### ****The Arguments For and Against Mandatory Minimum Sentences****

**The Assault on Mandatory Minimum Sentences.**Mandatory minimum sentences have not eliminated sentencing disparities because they have not eliminated sentencing discretion; they have merely shifted that discretion from judges to prosecutors.[[25]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn25) Judges may have to impose whatever punishment the law requires, but prosecutors are under no comparable obligation to charge a defendant with violating a law carrying a mandatory minimum penalty.[[26]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn26) As a practical matter, prosecutors have unreviewable discretion over what charges to bring, including whether to charge a violation of a law with a mandatory minimum sentence, and over whether to engage in plea bargaining, including whether to trade away a count that includes such a law. Moreover, even if a prosecutor brings such charges against a defendant, the prosecutor has unreviewable discretion whether to ask the district court to reduce a defendant’s sentence due to his “substantial assistance” to the government.[[27]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn27)

What is more, critics say, unbridled prosecutorial discretion is a greater evil than unlimited judicial discretion. Prosecutors are not trained at sentencing and do not exercise discretion in a transparent way.[[28]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn28) Critics also claim that prosecutors, who stand to gain professionally from successful convictions under mandatory minimums, do not have sufficient incentive to exercise their discretion responsibly.[[29]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn29)

Indeed, nowhere else in the criminal justice system does the law vest authority in one party to a dispute to decide what should be the appropriate remedy. That decision always rests in the hands of a jury, which must make whatever findings are necessary for a punishment to be imposed, or the judge, who must enter the judgment of conviction that authorizes the correctional system to punish the now-convicted defendant.[[30]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn30)

Furthermore, they contend, mandatory minimum sentences do not reduce crime. As University of Minnesota Law Professor Michael Tonry has concluded, “the weight of the evidence clearly shows that enactment of mandatory penalties has either no demonstrable marginal deterrent effects or short-term effects that rapidly waste away.”[[31]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn31) Nor is it clear that mandatory minimum sentences reduce crime through incapacitation. In many drug operations, if a low-level offender is incapacitated, another may quickly take his place through what is known as the “replacement effect.”[[32]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn32) In drug cases, mandatory minimum sentences are also often insensitive to factors that could make incapacitation more effective, such as prior criminal history.[[33]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn33)

In theory, mandatory minimum sentences enable the government to “move up the chain” of large drug operations by using the assistance of convicted lower-level offenders against senior offenders. The government can reward an offender’s cooperation by moving in district court for a reduction of the offender’s term of imprisonment below whatever term is required by law.[[34]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn34) In reality, however, critics argue that the value of that leverage is overstated. The rate of cooperation in cases involving mandatory minimums is comparable to the average rate in all federal cases.[[35]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn35)

Further, only certain defendants in cases involving organized crime—those who are closest to the top of the pyramid—will be able to render substantial assistance.[[36]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn36) The result is that sentencing reductions go to serious offenders rather than to small-scale underlings. The practice of affording sentence concessions to defendants who assist the government is entrenched in American law, but the quantity-driven drug mandatory minimums are uniquely problematic because they can render each low-level co-conspirator responsible for the same quantity of drugs as the kingpin.[[37]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn37)

Statutes imposing mandatory minimum sentences result in arbitrary and severe punishments that undermine the public’s faith in America’s criminal justice system. Consider the effect of those provisions in the Anti-Drug Abuse Act of 1986. Drug offenses, which make up a significant proportion of mandatory minimums, can give rise to arbitrary, severe punishments.[[38]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn38) The difference between a drug quantity that triggers a mandatory minimum and one that does not will often produce a “cliff effect.”[[39]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn39) While someone with 0.9 gram of LSD might not spend much time incarcerated, another fraction of a gram will result in five years behind bars.

In fact, it is easy to find examples of unduly harsh mandatory minimums for drug offenses. A financially desperate single mother of four with no criminal history was paid $100 by a complete stranger to mail a package that, unbeknownst to her, contained 232 grams of crack cocaine. For that act alone, she received a sentence of 10 years in prison even though the sentencing judge felt that this punishment was completely unjust and irrational.[[40]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn40)

In some cases, mandatory minimums have been perceived as being so disproportionate to a person’s culpability that the offender has altogether escaped punishment. Florida Judge Richard Tombrink “nullified” the 25-year mandatory sentence of a man who possessed (without an intent to distribute) hydrocodone pills.[[41]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn41) Juries also have the power to nullify by acquitting someone they would otherwise have convicted if not for the disproportionately harsh sentence. Although defendants cannot demand that the trial judge explicitly instruct the jury that it has the power to nullify, in mandatory contexts, a judge troubled by the length of the sentence a defendant must receive for a conviction can allow the jury to learn what those penalties are in the hope that the jury exercises this power sua sponte.[[42]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn42)

Finally, critics maintain that mandatory minimum sentences are not cost-effective. The certainty of arrest, prosecution, conviction, and punishment has a greater deterrent effect than the severity of punishment. If a one-year sentence for a crime has the same deterrent effect as a five-year sentence, the additional four years of imprisonment inflict unnecessary pain on the offender being incarcerated and, to borrow from economics, impose a “dead weight” loss on society. Mandatory minimum sentences, therefore, waste scarce criminal justice resources.

**The Defense of Mandatory Minimums.**On the other hand, a number of parties defend the use of mandatory minimum terms of imprisonment. They argue that mandatory minimum sentences reflect a societal judgment that certain offenses demand a specified minimum sanction and thereby ensure that anyone who commits such a crime cannot avoid a just punishment.

A nation of more than 300 million people will necessarily have a tremendous diversity of views as to the heinousness of the conduct proscribed by today’s penal codes, and a bench with hundreds of federal district court judges will reflect that diversity. The decision as to what penalty should be imposed on a category of offenders requires consideration of the range of penological justifications for punishment, such as retribution, deterrence, incapacitation, education, and rehabilitation. Legislatures are better positioned than judges to make those types of judgments,[[43]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn43) and Americans trust legislatures with the authority to make the moral and empirical decisions about how severely forbidden conduct should be sanctioned. Accordingly, having Congress specify the minimum penalty for a specific crime or category of offenses is entirely consistent with the proper functioning of the legislature in the criminal justice processes.

Mandatory minimum sentences eliminate the dishonesty that characterized sentencing for the majority of the 20th century. For most of that period, Congress vested district courts with complete discretion to select the appropriate period of confinement for an offender while also granting parole officials the authority to decide precisely whether and when to release an inmate before the completion of his sentence.

That division of authority created the inaccurate impression that the public action of the judge at sentencing fixed the offender’s punishment while actually leaving that decision to the judgment of parole officials who act outside of the view of the public. At the same time, Congress could escape responsibility for making the moral judgments necessary to decide exactly how much punishment should be inflicted upon an individual by passing that responsibility off to parties who are not politically accountable for their actions. The entire process reflected dishonesty and generated cynicism, which corrodes the professional and public respect necessary for the criminal justice system to be deemed a morally defensible exercise of governmental power.

Mandatory minimum sentences also address two widely acknowledged problems with the criminal justice system: sentencing disparity and unduly lenient sentences. Mandatory minimums guarantee that sentences are uniform throughout the federal system and ensure that individuals are punished commensurate with their moral culpability by hitching the sentence to the crime, not the person.[[44]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn44)

In fact, the need to use mandatory minimums as a means of addressing sentencing variances has become more pressing in the wake of the Supreme Court’s 2005 decision in United States v. Booker.[[45]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn45) Booker excised provisions of the Sentencing Reform Act of 1984 that had made the Sentencing Guidelines binding upon federal judges.[[46]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn46) The result, unfortunately, has been a return to the type of inconsistency that existed before that statute became law. According to the Department of Justice, Bookerhas precipitated a return to unbridled judicial discretion: “[For] offenses for which there are no mandatory minimums, sentencing decisions have become largely unconstrained.”[[47]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn47) Booker therefore threatens to resurrect the sentencing disparities that, 30 years ago, prompted Congress to enact the Sentencing Reform Act. Mandatory minimum sentences may be the only way to eliminate that disparity today.

Mandatory minimum sentences also prevent crime because certain and severe punishment inevitably will have a deterrent effect.[[48]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn48) Locking up offenders also incapacitates them for the term of their imprisonment and thereby protects the public.[[49]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn49) In fact, where the chance of detection is low, as it is in the case of most drug offenses, reliance on fixed, lengthy prison sentences is preferable to a discretionary sentencing structure because mandatory sentences enable communities to conserve scarce enforcement resources without losing any deterrent benefit.[[50]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn50)

Finally, the available evidence supports those conclusions. The 1990s witnessed a significant drop in crime across all categories of offenses,[[51]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn51) and the mandatory minimum sentences adopted in the 1980s contributed to that decline.[[52]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn52)

Moreover, mandatory minimums are an important law enforcement tool. They supply the police and prosecutors with the leverage necessary to secure the cooperation and testimony of low-level offenders against their more senior confederates.[[53]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn53) The evidence shows that mandatory minimums, together with the Sentencing Guidelines promulgated by the U.S. Sentencing Commission, have produced more cooperation and accomplice testimony in organized crime cases.[[54]](http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms%22%20%5Cl%20%22_ftn54)

It is a mistake to condemn mandatory minimum sentences because of the cost of imprisoning offenders. Opponents of mandatory minimums decry the high cost of housing a large number of inmates for a lengthy period of time and point to other criminal justice programs—e.g., the FBI, Federal Public Defenders, and victim advocates—that can better use those funds. That argument, however, does not consider both sides of the ledger. Imprisonment reduces the number of future victims of crime and thereby reduces the costs that they and the rest of society would otherwise suffer. Society is entitled to decide how to spend its funds, and underwriting the cost of incapacitating proven criminals is certainly a legitimate use of resources. Moreover, this efficiency-based criticism mistakenly assumes that Congress will not increase the budget for the Justice Department to use a valuable criminal justice tool: imprisonment.

In any event, there is no guarantee that any funds saved by reducing the length of offenders’ sentences will go to other components of the criminal justice system. Indeed, there is no criminal justice “lockbox” into which all saved or unspent funds are dumped, and it is dishonest to pretend that funds not given to the Federal Bureau of Prisons will necessarily be used elsewhere in the criminal justice system rather than for non–criminal justice government programs.

Finally, the arguments against mandatory minimum sentences are, at their core, just a sleight of hand. The principal objection to mandatory minimum sentences is not that they are mandatory, but that they are severe or that they are required for drug offenses. No one would object to a mandatory 30-day sentence for possession of heroin or a mandatory one-year sentence for rape (in fact, the objection likely would be that those mandatory sentences are too short). Critics are concerned less about the mandatory nature of federal sentences than they are about their length and their use in drug cases.