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Issue Brief

Mandatory Minimum Drug Sentencing: Is it an effective Drug Use Control Strategy?

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BACKGROUND

The office of National Drug Control Policy estimates that 8.2% of the United States population 12 years of age and older are current users of illicit substances[1] with an economic cost of over $160 billion.[2] Drug control is a major priority for the federal government, with an estimated budget in 2004 of $11.7 billion[3], not including the cost of housing drug offenders in federal prison.

Mandatory minimum drug sentencing (MMDS) laws were established by Congress in 1986 and 1988 as part of the Anti-Drug Abuse Acts. These laws created strict penalties for the use and distribution of illicit substances. As a result of increased drug enforcement, the number of prisoners incarcerated for drug-related offenses has dramatically increased; one in four inmates in the federal prison system is currently serving time or awaiting trial for a drug-related offense, at a cost of $6.1 billion. In 1983, this number was one in eleven.[1]

The American Bar Association recently called for the end of mandatory minimums, following a year-long study of the issue by its Kennedy Commission. As part of its rationale, it points out that in 2001, the average federal drug trafficking sentence was 72.7 months, the average federal manslaughter sentence was 34.3 months, the average assault sentence was 37.7 months, and the average sexual abuse sentence was 65.2 months.[4]

Although Federal MMDS laws continue to be in place, public dissatisfaction appears to be increasing with several states, including Wisconsin, recently repealing their own MMDS laws. Although Wisconsin has repealed its own MMDS laws, its residents are still subject to MMDS under federal prosecution. Therefore, examining this federal policy is relevant for determining effective strategies that will improve the health of its residents. This issue brief examines the effectiveness of mandatory minimum drug sentencing as a public health drug use control strategy.

REVIEW OF THE EVIDENCE

Arguments for MMDS

Proponents of MMDS argue that it meets the goals of the penal system: deterrence, just punishment, incapacitation and rehabilitation. These arguments are considered in turn.

Stiff penalties act as a deterrent

Mandatory minimum sentences for drug offenses range from five to ten years for a first offense to life in prison for an individual with two previous drug felonies. Advocates of MMDS feel that these stiff penalties deter people from using and trafficking drugs. However, two recent reviews[5, 6] point out that the evidence that deterrence works is lacking. Deterrence requires knowledge of the penalties that will occur, and studies have repeatedly shown that both the general public and potential offenders have little knowledge of sentencing penalties.[7,8] In addition, studies have shown that offenders are less inclined to think about the consequences of their actions. This may be a result of a greater tendency toward impulsive behavior, risk-seeking rather than risk-avoidant nature, or, not uncommonly, being under the influence of alcohol or illicit substances of abuse.[8] Therefore, individuals prone to criminal behavior may not behave in the risk avoidant manner that is needed for deterrence to work. Finally, the stability of substance misuse prevalence rates in the U.S. over the last decade argues against a deterrent effect of MMDS.[9]

MMDS is just punishment for criminal offenses

No evidence of effectiveness or informed policy helped establish the appropriate length of mandatory minimums. MMDS were introduced in Congress just prior to national elections. The years of incarceration assigned to each offense were determined by the congressmen calling out numbers until consensus was reached.

MMDS incapacitates for long periods those people who sell drugs

One of the arguments for MMDS is that it takes drug dealers off the streets, and therefore prevents those individuals from committing further crimes. However, a provision of the MMDS laws is that informants who provide drug enforcement officials with ”substantial assistance” in prosecuting other drug offenders will have their own sentence reduced. As higher-level dealers have more valuable information to reveal, they may have a better chance of getting a shorter sentence. One study found that 57.7% of offenders in state prisons were non-violent offenders without high-level drug activity (defined as importing drugs into the United States, manufacturing or aiding in the manufacture of drugs, laundering drug money, distributing to or aiding in distribution to dealers).[10] Of drug offenders in state prisons, 75% percent have been convicted of drug possession and/or non-violent crime.

Similarly, in U.S. federal prisons, possession, as opposed to trafficking, charges are common grounds for incarceration. In 2000, one in four, or 334,000, inmates in the U.S. penal system were serving time or awaiting trial for a drug-related offense at an annual cost of 6.1 billion dollars. This represented an increase from one in eleven, or 57,975, inmates in 1983. Fifty-seven percent of all federal inmates were incarcerated for drug-related offenses. Only 11% of these federal inmates incarcerated for drug-related offenses were characterized as high-level dealers.[11]

Incarcerating drug users and dealers allows them to be rehabilitated

There is strong evidence that drug treatment initiated in prison reduces further drug use, especially when drug offenders are kept in facilities separate from other prisoners and treatment is combined with further follow up after release from prison. However, treatment in prisons is not available for all whom would benefit from these services. The 1997 Inmate Survey found that 51% of prisoners at the federal or state level used alcohol or drugs while committing their offense. Since being incarcerated, only 14% of those individuals reported treatment for alcohol, and 9-10% received treatment for drugs.[12] The failure to treat individuals who are drug users has strong consequences for drug control; a recent review of drug studies found that between 70 and 98 per cent of those who have been imprisoned for drug-related crimes and not treated during the course of their incarceration relapsed within the year following release.[13]

Arguments against MMDS

Opponents of MMDS state that it is not cost-effective, takes sentencing discretion away from judges, and unfairly targets minorities.

MMDS is not cost-effective

As mentioned above, the number of prisoners incarcerated on drug-related charges has increased dramatically since the advent of MMDS. Researchers at the Drug Policy Research Center compared MMDS with other drug control approaches in terms of cost-effectiveness using statistics based on the market for cocaine. They concluded that MMDS was a less cost-effective policy than prior enforcement strategies. In fact, all incarceration strategies were less cost-effective than treating heavy cocaine users.

MMDS takes away judicial power

MMDS rules allow Federal prosecutors to determine if "substantial assistance" has been provided by the offender. It is up to the prosecutor to determine if the information obtained is useful, and if the offender deserves to have his sentence decreased rather than apply the mandatory minimum penalty. Between 1999 and 2001, 28% of federal drug cases eligible for a mandatory minimum sentence had downward departures due to substantial assistance motions. In many states, the judge cannot review the facts leading to these prosecutorial motions. Thus, judges are unable to consider all the facts of the case when sentencing, and are constrained by mandatory minimums in the sentences that they mete.

MMDS promote racial disparity in sentencing

Black prisoners (56%) and Hispanic prisoners (23%) comprise the majority of those incarcerated on drug offenses.[6] However, the use of drugs in these groups does not reflect this predominance. Data from the 1997 National Household Survey on Drug Abuse indicate that Blacks are 13% of monthly drug users and Hispanics, 9%. Whites, who make up only one-fifth of the drug offenders in state prisons, comprise 74% of monthly drug users.[1] Part of the racial disparity has been attributed to sentencing disparity between crack and powder cocaine. Crack is used predominantly by minorities, and powder cocaine used predominantly by non-minorities. Under current MMDS laws, a conviction of possession with intent to distribute for crack results in a five-year sentence for 5 grams of cocaine. For powder cocaine, a five-year sentence is received for quantities of 500 grams or more. This 100:1 ratio was initially created by Congress because of the belief that crack cocaine was a more dangerous drug, and more likely to be associated with violence. Current evidence, however, disputes this theory. As pointed out by the US Sentencing Commission, in 2000, three-quarters of federal crack cocaine offenders had no personal weapon involvement, and only 2.3 percent actually discharged a weapon. Thus, the sentencing commission has repeatedly called for the revision of MMDS in regard to crack cocaine.

"In summary, the evidence does not support mandatory minimum drug sentencing in its current form as an effective strategy for drug control."

SUMMARY

In summary, the evidence does not support mandatory minimum drug sentencing in its current form as an effective public health strategy for drug use control. Two alternative strategies for drug control that appear to be more evidence-based are the use of drug courts and treatment programs.

Drug courts provide an alternative judicial pathway for drug offenders that are not violent or drug traffickers. Under these programs, the offender is monitored by the courts while participating in a community-based substance abuse treatment program. Failure to comply with the program's mandates results in legal sanction. The Department of Justice's own review and an independent meta-analysis both concluded that recidivism is significantly reduced among drug court participants.[17,18] Therefore, the creation or further use of drug courts is encouraged as an alternative to MMDS and the traditional judicial structure.

The other evidence-based recommendation is to expand access to treatment, both in prisons, and in general for the population. Large societal and health benefits can be expected from this approach. According to the CDC, evidence shows that every one dollar invested in treatment reduces the costs of drug-related crime, criminal justice costs and theft by four to seven dollars. When health care savings are factored in, total estimated savings can exceed costs by a ratio of 12 to 1. Successful treatment will reduce the risk of transmission of diseases more common in drug users such as hepatitis and tuberculosis, and improve employment and other social determinants of health for current users.[19]

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