

# SYMPOSIUM: DRUG POLICY REALITY AND REFORM

## ASSET FORFEITURE IN A NEW MARKET- REALITY NARCOTICS POLICY

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### I. A NEW SOLUTION FOR AN OLD PROBLEM

This is an odd historical moment for those who have inveighed against the relentless use of mass incarceration to address America's narcotics problem. After hitting a milestone with one of every 100 adults behind bars,<sup>1</sup> things are actually changing. Even conservative states like Texas have ratcheted down their use of prison for non-violent narcotics cases.<sup>2</sup> For activists who have argued for decades against these failed tactics, there is a certain sense of being the dog who caught the car. This is a welcome development, but policymakers must consider what should come next. This article suggests a concrete step: expanded use of forfeiture statutes to narrowly attack payments that illegal narcotics businesses send to their narcotics sources.

Admittedly, the move away from broadly imposed harsh punishment in narcotics cases has been gradual. However, American culture and policy do not move at right angles—it is all curves, bending from what was to what will be in a series of gradual changes that together move toward something new.<sup>3</sup> Right now, it is inescapably true that the arc of policy change is sloping away from harsh sentences as a solution to the problem of narcotics. In 2010, Congress took the very rare step of increasing the threshold for a mandatory sentence in crack cases through the Fair Sentencing Act;<sup>4</sup> in

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<sup>1</sup> John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, N.Y. TIMES, Dec. 12, 2012 at A1.

<sup>2</sup> See Mike Ward, *Texas Prison Population Shrinks as Rehabilitation Programs Take Root*, AUSTIN AMERICAN-STATESMAN (Aug. 11, 2012), available at <http://www.statesman.com/news/news/state-regional-govt-politics/texas-prison-population-shrinks-as-rehabilitatio-1/nRNY/>, archived at <http://perma.cc/4VE3-SPLB->.

<sup>3</sup> Of course, sometimes that arc is longer than others. For example, the shift toward harsher sentencing that established the status quo now being rejected occurred not all at once, but in a relatively short period from 1984 through 1987—three years that saw the federal system jettison parole, impose stiff mandatory sentences in many narcotics cases, and become dominated by new mandatory sentencing guidelines. Mark W. Bennett & Mark Osler, *A 'Holocaust in Slow Motion?' America's Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. SOC. JUST. 117, 129–130 (2014).

<sup>4</sup> Peter Baker, *Obama Signs Law Narrowing Cocaine Sentencing Disparities*, N.Y. TIMES THE CAUCUS (Aug. 3, 2010, 12:55 PM), <http://thecaucus.blogs.nytimes.com/2010/08/03/obama-signs-law-narrowing-cocaine-sentencing-disparities/>, archived at <http://perma.cc/8GFP-LPHN>.

2013, the Department of Justice announced new and less harsh charging policies that would affect many narcotics offenders;<sup>5</sup> and in 2014, a new clemency initiative was announced,<sup>6</sup> and the United States Sentencing Commission broadly reduced the guidelines for all narcotics cases, then made that change retroactive.<sup>7</sup> Taken together, it is hard to mistake the shape of this curve.

This movement away from an absolutist approach to narcotics defendants seems to leave a void, however. What will replace the “War on Drugs” as a means of addressing the continuing and legitimate problem of narcotics abuse? While America continues the move away from mass incarceration, what does it move toward?

Policy makers need to be heading toward a new goal, because harsh measures did not solve the narcotics problem and that problem should not be ignored. In 2008, after three decades of ratcheting up federal sentences, a study showed that illegal drug use in the United States led the world.<sup>8</sup> For example, sixteen percent of Americans reported having used cocaine at some point in their life.<sup>9</sup> The next highest rate was found in New Zealand, at four percent.<sup>10</sup> Not only did the United States lead the world, but by some key metrics, the effects of narcotics on society became worse even during the War on Drugs; between 1982 and 2012, drug overdoses went up nearly six hundred percent, replacing car accidents as the leading cause of accidental death in the United States.<sup>11</sup>

In other words, the social costs of narcotics persist. Mass incarceration is fading, but drug abuse is not. Policy reformers who merely celebrate the sunset of mass incarceration are ignoring the reason for resorting to such extreme measures in the first place.

Two solutions are often suggested. The first is expanded and affordable treatment for narcotics addiction, which, if successful, will limit the demand for drugs and the social costs. That is a commendable goal, and the Affordable Care Act has moved resources in that direction.<sup>12</sup> However, even when

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<sup>5</sup> Charlie Savage, *Justice Dept. Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES, Aug. 12, 2013, at A1.

<sup>6</sup> Matt Apuzzo, *Justice Dept. Expands Eligibility for Clemency*, N.Y. TIMES (Apr. 23, 2014), available at <http://www.nytimes.com/2014/04/24/us/politics/clemency.html>, archived at <http://perma.cc/3N8M-YQ7P>.

<sup>7</sup> Matt Apuzzo, *New Rule Permits Early Release for Thousands of Drug Offenders*, N.Y. TIMES (July 18, 2014), available at <http://www.nytimes.com/2014/07/19/us/new-rule-permits-early-release-for-thousands-of-drug-offenders.html>, archived at <http://perma.cc/GL6R-QQVN>.

<sup>8</sup> Jennifer Warner, *U.S. Leads the World in Illegal Drug Use*, CBS NEWS (July 1, 2008, 11:30 AM), <http://www.cbsnews.com/news/us-leads-the-world-in-illegal-drug-use/>, archived at <http://perma.cc/JW9U-8JGR> (reporting on World Health Organization study of seventeen countries).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Kevin A. Sabet, Op-Ed., *Overdosing on Extremism*, N.Y. TIMES, Jan. 1, 2012, at A21.

<sup>12</sup> See *Substance Abuse and the Affordable Care Act*, OFFICE OF NAT'L DRUG CONTROL POLICY, <http://www.whitehouse.gov/ondcp/healthcare> (last visited Oct. 19, 2014), archived at <http://perma.cc/8AD4-HW5E>.

effective, treatment is not a law enforcement measure, and certainly is not exclusive of law enforcement measures that would restrict the supply of illegal narcotics. Treatment is only part of the answer, because it can never reach all drug abusers, and will fail in addressing the problems of many that it does reach. Ideally, both the health care system and law enforcement will address the problem effectively at the same time. One need not work to the exclusion of the other, even as they work toward a common goal.

The second often proffered solution is legalization of narcotics, including the most severe drugs such as methamphetamine and heroin.<sup>13</sup> Unfortunately, legalization is a solution only to the problems created by over-enforcement; it does not address the underlying social costs of narcotics use itself.<sup>14</sup> At any rate, legalization is remarkably unpopular with American citizens, despite its frequent embrace by intellectuals.<sup>15</sup>

This article identifies a different path, which allows law enforcement to attack illegal narcotics without the continuation of mass incarceration. In short, a simple market-driven solution could work to restrict the flow of narcotics. Rather than focusing resources on sweeping up low-wage labor, product, or profit, policymakers should directly address and seize the cash flow of narcotics organizations which streams back to sources of narcotics;<sup>16</sup> in the end, it is a disruption in cash flow and credit that is most likely to make a drug business fail.<sup>17</sup>

Part II will describe the futility of our present efforts, and then explore the importance of cash flow in a narcotics organization and the opportunity this presents. A business can replace labor, product, and profit, so long as it has cash flow (or credit) to pay suppliers, but the reverse is not true, at least in the long term.<sup>18</sup> That makes cash flow a particularly vulnerable area of attack—the opposite of low-wage labor, which is easily replaced.

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<sup>13</sup> Legalization is only the most extreme policy prescription in a range of options, of course. Some have suggested a less-revolutionary measure, decriminalization, which makes drug trafficking illegal but makes the possession of narcotics a civil infraction rather than a criminal offense. This has been tried with some success in Portugal. See Jordan Blair Woods, *A Decade After Drug Decriminalization: What Can the United States Learn from the Portuguese Model?*, 15 UDC/DCSL L. REV. 1, 19–24 (2011).

<sup>14</sup> See Kevin A. Sabet, *A New Direction? Yes. Legalization? No. Drawing on Evidence to Determine Where to Go in Drug Policy*, 91 OR. L. REV. 1153, 1156–1157 (2013).

<sup>15</sup> Peter Reuter, *Why Has Drug Policy Changed So Little Over 30 Years?*, 42 CRIME & JUST. 75, 111 (2013). In 2010, less than ten percent of Americans polled favored the legalization of hard drugs. *Id.*

<sup>16</sup> The term “cash flow” is used as shorthand to refer not to all cash received by a business, but that which is used to pay back or pay forward the cost of narcotics themselves—that is, cash flowing to the source of narcotics.

<sup>17</sup> See Tim Berry, *Ten Critical Cash Flow Rules*, ENTREPRENEUR (Nov. 30, 2007), <http://www.entrepreneur.com/article/187366>, archived at <http://perma.cc/G6SW-P82E> (citing study which concluded that eighty-two percent of business failures were due to poor cash management).

<sup>18</sup> In the short term, a business can cover a reduced cash flow by not taking a profit or limiting its expenses temporarily.

Part III, in turn, will describe the existing federal statutes and the way that they have been used. There are two problems that become evident upon such an examination. First, the forfeiture statutes are overbroad, and when paired with the incentives given to local law enforcement, have led to abuses that have tarnished the image of forfeiture in the public imagination. Second, the use of the statutes has primarily been against profit, not cash flow. This matters, because profit can be replaced so long as the business continues, and cash flow is the lifeblood of the business.

Finally, Part IV will describe new tactics that can be used to better harness the potential of these existing statutes, and analyze political and practical challenges to such a project. Fortunately, the federal government already has in place much of the structure that would be needed in a cash-flow-first approach. Thus, there is no lack of statutory power, money, or structure; those things are all in place now. What is needed is the political will to try something new.

That political will needs to emerge soon. American society is quickly coming to a consensus that it is unwilling to spend billions of dollars and give up lifetimes of freedom to combat narcotics through mass incarceration. However, this does not mean that the American public is happy or comfortable with the real costs of narcotics abuse in our society.<sup>19</sup> Taking down the current law enforcement machine will not be enough; the U.S. must also create something new and better to take its place if the goal of restricting drug use remains—and it does. This article does not shy away from that challenge, and neither should our political leaders.

## II. LABOR, PRODUCT, PROFIT, AND THE ILLUSION OF VICTORY

The press and popular culture have focused on three symbolic images of “victory” in the War on Drugs. All three, insofar as they symbolize success in restricting narcotics, are largely an illusion.

The first enduring image is a suspected drug dealer being led away in handcuffs. Americans have seen this over and over, often in stories involving “round-ups” of dozens of offenders. Law enforcement officials intone against the dangers of drugs and people are shepherded into squad cars as the cameras roll.<sup>20</sup> This is the labor force of the narcotics business, carted off and incarcerated. They are the raw material of mass incarceration.

A second image is nearly as common—large amounts of narcotics stacked up after a drug bust. Typically, it is credited to “good old fashioned

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<sup>19</sup> Eighty-seven percent of Americans believe that drug abuse is either a “crisis” or a “serious problem,” according to a Pew Research Survey conducted in February of 2014. PEW RESEARCH CENTER, AMERICA’S NEW DRUG POLICY LANDSCAPE 6 (2014), available at <http://www.people-press.org/files/legacy-pdf/04-02-14%20Drug%20Policy%20Release.pdf>, archived at <http://perma.cc/AM8R-8WWW>.

<sup>20</sup> See, e.g., *Drug Roundup in Clay County Leads to Over 50 Arrests*, WKYMT TELEVISION (Aug. 10, 2009), <https://www.youtube.com/watch?v=iIBY3WxWUxI>.

police work,”<sup>21</sup> though often the haul is due to luck, such as bricks of cocaine washing up on the Florida shore.<sup>22</sup>

Finally, American media often features pictures of the houses,<sup>23</sup> cars,<sup>24</sup> and other items<sup>25</sup> seized from drug dealers. These are generally sold at auction, and the proceeds go to law enforcement.<sup>26</sup>

These images properly reflect where the focus has been in the War on Drugs: locking people up, grabbing drugs off the streets (or the beach) and taking the property drug dealers have bought. While they make great reality shows, these priorities have not led to much success in actually addressing drug abuse and trafficking, which continues to thrive in the United States.<sup>27</sup> Given the high profit margins in some parts of the narcotics business, it is not surprising that drug use and trafficking continues to flourish.<sup>28</sup> The United States has achieved the goal of incapacitating many people, but not the more important goal of creating business failure.<sup>29</sup>

Particularly ineffective has been the focus on sweeping up labor through the incarceration of those involved in narcotics operations. Admittedly, incapacitation of individuals has value in attacking a business if the person incapacitated has unique skills or abilities that are not easy to replace.<sup>30</sup> However, too often that is not who is being incarcerated. Between

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<sup>21</sup> *U.S. Attorney Hochul Announces Major Drug Bust*, WHEC.COM (Feb. 10, 2014), <http://www.whec.com/article/stories/s3318852.shtml>, archived at <http://perma.cc/X6YC-W3UC>.

<sup>22</sup> *See, e.g., 16 Kilos of Cocaine Wash Ashore*, NEWS4JAX.COM (Sep. 18, 2013), <http://www.news4jax.com/news/16-kilos-of-cocaine-wash-ashore/22008604>, archived at <http://perma.cc/Q97Y-JTDX>.

<sup>23</sup> *House Hunting? U.S. Marshals to Auction Former Drug Kingpin's Houston Mansion*, KHOU.COM (March 24, 2010, 8:46 AM) <http://www.khou.com/story/local/2014/08/06/11295856/>, archived at <http://perma.cc/X4ZZ-UGFC>.

<sup>24</sup> Scott Gordon, *Edsel, Bel Airs, Other Classic Cars Seized from Drug Dealer*, NBCDFW.COM (May 19, 2014, 4:37 PM), <http://www.nbcdfw.com/news/local/Edsel-Bel-Airs-Other-Classic-Cars-Seized-from-Drug-Dealer-259812561.html>, archived at <http://perma.cc/48FZ-S37W>.

<sup>25</sup> A fascinating window into these forfeited items is found at the United States Marshal Service web site, [see http://www.usmarshals.gov/assets/sales.htm](http://www.usmarshals.gov/assets/sales.htm).

<sup>26</sup> *See id.*

<sup>27</sup> *See supra*, § I.

<sup>28</sup> Illegal drug use, in fact, has increased over the past decade. PEW RESEARCH CENTER, *supra* note 19, at 5.

<sup>29</sup> Too often public discussions either fail to identify goals or describe unrealistic goals such as the elimination of drugs in society. *See generally* James P. Gray, *Our Top Ten Drug Policy Goals*, 91 OR. L. REV. 1327 (2013). This article views the goal of law enforcement-based narcotics policy simply as restricting the supply of narcotics or lowering demand for narcotics. *Id.* Disrupting drug businesses (which raises their costs) and making them fail will restrict the supply of drugs and result in higher prices. Higher prices will result in lessened demand (which, admittedly, will lower prices, until the cycle repeats). *Id.*

<sup>30</sup> Part of the problem with incapacitating the right people has been the structure of our guidelines and statutes, as addressed meaningfully by a student note in a recent issue of this journal. There, Harvard student Dan Honold properly describes the deep and troubling aspects of using weight of narcotics as a proxy for relative culpability of a narcotics trafficking defendant, particularly the way this universal statutory/guideline formula tends to give similar sentences to true kingpins and mere couriers. *See generally* Dan Honold, Note, *Quantity, Role, and Culpability in the Federal Sentencing Guidelines*, 51 HARV. J. ON LEGIS. 389 (2014). Honold suggests a revision that would replace weight with role in the offense as a core mea-

1980 and 2013, the number of people in federal prisons on narcotics convictions shot up from 4,749 to 100,026.<sup>31</sup> Certainly, some of those people were “key players” with particular skills, but many and perhaps most of them were low- to mid-level sellers, mules, supervisors, and independent operators who fell victim to laws that treated those who sold as little as five grams of crack or methamphetamine like kingpins, requiring a mandatory five-year prison term.<sup>32</sup> In fact, in 2005, nearly seventy percent of those sentenced for crack offenses in federal courts were low-level street sellers, couriers, loaders, and the like, according to the United States Sentencing Commission.<sup>33</sup>

The futility of sweeping up labor is particularly acute in precisely those areas where the law creates the greatest incentives to do so: crack and homemade<sup>34</sup> methamphetamine. These incentives are embedded in the guidelines<sup>35</sup> and the controlling statute,<sup>36</sup> which set low thresholds for high sentences when those two substances are involved. Following the trail of these incentives, an investigating agent can make a “big” case—in terms of sentence—with relatively little effort. It does not make a difference, though; the people who are quickly arrested, easily convicted, and often sentenced to long terms under mandatory statutes are seamlessly replaced on the street. There is no effect on the market. The reason why is a matter of simple economics.

Because crack and homemade methamphetamine can be made from materials that are readily available using a simple recipe, the crack or methamphetamine business has what economists call a “low barrier to entry.” Almost anyone is able to do it, and in areas with few other opportunities like that, people do. It is this low barrier to entry that also makes mass incarceration so ineffective; removing an actor from the market usually just

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sure of culpability. *Id.* at 412. One problem with such a scheme, though, is the malleability of job titles such as “Kingpin,” “Manager,” “Leader,” “Manufacturer,” and “Distributor.” Narcotics dealers do not assign themselves job titles, and how they are later categorized will create disparities between interpreters (as already seen with judges assigning “role in the offense” points under the Guidelines, *see* United States Sentencing Commission, *Guidelines Manual* §§ 3B1.1–3B1.2 (2014) [hereinafter USSG]). The author’s view of this dilemma is that it is better to use profit taken as a proxy for culpability, since those with the most valuable skills within a market will take the most profit; the market (rather than artificial categorizations) will show us who to incapacitate. *See* Mark Osler, *We Need Al Capone Drug Laws*, N.Y. TIMES (May 4, 2014), available at [http://www.nytimes.com/2014/05/05/opinion/we-need-al-capone-drug-laws.html?\\_r=0](http://www.nytimes.com/2014/05/05/opinion/we-need-al-capone-drug-laws.html?_r=0), archived at <http://perma.cc/K4LD-QNU2>.

<sup>31</sup> Osler, *supra* note 30.

<sup>32</sup> 21 U.S.C. § 841(b)(1)(B) (2012). In 2010, the Fair Sentencing Act altered the threshold for crack, raising it to twenty-eight grams, while leaving the five-gram threshold in place for methamphetamine.

<sup>33</sup> UNITED STATES SENT’G COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 21 (2007).

<sup>34</sup> This article uses the term “homemade” here to distinguish locally-made meth (usually made with pseudoephedrine bought at retail) from the pill-form meth that is more commonly imported from Mexico. *See, e.g., Mexican Drug Cartels Shipping Crystal Meth from Super Labs to Mississippi*, NEW ORLEANS TIMES-PICAYUNE (Mar. 2, 2014), available at [http://www.nola.com/crime/index.ssf/2014/03/mexican\\_drug\\_cartels\\_shipping.html](http://www.nola.com/crime/index.ssf/2014/03/mexican_drug_cartels_shipping.html), archived at <http://perma.cc/FX77-WAZU>.

<sup>35</sup> *See* USSG, *supra* note 30, at § 2D1.1(c).

<sup>36</sup> *See* 21 U.S.C. § 841(b) (2012).

results in another stepping over the low barrier and taking his place.<sup>37</sup> Creating incentives to pluck out and imprison people who are easily replaced did not succeed in restricting the flow of drugs—something that should have been obvious before the United States began the three-decade project to incarcerate nearly 100,000 people in the federal system alone.<sup>38</sup>

Not surprisingly, public support for mass incarceration has cratered. The majority of Americans correctly believed that the War on Drugs had failed as far back as 2008,<sup>39</sup> and that belief is now so widespread that the Attorney General of the United States has concluded that, “It’s clear—as we come together today—that too many Americans go to too many prisons for far too long, and for no good law enforcement reason . . . . The bottom line is that, while the aggressive enforcement of federal criminal statutes remains necessary, we cannot simply prosecute or incarcerate our way to becoming a safer nation.”<sup>40</sup>

When even the head of the Federal Bureau of Investigation (“FBI”), Drug Enforcement Agency (“DEA”), and the rest of the Department of Justice conclude that incapacitating labor is not the answer,<sup>41</sup> it becomes time to turn to the question of what the answer should be. From a business systems perspective—that is, if our goal is to disrupt the business of distributing narcotics and thus raising prices—one good answer is to attack cash flow instead by taking the money using existing asset forfeiture rules.<sup>42</sup>

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<sup>37</sup> This is not true for other narcotics that require a higher level of sophistication to manufacture or import, such as heroin, powder cocaine, prescription opiates, MDMA, and amphetamines.

<sup>38</sup> The federal population is just a fraction of the nation’s narcotics prisoners, most of whom are incarcerated by state systems. From 1980 to 2010, the total number of people in American prisons (including state prisons) rose from 50,000 to 500,000. Reuter, *supra* note 15, at 77–78.

<sup>39</sup> Joel Connelly, *82 percent say U.S. ‘losing’ War on Drugs*, SEATTLE POST-INTELLIGENCER POT BLOG (Aug. 19, 2013), <http://blog.seattlepi.com/marijuana/2013/08/19/82-percent-say-u-s-losing-war-on-drugs-poll/#10916101=0&14671103=0>, archived at <http://perma.cc/L3E7-K5RC>; John Tierney, *Drug Czar Controversy*, N.Y. TIMES TIERNEYLAB (Dec. 8, 2008, 12:23 PM), <http://tierneylab.blogs.nytimes.com/2008/12/08/drug-czar-controversy/>, archived at <http://perma.cc/7XXT-2H4E>.

<sup>40</sup> Eric Holder, U.S. Att’y Gen., Address at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>, archived at <http://perma.cc/A74X-DRZL>.

<sup>41</sup> The Attorney General had a lot of company in reaching this conclusion. Judges, who have the most obvious role in sentencing, were among the first to identify the problems with mass incarceration driven by mandatory minimums and guidelines. See generally Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523 (2007).

<sup>42</sup> Perhaps the best description of why this is a good idea is found on the web site of the very agency that has under-used this tool, the Department of Justice. They properly state that, “Asset forfeiture has the power to disrupt or dismantle criminal organizations that would continue to function if we only convicted and incarcerated specific individuals.” *Overview of the Asset Forfeiture Program*, U.S. DEPT OF JUSTICE (Jan. 2013), <http://www.justice.gov/jmd/afp/>, archived at <http://perma.cc/XN6H-WKEV>. The description misses only one important caveat: that this forfeiture creates such disruption only if cash flow is seized.

Without cash flow and credit, a business of any kind will fail. That's because it is cash flow which normally allows a business to do the things it must to keep operating: pay employees, buy supplies, and cover overhead such as property upon which to conduct the business. In addition, drug businesses often have some expenses that others do not, such as extra costs for security and the payment of bribes. Normally, if a business lacks cash flow it can survive, temporarily, at least, if it has access to credit. Illegal businesses, however, do not have access to traditional credit, putting even more pressure on a continual cash flow if profits are to be maintained.

In the narcotics business, the flow of cash both creates profits and allows drug dealers to purchase more product to sell. It is the latter that should be targeted, because doing so will create more disruption of narcotics businesses. Consider, for example, the interconnected set of businesses that might bring heroin into the United States and distribute it here. A Mexican cartel might buy heroin from Asia, process it in Mexico, and ship it over the border to Houston, where it is sold to a wholesaler. The wholesaler sells some to dealer in Dallas, who then sells to the street dealers. The money, in turn, will flow the other way—it starts in Dallas with a heroin user paying his dealer, then goes to the Dallas wholesaler, who sends it as payment for past or future shipments to the guy in Houston, who pays off the Mexican cartel. Traditionally, policymakers and law enforcement agents have cared much more about the flow of drugs to the street, rather than the flow of money from the street back to Mexico, and that has been our mistake. In short, law enforcement is striking where targets are dispersed rather than concentrated, leaving other streams intact. By focusing on street dealers or the Dallas wholesaler, who are easily replaceable, policymakers make it easy for the higher-ups in Houston and Mexico to continue to flourish because they have other places to send their drugs downstream. A cash-flow approach allows for a small number of targets rather than dozens or hundreds.

In a cash-flow attack, this approach would be reversed. Instead of wanting to get drugs and money at the street level, the goal would be to get money as it flows back to the higher levels—to Houston and Mexico. This has a better chance of creating disruption and business failure at multiple levels. Imagine, for example, attacking the cash flow from Houston back to the Mexican cartel. By tracking the money from Dallas back to Houston, officials could find out how it is combined with other streams, then sent to Mexico—and take it. When the money is taken, the cartel is hurt because it is not getting the money. The Houston wholesaler is hurt because his payment to the cartel is gone and has to be replaced. The Dallas wholesaler is affected by the disruption as well because the money he sent to Houston is gone and will have to be replaced. Meanwhile, the street dealer and user will both find that the price has gone up. In the end, importantly, the money is in the hands of the government rather than a drug cartel.

To make this work, law enforcement agents will need the right tools in the form of statutes and manpower and the resolve to focus on this lifeblood



of narcotics rather than the distraction of flashy arrests of low-wage labor. Upon examination, it becomes clear that those agents and their policy-making superiors already have the tools but lack the resolve.

### III. EXISTING STATUTES & FORFEITURE EFFORTS

#### A. Existing Statutes

In order to pursue the seizure of money flowing back to narcotics suppliers, it will require the right statutes in place to authorize our actions. Fortunately, current federal forfeiture statutes allow great breadth; the solution is not more law, but greater discipline in using the existing laws.

Generally, forfeitures in narcotics cases are authorized by three different kinds of statutes and rules. Administrative forfeitures generally involve contraband, items very directly related to contraband, or a failure of the owner to properly claim the property once given notice of the seizure.<sup>43</sup> Unlike civil and criminal forfeitures, administrative forfeitures do not require judicial involvement.<sup>44</sup> Civil forfeitures are actions directly against property itself, and criminal forfeitures are part of the criminal action against a defendant.<sup>45</sup>

In federal cases, civil and criminal forfeiture are the primary tools used to retain and convert property to the government. There are three principle distinctions between the two.<sup>46</sup> First, because civil forfeiture is an action against the property itself, the conviction of the property owner is not required.<sup>47</sup> Second, and importantly, the burden of proof for a civil case is simply by a preponderance of the evidence, while in a criminal forfeiture the allegations are formulated as a count of the indictment and must be proven beyond a reasonable doubt.<sup>48</sup> Finally, with criminal forfeiture there is no basis for forfeiture until there is a conviction, while in civil cases the forfeiture is rooted in the property's tie to illegal activity and property can be forfeited through court action at any time after that activity occurs, allowing broader flexibility.<sup>49</sup>

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<sup>43</sup> 19 U.S.C. §§ 1602–1609 (2012) establishes one such process.

<sup>44</sup> *Types of Federal Forfeiture*, U.S. DEPT OF JUSTICE (Jan. 2013), <http://www.justice.gov/jmd/afp/07federalforfeiture/>, archived at <http://perma.cc/YY8S-95SG>.

<sup>45</sup> For an example of one fascinating criminal forfeiture outside the realm of narcotics, see the indictment of former Virginia Governor Robert McDonnell. Indictment, *United States v. McDonnell*, No. 3:14-cr-00012 (E.D. Va., Jan. 21, 2014), available at <http://www.scribd.com/doc/201279278/Bob-McDonnell-indictment>, archived at <http://perma.cc/V6GV-ZSA6>.

<sup>46</sup> See Irving A. Pianin, *Criminal Forfeiture: Attacking the Economic Dimension of Organized Narcotics Trafficking*, 32 AM. U. L. REV. 227, 233 (1982).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 234.

<sup>49</sup> *Id.* In *United States v. 92 Buena Vista Avenue*, the Supreme Court clarified this somewhat confusing rule. 507 U.S. 111 (1993).

Looking at these differences, it is not hard to guess which method is often preferred by prosecutors. Civil forfeiture is simply easier, and offers more options. Here, there is an added level of meaning—because no conviction is required, civil forfeiture allows for the taking of cash flow without imprisonments. For that reason, this article will focus on civil forfeiture provisions in the discussion that follows.<sup>50</sup>

### 1. 21 U.S.C. § 881

The primary tool in the narcotics forfeiture arsenal is 21 U.S.C. § 881, which covers the waterfront with provisions that allow for the seizure and civil forfeiture of a wide variety of property associated with narcotics trafficking, including, in part, the drugs themselves,<sup>51</sup> materials and equipment used to make or deliver the drugs,<sup>52</sup> vehicles used to transport narcotics,<sup>53</sup> real property used to facilitate drug trafficking,<sup>54</sup> and any firearms related to these same crimes.<sup>55</sup> Most important for the purposes of this article is 21 U.S.C. § 881(a)(6), which provides for the civil forfeiture of

All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.<sup>56</sup>

This is a strikingly broad statute. It has been successfully used to forfeit the money a rogue opioid-prescribing doctor had stashed in a bank,<sup>57</sup> a black bag stuffed with \$160,840 in cash,<sup>58</sup> \$658,830 found in a package being shipped,<sup>59</sup> and \$864,400 taken from the driver's door of a rented car,<sup>60</sup> among

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<sup>50</sup> This is not to say that criminal forfeitures should not be used, or that they would not be useful in combination with the tactics proposed in this article. The principle criminal forfeiture statute for narcotics is found at 21 U.S.C. § 853 (2012).

<sup>51</sup> 21 U.S.C. §§ 881(a)(1), (8).

<sup>52</sup> *Id.* §§ (a)(2), (9).

<sup>53</sup> *Id.* § (a)(4). This provision also covers vehicles that are used to otherwise “facilitate” drug trafficking. *Id.*

<sup>54</sup> *Id.* § (a)(7).

<sup>55</sup> *Id.* § (a)(11).

<sup>56</sup> 21 U.S.C. § 881(a)(6) (2012). The related criminal forfeiture statute is simpler but similarly broad, allowing action relating to “any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of” narcotics trafficking. 21 U.S.C. § 853(a)(1) (2012).

<sup>57</sup> See generally *United States v. Funds on Deposit at Bank One*, No. 2:02CV480, 2010 WL 0909091 (N.D. Ind. Mar. 9, 2010), *aff'd* 393 F. App'x 391 (7th Cir. 2010).

<sup>58</sup> See generally *United States v. Currency*, in U.S. \$178,858, No. 13-15202, 2014 WL 2219046 (11th Cir. May 30, 2014).

<sup>59</sup> See generally *United States v. Approximately \$658,830 in U.S. Currency*, No. 2:11-cv-00967, 2014 WL 1004042 (9th Cir. Mar. 17, 2014).

<sup>60</sup> See generally *United States v. Currency*, U.S. \$864,400, No. 09-1935, 2010 WL 5189543 (4th Cir. Dec. 16, 2010).

many other instances.<sup>61</sup> Because it allows not only for the seizure of assets in the possession of its owner, but also money held by a bank or courier, this provision provides plenty of latitude to accommodate the forfeiture of cash flow streaming back to the source of narcotics.

Although it is the most relevant civil forfeiture statute for drug cases, there are other statutes scattered throughout the federal code which provide further possibilities either in combination with 21 U.S.C. § 881 or on their own.

## 2. *The Foreign Narcotics Kingpin Designation Act*

Codified at 21 U.S.C. § 1901–08, the Foreign Narcotic Kingpin Designation Act is directed at international narcotics-based financial transactions. It allows the President to identify and designate “significant foreign narcotics traffickers,”<sup>62</sup> who are then subject to sanctions, including the freezing of assets within the United States and the inability to conduct further financial transactions here.<sup>63</sup> It sets out civil and criminal penalties for those who violate the restrictions that may be imposed, but does not contain any comprehensive forfeiture provision. Instead, once a transaction is “blocked” under the Foreign Narcotics Kingpin Designation Act, the money seized can then be subjected to forfeiture under another statute, such as 21 U.S.C. § 881.<sup>64</sup>

## 3. *18 U.S.C. § 981(a)(1)*

The general statute for civil forfeiture, 18 U.S.C. § 981(a)(1), can be applied to narcotics crimes<sup>65</sup> or to money laundering crimes, which often relate to narcotics.<sup>66</sup> The statute is sometimes used as an alternative theory in narcotics cases which rely primarily on 21 U.S.C. § 881.<sup>67</sup>

18 U.S.C. § 981(a)(1) is particularly useful if used in combination with the money laundering statutes.<sup>68</sup> In a 2004 article, the Deputy Chief for Legal Policy of the U.S. Department of Justice’s Asset Forfeiture and Money

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<sup>61</sup> Occasionally, courts do reject a civil forfeiture. For example, in *United States v. \$48,100*, the Eighth Circuit held that the government had not met its low burden of proof, where the money was seized from a man driving to his parents’ house in an RV with cash in a safe and a user amount of marijuana. 756 F.3d 650, 655 (8th Cir. 2014).

<sup>62</sup> 21 U.S.C. § 1903(b) (2012).

<sup>63</sup> See *United States v. 2,000,000.00 in U.S. Currency*, No. 6:12-CV-1279-ORL-18KRS, 2013 WL 5462320, at \*1 (M.D. Fla. Oct. 2, 2013).

<sup>64</sup> See *id.*

<sup>65</sup> It is a circuitous route, though. 18 U.S.C. § 981(a)(1)(C) allows that the statute applies to property traceable to a violation of an offense listed in 18 U.S.C. § 1956(c)(7). In turn, § 1956(c)(7)(A) incorporates “any act or activity constituting an offense listed in section 1961(1) of this title,” and § 1961(1) includes felony controlled substance trafficking violations.

<sup>66</sup> 18 U.S.C. § 981(a)(1)(A) (2012).

<sup>67</sup> See, e.g., *United States v. \$86,425.00 in U.S. Currency*, No. 2:13-CV-06614-ODW, 2014 WL 842675, at \*3 (C.D. Cal. Mar. 4, 2014).

<sup>68</sup> 18 U.S.C. §§ 1956–1957 (2012).

Laundering section argued that because this combination allows forfeiture of any “property involved” in a money laundering case, it has a broader reach than other forfeiture statutes.<sup>69</sup>

#### 4. 31 U.S.C. § 5332

Unlike other forfeiture statutes, 31 U.S.C. § 5332 is directed toward a specific form of property: cash that is being moved out of the country. It was enacted as part of 2001’s USA Patriot Act,<sup>70</sup> pursuant to a Congressional finding that smuggling “bulk cash” is a favored device of both terrorist and drug traffickers.<sup>71</sup> Though the primary bulk cash smuggling statute never explicitly mentions narcotics, it is often used in this way and would be a critical tool in the fight against cash flow back to narcotics sources. In short, 31 U.S.C. § 5332 makes it a criminal offense to conceal and transport or transfer (or attempt to transport or transfer) more than \$10,000 across the United States border to evade currency reporting requirements. It expressly allows for civil forfeiture of the money that is transported.<sup>72</sup>

Typically under this statute, a defendant will be stopped on the way to an international border or an international flight, and asked if he has a large amount of money. Often, he will deny having a large amount of money. A search then shows that claim to be false. Once the large amount of money he is carrying is seized, forfeiture proceedings begin.<sup>73</sup>

Between these many overlapping laws, the challenge in implementing an attack on cash flowing back to narcotics sources will not be identifying a statutory basis for action. Rather, the key to implementation will be a focused action using tools already at hand.

### B. Current Forfeitures

Federal authorities already use the tool of forfeiture quite often. In fact, the numbers are remarkable. For fiscal year 2013, the Department of Justice reported that forfeitures and seized assets in all types of cases exceeded \$2 billion.<sup>74</sup> Much of this, of course, was unrelated to narcotics; in the case

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<sup>69</sup> See Stefan D. Cassella, *The Forfeiture of Property Involved in Money Laundering Offenses*, 7 BUFF. CRIM. L. REV. 583, 585–586 (2004).

<sup>70</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

<sup>71</sup> Cassella, *supra* note 69, at 606.

<sup>72</sup> 31 U.S.C. § 5332(c) (2012).

<sup>73</sup> See, e.g., *United States v. Approximately \$158,000.00 in U.S. Currency*, No. 1:12-CV-01260 AWI, 2013 WL 1091395, at \*1–\*2 (E.D. Cal. Mar. 15, 2013).

<sup>74</sup> *Asset Forfeiture Fund and Seized Asset Deposit Fund Method of Disposition of Seized Property—Fiscal Year 2013*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/jmd/afp/02fundreport/2013affr/report5.htm> (last visited Oct. 19, 2014), archived at <http://perma.cc/4MBK-M8AL>.

against Bernard Madoff alone, over \$170 billion in forfeitures were sought,<sup>75</sup> and that money continues to flow into government coffers.<sup>76</sup>

Similarly, it would be a mistake to think that nothing currently is being done to seize the cash flow to narcotics sources. Certainly, some of what is being taken now constitutes cash flow, as defined here. However, there is no sign of a concerted effort to focus efforts on cash flow. Very often these seizures seem incidental to the primary target: profits retained by the narcotics traffickers to add to their own wealth. As described above,<sup>77</sup> retained profits can be replaced if cash flow continues. An attack on profits is an attack on a person—the actor who has taken the profit—and people can be replaced. An attack on cash flow, though, is an attack on the business, which in the end is more disruptive than taking the profits of an individual.

At a most basic level, when a police officer happens to stop someone driving narcotics proceeds back to Mexico, that constitutes a direct interception of cash flow to a narcotics source, and in such cases forfeiture can be (and is) facilitated by the breadth of 21 U.S.C. § 881<sup>78</sup> and the bulk cash smuggling statute, 31 U.S.C. § 5332,<sup>79</sup> among other options.<sup>80</sup> As restrictions on bank-based financial transactions have become more extensive, narcotics traffickers have found it easier at times to launder the money outside of the country and thus need to take it out of the country as bulk cash.<sup>81</sup> If law enforcement simply intercepts and keeps this money—and sometimes they do already<sup>82</sup>—this is a simple and straightforward seizure of cash flow back to a narcotics source.

Usually, though, the seizure of bulk cash seems to be the result of an observation of an officer near the border, who has no idea about a larger

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<sup>75</sup> Diana B. Henriques, *U.S. Proposes 150 Years for Madoff*, N.Y. TIMES (June 26, 2009), available at [http://www.nytimes.com/2009/06/27/business/27madoff.html?\\_r=0&adxnml=1&adxnmlx=1413736283-JGT7bZ6NoQKeJCD1eSoZ6w](http://www.nytimes.com/2009/06/27/business/27madoff.html?_r=0&adxnml=1&adxnmlx=1413736283-JGT7bZ6NoQKeJCD1eSoZ6w), archived at <http://perma.cc/8PWB-QMX7>.

<sup>76</sup> Sydney Ember, *JPMorgan Settles Madoff Charges*, N.Y. TIMES DEALBOOK (Jan. 8, 2014, 8:39 AM), [http://dealbook.nytimes.com/2014/01/08/morning-agenda-jpmorgan-settles-madoff-charges/?\\_php=true&\\_type=blogs&\\_r=0](http://dealbook.nytimes.com/2014/01/08/morning-agenda-jpmorgan-settles-madoff-charges/?_php=true&_type=blogs&_r=0), archived at <http://perma.cc/9XQU-Z5PP>.

<sup>77</sup> See *supra*, § II.

<sup>78</sup> See *supra*, § III(A)(1).

<sup>79</sup> See *supra*, § III(A)(4).

<sup>80</sup> The choice of the right tactics and statutes is crucial in these cases. In 2008, the Supreme Court reversed the conviction of Humberto Cuellar, who was stopped by police about 100 miles from the Mexican border, headed south on a Texas highway in a Volkswagen Beetle with about \$81,000 in cash bundled with duct tape hidden in the car. *Cuellar v. United States*, 553 U.S. 550, 568 (2008). The Court held that though the money was hidden in a secret compartment, the charge under 18 U.S.C. § 1956 could not be sustained, since there was not sufficient proof that the transportation was “designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control” of the funds. *Id.*

<sup>81</sup> Stefan D. Cassella, *Bulk Cash Smuggling and the Globalization of Crime: Overcoming Constitutional Challenges to Forfeiture Under 31 U.S.C. § 5332*, 23 BERKELEY J. INT’L L. 98, 100–102 (2004).

<sup>82</sup> See, e.g., *United States v. Salcido*, No. CR 09–01878–TUC–RCC(HCE), 2010 WL 2044468, at \*2 (D. Ariz. Mar. 12, 2010); *United States v. Jimenez*, 421 F. Supp. 1008, 1009 (W.D. Tex. 2008); *United States v. Medrano-Arellano*, No. CR L-04-395, 2004 WL 895937, at \*1 (S.D. Tex. Apr. 23, 2004).

network that might exist rather than a broad operation targeting a specific network systemically.<sup>83</sup> With that in mind, this article looks at two more intentional government operations that probably did tap into cash flow, but seemed to be more directed at profits. One such operation is the current utilization of the Foreign Narcotics Kingpin Designation Act,<sup>84</sup> which has been used to complicate things for international drug traffickers. A second is the work of the Money Laundering and Bank Integrity Unit of the Department of Justice's Asset Forfeiture and Money Laundering Section, which targets banks who are involved in funneling money to or from criminal organizations.

In September of 2013, the Treasury Department took action against a narcotics ring known as "Los Gueros."<sup>85</sup> Notably, they were not rounded up and arrested or targeted with a drone strike; instead, the top members of the organization and six of their companies were "designated" under the Foreign Narcotics Kingpin Designation Act,<sup>86</sup> meaning that any assets held by the designated people are frozen, and their ability to conduct financial transactions with U.S. institutions and citizens is restricted.<sup>87</sup>

Certainly, the designation of the Los Gueros-related people and companies might restrict their access to cash flow, particularly money returning to them for narcotics they have sent or will send into the United States. However, it seems that the Treasury Department was thinking more about profits. In the press release announcing the move, a DEA official said that "[t]oday's designations will have a direct impact on the businesses owned by Los Gueros and the flow of illicit money. It strikes a powerful blow at the illegal proceeds and exposes the international businesses they used to hide their drug profits."<sup>88</sup> Clearly, this was not an intentional, targeted strike against cash flow.

The work of the Money Laundering and Bank Integrity Unit was perhaps most publicly revealed in December of 2012, when the United Kingdom and U.S. branches of HSBC bank agreed to forfeit \$1.2 billion (in addition to about \$700 million in fines) and enter into a deferred prosecution agreement based on the bank's violation of the Bank Secrecy Act and other statutes.<sup>89</sup> At least in part, the violations were based on "accusations that it

<sup>83</sup> See generally *Cuellar*, 553 U.S. 550, *supra* note 80.

<sup>84</sup> 21 U.S.C. §§ 1901–1908 (2012).

<sup>85</sup> *Los Gueros Mexican Drug Trafficking Organization Targeted*, DRUG ENFORCEMENT AGENCY (Sept. 24, 2013), <http://www.dea.gov/divisions/hq/2013/hq092413.shtml>, archived at <http://perma.cc/Z5Z-U324>.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* Notably, another official quoted in the press release seems to better reflect the more important issue of cash flow, saying that "[t]ransnational criminal organizations are only as effective as their cash flow," though he then muddies the waters by then claiming that his organization "is committed to making it as difficult as possible for kingpins to disguise their ill-gotten profits behind the facade of legitimate business." *Id.*

<sup>89</sup> Ben Protess & Jessica Silver-Greenberg, *HSBC to Pay \$1.92 Billion to Settle Charges of Money Laundering*, N.Y. TIMES DEALBOOK (Dec. 10, 2012, 4:10 PM), <http://dealbook.ny>

transferred billions of dollars for nations like Iran and enabled Mexican drug cartels to move money illegally through its American subsidiaries.”<sup>90</sup> Though some criticized the settlement as too lenient (favoring an indictment),<sup>91</sup> there is no doubt that it resulted in new measures by the bank that would make future narcotics cash flow difficult to divert through their vaults.<sup>92</sup> As with the Los Gueros operation, the government asserts a mixed goal that seems to mostly be about drug “profits.” For example, Immigration and Customs Enforcement Director John Morton issued a press release about the HSBC forfeiture, saying that “[c]artels and criminal organizations are fueled by money and profits.”<sup>93</sup>

Both of these efforts certainly captured some cash flow. However, because of the diversion of attention to profits rather than cash flow back to sources, they do not seem strategically directed at what is most important in order to disrupt narcotics businesses. Certainly, taking profits is something of a disincentive to engaging in the drug trade. However, three factors mitigate in favor of cash flow rather than profits as the target of forfeiture. First, cash flow will disrupt multiple levels of the business, because both the sender and receiver of money lose out. Profits are held at a single level. Second, cash flow has to move from one place to another, which makes it more vulnerable than profits, which can be hidden in a static place. Third, profits can be replaced so long as a business continues, while a business cannot survive a significant seizure of cash flow; if that money is taken it loses the ability to buy product, hire workers, and do the other things that otherwise would generate profits.

### C. *The Problem with Existing Efforts*

A new effort to use forfeitures in narcotics cases will likely face opposition based on wide-reaching problems with current cases where forfeitures have been misused. The employment of forfeitures in narcotics cases has come under increasing criticism as being poorly used, creating bad incentives, and relying on overbroad statutes. Such criticisms need to be squarely addressed, even as the use of existing statutes is turned toward a clearer focus on cash flow rather than profit.

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times.com/2012/12/10/hsbc-said-near-1-9-billion-settlement-over-money-laundering, *archived at* <http://perma.cc/JY7C-KWPH>.

<sup>90</sup> *Id.*

<sup>91</sup> See, e.g., David M. Uhlmann, Op-Ed., *Prosecution Deferred, Justice Denied*, N.Y. TIMES (Dec. 13, 2013), *available at* <http://www.nytimes.com/2013/12/14/opinion/prosecution-deferred-justice-denied.html>, *archived at* <http://perma.cc/NA9W-BDY2>.

<sup>92</sup> See Protess & Silver-Greenberg, *supra* note 89. Of course, the money received in the settlement was not the same as the cash flow from the narcotics organizations—that would have been long gone by the time the payment was made.

<sup>93</sup> *HSBC Admits to Anti-Money Laundering and Sanctions Violations Following an HSI El Dorado Task Force Investigation*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Dec. 11, 2012), <http://www.ice.gov/news/releases/hsbc-admits-anti-money-laundering-and-sanctions-violations-following-hsi-el-dorado>, *archived at* <http://perma.cc/ZL9S-4MSN>.

### 1. *Overbreadth and Incentives*

In a lengthy and compelling 2013 article, journalist Sarah Stillman asked “[u]nder civil forfeiture, Americans who haven’t been charged with wrongdoing can be stripped of their cash, cars, and even homes. Is that all we’re losing?”<sup>94</sup> She framed the article with the story of Jennifer Boatright, a Houston waitress who was stopped while driving near the town of Tanaha, Texas with her children and boyfriend, on the way to visit her boyfriend’s family. The police found a glass pipe in the car, claimed to have smelled marijuana—though none was found—and threatened the couple with felony charges unless they agreed to forfeit the \$6,037 they were carrying.<sup>95</sup> Having spoken to over a hundred people involved with civil forfeitures,<sup>96</sup> Stillman reported that many were concerned that “laws designed to go after high-flying crime lords are routinely targeting the workaday homes, cars, cash savings, and other belongings of innocent people who are never charged with a crime.”<sup>97</sup>

Stillman was not alone in her observations. *Forbes* has consistently lodged similar criticisms: among other instances, in 2011 an opinion piece there called civil forfeiture an “assault on private property,”<sup>98</sup> while a more moderate piece in 2012 merely concluded that “Uncle Sam is on the war-path.”<sup>99</sup> The harsher edge returned to the pages of *Forbes* in 2013, when a contributor compared civil forfeiture to the actions of a “banana republic kleptocracy,”<sup>100</sup> and continued into 2014 with a piece that argued against equitable sharing of forfeiture money between local, state and federal entities,<sup>101</sup> and another that described forfeiture money going toward a \$90,000 sports car and a “party house.”<sup>102</sup> In the last of these, showing the breadth of

<sup>94</sup> Sarah Stillman, *Taken*, *NEW YORKER* (Aug. 12, 2013), available at <http://www.newyorker.com/magazine/2013/08/12/taken>, archived at <http://perma.cc/XR7F-N7NA>.

<sup>95</sup> The couple said they were going to use the money to buy a car. *Id.*

<sup>96</sup> Much of Stillman’s article addressed state forfeiture laws, though the same structural issues apply to federal laws, which broadly allow for the taking of almost any property “traceable” to proceeds of a drug transaction. See 21 U.S.C. § 881(a)(6) (2012).

<sup>97</sup> *Id.*

<sup>98</sup> Chip Mellor, *Civil Forfeiture Laws and the Continued Assault on Private Property*, *FORBES* (June 8, 2011, 5:30 PM), <http://www.forbes.com/2011/06/08/property-civil-forfeiture.html>, archived at <http://perma.cc/374D-2QK7>.

<sup>99</sup> Robert Lenzner, *The Babe Ruth of Forfeiture is After Your Ill-Gotten Gains*, *FORBES* (Aug. 14, 2012, 1:47 PM), <http://www.forbes.com/sites/robertlenzner/2012/08/14/uncle-sam-forces-crooks-to-forfeit-billions-to-their-victims/>, archived at <http://perma.cc/PC2G-WLD9>.

<sup>100</sup> Bill Frezza, *Big Brother’s Stop-and-Snatch Asset Forfeiture Boom*, *FORBES* (Nov. 4, 2013, 5:48 PM), <http://www.forbes.com/sites/billfrezza/2013/11/04/rogue-government-agencier-reap-bonanza-when-citizens-are-guilty-until-proven-innocent/>, archived at <http://perma.cc/XF3S-KLT5>.

<sup>101</sup> See Nick Sibilica, *Cops in Texas Seize Millions by ‘Policing For Profit’*, *FORBES* (June 5, 2014, 4:51 PM), <http://www.forbes.com/sites/instituteforjustice/2014/06/05/cops-in-texas-seize-millions-by-policing-for-profit/>, archived at <http://perma.cc/MT7X-GYGH>.

<sup>102</sup> Nick Sibilica, *Cops Use Traffic Stops To Seize Millions From Drivers Never Charged With a Crime*, *FORBES* (Mar. 12, 2014, 11:38 AM), <http://www.forbes.com/sites/instituteforjus->



displeasure over these small-time, ticky-tacky forfeitures, the writer for the conservative *Forbes* quoted the left-wing *Mother Jones* as a source.<sup>103</sup>

Underlying all of the troubling issues these articles describe are two problems that work in tandem: the laws are overbroad, and the incentives they give to law enforcement lead to improper actions. Because law enforcement gets to keep most or all of the property they seize—either under state law or “equitable sharing” agreements with the federal government—they are driven to take property right up to the margin of what those overbroad laws allow.<sup>104</sup> In some jurisdictions, forfeitures fund police salaries;<sup>105</sup> in others the uses for the cash, cars and property seized are much more wide-ranging.<sup>106</sup>

The critics of civil forfeiture are correct—the power has been abused, and the current programs which distribute large sums of money to state and local police skew priorities by providing incentives to law enforcement to seize property regardless of its value in disrupting crime. This is not good for civil society, the individuals within it, or the better aims of law enforcement. More discipline in the use of forfeiture laws is one way to counteract this problem, and a narrower focus for the use of forfeiture is one way to impose that kind of discipline. By shifting focus away from profit and the margins of what forfeiture laws allow and instead targeting the money flowing at the very heart of the narcotics business, it will move incentives and actions away from the small-value seizures that substantiate the valid complaints made by investigators like Stillman.

## 2. Goals

Three goals of civil forfeiture have been taking the profit out of drug dealing,<sup>107</sup> pursuing restitution and services for crime victims,<sup>108</sup> and funding law enforcement efforts.<sup>109</sup>

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tice/2014/03/12/cops-use-traffic-stops-to-seize-millions-from-drivers-never-charged-with-a-crime/, archived at <http://perma.cc/T3SG-94YP>.

<sup>103</sup> *Id.*

<sup>104</sup> See Stillman, *supra* note 94.

<sup>105</sup> See Sibilis, *supra* note 101.

<sup>106</sup> These improper actions extend both to how those funds are gathered, and how they are spent. For a glimpse into the latter, see *The Top 6 Craziest Things Cops Spent Forfeiture Money On*, INST. FOR JUSTICE (Jan. 31, 2014), <https://www.youtube.com/watch?v=n2iJ7UBODw8>.

<sup>107</sup> See *supra*, § III(B).

<sup>108</sup> This goal is sometimes realized now. Sharon Cohen Levin, an Assistant United States Attorney for the Southern District of New York (where the majority of forfeited money goes to victims), told the New York Times “[t]o put someone in jail is very important, but equally important is to provide the crime victims with some type of compensation.” Peter Lattman, *For U.S. Attorney’s Office, Forfeiture From Crimes Pays (Sometimes in Dinosaur Bones)*, N.Y. TIMES DEALBOOK (Jan. 1, 2013, 2:29 PM), <http://dealbook.nytimes.com/2013/01/01/crime-forfeiture-pays-for-u-s-attorneys-office-sometimes-in-dinosaur-bones/>, archived at <http://perma.cc/9NKA-D5MJ>.

<sup>109</sup> See *supra*, § III(C)(2).

The last of these goals, funding law enforcement, is undermined by the problems described in the preceding section. Allowing police officers at the federal, state, or local level to fill their own coffers through taking things from citizens is deeply unwise—it ignores the economist’s chief imperative to begin by looking at incentives. This is not a theory; we know that letting local authorities keep forfeiture funds incents bad behavior in some cases.<sup>110</sup> Tangential but related to the reforms suggested here should be a re-thinking and restructuring of the use of forfeiture money and the sharing of proceeds between governmental units.

The second of these goals, providing restitution and services to crime victims, is certainly worthwhile—and preferable to using the same money to fund law enforcement. Given the abuses described above, it would make sense to shift the bulk of forfeiture proceeds from law enforcement to victims. However, and importantly, that purpose does not offer a strategic reason to take the money in the first place—and that is where a focus on cash flow makes sense.

Finally, in trumpeting the need to “take the profit out of crime,”<sup>111</sup> forfeiture proponents conflate two very different things: profit and cash flow. The difference between the two matters is what matters most in shutting down the narcotics network rather than just hurting the financial condition of individual traffickers. Profit is the net proceeds that are not re-invested in the business.<sup>112</sup> In other words, profit is what traffickers take *out* of the cycle of the market and keep for themselves. They might pile it up, spend it on boats, or buy a mansion; what they are not doing with profit is sending it to their suppliers to pay off debt or buy new supplies. Cash flow, on the other hand, is that money that is reinvested in the business to buy more product or predicates. For example, if Dealer X buys a kilo of cocaine for \$40,000 from a supplier, dilutes it, and sells it to others in smaller amounts, he might get \$60,000 from the purchasers. Only \$20,000 of that \$60,000 is profit. The other \$40,000 (the amount originally invested) is probably going to become cash flow—Dealer X is going to use it to buy another kilogram of cocaine.

Keeping in mind that the goal of law enforcement is to disrupt the narcotics businesses that bring drugs into the country, the difference between the two is important because of what happens when law enforcement seizes the money and distributes it between and within communities. If you take the cash flow rather than profit, enduring disruption is achieved.<sup>113</sup> The sup-

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<sup>110</sup> See *supra*, § III(C)(1).

<sup>111</sup> Douglas Leff, *Money Laundering and Asset Forfeiture*, FED. BUREAU OF INVESTIGATION (Apr. 2012), [http://www.fbi.gov/?came\\_from=http%3a%2f%2fwww.fbi.gov%2fstats-services%2fpublications%2flaw-enforcement-bulletin%2fapril-2012%2fmoney-laundering-and-asset-forfeiture](http://www.fbi.gov/?came_from=http%3a%2f%2fwww.fbi.gov%2fstats-services%2fpublications%2flaw-enforcement-bulletin%2fapril-2012%2fmoney-laundering-and-asset-forfeiture), archived at <http://perma.cc/8ML7-JNAZ>.

<sup>112</sup> Definition of *Profit*, INVESTOPEDIA.COM, <http://www.investopedia.com/terms/p/profit.asp> (last visited Nov. 10, 2014), archived at <http://perma.cc/B8HF-FTK2>.

<sup>113</sup> This will be true whether or not the buyer is pre-paying for narcotics yet to be shipped, or paying for the shipment after it is received. In either case, the transaction is not completed, and the parties on both sides lose the value of the transaction. If it is a pre-payment, the buyer

plier is not getting paid, and is not going to send more drugs. If you take the profit, however, it is the individual and not the business that is disrupted. The cash flow continues, another shipment is sent, and future profits can still be realized.<sup>114</sup>

In order to achieve this, however, there are several things that will need to change.

#### IV. POLICY RECOMMENDATIONS

To focus our forfeiture efforts on cash flow rather than profits, product, or labor, it is worth first acknowledging what does not need to change. Importantly, new statutes are not necessary; the ones currently in place are plenty broad (even overly broad, critics say)<sup>115</sup> and perfectly adequate to allow an aggressive pursuit of money flowing back to narcotics sources like water filtering back to a reservoir. Similarly, it is not necessary to hire a new wave of narcotics-fighters; there are plenty. Nor is more funding necessary—there is plenty, perhaps too much, already being spent. What is needed are new tactics for the same soldiers, using the funds and statutes currently in place.

In short, law enforcement needs to focus more on cash flow, and less on incarcerating labor, seizing drugs, and forfeiting profits. How can this be accomplished? The Department of Justice's premier organization in this area, the Organized Crime Drug Enforcement Task Forces ("OCDETF"), is well positioned to lead the attack on narcotics cash flow, and should do so. For that to happen, the metrics of success will have to change, in order to look more toward money seized—and narcotics businesses which are disrupted—rather than toward defendants arrested and incarcerated. The idea of taking down money but not people cuts against the prevailing culture within some corners of law enforcement; yet it is worth it to try to change that culture if the payoff is better results with less incarceration.

##### A. *A Better Use for OCDETF*

American law enforcement is composed of a multitude of overlapping, independent agencies. These agencies may coordinate with each other, or they may not. Consider this situation: If I were to sell one of my students a bag of crack during class, who could take action? Certainly, the campus police could step in, as could the Minneapolis police. The Hennepin County

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has lost his money, and the seller has lost a sale. If it is a payment upon receipt of the narcotics, the seller is short the money, and the buyer is in debt to the seller. Either way, the continuing relationship between buyer and seller is disrupted.

<sup>114</sup> That is, if the person taking the profit remains free. Often with the forfeiture of profits, the person owning the property is arrested at the same time the property is forfeited. This might be disruptive—but also might not be, if that individual is easily replaced.

<sup>115</sup> See *supra*, § III(C)(1).

Sheriff's office could also arrest me; they have a task force directed specifically against narcotics.<sup>116</sup> The Minnesota State Patrol could also arrest me, of course,<sup>117</sup> and at the federal level I could be targeted by the Drug Enforcement Agency or other federal agencies that might find a way to claim interest. That is five very independent investigative agencies, whose jurisdictions all overlap at the precise place I would stand with my bag of crack.

This granulation is a challenge to any effort to move toward the forfeiture of cash flow to narcotics sources as a primary tactic. Having many small operations doing the same thing makes it difficult to gather the large-view intelligence on narcotics networks necessary. The patience to gather information before acting comprehensively would be crucial to the success of a cash-flow-first approach.

Fortunately, there is a good center of operations already in place, thanks to the now-fading War on Drugs. One attempt at centralization at the federal level was the formation of inter-agency task forces focused upon narcotics. The Department of Justice's Organized Crime Drug Enforcement Task Force initiative began in 1982, and focused on several "hub" cities around the country through coordinated efforts and long-term investigations.<sup>118</sup>

OCDETF has two important assets that would be crucial to a cash-flow attack on a specific organization. One is the OCDETF Fusion Center, a hub for intelligence about narcotics organizations drawn from a variety of sources.<sup>119</sup> Because the specialists there already gather and analyze financial information relating to drug trafficking, it would be a potent tool for a new focus on cash flow. The second existing asset within OCDETF is the Consolidated Priority Organization Target List, which comprehensively catalogues the "'command and control' elements of the most prolific international drug trafficking and money laundering organizations," according to the DOJ.<sup>120</sup> This would be the obvious starting point for identifying targets.

Just as current statutes already contain the tools needed for a strike against cash flow, OCDETF already has some of the structure needed within the federal law enforcement community. The problem is that though OCDETF does pursue financial investigations and considers asset forfeiture

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<sup>116</sup> See HENNEPIN COUNTY SHERIFF'S OFFICE, 2013 ANNUAL REPORT 18 (2013), available at <http://www.hennepinsheriff.org/sites/hennepinsheriff.org/files/2013annualreport.pdf>, archived at <http://perma.cc/XE6Y-RSKS>.

<sup>117</sup> On the other hand, the State Patrol might also provide me with drugs, apparently—a recent scandal revealed that trainees in a State Patrol program were giving people drugs rather than taking them away. See Laura Yuen, *Head of Suspended Drug Training Program Has History of Complaints*, MPR NEWS (June 22, 2012), <http://www.mprnews.org/story/2012/06/21/news/head-of-drug-training-program-has-history-of-complaints>, archived at <http://perma.cc/WR84-RA4X>.

<sup>118</sup> *Organized Crime Drug Enforcement Task Forces*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal/taskforces/ocdetf.html> (last visited Oct. 19, 2014), archived at <http://perma.cc/ZS3B-X9NK>.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

a priority,<sup>121</sup> this is not the same thing as narrowly attacking cash flow. More importantly, current OCDETF investigations have as a primary focus the take-down and arrest of multiple defendants, and it is this operation that almost by necessity takes priority. As one former chief the OCDETF unit in the Massachusetts U.S. Attorney's Office said, "[d]rug prosecution is a very labor-intensive job. When you're indicting 20 people at a time, that takes a lot of effort and a lot of manpower."<sup>122</sup> He is right, and indicting and arresting twenty people at a time is a distraction of time and money from the more important task of depriving those twenty people of a job through business failure.

Moreover, it seems that some of those targeted by OCDETF are well below the kingpin level, and it is the incarceration of these small-time actors that has played a role in the mass incarceration problem. For example, in January 2013, a press release titled "Third Defendant Sentenced in OCDETF Case" described the seventy month sentence given to a defendant charged with distributing "more than five grams of methamphetamine," while another defendant in the same case had been taken down for "possession with intent to distribute a small amount of cocaine."<sup>123</sup> Other OCDETF cases have been remarkable disasters for other reasons—including the infamous "Fast and Furious" case out of Arizona.<sup>124</sup>

Small-time cases and big-time debacles are a part of OCDETF reality. What this paper is suggesting is not eliminating OCDETF, but re-focusing it to produce better long-term results with less incarceration. Rather than having those crucial OCDETF assets used to conduct "expanded, nationwide investigations against all the related parts of the targeted organizations" (as the website for OCDETF puts it),<sup>125</sup> law enforcement should look to succeed in just one area—the civil forfeiture of cash flow of drug money within an identified set of criminal networks. It is not necessary to change everything at once; a good start would be to pluck one drug network from the Consolidated Priority Organization Target List and then attack it through cash flow seizures. If the business fails or is significantly disrupted, the interests of the American public are served.

It is not necessary to give up on arresting people for narcotics. The arrest of high-level traffickers will always be warranted. However, at least a portion of the most sophisticated part of the federal government's crime-

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<sup>121</sup> See *id.*

<sup>122</sup> *Drug Task Forces Targeting Mexican Cartels to Shrink*, U.S. DEP'T OF JUSTICE (Nov. 12, 2009), <http://www.mainjustice.com/tag/ocdetf/>, archived at <http://perma.cc/X7GQ-AQF7>.

<sup>123</sup> *Third Defendant Sentenced in OCDETF Case*, FED. BUREAU OF INVESTIGATION (Jan. 13, 2013), <http://www.fbi.gov/saltlakecity/press-releases/2014/third-defendant-sentenced-in-ocdetf-case>, archived at <http://perma.cc/JH3Y-4G2J>.

<sup>124</sup> This gun-transfer investigation allowed firearms to be sold through to felons in Mexico. See Andrew C. McCarthy, *Fast and Furious and OCDETF*, NAT'L REVIEW (June 22, 2012), available at <http://www.nationalreview.com/articles/303808/fast-and-furious-and-ocdetf-andrew-c-mccarthy>, archived at <http://perma.cc/6F42-5DBN>.

<sup>125</sup> U.S. DEP'T OF JUSTICE, *supra* note 118.

fighting apparatus should shift its focus to the interdiction of cash flow to sources of narcotics.<sup>126</sup> The hope is not that no one will be indicted, convicted, and incarcerated, but that fewer people will be, and that these convictions will be less crucial to the ultimate success of a large-scale narcotics interdiction, which is the dissolution of the drug network itself. This shift in focus by OCADETF would further the goal of federalism as well, by leaving to the federal government only that part of the anti-drug fight that best suits its strengths and international reach. At the same time, this shift will take forfeitures out of the hands of local task forces that now create many of the problems described in Section III(C)(1).

If a group like OCADETF identifies a discrete criminal network, it should establish specific goals. The ultimate goal, of course, is the disbandment of the criminal network. The interim goal should be seizing the amount of cash flow that will make that criminal network unsustainable. Rather than tacking pictures of individuals to a board and drawing lines between them, it is the stream of money that should be above a lead case agent's desk.

To do this, some parts of law enforcement culture will have to give way, particularly the single-minded focus on individual guilt and punishment as the system moves toward action directed against financial systems.<sup>127</sup> Moreover, new attempts to disrupt the flow of money to narcotics sources might also disrupt the flow of money to law enforcement, as well. If the tactic works, task forces based on arrest and conviction models may be disbanded, for example. Not surprisingly, ideas that threaten the status quo of law enforcement practices are sometimes opposed by law enforcement.<sup>128</sup>

## V. CONCLUSION

The primary metric for success in law enforcement has long been the successful arrest. Policymakers and the public seem to be rejecting the model of mass incarceration that results, however. More recently—as reflected by the actions of OCADETF and others—forfeitures have become a

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<sup>126</sup> In reality, it would be unwise to give up entirely on criminal prosecution of individuals, because some of those individuals have such skills and connections that they can begin again once their narcotic network has been destroyed. It is a proper goal of law enforcement to incapacitate these most culpable people. Moreover, some of the tools that will be necessary to track money (such as grand jury subpoenas) are typically obtained in the context of a traditional investigation into individuals.

<sup>127</sup> For prosecutors, the challenges under a cash-flow-first system would be different and, frankly, less interesting to some—the thrill of winning a trial and watching the defendant led away in chains will be replaced in part by the drier routine of civil forfeitures.

<sup>128</sup> For example, a proposal to allow legal medical marijuana in Minnesota was opposed by some police groups. A state legislator who was promoting the idea was told by the head of one police group that he was concerned that legalizing marijuana could result in a reduction in the federal anti-drug grants that had become an important funding source for many police departments. See Mike Mosdale, *Melin Challenges Cops on Pot Opposition*, CAPITAL REPORT (Feb. 14, 2014), available at <http://politicsinminnesota.com/2014/02/melin-challenges-cops-on-pot-opposition/>, archived at <http://perma.cc/Z6M8-JBP5>.

secondary measure. It is time for the third step in that evolution, which is to narrowly focus those forfeitures on cash flow, and make those forfeitures a primary rather than a secondary tactic in continuing the fight against illegal narcotics.

Such an effort would simultaneously address two problems: mass incarceration and the continuing problem of drug trafficking and abuse. In the end, the use of government's sword should be reserved for those operations where a problem is actually being solved. History's verdict is now clear: mass incarceration has not solved the problem of narcotics use. It is time, at the very least, to encourage a shift in weight among our federal narcotics bureaucracy toward striking out at cash flow in a way that is focused, fierce, and effective.

