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A New Alliance for Criminal Justice Reform? Don't Count On It.

Why talk of a left-right alliance to fight the prosecution state seems unlikely.

Radley Balko | November 30, 2009

New York Times Supreme Court reporter Adam Liptak had legal and political opinion websites buzzing last week with a [front-page article](#) about non-traditional left-right alliances that may be emerging on criminal justice issues.

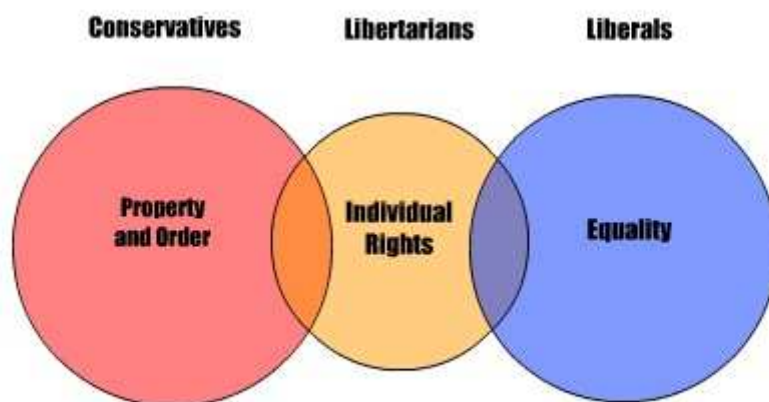
In particular, Liptak's piece focused on a [project](#) started by the conservative Heritage Foundation that aims to combat what the think tank calls *overcriminalization*, a broad term that includes the federalization of crime, the expansion of state and local criminal codes, and the ramping up of police and prosecutorial power.

Heritage has taken some heat for the new project, some of it deserved and some not. It's fair, for example, to point out that Heritage and the people who have worked there over the years—such as former Reagan administration Attorney General Ed Meese—should acknowledge [their own contributions](#) to the vast expansion of police powers over the last quarter century instead of merely blaming the overcriminalization problem on the left (as Meese did in Liptak's piece). But it's also unfortunate that some liberal outlets—most notably the lefty activist [Media Matters website](#) and, following its lead, [MSNBC personality Rachel Maddow](#)—have attacked Heritage with the very sort of soft-on-crime accusations traditionally employed by the law-and-order right.

The time would certainly seem to be ripe for new left-right alliances on criminal justice reform. This week, the Senate Judiciary Committee will consider a new bill [from Sen. Jim Webb \(D-Va.\)](#) that would create a national criminal justice commission to review all aspects of America's police, criminal courts, and prisons. Webb's bill comes on the heels of a sobering set of developments. The U.S. has for some time now accumulated the world's largest prison population, both proportionally and overall. DNA testing continues to clear people wrongly convicted and imprisoned for violent crimes. And the federal criminal code has swelled from the three laws proscribed in the Constitution to, by one estimate, more than 4,000 laws today.

Still, the prospect of any sort of lasting alliance seems unlikely, mostly because conservatives, libertarians, and liberals view the legal system in fundamentally different

ways. Conservatives believe the primary purpose of the legal system is to protect property and to promote order and stability. Liberals believe it's to promote equality—or to combat inequality. Libertarians put a premium on individual rights, favoring a limited legal system that serves only to protect society from those who cause direct harm to others or their property. If we were to diagram out where the three philosophies favor reform, it would look something like this:



These are generalizations, of course. There are exceptions in all three camps. But this is why leftist groups have been suspicious of Heritage, particularly when the project focuses heavily on white collar crime, which critics might see as more of an effort to protect property and the traditional social order than a genuine interest in fair justice. By the same token, many of the same liberal editorial boards, activist groups, and personalities who have championed the rights of those accused of street crimes (for lack of a better term) don't seem particularly interested in defending the rights of white collar defendants, particularly when it comes to corporate executives accused of what you might call crimes of greed. Indeed, before his fall Elliott Spitzer was a hero of the left, despite his use of the sorts of aggressive and dubiously constitutional tactics that would have many leftist groups up in arms were they used against less affluent criminal suspects. Libertarians (and reform groups like the National Association of Criminal Defense Lawyers) have been critical of government overreach on both fronts.

Libertarians and conservatives believe government has become too aggressive in snatching up private property—the dark orange overlap in the diagram above. For example, though conservatives have traditionally been hawkish on the drug war, it was primarily resistance from the right—most notably the late Rep. Henry Hyde (R-Ill.)—that produced reforms in 2000 to odious federal civil asset forfeiture laws that give government the ability to take property from suspected criminals without actually having to convict them. In fact, it has largely been the conservative wing of the Supreme Court that has restrained the state's forfeiture powers, and the more liberal justices who have upheld them. Generally, the same can be said of eminent domain power. It was the Supreme Court's five most liberal justices who in *Kelo v. City of New London* (2005) ruled that the government can take land from homeowners and hand it over to wealthy developers, with the four most conservative justices in dissent.

But libertarians and conservatives part ways on consensual crimes and individual rights, with conservatives tending to take the view that the preservation of order requires us to give police and prosecutors broad leeway, even if they occasionally overstep their bounds. Conservatives may loathe the government employee sitting behind a desk at the Environmental Protection Agency, but those same conservatives will bend over backwards for the government employee with a badge, a gun, and the power to kill.

Liberals put a premium on equality. Not equality under the law (as noted above by their general support for the aggressive prosecution of white collar criminals), but equality of wealth and status. Libertarians and liberals tend to agree, then, that the drug war disproportionately harms the poor and certain minority groups. We agree on the absurdity of the crack/powder cocaine sentencing disparities. But libertarians are less interested in ensuring the drug laws treat everyone equally than in eradicating them altogether. Most liberals stop well short of endorsing a fundamental individual right to ingest psychoactive drugs, or the belief that preventing you from doing so isn't a legitimate function of government.

Hate crimes are another example. An emphasis on equality and tolerance routinely trumps free expression on the left. Affirmative action (which, like eminent domain, is a civil matter not a criminal one) is another example. Liberals also part ways with libertarian and conservative concerns over the federalization of crime because liberals tend to have more faith in federal than local officials to enforce the law equitably. There's certainly some historical justification for that, given the federal government's role in stopping racial inequities in the criminal justice system at the local level during the civil rights era (and beyond). But the federalization of crime has moved well beyond oversight of local officials. We're now adding another level of police power. You can be prosecuted twice for what is essentially the same crime.

These fundamental philosophical differences make broad reform alliances between advocacy groups such as Heritage, the ACLU, the Cato Institute, the NACDL, and other players in the criminal justice reform debate seem unlikely. But a more significant hurdle may be the divide between advocacy groups and politicians.

Sen. Webb notwithstanding, there's simply not much political will to alter the 40-year-old "tough on crime" paradigm. Barack Obama may be the most sympathetic president on these issues in a generation, but that isn't saying much. Liberal groups have given him a pass because of his efforts on other issues more important to them.

So far, Obama's Justice Department has sided with police and prosecutors on every major criminal case to come before the Supreme Court, often in opposition not only to groups like the ACLU and the Innocence Project but to libertarian groups like Cato, the Institute for Justice, and the Reason Foundation (the nonprofit that publishes this website). Obama has also increased federal crime fighting grants to local police departments, and signed a bill to broaden the federal hate crimes statute.

Beyond even ideology, this is probably the biggest barrier to reform: Politicians are simply averse to limiting government power. Electoral success is an opportunity not to roll back

the excesses of the other party, but to expand police powers to achieve new objectives. Until politicians suffer at the ballot box for doing so, we probably aren't going to see any substantive reform.

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