

JOIN THE CONVERSATION ABOUT MANDATORY MINIMUM SENTENCING

The new film *Snitch*, starring Dwayne Johnson, explores how mandatory minimum sentencing laws can impose harsh punishments on drug defendants without fully considering the individual's case, shifting power away from the judge and fully into the prosecution's hands. Is this an unfortunate consequence of our nation's ongoing war against international drug cartels? Or is it an avoidable miscarriage of justice?

Review the facts. Debate the issues. Take action. For more information, visit takepart.com/snitch.

WHAT IS MANDATORY MINIMUM SENTENCING?

- A mandatory minimum sentencing provision is a criminal statute requiring the imposition of a specified minimum term of imprisonment for a particular crime.¹ Once triggered, mandatory minimums severely limit judicial discretion to impose a prison term below a certain statutorily prescribed floor.² This means that a mandatory sentence cannot be lowered by a judge at sentencing due to mitigating circumstances like the defendant's role, motivation, or likelihood of repeating the crime.³ As a result, prosecutors have enormous power within the judicial system because the offense with which a prosecutor chooses to charge a defendant effectively determines his penalty.⁴
- The most frequently applied federal mandatory minimums were enacted by Congress in the Anti-Drug Abuse Acts of 1986 and 1988 as part of the "War on Drugs."⁵ In 2011, 77.4% of convictions carrying a mandatory minimum penalty were for drug trafficking offenses.⁶ Almost half of all drug offenders were convicted of an offense carrying a ten-year mandatory minimum penalty, which is the most frequently reported drug mandatory minimum penalty.⁷
- Mandatory minimum penalties are very effective in soliciting cooperation from defendants.⁸

HOW WE GOT HERE

- Mandatory minimum sentencing has been used in various contexts since Congress created the first comprehensive series of federal offenses in 1790, but the most recent mandatory minimum sentencing schemes were passed in the 1980s as part of the "War on Drugs."⁹ One of the purposes of these laws was to target the "kingpins" or high-level leaders of drug cartels.¹⁰ Drug quantity was supposed to serve as a proxy for identifying the type of trafficker.¹¹

- Prior to the 1980s, trial judges followed an "indeterminate" sentencing scheme that gave them broad discretion and authority to impose a wide range of sentences.¹² However, indeterminate sentencing was increasingly criticized for creating unwarranted disparities in sentences while failing to curb recidivism rates.¹³ These criticisms culminated in the passage of the Sentencing Reform Act of 1984, which created the U.S. Sentencing Commission to develop guidelines for federal sentencing that would limit judges' discretion in determining prison terms,¹⁴ and additional legislation that instituted predetermined sentences for certain crimes—mandatory minimums—that could trump those sentencing guidelines.¹⁵
- Since 1971, when President Nixon first declared the "war," the U.S. has spent \$1 trillion on anti-drug efforts.¹⁶ In 2010 alone, the U.S. spent \$15 billion dollars.¹⁷

CONSEQUENCES AND CRITICISMS OF MANDATORY MINIMUM SENTENCING

- Mandatory minimum sentencing has contributed to the vast increase in the U.S.'s prison population. In the 25 years since the advent of the mandatory minimum sentences for drug offenses and the adoption of Sentencing Guidelines, the average federal sentence has roughly tripled in length.¹⁸ Despite the fact the U.S. represents only 4.6% of the world's population, it houses 25% of the world's inmates.¹⁹ In 2010, 40% of U.S. federal inmates were serving mandatory minimum sentences.²⁰
- Mandatory minimum sentencing allows prosecutors to coerce defendants into pleading guilty by threatening them with charges that will

carry significantly longer sentences if they refuse to "plead out" and waive their right to a jury trial.²¹ On average, federal defendants who refuse to waive their right to a jury trial receive a sentence three times longer than those who plead.²²

- In the context of drug offenses, there are only two situations in which a judge can grant a downward departure from a mandatory minimum sentence:
 - On the prosecutor's motion, based on the defendant's "substantial assistance" in the investigation or prosecution of another person.²³ The discretion to make such a motion rests solely with the prosecutor.²⁴
 - If the defendant meets all the elements of the "safety valve" provision: they have minimal criminal history; they were not violent, armed, or high-level participants in the crime; and they provided the government with truthful information regarding the offense.²⁵
- Most recipients of drug mandatory minimums are couriers, mules, and street-level dealers, not kingpins or leaders of drug cartels.²⁶ Some critics say this is because low-level offenders are not likely to have the kind of information they need to be able to provide to a prosecutor in order to obtain a "substantial assistance" departure.²⁷
- One federal judge has proposed that it may be possible to stop mandatory minimum sentencing from being applied in unfair ways, even without new legislation, if a policy is instituted directing prosecutors to charge defendants with mandatory minimum crimes only if they intend to prove that the individual was in fact in a managerial or leadership role within the drug enterprise.²⁸

¹ United States Sentencing Commission, "Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System" 4 (2011).
² Erik Luna, Cato Institute, "Mandatory Minimum Sentencing Provisions Under Federal Law," Congressional Testimony, May 27, 2010.
³ See FAMM, "What Are Mandatory Minimums?", available at <http://famm.org/aboutsentencing/WhatAreMandatoryMinimums.aspx>.
⁴ Caulkins, J., et al., *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?* (Santa Monica, CA: RAND Corp., 1997), 24.
⁵ Pub. L. No. 99-570, 100 Stat. 3207 (1986); Pub. L. No. 100-690, 102 Stat. 4181 (1988); see FAMM, "Understanding Federal Sentencing Laws," <http://www.famm.org/federal/UnderstandingFederalSentencingLaws.aspx>.
⁶ *Supra* note 1 at xviii.
⁷ *Id.* at 153.
⁸ Lanny A. Breuer, The Attorney General's Sentencing and Corrections Working Group: A Progress Report, *Federal Sentencing Reporter*, Vol. 23, No. 2 (December 2010), pp 110-114.
⁹ *Supra* note 1 at 1, 23.
¹⁰ C. Mascharka, "Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences," *Florida State University Law Review*, Vol 28:935 (2001) at 941.
¹¹ See *supra* note 1 at 24, quoting 132 Cong. Rec. 27,193-94 (Sept. 30, 1986); H.R. Rep. No. 99-845, pt. 1, at 11-12 (1986).
¹² Congressional Research Service, "Federal Sentencing Guidelines: Background, Legal Analysis and Policy Options" (June 2007).

¹³ See, e.g., Report of the Twentieth Century Fund, Task Force on Criminal Sentencing, Fair and Certain Punishment (New York: McGraw-Hill Book Company, 1976); Andrew Von Hirsch, *Doing Justice, The Choice of Punishments* (New York: Hill and Wang, 1976), and others, as quoted in CRS, *supra* note 12.
¹⁴ Sentencing Reform Act of 1984, P.L. No. 98-473, 98 Stat. 1987.
¹⁵ These included the Anti-Drug Abuse Acts of 1986 and 1988, see *supra* at note 5.
¹⁶ Franklin, Neil, "Former Cops Agree: Legalization is the Path to Controlling Drugs," *N.Y. News & World Report*, July 9, 2012.
¹⁷ Drug Sense Nonprofit, "Drug War Clock," available at <http://www.drugsense.org/crs/warlock>.
¹⁸ The Third Branch, "Sentencing Commission Takes New Look at Mandatory Minimums," June 2010.
¹⁹ Adam Lipitz, "Inmate count in U.S. dwarfs other nations," *New York Times*, April 23, 2008.
²⁰ *Supra* note 1, chapter 4.
²¹ See, e.g., Rachel E. Barkow, "The Problem With Mandatory Minimum Sentences," *New York Times*, August 19, 2012; Judge John Gleeson, Statement of Reasons in *United States v. Dossie*, 11-Ch-237 (E.D.N.Y. Mar. 30, 2012).
²² Quoted in Barkow, "The Problem With Mandatory Minimum Sentences," *supra* note 21.
²³ 18 U.S.C. § 3553(e).
²⁴ *Id.*
²⁵ 18 U.S.C. § 3553(i).
²⁶ See, e.g., United States Sentencing Commission, "Special Report to the Congress: Cocaine and Federal Sentencing Policy," 20-21, 85 (2007).
²⁷ See, e.g., Interview with Eric E. Sterling, ProCon, PBS Frontline, available at www.pbs.org/wgbh/pages/frontline/shows/snitch/proconsterling.html
²⁸ See Gleeson, Statement of Reasons, *supra* note 21.



SNITCH IN THEATERS 2.22.13



JOIN THE CONVERSATION ABOUT “SNITCHING”

The new film *Snitch*, starring Dwayne Johnson, shows how those facing long prison terms under mandatory minimum sentencing laws can find themselves sent back into the drug world as reluctant informants in hopes of reducing their sentence. Is this a necessary tool for law enforcement, or a dangerous exploitation of individuals in a desperate situation?

Review the facts. Debate the issues. Take action. For more information, visit takepart.com/snitch.

WHAT IS SNITCHING?

- “Snitch” is a slang term for a criminal informant, and “snitching” occurs when police or prosecutors offer a deal to criminal suspects in exchange for information or cooperation.¹ “Snitching” often occurs in the context of plea bargaining,² and is enabled by determinate sentencing regimes and mandatory minimum sentencing, which make it extremely difficult for defendants to avoid a severe prison term unless they can offer assistance in investigating or prosecuting a case.³
- A defendant who agrees to become a “snitch” may wear a wire, have a conversation with another suspect, or collect physical evidence; they may also agree to testify in court against others. In exchange for this cooperation, a prosecutor can agree not to bring or to dismiss certain charges,⁴ recommend a lower sentence or sentence range to the sentencing judge,⁵ or agree that a specific sentence or sentencing range is appropriate in the defendant’s case.⁶
- Thousands of criminal informants receive more lenient sentences or avoid prosecution by providing information to the government each year.⁷

HOW IT WORKS

- Some criminal informants agree to assist the government as part of a formal cooperation agreement.⁸ Typically, this type of agreement require an informant to be available for testimony and to provide truthful and complete information to law enforcement officials at all times.⁹ It may also require the informant to waive his right to counsel during meetings with the government, as well as his right against self-incrimination. This allows the government to use the snitch’s testimony against them if the snitch breaches the cooperation agreement.¹⁰ In exchange, the prosecutor will generally agree to file a motion for

“substantial assistance” to the sentencing judge.¹¹ The prosecutor reserves discretion to decide what qualifies as “substantial assistance,” and can ultimately choose not to file this motion.¹² It is then up to the judge to ultimately grant the snitch a more lenient sentence.¹³

- However, because the work of criminal informants is “necessarily shrouded in secrecy,”¹⁴ agreements between law enforcement and informants are often highly unregulated. Police can decline to make an arrest in exchange for a snitch’s tip, or prosecutors can drop charges against an informant without official explanation or justification.¹⁵
- According to the Department of Justice’s guidelines for using “confidential human resources,” as informants are called, every informant working with federal law enforcement must undergo a “validation” process. This process includes, among other things, proof of the informant’s real identity, whether the informant has a criminal record, is currently under arrest, investigation, or is reasonably believed to have been involved with a crime, and the informant’s motives for cooperating, including any promises, terms or benefits.¹⁶
- A snitch can be authorized to commit otherwise illegal activities if the “benefits outweigh the risks,” and the illegal activity is either a) necessary to secure evidence essential for the success of an investigation that is not reasonably available without such activity (including circumstances where the snitch must commit a crime to maintain credibility), or b) the activity is necessary to prevent death, bodily injury, or significant damage to property.¹⁷ Depending on how serious the crime is, different levels of authorization are required.¹⁸ All crimes are supposed to be authorized in advance and in writing for a specific period, and the FBI may never authorize a crime of violence.¹⁹

CONSEQUENCES AND CRITICISMS

- There is growing concern that law enforcement officials manipulate low-level offenders—many of them being low-income, minority youth—into becoming informants by threatening them with exaggerated estimates of the sentences they could

face if they don’t cooperate. Also, much of the young informants’ cooperation involves circumstances far more serious than the charges they are facing.²⁰

- Some criminal informants continue to commit crimes while working with law enforcement officials. One of the most notorious examples of informant abuse arose in the case of Stephen Flemmi and Whitey Bulger, two Irish mob hit men who for 20 years committed murder and engaged in kidnapping, racketeering, and other serious crimes while they worked for the FBI.²¹ Although the Department of Justice’s current guidelines are intended to better regulate and track the use of criminal informants,²² recent evidence of mishandling and corruption suggests that serious problems persist.²³
- Critics also argue that informants can be notoriously untrustworthy.²⁴ In a case that led to an ACLU lawsuit, *Kelly v. Paschall*, an informant in Hearne, Texas, provided false information to a federally-funded drug task force that led to the wrongful arrest of almost 15% of the town’s young, black male population on felony cocaine charges.²⁵ In a 2004 study, Northwestern University Law School estimated that false testimony from criminal informants accounted for over 45% of all wrongful capital convictions, making snitches the leading cause of wrongful convictions in U.S. death penalty cases.²⁶

¹ See “Snitching Blog: A Comprehensive Resource on Criminal Informants,” available at <http://snitching.org/resources/>
² Alexandra Natapoff, “Secret Justice: Criminal Informants and America’s Underground Legal System,” *Prison Legal News*, January 12, 2013.
³ See, e.g., The Sentencing Reform Act of 1984, P.L. No. 98-473, 98 Stat. 1987; The Anti-Drug Abuse Act (ADAA) of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986); The ADAA of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).
⁴ F.R.Crim.Pro. Rule 11(d)(1)(A)
⁵ *Id.* at 11(d)(1)(B).
⁶ *Id.* at 11(d)(1)(C).
⁷ Alexandra Natapoff, “How snitching erodes criminal justice,” *The Washington Post*, March 2, 2010.
⁸ See sample federal court plea and cooperation agreement in *U.S. v. Jackson*, February 2011, available at <http://www.justice.gov/atr/cases/268700/268710.htm>.
⁹ See *id.*
¹⁰ See U.S.S.G. § 5K1.1; 18 U.S.C. § 3553(e).
¹¹ See *Wade v. U.S.*, 504 U.S. 181 (1992); see also, e.g., *U.S. v. Brechner*, 99 F.3d 96 (2d Cir. 1996).
¹² See U.S.S.G. § 5K1.1(a); 18 U.S.C. § 3553(e).
¹³ Sara Stillman, “The Throwaways,” *The New Yorker*, Sept. 3, 2012.
¹⁴ Natapoff, *supra* note 7.
¹⁵ United States Department of Justice, *The Attorney General’s Guidelines Regarding the Use of FBI Confidential Human Resources* (Dec. 13, 2006).
¹⁶ *Id.*
¹⁷ *Id.*
¹⁸ *Id.*
¹⁹ Stillman, *supra* note 14.
²⁰ U.S. House of Representatives, Committee on Government Reform, Report 108-414: “Everything Secret Degenerates: The FBI’s Use of Murderers as Informants,” 108th Cong. 2nd Sess. (2004).
²¹ Attorney General’s Guidelines, *supra* note 16.
²² United States Department of Justice, Office of the Inspector General, *The Federal Bureau of Investigation’s Compliance with the Attorney General’s Investigative Guidelines* (Sept. 2005); see also Eric Lichtblau, “FBI Found to Violate its Informant Rules,” *New York Times*, Sept. 13, 2005; “Informants cutting deals to continue lives of crime,” *FOX News*, Feb. 6, 2012.
²³ Natapoff, *supra* note 7; see also Stephen Trotter, “Words of Warning for Prosecutors Using Criminals as Witnesses,” 47 *Hastings L.J.* 1381 (1996).
²⁴ ACLU press release, “In Wake of ACLU Civil Rights Lawsuit Settlement, African Americans Affected by Texas Drug Task Force Scandal Call for Reconciliation at Town Meeting,” June 2, 2005.
²⁵ Rob Warden, “The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row,” *Center on Wrongful Convictions, Northwestern Univ. Sch. of Law* (2004).



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