Walls of Stone, Bars of Gold:

A Politico-Economic History of Colorado's Prisons

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by

Stephen Raher

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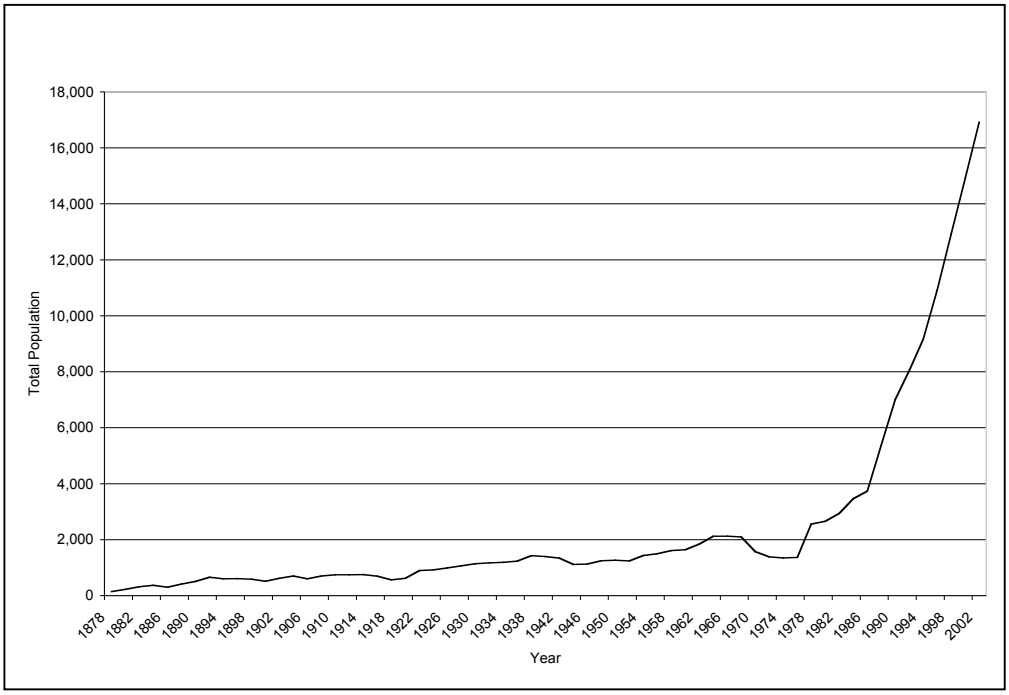
Introduction

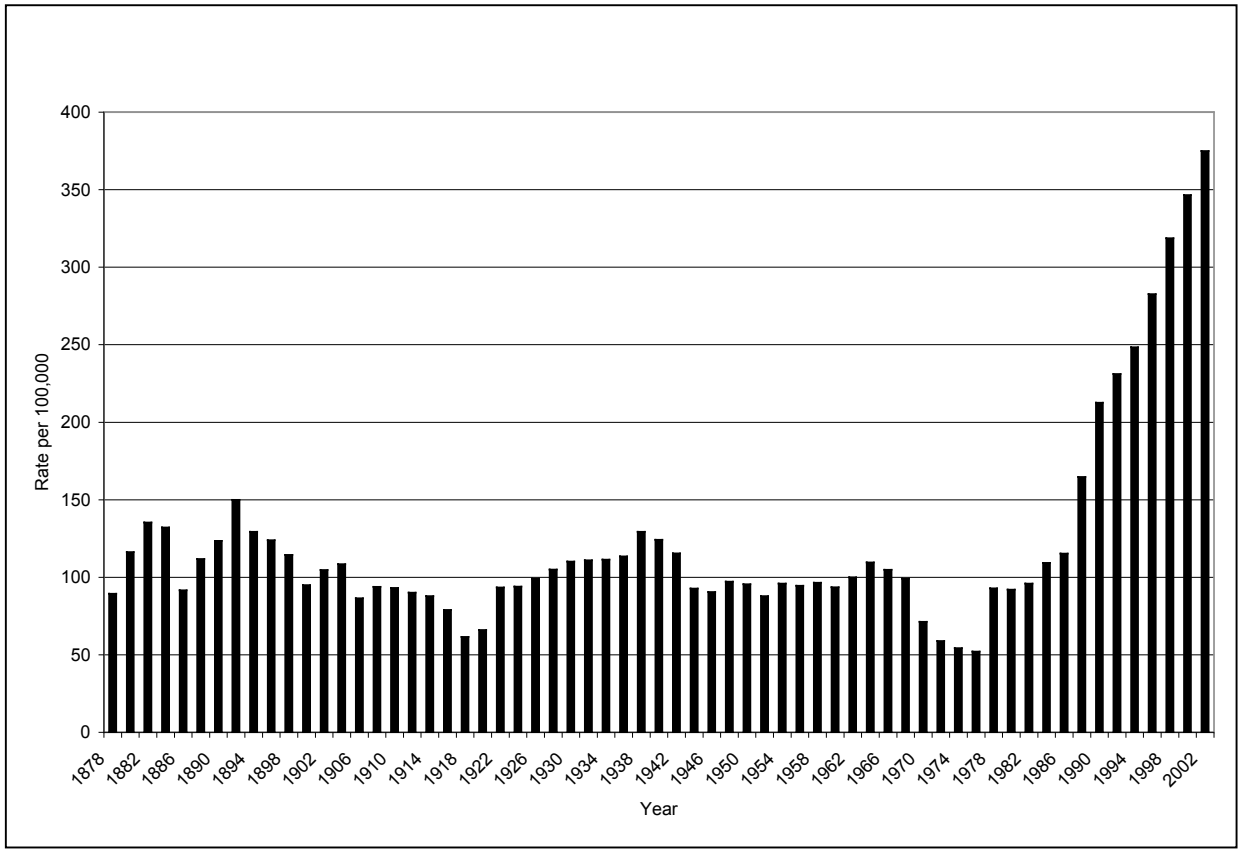
The United States may best be understood as an amalgamation of thematic conflicts—the friction between freedom and authority, the conflict among individualism and community, the tension of stability and change. Indeed, our most memorable founding father, Thomas Jefferson, was a human enigma. One of the physical manifestations of the American conflict between freedom and authority is the prison. The prison (alternately known as penitentiary, correctional facility, and correctional institution) is not unique to America, having been created in Europe before the voyage of Christopher Columbus. Prison's original purpose was to change people. This mission was based partly in moral terms and largely in economic interests. Through various means, societies sought to reform wayward citizens through incarceration and rehabilitation.

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).

Figure 2. Colorado 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.

Colorado's prison system started with roots firmly in the rehabilitative milieu. During the late twentieth century, however, rapid growth of the prison population (see figures 1 and 2) resulted in the rechartering of carceral institutions—the prime focus is being incapacitation. The dramatic increase in Colorado's prison population is a result of legislative, judicial, and economic factors which have combined to make policy change a formidable endeavor.

Roots of the American Prison System

When the United States fought its successful revolution for independence from Great Britain, a new country was formed with roots in the Anglo-Saxon tradition. The erstwhile

colonies separated from the crown in order to implement reforms which had not been forthcoming from the monarchy. The revolution, however, was not a wholesale rejection of all things British. So it was that the system of Anglo-Saxon criminal law became the basis for a new system of American crime and punishment. Thomas Jefferson, in his *Notes on the State of Virginia*, wrote that many of the laws governing the colonies during British rule were "relative merely to that form of government, or inculcating principles inconsistent with republicanism." It was with this problem in mind that the first post-Revolution meeting of the Virginia General Assembly was held to revise the criminal code so as to conform with the new system of government.[1]

Criminal justice in England had relied largely on fulfilling the body politic's psychological desire to see offenders suffer for their transgressions. Punishment—often a public event—was designed to serve several complex purposes. Execution was used commonly, and worked as a spectacle "to be understood not only as a judicial, but also as a political ritual," according to French historian Michel Foucault. "An offence," explained Foucault,

> according to the law of the classical age, quite apart from the damage it may produce, apart even from the rule that it breaks, offends the rectitude of those who abide by the law….Besides its immediate victim, the crime attacks the sovereign: it attacks him personally, since the law represents the will of the sovereign; it attacks him physically, since the force of the law is the force of the prince.[2]

As a result, the British system evolved from a general European tradition which granted judges a wide variety of options when sentencing a defendant—many of which were designed to give emotional satisfaction to the law-abiding citizenry. The most severe punishment was death, sometimes enhanced by extraordinary infliction of pain (such as breaking on the wheel or quartering). On the low end of the sentencing scale was a verbal warning. Sanctions falling in between these extremes included "more and less serious forms of corporal punishment (such as

mutilation), exposure on the scaffold or the pillory, forms of bondage (such as galley servitude or confinement in a prison workhouse), banishment, fines, and a host of minor obligations or prohibitions."[3]

Myriad penal reforms swept though England during the eighteenth and nineteenth centuries, resulting in incarceration practices of the 1800s which were much different from those of the preceding century. Eighteenth century penal law focused on sanctioning offenders with fines or symbolic public humiliation (e.g., whipping, pillories). Jail-based confinement was used most commonly for pre-trial detainees and debtors. Understanding the role of the debtor in English prisons is quite important in interpreting the impetus driving later reforms. As part of the government's duty to enforce contracts, debtors were frequently held in jails in order to secure payment to their creditor—not necessarily to punish the debtor. While the debtor was in jail, he retained his full rights as an Englishman (excepting freedom of movement), despite being housed alongside felons, who did not enjoy the rights of citizenship. Debtors often paid their jailer for their room and board, thus creating a system of graduated conditions of confinement, based on one's ability to pay. Jails were a tool of confinement (for debtors and felons alike)—focused on detaining their charges and not concerned with any type of reform or rehabilitation. The result was a system of chaos, arising from the lack of structure and the fact that jailers had a personal financial interest in the operation of their jail.[4]

Serious reform in England was coetaneous with the American war for independence, foretelling the similarities which would appear in both of the separate systems in coming decades. English reform of the nineteenth century was a reaction to the ineffective and corrupt system which had evolved. Change was centered on a refocusing of incarceration on improvement of the offender, as opposed to exacting revenge on behalf of the public. Reformer

Josiah Dornford summarized the feelings of many by saying "we take little care of the bodies, and less of the souls of our prisoners." The reform movement did not seek to make conditions more friendly for convicts. Instead, activists sought to reform the minds of prisoners through religious programming, hard labor, and solitary confinement. The model prison forbade communication among inmates, provided coarse clothing and plain meals, and ensured the religious and physical health of the inhabitants. John Howard, the sheriff of Bedfordshire, wrote the 1777 work *The State of the Prisons in England and Wales*, which largely catalyzed the reformist Penitentiary Act of 1779. Philanthropists, physicians, and religious leaders called for the new regime of prison programming as well as professionalizing of prison administration through removing direct financial incentives for jailers and paying a sufficient salary—the birth of Weberian bureaucracy in the correctional field.[5]

Meanwhile, in America, independence-fueled reform resulted in the rewriting of criminal codes. Jefferson drafted Virginia's "Bill for Proportioning Crimes and Punishments," which reflected the notion arrived at in England, that the punishment should fit the crime (and, as a corollary, that execution was over-used). In the bill's legislative declaration, Jefferson summarized the prevailing thoughts on government response to crime, saying

> it becomes a duty in the Legislature to arrange in a proper scale the crimes which it may be necessary for them to repress, and to adjust thereto a corresponding gradation of punishments. And whereas the reformation of offenders, though an object worthy the attention of the laws, is not effected at all by capital punishments which exterminate instead of reforming, and should be the last melancholy resource against those whose existence is become inconsistent with the safety of their fellow citizens.[6]

Jefferson's words reflect the belief in the potential for rehabilitation which was becoming popular on both sides of the Atlantic. The death penalty, so popular in previous centuries, was only to be used in the most severe cases and redemption of lesser offenders was to be achieved through the use of the penitentiary. Early penitentiaries in the U.S. closely mirrored the new

penal institutions in Europe. Quakers pioneered the Pennsylvania model of penitentiaries which emphasized isolation and labor. The rival (ultimately triumphant over the Pennsylvania model) was the Auburn model (developed in New York) which also relied on labor and contemplative silence, but featured group working and eating. The new prison system enjoyed immense popularity among citizens and elected leaders. According to Rothman, in no state did the decision to design and build a penitentiary system

> appear to have sparked political confrontations between supporters and opponents. The consensus was broad, undoubtedly because the idea of the asylum had something for everyone. There were those who supported it because they thought that juries would not hesitate to convict the guilty if jury members knew that a prison sentence, not the gallows, awaited the convicted; others, probably the majority, advocated confinement because of its rehabilitative potential.[7]

On the one hand, the harsh conditions of reformist penitentiaries can be seen as a step in the evolution away from emotional retributive justice,

> [h]owever repressive these disciplinary strategies may look to us, in their own day they were part of the reformist, humane and enlightened discourse that responded to the needs of the times and were often inspired by a pedagogic intention to transform individuals into able bodied citizens.[8]

On the other hand, reformist movements which do not decisively and successfully strike at the root of the social problem at issue must be held at fault to some degree. In other words, while abolitionists and women's suffragists, can be credited with overcoming the basic challenges which they organized against, other movements—including prison reform of the eighteenth, nineteenth, and twentieth centuries—have simply replaced one set of problems with another, despite any modernization which was produced as a byproduct of the reform.

Adams and Balfour, in their work *Unmasking Administrative Evil*, warn of this phenomenon in their discussion of technical rationalism. In pursuit of a better society, disciplines such as penology and public administration can focus so intently on professionalizing

and legitimating their fields that they lose sight of the original purpose.[9] Speaking directly to prisons, Adams and Balfour cite Phillip Zimbardo's famous Stanford prison experiment, pointing out the irony of prison as a human (and therefore fallible) system which is designed to address human fallibility. "Technical rationality," they write, "professionalism, and bureaucracy all redefine ethics out of the picture in many instances."[10] Sociologist John O'Neill explains the shortcomings of bureaucracy by pointing out Weber's own failing—namely that his "concept of the legitimacy of the modern state is purely formal: laws are legitimate if procedurally correct and any correct procedure is legal."[11] More specific to the correctional field, former correctional administrator Jerome Miller characterizes reform gone awry through the example of the control model used in Texas prisons in the 1960s. Miller describes it as an "efficiently run system of minute rules, unbending regulations, and obsessive accountability, [which] was violent to its core. The values which countenanced depersonalization and chronic abuse of inmates were left untouched. *Things were simply managed better*. This seems to be the goal of contemporary corrections" (emphasis added).[12]

Philosophical Underpinnings of the Public Institution

Prisons were not the only form of public institution which enjoyed a renaissance in the new American republic. The mercantile capitalist marketplace of Europe had been gradually effecting the growing use of institutional structures since the sixteenth century. As Europe became a capitalist industrial society, a new secular mechanism for controlling deviants—vagrants, criminals, orphans, the destitute, and the mentally ill—had to be developed. In the previous feudal economic system there existed an inherent paternalistic obligation of the wealthy classes to care for the poor in some manner—typically through church-based programs.

While an exclusively Marxist analysis of economics is not entirely satisfying, Marx did manage to hit upon a fundamental truth of capitalism—free labor must be compelled to work in a Darwinian, eat-or-be-eaten society. Thus, the previous moral obligation of the ruling class to care for the less fortunate could not be reconciled with the modern system of labor in which success for the rulers depended on discipline among the ruled.[13]

The emerging capitalist marketplace in Europe (a structure imported into the United States) resulted in the birth of several public institutions all of which were focused on dealing with surplus classes. The *modus operandi* of the new institutions, whether in the case of schools, jails, or hospitals, was to use disciplinary methods to instill an ethic of work and comfort with repetition in the inhabitants.[14] Or, to use O'Neill's words, the *raison d'etre* of any public institution "is a question of reproducing among the propertyless a sense of commitment to the property system in which they have nothing to sell but their labour and loyalty."[15] In order to achieve this dictum, the Europeans naturally structured a bureaucratic system of discipline and punishment. Gone was the patriarchal system of the past, and in its stead was a bureaucracy of asylums, workhouses, prisons, and training schools. Bureaucracy, after all, is centered around "a discharge of business according to calculable rules and 'without regard for persons,'" according to Weber, who defined "without regard for persons" as being "the watchword of the 'market' and, in general, of all pursuits of naked economic interests."[16]

In light of the capitalist impetus which underlies public institutions, our previous discussion of American prisons as grounded in the belief in rehabilitation becomes less convincing. The leaders of prison reform, such as the Quakers, were sincere in their belief in the potential of the human soul to be reformed. What made their movement successful, however, was not philosophical agreement on the part of the state, but rather the economic interest of

capital. If prisons could make good on their promise of instilling discipline and obedience in their charges, then capital could rely on dissident trouble-makers being "remanufactured" into docile and productive members of the market economy.

The Territory of Colorado and the Statehood Process

In the final hours of his presidency, James Buchanan signed legislation creating the Territory of Colorado on February 28, 1861.[17] Colorado's territorial government was created by the federal government in Washington DC, far removed from the realities of Colorado life. In order to facilitate a system of justice, the thirty-ninth Congress passed legislation in June of 1867 to set aside "net proceeds of Internal Revenue of the Territory of Colorado" between the years of 1866 and 1868 for the building of a penitentiary. The seventh session of the territorial legislature requested $40,000 from these funds in 1868 and Congress approved the request.[18]

The territorial prison was sited in Cañon City, thanks to the influence of Thomas Macon, a Cañon City resident. As in any jurisdiction, Colorado's siting of state institutions was generally treated as the pork barrel process that it was. Boulder, Black Hawk, Burlington, Central City, Golden, Denver, Georgetown, Pueblo, and Colorado City all lobbied to receive the new prison.[19] Cañon City, however, had an advantage in Macon. Mr. Macon served in the territorial legislature and supported the movement to locate the capital in Denver, instead of Golden. In return for his support, Denver-area legislators supported Macon's bill to locate the penitentiary in Cañon City. The enabling legislation, passed during the seventh session of the legislature, specified that the prison site should be at least twenty-five acres and be located within a half mile of the center of Cañon City. The penitentiary received its first inmate in

January 1871 and the operation of the facility was transferred from the U.S. Marshals' office to territorial officials in 1874.[20]

From the beginning of the Colorado Territory's existence, certain parties advocated strongly for statehood. Part of achieving statehood requires a prospective state to draft a constitution to be approved by Congress. Colorado held four constitutional conventions before finally attaining statehood in 1876. The fourth and final constitutional convention, convened on December 20, 1875, was not nearly as contentious as the national debate over whether Colorado should, in fact, enjoy the status of statehood. By the 1875 convention, "there was general agreement throughout the United States on what a state constitution should include and how a state government should be structured."[21] Unlike the uncertainty which surrounded the drafting and adoption of the U.S. Constitution in the eighteenth century, by 1875 the Jacksonian era had fostered the formation of a general consensus that "[l]egal order, bureaucracy, compulsory jurisdiction over a territory and monopolization of the legitimate use of force are the essential characteristics of the modern state."[22] The major controversies at the constitutional convention centered around church and state separation, a debate fueled by tensions between Colorado's Catholic and Protestant congregations.[23]

One of the topics which sparked virtually no disagreement was that of public institutions. Of the twenty-five standing committees charged with drafting sections of the constitution, one—the Committee on State Institutions and Buildings—had domain over crafting a prison system. The committee made its report on January 29, 1976 and the proposed language was accepted with only stylistic changes. Later, in February, language was added concerning the transfer of educational institutions from territorial to state control, but the original committee draft was essentially the same language that was ultimately codified as Article VIII, Section 1 of

the Colorado Constitution.[24] Article VIII, Section 1 is one of the few parts of the constitution which has not been amended since its inception. It reads:

> Educational, reformatory and penal institutions, and those for the benefit of insane, blind, deaf and mute, and such other institutions as the public good may require, shall be established and supported by the state, in such manner as may be prescribed by law.[25]

The simple language of Article VIII, Section 1 concisely reflects the thinking of the day concerning public institutions. The moral values which supported the use of prisons as a means to address societal problems and served as a veneer, covering the baser economic motives, is excellently represented by Colorado State Penitentiary (CSP) Warden R.A. Cameron who wrote in 1886 that "the public should not forget the fact that, although a man, 'overtaken in a fault,' may be incarcerated in a prison, nevertheless he is still a 'man and a brother,' and not a brute. Society, which has for its protection, taken away his liberty, still owes him something."[26]

In Colorado, the belief in prison's ability to reform was seen in a motion made on the floor of the constitutional convention. A convention delegate named Mr. Clark offered a resolution which would have clarified that once a person served their prison term, "it shall be held sufficient and final punishment under said judgement for that offense, and that he [the ex-convict] shall not thereafter be harassed with disfranchisement or other political disabilities."[27] Although the resolution did not pass in precisely the same format as Mr. Clark proposed, the original constitution did allow for restoration of voting rights after convicted felons served their term.[28]

In addition to the value-driven support of reformers and the self-interested support of capital, prisons—particularly in the western territories of the United States—were helped by the belief that crime was rampant and prisons were the chief method of creating civilization in the social and geographic wilderness. Communities frequently view the threat of crime out of

proportion with the actual crime rates, largely due to socio-psychological functions such as the framing effect.[29] The young state of Colorado was concerned about public safety, or the perceived lack thereof. Politicians and newspapers spread fear of vigilante frontier justice and the "code of the Lynch Law." In many ways, fear was an effective catalyst for statehood—the promise that a localized government could effectively instill the rule of law better than the federal government was a powerful argument for full admission into the Union.[30]

Colorado State Penitentiary:[*] The Early Years

The earliest extant record of conditions in the state-run prison system paints a bleak picture. Warden M.N. Mergue wrote in 1878 that "[a]t the time of my taking possession [of the penitentiary] there were, as shown in statement, eighty-four prisoners on hand. The supply of provisions was about exhausted, and the men were almost destitute of clothing and blankets, so that there was not a change of clothing."[31] Mergue provides an excellent glimpse into the philosophy of the time concerning public institutions. In his plea for a chaplain, he wrote "'Am I my brother's keeper?' was not accepted as a sufficient answer when uttered. It is less sufficient to-day, when the obligations of the different stratas of society to each other are much better understood."[32] In addition to requesting a paid chaplain (a request which subsequent wardens would make—to no avail—for years to come), Mergue asked for appropriations to build a secure cell house for mentally ill inmates and additional cells for the general population, which were already kept two per cell, in a facility designed for single bunking.[33]

[*] Until 1959, the Colorado prison system consisted of one facility—Colorado State Penitentiary in Cañon City. The penitentiary was later renamed Cañon Correctional Facility and is presently known as Colorado Territorial Correctional Facility. In 1993, a new prison was opened east of Cañon City and was named "Colorado State Penitentiary." For simplicity's sake, all references in this paper to the original prison will use the name "Colorado State Penitentiary."

The belief in prison-based reformation was stated clearly and extensively in 1883 by the CSP board of commissioners which wrote "[p]enal institutions like this are no longer considered as places of punishment only, but are also expected to be made the means of reformation." This belief should not be confused with a desire to make conditions luxurious for prisoners. In fact the commissioners showed great faith in the reformative powers of solitary confinement and hard labor. A truly remarkable section of the 1883 report featured a lengthy quotation from the commissioners of Illinois' Joliet Penitentiary, criticizing the use of life sentences. Among other things, the passage expresses sympathy for lifers, remarking

> "[t]o him the days come and go, and bring no hope, for he cannot say to himself as he awakes in the morning, or lies down to sleep at night, that he is one day nearer the time of his discharge, for, alas, he is one of those for whom there is no release save through the valley of the shadow of death….Surely such a form of punishment is little in keeping with the spirit of this age, and does not deserve the name of justice, for it is a species of torture more in keeping with the age of barbarism"[34]

This section of the report ends by remarking that when weighing a life sentence and a death sentence, "jurors who stand out for a verdict that will send a man to the penitentiary for life undoubtedly believe that they are leaning toward mercy, but, in our opinion, in such cases, mercy leans towards capital punishment as the lesser punishment."[35]

The 1883 Board of Commissioners' report also provides an invaluable view of penitentiary culture since, for the first and last time, the report was used to publish the inmate and staff rules of CSP. The rules make clear that the "convict must not be permitted to forget his position," and effected this through a regulation disallowing inmates from addressing officers or visitors by their given names and directing that "the title of Mister must not be applied to a convict." At the same time, however, a different modality of respect was to be shown to inmates—officers were told that they "must speak to convicts in a firm, mild tone, using no offensive terms, and at the same time with positive, dignified demeanor, which almost invariably

commands obedience without resort to punishment." While employees and guards have four pages of rules, inmates have only two pages of regulations, starting with "The First Duty of the Convict is 'Obedience,' and it will be for his Interest to Obey all Rules." Conversation by convicts is prohibited, and Rule 10 states that "[w]hen at meals or at work, if anything may be needed, [the inmate] will signify by holding up the hand or cup."[36]

A few years later, the theory of prison as a compassionate means of rehabilitation would be codified into Colorado's administrative nomenclature with the passage of Senate Bill 34 (1891). The bill created the Colorado State Board of Charities and Corrections, which had oversight of "all prisons, jails, reformatories, reform and industrial schools, hospitals, infirmaries, orphanages, [and] public and private retreats and asylums for the insane, and any, or all other institutions which derive their support wholly or in part from State, County or Municipal appropriations."[37] Senate Bill 34 showed once again that, in moral and economic terms, public institutions of all kinds played similar missions—care, isolation, and rehabilitation—rendered by the state in order to stabilize society and keep the rhythms of commerce in motion.

Correctional theory was in its infancy as a discipline in the nineteenth century and it relied heavily on recruiting staff who shared a passion for reforming the wayward inmate. Warden R.A. Cameron, in 1886, quotes an unnamed source (from the context, it appears likely to be excerpted from a publication of the National Prison Association) as saying "'[a] prison, without officers filled with zeal for reformation, and not under a benign influence, is but a nursery for crime, and a hot-bed for the propagation of vice.'"[38] In addition to promulgating policies and standards for within prisons, the National Prison Association encouraged wardens to advocate for policy changes in other areas of the criminal justice system, such as sentencing law.

In Warden Cameron's 1886 report, he asks the General Assembly for five changes to the criminal justice system. Three of the proposed changes are designed to distinguish inmates by establishing a classification system which would allow a continuum of treatment based on an inmate's behavior. The other two changes pertain to sentencing law: implementing the use of indeterminate sentencing and establishing a parole system.[39] We will see later that changes to sentencing laws have been one of the driving factors in twentieth century growth of Colorado's prison population.

From its inception, CSP was designed around a belief that through hard labor and humane treatment, prisoners could be released to lead moral, crime-free lives. In the first warden's report, Mergue boasted that "[t]he prisoners have been kept constantly employed" and that Colorado Boot and Shoe Manufacturing Company had entered into a contract to use prisoner labor in their manufacturing activities. Mergue reported the value of work performed by prisoners during the biennial period at $8,522.26, with an additional $36,996.19 worth of labor devoted to improvements to the physical plant—contrasted to total expenditures during the biennium of $66,017.01.[40]

The history of CSP is substantially intertwined with the history of U.S. prison labor. Convict labor in the United States started as a means of keeping prisoners occupied and preparing them for release by teaching a viable trade. The key selling point, however, for prison labor was the promise of a self-sufficient penitentiary. It became clear in the mid-nineteenth century that no prison would ever be self-sufficient using convict labor. In an effort to maximize profits, prisons turned to the contract system (in the north) and the lease system (in the south)(see table 1). Both of these systems involve prison systems granting convict labor to private firms in exchange for monetary compensation. The finished goods are then sold on the open market.[41]

Table 1. Prison labor systems.

		Means of Production	
		Public	Private
Marketplace	State Market	State-Use System (e.g., license plates, furniture for state offices, prison supplies)	
	Open Market	State Account System (e.g., CSP lime kilns)	Contract System (state controls inmate custody, care & discipline functions) or Lease System (all management of inmates is delegated to private party

Organized labor was opposed to convict labor based on two criteria: prison labor challenged the dignity of free labor and unfairly competed with free labor by providing a source of workers who were forced to work for sub-market wages or no wages at all. During the 1870s and 1890s, economic recessions created a policy window for labor unions in northern states to strike a decisive blow against prison labor. The final compromise that came out of the policy process was to limit prison labor to the state-use system. The unions' victory was short lived, however, due to the fact that states could not regulate prison-made goods imported from other jurisdictions, due to the strictures of the Interstate Commerce Clause of the U.S. Constitution. This gave birth to a new round of battles over prison labor which were once again resolved during a time of economic stagnation—the Great Depression. Congress passed the Hawes-Cooper Act in 1929 which effectively exempted prison-made goods from Commerce Clause status and subjected them to state regulations. In 1935, Congress granted the federal government power to enforce Hawes-Cooper and made it a crime to import prison-made goods into states that prohibited their sale.[42]

Colorado had experimented briefly with the contract system (in concert with the Colorado Boot and Shoe Manufacturing Company), but this practice had fallen out of fashion in

Colorado state government by 1892, when Warden William Smith proclaimed on behalf of CSP's administration "[w]e do not believe in the contract system now in vogue in many of the eastern prisons, but we do believe, that properly controlled, the shop [i.e., state account] system is the best disposition yet suggested for the labor of prisoners." He also championed the benefits of the state-use system (the crux of CSP's convict labor program), stating that it was "grossly unjust to the taxpayers, to require them to pay the cost of maintaining our prisoners in idleness…We recommend that the Penitentiary be placed on a self-supporting basis, as a great number of like institutions in the East."[43] Despite experiments with the state account system, inmate labor at CSP focused on maintenance of the institution and public works projects. State officials were sensitive to the objections of labor, and frequently attempted to minimize the impact of prison labor on the free market. In 1898, when Warden John Cleghorn proposed a CSP-based mining project, he was sure to point out that under his plan, "the state alone invests the capital, becomes the sole owner and manager, and the product will augment the wealth of the world. It will work no injury to private enterprise, nor does it infringe upon any conceded right of free labor."[44]

In 1882, CSP operated twelve lime kilns and showed cash earnings of $59,787.14 from convict labor and $83,086.32 worth of labor on improvements and repairs.[45] In 1886, Warden Cameron made moves to expand prison labor—a plan which was propel CSP further toward economic self-sufficiency. He explained that vegetables were necessary for the health of the inmates, but since the state could not afford produce on the retail market, CSP operated its own farming operation. This farm was on leased land, and the warden requested an appropriation to buy a plot of land for continued farming. Not stopping at this, he also requested that the state

build an electric plant for the prison, appropriate $6,000 for a water works, and buy a coal mine so that inmates could mine coal to power the lime kilns.[46]

By 1936, however, Colorado's earnings from convict labor were down. Warden Roy Best attributed the lack of profits from CSP's previously profitable canning plant "entirely…to the enforcement of the Hawes-Cooper Bill, which curbs the activities this plant has enjoyed in the past."[47] Still, correctional industries had managed to employ most convicts in one manner or another. A 1939 report to the federal Prison Industries Reorganization Administration on Colorado's employment of inmates showed that of 1,470 inmates, 1,075 (73%) were employed in production jobs (industrial, construction, land improvement, or agriculture) and an additional 325 worked in maintenance capacities or in the prison band. Only 5% of the entire prison population (seventy inmates) were unemployed—due to disability or illness.[48]

By the 1970s, however, prison labor had taken a nose dive and most inmates spent the day idle, with no employment, education, or recreation to occupy their time. This institutional boredom is partially credited with causing general unrest in the 1970s, including the riot of May 1975. Prison industries throughout the states have enjoyed somewhat of a revitalization under the 1979 Prison Industry Enhancement (PIE) Act, which relaxes certain provisions of the Hawes-Cooper Act for state prison labor programs which are accredited by the PIE Certification Program. In order to obtain PIE certification, programs must pay prevailing wages (up to 80% of which can be withheld for cost of confinement, victim restitution, inmate family support, and taxes) and agree to consult with organized labor when developing a prison labor program.[49] Despite the benefits delivered by the PIE program, only forty-two Colorado inmates are currently employed in PIE certified programs,[50] although a total of 6,551 inmates have jobs of some kind (including custodial, foodservice, laundry, clerical, etc.), paying an average of 85¢ per day.

Despite the relatively large number of employed inmates, many inmate jobs consist of menial tasks and require few hours of work per week. Moreover, unlike the 95% employment rate of 1939, only 52% of inmates in DOC facilities (not including private prisons) were employed in fiscal year 2002.[51]

Twentieth Century: Managing the Challenges of Growth

The earlier half of the twentieth century witnessed the administration of CSP devolve slowly into disorganization and unaccountability. In 1933 the Board of Charities and Corrections was abolished and its functions were assigned to the Division of Public Welfare.[52] The next administrative reorganization came in 1951, when CSP was incorporated into the newly created Department of Institutions (DOI). While the CSP warden had traditionally enjoyed absolute control over the workings of the penitentiary, changing trends in public administration theory resulted in the genesis of an overarching executive department (i.e., the DOI) which was charged with management of the State Penitentiary, State Reformatory, State Hospital, homes and training schools for the developmentally disabled, and the State Industrial School for Boys. The DOI also was charged with "general supervisory control" over the School for the Deaf and Blind, the State Soldiers' and Sailor's Home, Bureau of Child and Animal Protection, the State Home for Dependent and Neglected Children, the State Industrial School for Girls, and the Department of Public Welfare.[53]

As with many reform movements, the effect of DOI supervision over CSP changed over the years. CSP wardens still wielded considerable power. Iron-handed warden Roy Best became a bit too comfortable in power and was suspended in 1952 for violating the civil rights of inmates by means of the "Old Gray Mare"—a modified saw horse which inmates would be bent

over while Best would flog them with a leather strap soaked in salt water. Best had frequently been criticized for dehumanizing inmates and alienating staff. In the wake of his suspension, CSP seemed to swing back toward a more rehabilitative stance with the establishment of a specialized pre-parole facility (in 1959) and a minimum security work facility on the grounds of Camp George West (in 1969). In 1965 Colorado's adult prisons, the state reformatory, and the parole board were placed under the aegis of the Division of Correctional Services, an administrative subsection of the DOI.[54]

The prison system of the 1960s and particularly the 1970s was characterized by turmoil and poor management. Nowhere is this more apparent than the lack of documentation of any sort from these two decades. One of the few entrees into Colorado's prisons of the 1970s comes from a 1974 report of the Colorado Statewide Grand Jury which investigated matters at CSP. The grand jury, convened at the behest of Governor John Vanderhoof, spend eight months hearing testimony from CSP staff, inmates, attorneys, ex-employees of CSP, citizens groups, and others. The report issued by the grand jury gives an extensive list of "those conditions which the Grand Jury feels are a cause of, or promote, criminal acts within the penitentiary."[55] One of the criticisms contained in the report was a problem which the grand jury termed the "warden syndrome."

> For many years our various state prisons have not been known by their state, or their city, but by their warden; they are "Warden Brown's", or "Warden Smith's." The significance of this tradition is in the fact that the warden has virtually a free hand in establishing the programs, policies, and administrative structure of "his" prison. In addition, he may have the ability to make personal personnel choices and recommendations, determine sentences of inmates, and to promote or inhibit sporadic legislative changes.

Weber's vision of the estimable public official had somehow gone horribly awry. The grand jury concluded that the warden syndrome resulted in "a penal system that lacks coherence,

consistency, and confidence."[56] The report also criticized the state of inmate employment practices, administration, medical care, and educational programs.

The major change to stem from the Grand Jury report was the 1977 creation of the cabinet-level Department of Corrections, a move which pre-dated the dismantling of the DOI by sixteen years.[57] Still, administrative inefficiencies and lack of accountability continued to hamper the DOC (apparent again in the lack of documentation). From the 1980s to the present, Colorado's prison system has been characterized by one trend: explosive growth. During the two decades between 1980 and 1999, the prison population grew by an astonishing 454%, with a concomitant growth in the incarceration rate—from 92 per 100,000 to 323. The cause of this dramatic trend in incarceration can best be understood as a confluence of three factors: modified sentencing laws, litigation, and economic factors. All three factors produced unintended—if not unanticipated—consequences.

Ironically, the growth of the incarcerated population (and the accompanying prison construction boom) came at a time when other public institutions were dead or dying. In fact, in 1971 (before America's love affair with prisons matured), David Rothman concluded his book *The Discovery of the Asylum* with the words "we have been gradually escaping from institutional responses and one can foresee the period when incarceration will be used still more rarely than it is today."[58]

Prisons not only survived, they flourished. Why? Again, the answer is multi-faceted. Marc Mauer points to the political aspect surrounding crime in the context of America's culture of individualism, saying "it [is] simpler to conceptualize 'solutions' that punish individual behavior rather than addressing underlying contributors to crime."[59] A sociological perspective is provided by Miller, who reminds us that institutions have a life of their own and often have

subterranean purposes. In *Last One over the Wall*—Miller's remembrance of dismantling Massachusetts' reformatory system—he explains

> [a]sylums, prisons, and reform schools have hidden tasks to perform. They rest uncomfortably close to what holds a society together. It is a delicate balance, a societal cohesion that authentic deinstitutionalization threatens. To bring back into the community those who test the boundaries of its tolerance, beliefs, and safety is to invite a barrage of harsh questions and a resurgence of dark impulses. Institutions provide more than one kind of asylum. While they lock away those who offend our sensibilities or threaten our well-being, they also allow us to escape the deliberation we might otherwise expect from a compassionate society. They relieve us of responsibility. It's relatively unimportant whether an institution succeeds in its public purpose, whether curing the mentally ill or setting criminals straight. Its private task is to give absolution to society….deinstitutionalization is not a technical problem. It is not a matter of means. It has to do with values.[60]

Miller's astute observation is in some ways contrary to the Foucaltian view of punishment as an economic training mechanism—but the two are not necessarily mutually exclusive. Rather, the two functions of prison—discipline and segregation—have served as anchoring ends of a spectrum since the birth of the modern penitentiary. Clearly, by the late twentieth century, as Miller shows, the pendulum had swung back toward segregation and punishment.

Still, the social psychology of fear alone cannot sustain the investment of capital necessary to build and operate our current prison system. Carceral geographer Ruth Wilson Gilmore provides insight into the economic machinations of the prison-industrial complex in her theory of post-Keynesian militarism. In addition to fear of street crime and social unrest of the 1960s, there was the additional crisis of growing resistance to government growth. "The new state emerging from the crises," writes Gilmore, "and materialised as the integument of the prison industrial complex, is neither unexpected nor without roots. Rather, the US state…can claim permanent ideological surplus in the realm of 'defence.'"[61] In other words, in order to counter attacks on government's size, the state fell back on its unquestionable role of ensuring public safety—regardless of whether public safety was truly jeopardized.

Sentencing Law

Colorado's move toward harsher criminal sentences is in no way peculiar to the Centennial State—America in the 1970s and 1980s moved toward much longer sentences for convicted felons. Colorado began to experiment with changes to the state's sentencing statutes in 1979 when the General Assembly passed House Bill 79-1589, which changed Colorado's sentencing structure from indeterminate to determinate. The bill, sponsored by Representative Ann Gorsuch, eliminated the previous sentencing regime wherein a sentence to prison would be for an unspecified period, bound on either end by a minimum and maximum length.[62] For example, under the indeterminate plan a class 4 felony carried a sentence of five to forty years. How much of the sentence was actually served by the defendant was decided by the parole board. In contrast, under the Gorsuch bill, the sentencing judge would determine a finite sentence between four and eight years (see table 2).[63] For cases where extraordinary aggravating or mitigating factors were present, a sentence could be as low as one-half of the bottom boundary, or up to double the upper limit.[64] The Gorsuch bill was written with input from the executive branch (including the Department of Corrections), the judiciary, and the Colorado District Attorneys' Council.[65]

The great latitude which the parole board had wielded over criminal sentences was now significantly diminished. Judges had some power to pick a specific sentence within the prescribed range, or deviate from the sentencing range based on extraordinary circumstances. The sentencing structure had become more formulaic. The tension between discretionary and automatic punishment has long plagued the criminal justice system, which—at its core—is inherently subjective. This subjective nature is what Weber calls "empirical justice" in the sense

that it draws on "ethical or other practical evaluations" instead of metaphysical prophecies and oracle dicta. In an insightful moment, Weber recognized that the law is difficult to frame in terms of bureaucratization. He remarks that empirical justice

> can be sublimated and rationalized into a 'technology.' All non-bureaucratic forms of domination display a peculiar coexistence: on the one hand, there is a sphere of strict traditionalism, and, on the other, a sphere of free arbitrariness and lordly grace. Therefore, combinations and transitional forms between these two principles are very frequent…[66]

Colorado's politicians wanted quantitative proof of being "tough on crime." Thus, they sought to further sublimate and rationalize the sentencing system.

Table 2. Criminal Sentences

Felony Class	Indeterminate Sentence	Gorsuch Range	Mielke Range
1	Life – Death	Life – Death	Life – Death
2	10-50 years	8-12 years	8-24 years
3	5-40 years	4-8 years	4-16 years
4	1 day – 10 years	2-4 years	2-8 years
5	1 day – 5 years	1-2 years	1-4 years

Source: Rogers, "Criminal Sentencing in Colorado," 688.

The public, fueled by several high-profile cases, quickly became dissatisfied with sentences being handed down under the Gorsuch approach. Politicians, eager to accelerate their careers using public fear of crime as a fuel, wanted a more punitive criminal justice system. Hearing this sentiment, the General Assembly passed House Bill 85-1320, in May 1985, in order to demonstrate a harsh approach toward crime. In introducing HB 85-1320 (also known as the Mielke bill), House sponsor Don Mielke declared that "the citizens of the State of Colorado are looking to us [the General Assembly] to raise the penalties and change the system…" Mielke had submitted an extremely broad title ("Concerning criminal justice, and regarding the imposition and administration thereof") so that he could have the flexibility to craft the bill any number of ways as it moved through the legislative process. When the House Judiciary

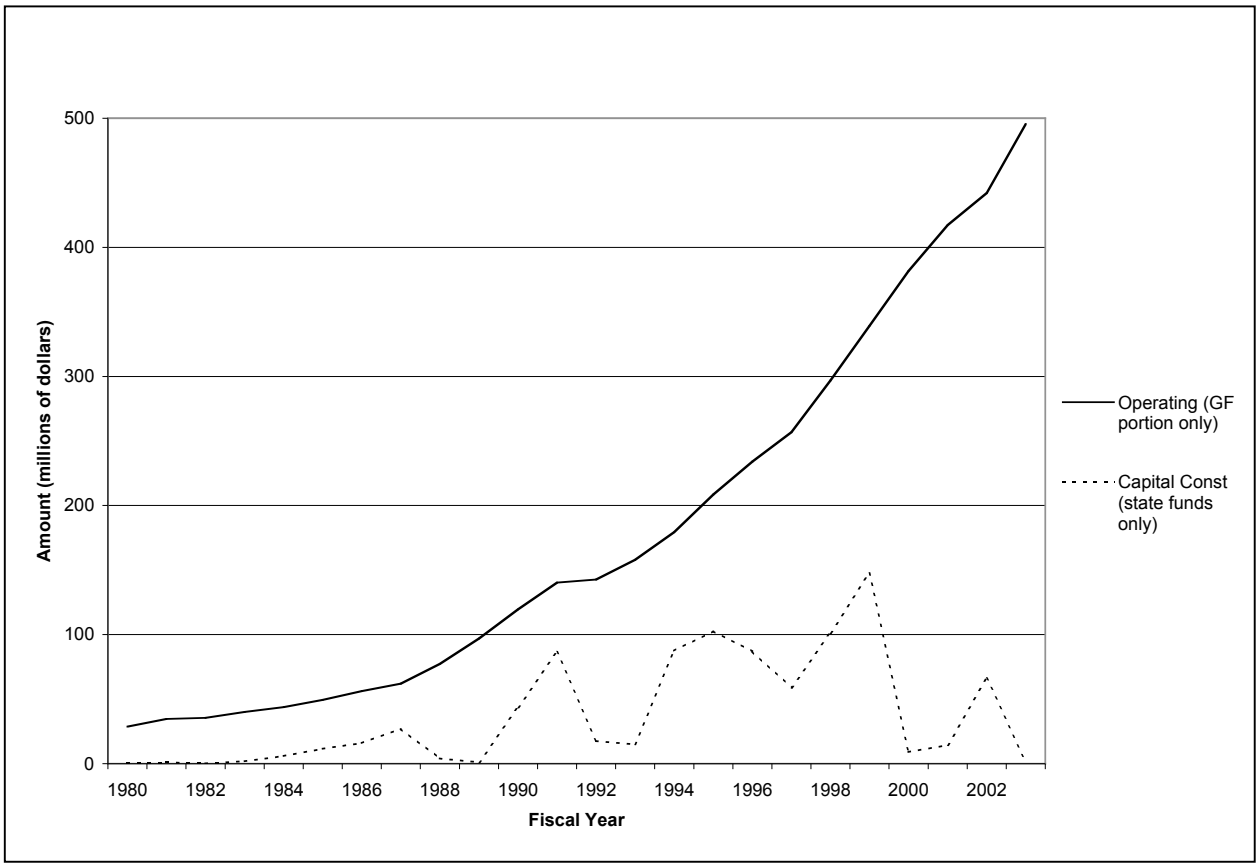
Committee held a hearing on HB 85-1320 on February 21, the bill had three main facets: it would abolish good time (time credited toward an inmate's sentence for every day he or she was not cited for a rules infraction), require multiple sentences for crimes of violence to run consecutively, and—most notably—it doubled the upper range for all felony classes.[67]

The Mielke bill was clearly grounded in a reactionary model of public policy. Some components of the bill were of dubious value, such as the consecutive sentence provision (judges already had latitude to run sentences consecutively), other parts were simply not thoroughly planned. Of HB 85-1320's flaws, the most astounding was the fact that the bill did not address the need for new prison construction which would surely result from its passage. Representative Mielke unambiguously asserted that it was necessary to keep people in prison longer, yet he did not include an appropriation to fund the impact that this practice would surely have on capital and operating budgets. The bill's proponents insisted that it only gave judges the *option* to impose longer sentences. Dismissing concerns over budgetary impacts, Denver District Attorney Norman Early told the committee, "there is no legitimate concern of fiscal impact which outweighs public safety."[68] Also presenting testimony at the Judiciary Committee hearing were several victims' groups. Alan Hutchings, whose sister had been murdered in 1979, supported HB 85-1320, but reminded the committee that his interest was in incarcerating *violent* offenders. "I am not talking about shop lifters, dope peddlers, burglars, or litterers," Hutchings testified. "I am talking about murderers, rapists, child molesters, and others whose crimes are of such a nature that a healthy person would vomit if they were exposed to the evidence."[69] In response to fiscal considerations, Barbara Brodt, founder and president of the Denver chapter of Mothers Against Drunk Driving, presented a petition signed by voters willing to pay additional taxes for a new prison to be built to handle the expected increase in prison population.[70] The petition read:

> "Our main objective is to have our current sentencing laws substantially *raised* for *violent crimes* in Colorado. (murder, rape, child molestation, etc.) Our first obstacle is that we do not have adequate prison space, therefore, *violent criminals are being released* after serving half of the original sentence…
>
> The cost to each taxpayer to build a 500 bed prison is between *$40.00 to $90.00 the first year and $10.00 to $20.00 per year after to maintain it.*
>
> We the undersigned petition the government to strengthen the sentencing laws and are willing to pay the above cost for a prison to accomplish this.[71]

Little did any of those present on February 21 realize that the Mielke bill would end up necessitating seventeen new prison facilities (through the present time), totaling 12,206 new prison beds. In fact, *without* the two most recent prisons (which opened during fiscal year 2002,

Figure 3. Department of Corrections' General Fund Appropriations

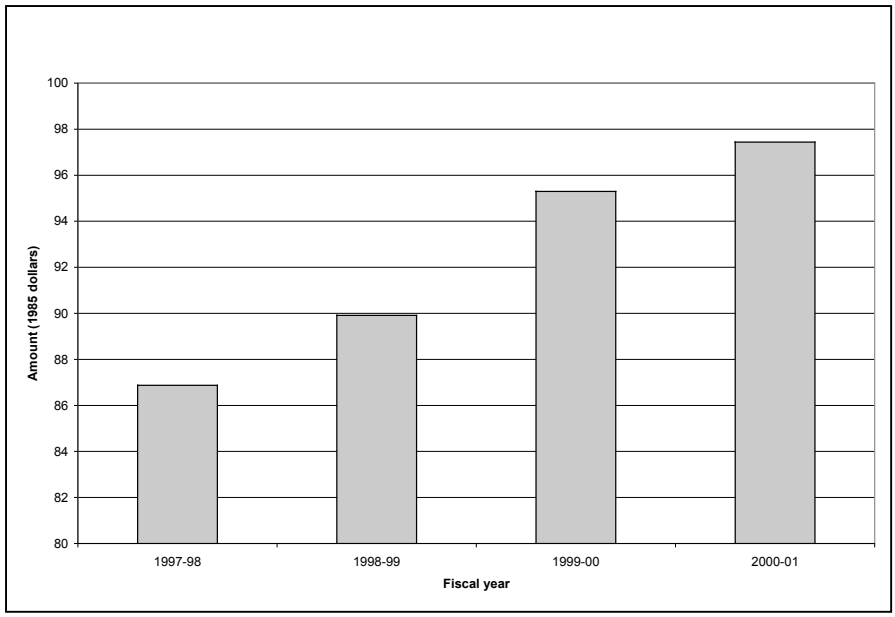


Sources: Operating budget: Colo. Gen. Assembly, Joint Budget Committee, *Appropriations Report* (FY 1983 through FY 2003). Capital construction budget FY 1980-86: Colo. Gen. Assembly *Session Laws*; FY 87-01: Colo. Gen Assembly, Leg. Council Staff, *An Overview of the Colorado Adult Criminal Justice 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.

and for which cost data is not yet available), the average Colorado taxpayer paid $95.72 in fiscal year 2001 for operation *only* of prison beds which have come on line since the Mielke bill's passage. Adjusted for inflation, this figure represents $59.19 in 1985 currency—nearly three times the amount "agreed to" by the petition signers.[72]

To grasp the full fiscal impact of the Mielke bill, it is useful to look at both operating and capital costs associated with the state's prisons. Since fiscal year 1980, Colorado has spent $765 million building new prisons, and more than four billion general fund dollars operating the prison system (see figure 3)—a number which does not account for federal and cash funds which are included in the DOC's budget. The annual per-taxpayer cost for operation alone is approaching $100 (see figure 4). The DOC's total operating budget (including federal and cash funds) has grown a total of 1,398% since fiscal year 1980—from $37 million to $563 million. Despite the certainty of budgetary increases, HB 85-1320 had an appropriation of only $106,400 while moving through the legislative process.[73]

Figure 4. Per-Taxpayer Share of Prison Costs (operating budget only)



Sources: Appropriations data: Colo. Gen. Assembly, Joint Budget Committee, *Appropriations Report* (fiscal years 2001 through 2003); number of taxpayers: Colo. Dept. of Revenue *Annual Report* (fiscal years 1998-2001); consumer price index data: U.S. Dept. of Labor, Bureau of Labor Statistics.

Some members of the Judiciary Committee were hesitant about the potential fiscal impact of HB 85-1320, and others pointed out that the newly-formed Commission on Criminal Justice would be meeting over the summer and could discuss reform of the sentencing statutes in a more thoughtful manner. But Representative Jeanne Faatz expressed the view of many politicians, impatient to act in some manner, by saying "I just feel we owe it to the citizens to take action now and not to propose more studies." The Mielke bill passed out of committee unanimously on February 21. For reasons unknown, the bill was not brought up for second reading on the floor of the House until several months later—on May 21, just four days before the legislature adjourned for its summer recess. The Mielke bill passed second reading on a voice vote and the next day (May 22) was up for third reading. With several representatives proclaiming it "the most important piece of legislation we have before us this year," [74] the bill passed out of the House on a vote of fifty-three to nine (three absent or excused) at 11:12 a.m.[75]

The bill was introduced in the Senate that same day, and was referred directly to the Appropriations Committee, without being assigned the judiciary committee (an allowable, but unheard of maneuver). At 8:48 that night, the Senate debated the Mielke bill on second reading. The Senate was more divided over the bill, and debate centered around the section which eliminated good time. Supporters of the bill, such as Senator Al Mieklejohn, reinforced the simple opinion that criminals needed to be segregated from society. During the debate, Mieklejohn gave the following summary of his thoughts:

> Mister Chairman and members of the committee: A criminally inclined person who's in prison can't be hurting citizens. And the citizens are looking to us to protect them. The first duty of the government is public safety, and as long as they're in stir, they're not out shooting somebody or robbing or whatever. This bill should be enacted.[76]

But several senators raised objections to the low appropriation when clearly the long term fiscal impact of the bill would be much greater. Senate sponsor Kathy Arnold responded to this

criticism by saying that the bill only had to carry an appropriation for the first year—not out years. While this appropriation had been set at $106,400, Arnold said that over forty years, the bill was anticipated to require 500 new prison beds, at a cost of $3.2 to $25 million. Republican Martha Ezzard called the fiscal note "dishonest" and the bill "overkill," countering with an estimate projecting up to $42 million in fiscal impact. Ezzard and others raised serious objections to the bill not having been heard before the Judiciary Committee. After twenty-eight minutes of debate, HB 85-1320 passed second reading on a vote of eighteen to fourteen (three members excused).[77]

The next morning, May 23, the Senate took up the Mielke bill on third reading. Senator Ezzard started the debate by offering a third reading amendment, which would appropriate $27 million over two years by raising the taxes on alcohol and tobacco. In proposing her amendment, Ezzard cited an opinion poll conducted by the Division of Criminal Justice which found that Coloradans wanted longer criminal sentences, and 70% said they would support increased alcohol and tobacco taxes to pay for new prisons (the next most popular option was to increase corporate taxes, which was supported by 23% of those surveyed). Making an eleventh hour proposal to increase taxes was clearly a desperate move on the part of the opposition.[78]

Realizing the need for a more thorough and reasoned debate, Senator Jack Fenlon moved to refer the bill to the Senate Judiciary Committee for a hearing. Fenlon's motion received support from senators of both parties, including Senate President Ted Strickland. Speaking in support of the Fenlon motion, Senator John Beno explained that he had met with a staff analyst from the Office of Planning and Budgeting. The analyst had told him that there was a documented trend of Colorado judges predominately giving sentences at the median of the applicable sentencing range. Given this trend, Beno explained, the state would need two new

prisons within the next three years, if Mielke passed. Senator Dan Noble argued on the floor that the previous night's second reading debate had been as good as any committee hearing was likely to be, not mentioning the fact that no public testimony was allowed. Senator Harold McCormick pointed out that he had recently served on a conference committee (for SB 85-05, a water bill) which had met for thirty hours over a two day period—given the magnitude and potential for impacts, the Mielke bill, in McCormick's opinion, could not be properly considered in a half-hour floor debate. Nonetheless, Fenlon's motion lost fifteen to twenty.[79]

Having completed consideration of the Fenlon motion, the Senate again took up consideration of the Ezzard Amendment. The amendment lost on a vote of thirteen to twenty-two, however after tallying the vote, eight senators changed their vote to "no," thus making the official recorded vote five to thirty. Democrat Jim Rizzuto offered an amendment which removed the elimination of good time, but did not increase the appropriation. Rizzuto's amendment passed twenty-seven to eight.[80]

At last, the time had come for the Senate to take a final vote on HB 85-1320. Senator Arnold reminded the chamber that the bill only gave expanded options to judges. Senator Fenlon advised his colleagues to vote no, saying, "I believe in being tough on crime, but I also believe in being reasonable, realistic, and fiscally responsible." During the voting, Senator Tom Glass spoke for most, if not all, of the dissenters with the following declaration:

> I'm going to vote "no" on this bill and I'm going to do it not because I think the bill is so terrible…but I think it's irresponsible for us to take up a bill, vote on it at ten o'clock at night, with no public input, no responsible fiscal note, and no opportunity for the normal committee of reference to consider it. Therefore, I vote "no."[81]

The Mielke bill passed the Senate on a vote of twenty-four to eight (three absent/excused). Among those voting "no" were Republicans Strickland, Fenlon, Cole and even Cañon City's senator, Harold McCormick.[82]

Litigation

In November of 1977, Colorado inmate Fidel Ramos, filed a lawsuit in federal district court which would profoundly change the DOC and the lives of prisoners. Federal case law of the 1970s opened new doors for prisoners who wished to challenge the conditions of their confinement.[83] Without assistance of an attorney, Ramos filed a lawsuit under 42 USC §1983, alleging constitutional violations based on his living conditions at CSP (referred to at that time alternately as Cañon Correctional Facility and "Old Max"). A few months later, the American Civil Liberties Union came to Ramos's aid and refashioned his complaint into a class action on behalf of "all persons who are now or in the future may be incarcerated in the maximum security unit of the Colorado State Penitentiary, at Cañon City, Colorado."[84] The trial, held in the courtroom of Judge John Kane, lasted five weeks. The pre-trial orders consisted of 1,727 paragraphs "containing stipulations and proposed stipulations of fact, excerpts of sworn testimony and summaries of statistics," thirty-six witnesses testified at the trial, and over 400 exhibits were introduced.[85]

Judge Kane found for Ramos in November 1979, noting that

> [t]he conditions of confinement at the Cañon Correctional Facility meet all tests [of unconstitutionality] by all known measures of proof. As shown by substantial evidence, these conditions shock the conscience, are incompatible with evolving standards of decency, involve unnecessary and wanton infliction of pain, and evidence both deliberate indifference to the prisoner's protected interests and "circumstances and conduct so grossly incompetent, inadequate or excessive as…to be intolerable to basic fairness."[86]

In his more than 30,000 word opinion, Kane specified many areas where he felt that the conditions at Old Max violated the first, eighth, and fourteenth amendments. These areas included housing conditions, sanitation, idleness of inmates, isolation practices, inmate employment, education, recreation, personal safety, medical and mental health care, classification of inmates, visitation, mail regulations, and access to the courts. Predictably, the

DOC had asked Kane to not consider the case, in light of the deference federal courts had traditionally given state prison systems. Kane acknowledged this tradition, but noted that the U.S. Supreme Court had consistently applied the eighth amendment to state prisons and that the courts could not ignore the "substantial, often compelling, evidence of long existing and continuing constitutional violations" at Old Max.[87]

After Kane handed down his decision, he gave the DOC forty-five days to come up with a plan to ameliorate the problems at the facility. The DOC filed their plan along with a motion for stay of further proceedings, pending the appeal the DOC planned on filing. DOC's grounds for appeal apparently stretched the patience of Judge Kane who wrote on February 21, 1980

> [d]efendants contest the court's findings and conclusions, but they have not presented any evidence or authority which suggests that those findings or conclusions should be otherwise. In fact, they have not even indicated which of those findings and conclusions they contest. In short, there is nothing in the motion but the bare assertion that defendants believe that I am wrong. It is an exercise in *ipse dixit*.[88]

Kane was most shocked by the state's objection to the requirement that the DOC develop a remedial plan. He noted in his opinion on the motion for a stay of execution that almost all of the evidence at trial had been undisputed by DOC, and that his order directed the state to craft its own remedy instead of imposing a judicially-designed plan on the state. Exasperated by DOC's "confused and confounded" reading of his original order, Kane wrote "[n]o one except defendants [DOC] appears to have had such difficulty understanding" the requirements of the order. DOC again resorted to the claim that Kane had overstepped his bounds. Unlike judges in other eighth amendment cases, however, Kane had deliberately avoided such behavior. In response to this line of attack, he wrote

> [d]efendants complain that I have intervened too much, that I have taken over the supervision of the prison. That could not be further from the truth. From page one of the December 20 decision, I expressed a great measure of deference toward state officials, and made it clear that I have no intention of running the prison. The order is hardly a

> catalog of things to do and when to do them. Maximum latitude is afforded to the state's prison officials. The irony of defendants' allegations is that they also complain that I have not sufficiently told them what they have to do. The order is a public document that all are entitled to review. If it amounts to running the prison, then prisons require no personnel.[89]

Judge Kane denied the DOC's motion to stay proceedings, but continued the stay of execution for the closure of Old Max, pending the state's appeal to the circuit court.

On June 30, the U.S. Court of Appeals for the Tenth Circuit heard Colorado's appeal of the *Ramos* case. In an opinion issued on September 25, a panel of judges from the Tenth Circuit found the bulk of Kane's decision to be appropriate. The appeals court struck down Kane's findings concerning motility, classification, idleness, and visiting regulations, but let all other sections stand. The court concluded by remanding the case to Kane so that he could consider new developments in Colorado's prison building campaign. The state's request for an *en banc* hearing was denied, and a petition of certiorari to the U.S. Supreme Court was also denied in April of 1981.[90]

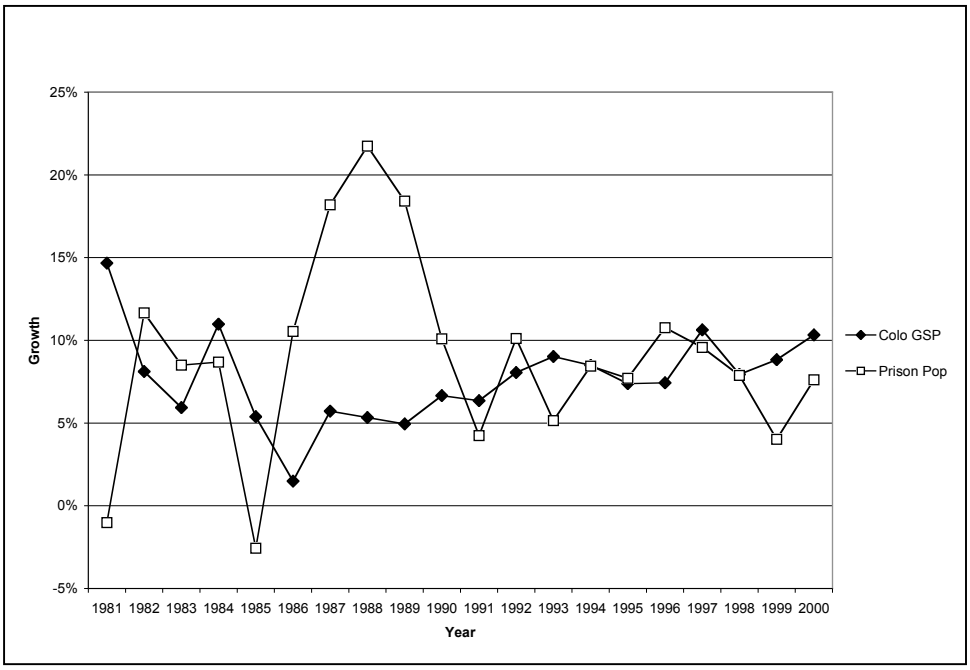
Colorado was hardly alone in its clash with the federal court system. By mid-1988 prison systems in thirty-nine states and the District of Columbia were under court orders to alleviate unconstitutional conditions, primarily stemming from overcrowding.[91] The overcrowding was, not surprisingly, caused by the nationwide move toward harsher sentencing. The court battles resulted in a massive campaign of prison building, so as to avoid further overcrowding suits.

"It's the economy, stupid"

As previously mentioned, the Mielke bill has resulted in an explosion of Colorado's prison population. This population increase, coupled with the impact of the *Ramos* decision, has resulted in rapid building of new prisons and an associated growth of the correctional budget.

From FY 1986 to FY 1998 (a time period over which the administrative structure of state government has remained essentially unchanged), the DOC's total operating budget increased 14.4%, a greater increase than any other area of state government (and, with health care, the only area to increase more than 10% over the same period).[92] By 1985, Colorado already had a statutory limit on state budget growth—the Kadlecek Amendment, which limited general fund appropriation increases to 7% annually. In 1991, the limit was rewritten and lowered to 6% by means of the Arveschoug-Bird bill, found at CRS §24-75-201(1).[93] 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.[94]

Figure 5. Economic Growth vs. Prison Population



Sources: Colorado GSP data from U.S. Dept. of Commerce, Bureau of Economic Analysis (www.bea.doc.gov), Prison population data from Colorado Dept. of Corrections *Statistical Report* (fiscal years 2000 and 2001).

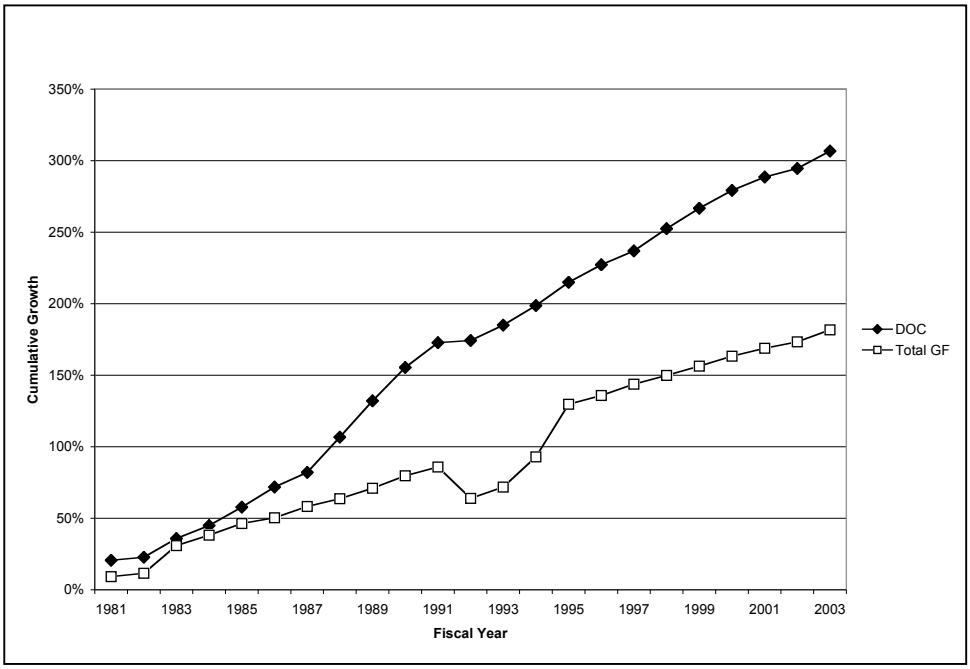
Since the prison population has grown at a much steeper rate than state population, TABOR and Arveschoug-Bird have made it necessary for DOC budget increases to come at the expense of other areas of state government. Moreover, TABOR and Arveschoug-Bird are essential to

understanding the concept of post-Keynesian militarism. Dissatisfied with the loopholes in Arveschoug-Bird, Coloradans voted for TABOR-type legislation in increasingly large numbers in 1986, 1988, and 1990, before its eventual passage in 1992.[95]

The fact that TABOR passed in 1992 is no coincidence. After the Colorado recession of the late 1980s and early 1990s, citizens were particularly dissatisfied with the state's Keynesian policies of increased spending in times of downward business cycles in order to guarantee effective demand. The implementation of TABOR has produced unforeseen problems in correctional budgeting. Since prison admissions are generally inversely related to economic activity, economic hard times have translated into increased prison spending. Interestingly, the correlation of economic stagnation with high prison populations is somewhat reduced—but by no means eliminated—due to drug policy. Although bad economic conditions can lead to more prevalent drug use, the fact remains that most drug addicts are employed,[96] which lessens the correlation of rising unemployment with prison growth. These phenomena tend to ensure that prison growth is typically on the rise, despite economic trends, although there is still a noticeable correlation (with some lag time) between prison admissions and the economy (figure 5). This has not resulted in true fiscal crisis until the present day, as legislators begin to ponder the state's fiscal year 2003-04 budget in the face of a $388 million budget shortfall.[97] The most damaging impact of DOC budget growth and the limitations of TABOR and Arveschoug-Bird is the fact that increased prison spending can only come about by cutting money from other areas. This opportunity cost is difficult to measure but can be seen in broad terms in figure 6.

While the intent of TABOR's supporters was to curtail all government spending, this goal was not accomplished insofar as correctional spending is concerned. While some may have predicted this during the 1992 election cycle, they probably could not have imagined the confluence of factors—or, in Kingdon's terminology, the coupling of proposals, alternatives, and solutions[98]—which conspired to sustain growth in the post-Keynesian prison system. Three primary factors have combined to ensure continued growth of the DOC budget—the policy process, manipulation of public opinion, and rural economic interests.

Figure 6. DOC versus General Fund Cumulative Growth



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

The policy process itself, as viewed through the punctuated-equilibrium model, is both the cause of the massive changes engendered in the Mielke bill and the lack of innovative change of the correctional system since 1985. The punctuated-equilibrium theory holds true in general, and is particularly germane to criminal justice policy since it accounts for the peaks and valleys in citizen concern for public safety. As distilled by True, Jones, and Baumgartner, "[a]s opposed to smooth, moderate adjustments to changing circumstances, the conservative nature of the

national political system often favors the status quo, thereby making conflict or an extraordinary effort necessary for major change." In between times of major change to a particular policy area, policies are characterized by stasis and incrementalism.[99] While True, Jones, and Baumgartner are speaking specifically of the national political system, Colorado's policy arena easily fits the punctuated-equilibrium model, particularly given Coloradans' general conservatism and skepticism of change.[100] Colorado's criminal justice policy and its human byproduct, the prison population, had remained stable—touched only by minor changes and administrative restructuring—until the Gorsuch and Mielke bills dramatically changed the use of prisons in the state.

Essentially, once the Mielke bill passed, it has proven largely impossible to change. In fact, only two noteworthy changes to Mielke have been enacted by the legislature since 1985, both of which have tried, in vain, to mitigate the exponential growth of the prison population. Senate Bill 89-246 created a class 6 felony, with a range of six months to four years. House Bill 93-1302 reduced the maximum limit for class 3, 4, 5, and 6 felonies by twenty-five percent. Other than the two aforementioned bills, the only other changes to sentencing law have been a bewildering growth in special sentencing categories (e.g., crimes with extraordinary mitigating or aggravating circumstances, crimes with sentence-enhancing circumstances, crimes presenting an extraordinary risk of harm to society, and habitual offender statutes) which has made criminal sentencing much more complicated and has placed significant power into the hands of District Attorneys, who decide how to charge a defendant.[101] Table 3 gives an overview of the complex sentencing system which has evolved over time.

Table 3. History of Sentencing Ranges for Special Sentencing Categories

	Class 2 Felony	Class 3 Felony	Class 4 Felony	Class 5 Felony	Class 6 Felony
1979 Normal Presumptive Ranges	**8 to 12 years**	**4 to 8 years**	**2 to 4 years**	**1 to 2 years**	**N/A**
Extraordinary mitigating or aggravating circumstances	4 to 24 years	2 to 16 years	1 to 8 years	6 months to 4 years	N/A
Crime of Violence	8 yr. minimum	4 yr. minimum	2 yr. minimum	1 yr. minimum	N/A
1981 Normal Presumptive Ranges	**8 to 12 years**	**4 to 8 years**	**2 to 4 years**	**1 to 2 years**	**N/A**
Extraordinary mitigating of aggravating circumstances	4 to 24 years	2 to 16 years	1 to 8 years	6 months to 4 years	N/A
Extraordinary aggravating circumstances/crime of violence	12 to 24 years	8 to 16 years	4 to 8 years	2 to 4 years	N/A
1985 Normal Presumptive Ranges	**8 to 24 years**	**4 to 16 years**	**2 to 8 years**	**1 to 4 years**	**N/A**
Extraordinary mitigating or aggravating circumstances	4 to 48 years	2 to 32 years	1 to 16 years	6 months to 8 years	N/A
Extraordinary aggravating circumstances/crime of violence	24 to 48 years	16 to 32 years	8 to 16 years	4 to 8 years	N/A
1988 Normal Presumptive Ranges	**8 to 24 years**	**4 to 16 years**	**2 to 8 years**	**1 to 4 years**	**N/A**
Extraordinary mitigating or aggravating circumstances	4 to 48 years	2 to 32 years	1 to 16 years	6 months to 8 years	N/A
Extraordinary aggravating circumstances/crime of violence	16 to 48 years	10 to 32 years	5 to 16 years	2.5 to 8 years	N/A
1989 Normal Presumptive Ranges	**8 to 24 years**	**4 to 16 years**	**2 to 8 years**	**1 to 4 years**	**1 to 2 years**
Extraordinary mitigating or aggravating circumstances	4 to 48 years	2 to 32 years	1 to 16 years	6 months to 8 years	6 months to 4 years
Extraordinary aggravating circumstances/crime of violence	16 to 48 years	10 to 32 years	5 to 16 years	2.5 to 8 years	18 months to 4 years
1990 Normal Presumptive Ranges	**8 to 24 years**	**4 to 16 years**	**2 to 8 years**	**1 to 4 years**	**1 to 2 years**
Extraordinary aggravating circumstances/crime of violence	16 to 48 years	10 to 32 years	5 to 16 years	2.5 to 8 years	18 months to 4 years
Sentence-enhancing circumstances	8 to 48 years	4 to 32 years	2 to 16 years	1 to 8 years	1 to 4 years
1993 Normal Presumptive Ranges (current law)	**8 to 24 years**	**4 to 12 years**	**2 to 6 years**	**1 to 3 years**	**1 year to 18 months**
Extraordinary mitigating or aggravating circumstances	4 to 48 years	2 to 24 years	1 to 12 years	6 months to 6 years	6 months to 3 years
Extraordinary aggravating circumstances/crime of violence	16 to 48 years	8 to 24 years	4 to 12 years	2 to 6 years	15 months to 3 years
Sentence-enhancing circumstances	8 to 48 years	2 to 24 years	2 to 12 years	1 to 6 years	1 to 3 years
Extraordinary risk of harm to society	N/A	4 to 16 years	2 to 8 years	1 to 4 years	1 to 2 years

Source: Colo. Gen. Assembly, Leg. Council Staff, *An Overview of the Colorado Adult Criminal Justice System* (2001), 31.

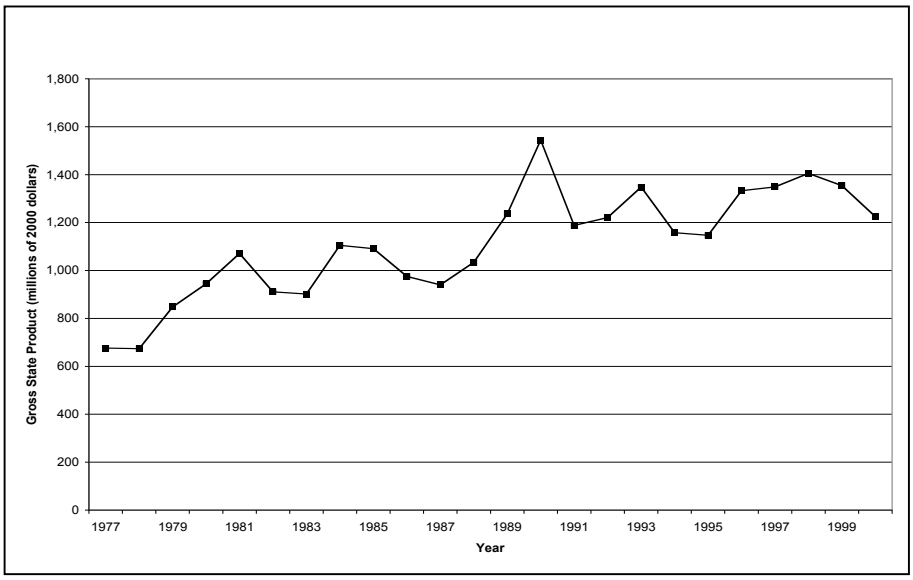
Second, meaningful reform of criminal justice policy is continually threatened by societal attitudes toward crime and punishment. When political values swing toward retributive models of justice—as they have for the past twenty years—reform proposals tend to fail quickly and summarily. Just as politicians frame their agendas with one eye on public opinion, policy specialists (legislative staff, DOC analysts, governor's office staff) are influenced by dominant political views. This pattern stacks the deck even more against reform, since successful proposals must survive scrutiny by policy specialists.[102] Clearly, political and public sentiment

is skeptical of any move away from a "tough on crime" model, but this opinion has been largely manipulated by issue networks which have a vested interest in sustained public fear of crime.

The topic of crime and violence in popular culture and politics has filled entire volumes. The distillation of this topic shows two trends: media sensationalization of crime and political capitalizing on public fear. Nationally, TV news programming (the primary news source for the vast majority of Americans) features coverage of crime and mayhem over governmental, educational, and racial issues by a ratio of two to one.[103] Journalistic coverage of crime is compounded by violence in popular culture which produces what Colorado-based journalist Joel Dyer terms the "amplifier effect." Dyer admits that various sources of violence in daily life—newspapers, television news, movies, political commercials, music—have different motivations, but, "[s]ince we know that after a period of time we tend to remember the message yet forget the source, it stands to reason that our fear of crime is 'amplified' through the entertainment industry's 'reflection' of society."[104] Once we have become indoctrinated into the modern culture of violence, it is up to political alchemists to transform the raw power of fear into the finished product of votes. Politicians have always relied on various forms of fear in order to motivate citizens. The modern use of crime in this capacity started with Richard Nixon, but matured during the presidential campaign of 1988 with the Willie Horton campaign commercials run by the National Security Political Action Committee. Democratic candidate Michael Dukakis's defeat was in large part due to the power of the prurient message of socio-economic and race-based fear engendered in the Horton commercials.[105] Ever since the 1988 campaign, politicians have been quick to run on platforms of law and order. Even those candidates who are hesitant of such tactics are often quick to distance themselves from any policy alternatives which could be characterized as "soft on crime."[106]

The third, and perhaps most implausible, force which has helped bolster increased incarceration in Colorado and throughout the country is the economic crisis in rural communities. While Colorado's gross state product (GSP) has been steadily increasing since the late 1970s, agriculture has not enjoyed a prosperous nor a predictable existence over the same period (see figure 7). Globalization of trade has made American farming an inhospitable livelihood during the past two decades as domestic farmers have been forced into competition with growers from across the world. At the same time that rural communities were frantically seeking new activities to replace the diminished revenues derived from extractive industries, the nation was undertaking a massive prison building effort. In Colorado, as in most other states, the confluence of these two trends resulted in prisons as a "boom" industry for rural communities. Of the seventeen post-Mielke prisons built in Colorado, thirteen of the facilities (accounting for 86% of post-Mielke prison beds) have been built in non-metropolitan counties, predominantly on the eastern plains. So pronounced is the siting of prisons in eastern Colorado, that Colorado's chief economist has described prisons as one of the major employers for the eastern plains region.[107]

Figure 7. Colorado Farm Gross State Product



Source: U.S. Dept. of Commerce, Bureau of Economic Analysis (www.bea.doc.gov)

In a state which is generally skeptical of government spending, rural support for prison expansion has been key to the successful growth of the prison budget. With promises of jobs and revitalized local economies, rural towns have fiercely competed for new prisons in recent decades. For the first time in Colorado history, large prisons were being located outside of Fremont County and towns were avid to win the siting competition. Elected officials, civic leaders, business owners, and economic development organizations all joined in a concerted fight to promote their town as the best candidate.

In 1984, consultants hired by the DOC released a feasibility study of possible sites where a new medium-security prison could be built. Thirty-four communities had expressed initial interest in hosting a prison (all but two of which were in non-metropolitan counties) and eighteen communities (all rural) ultimately submitted proposals to be considered during the siting process.[108] In a 1990 siting campaign, the Buena Vista town administrator sent a batch of cookies to the legislative committee considering potential sites, to let them know that "Chaffee County is sweet on a new prison."[109] When Sterling was selected for Colorado's largest prison (2,445 beds), polling found that 72% of residents supported the prison coming to town.[110] Upon the opening of the Sterling Correctional Facility, Sterling's mayor Bill Finch proclaimed that the prison "is the greatest thing to happen in northeast Colorado. Our kids can stay home now because there are jobs for them here."[111]

The question of whether or not prisons actually provide economic benefit is far from certain. Most rural prisons are sited in locations such that employees can live outside the host county, near a metropolitan area and commute to work—an attractive option for married employees whose spouses must find non-prison work. In addition, new prisons necessitate infrastructure upgrades, such as sewage system improvements, road construction, and expanded

court and jail capacity, which are most often paid for by local governments. Such infrastructure upgrades constitute local subsidies for prisons, often coupled with direct assistance in the form of free land, economic development grants, and (in the case of private prisons) tax.[112] U.S. Department of Agriculture senior demographer Calvin Beale, who has observed the national growth of rural prisons, remarked in an interview, "states and private firms have learned that they don't have to go out and offer things for rural communities to take the prisons. Rather, they can extract concessions from the rural areas."[113] Moreover, irrational exuberance of local boosters notwithstanding, most rural prison supporters realistically view prisons as a "last resort" method of saving the local economy. Criminologist David Shichor has written that "[c]ommunities in which a prison is sited become stigmatized because they are usually in a bad economic situation and cannot find other, more reputable resources to better their situation. Most residents are aware of this stigma attached to their community. This awareness results in a feeling of powerlessness or a lack of efficacy."[114] Add to this stigmatization the high likelihood of prison workers succumbing to alcoholism, domestic violence, or depression (as a result of the high-stress work environment), and the promised benefits of prisons becomes much murkier.[115]

Although the evidence indicates that economic revitalization from prisons is over-promised during the siting phase, there are doubtless *some* benefits—however minor—from hosting a new prison. More important than the actual benefits, however, is the perception of economic development. Corrections officials used to contemplate prison siting with some dread, based on the "not in my backyard" reaction of most communities.[116] As community sentiment turned toward a "yes in my backyard" mentality, one of the major hurdles in opening new prisons disappeared. Along with the governmental commitment (fueled by public fear and political ambitions) to fund corrections expansion at any cost, prisons became another tool for

pork barrel spending. Perhaps the correctional system's greatest benefit derived from rural prisons is the strong investment that rural prison towns subsequently have in maintaining high incarceration rates. Any hint of reducing the prison population—whether through sentencing changes, alternatives to incarceration, or wholesale paradigm shifts—is met with strong opposition by rural communities who see their viability as tied to prisons.

In 2001 a proposal to ban private prisons from housing out-of-state inmates in Colorado facilities met with vocal opposition from county commissioners from Bent and Crowley counties, who told legislators that their counties could not exist without the private prisons (724 beds and 1,135 beds respectively) that operated in their jurisdictions. They apparently based these pleas on information from the private prison companies themselves (which make money by importing out-of-state prisoners) who promised that their facilities would likely close if they could not import inmates from other locations—this despite the fact that Colorado is projected to run out of state and private prison beds by 2006.[117] The proposal (Senate Bill 02-174) failed and private prisons remain free to import prisoners from out of state.

The prison boom in eastern Colorado is still in effect. Rural prison towns fight any attempt at reform which could drain prisoners from the local correctional facility. Two towns—Akron and Brush—have speculative facilities which were financed without a guaranteed source of inmates (Akron's facility is operating and Brush's is still waiting to find prisoners to house).[118] Despite possessing natural beauty and friendly residents (characteristics which can translate into selling points for a community), eastern Colorado's efforts at spurring economic activity are dwarfed by Colorado Western Slope counties, which have successfully learned how to turn natural landscapes into a commodity. For the time being, it appears that the eastern

plains—a region described by Horace Greeley as "the acme of barrenness and desolation"[119]—will remain Colorado's prison hub.

Conclusions

The character and content of Colorado's prison system has changed dramatically over the course of the state's history. Starting as a poorly organized arm of the territorial government, Colorado State Penitentiary became an institution focused on moral reform and discipline. After lapsing into another period of unrest and tumult in the mid-twentieth century, the Department of Corrections emerged in the 1980s as the fastest growing area of state government. Gone is any serious concern for training and rehabilitation—motives which had evolved over time, inspired by religious conviction and economic interests.

The exponential growth in the prison population has put the DOC's primary focus on containment and management. Stated concisely and eloquently by Gilmore, today's prison system is built on a "stark time-space punishment [which] disavows the penal system's earlier responsibility for, or concern with, rehabilitation—or the latter's negative avatar, recidivism."[120] Colorado has seemingly come full circle, back to the early British jail's role of confinement—nothing more, nothing less. The major difference between contemporary corrections and eighteenth century English carceral practices is the intervening bureaucratization and professionalization which has made the corrections industry a powerful player in the policy arena.

In the heyday of Colorado's inmate labor program, prisons presented little promise of economic profit to anyone other than correctional employees. With rapid growth of the prison system, has come a plethora of vendors and contractors—from private prison operators to soap

companies—which have a vested interest in inflating the prison population. In the 1990s, a time when government spending was under attack, state agencies were forced to justify their budgets. The legislature and the courts had laid the groundwork which ensured DOC's budgetary growth. Harsher sentencing regimes and a federal court mandate to alleviate overcrowding gave Colorado a distinct choice: build more prisons or change the state's approach to criminal justice. The General Assembly chose the former, spurred by public fear of crime, which in turn was crafted through a system of information asymmetry. In addition to public sentiment, financial benefactors of correctional spending and rural communities desperate for jobs have completed a powerful issue network which has yet to be cracked. The ultimate undoing of today's correctional policies will only come through a massive groundswell of public advocacy (proactive movement) or dire fiscal crisis (reactive movement)—only time will tell which proves to be the tipping factor in Colorado's criminal justice policy stream.

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