



How Many Laws Did You Break This Week?

Overcriminalization in Colorado

by Mike Krause and Chelsea Johnson
Justice Policy Initiative

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13952 Denver West Parkway • Suite 400 • Golden, Colorado 80401-3141
www.IndependenceInstitute.org • 303-279-6536 • 303-279-4176 fax

“It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is to-day can guess what it will be tomorrow”

James Madison, fourth President of the United States and delegate to the original U.S. Constitution Convention.

The Federalist, number 62.

Executive Summary

There is a principle in jurisprudence that “ignorance of the law is no excuse.”¹ In other words, no one can justify his illegal conduct on the grounds that he was unaware of the law. But what happens when the sheer volume, complexity, and ambiguity of the

law means that neither citizens, nor the government, can reasonably know what is and is not against the law?

Colorado currently has some 30,000 laws filling more than 50 volumes of the Colorado Revised Statutes, both criminal and regulatory. Every session, the Colorado General Assembly passes hundreds of new laws for government to enforce and citizens to both understand and obey.

Aside from the sheer number of laws, the definition of what constitutes

a criminal act has changed; often the legislature actually creates new crimes, and thus, new criminals, where no inherent criminality exists.

Overcriminalization detracts from the seriousness of the law. This in turn breeds a lack of respect for the law.

Overcriminalization is also a step backwards from the concept of clear and simple rules—essential for dynamic and vibrant economic activity—so that both individuals and businesses can be reasonably sure as to the legality of activity in which they are engaging.

This paper will examine several consequences of overcriminalization including:

- The dramatic increase in the quantity of laws in Colorado, and the relative inability of both citizens and businesses to be in compliance, and the wide latitude this offers both police and prosecutors.
- The expanded definition of what constitutes a crime (public welfare laws), and the erosion of

mens rea (bad intent) in favor of strict liability, and the threat posed to Colorado businesses.

This paper also looks at trends in overcriminalization both in Colorado and nationwide and makes recommendations for legislators, including:

- Alternatives to use of the criminal law in pursuing public policy goals.
- A checklist of issues to consider before creating new crimes.

Introduction

In April 2005—after a month-long investigation—a police SWAT team raided a small stakes poker game in a Palmer Lake, Colorado restaurant. Twenty-four individuals were arrested and given misdemeanor summons for participating in the poker circle. Restaurant owner Jeff Hulsmann faces both felony and misdemeanor charges for “allegedly hosting gambling activity in a licensed liquor establishment.” None of the accused, including Hulsmann, believed their activities to be illegal.²

They were not alone in their confusion about state laws. Upon notification of the ongoing poker game, Palmer Lake police turned the case over to state liquor enforcement officials because local law enforcement was “uncertain whether it was legal or not.”³

Neither Hulsmann nor his business received or handled any money related to the poker games, Hulsmann will, if convicted, carry a felony charge, and the post-incarceration punishment of lost opportunities in obtaining employment or credit, along with lost civil liberties, such as a lifetime ban on gun ownership. As a small business owner, he will be ruined.

The poker game in Hulsmann’s restaurant consisted of consenting adults peacefully risking their own money in a game of skill.

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Colorado's ambiguous gambling statute starts with a legislative declaration concerning the morality of gambling, aiming to "restrain all persons from seeking profit from gambling activities..."⁴ This despite the fact that the state government operates

the Colorado State Lottery, a game of pure chance and the state's largest gambling operation.

The fact that a Colorado citizen and small business owner can be charged with a felony not for gambling, but for *allowing* gamblers to enter one's business, is a prime example of overcriminalization in Colorado.

Too Many Laws

In his book *Drug War Addiction*, Sheriff Bill Masters of San Miguel County Colorado describes his discovery of the Colorado Statutes of 1908. At the time, "all the laws of

the state fit in one volume. Murder, rape, assault, stealing, and trespassing were all against the law in 1908."⁵

Currently, Colorado has more than 30,000 laws filling more than 50 volumes of both criminal and regulatory statutes. The drastic increase in the quantity of laws distracts police from concentrating on the serious violent and property crimes, which have always been illegal, including in 1908.

Too many laws mean too many technical "criminals," and, consequently, disrespect for the law. As Sheriff Masters writes, today, "lawlessness is commonplace, even in vogue."⁶

In the Cato Institute's book *Go Directly to Jail: The Criminalization of Almost Everything*, James V. DeLong writes, "When the government criminalizes almost everything, it also trivializes the very concept of criminality."⁷

In the 2005 legislative session, Colorado lawmakers introduced 602 bills, of which 402 were passed.⁸ Governor Owens then vetoed 47 of those bills. So the percentage of bills introduced to bills actually becoming law was 59 percent.

An analysis by *Denver Post* columnist Fred Brown found that the pre-veto 67 percent "is well above any legislative batting average in at least the past nine sessions." As for the post-veto 59 percent, Brown found that to be "about the same as most years."⁹

Colorado lawmakers, both Republican and Democratic, have been in an ongoing law-making binge, doing their part to 'trivialize' criminality and lawlessness.

As DeLong notes, "It seems as if the Left and the Right have entered into an agreement whereby each side gets to criminalize conduct it abhors so long as it lets the other do the same."¹⁰

The Governor's veto pen notwithstanding, the trend in Colorado is toward more, rather than fewer, new laws.

Public Welfare Laws, No Bad Intent Required

The vastness of the body of law means that a good moral compass is no longer sufficient to know legal from illegal. In earlier times, personal judgment could keep a person in line with the law; every decent person knows that stealing another person's property is inherently wrong. Acts that create wrongs against others are called *malum in se*—wrong in and of themselves.

In Colorado, crimes such as murder, rape, assault and robbery, have long been on the books, as have theft, trespassing, and other property crimes. While technology has created new ways to commit fraud or

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embezzlement, the basic elements of these financial crimes have remained unchanged from the days of common law.

Since real crimes against people and their property have long been codified, legislators now have to satisfy themselves with passing “public welfare” laws. These laws criminalize activities and behavior not inherently wrong, but are only “wrong” due to a legislative declaration—*malum prohibitum*.

Such new crimes increase demands on police, the courts, and the public—creating new criminals, while often delivering dubious benefits.

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As of July 1, 2005, it is a crime in Colorado to buy more than three packs of cold medication, such as Sudafed, at one time. The criminalization of Sudafed is meant to address illegal methamphetamine production, in which Pseudoephedrine—an active ingredient in cold medicines such as Sudafed—is used. This does not change the fact that the legislature

created a crime (selling or buying four rather than three boxes of cold medicine) where no inherent criminal behavior exists.

Another example is Senate Bill 34, which criminalizes the sale or use of AWOL (Alcohol without Liquid) devices, by which alcohol is ingested in a vapor, rather than liquid form. The Legislature panicked over AWOL because alcohol is absorbed through blood vessels in the nose or lungs “creating a more intense ‘high’ or intoxicating effect on the brain.”¹¹

But according to AWOL’s American distributor,¹² there is a “built-in” safety device because it takes about 20 minutes to inhale one vaporizer shot of alcohol (about 1/2 actual shot size).” That equals one and a half full shots per hour. In 20 minutes, many more shots of alcohol can be consumed the old-fashioned way.

In other words, Colorado legislators made a crime out of a potentially safer method of consuming alcohol.

The 2005 legislative session also found Colorado lawmakers debating statewide smoking bans and primary seat belt laws,¹³ both of which will undoubtedly be re-introduced in the next legislative session.

The sheer number of such “public welfare” laws on the books makes it impossible to enforce these laws consistently. And since a sense of right and wrong is no longer a guide to remaining a law-abiding citizen, the average Coloradoan has no hope of complying with all of them. This breeds a lack of respect for the rule of law itself.

Too Many Laws Empower Only Bureaucrats

In July 2005, a San Marcos, Texas man saved another man caught in the current of the San Marcos River. The Good Samaritan was arrested by local police and charged with “interfering with public duties” for failing to obey orders by emergency personnel to get out of the water.¹⁴

Another problem with too many and overly broad laws is that they often leave deciding what is, and is not a crime solely to the discretion of public officials.

Most Colorado municipalities have their own versions of “interfering” laws. In Northglenn, Colorado, for example, “Disobeying—Refusing to Aid”¹⁵ makes it a crime to disobey an order by police to assist during an emergency.

Also in Northglenn, “Interfering with Public Officers or Employees” makes it a crime to “...fail to refuse

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to comply with the order of any officer having police power within the city.¹⁶

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Yet disobeying authority is sometimes necessary to save lives. On September 11, 2001, 911 operators told occupants of the burning World Trade Center towers to stay put and await rescue. It was also standard training in the towers (as in most high rise buildings) to use stairs rather than elevators for evacuation. According to a 2004 report by the National Institute on Standards

and Technology (NIST),¹⁷ occupants of the towers ignored the official instructions and existing rules and immediately began evacuating, including using the elevators, saving some 2,500 lives.

According to an analysis of the NIST report, “In fact, the people inside the towers were better informed and far more knowledgeable than emergency operators far from the scene.”¹⁸

Yet the bold, life-saving acts of citizens in New York City might easily be considered criminal in Colorado.

For instance, in the city of Lakewood, Colorado, it is unlawful to disobey any “fireman, emergency personnel or military personnel given incident to the discharge of the official duties of such police officer or fireman...”¹⁹

So in an overcriminalized state, surviving a disaster—man-made or natural—or helping others to survive, may necessitate breaking the law by acting contrary to the instructions of emergency personnel.

All such broad “obey government officials or else” laws should be narrowed to contain an affirmative defense for citizens taking decisive actions on their own during emergencies.

The Criminalization of Earning a Living

In addition to the overly-large body of Colorado law, there are more than 4,000 federal crimes in the 27,000 pages of the *U.S. Code*. These include violations of the regulations expressed in the tens of thousands of pages of the *Code of Federal Regulations*, on which Congress never voted.²⁰ Therefore, even if a Colorado business owner believes himself to be in total compliance with Colorado law, he still may unknowingly be violating federal law.

In addition to the overly-large body of Colorado law, there are over 4,000 federal crimes in the 27,000 pages of the U.S. Code.

Preston Oade, a Denver attorney explains, “[State] worker compensation laws have incentives for an employer to put injured workers on light duty jobs, but under the ADA (federal Americans with Disabilities Act) this can be used as evidence that the employer perceives the employee as ‘disabled,’ or that the employer has changed the job requirements so the employee now can claim they are entitled to light duty as a full time job.”²¹

The body of law at the federal level is complicated and difficult with which to comply. It might seem appropriate then for lawmakers to assist business in legal compliance at the state level through fewer, clearer laws. But across the country, the trend is toward more new laws for business to both understand and obey, or inadvertently violate.

According to a 2003 overcriminalization study by the Virginia-based Stateside Associates, slightly more than half of American states have recently enacted “significant corporate criminalization developments.”²²

Among the findings: California in 2003 established strict civil liability for environmental regulation violations for “people who cause or permit a

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hazardous substance to be discharged into water of the state regardless of whether it caused a condition of pollution or nuisance.” In other words, in California, you can be held strictly liable for polluting even if you do not actually pollute anything.

In 2001, Ohio changed from a *mens rea* standard to “strict liability” not only for persons who actually violate

the state’s Pesticide Law; now “the employer is liable for and may be convicted of the violation if the person was acting on behalf of the employer.” In other words, a landscape contractor with several crews working can be convicted for a regulatory violation committed by a foreman, even if neither the foreman nor employer had any criminal intent.

Similarly unjust laws exist at the federal level. For example, Edward Hanousek, Jr., a road master for a railroad in Alaska, was prosecuted in criminal court when a backhoe operator working under him swept rocks off a section of the track, accidentally rupturing an oil pipeline near the construction area. Not only did Mr. Hanousek not cause the mistake, he was off duty and away from the site at the time. He was sentenced to six months in prison for violation of the Clean Water Act.²³

As legal scholar Marc Levin of the Texas Public Policy Foundation explains, “Because it is based on moral condemnation rather than a weighing of interests, criminal law tends to be an overly blunt instrument for regulating business activities, particularly those not committed with intent to defraud.”²⁴

Stateside Associates also reports the creation of new financial crimes (Montana, Maryland and Mississippi), new or expanded criminal penalties for existing regulatory violations (New Hampshire, Michigan and New York), and expanded corporate

liability for financial reporting (Illinois, Kansas and Massachusetts).²⁵

Colorado was one of the states without “significant” developments in corporate criminalization in 2003. But in the 2005 Legislative Session, Colorado lawmakers did try to create new laws for business people to comply with, or inadvertently violate.

For instance, HB-1115, which Colorado Governor Owens vetoed, would have mandated access by employees to their personnel files.

The law also includes new civil liability for recordkeeping violations up to \$10,000, and daily fines for non-compliance up to \$250 per day. The law defined an employer as anyone having even one employee. The bill was a threat to any small business

owner who sees his top priority as working his business rather than ensuring his personnel files are up-to-date and accessible to employees.

The trend in Colorado is toward more and more new laws, but lawmakers should note that criminal penalties, both felony and misdemeanor, already exist throughout Colorado’s regulatory codes. Many of these crimes require at least some kind of guilty knowledge on the part of the offender, but others are strict criminal liability offenses, punishable despite the absence of criminal intent or negligence. These strict liability offenses can often be identified by the lack of qualifying words denoting intent, such as “knowingly” or “intentionally.”

In Colorado’s Labor and Industry regulations,²⁶ the Youth Employment Opportunity Act (child labor law) makes it a crime for someone legally responsible for a minor to “knowingly” permit the minor to work in violation of the statute.²⁷

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Yet elsewhere in labor and industry law, statutes require neither knowledge nor intent for a criminal violation:

- Anyone who violates any of the numerous provisions of the Industrial Claim Appeals Office regulations is guilty of a misdemeanor crime.²⁸ For instance, the misdemeanor applies to anyone who simply “fails” to produce “books, papers, and records” in response to a lawful subpoena.²⁹ But what if the person in question had no knowledge of the existence of certain materials relevant to the subpoena? Strict criminal liability does not take into account a good faith effort on the part of the accused.
- In the Fuel Products regulations, anyone “who fails to comply” is guilty of a misdemeanor.³⁰ So simply refilling or using a container for cooking gas that “has imprinted thereon the name, initials, or trademark of the owner” and you are not the owner or authorized by the owner, is a crime.³¹ If the problem is theft of containers, there are already laws against that.

Colorado law concerning financial institutions³² also contains differing standards for criminal violations:

- The felony criminal offense for securities fraud,³³ and other felonies for lesser securities law violations,³⁴ requires one to “willfully” violate the statute.
- Similarly, under the Foreign Capital Depositories regulations,³⁵ a felony financial record disclosure crime requires that one “knowingly” disclose the record in violation of the statute.³⁶
- But the less serious misdemeanor disclosure crime requires only that one “discloses” the record in violation of the statute.³⁷ It is legal to disclose a financial record “that is not identified with or identifiable as being derived from a financial record of a particular customer by name.”³⁸ So if a clerk forgets to remove a customer's identifying information from a disclosed document, or is unaware he

is required to, the clerk is a criminal. The statute already offers civil relief of ten thousand dollars “without regard to the type or number of records involved” for wrongful disclosure,³⁹ making strict criminal liability unnecessary to deter accidental disclosure.

Colorado statutes concerning Professions and Occupations⁴⁰ contain numerous strict criminal liability violations for regulated occupations:

- The Drugs and Druggists⁴¹ regulations require only a violation of its provisions to be a misdemeanor crime, with a second or subsequent violation being a felony.⁴² In other words, even the inadvertent violation of two entirely different provisions of the law makes a citizen a felon, regardless of intent. For instance, it is a violation to dispense drugs “without complying with the labeling, drug identification, and container requirements imposed by law.”⁴³ Yet mislabeling drugs, or using the wrong container, may involve incompetence or a simple mistake rather than an intentional violation. The statutes already give broad authority to the state board of pharmacy to suspend or revoke licenses in such situations.⁴⁴ Civil sanctions should be adequate when the act does not involve criminal negligence.
- The statutes for Money Orders impose strict criminal liability, requiring only a violation of the article.⁴⁵ Yet the power to “make, promulgate, alter, amend or revise” rules and regulations for enforcement of the article lies with the banking board.⁴⁶ The banking board also has the power to revoke licenses,⁴⁷ an adequate punishment for unintentional regulatory violations.

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If you see a 35 mph road sign, and your speedometer says you are going 55 mph, you can be fairly sure

you are speeding, and breaking the law. But if you inadvertently violate some provision of Colorado's regulatory code, should that error make you a criminal?

Here is a federal example of how criminal penalties combined with strict liability within an incomprehensible body of regulatory law actually works: Two American business owners, Bob

Blandford and Abner Schoenwetter, are each serving more than eight years in federal prison. The underlying crime was the inadvertent importing of undersized and improperly packaged lobster tails from Honduras in violation of the federal "Lacey Act," which regulates trading in seafood from other countries. Because money changed hands (as it tends to do in trade), everyone involved was charged with money laundering. Because the lobster tails were packaged in plastic rather than cardboard, as the relevant regulations require, smuggling was tacked on. In other words, business people were criminally prosecuted in

the course of enforcing a regulatory violation, where no criminal intent was ever shown.⁴⁸

Given the spectacular recent corporate criminal cases such as Enron and WorldCom, it may be tempting for state lawmakers to jump on the bandwagon and pass new laws, or expand existing laws and punishments concerning business conduct. But "white collar" crime is not just about multi-billion dollar corporations. Corporations, and business entities in general, include sole proprietors, partnerships, independent contractors and just about every non-wage earner trying to make a living.

A guide for Legislators:

In 2005, the Virginia State House overwhelmingly passed a bill criminalizing the wearing of pants so low that underwear is visible in "a lewd or indecent

manner." A Senate committee later killed the bill.

The sponsor of the bill issued a statement saying the bill "was in direct response to a number of my constituents who found this to be a very important issue."

When constituents request dumb "droopy-pants" style legislation, which detract from the seriousness of the law, a standard response for Colorado legislators should be: *I can't help you, this is simply outside the boundaries of what responsible and limited government should be concerned with.*

Further, the legislature should reform strict criminal liability. All criminal offenses in Colorado should include some culpable state-of-mind requirement such as "willful," "knowing," or criminally negligent. Strict criminal liability is contrary to the best traditions of American law.

The Texas Public Policy Foundation has produced a "checklist" for state lawmakers to use when considering whether to regulate yet more of everyday business and personal affairs.⁴⁹ These suggestions are equally applicable in Colorado as Texas.

Should it be against state law?

- Should the conduct be prohibited at all or will the free market provide a sufficient disincentive?
- Should the conduct be regulated by state government, or might it be better addressed by local government entities that can tailor policies to their own communities?

Should it be a crime?

- Does the conduct present a threat to public safety? If not, civil penalties may be more appropriate.

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- Is the conduct inherently wrong and therefore properly prohibited regardless of its benefits in some circumstances? If not, criminal penalties may be too rigid of an enforcement mechanism.
- Should enforcement be dependent entirely on the discretion of local prosecutors? Would civil penalties, forfeiture of state licenses and permits, a private cause of action, or other remedies be equally or more effective in providing redress to the victim and discouraging the conduct?
- If the conduct is part of a business activity, does criminalization unfairly place the burden of personal criminal liability on employees for acts committed within the scope of employment?

If it is a crime, what should the punishment be?

- Does the individual pose a danger to society? If not, incarceration may be an unnecessary expense for the state. Probation, fines, and restitution may provide a sufficient deterrent to prevent recidivism.
- Should the offense be classified as a misdemeanor or a felony? Felony convictions are more likely to permanently interfere with the offender’s ability to obtain employment and housing, undermining efforts to promote community reintegration.

Conclusion

An overly broad, complex and ambiguous body of law is contrary to the American principles of free and open markets, limited and responsible government and both personal and economic liberty. The American Founders’ vision was free people responsible for mapping their own destinies and fortunes within a limited framework of clear and certain laws.

Overcriminalization means that the difference between legal and illegal is often arbitrary and uncertain. It is highly likely that Colorado businesses, whether a sole proprietor or a large

corporation with a human resources staff, often break the law without even knowing it.

And as in the case of restaurant owner Jeff Hulsmann, it is reasonable to expect that crimes for which a person can be ruined for life should be clearly defined and obvious both to those obligated to obey the law, and to those tasked with enforcing it.

As a sign of good faith, the Colorado General Assembly should dedicate the next legislative session towards paring back overcriminalization in the Colorado statutes.

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¹ This concept dates back to Roman law and is expressed in the Latin, *ignorantia legis non excusat*.

² Reuter, Jane. "Small-town poker bust criticized as overblown." *Colorado Springs Gazette*, April 29, 2005.

³ *Ibid*.

⁴ Colorado Revised Statutes 18-10-103

⁵ Masters, Bill, *Drug War Addiction*. St. Louis: Accurate Press, 2001, 95.

⁶ *Ibid*.

⁷ DeLong, James V., "The New 'Criminal' Classes." *Go Directly to Jail*. Washington: Cato Institute, 2004, 35.

⁸ Hillman, Mark, "The Good News on Session 2005: It Could Have Been Worse," *Coloradosenate.com*, May 15, 2005.

http://www.coloradosenate.com/results.php3?news_id=795

⁹ Brown, Fred, "Vetoes even odds at Capitol," *Denver Post*, July 31, 2005. http://www.denverpost.com/brown/ci_2897715

¹⁰ DeLong, 11.

¹¹ CRS 12-47-902.5 (1)(a)(III)

<http://www.awolusa.com>

¹³ Not wearing a seatbelt is currently a secondary offense in Colorado. Police can ticket a driver or passenger for not wearing a seatbelt only if the vehicle were pulled over for some other, primary offense, such as speeding.

¹⁴ Associated Press, "Houston swimmer's rescuer ends up in jail," *Houston Chronicle*, July 5, 2005. <http://www.chron.com/cs/CDA/ssistory.mpl/front/3252707>

¹⁵ Northglenn Municipal Code, sec. 9-5-6.

http://www.northglenn.org/municode/ch9/content_9-5.html

¹⁶ Northglenn Municipal Code, sec. 9-5-4.

http://www.northglenn.org/municode/ch9/content_9-5.html

¹⁷ National Institute on Standards and Technology, "Draft report on project 7: Occupant Behavior, Egress and Emergency Communication," April, 2004.

<http://wtc.nist.gov/pubs/NISTNCSTAR1-7ExecutiveSummary.pdf>

¹⁸ Wolf, Gary, "Question Authorities: Why it's smart to disobey officials in emergencies," *Wired*, June 2005, p.30.

¹⁹ Lakewood City Code, 9.10.40

²⁰ Healy, Gene. "Criminalization Out of Control," Washington: Cato Institute, 2005.

²¹ Interview with Preston Oade, board member of the Colorado Civil Justice League. <http://www.ccjl.org>

²² "Recent Developments in State Corporate Criminalization," Stateside Associates, Dec. 2003.

<http://www.fed-soc.org/Publications/stateside.pdf>

²³ Healy, Gene, *Go Directly to Jail*. Washington: Cato Institute, 2004.

²⁴ Levin, Marc, "Not Just For Criminals: Overcriminalization in the Lone Star State," Texas Public Policy Foundation, April, 2005, 2.

<http://www.texaspolicy.com/pdf/2005-04-pp-overcrim.pdf>

²⁵ Stateside Associates, see note 22 above, Attachment 2—Enacted and pending legislation.

²⁶ CRS, Title 8-1 to 8-42

²⁷ CRS 8-12-116 (a)

²⁸ CRS 8-1-140

²⁹ CRS 8-1-139(1)

³⁰ CRS 8-20-305

³¹ CRS 8-20-302

³² CRS Title 11

³³ CRS 11-51-603 (1)

³⁴ CRS 11-51-603 (2)

³⁵ CRS 11-37.5

³⁶ CRS 11-37.5-215 (2)

³⁷ CRS 11-37.5-215 (1)

³⁸ CRS 11-37.5-212(1)(a)

³⁹ CRS 11-37.5-214 (4)(a)

⁴⁰ CRS Title 12

⁴¹ CRS 12-22

⁴² CRS 12-22-127

⁴³ CRS 12-22-126 (1) (m)

⁴⁴ CRS 12-22-125

⁴⁵ CRS 12-52-115

⁴⁶ CRS 12-52-113

⁴⁷ CRS 12-52-112

⁴⁸ Stealey, Karen, "Hard Time," *My Business*, National Federation of Independent Business, Oct.-Nov., 2004.

⁴⁹ Levin, 6.

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MIKE KRAUSE is a Senior Fellow at the Independence Institute.

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**13952 Denver West Parkway, Suite 400
Golden, Colorado 80401-3141**

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