



## **2015 can be the year of criminal justice reform**

**By Timothy Lynch**

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Criminal justice reform appears to be one of the hot topics this year. Unlike most other policy areas, where President Obama and Republicans remain at loggerheads, criminal justice reform holds much greater promise since both political parties seem to agree that there are festering problems that need to be addressed.

Let's explore some of the most pressing topics.

### **Militarized policing**

The militarization of American policing has been under way since the early 1980s. Until recently, there has been very little debate about its profound implications. And then, all of a sudden, the images that emerged on the evening news from the unrest in Ferguson, Mo., brought scrutiny, at last, to the idea of militarized police. The Ferguson police looked like soldiers — helmets, camouflage, armored vehicles and M-16s. Since the equipment and weaponry came from the Pentagon, Obama found himself on the defensive when asked a basic question: Why do local police departments need weapons of war? In response to the growing criticism from both the Left and the Right, Obama ordered a “review” of the Pentagon program.

The police and the military have very different missions. The essence of the military mission is to kill the enemy. That's what the rockets and bombs are designed for. The police, in contrast, are supposed to be “peace officers.” Their mission is to respond to disturbances and crimes and restore the peace. We should expect the police to avoid the use of force, if possible, or use the minimum amount of force necessary to bring suspects into a court of law where disputes can be resolved without further violence. When the police confuse their mission with the military mission, one finds unnecessary confrontations and unnecessary killings.

The original idea behind the Special Weapons and Tactics team was to have a unit available for extraordinary events, such as a hostage situation. As the years passed, several things happened.

First, SWAT units started to pop up all around the country — even in small towns where there was little criminal activity. Second, the mission of these units expanded to include ordinary policing assignments, such as the execution of search warrants in drug cases. In recent years, SWAT teams have been used to raid medical marijuana clinics and to conduct regulatory inspections of taverns. Third, the Pentagon made surplus military equipment available to local police departments around the country, including armored vehicles, grenade launchers and even bayonets. Sen. Rand Paul, R. Ky., observed that “Washington has incentivized the militarization of local police precincts by using federal dollars to help municipal governments build what are essentially small armies.”

Until Ferguson and the intense media scrutiny that followed, there had been little congressional oversight over the flow of weaponry to small-town police departments. When the media queries came along, some local departments could not account for the weapons they had received in recent years. And the definition of “law enforcement” was stretched so far that military weapons found their way to a harbor master in Massachusetts and the California Assembly’s sergeant-at-arms.

Hearings were held and reform bills were introduced in the waning days of the last session of Congress. Now-former Sen. Tom Coburn, R-Okla., introduced the Stop Militarizing Law Enforcement Act. In the House, Rep. Chris Stewart, R-Utah, introduced the Regulatory Agency Demilitarization Act. That bill addresses a separate aspect of the problem — the proliferation of paramilitary units from police agencies such as the FBI to regulatory agencies including the U.S. Food and Drug Administration.

“Having highly armed units within dozens of agencies is duplicative, costly, heavy-handed, dangerous and destroys any sense of trust between citizens and the federal government,” Stewart said.

It is hard to say whether Congress will enact reform legislation on this subject in 2015. The giveaway program exists for a reason. The Pentagon wants to rid itself of surplus vehicles and weapons, and local police departments want that stuff. If Obama really wanted to do something about it, he could have issued an executive order halting the practice.

## **Marijuana legalization**

The most dramatic change in our criminal justice system has been the legalization of marijuana. Too many news reports miss the unfolding impact of this because it is happening in small spurts. Unfortunately, news reports mostly marvel at the pot shops that have opened in Colorado and Washington. Consider this: More than 20 million Americans use marijuana regularly. Millions more use it occasionally. From a criminal justice perspective, it is astonishing that, in the eyes of the law, so many people are viewed as criminals. As the legal status of marijuana changes, there will be sharp reductions in the number of searches, arrests, detentions and prisoners.

Last November, voters in Alaska, Oregon and Washington, D.C., approved referenda to legalize recreational marijuana for adults. The politics of marijuana policy are changing as politicians grasp the fact that voters are ready for a change — at least in some parts of the country. Even Texas Republican Gov. Rick Perry says marijuana ought to be decriminalized. Voters in Nevada and California are expected to approve legalization initiatives in 2016. Should that happen, momentum will surely move more states in the same direction.

Less dramatic reforms are occurring in American cities. New York City Mayor Bill de Blasio has directed the NYPD to stop arresting people who are found to be possessing small amounts of marijuana. Instead of acquiring a criminal record, such persons will instead receive a ticket. De Blasio recognized that blacks and Latinos were swept into a criminal justice system by the thousands every year. The mayor's policy has, in turn, prompted members of the state legislature to take up marijuana reform. Daniel Squadron, a Democratic state senator, says de Blasio's shift "is a big deal to undo a glaring injustice. But it shows we also need to change state law to create fairness."

Since the politics of marijuana are in flux, many members of Congress would rather avoid the topic altogether. That may not be possible given the success of the marijuana legalization measure in the District of Columbia. Rep. Andy Harris, R. Md., moved to kill the measure last month in a rider to a must-pass appropriations bill. The Harris rider would bar D.C. from spending any money to implement its legalization initiative. Karl Racine, the city's new attorney general, says the rider will prevent pot shops from opening but allow home cultivation of marijuana and permit adults to possess small amounts of the drug. It will be interesting to see whether Harris can persuade the new Republican Congress to go further and turn back marijuana reform in D.C. Sen. Rand Paul has said Congress should not override the D.C. legalization measure. Stay tuned.

### **Sentencing reform**

One area where Obama and the GOP Congress are likely to find common ground is federal sentencing reform. The federal prison population has ballooned over the past 30 years. Crime rates have, happily, been falling, but there seems to be a bipartisan consensus that sentencing reform is necessary. Too many people are locked up and one of the reasons is that sentencing is too severe.

Last year Sens. Mike Lee, R-Utah, and Dick Durbin, D-Ill., co-sponsored the Smarter Sentencing Act. The bill would reduce mandatory minimum sentences in certain drug cases from 5-10-20 years to 2-5-10 years. When the Senate Judiciary Committee voted on the bill, Republican Sens. Ted Cruz of Texas and Jeff Flake of Arizona joined Democrats in passing the measure by a 13-5 vote.

Former federal prosecutor John Malcolm, who is now a scholar with the Heritage Foundation, explains why many conservatives find merit in the bill: “I see each prison cell as very valuable real estate that ought to be occupied by individuals who pose the greatest threat to public safety. In my opinion, under our current system, too many relatively low-level drug offenders are locked up for five, 10 and 20 years when lesser sentences would, in all likelihood, more than satisfy the legitimate penological goals of general deterrence, specific deterrence and retribution.”

Sens. Paul and Patrick Leahy, D-Vt., have co-sponsored a more far-reaching sentencing measure called the Justice Safety Valve Act. If that bill were to become law, minimum sentences would no longer be mandatory. That is, federal judges could hand down lighter sentences if they decide less severe penalties are just and appropriate under the circumstances.

Since November’s midterm elections, Obama has spoken quite a bit about bypassing Congress and taking action on his own through executive orders. He could commute scores of unjust sentences all by himself, but he clearly does not want to go that route. He has, however, repeatedly indicated support for sentencing reform. And now that his controversial Attorney General Eric Holder is leaving office, the GOP leadership may allow sentencing reform to come up for a vote.

Regardless of what happens at the federal level, it is important to remember that most of the criminal cases in our legal system occur at the state and local level. And many states have been adopting sentencing reforms that offer alternatives to incarceration, such as drug courts and home detention.

Even conservative states such as Texas and Indiana are embracing reforms. Prisons are expensive to build and maintain, presenting painful choices to conservative policymakers. Some may not like the idea of supporting reduced sentencing and may want to avoid being tagged as “soft on crime,” but neither do they want to vote for increased spending and taxes. And when the experience of other states demonstrates no spike in crime following a reduction in their imprisonment rates, conservative support for sentencing reform grows further still.

### **Civil asset forfeiture**

Many people are startled when they learn how civil forfeiture laws work. Such laws permit police and prosecutors to seize property — cash, cars, boats, houses, land — from people who have not been convicted of a crime. In many jurisdictions the presumption of innocence is turned on its head. That is, if an owner has had his property taken and wants to get it back, he must prove his innocence to the satisfaction of the court. There is a growing awareness of how unfair these procedures are — so reform may be coming in 2015.

There are two types of forfeiture: criminal and civil. Criminal forfeiture takes place after a person is convicted of a crime. Ill-gotten gains can then be seized by the government. Civil forfeiture laws are controversial because they empower the police to seize property in situations where there has been no conviction, or even, in some cases, an arrest.

In addition to the due process problem, civil forfeiture laws commonly allow police departments to keep the property they seize rather than deposit it in the government's general treasury. That gives police a financial incentive to engage in predatory behavior. Instead of devoting resources to enhance public safety, police may choose to pursue assets and profits. Reporters have found cases in which homes were seized after teenagers sold pot from their front porches — unbeknownst to the parents. Federal agents seized a family owned motel after some customers were caught with drugs in one of the rooms. Highway patrols seize cash from motorists on the hunch that it is drug money.

Police like to say that cash seizures are rarely contested in court. Strong proof, they say, that police are using the forfeiture laws against the criminal element, not innocent victims. A more likely explanation is that it is very hard to fight city hall. As conservative columnist George Will observed, civil forfeiture “forces property owners of limited means to hire lawyers and engage in protracted proceedings against a government with limitless resources just to prove their innocence.”

Last year, Minnesota Gov. Mark Dayton signed a civil forfeiture reform measure. Law enforcement strongly opposed the bill behind the scenes, but once it came up for a vote in the legislature, there was very little opposition. In fact, it passed the state assembly unanimously.

There were several reform bills introduced last year. Now we will hear the argument that the problems have already been fixed. No one should expect the federal law enforcement bureaucracy to roll over. There is too much money at stake. The Department of Justice has grown accustomed to a revenue stream that is separate from and independent of the congressional appropriations process.

On Jan. 16, Holder announced that he was ordering a curtailment of the Justice Department's civil forfeiture policies, particularly the practice known as "adoption." Adoption occurs when a local police agency seizes property under state law, but then asks the feds to take over the case by relying upon federal law. After the federal adoption, they split the proceeds: 20 percent to the feds; 80 percent to the local agency. Why bother to involve the feds? It is all about the money. Since some states require that all forfeited assets go into its general treasury fund, local departments get around those restrictions by seeking federal adoption. That way, the police agency can bypass local rules and keep a good chunk of the forfeited assets.

Holder's new directive only affects a small part of the federal asset forfeiture operation. It may have been an attempt to preempt reform legislation.

### **Indigent defense reform**

The overwhelming majority of cases in the criminal justice system involve the poor. And the poor obviously cannot afford lawyers to represent them in court. In 1963, in a landmark ruling, the Supreme Court held that the government must provide attorneys for indigent persons accused of serious crimes. The idea was to elevate the standard of justice, but indigent defense in America today is in a state of crisis.

One problem has been the crushing caseloads. Even good attorneys are incapable of doing good work if they are swamped with clients pulling them in different directions, demanding their time to find supportive witnesses and research the law. For the indigent, the right to counsel too often has been illusory. A 2011 report from the Justice Policy Institute offered a grim assessment: “In many jurisdictions across the country, defenders meet with clients only minutes before their court appearance in courthouse hallways, often just presenting an offer for a plea bargain from the prosecution without ever conducting an investigation into the facts of the case or the individual circumstances of the client.”

Texas is about to shake things up. Instead of relying on the familiar public defender system, the Texas Indigent Defense Commission has authorized a pilot program called “client choice.” The accused indigent will receive a voucher that he can use to hire his own attorney. Like the school voucher concept, the idea is to bring choice and competition to the marketplace for criminal defense services. The lawyers and firms that do good work will prosper and expand, and the lawyers that do lousy work will find fewer clients. Interestingly, this system has never been tried in the United States, but it is used in countries such as Canada, England, and Scotland.

The pilot program is set to begin in February in Comal County near San Antonio. If the program goes smoothly, it will be introduced in other Texas counties.

Critics say that if overall funding for indigent defense is inadequate, it will not matter which defense arrangement is in place. Supporters of client choice do not deny the importance of funding, but say whatever that level turns out to be, vouchers will produce better outcomes for both the accused and the public. By better outcomes they mean fewer wrongful convictions and more just sentencing. With more state governments controlled by the GOP, one can expect the defense voucher idea to move beyond Texas.

The political climate for criminal justice reform is superb. Present low crime rates provide space for policymakers who are inclined to address this compelling need. If there is no movement on reform now, we will all look back on 2015 as a lost opportunity.

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