I have fought the injustices and disparities of mandatory minimum criminal sentencing since I entered the Halls of Congress during the 102nd Session of Congress in the early nineties. Sadly enough, the arguments that many of my colleagues and I made then continue to apply to the miscarriage of justice as effectuated by the American criminal justice system. The clear failures of the infamous “three-strikes and you’re out” law that originated in the California legal system in 1994 did not open the eyes of America to the regression of society through measures purporting to punish and rehabilitate.

This sentiment could have been refuted by changing our legislative focus during that period. Just prior to the enactment of the pernicious California legislation, from 1988 to 1994, 38 states and the District of Columbia experienced an increase in the racial disparity in their rates of incarceration. Furthermore, as of 1991, more than half of Black and Latino inmates were incarcerated for non-violent drug and property crimes (52% and 62%, respectively). Nevertheless, the implementation of the “three-strikes” law and subsequent mandatory minimum sentencing schemes perpetuated a downward spiral for African Americans. In California, 44 percent of the more than 6,500 people sentenced after a third strike have been African American, prompting one critic to label that state’s 7-year-old law “California’s apartheid.” In many instances, police concentrate their patrols on poorer communities that have high crime rates and low-level drug dealing. Furthermore, lower-income defendants are typically less able to afford adequate legal counsel. This, in turn, has led to more guilty pleas, or “strikes”—exacerbated by race and socioeconomic status. The legal system has obviously not taken the right approach to change this trend.

My colleague Representative Rangel (D-NY) stated it well back in 2000:

What happens if I ask them about their political prisoners and they ask me about ours? ... many non-violent prisoners are political prisoners because drug laws disproportionately impact poor people and minorities.

Federal criminal penalties for the possession and distribution of crack cocaine are one hundred times more severe than penalties relating to the exact same amount of powder cocaine. Thus, possession of only five grams of crack cocaine carries the same penalty as 500 grams of powder cocaine. This statistic translates to the issuance of the same 5-year mandatory minimum sentence to someone dealing an average of 25 doses of crack cocaine as that given to another person dealing an average of 1,000 doses of powder cocaine.

Although empirical proof such as the 1995 Special Report to Congress by the United States Sentencing Commission illustrates that “Federal sentencing data leads to the inescapable conclusion that Blacks comprise the largest percentage of those affected by the penalties associated with crack cocaine,” we see the data right outside our windows and in the newspapers nearly each day.

For the same reasons I join the members of the Justice Roundtable in citing the ethnically debilitating trends and statistics for the Inter-American Commission on Human Rights today, I first introduced the “Major Drug Trafficking Prosecution Act” in 2001. That measure was designed to strip mandatory minimum drug sentences from the federal criminal code. It required that United States Attorneys obtain written approval from the United States Attorney General before prosecuting certain federal drug offenses and would have restored the ability of federal judges to place drug offenders on probation or a suspended sentence instead of applying stiff and excessive sentences.

The “Major Drug Trafficking Prosecution Act” was the high point of a decade-long campaign to depart from mandatory minimum drug sentencing, a policy that accelerated dramatically with the Anti-Drug Abuse Act of 1986 in the midst of the media and political frenzies created by crack cocaine. Just as is the case now, we fought to eradicate the 100 to 1 disparity between the amounts of powder and crack cocaine that would trigger five and 10-year mandatory sentences. The measure would have reduced that disparity significantly—long before the new perspective was enunciated by the Supreme Court in the Booker/Fanfan decisions.

Today, the impact of mandatory minimums on minorities—particularly African-Americans—exceeds that found as a result of the “three-strikes” laws. In a study by Cassia
Furthermore, the growth of the prison population around the world has significantly increased. In 1970, the U.S. population makes up approximately 5% of the world's population, yet it contains many mandatory minimum sentencing provisions that result in one third to one half of all such provisions. My colleagues on the Judiciary Committee agreed that the inclusion of such provisions is a flawed approach because they distort the sentencing process, discriminate against minorities in their application, and waste government resources. The “Dissenting Views” of the Committee report stated that mandatory minimum penalties have been studied extensively. The Judicial Conference of the United States and the U.S. Sentencing Commission have found that mandatory minimums distort the sentencing process and have the “opposite of their intended effect.”

In addition, mandatory minimums tend to discriminate against minorities. Both the Judicial Center in its study report entitled The General Effects of Mandatory Minimum Prison Terms: a Longitudinal Study of Federal Sentences Imposed and the United States Sentencing Commission in its study entitled Mandatory Minimum Penalties in the Federal Criminal Justice System found that minorities were substantially more likely than whites under comparable circumstances to receive mandatory minimum sentences. The Sentencing Commission study also reflected that mandatory minimum sentences increased the disparity in the sentencing of like offenders with no evidence that mandatory minimum sentences had any more crime-reduction impact than discretionary sentences.

While the U.S. population makes up approximately 5% of the world’s population, the U.S. population comprises about 25% of the world’s population in prison. Furthermore, the growth of the prison population around the time that the “three strikes” laws were enacted—during the 1990s—is nearly 30 times higher than the average growth from the fifty-year period from 1920 to 1970. The mandatory minimum sentencing and “three-strikes” schemes that we have in America surpass all other Western nations. While Western Europe has completely abolished the death penalty, America has over 3,625 inmates on death row; and during the 1990s, only Iran, Nigeria, Yemen, Saudi Arabia, and Pakistan joined America in having executed a juvenile offender. In addition, “Amnesty International has launched a worldwide campaign against the United States, the first time it has ever done so against a Western nation, based on the ‘persistent and widespread pattern of human rights violations’ in our prison system.” In the last four years, it appears that while technology has advanced, America has regressed in its treatment of its disadvantaged communities. Arguably, with respect to the recent contentions that the Administration has trampled on fundamental civil liberties with its warrantless foreign surveillance program; that its wartime practice has been characterized by torture of human beings; and that scores of human lives were placed in jeopardy in the case of response to Hurricane Katrina, it would behoove our Government to finally give the issue of disparate effects caused by mandatory minimums the attention and analysis it deserves.

Notes
2 Id. at 3.
8 See, e.g., Lee Hammel, Crack vs. cocaine; Caught between a rock and a powder: Cracks exist in drug sentencing, WORCESTER TELEGRAM AND GAZETTE A1 (Feb. 19, 2006).
9 United States v. Booker, No. 04-104, and United States v. Fanfan, No. 04-105 (consolidated as 543 U.S. 220(2005)). In Booker, the U.S. Supreme Court held that the federal sentencing guidelines are merely advisory and that certain sentencing enhancements are unconstitutional.
This legislation was reported, as amended, by the Committee on the Judiciary, H.Rep. 109-74 on May 5, 2005. On May 11, 2005, it passed the House by vote of 279-144, Roll no. 168, and on May 12, 2005, it was received in the Senate and read twice.

H.Amdt. 121 was an amendment numbered 10 printed in House Report 109-76 to strike all sections of the bill that set mandatory minimum sentences (sections 102, 103, 104, 105, 106 and 107).


See Cole, supra note 15.
