THINKING OUTSIDE THE BARS: USING HAWAIIAN TRADITIONS AND CULTURALLY-BASED HEALING TO ELIMINATE RACIAL DISPARITIES WITHIN HAWA'I'S CRIMINAL JUSTICE SYSTEM

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Bronson was just 26. In February 2010, he was eight months away from completing a five-year sentence for second-degree burglary, attempted second-degree burglary, and third-degree property damage. As a paʻahao, or Native Hawaiian prisoner, Bronson was serving out the rest of his time in the Special Housing Incentive Program unit (SHIP) at Saguaro Correctional Center (SCC), a private, for-profit prison in Eloy, Arizona. On several occasions, Bronson had been attacked and threatened by prison gang members and he was in constant fear for his life. Bronson made several attempts to petition for a transfer out of SHIP, but his paperwork was misplaced in the paper shuffle of prison bureaucracy. On February 18, during morning day room hours when prison cells were unlocked, two prisoners entered Bronson’s cell and repeatedly punched, kicked, and stomped on Bronson. The assailants then viciously stabbed him more than 140 times. After the savage attack, the assailants carved the name of their gang into Bronson’s chest, and as Bronson lay dying, other inmates cleaned the assailants’ bloody tracks as the two showered, changed, and returned to the unit.

Prior to this fatal assault, Bronson participated in activities that were tailored to assist paʻahao in reconnecting with their roots as a form of

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3 See MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY: HAWAIIAN-ENGLISH, ENGLISH-HAWAIIAN 297 (1986). Paʻahao means prisoner, convict; to be imprisoned. Throughout this paper, paʻahao (rather than Native Hawaiian) will be used to describe a prisoner of Native Hawaiian ancestry, thus emphasizing one who has been convicted.

4 See id. at 2. The complaint alleged that SHIP was an area known for improperly mixing violent and nonviolent inmates. Prison staff threatened to place Bronson in segregation until he agreed to participate in SHIP. SHIP consisted of a progression of units or blocks (SHIP I, SHIP II, SHIP III).

5 See CCA, https://www.cca.com/facilities/saguaro-correctional-center (last visited Apr. 4, 2016). Saguaro Correctional Center (SCC) is a medium security facility that is operated by Corrections Corporation of America (CCA). The State of Hawai‘i has been contracting with CCA since 1995. SCC has housed the majority of the state’s male prison population since 2007.

6 See Complaint, supra n. 2, at 2.

7 See Complaint, supra n. 2, at 6.

8 See id.

9 See id. All inmates involved were housed in SHIP II, where lockdown was 22 hours a day. E-mail from Kat Brady, Coordinator, Community Alliance on Prisons, to author (Aug. 2, 2015, 8:38 HST) (on file with author). The assault occurred within the remaining two hours during which time the lone Correctional Counselor left inmates’ cell doors open. See Complaint, supra n. 2, at 4.
rehabilitation, including makahiki\(^{10}\), ‘ōlelo\(^{11}\) or language correspondence courses, and programs geared towards job training. Bronson had goals of finding work after his release, of contributing to his community, and of reestablishing a relationship with his seven-year-old son.\(^{12}\)

Bronson’s story illustrates the risks of sending prisoners, especially Native Hawaiians, to the continent where they are cut off from family, community, and ‘āina (land).\(^{13}\) The connection to people and places are crucial to Native Hawaiian identity. Pa‘ahao experience greater hardships with out-of-state incarceration because they are cut off from family and culture and placed into a prison system that is foreign to them. As a result, pa‘ahao stand to suffer more severely than other groups and are unlikely to achieve meaningful rehabilitation, thus preventing them from healing from the physical, emotional, and mental wounds inflicted by incarceration.

The Office of Hawaiian Affairs’ 2010 report *The Disparate Treatment of Native Hawaiians in the Criminal Justice System*\(^ {14}\) is a comprehensive study that illustrates the hardships encountered by Native Hawaiians who come into contact with the criminal justice system. OHA’s report establishes that there is an overwhelming number of Native Hawaiian men, women, and youth in facilities and prisons in both Hawai‘i and on the continent, accounting for a disproportionately high percentage of Hawai‘i’s prison population. Research shows that pa‘ahao are more likely to receive prison sentences once convicted, have the highest rate of recidivism, and are more likely to suffer parole revocations than any other ethnic group in the state.\(^ {15}\) Pa‘ahao also make up the highest percentage of those incarcerated in private, out-of-state facilities,\(^ {16}\) and although they do not use drugs at drastically higher rates than other ethnic groups, they go to jail more often for drug offenses.\(^ {17}\)

In 2011, the number of individuals housed in out-of-state facilities had reached 1,700.\(^ {18}\) That amounted to almost half of the state’s prison

\(^{10}\) See PUKUI & ELBERT, *supra* n. 3, at 225. Makahiki is an ancient festival beginning about the middle of October and lasting about four months, with sports and religious festivities and taboo on war.

\(^{11}\) See *id.* at 284 (describing ‘ōlelo as language).

\(^{12}\) See Complaint, *supra* n. 2, at 2.

\(^{13}\) See PUKUI & ELBERT, *supra* n. 3, at 11 (describing ‘āina as land, earth).


\(^{15}\) See *id.* at 10-11.

\(^{16}\) See *id.* at 11.

\(^{17}\) See *id.* at 12.

population and cost the state $45 million.\textsuperscript{19} As a response to the staggering number of Hawai‘i’s prisoners on the continent, the State sought ways to reduce the number of both prisoners and dollars being sent out of state. Now, with the return of approximately 1,400\textsuperscript{20} of Hawai‘i’s incarceration population from out-of-state facilities on the horizon, Hawai‘i has an opportunity to address the issues concerning the criminalization of Native Hawaiians and to revisit recommendations produced by the Native Hawaiian Justice Task Force of 2012.\textsuperscript{21} Arguably, the most essential of those recommendations is that the State and its agencies promote and collaborate to further develop culturally-based standards to be applied to Native Hawaiians in the criminal justice system.\textsuperscript{22}

This paper asserts that implementing culturally sensitive programs for Native Hawaiians in the criminal justice system will produce better results, including reducing recidivism and improving rehabilitation. This paper argues that healing\textsuperscript{23} and rehabilitation, more than punishment, should be the goal of prisons, which in turn will help communities that have been touched by crime. This shift in theory away from punishment is contrary to the adversarial American justice system. Section II of this paper will compare the American penal system to the traditional Hawaiian system of justice, as well as provide background and empirical evidence relative to the disparities within Hawai‘i’s prison system today. Section III explores best practices and alternatives to incarceration that have been introduced in Hawai‘i before examining the application of indigenous approaches in Australia, New Zealand, and within the Navajo Nation. Finally, Section IV will present recommendations for Hawai‘i’s next steps towards improving the disparate impact of the criminal justice system on Native Hawaiians based on the different justice models.

\textsuperscript{19} See id.


\textsuperscript{21} Office of Hawaiian Affairs, The Native Hawaiian Justice Task Force Report (2012). This report was produced by a nine-member Task Force pursuant to Act 117, Relating to SLH 2012, and following a recommendation by the Office of Hawaiian Affairs’ 2010 report: The Disparate Treatment of Native Hawaiians in the Criminal Justice System.

\textsuperscript{22} See id. at 27.

\textsuperscript{23} See Mark K. Patterson et al., Can Prison Be a Place of Healing? The Trauma-Informed Care Initiative at the Women’s Community Correctional Center, 9 Hūlili: Multidisciplinary Res. on Hawaiian Well-Being 305, 306 (2013). “Healing” is a term of art employed by Warden Mark Patterson to describe the framework he implemented at the Women’s Community Correctional Center (WCCC) for creating a place that nurtures healing within the individual, family, and community, and can also help reduce recidivism.
II. BACKGROUND

This section explores two incompatible penal systems. Native Hawaiians had a system that allowed transgressors of the law to flee to a place of refuge, receive rehabilitation and forgiveness, and be absolved of the wrongdoing in order return to their communities without stigma.\(^\text{24}\) This way, transgressors could resume their roles without disrupting the social fabric of their communities. On the other hand, the American penal system focuses on retribution in the form of punishment to the offender and compensation to the victim. Offenders are stigmatized and impaired, often preventing them from subsequently becoming contributing members of society.

A. Pre-Contact Hawai‘i

1. The Social Stratification of Pre-Contact Hawai‘i

Ancient Hawaiian society consisted of four main classes.\(^\text{25}\) Ali‘i, or chiefs, made up the highest class, along with their close relatives.\(^\text{26}\) “The ali‘i was the one person above all the people . . . what he said was the word of the chiefdom.”\(^\text{27}\) Included in this class was the Ali‘i Nui, or high chief, who held the most status and power and would typically rule over a district or an entire island.\(^\text{28}\) Konohiki were stewards of the land and served as intermediate leaders who were related to higher chiefs.\(^\text{29}\) The third class was the maka‘āinana, or commoners, who made up the majority of the population. “The maka‘āinana were the ones who provided the ali‘i with food, capes, kākua (belts), houses and other things.”\(^\text{30}\) They were usually named according to their craft, which included mahi‘ai (farmers), lawai‘a (fishermen), and kalai wa‘a (canoe builders), among others.\(^\text{31}\) The last class was the kauwā, otherwise known as outcasts.\(^\text{32}\) Though the term “kauwā” was regularly used in a derogatory manner in order to embarass and offend, the kauwā were


\(^{25}\) See id.

\(^{26}\) See MARSHALL D. SAHLINS, SOCIAL STRATIFICATION IN POLYNESIA 13 (1967).

\(^{27}\) DAVIDA MALO, KA MO‘OLELO HAWAI‘I (HAWAIIAN TRADITIONS) 42 (2006).

\(^{28}\) See id. at 43.

\(^{29}\) See SAHLINS supra n. 27, at 13.

\(^{30}\) See MALO, supra n. 28, at 50.

\(^{31}\) See id.

\(^{32}\) See PUKUI & ELBERT, supra n. 3, at 134 (describing kauwā as a caste which lived apart and was drawn on for human sacrifices).
greatly feared.\textsuperscript{33} They could not enter into any house other than that of their lord and were considered ‘aumakua (belonging to the family).\textsuperscript{34} The status of kauwā was usually inherited since they and their descendants would generally stay with the same ‘ohana (family).\textsuperscript{35}

2. The Kapu System

The Kapu\textsuperscript{36} System was a religious law system that existed in Pre-Contact Hawai‘i as a “code of conduct” and dictated almost every part of the Hawaiian way of life. It was based on beliefs of mana, or spiritual power, and anyone who broke a kapu was usually put to death.\textsuperscript{37} Kapu were rules of nā akua (the gods),\textsuperscript{38} and although ali‘i and kahuna (priests)\textsuperscript{39} were believed to be interpreters of those rules, they were also required to follow them.\textsuperscript{40} “The people believed that breaking the kapu would bring the anger of the gods on themselves and their community.”\textsuperscript{41} Thus, every effort was made to comply.

There were three types of kapu that, if violated, would result in immediate death: kānāwai akua (laws of the gods), kānāwai kapu ali‘i (laws of the chiefs), and the infliction of injuries on others, especially family members.\textsuperscript{42} The actions and offenses that brought the most guilt were those committed against another person. For Hawaiians, responsibility to ‘ohana was very important and it was a disgrace to shame one’s family in this way. “Stealing food deprived another. A beating injured another. Harsh words or ‘ānai (curse) set in motion forces that hurt another.”\textsuperscript{43} Ali‘i kapu were some of the most strict kapu where offenders would face death for things such as casting one’s shadow on an ali‘i’s hale (house), or allowing one’s shadow to rise upon the back of an ali‘i or anything belonging to him.\textsuperscript{44} This was how order was achieved.

\begin{footnotesize}
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\item \textsuperscript{33} See MALO, supra n. 28, at 56.
\item \textsuperscript{34} See id.
\item \textsuperscript{35} See PUKUI & ELBERT, supra n. 3, at 276.
\item \textsuperscript{36} See id. at 132. Kapu means prohibited, forbidden.
\item \textsuperscript{37} See MALO, supra n. 28, at 46.
\item \textsuperscript{38} See PUKUI & ELBERT, supra n. 3, at 15.
\item \textsuperscript{39} See PUKUI & ELBERT, supra n. 3, at 114.
\item \textsuperscript{40} See Kaizen Wong, Kapu System, ANGEL FIRE, http://kaizenwong.angelfire.com/Kapu_System.pdf (last visited Apr. 4, 2016).
\item \textsuperscript{41} See id.
\item \textsuperscript{42} See MARY KAWENA PUKUI, E.W. HAERTIG & CATHERINE A. LEE, NĀNĀ I KE KUMU (LOOK TO THE SOURCE, VOL. II) 241 (1972).
\item \textsuperscript{43} See id. at 242.
\item \textsuperscript{44} See MALO, supra n. 28, at 45.
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There were many different kapu for different aspects of Hawaiian living, many of which defined the roles of men and women. The ‘Ai Kapu (restricted foods or eating) prohibited men and women from eating together in the same house.\textsuperscript{45} Husbands could enter into a wife’s hale ‘āina (eating house) because they were responsible for preparing the wife’s food.\textsuperscript{46} However, women would be put to death if they set foot in the mua, or men’s house. This most likely applied because it was where men not only ate, but worshipped and performed initiation ceremonies for young boys as well.\textsuperscript{47} Men would face similar mortality if they entered the hale pe’a, or house for menstruation.\textsuperscript{48} Furthermore, “women could not eat pu’a’a (pork), mai’a (banana), niu (coconut), several types of fish such as ulua (jackfish), kūmū (goatfish), manō niuhi (shark), honu (turtle), ‘ea (hawksbill turtle), pahu (trunkfish), nai’a (porpoise), koholā (whale), nu’ao (porpoise), hāhālua (manta ray), hīhīmanu (stingray), hailepo (stingray) and several other consecrated things.”\textsuperscript{49} These trespasses ensured death.

In the old days, there were no courts or judges; killing was the law according to how offensive the wrong was.\textsuperscript{50} The administration of the kānāwai make (death penalty) was carried out by the ali‘i nui.\textsuperscript{51} The only means to escape was to flee to a place where kapu did not extend and where kahuna would provide shelter, protection, and forgiveness to those who broke the kapu.\textsuperscript{52}

3. Pu’uhonua as Places of Refuge

Pu’uhonua translates literally as pu’u (hill), and honua (earth).\textsuperscript{53} The word was said to have referred to fortresses on hills that were “eminences of difficult ascent, and, by walling up the avenues leading to them, sometimes rendered inaccessible.”\textsuperscript{54} Stonewalls across entrances of these fortresses would allow only one person to enter at a time, providing an advantage for those hidden inside.\textsuperscript{55} Such places of refuge and

\textsuperscript{45} MALCOLM NA‘EA CHUN, NO NĀ MAMO: TRADITIONAL AND CONTEMPORARY HAWAIIAN BELIEFS AND PRACTICES 290 (2011).
\textsuperscript{46} See MALO, supra n. 28, at 22.
\textsuperscript{47} See CHUN, supra n. 46, at 291.
\textsuperscript{48} See id. at 90.
\textsuperscript{49} Id. at 24.
\textsuperscript{50} See MALO, supra n. 28, at 47.
\textsuperscript{51} See id.
\textsuperscript{52} See Wong, supra n. 41.
\textsuperscript{53} See supra n. 25.
\textsuperscript{54} Id.
\textsuperscript{55} See id.
protection were necessary in Hawaiian culture due to the exercise of the kapu system and because rulers would frequently engage in war to establish power and authority.\textsuperscript{56} Pu‘uhonua were established in each moku (district)\textsuperscript{57} as a sanctuary for kapu breakers, as well as victims of war.\textsuperscript{58} It was a place that was always accessible, and all who reached it were assured protection, regardless of class or the type of crime they had committed.\textsuperscript{59} A kapu breaker usually remained several days at the pu‘uhonua, then returned home absolved of his/her misdeeds by the gods and without stigma of the offense.\textsuperscript{60} Fallen warriors could return to their families healthy and safe from threat.\textsuperscript{61} Thus, when one entered the pu‘uhonua, they were afforded the benefit of a reconciliatory, healing process “through the prayers and rituals of the kahuna,” which would have satisfied the gods.\textsuperscript{62}

Today, Pu‘uhonua do not exist as asylums.\textsuperscript{63} Instead, they have become tourist attractions, marked only as historic preservation sites,\textsuperscript{64} leaving a faint vision of what once operated successfully as a system of healing.

### B. The American Criminal Justice System

The United States is currently the largest jailer in the world. Though it accounts for only 5% of the world’s total population, it holds 25% of the world’s prisoners, or nearly two-and-a-half million people.\textsuperscript{65} This epidemic of incarceration can be attributed to several factors, all of which led to the greater problem of mass incarceration, and consequently, the rise of the private prison industry.\textsuperscript{66}

In 1971, President Richard Nixon’s attack on drug use launched the country’s War on Drugs and the imposition of harsh prison sentences

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\item\textsuperscript{56} See id.
\item\textsuperscript{57} See PUKUI & ELBERT, supra n. 3, at 252.
\item\textsuperscript{58} See Wong, supra n. 41.
\item\textsuperscript{59} See supra n. 25.
\item\textsuperscript{60} See id.
\item\textsuperscript{61} See id.
\item\textsuperscript{62} See Wong, supra n. 41.
\item\textsuperscript{63} See CITY OF REFUGE, \url{http://www.aloha-hawaii.com/big-island/city-of-refuge/} (last visited Apr. 4, 2016). Pu‘uhonua o Hōnaunau was designated a national historic park in 1961.
\item\textsuperscript{64} See id.
\item\textsuperscript{65} See ROBERT REICH, \url{http://robertreich.org/post/121924725970} (last visited Apr. 4, 2016).
\item\textsuperscript{66} See id.
\end{itemize}
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for drug offenses, including mandatory minimums. According to Michelle Alexander, civil rights attorney, scholar, and author of The New Jim Crow: Mass Incarceration in the Age of Colorblindness, “this policy single-handedly drove much of the increase in incarceration rates.”

Professor David Cole of the University of Georgetown noticed a recent, shifting trend against the reliance on incarceration indicating that “the fall in the rate of violent crimes and the acknowledged failure of the War on Drugs has cast doubt on the necessity of imprisoning so many,” and that “innovations with alternatives to incarceration and attempts to assist the ‘reentry’ of those released from prison” are signs of that trend. Professor Cole is quick to acknowledge, however, that these changes are small relative to the magnitude of the increase in America’s prison population over the last four decades.

The Obama administration has taken a bold approach in addressing the disproportionate representation of minorities in the criminal justice system due to the aforementioned tougher drug laws. In July 2015, President Obama commuted the sentences of 46 federal prisoners, a majority of whom were serving time for non-violent, drug offenses.

Commutation is a power granted to the President under Article II, Section II of the United States Constitution, which is defined as “the executive’s substitution in a particular case of a less severe punishment for a more severe one that has already been judicially imposed on the defendant.” This effort led to the administration’s collaboration with an independent partnership known as the Clemency Project 2014.

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69 See id. at 3. David D. Cole is the Hon. George J. Mitchell Professor in Law and Public Policy at the Georgetown University Law Center.

70 See id.

71 See id.

72 See id. Steiker notes that the rate of incarceration in American prisons has increased more than fivefold since 1972, yielding a current rate of more than 700 per 100,000, or a total number well over two million people. See id. at 1.


74 See U.S. CONST. art. II, § 2, cl. 1 (granting the President of the United States “power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment”).

75 COMMUTATION, BLACK’S LAW DICTIONARY 318 (9th ed. 2009).

76 See THE CHRISTIAN SCIENCE MONITOR, http://www.csmonitor.com/USA/USA-Update/2015/0711/Why-Obama-will-be-the-first-
Project task force screens thousands of petitions by applying the following criteria: 1) Prisoners must be nonviolent offenders, who would have received a substantially lower sentence if convicted of the same offense(s) today; 2) They must have already served at least 10 years in prison; 3) They should be serving a sentence for their first crime or lack a significant criminal history.\textsuperscript{77} If the criteria are met, petitions are submitted to the Justice Department for review.\textsuperscript{78}

President Obama has issued 673 commutations to date, mostly to non-violent drug offenders.\textsuperscript{79} In fact, he has surpassed the total number of commutations issued by the past ten presidents combined.\textsuperscript{80} The Obama administration’s focus on fair sentencing, and the reducing of prison populations, signals a divergence from policies of the earlier so-called war on drugs,\textsuperscript{81} which may be just what the criminal justice reform movement needs.

C. Hawai‘i’s Prison System Today

In Hawai‘i, non-violent crimes make up the greatest percentage of the offenses committed by incarcerated individuals.\textsuperscript{82} It is often the case that “crime is usually a response to real or perceived deprivation at some level,”\textsuperscript{83} and for Native Hawaiians, this is particularly profound. A number of social and historical factors play into this disparity, including contact with Western civilization and the on-going effects of colonization. The historical trauma associated with the loss of land, language and religion is important to understand since it manifests itself through

\textsuperscript{77} See id.
\textsuperscript{78} See id.
\textsuperscript{80} See id.
\textsuperscript{81} See CHRISTIAN SCIENCE, supra n. 77.
\textsuperscript{82} See HAWAII PAROLING AUTHORITY, 2016 ANNUAL STATISTICAL REPORT (2016).
substance abuse.\textsuperscript{84} The negative effects of the criminal justice system on Native Hawaiians accumulate at every stage.\textsuperscript{85}

1. The Disparity of Native Hawaiians in the Criminal Justice System

According to the Office of Hawaiian Affairs’ 2010 Report on \textit{The Disparate Treatment of Native Hawaiians in the Criminal Justice System}, Native Hawaiians make up only 24% of Hawai’i’s general population, while comprising 39% of the state’s prison population.\textsuperscript{86} This number includes both the male and female population, both of which are disproportionately overrepresented in Hawai’i’s prisons. Some advocates in the field of criminal justice reform argue that, today, the number of Native Hawaiians that make up the incarcerated population is closer to 60%.\textsuperscript{87} For Native Hawaiian women, the percentage is at an alarming 44%,\textsuperscript{88} while Native Hawaiian youth are arrested more frequently than any other ethnic group for nearly every offense.\textsuperscript{89} Moreover, research done by the National Council on Crime and Delinquency found that children of incarcerated parents are five to six times more likely to become incarcerated than their peers.\textsuperscript{90}

Native Hawaiians are more likely to receive a prison sentence following a determination of guilt.\textsuperscript{91} This is due in part to the discretionary nature of sentencing.\textsuperscript{92} Pa’ahao\textsuperscript{93} also have the highest recidivism rate due to limited access to reentry services that would assist them in returning to society.\textsuperscript{94} As a result, pa’ahao are denied parole because they are unable to complete the necessary programs, thus causing

\begin{itemize}
\item \textsuperscript{84} See OHA, \textit{supra} n. 15, at 24.
\item \textsuperscript{85} See \textit{id.} at 12.
\item \textsuperscript{86} See \textit{id.} at 10.
\item \textsuperscript{87} Letter from Kat Brady, Coordinator, Community Alliance on Prisons, to Karen Humes, Chief, Population Division, U.S. Census Bureau (July 6, 2015) (on file with author).
\item \textsuperscript{88} See OHA, \textit{supra} n. 15, at 11.
\item \textsuperscript{89} See \textit{id.} at 15. Native Hawaiian youth made up 30\% of arrests in 2008. See \textit{id.} at 68.
\item \textsuperscript{90} See \textit{id.}
\item \textsuperscript{91} See \textit{id.} at 10.
\item \textsuperscript{92} See \textit{id.} at 13.
\item \textsuperscript{93} See \textit{supra} n. 3 (describing pa’ahao as prisoners of Native Hawaiian ancestry, and emphasizing that they have been convicted).
\item \textsuperscript{94} See OHA, \textit{supra} n. 15, at 13.
\end{itemize}
them to cycle through the system.\textsuperscript{95} Parole revocations are also very high for pa‘ahao, and their likelihood of early release is lower than most other ethnic groups in Hawai‘i.\textsuperscript{96} Additionally, OHA’s report reflects that 41% of Hawai‘i’s prisoners sent to out-of-state facilities are Native Hawaiian.\textsuperscript{97} Perhaps the most detrimental disproportion is that Native Hawaiians go to prison more often for drug offenses than any other ethnic group.\textsuperscript{98} This disproportionality is the result of a variety of social and historical factors unique to indigenous people who have been culturally displaced, in combination with the system’s biased response to drug use.

In light of the overrepresentation of Native Hawaiians in prison and the ineffectiveness of the prison system to serve the Native Hawaiian prison population, this paper next examines drug offenses, one of the most problematic elements of Native Hawaiian incarceration.

2. Incarceration for Drug Offenses

\textit{“Although the war on drugs is part of the larger criminal justice picture, the effect it has on Native Hawaiian communities is worthy of discussion . . .\textquotedblright} \textsuperscript{99}

In 2009, Native Hawaiians made up the largest portion of people admitted to prison for drug offenses in Hawai‘i.\textsuperscript{100} Interestingly, Native Hawaiians do not use drugs at higher rates than other ethnic groups, yet they go to jail remarkably more often.\textsuperscript{101} A good example of this is evidenced by the charges related to methamphetamine, which accounts for the most charges of all drug offenses.\textsuperscript{102} It is reported that Native Hawaiians only use the drug at a slightly higher rate than people of other races or ethnicities, yet they are charged with the most offenses related to methamphetamine.\textsuperscript{103} This pre-sentencing structure contributes to the disproportionate representation of Native Hawaiians in the criminal justice system.\textsuperscript{104}

\textsuperscript{95} See id.
\textsuperscript{96} See id. at 12.
\textsuperscript{97} See id. at 11.
\textsuperscript{98} See id. at 12.
\textsuperscript{99} Id.
\textsuperscript{100} See id.
\textsuperscript{101} See id.
\textsuperscript{102} See id.
\textsuperscript{103} See id. Data from the Hawai‘i Criminal Justice Data Center show that Native Hawaiians account for 38% of methamphetamine charges.
\textsuperscript{104} See OHA, supra n. 15, at 14. Critics of the current emphasis on incarcerating individuals for drug offenses assert that drug treatment has better outcomes not only for the individual, but also the community and the economy. See OHA, supra n. 15, at 98.
Further adding to the problem is the fact that drug offenses are not reported to the police in the way that other crimes such as property damage, theft, and violent crimes are.\textsuperscript{105} Thus, incidents involving drug arrests are more likely to involve proactive policing, and therefore encounter a higher rate of police discretion.\textsuperscript{106} Marijuana possession arrests in Hawai‘i impact some key ethnic groups much more heavily than others.\textsuperscript{107} For example, Native Hawaiians are arrested for marijuana possession six times more often than their share of the population, statewide. This pattern mirrors disparities identified for Native Hawaiian juveniles in many other areas of the Hawai‘i criminal justice system.\textsuperscript{108}

3. Private, For-Profit Prisons: Hawai‘i’s Inadequate Solution to Overcrowding

“Incarceration is particularly traumatic for Native Hawaiians, especially when imprisonment is on the continent.”\textsuperscript{109}

The number of pa‘ahao continues to increase at an alarming rate due in part to the state’s practice of partnering with private companies to help build and operate prisons. Incarceration for non-violent crimes, long sentences for small quantities of illegal drugs, and minimum sentencing policies have served to profit the prison industrial complex\textsuperscript{110} while disproportionately incarcerating minorities, such as Native Hawaiians. Since 1995, the State of Hawai‘i has contracted with Corrections Corporation of America (CCA), a private, for-profit company.\textsuperscript{111} CCA assumes the responsibility of supervising and controlling individuals who

\textsuperscript{105} See OHA, \textit{supra} n. 15, at 98.
\textsuperscript{106} See id.
\textsuperscript{107} Id.
\textsuperscript{108} DAVID C. NIXON, \textit{UPDATE TO: BUDGETARY IMPLICATIONS OF MARIJUANA DECRIMINALIZATION AND LEGALIZATION FOR HAWAI‘I} 4 (JAN. 2013).
\textsuperscript{109} OHA, \textit{supra} n. 15, at 13.
\textsuperscript{110} Rachel Herzing, \textit{What is the Prison Industrial Complex?} PUB. EYE (2005), \url{http://publiceye.org/defendingjustice/overview/herzing_pic.html} “Prison Industrial Complex (PIC) is a term we use to describe the overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to what are, in actuality, economic, social, and political ‘problems.’” The term was coined by political activist, scholar, and author Angela Davis. See \url{http://stopthedrugwar.org/chronicle/2014/mar/10/new_jim_crow_michelle_alexander_talk}.

\textsuperscript{105} See OHA, \textit{supra} n. 15, at 98.
\textsuperscript{106} See id.
\textsuperscript{107} Id.
\textsuperscript{108} DAVID C. NIXON, \textit{UPDATE TO: BUDGETARY IMPLICATIONS OF MARIJUANA DECRIMINALIZATION AND LEGALIZATION FOR HAWAI‘I} 4 (JAN. 2013).
\textsuperscript{109} OHA, \textit{supra} n. 15, at 13.
\textsuperscript{110} Rachel Herzing, \textit{What is the Prison Industrial Complex?} PUB. EYE (2005), \url{http://publiceye.org/defendingjustice/overview/herzing_pic.html} “Prison Industrial Complex (PIC) is a term we use to describe the overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to what are, in actuality, economic, social, and political ‘problems.’” The term was coined by political activist, scholar, and author Angela Davis. See \url{http://stopthedrugwar.org/chronicle/2014/mar/10/new_jim_crow_michelle_alexander_talk}.
have been convicted and sentenced for crimes under Hawai‘i law. The
Department of Public Safety (DPS) is the entity in charge of managing
these contracts, which govern the confinement, custody, and care of
Hawai‘i prisoners to CCA facilities in Arizona, Oklahoma, Mississippi,
and Kentucky. For over a decade, inmates have been involuntarily
transferred to these facilities as its “temporary solution” to prison
overcrowding in the islands.\footnote{112} In fact, Saguaro Correctional Facility in
Arizona was specifically constructed to exclusively house Hawai‘i
prisoners. However, scholars examining the effects of prison on Native
Hawaiians warn that separating pa‘ahao from their ancestral land is more
destructive than separating any other group of people from one state to
another.\footnote{113}

Native Hawaiians have a deep connection to the ‘āina (land) and
believe that their akua (gods), ‘aumākua (ancestral spirits), and kūpuna
(ancestors)\footnote{114} live in nature. Stripping Native Hawaiians of support
systems such as family, community, and friends adds to the perpetuation
of the destruction of their native identity, something all too familiar
throughout the history of indigenous peoples. This injury gets exacerbated
when they are out-of-state and imprisoned.

For Native Hawaiians, the impact of trauma is
particularly salient because of strong connections to family,
the land and community. Imprisoning people from Hawai‘i
contributes to the growing prison population and
exacerbates the disproportionate impact of the system on
Native Hawaiians because they are cut off from supportive
communities and families that give them a reason to exit
prison as soon as possible. Even the absence of familiar
surroundings and changes in the weather are
traumatizing.\footnote{115}

Considering this sacred connection with the land, it is no wonder
that Native Hawaiians suffer disproportionately at the hands of for-profit
prisons. This problem has not gone unnoticed by policy makers however.

\footnote{112} The first trafficking of pa‘ahao started in 1995, the week between Christmas
and New Year’s, when 300 men were whisked out of Hawai‘i in the middle of the night
and shipped to Texas (to a private prison run by the Bobby Ross Group) with no advance
notice to their families or even to those who were being sent. E-mail from Kat Brady, Coor-
ordinator, Community Alliance on Prisons, to author (Aug. 2, 2015, 8:38 HST) (on file
with author).

\footnote{113} See OHA, supra n. 15, at 13.

\footnote{114} See PUKUI & ELBERT, supra n. 3, at 186. Kūpuna is the plural of kupuna and
means “from the ancestors.” Singular kupuna means “grandparent, ancestor, relative or
close friend of the grandparent’s generation.”

\footnote{115} OHA, supra n. 15, at 13.
Next, we will explore the state’s recent attempts to improve public safety and justice in Hawai‘i by investing in more appropriate treatment programs.

4. Hawai‘i’s Justice Reinvestment Initiative

In 2012, Hawai‘i enacted legislation that would reduce spending on corrections and employ strategies to increase efficiency and reduce recidivism.\textsuperscript{116} Known as the Justice Reinvestment Initiative (JRI), it was created as a response to the rapid prison growth that led to overcrowding in state prison and jail facilities, and resulted in contracts with the CCA. By 2011, the number of individuals housed in out-of-state facilities had reached 1,700 people and cost the state $45 million annually.\textsuperscript{117} This prompted the governor, along with legislative and judiciary leaders, to examine the inefficiencies of the state’s corrections regime and settle on a comprehensive goal to reduce the number of prisoners and money being sent out of state.\textsuperscript{118} One of the identified inefficiencies was that programs intended to reduce recidivism were not being applied to the people most likely to reoffend.\textsuperscript{119} In other words, Native Hawaiians were not the predominant concern. Nonetheless, the objective of JRI was to reduce recidivism by focusing probation and parole resources on individuals most likely to reoffend, including requiring programming for these individuals.\textsuperscript{120}

With the help of The Council of State Governments Justice Center\textsuperscript{121} and funding from the Bureau of Justice Assistance,\textsuperscript{122} JRI has reinvested in the expansion of community-based treatment programs. JRI facilitated the hiring of additional corrections staff to complete risk and needs assessments, to support reentry efforts, and to reestablish DPS’s research and planning office within its first year.\textsuperscript{123} By focusing on and

\textsuperscript{116} See Justice Reinvestment in Hawaii, supra n. 19, at 1.

\textsuperscript{117} See id.

\textsuperscript{118} See id. This framework was known as SB2776 and HB2515, which passed both chambers of the legislature and was signed into law by Gov. Neil Abercrombie on June 20, 2012.

\textsuperscript{119} See id.

\textsuperscript{120} See id.

\textsuperscript{121} See The Council of State Governments Justice Center, https://csgjusticecenter.org/about-jc/ (last visited Apr. 4, 2016). The Council of State Governments Justice Center is a national nonprofit organization that serves policymakers at the local, state, and federal levels.

\textsuperscript{122} See The Bureau of Justice Assistance, https://www.bja.gov/about/index.html (last visited Apr. 4, 2016). “BJA’s mission is to provide leadership and services in grant administration and criminal justice policy development to support local, state, and tribal justice strategies to achieve safer communities.”

\textsuperscript{123} See Justice Reinvestment in Hawaii, supra n. 19, at 2. However, according to
appropriately treating the individuals identified as high risk for recidivism, JRI aims to improve public safety overall. This focus includes targeting the real problem and preventing additional individuals from getting lost in the criminal justice system.\textsuperscript{124}

Moving drug offenders out of the prison system and into treatment is one way to rectify the disparate treatment of Native Hawaiians in the system, but what kinds of treatments are most effective at rehabilitation and healing for those individuals once they get there?

III. \textbf{CULTURALLY RELEVANT MODELS \& ALTERNATIVES TO INCARCERATION}

So far, this article has discussed the problems with Hawai‘i’s criminal justice system and its particular effects on Native Hawaiians caught in that system. This section now considers proposals for problem solving by way of culturally relevant models and alternatives to incarceration. A large number of Native Hawaiians, and potentially other offenders, stand to benefit from this more effective and appropriate treatment. The community and the economy also stand to benefit. These programs and models, some of which are currently in practice in Hawai‘i and elsewhere, share common elements of reconciliation and healing while empowering participants through cultural self-actualization and a sense of duty to community. It is fair to say that these characteristics are commonly missing in the mainstream penal system, but are also critical to the success of the participants’ true rehabilitation and successful reentry into society.

A. Hawai‘i’s Best Practices

1. Hawai‘i’s Opportunity Probation with Enforcement Strategy (HOPE) and O‘ahu’s Drug Court

Hawai‘i’s Opportunity Probation with Enforcement strategy (HOPE Probation)\textsuperscript{125} was launched in 2004 by First Circuit Court Judge Steven Alm with the goal of reducing probation violations and recidivism. Unlike many specialty courts, HOPE Probation is a strategy that focuses on the higher-risk probation population.\textsuperscript{126} This effort extends to a wider demographic of drug and substance users, including sex offenders.\textsuperscript{127}

\textsuperscript{124} See \textit{id.} at 2.


\textsuperscript{126} See \textit{id} at 1666.

\textsuperscript{127} See \textit{id} at 1672.
HOPE combines a “swift, certain, consistent, and proportionate”\textsuperscript{128} sanctions component with probation officers using evidence based principles (EBP)\textsuperscript{129} all in an atmosphere of caring and support. Part of the EBP process is matching probationers to programs. For example, a probationer who needs residential treatment and is Native Hawaiian might be appropriately matched with Ho‘omau Ke Ola, which has a strong Native Hawaiian spiritual component.\textsuperscript{130} Probationers are also able to receive drug treatment if they continue to test positive for drug use or if they request it.\textsuperscript{131} Judge Alm found that offenders who violate the terms of their probation would benefit more in the long run from a swift, certain, consistent and proportionate approach to these violations.\textsuperscript{132}

If they tested positive for drugs and admitted to the use, they would be arrested on the spot and the sanction would be two days in jail. If they tested positive for drugs, denied use and the lab later confirmed drug use, the sanction would be fifteen days in jail (for being in denial or lying about the drug use). If the probationer didn’t show up for the drug test or the probation appointment at all . . . the sanction would be at least thirty days in jail. If the probationer repeatedly absconded, their actions would be showing me . . . that they were not up to participating in community supervision, and they would be sent to prison.”\textsuperscript{133}

Several elements encompass what is known as the “HOPE model.” The first component is a called a “Warning Hearing,” where probationers appear before the judge in an open group format. The judge addresses each probationer by name and encourages them all to succeed. The judge then explains the terms, duration, and expectations of HOPE Probation, while stressing additional consequences for dishonesty about one’s violations, especially for absconding.\textsuperscript{134} Another component is the “Drug Testing Hotline” where probationers are assigned a color and are required to call the hotline every weekday to listen if their color is called, then

\textsuperscript{128} See id at 1673.


\textsuperscript{131} See Alm, supra n. 127, at 1675.

\textsuperscript{132} See id at 1673.

\textsuperscript{133} See id at 1674.

\textsuperscript{134} See id at 1677.
report to First Circuit Court in downtown Honolulu for a urinalysis. In the beginning of the program, a probationer’s color is called up to six times a month during the first two months, eventually getting less frequent as the program progresses and if the probationer is testing negative. To make sure a probationer shows up even if he knows he will test positive, swift, consistent sanctions are imposed and officers are readily available to arrest absconding probationers. A third component of the program is the “Probation Violation Hearing.” When a participant violates the terms of his probation, he is immediately given a sanction, but can still resume participation in HOPE pending a modification/revocation hearing. The final component is that a probationer may become eligible for early termination of their probation if they substantially comply with the terms and conditions of HOPE Probation and remain violation free for two years.

HOPE probationers spend less than half as much time in prison as similar offenders on regular probation. It has also been reported that Native Hawaiians experience a significantly lower probation revocation rate in HOPE compared to regular probation, and that they do just as well as any other ethnic group. Thirty-one states have adopted the Hawaii-based HOPE model, which continues to pick up momentum both nationally and worldwide.

If probationers are unsuccessful in HOPE, many now have a second chance in Drug Court. In 1995, the Hawai‘i State Legislature established O‘ahu’s Drug Court as a way to help qualified offenders avoid incarceration by undergoing community supervision. The program is open to a wide variety of probationers with drug issues who are able to remain in the community if they successfully participate in and complete the program. Drug testing is conducted regularly and appearances before


136 See Alm. supra n. 127, at 1674.

137 See id at 1679.

138 See supra n. 137, at 20-21.

139 See Alm, supra n. 127, at 1682.


the drug court judge once a week are mandatory for the first few weeks. Getting a job and doing well in drug court decreases the frequency of a probationers court hearings. The program typically lasts 18 months to two years and saves the state $50,000/year – the cost of incarcerating one person for a year in Hawai‘i. For every drug court graduate who can succeed and stay out of prison. The rules are simple: If you mess up, you go to jail. Participants are able to work with a counselor for drug and alcohol treatment, as well as a case manager to assist with housing and employment. For many, it is a way to get their lives on track since they receive assistance with job searching, including resume drafting and acquiring job interview skills. Some participants even go on to find jobs with businesses that support the program, such as Ogasawara Farms in Mililani, O‘ahu. In 2011, the program reported a remarkable completion rate of 75%, and although it is seen as a strict program, it boasts real, tangible results. Of the 1,032 clients admitted since the program’s creation, six hundred sixty-six have successfully graduated and approximately 200 are currently participating. Not only do participants regain their self-esteem, but they also have the opportunity of earning income in order to pay off court fines and other restitution.

2. Ho‘oponopono

Ho‘oponopono is a traditional Hawaiian communication practice where an offender, victim, and other stakeholders of the offense participate in a guided discussion. Traditionally, only immediate family members would participate in this practice since it was based on the need to work together to ensure the family’s survival. Ho‘oponopono is a voluntary process led by a haku (facilitator, usually a respected elder), and which requires each participant to agree to the following conditions: 1) Each

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142 See id.
143 See id.
144 See Minna Sugimoto, Drug Court Participants Earn Money, Gain Self-Esteem Working at Mililani Farm, HAWAII NEWS NOW (June 19, 2011, 2:50 PM) http://www.hawaiinewsnow.com/story/14931792/drug-court-participants-earn-money-gain-self-esteem-working-at-mililani-farm. Wayne Ogasawara of Mililani Agricultural Park allows drug court participants to work and earn money on his farm doing things such as cleaning sweet potatoes and preparing them for the market.
145 See Sugimoto, supra n. 143.
146 See id. See also Alm, supra n. 127, at 1689.
147 See PUKUI & ELBERT, supra n. 3, at 82. Ho‘oponopono means to correct.
individual is committed to the process; 2) All sharing is truthful and sincere; 3) Everything is confidential and not to be repeated; 4) The haku is fair and impartial. Participants sit in a circle to promote comprehensive sharing, as well as to stimulate spiritual solidarity in working towards positive ends. It begins with a pule (opening prayer) addressed to the ‘aumakua to ask for guidance throughout the process. The next step is the kukulu kumuhana, which is a statement of why the ho’oponopono was called. The haku then introduces the hala (problem), which is also known as the “entanglement,” implying that the offender and victim are bound together. Mahiki (discussion of the problems) is the most important step as it is where participants discuss each problem until it can be fully understood. In order to manage flaring emotions and keep the discussion under control, participants do not speak directly to one another, but only to the haku and with his/her permission. After each individual has an opportunity to share their mana’o (feelings), the haku leads the group in mihi (the sincere confession of wrongdoing and the seeking of forgiveness). From there, participants can then move to kala (to release, untie), otherwise known as the “cutting of the cord,” of the offense that binds them. This is where true forgiveness takes place, and although the incident may be remembered after the ho’oponopono, it will be seen as “no big thing anymore.”

Today, ho’oponopono is used informally among Hawaiian families. However, ho’oponopono is not limited in its application to Native Hawaiians. It is a practice that is community-based, not racially or ethnically-based. As long as parties appreciate Hawaiian culture and desire to incorporate Hawaiian values into the reconciliation process,

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150 See id. at 31.
151 See id. at 32.
152 See PUKUI & ELBERT, supra n. 3, at 32. ‘Aumakua in this context means family or personal gods.
153 See Meyer, supra n. 151 at 31.
154 See Hosmanek, supra n. 150, at 364.
155 See id. at 365. This step is often analogized to peeling an onion. As the participants discuss each problem, it is peeled away, revealing another problem beneath the first. See Kim Steuterman Rogers, Sacred Harmony, HAW. MAG. 33, 34 (Jan./Feb. 2004).
156 See id.
157 See id. at 366.
158 Meyer, supra n. 151, at 35.
159 See id.
160 See id.
ho'oponopono can work. In the case of “victimless crimes” such as drug use and possession, ho'oponopono can also be effective “in terms of the family letting the perpetrator know that he/she is loved and valued and that he/she needs to change in order for the family to be whole.”

3. Huikahi Restorative Circles

Huikahi Restorative Circles is a group process that involves the offender, his/her family, and at least one prison representative. Circle processes are a fundamental practice of the restorative justice movement and are commonly used within indigenous communities. Peter Senge, co-founder of the MIT Organizational Learning Center, states that “no indigenous culture has yet been found that does not have the practice of sitting in a circle and talking.” The Huikahi Restorative Circle was developed in 2005 by two community-based organizations – the Hawai’i Friends of Civic Law & Related Education and Community Alliance on Prisons – in collaboration with Waiau Correctional Facility on O’ahu. Hui means group and Kahi means individual; thus, Huikahi is said to signify the coming together of individuals to form a covenant. It is a process where all parties are able to voice their own experience related to the offense, while collaborating with the offender to create a plan that meets his/her needs for a successful transition back to the community. How the offender can meet these needs is addressed during the Circle, including “developing and maintaining a support system, locating and keeping housing, and maintaining physical and emotional health, which includes staying clean and sober.”

Huikahi Circles also provide healing for family and loved ones, since they often experience trauma as a result of the incarceration. The Circles help loved ones reconcile with the offender by allowing each individual to speak openly about the impacts the incarceration has had on

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161 See Hosmanek, supra n. 150, at 373.
162 Id. at 370
164 Tony Ward & Robyn Langlands, Repairing the Rupture: Restorative Justice and the Rehabilitation of Offenders, 14 AGGRESSION AND VIOLENT BEHAV. 205 (2009). Restorative Justice is a social justice movement that aims to deal with consequences of crime through repairing and restoring relationships of three key stakeholders: victims, offenders, and communities.
165 See Walker & Greening, supra n. 165, at 43.
166 See id.
167 See id.
168 See id.
169 Id. at 46.
them. As a result, family and community relationships are restored and strengthened, providing hope and stability for inmates who are ready to reenter society. The difference between ho'oponopono and Huikahi Restorative Circles is the presence of a prison official in the latter, whose involvement is essential in crafting a successful reentry plan for the incarcerated individual. Though these Circles have been shown to reduce recidivism, the service is only available through an application process. However, the lack of institutional support, as well as lack of support from the state executive office, often prevents its practice.

4. Aloha ʻĀina

_E mālama pono i ka ʻāina; nānā mai ke ola._

"Take good care of the land; it grants you life."  

Aloha ʻĀina means to care for the land. Hawaiian communities have long used Aloha ʻĀina activities to help deal with an array of problems, including substance abuse.

The activities and programs of aloha ʻāina reflect the Native Hawaiian belief that people originate from the land, are stewards of the land, and are recipients of its bounty. The relationship and reciprocity of land and caregivers are best experienced through cultural immersion activities and programs that require participants to ‘live with the land.’

One activity includes working in the lo‘i kalo (taro patch). In Hawaiian culture, the first sibling was a taro (kalo) plant, so to tend to

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170 See id at 45.

171 See id. By 2010, the recidivism rate of Huikahi Circle participants was 30% compared to the overall state 54.7% rate.


173 Noreen Mokuau, Culturally Based Interventions for Substance Use and Child Abuse Among Native Hawaiians, 117 PUB. HEALTH REP. 82, 85 (2002). Davianna McGregor, Professor of Ethnic Studies at the University of Hawai‘i at Mānoa, describes Aloha ʻĀina as a “deeply held concept with Hawaiian kaona, hidden meaning concealed in Hawaiian language, poetry, and action. Beginning in 1976, Aloha ʻĀina was revitalized as an expression for the Hawaiian way of loving, working, and protecting the land and native environment. It is a way of the kupuna, Hawaiian elders, and ancestors. At its root, Aloha ʻĀina has a tenet that the land is the religion and the culture.” See MCGREGOR, supra n. 173, at 8.

174 See id. at 85-86.

175 See KUMUKAHI, http://www.kumukahi.org/units/ka_hikina/haloa (last visited Apr. 4, 2016). In Hawaiian history, Hāloa is symbolized by the taro plant and represents
and care for kalo was essentially to care for one’s ancestors. In the lo‘i kalo, participants perform physically demanding work such as weeding and cleaning the lo‘i, harvesting the kalo, and replanting stocks for future growth. It is also a time for them to engage in conversation with elders and others working in the lo‘i, to share cultural stories which build on self-reflection, identity, and cultural pride. Working in the lo‘i kalo, participants also learn the values of cooperation and reciprocity, which, in turn, help to benefit them in the long run.

Another common activity is caring for sacred places, or wahi pana. One such place that Hawaiians hold dear is the island of Kaho‘olawe, also known as Kanaloa. Used as a practice site for the military during World War II, Kaho‘olawe was returned to the states’ custody in 1994 after the steadfast and earnest efforts of activists, led by the Protect Kaho‘olawe ‘Ohana (PKO). Today, volunteer groups visit the island to help restore and preserve its remaining resources, participating in activities such as planting vegetation, removing debris, the original ancestor of the Hawaiian people. He died at birth and was the child of Wākea (Father Heaven) and Ho‘ohōkūkalani (the stars). Ho‘ohōkūkalani buried the baby and a taro plant grew from it. Ho‘ohōkūkalani became pregnant again with a healthy baby boy who was also given the name “Hāloa” in honor of his older brother, the kalo (taro plant). Thus, Hawaiians believe that Hāloa is embodied by the kalo and is the “eldest brother” of all Hawaiians.

176 See Mokuau, supra n. 175, at 86.
177 KUMUKAHI, http://www.kumukahi.org/units/ke_ao_aku/aku/kanaloa (last visited Apr. 4, 2016). “Kanaloa is one of the four major akua (gods) of traditional Hawaiian religion. He is associated with the ocean, long distance voyaging, and healing … Kanaloa is another name for the island of Kaho‘olawe. The island serves as a center for learning open-ocean navigation and healing practices.”
178 See PROTECT KAHO‘OLawe ‘OHANA, http://www.protectkahoolaweohana.org/history.html (last visited Apr. 4, 2016). From 1941 to 1976, the U.S Navy conducted training operations on Kaho‘olawe that included ship-to-shore fire control training, torpedo testing directed to the shoreline, air-dropped bombing, air attacks and strafing runs, among many others. In 1965, Operation Sailor Hat was conducted on Kaho‘olawe, which consisted of three 500-ton TNT charged surface explosions. It was an underwater and surface high-explosive test whose detonations resulted in the crater now known as “Sailor’s Hat” crater. By 1967, the entire island was used as a weapons range with no restrictions. In 1976, PKO filed suit in Federal District Court to enjoin the Navy’s activities on Kaho‘olawe and in 1980 a settlement was reached wherein the Navy was required to protect historic and cultural sites, remove unexploded ordnances from the island, continue vegetation and soil conservation efforts, and allow PKO monthly access to the island. Since its inception, the mission of the PKO has been to “perpetuate Aloha ‘Āina throughout our islands through cultural, educational, and spiritual activities that heal and revitalize the cultural and natural resources on Kaho‘olawe.” See also PROTECT KAHO‘OLawe ‘OHANA, http://www.protectkahoolaweohana.org/vision--mission.html (last visited Apr. 4, 2016).
building stone foundations and walking paths, and recording archaeological sites.\textsuperscript{179} “Caring for Kaho’olawe has been described as physically intensive work that is emotionally fulfilling, provides new learning about land and ocean management, and connects people to a broader spiritual significance. By fostering identity and cultural esteem, it establishes a foundation for interventions for problems such as substance abuse.”\textsuperscript{180}

5. Juvenile Justice and Ho’opono Mamo: The Hawai’i Civil Citation Initiative

Ho’opono Mamo is a diversion program for first-time youth offenders that started in March 2015 with the goal of offering youth “the avenues to overcome challenges that lay at the root of their actions and to realize their own kuleana as valuable and gifted members of our communities.”\textsuperscript{181} The program gets its name from the idea of helping children, who are like precious mamo flowers of the lehua plant, to chart a pono (righteous) path. Youth who commit status offenses or first-time misdemeanors are able to receive a citation rather than an arrest. A status offense is defined by Black’s Law dictionary as “a minor’s violation of the juvenile code by doing some act that would not be considered illegal if an adult did it, but that indicates that the minor is beyond parental control.”\textsuperscript{182} Youth who participate in ho’oponomamo are given an opportunity to work with a kupuna and a counselor at the program’s community-based assessment center\textsuperscript{183} to access supportive services and to help find a program that best suits their needs.

From January 2013–June 2014, a multi-agency task force met regularly to design the recent program whose implementation is being overseen by a team of law enforcement officers, educators, and youth service providers.\textsuperscript{184} The City & County of Honolulu Juvenile Justice Center is the lead agency, with support from partners such as the State of Hawai’i Office of Youth Services, the Hawai’i State Judiciary, the Assessment Center at Susannah Wesley Community Center,\textsuperscript{185} and EPIC.

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\textsuperscript{179} See Mokuau, supra n. 175, at 86.
\textsuperscript{180} Id.
\textsuperscript{182} STATUS OFFENSE, BLACK’S LAW DICTIONARY 1188 (9th ed. 2009). Examples include running away from home and truancy.
\textsuperscript{183} See HOOPONOMAMO, supra n. 183. The assessment center is located in Kalihi and the first phase was developed in Honolulu Police Department District 5 (Moanalua to Kalihi) in March 2015.
\textsuperscript{184} See id.
\textsuperscript{185} See SUSANNAH WESLEY, http://www.susannahwesley.org/?page_id=704 (last
‘Ohana. Staff and volunteers work with the youth to develop a plan of action; parents and guardians also participate in the process by sharing the circumstances and challenges of the child. Options range from something as simple as an apology or follow-up appointment to a full-blown residential program reserved for those facing more difficult challenges. The list of pathways include: 1) a wide array of community-based programs either at the program’s family center or through a number of existing programs; 2) mental health and/or substance abuse treatment, whether residential or outpatient; 3) Ho‘ala Conferencing Circles, which is comprised of supporters that the child chooses in order to establish a ring of support; or 4) Wahi Kana‘aho Cultural Learning and Healing Center, a 21-day residential program with a cultural, ‘āina-based approach that focuses on the healing art of ho‘oponopono, which involves emotional healing, self-reflection, and self awareness. All of these pathways emphasize responsibility and positive reconnection to family, friends, school and community, with assessment center staff diligently tracking the progress of each youth to improve system effectiveness.

B. Other Indigenous Justice Models

1. Australia: Indigenous Sentencing Courts

In 1899, Australia established a number of indigenous sentencing courts. These courts use indigenous community members to talk to a defendant and to assist the judicial officer during sentencing. Rather than apply indigenous customary laws, sentencing courts operate within the framework of Australian criminal laws and procedures while sentencing people. They differ, however, in allowing indigenous elders or respected persons to participate in the process. In this way, sentencing

visited Apr. 4, 2016). Susannah Wesley Community Center is a social service agency that provides information, networking, and programs to individuals and families to help empower and develop their fullest potential.

186 See Epic ‘OHANA, http://www.epicohana.info/ (last visited Apr. 4, 2016). Epic ‘Ohana is a nonprofit organization that “works to strengthen ‘ohana and enhance the welfare of children and youth through transformative processes that are respectful, collaborative and solution-oriented.”

187 See id.


189 See id. at 2.

190 See Elena Marchetti & Kathleen Daly, Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model, 29 SYDNEY L. REV. 415 (2007).

191 See id.

192 See id. at 420.
courts “give due recognition and respect to cultural considerations such as respect for Elders.”\footnote{Id.}

The first and most common feature of Indigenous sentencing courts is that the offender must be indigenous. After a finding of guilt or a guilty plea has been entered, the offender must agree to have his/her case heard before a sentencing court.\footnote{See id. at 421.} Offenders are encouraged to appear before the court with a support person – such as a family member, spouse, or partner – who is also allowed to speak to the court during the hearing.\footnote{Id.} The victim and their support people are also present. The magistrate sits at eye-level with the parties, usually in a circle formation, and along with the elders.\footnote{Id.} During the hearing, the elders’ role varies from talking to the offender about his/her behavior, to advising the magistrate on appropriate sentencing based on interviews with the offender or pre-sentence reports that are produced by the elder.\footnote{Id.} The interaction between the magistrate and the offender is more involved than in a typical court proceeding, and the elder will often monitor an offender’s progress post-sentencing.\footnote{Id.} The types of cases heard by these courts are limited, as most do not handle domestic violence or sexual assault matters, but have proven to be effective in drug use cases.

Sentencing courts have distinct objectives, including making the court process more culturally appropriate and increasing the involvement of indigenous people in those processes.\footnote{See id. at 415.} What results is: 1) open and honest communication; 2) a greater reliance on indigenous knowledge in the sentencing process; 3) penalties that are better suited to the offender’s situation; and 4) the strengthening of indigenous communities by reestablishing the authority of elders.\footnote{See id. at 422.} As of 2007, Indigenous Sentencing Courts exist in Queensland, Victoria, New South Wales, South Australia, the Northern Territory, the Australian Capital Territory, and in Western Australia.\footnote{See id. at 416.}
2. Navajo Nation Courts: Peacemaking Program

“The Navajo Nation court system is the largest Indian court system in the United States.”[^202] These courts were created in 1959 by the Navajo Nation Council, and “assumed responsibility for criminal and civil matters within the Navajo Nation territorial jurisdiction.”[^203] In the early 1980s, members of the council, judges, and the Navajo community sought to renew traditional Navajo justice methods, which led to the revitalization of the Navajo style of justice known as “Peacemaking.”[^204] It is a traditional form of dispute resolution, which begins with either an individual or several people who work towards dispelling conflict.[^205] Peacemaking provides groundwork for a person or group to confront issues and work towards a harmonious existence and includes the following participants: 1) Peacemaker, or traditional teacher;[^206] 2) Troubled decision-makers who agree to participate; 3) Family members, workmates, friends or others affected who may contribute to the discussion but do not make the ultimate decision; and 4) Observers, who may attend with the permission of the group but may not participate.[^207]

A typical Peacemaking session goes as follows:

Through engagement, the Peacemaker educates, scolds, persuades, pleads and cajoles the individual or group toward a readiness to open up, listen, share, and make decisions as a single unit... Through stories and teachings, the Peacemaker dispenses knowledge in order to guide the whole toward a cathartic understanding of [peace] that opens the door to transformative healing. The flow of [peace] is a movement inwards toward the core issue or underlying truth. Recognition of this truth and the ending of denial provide the opportunity for healing or mutual mending. Realization of the truth occurs when individual feelings are fundamentally satisfied. The resolution of damaged feelings is the core material of peacemaking sessions.[^208]

[^203]: Id.
[^204]: See id.
[^206]: Id. at 1.
[^207]: Id. at 6.
[^208]: Id. at 9.
The framework of Peacemaking resembles that of ho‘oponopono and sentencing courts because it engages the offender with those affected by the wrongdoing. It also begins with an opening prayer and employs a “talking it out” type of approach.\(^{209}\) A unique thing to note about the Navajo Peacemaking process, however, is that no words of apology are exchanged, but rather, the emphasis is on gestures of peace.\(^{210}\) One story illustrates this rule:

Two uncles of a Peacemaking Program staff had a longstanding quarrel. Disrespectful words had been spoken and there were hurt feelings. Then one day, one of the uncles approached the other and placed a turquoise necklace over his head, and said, “Thank you for being my brother.” The next day, the uncle who received the necklace brought a horse to the other uncle and said, “Thank you for being my brother.”\(^{211}\)

No words of apology or forgiveness were exchanged. The gestures of gifts and conciliatory words and the manner in which they approached one another are all “gestures of peaceful engagement toward reconciliation.”\(^{212}\) Like ho‘oponopono, these peacemaking sessions may need to occur several times. This kind of simple forgiveness and ability to move forward without focusing on punishment allows for healing and rebuilding lives for not only offenders but also for the communities they come from.

3. New Zealand: Community Justice Panels

Retorative justice is a concept that sits comfortably in the New Zealand context since Māori values include reconciliation, reciprocity, and whānau (family) involvement.\(^{213}\)

Through whānau or hapu (wider family) meetings, and on occasional iwi (tribal) meetings, the voices of all parties could be heard and decisions arrived at by

\(^{209}\) See id. at 13.

\(^{210}\) See id. at 11.

\(^{211}\) Id. at 11-12.

\(^{212}\) See id.


consensus (kotahitanga). The aim was to restore the mana (prestige/authority) of the victim, the victim’s family and the family of the offender, and to ensure measures were taken to restore the future social order of the wider community. Because these concepts were given meaning in the context of the wider group, retribution against an individual offender was not seen as the primary mechanism for achieving justice. Rather, the group was accountable for the actions of the individual (manaakitanga) and that exacted compensation on behalf of the aggrieved.215

New Zealand’s Sentencing Act of 2002216 contains provisions for restorative justice processes that reinforce the Māori community’s commitment to promoting practical and principled responses to issues related to justice and the criminal justice system. Currently in place is a police diversion scheme where offenders are redirected away from the court upon accepting responsibility for the harm caused, making reparations through community work, and apologizing to their victims.217 Another, more inclusive initiative is the trial with a Community Justice Panel where offenders are held accountable for their offending by a panel of vetted and trained community representatives.218 These panels occur during the pre-charge stage and, in 2012, resulted in only 55 of 100 cases returning to District Courts for disposition.219

Similar to other models discussed above, the key element in New Zealand’s justice model is culture. By involving family, communities, and even victims directly in the conflict resolution and rehabilitation efforts, more appropriate and effective outcomes are achieved. Similar to the Navajo Nation and Hawai‘i-specific models, forgiveness is key in a healing rather than a punitive model. Next, we will consider the application of these elements to the criminal justice system in Hawai‘i.

IV. HAWAI‘I’S NEXT STEPS TOWARDS IMPROVING THE DISPARATE IMPACT OF THE CRIMINAL JUSTICE SYSTEM ON NATIVE HAWAIIANS

“The resiliency of Native Hawaiians and the strength of culture, are the foundation for keeping Native Hawaiians out of the criminal justice

215 Id. at 3.


217 See Carruthers, supra n. 216, at 8.

218 See id. at 9.

219 See id. at 10.
Now that we have explored a sampling of culturally relevant models and approaches to the criminal justice system, we must ask, what next steps can we take to integrate these models to help heal our society and improve public safety? We know that there are a large number of non-violent drug related offenders that may be diverted from the criminal justice system and rehabilitated with culturally relevant programs that stand to induce healing and rehabilitation for offenders, their families, their communities, and the economy. Keeping that in mind, we turn to the application of these principals and ideals. OHA’s report summed it up by providing:

Research shows that culturally relevant and appropriate interventions and services are the most effective for helping Native Hawaiians participate fully in the community. . . Pacific cultures, including Native Hawaiians, tend to see themselves as part of a collective group or community. In order to effectively provide services for re-entry or some other wellness promotion initiative, a provider must be aware of the totality of community context, interdependence, and, also, the role that oppression by other groups has played. The application of Western values to a culture that does not share them makes it difficult to ensure successful implementation of initiatives or services.

Weaving Hawaiian Values, Best Practices, and Alternatives to Incarceration into the Criminal Justice System

Exploring different systems of justice is necessary in understanding where to begin with criminal justice initiatives in Hawai‘i moving forward. A successful, practical plan to improve the situation of Native Hawaiians in the criminal justice system should pull the most effective elements from best practices in Hawai‘i and from other indigenous cultures. These models are evidence of the success of using cultural approaches when serving offenders and communities, especially Native Hawaiians, and will prevent the recurrence of disparities of future generations. Relying on positive identity construction and cultural pride will help support Native Hawaiians in remaining productive, and in

\[\text{220}\text{ OHA, supra n. 15, at 15.}\]

\[\text{221}\text{ Id. at 13.}\]
allowing them to return to our communities as contributing citizens.\textsuperscript{222} In addition, changing the system from one that incarcerates individuals with drug problems to one that helps them get treatment outside the prison system would create a more effective scheme by greatly reducing the number of Native Hawaiian inmates, by saving money that can be utilized in other programs, and by improving public safety overall.

Ho‘oponopono and Huikahi Restorative Circles are significant in that they strengthen family dynamics by allowing everyone to voice their concerns in an open and honest setting. The spiritual component of ho‘oponopono is unique in that participants feel a sense of emancipation by letting go of the problem that binds them. Huikahi Circles are also unique in that prison representatives are involved in the reentry planning. Both practices provide processes by which all stakeholders have an opportunity to reconcile with the offender and heal from the harm created by the offense as well as the incarceration. This is an element that is often overlooked, but pertinent to the problem overall. Aloha ‘Āina engages participants with elders and community members, cultivates reciprocity and cooperation, while strengthening one’s cultural pride and identity. Aloha ‘Āina is a concept that is deeply rooted in Hawaiian religion and culture, and through its practice, participants develop special relationships with the land that go far beyond the physical domain and into another, more spiritual realm.

In Australia, elders play an especially critical role in Indigenous Sentencing Courts by assisting magistrates during the sentencing process. Although they operate within the sphere of mainstream criminal and sentencing laws and do not apply indigenous customary laws or use traditional forms of punishment, sentencing courts work to reduce the over-representation of indigenous people in the criminal justice system by arranging culturally appropriate penalties that are best suited to the offender. Peacemaking, which is a dispute resolution process used within the Navajo Nation, and is similar to ho‘oponopono, encourages open communication with a focus on gestures of peace in moving towards reconciliation. New Zealand’s use of Community Justice Panels includes the participation of vetted community representatives during the pre-charge stage, which adds another element of accountability, especially to indigenous offenders whose cultures place importance on respecting elders.

In Hawai‘i, an indigenous sentencing court like those employed in Australia could work since it combines two systems and has been effective in reducing the number of indigenous people in the criminal justice system. It would be optimal for a court of this type to be implemented under the new Native Hawaiian Nation,\textsuperscript{223} if and when it gets established.

\textsuperscript{222} See id. at 15.

Cultural practitioners, priests, and kūpuna would play integral parts in assisting our pa‘ahao, and instead of sentencing them to prison terms, they would be sent to a pu‘uhonua or other diversion program where ho‘oponopono and/or other group circle processes are commonly practiced. These places of refuge, of wellness, and especially of healing, are essential to an island society who has long felt the impacts of colonialism and assimilation.

Even in the absence of a Native Hawaiian Nation, the state of Hawai‘i should recognize the failure of the current criminal justice system for Hawai‘i’s only indigenous group and implement more appropriate solutions. There is a unique relationship between the State and Native Hawaiians that have existed since Statehood. Entities such as the Office of Hawaiian Affairs have been established to aim at improving the status of Native Hawaiians.224 As a part of Hawai‘i’s admission to the United States, the Hawaiian Homes Commission Act also created the Department of Hawaiian Homelands as an effort to "rehabilitate" Native Hawaiians.225 Creating more effective and appropriate solutions for Native Hawaiians is not too much to ask. We know that Hawai‘i has the ability to tailor solutions for unique issues. For example, special courts have been set up to manage veteran’s issues,226 and, more recently, a special court has been established to handle environmental issues.227 Furthermore, the knowledge base for systems such as ho‘oponopono and Hui kahi Circles not only already exist, they are embedded in the cultural foundation of the Native Hawaiian community. The State needs only to allow this knowledge to be utilized.

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224 See HAW. CONST. art. XII, §5 (1978). The Office of Hawaiian Affairs is a state office established in 1978:

The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The board shall select a chairperson from its members.


V. CONCLUSION

The current criminal justice system lacks systemic mechanisms to address the damaging effects of incarceration on the offender, victim, families, and communities. It is vital to restore each party, not in the sense of restitution, but with emotional, psychological, and spiritual healing so issues can be put to rest and people can live in harmony. This shift in theory from punishment to healing is essential. In order to thrive as a community, as well as prevent the decimation of our most disenfranchised members – Native Hawaiians – we must change what is not working.

The State should be looking to effective models that successfully weave Hawaiian values and best practices in order to reduce the incarceration of Native Hawaiians, thereby also reducing recidivism. Furthermore, in order for our paʻahao to reintegrate successfully into society, there must be a system of programs in place that focus on culturally relevant and appropriate interventions and services. Since Hawaiian culture is centered on building strength from community and family, the implementation of relevant cultural practices in our criminal justice system such as hoʻoponopono and Huikahi circles will give our paʻahao a sense of place and belonging, which is essential to successful rehabilitation and will result in stronger and safer communities.

Native Hawaiians are the indigenous people of Hawai‘i. It should be of utmost concern to us all that Native Hawaiians are disproportionately represented in our facilities and prisons. Returning to a system where community and family members would mālama\textsuperscript{228} each other ensures that each individual is valued. Caring for one another is the Hawaiian way, perpetuating the philosophy captured in the “Aloha Spirit” law of 1986 which describes “Aloha” as “mutual regard and affection that extends warmth in caring”\textsuperscript{229} and as “the essence of relationships in which each person is important to every other person for collective existence.”\textsuperscript{230} This acknowledgement of the innate value of everyone in our community, which is rarely found in the criminal justice system, may be the key to turning the tide from our current punitive system.

Criminal justice doesn’t exist in isolation. Crime and punishment affect us all, so too will healing and rehabilitation.

\textsuperscript{228} See PUKUI & ELBERT, supra n. 3, at 232. Mālama means to take care of.
\textsuperscript{229} HAW. REV. STAT. § 5-7.5 (1986).
\textsuperscript{230} Id.