

Blueprint for Smart Justice
Hawai'i



Blueprint *for* Smart Justice Hawai'i

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Executive Summary

Over the past five decades, the United States has dramatically increased its reliance on the criminal justice system as a way to respond to drug addiction, mental illness, poverty, and broken schools. As a result, the United States today incarcerates more people, both in absolute numbers and per capita, than any other nation in the world. This overreliance on the criminal justice system doesn't just affect the people who are incarcerated — millions of lives have been upended and families torn apart. The mass incarceration crisis has transformed American society, damaged families and communities, and wasted trillions of taxpayer dollars.

We all want to live in safe and healthy communities, and our criminal justice policies should be focused on the most effective approaches to achieving that goal. But the current system has failed us. It's time for the United States to dramatically reduce its reliance on incarceration and invest instead in alternatives to prison and approaches that are better designed to break the cycle of crime and recidivism and help people rebuild their lives.

The ACLU's Campaign for Smart Justice is committed to transforming our nation's criminal justice system and building a new vision of safety and justice. The Campaign is dedicated to cutting the nation's incarcerated population in half and combating racial disparities in the criminal justice system.

To advance these goals, the Campaign partnered with the Urban Institute to conduct a two-year research project to analyze the kind of changes needed to cut the number of people in prison in each state by half and reduce racial disparities in incarceration. In every state, we identified primary drivers of incarceration

and predicted the impact of reducing prison admissions and length of stay on state prison populations, state budgets, and the racial disparity of those imprisoned.

The analysis was eye-opening.

In every state, we found that reducing the prison population by itself does little to diminish racial disparities in incarceration — and in some cases would worsen them. In Hawai'i — where Native Hawaiians and Pacific Islanders made up 23 percent of adults in the state in 2018, but a reported 47 percent¹ of people incarcerated under the state's jurisdiction that year² — reducing the number of people imprisoned will not on its own reduce racial disparities within the prison system. These findings confirm for the Campaign that urgent work remains for advocates, policymakers, and communities across the nation to focus on efforts like policing and prosecutorial reform that are specific to combating these disparities.

As in many states, the number of people incarcerated in Hawai'i has grown rapidly in recent decades. Between 1980 and its peak in 2005, the number of people incarcerated in Hawai'i's unified corrections system³ rose by 524 percent. In spite of a slight decline that followed, there were still 5,630 people incarcerated under the jurisdiction of the Hawai'i Department of Public Safety (PSD) in 2017.⁴ Many of Hawai'i's correctional facilities struggle with overcrowding. As of May 2019, four facilities were holding populations that exceeded their operational bed capacities, each by at least 25 percent.⁵ Recognizing the burden of this growing incarcerated population, Hawai'i engaged in the Justice Reinvestment Initiative⁶ in 2012. Still, in 2018, a legislative task force that conducted a

comprehensive assessment of the state's justice system concluded that "Hawai'i's correctional system is not producing acceptable, cost-effective, or sustainable outcomes and needs immediate and profound change."⁷

In 2018, just over half (53 percent) of the people incarcerated by PSD were serving a felony sentence, and an additional 2 percent were serving misdemeanor sentences. That year, more than one-quarter of all people (27 percent) incarcerated under PSD's jurisdiction had a charge or sentence for a property crime, and more than one in 10 (12 percent) were incarcerated for a charge or sentence for a drug offense. An additional 11 percent of people incarcerated under Hawai'i's jurisdiction that year were there because they had been revoked from community supervision.⁸

Incarceration in Hawai'i has a profoundly disparate impact on Native Hawaiian communities. A 2010 Office of Hawaiian Affairs report found that Native Hawaiians were overrepresented at every stage of the justice system. That report noted that Native Hawaiians were more likely to receive a prison sentence post-conviction, and were likely to receive a longer prison sentence or probation term for similar offenses, than most other racial or ethnic groups.⁹ Incarceration also disproportionately impacts Black communities; while 3 percent of adults in Hawai'i were Black, PSD reported that 5 percent of people incarcerated under their jurisdiction in 2018 were Black.¹⁰ Further, the number of women incarcerated under PSD's jurisdiction grew rapidly before declining again in recent years. Overall, the number of women incarcerated in Hawai'i grew by 265 percent between 1990 and 2017.¹¹

So, what is the path forward?

Criminal justice stakeholders in Hawai'i must continue to invest in alternatives to incarceration. For example, the current piloting of a Law Enforcement Assisted Diversion (LEAD) program, which diverts people accused of low-level offenses away from the criminal justice system, in Honolulu's Chinatown is a step in the right direction. The state should also continue to reduce probation and parole revocations, particularly for technical violations that do not involve a new offense. These revocations disproportionately impact Native

Hawaiians.¹² The Legislature should implement a system of graduated sanctions for probation and parole violations, and ensure responses to these violations are proportional.

Hawai'i must also prioritize pretrial justice reform. Cash bail is over-relied upon and leaves people waiting in jail simply because they can't afford to pay, not because they pose a risk to public safety. The state should reevaluate its use of the Ohio Risk Assessment System Pretrial Assessment Tool, which has been found to be racially and socioeconomically biased.¹³

These are just a few examples of how Hawai'i can continue to reduce its incarcerated population and reform its justice system. Ultimately, the answer is up to Hawai'i's voters, policymakers, communities, and criminal justice advocates as they move forward with the urgent work of ending Hawai'i's obsession with mass incarceration.

The State of the Hawai'i Prison System

The number of people incarcerated in Hawai'i's unified corrections system¹⁴ rose by 524 percent between 1980 and its peak in 2005. Between 2005 and 2017, the state's incarcerated population declined by 8 percent. Still, in 2017, there were 5,630 people incarcerated under the jurisdiction of PSD – five times (472 percent) more than in 1980.¹⁵ When you include people on community supervision, the reach of Hawai'i's justice system is much greater. At the end of 2016, 27,500 people – more than 2 percent of the state's adult population – were under some form of correctional control.¹⁶

Many correctional facilities run by PSD are significantly overcrowded. As of May 2019, four facilities were holding populations that exceeded their operational bed capacities, each by at least 25 percent. The Hawai'i Community Correctional Center is

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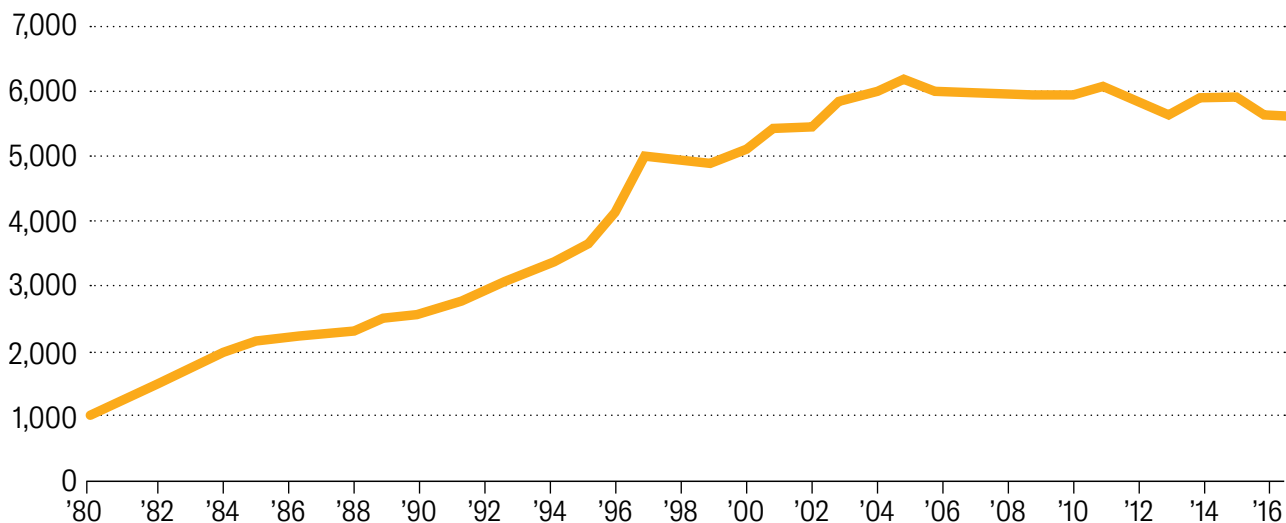
HAWAI'I INCARCERATION

Between 1980 and 2017, Hawai'i's incarcerated population rose by **472 percent**.

In 2017, there were **5,630 people** incarcerated under the jurisdiction of the Hawai'i Department of Public Safety.

Due to overcrowding, as of November 2018, **1,459 people** under the jurisdiction of the Hawai'i Department of Public Safety were serving their sentences in a private prison in Arizona.

HAWAI'I INCARCERATED POPULATION



particularly overcrowded, holding nearly twice as many people (177 percent) as its operational bed capacity.¹⁷

Partially because of this overcrowding, not all people incarcerated under PSD's jurisdiction are held in the state. Hawai'i has a contract with CoreCivic, a private prison company, to send many people from Hawai'i to serve their sentences approximately 3,000 miles from home in a facility in Arizona.¹⁸ While the state first proposed contracting with prisons on the mainland in 1995 as a "short-term solution to chronic overcrowding," it has remained in place ever since.¹⁹ In November 2018, 1,459 people under the jurisdiction of PSD were serving their sentences in CoreCivic's Saguaro Correctional Center in Eloy, Arizona.²⁰

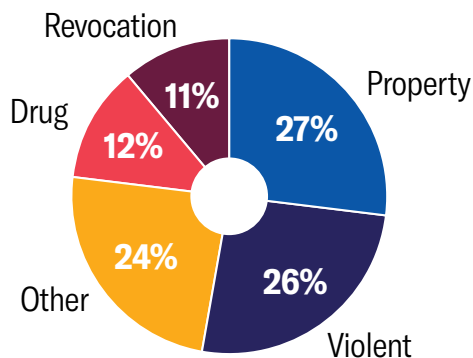
Hawai'i has engaged in a number of criminal justice reforms in recent years, including the Justice Reinvestment Initiative²¹ in 2012. Further progress is needed, however. In 2018, a legislative task force that conducted a comprehensive assessment of the state's justice system concluded that "Hawai'i's correctional system is not producing acceptable, cost-effective, or sustainable outcomes and needs immediate and profound change."²²

The Current Incarcerated Population

Because Hawai'i has a unified corrections system, the state's incarcerated population includes both people who are serving sentences and people who are detained pretrial. In June 2018, just over half (53 percent) of the people incarcerated by PSD were serving a felony sentence, and an additional 2 percent were serving misdemeanor sentences. That year, one quarter (23 percent) of the people incarcerated by PSD were incarcerated for parole or probation violations, while one in five (21 percent) people were incarcerated pretrial and had not been convicted of a crime.²³ A report that reviewed all cases filed in circuit court during the first semester of 2017 found that Hawai'i courts set bail as a condition for release in 88 percent of all cases, and bail was posted only 44 percent of the time.²⁴

People are incarcerated in Hawai'i under charges or sentences for a wide range of offenses.²⁵ In 2018, more

HAWAI'I INCARCERATED POPULATION



than one-quarter of all people (27 percent) incarcerated under PSD's jurisdiction had a charge or sentence for a property crime, and more than one in 10 (12 percent) were incarcerated with a charge or sentence for a drug offense. An additional 11 percent of people incarcerated under Hawai'i's jurisdiction that year were there for a community supervision revocation.²⁶ The Hawai'i Paroling Authority (HPA) reported that, of the 352 people revoked from parole in fiscal year 2018, only two were revoked for a new felony conviction. The other 350 people were revoked for technical violations.²⁷

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HAWAI'I JAIL AND PRISON POPULATION

23 percent of the people incarcerated by the Hawai'i Department of Public Safety in 2018 were there because of a parole or probation violation.

21 percent of the people incarcerated by the Hawai'i Department of Public Safety in 2018 were being detained pretrial.

27 percent of people incarcerated under the Hawai'i Department of Public Safety's jurisdiction in 2018 had a charge or sentence for a property crime.

Hawai'i relies heavily on its contract with the private prison company CoreCivic to hold people who are incarcerated under PSD's jurisdiction,²⁸ and also incarcerates some people at the Federal Detention Center in Honolulu. In 2018, three in 10 people under PSD jurisdiction were held in a contracted facility.²⁹

Why Do People Stay in Prison for So Long?

Unlike other states, judges in Hawai'i only have control of maximum sentences, not minimums. The minimum incarceration terms that people who have been sentenced are required to serve are set by the HPA.³⁰ Many of the minimum sentences set by the HPA are lengthy, even for more minor offenses. For example, in fiscal year 2018, 131 people were sentenced for "promoting a dangerous drug in the third degree," which is defined as possession of any amount of specific controlled substances.³¹ While this offense is a Class C felony – the lowest felony class – people convicted of this offense in fiscal year 2018 received an average minimum sentence of 2.45 years.³²

The HPA also has the power to decide whether people who have served their minimum terms should be released or remain incarcerated for additional time, up to their maximum sentence.³³ Many people incarcerated in Hawai'i remain in correctional facilities after they become eligible to be considered for parole. The number of people released to parole in Hawai'i has risen in recent years, increasing by 40 percent between fiscal years 2016 and 2018. Still, during fiscal year 2018, only about three in 10 (29 percent) parole hearings resulted in a parole grant.³⁴

Who Is Imprisoned

Native Hawaiians: Incarceration in Hawai'i has a profoundly disparate impact on Native Hawaiian communities. While Native Hawaiians and Pacific Islanders made up an estimated 23 percent of adults in the state in 2018,³⁵ PSD reported that 40 percent³⁶ of people incarcerated under the state's jurisdiction in 2018 were Native Hawaiians, and another 6

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DEMOGRAPHICS

40 percent of people incarcerated under Hawai'i's jurisdiction in 2018 were reported by PSD as being Native Hawaiians.

The number of women incarcerated in Hawai'i grew **1265 percent** between 1990 and 2017.

Though just **3 percent** of adults in Hawai'i were Black in 2018, PSD reported that 5 percent of people incarcerated under the state's jurisdiction that year were Black.

percent were identified as Samoan or "Guam/Pacific Islander."³⁷

A 2010 Office of Hawaiian Affairs report found that Native Hawaiians were overrepresented at every stage of the justice system. That report noted that Native Hawaiians were more likely to receive a prison sentence post-conviction, and were likely to receive a longer prison sentence or probation term for similar offenses, than most other racial or ethnic groups.³⁸

Black people in Hawai'i: Incarceration in Hawai'i also has a disparate impact on Black communities. In 2018, an estimated 3 percent of adults in Hawai'i were Black,³⁹ and PSD reported that 5 percent of people incarcerated under the state's jurisdiction were Black.⁴⁰

Women in Hawai'i: The number of women incarcerated in Hawai'i grew 265 percent between 1990 and 2017. In 2017, there were 624 women incarcerated under the jurisdiction of PSD.⁴¹ As of 2018, 11 percent of the people incarcerated under the state's jurisdiction were women.⁴² Three in 10 (30 percent) women incarcerated in Hawai'i in 2018 were being held pretrial, and more than one-quarter (27 percent) were incarcerated due to a violation of community supervision.⁴³

Older People in Hawai'i: In October 2018, more than one-fifth (21 percent) of people incarcerated in Hawai'i

were age 50 or older⁴⁴—a group generally considered to pose a negligible risk to public safety.⁴⁵

People with Mental Health and Substance Use Disorders

Mental health challenges are prevalent among people in Hawai‘i’s criminal justice system. For example, PSD estimates that approximately one in 10 people (between 9.5 and 12 percent) in the Oahu Community Correctional Center (OCCC)—the largest jail facility in the state — have a mental illness.. PSD estimates that over the course of 2018, about 700 people classified as “Severe and Persistently Mentally Ill” were incarcerated at OCCC at some point, and between 450 and 600 people were on suicide watch at some point.⁴⁶

The state has struggled in recent years to provide adequate mental health services to incarcerated people. Concerns about insufficient care in the OCCC sparked a 2005 investigation by the U.S. Department of Justice, which concluded that “certain conditions at the Jail violate the constitutional rights of the detainees confined there and subject those detainees to harm and risk of harm.”⁴⁷ This finding sparked a lawsuit against the state, and in 2009, the Department of Justice approved the state’s corrective action plan.⁴⁸ The Department of Justice agreed that the OCCC had been brought in compliance with federal standards in 2015, nearly seven years later, and dismissed the lawsuit. However, shortly thereafter, concerns were again raised about the adequacy of mental health care in that facility, which again fell out of compliance due to issues including understaffing.⁴⁹ In December 2018, PSD reported that conditions at OCCC had improved in fiscal year 2018, bringing the state closer to compliance.⁵⁰ However, an expert report from November 2018 noted ongoing challenges with overcrowding and understaffing, leading to problems such as inadequate sleeping conditions, and recommended additional staff training to improve the quality of group therapy for people with serious mental illness.⁵¹

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BUDGET

Hawai‘i spent **\$255 million** of its general fund on corrections in 2017.

General fund spending on corrections increased by **263 percent** between 1985 and 2017.

Budget Strains

As Hawai‘i’s incarcerated population has risen, so has the cost burden. In 2017, Hawai‘i spent \$255 million of its general fund on corrections, accounting for 3 percent of the state’s total general fund spending that year. Corrections general fund spending increased by 263 percent between 1985 and 2017, forcing tradeoffs in other state spending priorities like education; higher education general fund spending increased by just 22 percent over the same time period.⁵²

Ending Mass Incarceration in Hawai‘i: A Path Forward

Mass incarceration is a result of many systems failing to support our communities. To end it, we must develop policies that better address inadequacies throughout our education, health care, and economic systems – to name a few. There are many potential policy changes that can help Hawai‘i end its mass incarceration crisis, but it will be up to the people and policymakers of Hawai‘i to decide which changes to pursue. To reach a 50 percent reduction, policy reforms will need to reduce the amount of time people serve in prisons and/or reduce the number of people entering jail and prison in the first place.

Reducing Admissions

To end mass incarceration, Hawai‘i must break its overreliance on jails and prisons as a means to hold people accountable for their crimes. Evidence indicates that prisons seldom offer adequate solutions to wrongful behavior. In fact, imprisonment can be counterproductive – increasing cycles of harm and violence and failing to provide rehabilitation for incarcerated people or adequate accountability to the survivors of crime.⁵³ Here are some strategies:

- **Alternatives to incarceration:** Several types of alternative-to-incarceration programs have shown great success in reducing criminal activity. Programs offering support services such as substance use treatment, mental health care, employment, housing, health care, and vocational training – often with a community service requirement – have significantly reduced recidivism rates for participants.⁵⁴ Hawai‘i is piloting a LEAD program, a pre-booking and pre-arrest diversion option based on Seattle’s highly successful program, in Honolulu’s Chinatown. The program diverts people accused of low-level offenses away from the criminal justice system and to agencies where they can get supportive services such as housing, financial assistance, and physical and mental health treatment. For crimes involving violence, restorative justice programs – which are designed to hold responsible people accountable and support those who were harmed – have not only been demonstrated to reduce recidivism for defendants,⁵⁵ they have also been shown to decrease symptoms of posttraumatic stress in victims of crime.⁵⁶ One provider of such programs is Hawai‘i Friends of Restorative Justice (HFRJ), a nonprofit organization established in 1980 that collaborates with community partners including government, nonprofit, and service agencies. Its mission is to advance civic behavior and improve the justice system. HFRJ trains, advocates, develops programs, researches, and educates on evidence-based practices. Prosecutors and judges who embrace these solutions can fulfill their responsibilities to the public safety and to supporting victims in their healing – and can often generate far better results than imprisonment can deliver.
- **Improve community supervision:** Community supervision is intended to be an alternative to incarceration and a mechanism for early release, and presents an opportunity to lower recidivism through effective reentry practices. Yet, many state probation and parole

practices perpetuate mass incarceration. Probation and parole offices must prioritize the risk-need-responsivity principle, ensuring the level and parameters of supervision are aligned and lead to better public safety and rehabilitation outcomes. The Hawai‘i Legislature should ensure probation is used as a prison alternative, not widening the net of system-involved people. Further, it should expand parole eligibility and other release mechanisms.

- **Reduce probation and parole revocations:**

Too often, people revoked from supervision are sent to prison for technical violations, not for committing new crimes. Missing curfew or lack of employment could result in incarceration. Racial disparities are often stark in revocation decision-making; in Hawai‘i, Native Hawaiians are more likely to have their parole revoked and be returned to prison than other racial or ethnic groups.⁵⁷ The Hawai‘i Legislature should implement a system of graduated sanctions for probation and parole violations, ensuring responses are proportional. Incarceration should be prohibited in cases of technical violations. In 2004, Hawai‘i launched a program aimed at reducing crime and drug use among people convicted of crimes, Hawai‘i’s Opportunity Probation with Enforcement, also known as HOPE.⁵⁸ The HCR 85 Task Force Report notes that as of April 30, 2018, there were 303 people had who violated their probation under HOPE incarcerated at OCCC, comprising about 22 percent of the total jail population. The Task Force recommended that the state stop using incarceration to sanction HOPE probation violators.⁵⁹ The Hawai‘i Legislature should also pass a law requiring the HPA to appoint counsel at revocation hearings to ensure adequate due process protections before someone loses their liberty.

- **Expand diversion and treatment for people with substance use and mental health issues:** Diversion is an effective way to redirect people with substance use and mental health

issues out of the criminal legal system and into supportive community treatment. Diversion programs have been shown to be effective for people charged with criminal offenses.⁶⁰ When implemented effectively, diversion reduces arrests, encourages voluntary treatment in the community, and saves money.⁶¹ Effective diversion programs such as LEAD coordinate with community services that provide a wide range of substantial, quality wraparound treatments and support for people with substance use and mental health issues to access housing, employment, and intensive, individualized supports in the community. After an initial investment in community supports, diversion programs have the potential to save jurisdictions large amounts of money.⁶² Hawai‘i should support successful models that divert people to treatment and services before arrest and support prosecutor-led programs that divert people before they are charged. Lawmakers can explore such interventions at multiple phases in the system, whether through decriminalization or alternatives to arrest, charges, or incarceration. Further, lawmakers should pass laws that increase funding for substance use treatment and mental health services.

- **Support decriminalization and defelonization:** The Hawai‘i Legislature consistently introduces bills to criminalize behavior that previously would not have led to incarceration. The Legislature needs to move away from a culture of criminalization, stop expanding the criminal code, and look at alternatives to incarceration. Hawai‘i should work to employ decriminalization strategies that eliminate criminal penalties while embracing diversion and alternatives to incarceration. The state can move toward decriminalization of personal drug use and possession in favor of an evidence-based health policy approach to what is a public health problem. This includes the decriminalization of drug possession and working to undo the criminalization of poverty across Hawai‘i. Criminal penalties can be replaced with civil fines that account for a

person's present ability to pay, diversion, and expanded social services and treatment for mental health and substance use needs. Hawai'i should also consider defelonization of offenses as a way to contract the breadth and reach of the Hawai'i criminal code.

- **Enact pretrial justice reform:** Hawai'i can significantly reduce its rates of pretrial detention by creating a fairer, smarter pretrial system. Cash bail is overrelied on and leaves people languishing in jail simply because they cannot afford to pay. Far too often, people who cannot afford their bail will end up in jail for weeks, months, or, in some cases, years as they wait for their day in court. When this happens, the criminal justice system leaves them with a difficult choice: Take a plea deal or fight the case from behind bars. While detained pretrial, research shows many people face significant collateral damage, such as job loss or interrupted education.⁶³ After even a short stay in jail, taking a plea deal sounds less burdensome than losing everything, which is likely why evidence shows that pretrial detention significantly increases a defendant's risk of conviction.⁶⁴ The current pretrial system harms Native Hawaiians, Pacific Islanders, and other people of color in particular. Research shows that people of color are detained at higher rates across the country when unable to meet bail, and that courts set significantly higher bail amounts for them.⁶⁵ The solution is not to shift from a cash-based system to a system where risk assessment instruments inform or support judicial decisions about who loses their liberty after an arrest. Risk assessment instruments have not been shown to eliminate bias in pretrial decision-making, even as a supplement to decisions made by judges. To address this, Hawai'i should re-evaluate its use of the Ohio Risk Assessment System Pretrial Assessment Tool (ORAS-PAT), which has been found to be racially and socioeconomically biased. For example, ORAS-PAT relies on age at first arrest as one of the factors that may increase someone's "risk." Age of first

arrest is strongly correlated with race and socioeconomic status, given disparate policing practices in poorer and marginalized schools and communities.⁶⁶ In order to significantly reduce pretrial detention and combat racial disparities, the Hawai'i Legislature should enact pretrial reform – including enhancing speedy trial rights, expanding access to counsel, and expanding mandatory cite and release policies – and limit pretrial detention to the rare case where a person poses a serious, clear threat to another person.

- **Prosecutorial reform:** Prosecutors are the most powerful actors in the criminal justice system, with the ability to wield the power of the state against an individual to deprive that person of life, liberty, and property. Hawai'i should aim to adopt prosecutorial reform that increases transparency, enhances oversight, and embraces diversion and alternatives to incarceration. The initial decision of whether to charge someone with a crime and if so, what and how many, has a major impact on every aspect of a person's experience with the system, not least of which is the amount of time someone faces and eventually serves incarcerated. There should be some mechanism for the state and counties to review and assess those decisions overall to ensure that they make these decisions appropriately. For example, Hawai'i could introduce the Prosecutorial Transparency Act.⁶⁷ This model legislation requires all prosecutors to make their policies public and to gather and report data. Furthermore, prosecutors sometimes wrongfully convict a person, whether through prosecutorial misconduct or the conviction of an innocent person. Legislation that supports statewide Conviction Integrity Units in each county prosecutor's office can address wrongful convictions and prosecutorial misconduct. Conviction Integrity Units add oversight to a prosecutor's decisions, encouraging prosecutors to use greater scrutiny when reviewing and charging cases. Prosecutors should also be incentivized to prioritize the use of diversion and alternatives to incarceration.

The Legislature should pass a bill that requires statewide, uniform data collection by each prosecutor so that wrongful convictions, prosecutorial misconduct, access to diversion, timeliness of disposition, and disparate impact on vulnerable communities can be reviewed.

- **Expand judicial options at sentencing:** The Legislature can limit the circumstances in which a judge is required to impose a prison sentence instead of community supervision, especially for drug offenses and in situations when the mandatory prison sentence is triggered by a prior felony. Judges must have a variety of options at their disposal besides imprisonment,

A NOTE ON SPECIALTY COURTS

Many jurisdictions assign some people to specialty courts, such as mental health, behavioral, veterans, and drug courts. The ACLU has concerns about the growing use of these courts. They may violate due process rights, including the rights to notice, hearing, and counsel, and may needlessly subject people with disabilities to criminal justice control. And they require significant resources that would be better spent providing upfront services in the community.

Where established, participation in these courts must be voluntary and not require a guilty plea. Specialty court providers must be disability-competent and informed in public health, addiction, and treatment. People in these courts must have access to counsel, and supervision should not last beyond the length of any sentence that would have been imposed for the underlying charge. Participants should be allowed to quit the program and either take a plea agreement or stand trial, protected by all due process rights, at any time. All programs must be tailored to meet individual needs, including having specialized, evidence-based options for people with dual diagnoses (mental health and substance use disorders). Finally, the response to lapses or noncompliance should be enhanced case management, not incarceration.

allowing them to require treatment, mental health care, restorative justice, or other evidence-based alternatives to incarceration. These programs should be available to the court in all or most cases, regardless of the severity of the offense or someone's prior criminal history. One way to expand judicial options is to expand Hawai'i's treatment courts (drug court, mental health court, and veterans court).⁶⁸ The court, not the Legislature, should be in a position to decide whether such an option is appropriate in individual cases.

The Hawai'i State Legislature passed SB 192 in May 2019.⁶⁹ The law, which went into effect July 9, 2019, gives judges the option of accepting a signature bond to cover all or part of a defendant's bail. The impact of this new law is entirely dependent on whether/how frequently judges use the signature bond option. We encourage the judiciary to pass rules outlining when a signature bond should be required and considered sufficient for release.

Reducing Time Served

Reducing the amount of time people serve, even by just a few months, can lead to thousands fewer people in Hawai'i's prisons. Here's how:

- **Sentencing reform:** The Legislature can amend Hawai'i's criminal code to reduce sentencing ranges, including and especially for drug offenses, burglary and other property offenses, robbery, public order offenses, and assault. The Legislature can also limit the circumstances and severity of Hawai'i's prior felony sentencing, in which the presence of even a single prior felony can both substantially increase the sentencing range and delay initial parole eligibility. Multiple prior felonies and simultaneously charged felonies trigger even more substantial enhancements to both sentencing range and initial parole eligibility. Further, the Legislature should repeal the career criminal prosecution statute and eliminate all

sentencing enhancements for people who fall into designated categories of prior criminal histories.

- **Eliminate mandatory minimums:** The Hawai‘i Legislature should eliminate mandatory minimums that keep people in prison even when they can demonstrate that they pose no risk of harm to anyone. These harsh, one-size-fits-all approaches don’t allow for consideration of unique variables like mental health history, trauma, or substance use disorder to be taken into account. They also make a significant portion of the incarcerated population automatically ineligible for opportunities for release, regardless of individual mitigating circumstances. Further, they limit the discretion of other actors in the criminal justice system, including the court, jury, and parole board. By eliminating mandatory minimums, including mandatory minimums for “repeat offenders,” the Legislature can ensure that people who have shown improvement while serving their sentences are allowed to return to their communities.
- **Earned time/earned credit reform:** Hawai‘i does not currently have a “good time” or earned time/earned credit law on the books. Instead, the HPA is authorized to reduce minimum sentencing terms, but the rules of eligibility and when reductions are granted are at the discretion of the parole board. The Legislature should pass a law standardizing earned time and earned credit for people who are incarcerated, with no exclusions, carveouts, or limits on the accumulation of earned credits against a prison sentence through good behavior or participation in educational, vocational, and other opportunities.
- **Compassionate release:** The Hawai‘i Legislature and HPA should allow compassionate release from prison wherever appropriate. Keeping aging and seriously injured or ill people incarcerated significantly taxes prison resources. Studies have shown that incarcerating an older (50 and above) person costs double what it costs to incarcerate a

younger person.⁷⁰ What is more, keeping older people behind bars does not serve the goal of incapacitation, particularly as studies have clearly shown that as people age, their propensity to commit crime significantly declines.⁷¹ There is also clear evidence showing that older persons have much lower rates of recidivism than their younger counterparts.⁷² In 2019, the Hawai‘i Legislature passed a compassionate release bill (HB 629) that could serve a model for the rest of the country. The bill makes inmates with a terminal seriously debilitating illness eligible for compassionate release, provides for an evidentiary hearing before the parole board for inmates seeking compassionate release, and requires PSD to appoint an advocate for inmates seeking compassionate release who are unable to advocate for themselves. Unfortunately, on July 9, 2019, the governor of Hawai‘i vetoed HB 629. In the future, the Legislature should pass an expanded version of this bill that expands access to compassionate release with as few restrictions as possible.

Reducing Racial Disparities

Reducing the number of people who are imprisoned in Hawai‘i will not on its own significantly reduce racial disparities in the prison system.

As stated earlier in the report, Native Hawaiians are at a higher risk of becoming involved in the justice system, including living under heightened police surveillance and being at higher risk for arrest. There are several reasons for the overrepresentation of Native Hawaiians in the criminal justice system. It started with their marginalization through colonialism and continuing racism in the present. Racism functions differently in Hawai‘i than in many other states, but it functions.

Native Hawaiians have disproportionate rates of school suspensions and engagement in the juvenile justice system.⁷³ The imbalance cannot be accounted for by disparate involvement in illegal activity, and it grows at each stage in the justice system, beginning with initial law enforcement contact and increasing at subsequent

“These structures are active here in Hawai‘i in the ongoing military occupation, in the mass incarceration of Native Hawaiian and Pacific Islanders exported to the private Saguaro Correctional Center in Arizona, in Hawai‘i’s housing crisis, in our human trafficking crisis, in the staggering wealth inequality, in the divestment from a public education system that primarily serves brown kids while those with means educate their children in private schools, in the ongoing abuse of Hawai‘i’s lands and waters. These structures are hard to see unless you live with them and unless they impinge on your humanity on a daily basis, unless they weigh heavily on the people and communities you love.”

—Akiemi Glenn⁸⁶

stages, such as pretrial detention, conviction, sentencing, and post-release opportunity.⁷⁴ Focusing on only one of the factors that drives racial disparity does not address issues across the whole system.

Racism is so ingrained in the system that it cannot be mitigated by solely reducing the scale of mass incarceration. Shrinking the prison population across the board will likely result in lower imprisonment rates for all racial and ethnic populations, but it will not address comparative disproportionality across populations. For example, focusing on reductions to prison admissions and length of stay in prison is critically important, but those reforms do not address the policies and practices among police, prosecutors, and judges that contribute greatly to the racial disparities that plague the prison system.

New Jersey, for example, is often heralded as one of the most successful examples of reversing mass incarceration, passing justice reforms that led to a 26

percent decline in the state prison population between 1999 and 2012.⁷⁵ However, the state did not target racial disparities in incarceration and, in 2014, Black people in New Jersey were still more than 12 times as likely to be imprisoned as white people — the highest disparity of any state in the nation.⁷⁶

Ending mass incarceration is critical to eliminating racial disparities, but insufficient without companion efforts that take aim at other drivers of racial inequities outside of the criminal justice system. Reductions in disparate imprisonment rates require implementing explicit racial justice strategies.

Some examples include:

- Ending overpolicing in communities of color
- Evaluating prosecutors’ charging and plea bargaining practices to identify and eliminate bias
- Investing in diversion/alternatives to detention in communities of color
- Reducing the use of pretrial detention and eliminating wealth-based incarceration
- Ending sentencing enhancements based on location (drug-free school zones)
- Requiring racial impact statements before any new criminal law or regulation is passed and requiring legislation to proactively rectify any potential disparities that may result from new laws or rules
- Eliminating discriminatory gang sentencing enhancements that disproportionately target people of color
- Addressing any potential racial bias in risk assessment instruments used to assist decision-making in the criminal justice system
- Encouraging judges to use their power to dismiss cases that originate with school officials or on school grounds, when the matter may be adequately addressed through school disciplinary or regulatory process to avoid

incarcerating children during their most formative years

- Eliminating fines and fees, which effectively criminalize poverty
- Shifting funding from law enforcement and corrections to community organizations

Reducing Disability Disparities

The rates of people with disabilities in the U.S. criminal system are two to six times that of the general population.⁷⁷ In particular, people with psychiatric disabilities are dramatically overrepresented in jails and prisons across the country.⁷⁸

- People showing signs of mental illness are twice as likely to be arrested as people without mental illness for the same behavior.⁷⁹
- People with mental illness are sentenced to prison terms that are, on average, 12 percent longer than other people in prison.⁸⁰
- People with mental illness stay in prison longer because they frequently face disciplinary action from conduct that arises due to their illness — such as attempted suicide — and they seldom qualify for early release because they are not able to participate in rehabilitative programming, such as educational or vocational classes.⁸¹

Furthermore, sentencing reforms appear to leave people in prison with psychiatric disabilities behind. In recent years in California, for example, the prison population has decreased by more than 25 percent following a court order, but the number of people with a serious mental disorder has increased by 150 percent — an increase in both the rate and the absolute number of incarcerated people with psychiatric disabilities.⁸²

Screening tools to evaluate psychiatric disabilities vary by state and jurisdiction, but the most reliable data indicates that more than half of jail populations and close to half of prison populations have mental health disabilities.⁸³ The fact that people with mental health disabilities are arrested more frequently, stay

incarcerated longer, and return to prisons faster is not due to any inherent criminality related to psychiatric disabilities. It arises in part because of the lack of accessible and appropriate mental health treatment in the community; in part because of a perception of dangerousness by police, prosecutors, and judges; and in part because prison staff and probation officers fail to recognize and accommodate disability.

Many people of color in jails and prisons are also people with disabilities, and efforts to reduce racial disparities must go hand in hand with efforts to reduce disability disparities.⁸⁴ Not surprisingly, many of the strategies to reduce disability disparities are similar to approaches that reduce racial disparities. Some examples include:

- Investing in pre-arrest diversion:
 - Creating behavioral health centers, run by state departments of health, as alternatives to jails, or emergency rooms for people experiencing mental health crises or addiction issues.
 - Training dispatchers and police to divert people with mental health issues who commit low-level nuisance crimes to these behavioral health centers. Jurisdictions that have followed this approach have significantly reduced their jail populations.⁸⁵
- Ending arrest and incarceration for low-level public order charges, such as being drunk in public, urinating in public, loitering, trespassing, vandalism, and sleeping on the street. If needed, refer people who commit these crimes to behavioral health centers.
- Requiring prosecutors to offer diversion for people with mental health and substance use disabilities who are charged with low-level crimes
- Evaluating prosecutors' charging and plea bargaining practices to identify and eliminate disability bias
- Requiring prosecutors' offices be transparent in their hiring practices, charging decisions, and plea deals

TAKING THE LEAD

Prosecutors: They make decisions on when to prosecute an arrest, what charges to bring, and which plea deals to offer and accept. They can decide to divert people to treatment programs (for example, drug or mental health programs) rather than send them to prison. And they can decide not to seek enhancements that greatly increase the length of sentences.

Police: They are generally the first point of contact with the criminal justice system. The practices that police employ in communities can shape the public's view of and trust in that system. Police can decide whether or not to arrest people and how much force to use during encounters with the public. Police departments can also participate in diversion programs, which enable officers to divert people into community-based intervention programs rather than into the criminal justice system.

State lawmakers: They decide which offenses to criminalize, what penalties to include, how long sentences can be, and when to take away discretion from judges. They can change criminal laws to remove prison as an option when better alternatives exist, and they can fund the creation of new alternatives, including diversion programs that provide supported housing, treatment, and vocational training. And they can decide to sufficiently fund mental health and substance use treatment so it is available for people who need it before they encounter the criminal legal system.

Parole boards: They decide when to allow people to leave prison. If the parole board is trained to consider and accommodate disability issues, they may recognize and release more people who have disciplinary issues in their records that are due to a lack of accommodations for their disabilities.

Judges: They often have discretion over pretrial conditions imposed on defendants, which can make a difference. For example, individuals who are jailed while awaiting trial are more likely to plead guilty and accept longer prison sentences than people who are not held in jail pretrial. Judges can also have discretion in sentencing and should consider alternatives to incarceration when possible.

Hawai'i Department of Public Safety: PSD controls all prisons and jails in Hawai'i and oversees state law enforcement, including the Narcotics Enforcement Division and the Sheriff Division. PSD is administratively attached to the Hawai'i Paroling Authority. PSD has in the past lobbied against criminal legal reform efforts before the Hawai'i State Legislature. PSD is leading the effort to build a new jail to replace the Oahu Community Correctional Center. In 2019, the Legislature passed HB 1552, which will create the independent Hawai'i Correctional System Oversight Commission as well as the Criminal Justice Research Institute.

- Investing in diversion programs and alternatives to detention designed for people with disabilities, including programs that provide supportive housing, Assertive Community Treatment, wraparound services, and mental health supports
- Reducing the use of pretrial detention while increasing reminders of court dates and other supports to ensure compliance with pretrial requirements
- Reducing reincarceration due to parole or probation revocations through intensive case management, disability-competent training for officers on alternatives to incarceration and reasonable modifications to requirements of supervision, and no return to incarceration for first and second technical violations
- Addressing bias against mental disabilities in risk assessment instruments used to assist decision-making in the criminal justice system
- Shifting funding away from law enforcement and corrections into supportive housing, intensive case management, schools, drug and mental health treatment, community organizations, job creation, and other social service providers

Endnotes

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