INTRODUCTION

With the dawn of the twenty-first century, the regulation and control of illicit drug trafficking continues to be one of the most difficult challenges confronting the United States and the world. In 2008, in response to over seven thousand drug-related murders and concerns that Mexico may become a failed state, Mexico’s President Felipe Calderon waged war on the country’s drug trafficking cartels. Yet, it is the demand from the United States that fuels the growth of the international drug trade, creating a moral and strategic challenge for the federal government in drug offense

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1. See David Luhnow & Jose De Cordoba, The Perilous State of Mexico, WALL ST. J., Feb. 21, 2009, at W1, available at http://online.wsj.com/article/SB123518102536038463.html (detailing how the Mexican government has been embattled in a war on drugs and why some scholars believe that if the conflict continues Mexico could become a failed state).

enforcement. Morally, one might argue that the United States should move towards a program of legalization because drug enforcement, at best, is ineffective at reducing crime and, at worst, erodes our confidence in the fairness of the criminal justice system by breaking apart poor minority communities. Regardless of the merits of this claim, the United States is unlikely to move towards legalization, especially because so many resources have been invested in combating drug-trafficking. Therefore, the question becomes: what should the federal enforcement strategy be in the new millennium. The answer to this question must take into account three factors: (1) the role of globalization in today’s drug trade, (2) the lessons learned from our experience with drug enforcement in the 1980s and 90s and (3) the role of the federal government in the drug war.

This Note argues that the federal government is likely to and should move away from its enforcement paradigm that defined past decades. This paradigm was based on prosecuting the manufacture, distribution, and possession of drugs, mainly in urban areas. Rather, today, the government should focus its resources on disrupting the global flow of money that fuels the trade. The tools—the money laundering and civil asset forfeiture statutes—have been in place for years.3

There is already evidence that the government is adopting this strategy. During its 2008 term, the United States Supreme Court heard three cases4 involving the interpretation and application of numerous provisions of the money laundering statute, reflecting the government’s increased reliance on this law. Similarly, over the last fifteen years the number of federal drug dealing prosecutions remained consistent;5 however, federal forfeiture amounts have increased every year. In 2000, the amount of funds forfeited

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totaled 507 million U.S. dollars.\(^6\) In 2008, the amount forfeited totaled over 1.3 billion U.S. dollars.\(^7\) Thus, money laundering and asset forfeiture prosecutions may become the key enforcement strategy in the drug war of the twenty-first century. This Note argues that they ought to be, but that the current framework laid down by the Supreme Court in 2008, in the Santos–Cuellar–Ness trilogy, poses a stumbling block. In turn, this Note offers arguments to limit the reach of these cases.

**PART I: OVERVIEW OF THE NOTE**

This Note has five parts. Parts II–IV argue for a new federal enforcement strategy in the twenty-first century, paying due regard to the opportunities of globalization and the lessons of the 1980s–90s drug war. Part V argues that the law, decided in three 2008 Supreme Court cases, will have to be rethought if the policy is to be effective. This Note is not a primer on civil asset forfeiture or money laundering laws.

Part II sets the current drug enforcement challenge within its historical context. In the 1980s–90s, urbanization linked supply and demand presenting opportunities for traffickers to gain wealth and power. Thus, it was logical for the federal government to focus on urban drug dealing and to rely heavily on its laws criminalizing distribution and trafficking. Today, however, this policy seems ill-founded. Urbanization no longer links supply and demand, but globalization does, giving traffickers new and unprecedented opportunities. A further lesson of the 1980s and 1990s was that stepped-up

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6. In 2008, most forfeiture cases arose in the same cities that were notorious for drug dealing in the nineties. According to the FBI Uniform Crime Report for 1995, the top reporting cities with the highest violent crime rates at the peak of the crack-cocaine explosion included New York City (with a rate of 1,392 violent crimes per 100,000), Baltimore (1,335), Los Angeles (1,422), and Miami (1,886). FBI, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1995, 80, 92–93, 95 (1995). Comparing the amount of payout from the federal asset forfeiture fund in 2008, these cities top the list in amount of forfeiture within their respective geographic areas. U.S. DEPARTMENT OF JUSTICE, EQUITABLE SHARE OF CASH AND SALE PROCEEDS 2008 (2008), available at http://www.usdoj.gov/jmd/afp/02fundreport/2008affr/report2b.html. On the West Coast, Los Angeles forfeited over $9.7 million (while comparatively the state of Oregon forfeited only $1.0 million, Washington $2.5 million, and Nevada 3.9 million). Id. Similarly, on the East Coast, New York City amassed a total of $11.2 million (which was greater than Georgia, South Carolina, and North Carolina). Id. Baltimore federally forfeited 1.6 million (with another 1 million from Baltimore proper) and Miami forfeited $3 million. Id.

drug-trafficking prosecutions in urban areas were more effective at breaking up poor minority communities than breaking up the trade. Therefore the government can no longer rely on the tools of the 1980s and 1990s. Nor should it continue to pursue a strategy that resulted in mass incarceration and the breaking up of minority communities. Part III argues that the government should move away from wholesale reliance on distribution and trafficking prosecutions and instead build a new enforcement norm centered around the use of the federal civil asset forfeiture and money laundering statutes. Relying on these statutes uses globalization and its free-market emphasis—rather than the criminal justice system and its expensive prison system—to disrupt globalized drug-trafficking networks.

Part IV of this Note refracts the arguments of Part II and III through the stories of Samuel Ness and Regalado Cuellar. Their stories demonstrate how globalization presents new opportunities for “launderers” to broker the exchange of millions of dollars of drug money between U.S. wholesalers and international cartels. It also demonstrates how the government can use prosecutorial discretion effectively in order to make an impact on drug trafficking without relying on mass incarceration. To this end, discretion should be used to choose between pursuing a money laundering prosecution or a civil asset forfeiture action. The stories of Cuellar and Ness, however, also provided the facts for the Supreme Court, in 2008, to reign in the government’s ability to apply these laws in an optimal fashion. This Note criticizes the Santos–Cuellar–Ness trilogy for relying on a drug war paradigm that is tied to our experiences with drug trafficking in the 1980s and 1990s rather than the new millennium. Nonetheless, this Note argues that these cases can be narrowly interpreted.

PART II: DRUG MARKETS: NEW OPPORTUNITIES AND ENFORCEMENT CHALLENGES

A. Market Opportunities

1. Economic Principles of the Illegal Drug Market

The drug-trade is like any other market, and drug-traffickers, like other businesses, must abide by the forces of supply and demand. To be

sustainable, a drug market must reach a point of equilibrium—where willingness and ability to purchase drugs meets the willingness and ability to sell drugs at a certain price per quantity. 9 On the supply side, the price will be a function of such costs as the product, its distribution, and the risk of arrest. Thus, to be competitive a successful drug-trafficker must find opportunities to reduce these costs.


In the 1980s and 1990s, urbanization fueled drug trafficking. Today, globalization is the driving force bringing together supply and demand and global finance is super-charging the trade. This means that drug-traffickers have new and unprecedented opportunities to grow and sustain drug-markets.

a. The 1980s and the Opportunity of Urbanization

Perhaps one of the most significant factors in the growth of the crack market in the 1980s was urbanization. 10 Urban areas provided the opportunity for the trade to become lucrative. 11 Although crack was cheap to produce, demand per “hit” of crack was also low; crack users tend to be unable to afford more than one “hit” at a time. 12 Thus, to profit, dealers had to find opportunities for reducing supply costs. Urbanization was that opportunity; low-level street dealers could be employed for less than

9. See Ilyana Kuziemko & Steven D. Levitt, An Empirical Analysis of Imprisoning Drug Offenders, 88 J. of Pub. Econ. 2046–2047 (2004); see also Gary S. Becker, Crime and Punishment an Economic Approach, 76 J. Pol. Econ. 169 (1968) (providing the pivotal argument that offenders undertake a cost and benefit analysis, weighing the illegal opportunities availability, costs, and its expected utility or return, when choosing whether to enter into a criminal market).

10. Levitt & Venkatesh, supra note 8 at 766. Professors Levitt analyzed a crack selling street gang’s finances for a span of four years from the mid to late 1980s and found that in the mid 1980s the gang was making $11,900 a year in drug sales but four years later was making $53,000. They attribute this to the crack cocaine explosion. Id.


minimum wage\textsuperscript{13} and densely populated urban areas meant that there would be high customer volume and rapid turnover.\textsuperscript{14} However, urbanization also caused the bursting of the crack-cocaine bubble because these same opportunities created an incentive to become involved in the trade, causing the market to become over-saturated with dealers.\textsuperscript{15}

b. A New Era: The Opportunities of Globalization

Today, drug markets are again flourishing.\textsuperscript{16} The explanation is no longer urbanization but rather is globalization. The proliferation of technology—an element of globalization—provides drug-traffickers with the opportunity to establish national and international supply networks.\textsuperscript{17} Technology enables domestic traffickers to establish connections with international drug trafficking organizations and cartels, allowing them to move from retail to wholesale level operations.\textsuperscript{18} At the same time, technology also allows traffickers to expand into new drug markets by outsourcing retail level sales. Rural and suburban areas are reporting a significant increase in gang activity which is largely attributed to the formation of alliances between large urban based gangs and small regional drug crews.\textsuperscript{19} These crews exist and are supplying demand in all areas of the country.\textsuperscript{20} A globalized supply network also gives traffickers the opportunity to diversify their products; thus traffickers today have simultaneous connections with Mexican organizations that supply cocaine and Asian cartels that produce MDMA.\textsuperscript{21} Finally, and most importantly, the speed per distance at which these transactions take place has greatly increased

\textsuperscript{13} See generally Anderson, supra note 11, at 114–18. The thesis of Professor Anderson’s work is that inner city subcultures, particularly those found in poor black areas, have codes and values which are a direct response, albeit an inverted one, to mainstream normative values. \textit{Id.} Thus, drug dealers deal drugs because it provides an economic opportunity to gain wealth and status when legitimate opportunities for poor black Americans are otherwise scarce. \textit{Id.}

\textsuperscript{14} Venkatesh, supra note 11, at 72–73 (observing a crack gang in Chicago and stating that a crack gang’s profits “depend[ed] on high volume and quick turnover”).

\textsuperscript{15} Fryer Jr. et al., supra note 12, at 5–7.

\textsuperscript{16} \textit{Id.} at 17–18.

\textsuperscript{17} See generally Aaron Fichtelberg, Crime Without Borders: An Introduction to International Criminal Justice 1–8 (2008).

\textsuperscript{18} See NAT'L DRUG INTELLIGENCE CTR., supra note 2, at 43–45.

\textsuperscript{19} NAT'L GANG INTELLIGENCE CTR., NATIONAL GANG THREAT ASSESSMENT 2009, PRODUCT NO. M0335–001 5–6 (2009).

\textsuperscript{20} \textit{Id.}

\textsuperscript{21} See NAT'L DRUG INTELLIGENCE CTR., supra note 2, at 46.
efficiency. A Chicago based gang can instantaneously communicate with an Asian organization causing a shipment of MDMA to be on one next flights coming out of Tokyo international that very day. Thus, technology presents new opportunities for a globalized supply network—reducing trafficking costs and incentivizing supply.

c. Globalization and Drug Trafficking Finance

Moreover, if globalization creates greater opportunity for drug-traffickers to supply drugs, it supercharges their ability to grow and sustain the trade through illicit finance. The coalescence of two factors—the “financial valorization of capital independent from goods and services”\(^ {22} \) and the emergence of new technologies which de-territorialize and speed up financial transactions—contribute to the growth of finance opportunities.

The globalized world’s reliance on capital and indifference to its source creates new opportunities for drug traffickers to launder money. Guilhem Fabre argues that: “far from being a perversion of capitalism, drug trafficking and money laundering may be interpreted as the continuation of the liberal rule of profit maximization at a time of globalization of trade.”\(^ {23} \) In other words, with globalization’s emphasis on efficiency and profit maximization, the line between illicit activity and the capital it produces is often and necessarily blurred. This can be seen in the loosening of financial controls.\(^ {24} \) Indeed, in order to attract money and create wealth, many States adopt bank secrecy laws.\(^ {25} \) This encourages the growth of financial industries that rely on these laws to attract investments and efficiently do business.\(^ {26} \) The bitter with the sweet means that such States have also created a globalized economic system that supercharged the opportunities for traffickers to launder money.

\(^{22}\) Guilhem Fabre, Criminal Prosperity: Drug Trafficking, Money Laundering and Financial Crisis after the Cold War 68 (Routledge Curzon 2003).

\(^{23}\) Id. at 67.

\(^{24}\) Id. at 70–71.

\(^{25}\) Id. at 73–74. Guilhem Fabre states that “[t]he development of offshore banking, in parallel with financial deregulation has considerably facilitated [the blurring of the legitimate and criminal economy].” Id. at 73. He finds that “more than half of the world’s monetary transactions transit through [off-shore banks],” which is driven by “the secrecy of transactions [being] generally guaranteed . . . [with] legal refuges in case of pursuance.” Id. at 74.

\(^{26}\) Id. at 74–75 (explaining that one of the roles of off-shore banking is to allow businesses to exploit “the opportunities of capital and currency markets in confidential and fiscal optimization conditions” (internal quotation marks omitted)). That is, business is drawn to off-shore banking because the lack of government regulation reduces costs.
In 2007, the Department of Justice and the Treasury released a comprehensive report entitled National Money Laundering Strategy. The report concludes that the volume of “dirty money circulating through the United States is undeniably vast as criminals are enjoying new advantages with globalization and the advent of new financial services.” While U.S. bank regulations make initial investment of drug proceeds difficult, rapid telecommunications and rapid transportation across borders present opportunities to circumvent U.S. investment. The report cites the proliferation of unregistered Money Services Businesses (MSBs) many of which are growing “at a rapid rate.” These MSBs act as brokers between drug traffickers and the financial system. MSBs structure transactions to avoid reporting requirements, purchase money orders from different legitimate businesses, and channel money through different companies in order to move drug money into legitimate financial institutions without detection. The blurring of legitimate and illegitimate business, financial valorization of capital, and high speed telecommunications makes this possible. Too much money moving from all different sources, too many transactions occurring too quickly, and increased competition between banks “often incite operators to disregard the origin of their client’s assets [despite] regulations . . . supposed to control them.” Similarly, bulk cash smuggling into countries such as Mexico, where U.S. dollars fuel the black market peso

28. Id. at 16.
29. Under 18 U.S.C. § 1960, all MSBs must register with the FinCEN, a program created in the United States Department of the Treasury to regulate MSBs. 31 U.S.C. § 5330 (2006). The Department of Justice, however, has found that the “majority of MSBs in the United States continue to operate without registering.” Money Laundering Strategy at 29.
30. Money Services Businesses provide financial services unconnected to the banking system. Id. at 26. They are defined under § 5330 to include any business that: provides check cashing, currency exchange, or money transmitting or remittance services, or issues or redeems money orders, travelers’ checks, and other similar instruments or any other person who engages as a business in the transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system . . . .
32. Id. at 27–28.
33. Fabre, supra note 22, at 80.
exchange\textsuperscript{34} or into banks with bank secrecy laws, is on the rise.\textsuperscript{35} Globalization is also fueling this opportunity. One million individuals cross over into Mexico every day. Infrastructure speeds up this movement.\textsuperscript{36} Our economies are also connected, thus making it easy for launderers to hide money in shipping containers transporting the $267 billion in merchandise traded between the United States and Mexico yearly.\textsuperscript{37} At bottom, it is technology that provides a greater opportunity to launder money. These opportunities incentivize drug-trafficking in the first instance and then provide dealers with the opportunity to grow the trade through money laundering in the second.

\textbf{B. Market Regulation: Enforcement Challenges}

1. Public Law as Regulating Markets

Public law is the counterbalance to markets and the drug market is no exception. Public law intrudes on private markets to achieve a purpose. In the last century, the United States government had as one of its primary purposes controlling and protecting people from markets.\textsuperscript{38} Sometimes this is done through welfare by ameliorating the effects of markets.\textsuperscript{39} Other times, it is done through regulation of the market or even suppression.\textsuperscript{40} For drug-markets, Americans still support a policy of suppression rather than

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\textsuperscript{34} See Testimony of Alvin James, The Black Market Peso Exchange: How U.S. Companies are used to Launder Money, Hearing Before the S. Comm. on Int. Narcotics Control, 106th Cong. 47–49 (1999) (discussing how the Black Market Peso exchange works and how “smurfs” are needed to smuggle U.S. cash into Mexico). The problem with the Peso Exchange is that the cartel trafficker sells off his proceeds in the United States, thus dropping out of the picture, and the buyer assumes the risk.

\textsuperscript{35} Id. at 51–52.

\textsuperscript{36} Id. at 52.

\textsuperscript{37} PHILIP BOBBITT, TERROR AND CONSENT, 86 (2008) (discussing how the nation-state, “set itself against the unfettered market,” and thus the government’s purpose was protecting citizens from the consequences of markets).

\textsuperscript{38} See Califano v. Boles, 443 U.S. 282, 283 (1979) (reviewing the constitutionality of the SSA and stating that “[s]ince the Depression of the 1930’s, the Government has taken increasingly upon itself the task of insulating the economy at large and the individual from the buffeting of economic fortune”).

\textsuperscript{39} See Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089, 1111–15 (1972) (discussing government regulation and suppression of certain markets such as markets in pollution, kidneys, slavery, and babies).
regulation.\textsuperscript{41} To be sure, welfare policies are also pursued—hundreds of millions of dollars are spent each year on substance abuse treatment programs thus ameliorating the effects of the drug trade—but enforcement is the key priority.\textsuperscript{42} The question then becomes what enforcement norm will define the twenty-first century drug-war? Will it be: attacking production, interdicting the import of drugs, controlling distribution, or attacking finance systems?\textsuperscript{43}

2. A New Enforcement Norm

As the move from urbanization to globalization creates new opportunities for traffickers to supply drugs and launder their proceeds, it also creates new challenges to U.S. drug enforcement.

a. Lessons from the 1980s and 90s

Supply side enforcement in the 1980s and 90s, aimed at attacking production, smuggling and distribution, was costly and ineffective; however, by the mid 1990s it became apparent that this strategy came at a cost. In Colombia, in the early 1990s, U.S. military, DEA, and CIA directly led Colombian police in a concentrated effort against the Mendellin Cartel, eventually killing kingpin Pablo Escobar.\textsuperscript{44} This operation was funded by a $2.2 billion appropriation by Congress for a five-year war against cocaine

\begin{itemize}
\item \textsuperscript{41} In 2009, the total appropriations for federal drug enforcement programs was 9.2 billion whereas the total appropriations for treatment, prevention, and research was 4.9 billion. \textit{See Office of National Drug Control Policy} (ONDCP), \textit{National Drug Control Strategy: Fiscal Year 2009 Budget Summary}, 1 (2009), available at \url{http://www.whitehousedrugpolicy.gov/publications/policy/09budget/exec_summ.pdf}.
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} \textit{See Steven B. Duke & Albert C. Gross, America’s Longest War: Rethinking Our Tragic Crusade Against Drugs} 200–211 (1993). Professor Duke and Albert Gross categorize supply reduction as involving one of four strategies: attacking production capabilities, interdiction of smuggling, prevention of distribution, or disruption of finance and control systems. \textit{Id.}
\item \textsuperscript{44} \textit{See generally Mark Bowden, Killing Pablo: The Hunt for the World’s Greatest Outlaw} (Penguin 2002) (chronicling the US lead effort and the governments assistance to Columbia to track down and kill Pablo Escobar). Mark Bowden’s book suggests that the operation became a means in itself, embroiling the United States in a costly manhunt involving many different U.S. agencies. \textit{Id.} at 41. At the end of the book, Bowden suggests that it actually may have been a member of U.S. Special Forces that pulled the trigger and let the fatal bullet fly killing Pablo Escobar. \textit{Id.} at 253–60.
\end{itemize}
production. At the level of interdiction, border-prosecutions controlled the dockets of federal courts in the 1990s. In a 1989 report on the federal judiciary Chief Justice Rehnquist stated “courts, especially in border states, are approaching the outer limits of caseload and fatigue from handling drug-related criminal cases.” Finally, at home, popular reaction to drug gang-wars in large cities fueled prosecutions of street dealers. Despite broad federal conspiracy statutes, urbanization complicated these prosecutions thus increasing the cost of the drug-war. Large crowds of people on city blocks, abandoned, rental and jointly owned housing, and gang structures created problems of proving conspiracies. Incarceration of gang members doubled but gangs kept growing because street-dealers were replaceable since drug dealing in inner city neighborhoods is seen by many, who have little other means of earning income, as an economically powerful trade. Thus, the drug war strategy of the 1980s–90s was defined by costly wars against cocaine production, federal courts jammed with border prosecutions, and mass incarceration in cities. However, the opportunities of urbanization remained in place. The drug trade continued until urbanization itself crashed the crack market and therefore reduced international cocaine supply. Thus, by the end of the decade the United States had spent billions on supply side production. At the level of interdiction, border-prosecutions controlled the dockets of federal courts in the 1990s. In a 1989 report on the federal judiciary Chief Justice Rehnquist stated “courts, especially in border states, are approaching the outer limits of caseload and fatigue from handling drug-related criminal cases.” Finally, at home, popular reaction to drug gang-wars in large cities fueled prosecutions of street dealers. Despite broad federal conspiracy statutes, urbanization complicated these prosecutions thus increasing the cost of the drug-war. Large crowds of people on city blocks, abandoned, rental and jointly owned housing, and gang structures created problems of proving conspiracies. Incarceration of gang members doubled but gangs kept growing because street-dealers were replaceable since drug dealing in inner city neighborhoods is seen by many, who have little other means of earning income, as an economically powerful trade. Thus, the drug war strategy of the 1980s–90s was defined by costly wars against cocaine production, federal courts jammed with border prosecutions, and mass incarceration in cities. However, the opportunities of urbanization remained in place. The drug trade continued until urbanization itself crashed the crack market and therefore reduced international cocaine supply. Thus, by the end of the decade the United States had spent billions on supply side


47. Kuziemko & Levitt, supra note 9, at 2046 (discussing the link between drug dealer violence and an increase in incarceration).

48. See United States v. Salmon, 944 F.2d 1106, 1114 (3d Cir. 1991) (holding that association with conspirators involved in a drug deal and possessing surveillance equipment was not enough to support conspiracy involving possession with intent to distribute cocaine).

49. See United States v. Onick, 889 F.2d 1425, 1429–30 (5th Cir. 1989) (construing the federal “crack house” statute, 21 U.S.C. § 841 (2006), and finding that the government failed to establish possession with intent to distribute despite the evidence showing that that defendant was arrested in an abandoned house where her clothes, a picture of her, and a large quantity of heroin was located).

50. See United States v. Ramirez, 880 F.2d 236, 238–39 (5th Cir. 1989) (holding that although defendant was arrested in a house where substantial amounts of cocaine, scales, and drug sales ledgers were found, the government failed to prove he was a co-conspirator because he was only a guest in the house).

51. See ANDERSON, supra note 11, at 110–12 (explaining that the drug trade presents a lucrative opportunity for achieving wealth in poor black areas where jobs are not readily available, yet material resources and symbols of success are still coveted).
enforcement, pursuing production, interdiction, and distribution, only to see drug-markets re-emerge with force in the twenty-first century.

b. The Challenges of Globalization

Today, globalization creates even greater enforcement challenges for the U.S. government than did urbanization. As was discussed, globalization provides traffickers the opportunity to form new national and international supply networks and the technology to supply drugs and avoid detection. Law enforcement will have an increasingly difficult time interdicting drug smugglers with the proliferation of rapid and mass transportation systems. In 1991, 112,305 private and 340,951 commercial aircrafts were inspected by U.S. Customs and Border Inspection agents. In 2007, this number had increased to 139,030 and 916,276 respectively. Today, 331,347 privately owned vehicles are inspected crossing the border every day. Mass transportation provides more opportunities for drug-traffickers but increases interdiction challenges. Mass communication is also hindering interdiction and distribution investigations. For example, the United States Justice Department reports:

Mexico—and U.S.—based Mexican drug traffickers are employ[ing] advanced communication technology and techniques to coordinate their illicit drug trafficking activities . . . us[ing] an array of communication methods, such as Voice over Internet Protocol, satellite technology (broadband satellite instant messaging), encrypted messaging, cell phone technology, two-way radios, scanner devices, and text messaging, to communicate.

At bottom, globalization makes supply side enforcement even more complex. In the era of urbanization, jointly owned property, crowded city

52. JONATHAN P. CAULKINS ET. AL., RAND, HOW GOES THE WAR ON DRUGS: AN ASSESSMENT OF U.S. DRUG PROBLEMS AND POLICY 19–22 (2005) (discussing how production, interdiction, and domestic enforcement strategies were costly and ineffective).
53. See Fryer Jr. et al., supra note 12, at 5–6.
54. DUKE & GROSS, supra note 43, at 143.
57. NATIONAL DRUG INTELLIGENCE CTR., supra note 2, at 45.
areas, and street gang structures made it difficult to prove drug trafficking conspiracies. Distribution investigation is even more complex today because of interconnected drug-markets, the speed with which dealers can communicate, networked cartels, international drug trafficking organizations, and drug gangs. Therefore, any distribution or interdiction enforcement effort is likely to prove more costly than the 1980s–90s war on drugs. The 1980s–90s drug-war cost billions of dollars; incarceration costs from this war are still mounting, and the crack-cocaine market has not abated. Quite simply it is unlikely that the American people will support an even more costly distribution centered drug-war in the twenty-first century.

In order to counter drug-trafficking opportunity in the twenty-first century, accord with globalization’s emphasis on efficiency, and meet the strategic and moral exigencies of the drug-trade, the United States must think in the language of the market. This means if the drug war is to remain legitimate, any U.S. enforcement strategy must increase drug-trafficking costs and decrease drug-trafficking enforcement costs. Production, interdiction, and distribution centered strategies are costly and inefficient. Attacking finances, however, provides a potential solution.

PART III: A NEW STRATEGY AND ITS LEGISLATIVE SUPPORT

The federal civil asset forfeiture and money laundering statutes are an efficient means of increasing trafficking costs while decreasing enforcement costs. Supply side enforcement will be costly and ineffective in the face of globalized opportunities. However, attacking the finance system of drug-markets at the initial investment level is a viable solution to the exigencies of the trade. Finance disruption strikes at the flow of capital between global networks of cartels and drug-traffickers. Thus, those networks and, consequently, supply will dissolve. Moreover, this strategy has the benefit of decreasing the prison population because, rather than mass incarceration of individual powerless street-dealers, money laundering prosecutions deter the true power players of the trade; the sophisticated brokers who link cartels and U.S. suppliers. Finally, civil asset forfeiture allows the government to

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interdict the movement of U.S. dollars to international cartels, thus frustrating the economic motives of the trade while also preventing the federal courts in border states from being overburdened with lengthy smuggling cases. These benefits accord with globalization’s emphasis on the market; the United States will use the market itself, as opposed to the resource intensive criminal justice system, to disrupt and dismantle the trade. Fortunately, the 1980s–90s drug war provided one benefit that can be used in the twenty-first century drug war: the 1980s money laundering and civil asset forfeiture statutes.

A. Applying 1980s Drug Laws to 2000

A preliminary objection might be that money laundering and asset forfeiture statutes were enacted in an era where drug-markets were urbanized not globalized and therefore these statutes need to be amended in order to meet the exigencies of the twenty-first century trade. But Congress, in enacting the 1984 Comprehensive Crime Control\(^\text{61}\) and the 1986 Drug Abuse Acts,\(^\text{62}\) foresaw the potential challenges of supply-side enforcement and thus supplemented the statutes with what would later become the twenty-first century solution. Thus, in 2000, when Congress passed the Civil Asset Forfeiture Reform Act,\(^\text{63}\) and then again in 2001 with the enactment of Bulk Cash Money Laundering Statute,\(^\text{64}\) it reaffirmed that the asset forfeiture and money laundering statutes should become the new enforcement norm in today’s drug-war.

Through the 1984 Comprehensive Crime Control Act, Congress amended the civil asset forfeiture laws in order to encourage the use of these statutes to strip drug trafficking organizations of their economic power bases.\(^\text{65}\) The legislative history makes three important points for our purpose. First, the legislative history cited a GAO report which made clear that large scale prosecutions of drug-traffickers and street-level dealers were
enormously costly and ineffective. Second, the history also recognized that conviction and imprisonment of individual drug traffickers left the power bases and networks of drug-trafficking organizations intact. Third, incarceration and severe punishment was not much of a deterrent. This history shows that Congress realized, even from the beginning of the drug-war, that supply side enforcement, without more, is costly and ineffective in disrupting drug markets.

In 1986, Congress enacted the Anti-Drug Abuse Act and with it the first federal money laundering laws. Although there is little in the Congressional Record concerning the purposes of the federal money laundering statutes, the same rationale driving the 1984 civil asset forfeiture law applies to the money laundering statute—stripping drug trafficking organizations of their economic power bases. The difference with the money laundering statutes is that Congress gave the Justice Department the option of relying on the criminal justice system if it would serve the purpose of deterrence when the civil asset forfeiture statute would not. This is why the money laundering statute mirrors the civil asset forfeiture provision. Under the civil asset forfeiture statute, “proceeds traceable to [a controlled substance exchange]” are subject to forfeiture. Under the later enacted

66. 1984 U.S.C.C.A.N. 3374 (“Today, few in the Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs, with its inevitable attendant violence . . . .”). The legislative history then cites a report by the GOV’T ACCOUNTABILITY OFFICE (GAO), PUB. NO. GGD–81–51, ASSET FORFEITURE A SELLDOM USED TOOL IN COMBATTING DRUG TRAFFICKING (1984). The report argues that criminal prosecutions of drug dealing are ineffective and therefore enforcement needs to be aimed at the financial power base of drug trafficking. Id. at i.

67. Id. at i.

68. Id.


71. See Strafer, supra note 3, at 150 (reviewing legislative background and concluding that the money laundering laws are linked to conspiracy and forfeiture laws as well as enforcement difficulties).

money laundering statute, the government needs to prove three elements: (1) knowledge that property is involved represents the proceeds of [a controlled substance violation]; (2) use of the proceeds in a “financial transaction” or “transportation” of the proceeds into or out of the United States; and (3) knowledge that the transaction or transportation is designed to conceal the nature, location, source, ownership, or control of the proceeds. The money laundering statute can therefore be viewed as building upon the asset forfeiture statute by criminalizing dealings in drug proceeds designed to facilitate the drug-trade. Both statutes strike at the economic power bases of the trade, but the money laundering statute reserves the option of using the criminal justice system to deter future launderers through punishment of laundering activity.

B. The Civil Asset Forfeiture Reform & Bulk Cash Smuggling Acts

In 2000, Congress passed the Civil Asset Forfeiture Reform Act (“CAFRA”), amending the civil asset forfeiture statute and explicitly linking it to the money laundering statute. The Act is a twenty-first century approach to drug enforcement because for the first time it: (1) defined the driving force behind all organized crime as economic and (2) recognized the sophisticated and networked nature of organized criminal activity, finding that globalization and the valorization of capital is driving crime in the twenty-first century. In 2001, as part of the Patriot Act, Congress also enacted a new money laundering offense—bulk cash smuggling. This statute also linked the money laundering and asset forfeiture statutes and provided the Department of Justice with another arrow in its quiver to deter international drug money laundering.

With the enactment of CAFRA, Congress recognized that crime of the twenty-first century is driven by the market and that this means, in a time of globalization, crime is becoming sophisticated and networked. During Congressional hearings, Stefan Cassella testified that: “[T]here is no reason

73. 18 U.S.C. § 1956(a)(1), (2) (2006). Section 1956(a)(1) is the “transaction” provision, whereas §1956(a)(2) is the “transportation” provision.
77. See § 5332(c) (noting that any violation of or conspiracy to violate the Bulk Cash Smuggling Act can result in forfeiture).
78. Stefan Cassella is the Deputy Chief of the Department of Justice’s Asset Forfeiture and Money Laundering Section. He was instrumental in drafting CAFRA. See infra note 107.
not to expand forfeiture into new areas where it can be used to combat sophisticated and serious criminal activity.” CAFRA applied forfeiture to nearly all federal criminal activities by linking the civil forfeiture statute to the money laundering statute’s definition of “specified unlawful activity,” thus subjecting to forfeiture all proceeds related to “racketeering activity.” Hence, by applying asset forfeiture to all racketeering activity, Congress implicitly recognized that the problem of illegal enterprise is entirely economic and that a strategy also based in economics is needed. By using the “racketeering activity” provision from the RICO statute, Congress also recognized the emerging networked nature of crime.

At the same time, Congress recognized that as crime is becoming economic, it is also becoming sophisticated. CAFRA provides a broad definition of “proceeds”—obtained from unlawful activity, “not limited to the net gain or profit realized.” Congress realized that it is nearly impossible to determine if money is profits or gross receipts because criminal organizations, like drug traffickers, deal in cash and avoid paper trail accountings. With U.S. bank reporting requirements, dealers need to move the cash out of the country. Globalization, with its emphasis on the valorization of capital and the opportunity for cross-border networks sustained by technology and rapid transportation, provides an opportunity. Because this opportunity reduces costs for drug traffickers, it should not increase costs of civil forfeiture actions. Thus, CAFRA reassures the proposition that civil asset forfeiture can be used for finance disruption in the twenty-first century drug war by increasing drug finance opportunity costs and decreasing prosecution costs.

In 2001, Congress enacted the Bulk Cash Smuggling Act, making it a money laundering offense to conceal and attempt to transport over $10,000 of U.S. currency out of the country. The statute was passed as part of the Patriot Act; thus, as Stefan Cassella says, Congress realized “the central role

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that bulk cash smuggling plays in the globalization of crime.\textsuperscript{84} This statute, like the money laundering statute, allows the government to use the criminal justice system to deter brokers who facilitate the drug trade by providing the service of moving drug finances. Finally, Congress authorized the forfeiture of any and all cash seized in violation of this statute.\textsuperscript{85} The Bulk Cash Smuggling Act and CAFRA therefore punctuated Congress’s intent that the government move towards a strategy of finance disruption by relying on these statutes and their predecessors—the money laundering and asset forfeiture provisions enacted in the narcotics laws of the 1980s. Whether the courts will also realize that these statutes adequately cover complex drug-finance cases of the twenty-first century is an entirely separate matter which I defer until Part IV. For now, I briefly address an important point: prosecutorial discretion in choosing between a civil asset forfeiture action and a money laundering indictment.

\textbf{C. Prosecutorial Discretion}

I have argued that: the drug war strategy of the twenty-first century should rely on money laundering prosecutions and civil asset forfeiture actions to disrupt drug trafficking finance systems; that these tools will effectively disrupt and break apart global drug trafficking networks; and that this strategy is responsive to the challenges that de-legitimated the drug-war in the 1980s—namely, over reliance on the cost intensive criminal justice system. However, it is critical to the success of this strategy that the government carefully determines, in each particular case, whether to file a civil asset forfeiture action or indict under the money laundering statute. The latter statute is criminal while the former is civil. When the government chooses to pursue a criminal action, it is relying on the resource intensive criminal justice system. Further, drug-related prosecutions trigger memories of past decades of mass incarceration but continued drug trafficking. Thus, to remain legitimate, the government must choose carefully which case it will bring under the civil asset forfeiture statute and which it will bring under the criminal money laundering statute. I will briefly offer some factors for consideration.

The two most important considerations in choosing whether to pursue a money laundering prosecution or a civil asset forfeiture action are frustration


\textsuperscript{85} 31 U.S.C. § 5332(c).
Both statutes can be used to disrupt the drug trade by frustrating free movement of drug money. If a money launderer is incarcerated, then drug traffickers must find a new avenue for moving their illicit proceeds. Similarly, with civil asset forfeiture, drug traffickers will be incentivized to take extra precaution to ensure their proceeds are not linked to drug dealing. The difference between the statutes, however, is their deterrent effect, and more specifically, who they deter. Civil asset forfeiture can be used to deter drug traffickers from pursuing the trade in the first place—for example, when he was a Deputy Attorney General, Attorney General Eric Holder testified before Congress that “[w]ith the forfeiture laws, we can separate the criminal from his profits—and any property traceable to it—thus removing the incentive others may have to commit similar crimes tomorrow.” However, forfeiture is less likely to deter the broker handling the money for the drug dealer or other potential brokers similarly situated because it is the drug trafficker’s money that is lost rather than the broker’s, and there is no threat of incarceration. In contrast, the

86. I use the concepts “deterrence” and “frustration” in conformity with the classical (or rational choice) school’s view of criminology. See Irving Piliavin et al., Crime, Deterrence, and Rational Choice, 51 Am. Soc. Rev. 101, 101–103 (1986) (explaining that the rational choice model of criminology is a function of the expected utility of the offending activity, the likelihood of being punished for the activity, the anticipated returns from the activity, and the anticipated penalty if punished). The expected utility of an activity is on one side of the equation while the other factors are balanced on the other side. Id. Therefore, as long as the expected utility outweighs the other factors, the dealer will engage in the behavior. Id.; see also Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 176–178 (1968) (explaining that the rational choice to commit an offense is equal to the probability of conviction, severity of punishment, and other factors such as returns from the offense as compared to returns from other opportunities, perceptions of risk, and willingness to commit an illegal act). Deterrence can obviously be specific—if a particular drug dealer is imprisoned, his or her perceptions of conviction or punishment or willingness to commit an illegal act may change. At the same time, deterrence can also be general—increased enforcement or probability of conviction can change perceptions of, and the calculus for, potential offenders.

My conception of “frustration” is grounded in routine activity (or opportunity) theory. Criminologists such as Lawrence Cohen and Marcus Felson argue that changes in the modern world, such as urbanization, increase the opportunities for criminal behavior. See generally Lawrence E. Cohen & Marcus Felson, Social Change and Crime Rate Trends: A Routine Activity Approach, 44 Am. Soc. Rev. 588–607 (1979). Turning Cohen and Felson’s theory into broad policy means that the government should aim to frustrate opportunities for would be offenders.


88. The one exception is the black market peso exchange. As explained by Alvin James, former senior policy advisor at FinCEN, the drug trafficker in Mexico sells to the
sting of money laundering is that it directly deters the potential launderer because she, and others similarly situated, face criminal prosecution and incarceration.\textsuperscript{89} The effect on the drug trafficker is more hidden; it deters the drug trafficker by increasing transaction costs, since the launderer will demand more money for the risk of criminal prosecution. This is not the case with civil forfeiture because the agent moving drug money does not face criminal prosecution. At bottom, the question for the government then becomes whether to prosecute an agent or only civilly forfeit the money the agent is transporting. The answer turns on whether the agent and others similarly situated to the agent will be deterred and thus the trafficking organization will also be deterred because it will have to pay the agent more.\textsuperscript{90} If not, then incarceration is pointless in the way that mass incarceration of low level street dealers in the 1980s–90s was pointless. Let me demonstrate these arguments through the back-story of two recent Supreme Court cases.

**PART IV: SAMUEL NESS \& REGALADO CUELLAR**

In 2008, the Supreme Court granted certiorari in three cases involving the federal money laundering statute.\textsuperscript{91} One of those cases was United States \textit{v. Ness}.\textsuperscript{92} Another was United States \textit{v. Cuellar}.\textsuperscript{93} I will discuss the holding of \textit{Ness}—which was remanded to the Second Circuit in light of the Court’s decision in \textit{Cuellar}—in the next part of this Note. However, here, I will refract the first two parts of this Note through Ness and Cuellar’s stories. What emerges is a real-life picture of globalized drug trafficking and money laundering, sustained through global networked connections, technology, intermediary, at a discount price, his proceeds in the United States. Thus, the intermediary in the Black Market Peso Exchange does have a substantial interest in ensuring the money is not forfeited. \textit{See Caulkins et al., supra} note 52, at 47–49.


90. \textit{See Guillem Fabre, Criminal Prosperity: Drug Trafficking, Money Laundering and Financial Crisis After the Cold War} 71 (Routledge Curzon 2003) (noting an increase in the amount charged by money launderers after money laundering was made a federal offense).


mass transportation, and the blurring of legitimate and illegitimate business. This part concludes that Ness and Cuellar demonstrate that the government’s best strategy today is finance disruption pursued through money laundering and civil asset forfeiture. However, the critical prosecution choice for the government will be when to pursue money laundering instead of a civil asset forfeiture action. The problem was that in relying on money laundering in Cuellar’s case, this provided a precedent for deciding Ness’s case—which was a stronger case for the application of the money laundering statute.

A. Samuel Ness’s Story

Between July 2000 and Spring 2001, Samuel Ness laundered millions of dollars for at least five different U.S. MDMA wholesalers,\(^\text{94}\) sending the proceeds to numerous different drug trafficking organizations and cartels in at least three different countries.\(^\text{95}\) The U.S. wholesalers did not work together or know each other, and each did business with different international drug trafficking organizations;\(^\text{96}\) but they were all linked by Sam Ness—the opportunity broker that facilitated the movement of U.S. dollars to international cartels. How did he do it? By relying on legitimate markets, technology, rapid transportation, and global connections.

Ness’s legitimate courier business—Protective Logistics, with offices in New York City and in Los Angeles\(^\text{97}\)—facilitated the money laundering operation. Protective Logistic’s main client was OroAmerica\(^\text{98}\)—a multi-million dollar gold jewelry company\(^\text{99}\)—who used Protective Logistics to ship its products by air within the country.\(^\text{100}\) Protective Logistics did not own the means of shipping but rather relied on private air shipping services such as Dunbar Air.\(^\text{101}\) Ness was also able to obtain a courier’s license giving him access to airport runways for the purpose of picking up and sending

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95. Id. at *1.
96. Id.
97. Id. at *3.
98. Id.
The legitimate side of Protective Logistics provided Ness with the opportunity to coordinate the shipment and receipt of U.S. narco-dollars by international cartels. In Los Angeles and New York, Ness and his associates would receive deliveries of huge sums of cash from U.S. MDMA wholesalers. \(^{103}\) Ness would give the wholesaler a code-word and an international phone number to call so that the cartel and wholesaler could arrange for the cash to be received. \(^{104}\) After being informed of the agreed upon delivery location, Protective Logistics moved the cash by packaging it with OroAmerica’s gold products—shipping those packages by air to New York. \(^{105}\) At the airport, Ness—who as a licensed courier had access to the runway—received the shipment, separated the gold and cash, sent the gold to its consignee and put the cash aboard an international air-carrier flight going to the chosen location. \(^{106}\) Ness was not detected until Wyoming state troopers discovered a Protective Logistics business card in the possession of a trafficker who was discovered transporting one hundred and forty-seven pounds of MDMA. \(^{107}\)

Ness evaded detection by utilizing the opportunities of globalization, which in turn complicates enforcement efforts and challenges our assumptions about drug trafficking. Protective Logistics appeared to be a legitimate business and therefore the air couriers Ness relied upon were not suspicious of what was being shipped. Unlike banking laws, \(^{108}\) there is no affirmative duty for common carriers to ensure that what is being shipped is not illegal; rather the carrier is only liable if it knows it is shipping contraband. \(^{109}\) Globalization’s emphasis on efficiency and its valorization of capital provides a strong argument that air carriers like Dunbar would not know that narcotics proceeds are being shipped. Similarly, Ness would not have been able to ship so much money in such a short period of time without being detected if not for the proliferation of international air carriers. When

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103. Id. at *1–4.
104. Id. at *2.
105. Id. at *3.
106. Id.
107. Id. at 4.
108. See Bank Secrecy Act, 31 U.S.C. §§ 5312–5313 (2006). The Bank Secrecy Act requires a banking “institution” to report cash transactions involving over $10,000. Id. § 5313. Dunbar or other common carriers are probably not considered “institutions” under the statute.
109. 49 USC §§ 80302–80303 (2006) (making an air carrier liable for knowingly transporting contraband; contraband, however, does not include money). Thus there is no affirmative duty to know what is being shipped. The duty is more likely on the shipper under the customs laws.
the money shipment arrived in New York, Ness was able to transfer it to an international flight that same day. Thus, time was on Ness’s side. He could quickly move the money and move it into international air-space, where jurisdictional issues arise. Finally, Ness’s network of numerous independent U.S. dealers and cartels in at least three different countries complicates law enforcement efforts because it is so complex.\footnote{See Cassella, \textit{supra} note 84, at 98 (“[T]he hallmark of the new millennium is the rapid increase in the globalization of crime. . . . A computer, a cell phone, an internet connection, and a bank account may be all the tools a person needs to . . . finance a terrorist attack in one country with money generated in another, or to launder the proceeds of multinational organized crime. . . . [C]riminals revel in the limitations imposed on local law enforcement authorities by antiquated concepts of jurisdiction and national sovereignty.”).}

The international telecommunications system which linked the cartels, wholesalers, and Ness’s business allowed Ness to easily, quickly, and surreptitiously coordinate receipt and shipment of the money. It also possesses challenges to Title III\footnote{18 U.S.C. §§ 2510–2525 (2006).} and FISA wiretaps,\footnote{50 USC §§ 1801–1811 (2006).} as global telecommunications mean that it “may no longer . . . be technically possible to determine exactly when a communication is taking place within the United States” and thus subject to wire-tapping.\footnote{K.A. Taipale, \textit{Whispering Wires and Warrantless Wiretaps: Data Mining and Foreign Intelligence Surveillance}, 7 N.Y.U. REV. L. & SECURITY, 4–5 (Spring 2006) (internal quotation marks omitted).}

These opportunities, born out of globalization, actually create an unprecedented level of trust which grows the drug-trade and at the same time challenges our assumptions about drug trafficking. It is important to note here that the cartels trusted the wholesalers to send them payment for the drugs and both the wholesalers and cartels trusted Ness to broker that payment. Gone are the days where drug traffickers rely on hand to hand trades of narcotics and money. At bottom, Ness was an opportunity broker. He relied on the opportunities of globalization to run a successful money-laundering business—evading detection and bringing together a network of international and U.S. drug traffickers.

Ness’s story demonstrates why a federal drug war strategy focused on supply-side enforcement is not an effective solution to the exigencies of the twenty-first century drug trade. The government would have been unsuccessful trying to establish a conspiracy between the international cartels and domestic drug traffickers that were relying on Ness’s business. The cartels did not work together nor did the U.S. wholesalers know each other. That is, without Ness there was no connection between these traffickers and
consequently it is doubtful that the federal government would have detected
and prosecuted each of the numerous different dealers involved throughout
the country. At best, separate prosecutions would have been complicated,
expensive, and would have wasted resources. Further, as long as drug
dealing opportunities are present, domestic dealers will take advantage of
them. Thus, distribution prosecutions lead to the same results as the 1980s–
90s drug war—increased incarceration with no corresponding decrease in
trafficking. As for the cartels and international traffickers involved in Ness’s
case, the United States would have a difficult time hauling these conspirators
into its criminal courts thus complicating enforcement, increasing costs, and
impacting international relations.\footnote{114
On the other hand, Ness’s story also demonstrates why a strategy of
utilizing the money laundering statute is an effective solution to the
exigencies of today’s drug trade. Ness’s services are not as easily replaced as
are the services of street level drug-dealers. Prosecuting Ness also sends a
stronger signal to other would be launderers. Money launderers like Ness,
who owned a company which did business with a multi-million dollar gold
jeweler, are more likely to be deterred by the threat of prosecution than are
dealers who have little other opportunity beyond the drug trade. Such
prosecutions also send a counter-signal that, despite globalization’s
valorization of efficiency and capital, there still exists a line between the
legitimate and illegal economy. Finally, by taking money laundering
seriously, the United States can have an impact on international cartels. A
strategy of prosecuting launderers such as Ness significantly disrupts the
finances and flow of U.S. dollars to international cartels, thus increasing
costs of trafficking. This is more so with laundering than supply-side
prosecution because the launderer is more of an asset to both the
international and U.S. trafficker than is a drug courier. Ness was trusted by
both the U.S. dealers and their international suppliers. Disrupting the flow of
money between cartels and distributors has one of three consequences:
freezing the trade entirely between those two parties; forcing both parties to
find and agree upon a new launderer—increasing transaction and risk costs;
or forcing the parties to exchange money and drugs at the same time-
increasing the risk of detection for both parties. Thus, prosecuting money
launderers—who are the opportunity brokers in a globalized trade—deprives
traffickers of the opportunity to sustain the trade.

\footnote{See Cassella, \emph{supra} note 84, at 101 (stating “[t]here is no such thing as
international jurisdiction over multinational crime. There are no transnational wiretap orders,
or search warrants . . . . What is a crime in one place may not be a crime in another.”).}
It might be objected, however, that Ness’s sophisticated and complex operation proves that the government must expend enormous resources in detecting and prosecuting these operations. However, the reason such prosecutions appear complex is because we are not attuned to the globalized drug-trade. No one suspected Protective Logistics because it conformed with the globalized world’s emphasis on business and the valorization of capital. By changing our viewpoint however, the chinks in the armor become evident. The weakest point in any money laundering operation is the initial movement of money into the globalized economy. Launderers, like Samuel Ness, must physically move large quantities of cash into international territory or the financial system. Once cash moves into international air-space, complex jurisdictional problems arise. However, before that point, U.S. dollars are territorialized and detectable. With regulatory law—conditioning a common carrier’s license upon a duty to report large money shipments—and new enforcement strategies—i.e., federal agents focusing investigations on the movement of money rather than street dealing—the government can become attuned to and detect money laundering operations before U.S. dollars are lost to drug traffickers in the global marketplace. Thus money laundering prosecutions increase drug trafficking costs and decrease costs of mass incarceration, complex international operations, and costly domestic investigations.

B. Regalado Cuellar’s Story

Regalado Cuellar’s case is less sophisticated than Samuel Ness’. While heading towards the Mexican border, Cuellar was stopped and consented to a search of his car. Texas troopers recognized what appeared to be mud purposely splashed across the car to cover up toolmarks and fresh paint. After a drug dog alert, officers uncovered goat hair spread throughout the back seat and a secret compartment under the floorboard of the car containing $81,000 in cash bundled in plastic bags and duct tape. Relying on the theory that Cuellar was a drug courier, the Government prosecuted him for money laundering. At the trial, the troopers testified that drug

116. Id.
118. Id. at 554.
119. Id.
120. Id.
traffickers will cover a car with mud to cover up tool marks left after installing a secret compartment and use goat hair to mask the scent of drugs.121 An ICE Agent also testified as an expert in international narcotics distribution that: the cash was wrapped in cellophane because drug—dogs can detect money that has been stored with drugs;122 that most couriers are paid to transport money back to Mexico where U.S. dollars can be injected into the cash based economy in border towns;123 and drivers only know that they are either transporting drugs or cash.124

Unlike Samuel Ness, Cuellar was not utilizing the opportunities of globalization to profit in the drug trade. The trafficking organization itself relied on opportunities of globalization such as mass transportation and Mexico’s cash based economy. However, Cuellar is most likely only a courier, and, while it might be argued that he is an intermediary no different than Ness, Ness designed the operation himself, utilized the opportunities of globalization, and thus was integral to facilitating a global drug network. In contrast, Cuellar’s position in the drug trade was not much different than a street-dealer who was told how much to sell and at what price—he was only told where to go. Finally, it is unlikely that the drug-dealing network involved in this case is as complex as the network Ness built. Evidence at trial—a bus ticket—showed that, in a 48 hour period, Cuellar traveled from Del Rio to Amarillo, Texas and then back to Del Rio where he was stopped near the Texas/Acuna, Mexico border.125 Most likely, Cuellar traveled to North Texas to receive drug proceeds to be transported back to Acuna, Mexico. Unlike Ness’s operation, which connected drug traffickers throughout the United States with cartels in three different countries, the network involved in Cuellar was local. Further, while $81,000 is not an insignificant amount of money, it is incomparable to the millions of dollars Ness was laundering a day. Cuellar’s case is thus more analogous to the drug trafficking cases of the 1980s and 90s, where proximity and population provided drug market opportunity, not globalized networks and a flat world.

Pursuing a money laundering prosecution in Cuellar’s case is inconsistent with the twenty-first century drug war. Regalado Cuellar is no Samuel Ness—a criminal prosecution is not likely to achieve the same goals of deterrence, signaling, and cartel frustration. Cuellar, unlike Ness, did not rely on his access to global opportunity to facilitate drug-trafficking. Rather,

121. United States v. Cuellar, 478 F.3d 285 (5th Cir. 2007).
122. Id. at 286.
123. Id.
124. Id.
125. Id. at 284–285.
it is likely that Cuellar, a resident of the impoverished Acuna, did not have access to many legitimate opportunities and thus was more willing to run drugs or money across the border. Hence, incarceration is an unlikely deterrent for Cuellar or other couriers in Acuna, who because of low employment opportunities are willing to risk prosecution for the opportunity to become involved, albeit nominally, in Mexico’s lucrative drug trade. Nor would Cuellar’s incarceration hurt his cartel employer. Unlike Ness, who the cartels and traffickers relied on because he had access to unique opportunities for facilitating money, Cuellar was not vital to the cartel’s operation. It is likely that the cartel which hired Cuellar also hired many other drivers, split up the cash between different cars, and expected that some of the cars would be detected. Therefore, incarcerating Cuellar will not increase costs for traffickers, as it most certainly did in Ness’s case, but rather will only increase U.S. enforcement costs by expending resources prosecuting and incarcerating low level couriers. It is significant, to punctuate the point that Cuellar was only a low-level drug courier, that Cuellar was represented by the Federal Public Defender’s Office in these matters. Like in the 1980s–90s, such prosecutions would overwhelm the federal courts in border states. Thus, pursuing a money laundering prosecution in Cuellar’s case looks more like the failed policies of the urbanized drug trade rather than the new strategy of the globalized drug trade.

Nonetheless, Regalado Cuellar was headed to Acuna, Mexico, a border city in the grips of drug cartels. It is important that the U.S. government ensures that U.S. dollars are not used to grow these cartels. The solution in Cuellar’s case is for the government to rely on civil asset forfeiture. With the forfeiture statutes the government could bring an action to forfeit the $80,000 and the car as “substantially related” to drug-trafficking. This would save

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129. 21 U.S.C. §§ 881(a)(6)–(7) (2006). The government could forfeit the cash as traceable to drug trafficking under § 881(a)(6) and the vehicle as facilitating drug trafficking.
the expense of pursuing a criminal prosecution where, because the evidentiary burden is higher, more resources are likely to be expended, in turn burdening the dockets of border courts. It would also save the cost of incarceration. And the $80,000 and the car can be re-invested in the United States treasury. This solution, which relies less on the criminal justice system and more on globalization’s efficiency emphasis, is a drug war solution for the twenty-first century.

On remand, the Second Circuit overturned Ness’s conviction in light of the Supreme Court’s decision in Cuellar. The circuit court reasoned that Cuellar required the government to show not only that Ness transported MDMA proceeds to international drug-traffickers through a highly complex and surreptitious scheme designed to conceal the fact that the cash was MDMA proceeds, but, that he also intended that transporting the cash to the cartels would conceal its “nature, location, source, ownership, or control.” Unfortunately, Cuellar should not have been brought as a money laundering case; civil asset forfeiture was the better solution. However, since Cuellar was decided before Ness, the Supreme Court’s interpretation of the money laundering statute in the former case was broad enough to bring the latter case under its holding. Therefore, the strategy that I have detailed—where the government will rely on finance disruption but must choose between a civil asset forfeiture action or a money laundering prosecution by determining, in each specific case, when doing so accords with reducing prosecution costs and increasing the costs to the global drug trade—is already constrained by these two decisions. Can these cases be interpreted in a way that saves this strategy?

PART V: THE LAW


15. United States v. Ness, 466 F.3d 79 (2d Cir. 2006), vacated, 128 S. Ct. 2900, remanded to 565 F.3d 73 (2d Cir. 2009).
followed by Cuellar, and then Ness was remanded in light of the decision in
Cuellar. The cases constrain the government’s strategy that I have advocated
for; however, they can also be interpreted in a way that saves the strategy.
Although not a drug case, Santos is the most important case in the trilogy
because it set the methodology of statutory interpretation for the money
laundering statute and the framework for future argument. Santos is also the
most important case because it was a plurality decision with different justices
adopting different frameworks of analysis. In fact, if there is any holding in
Santos it is that, although the case was not a drug-money case, laundering
drug money is viewed differently. Cuellar, which did garner a majority of
the Court, implicitly and, as I argue, erroneously, adopted the Santos
statutory interpretation framework. However, Cuellar can be limited to its
cases and the government’s position should be that it should have brought
Cuellar as a civil asset forfeiture action. This, however, raises questions
about whether Cuellar can affect the interpretation of the civil asset
forfeiture statute which was linked to the money laundering statute with the
enactment of CAFRA. This Note will examine a circuit court split, which
occurred before Cuellar, but raises the very question of whether Cueller’s
cases would support a civil asset forfeiture action even though they do not
support a money laundering prosecution. Finally, this Note concludes by
arguing that Ness can be limited to its facts.

A. United States v. Santos

In United States v. Santos the Court was asked to construe the meaning
of the word “proceeds” in the federal money laundering statute in the context
of an illegal gambling operation. The Government’s main argument was
that “proceeds” should be interpreted broadly to mean “gross receipts” rather
than “profits” because a narrow interpretation would lead to overly
complicated prosecutions. While the plurality decided against the
Government, the dissent and concurrence made it clear that the result
would have been different if this had been a drug trafficking case. Both
opinions recognized that money laundering and asset forfeiture laws are

137. Id. at 2025.
138. Id.
139. In a footnote, the dissent noted that between the dissent and the concurrence there
is a majority for the proposition that “proceeds” means “gross receipts” in drug trafficking
cases. Id. at 2036 n.1 (Alito, J., dissenting).
primarily utilized in drug trafficking cases. The three rationales offered by the dissent and concurrence, which broadly interpreted the money laundering statute in drug money cases, illuminates a framework of statutory interpretation consistent with the finance disruption strategy that I have advocated.

The concurrence and dissent recognized the integral connection between the money laundering and civil asset forfeiture statutes and argued that Congress did not intend to increase prosecution costs in the way that the plurality’s opinion would require. By analogizing to the civil asset forfeiture statute, the concurrence and dissent recognized that the money laundering and civil asset forfeiture statutes are integrally connected—both dealing with finance disruption—and that the civil asset forfeiture statute can therefore throw a cross light onto Congressional intent in the money laundering statute. Both opinions noted that Congress explicitly provided for a gross receipts definition in CAFRA and thus they concluded that this might be evidence that Congress also intended a gross receipts definition in the money laundering statute. However, these opinions did take seriously the point that CAFRA is civil and the money laundering statute is criminal. Nonetheless, Congress’s intent is still dispositive; thus, these Justices

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140. In Justice Alito’s dissent, he offers various hypothetical situations involving drug trafficking to argue that a narrow definition of proceeds would be problematic to drug dealing prosecutions. *Id.* at 2038, 2040–41 (Alito, J., dissenting). In his concurrence, Justice Stevens agrees with the dissent that Congress made it clear that when applied to the sale of contraband ‘proceeds’ under these sections were necessarily intended to mean gross receipts. *Id.* at 2031–33 (Stevens, J., concurring).

141. The concurrence compares the civil asset forfeiture provision dealing with drug trafficking crime, 18 U.S.C. §981(a)(2)(A), which does not restrict proceeds to net gain or profit, with 18 U.S.C. §981(a)(2)(B), the civil asset forfeiture provision dealing with commercial fraud, which does provide for a narrower definition of proceeds. *Santos*, 128 S. Ct. at 2031–32 (Stevens, J., concurring). The dissent also echoes this point. *Id.* at 2043 (Alito, J., dissenting).

142. The concurrence agreed with the plurality that in the context of illegal gambling the definition of proceeds should be construed to mean profits, but it also made clear that if this had been a drug dealing case the broader receipts definition would have controlled. *Santos*, 128 S. Ct. at 2032 (Stevens, J., concurring). The dissent argued that the broader definition should be controlling in both cases. *Id.* at 2035–36 (Alito, J., dissenting).

143. *See supra* note 142.

questioned whether Congress could have had a purpose for crafting the two statutes differently.

The concurrence and dissent argued that a “profits” definition would increase prosecution costs and Congress would not have intended this. The opinions concluded that a “profits” interpretation of the money laundering statute would increase prosecution costs. This is overwhelmingly true today; with globalized drug trafficking networks, it is impossible to determine whether money, which has been intercepted somewhere in the network, is drug profits or is merely gross receipts. Justice Alito hypothesized that a profits interpretation, taken seriously, would require the government to trace all of the transactions in a drug dealing operation and determine whether a profit has been reached or whether the traffickers are still recouping overhead. Congress, he concluded, did not intend to increase prosecution costs in this way. The underlying premise, which accords with this Note’s thesis, is that Congress intended the civil asset forfeiture and money laundering statutes to be used to disrupt drug trafficking while reducing enforcement costs and therefore should be interpreted this way. The problem, however, was that Santos was not a drug trafficking case and hence even if the concurrence and dissent gained a majority for this statutory interpretation framework in drug dealing cases, it might only be considered dicta.

The concurrence and dissent formed a majority for the proposition that when the underlying offense in a money laundering prosecution is drug trafficking, the statute only requires proof of “gross-receipts.” The unique structure of the money laundering statute (and for that matter the civil asset forfeiture statute as well) makes it necessary that this holding is precedential. It should be apparent that if a statute, such as the money laundering or civil asset forfeiture statute, covers various predicate criminal activities, then any interpretation of the statute’s language will apply regardless of the predicate criminal activity involved. This is why the dissent and concurrence in Santos were concerned that interpreting the money laundering statute in the context of laundering gambling money was going to have unintended consequences when that interpretation was later applied to a case involving the laundering

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145. Id. at 2041–42.
146. For example, in his dissent, Justice Alito offered a hypothetical account of all of the problems that a profits interpretation of proceeds could create for prosecutors. Id. at 2040–42. He stated that “[t]racing funds back to particular drug sales and proving these sales were profitable will often prove impossible.” Id. at 2040. He then continued to explain that “[i]n the drug-money cases that I have been discussing, the courts would have to decide whether the drug syndicate’s net income should be calculated on an annual, quarterly, or some other basis.” Id. at 2041.
of drug money. Justice Stevens’ solution was to argue that in the money laundering and asset forfeiture statutes, which incorporate nearly all federal crimes as predicate activity to each statute’s application, the meaning of the statute can change depending on the predicate activity. Justice Alito’s dissent disagreed that statutory language can change and thus his solution was to analyze how a proceeds or profits interpretation would apply under all of the various criminal activities listed in the statute. At bottom, however, the lower courts had to decide whether the plurality holding of Santos applied to drug money laundering as well. Most courts have determined that it does not. Thus they have implicitly adopted Justice Stevens’ position that the statute’s interpretation changes if the case involves drug money. It follows that drug-trafficking is unique under these finance disruption statutes and, as such, courts should interpret these statutes in a way that takes account of Congress’ purpose to increase costs of drug-trafficking while decreasing enforcement costs in drug money cases.

But then came Cuellar.

B. United States v. Cuellar

The issue in Cuellar concerned the interpretation of the “designed to . . . conceal” element of the money laundering statute. The Government argued that the facts proved in Cuellar’s case were sufficient to meet this element. Specifically, the Government argued that concealing money in a secret compartment, packaging it in plastic, and spreading goat hair around the car to throw off the drug dogs was enough to prove that Cuellar knew that the transportation was designed to conceal the fact that he was transporting drug money. The Court rejected this argument, holding that the “designed to . . . conceal” element requires the Government to prove, not how Cuellar transported the money in a secretive manner, but why he transported it—to conceal its source, nature, or location within Mexico’s cash based economy.

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147. Id. at 2031–32 (Stevens, J., concurring).
148. Id. at 2035–36 (Alito, J., dissenting).
151. Id. at 558–59.
152. Id. at 559–560.
153. Id.
Importantly, the Court arrived at this interpretation through a textual reading of the statute rather than an attempt to glean congressional intent. Like the concurrence and dissent in Santos, the Government argued that the statute should be interpreted consistent with Congress’s purpose that it be used to disrupt drug trade finances by striking at any activity designed to conceal drug proceeds.\footnote{Id. at 560 n.6.} The Court instead turned to a “plain meaning” interpretation of the word “design.”\footnote{Id. at 559.} Relying on Webster’s, American Heritage, and Black’s Law Dictionary, the Court gleaned two meanings of the word “design.”\footnote{Id. (citations omitted).} The Court found that design can mean either “purpose” or a “structure or arrangement.”\footnote{Id. (citations omitted).} Although, a “structure” definition might support the government’s argument—Cuellar knew that the transportation was structured to conceal that he was carrying drug money—the Court rejected this argument, holding that it was more likely that, because this is a criminal statute, Congress intended the “purpose” (scienter) meaning of “design.”\footnote{Id. at 560 (internal quotation marks omitted).} Therefore, although a majority of the Court in Santos held that the money laundering statute should be interpreted in light of Congress’s purpose of increasing drug-trafficking costs and decreasing enforcement costs to achieve finance disruption, a majority of the Cuellar Court quickly rejected this argument and instead relied on textual interpretation.

This is a troubling holding if the government decides to pursue a drug war strategy based on money laundering and civil asset forfeiture. The decision casts the Court’s interpretational methodology in textual terms rather than in congressional intent. The former methodology is static and fails to recognize our checkered, expensive, and unsuccessful drug war history. The latter accords with the drug war of the twenty-first century and recognizes Congress’s purpose of enacting the statute—disrupting finance opportunities of the drug trade while reducing enforcement costs and relying less on the resource intensive criminal justice system.

Further, although I argue below that Cuellar’s application to money laundering cases might be insignificant in the long run, it could be important to civil asset forfeiture cases. Even if Cuellar was brought as a civil asset forfeiture action, the Court’s textual methodology could be problematic for the finance disruption strategy that I have advanced. There is a current circuit split over the proper interpretation of the civil asset forfeiture statute. The issue concerns whether facts very similar to those in Cuellar are sufficient to
support forfeiture based on a connection to drug trafficking. Thus, in order to defend the strategy, I have advocated that it is critical to distinguish Cuellar so that it does not influence the circuit split. Nor can it be used to predict which way the Court would resolve the split.

C. Civil Asset Forfeiture Law

1. The Eighth and Tenth Circuit’s Interpretation

In United States v. $124,700,159 the Eighth Circuit overturned the district court’s finding that the Government failed to demonstrate that the $124,700 in currency that police found hidden in Emiliano Gonzolez’s car was “proceeds traceable” to drug trafficking.160 The district court had found that Gonzolez’s explanation that he was on his way to buy a refrigerated truck for his produce business was “plausible.”161 On de novo review, the Eighth Circuit held that the “bundling and concealment of large amounts of currency, combined with other suspicious circumstances, supports a connection between money and drug trafficking.”162 The court went on to hold that the district court’s finding that Gonzolez’s explanation was “plausible” was not a finding of fact to which deference was appropriate.163 Hence, the court found the money “traceable” to drug dealing.164

In United States v. $252,300,165 after searching Levonezell Nowden’s truck, police found $252,300 in currency in a briefcase that was concealed in a hidden compartment.166 The money in the briefcase was bundled in stacks and sealed in plastic.167 When asked about the money, Nowden first denied having any knowledge of it but then later explained that it was for a start-up truck business.168 On appeal from the district court’s finding of a nexus, the circuit court however held that the amount of currency, bundled and concealed in plastic coupled with Nowden’s inconsistent statements about

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159. United States v. $124,700, 458 F.3d 822 (8th Cir. 2006).
160. Id. at 823–25.
161. Id. at 825 (internal quotation marks omitted).
162. Id. at 826.
163. Id. at 825–26.
164. Id. at 826 (internal quotation marks omitted).
165. United States v. $252,300.00, 484 F.3d 1271 (10th Cir. 2007).
166. Id. at 1272.
167. Id.
168. Id. at 1273–74.
the source of the money supported a finding that the money was traceable to drug trafficking.\textsuperscript{169}

2. The Third Circuit’s Interpretation

In reviewing a similar set of facts, the Third Circuit in \textit{United States v. $10,700.00},\textsuperscript{170} held that although money was concealed in a duffle bag in the trunk and wrapped in plastic,\textsuperscript{171} it was not “traceable” to a narcotics transaction because the claimants informed the officer of the money and explained that it was to be used to purchase a car.\textsuperscript{172} The circuit also found it significant that the record did not contain an affidavit by a DEA agent that money sealed in plastic is indicative of drug dealing.\textsuperscript{173}

One way of interpreting the Third Circuit’s holding is that, in its view, transporting large sums of cash bundled in plastic is not “traceable” to drug-trafficking. Viewed this way, there is a circuit split between the Third and Eighth/Tenth Circuits. However, the cases might be reconciled by the fact that unlike in Nowden and Gonzales’ cases, in $10,700, the court found that the explanation given for carrying this amount of money was plausible.\textsuperscript{174} Further, in $10,700, the court could not consider the fact that the money was wrapped in plastic because there was no affidavit or testimony in the record as to the significance of the plastic.\textsuperscript{175} That is, the distinguishing factor is that courts find it less indicative of being a drug money courier if a person merely hides a large sum of money than if they attempt to conceal the fact that the circumstances surrounding the money are consistent with transporting drug

\begin{itemize}
  \item \textsuperscript{169} Id. at 1275.
  \item \textsuperscript{170} United States v. $10,700.00, 258 F.3d 215 (3d Cir. 2001).
  \item \textsuperscript{171} Id. at 219.
  \item \textsuperscript{172} Id. at 232.
  \item \textsuperscript{173} Id. at 232–33. The court explained that although the record indicated that the money was packaged in plastic, the court could not consider this because the record did not contain an affidavit of a DEA agent stating that concealing money in plastic is indicative of drug dealing. Id. This holding is most likely explained by the procedural posture of the case. The parties in this case stipulated to forfeiture so that they could contest the district court’s decision to deny the claimant’s summary judgment motion. Id. at 221. Summary judgment was sought because the government had not provided enough evidence in the complaint (including any testimony by law enforcement officers) to satisfy bringing the forfeiture action. Id. The court made clear that the decision in favor of the claimant might have been different if there was testimony in the record concerning the packaging of the money. Id. at 232–233.
  \item \textsuperscript{174} Id. at 231.
  \item \textsuperscript{175} Id. at 232–33.
\end{itemize}
money. Most people who are transporting a large amount of cash would not leave it on the passenger seat, for instance, for fear of theft, but would instead hide it in the trunk. However, drug money couriers have an extra incentive to avoid detection and thus the “proceeds traceable” element will be proved if the facts demonstrate that a person was intending to conceal the fact that they were transporting drug money. However, this interpretation runs into Cuellar.

3. Compared to Cuellar

As was previously discussed, in Cuellar, the Supreme Court held that a courier who transported money that was concealed in a secret compartment, packaged in plastic, and surrounded by goat hair could not, on these facts, be convicted under the money laundering statute. The Government argued that, under the facts of the case, Cuellar was intending to conceal the fact that he was transporting drug money. The Court rejected this argument and held that Congress did not intend for the money laundering statute to criminalize surreptitious transportation of money without more. This holding could be problematic for the civil asset forfeiture statute.

I argue that the circuit split over interpretation of the civil asset forfeiture statute can be reconciled by recognizing that the court will find that money being transported is traceable to drug dealing if the facts show the courier intended to conceal the fact that he was transporting drug money. Thus, in United States v. $252,300, the circuit court decided that Levonezell Nowden was transporting drug money that could be forfeited because the money was concealed in a hidden compartment, in a briefcase, bundled in stacks and sealed in plastic. Moreover, when asked about the money, Nowden first denied having any knowledge of it but then later explained that

176. The test is an abstracted inquiry, as the government does not need to distinguish between the money being the proceeds of a drug sale or the money being capital intended to facilitate the trade. For example, in United States v. $10,700.00, the Government argued that there “had been, or was about to be, a violation of the drug laws involving this currency.” Id. at 225. Similarly, in United States v. $252,300.00, the Government’s theory of forfeiture was that the currency was “furnished or intended to be furnished in exchange for a controlled substance, or constitutes proceeds traceable to such an exchange.” 484 F.3d 1271, 1273 (10th Cir. 2007). Today, however, under CAFRA, if the government’s theory rests on “facilitation,” then it must show a “substantial connection”—as distinguished from being “traceable”—to drug trafficking. 18 U.S.C. § 983(c)(3) (2006).

177. United States v. $252,300.00, 484 F.3d 1271 (10th Cir. 2007).
178. Id. at 1272.
179. Id.
it was for a start-up truck business. The facts of Nowden’s case show that he intended to conceal the fact that he was transporting drug money. Cuellar’s case is almost indistinguishable. The money Cuellar was transporting was sealed in a hidden compartment, bundled, wrapped in plastic, and Cuellar also told inconsistent stories about why he was in the United States and where he was coming from. Thus, Cuellar could pose problems for the government in civil asset forfeiture cases. There are two ways to get around this conclusion, however.

The government can argue that Cuellar interpreted the money laundering statute, not the civil asset forfeiture statute, and that these two statutes, although connected, are textually distinguishable. While the statutes build upon one another, they are different in the elements required. The essential inquiry under the civil asset forfeiture statute is whether the money is traceable to drug dealing activity; whereas, the money laundering statute requires proof of a connection and a design to conceal the nature, location, or source of the money by transporting it out of the country. Thus, Cuellar could be interpreted as recognizing that the first element of money laundering—the courier’s knowledge that the money is connected to drug trafficking—was proved in Cuellar’s case. It might, however, be argued that because the civil asset forfeiture and money laundering statute are linked in purpose, and because the Court held in Cuellar that Congress intended the government to prove something more than the surreptitious transportation of money, this interpretation should guide interpretation of the civil asset forfeiture statute. This argument alone might not be dispositive, but, coupled with the Third Circuit’s view, it is a fairly strong argument that Eighth and Tenth Circuit’s interpretation is wrong. It therefore becomes necessary to confront the legislative history of the two Acts.

The Government can argue that the money laundering and civil asset forfeiture statutes were intended to be complimentary, so that even if the Government cannot prove a case under the money laundering statute it can still bring a forfeiture action. Viewed this way, less proof is required in a civil asset forfeiture case; hence, the Court’s view of the facts in Cuellar does not illuminate how it would view similar facts applied under the civil asset forfeiture statute. The complimentary interpretation accords with the legislative history of the two statutes, discussed above. However, the plurality in Santos and the majority in Cuellar refused to examine the legislative history behind these acts. Thus, the Government must argue for the Court to expand its methodology in interpreting these statutes. Only then

180. Id. at 1273–74.
will the Government be able to rely on the Eighth/Tenth Circuits’
interpretation of the civil asset forfeiture statute.

D. Changing the Paradigm: Minimizing Ness

The Government can confine the holding *Cuellar* to traditional money
laundering cases. As was argued above, the facts of *Cuellar* should be
enough to prove a civil asset forfeiture action or even a bulk cash smuggling
prosecution. Thus, *Cuellar* can be viewed as a case that should have been
brought under these statutes and not pursuant to the 1980s money laundering
statute. The Government should pursue civil forfeiture when a criminal
prosecution would be ineffective and a waste of criminal justice resources.
At the same time, money laundering prosecutions can efficiently achieve the
objectives of finance disruption by using the threat of the criminal justice
system to deter would-be launderers and therefore increase transaction costs
for globalized drug traffickers. Samuel Ness’s case was a near perfect case
for application of this principle. Thus, the holding of *Ness* needs to be
minimized lest it be analogized to Cuellar’s case which, as argued above, is
distinguishable and less appropriate for the criminal justice system.

Importantly, the Government did not appeal the Second Circuit’s
decision in *Ness*. Thus, even though the Supreme Court remanded *Ness* in
light of *Cuellar*, it does not follow that the Court would have analogized
*Ness* to *Cuellar*, and therefore, disposed of both cases the same way. In fact,
even under the statutory holding of *Cuellar*, there is room to argue that Ness
intended the money to be transported to international cartels in order to
conceal the nature, source, location, ownership, or control of the money, thus
coming under the interpretation in *Cuellar*.

The differences between *Ness* and *Cuellar* become apparent when we
recognize that today globalization is driving the opportunities for drug
money launderers to be successful and evade detection. As was argued, by
relying on the valorization of capital and his legitimate multi-million dollar
clients, Ness was able to ship millions of dollars by way of commercial
carriers without being detected. Similarly, he relied on the proliferation of
private transportation systems to easily, quickly, and surreptitiously ship the
money internationally. Finally, Ness established a global network of drug
cartels and suppliers in many different countries. Cuellar, in contrast, was a
drug money courier who did not have the opportunities and connections Ness
had; nor did Cuellar rely on any advent of globalization. The cases are very
different and in deciding *Cuellar*, the Court did not have the opportunity to
see globalized drug-money laundering at work. If the Court had heard Ness’s
case first, the outcome might have been different on statutory interpretation
grounds or in application of the interpretation the Court adopted in Cuellar. Although the Second Circuit found that Cuellar and Ness were indistinguishable, this was not a foreordained conclusion even after Cuellar.

After Cuellar, the Government was required to prove that Ness knew the plan to transport the money out of the country was designed to conceal the nature, source, location, ownership, or control of the money. That is, the Government had to prove that Ness’s surreptitious operation was designed to ship money out of the country in order to conceal it, rather than being designed only to conceal shipment of the money. The Court in Cuellar focused on the word “design,” holding that Congress intended the word as a scienter requirement. Unlike Cuellar—who was only a drug-money courier indistinguishable from the street-dealer directed by the gang leader as to when, where, and how much to sell—Ness designed the entire money laundering operation himself. Multiple cartels and suppliers in many different countries were linked together by Ness’s operation. Ness was able to establish a business relationship with common carriers gaining him trust so that the carriers would not scrutinize what he was shipping. His money laundering scheme was far-reaching and he knowingly relied on the opportunities of globalization to facilitate his scheme and avoid detection. Thus, Ness had a much higher level of scienter than Cuellar—who did not know whether he was transporting money or drugs and was only hired to drive from point A to point B.

Once we recognize that Ness, unlike Cuellar—whose only concern was driving from point A to point B—was designing a continuous operation by taking advantage of the opportunities of globalization, we can see that the Supreme Court is asking the wrong question. Whether Ness was shipping money out of the country to conceal its nature, source, ownership, or control, or whether he was, only concealing the money to ship it out of the country, as the Court found Cuellar was doing, is a fundamentally meaningless question in Ness’s case. In order to succeed, Ness needed his business operation to remain undetected. He needed to conceal his operation and he did this by relying on globalization, the valorization of capital, and global networks. Ness succeeded because of these international networks and therefore he was also able to grow his business. As Ness grew his business he gained more capital. With the valorization of capital as an outgrowth of

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181. See Reed Dickerson, Statutory Interpretation: A Peek into the Mind and Will of a Legislature, 50 Ind. L.J. 206, 206-07, 229–230 (1975) (arguing that the courts should try to determine as accurately as possible legislative intent but recognizing that in searching for legislative purpose there is a “strong temptation to perform the bootstrap operation of formulating a legislative purpose with one eye on the situation to which it is to be applied”).
globalization, Ness was able to rely on legitimate businesses to sustain his own illegitimate enterprise. Ness knew that with his multiple offices, multiple legitimate clients, and a booming business, his shippers would not suspect Ness of engaging in illicit activity. Thus Ness was simultaneously concealing to ship and shipping to conceal. This was not the case in Cuellar because Cuellar’s only concern was to drive either drugs or money across the border. Further, he was not relying on globalization. Once we become aware of the shadow side of globalization, we can see how Ness truly is a twenty-first century drug money launderer and therefore should have been prosecuted and convicted as such.

CONCLUSION

This Note argued that drug-trafficking is changing and therefore, if the United States continues to pursue a war against drugs, the drug war itself also must change. Drawing on the lessons of the 1980s–90s drug-war with its cost intensive focus on supply-side enforcement, I argued that a new strategy is needed. Finance disruption is the key. Through the use of civil asset forfeiture and money laundering laws, the government can disrupt the economic power bases of the trade, which today are proliferating because of globalization and the opportunities it provides for drug-traffickers to grow and sustain the trade through supply and finance. U.S. dollars are fueling demand and growing cartels in foreign states such as Mexico and Japan. By relying on asset forfeiture the government can interdict the cross-border movement of U.S. narco-dollars and forfeit the money back to the U.S. Treasury, all in a less costly proceeding than the drug smuggling prosecutions that overwhelmed the resources of federal courts and prisons in the border states in the 1990s. Thus the government will rely less on the criminal justice system and at the same time, combined with bank reporting laws, will also frustrate cartels and dealers attempting to move U.S. dollars into foreign states with less regulated economies. The criminal justice system, however, must still play a part. Money laundering laws can be used to deter opportunity brokers, like Samuel Ness, who rely on the processes of globalization to evade detection and facilitate the movement of finances between U.S. dealers and international cartels. At the same time, by carrying a term of imprisonment, these laws can disrupt the cartels who relied on and trusted the launderer to move enormous amounts of money between the United States and the cartel’s State. Both statutes are integral to this strategy. The government has the option of relying on the criminal justice system by bringing a money laundering prosecution when it will disrupt drug-trafficking networks and deter other dangerous launderers. Or the
government can choose instead to bring a civil asset forfeiture action which interdicts U.S. narco-dollars headed to international cartels but at the same time avoids lengthy prosecutions and incarceration of insignificant drug-couriers. Thus, the government will have the choice, and choice itself accords with the flexibility and efficiency approach of a globalized world.

In one term the Supreme Court almost undermined this entire strategy, not on constitutional grounds but on statutory interpretation grounds. The Santos decision, which set the framework for interpreting the money laundering statute, only commanded a plurality. However, a majority of the Justices agreed that in drug trafficking cases, Congress intended the money laundering statute to be broadly interpreted, thus reducing prosecution costs. This was in fact Congress’s intent—an intent that foreshadowed the failed policies of 1990s drug war and accords with globalization’s emphasis on capital and efficiency. However, despite this brief moment of judicial recognition that the drug war was changing, the Court then decided Cuellar. Having decided Cuellar before Ness—thus remanding Ness in light of Cuellar—the Court, and the circuit court on remand, failed to see an important difference between the cases. Cuellar was only a drug courier and under such facts the Court’s interpretation of the money laundering statute was reasonable. Applying this interpretation to Ness’s case reveals that the framework is inadequate at best and at worst could seriously frustrate a drug war strategy focused on finance disruption. Ness can be distinguished, but the better argument is that the courts must also become aware that drug-trafficking and its finance systems is very different from the twentieth-century. Therefore, this Note is, at bottom, a call for the recognition that because globalization has changed the drug-war, it is imperative that the courts and the government recognize that our perceptions of drug-trafficking and money laundering must change in order to apply the money laundering and asset forfeiture statutes which, although crafted in the 1980s, are broad enough to be applied in the twenty-first century. All that is needed is a new perspective and a recognition that the old paradigm is no longer appropriate.