

Building Constructive Prison Reform on Norway’s Five Pillars, Cemented with Aloha

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LIST OF ABBREVIATIONS

ACA	American Correctional Association
ACLU	American Civil Liberties Union
ACO	Adult Corrections Officer
CCA	Corrections Corporation of America, recently rebranded as Core Civic
DPS	Department of Public Safety
DWI	Driving While Impaired/Intoxicated
HCCC	Hawai‘i Community Correctional Center
HCF	Halawa Correctional Facility
HPA	Hawai‘i Paroling Authority
KCCC	Kauai Community Correctional Center
KCF	Kulani Correctional Facility
MCCC	Maui Community Correctional Center
OCCC	Oahu Community Correctional Center
OHA	Office of Hawaiian Affairs
SCOTUS	Supreme Court of the United States
WCCC	Women’s Community Correctional Center
WCF	Waiawa Correctional Facility

I. MORE ALOHA IN NORWEGIAN PRISONS THAN IN THE ALOHA STATE’S

In Norway, crimes are primarily punished with fines, but in severe cases, the punishment is denial of physical freedom—and nothing else.¹

¹ *About the Norwegian Correctional Service*, KRIMINALOMSORGEN, <http://www.kriminalomsorgen.no/information-in-english.265199.no.html> (last visited

Inmates wear street clothes, cook their own food, and have keys to their cells so they can maintain their privacy.² The recidivism rate is currently at 20%.³ The department responsible for prison operations, Criminal Care,⁴ promotes the following approach: when inmates are incarcerated, rather than pressing *pause* on the inmate's life, Criminal Care presses *play*.

Norway, like Hawai'i, has a relatively small population.⁵ Norway, like Hawai'i, struggles with violent crime, gangs, drug addiction, and organized crime. Norway, like Hawai'i, has seen substantial immigration from a multitude of cultural backgrounds, which may cause friction among the groups.⁶ Furthermore, both the Norwegian and Hawaiian cultures value the community over the individual under similar concepts of Aloha.⁷

Mar. 27, 2018).

² See, e.g., Piers Hernu, *Norway's Controversial "Cushy Prison" Experiment – Could It Catch on in the UK?*, DAILY MAIL (July 25, 2011), <http://www.dailymail.co.uk/home/moslive/article-1384308/Norways-controversial-cushy-prison-experiment--catch-UK.html>.

³ Zaid Jilani, *As the Right Bemoans Norway's Criminal Justice System, It Is One of the Safest Countries on Earth*, THINKPROGRESS.ORG (July 25, 2011), <https://thinkprogress.org/as-the-right-bemoans-norways-criminal-justice-system-it-is-one-of-the-safest-countries-on-earth-f181a7585493#.5pq86xmkc>.

⁴ The name of the department is *Kriminalomsorgen*, which translates into two English words: criminal (*kriminal*) and care (*omsorg*), where *care* is defined as "the provision of what is necessary for the health, welfare, maintenance, and protection of someone or something[.]" CARE, *New Oxford American Dictionary* (2013). The use of the name encourages positive views and a humanistic approach toward inmates. Justice Ruth Bader Ginsburg similarly carefully chose to use the word *gender* instead of *sex* in advocating for equal treatment. Catherine Crocker, *Ginsburg Explains Origin of Sex, Gender: Justice: Supreme Court's Newest Member Speaks at Her Old Law School and Brings Down the House with Her History Lesson about Fighting Bias*, LOS ANGELES TIMES (Nov. 21, 1993), http://articles.latimes.com/1993-11-21/news/mn-59217_1_supreme-court. A similar movement is currently promoting the use of *undocumented* instead of *illegal* when referring to individuals who have entered the country without inspection. See e.g. Gene Demby, *In Immigration Debate, 'Undocumented' Vs. 'Illegal' Is More Than Just Semantics*, NPR.ORG (Jan. 30, 2013), <http://www.npr.org/sections/itsallpolitics/2013/01/30/170677880/in-immigration-debate-undocumented-vs-illegal-is-more-than-just-semantics>.

⁵ Hawai'i's population is approximately 1.4 million. United States' Census Bureau, *State Population Tables*, <https://www.census.gov/quickfacts/fact/table/HI,US/PST045217?>. Norway's population is approximately 5.2 million. See Folketall [Population], Statistisk sentralbyrå, SSB.NO, <http://ssb.no/>.

⁶ Of Norway's total population, approximately 883,000 are first- or second generation immigrants (*innvandrete og norskfødte med innvandrete foreldre*). Nøkkeltall for befolkning [Key numbers on population], Statistisk sentralbyrå, <https://www.ssb.no/befolkning/nokkeltall/befolkning>.

⁷ The Norwegian government is built on the concept of *velferdsstaten*, which means the State is responsible for ensuring the well-being of all its residents through

Norway and Hawai‘i also share values of freedom of movement and access to nature and natural resources. A part of Norway’s cultural heritage is *allemansretten*,⁸ which has its roots from the year 1273.⁹

Outdoor recreation is an important part of our cultural heritage in Norway. Since ancient times, we have had the right to roam freely in forests and open country, along rivers, on lakes, among the skerries, and in the mountains—irrespective of who owns the land. We are allowed to harvest nature’s bounty—which means not only saltwater fish, berries, mushrooms and wildflowers, but also our sensory impressions of the whole outdoor experience.¹⁰

As such, *allemansretten* is similar to the Native Hawaiians’ traditional and customary rights to access and gathering of raw materials.¹¹ Unlike Native Hawaiian access and gathering rights, however, *allemansretten* does not discriminate against anyone on the basis of race or national origin, nor does *allemansretten* limit the types of resources that can be gathered.¹²

comprehensive social programs such as sick leave, maternity- and paternity leave, universal health care, drug rehabilitation programs, free university tuition, and retirement benefits. *Velferdsstat*, STORE NORSKE LEKSIKON, <https://snl.no/velferdsstat>. The concept of *velferdsstaten* can be derived from the Norwegian view of criminal justice and the humane treatment of inmates.

⁸ *Allemansretten*, REGJERINGEN.NO, <https://www.regjeringen.no/no/tema/klima-og-miljo/friluftsliv/innsiktsartikler-friluftsliv/allemansretten/id2076300/> (last visited Mar. 16, 2018).

⁹ *Allemansretten* originated with King Magnus Lagabøter’s laws of 1273. King Magnus’s nickname, *Lagabøter*, means “Law Creator.” Siri Schrøder Vesterkjær, Hytter og hus og ingen borge 6 (Mar. 2008) REGJERINGEN.NO, https://www.regjeringen.no/contentassets/9b075710d3b74b1ea370bb1ed344ffa2/historiedel_landvermplan_for_miljovernsektoren_siri_schroder_vesterkjar_2013.pdf.

¹⁰ *Right to Roam*, NORWEGIAN ENVIRONMENT AGENCY, <http://www.miljodirektoratet.no/en/Areas-of-activity1/Outdoor-recreation/Right-to-Roam/> (last visited Mar. 16, 2018).

¹¹ See generally Melody Kapilialoha MacKenzie (ed.), NATIVE HAWAIIAN RIGHTS HANDBOOK Part IV (1991), http://nhlchi.org/images/uploads/Native_Hawaiian_Rights_Handbook.pdf.

¹² Compare MacKenzie, *supra* note 11 (explaining that the access and rights are only available to Native Hawaiians, who reside within the same *ahupua‘a* as they wish to gain access to, and for gathering only of thatch, *aho* cord, *ki*-leaf, house-timber, and firewood) with *The Right to Roam: Joys and Responsibilities*, VISITNORWAY.COM, <https://www.visitnorway.com/plan-your-trip/travel-tips-a-z/right-of-access/> (last accessed Mar. 16 2018) (explaining that access is granted to every person visiting Norway, and that every person may pick berries, mushrooms, and wildflowers; fish for saltwater species; and pitch tents 200 meters from any inhabited structure. Freshwater fishing does require permission from landowner, and some limitations do exist endangered plants). Access rights under *allemansretten* may be analogized with the right of every person to access

In contrast to those in Norwegian prisons, the conditions within Hawai‘i’s prisons¹³ are egregious, have enormous “implications for public safety”¹⁴ through recidivism rates that are higher than necessary, and do not reflect the values embedded in Hawaiian concept of Aloha and the Aloha spirit.¹⁵ Sexual assault, violence, solitary confinement, lack of

beaches in Hawai‘i—however, *allemanstretten* extends to privately owned land in addition to public lands. See HAW. REV. STAT. Ch. 115.11.

¹³ Within the State of Hawai‘i there are two types of incarceration: jail and prison. The Hawai‘i Department of Public Safety [hereinafter DPS] operates four jails, which provide incarceration during a defendant’s pre-trial phase and short-term incarceration for those found guilty of misdemeanors, as well as for felons transitioning to returning to the community. DPS operates four prisons on Oahu for inmates serving longer sentences and also sends prisoners to Saguaro Correctional Center in Arizona. *Corrections Division*, Department of Public Safety, <http://dps.Hawaii.gov/about/divisions/corrections/> (last visited Mar. 27, 2018).

For the purposes of this paper, the primary focus is on imprisonment because inmates in long-term incarceration are more likely to experience undesirable consequences than are faced by those in jail. Nevertheless, conditions in both prison and jail have many similarities. Thus, unless otherwise noted, jail and prison will be referred to collectively as *prison*.

¹⁴ President Barack Obama recently wrote about criminal justice reform and said the following:

How we *treat citizens who make mistakes* (even serious mistakes), pay their debt to society, and deserve a second chance *reflects who we are as a people* and reveals a lot about our character and commitment to our founding principles. And how we police our communities and the kinds of problems we ask our criminal justice system to solve can have a *profound impact on the extent of trust in law enforcement and significant implications for public safety*.

President Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HAR. L.R. 811 (2017), <http://harvardlawreview.org/2017/01/the-presidents-role-in-advancing-criminal-justice-reform/> (emphases added).

¹⁵ Haw. Rev. Stat. § 5-7.5(a) (1986) provides, in part:

“Aloha Spirit” is the coordination of mind and heart within each person. It brings each person to the self. Each person must think and emote good feelings to others. In the contemplation and presence of the life force, “Aloha”, the following unuhi laula loa may be used:

“Akahai”, meaning kindness to be expressed with tenderness;

“Lokahi”, meaning unity, to be expressed with harmony;

“Oluolu”, meaning agreeable, to be expressed with pleasantness;

“Haahaa”, meaning humility, to be expressed with modesty;

“Ahonui”, meaning patience, to be expressed with perseverance.

These are traits of character that express the charm, warmth and sincerity of Hawaii’s people. It was the working philosophy of native Hawaiians and was presented as a gift to the people of Hawaii. “Aloha”

medical services, insufficient time outdoors, boredom, random searches of personal effects and body cavities, lack of privacy, overcrowding, dehumanization,¹⁶ and limited access to the outside world all compound to constitute violations of multiple Hawai‘i constitutional provisions,¹⁷ as well as the Aloha spirit. Moreover, atrocious prison conditions create a vicious, spiraling cycle of a lack of dignity and respect, constant fear, and inability to flee potentially dangerous situations causes more fear. This emphasis on fighting skills and an “every man for himself” mentality continues upon release, leading, in part, to a staggering 49.6% recidivism rate.¹⁸

As of July 2016, 28.8% of Hawai‘i’s inmates (1,386 total individuals)¹⁹ were serving their prison sentences in Saguaro Correctional Center (“Saguaro”),²⁰ a private, for-profit prison facility in Arizona. Two decades ago, the Saguaro inmates from Hawai‘i banded together in a gang to protect themselves against physical and sexual attacks and extortion by other inmates and correctional officers.²¹ The gang, USO, has evolved into

is more than a word of greeting or farewell or a salutation. “Aloha” means mutual regard and affection and extends warmth in caring with no obligation in return. “Aloha” is the essence of relationships in which each person is important to every other person for collective existence

¹⁶ See, e.g., Kat Brady, *Hawaii’s Use of Striped Uniforms for Prisoners Is Downright Inhumane*, CIVIL BEAT (Aug. 25, 2016), <http://www.civilbeat.org/2016/08/when-incarceration-is-about-humiliation-not-rehabilitation/>.

¹⁷ See *infra* sections I and II.

¹⁸ Laws 2016, Act 227 Legislative notes.

¹⁹ In 2016, the Hawai‘i State Legislature created the HCR 85 Task Force to study effective incarceration policies to improve Hawai‘i’s correctional system in preparation for building a new jail to replace the aging and crumbling Oahu Community Correctional Center (OCCC). For more information on the Task Force, see Section III, *infra*. The statistics provided in this section were presented by Robert Merce at a Task Force Meeting July 27, 2016 [hereinafter JULY 2016 PRISON STATISTICS] (citing George King, Department of Public Safety; Tommy Johnson, Hawaii Paroling Authority; and Judiciary of the State of Hawaii 2015 Annual Report, Statistical Supplement). Hawai‘i has reduced the incarceration rate by 54% from the high in 2009. DEPARTMENT OF SOCIOLOGY, UNIVERSITY OF HAWAI‘I AT MĀNOA & DEPARTMENT OF THE ATTORNEY GENERAL STATE OF HAWAI‘I, HAWAI‘I’S IMPRISONMENT POLICY AND THE PERFORMANCE OF PAROLEES WHO WERE INCARCERATED IN-STATE AND ON THE MAINLAND 1 (2011) [hereinafter *MAINLAND/IN-STATE STUDY*], <https://ag.hawaii.gov/cpja/files/2013/01/AH-UH-Mainland-Prison-Study-2011.pdf>.

²⁰ *Corrections Division*, Department of Public Safety, <http://dps.hawaii.gov/about/divisions/corrections/> (last visited Mar. 27, 2018).

²¹ Jennifer Sinco Kelleher, *Prosecutor: Hawaii Prison Gang “Kings of the Castle”*, AP NEWS (Sep. 24, 2014), <http://townhall.com/news/us/2014/09/24/prosecutor-hawaii-prison-gang-kings-of-castle-n1896283> [hereinafter KELLEHER, *Hawaii Prison Gang*].

one of the most notorious prison gangs in the country today.²² Although the creation of USO should have put DPS and Saguaro on notice to improve safety at the Saguaro facility, the conditions remain poor and dangerous.²³

Norway, and other jurisdictions that severely limit the use of incarceration and that have implemented procedures that preserve inmates' dignity, humanity, and a sense of normalcy, produce sharp reductions in recidivism.²⁴ These jurisdictions provide opportunities for inmates to be engaged in their own futures through the collaborative creation of plans for education, work skills, and personal skills.²⁵ Furthermore, American state jurisdictions that reduced their prison populations by 4% between 2010 and 2014 saw a reduction in crime rates of 10%,²⁶ suggesting that reductions in prison populations might lead to less crime and create safer communities.²⁷

The decrease in crime in these state jurisdictions is unsurprising when coupled with an overall decrease in crime on the national level.²⁸ Incarceration has a debilitating effect on one's economic, social, mental, and physical health.²⁹ Furthermore, incarceration is often an incubator to procure skills that can further an inmate's criminal career.³⁰ Therefore, incarceration in and of itself may increase the chance that an incarcerated individual will reoffend, paradoxically leading to an increase in crime.

²² *Id.*

²³ *See generally, infra* Sections II.B and II.E.

²⁴ Nicholas Turner & John Wetzel, *Treating Prisoners with Dignity Can Reduce Crime*, ATLANTIC (May 22, 2014), <http://www.theatlantic.com/politics/archive/2014/05/treating-prisoners-with-dignity-can-reduce-crime/430962/> (describing how improved conditions in prisons of Germany and The Netherlands have directly led to lower recidivism rates).

²⁵ *Id.*

²⁶ JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 12 (2017).

²⁷ *Cf. id.* (decreasing crime levels will likely lead to safer communities).

²⁸ The overall crime rate in the United States has fallen by almost half since the peak in 1991, and the violent crime rate has fallen by about half. The murder rate has decreased from 9.8 to 5.3 murders per 100,000 residents. MATTHEW FRIEDMAN ET. AL., BRENNAN CTR. FOR JUS. AT N.Y.U., *CRIME TRENDS: 1990-2016*, at 3, Apr. 18, 2017, <https://www.brennancenter.org/publication/crime-trends1990-2016>.

²⁹ *See, e.g.,* Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L.L. REV. 257 (2013); *Health and Incarceration: A Workshop Summary*, NAT'L. CTR. FOR BIOTECH. INFO. (2013), <https://www.ncbi.nlm.nih.gov/books/NBK201966/>; *infra* section II.

³⁰ *See infra* sections II.A, II.B, II.C, and II.E.

II. REHABILITATION AND THE FIVE PILLARS

Over a century ago, Sir Winston Churchill publicly recognized that criminal justice systems have a greater responsibility than merely providing food and shelter, for “the convict stands deprived of everything that a free man calls life.”³¹ Sir Churchill advocated for rehabilitation, not punishment, as the basis for incarceration:

The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A *calm and dispassionate recognition of the rights of the accused* against the state, and even of convicted criminals against the state, a constant heart-searching by all charged with the duty of punishment, a *desire and eagerness to rehabilitate* in the world of industry all those who have *paid their dues in the hard coinage of punishment*, tireless efforts towards the discovery of curative and regenerating processes, and an *unflinching faith that there is a treasure, if you can only find it, in the heart of every man* these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it.³²

Norway has adopted a concept of rehabilitation that embodies Churchill’s vision, with great success. Every facet of the Norwegian criminal justice system adheres to the following five “pillars”:

- 1) adhering to the government’s expressed goals that the punishment is to achieve;
- 2) a humanistic view of inmates;
- 3) the principles of due process and equal treatment under the law;
- 4) the principle that the convict has completely paid his or her dues to society upon release from prison; and
- 5) the principle of normalcy.³³

³¹ Sir Winston Churchill, Speech given as Home Secretary to the House of Commons (Jul. 20, 1910), <http://www.justiceinprisons.org.uk/resources/quotes.html>.

³² *Id.* (emphases added).

³³ St. meld. nr. 37 (2007-2008), *Straff som virker – mindre kriminalitet – tryggere samfunn (kriminalomsorgsmelding)* [Parliament Message Number 37 (2007-2008), *Punishment that Works – Less Crime – a Safer Society*] 7, <https://www.regjeringen.no/no/dokumenter/stmeld-nr-37-2007-2008-/id527624/sec1> (for a PDF version, follow “Last ned dokument” hyperlink).

The pillars ensure that the Norwegian criminal justice system approaches rehabilitation through a humanistic view of inmates and encourages inmates to take responsibility for past actions, after which the convicted may receive absolution.³⁴ The goals of rehabilitation and reduced recidivism are achieved through what many in the United States would consider leniency or being “soft on crime.”³⁵ Indeed, prosecutors all over the United States frequently run for office on a “tough on crime” platform by focusing on successful prosecutions.³⁶ The few prosecutors who advocate for prison reform often face backlash.³⁷

The tough on crime policy is a legacy of the Bill Clinton administration’s crackdown of high crime rates by imposing mandatory minimum sentences and funding construction of additional prisons.³⁸ President Clinton’s crime bill, with its infamous “three strikes” provision that imposed severe penalties at a third conviction, is largely attributed to the current situation of mass incarceration and hugely disproportionate

Three of these five pillars are also incorporated into Japan’s criminal justice system: an expressed goal that punishment is to achieve, due process and equal treatment, and full payment of dues to society. JOHN O. HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 121-38 (1991). Although the Japanese system does achieve a lower recidivism rate than Hawai‘i, the system is fraught with serious human rights violations, in diametrical opposition to Hawai‘i’s emphasis of Aloha. JAPAN 2015 HUMAN RIGHTS REPORT 2-8, U.S. DEPT OF STATE, <https://www.state.gov/documents/organization/252979.pdf> (last visited Mar. 27, 2018).

³⁴ The Japanese system is similarly based on confession, repentance, and absolution. HALEY, *supra* note 33, at 129; see Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317 (Mar. 1992).

³⁵ The Japanese system similarly utilizes “soft on crime” methods. Foote, *supra* note 34, at 317; see, e.g., *A Timeline of the Rise and Fall of “Tough on Crime” Drug Sentencing*, ATLANTIC (Apr. 22, 2014), <https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983/>.

³⁶ Because prosecutors have unfettered discretion of choosing which individuals to prosecute and which sentences to seek for each crime committed, their political platform is instrumental in shaping the criminal justice systems of every U.S. jurisdiction. Prosecutorial discretion is rarely raised in criminal justice reform discussions, despite the immense and almost singular impact prosecutors have on the criminal justice system. PFAFF, *supra* note 26, at 127-59.

³⁷ Eli Hager, *A New Florida Prosecutor Says “No” to the Death Penalty*, MARSHALL PROJECT (Mar. 16, 2017), <https://www.themarshallproject.org/2017/03/16/a-new-florida-prosecutor-says-no-to-the-death-penalty#.p65s8tqbG> (explaining that the Florida governor reassigned a death penalty case after the new prosecutor refused to recuse herself following her announcement that she will not seek the death penalty in any case that comes before her).

³⁸ *Bill Clinton Says Tough ‘90s Crime Bill Went Too Far*, REUTERS (May 6, 2015), <https://www.reuters.com/article/us-usa-election-clinton/bill-clinton-says-tough-90s-crime-bill-went-too-far-idUSKBN0NR23G20150506>.

numbers of people of color in prison.³⁹ Although President Clinton rightfully has received much criticism for his bill, he was only one in a line of presidents calling for tough of crime policies, from Richard Nixon to George W. Bush.⁴⁰ And twenty-one years after implementation of the bill, President Clinton acknowledged that the tough of crime policies failed.⁴¹ In an interview, President Clinton stated:

[t]he problem is the way it was written and implemented. We have too wide a net. We have too many people in prison. And we wound up spending—putting so many people in prison that there wasn't enough money left to educate them, train them for new jobs and increase the chances when they came out that they could live productive lives.⁴²

In other words, the “soft on crime” policies improve rehabilitation rates and achieve much lower recidivism rates than the typical American prison system⁴³ and should, therefore, be emulated.

The ideas inherent in the five pillars are not new to Hawai‘i; they are reflected in the state’s sentencing statute, Haw. Rev. Stat. § 706-606.⁴⁴

³⁹ *Id.*

⁴⁰ Inimai M. Chettiar & Abigail Finkelman, *If You Blinked, You Missed When Obama Made Criminal Justice Reform History*, BRENNAN CENTER FOR JUSTICE (Jan. 13, 2016), <https://www.brennancenter.org/analysis/if-you-blinked-you-missed-when-obama-made-criminal-justice-reform-history>.

⁴¹ *Bill Clinton Says Tough ‘90s Crime Bill Went Too Far*, *supra* note 38.

⁴² *Id.*

⁴³ See Jilani, *supra* note 3; Laws 2016, Act 227 Legislative notes, *supra* note 18.

⁴⁴ Haw. Rev. Stat. § 706-606 (1986) provides:

The court, in determining the particular sentence to be imposed, shall consider:

(1) The nature and circumstances of the offense and the history and characteristics of the defendant;

(2) The need for the sentence imposed:

(a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;

(b) To afford adequate deterrence to criminal conduct;

(c) To protect the public from further crimes of the defendant; and

(d) To provide the defendant *with needed educational or vocational training, medical care, or other correctional treatment* in the most effective manner;

(3) The kinds of sentences available; and

In the statute, the Legislature indirectly set goals of incarceration, the first pillar, which includes promoting respect for the law, individual deterrence, and protecting the public. The Legislature further requires judges to view the convicted as individuals with unique history and character, and with unique educational and medical needs, evincing the humanistic view of the second pillar. The third pillar of due process and equal protection is found in the judge's mandate to avoid disparate treatment in sentencing. Requiring that a punishment at the time of sentencing is "just" indicates that the sentencing should constitute the entirety of the convict's debt to society, found in the fourth pillar. Finally, the goal of effective rehabilitative efforts through "adequate deterrence" can be most effectively achieved through the fifth pillar's principle of normalcy, as evidenced by the Norwegian experience. Because the concept of the five pillars is already expressed, albeit indirectly, in the sentencing statute, Hawai'i should build upon the existing foundation to create an improved criminal justice system.

The Hawai'i Constitution expressly requires only one of these five pillars: due process and equal protection.⁴⁵ Nevertheless, even the minimal due process and equal protection requirements are insufficiently implemented and frequently violated.⁴⁶ In addition, the current implementation of Hawai'i's criminal justice system violates constitutional prohibitions against cruel and unusual punishment⁴⁷; defies the Law of the Splintered Paddle⁴⁸, inherent and inalienable rights⁴⁹, and substantive and procedural due process⁵⁰; denies inmates their constitutional rights to enjoyment of life and pursuit of happiness⁵¹; and

(4) The need to *avoid unwarranted sentence disparities* among defendants with similar records who have been found guilty of similar conduct.

(emphases added).

⁴⁵ HAW. CONST. art I, § 5 provides:

No person shall be deprived of life, liberty or property without *due process of law*, nor be denied the *equal protection of the laws*, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

(emphases added).

⁴⁶ See *infra* discussion in section II.C.

⁴⁷ See *infra* sections II.B.1 and II.E.1.

⁴⁸ See *infra* section II.B.2.

⁴⁹ See *infra* section II.B.3.

⁵⁰ See *infra* section II.C.1.

⁵¹ See *infra* sections II.C.1 and II.E.1.

ignores Hawai'i's code of ethics.⁵² Combined, these constitutional violations constitute cracks in every one of the five pillars.

A 2014 report by Council of State Governments Justice Center identified three priorities for Hawai'i's criminal justice system: "1) increase efficiency during the pretrial process, 2) reduce recidivism, and 3) hold individuals accountable in more meaningful ways."⁵³ However, no comprehensive statutory scheme currently exists that offers a coherent and goal-oriented procedure to implement these priorities, for improving treatment of inmates, or for reducing recidivism rates.⁵⁴

Nationally, a large percentage of voters in favor of criminal justice reform shows that the time is ripe for taking the leap.⁵⁵ In a recent national survey by the PEW Research Center, 44% of registered voters responded that "they believed that 'reforming the criminal justice system should be a top priority.'"⁵⁶ Voters of racial minority groups were in even greater favor of reform.⁵⁷

The similarities between the Norwegian and Hawaiian cultures and values demonstrate that the Norwegian system is transferable to Hawai'i with few changes, and that Hawai'i could adopt the five pillars from Norway as a basis for complete criminal justice reform. Although the five pillars have universal application, their implementation must still be customized to our state's unique challenges and cultural sensitivities, and each pillar should be cemented in Aloha.⁵⁸ Reform based on the five pillars will directly address and alleviate current constitutional violations, improve working conditions for prison staff and correctional officers, decrease recidivism, and increase public safety.

⁵² See *infra* section II.B.2.

⁵³ THE COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, JUSTICE REINVESTMENT IN HAWAII: ANALYSIS AND POLICY OPTIONS TO REDUCE SPENDING ON CORRECTIONS & REINVEST IN STRATEGIES TO INCREASE PUBLIC SAFETY (2014), <https://csgjusticecenter.org/wp-content/uploads/2014/08/JR-in-HI-Analyses-and-Policy-Options.pdf> [hereinafter JUSTICE REPORT].

⁵⁴ David T. Johnson, HAWAII'S IMPRISONMENT POLICY AND THE PERFORMANCE OF PAROLEES WHO WERE INCARCERATED IN-STATE AND ON THE MAINLAND 4 (Jan. 2011), <http://ag.Hawaii.gov/cpja/files/2013/01/AH-UH-Mainland-Prison-Study-2011.pdf> (arguing that "imprisonment *increases* the probability of recidivism") (emphasis in original).

⁵⁵ PFAFF, *supra* note 26, at 5.

⁵⁶ *Id.*

⁵⁷ Among African-American and Hispanic voters, the affirmative responses increased to 73 and 48 percent, respectively. PFAFF, *supra* note 26, at 5.

⁵⁸ See *infra* section III.

A. *1st Pillar: Set and Adhere to Goals that the Punishment Is to Achieve*

Like Norway's concept of the five pillars, an effective criminal justice system sets goals that the punishment is to achieve and lets the goals permeate and guide every layer of the system. Justice Brennan wrote in *Furman* that a punishment should be grounded in goals; otherwise, the punishment may violate human dignity:

The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive.⁵⁹

When there is no clear goal expressed for incarceration to achieve, such incarceration is arbitrary and unreasonable.⁶⁰ Furthermore, if

⁵⁹ *Furman v. Georgia*, 408 U.S. 238, 271-79 (1972) (Brennan, J., concurring). *Furman* placed a moratorium on the use of the death penalty in the United States until *Gregg v. Georgia*, 428 U.S. 153 (1976). In *Gregg*, the Supreme Court found that death penalty was permissible when the state provided additional procedures such as bifurcation of the guilt and sentencing portions. The language in *Furman* has therefore not been overruled.

See also Hugo Adam Bedau, *The Eight Amendment, Human Dignity, and the Death Penalty*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 157-59 (Michael Meyer & William Parent, eds. 1992). *Furman*, 408 U.S. at 279 (emphases added).

⁶⁰ The government violates substantive due process when the government action is “clearly *arbitrary* and *unreasonable*, having *no substantial relation* to the public health, safety, morals, or general welfare.” *DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC.*, 134 Hawai‘i 187, 219, 339 P.3d 685, 717 (2014) (emphases added) (providing that the Land Use Commission’s reversion of the land classification did not violate substantive due process when the developer had failed to comply with development conditions). For example, legislation barring children from receiving a public education would be invalid since the law would not further a substantial governmental goal. *Plyler v. Doe*, 457 U.S. 202, 224 (1982) (finding that a Texas statute barring undocumented children from attending public schools “can hardly be considered rational *unless it furthers some substantial goal* of the State.”) (emphasis added).

“[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.” *Bell v. Wolfish*, 441 U.S. 520, 539 (1979) (finding that two individuals sharing a prison cell in which a bunk bed was installed for fewer than sixty days did not constitute impermissible punishment under the Due Process Clause. The Court indicated that longer-term sharing of a cell designed for fewer people than actually occupying the cell would likely constitute punishment and therefore violate the Due Process Clause.).

Although Hawai‘i’s sentencing statute lists factors that might be inferred to

incarceration is meant merely to *punish an individual*, the incarceration does not further *public* health, safety, or general welfare unless the punishment causes the individual to leave the criminal life behind for good.⁶¹ Hawai‘i should, therefore, set clearly expressed goals before it can inflict punishment. These goals should be to reduce recidivism, which will increase public safety. Once the goals are defined, Hawai‘i should implement procedures and systems that truly aim, in every way, at fulfilling these goals.

Under the first pillar, the Norwegian government’s overarching goal with prison is to reduce recidivism and increase public safety.⁶² This goal is founded on a utilitarian criminal justice theory of individual and societal prevention of future harm.⁶³ A 1998 study of Norwegian prison conditions showed that incarceration could cause serious harm and risk to inmates, including loss of contact with their closest relatives and friends, job loss, recruitment into criminal gangs or groups, access to and use of illegal and addictive substances, psychological suffering and illness, and suffering discrimination following release from prison.⁶⁴

The same study also found that many inmates were later institutionalized, marginalized, isolated, underactive, and disoriented.⁶⁵

constitute goals, the factors are far from clearly expressed. HAW. REV. STAT. § 706-606, *supra* note 44.

⁶¹ A state or country in which there is no law enforcement would easily erupt into chaos and lawlessness, as evidenced by the recent police strikes in Brazil. *See e.g.* Marina Lopes, *Police Went on Strike in a Brazilian State. The Result Was Near-Anarchy*, WASHINGTON POST (Mar. 1, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/03/01/police-went-on-strike-in-a-brazilian-state-the-result-was-near-anarchy/?utm_term=.dc09fd471a2b. However, instituting alternatives to incarceration does not equate lack of law enforcement, but, rather, is directly addressing the root causes of crime.

⁶² St. meld. nr. 37, *supra* note 33, at 7.

⁶³ Thomas Ugelvik, *Forelesning 3: Hvorfor Straff? Straffeteori og straffens begrunnelser: fengsler, fanger, samfunn* [Lecture 3: *Why Punishment? Theory of Punishment and the Justifications for Punishment: Prisons, Prisoners, Society*] (Sep. 25, 2013), http://www.uio.no/studier/emner/jus/ikrs/KRIM2904/h13/straffeteori_straffens_begrunnelser.pdf.

⁶⁴ The study provided the following full list of harms and risks: loss of contact with their closest relatives and friends as well as with other positive forces in society; abrupt interruption of education or training; job loss; being recruited into criminal gangs or groups; gaining access to and using illegal and addictive substances; becoming a victim of violence; exhibiting suicidal thoughts and tendencies; psychological sufferings and illness; loneliness; becoming stigmatized in society; beginning or strengthening a criminal career; difficulty assimilating back into society; being discriminated against after release from prison; and developing desire for revenge upon society. St. meld. nr. 37, *supra* note 33, at 80-81 (citing a 1998 study by Hammerlin & Kristoffersen).

⁶⁵ *Id.*

They often suffered a loss of property, income, safety, love, sexuality, were subjected to forced unwanted contact, and were deprived of personal integrity.⁶⁶ One study found that the greater the use of force in a prison resulted in increased occurrences of violence among the inmates.⁶⁷ Results from the first studies in the 1940s until today have shown that imprisonment rarely promotes rehabilitation.⁶⁸ Instead, the reverse has been proven: imprisonment is a major cause of recidivism.⁶⁹

1. 1st Goal: Minimize the Use of Incarceration

Hawai'i's criminal justice system should minimize the use of incarceration and reserve imprisonment for offenders of only the most severe crimes in order to reduce recidivism and thus increase public safety, as well as reducing costs associated with incarceration. Reducing incarceration rates would be the single most effective means to increase the number of beds available in Hawai'i's prisons, thus decreasing or even eliminating the need to send Hawai'i's residents to for-profit prisons in Arizona.⁷⁰

A survey of a single day in 2016 found the Hawai'i jail and prison population consisted of 1,416 individuals in either pre-trial detention for, or convicted of, Class A and B felonies; and 4,158 individuals in either pre-trial detention for, or convicted of, Class C felonies, misdemeanors, and other lesser crimes.⁷¹ Thus, a mere 34% of individuals were incarcerated for serious felonies.⁷² If fewer than half of the inmates in jails and prison for less severe violations or pre-trial detention were released,⁷³ every single inmate serving in Arizona could be returned to Hawai'i.⁷⁴ If the entire population of Class C felons, misdemeanants, and pre-trial

⁶⁶ *Id.*

⁶⁷ *Id.* at 81 (citing a 2005 study by Homel & Thompson).

⁶⁸ *Id.* (citing studies by Clemmer (1940), Sykes (1958), Sykes & Messinger (1960), Wheeler (1961), Galtung (1959), Bødal (1962 and 1969), Lauesen (1998), Svendsen (2005), and Alnæs (2006)).

⁶⁹ *Id.*

⁷⁰ PFAFF, *supra* note 26, at 6; JUSTICE REPORT, *see supra* note 53, at 3.

⁷¹ JULY 2016 PRISON STATISTICS, *supra* note 19, at 2.

⁷² Class A and B felonies include, among others, murder in the second degree, assault in the first degree, kidnapping, sexual assault in the first degree, and burglary in the first degree. HAW. REV. STAT. §§ 707-701.5, 707-710, 707-720, 707-730, 707-810.

⁷³ Release here does not signify that the inmates would be free from restrictions; rather, the inmates would be subject to ankle monitoring, house arrest, fines, community service, or other non-prison dispositions.

⁷⁴ The state would only need to release 1,386 of the 4,148 individuals in pre-trial detention or Class C felonies and below to free up sufficient beds to bring the entire population of Hawai'i's inmates back from the continental United States. JULY 2016 PRISON STATISTICS, *supra* note 19.

detainees were released, the crumbling OCCC could be closed without being replaced.⁷⁵ Furthermore, releasing these categories of inmates could directly lead to decreased recidivism and thereby provide greater benefit to the community than keeping the individuals locked away.⁷⁶

For lesser offenses, Hawai‘i should incorporate greater use of house arrests, fines, community service, and rehabilitation programs aimed at preventing convicts’ future contact with police, the court system, and the prison system. The Hawai‘i State Judiciary has instituted several such rehabilitation programs and specialty courts, including, among others, Mental Health Court, Veterans’ Court, Truancy Court, Drug Court, Girls Court, and the newest program: Community Outreach Court.⁷⁷ These specialty courts are proactively keeping offenders out of the prison system with great success, and they are making “great strides in addressing the needs of those specialized populations.”⁷⁸ Arguably, expanded use of specialty courts thus decreases the number of prison beds needed. Furthermore, the cost of incarceration far exceeds the cost of running the specialty courts. For example, Drug Court costs \$25 per day per participant compared to \$140 per day per prison inmate.⁷⁹ Therefore, increased use of specialty courts can greatly decrease the overall cost for Hawai‘i’s taxpayers.

⁷⁵ OCCC, although only designed to house 628 inmates, has been modified to house 954 inmates. In on a specified day in 2016, the head count was 1,217 (at 263 inmates over capacity, the occupancy rate was 127.6%). JULY 2016 PRISON STATISTICS, *supra* note 19, at 4.

⁷⁶ *See supra* section I.

⁷⁷ Other specialty courts include Juvenile Drug Court and DWI Court. The Mental Health Court provides out-patient services and intensive supervision to keep offenders out of jail. Hawai‘i State Judiciary – Mental Health Court, (2018), http://www.courts.state.hi.us/special_projects/mental_health_court_oahu (“By providing participants with support, court monitoring, and treatment services that aid in addiction recover [sic], the DWI Court is able to reduce recidivism and increase public safety.” *Court Briefs*, HAW. B.J., September 2016, at 34; *see generally* Hawai‘i State Judiciary, <http://www.courts.state.hi.us/>; Chief Justice Mark E. Recktenwald, Hawai‘i Supreme Court, State of the Judiciary Address at the Hawai‘i State Legislature (Jan. 25, 2017) (transcript in author’s file); *see also* Juvenile Services for First Circuit, http://www.courts.state.hi.us/courts/family/family_court_programs (last visited Mar. 29, 2018).

⁷⁸ *State of the Judiciary* speech by Chief Justice Mark E. Recktenwald, Jan. 26, 2011 at 6, *available at* http://www.courts.state.hi.us/docs/news_and_reports_docs/state_of_the_judiciary_2011.pdf.

⁷⁹ *Id.*; Marisa Yamane, *The Cost to House a Prisoner in Hawaii May Surprise You*, KHON2 (Jun. 28, 2016), <http://khon2.com/2016/06/28/the-cost-to-house-a-prisoner-in-hawaii-may-surprise-you/> (explaining that the daily amount of \$140 includes “program services, food, health care, and administrative costs”).

Hawai‘i has 406 inmates currently incarcerated per 100,000 residents and 1,972 per 100,000 when parolees and probationers are included.⁸⁰ The prison population of 5,806 is greater than the prison population of the entire country of Norway’s, despite Norway’s almost four times greater total population.⁸¹ In Hawai‘i, the average time spent in prison is 3.5 years,⁸² in addition to an average pretrial detention of 3 months.⁸³ In Norway, only the most severe criminal violations result in imprisonment, and the average time spent in prison is 173 days.⁸⁴ Norway has 72 inmates per 100,000 citizens.⁸⁵

⁸⁰ The estimated state population on July 1, 2016 was 1,428,557. *Census*, DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM, <http://census.Hawaii.gov/whats-new-releases/2016-state-population-estimates/> (last accessed Mar. 27, 2018). As of July, 2016, the number of incarcerated persons was 5,806, the number of parolees 1,540, and the number of probationers, based on the 2015 caseload, was 28,174. JULY 2016 PRISON STATISTICS, *supra* note 19.

⁸¹ Fengslinger [Incarcerations], STATISTISK SENTRALBYRÅ (Oct. 24, 2017), <https://www.ssb.no/sosiale-forhold-og-kriminalitet/statistikker/fengsling/aar>. Sweden, which has a largely similar criminal justice system to Norway, has a prison population smaller than Hawai‘i’s, despite a population that is almost six times greater than Hawai‘i’s. JULY 2016 PRISON STATISTICS, *supra* note 19, at 9.

⁸² MAINLAND/IN-STATE STUDY, *supra* note 19, at 1; JULY 2016 PRISON STATISTICS, *supra* note 19, at 8.

⁸³ JUSTICE REPORT, *supra* note 53, at 4-5. The problem of overly lengthy sentencing is amplified because it is within the purview of the Hawai‘i Paroling Authority to set minimum sentences, and not within the judges’ discretion. Mr. Nolan P. Espinda, Director of DPS, recommends transferring this power from the Hawai‘i Paroling Authority to the judges as a “positive reform that would promote openness in government and efficiency within the correctional system.” Letter from Noal P. Espinda, Director, Department of Public Safety, to Associate Justice Michael D. Wilson, Hawai‘i Supreme Court (July 5, 2016) (on file with author). For a deeper discussion on the sentencing ranges, *see* section II.D.1, *infra*.

⁸⁴ The average is an approximate because every type of crime is not represented in the table that the Norwegian Central Bureau of Statistics maintains. Among the crimes represented in the table is the average time spent in prison for murder with 4,905 days, burglary with 193 days, attempted murder with 2,113 days, sexual assault of a child under 10 years old with 1,312 days, money laundering with 158 days, and first degree assault with 2,169 days. *Table of Dispositions*, STATISTISK SENTRALBYRÅ, <https://www.ssb.no/214988/straffereaksjoner-etter-type-hovedlovbrudd-type-reaksjon-utvalgte-og-straffeutmaling.gjennomsnittlig-antall-dager-fengsel-og-kroner-bøtstraff> (last visited Apr. 28, 2018); *see also* Norsk fengselsstraff hjelper mot kriminalitet, UNIVERSITY OF BERGEN, <http://www.uib.no/aktuelt/100147/norsk-fengselsstraff-hjelper-mot-kriminalitet>, (*English language version, titled Norwegian Prisons Rehabilitate Criminal Offenders, available at* <https://www.forensicmag.com/news/2016/08/norwegian-prisons-rehabilitate-criminal-offenders>) (last visited Mar. 27, 2018).

⁸⁵ The Norden—NORDIC PRISONS, *documentary available at* YouTube, <https://www.youtube.com/watch?v=HfEsz812Q1I>.

Minimizing the use of incarceration leads to a reduction in crime, not an increase. In 2011, California instituted a program under which 30,000 inmates were released to reduce its prison populations and solve the problem of overcrowding.⁸⁶ The program was a success and brought additional state benefits—statistical analysis showed an overall decrease in crime since the program’s inception.⁸⁷ The decrease in crime was unsurprising, however, given the proven harms incarceration has on inmates.⁸⁸

Furthermore, imposing fewer and shorter prison sentences is fiscally responsible: less time served in prison means less money spent on each inmate. A recent United States Sentencing Commission report showed that the average age of inmates at the time of sentencing for life imprisonment was 37.⁸⁹ In 2015, 64.3% of convicted murder offenders in Hawai‘i were younger than 35 years old.⁹⁰ Although this low age could be the result of incarceration of older individuals, which would thereby prevent them from committing crimes, a more plausible explanation is that younger individuals are more likely to commit violent crimes.⁹¹

Older individuals are also less likely to reoffend than younger individuals.⁹² Statistics from DPS show that the 30-34 year age group comprised the greatest number of inmates in July 2016, with decreasing numbers in each subsequent five-year age group.⁹³ If most crimes are committed by a younger population—thereby indicating that older

⁸⁶ Following release from prison, offenders were placed under probationary supervision. California reported that the overall crime rate decreased following the prison realignment scheme, and with the only increase in crime in auto theft. Recidivism rates remained mostly unchanged. MAGNUS LOFSTROM & BRANDON MARTIN, PUB. POL’Y INST. OF CAL., *IMPACTS SO FAR*, (Sep. 2015); *see also* Rui Kaneya, *Oahu’s Inmates Are Facing Some Seriously “Inhumane” Conditions*, CIVIL BEAT, Oct. 21, 2016, <http://www.civilbeat.org/2016/10/oahus-inmates-are-facing-some-seriously-inhumane-conditions/> [hereinafter *Inhumane Conditions*].

⁸⁷ *Id.*

⁸⁸ *See supra* list of harms in section II.A.

⁸⁹ UNITED STATES SENTENCING COMM’N, *LIFE SENTENCES IN THE FEDERAL SYSTEM 7*, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf.

⁹⁰ CRIME IN HAWAII 2015, at 14, <https://ag.Hawaii.gov/cpja/files/2016/12/Crime-in-Hawaii-2015.pdf>.

⁹¹ “[T]here’s a sizeable body of evidence showing that people generally ‘age out’ of crime in their thirties or forties, for various biological and social reasons.” PFAFF, *supra* note 26, at 75.

⁹² The MAINLAND/IN-STATE STUDY found that “older people recidivated less than did younger people. Age is a powerful ally of efforts to stop criminal offending.” *Supra* note 19, at 2.

⁹³ JULY 2016 PRISON STATISTICS, *supra* note 19.

individuals are more likely to refrain from committing new crimes—incarcerating individuals beyond the age where they no longer pose a threat to society is unwarranted. To advance the goal of a decreased prison population, Hawai‘i should categorically shorten sentences and utilize a flexible approach to reassess the need for continued incarceration of each inmate based on their likelihood of reoffending.⁹⁴

In addition to reducing the length of prison sentences, Hawai‘i should also increase the use of alternatives to incarceration, such as expanding the Hawai‘i’s Opportunity with Probation Enforcement (“HOPE”) program.⁹⁵ HOPE was created by Judge Steven S. Alm in 2004 and is a reactive program that offers probationers a chance to take responsibility for their actions.⁹⁶ Probation violations are dealt with in a swift, certain, and fair manner, with a focus on deterrence.⁹⁷ However, the program is non-adversarial and collaborative and allows probationers a chance to be heard and to be active participants in their own lives.⁹⁸

HOPE is but one alternative to incarceration. The city of Philadelphia recently received a \$3.5 million grant from the MacArthur Foundation to assess what risks offenders pose in order to gauge whether

⁹⁴ An individualized approach to determining the likelihood of an individual reoffending is attainable. New Jersey recently implemented a bail reform in which each defendant’s characteristics are entered into an algorithm. This algorithm then predicts the person’s flight risk and level of danger to society. Douglas Ernst, *Bail Hearings by Algorithm: N.J.’s ‘Earth-Shaking Reform’ Takes Aim at Racial, Class Biases*, WASH. POST. (Feb. 23, 2017), <http://www.washingtontimes.com/news/2017/feb/23/bail-hearings-by-algorithm-new-jerseys-earth-shaki/>. There would always be some risk of racial bias within an algorithm. Sarah Kramer, *An Algorithm Is Replacing Bail Hearings in New Jersey*, VICE: MOTHERBOARD (Feb. 23, 2017), https://motherboard.vice.com/en_us/article/78mngy/an-algorithm-is-replacing-bail-hearings-in-new-jersey. The New Jersey reform is still in its infancy and is attracting some negative comments. *See, e.g.*, John Raphling, *Human Rights Watch Advises Against Using Profile-Based Risk Assessment in Bail Reform*, HUMAN RIGHTS WATCH (July 17, 2017), <https://www.hrw.org/news/2017/07/17/human-rights-watch-advises-against-using-profile-based-risk-assessment-bail-reform> (Human Rights Watch official response to Alec Karakatsanis & Alexis Wilson Briggs, *8 Basic Principles for Money Bail Reform* (June 2, 2017), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=70c95804-a617-fcba-3082-e00285d2cccb&forceDialog=0>). Nevertheless, the use of an algorithm, if properly created and applied, can greatly reduce implicit and explicit biases and greatly reduce the jail and prison populations while keeping the community safe.

⁹⁵ LORANA BARTELS, LOOKING AT HAWAII’S OPPORTUNITY WITH PROBATION ENFORCEMENT (HOPE) PROGRAM THROUGH A THERAPEUTIC JURISPRUDENCE LENS 30-34, QUT L.R. VOL. 16, http://hopehawaii.net/assets/bartels_hope.pdf.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

imprisonment is necessary.⁹⁹ Between July and December 2016, Philadelphia reduced its jail population by 13% through reassessing whether bail could be set lower in nonviolent cases;¹⁰⁰ offering treatment and housing options for mentally-ill arrestees; and increasing the use of ankle monitoring and house arrest.¹⁰¹ Although it is too soon to determine whether the reduction in the prison population will lead to increased public safety, the program aims to address the root causes of crime. Indeed, the social and mental factors, as well as the California experience discussed above, indicate that the program has a high likelihood of success.

Norwegian prisons provide every inmate with occupational training, education (including higher education), cultural experiences, extracurricular activities, and motivational classes to rehabilitate the inmates and prevent future criminal infractions.¹⁰² These opportunities demonstrate that Norway focuses on true rehabilitation that allows the inmates to become law-abiding, tax-paying citizens who will not cost taxpayers future resources of police, the courts, and the prison system—and who will not create additional victims of crime.

Concepts of retribution and punishment are mostly absent from Norway's criminal justice system, with the closest analogy being that set prison terms are imposed upon sentencing.¹⁰³ The likely reason that the concepts are missing is that, with sentences of no more than 21 years, citizens realize that the inmates will eventually be released and will, therefore, be living in the community again.¹⁰⁴ However, the loss of physical freedom can be viewed as sufficient punishment because the Norwegian culture highly values the freedom of movement.¹⁰⁵ In addition, Norwegian culture views every person as possessing equal worth, and no

⁹⁹ Eli Hager, *Let's Go to Prison!*, MARSHALL PROJECT (Dec. 14, 2016), <https://www.themarshallproject.org/2016/12/14/let-s-go-to-prison?ref=collections#.ZtAiBdOhU>.

¹⁰⁰ For a discussion on the use of bail, see section II.C.2, *infra*.

¹⁰¹ Hager, *supra* note 99.

¹⁰² St. meld. nr. 37, *supra* note 33, at 9.

¹⁰³ See generally Nor. Penal Code §§ 101 – 410, available in English at https://lovdata.no/dokument/NLE/lov/2005-05-20-28/KAPITTEL_2#KAPITTEL_2 (last visited Mar. 16, 2018).

¹⁰⁴ Only crimes of genocide, war crimes, and crimes against humanity will result in a sentence of up to thirty years; all other crimes, including murder, will result in a sentence of no greater than 21 years. See generally Nor. Penal Code §§ 101 – 410, available in English at https://lovdata.no/dokument/NLE/lov/2005-05-20-28/KAPITTEL_2#KAPITTEL_2 (last visited Mar. 16, 2018).

¹⁰⁵ See *supra* section II.

one is viewed as better than anyone else.¹⁰⁶ Consequently, inmates must be treated as human beings and afforded all possible dignity.

American criminal justice systems, on the other hand, although often based on supposed utilitarian principles, bring with them too much emotion: Americans tend to be unable to keep anger and blame of criminals separate from the utilitarian goal of future crime prevention.¹⁰⁷ Anger and blame cause Americans to impose exceedingly long prison sentences for even non-violent crimes and to treat inmates as undeserving of the same types of living conditions to which law-abiding citizens are entitled.

In addition, so-called “rights of the victims” prevent a humanistic view and treatment of inmates.¹⁰⁸ When James Conway, a retired prison superintendent from Attica Correctional Facility in New York, visited prisons in Sweden, Finland, and Norway, he expressed disbelief at the positive and friendly way the correctional officers and the inmates interacted and the way the inmates lived.¹⁰⁹ Mr. Conway claimed he would never be able to institute similar conditions at the Attica Correctional Facility because the victims’ families would object. Although victims’ objections may carry political clout, they carry no legal weight. Few, if any, states provide victims’ families constitutional or statutory rights to see perpetrators live in undignified, unsafe, and downright terrible

¹⁰⁶ The view that everyone is created equal is referred to as *Janteloven* [the Law of Jante], a concept first expressed in the 1933 book *A Fugitive Crosses His Tracks* by Aksel Sandemose. *Janteloven* holds, in part, “You shall not believe you *are* anything. You shall not believe you are as much as *us*. You shall not believe you are wiser than *us*. You shall not imagine you are better than *us*. You shall not believe you know more than *us*. You shall not believe you are more than *us*.” STEPHEN RICHARD TROTTER, *Breaking the Law of Jante* 2, 23 ESHARP 10, U. GLASGOW, available at https://www.gla.ac.uk/media/media_404385_en.pdf (last visited Mar. 16, 2018). As such, *Janteloven* is not a derogatory view, but, rather, an egalitarian view.

¹⁰⁷ Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 317 (1984). The United States frequently cite punishment and retribution as goals of the criminal justice system. For example, the United States submitted the following statement upon ratification of the ICCPR: “The United States further understands that paragraph 3 of article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system.” *U.S. Reservation, Understanding, and Declaration to the ICCPR* (June 8, 1992) [hereinafter RUD to the ICCPR] (emphasis added), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec. Likewise, the U.S. Supreme Court has repeatedly stated that punishment and retribution are permissible goals. *See, e.g., Gregg v. Georgia*, 428 U.S. 183 (1976).

¹⁰⁸ *See, e.g., Bob Cameron, Why Does Norway Have a 21-Year Maximum Prison Sentence?*, SLATE.COM (May 7, 2013), http://www.slate.com/blogs/quora/2013/05/07/why_does_norway_have_a_21_year_maximum_prison_sentence.html.

¹⁰⁹ NORDIC PRISONS, *supra* note 85.

conditions.¹¹⁰ Victims' families may, therefore, voice objections under their First Amendment right to free speech, but they would have no legal cause of action against the State for treating inmates with dignity and respect.¹¹¹

Hawai'i's main goal in its criminal justice system should be the prevention of crime, even if under protest by victims. When resources are spent on prevention of crime, the payout will be lower crime rates, safer communities, and fewer victims.¹¹²

2. 2nd Goal: Inmates and Advisors Should Set Goals and Implement Plans for Achieving Those Goals upon Commencement of Prison Sentence

The identified priority for Hawai'i's criminal justice system to "hold[ing] individuals accountable in more meaningful ways" could be implemented with a system similar to Norway's,¹¹³ and it would be a natural extension of the existing HOPE program or by expanding the use of specialty courts. Because inmates in Norway have the right to make their own choices and must face the consequences of their decisions, inmates must participate in rehabilitation programs voluntarily.¹¹⁴ Thus, it is the responsibility of Criminal Care to *motivate* and *encourage* inmates to participate in programs—including substance abuse treatment—and no inmate will be forced to participate against his or her will.¹¹⁵ Inmates who participate in programs, including substance abuse, education, and training, may earn benefits such as day- or weekend passes from prison, activity trips, and part-time imprisonment during which the inmate may live partly at home.¹¹⁶

¹¹⁰ In Hawai'i, victims' legal rights include restitution to compensate for losses incurred resulting from the crime. Compensable losses the full value of damaged or stolen property, medical expenses, and funeral expenses. HAW. REV. STAT. § 706-646 (2016).

¹¹¹ Victims have political power to change laws, but the current legal system would offer them no recourse against the state for treating inmates "too nicely."

¹¹² Although Norway spends about \$93,000 per year on each inmate, if the United States did the same but incarcerated individuals at rates as low as Norway, the country, as a whole, would save \$45 billion annually. Jessica Benko, *The Radical Humanness of Norway's Halden Prison*, NEW YORK TIMES (Mar. 26, 2015), http://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html?_r=1 [hereinafter *The Radical Humanness of Norway's Halden Prison*].

¹¹³ JUSTICE REPORT, *supra* note 53, at 1; St. meld. nr. 37, *supra* note 33, at 20-21.

¹¹⁴ St. meld. nr. 37, *supra* note 33, at 20.

¹¹⁵ *Id.*

¹¹⁶ Fengsel og straff: Idealer og realiteter fra et fangeperspektiv [Prison and Punishment: Ideals and Realities from a Prisoner's Perspective] 22, Universitetet i Oslo,

The first step of the rehabilitation process begins with a meeting between the individual and an advisor. Together, they create goals to meet before, upon, and after release, tailoring each meeting to the individual's needs and circumstances. A detailed plan for reaching their goals may include vocational training, education, higher education, employment, housing, maintenance of relationships, substance abuse treatment plans, and other individual needs.¹¹⁷

Currently, only limited access to vocational, educational, and social education is available in Hawai'i.¹¹⁸ There is no advisor available to help inmates set goals or to encourage and facilitate inmates' successful integration into society upon release.¹¹⁹ Providing inmates with advisors who allow inmates to take charge of their own futures will encourage inmates to change the course of their own lives from crime to positive contributions to society.

The most cost-effective method for reducing recidivism is providing adequate and appropriate education and skills to inmates.¹²⁰ One study found that for every dollar spent on education for inmates, the jurisdiction saved four to five dollars on re-incarceration.¹²¹ Furthermore, individuals who completed vocational training while incarcerated increased their post-release employment rates by 28% compared to those who did not participate in training.¹²²

Engaging the inmates and assisting them in preparing for the future also creates calmer prison populations compared with systems built on punishment. Retired psychiatrist James Gilligan, explains that, "[f]ar from reducing violence, punishment is the single most effective way of stimulating violence that we've yet discovered. . . . The more severely the prisoners were punished, the more violent they became. This becomes a

<http://www.uio.no/studier/emner/jus/ikrs/RSOS2801/h09/undervisningsmateriale/Fengsel%20og%20straff%20-%20rsos2801.ppt>.

¹¹⁷ St. meld. nr. 37, *supra* note 33, at 20-21. *See also*, discussion on human dignity and respect, *infra* section II.B.

¹¹⁸ *See* AMY JADOR, Department of Public Safety, Corrections Program Services, Education Branch, Report provided at Education Subcommittee meeting Sept. 28, 2016 [hereinafter JADOR].

¹¹⁹ Amy Jador confirmed during the Education Subcommittee meeting Sept. 28, 2016 that there is currently no dedicated advisor available for this purpose. *See also id.*

¹²⁰ LOIS M. DAVIS & ROBERT BOZICK, ET AL., EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION: A META-ANALYSIS OF PROGRAMS THAT PROVIDE EDUCATION TO INCARCERATED ADULTS iii, Rand Corporation, http://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR266/RAND_RR266.pdf [hereinafter EDUCATION EVALUATION REPORT].

¹²¹ *Id.*

¹²² *Id.* at xvii.

vicious cycle.”¹²³ One San Francisco prison instituted an intensive treatment program for violent offenders, which included group counseling sessions, visits by people sharing how violence had impacted them, and writing and theater classes.¹²⁴ The program resulted in 13.6% less recidivism, which equates to far fewer future victims and huge savings for the city and the state from reduced future interactions with the police, courts, and prisons.¹²⁵

Similar programs to those offered in Norway and San Francisco should be instituted in Hawai‘i. The programs would allow inmates to take charge of their own futures, develop goals and life skills, and train for the transition to a life outside.¹²⁶

3. 3rd Goal: 100% High School Equivalency upon Release, Encourage Higher Education, and Offer Vocational Training Based on Community Needs

Courts have held that “the very essence of the personal freedom and opportunity that it was the purpose of the [5th Amendment Due Process Clause] to secure” is the “right to pursue one’s chosen profession free from unreasonable government interference[.]”¹²⁷ Therefore, as long as an inmate retains rights under the 5th Amendment, among an inmate’s liberties that cannot be denied without due process is the right to education and vocational training of their choice. Of course, DPS cannot reasonably be expected to offer on-site education and training for the thousands of professions that exist. DPS should be expected, however, to facilitate inmates’ desire to pursue a chosen profession by developing programs and opportunities through collaborative efforts with organizations and institutions in the community, as well as providing adequate computer and internet access to facilitate online learning.

¹²³ James Gilligan is a former prison psychiatrist at a medium security prison in Norfolk, Massachusetts, and director of a violence prevention program in a San Francisco jail. Rebecca McCray, *Rehabilitating Violent Offenders Is Possible. Why Aren’t We Doing It?*, TAKEPART’S BIG ISSUE VOL. 11 (Sep. 19, 2016), <http://www.takepart.com/feature/2016/09/19/violence-and-redemption-rehabilitation>.

¹²⁴ *Id.*

¹²⁵ *Id.* The recidivism rate of inmates who participated in the program decreased by 48.3% whereas the control group’s recidivism rate decreased by 34.7%.

¹²⁶ The caption of illustration 5.3 states that at Bastøy Prison, the inmates train “for the rest of our lives[.]” meaning they develop positive skills they will use for the rest of their lives. St. meld. nr. 37, *supra* note 33. For more information on Bastøy Prison, see *infra* section II.B.3.

¹²⁷ *Minton v. Quintal*, 131 Hawai‘i 167, 186, 317 P.3d 1, 20 (Haw. 2013) (internal citation and quotation marks omitted). Furthermore, the Hawai‘i Revised Statute entitled “Rights lost” upon incarceration specifies that “[a] person sentenced for a felony” only loses two enumerated rights: 1) the right to vote in elections, and 2) the right to either become a candidate for or hold a public office. HAW. REV. STAT. § 831-2 (2006). Consequently, the inmate retains all other rights guaranteed by the Hawai‘i Constitution.

DPS currently offers 17 career and technical training programs divided among seven of the nine correctional facilities that they maintain.¹²⁸ The seven facilities each provides between two and seven programs.¹²⁹ Most of the programs offer skills that may be directly applicable to work, such as carpentry, plumbing, facilities maintenance, forklift operator, tour guide training, food safety, culinary arts, and sustainable horticulture production.¹³⁰ Nonetheless, only three programs provide certification or college credits, and only one teaches any computer skills.¹³¹

Upon release from prison, there is no Hawai'i state agency responsible for following up with inmates to determine whether the training the inmates completed constitutes necessary and appropriate skills for productive contributions in the workplace.¹³² When no agency follows up with inmates, the State cannot answer a fundamental question: is the investment in the current training programs an appropriate use of State resources and time, or is it wasteful?

The correctional system's lack of cost-benefit research into the training programs has real consequences, which inmates in New York experienced. The most popular vocational program in prison, barber school, turned out to be a waste of time and resources.¹³³ The agency in charge of licensing barbers in New York refused to issue licenses to anyone with a felony record.¹³⁴ Thus, to avoid similar problems, Hawai'i should immediately initiate a study to determine the most sought-after skills in the community and to what degree current training assists people in finding work after release from prison.

¹²⁸ JADOR, *supra* note 118.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* In addition to suffering from inadequate funding, vocational skills training in carpentry and culinary arts is taught with dull blades in the name of safety for inmates and correctional officers. These tools do not represent the tools the inmates will be working with once they are in the work force, which may cause severe injuries to themselves or others in the future. Thus, the training does not appropriately prepare the inmates in work skills.

¹³² *Id.* The lack of research and data raises several questions, including the following: are the skills taught representative of the needs of the community? Are the skills taught assisting released inmates in finding work? Does the recidivism rate change based on whether an inmate has completed a training program? Which programs—if any—are more successful in reducing recidivism? Do inmates find work in the area in which they have been trained? If so, are the skills taught representative of the skills required for their new positions?

¹³³ PFAFF, *supra* note 26, at 62.

¹³⁴ *Id.*

B. 2nd Pillar: View Inmates as Human Beings

The Hawai‘i Constitution guarantees that “[n]o citizen shall be disfranchised, or deprived of any of the rights or privileges secured to other citizens, unless by the law of the land.”¹³⁵ Although the “law of the land” allows imprisonment for crimes, no law demands that inmates must live in conditions where they face the harms and losses described earlier. The living conditions of most Hawai‘i inmates are denigrating to human dignity and constitute violations of the Hawai‘i constitution’s prohibition against “cruel and unusual punishment[.]”¹³⁶

Although some may believe that “the vilest criminal”¹³⁷ deserves to be treated poorly, tortured, executed, and to live in fear, “there is no question that stakeholders in the post-DNA era now recognize that more innocent people have been convicted than anyone imagined[.]”¹³⁸ The overwhelming number of cases ending in plea deals further increases the possibility that innocent individuals are being imprisoned.¹³⁹ There is little possibility of differentiating between the innocent and the “vile criminals.” If the legal system has failed the innocent individuals by convicting them,

¹³⁵ HAW. CONST. art. I, § 8.

¹³⁶ HAW. CONST. art. I, § 12 provides in part, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.”

¹³⁷ The “fundamental premise of the [cruel and unusual] Clause [is] that even the vilest criminal remains a human being possessed of common human dignity.” *Furman v. Georgia*, 408 U.S. 238, 273 (1972).

¹³⁸ Barry C. Scheck, *Conviction Integrity Units Revisited 5* (2016) (draft provided by Mr. Scheck in author’s file).

¹³⁹ *Criminal Cases*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/index.cfm?ty=tp&tid=23> (last visited Mar. 29, 2018) (finding that “[a]bout two-thirds of felony defendants were eventually convicted and more than 95% of these convictions occurred through a guilty plea.”). U.S. District Judge John L. Kane explained the phenomenon of innocent people pleading guilty in the following way:

Defendants plead guilty for a variety of reasons: pleas to reduced charges result from an explicit agreement between the prosecutor and defense counsel in which both parties make concessions and explain the result to the hapless defendant and the offended victim. To use an economic analogy, plea bargaining establishes a “going rate.” The anticipated sentence is the central concern in the negotiation. The problem, however, is that both innocent and guilty defendants are placed in the same pot and the goal is to achieve the appearance of justice, not the realization of it.

Judge John L. Kane, *Plea Bargaining and the Innocent*, MARSHALL PROJECT (Dec. 26, 2014), <https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent#.kA7zcKgI7>. In cases that do go to trial, regardless of how meticulously the police and the prosecution investigated, how convinced of guilt the jury was, and how certain the judge might have been that the jury made the correct finding, there is always a possibility that innocent individuals are also living under the same conditions as the guilty.

the prison system cannot afford to fail them again by denying them the respect and dignity appropriate for human beings.

1. Violations of Prohibitions Against Cruel and Unusual Punishments

The United States Supreme Court declared that the Eighth Amendment prohibition against cruel and unusual punishments “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹⁴⁰ In our maturing society, our standards of decency have evolved from condoning corporal punishment¹⁴¹ such as “whipping by a cat-o-nine-tails” of “incorrigible prisoners[,]”¹⁴² to prohibiting all acts that today’s society considers tantamount to torture. The Hawai‘i Supreme Court has adopted the doctrine of “evolving standards of decency” and has determined that punishments that “shock the conscience and outrage the moral sense of the community” violate the prohibition against cruel and unusual punishments, both under the United States Constitution and the Hawai‘i Constitution.¹⁴³

Neither the United States Supreme Court nor the Hawai‘i Supreme Court has yet to decide whether typical prison conditions violate “evolving standards of decency.” However, the courts are facing considerable pressure to rule the conditions inhumane, especially considering the increasingly frequent condemnation of human rights violations by the international community¹⁴⁴ and domestic national and state organizations.¹⁴⁵

The Department of Public Safety violates the Eighth Amendment when either of two conditions is met: 1) an inmate is denied “the minimal civilized measure of life’s necessities” or the inmate is “incarcerated under conditions posing a substantial risk of serious harm”; and 2) there is a culpable state of mind of “‘deliberate indifference’ to inmate health and safety.”¹⁴⁶

¹⁴⁰ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

¹⁴¹ Exceptions still exist in those states that still allow the death penalty; however, no state allows branding, flogging, beatings, blinding, or other punishments that cause physical pain. *See Corporal Punishment*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/corporal-punishment> (last visited Mar. 29, 2018).

¹⁴² *In re Candido*, 31 Haw. 982, 983-84 (SC of the Territory of Haw. 1931).

¹⁴³ *State v. Iaukea*, 56 Haw. 343, 360, 537 P.2d 724, 735 (Haw. 1975).

¹⁴⁴ *See, e.g.*, HUMAN RIGHTS WATCH, WORLD REPORT 2015: UNITED STATES (2016), <https://www.hrw.org/world-report/2016/country-chapters/united-states>.

¹⁴⁵ *See generally*, MARSHALL PROJECT, <https://www.themarshallproject.org/#.fGvpzLkDM> (last visited Mar. 29, 2018); THE VERA INSTITUTE, <https://www.vera.org/>; COMMUNITY ALLIANCE ON PRISONS, <https://capHawaii.wordpress.com/about/coordinator/> (last visited Mar. 29, 2018).

¹⁴⁶ *Kimberly v. State*, 108 Hawai‘i 1, 116 P.3d 7 (2005) (mem) (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). Unpublished decisions prior to July 1, 2008 cannot

a. *The First Condition of Eighth Amendment Violations: An Inmate is Denied the Minimal Civilized Measure of Life's Necessities or the Inmate Is Incarcerated Under Conditions Posing a Substantial Risk of Serious Harm*

DPS violates the Eighth Amendment by allowing inmates to face substantial risk of serious mental and physical harm. In the last few years, there have been multiple brutal attacks and even murders in facilities in Hawai‘i and Arizona.¹⁴⁷ In 2013, a 76-year-old inmate at OCCC was beaten to death when, due to overcrowding, prison officials placed him in a special holding cell with another inmate instead of holding them separately.¹⁴⁸ In the two months that followed, there were four additional deaths at OCCC and HCF.¹⁴⁹ In a recent lawsuit against the State of Hawai‘i, one inmate at HCF claimed that prison staff allowed two USO¹⁵⁰ gang members into the inmate’s cell.¹⁵¹ The ensuing attack left the victim with a “head injury, a cut lip, broken and loose teeth, and pain to various areas of his body.”¹⁵²

“Although ‘cruel and unusual’ ... was directed against barbarous forms of torture,”¹⁵³ the United States Supreme Court has found that any punishment that “subjects the individual to a fate of ever-increasing fear

be cited for persuasive value. *See* Haw. Rules of App. Proc. Rule 35. However, because *Kimberly* cites to a U.S. Supreme Court decision, it would be somewhat unlikely that Hawai‘i courts would reach a different holding on similar facts.

¹⁴⁷ *See, e.g., Inmate Sentenced for Prison Attack at Halawa*, KHON2 (Nov. 12, 2015), <http://khon2.com/2015/11/12/inmate-sentenced-for-prison-attack-at-halawa/>; *Family of Murdered Inmate Sues Hawaii, Prison*, DESERET NEWS (Feb. 15, 2012), <http://www.deseretnews.com/article/print/76551157/Family-of-murdered-inmate-sues-Hawaii-prison.html>; KELLEHER, *Hawaii Prison Gang*, *supra* note 21; *Suspect in Fatal Prison Beating Had History of Mental Issues*, HAWAII NEWS NOW (2013) [hereinafter *Fatal Prison Beating*], <http://www.Hawaiinewsnow.com/story/21672022/suspect-in-fatal-prison-beating-had-history-of-mental-issues>.

¹⁴⁸ *Fatal Prison Beating*, *supra* note 147.

¹⁴⁹ David Reutter, *Hawaii Prisons Experience Security Failures, Other Troubling Incidents*, PRISON LEGAL NEWS (May 5, 2016), <https://www.prisonlegalnews.org/news/2016/may/5/hawaii-prisons-experience-security-failures-other-troubling-incidents/>.

¹⁵⁰ For a discussion on USO, *see supra* section I.

¹⁵¹ Michael Lasquero, *State Plans to Settle Lawsuit over an Attack Inside Prison*, HONOLULU STAR-ADVERTISER (Apr. 11, 2016), <http://www.staradvertiser.com/2016/04/11/Hawaii-news/state-plans-to-settle-lawsuit-over-an-attack-inside-prison/>.

¹⁵² *Id.*

¹⁵³ *State v. Iaukea*, 56 Haw. at 360.

and distress[.]” violates the Eighth Amendment¹⁵⁴. These frequent occurrences¹⁵⁵ of violence surely cause “ever-increasing fear and distress” because the inmates are denied a chance to feel safe from harm.¹⁵⁶ Consequently, the State violates the Eighth Amendment when subjecting individuals to the current conditions in the prisons and fails to protect inmates from violence and harm.

Unlike federal and state-run prisons, private, for-profit prisons are not required to provide information upon request, and the DPS has refused to release records pertaining to violence at Saguaro Correctional Center, which is operated by Corrections Corporation of America (“CCA”).¹⁵⁷ Thus, there is no available information on the frequency and severity of violent occurrences at Saguaro.¹⁵⁸ What is known, however, is that at least three Hawai‘i inmates have been murdered at CCA’s Saguaro Correctional Center in the last six years,¹⁵⁹ which evidences a “substantial risk of serious harm.”¹⁶⁰

¹⁵⁴ *Trop v. Dulles*, 356 U.S. at 102.

¹⁵⁵ The frequency of sexual assault on Hawai‘i’s inmates seem to be increasing. Between 2014 and 2015, reports of sexual assaults increased from 45 to 64. Sexual assault is likely severely underreported as inmates claim and fear retaliation by other inmates and correctional officers. Kevin Dayton, *Inmate Sex Assaults: Staff Abuse Outnumbers Inmates’ for Second Year*, HONOLULU STAR-ADVERTISER, Feb. 26, 2017, at A1.

¹⁵⁶ Nationally, 33.8% of deaths in jails and 5.5% of deaths in prisons in 2013 were caused by suicide, indicating a high level of “fear and distress.” U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000-2013: STATISTICAL TABLES 7, 20 (Aug. 2015), <https://www.bjs.gov/content/pub/pdf/mljisp0013st.pdf>; *Suicide: Leading Cause of Death in Prison*, HAWAII NEWS NOW (2013), <http://www.hawaiinewsnow.com/story/23340593/suicide-leading-cause-of-death-in-prison> (explaining that “a prisoner has a better chance of taking his own life, than being murdered or overdosing on drugs behind bars.”).

¹⁵⁷ CCA became the first company to “provide privatized jail, prison and detention services” in 1983 and is currently the largest for-profit corrections company in the United States. CCA houses over 70,000 inmates in its more than 70 facilities. CCA’s stated mission is to “[advance] corrections through innovative results that benefit and protect all we serve.” The company is currently rebranding to CoreCivic. *See generally* CCA.com, <http://www.cca.com> (last visited Mar. 29, 2018).

¹⁵⁸ Civil Beat has attempted to obtain records pertaining to violence at Saguaro Correction Center. Despite Hawai‘i law requiring the state to respond within ten business days, it took the state eight months to give a cost estimate of \$22,940 for obtaining the records. The only record the state has provided Civil Beat thus far is a copy of a certificate for Saguaro’s certification. Rui Kaneya, *Hawaii Prison Officials Say It Will Cost \$23,000 for Public Records*, CIVIL BEAT (Oct. 31, 2016), <http://www.civilbeat.org/2016/10/Hawaii-prison-officials-say-it-will-cost-23000-for-public-records/>.

¹⁵⁹ *Id.*

¹⁶⁰ In 2016, under the Obama administration, the Justice Department promised to

In July 2016, reporter Shane Bauer published an exposé of a CCA facility in Louisiana.¹⁶¹ Working undercover as a correctional officer, Bauer uncovered evidence showing that CCA severely underreports incidents of violence, rape, and confiscations of shanks¹⁶²; refrains from seeking medical attention for inmates in a timely manner to save on costs; understaffs the prison; fails to sufficiently man guard towers; places prisons on lockdown due to staffing shortages; confiscates any pictures drawn with crayons, including those by the inmates' children; and extends inmates' prison time for infractions as a money-making scheme since CCA is paid a daily rate for each inmate.¹⁶³ Bauer's exposé suggests a culture of indifference within CCA, which likely also extends to its Saguaro facility.

Prisons and jails receive accreditation through the American Correctional Association ("ACA").¹⁶⁴ Every CCA facility passes ACA audits with an average score of 99% despite many serious problems at each, possibly because the co-founder of CCA is now the head of the ACA.¹⁶⁵ Hawai'i has its own auditing procedures for Saguaro in Arizona, but, during one particular audit, Hawai'i officials faced severe roadblocks from CCA. The Saguaro warden initially refused to disclose documents to the Hawai'i auditors.¹⁶⁶ Even when documents were finally released, they

phase out the use of private for-profit prisons because "[t]hey simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and . . . they do not maintain the same level of safety and security[.]" Private prison corporations donated at least \$575,000 directly or indirectly to Trump's presidential campaign and inauguration festivities. \$100,000 was donated the day after the Justice Department's announcement. The Trump administration reversed the decision to phase out the use of for-profit prisons on Feb. 23, 2017. Matt Zapotsky, *Justice Department Will Again Use Private Prisons*, WASHINGTON POST (Feb. 23, 2017), https://www.washingtonpost.com/world/national-security/justice-department-will-again-use-private-prisons/2017/02/23/da395d02-fa0e-11e6-be05-1a3817ac21a5_story.html?tid=sm_tw&utm_term=.06583a38b38d.

¹⁶¹ Shane Bauer, *My Four Months as a Private Prison Guard*, MOTHER JONES (July/Aug. 2016), <http://m.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer>.

¹⁶² A shank is "a makeshift knife fashioned from a sharp item such as broken glass or a razor[.]" *Shank*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2011).

¹⁶³ See generally Bauer, *supra* note 161.

¹⁶⁴ *Welcome to the Standards and Accreditation Department, ACA*, http://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards__Accreditation/ACA_Member/Standards_and_Accreditation/SAC.aspx?hkey=7f4cf7bf-2b27-4a6b-b124-36e5bd90b93d (last visited Mar. 29, 2018).

¹⁶⁵ *Id.*

¹⁶⁶ *Hawaii State Auditor Blasts Private Prison Contracting; State Renews Contract Anyway*, PRISON LEGAL NEWS (Aug. 15, 2011), <https://www.prisonlegalnews.org/news/2011/aug/15/Hawaii-state-auditor-blasts-private-prison-contracting-state-renews-contract-anyway/> [hereinafter *Auditor Blasts Private Prison Contracting*].

were piecemeal and incomplete, and the Saguaro warden refused to provide information on its inmate tracking system.¹⁶⁷

Because of the lack of cooperation from Saguaro and CCA, Hawai'i is offered no avenue for determining whether Saguaro treats inmates humanely and ensures that the inmates' medical and physical needs are met.¹⁶⁸ Furthermore, only the physical condition of the prison is inspected during audits. The audits fail to collect data on intangible aspects of prison such as the amount of time inmates are allowed out of their cells, the rate at which they are afforded participation in recreational, educational, and training opportunities, the frequency of physical and sexual attacks within the prison, and the accessibility and quality of medical care.¹⁶⁹

¹⁶⁷ *Id.*

¹⁶⁸ During his four months as a CCA correctional officer at Winn Correctional Center in Louisiana, Bauer experienced an audit by the ACA, which is the auditing body for correctional facilities, and recorded the following:

In anticipation of the audit, I read the ACA standards. How will the auditors deal with the fact that the cells in segregation are at least 20 square feet smaller than required? Or that inmates only get 10 minutes to eat, not the mandated 20? There are many other ACA standards and recommendations Winn does not appear to meet: [w]e rarely have the required number of positions staffed; guards' pay is not comparable to the pay of state corrections officers; guards rarely ever use the metal detectors at the entrances to the housing units; prisoners often don't get one hour of daily access to exercise space; suicide watch meals are below caloric requirements; there aren't enough toilets in the dorms.

...

[During the audit, two] well-dressed white men enter Ash unit and do a slow lap around the floor. The only questions they ask Bacle and me are what our names are and how we're doing. They do not examine our logbook, nor do they check our entries against the camera footage. If they did, they would find that some of the cameras don't work. They do not check the doors. If they did, they would see they need to be yanked open by hand because most of the switches don't work. They don't check the fire alarm, which automatically closes smoke doors over the tiers, some of which must be jimmed back open by two guards. They do not ask to go on a tier. They do not interview any inmates. They do a single loop and they leave.

Bauer, *supra* note 161.

¹⁶⁹ In addition to the items listed, the audit does not identify the frequency at which inmates receive visitors and phone calls, the frequency of reports violent attacks, or the quality and amount of food the inmates are served. Furthermore, the auditors do not report any complaints by—or even conversations with—the inmates. The lack of interaction with inmates suggests that the auditors are not concerned with attempting to verify any information provided by CCA, nor with the inmates' wellbeing. Although some may forgive the auditors of not trusting inmates' reports, the lack of verification of information provided by the for-profit prison is disconcerting. *Cf.* DEPARTMENT OF

Although Saguario has been less-than-forthcoming in reporting occurrences of violence, in a recent national government study, 4% of prison inmates and 3.2% of jail inmates reported one or more acts of sexual victimization in the last 12 months, suggesting that more than 180,000 prisoners have been victimized.¹⁷⁰ However, officials reported only 8,800 incidents of sexual assault and rape during the same year.¹⁷¹ Of the reported acts of physical assault, 19% of all inmates in the U.S. reported attacks by other inmates, and 21% reported attacks by prison staff.¹⁷² Additionally, inmates in for-profit prisons like Saguario reported sexual assaults by prison staff at nearly twice the rate of inmates in federal or state prisons.¹⁷³ The high rates of physical and sexual assault indicate that inmates face a substantial risk of serious harm during imprisonment, with inmates at for-profit prisons facing even greater risk.

b. *The Second Condition of Eighth Amendment Violations: A Culpable State of Mind of Deliberate Indifference to Inmate Health and Safety*

The Department of Public Safety also violates the second condition of Eighth Amendment: deliberate indifference to inmate health and safety. The minimum requirements for the testing and employment process for Hawai'i correctional officers include the ability to sprint 125 yards, drag a 178-pound dummy, carry a 25-pound backpack up a flight of stairs, and push a 138-pound object 25 feet.¹⁷⁴ There are no requirements to be personable, adept at listening, or compassionate. Nor are correctional officers mandated to treat inmates as human beings or assist them on their path of rehabilitation. Instead, candidates must simply be able to "drag dummies" and push bodies away. Consequently, the hiring process itself shows a clear indifference to inmate health and safety since it focuses instead on the dehumanization and objectification of inmates.¹⁷⁵

Prisons in Hawai'i and at Saguario regularly experience problems

PUBLIC SAFETY, MAINLAND / FDC BRANCH CONTRACT COMPLIANCE CHECKLIST 8 (2011) [hereinafter 2011 AUDIT], <http://dps.Hawaii.gov/wp-content/uploads/2012/09/Saguario-Audit-Dec-2011.pdf>.

¹⁷⁰ ALLAN J. BECK ET AL., U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES 9, 2011-2012 (2013), <https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>; Bauer, *supra* note 161.

¹⁷¹ Bauer, *supra* note 161.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *How to Become a Correctional Officer in Oahu, Hawaii*, CORRECTIONALOFFICEREDU.ORG, <https://www.correctionalofficeredu.org/hawaii/> (last visited Mar. 29, 2018).

¹⁷⁵ For a discussion on the job description and requirements for the Norwegian equivalent to a correctional officer, see discussion *infra*, section II.B.3.

with the correctional officers and staff, including corruption, smuggling of contraband, assault, and rape.¹⁷⁶ The proliferation of problems evinces a culture of indifference. In addition, Hawai'i correctional officers are frequently exploiting the sick leave system, especially on days with big sporting events such as the Super Bowl, thereby demonstrating a clear indifference.¹⁷⁷ On Super Bowl Sunday in 2017, for example, more than one third of the corrections officers scheduled to work that day called in sick.¹⁷⁸ The sick leave abuses show a clear indifference to inmates and

¹⁷⁶ See, e.g. *State-by-State Prisoner Rape and Sexual Abuse Round-up*, PRISON LEGAL NEWS (Apr. 15, 2012), <https://www.prisonlegalnews.org/news/2012/apr/15/state-by-state-prisoner-rape-and-sexual-abuse-round-up/> (reporting that a correctional officer had forced transgendered inmate to perform oral sex with him); *4 Women Inmates Accuse 2 Guards of Sex Acts in Exchange for Candy, Snacks*, HAWAII NEWS NOW (Jan. 11, 2016), <http://www.hawaiinewsnow.com/story/30940503/exclusive-4-women-inmates-accuse-2-guards-of-sex-acts-in-exchange-for-candy-snacks>; *Auditor Blasts Private Prison Contracting*, *supra* note 167, (explaining that eighteen inmates at Saguaro sued for CCA and state officials, claiming that correctional officers and the warden beat, kicked, and threatened the inmates); *Inmate's Lawsuit Alleges She Was Raped by Maui Guard*, HONOLULU STAR-ADVERTISER (Jul. 1, 2016), <http://www.staradvertiser.com/2016/07/01/breaking-news/inmates-lawsuit-alleges-she-was-raped-by-maui-guard/>; *3 Halawa Prison Guards Fired for Allegedly Beating Inmate*, HAWAII NEWS NOW (July 1, 2010), <http://www.hawaiinewsnow.com/story/13666645/3-halawa-correctional-facility-prison-guards-fired-for-beating-inmate>; *Another Hawaii DOC Guard Goes to Prison*, PRISON LEGAL NEWS (Aug. 9, 2016), <https://www.prisonlegalnews.org/news/2016/aug/9/another-hawaii-doc-guard-goes-prison/> (a correctional officer was found guilty of smuggling drugs and cigarettes to prisoners and accepting bribes from a prison gang.).

Bauer reported that, during correctional officer training, the trainer recommended against attempting to break up fights, saying "if them fools want to cut each other, well, happy cutting." Bauer reported abusive practices by correctional officers, and one correctional officer was quoted as saying, "if inmates want to act stupid, then we'll give them some pain to help increase their intelligence level." Bauer, *supra* note 161.

¹⁷⁷ *Hawaii CO's Excessive Sick Days Deny Visits by Inmate's Families*, CORRECTIONSONE.COM (Mar. 23, 2014) [hereinafter CORRECTIONSONE], <https://www.correctionsone.com/treatment/articles/7005087-Hawaii-COs-excessive-sick-days-deny-visits-by-inmates-families/>.

¹⁷⁸ On Super Bowl Sunday 2017, 260 out of 733 workers assigned to work called in sick, which represented an increase of thirty workers from Super Bowl Sunday in 2016. In 2015, 255 workers called in sick. Unlike previous years, however, the Department of Public Safety officials said that all scheduled programs were held in 2017, including visitation. Abuse of sick leave costs taxpayers huge sums of money because more correctional officers become entitled to overtime pay. Alexander Zannes, *Hundreds of Corrections Officers Call in Sick During NFL Championship Game*, KHON2 (Feb. 9, 2017), <http://khon2.com/2017/02/09/hundreds-of-corrections-officers-call-in-sick-during-nfl-championship-game/>. On Super Bowl Sunday in 2014, roughly one third of the prison correctional officers scheduled to work called in sick. CORRECTIONSONE, *supra* note 177. The 2018 Superbowl Sunday numbers had marginally improved when "only" 213 out of 733 scheduled to work called in sick. *One Third of Corrections Officers Assigned to Work on Super Bowl Sunday Called in Sick*, HAWAII NEWS NOW (Feb. 7, 2018),

their families, forcing prisons to cancel the majority of scheduled visitation days and thereby denying inmates and their families opportunities to connect and maintain relationships.¹⁷⁹

Indifference is also evidenced by the severe overcrowding in Hawai‘i’s prisons and jails. As of July 11, 2016, six of the state’s nine facilities operated over capacity, with three operating at 150%–168% of capacity.¹⁸⁰ In September 2016, OCCC operated at more than twice its capacity of 628 when it housed 1,354 inmates, necessitating one to two inmates per cell sleeping on mattresses on the floor because the bunks were already occupied.¹⁸¹ Despite the existing overcrowding crisis, in 2014, the admission rate to Hawai‘i’s prisons was 34% higher than the previous year, and the total number of inmates increased by the third-highest percentage of all states nationwide.¹⁸² Overcrowding has a severe impact on the health and safety of inmates and shows complete disregard and indifference to their health and safety.¹⁸³

<http://www.hawaiinewsnow.com/story/37455615/how-many-corrections-officers-statewide-called-in-sick-on-super-bowl-sunday>.

¹⁷⁹ By March 2014, eighteen out of the most recent twenty-two visitation days were canceled because of sick leave abuses. CORRECTIONS ONE, *supra* note 177.

¹⁸⁰ The occupancy rates include HCCC at 168%, MCCC at 155%, KCCC at 150%, OCCC at 127.6%, WCCC at 114.2%, and HMSF at 100.1%. The only facilities operating under capacity were SNF at 98.5%, KCF at 87.5%, and WCF at 81.4%. JULY 2016 PRISON STATISTICS, *supra* note 19.

¹⁸¹ JULY 2016 PRISON STATISTICS, *supra* note 19; *Inhumane Conditions*, *supra* note 86. The U.S. Supreme Court has held that confining people “in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment[.]” *Bell v. Wolfish*, 441 U.S. at 542.

¹⁸² E. ANN CARSON, PH.D., U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014 at 4, 9 (Sep. 2015), <https://www.bjs.gov/content/pub/pdf/p14.pdf>.

¹⁸³ See generally Reutter, *supra* note 149 (quoting Kat Brady that an earlier suicide watch should have served as a warning of future suicide).

The state has spent \$1.2 million so far on a jail site selection study after identifying a pressing need to replace the aging and crumbling OCCC. Kevin Dayton, *Senate’s Draft Budget Includes \$66 Million to Plan a New Jail at Halawa*, HONOLULU STAR ADVERTISER (Mar. 30, 2017), <http://www.staradvertiser.com/2017/03/30/hawaii-news/senates-budget-includes-66m-for-new-jail-at-halawa/>. Nonetheless, legislators are currently advancing a bill to build a combined prison and jail in Halawa at a current cost estimate of \$1.3 billion without first awaiting the HCR85 Task Force’s recommendations on inmate number reductions and prison design. HCR 85 TASK FORCE, INTERIM REPORT OF THE HCR 85 TASK FORCE (ON EFFECTIVE INCARCERATION POLICIES AND IMPROVING HAWAII’S CORRECTIONAL SYSTEM) TO THE LEGISLATURE FOR THE REGULAR SESSION 2017 at 27-28 (Feb. 2017), available at http://www.courts.state.hi.us/wp-content/uploads/2016/07/HCR_85_TASK_FORCE_INTERIM_REPORT.pdf [hereinafter INTERIM HCR 85 REPORT].

Current conditions at facilities in Hawai‘i and at Saguaro pose a substantial risk of serious harm and exhibit a deliberate indifference to inmate health and safety, thereby violating both the U.S. and Hawai‘i constitutional prohibitions against cruel and unusual punishment. Furthermore, although imprisonment in and of itself would likely not shock most citizens’ conscience, there are a myriad of indirect consequences to imprisonment, both to the inmate and the inmate’s family, friends, and children.

Hawai‘i should immediately remove all inmates from any CCA-run prison and reduce the number of inmates to no more than 100% capacity of each facility located in Hawai‘i. Failure to do both will continue to cause harms to individual inmates, their loved ones, and the community in form of high recidivism rates. In addition, failure to mitigate the problem poses a great risk of class action lawsuits against the State for constitutional violations of the prohibition of cruel and unusual punishments. Evidence of the risk is clear from the American Civil Liberties Union (“ACLU”)’s recent filing of a formal complaint to the federal Department of Justice over the overcrowding and insufficient and unacceptable conditions in Hawai‘i’s prisons, including lack of “adequate shelter, sanitation, medical and mental health care, food services, and protection from harm.”¹⁸⁴

The Halawa location sits immediately next to the Navy fuel tanks at Red Hill, which have been experiencing major leaking, thus contaminating the soil. Reutter, *supra* note 149; *Red Hill Fuel Storage Facility in Hawaii*, U.S ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/red-hill> (last visited Mar. 29, 2018) (informing the public of an Administrative Order of Consent between the EPA and the Navy that requires the Navy to “implement numerous activities to address fuel releases[.]”); *Red Hill Bulk Fuel Storage Facility*, BOARD OF WATER SUPPLY, <http://www.boardofwatersupply.com/community/news-and-updates/red-hill-bulk-fuel-storage-facility> (last visited Mar. 29, 2018) (confirming ground contamination from multiple fuel leaks and discussing the impact of a January 2014 27,000 gallon fuel leak on the aquifer and water quality). The legislators attempted to exempt the construction from environmental impact assessments. Panagioti Tsoikas, *Hawaii Prison Relocation Project Fails to Skirt Environmental Review*, PRISON LEGAL NEWS (Aug. 2, 2016), <https://www.prisonlegalnews.org/news/2016/aug/2/hawaii-prison-relocation-project-fails-skirt-environmental-review/>. Although it failed, the attempt evidenced the legislators’ complete disregard for the health and safety of the inmates, their visiting family members, and the prison staff by potentially exposing them to contaminated soil.

Bauer uncovered frequent indifference toward inmates’ health in his exposé of a CCA-run prison. One inmate is currently suing CCA for neglect after the prison staff failed to take seriously four months of requests to see a doctor and gave the inmate “sole pads, corn removal strips, and Motrin” for what was finally diagnosed as severe gangrene. Consequently, the inmate needed to have fingers and both legs amputated. Bauer, *supra* note 161.

¹⁸⁴ In its complaint, the ACLU argues that Hawai‘i has allowed the prison system to again become overcrowded and unsafe in violation of a 1985 consent decree requiring Hawai‘i to reduce its prison population, improve health services, and remedy unsafe conditions. The consent decree was ordered as a result of the 1984 ACLU lawsuit

2. Violations of the Law of the Splintered Paddle and Constitutional Proscriptions of Ethical Conduct by Government Officers and Employees

The Hawai‘i Constitution includes the Law of the Splintered Paddle, which provides:

The law of the splintered paddle, mamala-hoe kanawai, decreed by Kamehameha I—Let every elderly person, woman and child lie by the roadside in safety—shall be a unique and living symbol of the State’s concern for public safety. The State shall have the power to provide for the safety of the people from crimes against persons and property.¹⁸⁵

The Law of the Splintered Paddle protects the rights of “men great and humble”¹⁸⁶ against oppression by the state.¹⁸⁷ This ethos of protecting

against the State on behalf of inmates at OCCC and what has since been renamed WCCC. ACLU, *Complaint Against the State of Hawai‘i Concerning Unconstitutional Prison Conditions and Overcrowding*, Jan. 6, 2016 [sic], at 7-8, <http://www.civilbeat.org/2017/01/aclu-calls-for-federal-probe-of-hawaii-prison-conditions/> (ACLU’s complaint was erroneously dated Jan. 6, 2016. The correct date is Jan. 6, 2017); Timothy Hurley, *Federal Probe of State’s Crowded Jails Sought*, HONOLULU STAR-ADVERTISER, Jan. 11, 2017, at B1.

¹⁸⁵ Haw. Const. art IX, § 10. The complete original 1797 law in Hawaiian states as follows:

Kānāwai Māmalahoe
 E nā kānaka,
 E mālama ‘oukou i ke akua
 A e mālama ho‘i ke kanaka nui
 a me kanaka iki;
 E hele ka ‘elemakule,
 ka luahine, a me ke kama
 A moe i ke ala.
 ‘A‘ohe mea nāna e ho‘opilikia.
 Hewa nō, make.

The Law of the Splintered Paddle
 O my people,
 Honor thy gods;
 respect alike (the rights of)
 men great and humble;
 see to it that our aged,
 our women, and our children
 Lie down to sleep by the roadside
 Without fear of harm.
 Disobey, and die.

THE LAW OF THE SPLINTERED PADDLE: KĀNĀWAI MĀMALAHOE 14, Hawaii Legal Auxiliary, <https://www.Hawaii.edu/uhelp/files/LawOfTheSplinteredPaddle.pdf>.

¹⁸⁶ GEORGE E. BUSHNELL, JR., ABA PRESIDENT AT L.A.S.H. DINNER, Hawaii Bar

the weak is rooted in Hawai'i's history and culture.¹⁸⁸ The constitutional provision explicitly states that it serves merely as a symbol and does not provide private causes of action,¹⁸⁹ nor does it create in the State an affirmative duty to protect the defenseless.¹⁹⁰ However, the provision does provide principles for the State to follow, including protecting inmates against oppression by the state.

Hawai'i's violation of the Law of the Splintered Paddle is twofold. First, the State fails to protect inmates against oppressive, inhumane, and dangerous conditions.¹⁹¹ Second, the State fails to protect the public against future preventable harm because the State's use of imprisonment causes higher recidivism rates than necessary.¹⁹²

Hawai'i fails to protect the mentally ill by failing to provide adequate services both within its prisons and beyond. OCCC maintains three cell blocks for the mentally ill, housing as many as 100 acutely ill inmates, yet incarceration of the mentally ill violates prohibitions against cruel and unusual punishment.¹⁹³ At one OCCC site visit, observers found two cells marked "Jane Doe"—the inmates were suffering such severe mental illness that authorities were unable to identify who the inmates

Journal, 1995-SEP Haw. B.J. 24.

¹⁸⁷ Melody Kapilialoha MacKenzie, *Ka Lama Ku O Ka No'eau: The Standing Torch of Wisdom*, 33 U. HAW. L. REV. 3 (2010).

¹⁸⁸ The Law of the Splintered Paddle proclaimed by King Kamehameha I was the first law enacted in Hawai'i. James H. Pietsch, *Teaching Elder Law at the University of Hawai'i-Integrating Health Law and Cultural Issues into the Curriculum*, 40 STETSON L. REV. 263 (2010).

¹⁸⁹ *De-Occupy Honolulu v. City & Cty. of Honolulu*, 2013 WL 2284942, at *10 (D. Haw. May 21, 2013) (providing "that the law of the splintered paddle is not the proper basis for a substantive claim for relief.").

¹⁹⁰ "In fact, the Standing Committee Report No. 36 detailing the creating of the proposed amendment states that it creates no standing to sue the State." Wayne Wagner, *Homeless Property Rights: An Analysis of Homelessness, Honolulu's "Sidewalk Law," and Whether Real Property Is A Condition Precedent to the Full Enjoyment of Rights Under the U.S. Constitution*, 35 U. HAW. L. REV. 197 (2013) (citing Stand. Comm. Rep. No. 36, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 583-584 (1980)).

¹⁹¹ See *supra* section II.B.1.

¹⁹² See *supra* section II.A.

¹⁹³ *Inhumane Conditions*, *supra* note 86; see generally, Katherine L. Smith, *Lost Souls: Constitutional Implications for the Deficiencies in Treatment of Persons with Mental Illness in Custody*, 42 GOLDEN GATE U. L. REV. 497 (2012) (discussing the implications of the constitutional prohibition of cruel and unusual punishment inflicted on individuals with mental illness in light of findings that over half of individuals in penal custody suffer some form of mental illness).

were.¹⁹⁴ By statute, court proceedings should not continue if there is “reason to believe that a physical or mental disease, disorder, or defect . . . will or has become an issue in the case[.]”¹⁹⁵ When an inmate is so mentally ill as to prevent proper identification, there can be no doubt this statute is violated.

Furthermore, “[i]n the most egregious of circumstances, a mentally ill defendant who otherwise should have been subjected to examination . . . and treatment . . . may remain untreated in prison and upon his or her release, present a further or greater risk to public safety.”¹⁹⁶ Instead of mere incarceration, inmates with mental illness should be receiving proper treatment, both for their sakes as well as for public safety.¹⁹⁷

These violations of the Law of the Splintered Paddle go hand in hand with the ethical conduct violations of Art. XIV of the Hawai‘i Constitution, which provides “that public officers and employees must exhibit the highest standards of *ethical conduct* and that these standards come from the personal integrity of each individual in government. . . . Each code of ethics shall include, but not be limited to . . . *use of position*[.]”¹⁹⁸ The Legislature further requires that public officers act within the framework of the Aloha spirit.¹⁹⁹

¹⁹⁴ *Inhumane Conditions*, *supra* note 86.

¹⁹⁵ HAW. REV. STAT. § 704-404 (2015).

¹⁹⁶ *State v. Castro*, 93 Hawai‘i 454, 463, 5 P.3d 444, 453 (Ct. App. 2000) (Acoba, J., concurring).

¹⁹⁷ Prison conditions can exacerbate mental illness and lead to increased recidivism:

[M]ost persons with mental illness who are incarcerated face living conditions that at best can be characterized as counter-therapeutic; at worst, they are dangerous. Part of the problem arises from staff use of force. Persons with mental illness in inpatient hospitals are not at risk of needless or punitive beatings, assault with pepper spray or being stunned with conductive electrical devices. But those in jails and prison are.

Jamie Fellner, *Pain and Punishment for Persons with Mental Disabilities Behind Bars in the USA*, HUMAN RIGHTS WATCH (Sep. 14, 2015), <https://www.hrw.org/news/2015/09/14/pain-and-punishment-persons-mental-disabilities-behind-bars-usa>.

¹⁹⁸ HAW. CONST. art. XIV (emphases added).

¹⁹⁹ HAW. REV. STAT. § 5-7.5(b) (1986) provides:

In exercising their power on behalf of the people and in fulfillment of their responsibilities, obligations and service to the people, the legislature, governor, lieutenant governor, executive officers of each department, the chief justice, associate justices, and judges of the appellate, circuit, and district courts may contemplate and reside with the life force and give consideration to the “Aloha Spirit”.

Despite the constitutional proscription of ethical conduct for all public employees, in 2015, DPS substantiated more correctional officer-on-inmate than inmate-on-inmate sexual assault claims for the second year in a row.²⁰⁰ Incidents of abuse and assault continue, and ten women recently filed a lawsuit, claiming that corrections officers and a worker assaulted them at WCCC.²⁰¹

As demonstrated above, a multitude of examples also show correctional officers being violent, raping inmates, accepting bribes, smuggling, abusing the sick leave policy, and rendering inhumane treatment of inmates.²⁰² Therefore, correctional officers clearly and frequently violate their obligation to display the “highest standards of ethical conduct” and abuse their positions and power to take advantage of the inmates.²⁰³

3. Treat Inmates with Respect, Dignity, and Aloha to Decrease Violence in Prison and to Decrease Recidivism

Prison systems that focus on respect and dignity see significantly lower rates of violence, especially when inmates are offered outlets through recreational activities.²⁰⁴ Thus, bringing respect and dignity in the form of Aloha into every facet of Hawaiian prisons will likely reduce the fear and stress levels of inmates and, consequently, reduce incidents of violence.

Hawai‘i is obligated to provide humane treatment to inmates,²⁰⁵ and the Hawai‘i Supreme Court has recognized that the Bill of Rights and Hawai‘i’s constitutional provisions “uphold the *dignity* of the individual and protect his right to develop in accordance with the inward forces which make him a unique human being.”²⁰⁶ Chief Justice Warren stated

²⁰⁰ Dayton, *supra* note 155, at A6.

²⁰¹ Jennifer Sinco Kelleher, *10 Women File Suit Claiming Abuse at Hawaii Women’s Prison*, U.S. NEWS (Mar. 31, 2017), <https://www.usnews.com/news/best-states/hawaii/articles/2017-03-31/lawsuit-alleges-sexual-abuse-at-hawaii-womens-prison>.

²⁰² See *infra* section II.B.1.

²⁰³ See *generally id.* While many correctional officers are caring, professional, ethical, and non-violent, there are too many who violate their ethical obligations.

²⁰⁴ See *infra* section II.E.

²⁰⁵ Art. IX § 10 provides the Law of the Splintered Paddle, see *infra* section II.B.2; HAW. CONST. art. I § 2 provides:

All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property. These rights cannot endure unless the people recognize their corresponding obligations and responsibilities.

²⁰⁶ *State v. Mallan*, 86 Hawai‘i 440, 470, 950 P.2d 178, 208 (1998) (emphases in original) (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

that "the basic concept underlying the Eight Amendment is nothing less than the dignity of man."²⁰⁷ The dignity of human beings is not explicitly mentioned in the U.S. or Hawai'i constitutions; however, dignity can be found implicitly in the text of both constitutions, and it is the concept behind most explicitly constitutionally mandated rights.²⁰⁸

There is little doubt that most inmates experience fear and anguish when they serve time in Hawai'i prisons and at Saguaro, or that their treatment is humiliating and degrading.²⁰⁹ Consequently, affronts to the dignity of prisoners may constitute constitutional violations of the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments.

In diametrical opposition to the situation in the Hawai'i prison system, respect and dignity are the basic tenets of the Norwegian prison system. Inmates and correctional officers interact politely and respectfully toward each other.²¹⁰ Because of Norway's humanistic and individualistic views toward incarceration,²¹¹ inmates wear street clothes and are not shackled except in extreme circumstances.²¹² At least six Norwegian prisons have instituted "dialogue conferences" in which inmates and correctional officers meet together and discuss, "what does a good day look like for me at this prison?"²¹³ Although each prison may receive general suggestions such as increased access to telephones and visitation times, all tend to agree that a good day is one where everyone was "seen, heard, and respected for who they are."²¹⁴

Halden Prison, a high security facility in Norway, sits among tall trees, grass, and blueberry bushes. As one visitor observed:

To anyone familiar with the American correctional system,

²⁰⁷ *Trop v. Dulles*, 356 U.S. at 100.

²⁰⁸ Since the Second World War, the SCOTUS "justices have interpreted the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments to rely in some part on the idea of human dignity. That trend continues to this day and may even be expanding." Erin Daly, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right*, 37 OHIO N.U. L. REV. 381, 381 (2011) (internal citation omitted).

²⁰⁹ *Supra* section II.B, *see* Brady, *supra* note 16. "Treatment is degrading . . . if it arouses in its victim feelings of fear, anguish and inferiority capable of humiliating and debasing them," and acts that are humiliating and degrading in nature constitute affronts to a person's dignity. Jeremy Waldron, *Inhuman and Degrading Treatment: The Words Themselves*, 23 CAN. J.L. & JURISPRUDENCE 269, 283 (2010), available at HEINONLINE.ORG (internal quotations and citation omitted).

²¹⁰ Emily Labutta, *The Prisoner as One of Us: Norwegian Wisdom for American Penal Practice*, 31 Emory Int'l L. Rev. 329, 346 (2017).

²¹¹ *See generally supra* section II.B.

²¹² *See infra* note 347.

²¹³ St. meld. nr. 37, *supra* note 33, at 21.

²¹⁴ *Id.*

Halden seems alien. Its modern, cheerful and well-appointed facilities, the relative freedom of movement it offers, its quiet and peaceful atmosphere — these qualities are so out of sync with the forms of imprisonment found in the United States that you could be forgiven for doubting whether Halden is a prison at all. It is, of course, but it is also something more: the physical expression of an entire national philosophy about the relative merits of punishment and forgiveness.²¹⁵

At Halden Prison, correctional officers are often found playing ping-pong with the inmates or sitting down for a cup of coffee together. Through the principle of “dynamic security,” interpersonal relationships between inmates and correctional officers are viewed as a primary means of preventing brawls and violence and maintaining safety.²¹⁶ Thus, the use of bars, shackles, cameras, tamper-proof furniture, dull kitchen knives, and random searches of personal effects and cells commonly found in American prisons are mostly absent.²¹⁷ The entire prison is built to maximize interactions between inmates and correctional officers, even boasting a full music studio for use by both groups.²¹⁸ Halden Prison has never experienced an attempted escape or brawl.²¹⁹

Bastøy Prison serves as a prime example of how the five pillars can be completely incorporated. Bastøy is located on a small island in the Oslo Fjord and has no correctional officers on duty during day-time hours.²²⁰ Instead, the prison fosters an open community that is solely operated and maintained by the inmates.²²¹ All inmates are expected to contribute to the daily operations of Bastøy, which, in turn, teaches the

²¹⁵ Benko, *supra* note 112.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ HALDEN FENGSEL (Sep. 30, 2014) <https://youtu.be/RfXn99B5KG8> (last visited Feb. 9, 2018). The official Halden Prison music group, the Kor'rectional (*Kor* is Norwegian for *choir*, making the name a word pun on *corrections*), released a music video Jan. 18, 2016, <https://youtu.be/uxHCaeZfJGM>.

²¹⁹ *The Radical Humanness of Norway's Halden Prison*, *supra* note 112.

²²⁰ Frode Myhre, *Strengere straff eller fokus på rehabilitering?* [*Stricter Punishment or Focus on Rehabilitation?*], DAGBLADET (Sep. 17, 2013), available at <http://www.dagbladet.no/2013/09/17/kultur/meninger/debattinnlegg/kronikk/debatt/29314323/>; BASTØY FENGSEL, <http://www.bastoyfengsel.no/English/bastoy-fengsel-Eng.html>. American documentary film maker Michael Moore visited the island for his documentary WHERE TO INVADENEXT (Dog Eat Dog Films 2015). A clip is available on YouTube at <https://www.youtube.com/watch?v=0IepJqxRCZY>.

²²¹ BASTØY FENGSEL, *supra* note 220.

inmates critical skills of hard work and cooperation.²²² The fostering of these skills better prepares them for life after prison—and keeps operating costs of the prison low.²²³ Bastøy focuses on inclusion and togetherness in order to foster vital social skills.²²⁴ In other words, the inmates are encouraged to “practice and prepare for the rest of their lives.”²²⁵

Critics of Bastøy bemoan the prison’s lack of punishment and liken it to a summer camp; however, in the words of Arne Kvernvik-Nilsen, a Bastøy prison warden, “[i]f this were a holiday camp for criminals, what’s the problem if I can show you the result?”²²⁶ The prison’s focus on rehabilitation and inclusion produces unprecedented results: at 16%, Bastøy Prison has the lowest recidivism rate in all of Europe.²²⁷

In the United States, correctional officers often struggle with hyper-vigilance that is difficult to shake off, even when off-duty, leading to higher risks of stress, PTSD, and domestic violence.²²⁸ Circumstances that can cause increased stress include inmate overcrowding such as the excessive inmate populations in most of Hawaii’s prison and jail facilities, inmate assaults against correctional officers, increased prison sentence lengths (which lead to a decreased sensitivity in response to in-prison punishments), and violent prison-gang activities.²²⁹ Additionally,

²²² Myhre, *supra* note 220; Paul Henley, *Crime and Punishment, Norwegian Style*, BBC NEWS (May 19, 2012), <http://www.bbc.com/news/world-europe-18121914> (explaining that the cost of operating Bastøy is lower than at a regular prison, partly because the inmates are expected to perform much of the maintenance, trash collection, cooking, and cleaning, and because there are fewer correctional officers. During a typical night, there are only four unarmed correctional officers on the island for the 114 inmates.)

²²³ Henley, *supra* note 222.

²²⁴ Myhre, *supra* note 220

²²⁵ St. meld. nr. 37, *supra* note 33, at 33.

²²⁶ Paul Henley, *supra* note 222.

²²⁷ Myhre, *supra* note 220; Henley, *supra* note 222.

²²⁸ Peter Finn, *Correctional Officer Stress: A Cause for Concern and Additional Help*, Fed. Probation, (Dec. 1998), 65, http://www.uscourts.gov/sites/default/files/62_2_9_0.pdf (“In addition to the personal suffering it causes, correctional officer stress can compromise safety at prisons and jails, create turnover that may force departments to hire less qualified applicants than they would like, and require extra taxpayers [sic] dollars to pay overtime to officers covering for sick and disabled coworkers.”); SpearIt, *Manufacturing Social Violence: The Prison Paradox & Future Escapes*, 11 Berkeley J. Afr.-Am. L. & Pol’y 84, 91 (2009) (“As the growing literature on prison guards shows, prison guards also suffer from their time spent in prison. . . And as a result of guards suffering from high stress, their families also suffer—sometimes—from abuse and violence.”); Dasha Lisitsina, *‘Prison Guards Can Never Be Weak’: The Hidden PTSD Crisis in America’s Jails* (May 20, 2015), <https://www.theguardian.com/us-news/2015/may/20/corrections-officers-ptsd-american-prisons>; SOLITARY: INSIDE RED ONION STATE PRISON (HBO 2017).

²²⁹ Finn, *supra* note 228.

correctional officers “come to feel they are wasting their time because the penal system does not result in rehabilitation.”²³⁰ Reduction of violence is therefore beneficial to correctional officers because it leads to a reduction of injuries, stress, PTSD, and burn-out.

At Saguaro, the current contractual minimum requirement is 160 hours of training within three months of hire and 40 hours supplemental training annually.²³¹ If CCA conducts training at all of its facilities in the same manner as Bauer reported at Winn, then it can be presumed that correctional officers at Saguaro receive no training in how to interact with inmates with dignity and respect. Instead, their training consists of how to use non-lethal weapons on inmates and admonishments against saying “thank you” to any prisoners.²³² The CCA job description explains that the correctional officer “is responsible for the supervision of the facility population including but not limited to: safety, security, and facility sanitation. Provides a safe environment for the facility, staff, and residents.”²³³ Like CCA’s job description, the DPS job description focuses on maintaining security and order in the facility and not on Aloha and achieving rehabilitation.²³⁴

In contrast, employees in Norwegian prisons attend a full two-year paid vocational training program for prison *attendants*.²³⁵ The goal of a prison attendant is to “attempt to prevent future criminal acts by making the incarceration meaningful, awareness raising, and rehabilitating for the inmate. Part of the job consists of implementing different programs that will contribute to mastery and awareness as well as organizing activities and social events.”²³⁶ One current Norwegian attendant says that he finds it motivating “to be able to contribute to an inmate being able to start fresh with a blank slate[.]”²³⁷ Another attendant explains that she looks forward

²³⁰ Finn, *supra* note 228.

²³¹ See 2011 AUDIT, *supra* note 169.

²³² See Bauer, *supra* note 161.

²³³ See generally *Careers*, CCA, <https://correctcorp.taleo.net/careersection/cca-external-new/jobsearch.ftl?lang=en> (last visited Mar. 29, 2018).

²³⁴ See job description for Adult Corrections Officer, <http://dps.Hawaii.gov/> (follow link to Employment Website, search up job description for Adult Corrections Officer).

²³⁵ *Yrkesbeskrivelse Fengselsbetjent [Job Description Prison Attendant]*, UTDANNING.NO, <https://utdanning.no/yrker/beskrivelse/fengselsbetjent> (last visited Mar. 29, 2018). The Norwegian government, realizing how much power and stigma words may contain, uses the term *prison attendant* instead of *prison guard* or *correctional/corrections officer*, which are commonly used in the United States.

²³⁶ *Id.*

²³⁷ *Id.*

to going to work every day because she knows she is making a difference for people in vulnerable situations.²³⁸

As the Norwegian experience has proven, treating inmates with dignity and respect increases the inmates' motivation to work toward rehabilitation.²³⁹ Furthermore, when inmates are treated with respect and dignity, they are much more likely to reciprocate such behavior toward other inmates and correctional officers. Thus, treating inmates with Aloha leads to safer work environments for correctional officers, safer living conditions for inmates, decreased recidivism, and, consequently, safer communities.

The correctional officer training program in Hawai'i should be greatly expanded, particularly the areas of inmate interaction, situation de-escalation techniques, social work, and psychology, and current officers should also be re-trained. By changing the prison culture to one based on mutual respect, both correctional officers and inmates will greatly benefit. While a two-year associate's degree program may be unfeasible in Hawai'i, the state should establish a correctional officer academy that focuses on the skills taught in Norway.²⁴⁰

C. 3rd Pillar: Due Process and Equal Treatment under the Law

Both the U.S. Constitution and the Hawai'i Constitution require that the accused receive due process and equal treatment under the law. However, Hawai'i's criminal justice system evinces violations of both constitutional guarantees.

1. Denial of Constitutional Rights to Enjoyment of Life and Pursuit of Happiness Constitute Violations of the Right to Procedural Due Process

At its core, the right to due process protects individuals from state infringement of rights through a two-pronged test: 1) ascertaining if the State interfered with one's liberty, and 2) determining procedural

²³⁸ *Id.*

²³⁹ See generally, Amanda Ploch, *Why Dignity Matters: Dignity and the Right (or Not) to Rehabilitation from International and National Perspectives*, 44 N.Y.U. J. INT'L L. & POL. 887 (2012) (arguing that human dignity demands that prisoners have a right to rehabilitation).

²⁴⁰ To require all correctional officers to complete an associate's degree program may be cost inhibitive for the correctional officers and may lead to a correctional officer staffing shortage. In addition, such a problem would likely not attract the minimum number of students to be economically unfeasible for the State because Hawai'i only has a population of approximately one million residents. *Accord*, INTERIM HCR 85 REPORT, *supra* note 183, at 17. The University of Hawai'i should, however, create a certificate degree program, which could become a prerequisite to higher positions within the prison system, and eventually might even become a prerequisite for lower level positions.

requirements for compliance with Due Process.²⁴¹ In the Constitution and the Laws of the Hawaiian Islands during the reign of King Kamehameha III, “[p]rotection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property . . . and nothing whatever shall be taken from any individual except by express provision of the laws.”²⁴² Nevertheless, inmates are routinely denied the rights to enjoyment of life and the pursuit of happiness, yet no process in the Hawai‘i Revised Statutes affords procedures through which denial of these rights may skirt the inmates’ constitutional rights.

The Hawai‘i Constitution provides four distinct inalienable rights in article I, section 2: 1) enjoyment of life, 2) liberty, 3) the pursuit of happiness, and 4) the acquiring and possessing of property.²⁴³ Hawai‘i courts are authorized to sentence a convicted defendant to one or more of the following dispositions based on the defendant’s law violation: probation, payment of a fine, imprisonment, performing of community service, a suspended sentence, and compensation or restitution fees.²⁴⁴ Each authorized disposition is an imposition on the individual’s right to

²⁴¹ *Minton v. Quintal*, 131 Hawai‘i 167, 185, 317 P.3d 1, 19 (2013). In *Minton*, the Hawai‘i Supreme Court found that the city violated stagehands’ due process rights when they were, as retribution by the mayor, effectively banned from future work in Honolulu, which constituted tortious interference with prospective business contracts. Similarly, inmates are denied their constitutional rights to enjoyment of life and pursuit of happiness without due process. Interference with prospective business contracts can also be found analogous to interference with prospective future employment when the state or county denies the inmates opportunities to choose a profession. *Cf.* section II.A.3.

²⁴² CONSTITUTION AND THE LAWS OF THE HAWAIIAN ISLANDS 10, King Kamehameha III, 1842, trans., available at HeinOnline.

²⁴³ Art. I § 2, *supra* note 205. Hawai‘i courts follow the following procedure for interpreting statutes:

First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. And fifth, in construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.

Hawaii Gov’t Employees Ass’n, AFSCME Local 152, AFL-CIO v. Lingle, 124 Hawai‘i 197, 202, 239 P.3d 1, 6 (Haw. 2010).

²⁴⁴ Authorized Disposition of Convicted Defendants, HAW. REV. STAT. § 706-605 (2016).

possessing of property (in the form of fees or fines), or on the right to liberty from physical restraint (in the form of imprisonment).²⁴⁵

No available disposition authorizes the court to deny the defendant the rights to enjoyment of life or the pursuit of happiness. Inmates are denied these constitutional rights when they are forced to live in constant fear for their safety, are offered limited opportunities to communicate with their loved ones, suffer humiliation, are denied the possibility of furthering their education, are placed in solitary confinement, and suffer other dehumanizing treatment.²⁴⁶ Such denial of rights violates Article I, Section 5²⁴⁷ of the Hawai‘i Constitution, which ensures individuals’ rights to due process and protects individuals from governmental transgressions against their liberty and civil rights.

The Hawai‘i Supreme Court has recognized the rights to enjoyment of life and pursuit of happiness as significant:

The makers of our Constitution undertook to secure conditions favorable to the *pursuit of happiness*. They recognized the *significance of man's spiritual nature, of his feelings and of his intellect*. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their *beliefs, their thoughts, their emotions and their sensations*. They conferred, as against the Government, *the right to be let alone*—the most comprehensive of rights and

²⁴⁵ California law will always be interpreted with a presumption against redundancy. Thus, although *liberty* may be defined to encompass “[f]reedom from arbitrary or undue external restraint, esp. by a government[.]” read in context with the other enumerated rights as well as the authorized dispositions, liberty in the context of Art. 1 § 2 should be interpreted only as “the state of not being imprisoned or enslaved[.]” This reading is consistent with the common law definition. Consequently, the right to freedom from imprisonment is, arguably, denied a defendant who is sentenced to prison after being found guilty beyond a reasonable doubt for a violation of a serious crime. LIBERTY, *New Oxford American Dictionary* (2013); KATHLEEN M. SULLIVAN & NOAH FELDMAN, *CONSTITUTIONAL LAW 477*, (18th ed. 2013); LIBERTY, *Black's Law Dictionary* (10th ed. 2014); *Lawrence v. Texas*, 539 U.S. 558 (2003) (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”); see *Obergefell v. Hodges*, 576 U.S. __ (2015) (Justice Thomas, dissenting) (“State decisions interpreting [‘life, liberty, or property’] almost uniformly construed the word ‘liberty’ to refer only to freedom from physical restraint.”).

²⁴⁶ See *supra* sections II.A and II.B; *infra* sections II.D and II.E.

²⁴⁷ HAW. CONST. art I, § 5 provides:

No person shall be deprived of life, *liberty* or property without *due process* of law, nor be denied the equal protection of the laws, *nor be denied the enjoyment of the person's civil rights* or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

(emphases added).

the right most valued by civilized men.²⁴⁸

The Hawai'i Supreme Court explained that "[t]his right to personal autonomy lies at the heart of our system of government"²⁴⁹ because the constitutional guarantees provided in the Bill of Rights collectively "uphold the dignity of the individual and protect his right to develop in accordance with the inward forces which make him a unique human being."²⁵⁰

The right to the pursuit of happiness is, however, extended to familial association, although this right must be balanced against the state's interests²⁵¹ in placing time and manner restrictions on inmates, such as predetermined visitation days. When the state frequently cancels visitation days, the inmates are, in effect, denied their constitutional right to familial association.²⁵² Furthermore, when the State incarcerates individuals who do not pose a risk to the public's health, safety, and welfare, the incarceration in and of itself violates the inmate's right to maintain familial relationships.

Time and manner restrictions for visitation are currently too strict and should instead weigh in favor of inmates against the state. For inmates serving time in Hawai'i facilities, DPS has limited the number of visitors

²⁴⁸ *Mallan*, 86 Hawai'i at 470. The right to be let alone is substantially restricted upon conviction in the form of restriction of movement; however, the inmates' right to pursuit of happiness is not a valid disposition under the sentencing scheme as discussed *supra*.

²⁴⁹ *Id.* (emphases in original).

²⁵⁰ *Id.* The right to a pursuit of happiness is incorporated into the right to privacy under article one, section six, which "gives each and every individual the right to control certain highly personal and intimate affairs of his own life. The right to personal autonomy, to dictate his lifestyle, to be oneself are included in this concept of privacy." HAW. CONST. art. I § 6 (providing, "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right."); *State v. Kam*, 69 Haw. 483, 492, 748 P.2d 372, 377 (1988) (emphasis omitted) (citing *Stand. Comm. Rep. No. 69*, in *Proceedings of the Constitutional Convention of Hawai'i of 1978*, at 674–75 (1980)).

The right to personal autonomy is not absolute, however. For example, the Hawai'i Supreme Court has found the right to personal autonomy does not extend to recreational or religious use of marijuana. *Mallan*, 86 Hawai'i at 440 (finding no fundamental right to recreational use of marijuana); *State v. Kimmel*, 119 Hawai'i 467, 198 P.3d 730 (Ct. App. 2009) (finding no fundamental right to religious use of marijuana).

²⁵¹ "[T]he constitutional liberty interest in the maintenance of the familial relationship is not absolute. The interest of the parents must be balanced against the interests of the state and, when conflicting, against the interests of the children." *In re AS*, 130 Hawai'i 486, 513 (Ct. App. 2013), *aff'd*, 132 Hawai'i 368, 322 P.3d 263 (2014) (internal quotation marks and citation omitted).

²⁵² *See supra* section II.B.1.

inmates may place on the “approved” visitor lists to two adult individuals and a maximum of five people, including “approved children.”²⁵³ Consequently, an inmate with a spouse and more than four children, or an inmate who would like both a spouse and a parent to visit as well as four children, will have to choose whom among their loved ones to place on the approved list. Those who do not “make the list” must wait until their loved one is released, which could take years, decades, or even never in cases of life sentences. Furthermore, each inmate is only allowed one visit for one hour per weekend. These limitations severely minimize the number of times inmates, and loved ones can see each other, a problem that is further exacerbated by the frequent visitation day cancellations discussed above.²⁵⁴

Manner restrictions for telephone contact should also weigh heavily in favor of inmates and against the state. Although inmates have “the privilege” of phone calls to loved ones, calls can only be placed via expensive “collect calls.”²⁵⁵ Inexpensive pre-paid calling cards are strictly prohibited.²⁵⁶ Thus, family members of limited means may be unable to talk to their loved ones if they are unable to afford the high cost.

Those most affected by violations of the right to a familial association are residents who are sent to prison on the mainland.²⁵⁷ Inmates serving time in Saguaro become largely incapable of maintaining relationships with their loved ones because their friends and family members face considerable expenses to travel to and stay in Arizona to visit the inmates. Furthermore, the inmates sent to Saguaro are disproportionately poor, which means that they are even less likely to have family members who can afford traveling to Arizona.²⁵⁸

²⁵³ See, e.g., Halawa Correctional Facility visitor information at 4, DPS, <http://dps.Hawaii.gov/wp-content/uploads/2012/09/HCF.pdf> (providing, “Eligible inmates shall be authorized 2 adult approved visitors. The *maximum number of visitors, counting approved children, shall not exceed 5*. A married couple shall be counted as two (2) allowable visitors. *There shall be no replacement of visitors once the allowable limit is allowed access.*”) (emphases added).

²⁵⁴ See *supra* section II.B.1.

²⁵⁵ See, e.g., Hawai‘i Community Correctional Center Facility Information, DPS, <http://dps.Hawaii.gov/about/divisions/corrections/about-corrections/hccc/hccc-facility-info/> (last visited Mar. 29, 2018); Oahu Community Correction Center Facility Information, DPS, <http://dps.Hawaii.gov/wp-content/uploads/2012/09/OCCC.pdf> (last visited Mar. 29, 2018).

²⁵⁶ *Id.*

²⁵⁷ See also *infra* section II.E.1.

²⁵⁸ See *infra* section II.E.1. Saguaro only allows visitors to see one inmate per visit. One woman, Mahealani Meheula, lamented that, because both her boyfriend and her nephew are serving time at Saguaro, she is forced to choose whom to visit when she is in Arizona. The total cost of each trip to Arizona is between \$1,000 and \$1,200. Rui Kaneya & Eli Hager, *The Prison Visit that Cost My Family \$2,373*, CIVIL BEAT (Apr. 12,

Norway has implemented alternative methods of encouraging contacts with inmates' families and the community at large, including unescorted weekend visits as a reward for good behavior and increased visitor days or expansion of time with visitors.²⁵⁹ Although such in-person visits are unfeasible for inmates serving time in Saguaro, alternatives that could easily be implemented are greater access to alternatives to in-person visits such as additional video-conferencing opportunities, increasing the number of "approved" visitors or allowing inmates to call their loved ones without using expensive collect call.

2. End the Extensive Use of Pre-Trial Detention and Bail

Common law tradition demands that an accused is innocent until proven guilty. Furthermore, the constitutional requirement of due process mandates that "[n]o person shall be deprived of life, liberty or property without due process of law[.]"²⁶⁰ Although the plain language reading would prohibit the detention of individuals awaiting trial because they have not been convicted of a crime, the bail hearing process in Hawai'i currently allows this practice.²⁶¹ The Hawai'i Constitution provides the following:

*Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. The court may dispense with bail if reasonably satisfied that the defendant or witness will appear when directed, except for a defendant charged with an offense punishable by life imprisonment.*²⁶²

Thus, the Constitution requires that the court imposes a bail amount *no greater than* an amount calculated to persuade the accused to appear at future court proceedings. In other words, the Constitution provides an explicit test: the court should assess the individual's financial situation to determine the maximum amount the individual *can provide*. If the individual is unable to provide such an amount, the bail is "excessive."

2016), <http://www.civilbeat.org/2016/04/the-prison-visit-that-cost-my-family-2370/>.

²⁵⁹ See discussion *supra* section II.A.1.

²⁶⁰ HAW. CONST. art I, § 5.

²⁶¹ HAW. CONST. art I, § 12 (providing, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. The court may dispense with bail if reasonably satisfied that the defendant or witness will appear when directed, except for a defendant charged with an offense punishable by life imprisonment."); HAW. R. PENAL P. 5(a) (providing that, following a finding of probable cause pursuant to a warrant or after a warrantless arrest, a hearing will be held to determine the amount of bail, if any).

²⁶² HAW. CONST. art I, § 12 (emphases added).

The goal of imposing bail is to give the defendant a financial incentive to appear before the court.²⁶³ A multi-millionaire posting a \$500,000 bond may be less inclined to appear because the amount is but a drop in the bucket. On the other hand, a person with limited means has much more incentive to appear in court after posting a \$1,000 bond since that amount may be critical for their day-to-day expenses. The amounts set are usually based on the seriousness of the crime and the extent of the person's roots in the community rather than the person's means,²⁶⁴ and the system tends to hurt the poor to a much greater degree than the rich.

The Hawai'i Supreme Court has found that an amount is not excessive merely because the defendant is unable to pay.²⁶⁵ Nevertheless, the Court has also stated that defendants are "entitled to an opportunity to make [bail] in a reasonable amount."²⁶⁶ If bail is placed beyond the means of a defendant, then the defendant has not been given a reasonable opportunity to make bail, and no defendant should be forced to languish in jail for failure to be able to post bail unless the failure is by choice. Inmates failing to post bail suffer disruption to their lives, and pre-trial detention may cost them their jobs, may lead to psychological troubles and depression,²⁶⁷ and, importantly, will increase the detained individuals' chances of being found guilty at trial or of pleading guilty to the charges.²⁶⁸

There are two problematic legal implications created by pre-trial detention: 1) a detained individual has an inferior bargaining position compared to a released individual; and 2) a detained individual's lawyer exerts much more time and resources and on securing the individual's pre-trial release, which takes time away from building an effective defense.²⁶⁹

²⁶³ ACLU, AS MUCH JUSTICE AS YOU CAN AFFORD: HAWAII'S ACCUSED FACE AN UNEQUAL BAIL SYSTEM 4 (2018), <https://acluhawaii.files.wordpress.com/2018/01/aclu-of-hawaii-bail-report.pdf> [hereinafter ACLU BAIL REPORT].

²⁶⁴ Lynn Kawano, *Why Are Bail Amounts so Inconsistent? Legal Experts Weigh in*, HAWAII NEWS NOW (June 11, 2015), <http://www.hawaiinewsnow.com/story/29301221/why-are-bail-amounts-so-inconsistent-legal-experts-weigh-in>.

²⁶⁵ *Sakamoto v. Won Bae Chang*, 56 Haw. 447, 451, 539 P.2d 1197, 1200 (Haw. 1975).

²⁶⁶ *Id.* at 451 (citing *Stack v. Boyle*, 342 U.S. 1, 10 (1951)).

²⁶⁷ For a list of consequences inmates face from imprisonment, *see supra* section II.A.

²⁶⁸ Detained individuals are more likely to plead guilty even if they are innocent because they see pleading guilty as the only option to leaving the poor conditions of jail. Will Dobbie, Jacob Goldin, Crystal Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* 1, PRINCETON.EDU (July 2016), https://scholar.princeton.edu/sites/default/files/wdobbie/files/dgy_bail_0.pdf.

²⁶⁹ *Id.* at 3. In addition, Dobbie identifies that the subsequent criminal conviction

Although pre-trial detention ensures that an individual will appear before the court, it has no positive effects on reducing recidivism following the disposition of the case.²⁷⁰ Additionally, pre-trial release “may strengthen defendants’ ties to the formal employment sector or affect their attitudes toward the government, which may change the likelihood that they file a tax return.”²⁷¹ Consequently, a pre-trial release may offer economic benefits to the community, both by freeing up resources that would otherwise be used to house individuals in jail and by increasing the individual’s future tax-paying ability.

On November 17, 2015, OCCC alone housed 569 legally-presumed-to-be-innocent individuals awaiting trial, which represented almost half of the total head count.²⁷² On average, pre-trial individuals in custody in Hawai‘i spend 92 days incarcerated, which is extraordinarily long when compared to jails nationwide.²⁷³ Although Hawai‘i does attempt to minimize the use of bail, most of these individuals remain in jail because they are financially unable to post bail.²⁷⁴ Thus, the determination of whether the presumed-to-be-innocent individuals will be released is based on the individuals’ financial situation and not on their potential danger to the community. In Hawai‘i, a Class C felony typically requires a bail of \$20,000, which, understandably, most people are unable to afford.²⁷⁵ As such, the inability to post bail has created a new type of debtor’s prison.²⁷⁶

limits the person’s prospects in the job market upon release.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² The total headcount was as follows: 138 sentenced felons, 204 sentenced felon probationers, 60 sentenced misdemeanants, and 201 probation violators. Of those in pre-trial detention, 516 were accused of felonies and 53 were accused of misdemeanors. JULY 2016 PRISON STATISTICS, *supra* note 19, at 7.

²⁷³ JULY 2016 PRISON STATISTICS, *supra* note 19, at 7; ACLU BAIL REPORT, *supra* note 263, at 14.

²⁷⁴ Alysia Santo, *When Freedom Isn’t Free: The Bail Industry Wants to be Your Jailer*, MARSHALL PROJECT (Feb. 23, 2015), <https://www.themarshallproject.org/2015/02/23/buying-time#.UyVZhs8ev>; ACLU BAIL REPORT, *supra* note 263, at 5.

²⁷⁵ ACLU BAIL REPORT, *supra* note 263, at 4.

²⁷⁶ Furthermore, the use of bail is greatly benefiting the private bail bond industry. Because every aspect of the criminal justice system is the responsibility of the State, private companies should not profit from the system. When private companies profit, they lobby the legislature to increase use and amounts of bail, which further hurts our residents. See Thanithia Billings, *Private Interest, Public Sphere: Eliminating the Use of Commercial Bail Bondsmen in the Criminal Justice System*, 57 B.C. L. REV. 1337 (Sept. 2016) (arguing that “commercial bail bonds should be eliminated in favor of a system in which cash bail is not the default method of securing pretrial release. Second, all states should establish and maintain pretrial services agencies that aid courts in

Norway does not have a bail system, although it utilizes pre-trial detention in four distinct categories of cases: if there is a risk that the accused may not appear for court, if there is a risk of the accused destroying evidence, if there is a grave risk that the accused may commit additional criminal acts, or if the accused requests to be detained.²⁷⁷ Nevertheless, several international organizations and experts have criticized Norway's use of pre-trial detention as excessive and likely to be violating international human rights conventions.²⁷⁸

Pre-trial detention may be invaluable in cases in which the accused poses a severe threat to society. In other words, Hawai'i should continue to deny pre-trial release to individuals deemed to pose an immediate and severe threat.²⁷⁹ However, offering individuals a chance to be released prior to trial by paying money is inherently arbitrary and does nothing to keep our communities safer. If the current bail system is preserved under the auspices of assuring that individuals will appear for court proceedings, the amount set for bail should be within reach of the individuals to allow everyone who is not posing an imminent threat to the community a real opportunity to be released prior to any finding of guilt.

3. Violations of the Constitutional Right to Equal Treatment under the Law

Inmates of Hawaiian ancestry face severely disparate treatment in the prison system.²⁸⁰ The Office of Hawaiian Affairs ("OHA") reported in 2010, that, although Native Hawaiians comprise only 24% of the State's total population, they represent 27% of all arrests and 39% of the State's

making bail determinations."); *see generally* HAW. CONST. art. I, §§ 5, 10-15.

²⁷⁷ *Varetekstfengsling* [Pre-Trial Detention], NORGES DOMSTOLER, <https://www.domstol.no/no/Straffesak/Sakstyper/Varetekstfengsling/> (last visited Feb. 14, 2018). On January 1, 2015, there were 3,686 inmates in Norwegian prisons, of which 1,044 were in pre-trial detention. *Fengslinger*, *supra* note 81.

²⁷⁸ *See, e.g., Kraftig kritikk mot norsk varetekt og isolasjon* [Sharp Criticism Against Norwegian Pre-Trial Detention and Isolation], DAGSAVISEN (Nov. 26, 2012), <https://www.dagsavisen.no/innenriks/kraftig-kritikk-mot-norsk-varetekt-og-isolasjon-1.469553>; *Varetekt i Norge – i strid med internasjonal rett* [Pre-Trial Detention in Norway – Violates International Law], AMNESTY INTERNATIONAL (Aug. 29, 2000) Sonja Balci, *Norsk varetekt er i strid med menneskerettighetene* [Norwegian Pre-Trial Detention Violates Human Rights], OSLOMET - STORBYUNIVERSITETET (June 5, 2014), <https://forskning.no/barn-og-ungdom-juridiske-fag-menneskerettigheter/2014/06/norsk-varetekt-er-i-strid-med>.

²⁷⁹ *Accord*, ACLU BAIL REPORT, *supra* note 263, at 18-19.

²⁸⁰ *See generally* OFFICE OF HAWAIIAN AFFAIRS, THE DISPARATE TREATMENT OF NATIVE HAWAIIANS IN THE CRIMINAL JUSTICE SYSTEM 15 (2010) [hereinafter DISPARATE TREATMENT REPORT], available at <https://19of32x2yl33s8o4xza0gf14-wpengine.netdna-ssl.com/wp-content/uploads/2015/01/native-hawaiians-criminal-justice-system.pdf>. This study appears to be the most recent study of its kind.

prison population.²⁸¹ The report stated that inmates of Hawaiian ancestry are 66% more likely to receive prison sentences than whites for the same offenses, and, statistically, those prison sentences are longer than their white counterparts'.²⁸² Additionally, Native Hawaiian inmates are much more likely to be sent to Saguaro in Arizona than inmates of other ethnicities: in 2010, Native Hawaiians represented 41% of the Hawai'i residents serving out-of-state.²⁸³

The numbers reported by OHA may not truly reflect the current situation, given that the study is six years old and may be based on a skewed reporting methodology for determining race.²⁸⁴ Nevertheless, the statistics do indicate a continuing and serious problem. Disparate impact is not, per se, an equal protection violation.²⁸⁵ However, if further research uncovers a discriminatory motive, the state may be held liable.

D. *4th Pillar: The Principle that Dues to Society Are Paid upon Release from Prison*

Increasing inmates' motivation to become active participants in rehabilitation can be accomplished by giving inmates hope for release from prison, an improved future, and a chance to move past the criminal conviction.²⁸⁶ Multiple policies and statutes combine that may quash inmates' hopes for the future: uncertain prison release dates, life sentences without the possibility of parole, habitual offender laws that increase

²⁸¹ *Id.* at 12.

²⁸² *Id.* at 12-13.

²⁸³ *Id.* at 12.

²⁸⁴ For example, in 2010, HCF reported almost no one identifying as more than one race while, in the same year, the Federal Detention Center in Honolulu reported 35% identifying as being of more than one race. *Hawaii Profile*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/profiles/HI.html> (last visited Mar. 29, 2018). These discrepancies show that the methodology used can severely skew the numbers.

²⁸⁵ *State v. Tookes*, 67 Haw. 608, 614, 699 P.2d 983, 987 (Haw. 1985) provides:

In order to rely upon equal protection as a ground of invalidating the law, therefore, [the defendant] will need *evidence of a pattern of discriminatory enforcement against [a discreet and insular minority] so overwhelming that intent to discriminate can be inferred*. Such a pattern of invidious discrimination, demonstrating an unequal application of the law extreme enough to show *intentional discrimination* is necessary because the Supreme Court has held that the *disparate impact of legislation alone is not enough* to make out an equal protection violation.

(emphases added).

²⁸⁶ In advocating for reducing prison sentences to less than life, Judge Denny Chin said that inmates will work harder if they are given hope for release from prison. Judge Denny Chin, U.S. Second Circuit Court of Appeals, Public Talk at the University of Hawai'i at Mānoa, William S. Richardson School of Law (Oct. 18, 2016).

felons' prison sentences, offender registries restricting former inmates' living and work situations, and denials of rental and employment applications stemming from criminal records. These policies forever disassociate a former inmate from the community, and they act to deny most former inmates any chance to move beyond a criminal life and lead a productive one. Without hope, current and former inmates have little incentive to work toward rehabilitation, which increases recidivism rates.

1. End Use of Life Imprisonment Without the Possibility of Parole and Sentencing Ranges

Life without the possibility of parole denies people a chance to hope, a chance to redeem themselves, and a chance to fully pay their debt to society. In Hawai'i, individuals 18 years old and older are sentenced to life imprisonment without the possibility of parole for conviction of first degree murder or first degree attempted murder.²⁸⁷ Although the governor may commute such a sentence to life imprisonment with parole after the inmate has served 20 years,²⁸⁸ the inmate may easily lose any hope of release because the chance for the sentence to be commuted is slim. When inmates have a predetermined date of release, they may at least have a hope of a future outside the prison walls.²⁸⁹

As recently as 2014, Hawai'i changed its sentencing guidelines to preclude life imprisonment without the possibility of parole for juveniles.²⁹⁰ The Hawai'i legislature cited not only *Miller v. Alabama*,²⁹¹

²⁸⁷ HAW. REV. STAT. § 706-656(1) (2014) provides:

Persons eighteen years of age or over at the time of the offense who are convicted of first degree murder or first degree attempted murder *shall be sentenced to life imprisonment without the possibility of parole.*

As part of such sentence, the court shall order the director of public safety and the Hawaii paroling authority to prepare an *application for the governor to commute the sentence to life imprisonment with parole at the end of twenty years* of imprisonment; provided that persons who are *repeat offenders* under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

Persons *under the age of eighteen years* at the time of the offense who are convicted of first degree murder or first degree attempted murder shall be *sentenced to life imprisonment with the possibility of parole.*

(emphases added).

²⁸⁸ *Id.*

²⁸⁹ Judge Chin, *supra* note 286.

²⁹⁰ *See* Act 202, Session Laws 2014.

²⁹¹ *Miller v. Alabama*, 567 U.S. 460 (2012) (finding that life without the possibility of parole for juveniles constituted cruel and unusual punishment in violation of the Eighth Amendment).

but also a concern for compliance with international law.²⁹² The International Criminal Court, which tries, primarily, individuals for international crimes of “genocide, war crimes, crimes against humanity, and the crime of aggression,”²⁹³ does not impose sentences over 30 years except “in extreme cases[.]”²⁹⁴ In 2014, despite a conviction of accessory to murder and war crimes of “particular cruelty” against “numerous civilian victims” in the Democratic Republic of the Congo, Germain Katanga was sentenced to only 12 years’ imprisonment.²⁹⁵ By contrast, a person convicted as an accessory to multiple murders and rapes in Hawai‘i would face multiple life sentences, without the possibility of parole, to be served consecutively.²⁹⁶

Norway sentences a person convicted of murder to a maximum of 21 years’ imprisonment, and there are no consecutive sentences.²⁹⁷ In 2015, the average sentence for murder was 12 years.²⁹⁸ However, an exception exists in extreme cases that allows the court to impose a sentence of *forvaring*, meaning that the prosecution may request five-year increments of continuing custody beyond the 21 years if the convicted person still poses a grave and certain threat to society.²⁹⁹ Theoretically, *forvaring* could be extended in five year increments indefinitely, resulting in the equivalent of life imprisonment. However, *forvaring* preserves an inmate’s hope of future release by offering a chance of freedom in exchange for hard work toward rehabilitation.

²⁹² Standing Comm. Rep. 27-3248, Reg. Sess., at 1351 (Haw. 2014).

²⁹³ INTERNATIONAL CRIMINAL COURT, *Understanding the International Criminal Court* 13, 31, [hereinafter *Understanding the ICC*] <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> (last visited Mar. 29, 2018).

²⁹⁴ *Id.* at 31.

²⁹⁵ Press Release, International Criminal Court, *Germain Katanga Sentenced to 12 Years’ Imprisonment* (May 23, 2014), <https://www.icc-cpi.int/pages/item.aspx?name=PR1008>.

²⁹⁶ See HAW. REV. STAT. § 706-656, *supra* note 287; HAW. REV. STAT. §§ 706-701 (2016) and 706-730 (2009).

²⁹⁷ In other words, a single stint in prison will not last longer than 21 years. *Drap* [Murder], STORE NORSKE LEKSIKON, <https://snl.no/drap>. See also Nor. Penal Code, Chapter 25, § 275, available in English at https://lovdata.no/dokument/NLE/lov/2005-05-20-28/KAPITTEL_2#KAPITTEL_2 (last visited Mar. 16, 2018). Sentences up to 30 years is possible for war crimes, genocide, and crimes against humanity to mirror those imposed by the International Criminal Court. Compare Nor. Penal Code, Chapter 16, §§ 101 – 109, available in English at https://lovdata.no/dokument/NLE/lov/2005-05-20-28/KAPITTEL_2#KAPITTEL_2 (last visited Mar. 16, 2018) with *Understanding the International Criminal Court*, *supra* note 293.

²⁹⁸ *Id.*

²⁹⁹ *Forvaring* can be loosely translated as *custody*. Martin Herman Wiedswang Zontag, *Dette er Breivik-dommen* [This is the Breivik-Conviction] NRK (Aug. 24, 2012), <https://www.nrk.no/227/artikler/dette-er-breivik-dommen-1.8294711>.

Norwegian courts rarely impose *forvaring*,³⁰⁰ but one individual currently in *forvaring* is Anders Behring Breivik, who was convicted of detonating a bomb at legislative offices as a diversion before heading to a political youth camp on a small island and carrying out a mass-shooting in 2011.³⁰¹ Having murdered 77 people, most of whom were teenagers, Breivik has the dubious distinction of having killed more people than any other lone mass shooter in the last two decades worldwide.³⁰² Although many in the international community strongly disagreed with what they considered an overly light sentence at the time of Breivik's conviction,³⁰³ Norway's Parliament has still not increased the statutory maximum sentence in the five years since the incident.³⁰⁴ Hawai'i should continue to emulate progressive policies from the international community and should seek to end the use of life imprisonment without the possibility of parole for adults.

In addition to ceasing the use of life sentences, Hawai'i should afford judges an opportunity to *judge*. In other words, an assigned judge in a felony case should "set the term of incarceration to be served by the convicted, at the point of sentencing."³⁰⁵ Hawai'i statutes currently provide

³⁰⁰ In June, 2015, only ninety-four individuals were currently in prison pursuant to *forvaring*. Forvaring, KRIMINALOMSORGEN, <http://www.kriminalomsorgen.no/forvaring.237879.no.html>.

³⁰¹ *Dette er Breivik-dommen*, *supra* note 299. Breivik has since changed his name to Fjotolf Hansen. *Anders Behring Breivik har byttet navn [Anders Behring Breivik Has Changed His Name]*, AFTENPOSTEN (June 9, 2017), <https://www.aftenposten.no/norge/i/knqx6/Anders-Behring-Breivik-har-byttet-navn>.

³⁰² *Timeline of the Worst Mass Shooting Incidents Across the Globe over the Past Two Decades*, N.Y. DAILY NEWS (Dec. 14, 2012), <http://www.nydailynews.com/news/world/timeline-worst-mass-shootings-globe-article-1.1220608>.

³⁰³ Svein Vestrum Olsson, *Slik reagerer de i utlandet [This Is How They React Abroad]*, NRK (Aug. 23, 2012), <https://www.nrk.no/227/artikler/reaksjoner-fra-utlandet-1.8292531>.

³⁰⁴ The likely reason for Norway's reluctance to change is a strong cultural belief in every person's humanity and dignity. *See* discussion *supra* section II.A.1. For a discussion on the issues the special case of Breivik poses for Norway's prison system, *see infra* note 326.

³⁰⁵ Espinda, *supra* note 83. In cases of misdemeanors, judges may sentence a defendant to a definite term. HAW. REV. STAT. § 706-663 (2016) provides:

After consideration of the factors set forth in sections 706-606 and 706-621, the court may sentence a person who has been convicted of a misdemeanor or a petty misdemeanor to imprisonment for a *definite term to be fixed by the court* and not to exceed one year in the case of a misdemeanor or thirty days in the case of a petty misdemeanor, subject to earlier release pursuant to section 353-36.

(emphasis added).

that a judge may determine a sentencing range,³⁰⁶ and the Hawai'i Paroling Authority ("HPA") determines the minimum sentence,³⁰⁷ leaving inmates uncertain of when they might be released.

When judges set a defined prison sentence, there is no need to spend resources on parole hearings.³⁰⁸ Instead, the HPA may change its operations to oversee compliance with the plans that inmates create upon entry into the prison system.³⁰⁹ The HPA should be able to assess the inmates' rehabilitation progress and, unilaterally, should be empowered to release an inmate early when the following two conditions have been met: 1) the HPA deems that the inmate no longer poses a threat to the community, and 2) the inmate has reached specified milestones identified in the plan created upon admittance to prison. Such a system will allow judges to judge and will free resources for use in rehabilitation in a flexible approach that allows reassessment of the prison sentence. At the same time, the process will allow inmates to become active participants in their rehabilitation and future, as well as give inmates hope and motivation to work toward positive goals.

2. Restore Every Right Upon Release, and End Habitual Offender Laws

Disposition of convicted persons should be strictly limited to those sanctions the courts are currently authorized to impose: probation, payment of a fine, imprisonment, performing of community service, a suspended sentence, and compensation and/or restitution fees.³¹⁰ Although

³⁰⁶ See, e.g., HAW. REV. STAT. § 706-660(2)(a) (2016) (providing that individuals convicted of a Class B felony shall be sentenced to "ten years or less, but not less than five years[.] The minimum length of imprisonment shall be determined by the Hawaii paroling authority in accordance with section 706-669.").

³⁰⁷ See, e.g., HAW. REV. STAT. § 706-656(2) (2014) (providing, "[t]he minimum length of imprisonment shall be determined by the Hawaii paroling authority; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.").

³⁰⁸ If judges set definite sentencing terms, then the parole system would be obviated. In the current system, the HPA reinvents the wheel by holding a hearing "no later than six months" after taking custody of the inmate. The procedure for determining minimum term of imprisonment is described in HAW. REV. STAT. § 706-669 (1996). The HPA obtains a full report on the inmate's life and trial—all of which were likely presented during the sentencing phase in front of the judge. The only new information the HPA presents at the hearing is a "prisoner's progress in the institution." Because the hearing is held no later than six months after the inmate enters the prison, only limited new information can be available. Thus, the hearing largely duplicates the use of resources and manpower without bringing much new information, while leaving inmates in limbo.

³⁰⁹ See *supra* section II.A.2.

³¹⁰ HAW. REV. STAT. § 831-3 (2003) provides:

Except as otherwise provided by law, a person convicted of a crime does not suffer civil death or corruption of blood or sustain loss of civil

Hawai‘i’s disenfranchisement law currently denies the right to vote to inmates who, at the time of the election, are serving time for a felony conviction, and restores the right to vote upon release from prison, the ACLU of Hawai‘i argues that this law should be repealed.³¹¹ Disenfranchisement does not prevent crime, nor does it compensate victims, leaving the loss of voting rights largely ineffective and not beneficial to the community.³¹² Furthermore, denying inmates the right to vote “is antithetical to the reentry process and harmful to long term prospects for sustainable reintegration of formerly incarcerated individuals into society.”³¹³ Repealing the disenfranchisement law could, in fact, lead to lower recidivism rates, and doing so would be constitutional: the Hawai‘i Constitution does not mandate disenfranchisement; rather, it provides disenfranchisement as a mere option for the Legislature.³¹⁴ In Norway, where the only punishment is a denial of physical freedom, inmates are not disenfranchised.³¹⁵

Allowing inmates hope also means that once inmates have served their prison sentences, their past behavior should no longer haunt them.³¹⁶ Currently, Hawai‘i statutes provide that “career criminals” are sentenced

rights or forfeiture of estate or property, but *retains all of the person's rights, political, personal, civil, and otherwise*, including the right to hold public office or employment, to vote, to hold, receive, and transfer property, to enter into contracts, to sue and be sued, and to hold offices of private trust in accordance with law.

(emphases added). *See also supra* section II.C.1.

³¹¹ *Voting in Hawaii with a Criminal Conviction*, ACLU OF HAWAI‘I (Sep. 27, 2012), <https://acluhi.org/2012/09/27/voting-in-Hawaii-with-a-criminal-conviction/>.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ HAW. REV. STAT. § 831-2 (2006) provides in part:

(a) A person *sentenced for a felony*, from the time of the person's sentence until the person's final discharge, *may not*:

(1) *Vote in an election*, but if the defendant is placed on probation or the defendant is paroled after commitment to imprisonment, the defendant may vote during the period of the probation or parole; or

(2) Become a candidate for or hold public office.

(emphases added).

³¹⁵ Lov om straff (straffeloven), Part I, Ch. 10, *available at* https://lovdata.no/dokument/NL/lov/2005-05-20-28/KAPITTEL_1-11#KAPITTEL_1-11 (last visited Feb. 14, 2018).

³¹⁶ HAW. CONST. art. I, § 8 (providing, “[n]o citizen shall be disfranchised, or deprived of any of the rights or privileges secured to other citizens, *unless by the law of the land.*” (emphasis added)).

to longer subsequent prison sentences than first time offenders.³¹⁷ The Legislature created the statute to serve as a deterrent,³¹⁸ but the premise is faulty: if spending time in prison did not deter the offender from committing new crimes, spending additional time in prison will likely achieve even less. The Conference Committee Report preceding the repeat offender statute focused on retribution to justify the statute and said, “repeat violent and sexual offenders *deserve* some degree of enhanced sentencing.”³¹⁹ As discussed in section **Error! Reference source not found.**, *supra*, the principal goal of Hawai‘i’s criminal justice system should be reducing recidivism. Retribution has no place in an effective criminal justice system.³²⁰

E. 5th Pillar: The Principle of Normalcy

Many European countries have found that the most effective tool against high recidivism rates that also increases safety within prisons is to ensure that the conditions within the prison are as close as possible to what the inmates could find outside the prison walls.³²¹ The Norwegian Criminal Care explains this principle of normalcy in the following way:

³¹⁷ See HAW. REV. STAT. § 845-3 (1984) Persons Subject to Career Criminal Prosecution Efforts and HAW. REV. STAT. § 706-606.5 (2016) Sentencing of Repeat Offenders.

³¹⁸ Conf. Comm. Rep. 10-59, Reg. Sess., at 980 (Haw. 1979) (explaining that the career criminal statute was enacted to allow prosecutors to prosecute career criminals in “an attempt to alleviate [the] ever increasing problem” of a “relatively small number” of repeat and multiple offenders).

³¹⁹ Conf. Comm. Rep. 20-89, Reg. Sess., at 949 (Haw. 1979) (providing, “[t]he purpose of this bill is to *heighten penalties* for habitual violent and sexual offenders. Your Committee on Conference finds that repeat violent and sexual offenders *deserve some degree of enhanced sentencing.*”) (emphases added).

³²⁰ Furthermore, repeat offender laws may run contrary to the constitutional prohibition against double jeopardy. The Hawai‘i Constitution art I, § 10 states, “nor shall any person be subject for the same offense to be twice put in jeopardy[.]” HAW. CONST. art I, § 10. The Hawai‘i Supreme Court has found that the Hawai‘i Constitution “prohibits the State from pursuing multiple prosecutions of an individual for the same conduct” and that courts may not impose multiple punishments for the same offense. *Hawaii v. Lessary*, 74 Haw. 446, 461, 848 P.2d 966, 976 (1994); *State v. Feliciano*, 107 Hawai‘i 469, 480, 115 P.3d 648, 659 (2005).

Although the Hawai‘i Supreme Court affords great deference to the legislative intent of the punishment, when an individual’s extended sentence is based upon a prior completed prosecution, the imprisonment time-period exceeding the imprisonment time a first-time offender would incur for the same violation likely constitutes a second punishment for the first offense. *Feliciano*, 107 Hawai‘i at 483 (stating “[l]egislative intent is the proper analysis to apply in determining whether double jeopardy bars multiple punishments”). Consequently, the legislative intent—admirable as it may be—may arguably still have created a statute that unconstitutionally violates the prohibition against double jeopardy.

³²¹ Nicholas Turner & John Wetzel, *supra* note 24.

- The punishment is the restriction of liberty; no other rights have been removed by the sentencing court. Therefore, the sentenced offender has all the same rights as all others who live in Norway.
- No-one shall serve their sentence under stricter circumstances than necessary for the security in the community. Therefore, offenders shall be placed in the lowest possible security regime.
- During the serving of a sentence, life inside will resemble life outside as much as possible.³²²

In an example closer to Hawai‘i, North Carolina allows inmates on death row to “mingle with each other and spend hours outside.”³²³ The progressive and liberal policies have allowed the inmates to develop a community, which has led to the “most well-behaved population in the prison.”³²⁴ “Well-behaved” inmates make for safer and less stressful conditions for inmates and corrections officers alike.

1. Cease Alienating Our Community Members by Shipping Them Away from Their Support Network of Family and Friends

“[T]he need for human company” is one of the most fundamental needs of human life; therefore, the denial of the ability to maintain familial relationships may be described as inhuman treatment.³²⁵ As discussed in section I.C, Hawai‘i citizens are constitutionally entitled to maintain familial associations and relationships. Maintaining such relationships is difficult for individuals forced to live behind bars, especially because they are completely reliant upon visiting days, which are frequently canceled.³²⁶ Hawai‘i inmates shipped off to the continental United States are denied almost every opportunity to maintain family relationships, and, for the few families who can afford the trip to Arizona, several non-contact visitor phone stations were inoperative in a recent audit.³²⁷

³²² *About the Norwegian Correctional Service*, *supra* note 1.

³²³ *See Hager*, *supra* note 99. The changes came after a conservative Republican became North Carolina’s commissioner of corrections.

³²⁴ *See Hager*, *supra* note 99.

³²⁵ Waldron, *supra* note 209, at 280.

³²⁶ Regarding the ongoing problem of canceled visiting days, *see supra* section I.C.1.

³²⁷ 2011 AUDIT, *supra* note 169, at 5-6. Despite three of the non-contact visitor phone stations being inoperable, the auditors noted that there were no deficiencies. Whether the inoperable equipment has caused difficulties for people to communicate with their family members in prison is unclear.

At Saguaro, inmates are only allowed to have 10 people on their “approved visitation list.”³²⁸ Saguaro permits extended visits of up to eight hours for four consecutive days for inmates from Hawai‘i to accommodate visitors traveling from afar,³²⁹ but when families categorically cannot afford to visit, the extended visiting time matters little.

Effects on inmates from a lack of contact with their family members include an increased risk of self-harm.³³⁰ In addition to their family ties being severed, inmates housed on the continental United States face decreased odds of obtaining employment and are less likely to be rehabilitated upon their return to Hawai‘i, partly because DPS inadequately prepares inmates and their families for the inmates’ return to Hawai‘i.³³¹

However, the inmates are not the only ones to suffer from being shipped off to the continental United States. Every month, approximately 600 of Hawai‘i’s children are forced to say goodbye to a parent who enters the prison system.³³² Loved ones, including inmates’ children, are denied an opportunity to foster relationships with their Saguaro inmate family members to a much greater degree than when inmates are serving in-state, especially because individuals on average serve longer sentences at Saguaro than in Hawai‘i.³³³ This lack of a relationship causes negative consequences to the children, who tend to develop emotional and behavioral problems, suffer increased chances of being placed in new living situations such as foster care or with extended family, and suffer financial troubles.³³⁴

Keeping each inmate at Saguaro costs Hawai‘i \$76.78 daily.³³⁵ Although the cost is nearly half the reported cost of housing inmates in Hawai‘i, the savings are deceptive because the private-cost estimate is not

³²⁸ *Visitation and Contact Instructions 4*, CCA, <https://ccamericastorage.blob.core.windows.net/media/Default/documents/Facility-Info-Sheets/Saguaro%20Correctional%20Center%20Information%20Page%202014.05.pdf> (last visited Mar. 29, 2018).

³²⁹ *Id.* at 5-6.

³³⁰ Joseph Murrey, *The Effects of Imprisonment on Families and Children of Prisoners* (2008) <https://www.i-hop.org.uk/ci/fattach/get/201/0/filename/Murray+and+Farrington+Effects+of+Parental+Imprisonment+on+Children.pdf>.

³³¹ Johnson, *supra* note 54, at 9.

³³² *Help Guide for Families of Those Serving Time*, Keiki O Ka `Āina & the Family Reunification Working Group (brochure in author’s file; copies of brochure available via email to smorse@blueprintforchange.org).

³³³ Johnson, *supra* note 54, at 12.

³³⁴ John Hagen and Ronit Dinovitzer, *Collateral Consequence of Imprisonment for Children, Communities, Prisoners*, 26 CRIME & JUST. 121, 122 (1999).

³³⁵ Yamane, *supra* note 79.

all-inclusive.³³⁶ In particular, contracts with private prisons often preclude inmates with serious medical- and mental health problems from being sent to the continental United States, which further skews the numbers.³³⁷ In addition, because of the composition of the categories of inmates sent to the continental United States as compared to those being kept in Hawai‘i, 90 percent of parolees from Hawai‘i prisons require greater treatment and services than parolees from Saguaro, which increases the in-state cost numbers. The reason for the greater need for services is that inmates kept in Hawai‘i are much more likely to serve time for addiction-related crimes or suffer from medical or mental health issues, while inmates sent to Saguaro are more likely to have committed violent felonies.³³⁸ Finally, the supposed savings in utilizing private prisons on the continental United States do not take into account the “multiplier” effect denied to the local economy by not keeping jobs in Hawai‘i.³³⁹ The potential cost-savings are therefore much lower than the difference between the reported in-state and Saguaro daily costs.

2. Cease the Practice of Solitary Confinement

Use of solitary confinement should be severely decreased or, preferably, eliminated. In a concurring opinion, U.S. Supreme Court Justice Kennedy said that “research still confirms what this Court suggested over a century ago: [y]ears on end of near-total isolation exact a terrible price.”³⁴⁰ This price includes “profound negative consequences, exacerbating mental illness[,] and undermining the goals of rehabilitation.”³⁴¹ Several states have already followed the Department of Justice’s lead in reducing or eliminating use of solitary confinement as punishment for infractions, including California, Nebraska, and North Carolina.³⁴² Hawai‘i is not among these progressive states.

³³⁶ Johnson, *supra* note 54, at 1.

³³⁷ *Id.* at 8 n.6. Bauer addressed the deceptive cost-savings estimate by describing CAA contracts as frequently including terms that prevent states from sending inmates to their for-profit prisons who are over sixty-five years old or have serious health conditions like HIV or mental health issues. “Such exemptions allow CCA to tout its cost-efficiency while taxpayers assume the medical expenses for the inmates the company won’t take or treat.” Bauer, *supra* note 161.

³³⁸ Johnson, *supra* note 54, at 16-19.

³³⁹ *Id.* at 7.

³⁴⁰ Davis v. Ayala, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) (citing Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325 (2006)).

³⁴¹ Obama, *supra* note 15.

³⁴² *Id.*

Most of Hawai‘i’s maximum security inmates are forced to remain in their cells for 23 hours per day.³⁴³ Many suffer from acute mental illness or are placed in solitary for their own protection against other inmates.³⁴⁴ Subjecting an entire class of inmates—here, maximum security inmates—to solitary confinement is highly unusual on the continental United States, but Hawai‘i has found the practice necessary: Hawai‘i operates no maximum security facility to house its maximum security inmates.³⁴⁵ Nevertheless, the danger of exacerbated mental illness because of solitary confinement is too grave to be ignored.

Inmates in solitary confinement are reassessed biannually for the potential downgrading of their security level. Downgrading is mainly based on the inmate’s behavior.³⁴⁶ However, solitary confinement offers few ways for inmates to prove that their behavior toward other individuals in the general population has improved because the inmates are, by the very nature of solitary confinement, serving time separately from others. Other jurisdictions have found ways to decrease the use of solitary confinement while also maintaining security, such as the use of security chairs or desks that allow social interaction while also restraining the inmate. Although such options are a far cry from the principle of normalcy as displayed in Norway,³⁴⁷ they could be a valuable stepping stone for Hawai‘i while Hawai‘i works on changing the prison culture to one based on mutual respect, dignity, and the Aloha spirit.

³⁴³ Rui Kaneya, *Hawaii Behind Bars: Do Hawaii Prisons Overuse Solitary Confinement?*, CIVIL BEAT (Dec. 22, 2016), <http://www.civilbeat.org/2016/12/do-hawaii-prisons-overuse-solitary-confinement/>.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ Norway utilizes no solitary confinement and extremely limited physical restraints beyond prison walls. The only exception that has ever been made is for Anders Behring Breivik (*see supra* section II.D.1 on his crimes). Behring Breivik has minimal contact with anyone inside or outside the prison. His correctional officers are changed out biweekly to discourage any personal connections, and, for the same reason, he is not allowed to mingle with the general population.

To accommodate such a unique situation, Criminal Care has provided Behring Breivik with three cells: one for sleeping, one as a living room and office, and one for exercise equipment. Behring Breivik partially won a lawsuit against the Norwegian government for inhumane treatment based on his lack of human contact, being shackled early in his incarceration, and frequent strip searches. The case was appealed both by Behring Breivik and by the Norwegian government and is currently pending final disposition. *See, e.g., Anders Breivik: Norwegian Government Appeals Against Rights Ruling*, GUARDIAN (Jan. 10, 2017), <https://www.theguardian.com/world/2017/jan/10/anders-breivik-norwegian-government-appeals-against-rights-ruling>; *Mass Murderer Anders Breivik Gives Nazi Salute in Court*, FOX NEWS (Jan. 10, 2017), <http://www.foxnews.com/world/2017/01/10/norwegian-mass-murderer-breivik-in-court-in-appeals-case.html>.

3. Implement Programs and Initiatives Aimed at Keeping Inmates Physically and Mentally Active, Engaged, and Challenged

DHS should actively implement a series of initiatives to keep inmates active, engaged, and challenged, both physically and mentally. In the words of one inmate:

It's hard to fathom in your mind *what it's like to be doing stagnant time, sitting on your bed for 24 hours, only standing to do head count*. Unless they wear my shoes, they can't really comprehend what it's like, how it feels, then have an ACO degrade me, *that's not encouraging me to better myself*, especially if I come from a very severe traumatic background in life. Then you feel like a dollar symbol with a *revolving door back to prison*.³⁴⁸

Keeping inmates engaged is one of the best ways to rehabilitate them and to keep violence out of the prisons, which benefits both the inmates and the correctional officers. At WCF and HCF, a successful *makahiki*³⁴⁹ program, focusing on Native Hawaiian cultural practices and games, sees inmates finding inner peace and encouragement to become better fathers and better husbands.³⁵⁰ Through the *makahiki*, which features hula and traditional Hawaiian games, inmates find positive connections to each other, the community, and their cultural heritage that can favorably bolster their lives, both in prison and upon release.³⁵¹

Some programs have been developed through Hawai'i Correctional Industries ("HCI") to retrain inmates in valuable skills and to help them acquire positive work habits and motivation to "secure meaningful employment that provides adequate pay and is conducive to a more normal lifestyle."³⁵² CCA in Arizona also has a well-equipped hobby shop.³⁵³ Nevertheless, inmates are required to purchase their own supplies, which few inmates can afford.³⁵⁴

³⁴⁸ DISPARATE TREATMENT REPORT, *supra* note 280, at 15 (emphases added).

³⁴⁹ *Makahiki*, HAWAIIHISTORY.ORG, <http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&PageID=534> (last visited Mar. 16, 2018) ("Makahiki was a time to gather and pay tithes to chiefs who redistributed the gifts of the land, a time to cease farming labors and a time to feast and enjoy competitive games.")

³⁵⁰ Pat Gee, *Inmates Find Healing and Spiritual Strength with Makahiki Events*, HONOLULU STAR-ADVERTISER (Feb. 25, 2017), <http://www.staradvertiser.com/2017/02/25/hawaii-news/inmates-find-healing-and-spiritual-strength-with-makahiki-events/>.

³⁵¹ *Id.*

³⁵² S.B. 2630, 28th Leg. (Haw. 2016) (passed as Act 227).

³⁵³ See 2011 AUDIT, *supra* note 169.

³⁵⁴ JADOR, *supra* note 118.

Furthermore, not every inmate has an interest in arts, crafts, and construction. Therefore, prisons should offer much greater variety, be it classes for personal growth such as Toastmasters Club, foreign language, and parenting skills;³⁵⁵ entertainment such as video games, TVs, well-appointed libraries, table tennis, and pool tables; exercise options such as gyms, basketball courts, exercise classes, running track, and volleyball; cultural programs such as theater, concerts, art shows for and by inmates, music classes, and jam sessions; agricultural projects; increased options for working within the prison; and largely increased options for maintaining familial ties through access to social media, Skype, increased visiting hours, and more. DPS should survey former and current inmates to identify which classes and activities they would find most desirable and beneficial and implement these as quickly as feasible.

Prisons that have instituted dog training programs have made great strides by engaging inmates in positive behavior and obtaining reduced recidivism rates, in addition to valuable training of service dogs.³⁵⁶ Prisons with dog programs have seen a decrease in depression, aggression, and high blood pressure and anxiety; improvement in social sensitivity; and an overall calming effect on their inmates.³⁵⁷ Taking part in dog programs is usually highly competitive, which leads to a calmer prison population in the hope that each prisoner can become part of the program.³⁵⁸

Dog programs can provide additional benefits to the community at large, including training of service dogs for visually impaired persons, children with autism, physically impaired individuals, and military veterans with post-traumatic stress disorder. One organization that places dogs in prisons for training provides the following statement from a former inmate:

I woke up during my first year of the DAWGS program. *My attitude changed.* My routine changed. My health changed. *My priorities changed.* Everything changed in my life in order for me to be responsible enough to take care of one of God's precious creations. *DAWGS gave me the wisdom to see what kind of changes were needed in my life*

³⁵⁵ Toastmasters Club, parenting skills, and Japanese and Hawaiian language classes are offered at some facilities, but far from all. *JADOR*, *supra* note 118.

³⁵⁶ Brian Neese, *Man's Best Friend: How Dog Training Is Affecting Prison Rehabilitation*, ALVERNIA UNIVERSITY (Oct. 15, 2015), <http://online.alvernia.edu/how-dog-training-is-affecting-prison-rehabilitation/>; Elissa Koehl, *Who Rescues Whom in this Prison Dog Training Program?*, USA TODAY (Sep. 4, 2014), <http://www.usatoday.com/story/news/nation-now/2014/09/04/inspiration-nation-prison-dog-training-program/15073363/>.

³⁵⁷ Neese, *supra* note 356.

³⁵⁸ Rebecca J. Huss, *Canines (and Cats!) in Correctional Institutions: Legal and Ethical Issues Relating to Companion Animal Programs*, 14 NEV. L.J. 25, 34 (2013).

in order to be a productive citizen again after a total of 26 years behind bars.³⁵⁹

Providing inmates with opportunities to take responsibility of their own lives and actions, as well as keeping inmates engaged and challenged in positive ways, improve the quality of life for the inmates and correctional officers alike, in addition to decreasing recidivism.

III. OPPORTUNITIES FOR IMPROVEMENT

When the Hawai‘i State Legislature appropriated money to build a new prison to replace OCCC, it also established a task force to examine better practices for the state prison system, HCR85.³⁶⁰ The task force created five subcommittees to provide specialized recommendations in the areas of education, programming, Native Hawaiian culture and needs, physical structural design, and issues of faith, and the subcommittees have found many similar problems as discussed in this article.³⁶¹ Most prominent is the task force’s concern with infusing the system “with aloha.”³⁶²

Aloha conjures up images of welcoming arms, understanding, empathy, respect, love for others, offering a helping hand to neighbors, and dignity. Although Norway has no expressed cultural concept of Aloha, the welcoming arms, understanding, empathy, respect, love for others, offering a helping hand to neighbors, and dignity are infused into Norway’s culture and have been incorporated into its correctional justice system through its advanced view of humanity, dignity, and civil rights. The jurisdictions of Hawai‘i and Norway have many similarities: both have relatively small populations, are comprised of many minorities and immigrants, and struggle with large numbers of drug addicts.³⁶³ Adopting Norway’s successful pillars for obtaining decreased recidivism and increased public safety is therefore compatible with Aloha—and within reach.

³⁵⁹ Dawgs in Prison, <http://www.dawgsinprison.com/> (last visited Mar. 29, 2018) (emphases added).

³⁶⁰ HCR 85, http://www.capitol.hawaii.gov/session2016/bills/HCR85_SD1_.HTM. In 2015, several of the current members of the Task Force, including Justice Wilson, visited Norwegian prisons to observe and learn better practices. Impressed by the effective and humane prisons, the Task Force is recommending to model a reformed prison system in Hawai‘i off the Norwegian system, but “with aloha.” INTERIM HCR 85 REPORT, *supra* note 183, at v-vi.

³⁶¹ 2016 House Concurrent Resolution 85 (HCR85) Taskforce Minutes (June 20, 2016), <http://www.courts.state.hi.us/wp-content/uploads/2016/07/6.24.16-Commission-Meeting-Minutes.pdf>.

³⁶² INTERIM HCR 85 REPORT, *supra* note 183.

³⁶³ *See supra* section II.

Although the prison population likely will need to be reduced to free up the resources required to implement the more expensive aspects of the much-needed and recommended prison reform, some are available immediately and do not require legislative action. These immediately available improvements include working toward changing the culture by providing inmates and correctional officers with increasing opportunities for recreation and exercising together, encouraging handshaking, and treating each other with dignity and respect. Minimum security facilities may increase the inmates' autonomy to prepare their food, take escorted trips for community interaction and visiting services, and opportunities to earn passes to leave the facility unescorted, including for overnight visits with family.³⁶⁴

As one of the most progressive states in the Union, Hawai'i should lead the way in prison reform by adopting the five pillars and infusing Aloha in every pillar. Hawai'i should stop sending its residents to serve time almost three thousand miles away from their families, loved ones, and support systems. If Hawai'i starts reducing the number of inmates now, by the time OCCC is finally shut down, it may not need to rebuild the jail—and it can still bring the last of its residents home. Let's construct the five pillars, and cement them with Aloha.

³⁶⁴ A delegation from North Dakota travelled to Norway with the Hawai'i delegation in 2015. Since the visit, North Dakota has implemented a plethora of relatively inexpensive—or free—reforms. Reforms include limiting the use of solitary confinement and transitioning about 80% of prisoners from solitary confinement to general population housing; expanding access to treatment and socialization; revising the correctional officer positions to focus on both security and positive engagement with inmates; offering greater food choices for inmates; encouraging inmates and correctional officers to recreate and exercise together and interact in a positive manner; emphasizing inmates and correctional officers to treat each other with dignity and respect, including shaking hands; and increasing autonomy for minimum security inmates.

In addition, North Dakota is working toward normalizing life in both minimum- and maximum security facilities through starting a prison band, adding potted plants throughout the facility, actively encouraging visitors, as well as offering increased family visitation programs such as movie night and pumpkin carving. INTERIM HCR 85 REPORT, *supra* note 360, at 10-12. See also Dashka Slater, *North Dakota's Norway Experiment: Can Human Prisons Work in America? A Red State Aims to Find Out.*, MOTHER JONES (July/Aug. 2017), <http://www.motherjones.com/crime-justice/2017/07/north-dakota-norway-prisons-experiment/>.