one

Racial Discrimination in the Eyes of the Law

The federal legislation that decreed Edward James Clary's fate dates from 1986, a period of intense concern about the rise of crack cocaine. Congress, transfixed by frightening images of a "ghetto drug" spreading addiction throughout the nation, adopted legislation requiring five- and ten-year sentences for offenses involving sales of crack cocaine; in 1988 it added a five-year penalty for simple possession. The mandatory-minimum legislation sent a message not just to drug sellers and users, but also to law enforcement and the courts. The high penalties were a signal to police forces that they should make enforcement of these laws a priority. For judges, the signal was rejection. Mandatory-minimum penalties drastically reduced the traditional power of judges to fashion sentences individually to the circumstances of the offender and the priorities of the judge. When the legislature prescribed a mandatory-minimum sentence, it reduced the factors at stake to those chosen by the legislatures, for example, the weight of the substance seized. The idea was to get tough, and also to make sentences more certain and more uniform from case to case.

In the Clary case, however, the mandatory-minimum sentencing structure did not work as planned. Judge Cahill was not willing to passively impose the ten-year sentence prescribed for Clary. The prospect brought the severity of the drug war into sharp relief for Judge Cahill, creating a dilemma that would not easily be resolved. So he postponed the case, and postponed it again. For Judge Cahill, the issue was not just the harshness of the mandatory sentence, but also the inherent racial bias in focusing a massive, very punitive drug-control effort on crack cocaine.

This chapter follows *United States v. Clary*[1] through to its conclusion. The importance of this case for our consideration lies in Clary's ordinariness as a drug felon and Judge Cahill's extraordinariness as a trial judge.

The case forced Judge Cahill to choose between what the law prescribed for Clary and a more fully elaborated moral reality that suggested a more compassionate outcome. Clary was Judge Cahill's Billy Budd, pitting the regularity of law against a backdrop of injustice—and demanding a choice between them.

Judge Cahill's resolution of his dilemma in this case reflected his own roots in the civil rights struggle and his awareness of the issues that face African Americans less successful than himself. The story does not end with Judge Cahill, however. The trial court decision went up on appeal and was reversed. The Eighth Circuit, which reviewed the case on appeal, reaffirmed prevailing constitutional values and restored Clary's original sentence. This case nevertheless lives on. Although it is no longer "good law" in legal terms, Judge Cahill's opinion continues to be cited because it resonates with concerns on and off the courts about the constitutionality and fairness of the war on drugs.

Casualties in the War on Drugs

The drug war in Judge Cahill's federal district had been waged almost entirely against the undereducated minority youth in East St. Louis, an area that lies on the Illinois side of the border between Missouri and Illinois. Cases like Clary's crowded the docket, reminding the court staff of the racial and class dimension of an imprisonment-oriented drug-control policy. Of the fifty-seven people in this court charged with crack cocaine offenses during the three years preceding the Clary case, fifty-five were Black, one was Hispanic, and one was white. From the court's perspective, the constant lineup of crack prosecutions had made the whole staff complicit in a system of mass incarceration for poor, mostly minority, youth.

The irony was that the harsh criminal sanctions for this drug and the flow of convictions seemed to have no effect on the market for crack cocaine in East St. Louis. When Clary's case came before the court in 1994, the effort to stamp out crack use had been going on for nearly a decade, with no sign that it had reduced the flow of illicit drugs into East St. Louis. Nationally, the pattern was the same: Rates of use had hardly changed, and drug prices had fallen (King and Mauer 2002). Illicit drugs had become a significant element—estimated at $64 billion—in the underground economy. At the same time, the number of inmates incarcerated for drug offenses was growing exponentially.

In 1993, when Clary committed his crime, the federal prisons already contained 234,600 convicted drug offenders, a nearly tenfold increase from

1980 (Schaffer Library of Drug Policy 1995). As the number of drug arrests had increased, the proportion of Blacks and Hispanics under arrest and in prison had grown accordingly. Between 1976 and 1996, the rate of white drug arrests climbed by 86 percent, while the rate of Black arrests increased 400 percent. The pattern was particularly stark in urban areas like East St. Louis. In 1994, Blacks and Hispanics constituted over 75 percent of those charged with felony drug offenses in the nation's seventy-five largest cities. The racial pattern was the same in the federal courts, but it was even more dramatic in cases involving crack cocaine, where 85 percent of those sentenced were African American, 9 percent were Hispanic, and 6 percent were white (Spohn and Spears 2003, 197–98).

In many respects the law-enforcement picture has not changed appreciably. Remarkably, drug offenders now make up nearly 60 percent of the federal prison population. Nearly three-fourths of these 325,000 offenders have no history of violence; many are addicts (Sentencing Project 2004). Only 11 percent of them could possibly be classified as high-level dealers, according to a study conducted by the Federal Sentencing Commission (U.S. Sentencing Commission 2002). Over 90 percent of those convicted of crack cocaine offenses are minorities, and half of those offenders are thirty years old or younger. The average sentence for distribution of crack cocaine is 123 months, or over ten years (U.S. Sentencing Commission 2002).

Meanwhile, crack cocaine has been slowly declining in popularity among drug users. By the mid 1990s, the rate of use was down in many parts of the nation, though not in St. Louis (Golub and Johnson 1997). Informal means of social control, primarily stigmatization of crack users, may be responsible, according to sociologist Bruce Jacobs, who studied the social world of crack selling: "Powerful anti-crack norms have taken root in urban areas across the country that make 'crack' a dirty word and vilify those who use it. . . . The epidemic is essentially over: demand for the substance has been siphoned off by stigma" (1999, 128). The most recent data come from the National Survey on Drug Use and Health, which reports reductions in use within the past year and over a lifetime in 2002, 2003, and 2004 (U.S. Department of Health and Human Services 2006).

Still, the rate of use remains impressive. According to the Office of National Drug Control Policy, users spent $35.3 billion on cocaine in 2000, a decrease from $69.9 billion spent in 1990. Americans consumed 259 metric tons of cocaine in 2000, a decrease from 447 metric tons in 1990 (Office of National Drug Control Policy 2003). Arrests for crack cocaine are down only slightly, and the penalty structure remains the same, so rates of imprisonment have not been noticeably affected. The most notable trend has

been toward lower-level arrests and, partly as a result, the imprisonment of more women.

The declining significance of crack, centerpiece of the federal war on drugs, nevertheless illustrates an important aspect of the drug war: its capacity to continue, and even expand, without any clear agenda. The drug war has been institutionalized and will continue even in the face of declining interest in dangerous drugs. Drug arrests increased by 41 percent between 1990 and 2002, largely because of greater law-enforcement attention to marijuana, a drug innocuous enough that it has been a perennial candidate for legalization. Marijuana arrests now constitute 45 percent of the 1.5 million drug arrests that occur annually, and 79 percent of those arrests are for possession alone (King and Mauer 2005, 9). This aggressive arrest policy, which takes an inordinate amount of police time, in the estimate of many state and local officials, costs the nation an estimated $4 billion annually. There appears to have been no effect on the availability of marijuana, or the tendency for young people to experiment with it, or its potency (which has increased in the past decade). African Americans, an estimated 14 percent of marijuana users, make up 30 percent of marijuana arrests.

The Racial Impact of the War on Drugs

The war on drugs has sent unprecedented numbers of poor, minority citizens to prison. Most of those imprisoned are either African American (56 percent) or Hispanic (23 percent). Law-enforcement agencies have helped to create this racial skew by focusing their attention on nonwhites. "Those communities that are subject to police surveillance," Angela Davis observes, "are much more likely to produce more bodies for the punishment industry" (Davis 2005, 41). Racial profiling that leads to pretextual traffic stops and "consent" searches, anti-gang initiatives that target minority youth for police scrutiny, and drug-free zones that automatically enhance penalties have also helped to create racial disparity in arrests, creating a misleading impression of racial differences in offending (see, e.g., Zatz and Krecker 2003).

Two recent studies of drug-enforcement policies and practices in Seattle provide insight into how race factors into the drug-enforcement process. The first found that African Americans and Latinos were overrepresented among those arrested for drug possession, as compared with the overall drug-using population in Seattle. The reason was that law enforcement had focused almost all of its efforts on crack users, rather than drug users more generally (Beckett et al. 2005). A second study, relying on needle exchange survey data, ethnographic observations, and incident reports, found that

crack arrests were nearly twice as frequent as the combined total for all of the drugs preferred by whites (methamphetamine, ecstasy, and powder cocaine), yielding an overall arrestee pool that was nearly two-thirds Black. The authors, who accompanied police and observed many drug deals, also noted that police tended to focus their attention on mixed-race neighborhoods and outdoor venues, which tended to increase the rate of nonwhite arrests. The authors also observed that police displayed a pervasive tendency to overlook whites making drug deals: "Police officers and officials are simply less likely to perceive whites who are involved in illicit drug activity as drug offenders" (Beckett et al. 2006, 130).

Arrests of poor, uneducated minority defendants tend to become convictions for a variety of reasons that scholars have explored (see, e.g., Miller 1996; Cole 2000; Kennedy 1997; Tonry 1995; Walker, Spohn, and DeLone 2004; Belenko 1993; Zatz 2000). This means that the social disadvantages associated with convictions and imprisonment will be visited particularly on impoverished minority populations. Long prison terms, as has been well documented, tend to exacerbate social inequalities, to create dysfunctional personal relationships, and to produce more imprisonment. State and federal legislatures have created additional penalties that make those convicted of crimes ineligible for public assistance, education loans, driving privileges, public housing, and food stamps. Most states restrict rights to vote, and many make it easier to terminate parental rights. Some felons are required to register with the police for the remainder of their lives, and some can be deported (Travis 2005, 63; and see Mauer and Chesney-Lind 2002).

Poverty is a key factor, not just in creating disproportionate rates of punishment for African Americans, but also in creating incentives for illegal activities such as drug selling, prostitution, and gambling (Reiman 1995, chap. 3; and see Mirandé 1987). Economically deprived groups engage in illegal industries because it makes economic sense, despite the risks. "Ethnic vice industries," sociologist John Hagan observes, provide a much-needed route to economic mobility in poor, racially segregated neighborhoods. The attractiveness of vice industries is particularly high in periods like our own, characterized by disinvestment in the urban core (Hagan 1995).

Economic and social marginality are the keys to this pattern. Immigrant groups that are now in the economic and cultural mainstream—Irish, Germans, and Italians, for instance—were once on "the crooked ladder" to economic survival in many urban areas, as James O'Kane (1992) notes in his analysis of ethnic vice industries and gangsterism in American history. Daniel Bell calls vice the "queer ladder of social mobility" and notes "the specific role of various immigrant groups as they, one after another, become

involved in marginal business and crime" (1960, 115, 117). The dilemma is that poor, minority communities in which vice is important economically are not moving toward assimilation in the general economy. Heavy-handed laws to suppress the drug trade have increased its violence. Meares and Kahan (1999) describe the paradox of attitudes in depressed areas, where police are simultaneously resented for their rough and aggressive tactics, but sought after to enhance public safety. Meanwhile, groups that were once in similar positions do not generally acknowledge their pasts, which tends to obliterate the difficulties that isolated groups of all kinds face in gaining acceptance and to mask the actual historical changeability of "whiteness" (see, e.g., Jacobson 1998).

The cycle of impoverishment, illicit industry, arrest, punishment, and further marginalization is particularly vicious with respect to illicit drugs like crack cocaine. Federal initiatives have significantly extended the reach of law enforcement, providing many inducements for arrests, including budgetary incentives and broad power to confiscate and auction off the property of drug dealers. Federal agents are supposed to assist local police in their drug-fighting efforts, taking cases to federal court only when they involve big-time drug dealing. The incentive structure, however, works the other way, encouraging law-enforcement agents at all levels to concentrate on the low, exposed end of the drug-selling network, where minorities predominate and arrests are easiest to make.

The extent to which the federal government has become involved in the bottom-most end of drug distribution was evident in Judge Cahill's docket, which was full of minor cases like Clary's. In three years of federal prosecutions in Judge Cahill's court, none of the fifty-seven defendants charged under the federal law could have been called kingpins. Eight of them had less than 10 grams of crack when arrested, and five had less than a gram, barely enough to detect or to use. The largest drug bust in the three-year period was 944 grams involving three defendants. The average arrest involved less than 25 grams of crack.

The consequences for African American and mixed-race communities are well known. Drug cases have changed the demographics of the poor, mostly urban areas where African Americans and Latinos predominate. Prison has become almost a rite of passage for young men growing up in these areas, and the ability of citizens in these communities to raise families and participate in civic life has been severely compromised (see, e.g., Miller 1996; Bourgois 1995; Western 2006). Some of these impacts are more obvious than others. Approximately 13 percent of African American males in the United States, for example, are ineligible to vote under state felony

disenfranchisement laws; approximately 30 percent of Black males in Alabama and Florida have lost the right to vote permanently (National Association for the Advancement of Colored People 2005).

Challenging the Incarceration Approach

Judge Cahill had to confront—face to face—the racial impact of the war on drugs in carrying out his responsibilities as a federal district judge. The requirement that sentences be fixed without regard to the broader context in which drug policy is being pursued has caused many complaints from judges and some resignations and retirements. The federal crack penalties have also, from their inception, precipitated many legal challenges on a variety of constitutional grounds. Some were successful at the trial level, but at the time Judge Cahill was considering Clary's case, most of these cases had been taken up on appeal and reversed. Federal courts of appeal around the nation were reasserting congressional authority to control the sentencing process and to select crack for particularly harsh punishment.[2] In light of these decisions, most trial judges in the federal courts were doing as they had been told to do by Congress and by the federal Sentencing Commission, which assisted Congress in this process. Judges were, sometimes complainingly, sentencing offenders to long terms in prison for crack offenses. Judge Cahill decided that he could not go that route in Clary's case.

What is a judge's responsibility in a situation like this? Does a trial judge, before imposing sentence, have a duty to determine whether the law is just? Perhaps a moral duty, but not a legal duty. American judges are expected to be "priests, not prophets," Thomas Ross observes. "Their job is to serve and maintain the state's law and not to 'make law'" out of moral or philosophical conviction (1996, 137). The rule-of-law approach finesses the question of whether a law is just by offering constitutionality as a substitute. Judges can act against the will of the legislature or executive, but only if they do so in the name of upholding the higher authority of the federal or relevant state constitution.

The American system discourages judges from taking up constitutional issues unless counsel for one of the parties puts them before the court. This prescribed passivity stands in contrast to the European civil law tradition of investing some judges with investigative authority. The appropriate metaphor for an American judge is the umpire in a contest between litigants over the truth (see, e.g., Fletcher, 1988). Judges maintain the fiction of their own absence from the process in the way they write opinions, referring to *the court* as the source of decision, and avoiding *I* and *me* at all costs.

Judge Cahill decided against passivity in Clary's case, perhaps seeing an opportunity to move the law toward a more realistic fit with the demands of justice, or perhaps out of despair at the job he was expected to do. He asked Clary's lawyer, federal public defender Andrea Smith, to invite experts to testify on the law's sharp distinction between crack cocaine and powder cocaine. Judge Cahill was particularly struck by the fact that the penalties for crack are triggered by drug quantities just one-hundredth of that for powder cocaine, even though they are pharmacologically identical. He noted a racial aspect to the distinction between crack and powder cocaine that might create an opportunity for a constitutional challenge. The grossly higher penalties for crack, which the media had portrayed as a "Black" drug, suggest the possibility that racial bias might have been operating when Congress adopted the 1986 and 1988 anti-crack initiatives. Judge Cahill prepared to call into question the *bone fides* of the war on drugs.

Judge Cahill's willingness to engage this issue can perhaps be explained by his experience as an activist and child of the civil rights era. He was no stranger to racial discrimination. Clyde Cahill had attended segregated schools as a child. He had been a high school student when Missouri's last lynching had occurred; a Black man had been accused of molesting a white woman. Cahill joined the air force during World War II, when integration of the armed forces was still a largely untested and unrealized ideal. Cahill had felt racial discrimination personally on many occasions. As a young officer, he formally protested his exclusion from the whites-only officer's club. Racial segregation in the World War II era was common in the American military. Suzanne Mettler, in her study of this generation of soldiers, describes how conflicted African American enlisted men and officers felt about the complicated mission of "proving themselves as a group even as they were treated as inferior to white soldiers" (2005, 30; and see Katznelson 2005).

Cahill was one of the first African Americans to graduate from St. Louis University Law School. He was an activist public interest lawyer from that point on, serving as the chief legal advisor to the Missouri NAACP from 1958–65, a time of major activity in the civil rights struggle in the state. Under his leadership, the local NAACP filed the first suit in Missouri to implement school desegregation under the mandate of the Supreme Court's decision in *Brown v. Board of Education*. He also became involved in other civil rights litigation in the region. After this distinguished career of advocacy for the poor and for legal aid, Cahill had become a judge, first at the state and then at the federal level. Even this last appointment broke new civil rights ground. He was the first African American to be appointed to the U.S. District Court for the Eastern District of Missouri.

Experience and inclination thus prepared Judge Cahill to see the injustice of the law that applied to Clary, and to push for reform. Judge Cahill was certainly not the only trial judge willing to express skepticism about the mandatory minimum sentences that Congress had prescribed for crack cases, however. There were critics of the one-size-fits-all mandatory-minimum approach, even in Cahill's own Eighth Circuit, not a particularly liberal appellate bench. In *United States v. Marshall*, a panel of the Eighth Circuit had noted the "extraordinary disparity in punishment between possession of cocaine powder and cocaine base" and suggested that the issues surrounding these punishments might possibly deserve exploration.[3] As Judge Pasco Bowman wrote for the panel: "With so much at stake . . . in this and other cases, we are reluctant to say that full exploration of the issues is unwarranted . . . in connection with crack cocaine punishments, which continue to perplex many sentencing judges." He was cautious in suggesting concern, however: "We do not invite mere repetition of prior rejected arguments, without new facts or legal analysis."[4] Judge Cahill may have read these rather tepid words of encouragement as an invitation to break new ground. And the timing was right. Judge Cahill was seventy years old and on senior status. He had plans to retire. Perhaps he saw this case as a capstone in his lifelong fight against racism. Public defender Andrea Smith described the Clary case as Cahill's "swan song."

The Constitutional Challenge

As Judge Cahill saw it, the case against crack cocaine rested on the Fourteenth Amendment to the U.S. Constitution, which promises that no state shall deny "equal protection of the laws" to any citizen. Assuming that crack and powder cocaine are basically the same drug, the drastically different penalty structure looks suspicious because the subjects of prosecution for crack offenses are overwhelmingly African Americans, while those prosecuted for powder are mostly white. How can it be reasonable for poor African Americans, who buy and sell crack on the streets because it is cheap and plentiful, to receive the same penalty that a seller of powder cocaine would receive for one hundred times as much of the drug? And why are the courts seeing such an overwhelming number of drug prosecutions of young, uneducated African American men when the user communities and the big-dollar business world of drugs are more often than not white?

The whole case in Judge Cahill's court would turn on what Congress intended when it drafted the legislation, not on what actually came to pass as police officers applied it. The Rehnquist era Supreme Court declared

that intent to discriminate must be shown in challenges under the Fourteenth Amendment's equal protection clause, a requirement that is difficult to satisfy. The federal courts tend to be very cautious in criticizing Congress, in deference to the separation of powers among the three branches and their own fragile legitimacy as an unelected branch of government. Previous cases provided Judge Cahill only a narrow basis for judicial critique. The task would be to show convincingly that Congress meant to do Blacks harm in adopting crack penalties. Nothing less would do. Flawed, negligent, or even reckless judgment is beyond constitutional reproach under prevailing constitutional jurisprudence.

Even by this constricted standard, however, Judge Cahill saw possibilities. What if the crack penalties could be shown to have arisen from a panicky reaction to an exaggerated, racially tinged threat? What if racism could be shown to underlie the whole criminalization approach to dangerous drugs? There were difficulties with this argument. The adversary system does not lend itself easily to complex analysis of legislative intent under conditions of strain and uncertainty. To begin with, Congress is not an easy institution to analyze; its large membership and complicated rules of political engagement pose daunting problems for anyone trying to determine the body's state of mind. Courts must also be aware of the limits of their own investigative capacities. Congress had expressed itself in nonracial terms in proposing and adopting this legislation. Danger to the whole society, and especially to young people of all races, had been the theme in the minimal legislative debate that had occurred. How could Judge Cahill show that there was a racial subtext lying below the surface?

Public defender Andrea Smith was aware of the obstacles to a decision in her client's favor. She knew that the prosecution would appeal any deviation from Clary's prescribed sentence. Her goal was to give the judge a good record on appeal. She asked for, and was given, extra time and resources to prepare the case. She chose eleven expert witnesses to testify over a four-day period. The witness list included doctors, academics recognized for their expertise in the history of drug law, and people knowledgeable about the circumstances of sentencing law because of their own participation in the legislative process. The witnesses brought with them a wide variety of documents to back up their arguments, including scholarly articles, books, and newspaper articles.

Much of this material found its way into Judge Cahill's fifty-eight-page opinion, which boldly declared the mandatory minimum penalty unconstitutional as applied to Clary. Judge Cahill set the story of the crack/powder distinction against a backdrop of historical racism in the criminal law,

beginning with slavery. He argued that what had once been explicit racism in law and policy had become an implicit racial bias in legislating against crime associated with African Americans. The prejudicial attitudes were not necessarily conscious, but they were no less powerful because of that. Judge Cahill determined that an unconscious racial bias must have been at work in the rush to punish crack much more severely than other drugs. There could be no other explanation for the crack/powder disparity when the punishment assessed for crack possession was "100 times greater than the punishment for the same crime but involving powder cocaine."[5]

This conclusion deviated significantly from the traditionally cautious judicial approach to Fourteenth Amendment claims. Judge Cahill essentially was playing the role a unanimous Supreme Court did in 1954 in *Brown v. Board of Education*, drawing on scientific evidence to challenge received doctrine about race. In this instance, though, the issue was the motivation of the legislature rather than the impact of the legislation. The suggestion that courts could recognize unconscious, as well as conscious, motives as part of legislative decision making was perhaps the most significant innovation. How would a judge be able to determine if unconscious motivation had a role in creating a statute? Judge Cahill suggested that the court make a realistic assessment of the context in which the legislation was adopted and act with sensitivity to the history of racial bias in the criminal law. Cahill also suggested that racial impact can be a sign of legislative bias in enacting legislation. This principle of examining impact to determine motivation is used in employment discrimination cases arising under federal civil rights legislation. In those cases, evidence of adverse impact shifts the burden of proof to the defendant employer to explain racial discrepancies. Constitutional cases, Judge Cahill reasoned, should be decided the same way because outcomes deeply disadvantageous to minorities always suggest the possibility of bias—conscious or unconscious—in policy design.

Judge Cahill believed that he had located racial bias in the congressional discussions of appropriate penalties for offenses involving crack cocaine. Prior to enacting the mandatory minimums, members of Congress had been deluged with "[l]egions of newspaper and magazine articles regarding the crack cocaine epidemic" that "depicted racial imagery of heavy involvement by blacks in crack cocaine."[6] Many of these articles characterized crack cocaine use as a "black problem" that needed to be prevented from spreading to the white suburbs.[7] This evidence was enough, Cahill argued, to make unintended racism the central issue in the case. Rejecting intentional racism as unlikely, he suggested that "unconscious feelings of difference and superiority still live on even in well-intentioned minds. There

is a realization that most Americans have grown beyond the evils of overt racial malice, but still have not completely shed the deeply rooted cultural bias that differentiates between 'them' and 'us.'"[8] This constituted a violation of the constitutional right to equal protection, rendering the crack statute unconstitutional as it applied to Clary.

Having declared the harsh penalties for crack invalid as applied in this case, Judge Cahill sentenced Clary as if the substance he had carried home had been powder cocaine. Following standard practice under the federal Sentencing Guidelines, Cahill enhanced the penalty slightly because Clary had made a significant effort to transport the drug from California. This behavior indicated forethought and planning that arguably merited additional punishment. The sentence was four years in the federal prison at Springfield, Missouri. Clary served his four-year term and was released. At this point he married and started a family.

Meanwhile, the prosecution decided to take the matter to the Eighth Circuit Court of Appeals. Judge Cahill's opinion was clearly at variance with the prevailing law of the circuit, and indeed, with all of the relevant federal appellate case law. The prosecution anticipated a reversal at that level, and quickly got one.[9] The court of appeals rejected Judge Cahill's reasoning and followed the other circuits that had examined the issue. It found no constitutional defects in the crack legislation. It rejected the finding of unintentional racism, noting that although the trial record in the Clary case "undoubtedly present[ed] the most complete record" on the issue of the crack/powder disparity to come before the court, Judge Cahill's findings nonetheless fell short of establishing that Congress had exercised discriminatory intent in enacting the Sentencing Guidelines.[10] From the appellate court's point of view, the case was not even close. The appellate review panel had no questions for Clary's attorney, and the panel's opinion was unanimous. Judge Cahill had erred, and Clary must be resentenced. So the case went back to the district court for resentencing, and Edward James Clary—now married and a father—went back to prison to complete his ten-year term.

Judge Cahill may not have expected to persuade the higher courts to support his decision. His approach challenged long-accepted rules of interpretation in constitutional law. He was attempting to create a new standard in racial discrimination claims. Legally speaking, the judge was tilting at windmills. But in the realm of science and experience, Judge Cahill's critique was on much firmer ground. There is little doubt that white prejudice has played a significant role in the development of criminal law. The South during the pre–civil rights era, for example, openly used police, courts, and law to enforce white superiority (see, e.g., Sutherland and Cressey 1974;

Tonry 1995; Hawkins 1995; Miller 1996; Higginbotham 1996). That white prejudice continues to influence thinking about crime is also well established (see, e.g., Zatz 2000; Kansal and Mauer 2005; Reiman 1995, chap. 3). The idea that prejudice operates subtly to influence decisions and that its influence is not necessarily consciously felt is also broadly accepted (see, e.g., Banaji and Greenwald 1995; Fiske and Taylor 1991). Judge Cahill's opinion can thus be seen as one judge's crusade to bring jurisprudence into line with reality. Perhaps he thought of himself as the miner's canary that Guinier and Torres describe (2002, 11–12), signaling concern about a crime-control system that cannot persuasively claim to be achieving racial justice in American society (see Chambliss 2003, 315).

Punitive Prohibitionism

Craig Reinarman and Harry Levine (1997), who have written widely on drug policy in America, coined the term *punitive prohibition* to describe the harsh system of arrest, prosecution, and imprisonment that began in the 1920s and has since become the dominant U.S. approach to crime. An important milestone was the adoption in the 1970s of harsh drug laws in New York State at Governor Nelson Rockefeller's urging. The Rockefeller drug laws imposed mandatory-minimum sentences for even minor drug crimes, including possession of small amounts of marijuana. The New York law also increased penalties for repeated offenses and placed restrictions on sentence mitigation, probation, and parole for drug crimes (Reinarman and Levine 1997, 321–22). This extreme form of drug legislation, Reinarman and Levine suggest, should be distinguished from "more tolerant and humane forms of drug prohibition that do not rely so heavily on arresting and imprisoning men and women for possessing and using illicit drugs or for small-scale dealing," an approach these authors dub "regulatory prohibition" (1997, 322). While the United States remains firmly committed to the extreme punitive approach, the nations of Europe tend to more regulatory and are moving increasingly in that direction (Reinarman and Levine 1997, 322).

The struggle over penalties for crack cocaine, in short, is part of a much broader conflict over the means and, in some minds, the ends of the criminal law in the United States. The outcome of this conflict, William Chambliss argues, has implications not just for the poor and racial minorities, but also for the welfare of the nation as a whole:

> Not since the early days of the Civil Rights Movement has there been such a gap between the views of minority and white communities on the

> legitimacy of the criminal law. We face a crisis unprecedented in our history with the creation of a crime control industry and a criminal justice system that is out of control. Reconciling the contradiction between social justice and crime control will require a massive effort, one that is certain to be resisted by those with a vested interest in the status quo. (2003, 315)

Those with an interest in the status quo include most of the political establishment and, apparently, much of the law-abiding public. William Bradford Reynolds, attorney general during the first Bush presidency, describes the approach the federal government took to the control of illicit drugs: "Overall, we should send the message that there are two ways to approach drugs: the soft, easy way that emphasizes drug treatment and rehabilitation versus the hard, tough, approach that emphasizes strong law enforcement measures and drug testing. Naturally, we favor the latter" (quoted in Chambliss 1999, 94–95).

A decade later, that approach has not changed, despite its apparent ineffectiveness in reducing the demand for illicit drugs and its hefty price tag (about $40 billion per year when foreign anti-drug efforts are included). There has been some movement toward drug courts and rehabilitative sentencing, but the punitive framework remains basically intact and not significantly contested at a political level. It is important to ask, as Roland Chilton did in his presidential address to the American Society of Criminology, how the current approach to nonviolent crimes like Clary's gained such primacy:

> We need to know more about why so many Americans are willing to accept the staggering social, political, and economic costs of creating a vast set of prisons and filling them beyond capacity not only with people who are dangerous, but with hundreds of thousands of people who are not dangerous and never have been. We need to know more about why so many people accept the drug war as a fact of life—as something that has always been there and that will always be there. (2001, 4)

Part of the answer may be that harsh criminal controls satisfy a widely felt yearning for simple, clear-cut standards that put moral responsibility squarely on the individual's shoulders. This view, historian Michael Willrich notes, has "ideological roots running deep into the soil of Anglo-American culture: in the classical Christian doctrine of free will, in the common law, and, most recently, in liberal political thought" (2003, 68–69). The prevalence of crime news in the media and entertainment tends to make Americans more pessimistic than they might otherwise be about disorder and

disorderly persons. Times of stress, historians observe, tend to bring out the Hobbsian view that justifies drastic, unequivocal state action to preserve social order (see, e.g., Stone 2004). Cost is quite appropriately a secondary issue if the problem is conceived to be preservation of the social fabric of civilized life.

Still, it is remarkable how much the public's fear of crime and its devotion to punishment have increased in the past thirty years, even as victimization rates have been stable or declining (Altheide 2002). Current attitudes stand in sharp contrast to periods of more rehabilitation-oriented thinking. In the Progressive era around the turn of the twentieth century, for example, some cities and states committed themselves to social-control policies that emphasized the potential for rehabilitation. Progressives in Chicago and other cities invented new specialized courts for juvenile, domestic relations, and morals offenses. Judges invited social workers into their courts to work with defendants and fashioned penalties to facilitate rehabilitation. States changed their laws and constitutions to facilitate these developments. There was even talk about the possibility of wiping out crime (see, e.g., Willrich 2003). While these reforms arose out of a somewhat patronizing conviction that immigrants and Blacks newly arrived from the South needed to learn the norms of white, middle-class society, they nevertheless represented a sense of social responsibility and humane concern. Edward James Clary, a youth of disadvantaged background and limited opportunities, would have been an excellent candidate for the soul-saving efforts of Progressive-era reformers.

The Construction of a Social Problem

Clearly, the American public's long-term fascination with law as the basis of effective social control can be shaped in more or less punitive directions. Politicians and the media have a hand in focusing public opinion on punishment. The case of drug control suggests, in addition, a particular interest at the federal level in making the case for law and order in a way that aggrandizes federal power over states and localities. This is a role not envisioned by the drafters of the Constitution, which left crime control to the states.

The federal government first inserted itself aggressively into local law enforcement in the 1920s in the campaign to prohibit alcohol consumption. Mandatory minimums for drug crimes were tried in the 1950s in the Boggs Act and not abandoned until the 1970s, only to return a decade later. The trend toward federal control gathered momentum in the 1970s when Congress began duplicating the jurisdiction of state and local codes. Prohibition

of illicit drugs once again provided a rationale for expanding federal authority. Lisa Miller and James Eisenstein observe (2005, 240), "nearly every state felony can now be pursued through federal criminal statutes, and . . . cooperative relations between federal and local prosecutors (formal and informal) are increasingly promoted as a solution to urban crime problems." Federal spending on crime control has followed the same pattern, playing a greater and greater role in government's response to perceived crime threats. Federal spending on law enforcement grew from $15 billion in 1991 to $34 billion in fiscal year 2002 (U.S. General Accounting Office 2002).

The problem for democracy is that dissenting voices have tended to get drowned out in the march toward greater and greater reliance on imprisonment as a solution to persistent social problems. The crime-control industry has become a powerful lobbyist in behalf of its own interests. It has been aided by a corporate mass media eager for crime news, which is cheap to produce and offers mass appeal. For political leaders, punitive policies offer a path of least resistance that wins votes. This current instantiation of the traditional American reliance on legal controls, bolstered by strong economic and political forces, feeds a broader shift in public policy away from concern for society's underclass and a new pessimism about its potential for successful integration into the social fabric. More and more, the underclass is something to be feared and protected against, a target for surveillance, blame, and incapacitation.

Political scientists Anne Schneider and Helen Ingram describe this process of targeting groups for ostracism and punishment an example of "degenerative pluralism," to suggest its deviation from a more desirable healthy pluralism in democratic society. Degenerative pluralism occurs when

> [p]luralism no longer reflects reasoned analysis and a balance among competing interests, but degenerates into ill-founded characterizations that set one group against another. Policy arenas dominated by this type of divisive social constructions and the political opportunism of officials do not serve justice, do not create arenas for public discourse, and are not held accountable in terms of effectiveness or efficiency. Without the participation of reasonable interest groups and an informed, alert public to create a balanced dialogue, the discourse about punishment policy is one-sided. (2003, 13; and see Schneider and Ingram 1993)

John Pratt (2007) locates the drift toward punitiveness in a decline of deference for law-enforcement professionals among politicians and in the

public at large. Politicians and the media have tended to dismiss the opinions of penal professionals and research on the complexities of crime. It is easier to blame high recidivism rates on lack of punishment. These sentiments have been channeled through the tabloid press, crime-saturated local news, and talk-back radio. The trend is evident not just in the United States, but in many Western nations, where rates of imprisonment have risen steadily during the last decade.

Other analysts speak more pessimistically of the manipulation of public sentiment and cultivation of mass emotionalism as standard fare in politics (see, e.g., Edelman 1988; Burke 1989; Goffman 1974). Sentencing has grown more severe, in this view, because the public finally took notice of the sentencing process. Whatever variant of the pathologies of the democratic process one finds most persuasive, it is clear that the subtleties of modern racism are easily exploited. Policies that target racial minorities play to long-standing racial and economic divisions in American society that are barely acknowledged to exist. The most effective target for these public anxieties is disadvantaged minority youth. Politicians and special interests can exploit this racial divide, playing up the dangers of drug and street crime, and laying the groundwork for a moral panic about crime by drugged teenagers in order to perpetuate their own terms in office as guardians of public safety (see Chambliss 1995, 256).

To analyze the current situation in this way, it should be noted, turns traditional approaches to public policy analysis on their head. The suggestion here is that at least some policies begin not with a broad sense of social need, but with determined manipulation of public sentiment by public elites. Borrowing on deviance theory in sociology, the idea is that powerful moral entrepreneurs, seeking particular policy outcomes, create their own support by successfully labeling some behavior as needing strong social controls (see, e.g., Becker 1973). They do this perhaps out of conviction, but always with the goal of consolidating and extending their power and control.

While there is no denying that illicit drugs pose dangers to society, it must be acknowledged that the contemporary war on drugs represents an extraordinary response to the problem, and that the payoffs have been significant for politicians and powerful law-enforcement interests in our society. The considerable damage this approach has produced—from harassment and profiling of law-abiding minority citizens, to the ruined lives of minor players in drug enterprise—has been largely ignored.

The panicky reaction to crack cocaine in the 1980s and the general hardening of attitudes toward drugs and crime that began in the 1970s,

however, are only the latest manifestations of a much longer-running relationship among race, prohibitionism, and drugs. Punitive prohibitionism has been the predominant approach in dealing with drugs favored by minority populations throughout U.S. history, even before the nation was founded. What changed in the 1970s and 1980s was the degree of effort devoted to drug-law enforcement, and the targeting of that effort with hyperharsh penalties for sale and possession of crack cocaine. The dramatic outcome—a huge increase in Black imprisonment—should not obscure the fact that racial prejudice has always been used to promote harsh punishment for drug use.

What demands explanation, then, is not only the recent acceleration of punitive prohibitionism, but also the long-term resonance of drug-control policy that targets African Americans and other racial minorities for punishment. The United States has demonstrated remarkable zeal in its effort to stop the ingestion of mind-altering drugs associated with feared minorities and the underclass. Dangerous drugs and dangerous minorities, particularly in combination, are what Murray Edelman (1988) labels "condensation symbols," providing images that powerfully concentrate public anxieties. Condensation symbols can evoke positive feelings, as the American flag does, or negative ones. Most significantly, they discourage pragmatic thinking: "Where condensation symbols are involved, the constant check of the immediate environment is lacking" (Edelman 1988, 6.)

The association of minorities with drug abuse also feeds the convenient fiction that racial minorities are responsible for their own victimization. Harsh, uncompromising penalties for drug abuse suggest the resurgence of a Victorian sensibility in which the collectivity bears no responsibility for the unassimilated "others" in American society. The individualistic ethos is evident not just in the emphasis on punishment, but also in the rules determining what mitigating factors can be considered in imposing it. Federal sentencing guidelines then in effect specifically discouraged judges from considering poverty, lack of education, family responsibilities, and social disadvantage in sentencing.

Judge Cahill was right to see the struggle over Clary's sentence in terms of the long struggle for civil rights in American society. With the institutional support punitive prohibitionism enjoys and the ideological purposes it serves, drug policy is unlikely to change unless it becomes a civil rights issue. The most significant obstacles to change may not be a prison-industrial complex that favors high rates of imprisonment, as is commonly thought, but American society's unwillingness or inability to confront the legacy of race in the war on drugs. Racial fears were key to the original criminalization of

drug use, and they played a significant role in the harsh penalties Congress established for crack.

Racism in Law

Racism has been widely recognized as a problem in the criminal justice system. Racial profiling, for example, was a topic in the second presidential debate between Al Gore and George W. Bush (Second Presidential Debate 2000). Both vowed to root out the "bad apples" in the system who perpetuate this practice.[11] Social scientists demonstrate their concern about racism when they design studies to find racial difference in the administration of justice. The working assumption is that racism is a cultural or social force that affects law when its agents are prejudiced. The source of racism, in other words, is outside of law, in society. Law itself is color-blind. This view is widespread, as political scientist Rogers Smith observes: "Through most of modern intellectual history, most American writers have treated race either as essentially a biological category, a cultural/sociological category, or as both" (2004, 43). Political scientists, for example, have generally tended to focus on race as an explanatory variable in the behavior of officials, not as an inherent characteristic of American political institutions.

American political experience, however, is open to another, possibly more persuasive, interpretation. What if race has a more intimate relationship with law and politics than the nation's (recent) commitment to color blindness admits? Critical race theorists reject the assumption that law and the political processes that support it are fundamentally race neutral. They highlight the role that law has played in creating and maintaining racial categories throughout our history. Rogers Smith criticizes political science for not being more aware of the role governing institutions have played in maintaining racial separation in American society: "American racial identities have gained much of their practical reality from their institutionalization by political elites in laws, public policies, and governmental programs" (2004, 43). The consequences of these rules have been enormous for oppressed populations. As Michael Omi and Howard Winant remind us:

> For most of its existence, both as a European colony and as an independent nation, the U.S. was a *racial dictatorship.* From 1607 to 1865—258 years—most non-whites were firmly eliminated from the sphere of politics. After the Civil War there was the brief egalitarian experiment of Reconstruction, which terminated ignominiously in 1877. In its wake followed almost a century of legally sanctioned segregation and denial of

> the vote, nearly absolute in the South and much of the Southwest. . . . These barriers fell only in the mid-1960s. (1994, 65–66)

The pre–civil rights period is not ancient history. Many Americans remember when racial apartheid prevailed by law and social convention. In the North, as in the South, part of the experience of growing up was learning how to recognize racial and class differences and to treat them as social barriers. Failure to do so was grounds for social ostracism, or worse. Law organized the separation of the races with race-based school districting, restrictive covenants, redlining, membership rules, and other technical devices. Law also sanctioned the obvious racial markers: segregated restaurants, hotels, drinking fountains, restrooms, and waiting rooms. At every turn, the promise of violence reinforced the norm of separation (see, e.g., Smith 1997; Higginbotham 1996; Katznelson 2005).

The elimination of this system of racial rules was an important first step in changing American racial policy, but it was only a first step. Institutions do not operate by rules alone. They have their own internal systems of control and their own priorities that help them maintain their power and place in society (see, e.g., Becker 1973, chap. 8). Change is difficult because institutions—not individuals or the community as a whole—have the staying power and commitment to set norms, establish social priorities, and determine what people remember and take for granted, including what seems fair in society. Institutions set priorities for individuals to act in racist or nonracist ways (Frymer 2005). Institutions, in the words of anthropologist Mary Douglas, "secure the social edifice by sacralizing the principles of justice" (1986, 112; and see Orrin and Skowronek 1994, 320). Criminal justice will change only when these internal mechanisms are revamped to make racial categorization and racial hierarchies irrational for the individuals who enforce the norms. Changing institutions at this level is fundamental to the success of the struggle for racial equality.

The persistence of the contemporary war on drugs is a clear indication that the criminal justice system has not rejected the negative racial stereotypes and prejudice that serve its institutional interests. The problem is not only the much-discussed racial differences in surveillance, arrest, and prosecution associated with the implementation of the laws on crack, as serious as these are. These practices derive their support and rationale from the legislation that authorizes prosecutions. The United States has not come to grips with the fact that Congress knew that poor minorities, principally African American, would bear the brunt of its policy (see, e.g., Tonry 1995; and see chapters 4–6). In a fundamental sense, Congress got exactly what

it intended, which helps to explain its imperviousness to appeals based on racial impact.

Conclusion

Some scholars speculate that our system of criminal justice, reflecting America's deep ambivalence about race and ethnicity, is firmly committed to maintaining a two-tier moral order (Reiman 1995; Beckett and Sasson 2000; Scully 2002). But even if one is less pessimistic, the failure of the system to police itself is, at the very least, part of the unfinished civil rights revolution of the 1960s. The Clary case is a particularly apt illustration of the problems discussed here because Judge Cahill laid the problem bare in his lengthy opinion, and his analysis was summarily rejected on appeal.

The current legal approach, by conceiving of racism only in terms of evil intent and treating it as an anomaly, allows "innocent" whites to escape responsibility for the conditions they help to create (Reiman 1995; Romero 2005). The "intentionalist" approach favored by the courts can usefully be contrasted with how corporations, the military, universities, and other organizations approach lack of racial and gender diversity in their ranks. When the goal is increasing diversity, the emphasis is not on exposing subversive racist behavior within the organization but on adjusting procedures to attract and retain a more varied clientele or workforce. The working assumption is that institutional norms can exclude people on the basis of race or gender without anyone in particular desiring that effect. This outcomes-oriented approach rests on a more complex version of racial motivation than courts have used in discrimination cases, and demonstrates more determination to change institutional priorities. While courts do not have the freedom to ignore intentions, as these organizations do, they could embrace a more nuanced appreciation for race in decision making.

The silence of the Supreme Court on the role of unconscious racism is unfortunate because jurisprudence can sometimes provide Americans with a helpful vocabulary for talking about fundamental governing values, offering concepts that take issues to another level of consideration. But the Supreme Court has done nothing to discourage Americans from continuing to treat words like *racism* and *racist* as moral insults, rather than conditions based in social structures and institutional norms. *Racism* and *racist* are personalized and decontextualized, and so become fighting words, much too strong to be used dispassionately in an effort to create change. As Randall Kennedy describes this tendency:

> Allegations of racism put into question more than a person's judgment; they put into question a person's basic moral fitness. Once the racism charge is voiced, considerations of personal honor and public reputation elevate the stakes and polarize the antagonists. Moreover, once a charge of racism is alleged, it tends to dominate all other concerns. Instead of determining on a broad basis the relative merits of a policy, discussion is channeled toward the narrow question of whether the policy at issue is "racist." (1997, 384)

Efforts to define a more useful set of terms are also frustrated by the changing face of race and ethnicity in the United States. As popular and scientific beliefs about race and ethnicity have changed, so has the politics of race.[12] As expressed in law, for example, contemporary racial prejudice is quite sharply at odds with the racism expressed in the laws of the Jim Crow South in the post-Reconstruction, pre–civil rights period. Racism, in other words, is socially constructed and historically contingent. It is hard to create an encompassing approach that takes account of the full range of historical practice. The difficulty is evident in this rather abstract definition: "A racial project can be defined as *racist* if and only if it *creates or reproduces structures of domination based on essentialist categories of race*" (Omi and Winant 1994, 71).

Lawrence Bobo has dubbed our contemporary period one of "laissez faire" racism, which he describes as a "persistent negative stereotyping of African Americans, a tendency to blame blacks themselves for the black-white gap in socioeconomic status, and resistance to meaningful policy efforts to ameliorate U.S. racist social conditions and institutions" (2004, 16–17; and see Kinder and Sanders 1996). Public opinion research and years of experimental research in social psychology support this analysis. Social psychologists have identified prevalent negative habits of mind about African Americans in whites that combine easily with the current ascendancy of free-market individualism and the comforting presence of color-blind policy (Sears et al. 2000).

The ostensibly color-blind philosophy of our day, as Bobo and others suggest, bears a certain family resemblance to this nation's overtly racist past. Nowhere is this more evident, this book argues, than in the evolution of drug policy. The next step, then, is to turn back the clock to the nation's first well-organized national war on drugs: the effort to deter and eventually stamp out alcohol as a social beverage. This ancestor drug policy contains important lessons for anyone concerned about the contemporary war on drugs and its pernicious racial impacts.