Eliminating Mandatory Minimums: A Multidisciplinary Argument

Maanas Sharma

Maanas Sharma is the Editor-in-Chief of the Journal of Interdisciplinary Public Policy. He is also the captain of the policy debate team at the School of Science and Engineering in Dallas and is interested in mathematics and public policy.

The FIRST STEP Act, the first major policy to reform federal drug sentencing in history, was passed with bipartisan support and signed into law by President Donald Trump in 2018 (Grawert & Lau). However, while the legislation was touted as a win for bipartisan cooperation in an increasingly divided political climate, many have criticized the policy as being only a surface-level fix (Clark & Ross). As support for criminal justice reform soars nationally (Savage), it is imperative we analyze the true nature of criminal justice in the United States, starting with the focus of the FIRST STEP Act: mandatory minimum sentencing.

Mandatory minimum sentencing laws—often called simply "mandatory minimums"—are legal requirements that force judges to sentence convicts for *at least* a specific minimum time in prison, irrespective of the circumstances of each individual case and/or defendant (Pryor, et al. (a)). These laws were first introduced at the federal level in the mid 1980's, as part of the intensely racialized "tough on crime" movement, and were initially intended to punish high-level, violent crimes (The Criminal Justice Policy Foundation; Boyd). However, we argue that these policies are not only foolish and ineffective but are being practiced in a way that is disastrous to the well-being of millions of Americans on a daily basis.

At the most basic level, mandatory minimum sentencing creates contrived categories of crimes that must be punished harshly in all instances. According to senior judge of the Second Circuit Court of Appeals Jon Newmon, judges are disallowed from considering individual circumstances, and thus the power of sentencing is shifted away from the judiciary to the prosecutor's decision of how to charge—a dangerous misappropriation of responsibility. In addition, mandatory minimum laws are

deliberately crafted in a way that decks any nuance. For instance, mandatory minimums for drugs are based on the *sum* of the *weight* of *all drugs related to* the defendant (Doyle). So, a hypothetical 500 grams of 10% cocaine is prosecuted as 500 grams of cocaine in a court of law even though only 50 grams was actually cocaine. Furthermore, although the defendant may have only couriered drugs once, he will be tried for the weight of drugs trafficked by the entire organization he was hired by (The Criminal Justice Policy Foundation). Similarly, the US Sentencing Commission itself has found that the arbitrary distinctions in punishment for receipt and possession offenses for sex offenses are not based on any meaningful criminological basis (Pryor et al. (b)). This system of "incremental immorality," as set up by mandatory minimum policies, is "unknown to any [other] sentencing system in the world" and widely criticized by judges, policymakers, and activists alike (Newmon; Cullen).

The first primary facet of criticism is exploitative prosecuting practices. Let us take the example of Jesse Webster, who was convicted for *conspiracy* to possess cocaine (Jones). Even though Webster had never possessed the drug, he was convicted based solely on the testimony of Webster's alleged co-conspirators, "none of [whom] could be said to have led the existence of choir boys" (qtd. In Jones). While the co-conspirators were able to drastically reduce their sentences by cooperating with the prosecution, Webster was sentenced under the mandatory minimum policy for what he 'would have sold.' Life in prison. The inflation of the sentence under mandatory minimums for Jesse Webster is unjustifiable under the principles of equality and fairness the justice system was founded on. Additionally, his case highlights the problem of the "hearing penalty" (Hechinger). To invoke the hearing penalty, prosecutors often threaten to charge defendants with a crime (or combination of crimes) that would trigger a mandatory minimum sentence (Cullen). Prosecutors then offer one-time only plea offers for less harsh crimes to defendants, who, scared of the prospect of guaranteed harsh punishment, often confess even when innocent (Hechinger). This practice jeopardizes the ideological foundations of the United States: why should plea offers hinge on a person using their constitutional right to a trial? Worse, why should the right to fair, individualized punishment hinge on a person's audacity to invoke their constitutional rights? In the words of the majority in *Mapp v. Ohio*, a landmark Fourth Amendment case, "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence" (Mapp v. Ohio). However, some may still contend that, while despicable, such practices are limited to a small number of cases. However, such an argument is simply factually inaccurate. 96.9

percent of federal drug crimes were settled by plea deals (Jones & Cornelssen), and according to the most recent Department of Justice data, more than half of all federal mandatory minimum convictions were non-violent drug offenses where mandatory minimums forced excessively harsh sentences (Pryor et al. (a)). This clearly establishes that the arbitrary distinctions that mandatory minimums rely on are not just bad policy but actively hurt American citizens.

However, the problems in sentencing do not end here. Mandatory minimums were first created in the 80s, when people began to construct Black people as 'the criminal' (DuVernay & Moran; Boyd). Given racially disparate outcomes throughout criminal justice today, and the fact that 95% of elected prosecutors (those to whom mandatory minimums transfer the power of sentencing) are white, no analysis of mandatory minimums can be complete without understanding its racialized outcomes (Equal Justice Initiative). Mandatory minimum sentences—particularly for drug offenses—disproportionately affect Black, Hispanic, and Native American people in all steps of the process (Pryor et al. (a)). A statistical analysis of crack-cocaine sentencing before and after the 2010 Fair Sentencing Act that increased the 10-year mandatory minimum amount to 280 grams by Dr. Tuttle discovered that the amount of cases tried for exactly 280 grams of cocaine (the new mandatory minimum threshold) sharply increased immediately after the law was passed and was "disproportionately large for black and Hispanic offenders." The study concluded that the racial disparity was not due to any feasible external factors, but rather "state-level racial animus" and "prosecutorial discretion" as explored above (Tuttle). In addition to this, once entering the prison system, Black people are the least likely to receive the relief measures established through recent reform legislation (Pryor et al. (a)). All in all, Black people and other people of color, particularly of low socioeconomic status, are specifically harmed by mandatory minimum policies.

Furthermore, people sentenced under mandatory minimum statutes account for more than half of all inmates in federal custody (Pryor et al. (a)), and since mandatory minimums are often excessively long for the crime, more than two-thirds of people serving life or de facto life sentences in federal prison committed non-violent crimes (Nellis). In addition to those incarcerated under mandatory minimum sentences, we must not forget the large number of inmates who were coerced into false confessions under the threat of mandatory minimums—a population that recent research has indicated is much larger than previously suspected, and particularly biased along racial

lines (Gross et al.). Ergo, mandatory minimums are one of the prime contributors to mass incarceration in the United States and the problems associated with it. Mass incarceration wrecks communities, as would-be providers are shipped off to prisons at record rates and for record sentences (Crutchfield & Weeks). This not only results in severe socioeconomic and familial consequences, but the *American Journal of Public Health* found that high incarceration has acute, long-lasting effects on the psychiatric well-being of the nonincarcerated in the community as well (Hatzenbuehler et al.). Lastly, as the prison population skyrockets, expenditure on prisons must rise as well: federal spending on prison has increased 600% since 1980 (Grawert & Lau). However, this spending too has been inadequate—many prisons are overcrowded, some to the point of avoidable deaths in prison populations (Rubin). In fact, the US Supreme Court found that California prisons were crowded to the extent of causing an "unconscionable degree of suffering" and was thus unconstitutional (Brown v. Plata). During the current COVID-19 pandemic, UCLA professor Aaron Littman characterizes prisons as "ideal sites for incubating respiratory viruses" since inmates are tightly packed in with each other with minimal sanitation products and guards physically handle inmates to then go home, to stores, etc. (qtd. in Ganeva). New York Times tracing reveals that 35 of the 100 top cluster sites were tied to correction facilities, more than nursing homes, and the ACLU estimates that 100,000 more people will die because of the American "obsession with incarceration" (Ganeva; Ofer & Tian). The fiscal, political, and social costs of mass incarceration all run deep through American society today.

Even given the number of problems with mandatory minimum sentencing, there remain a minority of people who advocate for mandatory minimum laws as effective methods to preserve public safety. However, analysis of 40 years of data from all 50 states and the 50 largest cities revealed that the efficacy of harsh incarceration policies in crime control "has been non-existent since 2000" (Eisen et al.). Given that mandatory minimums are against the spirit of the Constitution, inflict intense, racialized damage on communities across America, and cause undue fiscal expenditure and death—all for a near-zero benefit to public safety—it is unconscionable for the United States to continue with mandatory minimum sentencing. Instead, the United States federal government, and all states and relevant territories should repeal all mandatory minimum sentencing laws. Such action would revert the power of sentencing back to the judiciary. Instead of prosecutors charging defendants unfairly using arbitrary minimum sentencing laws, judges would be able to sentence offenders for time suitable for their *individual* case. Gone must be the days that the one-time drug courier gets

sentenced more than the kingpin. Repealing mandatory minimums is key to minimizing inordinate community upheaval and prison overcrowding due to excessive sentences, and a critical first step towards a more equitable criminal justice system.

Moreover, an important thing to note is that sentencing based on judicial discretion is in fact more effective at reducing crimes than mandatory minimum sentencing (Caulkins). Crimes are not going unpunished, rather they are being punished fairly and proportionally. Research by the RAND Corporation, a nonpartisan think tank, discovered that judicial discretion reduced 1.5 times the amount of cocaine use as mandatory minimum sentences (Caulkins). Besides, concerns about uniformity in sentencing among similar crimes have been effectively curtailed using sentencing guidelines as opposed to mandatory minimums (Reisinger). In fact, states across the country, both red and blue, have begun to roll back their mandatory minimum provisions and have led to "generational crime lows [and] reduced prison populations" (Newburn et al.; Newburn & Nuzzo). We should move to build on such efforts and universalize those benefits. However, to do that, mandatory minimum reforms must make the changes retroactive. This means that cases sentenced in the pre-reform or pre-elimination era are re-evaluated using revised sentencing guidelines to establish how much time the offender "should" have spent in prison (Reisinger). For clarification, let us refer back to the hypothetical case of 500 grams of 10% cocaine. Instead of the five-year mandatory minimum for 500 grams of cocaine, sentencing guidelines may retroactively revise the sentence to two years (based on noting the true cocaine weight as 50 grams, and other similar metrics of the case). If the offender had already served more than two years, he would be released; if not, he would be incarcerated until the terms of his release were met. In this way, several metrics and guidelines would be used to retroactively revise unfair sentences, reducing prison overcrowding and providing a more equitable punishment for offenders all while maintaining a low burden on prosecutorial and judicial resources (Reisinger). Congress has demonstrated a willingness to commit to this in the retroactivity provisions of the FIRST STEP Act, an action widely considered long overdue (Clark & Ross), though more decisive actions are sorely needed.

The benefits to eliminating mandatory minimums are clear: namely, saving communities from predatory prosecution practices, over-sentencing, and racially disparate outcomes in addition to the fiscal and social costs of mass incarceration. However, in the words of Inimai Chettiar, Federal Legislative and Policy Director at the

Justice Action Network, "it is imperative that this first step not be the only step." Ideally, eliminating mandatory minimums should open up much larger conversations of when incarceration is even necessary and alternate modes of rehabilitation. The criminal justice system in the United States has been constructed by racially motivated policies for decades without any meaningful change, and mandatory minimums are only one piece of a much larger puzzle. While dismantling mandatory minimums is certainly an important policy, it is just a first step of many, and further discussion and research is imperative.

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