

9-30-2011

Breaking Free From Insanity: A White-Collar Crime Approach To Drug War Policy

Brian Harrison

Follow this and additional works at: <https://digitalcommons.law.udc.edu/udclr>



Part of the [Criminal Law Commons](#), [Food and Drug Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Brian Harrison, *Breaking Free From Insanity: A White-Collar Crime Approach To Drug War Policy*, 15 U.D.C. L. Rev. 129 (2011).

Available at: <https://digitalcommons.law.udc.edu/udclr/vol15/iss1/8>

This Article is brought to you for free and open access by Digital Commons @ UDC Law. It has been accepted for inclusion in University of the District of Columbia Law Review by an authorized editor of Digital Commons @ UDC Law.

BREAKING FREE FROM INSANITY: A WHITE-COLLAR CRIME APPROACH TO DRUG WAR POLICY

By Brian Harrison*

I. INTRODUCTION

Preventing crime should be a top priority for law enforcement. A victim of crime would readily agree that never having been a victim at all is preferable to suffering at the hands of a criminal. Even if the criminal is later caught and punished, a victim remains a victim. Despite this simple truth, current drug policy does not place a top priority on preventing the laundering of drug-tainted money. As a result, the United States remains a victim in the War on Drugs.¹ As will be discussed, the crime of money laundering can be prevented in many instances by prosecuting banks that fail to keep drug-tainted money out of the financial system.

The highest levels of law enforcement agree that illegal trafficking of controlled substances – drug dealing – is big business.² Our country is a victim every time a drug trafficking organization successfully launders money for its business.³ Yet, tracing laundered money *after* it has made its way into the financial system should not be the focus of anti-money laundering efforts because it focuses on detection of a crime *after* it has occurred; our country remains a victim in this

* J.D., Baylor University School of Law. The author would like to thank Professor Mark Osler for encouraging thoughtful disagreement in his teaching and mentoring of students. This article is a companion article to Professor Osler's *What Would It Look Like If We Cared About Narcotics Trafficking? An Argument to Attack Narcotics Capital Rather Than Labor*, 15 U.D.C. L. Rev. (forthcoming Jan. 2012).

1 U.S. DRUG ENFORCEMENT ADMINISTRATION: MONEY LAUNDERING, <http://www.justice.gov/dea/programs/money.htm> (last visited October 2, 2011) (“DEA’s financial enforcement strategy is “mission driven” in that we are focused on the flow of money back to the international sources of supply. . . .”). Chapter 5 of the 2011 National Drug Control Strategy details financial investigative efforts to pursue illicit funds once in the financial system, but mentions only in passing efforts to “deny criminals the ability to move money. . . .” 2011 National Drug Control Strategy, Executive Office of the President of the United States (2011), <http://www.whitehouse.gov/sites/default/files/ondcp/ndcs2011.pdf>.

2 “Whether it takes the form of drug trafficking, fraud, or corruption, crime is – very bluntly – a business.” Lanny Breuer, Assistant Attorney General, Criminal Division, Department of Justice, Key Note Address at the Money Laundering Enforcement Conference (Oct. 19, 2010), *available at* <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101019.html>.

3 The Federal Bureau of Investigation defines money laundering as “the process by which criminals conceal or disguise the proceeds of their crimes or convert those proceeds into goods and services. It allows criminals to infuse their illegal money into the stream of commerce, thus corrupting financial institutions and the money supply, thereby giving criminal’s unwarranted economic power.” 2009 Financial Crimes Report, Federal Bureau of Investigations, Fiscal Year 2009: Financial Crimes (October 1, 2008-September 30, 2009), <http://www.fbi.gov/stats-services/publications/financial-crimes-report-2009/financial-crimes-report-2009#asset>.

scenario. Anti-money laundering policy should focus on prevention – stopping money from entering into the financial system. Focusing policy on the prevention of money laundering instead of after-the-fact detection is consistent with well-founded principles of white-collar crime that should be applied to drug trafficking organizations as big businesses.⁴ Only when this policy shift occurs will the United States be effective in combating drug-trafficking organizations.

A radical change of perspective is required: the United States must be placed in the role of a business. Then, drug trafficking organizations must be treated like employees engaged in crimes against their employer, in this case the United States.⁵ The United States, as the employer, would quite naturally want to primarily focus on preventing the drug-trafficking organizations, as the employee, from committing any crime in the workplace. Good business practices dictate that prevention of internal crime must be a high priority.⁶ Every chief executive officer (“CEO”) knows that embezzlement is a reality of running a business.⁷ Imagine the absurdity of a CEO standing up at a meeting and announcing to managers that they need not worry about embezzlement by employees because it will be discovered at some point in the future. The reality is that the CEO tells his managers to create policies that discourage and strive to prevent embezzlement, illustrating that those who violate this preventative policy will be severely punished.⁸

In order to truly combat drug trafficking organizations in our country, policy must do more than just call drug dealing a business. Instead, white-collar crime principles must be applied to the drug trafficking organizations as businesses. Analyze the problem as if it were white-collar crime, with the United States in the role of a business and drug trafficking organizations as the employees of that business. This approach, while unorthodox, demonstrates why current anti-money laundering policy primarily focused on detection is flawed drug policy.

This article argues that prioritizing prevention ahead of detection would deter the drug business more effectively than continued or increased efforts focused on tracing and seizing laundered money. Continuing again and again with efforts to

4 ASSOCIATION OF CERTIFIED FRAUD EXAMINER’S, FRAUD EXAMINERS MANUAL – 2010 U.S. EDITION, 4.719, (2010) (“Most experts agree that it is much easier to prevent than detect fraud.”).

5 This is, of course, is not an argument for legalization of drugs or an effort to create a business relationship between the United States and drug trafficking organizations. The only intent is to examine the problem from a fresh perspective.

6 Caron Beesley, *6 Tips for Preventing Employee Theft and Fraud in the Workplace*, SBA COMMUNITY, SMALL BUSINESS MATTERS BLOG (Dec. 23, 2010, 4:00 AM), <http://community.sba.gov/community/blogs/community-blogs/small-business-matters/6-tips-preventing-employee-theft-and-fraud-workplace> (The Small Business Administration notes that “occupational fraud now results in the loss of 5% of an organization’s annual revenue.” Businesses are encouraged to implement measures to prevent internal theft and fraud in the workplace.).

7 *Id.*

8 ASSOCIATION OF CERTIFIED FRAUD EXAMINER’S, FRAUD EXAMINERS MANUAL – 2010 U.S. EDITION, 4.516, (2010) (“As a strategy to control crime, deterrence is designed to detect law violations, determine who is responsible, and penalize offenders in order to deter future violations.”).

detect money laundering will produce the same result, and our country will continue to be victimized by drug trafficking organizations. The second part of this article explains the white-collar crime principle of prioritizing prevention before detection. The third part of the article discusses shifting the focus of anti-money laundering policy to prevention by aggressively prosecuting banks that violate current laws designed to prevent money laundering.

II. PREVENTION BEFORE DETECTION

A basic principle of white-collar crime is that prevention of internal crime is more effective than detection.⁹ The earlier example of the CEO, while simplistic, demonstrates why this not only makes sense, but is true. Preventing crime within a business is accomplished through internal policies that discourage employees from engaging in the activity.¹⁰ Where prevention fails, internal policy shifts focus to detect those employees who defy the policy designed to prevent internal crime.¹¹ The United States should align priorities with this basic principle of white-collar crime so that prevention of money laundering is at the forefront of efforts to disrupt drug businesses.

Successful internal policies implement what are commonly referred to as internal controls.¹² Internal controls can be thought of as checks-and-balances within a business.¹³ These checks-and-balances properly place emphasis on prevention rather than detection in a successful business.

As an example, imagine a fruit stand that receives fresh fruit each morning from a supplier. At the end of each business day, any fruit that has spoiled is discarded at a loss to the owner. The owner only has one employee who is responsible for receiving the fresh fruit each morning and also responsible for discarding spoiled fruit at the end of each day. It would not take long for the

9 ASSOCIATION OF CERTIFIED FRAUD EXAMINER'S, FRAUD EXAMINERS MANUAL – 2010 U.S. EDITION, 4.719, (2010) (“Increasing the perception of detection might be the most effective fraud prevention method.”).

10 ASSOCIATION OF CERTIFIED FRAUD EXAMINER'S, FRAUD EXAMINERS MANUAL – 2010 U.S. EDITION, 4.701, (2010) (“Fraud prevention requires a system of rules, which, in their aggregate, minimize the likelihood of fraud occurring while maximizing the possibility of detecting any fraudulent activity that may transpire. The potential of being caught most often persuades likely perpetrators not to commit the fraud. Because of this principle, the existence of a thorough control system is essential to fraud prevention.”).

11 *Id.*

12 Internal controls are defined as “[s]ystematic measures (such as reviews, checks and balances, methods and procedures) instituted by an organization to (1) conduct its business in an orderly and efficient manner, (2) safeguard its assets and resources, (3) deter and detect errors, fraud, and theft, (4) ensure accuracy and completeness of its accounting data, (5) produce reliable and timely financial and management information, and (6) ensure adherence to its policies and plans.” Definition of “internal controls” as defined by BusinessDictionary.com, <http://www.businessdictionary.com/definition/internal-control.html> (last visited Dec. 3, 2011).

13 See *supra* note 12.

unscrupulous employee to untruthfully report a large amount of spoiled fruit each day so that he could pocket profits from fresh fruit sold during the day.

Firing this employee, without taking any other steps, would be a mistake. The owner who fired and replaced the employee would be taking a gamble that the next employee's behavior would be different. This approach is flawed because it creates the potential for a continuing cycle of criminal behavior: employee steals, employer fires employee, new employee is hired, new employee steals, employer fires employee, and so on. Hoping for a different result would be insane.¹⁴

Instead, the owner could fire the employee and put in place internal controls to prevent embezzlement by the next employee. A simple internal control might be that the owner takes over the duty of receiving the fruit each morning and discarding the spoiled fruit at the end of the day. Combine this step with unannounced cash counts and inventory checks and the fruit stand owner has avoided crime by creating sound internal controls. Of course, the employee may try to steal, but is more likely to be discouraged from doing so because the threat of detection is much higher.¹⁵ The cycle of insanity is broken and the employer can now rationally expect a different result.

If prevention is the preferred method of operating a business, why then does the United States focus on detection? The answer may be one of measurable returns. Consider the effect of a prevention policy. Internal management controls that prevent crime through deterrence are the hallmark of a good crime-prevention program.¹⁶ However difficult it may be to convince a business that the prevention of a never-attempted crime is better than the obvious results of detecting and prosecuting a crime, convincing government is immeasurably more difficult. Quite simply, in law enforcement it is often easier and more expedient to quantify success under a detection policy than a prevention policy.¹⁷ A preventative

14 The author acknowledges that Bernd Debusmann drew the analogy between the definition of insanity (often attributed to Einstein) and the War on Drugs in *Einstein, insanity, and the war on drugs*. This article focuses narrowly on money laundering policy as it relates to the war on drugs, an aspect not considered by Mr. Debusmann in his article discussing the legalization of drugs. Bernd Debusmann, *Einstein, insanity and the war on drugs*, REUTERS (Dec. 3, 2008, 10:02 EST), <http://blogs.reuters.com/great-debate/2008/12/03/einstein-insanity-and-the-war-on-drugs>.

15 ASSOCIATION OF CERTIFIED FRAUD EXAMINER'S, FRAUD EXAMINERS MANUAL – 2010 U.S. EDITION, 4.719, (2010) ("Controls, for example, do little good in forestalling theft and fraud, if those at risk do not know of the presence of possible detection.").

16 ASSOCIATION OF CERTIFIED FRAUD EXAMINER'S, FRAUD EXAMINERS MANUAL – 2010 U.S. EDITION, 4.701, (2010) ("Fraud prevention requires a system of rules, which, in their aggregate, minimize the likelihood of fraud occurring while maximizing the possibility of detecting any fraudulent activity that may transpire. The potential of being caught most often persuades likely perpetrators not to commit the fraud. Because of this principle, the existence of a thorough control system is essential to fraud prevention.").

17 For example, in August 2011, at least 78 out of 129 press releases documented the indictment, guilty plea, conviction, sentencing or extradition of criminal defendants. The remaining press

policy can only be proven successful through long-term analysis that demonstrates a reduction in crime.¹⁸

A preventative policy would rightly focus on the financial system, placing a secondary focus on the detection of money laundering. Money laundering is central to drug operations and the financial system is central to money laundering. To be successful, a drug operation must not only receive money for drugs, but then reinvest that money into the business. Whether by paying street-level dealers or buying more drugs for resale, the money must be readily accessible, as with any business. This often means that the money must be introduced into the financial system. Introducing the money into the financial system leaves a trail that federal agents can then follow, allowing law enforcement to detect and build a criminal case against those involved with the transaction.¹⁹ In other words, a prevention policy stops the money from entering the financial system while a detection policy is only triggered once the money is in the system.

By focusing on the money after it is in the system, the United States has established a policy analogous to the firing and replacing of the employee.²⁰ Similar to the example of the fruit vendor, the result of federal law enforcement efforts is that another money launderer replaces the first that was successfully removed from the cycle by prosecution. The cycle of continued efforts to detect the next money launderer simply begins anew.

Federal law enforcement appropriately takes credit for successful efforts at detecting money laundering when executing current drug policy.²¹ Press releases

releases related to civil, not criminal matters. Press Releases, United States Department of Justice, Justice News (Prior to Jan. 20, 2009) available at <http://www.justice.gov/opa/pr/2011/August/>.

18 Anthony A. Braga, U.S. Department of Justice, Office of Community Oriented Policing Services, *Crime Prevention Research Review: Police Enforcement strategies to Prevent Crime in Hot Spot Areas* (2008), available at <http://www.cops.usdoj.gov/files/RIC/Publications/e040825133-web.pdf> (demonstrating the efforts undertaken by the Department of Justice to study and disseminate information on both successful and unsuccessful methods of crime prevention at a community level).

19 The Financial Crimes Enforcement Network ("FinCEN") stores information gathered from transactions between financial institutions and customers. Broadly categorized as Cash Transaction Reports ("CTR's") or Suspicious Activity Reports ("SAR's"), these reports are available for federal law enforcement review. U.S. Department of the Treasury, Financial Crimes Enforcement Network, *Bank Secrecy Act Forms and Filing Requirements*, http://www.fincen.gov/forms/bsa_forms/ (last visited Oct. 2, 2011).

20 This article does not argue that the United States turns a blind-eye to money-laundering regulation of the financial system. Rather, the argument presented is that priorities must shift through increased inspection and prosecution of the financial system.

21 The Internal Review Service Criminal Investigation displays three years of statistics for criminal investigations related to money laundering. Included are the number of investigations initiated, prosecutions recommended, resulting indictments/informations, number of offenders sentenced, and the incarceration rate of sentenced offenders. IRS, *Statistical Data- Money Laundering & Bank Secrecy Act*, <http://www.irs.gov/compliance/enforcement/article/0,,id=113002,00.html> (last visited Oct. 2, 2011).

announce the arrest of offenders and report the amount of money seized.²² Federal prosecutors, likewise, take credit for the subsequent prosecution.²³ It is easy to see how a drug policy focused on prevention would take away opportunities to immediately report successes that are quantifiable under a detection policy. The drug war, however, continues without significant change.²⁴ To effect change, prevention should take center stage in drug policy with a focused requirement on the financial system instead of the individual money launderer.

PART III. PREVENTING DRUG OPERATIONS BY PROSECUTING BANKS

Aggressively prosecuting banks that facilitate money laundering will encourage banks to turn away the business of would-be money launderers. Just as money laundering is central to drug trafficking organizations, the banks that make up the financial system are central to money laundering efforts. Requiring banks to turn away money-laundering business will prevent drug-tainted cash from entering into the financial system. Thus, prevention of money laundering is accomplished by prosecuting the banks, not the money launderers.

Banks with a presence in the United States are required to create anti-money laundering compliance programs.²⁵ The requirements, found in the Bank Secrecy Act, are complex, burdensome, and create expenses for the banks.²⁶ Consequently, some banks do not comply with some aspects of the Bank Secrecy Act²⁷ while others completely fail to establish a program at all.²⁸ Banks with non-compliant programs may become passive participants in money laundering by unwittingly partnering with drug dealers to move drug money. Banks may, of course,

22 National Press Releases, Federal Bureau of Investigations (2011), available at <http://www.fbi.gov/news/pressrel> (Follow Project Delirium Results in Nearly 2,000 Arrests During 20-Month Operation, Seizures of More Than 12 Tons of Drugs and \$62 Million in U.S. Currency hyperlink).

23 See *supra* note 18.

24 Although Project Delirium serves as a model for aggressive detection of drug trafficking organizations, such efforts have proven to win battles, not wars. William Rempell highlights perhaps the best example of this in his opposite the editorial page article discussing the destruction of the Cali cartel and the subsequent power vacuum filled by the Mexican cartels. William C. Rempell, *Drug War: One Cartel Falls, Another Rises*, L.A. TIMES, June 19, 2011, available at <http://articles.latimes.com/2011/jun/19/> (Follow drug war: One cartel falls, another rises hyperlink).

25 See generally 31 U.S.C. §§ 5311-5330 (2008); 31 C.F.R. Chapter X (2011).

26 Eric J. Gouvin, *Bringing out the Big Guns: The USA Patriot Act, Money Laundering, and the War on Terrorism*, 55 BAYLOR L. REV. 955 (2003).

27 Press Release, Department of Justice, North Carolina Bank Agrees to Pay \$400,000 in Restitution to Victims of Investment Fraud Scheme It Failed to Detect and Report (April 27, 2011), available at <http://www.justice.gov/opa/pr/2011/April/11-crm-533.html>.

28 Press Release, United States Attorney's Office, Southern District of Florida, Wachovia Enters Into Deferred Prosecution Agreement (March 17, 2010) (explaining that prosecution resulted from willfully failing to maintain an anti-money laundering program from May 2003 through June 2008), available at <http://www.justice.gov/usao/fls/PressReleases/100317-02.html>.

become active participants when they know that money is being laundered through the bank, but allow it to continue because it is profitable to the bank.²⁹

The first category, passive participant banks, should be aggressively prosecuted. The prosecution of the passive participant should be the focal point in the prevention of money laundering. Targeting the passive participant banks is critical because it will deter active participant banks.

The basic principle applies: prevention is better than detection. Detection – finding the active participant bank – is a difficult game. The active participant bank may have a program that appears fully compliant and any conspiracy, secret in nature, is more difficult to investigate.³⁰ In contrast, the passive participant bank is more likely discovered through inspections of its compliance program.³¹

The primary focus on passive participant banks may seem unfair considering that active participant banks are engaged in what is arguably the more serious offense – the conspiracy to launder money. However it is important to remember that the focus must be the prevention of money laundering, not prosecution of money laundering. Aggressively prosecuting the passive participant bank, while seemingly unfair, punishes the most easily discovered violations and will serve as a general deterrent for active participant banks. It may be presumed that all banks are aware of anti-money laundering laws. The passive participant bank, while not actively participating in a money laundering conspiracy, is willfully violating laws designed to detect money laundering. What initially seems unfair must be reconsidered when shifting the focus from detection to prevention.

Prosecution of passive participant banks appears to be a policy of detecting violations of the law at first glance. Consider, however, the effect of such prosecutions. A key requirement of a bank's anti-money laundering compliance program is to "know your customer." A bank that moves money for law-abiding citizens and for drug dealers does not know *all* of its customers. By aggressively prosecuting these violations, a bank will be encouraged to identify money launderers through due diligence.³² The obvious effect is that the drug money will not easily

29 The terms "active participant bank" and "passive participant bank" are used throughout this article to distinguish between those banks that enter into criminal conspiracies or do not establish any compliance program at all (active) and those banks that establish ineffective programs that are then exploited by money launderers (passive).

30 "[T]he basic conspiracy principle has some place in modern criminal law, because to unite, back of a criminal purpose, the strength, opportunities and resources of many is obviously more dangerous and difficult to police than the efforts of a lone wrongdoer." *Krulwitch v. United States*, 336 U.S. 440, 335-36 (1949) (Jackson, J. concurring).

31 U.S. Department of the Treasury, Financial Crimes Enforcement Network, *What We Do*, http://www.fincen.gov/about_fincen/wwd/ (last visited Oct. 2, 2011) (explaining that in addition to collecting information on financial transactions, FinCEN is charged with regulating compliance with the Bank Secrecy Act).

32 "Know your customer" laws are a more recent compliment to the Bank Secrecy Act. As part of the 2001 Patriot Act, banks now face criminal sanctions for lack of due diligence. The government has stepped up enforcement under the BSA, increasingly prosecuting banks for violations. Thomas P.

enter into the financial system. Without the ability to move proceeds through the financial system, a drug operation is deprived of a central method of money laundering.³³

Prevention of money laundering will occur when a bank takes the evaluation of risk versus reward seriously. The risk, or punishment in the form of fines, must be greater than the reward of avoiding the burden and expense of implementing complex compliance programs. Offending banks must be dealt a measured punishment so that other banks will be unwilling to take the risk of non-compliance. The bank's financial interest must not align with that of drug dealers.

Return to the example of the fruit stand owner, and consider internal management controls. Imagine the fruit stand owner hired a manager to supervise the employee, and the manager learns of the employee's theft. If the employee offers to split the proceeds of his theft with the manager, then the internal management control of hiring the manager to prevent theft is thwarted. But if the manager knows that he risks punishment much more severe than the reward of splitting the stolen cash, the manager will rebuff the offer by the employee and may even report the employee to his employer. Preventing the theft is the primary goal of the fruit stand owner, not detecting thieving employees.

Here, the banks are the managers of the financial system. The United States, as the business owner, must make clear to the banks that the risk greatly outweighs the reward. The decision should be an easy one for the banks. Bank compliance should be encouraged through punishment of complacent banks identified through inspections, not through directionless searches for the conspirator bank that chooses to split the cash with money launderers. Of course, the conspirator bank that is discovered should suffer more severely than complacent banks.

IV. CONCLUSION

Preventing money laundering would be more effective than the currently attempted strategy of detection. Drug trafficking operations are businesses focused on profit. Taking steps to prevent, rather than detect money laundering efforts will strike a blow at the profit motive of the drug business. It is time to treat drug

Vartanian & Dominic A. Labitzky, *Money Laundering and Criminal Prosecution of Banks: A Focus of Bank Enforcement in Recent Years*, ABA BUSINESS LAW SECTION, CHICAGO, IL, (Nov. 2007), available at <http://apps.americanbar.org/buslaw/committees/CL130000pub/newsletter/200711/vartanian.pdf>.

³³ The U.S. Money Laundering Threat Assessment, December 2005, identifies numerous methods of money laundering that require the introduction of money into the financial system or at least require contact with a financial institution that have at least some requirement to report under the BSA. One notable exception is bulk cash smuggling. U.S. Money Laundering Threat Assessment, Money Laundering Threat Assessment Working Group, (Dec. 2005), <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/mlta.pdf> (last visited Dec. 3, 2011).

trafficking organizations like businesses – principles of white-collar crime are the answer to reducing or eliminating the profit margin of the drug business. The banks are the gate-keepers to the financial system, and those that do not want to join the United States in a prevention policy must be aggressively prosecuted.

The bank that fears a multimillion-dollar fine will not passively stand by and allow their services to be exploited by international money launderers. The criminal's opportunity to introduce money into the globally connected financial system must be removed. "Know your customer" and other requirements, must become a sought-after goal of financial institutions, not just a checklist item for a compliance program. Of course, when the banks' efforts are bested, the money launderer should be aggressively pursued and prosecuted.

Our country deserves a new approach and new results in a drug war that has only produced victims. The United States should acknowledge and apply the well-established principles of white-collar crime prevention to drug policy: preventing the introduction of laundered money into a bank is more effective than chasing laundered money that is already in the financial system.

