

Written Testimony of

**Lisa Graves and Brendan Fischer**  
**The Center for Media and Democracy**

Before the United States Senate Committee on the Judiciary on  
**“The Adequacy of Criminal Intent Standards in Federal Prosecutions”**  
January 20, 2016

Mr. Chairman Grassley, Ranking Member Leahy, and Members of the Committee:

Thank you for the opportunity to submit this testimony regarding the importance of *not* changing federal laws to make it harder to prosecute serious financial and environmental crimes that harm the well-being of Americans from all walks of life.

This statement is being submitted by Lisa Graves and Brendan Fischer, who serve as the Executive Director and General Counsel, respectively, of the Center for Media and Democracy.

CMD is a national media group that investigates the undue influence of corporations on our democracy. For more than 20 years, CMD’s watchdog investigations have exposed corporate spin and deception about products, practices, or policies that threaten the health, safety, or security of American families. CMD publishes PRWatch.org, ALECexposed.org, and SourceWatch.org, and its research is regularly cited in documentaries and by major newspapers and news magazines.

CMD applauds this Committee for its efforts to begin the reform of America’s criminal justice laws, policies that have helped make the United States the world’s biggest jailer and whose burdens have fallen disproportionately on people of color.

However, we have deep concerns about the push to exploit this crisis to impose a new default intent requirement, particularly for so-called “white collar” crimes. Enacting a default *mens rea* requirement for most criminal laws would do little to address the mass incarceration crisis, but would make it harder to prosecute corporate violations of environmental and financial laws that try to protect the public from the mass effects of corporate wrongdoing.

Most Americans believe, for example, that more corporations and executives should have been prosecuted following the 2008 Wall Street crash, not fewer. Congress should not make it harder, for example, to prosecute executives whose actions harm our economy, destroy Americans’ pensions, or poison our water or air in violation of federal statutes.

In particular, we wish to provide the Committee with important background about one of the driving forces behind the call for *mens rea* reform—namely, Koch Industries, the Wichita-based company led by David and Charles Koch that claims annual revenues of more than \$115 billion. Koch Industries and other big energy conglomerates could benefit from increasing the intent standard in federal criminal laws—to the detriment of the interests of millions of American families who live near their industrial operations

No one should be above the law, but some of the intent proposals would effectively do just that, to the benefit of corporations and CEOs who could be held responsible for wrongdoing under current laws.

For at least the past five years, the Kochs and Koch-backed groups like the American Legislative Exchange Council (ALEC) have been pushing to create a stringent "intent" standard for criminal violations, particularly for so-called corporate crime and executive suite criminals.

This under-reported aspect of the Koch criminal justice reform agenda could potentially reap big benefits for Koch Industries and other big corporations.

Although it may appear that there are a myriad of voices from different groups clamoring for changes to *mens rea*, in fact almost all of them have one thing in common: Koch funding. In some ways, the echo chamber pressure to add this issue to the criminal justice reform movement serves to illustrate the power and illusion that Koch money and power over public policy has helped fuel.

### **New "Intent" Requirement Would Block Many Corporate Criminal Prosecutions**

As you know, legislation to make the criminal justice system fairer passed the U.S. Senate with bipartisan support this winter. As the U.S. House of Representatives has taken up the matter, the bipartisan consensus has begun to fray with a controversial proposal traced to the Kochs.

A bill that passed the U.S. House Judiciary Committee in November, sponsored by Rep. Jim Sensenbrenner (R-WI), doesn't address mass incarceration, one of the primary concerns that many have been raising for years. His bill would instead overhaul numerous federal criminal laws by requiring prosecutors to prove that a person or corporation "knowingly" engaged in illegal conduct and additionally "knew" or should have known that the conduct violated the law.

That bill's default criminal intent standard is strikingly similar to the ALEC "Criminal Intent Protection Act," and tracks policies promoted by Koch-backed organizations for the past five years.<sup>1</sup> Koch Industries is a major funder and leader of ALEC. The billionaire Koch brothers have underwritten ALEC through foundations they control and organizations they fund.

Many criminal laws have an "intent" requirement that can affect the length of the sentence imposed, as with the different degrees of guilt assessed for killing another.

But for a number of white collar crimes—such as environmental violations and financial crimes under the Dodd-Frank financial reform law—federal law does not require that prosecutors prove that a company or its leaders had specific intent to pollute our waterways or crash the economy.

Instead, the harms caused by extensive pollution, for example, can be enough to hold a corporation and its leaders criminally liable under certain circumstances.

Sophisticated corporations are expected to know their legal obligations, particularly when engaging in activities that pose a danger to the health and well being of the public at large.

It is not unreasonable to expect they be aware of laws that regulate their industry, and it is not unreasonable to punish them for violating those laws, through both civil *and* criminal penalties.

What's more, proving corporate "intent"—or an executive's mixed motives, such as maximizing profits or cutting costs versus harming workers, investors, or neighbors—can be difficult in a complex corporate structure, with varying layers of hierarchy and lines of authority.

Corporate decisions rationalized in the name of cost-cutting or efficiency can lead to tragedies like the Upper Big Branch Mine disaster, which killed 29 workers, even in the absence of malicious intent to kill the miners and violate safety laws.<sup>2</sup> That case recently resulted in a rare criminal conviction for the former CEO of Massey Energy.<sup>3</sup>

"Requiring that prosecutors prove that a corporate executive is both consciously aware of the conduct of their subordinates and consciously aware that the conduct of those subordinates violates criminal law is very, very difficult," said Frank O. Bowman, a law professor at the University of Missouri.

"This would make [white collar] prosecutions more difficult than they now are, and they are already hard," Bowman said.

Additionally, evidence CMD has reviewed indicates that the Koch-backed push to impose a default "intent" requirement on federal criminal laws is less about genuinely reforming the manifest crisis in the criminal justice system, which is mass incarceration, and more about undermining crucial regulations that protect the public's interests.

### **Overcriminalization vs. Mass Incarceration**

Although civil rights activists have been focused on mass incarceration—such as changing the mandatory minimum sentences enacted during the drug war that have disproportionately affected people of color, policies that scholars like Michelle Alexander have described as a "new Jim Crow"—the Kochs, ALEC, and other Koch-backed groups have been largely focused on overcriminalization.

Despite how it sounds, overcriminalization isn't focused on the disproportionate rate of incarceration of people of color. It is instead focused on the idea that there are too many crimes—and, more specifically, too many white-collar crimes that might affect corporate interests.

"All of the attention here is on whether this will only benefit quote-unquote white-collar criminals, people at financial institutions, people at firms that are damaging the environment," Jeffery Robinson, deputy legal director of the ACLU, said about Rep. Sensenbrenner's bill.

"If it only benefits those people, then I haven't seen any evidence that there is any over-incarceration among that group. In fact, we see very few prosecutions of such individuals."<sup>4</sup>

That is, corporations and their leaders are not often prosecuted and convicted in our federal courts. Many Americans have expressed deep disgust that more corporations and bankers were not prosecuted following the gambling on Wall Street that led to the economic crash in 2008, for example, unlike the nearly 1,000 prosecutions following the Savings & Loan crisis.

"To a considerable extent, deferred prosecutions—in which the Justice Department agrees not to prosecute in exchange for a promise by corporate defendants not to violate the law in the future—have replaced actual prosecutions, undermining any kind of deterrent effect" for criminal

penalties, said Public Citizen president Rob Weissman. Deferred prosecutions are almost unheard of outside of the white-collar crime context.

Indeed, as investigative reporter Jane Mayer recently documented in *The New Yorker*, Koch funding for criminal justice reform has largely focused on white-collar crime, which nets only a handful of prosecutions each year, as opposed to the drug crimes and sentencing policies that affect the overwhelming majority of criminal defendants.<sup>5</sup>

Some have expressed general concern that there are too many federal offenses with criminal penalties and too many that don't specify an intent standard, an issue that is being studied in the Senate bill that passed, as you know.

However, the Koch-backed "solution" to overcriminalization—the blanket imposition of a strict intent standard on every federal crime, as opposed to less-stringent "negligence" or "recklessness" standards—would undermine the few corporate criminal prosecutions that do take place.

For example, the U.S. Department of Justice has noted that—if a default "intent" requirement had been enacted—it could not have secured a guilty plea in last year's case against Jensen Farms, whose failure to follow food safety standards with its cantaloupe led to a listeria outbreak that killed 33 people.<sup>6</sup>

Imposing a default intent requirement could affect prosecutions for violations of laws like:

- the Clean Water Act;
- the Clean Air Act;
- the Endangered Species Act;
- the Resource Recovery and Compensation Act (RCRA);
- and many other laws intended to protect the public's interests.

Changing from a general intent requirement of *knowingly* to *willingly*, in cases of killing endangered species for example, would create an additional hurdle to prosecution despite the harm done. Moreover, any effort to eliminate criminal negligence in favor of a stricter standard in these or other statutes would also put the public at greater risk of harm—an unwarranted result.

Such changes could also make it more difficult to prosecute the benefactor of the criminal intent reform effort, Koch Industries, if it again contaminates the communities where it operates with huge quantities of cancer-causing chemicals.

As *Forbes* noted, in 2000, "A federal grand jury indicted the privately held company and four of its employees in September on 97 related charges for alleged violations that took place at the company's refinery in Corpus Christi, Tex."<sup>7</sup> Koch Industries was facing "criminal charges, in which the petroleum giant is accused of spewing the toxic chemical benzene into the environment in 1995 and then trying to hide it from government investigators."<sup>8</sup>

Koch and its employees may not have intended to "leak" 91 metric tons of toxic benzene into the air and water around their refinery but their failure to install key protections and fully monitor their emissions resulted in their refinery loading 15 times the legal limit of the toxic substance into the environment.

That is, Koch Industries exposed nearby residents to massive amounts of benzene, which "is a well-established cause of cancer in humans."<sup>9</sup> It is a "group 1" carcinogen because studies have documented that it causes acute myeloid leukemia in humans, and it may also cause lymphocyte leukemia, non-Hodgkin's lymphoma, and multiple myeloma. It can also result in reduced production of bone marrow and suppress T-cells, which makes people more vulnerable to infections. It has also been found to lead to chromosomal aberrations and can reduce birth weight and cause other health problems.

But as Koch Industries' team of lawyers fought the charges, the 2000 presidential election was underway. David Koch was one of the top 30 donors to George W. Bush and the Republican Party, contributing \$378,500 directly.<sup>10</sup> (They also may have funded soft money operations resembling the Triad group that was tied to the Kochs by a whistleblower whose account of Koch funding was confirmed *after* the conclusion of a 1997 SJC investigation, as CMD has documented).<sup>11</sup>

After Bush became president and former Senator John Ashcroft was appointed Attorney General, the administration reduced the charges--which could have led to fines of more than \$500 million--and dropped it to just one count for a Koch Industries subsidiary, Koch Petroleum Group. Despite the drastic reduction it was still a record fine for environmental law violations.

"Under the plea agreement, Koch will pay a total of \$20 million dollars: \$10 million in criminal fines and \$10 million for special projects to improve the environment in Corpus Christi—a record amount imposed in an environmental prosecution," the DOJ stated at the time.<sup>12</sup>

It is *this* experience—prosecution of their corporation and a subsidiary for the massive emission of a known carcinogen—that the Kochs say sparked their interest in criminal justice reform.

And the Koch reform efforts could help prevent such prosecutions from ever occurring again.

"By their own admission, they became interested because they were prosecuted in Corpus Christi," David Uhlmann, who headed the justice department's environmental crime department and prosecuted Koch Industries, recently told *The New Yorker*'s Jane Mayer.

"The Koch brothers are not interested in criminal-justice reform because they suddenly became interested in the number of poor and minority Americans who are in prison," he said.

"They and their allies want to take us back to 1970, before the regulatory state," said Uhlmann, who is now a law professor at the University of Michigan.

In addition to the Corpus Christi prosecution, Koch Industries has been investigated for many potential violations of federal and state laws, some of which resulted in settlements.<sup>13</sup>

### **Overcriminalization: Liberty, and More, At Risk for Corporations and Their Employees**

At times, the Kochs have been clear about the connection between overcriminalization, a *mens rea* intent requirement, and their corporate interests.

In September 2011, Koch Industries' Associate General Counsel, Marsha Rabiteau, gave a presentation titled "Overcriminalization: Liberty, and More, At Risk for Corporations and Their Employees" for example.<sup>14</sup> She had given a nearly identical presentation two years earlier, titled then "*Mens rea* and other Criminal Law Fundamentals on the Tines of the Public Pitchfork."<sup>15</sup>

That presentation, to the Federation of Defense and Corporate Counsel, claimed: "The life of the corporation, the liberty interests of corporate officers and other employees can be in the cross-hairs of criminal prosecution over matters that often do not rise to true criminal activity."

The solution to the overcriminalization problem, Rabiteau said, was to create a default *mens rea* requirement, as would later appear in the Sensenbrenner bill and in ALEC model legislation.

Rabiteau suggested that attendees visit the Koch-backed Heritage Foundation's "Overcriminalization" project and cited a report from Heritage and another Koch-backed group, the National Association of Criminal Defense Lawyers, called "Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law."

(Rabiteau also suggested that corporations, as a legal fiction, could not form the requisite "intent" to be held liable for a criminal act—although corporations and Koch groups have supported the creation of a right to corporate "free speech" in the form of spending unlimited amounts in elections as with the divisive and widely discredited *Citizens United* decision.)

She argued that reforming corporate criminal justice law is needed "so that wrongdoers are punished with laws that are clear and adhere to our Anglo-American heritage."

### **Dodd-Frank Wall Street Reform Compromise, "Without Intent"**

The Koch funding for criminal justice reform efforts appeared to ramp-up as the federal government began taking steps to reign in financial institutions after the collapse of Wall Street.

As the Dodd-Frank financial reform bill was being debated in 2010, two Koch-backed groups, the National Association for Criminal Defense Lawyers (NACDL) and the Heritage Foundation, issued a comprehensive joint report/project named "Without Intent," criticizing what they called overcriminalization and the lack of universal intent requirements in the federal criminal code.<sup>16</sup>

The co-author of NACDL's "Without Intent" report, which has been repeatedly cited in Congress' debate on criminal justice reform, is now a counsel for the House Judiciary Crime Subcommittee, which is chaired by Rep. Sensenbrenner (R-WI).

NACDL urged Congress to strike criminal provisions of Dodd-Frank that did not include an intent requirement, but Congress rejected that lobbying. When the law passed later that year, NACDL criticized the bill on these grounds:

"[T]he overwhelming majority of the criminal offenses contained in the bill lack adequate *mens rea*, or criminal intent, requirements and, consequently, will fail to protect innocent or inadvertent actors from being criminally prosecuted or punished."<sup>17</sup>

Why would the Kochs be concerned about Dodd-Frank and financial regulation? Because a big part of their multi-billion-dollar business comes from oil speculation. The Kochs have long been deeply involved in global financial markets, especially energy and commodity trading.<sup>18</sup>

The Kochs are credited with creating the first oil derivatives in 1986. And they worked with U.S. Senator Phil Gramm (R-Tex.) to deregulate energy speculation with credit default swaps in 2000 with a measure that was later dubbed the "Enron loophole" after it aided the catastrophic collapse of the Texas energy giant.<sup>19</sup>

By 2009, a Koch executive boasted that the firm was one of the top five oil speculators in the world, with offices in London, Geneva, Singapore, Houston, New York, Wichita, Rotterdam, and Mumbai.<sup>20</sup>

According to the *Center for Public Integrity*, the Kochs and their lobbyists "worked to favorably shape the [Dodd-Frank] bill, and have not stopped working since it was passed."<sup>21</sup>

Key aspects of the 2010 Dodd-Frank Wall Street reform bill attempted to bring transparency and stability to the \$600 trillion "over-the-counter" derivatives market by dragging trades into the light of day, requiring supervision by a clearing houses, creating position limits for key commodities and requiring capital and margin requirements. Dodd-Frank also created some new criminal penalties, which were the focus of NACDL's objections.

### **White-Collar Criminal Defense**

The Kochs have received good press in recent months for acknowledging that they help fund NACDL.<sup>22</sup> However, Koch funding for NACDL has gone overwhelmingly to support the white collar criminal defense project that NACDL launched with Koch funding in 2004.

The white collar section of NACDL is designed to reshape the law to assist corporate executives and address overcriminalization, rather than supporting underpaid public defenders.<sup>23</sup>

Almost the entirety of the Kochs' funding for NACDL over ten years has gone toward white collar criminal defense; it was not until 2014, after the Kochs launched a public relations offensive to reshape their public image, that they provided any meaningful support directly for NACDL's indigent defense projects, according to one account.<sup>24</sup> (And even that grant was less than a tenth of what Koch Industries spent on its corporate image ads that year, *The New Yorker's* Mayer noted.)

Koch has actively encouraged white collar defense lawyers to support NACDL: in Rabiteau's presentations to the Federation of Defense and Corporate Counsel, for example, the Koch Associate General Counsel urged others to "Join the Corporate Advisory Council to the National Association of Criminal Defense Lawyers White Collar Crime project." NACDL has also hosted Koch Fellows at its DC office.

And NACDL has been particularly focused on the *mens rea* issue in recent years, as the Kochs have ramped up their funding of criminal justice reform.

For example, the current Director of NACDL's White Collar Crime Project has testified on Capitol Hill in favor of an intent requirement for white-collar crimes. She has also co-authored op-eds with the Heritage Foundation favoring intent laws.<sup>25</sup> And she addressed ALEC's criminal justice task force—apparently the only time that NACDL presented to that task force—about this very issue, criminal intent.

### **NACDL: FCPA Amounts to "Overcriminalization"**

In 2011, NACDL testified before the U.S. House Judiciary Committee in favor of reforming another white collar crime law, the 1977 Foreign Corrupt Practices Act (FCPA), which prohibits U.S. corporations from bribing foreign public officials.<sup>26</sup> NACDL's white collar rep then claimed that "the FCPA is emblematic of the serious problem of overcriminalization," and called for Congress to "strengthen the *mens rea* requirements of the statute."

FCPA experts criticized her call for adding an intent standard, describing it as a means of undermining the anti-bribery statute's enforcement and reducing incentives for companies to take affirmative steps to halt bribery.<sup>27</sup>

At the hearing, Rep. John Conyers (D-MI) pressed NACDL on how the FCPA could amount to "overcriminalization" when the Justice Department prosecutes an average of 14 cases per year.<sup>28</sup> She replied simply that "a statute with no reasonable limitations is overcriminalization."

Notably, at the same time that NACDL was testifying in favor of reforming the federal anti-foreign-bribery statute on "overcriminalization" grounds, Koch Industries was embroiled in a bribery scandal in France.<sup>29</sup>

Prior to the Kochs' public PR push on criminal justice this past year, few people outside of NACDL knew that it was funded by Koch money. The Koch role in funding NACDL as it advanced the Koch agenda on criminal intent changes did not come up during the hearing about those proposals.

### **The ALEC-SPN "Overcriminalization" Push**

The year Dodd-Frank became law, in 2010, the Texas Public Policy Foundation (TPPF) formed its "Right On Crime" project to make a conservative push for criminal justice reform, with "overcriminalization" one of its priority issues.<sup>30</sup> TPPF is one of the "think tanks" that is part of ALEC and a sibling of ALEC, the State Policy Network (SPN), which has also been funded by Koch money and other funding vehicles used by the Koch network of billionaires.<sup>31</sup>

Thanks to an accidental disclosure of TPPF's donor list, the *Texas Observer* reported that Koch Industries directly funded TPPF to the tune of \$160,000 that year, as did the Kochs' Claude R. Lambe Foundation, which gave \$70,000.<sup>32</sup> Funding from Koch Industries or the Kochs themselves is not publicly reported so it is not known whether Koch Industries or the Kochs funded TPPF in prior or subsequent years.

When the "Right On Crime" launched its website on this project in early 2011, the group made clear that a major focus was expressly "Overcriminalization," which it described on the front page of its website as "The Criminal Prosecution of Corporations."<sup>33</sup>

Right on Crime's first post on overcriminalization warned that "criminal prosecution of corporations has gotten out of hand" and decried the prosecution of Arthur Andersen in the Enron case.<sup>34</sup>

The "conservative solution" to overcriminalization, Right on Crime stated, was to "Stop creating new criminal offenses as a method of regulating business activities. Regulation is better handled through fines and market forces, not the heavy stigma of criminal sanctions."<sup>35</sup>

The Koch-backed ALEC soon jumped on the "overcriminalization" bandwagon. ALEC, which bragged in the 1990s that it successfully spread "three strikes you're out" and "truth in sentencing" bills that helped increase the number of prisoners and the length of time served in prison for a variety of crimes, was now decrying the lack of a *mens rea* requirement for white collar crimes.<sup>36</sup>

For years, ALEC not only pushed for bills that increased the prison population but it also pushed numerous measures to privatize prisons, which benefited its corporate funders like Corrections



Corporation of America (CCA).<sup>37</sup> As part of its pay-to-play operations, when Walmart started funding ALEC, ALEC also pushed bills to create mandatory minimum sentences for shoplifting, enacted new penalties for retail theft, and even added sentencing enhancers for using an emergency exit when shoplifting.<sup>38</sup>

But, in April 2011, ALEC held a presentation called "Overcriminalization: Not a Fair Fight: The Perils of Vague Criminal Statutes," featuring NACDL. ALEC's agenda stated that "This presentation will discuss the proliferation of criminal law which has produced scores of criminal offenses that lack adequate '*mens rea*' criminal intent requirements. This discussion will provide legislators solutions to this attack on individual liberty and economic growth in their state."<sup>39</sup>

A few months later, ALEC adopted the Criminal Intent Protection Act as a "model" bill for states.<sup>40</sup> This bill—like Rep. Sensenbrenner's federal proposal—would impose a strict criminal intent requirement for any state criminal offense that doesn't specify otherwise.

Early the following year, in January of 2012, ALEC adopted a "Resolution on Transparency and Accountability in Criminal Law" decrying that "the creation of new criminal penalties is often obscured because these penalties are buried in legislation that is thousands of pages such as the convoluted Dodd-Frank bill enacted by Congress."<sup>41</sup>

In 2013, ALEC released a report titled "Criminalizing America: How Big Government Makes a Criminal of Every American" urging state legislators to create a default *mens rea* requirement, specifically by enacting the ALEC "Criminal Intent Protection Act."<sup>42</sup> The report itself suggested ALEC's wanted a *mens rea* requirement because the corporate-backed group was concerned about average Americans.

Yet ALEC showed its hand in a post announcing the report where it specifically noted that a default criminal intent requirement would affect the Clean Water Act, the same law that Koch Industries was accused of violating in 2000, claiming that:

"to convict someone of violating the Clean Water Act, a prosecutor must only show that the accused has committed an infringement of the Act. Therefore, a person who did not know their conduct was illegal, or whose conduct was accidental, could find themselves facing criminal charges."<sup>43</sup>

### **Kochs Ride the Wave of Criminal Justice Reform and Score Positive Press**

The conversation around criminal justice reform has shifted over the years. Even as crime rates dropped, prison populations were growing and were costing states a significant amount of their budgets. The private prison industry was pushing to add new revenue streams through expanded detention of immigrants. After an expose by DBA Press showed the controversial SB 1070 was adopted at an ALEC conference before it was introduced in the Arizona legislature, CCA stopped funding ALEC, and ALEC stopped pushing prison privatization on legislators.

Around that same time, states were facing substantial budget challenges following the Wall Street crash, and "conservative" politicians were more open to concerns that had been raised for years by progressives that many states were spending more on prisoners than on school children. A number of religious groups had also expressed concerns that mass incarceration was not leading to rehabilitation. And, the so-called "war on drugs" was increasingly recognized as a failure, as a number of jurisdictions began pursuing marijuana legalization measures.

Addressing the crisis of mass incarceration was also a key plank of many civil rights organizations' policy platforms.

As the racial justice aspects of criminal justice reform became mainstreamed—and as the Kochs became increasingly focused on burnishing their public image—they began to reframe their criminal justice efforts as part of a public relations offensive, as Mayer documents in *The New Yorker*.<sup>44</sup>

This effort reaped some PR benefits, in the aftermath of a mountain of negative press about the extent of their efforts to reshape the U.S. political system.

Some in the press have even treated the Kochs as civil rights activists, despite Charles Koch having been a member and funder of the John Birch Society (JBS) in the 1960s, even fundraising for the JBS and helping to run a JBS bookstore in Wichita stocked with books attacking Rev. Martin Luther King Jr. and the civil rights movement as communist, as CMD has documented.<sup>45</sup>

The Kochs have received accolades for supporting a bipartisan coalition promoting criminal justice reform on the federal level.

"Everything we do is designed to help people improve their lives, whether you're talking about our business or our philanthropy," Koch General Counsel Mark Holden asserted to *The Atlantic* in March 2015.<sup>46</sup>

Uhlmann, the former Justice Department official, warned that "While we need to reduce the Draconian sentences imposed on nonviolent drug offenders, the Kochs are using criminal-justice reform as a Trojan horse for their efforts to weaken environmental, health, and safety regulations."

The overwhelming focus of Koch-backed groups has been on criminal justice issues that would directly benefit Koch Industries and other corporate interests.

Meanwhile, the Kochs have been outspoken about their support for political candidates like Scott Walker, who oppose criminal justice reforms that would help communities of color and others affected by harsh criminal justice laws.<sup>47</sup> Among other things, Walker pushed ALEC's truth in sentencing into law in Wisconsin as a state legislator and ALEC member, helping make Wisconsin the worst state in the country when it comes to racial disparities in incarceration.<sup>48</sup> But that didn't stop Koch Industries from maxing-out on contributions to Walker's 2010 gubernatorial campaign or David Koch's Americans for Prosperity from spending \$10 million supporting Walker during the 2012 recall elections.

The Kochs have also spent significant sums helping to elect judicial candidates using messaging that studies have shown have pushed judges to hand-down harsher sentences.<sup>49</sup>

The U.S. criminal justice system is genuinely in crisis, and for too long has devastated families and communities. The stakes are too high to do nothing to address the crisis of mass incarceration and key injustices caused by mandatory minimum sentences that take away judicial discretion.

But, given the Kochs' corporate interests in changing the criminal intent requirements, and the heavy push for such a change by groups and politicians they fund, there appears to be good

reason for concern that Koch-backed "reform" efforts focused on adding stricter criminal intent provisions could ultimately be an effort to allow white-collar criminals to get off the hook for financial and environmental crimes that hurt countless Americans.

Thank you for considering our views about the adequacy of federal criminal intent standards.

- 
- <sup>1</sup> <http://www.alec.org/model-legislation/criminal-intent-protection-act/>
- <sup>2</sup> <http://fortune.com/2015/09/30/massey-ceo-mine-explosion-coal/>
- <sup>3</sup> <http://www.nytimes.com/2015/12/04/us/donald-blankenship-massey-energy-upper-big-branch-mine.html>
- <sup>4</sup> [http://www.huffingtonpost.com/entry/criminal-justice-reform-koch\\_us\\_56560fb0e4b079b2818a13fe](http://www.huffingtonpost.com/entry/criminal-justice-reform-koch_us_56560fb0e4b079b2818a13fe)
- <sup>5</sup> <http://www.newyorker.com/magazine/2016/01/25/new-koch>
- <sup>6</sup> [http://www.denverpost.com/breakingnews/ci\\_24182307/colorado-cantaloupe-farm-charged-by-federal-officials-fatal](http://www.denverpost.com/breakingnews/ci_24182307/colorado-cantaloupe-farm-charged-by-federal-officials-fatal)
- <sup>7</sup> <http://www.forbes.com/2001/01/04/0104faces.html> <http://www.nytimes.com/2000/09/29/business/us-indicts-koch-industries-on-pollution-violations-in-texas.html>
- <sup>8</sup> *Id.*
- <sup>9</sup> <http://www.who.int/ipcs/features/benzene.pdf>
- <sup>10</sup> <http://www.motherjones.com/politics/2000/10/top-50-political-donors-2000>
- <sup>11</sup> <http://www.prwatch.org/news/2015/11/12964/fred-thompsons-legacy-includes-giving-kochs-free-pass>
- <sup>12</sup> <http://www.justice.gov/archive/opa/pr/2001/April/153enrd.htm>
- <sup>13</sup> <http://http://www.rollingstone.com/politics/news/inside-the-koch-brothers-toxic-empire-20140924>
- <sup>14</sup> Presentation outline available at [http://www.prwatch.org/files/rabiteau\\_sept\\_2011\\_overcriminalization.pdf](http://www.prwatch.org/files/rabiteau_sept_2011_overcriminalization.pdf)
- <sup>15</sup> Presentation outline available at [http://www.prwatch.org/files/rabiteau\\_2009\\_overcriminalization.pdf](http://www.prwatch.org/files/rabiteau_2009_overcriminalization.pdf)
- <sup>16</sup> <https://www.nacdl.org/withoutintent/>
- <sup>17</sup> <https://www.nacdl.org/criminaldefense.aspx?id=9920>
- <sup>18</sup> <http://thinkprogress.org/report/koch-oil-speculation/>
- <sup>19</sup> <http://www.nytimes.com/2008/11/17/business/17grammside.html>
- <sup>20</sup> <http://thinkprogress.org/economy/2011/04/13/153206/koch-industries-price-gouging/>
- <sup>21</sup> <http://www.publicintegrity.org/2011/04/06/3936/kochs-web-influence>
- <sup>22</sup> <http://www.kansas.com/news/special-reports/koch/article5050731.html>
- <sup>23</sup> <https://www.nacdl.org/whitecollar>
- <sup>24</sup> <http://www.newyorker.com/magazine/2016/01/25/new-koch>
- <sup>25</sup> <http://www.heritage.org/research/commentary/2010/12/you-might-be-committing-a-federal-crime>
- <sup>26</sup> <https://www.gpo.gov/fdsys/pkg/CHRG-112hrg66886/html/CHRG-112hrg66886.htm>
- <sup>27</sup> <http://www.stephenclaytonlaw.com/articles-and-writing/commentary-on-written-testimony-of-shana-tara-regon>
- <sup>28</sup> <http://www.gpo.gov/fdsys/pkg/CHRG-112hrg66886/html/CHRG-112hrg66886.htm>
- <sup>29</sup> <http://www.bloomberg.com/news/articles/2011-10-02/koch-brothers-flout-law-getting-richer-with-secret-iran-sales>
- <sup>30</sup> [http://www.sourcewatch.org/index.php/Texas\\_Public\\_Policy\\_Foundation](http://www.sourcewatch.org/index.php/Texas_Public_Policy_Foundation)
- <sup>31</sup> [http://www.sourcewatch.org/index.php/State\\_Policy\\_Network](http://www.sourcewatch.org/index.php/State_Policy_Network)
- <sup>32</sup> <http://www.texasobserver.org/revealed-the-corporations-and-billionaires-that-fund-the-texas-public-policy-foundation/>
- <sup>33</sup> Archived version from 2011 available at <http://web.archive.org/web/20110116210115/http://www.rightoncrime.com/> see also [http://www.prwatch.org/files/overcriminalization\\_prosecutionofcorporations.png](http://www.prwatch.org/files/overcriminalization_prosecutionofcorporations.png)
- <sup>34</sup> Archived version from 2011 available at <http://web.archive.org/web/20110119172250/http://www.rightoncrime.com/2011/01/the-risky-business-of-overcriminalization/>
- <sup>35</sup> Archived version from 2011 available at <http://web.archive.org/web/20101228034134/http://www.rightoncrime.com/priority-issues/overcriminalization/>
- <sup>36</sup> 1995 ALEC "scorecard" available at [http://www.prwatch.org/files/alec\\_1995\\_scorecard.pdf](http://www.prwatch.org/files/alec_1995_scorecard.pdf)
- <sup>37</sup> <http://www.safetyandjustice.org/story/alec-house-how-corporate-bias-affects-criminal-justice-legislation>
- <sup>38</sup> [http://alecexposed.org/w/images/f/f7/7B4-Mandatory\\_Sentencing\\_for\\_Repeated\\_Felony\\_Theft\\_From\\_a\\_Retail\\_Store\\_Act\\_Exposed.pdf](http://alecexposed.org/w/images/f/f7/7B4-Mandatory_Sentencing_for_Repeated_Felony_Theft_From_a_Retail_Store_Act_Exposed.pdf)
- [http://alecexposed.org/w/images/a/a5/7B7-Theft\\_From\\_Three\\_Separate\\_Mercantile\\_Establishments\\_Act\\_Exposed.pdf](http://alecexposed.org/w/images/a/a5/7B7-Theft_From_Three_Separate_Mercantile_Establishments_Act_Exposed.pdf)
- [http://alecexposed.org/w/images/d/dd/7B5-Organized\\_Retail\\_Theft\\_Act\\_Exposed.pdf](http://alecexposed.org/w/images/d/dd/7B5-Organized_Retail_Theft_Act_Exposed.pdf)
- [http://alecexposed.org/w/images/1/13/7B8-Theft\\_Using\\_Emergency\\_Exit\\_to\\_Avoid\\_Apprehension\\_or\\_Detection\\_Act\\_Exposed.pdf](http://alecexposed.org/w/images/1/13/7B8-Theft_Using_Emergency_Exit_to_Avoid_Apprehension_or_Detection_Act_Exposed.pdf)
- <sup>39</sup> [http://www.commoncause.org/issues/more-democracy-reforms/alec/whistleblower-complaint/original-complaint/National\\_ALEC\\_Exhibit\\_4\\_PSE\\_2011\\_STFS.pdf](http://www.commoncause.org/issues/more-democracy-reforms/alec/whistleblower-complaint/original-complaint/National_ALEC_Exhibit_4_PSE_2011_STFS.pdf)
- <sup>40</sup> <http://www.alec.org/model-legislation/criminal-intent-protection-act/>
- <sup>41</sup> <http://www.alec.org/model-legislation/resolution-on-transparency-and-accountability-in-criminal-law/>
- <sup>42</sup> [http://alec.org/docs/Criminalizing\\_America.pdf](http://alec.org/docs/Criminalizing_America.pdf)
- <sup>43</sup> <http://www.americanlegislator.org/new-report-overcriminalization/>
- <sup>44</sup> <http://www.newyorker.com/magazine/2016/01/25/new-koch>
- <sup>45</sup> <http://www.prwatch.org/news/2014/07/12527/his-dad-charles-koch-was-bircher-new-documents>
- <sup>46</sup> <http://www.theatlantic.com/politics/archive/2015/03/do-the-koch-brothers-really-care-about-criminal-justice-reform/386615/>
- <sup>47</sup> <http://www.nytimes.com/politics/first-draft/2015/04/20/koch-brothers-signal-support-for-scott-walker/>
- <sup>48</sup> <http://www.prwatch.org/news/2014/06/12513/alec-scott-walker-racial-politics>
- <sup>49</sup> <https://www.themarshallproject.org/2014/12/11/trial-by-cash#.rrSajkg9S> see also <https://theintercept.com/2015/11/03/soft-on-crime-ads/>