Refining Colorado's Criminal Code

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Executive Summary

Every year, the Colorado criminal code grows in length and complexity. This Issue Paper comprehensively analyzes articles 16 and 18 of the Colorado Revised Statutes, to offer over a hundred specific suggestions for reform of criminal law and procedure. The Paper does *not* challenge various philosophical assumptions which have been made by the Code (e.g., the death penalty is a good idea). Rather, the Issue Paper accepts the basic structure of Colorado criminal law, and proposes specific reforms to clarify, improve, and prune the law. The topics include:

Search and Seizure: The Denver Police Department is currently installing electronic tracking devices on automobiles without obtaining search warrants. The Legislature should close the loophole in the electronic surveillance statute which permits the spying to take place without a warrant.

Privacy: A different loophole in the wiretapping law allows the media to spy on people, even under circumstances in which the police would need a warrant to conduct similar surveillance. To protect privacy from paparazzi and the like, the loophole allowing electronic privacy invasions by the media should be closed.

Governor's Authority: The statute which unconstitutionally limits the Governor's pardon power in capital cases should be repealed. So should the statute forbidding the Governor to consider the innocence of a person who is the subject of an extradition request.

Sentencing: Statutes providing harsh mandatory sentences and high-level felony convictions for first-time drug offenders should be revised, so as to distinguish major traffickers from mere users.

Definitions of Crimes: Nearly two dozen statutory definitions of various crimes should be revised, in order to comply with court decisions, or to rectify overbroad language.

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I. Search and Seizure

Section Summary: This section addresses three key issues:

- Electronic surveillance by police and news media without search warrants.
- Issuance of search warrants based on uncorroborated tips, and similar abuses.
- "Consent" searches based on intimidation rather than real consent.

A. Electronic Surveillance

18-9-301(3.3)(d). Warrantless electronic bugs on cars.

This Part restricts wiretapping and other interceptions of electronic communications, while making some very large exceptions for law enforcement purposes. The statute removes "Any communication from a tracking device" from the definition of an electronic communication.(1)

As a result, a very large amount of personal information is subject to interception--by snoops, private detectives, stalkers, law enforcement, or anyone else--with no legal restriction.

In particular, many new automobiles include tracking devices, to help the driver find his way. The device in the auto sends a signal to a satellite, which then sends back information to the auto. The tracking device displays a map showing the auto's current location, on a small computer screen inside the car. The tracking device shows the car's position on a particular street is very accurate, usually erring by no more than a few feet.

A similar tracking device is used by cellular phones. As a phone user moves from one location to another, the phone's tracking device communicates with

a satellite; the phone tells the satellite where the user is, and the satellite sends back information for which satellites or transmission towers the phone should attempt to send its voice signal to.

Tracking devices on cars and phones are very useful, but they also reveal very detailed private information about a person's movement and location. A stalker could intercept these signals, and discover his victim's current location, as well his victim's detailed travel patterns. Information from tracking devices can reveal just as much personal information as can a telephone conversation.

The Denver police department is currently placing transponders (a type of small tracking device) on cars, without obtaining warrants. The particular items are $1,000 battery-powered devices made by Teletrac, Inc. of Kansas City, Missouri. The Teletrac device can be magnetically attached to a car in seconds. Tracking costs as little as $15 per month.(2)

Obtaining a precise record of everywhere a person drives her car is a gross invasion of personal privacy. Such invasions should require a search warrant, and should not be allowed at the whim of a police officer.

The wiretapping statute should be modified, and the "tracking device" exception removed. Law enforcement would, of course, still be able to obtain information from tracking devices, by first obtaining a search warrant.

Warrant legislation for transponders was required this year by California Senate Bill 443. Sponsored by Republican Ross Johnson of Irvine, the bill passed the California Senate 33-2 and the California Assembly 66-7, although it was vetoed by Governor Wilson.

18-9-305(1). Wiretapping by news media allowed.

This section allows wiretapping, eavesdropping, and other electronic surveillance by news media. This provision should be repealed.

Media should not have a special privilege to spy on people, or to invade their privacy. Law enforcement wiretapping/eavesdropping is constrained by the need to obtain a warrant from a court. News media invasions of privacy are constrained only by the requirement that the privacy invasion use the "accepted tools" of the media; in an age of paparazzi "news media" who stalk people, and who routinely eavesdrop on cellular phone calls, the "accepted tools" of the media are synonymous with "anything that can be used to sell a story and make money." The First Amendment protects the media from government interference; it does not authorize the media to commit crimes against private persons. The media wiretapping privilege should be repealed.

18-9-309(5)(b). Government violations of anti-cloning statute.

This new statute makes it illegal to "clone" cellular phones (to steal their electronic identification, and use the identification to make and receive phone calls without the permission of the phone's owner). The statute exempts

government from the anti-cloning law. The government exemption should be repealed; cloning a person's phone is a form of theft, and a significant privacy invasion. Cloning by government should be allowed only when pursuant to a warrant obtained from a court.

B. Search Warrant Reforms

Background about the Need for Reform

Informants' Tips

Until 1984, the U.S. Supreme Court required that warrants based on tips from informants must pass a "two-pronged" test, as set forth in the case of *Aguilar* v. *Texas*.(3) The first prong was the informant's basis of knowledge. For example, if the informant claimed that somebody possessed unregistered machineguns, how did the informant know about the machineguns? Had he gone shooting with the gun-owner and actually fired the machineguns (a very strong basis of knowledge) or had he just heard somebody else say that the gun-owner had expressed interest in machineguns (a very weak basis of knowledge, used in the Waco warrant).

If illegal activity, such as drug sales, was allegedly going on inside someone's home, had the informant been inside the home and seen activity (strong basis of knowledge), or seen a suspicious pattern of people coming and going to the home (a moderate basis of knowledge) or just heard a rumor about the drug sales (weak basis of knowledge)?

The second prong of the two-part test was the informant's veracity. Was there reason to believe that the informant, even if he had a good basis of knowledge, was telling the truth? The veracity prong was frequently examined for two factors: credibility, and reliability. Regarding credibility, was the informant someone with a strong personal motive to lie--such as a criminal who was working as an informant in order to receive more lenient treatment for his own crimes? Conversely, did the informant have nothing personal to gain by conveying the information?

The reliability factor examined whether the informant, even without a motive to lie, was a good observer of events. One way to test reliability would be for the police to corroborate some of what the informant had said. For example, if the informant said that a suspect lived at a particular address, the police could verify the information, either by using a phone book, or by observing who came and went at the particular address. (In a notorious St. Louis raid, a family was terrorized by a police break-in and hours-long destructive search, based on a lying informant's uncorroborated tip. The police did not even bother to corroborate the informant's lie that an alleged gun-runner lived at the family's home.(4))

Verification of suspicious activity would be more important than verification of innocent activity. For example, if an informant said that someone ran a

crack house at a particular address, the police could corroborate the tip by observing many persons coming and going from the house at unusual hours, but only spending a few minutes, and coming out with a glassy look in their eyes; this corroboration would be much stronger than merely corroborating that the suspect happened to live at the house in question.

The Supreme Court's two-prong test provided structured guidance to magistrates who were asked to issue warrants based on informant tips. The two-prong test likewise guided law enforcement officers who were seeking to obtain a search warrant. They knew that they should investigate the informant's basis of knowledge and veracity, and that corroborating incriminating information from the tip would be especially important.

The net effect was that informant tips would rarely be the only basis for a search warrant. Instead, informant data would be the starting point for a more thorough investigation to build probable cause. The two-prong test promoted good police work.

But like many other civil liberties protections, the *Aguilar* two-prong test fell victim to the drug war. In 1983, the Supreme Court heard a case involving a search warrant which three lower courts had ruled clearly failed the two-part test. Someone had written an anonymous poison-pen letter accusing a married couple of being drug dealers. The letter indicated no basis of knowledge. The writer did not even know the couple's address. The police did attempt to corroborate some information from the tip, but the only information corroborated was of innocent conduct. The husband flew down to Florida where he met his wife, and two were observed driving north, in the direction of Disneyworld.

Issuing a search warrant for the couple's home was plainly wrong under the *Aguilar* two-prong test, as a trial court, intermediate court of appeals, and the Illinois Supreme Court all found. The United States Supreme Court did not disagree. Instead, the Court majority scrapped the two-prong *Aguilar* test (without actually overruling *Aguilar*), and replaced it with a "totality of the circumstances" test.(5)

In contrast to the structured *Aguilar* test, the amorphous "totality of the circumstances" test allows search warrants even if there is no evidence regarding the informant's basis of knowledge, or no demonstration of the informant's veracity. In theory, magistrates should still consider basis of knowledge and veracity in assessing the totality of the circumstances. If all magistrates were as conscientious as Supreme Court Justices, replacing the two-part test with the totality test would not make a major difference. But in real-world law enforcement, where many magistrates are inclined to rubber-stamp warrant applications, the totality standard means that magistrates are less likely to take a serious look at the informant's basis of knowledge and reliability.

An example of the kind of searches which the *Gates* standard (which has been adopted by many state courts) encourages was the search that led to the death of Rev. Accelyne Williams. The Reverend Williams was a substance abuse counselor in a poor neighborhood in Boston. One evening he was visited in his apartment by a substance abuser who also happened to be an undercover informant in the pay of the Boston police. Later, the informant, obviously drunk, gave the police the address of a drug dealer, except the informant mistakenly gave the police the address of the Rev. Williams. Freed, by *Gates*, from any requirement to corroborate anything the informant said, the police promptly obtained a search warrant. Of course, if the police had attempted corroboration, they would have found that the apartment in question belonged to a seventy-year-old retired Methodist minister, and there were no signs of drug activity at the apartment.

Armed with the search warrant, and plenty of firearms, the Boston police executed a dynamic entry, breaking into the Rev. Williams' apartment, chasing him into his bedroom, shoving him to the floor and handcuffing him while pointing guns at his head. He promptly died of a heart attack.(6)

Following the U.S. Supreme Court's lead, the Colorado Supreme Court has adopted the vague "totality of the circumstances" test for Colorado warrants.

Given the real-world impact of *Gates*'s lowering of standards for police work, the Colorado legislature should mandate that the two-prong test be used when magistrates are asked to issue warrants based on informants. The legislature should bar the use of evidence in state courts which is obtained in violation of the two-prong test.

The harm done by informants is not limited to providing false information used to obtain search warrants. The whole Ruby Ridge disaster started when a BATF undercover informant spent three years to finally get Randy Weaver to sell him a sawed-off shotgun. But the BATF is still using undercover informants to encourage, rather than uncover, violent crime. After the much-publicized arrest of the dozen-man "Viper Team" in Arizona, it turned out that while there may have been violations of federal weapons licensing laws, the only proposals for violence came from the BATF infiltrator. He suggested that the men start robbing banks, and they all refused.(7)

Hearsay

A separate search warrant application reform would be to prohibit use of hearsay in warrant application. Hearsay is "proving" a fact by reporting what one person heard someone else say.(8) For example, Jones says "I heard Smith say that he bought a new sofa." If an attorney wants to prove in court whether Smith really has a new sofa, the attorney cannot call Jones to testify about what he heard Smith say; Jones' testimony would be inadmissible hearsay. The law frowns on hearsay because second or third-hand reports about what someone else saw or said tend to be unreliable. Instead of using

hearsay, attorneys must use more direct, reliable evidence--such as a receipt from a sofa store, testimony from a neighbor who actually saw Smith's sofa, and so on.

In 1932, the United States Supreme Court, concerned about the invasions of private homes that had resulted from federal alcohol prohibition laws, unanimously ruled that search warrants must be based upon evidence that would be admissible in court.(9) (Hearsay evidence is generally not admissible.(10)) Unfortunately, the Court changed its mind seventeen years later.(11)Given the frequency of violent home invasions that result from third-hand "information" supplied to law enforcement by dishonest informants (see chapter six for more examples), it would be appropriate for the legislature to reinstate the rule against use of hearsay and other legally inadmissible evidence to obtain search warrants.

The prohibition on hearsay evidence in warrant application should include the same exceptions as does the courtroom rule against hearsay. For example, hearsay can be used if the actual witness is unavailable by reason of death or incapacity.(12)

Stale Information

A valid warrant may not be based on stale information; "the magistrate [must] conclude that what they are searching for is there now, not that it was there at some time in the past."(13)Thus, a key requirement of warrant applications is that they give some indication that the evidence is fresh.(14)

Unfortunately, while the Supreme Court has announced a clear rule that warrants may not use stale information, many lower federal courts have been lax in enforcing this rule, and have allowed search warrants based on information that was many months, or even two years, old.(15) To give courts appropriate guidance, state law should specify a cutoff period (such as thirty days) beyond which information should automatically be considered stale.

Technical Knowledge in Warrant Applications

When a witness's knowledge of a particular subject (i.e. the difference between a real machine gun, and a gun which just looks like a machine gun) is necessary to establish probable cause, the warrant application should disclose the basis of the witness's knowledge. If the witness is a gun expert, the judge should know this fact. Conversely, if the witness freely admits that he knows very little about guns, the judge should also be informed.

16-3-303. Search warrant application

This statute implements the reforms discussed above. In addition, the statute:

- Requires that search warrants be reviewed and presented to court by government attorneys. Attorney professionalism can help ensure that warrant applications meet quality standards.
- Requires that warrant applications disclose contrary evidence, so that the judge will know all the facts. For example, if a warrant application states that the loud explosions were heard coming from a suspect's ranch (possible evidence that he was illegally manufacturing grenades), the warrant should let the judge know that the suspect was observed to be lawfully using explosives to excavate ground for a swimming pool.
- Requires state officials executing a warrant to notify and cooperate with local law enforcement.
- Requires that when the warrant is to be served by a violent break-in ("dynamic entry"), the justification be presented to the judge.
- Requires that warrants not be based on informants who are paid only if a person is arrested. Such payments provide very heavy incentive for informants (a disreputable bunch in general) to fabricate lies about innocent people.

Add the following subsections:

(4)Issuance of Search Warrants. Notwithstanding any other law or rule, no warrant for search and seizure shall issue:

(a) unless the application for such warrant and affidavit has been reviewed, approved, and signed by an attorney for the government and, in the case of a warrant based upon sworn oral testimony, unless the attorney for the government:

(I) is a party to any telephonic or other communication between the magistrate or judge and each person whose testimony forms a basis for the warrant and each person applying for the warrant, and

(II) verifies to the magistrate or state judge that such attorney approves the issuance of the warrant;

(b) unless supported by affidavit or sworn oral testimony of one or more credible and reliable persons with personal knowledge of the facts set forth in the affidavit or sworn oral testimony and such affidavit or sworn oral testimony establishes the factual basis for the person's or persons' knowledge and veracity and reliability;

(c) based in any part upon hearsay evidence, unless the declarant is unavailable at the time the warrant is sought by reason of death or physical or mental incapacity;

(d) unless the facts establishing probable cause became known or are verified not more than thirty days prior to the issuance of the warrant, except where an offense is to be committed at a specific future time;

(e) unless the law enforcement officer applying for the warrant provides, as part of the application, an affidavit or sworn oral testimony containing any known evidence which would tend to support denial of the application;

(f) unless prior consent has been obtained from the sheriff or chief of police in the jurisdiction where the warrant is to be executed;

(g) unless, if the warrant is to be served by dynamic entry, the warrant application has specifically noted the intent to serve by dynamic entry, and the warrant application has, by clear and convincing evidence, demonstrated both the need for dynamic entry and the unsuitability of other methods of service.

(h) if based in any part on information supplied from an informant who is paid by any government, and whose payments are contingent on a conviction, arrest, or indictment.

(5) An order to seal a warrant, affidavit, record of testimony, related papers, or voice recording shall not extend beyond the shorter of: thirty (30) days from the date of entry of such order, or the execution of the warrant. Such order may be renewed upon a showing of good cause. An order to seal may only be based on a demonstration, by clear and convincing evidence, that there is a substantial risk of injury to persons or property if an order to seal is not granted.

(6) Notwithstanding any other law or rule, evidence which is obtained as a result of the execution of a warrant, but which was issued without compliance with all provisions of section 16-3-303 shall not be admissible in any court and shall not be used by the State of Colorado or any local government for any purpose."

16-3-308. "Good Faith Exception" to exclusionary rule

The exclusionary rule, first announced in 1914, prohibits the use of evidence seized as a result of government conduct in violation of the Constitution. (16) The exclusionary rule has four purposes:

- First, it deters illegal conduct by the police, since they know that evidence that is illegally seized cannot be used.(17)
- Second, the rule protects "the imperative of judicial integrity," by ensuring that courts do not become "accomplices in the willful disobedience of a Constitution they are sworn to uphold."(18)
- Third, the exclusionary role reinforces "popular trust in government" by "assuring the people--all potential victims of government conduct--that the government would not profit from its lawless

behavior."(19) This third purpose is distinct from the first purpose (to affect government behavior); the third purpose aims to reassure the people about how the government will behave, so as to increase popular confidence in government.

- Fourth, besides promoting popular support for the government, the exclusionary rule promotes popular adherence to the rule of law.

As Justice Brandeis wrote:

" If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of criminal law, the end justifies the means...would bring terrible retribution."(20)

All of these purposes were undermined by the 1984 Supreme Court decision in *United States v. Leon*. That decision allows the introduction of evidence seized by police relying in "good faith" on a search warrant, even when the warrant is later found to lack the Constitutionally-required probable cause. (21) Section 16-3-308 creates a similar exception in Colorado law.

When creating the "good faith" exception, the Supreme Court majority reasoned that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges." Since "there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment," there would be only "marginal or non-existent benefits" to excluding evidence found as a result of good-faith reliance on a warrant.

Whatever appeal the Supreme Court majority's reasoning may have had in the abstract in 1984, the *Leon* rationale has been disproven by the sad experience of law enforcement since then.

First of all, *Leon* argued that judges do not seek to subvert the Fourth Amendment. Yet while judges may not be hostile to the Fourth Amendment, many are indifferent to it. Observed nationally-known attorney Dick DeGuerin:

"As practicing lawyers, we know that usually judges rubber stamp the applications for search warrants....[T]he way we made progress in the jurisprudence of this country was requiring search warrant applications to be accurate and to have enough probable cause in them to justify a supposedly neutral and detached magistrate into authorizing a search. But *Leon* wipes that out. If you have got some judge that doesn't carefully read such warrants -- and, cynically I say, that happens all the time -- then he just rubber stamps it and that's the end of the inquiry."(22)

Leon removes the incentive for a judge be sure that he only issues search warrants when there is probable cause, since his issuance of the warrant cannot be meaningfully challenged later.

Second, *Leon* and C.R.S. § 16-3-308 promote police misconduct. The "good faith" exception means that there is little incentive for officers seeking search warrants to tell the whole truth, and not to rely on informants' tips which they strongly suspect to be lies. When other officers conduct a search resulting from the warrant, all the evidence will be admitted, since they were acting in "good faith" on the warrant.(23) Whether the magistrate issues the warrant because he is too lazy to examine it carefully, or because he does examine the warrant application carefully, and is deceived by an informant's lies in support of the application, the evidence will still be admissible.

The third purpose of the exclusionary rule--promoting popular confidence in government--has also been undermined. Many families have been subjected to violent "searches" and "dynamic entries" into their homes as a result of warrants that are based on lies and which lack probable cause. Such Constitutional misconduct has played a major role in creating the current climate of mistrust of government.

Finally, it is sadly true that many criminals purport to excuse (to themselves) their own criminality by telling themselves that the government also commits crimes.

While the U.S. and Colorado Supreme Courts set the minimum standards for what kind of evidence can be admitted in court, the legislature can set better standards. Thus, the Colorado legislature can prohibit all use in Colorado courts of evidence seized in violation of the Constitution. If a search was illegal, the product of the search should not be allowed in court. Period.

Advocates of the "good-faith exception" claim that they are only objecting to the exclusionary rule, which they deride as a "technicality." But really, their objection is the search and seizure standards of the United States and Colorado Constitutions. The Colorado Constitution states that the government may search people and their property only when the government has obtained search warrant, and that warrant is based upon probable cause.(24) The exclusionary rule merely establishes a practical mechanism to enforce this requirement. The Constitution is not a "technicality." Government conduct in violation of the Constitution is a far more serious breach of law and order than is the conduct of a lone individual who violates a mere statute or regulation.

Persons hostile to the Fourth Amendment exclusionary rule are wrong when they tell the public that keeping illegal evidence out of court harms law enforcement. A 1979 study (conducted before the weakening of the exclusionary rule that took place in the 1980s and 1990s) found that in only one percent of federal prosecutions was even a single piece of evidence excluded as a result of the exclusionary rule.(25) The impact is even lower in violent crimes, for search and seizure violations disproportionately cluster in the investigation of victimless crimes.

Thus, section 16-3-308 should be repealed entirely.

At the least, subsection 16-3-308(4)(b) should be modified. This subsection automatically allows reliance on a warrant except when the warrant is obtained "through intentional and material misrepresentation." The words "or reckless" should be added "intentional." The addition of "reckless" would cover cases where a law enforcement officer has good reason to believe that an informant is lying, and deliberately avoids pre-warrant investigation which would verify or disprove the informant's claims.

C. Consent Searches

16-3-110. Consent Searches.

Proposed new language:

"No search based on consent shall be valid unless the person authorizing the consent gives written consent. No search based on consent shall be valid unless the person is informed, before being asked for consent that consent may be withdrawn at any time. A person's refusal or withdrawal of consent shall not be considered in any way to contribute to probable cause authorizing a search, and shall not be used against any person for any purpose."

This proposal addresses the problem, which is especially widespread in automobile searches, of persons being intimidated into "consenting" to having their car searched without a warrant. Consent searches are the main mechanism by which traffic stops for minor violations like seat belt laws are parlayed into intrusive searches of an automobile's entire contents.

D. Protection of Colorado Sovereignty and Colorado Citizens from Federal Law Enforcement Abuse

The current climate of mistrust of government has many causes, but the proximate causes are the deadly, irresponsible actions of federal officials at Ruby Ridge, Idaho, and Waco, Texas. Neither the Ruby Ridge nor the Waco disasters would have occurred if the federal agencies had consulted and worked with (instead of subverting), the sheriffs in Idaho and Texas. Here in Colorado, there have been cases of gross abuse of federal power, such as the Drug Enforcement Agency "dynamic entry" (violent break-in) raid on the home of an elderly suburban woman, based on a bad tip.

More generally, federal law enforcement is increasingly involved in matters of local crime over which the federal government has no proper authority. In order to redirect federal law enforcement to its proper purposes (such as interstate gun-running, crimes against federal property, and the like), several approaches are possible. Both approaches have been passed by the Montana legislature.

The first approach, embodied in Montana House Bill 415, puts formal legal restrictions on federal law enforcement operations in areas under the jurisdiction of Montana law enforcement. The bill was passed by the legislature in amended form; Governor Mark Racicot, having fought very hard in the legislature to have amendments put on the bill, then vetoed the bill, claiming that the amendments made the bill to weak.

The second approach, also passed by the Montana legislature, was a Joint Resolution requesting federal law enforcement to behave better. Although the Joint Resolution does not have the force of law, it has some moral force, and was not subject to the Governor's veto.

Following is the literal text of the Montana bill as introduced, and the Montana Joint Resolution:

HOUSE BILL NO. 415

A BILL FOR AN ACT ENTITLED: "AN ACT REGULATING ARRESTS, SEARCHES, AND SEIZURES BY FEDERAL EMPLOYEES; PROVIDING THAT FEDERAL EMPLOYEES SHALL OBTAIN THE COUNTY SHERIFF'S PERMISSION TO ARREST, SEARCH, AND SEIZE; PROVIDING FOR PROSECUTION OF FEDERAL EMPLOYEES VIOLATING THIS ACT; REJECTING FEDERAL LAWS PURPORTING TO GIVE FEDERAL EMPLOYEES THE AUTHORITY OF A COUNTY SHERIFF IN THIS STATE; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

1. Purpose. It is the intent of the legislature to ensure maximum cooperation between federal employees and local law enforcement authorities; to ensure that federal employees who carry out arrests, searches, and seizures in this state receive the best local knowledge and expertise available; and to prevent misadventure affecting Montana citizens and their rights that results from lack of cooperation or communication between federal employees operating in Montana and properly constituted local law enforcement authorities.

2. County sheriff's permission for federal arrests, searches, and seizures exceptions. (1) A federal employee who is not designated by Montana law as a Montana peace officer may not make an arrest, search, or seizure in this state without the written permission of the sheriff or designee of the sheriff of the county in which the arrest, search, or seizure will occur unless:

(a) the arrest, search, or seizure will take place on a federal enclave for which jurisdiction has been actively ceded to the United States of America by a Montana statute;

(b) the federal employee witnesses the commission of a crime the nature of which requires an immediate arrest;

(c) the arrest, search, or seizure is under the provisions of 46 6 411 or 46 6 412;

(d) the intended subject of the arrest, search, or seizure is an employee of the sheriff's office or is an elected county or state officer; or

(e) the federal employee has probable cause to believe that the subject of the arrest, search, or seizure has close connections with the sheriff, which connections are likely to result in the subject being informed of the impending arrest, search, or seizure.

(2) The county sheriff or designee of the sheriff may refuse permission for any reason that the sheriff or designee considers sufficient.

(3) A federal employee who desires to exercise a subsection (1)(d) exception shall obtain the written permission of the Montana attorney general for the arrest, search, or seizure unless the resulting delay in obtaining the permission would probably cause serious harm to one or more individuals or to a community or would probably cause flight of the subject of the arrest, search, or seizure in order to avoid prosecution. The attorney general may refuse the permission for any reason that the attorney general considers sufficient.

(4) A federal employee who desires to exercise a subsection (1)(e) exception shall obtain the written permission of the Montana attorney general. The request for permission must include a written statement, under oath, describing the federal employee's probable cause. The attorney general may refuse the request for any reason that the attorney general considers sufficient.

(5) (a) A permission request to the county sheriff or Montana attorney general must contain:

(i) the name of the subject of the arrest, search, or seizure;

(ii) a clear statement of probable cause for the arrest, search, or seizure or a federal arrest, search, or seizure warrant that contains a clear statement of probable cause;

(iii) a description of specific assets, if any, to be searched for or seized;

(iv) a statement of the date and time that the arrest, search, or seizure is to occur; and

(v) the address or location where the intended arrest, search, or seizure will be attempted.

(b) The request may be in letter form, either typed or handwritten, but must be countersigned with the original signature of the county sheriff or designee of the sheriff or by the Montana attorney general, to constitute valid permission. The permission is valid for 48 hours after it is signed. The sheriff or attorney general shall keep a copy of the permission request on file.

3. Remedies. (1) An arrest, search, or seizure or attempted arrest, search, or seizure in violation of [section 2] is unlawful, and individuals involved must be prosecuted by the county attorney for kidnaping if an arrest or attempted arrest occurred, for trespass if a search or attempted search occurred, for theft if a seizure or attempted seizure occurred, and for any applicable homicide offense if loss of life occurred. The individuals involved must also be charged with any other applicable criminal offenses in Title 45.

(2) To the extent possible, the victims' rights provisions of Title 46 must be extended to the victim or victims by the justice system persons and entities involved in the prosecution.

(3) The county attorney has no discretion not to prosecute once a claim of violation of [section 2] has been made by the county sheriff or designee of the sheriff, and failure to abide by this mandate subjects the county attorney to recall by the voters and to prosecution by the attorney general for official misconduct.

4. Invalid federal laws. Pursuant to the 10th amendment to the United States constitution and this state's compact with the other states, the legislature declares that any federal law purporting to give federal employees the authority of a county sheriff in this state is not recognized by and is specifically rejected by this state and is declared to be invalid in this state.

[Effective date and severability sections omitted.]

The text of the Montana Joint Resolution, which was passed by both houses, is as follows:

HOUSE JOINT RESOLUTION NO. 28

INTRODUCED BY CURTISS, MCGEE, MOOD, WAGNER, ORR

BY REQUEST OF THE HOUSE JUDICIARY COMMITTEE

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING FEDERAL LAW ENFORCEMENT OFFICERS TO MORE FULLY COOPERATE WITH COUNTY SHERIFFS.

WHEREAS, Montana is one of the several sovereign states that together form the United States of America; and

WHEREAS, the several states banded together under the United States Constitution to form the federal government and empowered it to serve the states in certain, limited ways; and

WHEREAS, since its inception, the federal government has assumed increasingly greater powers over the affairs of, and within, the states; and

WHEREAS, as the Montana Attorney General has stated in an amicus brief in Printz v. United States, before the United States Supreme Court, the states are not intended to be "mere administrative subdivisions of the federal

government contrary to the sovereign powers reserved to [the states] by the Tenth Amendment"(26); and

WHEREAS, the exercise of the power of the federal government to send federal law enforcement officers into this state for enforcement of the laws has been considerably expanded relatively recently; and

WHEREAS, there have been occasions when federal law enforcement officers have conducted significant law enforcement operations in Montana without the knowledge and participation of the elected County Sheriffs; and

WHEREAS, the regular involvement of the elected County Sheriffs in federal law enforcement operations will ensure local knowledge of conditions and personalities, ensure that federal law enforcement operations will be conducted so as to minimize alienation of the local public, enhance safety of law enforcement personnel, and ensure that instances of federal abuse of the rights of Montana citizens will be minimized.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

(1) That federal law enforcement officers conducting or planning arrests, searches, and seizures in Montana be requested to inform the County Sheriff of the county in which the operations are planned in advance of the operations.

(2) That federal law enforcement officers conducting or planning arrests, searches, and seizures in Montana be requested to invite the County Sheriff or a representative of the County Sheriff of the county in which the operations are planned or conducted to participate in the operation.

(3) That the Department of Justice, Division of Crime Control, be requested to keep an operations log of federal arrests, searches, and seizures in Montana reported by County Sheriffs, including reported information about the operations for which the County Sheriffs have been given advance knowledge and an invitation to participate.

(4) That the Secretary of State be requested to send a copy of this resolution to the U.S. Attorney for Montana and to the directors of each federal law enforcement agency having jurisdiction in Montana, including but not limited to the U.S. Department of Justice; Federal Bureau of Investigation; Drug Enforcement Administration; U.S. Secret Service; U.S. Marshals Service; U.S. Fish and Wildlife Service; Bureau of Alcohol, Tobacco, and Firearms; U.S. Forest Service; Bureau of Land Management; Bureau of Indian Affairs; U.S. Customs Service; Immigration and Naturalization Service; U.S. Postal Inspection Service; Defense Investigation Service; Department of Energy Inspector General; Department of Education Inspector General; Federal Protective Service; General Services Administration Inspector General; Department of Health and Human Services Inspector General; Department of Housing and Urban Development Inspector General; Internal Revenue

Service; Department of Labor Inspector General; Department of Transportation Inspector General; and Veterans Affairs Security and Law Enforcement.

II. Jury Trials

Section Summary: *Defendants who prefer a bench trial instead of a jury trial should not have that choice taken away. Jurors should be fully informed of their traditional right to acquit a criminal defendant based on their conscience. The decision about whether to impose a death penalty is properly made by juries, who serve as the conscience of the community, rather than by judges.*

16-10-101. Bench Trials

This statute allows the government to insist on trial by jury, even when the defendant wants a bench trial. In some cases-such as where complex scientific may be an issue-the defendant ought to have the right to a bench trial. Likewise, in cases where public passions are running high, the accused ought to be able to ask for a judge-often more dispassionate than a jury-to hear the case. Many other states do not give prosecutors the option to demand a jury trial.

16-10-110. Fully Informed Juries

The jury is one of the greatest of all mediating institutions in American law. The jury, as a body of citizens, stands between the individual and the coercive power of government.

America's Founders were unanimous about the importance of jurors as a check on government abuses. And the Founders unanimously supported the right and duty of jurors to vote to acquit a technically guilty defendant, if a conviction would be contrary to the jury's conscience.

The jury's power to acquit based on conscience has been used to protect defendants who violated "sedition" laws by peacefully criticizing the government, defendants who violated the Fugitive Slave Law by harboring runaways, defendants who drank beer in violation of alcohol prohibition, and critics of bureaucratic misconduct who were singled out for retaliatory prosecution.

Given the very broad scope of the modern criminal law, and the severity of mandatory sentencing, a strong jury system is more important today than ever. In Maryland and Indiana, the state Constitutions explicitly affirm the jury's right to judge the law, and to acquit a technically guilty defendant in cases where the jury's conscience so demands.

A fully-informed jury law in Colorado would state:

(1) A defendant's right to trial by jury includes the right, if he requests, to have the jurors instructed at both the opening of trial and in the instructions

at the close of evidence, of their power to judge the law as well as the evidence, and to vote on the verdict according to conscience.

(2) This right shall not be infringed by any juror oath, court order, or procedure or practice of the court, including the use of any method of jury selection which could preclude or limit the empanelment of jurors willing to exercise this power, including jurors who object to the penalty which could be imposed on the defendant or to the law which the defendant is being accused of violating.

(3) Nor shall this right be infringed by preventing the defendant from presenting arguments to the jury which may pertain to issues of law and conscience, including the merit, intent, constitutionality or applicability of the law in the instant case; the motives, moral perspective, or circumstances of the defendant; the culpability of the defendant or any other person; the actual harm done; or the sanctions which may be applied to the defendant..

(4) Failure to allow the court to conduct the trial in accordance with this rule shall be grounds for mistrial and another trial by jury."

18-6-609. Jury Tampering

Persons have arrested and charged for this offense merely for passing out juror's rights pamphlets near a courthouse. Add a section (3): "Jury tampering does not include communications to the public at large, including communications in or near a courthouse, regarding the rights, duties, or responsibilities of jurors."

16-11-103. Death penalties imposed by three-judge panel

The jury is an important intermediary between the vast power of the state and the individual. If a prosecutor cannot convince twelve ordinary citizens that a defendant should be killed, then the state should not have the power to kill the defendant.

While judges often set penalties, their authority over sentencing is not exclusive-after all, the legislature specifies sentencing ranges.

Death is different from lesser penalties. It is involves the total destruction of a life, rather than just deprivations of liberty or property. It is irreversible. The jury is the embodiment of the conscience of the community. If prosecutors can rarely win death sentences, that is because the conscience of the community rarely supports death sentences.

In the long run, rigging the sentencing process to promote more executions may undermine public confidence that the death penalty is fairly applied, and thus undermine support for the death penalty itself.

III. The Governor's Constitutional Discretion

16-17-101. Unconstitutional Restriction on Governor's Commutation Power

Section 16-17-101 states that when the Governor commutes a capital sentence, the sentence cannot be reduced to less than 20 years in prison. The restriction violates Article IV, section 7 of the state Constitution, which specifies that the only limits on the pardon power are that the Governor cannot pardon treason or impeachment.

The Constitution makes the pardon power "subject to such regulations as may be prescribed by law as to the manner of applying for pardons." But 16-7-101 does not regulate applications for pardons; the statute limits the pardon power itself.

Putting aside the Constitutional violation, section 101 is an inappropriate limit on discretion. The Governor might choose to use the pardon power in a capital case because the defendant is actually innocent. Why should an innocent person have to spend twenty years in prison?

16-19-121. Extradition regardless of innocence

This section states: "The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceedings after the demand for extradition..."

What a horrible standard! Innocence is always relevant. What if the Scottsboro Boys were caught in Colorado? What if the Chinese government presented a demand to extradite a political dissident?

Extradition is the responsibility of the Governor, and the legislative attempt to prevent him from exercising his best judgment may be a violation of the separation of powers.

IV. Sentencing and Parole

18-1-105 (9.7)(b)(XI). Heavy extra sentence for low-level drug crimes

Repeal this subsection, which puts *any* controlled substance sale into the category of "Crimes which present an extraordinary risk of harm to society." (The effect is to raise the maximum sentence in the presumptive range). The subsection is nonsense. No fully consensual crime should so qualify. Certainly not the sale of small quantity for personal consumption, from one friend to another.

18-1-105 (9.7)(b)(XII). Overbroad definition of "extraordinary risk" crimes

This subsection makes any crime of violence (as defined in 16-11-309) into one of "Crimes which present an extraordinary risk of harm to society." While XII is more plausible than XI, the combined effect of XI and XII is to turn almost all criminal offenses (all felony violent crimes, and all drug sales, even

misdemeanors) into "extraordinary" ones. Crimes obviously cannot be extraordinary if they are the vast majority.

Based on the individual facts of a case, judges should be the ones who determine when a crime is "extraordinary."

General Problems with Mandatory Sentences

Second-degree assault is a very serious crime, and deserves stern punishment. On the floor of a legislative body, it may seem obvious that judges should be forced to impose a long prison sentence for a violent crime such as second-degree assault. But consider how the mandatory prison sentence works in practice, from a current Colorado case.

Mr. A menaces a woman and threatens to hit her with an irrigation shovel. The woman asks Mr. B to protect her. Mr. B, who also has an irrigation shovel, hits Mr. A with that shovel.

This case is, at best a minor contretemps, or at worst an unjustified prosecution of a chivalrous man coming to the aid of a woman in distress. The prosecutor offered to let chivalrous Mr. B-who has no prior convictions-plead guilty to misdemeanor assault, and be sentenced to probation.

But Mr. B refuses to plead guilty to anything. He did not do anything wrong, and his conscience will not allow him to say he was guilty of a crime he did not commit.

So this spring, Mr. B will go on trial-for second degree assault. If he is convicted, the judge will have to sentence Mr. B to many years in prison, without regard to the facts of this individual case.

Prosecutors routinely use the coercive power of mandatory sentences to force defendants (most of whom cannot afford high-quality attorneys who will vigorously contest a case) to plea bargain, and thereby "admit" guilt to a crime which they did not really commit.

Mandatory prison sentences, in any context, improperly prevent judges from considering the facts of an individual case.

One common defense of mandatory sentences for non-violent offenders is to claim that a certain percent of them are "violent or repeat" offenders. If the person committed a violent crime in the past, he should have been appropriately punished. But if the person has stopped committing violent crimes, there is little public safety benefit to forcing the person to serve a long mandatory sentence for a non-violent crime.

Some persons who are repeat offenders for a non-violent crime should be sent to prison. But not all of them. It is hardly a wise use of taxpayer dollars to send someone to prison because they twice violated a weapons registration law, or twice consumed illegal drugs.

Even if ninety-five percent of persons serving a mandatory sentence for a non-violent crime were repeat offenders, or persons who had committed a violent crime in the past, mandatory sentences are still inappropriate: Mandatory sentences are guaranteed, by their terms, to impose severe sentences on persons with no prior convictions. Unlike legislatures, courts do not need to use generalizations that may apply to some cases and not to others. Freed from mandatory sentencing laws, courts can impose stiff sentences on violent or incorrigible offenders, and more appropriate sentences on first-times who have made a lone mistake.

17-22.5-404(3)(a)(X). Parole guidelines

Persons evaluating a parole application are required to count as a negative factor that "The object of the crime was to acquire or obtain control of a controlled substance or other item or material, the possession of which is illegal." The requirement diminishes the possibility of parole for all drug violations. The statute should be amended to add "without the consent of the owner." The amendment restricts parole for drug-related robberies or burglaries, and clarifies that simple drug possession is not covered.

V. Definitions of Crimes

Summary of Section: This section identifies a variety of problems with statute defining crimes. In most cases, the problems do *not* require repeal of the statute. Instead, the problems can be solved with clarifying language. The classes of problems are:

- Overbroad language which covers conduct not properly covered by the statute (contributing the delinquency of a minor, pimping, riot).
- Unconstitutional as a result of judicial decisions (abortion, display of obscenity, flag mutilation, disorderly conduct).
- Failure to distinguish lesser from more serious versions of the crime (introducing contraband, allowing juvenile handgun possession, endangering public transportation).
- Dangers to First Amendment (criminal libel, attempting to influence a public official, membership in a seditious organization)
- Dangers to Second Amendment (judicial misreading of felony menacing language, gun possession in a transportation facility, Denver defiance of statewide concealed handgun license law)
- Interference with Parental Rights (distributing tobacco to a minor, dispensing violent films to minors)
- Not a proper subject of the state criminal code (adultery, requirement that everyone act as a government informant, Coors Field).

18-3-206. Felony Menacing Should not Include Simple Gun Possession

In *People* v. *Adams*, the Colorado Court of Appeals wrote:

"Giving effect then to the plain and ordinary meaning of the words and phrases contained in the statute, we conclude that, for purposes of the felony menacing statute, the General Assembly intended that the word "use" would necessarily include the physical possession of a deadly weapon at the time of the crime. See People v. Hines, 780 P.2d 556 (Colo. 1989) (The term "use" in § 18-3-206 is broad enough to include the act of holding the weapon in the presence of another, without pointing the firearm at that person, in a manner that causes the other person to fear for his or her safety.)."

867 P.2d 54 (Colo. App. 1993).

In other words, "menacing" with a gun can include nothing more than simple possession of a gun. This twisted interpretation of the word "use" has allowed menacing charges to be brought against people who were doing nothing more than lawfully carrying firearms for protection. The Firearms Coalition of Colorado has reported several cases of people engaged in nothing more than carrying a gun in a holster for lawful protection who were arrested and charged with "menacing."

The statute should be amended to add: "Menacing does not include any use of a firearm for lawful protection, or any statement about the use of a firearm for lawful protection."

18-6-101 through 105. Abortion Law is Unconstitutional

This entire Part is unconstitutional under *Roe v. Wade* and subsequent decisions, and should be repealed, except for 18-6-104, which affirms that hospitals are not required to perform abortions.

The best argument for the preservation of this Part would be the expectation that if *Roe* v. *Wade* were over-ruled, the Part would again be legal. Most Supreme Court observers, however, do not see any possibility for *Roe* v. *Wade* being overturned.

18-6-501. Adultery

This statute outlaws adultery. It has no place in a criminal code, and should be repealed.

18-6-701. Contributing to the Delinquency of a Minor

Suppose you and your sixteen-year-old have gone out for a drive to the grocery store. The parking lot is nearly deserted, and it is raining heavily. You tell your sixteen-year-old to park in the handicapped parking space near the front door, and wait for you while you run in to get a loaf of bread. You accept the risk that you might be caught, and might have to pay a fine for illegal parking. But in fact, you can be charged with a *class 4 felony*. Any

person who induces or aids a minor to break *any* law or ordinance, no matter how trivial, is guilty of contributing to the delinquency of a minor. Given the vast number of federal, state, and local laws, it is doubtful that most parents could spend 18 years raising a child without at some time aiding or encouraging a violation of some ordinance.

The contributing to delinquency statute should be revised: If the underlying crime is a felony under Colorado law, the "contributing" crime should be a class 6 felony. If the underlying crime is a misdemeanor, the "contributing" crime should be a misdemeanor of the same degree. If the underlying crime is a petty offense, the "contributing" crime should be class 1 petty offense.

18-7-206. Pimping

This offense is defined so broadly that a teenager who sometimes receives gifts of food from her aunt, who is a prostitute, is guilty of "pimping," a class three felony. The felony should be defined much more narrowly, so that it applies to people who direct prostitution operations, and not to everyone who has repeated economic contact with someone who is a prostitute. The offense should be reduced from a class 3 felony to a class 1 misdemeanor for a first offense.

18-7-407. Child Prostitution

Patronizing a child prostitute is, and should be, a serious offense. The legal difference between patronizing a child prostitute and an adult prostitute is huge: a class 3 felony vs. a class 1 petty offense. The difference is eminently reasonable. The law encourages someone who might patronize a prostitute to steer clear of child prostitutes. But the purpose of the law is defeated when people who intended to avoid child prostitutes, and took steps to do so, are punished. Section 407 states that "it shall be no defense that the defendant....*reasonably*believed the child to be eighteen years of age or older." (emphasis added). This provision should be repealed.

If two men patronize two prostitutes, both of whom appear to be 21 years old, and both of whom, when requested, produce identification showing their age to be 21, it is unjust that one man is guilty of a class 1 petty offense, and the second man guilty of a class 3 felony, because the second prostitute was actually 17 ½ years old, and successfully deceived her customer.

The law against patronizing a child prostitute should be rigorously enforced against people who choose to patronize child prostitutes; the law should not apply to a random subset of customers of adult-appearing prostitutes.

18-7-501 through 504. Display of sexually explicit materials

This entire Part has been found unconstitutional, and should therefore be repealed. *Tattered Cover, Inc.* v. *Tooley*, 696 P.2d 780 (1985).

18-7-601. Dispensing Violent Films to Minors

This statute makes it a crime for a father to rent a gruesome war film, and allow his 17-year-old son to watch it. The statute makes it illegal to "furnish" to a minor any video which (a) appeals to an interest in violence, (b) has actual [not simulated] violence, and (c) lacks serious literary, artistic, etc. value.

The statute, which infringes parental rights, should be amended so as to create an exception for any parent, guardian, or person acting according to the parent or guardian's wishes.

18-1-115. Duty to Report a Crime

This requires every person in the state to act as an informant on everyone else whom they "reasonably suspect" may have committed a crime, all the way down to a class 3 misdemeanor. The law is unenforceable in practice, and Stalinist in principle. It should be repealed.

18-8-203. Introducing Contraband in the First Degree

This statute bans the introduction of contraband into penal facilities. It treats smuggling a can of beer into prison as an offense equal to smuggling a bomb--a class four felony. The statute should be revised to apply only to weapons. Alcohol and drugs should be covered under the second degree statute (18-8-204), which is a class six felony.

18-8-306. Attempt to Influence a Public Servant-Ban on Lawful Speech.

This statute is overbroad, and criminalizes First Amendment activities. For example, the statute makes it a crime to say "If the Boulder City Council enacts this smoking ban, I will organize an economic boycott of Boulder." The statute should be amended to add the word "unlawful" following "threat of".

18-9-101. Riots.

The statute defines a "riot" as involving "three or more persons." This is a preposterous misuse of the word "riot." Riot statutes are designed to guard against *large* collections of people, not to serve a conspiracy statutes. Three people can commit a crime together, but they can hardly carry off a "riot." Replace "three" with the common-law number necessary to constitute a riot: twelve.

18-9-106(1)(b). Disorderly Conduct.

This statute criminalizes abusing or threatening a person in a public place. The law has been held unconstitutional, and should therefore be repealed. *Aguilar* v. *People*, 886 P.2d 725 (1994).

18-9-115(1)(b). Endangering public transportation.

This statute makes it a crime to board public transportation with the intent to a crime thereon. The crime is a class 3 felony. The punishment is far too

severe, in that it covers offenses hardly worthy of a class three felony. For example: getting on a bus with intent to violate a no-smoking ordinance; getting on a bus with intent to make a cellular phone call involving a misdemeanor fraud; getting on a bus with intent to commit the petty offense of possessing the marijuana cigarette in one's pocket.

The statute should be more carefully defined, so as to apply to felony personal crimes against people using public transportation, or felony property crimes against their property, or bus property. Misdemeanor personal/property crimes involving public transit should be classified as a class 1 misdemeanor. Other crimes not involving people or property in public transit should be prosecuted based on the relevant underlying statute.

18-9-118. Firearms in facilities of public transportation.

This statute makes it a class six felony to unlawfully possess a loaded firearm in a public transportation facility (e.g. a bus station). Until a reasonable concealed handgun statute is enacted, it is inappropriate to give a felony record to a good citizen who carries a handgun for protection. The offense should be reduced to a class 1 misdemeanor.

18-10-101. Gambling.

The first section of the gambling part contains an imprecation against the evils of gambling, and the state's desire to protect people from gambling. Given the state's active promotion of gambling--through the lottery--the first section is statutory hypocrisy. It should be repealed.

18-11-201. Membership in seditious organization.

This section criminalizes, as a class 5 felony, mere *membership* in a "seditious organization"--even if the person neither engages in nor assists any act of sedition. The statute conflicts with the rights of free speech and free association, and should be repealed. Repealing this section will have no effect on other statutes punishing actual sedition.

18-11-204. Flag mutilation/contempt of flag.

This section directly contrary to recent Supreme Court precedent, and blatantly unconstitutional.

18-12-105. Carrying weapons.

The statute bans the carrying of concealed guns or knives, but includes affirmative defenses for persons on their own property, or persons carrying guns in their cars while traveling. The City of Denver refuses to recognizes these exceptions, and has prosecuted travelers for carrying guns in cars for lawful protection. A subsection should be added to this section stating that a local government may not prosecute a person of carrying a concealed weapon, if the person's conduct conforms to the affirmative defenses of the statute.

18-12-108.7(1). Allowing juvenile to possess a handgun.

This section makes it a class 4 felony for a parent to allow a juvenile to possess a handgun in violation of 18-12-108.5. A separate subsection (2) makes it a class four felony to allow a juvenile to possess a handgun under circumstances indicating that the juvenile will use the handgun for a crime. Consider two parents:

a. One parent allows his seventeen year-old daughter to possess a handgun in the glove compartment of the family car, when she drives home at night from the local library to their home ten miles away.

b. Another parent gives a handgun to his fifteen-year-old son, a gang member, knowing and intending that the gangster will use the gun to murder a rival.

Both parents are guilty of the exact same crime, a class 4 felony. This is morally preposterous. The crime described in subsection (1)--allowing non-violent handgun possession, should be reduced to a class 2 misdemeanor (the same level as the underlying offense of juvenile handgun possession).

18-13-105. Criminal libel-First Amendment Violation.

This statute makes is a class 6 felony to "blacken" the reputation of a dead person--even if one's written statement is true. Thus, a letter which says "Old uncle Fred was an adulterer, a thief, a habitual liar, and a drunk" is a felony--even if the statement is true. As applied to public figures, the statute is plainly unconstitutional under Supreme Court precedents. The statute should be repealed. The civil law of libel and slander provide adequate remedies for persons allegedly injured by someone else's words.

18-13-121. Cigarettes and Parental Rights.

This section makes it a crime to furnish tobacco to persons under the age of 18. The state has no business telling a parent that she cannot share a smoke with her seventeen-year-old after dinner. The statute should be amended to provide an explicit exception for parents or guardians, or persons who have the consent of the parent or guardian.

VI. Courts

16-3-209(6). Lab tests performed in secret.

As recent revelations make clear, even the nation's best crime labs may sometimes falsify or mishandle forensic tests, thereby creating "evidence" that may convict innocent people. For example, senior FBI chemist Frederic Whitehurst has testified under oath that administrators at the FBI crime lab have pressured forensic experts to commit perjury and to falsify test results in hundreds of criminal cases.(27) One safeguard against negligent or deliberate errors is allowing a defendant's attorney to be present while forensic tests are conducted, if the attorney's observation will not interfere

with the actual testing. But CRS 16-3-309(6), instructing courts when to admit forensic lab evidence, specifically forbids courts to take into account whether the defendant's attorney was present--even if there is no good reason why the attorney should have been excluded.

16-4-105. Bail.

This section encourages judges not to make bail available to persons accused (but not convicted) of certain drug crimes. Since the purpose of bail is simply to assure the presence of the defendant (who is presumed innocent) at trial, and not to impose punishment before conviction, these provisions should be dropped. Likewise, judges should not be able to require as a condition of bail that a defendant undergo any form of counseling or medical treatment. Such conditions may be an appropriate punishment *after* conviction, but are antithetical to the presumption of innocence before conviction.

18-1-303. Double Jeopardy. Second trial barred by prosecution in another jurisdiction.

This statute specifies that a person cannot be prosecuted for an alleged crime if he has already been prosecuted (and found not guilty), by another jurisdiction (such as a prosecution by the federal government).

But subsection (I) creates a gaping loophole. A second prosecution s allowed if one prosecution requires proof of an "additional fact" from the other prosecution. But this additional fact could be a very trivial fact. For example, a defendant is accused in federal court of violating the federal law against carrying guns near school. The federal prosecutor must prove that the defendant's gun was once sold in interstate commerce.

Despite the federal acquittal, the defendant could then be prosecuted in state court for violating the state gun carry statute-since the state statute does not proof of the gun's shipment in interstate commerce. (28)

Subsection (I), besides requiring the "additional fact," also requires that the second prosecution be based on a statute involving a "substantially different harm or evil" form the statute in the first prosecution. But this "different harm" test is easy to evade. The federal law is based on protecting children at school, while the state law is a general law about gun carrying in public. Courts have generally been quite generous in allowing prosecutors several bites at one defendant, based on technical differences in statutes.

Successive prosecutions violate the spirit of the Constitution's Double Jeopardy. If a defendant has been prosecuted and acquitted once, a new prosecutor should not be allowed to initiate a second case. Thus, subsection (I) should be repealed.

VII. Controlled Substances Act

Section Summary: This section addresses various problems caused by a "model" controlled substances law enacted in the early 1990s. The particular issues are:

- classification of items under drug laws
- severe mandatory penalties for minor offenses
- overbroad money-laundering statute
- invitations to forfeiture abuse.

18-18-102(6). Ban on inventions

This section makes it a crime to invent a drug which has substantially similar effects to anything on schedule I or II of the Controlled Substances Act.

These schedules list a wide variety of highly effective painkillers which recognized medical uses (such as morphine) and psychiatric uses (such as hallucinogens). Schedules I and II state that they only list drugs which have high potential for abuse and addiction.

Suppose a scientist invents a drug, which, like morphine, is a highly effective painkiller. Suppose also that the new drug has features which make it (unlike morphine) unlikely to cause dependence. (For example, the drug might be designed so as to produce no effect if the person using the drug had used the drug more than a few times in the last month.)

But this new drug--with no addictive potential--does have the same *effect* as morphine: it significantly reduces the pain from surgery. Under current law, the new drug automatically becomes a Schedule II drug, and its possession becomes a major felony. This is bass-ackwards. The point of the drug control laws is *not* to outlaw particular mental or physical states (such as reduced sensitivity to pain). The point is to control drugs which have a high potential for abuse and addiction.

Simply because a new drug has some of the beneficial effects (like pain reduction) of a Schedule I or II drug does not mean that the new drug *necessarily* has a high potential for abuse and addiction.

The statute 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, the statute in effect makes it illegal to have a particular mental state. If a controlled substance creates 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.

Section 102(6) is an abdication of the General Assembly's responsibility for making the criminal law.

A second flaw of the statute is that the definition of "controlled substance analog" is vague. 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(6)(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(6)(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 amphetamines.

The vagueness of "substantially similar" would be less of a problem if "substantially similar" were merely a guideline for a regulatory board 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.

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(6)(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?

18-19-102(13)(a). Drug definition.

"Drug" means, among other things, "Substances (other than food) intended to affect the structure or function of the human body of individuals or animals." This definition, copied from the federal Food and Drug Act, is ridiculously overbroad. It includes, for example, bullets, since bullets are clearly intended to affect the bodies persons and animals that the bullets are aimed at.

The dangers of this overbroad definition are readily apparent. Tobacco is not a "drug" in any normal sense of the word; no doctor would ever prescribe it, and tobacco is not intended to improve any body function. But when the Food and Drug Administration claimed for itself a power which Congress had never intended to grant--the power to regulate tobacco as a "drug"--the power grab was upheld by a federal court; the court reasoned that the FDA's power grab was consistent with the extremely broad statutory definition.

The overbroad definition should be promptly removed from Colorado statute books. The definition serves no useful purpose, except to encourage "innovative" prosecutors to criminalize things which have no basis being criminalized.

18-18-203(1). Schedule I controlled substances incorrectly includes drugs with medical uses.

A particular drug is supposed to be on Schedule I (the highest level of control), if it "has no currently accepted medical use in treatment in the United States" *and* "lacks accepted safety for use under medical supervision." Based on these criteria, most of the specific drugs listed in subsections (a) and (b)[opiates] and (c)[LSD and other hallucinogens] should be moved to schedules II or III. Schedules II and III are for substances which have recognized medical uses but also high potential for abuse.

Heroin (a synthetic opiate) was invented in the 19th century for surgical use, and doctors called it "Gods' drug" because of its outstanding pain relieving quantities. There is nothing else ever invented which is as effective at relieving pain.

LSD and some of the other hallucinogens have a long record of successful psychiatric use in Europe, in controlled settings.

It is true that neither heroin nor LSD are currently used medically in the United States, but that is only because the federal government so forbids. There are large numbers of physicians who have expressed strong interest in using both drugs to treat their patients.

Moving these drugs to the proper schedules does *not* legalize them. It simply places them on the schedule which is scientifically appropriate.

18-18-104(1)(b). Unlawful use of a controlled substance.

This section makes mere use of a Schedule I or II controlled substance, on a single occasion, into a class 5 felony. Felony convictions carry with them massive losses of civil rights, and destroy the possibility of lawful employment in most of the economy. Felonies should be reserved for acts which harm other people, not for acts which, at most, create a potential danger to oneself. The crime should be reclassified as a class 1 misdemeanor.

The inappropriate harshness of the felony penalty is only partially mitigated by subsection (2), which allows a controlled substance addict to enter treatment programs, and have the sentence reduced if he completes the treatment program successfully. Even after completing the treatment program, the person still has a felony record.

Moreover, the treatment program is only available to addicts. A person who uses a controlled substance just once, or a few times, but is not an addict, is ineligible for a treatment program.

18-18-405. Drug "Distribution" Penalties Applied to Casual Gifts of Small Quantities.

The controlled substance distribution law defines a gift as a "sale." The statute imposes mandatory prison terms, regardless of the circumstances. Thus, if a college student gives his friend, on a single occasion, five dollars worth of "magic mushrooms," the student is guilty of class 3 felony, and must be sentenced to at least four years in prison. The subsection imposing a mandatory four-year prison term, regardless of the circumstances [18-18-405(3)(a)] should be repealed.

Further, small scale gifts or sales of less than one hundred dosage units are hardly of the same character of normal class three felonies--such as first degree sexual assault. It is morally offensive to say that the selling or giving someone a small quantity of something which he wants to consume but which might, in the long run, his their health is *worse* than intentionally killing someone! (Voluntary manslaughter is a class 4 felony; controlled substance crimes which directly lead to someone's death are separately classified as first degree murder, if the decedent is a minor.)

To keep the moral lessons of the criminal code in appropriate balance, sale of small quantities of drugs should be classified as, at most, class 5 felonies. More appropriately, no drug offense, except in unusual aggravated circumstances, should be treated as seriously as a deliberate killing, which is a class 4 felony in Colorado.

18-18-406(8). Marijuana.

This subsection makes the cultivation of a single marijuana plant for personal consumption into a class 4 felony--the same class as manslaughter. This is absurd.

Cultivation of one or two marijuana plants should be reduced to a class 1 misdemeanor (the penalty currently applied to possession of between one and eight ounces of marijuana). Cultivation of 20 plants or fewer should be classified as a class 6 felony. All other cultivation should be a class 5 felony, under the principle that growing a substance which has *never* in human history caused a fatal overdose is not morally equivalent to killing someone.

18-18-407. Mandatory Drug Sentences.

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 wrong-doing. Mandatory sentences deprive courts of the ability to tailor the punishment to fit the crime. 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."(29)

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 10 grams of heroin contained in 290 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?(30) 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?(31) 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.

Likewise, subsection (f) triggers the class 2 felony if the defendant merely a "possessed" or "had available" a deadly weapon. There is no requirement that the weapon possession be in furtherance of the crime, or in any way related to it.

A mandatory sentence for simple gun possession is heavily discriminatory against regions of the state where recreational gun ownership is common. Consider two defendants:

Defendant A lives in Denver, where gun ownership is relatively rare. He grows marijuana for personal consumption. No one in his apartment owns a gun.

Defendant B lives in southern Colorado where gun ownership is common. She grows marijuana in the basement for personal consumption. Her husband owns a .22 squirrel rifle, which he keeps unloaded in an upstairs closet.

As a substantive matter, defendants A and B have committed precisely the same crime, and should receive precisely the same punishment. But under 181-18-407(1)(f) defendant B will receive many extra years in prison, simply because her husband exercised his right to keep and bear arms.

Such a result is unjust. It is wrong to punish someone for the exercise of a constitutional right if the person did not abuse that constitutional right. The mandatory sentence is just as unfair as giving a person convicted of securities fraud an extra five or ten years in prison just because he owned gun in his home, or because he exercised some other constitutional right unrelated to his crime. In essence, 407(1)(f) bills move gun ownership into a highly negative legal status: if a person who owns a gun does something wrong, the person will be punished much more simply because he owned a gun.

Section 407' 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 the 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. The placement of such power in the prosecutor undermines the separation of powers.

18-18-408. Money Laundering.

Control of money laundering is rational element of any criminal drug control strategy. But this "money laundering" provision covers actions which have nothing to do with money laundering.

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(1)(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." 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).

The simplest way to make the statute more closely track genuine money laundering would be to add the word "felony" before every occurrence of "violation of this article" in § 18-18-408(1). In addition, item (1)(b) [the provision that turns donation of the plastic baggie into "money laundering"] could be stricken, since items (1)(a), (c), and (d) are broadly worded enough to cover all possible ways to engage in money laundering.

Alternatively, the statute could be replaced with one based on the model developed by the United States House of Representatives Judiciary Committee in 1986. Such a statute might read:

(1) Whoever knowingly engages or attempts to engage in a financial transactions in criminally derived property commits a class 5 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 5 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.

18-18-410. Invitation to Forfeiture Abuse of Homes and Automobiles.

With existing forfeiture laws already being questioned by private property advocates nationwide, section 18-18-410 encourages forfeitures hugely disproportionate to the underlying offense: "*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."

Thus, if a college student brings home a couple marijuana cigarettes over Christmas vacation, and sells them to his older brother, the parents' 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.

The problem could be partially corrected by adding the words "for the purpose of felony manufacture, sale, or distribution" after the word "storage."

VII. Forfeiture Reform

Imagine a proposed forfeiture law that looked like this:

(1) Whenever a police officer is permitted, with or without judicial approval, to conduct a search to investigate a potential crime, the officer may seize and keep as much property associated with the alleged criminal as the police officer considers appropriate.

(2) For purposes of subsection (1), the amount of proof necessary to authorize a forfeiture shall be the same amount of proof necessary to procure a search warrant.

(3) Although forfeiture is predicated on the property being used in a crime, there shall be no requirement that the owner be convicted of a crime. It shall be irrelevant that the person was acquitted of the crime on which the seizure was based, or was never charged with any offense.

(4) Normal procedural protections of the Rules of Civil Procedure shall not be applicable.

(5) Although this section is intended for the punishment of criminals, none of the Constitutional protections relevant to criminal cases shall be applicable.

Does the above statute seem more appropriate to North Korea than the United States? The above statute is *currently* law in Colorado. In the 1980s, almost every state enacted forfeiture laws along the model above. Although the actual phrasing of the statutes is a little more elegant, the effect is the same as the "model" statute above.

A. Forfeiture is allowed for many low-level crimes

Punishments under this "model" statute are draconian, and bear no relationship to the seriousness of the alleged underlying crime. For example, section 16-13-303(1)(c)(II) authorizes the forfeiture of real property simply because someone on the property possessed any quantity of drugs for personal use (other than small quantities of marijuana). Forfeiture of an entire ranch, farm, home, or apartment building simply for personal possession of drugs is a punishment grossly disproportionate to the crime.(32)

Under existing laws, prior court approval is not necessary for a forfeiture. All that is required is that the police officer seize the property pursuant to a lawful search, and all that is necessary for a lawful search is probable cause. (33)

Colorado's public nuisance statute allows forfeitures for many specific offenses, including: prostitution, gambling, sale of drugs, simple possession of drugs without intent to sell, anything declared to be a public nuisance, fencing of stolen goods, sale of drug paraphernalia, child prostitution, sexual exploitation of a child, possession of aircraft without federal identification numbers, felony vehicular eluding, vehicular hit and run, or commission of a drive-by crime. Following this litany of forfeiture offenses, the statute then adds that any other property can be forfeited if allegedly "used in the commission of a felony." C.R.S. § 16-13-303(1)(b)(i). Given the vast amounts of behavior that has been felonized (i.e. failing to file an environmental report, possession of certain weapons without a permit, or second offense of what would otherwise be a misdemeanor), it is inappropriate to automatically allow forfeiture for *any* offense that has been classified as a felony.

B. Forfeiture is allowed without court authorization, and based on a low standard of evidence.

Colorado law allows forfeitures based on "probable cause." Probable cause is an extremely easy standard to meet. Probable cause is not proof "beyond a reasonable doubt," which is the burden of proof the government must meet in a criminal case. It is not proof by "a preponderance of the evidence" (51 percent) that must be met in a civil case. Rather, probable cause is the far lower standard; it merely means that there must be enough tentative evidence of possible criminal activity to justify the issuance of a search warrant.

Probable cause, including the probable cause used for forfeiture, can be based on an informant's tip.(34)

Because there are many situations where searches without a warrant are lawful, there are just as many situations where forfeiture without prior court approval is lawful.

In cases when the government does seek prior approval for a forfeiture, the only party presenting evidence is the government. There is no requirement the that property owner be notified, or have an opportunity to present his own evidence to the court. Notification comes only *after* the court has determined that there is probable cause. At that point--when the property is already in the government's hands--the property owner is finally notified and given an opportunity to ask for his property back; the owner is ordered to "show cause" why the property should not be forfeited.(35)
Courts have the authority to issue *ex parte* orders for the forfeiture of property. But the forfeiture statute also allows property to be forfeited even

without any court order; all that is necessary is a search warrant, even if the search warrant application never raised the possibility of forfeiture. Forfeiture is even allowed when a police officer is simply conducting a lawful search or arrest *without* a warrant. Except in special circumstances, property should only be seized for forfeiture when neutral and detached magistrate has issued an order. Thus, C.R.S. 16-13-315(1)(b) and (c) should be removed

C. Acquittal is irrelevant.

Many persons may believe that since they do not engage in illegal conduct with their property, and do not knowingly allow anyone else to use their property illegally, the property is safe from forfeiture. Those persons are wrong.

First of all, while forfeiture is based on property's alleged connection to a crime, the fact that the owner may be found not guilty is no bar to forfeiture.

It is true that there may be special situations where a criminal conviction cannot be obtained (as when the defendant flees the jurisdiction). Provisions can be made to allow forfeiture without conviction when the government proves that a special situation exists. But in the vast majority of cases, it is unfair for persons to lose their property for supposedly criminal conduct when they have never been found guilty of criminal conduct.

D. Forfeiture laws denigrate property rights.

The implication of allowing forfeiture without conviction is that property rights are unimportant. While the government must secure a criminal conviction to punish a person by depriving him of his liberty (by putting him in prison), the government need not obtain any conviction to punish him by depriving him of his property. The disrespectful treatment of property--as being less deserving of protection than liberty--ignores the United States Constitution, which insists that "life, liberty, *and property*," all deserve the full spectrum of protection from arbitrary government action.(36) As Justice Potter Stewart noted:

" The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without lawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could exist without the other."(37)

In earlier days, carrying a large roll of cash was considering nothing more than a crime against good taste if the money were flashed ostentatiously. But today, many persons are legitimately afraid of carrying large sums of money through transportation hubs, or on automobile trips. They know that if they are stopped by the police, a police dog may sniff them, and "discover" that

their money is "tainted" by drugs. The mere fact that currency contains drug residues is usually sufficient, by itself, for the currency to be forfeited. In fact, one study found that 96 percent of currency in ten major cities in the United States bore traces of cocaine residue.(38) Incredibly, the forfeited "tainted" money is put back into circulation--perhaps to be seized and forfeited again one day!(39)

E. Procedural rules for forfeiture cases are stacked against the property owner.

Although forfeiture laws amount to severe, drastic punishments for criminal offenses, forfeiture cases are labeled as "civil." As a result, Constitutional protections required in criminal prosecutions are not applicable.(40) There is no right to counsel for persons who cannot afford an attorney, no rules against the introduction of illegally seized evidence or coerced confessions or hearsay evidence or anonymous denunciations, no right to confront government witnesses, and no protection against compelled self-incrimination.

Stripped of the Constitutional protections applicable to criminal cases, property owners in forfeiture cases are not even allowed the normal protections granted to litigants in civil cases. A defendant in a slip-and-fall case enjoys broader protections of his property rights than does a person whose property has been seized by the government.

In civil cases, each side is allowed to engage in broad "discovery"--to interview the other side's witnesses,(41) and to review documents possessed by the other side.(42) In contrast, discovery rights in criminal cases are much narrower; for example, there is no right to take the deposition of an adverse criminal witness. The forfeiture laws specify that for discovery, the rules of criminal procedure shall apply.(43) So having made forfeiture into a civil action--to deprive the property owner of the Constitutional provisions applicable to criminal cases, the forfeiture law turns around and declares that discovery shall be according to the rules of criminal procedure--to deprive the property owner of the discovery rights applicable to all civil cases.

In normal litigation, each party may raise relevant claims against the other. For example, if the plaintiff sues the defendant for money owed, the defendant may sue back for damages caused by the plaintiff performing certain work improperly. But in a forfeiture case, property owners are specifically barred from raising legally relevant claims; the only thing they may ask for is the return of their property.(44) Thus, if rogue police officers vandalize someone's house while removing electronic equipment, the property owner may only ask for the return of the electronic equipment, and not for money to compensate for the vandalism. Accordingly, section 16-13-307(11), which bars forfeiture victims from raising claims about damages they have suffered, should be repealed.

F. Innocent victims of forfeiture should be allowed to recover attorney's fees.

Contesting a forfeiture obviously requires a heavy legal expenditure on the part of the property owner. Thus, a poor person whose car is worth $3,000 may find it economically impossible to spend the necessary money (several thousand dollars at least) in legal fees to get his property back. This problem could be remedied by allowing persons whose property has been improperly taken to recover reasonable attorney's fees. The statutory language might state, "If the owner of property contests a forfeiture action, and the court determines that none of the property belonging to the owner is subject to forfeiture, the owner may recover his or her reasonable attorney's fees for contesting the forfeiture action."

The attorney's fees could be paid from the revenues which the seizing agency has garnered from other forfeitures. The attorney's fee provision would also help deter bad-faith seizures, just as laws allowing attorney's fee awards for frivolous lawsuits help deter bad-faith litigation.

Notably, under current law, when seizing agencies win a forfeiture, they get *their* attorney's fees paid.(45) It is hardly unreasonable that seizing agencies make whole the innocent people whose property has been improperly taken.

G. Colorado agencies should be forbidden to collude in the violation of Colorado law.

Whatever procedural protections are provided by Colorado state law are deliberately subverted by the federal government. When local law enforcement officials perform a forfeiture, they can turn processing of the case over to federal officials. This federal "adoption" means that the forfeiture will only need to meet the lenient federal rules, not the sometimes stricter state rules.

This adoption provision is the key to much of the drug "war." As economists Bruce Benson and David Rasmussen have demonstrated, in 1984 state law enforcement agencies undertook a massive shift in priorities, away from violent and property crime enforcement, and in favor of drug law enforcement geared to producing forfeiture revenues. The shift was the direct result of the 1984 federal law which allowed use of the adoption tactic as a means for state and local law enforcement to evade state and local laws governing forfeiture. (46)

H. California's forfeiture reform

In 1994, the California legislature passed, and Governor Pete Wilson (not generally considered soft on crime) signed a forfeiture reform bill which included the following provisions:

- Except in special circumstances, the government cannot take property until it proves that the property is subject to forfeiture.
- Real property (land and buildings) can only be forfeited after a contested hearing in which the property owner can take part. If real property is owned by two or more individuals, the property is not forfeitable if one person "had no knowledge of its unlawful use."
- Family homes and family cars may not be seized.
- Any government agency which wishes to engage in forfeiture must have a department forfeiture practice manual; government employees performing forfeitures must receive special training.
- Vehicles may not be forfeited simply because they contained drugs. Vehicles carrying drugs for sale (or for possession for sale) may be forfeited if they contain more than 10 pounds of marijuana, peyote, or mushrooms, or 14.25 grams of heroin or cocaine.
- Government agencies which seize property may not keep it; the property must be sold. Of the revenues, fifty percent goes to the seizing agency, fifteen percent to community anti-drug or anti-gang programs, twenty-four percent to the state general fund, and one percent to a special fund to train government employees in the "ethics and proper use" of forfeiture.

These reforms are a good first step, but do not go far enough. (And besides that, they can be evaded through the federal adoption trick, discussed above.) Two more fundamental reforms are needed.

First, it should be recognized that as long as the seizing agency keeps a share of the revenues from the seizure, there will also be immense incentives to forfeiture abuse. All forfeiture revenues should be turned over to the general fund of the State of Colorado, and none of them should be kept by the law enforcement agency. Any state agency which uses federal adoption to avoid this rule should have its appropriations reduced appropriately.(47)

The second reform is to follow the logic of the 1886 case *Boyd* v. *United States*, in which Justice Bradley declared a civil forfeiture statute unconstitutional, writing, "We are clearly of the opinion that proceedings institute for the purpose of declaring the forfeiture of a man's property by reason of offenses committed against him, though they may be civil in form, are in the nature criminal."(48) Following the logic of *Boyd*, Colorado should simply abolish civil forfeiture. Property should only be taken after the government has met the proper Constitutional burden of proving guilt beyond a reasonable doubt in a criminal trial. Exceptions should be allowed only for cases in which it was impossible to bring the alleged criminal to trial. (49)

Endnotes

1. A similar exception is found in a related wiretapping statute, 16-15-101(3.3)(d).

2. "Police Secretly Tracking and Bugging Thousands of Private Cars," *The Financial Privacy Report*, June 1995, pp. 4-5. California's similar bugging program is discussed in the June 1, 1997, Orange County Register. For discussion of Governor Wilson's veto, see "Governor's Off Track," *Orange County Register*, Oct. 12, 1997, available at http://www.ocregister.com/liberty/1997/1097/100997/edit2.html.

3. *Aguilar* v. *Texas*, 378 U.S. 108 (1963).

4. According to the *St. Louis Post-Dispatch*, on April 30, 1996, in a suburb of St. Louis, the Bureau of Alcohol, Tobacco and Firearms assisted a local police search of the quiet suburban home of Paul and Patty Mueller, which an informant (hoping for leniency in the criminal charges pending against him) had falsely claimed was a distribution center for illegal weapons. At 9:30 p.m., thirteen local law enforcement officers and one BATF agent, all wearing black, kicked open an unlocked door, breaking its frame. A gun was held three inches from Patty Mueller's head. Her husband was handcuffed, and the intruders threatened to kill the family dog. An hour later, the intruders showed the Muellers the search warrant, and explained what they were looking for. No illegal weapons were found (the Muellers do not even own a BB gun), and the agents left.

A BATF supervisor admitted that the local police were wrong in their failure to attempt to corroborate independently some of the information supplied by the criminal informant. What little checking had been done had already shown that the informant was, at the least, entirely misinformed. The informant had claimed that a particular man alleged to be a gunrunner lived in the Mueller's home. When the police found that the home was owned by the Muellers, rather than the gunrunner, the informant claimed that the gunrunner was living with the Muellers. No effort was made to observe the Muellers' home to see if the gun-runner ever came or went. Michael D. Sorkin, "Raid Deserves Little More than Apology," *St. Louis Post-Dispatch*, May 3, 1996, p. 1; Michael D. Sorkin, "Federal Agents Raid St. Charles Home by Mistake," *St. Louis Post-Dispatch*, May 2, 1996; "Love, Fear and the ATF," *Potomac News*, May 5, 1996.

5. *Illinois* v. *Gates*, 113 S.Ct. 2317 (1983).

6. *N.Y. Times*, Mar. 28, 1994, pp. A1, A9.

7. Vin Suprynowicz, "The Real Viper Conspiracy," *Liberty*, Sept. 1996, p. 15. A different version of the article is available at http://www.nguworld.com/vindex/071796vs.htm.

8. Federal Rules of Evidence 801(c): "'Hearsay' is a statement, other than one made by the declarant, while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted."

9. *Grau* v. *United States*, 287 U.S. 124 (1932). For the Court's increasing concern about the civil liberties price exacted by prohibition, see Kenneth M. Murchison, *Federal Criminal Law Doctrines: The Forgotten Influence of National Prohibition* (Durham, N.C.: Duke Univ. Pr., 1994).

10. Fed. Rules. Evid. 802.

11. *Brinegar* v. *United States*, 338 U.S. 160 (1949).

12. Fed. Rules Evid. 803, 804 (listing numerous exceptions to Rule against Hearsay).

13. *See Sgro* v. *United States*, 287 U.S. 206 (1932); *United States* v. *Ruff*, 984 F.2d 635 (5th Cir. 1993).

14. *United States* v. *Ruff*, 984 F.2d 635 (5th Cir., 1993).

15. At the 1995 Congressional hearings, defenders of the Waco warrant pointed to the following cases: *United States* v. *McCall*, 740 F.2d 1331 (4th Cir. 1984)(seven months, possession of a handgun); *United States* v. *Brinklow*, 560 F.2d 1003 (10th Cir. 1977)(eleven months, firearm); *United States* v. *Rahn*, 511 F.2d 290 (10th Cir. 1975)(two years); *United States* v. *Mariott*, 638 F. Supp. 333 (N.D. Ill. 1986) (thirteen months). Testimony of AUSA William Johnston, Joint Hearings, part I, p. 267. See also Univ. of Chicago Law Professor Albert W. Altschuler, letter to Rep. John Conyers, Jr., reprinted in Joint Hearings, part I, p. 812 (arguing that whether evidence is "old" is distinct from whether it is "stale"; in contrast to drugs, which are consumed, guns observed in a building are relatively likely to still be in the same building months later).

While it is true that guns are much more durable than drugs, evidence that is more than half a year old is stale enough so that it simply should not be allowed. If there is some real threat to public safety, the federal government ought to be able to finish an investigation in half a year.

16. *Weeks* v. *United States*, 232 U.S. 383 (1914).

17. *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

18. *Elkins* v. *United States*, 364 U.S. 206 (1960).

19. *United States* v. *Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

20. *Olmstead* v. *United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

21. *United States* v. *Leon*, 468 U.S. 897 (1984). *See also Illinois* v. *Krull*, 480 U.S. 340 (1987); *Arizona* v. *Evans*, 115 S.Ct. 1185 (1995)(reliance on defective computer records).

22. Joint Hearings, part 2, p. 40.

23. The "good faith" exception does not apply if the police knowingly or recklessly misled the magistrate, but proving that a police officer actually knew an informant was lying is nearly impossible.

24. Colo. Const, art. II, § 7.

25. Comptroller General of the United States, *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* (Apr. 19, 1979).

26. The amicus brief in which the Montana Attorney General joined was written by Colorado Attorney General Gale Norton. David Kopel assisted in the writing of the brief, as an unpaid volunteer.

27. "F.B.I. Chemist Says Experts are Pressured to Skew Tests," *New York Times*, Sept. 15, 1995, p. B3.

28. After the U.S. Supreme Court struck down the original federal school zone law, Congress re-enacted the law to require that the gun must have been sold in or otherwise "affect" interstate commerce.

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

30. 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).

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

32. Unlike sale of drugs, mere possession of drugs cannot plausibly be considered a "public nuisance." The statute is also inconsistent with the United States Supreme Court's 1993*Alexander* v. *United States* ruling, which requires that forfeitures not be disproportionate to the underlying crime.

33. Colorado Revised Statutes, § 16-13-504(1).

34. This point is discussed at greater length in Part I B of this paper.

35. Colo. Revised Statutes § 16-13-505(2)(b),: "If the court finds from the petition and the supporting affidavit that probable cause exists to believe that the seized property is contraband property as defined in this part 5, it shall, without delay, issue a citation directed to interested parties to show cause why the property should not be forfeited."

36. . U.S. Const., Amend. XIV ("nor shall any state deprive any person of life, liberty, or property without due process of law")(italics added).

37. *Lynch* v. *Household Finance*, 405 U.S. 538, 552 (1971).

38. "Nosy, Drug-sniffing Pooch Can Land an Innocent Person in the Doghouse," *Rocky Mountain News*, Aug. 12, 1996. Then-Attorney General Richard Thornburgh stated that over ninety percent of American paper currency has drug residues. *St. Louis Post-Dispatch*, Oct. 7, 1991, p. 6.

39. *Id.*

40. *E.g.*, *People* v. *Allen*, 767 P.2d 798, 799 (Colo. App. 1988).

41. Colo. Rules of Civ. Procedure 30(a) (depositions allowed by any party, for any reason; no need for court approval).

42. Colo. Rules of Civil Procedure 34(a).

43. Colo. Rev. Stat. § 16-13-505(4),: "The discovery phase of such action shall be governed by the Colorado rules of criminal procedure.

44. Colo. Rev. Stat. § 16-13-307(11).

45. Colo. Rev. Stat. § 16-13-311(3)(A)(III)

46. David W. Rasmussen and Bruce L. Benson, *The Economic Anatomy of a Drug War* (Lanham, Maryland: Rowman & Littlefield, 1994), pp. 135-39.

47. C.R.S. 16-13-701 requires agencies which carry out forfeitures to make written reports about the disposition of forfeited property. Subsection (2) exempts the Attorney General, the Colorado Bureau of Investigation, and the Department of Public Safety from making the reports. In the interests of accountability and full disclosure, the exemptions in subsection (2) should be repealed.

Part 5 of Article 13 of Title 16 is a forfeiture act from the 1980s, before the public became aware of the dangers of excessive forfeiture laws. As a result of the Foster-Johnson forfeiture reform bills enacted in 1992 and 1993, this part is now almost identical to the general forfeiture state contained in Part 3 of Article 13. Accordingly, this duplicative Part 5 should be repealed.

48. 116 U.S. 616, 634-35 (1886). More recently, Justice Arthur Goldberg made the same observation: "A forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law." *One 1958 Plymouth* v. *Pennsylvania*, 380 U.S. 693, 700 (1965).

49. For example, the person fled the state, or died while trial was pending.

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