Dangerous Bedfellows

The stalemate on criminal justice reform.

BY RENA STEINZOR MAY 11, 2016

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In February 2015, a startling collection of strange political bedfellows assembled to promote mass-incarceration reform at all levels of government. The U.S., with less than 5 percent of the world's population, incarcerates more than 20 percent of all prisoners. Sixty percent of the imprisoned are racial and ethnic

minorities. Between 2001 and 2010, eight million people were arrested on marijuana charges; African Americans were 3.73 times more likely to be arrested for possession as whites.

Fiscal and libertarian conservatives (Koch Industries, FreedomWorks, and Right on Crime) joined the group to emphasize the urgency of cutting prison spending, which is about $80 billion annually and unsustainable for many states, as well as the importance of freeing nonviolent offenders from government control. Liberals (the Leadership Conference Education Fund, the NAACP, the ACLU, and the Center for American Progress) hoped to rebuild communities by preventing lengthy prison terms for people who commit nonviolent drug offenses. Some of the organizations had worked together at the state level, establishing a modicum of trust that they hoped could survive a presidential election year. With a $2 million annual budget provided by the Laura and John Arnold, the Ford, and the MacArthur foundations, as well as Koch Industries, they formed the Coalition for Public Safety, which has an executive director, a paid staff, and a website. The ACLU also received a $50 million grant from George Soros's Open Society Institute to reduce incarceration rates.

Denis Calabrese, long-time communications expert for conservative causes and now the president of the Arnold Foundation, described the coalition to *The New York Times* as "putting dogs and cats together in the same room." The group's first executive director, Christine Leonard, a former staffer for Senator Ted Kennedy, promised that the group would mobilize behind comprehensive proposals that could achieve consensus among its broad-spectrum members.

The coalition began with the low-hanging fruit: reforms designed to eliminate mandatory minimums for nonviolent drug offenders and to give judges more

AP PHOTO/PAUL VERNON

discretion in sentencing other defendants. Its members worked closely with Democratic Senator Cory Booker and a bipartisan group of Senate Judiciary Committee members, including Democrats Patrick Leahy, Charles Schumer, and Sheldon Whitehouse, and Republicans John Cornyn, Lindsey Graham, Charles Grassley, and Mike Lee. They had the enthusiastic support of President Barack Obama, who used his bully pulpit to promote these issues.

But then, after months of closed-door negotiations to craft an acceptable compromise and on the eve of a Senate Judiciary Committee vote, what Whitehouse describes as a "Trojan horse" rumbled noisily onto the stage in the form of demands by Republican Senator Orrin Hatch that the bipartisan group add provisions to weaken white-collar criminal enforcement. This hidden agenda was the central goal of business conservatives, led by Charles and David Koch. The senators refused the provisions, and the committee passed the legislation without the amendment.

Conservative lobbyists persisted. And in the House, the dynamics turned out to be quite different. Succumbing to Judiciary Committee Chairman Bob Goodlatte's threat to kill sentencing reform unless white-collar relief was added, ranking Democrats John Conyers of Michigan and Sheila Jackson Lee of Texas, long-standing members of the Congressional Black Caucus, voted to bundle the two measures. As a sweetener, Goodlatte agreed with Conyers and Jackson Lee to consider other criminal justice reforms-for example, provisions easing inmates' re-entry into society-with the goal of assembling a comprehensive package of legislation known as a "manager's amendment" that would then

move to the House floor. Such large packages make it virtually impossible for individual members to change any specific aspect of the deal.

House Speaker Paul Ryan has promised to schedule floor time for the package "this year," a vague commitment that could include a potential lame duck session after the presidential election. The Senate's schedule for a floor vote on the legislation developed by the bipartisan group is unclear. Senior prosecutors at the Department of Justice are fiercely opposed to the Hatch bill and the Goodlatte-Conyers deal. Obama has done what he can without Congress, using executive orders to ban solitary confinement for juveniles in federal prison and compulsory disclosure of prison records on federal job applications.

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> Given acute congressional dysfunction in an age of extreme vituperation, a stalemate could persist until a new president is inaugurated.

CRIMINAL LAW ESTABLISHES two tests for culpability: whether the defendant committed an *actus reus*, or an illegal act, and whether he possessed *mens rea*, or a guilty mind. Conservative advocates of higher bars to corporate prosecutions have directed their fire primarily at the second test. They argue that Congress has been

both wanton and sloppy in criminalizing behavior, allowing prosecutors to avoid proving that defendants knew they committed a crime, a loophole that supposedly leads to widespread abuse.

Conservatives argue that traditionally harsh punishments apply to people who murder, steal, or assault. These penalties are appropriate because everyone knows such behavior is *malum in se*, or obviously, almost without exception, wrong. But the supposed "over-criminalization" criticized by the right largely targets acts or omissions that are *malum prohibitum*, meaning they are deemed illegal under highly technical statutes and regulations that are unintelligible to the average person, including such statutory schemes as Dodd-Frank banking reform and complex environmental laws. Well-meaning corporations and their hard-working managers should not be prosecuted when they stumble over abstruse rules they cannot understand.

John Malcolm, director of the Heritage Foundation's Edwin Meese III Center for Legal and Judicial Studies and the architect of *mens rea* reform, made these points in a September 2015 call to arms:

AP PHOTO/J. SCOTT APPLEWHITE

Today, nearly 5,000 federal criminal statutes are scattered throughout the 51 titles of the U.S. Code, and buried within the Code of Federal Regulations, which is composed of approximately 200 volumes with over 80,000 pages, are an estimated 300,000 or more (in fact, likely many more) criminal regulatory offenses or so-called public welfare offenses. In fact, it is a dirty little secret that nobody, not even Congress or the Department of Justice, knows precisely how many

criminal laws and regulations currently exist. Many of these laws lack adequate, or even any, mens rea standards-meaning that a prosecutor does not even have to prove that the accused had any intent whatsoever to violate the law or even knew he was violating a law in order to convict him. In other words, innocent mistakes or accidents can become crimes.

Malcolm especially condemns so-called strict liability offenses that deal with what are known as public welfare offenses, which harm public health, consumer safety, or the environment. Virtually all of these provisions are misdemeanors, punishable by no more than one year in jail. Unlike other statutes, strict liability provisions do not specify a state of mind (mens rea) standard on their face and they have been interpreted to mean that the government must only prove a defendant was conscious of his bad behavior without proving that he knew it was illegal. The justification for such prosecutions is that anyone engaged in transactions with the public that have the potential to threaten people's lives or well-being must be especially careful to understand all the steps that must be taken to prevent harm.

The conservative solution to the over-criminalization problem is to pass legislation that would insert a new definition of "knowledge" into any provision of law that happens to omit an explicit standard for the *mens rea* part of the prosecutor's burden of proof. The new definition would override decades of judge-made laws

that interpreted what constitutes a guilty mind for each statute. In their place, conservatives would substitute a far higher burden of proof for prosecutors. Under the Hatch bill, the government must prove that a defendant was "practically certain" his acts or omissions would have a specific result. The Goodlatte-Conyers deal would require 1) proof that a "reasonable person" would have known that what he was doing was wrong, and then require prosecutors to double back and deliver, and 2) proof that the defendant also harbored that knowledge, in effect eliminating the long-standing legal principle that ignorance of the law is no defense. These new hurdles will confuse judges and juries and could chill prosecutors from even attempting many white-collar prosecutions-which seems to be the point.

FOR A VARIETY OF HISTORICAL reasons, especially the so-called war on drugs, the country has an acute overkill problem with regard to street crime. In the white-collar crime arena, the problem is the opposite. Not a single financial institution or executive has ever been charged criminally for the activities that produced the 2008 recession. DOJ has even blinked regarding cases where workers and consumers lost their lives as a direct result of criminal behavior. Two vivid, recent examples are cited in a January 2016 report released by Massachusetts Senator Elizabeth Warren, titled "Rigged Justice: How Weak Enforcement Lets Corporate Offenders Off Easy."

In 2003, General Motors was in a rush to get the Cobalt, its new subcompact car, into showrooms for the 2004 model year. Compliance with fuel-efficiency standards is calculated based on the average achieved by an automaker's entire fleet. Company executives needed the

AP PHOTO/EVAN VUCCI

efficient little cars to offset highly profitable sales of the fuel-guzzling trucks that are its major source of profits in the American market. But the new subcompacts had a fatal design flaw. Their ignition switch systems were so low on torque that they would rotate into the "accessory" position, stalling the engine, if the driver did nothing more than brush the key fob with a knee. An on-road stall meant the loss of power steering, brakes, and functioning airbags. If the cars were traveling at any speed, a sudden stall could cause drivers to lose control.

In the absence of congressional action, President Obama has signed executive orders to ban solitary confinement for juveniles in federal prison and compulsory disclosure of prison records on federal job applications. Here, Obama pauses as he speaks at the El Reno Federal Correctional Institution in El Reno, Oklahoma.

As the evidence mounted that the stalls were causing serious accidents, GM engineers resisted acknowledging the switch defect; instead they categorized it as an "annoyance," the lowest level of severity for glitches in a vehicle's design, as opposed to the severe safety defect it undoubtedly was. By 2006, Raymond DeGiorgio, the engineer in charge of the ignition switch system in the Cobalt, fixed the defect so that a better switch could be installed in new cars. But he also made sure that the part number did not change, leaving admittedly dangerous cars on the road. DeGiorgio finally admitted to this cover-up in a 2013 deposition taken by plaintiffs' lawyers. Still, executives resisted until 2014, when GM finally agreed to a recall. GM has provided compensation to the families of 124 people killed in ignition switch accidents, but the final number of fatalities and injuries is likely to be significantly larger when all the pending cases are

resolved. DeGiorgio and 14 other senior managers were fired.

The case would seem ripe for a criminal prosecution, and DOJ opened such an investigation. But in September 2015, prosecutors announced a "deferred prosecution agreement" with GM, suspending any criminal charges so long as the company pays a fine of $900 million and otherwise behaves itself for three years. No individual was charged, and none are expected to be. In fact, deferred prosecution agreements have become the norm in big corporate settlements.

The second example occurred in May 2015, when the Justice Department settled a big case against five of the world's largest banks-Citigroup, JPMorgan Chase, Barclays, the Royal Bank of Scotland, and UBS-for crimes extending over five years that involved daily efforts to manipulate the foreign currency market and defraud their clients. The conspiracy was coordinated among the banks by traders using Internet chat rooms. The gist of these criminal activities was price-fixing: The banks cheated their clients by manipulating market prices of currencies. One bank would build its investment position in a currency and then dump the currency all at once, moving prices down. Other banks, warned in advance about such maneuvers through the chat room, would cooperate, allowing the perpetrator to cover up its windfall.

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> Together, the banks paid $2.7 billion in fines. No individual-trader or supervisory executive-was charged.

The Warren report describes an additional 16 cases of comparable size and ramifications where DOJ white-collar enforcement was inexcusably weak; all occurred in 2015, and she has promised annual updates. They show that far from having a white-collar over-criminalization problem, the legal system suffers from a severe under-criminalization problem.

Conservative advocates of white-collar crime reform point to an entirely different galaxy of examples to prove their case. The Heritage Foundation has produced a glossy publication entitled "USA vs. YOU" that sets forth the sad stories of several ill-fated individuals who were persecuted by federal prosecutors without justification. Several of these anecdotes do not stand up to scrutiny. The behavior targeted by the indictment had harmful consequences, however sympathetic the defendant appeared as an individual person. Punishment was typically light-payment of a small fine or probation. The anecdotes are not supported by independent sources, defeating even diligent efforts to evaluate them.

Take, for example, the poster child for the Heritage roster of victims. Lawrence Lewis served as the director of engineering for Knollwood, a nursing home in Washington, D.C. He is African American. Lewis is featured on the Heritage website, has testified before Congress, and has visited the offices of members who now support the reforms Heritage advocates. No question, Lewis is a sympathetic figure. According to the memorandum his attorneys prepared prior to sentencing, he went to night school to gain engineering skills, was the sole supporter of his 91-year-old mother and two teenage daughters, did not have a criminal record, and had three brothers, all of whom were victims of homicide at an early age.

But Lewis's crime was far less sympathetic. The sewage system at Knollwood repeatedly backed up because

adult diapers were stuffed down the toilet. On several occasions, Lewis dealt with the backups by flushing the raw sewage through a hose down the driveway of the nursing home and into a storm drain that had an outfall pipe feeding into Rock Creek, the central feature of one of the most beautiful urban parks in the country. Lewis said he was unaware of the fact that the storm drain led directly to the creek and instead thought it conveyed the raw sewage to a wastewater treatment plant. Court records do not explain why, as chief engineer, he neglected the sewage backup problem for so long.

Lewis was indicted on a single misdemeanor count for negligently violating the Clean Water Act. He was represented by an experienced criminal defense attorney and advised to plead guilty. He received probation. If this kind of story is the best Heritage can manage, it's far from persuasive evidence for a wholesale gutting of standards for white-collar prosecutions.

TOM WILLIAMS/CQ ROLL CALL/AP IMAGES

Digging deeper, it turns out that self-interest of America's most powerful conservative donors explains a lot of this crusade.

AS DISCUSSIONS OF THE creation of the Coalition for Public Safety progressed, the involvement of the Koch brothers signaled a remarkable new form of bipartisanship. A month before the coalition's launch, the Kochs announced that the political network of conservative donors they created had budgeted $889 million to influence the 2016 election, covering both the presidency and seats in Congress. This astoundingly large amount of money follows the $400 million they

spent unsuccessfully in 2012 to defeat President Obama for a second term.

Although political influence and embedding conservative principles into the structure and content of governing is their primary interest, according to *New Yorker* writer Jane Mayer, author of *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right*, the Kochs are also in the midst of a campaign to change their public image. They have consciously adopted causes that demonstrate concern for the welfare of the poor, including and especially proposals to ameliorate mass incarceration. Fraser Seitel, a public-relations expert, told Mayer, "They're waging a charm offensive to reset the image of the Kochs from bogeymen shrouded in secrecy to philanthropists who are supporting black colleges and indigent defense."

On the day the coalition launched, Neera Tanden, president of the Center for American Progress (CAP), told *The New York Times*: "We have in the past and will in the future have criticism of the policy agenda of the Koch brother companies, but where we can find common ground on issues, we will go forward. I think it speaks to the importance of the issue." Tanden's pragmatism seems reasonable given the dual realities that criminal justice reform must be accomplished through legislation and that nothing much can move through Congress these days without wide-spectrum political support.

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> Liberal members were aware that conservatives, including the Kochs, had long advocated white-collar criminal reform.

What they may not have grasped was that the Kochs were harboring a deep-seated commitment to vengeance over an Environmental Protection Agency (EPA) enforcement action brought more than 15 years before. In an interview with *The New York Times* in November 2015, Mark Holden, general counsel and senior vice president of Koch Industries, acknowledged that these efforts were "inspired in part" by that case-the only one mentioned-which involved environmental violations at a Koch Industries refinery in Texas.

The indictment in *U.S. v. Koch Industries, Inc.* was filed on September 28, 2000, about three months before President Bill Clinton left office. The government alleged that the company and four of its employees had deliberately violated a rule issued under the Clean Air Act that restricts the amount of airborne benzene emitted by oil refineries. The facility at issue was the "West Plant," a unit within the Kochs' sprawling refinery in Corpus Christi, Texas. Even back at that time, which was during the heyday of environmental criminal prosecutions, charging individual employees was unusual, and indicated a serious case.

None of the four employees were low-level employees. David L. Lamp was the plant manager; Vincent A. Mietlicki was an in-house attorney designated as the "environmental manager" for the refinery as a whole; John C. Wadsworth was a company vice president and refinery manager in Nueces County; and James W. Weathers Jr. was an environmental engineer for the West Plant. Or, in other words, they were collectively responsible, compensated, and trained to figure out how to comply with the allegedly hyper-technical rules that protect public health.

Benzene is a potent carcinogen and can cause acute respiratory distress when inhaled. Emissions are heavily regulated in the workplace and the ambient

environment. At the Koch plant, benzene was part of an aqueous (water-based) waste stream, but the chemical is not soluble in water and quite volatile, properties that meant it easily off-gassed from the waste stream and was released into the air. Because the level of benzene in the waste generated by the plant was above the EPA's cutoff of ten tons annually, the plant was required to install equipment that would capture it before it vaporized, preventing public exposure. Everyone involved knew what the equipment was and everyone knew it needed to operate properly.

The company's first step was to apply for a waiver of these control requirements; the request was granted by Texas regulators who implement the rules drafted by the EPA. The waiver went into effect in 1993, ostensibly to give plant managers time to purchase appropriate pollution-control equipment and install it by 1995, when the waiver would expire. But 1995 came and went without activation of the equipment.

> “A whistleblower named Sally Barnes-Soliz reported to Texas regulators that the company had released at least 91 metric tons of benzene during this time period, an amount that was 15 times the legal limit.

The federal indictment alleged that the four men conspired to disconnect the malfunctioning control equipment, which was known as a "Thermatrix thermal oxidizer." It was designed to operate as a high-temperature furnace that would transform the benzene into carbon dioxide and water. Instead of traveling

through the oxidizer, the waste stream containing the benzene was diverted into other equipment-an oil/water separator, a sewage pipe, and tanks-that were not equipped to control off-gassing. At the end of the line, the benzene vapor vented into bypass stacks where it was released into the ambient air. These arrangements violated not just the Clean Air Act but also the Comprehensive Environmental Response, Compensation and Liability Act, the federal statute that requires reporting of toxic chemical releases.

According to the indictment, the conspiracy among the four individual defendants included a cover-up with the dual goals of averting private lawsuits by residents and workers who became ill after exposure to the excess emissions and thwarting government enforcement action seeking civil or criminal penalties. A third goal was to "avoid or delay the financial expenditures necessary to comply with the law and to avoid shutting down the West Plant until it could be brought into compliance."

The case was on its way to trial before federal District Court Judge Janis Graham Jack, a Clinton appointee, in the spring of 2001. But on April 9, DOJ announced it had settled the case. Charges against the four Koch employees were dropped. The indictment was reduced from 97 counts to nine. The company was placed on probation for five years and assessed $10 million in criminal fines, payable to the U.S. Treasury, and $10 million to support "special projects" that would improve air quality in Corpus Christi. The Justice Department's press release repeated the key charges in the indictment, including the failure to operate pollution-control equipment and the cover-up that, not incidentally, involved making false statements to the government. The $20 million penalty was high in comparison to other settlements at the time, but in relationship to the

revenue generated by the refinery and the wealth accumulated by the Koch brothers, it was a trivial cost of doing business.

One reason the prosecutors settled is that Judge Jack signaled that she was on the defendants' side before a jury got anywhere near the evidence. Claire Poole, a reporter for *Texas Monthly*, reported that Jack scolded prosecutors at a motions hearing: "What I'm sitting here wondering is how on earth you all are going to explain this to a jury and how you expect to actually get a conviction on this." Judges sympathetic to white-collar defendants who look like them are a perennial problem in such cases, and renewed efforts to reach settlement must have seemed like the only response to Jack's intemperate remarks.

But prosecutors were also under considerable political pressure because, by then, President George W. Bush had been inaugurated and had nominated former governor and stalwart conservative John Ashcroft as his attorney general. During the 2000 presidential campaign, conservatives had singled out the case, arguing that it represented politically motivated retaliation for the Koch brothers' contributions to Bush. Michele Davis, a spokesperson for former Republican House Majority Leader Dick Armey, told the Associated Press, "He's concerned the timing is so fishy, coming at a time when this administration is playing political football with anything doing with Texas."

Years later, after the Kochs became more prominent politically, *The Texas Observer* ran a story in 2012 called "Kochworld," written by veteran reporter Melissa del Bosque. It described how the two giant refineries in Corpus Christi, the one owned by the Kochs and a second owned by Citgo, affected the health of a poverty-stricken, African American neighborhood that adjoins the plants. Koch Industries immediately attacked del

Bosque and the magazine, accusing them of "dishonest and distorted" journalism. Not satisfied with posting this criticism on its own website, the company took out an ad excoriating del Bosque on the website of the Poynter Institute, a respected journalism center. She responded via Twitter that she was "proud to join New Yorker, Bloomberg and others," a reference to similar Koch Industries attacks on critical reporting. The 2010 attack on *The New Yorker*'s Jane Mayer had been quite intense. The Kochs went so far as to hire investigators to comb through her life, and they also leveled unfounded accusations of plagiarism, a professional sin for reporters. These accusations were unfounded. The incidents are telling not only in their dark tone, but because they occurred in 2010 and 2012, presumably after the re-branding effort was conceived and initiated.

ACCORDING TO HERITAGE'S

AP PHOTO/RON SCHWANE

John Malcolm, Congress has gone on a crazed spree of lawmaking over the past several decades, adding thousands of new criminal offenses throughout the U.S. Code, to the point that the government has lost track of how many and what kinds of criminal culpability confront the average citizen. Far worse, federal regulatory agencies possess delegated authority to define the behavior that triggers such culpability, an outrageous usurpation of authority that the framers of the U.S. Constitution intended to limit to Congress. According to Edwin Meese III, the 75th attorney general of the United States, who testified before the Senate Judiciary Committee in January:

No person with a family to feed and a mortgage to pay has time to pore through the Code of Federal

Regulations to ensure perfect compliance with 300,000 criminal regulations, just as no small business owner can afford to hire the army of lawyers necessary to understand the intricacies of the U.S. Code. Criminal intent requirements protect these individuals when they make honest mistakes or run afoul of obscure provisions that a more sophisticated company with an in-house compliance department might know about.

Of course, the number of laws on the books does not give any indication how they are enforced in the real world. Fortunately, more reliable statistics about the kinds of white-collar crimes that dominate federal dockets are available. According to a study by University of Texas Law Professor Susan Klein and her student, Ingrid Grobey, 80 percent of federal criminal prosecutions deal with offenses involving controlled substances, immigration, and weapons. Defendants charged with so-called "regulatory offenses" (like the Koch brothers in Texas) now make up 2 percent of all federal criminal defendants, down from 7 percent in 1980. "Crime remains as much a local matter today as it did in 1913," they write. "Overall, federal felony convictions have comprised around 5% of all felony convictions (state and federal combined) since at least 1992."

But just because such prosecutions are few and far between does not mean that the changes advocated by conservatives would have little effect on the future of white-collar criminal prosecutions across the nation. Leslie Caldwell, assistant attorney general for DOJ's Criminal Division, warned when testifying alongside Meese at the January hearing that pending default *mens rea* legislation would cause "extreme and very harmful disruptions" in "essential federal criminal law enforcement operations." The legislation would "create massive uncertainty in the law" and allow defendants

charged with serious crimes "to embroil federal courts in extensive litigation and potentially escape liability for egregious and very harmful conduct."

What kinds of cases would be affected? "Terrorism, violent crimes, sexual offenses, immigration violations, and corporate fraud," Caldwell recited. She explained that the legislation would "frustrate" law enforcement with respect to violent terrorist assaults on U.S. citizens undertaken outside the country, because prosecutors would be forced to prove that the terrorist knew their victims were in fact U.S. citizens. Similarly, in a case involving an assault on a federal officer, prosecutors might be asked to prove that the defendant knew the identity of the officer at the time, and in cases involving sexual exploitation of children, that the rapist knew his victim's age. Caldwell added that the legislation would make it far more difficult to prosecute corporate fraud on the scale of the behavior of WorldCom CEO Bernard Ebbers, who was convicted in 2005 and is now serving a 25-year prison sentence. Or, as another witness,

> Robert Weissman, president of Public Citizen, said after the hearing, "DOJ would essentially have to have smoking-gun evidence regarding every single element of a crime."

AS GOODLATTE WAS ISSUING his ultimatum to Conyers and Jackson Lee, liberal members of the Coalition for Public Safety faced a tough and unexpected decision. Civil-rights groups like the Leadership Conference and the NAACP, civil-liberties advocates at

the ACLU, and CAP staff, who enjoy easy access to the White House, understood only too well that cooperating with conservatives in the House was the only way to get the law passed. Given their conviction that mass incarceration caused devastating harm to their core constituencies, and the many hours they had spent working to push the legislation forward, the temptation to accept some form of compromise was powerful. But these groups had broader interests, including economic equity and environmental protection policies, which could be undercut by weakening criminal enforcement.

In the weeks leading up to the House Committee markup in November 2015, CAP led the liberal groups to break with their coalition partners and eased the way for Justice Department prosecutors to prevail within the White House. By the time of this turning point, Koch Industries Senior Vice President Mark Holden had held no fewer than four meetings on criminal justice reform with Valerie Jarrett, one of Obama's most senior and trusted advisers, apparently to no avail, for the White House did not move to overrule Justice Department opposition to the deal.

Todd Cox, CAP's director of criminal justice policy, told me that the decision was a combination of principle and pragmatism: "The criminal justice reform movement is responding to the discredited war on drugs policies that affect poor communities and communities of color ravaged by mass incarceration, and involve overreach by prosecutors, removal of discretion from judges regarding sentencing, and situations where communities are over-policed. The *mens rea* reform proposals involve an entirely di erent system dealing with white-collar criminal offenses. In that system of justice, we have a lack of effective law enforcement, well-resourced corporations that helped develop the

law, and defendants typically situated socially in [the] same place as judges and prosecutors."

ACLU Executive Director Anthony Romero, in a letter to *e New York Times*, wrote, "Advocates of all political persuasions working to bring meaningful criminal justice reform would do well to keep our eyes on the prize of getting meaningful legislation passed and not let mens rea become the poison pill for the solutions our country so desperately needs."

Like so many other social problems of grave importance, progress on criminal justice reform seems likely to remain stalemated until after the presidential election. Koch Industries' Holden has stated publicly that he does not insist on any linkage between sentencing and white-collar crime reform. But House Judiciary Committee Chairman Goodlatte does not appear to have internalized this pronouncement. Democratic candidates Hillary Clinton and Bernie Sanders both pledge to be tough on white-collar crime, translating the commitment into the sound bite that "no one is too big to jail." Republican frontrunner Donald Trump has ridiculed Clinton, saying that she is the prime example of someone "big" who should be indicted over State Department emails and other offenses.

This campaign theater remains largely irrelevant to the millions of young people consigned to spend their most productive years in prison for nonviolent offenses, except in one respect. The gaping dichotomy between street crime injustice and white-collar non-justice is a powerful validation of their widening cynicism and underlying rage. Abusive policing in communities of color is the civil-rights issue of this generation. Its infuriating backdrop is the impunity of well-heeled corporate executives held harmless for far more harmful crimes.

by Rena Steinzor