

Trump-era criminal justice 'reform' won't help stop mass incarceration

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Despite the most extensive bipartisan support in many years for the reform of mass incarceration in the United States, the Trump administration has ignored this enormous problem and focuses solely on greater leniency for white collar criminals.

In a little-noticed speech at the end of November, Deputy Attorney General Rod Rosenstein informed an understandably grateful audience of corporate executives that so long as they voluntarily disclose their misdeeds under the Foreign Corrupt Practices Act, they will not face criminal prosecution. This about-face on the “Yates Memo,” a statement developed by career federal prosecutors stating that they expected companies to disclose without amnesty, was as stunning as it was misguided.

Rosenstein’s speech was followed by an announcement that the Department of Justice (DOJ) plans no further prosecution of HSBC, which had signed a deferred prosecution agreement to settle a massive criminal case accusing it of money-laundering for Mexican drug cartels and allegedly serving as banker for rogue states like Iran and Sudan. The bank dramatically expanded its compliance efforts even as it stood accused of committing further crimes, including assisting its customers in evading U.S. taxes. But its agreement went up in a puff of smoke.

The notion that the United States has a serious problem with overzealous prosecution of white collar crime falls in the same category as the claim that we have widespread problems with fraudulent voting. Both are inordinately rare. Not a single bank and just one low-level trader were prosecuted for the shenanigans that led up to the devastating stock market crash of 2008 and the ensuing Great Recession.

The United States imprisons 2.2 million people at the federal, state, and local levels; with just 4.4 percent of the world's population, we account for 20 percent of people locked up. Between 2001 and 2010, 8 million people were arrested on marijuana charges. African Americans were nearly four times as likely to be arrested for possession as whites.

A few years ago, the gross unfairness and unaffordable expense of this system became too much for many advocates and activists to stomach. They formed an informal coalition, which included prominent voices on the left and right. Conservatives (Koch Industries, Freedom Works, and Right on Crime) often emphasized prison spending cuts, which run upwards of \$80 billion annually and are unsustainable for many states. Liberals (the Leadership Conference for Civil Rights Education Fund, the NAACP, the ACLU, and the Center for American Progress) focused on the harm over-incarceration does to communities of color.

A bipartisan group of senators, including Cory Booker (D-N.J.), John Cornyn (R-Texas), Lindsey Graham (R-S.C.), Charles Grassley (R-Iowa), Patrick Leahy (D-Vt.), Mike Lee (R-Utah), Charles Schumer (D-N.Y.), and Sheldon Whitehouse (D-R.I.), wrote reform legislation that was just about ready to go to the floor when it was derailed by tension over the presidential election and threats to attach legislation drafted by Orrin Hatch (R-Utah) to reform *mens rea* (state of mind) rules so that prosecutors would need to prove defendants knew every detail of the laws they had broken — a “reform” that would make white collar crime harder to prosecute. Once Donald Trump was inaugurated, it all got shoved to the sidelines. But judging from these opinion pages, white collar crime reform is back on the agenda while mass incarceration reform is on the far back burner. No less august a group than Jared Kushner's special-interest-friendly “Office of American Innovation” held a summit about convicted street criminals who have embarked on the painful process of reentering their communities. And, according to former Maryland Governor Robert Ehrlich, what these men need for their rehabilitation is not job training, halfway houses, and the abolition of applications that demand information about convictions, but rather the same *mens rea* reform identified as the brainchild of the Heritage Foundation and Koch Industries.

If passed, legislation along the lines of the earlier Hatch bill would overturn decades of precedent interpreting federal criminal law, ushering in a new era of intensive litigation that only well-heeled defendants could possibly afford. It would diminish incentives for companies to prevent their employees from cutting corners on compliance in every arena, from drug manufacture to deepwater drilling to setting up phony bank accounts for unsuspecting consumers.

President Trump's crusade against regulation would culminate in the elimination of accountability for the most egregious corporate misconduct. Using people convicted of street crimes effectively as human shields to usher through such measures is but another reason for Americans to suspect the sincerity of conservative populism on a national scale.

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