

Arrest Unbound

Eisha Jain*

ABSTRACT: Arrest has long been legally defined as a seizure, or temporary restraint on liberty, under the Fourth Amendment. But when the government arrests someone today, it imposes far more than a seizure. The government also marks individuals with arrest records, which enable wide-ranging penalties, such as deportation, civil detention, loss of a professional license, and disruption of custody. One consequence is that this regulatory structure unravels arrest from the key institutional checks that would permit the public or key actors to examine whether the government-imposed consequences stemming from arrest are fair and justified. Proportionality depends on the public at large being able to recognize and mediate the full government-imposed consequences of arrest. But we are rapidly moving toward a regulatory landscape where no one—not a prosecutor, defense attorney, informed voter, and certainly not the arrested individual herself—genuinely has the tools to recognize what the full consequences of an arrest might be, much less mediate them.

This Article argues responding to these penalties requires recognizing arrest as more than just a seizure. Arrest should be understood in light of the relationship between government action and the political and legal process. The more systemic government action is tied to arrest, the greater the need for systemic safeguards. It unpacks one proposal for reform: conceptualizing arrest not just as a seizure, but as a government-imposed marker with attendant penalties.

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* Henry P. Brandis Distinguished Professor of Law, University of North Carolina School of Law. Earlier drafts benefited from feedback at faculty workshops at the University of Alabama School of Law, Cardozo Law School, Cornell Law School, George Mason Law School, Northeastern Law, the University of North Carolina School of Law, and Washington & Lee School of Law, and from presentation at the Immigration Enforcement Scholars Roundtable.

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INTRODUCTION

Arrest has long been defined as a physical seizure, or a temporary restraint on liberty, under the Fourth Amendment.¹ But when the government arrests someone today, it imposes more than a seizure. Arrests systemically create arrest records—notations of the interaction between the individual and the government. These markers make it remarkably easy for the government to impose what I have previously conceptualized as widespread “regulatory” consequences.² Arrest can land people in immigration detention and lead to deportation.³ It can trigger eviction or denial of rental housing, loss or suspension of a professional license, or upend child custody arrangements.⁴

When the government arrests someone, it asserts the legal authority to bind a person and restrict their liberty. But the arrest power itself should be bound within a larger framework of law. Historically, these bounds were to

1. *Dunaway v. New York*, 442 U.S. 200, 212–13 (1979).

2. See generally Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015) (developing an account of arrests as regulation and explaining how it operates in immigration, housing, professional licensing, and other arenas).

3. See *id.* at 827–29.

4. JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 2–4 (2015) (comparing a criminal record to a “negative curriculum vitae”); Jain, *supra* note 2, at 834, 839–43; Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937, 939, 942 (2003).

some degree self-evident. The primary government action at issue was the seizure, and the only systemic legal process at issue was the potential criminal prosecution. But today, government action related to arrest has grown well beyond the criminal legal system. Arrested individuals do not just navigate the criminal prosecution, but also other regulatory processes triggered by arrest.

For low-level arrests, courts have tended to ignore these penalties or treat them akin to stigma, such as bad publicity.⁵ This approach overlooks the enormous, formal governmental action behind arrest. It also overlooks how the burgeoning growth of arrest records has unraveled key mechanisms of checking the reach of arrest. And the problem is not limited to arrest—many contacts with the police, such as stops or more fleeting encounters with law enforcement, can create marks that trigger adverse penalties—but these penalties are often dismissed as mere reputational harm.

This Article argues that arrest has not just become disproportionate—it has also become unmoored from a legal framework that would allow institutions, courts, and the public at large to recognize and mediate the consequences of arrest. At the same time, courts continue to assume that there's a simple way for key actors to recognize and respond to disproportionate penalties. Normatively, I argue that courts should take into account the mismatch between the consequences of arrest and the public's ability to mediate those consequences. One proposal is to recognize the different types of government action at issue with arrest—actions that reach well beyond the seizure itself—and to reconstruct procedural guardrails to permit key actors to recognize and respond to the reach of arrest.

For a preliminary illustration of this argument, consider two Supreme Court cases decided within months of each other: first, *Atwater v. City of Lago Vista*⁶—a staple of criminal procedure courses—and second, *Department of Housing and Urban Development v. Rucker*, decided in 2002, which upheld the government's ability to engage in “one-strike” federal housing evictions.⁷ These cases occupy separate doctrinal silos; they are virtually never studied or analyzed together. But taken together, they show how arrest spans institutions and imposes costs that reach well beyond just the immediately visible penalties. The *Atwater* decision gives police broad authority to make custodial arrests for fine-only offenses, but the opinion doesn't reference the impact of a criminal record—it doesn't even mention the creation of the arrest record.⁸ *Rucker* gives the government broad authority to engage in evictions, but it makes no mention of how high-volume, low-level arrests trigger eviction in the first place.⁹ Taken together, the opinions reveal a too-limited understanding of how law and the political process operate to check the consequences of arrest.

5. See discussion *infra* Section II.A.

6. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 351–52 (2001).

7. *Dep't of Hous. & Urb. Dev. v. Rucker*, 535 U.S. 125, 136 (2002).

8. See generally *Atwater*, 532 U.S. 318.

9. See generally *Rucker*, 535 U.S. 125.

In *Atwater*, Gail Atwater was subjected to a full custodial arrest for a fine-only offense.¹⁰ She argued that her custodial arrest—the process of handcuffing her, taking her to the jail, and booking her—was “unreasonable” under the Fourth Amendment, given that she was arrested for a seatbelt violation that carried a maximum penalty of a fifty-dollar fine, with no possibility of jail time.¹¹ The Court agreed that the officer behaved unreasonably—the opinion described her custodial arrest as a “pointless indignity”¹²—but held that there was no Fourth Amendment violation.¹³ The Court observed that policing officials, elected officials, and the public at large have a mutual interest in curbing bad behavior by police officers—and “the good sense (and, failing that, the political accountability) of most local lawmakers and law-enforcement officials” would in itself check “unnecessary minor-offense arrests.”¹⁴ The opinion contains no discussion of Atwater’s newly minted arrest record because it reduced the government action at issue to the physical arrest.¹⁵ The Court’s theory of political accountability rests on its assumption that the cost of the arrest lay in the indignity itself—and that the public would be able to recognize and check police officers who habitually made unnecessary or unjustified arrests.¹⁶

In the *Rucker* case, Pearlie Rucker argued that her household—consisting of herself, her adult daughter Gelinda, and several children—should not be evicted after Gelinda’s off-premises drug arrest.¹⁷ Rucker’s family was subject to a mandatory lease provision that provided for potential eviction if a “tenant, any member of the tenant’s household, or any guest” engaged in “any drug-related criminal activity on or off [the] premises.”¹⁸ Rucker mounted a due process challenge to “one-strike” evictions.¹⁹ She argued that tenants should not be subject to eviction for behavior that they had no knowledge or control over.²⁰ In *Rucker*, the Court rejected this argument.²¹ According to the Court, it would be a different story if Rucker and the others were subject to mandatory or automatic evictions under the federal housing law at issue.²² But because the Housing Authority ultimately retained the discretion over whether to

10. *Atwater*, 532 U.S. at 324.

11. *Id.* at 325.

12. The Court characterized Atwater’s arrest as a “pointless indignity” and commented that the officer’s behavior demonstrated “extremely poor judgment [at best],” especially given that Atwater was arrested in front of her young children, who were in the car with her and traumatized by her arrest. *Id.* at 346–47.

13. *Id.* at 354–55.

14. *Id.* at 353–54.

15. *See generally id.*

16. *See id.* at 351–54.

17. *Dep’t of Hous. & Urb. Dev. v. Rucker*, 535 U.S. 125, 128–29 (2002); *see also* Brief for Respondents at 1, 4–5, *Rucker*, 535 U.S. 125 (Nos. 00-1770, 00-1781).

18. *Rucker*, 535 U.S. at 127; *see* 24 C.F.R. § 966.4(l)(5)(i)–(ii) (2025).

19. Brief for Respondents, *supra* note 17, at 40–41.

20. *Id.* at 27–28.

21. *Rucker*, 535 U.S. at 135–36.

22. *Id.* at 133–34.

evict—the arrest served as a notice mechanism for the Housing Authority about potential lease violations—and because Rucker had the chance to have her say in housing court, the eviction procedures comported with due process.²³

Policing receives no discussion by the Court, nor was it raised in any of the briefings.²⁴ But it is impossible to understand how Rucker landed in eviction proceedings without recognizing the policing practices at issue.²⁵ Two separate arrests led to the eviction notice.²⁶ First, a police officer approached Rucker’s daughter Gelinda when the officer spotted her with an open container of alcohol, which she put away when the officer approached.²⁷ Instead of letting her go with a warning, the officer chose to arrest her, which, in turn, gave him the legal authority to perform a search incident to arrest.²⁸ During the search, the officer found drugs.²⁹ A few months later, a police officer approached Rucker’s adult son Michael on suspicion of “loitering at a bus stop.”³⁰ During this encounter, the officer learned of Michael’s outstanding warrant, which, in turn, provided the basis for his arrest.³¹ When the officer asked Michael where he lived, Michael gave his mother’s address.³² We do not know why the officer thought Michael was loitering instead of waiting for a bus, why Michael gave his mother’s address to the officer (he may have lacked stable housing of his own), or precisely when the arrest was reported to the public housing authority. But there is no doubt that the records of the arrests were pivotal. Rucker’s eviction notice was served nine months after Gelinda’s arrest, and it cited both Gelinda’s and Michael’s arrests as grounds for her eviction.³³ The arrests served as the way for the Housing Authority to learn of potential lease violations, and then it wielded its own discretion to commence eviction.

23. *Id.* The Court noted that the one-strike law “does not *require* the eviction of any tenant who violated the lease provision. Instead, it entrusts that decision to the local public housing authorities.” *Id.*

24. *See generally id.*

25. “Stop-and-frisk” and “public-order” policing are both terms used to refer to high-volume, low-level policing. Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 165 (2015).

26. Brief for Respondents, *supra* note 17, at 1.

27. Petitioners’ Brief on the Merits at 10, *Oakland Hous. Auth. v. Rucker*, 535 U.S. 125 (No. 00-1781).

28. *Id.*; *United States v. Robinson*, 414 U.S. 218, 235 (1973) (holding that police officers who make custodial arrests may perform warrantless searches incident to arrest and that such searches are “reasonable” under the Fourth Amendment).

29. *Rucker*, 535 U.S. at 128.

30. Petitioners’ Brief on the Merits, *supra* note 27, at 10.

31. *Id.* at 10–11. For a criticism of the prevalence of warrants and their use justifying arrests, see *Utah v. Strieff*, 579 U.S. 232, 247 (2016) (Sotomayor, J., concurring) (“The officer’s discovery of a warrant was not some intervening surprise that he could not have anticipated. . . . It was part and parcel of the officer’s illegal ‘expedition for evidence in the hope that something might turn up.’” (quoting *Brown v. Illinois*, 422 U.S. 590, 605 (1975))).

32. Petitioners’ Brief on the Merits, *supra* note 27, at 11.

33. *Rucker*, 535 U.S. at 128.

In the twenty years since Gail Atwater and Pearlie Rucker appealed to the Supreme Court, the consequences of arrest have grown only greater. Arrest spans institutions. When courts or other actors focus on a single process, they miss the bigger picture. It's not just a question of whether any given arrest is justified or whether an eviction is justified, but rather whether the two processes, taken together, outstrip the ability of key actors to recognize and respond to the consequences of arrest.

Consider how little notice mattered in both *Atwater* and *Rucker*. Both Rucker and Atwater were in the dark about the full consequences of arrest. Neither recognized the relationship between the mark of an arrest record and consequences such as eviction. Atwater did not even brief the significance of having a criminal record,³⁴ and the *Rucker* briefing also does not discuss the significance of the underlying arrests that triggered conviction.³⁵ No one knew the full costs of arrest, so they did not raise it when challenging the government action at issue.

Consider the role of process. The standard of probable cause for arrest is designedly low; it is markedly different than the standard for a conviction. Prosecutors wield significant discretion in criminal cases, and they make judgments about whether certain charges are justified.³⁶ But prosecutors have no role in mediating penalties outside of the criminal legal system—they may also be in the dark about potential noncriminal penalties. Dismissal of an arrest will not prevent eviction, or immigration detention or deportation, because arrest is being used for very different purposes in these regulatory systems than in the criminal law enforcement system. Procedures designed to provide effective notice within one system do not work when penalties apply across institutional settings.

Finally, consider the role of institutions. There may be good reasons for a housing authority to have access to arrest data. There are also legitimate reasons to give police officers significant discretion in when and how they choose to make arrests. But in both cases, that discretion should not be unlimited. Nor should it take place in a black box. The key question for a case like *Rucker*'s is not just whether people are evicted, but rather how arrests are reported, how they are used, whether the housing authority functions like a rubber stamp and routinely uses arrest decisions to trigger evictions, and whether open container violations regularly lead to eviction notices. In short, how does the arrest process shape the process of terminating access to housing? Members of the polity ought to be able to ascertain whether a housing authority is exercising discretion in a way that aligns with the interests of the community at large. When courts defer questions relating to the reach and

34. See generally Brief of Petitioners, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2000) (No. 99-1408).

35. See generally Brief for Respondents, *supra* note 17.

36. I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1568 (2020) (discussing prosecutors who “use their power to decline to pursue some offenders [and] also use their power to overcharge many others”).

impact of arrest to the political process, it is crucial to understand whether the legal and political process provides an accurate portrait of how institutions wield their discretion.

When the governing doctrinal framework disaggregates eviction from the arrest practices that trigger those evictions—and when it also disaggregates arrest records from downstream regulatory consequences—it erroneously assumes that the public recognizes the reach and impact of arrest, and its relationship to institutions that wield discretion and oversight. In other words, each institution examines only one aspect of arrest. Meanwhile, arrested individuals may experience multiple penalties, imposed through separate regulatory systems operating autonomously, at once.

This Article develops the core claim that arrest has become unbound from key institutional and legal tethers that have historically permitted members of the polity to understand and limit the reach of arrest. I propose a framework for evaluating how arrest fits within the larger legal and political process, one that involves identifying and responding to three different aspects of arrest—the physical restraint, the mark of a criminal record, and the regulatory action based on the record. I argue that the more unbound the penalties of arrest, the stronger the case for heightened procedural protections before penalties are imposed. I conclude by considering how this framework could apply to creating low-level arrest records and distributing arrest information.

A few caveats to the analysis: My focus here is on the government-imposed consequences of criminal arrest as an illustrative example—but the dynamics discussed here are not unique to arrest. Similar dynamics operate with other police contacts; even a stop or a call to the police can create a mark that triggers predictable penalties. Although I have limited my analysis to arrest (as opposed to conviction), the reach of the argument goes further.

In addition, my focus here is on uncoordinated government actions. A growing body of scholarship analyzes coordinated government action—such as when government actors coordinate their enforcement approaches.³⁷ My focus here is on a different phenomenon: systemic government action based on arrest where the key actors themselves are in the dark about how arrest information is used across institutions.

The balance of this Article proceeds as follows: Part I situates the analysis by providing background on the evolving meaning of arrest. Part II surfaces political accountability concerns and theorizes how arrest has become unbound from a legal system designed to give notice of the stakes, construct effective

37. For instance, housing or immigration officials could inform local police how to wield arrest power to better serve regulatory ends. For discussions of this dynamic, see, for example, Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1300 (2010) (analyzing federal immigration enforcement); Evelyn Malavé, *Criminal Courteaucracy*, 61 AM. CRIM. L. REV. 1205, 1209 (2024) (examining coordinated actions imposed by court administrative actions after arrest). See generally Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015) (discussing the executive branch's use of pooling across various policy domains and the effects of that pooling).

procedures, and provide for effective institutional responses. Part III turns to proposals for reform and considers how to reconstruct the bounds of arrest.

I. THE EVOLUTION OF ARREST

Arrest constitutes one of the most visible features of the criminal law, but it remains misunderstood. Police make ten million arrests each year—an estimated one arrest every three seconds.³⁸ While the inner workings of punishment remain hidden behind prison walls, arrests often take place in the most public of places.³⁹

For much of our nation's history, the key government action involved with arrest was the bare seizure, or the temporary restraint on liberty. Today, however, arrest constitutes much more. The government systemically and formally marks individuals with arrest records.⁴⁰ And those records, in turn, trigger wide-ranging regulatory consequences. Courts, for the most part, have ignored these penalties altogether or treated them akin to stigma. As a result, they too often present an incomplete account of the severity of the government action at issue.

This Part situates the analysis by discussing the burgeoning significance of arrest.

A. THE EXPANDING SIGNIFICANCE OF ARREST

Arrest alone, regardless of conviction, triggers massive consequences outside of the criminal legal system. Police databases routinely record arrest information at the time of booking.⁴¹ This arrest record is automatically—and often immediately—shared with a host of regulatory entities, including immigration, housing, and professional licensing officials.⁴² As a result, for

38. *Every Three Seconds: Unlocking Police Data on Arrests*, VERA INST. JUST. (Jan. 2019), <https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/overview> [<https://perma.cc/Y2U4-QCXA>]. Throughout, this Article uses “arrest” to refer solely to criminal arrests. It does not refer to noncriminal arrests, such as immigration arrest, except where expressly noted.

39. Cell phone, body camera, or other surveillance videos can often offer a window. *See, e.g.*, Audra D.S. Burch & John Eligon, *Bystander Videos of George Floyd and Others Are Policing the Police*, N.Y. TIMES (Nov. 24, 2021), <https://www.nytimes.com/2020/05/26/us/george-floyd-minneapolis-police.html> (on file with the *Iowa Law Review*).

40. JACOBS, *supra* note 4, at 2 (comparing a criminal record to a “negative curriculum vitae” that “contains only disreputable information”); James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U.J. LEGIS. & PUB. POL’Y 177, 177 & n.3 (2008); Pager, *supra* note 4, at 939, 942 (describing incarceration and criminal records as a “negative credential” established by the state); DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 67–72 (2007) (discussing the mark of a conviction and its impact on obtaining entry-level work); Eisha Jain, *The Mark of Policing: Race and Criminal Records*, 73 STAN. L. REV. ONLINE 162, 178–79 (2021) (arguing that criminal records should receive greater attention in debates about police reform).

41. Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 101 MINN. L. REV. 541, 556 (2016) (discussing how “individual cases are dutifully recorded and memorialized” in a way that “would not have been possible or useful” prior to technological changes).

42. Jain, *supra* note 2, at 810–17.

many arrested individuals—and particularly noncitizens, who face automatic jailhouse immigration screening—the most consequential regulatory action happens after the seizure, as a result of being marked with an arrest record.⁴³ My aim here is to briefly provide an overview of the consequences of arrest; a more in-depth treatment is available in prior work.⁴⁴

Some penalties of arrest are a predictable consequence of criminal law. Arrest has always included the physical experience of being detained, including a police officer's lawful ability to use force to effectuate a detention.⁴⁵ A new arrest can trigger revocation of probation or parole or other consequences for the 5.4 million people currently subject to some sort of criminal court supervision.⁴⁶ It can delay the dismissal of an open criminal case.⁴⁷ Prior arrest records can affect plea bargaining.⁴⁸

In contrast to these consequences, the regulatory use of arrests is relatively new. Agencies use arrests as a means to achieve their own ends, such as: identifying noncitizens for removal; keeping tenants who might pose a risk out of housing; and identifying whether any particular person has the temperament or judgment for a particular professional license.⁴⁹ By relying on arrest, rather than conviction, regulatory agencies may be able to accomplish their own administrative goals in a cost-effective way. But because the information sharing occurs at the time of arrest, it elevates the significance of arrest relative to conviction. It carries the risk of entrenching false or incorrect information. And it creates harmful spillover effects, including the potential for unnecessary detention, job loss, or family breakup without justification.

43. *Id.*

44. *See generally id.* (discussing how regulatory actors outside of the traditional criminal justice system rely on arrests).

45. *California v. Hodari D.*, 499 U.S. 621, 624 (1991).

46. EMILY D. BUEHLER & RICH KLUCKOW, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2022 – STATISTICAL TABLES 5 (2024), https://bjs.ojp.gov/document/cpus22st_revised.pdf [<https://perma.cc/Pg8C-SDMS>] (estimating that in the United States at the end of 2022 there were 3,668,800 people on probation or parole, and 5,407,300 adults under supervision of a correctional system). The arrest alone can trigger revocation of probation or parole. *See* Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 295, 322–23 (2016) (explaining that probation may be revoked if the probationer is arrested for or charged with new criminal conduct without any requirement that the state prove the violation beyond a reasonable doubt).

47. *See, e.g.*, Eric S. Fish, *The Constitutional Limits of Criminal Supervision*, 108 CORNELL L. REV. 1375, 1396–1401, 1435 (2023) (recognizing that probation and parole can be revoked with an arrest and arguing that the constitutional doctrine governing this approach contributes to mass incarceration); Kate Weisburd, *Rights Violations as Punishment*, 111 CALIF. L. REV. 1305, 1307–26 (2023) (analyzing “non-carceral punishments” that can commonly be triggered by arrest); Doherty, *supra* note 46, at 340.

48. Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1202, 1206 (2016).

49. Jain, *supra* note 2, at 811–12, 815–16.

1. Consequences of Arrest on Immigration

For over a decade, every custodial criminal arrest has triggered automatic immigration screening.⁵⁰ The aim of jailhouse immigration screening through the Secure Communities program is to identify and remove noncitizens who lack lawful immigration status.⁵¹ In terms of mechanics, the fingerprints and other biographic information taken from arrested individuals during the normal booking process are automatically shared with the Department of Homeland Security (“DHS”), which, in turn, checks that data against immigration databases.⁵² Based on a remote screening process, immigration officials check if the person in custody appears in immigration databases and appears to be removable.⁵³ They then determine whether to send a detainer to a local jail to request that the jail officials maintain custody of the arrested individual for an additional period of time so that immigration officials can assume custody.⁵⁴

The rationale for this program is to provide a cost-effective means of identifying and removing noncitizens from inside the United States.⁵⁵ The stated focus has historically been on identifying arrested noncitizens who fall within removal priorities established by the Executive.⁵⁶ But the costs are significant and include wrongful detention and the risk of undermining immigration goals of integration. I discuss each in turn.

i. Wrongful Detention

For a number of reasons—bad data, poor communication, weak procedures, and poor recordkeeping, among others—information sharing at the time of arrest has led to systematic cases of wrongful detention after arrest. Data from a class action settled in December 2024 in New York City shows that the government wrongfully detained close to twenty thousand arrested individuals after their criminal case had been marked closed or dismissed.⁵⁷ The average length of over-detention based on faulty immigration detainers was over two

50. *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENF’T (May 16, 2025), <https://www.ice.gov/secure-communities> [<https://perma.cc/XW5W-P32D>]. The program began in 2008 and was fully implemented nationwide in 2013.

51. *Id.*

52. *Id.*

53. *Id.*

54. Eisha Jain, *Jailhouse Immigration Screening*, 70 DUKE L.J. 1703, 1721–22 (2021).

55. U.S. IMMIGR. & CUSTOMS ENF’T, U.S. DEP’T OF HOMELAND SEC., *SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS* 6 (2009), https://www.ice.gov/doclib/foia/secure_communities/securecommunitiesstrategicplan09.pdf [<https://perma.cc/YW3M-GTTR>].

56. Jain, *supra* note 48, at 1720–21.

57. Luis Ferré-Sadurní, *New York City to Pay \$92.5 Million to Improperly Detained Immigrants*, N.Y. TIMES (Dec. 18, 2024), <https://www.nytimes.com/2024/12/18/nyregion/migrants-detention-settlement-deportation.html> (on file with the *Iowa Law Review*).

weeks.⁵⁸ These were individuals who in many cases were not legally removable; they were jailed and then released.⁵⁹

Oscar Onadia, the lead plaintiff in the New York City case, endured forty-two days of detention because jail officials believed his immigration status made him ineligible to post the one-dollar bail for an unlicensed driving charge.⁶⁰ After weeks of unsuccessful attempts to pay his one-dollar bail, he was eventually released.⁶¹ Similar cases of over-detention on a mass basis have unfolded around the county.⁶²

The reasons for wrongful detention are complex. They include database errors, lack of training, time pressures on immigration officials, and the social reality that enforcement occurs against a vulnerable population that often has exceedingly little opportunity for recourse. First, the databases DHS officials rely on are vulnerable to systemic error. As an expert witness, a former deputy chief of staff for Immigration and Customs Enforcement (“ICE”) explained, “DHS databases contain many errors, missing information, and inconsistent information. The information in the databases is only as reliable as the accuracy of the information being entered and the accuracy of its entry into the system.”⁶³ Second, jail officials may not be trained in how to handle ICE detainees. In Onadia’s case, for instance, the jail officials simply refused to accept his bail payment, even though there was no legal reason to do so.⁶⁴ Immigration officials also experience time pressure to issue detainer requests to jails quickly before an arrested individual is released. Immigration officials may over-rely on detainers because they prioritize enforcement over the risk of false positives. All of these factors create the risk of wrongful detention after arrest because of immigration screening.

And the stakes of arrest have grown with increased efforts to link criminal arrest to immigration arrest.⁶⁵ In January 2025, the Laken Riley Act further

58. *Onadia v. City of New York*, 44 N.Y.S.3d 882, 890 (N.Y. Sup. Ct. 2017).

59. *See* Ferré-Sadurní, *supra* note 57.

60. *Onadia*, 44 N.Y.S.3d at 886. Based on the author’s knowledge of depositions in this case, it is possible jail officials may have erroneously treated the immigration detainer as akin to a warrant.

61. *Id.*

62. *See generally* *Gonzalez v. U.S. Immigr. & Customs Enf’t*, 975 F.3d 788 (9th Cir. 2020) (discussing detainers issued en masse without probable cause). *See* Jain, *supra* note 40, at 176. For a prescient analysis of the dangers of overbroad immigration detainers, see Michael Kagan, *Immigration Law’s Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 163 (2015).

63. Rule 26(a)(2)(b) Expert Report of John Amaya at 14–15, *Creedle v. Miami-Dade County*, 349 F. Supp. 3d 1276 (S.D. Fla. 2018) (No. 17-cv-22477); *Gonzalez v. U.S. Immigr. & Customs Enf’t*, 416 F. Supp. 3d 995, 1008 (C.D. Cal. 2019), *rev’d in part*, 975 F.3d 788 (9th Cir. 2020); Margaret Hu, *Biometric ID Cybersurveillance*, 88 IND. L.J. 1475, 1540 (2013) (discussing how biometric identification can be vulnerable to errors).

64. *Onadia*, 44 N.Y.S.3d at 886.

65. Even without congressional action, the President has widespread power to shape immigration enforcement policy. As Adam Cox and Cristina Rodriguez have discussed, much of immigration enforcement policy depends on discretionary enforcement actions at the option of the Executive, meaning that the President has the legal authority to rapidly shift how enforcement unfolds. *See generally* ADAM B. COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* (2020); Shalini Bhargava Ray, *Abdication Through Enforcement*, 96 IND. L.J. 1325, 1327–28

raised the stakes of arrest.⁶⁶ While the reach and impact of Laken Riley remains to be seen, it will likely lead to increased detention, particularly after lower-level arrest. Among other things, the Laken Riley Act mandates the immigration detention of every person arrested for “burglary, theft, larceny, or shoplifting” if the arrested individual “is unlawfully present in the United States or did not possess the necessary documents when applying for admission.”⁶⁷ This approach necessarily relies on expanding jailhouse immigration detention after a criminal arrest.

The Laken Riley Act extends the impact of previous efforts at jailhouse immigration screening in several ways. Initial efforts at jailhouse immigration screening had focused on people arrested for felonies or violent crimes.⁶⁸ Immigration detention after an arrest like shoplifting was previously prioritized only if the arrested individual had a prior criminal conviction or was a removal priority for another reason, such as a recent unauthorized entry.⁶⁹ The current approach applies to a much broader population—all shoplifting arrests trigger immigration consequences, regardless of the arrested individual’s lack of prior history or their long-term presence in the United States.⁷⁰ The main area of expansion is necessarily low-level arrest. Second, the Laken Riley Act purports to mandate immigration detention after a criminal arrest, rather than the previous approach, which gave immigration officials discretion about when to issue detainers that would trigger additional detention. The Laken Riley Act also contains expansive language that purports to apply to people who “did not possess the necessary documents when applying for admission.”⁷¹ Because this is a broad standard, it raises the risk that people will be unlawfully detained without probable cause just for investigative purposes. It also raises the risk that people who are lawfully arrested will face very different outcomes because of their immigration status.

The Laken Riley Act raises the risk that immigration officials and local law enforcement officials may err on the side of over-detention solely because of the potential penalties for noncompliance. It also leads to a potential increase in the likelihood of wrongful detention, especially given that many noncitizens in detention lack access to counsel.⁷²

(2021) (arguing that the President cannot abdicate the duty to establish meaningful enforcement priorities); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 181 (2015); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 511 (2009) (discussing the role of the President in establishing immigration enforcement priorities).

66. Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025).

67. *Id.* § 2 (codified at 8 U.S.C. § 1226(c)(1)(E)(ii)); S.5 - *Laken Riley Act*, CONGRESS.GOV, <https://www.congress.gov/bill/119th-congress/senate-bill/5> (on file with the *Iowa Law Review*).

68. See Jain, *supra* note 54, at 1721.

69. *Id.*

70. See Laken Riley Act § 2.

71. S.5 - *Laken Riley Act*, *supra* note 67.

72. See generally Ingrid V. Eagly, Steven Shafer & Renee Moulton, *Access to Counsel in Immigration Court, Revisited*, 111 IOWA L. REV. 1 (2025) (showing that many immigrants lack representation in deportation cases).

ii. *Undercutting Integration into the Polity*

An additional cost to coupling immigration enforcement onto criminal arrest relates to uncertainty. Immigration enforcement raises the stakes of arrest—not just for those who are legally removable, but for many more people who have uncertainty about their own status or a family member’s status. This uncertainty operates in tension with the long-term goal of integrating noncitizens into the polity.

The United States is home to an enormous—and enormously diverse—population of immigrants and former immigrants. In total, one-fifth of the world’s immigrant population resides in the United States.⁷³ Approximately twenty-three million people living in the United States today are former immigrants who have become naturalized citizens; eleven million are lawful permanent residents; and approximately an additional eleven million are immigrants who lack formal legal status, but who have resided in the United States for a significant time—on average, approximately fifteen years.⁷⁴ Given the deep ties that noncitizens have to the United States, coupling immigration to arrest creates substantial uncertainty about what types of interactions will lead to removal. This, in turn, has created incentives for “system avoidance” of government services in general. Research by Marcella Alsan and Crystal Yang found that system avoidance extends beyond noncitizens themselves to mixed-immigration-status families who fear potential removal of a family member.⁷⁵

This avoidance dynamic cuts against the immigration law aim of promoting integration into the polity. The risk is twofold. In the short term, people who are uncertain about the consequences of contact with the police could be chilled from a broad range of socially useful interactions. Police have enormous discretion to go into homes, schools, hospitals, and a host of other institutions. Police often wear multiple hats; they enter places like schools in order to be a resource for students, but they also have the power to arrest. Thus, people who are highly concerned about the potential immigration consequences of arrest may be chilled from engaging in socially useful interactions, like attending school.⁷⁶ Second, in the long term, this dynamic

73. Mohamad Moslimani & Jeffrey S. Passel, *What the Data Says About Immigrants in the U.S.*, PEW RSCH. CTR. (Sept. 27, 2024), <https://www.pewresearch.org/short-reads/2024/09/27/key-findings-about-us-immigrants> [<https://perma.cc/L82V-Z5RD>].

74. See *id.*; Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1464–65 (2019) (“The vast majority of the undocumented population remains present long-term, with the median length of residence being about fourteen years.”).

75. Immigration screening creates incentives for noncitizens to engage in “system avoidance” and stay “off the radar” for law enforcement officials. Marcella Alsan & Crystal Yang, *Fear and the Safety Net: Evidence from Secure Communities*, at ii (Nat’l Bureau of Econ. Rsch., Working Paper No. 24731, 2018) (finding “significant declines in SNAP and SSI enrollment” from mixed-immigration-status households as a result of Secure Communities); Jain, *supra* note 74, at 1511.

76. Amalia Chamorro, Sophia Rodriguez & Rimga Viskanta, *Immigration Enforcement and US Schools: What Could Happen and What Education Leaders Can Do*, BROOKINGS (Jan. 13, 2025), <https://www.brookings.edu/articles/immigration-enforcement-and-u-s-schools-what-could-happen-and-what-education-leaders-can-do> [<https://perma.cc/LE7P-ABXN>]; Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 9 (2014).

has a corrosive effect on integration into the polity. Most immigrants in the United States remain long term, and many are future citizens.⁷⁷ The risk is that they will become full members of the polity only after having experienced system avoidance with key institutions designed to promote integration and good governance.

2. Arrest in Contexts Other than Immigration

Immigration is far from the only example of systemic consequences after an arrest. In the housing context, arrest information is automatically shared at the time of arrest in a number of localities.⁷⁸ In jurisdictions that rely on arrests as the trigger for “nuisance” enforcement, the police department may automatically notify a private landlord after an arrest, who, in turn, has powerful incentives to initiate eviction.⁷⁹ In some cases, a police call itself, as well as an arrest, can be the trigger for eviction.⁸⁰ Landlords may be informed that their failure to “abate” the nuisance—such as by evicting a tenant who has been subject to arrest—may result in removal of the landlord’s license.⁸¹

The stated rationale for these programs is to partner with police to keep crime down.⁸² Because the 1996 federal “one-strike” law requires that tenants agree to avoid drug-related and criminal activity, arrests for drugs can provide the housing authorities with notice of lease violations.⁸³ Arrests can also provide a way of promoting safety; it may be the case that a housing authority or private housing provider determines that eviction is justified given the safety risk a particular person poses to others in the residence.

As in immigration, the costs of this approach include overbreadth, uncertainty, and undercutting law enforcement aims. First, errors: Arrests can be overbroad, or even when the arrest is legitimate, the eviction goes well beyond a person suspected of a crime. Because the information sharing occurs on the basis of arrest, it will necessarily be overbroad. In the *Rucker* case, for instance, Michael’s arrest was reported to the Housing Authority and triggered the eviction of his mother’s household, even though it appeared that Michael did not live in the household.⁸⁴ And one of Rucker’s coplaintiffs, Herbert Walker, was threatened with eviction after his home health provider

77. See Moslimani & Passel, *supra* note 73.

78. Kathryn V. Ramsey, *One-Strike 2.0: How Local Governments Are Distorting a Flawed Federal Eviction Law*, 65 UCLA L. REV. 1146, 1148 (2018).

79. *Id.* at 1163–66.

80. *Id.* at 1149–50.

81. *Id.*

82. See *id.*

83. OFF. OF PUB. & INDIAN HOUS., U.S. DEP’T OF HOUS. & URB. DEV., NOTICE PIH 96-16 (HA), “ONE STRIKE AND YOU’RE OUT” SCREENING AND EVICTION GUIDELINES FOR PUBLIC HOUSING AUTHORITIES (HAS) 9 (1996) (urging implementing housing authorities to promptly obtain relevant incident reports from police departments to provide for timely evictions); Jain, *supra* note 2, at 834–35.

84. See Petitioners’ Brief on the Merits, *supra* note 27, at 10–11.

used contraband in his home.⁸⁵ Walker, who lived in a complex “reserved exclusively for senior and disabled residents,” suffered from respiratory problems, and posted an “oxygen no smoking” sign to his front door in an ultimately futile effort to keep drugs and cigarettes out of his unit.⁸⁶ Walker’s case raises a broader issue with reliance on arrest as a proxy; in some cases, reliance on arrest as a proxy for potential eviction means that crime victims or other parties will be targeted. This contradicts the aims of arrest in criminal law enforcement and can make people less likely to cooperate with the police and report crime.

In the long term, arrests can also lead to surveillance in and out of the home. Many tenants are not evicted; instead, they make deals that permit them to retain housing after an arrest.⁸⁷ For instance, Pearlie Rucker’s co-plaintiff, seventy-four-year-old Willie Lee, required her teenage grandson to move out after his off-premises arrest for smoking marijuana to make a deal to retain her home.⁸⁸ Rucker herself was able to keep her home because she showed that her arrested daughter Gelinda would not be returning there.⁸⁹

The goal of surveillance and ousting tenants is to promote safety in the building. And it’s reasonable to think that if one particular individual is posing a risk, it is better to let the leaseholder make the decision to oust a particular person, rather than evict the entire householder. But there are several problems with this approach. First, the threat of eviction is serious when there are housing shortages, which, in turn, can lead to overbroad decisions to remove particular individuals. Given unequal bargaining power, tenants may lack the ability to demonstrate that the arrest does not actually correlate to risk in the home or that an ouster is overkill. And keeping someone out of a home itself constitutes a serious intrusion on one’s intimate association—one that should not be taken lightly. The agreement may also reach well beyond the lease violation. Nicole Summers’s empirical study of a Massachusetts eviction system found that a majority of deals required tenants to accede to conditions unrelated to the lease violation as a condition of remaining in the home.⁹⁰ In addition, deals that require ousting family members can cut against law enforcement aims—they can create the conditions that lead to more crime.⁹¹ Tenants often agree to unannounced

85. *Id.* at 11.

86. *Id.* at 11–13.

87. See Jain, *supra* note 2, at 838.

88. Monica Sagullo, *Disabled Grandma May Lose Her Home*, SAN MATEO CNTY. TIMES, Mar. 27, 2002, at 1 (quoting housing authority spokesperson Lily Toney stating: “We don’t have fun evicting people, but we have to do this to protect the community If the problem has been taken care [of], if the person (involved with the drug use) has moved, there will not be a problem.”).

89. Dep’t of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125, 128 & n.1 (2002).

90. See Nicole Summers, *Civil Probation*, 75 STAN. L. REV. 847, 868–75 (2023).

91. Jain, *supra* note 48, at 1215–16 (explaining how some criminal prosecutors, who employ the “collateral mitigation” model, seek to ameliorate disproportionate collateral consequences, “harm that is not justified by any theory of punishment, such as deterrence or retribution”).

inspections in order to keep their homes, which in itself creates a serious cost, even if eviction never follows.⁹²

Arrest triggers other widespread consequences, which I have discussed elsewhere.⁹³ For people who hold professional licenses, arrests can trigger immediate license suspension.⁹⁴ The rationale is to investigate whether the arrested individual remains fit to practice her profession; someone with a fraud arrest, for instance, may also lack the judgment or integrity to manage client finances as a lawyer; someone with an arrest for assault may pose a safety risk that justifies loss of a home health license.⁹⁵ However, the risk is that the downstream penalty is overbroad and people lack an effective way to stop disproportionate penalties. Federal antidiscrimination law guidance indicates that employers should not deny access to work on the basis of an arrest alone, but consistent with this guidance, employers may suspend someone without pay to investigate the circumstances of the arrest.⁹⁶ And of course, unpaid suspension from work itself has a feedback effect on the criminal case. Someone whose arrest results in a temporary suspension from work has an incentive to dispose of the case quickly if the prosecutor offers a plea that will permit her to return to work in short order.

Consequences of arrests may be immediate, or they may take place down the road. For instance, an arrested individual might face immediate suspension of a professional license. Or the consequence may arise years later if they apply for a professional license for the first time.⁹⁷ Because employers are not required to disclose when they deny any given person a job, an arrested individual may not connect any given arrest to a downstream consequence. As a result, arrested individuals themselves may lack insight into whether any given arrest triggered consequences.

II. ARREST UNBOUND

This Part advances the claim that arrest has become unbound from key tethers that would permit the reach and impact of arrest to be understood. Understanding how arrest fits within the larger legal and regulatory framework

92. Summers, *supra* note 90, at 851 (conceptualizing this dynamic as “civil probation”).

93. These penalties have been described in further detail in *Arrests as Regulation*. Jain, *supra* note 2, at 810–17.

94. *Id.* at 839–41.

95. *See id.*

96. *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Apr. 25, 2012), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions> [<https://perma.cc/5UAE-XBUD>]. *See generally* Joseph Fishkin, *The Anti-Bottleneck Principle in Employment Discrimination Law*, 91 WASH. U. L. REV. 1429 (2014) (conceptualizing criminal conviction as a type of “bottleneck” that inhibits employment opportunity).

97. Benjamin Levin, *Criminal Employment Law*, 39 CARDOZO L. REV. 2265, 2269–70 (2018) (discussing how negligent retention and hiring law and public pressure can lead to employment consequences based on a criminal record); Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 998 (2019).

matters for several reasons. First, courts routinely invoke the political process and defer to discretionary judgments about proportionality and fit. One common rationale for courts to take a hands-off approach to questions of proportionality and punishment has to do with democratic engagement. The assumption might be that communities have the means to look to certain metrics—the penalties on the books, the constraints of criminal procedure, how communities are affected by crime and policing, and the experience of arrested people themselves, for instance—and determine if the penalty fits. But sometimes, the law creates barriers to understanding the full reach of arrest. Similarly, people lack the tools to understand how key institutions mediate government-imposed consequences. If institutions and relevant actors lack visibility into the full consequences of arrest, then they cannot meaningfully weigh when and how to check government action.

Second, notice and process are core aspects of a fair system of punishment. The legal standard for an arrest is low—all that is needed is a single officer's determination of probable cause—because other aspects of the legal system are supposed to give individuals access to notice and process before penalties are imposed. But with the interconnections between criminal law enforcement and regulatory systems, individuals increasingly have little access to meaningful notice or process. The resulting system is lawless—not in the colloquial meaning, which often involves a bad actor deliberately violating the law—but in quite a literal sense. Arrest has become unbound from law.

The diffusion of the arrest power erodes key procedural and legal checks on the government. Arrest penalties span institutions. As a result, procedures and rules designed to operate within a single institution no longer apply. This Part first argues how the penalties of arrest should be understood as government action, not just as stigma. It then discusses how government action related to arrest does not provide adequate notice, process, and institutional accountability.

A. RECOGNIZING ARREST BEYOND STIGMA

Courts have failed to recognize the full reach of arrest in part because they treat penalties related to arrest as stigma. In the 1971 U.S. Supreme Court decision *Paul v. Davis*, the Court analogized harm imposed from the distribution of arrest information to mere stigma.⁹⁸ It held that while an arrested individual may have a state tort defamation claim, he did not have a due process claim.⁹⁹

In *Davis*, Edward Davis argued that his due process rights had been violated when a local police department distributed a flyer that branded him an “active shoplifter” and distributed it to 800 merchants.¹⁰⁰ The flyer stated: “This flyer is being distributed to you, the business man, so that you may

98. See generally *Paul v. Davis*, 424 U.S. 693 (1976) (holding that injury to reputation alone, without a more tangible loss of liberty or property, is insufficient basis for a Fourteenth Amendment due process claim).

99. *Id.* at 701–12.

100. *Id.* at 695–97.

inform your security personnel to watch for these subjects. These persons have been arrested during 1971 and 1972 or have been active in various criminal fields in high density shopping areas.”¹⁰¹ The practice of distributing these flyers had been in place for fifteen years at the time of Davis’s arrest, and the flyers were based entirely on the fact of arrest and on the basis of information provided by the arresting officer.¹⁰²

Davis’s arrest was dismissed less than a week after the flyer was distributed.¹⁰³ In the interim, however, his supervisor called him in “to hear his version of the events leading to his appearing in the flyer” and warned him that “although he would not be fired, [Davis] ‘had best not find himself in a similar situation’ in the future.”¹⁰⁴

In dismissing Davis’s claim, the Court determined that his argument—that the “active shoplifter” designation would inhibit him from entering business establishments—at most stated a claim to reputational harm.¹⁰⁵ It further held that reputational harm, standing alone, was insufficient to establish a due process violation.¹⁰⁶ The opinion emphasized the importance of giving police the ability to announce arrests of public importance.¹⁰⁷ The Court concluded that Davis may have articulated a state tort claim for defamation, but he did not articulate a constitutional due process claim.¹⁰⁸

There are several problems with the approach in *Davis*. As the dissent argued, the majority opinion “failed to distinguish . . . precedents in any rational manner.”¹⁰⁹ And the Court offered no explanation for how tort law related to the due process claim, including why the availability of a tort claim for defamation would preclude other relief.¹¹⁰ Edward Davis discussed several concrete harms that arose from the distribution of the flyer publicizing his arrest and labeling him as a known shoplifter. He explained that he experienced racial isolation and tangible employment penalties:

Unfortunately it did not take long for everyone in the department to know that I was on an active shoplifter’s list, and at that time I was the only black working in the department, which made it extremely difficult for me to function. I suffered humiliation and ridicule.

After six or seven months . . . I felt the only way out was for me to resign in order to regain my full sanity and keep what little self-respect I had left. . . .

101. *Id.* at 695.

102. *Davis v. Paul*, 505 F.2d 1180, 1181 n.1 (6th Cir. 1974), *rev’d*, 424 U.S. 693 (1976).

103. Brief for Respondent at 7, *Davis*, 424 U.S. 693 (No. 74-891).

104. *Davis*, 424 U.S. at 696.

105. *Id.* at 697-99.

106. *Id.* at 701.

107. *Id.* at 698.

108. *Id.* at 712.

109. *Id.* at 734 (Brennan, J., dissenting).

110. *Id.* at 715 (criticizing the “novel doctrine that state law is any way relevant” to the due process issue).

After finally leaving my place of employment, I found it difficult to find jobs in my expertise, because the newspaper that I was employed with was the only daily in town. Prospective employers in other lines of work were reluctant to hire me because of the publicity and implications of the police department's publication.

Now, five years later, after trying to clear my name through this country's judicial system, I am broke, without employment, emotionally sick and in a state of anxiety.¹¹¹

The penalties Davis experienced were serious—loss of existing work, reputational harm, and the inability to find future work in his chosen profession. And given that he was never convicted, he had little recourse in terms of trying to clear his name. That alone calls into question the Court's analogy to stigma. And today, the penalties reach well beyond employment. Today, the facts in *Davis* seem almost quaint—a paper flyer distributed to eight hundred businesses. Arrest will necessarily have far wider distribution in the electronic age.

In addition, the Court mistakenly assumed a linear process when focusing on the legal remedy of defamation. The arrested individual would learn of the flyer, experience harm, then bring a suit for defamation. A contemporary arrested individual, however, would never see a flyer. Even if they lost their job, they might not connect that penalty to the underlying arrest record. Given that the default approach today involves creating the arrest record and distributing that record, many arrested individuals will experience penalties but lack knowledge of how those consequences unfold. Unlike Davis, they may have no opportunity to explain the circumstances of arrest to their employer. Depending on how the arrest record is used, the circumstances of the arrest may be irrelevant to the regulatory action at issue.

B. PROPORTIONALITY AND THE POLITICAL PROCESS

Courts routinely invoke a particular set of assumptions about how law relates to the political process. They assume that voters understand the maximum penalty, recognize how meaningful procedural safeguards apply, and assume informed discretion is exercised by key institutional players. The theory is that these checks are supposed to operate as tethers between the government's power to arrest and the polity's ability to shape and check government power. The political process binds the government's power, because the people can visualize the scope of the penalties.

Ewing v. California, where the Court held that a life sentence for three nonviolent felonies did not constitute grossly disproportionate punishment, offers an example of this bounded analytic framework.¹¹² The Court's stated

111. Edward Charles Davis III, *A "Keep Out" Sign on the Courthouse Doors?*, JURIS DOCTOR, July/Aug. 1976, at 31; see Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 U.C. DAVIS L. REV. 79, 88 (2009).

112. *Ewing v. California*, 538 U.S. 11, 17–20 (2003).

rationale for upholding an excessive (though not unconstitutional) penalty involved deferring to the political process.¹¹³ In this framework, penalties that are punitive by design are entitled to deference. By extension, penalties that are not punitive by design should not receive deference.

The Court's approach to the bounds of punishment are reflected in its particular methodology: First, it looked to the maximum penalty on the books to evaluate the stakes.¹¹⁴ Ewing argued that a minimum twenty-five-year sentence was grossly excessive for shoplifting, given that in the absence of the "three-strikes" law, his penalty would likely have been a maximum of three years.¹¹⁵ The Court evaluated the formal sentence on the books, compared that sentence with the state's past approach to punishment for the same crime, and also engaged in a comparative analysis of other state and federal approaches.¹¹⁶ In upholding California's law, the Court emphasized the importance of reasoned discretion through the political process.¹¹⁷ The Court stated that the law reflects a "rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated."¹¹⁸

In terms of process, Ewing had access to a trial before his conviction was imposed.¹¹⁹ The Court also examined avenues for discretion. Ewing's sentence was a "wobbler" offense, meaning that the prosecutor could have charged it as a misdemeanor instead of as a felony, which would have avoided the three-strikes penalty.¹²⁰ Ewing had argued (unsuccessfully) for this form of discretion to be invoked in this case. In addition to noting these safeguards, the Court visualized multiple avenues for voters to respond to the law if they viewed it as disproportionate.¹²¹ Voters, for instance, could effect legislative change.¹²² They could also use the political process to shape how prosecutors exercise discretion over "wobbler" offenses.¹²³

The *Ewing* decision reflects several assumptions—ones that are overly simplistic—about how political accountability operates to check spiraling

113. *Id.* at 28.

114. *Id.* at 15–17.

115. *Id.* at 44 (Breyer, J., dissenting). The facts also seemed to undercut the theory of specific deterrence on which the hefty penalty was based. In theory, a three-strikes law would deter recidivists from further crime, because they would look at the penalty and reason that engaging in crime is just not worth the risk of being caught. Ewing, however, did not operate as a rational actor, given his addiction.

116. *Id.* at 15–17 (majority opinion).

117. *Id.* at 24–25.

118. *Id.* at 30.

119. *See id.* at 19.

120. The Court noted at the outset that "prosecutors may exercise their discretion to charge a 'wobbler' as either a felony or a misdemeanor. Likewise, California trial courts have discretion to reduce a 'wobbler' charged as a felony to a misdemeanor either before preliminary examination or at sentencing to avoid imposing a three strikes sentence." *Id.* at 17.

121. *Id.* at 24–26.

122. *Id.*

123. *Id.*

penalties. First, the Court assumed that voters were informed: They recognized the maximum penalty on the books and how it could apply. Next, voters could visualize the population affected and identify how a recidivist would be treated in the absence of the three-strikes law. The public also has the ability to recognize how key players wield their discretion. Finally, the public at large can ask whether judges and prosecutors exercise their discretion in ways that are consistent with the values and interests of the political community. If not, then they can seek changes in the law—or at the very least, seek different prosecutorial charging practices or different sentencing practices.

Even within just the formal sentence, these assumptions often do not apply in practice. Voters may not be informed. Penalties may not deter some people from committing crime. Gary Ewing was not a rational cost-benefit actor; his crime was poorly planned and executed. He ignored the virtual certainty he'd be caught when he chose to hobble out a store with golf clubs concealed inside his pants leg.¹²⁴ He was not thinking rationally about the costs of punishment; he was seeking to get money quickly to fuel his addiction.¹²⁵ In this case, specific deterrence—the theory justifying the punishment—simply does not work. And similarly, if crimes are committed by those not engaging in rational cost-benefit assessments, then generally deterrence will not work, either.

The legislative process may also trigger overly punitive outcomes. When people think about a “recidivist” in the abstract, they may imagine someone who commits violent crimes, not someone who steals golf clubs and has no prior violent criminal history, like Ewing.¹²⁶ And even if there is a policy corrective—California did eventually rescind the three-strikes law—in the meantime, people like Ewing experience lengthy detention.

In terms of process, trials are of course available to very few criminal defendants in practice, who face overwhelming pressures to take plea bargains.¹²⁷ And there is little recourse for challenging arbitrary enforcement. Ewing ended up with a life sentence not because his crime was particularly harmful, but because he was the unfortunate individual that prosecutors chose to punish with an extreme sentence.

But with the diffusion of arrest information, even this flawed analytic framework does not apply. Notice, process, and institutional discretion do not operate in the same way, if at all. Because the penalties triggered by arrest are not considered “punishment,” there is no meaningful way to tally up the sum total of the government-imposed penalties experienced and to ascertain if they are fair and justified.

124. Sara Sun Beale, *The Story of Ewing: Three Strikes Law and the Limits of the Eighth Amendment Proportionality Review*, in *CRIMINAL LAW STORIES* 427, 436–38 (Donna Coker & Robert Weisberg eds., 2013).

125. *Id.* at 440.

126. Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1292 (2005) (discussing how people are suspect to cognitive biases that lead them to overstate the fear of crime).

127. *Lafler v. Cooper*, 566 U.S. 156, 169–70 (2012); *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (discussing how the vast majority of criminal convictions are the result of guilty pleas).

C. NOTICE OF THE STAKES

When courts assume that members of the polity are aware of the stakes—the materiality of harm imposed—that assumption includes both individual notice and societal notice. Both have eroded with the escalation of regulatory penalties tied to arrest.

1. Individual Notice of Arrest

When courts engage in a Fourth Amendment analysis, they focus on a narrow set of questions relating to the seizure: Did the encounter rise to the level of arrest?¹²⁸ If so, was it supported by probable cause? Courts distinguish between two types of seizures: “stops” and “arrests.” In *Terry v. Ohio*, the Court conceptualized an arrest as “the initial stage of a criminal prosecution.”¹²⁹ “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.”¹³⁰ This framing focuses on the seizure as an “intrusion upon the sanctity of the person.”¹³¹ In *Terry*, the Court held that while an arrest requires a showing of probable cause, “a stop” requires a lower standard of proof, given its more limited intrusion on a person’s liberty.¹³² And precisely because the Court focused on the restraint on liberty, all arrests—regardless of whether they take place entirely on the street or involve the police transporting the arrested individual to the precinct—constitute seizures for Fourth Amendment purposes.¹³³

Courts thus focus on the restraint on liberty and conceptualize arrest as the first step on the path toward a prosecution.¹³⁴ The legal process surrounding arrest matters because it gives the arrested individual the tools to ameliorate the harm arising from arrest—to make the case that the arrest was unjustified or unfair—and to manage predictable consequences arising from arrest.

Of course, every arrest carries the potential for stigma, but people who are aware of the stigma also have some tools to manage it. Erving Goffman’s classic analysis of stigma offers insights for how people subject to criminal

128. *United States v. Mendenhall*, 446 U.S. 544, 553–54 (1980) (“We adhere to the view that a person is ‘seized’ only when, by means of physical force or a show of authority, his freedom of movement is restrained. . . . As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person’s liberty or privacy as would under the Constitution require some particularized and objective justification.”).

129. *Terry v. Ohio*, 392 U.S. 1, 26 (1968).

130. *Id.*

131. *Id.*

132. *Id.* at 25–26.

133. *Dunaway v. New York*, 442 U.S. 200, 212–13 (1979). “The mere facts that petitioner was not told he was under arrest, was not ‘booked,’ and would not have had an arrest record if the interrogation had proved fruitless” do not make the restraint on liberty anything less than an “arrest.” *Id.* A different approach “would threaten to swallow the general rule that Fourth Amendment seizures are ‘reasonable’ only if based on probable cause.” *Id.*

134. *Id.* at 216.

records navigate their identities.¹³⁵ Goffman defines stigma as “an attribute that is deeply discrediting,” but emphasizes that it is, at core, a relational concept.¹³⁶ Effective management of stigma involves effective social and legal performance. In the immediate term, the arrested individual might post bail or contest charges to reduce the initial period of detention. In the long term, someone subject to the criminal process could choose to engage in various strategies to reduce the impact of the arrest, such as by clearing the criminal record.¹³⁷

Contemporary arrest dynamics upend an individual’s ability to navigate both the immediate and long-term consequences of arrest. Since multiple legal processes are often at work after an arrest—not just the criminal legal process—the individual may well lack the notice required to ameliorate the penalties. They are aware of a piece of the picture, but not its entirety.

Uncertainty about the reach of an arrest record itself creates barriers to effective management of any subsequent penalties. Recent empirical studies report an enormous gap between people who are eligible for relief and those who seek it. Colleen Chien found a massive “second chance gap” where less than ten percent of people eligible to have their criminal convictions expunged actually received relief.¹³⁸ Chien attributes this in large part to an “uptake gap”—people who are eligible do not apply for relief in the first place.¹³⁹ Similarly, J.J. Prescott and Sonja B. Starr found that “Michigan’s expungement uptake rate is discouragingly low; our best estimate is that only 6.5% of *all* eligible individuals receive an expungement within five years of the date at which they first qualify for one.”¹⁴⁰ In other words, even after release from prison, people remain trapped in “paper prisons” and burdened by criminal records.¹⁴¹ Prescott and Starr attribute the low uptake gap to a variety of factors, one of which is that the hassle of seeking relief might not be worth the perceived payoff.¹⁴²

It may well be the case that the bureaucratic hurdles to obtaining relief are too daunting. But it may also be the case that eligible people do not perceive a payoff to applying for relief. They may be in the dark about the consequences of an arrest record. Since no one is required to notify arrested

135. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 5 (First Touchstone ed. 1986) (1963).

136. *Id.* at 3–5 (“By definition, of course, we believe the person with a stigma is not quite human.”).

137. *Id.* at 41–90 (discussing how stigma management could involve a number of strategies: minimizing certain markers, highlighting other markers, omitting biographic details, passing as a nonstigmatized person, or covering stigmatized aspects of identity).

138. Colleen Chien, *America’s Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 540–41 (2020).

139. *Id.*

140. J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2552 (2020) (citing “procedural hurdles and expenses involved, the lack of legal counsel, the dearth of public information, and the fact that most people with records have limited resources for overcoming these challenges” as some reasons for the uptake gap).

141. Chien, *supra* note 138, at 540–41.

142. Prescott & Starr, *supra* note 140, at 2502–04.

individuals when they rely on arrest information, individuals may experience job denial or denial of access to housing without being aware of it. And noncitizens may also experience immigration consequences down the road, if they seek to change their status or reenter the country after going abroad, without realizing the lasting consequence of arrest.

2. Societal Notice

Criminal law reform proposals commonly start with the metrics: 2.3 million people in prison, twice as many under some form of criminal supervision, eleven million in jail, and one out of three adults subject to some type of criminal record.¹⁴³ Then, they turn to the normative: Once we recognize the reach and impact of the law, we as a society should evaluate whether this approach is justified. Courts evaluating the proportionality of punishment defer questions of fit and fairness to the political process, precisely because they assume that the public can look to certain metrics—sentence lengths, conviction rates, arrest rates—and make reasoned determinations about whether any given approach is too much.

When it comes to many consequences of policing and arrest today, potential maximum sentence length does not capture the full reach of government action. Writing in the context of “collateral consequences,” Jeremy Travis observed: “Prisons have this virtue: They are visible embodiments of society’s decision to punish. . . . Because prisons make punishment visible, we can more easily quantify the policy debates over the wisdom of this application of the criminal sanction.”¹⁴⁴ Travis made the point that punishment is “invisible” because penalties such as lifetime voting bans cannot be found in the formal sentence.¹⁴⁵

With arrest, the problem with visualizing the reach and impact of the law goes deeper than it does with penalties that arise after conviction. Certain “collateral consequences of criminal convictions,”¹⁴⁶ such as felony voting bans, deportation of a lawful permanent resident after a criminal conviction, or a bar on eligibility for student loans or public housing, are the product of statutory decisions.¹⁴⁷ By contrast, penalties triggered by arrest are commonly

143. See, e.g., Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOCIO. 351, 351–52 (2013).

144. Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 15–16 (Marc Mauer & Meda Chesney-Lind eds., 2002).

145. *Id.*

146. *Id.* at 20.

147. Cf. *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974) (“We would by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them against those advanced in support of California’s present constitutional provisions [regarding disenfranchisement on the basis of a felony conviction]. But it is not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.”).

not products of statute at all; they come from many different sources: linked databases that are the product of information-sharing agreements between different government agencies, “use and dissemination agreements” between public housing providers and local law enforcement agencies,¹⁴⁸ publicly accessible records that are purchased by licensing agencies, and through other mechanisms that are not found in statutes.¹⁴⁹ As a result, penalties are not rendered visible through law. And because people often associate dismissal of an arrest with dismissal of the full legal consequences of arrest, they are particularly unlikely to recognize systemic penalties from arrests.

There is no way to tally all the consequences of arrest. And arrests also have well-documented disparities along the lines of class, race, and disability.¹⁵⁰ When arrests are used as a screening mechanism, all the underlying disparities in arrest rates become baked into the downstream regulatory decisions. But the reach and impact of those disparities is not cognizable in any one regulatory metric.

D. ADEQUATE PROCESS

Criminal procedure is supposed to provide a means to level the playing field and guard against unjustified government overreach. As a general matter, more severe penalties trigger more stringent procedural safeguards.¹⁵¹ Thus, while an arrest requires only a single police officer’s determination of probable cause, further process ensues before the defendant’s liberty is taken away. In the criminal law enforcement context, a magistrate should provide a probable cause determination after the fact of an arrest.¹⁵² Similarly, arrested individuals are entitled to other protections if a prosecution ensues, such as appointed defense counsel if the defendant is indigent.

While procedure is no panacea, it plays an important role in tethering punishment to a particular process. In theory, procedure provides a roadmap that allows the arrested individual to understand her rights from the moment

148. See Jain, *supra* note 2, at 835, 839 n.158.

149. See *id.* at 839–41.

150. See, e.g., Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2057, 2085–86 (2017); Devon W. Carbado, *(E)rasing the Fourth Amendment*, 100 MICH. L. REV. 946, 964–69 (2002); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 45–47 (2009); Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 655–59 (2020); Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 179–80 (2019); Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation: From Ferguson to New York*, 106 GEO. L.J. ONLINE 33, 112–34 (2017); Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1404–11 (2021); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 4 (2019) (“Key aspects of carceral law enforcement — police, prisons, and the death penalty — can be traced back to slavery and the white supremacist regime that replaced slavery after white terror nullified Reconstruction. Criminal punishment has been instrumental in reinstating the subjugated status of black people and preserving a racial capitalist power structure.”).

151. Cf. Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 280–90 (2011) (noting reduced procedural protections in misdemeanor cases and advocating for greater protections for defendants).

152. *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975).

of seizure to conviction or dismissal. Procedure also allows for courts to engage in a retrospective analysis, examining whether the process that was provided at a particular point in time was sufficient.

Criminal procedure is thus designed for a world where penalties unfold in a linear, step-by-step fashion: from arrest to conviction. But with arrest, government penalties do not unfold in a step-by-step fashion. Instead, they could be described as unfolding in cascades, loops, or webs. That is because civil and criminal penalties triggered by arrests may unfold at the same time, and because criminal procedure only governs one set of penalties. This approach waters down procedure or erodes it altogether. The combination of two regulatory systems operating at once—the criminal and noncriminal—leads to penalties that go well beyond the penalties imposed in either system.

Immigration provides an example of how arrest creates systemic spillover effects, including the expanded risk of detention.¹⁵³ The 2020 Second Circuit case *Velasco Lopez v. Decker* illustrates how combined immigration–criminal law enforcement magnifies penalties.¹⁵⁴ In March 2017, Velasco Lopez was arrested and released on charges relating to a bar fight.¹⁵⁵ He was arrested again on unrelated charges a year later.¹⁵⁶ Had he been a U.S. citizen, he would have been released pending trial.¹⁵⁷ Instead, he was transferred to immigration detention, where he would remain for fifteen months.¹⁵⁸ In a catch-22, the immigration judge denied his release in part because he had outstanding criminal charges pending, but he had no ability to contest those charges, or even make an appearance in criminal court, because the government held him in immigration detention.¹⁵⁹ On four separate occasions, immigration officials refused to produce him in court so he could contest the charges relating to the bar incident.¹⁶⁰ When he was finally produced in criminal court, the charges relating to the bar fight were dropped.¹⁶¹

Eventually, after he spent more than a year in detention, a federal court ordered his release pursuant to a habeas petition, holding that “[h]e was not ‘detained’; he was, in fact, incarcerated under conditions indistinguishable from those imposed on criminal defendants sent to prison following convictions

153. My focus is on interior enforcement efforts directed at unauthorized residents, but there is an important literature discussing weakened procedures during immigration arrest at the border. See, e.g., Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967, 1983 (2020) (discussing Operation Streamline, where “federal prosecutors greatly increased the number of illegal entry convictions by relying on federal magistrate courts to implement a system of mass guilty pleas”); Eric S. Fish, *Resisting Mass Immigrant Prosecutions*, 133 YALE L.J. 1884, 1897–1905 (2023).

154. See *Velasco Lopez v. Decker*, 978 F.3d 842, 847 (2d Cir. 2020).

155. *Id.*

156. *Id.* at 846–47.

157. *Id.* at 851.

158. *Id.*

159. *Id.* at 847.

160. *Id.*

161. *Id.*

for violent felonies and other serious crimes.”¹⁶² Velasco Lopez, however, was not presumptively entitled to release prior to adjudication.¹⁶³ In a criminal proceeding, the burden rests with the government to make the case that a defendant should stay in jail prior to trial; the norm is pretrial release unless the government can offer a compelling reason otherwise.¹⁶⁴ But the immigration judge denied his request for release in part on the basis of the outstanding criminal charges—ones that he had no opportunity to contest.¹⁶⁵ Judge Parker, writing for a three judge panel, observed:

Velasco Lopez had no right to court-appointed counsel and no regular right to judicial review of his incarceration. He had no rights analogous to Sixth Amendment speedy trial rights. He faced significantly greater obstacles to acquiring evidence than an indicted or convicted criminal defendant. In addition, because the BIA placed on Velasco Lopez the burden of justifying his release, there was a considerable risk of error in the BIA’s findings. And that risk was not theoretical: costly error actually occurred.¹⁶⁶

At stake in this process was more than the ultimate decision as to whether Velasco Lopez should be punished or deported. Neither of those issues had been decided at the time he was subject to prolonged detention. Rather, this is a case about basic procedural safeguards and how they apply to everyone.

The combination of immigration enforcement and criminal arrest has a dual impact. First, without the opportunity to appear in criminal court, defendants have no means of holding the government to its burden of proof in the criminal case.¹⁶⁷ Second, prolonged detention imposes an immediate cost, well before any decision to punish or deport had been made. Rather than experiencing penalties unfolding in a sequential fashion—the criminal process unfolding first, following by immigration adjudication—defendants like Velasco Lopez experience a punishment cascade. The overall consequence—fifteen months of detention—reached above and beyond anything that would be imposed if either the immigration enforcement system or the criminal law enforcement system were operating in isolation.

The process is cyclical because the criminal charges have an immediate impact on federal immigration proceedings, which, in turn, have feedback effects on the disposition of the criminal case. And for noncitizens, a criminal conviction itself will increase the likelihood of removal.¹⁶⁸

162. *Id.* at 850.

163. *Id.* at 849.

164. *Id.* at 850–51, 852 n.8.

165. *Id.* at 847.

166. *Id.* at 851.

167. *Id.* at 855 (“Velasco Lopez’s prolonged incarceration, which had continued for fifteen months without an end in sight or a determination that he was a danger or flight risk, violated due process.”).

168. See generally David K. Hausman, *The Unexamined Law of Deportation*, 110 GEO. L.J. 973 (2022) (criticizing an enforcement approach that prioritizes removal on the basis of conviction).

This approach prevents arrested individuals from understanding the full range of penalties, taking advantage of criminal procedure protections, and it also prevents society at large from understanding the full reach of governmental power invoked through arrest.

E. INSTITUTIONS

As a practical matter, institutions are key to regulating the reach of the criminal law. In the criminal legal system, prosecutors wield an important form of discretion. The regulatory consequences of arrest upset the balance of power between police and prosecutors; they give police more institutional power, because decisions to arrest have consequences that prosecutors may not recognize nor mediate. This dynamic also risks creating an incoherent regulatory agenda, where one institution can employ its discretion to cut against another institution's objectives. For instance, immigration officials may deport a crime victim or cooperating witness and, in turn, jeopardize public safety interests. This dynamic can also create profound uncertainty for the public at large in assessing institutional competence.

1. Elevating Police Relative to Prosecutors

The growth of arrest-based penalties upends the role of prosecutors relative to police. Some of the most impactful criminal law scholarship in recent years has focused on assessing how the regulatory structure of criminal law changes the incentives of key actors. Two decades ago, William Stuntz memorably compared prosecutors to diners who order off a menu.¹⁶⁹ As Stuntz put it: Criminal law's "primary role is not to define obligations, but to create a menu of options for prosecutors. If the menu is long enough—and it usually is—prosecutors can dictate the terms of plea bargains."¹⁷⁰ The key question for members of the public to grasp, if they want to influence prosecutorial decision-making, is how prosecutors exercise their charging discretion.

In the misdemeanor context, prosecutors could also be analogized to ordering "off a menu," in the sense of exercising discretion in ways that are hidden from the public. Prosecutors who lack the ability to "stack" more serious charges may nonetheless wield significant discretion over case management and deliberately keep charges open.¹⁷¹ Issa Kohler-Hausmann's empirical study of a New York misdemeanor court concludes that the court adopts a "managerial model" of misdemeanors, as opposed to an approach geared toward adjudication.¹⁷² Prosecutors deploy case management strategies such as keeping a case open for a period of time to see if the defendant has

169. See William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004).

170. *Id.* at 2548.

171. See *Bordenkircher v. Hayes*, 434 U.S. 357, 361–62 (1978).

172. See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 654 (2014).

any new arrests or convictions.¹⁷³ The underlying assumption is that someone with no new arrests in a period of six months is less of a safety risk than someone who is rearrested in that same period.¹⁷⁴ The “menu” in this system relates to how long a particular case is kept open and the ability to order defendants to comply with various programs.¹⁷⁵

When it comes to civil penalties triggered by arrests, however—as well as for a host of discretionary penalties triggered by conviction—the analogy to the menu falls apart. First, when penalties are triggered by arrests alone, the prosecutor may have no agency at all over the consequences. In theory, prosecutors have the power to “check and regulate police every day through dozens of routine decisions about whether to file charges after an arrest, to seek bail, to disclose or use evidence, to call a witness, or to reward an informant.”¹⁷⁶ Prosecutors may not utilize these powers in practice; as Alexandra Natapoff has recently argued, in misdemeanor cases, prosecutors too often rubber-stamp police decisions to arrest by proceeding with prosecutions.¹⁷⁷ But prosecutorial decision-making nonetheless provides an important source of institutional constraints on policing and arrest decisions.

Civil penalties triggered by arrest empower police relative to prosecutors. The key regulatory moment is the criminal arrest. Jailhouse immigration screening unfolds at the time of custodial criminal arrest itself—it is not triggered by criminal conviction. Thus, the arrest is the moment that matters for people who are removable by virtue of their immigration status alone. Similarly, prosecutors may have no timely notice of, much less the ability to constrain, eviction triggered by arrest or immigration detention. Police decisions matter more, relative to prosecution decisions, when arrest alone triggers systemic consequences.

2. Social Control and Institutional Discretion

One complaint with misdemeanor arrests that do not result in prosecution is that they impose enormous “process costs”—namely, the hassle and indignity of being a defendant in misdemeanor court.¹⁷⁸ The misdemeanor system imposes an enormous amount of social control on people who are subject to its operation, even if a conviction never follows. Repeated court appearances and compliance with monitoring requirements take a toll on defendants, one

173. *Id.*

174. *See id.* at 624, 648.

175. *Cf. id.* at 646–49.

176. Alexandra Natapoff, *Misdemeanor Declination: A Theory of Internal Separation of Powers*, 102 TEX. L. REV. 937, 940–41 (2024) (noting that these powers are underutilized and prosecutors too often rubber-stamp police).

177. *Id.*

178. *See* MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 199–243 (1992) (classic analysis of “process costs”); Natapoff, *supra* note 176, at 1009.

not reflected in conviction rates. The hassle defendants endure is a part of the process.¹⁷⁹

The political accountability problem comes from the mismatch between the metrics that actually drive misdemeanor court and the metrics used to evaluate case outcomes. From the perspective of defendants, the hassle and indignity of the process of misdemeanor court is the real punishment, and it is one imposed by police and prosecutors without any input from a jury.¹⁸⁰

Arrested individuals who experience the inner workings of a court system can show how repeated court appearances function as a punishment, even when the arrest is ultimately dismissed.¹⁸¹ But arrested individuals themselves may lack insight into the full costs of arrests, particularly when arrest records continue to trigger consequences in ways that operate down the road.

3. Institutions Operating in the Dark

When consequences of arrest span institutions, it can be very difficult to form a rational regulatory agenda. In some cases, prosecutors and police themselves may well be in the dark about civil penalties. This magnifies the public accountability gap. It is not just the case that prosecutors make informed decisions while the public lacks an understanding of what factors inform those decisions. Rather, prosecutors themselves have barriers to understanding what actions actually make up the “menu.”

To be clear, prosecutors and police are certainly aware of penalties arising from arrest or conviction. Any time a prosecutor brings a felony charge, she is certainly aware that the felony charge may well trigger the “felony bans” such as bars on voting or serving on juries. And in *Padilla v. Kentucky*, the Supreme Court recognized that prosecutors who were aware of the possibility of deportation could take that into account in crafting immigration-safe pleas.¹⁸² As the Court stated,

[A] criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.¹⁸³

179. Malcolm Feeley made this point in his seminal study of misdemeanors. See generally FEELEY, *supra* note 178.

180. Kohler-Hausmann, *supra* note 143, at 357–58.

181. See generally ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME (2018) (discussing the collateral consequences of the misdemeanor system on individuals and society).

182. *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010).

183. *Id.*; see Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 555 (2013) (conceptualizing prosecutors as “de facto immigration courts” because “[i]n many cases, a

But when it comes to arrest, there are many civil penalties, and many more discretionary penalties that arise as a result of conviction, such that it is impossible to respond to all of the consequences. Prosecutors do not have a systemic way of recognizing the full menu. And in cases where localities have very different aims—some localities may want to maximize immigration enforcement for certain groups, while others seek to minimize it—prosecutors and police have limited options in terms of how to maximize their own institutional goals.

In some cases, when prosecutors dismiss arrests, they want to signal that the arrest is unfair and unjustified. Prosecutors who publicly announce policies against prosecuting certain arrests convey to the public that they are constraining the reach of those particular arrests. But police send their own message if they make arrests anyway and only for purposes of triggering downstream regulatory consequences such as deportation. The institutional check prosecutors wield on arrest decisions within the context of the criminal law does not work outside of the criminal legal system. This, in turn, diminishes the power of elections over prosecutor leadership as a means of shaping any given locality's enforcement practices.

Just as police and prosecutors lack full insight into the consequences of their decision-making, so too does the public at large. This includes even individuals most affected by policing practices and hidden regulatory penalties. This dynamic leaves communities with limited ability to mobilize and seek changes in both policing practices and criminal record-keeping practices.

III. TOWARD A FRAMEWORK FOR BOUNDING ARREST

As arrest takes on greater significance, it is imperative to develop a framework for tethering arrest to the legal process. Precisely because arrest records serve as a useful proxy, there are powerful incentives for agencies and other actors to continue to create and rely on them. As I have argued in earlier work, arrests are widely used “not necessarily because they are the best screening tools from the perspective of institutional design . . . [but] because they are relatively easy and inexpensive to access and because [agencies and other actors] regard arrests as proxies for information they value, such as the potential for violence, unreliability, or instability.”¹⁸⁴ Given the overwhelming incentives to rely on arrests and arrest records, the risk is that arrest will continue to take on outsized significance, and the public at large will lack the tools to check their consequences.

One argument, of course, is that arrest should not be used at all as a regulatory proxy. Since arrest is not tantamount to guilt, one argument is that relying on arrest imposes the stigma of a conviction.¹⁸⁵ But there are several serious obstacles to shifting away from reliance on arrest as a regulatory proxy

noncitizen's only meaningful chance to avoid removal is to negotiate a deal in upstream criminal proceedings that provides immunity against downstream removal”).

184. Jain, *supra* note 2, at 815.

185. Roberts, *supra* note 97, at 999.

entirely. At the very least, there is already enormous path dependence baked into using arrest records as regulatory proxies. Second, there are cases where arrests might be relatively valuable proxies for a particular type of risk. That raises the question of how to regulate arrest to avoid overbreadth, while also permitting arrest information to be used in a cabined way.

This Part offers two proposals for reform. First, courts and commentators should recognize how arrests span institutions. As a practical matter, a contemporary arrest today does not just involve one process—the physical seizure—but rather three: the physical aspect of the seizure, a marking process, and a regulatory process. The marking process ties the arrested individual to the record of arrest. And the regulatory process uses that record and vests it with ever-greater governmental significance. Distinguishing between these types of governmental activities tied to arrest holds the promise of offering more analytic purchase on questions of procedure and proportionality than just a bare distinction between arrest and conviction. It offers a way to focus on the government action at issue, and the notice, process, and institutions involved in the arrest, rather than focusing on the impact of the arrest.

Second, courts should take a contextual approach to the relationship between arrest and oversight from the legal and political process. Rather than assuming the existence of legal and political process constraints, it is essential to ask whether those constraints actually apply when the impact of policing and arrest decisions spans across different institutions. The goal should be to create a regulatory framework that provides notice, meaningful process, and institutional accountability. At the very least, we should acknowledge when key actors lack the tools to recognize and respond to the full reach of arrest. And the less bound arrest is to the legal and political process, the less courts ought to defer to the political process in addressing the reach and impact of arrest.

This approach will not offer a precise formulation for when and how to regulate the reach of arrest, nor is it my aim to do so. Rather, the goal is to reorient the conversation toward the government action at issue, rather than just on the relatively narrow aspect of government action that may be immediately visible to the public at large.

This Part develops how the government-imposed consequences of arrest could be recognized beyond just the physical seizure itself. I discuss creating arrest records, distributing arrest information, and reliance on erroneous or wrongfully included records. I also discuss some possibilities for changes in lawyering.

A. *RECOGNIZING ARREST BEYOND SEIZURE*

One way to situate arrests within a larger governing framework is to separate out three different types of government action—seizure, marking people with arrest records, and using those records for regulatory ends—that are commonly integrated within the process of custodial arrest. Taking this approach reorients the focus on government action, as opposed to just on the impact of arrest. It also shifts away from a focus on defining arrest relative to conviction. The arrest/conviction dichotomy is too narrow to recognize the range of government

action at issue. And it holds the promise of creating a vocabulary for recognizing the government action at work—and that the penalties that follow are more than just mere stigma.

1. Seizures, Marking, and Regulatory Consequences

Rather than treating an arrest as just one government action, it should be recognized as three types of closely interrelated government actions. Recognizing the different government actions at work is key to showing how arrest has evolved over time.

The 1948 decision in *Michelson v. United States*, a canonical evidence decision, illustrates how government action related to arrest has expanded.¹⁸⁶ *Michelson* analyzed whether a defendant's character witnesses could be cross-examined about the defendant's twenty-seven-year-old arrest, which did not result in conviction.¹⁸⁷ The Court contrasted arrest with conviction in this way: "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. Only a conviction, therefore, may be inquired about to undermine the trustworthiness of a witness."¹⁸⁸ However, the Court further recognized that "[a]rrest without more may nevertheless impair or cloud one's reputation. False arrest may do that."¹⁸⁹ Therefore, when a witness claims to have knowledge of defendant's good character or reputation, knowledge of past arrests would fall within the scope of the cross-examination, although the substantive evidence of arrest could not be introduced.¹⁹⁰

This formulation oversimplifies arrest. Law serves an expressive function—and the vocabulary we use to express that someone is under government authority matters in conveying both the seriousness of the stakes and the need for checks on the government's power. Arrests operate along a spectrum, not along a binary between conviction and nonconviction. Surfacing the different government actions related to arrest—seizure, marking, and regulatory—itsself would be an improvement over an overly simplistic analysis that focuses only whether the arrest resulted in conviction.

For an illustration, suppose the police arrest both Karl and Devi for protest activity. Both are detained for two hours before the police realize they made a mistake and send them on their way. For purposes of the example, let's assume the arrest was reasonable, but incorrect. Due to a staffing shortage, Karl is detained on the street; Devi is taken to the precinct, fingerprinted, and booked prior to her release. Both have been arrested for Fourth Amendment

186. See *Michelson v. United States*, 335 U.S. 469, 482 (1948).

187. *Id.* at 473.

188. *Id.* at 482.

189. *Id.*

190. *Id.* at 483 ("The inquiry as to an arrest is permissible also because the prosecution has a right to test the qualifications of the witness to bespeak the community opinion. If one never heard the speculations and rumors in which even one's friends indulge upon his arrest, the jury may doubt whether he is capable of giving any very reliable conclusions as to his reputation.").

purposes—they have been subjected to a meaningful constraint on their liberty. But only Devi has been marked with a criminal record.

Both Devi and Karl have been subjected to arrest “without more.” But their relationship with government authority is quite different. Karl’s encounter with the criminal law is truly over when he is free to leave. And precisely because the experience of being taken into custody is now so integral to arrest, Karl may not even recognize that he was arrested. He may honestly deny having been arrested when asked in the future.

For Devi, the criminal legal process worked as it should. The arrest was dismissed in short order. But she is not back in the same position she would have been but for the arrest. The consequences of being arrested may be immediate, or they may take place over the long term. But this much is certain: They are unpredictable. For Devi, part of the harm comes from the uncertainty about when and how the record of arrest will function down the road.¹⁹¹ And of course, her arrest could have immediate ramifications if she is a noncitizen, is applying for a professional license, or has foster children in her home.¹⁹²

For Devi, the materiality of the harm imposed operates at odds with the legal ramifications in the criminal legal system. In her case, the dismissal of the arrest carried a particular expressive value and a legal meaning: The law enforcement officers made a reasonable mistake, which they rectified by releasing her and dropping the arrest. But the arrest has an ongoing significance. Even if she does eventually recognize that her arrest has lasting consequences, she may not be able to advocate for herself in a timely way.¹⁹³

Separating out the seizure, the marking process, and the regulatory action—rather than collapsing them all within the framework of “arrest”—offers a starting point for a more tailored approach to regulating arrest. This framework invites consideration of whether all custodial seizures should mark people with arrest records, and whether those records should also trigger regulatory consequences. Arrests that create criminal records—that mark people with tangible notations of prior contact with the police—have very different consequences than seizures alone. And arrests that trigger the massive regulatory consequences—interior immigration enforcement today being the largest example—also operate in a different valence than merely having an arrest record that does not lead to subsequent regulatory activity.

191. See, e.g., *Application Process*, STATE BAR CAL. (2025), <https://www.calbar.ca.gov/Admissions/Moral-Character/Process> [<https://perma.cc/U2RC-DUU5>] (noting that the applicant must submit fingerprints); STATE BAR OF CAL., FREQUENTLY ASKED QUESTIONS: MORAL CHARACTER DETERMINATIONS (2025), <https://www.calbar.ca.gov/Portals/o/documents/admissions/moral-Character/Moral-Character-FAQ.pdf> [<https://perma.cc/ZK4H-QC9Q>] (noting that even in cases where criminal charges are dropped, the arrests that are undisclosed may be taken into account for character and fitness).

192. See Jain, *supra* note 2, at 810–17.

193. See generally SARAH ESTHER LAGESON, DIGITAL PUNISHMENT: PRIVACY, STIGMA, AND THE HARMS OF DATA-DRIVEN CRIMINAL JUSTICE (2020) (discussing cases of people who did not know they had criminal records that adversely affected them).

Our legal framework should recognize these distinctions, rather than subsuming them under a legal framework that focuses on a time-limited physical restraint on liberty.

2. Arrest and the Big Data Problem

Situating the government action at work with arrest also provides a way for illuminating the shortcomings of *Paul v. Davis* and its treatment of the publication of an arrest as mere stigma.¹⁹⁴ *Paul v. Davis* represents an outdated model of the impact of arrest, given that it focused on a very discrete type of publication. Even if *Paul v. Davis* was rightly decided at the time, its contemporary application misapprehends the significance of arrest records and their relationship to both the political process and the legal process.

First, the record of arrest is a much more meaningful marker today than it was in 1971; given the prevalence of arrest records and their systemic uses in civil regulatory decisions, the costs of an arrest record—even an erroneous arrest record—is significantly higher than prior to the age of digital arrest records.¹⁹⁵ The government action today extends well beyond anything the government was capable of doing prior to the digital age. Relative to the contemporary marking and regulatory process, the dissemination of the arrest information in *Paul v. Davis* was arguably tailored; the police chief sent it only to businesses, and it was for the purpose of specific deterrence for the crime at issue: shoplifting.¹⁹⁶ By contrast, today, arrest records and the regulatory impact of arrest are not tethered to specific deterrence; the regulatory impact of arrest is not tethered to any offense at all.

In some ways, the reach of arrest operates akin to other types of “big data” problems recognized under the Fourth Amendment.¹⁹⁷ For instance, as Justice Sotomayor put in her concurrence in *United States v. Jones*, “I would ask whether people reasonably expect that their movements will be recorded and aggregated” in a way that conveys enormous information to the government as a default matter on an ongoing basis.¹⁹⁸ A similar concept applies in the case of arrest. The sum is greater than its individual parts. Even if the government were permitted to distribute information regarding a suspect’s arrest to warn local businesses, it does not follow that individuals who experience automatic dissemination of their arrest information assume the risk of this approach or have a way to check it. The risk of misuse and unchecked government harm is significantly greater, and the focus should be on the use of arrest information in the aggregate.

194. See *Paul v. Davis*, 424 U.S. 693, 701 (1976).

195. For a discussion of the difficulties in correcting errors in digital criminal records, see LAGESON, *supra* note 193.

196. See *Davis*, 424 U.S. at 695.

197. See generally Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311 (2012) (conceptualizing the mosaic theory to recognize how the sum of a series of searches can be greater than its parts).

198. *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring).

Focusing on the systemic nature of the government action at issue with arrest today should lead to two changes. First, the focus should not be on how and when people learn of their arrest being disseminated—the focus should be on the government action. Second, given the lack of any adequate notice—much less remedy—with contemporary arrest, the scope of *Paul v. Davis* should be narrowed. It should not apply where the arrested individual is necessarily in the dark about the consequences.

B. RECOGNIZING UNREASONABLE SEIZURES AND MARKING

Because the Court in *Atwater* failed to examine the full significance of arrest, it adopted an overly narrow view of the government action at issue. In *Atwater*, the Court understated the significance of custodial arrest.¹⁹⁹ First, it ignored the significance of arrest records.²⁰⁰ Second, it overstated the ability of law and the political process to check the consequences of arrests.²⁰¹ When these are taken into account, *Atwater*'s underlying assumptions do not hold.

The Court framed Gail Atwater's case entirely in terms of the indignity of being subjected to a custodial arrest for a seatbelt violation.²⁰² Even as the Court acknowledged that "her claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case," the Court declined what it framed as a request "for a modern arrest rule . . . forbidding custodial arrest, even upon probable cause, when conviction could not ultimately carry any jail time and when the government shows no compelling need for immediate detention."²⁰³

As Alexandra Natapoff has argued, this approach "understates and mischaracterizes the extraordinary influence of the low-level misdemeanor machinery, especially with respect to fine-only and traffic offenses. It minimizes and demeans the pain, fear, and burdens that attend a full custodial arrest."²⁰⁴ But even beyond these known consequences, there are additional costs to marking people with arrest records. When the Court asked, "how bad the problem is out there," the "problem" was framed as the boorish behavior by the police officer.²⁰⁵ When the full consequences of custodial arrest are taken into account—including the consequences of arrest records, the "problem" is much more wide-ranging. Precisely because the opinion overlooks the marking process other than as being incidental to the indignity of jail time, the Court was able to draw an analogy to legislative sources of warrantless arrest authority to support its holding, pointing to sixteenth- and seventeenth-century statutes

199. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 354–55 (2001).

200. See generally *id.*

201. See *id.* at 353.

202. *Id.* at 346–47.

203. *Id.*; see also *id.* at 361–62 (O'Connor, J., dissenting) (describing the majority opinion, "contrary to the principles that lie at the core of the Fourth Amendment," as "mint[ing] a new rule" in favor of custodial arrest).

204. Alexandra Natapoff, Response, *Atwater and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147, 153 (2020).

205. *Atwater*, 532 U.S. at 351–52 (majority opinion).

that permitted peace officers to make arrests for “persons playing ‘unlawful games’ like bowling, tennis, dice, and cards” and that permitted “the warrantless arrests of ‘rogues, vagabonds, beggars, and other idle and disorderly persons.’”²⁰⁶

The practice of making warrantless arrests three hundred years ago, however, could not be more different from the contemporary phenomenon of arrest.²⁰⁷ Arrests today are much more meaningful markers than they were before the age of ubiquitous criminal records. The impact of an arrest alone—where someone is subject to both marking and downstream regulation—may easily outstrip the maximum penalty on the books for a criminal conviction for a warrantless arrest. To put the point differently, many people pay significantly more than fifty dollars—the total of Atwater’s penalty—in order to expunge arrest records. Even if the government was permitted to seize a person for fine-only offenses, it does not follow that police officers should also be permitted to engage in marking and downstream regulation on the basis of the arrest record.

An additional rationale the Court offered for its approach relates to line drawing and the costs of uncertainty. In particular, the Court reasoned that if it were to adopt Atwater’s argument, police officers might face uncertainty about whether a low-level offense triggers a fine alone, and they might then err on the side of not making arrests.²⁰⁸ This reasoning examines the significance of uncertainty along only one dimension. Whenever the police mark individuals with arrest records, they create uncertainty about the consequences of that mark. Even someone like Gail Atwater—keenly aware of the excessive arrest and motivated enough to take her case to the Supreme Court—cannot claim to know what the full consequences of being marked will be. This is also true with criminal records writ large. Precisely because there is so much uncertainty about the short-term and long-term consequences of being marked with an arrest record, there are good reasons to err on the side of caution when marking people with records in the first place.

C. REDUCING AND RESTRICTING THE REGULATORY IMPACT OF ARREST

Taking the full consequences of arrest into account should lead to reducing the impact of certain records, especially those that were created in error or that should not have been accessed in the first place. In the Fourth Amendment context, the Court has given significant discretion to police officers to make arrests on the basis of inaccurate or wrongfully accessed arrest records. First, in *Herring v. United States*, the Court held that incorrect, negligently maintained arrest records could provide justification for searches and seizures—and that

206. *Id.* at 334–35. In finding the custodial arrest reasonable, the Court stated: “[A]part from Hale and Blackstone, the legal background of any conception of reasonableness the Fourth Amendment’s Framers might have entertained would have included English statutes, some centuries old, authorizing peace officers (and even private persons) to make warrantless arrests for all sorts of relatively minor offenses unaccompanied by violence.” *Id.* at 333.

207. These historical analogues have been recognized in some cases as creating illegitimate profiling and as being void for vagueness.

208. *Atwater*, 532 U.S. at 321.

evidence gathered in those searches was not barred by the exclusionary rule.²⁰⁹ Relatedly, in *Utah v. Strieff*, the Court held that a police officer who conducts an illegal *Terry* stop may justify the stop and subsequent search by after-the-fact reliance on an outstanding warrant.²¹⁰ In *Strieff*, an officer unlawfully stopped Edward Strieff, checked his identification, and ran his criminal record. During the record search, the officer discovered an outstanding warrant for a traffic violation. The officer then engaged in an arrest and search on the basis of the outstanding warrant and discovered drugs. Strieff argued that the drugs should be suppressed, because it would not have been discovered but for the unlawful stop. The Supreme Court denied the motion to suppress, given the existence of the criminal record.²¹¹ As the dissent recognized, this approach creates significant incentives for police officers to make unlawful *Terry* stops.²¹² The officer benefited from “exploiting his own illegal conduct” because he “illegally stopped Strieff and immediately ran a warrant check,” and the results of that criminal record check gave him the legal authority to arrest and conduct a search that produced evidence.²¹³

These decisions examine criminal records in the context of a relatively narrow Fourth Amendment framework—focusing on the issue of suppression of evidence—rather than asking the broader question about how and when the government takes adversarial action against individuals. A more complete way of balancing the Fourth Amendment interests at issue is to recognize explicitly the government interest in creating the criminal record and to also consider the individual interests on the other side—including the likelihood that any resulting criminal record will have a lasting impact.

D. LAWYERING AND THE POLITICAL PROCESS

The consequences of arrest pose distinct challenges for lawyering. Lawyers may need to look more broadly to recognize how policing and arrest decisions create pathways to downstream regulation.

When lawyers focus on the downstream regulatory action—without connecting that action to the policing decisions at issue in the first place—they create an incomplete portrait of the government action at work. In addition, people who experience regulatory consequences may hold the regulatory agency ultimately responsible but not also connect the regulatory decision with policing practices in the first place. The regulatory consequences of an arrest are attenuated from the criminal process itself. Thus, in cases involving regulatory action that stem from arrest, it’s important to present the role of arrest in litigation.

One way to raise this issue is to highlight the harms of uncertainty. Lawyering depends on arguing that a particular individual has experienced

209. *Herring v. United States*, 555 U.S. 135, 137 (2009).

210. *Utah v. Strieff*, 579 U.S. 232, 243 (2016).

211. *Id.* at 243.

212. *Id.* at 245 (Sotomayor, J., dissenting).

213. *Id.* at 246–47.

an unjust penalty—but also recognizing that the known penalty is only part of the picture. One challenge for lawyering—for prosecutors, defense attorneys, and legal aid lawyers in particular—is recognizing that the regulatory reach of arrests poses real challenges for the traditional lawyering model, where lawyers typically learn about consequences by speaking directly to clients. Instead, in today’s regulatory landscape, even people who experience serious adverse consequences may only be able to point to certain known consequences. Lawyers should take this dynamic into account when illuminating the reach of arrest. Rather than relying on individuals to bring traditional legal claims by pointing to a discrete action that triggered harm, lawyers will need to expand their investigative processes, including by seeking discovery about how arrest practices shaped downstream regulatory practices at issue. Learning about the role of arrest and deportation, professional licensing, and eviction may be the first step in illuminating the scope of government action at issue.

CONCLUSION

Arrests have an enormous impact in the United States today. Yet our working understanding of arrest remains antiquated. For purposes of the Fourth Amendment, arrests are commonly conceptualized just as physical seizures. But in the age of criminal records and widespread regulatory action premised on arrest alone, this definition obscures more than it illuminates. This Article has shown how the reach of arrests creates a systemic gap in our understanding of proportionality, punishment, and the arrest process. Arrest can trigger penalties that are severe, but that do not depend on conviction.

Arrests create profound uncertainty about notice, process, and the way institutions operate. Recognizing how little purchase our legal institutions have over arrest should be the first step in developing a more tailored regulatory framework, one that recognizes that arrest is no longer just one government action—the seizure—but several different processes at once. Recognizing the reach of government action is key to developing a legal and policy framework that tethers arrest to the law and, in turn, permits members of the polity to have the opportunity to evaluate pressing questions relating to fit, proportionality, and fairness.