NARCOTICS PROSECUTORS AS PROBLEM SOLVERS

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INTRODUCTION

If you ask a federal prosecutor what her job entails she will probably give you a simple answer: "I enforce the federal laws in court."

That simple answer is deeply misleading. First, it obscures the fact that prosecutors often (properly) choose *not* to enforce the law; they pick and choose their cases. Second, by emphasizing convictions it reflects a world that no longer exists in criminal law, one in which Congress entrusted prosecutors primarily to convict the guilty, and judges to employ broad discretion in issuing sentences tailored to individual circumstances. All that changed in the mid-1980's, when Congress enacted mandatory minimum sentences, sentencing guidelines, and other reforms, many of which were directed specifically to narcotics cases. Now a prosecutor's job involves much more than merely obtaining convictions. While a great deal has been written about how this new structure shifted the ability to shape sentences from judges to prosecutors,[1] there is more to the story.

With this shift of power to prosecutors came an enlargement of an existing duty—the duty to solve problems. In the modern courts where judges' hands are often tied, no other actor has the power to effect change through discrete cases. Problem solving through the use of discretion is a task that federal prosecutors have too often failed to recognize or embrace, and the cost has been gross overincarceration, the utter loss of the war on drugs, and a diminished trust in criminal law as a way to create order. A better answer to the question posed above would be "I use federal laws to solve problems."

Very simply, it comes down to this: If policy makers and narcotics prosecutors made discretionary decisions based on this better answer, our system of criminal justice would be much healthier. Prosecutors would defer less to investigators, think more broadly when making key decisions, and only seek to incarcerate those individuals who are not easily replaceable in criminal organi-

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1. *See, e.g.*, KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998).

zations. This essay will look broadly both at the remarkable power prosecutors have, and at the failure of prosecutors to systemically embrace the role of problem solver. In the end, there is reason to hope for something better in the future.

I do not intend this essay to be read as an attack on prosecutors; I was a prosecutor myself, and loved the job.[2] It was only through firsthand experience that I realized the remarkable breadth of discretion that prosecutors enjoy. At my very first sentencing, I appeared before Judge Avern Cohn, a veteran jurist (appointed to the bench by President Carter) who was a noted civil rights leader prior to his appointment. He looked down at me and said, "So? What do you want to do?" It seemed a strange question, but only because I was a beginner. In time I learned why it was logical, in our contemporary upside-down federal justice system, that the judge would ask the prosecutor what he wanted, rather than vice-versa.

We need to understand this discussion of the power and responsibilities of prosecutors in context, by acknowledging one core truth: We ask prosecutors to do something gut-wrenching. Society has assigned them the task of looking another man or woman in the eye and saying, sincerely, "I want to take away your freedom," or even (in death penalty jurisdictions), "I want you to die" before proceeding to argue for exactly that. It is a remarkable, essential, terrible role.

Compounding the emotional drain arising in that raw moment are the limitations on what prosecutors can do to effect change, as their only tool is a hammer. They deal with tragedies of the past, which cannot be undone—they cannot un-murder a man or un-rape a woman. Their best hope is to somehow avoid a tragedy in the future by rehabilitating a defendant, incapacitating him, or deterring others from committing crimes.

These are stark realities. A prosecutor must condemn others publicly, and may create change only by exacting hurtful punishment on defendants. It is in this dark world that we glimpse prosecutors' need for underlying principles by which to employ their discretion. Without them, prosecution amounts to merely punishing defendants—causing them pain—because prosecutors can; it becomes nothing more than bullying.[3]

The danger in this is not an abstraction. As Rachel Barkow has aptly recognized, pointing to a 95% rate of guilt-by-plea in federal courts, prosecutors "are the final adjudicators in the vast majority of cases."[4] That means that if prosecutors become unprincipled bullies, their actions can define our entire sys-

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2. I was an Assistant United States Attorney in the Eastern District of Michigan from 1995 through 2000.

3. I am aware that there is a fairly extensive academic genre that discusses "punishment theory," and includes arcane justifications for punishment as a good unto itself. *See, e.g.*, Chad Flanders, *In Defense of Punishment Theory, and Contra Stephen: A Reply to DiGirolami,* 10 OHIO ST. J. CRIM. L. 243 (2012). I am also confident that this specialized body of scholarship has no point of intersection with those who actually practice law in the criminal courts or develop the policies discussed here.

4. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009).

tem of criminal justice. Federal power, and particularly the power to restrict the freedom of individuals, should only be employed where it can effectively address real problems. In the fight against narcotics, this power has too often been employed without actually solving problems.

Section One below will lay out the changing role of prosecutors in our system of criminal justice, and describe the discretion now allowed them. Some of that discretion existed before the reforms of the mid-1980's. Most importantly, prosecutors have always had the ability to pick which cases to put before a grand jury. The modern grand jury, however, is little more than a rubber stamp on the prosecutor's charging decision, further enhancing prosecutors' ability to pursue cases or reject them. More recent developments have shifted even greater power to prosecutors: The federalization of low-level crimes has given them additional options in charging and plea negotiations, while mandatory-minimum sentences and sentencing guidelines have granted them power formerly reserved for judges. Prosecutors have a responsibility to use this power to solve problems.

Section Two identifies and describes this responsibility, and suggests how it might be pursued. Looking to the future, three options for fighting narcotics trafficking are briefly considered: using the tactics of war, focusing only on key players, and seizing money rather than people. Each would require new roles for people at each level of federal prosecution. These changes might be particularly wrenching for the line attorneys who actually negotiate pleas and argue for sentences, as they would have to confront investigators who often have different interests than prosecutors.

Finally, Section Three will pluck out and examine the seeds of hope that have been scattered in the waning days of the Obama administration, making this the right moment to rethink narcotics prosecution both at the wholesale (in terms of broad policy) and retail levels (in terms of how we address discrete cases).

I. THE JOB OF THE FEDERAL PROSECUTOR

A. *The Discretion to Choose Cases*

There are two primary sources of a prosecutor's discretion. One has always existed and flows from the nature of the job itself—the ability of a prosecutor to choose the cases she will take on and those she will decline. The other has been congressional legislation, which has self-consciously created new powers for prosecutors and moved problem solving to their plate.

The inherent power of prosecutors is rooted in their role within the modern system of criminal law. In short, prosecutors decide which cases will be

charged, and which will not be.[5] Historically, this case-selection role was played primarily by grand juries. At the time of the framers, and in the manner of British tradition,[6] there were no professional prosecutors and the job of investigating felonies and initiating a charge was left to the grand jury acting on a citizen's complaint.[7] That changed over the ensuing two centuries with two key developments. First, professional prosecutors proliferated in both the federal and state systems. They took over the role of initiating cases as complaints were routed to them through law enforcement officers, and accordingly became the conduit to the grand jury and to indictment. [8] The second development that limited the role of grand juries and expanded that of prosecutors was spurred by changes to the rules of criminal procedure: the elimination of the grand jury functions of vindication (actually finding someone innocent) and presentment (issuing a report).[9] This put the prosecutor firmly in charge of the process, largely replacing the grand jury as investigator and almost entirely usurping the grand jury's role as a meaningful filter between the stages of investigation and charge.

The traditional powers of the grand jury are now in the hands of the prosecutor to a degree many Americans would not imagine. In *United States v. Santucci*,[10] decided in 1982, a somewhat flummoxed panel of the Seventh Circuit reluctantly allowed the now-common practice of federal prosecutors gathering evidence through the use of pre-signed grand jury subpoenas, even where the grand jury itself never knows that the subpoenas are being sent out.[11] Today, grand juries conduct investigations without even realizing they are doing so; they are just the glittering pixie dust that gives prosecutors much of their power.

It is not just the investigative role of the grand jury that has been taken over by prosecutors. In reality, prosecutors now choose which cases are actually indicted; the grand jury is little more than a rubber stamp. The saying that "a

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5. Angela J. Davis has called this decision "the strongest example of the influence and reach of prosecutorial discretion." Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001).

6. The institution of the grand jury precedes even the Magna Carta, having been established by the Assize of Clarendon in 1166. R.H. Helmholz, *The Early History of the Grand Jury and the Canon Law*, 50 U. CHI. L. REV. 613, 613 (1983).

7. Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Secrecy, and Its Process,* 24 FLA. ST. U. L. REV. 1, 5-12 (1996).

8. William J. Stuntz, *Reply: Criminal Law's Pathology*, 101 MICH. L. REV. 828, 831 (2002).

9. As late as 1955, a court instruction to a grand jury told them that they were the "vindicator of the innocent as well as the accuser of the guilty." Charge to Grand Jury, 16 F.R.D. 93 (1955).

10. 674 F.2d 624, 632-33 (7th Cir. 1982).

11. *Id*. at 632.

good prosecutor could indict a ham sandwich" is hyperbole, but only barely.[12] Today, if a prosecutor takes a case to the grand jury seeking an indictment, it is a nearly sure thing that an indictment will be issued. One researcher found that in 785 federal grand juries in 1991, grand jurors voted against the prosecutor in fewer than twenty of the more than 25,000 matters presented to them, siding with prosecutors 99.9%of the time.[13]

These fundamental changes to the institution of the grand jury mean that the crucial sorting of good and bad cases has moved almost entirely from the grand jury room to the more informal and well-guarded confines of the prosecutor's office. There, the prosecutor meets with the investigating law enforcement agent who has come to present a case, and decides whether to accept the case for prosecution or decline it.

That meeting is of fundamental importance, and is the font of a thousand disparities. Investigators, understandably, may want fast, easy cases, because that makes them look productive. Moreover, they naturally want the cases they present to federal prosecutors to be accepted: If a case is declined their work to that point may be for naught. Prosecutors should want something very different, though—thoroughly researched cases that are carefully selected to solve problems. Some prosecutors will bow to the will of the agent, while others will resist and require more work and decline more cases.

In making this decision on case initiation, the AUSA (or her supervisor) might seek guidance from the United States Attorney's Manual, which is intended to be a reference manual in exactly this situation. The guidance it offers, however, is remarkably spongy. For example, the basis for declination of a case might be a lack of "substantial Federal interest,"[14] a decision that can rest on a laundry list of reasons, including:

> 1. Federal law enforcement priorities; 2. The nature and seriousness of the offense; 3. The deterrent effect of prosecution; 4. The person's culpability in connection with the offense; 5. The person's history with respect to criminal activity; 6. The person's willingness to cooperate in the investigation or prosecution of others; and 7. The probable sentence or other consequences if the person is convicted.[15]

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12. Matthew R. Lasky, *Imposing Indigence: Reclaiming the Qualified Right to Counsel of Choice in Asset Forfeiture Cases*, 104 J. CRIM. L. & CRIMINOLOGY 165, 189-190 (2014).

13. Roger Roots, *If It's Not a Runaway, It's Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821, 827 (2000).

14. *Grounds for Commencing or Declining Prosecution*, UNITED STATES ATTORNEYS' MANUAL 27.220, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.220 (last visited July 16, 2014), *archived at* http://perma.cc/4L78-QC5V.

15. *Initiating and Declining Charges – Substantial Federal Interest*, UNITED STATES ATTORNEYS' MANUAL 27.230, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.230 (last visited July 16, 2014), *archived at* http://perma.cc/DTN5-T47L.

The remarkable breadth of these exceptions opens a gaping chasm of discretion within which the federal prosecutor has broad play, subject only to the limitations of supervision within the office.[16] I am not arguing here that broad discretion to accept or decline cases is wrong; however, in combination with the inherent interest investigators have in quick and easy cases, the table is set for a system that tilts toward a particular kind of efficiency, a system that aims to clear a large volume of cases rather than solving problems. Within this dynamic lies the seed of injustice and disparity. As we will see, the actions of Congress (and, at times, the United States Sentencing Commission) provided the water and nutrients necessary to allow this seed to grow, by federalizing new crimes and making some low-level cases seem more important than they really are through the creation of sentencing enhancements and mandatory minimums.[17]

B. *Congressionally-Created Discretion*

Congress has broadened prosecutorial discretion in three principal ways over the past half-century. The first is through the creation of new criminal laws, which give prosecutors the ability to bring charges against defendants that might otherwise be beyond their reach. Importantly, this increasing federalization of criminal law has included the creation of a number of statutes that cover minor crimes and lesser defendants.[18] Second, Congress has empowered prosecutors by beefing up some existing statutes—most notably 21 U.S.C. § 841—through the addition of mandatory minimums and similar enhancements that apply only if the prosecutor chooses to employ them. Third, discretion has been

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16. There is commentary within the United States Attorneys' Manual to provide further direction, but it is hardly any more restrictive. For example, in explaining the "limits" on declinations relating to "federal law enforcement priorities," the Manual sets out that national priorities will be established, but that "Attorneys may establish their own priorities, within the national priorities, in order to concentrate their resources on problems of particular local or regional significance." *Id*. While the Manual requires that prosecutors charge "the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction," this is construed quite broadly in the commentary that follows. For example, it allows that "a faithful and honest application of the Sentencing Guidelines is not incompatible with selecting charges or entering into plea agreements on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime." *Id*. at 27.300.

17. The Sentencing Commission has abetted Congress in this by molding the federal guidelines around the contours of mandatory minimums. *E.g*., U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2013) (largely tracking the mandatory minimums of 21 U.S.C. § 841(b)). In fairness to the Commission, this contouring avoids inefficiencies that would be created if the guidelines were not synched to the statute.

18. TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AB.A. CRIMINAL JUSTICE SECTION, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998); Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 826-27 (2000); *see also, e.g.,* William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1881 (2000) (discussing federal crimes of fraud and misrepresentation).

heaped onto the prosecutors' already bulging plates through the creation of federal sentencing guidelines, which rest largely on the formal (i.e., charging) and informal (i.e., providing information to the probation officer writing a presentence investigation report) actions of the prosecutor.

1. *Federalization of Low-Level Crimes*

The federal penal code only grows; like most organizations, the federal government is loath to give up power and eager to expand it. In the criminal law context, a federal prosecutor's powers grow and her reach extends when additional actions are criminalized.[19] This is accomplished by passing new laws creating new crimes, something Congress has done eagerly over the past 50 years, and with particular intensity at the end of the twentieth century.[20]

An ABA task force noted that 40% of the federal criminal statutes enacted in the nearly 150 years since the Civil War were created in the twenty-eight-year period between 1970 and 1998.[21] Particularly in the field of narcotics, options for prosecutors abound, including not only the basic statute on narcotics trafficking (offering a range of possible sentences, including life sentences),[22] but also statutes that outlaw conspiracy to traffic narcotics (offering the same array of sentences as for trafficking),[23] simple possession of narcotics (usually leading to a comparatively low sentence),[24] using a telephone or other means of communication to "facilitate" the sale of narcotics (for which a sentence is capped at four years),[25] investing drug profits in nearly any manner (leading to a maximum sentence of ten years),[26] managing or controlling a space used for narcotics trafficking or use (offering a maximum sentence of 20 years),[27] and employing those under 18 to assist in narcotics trafficking (which doubles other terms),[28] among many others.[29]

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19. There is a loser, too, when federal statutes expand federal criminal jurisdiction. With most of these expansions, the states lose their exclusive ability to develop policy relating to that type of crime.

20. *See, e.g.*, Ehrlich, *supra* note 18, at 826; Stuntz, *supra* note 18, at 1881.

21. *See* Task Force on the Federalization of Criminal Law, *supra* note 18.

22. 21 U.S.C. § 841(a) (2012). This statute in itself makes several actions relating to narcotics unlawful, including manufacture of narcotics, distribution of narcotics, dispensing of narcotics, and possession with the intent to manufacture, distribute, or dispense narcotics. *Id*.

23. 21 U.S.C. § 846 (2012).

24. 21 U.S.C. § 844 (2012).

25. 21 U.S.C. § 843(b) (2012).

26. 21 U.S.C. § 854 (2012).

27. 21 U.S.C. § 856 (2012).

28. 21 U.S.C. § 861 (2012).

29. For example, money laundering under 18 U.S.C. §§ 1956, 1957 (2012) often will apply to drug crimes, and especially tough statutes like 21 U.S.C. § 848 (2012) (continuing criminal enterprise) even allow for the death penalty in some drug cases where there is an intentional killing.

Setting aside enhancements, consider simply the statutes described above. In even a very simple drug trafficking case, all of the above statutes could easily apply, as the defendant probably worked with others, had some drugs of his own, made a phone call to set up a deal, did something with his profits, controlled a space within which to work, and maybe even employed a minor at some point to perform some small task. A prosecutor, within her discretion, can select everything from this menu, or choose not to charge at all. That, in itself, is a remarkable power largely created by a willing Congress.

2. *Mandatory Minimums in the Hands of Prosecutors*

Expanding the charging options for prosecutors by expanding the penal code is only one of the gifts that Congress has given its friends in the executive branch. Another, very significant, boost to the power of prosecutors has been the creation of mandatory minimum sentences that come into play only if prosecutors so desire.

For federal narcotics cases, the two most significant such enhancements are embedded within 21 U.S.C. §§ 841, 851. The first allows prosecutors to require a mandatory minimum sentence of at least five or ten years based on the weight of narcotics that they choose to charge and prove.[30] Five grams of methamphetamine at issue,[31] for example, will create (if the prosecutor chooses) a five-year mandatory-minimum sentence, while 50 grams allows for a mandatory ten-year sentence.[32]

Those mandatory sentences are only a starting point, though, for another discretionary power of the prosecutor. If the defendant has criminal history that includes narcotics trafficking felonies, the prosecutor may choose (or not) to jack the mandatory sentence up even further.[33] Section 851 of title 21 specifically puts that power in the prosecutor's hands, directing that, "No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information . . . stating in writing the previous convictions to be relied upon."[34] The impact of this discretion is huge—on a trafficking charge involving more than 50 grams of methamphetamine, for example, the mandatory minimum sentence goes from 10 years to 20 years if one previous narcotics trafficking conviction is put on record, and life in prison without parole if two such convictions are presented by the prosecutor.[35]

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30. 21 U.S.C. § 841(b) (2012).

31. A single dose of methamphetamine, not including diluting material, is about 5 milligrams. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 application note 9 (2013).

32. 21 U.S.C. § 841(b).

33. 21 U.S.C. § 843(d) (2012).

34. 21 U.S.C. § 851(a)(1) (2012).

35. 21 U.S.C. § 841(b)(1).

Putting these together, one can see the remarkable cumulative effect of the discretion that Congress has put in prosecutors' hands. If a defendant was trafficking more than fifty grams of meth,[36] and had two prior convictions, there are three primary options.[37] First, the prosecutor could simply charge distribution of narcotics without specifying an amount or filing a notice of prior convictions, and no mandatory minimum would apply. If an amount over 50 grams was specified in the indictment, but no priors were filed, the ten-year mandatory minimum would apply. If the amount over 50 grams was specified in the indictment, *and* an information specifying the prior convictions, the sentence would be life. Thus, the sentence can go from whatever the judge chooses (even probation, if that is "reasonable" under 18 U.S.C. § 3553) to the certainty of life without parole, based only on what the prosecutor chooses to allege. The judge, typically chosen for her post after a remarkable career as an attorney because of her ability to employ discretion, has no control over those decisions.[38]

Sadly, this discretion has been used unevenly. Examining just the filing of prior conviction notices under 21 U.S.C. § 851, Judge Mark W. Bennett of the Northern District of Iowa recently analyzed data provided to him by the United States Sentencing Commission, and found that the rate of filing such enhancements varied enormously, even in adjacent districts.[39] For example, in Judge Bennett's district of Northern Iowa, prosecutors employed the discretionary enhancement about 79% of the time. In contrast, this hammer was used in only 3% of cases in a neighboring district, Nebraska.[40] Similar inexplicable disparities appeared in other areas.[41]

3. *Guidelines as Prosecutors' Tools*

Finally, the federal sentencing guidelines allow prosecutors an additional layer of control over the criminal justice process. While the Supreme Court's

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36. It is important to recognize the marginal nature of charging narcotics. That is, if a defendant is first caught possessing seven grams of methamphetamine intended for sale, it is unlikely that this is the first and only time he engaged in that activity. Investigation (if pursued) may reveal how long he has been in the business, and how much he normally sells at a time, allowing for a fuller picture of the amount he has trafficked. Whether or not to pursue this analysis, of course, is at the discretion of the prosecutor and investigator and is another cause of disparity between cases.

37. Of course, there are far more than three possible options, including deferral of adjudication, alternate charges as discussed in the preceding section, and declination of the case in favor of state prosecution.

38. The helplessness of federal judges in this situation sometimes leads to visible anguish. Katherine Bishop, *Mandatory Sentences in Drug Cases: Is the Law Defeating Its Purpose?*, N.Y. TIMES, June 8, 1990, at B16, *available at* http://www.nytimes.com/1990/06/08/us/law-mandatory-sentences-in-drug-cases-is-the-law-defeating-its-purpose.html (last visited July 16, 2014), *archived at* http://perma.cc/8Z55-U47J.

39. United States v. Young, 960 F. Supp. 2d 881, 895–96 (N.D. Iowa 2013).

40. *Id.* at 896.

41. *Id.*

decision in *United States v. Booker*, made the federal guidelines advisory rather than mandatory,[42] the result was only to diminish, not eliminate, the power that prosecutors gained when the guidelines were first enacted. The source of that power is the same that we see with enhancements and mandatory minimums, though perhaps somewhat more hidden.

The guidelines are rooted in a real offense system,[43] meaning that "relevant conduct" beyond the actual conduct charged can be considered by the judge in sentencing. [44] This relevant conduct, though, usually becomes known to the judge only as the prosecutor so desires. The probation officer who informs the judge about such conduct through a presentence investigation report[45] gets her information from the prosecutor and the investigating agent,[46] who can choose to withhold information they don't want forming the basis of a more serious sentence. Because of the process, rather than because of the strict requirement of the law, guidelines continue to ladle power into the bowls of prosecutors.

In sum, the decisions of who gets charged and how much time they will face are largely left in our modern system to the prosecutor's discretion. Problems are solved, ignored, created, and exacerbated according to how prosecutors use this power. That is why these decisions, and the principles that guide them, matter so much.

II. USING PROBLEM SOLVING TO GUIDE DISCRETION

A. *The Role of a Guiding Principle*

When I suggest that a simple, normative principle ("solve problems") should guide prosecutorial discretion, I am speaking to several levels at once. We can't forget that the Department of Justice is a hierarchy, albeit an uneven one. The Attorney General is in charge of the Department, and is able to issue directives to the four primary levels below her: the brass at Main Justice, the presidentially-appointed United States Attorneys who head the office in each district, the supervisors in those offices, and the line attorneys who prosecute cases.[47] Each level has a different task and a different degree of independence. In suggesting problem solving as a razor of decision (that is, as a tool for discerning which cases to pursue, and what to do with them), I am directing my analysis towards all of these levels, while recognizing that it will necessarily take on different inflections at each point. The Attorney General should focus

42. 543 U.S. 220, 245–46 (2005).

43. U.S. SENTENCING GUIDELINES MANUAL, § 1A4(a) (2013).

44. U.S. SENTENCING GUIDELINES MANUAL, § 1B1.3.

45. Presentence investigation reports are required in nearly all federal felony cases. 18 U.S.C. § 3552(a) (2012).

46. The probation officer also interviews the defendant, but the revelation of relevant conduct that might increase a sentence should be limited by the presence of the defense attorney at such an interview. FED. R. CRIM. P. 32(c)(2).

47. Barkow, *supra* note 4, at 876.

on problem solving in setting priorities for the department, and at the other end of the organization the line attorneys should employ that same razor in making decisions in discrete cases. Moreover, Congress has an important role in creating incentives for all of these levels to work to solve real-life problems.

Before moving forward, I need to recognize that statutes already provide a number of principled goals for sentencing. In fact, Congress and the Sentencing Commission have set out no fewer than 31 discrete factors and sentencing goals in various statutes,[48] including promotion of "respect for the law,"[49] the avoidance of sentencing disparities,[50] racial neutrality,[51] fairness,[52] respect for community values,[53] and even "flexibility."[54]

Perhaps most important are the four "traditional" goals set out in 18 U.S.C. § 3553(a): punishment,[55] deterrence,[56] incapacitation,[57] and rehabilitation.[58] The presence of these goals isn't contrary to the razor of decision I suggest; rather, they are the tools a prosecutor may employ to solve problems. For example, the problem presented by a hard-core recidivist may be solved only by incapacitation, while the problem of a drug addict may be best addressed through rehabilitation. Some relative ordering of the § 3553(a) goals is not only possible in any given case, it is necessary. The very natures of these goals, which are usually in tension with one another, make the idea that all are being served at once nearly impossible. Rehabilitation, for instance, usually requires that a sentence be structured in a way (e.g., probation) that doesn't provide much punishment, deterrence, or incapacitation.[59]

Moreover, in suggesting that problem solving would be a good razor of decision by prosecutors, I recognize that problem solving is already a consideration in many cases, particularly through the use of incapacitation through imprisonment.[60] For example, if a person has committed two violent crimes, been

48. I have described this in depth previously. Mark Osler, *Policy, Uniformity, Discretion, and Congress's Sentencing Acid Trip*, 2009 BYU L. REV. 293, 293-95 (2009). The problem with the federal code isn't a lack of directions—it is that there are too many of them, meaning that arrows point a prosecutor in every direction at once, justifying nearly any decision that prosecutor may make while employing discretion. *Id*.

49. 18 U.S.C. § 3553(a)(2)(a) (2012).

50. 18 U.S.C. § 3553(a)(6).

51. 28 U.S.C. § 994(d) (2012).

52. 28 U.S.C. § 991(b)(1)(B) (2012).

53. 28 U.S.C. § 994(c)(4).

54. 28 U.S.C. § 991(b)(1)(B).

55. 18 U.S.C. § 3553(a)(2)(A).

56. 18 U.S.C. § 3553(a)(2)(B).

57. 18 U.S.C. § 3553(a)(2)(C).

58. 18 U.S.C. § 3553(a)(2)(D).

59. The statute itself only requires that these goals be "considered" by a sentencing judge, after noting that a sentence should be "sufficient, but not greater than necessary" to the achievement of these goals. 18 U.S.C. § 3553(a).

60. In jurisdictions with capital punishment, of course, incapacitation can also be accomplished by executing the defendant.

incarcerated, and is then charged with another, incapacitating him for a long time will solve the problem of his recidivism. In such cases, prosecutors do seek incapacitation, and for the very purpose I suggest—they are solving a problem in the most reasonable manner. They are right to do so. However, in other cases, we incapacitate defendants who are easily replaced within a criminal organization, or who didn't matter much in the first place, so no problem is solved. Indeed, strong arguments have been made that this kind of failure to solve problems exacerbates harmful social conditions faced in some communities.[61]

The idea of a razor of decision is perhaps best understood in a discrete context. In the sub-parts below, I will address how this idea might operate in addressing the continuing problem presented by narcotics.

B. *Problem Solving and Narcotics*

Broadly speaking, in recent decades the goal of federal prosecution in narcotics cases seems to have been simply to lock up as many people as possible for long terms. Between 1980 and 2013, the number of people in federal prison on narcotics charges soared from 4,749 to 100,026.[62] Narcotics defendants now make up more than half of the federal prison population.[63] When we look at this disheartening trend, we cannot even pretend we are imprisoning the most culpable people. According to the United States Sentencing Commission, 93.4% of federal drug defendants were in the lower or middle tier of the narcotics business; 'couriers' is the largest category of narcotics defendants.[64]

What problem are we trying to solve through this vast imprisonment project? The primary problem with drugs is their use and the social cost it exacts on families and communities.[65] Undoubtedly, this is a real problem, as anyone close to someone addicted to heroin, cocaine, or methamphetamine can attest.[66]

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61. This is a central thesis of one of the most discussed books in the field. MICHELLE ALEXANDER, THE NEW JIM CROW (2010).

62. HUMAN RIGHTS WATCH, AN OFFER YOU CAN'T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 17 (2013), *available at* http://www.hrw.org/reports/2013/12/05/offer-you-can-t-refuse (last accessed July 20, 2014), *archived at* http://perma.cc/B8HW-TTGS.

63. *Id*.

64. *Id*. at 18.

65. Of course, there are other problems sometimes identified with (but less closely tied to) narcotics trafficking. Most obvious is the violence sometimes associated with the selling of narcotics. Yet drug-related violence may be difficult to identify and isolate, and constitutes a serious crime in its own right. Moreover, it is hard to accept indirect causation of violent crimes as a principal reason for harsh narcotics trafficking sentences when we punish trafficking of small amounts more harshly than we do actual violent crimes like armed robbery. Mark Osler, *Indirect Crimes and Proportionality: The Upside-Down World of Federal Sentencing*, 74 MISS. L.J. 1, 24-25 (2004).

66. There are several compelling eyewitness accounts of addiction, including one by a successful literary agent. BILL CLEGG, PORTRAIT OF AN ADDICT AS A YOUNG MAN (2010). However, the discussion of narcotics' inherent social costs requires nuance. Most users of

As one might expect, imprisoning low-level workers in the narcotics trade for long periods hasn't much reduced the amount of narcotics being purchased and used by Americans.[67] The reason for this failure is rooted in the nature of the crime itself. There are low barriers to entry into the low and middle rungs of the narcotics business—one need only perform simple tasks like selling or driving. Even the dreaded "crack dealer," who buys powder cocaine, cooks it on a stovetop with some baking soda and water and sells it to others, has no special skill other than a willingness to break the law. Nearly anyone can do it.[68]

Such low barriers to entry mean that when the couriers and crack dealers are incapacitated through incarceration, they are easily replaced. Thus, just enforcing the laws on the books—and using the enhancements Congress has provided—does little to solve the problem. We pluck one person out, and another takes his place. You can imprison millions, and millions more, with equally few alternatives and facing similar low barriers to entry, will replace them.[69]

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cocaine, for example, do not become addicted, and these non-addicts "rarely speak out about their experiences because they have nothing much to say about them or because they are afraid of being vilified for having taken an illegal substance." CARL HART, HIGH PRICE 211 (2013). Moreover, some dangers of narcotics have been overstated. In a remarkable 2007 report to Congress the United States Sentencing Commission sorted out valid and invalid claims of harms attributed to crack cocaine. For example, it found that the fear of scarring "crack babies" for life due to their mothers' use of the drug was overstated, and that "the negative effects of prenatal exposure to crack cocaine are identical to the effects of prenatal exposure to powder cocaine and are significantly less severe than previously believed." U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 62 (2007) [hereinafter USSC REPORT].

67. Drug use is very hard to measure, because honest self-reporting is difficult to obtain—essentially, the interviewer is seeking admission of a crime. Still, what we do know indicates that drug use has not been much impacted by our efforts to interrupt the narcotics trade. The Sentencing Commission's 2007 report to Congress showed drug usage among high school students to be consistent from 1991 through 2006, which was the heart of the War on Drugs. USSC REPORT, *supra* note 66, at 73. Setting aside such surveys, the best gauge of success in drug interdiction is an economic one—if we are winning and supply is restricted, price will go up. By this important measure, we have failed. Cocaine, for example, is now more than 70% cheaper in the United States than it was 30 years ago. Eduardo Porter, *Numbers Tell of Failure in Drug War*, N.Y. TIMES, July 4, 2012, at B1, *available at* http://www.nytimes.com/2012/07/04/business/in-rethinking-the-war-on-drugs-start-with-the-numbers.html (last visited July 27, 2014), *archived at* http://perma.cc/S5KM-K5SD.

68. The process is depicted in at least one music video. DADAcreative, *Prince Eazy Ft. Fredo Santana—Cookin Crack*, YOUTUBE (Jan. 16, 2014), http://www.youtube.com/watch?v=9U7Smp4mjYI.

69. The attraction of so many Americans to the narcotics business reflects the deep entrepreneurial streak in our culture. When someone buys powder cocaine and baking soda, cooks up crack, and sells it, that person is starting and running a business. While many cite high unemployment as a cause of the flourishing of the narcotics trade, a truer source might be a lack of entrepreneurial opportunities—chances to create a business rather than work for someone else. The obvious desire of so many Americans to start a business (albeit an illegal one) makes the heavy regulation of small businesses in many large cities a root cause of the narcotics problems, because they create a high barrier to entry to other entrepreneurial opportunities. For example, in Detroit there are significant barriers to starting other types of new businesses, such as a barbershop or a food truck. *See* MICHIGAN STATE UNIV. COLLEGE OF LAW SMALL BUSINESS AND NONPROFIT CLINIC, DETROIT ENTREPRENEUR LEGAL BARRIER

So, then, mass incarceration of low- and mid-level participants in narcotics trafficking does almost nothing (nor could it) to solve the primary problem we are supposedly addressing (narcotics use). To truly understand why this is, we have to acknowledge reality: The narcotics trade, unlike many other crimes, is a function of raw capitalism.[70] There is an insatiable market for narcotics in the United States. Businesses inevitably respond to the demands of this market, because profit is there, and barriers to entry are low. Barring the magical elimination of Americans' appetite for drugs, this market will exist just as surely as water flows downstream.

Given the real-life existence of this market, we must examine what law enforcement can do. That is, we must be realistic about what exactly is the best possible outcome that law enforcement might achieve. There is, in the end, only one thing we can hope for if drug use is the problem, and that is to convince drug users to stop using drugs. There are two legitimate avenues to this end available to law enforcement. First, law enforcement agencies can directly address drug use by arresting and imprisoning drug users, which will certainly incapacitate them and might also deter others from drug use. Second, they can pressure drug dealers such that the price of narcotics goes up, which in turn should reduce drug use. I realize these two options fall short of our anti-drug rhetoric, which assumes that if we bust enough drug dealers drugs will go away. That, however, is a failed experiment. Drugs haven't gone away. Market forces have prevailed, as we should have known they would. You can't win a "war" on a market, because markets are endlessly adaptable. There is great irony in the fact that the source of our nation's wealth, capitalism and free markets, is also the source of our most prominent and continuing social scourge and law enforcement failure.

Let us examine the first of these options—direct action against users to end or limit their consumption of drugs. Treatment of addiction can do something to accomplish this goal, but that isn't what law enforcement *does*. Rather, it is what health care does,[71] and one of our greatest measures to combat narcotics

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STUDY (2012), *available at* http://ippsr.msu.edu/policy/presentations/13MayDandridge.pdf, *archived at* http://perma.cc/R45P-KS5X.

70. Understanding that narcotics trafficking is a crime that follows business principles allows for a deeper understanding of many aspects of that problem. For example, crack was developed in competition with other forms of freebase cocaine, and won out because of its superior price point and ease of manufacture. Mark Osler, *Learning From Crack*, 10 OHIO ST. J. CRIM. L. 671, 673-77 (2013). Similarly, it spread from one city to the next as competitors entered a market, lowering the price in that locality and sending some crack sellers in search of cities where a higher price could be charged. *Id*. at 677-81.

71. One 2003 report estimated that over $5.5 billion a year was being spent on private narcotics treatment programs in America. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN., THE ADSS COST STUDY: COSTS OF SUBSTANCE ABUSE TREATMENT IN THE SPECIALTY SECTOR 21, 27-29 (2003), *available at* http://www.oas.samhsa.gov/ADSS/ADSSCostStudy.pdf, *archived at* http://perma.cc/PGZ4-LX26.

may well turn out to be the broader coverage for addiction treatment available under the Affordable Care Act,[72] reviled as it is in some quarters.

What law enforcement can do, using the only tool it has (a hammer), is to arrest and convict people for simply using drugs and hope that this will deter them and others from buying and using narcotics. In other words, we can reduce demand by locking up the consumers. If done extensively enough, this would probably work to some degree, especially if it took down the cocaine users in the suburbs, the marijuana-smoking college students, and the less affluent users of crack cocaine and methamphetamine in the center cities and rural counties. Let's be honest, though—this will never happen. America will not spend billions of dollars to lock up CEO's and students, cab drivers and lawyers, for simple possession of narcotics.[73] Perhaps this fact alone is evidence that we care about the war on drugs more as a form of social control than as a solution to a problem—that we as a society are more afraid of the stereotypical "drug dealer," defined primarily by race and appearance, than we are afraid of narcotics.

If direct action against consumers is unpalatable to the American public, then we are left pursuing a less direct means of affecting the choices of drug users who drive the narcotics market—by taking actions that will raise the price of their drug of choice. If we are to see things honestly, this is really all that *any* form of narcotics interdiction can hope for. In terms of raw economics, even the biggest drug bust is only going to temporarily restrict the supply side of the demand-supply equation, raising prices.[74] We hope, then, that higher prices will lead to less drug use, and the real-world results of cigarette taxation show that it might.[75] Given the presence of a vibrant market, that is as good as it gets in the real world of fighting drugs through drug busts.

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72. Office of Nat'l Drug Control Policy, *Substance Abuse and the Affordable Care Act*, WHITEHOUSE.GOV, http://www.whitehouse.gov/ondcp/healthcare (last visited July 27, 2014), *archived at* http://perma.cc/8PG4-YXKM.

73. A fascinating study in 2012 found that Americans are less punitive than we think we are regarding drug use. When Americans were polled individually there was little support for locking up drug users, even though we tend to think that the consensus favors harshness. This was true for both Democrats and Republicans. Matthew B. Kugler & John M. Darley, *Punitiveness Towards Users of Illicit Drugs: A Disparity Between Actual and Perceived Attitudes*, 24 FED. SENT'G. REP. 217 (2012).

74. The effect of raising prices will likely be temporary, again because of the function of markets. If we take actions that raise the price and (as we hope) demand falls, the price will then fall in response to the lower demand. That new level of demand might stick, or the lower price could inspire additional demand, luring usage rates back up. Thus, there is a chance that even though raising the price of narcotics is the best we can hope for through interdiction, that will only have a temporary effect on both demand and price.

75. Cigarette taxes, of course, also affect a highly addictive substance. Hikes in cigarette taxes have been effective at cutting smoking rates, particularly among young people and low-income communities. Chuck Marr, Krista Ruffini & Chye-Ching Huang, *Higher Tobacco Prices Can Improve Health and Raise Revenue*, CENTER ON BUDGET AND POLICY PRIORITIES, http://www.cbpp.org/cms/?fa=view&id=3978 (last updated Mar. 19, 2014), *archived at* http://perma.cc/5A4M-7C2E.

So, if we care about raising prices as the only realistic way we can begin to solve the problem of narcotics use (and we should), how can we accomplish this goal? As described above, mass incarceration has not been effective, because it results primarily in the incapacitation of people who are easily replaceable. Given that failure, let me suggest three additional methods of raising the price through law enforcement efforts that target producers and sellers (rather than consumers) in the narcotics market.

First, we could use the methods of an *actual* war to take down drug makers abroad. Second, we could create incentives to incapacitate only those who are not easily replaceable. Finally, we could attack cash flow rather than labor in an effort to close down discrete narcotics businesses by making them financial failures.

1. *Make the "War on Drugs" a Real War*

There is an odd distinction between the methods we have used to wage the war on terror and the methods used to wage the war on drugs. In fighting terror we use drone attacks, targeted killings, and even the invasion of other nations (most notably the American invasion of Afghanistan). We are willing to violate the sovereignty of other nations, torture people, and detain people indefinitely without charge. There are seemingly no limits to the methods we will use to pursue terrorists, particularly those who are in foreign countries.

In the war on drugs, however, we pull our punches. We respect international treaties, we do not kill groups of people with drone attacks, and (with the possible exception of the brief incursion into Panama to snatch Manuel Noriega)[76] we do not invade other nations. In waging the war on drugs, it seems, we do not utilize these methods of actual war, even though the parallels to terrorism are striking: both are international battles, both involve an extra-governmental enemy that may or may not be linked to a ruling body, both are well-armed, and both pose a threat to the safety of the citizens of the United States. In fact, a significant distinction between terrorism and narcotics is that narcotics cause Americans substantially more harm than terrorism. Terrorist attacks by groups based abroad have affected thousands of Americans; at the same time, the scourge of drugs like methamphetamine, heroin, and cocaine affects millions. Even measured solely by deaths, narcotics may be more serious. The worst terrorist attack on American soil, the September 11, 2001 destruction of the World Trade Center in New York, killed 2,752 people.[77] That same year, 3,934 people died in the United States just from cocaine overdoses.[78]

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76. Noriega challenged his unusual arrest and extradition, and lost in American courts. *Noriega v. United States*, 117 F.3d 1206 (11th Cir. 1997).

77. Phil Hirschkorn, *New York Reduces Death Toll by 40*, CNN.COM (Oct. 29, 2003, 1:13 PM EST), http://www.cnn.com/2003/US/Northeast/10/29/wtc.deaths/ (last visited Aug. 9, 2014), *archived at* http://perma.cc/4ER9-FTAL.

78. UNITED STATES CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL VITAL STATISTICS REPORT: DEATHS: INJURIES, 2001 (June 2, 2004), *available at*

Importantly for the purposes of this comparison, the great majority of illegal, non-prescription narcotics in the United States comes from foreign sources. Given the social costs flowing from what those drug makers do, why don't we go beyond crop eradication[79] and use drone attacks on the methamphetamine pill factory in Mexico, the cocaine-processing plant in Columbia, and the ecstasy makers of Holland? All of the usual excuses—that we don't want to invade the sovereignty of other nations, that we must respect the rule of law, that we should focus on what goes on at home—would seem to apply to the war on terror, but do not seem to limit our actions.

There are, of course, good answers to the question "why not treat drugs like terror?" One of those good answers is that the war on terror has led to remarkable excesses (such as the use of torture) and incursions into our privacy.[80] Critics, of course, have already lost the broader argument on terrorism, as even a President who vowed to close the prison at Guantanamo Bay has continued nearly all of the tactics of his predecessor and increased the use of deadly drone strikes.[81]

A more persuasive reason to avoid this tactic might rest in its proven inefficacy. Drug prices in source countries account for very little of the retail price paid in the United States, perhaps only 1-2% for drugs such as cocaine.[82] That means that source interdiction is a very inefficient way to manipulate the street price of narcotics. In the end, the difference between narcotics and terrorism is that the former follows the rules of a free market while the latter does not. Killing terrorists abroad so they do not come to the United States makes more sense than eradicating drug crops abroad merely hoping that the market will not supply them here anyways.

Moreover, federal law currently bars the president from employing the people best able to fight a war—the military—to enforce criminal laws. The Reconstruction-era Posse Comitatus Act[83] requires an act of Congress to deploy troops to fight crime, meaning that the executive does not have this power as commander-in-chief. With these problems noted, let's move on to more reasonable ideas.

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http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_21acc.pdf, *archived at* http://perma.cc/EG6M-U2WF.

79. Office of Nat'l Drug Control Policy, *Coca In The Andes*, WHITEHOUSE.GOV, http://www.whitehouse.gov/ondcp/targeting-cocaine-at-the-source (last visited Aug. 9, 2014), *archived at* http://perma.cc/PL85-NL6T.

80. Some authors have, of course, analogized the tactics on the war on drugs and the war on terror, claiming that both have simultaneously (and in distinct ways) reduced our privacy. *E.g.*, DAVID K. SHIPLER, THE RIGHTS OF THE PEOPLE: HOW OUR SEARCH FOR SAFETY INVADES OUR LIBERTIES (2012).

81. Tom Junod, *The Lethal Presidency of Barack Obama*, ESQUIRE, Aug. 2012, at 98, *available at* http://www.esquire.com/features/obama-lethal-presidency-0812 (last visited Aug. 9, 2014), *archived at* http://perma.cc/S3R4-2UPN.

82. Jonathan P. Caulkins & Peter Reuter, *How Drug Enforcement Affects Drug Prices*, 39 CRIME & JUST. 213, 217 (2010).

83. 18 U.S.C. § 1385 (2012).

2. *Target Only Significant Players in Drug Markets by Using Profit as a Proxy for Culpability*

A second method for raising the price of narcotics would be to focus narrowly on those actors in the narcotics markets who are not easily replaceable. The people we most often lock up—the couriers, the sellers, the mid-level managers[84]—have no effect on the price of narcotics, and our punishment of them has much more to do with public morality than problem solving. If problem solving is the goal, and the tool is increasing narcotics prices, then we should set our sights only on those with unique skills or abilities that make them difficult to replace.

Certainly, those skilled people exist. The logistics of moving large amounts of narcotics over international borders are complicated, and success in that job requires a talent found in others who understand business logistics. Similarly, the financial masters of the drug world have unique skills, as do those who handle governmental affairs (the paying off and co-opting of soldiers, politicians, and government workers). To analogize, arresting the greeter or cashier at Wal-Mart won't close down the store; arresting the guy who sends the trucks or issues the paychecks might.

The problem with our current system is that we use the wrong proxy for importance in the narcotics business. The proxy we use is the weight of the narcotics at issue. Farcically, federal law treats as a "kingpin" anyone who (for example) transports or distributes over 50 grams of methamphetamine.[85] That is the magic formula that incentivizes law enforcement to arrest couriers. Arresting the truck driver transporting methamphetamine from Houston to Indianapolis yields an easy case that results in a lengthy sentence. But that sentence, of course, will not make a whit of difference in solving the problem presented by narcotics. By the next week, another trucker will perform the same task.

If we truly wanted to incentivize incapacitating people with unique talents, we would use a very different proxy for culpability: the amount of profit the target makes from narcotics trafficking. Because trafficking narcotics is a business, the profit in narcotics (like any other business) goes to those who are innovative, those who lead, and those who have unique talents; in other words, the profits go to the people who are not easily replaceable. Using profit as a proxy for culpability would mean that the courier who is paid $1,000 or the street dealer making $7 an hour or less[86] would no longer face the same sentence as the true kingpin. The long sentences would go to those who make the most money, and whose incapacitation would make the most difference.

Another advantage to punishing narcotics traffickers according to their profits is that it would produce an effective incentive to go after the people who

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84. *See supra* Section II.B.

85. 21 U.S.C. § 841(b) (2012).

86. STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 103 (2005).

make money from black and grey market transactions in prescription drugs like OxyContin, a segment of the drug market that is more important than ever.[87] Doctors who overprescribed drugs they knew were being abused would face the same penalties as more traditional drug dealers, based on the personal profit they made through these overprescriptions.

Focusing on the profit-makers would mean more work and fewer cases for prosecutors, but moderating the amount of work a prosecutor may have to do is not the problem we are trying to solve. The current proxy (weight of narcotics at issue) is efficient only at generating meaningless cases. The easiest case to make with the current proxy is likely to target the least culpable schlub of them all, the guy who is on the street (or driving along it) in possession of narcotics, moving towards a retail buyer. A better proxy (profit) would be more efficient in solving the problem of narcotics use by raising the price of illegal drugs, because markets are more likely to be disrupted (at least temporarily) if key players are suddenly absent.

3. *Target Cash Flow*

Finally, if we endeavor to raise the retail price of drugs by attacking key parts of the relevant market, we could ignore labor altogether and attack a different, more vulnerable part of the business: the cash flow back to producers and wholesalers, which is the lifeblood of narcotics trafficking.

Without either cash flow or credit, any business will fail. It will no longer be able to pay workers, buy materials, or ship products. The cash flow of a narcotics business is particularly vulnerable, because such businesses do not have access to traditional banking or credit markets, meaning that if cash flow is interrupted above the margin of profit, the business will fail. Business failure means the same thing in legal and illegal markets alike: supply of a product is reduced, and prices increase, at least temporarily.

Targeting cash flow would require no new laws. Current federal statutes on drug trafficking and money laundering already allow for the forfeiture of money that is either the product of or used in furtherance of an illegal drug business.[88] Moreover, those laws don't even require a criminal case to seize the money—a civil forfeiture action may be filed against the money itself.[89]

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87. The Centers for Disease Control and Prevention has labeled the abuse of prescription drugs an "epidemic," and the Obama administration has prioritized the need to address this epidemic. Office of Nat'l Drug Control Policy, *Prescription Drug Abuse*, WHITEHOUSE.GOV, http://www.whitehouse.gov/ondcp/prescription-drug-abuse (last visited July 27, 2014), *archived at* http://perma.cc/WGR6-J722.

88. Money laundering in general is criminalized through 18 U.S.C. §§ 1956 and 1957 (2012). Criminal forfeiture of narcotics money is allowed through 21 U.S.C. §§ 853 and 881 (2012).

89. Congress allows for civil forfeiture of money that is traceable to a drug transaction or intended to facilitate a narcotics transaction. 21 U.S.C. § 881(a)(6). Cash flow to a narcotics source does both.

Casual observers of narcotics interdiction may think that we already seize cash flow, but many of the drug forfeitures we see are of profits, not cash flow. Profits and cash flow are not the same—profits are the cash, houses, and cars that drug makers, wholesalers, and dealers acquire through the drug trade. So long as there is cash flow, profit can be replaced; as long as business is generated, the profits will come back. Cash flow, on the other hand, is the money flowing upstream that will become not only profits but payments to vendors, employees, and others. If cash flow is interdicted, not only will profit dry up, but the operation of the business will become impossible as well.

Going after significant narcotics cash flow rather than profits might also address another problem, which is created by the strong incentives in place now for local officials to seize and forfeit small-value items from those they arrest. Local law enforcement offices get to keep much of the value of what they seize and forfeit,[90] meaning that the size of their own budgets can depend on how much they seize. This has led to controversial abuses, in which local authorities use civil forfeiture to take the low-value but readily available property of people only tangentially involved with narcotics.[91] Shifting the focus from profits to cash flow will largely avoid this problem, because cash flow is likely to be concentrated in large amounts and carefully guarded due to the danger of employee theft. If we pursue cash flow rather than profits, law enforcement will seize wire transfers and large amounts of cash rather than a poor man's pickup truck.[92]

These last two methods of raising the price of drugs—targeting non-replaceable actors by using profit as a proxy for culpability, and interdicting cash flow—could be used together, and the combination might have stunning results. Notably, such a focus would not only have a chance of solving the problem of narcotics use (at least in part) by raising prices, it also avoids the social costs and moral ambiguities inherent in our current program of mass incarceration.

C. *Presidents and Prosecutors as Problem Solvers*

1. *Policy Makers*

Certainly, the most reasonable of these problem-solving initiatives (prosecuting only the most culpable defendants and targeting cash flow) would work

90. Chip Mellor, *Civil Forfeiture Laws and the Continued Assault on Private Property*, FORBES.COM (June 8, 2011, 5:30 PM), http://www.forbes.com/2011/06/08/property-civil-forfeiture.html (last visited Aug. 9, 2014), *archived at* http://perma.cc/Y68T-TBXM.

91. *See, e.g.*, Sarah Stillman, *Taken*, THE NEW YORKER, Aug. 12, 2013, at 48, *available at* http://www.newyorker.com/magazine/2013/08/12/taken (last visited Aug. 9, 2014), *archived at* http://perma.cc/8UH6-7ZBY.

92. Tracking the money backwards, from drug sale on the street to transfer back to the source, could also ensure the right money is being taken.

best if they were initiated at the highest levels. Each would require a unique set of actions from the President and Main Justice.

Consider first the idea of leaving low-level traffickers to state law enforcement and reserving our federal resources for high-value targets—those who make the most money, have the highest skill levels, and are most difficult to replace by a trafficking network. A commitment at the highest levels to take on fewer but more important cases would be a prerequisite to success on a broad scale. The Department of Justice would have to make clear, to both investigators and prosecutors, that they would be evaluated not on the number of convictions obtained, but on the level of culpability of those they convicted. Moreover, a good metric would need to be used to assess culpability—something different from the false proxy of weight built into our statutes and sentencing guidelines. As discussed above, one better proxy would be the profit an individual takes from a narcotics operation.

Just as important would be a re-allocation of resources. Currently, law enforcement agencies commonly investigate and prosecute the higher reaches of a narcotics organization by "working up the chain"—pleading out low-level defendants who then provide information against the higher-ups.[93] This technique is low-cost in terms of investigative resources and is occasionally effective, but it creates striking disparities. For example, if we want to take down an organization with two low-level functionaries, a lieutenant, and a kingpin, we might start by arresting the functionaries and threatening them with long sentences if they refuse to cooperate against the more-culpable lieutenant and kingpin. That works, sometimes, if the low-level defendant has worthwhile information. If the defendant refuses to cooperate with the government, though, prosecutors will often make good on their promise of a long sentence for the low-level functionary.[94] That means that the low-level functionary ends up sentenced harshly, while the kingpin goes free (or, if he later flips on others, he may receive a lesser sentence than his subordinates).

This cheap option would have to be replaced by methods that allow us to go directly after the kingpin without threatening the subordinates with disproportionate sentences. These techniques could involve financial tracking, intensive surveillance, and wiretaps. The higher-value targets would require more resource-intensive investigations. The decision to go from cheap but unjust to more expensive but worthwhile should come from the top, because it requires a change of prosecutorial culture if it is to work broadly. In the end, of course, the costs may well net out as fewer people serve long prison terms, and prison costs decline. Moreover, there will be other savings generated by processing fewer people through the federal system.

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93. This technique was recognized and defended by Attorney General Janet Reno in the midst of the War on Drugs. Janet Reno & Barry R. McCaffrey, *Letter to President Clinton: Crack and Powder Cocaine Sentencing Policy in the Federal Criminal Justice System*, 10 FED. SENT'G REP. 192 (1998).

94. HUMAN RIGHTS WATCH, *supra* note 62 at 101-02.

Similarly, a shift to seizing cash flow rather than people would work best if implemented nationally. In particular, FBI agents who have become expert at seizing cash flow to terrorist organizations could either be transferred to the narcotics effort or train those who are already working against drug trafficking in this new technique. Again, this shift would challenge the culture of law enforcement, which is built around arresting people and making cases that result in prison terms. A new focus would require a consistent insistence on these new priorities, and would have to create a reward structure that would incentivize the pursuit of cash flow.

2. *The Line Prosecutor as Problem Solver*

Working as part of a national effort or on their own, individual Assistant United States Attorneys can refocus priorities towards problem solving rather that simply incarcerating (and many already do). Whether they choose to pursue high-value targets directly or to seize cash flow, a problem-solving prosecutor is going to have a fundamental challenge: convincing supervisors and investigators to cooperate with the actions required to implement such a strategy.

Of those two groups, supervisors may be the easier to work with. Of course, this is simplest if (as described in the preceding section) there is a national mandate to pursue these tactics. If that is the case, then supervisors will be looking to line prosecutors to change their methods. Even in the absence of such a national effort, though, individual prosecutors may get approval to use new methods, particularly if articulated in a way that is consistent with Department of Justice policy. Prosecutors traditionally have some leeway in how they approach cases, particularly if they are experienced.

Convincing investigators to go along with such a new program may prove more difficult. It would mean that some of their traditional cases would be declined, and that more work would be required on others. Further complicating things is the bare fact that many investigators presenting narcotics cases to Department of Justice attorneys are not themselves employed by the Department—they report to a local police chief, or state officials, or Homeland Security, or a branch of the military.

This brings us back to the crucial initial conference between the prosecutor and the investigator.[95] One mistake of the legal academy is our lack of focus on the importance of this meeting.[96] With the fading of the grand jury as anything more than a discovery tool for prosecutors, this meeting has become the primary opportunity for culling out bad cases within our system of criminal justice,

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95. *See supra* Section I.A.

96. This isn't to suggest that there haven't been worthwhile analyses by sharp minds—just that not enough of us have turned to this topic. Ronald Wright, in particular, had offered fascinating insights into the inner workings of prosecutor's offices. *See* Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010 (2005); Ronald F. Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 61-66 (2003).

but it is non-public and largely beyond observation, commentary, and reform. It is also a stage where the idea of problem solving gets lost, because the prosecutor will focus on the provability of a case rather than its impact in solving a problem.

The dynamics of this meeting are fascinating, because the prosecutor and the investigator must reconcile fundamentally different interests. The investigator wants to efficiently bring the case to a conclusion—his best result will be that the prosecutor accepts the case immediately, charges it based on the information at hand, and negotiates a plea agreement quickly and with a significant sentence. That will result in little need for follow-up work, and allow the investigator to move on to other cases. In contrast, the prosecutor wants as much evidence gathered as possible to ensure a strong negotiating position and a likely win at trial if necessary. She wants to reject a weak case and receive follow-up work on the stronger ones to ensure her own success.

The tension between these interests can be exacerbated by the relative experience of the actors. If the prosecutor is a 27-year-old recent law school grad still finding his way, and the investigator is a seasoned 20-year Special Agent of the FBI, it is unrealistic to expect the prosecutor to dominate the conversation about what further work should be done on the case.[97] Yet that is his role. In the end, it will be the prosecutor who is responsible for proving each element beyond a reasonable doubt at trial.

In considering a new case at the initial meeting with an investigating agent, a prosecutor has three choices. She can accept the case as it is presented (and make the investigator happy). She can decline the case for prosecution (which will make the investigator unhappy). Finally, she can stall, and ask the investigator to pursue more evidence before a decision is made (which is also probably going to make the investigator unhappy, since he was hoping not to do further substantive work on the case).[98] There is strong incentive to please the investigator, who might seek that prosecutor out for further cases and also has the ability to enhance or diminish the reputation of the prosecutor. Certainly, a great many investigators favor thorough investigation, and I don't mean to suggest otherwise by noting that there is a built-in incentive to do the opposite. Necessarily, some agents resist that incentive more than others.

To create a new paradigm of problem solving, the dynamics of that meeting will have to adhere to a new standard. The prosecutor will have to insist on a discrete course of action, and firmly set out a new type of goal beyond "en-

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97. This can be mitigated somewhat if a supervisor handles intake, particularly for the newest prosecutors, but the effect of this mitigation will only be as strong as the will of that supervisor to discern good cases from bad and to reject cases that do not solve a discrete problem.

98. The United States Attorney's Manual lays out these options for prosecutors, noting that where prosecution is declined, the prosecutor has the option of referring the matter for prosecution elsewhere or recommending pretrial diversion. UNITED STATES ATTORNEY'S MANUAL § 9-27.200, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.200, *archived at* http://perma.cc/VX47-RZ68.

forcing the federal laws in court."[99] If the culture is to change and move towards problem solving, it will change within the context of these meetings.

III. SEEDS OF HOPE AND CONTINUING CHALLENGE

The sections above suggest two crucial steps in a problem-solving approach to narcotics by federal authorities. The first is that we move away from mass incarceration of low- and mid-level actors in narcotics markets. The second is that we begin trying new approaches to solving the continuing problem of narcotics use in the United States. In the second term of Barack Obama's presidency, we are seeing strong signs that the administration is embracing the first and trying to scale back on the scope of mass incarceration. The continuing challenge, however, will be something the administration has been largely silent on—what law enforcement tactics will replace the failed strategy of mass incarceration of low-level offenders. The problems caused by narcotics use are just too significant to ignore, and the law enforcement establishment is not going away. It must be retasked with something more productive.

A. *The Rejection of Mass Incarceration*

On August 12, 2013, Attorney General Eric Holder gave a remarkable speech to the American Bar Association in San Francisco. In that speech, he powerfully rejected the ethics and effectiveness of mass incarceration of narcotics defendants:

> As we come together this morning, [the promise of equal justice for all] must lead us all to acknowledge that—although incarceration has a significant role to play in our justice system—widespread incarceration at the federal, state, and local levels is both ineffective and unsustainable. It imposes a significant economic burden—totaling $80 billion in 2010 alone—and it comes with human and moral costs that are impossible to calculate.
>
> As a nation, we are coldly efficient in our incarceration efforts. While the entire U.S. population has increased by about a third since 1980, the federal prison population has grown at an astonishing rate—by almost 800 percent. It's still growing—despite the fact that federal prisons are operating at nearly 40 percent above capacity. Even though this country comprises just 5 percent of the world's population, we incarcerate almost a quarter of the world's prisoners.[100]

Holder's announcement of principle was backed up by actions. At the same time that he made the speech, his office provided federal prosecutors with new directives regarding narcotics prosecutions. Two of these were particularly

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99. *See supra* Introduction.

100. Attorney General Eric Holder, Remarks at the Annual Meeting of the ABA's House of Delegates (Aug. 12, 2013), *available at* http://www.justice.gov/iso/opa/ag/speeches/ 2013/ag-speech-130812.html (last visited Aug. 9, 2014), *archived at* http://perma.cc/PH59-HNEP.

striking. One directed prosecutors to refrain from enhancing the sentences of some low-level drug offenders by charging the weight of the narcotics at issue. Another told prosecutors not to jack up the sentences of some offenders based on prior criminal history—the very enhancements allowed in 21 U.S.C. § 851 that Judge Bennett had decried in his *Young* opinion. Despite the opposition of some line prosecutors (giving up power is never easy), Holder seemed determined to use the power of the Executive to reduce narcotics sentences for the types of defendants who too often received extreme sentences out of proportion to their culpability. Several months later, the Department of Justice announced another blow aimed directly at the same problem: an initiative to commute the sentences of long-term prisoners convicted of drug trafficking.

It appears, too, that these initiatives come from the president himself. In an interview with journalist Bill Keller, Attorney General Holder said that the new approach was "something that matters to the President . . . . This is, I think, going to be seen as a defining legacy for this administration."[101]

All this is cause for hope. The President and Attorney General seem committed to mitigating the adverse affects of the mass incarceration that has come with the war on drugs. On its own it is a good development, but unfortunately it still does nothing to address the continuing problem of drug use in the United States.

B. *The Challenge of New Initiatives*

Certainly, steps towards making treatment for addiction more widely available, such as the coverage allowed under the Affordable Care Act, are a good thing and may do something to reduce the demand for narcotics in the United States. However, treatment on its own cannot be enough. Beyond its expense, it is very hard to quantify success in addiction treatment, and it appears by any measure that success is hard to come by if total cessation of narcotics use is the goal.[102]

To effectively combat harmful narcotics use, we need to augment increased treatment with vigorous law enforcement action to raise the price of drugs. Section Two above suggests three nonexclusive options: using the tools of war, incentivizing the prosecution of key figures, and attacking cash flow. Each might be effective, though the first has built-in political and operational problems. Were we to properly incentivize the prosecution of those within the narcotics

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101. Katherine Harmon, *Does Rehab Work as a Treatment for Alcoholism and Other Addictions?*, SCIENTIFIC AMERICAN, July 25, 2011, http://www.scientificamerican.com/article/does-rehab-work/ (last visited Aug. 9, 2014), *archived at* http://perma.cc/BUE3-GPDE; Bill Keller, *Crime and Punishment and Obama*, N.Y. TIMES, Feb. 24, 2014, at A19, *available at* http://www.nytimes.com/2014/02/24/opinion/keller-crime-and-punishment-and-obama.html, *archived at* http://perma.cc/93ES-EC49.

102. Benedict Carey, *The Evidence Gap: Drug Rehabilitation or Revolving Door?*, N.Y. TIMES, Dec. 23, 2008, at D1, *available at* http://www.nytimes.com/2008/12/23/health/23reha.html, *archived at* http://perma.cc/9JPQ-MRXQ.

business who are not easily replaced, while also attacking cash flow, we could see measurable success.

President Obama is right to want part of his legacy to be a dialing back of the failed tactics of narcotics interdiction. Hopefully, another part of his legacy can be the embrace of new tactics to address the problem that has always been there: the destruction of families and communities by drug use itself. I represent, pro bono, some of the men and women who have been sitting in prison for far too long on nonviolent drug charges. I know the tragedy those imprisonments have caused, and will be happy to see them freed. What will remain with their release is another set of tragedies. Narcotics use and addiction exact too great a toll to be ignored, and addressing that problem must continue to be part of our national priorities. We have properly set aside the idea that incarceration is the only solution. Now we must move on to finding better answers.