Extreme Drug Law Tramples Bill of Rights:

Flaws Seen in Uniform Controlled Substances Bill

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Executive Summary

Coloradans understandably anxious to see their children protected from pushers and their neighborhoods freed of drug-related violence may get more than they bargained for if a current legislative proposal is enacted.

H.B. 1015, the Uniform Controlled Substances Act, drafted at the national level and parachuted into our State Capitol this month, invokes worthy goals, but is fatally flawed by a prosecutorial zeal that seeks to punish suspects

believed guilty even when their accusers "have no means of proving it." Those are the actual words of an Assistant U.S. Attorney from Colorado promoting the bill's broad new forfeiture-style provision.

Is this any way to legislate in a nation fresh from the Bill of Rights bicentennial, and in a state proud of its own Bill of Rights that runs three times longer than the U.S. document? Is an increment of presumed advantage in the drug war worth the price of warrantless searches, extreme and irrational punishments, pointless additional prison crowding, expansion of prosecutors' power to take property from people never found guilty of a crime, and further abdication of state powers to federal bureaucrats? Legislators and concerned citizens should ask themselves.

> [*No protracted war can fail to endanger the freedom of a democratic country*. --Alexis de Tocqueville.
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> [*Necessity is the plea of every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves*. --William Pitt, Speech on the India Bill, November 18, 1783.
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> [*You do not examine legislation in the light of the benefits it will convey if properly administered but, in the light of the wrongs it would do and the harms it would cause if improperly administered.*--President Lyndon Baines Johnson.

The Cold War against Communism, coming immediately after the war against the Nazis and persisting for nearly 50 years, was the primary cause of the growth of the federal government to its present monstrous size, suggests the Heritage Foundation's Burton Yale Pines. With the Soviet threat vanquished, it is now urged that domestic policy objectives be elevated to the status of "war," as in the "War on Drugs" or the earlier "War on Poverty." Such domestic wars, like their overseas counterparts, involve widely-shared public objectives. But they also pose a risk of expanding Washington's already overlarge control of American life, and of undermining the democratic principles upon which our republic was founded.

One of the newest salvos in the War on Drugs is a lengthy revision of the Uniform Controlled Substances Act created by the National Conference of Commissioners on Uniform State Law. Colorado, along with five other states, had refused to adopt the original Uniform Controlled Substances Act. The Revised Uniform Controlled Substances Act is now offered in Colorado to eliminate all existing Colorado drug law, and replace it with the uniform act. The uniform act has been introduced in Colorado as House Bill 92-1015. The discussion below cites the Colorado bill, but is also applicable to uniform commissioners draft.

In some respects, the bill accomplishes the purposes of uniform legislation, by providing for standardized definitions. In other respects, the bill is deeply flawed, for it includes numerous provisions which too greatly expand

governmental power. The continued inflation of government power, accompanied by the derogation of Constitutional values, creates the substantial risk that in attempting to create a drug-free Colorado, the bill may create an unfree Colorado.

Overview

House Bill 92-1015 surrenders one of the most essential prerogatives of a democratic legislature -- the authority to make criminal law -- and transfers that awesome power to unelected federal bureaucrats. In violation of fundamental fairness, the bill makes persons subject to felony penalties for violating laws which have never been published. The "controlled substance analogs" section is so vague as to provide no fair notice of what is illegal; physicians and chemists must proceed at their own risk until a substance is affirmatively declared legal.

The money laundering statute is so overbroad as to include a college student's giving his roommate a baggie in which to store a few marijuana cigarettes within the definition of "money laundering." If the college student invites his roommate home for Thanksgiving, and the roommate brings along just one marijuana cigarette, the parental home where the students stay becomes subject to forfeiture.

H.B. 92-10 15 makes the offices of physicians, veterinarians, and other medical professionals subject to warrantless searches at the whim of the government. Sentencing provisions fail to distinguish adequately between casual users and kingpins. The scheduling of particular drugs perpetuates rather than reforms some of the unscientific anachronisms contained in the present controlled substances law.

Perhaps most dangerous of all is a "Continuing Criminal Enterprise" provision which allows the government to confiscate three times the annual gross revenue of an allegedly criminal enterprise. Although ostensibly aimed at drug racketeers, the provision has no requirement that the defendant corporation be convicted of any criminal offense at all. Advocates of letting the government impose harsh sanctions without proving a criminal case insist that prosecutors must be allowed to punish persons whom the prosecutors believe are guilty, even when prosecutors "have no way of proving it."

At 133 pages, House Bill 92-1015 is so large that it is nearly impossible for legislators to carefully scrutinize each provision. Thus, the bill violates the spirit of the Colorado Constitution, which requires that "No bill, except general appropriation bills, shall be passed containing more than one subject." Colo. Const., Art. V, § 21. While all of the bill's provisions do relate to the general subject of "drugs," the numerous sections, many of them creating stiff felony penalties, could have been more thoughtfully considered if they had been introduced in a series of smaller bills. As is, House Bill 92-

1015 is a 133 page giant that threatens the values of due process and fairness upon which Colorado and the United States were founded.

I. Delegation to Unelected Federal Bureaucrats of the Authority to Make Colorado Criminal Law

One of the core principles of a free society is that laws be made democratically. Because legitimate authority is based on "the consent of the governed," legitimate law is made by the legislature, which is the democratically elected voice of the people.

As government has grown larger over the last half century, many people have come to accept the concept of administrative law-making, by which appointed boards or commissions fill in the details of statutes enacted by legislatures. Even when administrative law-making is allowed, it is always under the control of persons answerable to the people they govern. While appointed officials may create regulations, those officials are directly appointed by the elected Governor, and are often personally confirmed by the elected Legislature.

House Bill 92-1015, however, departs from the time-honored principle that Colorado law should be made by Coloradans. The authority to make Colorado criminal law is delegated to federal bureaucrats in Washington, D.C.

House Bill 92-1015 states that which drugs are legal or illegal in Colorado will be based on regulations enacted by the Colorado Board of Pharmacy. § 18-18-201. The proposed abdication of the legislature's authority to make felony criminal law, the turning over of such an awesome responsibility to an un-elected Board, is troubling (more on this below). But to make matters much worse, the bill actually strips the Colorado Board of Pharmacy of its discretion, and vests that discretion in federal bureaucrats. The Board is required when scheduling controlled substances to exactly mimic the actions of the federal bureaucracy in scheduling substances under federal law. § 18-18-201(3). In other words, the decision about what becomes an illegal substance in Colorado would be made not by Colorado's elected legislature, or even by Colorado's Board of Pharmacy, but by a federal employee in Washington, D.C.

While some persons may be horrified that a body as consistently self-serving and inept as the Washington bureaucracy be allowed to make Colorado criminal law, other persons may believe that the drug control bureaucracy in Washington, D.C. has always acted wisely in the past, and will always do so in the future. If the optimistic view of the drug-control bureaucracy is correct, then H.B. 92-1015 will likely serve as a model for many future delegations of the Colorado legislature's law-making authority to Washington officials. Just as complex -- and in need of "expert" Washington decision-making -- as decisions about drug legality are decisions about the scope of environmental laws, the meaning of securities fraud, the extent of state gun controls, or

many other issues. Once the principle is established that Washington bureaucrats can write Colorado's criminal laws, there is no principled objection to allowing Washington to write other Colorado laws.

The Washington bureaucrats who will be writing Colorado's laws will not be chosen by the Colorado voters, nor will they be appointed by a Governor chosen by Colorado voters. Indeed, the bureaucrats may not, in any meaningful sense, even be appointed by the President (who may or may not be the choice of a majority of Colorado voters). The federal official who chooses the drugs to make legal or illegal may be the appointee of an appointee of an appointee. He may well be a career civil servant, as far removed from the democratic process as any government employee could be.

There is no need for the Colorado legislature to delegate its law-making authority to the Washington bureaucracy. There is little evidence that the federal bureaucracy is before then, potent varieties of marijuana were readily available. People who use the more potent varieties simple consume less, just as persons who drink scotch consume a lower volume of fluid than do beer drinkers.

Thus, persons who wish to stop marijuana use generally need only simple willpower, not medical help to cope with withdrawal symptoms. Accordingly, a policy of coercing marijuana offenders into drug treatment will essentially mean that the drug treatment system will be forced to "cure" persons who are not addicts and do not wish to be cured, and forced to turn away persons who are cocaine or heroin addicts who desperately crave help. Such a policy will not only make drug treatment expenditures less efficient, the policy may also increase crime committed by cocaine or heroin addicts who cannot get treatment.

Lastly, coerced treatment raises serious ethical questions for the government and for physicians. Does the government have a right to impose medical treatment on unwilling adults? Can physicians perform such treatment without violating the Hippocratic Oath, and risking malpractice suits? During the era of alcohol Prohibition, it would have seemed ludicrous to send illegal imbibers to Alcoholics Anonymous meetings, or to alcohol treatment sanatoriums. Most people who broke the alcohol laws, like most people who break the marijuana laws, are not physically sick. They are simply persons who refuse to obey the law.

All of the above argument does not in itself prove that the Legislature should not impose jail terms for possession of small amounts of marijuana. Most people who support the death penalty would continue to do so even if it were proven that the death penalty is far more expensive to administer than is life in prison, and that the death penalty does not deter crime. Many death penalty advocates simply like the moral statement the death penalty makes, and are willing to spend the money to make it; some legislators might simply

like the moral statement made by six month jail terms for possession of any amount of marijuana.

But in the last decades, the General Assembly and the people of Colorado have learned a hard lesson about the consequences of increasing the severity of the criminal law without increasing the funds available to enforce the law. If the Legislature determines that the sharp increase in the marijuana penalty is appropriate, the Legislature should fully assess the resultant costs to the State and the counties, and make the necessary fiscal appropriation. To not do so is to dishonor the Legislative duty to zealously guard the public fisc.

II. Colorado's Constitution Requires Full Disclosure in Legislation

The United States Constitution contains few limits on the procedures and operation of Congress. In contrast, the Colorado Constitution contains numerous provisions detailing "open government" rules for how the General Assembly must address legislation. That is one reason why Colorado's laws can fit on a single shelf, and are generally respected; and why Congress's laws cannot fit on an entire bookshelf, and are generally disrespected.

The Colorado Constitution states:

Bill to contain but one subject - expressed in title. No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed. --Colo. Const. Art. V, § 21.

House Bill 1173 does not conform to the above Constitutional standard. In violation of the Constitution, the bill is about "more than one subject." The main subject of the bill, substance abuse evaluation and testing for persons under the supervision of the criminal justice system, consumes most of the bill's 30 pages. The second subject, increasing the penalty for violation of a criminal law, is a relatively short provision contained in the middle of the bill.

In addition to violating the Constitution's "one subject" rule, the marijuana provision also runs afoul of the rule that the subject of the bill "shall be clearly expressed in its tide." The title of HB 1173 is "A Bill for an Act Concerning the Elimination of Substance Abuse in the Criminal Justice System, and Making Appropriations in Connection Therewith." The title relates to substance abuse evaluations of persons under supervision of the criminal justice system -- persons on parole or probation. The appropriation made "in connection therewith" also relates to that subject.'3

In contrast, the subject of increasing the penalty for marijuana possession is not expressed in the bill's title, and is certainly not "clearly expressed" as the Constitution mandates.

The Constitutional rules of "one subject.. . clearly expressed in the title," are an important basis for democratic legislation. Because members of the public cannot read every word of every bill that is introduced, the one subject/clear title rules help persons focus on which bills are most important to them. The rules also force each legislative proposal to depend on its own merits for passage, and force the Governor to consider each subject separately in deciding whether or not to exercise his veto power.

Thus, the one subject/clear tide provisions of the Constitution provide several checks and balances to ensure that the only laws enacted are those for which citizen input

III. Controlled Substance Analogs: Everything Which is Not Declared Legal May Be illegal

By attending every meeting of the Board of Pharmacy, a person could, theoretically, learn which substances were illegal, even if no notice were ever published of the substances' illegality. Even then, the person could not be sure what was lawful under the new act. The provision regarding "controlled substance analogs" is intended to regulate "designer drugs" -- newly invented drugs which are similar to controlled substances. The language of the provision is far broader than necessary for the stated objective, and makes it nearly impossible for a person to determine if a particular drug is legal or illegal.

Since the Board of Pharmacy (like the legislature) can meet at any time to put a drug on the controlled substance schedules, the problem of "designer drugs" could be handled simply by specifically stating that the Board (or the legislature) shall have the authority to add to the schedules of illegal controlled substances any substance which is a controlled substance analog.

House Bill 92-1015 does not take the above approach. Instead, the bill makes immediately illegal everything which fits the bill's vague definition of "controlled substance analog." Such an analog is something "the chemical structure of which is substantially similar to the chemical structure of a controlled substance" on schedule I or II. § 18-18-102(5)(a). But "substantially similar" has no meaning within the world of scientific chemistry.

A "controlled substance analog" also has an effect "substantially similar" to that of a controlled substance. § 18-18-102(5)(a)(I). Again, the term "substantially similar" is far from precise. After all, caffeine or diet pills (in large doses) produce a stimulant effect on the nervous system which is "substantially similar" to (small doses of) amphetamines.

The vagueness of "substantially similar" would be less of a problem if "substantially similar" were merely a guideline for the Board or the Legislature to place drugs on the controlled substances schedule. But because the vague "controlled substance analogs" are made illegal without further definition, scientists and physicians are at risk of the next district attorney

who decides he needs a spectacular white-collar "designer drug" bust before the next election.

How does House Bill 92-1015 deal with the vagueness problem? "After final determination that a controlled substance analog should not be scheduled, no prosecution relating to that substance as a controlled substance analog may be commenced or continued." § 18-18-214. So a person can be prosecuted for any substance which might arguably fit the vague "controlled substance analog" definition unless and until the Board of Pharmacy specifically declares the substance legal. (And even after the declaration of legality, persons who have been prosecuted for the substance and sent to prison remain in prison.)

The proposed Board of Pharmacy procedure is, again, an inversion of due process model of law-making. The due process model states that everything is legal until declared illegal by the government. The House Bill 92-10 15 model is that anything may be illegal, until the government affirmatively declares it legal.

Because of the failure to provide fair notice of what is illegal, the analog provision may be unconstitutional. While the Colorado Supreme Court has not stopped the Legislature from delegating power to make carefully bounded laws, the Court has insisted that when a delegated body makes criminal law, the public has "an important liberty interest" in "the right to reasonable notice of criminally proscribed conduct."'(1)

Several other provisions of the controlled substance analog provision are also questionable. First, a chemical that is declared by a prosecutor to be an analog of a Schedule II substance is legally classified as a schedule I substance. § 18-18-2 14. Should not an analog (however defined) of a schedule II substance be considered a schedule II substance?

Second, the bill defines as a controlled substance analog not only substances which actually do have effects "substantially similar" to a controlled substance, but also substances which the individual thinks have an effect similar to a controlled substance. § 18-18-102(5)(a)(II). Thus, a person who thinks he possesses a depressant, stimulant, or hallucinogen -- even if he really does not -- commits a crime. Are the felony resources of the criminal law really necessary to deal with people engaged in the thought-crime of (incorrectly) believing they possess potent drugs?

Finally, the entire provision regarding drugs said to have a "substantially similar" effect to other drugs marks a radical expansion of the principles of drug control law. Since beginning in 1914, the drug war has focused on particular drugs which have been found to have uniquely dangerous effects. By refocusing the drug war on all combinations of chemicals with have mental effects "substantially similar" to illegal drugs, House Bill 92-1015 in effect makes it illegal to have a particular mental state. If a controlled

substance relates in a particular mental state, a person who seeks that mental state through a different, legal chemical becomes a criminal. What is being controlled is no longer specific drugs, but politically incorrect thought.

IV. Infringements on the Rights of Medical Providers

A. Subjecting Medical Professionals to Warrantless Searches

As government officials demand more and more power for the "drug war," many persons who thought that they were exempt from the war (because they had never taken an illegal drug), have found their liberties restricted. For example, World War II veterans living in New Jersey now commit a felony if they continue to possess their old service M-1 carbine, because such a gun is supposedly an "assault weapon" and the "weapon of choice" of drug dealers.(2) under House Bill 92-1015, physicians, veterinarians, and other health professionals -- most of whom probably spent their college days in the science library rather than at wild parties and hence thought themselves immune to drug war abuse -- will find the right to privacy in the medical professional's place of business has vanished.

Under section 18-18-501(3)(c)(II), the government may conduct warrantless inspections and seizures of places where controlled substances are stored (such as doctor's offices) "in situations presenting imminent danger to health and safety." The provision is unnecessary and subject to abuse.

First of all, the government is allowed to search a doctor's office -- without a trace of evidence that the doctor may be doing anything illegal -- merely by obtaining an administrative search warrant. § 18-18-501(2).

Second, warrantless search and seizure is specifically allowed "in all other situations in which a warrant is not constitutionally required." § 18-18-501(c)(V). The courts have already created exceptions to the warrant requirement, such as the "exigent circumstances" exception, which allow warrantless searches in genuine emergencies.

The additional exception created by H.B. 92-1015, in any situation "presenting imminent danger to health or safety," could become the exception that swallows the warrant rule. After all, anytime there is the slightest suspicion that a controlled substance is being illegally dispensed, there could be said to be an "imminent danger to health or safety." Accordingly, the flimsiest of rumors or anonymous denunciations could become the basis for a warrantless search of a health professional's office, seizure of all his registered controlled substances, and copying of all his patients' confidential medical records. Giving the government the power to make such uncontrolled searches without a warrant violates of the fundamental Constitutional rule for searches and seizures: "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures..." Colo. Const., Art. H, § 7.

B. Unbounded Registration Discretion

A second manner in which pharmacists, veterinarians, physicians and others could be subject to abuse is in the registration procedure for legal approval to dispense controlled substances. Approval may be denied because of a number of specific reasons, and also for "any other factors relevant to and consistent with the public health and safety." § 18-18-303(1)(h).

The "any other factors" catchall could be easily abused. Perhaps the official reviewing the registration application might think that one pharmacy was enough for a small town. A second legal pharmacy would double the chances of controlled substances being stolen. The statute would allow the state official to prevent the second pharmacy from doing business. Or the official could impose unreasonable conditions on the registration being granted, such as waiver of privacy objections to warrantless government inspections of financial or patient records.

V. Punishments that Don't Fit the Crime

Logically speaking, the severity of drug laws should be tied to the dangerousness of the drug and the individual's conduct regarding the drug. Several provisions of H.B. 92-1015 violate this logical standard.

A. Compound Inflation

Suppose a person decides to be a drug courier and transport 10 grams of pure heroin from Denver to Glenwood Springs. Now imagine a second courier, who also carries 10 grams of heroin from Denver to Glenwood Springs. Imagine that the second courier, instead of carrying the 10 grams in pure form, were given a shipment to deliver that consisted of the 10 grams mixed in with 60 grams of adulterants, to dilute the heroin.

Logically speaking, the two couriers have committed equally serious offenses. By each moving 10 grams of heroin through the stream of commerce, they have each created a similar threat to public health, as determined by the legislature. Courier two carried heroin to which diluting materials had already been added; courier one carried heroin to which the diluting materials would be added later; both couriers transported the same amount of actual heroin. Yet while the two couriers would seem to merit equal punishment, H.B. 92-1015 (like present law) treats the two couriers very differently.

A "narcotic drug" is defined to include "any compound, mixture, or preparation containing any quantity" of narcotics. § 18-18-102(18)(h). Likewise, the prison sentences for possession of cocaine, methamphetamine, and heroin are geared to the weight not of the drug itself, but the weight of the "material, compound, mixture or preparation" which contains the drug. § 18-18-405(3),(4)&(5).

The emphasis on total weight, rather than drug weight, is not compelled by forensic needs. Police scientists can readily assess the percentage purity of a seized mixture, and hence determine the actual quantity of drug possessed.

Persons caught with small quantities of illegal drugs contained in large quantities of adulterants are not sympathetic figures. Some legislators may feel that if these unlucky persons receive an illogically severe punishment, there is little harm done.

Prison capacity in Colorado is, however, quite limited. When a small-time criminal is given a sentence appropriate to a drug kingpin, simply because the small timer possessed highly diluted drugs, the small-timer occupies a prison cell for many years, and prevents that cell from being used for other, more dangerous criminals (including persons who were selling large quantities of actual drugs). Drug law sentences should be based on actual drug quantity equivalents.

B. Treating Casual Users like Kingpins

The penalty schedules set forth for cocaine, methamphetamine, and heroin provide for graduated penalties based on the quantities possessed. The bill thereby attempts to allocate Colorado's limited prison space according to the dangerousness of the offender. (And if the quantities were geared to actual quantities of drugs, rather than quantities of adulterants, the goal would be fully achieved.) For other controlled substances, however, the bill makes no distinction between a casual user possessing a single dosage unit, and a kingpin selling ten thousand dosage units. Both the casual user and the kingpin are treated as class 3 felons. § 18-18-405(2)(a)(I). The equal treatment of such unequal persons is illogical and unfair.

Under federal law, the first offense of mere possession of a controlled substance, without intent to sell, is a misdemeanor. Federal Controlled Substances Act § 404; 21 United States Code § 844. Colorado's limited prison space would be best utilized by reserving lengthy prison sentences for persons other than first-time casual possessors. For the first-timers, the one-year misdemeanor prison sentence should be more than adequate.

A rational reallocation of prison space towards dealers, and away from first-time users, could be accomplished by revising § 18-18-405(1)&(2) to delete all references to possession in the penalty structure, and creating a Class 1 misdemeanor offense for possession only (not with intent to sell) by a first time offender with no previous conviction. Section 18-18-404(1)(a), criminalizing use of controlled substances, would be likewise amended.

C. Invitation to Forfeiture Abuse of Homes and Automobiles.

With existing forfeiture laws already being questioned by private property advocates nationwide, House Bill 92-1015 takes no steps to correct current forfeiture abuses. Instead, section 18-18-411 adds new forfeiture provisions.

"Any.. ... dwelling house, vehicle.., or place whatsoever. . .which is used for the unlawful storage, manufacture sale, or distribution of controlled substances is declared to be a class 1 public nuisance." § 18-18-411.

Thus, if a college student brings home a couple marijuana cigarettes over Christmas vacation, the parent's home can be forfeited. if the student's father drove up to the college to bring his child home, the father's car would be subject to forfeiture.

D. Drug-Free (Correspondence) School Zones

Section 18-18-405(6) re-enacts existing Colorado law regarding school zone drug sales. The theory of the school zone restriction is to create higher penalties for dealers who specialize in selling drugs to schoolchildren. The principle is valid, but it has, like many other drug law provisions, been twisted and abused by overzealous prosecutors. In particular, some prosecutors have invoked the "school zone" provision in cases having only the tiniest nexus with a genuine school zone. For example, in one Washington, D.C. case, the "school zone" was said to emanate from a mail-order correspondence school situated between two taverns.

Abuses could be prevented by adding a provision that "school" does not include a correspondence school or other school which does not instruct on campus students the majority of whom are 18 years of age or less.

E. Punishing People for Selling Drugs Who Don't Sell Drugs

The only persons who should be punished for conspiring to sell drug are persons who actually conspire to sell drugs. This common-sense rule is embodied in the common law "procuring agent defense," which H.B. 92-1015 abolishes. § 18-18-431.

The procuring agent defense is hardly a loophole for drug criminals. It provides no defense to the charge of drug possession.(3) It provides no defense to the charge of dispensing dangerous drugs.(4) It does not apply to persons who locate and purchase drugs, and then re-sell them to an undercover agent.(5) It does not apply to defendants who make a profit through a drug transaction.(6) The defense applies only to charges of conspiring to sell drugs. The defense is limited to persons who purchase drugs for an undercover agent at the direction of the undercover agent, and only to such persons who make no profit from purchasing the drugs for the agent. The defense does not apply to persons who act as independent middle-men. As the Colorado Supreme Court explains, "The legal theory behind this defense is that a defendant, as an exclusive agent for the buyer, is a principal in or a conspirator in the purchase rather than the sale of the contraband, and as such, the defendant, like the buyer, cannot be convicted of selling the narcotic, nor can he be convicted of conspiring to sell.(7) And of course the defense is only available in situations where the jury considers it credible."(8)

Because the "procuring agent defense" only pertains to narrow factual circumstances where a defendant acts as an exclusive agent for an undercover agent purchasing drugs, and because the defense is no defense to charges of possessing drugs or conspiring to purchase drugs, the defense simply ensures that a person is not convicted of conspiracy to sell drugs if he did not actually conspire to sell drugs. There is no reason to abolish this narrow, carefully delineated common-law rule.

F. Punishing People for Money Laundering Who Don't Launder Money

Control of money laundering is rational element of any criminal drug control strategy. House Bill 92-1015, however, includes a money laundering provision that covers actions which have nothing to do with money laundering. § 18-18-408.

For example, "money laundering" is claimed to be committed by any person who "makes available anything of value which the defendant knows is intended to be used for the purpose of committing or furthering the commission of any violation of this article." § 18-18-408(b). Thus, if a college student gives his roommate a plastic baggie in which to store the roommate's one-eighth ounce of marijuana, the student commits "money laundering," since he made available something of value (the baggie) for the purpose of committing a violation of the drug article (possession of marijuana).

Similarly, if a person who bought a small bag of marijuana for forty dollars decides to get rid of it, and sells it for thirty dollars, and buys his girlfriend a box of chocolate with the money, and the girlfriend knows where the money came from, the girlfriend commits "money laundering." Under the terms of H.B. 92-1015, the girlfriend "receives or acquires proceeds" (the box of chocolate) "known to be derived from the violation of this article" (the sale of the small marijuana bag).

A more sensible money laundering statute, actually geared towards genuine money laundering, would be the one based on the model developed by the United States House of Representatives Judiciary Committee in 1986. Such a statute would read:

(1) Whoever knowingly engages or attempts to engage in a financial transactions in criminally derived property commits a class 3 felony. This paragraph does not apply to financial transactions involving the bona fide attorney fees an attorney accepts for representing a client in a governmental investigation or any proceeding arising therefrom.

(2) Whoever knowingly engages or attempts to engage in a commercial transaction, knowing the transaction is part of a scheme--

(a) to conceal criminally derived property; or
(b)to disguise the source of ownership of, or control over, criminally derived property;

commits a class 3 felony.
(3) As used in this section

(a) the term "financial transaction" means the deposit, withdrawal, transfer, or exchange of funds or monetary instrument by, through, or to financial institution or affiliate financial institution, as defined in section 11-25-102, C.R.S.
(b)the term "commercial transaction" means:
(I)a financial transaction;
(II) the creation of a debt; or
(III) the purchase or sale of any property for

(A)a fair market value; or
(B) a price greater than $10,000; or
(C)a price equal to or less than $10,000, if effected with the intent to evade criminal jurisdiction under clause (B).
(c)the term "criminally derived property" means property constituting, or derived from, proceeds obtained from a felony violation of this article involving sale of a controlled substance.

G. Overuse of Mandatory Minimums

At a time when Colorado faces a prison overcrowding crisis that makes it difficult to send repeat violent offenders to prisons for appropriately lengthy terms, the bill includes far too many mandatory minimum sentences, which will ensure that Colorado's prison space shortage grows even worse.

As a general principle, mandatory sentences of any type depart from the moral underpinning of criminal law: persons should be punished in proportion to their wrongdoing. Mandatory sentences deprive courts of the ability to tailor the punishment to fit the criminal's conduct. As Congressman George Bush explained in 1970, supporting a bill to eliminate most mandatory minimums from federal law:

Contrary to what one might imagine, this bill will result in better justice and more appropriate sentences... [Federal judges] are almost unanimously opposed to mandatory minimums, because they remove a great deal of the court's discretion... [By repealing mandatory minimums] we will undoubtedly have more equitable action by the courts, with actually more convictions when they are called for and fewer disproportionate sentences.(9)

Does a drug kingpin caught with 300 grams of pure heroin deserve a severe, lengthy sentence? Does a person in debt to a loan shark, who agrees to smuggle 30 grams of heroin contained in 270 grams of sugar, and who gets caught on his first and only offense deserve a sentence just as severe and

lengthy? The mandatory minimums for possession of certain quantities of heroin, cocaine, and amphetamine (with adulterants counting towards the quantity totals) remove the court's discretion to treat the kingpin and the one-time courier as the very different offenders that they are.

Does a school janitor who pushes drugs to elementary school children deserve a severe, lengthy sentence? Does an 18 year-old high school student who asks his 17 year old girlfriend to temporarily store a gram of cocaine in her jacket pocket until his older brother can buy it deserve an equally severe, lengthy sentence?(10) Does a Stanford college student who brings four grams of psilocybin mushrooms home to Grand Junction for personal use on Christmas vacation deserve the same type of very severe sentence meted out to someone who smuggles 3 pounds of heroin into the state?(11) According to section 18-18-407, all the persons described in this paragraph must be sentenced to class 2 felony term that is greater than the presumptive range for a class 2 felony. That is the same sentence accorded to someone who, in course of perpetrating a first degree sexual assault, causes serious bodily injury to the victim, and does so while on parole for another felony.

The act's very lengthy list of factors triggering a mandatory sentence is based on an initial valid premise. Procuring minors for drug crimes, or importing drugs into the state, often do evince the behavior of an especially serious offender. But not always. The "aggravating factors" of section 18-18-407 would be better treated as just that: aggravating factors, rather than mandatory sentence triggers. The presence of one of the 18-18-407 factors could allow but not require the court to impose a sentence in excess of the presumptive class 2 felony sentence.

Prosecutors might assure that legislature that the prosecutors' discretion will prevent the mandatory minimums from being imposed unfairly. Such an assurance, however, would be an admission that "mandatory" minimums are not mandatory at all. They simply transfer sentencing discretion from the place where it belongs -- the court--and give it to the prosecutor.

VI. Some Other Issues

A. Marijuana and other Drugs Listed on Wrong Schedules

House Bill 92-1015, like the statutes it replaces, sets up a multi-level schedule of controlled substances, and places various drugs on the schedules. The Bill neglects an opportunity to correct an earlier misclassification of marijuana and some other drugs.

Marijuana is listed as a Schedule I controlled substance, § 18-18-204(c)(XIV). Schedule I is for drugs which have "no currently accepted medical use in treatment in the United States." § 18-18-203(1)(b). Marijuana, however, is recognized as effective medical treatment for the symptoms of glaucoma, and for the nausea caused by chemotherapy.'(12) The addictive potential of marijuana is similar to that of caffeine. According to former Surgeon General

Koop, marijuana is much less addictive than heroin, nicotine, or alcohol. General Koop, during his time in office, spoke out in favor of making marijuana available for medical use.(13) Accordingly, marijuana would be properly controlled under Schedule V, which deals with drugs that have some potential for abuse, which cannot be possessed without a prescription, and for which there are medical uses.

Several other drugs on Schedule I (no medical use) would fit better on Schedule II (medical use possible under rigidly controlled conditions). Most of the hallucinogenic drugs on schedule I [§ l8-18-204(1)(c)] are recognized in medical literature as being effective in psychiatric treatment of alcoholics, of heroin and cocaine addicts, of persons with fatal illnesses, and for other psychotherapeutic purposes.'(14) On Schedule II, these drugs could not be prescribed by physicians in general, but only by a much smaller group with the training and expertise to supervise the carefully controlled therapeutic use of the drug. Schedule II seems to work well for morphine, which has both medical uses and an extremely high potential for addiction; Schedule II would seem well-suited for the psychedelic drugs, since they have little to no potential for addiction, and are medically useful in controlled settings.

Of course it is true that the substances discussed above are all listed on Schedule I of the federal controlled substances list. But their placement there is more the result of "political correctness" within the world of federal drug war bureaucrats than of logic. In rejecting the overwhelming evidence that marijuana has medical use, the U.S. Drug Enforcement Administration head stated that he would only allow his agency to classify as medically useful drugs which were widely recommended for use in medical textbooks. But because marijuana is already listed on Schedule I, it is nearly impossible to obtain authorization to use it even for research, let alone treatment. Hence, its medical uses are rarely discussed in textbooks intended as guides for practitioners. The conservative federal Courts of Appeals for the District of Columbia unanimously found that the DEA had deliberately created "standards" which made it impossible for any Schedule I drug to ever be reclassified. The three-judge Court over-turned the DEA's rejection of medical marijuana, and ordered the agency to reconsider its decision.'(15)

The DEA's politicized, unreasonable handling of the medical marijuana issue provides a clear example of why Colorado legislators should continue to make their own decisions about Colorado drug laws, rather than trusting in the wisdom of Washington bureaucrats.'(16)

B. The Container Requirement

Under § 18-18-413, only the legal owner of a controlled substance may store it in anything other than "the container in which it was delivered." So if a parent (the owner) gives her child a prescription pill that had been prescribed for a child; the child brings the pill at school to take at lunch, and the child

stores the pill in lunch box, rather than in a prescription container, the child commits a crime. To deal with all the situations where the person with the prescription might not be the "owner" of the controlled substance (as when one person pays for medicine for another's use), the statute might better read "legal owner, or a person acting at the direction of the legal owner."

C. "Continuing Criminal Enterprise": Criminal Punishments without Criminal Convictions

The bill provides criminal and civil penalties for running any "continuing criminal enterprise": that is, supervising two or more felony violations of the article, undertaken by five or more persons, and making "substantial income" on the violations.

The concept is similar to the federal RICO statute, which was enacted as a tool against organized crime. According to both the Wall Street Journal and the American Civil Liberties Union, federal RICO law has been abused, and often used in situations having no real relation to racketeering. Instead, it has been used by overzealous prosecutors to intimidate legitimate businesses, and to coerce them into paying large fines for minor offenses. To prevent abusive use of the continuing criminal enterprise against persons other than the serious organizers the bill is aimed at, the following provision could be added: "The term 'substantial income' means more than fifty thousand dollars. "(17)

Besides the Class 2 felony prison term and fine, the provision adds the additional punishment of a legal cause of action for the government to take three times the gross income generated by a "continuing criminal enterprise" plus the costs of investigating the prosecuting the defendant. The treble damages provision would seem potentially dangerous to "deep-pocket" corporate defendants, such as banks, which might be accused of technical violations of a financial reporting statute by a overzealous prosecutor. Similarly, a pharmaceutical company which is accused -- but never formally charged or convicted -- of failure to comply with registration requirements, might have its bank accounts seized, be forced to pay three times its gross annual revenue to the government, and -- to add insult to injury -- have to pay all the government's investigative and legal fees too.

At the uniform commissioners conference in Milwaukee, the Continuing Criminal Enterprise section was the most controversial item in the uniform act.'(18) By a vote of 76 to 70, the conference rejected a motion to delete the provision entirely. The conference first approved, and then removed the next day, a provision that would permit the Continuing Criminal Enterprise treble-damages civil lawsuit only after a criminal conviction for operating a continuing criminal enterprise.

Although treble damages (of gross revenue) plus paying government attorney fees is plainly a punitive, criminal-type sanction, an Assistant United States

Attorney from Colorado, Reid Pixler, argued forcefully against requiring a criminal conviction for the [criminal-style] fine.'(19) Mr. Pixler stated that there were situations where the prosecutors would feel certain that a crime had occurred, but because of "sophisticated, intentional" actions by the defendants, the prosecutors would "have no way of proving it."

In Mr. Pixler's arguments lies the nub of most of the issues surrounding H.B. 92-1015: are prosecutors to be allowed to impose extremely severe sanctions when the prosecutors believe someone is guilty, but "have no way of proving it"? After 78 years of expanding governmental power to fight a drug war, after 15 years of explosive growth in government power to search, seize, and confiscate property, is yet more inflation of government power so important as to necessitate harsh punishment for offenses even when prosecutors "have no way of proving it"?

D. Who Needs the Federal Government Anyway?

Not too many years ago, high school civics students were told that the federal government had limited, enumerated powers, and was supposed to involve itself only in areas requiring national uniformity. Do we really need a federal speed limit on Colorado highways? Do we really need Colorado to scrap its own drug laws, and adopt ones based on a national model?

Yale Law Professor John Langbein, a member of the National House Bill 92-1015 inverts traditional Colorado values of consent of the governed, of law-making by state law-makers rather than by Washington bureaucrats, of fair notice, of carefully-regulated search and seizure, of punishment commensurate with the crime, and of careful bounds on government discretion, House Bill 92-1015 will, in the guise of building a drug-free society, take Colorado many steps down the path toward an unfree society.

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Notes

1. People v. Lowrie, 761 P.2d 778, 781 (Colo. 1988). Failure to provide notice of illegal conduct led to an earlier version of the Uniform Controlled Substances Act being declared unconstitutional in Illinois. People v. Avery, 9 Ill. Dec. 645, 367 N.E.2d 79, 67 Ill.2d 182 (1977).

2. For an overview of the "assault weapon" issue, and police statistics debunking the assertion that semi-automatics are a criminal weapon of choice, see Eric Morgan and David Kopel, *The Assault Weapon Panic: "Political Correctness" Takes Aim at the Constitution*, Independence Institute, Issue Paper 12-91, October 1991.

3. People v. Dodd, 195 Colo. 408, 578 P.2d 1061 (1978).

4. People v. Dinkel, 189 Colo. 404, 541 P.2d 898 (1975); People v. Santiago, 554 P.2d 710 (Colo. App. 1976).

5. People v. Bailey, 41 Colo. App. 385, 590 P.2d 508 (1978).

6. People v. Smith, 624 P.2d 1338, 1339 (Colo. App. 1979).

7. People v. Hall, 622 P.2d 571 (Colo. App. 1980), quoting People v. Fenninger, 191 Colo. 334, 336-37, 552 P.2d 1018, 1020 (1976).

8. People v. McGhee, 677 P.2d 419 (Colo. App. 1983).

9. Rep. George Bush (Texas), Congressional Record, Sept. 23, 1970, p. 33,314.

10. The 18-year-old student would have "induced... .a child.. .to act as his agent in the unlawful possession for the purposes of sale any controlled substance." § 18-18-407(1)(h).

11. Both the student and smuggler would be guilty of bringing a schedule one controlled substance into the state. § 18-18-407(1)(d).

12. Rick Doblin & Mark A.R. Kleiman, "Use of Marijuana as an Antiemetic," *Annals of Internal Medicine*, May 1, 1991; Rick Doblin & Mark A.R. Kleiman, "Marijuana as Antiemetic Medicine: A Survey of Oncologists' Experiences and Attitudes," *Journal Of Clinical Oncology*, vol. 9 (no. 7, June 1991), pp. 1314-49 (survey of oncologists shows that 48% would prescribe marijuana if allowed by law); R.C. Randall, *Marijuana, Medicine, and the Law*(Washington, D.C.: Galen Press, 1988); R.C. Randall, *Cancer Treatment and Marijuana Therapy*(Washington, D.C.: Galen Press,1990).

13. Then Surgeon General Koop also told a Congressional Committee that nicotine was as addictive as heroin. When a frustrated pro-tobacco Congressman pointed out that cigarette smokers do not rob liquor stores to purchase nicotine, Koop replied that if nicotine were illegal, some smokers would if they had to.

14. The term "hallucinogen" is a misnomer, since the drugs produce actual hallucinations only in very large quantities (far above the dose that a psychiatrist would ever prescribe). Among the many books and articles discussing use of the drugs in controlled medical settings are: M. Leister, C. Grobe, G. Bravo, & R. Walsh, "Phenomenology and Sequelae of MDMA,"*Journal of Nervous & Mental Disorders*, 1992 (forthcoming); S. Groff, *LSD Psychotherapy* (Pomona, Calif.: Hunter House, 1980); H. Abramson, ed., *The Use of LSD in Psychotherapy and Alcoholism*(New York: Bobbs-Merrill, 1967).

15. *Alliance for Cannabis Therapeutics v. Drug Enforcement Administration*, 930 F.2d 936 (D.C. Cir. 1991). The case grew out of a ruling by an Administrative Law Judge that the DEA had mis-classified marijuana. The AIJ was over-ruled by the DEA director. 54 Federal Register 53,767-785 (Dec. 29, 1989).

16. It might also be asked whether the entire structure of the Schedules is appropriate. Under the Schedules, medical use is the only beneficial use of a substance that the Board of Pharmacy is allowed to consider. But is medical care the only value that should matter? Alcohol is specifically exempted from treatment as a controlled substance. § 18-18-201(5). Is the exemption based solely on the recognition that alcohol may have some limited medical utility? Or is the recognition based on the fact that alcohol has numerous non-medical utilities, such an enhancing a good meal, stimulating social intercourse, and tasting good?

17. Alternatively, "substantial income" could be defined to be the same as "substantial source of that person's income," which is defined (for a different offense) as more than one year's worth of minimum wage earnings. § 18-18-407(3)(b).

18. To be precise, there was one even more controversial item, forfeiture, which was removed from the act entirely. The expanded forfeiture bill which the Colorado legislature rejected in 1991 was a prosecutor's draft forfeiture bill which had failed to win approval from the uniform commissioners.

19. According to the United States Supreme Court, "[Al civil as well as criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment," as when the civil sanction "may not fairly be characterized as remedial, but only as deterrent or retribution." United States v. Halper, 490 U.S. 435, 109 S.Ct.1892, 45 Crim. L. 3046, 3050 (May 15, 1989).

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