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WHAT WOULD IT LOOK LIKE IF WE CARED ABOUT NARCOTICS TRAFFICKING? AN ARGUMENT TO ATTACK NARCOTICS CAPITAL RATHER THAN LABOR

Mark Osler*

INTRODUCTION

Law enforcement actions should be judged by a simple measure: are they solving a problem? After all, we Americans loathe the loss of freedom and the spending of tax dollars, and we should never take away citizens' freedom and money unless there actually is a problem being solved.

Illegal narcotics are a problem, but we aren't solving it. Narcotics trafficking and use lead to violence, undermine productivity,¹ and rip apart the social fabric of families and communities. Despite much attention to these issues, drug use in this country continues at high levels, even among children.² We have failed, and it is time to try something new, radical, and rooted in two conservative ideals: a belief in the power of markets, and the desire for a smaller and less intrusive federal government.

This article argues that the failure of law enforcement to solve the problem of narcotics trafficking is rooted in a failure to discern the basic nature of drug trafficking. Drug trafficking is a business.³ If we really cared about stopping drug trafficking, we would think hard about how to shut down that business – not about how many people we arrest, not about the heaps of marijuana we might seize and photograph for the news shows, not about growing the federal government even more, but about how to make that business *fail*.⁴

* Professor of Law, University of St. Thomas. I would like to thank Brian Harrison and Christian Latham of Baylor for their assistance in researching and understanding these issues, and their insights on the topic.

1 While one academic has compared the effect of drugs on productivity to the opening of walleye season in Minnesota, this laughably discounts the regular, fairly constant, and often lifelong degradation of personal productivity that the abuse of hard drugs can create. Donald A. Dripps, *Recreational Drug Regulation: A Plea for Responsibility*, 2009 UTAH L. REV. 117, 130 (2009).

2 Office of National Drug Control Policy, *Monitoring the Future Study* (2010), available at http://www.whitehousedrugpolicy.gov/publications/pdf/MTF_fs.pdf.

3 Not only is drug trafficking a business, it is a huge international business. Illegal drug production has overtaken car production as a proportion of the global economy. Chantal Thomas, *Disciplining Globalization: International Law, Illegal Trade, and the Case of Narcotics*, 24 MICH. J. INT'L L. 549, 553 (2003).

4 The argument here is for making the core business of narcotics trafficking fail. This is not to be confused with the already-pursued tactic of blacklisting "legitimate" businesses such as hotels which are owned by suspected drug traffickers. For an excellent description of these efforts, see David T. Duncan, *'Of Course This Will Hurt Business': Foreign Standing Under the Foreign Narcotics Kingpin Designation Act of 1999 and America's War on Drugs*, 37 GEO. WASH. INT'L L. REV. 969 (2005).

In short, our mistake has been to try to make narcotics businesses fail by creating a shortage of labor through massive incarceration.⁵ This is an impossible task at a time when markets are flooded with cheap, unskilled labor, and it should be no surprise that we have failed. Arresting all the greeters, stock boys, and floor managers at Wal-Mart on any given day will not shut down that corporation. The next morning, people will line up for those jobs. Instead of continuing with that flawed tactic, we should now focus on what really makes a business fail: a lack of cash flow and credit.

In other words, we have been following our urge to punish and condemn, when we should have been following the money.⁶ Devoting much of federal law enforcement to the task of arresting mules, local managers, and street dealers is not the answer – instead, we should intercept the money going from the street to the source of the narcotics because this disruption of cash flow will make that business (or, more properly, set of inter-connected businesses) fail. Because federal law enforcement has the clearest ability to conduct the type of operation needed to force narcotics businesses into failure, this article is primarily directed at the failures and possibilities within the federal system.⁷

Part I of this article will describe the failure of the war on drugs as a failure of our primary tool – incarcerating low-wage workers. Part II will move on to describe what a “business failure” model of narcotics restriction would look like. Finally, Part III will argue for this shift from a focus on labor to a focus on capital in narcotics control at this moment in our history, as we move forward as a nation with at least some narcotics remaining illegal.⁸

5 The scale and cost of this spike in incarceration is shocking. In 1972, the American incarceration rate was 96 people per 100,000 members of the population. In 2008, this had jumped to 750 per 100,000 in the population – coming close to 1% of the population being locked up. Not surprisingly, costs have bloated accordingly. U.S. corrections budgets sat at about \$9 billion in 1982, and hit \$69 billion in 2006 – a 660% increase. Steven N. Durlauf and Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 *CRIMINOLOGY & PUB. POL’Y* 13 (2011).

6 I realize that I am rejecting retributionist theory in staking this position. I do reject retributionism as a *primary* goal of criminal law, and it has become exactly that in the area of narcotics. Our failure at deterrence, rehabilitation, and incapacitation is evidenced by constant or increasing supply of narcotics, leaving only retribution among the traditional goals of criminal law. I reject retribution in the absence of the fulfillment of at least some other goals because the social cost to society of failing to control drugs to simply pursue retribution is too high, because the cost in personal freedom outweighs the value of retribution in a victimless crime, and because it is simply too expensive a way to make a societal point divorced from societal improvement. At any rate, it appears that people adapt to imprisonment and monetary fines in ways that make it difficult to gauge real retributive effects, making retribution even less valuable. John Bronsteen, Christopher Buccafusco, and Jonathon Masur, *Retribution and the Experience of Punishment*, 98 *CAL. L. REV.* 1463 (2010).

7 Similar techniques by state and local agencies, of course, may benefit from a similar, smaller scale re-focus on seizing funds rather than people.

8 Much of what I say here may also be taken as an argument for the legalization of narcotics. Because I do not believe that narcotics other than marijuana should be legalized, due to the social cost of drugs like crack cocaine and methamphetamine, I do not make that argument here. In addi-

I. THE MISTAKE OF FOCUSING ON INCARCERATION OF LOW-WAGE LABORERS

Others involved in this symposium have comprehensively addressed the general failure of the “war on drugs” approach to narcotics.⁹ There is no need to repeat that excellent work here. Instead, I will link that failure to a primary tactic that was always doomed to failure: the attempt to restrict the low-wage drug network labor pool through the mass incarceration of mules (those who merely transport narcotics), local managers, and street-level drug dealers.¹⁰ In an economy with an overabundance of unskilled low-wage workers, sweeping up those workers will have little effect because they are so easily replaced.

Our mistake has been to let the urge to punish be the primary driver of our policies. As the late William Stuntz sharply put it, “criminal law does not drive criminal punishment. It would be closer to the truth to say that criminal punishment drives criminal law.”¹¹

A. *The tactic of incarcerating low-wage workers*

There are seven basic ways that the distribution of narcotics imported from other countries can be disrupted by federal law enforcement,¹² and each addresses a different part of the interlocking set of businesses that comprise the international drug trade. First, we can destroy the crops at the source country.¹³ Second, we can try to eliminate leadership at the source country through legal

tion, I don’t think that broad legalization of narcotics is politically feasible. At any rate, the approach I suggest is consistent with a path for law enforcement which would dovetail well with any process of gradual legalization – the two ideas are consistent rather than in tension when considered as complementary processes over time.

9 For example, the Drug Policy Alliance, represented here by Jasmine Tyler, offers a systemic and accessible critique of the War on Drugs at <http://www.drugpolicy.org/drugwar/>.

10 It appears that this tactic of broad and harsh incarceration has the by-product of being wildly uneven. This aberration has been largely limited to addressing narcotics – other areas of the law have seen sentences that are “far more stable and predictable.” Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotic Sentencing*, 40 AM. CRIM. L. REV. 87, 88 (2003).

11 William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001).

12 I acknowledge that non-law enforcement approaches are possible and often preferable, such as widely available treatment for narcotics addiction, which would lower the demand for drugs. However, this article is restricted to the allocation of resources within law enforcement, and would encourage that widely-available and effective treatment of narcotics addiction be a part of any comprehensive plan.

13 UNITED NATIONS OFFICE ON DRUGS AND CRIME, COCA PRODUCTION IN THE ANDEAN REGION, available at http://www.unodc.org/pdf/andean/Andean_report_2007.pdf (comprehensive report on these efforts and coca production generally).

action¹⁴ or assassination.¹⁵ Third, we can try to interdict the drugs at the border.¹⁶ Fourth, we can interfere with distribution systems within the U.S. Fifth, we can sweep up street dealers. Sixth, we can convict and punish drug users.¹⁷ The first five of these seek to reduce supply, while the sixth (like the treatment of narcotics addiction)¹⁸ would address demand. The seventh option, as suggested here, is to interdict the money going back to the source country, which would eventually lead to a lesser supply.

To some degree or another, each of these approaches has been taken. By far, the most federal resources have been allocated, though, to numbers three through five – that is, catching drugs at the border, halting national distribution networks, and, most of all, incarcerating street level dealers.¹⁹ In terms of addressing a business, each of these is focused on restricting the trafficking networks' supply of labor, especially at the lower levels of expertise – mules who carry the drugs into and around the country, and street dealers who sell directly to users.

This focus on street dealers, local managers, and mules is no accident. They are the easiest people to catch holding drugs, and catching people while they possess narcotics makes for a very easy case once they are caught.²⁰ Arresting and incar-

14 Perhaps most famously, the United States captured Manuel Noriega, the dictator of Panama, and convicted him of drug charges. Geoffrey S. Corn & Sharon G. Finegan, *America's Longest Held Prisoner of War: Lessons Learned From the Capture, Prosecution, and Extradition of General Manuel Noriega*, 71 *LA. L. REV.* 1111, 1112 (2011).

15 The tactic of taking out the leadership of narcotics organizations may have lost its effectiveness, as international cartels have adjusted to this risk by organizing as decentralized "cells." Rishi Hingoraney, *International Extradition of Mexican Narcotics Traffickers: Prospects and Pitfalls for the New Millennium*, 30 *GA. J. INT'L. & COMP. L.* 331, 361 (2002).

16 Drug traffickers, of course, have devised remarkable methods to evade interdiction efforts at the border, including the construction of a giant slingshot. Drug Catapult Discovered on Mexico Border, *MSNBC.COM*, http://www.msnbc.msn.com/id/41282726/ns/world_news-americas/ (last updated Jan. 26, 2011).

17 The experiment of broad incarceration of narcotics users has been tried, and failed. In 1973, New York passed the Rockefeller Drug Laws, which harshly punished possessors of small amounts of narcotics, with the effect primarily of swelling the prison population. For an interesting analysis of this experiment, see Teresa A. Miller, *Lessons Learned, Lessons Lost: Immigration Enforcement's Failed Experiment with Penal Severity*, 38 *FORDHAM URB. L. J.* 217, 226-227 (2010).

18 Like the prosecution of narcotics users, treatment of users is properly a state function, not a federal concern. It is precisely the relentless concern with street-level effects such as addiction in individuals that has distracted federal agencies from the central concern of large-scale trafficking.

19 The lack of imagination in combating crime is made clear in the National Drug Control Strategy for 2010, which focuses on the non-law enforcement use of treatment and the same old interdiction tactics. OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY, available at <http://www.whitehousedrugpolicy.gov/publications/policy/ndcs10/ndcs2010.pdf>.

20 UNITED STATES SENTENCING COMMISSION, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 19 (May 2007), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf

cerating vast numbers of low-level offenders also has the benefit of making it seem that *something* is being done – arrests and convictions are easily quantifiable and make for a handy and readily achievable measure of success.²¹

B. *The failure of this tactic*

The problem, of course, is that the number of people you incarcerate does not necessarily mean that you are solving a problem – in this case, the importation of narcotics into American neighborhoods and the destruction of family networks, productivity, and communities by the use of those drugs. A count of bodies in prison is just not an effective way to gauge success (unless the end goal is really just to incarcerate as many people as possible) because it does not go to the end result we care about – the number of drugs on the streets. A better measure of that is economic. If the demand for a commodity stays constant, then a successful restriction of supply will result in prices going up. That simply hasn't happened. Even after two decades of massive spending on interdiction, most illegal drugs are more easily found, cheaper, and purer than they were in the early 1980s.²²

It shouldn't surprise us that relying so heavily on incarcerating low-level offenders has been ineffective at reducing the supply of illegal narcotics. Looking at the drug trade as a business, it becomes clear that what we are doing is trying to close the business by depriving it of low-paid employees. That tactic is certain to fail over time in an economy where low-skilled laborers are plentiful and cheap to employ. We are trying to shut them down by taking away something they can easily replace.

Redoubling the futility of this tactic is the bare fact that drug networks, like other businesses, have structured themselves to accommodate the rapid replacement of low-wage laborers. For example, decades ago heroin traffickers pioneered the use of juveniles as low-level workers in narcotics organizations.²³ Juveniles were favored because they were fearless, easily replaced, and often did little or no jail time if caught.²⁴

(noting that a majority of those sentenced for crack cocaine offenses (55.4%) were categorized as street-level dealers who were not wholesalers, managers, supervisors, importers, or manufacturers).

21 One easy measure of this is the content on the Drug Enforcement Administration's website, available at <http://www.justice.gov/dea/index.htm>.

22 Juan Gabriel Tokatlian, *Illicit Drugs and the Americas: Avoiding a Pax Mafiosa*, 31 FLETCHER F. OF WORLD AFF. 57, 58 (2007).

23 Nekima Levy-Pounds, *From the Frying Pan Into the Fire: How Poor Women of Color and Children are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 SANTA CLARA L. REV. 285, 305-306 (2007) (one result of this tactic, and the reaction of continuing to incarcerate low-wage workers in drug networks, has been that law enforcement, especially at the federal level, has disproportionately targeted minorities).

24 A particularly fascinating and repulsive description of this development is laid out in the autobiography of Butch Jones, the founder of a groundbreaking Detroit heroin network called

One myth must be discarded in understanding this analysis – the idea that street dealers of narcotics are something other than low-wage workers. In their acclaimed book *Freakonomics*, Steven D. Levitt and Stephen J. Dubner found that “a crack gang works pretty much like the standard capitalist enterprise: you have to be near the top of the pyramid to make a big wage.”²⁵ Not only that, but the pay for street-level crack dealers they studied was shockingly low. Despite holding the most dangerous job in America, Chicago’s crack dealers were making about \$3.30 an hour in the 1990s.²⁶

II. THE “BUSINESS-FAILURE” MODEL OF NARCOTICS CONTROL

This article does not endeavor to discern why the tactics used in the War on Drugs were chosen; it is sufficient to note that they have failed, and that this failure was relatively predictable given their focus on affecting low-wage labor at a time when low-wage labor was cheap and plentiful.

So, what would work?

Certainly, some of the other methods described at the start of the preceding section have some appeal. Destroying drugs at the source is potentially successful, and in some instances has been successful, at least temporarily.²⁷ Incapacitating (through death or incarceration) those traffickers with special skills and leadership roles also can be (and has been) effective. However, both of these tactics require significant cooperation with sometimes-unstable regimes, and carry unforeseeable political consequences.²⁸

The remaining tactic, then, is one that has been used, but only as a minor note in this symphony of efforts: the interdiction not of drugs coming into the country, but of money going out, traveling back to major sources within the United States and source countries around the world. This too-long undervalued strategy should become our primary weapon in restricting narcotics. If we choose this as our first approach rather than an afterthought, we can achieve greater results at less cost through the use of economic principles in lieu of mass incarceration.

The economic principles at work are basic. A business (or inter-connected group of businesses) has certain identifiable needs. First, it needs a product or service to make or sell. Second, it needs people to make, distribute, package, transport, and sell this product, along with managers to oversee these activities.

“Young Boys Incorporated.” MILTON “BUTCH” JONES WITH RAYMOND CANTY & JULIUS JUSTICE, *THE AUTOBIOGRAPHY OF BUTCH JONES/Y.B.I./YOUNG BOY’S INC.* (H. Publications 1996).

25 STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS* 103 (2005).

26 *Id.* at 104.

27 For example, cocaine eradication (part of a \$5 billion effort) in Columbia led to a shift in coca production to Peru. Simon Romero, *Coca Production Makes a Comeback in Peru*, N.Y. TIMES, June 13, 2010, available at <http://www.nytimes.com/2010/06/14/world/americas/14peru.html>.

28 *Id.*

Third, it needs capital to pay for raw materials, overhead, and to pay the labor.²⁹ Our focus in combating narcotics, as set out above, has been primarily on the first two of these. We arrest and incarcerate the labor, and we seize and destroy the drugs (usually as a by-product of arrests).

What about the third factor, capital? Certainly, any narcotics network needs capital, just like any other business. Also, like other businesses, the flow of that money is cyclical – that is, the money is generated after expenses are accrued, because drugs must be obtained at the source before they are sold on the street. Thus, money has to flow consistently from the street to the source for the business to get more product and continue to function. The constant need to not only generate capital but convey it upstream is a weakness for any business, and an opportunity for law enforcement when addressing a system of narcotics distribution.³⁰

There are three primary sources of capital for any business: cash flow (from selling the good or service), selling an equity stake in the business (for example, by selling stock), and credit (from banks or the sale of bonds). However, the capital needs of a narcotics business are highly unusual. Because the business is illegal, it does not have access to two of these primary sources of credit, at least in any conventional sense. A drug business can't sell stock to raise money – the illegal nature of the business makes easy sale of an equity stake difficult. It also cannot get credit from any kind of traditional source.

That means that the credit needs of a drug network are met from two sources: cash flow from the sale of drugs, and perhaps credit from suppliers themselves. This limited and narrow source of capital makes the network even more susceptible to disruption by law enforcement if our attack is on that narrow stream of cash rather than drugs or people. In sharp contrast to the broad source of labor, there are far fewer sources for large amounts of capital if you are a narcotics trafficker.

Pause here, and consider this intriguing dynamic – drug dealers must either maintain a high rate of cash flow back to the source or get credit from that source itself (to cover the next shipment). To break the business cycle, we need not seize *all* of the money in that stream, or even *most* of it. We only need to seize enough to reduce the cash flowing back to the source below the margin of profit. For example, if a Mexican methamphetamine exporter makes a (very generous) profit of 30% on what he exports to the United States, we don't need to capture even half of the money flowing back to Mexico; if we capture 31%, that business will fail. The Mexican exporter has no economic reason to continue sending drugs

29 Some would argue that a fourth need of any business is real property from which to conduct business, though the rise of the internet may be decaying this notion.

30 Even if a trafficking business receives significant credit to finance product shipments, it will fail if it cannot meet the terms of repayment set by the lender – something that will happen if proceeds of the business are seized by the government.

to the United States. He will either close up shop or find markets in other nations, with the end result that methamphetamine prices will rise in the United States (as demand falls).³¹

The seizure of money is much harder for traffickers to accommodate than the seizure of workers or drugs. If we sweep up the workers, as set out above, they are easily replaced in most roles. When drugs are seized, the trafficking business need not fail if it can raise the capital (through cash flow or credit) to get some more product into the pipeline. However, when it is the capital that fails, the game is over. Without capital, there is no product. Black-market bankruptcy is the happy result.

To its credit, the Department of Justice is making some movement towards a focus on the financial cycle that sustains the narcotics trade.³² Currently, a special unit is being formed to target money launderers. However, the new Money Laundering and Bank Integrity Unit seems to be primarily charged with targeting the institutions and individuals involved with financial transactions, not the money itself.³³ While the disruption such investigations would cause may well be significant, the dynamic is related to but distinct from the narrow focus on the cash stream that I advocate here.

A. *Methods to restrict cash flow to narcotics sources*

Cash flow in the narcotics business is generated entirely by the sale of narcotics to end users. The money then flows back up the supply chain to the source country. The closer the flow gets to the original source of narcotics, the greater the amount of money being conveyed, because the largest amount of narcotics will have flowed the other way through that point (and must be paid for either before or after street sales).

There are two ways that money can be transferred back to the major sources of supply. First, it can be kept in cash and transported in bulk. Second, it can be converted into non-cash instruments (checks or wire transfers, for example) and then sent along to the source. Both methods are vulnerable to subversion by law

31 Higher prices lead to less use – our belief in this truth is played out by the artificial inflation of cigarette prices as a matter of government policy to achieve the social goal of reducing smoking. Less use will adjust quantity demand, but the smaller network resulting from this process is now easier to detect and stamp out.

32 Lanny A. Breuer, Assistant Attorney General, Keynote Address at Money Laundering Enforcement Conference (Oct. 19, 2010), available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101019.html>.

33 *Id.* The primary targets of the new unit are financial institutions, hired-gun money launderers, and those who use cutting-edge techniques.

enforcement, as are the stores of funds accumulated prior to being sent back up the chain.³⁴

Transporting cash in large amounts is inherently problematic, which is why businesses hire armored car companies to perform this function. The danger of theft by those transporting the money, for one thing, is greater than that presented by mules stealing drugs – an illegal immigrant probably lacks the ability to single-handedly market a large amount of narcotics, but will have no problem living off a huge stash of cash once it is diverted. Imagine yourself driving a pick-up hauling a few million dollars in small bills on a southern interstate; wouldn't you be tempted to steal it, rational and risk-averse as you may be? At any rate, transporting bulk amounts of cash through international borders is dangerous – at best, your hoard will shrink through the payment of bribes. Despite all these challenges, bulk cash smuggling is occurring, and at shocking volumes – one report claims that in 2003 and 2004 alone, over \$17 billion in bulk cash was smuggled into Mexico from the United States.³⁵

Fortunately, we already have the tools to address bulk cash smuggling, should we choose to deploy them. Rather than having task forces and agents conduct street surveillance for the purpose of making arrests and seizing drugs, these same officers and techniques can be used to trace the money back up the system. Once it is traced to a point where there is a significant accumulation, the seizure and forfeiture can be made. This bottom-up investigation can involve the same tools we already use to arrest people: confidential informants, wiretaps and other forms of electronic surveillance, and the skilled eyes of federal agents. It is only the goal that will change, and that goal will be equally exciting – the seizure of vast sums of cash before it leaves the country.

The second option for paying off those in source countries is to convey the money back to the source through non-cash financial instruments like a check or a wire transfer. Can we hope to intercept those in transit or before they are conveyed?

Absolutely. In the wake of the 9/11 tragedy, law enforcement has significant new tools to use against such transactions. Many federal agents have gained experience at examining and tracing financial transactions.³⁶ In the fight against terrorism, these efforts have been successful enough that in February 2008, Director

34 Of course, this tactic is most effective against those drugs that are primarily sourced outside of the United States, such as cocaine, heroin, and ecstasy. It may be less effective (at least at the federal level) against drugs that are often sourced locally, such as marijuana.

35 This claim was part of the 2010 National Drug Threat Assessment. U.S. DEPARTMENT OF JUSTICE NATIONAL DRUG INTELLIGENCE CENTER, NATIONAL DRUG THREAT ASSESSMENT 47 (2010), available at <http://www.justice.gov/ndic/pubs38/38661/38661p.pdf>.

36 For a knowledgeable overview of this process, see Matthew Levitt and Michael Jacobson, *The Money Trail: Finding, Following, and Freezing Terrorist Finances*, WASHINGTON INSTITUTE FOR NEAR EAST POLICY 2008, available at <http://www.washingtoninstitute.org/pubPDFs/PolicyFocus89.pdf>.

of National Intelligence Michael McConnell asserted that in the previous year interdiction efforts had been so successful that “al-Qaeda has had difficulty in raising funds and sustaining themselves.”³⁷ Coming even close to this level of success in the field of narcotics would be a significant improvement over our achievements in the past forty years.

A primary tool in seizing funds will be the use of federal forfeiture law. Forfeitures have greatly increased in recent years, but I would suggest a new focus. Currently, the government largely forfeits property in conjunction with the cases they bring involving the seizure of drugs and the arrest of narcotics laborers. An investigation, for example, might target the importation of narcotics in bulk to a certain house in Illinois. Officers will wait until a shipment has arrived, seize the drugs, arrest those involved, and forfeit the house as a property used to further the drug trafficking. Under 21 U.S.C. § 881, such forfeitures can be brought either as part of a criminal action, or separately as a civil action.³⁸

A better bet for disrupting drug trafficking through forfeiture would be to focus narrowly on the money going out to sources of supply, or built up in an account to be sent as payment to a source.³⁹ The transition is simple – we would use the investigation not to identify people and drugs, but money, and then forfeit those funds right before they are sent off as payment, or while they are in transit. This can be done as a civil action under federal law,⁴⁰ and would be an extremely effective way to disrupt the cash flow that sustains the business we want to shut down. The key is to target cash flow rather than the accumulated profits of drug traffickers – that is, money in transit rather than the property that traffickers have accumulated for themselves. To succeed in this, forfeitures will have to become a driving force in an investigation, not a secondary concern.

B. *Implementing this change*

To shift our law enforcement efforts from a focus on labor to a focus on capital, we would have to reform two related structures: the funding for fighting illegal narcotics, and the laws that prohibit narcotics and direct the sentencing of those convicted of narcotics crimes.⁴¹

³⁷ *Id.* at 40.

³⁸ This process was approved by the Supreme Court in *United States v. Ursery*, 518 U.S. 267 (1996), where the civil forfeiture of a home used to manufacture marijuana was held to not be “punishment,” and thus does not constitute double jeopardy where a parallel criminal prosecution is undertaken.

³⁹ Under 21 U.S.C. § 881(a)(6), both proceeds of narcotics sales and money “intended to be used” for drug trafficking are subject to civil forfeiture. Controlled Substances Act, 21 U.S.C. § 881(a)(6) (2007).

⁴⁰ *Id.*

⁴¹ Forfeiture law, however, would not need to be changed – as described above, it already allows for the seizure and taking of the proceeds of narcotics sales.

1. Funding

Currently, the federal government funds literal armies of agents and officers who are tasked specifically with arresting those who work for narcotics trafficking organizations – in other words, those tasked with addressing the labor side of the drug business. This includes not only federal agents, but many federally-funded drug “task forces” which largely focus on local narcotics dealers.⁴²

Quite simply, the funding now lavished on the ultimately ineffectual arrest of narcotics laborers and managers should be shifted to the interception and seizure of money flowing from street sales to narcotics sources. While (as set out about above) the necessary surveillance can use many of the tools already used, particularly in relation to bulk cash smuggling, the toolkit will have to be broadened to address the full range of financial transactions. There will be less chasing down of suspects, and much more financial surveillance. Re-training of experienced agents and the hiring of new agents with an appropriate background will become essential.⁴³

Two by-products of this shift (aside from its overall effectiveness) should be especially attractive to policy-makers. First, there is a tremendous financial benefit to seizing money instead of people. When we arrest and incarcerate a street dealer who is easily replaced, we as a society take on the financial burden of feeding, housing, and providing health care to that individual. If we instead seize the money that street dealer produces we not only deprive him of the ability to traffic narcotics (when the business fails), but the government gets to keep the money – meaning that this law enforcement effort has a chance of being self-funding so long as such seizures are made.

Second, the seizure of money provides an easily quantifiable measure for short-term success. One of the attractions of the current system is that it provides for flashy, quantitative headlines – “23 indicted in drug sting,” or “100 pounds of marijuana seized in bust.” Of course, those 23 indicted people filled slots in the narcotics business that quickly will be filled again, and the 100 pounds of marijuana is relatively insignificant, but we do like numerical markers to show that something is being done.⁴⁴ By shifting to a focus on capital, we do not give this up; we simply adjust the focus of the press release to highlight the dollar amount

42 For example, Utah’s “DEA Metro Narcotics Task Force” addresses “individuals/organizations” involved in local narcotics operations. Task Force Involvement, UT DEP’T OF PUBLIC SAFETY, available at <http://publicsafety.utah.gov/investigations/TaskIndex.html>.

43 Notably, the skills needed to detect drug trafficking overlap with the skills needed to track money – it will still be essential that narcotics activity be detected because that will often be the starting point for tracing funds.

44 William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2025 (2008). William Stuntz astutely observed that this process of churning new, easily replaceable defendants creates an image of success: “Politically speaking, the drug war is self-sustaining as long as it continues to create casualties. Tragically, those are never in short supply.”

of seizures and forfeitures of accounts, measures which are more likely to correlate to fewer drugs on the streets.

2. Narcotics laws and sentencing guidelines

There is a fundamental, flawed, and ancient mechanism that pushes law enforcement towards incarcerating low-wage narcotics laborers: we continue to use the weight of drugs possessed as a proxy for culpability. The big lie in this standard is the claim that anyone with lots of drugs must be important, because too often the people we catch possessing large amounts of drugs are the mules who transport them and the street-level dealers who sell them directly to users, and these are the least culpable actors in the entire system. The true kingpins – the people who direct the others and are the importers and employers – don't often handle drugs. They handle money. This is a lesson we should have learned eighty-five years ago in the pursuit of Al Capone, who was making decisions, creating business alliances, and accumulating profits, not driving a truck full of whiskey and beer.⁴⁵

The silliness of this false proxy is revealed in the language of the statutes themselves. For example, in 1986 Congress passed the law now codified at 21 U.S.C. § 841(a), and labeled those holding half a kilogram of cocaine as “serious” traffickers.⁴⁶ The idea that a serious trafficker is someone holding such a small amount reflects the small ambitions of the project as a whole.

I have previously described the specific changes in the federal statutes and sentencing guidelines that could take the focus off of weight as a proxy, and the meaningless imprisonments that result.⁴⁷ Briefly, statutes and sentencing guidelines could be revised to use weight only to establish a drug network as a whole, and then order sentences within that network according to real culpability which would be measured by factors that would include the exercise of decision making authority, the number of people supervised, and (perhaps most importantly) their numerical share of the fruits of the crime. As with any business, those who are most valuable and difficult to replace tend to make the most money, and follow-

45 Oddly, the federal criminal law scheme has changed little since Capone's time in terms of using pretextual charges (such as tax fraud) to convict major criminals. Prosecutors still choose from a large number of charging possibilities, make their decisions with unclear responsibility, and face few if any external performance measures. Daniel C. Richman and William Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 623 (2005).

46 Previous to recent reforms, the same law labeled someone possessing just five grams of crack cocaine as a “serious” trafficker. United States Sentencing Commission, “Cocaine and Federal Sentencing Policy,” p. 6 (Report to Congress issued May 2002), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf.

47 Mark Osler, *More Than Numbers: A Proposal for Rational Drug Sentences*, 19 FED. SENT'G REP. 326 (2007). That article did not describe the systemic change in focus suggested here, but the restructuring of statute set out there is consistent with that focus.

ing the money has the added benefit of taking law enforcement to them rather than the mules and street dealers, because money collects in their hands over time.

Beyond altering the core drug statutes, new statutes could better enable law enforcement to focus on those within a drug network who have financial expertise – including the ability to mask payments to a source. Arrest and incapacitation of these specialists will create a new opportunity as less skilled hands take over these financial networks, making it easier to seize money that is then less expertly conveyed. Money laundering statutes, including 18 U.S.C. §§ 1956-1957, could be simplified to more readily allow prosecution of those who clearly are directing drug proceeds back to sources of supply.

In reforming these laws to address a new imperative, we would be no less relentless in our goal of destroying the drug trade, but we would simply be relentless in the pursuit of money rather than people. In the end, making the business fail will solve the problem of people selling drugs, as those jobs will no longer be there. It is better for them and better for us to have those former drug traffickers seeking other (legitimate) employment because their drug network went out of business, rather than sitting in prisons built and maintained with our tax money.

III. THIS IS THE MOMENT TO SHIFT TO A FOCUS ON CAPITAL RATHER THAN LABOR IN COMBATING NARCOTICS

A. A summary of the benefits of capital interdiction

In the preceding sections, I have catalogued some of the best reasons to seize money rather than people if we want to actually restrict the flow of illegal narcotics into and within our country.

First, a focus on capital is more likely to be successful at ultimately reducing drug use and trafficking. The focus on labor has now been proven unsuccessful – our prisons are full, yet the supply of narcotics is undiminished. This isn't surprising, given that it is very easy for drug trafficking networks to replace unskilled labor in an economy that provides plenty of unskilled labor. What is constricted for drug dealers is capital, and if we can disrupt cash flow successfully, we can close those businesses.

Second, there are significant benefits that come with this more effective approach. It will be less expensive in two ways. First, it will likely require fewer people to seize money than it does to arrest and imprison people, especially if this strategy is effective and the problem itself is lessened. Second, fewer people will be imprisoned, providing further cost reductions.⁴⁸

⁴⁸ Two intriguing and recent books have attacked the unthinking assumption that more incarceration necessarily results in less crime, and is necessary to the reduction of crime. See MARK KLEIMAN, *WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT* (2009); DAVID

Third, this approach is consistent with three core American values: the love of freedom, a belief in limited government, and faith in the power of markets.

There is something discomfiting about mass incarceration in a nation founded on freedoms. Certainly, the framers did not envision any such policy, as they lived in an era with few prisons.⁴⁹ At the very least, if we are going to imprison broad swaths of certain communities, such imprisonment should be justified by movement toward an essential government imperative; we know that mass incarceration has not achieved anything in the sense of lessening drug use.⁵⁰ Compounding this discomfort is the knowledge that our project of mass incarceration has been focused on certain minority communities,⁵¹ the result of which offends not only our preference for freedom, but also the notion that opportunity and punishment should not be meted out in accordance with race.

The value of federalism has also been undermined by our current approach to narcotics. Current laws and funding schemes drive federal agents en masse into what should be state investigations, a trend which has ballooned the federal budget for narcotics control.⁵² For example, federal laws and guidelines⁵³ which exponentially punish those holding crack rather than powder cocaine have been a strong incentive for federal agents to hit the street to sweep up the least culpable individuals, since cocaine is generally not converted into crack form until shortly before it is sold at retail.⁵⁴

In Federalist 17, Alexander Hamilton wrote that the ordinary administration of civil and criminal law is properly the province of state governments, and James Madison concurred in Federalist 45.⁵⁵ It is time to return to those core values. Were federal agents to re-focus their efforts on interdicting capital, it would both pull them away from street crimes and lessen the overall federal expenditures for narcotics control.⁵⁶

KENNEDY, DETERRENCE AND CRIME PREVENTION: RECONSIDERING THE PROSPECT OF SANCTION (2009).

49 Matthew W. Meskell, Note, *The History of Prisons in the United States From 1777 to 1877*, 51 STAN. L. REV. 839, 841-846 (1999) (the development of prisons in America occurred after the Revolution).

50 OFFICE OF NATIONAL DRUG CONTROL POLICY, MONITORING THE FUTURE STUDY (2010), available at http://www.whitehousedrugpolicy.gov/publications/pdf/MTF_fs.pdf.

51 Levy-Pounds, *supra* note 23, at 285.

52 Current federal spending for narcotics control hovers at about \$15 billion. OFFICE OF NATIONAL DRUG CONTROL POLICY, *supra* note 50, at 111.

53 18 U.S.C. § 841(a) and United States Sentencing Guideline 2D1.1.

54 UNITED STATES SENTENCING COMMISSION, *supra* note 20.

55 See Pat Nolan & Julie Stewart, Op-Ed., *Don't Make a Federal Case Out of It*, WASH. TIMES, Mar. 17, 2011, available at <http://www.washingtontimes.com/news/2011/mar/17/recently-the-republican-controlled-house-of-repres/>.

56 William Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 844 (2006) (arguing that a second federalism concern exists – that Congress “devotes far too much legisla-

Finally, this is a nation that has consistently succeeded when we pay attention to markets and business. If you believe that markets work, that goes two ways. It means that markets work to provide employment, to grow the economy, and to produce wealth. On the other hand, it also means that government intervention can disrupt markets and destroy value. We see this (properly) as a negative, at least when ham-handed government intervention harms free markets that we desire. However, here there is an opportunity to use market forces to destroy a market we *don't* want, if we choose to see it through the lens of business analysis rather than retribution against individuals.

B. 2011 as a time of opportunity

With the re-capture of many legislatures, including the U.S. House of Representatives, by Republicans, many fear that the reform of narcotics laws is less likely than ever. This view is short-sighted and unfair. In truth, the current regime was largely built up by Democrats,⁵⁷ and (as outlined above) runs contrary to the core values of many conservatives.

Moreover, economic forces at all levels of government augur in favor of cheaper, more efficient solutions. Deficits threaten nearly every jurisdiction, and some are being forced to downsize whether they want to or not.⁵⁸ We simply can no longer afford the big-government answers of more agents, more prisons, and more spending without results.

Some states are already acting to reduce prison populations by reducing drug sentences. States such as Texas and Kentucky have already done so, and there are pending bills to do so in Delaware, Florida, Indiana, Massachusetts, and Pennsylvania.⁵⁹ While many of these laws promote treatment,⁶⁰ they do nothing to move towards proactively restricting the drug trade itself.

Finally, it seems that the current administration is open to the idea of using market forces to create societal change. In the area of immigration, the Obama administration has engaged in a significant change in tactics – rather than broad sweeps of employers in which undocumented workers are arrested, we are now seeing a trend toward broad audits of employers which force those employers to

tive energy to making law for the occasional federal prosecution, instead of regulating – and appropriating funds for – the local officials who do the real work of catching and punishing criminals”).

57 The current federal policies have remained relatively consistent through both Democratic and Republican administrations since the passage of major (and draconian) reforms in the mid-1980s.

58 Michael Rothfeld & Patrick McGreevy, *Opposition to State Budget Deal Mounts*, L.A. TIMES, July 22, 2009, available at <http://www.latimes.com/news/local/la-me-california-budget22-2009jul22,0,3124122,print.story> (California acted early in cutting budgets for criminal justice, with the attendant controversy).

59 Nathan Koppel & Gary Fields, *States Rethink Drug Laws*, WALL ST. J., Mar. 5, 2011, available at <http://online.wsj.com/article/SB10001424052748704728004576176514208186374.html?KEYWORDS=states+rethink+drug+laws>.

60 *Id.*

fire undocumented workers. The theory, of course, is that these workers will leave the country voluntarily as the prospect of employment dims.⁶¹

Shifting from a fruitless, expensive attack on drug traffickers' access to cheap labor to depriving them of capital can achieve several objectives at once. It can save money, fund further efforts directly, and finally bring our drug policy into line with our deeper principles. Most importantly, however, is that it just might work far better than what we are doing now. In the end, a child whose mother is not addicted to crack is a victory; a teenager not lost to heroin is a victory, and a neighborhood not threatened by drug dealers is a victory. The time for braggadocio and overstuffed prisons is gone; now it is time for common sense, economic realities, and some victories.

61 Julia Preston, *Illegal Workers Swept from Jobs in "Silent Raids"*, N.Y. TIMES, July 9, 2010, available at <http://www.nytimes.com/2010/07/10/us/10enforce.html?sq=employmentaudits&st=cse&scp=1&pagewanted=print>.