REDUCING THE DRUG WAR'S DAMAGE TO GOVERNMENT BUDGETS

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Soaring Medicaid costs, reduced tax revenues because of economic stagnation and the collapse of a housing bubble, and enormous expenditures on pensions for retired government employees have imposed severe stress on the budgets of almost every state government. As a result, many states are being forced to cut funding for traditional and important services provided by state governments—such as civil courts that can resolve disputes within a reasonably expeditious time, protection of children from abuse, and protection of the environment.

Unlike most state governments, the federal government does not have the fiscal discipline of a balanced budget requirement. As a result, federal debt is now more than $15 trillion,[1] and that figure has been growing by more than a trillion dollars per year for the last four years.[2] The rapidly increasing debt could place the nation on a short path to Greek-style fiscal collapse. Not one U.S. Senator or Representative has proposed a tax increase that would, in itself, result in a balanced budget; indeed, a trillion-dollar tax increase probably would drive the economy into a deep recession. So regardless of whether tax increases are a good idea, the need to cut at least some federal spending is clear.

Because states and the federal government must trim nonessential programs to preserve the essential ones, it is time for

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1. THE DEBT TO THE PENNY AND WHO HOLDS IT, U.S. DEP'T OF THE TREASURY, BUREAU OF THE PUBLIC DEBT, http://www.savingsbonds.gov/NP/BPDLogin?application=np (last visited Feb. 12, 2012).

2. GOVERNMENT HISTORICAL DEBT OUTSTANDING—ANNUAL 2000–2010, http://www.treasurydirect.gov/govt/reports/pd/histdebt/histdebt_histo5.htm (last visited Feb. 12, 2012).

Electronic copy available at: http://ssrn.com/abstract=1977152

states and the federal government to consider drug law reform. In this Essay, we make no philosophical arguments about drug prohibition. Rather, we identify several specific reforms that would reduce the fiscal costs of the "War on Drugs."

I. COLORADO REFORMS

Between 2001 and 2010, Colorado's violent crime rate fell by 8.3%, and the property crime rate fell by 30.4%.[3] During the same period, the prison population rose by 38.4%.[4] Perhaps the latter was one cause of the former. If so, it is an expensive cause. The average cost per inmate per year in public prisons is $32,334, and in private prisons it is $21,571.[5] So although sending someone to prison is less expensive than sending him to Harvard,[6] even small changes in prison population can have significant effects on state budgets. For example, in a medium-sized state such as Colorado, reducing the prison population by just a few dozen inmates could determine whether the state government can continue a matching grant program to poor, rural counties for a social safety net program.

Drug laws are the obvious candidates for sentencing reform. First of all, drug laws are the main cause of rising prison costs.

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3. In 2010, there were about 321 violent crimes in Colorado per 100,000 residents. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES: 2010 tbl.5 (2010) [hereinafter UNIFORM CRIME REPORTS 2010], *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl05.xls. That number is compared to 350 per 100,000 residents in 2001. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, ESTIMATED CRIME IN 2001: COLORADO, http://www.ucrdatatool.gov/search/crime/state/RunCrimeStatebyState.cfm [hereinafter ESTIMATED CRIME IN 2001: COLORADO] (last visited Feb. 12, 2012). Similarly there were 2684 reported property crimes per 100,000 Colorado residents in 2010. UNIFORM CRIME REPORTS 2010, *supra*, at tbl. 5. That number is compared to 3857 property crimes per 100,000 residents in 2001. ESTIMATED CRIME IN 2001: COLORADO, *supra*.

4. BONNIE L. BARR ET AL., COLO. DEP'T. OF CORRECTIONS, STATISTICAL REPORT: FISCAL YEAR 2010, at 1 (2011) [hereinafter COLO. DEP'T OF CORRECTIONS, STATISTICAL REPORT], *available at* http://www.doc.state.co.us/sites/default/files/opa/StatRprt_FY10.pdf.

5. *Id.* at 11.

6. The Office of Admissions at Harvard College estimated that the annual cost of attendance for the 2011–2012 academic year, including tuition, room, board, student fees, and estimated personal expenses ranged from $56,000 to $60,200. *Cost of Attendance for 2011–2012*, HARVARD COLL., OFFICE OF ADMISSIONS, http://www.admissions.college.harvard.edu/financial_aid/cost.html (last visited Feb. 12, 2012). Those figures do not include $1834 for state-required insurance coverage. *Id.*

Electronic copy available at: http://ssrn.com/abstract=1977152

As the Colorado Criminal Justice Reform Commission (CCJRC) puts it, "drug offenses drive prison growth."[7] Because nonviolent drug offenders are more than 18% of Colorado's prison population and no other nonviolent crime is more than 7% of the population, drug-sentencing reform offers the greatest potential for fiscal savings.[8]

Drug laws also are the best practical candidates for sentencing reform. Reducing sentences for almost any other crime is a guarantee that more innocent victims will be harmed, either by violent criminals (such as rapists and robbers) or by nonviolent ones (such as burglars and identity thieves). In contrast, the harms of drug criminals are inflicted primarily on willing "victims."[9]

Colorado recently enacted four laws to partially reduce the fiscal burden that drug overcriminalization places on the state budget. We consider each of them in turn.

A. Fiscal Note for New Statutory Crimes

Colorado's Democratic Governor John Hickenlooper certainly could not be considered "soft on drugs"—not even on "soft drugs." In 2007, the voters of Denver used the initiative process to enact an ordinance requiring that marijuana be "the city's lowest law enforcement priority."[10] Yet in 2008, then-Mayor Hickenlooper's police cited more than 1500 people for marijuana.[11]

In March 2011, Governor Hickenlooper signed House Bill 11-1239, a bill "concerning a requirement to include additional information in fiscal notes for certain bills related to criminal offenses."[12] The new law requires that information about re-

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7. COLO. CRIMINAL JUSTICE REFORM COMM'N, 2010 COLORADO QUICK FACTS 2 (2010), *available at* http://www.ccjrc.org/pdf/2010_Colorado_Quick_Facts.pdf.

8. COLO. DEP'T OF CORRECTIONS, STATISTICAL REPORT, *supra* note 4, at 47.

9. It is true that some drug abusers (who are a subset of drug users) cause secondary harms by not working to support their families, by driving while under the influence, or by stealing to support their habits. The latter two harms remain directly criminalized. The more diffuse harms caused by some drug abusers (for example, not working) are conceptually no different from similar harms that result from other, legal, vices, such as alcohol abuse, gambling abuse, television abuse, sloth, and so on.

10. DENVER, COLO. MUN. CODE art. 5, div. 3, § 38-176(a) (2007).

11. JON GETTMAN, MARIJUANA IN COLORADO: ARRESTS, USAGE, AND RELATED DATA 8 (2009), *available at* http://www.drugscience.org/States/CO/CO.pdf (reporting 1658 citations in Denver in 2008 for persons over 21 possessing less than an ounce of marijuana).

12. H.B. 11-1239, 68th Gen. Assemb., 1st Reg. Sess. (Colo. 2011).

dundancy be included with any state legislature bill that creates "a new criminal offense, increases or decreases the crime classification of an existing criminal offense, or changes an element of an existing offense that creates a new factual basis for the offense . . . ."[13]

Here is how the new statute works: Currently, adultery is classified as a crime under Colorado state law.[14] The adultery statute, however, does not authorize the imposition of any punishment for conviction of that crime.[15] Now suppose that a Colorado state legislator, knowing that the lack of a penalty results in little legal deterrence, proposes turning adultery in a Class 2 (mid-level) misdemeanor. Before 2011, the bill to increase the adultery penalty would have needed to pass a committee in both the Colorado House and the Senate (probably the Judiciary or the State Affairs Committee), and be passed on the floor of both the House and Senate.[16]

Because the adultery bill would impose enforcement costs on state and local governments, it also would have received a "Fiscal Note" written by legislative staff.[17] The Note would estimate the proposed cost of the bill to state and local governments.[18] Now, with the addition of HB 11-1239, the Note also must incorporate how any redundancies in criminal law will affect the state's fisc.[19] The appropriations committees in both the House

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13. *Id.* at § 1.

14. COLO. REV. STAT. § 18-6-501 (2011).

15. *Id.* When Colorado's criminal code was revised in 1971, the legislature removed the crimes of fornication and sodomy. Jerry Kopel, *Adultery is nothing new in Colorado*, COLO. STATESMAN, May 13, 2011, http://www.coloradostatesman.com/kopel/992801-adultery-nothing-new-colorado. During a 1973 Judiciary Committee hearing on another sex crime bill, then-State Representative Jerry Kopel asked the witness, former Colorado Supreme Court Justice Otto Moore, "Justice Moore can you tell our committee the difference between adultery and fornication?" Justice Moore replied: "Well, I have tried both and I was unable to tell any difference." *Id.*

16. *See generally The Legislative Process*, COLO. GEN. ASSEMB., http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1231572728402&ssbinary=true (last visited Feb. 12, 2012).

17. Memorandum from Chris Ward, Fiscal Note Manager to Colo. Legislative Staff Agency Fiscal Note Coordinators 1 (Dec. 5, 2011) (updated Dec. 20, 2011), *available at* http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251760268327&ssbinary=true.

18. *Id.*

19. *See supra* notes 12–13 and accompanying text.

and the Senate then would need to analyze these considerations.[20] Those committees would need to identify where the money would come from to pay for enforcement of the adultery bill. The extra spending would need to be accounted for in the annual state budget (the Long Bill),[21] which is prepared by the Joint Budget Committee.[22] Because the Colorado Constitution requires a balanced budget,[23] to enact the adultery bill, the legislature would need to identify other spending cuts to pay for the bill. In a year in which state revenues were rising faster than mandatory spending on existing programs (such as Medicaid and K–12 public schools), and there was extra money to spend, the legislature still would need to identify that some of the surplus would be allocated to the bill.

During recent years of budget austerity, the existing practice of requiring that all new crimes or increased crimes be accounted for fiscally has been effective at deterring legislators from grandstanding by introducing bills to create new crimes.[24] When there is a budget surplus, however, legislators tend to invent new crimes about whatever is in the news ("Twitter fraud," for example), even when the underlying conduct is already covered by an existing statute. House Bill 11-1239 ensures that the Fiscal Note for new or enhanced crime bills will identify whether the bill is redundant.

House Bill 11-1239 arose from recommendations by the Colorado Commission on Criminal and Juvenile Justice (CCJJ).[25] Speaking in support of the bill, Jeanne M. Smith, Di-

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20. *See* COLO. GEN. ASSEMB., *supra* note 16.

21. *Id.*

22. *The Role of the Joint Budget Committee*, COLO. GEN. ASSEMB., http://www.state.co.us/gov_dir/leg_dir/jbc/jbcrole.htm (last visited Feb. 12, 2012).

23. COLO. CONST. art. X, § 16 (The Joint Budget Committee is a bipartisan committee of three members each from the House and the Senate.).

24. *Cf., e.g.*, Josh Hafenbrack, *Legislative Session Requires Overtime*, S. FLA. SUN SENT., May 1, 2009, http://articles.sun-sentinel.com/2009-05-01/news/0904300710_1_bills-legislators-floor-sessions (explaining that in Florida, where the economic crisis and a $6-billion budget deficit dominated a recent legislative session, bills that carried price tags "to house more prisoners because of stiffer criminal penalties or [to create] a program that requires administration . . . stalled in committee, if they got a vote at all").

25. The twenty-seven-member state government commission consists of law enforcement professionals, judges, legislators, members of local government, and other citizens; it studies justice issues and makes recommendations to the legislature. *Colorado Commission on Criminal & Juvenile Justice Members*, COLO. DEP'T OF

rector of the Division of Criminal Justice in the Colorado Department of Public Safety, pointed out that the Colorado criminal code had become incoherent, because "we have over the years developed a patchwork of statutes, some of which were designed specifically for such unique circumstances that you really wonder if we needed it at the time."[26] Thus, said Smith, "one of the ways the committee believed we might be able to try and narrow that growing patchwork is to get before you [the lawmakers] impartial information about how a new crime that is being proposed would fit into the existing statutes," specifically asking whether "the proposed level of the crime seem[s] consistent with other similar types of behavior that have already been named in the statutes."[27]

Also speaking in support of the bill, Christie Donner, the Executive Director and founder of the Colorado Criminal Justice Reform Coalition (a private NGO), said that the "task of this comprehensive review is to . . . [examine] our entire criminal code and look at where there are redundancies or things that don't make sense with these one-off crimes."[28] The review would look to ensure that "when new crimes are created they're relative in seriousness to one another." She added that significant disparities often exist between the punishment imposed for different provisions in the criminal code because "over the years . . . we've had a tendency to pass legislation that we can afford . . . [which results in] crimes that are misdemeanors [not for principled reasons, but] because that's what we could afford."[29]

When state Senator Mark Scheffel asked Donner about the effect the law might have on curbing the creation of new crimes, Donner stated this was "certainly not the intention" of the new law.[30] Rather, the purpose of the law is to get "information coming before decision making bodies [about whether] we need this offense or can it be charged under an existing stat-

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PUB. SAFETY, http://cdpsweb.state.co.us/cccjj/commission_members.html (last visited Feb. 12, 2012).

26. ColoradoSenateGOP, *Sen. Ellen Roberts: HB-1239*, YOUTUBE (Feb. 12, 2012) http://www.youtube.com/watch?v=jIsT-oZOT8c (legislative hearing of House Bill 1239 before the Colorado Senate Judiciary Committee).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

ute," which also enables lawmakers to evaluate "whether or not the crime classification is appropriate given the seriousness of other offenses."[31] As for curbing the creation of new crimes, Donner said, "[N]othing . . . would limit" the legislature from passing laws "as crimes evolve," and instead would ensure that "information would also be put forward" to make sure that lawmakers are informed about existing crimes.[32] In other words, the law is "not intended to inhibit but just to inform."[33]

While questioning Donner, Senate Judiciary Committee Chair Morgan Carroll echoed Donner's sentiment that the law would help rectify incoherencies in the criminal code and ensure that punishments better fit crimes. Senator Carroll commented that she had found some "fairly abhorrent behavior that remains at the misdemeanor level and some relatively . . . lesser behavior that has found its way into the felony [level] . . . I think routinely [presenting] this information with the goal that we ultimately have a cohesive sentencing structure where we really do have harsher penalties and sentences for more serious crimes would really help us make better decisions."[34]

After analyzing both the fiscal and legal effects of the bill, legislative council members concluded that it will have only a minimal effect on both the state budget and on the incoherence of the Colorado criminal code. They found that, between 2001 and 2010, an "average of 11 bills were introduced each year to which the new analysis would apply."[35] Furthermore, the Legislative Council found that "due to the relatively small number of bills each year," no appropriations change would be required because the minimal increase in expenditures that will likely result can be rolled into existing appropriations.[36]

Nevertheless, House Bill 11-1239 is an excellent model for other states and for the federal government. When a legislator wants to create a new crime based on something that is currently in the news (for example, "Facebook bullying"), it makes

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31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. COLO. LEGIS. COUNCIL STAFF, FINAL FISCAL NOTE HB 11-1239, COLO. GEN. ASSEMBLY 1 (July 12, 2011), http://www.leg.state.co.us/clics/clics2011a/csl.nsf/fsbillcont3/19FDBF6E4676263187257818007B81BA?Open&file=HB1239_f1.pdf.
36. *Id.*

sense that there be a formal analysis of whether the conduct at issue already is covered by existing criminal laws and what punishments already exist under those laws. Further, if the legislature decides that creation of a new crime, or augmentation of the punishment for an existing crime, is necessary, then the legislature should be required to specifically identify how to pay for enforcement of the new or enhanced crime.

We do not dispute that House Bill 11-1239 would not have made much fiscal difference in Colorado from 2001 through 2010. That was a period in Colorado when state legislators and the Colorado public were relatively uninterested in new "tough on crime" laws, and instead were generally satisfied with the severity of existing Colorado law. On the other hand, Colorado, like other states and like the nation, has gone through periods when legislators were in a frenzy to make new criminal laws. These have included the "drug war" panic that began in 1986,[37] and the 1993–1994 period when crime was among the most important national issues.[38] Had analytic requirements such as those contained in House Bill 11-1239 been used in the legislative process during those eras, the effect likely would have been more notable.

Regardless of the merits of the thousands of new state and federal laws passed during the late 1980s and early 1990s, those new laws have been imposing significant costs on taxpayers ever since. When enacting those laws, legislators should have been required to acknowledge frankly the costs of those laws and to identify specific means to pay for them.

Federal and state analogues of Colorado's House Bill 11-1239 will improve the rationality of the federal and state criminal codes (by deterring the enactment of redundant laws), and will ensure that the costs of new criminal laws are both expressly considered and paid for.

B. Reducing Drug Possession from a Felony to a Misdemeanor

Governor Hickenlooper's predecessor, Democrat Bill Ritter, also was a man who was never soft on crime. Before becoming Governor, he had served for thirteen years as District Attorney of

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37. *See, e.g.*, ERICH GOODE & NACHMAN BEN-YEHUDA, MORAL PANICS: THE SOCIAL CONSTRUCTIONS OF DEVIANCE 205–23 (1994).

38. *See, e.g.*, Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

Denver.[39] In May 2010, Governor Ritter signed a bipartisan bill, House Bill 10-1352, which lowered the statutory penalties for simple possession or use of controlled substances.[40] Significant savings are expected. In the State Corrections Department alone, the predicted savings are $56.5 million over the next five years.[41]

Colorado has long had special, high-level punishments for certain types of drug dealers (for example, for major traffickers[42] or persons who sell in school zones[43]). Until 2010, however, Colorado law made no distinction between ordinary drug dealers and ordinary drug users. Both were classified in the same felony category.

The new law lowers the penalty for unauthorized use of a controlled substance to a Class 2 misdemeanor.[44] Now, the crime of possession or use is distinct from the greater crime of "manufacturing, dispensing, selling, distributing, or possessing with intent to manufacture, dispense, sell, or distribute . . . ."[45] The penalty for distributing remains a felony, although at a lower level than before.[46] The new law also lowers the penalty for crimes involving fraud or deceit related to a controlled substance,[47] such as giving a pharmacist a forged prescription. Deceit crimes, standing alone, tend to be committed by users more than dealers.

In some situations, the prosecutor may only be able to prove possession, but the quantity possessed clearly indicates that the person is a dealer, not just a user. The new Colorado law takes this into account, and the defelonization of possession only ap-

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39. *About the Governor, Bill Ritter*, COLORADO, http://www.colorado.gov/cs/Satellite/GovRitter/GOVR/1177024890365 (2010) (last visited Feb. 3, 2012).

40. H.B. 10-1352, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010).

41. COLO. LEGIS. COUNCIL STAFF, FINAL FISCAL NOTE, HB 10-1352, CONCERNING CHANGES TO CRIMES INVOLVING CONTROLLED SUBSTANCES 5 (March 18, 2010) [hereinafter, COLO. LEGIS. COUNCIL STAFF, HB 10-1352], *available at* http://www.leg.state.co.us/clics/clics2010a/csl.nsf/fsbillcont3/F0B440D0C733A91C872576B40000FF89/$File/HB1352_00.pdf.

42. COLO. REV. STAT. § 18-18-407(1)(b)–(e) (1992).

43. COLO. REV. STAT. § 18-18-407(2)(a) (1992).

44. COLO. LEGIS. COUNCIL STAFF, HB 10-1352, *supra* note 41, at 1.

45. *Id.*

46. *Id.*

47. *Id.* at 2.

plies to quantities that indicate personal consumption, rather than dealing.[48]

Doug Wilson, head of the Office of the Colorado State Public Defender, said that by reducing the probability of a state prison sentence for mere use, "Colorado is starting to recognize that locking people up in prison for what is essentially a disease is not a way to cut recidivism . . . ."[49]

Since the early 1970s, Colorado has properly recognized that not all illegal controlled substances are equal. Methamphetamine is vastly more dangerous than marijuana. So without taking any step to legalize non-medicinal use of marijuana, the new law raises the amount of marijuana for a felony possession charge from eight to twelve ounces.[50]

The new law also creates new crimes and penalties relating to the distribution of controlled substances to minors. It is now a Class 3 felony to sell to a minor under fifteen years of age, and the offense carries a mandatory prison sentence.[51]

The result of the sentencing reforms is that approximately 217 felony convictions per year will be reduced to misdemeanor convictions.[52] Although some revenue will be lost due to the reduction in drug offense surcharges and fines, the total savings to the general fund in the first full year of operation is estimated at $6.35 million.[53] By fiscal year 2014–2015, the savings to the Department of Corrections will be approximately $17.35 million

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48. For example, felony provisions do not apply if a person openly and publicly displays less than two ounces of marijuana. *See* Colo. H.B. 10-1352, § 6 (2010) (amending COLO. REV. STAT. § 18-18-406(3)).

49. Jessica Fender, *More rehab, less jail in drug reform*, DENV. POST, Feb. 24, 2010, at B1.

50. *See* H.B. 10-1352, 67th Gen. Assemb., 2d Reg. Sess. § 6 (Colo. 2010) (amending COLO. REV. STAT. § 18-18-406(4)(c) (1992)). Possession of more than two ounces but fewer than twelve ounces is a misdemeanor. *Id.* § 18-18-1406(a)-(b).

51. *Id.* § 6 (amending COLO. REV. STAT. § 18-18-406(7)(c)). Colorado's felonies are classes 1 through 6. *See* COLO. REV. STAT. § 18-1-104 (2011). Class 1 is for aggravated murders for which the death penalty may be imposed. *Id.* at § 18-1.3-401. Class 2 felonies include murder in the second degree and sexual assault. *Class 2 Felonies*, COLORADO, http://www.colorado.gov/cs/Satelite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251704777229&ssbinary=true (last visited Jan. 28, 2012). Class 3 felonies include assault and aggravated robbery. *Class 3 Felonies*, COLORADO, http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251618277757&ssbinary=true (last visited Feb. 12, 2012).

52. COLO. LEGIS. COUNCIL STAFF, HB 10-1352, *supra* note 41, at 5.

53. *Id.* at 2.

per year.[54] Those savings will then be redirected to community-based drug treatment options.[55]

Defelonization of simple use or possession of drugs offers huge potential for cost savings in almost every jurisdiction. This is all the more true in jurisdictions that have severe mandatory sentences for some drugs and for jurisdictions that currently treat marijuana possession as a felony.

C. Smarter Calls on Three Strikes

"Three strikes" laws swept the nation in the early 1990s. They imposed very long mandatory sentences for a third conviction from a particular class of felonies. At the most abstract level, the three strikes laws are sensible. If a person has served five years for a forcible rape, and then twelve years for an armed robbery, and is then convicted of aggravated manslaughter, it makes sense that society be protected from that person for a very long time. If, however, the class of crimes that constitute "strikes" is too broad, the result can be inappropriately high prison expenditures ($32,000 year x 25 years) grossly out of proportion to the risk that a person might pose to society.

Colorado's habitual offender law requires courts to quadruple the sentence for individuals with three prior felony convictions.[56] Senate Bill 11-096, signed by Governor Hickenlooper in March 2011, narrows the felonies that can be considered a third strike under the habitual offender law.[57]

Before 2011, the unlawful possession of a controlled substance—a Class 6 felony, which is the lowest felony level in Colorado—would be counted as a qualifying felony for the purposes of the habitual offender law.[58] Normally, Class 6 felons are sentenced to an average of 12.2 months in prison.[59] Class 6 felons with a habitual offender sentence enhancement

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54. *Id.* at 5.

55. H.B. 10-1352 § 1 (amending COLO. REV. STAT. § 18-18-406(1)(c)).

56. *See generally* COLO. REV. STAT. § 18-1.3-801(2)(a) (2011).

57. S.B. 11-096 § 1, 68th Gen. Assemb., 1st Reg. Sess. (Colo. 2011).

58. COLO. LEGIS. COUNCIL STAFF, FINAL FISCAL NOTE, SB 11-096, CONCERNING EXCLUDING A CLASS 6 FELONY DRUG POSSESSION CONVICTION AS A QUALIFYING OFFENSE FOR THE HABITUAL CRIMINAL STATUTE 1 (Aug. 11, 2011) [hereinafter, COLO. LEGISLATIVE COUNCIL STAFF, SB 11-096], *available at* http://www.leg.state.co.us/clics/clics2011a/csl.nsf/fsbillcont3/1EA048792D99E0D5872578170055835C?Open&file=SB096_f1.pdf.

59. *Id.*

would serve sixty months.[60] Under the new statutes, Class 6 unlawful possession convictions will no longer qualify someone for habitual offender status.[61]

Of course, the removal of mere drug possession from felony status[62] made the three strikes reform much less important. Moreover, district attorneys and judges, apparently already aware that Colorado's state prison space was finite and that funds were not available for new prison construction, already had been structuring plea deals in ways calculated to avoid a third strike for drug possession. In fact, at the time the state enacted Senate Bill 11-096, the Colorado Department of Corrections had no inmates serving under the habitual offender enhancement for Class six unlawful possession.[63] Thus, the Legislative Council (the state legislature's research arm for fiscal issues) concluded that the bill would have no immediate fiscal impact.[64]

In the long run, however, it is likely that some period of incarceration, and thus some expenditure of funds, will be avoided for at least some potential inmates. Colorado currently spends between $22,000 and $32,000 per year on each inmate.[65] A four-year reduction in sentence, from sixty to 12.2 months, could result in as much as $128,000 in savings per offender.

More generally, three strikes laws across the country should be seriously revised. Colorado's three strikes law (quadrupling the sentence for the third strike) is actually mild by national standards. If the underlying third strike is relatively small (say, a one or two-year sentence), then the quadrupling effect, although significant, will still result in a sentence of less than ten years. In contrast, some states have imposed a very long penalty (for example, twenty-five years) regardless of the nature of the third strike.[66] This can result in a twenty-five-year sentence for some-

60. *Id.*

61. *Id.*

62. *See supra* Part I.B.

63. COLO. LEGIS. COUNCIL STAFF, SB 11-096, *supra* note 58, at 1.

64. *Id.* at 2.

65. COLO. LEGIS. COUNCIL STAFF, HB 10-1352, *supra* note 41, at 4.

66. At one point, California's minimum sentence for a "third strike" offender was twenty-five years. This was most famously put under public scrutiny in the "pizza thief" case in which a man was sentenced to twenty-five years in prison for his third strike, stealing a slice of pizza from children. *See* Jack Leonard, *"Pizza Thief" Walks the Line*, L.A. TIMES, Feb. 10, 2010, http://articles.latimes.com/2010/feb/10/local/la-me-pizzathief10-2010feb10. The state has since modified the law to require a prison term three times that for the underlying offense, twenty-

one who is evicted from his apartment for non-payment of rent, and then sneaks through a window of the apartment ("burglary") to recover his possessions. Even for a person with two prior felony convictions, a twenty-five-year sentence for the offense is unfair, disproportionate, and a tremendous waste of taxpayer dollars. Three strikes laws should be narrowed so that they apply solely to serious violent felonies.

Repeat offender laws, which are much older than three strikes laws, also should be carefully studied, so that they do not result in mandatory sentences that are grossly disproportionate to the actual danger evinced by the offender's actions. Repealing or narrowing these laws could save tremendous amounts of money.

D. Adjusting Old Sentences in Light of New Laws

Finally, House Bill 11-1064, signed by Governor Hickenlooper in May 2011,[67] will work in tandem with the sentencing reforms of HB 10-1352 to ensure those already in prison under the older, harsher penalties will be given a presumption of parole at their next hearing.[68] Parole will be given provided standard conditions are met: the inmate has displayed satisfactory institutional behavior, is program compliant, has never been convicted of certain crimes involving children or the illegal possession of firearms, and does not have an active felony or immigration detainer.[69]

Because HB 10-1352 altered the laws governing these convictions, the effects of HB 11-1064 will be limited.[70] With an estimated release rate of approximately nine inmates per year, within five years there will be no more qualifying inmates left

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five years, or the term of the underlying offense plus any sentence enhancement, whichever is longest. *See Three Strikes Laws: Past and Present*, BULL. (NAT'L CONFERENCE ON STATE LEGISLATURES, Denver, Colo.), Oct. 2010, at 3, 4.

67. *See* H.B. 11-1064, 68th Gen. Assemb., 1st Reg. Sess. (Colo. 2011).

68. COLO. LEGIS. COUNCIL STAFF, FINAL FISCAL NOTE, SB 11-1064, CONCERNING A PAROLE PRESUMPTION PILOT PROGRAM FOR CERTAIN DRUG OFFENDERS, AND MAKING AN APPROPRIATION IN CONNECTION THEREWITH 1 (Aug. 11, 2011) [hereinafter, COLO. LEGIS. COUNCIL STAFF, HB 11-064], *available at* http://www.leg.state.co.us/clics/clics2011a/csl.nsf/fsbillcont3/60163A6D202F12B4872578010060475C?Open&file=HB1064_r1.pdf.

69. *Id.*

70. *Id.*

incarcerated.[71] By fiscal year 2014–2015, the total savings—lower incarceration costs minus somewhat higher parole costs—will be approximately $406,000.[72]

When the legislature lowers sentences for new crimes, adopting a presumption of parole for convicts serving time under the old system makes sense. When Colorado defelonized low-quantity marijuana possession in 1971, Colorado also should have begun paroling persons who were serving long felony sentences under Colorado's old felony marijuana law. When Congress in 1994 revised some extremely harsh mandatory sentences for drug offenses,[73] Congress explicitly refused to make those revisions applicable to persons currently incarcerated.[74] Fiscally speaking, it makes no sense not to do so.

II. ENDING PROHIBITION

National alcohol prohibition did not end because Americans suddenly turned libertarian. After all, the first two years of the New Deal were not exactly a peak period for libertarian influence in national politics. The various harms of alcohol prohibition (gang violence; police corruption; loss of civil liberties because of wiretapping and warrantless searches of automobiles; and deaths, from, inter alia, the government program to sell poisoned liquor on the black market[75]) were not significantly worse in 1933 than they had been in 1929. What changed from 1929 to 1933 was the arrival of the Great Depression and mass unemployment.

As Edward Behr wrote, the "Depression accelerated the swing away from prohibition . . . ."[76] Then, as now, both state govern-

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71. *Id.* at 2.

72. *Id.*

73. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 18 U.S.C. § 3553(f) (2006)).

74. The changes in mandatory drug sentences were known as the "safety valve." *See generally* Fred A. Bernstein, *Discretion Redux—Mandatory Minimums, Federal Judges, and the "Safety Valve" Provision of the 1994 Crime Act*, 20 U. DAYTON L. REV. 765 (1995). Because of controversy and last-minute legislative wrangling, Congress chose not to include a proposed retroactivity clause in the final legislation. *See id.* at 776 & n.85.

75. Deborah Blum, *The Chemist's War*, SLATE, Feb. 19, 2010, http://www.slate.com/articles/health_and_science/medical_examiner/2010/02/the_chemists_war.single.html.

76. EDWARD BEHR, PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA 233 (1996).

ments and the federal government began looking for ways to increase sagging tax revenue. The Sixteenth Amendment had made the passage of prohibition less burdensome financially for the government, because revenues lost from federal excise taxes on alcohol were more than offset by general income taxes revenues.[77] Much like today, however, the Depression brought both revenue shortfalls and increased spending that caused many to think the unthinkable, that is, ending alcohol prohibition. There was a "growing awareness among economists and business leaders, as well as private citizens, that by banning liquor, the government had, since 1920, cut itself off from extremely valuable tax revenue."[78] By 1933, there was a national consensus that the harms of alcohol consumption were outweighed by the benefits of breweries, vineyards, and taverns re-opening and providing jobs.[79] As unemployed people went to work in the alcohol business, they would become taxpayers instead of tax consumers via relief programs for the poor.

Today, unemployment is not so bad as at the depths of the Great Depression, but the United States government is approaching insolvency. The Congressional Budget Office (CBO) projects a budget deficit of $1.3 trillion for 2011, or 8.5% of GDP.[80] As a percentage of GDP, this year's deficit represents the third highest in history, exceeded only by the deficits of 2009 and 2010.[81] The national debt now exceeds a staggering $15 trillion.[82] As CBO recently put it, "[t]he United States is facing profound budgetary and economic challenges"[83]—which is like saying that "the Pacific Ocean contains a profound amount of water."

Drastic times call for drastic, and more humane, measures. Everybody can list somebody on whose "back" the budget

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77. KENNETH J. MEIER, THE POLITICS OF SIN: DRUGS, ALCOHOL, AND PUBLIC POLICY 139–40 (1994).

78. BEHR, *supra* note 76, at 232–33.

79. *See* DANIEL OKRENT, LAST CALL: THE RISE AND FALL OF PROHIBITION 476 (2010).

80. CONG. BUDGET OFFICE, CBO SUMMARY, THE BUDGET AND ECONOMIC OUTLOOK: AN UPDATE 1 (2011), *available at* http://www.cbo.gov/ftpdocs/123xx/doc12316/Update_SummaryforWeb.pdf.

81. *Id.*

82. Michael A. Memoli, *GOP Pounces as National Debt Tops $15 Trillion*, L.A. TIMES, Nov. 17, 2011, http://articles.latimes.com/2011/nov/17/news/la-pn-national-debt-20111117.

83. CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: AN UPDATE, at ix, (Aug. 2011), *available at* http://www.cbo.gov/ftpdocs/123xx/doc12316/08-24-BudgetEconUpdate.pdf.

should not be balanced: the poor, the job creators, the children, the military, and so on. Yet few have discussed the budgetary impact that a comprehensive reworking of drug policy, both nationally and locally, could have on budget shortfalls. Although the fiscal gains by themselves will not fix the debt crisis, eliminating or rolling back certain aspects of the drug war could reduce the severity of cuts in other programs that are both more effective and popular.[84] Legalizing marijuana has enjoyed increasing support, and currently, the majority of Americans believe that marijuana should be legalized.[85]

A. Fiscal Impact of Legalizing Marijuana on Colorado

The extreme deference the Supreme Court has given to Congress in using the Commerce Clause as a police power[86] can greatly infringe states' ability to raise tax revenues from economic activities within their own boundaries.

In a 2010 study for the Cato Institute, Harvard economist Jeffery A. Miron and Katherine Waldock estimated the budgetary effect of ending drug prohibition.[87] The study considered both savings on expenditures and revenue gained from the presumptive taxing of drugs that would occur in the wake of legalization.[88] Miron and Waldock's data are extensive, breaking down the expected gains not only by each state[89] but also by each substance,[90] each type of crime (for example, possession versus sales and manufacturing),[91] and each department (for example, police versus the department of corrections).[92]

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84. *See, e.g.*, Robert Parloff, *How Marijuana Became Legal*, CNN Money, Sept. 18, 2009, http://www.money.cnn.com/2009/09/11/magazines/fortune/medical_marijuana_legalizing.fortune/?/postversion=2009091116.

85. Frank Newport, *Record-High 50% of Americans Favor Legalizing Marijuana Use*, GALLUP, Oct. 17, 2011, http://www.gallup.com/poll/150149/Record-High-Americans-Favor-Legalizing-Marijuana.aspx.

86. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005) (upholding Congress's ability under the Commerce Clause to criminalize an individual's growth of marijuana for personal medicinal purposes in a state that had legalized medical marijuana use).

87. JEFFREY A. MIRON & KATHERINE WALDOCK, CATO INST., THE BUDGETARY IMPACT OF ENDING DRUG PROHIBITION (2010), *available at* http://www.cato.org/pub_display.php?pub_id=12169.

88. *Id.* at 1.

89. *Id.* at tbl. 6 & app. H.

90. *Id.* at apps. B, D, E, F, & G.

91. *Id.* at app. C.

92. *Id.* at apps. C & E.

According to one recent poll, 51% of Coloradans support legalizing marijuana.[93] Ending marijuana prohibition in Colorado is not only politically feasible, it makes economic sense. According to Miron and Waldock, in police expenditures alone, Colorado spends $36.6 million per year enforcing laws against marijuana.[94] A surprising 89.5% of this money is spent on enforcement against persons who merely possess marijuana.[95] Colorado also spends an estimated $20.7 million in court costs and nearly $18 million to incarcerate marijuana offenders.[96] So by legalizing marijuana, Colorado's net savings would be approximately $74 million per year. To put this savings in perspective, public K–12 school budgets were cut by $227.5 million in fiscal year 2011–2012 due to budget shortfalls.[97]

Saving on expenditures is not the only fiscal benefit that could come from legalizing marijuana. Miron and Waldock also calculate the revenue that could be gained from taxing legalized marijuana. Although these numbers are necessarily impossible to specify precisely—estimates must be made, for example, of the future price of legalized marijuana, the tax rate imposed, as well as the likely elasticity of demand—they give a general idea of what revenues can be expected. Miron and Waldock estimate that Colorado could raise $47.29 million in tax revenue by legalizing and taxing marijuana.[98]

So if Colorado legalized marijuana, Colorado could restore much of the large cuts that had to be made in state funding to K–12 schools.

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93. John Ingold, *Polls, dispensary bans show Coloradans are split over possibly legalizing marijuana*, DENV. POST, Nov. 26, 2011, http://www.denverpost.com/news/marijuana/ci_19414905.

94. MIRON & WALDOCK, *supra* note 87, at 30.

95. *Id.*

96. *Id.* at 31.

97. Tim Hoover, *Gov. Hickenlooper inks $18 billion Colorado budget, but some pieces still in play*, DENV. POST, May 7, 2011, http://www.denverpost.com/legislature/ci_18013050. Some of the cuts were later restored when tax revenues exceeded projections, but the cuts were nevertheless substantial and led to many layoffs of teachers and constriction of public school programs. Jessica Fender, *Hickenlooper plans to restore cuts to education, funding for poor seniors as Colorado sees hike in tax revenues*, DENV. POST, Dec. 20, 2011, http://www.denverpost.com/news/ci_19582333.

98. MIRON & WALDOCK, *supra* note 87, at 42.

B. Ending National Marijuana Prohibition

Relaxing federal prohibition of marijuana use is a prudent change that is needed in a time of $1.3-trillion deficits.

Large savings can result from small alterations in federal marijuana laws. For marijuana alone, the federal government spends approximately $3.4 billion per year policing, adjudicating, and incarcerating offenders.[99] Miron and Waldock estimate that the federal government could collect $5.8 billion per annum in taxes on marijuana.[100] Together, states and the federal government could save a total of $8.7 billion in expenditures and raise additionally $8.7 billion in revenue by legalizing and taxing marijuana.[101]

Short of complete legalization, there are other options that could have significant positive budgetary effects. Enforcement of the federal Controlled Substances Act should be limited to interstate or international drug trafficking. Local law enforcement officers should deal with the young man standing on the street corner selling marijuana, or the older man using cocaine, under state laws.

In 2004, the most recent year for which data are available, the Bureau of Justice Statistics reported that 5.3% of federal drug prisoners were convicted of possessing drugs, rather than trafficking.[102] According to the Supreme Court, such low-level drug offenders exist in the "stream of commerce,"[103] and thus Congress can assert power over them under the Commerce Clause. Expending federal resources to enforce laws that are redundant with state laws (for example, mere possession),[104] should be closely scrutinized when deficits are enormous.

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99. *Id.* at 7, tbl. 4.

100. *Id.* at 8, tbl. 5.

101. *Id.* at 1.

102. CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, BUREAU OF JUSTICE STATISTICS, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004, at 4 (2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/dudsfp04.pdf.

103. *See* Gonzales v. Raich, 545 U.S. 1, 19 (2005).

104. Penalties for mere possession can be found in 21 U.S.C. § 844 (2006).

III. HOW TO SAVE MONEY BY OBEYING THE TENTH AMENDMENT

Given the growing support for marijuana legalization, it might be worthwhile to look to the lessons, both fiscal and constitutional, that can be learned from the failed experiment with alcohol prohibition. By taxing alcohol, states generated nearly $6 billion in revenue in 2009,[105] and, as late as 1950, 5% of federal tax revenue came from alcohol taxes.[106] Constitutionally speaking, lessons can be taken from both pre-Prohibition constitutional doctrine and post-Prohibition doctrine, specifically regarding the Commerce Clause. In general, prohibition—whether of drugs, alcohol, or switchblades—poses a unique challenge for our federalist system of dual sovereignty.

Ideally, either prohibition or legalization should be the result of each state's decision whether to exercise its police power. Within their own borders, states should be able to choose either a prohibition system or a tax and regulatory system; the choices made by any particular state should not unduly impinge on the ability of other states to make different choices. Yet prior to the enactment of the Eighteenth Amendment, the Supreme Court often gave the "dormant" prong of the Commerce Clause a broad interpretation and thereby rendered states unable to effectively prohibit alcohol within their borders.[107] Thus, out of necessity, what began as a movement for local prohibition became a movement for national prohibition, eventually coalescing into the Eighteenth Amendment.

We face a similar problem now. This time, however, because of the Court's excessive and aggressive interpretation of the Commerce Clause in *Gonzales v. Raich*,[108] states are unable to

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105. TAX POLICY CTR., ALCOHOL TAX REVENUE (2011), *available at* http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=399&Topic2id=80.

106. Thomas F. Pogue, *Alcohol beverage taxes, federal*, *in* THE ENCYCLOPEDIA OF TAXATION & TAX POLICY 5, 5 (Joseph J. Cords et al. eds., 2005).

107. *See* Rachel M. Perkins, Note, *Wine Wars: How We Have Painted Ourselves Into a Regulatory Corner*, 12 VAND. J. ENT. & TECH. L. 397, 402–05 (2010).

108. 545 U.S. 1 (2005); *see also* Robert A. Minos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009) (insisting that states have the power to exempt medical marijuana from federal criminal sanctions); Ilya Somin, Gonzales v. Raich*: Federalism as a Casualty of the War on Drugs*, 15 CORNELL. J.L. & PUB. POL'Y 507 (2006) (arguing that *Raich* was wrongly decided, resulting in the destruction of many of the benefits of our federalist system).

effectively legalize and tax marijuana—even medicinal marijuana—within their borders. Under both situations—that is, both the expansive interpretation of the dormant commerce clause prior to Prohibition and the modern interpretation of the Commerce Clause that supposedly authorizes nationwide drug prohibition—states face difficulties being laboratories of democracy that can "try novel social and economic experiments without risk to the rest of the country."[109]

In October 2010, as Californians were preparing to enter the voting booth and vote on Proposition 19, which would have legalized non-medicinal marijuana and allowed for its taxation,[110] U.S. Attorney General Eric Holder told the citizens of California that they were essentially powerless, because the federal government would "vigorously enforce the [Controlled Substances Act] against those individuals and organizations that possess, manufacture or distribute marijuana for recreational use, even if such activities are permitted under state law . . . ."[111]

A paradigmatic use of the police power—the power to legislate over the health, safety, welfare, and morals of a people—is to prohibit drugs, which are deemed harmful to all four objects of the power.[112] For exactly the same reason, the decision to legalize drugs also is a paradigmatic example of the States' police power. Yet through the Controlled Substances Act's prohibition on mere possession, the federal government has unconstitutionally usurped these traditional powers of the States.[113]

Commentators remark on the parallels between modern drug prohibition and federal alcohol prohibition of the 1920s and early 1930s.[114] There is one aspect, however, that is sharply disanalogous: Federal alcohol prohibition required a constitutional amendment, whereas federal drug prohibition has been

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109. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

110. STATE OF CAL., LEGISLATIVE ANALYSIS OFFICE, PROPOSITION 19: CHANGES CALIFORNIA LAW TO LEGALIZE MARIJUANA AND ALLOW IT TO BE REGULATED AND TAXED (2010), *available at* http://www.lao.ca.gov/ballot/2010/19_/1_2010pdf.

111. Aliyah Shahid, *Attorney General Eric Holder: Federal laws enforced even if marijuana bill in California passes*, DAILY NEWS (N.Y.), Oct. 16, 2010, http://www.nydailynews.com/news/national/attorney-general-eric-holder-federal-laws-enforced-marijuana-bill-california-passes-article-1.191703.

112. *See, e.g.*, Daut v. United States, 405 F.2d 312, 316 (9th Cir. 1968).

113. *See Raich*, 545 U.S. at 42 (O'Connor, J., dissenting).

114. *See, e.g.*, Ethan A. Nadelmann, *Let's End Drug Prohibition*, WALL ST. J., Dec. 5, 2008, at A21.

accomplished entirely by statute. Before national alcohol prohibition, the Supreme Court made it essentially impossible for a state to fully prohibit alcohol within its borders; today, Congress has made it essentially impossible for a state to legalize drugs within its borders. Both problems arose from illegitimate interpretations of the Commerce Clause that usurp the sovereign powers of the States.

The Controlled Substances Act, as amended, declares that "[c]ontrolled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate."[115] The statute also declares that "[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic."[116] Although these two statements might be true, they also were true of alcohol prior to prohibition.

Initially, alcohol prohibition was pushed on a local level by the temperance movement.[117] In 1890, sixteen states had laws prohibiting alcohol.[118] That same year, Congress passed the Wilson Act[119] to empower states to deal with the problem of imported alcohol.[120] The Act provided that, upon arrival in the state, shipments of imported liquor would be "subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent

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115. 21 U.S.C. § 801(5) (2006).

116. *Id.* § 801(6).

117. Originally, "temperance" meant being "temperate," that is, moderate. Temperate drinking would be two glasses of wine with dinner; intemperate drinking would be a dozen shots of whiskey at the saloon. Eventually, prohibitionists appropriated the word "temperance" for themselves. For an examination of the growth and ultimate failure of the alcohol prohibition movement, see OKRENT, *supra* note 79.

118. Ethan Davis, Liquor Laws and Constitutional Conventions: A Legal History of the Twenty-first Amendment 6 (Apr. 1, 2008) (unpublished law school paper), *available at* http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1065&context=student_papers.

119. Ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (2006)).

120. Davis, *supra* note 118, at 6.

and in the same manner as though such liquids or liquors had been produced in such State or Territory . . . ."[121]

The Wilson Act was largely a response to *Bowman v. Chicago & Northwestern Railway Co.*, which invalidated an Iowa law that required in-state shippers of alcohol to have certificates from proper state officials.[122] In concurrence, Justice Stephen Field stated that the "law of Iowa prohibiting the importation into that State of intoxicating liquors is an encroachment on the power of Congress over interstate commerce."[123] Yet even after the Wilson Act, the Supreme Court, in *Vance v. W.A. Vandercook Co.*, ruled that a state could not use the Act to completely prohibit the importation of alcohol across its borders.[124] As the Court noted:

> [t]he right of persons in one State to ship liquor into another State to a resident for his own use is derived from the Constitution of the United States, and does not rest on the grant of the state law. Either the conditions attached by the state law unlawfully restrain the right or they do not. If they do . . . then they are void.[125]

Vance was based on a constitutional doctrine now referred to as the "dormant commerce clause,"[126] which is premised on the idea that states are prohibited from some actions that interfere with interstate commerce.[127] The dormant commerce clause remains a major element of constitutional law today.[128]

As a result of *Vance*, states were hamstrung in maintaining an effective level of prohibition.[129] With Congress operating under the original meaning of the Commerce Clause, Congress recognized that it could not use the clause to prohibit simple

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121. 27 U.S.C. § 121 (1890).

122. 125 U.S. 465 (1888).

123. *Id.* at 500 (Field, J., concurring).

124. 170 U.S. 438 (1898).

125. *Id.* at 452–53.

126. *See* United Haulers Ass'n, Inc. v. Oneida-Herhimer Solid Waste Mgmt. Auth., 550 U.S. 330, 361 (2007).

127. *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 401–02 (1994).

128. *See, e.g.*, Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417 (2008); Daniel Tyler Cowan, Recent Development, *New York's Unconstitutional Tax on the Internet:* Amazon.com v. New York State Department of Taxation & Finance *and the Dormant Commerce Clause*, 88 N.C. L. REV. 1423 (2010).

129. *See* Andre Nance, *Don't Put a Cork in* Granholm v. Heald*: New York's Ban on Interstate Direct Shipment of Wine is Unconstitutional*, 16 J.L. & POL'Y 925, 960–61 (2008).

possession. Thus, there seemed to be no governmental entity with the power to enforce alcohol prohibition.

In response to the problem, temperance advocates did not advocate a specious new interpretation of Congress's Commerce Clause power that would give Congress the power to impose prohibition. Instead, prohibitionists pushed for a narrowly worded constitutional amendment that would expand Congress's powers just enough to accomplish alcohol prohibition.[130]

The Controlled Substances Act, and the Commerce Clause-expanding Supreme Court cases it depends upon, takes the opposite tack: Congress's power is increased by judicial fiat. The Supreme Court endorsed an extensive federal power over drugs in *Gonzales v. Raich*, holding that the federal prohibition on medical marijuana lawfully used according to state law is a valid use of the Commerce Clause power.[131]

The proper relationship between the federal government and the states should allow for those states that desire to either prohibit or legalize drugs, or even alcohol, and to effectively use their police powers to accomplish the task. Under pre-Prohibition interpretations of the Commerce Clause, effective prohibition was extremely difficult. Before the Eighteenth Amendment, the anti-prohibitionist states' preferences were imposed upon the states that desired prohibition. Now the obverse is true: Modern Commerce Clause doctrine imposes the preferences of the prohibitionists on states that choose to legalize.

The modern misuse of federal power severely impedes a state's ability to effectively tax legalized marijuana within its borders. At a time when the State of California and California local governments are having terrible budget problems, their taxation of legal medical marijuana is being thwarted by the U.S. Attorney General. Contrary to the campaign promises of then-candidate Barack Obama,[132] Attorney General Eric Holder

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130. *See* U.S. CONST. amend. XVIII.

131. 545 U.S. 1 (2005).

132. *See, e.g.*, E.D. Kain, *Obama Administration Shatters Campaign Promise, Escalates Crackdown on Medical Marijuana*, FORBES, Oct. 7, 2011, http://www.forbes.com/sites/erikkain/2011/10/07/obama-administration-shatters-campaign-promise-escalates-crackdown-on-medical-marijuana/.

announced a policy to devote federal resources to the prosecution of medical marijuana dispensaries in California.[133]

The problem of federal interference with state taxation will grow worse when, almost inevitably, states' voters choose to legalize marijuana in general, not just for medical use. Consider, for example, California's Proposition 19. Had a mere 4% of voters changed their minds, the legalization would have passed.[134] Supporters of the ballot initiative pointed to the savings that could result from eliminating the $156 million that California spends on marijuana prohibition[135] and to the $1.4 billion in tax revenue that marijuana excise and sales taxes would provide.[136]

Professor Robert A. Mikos examined how the "wrench thrown into the machine by federal law" would lead to widespread tax evasion.[137] Mikos argues that continuing federal prohibition concurrent with state legalization would incentivize tax evasion for two reasons:

> 1) [i]t would preserve the current fragmented structure of the marijuana market, by giving marijuana distributors an incentive to remain small and to operate inconspicuously; and 2) it would put state tax collectors in a dilemma, because federal authorities could use state tax rolls (and similar state-gathered information) to track down and punish tax-paying marijuana distributors.[138]

The first reason is based on the simple fact that the risk of federal prosecution creates an incentive for a business to remain small and try to stay under the radar. Furthermore, other federal laws, such as the Lanham Act,[139] prohibit trademark

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133. *See* Michael Winter, *U.S. crackdown targets dozens of Calif. pot shops*, USA TODAY, Oct. 7, 2011, http://content.usatoday.com/communities/ondeadline/post/2011/10/feds-order-all-calif-medical-marijuana-outlets-to-close/1.

134. *See* GREENBERG QUINLAN ROSNER, MARIJUANA PROJECT—PROPOSITION 19 IN PERSPECTIVE 1 (2010), *available at* http://www.greenbergresearch.com/index.php?ID=2538 (noting that Prop. 19 failed 54–46).

135. *L.A.'s Marijuana Industry*, THE WEEK, BY THE NUMBERS, June 9, 2010, http://theweek.com/article/index/203833/las-marijuana-industry-by-the-numbers.

136. CAL. STATE BD. OF EQUALIZATION, STAFF LEGISLATIVE BILL ANALYSIS, BILL NO. AB 390, at 6 (July 15, 2009) *available at* http://www.boe.ca.gov/legdiv/pdf/ab0390-1dw.pdf.

137. Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, 2010 U. CHI. LEGAL F. 223, 226 (2010).

138. *Id.* at 251.

139. Ch. 540, 60 Stat. 427 (1946) (codified as amended in scattered sections of 15 U.S.C.).

registration for any "product proscribed by federal law, including marijuana."[140] Insofar as trademarks help build market share—as they have done in the strongly brand-loyal cigarette market—such prohibitions could inhibit growth of marijuana producers. The second reason is that the paper trail of state taxation could be seized by federal agents "and there is nothing the states can do to stop them."[141]

This is wrong. Police powers reside in the States, and the People have never granted them to Congress.[142] Yet because of *Raich*, it is Congress, and not the States, which de facto exercises the police power as to whether certain drugs will be legal.

The Supreme Court properly retreated from the excessive Commerce Clause interpretations in *Bowman* and *Vance*. Today, a state can ban the shipment of alcohol, as long as the state does not discriminate between shippers who are located within the state and shippers whose product is produced outside the state.[143] The Court should likewise retreat from *Raich*, and recognize, as did *Raich*'s three dissenters, that it is indisputable that the Founders who wrote the Constitution and the People who ratified it unanimously intended to deny Congress a general police power.[144] If there is any ambiguity, the Ninth and Tenth Amendments provide the decisive rules of interpretation: The People's liberties are to be construed broadly, and the federal government's powers are to be construed narrowly, *especially* when those powers are attempted to be used to infringe the People's right of self-government within the States.[145] Among the many reasons that the Court should perform its duty to declare unconstitutional the congressional usurpation of the police power is that such usurpation infringes not only the police power, but also the tax power of the States. During a time of fiscal austerity, it is wrong as a matter of policy, and as

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140. Mikos, *supra* note 137, at 257 (discussing 15 U.S.C. § 1051(a)(3)(c)).

141. *Id.* at 258.

142. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 566 (1995) ("The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.").

143. *See* Granholm v. Heald, 544 U.S. 460, 492–93 (2005).

144. *See, e.g.*, Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469 (2003).

145. Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and "Expressly" Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1922–26 (2008).

a matter of constitutional law, for Congress to prevent states from raising revenue from intrastate economic activities whose control was never granted to Congress, but which the Constitution reserved to the States and the People, respectively.