

What We Got Wrong in the War on Drugs

Mark Osler

Follow this and additional works at: <https://ir.stthomas.edu/ustlj>



Part of the [Civil Rights and Discrimination Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Law and Race Commons](#), [Law and Society Commons](#), [Law Enforcement and Corrections Commons](#), [Legal Remedies Commons](#), and the [Other Law Commons](#)

This Article is brought to you for free and open access by UST Research Online and the University of St. Thomas Law Journal. For more information, please contact lawjournal@stthomas.edu.

ARTICLE

WHAT WE GOT WRONG IN THE
WAR ON DRUGS

MARK OSLER*

I. INTRODUCTION

On Friday morning of each week for two years, my phone would ring and each time I would hesitate to answer. The caller was a man named Ronald Blount, an inmate at the federal prison in Beaumont, Texas. I was his lawyer, working on his petition for clemency. I hesitated to answer, because week after week I had no good news to share.

Mr. Blount was serving a life sentence for conspiracy to possess with the intent to distribute crack cocaine. Enhancements built into 21 U.S.C. § 841—directed at drug kingpins—required that the judge impose that life sentence.

Ronald Blount was no kingpin. Rather, he was a hard-core crack addict, the kind that cautionary tales about drugs describe. He had two minor priors for narcotics, one of which involved marijuana. He spent his days begging for change, and his nights sleeping on his mother’s porch.¹ Sometimes, he told people where they could buy crack from his brother and his friends, or took them there hoping to get a bit of crack himself.² At sentencing, the judge asked Mr. Blount about his involvement, and Mr. Blount described a role so minor that he could not even fairly be called a “seller” of narcotics:

THE DEFENDANT: When they said that I was doing anything, it was nothing more than to get me a piece of rock, and that was probably what they said I—they said I took them to different locations I mean, they said—and you heard—I took them to this place over here to obtain—

* Mark Osler is the Robert and Marion Short Distinguished Professor of Law at the University of St. Thomas. He would like to thank Rachel Barkow, Brian Gilmore, and Thea Johnson for important comments on an earlier draft.

1. Sari Horwitz, *Struggling to Fix a ‘Broken’ System*, WASH. POST (Dec. 5, 2015), <https://www.washingtonpost.com/sf/national/2015/12/05/holderobama>.

2. Mark Osler, *Donald Trump, Meet Ronald Blount*, STAR TRIB. (Sept. 1, 2016), <https://www.startribune.com/donald-trump-meet-ronald-blount/392089531>.

THE COURT: Where they got crack.

THE DEFENDANT: They got it from a village where I hang at. I hang at a store begging for nickels and quarters and dimes. I stayed on the front porch of my mama's house, man. I don't—I don't—I don't sell dope. I didn't even have one change of clothes. I had to wash every day, Judge.³

I later confirmed it all: the abject poverty, the begging for change in a park, the living on a porch, the addiction, and a level of involvement that did not even rise to the level of street-seller.⁴ This man, the poorest person in a poor county in a poor state, addicted to drugs, begging for change in a park; somehow our system locked him away for life and pretended that this routine cruelty was somehow solving a problem.

Two decades later, in 2009, government officials declared an end to the “War on Drugs.”⁵ Apparently, drugs won.⁶ We spent, we imprisoned, we broke down doors, and yet overall drug use has remained relatively constant. And Ronald Blount remained in prison long after that declaration.

How did that happen? After all, we spent over a trillion dollars and incarcerated millions of people.⁷ Such a colossal failure deserves a thousand thoughtful reflections, and the purpose of this essay is to provide just one.⁸ With the passage of time, we can now see in full the brutal shape of the beast that we created, and understand the waste of life, money, and freedom that went with it. Perhaps most tragically, our failed approach to narcotics interdiction really hasn't changed,⁹ even a decade after the war was lost.

3. Transcript of Proceedings, Sentencing of Ronald L. Blount, Jr. (July 8, 1999) (on file with the author).

4. Ron Fournier, *On Matter of Mercy, Obama Can't Blame GOP for Gridlock*, ATLANTIC (Dec. 8, 2015), <https://www.theatlantic.com/politics/archive/2015/12/on-matter-of-mercy-obama-cant-blame-gop-for-gridlock/461841>.

5. Gary Fields, *White House Czar Calls for End to 'War on Drugs'*, WALL ST. J. (May 14, 2009), <http://www.wsj.com/articles/SB124225891527617397>. Importantly, the declared “end” of this war does not seem to have resulted in much change in the way that we approach narcotics, other than the gradual legalization of marijuana. See Susan Stellan, *Is the 'War on Drugs' Over? Arrest Statistics Say 'No'*, N.Y. TIMES (Nov. 5, 2019), <https://www.nytimes.com/2019/11/05/upshot/is-the-war-on-drugs-over-arrest-statistics-say-no.html>.

6. Nicholas Kristof, *Drugs Won the War*, N.Y. TIMES (June 13, 2009), <http://www.nytimes.com/2009/06/14/opinion/14kristof.html>.

7. Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs*, CATO INST. (Apr. 12, 2017), <https://www.nytimes.com/2019/11/05/upshot/is-the-war-on-drugs-over-arrest-statistics-say-no.html>.

8. There have been many others. See, e.g., Christine Minhee & Steve Callendrilla, *The Cure for America's Opioid Crisis? End the War on Drugs*, 42 HARV. J. L. & PUB. POL'Y 547 (2019); Brendan Walden, *Addicted to the War on Drugs*, 5 U. PA. J. L. & PUB. AFFS. 1 (2019); Wadie E. Said, *Limitless Discretion in the War on Drugs and Terror*, 89 U. COLO. L. REV. 93 (2018).

9. Stellan, *supra* note 5.

The loss of this war¹⁰ will probably never be fully understood, of course; the whole of it, involving dozens of substances, millions of people, hundreds of law enforcement bodies, and an uncountable number of bad decisions, is too complex to fathom. But I am going to try to describe some of the elements that have probably played a role in this tragedy—a few of the myths that too many people believed, the misunderstandings that undermined success, and the facts we willfully ignored for too long.

The first of these is the myth of race-neutrality.¹¹ The War on Drugs was never race-neutral, and that fact became more obvious to all as time went on.¹² Even after it was abundantly clear that the War on Drugs was largely a War on Minorities, we did not change course. Participants in the war might say that at the outset of the project they didn't know it was about race, but by the 1990s the proof was so clear that such claims ring hollow.¹³

Next, the War on Drugs never accounted for the fact that drugs are different than other types of crime.¹⁴ It shouldn't surprise us that the strategies and tactics we would bring to bear on other crimes didn't work with drugs. I'll lay out two unique aspects of narcotics that undermined the lock-'em-up approach to narcotics interdiction. First, narcotics crime is cooperative rather than oppositional (that is, the "victims" willingly participate in the crime), muddying the purpose of the project.¹⁵ Second, illegal and legal drugs are inter-related and often fungible, undercutting consistent messaging as one narcotic is advertised on television while another (which does the same thing) is severely punished.¹⁶

Finally, the War on Drugs never accounted for the fact that narcotics are a market—a big, active, confusing market, subject to the laws of supply and demand. Yet, we didn't use economic models to understand and approach that market. Instead, we used the language and tactics of war and a moral crusade.¹⁷ In so doing, we ignored what could have been better approaches rooted in economic realities. Imprisoning Ronald Blount was never going to deprive anyone of getting some crack. And yet, we built his tragedy on top of systemic racism, spent our treasure for steel bars,¹⁸ and all along ignored what was right before us.

10. I realize that the use of the term "war" could be viewed as hyperbolic. However, given the tactics, lethal force, and impact on affected communities, I think the term is appropriate.

11. A familiar (but false) narrative buttresses the myth of race neutrality: that racism existed, that Martin Luther King, Jr. fixed it, and that now we live in a post-racism nation. Mark Osler, *Short of the Mountaintop: Race Neutrality, Criminal Law, and the Jericho Road Ahead*, 49 U. MEM. L. REV. 77, 80–83 (2018).

12. *Id.* at 86–90.

13. *Id.*

14. *See infra* Section III.

15. *See infra* Section III(A).

16. *See infra* Section III(B).

17. *See infra* Section IV.

18. Prison costs vary but range up to over \$60,000 per year, per inmate. *See* Vera Institute, *The Price of Prisons: Prison Spending in 2015*, <https://www.vera.org/publications/price-of-pris>

II. RACISM AND THE WAR ON DRUGS

From the start, the War on Drugs was about race, but too many people averted their eyes from that jagged reality.

John Ehrlichman, who was a counsel and assistant to President Nixon (and one of the Watergate co-conspirators) was surprisingly blunt about the fact that the War on Drugs was focused on those Nixon disfavored, saying:

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.¹⁹

While Black Americans have borne an undue share of imprisonment²⁰ and the hardships of the War on Drugs,²¹ the truth is that Black Americans are no more likely to buy or sell drugs than white Americans.²² Rachel Barkow has convincingly argued that it has been racism that has allowed politicians to increase sentences over and over, while the media has incentivized them to propel that false narrative.²³ This dynamic remained even after racial disparities become apparent; once the white majority believed that the pain of the current system is being extracted from other people, they tended not to worry about its cruelty.²⁴

It was crack that brought to the surface the racial underpinnings of the broader project. Black and Hispanic people accounted for over 95 percent of crack convictions, even though more than half of crack users were white.²⁵ The failure to address wide and unjustifiable racial disparities²⁶ in the height of the frenzy to punish crack offenders is perhaps one of the most

ons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending (last visited Apr. 5, 2021).

19. Dan Baum, *Legalize It All*, HARPER'S MAG. (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all>.

20. Jamie Felner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 274–77 (2009).

21. Nekima Levy-Pounds, *Can These Bones Live? A Look at the Impacts of the War on Drugs on Poor African-American Children and Families*, 7 HASTINGS RACE & POVERTY L.J. 353, 366–77 (2010).

22. MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA 159–70 (2012).

23. RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 108–09 (2019).

24. Mark Osler, *The First Step Act and the Brutal Timidity of Criminal Law Reform*, 54 NEW ENG. L. REV., 161–98 (2021).

25. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY xi (Feb. 1995), <https://www.ussc.gov/research/congressional-reports/1995-report-congress-cocaine-and-federal-sentencing-policy>.

significant moral failings of our society in the twentieth century.²⁷ This government-sponsored beat-down of Black men was hardly a secret: the United States Sentencing Commission issued reports laying out the racial disparities and lack of a rational basis for the rules that drove crack sentences in 1995,²⁸ 1997,²⁹ 2002,³⁰ and 2007³¹—and nothing about it was changed by Congress until 2010.³²

All of this was protected, legally, by a veneer of facial race-neutrality.³³ So long as the statutes and guidelines, on their face, were not openly rigged against Black Americans, courts consistently held that the crack laws did not violate the Constitution's guarantee of equal protection unless it could be shown that creating racial disparities was the intent of the drafters.³⁴ Relying on the Supreme Court's 1976 ruling in *Washington v. Davis* (which involved a facially neutral hiring exam that produced disparate results),³⁵ lower courts failed to see any intent to discriminate in the creation of the crack laws, and refused to act based on the raw data showing grossly disproportionate outcomes.³⁶

The problem of facial neutrality is that it ignores the wide discretion afforded three groups of people—jurors, judges, and prosecutors—in determining convictions and sentences, and the play this gives to implicit and explicit bias.³⁷ Assuming that there is racism in our country (an indisputa-

26. Editorial, *Cocaine Sentencing, Still Unjust*, N.Y. TIMES (Nov. 4, 1995), <https://www.nytimes.com/1995/11/05/opinion/cocaine-sentencing-still-unjust.html>.

27. JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 164 (2017). It is a moral failing I share in. I served as an Assistant United States Attorney in Detroit from 1995 to 2000 and prosecuted dozens of crack cases.

28. See U.S. SENTENCING COMM'N, *supra* note 25, at vi.

29. See U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1997), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/19970429_RtC_Cocaine_Sentencing_Policy.pdf.

30. See U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002), <https://www.ussc.gov/research/congressional-reports/2002-report-congress-federal-cocaine-sentencing-policy>.

31. See U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2007), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf.

32. The 100:1 ratio between crack and powder cocaine embedded in the guidelines was finally amended (to 18:1) in the second year of the Obama administration. Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

33. Sometimes, the racism was not hidden very well. When Senator Howell Heflin, for example, pushed for tough crack laws because the drug might move from “the burned out, abandoned buildings of our large metropolitan areas” to “the tree-lined streets of small towns and villages,” the veneer was pretty translucent. Richard Dvorak, *Cracking the Code: De-Coding Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 654–55 (2000).

34. Christopher J. Tyson, *At the Intersection of Race and History: The Unique Relationship Between the Davis Intent Requirement and the Crack Laws*, 50 HOW. L. REV. 345, 348 (2007).

35. *Washington v. Davis*, 426 U.S. 229 (1976).

36. Tyson, *supra* note 34, at 348 n.8.

37. Osler, *supra* note 11, at 90–93.

ble assertion), necessarily there are racist impulses in that large group of people to whom we allow discretion.³⁸ Thus, facial neutrality will never cabin racism so long as those facially neutral laws accord such discretion to people in a broader, racism-infected community. And when we give those people almost *unlimited* discretion and brutalist sentencing rules—to the point where a prosecutor acting in our name³⁹ can create a narrative in which Ronald Blount faces a life sentence—we all become complicit.

If the simple moral wrong of racism isn't enough, consider this: so long as actions were shaped, however subtly, by racism, law enforcement was distracted from actually solving the problem of drug trafficking and addiction.⁴⁰

Legally and politically, facial race neutrality was a game of “let’s pretend”—a game that cost untold freedom for Black men like Ronald Blount who were over-punished.

III. NARCOTICS CRIME IS DIFFERENT

A. *Narcotics as a Cooperative Crime*

In most other types of major crime—assault, murder, sex offenses, theft, fraud—the people hurt by the crime do not desire it. That is, there is little or no positive demand coming from people who desire to be killed, raped, or stolen from.⁴¹ With narcotics, the greatest number of people hurt by narcotics are those who use them,⁴² and those people pay for the pleasure of damaging themselves.⁴³

To put it another way, most crimes are oppositional or unilateral, in that one person’s desire runs counter to another’s (oppositional) or is unop-

38. See Radley Balko, *There’s Overwhelming Evidence That the Criminal Justice System Is Racist. Here’s the Proof*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graph-ics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system>.

39. I was one of many who had the honor of announcing ourselves in court as representing “the United States of America.”

40. The crack laws were an example of this, as the high sentences for crack created an incentive for law enforcement to pursue and incarcerate the most easily replaced part of the network of transactions involved in the sale of crack on the street. Mark Osler, *Learning from Crack*, 10 OHIO ST. J. CRIM. L. 637, 681–82 (2013).

41. That is not to say there is *no* demand. Assisted suicide would be one example of a rare exception to my generality.

42. U.N. Office on Drugs and Crime, *Economic and Social Consequences of Drug Abuse and Illicit Trafficking* (1998), https://www.unodc.org/pdf/technical_series_1998-01-01_1.pdf. I acknowledge that there are people other than drug users who are harmed by drug abuse, and that the harm inflicted can be substantial. For example, the drug use of parents can and does have a negative impact on children. However, those harms come through an intermediary—the drug user—who has willingly chosen to participate in the crime.

43. It is important to recognize that narcotics trafficking and use has collateral damage among those who don’t take drugs. For example, some people are hit by stray bullets when traffickers battle, and family members certainly suffer, especially children. However, the causation of those harms are distinct crimes in themselves and are properly considered as such: negligent homicide and child abuse.

posed by anyone (unilateral). A robbery, for example, is oppositional: the robber wants the victim's money, and the victim would rather keep her money. Illegal weapons possession is unilateral, since no one else need be involved.

Narcotics trafficking crimes are neither oppositional nor unilateral. Rather they are cooperative—they require two sides, and both the criminal seller of narcotics and the buyer that the trafficker interacts with want the same result: for the buyer to pay money for the drugs. Only a few other crimes—such as some (but certainly not all) prostitution cases—could fairly be described as cooperative between all of the parties involved.

The fact that narcotics trafficking involves direct cooperation between the defendant and those most directly hurt by the crime means that we can't legitimately claim a need for retribution in the name of those direct victims. While there certainly are crimes, including murder, that can be collateral to narcotics trafficking, those ancillary crimes can and should be pursued on their own, and the victim-based retribution assigned more appropriately to that direct crime. In the absence of unwilling victims, mass incarceration as an imperative of societal wrath becomes much less convincing.

A fight against crime garners broad support when it is addressing a specific victimization,⁴⁴ and promises to prevent that kind of victimization in the future. Because narcotics trafficking is a cooperative crime, those fighting the War on Drugs could never create that kind of compelling narrative—and at any rate, it never delivered on “solving” the problem.

B. Illegal and Legal Narcotics Are Often Interchangeable

First, the market for drugs that are abused is not wholly legal and not wholly illegal—rather, it includes both narcotics that flow through the legal pharmaceutical industry and those that flow through illegal channels. For example, an opioid⁴⁵ addict can feed that habit either through the legal market—by getting a prescription for OxyContin⁴⁶—or through the illegal market, by purchasing heroin on the street.⁴⁷ A marijuana user can buy illegal

44. For example, a compelling argument for treating rape as a hate crime was made from the tragic death of Matthew Shepard. Kathryn Carney, Note, *Rape: The Paradigmatic Hate Crime*, 75 ST. JOHN'S L. REV. 315 (2001).

45. “Opioid” is the term used for the entire class of “[n]atural, synthetic, or semi-synthetic chemicals that interact with opioid receptors on nerve cells in the body and brain, and reduce the intensity of pain signals and feelings of pain” that includes both heroin and oxycodone. *Commonly Used Terms*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/drugoverdose/opioids/terms.html> (last visited Apr. 5, 2021).

46. OxyContin is the trade name for a brand of oxycodone. *Prescription Opioids*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Aug. 29, 2017), <https://www.cdc.gov/drugoverdose/opioids/prescribed.html>.

47. Wilson M. Compton et al., *Relationship Between Nonmedical Prescription-Opioid Use and Heroin Use*, 374 NEW ENG. J. MED. 154 (2016). Though opioids all “connect to particular brain and nervous system receptors that exist for the body's natural painkiller, endorphins,” the potency of those opioids varies from one kind to another. Dan Keating & Samuel Granados, *See*

marijuana at home in Utah,⁴⁸ or travel next door to Colorado and consume the same substance legally.⁴⁹ Even Adderall—a common treatment for attention-deficit disorders—contains the active ingredient of amphetamine.⁵⁰ Cocaine still has legal uses as a prescription drug, based on its unusual ability to simultaneously numb pain and act as a stimulant.⁵¹ Methamphetamine, too, can be legally prescribed.⁵²

The uncomfortable fact that so many drugs have both legal and illegal uses confounds any principled attempt to draw bright lines. Moreover, the interplay between the legal and the illegal uses can be significant. For example, a compelling case has been made that our current opioid epidemic, which spans legal prescription drugs and illegal heroin, was largely driven by the entirely legal marketing campaign of Purdue Pharma, the makers of OxyContin.⁵³

We see this same dynamic of legal and illegal markets providing the same thing when we look at ticket scalping. There, the supply of legitimate tickets is limited by the capacity of a venue. A black market arises to re-sell tickets at a higher price—but whichever system you use, you end up with a ticket.⁵⁴ The person with the scalped ticket sits next to the one who bought his at the box office, just as the opioid addict might use prescribed OxyContin until it runs out, and then buy heroin on the black market.⁵⁵ So long as there is a market for tickets at a price above what is charged at the box office, there will be scalpers; so long as there is a market for narcotics beyond what people can obtain legally, there will be illicit drug dealers. Narcotics aren't just a market, but a huge shadowy *mélange* of the legal and illegal.

How Deadly Street Opioids Like 'Elephant Tranquilizer' Have Become, WASH. POST (Oct. 25, 2017), <https://www.washingtonpost.com/graphics/2017/health/opioids-scale>.

48. While Utah recently began to allow medical marijuana, it remains illegal for recreational use. Bethany Rodgers, *Utah's First Marijuana Pharmacy Opens in Salt Lake City*, SALT LAKE TRIB. (Mar. 2, 2020), <https://www.sltrib.com/news/politics/2020/03/02/utahs-first-marijuana>.

49. The recreational use of marijuana has been legal in Colorado since 2014. Jack Healy, *Reefer Madness or Pot Paradise? The Surprising Legacy of the Place Where Legal Weed Began*, N.Y. TIMES (June 30, 2019), <https://www.nytimes.com/2019/06/30/us/marijuana-colorado-legalization.html>.

50. American Chemical Society, *How Does Adderall Work?*, YOUTUBE (May 11, 2015), <https://www.youtube.com/watch?v=MEJRBSghMt8>.

51. Valerie Vande Panne, *Why We Need Medical Meth + Cocaine*, DAILY BEAST (Apr. 14, 2017), <https://www.thedailybeast.com/why-we-need-medical-meth-cocaine>.

52. *Id.*

53. Harriet Ryan et al., *'You Want a Description of Hell?' OxyContin's 12-Hour Problem*, L.A. TIMES (May 5, 2016), <http://www.latimes.com/projects/oxycontin-part1>.

54. John Tierney, *Tickets? Supply Meets Demand on the Sidewalk*, N.Y. TIMES (Dec. 26, 1992), <https://www.nytimes.com/1992/12/26/nyregion/tickets-supply-meets-demand-on-sidewalk.html>.

55. 75 percent of people in treatment for heroin addiction began using opioids in the form of prescribed drugs such as OxyContin. Maia Szalavitz, *5 Myths About Heroin*, WASH. POST (Mar. 4, 2016), https://www.washingtonpost.com/opinions/five-myths-about-heroin/2016/03/04/c5609b0e-d500-11e5-b195-2e29a4e13425_story.html.

That, of course, made the War on Drugs a lot more complicated. In a sense, the civilians and opposing soldiers looked alike, and defining the enemy became more difficult. It has become increasingly hard to make a principled case that OxyContin when prescribed is harmless, while the same pills (or the heroin equivalent), once on the black market, become a poison so foul that we must imprison hundreds of thousands of people for doing on the street what pharmacists do behind a counter.

IV. THE AMERICAN APPETITE FOR NARCOTICS & THE MARKET THAT RESULTS

Americans love hamburgers.⁵⁶ We love sports.⁵⁷ And we *really* love recreational narcotics. Americans make up just 5 percent of the world's population, but most estimates peg Americans as consumers of about 25 percent of the world's total market for illicit drugs.⁵⁸ In a comprehensive 2019 report the RAND Corporation laid out the startling facts about our drug appetites, reporting that in 2016 Americans spent nearly \$150 billion on just four narcotics: marijuana, cocaine, heroin, and methamphetamine.⁵⁹ That shocking figure—which nearly matches the amount spent on alcohol in that year⁶⁰—doesn't include drugs like ecstasy or the value of prescription narcotics like OxyContin that are used recreationally. That is over thirteen times bigger than the total box office take (\$11.2 billion) for movies in that same year.⁶¹ And the hunger for illicit drugs is strong across all strata of our society (though the response has not been equally diffuse). One fascinating 2018 study looked at the wastewater from one university in the Southwestern United States. It found that the value of heroin consumed at that one school was about \$2.4 million a year.⁶²

56. In 2014, Americans purchased over nine billion hamburgers at restaurants. Phil Wahba, *Burgers Crushed Grilled Chicken in 2014 Sandwich Wars*, FORTUNE (Jan. 27, 2015), <http://fortune.com/2015/01/27/burgers-grilled-chicken-sandwich>.

57. In 2013, for example, Americans spent 33 billion hours watching sports on television. *That's Amore: Americans' Love Affair with Sports Extends Across Screens*, NIELSEN NEWSWIRE (Feb. 13, 2014), <http://www.nielsen.com/us/en/insights/news/2014/thats-amore-americans-love-affair-with-sports-extends-across-screens.html>.

58. Ernesto Zedillo, *Rethinking the 'War on Drugs': Insights from the US and Mexico*, VOX EU CEPR (Apr. 22, 2016), <http://voxeu.org/article/rethinking-war-drugs-insights-us-and-mexico>. Perhaps not coincidentally, this tracks the oft-cited statistic that the United States has 5 percent of the world's population but 25 percent of the world's prisoners. *E.g.*, President Barack Obama (@POTUS44), TWITTER (July 14, 2015, 5:20 PM), <https://twitter.com/potus/status/621081946236563456>.

59. Beau Kilmer, *Americans' Spending on Illicit Drugs Nears \$150 Billion Annually; Appears to Rival What Is Spent on Alcohol*, RAND CORP. (Aug. 20, 2019), <https://www.rand.org/news/press/2019/08/20.html>.

60. *Id.*

61. *Domestic Movie Theatrical Market Summary 1995-2020*, THE NUMBERS, <http://www.the-numbers.com/market>.

62. Adam J. Gushgari et al., *Tracking Narcotics Consumption at a Southwestern U.S. University Campus by Wastewater-based Epidemiology*, 359 J. HAZARDOUS MATERIALS 438, 441–42 (2018), <https://www.sciencedirect.com/science/article/pii/S0304389418306034?via%3Dihub>.

As discussed in the previous section, the legal and illegal markets are jumbled up—and we are thirsty for either. We Americans account for 80 percent of the *legal* opioids prescribed in the world.⁶³ That flood of legal opioids produces a broad swath of illegal users, whose addictions outlast their prescriptions. Three distinct waves of death from overdose have washed over the U.S. since 1998, yet use is down only slightly.⁶⁴

Our remarkable enthusiasm for illicit drugs is unusual. The World Health Organization compared drug use in seventeen nations from around the world, focusing on the use of alcohol, tobacco, cannabis, and cocaine.⁶⁵ That study concluded that drug use is not evenly distributed, and does not (contrary to what one might expect) correlate to stringent or liberal drug policies.⁶⁶ The unevenness was tilted in our direction: Americans were found to “have the highest levels of both legal and illegal drug use among all the countries surveyed.”⁶⁷ Cocaine use by Americans was particularly striking, as our rate of use was four times higher than the next highest nation surveyed.⁶⁸

In part, we use a lot of narcotics because we can afford it. As an affluent nation, Americans have disposable income that allows for money to be spent on drugs. That, though, doesn’t explain the discrepancy in drug use between the United States and other well-off countries.⁶⁹ Our appetite for drugs far eclipses that of affluent Holland, for example, despite that nation’s reputation as a haven for drug users.⁷⁰

The question of *why* Americans like narcotics so much has been left unexamined, at least in the community of those who are involved in interdiction. In a 2013 essay, marijuana user Alfred Ryan Nerz wrote that

63. Dina Gusovsky, *Americans Consume Vast Majority of the World’s Opioids*, CNBC (Apr. 27, 2016), <http://www.cnbc.com/2016/04/27/americans-consume-almost-all-of-the-global-opioid-supply.html>.

64. According to the Centers for Disease Control, the first wave was driven by over-prescription, the second by heroin, and the third by synthetic opioids such as fentanyl. *Opioid Overdose*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Mar. 17, 2021), <https://www.cdc.gov/drugoverdose/epidemic/index.html>.

65. Louisa Degenhart et al., *Toward a Global View of Alcohol, Tobacco, Cannabis, and Cocaine Use: Findings from the WHO World Mental Health Surveys*, 5 PLOS MED. 1053, 1054 (2008), <http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.0050141>.

66. *Id.* at 1065.

67. *Id.*

68. *Id.* at 1057. Notably, the WHO study was concluded in 2008, and cocaine usage rates in the United States have declined since that time, though overall narcotics-use rates have remained roughly the same because of increased use of other drugs. Beau Kilmer et al., *What America’s Users Spend on Illegal Drugs 2000-2010*, RAND CORP. (Feb. 2014), http://www.rand.org/pubs/research_reports/RR534.html.

69. Degenhart et al., *supra* note 65, at 1061–62.

70. Americans often view Holland as the world center for marijuana use. In fact, only 20 percent of Dutch adults have tried marijuana, while 42 percent of adult Americans have done so. Maia Szalavitz, *We Try More Drugs Than Anyone Else, and Nine Other Ways Addiction is Different in America*, PAC. STANDARD (July 4, 2014), <http://www.psmag.com/health-and-behavior/try-drugs-anyone-else-9-ways-addiction-different-america-85093>.

“[h]undreds of thousands” of Americans use narcotics to “blunt psychological pain, ease anxiety, or attempt to fill a spiritual void.”⁷¹ The last of these is especially intriguing, given that we are a people that has experienced two Great Awakenings, a shocking diversity of religious belief, a New Age movement, and television preachers so influential that they have shaped our politics. This spiritual desire, vibrant from the dawn of European settlement (and before), might be the seed of our narcotics appetite. Speculation on root causes aside, it does appear that the urge to get high is built into our national psyche.

Regardless of its origin, Americans’ hunger for drugs is undeniable. A failure to recognize this (and willingness to assume that people could be scared or shamed out of consuming something so widespread) surely played a role in the failure of the War on Drugs. At the least, a failure to recognize the remarkable appetite for narcotics underlaid our consistent inability to recognize what we were looking at—a market—and react appropriately.

In economic terms, Americans’ unrivaled desire for narcotics can be summed up in one word: demand. The demand for narcotics creates a market,⁷² which in turn will incentivize supply.⁷³ This is simple economics, but it is a reality that has too rarely been the basis for our approach to narcotics law.⁷⁴ Instead, we have approached the use and sale of narcotics as a moral wrong, and accepted that retribution alone can justify long sentences for even the most minor of participants.⁷⁵ It is in the soil of that miscalculation that our problem of mass incarceration has grown.

It seems pretty easy in retrospect to see that narcotics are an economic problem that requires solutions grounded in economics. But from the start, the War on Drugs was framed in military and moral terms rather than as an economic project. The military language is troubling because it evokes an effort to kill and subdue people. Like the focus on morality, the military rhetoric turned the project away from a focus on economics. Richard Nixon seemed to understand that an attack on the supply of narcotics would be unsuccessful so long as the demand remained strong, but initiated the mili-

71. Alfred Ryan Nerz, *Marijuanamerica: Why America Loves Weed*, HUFFINGTON POST (Apr. 20, 2013), http://www.huffingtonpost.com/alfred-ryan-nerz/marijuanamerica-book_b_2999684.html.

72. Hon. Juan R. Torruella, *Déjà vu: A Federal Judge Revisits the War on Drugs, or Life in a Balloon*, 20 B.U. PUB. INT. L.J. 167, 170 (2011).

73. If supply fails to meet demand, prices go up, which makes supplying the need more lucrative.

74. I’m not the first to observe that while narcotics traffickers seem acutely aware of economic rules, those who pursue them are not. See TOM WAINWRIGHT, *NARCONOMICS: HOW TO RUN A DRUG CARTEL* (2016).

75. The nation’s first “Drug Czar,” William Bennett, described the War on Drugs in terms of the Clint Eastwood movie *High Plains Drifter*, a world in which there are only “good guys” and “bad guys.” Howard Kohn, *Cowboy in the Capital: Drug Czar Bill Bennett*, ROLLING STONE (Nov. 2, 1989), <https://www.rollingstone.com/politics/politics-news/cowboy-in-the-capital-drug-czar-bill-bennett-45472>.

taristic language in first declaring the “War on Drugs” in 1971.⁷⁶ While this language echoed the more benign “War on Poverty” initiated by Lyndon Johnson,⁷⁷ it was more clearly aimed at people more than anything—and a specific kind of person at that.⁷⁸

Later, the language of a moral crusade—to the exclusion of an economic approach—would solidify. Ronald Reagan stuck to the military terminology, of course, saying that “We’ve taken down the surrender flag and run up the battle flag. And we’re going to win the war on drugs.”⁷⁹ He even compared the nation’s commitment to the War on Drugs to the French soldiers who won the Battle of Verdun in World War One.⁸⁰ Notably, the Battle of Verdun was significant for its terrible carnage; in 302 days of battle there were over 700,000 casualties and 300,000 dead.⁸¹ Reagan probably did not intend this, but the reference to Verdun was proven apt over time as analogous to the War on Drugs: despite the tremendous cost in lives and money, the Battle of Verdun ended with both sides in the same positions they had held before the battle began.⁸²

While continuing the martial theme, Reagan also introduced a strong moralistic tone to the venture. In a national address in 1986, he said:

. . . [T]hose who are killing America and terrorizing it with slow but sure chemical destruction will see that they are up against the mightiest force for good that we know. Then they will have no dark alleyways to hide in. In this crusade, let us not forget who we are. Drug abuse is a repudiation of everything America is. The destructiveness and human wreckage mock our heritage.⁸³

Reagan’s successor continued the theme. In his 1989 inaugural address, President George H.W. Bush said, “Take my word for it. This scourge will stop.”⁸⁴ Later, in a press conference where he held up a bag of

76. Chris Barber, *Public Enemy Number One: A Pragmatic Approach to the Nation’s Drug Problem*, RICHARD NIXON FOUND. (June 29, 2016), <https://www.nixonfoundation.org/2016/06/26404>.

77. Annie Lowrey, *50 Years Later, War on Poverty is a Mixed Bag*, N.Y. TIMES (Jan. 4, 2014), <https://www.nytimes.com/2014/01/05/business/50-years-later-war-on-poverty-is-a-mixed-bag.html>.

78. Baum, *supra* note 19.

79. Michelle Getchell, *The Enduring Legacy of Reagan’s Drug War in Latin America*, TEX. NAT’L SEC. REV. (Dec. 20, 2018), <https://warontherocks.com/2018/12/the-enduring-legacy-of-reagan-drug-war-in-latin-america>.

80. Andrew Glass, *Reagan Declares ‘War on Drugs,’ October 14, 1982*, POLITICO (Oct. 14, 2010), <https://www.politico.com/story/2010/10/reagan-declares-war-on-drugs-october-14-1982-043552>.

81. Lily Rothman & Liz Ronk, *A Century After Its End, See 10 Photos from the Longest Battle of World War I*, TIME (Dec. 16, 2016), <https://time.com/4596494/battle-verdun-photos>.

82. *Id.*

83. President Ronald Reagan & Nancy Reagan, Address to the Nation on the Campaign Against Drug Abuse (Sept. 14, 1986), <https://www.reaganlibrary.gov/research/speeches/091486a>.

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

crack bought from a hapless eighteen-year-old lured by federal agents to Lafayette Park across from the White House, Bush made it clear how he intended to accomplish this. He asked for \$500 million for “more prisons, more jails, more courts, more prosecutors.”⁸⁵ He wanted more money, as did his successors, and they got it. In 1973, the total federal expenditure on enforcement of drug laws was about \$100 million. By 2009 it had risen to \$44.1 billion a year, with total spending of over \$1 trillion,⁸⁶ and we continue apace.

And the results? In 2019, 70,630 Americans died of drug overdoses, compared to fewer than 20,000 in 1999.⁸⁷ Drug use has been stable or gone up; in 2018 almost one-fifth of the U.S. population over the age of twelve had used an illicit drug in the last year.⁸⁸ Like the Battle of Verdun that Ronald Reagan recalled in re-upping the War on Drugs in 1986, after the bloodshed and tragedy, nothing really changed.

V. CONCLUSION

In the end, the most damaging thing about describing the efforts to restrict drugs as a “war” is that it created the illusion that such a war could be “won.”⁸⁹ A problem that is deeply woven into our culture was never a good place for the sharp-edged blades of war; to strike at the enemy means bloodying ourselves.

There were always better ways, some of which I have outlined in previous articles,⁹⁰ which would have taken these realities into account. But we have chosen none of those better paths.

Perhaps, in the end, no “better” policy will win out. Instead, it could be that we simply tire of the war and stop spending money on what does not work. That is a gentler ending, free from academic hand-wringing, and might be the one we quietly choose.

I have an idea of what that would look like.

85. Brian Gilmore, *Again and Again We Suffer: The Poor and the Endurance of the ‘War on Drugs’*, 15 UNIV. D.C. L. REV. 59, 61–62 (2011).

86. Torruella, *supra* note 72, at 176.

87. *Overdose Death Rates*, NAT’L INST. ON DRUG ABUSE (Jan. 29, 2021), <https://www.drugabuse.gov/drug-topics/trends-statistics/overdose-death-rates>.

88. Substance Abuse and Mental Health Services Administration, *KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2018 NAT’L SURV. ON DRUG USE AND HEALTH 1* (2019), <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHNationalFindingsReport2018/NSDUHNationalFindingsReport2018.pdf>.

89. Because of market forces, in reality the most that the War on Drugs ever could have done is to temporarily raise the street price of narcotics, so long as demand remained steady.

90. Mark Osler & Thea Johnson, *Why Not Treat Drug Crimes as White-Collar Crimes?*, 61 WAYNE L. REV. 1 (2016); Mark Osler, *Asset Forfeiture in a New Market-Reality Narcotics Policy*, 52 HARV. J. ON LEGIS. 221 (2015); Mark Osler, *1986: AIDS, Crack, and C. Everett Koop*, 66 RUTGERS L. REV. 851 (2014); Mark Osler, *Narcotics Prosecutors as Problem Solvers*, 66 STAN. J. CRIM. L. & POL’Y 1 (2014).

In 2016, President Barack Obama granted clemency to Ronald Blount. The Pardon Attorney called me, and I called Mr. Blount in the prison. He had simply been called to the warden's office, not knowing what it was about. I knew him, had prayed with him, and said, "God is good."

There was a profound moment of silence. He knew what that meant. And, after it sank in, he said, "All the time."⁹¹

Those are the moments we must now seek.

91. Ronald Blount is now thriving in freedom and has successfully completed his supervised release (a form of probation that follows federal sentences).