

## ARTICLES

### 1986: AIDS, CRACK, & C. EVERETT KOOP

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#### I. INTRODUCTION

Turning points are hard to see as they occur, but clearer once time has passed and divergent paths emerge like footprints in the snow. We can now look back and compare the eventual success of federal policy in fighting AIDS with the troubling failure of that same government in addressing the challenge of crack cocaine. The distinct patterns we can now see, looking back over our shoulder, offer important lessons for narcotics policy in the future.

Nineteen eighty six was a landmark year in the history of American public health. Two new and terrifying threats challenged the American imagination. One was Acquired Immunodeficiency Syndrome (“AIDS”); the other was crack cocaine (“crack”). By 1986, a divergence had appeared between the political reactions to these twin challenges. Whereas these issues had previously been attacked as the result of immoral choices by gay men (AIDS) and African-Americans (crack), a key difference became clear in 1986. After that point, AIDS was addressed through a systems analysis as a medical problem, while crack was still dealt with case-by-case as a problem rooted in individual moral culpability. With AIDS, the root of the problem was confronted through medical research;<sup>1</sup> with crack it was individuals who were targeted through prosecution and incarceration.<sup>2</sup> The success of the former and the failure of the latter offer a firm lesson about our future approach to narcotics.

This article will examine each of these crises, contrast them, and then pose a crucial question: What if we had treated crack with the problem-solving approach we applied to AIDS?

Section Two will examine the AIDS crisis, and its path from

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1. See Lawrence K. Altman, *30 Years In, We Are Still Learning From AIDS*, N.Y. TIMES, May 31, 2011, at D1, available at [www.nytimes.com/2011/05/31/health/31aids.html](http://www.nytimes.com/2011/05/31/health/31aids.html) [hereinafter *30 Years*].

2. See, e.g., U.S. SENTENCING COMM., COCAINE AND FEDERAL SENTENCING POLICY 1-9 (2007) [hereinafter COCAINE AND FEDERAL SENTENCING POLICY].

moral scourge to medical problem. Like crack, it was principally identified with a traditionally oppressed group, yet a medical approach was pursued that separated the hostility to that group from the problem-solving mechanisms that were employed. Two people played especially important roles in this transition. By 1986, AIDS research had received a human face in the person of an Indiana schoolboy named Ryan White, and a strong medical advocate in the person of Surgeon General C. Everett Koop.<sup>3</sup> Both propelled the fight against AIDS towards science and away from moralistic approaches.<sup>4</sup> In time, that scientific approach moved towards solving the problem, saving millions of lives around the world.

Section Three, in turn, will study the trajectory of crack cocaine in the United States and the national response to its emergence. Unlike the fight against AIDS, the approach to crack after 1986 was based on retribution and individual moral culpability rather than system analysis and problem-solving.<sup>5</sup> While the fight against AIDS involved analysis and then action, the government's war on crack skipped over the analysis and went straight to misguided action. Part of this unfortunate reaction had to do with the unfortunate (and inaccurate) symbolism provided by the death of Len Bias, and the tough-talking antics of the first Drug Czar, William Bennett.<sup>6</sup>

Section Four, finally, will first contrast the roles played by White, Bias, Koop, and Bennett, and describe what might have happened if the same problem-solving approach had been pursued in fighting crack as had been applied to AIDS. After 1986, AIDS was analyzed and attacked as a disease rather than a moral scourge. First, scientists figured out how it spread and acted, and then they worked to disrupt those actions systemically. Had we done the same thing with crack, business experts would have looked at the narcotics trade as a business, and attacked it with a market solution, such as an attack on cash flow rather than labor. This path may still be pursued.

Massive government resources were dedicated to both AIDS and crack. One expenditure (AIDS) was justified by the results, and the other (crack) was not. The difference can be measured in money, human lives, and principle. The roads diverged in policy and outcome, and there is a deep and true lesson in the gap between them.

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3. See *infra* Section II.

4. See *infra* Section II.

5. See COCAINE AND FEDERAL SENTENCING POLICY, *supra* note 2, at 1-9.

6. See *infra* Section III.

## II. HIV/AIDS

At first, it did not have a name.<sup>7</sup> The disease that would later be called AIDS tentatively crept onto the national radar in the months following Ronald Reagan's inauguration in 1981. In May of that year, an "influential gay newspaper," the *New York Native*, reported on "rumors that an exotic new disease had hit the gay community in New York."<sup>8</sup> Though the story incorrectly claimed that the rumors were "unfounded," it did accurately describe some of the symptoms.<sup>9</sup> The following month, the *Los Angeles Times* featured a more thorough story,<sup>10</sup> based in part on a report to the Center for Disease Control by two Los Angeles doctors.<sup>11</sup>

In July of 1981, the *New York Times* had a new and alarming report: forty-one gay men had been diagnosed with a rare form of cancer called Kaposi's Sarcoma, most of them residents of New York and San Francisco.<sup>12</sup> Testing from nine of these men had revealed "severe defects in their immunological systems."<sup>13</sup> Two things seemed apparent at this early stage: that the new disease affected gay men, and that it somehow compromised the immune system.

A year later, in September of 1982, the term "Acquired Immunodeficiency Syndrome" was first used to describe the condition by the Center for Disease Control, in a report that revealed 593 identified cases, 243 of which had already claimed the life of the victim.<sup>14</sup> The report broke down these victims by group:

homosexual or bisexual males—75%, intravenous drug abusers with no history of male homosexual activity—13%, Haitians with neither a history of homosexuality nor a history of intravenous drug abuse—6%, persons with hemophilia A who were not Haitians, homosexuals, or intravenous drug abusers—0.3%, and

7. See *30 Years*, *supra* note 1.

8. Jack Begg, *Word for Word/Nameless Dread: 20 Years Ago, the First Clues to the Birth of a Plague*, N.Y. TIMES, June 3, 2001, at WK7, available at <http://www.nytimes.com/2001/06/03/weekinreview/word-for-word-nameless-dread-20-years-ago-first-clues-birth-plague.html>.

9. See *id.*

10. See Harry Nelson, *Outbreak of Pneumonia Among Gay Men Studied*, L.A. TIMES, June 5, 1981, at B3.

11. M.S. Gottlieb et al., *Pneumocystis Pneumonia – Los Angeles*, 30 MORBIDITY & MORTALITY WKLY. REP. 21 (1981), available at [http://www.cdc.gov/mmwr/preview/mmwrhtml/june\\_5.htm](http://www.cdc.gov/mmwr/preview/mmwrhtml/june_5.htm).

12. Lawrence K. Altman, *Rare Cancer Seen in 41 Homosexuals*, N.Y. TIMES, July 3, 1981, at A20, available at <http://www.nytimes.com/1981/07/03/us/rare-cancer-seen-in-41-homosexuals.html> [hereinafter *Rare Cancer*].

13. *Id.*

14. *Current Trends Update on Acquired Immune Deficiency Syndrome (AIDS)—United States*, 31 MORBIDITY & MORTALITY WKLY. REP. 37 (1982), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/00001163.htm> [hereinafter *Current Trends*].

persons in none of the other groups—5%.<sup>15</sup>

Somehow, this disease seemed to affect primarily those already disfavored by society, including, gay men, heroin addicts, and expatriates from the poorest country in the Western Hemisphere.<sup>16</sup>

It did not take long to decimate those communities, most prominently the gay communities in San Francisco and New York.<sup>17</sup> As Randy Shilts noted in his landmark study *And The Band Played On*, some experts marked the end of 1982 as an important demarcation, because those men who avoided unprotected sex with men after that year were much less likely to contract HIV than those who continued to have unprotected sex after that date.<sup>18</sup> Not that it was a bright line, but at that point, at least 20 percent of the gay men in San Francisco were probably affected with HIV.<sup>19</sup>

The politics of AIDS became more complicated as the epidemic became better known over the next few years. Homophobia was constantly in the background of the national discussion of the issue. At the 1984 Republican Convention that led to Ronald Reagan's re-nomination, the topic of AIDS got tangled up with the feelings of some participants about gay men.\* At one event held at the home of a Republican businessman, a minister offered an invocation that described AIDS as a "punishment to the immoral."<sup>20</sup> The next morning, the president of American Airlines began a breakfast speech with a joke: that "gay" stood for "Got AIDS Yet?"<sup>21</sup>

Some aspects of the epidemic baffled the relatively few doctors who were working on the new disease. Some "published papers were flawed" because they failed to consider the possibility that a previously undiscovered microbe was responsible.<sup>22</sup> Meanwhile, despite the passionate pleas of advocacy groups, funding for research was slow to appear. Center for Disease Control ("CDC") researcher Don Francis repeatedly submitted requests for less than \$400,000 to set up an AIDS laboratory at the CDC in 1983, but received no response.<sup>23</sup> As of his second election win in 1984, "President [Ronald]

15. *Id.*

16. See JAMES CHIN, THE AIDS PANDEMIC: THE COLLISION OF EPIDEMIOLOGY WITH POLITICAL CORRECTNESS 31-38 (2007); see also Country profile: *Haiti*, BBC NEWS (Oct. 17, 2012, 9:22 GMT), [http://news.bbc.co.uk/2/hi/americas/country\\_profiles/1202772.stm?lid=bbc&lpos=rgt\\_txt\\_country-profile](http://news.bbc.co.uk/2/hi/americas/country_profiles/1202772.stm?lid=bbc&lpos=rgt_txt_country-profile).

17. *Current Trends*, *supra* note 14.

18. RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC 209 (1987).

19. *Id.*

20. *Id.* at 474.

21. *Id.*

22. *30 Years*, *supra* note 1.

23. SHILTS, *supra* note 18, at 231-33.

Reagan had never publicly spoken the word ‘AIDS,’”<sup>24</sup> and in 1985, the Reagan administration proposed *reducing* AIDS spending across the board, including a 20% cut for research by the CDC.<sup>25</sup> Not surprisingly, given the lack of American interest, the HIV virus was isolated and identified by French scientists working far from the principle American outbreaks in New York and San Francisco.<sup>26</sup>

All of that changed in 1986. Along with the continuing activism of groups such as the Gay Men’s Health Crisis, two developments in that year shifted the story of the epidemic. One involved a controversial and conservative Surgeon General, Dr. C. Everett Koop. The second swirled around Ryan White, the Indiana schoolboy.

C. Everett Koop was an odd character to appear in the AIDS drama, sporting an Old Testament beard and a bow tie. Koop was a pioneer in pediatric surgery when he was nominated for surgeon general, but gained his popularity with conservatives through a series of seminars, films, and books that set out his opposition to legal abortion.<sup>27</sup> Liberals in the Senate fiercely contested his nomination,<sup>28</sup> and a *New York Times* editorial opposing his candidacy was titled simply “Dr. Unqualified.”<sup>29</sup>

His conservative backers were in for a surprise.<sup>30</sup> In 1986, President Reagan asked Koop to conduct an investigation and provide a report on the AIDS epidemic,<sup>31</sup> and he spent much of that year on the project.<sup>32</sup> When the report was ready, he ordered “tens of thousands of copies printed—without letting” administration officials see the contents of the report.<sup>33</sup>

Koop’s blunt, straightforward missive called for more research

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24. *Id.* at 495.

25. These proposals for the 1986 fiscal year would have cut the CDC AIDS research budget to just \$18.7 million. *Id.* at 525.

26. Stephen Pincock, *Françoise Barré-Sinoussi: shares Nobel Prize for discovery of HIV*, 372 THE LANCET 1377, 1377 (Oct. 18, 2008), available at <http://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2808%2961575-5/fulltext>.

27. Holcomb B. Noble, *C. Everett Koop, Forceful U.S. Surgeon General, Dies at 96*, N.Y. TIMES, Feb. 25, 2013, at A26, available at <http://www.nytimes.com/2013/02/26/us/c-everett-koop-forceful-surgeon-general-dies-at-96.html>.

28. *Id.*

29. Editorial, *Dr. Unqualified*, N.Y. TIMES, Apr. 9, 1981, available at <http://www.nytimes.com/1981/04/09/opinion/dr-unqualified.html>.

30. Actually, Dr. Koop had several surprises in store for the conservatives. Along with AIDS, he focused on reducing smoking, despite strong opposition from conservative politicians in tobacco states. Noble, *supra* note 27.

31. Noble, *supra* note 27. Koop had pleaded “at least a dozen times” for a meeting with President Reagan on AIDS through the mid-1980’s. *Id.* He later said that too many people had “placed conservative ideology far above saving human lives.” *Id.*

32. SHILTS, *supra* note 18, at 587.

33. *Id.* at 587.

while flatly rejecting the options favored by some: quarantine and mandatory testing.<sup>34</sup> Perhaps most compelling, though, was Koop's strong words for those who would prefer to deal with AIDS as a moral crusade rather than as a medical problem:

From the start, this disease has evoked highly emotional and often irrational responses. Much of the reaction could be attributed to fear of the many unknowns surrounding a new and very deadly disease. This fear was compounded by personal feelings regarding the groups of people primarily affected—homosexual men and intravenous drug abusers. Rumors and misinformation spread rampantly and became as difficult to combat as the disease itself. It is time to put self-defeating attitudes aside and recognize that we are fighting a disease—not people.<sup>35</sup>

White House officials urged him to delete references to condoms and make the report more moralistic, but he refused, even though he knew that conservatives in Congress and church groups would object.<sup>36</sup> Eventually, twenty million copies of the report were printed as it became a template for action for government and private entities.<sup>37</sup>

Ryan White, meanwhile, emerged into public view as a young white hemophiliac who contracted AIDS via a blood transfusion.<sup>38</sup> He first came to public attention in 1985, having been banned from his school in Kokomo, Indiana, because other students and parents feared the effects of his illness.<sup>39</sup> His family was castigated and the tires of their car were slashed, among other indignities.<sup>40</sup> His struggle to simply attend school captivated the nation until he moved with his family to another town in 1987.<sup>41</sup>

The *New York Times* obituary for White noted that, "Ryan White served as a deterrent to bigotry throughout the nation."<sup>42</sup> The bare fact that such a symbol—a straight, white, young symbol—was necessary to deter bigotry against those with AIDS, brings to the surface the politics of sexual orientation that existed at the time.

Not coincidentally, the largest federal financial commitment to

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34. C. Everett Koop, *Surgeon General's Report on Acquired Immune Deficiency Syndrome*, 102 PUB. HEALTH REP. 1, 2 (1987), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1477712/>.

35. *Id.* at 1.

36. Noble, *supra* note 27, at 1.

37. *Id.*

38. Dirk Johnson, *Ryan White Dies of AIDS at 18; His Struggle Helped Pierce Myths*, N.Y. TIMES, Apr. 9, 1990, at D10, available at [www.nytimes.com/1990/04/09/obituaries/ryan-white-dies-of-aids-at-18-his-struggle-helped-pierce-myths.html](http://www.nytimes.com/1990/04/09/obituaries/ryan-white-dies-of-aids-at-18-his-struggle-helped-pierce-myths.html).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

fighting AIDS was embodied in the “Ryan White Comprehensive AIDS Resources Emergency Act of 1990,”<sup>43</sup> passed just days after his death. One of the projects under this Act has been the provision of drugs to those who have contracted HIV.<sup>44</sup>

We know, of course, what happened once federal resources were applied to the science of AIDS: antiretroviral drugs were developed that allowed AIDS patients to live.<sup>45</sup> Essentially, AIDS has become a chronic, treatable disease rather than a death sentence.<sup>46</sup> In fact, it is now preventable even for those in high-risk groups. In May 2014, federal health officials recommended that hundreds of thousands of people start taking a safe, effective preventative medication called Truvada.<sup>47</sup> As one expert has noted, the ten years between the first reports of the disease and the development of effective treatments “is a relatively short time in the history of medicine to develop treatments and preventions; after all, many incurable cancers and other diseases have been known for centuries.”<sup>48</sup>

A conservative doctor favored by Ronald Reagan and a middle-school kid played a major role in steering the federal government’s approach to AIDS away from moralism and towards science and problem solving. In the following decades, experts conducted research, analyzed the systemic cause of the problem, objectively came up with a solution, and applied that solution. As a result, millions of lives have been saved. As we well know, the same trajectory has not applied to crack. For that crisis, there was no C. Everett Koop and no Ryan White, and that may have made all the difference.

### III. CRACK

At first, it did not have a name. Crack was a variety of cocaine that originated in the shadows. Cocaine in its powder and liquid form was used legally in the United States for decades, and was an original ingredient in Coca-Cola.<sup>49</sup> By the 1930s, new laws had driven

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43. Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101-381, 104 Stat. 576 (1990).

44. §§ 2614, 2616, 104 Stat. 576.

45. See *30 Years*, *supra* note 1.

46. See *30 Years*, *supra* note 1.

47. Donald G. McNeil Jr., *Advocating Pill, U.S. Signals Shift to Prevent AIDS*, N.Y. TIMES, May 15, 2014, at A1, available at <http://www.nytimes.com/2014/05/15/health/advocating-pill-us-signals-shift-to-prevent-aids.html>.

48. *30 Years*, *supra* note 1.

49. John P. Morgan & Lynn Zimmer, *The Social Pharmacology of Smokeable Cocaine: Not All It’s Cracked Up to Be*, in *CRACK IN AMERICA: DEMONS DRUGS AND SOCIAL JUSTICE* 131, 131-32 (Craig Reinerman & Harry G. Levine eds., 1997).

cocaine underground,<sup>50</sup> but it did not go away. Until about 1980, it burbled beneath the surface of American society, largely for the consumption of the wealthy.<sup>51</sup> Then, something happened.

That something was a chemical innovation that changed American law, culture, and sense of safety. Narcotics users in Southern California began using cocaine in a new way, by inhaling it as vapor rather than snorting it as a powder.<sup>52</sup> Vaporized cocaine affects the body differently than powder cocaine: it allows for a quicker high, a shorter high, and one that is more intense.<sup>53</sup>

It is impossible to simply put some powder cocaine in a pipe and smoke it; however, when heated, powder cocaine simply melts.<sup>54</sup> The powder cocaine has to be altered in some way to lower the vaporization point beneath that of an open flame.<sup>55</sup> In Southern California around 1980, several methods to accomplish this developed simultaneously.<sup>56</sup> For example, variations of the “California Method” required that powder cocaine be combined with ether, and then heated in a spoon.<sup>57</sup> Crack was one of the competing methods, which produced smokeable cocaine by combining powder cocaine with baking soda and water before being “cooked” in a pan to form crystals or “rocks.”<sup>58</sup>

All of these vaporized-cocaine variants, including crack, were known as “freebase” cocaine, despite their differences.<sup>59</sup> Freebase came to national attention due to an unfortunate incident involving comedian Richard Pryor. On June 9, 1980, Pryor was admitted to a hospital, suffering from severe burns.\* As quickly became known, he had apparently mishandled the volatile ether/cocaine combination while using the California Method.<sup>60</sup> In an article on the Pryor

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50. *See id.* at 132-33.

51. Consistent with this image is cocaine’s appearance in Cole Porter’s song “I Get A Kick Out of You,” written for the 1934 musical “Anything Goes” and later popularized by Billie Holiday and Frank Sinatra, which includes the lines: “Some get a kick from cocaine/I’m sure that if I took even one sniff/That would bore me terrifically, too/Yet, I get a kick out of you!” FRANK SINATRA, *THE BEST OF THE CAPITOL YEARS* (Capitol Records 1992).

52. EDITH FAIRMAN COOPER, *THE EMERGENCE OF CRACK COCAINE ABUSE* 5-6 (2002).

53. *COCAINE AND FEDERAL SENTENCING POLICY*, *supra* note 2, at 65-66.

54. *See COOPER*, *supra* note 52, at 5.

55. *COOPER*, *supra* note 52, at 5.

56. *See COOPER*, *supra* note 52, at 5-6.

57. *COOPER*, *supra* note 52, at 5-6.

58. *See COCAINE AND FEDERAL SENTENCING POLICY*, *supra* note 2, at 62-63.

59. *COOPER*, *supra* note 52, at 5. Crack was sometimes distinguished as “garbage freebase” because it was adulterated rather than purified by the process. *COOPER*, *supra* note 52, at 6-7.

60. *See Richard Pryor’s Tragic Accident Spotlights a Dangerous Drug Craze: Freebasing*, *PEOPLE*, June 30, 1980, at 69, available at



incident, *People* magazine described the emerging popularity of vaporized cocaine among other celebrities, replete with remarkable details: “Sly Stone went public with his habit, proclaiming that freebasing was superior to the old method of snorting cocaine. One Grammy-winning singer reportedly has a butane lighter built into a coffee table to make the procedure more convenient.”<sup>61</sup> Vaporized cocaine was beginning to come to the surface.

The beginning of the freebase epidemic was eerily noted in the same place, at the same time, and with the same hook of unexplained deaths as the first inkling of what would later be called AIDS. While in July of 1981 the *New York Times* first reported on a “Rare Cancer Seen in 41 Homosexuals,”<sup>62</sup> just the previous week that same paper published its first report on vaporized cocaine, noting that:

[b]ehind the surge in health problems appears to be a growing tendency for users of the very expensive drug to take large doses in search of what the author William Burroughs called “a rush of pure pleasure to the head.” These doses are taken either by injecting the substance, like heroin, or by smoking a highly concentrated and chemically altered form called “freebase,” made by treating the white powder with ether.<sup>63</sup>

Of the competing methods to vaporize cocaine, history shows that it was crack that won out. It was safer (at least in terms of explosions), cheaper, and could be made by dealers rather than consumers, allowing for an additional layer of value and profit to be added.<sup>64</sup> Like AIDS, it went unnamed in the press—finally being referred to by its street name of “crack” in a *New York Times* article on drug treatment in 1985.<sup>65</sup>

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<http://www.people.com/people/archive/article/0,,20076864,00.html> [hereinafter *Richard Pryor's Tragic Accident*]; *Comedian Richard Pryor dies at 65*, CNN (Dec. 10, 2005), [http://articles.cnn.com/2005-12-10/us/ryor.obit\\_1\\_richard-ryor-comedian-movies-multiple-sclerosis-stand-up-comedy?\\_s=PM:US](http://articles.cnn.com/2005-12-10/us/ryor.obit_1_richard-ryor-comedian-movies-multiple-sclerosis-stand-up-comedy?_s=PM:US).

61. *Richard Pryor's Tragic Accident*, *supra* note 60. This surprisingly thorough account also describes the chemistry behind freebase:

The name derives from a process of using ether to “free” the alkaloid cocaine (or “base”) from the additives and impurities that characterize drugs bought on the street. The powdery cocaine is dissolved in ether to separate extraneous matter. Then users apply a heat source—a butane or propane torch—to the pure cocaine and inhale the vapors.

*Richard Pryor's Tragic Accident*, *supra* note 60.

62. *Rare Cancer*, *supra* note 12.

63. Wayne King, *Heavy Use of Cocaine is Linked to Surge in Deaths and Illnesses*, N.Y. TIMES, June 26, 1981, at A1, available at <http://www.nytimes.com/1981/06/26/us/heavy-use-of-cocaine-is-linked-to-surge-in-deaths-and-illnesses.html>. In a fascinating coincidence, the *Times'* report focuses on events in San Francisco. *See id.*

64. Morgan & Zimmer, *supra* note 49, at 134.

65. BRUCE A. JACOBS, DEALING CRACK: THE SOCIAL WORLD OF STREETCORNER SELLING 3 (1999); *see* Peter Passell, *Economic Scene; Heading Off Heroin's Return*,

Between 1980 and that mention in 1985, crack spread out across the country. Like AIDS, it concentrated in major cities at first—New York, Los Angeles, and Miami most prominently.<sup>66</sup> Several theories attempted to account for the development and growth of crack, including the actions of Jamaican gangs and CIA manipulation.<sup>67</sup> Just as with AIDS, theories about where the new plague came from sometimes veered off in wild directions.<sup>68</sup> While the claim of a Jamaican connection has some validity in that Jamaican nationals played some role in some of the crack trade in some cities,<sup>69</sup> it hardly explains the much broader movement of the drug across the country. The idea that the CIA was responsible for the appearance of crack in the United States<sup>70</sup> was advanced in a later-discredited series of articles in the *San Jose Mercury-News* called “Dark Alliance,”<sup>71</sup> which put into print long-simmering rumors.<sup>72</sup>

Convincingly, the *Los Angeles Times* researched and rejected the CIA and gang theories, concluding instead that, “the rise of crack was driven by a broad array of factors—a worldwide glut of powder cocaine, shifting tastes among addicts, and the entrepreneurial moxie of the inner-city hustlers who marketed it.”<sup>73</sup> Its research revealed

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N.Y. TIMES, May 20, 1992, available at <http://www.nytimes.com/1992/05/20/business/economic-scene-heading-off-heroin-s-return.html> (“At \$40 a hit, [as one analyst puts it], only high rollers could afford to freebase—smoke—cocaine. But at \$5 for a rock of powerfully addicting crack cocaine, the stuff went out the door like Armani jackets at a pre-Christmas sale.”).

66. Ben Wallace-Wells, *The Drug War in Six Acts*, MOTHER JONES (June 17, 2009), <http://www.motherjones.com/politics/2009/07/drug-war-six-acts>.

67. See Michael Agar, *The Story of Crack: Towards a Theory of Illicit Drug Trends*, 11 ADDICTION RES. & THEORY 3, 11-12, 14-17 (2003).

68. See *The CIA and Aids, Conspiracy Theories*, Time (Nov. 20, 2008), [http://content.time.com/time/specials/packages/printout/0,29239,1860871\\_1860876\\_1861031,00.html](http://content.time.com/time/specials/packages/printout/0,29239,1860871_1860876_1861031,00.html) [hereinafter *Conspiracy Theories*].

69. See Wallace-Wells, *supra* note 67.

70. The CIA/crack imbroglio also ran parallel to a similar set of claims about AIDS. Intriguingly, stories furthered by people including South African President Thabo Mbeki had claimed that the CIA had created the AIDS virus. *Conspiracy Theories*, *supra* note []. Thus, the two crises even shared an unfounded but popular genesis story when their true origins were shrouded in mystery—that they had been created by the CIA. The CIA/AIDS link was even included in Time Magazine’s top ten list of conspiracies. *Conspiracy Theories*, *supra* note 68.

71. The CIA-driven theory was refuted in a comprehensive special report by the Inspector General of the Department of Justice. See OFFICE OF THE INSPECTOR GEN., U.S. DEPT OF JUSTICE, THE CIA-CONTRA-CRACK COCAINE CONTROVERSY: A REVIEW OF THE JUSTICE DEPARTMENT’S INVESTIGATIONS AND PROSECUTIONS (1997), available at <http://www.justice.gov/oig/special/9712/ch01p1.htm>.

72. See Scott Herhold, *Thinking back on journalist Gary Webb and the CIA*, SAN JOSE MERCURY NEWS, (Feb. 10, 2013, 9:02 AM), [http://www.mercurynews.com/ci\\_22560549/herhold-jeremy-renner-gary-webb-movie-cia](http://www.mercurynews.com/ci_22560549/herhold-jeremy-renner-gary-webb-movie-cia).

73. Jesse Katz, Claire Spiegel & Ralph Frammolino, *Paper: No Crack Conspiracy—Probe Finds Market Forces, Many Dealers—Not U.S. Plot*, LOS ANGELES TIMES, Oct. 20,

that the CIA link was tenuous, and that gangs were too unorganized to pull off such a feat of business acumen.<sup>74</sup> Instead, the researchers concluded that the popularity of crack “in the 1980s was a uniquely egalitarian phenomenon that lent itself more to makeshift mom-and-pop operations than to the sinister hand of a government-sanctioned plot.”<sup>75</sup>

The *Los Angeles Times*’ analysis rings true. What drove crack across the country and into cities large and small was not primarily gangs or the government; it was capitalism and the power of markets. Crack was something drug users wanted. This new market drew in tens of thousands of sellers performing simple tasks (i.e. buying some powder cocaine, cooking it up with some baking soda, and packaging it) that satisfied the demand. The driving force was not organized crime, but a disorganized multitude responding to the laws of economics. The fundamental dynamic at work is remarkably simple. It is easy to make and sell crack; to an economist, that means that there are “low barriers to entry” into that market. New sellers enter when the price is high, their entry drives prices down (as supply increases), and they then move outward to other markets where the price is still high. For example, a seller might buy powder and start cooking and selling crack in Philadelphia for \$20 a rock. Because he and others have entered the market, though, the price goes down to \$10. In Allentown, crack is selling for \$20 still, so the seller moves there, or sets up a cousin to do the same. Thus, the epidemic pushes outward, driven by the force of markets rather than the spread of a retrovirus.<sup>76</sup>

Lacking mass deaths, crack did not inspire the creation of activist groups like the Gay Men’s Health Crisis (which agitated for solutions to the challenge of AIDS from the early years of the epidemic), and the use of crack was not clearly documented in the way that the CDC’s weekly report on morbidity and mortality was able to do for AIDS deaths.<sup>77</sup> Dispersed law enforcement efforts were mounted, but a national focus did not emerge until the year C. Everett Koop spent studying AIDS—1986.<sup>78</sup>

In the early morning hours of June 19, 1986, during the period Koop was conducting his research, Len Bias died in his dorm room at the University of Maryland.<sup>79</sup> The cause of death was cocaine

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1996, *available* *at*  
<http://community.seattletimes.nwsources.com/archive/?date=19961020&slug=2355274>.

74. *See id.*

75. *Id.*

76. I have previously described this dynamic at greater length. *See* Mark Osler, *Learning From Crack*, 10 OHIO ST. J. CRIM. L. 671, 678-79 (2013).

77. *See supra* Section II.

78. *See supra* Section II.

79. Keith Harriston & Sally Jenkins, *Maryland Basketball Star Len Bias Is Dead*

intoxication.<sup>80</sup> Bias was not a normal student; he was a prodigious basketball talent, described by coaching legend Mike Krzyzewski of Duke University as one of “the two most difficult opposing players to prepare for in my time in the ACC.”<sup>81</sup> The other was Michael Jordan.<sup>82</sup> He had just been drafted by the Boston Celtics, with the number two overall pick in the draft.<sup>83</sup> He would have joined a powerhouse: the defending NBA champions, whose 1985-86 roster included NBA legends Larry Bird, Bill Walton, Kevin McHale, Robert Parish, and Danny Ainge.<sup>84</sup>

Combined with the cocaine-induced death of professional football player Don Rodgers of the Cleveland Browns, Bias’s story ratcheted the discussion about crack cocaine from near-obscurity (compared to AIDS, at least) to “a fever pitch.”<sup>85</sup> Bias’s death may have been more politically significant, though, for purely geographic reasons. He had played college ball at Maryland as a Terrapin, which is thoroughly covered as a “home team” by the *Washington Post* and read daily by the mostly-male members of Congress.<sup>86</sup> Moreover, his future team—the Celtics—were beloved on the home turf of two of the most powerful men in Congress: Senator Ted Kennedy and Speaker of the House Thomas P. (“Tip”) O’Neill.<sup>87</sup>

Both Kennedy and O’Neill were supporters of Congress’s harsh reaction to the crack epidemic in the wake of Bias’s death; a reaction that took the form of a new and strikingly harsh sentencing law, the Anti-Drug Abuse Act of 1986.<sup>88</sup> The retributive attitude of a bipartisan coalition of drug warriors was embodied in a key and disastrous provision of the new law: a set of mandatory minimum sentences that were keyed to a formula under which 500 grams of

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at 22: *Traces of Cocaine Found in System*, WASH. POST, June 20, 1986, at A1, available at <http://www.washingtonpost.com/wp-srv/sports/longterm/memories/bias/launch/bias1.htm>

80. DAVE UNGRADY, *BORN READY: THE MIXED LEGACY OF LEN BIAS* 14 (2011).

81. *Id.* at 15.

82. *Id.*

83. *Id.* at 14.

84. *See 1985-86 Boston Celtics Roster and Stats*, BASKETBALL- REFERENCE, <http://www.basketball-reference.com/teams/BOS/1986.html> (last visited Sept. 21, 2014).

85. Paul J. Larkin, *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 HARV. J.L. & PUB. POLY 241, 246 (2014).

86. The Post even runs a regular “Terrapins Insider” feature. *See* Roman Stubbs, *Terrapins Insider*, WASH. POST, <http://www.washingtonpost.com/blogs/terrapins-insider/> (last visited Oct. 12, 2014).

87. UNGRADY, *supra* note 80, at 162-63.

88. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 21 U.S.C. § 841(b)); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 224, 258 (1993); UNGRADY, *supra* note 80, at 162-63.

powder cocaine would be sentenced the same as just five grams of crack.<sup>89</sup> This “100-to-1” ratio was later incorporated into the federal sentencing guidelines when it went into operation the following year.<sup>90</sup>

The creation of the 100-to-1 ratio, without deliberation, was the precise point where the roads between crack and AIDS sharply diverged.

There was some irony in this, because once the facts came out, it became clear that Bias died after ingesting powder cocaine, not crack.<sup>91</sup> Even if there was no real nexus between Bias and crack, the connection between Bias’s death and the harsh new crack laws was clear. A former staffer to the House Judiciary Committee later testified that these laws were passed in a “frenzied” environment after O’Neill returned from a July trip to Boston, where he was “bombarded with constituent outrage” over Bias’s death.<sup>92</sup> O’Neill arrived in Washington intent on a fast-track process for a new tough law—a process that set aside the normal “deliberative practices of Congress.”<sup>93</sup> O’Neill, despite being a prototypical liberal, was also a die-hard Celtics fan and the father of a child who died young in the midst of a drug addiction.<sup>94</sup> Commentator Anthony Lewis later called the politicians’ fervor over the drug bill a “Gadarene rush.”<sup>95</sup> Though the 100-to-1 ratio offers the air of scientific precision, like something developed by scientists in lab coats, it was largely a product of emotional reaction. One hundred is simply a big number. In that moment, it was good enough, politically.

The new bill caught President Reagan by surprise, as he did not expect Democrats to push forward such tough measures.<sup>96</sup> Nevertheless, Reagan signed it eagerly, telling the public as he did so

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89. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 21 U.S.C. § 841(b)).

90. U.S. SENTENCING GUIDELINES COMM’N, GUIDELINES MANUAL, § 2D1.1(c) (1987).

91. See MARC MAUER, RACE TO INCARCERATE 62 (2d ed. 2006); Susan Schmidt & Tom Kenworthy, Bias Died Of Cocaine Intoxication: Examiner Says Pure Dose Stopped Heart in Minutes, June 25, 1986, at A1; *Tribble is Cleared in Len Bias Case*, N.Y. TIMES, June 4, 1987, at B11, available at <http://www.nytimes.com/1987/06/04/sports/tribble-is-cleared-in-len-bias-case.html>.

92. *Hearings Before the United States Sentencing Comm’n on Proposed Guideline Amendments* (Mar. 22, 1993) (testimony of Eric E. Sterling, President of the Criminal Justice Policy Foundation), quoted in William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1250 (1996).

93. *Id.*

94. UNGRADY, *supra* note 80, at 162.

95. Anthony Lewis, *Abroad at Home; The Political Narcotic*, N.Y. TIMES, Sept. 29, 1986, at A15, available at <http://www.nytimes.com/1986/09/29/opinion/abroad-at-home-the-political-narcotic.html>.

96. UNGRADY, *supra* note 80, at 163.

that “[t]he American people want their government to get tough and go on the offensive . . . . And that’s exactly what we intend, with more ferocity that [sic] ever before.”<sup>97</sup>

The poorly considered and retributive new law was fatally flawed. It ignored the single most basic facts about the crack trade—that until it is nearly ready for sale, the key ingredient of crack is the very same powder cocaine that was so greatly devalued under the new law relative to crack.<sup>98</sup> What ends up on the street as crack is imported as powder cocaine, wholesaled nationally as powder cocaine, distributed as powder cocaine within a city, and only converted into crack by the “mom-and-pop” retailer described above, cooking it up on a kitchen stove.<sup>99</sup> That meant that the incentives created would send agents ferociously after the least culpable people in the system. Those with more culpability did not deal in crack cocaine at all.

That ferocity was stoked by the people chosen to lead the battle. The federal approach to crack had no figure equivalent to C. Everett Koop. While Koop calmly researched for months and then advised a scientific rather than an emotional response to the problem at hand,<sup>100</sup> crack policy was guided by political opportunists and hotheads. First came the politicians like Tip O’Neill and Senator Paula Hawkins of Florida,<sup>101</sup> and then a succession of “Drug Czars.”<sup>102</sup> This was a new position—officially the “Director of National Drug Control Policy”—created by Congress through the Anti-Drug Abuse Act of 1988,<sup>103</sup> (Apparently the name “Anti-Drug Abuse Act” had worked so well two years before that the Congressional sponsors recycled it).

The Drug Czars through the 1980s and beyond were nothing like the deliberative Dr. Koop. The first Drug Czar, appointed by

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97. Gerald M. Boyd, *Reagan Signs Anti-Drug Measure; Hopes for ‘Drug-Free Generation,’* N.Y. TIMES, Oct. 27, 1986, available at <http://www.nytimes.com/1986/10/28/us/reagan-signs-anti-drug-measure-hopes-for-drug-free-generation.html>.

98. See Morgan & Zimmer, *supra* note 49, at 134.

99. See COOPER, *supra* note 52, at 24-25.

100. See Koop, *supra* note 34, at 1-3.

101. While signing the Anti-Drug Abuse Act of 1986, President Reagan singled out Hawkins as a “driving force” in the effort “to rid our society of drug abuse.” Boyd, *supra* note 97.

102. The term “Drug Czar” seems to have been popularized by then-Senator Joe Biden in 1982, as he advocated for such a position to be created at the cabinet level. See Leslie Maitland, *U.S. Plans a New Drive on Narcotics*, N.Y. TIMES, Oct. 9, 1982, available at <http://www.nytimes.com/1982/10/09/us/us-plans-a-new-drive-on-narcotics.html?module=Search&mabReward=relbias%3Ar>.

103. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 1002(b)(1), 102 Stat. 4181 (1988).

President George H.W. Bush, was firebrand William Bennett.<sup>104</sup> Even before taking the post, “[Bennett] called for an ‘all-out war on drugs,’”<sup>105</sup> and his candidacy was supported by an endorsement from the head of the International Association of Chiefs of Police, who called Bennett “a tough, two-fisted guy who can really relate to local law enforcement and its daily battle with the scourage [sic] of illegal drug use.”<sup>106</sup> Bennett was succeeded<sup>107</sup> by a string of tough-talking drug warriors, including his former deputy, John P. Walters.<sup>108</sup> Replacing a retired Army General, Walters advocated a greater role for the military in drug interdiction and even stiffer penalties for narcotics sellers.<sup>109</sup>

None of this swagger-based Czar-ing did much good. Walters’s tenure set a goal to “reduc[e] illegal drug use by 25 percent in five years,” but they did not even come close.<sup>110</sup> Over 700,000 marijuana arrests (more than for all violent crimes during the same period) led to only a 6 percent reduction in marijuana use, while use of other drugs rose slightly.<sup>111</sup> Overall, we can now see that an incarceration-based narcotics policy is generally futile. After a comprehensive analysis, the National Research Council recently concluded that, “lengthy prison sentences are ineffective as a crime control measure. Specifically, the incremental deterrent effect of increases in lengthy prison sentences is modest at best.”<sup>112</sup> The public agrees, as a strong

104. Richard L. Berke, *Washington Talk: Working Profile: William J. Bennett; Does ‘Drug Czar’ Face a Mission Impossible?* N.Y. TIMES, Feb. 21, 1989, available at <http://www.nytimes.com/1989/02/21/us/washington-talk-working-profile-william-j-bennett-does-drug-czar-face-mission.html>.

105. Philip Shenon, *Nominee for ‘Drug Czar’ Has Tough-Talking Past*, N.Y. TIMES, Jan. 13, 1989, available at <http://www.nytimes.com/1989/01/13/us/nominee-for-drug-czar-has-tough-talking-past.html>.

106. *Id.*

107. After serving as Drug Czar, Bennett crafted a career in promoting “virtue,” though his own story included millions of dollars lost while gambling. Katharine Q. Seelye, *Relentless Moral Crusader is Relentless Gambler, Too*, N.Y. TIMES, May 3, 2003, at A12, available at <http://www.nytimes.com/2003/05/03/national/03GAMB.html>. There was also a controversial episode of his radio program in which he suggested that crime could be reduced by aborting black babies. David D. Kirkpatrick & Marek Fuchs, *White House Criticizes Bennett for Remarks*, N.Y. TIMES, Sept. 30, 2005, available at <http://www.nytimes.com/2005/09/30/politics/30end-bennet.html>.

108. Christopher Marquis, *Tough Conservative Picked for Drug Czar*, N.Y. TIMES, Apr. 26, 2001, at A20, available at <http://www.nytimes.com/2001/04/26/us/tough-conservative-picked-for-drug-czar-officials-say.html>.

109. *Id.*

110. John Tierney, *The Drug Czar’s Report Card: F*, N.Y. TIMES (Oct. 10, 2008, 5:01 PM), <http://tierneylab.blogs.nytimes.com/2008/10/10/the-drug-czars-report-card-f/> [hereinafter *The Drug Czar’s Report*].

111. *Id.*

112. COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT’L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 155 (Jeremy Travis et al. eds., 2014)

majority believes that the drug war has failed despite the expenditure of tens of billions of dollars.<sup>113</sup>

Even the most obvious and tragic metric pointed to failure in the war on drugs. Between 1982 and 2012, drug overdoses rose almost 600 percent, overtaking car accidents “as the leading cause of accidental death.”<sup>114</sup> This development tellingly juxtaposes a success of federal action (i.e. auto safety) with the utter failure of federal action in containing the use and danger of narcotics. Regulation worked; incarceration did not.

Yet, incarcerate broadly was exactly what we did, even as it became increasingly clear that it was not working: the “drug war” era saw an “unprecedented rates of imprisonment” for narcotics defendants.<sup>115</sup> In 1980, there were 4,749 people in federal prisons for narcotics offenses.<sup>116</sup> In 2010, that number was 97,472.<sup>117</sup> With harsh new mandatory minimums, mandatory sentencing guidelines, and broader funding for drug cases, the number of federal drug prisoners had gone up by over 1,950 percent.

In the present day, we can look back at the efforts to fight AIDS and feel some level of satisfaction. Significant resources were used, but the result was the transition of a deadly disease that spread wildly to one that is treatable and relatively controlled. It did not happen fast enough, certainly; it has not gone far enough, but there is a positive, perhaps even a remarkable, result. The same simply is not true of the government’s efforts to control crack. We spent billions, imprisoned thousands, and have little to show for it. That leaves us with questions of what might have been, and what still can be in the continuing struggle against narcotics.

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[hereinafter THE GROWTH OF INCARCERATION].

113. See Joel Connelly, *82 percent say U.S. 'losing' War on Drugs*, SEATTLE POST-INTELLIGENCER (Aug. 19, 2013), <http://blog.seattlepi.com/marijuana/2013/08/19/82-percent-say-u-s-losing-war-on-drugs-poll/#10916101=0&14671103=0>; John Tierney, *Drug Czar Controversy*, N.Y. TIMES (Dec. 8, 2008, 12:23 PM), [http://tierneylab.blogs.nytimes.com/2008/12/08/drug-czar-controversy/?\\_php=true&\\_type=blogs&module=Search&mabReward=relbias%3Ar&\\_r=0](http://tierneylab.blogs.nytimes.com/2008/12/08/drug-czar-controversy/?_php=true&_type=blogs&module=Search&mabReward=relbias%3Ar&_r=0).

114. Kevin A. Sabet, *Overdosing on Extremism*, N.Y. TIMES, Jan. 2, 2012, at A21, available at <http://www.nytimes.com/2012/01/02/opinion/drug-policy-needs-centrists.html?module=Search&mabReward=relbias%3As%2C%5B%22RI%3A7%22%2C%22RI%3A18%22%5D>.

115. THE GROWTH OF INCARCERATION, *supra* note 112, at 120.

116. Mark Osler, *We Need Al Capone Drug Laws*, N.Y. TIMES, May 5, 2014, at A23, available at [http://www.nytimes.com/2014/05/05/opinion/we-need-al-capone-druglaws.html?\\_r=0](http://www.nytimes.com/2014/05/05/opinion/we-need-al-capone-druglaws.html?_r=0).

117. PAUL GUERINO, PAIGE M. HARRISON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, NCJ 236096, PRISONERS IN 2010 30 (Dec. 2011, rev. Feb. 9, 2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf>.



## IV. WHAT SHOULD HAVE BEEN

A. *White and Bias, Koop and Bennett*

The President who oversaw the creation of the misguided approach to crack, Ronald Reagan, understood better than any politician of his time the value of cultural symbolism. His remarkable success in the 1984 election, for example, was built on the strength of ads like, “It’s morning again in America,” filled with iconic images of weddings and fathers heading off to work in the morning.<sup>118</sup> In that time after the entrenchment of television, but before the internet, the media had a monopoly in creating and defining the symbols that came to describe moments, and the symbols they chose created future realities. In part because 1986 was between these two innovations (television and the internet), the televised symbolism around crack and AIDS was particularly important.

Len Bias, as an African-American man, became a symbol that reinforced rather than challenged the bigotry that too often underlaid the reaction to both health crises. The fact that Bias probably did not use crack at all adds a veneer of cruel irony to the role he played in this drama.<sup>119</sup> Ryan White, on the other hand, defied the stereotype of a person with AIDS; he was not the stereotypical gay man that straight America did not want to think about. He was young, he was (presumably) straight, and he did not contract the disease through sex.<sup>120</sup> These two people, reduced to symbols, became arrows pointing in opposite directions for the twin crises: White-as-symbol pointed towards problem-solving, while Bias-as-symbol pointed towards retribution and racialized blaming.

The media is not innocent in this creation of symbols, of course. Ryan White became the strangest type of celebrity because of press attention: a victim-celebrity.<sup>121</sup> He was visited by Ronald and Nancy Reagan, and drove a red Mustang convertible given to him by Michael Jackson.<sup>122</sup> Bias, on the other hand, was a more common celebrity archetype: the tragically dead.<sup>123</sup> The idea that crack (supposedly) could take down an athlete like Len Bias made it seem even more powerful, even irresistible. The creation of White as a celebrity at least provided a distraction from homophobia; the transition of Bias to dead black celebrity only prodded along the racial undertones to the discussion of crack.

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118. Andre Morgado, *Ronald Reagan TV Ad: “It’s morning in america again,”* YOUTUBE (Nov. 12, 2006), <https://www.youtube.com/watch?v=EU-IBF8nwSY>.

119. *See supra* Section III.

120. *See supra* Section II.

121. *See Johnson, supra* note 38.

122. Johnson, *supra* note 38.

123. *See Harriston & Jenkins, supra* note 79.

Perhaps more important was the contrasting approaches of C. Everett Koop and William Bennett. Koop, like White, was a disrupter of easy blame; he quickly moved the discussion away from homophobia and towards “fighting a disease—not people.”<sup>124</sup> Bennett and his fellow travelers in power, though, flipped that formula around. When it came to crack and other drugs, it *was* people they were fighting,<sup>125</sup> rather than the real problem, which was markets. Not surprisingly, given that kind of granular response, which failed to address the system as a whole, the drug warriors lost.

*B. What If There Had Been a C. Everett Koop for Crack?*

While crack was a public health crisis, it was not a disease like AIDS. Rather, it was spread through markets and market forces rather than the transmission of viruses. C. Everett Koop’s advice to fight “a disease—not people,”<sup>126</sup> would translate to “fight the market, not people,” if applied to crack.

Given that important point of differentiation, it is also clear that the person to analyze the problem and lead the battle against a market would not be a doctor like C. Everett Koop. Instead, it would require someone who understands how markets work—a business person. One of the true failures of Republican presidents from Reagan to Bush was naming bureaucrats like William Bennett and John P. Walters to head up the Office of National Drug Control Policy as the “Drug Czar.”<sup>127</sup> A better bet would have been to look to someone from the long bench of stalwart Republicans who had built a business and received a real-life education in what makes a commercial enterprise work—and, more importantly, what makes a business fail. After all, the end goal of narcotics interdiction is nothing more or less than that—making businesses fail.

What might such a Republican businessman look like? In the modern context, he would look a lot like Mitt Romney. In the 2012 election campaign, Romney was excoriated by Democrats and some in the media for his work at Bain Capital, a private equity firm he founded in 1984.<sup>128</sup> One of the harsher and more comprehensive attacks appeared in *Rolling Stone* just a few months before the presidential election.<sup>129</sup> There, Matt Taibbi described the kind of deal

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124. Koop, *supra* note 34, at 1.

125. See Berke, *supra* note 104.

126. Koop, *supra* note 34, at 1.

127. See *supra* Section III.

128. Daniel Fisher, *The Truth About Bain: Inside The House That Mitt Built*, FORBES, Oct. 3, 2012, available at <http://www.forbes.com/sites/danielfisher/2012/10/03/the-truth-about-bain/>.

129. Matt Taibbi, *Greed and Debt: The True Story of Mitt Romney and Bain Capital*, ROLLING STONE, Aug. 29, 2012, available at <http://www.rollingstone.com/politics/news/greed-and-debt-the-true-story-of-mitt->

Bain pursued: identifying distressed companies with good cash flow, taking them over by paying off the executives with bonuses and borrowing money to buy the stock, assigning that debt to the company, and then taking management fees.<sup>130</sup>

Whether Romney's work at Bain was good or bad for the economy, it definitely reflected a striking combination of talents: aggression, a comprehensive understanding of business structures, a willingness to focus on those structures rather than individuals, and an ability to build coalitions to support a mutually beneficial plan. It is that precise skill set that is needed to properly fight drugs—this is what the C. Everett Koop of crack would have looked like.

That leaves us with a final question: what would a Mitt Romney-type Drug Czar, properly empowered, have done?

Hopefully, he would have followed the lead of C. Everett Koop, who (though already an expert in public health) spent months meeting with medical and scientific experts inside the government and out,<sup>131</sup> and wrote seventeen drafts of the report that resulted.<sup>132</sup> Strikingly, Koop was conducting this investigation at the precise time that Len Bias died and Congress quickly and disastrously reacted.<sup>133</sup> If a Koop equivalent had been given the same charge relating to crack in the wake of Bias's death, the reaction of the politicians might have been delayed as they waited for a better understanding of what drove the perceived crisis from an authoritative figure.

So, imagine that a Mitt Romney was out investigating crack at the same time and in the same deliberative, objective way that C. Everett Koop was analyzing AIDS. What would Romney have concluded?

First off, we would hope that Romney would (as he did at Bain) look at the entire system of the business,<sup>134</sup> rather than worry too much about individuals. His goal in looking at a drug network would be destroying the business, rather than seeking retribution against people within that system. This was Koop's approach, and his report emphasized not only that it called for an attack on "a disease—not people," but that "personal feelings regarding the groups of people primarily affected" needed to be set aside.<sup>135</sup> A similar approach to narcotics would pull the government back from the most reflexive action—prosecuting the most available participants in the drug trade.

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romney-and-bain-capital-20120829.

130. *Id.*

131. Koop, *supra* note 34, at 1.

132. Noble, *supra* note 27.

133. *See* Noble, *supra* note 27.

134. *See* Taibbi, *supra* note 130.

135. Koop, *supra* note 34, at 1.

Second, we can be certain that Romney would *not* have decided that the way to address crack would be to sweep up low-wage laborers associated with the business—the precise tactic that mass incarceration embodies. Romney would have understood that low-wage labor and independent entrepreneurs in a field with low barriers to entry are easily and immediately replaced. The problem with mass incarceration is that it does not solve a problem.

Third, Romney would have focused on what *does* matter in a business. Intriguingly, his work at Bain Capital focused on the part of the narcotics business we have not systemically attacked—cash flow.<sup>136</sup> Primarily, we have focused on labor (through arrest and incarceration), profits (through forfeitures of drug dealers' homes and cars), and product (through drug seizures). These are precisely the factors Romney discounted at Bain, where he cared much more about evaluating a company's cash flow in analyzing its suitability as a target.<sup>137</sup> After all, profit, labor, and product can all be replaced so long as there is cash flow, and it was cash flow that promised Bain the possibility of debt being paid off over time. But if cash flow and credit are cut off (and drug networks do not have access to traditional credit), the business will fail. Romney's purpose would be different, but his focus the same: take the money, because that is what matters.

Finally, Romney-as-Drug Czar would not have been deterred by the complexity of international financial networks as he set out to disrupt the cash flow systems of narcotics businesses. This is a man who lives within those very networks, after all. In the 2012 campaign, he was harshly criticized for the complexity of his own finances, which involved wholly owned corporations in Bermuda, no fewer than twelve different funds in the Cayman Islands, secretive Swiss bank accounts, and other devices which required his 2010 tax return to include fifty-five pages just to describe the transactions with foreign entities in that one year.<sup>138</sup> While a comprehensive understanding of such complex cash flows may have hurt Romney in the last campaign, it would be a striking asset if set to the task of curtailing the flow of drug money back to wholesalers and suppliers. This is not a guy who is scared of financial puzzles.

In the end, it is a worthwhile daydream to imagine what would have happened if AIDS and crack had continued on similar paths after 1986: if both had been the focus of problem-solving approaches rather than moral crusades, if both had received systems analysis

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136. See Taibbi, *supra* note 130.

137. See *Id.*

138. Nicholas Shaxson, *Where the Money Lives*, VANITY FAIR, Aug. 2012, available at <http://www.vanityfair.com/politics/2012/08/investigating-mitt-romney-offshore-accounts>.

before a federal approach was framed, and if both had pivotal figures of authority guiding discussion away from a focus on individual actors. Drugs would not have disappeared, but they would have become more expensive,<sup>139</sup> and the financial and human costs of the war on drugs—in reality, a war on a market—would have been reduced.

Though the history recounted here reflects unfortunate choices in the past by people like Tip O'Neill and William Bennett,<sup>140</sup> it does not mean that we need to continue making those same tragic choices. As this nation continues to face social problems created by illegal drugs, particularly a new wave of heroin use,<sup>141</sup> it is *still* the right time to find our C. Everett Koop for narcotics, consider our options carefully, and move in a new direction. In fact, it may well be that Mitt Romney himself is available for the job.<sup>142</sup> Having pursued a wrong path in the past does not mean that we cannot right ourselves, look back at those diverging footprints in the snow, and take action based on what we have learned.

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139. Price goes up when supply is restricted, which would happen as drug businesses fail. We know that rising price has an effect on the use of highly addictive substances based on the effect of higher taxes on tobacco. Tellingly, just as Drug Czar John P. Walter's attack on marijuana use was failing to meet its goals, higher prices through taxation were also playing a role in significantly decreasing the number of young people who smoked tobacco. See *The Drug Czar's Report*, *supra* note 110.

140. See *supra* Section III.

141. See J. David Goodman, *New York is a Hub in a Surging Heroin Trade*, N.Y. TIMES, May 19, 2014, at A1, available at <http://www.nytimes.com/2014/05/20/nyregion/new-york-is-a-hub-in-a-surging-heroin-trade.html>.

142. See Steve Peoples, *Romney Tries to Re-Emerge as Force in GOP Politics*, YAHOO NEWS, June 12, 2014, <http://news.yahoo.com/romney-tries-emerge-force-gop-politics-071422367--election.html>.