POLICING IN THE AGE OF CRIMINAL RECORDS*

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When police officers conduct Terry *stops today, they routinely check criminal records.* Terry *itself was decided well before electronic criminal records were routinely accessible to police officers, however. As a result, courts and commentators have not fully appreciated how criminal records shape* Terry *stops, particularly pretextual stops. When courts adopt a "records-blind" approach, they assume that police observations—suspicious behavior or evidence of criminal activity—are the primary basis for initiating a stop, as opposed to the records check itself. Precisely because electronic criminal databases offer a wealth of information to police, they create incentives for police to pursue pretextual stops they would not otherwise pursue. This Article elaborates these claims and considers how criminal records reform—including sealing and expungement—could include a focus on policing and pretextual stops.*

INTRODUCTION

Criminal records play an enormous role in shaping police behavior today. A criminal records check may be the one of the first steps a police officer takes during a stop. Once an officer accesses the criminal records databases, the information found in the records check will likely shape what follows—whether the officer decides to let the stopped person go, engages in further investigation,

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or escalates the encounter to a search and arrest. Records—checking for recording and relying on those records—have become a routine part of policing in the electronic age.

There's a wide-ranging literature on criminal record history in sentencing and plea bargaining.[1] There is also widespread recognition that records of conviction can bar people who have served their sentences from finding work, gaining housing, and accessing other opportunities that would permit them to reenter society on equal terms.[2] But a key moment—the way that criminal records influence the initial police stop—remains relatively understudied.[3]

This Article argues that while there are many reasons for police to access and check criminal records, the costs of the current approach have not been sufficiently recognized or appreciated in the context of contemporary *Terry* stops. Criminal records checks give police access to more information about people they encounter than they would otherwise have. This approach can lead to a host of benefits, such as identifying suspects, those who pose a risk to officer safety, and generally assisting police officers in making more informed decisions about whether to investigate a stopped individual further or let them go on their way. But there are also significant costs. Police may engage in more *Terry* stops, well beyond the point that is fair or optimal, and contribute to entangling too many people in the criminal legal system. Routine record checks also alter the relationship between police and the individuals they encounter, making it easy for police to perceive residents through the lens of their records, and not as individuals who are entitled to move freely without government intervention.

These costs have not been fully appreciated for two reasons. First, much of our Fourth Amendment doctrine relating to police stops was developed well before police had quick and contemporaneous access to digital criminal records. As a result, courts adopted a set of assumptions that might have been reasonable at the time, but that no longer holds true in the contemporary digital world. Second, in the posture of exclusionary rule cases—where the ultimate legal issue is whether evidence ought to be suppressed—courts have tended to focus on the benefits for law enforcement for checking and using records. This approach does not sufficiently account for concerns relating to individual liberty,

1. Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 662–63 (2014) (empirical analysis noting the use of criminal records in dispositions); Brandon L. Garrett, William E. Crozier, Kevin Dahaghi, Elizabeth J. Gifford, Catherine Grodensky, Adele Quigley-McBride & Jennifer Teitcher, *Open Prosecution*, 75 STAN. L. REV. 1365, 1396–97 (2023) (discussing plea factors, including prior criminal record history, through empirical analysis).

2. *See, e.g.*, Margaret Colgate Love, *50-State Comparison: Expungement, Sealing & Other Record Relief*, COLLATERAL CONSEQUENCES RES. CTR., https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/ [https://perma.cc/PX8L-L8GC] (last updated October 2021) [hereinafter Love, *50-State Comparison*].

3. For an important recent contribution to police access to data, see Wayne A. Logan, *Policing Police Access to Criminal Justice Data*, 104 IOWA L. REV. 619, 622 (2019).

including the potential for police to engage in overly broad stops, especially for illegitimate reasons, such as race.

This Article develops these claims, unpacks some of the costs of routine police criminal record history checks during *Terry* stops, and argues that these costs should be taken into account. It proceeds as follows. Part I provides a brief snapshot of criminal records today. Part II analyzes how criminal records shape police incentives in a way that is not recognized in key constitutional criminal procedure cases governing police stops. Part III identifies additional costs borne by individuals as a result of criminal record checks in the digital age. Part IV considers how arguments for relief from criminal records might apply to policing decisions.

I. POLICING AND CRIMINAL RECORDS

Upwards of 110 million Americans have criminal records.[4] Those records do enormous work in ordering the relationship between individuals and their key governing institutions. In many ways, our society governs through criminal records.[5] Criminal record history plays a key role in mediating access to housing and work; it can restrict whether people can participate fully as citizens in activities like voting and serving on juries. Criminal record history also affects a host of discretionary decisions—whether to detain someone for longer, offer a noncarceral disposition, or make a future arrest.

Despite their ubiquity, there is no agreement on when criminal records should be created or used. There is not even a standard definition of criminal records. Criminal records document certain types of contact with the police—records of arrest, conviction, outstanding warrants—as well as records that appear in a range of other databases, such as gang-related databases that do not require a record of arrest or conviction.[6]

Although criminal convictions receive the most attention and have the most significant consequences, arrest records and other records short of conviction do significant work both within and outside of the criminal legal system. Prosecutors routinely consult prior criminal history when determining

4. BECKI GOGGINS & DENNIS A. DEBACCO, SEARCH, THE NAT'L CONSORTIUM FOR JUST. INFO. & STAT., SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2020, at 2 (2022), https://bjs.ojp.gov/library/publications/survey-state-criminal-history-information-systems-2020 [https://perma.cc/L52K-5QDP] (estimating upwards of 110 million criminal records).

5. *See generally* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007) (conceptualizing governing through crime as a lever for other policies that may not be primarily related to crime control).

6. JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 14–54 (2015) (discussing criminal justice repositories, rap sheets, gang databases, arrest databases, and other repositories); Deborah N. Archer & Daniel Harawa, *False Criminalization and the Erosion of Community Equity*, 103 N.C. L. REV. 1347, 1357 n.69 (2025).

whether and what type of plea to offer after an arrest.[7] For low-level arrests, prosecutors and judges often take into account the prospect of future criminal arrest history. For example, an "adjournment in contemplation of dismissal" keeps open a criminal case for a certain period of time to see if there are any new arrests or even other contact with the criminal legal system—it essentially defers a particular decision to release a person based on the possibility of future criminal history.[8] For people who are on probation or parole, any contact with the criminal legal system—including a mere stop—might trigger a return to criminal custody.

As a result, criminal record history can determine whether and what type of plea an arrested individual receives.[9] The existence of a record shapes whether a person will be jailed or released, whether charges will be dropped or pursued, and whether a person will be offered probation and on what terms.[10]

Arrest alone can also have massive consequences outside of the criminal legal system. At the time of arrest, arrest records are disseminated and shared with other regulatory entities—a dynamic I have previously called "arrests as regulation."[11] The aim of sharing arrest information is quite distinct from the aims of the criminal law. For immigration officials, for instance, arrest is used as a means of checking immigration status and making determinations about potential removability. The goal is to use arrest as a means of identifying and triggering removal, regardless of guilt or innocence in a particular case. Thus, even if arrests are dismissed and the arrest record later expunged, the arrest has a powerful impact on both the individual and other governmental entities.

7. *See generally* Jane Kelly, *The Power of the Prior Conviction*, 97 N.Y.U. L. REV. 902 (2022) (explaining the significance of criminal record history in federal criminal cases); Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to* Apprendi, 97 MARQ. L. REV. 523, 525–33 (2014) (providing a historical overview of the "repeat offender" doctrine and explaining why the doctrine falls short in meeting deterrent, incapacitative, and retributive aims).

8. Kohler-Hausmann, *supra* note 1, at 635–36.

9. Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1215–27 (2016) (analyzing how prosecutors approach collateral consequences, including criminal records); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1156–96 (2013) (analyzing criminal records and immigration records in Los Angeles, Harris County, and Maricopa County).

10. Christopher Lewis, *The Paradox of Recidivism*, 70 EMORY L.J. 1209, 1211 (2021) (noting the significance of criminal records in recidivist sentencing premiums and arguing for the opposite approach). Noncarceral dispositions, including those that include surveillance in the form of electronic monitoring, can often lead to additional entanglement with the criminal legal system. Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 186 (2022) (discussing punitive surveillance as a condition of punishment); Eisha Jain, *The Mark of Policing: Race and Criminal Records*, 73 STAN. L. REV. ONLINE 162, 171–74 (2021).

11. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 826–44 (2015) [hereinafter Jain, *Arrests as Regulation*] (discussing the consequences of arrest records).

Criminal records—records of both arrest and conviction—also play a role in governing access to work.[12] Arrested individuals may be barred from work until their arrest is dismissed.[13] Criminal records govern access to housing in myriad ways too, with arrests, stops and other contact with the police at times used as a basis for initiating evictions.[14] And of course, criminal records play a large role in affecting access to education, public benefits, and other services.[15]

There has been enormous interest in reducing the impact of criminal records and related "collateral consequences." Much of the literature has focused on granting people who have served their sentences an opportunity for "second chances" and restoring their rights as full members of society.[16] One common argument for restricting the reach of punitive "collateral consequences" is that these penalties do too much work and prevent people who have paid their debt to society from re-entering the community on equal terms.

Despite the interest in reducing the impact of criminal records, the role of records in police stops has received relatively little attention. That may be because, unlike employers or housing authorities, police are assumed to have the institutional competence to assess criminal records and given them their appropriate weight. It may also be because police have a clear interest in checking for criminal records in certain cases and because police have long had more rudimentary ways of checking criminal history prior to the digital age. Access to electronic databases, however, widely expanded the scope of information police could obtain after an initial contact.[17] They also made it much faster for police officers and other actors to check for prior history.

12. Amy F. Kimpel, *Paying for a Clean Record*, 112 J. CRIM. L. & CRIMINOLOGY 439, 444 (2022); Christopher Uggen, Mike Vuolo, Sarah Lageson, Ebony Ruhland & Hilary K. Whitham, *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627, 637–650 (2014); Cara Suvall, *Certifying Second Chances*, 42 CARDOZO L. REV. 1175, 1182–87 (2021) (discussing employment barriers due to criminal records).

13. Jain, *Arrests as Regulation*, *supra* note 11, at 815.

14. *See* Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 175 (2019).

15. *See What Are Collateral Consequences?*, NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, https://niccc.nationalreentryresourcecenter.org/ [https://perma.cc/ZQQ6-D3NE] (inventorying policies that impose collateral consequences stemming from criminal convictions, including education, government benefits, health care, and more).

16. *See* MARGARET LOVE & NICK SIBILLA, COLLATERAL CONSEQUENCES RES. CTR., ADVANCING SECOND CHANCES: CLEAN SLATE AND OTHER RECORD REFORMS IN 2023 (2023), https://ccresourcecenter.org/wp-content/uploads/2024/01/Annual-Report-2023.1.5.24.rev2_.pdf [https://perma.cc/B5NT-MH9A]; Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012).

17. Erin Murphy, *Databases, Doctrine & Constitutional Criminal Procedure*, 37 FORDHAM URB. L.J. 803, 809 (2010) ("It was estimated in 2001 that federal agencies and departments today maintain roughly 2000 databases" on topics "directly related to criminal justice purposes to those applicable only in the most specialized circumstances.").

As a result, police stops today not only create the first point of contact between an individual and the criminal legal system, but they also often represent the first point someone's criminal record history will be checked. As a result, they have an important effect on officer behavior. The next part unpacks these dynamics.

II. POLICE STOPS AND ACCESS TO CRIMINAL RECORDS

Police-initiated record checks have become so routine today that we take them for granted. But in the timeline of constitutional criminal procedure, they are a recent phenomenon. *Terry v. Ohio*[18] and other key cases involving police authority to stop and question people were decided decades ago; the technology that permits police to instantaneously check criminal record history emerged much later.

In *Terry v. Ohio*, the U.S. Supreme Court granted police officers the legal authority to undertake stops and frisks—searches limited to a pat down of one's exterior clothing—on a legal standard less than probable cause.[19] *Terry* developed a doctrinal approach that reduced the legal threshold for a seizure. In doing so, it set the stage for programmatic "stop and frisk," where police officers systematically engage in high-volume, low-level stops with people on the street and routinely check criminal records as part of the of those stops.

One question left open after *Terry* related to whether those subject to stops must identify themselves to police. In *Hiibel v. Sixth Judicial District of Nevada*,[20] decided in 2004, the Supreme Court upheld Larry Hiibel's conviction for refusing to identify himself during a *Terry* stop. The Court explained how identity can provide valuable information because of access to police records:

> Obtaining a suspect's name in the course of a *Terry* stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere. Identity may prove particularly important in cases such as this, where the police are investigating what appears to be a domestic assault. Officers called to investigate domestic disputes need to know whom they

18. 392 U.S. 1 (1968).
19. *Id.* at 30–31.
20. 542 U.S. 177 (2004).

> are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.[21]

Hiibel assumed that police would stop individuals, gain identity information, use that information to quickly check for criminal records, and then make decisions about whether to escalate the stop to an arrest. But the opinion did not engage in any analysis of how criminal records information may affect stops themselves. In this framework, the criminal records check is merely incidental to the stop, and not a motivating factor driving the stop.

Even if these assumptions were reasonable at the time *Terry* was decided, they are not reasonable when applied to programmatic *Terry* stops, where police wield significant discretion in choosing when to initiate a stop. Access to criminal records magnifies the perceived payoff for a police officer to engage in a stop. Police who know they can obtain criminal records have incentives to make stops that they would not otherwise pursue.

Terry and its progeny have been widely criticized for permitting unjustified government intrusion, including by promoting racial profiling and unlawful policing practices. As Jeffrey Fagan and Amanda Gellar have observed, "[p]olicies such as proactive policing, order-maintenance policing, and stop-and-frisk encourage, if not incentivize or even demand, police to interdict and temporarily seize citizens on thin or subjective bases of suspicion."[22]

Although *Terry* set the stage for contemporary police stops, in many ways, today's stops unfold quite differently than they did in 1963, given the electronic age and easy access to criminal records databases. In 1963, a police officer who engaged in a stop would not have access to instant criminal record history. The officer would only be able to make a lawful arrest if the stop turned up some evidence of a crime or otherwise provided probable cause for an arrest. Today, however, police officers who engage in stops are not limited to searches for evidence; if the stop turns up an outstanding warrant, that warrant by itself justifies an arrest.[23]

To briefly recount the facts of *Terry*, on October 31, 1963, Officer Martin McFadden was patrolling downtown Cleveland in midafternoon when he became suspicious of John Terry and Richard Chilton, neither of whom he recognized.[24] McFadden could not say "precisely what first drew his eye to them"—raising questions of whether Officer McFadden, who was white,

21. *Id.* at 186.

22. Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in* Terry *Stops in Street Policing*, 82 U. CHI. L. REV. 51, 53–54 (2015).

23. *See* Utah v. Strieff, 579 U.S. 232, 235 (2016).

24. *Terry*, 392 U.S. at 5.

engaged in racial profiling of Terry and Chilton, who were both Black men.[25] McFadden stated he believed—based on close to forty years as a police officer with significant experience patrolling for "shoplifters and pickpockets"—that something "didn't look right to me at the time."[26] He explained that he suspected the two men, who later conferred with a third, of "casing a job, a stick up" because they repeatedly strolled past and looked into a store window.[27] The officer further testified that he believed the men may "have a gun."[28] Based on these observations and his suspicions about the weapon, Officer McFadden engaged in a stop and frisk:

> Deciding that the situation was ripe for direct action, Officer McFadden approached the three men, identified himself as a police officer and asked for their names. At this point his knowledge was confined to what he had observed. He was not acquainted with any of the three men by name or by sight, and he had received no information concerning them from any other source. When the men 'mumbled something' in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat Officer McFadden felt a pistol.[29]

Afterward, Officer McFadden asked a store owner to call a police wagon, and all three men were charged with carrying concealed weapons.[30] Terry was not charged with attempted robbery; the only crime at issue was the concealed gun, which the officer would not have learned about but for the forcible detention and frisk.[31] Terry moved to suppress the evidence on the grounds that it had been unlawfully obtained.[32] The Court denied his motion and held that the police officer could perform both the stop and the frisk on a legal standard less than probable cause.[33] Terry was convicted of carrying a concealed weapon and sentenced to three years in jail.[34]

25. *Id.*; Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 964 (1999) (noting that although the Court presented the facts "in entirely race-neutral terms[,] . . . an examination of the trial court record reveals that John Terry and Richard Chilton were African American; 'the third man,' Katz, was white; Detective McFadden also was white").

26. *Terry*, 392 U.S. at 5.

27. *Id.* at 6.

28. *Id.*

29. *Id.* at 6–7.

30. *Id.* at 7.

31. *See id.*

32. *Id.*

33. *Id.* at 7–8.

34. *Id.* at 4.

Terry's holding—that probable cause is not required for certain police seizures and limited searches—set the stage for contemporary stop and frisk programs. But there are major differences between a *Terry* stop that took place in 1963 and contemporary stops.[35]

For one, the facts as presented in the opinion emphasize the officer's observations as forming the basis for reasonable suspicion. The analysis in *Terry* assumes that an officer has an investigative aim and performing a pat-down or engaging in questioning would yield tangible information to further that investigative aim. It was clear at the time *Terry* was decided that Officer McFadden had no systemic access to information other than what he could see or observe for himself. He had no way of getting more information on any suspects without asking questions. He had no way to even contact his own police department without assistance from a third party, the store owner. Because there was no way for him to gain information through a records check, investigation itself offered the sole pathway to gaining more information about stopped individuals.

With access to electronic criminal records, however, police have a significant independent source of information, separate and apart from anything the officer could see or observe himself. This, in turn, creates incentives to conduct stops, regardless of investigative aims. Access to a criminal records database itself provides significantly more information than questioning or a pat-down.

The risk is that police officers have powerful incentives to engage in stops for the purposes of checking criminal records, even beyond their incentives to engage in pretextual stops in the absence of criminal record history. *Whren v. United States*,[36] which held that pretextual traffic stops are not inconsistent with the Fourth Amendment, also adopted a records-blind approach.[37] In *Whren*, police officers stated that they engaged in the stop because they saw a vehicle turn without signaling and then drive off at an "unreasonable" speed from a

35. My focus in this Article is on criminal records, but there are many differences between the original rationales of *Terry* and its contemporary application. For selected contributions to this literature, see, for example, Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City "Stop and Frisk,"* 94 B.U. L. REV. 1495, 1535 (2014) (explaining that "NYC Stop and Frisk depends for its effectiveness on two related components that are hallmarks of unconstitutionality—arbitrary stops and 'indirect' racial profiling"); Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio*'s Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1512 (2017) (criticizing *Terry*'s application in cases where police stop and question people for reasons unrelated to investigation of a suspected crime in progress); Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 168–69 (2015) (considering how programmatic "stop and frisk"—where the directive comes from the department—differs from a situation where an officer decides to make an on the ground decision to investigate).

36. 517 U.S. 806 (1996).

37. *Id.* at 819.

stop sign, and not because they were the racially profiling the drivers.[38] When the police officers approached the vehicle for the stated purpose of enforcing the civil traffic violation, one officer "immediately observed two large plastic bags of what appeared to be crack cocaine in petitioner Whren's hands," which led to the arrest.[39] *Whren* adopts the assumption, as in *Terry*, that what matters are the officer's own observations; criminal records checks do not enter the picture at all, much less they influence police decisions to stop.

Today, where police officers routinely check criminal records during stops, the records-blind approach provides a skewed view of police incentives. The existence of criminal records databases provides an independent incentive for stops, separate and apart from checking for evidence of criminal activity. If an officer perceives the criminal record check as a payoff for the stop, then the officer will have incentives to make stops even where the officer fully expects that there will be no evidence turned up after further questioning or visual inspection.

One rationale for checking records is that it simply provides more information to the officer than she would otherwise have during the police encounter. In the digital age, where the government is able to track and aggregate mass amounts of data about people's activities with ease, criminal records checks offer a fast and easy way to find out vast amounts of information, more than could possibly be obtained through brief questioning.[40] Police officers who check criminal records do not just look at the stopped individual's prior criminal history—they also have access to systems of mass data unrelated to the criminal law. In the immigration context, for instance, police officers can rely on interoperability of criminal records and immigration records and check immigration status during the course of a *Terry* stop.[41] Police officers who see records checks as a valuable source of data have incentives to engage in stops just for the purpose of running records, and not because they expect to find evidence of a crime through further investigation.

As the Court observed in *Hiibel*, having information itself can help police officer make an informed decision to let stopped individuals go or engage in further investigation. But access to data itself also permits police to shift their incentives away from law enforcement to other aims. Precisely because immigration and criminal records are closely intertwined, and because police

38. *Id.* at 808.

39. *Id.* at 809.

40. Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721, 1745 (2014) (observing that "technology has vastly expanded the government's ability to engage in panvasive action" such as mass data gathering with relatively little cost).

41. Arizona v. United States, 567 U.S. 387, 412–14 (2012) (noting, however, that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns").

can routinely check immigration records, police have the ability to use *Terry* stops as a means of pursuing immigration enforcement unrelated to crime control. Any *Terry* stop potentially offers a way to check immigration status and trigger an immigration arrest, even in the absence of conduct justifying a criminal arrest.

Second, as the Court in *Hiibel* observed, criminal records checks might identify people who are dangerous to the police. The likelihood of this happening for any given stop may well be low. As Farhang Heydari recently observed, despite well-known anecdotes about traffic stops turning up dangerous criminals, traffic stops rarely—less than half a percent of the time in many jurisdictions—turn up evidence of serious crime.[42]

Still, even a low hit rate can make a criminal record check a worthwhile reason to pursue a traffic stop. The institutional incentives for police operate akin to the "one way rachet" of institutional design and politics that William Stuntz identified in substantive criminal law.[43] Stuntz argued that criminal law's expansion is the product not only of "surface politics"—where people demand harsh responses to crime—but also because of institutions; prosecutors and lawmakers both have incentives for expansive criminal codes, which in turn give prosecutors wide discretion to pick and choose which crimes to pursue.[44] A similar dynamic unfolds with criminal records in this sense: once police have access to databases, they have incentives to maximize their own discretion over how to use that data. For police, the political fallout of making a stop and releasing someone can be quite high—but the same incentives do not cut the same way in the opposite direction.

The Laken Riley Act of 2025[45] offers just one instance of the potential for backlash. The Act, passed after an unlawful entrant to the United States was arrested for shoplifting, released, and then convicted of murder,[46] illustrates how crime-control can lead to broad-based mandatory database checks and mandatory penalties. The Act, which purports to mandate immigration detention after any shoplifting and other low-level arrest for those "unlawfully present in the United States or [who] did not possess the necessary documents

42. Farhang Heydari, *Rethinking Federal Inducement of Pretext Stops*, 2024 WIS. L. REV. 181, 192 ("In California, police confiscated firearms in 0.03 percent of traffic stops in 2019. In North Carolina, police found illegal weapons in just 0.1 percent of stops. In 2022, the Chicago Police Department surged its use of traffic stops to more than 1,400 every day, and only 0.43 percent resulted in the recovery of weapons or drugs—about six of the 1,400 daily stops.").

43. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001).

44. *Id.*

45. Laken Riley Act of 2025, Pub L. No. 119-1, 139 Stat. 3 (codified at 8 U.S.C. §§ 1101, 1182(d)(5), 1225(b), 1226, 1231(a)(2), 1252(f), 1253).

46. Karoun Demirjian, *Laken Riley Act Is an Effort to Target Migrants Accused of Crime*, N.Y. TIMES (Jan. 29, 2025), https://www.nytimes.com/article/laken-riley-act-explained.html [https://perma.cc/5LLJ-92KL (staff-uploaded, dark archive)].

when applying for admission,"[47] will reach well beyond violent offenders. It will necessarily trigger detention of those who have not been convicted of any offense.[48] And it will also create incentives for police officers to check records and err on the side of arrest and detention based on the results of database checks.

Beyond looking for serious crime, police may also pursue pretextual stops to check for warrants. While checking for and enforcing outstanding warrants is a legitimate law enforcement goal, much depends on the content and type of outstanding warrant and how it relates to the potential for pretextual and unlawful police stops. There is wide variation in how many people have outstanding warrants in any given jurisdiction—but in certain jurisdictions, the rate is staggeringly high, particularly among racial minorities, and reflects the criminalization of poverty through petty offenses that trigger warrants for unpaid fines.[49] Police may also see the outstanding warrant as a means for conducting a search unrelated to the subject of the warrant.

Utah v. Strieff [50] demonstrated both of these possibilities. There, the Supreme Court permitted a police officer to retroactively justify an unlawful *Terry* stop based on the results of a criminal background check.[51] In *Strieff*, an officer unlawfully stopped an individual, checked his identification, and ran his criminal record.[52] During the record search, the officer discovered an outstanding warrant for a traffic violation.[53] The officer then arrested him on the basis of the warrant, engaged in a search, and discovered drugs.[54] In determining that the exclusionary rule did not apply, the Court relied on the existence of the record—the outstanding warrant—as an independent basis for the drug arrest. The Court rejected the argument that the drugs should be suppressed, because they would not have been discovered but for the unlawful stop.[55]

47. Congressional Research Service, *Summary: S.5—119th Congress (2025-2026)*, CONG., https://www.congress.gov/bill/119th-congress/senate-bill/5 [https://perma.cc/WB8V-P2A8 (staff-uploaded archive)] ("Under this bill, DHS must detain an individual who (1) is unlawfully present in the United States or did not possess the necessary documents when applying for admission; and (2) has been charged with, arrested for, convicted of, or admits to having committed acts that constitute the essential elements of burglary, theft, larceny, or shoplifting.").

48. Demirjian, *supra* note 46.

49. Utah v. Strieff, 579 U.S. 232, 258–59 (2016) (Kagan, J., dissenting) (noting the "staggering" number of warrants); Joseph Goldstein, *A Plan to Prune the City's Thicket of Warrants for Petty Offenses*, N.Y. TIMES (Feb. 9, 2017), https://www.nytimes.com/2017/02/09/nyregion/a-plan-to-prune-the-citys-thicket-of-warrants-for-petty-offenses.html [https://perma.cc/ZYU9-YQK9 (staff-uploaded, dark archive)].

50. 579 U.S. 232 (2016).

51. *Id.* at 240–43.

52. *Id.* at 234–37.

53. *Id.*

54. *Id.*

55. *Id.*

Strieff raises the question of how officers perceive the payoff for the stops. In *Strieff*, the payoff was not just the enforcement of the outstanding warrant for an unpaid fine, but also the search that the warrant permitted the officer to undertake. This type of payoff is only possible in a regulatory landscape where police can expect to quickly and easily learn about certain records during stops. Police officers may see the ability to check for records as a tangible outcome that makes the effort of a stop worthwhile because it eases the path to further investigation.

III. ADDITIONAL COSTS

While there are benefits to permitting police access to criminal records in traffic stops, they also come at a cost. These costs have not been sufficiently appreciated in the doctrine, given that procedural posture of exclusionary rule cases tends to focus on benefits for law enforcement.

One cost is liberty. The Supreme Court's approach in *Hiibel* dispensed with much of the reasoning in its 1977 decision in *Brown v. Texas*.[56] In *Brown*, the Court focused on liberty in holding that a police officer may not arrest someone just for refusing to provide the officer with his name.[57] In *Brown*, there was no reasonable suspicion: the officer admitted that he approached Zackary Brown because the officer observed him and thought the situation "looked suspicious and we had never seen that subject in that area before."[58] Brown was arrested after he informed the police officers that they had no right to stop him or require him to identify himself.[59] After being jailed, Brown complied with the request to identify himself.[60] Nonetheless, he was charged with and convicted of failing to identify himself to a police officer.[61]

During oral argument and in its decision, the Court emphasized the liberty interest at stake, asking "what's the State's interest in putting a man in jail because he doesn't want to answer something."[62] The Court's focus was two-fold: first, there is a liberty interest involved in unimpeded movement, and there's also a liberty interest involved in being able to refuse to identify oneself.

Brown remains good law, but its force weakened considerably after *Hiibel*. In *Hiibel*, the defendant, like Zackary Brown before him, refused to identify himself not because of "any articulated real and appreciable fear that his name would be used to incriminate him," but rather "only because he thought his

56. 443 U.S. 47 (1979).

57. *Id.* at 52–53.

58. *Id.* at 48–49.

59. The officers arrested him pursuant to a Texas penal code provision that criminalized refusing to give one's name and address to an officer who lawfully requested the information. *Id.* at 49.

60. *Id.*

61. *Id.*

62. *Id.* at 53–54 (appendix to the opinion).

name was none of the officer's business."[63] What changed between *Hiibel* and *Brown* was not just the presence of reasonable suspicion in *Hiibel*, but also the value of identity information. In *Hiibel*, a number of organizations submitted amicus briefs explaining how valuable it was for police officers to be able to run criminal records checks based on identity information.[64] For instance, the United States submitted an amicus brief arguing that "[k]nowledge of a person's identity enables officers to determine whether he has a criminal record," and further explained why having that information is "highly useful" for a host of reasons, including learning about outstanding warrants and making informed decisions about whether there's a risk to officer safety.[65]

The reasoning set the stage for a certain asymmetry in how the Court conceptualized criminal record information. When the Court considered the interest of the individual in refusing to give his name, it conceptualized the information offered as just the bare name itself, which is not incriminatory. The Court noted that "questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops" and dismissed the concern that identity information "was none of the officer's business" as irrelevant without an explanation of how identity information could be used in a criminal prosecution.[66] But when it came to the government's interest, the Court took into account all the information that the identity check could reveal during police stops, such as prior police contacts that would create suspicion.[67] This approach led the Court to value the government's interest above and beyond the individual's interest in not being jailed for refusing to give his name.

This approach gives short shrift to liberty—to an individual's ability to move freely in the absence of unwarranted government intrusion, particularly in cases where criminal codes reach low-level offenses that could easily be regulated by means other than the criminal law. In addition, criminal records checks magnify existing problems with government transparency.[68] In cases like

63. Hiibel v. Sixth Jud. Dist. Ct. Nev., 542 U.S. 177, 190 (2004).

64. Brief of United States as Amicus Curiae Supporting Respondent at 6, *Hiibel*, 542 U.S. 177 (No. 03-5554), 2004 WL 121587, at *6 ("First, knowledge of a person's identity promotes the safety of law enforcement officers and others at the scene of an investigative detention by enabling officers to determine whether the detainee has a criminal record or an outstanding warrant. In addition, such information advances the government interest in effective prevention of crime by giving officers important additional information with which to assess the suspect's conduct and determine the proper course of action."); Brief of the National Ass'n of Police Organizations as Amicus Curiae Supporting Respondents at 7–8, *Hiibel*, 542 U.S. 177 (2004) (No. 03-5554), 2004 WL 121586, at *7–8 (discussing technological advancements).

65. Brief of United States as Amicus Curiae Supporting Respondent, *supra* note 64, at 13–14.

66. *Hiibel*, 542 U.S. at 186, 190.

67. *Id.* at 186.

68. Andrew Guthrie Ferguson, *Illuminating Black Data Policing*, 15 OHIO ST. J. CRIM. L. 503, 504 (2018) ("[B]ig data policing is opaque, lacking transparency because most of the magic happens as a

Brown, *Terry*, and *Whren*, where police officers rely on their discretion or cite to their expertise to justify a stop, the key questions relate to how officers employ their discretion. In a world without criminal records databases, the normative question is why a police officer's suspicions were aroused by a common occurrence, such as seeing someone he does not recognize in an alley, or driving off quickly after stopping at a stop sign—and whether the stop was worth the infringement on someone's liberty. But with criminal record checks, the rationale for employing discretion expands. Some police officers may perceive checking the record—and creating a new record—as worthwhile in itself.

Even as criminal records provide incentives for police officers to engage in stops, they also raise the stakes for individuals who come into contact with the police. Stops that never result in arrest—much less conviction—can be entered into police databases. The issue received widespread attention during litigation involving New York's stop and frisk policy, where a core issue was the police department's retention of encounters on the street.[69] Millions of people who had been stopped and frisked had records of those encounters remain in police databases—records which in turn increased the likelihood of a stop turning into an arrest down the road.[70]

Criminal records checks raise the stakes for traffic and other minor stops for certain noncitizens and others with "liminal" legal statuses who experience uncertainty about the scope of their legal entitlements.[71] Noncitizens face the systemic risk of more punitive treatment in the criminal legal system, even if they are not ultimately convicted of any offense.[72] In some cases, those arrested and deported experience immigration and criminal law enforcement together, without a meaningful distinction between the two systems.[73] In other cases, information from bare arrest charges have been admitted against noncitizens in immigration cases.[74] In addition, even when noncitizens are not ultimately

result of "black box" proprietary and mathematically complex algorithms. Second, big data policing is racially encoded, colored by the history of real-world policing that disproportionality impacts communities of color.").

69. JACOBS, *supra* note 6, at 15–17.

70. *Id.*; Goldstein, *supra* note 49.

71. Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 716 (2015).

72. Eisha Jain, *Jailhouse Immigration Screening*, 70 DUKE L.J. 1703, 1741 (2021) [hereinafter Jain, *Jailhouse Immigration Screening*].

73. For recent contributions to this literature, see, for example, Michael Kagan, *Mass Surrender in Immigration Court*, 14 UC IRVINE L. REV. 163, 166 (2024) ("Confusion over what immigrant defense lawyers should do reflects a deeper confusion about the nature of deportation proceedings, specifically whether they are more like civil litigation or more like criminal trials."); Eric S. Fish, *Resisting Mass Immigrant Prosecutions*, 133 YALE L.J. 1884, 1894 (2024) (describing mass immigrant prosecutions, and "situat[ing] them in larger scholarly conversations over plea bargaining, mass misdemeanor justice, and the criminalization of immigrants").

74. Fatma Marouf, *Immigration Law's Missing Presumption*, 111 GEO. L.J. 983, 1032 (2023) ("A second way that immigration proceedings undermine criminal law's presumption of innocence is by

subject to deportation, the presence of an immigration detainer can lead to adverse outcomes in criminal cases.[75] Because of how immigration records are stored and used in criminal law cases, many aspects of immigration records—while categorized as civil—trigger penalties akin to criminal records.[76] Thus, the moment of an initial police stop and identity check could have massive ramifications for noncitizens and others, even if no criminal prosecution follows. As a result, noncitizens and others who face significant penalties after a low-level encounter with police have incentives to chill valuable social interactions—to stay "off the radar" and avoid engaging in civic behavior that they would otherwise undertake.[77]

Criminal records checks may create incentives for police officers to conduct unlawful searches and seizures.[78] Investigations into police departments in Ferguson, Missouri, and more recently, in Louisville, Kentucky, reveal a pattern of over-policing and racial profiling, characterized by excessive police stops and enforcement of minor offenses, like "wide turns and broken taillights."[79] While there are many causes of systemic police misconduct, one important driver is how criminal records are used. Police officers who have incentivizes to create revenue may focus on the creation and monitoring of records as a tangible reward of a police stop, rather than seeking to promote public safety and trust in the police. The costs of this approach include the indignity of the stop, damage to community relations, and the ongoing burden

allowing judges to rely on arrest reports and unproven charges in making decisions about detention, removability, and relief from removal."); Sarah Vendzules, *Guilty After Proven Innocent: Hidden Factfinding in Immigration Decision-Making*, 112 CALIF. L. REV. 679, 716 (2024).

75. Jain, *Jailhouse Immigration Screening*, *supra* note 72, at 1725 (discussing the impact of detainers).

76. For selected contributions to the "crimmigration" literature, see, for example, Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006); Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1574 (2010); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. UNIV. L. REV. 1281, 1288 (2010) [hereinafter Eagly, *Prosecuting Immigration*]. *See also* S. Lisa Washington, *Fammigration Web*, 103 B.U. L. REV. 117, 179 (2023) (discussing how family and immigration law intersect in ways that are punitive).

77. Logan, *supra* note 3, at 657 (discussing "poor and minority communities subject to aggressive proactive policing strategies" may be most likely to be chilled); Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PENN. L. REV. 1463, 1499 (2019) (discussing incentives for noncitizens to engage in "system avoidance" and avoid contact with the police).

78. Carbado, *supra* note 35, at 1512 ("[T]he Chief Justice did not expressly prohibit police officers from using reasonable suspicion to engage in what I call "stop-and-question"—the stopping and questioning of a person when the officer has no concern about his or anyone else's safety.").

79. U.S. DEP'T OF JUST. C.R. DIV., U.S. ATT'Y'S OFF. W. DIST. OF KY. CIV. DIV., INVESTIGATION OF THE LOUISVILLE METRO POLICE DEPARTMENT AND LOUISVILLE METRO GOVERNMENT 1 (2023), https://www.justice.gov/crt/case-document/file/1572951/dl [https://perma.cc/69RM-YMH8]; U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/5MKN-77G8] (concluding that policing in Ferguson was aimed at generating revenue rather than promoting public safety).

of criminal records in both future law enforcement interactions and interactions outside the criminal legal system.[80]

And because stopped individuals do not know about the contents of the data police are able to access, they may accede to "consent" searches. One issue is that an individual may consent to hand over his identity information for one purpose—perhaps assuming that the police officer wants to see if the identification itself is valid—without consenting or even contemplating to the use of the identification for a wholly separate purpose, such as checking criminal records.[81] Also, when individuals are uncertain about their rights, they may believe they need to provide identification and permit a criminal records search as part of a routine encounter with the police.

IV. CRIMINAL RECORD REFORM AND POLICE STOPS

Constitutional criminal procedure shapes much of the law and policy analysis relating to police stops and arrests. When viewed through the lens of the Fourth Amendment and the exclusionary rule, the question becomes narrowed to certain issues—did the officer act in "good faith?" How flagrant was the violation of the Fourth Amendment, or was the agency negligent in how it stored criminal records? But these concerns are tangential to the core questions: are criminal records being employed in ways that unfairly magnify the significance of a prior conviction, arrest, or other nonconviction? Are they entrenching unjustified socioracial disparities? What is the right balance between serving public safety aims while not creating unnecessary entanglement with the criminal legal system? These questions have occupied the literature on expungement and record-clearing, but they have often been overshadowed by the narrower focus on the application of the exclusionary rule in the policing context.[82]

In *Herring v. United States*,[83] which involved a database containing an erroneous warrant, the Court focused on the narrow question of whether the police department was negligent in maintaining the database.[84] But the bigger

80. After a quarter-century of "broken windows" policing, there were a reported "1.5 million low-level warrants on file in New York, demanding arrests for offenses so minor that many were not even categorized as crimes." Goldstein, *supra* note 49.

81. Golphin v. State, 945 So. 2d 1174, 1182–83 (Fla. 2006) (noting this potential issue).

82. There has been widespread interest in expungement and other forms of relief from criminal records in recent years. The approach taken by states have varied. *See* Love, *50-State Comparison*, *supra* note 2; J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2463–67 (2020) (determining through empirical analysis that "when expungement is not automatic (and takes time, effort, and even money to apply), only a very small share of the people eligible for relief actually apply for and receive an expungement—but those who do experience clear improvements in economic outcomes and pose little public-safety risk").

83. 555 U.S. 135 (2009).

84. *Id.* at 140.

issue is not just negligence, or even suppression of evidence in any given case, but rather how records are being created and maintained, and whether people have adequate notice and a way to tailor the impact of overbroad consequences.[85]

Some doctrinal changes could offer a better framework for addressing criminal records checks. In addition to substantive criminal law and criminal procedure reform to reduce or eliminate pretextual stops, scholars have raised arguments for different doctrinal approaches to police access to identity information. Professor Wayne Logan has argued, for instance, that disclosure of identity information during an unlawful *Terry* stop should lead to the suppression of derivative evidence obtained during a subsequent search.[86] Professor Daphna Renan has argued that the government should have the burden of providing the reliability of criminal records databases in cases like *Herring*, where the record check is erroneous.[87] And a number of scholars writing at the intersection of immigration and criminal law have argued for greater procedural protections and for uncoupling immigration enforcement from criminal law enforcement.[88]

My aim is to add to this discussion by preliminarily discussing ways to include a more balanced focus on the impact of criminal records checks during low-level policing decisions. First, when courts assess the reasonableness of low-level stops and criminal records checks, courts should adopt a fuller view of the costs of these stops. It is not the case that a record check is merely incidental to the stop itself. A record check prolongs contact with the criminal legal system in ways that reach well beyond the initial time period of the stop itself, including by creating burdensome new criminal records. This Article has sought to illuminate some of those costs and to argue that they should be taken into account, beyond just the scope of time necessary for a seizure.

Second, criminal record reform should include a forward-looking component. The bulk of the focus of state efforts has been on efforts to expunge or seal records. The goal is to help people gain information about the contents of their criminal records and to lower or remove barriers to clearing criminal

85. These questions apply more broadly to the use of criminal records beyond police stops. *See, e.g.*, Jessica M. Eaglin, *Racializing Algorithms*, 111 CALIF. L. REV. 753, 759 (2023) (examining "the production of race and the expansion of algorithms in the context of criminal law").

86. Logan, *supra* note 3, at 666 (arguing that in *Strieff*, both the stop and the disclosure of identity information were unlawful, and that the injury was compounded by the use of the identity information to search for outstanding warrants).

87. Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1090 (2016) ("What if an error in the database required the government, in order to avoid evidentiary exclusion, to demonstrate that extrajudicial mechanisms of oversight and accountability were firmly in place?").

88. *See, e.g.*, Eagly, *Prosecuting Immigration*, *supra* note 76. *See generally* Juliet Stumpf, *Crimmigration and the Legitimacy of Crimmigration Law*, 65 ARIZ. L. REV. 113 (2023) (arguing that the procedural deficiencies created by "crimmigration" law undermine the legitimacy of immigration law).

records. The theory behind these reforms is to recognize that certain records—prior arrests, convictions, or other contacts with the criminal legal system—are overly punitive, and to consider ways to reduce their unjustified impact. Similar concerns should animate forward-looking efforts to regulate the reach and impact of criminal records.

That is not to say, however, that the concerns about criminal record uses within the criminal legal system are the same as the policy concerns that arise outside of the criminal legal system. There are important differences. My aim is to illuminate guiding principles and to consider how they might apply to police access to criminal record databases.

One issue is error and managing the risk of error. Just as those seeking access to work may not recognize how the criminal record operates and creates barriers to employment, a similar dynamic operates in the context of stops and arrests. For every person who is subject to an erroneous record that gives rise to an arrest and prosecution, others are detained and then released without prosecution. In some cases, people may have no idea that they are being detained or arrested because of an incorrect record.[89] And just like in the civil context when people seek relief, they may remain trapped in "paper prisons" because the bureaucratic hurdles to obtaining relief are practically insurmountable.[90] Publishing data regarding how and when police departments check records, clear records, and check for error in their databases would assist in addressing certain risks of error.

Another issue is external versus internal oversight. Employers might make adverse decisions because they over-estimate the risk of hiring someone with a criminal record. One rationale for remedies—scrubbing employer access criminal records, offering certificates of relief, and restricting when employers ask about records—is to reduce the risk of over-reliance on records that do not actually relate to concerns about an applicant's fitness for the job or safety risk. A similar dynamic operates with police, in that police officers may over-estimate the risk of letting someone go with a criminal record history. External oversight—for instance, external review of how police officers check criminal record history and use it in traffic stops—could illuminate whether and when similar efforts for relief could apply in policing.

A third consideration is transparency about how records are used and how people are informed about identification. When police officers check identification during a stop, there is considerable uncertainty about what that identification will be used for. It could be used just to determine if that

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

90. Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 520 (2020).

identification itself is valid—does a driver have a valid license? But beyond that, the identification could be used to check for a host of ends: checking for outstanding warrants, for prior criminal conviction history, for arrests and other contact with the police. Transparency over key questions—when do police check certain records and what information short of conviction is systematically entered into police databases that are checked during stops?—could help promote accountability about the scope of records checks during stops.

Relatedly, when it comes to institutional competence within the criminal legal system, police are situated quite differently from prosecutors. Certain records may be relevant for sentencing and other decisions that relate to prosecutorial discretion, but do not relate to officer safety or public safety. Police and prosecutors have very different institutional roles and responsibilities. Even when certain records are relevant for proffering plea agreements and pursuing charges, they may not be relevant to making an initial decision to stop or arrest. That raises the issue of cabining the scope of records checks to certain stages in the criminal legal proceeding. This could reduce the risk of overbroad stops while also maintaining access to records relevant for sentencing and charging decisions.[91]

CONCLUSION

There is growing interest in expungement and relief from criminal records. While most of the literature tends to focus on collateral consequences and the need to cabin the impact of a conviction record, criminal records also have a massive impact on policing decisions themselves, including decisions to stop community members and check for criminal records. Recognizing how much criminal record checks influence police behavior—including in ways that are not recognized in the constitutional doctrine relating to stops—is key to adopting a more tailored approach to police access to criminal records.

91. This approach depends on prosecutors exercising meaningful discretion and not "rubber stamping" police arrest decisions. Alexandra Natapoff, *Misdemeanor Declination: A Theory of Internal Separation of Powers*, 102 TEX. L. REV. 937, 945 (2024) (criticizing prosecutors for failing to exercise proper screening of misdemeanor arrests).