

The Arrest Power Unchained

Author : Susan Bandes

Date : July 13, 2015

Eisha Jain, [Arrests as Regulation](#), 67 *Stan. L. Rev.* 809 (2015).

In standard criminal procedure and criminology texts, the concept of “arrest” receives surprisingly little attention. Arrest is portrayed as a way station on the road to trial. It is also portrayed as a meaningful sorting device: a determination that the criminal justice system has just cause to restrict an individual’s liberty, if only temporarily. For those who view arrest in these terms, coverage of recent events has provided a dramatic crash course in the true nature and scope of the arrest power. In Ferguson, Missouri, for example, Michael Brown’s arrest, which gave rise to the chain of events resulting in his death, was for the crime of “manner of walking along roadway.” Arrests on this charge were frequent in Ferguson, and 95% of those arrests were of African-Americans. Across the U.S., arrests for seemingly innocuous behavior are common; discretion to make the arrest “custodial” is generally broad; and the burden of arrests for misdemeanors and minor infractions falls disproportionately on minorities. One in three adults will be arrested by the age of 23. For minorities, the odds are even more shocking: 49% for African-American men, and 44% for Latino men. Legal scholars such as Babe Howell and Alexandra Natapoff have examined the often- draconian consequences of such arrests on individuals, including the process costs of contesting the charges and the lasting stigma of an arrest record. And as powerful recent scholarship by Alice Goffman, Michelle Alexander and Jill Leovy drives home, the arrest power is properly understood not merely as a restriction on individual liberty, but as a means of social control that holds entire communities in the grip of the criminal justice system.

Eisha Jain, in her valuable, meticulously documented article *Arrests as Regulation*, describes and critiques an additional set of burdens triggered by the broad, poorly circumscribed power to arrest—burdens that reach well beyond the criminal justice system. Arrests are used as a proxy, or a low-cost auditing mechanism, by agencies regulating public housing, public benefits, licensing for various professions, education, child welfare, and immigration, as well as by employers and other non-governmental actors. These agencies and individuals use arrests as a means of monitoring and tracking individuals (for example legal immigrants, foster parents, school children) and a means of setting regulatory priorities (for example determining who is entitled to public housing or employment or professional licensing). Agencies and individuals rely on arrests to assess the individual’s potential for violence, risk to security, or instability. In short, as Jain succinctly states, we have delegated broad front-end screening discretion to individual police officers, thus magnifying the effects of arrest decisions. The reasons for the arrest (even assuming the arrest is justified) often have little relevance to the rationales underlying the regulations at issue. Moreover, the use of the arrests often proceeds unchecked by any of the safeguards that would apply in the criminal justice context.

Jain describes several types of interactions between arrest and non-criminal consequences, many of them extremely troubling. For example, non-criminal consequences provide an incentive to law enforcement agents to circumvent the law. Evidence that is inadmissible in a criminal trial is often used in non-criminal contexts such as immigration hearings, and where consequences like deportation align with police priorities, the incentive to engage in illegal practices is magnified. Moreover, arrestees have no right to counsel in non-criminal proceedings, and often little or no access to the information used against them. Conversely, the use of arrest information in non-criminal contexts may directly conflict with law enforcement priorities. Examples include domestic violence victims evicted from public housing because the abuser lives under their roof; or cooperating witnesses deported before trial. On a deeper level, the use of arrests—often unverified, generally not subject to timely challenge in civil court—exacerbates the crisis of confidence in the police power and undermines the integrity of the criminal justice system.

One of the things I like a lot about this article is that it is filled with useful information. It illustrates and backs up each of

its claims with well-documented examples, and builds a damning case through the careful accretion of detail. Although some of the issues it addresses have received attention from immigration scholars, the article places the immigration account in the larger context of non-criminal consequences more generally. Along the way, it acknowledges that sometimes coordination between criminal and civil authorities is worthwhile. Yet it leaves the reader convinced that little effort has been expended on appropriately regulating the use of arrest information, and that the results have been devastating, particularly in communities that already bear the overwhelming costs of the misuse of the arrest power.

Cite as: Susan Bandes, *The Arrest Power Unchained*, JOTWELL (July 13, 2015) (reviewing Eisha Jain, *Arrests as Regulation*, 67 **Stan. L. Rev.** 809 (2015)), <http://crim.jotwell.com/the-arrest-power-unchained/>.