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# Crack Pipes and Policing: A Case Study of Institutional Racism and Remedial Action in Cleveland

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*This article uses a case study of selective drug law enforcement in Cleveland, Ohio, to explore the contours of institutional racism in criminal justice policy and practice. Using the multilevel theoretical framework developed by Ian Haney López (2000) that highlights the processes underlying how institutional racism is manifested, I analyze how and why racially discriminatory arrest and charging practices were able to persist in this case as well as how they were eventually reformed. In doing so, I explore the role of institutional empathy (and its withholding) in institutional racism and illustrate how the exploitation of empathy can be used strategically to effect policy change.*

## INTRODUCTION

Beginning in the mid-1980s, in the midst of a national crack cocaine panic, the Cleveland, Ohio city police department initiated a policy of arresting those in possession of drug paraphernalia for felony drug possession if trace amounts of the drug were detectable. These cases, initially charged as felonies by law enforcement, were almost always then processed through the local prosecutor's office (which handles misdemeanors) straight to the county district attorney's office for felony indictment. This enhanced charging policy placed the city of Cleveland out of step with the rest of the local jurisdictions in Cuyahoga County, as well as with localities across the state of Ohio, as the other jurisdictions treated such cases as misdemeanors.

Since the policy's initiation, those subject to felony charges in drug paraphernalia cases have primarily been those in possession of crack cocaine pipes, rather than other kinds of paraphernalia, and the majority of the tens

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of thousands arrested for felony drug possession when they only possessed drug instruments have been African American. In March 2009, on the heels of community pressure, the city officially dropped this long-standing policy, and the Cleveland police chief ordered officers to charge such cases as misdemeanors under Cleveland Codified Ordinance 607.17 (Cleveland Municipal Code 2010).

This article offers an in-depth examination of this episode of selective drug law enforcement in order to add to our understanding of the mechanisms of institutional racism in criminal justice settings. I use this case of the deployment of discretionary law enforcement tactics against low-level drug offenders as both a window into the racially discriminatory impact of the war on drugs and as a vehicle to explore avenues for socio-legal policy change. The case study is derived from work I did with several organizations in the Cleveland, Ohio, metropolitan area that aimed to document racially disparate drug arrest and prosecution patterns and that worked toward policy reform. My work on that project entailed collecting and assessing existing data on drug use patterns and drug arrest statistics in the city of Cleveland and its surrounds; participating in community meetings/workshops on the issue; and interviewing and observing criminal justice practitioners, legal and social service professionals, advocates, and others in Cuyahoga County, Ohio, where Cleveland is located.

In the next section, I provide an overview of how the concept of institutional racism has been theorized, and detail how legal scholar Ian Haney López (2000) has addressed some of the gaps in that theoretical body of work. I then build on Haney López's insights in order to explain the pervasiveness of racial disparities in criminal justice outcomes, suggesting that an institutional-level empathic deficit may also play a role. I follow with a detailed description and analysis of the Cleveland case, then conclude by deconstructing how reform was achieved in this case.

## INSTITUTIONAL RACISM AS A THEORETICAL CONSTRUCT[1]

One of the earliest conceptualizations of "institutional racism" was articulated by Stokely Carmichael and Charles Hamilton (1967), when they delineated its features and consequences in their book *Black Power: The Politics of Liberation*. They described institutional racism as pervasive, yet submerged within American bureaucracies and institutions, making it difficult to identify and combat, and resulting in a form of "inner colonialism" within the United States (Murji 2007, 846). Since then, the concept has been expanded upon in sociological (e.g., Murji 2007), social psychological (e.g., Henkel, Dovidio, and Gaertner 2006), and socio-legal (e.g., Haney López 2000) scholarship, and encompasses a wider range of relations and settings than in its earlier formulation. Thus, the concept of institutional racism has been featured in scholarship addressing policing and profiling issues in the

United Kingdom (Fitzgibbon 2007; Waddington, Stenson, and Don 2004; Wight 2003; Bridges 2001; Lea 2000) and police-community relations in Canada (Jackson 1994), and has even made its way into official state language in Great Britain (Macpherson 1999).[2] Yet debates over its history, components, mechanisms, and analytic utility for explaining racially disparate institutional outcomes and effects have cropped up since the term's inception. Among other critiques, it has been faulted for being too simplistically and monolithically focused on Black/White divisions (Murji 2007), and for ignoring its older intellectual roots that predate the Black Power movement by thirty to forty years (Singh 2004).

Perhaps the most detailed critique of institutional racism, as it is conceptualized by many contemporary scholars, has come from sociologist Tim Berard (2008), who contends that most conceptualizations ignore, or are even hostile to, the social psychology of racism. According to Berard, many theorists mis-specify causal relations, make erroneous inferences about the meaning of outcomes and effects, and use faulty reasoning and essentialization in making group-level assumptions, particularly about Whites. Berard (ibid.) suggests that most conceptualizations begin with the effect—harmful disparities and disadvantages as a function of race—without specifying the mechanisms by which institutions racially discriminate. In doing so, he argues, they ignore the individual level processes that may shape institutional outcomes. He also suggests that the "new racisms" that focus on structural level disparate impacts discourage research into microlevel processes within institutions.

David Wellman (2007), who is strongly committed to a structural understanding of racism, counters this position by foregrounding the role of group processes, structural inequality, and status position. He takes issue with the atomized individual assumed in social cognition theories of racial bias and suggests that by explaining racism as a function of unconscious individual-level processes, responsibility for its effects is elided. Wellman points out that such psychological approaches assume universality of experience and ignore important cultural and contextual differences between diverse groups. The cognitive bias theories, he contends, ignore "one of the first principles of the sociology of knowledge. Namely, that what individuals see, and the meaning they make of these images, is determined by their social position" (48).

In some sense, this battle over explanations of contemporary institutionalized racism relies upon a dialectic that pits theories focused on individual processes against those focused on social structural processes. Thus, both Wellman (ibid., 47) and Berard (2008, 760) explicitly argue that the other side may do "more harm than good" in the fight against racism. Nevertheless, some scholars grapple with the linkages between institutional-level outcomes, group-level processes, and individual cognitions and behavior. Henkel, Dovidio, and Gaertner (2006), for instance, have described how individual-level prejudice, bias, and discrimination are shaped by, and help shape, broader institutional and cultural practices, and how these processes are built

upon historical precedents and norms. In delineating contemporary institutional racism and its various manifestations, they fold in the insights from cognitive social psychological research (including their own) that elucidates how stereotyping and bias can be somewhat unconscious and automatic processes, without denying the historical and structural contexts in which individuals operate.

Haney López (2000) squarely tackles the levels-of-analysis challenge and provides a clear and convincing model of the actual mechanisms of action underlying institutionalized forms of racism. Challenging "rational choice" theories of discrimination, Haney López uses an historical case study of the persistent underrepresentation of Mexican-Americans on Los Angeles County grand juries to illustrate how and why discriminatory practices persisted within that legal institution despite direct challenges to them. He works with the concepts of "script institutionalism," which is the process by which institutional actors develop and use a set of "stock prescriptions of conventional action" that involve little conscious thought about their meaning or consequences (1781), and "path institutionalism," which speaks to the constraints and boundaries of institutional decision making, while allowing for more thoughtful and autonomous action, to set up his explanation of how institutional racism operates.

For Haney López, institutional racism occurs when institutions (via their actors) engage in actions that *enforce* racial status hierarchies (either harming a disadvantaged group or benefitting an advantaged group) while *relying upon* what he refers to as racial institutions. Racial institutions are characterized as "any understanding of race that has come to be so widely shared within a community that it operates as an unexamined cognitive resource for understanding one's self, others, and the-way-the-world-is," and they are generated by group interactions, so are neither static nor universal (1809). In Haney López's conceptualization of institutional racism, action is not intentionally racist in the traditional sense, but it does require, first, the involvement of racial institutions, which can be thought of as shared cognitions, attitudes, and/or world-views, and, second, a behavioral component that enforces or reinforces a racial status hierarchy. Thus, this definition does not simply use racially disparate or harmful outcomes as a measure of institutional racism—although they are central to the process. Rather, it addresses the precursors and processes that shape those outcomes.

Haney López (2000) further specifies two forms of institutional racism: script racism, which is relatively undirected and automatic; and path racism, which is more directed and deliberated. This bifurcation contemplates institutional actors' different kinds of cognitions and actions (considered vs. automatic) within a structured and constrained context that encourages a limited set of responses to manage routine tasks. Thus, applying his elaboration of institutional racism to the problem in the Los Angeles grand jury selection process, Haney López suggests that "script racism" likely led to the

bulk of the initial discriminatory practices, whereby judges selected primarily White friends and acquaintances without thinking much about it and while relying on unconscious biases and heuristics, but that "path racism" explains much of the persistence of the problem despite legal challenges and direct confrontations about the discriminatory practices. Under both of these forms, there is significant inertia pushing against reform efforts, because racially institutionalized ways of thinking and acting become normalized and routinized, especially within highly bureaucratic settings, and, as a result, requests (or demands) for a change of practice are resisted because they do not make sense or seem appropriate within this context.

## EMPATHY AND INSTITUTIONAL RACISM

Haney López's line of theorizing significantly advances the utility of institutional racism as a theoretical framework by providing linkages between different levels of process, describing the different forms that institutional racism can take, and by specifying the actual mechanisms by which it happens. It also implicitly speaks to the role of culture in organizational settings, so in some sense echoes anthropologist Mary Douglas's (1987) insights about "how institutions think." In particular, it highlights the way that norms and expectations develop in organized group settings, and how they consequently shape behavior, especially the ways in which cognitions and behaviors are specifically constrained within institutional settings.

In my forthcoming analysis of the Cleveland case, I push a bit further in exploring this area of linkage and mechanics by looking at how institutions both think *and* feel, particularly in relation to racial minorities. Specifically, I examine the role of empathy in institutionalized racism. This examination is not so concerned with empathy as an individual-level phenomenon; rather, I aim to analyze how the institutional rules, norms, practices, and processes in this criminal justice setting work to deny a place for empathy toward those subject to its intervention. I explore the ways in which what I call "institutional empathy" is locked out, allowing for systematic racial harms to persist; then I examine how community activists were able to highlight this empathic failure as part of a strategy to prompt reform.

In its narrowest sense, empathy refers to an individual's capacity to take on the perspective of another. From a psychological standpoint, though, empathy generally encompasses much more than that, in that it expects the empathizer not only to perceive another's point of view, but also to feel that other's experience (Rogers 1975). Thus, empathy can be thought of as having both cognitive and affective components (Stephan and Finlay 1999), and it may trigger a behavioral response as well. Empathy is generally considered an individual-level attribute; however, some have applied the concept to group-level processes. For instance, in an early articulation, sociologist Ralph Turner (1956) considered the relationship and distinctions between

empathic capacity, role-taking, and reference group in social relations. Stephan and Finlay (1999) have also examined the role of empathy in intergroup relations, arguing that its absence plays a role in shared negative attitudes and behaviors toward out-group members. More recently, empathy has been characterized as a "group-based emotion" (Thomas, McGarty, and Mavor 2009) that can help explain group-level dynamics and that might be harnessed to promote social change.

Foregrounding the role of institutional empathy helps illuminate why institutional forms of racism are particularly prevalent in the administration of criminal justice. To begin with, criminal offenders, especially serious ones, are already viewed by the mainstream as wholly unsympathetic, culturally deviant "others" (Lynch 2008; Garland 2001; Simon 1998). Coupled with this is the persistence of negative racial stereotypes about who offenders are (Quillian and Pager 2001), which appear to contribute to differential treatment as a function of offender race (Mazzella and Feingold 1994). Finally, because empathy is generally most strongly felt for similar others (Linder 1996), to the extent that institutions are powered by those dissimilar to the populations that are subject to their reach (as in the criminal justice context), we should expect empathy to be weak.[3]

Institutional racism (and "path racism" in particular) may well persist, especially within criminal justice organizations, because empathy is discouraged via three processes: through the conceptualization of the institution's role in a narrow and mechanistic fashion; through the deployment of routines that de-individualize offenders and rely upon typologies and even stereotypes; and as a function of the demographic distance between criminal justice actors and offenders/defendants. In short, as a result of organizational structures, policies, practices, and routines, empathy is rendered an inappropriate response to "typical," or stereotype-consistent, criminal suspects and defendants.

## INSTITUTIONAL RACISM AND CRACK COCAINE

That the problems with selective drug law enforcement in this case study primarily center around crack offenses is not surprising given the short but infamous national history of crack cocaine laws. The criminal regulation of crack cocaine has been racialized since the first laws specific to this form of the drug were enacted by Congress in the 1980s. As Doris Marie Provine (2007) has illustrated, the federal legislative process that gave rise to these laws was shaped by rhetoric that cast crack as predominantly a drug of choice among poor, urban, minority populations, posing a serious and unpredictable threat to White America if lawmakers did not act decisively and punitively against it. The resulting legislation made the threshold to trigger mandatory prison sentences in crack cases dramatically lower than in powder cocaine cases. Simple possession of crack also became the only drug posses-

sion offense subject to mandatory minimums; all other possession offenses were defined as misdemeanors under federal statutes (U.S. Sentencing Commission 1995). Federal law enforcement has since disproportionately targeted African Americans in crack prosecutions, and African Americans make up the overwhelming majority of those sentenced under these laws (U.S. Sentencing Commission 2007).

While the impact of crack legislation on racial disparities in sentencing is best known and most dramatic at the federal level, state and local jurisdictions have also enacted laws and adopted policies that disproportionately penalize crack offenders, resulting in huge sentence disparities for drug offenders by race. Thirteen states followed the federal system's lead and passed laws that punish crack offenses more harshly than powder cocaine ones (U.S. Sentencing Commission 2002). More insidiously, discretionary use of arrest and prosecution in some locales ends up disproportionately targeting drug offenses involving crack. Law enforcement agencies in particular may concentrate patrol and investigatory resources in areas known to have concentrations of crack users and/or dealers, resulting in disproportionate numbers of African American drug offense suspects coming into contact with the system.[4]

Thus, across the federal and diverse state systems, drug offenders who are involved with crack end up being overtargeted for arrest and punished more harshly upon conviction than other drug offenders. Consequently, crack offenders are disproportionately among the "low level" drug offenders who end up with prisons terms, as a result "of the smaller typical drug amounts possessed by crack offenders and the heavy street-level enforcement and harsher sanctioning targeted to crack offenders" (Sevigny and Caulkins 2004, 412).

Legitimate policy reasons for the disproportionate treatment of crack offenders are nearly impossible to identify. At the federal level, the panic that led to the crack-powder cocaine guidelines disparities relied on faulty evidence and hysteria about the alleged different risks posed by the two forms of the drug (Provine 2007). Nonetheless, it took until 2010 to reduce this disparity, when Congress passed legislation to reduce the ratio of powder to crack from 100-to-1 to 18-to-1.

At the local law enforcement level, there is little evidence in existing studies that the overtargeting of minority crack offenders is based on rational policy considerations (Beckett 2008; Beckett, Nyrop, and Pfingst 2006; Beckett et al. 2005). Likewise, in Cleveland, there does not appear to be a rational legal or justice-related justification for the anomalous felony "crack pipe" charging policy by the city police or for the prosecution of those cases as felonies by the Cuyahoga County Prosecutor. As such, the Cleveland case fits within a larger pattern that has emerged around the United States since the 1980s that has, in the end, especially harmed minority crack cocaine drug offenders through directed, harshly punitive policies, targeted law enforcement practices, and disparate sentencing.

## POLICING DRUGS IN CLEVELAND

Like many postindustrial rustbelt cities, the population of the Cleveland metropolitan area has been shrinking over the last forty years as manufacturing employment opportunities have disappeared, resulting in fewer well-paying jobs and high unemployment rates relative to other American urban settings. The city itself has had an especially dramatic and sustained pattern of population loss, losing more than half of its population size from 1950 to 2000. The flight from the city limits has been disproportionately of Whites and the relatively affluent, so Cleveland has become majority non-White and increasingly poor in population over time (Brinegar and Leonard 2008).[5] Within Cleveland, the Cuyahoga River bisects the city into the East side and the West side, which has also historically served as a socio-demographic divider. As the map in Figure 2 shows, Whites (and Latinos in recent years) are more concentrated in the West side neighborhoods, whereas African Americans are more concentrated in the East side ones.

It is in the African American majority East side neighborhoods that Cleveland police are especially prolific in making drug arrests, as illustrated in Figure 1. Due to the highly discretionary nature of how law enforcement identifies and comes to arrest drug offenders, this indicates, at least to some degree, a policy decision on the part of the Cleveland Police Department to concentrate a significant share of its law enforcement resources within certain sections of the city. The most concentrated levels of arrests per capita occur in a band of East-side neighborhoods with the highest percentage of African American population. Only two White majority neighborhoods, just west of the Cuyahoga River, had drug arrest rates above the citywide mean of 1,853 per 100,000, but even in those locales the majority of drug felon arrestees were non-White. Consequently, African Americans have an overall felony drug arrest rate in Cleveland that is nearly four times higher than Whites (Federal Bureau of Investigation 2007).[6] In sheer numbers, since the mid-1990s, over four of every five felony drug possession arrestees in the city was non-White (see Table 1).

Cleveland police are also prolific, relative to other county law enforcement agencies, in making felony drug arrests. In 2005, 69 percent of the 7,412 drug possession arrests in Cuyahoga County were made by the Cleveland Police within city limits, which means that the rate of arrests for felony drug possession in the city of Cleveland is about twice the expected rate, given the city's share of the county population (and assuming that drug possession incidents are evenly distributed throughout the county).

According to research by William Sabol and Kristen Mikelbank (2005), the predominant drug arrest method utilized by the Cleveland police has been "buy-bust" operations where officers pose as buyers, supplemented by periodic sweeps of known drug use sites within the city (i.e., of "crack"

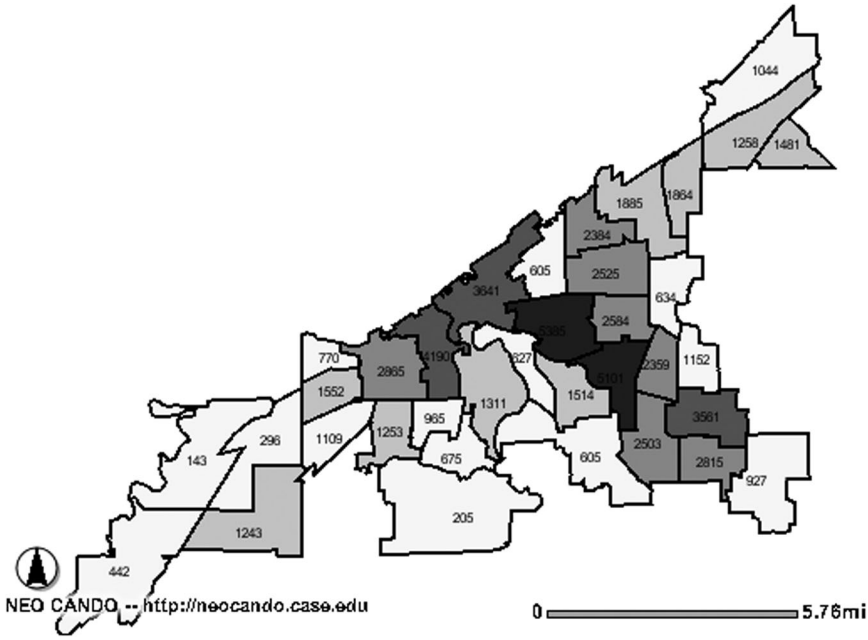


Figure 1. Drug Arrest Rate in Cleveland (per 100,000) by Neighborhood, 2000.

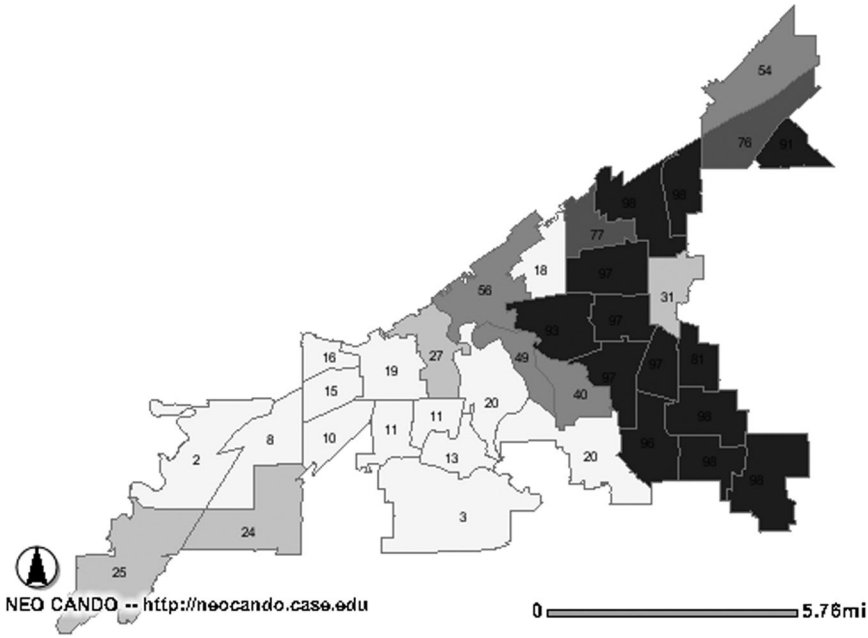


Figure 2. Percentage African-American Residents in Cleveland by Neighborhood, 2000.

Table 1. Drug Possession Arrests by Cleveland Police, 1995–2008

| Year | Illicit Drug Possession Arrests: White Arrestees | Illicit Drug Possession Arrests: Non-White Arrestees |
|---|---|---|
| 1995 | 895 (19%) | 3882 (81%) |
| 1996 | 729 (19%) | 3035 (81%) |
| 1997 | 758 (17%) | 3814 (83%) |
| 1998 | NA | NA |
| 1999 | 1509 (19%) | 6489 (81%) |
| 2000 | 1466 (20%) | 6008 (80%) |
| 2001 | 1166 (16%) | 6131 (84%) |
| 2002 | 1021 (17%) | 4974 (83%) |
| 2003 | 1058 (18%) | 4946 (82%) |
| 2004 | 886 (18%) | 3933 (82%) |
| 2005 | 968 (19%) | 4092 (81%) |
| 2006 | NA | NA |
| 2007 | 866 (19%) | 3589 (81%) |
| 2008 | 731 (18%) | 3255 (82%) |

Note: Excludes cases in which race of offender is unknown.
Number of "race unknown" cases ranges from 64 in 2008 to 628 in 1997.[1]
Data source: NEO CANDO, http://neocando.case.edu/cando/

[1] All drug arrest data were missing for 1998, and race of offender data were missing for 2006. The 628 "race unknown" in 1997 was otherwise anomalously high; the next highest was 383 in 1996, and from 1999 on, the "unknown" numbers were generally well below 200.

houses). Thus, most arrests are made as a result of police decisions to seek out drug offenders in specific areas. Athough Sabol and Mikelbank's research did not address how police decided upon where within the city to target resources, or whether it was prompted in any part by complaint calls, these particular arrest tactics indicate a proactive role by law enforcement in seeking drug arrests rather than a reactive approach to incidents as they naturally occur.

Available data also indicate that Cleveland police only very rarely charged the less serious misdemeanor charge of possession of drug instruments, while they have made thousands of felony drug possession arrests annually (Mikelbank 2008; Office of National Drug Control Policy 2007). Overall, the existing data suggest that the city of Cleveland has been disproportionately responsible for felony drug possession charges within the county and that law enforcement in the city underutilized the less serious misdemeanor option. Moreover, it is non-White offenders, arrested within the city of Cleveland, and, in particular, in the African American neighborhoods, who disproportionately bear the brunt of felony drug law enforcement within Cuyahoga County.

This is despite the fact that available data sources indicate that drug use in the region is both more diverse and more dispersed than what is reflected in arrest records.[7] Indeed, data collected by state and federal agencies over the

past decade indicate that many other drugs besides crack cocaine were prevalent in the county, including powder cocaine, marijuana, MDMA (3,4-methylenedio-xymethamphetamine, commonly known as Ecstacy), and heroin (Office of National Drug Control Policy 2004). While crack cocaine is reportedly used predominantly by African Americans in the central city, existing reports document both African American and White crack users from the entire metropolitan area. Heroin is also reported to be most frequently used by Whites and Latinos in the area, and, over the past decade, its usage has been growing among suburban, White, and upper socio-economic–status young adults. Powder cocaine is reportedly used predominantly by White suburban residents, including high schoolers, and marijuana is reportedly used by both African American and White residents from all areas (Alemagno, Stephens, and Shaffer-King 2007; Alemagno et al. 2006; Office of National Drug Control Policy 2007, 2004). Thus, the pool of potential felony drug arrestees in the area and the pool of actual drug arrestees diverge on race, locale, and drug type.

## THE STORY OF THE CRACK PIPE CASES

After the repeal of the felony drug possession arrest policy in Cleveland in March 2009, the city's safety director shared with the community group at the forefront of the reform—Citizens for a Safe and Fair Cleveland—that the policy to charge possession of drug paraphernalia with residue as felonies had been in place for twenty-three years. The mayor's office estimated that about 1,200 to 1,500 felony drug possession arrests annually fell into that category (Puente 2008), meaning that somewhere between 27,000 and 34,500 offenders had been subject to this policy over its lifetime. Community members were long aware of the disparity in drug arrest practices between the city and the suburbs—and its impact on African American drug users in the city (Diaz 2009). And by early 2002, the criminal justice system was also officially, and publicly, put on notice about its impact on urban drug users of color.[8]

The first notice came in the form of the September–December 2001 term grand jury report, issued in February 2002 by the foreman, Marvin McMickle (2002), a well-known and influential African American reverend from Cleveland. McMickle raised general concerns about the large number of drug possession cases that were being brought to the grand jury for felony indictment, and questioned the wisdom of prosecutors' pursuit of such cases as felonies. He specifically raised the issue of race in how drug possession cases were being pursued, suggesting that although the county's population was majority White, the low-level drug defendants in the cases presented to the grand jury were primarily African American and Hispanic. This concern was amplified for Reverend McMickle by his observation that, by and large, the prosecutors, police, and grand jury members who were responsible for

pursuing and authorizing the felony charges were White, resulting in the indictment process having "an apartheid feel" to it (ibid., 3).

He commented that many of the cases presented to the grand jury involved "some infinitesimal amount of drugs," yet the consequences of the felony arrest and prosecution were both quite serious for the defendant and generally ineffective in stopping the drug problem (ibid., 2). McMickle did not specifically voice concerns that the lowest level cases, such as possession of crack pipes being charged as felony drug possession, were coming out of the city rather than the county; however, he clearly highlighted the possibility that the racial disproportionality in who was being arrested and indicted was Cuyahoga County's "own brand of racial profiling" (ibid., 3).

After first sending the report to the presiding judge, Richard McMonagle, Reverend McMickle released it to the local news media, prompting a small flurry of publicity. The major Cleveland paper, *The Plain Dealer*, immediately published a story detailing the contents of the report (Naymik 2002). McMickle himself, Judge McMonagle, and the elected county prosecutor, William Mason, were all interviewed for the story. McMickle reiterated that he felt like he was participating "in a process that was designed to quickly indict and send off to trial as many people as possible, with the most of them being black" (Naymik 2002, B2) and said he hoped to begin a community discussion on the issues he raised in his report. Both Judge McMonagle and Mason denied that race had anything to do with felony drug prosecutions, and McMonagle publicly chastised McMickle for trying to make a "statement" with his report: "We are not here to make social statements. We are supposed to determine if a crime was committed" (ibid.). Mason indicated to the reporter that he made no apologies for his charging policy and had no intention of changing it.

The public response to the grand jury report by the presiding judge and elected district attorney seems to reveal the emergence of path racism in this case. What may have been a pattern of script racism, in which few within the system questioned the policies or practices that led to disparate drug arrest and prosecution outcomes, was now interrupted. Once official and public attention was drawn to the problem, the legal institutional actors could no longer simply subscribe to the previous "script" about who drug felons were. Rather, they were prompted to publicly defend their practices and justify their continuance in a much more deliberated manner. In this case, they did so by a combination of denial and elision, in part by suggesting McMickle had overstepped the scope of his authority by even raising the issue.

Both Mason and McMonagle invoked a discourse about "the law" and its proper boundaries as a way to deflect the criticisms and responsibility for reform. McMonagle in particular promulgated a view of the law (even as practiced here) as divorced from social causes and consequences. "Crime" in this construction functions as a kind of natural category, and the grand jury's role is simply limited to making an objective assessment of facts to determine if a crime happened. McMonagle also justified the apparent overrepresenta-

tion of minorities among criminal defendants with a matter-of-fact assertion that "because of the social and economic aspects of life . . . minorities are committing more crimes" (ibid.). This racial institution about minorities and criminality was thus relied upon to deny racism and was reinforced in a feedback loop by the persistent overrepresentation of non-Whites among criminal defendants.

McMickle's observation of the racial divide between defendants and legal actors in the system, and Mason's and McMonagle's reactions to it, also demonstrates the disconnect in perspective about how race, and racism, shape the system. In so doing, it reflects the role of positionality in shaping the perception and experience of racism (Wellman 2007) and implies an institutional empathic deficit as a function of the experiential and social distance between court actors and defendants. Neither institutional actor seemed to perceive the need to voice empathy for those who may be harmed by the system's practices, much less take the concerns seriously. Furthering the empathic divide is the bracketing of appropriate institutional concerns, in that McMonagle constructed boundaries around the court's (and its actors') role that specifically excluded an empathic consideration of harms caused by its routine operation. As such, McMickle's concerns were easily dismissed as both inappropriate in form and off base in substance. Empathy was thus discouraged by narrowly defining the court's function (to determine whether a crime was committed); deploying deindividualized typologies/stereotypes to explain away harms (poor minorities commit more crimes); and through further distancing and distinguishing the court and its actors from those subject to its power by the use of an "us" (the court) and "them" (minority offenders) rhetorical dichotomy.

The news story about McMickle's report was followed the next week with back-to-back editorials in *The Plain Dealer* urging city and county leaders to heed McMickle's message. The first of the editorials, titled "Locking up Blacks Is No Solution," urged a rethinking of the war on drugs that has devastated African American communities (Morris 2002). The second one brought it home to Cuyahoga County—as reflected in its headline, "Cuyahoga Drug War Is an Assault on Minorities"—and specifically criticized prosecutor William Mason for his misplaced priorities (Westlake 2002). Six weeks later, McMickle was able to convene a community meeting between African American leaders from the city and Mason to specifically address the issue of inner-city minorities getting charged with felonies in cases involving small quantities of crack cocaine such as in the paraphernalia cases. At this meeting, which was again covered by *The Plain Dealer*, Mason agreed to work with community members to find a solution to their concerns (Perkins 2002). Despite this conciliatory public response, however, Mason continued to prosecute the Cleveland "crack pipe" cases as felonies.

Indeed, the grand jurors who sat on the 2002 September term grand jury concluded their service with another report that was critical of the indictment process. One concern was that they felt "unfairly pressured" by prosecutors

to issue indictments, even if they did not feel the evidence warranted it (McCombs 2002, 7). This report also echoed McMickle's concerns about the high volume of low-level drug offenders who were brought for indictment, particularly the cases brought with only "trace" amounts of cocaine present. Dorothy McCombs (2002), author of the September 2002 report, referred to the underlying laws that allow for such prosecutions as "draconian" (ibid., 5).

McCombs devoted a full paragraph to the frequent crack pipe indictments, reporting that several such cases were presented during each session. She raised serious concerns about the geographic disparities underlying these prosecutions:

> It was particularly disturbing that this type of arrest and felony charge for residue seemed to be the rule in the city of Cleveland but not in the suburbs. The Cleveland Police and the CMHA Police [the public housing police] seemed to enforce this law with a vengeance. . . . There were few if any pipe residue cases from anywhere else in Cuyahoga County. . . . The large number of these types of cases presented, the fact that residue was the only evidence of wrong doing and the disturbing fact that arrests only happened to people in the City of Cleveland was not imaginable. (ibid., 4)

McCombs' report generated a news story in *The Plain Dealer*, but it was primarily focused on how grand jurors felt pressure to indict, only mentioning the concerns McCombs had raised about the drug laws in passing (Hiaasen and Turner 2003). This report did not exert enough pressure on system actors to do much but express concern to the newspaper reporters covering the story. Moreover, neither the McCombs report nor the news article framed the underlying problems in terms of racial impact.

In the spring of 2003, the issue of charging urban defendants with felonies in the crack pipe cases dramatically resurfaced, this time in the context of the May term grand jury. In this instance, Cuyahoga County Common Pleas Court Judge Burt Griffin, who was responsible for giving the grand jury charge to that body, included several controversial instructions to which the County Prosecutor William Mason objected. One of the instructions that the prosecutor found objectionable specifically suggested that crack pipe possession cases coming out of the city of Cleveland were charged as felonies, whereas the same cases in suburban jurisdictions were not. As Judge Griffin's instructions worded it,

> The most challenging decision you may have to make concerns cases involving what we call crack pipes.
>
> A "crack pipe" is a glass or metal tube used to smoke crack cocaine. The pipe is usually fitted with a substance you may have in your own kitchen—Chore Boy—to hold the crack cocaine. When the tube has cocaine residue in it, possession of that tube may be charged either as the misdemeanor of possessing a drug abuse instrument or possession or use of the drug itself. To prove the crime of *possession of the drug* in the tube, the State must prove beyond a

> reasonable doubt that the defendant knew that the residue in the tube still contained cocaine.
>
> To prove that the defendant knowingly *used cocaine* where a crack pipe is the only evidence, the State must prove beyond a reasonable doubt that the defendant had actually used the pipe. It is not proof against the defendant that someone else had used the pipe or that the defendant intended to use the pipe to smoke crack cocaine.
>
> Crack pipe cases may or may not pose those evidentiary issues, depending upon what other evidence exists. The reason that I suggest to you that these crack pipe cases are challenging is that they involve what I will call "differential prosecution" throughout the State of Ohio and in Cuyahoga County. For example, in many counties in Ohio, possession of a tube with cocaine residue is not prosecuted as the felony of possessing or using cocaine but as the misdemeanor of possessing a drug abuse instrument. Indeed, some courts have held that mere possession of a pipe with cocaine residue is not a felony.
>
> You *may* notice that your Grand Jury is being asked only to prosecute these crack pipe cases as felonies when the arrest has been made in the City of Cleveland. That is because few, if any, of our suburbs bring these matters as felony prosecution. They are prosecuted in the suburban municipal courts.
>
> Just as the police and local suburban prosecutors and prosecutors in other counties have decided that the misdemeanor prosecution is more appropriate for crack pipe cases, you may also make that decision if you believe that justice so requires that they be prosecuted as misdemeanors. (Griffin 2003, 4–5)

Judge Griffin went on to remind the jurors that a felony indictment was a "serious event in any person's life" (ibid., 5), so they should use their discretion in making those decisions; yet he also assured them that he was not attempting to tell them what to do. He included McMickle's and McCombs' reports as attachments to the instructions given to this grand jury.

County Prosecutor William Mason responded on a number of fronts. He launched his own investigation of the grand jury foreperson, law professor Phyllis Crocker, and had one of his investigators interrogate her about her role in shaping the judge's instructions (Crocker 2004). He filed a motion with presiding Judge McMonagle to discharge this grand jury panel based on the instructions that Judge Griffin had given. He accused Judge Griffin, in the news, of tainting the grand jury with these instructions, calling it "judicial activism to the extreme" (McCarty 2003, B1). He filed an affidavit in the state Supreme Court to disqualify Judge Griffin, accusing him of being biased against the prosecutor's office and alleging that Griffin had called the office racially biased, even though the instructions never mentioned race in any context. He also sought to have Professor Crocker, the foreperson, removed from the panel if the panel was not discharged. Ultimately, the prosecutor did not prevail in these efforts, but, nonetheless, the grand jury's term was almost fully aborted as the challenges underwent a number of proceedings. The

grand jury panel heard just one day's worth of cases at the very end of its four-month term (see Crocker 2004, for more details).

This incident clearly demonstrates how widely held the perception was that there was a problem with how Cleveland drug paraphernalia cases were being brought up as felonies. Indeed, the specifics of Judge Griffin's allegations (as shaped into grand jury instructions) had now become the substance of contentious and prolific litigation, once again making newspaper headlines, and this time drawing attention from legal elites outside of the county.[9] Yet, despite this very public scrutiny and criticism, no policy change was forthcoming from either the county prosecutor's office or the city of Cleveland. City crack pipe cases continued to be charged and prosecuted as felonies.

Griffin's call to the panel to consider the impact of a felony indictment on the defendant and his foregrounding of the injustices that have been experienced by low-level drug urban defendants served to authorize empathic judgment rather than the more constrained version of the grand jury role that both Mason and McMonagle insisted upon. It is precisely this aspect of Griffin's subversion to which Mason most strenuously objected, describing Judge Griffin's acts as the "kind of stuff you expect in the banana republics" (McCarty 2003, B1). Furthermore, rather than addressing the substance of the now-persistent claims of bias in the prosecution process, Mason characterized *Griffin* as the biased entity within the system. As such, his denials and counterattacks framed the status quo institutional processes in the county courts as normal, natural, and appropriately rule bound, and interrogations or critiques of those practices as deeply problematic violations of legal ideals. Like McMonagle's reaction to McMickle's critiques, in this instance, Mason cited the necessity of abiding by the institutional rules and procedures in order to achieve justice and distinctly placed empathic considerations of how those rules and procedures impact defendants as outside of the institution's purview.

Nearly three years after the instructions incident, the crack pipe issue erupted again when a retired Cleveland Municipal Court judge, C. Ellen Connally, served as grand jury foreperson and wrote another very critical concluding report. Her report addressed a number of concerns about the general grand jury process, including, specifically, the apparent geographic disparity in terms of who was being indicted in crack pipe cases. She first reiterated concerns raised by previous foreperson McMickle regarding the racial composition of the prosecutors, court staff, and county law enforcement personnel who interacted with the grand jury. And, like both McCombs' and McMickle's reports, Connally's report (2006) was also critical of prosecutors' pattern of overindicting, particularly in drug cases. Her deepest reservations, though, were about the charging of crack pipe possession as felonies. As she put it in her report,

> I served on the Grand Jury for four months. During that four months period I never saw a crack pipe case from a suburb. Only Cleveland police brought in cases for possession of a crack pipe. No one will ever convince me that the possession of crack pipes stop[s] at the borders of Cleveland.

> Crack pipes come into the system in four ways. The vast majority seem to come in through traffic stops where the pipe is retrieved during the arrest or incident to a search of the vehicle. Others are the result of some observed unlawful conduct or suspicion thereof and the resulting pat down and arrest. Many come in as a result of a buy/bust sting conducted by the police. Finally many such cases come in when police enter a residence or hotel room and find the crack pipes, almost always in plain view. I got the impression that in many cases police go out and essentially "shot fish in a barrel." They know the so called "high drug areas" so they go to the locations, pick up a couple of crack users, arrest them, get an indictment and conviction, get some overtime, keep the crime statistics up and repeat the same cycle. (ibid., 10–11)

Connally reported that after three weeks of service, she could no longer in good conscience follow her oath as it pertained to the crack pipe cases. Therefore, she recused herself from those cases for the remainder of her four-month term. In her discussion about her reasoning leading up to the recusal decision in these cases, she reiterated her concerns about the geographic dimension of the crack pipe cases and, further, raised the racial impact of these prosecutions:

> [T]he vast majority of these cases involved African American residents of the inner city. Not one suburb brought in similar charges. Again, possession of crack pipes does not end at the border of Cleveland. If it is a felony in Cleveland to possess a crack pipe, it should be a felony in West Lake, East Lake and every other suburb. Other jurisdictions charge possession of crack pipes as possession of drug paraphernalia, a misdemeanor of the first degree for which the person can receive up to six months in jail. In addition, there is a driver's license suspension in connection with the charge. It is a serious offense. But residents of Cleveland are not allowed the opportunity to avoid a felony conviction. They receive a felony indictment and if convicted will suffer the stigma of a felony conviction and the numerous collateral sanctions that go along with the conviction for the rest of their lives. (ibid., 11–12)

While Connally's report did not generate any print news coverage at the time, it clearly and bluntly reiterated the now well-documented concerns about racial and geographic disparities in drug law enforcement and prosecution to an audience that had the power to effect change. By naming who is harmed by these practices, detailing the aggressive policing practices that targeted only certain offenders, and referencing the stigma and other impacts of a felony conviction, it also explicitly made an empathic assessment in the critique. Nonetheless, neither the Cleveland Police nor the Cuyahoga County prosecutor's office took any steps to remediate or even publicly express concern over the accusations.[10]

## IS THIS A CASE OF INSTITUTIONAL RACISM?

Judge Connally's 2006 grand jury report raised a possible, ostensibly non-racial, motivation for the local jurisdictional differences in the charging

decisions: That police officers in Cleveland earn overtime for their court appearances; therefore, they can financially benefit on a personal level by charging such cases as felonies. Indeed, there are compelling—and competing—fiscal incentives within the county that appear to underlie how low-level drug offenses are charged and prosecuted.

Cleveland police officers do, by contract, earn significant overtime pay for court time when they appear outside of their shift hours. The collective bargaining agreement in effect in the early 2000s between the Cleveland Police Patrolmen's Association (CPPA) and the city required that officers who were called to court at times when they were not scheduled to work get paid one-and-one-half times their regular hourly pay for a minimum of three to four hours (CPPA Contract 2007). Based on the shift assignments in the Cleveland Police Department, a majority of the police in the city in any given week were eligible, under the terms of this contract, for the overtime pay when required to appear in court. Because most misdemeanor cases do not require the appearance of the citing officer,[11] while in felony cases officers are routinely called to court in case they are needed to testify, the charge as either a felony or a misdemeanor has an impact on how much overtime is necessary for court appearances. In this case, Cleveland police officers were regularly paid to show up to court in the felony cases, even though they rarely ended up testifying because the majority of cases settle early on in the adjudication process.

On the flip side, there appears to be a counterincentive to keep the drug instrument possession cases in the county municipal courts as misdemeanors. Like a number of municipalities, local jurisdictions in Ohio have expanded criminal law through municipal codes (Logan 2001). In most places in the United States, the new municipal codes aim to criminalize behavior that is deemed to compromise the "quality of life" within the locale. Such laws will, for instance, target certain behaviors in defined public spaces like parks and libraries, regulate people congregating in certain areas of the city, and ban "nuisance" behaviors that may deter tourists and/or retail customers from frequenting business districts. These laws typically supplement the state code and are specific to the local municipal jurisdiction (see Beckett and Herbert 2009, 2008; and Logan 2001 for more on this process).

Yet, in many parts of Ohio, cities and townships have written full criminal misdemeanor codes that mimic almost verbatim the state penal code. By bringing these violations into the municipal code, each jurisdiction can then collect the fines (which are held to a maximum of $1,000 per first-degree misdemeanor for individuals and $5,000 per first-degree misdemeanor for organizations) on top of the court costs and keep that revenue local. Misdemeanors can conceivably be charged under either the state penal code or the municipal code with identical potential penalties, but if they are charged under the state code, fines go to the county, whereas if they are charged under the municipal code, they go to the municipality. Felony charges do not afford that potential fiscal benefit to the local jurisdictions because felonies are handled in the county level courts.

This raises the question of why the city attorney's office in Cleveland would not also experience local political pressure to file misdemeanor charges in the low-level cases for the benefit of the city coffers. Cleveland's municipal code does indeed include the same range of drug offenses as the other municipal codes around the state,[12] but when the low-level drug cases get brought to the city attorney's office with the police recommendation for felony charges, that office—unlike all others in the state—generally just processes them through to the Cuyahoga County Court of Common Pleas for felony indictment. There are two contributing factors to this anomaly. First, the police union appears to be a sufficiently powerful political constituency to counteract any fiscal pressure to pursue the bulk of the crack pipe cases as misdemeanors. Second, the county prosecutor's office holds a uniquely powerful place within the city attorney's office of Cleveland in that it handles the potential felonies within Cleveland Municipal Court, thereby making the determination as to whether cases should move to the county level for grand jury indictment proceedings. Thus, the city attorney, in just this one municipal court jurisdiction within the county, does not have autonomy in making charging decisions, whereas in the remaining twelve municipal courts, the local city attorney's offices (or local city prosecutor's offices) make the independent judgment about whether to refer cases to the county as felonies.

Yet, even if the crack pipe felony charging policy was not motivated by racial animus (but rather by avarice), its ill effects are not justifiable on rational criminal justice-related grounds. This is coupled with the fact that the harms caused were made known to policymakers and implementers, but they still chose not to remedy it. Thus, this situation does indeed seem to meet the criteria for institutional racism. First, maintaining the practice for the financial benefit of individual officers is neither legally legitimate nor fiscally sensible from a local or regional policy standpoint. At the local level, the bill for personnel overtime in cases that anywhere else would not require such expenditure is fiscally imprudent, no doubt straining the city's ability to meet other municipal obligations. Felonies are also more costly to prosecute than misdemeanors; thus, each of these cases cuts into the county's budget, especially because they otherwise would likely stay in local court. They are also more expensive in sanctioning costs, as was pointed out with specific dollar amounts by a *Plain Dealer* columnist commenting on the high costs of felony "crack pipe" cases (Gaylord 2007).

More fundamentally, these differing charging policies and practices are built upon a law enforcement strategy that also appears to disproportionately assign within-agency resources to certain areas of Cleveland that ensures that minority drug offenders are more likely than White ones to come to the attention of police. And even among those drug possession cases that do end up going to the county for felony indictment and prosecution, it appears that race of defendant has influenced level of leniency offered in negotiated pleas (Paynter 2008a, 2008b).

Finally, the racial impact of this form of drug law enforcement was known to police, prosecutors, and city and county officials for years, but no remedial changes were made despite some significant pressure along the way. Thus, it appeared that the perceived benefits for both the police and the county prosecutor's office of differentially prosecuting predominantly minority low-level urban drug offenders as felons outweighed the direct costs to those so charged and the indirect costs to the broader African American community in Cleveland. As such, the lives of those harmed by this policy were markedly devalued by the stigmatic, economic, and life opportunity harms rendered by a felony conviction, and by the city and county officials' apparent disregard for causing those harms.

But is this institutional racism? Recall Haney López's elaboration and bifurcation of institutional racism. His general definition required two mechanistic elements: the reliance on racial institutions (which can be likened to widely shared and accepted stereotypes and unspoken understandings about race) and an action that results in racial status reinforcement (which either "enhances or degrades a racial group's social position" materially and/or symbolically [Haney López 2000, 1810]). In his conceptualization, and in keeping with other definitions of term, no directed intent to discriminate in a harmful manner is necessary, or even expected, in institutional racism.

Thus, like the problem of Mexican-American underrepresentation on the Los Angeles grand jury, the drug law enforcement issue in Cleveland also fits within Haney López's explication of institutional racism. The Cleveland case, like the Los Angeles case, appears to have proceeded from script to path form over the decades-long course of practice. In the Cleveland case, the policy was built upon pervasive racial institutions about race, criminality, and drug use, and especially about African Americans' use of crack cocaine, that are broadly accepted and that have shaped drug law enforcement policy throughout the nation. Indeed, this basis for the federal sentencing statutes' exceptionally harsh treatment of crack offenders has been acknowledged by at least one district court (see Dvorak 2000, discussing the underlying district court decision in *United States v. Clary* 1994).[13] That Cleveland instituted the policy at the height of the national "crack" hysteria, and that it has primarily targeted crack users despite the known diversity of drug use in the city, highlights the role of this racial institution here.

There is also demonstrable racial status enforcement in this case. Those directly harmed by Cleveland's felony charging policy for drug instrument possession cases were primarily African American citizens in possession of crack pipes, and the policy's detrimental impacts on the larger African American community were real and negative, as pointed out by several of its critics. While the available record of this policy's development and justification was limited, by February 2002, when the grand jury foreperson, Reverend Marvin McMickle, publicly criticized the criminal justice system for its overprosecution of minority low-level drug offenders and for its

"apartheid–like" structure, the racially degrading aspects of the policy were clearly identified.

Indeed, this moment not only directly alerted those powers within the system of a potential problem, but the concern was also widely publicized in the local news media, amplifying the message that at least some further investigation ought to be done (McMickle 2002; Morris 2002; Naymik 2002; Perkins 2002; Westlake 2002). McMickle's action was quickly followed by another well-publicized critical grand jury report (McCombs 2002) and then by the direct challenge by Judge Griffin to the county prosecutor in May 2003. Thus, by the early 2000s, the police and prosecutors' continued application of the felony charging policy, coupled with their denials of any harm, can clearly be characterized as path racism, in that it involved, "directed racial status-enforcement influenced in an unrecognized manner by racial institutions" (Haney López 2000, 1811).

As Haney López's (2000) conceptualization recognizes, group-level institutional practices—carried out by individual actors with specifically defined roles—that "impose substantial injuries on minorities, even if they do so quietly, in a matter-of-fact, taken-for-granted manner" (1810) are sufficient to meet the definitional criteria. In the Cleveland case, advancing an argument that the felony drug policy is not institutional racism because it was demonstrably being implemented for reasons other than race (i.e., for the financial gain afforded individual police officers, because of local political cowardice in relation to the police union, and/or for the accretion of the county prosecutor's political power) is to deny one-half of the equation that went into the decision to implement the policy in the first place. That is, that the harms done by the policy—knowable from the inception and known upon implementation—were discounted relative to the benefits for the policy implementers because of the nature of the population primarily targeted: poor, urban, African American crack users.

Moreover, the Cleveland case suggests a lack of institutional empathy for those who bear the brunt of the system's discriminatory practices. Several institutional actors' public reactions were particularly telling in this regard. For instance, in Judge McMonagle's reported response to McMickle's accusations, he concurred that there should be fewer drug cases in the system but viewed the downside of those prosecutions solely in reference to his own professional world: "We wish [the prosecutor's office] would reduce some of them to misdemeanors to lighten our load" (Naymik 2002, B2). His perspective here reflects a keen awareness of how such cases impact his working life and that of his peers, but it is absent of any recognition of the impact on those prosecuted. In other words, he empathized with the plight of overburdened court personnel but not with overindicted defendants.

Mason's public responses to the series of accusations similarly reflected a self-referential point of view shaped by his institutional role of county prosecutor rather than one that considered the perspective of those low-level offenders he indicted. His "ballistic" reaction (Gupta 2008) to Judge Griffin's

crack pipe instructions framed the harm done in terms of how it impugned his office's reputation and impeded its ability to do its job. Griffin had justified his actions to the state Supreme Court as furthering the promises of policy reform that Mason himself had made (but not delivered) to African American community leaders in their meeting just months earlier and suggested that it was important for justice to increase that community's confidence in the criminal justice system (ibid.). Mason's written response to the court was defensive and indignant, characterizing Griffin's explanation as, "a bald allegation with no support of any kind" that displayed a "stunning . . . disdain for the prosecutor's office" (ibid.).

Both McMonagle and Mason appear unwilling or unable to incorporate the perspective of those individuals who bore the brunt of the policy and instead analyzed the issue—and its impacts—only through their own role-specific lens. Note that this empathic deficiency is clearly institutional rather than personal; neither framed his response as coming from himself as an individual citizen. Rather, each spoke as an organizational actor and defined his concerns in reference to the organization's function. As such, their responses to the frequent critiques served to reinforce, and even exacerbate, the institutional empathic divide between the institution itself and those subject to its reach. Indeed, as detailed earlier, these actors argued that empathic considerations of the routinized and systemic harms brought on by this policy were outside of the scope of the institution's functions and therefore inappropriate to address.

Yet, as I describe in the remaining sections of the article, in this case, the empathy problem was able to be turned on its head and reconstituted as an avenue to reform. A key element to remediating the harms in Cleveland was by using group-level empathy to promote reform through making very directed claims about harms done to a broadened community of "us," thereby reducing the distance between those with the power to reform criminal justice policy and those impacted by it. As such, this case highlights a strategic, collaborative, and community-based approach to combating institutional racism more broadly.

## CHANGING POLICY IN CLEVELAND

In the spring of 2007, several community meetings were convened in Cleveland to discuss the possibility of more systematically documenting the racial disproportionality of drug arrests in the city and county and to develop a plan for effecting policy change. The meetings revealed a broad and diverse constituency of concerned residents and community leaders on the specific issue of the "crack pipe" felony arrest policy. An outgrowth of these early meetings was the formal establishment of a coalition of local citizens and organizations, "Citizens for a Safe and Fair Cleveland," which spearheaded the efforts to document the impacts of the felony drug paraphernalia policy

and promote policy reform on this issue. The coalition's stated commitment was to "(1) making the streets of the City of Cleveland safer for all persons, and (2) monitoring law enforcement policies to insure consistency, proportionality, and fairness" (Citizens for a Safe and Fair Cleveland n.d.).

As previously noted, I was hired as a consultant to gather data on the crack pipe felony arrest problem. The culmination of my involvement in this issue was producing a relatively brief report (Lynch 2007) that documented the nature and extent of the racial disparities in low-level felony drug charges in the region and that laid out an agenda for more systematic research to be done to document the impact of differential regional policies on racial disparities in case outcomes. The report implicitly anticipated a litigation strategy to changing the policy, thus the assumption underlying it was that further data would be required.[14] The Citizens for Safe and Fair Cleveland coalition, though, was able to leverage this brief report, along with the direct experiences of people who have observed and experienced the racial disparity problem, to mobilize policy change without litigation.

The coalition began the effort with a press release in summer 2008 entitled "Study Shows African Americans More Likely to be Charged with Drug Felonies: Citizens, Community Leaders Combat Selective Enforcement," which announced the publication of the report (Citizens for a Safe and Fair Cleveland 2008). More importantly, the press release set out an agenda for social change by defining the terms of that process, using strategic language to (1) frame the problem as conclusively proven; (2) signal the breadth and strength of the coalition and solidarity in the coalition's goals; (3) express recognition of public safety concerns balanced with the overarching values of fairness and equality; and (4) recast the drug offenders at issue as part of the community, thereby opening up space for empathy.

The press release used extended quotes from the coalition chairperson, James Hardiman, a local attorney who is also actively involved in leadership of the Cleveland chapter of the National Association for the Advancement of Colored People (NAACP), to do some of this rhetorical work. For example, Hardiman stated that the group "look[ed] forward to continue to work with city and county officials towards finding a resolution that will be equal to all and keep our streets safe" (ibid.), which encapsulated many of these aims. Implicit in this statement is that the problem exists, and explicit is a message of cooperative collaboration with a goal of bettering the community along both public safety and equal justice dimensions.

The press release also specifically named four major state and local organizations that were part of the coalition and mentioned that it included "a number of community leaders and stakeholders," thus making clear that this was not a small or fringe group effort. Furthermore, by framing the task ahead as a cooperative one, rather than an adversarial or confrontational one, as Hardiman did in the quote above, the release set up the city and county officials with the power to change policy as being on the side of inequality and racial bias if they refused to partner in this effort. Finally, the

press release included a quote from coalition chairperson Hardiman that specifically identified the human harms done by the policy, thereby inviting an empathetic assessment of the problem:

> This disparity has ravaged the African American community. Families are unable to make decent wages because felony convictions prevent them from attaining certain jobs. People who have a drug dependency problem are simply dumped into the local prison with little or no rehabilitation and often relapse into drug use. (ibid.)

The press release was followed up in September 2008 with a town hall meeting in Cleveland, which was attended by nearly 200 people. Both the initial press release and subsequent town hall meeting got some media play, locally and nationally. The Cleveland alternative news weekly, *The Cleveland Scene*, published an in-depth lead investigative news article, "Disparate Times," about the arrest and prosecution policies (Harkins 2008) and followed it several months later with a lengthy critique of district attorney William Mason, including his charging policies in the crack pipe cases (Gupta and Renner 2008). NewsOne, a national multimedia news outlet aimed toward an African American audience, did in-depth coverage of the issue and covered the town hall meeting (Farber 2008). The press release and report also ended up hitting several national justice and rights blogs.

While the major city newspaper, *The Plain Dealer*, did not publish a story, the coalition's activities may have prompted the paper to do its own investigation into the racial disparities in felony drug case sentence outcomes. In October 2008, a two-part investigative report was published on consecutive days that provided both a statistical summary of differences by defendant race in drug offense sentence outcomes from 2004 to 2007 and several individual stories to contrast the treatment of White and African American drug offenders (Paynter 2008a, 2008b). Most dramatically, the report contrasted the treatment of the White son of the county sheriff, arrested after buying $40 worth of crack cocaine in a police set-up (his second crack cocaine arrest in four years) with the case of a Black woman, caught with a crack pipe that had a tiny bit of residue during a traffic stop in which she was a passenger. The sheriff's son had his first case dismissed completely by the prosecutor's office and was able to settle for a misdemeanor conviction in the second one, while the woman, who had no criminal record, received a felony conviction.

This two-part report was immediately followed with two different pieces by a *Plain Dealer* columnist that reiterated the evidence of inequities and demanded reforms to achieve "colorblind justice" (Brett 2008a, 2008b) and by an editorial that implored the county criminal justice system to address the racial disparities problem (*The Plain Dealer* 2008b). While *The Plain Dealer*'s reporting and commentary primarily examined the end stage of the disparity problem—sentencing outcomes—and did not at all address the underlying selective law enforcement issue, the timing and conclusions added pressure on system actors to reform. *The Plain Dealer* in particular pointed the finger

at the district attorney's office, putting Mason on the defensive and prompting him to agree (once again) to investigate the racial disparities problem (Atassi 2008).

The eventual policy change was not initiated or prompted at all by the county prosecutor's office, even though it took much more criticism than did the city police. Rather, it came from the local municipal government. In November 2008, Cleveland's mayor, Frank Jackson, announced that his office would direct the police chief to change the arrest policy in paraphernalia cases, beginning in 2009, so that such offenders would be charged with misdemeanors (second degree on the first offense, and first degree subsequently) and would be eligible for diversion to treatment through drug court for their first two offenses (Puente 2008). The third arrest for possession of paraphernalia with traces of illicit drugs would be charged as a fifth-degree felony (Cleveland Division of Police 2009). Mayor Jackson framed the policy change as one that would more effectively combat crime, in that it would reduce corollary crime committed by addicts through getting treatment for them. By March 2009, the new policy was implemented, bringing a laudatory response from community groups and *The Plain Dealer* (Puente 2009; *The Plain Dealer* 2008a).

## THE VALUE OF LOCAL ACTION

The Cleveland case illustrates one fruitful route to policy reform that can remediate institutional racism in drug law enforcement, that is, using local action and community organizing to pressure power brokers for change. There are several elements to the Cleveland strategy that made it work. First is the coalition-building technique across diverse and differentially situated individuals and groups. While it was clearly not enough pressure when respected community members and stakeholders *individually* raised concerns (as happened with the grand jury forepersons and with Judge Griffin), by organizing these voices and adding numbers and unity to the effort, as occurred with the creation of the issue-specific coalition "Citizens for a Safe and Fair Cleveland" the message was amplified. The group was able to achieve legitimacy from its inception both by virtue of the trailblazing done by those individuals and because it was comprised of truly local participants, including criminal justice and direct services stakeholders, local experts, and community leaders. As such, it included advantaged group members who were able to "use the power of emotion to transform apathy to action" (Thomas, McGarty, and Mavor 2009, 310–11) to effect policy change.

It was also a racially diverse group, reflecting the demographics of the city, and implicitly speaking for Cleveland as a diverse but united community that was also inclusive of those directly negatively impacted by the policy. Key to this group's success was the ability to weave a message that did four things: define the problem as conclusively existing, address and counter arguments

that public safety would be compromised through policy change, keep the racial impact—with a human face—at the forefront of concerns, and project an inclusive image of community that extended to include the impacted low-level drug offenders within it.

The local community-based strategy has several advantages over the two other major routes to socio-legal change: litigation and higher-level legislative reform. In comparison to litigation, local grassroots organizing and action invites a cooperative and collaborative, rather than adversarial, mode of resolution. While a looming threat of litigation, even if just made implicitly, may have much strategic value to prompt change, litigation itself can inspire the opposing side to dig in to do battle. In the specific case of selective enforcement challenges, that battle will be an uphill one for plaintiffs, as the burden of proving unconstitutional racial bias is nearly insurmountably high (Rudovsky 2007).[15] Furthermore, even if successful in obtaining a favorable judgment, courts are notoriously ineffective in enforcing equal protection remedies and other judgments aimed at social change (Rosenberg 2008).

The key advantage of local organizing and activism over the legislative route to change (when it is an appropriate option) is that local politics are generally more pragmatic in style and process than state and federal politics. Crime, in particular, is prone to symbolic state and national politics, serving as a simplistic "valence issue" for grandstanding elected officials and candidates (Scheingold 1995a, 166). As Miller (2008) has illustrated in recent work, this accounts for why minorities and the poor—who are both disproportionately victimized by crime and targeted by punitive policies—are relatively uninfluential at those higher levels of political process. Indeed, her work suggests that local-level criminal justice policy reform efforts have the best chance of success if the goals are to achieve racially fair and just procedures and outcomes.

Political scientist Stuart Scheingold (1995b) has also suggested that there are fewer incentives, and more risks, to politicizing crime at the local level, opening up space for pragmatic and cooperative reform efforts. Specifically, he argues that local politicians who go the "tough on crime" route run a high risk of it backfiring, by potentially making promises that they cannot keep, hurting the local economy by scaring off potential businesses and shoppers, and, "most fundamentally," by inflaming race tensions as the politicization of crime is so tightly linked to covert racist appeals (ibid., 280). Instead, Scheingold suggests, local political leaders are incentivized to improve local race relations, particularly in urban settings where minorities have gained political power. Beyond this, when racially based harm is made salient at the local level—as it was in the Cleveland case—local leaders run the risk of being labeled as racist if they refuse to act to remediate in a way that is much more personalized than when there is more distance between reformers and their targets/audiences.

The importance of highlighting the racial impacts of the problematic policy—and their implications for those who make and promulgate the

policy—lies in the very act of explication. Following the theory of aversive racism (Gaertner and Dovidio 1986), social psychological research has demonstrated that making race salient in criminal case scenarios can have the effect of minimizing racially biased outcomes among Whites (Sommers and Ellsworth 2001, 2000). When local groups highlight the race of those negatively affected, they potentially trigger the same effect in those who have the power to alter policy. In the Cleveland case, the highlighting of race predictably prompted denials of racism from the White actors implicated; however, it also eventually was able to move at least city officials toward remedial action. The chorus of concerns about racial injustice in the courts by a diverse set of voices also explicitly highlighted fundamental values about equality and fairness. This provides a way for those in power to take action without admitting to participating in any prior or ongoing racism, as is reflected in Mayor Frank Jackson's announcement justifying the policy change: "It's not a race issue. . . . Everybody will be treated the same" (Puente 2008, B1).

## EMPATHY AND SOCIAL CHANGE

Finally, a local action strategy can capitalize on empathy by highlighting the "we" of community in its articulation of the harms done and the resulting need for reform (Dovidio, Gaertner, and Saguy 2009). As Hardiman did in his statement about the Cleveland selective enforcement policy, appealing to local political leaders by specifying who in the community is harmed, along with the details of that harm, works to solicit an empathic response from the targeted audience. This strategy relies upon the ability of the advocate for change to frame group identity as an inclusive and diverse one made up of the entire community (rather than "other" group identities based solely on race, status, class, and so on). Such a strategy becomes more difficult to successfully employ as the social, demographic, and geographic distance between the harmed and those who have the power to change policy increases. By rhetorically situating the affected population within the larger social in-group, an empathic understanding of the racially discriminatory harms can be achieved. Consequently, empathy can also lead to increased strength and cohesion in social change efforts through the reconfiguring of group boundaries.

So even though, as noted earlier in this article, empathy and race appear to interplay within American law in ways that pose a risk to justice, empathy also holds some promise for racial justice reform. Social psychological research on empathy and intergroup relations has generally demonstrated promising paths to triggering prosocial attitudes and behaviors toward disadvantaged out-groups by reshaping in-group/out-group boundaries, then marshalling group-based emotions to promote social change (Thomas, McGarty, and Mavor 2009). Furthermore, Ward, Farrell, and Rousseau's (2009) findings that diverse institutional work groups within the federal

courts are associated with lessened racial disparities in sentence outcomes imply one very straightforward route to remediation (although perhaps easier said than done)—diversifying those groups that hold the power to charge, prosecute, and sentence within criminal justice institutions. Such a remedy should open the door not only for more equitable empathy across populations subject to criminal sanction, but may also allow for exchanges between racially diverse actors within the institutional settings that could serve to heighten awareness about empathetic aspects of different cases. In the Cleveland case, this very solution was intuited and suggested early on as a way to combat the observed injustices by Reverend McMickle. His concerns were two-pronged yet intertwined: he viewed the overcharging of urban minorities as, in part, a product of the relative Whiteness of the system doing the charging and convicting.

In the future, empathy may also hold some potential remedial value in challenging racial bias through more robust and fruitful legal challenges (although it is not yet a realistic possibility in selective enforcement cases). Following a number of expressivist scholars, Rachel Godsil (2003) has argued for an expanded application and scope of the doctrine of expressivism, which has recently been applied in some Establishment Clause, voting rights, and affirmative action cases. Expressivism asks whether the message sent by governmental action comports with the underlying values of the constitutional issue at hand, and if it is shown to express a harmful message it is deemed unconstitutional. To date, this test has not been applied in equal protection cases, which presently require a showing of intent to discriminate in order to prevail. Thus, Godsil (2003), in concert with others, first suggests that an expressive harm standard should be expanded to equal protection claims. She goes further, though, by arguing for a place for empathetic consideration of harm. As currently applied, the expressive harm test requires judges to take an "objective observer" perspective in assessing the message conveyed. Godsil (ibid.) makes the case that this standard should be defined more precisely to ask how those directly targeted or affected by the message interpret the message. In doing so, such a test demands an empathetic consideration of those affected by government action as to how they might read such action. When applied to cases involving racially disparate impact of criminal justice institutions, challenges might some day be made by showing that the consistent and persistent oversentencing of minorities in a given jurisdiction sends a message to minority citizens that they are viewed by the government as more dangerous, less redeemable, or otherwise less valued within free society.

## HOW THIS CASE INFORMS STRATEGIES FOR POLICY REFORM

I have tried to make the case for local activism that uses soft coercion, the promise of collaboration, and an empathetic appeal as a fruitful route to

challenging institutional racism, especially in light of the hostility courts have demonstrated toward addressing racial discrimination in criminal justice. It is less costly and generally not such a long-term investment as litigation. It can also be much more responsive to specific local issues (Miller 2008), while being less threatened by political compromise than is the traditional legislative route. Yet, such a strategy can seemingly only be deployed to address a limited set of social problems in which local political and institutional actors have some power to effect change. It certainly loses some utility in fighting against national and transnational policies and practices, given the problems of access to power holders, relative (in)visibility of activists, and, often, the scope and intractability of the problem. Even in the case of drug law reform, the strategies employed in Cleveland would seem at first glance to hold little promise, in isolation, for prompting major change to state or federal sentencing statutes.

Nonetheless, we have witnessed increasing sophistication among activists who have worked to reframe global issues as locally relevant—and solvable—in a number of contexts. To the extent that even deeply rooted, multilevel, and widely strewn instances of institutional racism—as in the case of crack cocaine laws and their application at the federal level—can be deconstructed to identify specific incidents, actors, and institutions that harm specific individuals within specific local communities, a grassroots strategy like the one employed in Cleveland has the potential to remediate some of the damage of the nationwide, racialized war on drugs, either in concert with litigation and/or legislative efforts or on its own. By making the global (or even national or state-level) local, the door is also opened to using an empathy strategy through the rearticulation of in-groups that include those who might have formerly been construed as "others." Certainly, we have seen an individualizing strategy be successfully deployed over the past few decades to toughen state and national criminal law, in that the experiences of individual crime victims have been used by activist groups and legislators to bring home the message of why tougher laws are needed (Lynch 2002; Miller 2008).

Moreover, as I have argued elsewhere (Lynch forthcoming), because criminal law as practiced is for the most part local at its core—how legal actors in local jurisdictions interpret and apply state and federal statutes is very much a product of local cultures, norms, histories, and resources—efforts at reform must take into account those local practices. State-level criminal law "on the books" is given its force by local actors: municipal or regional law enforcement agencies and county-level prosecutors and judges. Even federal criminal law is very much shaped by local district court actors, so reform efforts that only aim at statutory change will not necessarily address a number of injustices in outcomes. The Cleveland case itself stands as an apt example of that gap between law on the books and law in action, and of the centrality of local practice in the production of inequality. Thus, locally based remedial efforts not only offer potential in the case of state and federal laws and policies, but

also suggest that consideration of local practices is central to successful social change strategies aimed at all structural levels.

More fundamentally, the Cleveland case reveals new insights into the mechanisms of institutional racism due to the particular road to remediation. The sustained episode of the crack pipe policy enforcement clearly illustrated the two types of institutional racism delineated by Haney López (2000)—script racism and path racism—thus adding further empirical support to his theoretical contributions. It also reveals how the absence of institutional empathy for those negatively affected may have allowed for the persistence of the policy even after the system was put on notice. Finally, the grassroots challenge mounted against the policy clearly reveals how triggering empathy in even a minimal way can prompt action. In doing so, this case explicitly reveals the interactions between and among individuals, groups, and institutional structures in both the promulgation and remediation of institutional racism.

## NOTES

1. "Institutional racism" and "structural racism" are often used interchangeably, although different definitions of each term reflect some variation in their conceptualization. For simplicity and clarity, I will use the term "institutional racism" throughout this article and trace its specific history and development in this section.
2. Most famously, in the United Kingdom, the concept of institutional racism was a key component of a public inquiry ordered by the Home Office into the police mishandling of the murder case of Stephen Lawrence, a Black teenager who appeared to have been killed because of his race. No murder charges were pursued despite identification of suspects. The report generated by the inquiry, known as the Macpherson Report (Macpherson 1999), attributed the mishandling to institutional racism. A number of scholars have gone on to analyze this usage in the Macpherson Report, including Lea (2000), Wight (2003), and Waddington, Stenson, and Don (2004).
3. Indeed, in the death penalty context, Craig Haney (2004) has persuasively argued that the "empathic divide" between predominantly White capital jurors and African American capital defendants contributes to discriminatory death sentencing. In a federal criminal court context, Ward, Farrell, and Rousseau (2009) have demonstrated that racially disparate sentencing outcomes are influenced by the racial and ethnic diversity of court work groups, in that the Black-White sentencing gap in the federal system was significantly narrowed as a function of relative racial diversity of individual U.S. attorney's offices.
4. See, for example, Beckett, Nyrop, and Pfingst (2006) and Beckett et al. (2005) for excellent illustrations of the discretionary use of police resources to overtarget open air crack dealers, in comparison to other open air drug markets, in Seattle.
5. Conversely, the rest of Cuyahoga County's population is overwhelmingly White in that 82 percent of the non-Cleveland county population identified as White in the 2000 census (U.S. Census 2000).
6. In 2005, the felony drug arrest rate for African Americans was 21.3 per 1,000 population, whereas for Whites it was 5.49 per 1,000 (Federal Bureau of Investigation 2007).

7. Actual low-level drug offending is notoriously difficult to measure because it does not involve victims who would draw attention to offenders through complaints to law enforcement; it is relatively hidden from police view and is generally not made public by offenders due to the risk of arrest, stigmatization, or other negative consequences. Just in terms of drug use—which is at the core of the arrest and charging disparities discussed here—alternative measures include self-report surveys, systematic drug testing of defined populations (typically arrestees or emergency room patients), and ethnographies. All of these have serious limitations for different reasons.
8. The generalized problem of racial discrimination and inequality in Ohio's entire criminal justice system had been made quite clear three years earlier upon the release of *The Report of the Ohio Commission on Racial Fairness* (Ohio Commission on Racial Fairness 1999), which made a series of recommendations to the state supreme court designed to more comprehensively document and combat the problems identified by the commission, including in how drug offenses are treated. The commission was chaired by Cleveland Municipal Court Judge Ronald Adrine, who also became involved in the group Citizens for a Safe and Fair Cleveland that was at the forefront of getting the felony residue policy rescinded.
9. Attention also came in legal scholarship. The May 2003 foreperson (and law professor) Phyllis Crocker (2004) published a law review article detailing this grand jury saga. The larger issue of the Cleveland crack pipe felony prosecutions also garnered an extended discussion in a *Michigan Law Review* piece on jurisdictional competition and crime (Gross 2006).
10. In fact, the only apparent public reaction to Connally's report by the police was a May 15, 2006, letter written by the Cleveland Police Patrolmen's Association president, Stephen Loomis, in which he chastised Connally for not following the law in her grand jury duties. This was in the context of her appointment by the Cleveland mayor as a special prosecutor to investigate five separate fatal police shootings of African American men. The letter was shared with union members and submitted to *The Plain Dealer*, although it does not appear it was published (http://www.cppa.org/presidentarc.htm).
11. In the majority of cases, misdemeanors are resolved in municipal court at the first court appearance, with the defendant appearing without representation and pleading guilty or no contest to the charges.
12. See Cleveland Municipal Code (2010), http://caselaw.lp.findlaw.com/clevelandcodes/cco_part6_607.html to illustrate.
13. Michael Tonry (1996) has ascribed even more culpability for racism for those lawmakers, arguing that even the most naïve congressional advocate for those laws had "forseeably and unnecessarily blighted the lives of hundreds of thousands of young, disadvantaged black Americans" (ibid., 82).
14. This was the course for challenges to selective enforcement of drug dealers in Seattle, requiring a nearly iron-clad empirical case. Thus, Beckett et al.'s (2008, 2006, 2005) research on the Seattle case is among the best work on this issue that exists in that it uses multiple methods to assess actual offense rates, arrest rates, and motivation for arrest to test if a huge range of legally legitimate reasons could explain the demonstrated racial disparity.
15. Specifically, in *United States v. Armstrong* (1996), the U.S. Supreme Court built upon the roadblocks erected in *McCleskey v. Kemp* (1987) to making an equal protection claim based on racially disparate criminal justice outcomes by denying the opportunity to even obtain data that is needed to prove selective prosecution through the discovery process, unless the plaintiff can show that such selective prosecution exists. Should a plaintiff be able to overcome this barrier through

alternative means of documenting racial disparities, he or she still must meet a standard that requires proof of intent to discriminate on the part of the government actor, in addition to a showing of racially disparate impact that cannot otherwise be explained.

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