
Colorado

Criminal Justice Reform Coalition

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

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Honorable Members of the Joint Budget Committee
Colorado State Capitol
200 East Colfax Avenue
Denver, CO 80203

Dear Members of the JBC:

I am writing to the Joint Budget Committee to provide a response to Governor Bill Owens' February 27 letter to your body concerning changes in Colorado's sentencing and correctional policies.

The governor's February 27 letter has been interpreted as a clear message that sentencing and correctional policy changes are off limits and not open to negotiation. While the governor is entitled to his opinion on this matter, we wish to advise the JBC of several inaccuracies and misstatements that appear in the February 27 letter. The Colorado Criminal Justice Reform Coalition urges the JBC to not declare sentencing and parole policy reform "off limits." We hope you continue to consider policy changes that would produce budget savings through reducing the prison population.

The governor's letter mentions several studies as support, but does not provide any citation information for these studies. On March 3, I called Dr. Nancy McCallin to inquire which studies were used as a basis for the claims in the governor's letter. Dr. McCallin cited the following four publications:

1. Edwin Zedlewski, "Making Confinement Decisions."¹ This research paper, written by a staff economist at the National Institute of Justice (NIJ), has been severely criticized by academics and practitioners as being poorly designed and careless in its conclusions. The benefit-cost analysis performed by Zedlewski is the focus of intense criticism and this suspect figure (\$17.2 : 1 benefit-cost ratio) is a major foundation of Owens' argument. Zedlewski's numerous critics have pointed out that his self-proclaimed "crude" methodology for estimating the average number of crimes committed by an average criminal in one year serves to vastly inflate the estimates of cost savings. In addition to overestimating the crime saved by imprisonment, Zedlewski distorts the cost of society's response to crime (including costs that would be incurred regardless of criminal activity) and he ignores the diminishing returns from expanding use of incarceration (i.e., as incarceration

¹ Edwin Zedlewski, "Making Confinement Decisions," NCJ 105834 (Washington, DC: National Institute of Justice, 1987).

is expanded to apply to lower-level offenders, the crimes prevented per-offender decreases). Due to the intense criticism focused on Zedlewski's article (along with his self-admitted sloppy methodology), "Making Confinement Decisions" is rarely cited in serious criminal justice research.²

2. Cavanagh and Kleiman, "A cost benefit analysis of prison cell construction and alternative sanctions."³ This mysterious study was referenced by Dr. McCallin as an NIJ study, but the NIJ has no record of the study and it does not appear in the National Criminal Justice Reference Service's database of abstracts (the compilation of record for criminal justice related research). The only reference to Cavanagh and Kleiman's report in the literature is in an article in the journal *Federal Probation*, which compares the report to Zedlewski's research and dismisses it as producing "inflated estimates of the benefits of imprisonment."⁴

Whatever the thrust of Cavanagh and Kleiman's research was in 1990 (only two libraries in the country report owning the item, neither of which are in Colorado), at least one of the authors has since come forth with criticism of policies (like Colorado's current system) that over-rely on incarceration. Kleiman co-authored a 2000 article that criticized contemporary American criminal justice practices, saying that current policy is

dependent upon incarceration as its only real punishment, [and] cannot get us to the level of safety that should be a civic birthright for all Americans. What is more, the benefits we have reaped from our increasingly high incarceration rates have come at a staggering cost. And the burden has been felt most acutely by those on whose behalf the struggle against crime and drug abuse most urgently needs to be fought: poor (largely black and Latino) Americans.⁵

3. Michael Block, "Supply Side Imprisonment Policy."⁶ Block's 1996 article contains some information that supports the governor's stance, but even more that refutes it. Block conducts a benefit-cost analysis using a more responsible (although not perfect) model than Zedlewski. But in addition to more carefully selected data, Block's calculations differ from Zedlewski's because he distinguishes benefits and costs among various types of crime. He also differentiates between the benefits of increasing sentence length and the benefits of increasing the risk of imprisonment (i.e., the chance that a person will be sent to prison as the result of an offense). Block's calculations find that lengthening sentences does *not* have a dramatic economic benefit to society (particularly in the case of non-violent crimes like burglary where costs *exceed* benefits). He does find that increasing the likelihood of

² Franklin Zimring and Gordon Hawkins, "The New Mathematics of Imprisonment," *Crime & Delinquency* 34(1988): 425-436; D.F. Greenberg, "Cost-Benefit Analysis of Imprisonment," *Social Justice* 17(1990): 49-75; Thomas Marvell, "Is further prison expansion worth the costs," *Federal Probation* 58(4): 59-62; and Marc Mauer, "Does Building More Prison Save Money?" briefing sheet (Washington, DC: Sentencing Project, 1988).

³ David Paul Cavanagh and Mark Kleiman, *A Cost Benefit Analysis of Prison Cell Construction and Alternative Sanctions* ([Cambridge, MA]: BOTEC Analysis Corp., 1990).

⁴ Marvell, "Is further prison expansion worth the costs" (see n. 2).

⁵ Stephen Teles and Mark Kleiman, "Escape from America's Prison Policy," *The American Prospect* (September 11, 2000), 266.

⁶ Michael Block, "Supply Side Imprisonment Policy," in *Two Views on Imprisonment Policies*, NCJ 165702 (Washington, DC: National Institute of Justice, 1997).

imprisonment is cost effective in the case of violent crimes, but again finds that increasing incarceration for some property crimes produces a net economic loss.⁷ Block's findings are congruent with research that has shown lengthening sentences has little deterrent effect and is economically impractical.⁸

Although some conservatives have been encouraged by Block's support of increasing the likelihood of imprisonment for violent offenders (a theme introduced and championed by conservative public policy scholar James Q. Wilson), his thoughts on lengthy sentences directly contradict Governor Owens' position that reducing sentences poses an unacceptable harm to society. Block terms this thinking as "getting tough and getting it wrong," warning "the benefit-cost results imply that [the] concentration on increasing sentence length in recent years is not particularly good public policy."⁹

4. Don Gottfredson, "Effects of Judges' Sentencing Decisions on Criminal Careers."¹⁰ Perhaps one of the most glaring misuses of data in the governor's letter is the claim (based on Gottfredson's study) that "82 percent of offenders who were sentenced to some type of confinement were re-arrested within 20 years, according to a 1999 National Institute of Justice Study." In fact, Gottfredson's twenty-year longitudinal study found a re-arrest rate of 70% (not 82%) over twenty years.¹¹ But in addition to the misquoted numbers, using Gottfredson's work to support the governor's position is shocking, given Gottfredson's own conclusion at the end of the report, where he states that the study's results "offer little support for the policy trends, prominent since this project began, that have supported increased use of confinement as a sentencing choice, emphasized longer terms, or accepted specific deterrence to reduce offenders' recidivism."¹²

Governor Owens' argument also has structural problems. His letter starts by saying "one of the central and indispensable functions of government is to provide for public safety. One of the surest ways to achieve that is through incarceration." While this statement might, at first glance, seem to be a strong statement of policy, it is riddled with problems. First, the statement is what logicians call a causal fallacy (specifically a fallacy of complex cause). In simpler terms, the error in reasoning can be diagrammed as follows:

Public safety is a critical government function (true)

Prisons are a tool to promote public safety (true)

Therefore, any attempt to decrease prison populations is a threat to public safety (fallacious)

The governor's argument assumes that prisons are the only way to ensure public safety, when in fact most policy makers, academics, and criminal justice professionals acknowledge there are

⁷ Block, "Supply Side Imprisonment Policy," 18-21.

⁸ Richard Lippke, "Crime Reduction and the Length of Prison Sentences," *Law & Policy* 24(2002): 17-35.

⁹ Block, "Supply Side Imprisonment Policy," 22.

¹⁰ Don Gottfredson, "Effects of Judges' Sentencing Decisions on Criminal Careers," NCJ 178889 (Washington, DC: National Institute of Justice, 1999).

¹¹ Gottfredson, "Effects," 4.

¹² Gottfredson, "Effects," 9.

many influences on crime and safety. Prisons are only one method of promoting public safety, and incarceration is not the most effective and efficient response to all crime.

The most problematic aspect of the governor's February 27 letter to the JBC is his reliance on Zedlewski's publication to justify a "no negotiation" policy on criminal justice. Not only has Zedlewski's 1987 piece been widely discredited, but the way in which the governor uses the deficient \$17.2 : 1 benefit-cost ratio is also inappropriate. The NIJ's most recent publication concerning benefit-cost analysis and criminal justice cautions that, "when used improperly, [benefit-cost analyses] can become nothing but rhetorical ammunition in an ideological debate."¹³ Other benefit-cost analyses have been published by NIJ (in more recent years) that were *not* mentioned in the governor's letter, possibly because they employ more responsible methodology and thus show dramatically lower cost savings than Zedlewski does. But methodological arguments aside, the critical problem in the governor's approach is that his purported cost savings from incarceration are not compared to alternative approaches. Cohen emphatically states "it is *not* appropriate to examine only one policy option. Instead policy analysts should examine many alternatives to find the one that has the highest benefit-cost ratio, or the most 'bang for the buck.' Indeed, regulatory agencies are often required by law to consider all technically feasible alternatives to proposed regulations."¹⁴

Another misleading statistic used in the governor's letter is the claim that "63 percent of felons were charged with a felony within three years of release." This statement (attributed only to an "NIJ study") has several problems. The number of ex-prisoners who are *charged* with a felony is relatively meaningless, since it does not take into account cases where charges are dropped or the defendant is acquitted. The most recent national study of recidivism by the Bureau of Justice Statistics (BJS) finds that 47% of ex-prisoners were convicted of a new charge (felony or misdemeanor) in the first three years following their release from prison.¹⁵ Data released by the Colorado executive branch also paints a different picture. The Department of Corrections' (DOC) most recent statistical reports shows the three-year return to prison rate over the last seven years has averaged 46%. It should be noted that the DOC data differ dramatically from the BJS measure of new convictions, since it combines new prison commitments with the large numbers of technical returns (where offenders return to prison for violating the conditions of parole or probation—status offenses which would not result in criminal penalties but for the offender's status as a parolee or probationer).¹⁶ Thus, the actual rate of *new offenses* in Colorado is somewhere *below* the 46% cited by the DOC.

Yet another disturbing aspect of the governor's letter is the fatalistic attitude expressed in his statement "we...know that releasing prisoners will result in new crimes committed—crimes that would not have occurred if a criminal remained behind bars." If, indeed, Colorado's criminal justice policy is based the assumption that all prisoners are guaranteed to re-offend, then this

¹³ Mark Cohen, "Measuring the Costs and Benefits of Crime and Justice," in *Criminal Justice 2000* (Washington, DC: National Institute of Justice, 2000).

¹⁴ Cohen, "Measuring," 281.

¹⁵ U.S. Department of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994*, by Patrick Langan and David Levin, NCJ 193427 (Washington, DC: GPO, 2002), 3.

¹⁶ Colorado Department of Corrections, *Statistical Report: FY 2002*, by Kristi Rosten (2003), 65.

leads to the *reductio ad absurdum* that every convicted felon should receive a life sentence—a policy initiative which would involve costs so high that the repeal of TABOR would become necessary, along with massive cuts to other areas of state government (to an even greater extent than Colorado is already experiencing). Instead, if money is invested in treatment, crime prevention, and reintegration programs, recidivism rates can be reduced further. Such funding, however, is highly unlikely to materialize when current budget restraints are combined with a rapidly growing prison population.

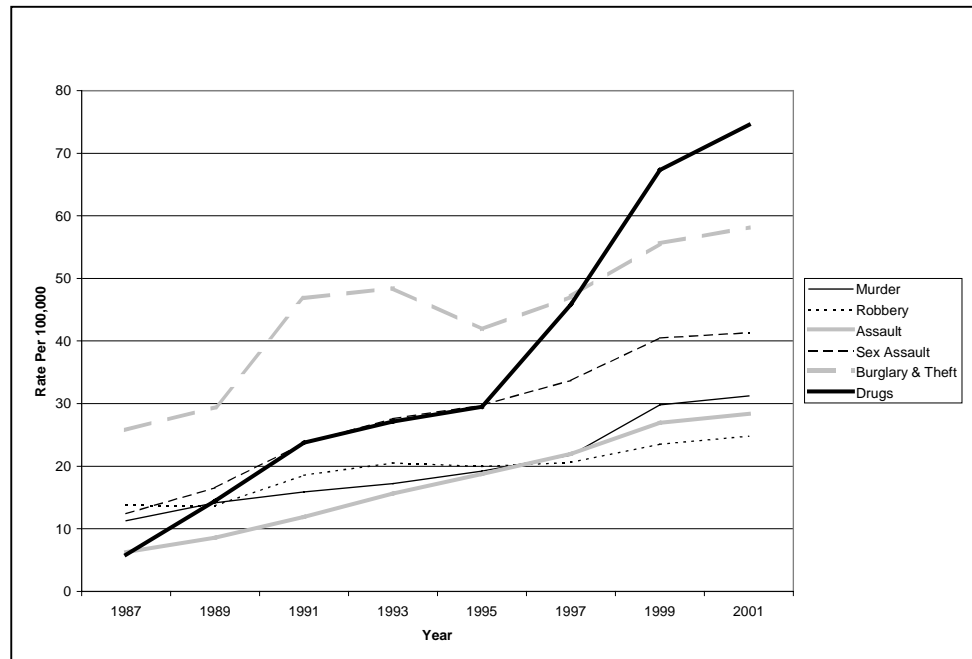
Even the leading conservative academics who ignited the tough-on-crime movement of the 1980s and '90s have recently expressed concerns. James Q. Wilson has deemed the prison-based drug policy of recent years to be a manifest failure; and, John DiIulio—a longtime proponent of harsher sentencing laws—has stated “the nation has ‘maxed out’ on the public safety value of incarceration.”¹⁷ In addition to theoreticians like Wilson and DiIulio, politicians have also come to realize the value of reexamining current policies. The Western Governors’ Association adopted a resolution in 2001 that advocates for more funding for drug treatment programs, increased use of alternatives to incarceration, and a greater focus on drug abuse prevention programs. The resolution (co-sponsored by Idaho Governor Dirk Kempthorne) notes that the

governors “recognize the escalating costs of incarceration and welcome effective common sense options within the criminal justice system that result in lessened drug abuse, healthier communities, and decreased criminal activity.”¹⁸

Governor Owens’ dismisses efforts to reevaluate criminal justice policies as “too-easy efforts” which threaten to

“override our primary duty to protect the safety of Coloradans.” When presenting the letter, Dr. McCallin dismissed other states’ efforts to reduce prison populations as dangerous experiments with “releasing felons early” which will end up saddling society with additional murders. This inflammatory language serves only to degrade the public policy process. There are numerous reforms that do not involve letting *anyone* out of prison early (much less violent offenders) and

Figure 1. Incarceration Rates for Specific Offenses



¹⁷ Teles and Kleiman, “Escape.”

¹⁸ Western Governors’ Association Policy Resolution 01-05 (August 14, 2001).

the constant focus on violent crime conveniently disregards the role that drug and property offenders have played in expanding our prison population (see figure 1).

Two national reports have summarized state-level reforms from the past three years.¹⁹ Table 1 shows recent reforms enacted in Colorado and our bordering states. States with both higher and lower incarceration rates than Colorado have enacted aggressive reforms which emphasize drug

Table 1. Reforms in Colorado and Neighboring States

	Incarceration Rate (2002)	Treatment & Alternatives	Parole Reform	Close Prison Beds	Targeted Releases	Sentencing Changes
Oklahoma	667				•	
Arizona	513	•			•	
Colorado	415		•			•
Wyoming	348					
Kansas	327	•	•			•
New Mexico	309	•			•	•
Utah	233		•	•	•	
Nebraska	228	•		•	•	

treatment (Kansas, New Mexico, Nebraska), eliminate certain mandatory sentence enhancements (Kansas, New Mexico), and closed prisons (Utah, Nebraska). Contrary to the scare tactics employed by critics, most state initiatives that released

prisoners to achieve cost savings were not indiscriminate “mass releases” of prisoners. Instead, several states carefully screened their prison populations and released inmates who met certain criteria, often requiring participation in specialized reentry programs designed to promote successful return to the community.

The governor’s February 27 letter uses discredited research, distortions of data, and scare tactics in an attempt to prohibit any policy changes that would result in a reduction of Colorado’s prison population. We do not pretend that criminal justice policy is an easy subject to tackle, but the budget pressures now facing Colorado require that all avenues are explored. If the governor is not willing to engage in a sincere and level-headed discussion about reducing the prison population, the General Assembly should take this task on themselves.

Your committee has access to excellent resources in the form of JBC and Legislative Council staffs. There are numerous policies that could be implemented to reduce the prison population while continuing to protect public safety. We urge the JBC to lead the General Assembly in selecting responsible ways to reduce the prison population before budget pressures force more drastic (and less thoughtful) measures. The Colorado Criminal Justice Reform Coalition remains committed to working with interested parties, including your committee, to formulate meaningful and sensible criminal justice policy reforms. If we can be of any assistance to the JBC, please do not hesitate to contact me.

Sincerely,

Stephen Raher
 Senior Policy Analyst

¹⁹ Vincent Schiraldi and Judith Greene, *Cutting Correctly: New State Policies for Times of Austerity* (Washington, DC: Justice Policy Institute, 2002); and Judith Greene, *Positive Trends in State-Level Sentencing and Corrections Policy* (Washington, DC: Families Against Mandatory Minimums, 2003).