

Robin S. Engel · Robert E. Worden ·
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The Power to Arrest

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 Springer

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Chapter 1

Introduction



Abstract Through their authority to make arrests, police officers play a critical role in the activation of the criminal justice system. As such, any comprehensive reform effort aiming to influence the population circulating through the criminal justice system must consider the predictors of and implications for police use of arrest. The purpose of this review is to gather empirical knowledge related to all aspects of the use of arrest by law enforcement. This review seeks to remind practitioners, policy makers, and philanthropists about what we know regarding the decision to arrest, and highlight the gaps in our knowledge that must be filled to facilitate informed, evidence-based policy decisions regarding the use of arrest. Introducing the review, this chapter discusses the importance of the police use of arrest and provides a roadmap for the remaining five chapters of this book.

Keywords Law enforcement · Police · Arrest · Alternatives to arrest · Criminal justice reform

In late December 2008, Hamilton County, Ohio, which includes the City of Cincinnati, was facing a multi-year fiscal crisis that forced the immediate closing of an 822-bed jail facility (Brown, 2008). This jail closure effectively reduced the available jail space in Hamilton County by 36%. Concern and fear swept across neighborhoods, as some political, civic, and law enforcement leaders predicted significant increases in crime, and declared that public safety was at risk (Bronson, 2009). Meanwhile the Cincinnati Police Department (CPD) responded differently. Their leadership recognized that the immediate reduction in jail space required a different enforcement approach; as such, they instructed officers under their command to prioritize the use of arrest. In practice, arrest was treated as a “limited commodity” to be reserved for primarily repeat and serious offenders, when possible. Using problem solving strategies, focused deterrence, and other evidence-based practices, the CPD significantly reduced the number of felony and misdemeanor arrests, while property and violent crime simultaneously continued on a downward trajectory for the next six years (Engel, Corsaro, & Ozer, 2017). In this case study, Engel and her colleagues were careful not to indicate that these trends

were causally linked. However, the fact remains that, contrary to the pessimistic predictions, the dramatic reduction in jail space in Hamilton County did not result in an increase in crime.

Yet as with many successful initiatives, after several leadership changes in key positions, law enforcement leaders in Hamilton County have drifted back into familiar territory, with concerns of overcrowding and recommendations to reopen the very same jail facility that had been closed a decade ago (Wartman, 2018). These and other concerns have recently led officials within the City of Cincinnati to revisit their policing practices, and again emphasize the importance of implementing problem solving and other evidence-based strategies (Green, Brann, Fagan, & Eck, 2018). In a recent meeting of law enforcement executives and civic leaders, one law enforcement executive asserted that “the role of law enforcement officers in this county is to fill the jail” and that officers across the agencies in Hamilton County have done their part. The implication, of course, is that more jail space (and correspondingly more arrests) are needed to continue reductions in crime. The current discourse in Hamilton County, Ohio is not dissimilar from the conversations shared by political, civic, and law enforcement leaders across the country. As the pendulum swings back toward law-and-order based politics (Scheingold, 1984), pro-arrest strategies are again becoming a mainstay in many communities across the country.

The role of the police as enforcers of the law in democratic societies has never been in serious dispute. Though police research has raised questions about whether law enforcement is—or should be—the *primary* role of police, the tremendous power to deprive citizens suspected of crimes of their liberty has remained in the hands of uniformed police officers. As a result, police officers have critical policy-making power at the street-level as they make discretionary decisions about which laws will be enforced, against whom, and when (Brown, 1988). Given this nearly exclusive responsibility, police are often referred to as the gatekeepers of the criminal justice system, as the entire judicial process is predicated upon an initial arrest of an individual suspected of criminal activity (Bittner, 1967).

Yet, what we know *systematically* about the use of arrest is simultaneously extensive and narrow. After nearly seven decades of scientific inquiry, a body of research has developed that provides great insight into routine practices, coupled with tremendous gaps in our understanding of the forces that shape day-to-day practices, and what is required to alter current practices. Given the importance and consequences surrounding the ability of the government to deprive its citizens of their liberty, the criminal justice system should face continual scrutiny and an expectation that the agencies within the system will routinely enhance their work based on scientific evidence of the most effective, efficient, and equitable practices. Further, because of the critical role that police play in the activation of the criminal justice system, any comprehensive reform effort targeting portions of the criminal justice system should also focus specifically on the initial arrest decision.

The purpose of this literature review is to take stock of what we know empirically about all aspects related to the use of arrest as an action by law enforcement officials that deprives criminal suspects of their liberty with the intent to invoke the

criminal justice system. Through this review, we hope to remind practitioners, policy makers, and philanthropists about the roads we have traveled, and the remaining gaps in our knowledge needed to make informed, evidence-based policy decisions moving forward.

In the mid-1970s, incarceration rates in the United States began to rise dramatically, with an exponential increase of roughly six to eight percent per year over the next 25 plus years (Travis, Western, & Redburn, 2014). Importantly, at any one time, roughly one-third of the adult incarcerated population is housed in jails, with many of these individuals being held and accused of misdemeanor offenses. The rise in police-driven arrests for low-level crime corresponded with a national movement of “get tough on crime” policies. In general, these policies led to unsustainable expenditures and long-term consequences of community disruption and harm. Indeed, police are routinely referred to as the gatekeepers of the criminal justice system, and therefore, their formal and informal policies surrounding the use of arrest likely have the most direct impact on incarceration rates (Bittner, 1967; Engel et al., 2017; cf. Pfaff, 2017).

Over the last six years, the rate of incarceration has slowed from its peak in 2008, as practitioners and policy makers have begun implementing concerted efforts to reduce the incarcerated population (Carson, 2018). Our most recent comprehensive figures regarding the incarcerated population stem from the Bureau of Justice Statistics released for 2014. In that year, police in the United States made an estimated 11.2 million arrests, including 477,659 for the most serious (Part I) violent offenses (excluding forcible rape), an additional 1,093,258 arrests for other assaults, and 1,553,980 for Part I property offenses (Snyder, Cooper, & Mulako-Wangota, 2017). This represents a reduction of nearly 2 million arrests compared to figures reported for 2010 (Snyder, 2012). Nevertheless, in 2014, nearly 9.2 million of the estimated 11.2 million arrests were made for non-Part I crimes, including 1,295,328 arrests for drug possession, 735,979 for drunkenness and liquor law violations, and 3,274,430 for any of a variety of non-traffic offenses that are otherwise uncategorized in the Uniform Crime Reports.

A great deal of scholarly attention has been paid to police-driven arrest decisions and the various structural, historical, organizational, and situational factors associated with officer decision making and discretion. Historically speaking, the traditional criminal justice response has been to enhance arrest rates for minor crimes. For example, broken windows policing, which is sometimes taken to imply that the police should make arrests for minor offenses to reduce the likelihood of serious violence (Wilson & Kelling, 1982), became a policing trademark despite research that suggests there is little to no association between arrests for minor offenses and more serious crime. Attempting to control for the many methodological complexities of examining the arrest-crime relationship in New York City from 1988 to 2001, Greenberg (2014) found that misdemeanor arrests had no significant impact on violent crimes in the city during this period. Likewise, as previously described, Engel and colleagues (2017) illustrated that a jail closure in Hamilton County, Ohio corresponded with a reduction in police-driven arrests for minor offenses; and, perhaps most importantly there was a continued decline in violent crime despite the

significant shift from using arrests (particularly misdemeanor arrests) as a vehicle to control crime rates. In short, there is little current empirical evidence to support an association between arrests for misdemeanor offenses and reductions in serious crime problems. Nevertheless, such net-widening policing tactics and courtroom approaches contributed to record-setting state and federal incarceration rates and unsustainable financial expenditures in the 1980–1990s (National Research Council, 2014). This is one of many reasons why more recent legislative and social movements have called for a reduction in criminal justice involvement to diminish incarceration rates, strengthen community policing efforts, and provide alternatives to traditional responses (Clear & Frost, 2014; Travis, 2014).

Further, recently there has been considerable attention paid to alternatives to police custodial arrests in an effort to curb this largely untenable model of policing, including an extensive review by the IACP in 2016 (International Association of Chiefs of Police, 2016). A growing chorus of voices inside and outside of law enforcement has called for alternative, non-arrest responses to some fraction of the voluminous and—in many instances—minor violations. Given that arrests for minor crimes often lead to broader community problems, this review examines the range of options available to police to handle non-serious offenses and disturbances. As noted by Gottfredson and Gottfredson (1988), there are multiple reasons for the police to avoid using arrest and custody at disturbance and crime scenes. There is a desire to minimize the costs associated with traditional criminal justice processing—particularly when there is no evidence that the added expenses lead to longer term crime reduction. For other situations, the criminal justice process is thought to be an inappropriate response; that is, social and community responses are perhaps better suited to alleviate the proximate disorder or behavioral problems.

As the frequency and perceptions of the disparate use of arrest continues to generate public scrutiny, we believe it is time for the research and practitioner communities to work together to systematically deconstruct the power of arrest. In the past several years, law enforcement executives have noted that “we cannot arrest our way out of this problem,” indicating that perhaps arrest is not the most efficient or effective strategy for reducing crime and handling the social problems that plague our communities (Engel et al. 2017, p. 394). It is therefore imperative that we collect and document what is known about the use of arrest, along with alternatives to arrest. We believe that a comprehensive review of the evidence surrounding all aspects of the decision to arrest—legal, economic, social, policy, managerial, etc.—will provide a clearer path forward.

Thus, our objectives in this review are to extract from existing research the principal questions concerning police-led diversion, critically evaluate the tentative answers to those questions that empirical evidence provides, and form suggestions for future inquiry. More specifically, the objectives for this review are as follows: (1) provide a comprehensive discussion of the factors associated with non-, partial-, and full-custodial police involvement; (2) evaluate the research that has been conducted thus far and highlight the most consistent and applicable lessons learned; and, (3) outline suggestions for future scholarship to better illuminate unanswered empirical questions and have the potential to better impact policy and programs

related to alternatives to arrest. Our intention is to provide a starting point for more advanced discussions among practitioners, academics, policy makers, and philanthropists regarding informed, evidence-based opportunities to reduce the use of arrest while simultaneously enhancing public safety and reducing crime. While police have at their disposal a series of alternatives to custody, in this review we focus most heavily on two non-custodial options that have been the object of much prior research. These two options include: citations in lieu of custody or arrest and third-party diversion. We focus mainly on police-led diversion, but make reference to programs that divert offenders at later stages of the criminal justice process in the interest of better understanding the impacts of the interventions to which offenders are referred.

Our review is organized into five chapters that follow this introduction. In Chap. 2, we establish the definition of arrest that guides our considerations. It may surprise some readers to learn that arrest is not and has not been defined uniformly across jurisdictions or over time in the United States. The “probable cause standard” for arrest allows for considerable variation. We further consider the social consequences of arrest: the deterrent impacts of arrest on crime, and the costs of arrest for the criminal justice system, for arrestees, and for others. Concerning deterrence, we review two bodies of research: studies that analyze the effects of changes in police presence and/or productivity on crime levels; and evaluations of the various police deployment strategies. Concerning costs, the monetary costs of American corrections are staggering. Pre-adjudication detention of arrestees contribute to those costs. Among individual arrestees, an arrest has both short- and longer-term consequences: short-term losses of time, money, liberty, and privacy, and longer-term losses of rights, benefits, privileges, and opportunities, including employment prospects, educational trajectories, public housing eligibility, and immigration/deportation status. The systemic, social, and individual consequences must weigh in any balancing of the benefits and costs of arrest.

In Chap. 3, we review research that describes arrest in the context of routine police practices and, to a degree, explains the arrest decision. Following the “discovery of discretion” in the 1950s, thanks to the American Bar Foundation field studies, ethnographic studies and systematic social observation of police showed that actual levels of enforcement fall far short of full enforcement—that is, police often chose not to make arrests when they had the legal authority to do so. In effect, diversion away from the criminal justice system was modal, though to what—if anything—would-be arrestees were diverted was a matter of ad hoc choice. So far as we know, this pattern was predominant through the 1990s, although additional research based on systematic social observation is sorely needed to extend the corpus of empirical evidence into the 21st century.

Furthermore, this body of research has pointed to a number of factors that have a bearing on officers’ decisions to arrest. Most of the factors on the effects of which the evidence is strongest are those that inhere in the immediate situation—“situational” factors. Some such factors are legal factors: the strength of the evidence of offending, the seriousness of the offense, the cooperation of a victim or complainant in pressing charges. Other factors on which research has dwelled are “extra-legal”:

the race/ethnicity, sex, and age of citizens with whom police interact, the demeanor of citizens toward the police, the presence of bystanders. Accounting for the well-established racial disparity in arrest has frequently been one objective of research, but among the mixed findings research has yet to reach a conclusion. Other than situational factors, research has tested hypotheses about the effects on arrest of officers' characteristics and attitudes, the structure and administrative orientation of police organizations, the social structure of the neighborhoods in which police-citizen interactions occur (i.e., neighborhood context), and requirements of the law. Notwithstanding the accumulation of findings across several decades of inquiry, much of the variation in arrest remains unexplained, and officers' choices among non-arrest alternatives is a mystery yet to be solved.

Police latitude in responding to domestic violence has been curtailed through legislation and administrative policy mandating arrest for specified types of offenses involving parties who have a domestic relationship. Rates of arrest, prosecution, and conviction for domestic violence increased as a result, though the deterrent efficacy of arrest for domestic violence is not a settled question. Moreover, mandatory arrest policies may have an array of unintended consequences, including victims' increased reluctance to report domestic violence, an increased likelihood of dual arrest, and a greater likelihood of repeat violence by some offenders. For these reasons, the costs and benefits of mandatory arrest policies must be carefully considered.

Finally, in Chap. 3 we consider the implications of proactive policing for arrest. By proactive policing, we mean police strategies or practices that focus on the prevention or reduction of crime through means that do not turn on reacting to individual crimes that have already occurred. Proactive policing includes police-initiated contacts for enforcement-related purposes, i.e., vehicle or pedestrian stops. Proactive policing also includes a variety of strategies that involve police-initiated activity, such as broken-windows policing, zero tolerance policing, and problem-oriented policing, which are likely to have varied effects on rates of arrest based on their underlying premises. Proactive policing that emphasizes the role of police as "sentinels"—guardians capable of deterring a motivated offender—may increase offenders' perceived risk of apprehension and thereby prevent crime without arrest, potentially making it an "alternative to arrest."

With research on police practices as a baseline for comparison, we turn in Chap. 4 to alternatives to arrest, and particularly programs of police-led diversion and the use of citations in lieu of arrest. In view of the social, economic, and community costs of arrest, alternatives to arrest warrant careful consideration. The *systematic* diversion of offenders from criminal processing, as opposed to the ad hoc decisions by officers as a matter of routine practice, is hardly new. It can occur at any pre-conviction point of the process. Police-led diversion allows for diversion at or near the point of police contact and prior to, or in lieu of, the filing of charges. In the United States and other English-speaking democracies, police-led diversion programs have primarily focused on diverting drug offenders, persons with mental illness, and juvenile offenders from the criminal justice system. We review the