Arnold Found., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (2013), <http://www.arnoldfoundation.org/wp-content/uploads/2014/02/>

Recent high-profile killings by police officers underscore that every arrest involves a confrontation between a suspect and a police officer that can go badly awry.

For an example, recall that in July 2014, New York Police Department officers were videotaped trying to arrest Eric Garner in Staten Island¹⁰. Garner refused to be handcuffed, and he was forcibly taken to the ground. The officer taking down Garner grabbed him by the neck. As a result of the hold and his underlying health problems, Garner was unable to breathe and died¹¹. It is clear from the video that Garner did not cooperate with his arresting officers. Doing so might have averted the force used against him. But it is inevitable that some arrestees will fail to comply with police directives, and had officers never sought to arrest Garner, he would likely still be alive. That is to say, arrests risk costly injuries and deaths, even when the arrest and the force used to ensure it are legally justified.

Many arrests are for crimes that are so minor that the harms of arrest would be far too serious a punishment if they were imposed for a retributive or deterrent purpose. Something like half a million arrests each year are for public drunkenness. People are arrested for loitering, for vagrancy, and for gambling. Eric Garner was selling loose cigarettes¹². Many think such crimes should not be crimes at all. But even if one assumes that imposing criminal punishment for these offenses is justified, it is hard to say that these crimes “deserve” the harms that come from arrests.

In any case, the harms of arrests extend far beyond criminal suspects. When someone is arrested, his family and community suffer, too. Officers put themselves at risk when they pursue fleeing suspects or counter physical

LJAF_Report_state-sentencing_FNL.pdf [https://perma.cc/8DLL-FJ35] (showing that, compared to defendants released prior to trial, those detained were four times more likely to receive a sentence of imprisonment and three times more likely to be given a longer prison sentence, even if the defendant is held for only a few days); Mary T. Phillips, New York City Criminal Justice Agency, Pretrial Detention and Case Outcomes, Part 1: Nonfelony Cases 26, 30, 35, 40 (2007) (linking one day of detention with an increase in conviction and incarceration rates, even controlling for other factors)

10 See Annie Karni et al., Two Cops Pulled Off Streets, Staten Island DA Looking into Death of Dad of Six After NYPD Cop Put Him in Chokehold During Sidewalk Takedown, N.Y. Daily News (July 19, 2014, 4:30 PM), <http://www.nydailynews.com/new-york/nyc-crime/staten-island-da-man-death-nypd-chokehold-article-1.1871946> (on file with Michigan Law Review).

11 Joseph Goldstein & Marc Santora, Staten Island Man Died From Chokehold During Arrest, Autopsy Finds, N.Y. Times (Aug. 1, 2014), <http://www.nytimes.com/2014/08/02/nyregion/staten-island-man-died-from-officers-chokehold-autopsy-finds.html> (on file with Michigan Law Review).

12 See Al Baker et al., Beyond the Chokehold: The Path to Eric Garner’s Death, N.Y. Times (June 13, 2015), <http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokeholdstaten-island.html> (on file with Michigan Law Review).

resistance. In fact, more officers are injured and killed during arrests than during almost any other single police activity.

Finally, arrests are expensive for the towns and cities that carry them out. Arrests take officers off the street, place demands on already overburdened courts, and incur jail costs¹³. In officer time alone, state and local governments spend more than \$1.8 billion each year on arrests.

Taken together, the costs of arrests are substantial. Overwhelmingly, these harms arise even when suspects are arrested legally and without excessive force.

II – THE LAW OF ARRESTS

In the United States, the Fourth Amendment is the Constitution's primary way of regulating arrests, and it seems reasonable to think that when an arrest satisfies the constitutional standard, it will also be justifiable as a policy and normative matter. In practice, however, Fourth Amendment law is a poor proxy for good arrest policy.

Although the United States Supreme Court has set minimum standards for reasonable arrests, those standards do not ensure that arrests serve important government interests or impose costs proportional to those interests. Under Fourth Amendment doctrine, given probable cause, an officer may "make a custodial arrest without balancing costs and benefits or determining whether... [the] arrest was in some sense necessary"¹⁴. It does not matter whether the person faces only a fine for punishment or whether he poses little threat to the public¹⁵. Nor does it matter whether the state can adjudicate the suspect's guilt equally well without an arrest¹⁶. Even bad motives do not negate the constitutionality of an arrest based on probable

13 The deprivation of freedom that arises solely from the arrest is the deprivation between the moment the suspect is taken into custody and the moment he is seen for a bail determination or released. That can be within a few hours, for stationhouse bail, or up to two days in the case of a first appearance before a magistrate. See *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 55–56 (1991). Some states require that arrests for particular crimes stay in jail for a minimum time, even if they post bond. See, e.g., Mich. Comp. Laws Serv. § 764.9c(3)(a) (LexisNexis 2002) (requiring mandatory holds for domestic violence); Tenn. Code Ann. § 40-11-150(h)(1) (2012) (requiring a person accused of domestic violence to be held for twelve hours if the accused is found to be a threat to the alleged victim).

14 *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); see *Dunaway*, 442 U.S. at 208 (1979) ("The standard of probable cause ... applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations.").

15 See *Atwater*, 532 U.S. at 354

16 See id

cause¹⁷: officers may use arrests to humiliate, to intimidate, or to exact revenge, all consistent with the Fourth Amendment. See *Whren v. United States*, 517 U.S. 806, 811-13 (1996).

The probable cause standard merely measures how much evidence the government has that the suspect committed a crime. That standard for legal arrests makes sense only because the Supreme Court views the government's "duty to control crime", *id.*, as necessarily generating "a strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity"¹⁸. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991). That is, the argument for the probable cause standard presumes that (rather than considers whether) the government needs to arrest criminal suspects in order to control crime.

When confronted with cases that highlight that the government can have probable cause to arrest without a strong interest in making an arrest, the Court has repeatedly doubled down. *Atwater v. City of Lago Vista* permits custodial arrests for fine-only offenses, for which public safety arguments for custody are at their weakest¹⁹. 532 U.S. 318, 354 (2001). *Whren v. United States* allows pretextual arrests. 517 U.S. 806, 812-13 (1996). And *Virginia v. Moore* rules constitutional even those arrests on probable cause that the state itself has declared do not serve state interests. 553 U.S. 164, 176 (2008). As even the Court admits, existing Fourth Amendment doctrine permits arrests that do not serve any government interest²⁰. *Atwater*, 532 U.S. at 346-47. According to the Court, by presumption, so long as the government has defined an activity as criminal, or even as a violation, it has sufficiently strong reason to make an arrest. The Court scrutinizes neither a state's decision to label an activity criminal, nor the conclusion that all criminal activities justify taking a suspect into custody.

The Court has also permitted a variety of exceptionally intrusive government activities on the theory that they are important in carrying

17 See *Whren v. United States*, 517 U.S. 806, 811-13 (1996) ("[O]nly an undiscerning reader would regard these cases as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause ...").

18 *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (citing *Gerstein*, 420 U.S. at 112).

19 532 U.S. at 354. *Atwater* dealt with a fine-only misdemeanor. 532 U.S. at 323. The Court has since extended its *Atwater* analysis to arrests for fine-only noncriminal traffic violations. See *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (*per curiam*).

20 *Atwater*, 532 U.S. at 346-47 ("If we were to derive a rule exclusively to address the uncontested facts of this case, *Atwater* might well prevail.").

out lawful arrests. The Court permits handcuffing arrestees; searches of the arrestee's person and the area surrounding him incident to arrest; strip searches at the jail; and detention for a night or two, even for trivial offenses and even when there is no indication of dangerousness.

Perhaps most importantly, if an arrest is based on probable cause, the Court has found it reasonable under Fourth Amendment law for officers to use force – including extreme force – to achieve it²¹. See *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). That is, although the government need not provide a reason for an arrest beyond criminal suspicion, the law assumes arrests are not only worth doing, but worth doing violently, at least if the suspect resists or tries to flee. Thus, officers may use violence against a suspect who threatens the success of the arrest, whether or not arresting him was socially useful in the first place, whether or not he poses any risk to the public, and whether or not another method, such as issuing a citation, would have been adequate to bring him to court.

In Part I, I argued that we engage in a massive number of arrests and that those arrests impose significant harms. The scope of these consequences suggests that our existing arrest practice must serve significant societal goals well to be justifiable. In this Part, I have argued that Fourth Amendment doctrine does not ensure that legal arrests meet that test. The probable-cause-and-no-more rule does not ensure that legal arrests serve the public interest. Of course, just because the law does not ensure that arrests serve the public interest does not mean that they do not do so. Given the consequences of arrests, evaluating our arrest practice requires determining whether and how well arrests serve societal goals in comparison to less harmful alternatives.

III — DO WE NEED ARRESTS?

Why, then, do we arrest? Public safety and public order are preconditions of any free society. Sometimes achieving those goals requires controlling individuals who threaten them. If police cannot do that job without arrests, then our practice of arrests might well be justified, despite

21 See *Graham v. Connor*, 490 U.S. 386, 396 (1989) ("Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.").

the harm it causes. This is the position of the Supreme Court, which has all but assumed that “[b]eing able to arrest... individuals is a condition precedent to the state’s entire system of law enforcement”²². *Tennessee v. Garner*, 471 U.S. 1, 10 (1985) (quoting Brief of Petitioners, *Garner*, 471 U.S. 1 (No. 83-1070), 1984 WL 566026, at *14).

Is the Supreme Court right? Just how badly do police need arrests?

The Court has frequently noted two specific ways arrests promote public safety and order. First, according to the Court, arrests are essential to start the criminal process and prevent criminals from escaping that process²³. Second, arrests prevent suspects from continuing disruptive or criminal activity²⁴. On occasion, the Court has mentioned a third benefit of arrests: arrests help the government collect evidence useful in prosecuting criminals²⁵. Unfortunately, the Court has never seriously evaluated how important arrests are in achieving these goals. In each case, the argument for using arrests is not as strong as it seems.

A. ARRESTS TO START CRIMINAL PROCEEDINGS

The most traditional view of arrests treats them as a critical part of the process leading to criminal punishment²⁶. Accusing the defendant and

22 *Tennessee v. Garner*, 471 U.S. 1, 10 (1985) (quoting Brief of Petitioners, *Garner*, 471 U.S. 1 (No. 83-1070), 1984 WL 566026, at *14).

23 *Atwater v. City of Lago Vista*, 532 U.S. 318, 351 (2001) (“An officer not quite sure that the drugs weighed enough to warrant jail time or not quite certain about a suspect’s risk of flight would not arrest, even though it could perfectly well turn out that, in fact, the offense called for incarceration and the defendant was long gone on the day of trial. Multiplied many times over, the costs to society of such underenforcement could easily outweigh the costs to defendants of being needlessly arrested and booked...”); *Gerstein v. Pugh*, 420 U.S. 103 114 (1975) (“Once the suspect is in custody, ... [t]here no longer is any danger that the suspect will escape or commit further crimes...”); *Terry v. Ohio*, 392 U.S. 1, 26 (1968) (“An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society’s interest in having its laws obeyed...”).

24 This is true in the Court’s view of both serious offenses and minor ones. Compare *United States v. Watson*, 423 U.S. 411, 419 (1976) (“The public safety, and the due apprehension of criminals, charged with heinous offenses, imperiously require that such arrests should be made without warrant by officers of the law.” (quoting *Rohan v. Sawin*, 59 Mass. 281, 284-85 (1850))), with *Atwater*, 532 U.S. at 349 (“But is it not fair to expect that the chronic speeder will speed again despite a citation in his pocket ...?”).

25 See *Virginia v. Moore*, 553 U.S. 164, 173 (2008) (“Arrest ensures that a suspect appears to answer charges and does not continue a crime, and it safeguards evidence and enables officers to conduct an in-custody investigation.”); *id.* at 174 (“[A]rrest will still ensure a suspect’s appearance at trial, prevent him from continuing his offense, and enable officers to investigate the incident more thoroughly.”).

26 See Wayne R. LaFare, *Arrest: The Decision to Take a Suspect into Custody* 3 (1965) (“In most cases, decisions to charge, to convict, and to sentence are made only with respect to those persons whom the police have first arrested. Thus, to a large extent, this decision determines those offenders against whom the official process is to be invoked.”); Cyril D. Robinson, *Alternatives to Arrest of Lesser Offenders*, 11 *Crime & Delinq.* 8, 8-9 (1965) (“Arrest has thus become the ordinary mode of beginning a criminal prosecution. As a result, arrest is not a process merely preliminary to possible punishment; it frequently is the punishment where the lesser offender is concerned.”).

adjudicating his guilt are prerequisites for convicting and punishing him, and arrests have long been the first step in accusation and adjudication²⁷. Taking for granted that there is good reason to engage in the criminal process to control and punish prohibited behavior, an assumption one should not make lightly, the question is how important arrests are in adjudicating criminal cases and punishing the guilty.

For much of criminal law history, criminal prosecutions began no other way²⁸. But today, many criminal cases start with some form of summons or citation. A summons – which can be issued by a judge in lieu of an arrest warrant – is an order to a suspect to appear in court on a particular date to answer a criminal charge or violation. A citation, called a summons in some jurisdictions, acts in lieu of an arrest and can be issued by a police official. It permits a suspect to remain out of custody upon the promise or expectation that he will appear to answer charges in court on a later date. Both are distinguishable from arrests in that suspects bring themselves to court rather than being placed there. Criminal summonses and citations remind us that even if arrest is the ordinary way to start the criminal process, there is nothing essential in the practice from the perspective of adjudicating criminal guilt. Criminal suspects can be charged, tried, and convicted without an arrest.

Summonses and citations have some considerable advantages as substitutes for arrests. Even apart from their benefits for criminal suspects, they offer substantial cost savings for municipalities in officer time, transportation costs, and detention costs²⁹. They may reduce conflicts between the police and citizens, which could decrease the total number of officers and suspects injured during efforts to start the criminal process³⁰. And because they produce fewer consequences and fewer confrontations, citations probably alienate heavily impacted communities less than arrests. In sum, using alternatives to arrest can improve criminal justice as well as minimize deprivations of liberty.

27 Terry, 392 U.S. at 26 (“An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society’s interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual’s freedom of movement, whether or not trial or conviction ultimately follows.”).

28 See Barrett, *supra* note 123, at 16–18; Sam B. Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 334 (1942).

29 Debra Whitcomb et al., *Nat’l Inst. of Justice, Citation Release 17–18 (1984)*, <https://www.ncjrs.gov/pdffiles1/Digitization/94200NCJRS.pdf> [<https://perma.cc/2DT7-GVVT>]; see also IACP, *supra* note 131, at 17–19.

30 See Int’l Ass’n of Chiefs of Police, *Citations in Lieu of Arrest, Literature Review 18 (2016)* [hereinafter IACP, *Literature Review*], <http://www.iacp.org/Portals/0/documents/pdfs/Citation%20in%20Lieu%20of%20Arrest%20Literature%20Review.pdf> [<https://perma.cc/A4CS-62SK>] (suggesting that citations could be safer for officers than arrests, though noting that no research supports the proposition).

These advantages explain why most departments use citations to some degree³¹. But arrests remain the default mechanism for starting the criminal process, and the law continues to favor arrests over citations. Citations would seem to have significant untapped potential. So why don't we use them more?

Partly, tradition. Through the early 1900s, even those charged solely with traffic violations in the United States were automatically arrested. By the 1940s, law permitted and police used citations for some traffic offenses, though citations for criminal offenses did not become commonly available for several more decades. See Debra Whitcomb Et Al., Nat'l Inst. Of Justice, Citation Release 1 (1984). After successful experiments in the late 1960s, major police and criminal justice organizations strongly advocated giving police officers discretion to issue citations in place of misdemeanor arrests, and states began adopting laws permitting that discretion³². By the early 1980s, all but nine states authorized citations for some criminal offenses³³.

Despite early enthusiasm, citation release for criminal offenses remained relatively uncommon, even after it was permissible. Initially, it seems, police resisted and misunderstood the use of citations, and policymakers did not adequately support the laws³⁴. These obstacles might have been overcome in time, but in the mid-1980s, criminal justice priorities

31 IACP, *supra* note 131, at 10, 18 (finding that while most departments use citations, they do so to varying degrees, and only weakly track their use in lieu of arrest).

32 See Fed. Bureau of Investigation, Uniform Crime Report: Crime in the United States, 2014, at 2 (2014), <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/persons-arrested/arrestmain.pdf> [<https://perma.cc/R9TD-55JA>]; Fed. Bureau of Investigation, Uniform Crime Report: Crime in the United States, 2012, at 1 (2012), <https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/arrestmain.pdf> [<https://perma.cc/H8AF-48M7>]; Howard N. Snyder, Bureau of Justice Statistics, Arrest in the United States, 1980–2009, at 16 (2011), <http://www.bjs.gov/content/pub/pdf/aus8009.pdf> [<https://perma.cc/F438-JX76>]. This and other federal data may overestimate the number of arrests. Federal statistics rely on the FBI's Uniform Crime Reporting Program. Reporting instructions for the UCR Program tell agencies to report as arrests "all persons processed by arrest, citation, or summons," an instruction that would appear to include some charged without a traditional custodial arrest. See Fed. Bureau of Investigation, Uniform Crime Reporting Handbook 98 (2004), <https://www2.fbi.gov/ucr/handbook/ucrhandbook04.pdf> [<https://perma.cc/2TUV-4BX7>]. The instructions then confusingly suggest that reporting refers only to arrests, that is, "the number of persons taken into custody." *Id.* Developing an accurate accounting of the number of arrests versus the number of criminal summonses and citations requires clearer instructions and more granularity in the data provided.

33 For the change in arrest definitions over time, compare the pre-Terry case, *Henry v. United States*, 361 U.S. 98, 103 (1959) ("When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete."), with the post-Terry decision in *Berkemer v. McCarty*, 468 U.S. 420, 433-35, 39 (1984) (distinguishing between a routine traffic stop, including roadside detention and questioning of a suspect, and a "formal arrest").

34 See *id.* at 117; see also *Illinois v. Caballes*, 543 U.S. 405, 414 (2005) (Souter, J., dissenting) ("There is no occasion to consider authority incident to arrest, however, for the police did nothing more than detain Caballes long enough to check his record and write a ticket." (citation omitted)).

shifted dramatically. Fear of rising violent crime and the crack epidemic led to new “tough on crime” rhetoric and policies, leading citations to drop almost entirely from conversations about criminal justice for decades. In the meantime, additional criminalization, a greater number of arrests, and additional costs for arrestees made arrests more consequential than ever.

History is not the only explanation for the ubiquity of arrest today. Arrests have one overwhelming advantage over citations: they guarantee the defendant’s presence to answer charges, a critical aspect of contemporary criminal process³⁵. Many people fear that if more citations were given, some defendants would fail to appear.

If we replace arrests with summonses and citations, most criminal defendants would still likely come to court. After all, most people show up when released on their own recognizance, and they (mostly) do not jump bail. Even apart from the social norms that shape legal compliance, defendants would accurately expect that if they fail to appear to answer for criminal charges, they could be subject to additional penalties³⁶. But even if most defendants appear as intended, some presumably will not.

When the risk of nonappearance is high, it might not be worth tolerating. But, for most offenders, the fact that a citation would generate uncertainty does not mean that an arrest is better, all told. To the degree that citations are a meaningful and cost-effective way of achieving the criminal justice ends we now use arrests to serve, they need not be perfect to be preferable. Moreover, although data is limited, research suggests that the rate at which suspects fail to appear for court proceedings is highly malleable.

For instance, many of the people who fail to appear pursuant to the terms of citations do so because they are sick, because they forget the date of their appearance, or because they cannot find the courtroom, rather than because they intentionally resist adjudication³⁷. In one study, over half of the failures to appear were solved by continuing the case for a week

35 Cf. *Bell v. Wolfish*, 441 U.S. 520, 534 (1979) (“[T]he Government has a substantial interest in ensuring that persons accused of crimes are available for trials and, ultimately, for service of their sentences, [and] confinement of such persons pending trial is a legitimate means of furthering that interest.”).

36 E.g., Ala. Code § 11-45-9.1(h) (LexisNexis 2008) (“If the defendant fails to appear as specified in the summons ... any person who willfully violates his written promise or bond to appear ... shall be guilty of the separate offense of failing to appear...”); Neb. Rev. Stat. § 29-426 (2008) (“Any person failing to appear or otherwise comply with the command of a citation shall be guilty of a misdemeanor...”); Tenn. Code Ann. § 40-6-215(b)(3) (2015) (“The failure to appear in court on the date and time specified is a separate criminal offense regardless of the disposition of the charge for which the person is originally summoned[.]”).

37 See Mark Berger, *Police Field Citations in New Haven*, 1972 Wis. L. Rev. 382, 385-86

and informing the suspect of the new day, with no additional penalty for the initial failure to appear. *Id.* at 407-08. If a jurisdiction limits the time between when the citation is given out and the appearance date, provides clear information about location and time, and gives suspects additional reminders about appearances, it may, at little expense, minimize failures to appear after release – and therefore lessen the risks of eliminating many arrests. New York City recently announced reforms along these lines, including robocalls and text messages reminders of court dates following summonses and allowing individuals flexibility in coming to court.

Connected to the issue of failures to appear is the idea that officers cannot always verify the identity of people with whom they interact, and identification doubts have long been argued to justify arrests. While real, the problem of identifying suspects is far less substantial than it used to be. Quite simply, technology that helps officers determine who a suspect is becomes stronger, cheaper, and more pervasive every day, and it is increasingly available to officers in the field. Nearly 90 percent of the United States' driving age population holds a driver's license. Most of those cards already comply with recent federal standards designed to make them harder to fake, and more will do so soon. Those without government-issued identification are increasingly identifiable by fingerprints or other biometric data. Police departments have already started using mobile technology that allows officers to quickly fingerprint, photograph, and scan the irises of individuals in the field and check them against federal databases to determine identity, criminal record, and the existence of outstanding warrants. One might lament the loss in privacy these technologies represent, but the means of identifying people on the street are ineluctably expanding. That expansion makes it possible for a police officer to be assured that someone is who he says he is.

Technology also affects how easy it is to find a suspect if he fails to appear. As a result, changing technology not only undermines the case in favor of arrests, it strengthens the case for citations. Almost all of us now leave an extensive digital trail when we use credit cards, bank cards, electronic benefits transfer cards, transit cards, electronic tolling devices (like FasTrak and E-ZPass), and other location-based services and devices. Most departments have automated license plate readers that can be used to track the whereabouts of drivers. More than 90 percent of us own cell phones, which allow police to determine where we are, as well as where we have been. Police departments use surveillance cameras and facial recognition

technology to find suspects with outstanding warrants or those who jump bail. Even a skilled person has a difficult time hiding if anyone is looking. Most criminals do not stand a chance against determined law enforcement.

I am not suggesting that if we replaced arrests with citations, everyone who did not appear would be easily found. For the moment, many of the common methods for looking for people remain resource intensive, and those who are now arrested are likely harder than average to find. However, as technologies make it cheaper to find those who hide, it may be possible to locate almost all of those who do not attend court dates. Some defendants would presumably always slip through the cracks – either because they could not be found or were not worth finding – but the end result might still be a significant improvement on current arrest practice, achieving a high level of compliance with legal process while reducing the costs associated with arrests.

These arguments suggest that the most traditional argument for arrests – that arrests are essential to begin the criminal process – is no longer persuasive. Using citations in place of arrests increases liberty and reduces costs. Assuming that failures to appear can be managed in cost-effective ways, something technology increasingly ensures, then for most defendants worth arresting, citations will be a credible alternative. Given how costly our system of arrest is, it is likely that managing failures to appear and accepting that some defendants will be costly or difficult to find is likely to be preferable. Given that, we cannot say that arrests are necessary to start the criminal process.

B. ARRESTS TO MAINTAIN ORDER

While lawyers treat arrests as the start of the criminal process, police officers and the scholars who study them often view arrests as a way to resolve threats to order. In many cases, we do not need arrests to achieve this goal; less costly tools would serve.

Many order-maintenance arrests occur when police respond to individuals who are disturbing others. An officer might arrest a mentally ill person who is behaving bizarrely on a street corner, an intoxicated man yelling noisily in a residential area, or a homeless person panhandling aggressively. In each case, an arrest solves the problem. In recent years, many departments have sought to prevent repetitive problems by collaborating with

communities to fix the conditions that encourage disorder³⁸. These efforts, which frequently employ both noncoercive measures and strategic arrests, have had success in reducing disorder and therefore in reducing arrests³⁹. Nevertheless, it is not always possible to prevent the kinds of problems that police must address.

Of course, police already have at hand several less coercive measures to resolve disruptive behavior. Police often use verbal commands and orders to disperse before they even consider arrest, and those practices should be encouraged. Officers trained to respond to calls involving mental disturbance can be especially effective in defusing situations with fewer arrests. Still, some disruptions resist these techniques.

Citations, tickets, and summonses are not as useful as alternatives to arrests for quickly addressing disorder as they are for starting the criminal process. After a citation, people who are drunk may continue to be excessively noisy, those who are angry may return to their fight, and those who are soliciting clients for prostitution to support a drug habit may persist in walking the street. Moreover, disruptive conduct of the kind that leads to police intervention is often closely tied to mental illness, homelessness, drug abuse, and alcoholism⁴⁰. These social problems sometimes lead to disorder precisely because they interfere with individual capacity to conform to behavioral norms, even when police are present. The same conditions may also make it less likely that individuals will be dissuaded from their conduct by citations⁴¹.

If a suspect is unresponsive or likely to continue disorderly conduct, then police may find removing the disruptive person from the situation the most effective way to defuse an order problem. But the need to remove a person does not always justify an arrest. First, a police officer can take someone off of the street without taking him to jail. If an individual with a serious mental condition poses a threat to himself or others, he can be

38 See Joel B. Plant & Michael S. Scott, Center for Problem-Oriented Policing, *Effective Policing and Crime Prevention* 32 (2009), <http://www.popcenter.org/library/reading/pdfs/mayorsguide.pdf> [<https://perma.cc/2CAB-QXET>] (describing problem-oriented policing).

39 See David Weisburd et al., *Is Problem-Oriented Policing Effective in Reducing Crime and Disorder? Findings from a Campbell Systematic Review*, 9 *Criminology & Pub. Pol'y* 139 (2010).

40 Kelli E. Canada et al., *Crisis Intervention Teams in Chicago: Successes on the Ground*, 10 *J. Police Crisis Negots.* 86 (2010).

41 Citations also raise other special problems for vulnerable populations, who may have trouble appearing at fixed court dates and paying fines, and who can be more difficult to find if they fail to appear.

detained for further psychiatric evaluation. If he needs social services, he can be taken to a crisis response drop-off center for the mentally ill, a detox center for those who are high or drunk, or a drop-in shelter for the homeless, to the degree one is available⁴². If he simply needs to be returned to a supportive environment, he can be given a ride home. Any of these will mitigate the immediate problem without the consequences of an arrest. This is not to say that criminal charges are never appropriate for public order offenses. But the decision to remove a disruptive person from the situation and the decision to charge him with a crime can both be separated from the decision to arrest him.

Second, a police officer can often prevent someone from continuing a crime by removing him from the scene of the incident briefly rather than by an arrest. Two men engaged in a shoving match outside a bar might stop if given a few minutes to cool down. Just as United States' constitutional doctrine permits officers with probable cause to detain a suspect in a traffic or pedestrian stop for the purpose of giving a warning, ticket, or citation or at the stationhouse in order to gather evidence, it may similarly permit short field detentions based on probable cause that criminal activity has occurred and would be likely to recur absent some brief form of restraint. During a short detention, many suspects will sober up, calm down, or lose the opportunity to be disorderly. A field detention could hinder continuing offenses without imposing the full negative consequences of an arrest.

The idea of field detentions raises obvious objections. For example, detentions would be less time consuming for a officer than an arrest. As a result, officers might do many more of them, including in circumstances in which they would have been unlikely to make an arrest. Introducing field detentions therefore risks reducing the harm of individual police-citizen interactions only to make it up in volume.

Given this risk, field detentions may not be good policy, especially if they are more intrusive than other means of maintaining order that have not yet been implemented to their full potential, such as the multidisciplinary police-community response teams recommended by the President's Task

42 See H. Richard Lamb et al., *The Police and Mental Health*, 53 *Psychiatric Servs.* 1266 (2002) (describing the use of mobile crisis teams and drop-offs to mental health professionals to assist police in dealing with the mentally ill); Henry J. Steadman et al., *A Specialized Crisis Response Site as a Core Element of Police-Based Diversion Programs*, 52 *Psychiatric Servs.* 219 (2001) (describing the characteristics of three mental health and substance abuse drop-off centers that make them effective alternatives to arrests for the mentally ill and drug dependent).

Force on 21st Century Policing. But if implemented well, field detentions would probably be less harmful than widespread order-maintenance arrests. An arrest is not the only way to solve order problems, and given the harms of arrests and the potential of alternatives, it is one that is increasingly difficult to justify.

C. ARRESTS FOR FELONIES

So far, I have mostly discussed alternatives to arrest using examples of misdemeanors, which account for more than 80 percent of arrests⁴³ in the United States. The same arguments apply to most felonies. Although some suspected felons should be arrested, our experience with pretrial release suggests that we can make predictions about which suspects are likely to reoffend before arraignment or are likely to fail to appear for court dates. It is very likely that our practice of arresting suspects, even for felonies, could be curbed significantly without risk of significant harm to public safety or order.

Arrest and pretrial detention are motivated by many of the same concerns, namely that suspects may fail to appear or may commit crimes in the interim. But the contrast between current decisions whether to arrest and decisions whether to detain pending trial is stark. Arrest is the default policy, especially for those suspected of serious crimes. By contrast, the law of pretrial detention has maintained a presumption *against* holding suspects. Policymakers have also sought ways to impose detention only on suspects who pose the highest level of risk, and they develop and use evidence-based measures to distinguish those suspects from others. The idea is that, while pretrial detention may sometimes be necessary to protect the public, it should only be imposed when we have good reason to believe it really is needed.

Pretrial detention decisions are hardly perfect. Still, comparing our existing arrest practice to our system of pretrial release shows how bizarre it is that we take for granted the necessity of so many arrests. Most felony defendants in the United States are released until trial, and 90 percent of those detained are held only because they do not have the money for bail. See Timothy R. Schnacke, Nat'l Inst. of Corr., *Fundamentals of Bail: A Resource*

43 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), http://www.courtstatistics.org/Other-Pages/~/_media/Microsites/Files/CSP/EWSC-2008-Online.ashx [<https://perma.cc/MM69-2ZM2>].

Guide for Pretrial Practitioners and a Framework for American Pretrial Reform 12 (2014). By contrast, almost all suspected felons are arrested. It seems odd to arrest so many defendants on day one because they are too risky to release when one day three or day ten they will likely be offered terms that permit them to go free, at least if they have some resources.

Pretrial release decisions are made after an adversarial hearing in court, based on clear and often objective, evidence-based criteria. The decisions can be revisited in short order, and they can be appealed. Despite these procedural protections, we favor release over detention. By contrast, arrest decisions are often made in the field. The decision to arrest rather than cite is usually uncontestable, irreversible, and unreviewable. Yet, in this context, we favor detention.

One could argue that pretrial release decisions are made in an environment much more conducive to assessing risk than the environment in which arrests for violent crimes are made. Pretrial release decisions happen in court at a bail hearing with input from pretrial agencies, prosecutors, defendants, and – when they are present – defense lawyers. The decision to arrest is more often made by police officers in the field in what are rapidly evolving circumstances. Nevertheless, risk assessment is not as impossible in the latter case as one might think.

First, police officers have the power to improve the conditions in which the decision to arrest is made. Just as an officer may hold a suspect during a traffic stop to check his driver's license, determine whether he has outstanding warrants, and inspect the car's registration and proof of insurance before issuing a ticket or warning⁴⁴, he may similarly detain a suspect whom he is citing or arresting to check his prior criminal history and record of failing to appear. This brief detention slows the decision down and allows an officer to gather information. Unlike an officer facing a decision to use force, an officer deciding whether to arrest need not respond instantaneously with only what he knows when he confronts the suspect.

Second, police officers have (or could have) all the information they need to make a determination about whether an arrest is necessary for a completed crime⁴⁵. The most critical risk factors to assess a defendant's risk

44 *Rodriguez v. United States*, 135 S. Ct. 1609, 1611 (2015).

45 If an officer stops an offender during the act, the decision to arrest might involve an additional consideration: whether the person would continue criminal activity in the absence of an arrest.

level at a bail hearing are also available to police officers in the field, by radio or computer, including whether the defendant has prior failures to appear; whether he has prior convictions; whether the present charge is a felony; and whether he has a pending case against him. Assuming that similar factors predict failures to appear and new criminal activity before trial and before arraignment, police officers might be able to engage in evidence-based risk assessment before determining whether to arrest.

We might even develop a risk-assessment tool for the decision to arrest. Research could identify objective factors that help predict whether a suspect is likely to reoffend or fail to appear if cited rather than arrested, such as the nature of the crime at issue, and the suspect's prior history of failing to appear. Once those factors are identified, police could input information related to those factors on a simple paper form, a computer program, or a phone app. The tool could then either guide the officer's arrest decision, by labeling a suspect high, medium, or low risk, as some pretrial release tools do, or perhaps more helpfully, spit out a directive to arrest or not to arrest.

To be sure, this is nothing like the way decisions to arrest are presently made. Citations are overwhelmingly forbidden by state law for all felonies and many misdemeanors. Even when there is no *prohibition* on issuing a citation, police officers are rarely *required* to cite rather than arrest, even when the risks of release are low. And officers have no way but intuition to assess those risks.

Police might be reluctant to give up what has long been viewed as a core part of their discretion. Some judges probably resist constraints on their pretrial release decisions too. But arguments in favor of the discretion to arrest depend on the idea that refined, situational analysis by officers best serves the public interest, because it most effectively identifies those suspects who should be arrested⁴⁶. If more people can, through a less discretionary process, be released with only a low increase in failures to appear and reoffending, then broad discretion to arrest is no longer justified.

46 See, e.g., Debra Livingston, Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing, 97 Colum. L. Rev. 551, 651 (1997) ("[C]lose, local examination by police of a neighborhood's problems, the devotion to ameliorating those problems in consultation with a neighborhood's residents, and the sparing use of public order laws for the specific purpose of strengthening the social fabric of a community, may offer a better alternative than what in many places has gone before."); Tracey L. Meares & Dan M. Kahan, The Wages of Antiquated Procedural Thinking: A Critique of *Chicago v. Morales*, 1998 U. Chi. Legal F. 197, 209-11 (arguing that "guided discretion" allows officers to incorporate community context and input into arrest and enforcement decisions).

Of course, risk assessment will not necessarily lead to fewer arrests for defendants charged with violent crimes. But if we actually engage in research to construct and validate risk-assessment instruments for the decision to arrest, we might be surprised by what we find. We might well discover that choosing not to arrest a suspect – even one charged with a violent crime – is far less risky than we imagine. We generally have accepted preventive arrests as easily justified because we think that the cost of arrest is small and the threat the suspects pose is significant. In Part I, I argued the first claim is not true. The argument here suggests that perhaps the second one is not either.

D. ARRESTS TO GATHER EVIDENCE

I have focused on arrests used to start criminal adjudication, to maintain order, and to protect public safety. There is, however, one additional argument that is sometimes used to defend arrests on pragmatic grounds that might require more analysis: evidence collection.

When an officer arrests a suspect, the law in the United States permits a full search incident to arrest of the person and the immediately grabbable area⁴⁷, a protective sweep of a house or car⁴⁸, ; and often an inventory search of a car or belongings⁴⁹. The government may obtain fingerprints and DNA, and photograph scars, tattoos, and other (sometimes) incriminating physical characteristics⁵⁰. The officer may ask ordinary booking questions and, with *Miranda* warnings, may conduct more extensive custodial interrogations⁵¹. Together these forms of questioning provide not only information about specific crimes, but also provide information about criminal associates and gang membership that are used to understand criminal patterns and networks. Restricting arrests and replacing them with citations or summonses limits all of these forms of developing evidence.

47 United States v. Robinson, 414 U.S. 218, 224 (1973); Chimel, 395 U.S. at 762-63.

48 See Maryland v. Buie, 494 U.S. 325, 327 (1990)

49 See Colorado v. Bertine, 479 U.S. 367, 370-72 (1987)

50 See Maryland v. King, 133 S. Ct. 1958, 1980 (2013)

51 Pennsylvania v. Muniz, 496 U.S. 582, 601-02 (1990) (allowing routine booking questions to be asked as part of the booking process); Miranda v. Arizona, 384 U.S. 436 (1966) (allowing interrogation following a custodial arrest so long as warnings are given)

Many of the arrest-conditional methods of gathering evidence have non-arrest substitutes, including *Terry* stops and frisks⁵², consent searches⁵³, searches pursuant to the automobile exception to the warrant requirement⁵⁴, exigency searches, searches pursuant to a warrant, and noncustodial interviews. But these substitutes are not perfect. They are variously narrower in scope, more demanding of individualized suspicion, and more costly to litigate than arrest-related, evidence-gathering techniques. Reducing arrests may mean giving up some evidence for some crimes.

The risk of losing evidence from custodial interrogations seems especially high. Suspects and witnesses are often arrested precisely so that the police can question them. If the arrest does not happen, neither will the interrogation. It is not enough to say that the suspect could be questioned at a different time. Before the arrest, the arrestee can choose to walk away from the police rather than talk. After the arrest culminates in an arraignment, he will usually have a court-appointed lawyer, who will put a stop to further questioning. The practicalities of arrest in combination with criminal procedure doctrine permit officers to generate a space in which suspects and witnesses are isolated and unrepresented and therefore likely to cooperate.

The key aspects of arrest for this purpose are the uncounseled interview and the threat of criminal charges. We have already seen that criminal charges are not dependent on arrest. If we truly believe that brief, uncounseled interviews are necessary to solve crimes, perhaps we should permit them. If doing so is inconsistent with other criminal justice values, then we might not want to permit arrests in order to create a workaround. In any case, given the costs generated by other aspects of arrests – for example, the criminal record – arrests seem unnecessarily broad for the job. Simply put, we can forgo the evidence; allow arrests; allow interrogations without arrests; or invest in alternative evidence-gathering methods. I do not assume arrests are the right answer.

E. ARRESTS TO DETER

It could be that, whether or not any specific arrest is necessary to achieve a law enforcement function, arrests have benefits more generally

52 *Terry v. Ohio*, 392 U.S. 1 (1968).

53 See, e.g., *United States v. Drayton*, 536 U.S. 194 (2002); *Florida v. Bostick*, 501 U.S. 429 (1991); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

54 *California v. Acevedo*, 500 U.S. 565 (1991).

because they allow police to deter crime. As it turns out, however, contemporary criminological research suggests that police do not deter crime best by arresting criminals⁵⁵.

In recent years, several policing strategies have been shown to reduce crime effectively, including mostly notably, hot spots policing, problem-oriented policing, and focused deterrence strategies. None of them is arrest-intensive. By contrast, arrest-intensive policing strategies, including traditional patrol and arrest strategies, zero-tolerance policing, and some versions of broken-windows policing, have much less evidence to support their effectiveness. It seems that police can deter without making many arrests.

How do police deter if not by arresting criminals? Daniel Nagin, a prominent criminologist, has argued that police deter crime more by persuading would-be offenders that they will not succeed than by arresting some criminals to make others afraid of future arrest. That is to say, police deter as “sentinels”, not as “apprehension agents”⁵⁶. Of course, the relationship between how police guard against crime and their use of arrests is complicated: if they never arrested anyone, it is hard to see how officers would persuade offenders that they would not succeed⁵⁷. Still, “[t]he bottom line on the effectiveness of policing tactics that emphasize arrest for misdemeanors... is that they don’t appear to be as effective as tactics designed to enhance guardianship or mitigate opportunities without arrest”⁵⁸. It is fair to say that police do not need to make a lot of arrests to stop a lot of crime.

CONCLUSION: WHAT TO DO ABOUT ARRESTS

Right now, arrests are deeply embedded in our system of criminal justice. They are often unnecessary to achieve our law enforcement goals, and we have not yet seriously explored the range of possible alternatives. Nevertheless, while other criminal justice practices are subject to intense

55 See Cynthia Lum & Daniel S. Nagin, *Reinventing American Policing: A Seven-Point Blueprint for the 21st Century* 9-12 (Feb. 9, 2016) (unpublished manuscript) (on file with Michigan Law Review).

56 See Daniel S. Nagin et al., *Deterrence, Criminal Opportunities, and Police*, 53 *Criminology* 74, 78-79 (2015); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 *Crime & Just.* 199, 237-40 (2013).

57 See Daniel S. Nagin et al., *Deterrence, Criminal Opportunities, and Police*, 53 *Criminology* 74, 78-79 (2015); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 *Crime & Just.* 199, 237-40 (2013).

58 Cynthia Lum & Daniel S. Nagin, *Reinventing American Policing: A Seven-Point Blueprint for the 21st Century* 9-12 (Feb. 9, 2016) (unpublished manuscript) (on file with Michigan Law Review).

scrutiny and proposals for profound reform, arrests are left largely intact, if they are considered at all.

Clearly, police departments could, starting any time, conduct far fewer arrests than they currently do. They should, and some have. Still, we cannot expect individual officers, police chiefs, and departments to balance adequately the interests of individuals and society in formulating arrest practices or to retain a commitment to doing so. Given competing demands, even a police department that states an intent to reduce arrests may find it difficult to do so, especially over time.

More meaningful change likely requires state law reform. States could expand the authority to issue summonses and citations where it is lacking, and they could limit statutory authority to arrest when it is least needed. They could impose evidence-based criteria on officers' decisions to arrest, and they could establish external mechanisms for reviewing those decisions. Federal law is less important, but at the very least, the federal government could reconsider its policy of actively incentivizing arrests through federal grant programs, as it now does.

Efforts to reduce arrests would likely create new risks. As the United States Department of Justice's investigation into unconstitutional law enforcement practices in Ferguson, Missouri forcefully reminds us, tickets, fines, fees, and outstanding warrants for failure to appear can be as effective as arrests and convictions at reinforcing inequality⁵⁹. If arrest-reduction policies are implemented in a way that substantially expands tickets, fines, fees, or warrants, then – in the aggregate – reform might do more harm than good. If we reduce arrests for those who have identification, or those who can convince an officer that they will show up pursuant to a summons, then we may disproportionately reduce arrests for the rich and white, exacerbating existing inequalities in the distribution of criminal justice harms.

These risks suggest that we should take care in how we restrict arrests, not that we should avoid the project. For example, it cannot possibly be that the best way to avoid overloading people with fines they cannot pay and issuing warrants to arrest them is to arrest them in the first instance instead. In Ferguson, the Justice Department suggested that this problem can be mitigated by improving municipal court practices, tailoring fines to ability

59 See Dep't of Justice, Civil Rights Div., Investigation of the Ferguson Police Department 3 (2015)

to pay, and instituting community service alternatives to fines and fees, all of which reduce the consequences for failing to pay for tickets or appear in court. Experience will likely lead to additional strategies for minimizing the tradeoffs that come from embracing alternatives to arrests.

If you think substantially reducing or eliminating arrests sounds impossible, consider that the civil process made this very transition. By the end of the sixteenth century, at common law in England, most civil defendants were arrested to start civil court proceedings. Though the practice lasted for centuries, over time “[t]he harshness of arresting a defendant on trumped-up charges and forcing him to raise bail, especially in small cases, brought about the development of procedures which helped to mitigate the rigors of the arrest system”⁶⁰. Now, of course, arrests to start civil suits are both unheard of and unnecessary. Yet, somehow, civil legal actions manage to continue. Given that criminal arrests are far more problematic and far less necessary than we have previously acknowledged, perhaps now is the moment to reconsider these arrests rather than continue to take this widespread form of state coercion for granted.

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Artigo convidado.