Colorado
Criminal Justice Reform Coalition

Prevention, treatment, and alternatives work
Prison should be the last resort

Incarceration and Correctional Spending in Colorado
A Legislator's Handbook on Criminal Justice Policy, 2003

A CCJRC Briefing Paper

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The Colorado Criminal Justice Reform Coalition is a network of organizations, faith communities, and individuals throughout Colorado engaged in grassroots efforts to stop the cycle of perpetual prison expansion in our state. We work toward our goals by advocating for changes in criminal justice policy and promoting alternatives to incarceration. We use public education, policy analysis, and legislative action as tools for positive change.

Executive Summary

Since 1985 the adult prison population in Colorado has grown at an unprecedented rate. This report is intended to offer an overview of some of the most significant policies driving prison expansion and the concomitant growth in the state's correctional budget. We have also included recommended policy initiatives. A report of this length cannot provide an exhaustive analysis because of the complex nature of Colorado's criminal sentencing and correctional policies which have been adopted and revised over the years.

Budget Growth

- From FY 1981 to FY 2003, the Department of Corrections (DOC) General Fund appropriation has grown by a cumulative 307%, compared to total General Fund appropriations growth of 182% during the same time period (pp 5-6).
- Under the governor's budget proposal for FY 2004, one out of every five dollars of new spending would be for prison operations (p 6).
- If the DOC budget continues to increase at its historical rate, General Fund appropriations to programs other than DOC, K-12, and Medicaid will grow at an average annual rate of 2% *less* than growth and inflation over the next five years (p 6-8).

Prison Population

- Starting in the 1980s, Colorado has seen an unprecedented growth in the state's prison population. Along with increased felony sentencing ranges, two significant drivers of increased inmate population are parole practices and drug policy (pp 9-13).
- Since the implementation of mandatory parole in 1993, parole revocations have gone from comprising 14% of annual prison admissions (FY 1993) to around 30% (FY 2001)(pp 9-10).
- The percentage of the prison population serving time for non-violent drug offenses has quadrupled, from 5% (FY 1987) to 20% (FY 2001). This is a result of increasingly punitive drug sentencing laws and a lack of available treatment—more than 70,000 Coloradans are in need of, but not receiving, substance abuse treatment (the sixth worst treatment gap in the nation)(p 10-13).
- When substance abuse treatment and prevention programs are cut, people with substance abuse problems frequently end up in the criminal justice system, thereby increasing public costs of addiction (pp 12-13).

Prison Expansion

- The DOC is currently requesting an $80 million, 756-bed expansion of Colorado State Penitentiary (CSP), a control unit facility. The construction would be financed by a lease purchase agreement, through issuance of certificates of participation (COPs). State Treasurer Mike Coffman has stated that lease purchase financing is long term debt and should be submitted for voter approval in order to fulfill the spirit of Colorado's laws concerning multi-year obligations (pp 14-16).
- The DOC has repeatedly claimed that security incidents in the state prison system have declined since the opening of CSP. Departmental data, however, does not confirm this assertion (pp 16-17).

- Colorado houses 7.5% of its inmate population in control unit facilities, compared to a national average of 3.3% (p 16).
- Studies have shown that conditions of confinement in control unit prisons, such as CSP, lead to serious psychiatric disorders in many inmates. Federal courts in two jurisdictions (Texas and California) have found that placing mentally ill inmates in control unit settings is unconstitutional, yet—according to the DOC—12% of CSP inmates have serious mental illnesses (pp 17-18).
- A substantial part of the DOC's expansion plans rely on increased capacity in private, for-profit prisons. The record, however, is not clear that private prisons provide adequate services or produce savings in operating budgets (p 19).

Policy Recommendations

For a full discussion of our policy recommendations, please see pages 20-21. In brief, we recommend the following actions be taken during the 2003 session of the General Assembly.

1. Do not approve HB 03-1256, expanding Colorado State Penitentiary through the issuance of certificates of participation.

2. Commission the State Auditor's Office to conduct an audit of private prison contracts in order to determine the true cost savings (if any) from privatizing corrections and compare quality of services between private and state operated facilities.

3. Pass legislation requiring that, when a person on mandatory parole commits a technical violation (i.e., no new crime is committed), they are not sent back to prison for the rest of their mandatory parole period, but instead are held accountable through intermediate sanctions such as increased monitoring, substance abuse counseling, therapy, or short term jail sentences.

4. Repeal CRS §17-22.5-403(9)(a), the "community supervision" law which imposes an additional twelve months of parole on persons who complete their period of mandatory parole in prison.

5. Pass HB 03-1263, expanding the ability of the parole board to parole seriously ill inmates.

6. Revisit drug sentencing reforms, such as SB 02-39 which was vetoed by the Governor in 2002.

7. Increase funding of substance abuse treatment. Increased funding can be accomplished by using cost savings produced by directing people to treatment instead of prison.

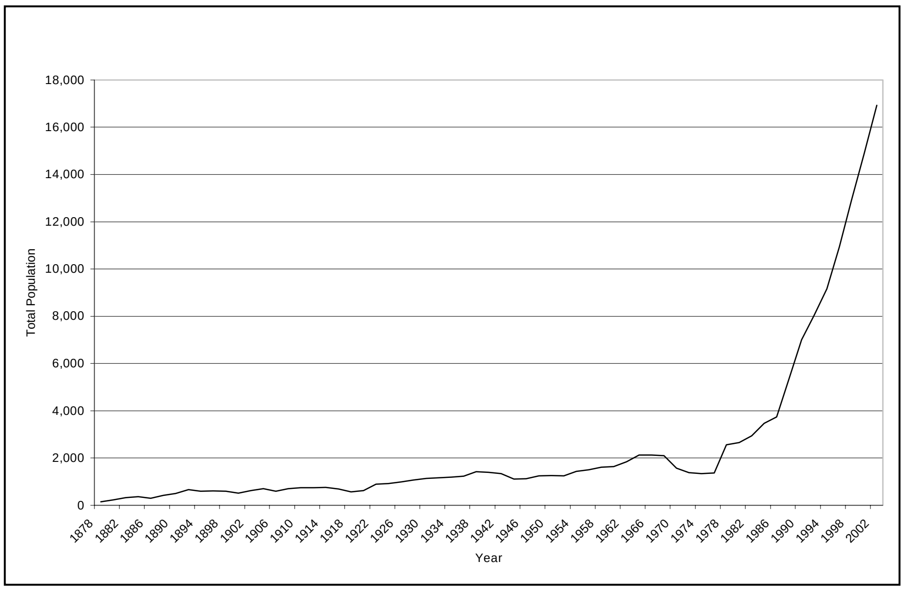
8. Reevaluate Colorado's use of administrative segregation prisons, particularly in regards to housing prisoners with serious mental illness.

Introduction

Starting in the 1980s, Colorado has seen an unprecedented growth in the state's prison population (figure 1). In addition to total numbers of citizens in prison, the state's incarceration rate (the number of incarcerated people per 100,000 residents) grew at a similarly high pace (figure 2).

The rapidly increasing prison population has brought with it economic and social impacts which are often swept aside in emotionally charged debates over crime. Over the years, many elected officials have framed public safety as a Hobson's choice: we must put more people in prison or our society will suffer from high crime rates. This simply is not the whole story. The reality of the situation is that incarceration rates and crime do not clearly correlate—equating incarceration with reduced crime is overly simplistic.

Figure 1. Colorado prison population



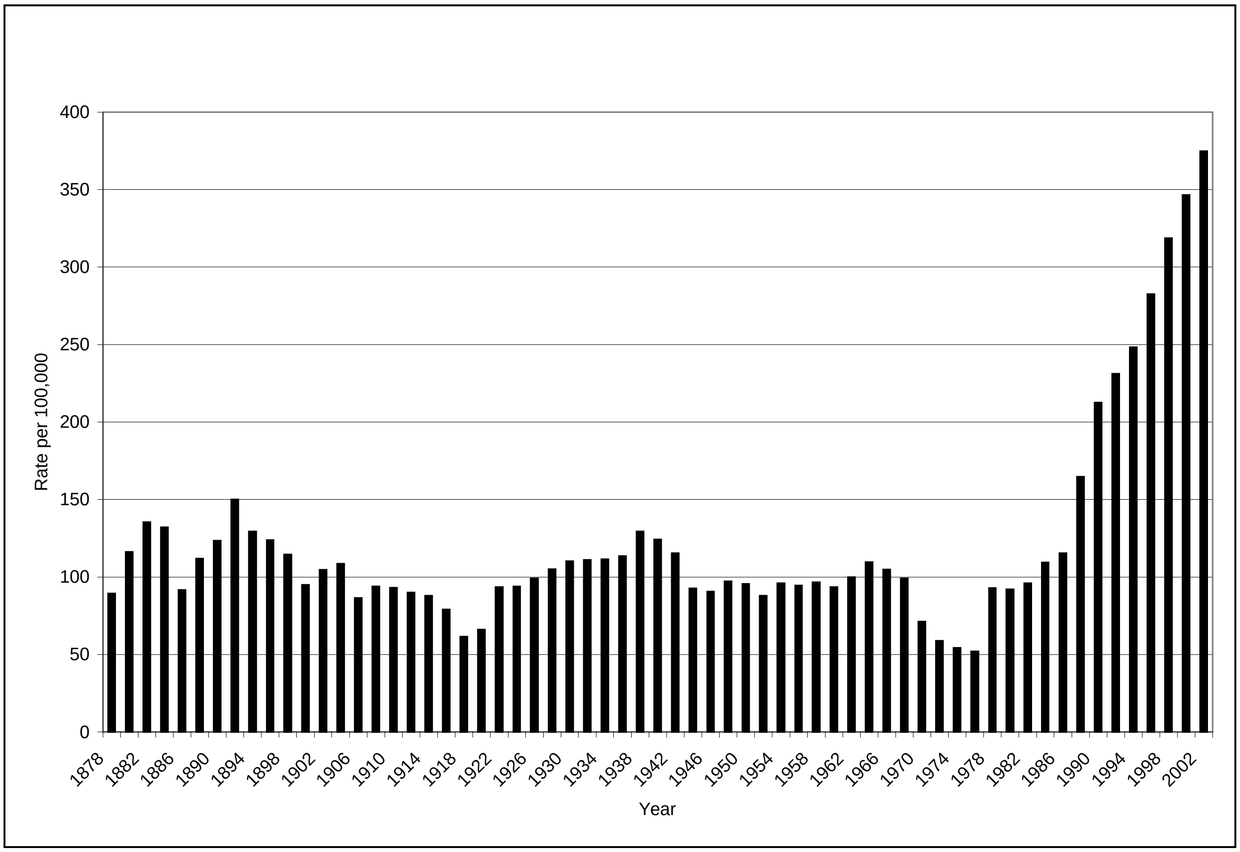
Sources: 1878-1940, 1944-46: CSP Biennial Report (1878-1946 editions); 1942, 1948-54: *Colorado State Penitentiary Presents a Ten Year Building and Development Program* (1955); 1956-64: DOC Annual Report (1958-64 editions); 1966-78: DOC "Movement of Population Report," (FY 1970-76 editions); 1980-2002: DOC *Statistical Report* (FY 1989-2001 editions).

Everyone can agree that those who commit crimes should be held accountable. Sometimes prison may be the best available option to respond to a particular offender. There are, however, numerous other approaches which more effectively address crime, often times costing less money than incarceration. Given the prevalence of drug and alcohol addiction in the prison population, expanded treatment options can help offenders overcome addiction and prevent crime from occurring in the first place. Restorative justice programs offer greater control to crime victims, demand accountability from offenders, and empower communities to craft solutions. Mental health treatment is another proactive method of helping citizens lead healthy lives and minimizing the chances of their involvement in the criminal justice system. Finally, it is imperative to provide sufficient reintegration support for parolees so they can successfully transition back into communities.

Many elected officials view the corrections budget as a spending category which is on auto-pilot—i.e., as long as judges continue to sentence people to prison, the state must pay for it. This is not the case. In what has become an annual tradition, this year's

Legislative Council Staff forecasts of prison population growth remind readers that "[w]hile demographic and economic factors are important factors in the increasing prison admissions, the *modifications made to the Colorado Criminal Code have had the most significant impact* on the growth of the inmate population." (emphasis added)[1] In other words, the General Assembly has broad powers to control the number of people who go to prison. Moreover, since 25-30% of annual prison admissions are technical parole revocations, changes to parole practices can dramatically decrease the prison population without any changes to sentencing laws.

Figure 2. Colorado's adult incarceration rate.



Sources: Prison population: see sources for figure 1. Colorado population: Colorado Department of Local Affairs, Colorado Economic and Demographic Information System (www.dola.state.co.us). Intercensal population estimates prior to 1980 were calculated using linear interpolation.

The most recent Legislative Council Staff prison population forecasts anticipate a total prison population of over 22,000 by June of 2008.[2] By extrapolating financial impacts from these population forecasts, it becomes apparent that Colorado cannot sustain its current rate of prison growth without reaching a fiscal crisis. This report explores immediate actions which can be taken by policy makers to reverse our trend of perpetual prison expansion.

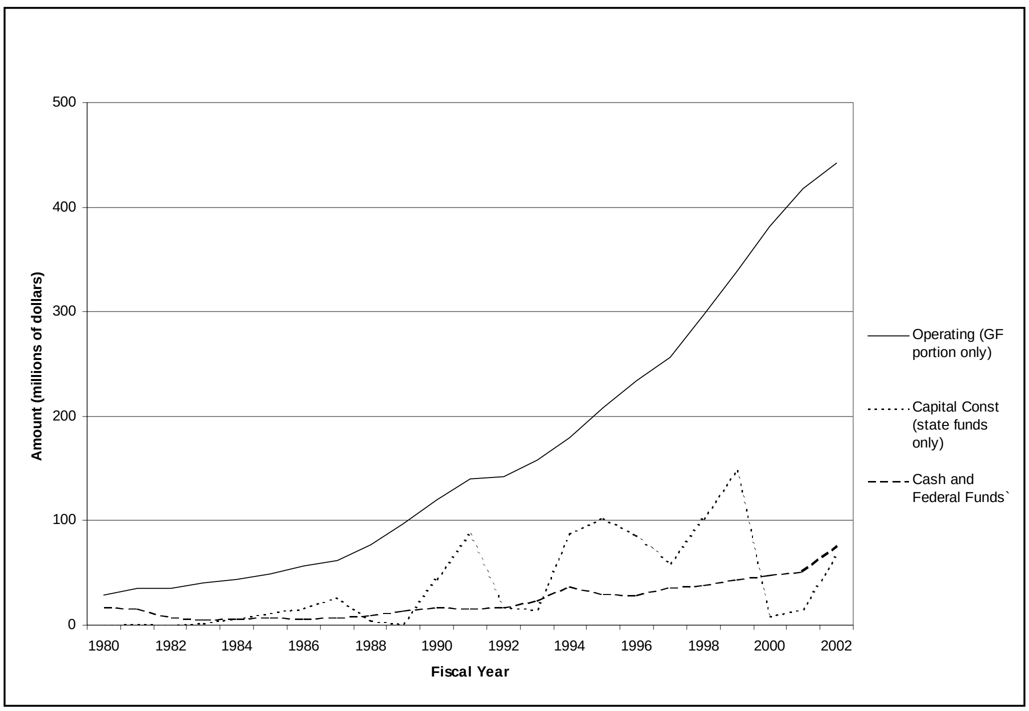
State Budget Landscape

Background

Despite statutory and constitutional restraints on Colorado's state spending, prisons have experienced a tremendous increase in appropriations during the past two decades (figure 3). The Department of Corrections' (DOC) General Fund appropriation has grown from $28.8 million in FY 1980 to $442.1 million in FY 2002. During that same time period, General Fund expenditures for prisons totaled $3.8 billion, with more than $800 million spent on capital construction. From FY 1986 to FY 1998 (a time period over which the administrative structure of state government has remained essentially unchanged), the DOC total operating budget increased at a compound average annual rate of 14.4%, a greater increase than any other area of state government (and, with health care, the only area to average more than 10% annual growth over the same period).[3]

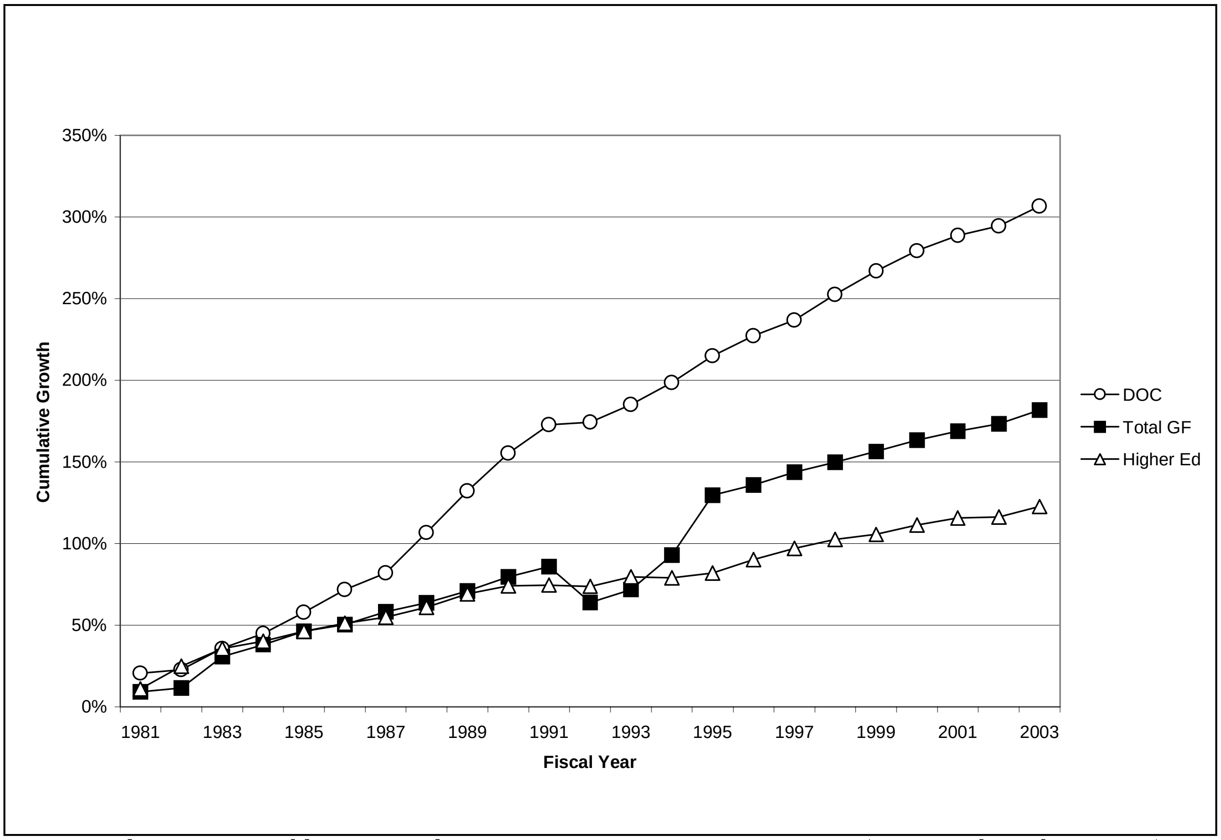
In 1991, Colorado's statutory limit on state budget growth (the Kadlecek Amendment) was rewritten and lowered from 7% to 6% by means of the Arveschoug-Bird bill, found at CRS §24-75-201(1).[4] In 1992, voters enacted a much more comprehensive limitation on government spending—the Taxpayers' Bill of Rights (TABOR). TABOR limits the increase of state and local government revenue to inflation plus population growth, unless voters allow otherwise.[5] Since the prison population has grown at a much steeper rate than state population, the DOC's General Fund appropriation has grown at a dramatically greater rate than overall General Fund

Figure 3. DOC budget growth



Sources: Operating, cash, and federal funds: Colo. Gen. Assembly, Joint Budget Committee, *Appropriations Report* (FY 1983 through FY 2003). Capital construction budget FY 1980 through FY 1986: Colo. Gen. Assembly *Session Laws*; FY 87-01: Colo. Gen Assembly, Leg. Council Staff, *An Overview of the Colorado Adult Criminal Justice System* (1996, 1998, 2001); FY 2002: *Appropriations Report FY 2002*. Note that the operating budget is based on actual expenditures, while the capital construction budget reflects appropriated funds.

Figure 4. Cumulative growth of General Fund, DOC, and higher education appropriations



Source: Colo. Gen. Assembly, Joint Budget Committee, *Appropriations Report* (FY 1980 through FY 2003).

spending (figure 4). Because of fiscal restraints, DOC budget increases over 6% must come at the expense of other areas of state government.

Current Budget Cycle

Despite the current budget crisis facing Colorado, the executive branch has submitted a budget request for FY 2004 seeking increased funding for prison construction and operation. The Office of State Planning and Budgeting (OSBP) formulated the executive branch budget request based on the premise that K-12 education, Medicaid, prisons, and programs for the developmentally disabled would be exempt from cuts.[6] Under Governor Owens' budget proposal for FY 2004, total General Fund appropriations would increase by 5.3%, while the DOC would receive a 12.3% increase.[*] In fact, one of every five dollars of new spending would be dedicated to prisons.[7] The governor's budget was released before the December revenue forecasts, which now dictate the need for an additional $113 million in budget cuts.[8]

[*] These figures are based on increases over FY 2003 appropriations, less the governor's 4% base reduction items. If the same calculations are done based on FY 2003 original appropriations (without reductions), the overall FY 2004 General Fund increase is 2.9%, with DOC receiving a 7.5% increase.

The DOC FY 2004 budget request includes $36.5 million in decision items, $29.2 million of which are directly related to population increases.† The FY 2003-04 budget request asks for $23.7 million to fund increased utilization of private prison beds, including the award of a contract for a new 500 bed private facility.

Since the submittal of the governor's budget request, OSPB has amended its capital budget request to include an $80 million, 756-bed high security prison to be financed through a lease purchase agreement.[9] The new prison would involve the issuance of certificates of participation, which—while legal—clearly violate the spirit of Colorado's constitutional prohibition of multi-year debt without voter approval (see pages 10-12 for a more detailed discussion).

Impact of Prison Budget on Other Areas

As previously mentioned, the expanding prison budget impacts all other areas of state spending. From FY 1984 to FY 2001, the DOC General Fund appropriation's compound average annual growth rate (CAAGR) was 10.57% (adjusted for inflation). During the same time period, Colorado's prison population grew at a CAAGR of 9.31%. Thus, on average, the DOC appropriation grew by 1.135% for every 1% of population growth.

In December 2002, Legislative Council Staff (LCS) released its updated prison population forecasts for 2003-08. Coupling the LCS prison population projections with the

Table 1
General Fund Appropriations Forecasts
(Dollars in millions)

	FY 02-03	FY 03-04	FY 04-05	FY 05-06	FY 06-07	FY 07-08	
GF Available	5,739.8	6,190.3	6,579.2	6,978.2	7,165.0	7,601.4	
Rebates/Expenditures	(143.8)	(147.0)	(151.6)	(156.3)	(162.4)	(169.1)	
Referendum A Reimbursement	(62.6)	(55.1)	(56.5)	(54.1)	(56.1)	(56.1)	
Capital Const. Transfer	(10.6)	(5.3)	(101.8)	(100.4)			
CMTF Payback			(138.2)	(138.2)			
TABOR Refund				(30.2)	(31.2)	(8.1)	
K-12 Settlement			(20.0)	(20.0)	(20.0)	(20.0)	
Year-end Reserve	(212.4)	(230.1)	(235.9)	(250.0)	(291.5)	(346.7)	
Total Available for Appropriations	**5,310.4**	**5,752.8**	**5,875.2**	**6,229.0**	**6,603.8**	**7,001.4**	**CAAGR**
K-12 Program and Categorical	2,369.8	2,454.9	2,597.7	2,748.9	2,909.0	3,078.6	5.3%
Medicaid	838.5	904.7	983.8	1,067.4	1,156.0	1,260.0	8.5%
DOC	474.5	516.36	562.14	611.74	662.84	715.88	8.6%
Available for non-protected areas	**1,627.6**	**1,876.8**	**1,731.6**	**1,801.0**	**1,876.0**	**1,946.9**	**3.7%**
Population Growth + Inflation		7.2%	6.6%	4.8%	4.9%	4.8%	5.7%

All data are from LCS December 2002 forecasts, except for the following. K-12 after FY 2004 is calculated at 6% annual growth for program and 2.8% annual growth for categorical, as anticipated in JBC Staff Briefing of Nov.15, 2002. Medicaid funding is based on estimates in HCPF strategic plan, Nov. 1, 2001. Methodology for DOC projections are explained above.

† The population-related decision items consist of additional private prison beds ($23.7 million), Denver Women's Correctional Facility population increase ($4.9 million), and increased community corrections population ($0.9 million).

population-to-budget ratio of 1:1.135, we have forecasted out-year DOC appropriation growth (including inflation, per LCS inflation forecasts) in table 1. In addition, we have estimated future General Fund appropriations for K-12 education and Medicare (the two largest budget sections which are significantly determined by external mandates). Using these figures, table 1 shows that if prisons continue to expand at their historical rates, non-protected General Fund appropriations (i.e., everything except prisons, Medicare, and K-12 education) will grow at a CAAGR of 3.7%, compared to population and inflation growth of 5.7% over the same period.

If the budget scenario in table 1 does become reality, the negative impact would be primarily shouldered by the other two largest consumers of General Fund appropriations—higher education and human services. Defunding higher education and human services to expand prisons not only balances the budget on the backs of students and citizens in need of assistance, but also creates a feedback loop wherein inadequate funding of education, mental health services, and substance abuse treatment increase the numbers of citizens becoming involved in the criminal justice system.

Catalysts of Prison Population Growth

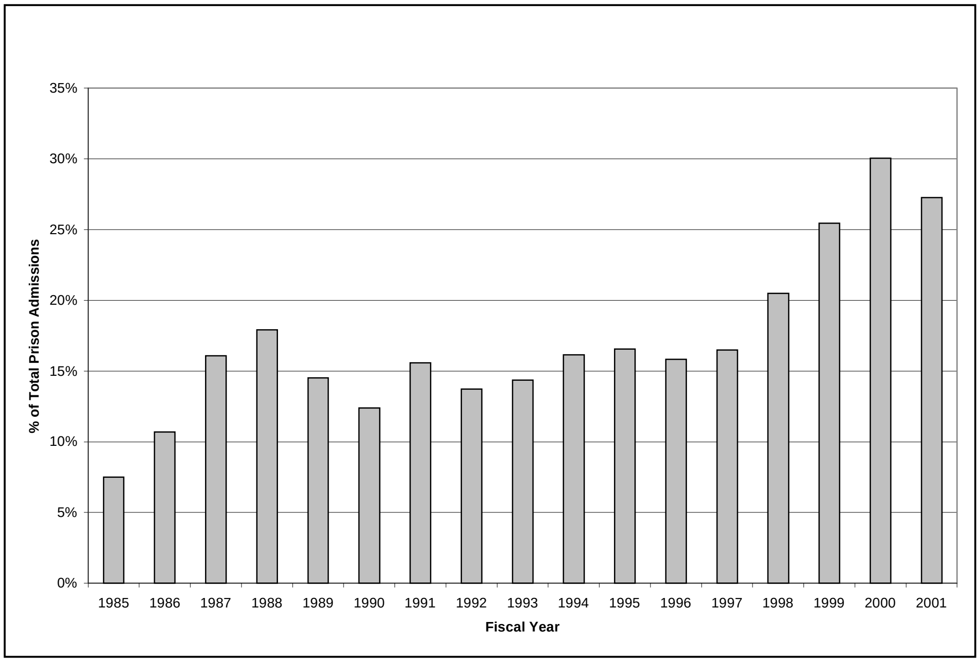
The massive increase of prisoners in Colorado during the past two decades is attributable largely to changes in sentencing laws, specifically major overhauls enacted in 1979 and 1985.[10] Two specific subcategories of criminal sentencing have significantly contributed to the overall increase in incarceration: parole practices and drug policy.

Parole

Colorado's parole laws are complicated by the fact that there are two types of parole: discretionary parole (when a prisoner is released from prison to serve the remainder of his sentence on parole) and mandatory parole (which an inmate serves *in addition* to his prison term).

In 1993, the General Assembly instituted mandatory parole via House Bill 93-1302 (see table 2). Since the advent of mandatory parole, the number of prisoners receiving discretionary parole (i.e., early release) has dropped sharply. Mandatory parole has also served to dramatically increase the parole population and has produced a concomitant growth in the number of parolees who are revoked to prison for violating the conditions of their parole. Figure 5 shows that parole revocations for technical violations have gone from comprising 7% of annual prison admissions (in FY 1985) to 27% (FY 2001). It is important to realize that figure 5 only reflects *technical* revocations of parole—it does not include cases of parolees who were convicted of new felonies.[‡] The legislative intent of the mandatory parole law was to supervise offenders during their return to the community. The high number of revocations, however, has meant that many prisoners serve the majority of their mandatory parole period in prison. When revocation is used to increase the time an

Figure 5. Technical parole revocations as percentage of admissions



Source: Colo. Dept. of Corrections, *Statistical Report*, FY 1989 through FY 2001.

[‡] For example, in fiscal years 2000 and 2001, the number of parolees revoked for new felony convictions was 413 and 402, respectively.

inmate spends in prison, it is essentially negating the legislative intent of mandatory parole—to supervise and support inmates transitioning back into the community.

Making the situation even more complex is CRS §17-22.5-403(9)(a), the "community supervision" law passed as part of House Bill 98-1160. Under this provision, persons who complete their period of mandatory parole in prison (as the result of a revocation) are subject to an *additional* twelve month period of parole (some or all of which can be spent in prison if the offender is revoked). The constitutionality of this statute is currently being challenged in court.

Table 2. Felony Sentencing

Felony Class	Minimum Sentence	Maximum Sentence	Mandatory Period of Parole
1	Life	Death	n/a
2	8 years	24 years	5 years
3	4 years	12 years	5 years
4	2 years	6 years	3 years
5	1 year	3 years	2 years
6	1 year	18 months	1 year

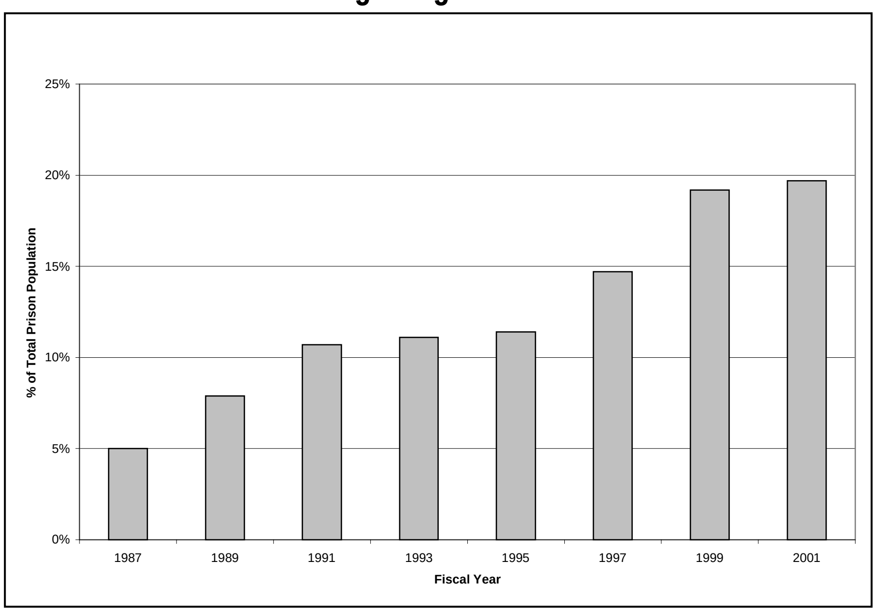
Source: CRS §18-1.3-401(V)(A)

Drug Policy

Drug policy is the other significant catalyst of the growing inmate population. Between fiscal years 1985 and 2001 the percentage of the Department of Corrections population whose most serious offense is a non-violent drug charge has nearly quadrupled (figure 6).

Colorado's approach to substance abuse can best be categorized as punitive. According to the latest national survey of substance abuse patterns, Colorado has the fifth highest rate of drug dependence and abuse of the fifty states and the District of Columbia.[11]

Figure 6. Percentage of DOC prisoners whose most serious offense is a non-violent drug charge

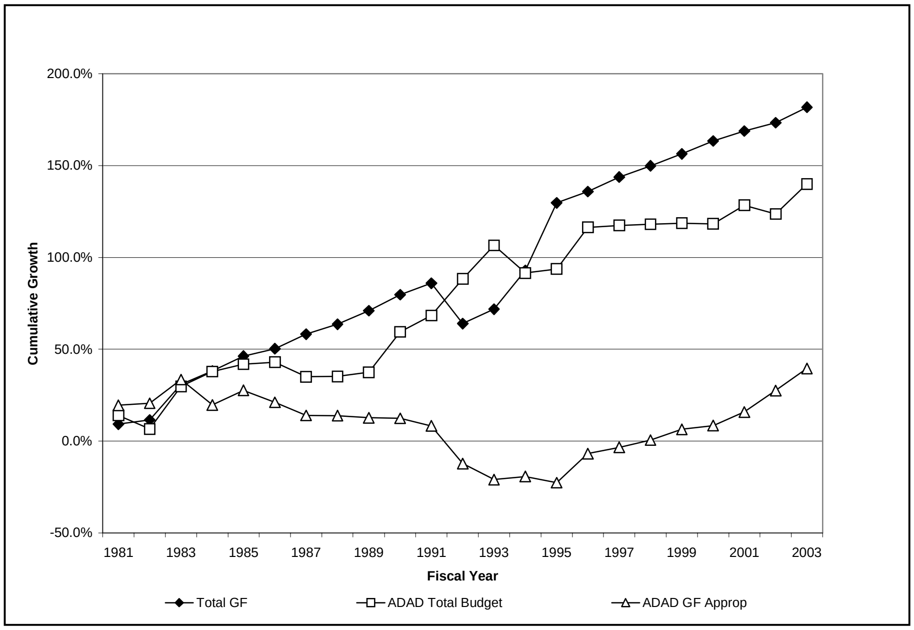


Source: Colorado Dept. of Corrections, *Statistical Report*, FY 1989 through FY 2001.

Drug use is closely tied to crime rates of all sorts, not just drug crime. During the five year period of 1995 to 1999, over two thirds (68%) of arrestees in Denver tested positive for illegal drug use.[12] While this prevalence of drug use among arrestees is generally in line with other major metropolitan areas,[13] the situation is exacerbated by Colorado's acute lack of substance abuse treatment relative to need.

Colorado has the sixth worst treatment gap of the fifty states and DC—2.09% of the state's population over the age of 12 is in need of, but not receiving substance abuse treatment (over 70,000 people).[14]

Figure 7. Cumulative growth of ADAD appropriations



Sources: General fund data: Colo. Gen. Assembly, Joint Budget Committee, *Appropriations Report* (FY 1980 through FY 2003); ADAD budget data: Colo. Gen. Assembly, Legislative Council Staff, "Research Memorandum to Senator Sue Windels," by Ron Kirk (December 3, 2002).

The collateral costs of untreated substance abuse are phenomenal. Healthcare, social services, and law enforcement agencies all experience increased workloads in direct relation to community prevalence of substance abuse and addiction. A recent national study by the Robert Wood Johnson Foundation estimates that nearly one out of every five dollars in Medicaid expenditures are associated with substance abuse. Families experience financial and psychological impacts of substance abuse, with 75% of female victims of nonfatal domestic violence reporting that their abuser had been using drugs or alcohol. Substance abuse by parents frequently leads to behavioral problems in children, increasing the workload for school systems and, lamentably, the juvenile justice system.[15]

A 2001 study by the National Center for Alcohol and Substance Abuse found that for every one hundred dollars that Colorado spends on the effects of substance abuse, $99.94 is spent on collateral costs (courts, corrections, child and family assistance, public safety) while only 6¢ is spent on treatment and prevention[16]—the worst ratio of reactive to proactive spending of the forty-seven jurisdictions covered by the study.[§]

Substance abuse treatment and prevention budgets have been cut over the years resulting in a treatment budget (measured by appropriations to the Alcohol and Drug Abuse Division (ADAD) of the Department of Human Services) which has decreased or remained static in as many years as it has increased (figure 7). A recent report to the Kansas Legislature by that state's sentencing commission found that inadequate treatment resources and the overall philosophy of approaching addiction as a criminal issue had lead to an expensive increase in drug offenders ending up in prison (either directly or

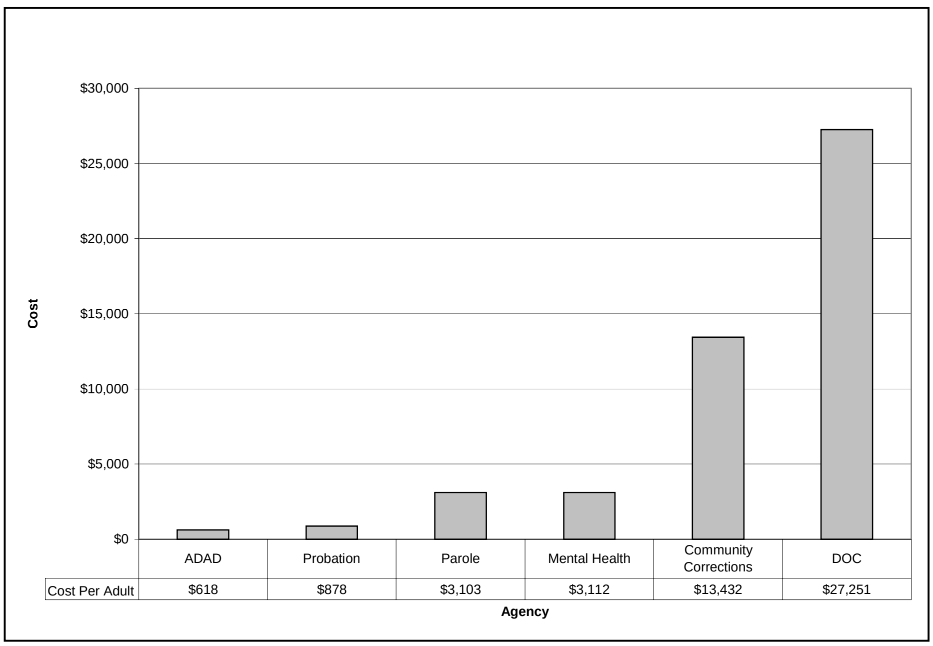
[§] The study examined 45 states plus the District of Columbia and Puerto Rico.

through probation revocations)—a scenario quite similar to Colorado's. The Kansas commission found that current state drug policy

> [exerts control] over the offender in the belief that the addiction can be cured, when in reality there is no known "cure" for drug addiction. What research has indicated is that drug addiction can be controlled through treatment and an individual's genetic predisposition, social circumstances, personal behavior traits and interpersonal relationships will affect the impact of treatment, all of which the criminal justice system has a limited ability to impact.[17]

The Kansas report concluded that a system of mandatory treatment in lieu of incarceration for drug possession would be more effective in addressing addiction and would save significant amounts of money in reduced prison populations. The proposed model requires offender accountability but also takes into account individual needs and addresses offender relapse without necessitating revocation to prison.[18]

Figure 8. Annual costs per consumer by agency.



Source: Colorado Dept. of Human Services, Alcohol and Drug Abuse Division, *The Costs and Effectiveness of Alcohol and Drug Abuse Programs in the State of Colorado*, Report to the Colorado General Assembly (October, 2002).

The Colorado General Assembly passed a much more modest drug policy reform measure during the 2002 session—Senate Bill 02-39. Instead of diverting offenders from prison to treatment, as the Kansas plan contemplates, SB 39 would have simply reduced the felony classification for low level drug possession (less than one gram). What made SB 39 unique was that it would have used resultant prison cost savings to fund drug treatment. Legislative Council Staff conservatively estimated that the five year cost savings of SB 39 would be $10.6 million. SB 39 moved through the legislature with strong bipartisan support, passing third reading on a vote of 26-9 in the Senate and 62-1 in the House. Governor Owens vetoed SB 39 saying that the state could not afford to fund substance abuse while "risking public safety." Moreover, Governor Owens asserted that "the most effective way to rehabilitate [drug] offenders is through the type of long-term drug treatment program offered in our prisons."[19] The assertion that prison-based treatment is most effective contradicts most addiction and treatment research. In a 2002 report on crime prevention, the Oklahoma Council on Violence Prevention reiterated the need to have treatment readily available in the community.[20] Similarly, the Western Governor's Association (WGA) has taken several steps to examine new approaches to drug policy. A 2000 white paper commissioned by the WGA's Drug Policy Working Group, concluded that "[c]itizens must be held accountable for their actions. However, alternatives to incarceration and the increased availability of treatment are important.[21]

Colorado's approach to substance abuse treatment and prevention continues to lag behind the proactive steps being taken in other states. Cutting treatment and prevention funding merely serves to shift the costs of addiction and abuse into more expensive realms, such as the criminal justice system (figure 8). Moreover, Coloradans are ready to explore new options. In a 2001 opinion poll of Colorado registered voters, nearly two thirds of respondents said they viewed drug abuse as primarily a public health problem as opposed to a criminal justice issue and 77% supported increasing public funding of treatment and education programs.[22]

Colorado State Penitentiary Expansion

Certificates of Participation

One of the centerpieces of the Department of Corrections (DOC) budget request for FY 2003-04 is an $80 million construction project which would double the size of Colorado State Penitentiary (CSP). CSP is a control unit prison, which holds administrative segregation (or "ad seg") inmates—the highest security level in the state's prison system. Prisoners in ad seg confinement are held in their cells 23 hours per day, with limited access to programs, and little social interaction.

On January 30, House Bill 03-1256 was introduced which seeks to finance the CSP expansion project (termed "CSP II") through a ten year lease purchase agreement with a maximum total repayment cost of $102.8 million. HB 1256 provides for lease purchase financing of CSP II *and* new buildings at the University of Colorado Health Sciences Center at Fitzsimons (UCHSC). The combining of the two projects in one bill is inappropriate. The projects are different enough that they should be separated and evaluated individually. According to text of HB 1256, the UCHSC project will generate $46.7 million in annual state tax revenues. Thus, the UCHSC lease payments are backed (formally or informally) by anticipated revenue, whereas CSP II will generate no significant revenue and will be backed only by existing revenue streams.

Debt-financed construction projects certainly contradict the spirit, if not the letter, of the law and could inflict serious fiscal damage on our state. Standard & Poor's (S&P) downgraded Colorado's credit rating over the summer (from AA to AA-) due to the general uncertainty of the economy. In November, S&P again placed Colorado on a negative credit watch, specifically citing high levels of outstanding debt.

In addition to the financial realities of the moment, Coloradans have historically favored fiscal restraint in government. The Colorado Constitution not only limits government revenue growth (through TABOR), but also prohibits tax-funded multi-year debt without voter approval (Article XI, part of the original constitution of 1876).

Given the aforementioned facts, the CSP II project is problematic. According to the Office of State Planning and Budgeting (OSPB), the prison would be financed through certificates of participation (COPs), which are bonds that do not require voter approval. COPs are the financial instrument through which investors fund a lease purchase arrangement.

The legal mechanism which exempts COPs from going before the voters is somewhat reminiscent of the accounting practices that led to the downfall of Enron. If the prison were to be built with COPs, a nonprofit shell corporation would own the prison (off Colorado's books) and lease it to the state, subject to annual appropriations. The Colorado Supreme Court ruled in 1977 that methods of indirect public indebtedness do not meet the constitutional definition of debt.[23]

The deceptive side of COPs lies in the fact that while the state can *legally* decide to stop making payments at any time, such action would significantly harm the state's credit rating. The negative consequences of COPs were concisely summarized in State Treasurer Mike Coffman's testimony before the Joint Budget Committee:

> the Treasurer recognizes that Certificates of Participation are considered legal under TABOR due to the annual appropriation language they contain. Although they meet this technical standard, the fact remains that a future legislature does not really have the latitude to not make the annual appropriation. The practical consequences of a decision not to make the annual appropriation, which include credit rating downgrades and quite probably being shut out of the capital markets indefinitely, are so severe that no Legislature will seriously contemplate facing them. Consequently, the Treasurer views this particular type of financing really as a form of long term debt, (which is how they are classified on the state's financial statements) and believes that a better approach is to ask for a vote of the people.[24]

COPs are essentially the worst of both worlds—they carry higher interest rates (requiring more taxpayer money) because they are not backed by the full faith and credit of the state. Yet Colorado must continue to pay off the debt or face a reduced credit rating as a penalty for short-changing investors. Legislators in Louisiana recently discovered that while they were legally empowered to cancel a multi-year lease of a troubled juvenile prison in Tallulah, the increased debt service which would result from the state's slashed credit rating would far outweigh the annual savings of $3.2 million.[25]

Treasurer Coffman has warned the General Assembly that they must resist the desire to increase spending and incur debt during tight fiscal times. In a July 2002 editorial, he likened the FY 2003 Colorado budget to "someone who has just been told he is approaching the limit on his credit card deciding to buy a new entertainment center. It is simply irresponsible."[26]

In a January hearing before the Capital Development Committee (CDC), OSPB director Dr. Nancy McCallin informed committee members that under her office's analysis, the state would likely *save* money by funding CSP II through COP-backed lease purchase financing. This fiscal sleight of hand is based on calculating the net present value of $80 million in payments over 15 years, at 4% interest, with 3% inflation, as opposed to an estimated 6% return on investments.[27] OSBP's predictions show a savings of $3.1 million; however, this analysis focuses solely on construction costs to the exclusion of other fiscal and non-monetary costs which would accompany such a project.

First, OSPB's calculations do not take into account operating costs which will be incurred upon CSP II's opening. The current CSP has the third highest operating cost of all state prisons at $36,835 per inmate per year.[28] Given $80 million in construction costs and $22.8 million in debt service (over a ten year lease), plus $27.8 million in annual operating costs, CSP II would carry an annual price tag of $38.1 million (during the first ten years of its operation). For comparison's sake, $38.1 million is several million dollars more than the entire operating budget of the Colorado Department of Agriculture, which received a $31.2 million appropriation in FY 2003. Dr. McCallin told the CDC that additional operating costs would be incurred whether or not CSP II was built, since the prison population will increase no matter what. This assertion is of dubious validity since a new prison would entail certain fixed costs which would *not* occur if it were not built. Nonetheless, we do agree that overcrowding or out-of-state placement of Colorado inmates are not acceptable alternatives. What Dr. McCallin overlooked is the fact that continued prison growth is not inevitable. The General Assembly can greatly influence prison populations through modest changes to law and policy (see policy recommendations on pages 20-21 for more on this topic).

Second, OSPB's analysis of the lease purchase's net present value does not take into account several factors which are typically included in benefit-cost analyses. The federal government's executive branch instructions for benefit-costs analysis (including those for lease purchase financing) direct agencies to provide a "comprehensive enumeration of the different types of benefits and costs, *monetized or not*" (emphasis added). In addition, the instructions specify that analyses should be based on benefits and costs to society, not government.[29] Prison expansion would entail numerous opportunity costs, given that funds allocated for new prisons come at the expense of proactive programs which actually do more to reduce crime.

Overuse of Control Unit Imprisonment

What makes the CSP II proposal even more troublesome is the fact that no clear evidence exists to support the *need* for a new administrative segregation facility. While prison population projections do indicate a shortage of prison beds in the near future, this is in no way inevitable nor does it specifically support adding new ad seg beds. Exponential growth of our state's prison population can be reversed by making common-sense changes to Colorado's drug policies and use of parole. We do not believe that the DOC has provided credible and thorough data to justify building a new control unit prison. A comparison with other states suggests that Colorado is overusing ad seg placements. In 2000, Colorado had the third largest percentage of inmates in ad seg of 38 reporting states—7.5% of our state's total prison population, compared to a national average of 3.3%.[30]

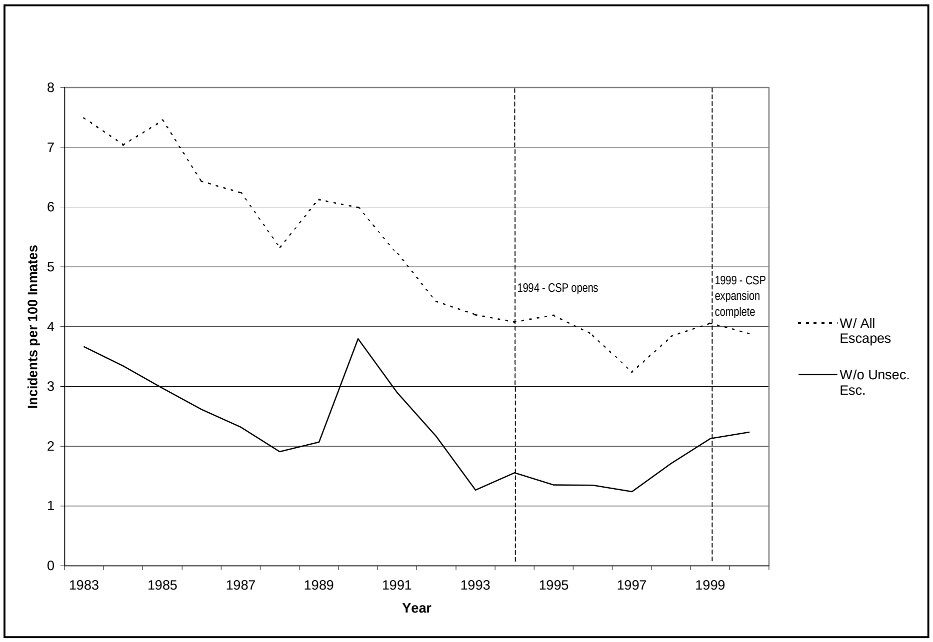
Since coming to CSP, my thoughts are becoming more violent oriented, i.e., revenge, hatred, lashing out, etc. I am starting to believe that I hear someone speak but then catch myself and realize that no one spoke to me.

—CSP Inmate A, 1996

The DOC has argued that the "ability to segregate inmates who assault other inmates or are disruptive has a very calming effect on other [prison] facilities."[31] The Department's own data, however, do not support this view of CSP as a tool to increase safety in other facilities. An examination of DOC security incidents (figure 8) shows that a long-term decline in incident rates was underway for years before CSP opened—the opening of CSP and its subsequent expansion in 1999 has had little impact on incident rates.

In some ways, CSP can actually be seen as a threat to public safety. Inmates are kept in 23-hour per day lockdown, which in many cases leads to increased paranoia, anger, and anti-social behavior which makes transition back into general population facilities or society much more difficult. Compounding the problem is the long average length of stay (ALOS) in ad seg. According to DOC, the ALOS in CSP is 31.6 months. Over such a long period of time, the isolation and sensory deprivation of the ad seg environment drastically exacerbates problems in mentally ill inmates and often elicits symptoms of psychosis in inmates who previously did not suffer from mental illness.[32]

Figure 8. DOC incident rates



Source: Colorado DOC *Statistical Report*, FY 1984 through FY 2001. Since several escapes occur from unsecure facilities (community corrections and home ISP placement) each year, we have calculated incident rates with and without escapes from unsecure facilities. We have calculated incidents without including self-inflicted injuries and suicide attempts, which are mental health issues. In addition, fights (as distinguished from assaults) have only been tracked by the DOC since 1991, so they have not been included. An independent analysis of fights over time shows fluctuations which do not correlate with ad seg capacity.

In 1980, a federal district court in Texas found in *Ruiz* v. *Estelle* that ad seg confinement of mentally ill inmates violated the Eight Amendment of the U.S. Constitution, since segregation units were "found by the court to be incubators of psychoses, seeding illness in healthy inmates and exacerbating illness in those already suffering mental infirmities."[33]

> **My anger has gone to the point of a silent rage. It's like they want to build a better killer. I don't know, it's hard to explain. I am beginning to really hate people.**
>
> ***—CSP Inmate B, 1996***

In 1993, a class action lawsuit was filed against the California Department of Corrections alleging unconstitutional conditions of confinement in that state's ad seg facility. In its opinion, the federal district court acknowledged that

> [s]ocial science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances. These include perceptual distortions, hallucinations, hyperresponsivity to external

> stimuli, aggressive fantasies, overt paranoia, inability to concentrate, and problems with impulse control.[34]

Drawing in part from *Ruiz*, the court did not prohibit ad seg placement across the board, but it did find that placing mentally ill offenders in an ad seg environment was unconstitutionally cruel and unusual punishment, noting that "[f]or these inmates, placing them in [ad seg] is the mental equivalent of putting an asthmatic in a place with little air to breathe. The risk is high enough, and the consequences serious enough, that we have no hesitancy in finding that the risk is plainly 'unreasonable.'"[35]

Unfortunately, the Colorado DOC continues to place mentally ill inmates in CSP. In 2001, ninety-one inmates at CSP (12% of the facility population) were diagnosed as seriously mentally ill.[36] Not only would the CSP II project likely lead to additional mentally ill inmates being unconstitutionally placed in administrative segregation, but CSP II has been prioritized ahead of a 250-bed expansion of the San Carlos Correctional Facility, DOC's specialized mental health facility. Also, due to Arveschoug-Bird and TABOR, CSP II (even if financed through COPs) would reduce funding available to strengthen community based mental health treatment and the Colorado Mental Health Institutes.

People come in here with few problems and will leave sociopaths....They become worse people. A petty thief may become a rapist or a murderer.

—CSP Inmate C, 1996

Finally, we also question the procedure used to project future needs of ad seg beds. In February of 2002, the DOC announced that a shortage of high security beds was imminent. This conclusion was reached by using June 2001 prison population data, during which 6.5% of DOC inmates were classified as administrative segregation. Anticipating that 6.5% of inmates in out years would be classified ad seg, the DOC showed a shortage of 155 ad seg beds. This methodology creates a self-fulfilling prophecy—6.5% of inmates *will* be ad seg, regardless of individual characteristics. Other states do not use static models such as the DOC's 6.5% method—the Kansas Sentencing Commission (the agency responsible for Kansas's prison population forecasts) uses a dynamic model for predicting classification levels, which takes into account classification processes and average length of stay in a given custody level. The current Kansas forecasts actually anticipate a decrease in ad seg percentage of the prison population over the next ten years.[37] Methodology aside, it is still unclear how the DOC can justify an ad seg facility as big as the proposed CSP II. Applying the DOC's 6.5% assumption to recently released prison population forecasts, there is a projected shortage of 275 ad seg beds in FY 2008—a significant number, but not enough to justify a 756-bed CSP II facility.

Expansion of Private Prison Capacity

The Department of Corrections (DOC) has announced its intention to expand the state's pool of available privately operated contract prison beds by 1,500-2,000 over the next three years.[38] Increased utilization of for-profit prisons is risky and undesirable. In fall 2002, CCJRC issued the report *Private Prisons and Public Money: Hidden Costs Borne by Colorado's Taxpayers*[**] which provides an in-depth examination of indirect costs which are inherent in Colorado's use of contract prisons. We strongly support a moratorium on private prison expansion until the State Auditor's Office conducts an audit of private prison contracts, in order to determine the true amount of cost savings (if any) that results from private operation of prisons. Many legislators support the use of for-profit prisons because of the decreased capital construction costs incurred by the state. Whether or not this assertion is true in the long run, to contract prison *operation* in order to save on *construction* costs is akin to throwing the baby out with the bath water.

There is also little merit to the claim that private prisons introduce competition and free market principles to the corrections industry. As the DOC itself recently admitted, as of January 19, Corrections Corporation of America (CCA) owns all four private facilities that Colorado utilizes, foreshadowing "a lack of competition within the private sector."[39] In addition, privatized correctional facilities hardly operate on a free market model. There is one customer (the state) and 77% if the national market is controlled by two companies (CCA and Wackenhut)—thus making the private corrections business both a monopsony and an oligopoly.

There has never been convincing proof that for-profit prisons offer programs that are comparable to or better than those in state prisons.[††] The General Assembly attempted to avoid the possibility of substandard conditions and programs in for-profit prisons through CRS §17-1-202(1)(f), which states that contract prison operators "shall be responsible for a range of…diet, education, and work programs at least equal to those services and programs provided by the department of corrections at comparable state correctional facilities." The DOC, however, has excluded private prisons from their comprehensive program review which is now in its second phase.[40] Without obtaining a clear picture of how private prisons compare to state prisons, Colorado is not only potentially condoning a statutory violation (on the part of private prison contractors), but is also not utilizing generally accepted methods of contract management.

There is clearly a lack of data on how private, for-profit prisons work in Colorado. Until a fiscal and program audit of private prisons is conducted, our state should not increase its dependence on the private corrections sector.

[**] Available at www.ccjrc.org.

[††] For a discussion of private prison deficiencies, see, e.g., Judy Greene, "Comparing Private and Public Prison Services and Programs in Minnesota: Findings from Prisoner Interviews," originally published in *Current Issues in Criminal Justice*, v. II n. 2 [1999].

Policy Recommendations

It is with these concepts in mind that we recommend the following actions be taken during the 2003 legislative session.

Budget

Recommendation 1. Do not pass HB 03-1256 (Spradley/Anderson) which would fund CSP II through a lease purchase agreement. Not only would the proposed lease purchase financing be fiscally damaging to the state, but it would clearly contradict the intent of Colorado's long term debt prohibition. Moreover, expansion of CSP would result in more mentally ill inmates being housed in administrative segregation. The $80 million price tag (for construction only) of CSP II would provide additional injury to the mentally ill insofar as it would lower the prioritization of expansions of the San Carlos Correctional Facility, the Colorado Mental Health Institutes, and community-based mental health treatment.

Recommendation 2. Request an audit of private correctional facility contracts. We urge the Legislative Audit Committee to direct the State Auditor's Office to examine private prison contracts with a particular focus on indirect costs borne by the Department of Corrections and the quality of service provided by private contractors. Evidence exists to suggest cost savings from private prisons are currently exaggerated. Furthermore, even if the state is saving money, if these savings come at the cost of public safety, the citizens of Colorado still end up on the losing end of the deal. Although the DOC's Private Prison Monitoring Unit (PPMU) examines the performance of contract prisons, the close relationship which often develops between contractors and regulators makes the PPMU an inappropriate candidate to conduct an independent audit.

Parole

Recommendation 3. Enact legislation to encourage the use of intermediate sanctions as a response to technical parole violations. Intermediate sanctions entail increased monitoring, substance abuse counseling, therapy, short term jail sentences, and many other options which do not include return to prison. Using intermediate sanctions holds parolees accountable for violating the terms of their parole, but does not simply return the parolee to prison for the duration of their mandatory parole period. This would only apply to mandatory parolees (people who have already served the length of their sentence), therefore it is not "releasing prisoners early." Such legislation would necessitate a more specific definition of a technical violation than currently exists. The purpose of this bill would be to ensure that, unless a parolee commits serious infractions, he or she should spend time in the community (receiving employment, addiction, and mental health assistance) and not in prison. Cost savings from such legislation could total up to $22.8 million in FY 2004.[41]

Recommendation 4. Repeal CRS §17-22.5-403(9)(a), the "community supervision" law (passed as part of HB 98-1160). The impacts of this law are just now beginning to be felt, with 158 people currently effected by this provision.[42] The DOC estimates that the parole caseload will increase by an average of 431 offenders per day during FY 2004 as a result of HB 98-1160. Even under the unrealistic assumption that none of the 431 parolees is revoked, the estimated cost is $1.7 million.[43] Yet the community supervision provision was passed in 1998 *without* the appropriation required by CRS §2-2-703. In addition to the fiscal improprieties of HB 98-1160, we feel that the essential goal of assisting prisoners during the reintegration process should be accomplished within the existing framework of mandatory parole, not via extra time such as the community supervision bill. Reintegration needs to become a smarter process, not a longer process.

Recommendation 5. Enact HB 03-1263 (Plant/Owen), which would expand the power of the parole board to grant parole to seriously ill prisoners who pose a low risk to the community due to their health.

Drug Policy

Recommendation 6. Revisit drug policy reform—despite the governor's veto of SB 02-39, drug policy reform is more crucial now than ever. Continuing to incarcerate low level drug offenders at the expense of treatment and prevention programs will lead to fiscal and social crises. Drug policy reform could entail resurrecting SB 02-39, mandating the criminal sentencing interim committee (HB 03-1013) to intensively focus on drug policy, or any number of other possibilities. Whatever specific form this activity takes, it is crucial for policy makers to craft a more effective and balanced approach to substance abuse.

Recommendation 7. Do not further defund substance abuse treatment. While we realize the severity of current revenue shortfalls, the Alcohol and Drug Abuse Division (ADAD) of the Department of Human Services has been subjected to substantial cuts in funding throughout the last two decades. Any further cuts would not only worsen the state of treatment and prevention in Colorado, but would shift addiction and abuse costs into more costly arenas, such as law enforcement and corrections.

Other

Recommendation 8. Take steps to reduce Colorado's reliance on administrative segregation units. Given our state's higher than average use of control unit imprisonment, and the potential for serious psychological harm which results from administrative segregation placement, a new approach is warranted. The General Assembly should undertake a coordinated effort to examine the effectiveness of the Colorado State Penitentiary, issues pertaining to offenders with serious mental illness in administrative segregation settings, and alternatives to CSP expansion.

Notes

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[6] Governor Bill Owens, letter to Joint Budget Committee Chairman Senator Dave Owen (November 12, 2002).
[7] Colorado General Assembly, Joint Budget Committee, “FY 2003-04 Staff Briefing: Overview of FY 2003-04 Budget,” by John Ziegler (November 12, 2002), 11.
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[9] Nancy McCallin, letter to Joint Budget Committee Chairman Senator Dave Owen (December 24, 2002).
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[17] Kansas Sentencing Commission, “Report to the 2003 Kansas Legislature,” (February 2003), 4.
[18] Kansas Sentencing Commission, “Report,” 7-17.
[19] Governor Bill Owens, “Senate Bill 2002-039 Veto Letter,” June 7, 2002.
[20] Oklahoma Council on Violence Prevention, *Violence in Oklahoma: A Case for Prevention* (May 2002), 99.
[21] Western Governors’ Association, Drug Policy Working Group, “Drug Strategies in the West,” preliminary draft (May 25, 2000), 9.
[22] Ridder/Braden, Inc., “Survey on Drug Abuse and Drug Policy: Summary of Results,” (September 2001), available at www.ccjrc.org.
[23] *In Re Colorado State Senate*, 566 P. 2d 350.
[24] Quoted in Joint Budget Committee, “FY 2003-04 Staff Budget Briefing: Department of Corrections,” by Karl Spiecker (December 20, 2002), 72-73.
[25] Chris Frink, “Contract cancellation would hurt La. rating,” *The Advocate* [Baton Rouge], May 29, 2002.
[26] Mike Coffman, “A Shot Across the Bow” (July 3, 2002), 2.
[27] McCallin (December 24, 2002).
[28] Department of Corrections, *Statistical Report, Fiscal Year 2001*, by Kristi Rosten (June 2002), 28.
[29] Office of Management and Budget, “Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs,” Circular A-94.
[30] *2000 Corrections Yearbook: Adult Corrections* (Middletown, CT: Criminal Justice Institute, 2001), 26.
[31] Nolin Renfrow (DOC Director of Prisons), testimony before the Capital Development Committee (January 9, 2003).

[32] Terry Kupers, *Prison Madness: The Mental Health Crisis behind Bars and What We Must Do About It* (San Francisco: Jossey-Bass, 1999), 53-64.
[33] Fred Cohen, "Inmates With Mental Illness in Administrative Segregation: Texas Inmates Prevail," *Correctional Law Reporter*, vol. 11, no. 1 (June/July 1999), 1-15.
[34] *Madrid v. Gomez*, 889 F. Supp. 1146, 1230.
[35] *Madrid v. Gomez*, 1265
[36] Colorado Department of Corrections, *Budget Request for Fiscal Year 2002-03*, 110.
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