

[Conservatives and Criminal Justice Reform](#)

Posted on: November 30, 2009 9:16 AM, by [Ed Brayton](#)

The New York Times has a [rather strange article](#) claiming that left and right are "joining forces" on criminal justice reform measures. And in some limited cases, there's a kernel of truth in that. When it comes to asset forfeiture, for example, conservative interest groups tend to be as opposed to such laws as liberal and libertarian groups (though elected officials from either party are unwilling to do anything to fix the problem, whether liberal or conservative).

In the next several months, the Supreme Court will decide at least a half-dozen cases about the rights of people accused of crimes involving drugs, sex and corruption. Civil liberties groups and associations of defense lawyers have lined up on the side of the accused.

But so have conservative, libertarian and business groups. Their briefs and public statements are signs of an emerging consensus on the right that the criminal justice system is an aspect of big government that must be contained.

This strikes me as spurious and very badly worded. This is not a question of the government being "too big" or "too small" and such rhetoric is pretty much meaningless in that context. Let's take just the problem of prosecutorial misconduct. Would new laws punishing prosecutors for misconduct make the government bigger or smaller? Neither, of course. The government would be restricting the government. The only thing that matters is that the law makes the government more just when dealing with its citizens, whether you define it as larger or smaller.

The conservatives in the story are talking about what they call "overcriminalization":

Edwin Meese III, who was known as a fervent supporter of law and order as attorney general in the Reagan administration, now spends much of his time criticizing what he calls the astounding number and vagueness of federal criminal laws.

Mr. Meese once referred to the American Civil Liberties Union as part of the "criminals' lobby." These days, he said, "in terms of working with the A.C.L.U., if they want to join us, we're happy to have them."

Dick Thornburgh, who succeeded Mr. Meese as attorney general under President Ronald Reagan and stayed on under President George Bush, echoed that sentiment in Congressional testimony in July.

"The problem of overcriminalization is truly one of those issues upon which a wide variety of constituencies can agree," Mr. Thornburgh said. "Witness the broad and strong support from such varied groups as the Heritage Foundation, the Washington Legal Foundation, the National Association of Criminal Defense Lawyers, the A.B.A., the Cato Institute, the Federalist Society and the A.C.L.U."

And here's where things to entirely wrong:

In an interview at the Heritage Foundation, a conservative research group where he is a fellow, Mr. Meese said the "liberal ideas of extending the power of the state" were to blame for an out-of-control criminal justice system. "Our tradition has always been," he said, "to construe criminal laws narrowly to protect people from the power of the state."

Okay, I call bullshit. So does Radley Balko, who [points out](#) that Meese has a long history of promoting the worst and most liberty-destroying aspects of our criminal justice system:

Both left and right have contributed to the over-criminalization problem, and we can blame both major parties for the massive police powers given up to government in the drug war over the last 30 years. But Meese is being disingenuous here. This is the same Ed Meese who popularized the phrase "zero tolerance." It's the same Ed Meese who once called the ACLU a "criminals' lobby," and who once said...

"...you don't have many suspects who are innocent of a crime. That's contradictory. If a person is innocent of a crime, then he is not a suspect."

In fact, browsing the index of Smoke and Mirrors, Dan Baum's excellent history of the drug war, during his time as Attorney General, Meese pushed for, among other policies....

- Expansion of federal asset forfeiture laws, including giving police the ability to seize before an indictment, and "substitute assets" provisions.
- More power to hold suspects without bail.
- Repeal of the Miranda requirement and the Exclusionary Rule.
- The power to issue administrative subpoenas to require defense attorneys to snitch on their clients.
- The federal reporting requirement on cash transactions over \$10,000.
- Stripping drug suspects of all their assets so they can't afford to hire a defense attorney.

When it comes to the most pressing issues in our criminal justice system -- prosecutorial immunity, the use and abuse of informants, anti-drug corruption, asset forfeiture, the militarization of law enforcement, the scandal of our public defender systems, access to DNA evidence by defendants, etc. -- conservatives are absolutely on the wrong side and have been for a long time as they pursue their "law and order" agenda.

Unfortunately, the allegedly progressive Obama administration is also on the wrong side of some of those issues. Already in the first 10 months in office, Obama's Justice Department has argued in favor of absolute prosecutorial immunity and against defendant access to DNA evidence that might exonerate them.

Balko nails Meese's convenient hypocrisy:

If Meese has come around on these issues, good on him. But he's hardly blameless in the story of how police and prosecutors--particularly federal prosecutors--wield the powers they do today...

Meese could actually have an impact if he's had a genuine road to Damascus moment. But that would require him to acknowledge and atone for his own contribution to the over-criminalization problem. Trying to whitewash his own history and time at DOJ by blaming where we are today on "liberal ideas" is just partisan hackery, and lends fuel to the accusation that he and Heritage are only taking interest in these issues because under the Obama administration the targets of U.S. Attorneys are more likely to be white collar Heritage donors than the hippie stoners and urban heroin addicts Meese spent years trying to strip of their constitutional rights.

Still, there are some signs that there is at least a kernel of truth to the claim that some conservative groups are beginning to come around on some of these issues. Next week we've got a conference in Grand Rapids looking at the horrendous public defender system in the state of Michigan and it's being co-sponsored by a Federalist Society chapter along with the Michigan Campaign for Justice and the Constitution Project. Let's hope that continues. But let's not fall for Meese's "conservatives have always been for this" bullshit.