

THE PUZZLE OF CLEARANCE RATES, AND WHAT THEY CAN TELL US ABOUT CRIME, POLICE REFORM, AND CRIMINAL JUSTICE

*Andrew D. Leipold**

Recent incidents of police violence have led to widespread reform efforts, from modest proposals to change police practices to dramatic attempts to slash funding or abolish the police entirely. But largely ignored in the debate is a simple question: How well is law enforcement currently performing its core functions? In particular, how good are the police at finding the perpetrator, arresting that person, and gathering enough evidence to start the matter through the criminal justice system? Answering this question requires close attention to the familiar, but understudied, metric of clearance rates.

Clearance rates measure the percentage of reported crimes that are “solved” by the arrest of a suspect and the filing of criminal charges. But while these rates provide one valuable measure of police effectiveness, a closer look reveals both puzzles and qualifications, each of which raise important policy questions. Using original compilations of data, this Article begins by looking at the puzzles. Clearance rates for violent and property crimes have been both quite low and amazingly steady for the last forty years. These figures are counterintuitive because during that same period, crime first rose and then decreased dramatically, law enforcement personnel numbers increased and then flattened, and the legal enforcement landscape appears to have tilted in the direction of the police and prosecution. Each of these changes should have significantly affected the clearance rates, but even collectively, they did not.

This Article then looks at possible explanations and concludes that low and steady clearance rates are the product of relatively recent decisions about the role of police and the role of the justice system generally. Beginning in the late 1990s, when our model would predict that clearance rates

* Edwin M. Adams Professor, University of Illinois College of Law. My thanks to Claire Dugard and Dylan Robinson for their invaluable research assistance. © 2020, Andrew D. Leipold.

would begin to increase, resources were increasingly diverted from solving traditional violent and property crimes. At the same time, a shift in law enforcement philosophy—one that prioritized crime prevention over crime clearance—was gathering steam. This choice was a sensible one, as most would prefer to have fewer crimes committed rather than a higher percentage of crimes solved. But even these sensible choices have had important implications for crime victims, for criminal punishment schemes, and for the direction of police reform.

TABLE OF CONTENTS

I.	INTRODUCTION.....	48
II.	CLEARANCE RATES	55
	A. <i>Why Bother?</i>	57
	B. <i>How Often Are Crimes Cleared?</i>	61
	C. <i>Trends</i>	64
	D. <i>Explaining the Rates (or Not)</i>	67
	1. <i>Crime Levels</i>	69
	2. <i>Policing Levels</i>	73
	3. <i>The Enforcement Landscape</i>	77
	a. <i>Advances in Detection</i>	77
	b. <i>Legal Changes</i>	79
III.	EXPLANATIONS AND IMPLICATIONS	80
	A. <i>Explanations</i>	80
	B. <i>Implications</i>	86
	1. <i>Crime and the Justice System</i>	86
	2. <i>Criminal Punishment and Deterrence</i>	89
	3. <i>Police Reform</i>	93
IV.	CONCLUSION.....	95

I. INTRODUCTION

Police reform is back on the public agenda. There is nothing novel about this; throughout our history, there have been frequent, impassioned movements at both the national and local levels to professionalize police officers, rein in law enforcement abuses, and combat corruption.¹

1. Among the early national efforts to reform police abuses were the Wickersham Commission, appointed by President Hoover in 1929, which addressed (among many other things), police brutality, *see generally* 11 NAT'L COMM'N ON L. OBSERVANCE & ENF'T, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931) (describing the Commission's findings on police brutality), and the Kerner Commission, appointed by President Johnson in 1967, which studied ways to improve policing in areas of civil unrest, *see generally* NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY

As has been true in past reform efforts, many of the current demands focus on *how* police do their job. There have been calls to eliminate chokeholds, reduce stop and frisks, increase the use of body cameras, and perhaps most significantly, eliminate or reduce qualified immunity to make it easier to sue officers and departments for abusing their monopoly on the use of force.²

The current efforts, however, also include a bigger ask—that states and municipalities change not only the “how” of policing but also the “what.” In particular, there have been a significant number

COMMISSION ON CIVIL DISORDERS (1968) (reflecting the Commission’s findings), with apparently little success, see Alice George, *The 1968 Kerner Commission Got it Right, But Nobody Listened*, SMITHSONIAN MAG. (Mar. 1, 2018), <https://www.smithsonianmag.com/smithsonian-institution/1968-kerner-commission-got-it-right-nobody-listened-180968318>. Widespread police reform efforts also followed the police beating of motorist Rodney King and the subsequent acquittal of the officers involved in the 1990s. For a collection of documents on the events and the resulting reform efforts, see *Indep. Comm’n on L.A. Police Dep’t, 1991*, UNIV. S. CAL. DIGIT. LIBR., <http://digitallibrary.usc.edu/cdm/landingpage/collection/p15799coll69> (last visited Mar. 30, 2021). More recently, the Department of Justice has undertaken reform efforts focused on individual police departments. See STEPHEN RUSHIN, FEDERAL INTERVENTION IN AMERICAN POLICE DEPARTMENTS 4, 132 (2017) (detailing many of those efforts); see also U.S. DEP’T. OF JUST., THE CIVIL RIGHTS DIVISION’S PATTERN AND PRACTICE REFORM WORK: 1994-PRESENT 1, 7 (2017). See generally Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS U. PUB. L. REV. 57 (2012) (describing the resistance of police subculture to reforms).

2. See Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020) (calling for amending 42 U.S.C. § 1983 to eliminate qualified immunity as a defense); George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020) (calling for eliminating qualified immunity and numerous other reforms, such as a modified mens rea for 18 U.S.C. § 242, mandating an independent agency or civil review board to investigate and review deadly force allegations, establishing accreditation standards for law enforcement organizations, and establishing a national police misconduct registry); Barbara Ortutay, *After Ferguson: Calls for Police ‘Body Cameras’*, ASSOCIATED PRESS (Aug. 23, 2014), <https://apnews.com/b84d0fabf6fa472cb3a6641a52655a7b>; Matthew Yglesias, *8 Can’t Wait, Explained*, VOX (June 5, 2020, 4:00 PM), <https://www.vox.com/2020/6/5/21280402/8-cant-wait-explained-policing-reforms> (describing a campaign banning chokeholds, requiring deescalation, requiring warnings before shooting, exhausting all other methods before shooting, imposing a duty to intervene, banning shooting at moving vehicles, and requiring comprehensive reporting). More recently, there have been calls for reforms such as restructuring police unions. See Daniel Nagin et al., *Guest Post: Repairing the Fractured Foundations of the Police*, WASH. POST (June 9, 2020, 12:14 PM), <https://www.washingtonpost.com/crime-law/2020/06/09/guest-post-repairing-fractured-foundations-police/>; Jorge L. Ortiz, *The Major Stumbling Block: Powerful Police Unions Stand in the Way of Structural Reform, Experts Say*, USA TODAY (June 12, 2020, 2:18 PM), <https://www.usatoday.com/story/news/nation/2020/06/12/george-floyd-police-unions-stand-way-reform-experts-say/5347136002/>.

of demands to “defund the police” and to move current law enforcement resources and responsibility to other parts of government.³

Despite the “defunding” label, and despite occasional pronouncements to the contrary,⁴ few sensible people really want to *abolish* the police.⁵ There are more than one million violent crimes committed in the United States each year, including hundreds of thousands of armed robberies and aggravated assaults,⁶ and when they occur, someone needs to step into harm’s way to stop an ongoing offense, keep a bad situation from getting worse, or capture the perpetrator. More thoughtful defunding proposals have accordingly emphasized the need to reduce law enforcement’s portfolio of duties.⁷ Over time, communities have increasingly asked police not only to

3. See Sarah Holder, *The Cities Taking Up Calls to Defund the Police*, BLOOMBERG CITYLAB (June 9, 2020, 1:40 PM), <https://www.bloomberg.com/news/articles/2020-06-09/the-cities-taking-up-calls-to-defund-the-police>; Stef W. Kight & Kim Hart, *The Cities That are Already Defunding the Police*, AXIOS (June 27, 2020), <https://www.axios.com/cities-defund-the-police-george-floyd-188e169a-a32a-44fa-bace-e2e5df4d1c9b.html>; Jon Schuppe, *What Would It Mean to ‘Defund the Police’? These Cities Offer Ideas*, NBC NEWS (June 11, 2020, 10:55 AM), <https://www.nbcnews.com/news/us-news/what-would-it-mean-defund-police-these-cities-offer-ideas-n1229266>.

4. See, e.g., Holder, *supra* note 3 (noting that members of the Minneapolis City Council “would disband the Minneapolis Police Department entirely, and start over with a community-led public safety system”).

5. According to a July 2020 Gallup poll, “[t]he concept of eliminating police departments does not enjoy wide support across the United States Abolishing the police was not a majority opinion held by any group in the poll, including when examined by race, age or political affiliation.” Ben Guarino, *Few Americans Want to Abolish Police, Gallup Survey Finds*, WASH. POST (July 22, 2020, 4:30 AM), <https://www.washingtonpost.com/nation/2020/07/22/abolish-police-gallup-poll>. A majority of Americans surveyed agreed, however, that the “police should undergo major changes.” *Id.*

6. In 2019, there were more than 1.2 million violent crimes in the United States, including almost 268,000 robberies and more than 820,000 aggravated assaults. See FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., CRIME IN THE UNITED STATES: 2000–2019, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-1> (last visited Mar. 30, 2021). These and other crime numbers are discussed in Subpart II.D, below.

7. See, e.g., Christy E. Lopez, *Defund the Police? Here’s What That Really Means*, WASH. POST (June 7, 2020, 6:37 PM), <https://www.washingtonpost.com/opinions/2020/06/07/defund-police-heres-what-that-really-means/>; Rashawn Ray, *What Does ‘Defund the Police’ Mean and Does It Have Merit?*, BROOKINGS (June 19, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/>; Derek Thompson, *Unbundle the Police*, THE ATL. (June 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/unbundle-police/612913/>; see also Jeff Asher & Ben Horwitz, *How Do the Police Actually Spend Their Time?*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/06/19/upshot/unrest-police-time-violent-crime.html> (noting that in some cities, police spend only 4% of their time handling violent crime).

deal with crime but also to manage mental health crises, addiction problems, school discipline issues, and other problems for which officers are not fully trained and which might be better addressed by health officials, social workers, and clergy.⁸ Without excusing for a minute the criminal and racist behavior that remains disturbingly common among officers, we can still acknowledge that we often ask too much and provide too few resources for law enforcement to accomplish all of these tasks.

No matter how communities ultimately choose to carry out their law enforcement function, the police (by whatever name) will always be asked to perform two core tasks: prevent crime when possible and arrest and charge the perpetrators when the crimes occur. But despite the centrality of these tasks, some important questions have been lost in the hyperbolic noise of the reform movement. Specifically, how well do the police currently perform these core duties?

When deciding what we want the police to do in the future, we might start by assessing how effective the police are at doing their job in the present. This might lead us to ask two related questions. First, what role do the police (as compared to the legislatures that criminalize conduct or the judges who sentence offenders) play in preventing crime? Second, once crimes occur, how often do the police solve the crime and make an arrest? The first question—the role of police in crime prevention—is difficult to measure; it is hard to know precisely what causes a crime *not* to be committed, although some estimates are possible.⁹ The second question—how often police solve crimes and make arrests—is also complex but more accessible; it requires a closer look at clearance rates.

With some important qualifications, the clearance rate describes the success the police have in solving crimes. When a crime is

8. See, e.g., Roge Karma, *We Train Police to be Warriors – and Then Send Them Out to be Social Workers*, VOX (July 31, 2020, 7:30 AM), <https://www.vox.com/2020/7/31/21334190/what-police-do-defund-abolish-police-reform-training>; Lopez, *supra* note 7; Katie Zezima, *As Opioid Overdoses Rise, Police Officers Become Counselors, Doctors and Social Workers*, WASH. POST (Mar. 12, 2017), https://www.washingtonpost.com/national/as-opioid-overdoses-rise-police-officers-become-counselors-doctors-and-social-workers/2017/03/12/85a99ba6-fa9c-11e6-be05-1a3817ac21a5_story.html.

9. See *infra* Subpart III.A. This is not to minimize the important work being done by social scientists on deterrence. But even the most sophisticated scholars acknowledge the difficulties that are inherent in this line of inquiry. For a survey of deterrence research, see generally Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 233–37 (2013). See also Daniel S. Nagin et al., *Deterrence, Criminal Opportunities, and Police*, 53 CRIMINOLOGY 74, 75–78 (2015).

committed and the police learn about it,¹⁰ the crime is considered “cleared”—that is, solved¹¹—when law enforcement arrests a person, charges him or her with the crime, and turns the matter over to the court for prosecution.¹² It does not matter whether the person arrested is ever convicted; from the police’s perspective, the crime is cleared once the person is charged.¹³ The clearance rate is calculated by dividing the number of crimes solved by the total number of crimes in that category.¹⁴ Thus, a jurisdiction that reports forty aggravated assaults, twenty of which are solved by an arrest and a charge, would have a clearance rate of 50% for that offense.

There is a second way to clear cases: through “exceptional means” (to use the Federal Bureau of Investigation’s (“FBI”) term). As long as the police identify the perpetrator of the crime, have enough evidence to arrest and charge, and are able to locate the offender such that they *could* have arrested him, the crime is considered cleared.¹⁵ The fact that the suspect died before being arrested, or that the victim refused to cooperate thereby preventing an arrest, or that the suspect was not extradited because he was being prosecuted for another crime in another jurisdiction does not matter for these purposes—the crime was cleared.¹⁶ Curiously, and unfortunately, the figures reported to

10. The FBI clearance rates cited in this article are based on “crimes known to the police,” which generally means those crimes that are reported to law enforcement. See FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., OFFENSES KNOWN TO LAW ENFORCEMENT, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/offenses-known-to-law-enforcement> (last visited Mar. 30, 2021) (stating that the FBI “collects the number of offenses that come to the attention of law enforcement”). Crimes that are not reported to the police do not count in the clearance rate, as discussed below in Subpart II.A.

11. The term “solved” will be used interchangeably with “cleared” in this Article, even though the two are not exactly the same. If the police arrest a person and charge him with an offense, the crime is cleared; but, if later evidence is uncovered to show that the person is innocent, it is hard to describe the crime as “solved.” Nonetheless, for current purposes, and with the qualifications described throughout the Article, a crime cleared will be treated and described as a crime solved.

12. See FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., OFFENSES CLEARED, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/clearances.pdf> (last visited Mar. 30, 2021). Note that clearance rates are related to, but different from, the number of arrests made by the police. A single arrest can clear multiple crimes if it turns out, for example, that the single arrested suspect can be charged with five burglaries. Similarly, the arrest of three people involved in a single armed robbery clears only one crime. It is the number of offenses involved, not the number of people arrested, that counts for clearance purposes. *Id.*

13. JAMES Q. WILSON & BARBARA BOLAND, THE EFFECT OF POLICE ON CRIME 1 (1979).

14. *See id.*

15. FED. BUREAU OF INVESTIGATION, *supra* note 12.

16. *Id.*

the FBI do not distinguish crimes cleared by arrest and charge from those cleared by exceptional means (more on this point below).¹⁷

Despite their importance in evaluating police performance, clearance rates get relatively little attention in criminal procedure literature. There have been some important exceptions to this neglect,¹⁸ and criminologists continue to provide valuable insights.¹⁹ This Article argues that the clearance rate is worthy of much greater study for a number of reasons.

Most obviously, the clearance rate tells us something important about how well law enforcement does one of its core jobs. After a crime is committed, how often do the police catch the perpetrator and gather enough evidence to allow the rest of the justice system to do *its* job—adjudicate, and punish if appropriate? As discussed below, using the clearance rate to measure law enforcement effectiveness is more complicated than it sounds; we also want the police to focus on preventing crime, not just on catching the wrongdoer once the harm is done.²⁰ Thus, it is important not to let the clearance rate become the sole, or perhaps even the dominant, measure of police performance.²¹ On the other hand, if there are going to be serious changes to law enforcement duties in this country, it is worth knowing something about how well the police currently do what they are uniformly asked to do.

Understanding clearance rates also has implications for constitutional criminal procedure. The familiar debate between the Crime Control Model and the Due Process Model²² in defining the

17. See discussion *infra* Subparts II.A., III.B.3.

18. See, e.g., Shima Baradaran Baughman, *How Effective Are Police? The Problem of Clearance Rates and Criminal Accountability*, 72 ALA. L. REV. 47 (2020). See also the lively exchange over the effect of *Miranda v. Arizona* on clearance rates: Paul G. Cassell & Richard Fowles, *Falling Clearance Rates After Miranda: Coincidence or Consequence?*, 50 STAN. L. REV. 1181, 1181–82 (1998); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1063–64 (1998); John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147, 1155–57 (1998); Stephen J. Schulhofer, *Miranda and Clearance Rates*, 91 NW. U. L. REV. 278, 278–80 (1996).

19. See, e.g., Anthony A. Braga & Desiree Dusseault, *Can Homicide Detectives Improve Homicide Clearance Rates?*, 64 CRIME & DELINQ. 283, 285 (2016); Philip J. Cook, *The Clearance Rate as a Measure of Criminal Justice System Effectiveness*, 11 J. PUB. ECON. 135, 135 (1979); Jesenia M. Pizarro et al., *The Impact of Investigation Strategies and Tactics on Homicide Clearance*, 24 HOMICIDE STUD. 3, 6–7 (2020); Steven Raphael, *Optimal Policing, Crime, and Clearance Rates*, 15 CRIMINOLOGY & PUB. POL'Y 791, 791 (2016).

20. See discussion *infra* Subpart III.A.

21. See discussion *infra* Subpart II.A.

22. The two models, as described by their creator Herbert Packer, place primary emphasis on efficiency in processing criminal matters and holding the

rules that govern searches and seizures or interrogations (for example) frequently pivots on the effect that a particular interpretation of the Constitution will have on effective police work.²³ Thus, if it turned out that clearance rates had increased (or decreased) over time, we might have greater (or lesser) confidence that specific policing techniques—such as DNA testing, facial recognition, cell phone tracking, etc.—are (or are not) worth the economic and social costs.

More broadly, clearance rates also can (should) inform the broad policy questions about how and why we punish. If most reported crime is solved, yet the crime rate continues to climb, we might conclude that the hoped-for deterrent effect of punishment is not being realized. On the other hand, if the clearance rate is high and crime is decreasing, perhaps we can achieve the deterrent effect with less severe punishment and more alternatives to incarceration.

guilty accountable (crime control) versus an emphasis on the rights of the accused (due process). HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 153–54, 162–63 (1968). The Crime Control Model

places heavy reliance on the ability of investigative and prosecutorial officers, acting in an informal setting in which their distinctive skills are given full sway, to elicit and reconstruct a [reasonably] accurate account of what actually took place in an alleged criminal event. The Due Process Model rejects this premise and substitutes for it a view of informal, nonadjudicative fact-finding that stresses the possibility of error.

Id. at 163.

23. Many of the majority and dissenting opinions in seminal criminal procedure cases have focused on this point. *Compare* *Herring v. United States*, 555 U.S. 135, 141 (2009) (noting the substantial cost imposed by the exclusionary rule on the ability to punish the guilty), *with id.* at 148–49 (Ginsburg, J., dissenting) (“[T]he most serious impact of the Court’s [refusal to exclude evidence obtained in violation of the Fourth Amendment] will be on innocent persons wrongfully arrested based on erroneous information . . .” (quoting *Arizona v. Evans*, 514 U.S. 1, 22 (1995) (Steven, J., dissenting))); *compare* *Illinois v. Gates*, 462 U.S. 213, 237–38 (1983) (rejecting the prior test for probable cause in part because it “cannot avoid seriously impeding the task of law enforcement”), *with id.* at 290–91 (Brennan, J., dissenting) (arguing that the majority’s relaxed standard of probable cause contains “code words for an overly permissive attitude towards police practices in derogation of the rights secured by the Fourth Amendment”); *compare* *Brewer v. Williams*, 430 U.S. 387, 406 (1977) (excluding evidence in a child murder case and noting that this is precisely the type of case where fidelity to constitutional rights is required), *with id.* at 415–16 (Burger, C.J., dissenting) (excluding the defendant’s statements to police “continues the Court—by the narrowest margin—on the much-criticized course of punishing the public for the mistakes and misdeeds of law enforcement”); *compare* *Miranda v. Arizona*, 384 U.S. 436, 455 (1966) (“[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.”), *with id.* at 541 (White, J., dissenting) (arguing that the *Miranda* requirements “will measurably weaken the ability of the criminal law to perform [its] tasks”).

Conversely, a low clearance rate might suggest that longer prison sentences, or more steps to increase the likelihood of arrest, are needed to raise the costs of crime to the perpetrator.

Finally, clearance rates can tell us a great deal about the wisdom and scope of police reform.²⁴ The importance we attach to solving crimes once they occur, and the policy choices we make to raise or lower the rate at which crimes are solved, can go a long way in determining the role we want the police to play in maintaining an orderly society.²⁵ But the first step is to understand the strengths and weaknesses of clearance rates and to extract what information from them that we can.

Part II of this Article looks at clearance rates. Subpart II.A addresses some of the problems and shortcomings of these rates and concludes that, while the difficulties are significant, there is still a great deal to be learned from studying the rates. Subpart II.B then looks at the rates for 2019, the most recent year for which they are available. Subpart II.C then looks at the rates over a forty-year period, using newly generated data. Subpart III discusses the implications of these figures.

II. CLEARANCE RATES

The FBI has gathered and published national crime clearance rates since the 1930s.²⁶ The Bureau compiles the crime statistics that are provided by state and local law enforcement agencies, then calculates the clearance rates for a limited number of offenses.²⁷ The first group includes violent crimes: (a) murder and nonnegligent manslaughter²⁸ (collectively referred to here as “homicide”), (b)

24. *See infra* Part III.

25. *See infra* Part III.

26. Although much of the data presented in this paper are original compilations, the underlying data are largely gathered by the FBI in its Uniform Crime Reports and published in its annual “Crime in the United States” publication. *See generally Services*, FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., <https://www.fbi.gov/services/cjis/ucr/> (last visited Mar. 30, 2021). In these annual reports, the FBI provides data on (among other things) offenses known to law enforcement, persons arrested, police employee data, and clearance rates. The Uniform Crime Reports for the years 1995–2019 are published online. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., UCR PUBLICATIONS, <https://www.fbi.gov/services/cjis/ucr/publications#Crime-in%20the%20U.S> (last visited Mar. 30, 2021). Earlier versions are in paper format. All compilations of data are available from the author.

27. *See* FED. BUREAU OF INVESTIGATION, UCR PUBLICATIONS, *supra* note 26.

28. Negligent killings, suicides, and attempted killings are not included in this definition. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., OFFENSE DEFINITIONS, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/offense-definitions> (last visited Mar. 30, 2021).

rape,²⁹ (c) robbery,³⁰ and (d) aggravated assault.³¹ The second group of rates covers property crimes: (a) burglary,³² (b) larceny and theft,³³ (c) motor vehicle theft,³⁴ and sometimes (d) arson.³⁵ These eight³⁶ offenses make up the so-called “index crimes” that are measured by the FBI in its annual report, *Crime in the United States*, the most widely used measure of the American crime problem.³⁷

Before looking at the clearance rates, it is worth addressing some of the criticisms that are frequently raised about both the rates themselves and the wisdom of relying on them. It turns out that while clearance rates are far from a perfect measure, they nonetheless offer important insights into the police specifically and the justice system generally.

29. The definition of rape changed in 2013 to describe the crime more accurately. The new definition includes “penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” *Id.* The so-called “legacy” definition of rape that was used prior to 2013 was “the carnal knowledge of a female forcibly and against her will.” See FED. BUREAU OF INVESTIGATION, U.S. DEPT OF JUST., RAPE, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/rape> (last visited Mar. 30, 2021). Although the new definition more accurately describes the criminal conduct, when comparing clearance rates, crimes, and arrests over time, this Article uses the legacy definition for consistency, despite the inevitable effect of underreporting the number and rate of this offense.

30. “The taking or attempting to take anything of value from the care, custody, or control of a person or persons by force or threat of force or violence and/or by putting the victim in fear.” FED. BUREAU OF INVESTIGATION, *supra* note 28.

31. “An unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. Simple assaults are excluded.” *Id.*

32. “The unlawful entry of a structure to commit a felony or a theft. Attempted forcible entry is included.” *Id.*

33. “The unlawful taking, carrying, leading, or riding away of property from the possession or constructive possession of another.” *Id.* Taking property by fraud is included in the category, but embezzlement and forgery are not. *Id.*

34. “The theft or attempted theft of a motor vehicle.” *Id.*

35. “Any willful or malicious burning or attempt to burn, with or without intent to defraud, a dwelling house, public building, motor vehicle or aircraft, personal property of another, etc.” *Id.* For many years, arson was not counted as one of the index crimes, making comparisons of arson crimes, arrests, and clearances over time difficult.

36. *See id.* Human trafficking crimes were added to the list of FBI Index offenses in 2013. See FED. BUREAU OF INVESTIGATION, U.S. DEPT OF JUST., OFFENSE DEFINITIONS, HUMAN TRAFFICKING IN THE UNIFORM CRIME REPORTING (UCR) PROGRAM, <https://ucr.fbi.gov/human-trafficking> (last visited Mar. 30, 2021). The inclusion of these crimes is sufficiently recent, and the numbers sufficiently small, such that they are excluded from consideration in this paper.

37. *See Services*, FED. BUREAU OF INVESTIGATION, *supra* note 26.

A. *Why Bother?*

The validity and usefulness of the FBI's clearance rates has been roundly criticized, with some justification.³⁸ The two primary complaints run along the following lines.

The first complaint is that the metrics are wrong.³⁹ The denominator of the clearance rate formula is only the crimes *reported* to the police, which is obviously a subset of the total number of crimes that actually occur in this country. It is estimated that more than half of all index crimes are never reported to law enforcement,⁴⁰ perhaps because citizens do not trust the police to solve the crime, because they fear retribution by the perpetrator, because they want to seek private resolution, or for other reasons.⁴¹ The result is that the reported clearance rate inflates, sometimes wildly so, the percentage of actual crimes that are in fact “solved.”

Another critical metric is the arrest and charge, which is the numerator in the clearance formula. Here the claim is that the resulting clearance rate fails to reveal what we really care about—not just whether someone is arrested for a crime but whether they are convicted and punished for it.⁴² By considering a crime “solved” when an alleged perpetrator is arrested, with no account given to whether the case was dismissed (perhaps because the defendant was innocent), the charges were reduced, or the defendant was acquitted, the police are given credit where perhaps little is due. If the defendant is never punished, the argument continues, there is also no

38. See, e.g., Baughman, *supra* note 18 (providing an extensive and nuanced criticism of clearance rates); Donohue III, *supra* note 18, at 1151 (“FBI crime data are notoriously bad.”); Yale Kamisar, *How to Use, Abuse—And Fight Back with—Crime Statistics*, 25 OKLA. L. REV. 239 (1972) (offering a dated but still informative discussion of the uses and misuses of crime statistics).

39. See, e.g., Baughman, *supra* note 18, at 59–60, 65.

40. See RACHEL E. MORGAN & JENNIFER L. TRUMAN, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., CRIME VICTIMIZATION, 2019 8 tbl.6 (2020), <https://www.bjs.gov/content/pub/pdf/cv19.pdf> (reporting that in 2019, roughly 47% of nonhomicide violent index crimes were unreported and about two-thirds of property crimes (67.5%) were not reported to the police, although the latter figure includes many nonindex property offenses). See also the discussion of this point *infra* note 68.

41. See Darlene Hutchinson, U.S. DEP'T OF JUST., *Fewer than Half of Victims Report Violent Crimes*, OFF. JUST. PROGRAMS: OJP BLOG (Dec. 14, 2017), <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/blogs-2017/2017-blog-ncvs.htm> (“Victims may decide not to report because they choose to deal with the crime privately. They may believe that going to the police will place them in further danger or that what happened is ‘not important enough’ to report. If they know the offender, they may be reluctant to ‘cause trouble.’ Or they may doubt the willingness or ability of police to help, or to believe their account.”).

42. See *id.*

way to tell whether the victim's interest in obtaining justice for the harm done was ever vindicated.⁴³

This criticism is more than the usual academic complaint that more data would improve our understanding. The sharper criticism about relying on arrests and charges as the moment of "clearance" is that it creates perverse incentives for law enforcement.⁴⁴ If the police are rewarded simply for making arrests (by the ability to report a higher percentage of crimes solved), they may focus their efforts disproportionately on establishing probable cause for the arrest itself, rather than on gathering evidence to sustain a conviction beyond a reasonable doubt at trial.⁴⁵ The clearance rate may also be an incentive to arrest too early, before the evidence has been fully evaluated, simply so that the police can check the clearance box.⁴⁶

A second complaint is that the data are unreliable.⁴⁷ As with any assessment based on self-reporting, clearance rates give the police an incentive to maximize the number of arrests and to minimize the number of reported crimes—perhaps by reducing the seriousness of the assault from aggravated to simple, or to understate the amount of the theft.⁴⁸ As one newspaper investigation found when examining the Los Angeles Police Department numbers:

The LAPD misclassified nearly 1,200 violent crimes during a one-year span ending in September 2013, including hundreds of stabbings, beatings and robberies The incidents were recorded as minor offenses and as a result did not appear in the

43. *See id.* (noting that when crimes are not reported, "victims don't receive a sense of justice, or the support and tools that can help them heal and regain their quality of life").

44. Kamisar, *supra* note 38, at 252 (noting that a single arrest may lead to clearance of more than one crime and "[d]etectives are rarely displeased at 'writing off old cases' and looking better on the FBI books").

45. *See* Baughman, *supra* note 18, at 59–60 (stating that the focus on clearance rates "may lead police to overemphasize arrest rather than other ways to deal with crime, or focus on arrests of some crimes over others. . . . A police officer is less likely to work out restorative outcomes with victims and perpetrators if she is measured by the number of arrests per number of reports brought into the office.").

46. *See id.* ("With the current focus on clearance rates, police can arrest suspects to improve clearance numbers, or rely on faulty evidence that does not result in a conviction . . .").

47. *See id.*

48. *See id.* ("There is intense pressure in certain police departments to pad or even falsify clearance rate numbers—either internally or to the FBI."); *cf.* Donohue III, *supra* note 18, at 1154 ("My hunch is that when there was little scrutiny over their actions, the police tended to 'close' cases in a highly self-serving way. When police practices came under greater scrutiny [during the 1960s], . . . police departments professionalized and crime reporting became standardized, resulting in more accurate, albeit less flattering, records of police efficacy." (citations omitted)).

LAPD's published statistics on serious crime that officials and the public use to judge the department's performance.

Nearly all the misclassified crimes were actually aggravated assaults. If those incidents had been recorded correctly, the total aggravated assaults for the 12-month period would have been almost 14% higher than the official figure⁴⁹

There is also a generalized concern that with more than 14,000 different law enforcement entities reporting statistics, there will be inevitable inconsistencies in how the numbers are calculated and what should be reported.⁵⁰

Perhaps the most troubling feature of the data is the ability of law enforcement to clear cases by "other exceptional means," a category that is ill-defined and easy to manipulate. Stories of police departments that report a high clearance rate, but do not actually make a high number of arrests or charges, are common enough to cast a shadow on all clearance numbers.⁵¹ At a minimum, it is regrettable that most of the local police clearance numbers (and as a result, the FBI numbers) do not distinguish between cases cleared by arrest and those cleared by other means.⁵² It is thus nearly impossible to tell how large each of these categories is in the final clearance rate, even

49. Ben Poston & Joel Rubin, *Times Investigation: LAPD Misclassified Nearly 1,200 Violent Crimes as Minor Offenses*, L.A. TIMES (Aug. 9, 2014, 6:04 PM), <https://www.latimes.com/local/la-me-crimestats-lapd-20140810-story.html>.

50. An obvious weakness in the FBI numbers is that their validity depends on the validity of the information provided by a subset of the more than 18,000 law enforcement agencies around the country, which vary greatly in size and sophistication. In 2019, the FBI received data from 16,554 of the 18,667 state and local agencies. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., FBI RELEASES 2019 CRIME STATISTICS (Sept. 28, 2020), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/cius-summary.pdf>.

51. In 2019, for example, the Chicago police cleared 53% of its homicides, a dramatic increase from the 26% reported a few years earlier. Frank Main, *Writing Off More Murder Cases with No Arrests Boosted CPD's Big Turnaround in Homicide Clearances*, CHI. SUN-TIMES (Feb. 7, 2020, 6:38 PM), <https://chicago.suntimes.com/2020/2/7/21126939/chicago-police-department-homicide-clearance-improvement-turnaround-analysis-cx#>. A later newspaper study found that more than half of those clearances were by "exceptional means," and thus no one was charged with the crime. *See id.*; see also Bernice Yeung et al., *When it Comes to Rape, Just Because a Case is Cleared Doesn't Mean it's Solved*, PROPUBLICA (Nov. 15, 2018, 10:00 AM), <https://www.propublica.org/article/when-it-comes-to-rape-just-because-a-case-is-cleared-does-not-mean-solved> (reporting on a study of more than sixty police departments and concluding that "[a]cross the country, dozens of law enforcement agencies are making it appear as though they have solved a significant share of their rape cases when they simply have closed them").

52. *See* Baughman, *supra* note 18, at 63–64 ("The majority of police reporting systems (more than 60%) still do not require agencies to declare how many of their cases are cleared by exceptional means." (footnote and emphasis omitted)).

though a more nuanced and helpful study of the rates would distinguish between them. All of this means that the clearance rate formula creates incentives to manipulate numbers in ways that are hard to check.

These criticisms are well-founded and require that any conclusions based on the rates be viewed with caution. But despite these problems, we should not abandon the effort to learn what we can from the data. Some of the criticisms are misdirected, while others prove too much.

The fact that there are many, many crimes that are never reported to the police, and thus live outside the coverage of clearance rates, is largely beside the point if we are evaluating police effectiveness. Police can't solve crimes that they don't know about, so the fact that roughly half of all burglaries go unreported⁵³ should not distract us from assessing the ability to solve the ones that are reported. To be sure, a high number of unreported crimes should worry us and may well reflect a lack of citizen trust in law enforcement, or a skepticism that the police could solve the crime even if it were reported. But the reporting problem is a distinct issue that is worthy of separate study; it does not on its own detract from the information provided by clearance rates.

The same is true with the claim that cases are not really "solved" with an arrest and charge—that an accounting is needed of the outcome of the case (conviction, acquittal, dismissal) as well.⁵⁴ This argument is surely correct if we are trying to measure the effectiveness of the criminal justice system as a whole. But the wider the lens, the harder it is to see important details. If we are assessing law enforcement's performance, a consideration of the case outcome is not only tangential but distorting. The fact that a prosecutor decided to drop the charges in return for cooperation or for other reasons,⁵⁵ or bungled the trial that resulted in an acquittal, or the fact that a judge erroneously dismissed the charges or made poor

53. See MORGAN & TRUMAN, *supra* note 40, at 8 tbl. 6 (reporting that 51% of burglaries were reported to police).

54. See Baughman, *supra* note 18, at 69 ("A key aspect of measuring police effectiveness is tracking national rates of conviction.").

55. One recent study in Chicago found that the Cook County State's Attorney dropped all charges against 29.9% of felony defendants over a three-year period. See David Jackson et al., *Kim Foxx Drops More Felony Cases as Cook County State's Attorney than Her Predecessor, Tribune Analysis Shows*, CHI. TRIB. (Aug. 10, 2020, 5:00 AM), <https://www.chicagotribune.com/investigations/ct-kim-foxx-felony-charges-cook-county-20200810-ldvrmqv6bd3hpsuqha4duehmu-story.html>. The Chicago Tribune investigation determined that charges were dropped in 8.1% of homicide cases, 7% of aggravated battery cases, and 7.1% of armed robbery cases. David Jackson et al., *Kim Foxx's Record on Dropped Felony Cases as Cook County State's Attorney, Charted*, CHI. TRIB. (Aug. 10, 2020, 11:38 AM), <https://www.chicagotribune.com/investigations/ct-viz-kim-foxx-anita-alvarez-comparison-20200810-32buh3a4p5bfjnpcp66shpk4ui-htmlstory.html>.

evidentiary rulings that harmed the prosecutor's case may tell us something meaningful, but they do not tell us much about the police.

The incentives to cheat that are created by clearance rates are worrisome, but hardly unique. Evaluating prosecutors by conviction rates (or universities by graduation rates, or surgeons by mortality rates) creates similarly bad incentives. Making an overly generous plea deal still counts as a conviction, even if it does not reflect the defendant's full measure of criminality, just as refusing to bring a difficult rape case because of the fear of losing at trial can keep the prosecutor's conviction percentage high. *Any* performance-based evaluation creates incentives to exaggerate or tailor behavior toward the performance metric, but as long as the risk is recognized and accounted for, it is not a reason to avoid the inquiry.

As a final defense of clearance rates, it is worth noting the salutary effect of inertia. If we are interested in a snapshot of how many crimes are solved by the police, the problems discussed above loom large—it is hard to know how much the incentives are influencing the numbers.⁵⁶ But it is reasonable to think that at least some of these problems will be smoothed out if we study clearance rates over time. Most institutions and individuals are creatures of habit, and however the numbers are reported from a particular jurisdiction one year is probably how they are going to be reported in other years. So even if the precision of the numbers is suspect, we might be confident that, in *relative* terms, the clearance rates are informative. Stated differently, we should be cautious about a claim that the clearance rate is X% in year 1; the real number may be X+1% or X-5%. But if the clearance rate is X% in year 1, X+2% in year 2, and X+5% in year 3, we can have some confidence that the clearance rate has increased over time. The inertia generated by the bureaucracies that record the numbers should give some confidence in at least the relative accuracy of the numbers.

With these preliminaries aside, it is time to look at some data.

B. *How Often Are Crimes Cleared?*

The most sobering feature of the national clearance rate is its size. In 2019, fewer than half (46%) of all violent index crimes known to the police were solved by an arrest and charge or by other exceptional means.⁵⁷ And that's the good news. For property crimes, the 2019 clearance rate was less than 18%.⁵⁸

56. *See supra* notes 41–46 and accompanying text.

57. The figures in this Subpart are taken from the FBI's 2019 Uniform Crime Reports. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., PERCENT OF OFFENSES CLEARED BY ARREST OR EXCEPTIONAL MEANS, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-25> (last visited Mar. 30, 2021).

58. *Id.*

TABLE 1⁵⁹

2019 Index Crime Clearance Rates	
Offense Type	Clearance Rate
Violent Crime	46%
Homicide	61%
Rape	33%
Robbery	31%
Aggravated Assault	52%
Property Crime	17%
Burglary	14%
Larceny/Theft	18%
Motor Vehicle Theft	14%
Arson	24%

The point is simple but important. More than half of all violent crime victims and more than 80% of property crime victims who report the offense to the police never see the perpetrator arrested, never go to court, never receive restitution, and never feel any sense of vindication.⁶⁰ Although there is private insurance available to property crime victims,⁶¹ medical treatment for violent crime victims,⁶² and occasionally modest compensation funds available to victims,⁶³ the justice system itself can't process what it doesn't see, and it doesn't see most criminal offenses.

Surely no one thinks that this is an optimal state of affairs. Although we will never live in a world where every wrongdoer is brought to justice, it is hard to argue that solving every other aggravated assault, one of every three sexual assaults, or one of every seven burglaries⁶⁴ is a sign of a well-functioning, efficient system. So, it is at least mildly surprising that, of all the recent complaints leveled against the police, little attention has been focused on how often those crimes that exact the heaviest toll on individuals and communities remain unsolved.

Moreover, no one doubts that the problem is far larger than the FBI numbers reveal. As noted, slightly more than half of all violent crimes and well more than half of all property crimes are not reported

59. *Id.*

60. *See id.*

61. *See* Saul Levmore & Kyle D. Logue, *Insuring Against Terrorism—and Crime*, 102 MICH. L. REV. 268, 315–16 (2003) (explaining that property insurance may cover damage resulting from crime).

62. *See* Jeffrey A. Parness et al., *Monetary Recoveries for State Crime Victims*, 58 CLEV. ST. L. REV. 819, 842–50 (2010) (discussing various states' approaches to subsidizing compensation of crime victims' medical bills).

63. *See infra* notes 174–80 and accompanying text.

64. *See supra* Table 1.

to the police,⁶⁵ which necessarily means that the percentage of perpetrators who are held accountable for their actions is substantially lower than the reported clearance rates. Shima Baradaran Baughman has argued that the “true” clearance rates should compare the number of crimes cleared to the number of victimizations, not simply to the crimes known to the police.⁶⁶ If we do that, she says, the index clearance rate drops from the overall reported 21.64% (combining both property and violent crimes) to a “true” rate of 10.61% in 2018.⁶⁷

On the other hand, most of us probably have little intuition about what a “proper” or realistic clearance rate should be. Those who commit crimes will go to extraordinary lengths to avoid detection,⁶⁸ including flight from the jurisdiction, making it difficult for the more than 18,000 state and local police departments⁶⁹ to coordinate their efforts to arrest wrongdoers. Crimes are also not cleared unless someone is charged,⁷⁰ and most prosecutors will not charge unless they believe that they can prove the case to twelve laypeople of varying abilities beyond a reasonable doubt, in the face of stout opposition by skilled defense counsel who will make use of the rules of evidence and the Bill of Rights to frustrate the effort. In short, clearing cases is hard work, and so perhaps a 31% clearance rate for robbery is actually pretty darn good.

To examine this issue, we switch to a historical view to see how clearance rates have changed over time.

65. MORGAN & TRUMAN, *supra* note 40, at 8 tbl.6. The percentage of unreported violent crime excluding simple assault (a nonindex crime) was 53.5% in 2019. *Id.* Overall, just under 33% of property crimes were reported to the police in 2019, although not all of the property crimes included in this figure are index crimes. *See id.*

66. Baughman, *supra* note 18, at 90.

67. *Id.* at 90–91. She goes on to note: “Considering a few individual crimes, the standard percent cleared was 30.4% for robbery, while the true clearance was 13.83%. For burglary in 2018, the standard clearance rate was 13.9% and the true rate was 5.94%.” *Id.* at 91.

68. *See, e.g.,* Anne-Marie Dorning, *Criminals Go to Painful Extremes to Mutilate Fingerprints*, ABC NEWS (July 23, 2010, 12:17 PM), <https://abcnews.com/Technology/US/crooks-erase-past-erasing-fingerprints/story?id=11236512> (“The one thing Boston Police noticed about [a criminal suspect], . . . was that all 10 of his fingertips appeared to be mutilated. [Apparently] by burning them, placing them on the electric coils of a stove perhaps or possibly by a chemical According to law enforcement officials . . . the number of criminal suspects engaging in the practice seems to be growing.” (internal quotation marks omitted)).

69. *See* FED. BUREAU OF INVESTIGATION, *supra* note 50.

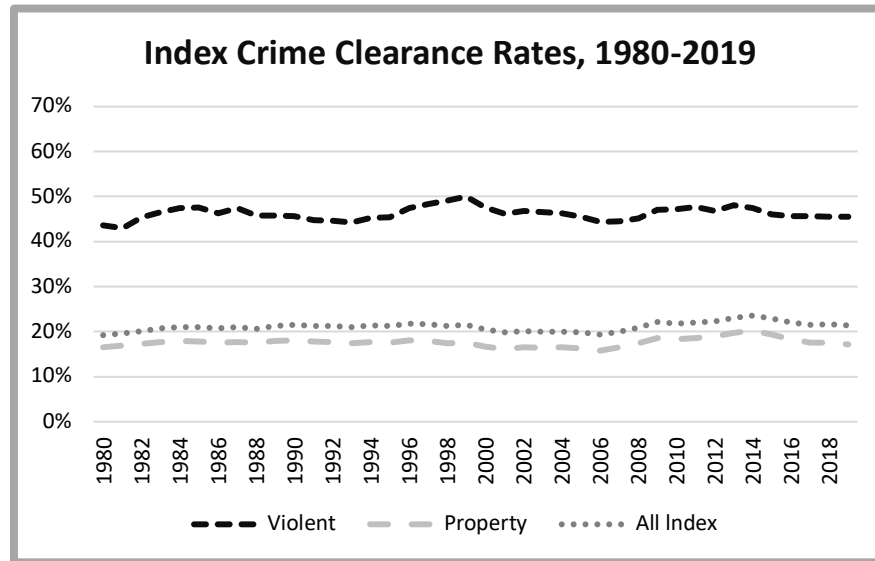
70. *See supra* notes 10–12 and accompanying text.

C. *Trends*⁷¹

Clearance data from a single year tells us little; maybe 2019 was an especially bad year, or maybe an especially good one. The amount of crime goes up and down, new investigative techniques come online, police departments around the country hire more or fewer officers, and crime-solving priorities shift as local circumstances dictate. Given that there is no national crime policy or other centralized criminal justice dictator that coordinates state and local enforcement efforts, we might expect the national clearance rate to fluctuate, maybe dramatically but at least modestly over time.

It turns out that this is not really true. For the last forty years, significant parts of the clearance rate for index crimes have remained remarkably, even astonishingly, steady. From 1980 through 2019, the clearance rates looked like this:

FIGURE 1



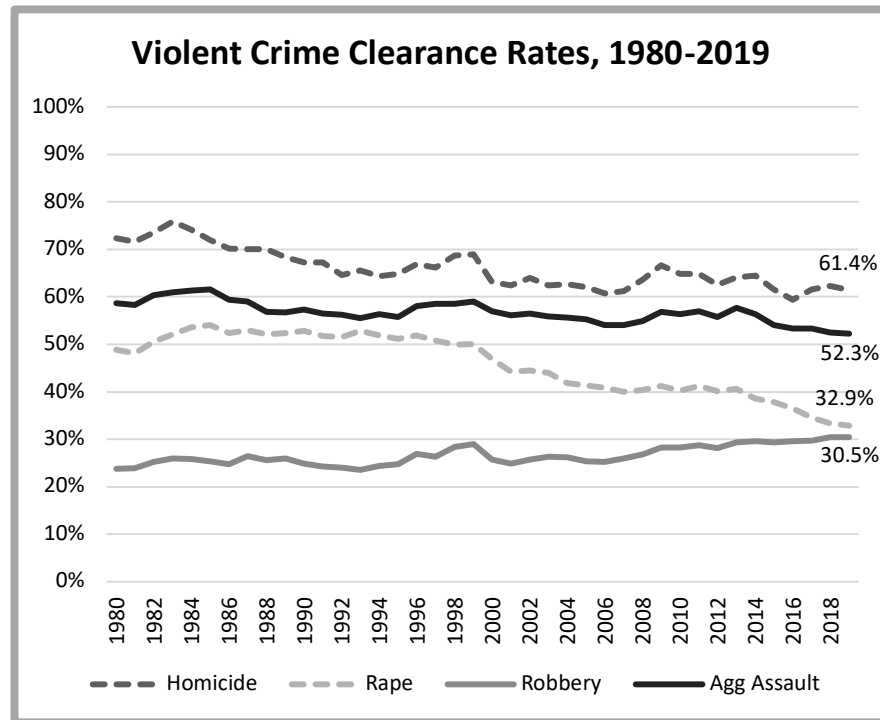
As this Figure reveals, the amount of violent crime cleared nationwide moved within a range of only seven percentage points (a low of 43% and a high of 50%) over a forty-year period, while the property clearance rate fluctuated only four percentage points (16%

71. The data in most of the following figures are compiled from the annual FBI Uniform Crime Reports for the corresponding year. See FED. BUREAU OF INVESTIGATION, UCR PUBLICATIONS, *supra* note 26. Unless otherwise noted, all compilations of data referenced in this Subpart were produced by the author and are available upon request.

to 20%) during that same time. The overall clearance rate moved from a low of 19% to a high of 24%.⁷²

The overall clearance rate, and in turn the violent and property crime numbers, are simply bundles of rates,⁷³ and so perhaps the flat data lines mask larger fluctuations within individual offenses. But again, while there is some modest movement within specific crimes, the overall pattern is similar:

FIGURE 2



The unbundled violent crime rates reveal two things. First, the individual trend lines have remained relatively smooth over the forty-year span; there are a few bumps, but not many and not dramatic. Second, with the exception of robbery, the rates have drifted lower. The clearance rates for homicide, rape, and aggravated assault are all

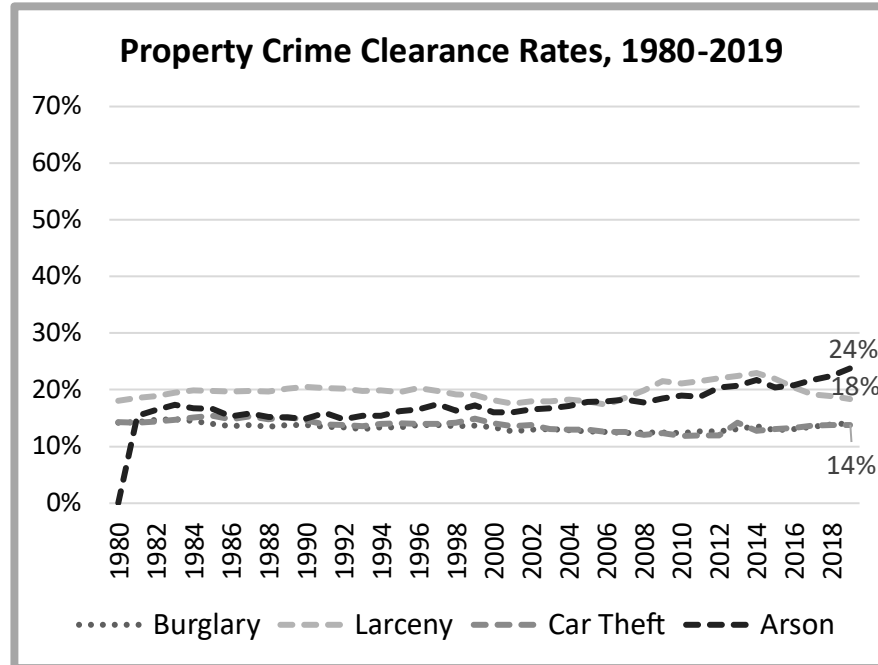
72. The standard deviation for the rates was 1.5 percentage points for violent crime, 0.9 percentage points for property offenses, and 0.9 percentage points for all index crimes.

73. The Index Crime Clearance Rates displayed in Figure 1 portray combinations of all the individual violent crimes to show the violent crime index rate and a combination of all the individual property crimes to show the property crime index rate. The “All Index” rate combines both the violent and property index rates. *See supra* notes 27–37 and accompanying text.

lower in the last twenty years than they were in the first twenty years of this period.⁷⁴

In mild contrast, individual property clearance rates have remained amazingly flat:

FIGURE 3



Here there is an upward drift in arson clearances,⁷⁵ but for burglary, larceny, and car theft, the difference between the highest

74. A comparison of the average clearance rate during the first twenty years of the study period (1980–99) to the more recent twenty years (2000–19) shows that the average homicide clearance rate dropped from 69% to 63%, the average rape clearance rate dropped from 52% to 40%, and the average aggravated assault clearance rate dropped from 58% to 55%. The average clearance rate for robbery rose from 26% during the earlier period to 28% during the last twenty years.

75. In 1981, the clearance rate for arson was 15%, and by 2019, the rate had increased to 24%, its highest point. Note that the clearance rate for arson was not calculated by the FBI during the first year of the period being studied. Also note that although the FBI calculates the clearance rate for arson in subsequent years, it also reports that “sufficient data are not available” to estimate the total number of arsons in a given year. See FED. BUREAU OF INVESTIGATION, *supra* note 6. It is unclear how the clearance rate can be calculated if there are not reliable numbers for the total number of offenses, and as a result, the arson numbers should be viewed with caution.

and lowest clearance rate over the last four decades has never been more than a few percentage points.⁷⁶

What explains these numbers? The first puzzle is why rates are so low. The related—but distinct—question is why, with thousands and thousands of independent actors making independent decisions about how to combat crime, the rates have hardly moved for several decades, and to the extent they have, most have drifted lower. The next Subpart briefly considers, and rejects, two easy explanations. It then introduces some of the variables that underlie a more satisfying rationale.

D. *Explaining the Rates (or Not)*

At the threshold we might ask why more crimes are not solved. Presumably, most of the hundreds of thousands⁷⁷ of police officers are trying their best to clear cases—they do not begin the year with the goal of only solving 30% of the reported robberies. And presumably, prosecutors are not calibrating their efforts to charge only a fixed ratio of car thieves and no more.

The first possibility is that most crimes are just too hard to solve. Criminals are often experienced, some are quite smart, and all are highly motivated to avoid detection. Law enforcement techniques improve, but perhaps the top tier of criminals improves as well; as a result, the current clearance rates may represent a ceiling of what law enforcement can realistically achieve.⁷⁸

This explanation has some appeal; even in the best of circumstances, there are reasons to think that some core percentage of crimes will never be solved.⁷⁹ But ironically, the explanation is

76. The range of clearance rates for burglary was 2.4 percentage points (high of 14.8%, low of 12.4%); for larceny, 5.6 percentage points (high of 23%, low of 17.4%); and for car theft, 3.6 percentage points (high of 15.4%, low of 11.8%).

77. In 2019, there were an estimated 697,000 sworn police officers. FED. BUREAU OF INVESTIGATION, U.S. DEPT OF JUST., FULL-TIME LAW ENFORCEMENT EMPLOYEES: 2019, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-74> (last visited Mar. 30, 2021).

78. See, e.g., Anthony A. Braga et al., *The Influence of Investigative Resources on Homicide Clearances*, 35 J. QUANTITATIVE CRIMINOLOGY 337, 358 (2018) (describing how even with increased resources and improved police techniques, it is extremely difficult to clear gang and drug homicides because of a lack of physical evidence and a lack of witness cooperation).

79. Experience has shown that even when law enforcement is in complete control of the environment and people have little ability to resist an investigation, crimes still occur and many will not be solved. Consider the problems with airport security and the detection of contraband. Although every person and bag are subject to a suspicionless search, the evidence suggests that detection remains a problem. As one news account reported:

In recent undercover tests of multiple airport security checkpoints by the Department of Homeland Security, inspectors said screeners, their

undermined by the steadiness of the clearance rate over time. Even if there is some fixed percentage of cases that will remain unsolved regardless of law enforcement efforts, it would be remarkable if the police routinely cleared nearly all of the remaining, solvable cases. Stated differently, assuming the existence of a clearance “ceiling” for crimes, we might expect that the clearance rate would dip below the hypothetical ceiling in some years and rise back to the ceiling in other years, as the law enforcement environment changes. Even if 40%–45% of aggravated assaults will never be solved because of the nature of the crime and the evasive skills of perpetrators, it does not follow that 55%–60% of the remaining assaults will routinely be solved.

A second explanation is that police and prosecutors, like everyone else, will work as hard as they need to but are slow to do more. If a 20% clearance rate for larceny has been good enough for the last forty years, probably no one will lose their job if the larceny rate is 20% again this year. Police work is contentious and dangerous,⁸⁰ and perhaps the professional satisfaction that comes from moving the clearance needle from 20% to 25% is not a sufficient reward for the additional risk and effort that would be required.

This explanation is also unsatisfying. A steady clearance rate in response to a constant level of law enforcement effort would be understandable if other features of the crime-solving landscape remained constant. But these other factors have not stood still; at least three of the critical variables that *should* have shifted the clearance rates have fluctuated, at times significantly, over the last forty years, without significantly affecting the percentage of crimes solved.⁸¹

There are a large number of variables that can affect clearance rates, but as the next three Subparts discuss, three of the most important are:

- *The amount of crime.* We would expect that an increase in the number of crimes would decrease the clearance

equipment or their procedures failed more than half the time The news of the failure comes two years after ABC News reported that secret teams from the DHS found that the TSA failed 95 percent of the time to stop inspectors from smuggling weapons or explosive materials through screening.

David Kerley & Jeffrey Cook, *TSA Fails Most Tests in Latest Undercover Operation at US Airports*, ABC NEWS (Nov. 9, 2017, 1:10 AM), <https://abcnews.go.com/US/tsa-fails-tests-latest-undercover-operation-us-airports/story?id=51022188>.

80. The line of duty death rate for firefighters and police officers combined is 6.2 deaths per 100,000 people, making it, by one accounting, the fifteenth most dangerous job in the country. See Jessica Learish, *The 20 Deadliest Jobs in America, Ranked*, CBS NEWS (July 19, 2017, 2:01 PM), <https://www.cbsnews.com/pictures/the-20-deadliest-jobs-in-america-ranked/7/>.

81. See *infra* Subparts II.D.1–3.

rate, while a decrease in crime should have the opposite effect.

- *The number of police officers.* If the number of officers available to clear crimes goes up, we would expect an increase in the clearance rate, while cutbacks in resources are likely to mean fewer solved crimes.
- *The enforcement landscape.* Criminal laws and procedures change, as do police practices and technology. Better policing techniques should increase the clearance rate; more suspect-friendly legal rules should make it harder to arrest and file charges.

A closer look at these three variables informs and gives context to the low and steady clearance rates.

1. *Crime Levels*

Holding other factors constant, a decrease in the *number* of index crimes should increase the *clearance rate*.⁸² If there are 100 robberies in Year One and 30 of them are solved, we would expect this 30% clearance rate to increase in Year Two if only 80 robberies occur. Assuming there are the same number of police officers dedicated to solving robberies (an assumption that is relaxed below), we might expect something like a 38% clearance rate in Year Two (30 crimes cleared/80 crimes = 38%)—there are still 30 robberies solved, but a smaller number of uncleared offenses, and thus a higher clearance rate. And of course, if the same number of police are asked to solve 120 robberies in Year Three, we would expect the clearance rate to decrease: by hypothesis, the police would still only have the resources to solve 30 of the robberies, and so the clearance rate would drop to 25%.⁸³

Over the last forty years, the national crime numbers at first went up significantly for violent crimes, and then, starting in the 1990s, down dramatically for both violent and property offenses. The violent crime rate rose 27% between 1980 and 1991, then plunged by more than 50% between 1992 and 2019, an astounding drop.⁸⁴ The

82. See Cook, *supra* note 19, at 136–37.

83. See *id.* (noting the “presumed effect of the crime rate on the clearance rate; an increase in the crime rate increases the workload on [criminal justice system] resources, *ceteris paribus*, presumably resulting in a reduction in the clearance rate”); Donohue III, *supra* note 18, at 1160 (“[I]ncreased crime may overwhelm the ability of police to process complaints and resolve cases, thereby lowering clearance rates”); Schulhofer, *supra* note 18, at 280–81 (“[I]ncreases in the amount of reported crime tend to drive down the clearance rate, even if police remain highly effective and solve as many cases as they did in prior years.”).

84. The violent crime rate in 1980 was 581 offenses per 100,000 people. It rose to 758 offenses per 100,000 by 1991, then began its decline to 367 offenses per 100,000 people by 2019. See FED. BUREAU OF INVESTIGATION, UCR PUBLICATIONS, *supra* note 26, at tbl.1.

property crime rate declined in the first few years of the 1980s, then rose for several years, then declined an astonishing 59% after 1991.⁸⁵

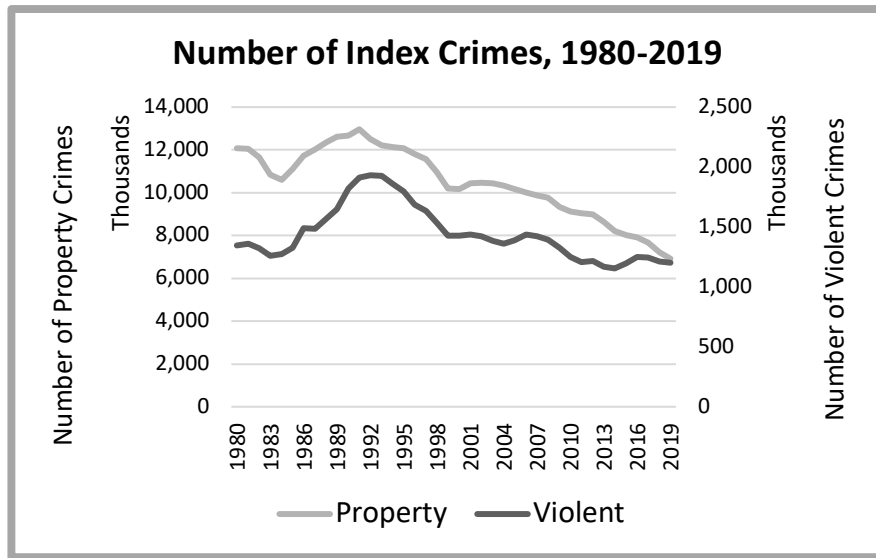
For current purposes, however, it is not the crime *rate* that should influence the clearance figures, but rather the absolute *number* of reported index crimes.⁸⁶ Even as the U.S. population steadily increased, the absolute number of violent offenses first grew until about 1992, but then dropped almost 38% between 1993 and 2019, while the number of property crimes dropped 45% during that same period.⁸⁷

85. The property crime rate in 1980 was 5,319 offenses per 100,000 people, and after a dip and then a rise, it was back at 5,140 offenses per 100,000 people by 1991. By 2019, the property crime rate was 2,110 offenses per 100,000 people, a decrease of 59%. *Id.*

86. *See* WILSON & BOLAND, *supra* note 13, at 1. The crime rate controls for population growth by reporting the number of crimes per 100,000 people, thus allowing a more accurate comparison of the crime problem over time. *See id.* at 1 n.1. In contrast, the clearance rate measures the *number* of crimes solved divided by the number of reported offenses, and thus when asking whether and how the clearance rate changed, the more salient question is whether and how the number of crimes has changed. *See id.*

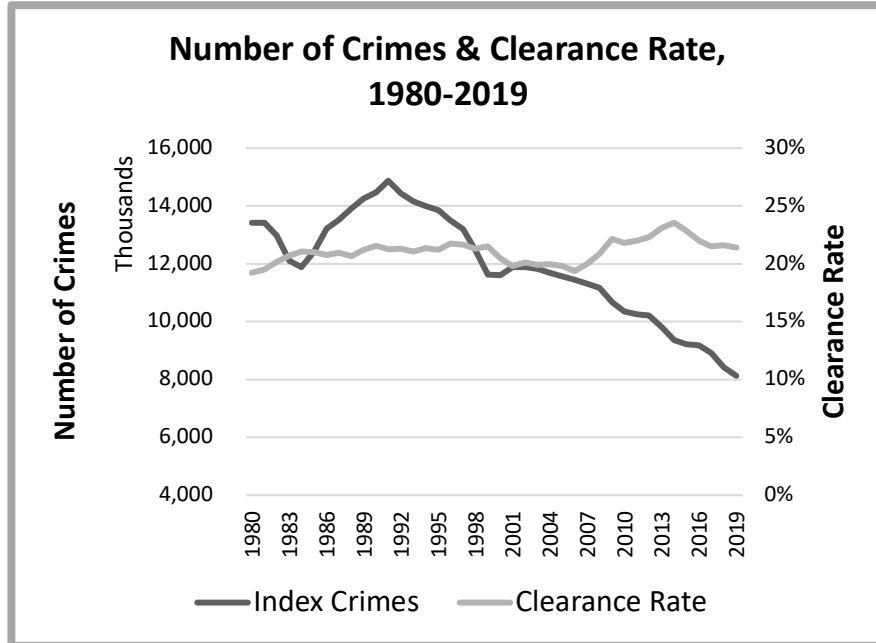
87. These numbers were taken from the various FBI Uniform Crime Reports, see FED. BUREAU OF INVESTIGATION, UCR PUBLICATIONS, *supra* note 26. This drop occurred despite the fact that the U.S. population increased steadily during that time. On April 1, 2000, the U.S. population was 281,421,906, *Decennial Census: By Decade*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/decennial-census/decade.2000.html> (last visited Mar. 30, 2021), and by April 1, 2019, the population was 328,653,775, *2018 National and State Population Estimates*, U.S. CENSUS BUREAU (Dec. 19, 2018), <https://www.census.gov/newsroom/press-kits/2018/pop-estimates-national-state.html>, an increase of 17%. The 2019 population figure was selected to maintain consistency with the latest available crime and clearance data.

FIGURE 4



But our prediction that the clearance rate would rise and fall inversely to the number of crimes (more crimes lead to a lower clearance rate, and vice versa) turns out to be largely incorrect:

FIGURE 5



As shown, during the big rise in the number of crimes—an 11% increase between 1980 and 1991—the clearance rate moved within a range of three percentage points, ending the period at 21%, two points higher than where it began. Then, when the number of crimes declined by 44% from 1992 through 2019, the clearance rate again hardly budged. It moved within a range of five percentage points over that period, starting at 21% in 1992 and ending at 21% in 2019.

The combination of reduced crime and steady clearance rates thus leads to the inescapable conclusion that overall, fewer index crimes are being cleared now than in the past. Again, it is worth asking why; with fewer crimes to solve, why is the clearance rate not increasing? Two of the possible explanations—fewer police to solve the crimes and changes in the legal landscape that make it harder to convict—are discussed below.⁸⁸ But before moving on from the crime variable, it is worth looking at the part of the clearance rate that is most relevant to evaluating the police: the arrest.

To clear a crime (other than by exceptional means⁸⁹) requires two actions—an arrest and a charge.⁹⁰ With the clearance rate remaining steady and the number of clearances decreasing, we might ask which of these two steps is doing the work: Are there fewer arrests (and thus necessarily fewer charges)? Or are there the same number of arrests, but a decrease in the number of charges being filed?

The second number—the number of charges filed over time across the country—is hard to measure, and in any event, is largely derivative of the arrest number. It is also easier to gather numbers of arrests, and it turns out that these figures are at least mildly informative.

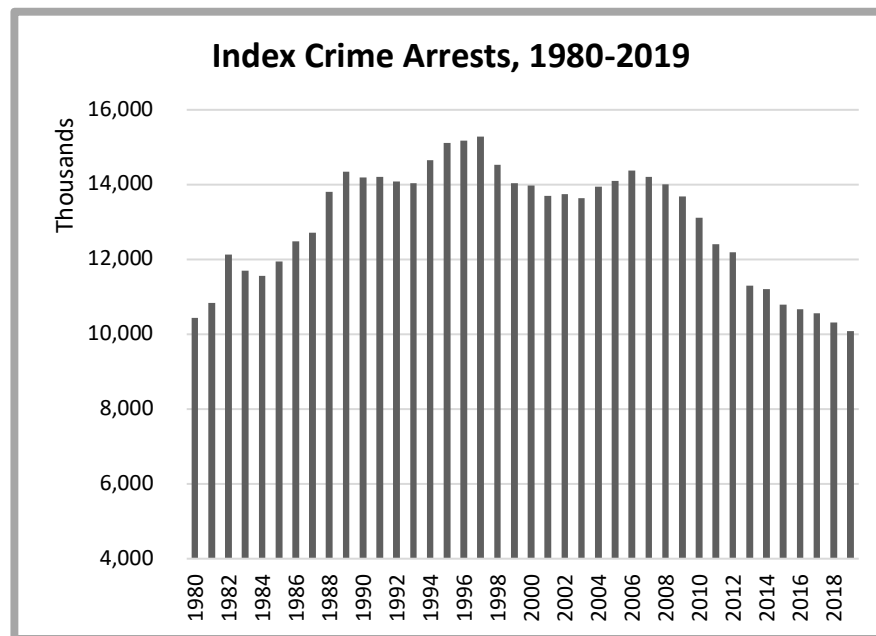
The number of index arrests has mostly tracked the crime rate: as crime was going up during the 1980s and through the mid-1990s, so were the number of arrests. When the crime rate began to decrease, so did the number of arrests.

88. See *infra* Subparts II.D.2, II.D.3.b.

89. See *supra* notes 15–16 and accompanying text.

90. See FED. BUREAU OF INVESTIGATION, *supra* note 12.

FIGURE 6



This is entirely predictable, except that it does not solve the puzzle—even as crime decreases, with tens of thousands of index crimes that remain uncleared, why would arrests go down? If there are twenty burglaries and four are cleared in Year One, why, in Year Two, are there only three arrests when there are fifteen burglaries? This requires us to examine another variable: the resources available to law enforcement to solve crimes, and in particular, the number of police officers available to clear cases.

2. Policing Levels

Logic tells us that the more resources that are devoted to clearing crimes, the more likely it is that they will be solved.⁹¹ And so the obvious explanation for why clearance rates remain the same when crime goes up or down is that there are proportionately more or fewer resources available to solve them. (When in doubt, follow the money.) When crime goes up, governments respond by hiring more police and reallocating existing money to combat the increased danger.⁹² When

91. See Braga et al., *supra* note 78, at 358 (discussing the effect of increased law enforcement resources on homicide clearance rates); Donohue III, *supra* note 18, at 1160 (“Increasing the number of police and police resources should lead to more clearances, so these are obvious explanatory variables.”).

92. Nagin, *supra* note 9, at 201 (“[T]here is substantial evidence that increasing the visibility of the police by hiring more officers and allocating

crime goes down, governments look to save money by cutting law enforcement spending.

Measuring “police resources” is a daunting task, with many thousand individual law enforcement agencies operating with their own nonstandardized budget. Within each of these agencies, there are, in turn, different allocations of personnel and money devoted to solving index crimes versus those devoted to solving nonindex crimes (think drug enforcement efforts).

Determining aggregate budget increases and decreases for police departments nationwide is nearly impossible, so perhaps the best proxy for the resource variable is the number of sworn police officers.⁹³ Since the 1930s, when it began cataloguing national crime numbers, the FBI has kept track of the nationwide number of law enforcement officers, both police in the field and civilian employees.⁹⁴ These numbers have the usual difficulties of self-reported data that is not validated,⁹⁵ and coming up with truly comparable numbers over time is tricky.⁹⁶ But even with these qualifications, the changes in law enforcement personnel are instructive.

existing officers in ways that materially heighten the perceived risk of apprehension can deter crimes.”).

93. “Sworn” police officers are “individuals who ordinarily carry a firearm and a badge, have full arrest powers, and are paid from governmental funds set aside specifically for sworn law enforcement representatives.” FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., POLICE EMPLOYEE DATA, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/police-employee-data> (last visited Mar. 30, 2021). The intent of the label is to distinguish police officers who have law enforcement duties from civilian employees of the police department.

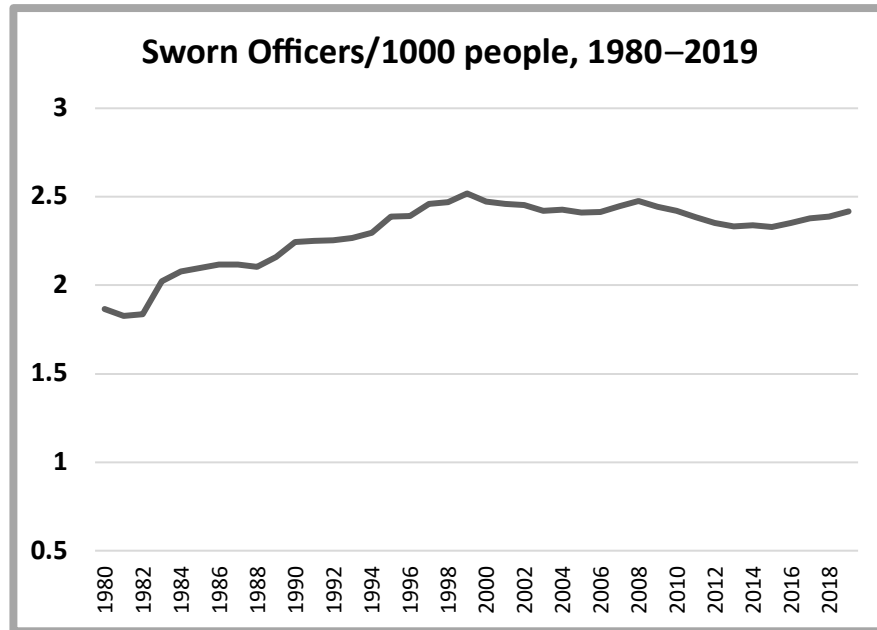
94. *See id.* (“Each year, law enforcement agencies across the United States report to the UCR Program the total number of sworn law enforcement officers and civilians in their agencies as of October 31.”); *see also Services*, FED. BUREAU OF INVESTIGATION, *supra* note 26 (explaining that the reporting process formally began in 1930).

95. *Id.* *See supra* Subpart II.A for a discussion on the problems with self-reported clearance rates.

96. The number of sworn officers reported each year is the sum of the numbers that state and local agencies submit to the FBI. *See* FED. BUREAU OF INVESTIGATION, *supra* note 93. But not all law enforcement agencies provide this information to the FBI, so calculating the total number of sworn officers requires an extrapolation from the population represented by the reporting agencies to the U.S. population as a whole. (The population covered by the reporting agencies is typically 85%–95% of the U.S. population.) The extrapolation has no effect on the rate of officers per 1,000 people that is reflected in Figure 7. It does change the number of officers that are used in the calculation for Figure 8, although it does not change the relative position of the data points. The extrapolation used to calculate the total number of officers in the U.S. each year is available from the author.

For the twenty years prior to the new century, as crime rates were increasing, so were police forces.⁹⁷ As expected, the absolute number of officers grew as the U.S. population increased, but so did the rate of police per capita, measured by the number of sworn officers per 1,000 people.⁹⁸ In 1980, there were fewer than 1.9 officers for every 1,000 people, but this number climbed quickly over the next twenty years, peaking at 2.5 officers per 1,000 people by 1999, a 35% increase. Since 2000, however, the rate first leveled off, then drifted slightly downward over the last ten years.

FIGURE 7



It is not surprising that the rate of officers increased while crime was rising between 1980 and 1999; public safety was a dominant social issue of the period, and public officials fought hard to avoid the dreaded “soft on crime” label.⁹⁹ And so it is also unsurprising that the clearance rates remained flat during this period—the number of offenses increased, but so did the number of officers available to address the problem, and thus the percentage of crimes solved stayed within a tight range.

97. Compare *supra* Figure 4, with *infra* Figure 7.

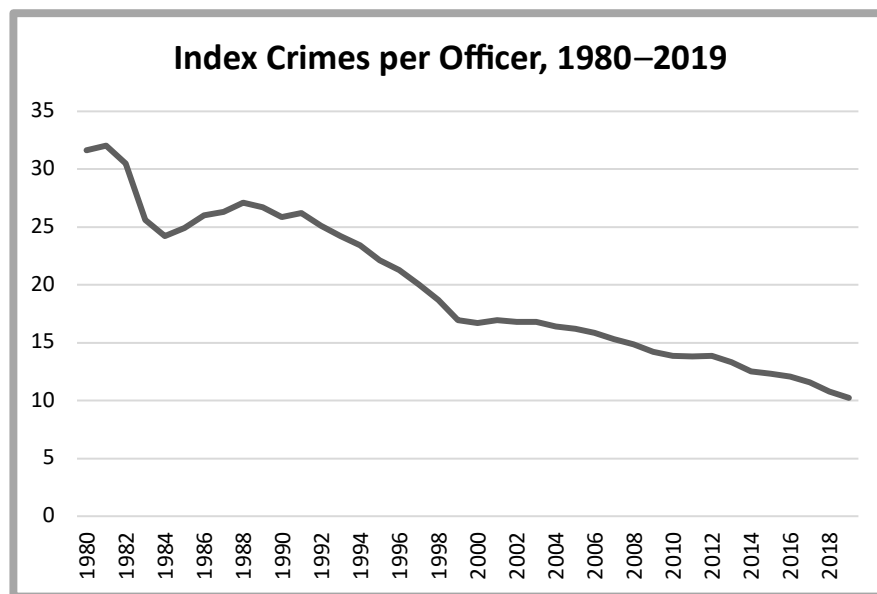
98. See FED. BUREAU OF INVESTIGATION, *supra* note 93.

99. Compare *supra* Figure 6 (showing increased arrests during this period), with *supra* Figure 7 (demonstrating an increase in sworn police officers for the same time period).

The last twenty years have been more of a puzzle. As crime dropped sharply, the per capita number of police remained steady or decreased much more slowly, and yet the clearance rate remained constant.¹⁰⁰ Fewer crimes and proportionately more officers to address them might have led to a higher rate, but they did not.

To illustrate the point, we compare the number of index crimes and the number of police officers. This (admittedly crude) measure reveals how many police officers were available to clear the reported number of index crimes. If we divide the total number of crimes (solved and unsolved) by the number of police officers, the “crimes per officer” trend looks like this:¹⁰¹

FIGURE 8



As shown, until the early 1990s, there were more than 25 index crimes committed for each sworn officer. By 2008, there were fewer than 15 index crimes per officer, and by 2019, the number was slightly more than 10.¹⁰² This indicates that over the last forty years, solving index crimes has consumed an increasingly small part of the average police officer’s duties.

100. See *supra* Figures 4–5.

101. For the discussion of the calculation method for this Figure, see *supra* note 96.

102. In 1980, there were almost 32 index crimes committed for every sworn police officer. *Supra* Figure 8. As police employment ramped up, that number dropped to 26 index crimes per officer by 1991, which was roughly the peak year of the crime problem. See *supra* Figures 5, 8. By 2019, there were 10.2 index crimes per officers. *Supra* Figure 8.

Stated differently, if the police were clearing index crimes at the same rate per officer as they were in the 1980s, the clearance rate would have gone up. Instead, over the last twenty years, the ratio of crimes cleared per police officer fell by 39%, from 3.4 index clearances per sworn officer in 2000 to 2.2 index clearances per officer in 2019.¹⁰³

A third variable, one that might explain why police are clearing fewer index crimes per officer (but ultimately does not), asks whether the job of arresting, gathering evidence, and charging has gotten harder over time. This requires a brief, but closer, look at the law enforcement landscape.

3. *The Enforcement Landscape*

A constant clearance rate could be evidence that police efficiency in solving crimes, as well as perpetrators' ability to avoid arrest, are either constant or else track each other, changing in the same direction and at roughly the same rate. Assuming that police want to catch every rapist and that every rapist wants to avoid capture, a steady clearance rate might indicate that any advancement or diminution in one party's ability to achieve its goals is offset by the other's.

But while there is no scientific way to measure this, experience and intuition suggest otherwise. In the last few decades there have been significant advances in the ability to detect crime, and to a lesser but still meaningful extent, the ability to arrest and prosecute.

a. *Advances in Detection*

Law enforcement's ability to gather evidence and solve crimes has advanced dramatically over the last few decades. DNA testing has revolutionized the investigations of homicide and rape (two index crimes) and has given prosecutors a powerful tool to overcome the vagaries of memory, witness hesitation, and other problems of proof.¹⁰⁴ Security and surveillance cameras are increasingly common, and in places, ubiquitous.¹⁰⁵ Technology tools like facial recognition

103. These calculations are available from the author. *See also infra* Subpart III.A (discussing index arrests).

104. For a discussion of how DNA evidence has affected law enforcement, see U.S. DEP'T OF JUST., *Using DNA to Solve Crimes*, in *ADVANCING JUSTICE THROUGH DNA TECHNOLOGY* (2017), <https://www.justice.gov/archives/ag/advancing-justice-through-dna-technology-using-dna-solve-crimes>. *See also* Karen J. Maschke, *DNA and Law Enforcement*, in *FROM BIRTH TO DEATH AND BENCH TO CLINIC: THE HASTINGS CENTER BIOETHICS BRIEFING BOOK FOR JOURNALISTS, POLICYMAKERS, AND CAMPAIGNS* 45–50 (Mary Crowley ed. 2008).

105. *See* Sidney Fussell, *When Private Security Cameras are Police Surveillance Tools*, *WIRED* (Aug. 11, 2020, 3:27 PM), <https://www.wired.com/story/private-security-cameras-police-surveillance-tools/> (“The US is home to an estimated 50 million closed-circuit TV cameras, roughly as many per capita as

software,¹⁰⁶ cell phone location tracking,¹⁰⁷ and GPS monitoring¹⁰⁸ remain somewhat rare today, but they will not be tomorrow. More generally, data-driven police enforcement initiatives (in particular, CompStat,¹⁰⁹ discussed below) have been credited with substantially improving the efficiency of police efforts.¹¹⁰

This is not to say that burglars, thieves, and robbers have been standing still. Although it is rank speculation, it is plausible to think that the high number of people who have spent time behind bars might have learned tools and techniques to avoid detection at a faster rate than when there were fewer prisoners.¹¹¹ And just as technology has made detection easier, the increasing technological sophistication of citizens in general may be giving perpetrators an increased ability to defeat law enforcement.¹¹² But on balance, it seems unlikely that perpetrators are enhancing their avoidance skills at the same rate as

China. Many are owned by people or companies, not the government. But many police departments can gain access to the images through partnerships with private companies”); Makena Kelly, *The NYPD has Added 14 Drones to Its Arsenal*, THE VERGE (Dec. 4, 2018, 12:49 PM), <https://www.theverge.com/2018/12/4/18125725/nypd-drones-police-new-york-city-advocacy-groups>. For an interesting discussion about the placement of security cameras on public property directed at a private residence, see *United States v. Moore-Bush*, 963 F.3d 29, 35–43 (1st Cir. 2020) (holding that the Fourth Amendment was not implicated by the practice), *reh’g granted*, Nos. 19-1582, 19-1625, 19-1583, 19-1626, 2020 WL 7251410 (1st Cir. Dec. 9, 2020).

106. See generally Kristine Hamann & Rachel Smith, *Facial Recognition Technology: Where Will it Take Us?*, 34 CRIM. JUST. 9 (2019) (discussing the growing use of facial recognition technology by law enforcement).

107. See *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (discussing the Fourth Amendment limits on the use of warrantless cell phone tracking).

108. See *United States v. Jones*, 565 U.S. 400 (2012) (discussing without resolving the privacy implications of long-term GPS tracking).

109. For an overview of CompStat, see *CompStat and Organizational Change: A National Assessment*, NAT’L POLICE FOUND., <https://www.policefoundation.org/projects/compstat-and-organizational-change-a-national-assessment/> (last visited Mar. 30, 2021). For an online glimpse of the New York City CompStat effort in action, see *NYPD CompStat 2.0*, NYPDONLINE, <https://compstat.nypdonline.org/2e5c3f4b-85c1-4635-83c6-22b27fe7c75c/view/89> (last visited Mar. 30, 2021).

110. TERESITA PEREZ & REECE RUSHING, CTR. FOR AM. PROGRESS, *THE CITISTAT MODEL: HOW DATA-DRIVEN GOVERNMENT CAN INCREASE EFFICIENCY & EFFECTIVENESS* 2–3, 5, 12 (2007), https://www.americanprogress.org/wp-content/uploads/issues/2007/04/pdf/citistat_report.pdf.

111. See *infra* Subpart III.B.2 for a discussion of the high levels of incarceration in this country.

112. See *FBI Worried that Ring Doorbells are Spying on Police*, BBC NEWS (Sept. 1, 2020), <https://www.bbc.com/news/technology-53985418>.

detection skills have grown. If true, this would support the view that clearance rates should be increasing rather than remaining steady.¹¹³

b. Legal Changes

Changes in statutes, court rules, and case law can materially affect the ability to detect and prosecute crime. Changes in the substantive criminal law can obviously expand or contract (usually expand) the pool of punishable conduct, although for current purposes, except for changes in sexual assault definitions,¹¹⁴ changes to the scope of index crimes have been uncommon and modest.¹¹⁵

On the other hand, changes in procedural law have the potential to significantly affect clearance rates. Rules of procedure or judicial decisions can restrict or relax the ability of police to search and seize, to obtain confessions, to conduct lineups, and to otherwise gather evidence that is necessary for a clearance. These rules also affect the charging decisions, as the rules of evidence, and what must be found by a jury, can influence the prosecutor's assessment of whether she has a winnable case.

While intuitions may differ, on balance, the legal changes in the last forty years have probably favored law enforcement. In that time, it has become easier to obtain a warrant,¹¹⁶ easier to find that a defendant waived his or her *Miranda* protections,¹¹⁷ and perhaps most importantly, harder for the defense to have evidence suppressed because of a constitutional violation by the police.¹¹⁸ There have, of course, been changes that strengthen the defense side as well,¹¹⁹ but if the intuition about government-friendly changes in criminal procedure is correct, we would predict that the evolution of legal doctrine would push clearance rates at least slightly higher. But nothing in the trend lines of clearance rates supports such a prediction.

* * *

113. *But cf.* Pizarro et al., *supra* note 19, at 6, 7 (noting that research has reached inconsistent results on whether changes in investigative tactics affect clearance rates).

114. For a discussion of definitional changes, see *supra* note 29.

115. See *supra* note 36 and accompanying text.

116. See, for example, FED. R. CRIM. P. 4.1, which allows law enforcement to obtain warrants by telephone or other electronic means. The Rule took effect in 2011.

117. See *Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010).

118. See, e.g., *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016); *Davis v. United States*, 564 U.S. 229, 236–37 (2011); *Herring v. United States*, 555 U.S. 135, 140–42 (2009); *Hudson v. Michigan*, 547 U.S. 586, 590–91 (2006).

119. See, e.g., *Arizona v. Gant*, 556 U.S. 332 (2009) (partially limiting the scope of the search incident to arrest doctrine in automobiles); *Crawford v. Washington*, 541 U.S. 36 (2004) (significantly altering hearsay doctrine); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (altering the division of authority between judge and jury).

The data allow us to draw the following conclusions. Despite changes in the amount of crime, the number of police, and the legal landscape, the clearance rate has remained stubbornly consistent. There are more sworn police officers now than in the past and fewer crimes to solve, but the number of arrests that are being made per officer has dropped, which has helped keep the clearance rate low and steady. And all of these events have occurred with virtually no national coordination of law enforcement policy choices or effort.

With these conclusions in mind, the next Part looks at more nuanced explanations for this state of affairs, then concludes by discussing some of the implications.

III. EXPLANATIONS AND IMPLICATIONS

A. *Explanations*

We seemed to have reached an equilibrium on clearance rates—a settled price we are prepared to pay for a certain amount of crime solving. We are willing to devote X amount of resources and endure Y amount of unpunished criminal conduct to clear a stable rate of offenses, and we are unwilling to go lower and either cannot or will not take steps to raise that rate. No one is happy with a large amount of unsolved crime, but health care, education, and pensions are also important—as are the constitutional restraints on police practices—and perhaps as a society, we are comfortable enough with the current balance.

But even if descriptively accurate, the acceptance of this equilibrium is probably unconscious rather than deliberate. Clearance rates themselves are rarely a topic of debate, and we might wonder whether the public is even remotely aware what the rates are. Paul Robinson and John Darley are very likely correct when they said: “We suspect that most citizens would be shocked at how low the punishment rates are, which suggests that the perception of detection rates tends to be higher than the rates actually are.”¹²⁰

Moreover, despite the drop in the rate and number of index crimes, the importance of crime as a social issue has hardly disappeared. Concerns about public safety and the fear of victimization has receded in recent years when compared to the 1980s and 1990s, but crime remains an important social issue to a large

120. Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 184 (2004); see also Baughman, *supra* note 18, at 49–50 (“Society generally assumes that when serious crimes are committed, justice is served. In other words, the conventional wisdom is that police are generally effective at solving crimes.” (citations omitted)).

number of people,¹²¹ despite the reduction in rates in more recent decades.¹²² And while the recent calls for police reform have been sweeping, it is hard to predict how many people in fact want to reduce the role and presence of the police.¹²³

What, then, explains the data? If we agree that clearing more crimes is a social good, and if an increased number of officers, a reduced number of crimes to solve, and a more favorable enforcement landscape provide the opportunity to raise the clearance rates, why hasn't it happened?

One explanation might be that clearance rates only measure index crimes, and perhaps index crimes are not as important as they used to be. There are lots of nonindex crimes that compete for law enforcement's attention—drug crimes, in particular, but also weapons offenses, domestic violence, computer crimes, and immigration offenses, all of which consume resources but are not part of the standard measure of crime in the United States.¹²⁴ Scholars have also frequently argued that state and federal governments have

121. In a 2019 Gallup poll, more than half of those surveyed said crime is an “extremely” or “very serious” problem. Justin McCarthy, *52% Describe Problem of Crime in the U.S. as Serious*, GALLUP (Nov. 13, 2019), <https://news.gallup.com/poll/268283/describe-problem-crime-serious.aspx>. This rate has remained relatively steady in this century: since 2001, with two slight deviations, between 50% and 60% of those surveyed have given these responses in the annual poll. *Id.*

122. The importance of crime as a social issue may be fueled in part by inaccurate beliefs regarding the scope of the problem, as most people believe that crime is getting worse even when it is not. Despite the steady and significant drop in the crime rate since the 1990s, *see supra* Subpart II.D.1, for the last decade, roughly two-thirds of those surveyed said that nationwide, crime is getting worse year over year. *See* McCarthy, *supra* note 121 (“In all but two polls over the past three decades, majorities of Americans have said there was more crime compared with the prior year.”).

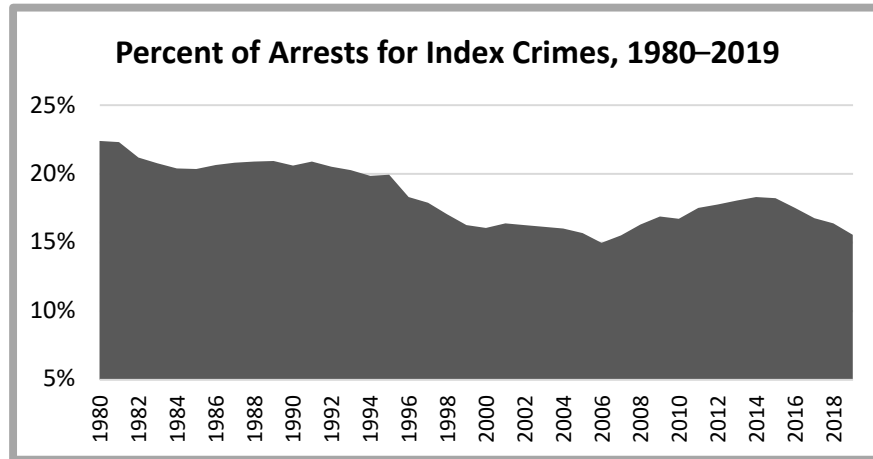
123. In Chicago, for example, although 59% of residents in fragile (low-income) communities know “some” or “a lot” of people treated unfairly by the police, 68% of these residents want a greater police presence in their neighborhood. Steve Crabtree, *Low Trust in Police Complicates Crime Problem in Chicago*, GALLUP (May 30, 2019), <https://news.gallup.com/poll/257798/low-trust-police-complicates-crime-problem-chicago.aspx>. In addition, while there are wide differences in how racial and ethnic minorities view the police when compared to whites, 65% of African Americans and 72% of Hispanics in fragile communities nationwide responded that police treated people “like them” either “fairly” or “very fairly.” Steve Crabtree, *Large Racial Gaps on Crime Seen in Fragile Communities*, GALLUP (May 9, 2019), <https://news.gallup.com/poll/251723/large-racial-gaps-crime-seen-fragile-communities.aspx>. The comparable number for whites was 87%. *Id.*

124. *See* FED. BUREAU OF INVESTIGATION, *supra* note 10 (including only “violent crime” and “property crime” as measures of crime in the United States).

overcriminalized antisocial behavior,¹²⁵ and the more nonindex offenses there are to be enforced, the fewer resources there are to combat robbery and burglary.

This explanation is supported by the arrest data. If officers are increasingly diverted toward nonindex offenses, we would expect the percentage of “index arrests” to decrease over time. And in fact, over the last forty years, the percentage of arrests for index offenses has dropped slowly but noticeably:¹²⁶

FIGURE 9



As this Figure reflects, between 1980 and 1999, an average of 20% of all arrests were for index crimes. In contrast, for the most recent twenty years, the average was less than 17%, representing a modest but perceptible (17%) drop.¹²⁷

Over the same time span, police officers were spending an increasing amount of effort combatting (among many other things)

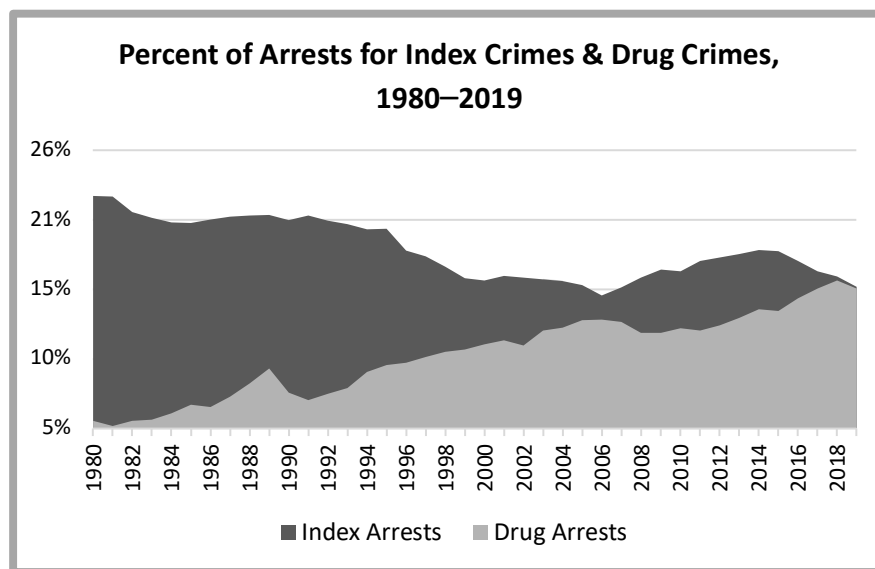
125. See, e.g., Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 773 (2005); Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 229 (2007); Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1536–37 (1997); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 717 (2005).

126. The data for this Figure is extracted from various Crime in the United States reports, see *supra* note 26, typically from Table 29, but at times from Table 18 (2016), Table 24 (1979–80 and 1984–90), or Table 23 (1981–83).

127. The average percent of index arrests was 20.1% between 1980 and 1999. Between 2000 and 2019, the average percentage of index arrests was 16.7%, which represents a decrease between the two periods of about 17% $((.201 - .167) / .201 = .169)$.

drug crimes.¹²⁸ If we overlay the percentage of arrests for index crimes with the percentage of arrests made for just drug offenses, we see the relationship:

FIGURE 10



Once again, the conclusion to be drawn from these numbers is simple, unsurprising, and important. If we want to carry out a major law enforcement effort to combat illegal drugs (to take the most prominent example), we almost certainly will pay for this effort in part with a suppressed clearance rate for index crimes. This reallocation of effort may be wise, foolish, or something in between, but it is a cost that should be recognized and paid with our eyes open.

A second, more intriguing explanation for the data is that the clearance rate *itself* is not as important as it used to be. Perhaps police departments have gradually become less focused on solving crime and more focused on preventing it. The diversion of resources away from investigating and toward community policing,¹²⁹

128. See, e.g., Benjamin Levin, *Guns and Drugs*, 84 *FORDHAM L. REV.* 2173, 2185 (2016).

129. “Community policing” is a broad term with many variations, but in essence, it is “a collaboration between the police and the community that identifies and solves community problems. . . . [It has an] expanded outlook on crime control and prevention, [with] the new emphasis on making community members active participants in the process of problem solving.” U.S. DEP’T OF JUST., BUREAU OF JUST. ASSISTANCE, UNDERSTANDING COMMUNITY POLICING: A FRAMEWORK FOR ACTION vii (1994), <https://www.ncjrs.gov/pdffiles/commp.pdf>.

maintaining a presence at crime hot spots,¹³⁰ fixing “broken windows,”¹³¹ and other innovative approaches might well have kept clearance rates from increasing, as the emphasis on deterring crime at the front end has meant fewer officers to interview witnesses, gather evidence, and prepare search warrants once the crimes occur.¹³² And of course, to the extent these prevention efforts have been successful, it has also meant fewer crimes were committed that need to be cleared.

The shift in focus from clearing crime to preventing crime has happened gradually. Historically, and up into the late part of the last century, solving crime was the dominant chore of the police.¹³³ As one report on policing trends put it, well into the 1990s: “Police officers in many cities focused on responding to crimes that had already been committed, and their effectiveness was judged in terms of response times, arrest statistics, and clearance rates. In many jurisdictions, the police were simply not held accountable for preventing crime.”¹³⁴ Or as one New York City police chief simply said: “We had been taught for a long time that there was nothing we could do about crime.”¹³⁵

130. “Hot spots policing” refers to the practice of “focus[ing] in on small units of geography with high rates of crime. . . . This place-based focus stands in contrast to traditional notions of policing and crime prevention more generally, which have often focused primarily on people.” *Hot Spots Policing*, CTR. FOR EVIDENCE-BASED CRIME POL’Y, <https://cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/hot-spots-policing/> (last visited Mar. 30, 2021).

131. This reference is to the classic article by James Q. Wilson and George Kelling that first articulated what is now called “Broken Windows Policing.” See George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, THE ATL. (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>. Broken Windows Policing “focuses on the importance of disorder (e.g., broken windows) in generating and sustaining more serious crime. Disorder is not directly linked to serious crime; instead, disorder leads to increased fear and withdrawal from residents, which then allows more serious crime to move in because of decreased levels of informal social control.” Under this approach, the police “focus in on disorder and less serious crime in neighborhoods that have not yet been overtaken by serious crime, [so] they can help reduce fear and resident withdrawal.” See *Broken Windows Policing*, GEORGE MASON UNIV. CTR. FOR EVIDENCE-BASED CRIME POL’Y, <https://cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/broken-windows-policing/> (last visited Mar. 30, 2021).

132. BUREAU OF JUST. ASSISTANCE, U.S. DEP’T OF JUST., *COMPSTAT: ITS ORIGINS, EVOLUTION, AND FUTURE IN LAW ENFORCEMENT AGENCIES* vii (2013), <https://www.nationalpublicsafetypartnership.org/clearinghouse/Content/ResourceDocuments/Compstat%20-%20Its%20Origins,%20Evolution.pdf>.

133. *Id.* at 3.

134. *Id.* (footnote omitted).

135. *Id.* at 4.

Starting in the 1990s, spurred by climbing crime rates, the focus in at least some departments changed. As one report described it, “[i]nstead of merely responding to crimes after they are committed, police fundamentally expanded their mission to include preventing crimes from happening in the first place.”¹³⁶ Law enforcement agencies have tried (and continue to use) a variety of approaches to become more proactive, but none have been more enduring than what is now generically referred to as CompStat.

In general terms, CompStat is a combination of managerial technique and data-intensive crime analysis, one that pays special attention to particular crimes (generally index crimes) and allows the police to marshal and deploy its resources into specific high-crime areas.¹³⁷ By studying crime patterns and deploying officers strategically, the goal is to anticipate crimes and deter them, rather than merely respond to reports and then pursue the perpetrators.¹³⁸ CompStat began in New York City, and the results there were dramatic: from the mid-1990s, when the program began, through 2010, the violent crime rate dropped more than two-thirds from where it was in the late 1980s and early 1990s, with much of the success attributed to this aggressively proactive approach.¹³⁹

The New York success led other cities to follow suit.¹⁴⁰ A significant number of police departments adopted some variant of CompStat, and many of the results were less dramatic but still impressive: one statistical study on crime in the fifty largest cities concluded that the adoption of CompStat was responsible, on average, for a 5%–15% overall reduction in violent and property crimes between 1994 and 2012.¹⁴¹ Small wonder, then, that CompStat has

136. *Id.* at vii.

137. “Although departments use [CompStat] differently, the general objective is the same: to implement strong management and accountability within police departments to execute strategies based on robust data collection to reduce and prevent crime.” OLIVER ROEDER ET AL., WHAT CAUSED THE CRIME DECLINE? 9 (2015), https://www.brennancenter.org/sites/default/files/2019-08/Report_What_Caused_The_Crime_Decline.pdf. See generally David Weisburd et al., NAT’L POLICE FOUND., THE GROWTH OF COMPSTAT IN AMERICAN POLICING (Apr. 2004), https://www.policefoundation.org/wp-content/uploads/2015/06/Weisburd-et-al.-2004-The-Growth-of-Compstat-in-American-Policing-Police-Foundation-Report_0.pdf (describing CompStat and its evolution).

138. BUREAU OF JUST. ASSISTANCE, *supra* note 132, at vii.

139. *Id.* at 6.

140. “Nearly two-thirds of the nation’s largest police departments and many smaller agencies currently rely upon a CompStat-like program to highlight crime problems, deploy resources, and track progress.” VERA INST. OF JUST., PERSPECTIVES FROM THE FIELD: LEVERAGING COMPSTAT TO INCLUDE COMMUNITY MEASURES IN POLICE PERFORMANCE MANAGEMENT 1 (Susan Shah et al. eds., 2018), https://www.compstat360.org/wp-content/uploads/2018/05/Leveraging_CompStat.pdf.

141. ROEDER ET AL., *supra* note 137, at 10.

been described as “the most important administrative policing development of the past 100 years.”¹⁴²

To oversimplify: programs like CompStat, as well as moves toward community policing and other approaches,¹⁴³ emphasize the proactive over reactive and crime prevention and deterrence over crime solving. This is an entirely sensible policy choice: to the extent this shift in focus means fewer crimes in the first instance—and the lower crime rate in recent years is suggestive on this point—this is a tradeoff that police departments and their communities are surely happy to make. A crime that is deterred is a crime that causes no harm, has no victim, and does not need to be cleared or adjudicated, which is surely the best of all worlds.

And yet this shift in focus is a policy decision of the first order, one that deserves closer attention than it has received. There are a variety of implications to this move, some obvious, some less so. The next section explores three of those implications.

B. *Implications*

1. *Crime and the Justice System*

With index crimes there is always a victim, very often an individual. Low clearance rates, and the diversion of attention away from clearing index crimes, mean that most perpetrators will not be punished, that most victims will receive no satisfaction, and that society’s interest in seeing justice done will more often be frustrated. The criminal system is a powerful tool for advancing societal goals, but only if the cases become part of that system in the first instance. With low crime reporting rates, and clearance rates consistently below 50% for violent crimes and below 20% for property crimes,¹⁴⁴ the cases that are inside the justice system can feel more like the tail than the dog.

The lack of vindication has an impact beyond the effect on the individual victim. Unsolved crimes have a corrosive effect on the quality of life generally,¹⁴⁵ and they have a cascading effect on the

142. BUREAU OF JUST. ASSISTANCE, *supra* note 132, at 1.

143. See JAMES J. WILLIS ET AL., MAXIMIZING THE BENEFITS OF REFORM: INTEGRATING COMPSTAT AND COMMUNITY POLICING IN AMERICA 11–15 (2010), <https://cops.usdoj.gov/RIC/Publications/cops-p178-pub.pdf> (discussing distinctions between CompStat-like programs and community policing efforts); *supra* notes 129–32 and accompanying text; see also BUREAU OF JUST. ASSISTANCE, *supra* note 132, at 24 (“Compstat and community policing can be viewed as co-existing rather than mutually reinforcing’ and the strategies operate ‘in parallel but independently.’”).

144. See *supra* Figure 1.

145. As Herbert Packer put it when describing the values underlying the Crime Control Model:

ability to detect and solve future crimes.¹⁴⁶ The lower the percentage of crimes cleared, the less likely victims may be to believe that reporting crimes to the police will do any good, which lowers the rate of reported crimes, and so on.¹⁴⁷

The disconnect between the “crime problem” and “criminal justice” issues can be seen in the victims’ rights efforts at both state and national levels. The federal Crime Victims’ Rights Act¹⁴⁸ provides for access and information for victims, but with limited exceptions, it is only relevant when a case is filed and a defendant is arrested.¹⁴⁹ (Indeed, in 2010, the Department of Justice’s Office of Legal Counsel expressed the opinion that the Crime Victims’ Rights Act did not apply at all before charges were filed.¹⁵⁰) As Paul Cassell has noted: “[M]any criminal cases may never proceed to formal charging. If

If the laws go unenforced—which is to say, if it is perceived that there is a high percentage of failure to apprehend and convict in the criminal process—a general disregard for legal controls tends to develop. The law-abiding citizen then becomes the victim of all sorts of unjustifiable invasions of his interests. His security of person and property is sharply diminished, and, therefore, so is his liberty to function as a member of society.

PACKER, *supra* note 22, at 158.

146. See PRESIDENT’S COMM’N ON L. ENF’T & ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 96 (1967), <https://www.ncjrs.gov/pdffiles1/nij/42.pdf>.

147. Pizarro et al., *supra* note 19, at 3–4 (“When offenders are not apprehended, the potential deterrent effect of sanctions is diminished and police legitimacy may be undermined. This can result in an increase of fear, legal cynicism, and self-help violent behaviors within communities.” (citations omitted)).

148. 18 U.S.C. § 3771.

149. See *Rights of Federal Crime Victims*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/resources/victim-services/rights-of-federal-crime-victims> (last visited Mar. 30, 2021) (“Most of these rights apply after charges have been filed by a U.S. Attorney’s Office.”). Section 3771(a) sets forth a list of rights that victims have, but most require a court case and an identified perpetrator to be relevant. 18 U.S.C. § 3771(a). However, the right of the victim to be treated fairly and with respect under subsection (a)(8), and the right to confer with the prosecutor about the case under subsection (a)(5), could apply to uncleared crimes and could be asserted in the district court even without an arrest, although it seems unlikely that victims exercise these rights very often. *Id.*

150. See The Availability of Crime Victims’ Rights Under the Crime Victims’ Rights Act of 2004, 35 Op. O.L.C. 1 (Dec. 17, 2010), https://www.justice.gov/sites/default/files/olc/opinions/2010/12/31/availability-crime-victims-rights_0.pdf. This position was sharply challenged by one of the Act’s sponsors and by others. See also Paul G. Cassell et al., *Crime Victims’ Rights During Criminal Investigations? Applying the Crime Victims’ Rights Act Before Criminal Charges Are Filed*, 104 J. CRIM. L. & CRIMINOLOGY 59, 61–62 (2014).

crime victims have no rights during criminal investigations, then many crime victims will never have any rights at all.”¹⁵¹

Each state in turn provides for some form of victims’ rights,¹⁵² many of which track the federal approach of focusing on the adjudication process that follows the report and clearing of the offense.¹⁵³ Beyond that, most states and the federal government provide for some compensation for crime victims even without an arrest and charge,¹⁵⁴ although the ability to obtain compensation often carries with it significant restrictions that highlight an assumed overlap between crime and the criminal justice system. Thus, for example, to be eligible for monetary benefits (the availability of which is often unknown to victims¹⁵⁵), the victim may need to report the

151. Cassell et al., *supra* note 150, at 59. The limited scope of the victims’ rights can be seen even in some cases that are brought into the system. As Cassell and his coauthors explain:

In many cases, prosecutors negotiate pleas well before any charges are ever drafted. If crime victims’ rights enactments do not extend rights to victims until the formal filing of charges, then crime victims can be effectively excluded from the plea bargaining process. . . . Crime victims will also lose other important rights If, for example, prosecutors work out a nonprosecution agreement with an offender, they need not notify his victims of what they are doing or of the fact that the potential charges will never be filed.

Id. at 61.

152. See *Victims’ Rights*, PRETRIAL JUST. CTR. FOR CTS., <https://www.ncsc.org/pjcc/topics/victims> (last visited Mar. 30, 2021) (“All states, the District of Columbia, and most U.S. territories have statutory or constitutional provisions that enumerate rights and protections for victims of crime.”).

153. See *VictimLaw*, OFF. OF JUST. PROGRAMS, U.S. DEP’T OF JUST., <https://www.victimlaw.org/victimlaw/start.do> (last visited Mar. 30, 2021) (extensive database of jurisdiction-specific victims’ rights laws).

154. Victims of Crimes Act, 34 U.S.C. §§ 20101–20111 (outlining the compensation program for victims of federal crimes); see OFF. OF JUST. PROGRAMS, *supra* note 153 (listing state laws and court rules in a searchable database).

155. As one source put it: “Although a broad range of rights and protections are afforded to victims, many victims are unaware of these rights or how to exercise them.” PRETRIAL JUST. CTR. FOR CTS., *supra* note 152; see also MORGAN & TRUMAN, *supra* note 40, at 9 tbl.8 (reporting that in 2018, 10.6% of victims of violent index crimes received assistance from a victim-service agency).

crime to the police,¹⁵⁶ cooperate in the prosecution,¹⁵⁷ and be subject to other limits that will leave victims as a group undercompensated.¹⁵⁸

The focus on victims' rights once they are inside the justice system is hardly surprising—it seems clear that some incentives are needed to encourage crime reporting. The point here is simply that emphasizing crime prevention, in ways that result in clearance rates remaining low, is a policy choice that has important consequences for the victims of uncleared crimes.

2. *Criminal Punishment and Deterrence*

A low clearance rate—and the policy choices that keep those rates low—has broad implications for criminal punishment as well. Retributive notions of justice are obviously not served when a crime is not cleared, nor is there any incapacitation or rehabilitation goal advanced. But low clearance rates have an additional, and important, effect on deterrence.

Standard deterrence theory tells us that people will be persuaded not to commit crimes when the potential cost of doing so outweighs the benefit gained.¹⁵⁹ The rational perpetrator will consider the

156. See, e.g., ALA. CODE § 15-23-12(a)(4) (2020) (stating that compensation “shall not be awarded” if the crime “was reported to a law enforcement officer later than 72 hours after its occurrence”); KAN. STAT. ANN. § 74-7305(e) (2020) (“Compensation may not be awarded unless the criminally injurious conduct resulting in injury or death was reported to a law enforcement officer within 72 hours after its occurrence or the board finds there was good cause for the failure to report within that time.”). In Florida, a crime must be reported to the police within five days for victims to be eligible for compensation. See BUREAU OF VICTIM COMP., FLA. OFF. OF THE ATTY GEN., HOPE BEGINS WITH HELP (2019), [http://myfloridalegal.com/webfiles.nsf/WF/MRAY-8CVP5T/\\$file/BVCVictimCompensationBrochure.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MRAY-8CVP5T/$file/BVCVictimCompensationBrochure.pdf).

157. See, e.g., BUREAU OF VICTIM COMP., *supra* note 156 (noting that to be eligible for compensation, victims “must fully cooperate with law enforcement”); *Assistance for Victims of Violent Crimes*, OFF. OF THE ILL. SEC’Y OF STATE, https://www.cyberdriveillinois.com/departments/court_of_claims/victims.html (last visited Mar. 30, 2021) (“To be eligible for assistance . . . [y]ou must report the crime within 72 hours to law enforcement or seven days for sexual violence, unless unable to do so. You must also cooperate with law enforcement.”).

158. See, e.g., CONN. GEN. STAT. § 54-211(c), (d)(1) (2019) (providing that there is no compensation available for property crimes or for noneconomic loss such as pain and suffering; compensation award capped at \$15,000 for nonhomicide crimes); KAN. STAT. ANN. § 74-7305(c)(1) (2020) (stating that victim compensation “shall be reduced or denied, to the extent, if any that the [e]conomic loss upon which the claimant’s claim is based is recouped from other persons, including collateral sources”); BUREAU OF VICTIM COMP., *supra* note 156 (noting that Florida provides no compensation for property loss unless the victim is at least age 60).

159. COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT’L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES:

likelihood of being caught and the discounted severity of the punishment and compare that to the expected benefits of successfully completing the offense. This in turn suggests that efforts to reduce crime by increasing the deterrent effect can take one of two paths, or both—increase the likelihood that a perpetrator will be caught or increase the severity of the punishment.¹⁶⁰ The first would require increasing the clearance rate;¹⁶¹ the second requires increasing the punishment of those who are caught.

This basic model has long been criticized as unrealistic (many crimes do not appear to be the product of high-level, nuanced interest balancing¹⁶²) and too simplistic.¹⁶³ There are other variables that can

EXPLORING CAUSES AND CONSEQUENCES 132 (Jeremy Travis et al., eds., 2014), <http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes> (“In the classical theory of deterrence, crime is averted when the expected costs of punishment exceed the benefits of offending.”). See generally Cook, *supra* note 19, at 141 (“From the time of Jeremy Bentham onward, it has been argued that the rational criminal will adjust his rate of crime commission to changes in the (perceived) effectiveness of the criminal justice system.”).

160. See, e.g., Steven Klepper & Daniel Nagin, *The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited*, 27 CRIMINOLOGY 721, 741 (1989) (“[O]ur findings suggest that both the certainty and severity of punishment are deterrents . . .”).

161. Of course, the deterrent effect comes not just from an arrest and charge but also from the likelihood that some punishment will follow these events. COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, *supra* note 159, at 130 (“[T]he certainty of punishment depends on the probability of arrest given a criminal offense and the probability of punishment given an arrest.”). Given the very high rates at which defendants plead guilty and the high percentage of trials that end up with a conviction, it seems unlikely the perpetrators would discount the likelihood of punishment after an arrest to any significant degree. See, e.g., Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 341 (2012) (noting that over 95% of federal felony convictions stem from guilty pleas).

162. As Paul Robinson and John Darley have summarized the point:

[I]ndividuals who commit crimes are likely to have certain individual patterns of thought characterized by impulsivity and risk-seeking behaviour, and to be under the influence of alcohol or drugs at the time they decide to commit crimes. Their individual pathologies are likely to be extended and amplified by the fact that the decision to commit a crime is often a group rather than an individual decision, and the group processes shift its members toward taking more risky actions, and deindividuates them, facilitating the commission of destructive behaviours. It is difficult to fit this to the image of a person who is affected by complex rational deterrence considerations.

See Robinson & Darley, *supra* note 120, at 181.

163. See, e.g., U.S. DEP’T OF JUST., NAT’L INST. OF JUST., FIVE THINGS ABOUT DETERRENCE 1 (2016), <https://www.ncjrs.gov/pdffiles1/nij/247350.pdf> (asserting that the “certainty of being caught is a vastly more powerful deterrent than the

affect the calculus,¹⁶⁴ most notably the background of the potential offender¹⁶⁵ and the swiftness with which the punishment is imposed.¹⁶⁶ But taking the base model as a starting point, there is little doubt that crime policy in modern times has favored increasing the severity of punishment over increasing the certainty of capture.¹⁶⁷ The clearance rate has hardly moved, but at least until recently,¹⁶⁸

punishment,” “[s]ending an individual convicted of a crime to prison isn’t a very effective way to deter crime,” and “[i]ncreasing the severity of punishment does little to deter crime”); Robinson & Darley, *supra* note 120, at 174 (discussing other relevant factors such as offender’s lack of knowledge of legal rules; perceived cost-benefit analysis that urges violation; and social, situational, and chemical influences that overbear cost-benefit analysis).

164. See Robinson & Darley, *supra* note 120, at 177 (discussing the array of factors that can influence the outcome of a criminal action, including “[v]ariations in investigative resources, in police efficiency, in prosecutorial policies and exercise of discretion, in witness availability, [and] in the exercise of judicial sentencing discretion”).

165. See Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 219 (2008) (noting that in communities that experience high levels of crime and incarceration, potential offenders may see prison as a normal experience, thereby reducing the deterrent effect of the threat of prison); Robinson & Darley, *supra* note 120, at 192 (“[T]he conventional wisdom that the publicized existence of long duration prison sentence serves as a deterrent . . . ignores what might be called the ‘leakage of the truth’ that prison is ‘not so bad’ into the communities of people who are at risk of committing crimes but have not yet experienced a prison term. The reality is that that group is being socialized by the communities within which they grow up and currently exist.”).

166. Both Jeremy Bentham and Cesare Beccaria believed that the speed with which the punishment followed the crime (the “celerity” of the sanction) had an impact on the deterrent effect, although as the National Research Council Report noted, “[t]he theoretical basis for [this belief] is ambiguous, as is the empirical evidence [of] its effectiveness.” COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, *supra* note 159, at 132–33. Cf. Robinson & Darley, *supra* note 120, at 193–95 (noting that “[i]t is a classic finding that the effects of punishment in deterring behaviour drop off rapidly as the delay increases between the transgressive response and the administration of punishment” and discussing the potential effects of delays on deterrence).

167. See, e.g., Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 956–57 (2004) (commenting that over the last four decades, lawmakers have relied primarily upon deterrence analyses when formulating rules of criminal law).

168. For a brief discussion of how attitudes of public officials and the general public have changed in recent years, see Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 AM. CRIM. L. REV. 1579, 1580–81 (2019).

increasing the punishment for crimes was a standard legislative response to crime.¹⁶⁹

The result has been a predictable array of problems. Even after recent declines in both state and federal prison populations, the United States still incarcerates both the highest number of inmates and the highest percentage of its population in the world.¹⁷⁰ Mandatory minimum sentences, “three strikes” laws, weapons enhancement provisions, and other sentencing provisions, many of which were specifically justified on deterrence grounds,¹⁷¹ helped increase inmate populations by more than 800% between 1972 and 2009.¹⁷² The problems this has created have been well-documented,¹⁷³ and as a result, both states and the federal government have recently taken steps to ease the number of people behind bars, including some reductions in the level of punishments authorized for certain (typically nonviolent) crimes.¹⁷⁴ But raising the punishment for those convicted—not because we have a newfound understanding of the seriousness of the crime but in an effort to increase deterrence—remains a frequently used legislative option, despite research that questions the effectiveness of doing so.¹⁷⁵

169. For a discussion of the range of criminal law rules that have been justified with a deterrence rationale, see Robinson & Darley, *supra* note 167, at 957–58.

170. See *Incarceration Rates by Country 2021*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/incarceration-rates-by-country> (last visited Mar. 30, 2021) (showing that the U.S. has more than two million inmates, at a rate of 639 per 100,000 people, both of which are the highest in the world).

171. COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, *supra* note 159, at 44 (“[F]rom the mid-1980s through 1996, changes in sentencing policy were aimed primarily at making sentences for drug and violent crimes harsher and their imposition more certain. The principal mechanisms to these ends were mandatory minimum sentences, ‘three strikes’ laws, laws labeled ‘truth-in-sentencing,’ and laws mandating life without possibility of parole for certain offenses.”); see also *id.* at 83.

172. Leipold, *supra* note 168, at 1587.

173. See *id.* at 1584–87; see also William Hubbard, *Remarks on Collateral Consequences of Mass Incarceration*, 2 CRIM. L. PRAC. 10, 10–12 (2014) (highlighting the “lifelong barriers to reentry for ex-offenders in all areas of life, including access to housing, employment, public assistance, education, and the ballot box . . .”); Marc Mauer, *Race to Incarcerate: The Causes and Consequences of Mass Incarceration*, 21 ROGER WILLIAMS U. L. REV. 447, 454–59 (2016) (presenting and explaining the consequences of mass incarceration).

174. See *35 States Reform Criminal Justice Policies Through Justice Reinvestment*, THE PEW CHARITABLE TRS. (July 2018), https://www.pewtrusts.org/-/media/assets/2018/07/pspp_reform_matrix.pdf.

175. “[T]here is little evidence that increases in the length of already long prison sentences yield general deterrent effects that are sufficiently large to justify their social and economic costs. Such severity-based deterrence measures

One problem with this approach is that it may well be backwards. Since the early days of deterrence theory, scholars have argued that as between the two main drivers of deterrence—certainty of capture and severity of punishment—certainty is more important.¹⁷⁶ Indeed, one of the earliest deterrence theorists, Cesare Beccaria, argued that “[o]ne of the greatest curbs on crime is not the cruelty of punishments, but their infallibility The certainty of a punishment, even if it be moderate, will always make a stronger impression than the fear of another which is more terrible.”¹⁷⁷ Modern scholars have largely agreed.¹⁷⁸

Of course, the “certainty of punishment” can take different forms. Punishment may be more certain if there is a greater police presence in the area of potential crimes, which can deter a person from attempting the crime in the first instance.¹⁷⁹ But more important for current purposes, the certainty of punishment would be increased by improving the clearance rate—raising the expected cost of the crime by making the imposition of a painful sanction more likely. Solving more of the crimes that are committed should then contribute to the deterrent effect of the law, which should in turn contribute to a lower crime rate.

Policy choices that fail to explicitly consider the impact that the clearance rate has on the deterrent effect thus limits the legislature’s options and potentially fails to consider the full and relative costs of focusing on crime prevention rather than solving crime.

3. *Police Reform*

Finally, clearance rates have implications for law enforcement reform. Amid the criticisms of racist, aggressive, and intrusive police

include ‘three strikes, you’re out,’ life without the possibility of parole, and other laws that mandate lengthy prison sentences.” Daniel S. Nagin, *Deterrence in the Twenty-First Century*, in 42 CRIME & JUSTICE IN AMERICA, 1975–2025, 199, 201 (Michael Tonry ed., 2013); see also Robinson & Darley, *supra* note 120, at 189–90 (“[R]ecent psychological research presents a radical challenge to the role of duration in the experience of punishment. . . . All of this [research] is bad news for the standard deterrence practice, which relies on sentence duration to adjust the magnitude of the punishment imposed by a prison term.”).

176. See CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 58 (H. Paolucci, trans., Bobbs-Merrill 1963) (1764); see also M. S. Guttmacher, *Individualization of Sentence*, 3 CANADIAN J. CORR. 226, 228–30 (1961) (agreeing with Beccaria’s argument that certainty of capture is more important to deterrence theory).

177. BECCARIA, *supra* note 176, at 58.

178. As one review of the research puts it: “I [have] conclude[d], as have many prior reviews of deterrence research, that evidence in support of the deterrent effect of various measures of the certainty of punishment is far more convincing and consistent than the severity of punishment.” Nagin, *supra* note 175, at 201.

179. See *id.* (“[T]here is substantial evidence that increasing the visibility of the police by hiring more officers and allocating existing officers in ways that materially heighten the perceived risk of apprehension can deter crimes.”).

behavior, there should be room for a discussion of how well the police are performing their core functions.

Low and steady clearance rates would seem to be ready ammunition for those seeking radical change. If most crimes are never reported, and if most serious crimes are not cleared, we might fairly ask whether the current structure of the justice system is up to the task of managing the crime problem. At a minimum, the clearance data support the notion that law enforcement's portfolio may be too large. If solving serious crimes is a core function, and if the diversion of resources to other tasks is a factor in keeping clearance rates low, perhaps the parceling out of community service functions that police now perform would help.¹⁸⁰

But as noted, clearance rates are only part of the law enforcement report card. Preventing crime in the first instance is surely a worthy goal, perhaps a paramount one, and the nationwide success in reducing crime over the last twenty years is a reason to celebrate. Not all of the crime decrease is due to the police, but an important part of it is,¹⁸¹ and so efforts at radical reform of the police should proceed with caution. Ensuring that the police act lawfully and treat people appropriately is critical, but when we move beyond how police perform their job to what jobs need to be done, we should have a more informed understanding of how the job is being done now.

A fuller understanding could begin with better data. In particular, it would be helpful to have more precise information on how—and how often—cases are cleared by exceptional means.¹⁸² When the police clear a case without an arrest, on what basis are they applying this label? Are the “exceptional means” really exceptions, or are they a substantial proportion of the crimes solved? Most of these clearances are undoubtedly legitimate, but the anecdotal evidence is troubling,¹⁸³ and after nearly ninety years of collecting clearance rates, this topic remains unnecessarily obscure.

More broadly, clearance rates can inform the discussion on what our law enforcement priorities should be. Pursuing drug and gun crimes may be sensible law enforcement choices, even if they come at the expense of clearing index crimes, but they are choices that should

180. See Karla Adam & Rick Noack, *Defund the Police? Other Countries Have Narrowed Their Role and Boosted Other Services*, WASH. POST (June 14, 2020, 7:00 AM), https://www.washingtonpost.com/world/europe/police-protests-countries-reforms/2020/06/13/596eab16-abf2-11ea-a43b-be9f6494a87d_story.html. Note that narrowing the focus of what the police do does not necessarily or logically suggest that police budgets should be cut to pay some other entity to perform these tasks. The proposals to “defund” the police—many of which are overtly punitive toward law enforcement—would seem highly counterproductive if the goal is to increase the number of crimes that are solved.

181. See *supra* note 140 and accompanying text.

182. See *supra* notes 16–17 and accompanying text.

183. See *supra* notes 51–52 and accompanying text.

be made deliberately. Similarly, deterring crime through police presence in high-crime neighborhoods probably leads to greater social welfare overall than clearing more offenses after they occur. But the impact on crime victims and the corrosive effects of too many instances of perpetrators remaining at large and unpunished are costs that deserve a more prominent accounting than they currently receive.

IV. CONCLUSION

The thesis of this Article has been that low and steady clearance rates over the last few decades are, on the surface, difficult to explain. Crime detection techniques have gotten better; the legal landscape has become more favorable to law enforcement; both the absolute and the relative number of sworn officers have increased; and crime has decreased. This powerful combination of circumstances should have led to a higher percentage of crimes being solved, but that has not been the case.

While there is no single explanation, the diversion of resources from index crimes and a change in focus toward crime prevention seem to have the most explanatory power. But as appealing as the shift toward prevention is, there are important public policy implications to the shift. Despite the decrease in crime over the last twenty years, the number of serious crimes remains high in absolute terms: tens of thousands of homicides, rapes, robberies, and aggravated assaults and hundreds of thousands of burglaries, thefts, and arsons, a large percentage of which remain unsolved. The fact that we have lower crime is not the same as having a low amount of crime, and so the effectiveness of the police in solving those crimes remains a critical topic.

Far more study of clearance rates and their implications is needed, and this Article has raised more questions than it has answered. But the gap between crime and criminal justice is large enough, and the impact of unresolved cases is important enough, to make further study worthwhile.