



# Getting It Right: Better Ideas for a New Jail

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# TABLE OF CONTENTS

	<i>Page</i>
Introduction .....	1
The Jail Planning Process Was Flawed From The Very Beginning .....	2
A Critical Mistake Sent the Planning Process In The Wrong Direction .....	3
The State Deliberately Ignored Best Practices in the Planning Process .....	3
The Public Was Completely Shut Out of the Planning Process .....	5
We Should Not Commit to a New Jail Until We Know How Much Will Cost .....	7
The Utah State Prison: A Cautionary Tale .....	7
The New Jail Will Make Hawaii’s Long-Term Fiscal Problems Worse .....	8
The Operating Costs of the New Jail Are Not Sustainable .....	9
Creating Off-Ramps To Reduce the Jail Population .....	10
P3s Are Not Suitable for Planning Jails .....	14
21 <sup>st</sup> Century Jail Design .....	18
Modern Jails Should Have A Problem-Solving Function .....	19
Intensive Re-Entry Support–The Queens Care Model .....	20
Some Design Elements of a 21 <sup>st</sup> Century Jail .....	20
Conclusion .....	21
Endnotes .....	23

# BETTER IDEAS FOR A NEW JAIL\*

## INTRODUCTION

Within the next few months the State plans to issue a Request for Proposals (RFP) for a public-private partnership (P3) to design, construct, finance, and partially maintain a new jail to replace the Oahu Community Correctional Center (OCCC). The new jail will have approximately 1,300 beds, and will probably cost closer to \$1 billion than the \$525 million estimate that was made three years ago.

The new jail will be one of the most expensive, if not *the* most expensive, public works projects ever undertaken by the State, and it will have a major impact on criminal justice outcomes in Hawaii for decades.

There is a right way and a wrong way to plan a new jail, and unfortunately, Hawaii chose the wrong way. The Departments of Public Safety (DPS) and Accounting and General Services (DAGS) turned to a New Jersey-based consulting firm with very little knowledge of Hawaii to lead the planning effort. The planners ignored best practices, shut the community out of the planning process, focused on bricks and mortar rather than people and programs, and failed to address critical questions about who should be in the jail, and how the State could reduce the jail population and build a smaller and less expensive jail without compromising public safety.

In 2017 the House Concurrent Resolution (HCR) 85 Task Force on Prison Reform warned that planning for the new jail was on the wrong track, and in their final report to the 2019 legislature they sounded the alarm, saying that despite spending millions on planning, the new jail incorporated all of the problems and bad ideas of the old jail and that it would be “a relic of the past the moment it is completed, because no matter how modern it looks from the outside, it will be based on outmoded and obsolete ideas and a failed planning process.” The Task Force found that the new jail was so poorly thought out that the State should convene a group of government and community stakeholders to *start the jail planning process over again* and focus on building “a smart, small, and humane 21<sup>st</sup> century jail instead of the monolithic 19th century jail that is now on the drawing boards.”<sup>1</sup>

More recently the Hawaii Correctional Systems Oversight Commission, whose five members collectively have more than 100 years of experience with Hawaii’s criminal justice system,

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expressed deep concerns about the new jail and called for the creation of an advisory committee of community stakeholders to review, *and if necessary revise*, the planning that has been done to date.

The new jail will be a financial disaster and produce bad outcomes for decades, but it doesn't have to be that way. If we work together we can build a jail that will make our community safer at a fraction of the cost of the jail now being planned. Working together we can build an innovative and transformative jail that will address the inequities of our criminal justice system, save lives, and meet the ever-evolving needs of our community.

But we must act quickly. If we don't stop the procurement process now, we will soon be irrevocably committed to a jail the people of Honolulu had no say in planning, and that is too big, too expensive, and will cause harm to our community as long as it exists.

### **THE JAIL PLANNING PROCESS WAS FLAWED FROM THE VERY BEGINNING**

To understand how the jail planning process went off the rails we have to go back to 2015 when then DPS Director Nolan Espinda announced that the Honolulu Authority for Rapid Transit (HART) had decided to put an elevated rail station near the current OCCC, which meant that the land the jail occupies had become very valuable: "Now that the city plans to run Oahu's elevated rail line past the OCCC site, it is obvious the Kalihi land under OCCC could be put to much more valuable use as a new development rather than a jail site," Espinda said, adding that the idea of moving the facility had support in the House and Senate and that "there are a lot of stars aligning here."<sup>2</sup>

The City and County of Honolulu's 2018 Plan Review Use Permit for the new jail echoed Espinda's comments: "The replacement OCCC frees up important urban land in the populated Kalihi area; the existing OCCC is located within one-quarter-mile from the future Kalihi rail station."<sup>3</sup>

The decision to build a new jail on Oahu was not driven by the fact that the existing OCCC is falling apart and essentially unfit for human habitation: From the very beginning, the idea was to relocate the old jail as quickly as possible so that the land it occupies could be redeveloped.

In their effort to streamline the planning process DPS, DAGS, and their consultants focused almost exclusively on site-selection and the physical features of the jail and gave little or no thought to who should be in the jail, or how it should function within the context of the broader criminal justice system. While Honolulu was focused on building a huge new jail, other cities were focused on reducing their jail populations. A Commission in New York City set a goal of reducing their jail population by more than 50 percent by closing the infamous Rikers Island Jail and replacing it with smaller jails in the city's boroughs.<sup>4</sup> Philadelphia was developing a plan to

cut its jail population in half and address racial, ethnic, and economic disparities in its criminal justice system.<sup>5</sup> New Orleans was working on an initiative to reduce its jail population by 38 percent,<sup>6</sup> and Akron, Ohio was developing a plan to divert low-level offenders from its jail.<sup>7</sup> Similar reform efforts were being undertaken in at least 50 cities, both large and small, across the United States.<sup>8</sup>

## **A CRITICAL MISTAKE SENT THE PLANNING PROCESS IN THE WRONG DIRECTION**

DPS and its consultants made many planning mistakes, but the biggest one by far was to decide that they did not need to examine the policies and practices driving the jail population and address them as part of a comprehensive plan to manage both the jail population and the larger justice system more effectively and efficiently. The magnitude of that error cannot be overstated because it affected every aspect of the planning process, and like taking a wrong turn at the beginning of a journey, it led the planners, and now the entire State, down the wrong path and to the wrong destination.

## **THE STATE DELIBERATELY IGNORED BEST PRACTICES IN THE PLANNING PROCESS**

Virtually all of the problems with the new jail stem from fact that the planners decided not to follow best practice in jail planning, many of which are clearly set out in the National Institute of Correction's *Jail Capacity Planning Guide: A Systems Approach* (2009).<sup>9</sup>

The systems approach views jails as one of many parts of a criminal justice system whose policies and practices determine how the jail is used and how many beds are needed to avoid overcrowding. The systems approach stresses that *the key to long term management of the jail population is directly tied to management of other aspects of the justice system:*

Jails are part of a complex criminal justice system whose policies and practices directly influence total bed need. As such, jail planning cannot be done in a vacuum. Any consideration of future jail bed need must take place within the context of a discussion about how to manage the larger criminal justice system more effectively. ***Jail planning and system planning are one and the same.***<sup>10</sup>

The systems approach shifts the nature of jail planning from simply making population forecasts based on past trends and the assumption that the policies driving the jail population will remain unchanged—the approach used in Hawaii—to developing a continuum of options for law enforcement and judges in which jails are only one option among many, and one to be used sparingly and as a last resort. The systems approach calls on planners to “plan as much for programs as they do for [jail] beds.”<sup>11</sup>

Research has shown that the traditional way we use jails does nothing to reduce future offending. Accordingly, jail planning must move beyond the simplistic formula-based approach that builds beds based on past demands to a results-based paradigm that addresses the many factors that drive the demand for beds.<sup>12</sup>

The systems approach is based on a body of research that challenges the notion that locking people up is the only way, or the best way, to protect the public.<sup>13</sup> It makes the case for a new conceptual framework that “reasserts the primacy of treatment and redefines the system’s response to failure.”<sup>14</sup> It is a new way of thinking about the criminal justice system that makes reducing future crime a central goal and manages the jail population long-term by:

1. Reserving jail for the highest risk defendants;
2. Making available a full continuum of alternatives to jail;
3. Relying on high quality treatment and evidence-based sanctions;
4. Creating strong and effective pretrial and reentry services; and
5. Adopting a positive emphasis on collaboration and systemic change.<sup>15</sup>

Population management strategies that focus on alternatives to jail significantly reduce the jail population, which in turn allows communities to build smaller and less expensive jails. That is important for three reasons.

First, construction cost for new jails are outrageously high. If, as projected, the new jail will cost \$525 million and have approximately 1,300 total new beds, each bed would cost a whopping \$404,000, which is probably the highest per bed cost in the country, if not the world.

Second, although construction costs for a new jail are incredibly high, on average, *they represent only 10% of the overall operating costs of a jail over a 30-year period.*<sup>16</sup> Thus, the key to reducing correctional costs long-term lies in reducing the jail population by providing alternatives to jail, or “off ramps,” at each at each of the key decision points in the criminal justice system.

Third, the Vera Institute of Justice studied counties that built new jails between 1999 and 2005 as a solution to old or overcrowded facilities and found that building a new jail *without addressing the policies driving the jail population* resulted in a vicious cycle in which the new jails that were supposed to reduce overcrowding rapidly filled to capacity, creating a demand for more capacity, and precipitating a costly building cycle.<sup>17</sup> For example:

- In Salt Lake County, Utah, a new 2000 bed jail filled to capacity within 21 days of opening;
- In Tipton County, Tennessee, a newly expanded jail that increased capacity from 122 beds to 201 beds became overcrowded the month it opened.;
- In Jefferson County, Colorado, a 480- bed jail that that was supposed to serve the county for 19 years filled up within five years; and
- In Adams County Colorado a jail that was intended to serve the county for 14 years filled to capacity in two years.<sup>18</sup>

We can only speculate on why the State decided to ignore best practices and use an old and discredited planning process for one of the biggest and most important public works projects in the history of the State, but that is what it has done. The misguided planning process will result in the continued misuse of the jail, a jail that is bigger and more expensive than it needs to be, and a jail that will not reduce future crime or keep our community safe.

## THE PUBLIC WAS COMPLETELY SHUT OUT OF THE JAIL PLANNING PROCESS

*“The best solutions are driven by those who experience and are familiar with the local culture and environment.” –Center for Policing Equity*

Engaging the community in the jail planning process is universally recognized as a best practice and an absolutely essential element of the jail planning process. Community stakeholders bring the aggregated knowledge, skills, intuition, and insights of local residents to solving a collective challenge.<sup>19</sup> This is often called “the wisdom of the community.” Tapping into this wisdom can shape the type of questions that are asked, challenge prevailing norms, and bring about unexpected insights that lead to innovative and transformative solutions.



The National Institute of Corrections (NIC) has said:

Community participation in planning is important because the jail belongs to the community it serves; it is not solely the concern of the sheriff or director of corrections. The type of facility a community builds and the way it is used are as much a reflection of community values as they are of local, state, and federal



laws. It is common for stakeholders such as victim advocates, business leaders, the clergy, educators, and elected officials to actively participate on the community advisory committee.<sup>20</sup>

The MacArthur Foundation also emphasizes the importance of a collaborative process in jail planning:

COLLABORATE. The first step is to ensure that the local justice system is truly functioning as a system. Policymakers must step out of their silos and consider how the different elements of the system interrelate, and how each contributes to public safety outcomes. This can take time and energy but reap rewards in the form of trust and collaboration, so that organizations have a shared understanding of the system, both as it exists now and what it can be in the future.

...

Affected groups must be on board to advance the new way of doing business, and to move forward despite barriers and setbacks. Engaging the community, the workforce, and other interested groups doesn't happen on its own. As motivation for change starts to build, conversations can begin with affected parties. Transparency and genuine opportunities for input by constituent's support engagement.<sup>21</sup>

The Justice Management Institute has found that a “culture of collaboration is one of the shared characteristics of successful justice systems,” and in this context collaboration means more than just having meetings: it means “working together toward a common purpose—sharing a vision, preparing a plan, and implementing the plan to achieve agreed upon outcomes.”<sup>22</sup>



The OCCC Planning Team does not include any community stakeholders or representatives. (DPS photo).

The planners at CGL/Ricci Greene Associates, one of the country's leading justice architectural firms, likewise stress the need for a collaborative approach to jail planning: “Successful jurisdictions use a collaborative approach to planning that include representation of *all actors in the criminal justice system and the community* including advocates, judges, administrators, legislators, prosecutors, the defense bar, correctional officers, program operators, and community members. The “buy in” from key stakeholders is *absolutely essential*.<sup>23</sup>



The HCR 85 Task Force specifically found that the State and its consultants did not engage the community in the jail planning process in a meaningful way,<sup>24</sup> and that is surely a prescription for failure.

## **WE SHOULD NOT COMMIT TO BUILDING A NEW JAIL UNTIL WE KNOW HOW MUCH IT WILL COST**

DAGS has said the jail will cost \$525 million,<sup>25</sup> but that was back in 2018, before construction costs started to rise. Since then they have increased dramatically due to a steep rise in the cost of materials, snarled supply chains, tariffs on steel and aluminum, and producer staffing shortages due to the pandemic.

The leading association for the construction industry, Associated General Contractors of America (AGC), recently reported that the producer price index (PPI), which measures the average changes in prices received by domestic producers for their output, increased 26.3% from June 2020 to June 2021, and even that steep increase understates the severity of the problems facing the construction industry which has seen the index for lumber and plywood increase 101%, the index for steel increased 88%, for copper and brass 61%; and for aluminum 33%.<sup>26</sup> The high prices are expected to persist well into the future.<sup>27</sup>

The AGC warns that in addition to significant price increases, contractors are experiencing completely unreliable delivery times and that owners should start their projects with realistic expectations about current costs and the likelihood of increases.<sup>28</sup>

## **THE UTAH STATE PRISON: A CAUTIONARY TALE**

In 2017 Utah broke ground on a new, 4,000-bed state prison outside of Salt Lake City. The new prison was considered state of the art and was projected to cost \$550 million.<sup>29</sup> After years of planning, state legislators were pleased that construction was finally underway and Salt Lake City leaders were satisfied with the project despite their initial opposition to building the prison near their city.<sup>30</sup>

But beneath the buoyant optimism there was an undercurrent of concern. As the new prison broke ground, the city's nearby airport expansion project was \$350 million over budget and construction costs in the area were up 12%.<sup>31</sup> Jim Russell, the state official overseeing the new prison said he was concerned about the cost increases but confident they could be managed. State Senator Jerry Stevenson, who co-chaired the legislature's Prison Development Commission, acknowledged that higher construction costs were "very possible" but said it was an issue the legislature would address when and if it arose.<sup>32</sup>

By April of 2019 the cost of the new prison had risen from \$550 million to \$800 million<sup>33</sup> and construction costs were running 18% to 20% higher than anticipated, but by that time it was too late to do anything about it. Senator Stevenson said that the legislature did not want to come up with the additional funds but “we’re way past the point of no return on this. We’re going to have to finish it now.”<sup>34</sup>

Utah’s new prison is now almost complete. The final cost has not been tabulated but it is expected to come in at about \$1 billion, depending on the final procurement process.<sup>35</sup> That’s an 80% increase over the original cost estimate.

Officials blame the high cost on tariffs on China, the pandemic, labor shortages, and supply chain issues. “We’ve had now 42% escalation [in construction costs] since 2015 when it [the prison] was first funded until now,” Russell said. “All in all, I think we’ve done a fantastic job with where we’re at. The budget could have been much more . . . *it should have been \$1.3 billion.*”<sup>36</sup>

The Utah State Prison is the canary in the coal mine. DAGS’ \$525 million cost estimate for the new jail is three years old and has never been updated to account for the increased cost of materials, delivery delays, and overall price increases in the construction industry. The 2018 estimate is undoubtedly too low, but we do not know how low. We simply don’t know how much the new jail will cost, so there is no way to determine if it will be worth the price, or if a P3 is a better financing option than the traditional procurement process.

## **THE NEW JAIL WILL MAKE HAWAII’S LONG-TERM FISCAL PROBLEMS WORSE**

In 2019 a committee of economists, scholars, and fiscal experts from the Hawaii Executive Council issued a report, *Troubled Waters: Charting a New Fiscal Course for Hawaii*, that documents the enormous fiscal challenges facing Hawaii’s State and local governments in the next 30 years.<sup>37</sup> The Committee found that future costs in three critical areas—mitigating the impact of climate change, developing and maintaining infrastructure, and honoring public employee retirement benefits—will exceed \$88 billion, and that revenues will not be sufficient to meet those needs.

Today, the cost of operating government is getting more expensive while Hawaii’s economy has not kept pace with the rest of the nation. Between 2012 and 2018, the cost of State government increased 41% despite the number of employees remaining relatively flat. During this same period, Hawaii’s economy grew 9.8% or 1.6% annually compared to the national rate of 2.4%. DBEDT forecasts GDP growth of 1.1% in 2019 and 1.2% in 2020. Faced with these economic conditions, State and county governments cannot continue to operate in such a manner. *Government will simply be too expensive to conduct business as usual.*<sup>38</sup>

The report calls for government and the private sector to collaborate, innovate, and create a strategic vision to address the serious fiscal challenges facing the State.<sup>39</sup>

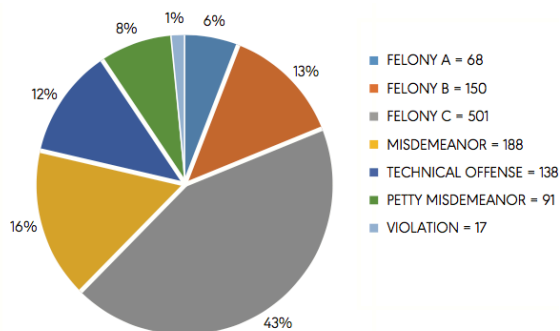
Honolulu has a wealth of innovators and thought-leaders from business, labor academia, non-profits, and other interest groups who are ready to share their knowledge, experience and insights in a collaborative effort to improve our criminal justice system and plan and design a jail that will meet the needs of our State ***without putting a huge financial burden to the next generation.*** It would be foolish not to tap into this reservoir of knowledge, experience, and insight in planning the new jail.

### THE OPERATING COSTS OF THE NEW JAIL ARE NOT SUSTAINABLE

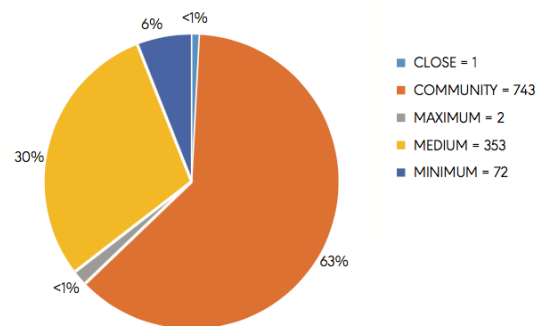
In June, 2021, the DPS and DAGS received a report from one of their consultants that said “assuming there are no changes in our criminal justice or correctional policies,” by 2024 the average daily population (ADP) of the new jail will be 1,237 inmates, and that the ADP would decrease to 918 inmates by 2032.<sup>40</sup>

It now costs \$219 a day to house an inmate in Hawaii.<sup>41</sup> That cost will almost certainly increase, but using the current figure, by 2024 the OCCC population will cost the State, on average, \$271,000 a day (\$99 million a year) decreasing to \$201,000 a day (\$73 million a year) by 2032 (assuming current costs). The lease rent on the new jail—which will include the private partner’s profit—will also have to be factored into the cost of operating the new jail.

Eighty-one percent of the men in OCCC are charged with low-level (class C) felonies or lesser offenses—misdemeanors, petty misdemeanors, technical offenses, or violations. Nearly 70% are in one of the two lowest security classifications—community custody (63%) and minimum security (6%),<sup>42</sup> and 23% are men who violated a condition of probation but did not commit a new crime.<sup>43</sup>



Severity Classification by Gender (Men)



Security Classification by Gender (Men)

There is no rational reason for keeping so many non-dangerous, low-level offenders in jail at such a high cost. We can't afford it, and it simply doesn't make sense. We should reduce our jail population as other jurisdictions across the country have been doing for years.

## CREATING "OFF RAMPS" TO REDUCE THE JAIL POPULATION

The key to reducing the jail population is to have alternatives to jail, or "off ramps," at key decision points in the criminal justice process. A full discussion of this topic is beyond the scope of this paper, but what follows are a few "off ramps" that have been discussed in Hawaii and should be carefully considered before the State builds a costly 1,300-bed jail.

### ■ *Issue Citations Lieu of Arrest*

Police officers currently have discretion to issue a citation in lieu of arrest for misdemeanors, petty misdemeanors and violations.<sup>44</sup> In 2018 the HCR 134 Task Force on Criminal Pretrial Reform recommended that the legislature expand police officer's discretion to include issuing citations for non-violent, class C felonies.<sup>45</sup>

Expanding the use of citations to non-violent class C felonies will reduce the number of people who are taken into custody and ultimately reduce the number of people who end up in jail.

### ■ *Establish A 24/7 Island-Wide Crisis Response Team*

Honolulu is one of many cities whose health care and criminal justice systems are challenged by a high volume of people experiencing a behavioral health crisis . In most cases the police and fire departments are called on to responded to these people, and in many cases the person in crisis ends up at the cell block and then in jail.

To address this problem the City and County of Honolulu recently launched a Crisis Outreach Response and Engagement (CORE) program that will use a team of emergency medical technicians and community health workers to respond to non-violent emergency calls about people in crisis.<sup>46</sup>

That is a good idea, but unfortunately the program has been scaled back from the original concept. Instead of operating 24/7 it will operate only 12 hours a day, instead of operating island-wide it will only operate in Waikiki and Chinatown, and the response team will not include a social worker as originally planned.<sup>47</sup>

Honolulu needs an effective, island-wide, 24/7 crisis response team. The goal should be a program that is as effective as the CAHOOTS (Crisis Assistance Helping Out On The Streets) program in Eugene Oregon that keeps people in crisis out of jail and saves the city millions of dollars every year.<sup>48</sup>

### ■ *Expand Diversion Programs*

Diversion is one of the most important strategies for improving the lives people who need help, and at the same time reducing the jail population. Honolulu should have at least two types of diversion programs:

**1. A Triage Center for People in Crisis.** Triage centers are for people who are experiencing a mental health or drug-related crisis. They are open 24/7 and are staffed by mental health professionals. The primary function of the center is to provide stabilization and case management services. The best centers accept walk-in patients and patients brought in by emergency medical personnel, mobile crisis intervention units, law enforcement, and family members or friends. Triage centers are characterized by a streamlined admission process (less than 15 minutes) and a “no wrong door” policy (patients are not turned away). Triage centers are designed for stabilization rather than extended care.

**2. Diversion Centers.** Diversion centers provide case management services to people who are not in crisis but have chronic social, economic and medical needs, and people who have engaged in criminal activity related to poverty, addiction, mental illness, and homelessness. Pre-arrest diversion centers help people get back on their feet and reduce the chances that they will reoffend. They are effective in reducing the jail population and making communities safer.

A triage center and effective island-wide prearrest diversion centers would address the needs of the thousands of Oahu residents who are not getting the care and services they need, and significantly reduce our jail population.

### ■ *Enact Bail Reform*

A key decision point in the criminal justice system occurs when a person who has been arrested appears before a judge who determines whether the person should be released pending trial, or remain in custody until their case has been resolved. The pretrial release/detention decision is critically important to the defendant because studies have shown that “[j]ust a few days in jail can increase the likelihood of a sentence of incarceration and the harshness of that sentence, reduce economic viability, promote future criminal behavior, and worsen the health of those who

enter—making jail a gateway to deeper and more lasting involvement in the criminal justice system at considerable costs to the people involved and to society at large.”<sup>49</sup>

For the disproportionately high number of people who enter jails from minority communities or who suffer from mental illness, addiction, and homelessness “time spent in jail exacerbates already difficult conditions and puts many on a cycle of incarceration from which it is extremely difficult to break free.”<sup>50</sup> Defendants who cannot make bail are at risk of losing their jobs, and with it the income that supports their children, pays their rent and utilities and puts food on the table. In the long run they can also lose their house or apartment, health insurance and custody of their children. After maxing out their credit cards, a family may end up deep in debt or even homeless.

In our society liberty is supposed to be the norm and detention prior to trial the exception, but in practice, just the opposite is true. A 2018 study by the ACLU-Hawaii found that overall judges in Hawaii required bail as a condition of release in 88% of cases, and in the majority of those cases it was set at a level the defendant could not afford.<sup>51</sup>

Almost half the people in OCCC are there because they cannot afford bail. In the six month period from April 1 to September 30 , 2021 pretrial detainees at OCCC cost the State, on average, \$113,000 a day. If we include the pretrial detainees in neighbor island jails the cost goes up to \$200,000 a day.

The use of money bail is often justified on the grounds that it makes us safer by keeping dangerous people in jail, but a report from the 2018 Criminal Pretrial Task Force chaired by Hawaii circuit judge (now U.S. magistrate) Rom A Trader found that “[t]here is virtually no correlation between the setting of a particular bail amount and whether the defendant will commit further crime or engage in violent behavior when released from custody. *Thus, money bail is a poor method of assessing and managing a defendant’s risks.*”<sup>52</sup>

To create a truly just pretrial system, we must end money bail. That is not a radical idea. The federal government did it, and many jurisdictions have moved in that direction:

- The District of Columbia releases 94% of the people who are arrested without bail. Of those released, 91% make their scheduled court dates and 98% are not arrested for a violent crime while awaiting trial.
- Since 2017 New Jersey has rarely imposed money bail as a requirement of release. Last year the Chief Justice of the New Jersey Supreme Court reported that bail reform in the state was working “admirably and well,” court appearance rates exceeded 90%, and the percentage of defendants on pretrial release who are charged with indictable criminal activity remained “consistently low.”<sup>53</sup>



- In February, 2021 Illinois completely eliminated money bail as part of a sweeping criminal justice reform bill that includes changes to every part of the justice system, from police accountability to sentencing.<sup>54</sup> The no bail law will not go into effect until 2023 to allow time for challenges to the bill and to train judges on how the new law should be applied.

It is time to quit tinkering with our money bail system in the hope that it will somehow become fair, equitable and just. It won't. If we want a truly just pretrial system, we have to end money bail.

We should eliminate money bail completely, but at the very least we should eliminate it for select non-violent class C felonies, misdemeanors, petty misdemeanors, and violations.

Judges should also be encouraged to release pretrial defendants on unsecured bail pursuant to HRS § 804-9.5 (2019). To our knowledge very few defendants have ever been released under this statute even though it has been the law for more than two years.

### ■ *Make Possession of 2 Grams Or Less of a Dangerous Drugs a Misdemeanor*

HRS §712-1243, Promoting a Dangerous Drug in the Third Degree (commonly referred to as “PDD3”), makes possession of “any dangerous drug *in any amount*” a class C felony punishable by up to five years in prison and a \$10,000 fine. The term “any amount” in HRS §712-1243 includes amounts as small as the residue found in a pipe.<sup>55</sup>

PDD3 is one of the most commonly charged drug crimes. In 2020 the Hawaii Paroling Authority set more than twice as many minimum sentences for PDD3 than for all other drug crimes combined.<sup>56</sup> The average minimum sentence was 2.72 years, with sentences ranging from 1 year to 4.3 years.<sup>57</sup> PDD3 is often charged when an individual with a substance use disorder is arrested on a minor charge, and during the custodial search police find a small amount of a dangerous drug in the defendant's possession.

The Legislature should enact SB 527, Thirty-First Legislature, 2021, that establishes a new misdemeanor offense of Promoting a Dangerous drug in the Fourth Degree for possession of small amounts of a dangerous drug, and limits the class C felony of PDD3 to possession of two grams or more of a dangerous drug.

Moreover, we should recognize that addiction is a complex, multifactorial health disorder that is preventable and treatable *and “not the result of moral failure or a criminal behavior.”*<sup>58</sup> We should treat substance use disorders as a public health rather than a criminal justice problem, implement evidence-based prevention and treatment programs, engage scientific experts and diverse stakeholders in coordinated policy making, support drug-related research, and ensure access to scheduled medications for therapeutic use.<sup>59</sup>

## ■ *Stop Housing Probation Violators in the Jail*

In the six months prior to the outbreak of the coronavirus pandemic in Hawaii (November 30, 2019 - April 30, 2020) there were, on average, 312 male probation violators at OCCC. The average daily cost to house the male probation violators was \$68,000 a day. Almost all of the men were in the HOPE probation program and were serving short sentences for violating program rules, *not because they committed a new offenses*.

In 2018 the HCR 85 Task Force on Prison Reform recommended that the State consider housing probation violators in dormitories or assigning them to community-based facilities where the reasons they violated the conditions of their probation could be addressed by mental health and/or addiction treatment professionals and hopefully remedied.”<sup>60</sup>

Before building 300 or more beds in the new jail for probation violators at a cost that would probably be in the neighborhood of \$120 million,<sup>61</sup> the State should follow the recommendation of the HRC 85 Task Force and explore other housing arrangements for HOPE probation violators.

## ———— P3s Are Not Suitable For Planning Jails ————

P3s may be suitable for projects like toll roads, bridges, and sewage treatment plants, but they are not appropriate for jails because jails require system planning. Before an architect picks up a pencil or puts a single mark on a piece of paper, a planning team that includes government officials *and community stakeholders* must arrive at a shared vision of a successful criminal justice system and define the function of the jail within that system. Architects sometimes describe this process with the maxim “Define Before You Design.”

In defining the role of the jail, the planning team must drill down on criminal justice data, identify the policies and practices driving the jail population, and plan for the expansion of alternatives to incarceration.<sup>62</sup> Jail planning decisions have a broad impact and in many ways define the community of which the jail is a part—its values, vision, goals and aspirations. As such, jail planning can and must be done by the community, and the community alone: It cannot be outsourced to a corporation under a P3 contract.

The best way to design and build a successful jail is for the planning team to work closely with a good architect. In 2020 the American Institute of Architects (AIA) amended its Code of Ethics and Professional Conduct to include prohibitions against designing spaces intended for torture and indefinite or prolonged solitary confinement,<sup>63</sup> and in 2021 the New York Chapter of the AIA went a step farther and called on all architects to stop designing “inherently unjust, cruel,

and harmful spaces” and to shift to the creation of “new systems, processes, and typologies based on prison reform, alternatives to imprisonment, and restorative justice.”<sup>64</sup>

The State should work with architects who have a track record of designing smart and humane spaces and who adhere to the ethical principles of the New York Chapter of the AIA. The architect who designs the jail should be willing to work closely with the community to ensure that the design of the jail aligns with community values and promotes the outcomes the community wants. P3s do not allow that to happen and *they should never be used to plan or design jails.*

Three other reasons why P3s are not a good idea for designing and building jails are:

- There is no reliable way to test whether a private sector proposal to deliver public infrastructure offers value for money compared to delivery of the same project by the public sector using conventional public procurement. Tools that purport to make such comparisons, called Public Sector Comparators (PSCs) tend to be unreliable due to: (a) lack of data on which to base cost estimates; (b) the difficulty of quantifying risks; (3) a lack of consensus on what discount rate to use for payments spread out over time; (4) the use of subjective judgments that can have a dramatic effect on cost estimates; and (5) the high cost of the modeling process.<sup>65</sup>
- The contract between the private company and the State would likely last 30 or more years during which time the State’s correctional needs will undoubtedly change. P3s typically restrict how their facilities can be used, and that severely limits a government’s ability to respond to changing conditions.<sup>66</sup> If the State owned the facility it could modify it to meet its changing needs, or it could even repurpose or dispose of the facility entirely.
- Jails must be carefully maintained to protect the health and safety of inmates and staff, but there is a tendency for corporate owners to save money by ignoring problems or deferring maintenance at the public partner’s expense.<sup>67</sup>

**P3s Lack Transparency.** In addition to the forgoing, one of the most troubling aspects of P3s is their lack of transparency and accountability. Alabama’s ill-fated partnership with CoreCivic\* highlights the problem.

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\* CoreCivic (formerly known as Corrections Corporation of America) owns and operates the Saguaro Correctional Center in Eloy, Arizona, that houses approximately 1,100 Hawaii prisoners. The State of Hawaii has maintained a business relationship with CoreCivic or more than 20 years.

In 2019, Alabama Governor Kay Ivey announced that to reduce prison overcrowding she was seeking proposals from private corporations to design, finance, build and maintain two new prisons and lease them to the Alabama Department of Corrections (ADC) which would operate them with State employees. In soliciting and screening potential private partners, the Ivey administration promised that “any information received in response to the solicitation/request will not be publicly available until final contract(s) has received all approvals.”<sup>68</sup> In other words, there would be no public scrutiny of the partnership agreement until it was signed, sealed and delivered and it was too late for the legislature or anyone else to change it.

In the ensuing months the Ivey administration selected CoreCivic as the private partner and entered into confidential negotiations on the cost of the new prisons.

State representative Rich Ringo, a Republican like Governor Ivey, complained about the secret negotiations and said that at the very least the legislature was entitled to know the developer’s profit margin.<sup>69</sup>

Representative Arnold Mooney, another Republican, said that lawmakers were being kept in the dark and asked rhetorically how they could carry out their fiduciary responsibilities to protect taxpayers without knowing anything about the P3 contracts or the cost of the prisons.<sup>70</sup>

Student and community groups sought information about the project but the State rejected their open records requests and insisted that secrecy was necessary to protect the integrity of the P3 process.<sup>71</sup>

On February 1, 2021 Governor Ivey announced that her administration had reached an agreement with CoreCivic and signed contracts that obligated the State to pay approximately \$3 billion to lease two prisons for 30 years.<sup>72</sup> Under the agreement the prisons would be financed, constructed, maintained and owned by CoreCivic, staffed by the Alabama Department of Corrections, and would be ready for occupancy by 2025.<sup>73</sup>

The version of the contracts that were released to the public on February 1 contained scant information about the terms of the agreement or the responsibilities of the parties. In a press release the Ivey administration said that “trade secrets and security-related information would not be disclosed” and that final lease costs would become available only when “financial close is achieved with CoreCivic.”<sup>74</sup> A Fact Sheet said that “[a]s is common in a project of this size, the parties will continue to engage in confidential negotiations during the Financial Phase designed to refine the scope and price of the project.”<sup>75</sup> An entire Exhibit to the contract that was supposed to contain information on how CoreCivic would obtain financing for the project was marked “Confidential.”<sup>76</sup>

Perhaps worst of all, the agreements had virtually no information on critical elements of the project such as the design of the prisons, maintenance and utilities management, environmental and sustainability services, plant services, and roads, grounds, and landscaping services.<sup>77</sup>

Alabama State auditor Jim Zeigler said the contracts would “make a handful of developers multi-millionaires at the expense of Alabama taxpayers” and said he would try to stop construction of the new prisons.<sup>78</sup>

In early April, 2021, Barclays, the London financial services firm that was the primary underwriter for the prison project, tested the waters and found that there was weak support for municipal bonds to fund new prisons in Alabama. Barclay’s also experienced a wave of criticism from the financial community and the public because it had previously agreed that it would not participate in bond offering to build prisons.<sup>79</sup>

On April 12, 2021, 43 business leaders, investors and activists signed a letter urging banks and investors to refuse to purchase bonds for the new prisons on the grounds that they would “perpetuate mass incarceration.”<sup>80</sup> Signers included AllianceBernstein, a firm with \$700 billion in assets under management, which announced that they would not participate in the offering because it contravened their policy against “modern slavery.”<sup>81</sup>

And in an unprecedented move, the American Sustainable Business Council and its partner, Social Venture Circle, which together represent over 250,000 businesses, returned Barclay’s membership dues and sponsorship to protest the deal.<sup>82</sup> MaryAnne Howland, the American Sustainable Business Council’s board chair announced the move, saying “We abhor the hypocrisy represented here and renounce the continued investment in the broken, unjust system of incarceration of this country.”<sup>83</sup>

On April 19 Barclays announced: “We have advised our client that we are no longer participating in the transaction.”<sup>84</sup> A short time later KeyBanc Capital Markets, Inc. a co-manager on the deal also announced its withdrawal, and the whole P3 collapsed.<sup>85</sup>

Hawaii is heading down the same treacherous and misguided path as Alabama. It is seeking a similar P3 and it is managing the P3 process with the same degree of secrecy that plagued the Alabama project. In October DPS and DAGS announced that had issued a Request for Information (RFI) to obtain feedback on the new jail. It received responses from 22 contractors, designers, financiers, equity investors, and others *but it has not released the names of any of the respondents or what they said about the project.*<sup>86</sup>

The State is now preparing to issue a Request for Qualifications (RFQ) to determine which companies will be allowed to participate in the RFP next year. We can expect that the RFQ, will

be cloaked in the same secrecy as the RFI, and that DPS and DAGS will continue to plan the new jail in secret.

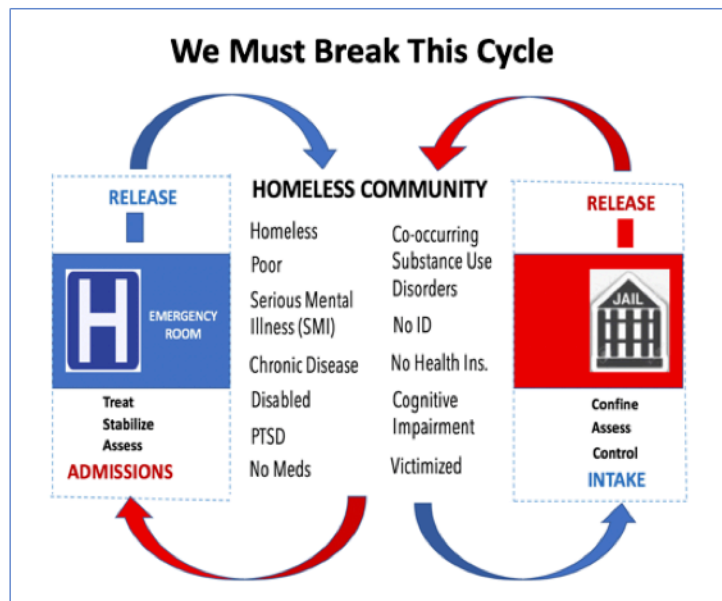
It is time for legislators and the public to step up and demand transparency in the planning of the new jail and *put an end to the secret P3 process.*

## 21<sup>ST</sup> CENTURY JAIL DESIGN

Architect Louis Sullivan’s adage “form follows function” raises the question “What should be the function of a jail in the 21<sup>st</sup> century, and what form should it take?”

The way jails are used today has been shaped by two major events. The first was the closing of state mental health hospitals or “asylums” as they were known, in favor of community-based treatment for the mentally ill. The “deinstitutionalization” of the mentally ill was a well-intentioned policy given the deplorable conditions in state mental hospitals, but it didn’t work. There was not enough money for the community-based centers, so they never materialized, mental health professionals underestimated the difficulty of coordinating care for the mentally ill, and court decisions made it difficult to commit very sick people against their will.

As a result of deinstitutionalization, many mentally ill people went untreated and ended up living on the street, a situation that exists to this day. In 2016 the Honolulu Police Department reported that 43% of all arrests were homeless people and that 72% of the homeless people in the police cellblock were mentally ill or on drugs.<sup>87</sup> Eighteen percent of the homeless population of Oahu say they have mental health issues,<sup>88</sup> and about 700 individuals diagnosed with Severe and Persistent Mental Illness (SPMI) are admitted to OCCC each year.<sup>89</sup> DPS estimates that between 9.5 % and 12% of the OCCC population are mentally ill, and on average these people cycle through the jail about once every four months, with some cycling through *every six weeks.*<sup>90</sup>





The second major event was the passage of highly punitive state and federal laws beginning in the 1970s in response to rising crime rates and a period of tumultuous political and social change.<sup>91</sup> From 1970 to 2000 Hawaii's combined jail and prison population increased 670 percent, and the incarceration rate increased 400 percent.<sup>92</sup> "Hawai'i didn't just follow mainland 'tough on crime' trends, it led them."<sup>93</sup> In the 1980s the average annual increase in Hawaii's prison population was the second highest in the nation.<sup>94</sup>

Today our jails function as *de facto* mental hospitals and temporary shelters for people who are homeless, too poor to make bail, and have chronic illnesses and substance use disorders.

### ■ *Modern Jails Should Have a Problem-Solving Function*

There are emerging paradigms in the criminal justice system that focus on problem solving and reducing recidivism rather than punishment.<sup>95</sup> A few examples are:

- Treatment Courts that offer alternatives to incarceration for offenses related to drug use, mental illness, domestic violence, and issues that specifically affect veterans and youth.
- Community Courts that provide alternatives to jail for low-level offenses;
- Equity Centers that support, health, arts, education and job training for those leaving prison and re-entering society;
- Restorative Justice programs that focus on rehabilitation through reconciliation with victims, family members, and the community at large;
- Peacemaking Programs modeled on Native American practices that seek to resolve disputes, heal relationships, and restore balance to the community; and
- Parent Support Programs that help non-custodial parents find employment, increase child support payments and engage with their children.

Jails in the 21<sup>st</sup> century should have a problem-solving function and be part of the problem-solving continuum, though positioned at the far end of the spectrum and used as a last resort.

Assuming that Hawaii enacts reasonable bail reform, pretrial detainees, who make up between 40% to 50% of the jail population, will not remain in jail more than a few days, and certainly no longer that it takes for a pretrial report and risk assessment to be prepared for a judge. During that time detainees' physical, mental, and economic needs should be assessed by case managers at the jail. The case managers should ensure that prior to release detainees have a discharge plan that, at a minimum, includes a place to live, health insurance, a primary care physician,

medication, a cell phone to stay in contact with court personnel, and access to drug or mental health programs if appropriate.

Hawaii's jails house a relatively small number of felons, misdemeanants and felony probationers who are sentenced to incarceration for a period of less than one year. Their needs should also be assessed, and treatment should begin while they are serving their sentence. They should also have a comprehensive discharge and reentry plan to ensure continuity of care when they are released.

### ■ *Intensive Reentry Support – The Queens Care Coalition Model*

Some of the people who are released from jail can access services on their own, but some will need extra help which should be provided by a program modeled on the work of the highly successful Queen Care Coalition (QCC). QCC uses community health workers as “navigators” to link high utilizers of the Queens Medical Center’s Emergency Department (ED), many of whom are chronically ill and unsheltered, to services in the community with the goal of improving their health and well-being and reducing their use of the ED.<sup>96</sup>

The QCC navigators have strong communication skills. They carry a small case load of 10 to 12 clients and adhere to harm reduction principles. They meet their clients “where they are at,” build trust, create an agreed upon action plan, and work on overcoming challenges incrementally. They help their clients navigate the complex benefits system, connect them to a primary care physician, and find housing for them if they are ready for it. They sometimes attend doctors’ appointments with the client, take them shopping, and even show them how to prepare simple meals—whatever is needed.

The program works. In the period January 2018 to September 2019 QCC served 322 individuals. In this group, utilization of the ED decreased by 53% and the number ambulance transports to the hospital dropped 54%.<sup>97</sup>

The manager of the QCC program has said that the model of small caseloads, frequent contact, harm reduction, and goals driven by the patient rather than those assisting them, can be adapted to reduce recidivism by people who repeatedly cycle through our jails without ever getting care they need.<sup>98</sup> Navigators should be part of the reentry process for those who need extra help.

### *Some Design Elements of a 21<sup>st</sup> Century Jail*

For many architects, designers and planners, Halden prison in Norway is the model of good correctional planning. Although it is a prison, not a jail, its design principles and many of its design features are applicable to both types of facilities.

The aim of the design is an environment that supports rehabilitation. Safety and order are maintained through “dynamic security” in which staff and inmates interact constantly and staff serve as role models for inmates. Activities are scheduled to avoid monotony and boredom. The facility is designed to mirror life on the outside to the greatest extent possible so that prisoners do not become institutionalized. The government agencies that provide employment, health, housing, vocational rehabilitation and other services to the general public, provide their services people who are incarcerated.

Interior features include spacious single-occupancy cells with tall vertical windows to admit natural light; wooden furniture (bed, desk, chair, bookcase, storage area); safety glass windows (no bars); the use of materials that dampen sound and provide good acoustics; modules limited to 10 inmates who share a common living area or day room furnished with normal furniture and a television; spaces specifically designed for education, leisure and worship; indoor and outdoor exercise areas; a library; and comfortable areas for contact visits with family and attorneys.



Single Occupancy Cell, Halden Prison

Prisoners should have access to thoughtfully landscaped outdoor spaces. A recent study has shown that prisons with a higher presence of green space have lower levels of self-harm, and lower level of prisoner-on-prisoner and prisoner-on-guard violence.<sup>99</sup>

The jail should have a courtroom for hearings and bench trials. That would reduce transportation costs, the security risks associated with prisoner transportation, and would expedite case processing and reduce length of stay in the jail.



Open space, Halden Prison

Severely mentally ill people should *not be housed in a jail*. They should be housed in a facility specifically designed for the mentally ill and staffed by mental health professionals.

In general, the 21<sup>st</sup> century jail is designed to respect the physical needs, health, dignity, and human potential of all who come in contact with it, including staff, visitors, service providers, and detainees.<sup>100</sup>

## CONCLUSION

Planning a new jail provides a unique opportunity to rethink and improve important elements of our criminal justice system in ways that will reduce our jail population and recidivism rate, save money, improve the well-being of people struggling with physical, mental and economic issues, and make our community safer. We should not squander that opportunity by rushing to build a jail that looks backward rather than forward and leaves in place the many antiquated and misguided policies and practices that perpetuate our overreliance on incarceration as a means of dealing with complex social and economic issues.

Planning a new jail must be part of a larger process of planning alternatives to jail. We must increase our capacity to help people while making every effort to reduce the harm that jails cause.

The collective wisdom of community stakeholders must be an integral part of the planning process because the best solutions come from people who know the local culture and environment. The people who have been planning the new jail thus far have underestimated and devalued the wisdom of Hawaii's people and their ability to collaborate and find innovative and transformative solutions to the problems facing our community.

Jails define who we are, what we believe in, and how we treat each other. We should never outsource our values to a corporation or let a corporation define who we are.

Decisions about the type of jail we build, who is in it, and how it is used, are not political or financial decisions, they are moral decisions, and it is clearly immoral to build a jail we know will cause harm, when we can just as easily, and far less expensively, build a jail that will mitigate harm and improve the well-being of members of our community.

We must join together now to stop the State from issuing an RFP for the new jail, and start planning a jail that we can afford and that reflects our values.

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