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## Why Arrest?

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# WHY ARREST?

Rachel A. Harmon\*

*Arrests are the paradigmatic police activity. Though the practice of arrests in the United States, especially arrests involving minority suspects, is under attack, even critics widely assume the power to arrest is essential to policing. As a result, neither commentators nor scholars have asked why police need to make arrests. This Article takes up that question, and it argues that the power to arrest and the use of that power should be curtailed. The twelve million arrests police conduct each year are harmful not only to the individual arrested but also to their families and communities and to society as a whole. Given their costs, arrests should be used only when they serve an important state interest; yet, they often happen even when no such interest exists. Governments have allowed constitutional law to become the primary constraint on arrest practices, and it has proved a poor proxy for good policy analysis. The Fourth Amendment permits arrests whenever an officer has probable cause: it has no mechanism for ensuring that the state has any interest in making an arrest—as opposed to starting the criminal process in another way. More broadly, traditional arguments for arrests cannot justify existing arrest practice. Arrests are usually unnecessary to start the criminal process effectively, to maintain order, to collect evidence, or to deter crime. In most cases, reasonable, less intrusive, alternative means exist or could exist for achieving these ends. Even arrests for some serious crimes might be curbed significantly without risking substantial harm to public safety or order. If the state can achieve its law enforcement objectives without arrests, then police departments should conduct far fewer arrests than they currently do, and states should restrict the statutory authority to arrest accordingly. Though there are risks to reducing arrests, those risks are far less problematic than continuing what is presently a massive, and largely unnecessary, enterprise of state coercion.*

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#### INTRODUCTION

“You are under arrest.”

Perhaps no words stand more for what it means to be a police officer than these. There is a reason for this preeminence. It is no exaggeration to say that handcuffing a suspect and taking him to jail is the paradigmatic police activity. Police make arrests to start most criminal prosecutions, to take control of dangerous people, and to solve problems on the street. Arrests are so central to our way of thinking about law enforcement that we often measure the success of policing by the number of arrests officers make. It is an axiom of criminal justice policy that law enforcement requires arrests.

If you want to see just how strong this assumption is, consider that, although arrests are at the heart of today’s most contentious critiques of criminal justice, critics almost never suggest that the power to arrest is part of the problem. When law enforcement detractors protest that police practices are abusive and discriminatory, they are frequently talking about arrests. When critics argue that we incarcerate far too many people for far too long and then continue to punish them after they are free, they view arrest as an important step towards incarceration and the use of arrest records as part of the extended punishment. And when they contend that the killings by law enforcement of Michael Brown, Walter Scott, Tamir Rice, Eric Garner, Freddie Gray, and Samuel Dubose represent a racist violence so extreme that it is analogous to lynching, they are often speaking of force used during arrests. To address these problems, commentators attack the judgment exercised in individual arrests, and they advocate reforms such as eliminating some low-level crimes, lowering sentences, discouraging racial disparities in policing, collecting more data, and prosecuting police officers more often. But they do not question police authority to make an arrest when a crime occurs. Like almost everyone else, even bitter critics of American criminal justice accept that arrests are generally essential to ensuring public safety and order, and that the police power to arrest is therefore largely inviolable.

This Article considers whether the axiom is true. Do police need to arrest? In a liberal society, government coercion that intrudes upon individual freedom must be justified. To be legitimate, our practice of arrest should be

at least plausibly necessary to achieve important public aims, the costs of arrests should be broadly proportionate to the ends they serve, and the harms of arrests should be distributed fairly.<sup>1</sup> Yet, right now, generous law enforcement authority to arrest exists, largely unexamined. Perhaps because constitutional doctrine purports to regulate each arrest, we take the power to arrest for granted. If anything, when we consider arrests, we tend to assume that arrests are not too costly, at least for most crimes, because they are so briefly intrusive and because—even if not every arrest is legitimate—arrests are critical to law enforcement goals.

I argue that these assumptions are flawed. First, arrests are more harmful than they seem, not only to the individuals arrested but also to their families and communities and to society as a whole. Second, the law we use to evaluate arrests cannot fairly weigh these harms. The Constitution's restrictions on the state's power to arrest have limited bearing on whether individual arrests are worthwhile and much less bearing on whether the present heavy reliance on arrest as a tool of policing is legitimate. And third, our traditional justifications for arrests—starting the criminal process and maintaining public order—at best support far fewer arrests than we currently permit.

In Part I, I provide a working definition of an arrest, a term which has no standard definition in the law. Under this definition, an arrest occurs when an officer takes a suspect into custody, transports him to a police facility, takes identifying information, creates a record of the arrest, and detains the suspect until release or judicial review. I then review the costs of legal arrests for suspects, families, officers, and municipalities. In Part II, I contend that Fourth Amendment law does not ensure that arrests are imposed only when these costs are worth bearing or normatively justified. In developing its Fourth Amendment doctrine, the Supreme Court takes for granted that the government has a strong interest in arresting those suspected of crimes, and it weighs this interest heavily in evaluating arrests. Moreover, the Court's Fourth Amendment rules often allow arrests (and the serious intrusions that accompany them) for reasons internal to constitutional doctrine rather than because the arrests reflect an adequate balance between individual and societal interests. In Part III, I consider the state interests in arrests and find that they are not as strong as they are commonly imagined to be. Arrests are usually unnecessary to start the criminal process because alternative—and less harmful—legal mechanisms can largely identify defendants and ensure they appear in court. Similarly, arrests are not essential either to defuse most ongoing disorder or to collect evidence or to

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1. See Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 873–74 (2015) [hereinafter Harmon, *Federal Programs*] (“[I]nvasions of privacy, autonomy, liberty, and bodily integrity by the police should . . . be measured both by whether they serve a legitimate state end and whether they are proportionate to that end.”). Fairness means both that the person is selected for arrest for a good, individualized reason, such as because there is evidence of criminal offending and a risk of nonappearance, and also that he is not also selected for a bad reason, such as his race, ethnicity, sex, or religion, though there can be debate about what constitutes a good or bad reason.

fight crime because police have, or could adopt, less intrusive alternative means of achieving the same ends. I conclude that, given that arrests are extremely costly and often unnecessary, we should consider significant reforms to reduce police reliance on arrests as a commonplace law enforcement tool, including reducing police authority to arrest.

In the United States, we arrest something like twelve million people a year, adding up to more than 250 million arrests over the past twenty years.<sup>2</sup> Even this initial look at why we arrest suggests that our existing practice is indefensible.

## I. THE CONSEQUENCES OF ARRESTS

### A. *What an Arrest Is*

There is no standard definition of an arrest and no shared nomenclature for the various police practices that start the criminal process and deprive people of their freedom. Court decisions and statutes sometimes apply the term to simply handcuffing a suspect or issuing a traffic ticket, but in other instances exclude charging a suspect and hauling him off to jail if he is soon let go. Moreover, definitions of arrests are frequently instrumental and unstable.<sup>3</sup> Courts define arrests differently when distinguishing them from *Terry* stops, when evaluating a wrongful arrest claim, and when considering whether evidence stemmed from a legitimate search incident to arrest.<sup>4</sup>

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2. See FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2014, at 2 (2014), <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/persons-arrested/arrestmain.pdf> [<https://perma.cc/R9TD-55JA>]; FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2012, at 1 (2012), <https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/arrestmain.pdf> [<https://perma.cc/H8AF-48M7>]; HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, ARREST IN THE UNITED STATES, 1980–2009, at 16 (2011), <http://www.bjs.gov/content/pub/pdf/aus8009.pdf> [<https://perma.cc/F438-JX76>]. This and other federal data may overestimate the number of arrests. Federal statistics rely on the FBI's Uniform Crime Reporting Program. Reporting instructions for the UCR Program tell agencies to report as arrests "all persons processed by arrest, citation, or summons," an instruction that would appear to include some charged without a traditional custodial arrest. See FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING HANDBOOK 98 (2004), <https://www2.fbi.gov/ucr/handbook/ucr-handbook04.pdf> [<https://perma.cc/2TUV-4BX7>]. The instructions then confusingly suggest that reporting refers only to arrests, that is, "the number of persons taken into custody." *Id.* Developing an accurate accounting of the number of arrests versus the number of criminal summonses and citations requires clearer instructions and more granularity in the data provided.

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

4. See Thomas K. Clancy, *What Constitutes an "Arrest" Within the Meaning of the Fourth Amendment?*, 48 VILL. L. REV. 129 (2003) (discussing varying constitutional definitions of arrests and collecting cases).

This paper evaluates contemporary arrest practice by examining the effects of arrests on individuals and government interests. Towards that end, it adopts a functional definition of arrests, one that focuses on what arrests do. In this view, the key components of an arrest are a significant deprivation of liberty, some formal step toward criminal prosecution, and getting “booked.” More specifically, the police arrest a suspect whenever they, on the basis of suspicion that he has committed a criminal offense or violation, (1) take him into custody by handcuffing or otherwise depriving him of his freedom; (2) transport him to a police station, jail, or detention facility; (3) process him by creating a permanent record of the arrest, taking identifying information, including photographs, fingerprints, and the like; and (4) detain him until either he is released or his arrest is subjected to judicial review.

The first of these criteria—custody—limits the concept of arrests to immediately coercive government activities. This distinguishes arrests from noncustodial means of commanding a suspect to appear to answer criminal charges. Criminal summonses and citations, for example, require suspects to bring themselves before a court at a fixed time. Some citations, usually traffic tickets, also permit defendants to choose between appearing to contest a charge and conceding guilt by mail. Although all of these are sometimes labelled “arrests” by courts or legislatures, none involve the traditional kind or scope of intrusion experienced by those taken into custody.

The second criterion—conveyance to a law enforcement facility—distinguishes arrests from lesser police detentions. This approach is consistent with the Supreme Court’s constitutional criminal procedure cases, which distinguish between “full custodial” or “formal” arrests and other seizures.<sup>5</sup> For example, Fourth Amendment law treats seizures that exceed the degree of intrusion permitted in a brief *Terry* stop like arrests in that they must be justified by probable cause.<sup>6</sup> But only “formal” or “custodial” arrests, and not extended stops that result in citations, put suspects in close and extended proximity to officers, and therefore justify “search[es] incident to arrest.”<sup>7</sup> In this way, the Court separates arrests (on one hand), from traffic

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5. See, e.g., *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015) (distinguishing between an arrest and a seizure for a traffic violation); *Berkemer*, 468 U.S. at 439 (distinguishing between formal arrest and a traffic or *Terry* stop); *Cupp v. Murphy*, 412 U.S. 291, 294 (1973) (distinguishing between formal arrest and a seizure implicating the Fourth Amendment); *United States v. Robinson*, 414 U.S. 218, 235 (1973) (distinguishing between full-custody and lesser seizures not justifying a search incident to arrest).

6. See *Dunaway v. New York*, 442 U.S. 200, 212–13 (1979) (“[Although] these intrusions fell far short of the kind of intrusion associated with an arrest. . . . [t]he application of the Fourth Amendment’s requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an ‘arrest’ under state law. 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, while not insignificant for all purposes, obviously do not make petitioner’s seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* and its progeny.” (citations omitted)).

7. See *Knowles v. Iowa*, 525 U.S. 113, 117–18 (1998).

stops, *Terry* stops, and other seizures (on the other), which may require legal justification, even probable cause, but do not constitute an arrest.<sup>8</sup>

The third criterion—booking—highlights another consequential component of arrests. During an arrest, after a person is handcuffed and transported to a police station, he and his belongings are searched thoroughly, and an officer “books” the suspect by taking information and creating a permanent record in the department’s files. In this way, arrests are different both from what happens to those detained on the street without an arrest and those transported to a station house by a police officer for another purpose, such as an interview. While precise procedures for booking vary, the officer will inevitably record the crime of arrest, as well as identifying information about the suspect, including the person’s name, address, date of birth, height, weight, eye, and hair color.<sup>9</sup> Suspects may also be photographed and fingerprinted, and have their DNA collected.<sup>10</sup> The fact of the arrest, the charges, and information about the suspect are entered into computerized databases with national links, and therefore are available far beyond the arresting agency. Unlike many other encounters with the police, a suspect who is arrested and booked faces practical, reputational, and privacy consequences that persist whether or not he is subject to further legal proceedings.

Some jurisdictions carry out what might be called “quick-release arrests,” in which defendants are transported to jail and booked, appear before a police official, and then are released, all within a few hours. Though they are frequently not labelled arrests by the jurisdictions that carry them out, and they are less costly for suspects than traditional arrests, quick-release arrests, including desk appearance tickets<sup>11</sup> and stationhouse releases, nevertheless share the intrusive character of more traditional arrests. A suspect who is taken to jail suffers a different kind of harm than one detained on the street, even if he is released soon afterward.

Finally, just as arrests are distinct from *Terry* and traffic stops, though they are all seizures under Fourth Amendment law, arrests are also distinct from the pretrial detention and sentences of imprisonment that often follow

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

9. See, e.g., CHI. POLICE DEP’T, SPECIAL ORDER S06-01: PROCESSING PERSONS UNDER DEPARTMENT CONTROL (2015), <http://directives.chicagopolice.org/directives/data/a7a56e4b-12cbe26-df812-ccbfb66447d9a33ff3e.pdf?hl=true> [https://perma.cc/Z8F9-3YFQ] (detailing the booking process used by Chicago Police Department); cf. *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990) (describing identifying booking questions as routine).

10. See *Maryland v. King*, 133 S. Ct. 1958 (2013) (describing and approving DNA collection during arrest).

11. See, e.g., N.Y. CRIM. PROC. LAW § 150.20 (McKinney 2004). For a thorough analysis of the workings of desk appearance tickets in New York City, see MARY T. PHILLIPS, NEW YORK CITY CRIMINAL JUSTICE AGENCY, THE PAST, PRESENT, AND POSSIBLE FUTURE OF DESK APPEARANCE TICKETS IN NEW YORK CITY (2014), <http://www.nycja.org/library.php> [https://perma.cc/8MC5-BKCC].

arrests, though they all involve incarceration. An arrest ends as soon as a suspect is released (with or without charge) or his custodial status is subject to judicial review.<sup>12</sup> When a bail determination is made, any continuing custody is a form of pretrial detention, an infringement of liberty that is justified by overlapping, but different, aims. As this distinction suggests, an arrest can have three lawful outcomes: (1) a suspect may be charged and freed almost immediately on some form of stationhouse release; (2) he may be charged and held until he sees a magistrate—often a day or two; or (3) he can be released without an outstanding charge or further proceeding.

### B. *The Costs of Arrests*

By its nature, every arrest diminishes a citizen's freedom. It denies the arrestee—albeit briefly—the possibility of living according to his own reasons and motives. Protecting this kind of autonomy is a central goal of liberalism, and depriving a person of it is a moral and political harm. This alone should lead to caution about arrests. But arrests also have more concrete consequences, and yet the legal tools we generally use to evaluate them are inadequate to consider whether those costs are justified.

In the near term, arrests are often frightening and humiliating. Arrestees lose income during the arrest, and sometimes their jobs when they do not show up for work.<sup>13</sup> They pay arrest fees,<sup>14</sup> booking fees,<sup>15</sup> and perhaps attorney's fees, if they hire a lawyer for their first appearance. If a suspect's car is towed because of an arrest during a traffic stop, he loses the value of the

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12. That can be within a few hours for stationhouse bail or up to two days in the case of a first appearance before a magistrate. See *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). Some states require that people arrested for particular crimes stay in jail for a minimum amount of time, even if they post bond. See, e.g., MICH. COMP. LAWS SERV. § 764.9(c) (LexisNexis 2003) (requiring mandatory holds for domestic violence); TENN. CODE ANN. § 40-11-150(h)(1) (2012) (requiring a twelve-hour hold of any person accused of domestic violence and found to be a threat to the alleged victim).

13. Cf. Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014, 10:30 PM), <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402> (on file with *Michigan Law Review*) (describing individuals who had difficulty obtaining jobs because of their arrest records, even when the charges against them were ultimately dropped).

14. For states charging police investigation fees for arrests, see, for example, MICH. COMP. LAWS SERV. § 769.1f (LexisNexis Supp. 2016), 42 PA. STAT. AND CONS. STAT. ANN. § 9728(g) (West 2014), and WASH. REV. CODE ANN. § 10.01.160 (West Supp. 2016).

15. See BARBARA KRAUTH & KARIN STAYTON, U.S. DEP'T OF JUSTICE, FEES PAID BY JAIL INMATES: FEE CATEGORIES, REVENUES, AND MANAGEMENT PERSPECTIVES IN A SAMPLE OF U.S. JAILS 30 (2005), <http://static.nicic.gov/Library/021153.pdf> [<https://perma.cc/DQG7-UP65>] (stating that 36 percent of jails responding to the survey imposed a booking fee ranging from \$3 to \$168 before criminal proceedings took place). Some states impose booking fees by statute. See, e.g., COLO. REV. STAT. § 30-1-104(n) (2014) (authorizing counties to impose up to a \$30 booking fee).



time it takes to find his car, travel to the impound lot, and secure the vehicle's release, as well as the impound fees.<sup>16</sup> An arrest can affect child custody rights, it can trigger deportation, and it can get a suspect kicked out of public housing.<sup>17</sup> Over the long term, individuals with arrest records may have worse employment and financial prospects.<sup>18</sup> And all of these consequences can occur even if the arrestee is never convicted of a crime.

As compared to simply charging someone with a crime and giving him a summons to appear in court, arrests may increase the chances that a suspect will be detained prior to trial.<sup>19</sup> That in turn is linked to higher prison sentences, which compound the deprivation of liberty caused by the arrest itself.<sup>20</sup> And as I noted previously, arrestees lose privacy. They are questioned

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16. There is no comprehensive estimate of the number of cars towed or costs of impoundment as a result of arrests. For one example of fees resulting from a towed vehicle see Ryan J. Stanton, *The Big Business of Towing: Records Show Thousands of Vehicles per Year Impounded in Ann Arbor*, ANN ARBOR NEWS (Sept. 2, 2012, 5:57 AM), <http://www.annarbor.com/news/the-big-business-of-towing-thousands-of-vehicles-per-year-impounded-in-ann-arbor/> [<https://perma.cc/3G9D-JZCA>] (finding that in Ann Arbor individuals were charged a \$60 tow fee and privately contracted towing companies charged \$120 per tow and \$20 in daily storage fees). Others have pointed out that arrests and impoundment have been used as a revenue raising measure in cities such as Los Angeles. See Shelby Grad, *Ferguson, Mo.'s, Alleged Revenue Scams Echo in Southeast L.A. County*, L.A. TIMES (Mar. 5, 2015, 9:11 AM), <http://www.latimes.com/local/lanow/la-me-ln-ferguson-missouri-abuses-echo-southeast-los-angeles-county-20150305-story.html> [<https://perma.cc/ZPS8-Y77F>].

17. See 24 C.F.R. § 966.4(l)(5)(iii)(A) (2016) (stating that a public housing lease may be terminated “regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction”); 24 C.F.R. § 982.553(c) (2016) (analogous provision for Section 8 voucher); CLARE M. NOLAN, CALIFORNIA RESEARCH BUREAU, CHILDREN OF ARRESTED PARENTS: STRATEGIES TO IMPROVE THEIR SAFETY AND WELL-BEING 11 (2003), <https://www.library.ca.gov/crb/03/11/03-011.pdf> [<https://perma.cc/Q7PE-6R2T>]; Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 1 (2014) (noting general consequences of arrest, including those related to child custody, deportation, and eviction); *FY 2015 ICE Immigration Removals*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/removal-statistics> [<https://perma.cc/M7ZE-777P>] (implying that 41 percent of deportations involved arrests of individuals with no prior criminal convictions).

18. See, e.g., Fields & Emshwiller, *supra* note 13 (citing a study by Tia Stevens Andersen of the University of South Carolina indicating that those who were arrested, but not convicted, earned \$2,000 less on average and were 8 percent more likely to be in poverty than those from a similar background who were never arrested); Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451 (2006); Christopher Uggen et al., *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627 (2014); see also *United States v. Marion*, 404 U.S. 307, 320 (1971) (“Arrest is a public act that may seriously interfere with the defendant’s liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.”).

19. See Terry L. Baumer & Kenneth Adams, *Controlling a Jail Population by Partially Closing the Front Door: An Evaluation of a “Summons in Lieu of Arrest” Policy*, 86 PRISON J. 386 (2006).

20. See CHRISTOPHER T. LOWENKAMP ET AL., LAURA & JOHN ARNOLD FOUND., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES (2013), [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF\\_Report\\_state-sentencing\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf) [<https://perma.cc/8DLL-FJ35>] (showing that, compared to defendants released prior to

about their home address, birth place, and medical and psychological conditions. They are likely to be photographed and fingerprinted, and to have their clothing and personal property taken. They will often be subjected to a strip search and a health screening when they enter jail, which can include X-rays for tuberculosis and blood tests for gonorrhea or AIDS.<sup>21</sup> Their DNA may be taken and uploaded to the National DNA Index.<sup>22</sup>

Even the initial decision to arrest carries a risk of potentially serious repercussions. Data about police use of force during arrests is notoriously unreliable, but recent high-profile killings by police officers underscore that every arrest involves a confrontation between a suspect and a police officer that can go badly awry. Once a police officer attempts an arrest, he is authorized to use force, sometimes deadly force, to enforce that decision.<sup>23</sup> As a result, arrests always risk and sometimes lead to injury or death.<sup>24</sup> That risk is likely to be far lower when an officer hands the suspect a citation and permits him to go on his way.

For an example, recall that in July 2014, New York Police Department officers were videotaped trying to arrest Eric Garner in Staten Island.<sup>25</sup> Garner refused to be handcuffed, and he was forcibly taken to the ground. The officer taking down Garner grabbed him by the neck. As a result of the hold and his underlying health problems, Garner was unable to breathe and

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trial, those detained were four times more likely to receive a sentence of imprisonment and three times more likely to be given a longer prison sentence, even if the defendant is held for only a few days); MARY T. PHILLIPS, NEW YORK CITY CRIMINAL JUSTICE AGENCY, PRETRIAL DETENTION AND CASE OUTCOMES, PART 1: NONFELONY CASES 26, 30, 35, 40 (2007) (linking one day of detention with an increase in conviction and incarceration rates, even controlling for other factors).

21. See e.g., ARIZ. REV. STAT. ANN. § 13-1415 (2010) (requiring a blood test for gonorrhea, HIV, and other sexually transmitted diseases for those alleged to have committed sexual offenses); GA. CODE ANN. §§ 17-10-15, 31-22-9.1 (2013) (allowing required HIV testing upon arrest for an AIDS-transmitting crime, at victim's request); KAN. STAT. ANN. §§ 65-6001, 65-6008, 65-6009 (2002 & Supp. 2014) (allowing infectious disease testing upon arrest for a crime involving potential transmission, at victim's request); MINN. STAT. ANN. § 144.445 (West 2011) (allowing tuberculosis screenings in correctional institutions); MO. REV. STAT. § 545.940 (2014) (allowing a prosecuting attorney to require a test for sexually transmitted diseases); WISC. STAT. § 968.255 (2015) (allowing strip searches for persons who are arrested and detained in jail).

22. See *Frequently Asked Questions on CODIS and NDIS*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet> [<https://perma.cc/K6ZN-NN6T>]; see also *Maryland v. King*, 133 S. Ct. 1958, 1968 (2013) (“Twenty-eight States and the Federal Government have adopted laws similar to the Maryland Act authorizing the collection of DNA from some or all arrestees.”).

23. See *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985).

24. See DUREN BANKS ET AL., BUREAU OF JUSTICE STATISTICS, ARREST-RELATED DEATHS PROGRAM ASSESSMENT 1 (2015).

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

died.<sup>26</sup> It is clear from the video that Garner did not cooperate with his arresting officers.<sup>27</sup> Doing so might have averted the force used against him.<sup>28</sup> But it is inevitable that some arrestees will fail to comply with police directives, and had officers never sought to arrest Garner, he would likely still be alive. That is to say, arrests risk costly injuries and deaths, even when the arrest and the force used to ensure it are legally justified.

For some, the Garner example triggers the intuition that, whether or not criminal justice costs are predictable, we should worry less about those that are within the suspect's control.<sup>29</sup> More generally, some who are unsympathetic to recent critiques of criminal justice might be tempted to discount the costs of arrests on the grounds that they accrue largely to criminals who, after all, deserve them. That intuition is wrong. First, many arrests are for crimes that are so minor that the harms of arrest would be far too serious a punishment if they were imposed for a retributive or deterrent purpose. Something like half a million arrests each year are for public drunkenness, for example.<sup>30</sup> Nearly that many again are for other violations of liquor laws, such as having an open container in public.<sup>31</sup> People are arrested for loitering, for vagrancy, and for gambling.<sup>32</sup> In New York City, 1,600 people were arrested in 2011 for putting their feet up on the subway.<sup>33</sup> Eric Garner was

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

27. Karni et al., *supra* note 25.

28. See Greg Botelho, *Was a New York Police Officer's Chokehold on Eric Garner Necessary?*, CNN (Dec. 8, 2014, 8:29 PM), <http://www.cnn.com/2014/12/04/us/eric-garner-chokehold-debate/> [<https://perma.cc/73LA-P7LX>] (including a discussion with Tom Fuentes, former assistant director with the FBI, about an officer's need to use force when someone resists arrest).

29. See, e.g., Bob McManus, *Blame Only the Man Who Tragically Decided to Resist*, N.Y. POST (Dec. 4, 2014, 12:03 AM), <http://nypost.com/2014/12/04/eric-garner-was-a-victim-of-himself-for-deciding-to-resist/> [<https://perma.cc/V8G7-XGH4>] (arguing that Eric Garner and others who resist are to blame when they lose their lives and that, as criminals, the use of force against them was justified).

30. SNYDER, *supra* note 2, at 2; FED. BUREAU OF INVESTIGATION, 2014 CRIME IN UNITED STATES, tbl. 29 (2014), <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014.tables/table-29> [<https://perma.cc/978P-J4RC>].

31. SNYDER, *supra* note 2, at 2.

32. *Id.*; FED. BUREAU OF INVESTIGATION, *supra* note 30, at tbl. 29.

33. See Joseph Goldstein & Christine Haughney, *Relax, if You Want, but Don't Put Your Feet Up*, N.Y. TIMES (Jan. 6, 2012), <http://www.nytimes.com/2012/01/07/nyregion/minor-offense-on-ny-subway-can-bring-ticket-or-handcuffs.html> (on file with *Michigan Law Review*). This data was gathered independently by New York Times reporters looking at data obtained from district attorney's offices in the boroughs. *Id.* Better data might reveal a different number.

selling loose cigarettes.<sup>34</sup> It is hard to say that these crimes “deserve” the harms that come from arrests.

Even for more serious crimes, the minimum standard for a lawful arrest, probable cause, is almost by definition not enough proof to establish blame-worthiness.<sup>35</sup> One could counter that in many cases, the police have far more than probable cause of criminal activity: they actually see the crime. Even then, when the proof is overwhelming, police officers are inappropriate institutional actors to determine culpability and sanction.<sup>36</sup> The consequences of arrests simply cannot be waved away on the ground that they are deserved.<sup>37</sup>

In any case, the harms of arrests extend far beyond the suspects who might have engaged in wrongdoing. When someone is arrested, his family and community suffer, too. His family is deprived of the housework and childcare he would have provided if he were home, and they fully feel his lost income and weaker job prospects. When Eric Garner died, he had six children, including a three-month-old baby, and three grandchildren, whom he cared for and supported.<sup>38</sup> All of them were harmed by the attempt to arrest him.<sup>39</sup> The suspect’s community experiences disruption as well, both in feelings of insecurity and alienation and in more practical terms. Even strangers are affected by arrests. When police engage in foot pursuits, car chases, and physical struggles to complete an arrest, for instance, they risk harm to bystanders, as well as suspects.<sup>40</sup>

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

35. See *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813) (“[T]he term ‘probable cause,’ according to its usual acceptance, means less than evidence which would justify condemnation . . . .”). Compare *Brinegar v. United States*, 338 U.S. 160, 176 (1949) (“These long-prevailing standards [of probable cause] seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community’s protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part.”), with *Victor v. Nebraska*, 511 U.S. 1, 16 (1994) (expressing concern that instructions demanding evidence “to a moral certainty” may not demand an adequate level of proof to establish the “beyond a reasonable doubt” proof necessary for conviction).

36. See Rachel A. Harmon, *When Is Police Violence Justified?*, 102 Nw. U. L. REV. 1119, 1151–52 (2008) [hereinafter Harmon, *Police Violence*] (“[P]olice officers’ irregular and discretionary decisions . . . hardly constitute the type of due process that supports punishing suspects.”).

37. See Harmon, *Federal Programs*, *supra* note 1, at 903 (“From a welfare perspective, all costs matter, even costs to criminals, and even if they are fairly imposed.”).

38. Joseph Goldstein & Nate Schweber, *Man’s Death After Chokehold Raises Old Issue for the Police*, N.Y. TIMES (July 18, 2014), [www.nytimes.com/2014/07/19/nyregion/staten-island-man-dies-after-he-is-put-in-chokehold-during-arrest.html](http://www.nytimes.com/2014/07/19/nyregion/staten-island-man-dies-after-he-is-put-in-chokehold-during-arrest.html) (on file with *Michigan Law Review*).

39. See *id.*

40. See *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2017–18 (2014) (describing how a passenger was killed when police shot into a car to end a high speed chase); *Scott v. Harris*, 550 U.S.

Potential arrestees and their families may take costly precautionary measures to avoid arrests. Consider a woman who is repeatedly abused by her husband. Many states either require or heavily favor arrests in response to incidents of domestic violence.<sup>41</sup> By encouraging arrests, these states seek to correct a disturbing tradition of under-policing family violence, and arrests can provide a crucial interruption in an ongoing violent encounter.<sup>42</sup> But knowing that her batterer will likely face arrest will predictably lead some victims to suffer a beating rather than call 911 and take the risk that her partner will lose his job or be deported.<sup>43</sup> The harm done to that woman, both physically and psychologically, during that beating—which the police could have stopped if they had been called — is a consequence of our arrest practices.

Arrests can also be problematic for the police officers who conduct them. Officers put themselves at risk when they pursue fleeing suspects or counter physical resistance.<sup>44</sup> In fact, more officers are injured and killed during arrests than during almost any other single police activity.<sup>45</sup> Arrests also affect public perceptions of the police, causing friction between communities and departments, especially for minority communities that disproportionately suffer the costs of arrests for minor offenses. That friction

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372, 384 (2007) (describing the threat to pedestrians and other motorists from high-speed police chases); *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 836–37 (1998) (discussing passenger killed in police chase).

41. See, e.g., ALASKA STAT. § 18.65.530(a) (2014) (requiring arrest upon probable cause to believe that a crime of domestic violence was committed within the past twelve hours); NEV. REV. STAT. § 171.137(1) (2015) (requiring arrest upon probable cause to believe that within twenty-four hours battery was committed); VA. CODE ANN. § 19.2–81.3(B) (Supp. 2016) (requiring arrest upon probable cause to believe there was an assault or battery on family or a household member).

42. See EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 12529 (3d ed. 2003); J. DAVID HIRSCHER & D.J. DAWSON, VIOLENCE AGAINST WOMEN: SYNTHESIS OF RESEARCH FOR LAW ENFORCEMENT OFFICIALS 2–10 (2000), <https://www.ncjrs.gov/pdffiles1/nij/grants/198372.pdf> [<https://perma.cc/F34D-CWQJ>].

43. See Harmon, *Federal Programs*, *supra* note 1, at 914 (describing precautionary costs and citing Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence from Mandatory and Recommended Arrest Laws*, 93 J. PUB. ECON. 85, 93 (2009)).

44. See CYNTHIA LUM & GEORGE FACHNER, INT’L ASS’N OF CHIEFS OF POLICE, POLICE PURSUITS IN AN AGE OF INNOVATION AND REFORM: THE IACP POLICE PURSUIT DATABASE 7 (2008), [http://www.nccpsafety.org/assets/files/library/Police\\_Pursuits.pdf](http://www.nccpsafety.org/assets/files/library/Police_Pursuits.pdf) [<https://perma.cc/XZ96-NPDD>] (finding that between 1987 and 2006, 51.8 percent of officer fatalities were due to automobile accidents or attempts to make arrests); Press Release, FBI, FBI Releases 2014 Preliminary Statistics for Law Enforcement Officers Killed in the Line of Duty (May 11, 2015), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2014-preliminary-statistics-for-law-enforcement-officers-killed-in-the-line-of-duty> [<https://perma.cc/FT79-NGWF>] (finding that 16 officers were killed in 2014 during traffic stops or pursuits or during investigative activities).

45. See *2013 Law Enforcement Officers Killed & Assaulted*, FED. BUREAU OF INVESTIGATION: UNIFORM CRIME REPORTING, tbl. 68, [https://ucr.fbi.gov/leoka/2013/tables/table\\_68\\_leos\\_asltd\\_circum\\_at\\_scene\\_of\\_incident\\_by\\_population\\_group\\_and\\_percent\\_cleared\\_2013.xls](https://ucr.fbi.gov/leoka/2013/tables/table_68_leos_asltd_circum_at_scene_of_incident_by_population_group_and_percent_cleared_2013.xls) [<https://perma.cc/P2TC-KAXV>] (showing that over 8,000 officers were assaulted during arrests in 2013).

causes fear among citizens and low morale and high stress for officers, who in turn have more difficulty policing as a result.<sup>46</sup>

Finally, arrests are expensive for the towns and cities that carry them out. Arrests take officers off the street, place demands on already overburdened courts, and incur one or two days of jail detention costs.<sup>47</sup> While there is no serious contemporary estimate of the cost of arrests to municipalities, even a back-of-the-envelope calculation suggests that they are substantial. According to the limited available research, an arrest averages several hours of officer time, by some estimates as little as four, but by others as much as 13.5 hours.<sup>48</sup> Let's call it five. That's the time that an officer is off the street handcuffing and transporting the suspect, drafting paperwork, and processing him. The mean wage for a police officer is around \$30 an hour, not including overhead or benefits.<sup>49</sup> On average, more

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46. See, e.g., David Cruickshank, *Recognizing the True Cost of Low Morale*, POLICE CHIEF, Sept. 2012, at 26 [http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=2756&issue\\_id=92012](http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2756&issue_id=92012) [<https://perma.cc/GZT8-Y52B>] (noting that low morale leads to increased officer attrition, absenteeism, and lower productivity that harms community-oriented policing); Justin Fenton & Justin George, *Violence Surges as Baltimore Police Officers Feel Hesitant*, BALTIMORE SUN (May 8, 2015, 9:35 PM), <http://www.baltimoresun.com/news/maryland/crime/blog/bs-md-ci-police-prosecutors-morale-20150508-story.html> [<https://perma.cc/ME45-SYJ3>] (contending that many officers have begun to take a "hands-off" approach due to low morale and feelings that there is a lack of public support for the police); Conor Friedersdorf, *The Brutality of Police Culture in Baltimore*, ATLANTIC (Apr. 22, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-brutality-of-police-culture-in-baltimore/391158/> [<https://perma.cc/SY4N-KN6C>] (arguing that the unrest in Baltimore occurred as a result of police use of force during the arrest of Freddie Gray and grew out of a history of over-policing and unnecessary arrests); Richard A. Oppel Jr., *West Baltimore's Police Presence Drops, and Murders Soar*, N.Y. TIMES (June 12, 2015), <http://www.nytimes.com/2015/06/13/us/after-freddie-gray-death-west-baltimores-police-presence-drops-and-murders-soar.html> (on file with *Michigan Law Review*) (noting that the combination of officer morale issues and safety concerns have led to a massive reduction in police presence in West Baltimore).

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

48. TERRY FAIN ET AL., RAND CORP., LOS ANGELES COUNTY JUVENILE JUSTICE CRIME PREVENTION ACT: FISCAL YEAR 2008–2009 REPORT 55–56 (2010), [http://www.rand.org/content/dam/rand/pubs/technical\\_reports/2010/RAND\\_TR832.pdf](http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR832.pdf) [<https://perma.cc/QJ3Y-HD4U>] (estimating 4 hours of officer time and 1.5 hours of detective review of the case for the LAPD per arrest and 13.5 hours per arrest for the Los Angeles County Sheriff's Department); L. ANTHONY LOMAN, INST. OF APPLIED RESEARCH, A COST-BENEFIT ANALYSIS OF THE ST. LOUIS CITY ADULT FELONY DRUG COURT 43 (2004), <http://www.iarstl.org/papers/SLFDC-costbenefit.pdf> [<https://perma.cc/PNJ2-2LUV>] (estimating 4 hours per arrest based on data from the Missouri Highway Patrol).

49. See *Occupational Employment and Wages, May 2015: 33-3051 Police and Sheriff's Patrol Officers*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/oes/current/oes333051.htm> [<https://perma.cc/U9T2-4JTF>] (finding an annual wage mean of \$61,270 for police officers).

than twelve million arrests have been conducted annually in recent years, but round down to twelve million.<sup>50</sup> In officer time alone—which is to say, ignoring other law enforcement personnel and indirect costs, court costs, some booking and transportation costs, and jail costs—state and local governments spend more than \$1.8 billion each year on arrests. Or, if one prefers, arrests consume something like sixty million hours of officer time that could be used for patrol, for problem solving, or for other community priorities.<sup>51</sup> Costs to municipalities and counties, like all of the other costs of arrests, whether physical, financial, psychological, or social, and whether to suspects, families, officers, or communities, should be considered in assessing the appropriateness of arrest as a dominant law enforcement tool.

## II. THE LAW OF ARRESTS

Taken together, the costs of arrests are substantial. Overwhelmingly, these harms do not arise from bad arrests or police misconduct. People suffer them even when they are arrested legally and without excessive force. Yet we often assume that if arrests are legal, and in particular, if they comply with the Constitution, then they are normatively justified, at least most of the time.

This assumption is plausible, but it is wrong. Given that arrests are costly deprivations of liberty, they should, as a normative matter, be imposed only when they serve a significant state interest, when the risk of harm is not grossly disproportionate to that interest, and when they are used fairly.<sup>52</sup> The Fourth Amendment is the Constitution's primary way of regulating arrests, and Fourth Amendment doctrine purports to weigh the harm to the individual against societal interests when evaluating searches and seizures.<sup>53</sup> It therefore seems reasonable to think that when an arrest satisfies the constitutional standard, it will also meet the conditions for normative justifiability, at least most of the time.

In practice, however, though Fourth Amendment doctrine is framed in terms of balancing competing interests, the probable cause requirement for initiating arrests does not ensure that the government has an interest in carrying out an arrest, as opposed to starting the criminal process in another way. Nevertheless, other Fourth Amendment law assumes that once probable cause exists, the state's interest in making an arrest justifies many other

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50. See SNYDER, *supra* note 2, at 2.

51. As the example of officer time suggests, not all of the costs of arrests are deadweight losses. But many of them, such as the harms of force used to conduct arrests, are.

52. See Harmon, *Police Violence*, *supra* note 36, at 1166 (arguing police should use force only in response to an imminent threat to a legitimate state interest, when necessary to defend that interest, and when using force would not create a risk of harm grossly disproportionate to the interest being protected).

53. *United States v. Place*, 462 U.S. 696, 703 (1983) (“We must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”).

intrusions. As a result, Fourth Amendment law is a poor proxy for good arrest policies.

A. *Fourth Amendment Law and the State's Interest in Arrests*

An arrest is the paradigmatic state seizure, and the Fourth Amendment prohibits unreasonable searches and seizures by the government.<sup>54</sup> Arrests must therefore be reasonable. One can think of reasonableness in Fourth Amendment law as having three components: Police must have a constitutionally reasonable basis for initiating the search or seizure, given its scope.<sup>55</sup> That basis for initiation must be assessed by a reasonable method.<sup>56</sup> And the search or seizure must be carried out in a reasonable manner.<sup>57</sup> Although the Supreme Court has set minimum standards for arrests along each of these lines, those standards do not ensure that arrests serve important government interests or impose costs proportional to those interests.

1. Probable Cause and Arrests

Under Fourth Amendment doctrine, “[a] police officer may arrest a person if he has probable cause to believe that person committed a crime,”<sup>58</sup> that is, if the facts and circumstances would lead a prudent person to conclude that the arrestee had carried out or was carrying out a criminal act.<sup>59</sup> The Court has long viewed this standard to be sufficient to accommodate both the individual’s interests in liberty and the government’s interests in law enforcement, because it represents “the accumulated wisdom of precedent and experience as to the minimum justification necessary” to establish

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54. See *Davis v. Mississippi*, 394 U.S. 721, 726–27 (1969) (“Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed ‘arrests’ or ‘investigatory detentions.’”).

55. See, e.g., *Draper v. United States*, 358 U.S. 307, 310 (1959) (indicating that an arrest may be constitutional if an officer has probable cause to believe that a suspect is violating the law).

56. See, e.g., *United States v. Watson*, 423 U.S. 411, 414–15 (1976) (holding constitutional a statutorily authorized warrantless arrest in public); *Katz v. United States*, 389 U.S. 347, 357 (1967) (emphasizing that an officer usually must obtain judicial approval before initiating a search, even where probable cause clearly exists).

57. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 7–8 (1985) (“Petitioners and appellant argue that if [the probable cause] requirement is satisfied the Fourth Amendment has nothing to say about *how* that seizure is made. This submission ignores the many cases in which this Court . . . has examined the reasonableness of the manner in which a search or seizure is conducted.”); *Terry v. Ohio*, 392 U.S. 1, 28 (1968) (“The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all.”).

58. *Garner*, 471 U.S. at 7.

59. *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949).



that an arrest is reasonable.<sup>60</sup> Thus, given probable cause, an officer may “make a custodial arrest without balancing costs and benefits or determining whether . . . [the] arrest was in some sense necessary.”<sup>61</sup> It does not matter whether the person faces only a fine for punishment or whether he poses little threat to the public.<sup>62</sup> Nor does it matter whether the state can adjudicate the suspect’s guilt equally well without an arrest.<sup>63</sup> Even bad motives do not negate the constitutionality of an arrest based on probable cause<sup>64</sup>: officers may use arrests to humiliate, to intimidate, or to exact revenge, all consistent with the Fourth Amendment.

The rule that probable cause legally justifies an arrest is so longstanding and pervasive that it is not defended or subject to scrutiny.<sup>65</sup> Unlike in other Fourth Amendment contexts, where the Court expressly weighs government and individual interests in determining what the Fourth Amendment requires,<sup>66</sup> the Court reasons differently in the context of arrests: “In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable.”<sup>67</sup> Probable cause is, by assertion, “the best compromise that has been found for accommodating [the] often opposing interests” of the government in carrying out arrests and of individuals in avoiding them.<sup>68</sup>

On its face, the probable cause standard seems a strange means of balancing the individual’s and the government’s interests in arrests, since it does not directly incorporate any of those interests. Rather, it measures how much evidence the government has that the suspect committed a crime. The standard makes sense only in light of the Court’s reasoning about the relationship between suspected criminals and public safety. In the Court’s view,

60. *Dunaway v. New York*, 442 U.S. 200, 208 (1979); *see also* *Maryland v. King*, 133 S. Ct. 1958, 1970 (2013) (“It is beyond dispute that ‘probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest.’” (quoting *Gerstein v. Pugh*, 420 U.S. 103, 113–14 (1975))).

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

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

63. *See id.*

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

65. In fact, the Court has suggested that such defense is unnecessary because the balance of interests is beyond doubt. *See Virginia v. Moore*, 553 U.S. 164, 171 (2008).

66. *See Riley v. California*, 134 S. Ct. 2473, 2484 (2014); *Maryland v. King*, 133 S. Ct. 1958, 1963 (2013); *United States v. Knights*, 534 U.S. 112, 119 (2001); *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).

67. *Moore*, 553 U.S. at 171 (citing *Atwater*, 532 U.S. at 354); *see also* *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004); *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975); *Brinegar v. United States*, 338 U.S. 160, 164 (1949).

68. *Brinegar*, 338 U.S. at 176.

probable cause safeguards individuals “from rash and unreasonable” interferences with privacy, liberty, and unfounded charges of crime, and therefore protects them.<sup>69</sup> And at the same time it permits the government to pursue its “duty to control crime,”<sup>70</sup> a duty that the Court views as generating “a strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity.”<sup>71</sup> Thus, the argument for the probable cause standard presumes that (rather than considers whether) the government needs to arrest criminal suspects in order to control crime. The Court takes it as *ipse dixit* that the government’s interest in law enforcement is coequal to an interest in arrest.

When confronted with cases that highlight that the government can have probable cause to arrest without a strong interest in making an arrest, the Court has repeatedly doubled down. Thus, *Atwater v. City of Lago Vista* permits custodial arrests for fine-only offenses, for which public safety arguments for custody are at their weakest.<sup>72</sup> *Whren v. United States* allows pretextual arrests in which the government may have no legitimate interest in arresting the suspect.<sup>73</sup> And *Virginia v. Moore* rules constitutional even those arrests on probable cause that the state itself has declared do not serve state interests.<sup>74</sup> As even the Court admits, existing Fourth Amendment doctrine permits arrests that do not serve any government interest.<sup>75</sup>

Though these cases highlight that the Court takes the state’s interest for granted, even if the Court were to overturn *Atwater*, *Whren*, and *Moore*, the character of Fourth Amendment doctrine on initiating arrests would remain largely intact. Prohibiting fine-only misdemeanor arrests or ill-motivated arrests might restrain the government when its interests in arresting a suspect for a crime are most minimal, but it would not undermine the theory that drives the constitutional law of arrests. According to the Court, by presumption, so long as the government has defined an activity as criminal, or even as a violation, it has sufficiently strong reason to make an arrest.

## 2. Warrants and Arrests

The assumption that the government has a strong interest in arrests extends beyond the probable cause requirement. In some areas of Fourth

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69. *Gerstein*, 420 U.S. at 112 (quoting *Brinegar*, 338 U.S. at 176).

70. *Id.*

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

72. 532 U.S. at 354. *Atwater* dealt with a fine-only misdemeanor. 532 U.S. at 323. The Court has since extended its *Atwater* analysis to arrests for fine-only noncriminal traffic violations. See *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (per curiam).

73. 517 U.S. 806, 812–13 (1996). Although *Whren* could be narrowly read to permit pretextual stops rather than pretextual arrests, the Court has expressly extended its earlier analysis to pretextual arrests for fine-only traffic violations. See *Sullivan*, 532 U.S. at 772.

74. 553 U.S. 164, 176 (2008).

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

Amendment doctrine, warrants are used to ensure that the police only conduct especially intrusive actions, such as entering a home to search it, with good grounds to do so.<sup>76</sup> The idea is that some activities are so consequential that the government should first explain its reasons for acting to a neutral arbiter, rather than subject individuals to serious harm based solely on the judgment of police officers and only give recourse to argue about legality later.<sup>77</sup> In the Court's view, arrests are not this consequential. Generally, arrests may be conducted without warrants,<sup>78</sup> precisely because the Court supposes the state's interest in arresting criminal suspects is strong even without prior judicial determination.<sup>79</sup>

Of course, the warrant "requirement" has many exceptions that have arisen because the Court views the government's interests in immediate action as making warrants unnecessary or counterproductive.<sup>80</sup> But it is not because arrests must be carried out without delay that the Court exempts most arrests from warrants.<sup>81</sup> Instead, in the exceptional cases where the Court does require warrants for arrests—non-exigent arrests in homes, it is clear about its reasoning:

To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant . . . even when it is accomplished under statutory authority and when probable cause is clearly present.<sup>82</sup>

That is, it is not that the Court considers warrants unworkable for arrests most of the time. Rather, it is motivated by the idea that entries into homes—unlike the autonomy, bodily integrity, and broader social harms that accompany all arrests—are so consequential that warrants are necessary

76. *E.g.*, *Kentucky v. King*, 563 U.S. 452, 459 (2011).

77. *Katz v. United States*, 389 U.S. 347, 358–59 (1967).

78. *Gerstein v. Pugh*, 420 U.S. 103, 113–14 (1975) (“[The Court] has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant. . . . [A] policeman’s on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime . . . .”); *see also* *United States v. Watson*, 423 U.S. 411, 422–23 (1976) (holding that a warrantless arrest for a felony in public does not violate the Fourth Amendment).

79. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991).

80. *E.g.*, *Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978) (“[W]arrants are generally required to search a person’s home or his person unless ‘the exigencies of the situation’ make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.” (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948)); *Chimel v. California*, 395 U.S. 752, 763 (1969) (search of arrested suspect and area within control for weapons justified by officer safety concerns); *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring) (“hot pursuit” exigency justified by public safety concerns).

81. *See Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); *Watson*, 423 U.S. at 423–24.

82. *Payton v. New York*, 445 U.S. 573, 588–89 (1980) (plurality opinion) (quoting *United States v. Reed*, 572 F.2d 412, 423 (2d Cir. 1978)); *see also Steagald v. United States*, 451 U.S. 204, 216 (1981).

to ensure they are legally justified.<sup>83</sup> After all, an officer without a warrant may simply wait for the suspect to leave the house and arrest him then.<sup>84</sup>

Even when a police officer obtains an arrest warrant, the warrant process does not ensure that the arrest serves a government interest in taking the person into custody. Instead, it offers additional assurance only that the government has sufficient evidence to suspect a crime. To get a warrant, an officer must establish probable cause to a magistrate's satisfaction before the arrest instead of soon afterward (at the suspect's initial appearance). Though the timing differs, magistrates issue warrants using the same standard that officers use for arrest, based on evidence that the suspect has engaged in criminal wrongdoing.<sup>85</sup> They do not evaluate whether public safety is promoted by the arrest or whether the magnitude of the crime justifies the intrusion on the individual. With warrants or without them, Fourth Amendment law permits arrests without scrutinizing the government's interest in carrying out an arrest rather than beginning criminal proceedings some other way.

### 3. How Arrests Are Conducted

The Court builds on its assumption that arrests are essential to the government when it evaluates what officers can do to a suspect when they arrest him. The Court has permitted a variety of exceptionally intrusive government activities on the theory that they are important in carrying out arrests. Yet, in doing so, the Court does not analyze the government's interest in taking the suspect into custody, because it takes that matter to be resolved by the law on when arrests may be initiated.

At the moment of arrest, the Court permits handcuffing arrestees, even for trivial offenses, because it is ordinary practice and ensures officer safety.<sup>86</sup> Similarly, regardless of the crime in question or the circumstances of an arrest, a legal arrest establishes grounds for searches of the arrestee's

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83. See *supra* note 82 and accompanying text. But see *Steagald*, 451 U.S. at 213 (contending that a search warrant protects privacy while an arrest warrant protects against arrest without probable cause).

84. *Steagald*, 451 U.S. at 221. If waiting becomes counterproductive—because the suspect might harm someone inside or destroy evidence or escape unnoticed—then the officer may simply go in to make the arrest without a warrant. See *id.*

85. Compare, e.g., FED. R. CRIM. P. 4(a) (describing the process for procuring an arrest warrant) with, e.g., FED. R. CRIM. P. 5(b) (“If a defendant is arrested without a warrant, a complaint meeting Rule 4(a)’s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.”); see also, e.g., TENN. R. CRIM. P. 4(a) (describing similar state process for issuing arrest warrants).

86. See *Arizona v. Gant*, 556 U.S. 332, 351–52 (2009) (Scalia, J., concurring) (arguing that searches of vehicles incident to arrest pursuant to *New York v. Belton*, 453 U.S. 454 (1981), are unnecessary because “[w]hen an arrest is made in connection with a roadside stop, police virtually always have a less intrusive and more effective means of ensuring their safety—and a means that is virtually always employed: ordering the arrestee away from the vehicle, patting him down in the open, handcuffing him, and placing him in the squad car”); *Atwater*, 532 U.S. at 354–55 (finding that when *Atwater* “was handcuffed, placed in a squad car, and taken to the local police station” for a seat belt offense, her arrest was “no more ‘harmful to . . .

person and the area surrounding him incident to arrest.<sup>87</sup> According to the Court,

The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.<sup>88</sup>

Once an arrestee gets to jail, an arrest may entail further, even greater, intrusions because the government needs them once it makes an arrest. In *Pennsylvania v. Muniz*, the Court permitted routine booking questions to fall outside the protections of *Miranda v. Arizona*,<sup>89</sup> in order to facilitate processing an arrestee.<sup>90</sup>

In *Maryland v. King*, it permitted routine DNA collection and testing because law enforcement needs “a safe and accurate way to process and identify the persons and possessions they *must* take into custody.”<sup>91</sup> The Court’s logic is simple:

It is beyond dispute that “probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest.” Also uncontested is the “right on the part of the Government . . . to search the person of the accused when legally arrested.” . . . “The fact of a lawful arrest, standing alone, authorizes a search.” . . . When probable cause exists to remove an individual from the normal channels of society and hold him in legal custody, DNA identification plays a critical role in serving those interests.<sup>92</sup>

And in *Florence v. Board of Chosen Freeholders of the County of Burlington*, the Court permitted every arrestee entering a jail to be required to strip, open his mouth, lift his tongue, hold out his arms, turn around, and lift his

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privacy or . . . physical interests’ than the normal custodial arrest” and therefore was constitutional based on probable cause (omissions in original) (quoting *Whren v. United States*, 517 U.S. 806, 818 (1996)); see also *United States v. Acosta-Colon*, 157 F.3d 9, 18 (1st Cir. 1998) (calling handcuffs “one of the most recognizable indicia of a traditional arrest”); *United States v. Glenna*, 878 F.2d 967, 972 (7th Cir. 1989) (“[H]andcuffs are restraints on freedom of movement normally associated with arrest. Clearly, the thought of allowing police officers to handcuff persons when probable cause to arrest is lacking is a troubling one.” (second emphasis added)).

87. See *United States v. Robinson*, 414 U.S. 218, 234–35 (1973).

88. *Id.* at 235; accord *Agnello v. United States*, 269 U.S. 20, 30 (1925).

89. *Miranda v. Arizona*, 384 U.S. 436 (1966).

90. *Pennsylvania v. Muniz*, 496 U.S. 582, 601–02 (1990) (plurality opinion) (quoting *Maryland v. King*, 133 S. Ct. 1958, 1975 (2013)).

91. 133 S. Ct. 1958, 1970 (2013) (emphasis added).

92. *King*, 133 S. Ct. at 1970–71 (first quoting *Gerstein v. Pugh*, 420 U.S. 103, 113–14 (1975); then quoting *Weeks v. United States*, 232 U.S. 383, 392 (1914), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961); and then quoting *Michigan v. DeFillippo*, 443 U.S. 31, 35 (1979)).

genitals to enable officers to search for scars, tattoos, and contraband, regardless of the risk he may pose.<sup>93</sup> After all, “[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals,”<sup>94</sup> and case by case determination of that risk “may be difficult, as a practical matter.”<sup>95</sup> Not only is every suspected criminal presumed to be worth arresting, he is also presumed to be potentially armed and dangerous, a status that justifies additional harm.

After an arrestee is processed, an arrest can legally include a night or two in jail, maybe more with good justification,<sup>96</sup> even though the state has significant control over how quickly an arrestee gets an initial hearing.<sup>97</sup> And an arrestee’s conditions of confinement are no better than those who await trial or sentencing, even when no magistrate has considered the grounds for his arrest.<sup>98</sup> The Court permits considerable harm to arrestees in order to minimize risk and administrative burden to the government. Those decisions are expressly premised on the Court’s view that, by establishing probable cause, the state has already demonstrated a sufficient interest in carrying out arrests to justify attendant harms.

Perhaps most importantly, if an arrest is based on probable cause, the Court has found it reasonable under Fourth Amendment law for officers to use force—including extreme force—to achieve it.<sup>99</sup> That is, although the government need not provide a reason for an arrest beyond criminal suspicion, the law assumes arrests are not only worth doing, but worth doing violently, at least if the suspect resists or tries to flee. Though Fourth Amendment doctrine evaluating uses of force purports to balance the intrusion on the individual “against the countervailing governmental interests at stake,” the doctrine takes for granted the value of arrests as a means of serving the government’s interests in criminal law enforcement and public safety.<sup>100</sup> Thus, officers may use violence against a suspect who threatens the success of the arrest, whether or not arresting him was socially useful in the first place, whether or not he poses any risk to the public, and whether or

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93. 132 S. Ct. 1510, 1520–22 (2012).

94. *Florence*, 132 S. Ct. at 1520.

95. *Id.* at 1521.

96. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991).

97. *Id.* at 69 (Scalia, J., dissenting) (noting that states place various time restrictions on arraignments).

98. *See Florence*, 132 S. Ct. at 1521 (referencing an expert in the case who argued that interaction between misdemeanants and felons requires that misdemeanants go through the same search procedure as felons).

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

100. *See Graham*, 490 U.S. at 396 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

not another method, such as issuing a citation, would have been adequate to bring him to court. Arrests are considered so integral to the government's interest in pursuing criminal activity that, when the state chooses to carry them out, they justify any harm necessary to complete them.

The Supreme Court has established one categorical exception to this rule: the Court concluded in *Tennessee v. Garner* that “[i]t is not better that all felony suspects die than that they escape.”<sup>101</sup> For this reason, a police officer may not shoot a fleeing suspect who, in light of his actions and suspected crime, poses no threat to the officer or to others.<sup>102</sup> But even in limiting deadly force against escaping arrestees, the Court never evaluated the government's interest in and need for arrests. Instead, it reasoned that “deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion.”<sup>103</sup> It is only in this extreme case—when the suspect's interest is so fully exterminated by the use of force and the government's interest in the arrest is so weakly promoted by it—that the Court put a hard limit on violence used to achieve an arrest. Elsewhere, Fourth Amendment jurisprudence presupposes that the state must, in its discretion, be permitted to carry out, even violently, any arrest for which it has sufficient evidence.<sup>104</sup>

#### B. *Constitutional Reasoning in Delineating Lawful Arrests*

I have argued that the Court's Fourth Amendment doctrine governing arrests assumes rather than evaluates whether arrests serve important state interests. The probable cause standard does not ensure that any particular arrest serves the public interest. More generally, the Court, in formulating doctrine, has not questioned the public interests that might justify arrests. However, even if the Court were more willing to scrutinize the government's reasons for conducting arrests, when the Court does weigh competing individual and government interests in Fourth Amendment arrest doctrine, it also frequently tilts its analysis in favor of the government because of concerns that are particular to constitutional analysis. For this reason, Fourth Amendment doctrine is unlikely to ever reflect the balance between the government and individual that a fuller consideration of the interests at stake warrants. The probable-cause-and-no-more rule could well be right as a matter of constitutional law, but good constitutional law is not always good policy.

For example, the Court has justified the probable cause standard as a product of tradition, and tradition matters in constitutional law.<sup>105</sup> Justice

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101. 471 U.S. at 11.

102. *Garner*, 471 U.S. at 11.

103. *Id.* at 10.

104. Although the state may make any arrest under Fourth Amendment law, the Constitution does not ever require that it do so. See *Hoffa v. United States*, 385 U.S. 293, 309–10 (1966) (“There is no constitutional right to be arrested.”).

105. *E.g.*, *Virginia v. Moore*, 553 U.S. 164, 168–71 (2008) (“In determining whether a search or seizure is unreasonable, we begin with history.”); *United States v. Watson*, 423 U.S.

Powell put it this way: “An arrest . . . is a serious personal intrusion regardless of whether the person seized is guilty or innocent. . . . But logic sometimes must defer to history and experience.”<sup>106</sup> The core of that history is beyond dispute, which explains why no Justice has ever suggested that the government give reasons beyond establishing a quantum of evidence of guilt before making arrests, at least for imprisonable offenses.<sup>107</sup> But if the question is whether our use of arrests today makes sense, tradition seems a weak argument for what is, by any reckoning, a costly, liberty-denying practice.

In addition to relying on tradition, the Court has often justified permissive arrest doctrines on the ground that they are easier for federal courts to implement, a concern that does not apply to arrest law and policy more broadly. In *Atwater v. City of Lago Vista*, for instance, the Court extended the probable-cause-only rule to minor offenses, even though the rule resulted in an unjustifiable, “pointless,” and “gratuitous” arrest in that case, and could easily do so in the future.<sup>108</sup> Of course, any general formulation might get some cases wrong, and police officers may sometimes require straightforward rules for reasons that justify the error rate. In this case, however, the Court rejected finer-grained alternatives on the ground that—even beyond any law enforcement need for simple rules—courts need especially easy-to-apply rules for arrests to facilitate judicial review.<sup>109</sup>

Similarly, in *Virginia v. Moore*, the Court rejected the argument that an arrest violated the Fourth Amendment when, though based on probable cause, it was expressly prohibited by state law.<sup>110</sup> Though many view an illegal arrest as obviously unreasonable, the Court provided Constitution-specific arguments for its seemingly counterintuitive result that police action could be clearly unlawful and still constitutional.<sup>111</sup> Following *Atwater*, for instance, the *Moore* Court reasoned that if it made the Fourth Amendment and state law coextensive, then “[t]he constitutional standard would be only as easy to apply as the underlying state law, and state law can be complicated indeed.”<sup>112</sup> Of course, police officers already have to apply state law in conducting arrests, but courts might struggle with the analysis.

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411, 422–24 (1976) (declining to require arrest warrants for felons arrested in public because “the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause”).

106. *Watson*, 423 U.S. at 428–29 (Powell, J., concurring).

107. *Cf. Atwater v. City of Lago Vista*, 532 U.S. 318, 362–63 (2001) (O’Connor, J., dissenting) (arguing that “in the case of felonies punishable by a term of imprisonment, we have held that the existence of probable cause is also a sufficient condition for an arrest,” but “[w]hile probable cause is surely a necessary condition for warrantless arrests for fine-only offenses, any realistic assessment of the interests implicated by such arrests demonstrates that probable cause alone is not a sufficient condition” (citation omitted)).

108. *See id.* at 346–48.

109. *Id.* at 347.

110. 553 U.S. at 168–78.

111. *Moore*, 553 U.S. at 168–78.

112. *Id.* at 175.



Finally, for similarly insular reasons, the Court rejected in *Moore* and in *Whren* outcomes that would limit arrests at the cost of causing Fourth Amendment law to “vary from place to place and from time to time.”<sup>113</sup> It found such variation unworkable in constitutional law, even if variable rules could lead to more reasonable arrests. In both *Atwater* and *Moore*, the Court sought to make sure that Fourth Amendment arrest doctrine is easily administrable by courts.

More generally, in this context as in others, the Supreme Court resists upending the rules developed in earlier cases. This faithfulness to precedent ensures the stability of law over time and thereby promotes the legitimacy of the judicial enterprise. This is a distinctly judicial concern: since other public institutions do not face the same kinds of legitimacy concerns, they do not have nearly as strong reasons for maintaining previously made decisions even when they might be wrong.<sup>114</sup> But maintaining stable law can come at the cost of restraining change even when that change would otherwise serve the public interest.

The Court is also constrained by the text of the Constitution itself, or at least by its interpretations of that text. Since the Fourth Amendment prohibits “unreasonable” arrests, the wording might not seem like much of a limitation on good outcomes, but it can easily permit arrests that are constitutional and yet unjustifiable by other measures. For example, the Court has concluded that the reasonableness requirement in the text requires a solely objective inquiry. For this reason, in a variety of Fourth Amendment settings, including arrests, the Court has refused to scrutinize the subjective motivation of officers in deciding constitutionality:<sup>115</sup> “[U]lterior motive” does not “serve to strip . . . agents of their legal justification,” because the Fourth Amendment is only concerned with objective circumstances, “whatever the subjective intent.”<sup>116</sup> Thus, whatever an officer’s reason for conducting an arrest, the seizure is constitutional if it is supported by probable cause.<sup>117</sup> By contrast, when other constitutional amendments are implicated, the Court considers motivation relevant in evaluating the behavior of state actors.<sup>118</sup> This contrast suggests that, by the Court’s own lights and without the constraint of its understanding of “unreasonable,” bad intent could matter in evaluating arrests. Indeed, most of us think

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113. *Id.* at 172 (quoting *Whren v. United States*, 517 U.S. 806, 815 (1996)).

114. *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

115. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001); *Whren v. United States*, 517 U.S. 806, 813 (1996); *Graham v. Connor*, 490 U.S. 386, 397 (1989).

116. *Whren*, 517 U.S. at 812, 814 (emphasis omitted).

117. This is true unless another constitutional provision is also implicated by the arrest, such as the Equal Protection Clause, which does concern itself with subjective motivation. *See id.* at 813; *see also United States v. Armstrong*, 517 U.S. 456 (1996).

118. *See, e.g.*, *Cty. of Sacramento v. Lewis*, 523 U.S. 833 (1998) (using an apparently subjective standard for a Fourteenth Amendment claim of excessive force); *Whitley v. Albers*, 475 U.S. 312, 319–20 (1986) (applying a subjective standard to an Eighth Amendment claim). *But see Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) (holding that the proper standard for evaluating a pretrial detainee’s excessive force claim is objective unreasonableness).

that arrests meant to humiliate or to intimidate are illegitimate, whether or not the Fourth Amendment says so.

I am not arguing that the Court should change Fourth Amendment doctrine. Rather, these examples suggest that constitutional law is unlikely to be a good stand-in for the justifiability of arrests, because the Court permits arrests for reasons that have nothing to do with the competing interests in them. The consequence is that good arrest policy must be made by institutions other than courts using something other than constitutional law. This should come as no surprise. As I have argued elsewhere, “Constitutional rights are . . . structurally ill suited to balance societal interests in law enforcement and individual freedom.”<sup>119</sup> Among other reasons, constitutional rights set minimum rather than best standards for government conduct, and they do not adequately take into account the aggregate effects of state coercion.<sup>120</sup> The consequence is that meaningfully balancing competing individual and social interests requires analysis beyond the Fourth Amendment.<sup>121</sup>

I suggested above that an arrest practice cannot be normatively justified unless it generally leads to arrests that serve important societal goals, imposes harms in reasonable proportion to the significance of those goals and how well arrests serve them, and is fairly carried out. In Part I, I argued that we engage in a massive number of arrests and that those arrests impose significant harms. The scope of these consequences suggests that our existing arrest practice must serve significant societal goals well to be justifiable. In this Part, I have argued that Fourth Amendment doctrine does not ensure that legal arrests meet that test. It neither ensures that legal arrests serve important state ends nor fairly balances societal and individual interests. But if law is not the proper standard for evaluating arrest practices, how should we proceed?

Most commentary on arrest has focused on fairness. Scholars and critics often argue that arrests are racially biased or are too forceful.<sup>122</sup> These important concerns, however, sometimes obscure an analytically prior one, an issue the Court has taken for granted: whether arrests as we carry them out today serve important state interests and are proportional to those interests. Given the consequences of arrests, evaluating our arrest practice requires determining whether and how well arrests serve societal goals in comparison to less harmful alternatives.

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119. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 776 (2012) [hereinafter Harmon, *Problem*].

120. See *id.* at 776–81.

121. See *id.* at 763.

122. See, e.g., Tammy Rinehart Kochel et al., *Effect of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473 (2011); Mitchell W. Karsch, Note, *Excessive Force and the Fourth Amendment: When Does Seizure End?*, 58 FORDHAM L. REV. 823 (1990) (discussing the use of excessive force during arrests and proposing bright-line rules for dealing with force during arrest); Harry Levine, *The Scandal of Racist Marijuana Arrests—and What to Do About It*, NATION (Oct. 30, 2013), <https://www.thenation.com/article/scandal-racist-marijuana-arrests-and-what-do-about-it/> [<https://perma.cc/8GQD-HHVK>].

## III. DO WE NEED ARRESTS?

Why, then, do we arrest? At a high level of abstraction, arrests illustrate a fundamental truth about policing: police exist both to protect and to limit liberty. Public safety and public order are preconditions of any free society. Sometimes achieving those goals requires controlling individuals who threaten them. Though police officers have many roles, the most critical is pursuing order and safety on behalf of the state through commands, through uses of force, and especially through arrests. If police cannot do that job without arrests, then our practice of arrests might well be justified, despite the harm it causes. None of us would have much in the way of freedom without it.<sup>123</sup> This is the position of the Supreme Court, which has all but assumed that “[b]eing able to arrest . . . individuals is a condition precedent to the state’s entire system of law enforcement.”<sup>124</sup> Is the Supreme Court right? Just how badly do police need arrests?

The Court has frequently noted two specific ways arrests promote public safety and order. First, according to the Court, arrests are essential to start the criminal process and prevent criminals from escaping that process.<sup>125</sup> Second, arrests prevent suspects from continuing disruptive or criminal activity.<sup>126</sup> On occasion, the Court has mentioned a third benefit of arrests: arrests help the government collect evidence useful in prosecuting

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123. See *Miranda v. Arizona*, 384 U.S. 436, 539 (1966) (White, J., dissenting) (“The most basic function of any government is to provide for the security of the individual and of his property. These ends of society are served by the criminal laws which for the most part are aimed at the prevention of crime. Without the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values.” (citation omitted)); cf. Edward L. Barrett Jr., *Police Practices and the Law—From Arrest to Release or Charge*, 50 CALIF. L. REV. 11, 15 (1962) (“Liberty is equally lost whether the citizen is left to the mercy of an overzealous policeman or a trigger-happy hoodlum.”).

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

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

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

criminals.<sup>127</sup> Unfortunately, the Court has never seriously evaluated how important arrests are in achieving these goals. Doing so is essential to assessing our practice of arrests.

In this Part, I consider the major ways arrests are thought to serve the state's interests: by bringing criminals to justice, by reducing crime and disorder, by managing violent criminals, and by enabling collection of evidence. I argue that, at least for large categories of crimes, citations and summonses are likely to be an adequately reliable method of bringing suspects to trial. In fact, by drawing a comparison with our current practice of pretrial release, I suggest that, even for felonies, officers could reasonably rely on citations in many cases. Officers can also use measures short of arrest for order maintenance and to gather evidence. Moreover, police can deter crime without relying on widespread arrests. In each case, I conclude that the argument for using arrests is not as strong as it seems, especially given the high costs of arrests and the available alternatives.

#### A. Arrests to Start Criminal Proceedings

The most traditional view of arrests treats them as a critical part of the process leading to criminal punishment.<sup>128</sup> As is well known, we punish criminals both to further retributive aims and to make society safer by deterring and incapacitating those who threaten that safety. Accusing the defendant and adjudicating his guilt are prerequisites for convicting and punishing him, and arrests have long been the first step in accusation and adjudication.<sup>129</sup> Assuming there is good reason to engage in the criminal process to control and punish prohibited behavior, the question is how important arrests are in adjudicating criminal cases and punishing the guilty.

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

128. See WAYNE R. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 3 (1965) (“In most cases, decisions to charge, to convict, and to sentence are made only with respect to those persons whom the police have first arrested. Thus, to a large extent, this decision determines those offenders against whom the official process is to be invoked.”); Cyril D. Robinson, *Alternatives to Arrest of Lesser Offenders*, 11 *CRIME & DELINQ.* 8, 8–9 (1965) (“Arrest has thus become the ordinary mode of beginning a criminal prosecution. As a result, arrest is not a process merely preliminary to possible punishment; it frequently *is* the punishment where the lesser offender is concerned.”).

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

For much of criminal law history, criminal prosecutions began no other way.<sup>130</sup> But today, of course, not all criminal cases begin with an arrest. Instead, many criminal cases start with some form of summons or citation.<sup>131</sup> A summons—which can be issued by a judge in lieu of an arrest warrant—is an order to a suspect to appear in court on a particular date to answer a criminal charge or violation. A citation, called a summons in some jurisdictions, acts in lieu of an arrest and can be issued by a police official. It permits a suspect to remain out of custody upon the promise or expectation that he will appear to answer charges in court on a later date. Both are distinguishable from arrests in that suspects bring themselves to court rather than being placed there.

Criminal summonses and citations remind us that even if arrest is the ordinary way to start the criminal process, there is nothing essential in the practice from the perspective of adjudicating criminal guilt. A summons equally demands that an individual answer criminal charges. A defendant responding to one is equally subject to booking and processing. He has a bail hearing, an arraignment, and a probable cause hearing just like an arrestee. Clearly, criminal suspects can be charged, tried, and convicted without an arrest.

Moreover, summonses and citations have some considerable advantages as substitutes for arrests. Even apart from their benefits for criminal suspects, they offer substantial cost savings for municipalities in officer time, transportation costs, and detention costs.<sup>132</sup> They may reduce conflicts between the police and citizens because giving citations is less confrontational, which could decrease the total number of officers and suspects injured during efforts to start the criminal process.<sup>133</sup> And because they produce fewer consequences and fewer confrontations, citations probably alienate heavily impacted communities less than arrests. In sum, using alternatives to arrest can improve criminal justice as well as minimize deprivations of liberty.

These advantages explain why most departments use citations to some degree.<sup>134</sup> In fact, some minor offenses, such as trespassing and possession of

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

131. INT'L ASS'N OF CHIEFS OF POLICE, CITATION IN LIEU OF ARREST: EXAMINING LAW ENFORCEMENT'S USE OF CITATION ACROSS THE UNITED STATES 10 (2016) [hereinafter IACP], <http://www.pretrial.org/download/law-policy/Citation-in-Lieu-of-Arrest-IACP-LJAF-2016.pdf> [<https://perma.cc/F4Z6-P4CJ>].

132. DEBRA WHITCOMB ET AL., NAT'L INST. OF JUSTICE, CITATION RELEASE 17–18 (1984), <https://www.ncjrs.gov/pdffiles1/Digitization/94200NCJRS.pdf> [<https://perma.cc/2DT7-GVVT>]; see also IACP, *supra* note 131, at 17–19.

133. See INT'L ASS'N OF CHIEFS OF POLICE, CITATIONS IN LIEU OF ARREST, LITERATURE REVIEW 18 (2016) [hereinafter IACP, LITERATURE REVIEW], <http://www.iacp.org/Portals/0/documents/pdfs/Citation%20in%20Lieu%20of%20Arrest%20Literature%20Review.pdf> [<https://perma.cc/A4CS-62SK>] (suggesting that citations could be safer for officers than arrests, though noting that no research supports the proposition).

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

marijuana, are frequently addressed through citation.<sup>135</sup> But arrests remain the default mechanism for starting the criminal process. Millions of arrests continue to occur each year, and the law continues to favor arrests over citations.<sup>136</sup> Officers have broad discretion to arrest, even when citations or summonses would serve state interests.

Arrests are likely necessary under some circumstances: some suspects may be so dangerous if released or so unlikely to be brought to justice for a serious offense that their arrest would serve the public interest better than any alternative.<sup>137</sup> But right now we largely take for granted that arrests are widely justified to start criminal adjudication and that departments and individual officers can balance the interests at stake. Citations would seem to have significant untapped potential. So why don't we use them more?

Partly, tradition. An arrest followed by an appearance before a magistrate was historically the only means of starting the criminal process. Through the early 1900s, even those charged solely with traffic violations in the United States were automatically arrested.<sup>138</sup> As cars became widespread and driving became more heavily regulated, this practice became burdensome. Police departments developed, and states authorized, new procedures to allow police officials to release those detained for traffic offenses at the stationhouse.<sup>139</sup> Eventually, these stationhouse procedures evolved into field citations, in which an officer at the scene could accept a promise to appear without ever taking the suspect into custody. By the 1940s the use of citations for traffic offenses became more widespread.<sup>140</sup>

Citations for criminal offenses did not become commonly available for several more decades. The expansion of citations to cover minor crimes followed the first bail-reform movement of the early 1960s, which sought to reduce the costs and consequences of pretrial detention.<sup>141</sup> Experiments in pretrial release suggested that a defendant's individual characteristics could be used to predict whether he would be likely to appear in court if he were released until his trial, and that a promise to appear could be as effective as money bail in ensuring that appearance.<sup>142</sup> If criminal suspects could be effectively sorted for release or detention pending trial, it seemed reasonable to believe they could similarly be sorted for citation rather than arrest.<sup>143</sup>

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135. *Id.* at 3.

136. *See infra* text accompanying notes 228–236.

137. *See* IACP, *supra* note 131, at 11–12.

138. WHITCOMB ET AL., *supra* note 132, at 1.

139. *See id.*

140. *See id.*

141. *See id.* at 1–3.

142. *See* FLOYD FEENEY, *THE POLICE AND PRETRIAL RELEASE* 18 (1982); WHITCOMB ET AL., *supra* note 132, at 2; Mark Berger, *Police Field Citations in New Haven*, 1972 *Wis. L. Rev.* 382, 384.

143. FEENEY, *supra* note 142, at 18; WHITCOMB ET AL., *supra* note 132, at 2; Berger, *supra* note 142, at 385–86.

After successful experiments in the late 1960s in New York City, major police and criminal justice organizations around the country strongly advocated giving police officers discretion to issue citations in place of misdemeanor arrests.<sup>144</sup> States widely adopted laws authorizing police to issue citations for minor crimes, and by the early 1980s, all but nine states authorized citations for some criminal offenses.<sup>145</sup>

Despite this enthusiasm, in 1984, a major Justice Department report lamented that, though citation release was good policy and good law, it was still relatively uncommon.<sup>146</sup> Among other explanations, the Justice Department speculated that police resisted and misunderstood the use of citations and that policymakers did not adequately support the laws.<sup>147</sup> Whatever the reasons, by the early 1980s, more than a decade after the first experiments with citations for criminal offenses, citations accounted for a small proportion of police encounters resulting in criminal charges in many jurisdictions.<sup>148</sup>

These obstacles to replacing arrests with citations might have been overcome in time. Certainly, the Justice Department thought the difficulties were manageable. But in the mid-1980s, criminal justice priorities shifted dramatically. Fear of rising violent crime and the crack epidemic led to new “tough on crime” rhetoric and policies. Minimizing harm by releasing criminal suspects suddenly seemed a much less appealing notion and citations have stayed invisible in conversations about criminal justice for decades, except recently and in small pockets.<sup>149</sup> In the meantime, additional criminalization, a greater number of arrests, and additional costs for arrestees made arrests more consequential than ever.

History is not the only explanation for the ubiquity of arrest today. Arrests have one overwhelming advantage over citations: they guarantee the defendant’s presence to answer charges, a critical aspect of contemporary criminal process.<sup>150</sup> A citation is only an effective alternative to an arrest if the defendant actually appears pursuant to its command. Whereas an arrest guarantees that the criminal adjudication will start as planned, a citation

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144. WHITCOMB ET AL., *supra* note 132, at 2.

145. *See id.* at 3. Even where states did not formally authorize the practice, some departments issued criminal citations. *See id.* at 3–4.

146. *See id.* at 8.

147. *See id.*

148. *See id.* at 3, 5, 8.

149. *See, e.g.*, IACP, *supra* note 131 (noting lack of recent attention and arguing that it is time to research citation use further); Gloria Pazmino, *Vance Announces Manhattan Summons Overhaul*, POLITICO (Mar. 1, 2016, 6:59 PM), <http://www.politico.com/states/new-york/city-hall/story/2016/03/vance-announces-manhattan-summons-overhaul-031836> [https://perma.cc/CP3V-25ZE] (describing a new policy of issuing summons in lieu of making arrests for minor offenses).

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

risks that it will not. Many people fear that if more citations were given, many defendants would fail to appear, and the state's interest in effective law enforcement would be undermined rather than furthered.<sup>151</sup>

If we replace arrests with summonses and citations, most criminal defendants would still likely come to court. After all, most people show up when released on their own recognizance, and they (mostly) do not jump bail.<sup>152</sup> Even apart from the social norms that shape legal compliance, most people would accurately expect that if they fail to appear to answer for criminal charges, they could be subject to additional penalties.<sup>153</sup> But even if most defendants appear as intended, some presumably will not.

When the risk of nonappearance is high, it might not be worth tolerating. But, for most offenders, the fact that a citation would generate uncertainty does not mean that an arrest is better, all told. Arrests are pretty intrusive. To the degree that citations are a meaningful and cost-effective way of achieving the criminal justice ends we now use arrests to serve, they need not be perfect to be preferable. Ultimately, to get the balance between arrests and citations right, we need to know more about the benefits, risks, and costs of each tool.<sup>154</sup> As of now, the research comparing failure to appear rates for arrests and citations suggests that the risks of expanding citations are not overwhelming.<sup>155</sup> But the studies are too few, too limited, and too dated to draw strong conclusions.

What we do know suggests the rate at which suspects fail to appear for court proceedings is highly malleable. Jurisdictions can increase appearance pursuant to citations by screening out the suspects least likely to appear if

151. IACP, *supra* note 131, at 20; IACP LITERATURE REVIEW, *supra* note 133, at 15–16.

152. See THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 2008–2010, at 16 (2012), [www.bjs.gov/content/pub/pdf/prmfdc0810.pdf](http://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf) [<https://perma.cc/R5GM-8D7W>] (indicating that only 1% of those released on their own recognizance and only 2% of those released on financial bail in federal criminal cases from 2008 to 2010 failed to appear); BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 21 (2013), [www.bjs.gov/content/pub/pdf/fdluc09.pdf](http://www.bjs.gov/content/pub/pdf/fdluc09.pdf) [<https://perma.cc/6UTM-4Y2F>] (indicating that 17% of those released in state felony cases in the largest urban counties in 2009 failed to appear).

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

154. IACP, *supra* note 131, at 4. For example, though law enforcement officials believe that citations may lead to fewer use-of-force incidents and officer injuries, no research has considered the issue. *Id.* at 18.

155. See, *e.g.*, IACP, LITERATURE REVIEW, *supra* note 133, at 15–22; WHITCOMB ET AL., *supra* note 132, at 43–52; Berger, *supra* note 142, at 407–08; Floyd F. Feeney, *Citation in Lieu of Arrest: The New California Law*, 25 VAND. L. REV. 367 (1972); Jeffrey M. Allen, Comment, *Pretrial Release Under California Penal Code Section 853.6: An Examination of Citation Release*, 60 CALIF. L. REV. 1339 (1972).



cited; by reducing obstacles to appearing as required; and by optimizing consequences for failures to appear. Each of these is a familiar and manageable criminal justice challenge.

For instance, many people fail to appear pursuant to the terms of citations because they are sick, because they forget the date of their appearance, or because they cannot find the courtroom, rather than because they intentionally resist adjudication.<sup>156</sup> In one study, over half of the failures to appear were solved by continuing the case for a week and informing the suspect of the new day, with no additional penalty for the initial failure to appear.<sup>157</sup> If a jurisdiction limits the time between when the citation is given out and the appearance date, provides clear information about location and time, and gives suspects additional reminders about appearances, it may, at little expense, minimize failures to appear after release—and therefore lessen the risks of eliminating many arrests. New York City recently announced reforms along these lines. It has started to make robocalls and send text messages to remind people of court dates following summonses, and the city has also started to allow individuals to come to court any time in the week before a scheduled appearance to make appearing in court more convenient.<sup>158</sup>

Connected to the issue of failures to appear is the idea that officers cannot always verify the identity of people with whom they interact.<sup>159</sup> A suspect whose identity is unknown may be less likely to show up pursuant to a citation and will be a lot harder to find if he does not. Moreover, unless an officer can identify a suspect, the officer cannot easily check whether the person is wanted for a more serious crime, or is a recidivist or has failed to show up for prior court appearances, circumstances that might justify arrest. In addition, without reliable identification, the officer cannot create a meaningful record of the current offense. As a result, identification issues can degrade the information we have on prior criminal conduct. For these reasons, identification doubts have long been used to justify arrests.<sup>160</sup>

While real, the problem of identifying suspects is far less substantial than it used to be. Quite simply, technology that helps officers determine who a suspect is becomes stronger, cheaper, and more pervasive every day, and it is increasingly available to officers in the field. Nearly 90 percent of the driving age population holds a driver's license.<sup>161</sup> Most of those cards

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156. Berger, *supra* note 142, at 408.

157. *Id.* at 407–08.

158. Michael Schwirtz, *New York City Plans to Transform Summons Process*, N.Y. TIMES (Apr. 14, 2015), <http://www.nytimes.com/2015/04/15/nyregion/new-york-city-to-transform-the-summons-process-for-courts-and-recipients.html> (on file with *Michigan Law Review*).

159. See *Maryland v. King*, 133 S. Ct. 1958, 1971 (2013) (“[I]n every criminal case, it is known and must be known who has been arrested and who is being tried.” (quoting *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177, 191 (2004))).

160. See WHITCOMB ET AL., *supra* note 132, at 20.

161. See U.S. Dep't of Transp., *Highway Finance Data Collection*, OFF. OF HIGHWAY POL'Y INFO., <http://www.fhwa.dot.gov/policyinformation/pubs/hf/pl11028/chapter4.cfm> [<https://perma.cc/YVH2-DCBW>] (last modified Nov. 7, 2014).

already comply with recent federal standards designed to make them harder to fake, and more will do so soon.<sup>162</sup> Even fake licenses are less useful to those seeking to avoid identification than they once were, because the police can check them against federal databases in the field, which can reveal mismatches in physical characteristics and appearance.

Those without government-issued identification are increasingly identifiable by fingerprints or other biometric data, since there are more than 100 million Americans with fingerprints in national databases and twenty-three million front-facing photographs linked to them.<sup>163</sup> It is also becoming easier and easier to check those biometrics on the fly. Police departments have already started using mobile biometric technology that allows officers to quickly fingerprint, photograph, and scan the irises of individuals in the field and check them against federal databases to determine identity, criminal record, and the existence of outstanding warrants.<sup>164</sup>

One might lament the loss in privacy these technologies represent, but the means of identifying people on the street are ineluctably expanding. That expansion makes it possible for a police officer to be assured that someone is who he says he is. When an officer knows the identity of a person, he can better evaluate whether that person should be arrested, because, for example, he has a track record of failing to appear. And a known suspect is easier to track down if he fails to appear, which means a citation in lieu of an arrest will be more likely to begin the criminal process effectively. In these ways, new means of assuring identity weaken identity uncertainty as a justification for making an arrest rather than issuing a citation.

Technology not only affects how easy it is to identify someone, but also how easy it is to find him if he fails to appear. As a result, changing technology not only undermines the case in favor of arrests, it strengthens the case for citations. Almost all of us now leave an extensive digital trail when we

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162. See *REAL ID Enforcement in Brief*, DEP'T OF HOMELAND SEC., <http://www.dhs.gov/real-id-enforcement-brief> [<https://perma.cc/M4EH-AL7Z>].

163. See FED. BUREAU OF INVESTIGATION, NEXT GENERATION IDENTIFICATION (NGI) MONTHLY FACT SHEET (Dec. 2015) (indicating that the federal biometric repository contained 109, 298,272 entries as of December 2015); Ellen Nakashima, *FBI Wants to Exempt Its Huge Fingerprint and Photo Database from Privacy Protections*, WASH. POST (June 1, 2016), [https://www.washingtonpost.com/world/national-security/fbi-wants-to-exempt-its-huge-fingerprint-and-photo-database-from-privacy-protections/2016/05/31/6c1cda04-244b-11e6-8690-f14ca9de2972\\_story.html](https://www.washingtonpost.com/world/national-security/fbi-wants-to-exempt-its-huge-fingerprint-and-photo-database-from-privacy-protections/2016/05/31/6c1cda04-244b-11e6-8690-f14ca9de2972_story.html) [<https://perma.cc/EL75-Y6RZ>] (noting that the FBI database contains more than 100 million fingerprints and 45 million facial photos); *Next Generation Identification (NGI)*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/services/cjis/fingerprints-and-other-biometrics/ngi> [<https://perma.cc/3YVF-GD2D>] (defining and describing the function and goals of the NGI biometric system).

164. See Jeffrey A. Rose, *The Future of Corrections: How Can Mobile Biometric Technology Revolutionize the Arrest and Booking Process?*, POLICE CHIEF, Dec. 2014, at 68 (2014), [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=3585&issue\\_id=122014](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=3585&issue_id=122014) [<https://perma.cc/82YS-AG9K>] (describing mobile identification technology that can take and check an individual's thumbprint against law enforcement databases in under a minute). The same technology also permits patrol officers to book and process suspects in the field, taking fingerprints, photographs, and demographic information, thus making it unnecessary for a suspect to report for booking before his court date. See *id.*

use credit cards, bank cards, electronic benefits transfer (EBT) cards, monthly transit cards, electronic tolling devices (like FasTrak and E-ZPass), and many other location-based services and devices. Most departments have automated license plate readers that can be used to track the whereabouts of drivers.<sup>165</sup> More than 90 percent of us own cell phones, which allow police to determine where we are in real time, as well as where we have been.<sup>166</sup> Police departments use surveillance cameras and facial recognition technology to find suspects with outstanding warrants or those who jump bail.<sup>167</sup> Even a skilled and determined person has a difficult time hiding if anyone is looking. Most criminals do not stand a chance against determined law enforcement.

I am not suggesting that if we replaced arrests with citations, everyone who did not appear would be easily found. For the moment, many of the common methods for looking for people remain resource intensive, and those who are now arrested are likely harder than average to find. Moreover, much of the time, no one bothers to hunt for suspects who fail to appear, though that is often because they were not worth charging with a crime in the first place.<sup>168</sup> But, taking it as given that we should issue citations only to those whose adjudication is in the public interest, as technologies make it cheaper to find those who hide, it may be possible to locate almost all of those who do not attend court dates. Some defendants would presumably always slip through the cracks—either because they could not be found or

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165. See, e.g., Robert Faturechi, *Use of License Plate Photo Databases Is Raising Privacy Concerns*, L.A. TIMES (May 16, 2014, 9:29 PM), <http://www.latimes.com/business/la-fi-law-enforcement-contractors-20140518-story.html> [<https://perma.cc/T35U-FGJG>].

166. Monica Anderson, *Technology Device Ownership: 2015*, PEW RES. CTR. (Oct. 29, 2015), <http://www.pewinternet.org/2015/10/29/technology-device-ownership-2015/> [<https://perma.cc/5A8R-M8LF>] (reporting cell phone ownership data in the United States). For example, the U.S. Marshals Service, which apprehends federal fugitives, has used devices, known as stingrays, that simulate cell towers to look for more than 6,000 suspects. See Brad Heath, *U.S. Marshals Secretly Tracked 6,000 Cellphones*, USA TODAY (Feb. 23, 2016, 10:13 PM), <http://www.usatoday.com/story/news/2016/02/23/us-marshals-service-cellphone-stingray/80785616/> [<https://perma.cc/N55V-Q6S7>].

167. E.g., Douglas A. Fretty, *Face-Recognition Surveillance: A Moment of Truth for Fourth Amendment Rights in Public Places*, 16 VA. J.L. & TECH. 430 (2011) (describing facial recognition technology); Tristan Hallman, *With New Surveillance Cameras, Police Have More Eyes in the Sky than Ever*, DALLAS MORNING NEWS (Sept. 16, 2015, 11:50 PM), <http://www.dallasnews.com/news/metro/20150916-with-new-surveillance-cameras-police-have-more-eyes-in-the-sky-than-ever.ece> [<https://perma.cc/CV5Y-4WSV>].

168. See BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2014 tbl. 5a (2015), <https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf> [<https://perma.cc/S88P-KPT2>] (showing over 7.8 million outstanding warrants in state and federal databases with the vast majority being only for minor offenses); DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 6, 55–56 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/Z8CP-XR8J>] (finding that in Ferguson, MO, 16,000 out of a population of 21,000 people had outstanding warrants, most of which were for traffic violations or ordinance infractions).

were not worth finding—but the end result might still be a significant improvement on current arrest practice, achieving a high level of compliance with legal process while reducing the costs and damages associated with arrests.

These arguments suggest that the most traditional argument for arrests—that arrests are essential to begin the criminal process—is no longer persuasive. Using citations in place of arrests increases liberty and reduces costs. Assuming that failures to appear can be managed in cost-effective ways, something technology increasingly ensures, then for most defendants worth arresting, citations will be a credible alternative. Moreover, citations are only one alternative to arrest, and not a particularly radical one. If you think that it is simply not acceptable to give up on adjudicating a criminal charge because a defendant chose not to turn up in court, and that is why you want him arrested, you might find a different substitute for arrests more appealing: continue without him.

It is not as crazy as it sounds, especially for misdemeanants. As scholars have repeatedly pointed out, the vast majority of arrestees receive very limited criminal process.<sup>169</sup> They are arrested for petty offenses en masse, often without probable cause.<sup>170</sup> Prosecutors are unlikely to notice the weakness of these cases because they give the evidence almost no scrutiny. And why should they? If the case against a defendant is not quickly dismissed he may be effectively forced to plead guilty at his arraignment with little advice from counsel in order to avoid serving more time before trial than he would receive as a sentence if convicted.<sup>171</sup> It may be unfair to advocate by comparison to the existing system of processing misdemeanor defendants—implicitly treating it as a baseline for procedural adequacy—when most commentators lament the absence of misdemeanor process. Still, would the system really be so much worse if some of those defendants were never present at all?

An officer with probable cause could issue a citation directly to the suspect on the street. Most suspects would appear, and the criminal process would proceed as it does now. If the charges are not dismissed, defendants would have avoided being taken into custody and could make a good case that since they showed up at their court appearance, they should remain free until trial. If a defendant fails to appear, the charges could still be dismissed, or the arraignment could be postponed, or finally, it could continue without him with a new summons issued for trial.

If the defendant then appears at trial, he is not in much worse a position than he would be if he had been arrested. If he does not appear on his trial date, the case could be continued or dismissed, or it could go ahead without

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169. E.g., Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1315 (2012); see, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2492–93 (2004); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008).

170. Natapoff, *supra* note 169, at 1332; see Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351, 374 (2013).

171. See Bibas, *supra* note 169, at 2492–93; Natapoff, *supra* note 169, at 1315.

him. At trial, the prosecutor would be required to present evidence sufficient to convict the defendant beyond a reasonable doubt, or the defendant would be acquitted. Defense counsel could still be assigned to challenge the government's case by cross-examining witnesses, making legal objections, and arguing about whether the government has met its burden. Assuming the defendant is convicted, a sentencing date would be set, and once again, process would be served.

Trials in absentia sound unconstitutional, but in these circumstances, they might not be, at least for misdemeanants. Defendants have long been held to have a right to be present at trial, one that grows out of a defendant's due process and Sixth Amendment rights.<sup>172</sup> But defendants can choose to waive that right.<sup>173</sup> Under Federal Rule of Criminal Procedure 43, for example, a suspect may consent to trial in absentia for misdemeanors.<sup>174</sup> More importantly, defendants can effectively forfeit the right to be present if, for instance, they choose not to return to court once a trial has started, or if they persist in disruptive conduct in the courtroom.<sup>175</sup> In those cases, trial and sentencing can and do proceed without the defendant, even for serious crimes.<sup>176</sup> Given this tradition, it is not much of a stretch to conclude that a defendant also forfeits his right to be present at trial when he receives actual notice of his trial date and he fails to appear. In that case, we might continue in his absence.

In fact, misdemeanor trials in absentia are not that different from traffic tickets. In many states, ignoring a traffic ticket for just a couple of weeks justifies a default judgment against the defendant.<sup>177</sup> If there is something terrible about forfeiting one's right to be present at trial, one would think permitting default judgments with no trial, often for the same crimes, would

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172. *Illinois v. Allen*, 397 U.S. 337, 338 (1970); *Hopt v. Utah*, 110 U.S. 574, 579 (1884).

173. See *Taylor v. United States*, 414 U.S. 17, 18–19 (1973); *Diaz v. United States*, 223 U.S. 442, 455 (1912).

174. FED. R. CRIM. P. 43(b)(2).

175. See *Taylor*, 414 U.S. at 19–20 (permitting waiver based on voluntary absence from trial, even though defendant was not warned that trial would continue in his absence); *Allen*, 397 U.S. at 342–43 (1970) (finding waiver “if, after [the defendant] has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom”); *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) (noting that right could be lost by “consent or at times even by misconduct”), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964).

176. See FED. R. CRIM. P. 43(c); *Allen*, 397 U.S. at 343. The Supreme Court has held that Rule 43 only applies when the defendant is present at the beginning of trial, but it has not held that this aspect of the rule is constitutionally mandated. See *Crosby v. United States*, 506 U.S. 255, 261–62 (1993).

177. *E.g.*, HAW. REV. STAT. ANN. § 291D-7(d)–(e) (LexisNexis 2010) (specifying that a default judgment shall be issued if a person fails to answer a traffic infraction notice within 21 days); ME. R. CIV. P. 80F(k)(1) (specifying that the clerk enter a default judgment if a defendant fails to respond to a traffic violation notice within 20 days); WASH. REV. CODE ANN. § 46.63.070(1), (6) (West 2012) (stating that a person who fails to respond to a notice of traffic infraction within 15 days shall be ordered to pay the penalty for the infraction).

be worse. Some misdemeanors are far more serious than traffic violations. Assaults and vandalism, for instance, are not comparable to speeding or failing to yield. But given the high rate of guilty pleas and the weak expressive value of misdemeanor convictions,<sup>178</sup> we might not lose much by permitting defendants to be tried in their absence even for these more serious crimes.

My point is not that trials in absentia are a good idea. Given the traditional role the defendant's presence plays in American due process, they probably aren't. Managing failures to appear in other ways—by setting new hearing dates, by finding defendants, and by dropping some prosecutions, for instance—is likely preferable. Still, thinking about using citations with trials in absentia should focus our attention on just how problematic our system of arrest is: even this unappealing alternative would likely vindicate our interests in criminal justice and our concerns for the defendant better than the current system. Given that, we cannot say that arrests are necessary to start the criminal process.

#### B. Arrests to Maintain Order

While lawyers treat arrests as the start of the criminal process, police officers and the scholars who study them often view arrests as a way to resolve threats to order rather than as a way to enforce criminal law. The reason you call 911 rather than a social services agency when something bad is happening is because police, in the words of Egon Bittner, have the unique capacity to “coerce a provisional solution upon emergent problems without having to brook or defer to opposition of any kind.”<sup>179</sup> It has long been true that “any policeman worth his salt is virtually always in a position to find a *bona fide* charge of some kind when he believes the situation calls for an arrest.”<sup>180</sup> And since arrests solve many problems, much of the police capacity to coerce provisional solutions is located in their power to arrest.

Some legal scholars reject the legitimacy of using criminal prohibitions as an excuse to make arrests to maintain order rather than basing arrest decisions on the need to enforce criminal law. Wayne LaFave argued in his 1965 book on arrests that any arrest for a purpose other than prosecution represents a misuse of discretion.<sup>181</sup> More recently, in 2015, Elina Treyger argued that criminal prosecution—and not other ends—should be the goal

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178. Alexandra Natapoff, *Why Misdemeanors Aren't So Minor*, SLATE (Apr. 27, 2012, 11:33 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/04/misdemeanors\\_can\\_have\\_major\\_consequences\\_for\\_the\\_people\\_charged\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/misdemeanors_can_have_major_consequences_for_the_people_charged_.html) [https://perma.cc/VC3Q-SPUK].

179. Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police, in THE POTENTIAL FOR REFORM OF CRIMINAL JUSTICE* 17, 18 (Herbert Jacob ed., 1974).

180. *Id.* at 27.

181. See LAFAVE, *supra* note 128, at 437–38 (1965) (“The making of an arrest intended to culminate in release of the suspected offender rather than in his prosecution is said to be both illegal and unlikely.”).

of any arrest.<sup>182</sup> If you agree with such sentiments, then it should not take much to persuade you that police should not retain the power to arrest in circumstances in which prosecution, if it happens at all, is intended merely to legitimize an arrest conducted for other purposes. But even if you think it is okay to arrest people to maintain order, you might still wonder whether we *need* arrests to achieve this goal, or whether less costly tools would serve.

Many order-maintenance arrests occur when police respond to individuals who are disturbing others. An officer might arrest a mentally ill person who is behaving bizarrely on a street corner, an intoxicated man yelling noisily in a residential area, or a homeless person panhandling aggressively. In each case, an arrest solves the problem. In recent years, many departments have sought to prevent repetitive disorder problems by using approaches to policing, such as problem-solving policing and community policing, in which they collaborate with communities to fix the conditions that encourage disorder.<sup>183</sup> These efforts, which frequently employ both noncoercive measures and strategic arrests, have had success in reducing disorder and therefore in reducing arrests.<sup>184</sup> Nevertheless, it is not always possible to prevent the kinds of disorder that police must address. Police officers also need more immediate solutions.

Of course, police already have at hand several less coercive measures to resolve disruptive behavior. Police often use verbal commands and orders to disperse before they even consider arrest,<sup>185</sup> and those practices should be encouraged. Officers trained to respond to calls involving mental disturbance can often be especially effective in defusing situations with fewer arrests and fewer injuries.<sup>186</sup> Still, some disruptions resist these techniques as well.

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182. See Elina Treyger, *Collateral Incentives to Arrest*, 63 U. KAN. L. REV. 557, 592 (2015) (“The prosecution principle as normative principle, however, persists in the background of policing and criminal jurisprudence as a guide for police discretion, rather than a legal mandate. Instead of legally sanctioning contrary arresting behavior as in the past, the prosecution principle is now best viewed as channeling arresting behavior towards the same ends. The prosecution principle is an aspiration.” (emphasis omitted)).

183. See JOEL B. PLANT & MICHAEL S. SCOTT, CENTER FOR PROBLEM-ORIENTED POLICING, EFFECTIVE POLICING AND CRIME PREVENTION 32 (2009), <http://www.popcenter.org/library/reading/pdfs/mayorsguide.pdf> [<https://perma.cc/2CAB-QXET>] (describing problem-oriented policing).

184. See David Weisburd et al., *Is Problem-Oriented Policing Effective in Reducing Crime and Disorder? Findings from a Campbell Systematic Review*, 9 CRIMINOLOGY & PUB. POL’Y 139 (2010).

185. See NAT’L RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING 68–69 (Wesley Skogan & Kathleen Frydl eds., 2004) (describing the use of verbal commands and dispersal as an alternative to physical force).

186. See PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 56 (2015) [hereinafter FINAL REPORT OF THE PRESIDENT’S TASK FORCE], [http://www.cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) [<https://perma.cc/U6KW-4BDK>] (recommending the widespread adoption of crisis-intervention training developed in Memphis, Tennessee); Kelli E. Canada et al., *Crisis Intervention Teams in Chicago: Successes on the Ground*, 10 J. POLICE CRISIS NEGOTS. 86 (2010).

Though citations, tickets, and summonses are practical alternatives to arrests intended to make suspects answer criminal charges, they are much less useful for quickly addressing disorder. After receiving a citation, suspects who are drunk may continue to be excessively noisy, those who are angry may return to their fight, and those who are soliciting clients for prostitution to support a drug habit may persist in walking the street. In each case, the disorder might continue or soon be repeated following a citation. Moreover, disruptive conduct of the kind that leads to police intervention is often closely tied to mental illness, homelessness, drug abuse, and alcoholism.<sup>187</sup> These social problems sometimes lead to disorder precisely because they interfere with individual capacity to conform to behavioral norms, even when police are present. The same conditions may also make it less likely that individuals will be dissuaded from their conduct by citations.<sup>188</sup>

If a suspect is unresponsive or likely to continue disorderly conduct, then police may find removing the disruptive person from the situation the most effective way to defuse an order problem. As Egon Bittner pointed out, and as many repeat today, a vast code of low-level misdemeanors and violations ensures that an arrest is almost always a credible legal mechanism to facilitate that removal.<sup>189</sup> But that does not mean that the need to remove a person always justifies an order-maintenance arrest.

First, a police officer can take someone off of the street without taking him to jail. If an individual with a serious mental condition poses a threat to himself or others, he can be detained for further psychiatric evaluation.<sup>190</sup> If he needs social services, he can be taken to a crisis response drop-off center for the mentally ill, a detox center for those who are high or drunk, or a drop-in shelter for the homeless, to the degree one is available.<sup>191</sup> If he simply needs to be returned to a supportive environment, he can be given a ride home. Any of these will mitigate the immediate problem without the consequences of an arrest. This is not to say that criminal charges are never appropriate for public order offenses. But the decision to remove a disruptive person from the situation and the decision to charge him with a crime can both be separated from the decision to arrest him.

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187. See Canada et al., *supra* note 186.

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

189. See EGON BITTNER, *THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY* 108 (1970).

190. See, e.g., CAL. WELF. & INST. CODE § 5150 (West 2016); COLO. REV. STAT. § 27-65-105 (2015); WIS. STAT. § 51.15 (2015).

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



Second, a police officer can often prevent someone from continuing a crime by removing him from the scene of the incident briefly rather than by an arrest.<sup>192</sup> Two men engaged in a shoving match outside a bar might stop if given a few minutes to cool down. This kind of detention could not be justified as a *Terry* stop. Although we think of *Terry* stops as the primary tool for conducting shorter seizures than arrests, lawful *Terry* stops are brief and investigative,<sup>193</sup> which makes them ill-suited for this purpose. Nevertheless, the Supreme Court has also repeatedly sanctioned non-*Terry* seizures that extend beyond the scope of a permissible *Terry* stop, but do not involve a full formal arrest. For example, a police officer may conduct traffic stops for the purpose of giving a warning, ticket, or citation, if the officer has probable cause,<sup>194</sup> and that detention may be as long as necessary to address the infraction.<sup>195</sup> Pedestrians may be similarly detained beyond the scope of a *Terry* stop in order to give an officer a chance to issue a citation or ticket, if the detention is based on probable cause. And stationhouse detentions without arrest for the purpose of gathering evidence are permissible so long as they are based on probable cause.<sup>196</sup> If the Fourth Amendment permits these seizures, it could similarly permit short field detentions based on probable cause that criminal activity has occurred and would be likely to recur absent some brief form of restraint.

A lawful field detention of this kind would allow officers to detain suspects temporarily, with or without citing them, and then let them go on their way, so long as the seizure was reasonable and not “prolonged beyond the time reasonably required to complete th[e] mission.”<sup>197</sup> Unlike *Terry* and its progeny, which provides for a less-than-arrest seizure on less-than-probable cause, a field detention for order maintenance would constitute a less-than-arrest seizure based on enough justification for an arrest.<sup>198</sup> In an hour, many suspects will sober up, calm down, or lose the opportunity to be disorderly. Thus, a field detention could hinder continuing offenses without imposing the full negative consequences of an arrest.

The idea of field detentions raises obvious objections. Though it may be less consequential than an arrest, it is still harmful. Even a brief detention deprives a suspect of time and autonomy and subjects him to humiliation

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192. Police might also use this strategy to address those who resist a less coercive alternative to arrest, such as, an order to disperse.

193. See, e.g., *United States v. Sharpe*, 470 U.S. 675, 686 (1985); *United States v. Place*, 462 U.S. 696, 706 (1983); *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion).

194. See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 407 (2005); *Knowles v. Iowa*, 525 U.S. 113 (1998).

195. See *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015).

196. See, e.g., *Cupp v. Murphy*, 412 U.S. 291, 296 (1973).

197. *Caballes*, 543 U.S. at 407.

198. In this way, this suggestion is different than that proposed in the pre-*Terry* Uniform Arrest Act. It provided for field detentions of up to two hours in order to question suspects, but like *Terry* stops, those detentions were intended to be investigative and based on less than probable cause. See Warner, *supra* note 130, at 320–21.

and perhaps risk of injury. Since the detention would be less time consuming for the officer than an arrest, officers might do many more of them, including in circumstances in which they would have been unlikely to make an arrest. Introducing field detentions therefore risks reducing the harm of individual police-citizen interactions only to make it up in volume. *Terry* stops and frisks arguably have had this problem, at least in some jurisdictions; and, as with *Terry* stops, Fourth Amendment law would not provide a check against this risk. Constitutional rights weigh the fairness of each coercion, not the harm efficiency of police practices all told.<sup>199</sup> This means that limiting the overall costs of field detentions would require action in the political arena rather than in the courts.

Unfortunately, local politics are often an inadequate constraint on the harms of policing.<sup>200</sup> Moreover, the political process can only be effective when the public and their agents can accurately assess police conduct.<sup>201</sup> The brevity and informality that makes police detentions less intrusive than arrests also makes them more difficult to monitor and therefore more susceptible to abuse, much as *Terry* stops are.<sup>202</sup> And, as with *Terry* stops, field detentions that do not result in criminal charges will rarely be to subject to judicial review. State legislatures and departments could mitigate the risk of abuse by ensuring that field detentions are reported and recorded, and by setting up mechanisms for reviewing their justification. Technologies that make it harder for patrol officers to evade scrutiny—cameras, computer-aided dispatch, radios, and GPS, for example—could also facilitate accountability, at least if someone bothered to look at what officers were doing. But field detentions nevertheless pose accountability risks.

Given these risks, I do not know whether regulated field detentions are good policy. They may be more intrusive than other means of maintaining order that have not yet been implemented to their full potential, such as the multidisciplinary police-community response teams recommended by the President's Task Force on 21st Century Policing.<sup>203</sup> But if implemented well, they would probably also be less harmful than widespread order-maintenance arrests. An arrest offers a swift and certain way for an officer seeking to impose a provisional solution to address disorder. But it is not the only way to solve order problems, and given the harms of arrests and the potential of alternatives, it is one that is increasingly difficult to justify.

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199. See Harmon, *Problem*, *supra* note 119.

200. See Harmon, *Federal Programs*, *supra* note 1, at 884–91.

201. See *id.* at 944; Rachel Harmon, *Why Do We (Still) Lack Data on Policing*, 96 MARQ. L. REV. 1119, 1123–24 (2012).

202. See, e.g., U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 9 n.8 (2014), [https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark\\_findings\\_7-22-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf) [<https://perma.cc/Y9RB-H989>] (describing problems with “backseat detentions” in Newark).

203. See FINAL REPORT OF THE PRESIDENT'S TASK FORCE, *supra* note 186, at 44.

## C. Arrests for Violent Crimes

So far, I have mostly discussed alternatives to arrest using examples of misdemeanors, which account for more than 80 percent of arrests.<sup>204</sup> The same arguments apply to most felonies. A few states already permit citations for some felonies.<sup>205</sup> While substituting citations for arrests in felony cases may seem radical, states already widely permit judges to issue summonses instead of arrest warrants for felony defendants, which have the same effect of commanding them to court rather than compelling their presence.

Even so, most people would think that there is one category of arrests that is beyond dispute: arrests for serious violent crimes.<sup>206</sup> Not even the most enthusiastic advocates of citations have suggested using them for the approximately 5 percent of arrests that are for violent felonies.<sup>207</sup> And rules allowing summonses instead of arrest warrants either expressly exclude these felonies or they implicitly do so by requiring judges (and often prosecutors) to agree that a summons should be issued in lieu of arrest.<sup>208</sup> I will not try to make a case for eliminating all of these arrests. Some serious offenders are likely to be so dangerous, or so unlikely to be brought to justice otherwise, that they are worth arresting. But even for violent crime, our intuition that arrests are essential is untrustworthy. Our experience with pretrial release suggests that we can make evidence-based predictions about which suspects are likely to reoffend before arraignment or are likely to fail to appear for court dates. If so, then it is very likely that our practice of arresting suspects for these crimes could be curbed significantly without risk of significant harm to public safety or order.

However much we think we need arrests to ensure that suspects show up in court generally, our instincts tell us that we need them more so for violent offenders. The risk and consequences of flight seem especially high

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204. R. LAFOUNTAIN ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 47 (2010), <http://www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/EWSC-2008-Online.ashx> [<https://perma.cc/MM69-2ZM2>].

205. See IACP, LITERATURE REVIEW, *supra* note 133, at 4. Some states say nothing about the range of statutes for which citations may issue, and two states expressly permit citations for a narrow range of felonies. *Id.*; see, e.g., LA. CODE CRIM. PROC. ANN. art. 211 (2016) (allowing issuance of a citation for felony theft or illegal possession of stolen things if value is between \$500 and \$1,000); OR. REV. STAT. § 133.055 (2015) (allowing issuance of a citation for felonies authorized by law to be reduced to a misdemeanor). In any case, citations are rarely used this way. IACP, *supra* note 131, at 11.

206. I have assumed as much myself. See Harmon, *Police Violence*, *supra* note 36, at 1150 (2008) (stating that it “seem[s] obvious” that “police must be able to arrest individuals for serious crimes, even if they resist”).

207. See FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2014, *supra* note 2, at 2 (finding that in 2014, 498,666 out of 11,205,833 arrests were for violent crimes); IACP, *supra* note 131, at 11 (finding that agencies rarely use their authority to issue citations in lieu of arrest in felony cases, including violent felonies); *id.* at 6 (quoting organizations in favor of expanding the use of citations); WHITCOMB, ET AL., *supra* note 132.

208. See, e.g., FED. R. CRIM. P. 4; OHIO R. CRIM. P. 4(A); VA. R. CRIM. PRAC. & P. 3A:4.

for violent crimes. A suspect who fails to appear and is never caught will never face the incarceration he would likely be sentenced to if convicted. Though he may pay an additional penalty for failing to appear if he is caught and brought to justice, that cost (discounted by the probability it will be imposed) might not be enough to deter efforts to escape justice. Intuition and anecdote tell us that, for many people, not showing up could be a rational response to a serious charge. The societal consequences of a violent suspect's decision not to appear may be greater than for other felons, too. Not only will the public interest in adjudicating his crime never be vindicated, but he may also commit other crimes that would have been prevented by his conviction and imprisonment.

Relatedly, though we worry that any suspect might commit a new crime if he is not arrested, we worry more that a person accused of a violent crime will hurt someone if he remains free before his first court appearance. This view appears so widely held that the Supreme Court quietly embedded it in the law, and almost no one has challenged it since. In *Tennessee v. Garner*, the Court considered when deadly force can be used to stop a suspected felon fleeing arrest.<sup>209</sup> It concluded that deadly force is constitutionally permissible only “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.”<sup>210</sup> How do we know when a suspect poses such a threat? The Court noted two possibilities. A suspect is sufficiently dangerous if he either “threatens the officer with a weapon” during the escape, or if “there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm.”<sup>211</sup> For the Supreme Court, suspicion that one has threatened violence in the past is sufficiently predictive of future danger to justify not only arrest, but shooting the suspect in the back of the head in order to prevent his escape.<sup>212</sup> Simply put, the Court shares the commonly held belief that people suspected of violent felonies are dangerous.

The Supreme Court does not explain its calculus for concluding that those accused of violent crimes pose a substantial ongoing risk of violence. Without more evidence, it is not obvious that mere suspicion of one crime predicts a high risk of new violent criminal activity in the short period between when the suspect is charged and his first date in court. One could take the view that the public should not have to accept even a low risk of future

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209. 471 U.S. 1, 3 (1985).

210. *Garner*, 471 U.S. at 11.

211. *Id.*

212. *See id.* at 11–12 (“Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.”).

violence, and that our shared sense of unease is sufficient evidence to establish the presence of enough risk. But if this logic justifies our existing practice of arresting defendants accused of violent crimes, it does so only at the price of raising considerable questions about our much more sophisticated system of pretrial release.

Arrest and pretrial detention are motivated by many of the same concerns. Like those just charged with a crime, suspects who are released pending trial may fail to appear or may commit crimes in the interim. Since the first bail-reform movement of the early 1960s, however, policymakers and commentators have viewed pretrial detention as a substantial intrusion on individual interests.<sup>213</sup> Over time, the law of pretrial detention has evolved to permit consideration of future dangerousness and yet still maintain a presumption against holding suspects.<sup>214</sup> Policymakers have sought ways to impose detention only on suspects who pose the highest level of risk, and they develop and use evidence-based measures to distinguish those suspects from others.<sup>215</sup> The idea is that, while pretrial detention may sometimes be necessary to protect the public,<sup>216</sup> it should only be imposed when we have good reason to believe it really is needed. While many jurisdictions continue to allow judges to make subjective pretrial release decisions, the clear trend is to base the decision on research-refined, objective, risk-assessment instruments that help judges identify the riskiest preconviction defendants.

There are methodological challenges to refining pretrial risk assessment and political challenges to implementing it more widely.<sup>217</sup> But the contrast

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213. For an early example, see Charles E. Ares et al., *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. REV. 67, 69 (1963) (“Americans take seriously the presumption of innocence . . . . At the pre-trial stage the presumption means that the defendant should ordinarily be given his freedom.”). For a more modern example, see Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1354 (2014) (“Being jailed . . . increase[s] the likelihood that the detainee will be convicted, imprisoned, and subjected to prolonged deprivation of liberty, privacy, and other fundamental elements of human existence.”).

214. See, e.g., 18 U.S.C. § 3142 (2012); *United States v. Salerno*, 481 U.S. 739 (1987).

215. See CHARLES SUMMERS & TIM WILLIS, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, *PRETRIAL RISK ASSESSMENT: RESEARCH SUMMARY 3* (2010), <https://www.bja.gov/Publications/PretrialRiskAssessmentResearchSummary.pdf> [<https://perma.cc/2W9E-W486>]; MARIE VANNOSTRAND & CHRISTOPHER T. LOWENKAMP, LAURA AND JOHN ARNOLD FOUND., *ASSESSING PRETRIAL RISK WITHOUT A DEFENDANT INTERVIEW 17* (2013), [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF\\_Report\\_no-interview\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_no-interview_FNL.pdf) [<https://perma.cc/N9N2-3HPP>]; MARIE VANNOSTRAND & KENNETH J. ROSE, *PRETRIAL RISK ASSESSMENT IN VIRGINIA 4* (2009), <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/virginia-pretrial-risk-assessment-report.pdf> [<https://perma.cc/VAE7-YVV3>].

216. SUMMERS & WILLIS, *supra* note 215, at 2.

217. See CYNTHIA A. MAMALIAN, PRETRIAL JUSTICE INSTITUTE, *STATE OF THE SCIENCE OF PRETRIAL RISK ASSESSMENT 26* (2011), [http://www.pretrial.org/download/risk-assessment/PJI%20State%20of%20the%20Science%20Pretrial%20Risk%20Assessment%20\(2011\).pdf](http://www.pretrial.org/download/risk-assessment/PJI%20State%20of%20the%20Science%20Pretrial%20Risk%20Assessment%20(2011).pdf) [<https://perma.cc/MN8R-87QA>] (summarizing the methodological challenges to creating an effective risk-assessment tool).

between existing pretrial detention decisions and prearrest arrest decisions is stark. For pretrial detention, jurisdictions use actuarial procedures to determine who should be held for trial, and they support ongoing research with the aim of releasing more suspects.<sup>218</sup> For arrest, the decision to impose coercive measures is simply the default, especially for those suspected of serious crimes.

One could counter that pretrial release decisions are made in an institutional environment much more conducive to assessing risk accurately than the environment in which arrests for violent crimes are made. Pretrial release decisions happen in court at a bail hearing with input from pretrial agencies, prosecutors, defendants, and—when they are present—defense lawyers. The decision to arrest is sometimes made in similar circumstances: judges decide whether to issue a summons rather than an arrest warrant post-indictment after input from the prosecutor, for example. But more often, it is made by police officers in the field in what the Supreme Court would remind us are rapidly evolving circumstances.<sup>219</sup> Nevertheless, although there are irreducible differences between a bail hearing and a field arrest, risk assessment is not as impossible in the latter case as one might think.

First, police officers have the power to improve the conditions in which the decision to arrest is made. Just as an officer may hold a suspect during a traffic stop to check his driver's license, determine whether he has outstanding warrants, and inspect the car's registration and proof of insurance before issuing a ticket or warning,<sup>220</sup> he may similarly detain a suspect whom he is citing or arresting to check his prior criminal history and record of failing to appear. This brief detention slows the decision down and allows an officer to gather information. Unlike an officer facing a decision to use force, an officer deciding whether to arrest need not respond instantaneously with only what he knows when he confronts the suspect.

Second, police officers have (or likely could have) all the information they need to make an evidenced-based determination about whether an arrest is necessary for a completed crime.<sup>221</sup> Many of the validated risk factors used by judges to assess a defendant's risk level at a bail hearing are also available to police officers in the field. The six most commonly used are (1) whether the defendant has prior failures to appear; (2) whether he has prior convictions (of various types); (3) whether the present charge is a felony; (4)

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218. See SUMMERS & WILLIS, *supra* note 215, at 3 (noting that the use of actuarial pretrial risk-assessment instruments may improve outcomes in pretrial services); VANNOSTRAND & LOWENKAMP, *supra* note 215, at 17 (finding that a noninterview, actuarial, risk assessment can accurately predict failure-to-appear rates); VANNOSTRAND & ROSE, *supra* note 215, at 4 (discussing pretrial risk assessment in Virginia and finding that new actuarial pretrial tools led to more effective release decisions).

219. *E.g.*, *Graham v. Connor*, 490 U.S. 386, 397 (1989).

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

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

whether he is unemployed; (5) whether he has a history of drug abuse; and (6) whether he has a pending case against him.<sup>222</sup> Even assuming that a police officer does nothing to assess whether the suspect is a drug abuser or employed—such as asking him—the other factors are available to most officers via radio or computer.<sup>223</sup>

In fact, with a risk-assessment tool, patrol officers may be able to make arrest decisions in the field as well as judges make release decisions in court. The most recent research on multi-jurisdiction risk-assessment instruments for pretrial release indicates that the instruments are just as strong if they exclude factors that can only be gained through an interview with a defendant, such as his employment, residence, or drug history.<sup>224</sup> This research finds that the most relevant information for predicting failure to appear or new criminal activity before trial is a suspect's prior failures to appear and prior convictions.<sup>225</sup> Both facts are or can be available to an officer in the field.<sup>226</sup> Assuming that similar factors predict failures to appear and new criminal activity before trial and before arraignment, police officers could engage in evidence-based risk assessment using validated instruments before determining whether to arrest.

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

To be sure, this is nothing like the way decisions to arrest or cite are presently made. First, the law does not allow evidence-based decisions about arrest for many crimes and discourages it for others. Citations are overwhelmingly forbidden by state law for all felonies and many misdemeanors.<sup>227</sup> Even within permissible crime categories, and even when statutes seem to encourage citations, law and policy prohibit citations for many, sometimes problematic, reasons.<sup>228</sup> For example, citations are generally forbidden whenever an officer has "reason to believe" a person will not appear

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222. MAMALIAN, *supra* note 217, at 9.

223. See IACP, *supra* note 131, at 12–13 (finding that most officers have access in the field to arrest history, warrant history, conviction history, and failure to appear history).

224. See VANNOSTRAND & LOWENKAMP, *supra* note 215, at 13.

225. *Id.* at 3.

226. See IACP, *supra* note 131, at 12–13.

227. See *id.* at 10–12.

228. See IACP, LITERATURE REVIEW, *supra* note 133, at 11, and Amber Widgery, *Citation in Lieu of Arrest*, NAT'L CONF. OF ST. LEGISLATURES (Mar. 13, 2013), <http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx> [https://perma.cc/D74S-97WP], for instances where citations might be prohibited.

in court or poses a danger.<sup>229</sup> No guidance is given about what objective circumstances would constitute such a reason. Thus, officers are left to their own intuitions about what facts predict non-appearance or dangerousness, though they have no special knowledge and little opportunity to correct their intuitions over time. Citations are also often forbidden if the suspect has an outstanding warrant.<sup>230</sup> Yet, in many communities, warrants are issued so frequently and for such minor offenses that this restriction will cause many low-level and low-risk offenders to be arrested.<sup>231</sup> And some existing restrictions on citations may be, on further analysis, unrelated to risk, such as the common prohibition against issuing a citation if a suspect is under the influence of alcohol or drugs.<sup>232</sup>

Second, even when there is no *prohibition* on issuing a citation, police officers are rarely *required* to cite rather than arrest, even when the risks of release are low. Except in some states for some low-level misdemeanors and traffic violations, the decision to cite is left almost entirely to the discretion of the individual officer.<sup>233</sup> That means that for most offenses, police discretion is limited in only one direction, against citation and in favor of arrest. The rest of the time, police officers (within department policy) may do as they will, which can lead to arrests for reasons unrelated to the public interest, such as the suspect's demeanor towards the officer,<sup>234</sup> or whether an officer wants overtime pay.<sup>235</sup> Perhaps as a result, arrest decisions sometimes seem arbitrary—even vindictive—and that is a considerable source of citizen frustration with the police.<sup>236</sup> Over time, risk-assessment tools could not only reduce arrests, they could mitigate some of the drawbacks of discretionary arrest decisions and perhaps the perceived injustice of existing practices.

Police might be reluctant to give up what has long been viewed as a core part of their discretion. Some judges probably resist constraints on their pretrial release decisions too. But arguments in favor of the discretion to

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229. Widgery, *supra* note 228.

230. *Id.*

231. See BUREAU OF JUSTICE STATISTICS, *supra* note 168, at tbl. 5a (showing over 7.8 million outstanding warrants in state and federal databases, the vast majority of which are for misdemeanors); CIVIL RIGHTS DIV., DEP'T OF JUSTICE, *supra* note 168 (finding that in 2014, 16,000 people out of a population of 21,000 had outstanding warrants in Ferguson, Missouri, most of which were for traffic violations or ordinance infractions).

232. IACP, LITERATURE REVIEW, *supra* note 133, at 11 (quoting Widgery, *supra* note 228).

233. *Id.* at 12.

234. See, e.g., Robin Shepard Engel et al., *Further Exploration of the Demeanor Hypothesis: The Interaction Effects of Suspects' Characteristics and Demeanor on Police Behavior*, 17 JUST. Q. 235, 256 (2000).

235. See EDITH LINN, ARREST DECISIONS: WHAT WORKS FOR THE OFFICER? 86–89 (2009).

236. Consider the reaction to Sandra Bland's recent arrest in Texas. Sandra Bland was pulled over for failing to signal, then arrested for failing to exit her car after she challenged the officer's authority. She was found dead in jail a few days later in what was ultimately deemed a suicide. Outraged commentators highlighted how ill-motivated and gratuitous the arrest seemed. See David A. Graham, *How Many Sandra Blands Are Out There?*, ATLANTIC (July 22, 2015), <http://www.theatlantic.com/national/archive/2015/07/how-many-sandra-blands-are-never-caught-on-video/399173/> [<https://perma.cc/B9LT-UKXV>].



arrest depend on the idea that refined, situational analysis by officers best serves the public interest, because it most effectively identifies those suspects who should be arrested.<sup>237</sup> If more people can, through a less discretionary process, be released with only a low increase in failures to appear and reoffending, then broad discretion to arrest is no longer justified.

Of course, risk assessment will not necessarily lead to fewer arrests for defendants charged with violent crimes. If the nature of the charged crime predicts failure to appear or new criminal activity, continuing to arrest violent criminals may be justified. But if we actually engage in research to construct and validate risk-assessment instruments for the decision to arrest, we might be surprised by what we find. Validated risk-assessment tools for pretrial release all use the charged crime as a risk factor in predicting failures to appear and commissions of a new crime during release.<sup>238</sup> But it is only one among many factors, and it is not heavily weighted in sorting defendants by risk.<sup>239</sup>

Existing instruments for pretrial release show that even defendants who would be assigned the highest risk classifications actually fail to appear or get arrested for any new crime less than a quarter of the time.<sup>240</sup> Those defendants have months to flee or to get into new trouble.<sup>241</sup> By contrast, defendants who are charged but not arrested will usually have far less time to disappear or commit a crime before they are scheduled to appear in court. Their failure rate may be lower, which might justify narrowing the highest-risk category and permitting more of them to avoid arrest. If we evaluate the

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

238. See VANNOSTRAND & LOWENKAMP, *supra* note 215, at 5.

239. *Id.* The Kentucky Pretrial Risk Assessment, for example, assigns 1 point out of 24 points to a defendant if the present charge is a Class A, B, or C felony. *Id.* at 10. A defendant is labelled high risk if he scores 14–24 points. *Id.* at 11. The revised validated Virginia Pretrial Release Assessment Instrument assigns 1 out of 9 points to a defendant if the present charge is a felony rather than a misdemeanor. See VANNOSTRAND & ROSE, *supra* note 215, at 13, 18. A defendant is classified high risk if he scores 5–9. *Id.* at 13.

240. See MAMALIAN, *supra* note 217, at 15 (noting that high risk defendants were found to have failure to appear rates under 25%); QUDSIA SIDDIQI, NEW YORK CITY CRIMINAL JUSTICE AGENCY, PREDICTING THE LIKELIHOOD OF PRETRIAL RE-ARREST FOR VIOLENT FELONY OFFENSES AND EXAMINING THE RISK OF PRETRIAL FAILURE AMONG NEW YORK CITY DEFENDANTS: AN ANALYSIS OF THE 2001 DATASET (2006) (finding a failure to appear rate of 24% for high-risk defendants); Marie VanNostrand & Gena Keebler, *Pretrial Risk Assessment in the Federal Court*, 72 FED. PROB. 13 (2009) (finding a combined failure to appear and re-arrest rate for high risk defendants of 15.5 percent).

241. See MAMALIAN, *supra* note 217, at 29 (noting average length of time between release and trial is measured in days or months depending on jurisdiction).

decision to arrest based on evidence rather than intuition, we might well find that choosing not to arrest a suspect—even one charged with a violent crime—is far less risky than we imagine. We generally have accepted preventive arrests as easily justified because we think that the cost of arrest is small and the threat the suspects pose is significant. In Part I, I argued the first claim is not true. The argument here suggests that perhaps the second one is not either.

One might respond that even if arresting someone charged with rape or armed robbery is unnecessary to adjudicate their crime, it is useful as a way to condemn the criminal. Our strong reasons to condemn felony conduct do not change one underlying problem with using arrests this way: probable cause is no more a basis for justifying condemnation of an individual for committing a felony than it is for a misdemeanor. In fact, using felony arrests this way may be more problematic because felony arrests are frequently based on weaker and more circumstantial evidence than arrests for misdemeanors.<sup>242</sup>

Still, even if arrest is inappropriate to communicate societal disapprobation of an individual, it might convey the seriousness with which society condemns the crime, a matter closely connected to respect for the victim. Thus, for example, advocates have suggested that we should arrest (even misdemeanor) domestic violence suspects because of the symbolic value of these arrests.<sup>243</sup> Usually, however, these arguments assume that arrests are also justified for other, more pragmatic, reasons. In the absence of another justification for the arrest, it seems normatively problematic to use this fundamentally instrumental tool for its expressive value, especially when we have other methods—namely, convicting a criminal in open court, labelling him a felon, and sentencing him to a substantial term of imprisonment—to serve that end.

Comparing our existing arrest practice to our system of pretrial release shows how bizarre it is that we take for granted the necessity of so many arrests. Most felony defendants are released until trial, and 90 percent of

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242. For felonies, police officers in some jurisdictions can rely on secondhand and circumstantial evidence to form probable cause for a warrantless arrest, whereas for misdemeanors in those same jurisdictions, officers must see the crime to make a warrantless arrest. See, e.g., ME. REV. STAT. ANN. tit. 17A, § 15 (Supp. 2015). This suggests, given that arrests are mostly warrantless, that on average one can expect that felony arrests are based on less and less direct evidence than misdemeanor arrests.

243. See KRISTIN A. KELLY, DOMESTIC VIOLENCE AND THE POLITICS OF PRIVACY 89–90 (2003) (discussing the symbolic value of domestic violence arrests to victims and those involved in domestic violence work); *id.* at 90 (noting that interviews “reflect[ed] a persistent and consistent presentation of the law as a key mechanism for bringing public commitment and values to bear in cases of domestic violence”); RANA SAMPSON, U.S. DEP’T OF JUSTICE, PROBLEM-ORIENTED GUIDES FOR POLICE PROBLEM-SPECIFIC GUIDES SERIES NO. 45, DOMESTIC VIOLENCE (2007), [http://www.popcenter.org/problems/pdfs/domestic\\_violence.pdf](http://www.popcenter.org/problems/pdfs/domestic_violence.pdf) [<https://perma.cc/8XCM-CHYZ>] (“For many advocates, batterer arrest is seen as an important symbol of a woman’s legal right to be free of intimate partner violence . . .”).

those detained are held only because they do not have the money for bail.<sup>244</sup> By contrast, almost all suspected felons are arrested. Why arrest so many defendants on day one because they are too risky to release when we know that on day three or day ten they will likely be offered terms that permit them to go free, at least if they have some resources?<sup>245</sup> Similarly, pretrial release decisions are made after an adversarial hearing in court, based on clear and often objective, evidence-based criteria. The decisions can be revisited in short order, and they can be appealed. Despite these procedural protections, we favor release over detention.<sup>246</sup> By contrast, arrest decisions are often made in the field. The decision to arrest rather than cite is usually uncontestable, irreversible, and unreviewable. Yet, in this context, we favor detention. There are times that the law permits people to be held in custody without much process because they pose a safety threat—during times of insurrection, for instance<sup>247</sup>—but, if anything, those circumstances suggest how extraordinary it is that, even for violent crimes, the decision to arrest has escaped scrutiny.

#### D. Arrests to Gather Evidence

I have focused on arrests used to start criminal adjudication, to maintain order, or to protect public safety. There is, however, one additional argument that is sometimes used to defend arrests on pragmatic grounds that might require more analysis: evidence collection.<sup>248</sup>

Police gather information from suspects after they are arrested, and they sometimes conduct arrests so that they may do so.<sup>249</sup> When an officer arrests

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244. See TIMOTHY R. SCHNACKE, NAT'L INST. OF CORR., FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 12 (2014), [http://clebp.org/images/2014-11-05\\_final\\_bail\\_fundamentals\\_september\\_8\\_2014.pdf](http://clebp.org/images/2014-11-05_final_bail_fundamentals_september_8_2014.pdf) [<https://perma.cc/NB7S-WWUP>].

245. One might contend that some of those released pretrial pay bail or bonds which might give them additional incentive to appear while arrestees do not, but many of those released pretrial are released on their own recognizance or on an unsecured bond. See THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 2 (2007), <http://www.bjs.gov/content/pub/pdf/prfdsc.pdf> [<https://perma.cc/2BKQ-38Z8>]; REAVES, *supra* note 152, at 38.

246. See, e.g., 18 U.S.C. § 3142 (2012).

247. See *Ludecke v. Watkins*, 335 U.S. 160 (1948) (upholding act allowing the President to detain and remove alien enemies from the United States during times of war); *Moyer v. Peabody*, 212 U.S. 78 (1909) (permitting governor to jail individual without probable cause during an insurrection).

248. See, e.g., *Virginia v. Moore*, 553 U.S. 164, 173 (2008) (“Arrest ensures that a suspect appears to answer charges and does not continue a crime, and it safeguards evidence and enables officers to conduct an in-custody investigation.” (citing *LAFAVE*, *supra* note 128)).

249. See, e.g., *Knowles v. Iowa*, 525 U.S. 113, 118 (1998) (striking down Iowa law that allowed a search of an automobile incident to a citation over State’s argument that “a suspect who is subject to a routine traffic stop may attempt to hide or destroy evidence . . . of another, as yet undetected crime”); *Chimel v. California*, 395 U.S. 752, 754 (1969) (finding unlawful a search incident to arrest consisting of entire three-bedroom house, including attic, garage, small workshop, and contents of drawers as too extensive for a search incident to arrest).

a suspect, the law permits a full search incident to arrest of the person and the immediately grabbable area,<sup>250</sup> a protective sweep of a house or car,<sup>251</sup> and often an inventory search of a car or belongings.<sup>252</sup> The government may obtain fingerprints and DNA, and photograph scars, tattoos, and other (sometimes) incriminating physical characteristics.<sup>253</sup> The officer may ask ordinary booking questions and, with *Miranda* warnings, may conduct more extensive custodial interrogations.<sup>254</sup> Together these forms of questioning provide not only information about specific crimes, but also provide information about criminal associates and gang membership that are used to understand criminal patterns and networks. Restricting arrests and replacing them with citations or summonses limits all of these forms of developing evidence.

Many of the arrest-conditional methods of gathering evidence have non-arrest substitutes, including *Terry* stops and frisks,<sup>255</sup> consent searches,<sup>256</sup> searches pursuant to the automobile exception to the warrant requirement,<sup>257</sup> exigency searches,<sup>258</sup> searches pursuant to a warrant, and noncustodial interviews.<sup>259</sup> But these substitutes are not perfect. They are variously narrower in scope, more demanding of individualized suspicion, and more costly to litigate than arrest-related, evidence-gathering techniques. Reducing arrests may mean giving up some evidence for some crimes.

This cost might not be trivial. Suspects and witnesses are often arrested—sometimes for unrelated crimes—precisely so that the police can question them.<sup>260</sup> If the arrest does not happen, neither will the interrogation. It is not enough to say that the suspect could be questioned at a different time. Before the arrest, the arrestee can choose to walk away from the police rather than talk. After the arrest culminates in an arraignment, he will usually have a court-appointed lawyer, who will put a stop to further questioning. The practicalities of arrest in combination with criminal procedure doctrine permit officers to generate a space in which suspects and witnesses are isolated and unrepresented and therefore likely to cooperate, even if they

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

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

252. *See Colorado v. Bertine*, 479 U.S. 367, 370–72 (1987).

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

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

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

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

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

258. *Kentucky v. King*, 131 S. Ct. 1849 (2011); *Mincey v. Arizona*, 437 U.S. 385 (1978).

259. *Berkemer v. McCarty*, 468 U.S. 420 (1984).

260. *See generally* Kit Kinports, Camreta and Al-Kidd: *The Supreme Court, the Fourth Amendment, and Witnesses*, 102 J. CRIM. L. & CRIMINOLOGY 283 (2012) (noting that individuals have often been seized as witnesses or for interrogation).

resisted talking on the street. If losing these statements means losing some convictions or reducing some sentences, and convictions and sentences deter crime and provide retributive justice, then not arresting these suspects could mean a less effective criminal justice system.<sup>261</sup>

Given how historically resilient criminal prosecutions have been in the face of procedural restraint,<sup>262</sup> it seems unlikely that crime would run rampant because of lost evidence from non-arrests. Still, if those custodial interrogations prove essential to the criminal process, we should ask whether arrests are necessary to facilitate them. The key aspects of arrest for this purpose are the uncounseled interview and the threat of criminal charges. We have already seen that criminal charges are not dependent on arrest. If we truly believe that brief, uncounseled interviews are necessary to solve crimes, perhaps we should permit them. If doing so is inconsistent with other criminal justice values, then we might not want to permit arrests in order to create a workaround. In any case, given the costs generated by other aspects of arrests—for example, the criminal record—arrests seem unnecessarily broad for the job. Simply put, we can forgo the evidence; allow arrests; allow interrogations without arrests; or invest in alternative evidence-gathering methods. I do not assume arrests are the right answer.

#### E. Arrests to Deter

I have argued that the most common justifications for arrests—that the arrests are necessary to start the criminal process, stop disorder, and gather evidence—are unpersuasive in light of available alternatives. It could be that, whether or not any specific arrest is necessary to achieve a law enforcement function, arrests have benefits more generally because they allow police to deter crime. If arrests deter crime, then decreasing arrests could increase crime, an important consideration in deciding what to do about the harms of arrests. As it turns out, however, contemporary criminological research strongly suggests that police do not deter crime best by arresting criminals.<sup>263</sup>

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261. Of course, if many of the statements secured during post-arrest interrogations are false, the system might be instead a more accurate one.

262. See Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585 (finding based on a study of 7,500 cases that the exclusionary rule exacted minimal social cost with suppression occurring in only 0.69 percent of cases); Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996) (finding that *Miranda's* net impact on conviction rates was near zero). *But see* Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 437–40 (1996) (finding a loss of conviction in 3.8 percent of serious criminal cases as a result of *Miranda*).

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

In recent years, several policing strategies have been shown to reduce crime effectively, including mostly notably, hot spots policing, problem-oriented policing, and focused deterrence strategies.<sup>264</sup> None of them is arrest-intensive. By contrast, arrest-intensive policing strategies, including traditional patrol and arrest strategies, zero-tolerance policing, and some versions of broken-windows policing, have much less evidence to support their effectiveness.<sup>265</sup> It seems that police can deter without making many arrests.

How do police deter if not by arresting criminals? Using both theory and empirical evidence, Daniel Nagin, a prominent criminologist, has argued that police deter crime more by persuading would-be offenders that they will not succeed than by arresting some criminals to make others afraid of future arrest. That is to say, police deter as “sentinels,” not as “apprehension agents.”<sup>266</sup> Of course, the relationship between how police guard against crime and their use of arrests is complicated: if they never arrested anyone, it is hard to see how officers would persuade offenders that they would not succeed.<sup>267</sup> Still, “[t]he bottom line on the effectiveness of policing tactics that emphasize arrest for misdemeanors . . . is that they don’t appear to be as effective as tactics designed to enhance guardianship or mitigate opportunities without arrest.”<sup>268</sup> It is fair to say that police do not need to make a lot of arrests to stop a lot of crime. Given how many good reasons there are to reduce arrests, this should reassure us that there are few good reasons not to do so.

#### CONCLUSION: WHAT TO DO ABOUT ARRESTS

Right now, arrests are deeply embedded in our system of criminal justice. They are central to what it means to be a police officer and central to our ways of thinking about stopping crime. Departments encourage arrests

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264. See, e.g., *id.* (manuscript at 9–12); Anthony A. Braga et al., *Can Policing Disorder Reduce Crime? A Systematic Review and Meta-Analysis*, 52 J. RES. CRIME & DELINQ. 567, 580–81 (2015) [hereinafter Braga et al., *Policing Disorder*]; Anthony Braga et al., *Hot Spots Policing Effects on Crime*, CAMPBELL SYSTEMATIC REVIEWS, June 27, 2012, at 20–21; Anthony A. Braga & Brenda J. Bond, *Policing Crime and Disorder Hot Spots: A Randomized Controlled Trial*, 46 CRIMINOLOGY 577, 597–600 (2008) (concluding that prevention strategies rather than misdemeanor arrests produced the greatest crime-prevention gains); Anthony A. Braga & David L. Weisburd, *The Effects of Focused Deterrence Strategies on Crime: A Systematic Review and Meta-Analysis of the Empirical Evidence*, 49 J. RES. CRIME & DELINQ. 323, 348–49 (2012); Weisburd et al., *supra* note 184, at 153.

265. See Braga et al., *Policing Disorder*, *supra* note 264, at 568–69; Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 272 (2006); David Weisburd & John E. Eck, *What Can Police Do to Reduce Crime, Disorder, and Fear?*, 593 ANNALS AM. ACAD. POL. SOC. SCI., May 2004, at 42, 58–60; Lum & Nagin, *supra* note 263 (manuscript at 15–17).

266. See Daniel S. Nagin et al., *Deterrence, Criminal Opportunities, and Police*, 53 CRIMINOLOGY 74, 78–79 (2015); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 237–40 (2013).

267. See Nagin, *supra* note 266, at 202–03.

268. Lum & Nagin, *supra* note 263 (manuscript at 17). Criminological research takes felony arrests for granted because they are now nondiscretionary. See, e.g., *id.* (manuscript at 7).

through broken-windows or zero-tolerance policing philosophies,<sup>269</sup> and use arrest numbers as a measure of productivity and a basis for overtime pay.<sup>270</sup> Yet our arrest practice appears largely unjustified. We conduct a vast number of harmful arrests, even though arrest is often unnecessary to achieve our law enforcement goals, and even though we have not yet seriously explored the range of possible alternatives. Nevertheless, while other criminal justice practices are subject to intense scrutiny and proposals for profound reform, arrests are left largely intact, if they are considered at all.

Take, for example, the Final Report of the President's Task Force on 21st Century Policing.<sup>271</sup> In its nearly one hundred pages, it barely mentions arrests. When it does, its proposals could hardly be meeker. Action Item 2.2.1, states that "[l]aw enforcement agency policies for training on use of force should emphasize de-escalation and alternatives to arrest or summons in situations where appropriate."<sup>272</sup> Recommendation 2.9 states that "[l]aw enforcement agencies and municipalities should refrain from practices requiring officers to issue a predetermined number of tickets, citations, arrests, or summonses . . ."<sup>273</sup> And Action Item 4.1.1 states that, "[l]aw enforcement agencies should consider adopting preferences for seeking 'least harm' resolutions, such as diversion programs or warnings and citations in lieu of arrest for minor infractions."<sup>274</sup>

Each of the President's Task Force suggestions is consistent with the arguments of this Article. The first recognizes that arrests and the use of force are inextricably linked. The second rejects arrest quotas as a productivity tool in policing. And the third acknowledges that arrests impose especially unjustifiable harm when they are used for noncriminal violations. But these recommendations would not significantly alter any aspect of contemporary arrest practice, and they keep responsibility for arrest decisions entirely in the hands of law enforcement agencies, which in turn tend to leave much of that discretion in the hands of individual officers.

The same is true of recent proposals seeking to reduce the impact of coercive policing by giving the police a wider range of options for managing disorder. For example, Charlie Gerstein and J.J. Prescott recently advocated

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269. See, e.g., George L. Kelling & William J. Bratton, *Why We Need Broken Windows Policing*, CITY J. (Winter 2015), <http://www.city-journal.org/html/why-we-need-broken-windows-policing-13696.html> [<https://perma.cc/3Y2G-R7H5>] (writing as founder and leading practitioner of broken windows policing and justifying increased misdemeanor arrests as part of broken windows strategy).

270. See LINN, *supra* note 235, at 48–49 (finding New York City police officers on average made 25.1 percent of arrests in the last hour of their shift as a means of getting overtime pay); *id.* at 104 (finding that a desire for promotion was a motivating factor for some arrests); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 498–99 (2004) (arguing that departmental rewards for arrests in the form of promotions or commendations lead to more arrests than legally justified).

271. FINAL REPORT OF THE PRESIDENT'S TASK FORCE, *supra* note 186.

272. *Id.* at 20.

273. *Id.* at 26.

274. *Id.* at 43.

passing civil ordinances permitting police to detain individuals for up to twenty-four hours without generating arrest records.<sup>275</sup> This additive approach to reducing arrests is favored by police chiefs, who in the words of then New York City Police Commissioner William Bratton “seek to expand the officer’s toolbox rather than to contract it, so that Department policy can provide guidance to officers based on a wider range of enforcement options, as circumstances warrant.”<sup>276</sup> But like the value of the Task Force’s proposals, the value of any such new tools depends on the interests and incentives of the officers and officials who choose whether to use them.

Clearly, police departments could, starting any time, conduct far fewer arrests than they currently do. They should, and some have. The New York Police Department, for instance, announced in March 2016 that it “will no longer arrest individuals who commit [minor] offenses – such as littering, public consumption of alcohol, or taking up two seats on the subway – unless there is a demonstrated public safety reason to do so.”<sup>277</sup> Instead, it intends to issue summonses for these offenses.<sup>278</sup>

The New York innovation has not been articulated in law, or even apparently in written policy, at least not yet.<sup>279</sup> Even if it were, we cannot expect individual officers, police chiefs, and departments to balance adequately the interests of individuals and society in formulating arrest practices or to retain a commitment to doing so over time. Police departments receive frequent demands from members of the public to immediately solve problems on the street. Communities may sometimes effectively press departments to engage in less intrusive policing, as happened in New York, but usually only when harms are especially apparent and salient, something that is rarely true for arrests.<sup>280</sup> Some exceptions aside, police chiefs are usually rewarded more for visibly promoting public safety than they are penalized

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275. Charlie Gerstein & J.J. Prescott, *Process Costs and Police Discretion*, 128 HARV. L. REV. F. 268, 283–88 (2015). Although Gerstein and Prescott approach the question of why police need to make arrests, they do not answer the question other than to say that the police are likely to continue to arrest people even if criminal public order offenses were removed from the statute books. *See id.* at 279–83. Their answer takes for granted that there is no way to restrict arrests for misdemeanor violations other than to eliminate the criminal violations themselves.

276. Letter from William J. Bratton, Police Commissioner, City of New York, to Melissa Mark-Viverito, Speaker, New York City Council (May 4, 2015) (on file with *Michigan Law Review*).

277. Press Release, The New York Cty. Dist. Att’y’s Office, District Attorney Vance, Commissioner Bratton, Mayor De Blasio Announce New Structural Changes to Criminal Summonses Issued in Manhattan (Mar. 1, 2016), <http://manhattanda.org/press-release/district-attorney-vance-commissioner-bratton-mayor-de-blasio-announce-new-structural-c> [<https://perma.cc/23CG-XXAH>].

278. *Id.*

279. *Cf. id.* (“[W]e are in the process of developing a set of proposals that could serve to divert more quality-of-life offenders from the criminal process, while preserving the ability to impose meaningful sanctions if needed.”).

280. *See, e.g., id.*



for imposing unnecessary coercion.<sup>281</sup> Moreover, public pressure to reduce arrests can be hard to sustain. Given competing demands, even a police department that states an intent to reduce arrests may find it difficult to do so, especially over time.<sup>282</sup>

Other recent reform ideas might have some impact. Many have suggested decriminalizing some misdemeanors, which could—at least in theory—reduce the number of arrests conducted for the least serious crimes, though substitute grounds for arrest are often plentiful.<sup>283</sup> Others have suggested ways to limit some of the harms of arrests by restricting the consequences for employment, public housing, and immigration status, or by forbidding the use of force to subdue some suspects.<sup>284</sup> Though these reforms might have benefits, I suspect that far more fundamental changes are necessary, changes that unsettle the assumption that police should have such broad discretion to arrest. Tinkering at the edges of arrests may not be sufficient to disrupt their elevated, nearly sacrosanct, status as a law enforcement tool, or to bring our existing practice of arrests in line with our best reasons for using them.

More meaningful change likely requires state law reform. States could expand the authority to issue summonses and citations where it is lacking, and they could limit statutory authority to arrest when it is least needed. They could impose evidence-based criteria on officers' decisions to arrest when arrests might be appropriate, and they could establish external mechanisms for reviewing those decisions. Federal law is less important, but it

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281. For example, police chiefs often do not effectively internalize the costs of monetary judgments from damages actions, the most common direct repercussion for incidents of excessive force. See, e.g., Armacost, *supra* note 270, at 475 (arguing that chiefs of police may tolerate police brutality because the political gains of aggressive policing outweigh the financial costs of liability); Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33 (2012); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000); Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144 (2016).

282. Cf. First Report of the Monitor at 17–18, 59–60, *Floyd v. City of New York*, 302 F.R.D. 69 (S.D.N.Y. 2014) (No. 08-CV-1034) (finding that following NYPD policy changes to stop and frisk policy, officers are failing to document some stops and frisks and reasoning that this may partially explain lower stop and frisk numbers).

283. See, e.g., DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 17–32 (2008) (discussing overcriminalization, the important constraints on criminal sanction, and the great injustice of overpunishment). But see Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism's Limits*, 24 CORNELL J.L. & PUB. POL. 319 (2014) (arguing that decriminalization has not reduced the number of arrests because of department incentives to arrest); Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672 (2015) (arguing that decriminalization alone cannot reduce the number of arrests without limits on police discretion).

284. See, e.g., Jain, *supra* note 17; Ian Ayres & Daniel Markovits, Opinion, *Ending Excessive Police Force Starts with New Rules of Engagement*, WASH. POST (Dec. 25, 2014), [https://www.washingtonpost.com/opinions/ending-excessive-police-force-starts-with-new-rules-of-engagement/2014/12/25/7fa379c0-8a1e-11e4-a085-34e9b9f09a58\\_story.html](https://www.washingtonpost.com/opinions/ending-excessive-police-force-starts-with-new-rules-of-engagement/2014/12/25/7fa379c0-8a1e-11e4-a085-34e9b9f09a58_story.html) [https://perma.cc/4289-JD5J].

could also encourage better arrest policies and practices. At the very least, the federal government could reconsider its policy of actively incentivizing arrests through federal grant programs.<sup>285</sup>

Most such reforms require more analysis to determine how best to implement them, and all of them would meet substantial resistance. Moreover, any efforts to reduce arrests would create new risks. One I have already mentioned is that field detentions to reduce arrests could backfire by allowing the police to impose harm on more suspects. This example should remind us that alternatives to arrests impose harm as well. As the Justice Department's investigation into unconstitutional law enforcement practices in Ferguson, Missouri forcefully reminds us, tickets, fines, fees, and outstanding warrants for failure to appear can be as effective as arrests and convictions at reinforcing inequality and holding people down.<sup>286</sup> If fines are imposed blithely and bench warrants issued too easily for failures to appear, suspects suffer. This is especially true for the poor, who find it harder to pay those fines or get to court. If arrest-reduction policies are implemented in a way that substantially expands these practices or other costs, then—in the aggregate—reform might do more harm than good.

A second risk is that, even if we reduce arrests without increasing harm overall, reducing arrests could still exacerbate existing inequalities in the distribution of criminal justice harms. For instance, if we reduce arrests for those who have identification, or those who can convince an officer that they will show up pursuant to a summons, then we may disproportionately reduce arrests for the rich and white, and in the process make the consequences of arrests to others even more invisible outside of heavily affected communities. Since arrest practices must, to be justifiable, be distributionally fair as well as proportional to the harm they impose, this kind of effect could worsen one problem with arrests in an effort to mitigate another.

Third, some costs of arrests may be more persistent than the arrests themselves. If fewer suspects are arrested, perhaps employers will ask about citations and tickets instead. If more citations are issued, perhaps those citations will become the new locus for confrontations between suspects and the police. If technology permits collecting evidence and information during the citation process, suspects will experience no privacy gains from restricting arrests. If many of the harms of arrests persist in such ways, limiting arrests may do less good than we imagine.

These risks suggest that we should take care in how we restrict arrests, not that we should avoid the project. For example, it cannot possibly be that the best way to avoid overloading people with fines they cannot pay and issuing warrants to arrest them is to arrest them in the first instance instead.

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285. See 42 U.S.C. § 3796hh (2013) (authorizing grants for arrests under Violence Against Women Act); Harmon, *Federal Programs*, *supra* note 1, at 913–14; see also CASSANDRA ARCHER ET AL., INST. FOR L. & JUST., NATIONAL EVALUATION OF THE GRANTS TO ENCOURAGE ARREST POLICIES PROGRAM 1–6 (2002), <https://www.ncjrs.gov/pdffiles1/nij/grants/199441.pdf> [<https://perma.cc/V5DM-R8E7>] (discussing origins, purposes, and effects of the Arrest Program).

286. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., *supra* note 168, at 3.

In Ferguson, the Justice Department has suggested that this problem can be mitigated by improving municipal court practices, tailoring fines to ability to pay, and instituting community service alternatives to fines and fees, all of which reduce the consequences for failing to pay for tickets or appear in court. New York's new robocalls and flexible court dates could minimize nonappearance before it occurs. Experience will likely lead to additional strategies for minimizing the tradeoffs that come from embracing alternatives to arrests.

If you think substantially reducing or eliminating arrests sounds impossible, consider that the civil process made this very transition. By the end of the sixteenth century, at common law most civil defendants were arrested to start civil court proceedings.<sup>287</sup> Though the practice lasted for centuries, over time “[t]he harshness of arresting a defendant on trumped-up charges and forcing him to raise bail, especially in small cases, brought about the development of procedures which helped to mitigate the rigors of the arrest system.”<sup>288</sup> Those reforms included alternatives to arrest and default judgments.<sup>289</sup> Now, of course, arrests to start civil suits are both unheard of and unnecessary.<sup>290</sup> Yet, somehow, civil legal actions manage to continue.

Though it has not been high on the agenda of criminal justice reformers in recent years, arrest reform seems more possible than it has in decades, in significant part because crime rates are low. Policymakers care about promoting cost-efficient and evidence-based criminal justice solutions. There is a new national dialogue about the problems of policing and increased sophistication about what it means to strengthen law enforcement. And through videos, the risks of violent confrontations during arrests are more visible than ever. Given that arrests are far more problematic and perhaps far less necessary than we have previously acknowledged, now is the moment to reconsider arrests rather than continue to take this widespread form of state coercion for granted.

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287. Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 *YALE L.J.* 52, 63 (1968).

288. *Id.* at 68.

289. *Id.* at 68–79. In England, summonses did not replace civil arrests for nearly all civil actions until 1838, when civil arrest was abolished except by court order. *See id.* at 68.

290. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant’s person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” (citation omitted) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))); *McDonald v. Mabee*, 243 U.S. 90, 91 (1917) (“The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun . . .”).