



## Do We Have a Mass Incarceration Problem? Compared to What?

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I would like to thank the Cato Institute for giving me the opportunity to respond to the provocative [essay](#) by Professors Jason Brennan and Chris W. Surprenant, and to engage with my friend Clark Neily on the important issues raised by this article. As is often the case with provocative essays, I agree with some of what it says, while disagreeing with much more.

Brennan and Surprenant begin: “Horrific incidents like the recent video of a Minneapolis police officer kneeling on the neck of George Floyd happen more often than most people think. Almost daily, we see police officers beating or shoot subdued citizens ....”

Let’s break this down a bit. While there is no denying that the murder of George Floyd—and I do believe it was murder—was a horrific event, the authors cite no data to support their hyperbolic and inflammatory statement that police beatings and shootings of already-subdued citizens are an almost daily occurrence. While impossible to prove or disprove, my guess is that, while such incidents occur, they are relatively rare. There are roughly 375 million police-civilian interactions every year, yet very few result in injury to either the officer or the civilian. The incidents of police brutality that do occur are isolated examples of misconduct, not standard operating procedure for police departments. While the authors hyperlink to a horrific video of an officer shooting a civilian (white, by the way) who was clearly trying to cooperate, there are many more videos of police officers being shot and killed by civilians.

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The main theses of this article are that we incarcerate too many people and that our criminal justice system is suffused with racism. As to the former charge, the authors note that per capita incarceration rates have risen significantly since the early 1970s and are much higher than other countries around the world, leading many to cite a “mass incarceration” problem. While it is certainly true that we have the [highest incarceration](#) rate in the world, there are many countries where crime, especially violent crime, is out of control and corruption is endemic. Such countries, I suspect, have an under-incarceration problem, and I am glad that we incarcerate more people than they do.

The authors compare today’s per capita incarceration rates to those that existed in 1971; however, it is hardly surprising that our incarceration rates have risen since then. After all, crime rates in this country rose precipitously in the ‘70s, ‘80s, and ‘90s, leading to many more arrests

and convictions. Crime (until recently) has dropped since then, thank God! And while well-respected economists such as Steven Levitt and William Spelman believe that increased incarceration is responsible for only part of the decline, it is not an insignificant contributor.

Moreover, some of the “fixes” offered by the authors to our “mass incarceration” problem would not, in my view, improve the situation. For example, they say we should “look for alternatives to imprisonment” and that prisons should “be reserved for convicted violent offenders who represent a continuing safety threat to others, and only if there is no better way to contain them.” Many jurisdictions are now utilizing diversionary courts, such as drug courts, for certain offenders. The D.C. Advisory Committee to the U.S. Commission on Civil Rights, which I chair, is finalizing a report about D.C.’s highly successful mental health court. Nonetheless, if the authors believe that prison should house only violent offenders, they have obviously never met fraudsters like [Bernie Madoff](#), [Bernie Ebbers](#), [James Lewis](#), [Tom Petters](#) or other scam artists such as the telemarketers I used to prosecute who preyed on the elderly depriving them of their life savings. Yes, their victims were still alive, but they were devastated, and the perpetrators deserved to be imprisoned. Should petty thieves who continue to recidivate or refuse to comply with the conditions of diversionary courts or supervised release get a free pass? And if a stalker kills his intended victim but clearly means no harm to anyone else, and thus is not a “continuing safety threat,” is he to remain free too? I don’t think so.

As to the charge of systemic racism, having never been stopped for “driving while black” or followed by a security guard as I sauntered down the aisles of a department store, I approach the issue with some humility. Nonetheless, it again seems to me that the authors have not proven their case.

To support this charge, they hyperlink to an [article](#) by Prof. Roland Fryer, but fail to note that with respect to officer-involved shootings, Fryer found no evidence suggesting racial bias, and that while racism might explain other findings, “the statistical evidence doesn’t prove it.” Indeed, the odds of an officer being shot by a black person are [significantly higher](#) than the odds of an unarmed black person being shot by an officer of any race.

Brennan and Surprenant seem to be perplexed and troubled by the fact that racism and poverty “went on a strong downward trend while the criminal justice system’s degree of harshness and punitiveness went on a strong upward trend.” To me, this is not perplexing at all, especially when one considers that the vast majority of crime is intra-racial and much of that crime takes place in the inner cities in communities of color.

Black-on-black crime has been and remains a naggingly persistent and seemingly intractable problem. In neighborhoods where looting, gang activity, and drive-by shootings are commonplace, people are trapped inside their homes and businesses suffer. When crime rates go down, people are liberated from their homes and more businesses open and flourish, improving economic prospects, safety, and emotional well-being within the community. Consistently high crime rates in communities of color also militate in favor of assigning *more* police officers to those communities, not fewer. This will, of course, lead to more police-civilian encounters, some of which will inevitably go awry, although the overwhelming majority will not.

Contrary to the beliefs of those misguided individuals pushing the defund/dismantle movement, while many individuals in those communities are wary of the police, [most residents](#) still want more, not less, of a police presence. This was evident most recently in New York City where

local officials dissolved a special anti-crime unit in the wake of protests, sparking a backlash from black community leaders who are now asking for more police protection. The interests and views of these concerned residents are entitled to respect too. Indeed, one suspects that if the police departments made a conscious decision to spend more resources protecting predominantly white communities, they would be accused of racism for ignoring black victims.

While the authors suggest, or at least allude to, some proposals that I support, such as mens rea reform, addressing overcriminalization, and civil asset forfeiture reform, some of their other “fixes” strike me as being off the mark.

They call, for example, for appointed prosecutors, arguing that elected prosecutors and other politicians win by running on “tough on crime” platforms, as if that is a problem. While that may have once been true, there are now dozens of prosecutors and politicians who ran on “let’s end mass incarceration and systemic racism” messages and won. Even our current presidential candidates are touting criminal justice reform and disavowing past “tough on crime” positions. Moreover, many of the criticisms that the authors level at elected prosecutors (for seeking high sentences) and judges (for imposing them) have also been leveled at federal prosecutors and judges, who are appointed.

The authors call for eliminating qualified immunity, without any discussion of the potential deleterious consequences that could result. They say civil damages assessed against bad cops should be paid out of funds set aside for good cops who put their lives on the line every day to protect us without explaining why this is fair or just. They contend juries, rather than judges, should be presented with sentencing options from the prosecutor and the defendant’s attorney, but the prosecutor’s recommendation should be imposed only if the jurors unanimously endorse it, without explaining why this task should be left to juries and why unanimity should be required. While I agree with a couple of their proposals and am sympathetic to others, space limitations (and an awareness of the patience of my readers) prevent me from delineating the many concerns I have with their other proffered solutions.

The authors end their article by stating that our “system is broken from top to bottom.” Surely there is room for improvement, but I fundamentally disagree with this conclusion. At the outset, they state that “Only 11 U.S. states incarcerate citizens at a lower rate than the Russian Federation. 25 U.S. states, including overwhelmingly white states like Wyoming and Montana, put people in prison at a higher rate than repressive, authoritarian Cuba.” But given the choice, would anyone subject themselves to a trial in Russia or Cuba or any of the dozens of other countries that fail to provide what we consider basic procedural safeguards over a trial in any of the 50 states? I didn’t think so.