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Benefits and Costs of Retroactivity

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Thank you for the opportunity to appear before the United States Sentencing Commission regarding the issue of making the crack cocaine guideline amendment retroactive. My name is Anne Morrison Piehl. I am an associate professor in the Department of Economics and a member of the Program in Criminal Justice at Rutgers University. For 15 years I have been actively engaged in empirical research on criminal justice, especially corrections and sentencing.

In my academic work, I assess policies from the perspective of a representative citizen. I understand that representatives of the federal agencies that will be responsible for implementing retroactivity, if approved, have provided their input to the Commission. I leave the technical and logistical details to those experts. Today, my testimony will take a broader perspective, that of society at large.

Benefit-cost Analysis

Benefit-cost analysis is one widely accepted approach to totaling the consequences of a proposed policy change. Benefit-cost analyses are required of federal agencies (as detailed in a series of circulars from the Office of Management and Budget) or by federal agencies for those seeking grants or contracts. It is routinely used in the areas of the environment and health care policy, but less commonly used regarding criminal justice.¹

The purpose of benefit-cost analysis is to aid decision-making by comparing the impacts of proposed policies. Its particular value as an analytic frame is that it incorporates all consequences of a policy choice and emphasizes the necessary tradeoffs. In addition, it puts these tradeoffs into a common metric -- money. While monetizing costs and benefits is the source of some controversy, it provides a metric that is well understood. The costs and benefits are assessed society-wide, not just from the perspective of a single government agency. This last feature is what makes benefit-cost analysis powerful – it assesses the entirety of an initiative without regard to agency or budgetary boundaries. This gives it the perspective of a “representative” citizen.

Benefit-cost analysis is particularly good at characterizing tradeoffs across time and projects. It makes explicit the types of tradeoffs that policymakers must make everyday. The approach it takes is inherently consequentialist; it is not very good at characterizing fairness, or distributional concerns. Therefore, any benefit-cost analysis should be accompanied by a discussion of who the benefits accrue to and who bears the various costs. It provides valuable input into the decision-making process.

Benefit-cost analyses are an accepted way to put social perspective into government decision making. Some are offended by economists’ willingness to monetize everything. My perspective is that policies invariably involve tradeoffs, and benefit-cost analysis makes explicit those tradeoffs that might otherwise be overlooked. I did not have the time to perform a complete

¹ See Gramlich (1981) for the classic presentation of benefit-cost analysis. See Cohen (2000) for a review of benefit-cost analysis in criminal justice. And see Aos et al. (2006) for an analysis of various expenditure options for controlling crime in Washington State, including incarceration.

benefit-cost analysis of the policy question before the Commission today. Nor did I have access to the data necessary to provide accurate calculation. Therefore, my testimony will provide a framework for characterizing retroactivity in terms of its social costs and benefits.

Benefits and Costs of Retroactivity of Crack Cocaine Amendment

In its report to the Commissioners (USSC 2007), USSC researchers provided rich detail about the likely impact of retroactivity. From their analysis, it is clear that adopting retroactivity would impact federal agencies, citizens in the communities to which inmates would return, taxpayers, and the inmates themselves. The reasonable assumptions underlying the estimates yield projections that approximately 19,500 inmates would be eligible for resentencing, with an average sentence reduction of 27 months. This impact is staggered temporally and dispersed geographically. These inmates are scheduled to be released without retroactivity; adopting the policy would move up the expected release dates. In particular, the policy would shift the bulge in releases that would occur several years out to next year and the following one.

For a benefit-cost analysis, the two categories of impact of the greatest concern to ordinary citizens are the cost savings due to decreased number of prison bed days and the increase in crime in local communities. I address these in turn.

Savings on Incarceration

Nearly 16 million bed-days are projected to be saved under retroactivity (19,500 * 27 months * 30 days/month). The question becomes how to value these savings. In technical terms, benefit-cost analyses take the status quo as given, and assess the policy under consideration as a “marginal” change from that status quo. This means that all costs and benefits must be measured as marginal (or incremental) costs and benefits, not averages. In addition, it implies that the scale of the change matters to the calculations.

There is a large range of estimates that could be used to value the cost of incarceration. The financial costs to the Federal Prison System for an additional inmate for a day are minimal, limited to food, health care, and other incidentals. This estimate would be on the order of \$20 per day. Another estimate comes from dividing the budget of the Prison System by the number of inmates:² 4.6 billion divided by 200,000 inmates divided by 365 days equals \$63 per inmate day. Yet another estimate is the \$40,000 per year per bed (\$110 per day) favored by researchers who conduct benefit-cost analyses.

How should we choose from among this range of estimates? The \$20 estimate is obviously too low. This is the appropriate figure for assessing the costs of incarcerating a single one inmate for a single day, not for a large-scale policy change. With scale, cost savings can be realized. Fewer staff will be hired, fewer facilities built. This reasoning argues for using the average cost of the federal prisons as the appropriate measure of marginal cost for this policy. But again, this

² Budget figures were obtained from http://www.usdoj.gov/jmd/2008summary/pdf/026_outlays_2006_2008.pdf and the inmates was obtained from <http://www.bop.gov/news/quick.jsp>.

estimate is too low, as it appears to be for operating cost alone. Capital costs can be saved with a policy change affecting this many inmates, as prison construction can be delayed, or avoided altogether. Given the substantial overcrowding in the federal prisons, the policy under consideration could lead to the postponement of some prison construction costs for years into the future. This argues for the \$110/day estimate standard in the literature.

The table below lists the cost savings using several reasonable measures of cost.

Cost per Inmate Day	Total Social Cost Savings from Retroactivity
\$70	\$1.1 billion
\$110	\$1.7 billion

Costs of Crime

What are the expected impacts on crime from releasing inmates 27 months earlier, on average, than previously scheduled?

Deterrence and incapacitation effects are quantitatively the most important in considering the impact of incarceration on crime. Here, deterrence will be unaffected. Because the crack cocaine amendment has been adopted prospectively, informed potential offenders already know the new penalties. Incapacitation is a bit more complicated. Changing the release date will have different effects than considering whether or not to incarcerate someone in the first place. For drug sellers, their position in the drug distribution “business” has long since been filled. And for all offenders, the criminal career has been interrupted.

The place we do expect to see an impact on crime comes from the released inmates themselves. Those who recidivate are likely to do so sooner, as they will have been released sooner. More importantly, under retroactivity inmates will be released when they are two years younger. And the relationship between age and crime is one of the strongest constants in criminology. The best evidence on the magnitude of this comes from a comprehensive study of recidivism of inmates released from state prisons in 1994, conducted by the Bureau of Justice Statistics (Langan and Levin 2002). This study finds that 48.8% of those aged 30-34 were convicted of a crime within 3 years of release. For those aged 35-39, the value was 46.3%. Using the outcome measure “incarcerated for a new crime,” the recidivism rates drop from 25.9% to 24%. Therefore an overestimate of increased crime would be a 2% increase in recidivism. It is an overestimate because it uses a figure calculated over three years when the average reduction would be 27 months. It is also an overestimate because it assumes that judges resentence without regard to predicted recidivism.

These estimates indicate the impact of releasing younger inmates will impose minimal additional crime costs on society, especially after recognizing that recidivism rates are much higher for property offenses than for subsequent violent offenses. (Of the arrests accounted for by state inmates released in 1994, 13.5% were for violent offenses.)

Finally, there should be a negligible impact, if any, of a “mass release” of inmates. As noted earlier, the releases are spread over time. The first year shows the largest impact, and increase of 2520 releases under the USSC research assumptions about resentencing. This is a small percentage of the 45,000 annual releases from federal prisons (5.6%). And a bulge in the number of releases of crack cocaine offenders is scheduled to occur in the 2nd, 3rd, and 4th years out even in the absence of retroactivity. This is not to minimize the impact on the federal agencies that must do the work or the impact on the few communities with substantial flow, but the average citizen will not notice this increase given the large numbers of inmates released from state and local facilities each year.

Conclusion

In conclusion, benefit-cost analysis shows that the proposed retroactivity will substantially reduce the costs of incarceration (on the order of \$1-2 billion) and will minimally impact crime rates. From the perspective of an American citizen, the consequences of retroactivity represent a large win.

It is not always true that economic efficiency and fairness considerations work in the same direction. In fact, tradeoffs of one for the other provide the greatest challenges for policy makers. In this case, the criteria are not opposed. In addition to the impacts analyzed above, I believe that supporting retroactivity will increase public support for criminal justice institutions, as the recently adopted amendments will do. I urge the Commission to allow for rehearings for those inmates who would potentially benefit from bringing their case back before a judge.

References

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