

## Holder's puny sentencing reform

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Monday, Attorney General Eric Holder addressed the annual convention of the American Bar Association. In that speech, Holder said the American criminal justice system is broken and it's time for some new policies. Unfortunately, Holder missed the chance to make some real improvements.

The main point of Holder's speech was that the United States is locking up too many people. As has been widely reported, America has about 5 percent of the world's population, but about 25 percent of the world's prisoners. We have a lot of people behind bars — about 2.5 million.

It took us 200 years to incarcerate the first million, but we've managed to lock up the second million in only the last 30 years. During the 1990s and early 2000s we were building one prison a week on average. And those prisons were quickly filled up. Many prisons are now operating beyond their design capacity.

Holder says it is time we "face this reality." Facing reality is always sound advice, but it's painfully obvious. Maybe next month he can go to Detroit and tell us about the potential risk of bankruptcy there.

The drug war has been the engine driving the exploding prison population, but President Obama and Holder do not want to face that fact. While other countries like Portugal and Uruguay are embracing drug decriminalization, the Attorney General is only prepared to tinker with some new approaches to drug sentencing.

The first idea is to direct federal prosecutors to use their charging discretion in ways that will minimize triggering mandatory minimum sentences. Most of the drug cases come from state criminal systems, so impact of this change in the federal system will be small. Holder also set forth criteria that will further limit the impact. The drug offender must not have connections to gangs or cartels, for example. Depending on how "connections" are defined, that could severely limit this policy change since cartels control the black market drug distribution networks.

Some people are wondering whether this is another example of the administration avoiding valid laws enacted by Congress. The answer to that question is no. When persons violate laws that overlap with one another, prosecutors can use their discretion to choose which law makes the most sense under the circumstances. Some members of congress may criticize Holder's policy as wrongheaded, but his policy is not unconstitutional or contrary to other valid law.

During his speech, Holder kept insisting that he was tough on crime. He evidently expects to be criticized from the right. But Holder has again misread the political environment. Because of the budget crunch, more and more conservatives have been applying a cost-benefit analysis to criminal justice expenditures. That has, in turn, brought more scrutiny to mandatory minimum sentences.

Since warehousing nonviolent drug offenders for long periods does not improve public safety, mandatory minimums do not make economic sense. Policymakers at the local level have already been exploring alternatives to prison, such as home monitoring and community service for nonviolent persons.

Over and over again, Holders spoke about “moving forward” in a pursuit of “justice” and “our values.” It sounds great, what does he mean?

Here’s the remainder of the Holder plan:

- There will be a Prevention and Reentry Coordinator in every federal district.
- Divisions with the Department of Justice will now consider whether their new regulations will have unnecessary collateral consequences on prisoners returning to their home towns.
- Prosecutors will develop recommendations to racial disparities in sentencing.
- A “compassionate release” program whereby elderly prisoners will be eligible for early release from prison. While that will certainly have an impact on the lives of those individuals and their families, the pool of eligible persons here is very small.

This is the politics of symbolism. Small gestures to address deep, festering problems. Despite some accolades in the press for a fine speech, Holder is passing those problems to the next administration.

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