

To: United States Sentencing Commission
Docket Number: USSC-2015-0003-0001
Regarding: Proposed Priorities for Amendment Cycle
From: Effective Altruism Policy Analytics

Thank you for the opportunity to offer comment on “Proposed Priorities for Amendment Cycle.” We at Effective Altruism Policy Analytics are pleased to offer our analysis and recommendations.

Changing Minimum Mandatory Sentences

We support the Commission's efforts to work with Congress in reforming statutory mandatory minimum penalties. The Commission's sentencing guidelines provide better and more proportional sentencing solutions than mandatory minimum sentencing rules. However, we do recommend that the Commission address the following concerns while working on these reforms.

Mandatory minimum penalties were established to avoid bias. Any change in these penalties should also address which biases are affected. Currently, the Commission has noted that proportionately less African-American drug offenders are eligible for the use of the “safety valve” (an exception to mandatory minimum sentences) than other drug offenders^[1]. While expanding the safety valve is likely to save taxpayer money, the Commission has suggested that this demographic trend is unlikely to change with expansion. It would be more efficient and fair to lower the mandatory minimum sentences of nonviolent crimes to the current safety valve sentences, as additional factors like criminal history and gun use already impact the suggested prison term length in accordance with the sentencing guidelines.

Another goal of mandatory minimum sentencing is to disincentivize crime by making punishment more certain and severe. However, because it is not certain that offenders will be arrested, and there may be diminishing increases in deterrence from increases in sentence length, this goal is not easily achieved. Between 2002 and 2012, the 17 states that reduced their imprisonment rates experienced a decline in crime rates^[2]. In 2006 analysis in Washington state found that incarcerating violent offenders caused a net public benefit by saving the state more than it costs, while imprisonment of property and drug offenders led to negative returns on investment^[3]. Assuming these findings are correct, mandatory minimum sentences for such crimes are likely to be counterproductive.

1: Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System. (2011, October 1). Retrieved July 27, 2015, from

http://www.usc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_12.pdf

2: These states are Alaska, California, Connecticut, Delaware, Georgia, Maryland, Massachusetts, Michigan, Mississippi, Nevada, New Jersey, New York, Oklahoma, South Carolina, Texas, Utah, and Wisconsin.

3: Steve Aos, “Evidence-Based Policy Options to Reduce Crime, Criminal Justice Costs and Prison Construction,” Symposium on Alternatives to Incarceration (Washington, DC: U.S. Sentencing Commission, July 14–15, 2008).

Attempts to properly incentivize behavior should account for typical human biases, such as risk attitudes associated with gains and losses. Those who have already committed crimes are likely to be biased toward risk-seeking actions. When added together with risk-seeking biases associated with facing a high probability of loss, there is an increased probability that those facing mandatory minimum sentences will resist arrest.

If the mandatory minimum sentence is equivalent to or near a life sentence, risk-seeking biases are not necessary to incentivize resisting arrest. In areas that implemented three-strikes laws, the number of policemen murdered in the line of duty increased more than 40 percent and an increase in the overall homicide rate was observed as well^[4]. The primary exception to this is that mandatory minimum penalties for crimes committed with firearms reduced police murders about 18 percent. When making changes, these concerns should be considered, because a small change in incentive can dramatically impact the survival chances of crime witnesses and police officers.

Reducing recidivism

The potential benefits of reducing recidivism are high, as a reduction in recidivism results in reduced crime, fewer expenses for each individual who does not return to prison, alleviation of overcapacity problems, and reduced cost of construction and maintenance of prisons built to address overcapacity issues.

We recommend that the USSC research methods to reduce recidivism in offenders who are determined to be at a high-risk of recidivism. According to a paper by the Crime and Justice Institute, low-risk offenders are often diverted into programs meant to discourage recidivism, reducing the amount of money available to put higher risk individuals through the same programs^[5]. For recidivism, the USSC's first priority should be to research a reliable tool to determine recidivism risk, and the second should be to then utilize the tool to study how to prevent those the tool considers to be moderate- to high-risk from returning to crime.

Finding a reliable measure of risk also allows easier measurement of the effectiveness of interventions at reducing recidivism. As individuals with low risk for recidivism would increase the sample size of a study while contributing little useful data: it is better to increase sample size with those already evaluated to be at high risk since they will be targeted for programs aimed at reducing recidivism.

4: Moody, C., Marvell, T., & Kaminski, R. (2002, January 11). Unintended Consequences: Three-Strikes Laws and the Murders of Police Officers. Retrieved July 27, 2015.

5: Warren, R. (2007, August 1). Evidence-Based Practice to Reduce Recidivism: Implications for State Judiciaries. Retrieved July 27, 2015, from <http://static.nicic.gov/Library/023358.pdf>

Child pornography

The current offense level for creating, receiving, and distributing child pornography is understandably high (as established in §2G2.2). Furthermore, §2G3.1 establishes offense levels for transferring obscene materials to minors.

Controversy exists in the treatment of minors who take pictures of themselves while nude or nearly nude and transmit those pictures to other minors, especially those with whom they share sexual or romantic relationships. As of 2009, surveys indicated that about 4 percent of minors between the ages of 12 and 17 sent sexually suggestive nude or nearly nude images via text messaging and 15 percent received them^[6]. At present, federal laws against child pornography still apply to this practice of “sexting” and carry a mandatory minimum sentence of 5 years^[7].

However, in cases of couples sending explicit material depicting themselves to each other (and certain other cases of minors sharing explicit materials depicting themselves), it is unclear that there exists a public interest in severe or any sentencing. Their actions may have some potential costs (including issues related to sharing explicit materials with those for whom material was not intended), and minors who coerce other minors into making explicit material of themselves should receive punishment. Given the various costs of incarceration (especially of minors), and the fact that actual harm done is much lower in cases where minors consensually shared explicit photos of themselves with each other, a reduction in the sentencing guidelines for these sorts of cases may be warranted, even if prosecution is unlikely.

Conclusion

Overall, we do not have any fundamental disagreements with the Commission’s priority list. We hope that this comment will help the Commission by providing guidance for its review, to reduce unnecessary penalties and increases in crime. We would appreciate any feedback you have regarding the usefulness of this comment.

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6: Lenhart, A. (2009, December 14). Teens and Sexting. Retrieved July 27, 2015, from <http://www.pewinternet.org/2009/12/15/teens-and-sexting/>

7: Child Pornography Sentences. (n.d.). Retrieved July 27, 2015, from <http://famm.org/affected-families/child-pornography-sentences/>