

# Paid in Full: A Plan to End Money Injustice in New Orleans

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**The following organizations endorse this report  
and its recommendations:**

ADL South Central Region  
ALAS  
American Civil Liberties Union of Louisiana  
ATD Fourth World Movement  
by DeSign (formerly BAR NONE)  
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Daughters Beyond Incarceration (DBI)  
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and its projects Stand with Dignity,  
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Urban League of Louisiana  
Welcoming Project  
Women with A Vision

## From the Director

Two and a half years ago, Vera published *Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans*. For the first time, researchers captured the staggering burden of bail, fines and fees—a dynamic we've come to refer to as money injustice. This report updates those findings, describes the progress that's been made and the harms that still flow, and offers a blueprint for ending money injustice once and for all—recommendations that, if followed, will keep hard-won dollars in the pockets of low-income New Orleanians and could decrease the local jail population by 56 percent, or even more.

Right now, residents with little money to spare, the majority of them black, pay to help keep a broken justice system running to the tune of almost \$9 million annually, not even including what people pay for minor municipal and traffic offenses. That's for those who can pay what the system demands. For the others, reliance on money bail in particular leads to unfair, unnecessary, and harmful incarceration. Again, black New Orleanians are overwhelmingly shackled—a deep affront in a city that desperately needs to invest in racial equity, not undermine it.

Poor and low-income black people and their families suffer most. But jailing people unnecessarily—a misuse of resources that all New Orleanians subsidize with tax dollars—impacts everyone. It leads to more, not

less, crime in the city because even short periods of detention destabilize people's lives, increasing the likelihood they will commit crimes in the future. Money bail also jeopardizes public safety when people who pose a significant danger to others are able to buy their way out of jail. In New Orleans, 65 percent of people arrested for the most serious crimes or who are flagged as high risk for other reasons avoid jail by paying bail. Although only a small number of them pose an imminent threat, the current system lacks the capacity to reliably identify and detain those who do.

Money injustice is not unique to New Orleans—it's pervasive nationally—but it is particularly acute and pernicious here, where revenue from bail, fines and fees is used to fund the court system. Judges therefore face an untenable conflict of interest that's baked into the institution in which they work: how can they follow the law when the court as a whole depends on following the money? Last August, two different federal courts said they cannot; no matter a judge's efforts or intentions, the institutional conflict violates defendants' right to due process of law.

The shadow that money injustice casts over New Orleans is lightened by the extraordinary opportunity for reform before the city today. Historically, one out of every four dollars in the Orleans Parish Criminal District Court budget came from overwhelmingly

poor defendants and their families. Then last year, at the urging of Criminal District Court judges who recognize the injustice of the status quo, the mayor and city council provided additional funding for 2019 designed to replace this “user-generated” revenue. This shift in funding policy is a watershed moment for justice reform in New Orleans. With direct funding for justice, the court, which is the lynchpin of deep and lasting reform, can take money out of the equation when making decisions about pretrial release and detention and also when sentencing people.

At the center of this report is a plan for doing just that: pragmatic changes in court practice that are fair to all and truly promote public safety. And the cost for greater safety and justice? Far less than what the city and its taxpayers are paying now, primarily because people who pose no danger to anyone will no longer be jailed simply because they can't pay bail. The dollar savings resulting from reduced incarceration can be used to provide stable replacement funding going forward for the district attorney and public defender,

as well as for the court, so that all three agencies are fully funded to focus on safety and justice.

With the system *Paid in Full*, there's nothing standing in the way of transformative change except the challenge of change itself. New Orleans Criminal District Court judges, the mayor, and other city officials are poised to become trailblazers within Louisiana and leaders nationally by implementing the first comprehensive, locally grown approach to ending money injustice. We at Vera hope this report serves as a helpful guide. Whether you're someone who cares most about public safety, justice, racial equity, or the fiscal accountability of government, that new path is a far better one.



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# I. Introduction: Challenging money injustice

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The role that money plays in criminal justice systems across the country has come under increased focus in recent years, a level of scrutiny that shows no signs of abating and is appropriate to the depth and breadth of the problem. State and local systems are extracting money, or trying to, from people who by and large are already struggling economically. Steep costs are levied early on in the process in the form of money bail, which becomes a requirement for release pretrial, and later on through the imposition of fines and fees that accumulate as debt. People who cannot pay are jailed while their cases proceed, as are those who make the difficult choice to support their families rather than pay what the system demands.

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The result is a de facto system of money injustice. That system is deeply unfair and harmful to those directly impacted and, on a broad scale, exacerbates poverty and racial inequality; it wastes scarce taxpayer dollars; and it does not deliver the safety all people value and want. Those

with a vested financial interest often claim that money bail protects public safety. In fact, the opposite is true. In the rare cases in which people pose a credible immediate danger, the outsized role of money in making pretrial release decisions allows many of those same people to buy their freedom. At the same time, the focus on money sends a steady stream of people to jail who pose no danger to anyone, where their lives are often turned upside down in ways that might even cause them to commit future crimes—all because they can't afford the price of freedom.

These practices have long plagued New Orleans, driving unnecessary and harmful jail incarceration, pulling millions of dollars out of the pockets of struggling families, grounding the legal system in fundamental unfairness, and costing the city's taxpayers more than if the system were funded directly through general tax dollars. Building on activism and policy changes over the last few years—and the city's significant decision in the past year to provide increased direct funding to the Criminal District Court—this report sets out the steps necessary to replace money injustice with a justice system that functions for all New Orleanians.

## The national landscape

Resistance to money injustice in all its forms is mounting—from grassroots opposition to decisions at the highest level of government. Community bail funds across the country are paying bail for people who would otherwise be detained just because they are poor.<sup>1</sup> Along with freeing people, these funds provide further evidence that money does not keep us safe and is not necessary to get people to come to court—arguments that are changing public opinion. The majority of Americans now oppose incarcerating people solely because they can't pay bail.<sup>2</sup>

Other advocates are appealing to the courts in a wave of litigation that challenges blatantly unfair uses of money bail and “debtors’ prisons.” When these lawsuits succeed, they restore fundamental rights and protections the U.S. Supreme Court first clarified nearly 70 years ago yet are denied in practice to people every day.<sup>3</sup> In its recent unanimous decision in *Timbs v. Indiana*, for example, the Court recognized that the 14<sup>th</sup> Amendment’s due process protections include the right to be free from “excessive fines,” which historically have been a tool of racial subjugation.<sup>4</sup> Writing

for the majority, Justice Ruth Bader Ginsburg connected today's abuses that fall disproportionately on people of color with post-Reconstruction Black Codes—laws intended to convict black people for dubious offenses and saddle them with fines they could never pay in order to extract involuntary labor.

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In some jurisdictions, reforms to curb money injustice are already underway. State legislatures in California, New Jersey, New Mexico, and New York have taken action to eliminate or significantly reduce the use of money bail.<sup>5</sup> A number of cities and counties are also undertaking bail reform, often ahead of their state legislatures, and at least one city, San Francisco, has eliminated the use of fees levied at conviction to the extent possible within existing state law.<sup>6</sup> A relatively new nonprofit organization—the Fines and Fees Justice Center, launched in April 2018—is solely dedicated to helping communities and their representatives in government address the pervasive problem of money injustice.<sup>7</sup>

## New Orleans on the path to change

The Vera Institute of Justice's (Vera's) work on bail, fines and fees spans multiple jurisdictions, but runs especially deep in New Orleans, where it has partnered with government and community-based organizations for more than a decade. Vera's previous report *Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans* crystalized the problem of

money injustice, laying out what is at stake for people and the city as a whole.<sup>8</sup>

Extensive data analysis conducted for that report showed that over the course of one year alone, poor and low-income families paid millions in money bail—mostly in the form of premiums to bondsmen but also in significant fees to justice system agencies—coupled with financial charges imposed at conviction. At that time, nearly a third of everyone in jail in New Orleans on any given day were incarcerated simply because they could not pay bail or pay debt from conviction fees.<sup>9</sup> The report also showed alarming disparity by race, with black New Orleanians bearing a hugely disproportionate share of the financial burden and the unnecessary incarceration.<sup>10</sup> Analysis conducted for this report shows the situation is much the same today. (See “Impact of the recommended reforms” at page 32.)

State laws that encourage and incentivize judges to extract money from poor people to fund the Orleans Parish Criminal District Court perverts justice itself. There is no reconciling the current system with one that upholds people's basic rights and promotes public safety. And that system is actually losing money. Incarcerating people who cannot pay bail and conviction fees costs the City of New Orleans and its taxpayers far more than all the “user-generated” revenue that flows to the court and, more modestly, to other justice system agencies. Reliance on poor people to fund the court is especially acute in New Orleans because, as the only judicial district in the state with separate criminal and civil courts, the Criminal District Court cannot tap revenue from filing fees paid by corporations and other civil litigants.

To its credit, New Orleans is actively responding to the crisis of money injustice. In 2017, the city council, exercising the full extent of its legislative authority, passed an ordinance that virtually eliminated the use of money bail for people arrested for municipal offenses. Later that same year, the Criminal District Court, which handles all felony cases, launched an initiative to increase the number of lower-risk arrestees released without money bail. More recently, the court implemented a new process for determining who should be released and who must be detained, and has somewhat reduced the use of money bail as a result. In December 2018, the Juvenile Court announced it would abandon money bail altogether and

stop imposing conditions of release, such as programs or drug tests, that people must pay to access.<sup>11</sup>

There has also been some progress in reducing the unfair and burdensome monetary costs imposed on people convicted of a crime. In response to a lawsuit filed in 2015, the Criminal District Court recalled some outstanding warrants for failure to pay and expunged over \$1 million in conviction fee debt.<sup>12</sup> As with money bail, the Juvenile Court went even further: in July 2018, judges stopped imposing conviction fees, except those mandated by state law.<sup>13</sup>

The city and its Municipal and Traffic Court collaboratively took a substantial first step toward ending money injustice. Although judges continue to impose and collect fines and fees, they now turn over the revenue to the city—diminishing any financial incentive that might influence their decisions in this regard.

Community-based organizations stimulated many of these reforms and implemented some of their own. Community bail-outs were held, and a revolving bail fund was established to facilitate the release of people who can't afford bail of \$5,000 or less—efforts that have been undertaken as temporary fixes on the path to eliminating money bail altogether. The Greater New Orleans Funders Network has made replacing bail, fines and fees one of its central priorities, and there has been a steady stream of opinion pieces in local newspapers. A September 2018 column penned by two New Orleans Saints football players concludes, “Money bond has never made New Orleans safer, and it never will. It's time to end money bail.”<sup>14</sup>

Grassroots activists are also tackling fines and fees. In 2017, with buy-in from the Municipal and Traffic Court, a group of community organizations held a pair of “warrant clinics” where people with outstanding arrest warrants and debt from fees could plead their cases to a judge in a community setting. The clinics served over 2,500 people—most had some debt waived and more than 500 had arrest warrants lifted.<sup>15</sup>

Beginning in spring 2018, 24 organizations banded together as the Alliance for Equity and Justice, which actively opposes all forms of money injustice in New Orleans and helped shape the recommendations in this report. Also reflecting the collective will, New Orleanians elected a new mayor with a history of supporting criminal justice reform as a city council member and for whom money injustice is a priority issue. Mayor LaToya Cantrell’s transition plan identified the current flawed approach to funding

the justice system as a serious concern and included a recommendation to “[i]mprove public safety by eliminating the practice of detaining people pretrial because they are poor” and “by eliminating the practice of charging fines and fees to people who are unable to pay due to poverty.”<sup>16</sup>

All of these reforms are situated within a broader effort to reduce local incarceration. In March 2016, city officials began ramping up efforts in this area through participation in the MacArthur Foundation’s nationwide Safety and Justice Challenge. Ahead of schedule, the city met its target jail population of 1,277 by May 2018—an impressive 24 percent reduction in less than two years.<sup>17</sup> However, with an average daily jail population of 1,172 people in the first quarter of 2019, New Orleans still puts people in jail at a rate 30 percent higher than the national average.<sup>18</sup> To approach the national incarceration rate, which in New Orleans would be 895 people incarcerated on any given day, the administration has committed to reducing the jail population to under 1,000 by May 2020.<sup>19</sup> That’s an enormous shift from a post-Katrina high of 3,400.

## The final steps to reaching the goal

The city’s accomplishments and the current appetite for reform bode well for the key challenge confronting New Orleans—to break free from a statewide system deeply grounded in money injustice. Statewide law, policy, and culture have rendered the Criminal District Court, district attorney, and even the public defender in New Orleans reliant on revenue generated from mostly poor people and their families.

What makes the status quo especially perverse in New Orleans is the inherent conflict of interest for judges. In August 2018, two federal courts ruled that judges cannot make impartial decisions about what someone can afford in terms of bail or fines and fees—which the law requires—when their own institution stands to benefit financially from these same decisions. (See “Legal challenges to money injustice” at page 8.) These rulings, combined with the reforms that the city and courts have already made, could be the catalyst for ending money injustice once and for all. Although statewide reform—at least regarding bail—appears politically out of reach in Louisiana at the moment, New Orleans is poised to become the first city in the nation to replace both money bail and conviction fees

with a system that adequately funds and promotes safety and justice.<sup>20</sup> This report outlines a pragmatic plan of action for reaching this goal.

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Focused on the Criminal District Court, where change is needed most, the blueprint presented here features sustained city funding for the court above the historic baseline and a targeted slate of recommended changes in court practice to complete the transition away from money injustice. The plan is the product of collaboration with many local community organizations and has broad support. Leaders in the mayor's office, city council, the court, and other justice system agencies provided crucial information and guidance during the process of shaping this plan. And, because the crisis of money injustice is a nationwide problem, the plan also benefits from some extraordinary work by people and organizations who are bending everyday practice in courts around the country closer to justice. This report begins by explaining why current legal challenges to the status quo require a significant shift in practice. The report then offers a clear plan to achieve such change and describes the many benefits of implementing that plan.

## II. Legal challenges to money injustice

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Judges in New Orleans frequently express frustration at having to fund the court partially on the backs of defendants—nearly all of whom are poor and the majority black. “The court’s gotta eat” was one judge’s justification for imposing a discretionary conviction fee in a particular case, speaking apparently without irony or animus, just resignation in the face of a longstanding reality.<sup>21</sup> And money bail and conviction fees indeed generate significant revenue for the Criminal District Court. In 2017, that income constituted a quarter of the court’s operating budget.

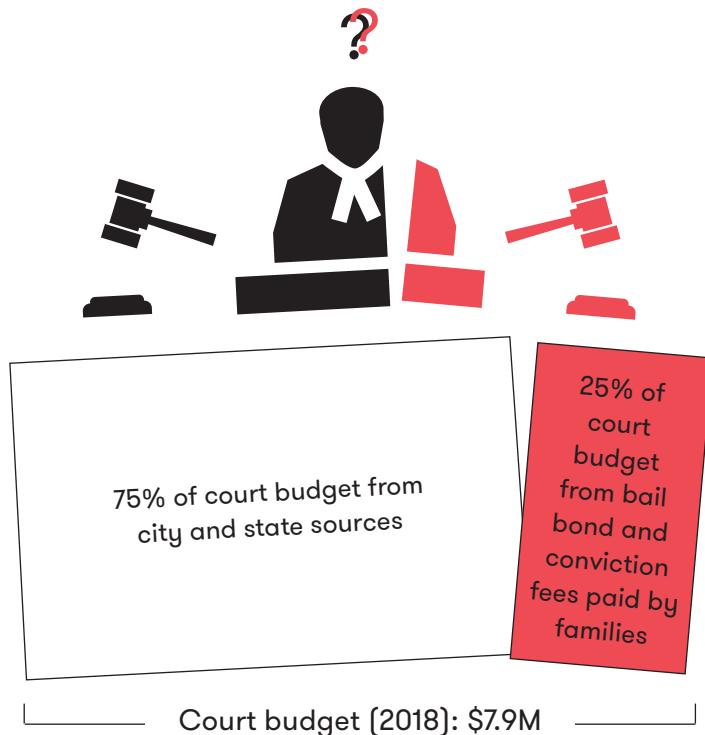
Although the offices of the district attorney, public defender, sheriff, and clerk of court also benefit financially from these same practices, generating revenue for the court itself in this way is particularly problematic. The central function of judging is to make neutral and impartial decisions that respect fundamental rights, including what the Supreme Court has defined as the fundamental right to pretrial liberty.<sup>22</sup>

When financially strapped court systems are made to rely more and more on revenue from criminal defendants, judges face an inherent conflict—between following the rule of law and following the money. In August 2018, two federal judges ruled that the institutional conflict of interest under which Orleans Parish Criminal District Court judges operate makes it impossible for them to apply basic laws and protections governing the use of money bail and conviction fees.

In *Caliste v. Cantrell*, the federal judge ruled that the local magistrate judge of the Criminal District Court—as a matter of law applicable to any judge—could not set money bail without first considering nonfinancial alternatives and, if requiring payment of money, determining that the arrested person is indeed able to pay.<sup>23</sup> This is because when money bail is set at an amount a person cannot pay, it is no different than an order of preventive detention, which must be justified through a stringent process applying heightened legal and factual standards.<sup>24</sup> But the federal judge also

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## Conflict of interest in setting money bail and imposing fees



ruled that because the court depends on revenue from bail bond fees, the “institutional incentives create a substantial and unconstitutional conflict of interest when [the judge] determines [arrested people’s] ability to pay bail and sets the amount of that bail.”<sup>25</sup> In other words, a judge’s hands are tied by the money injustice on which the system is grounded.

A different federal judge issued a parallel ruling regarding conviction fees in *Cain v. City of New Orleans*, holding that the court could not order a person to be jailed for failing to pay conviction fees without first determining whether he was in fact able to pay.<sup>26</sup> As in *Caliste*, the court held that judges of the Criminal District Court face a significant conflict of interest and thus cannot lawfully make the ability-to-pay determination.

These rulings prohibit the court in New Orleans from setting money bail as a condition of pretrial release or coercing payment of conviction fees by threatening or using jail. Yet to date, the federal court has not yet ordered any particular fix, and the Criminal District Court is appealing the portions of each ruling that found a due process violation rooted in an inherent conflict of interest. (They are not appealing the restatement of the

basic law pertaining to bail and fees.) In the meantime, notwithstanding some modest change in practice, judges continue to set money bail as an unattainable condition of pretrial release for many people and to impose conviction fees under the threat of jail for nonpayment.

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Although the legal battles are not yet settled, these twin rulings present an opportunity for the city and the court to collaboratively forge a better system that ends longstanding injustices.<sup>27</sup> *Cain* and *Caliste* are not the first higher court rulings to challenge the status quo. (See “Twisting and breaking the law to keep the money flowing” at page 11.) In essence, the court needs what many judges have long asked for: sufficient and sustained city funding to replace the money that the involuntary users of the system supply at great sacrifice. And, in turn, city officials need the full collaboration of judges to replace unfair and economically oppressive practices with money-free alternatives that promote safety and justice.

## Twisting and breaking the law to keep the money flowing

The Louisiana Legislature has gone to great lengths over the years to sustain the use of money bail and the revenue it generates for the district courts. As discussed earlier in this report, while bondsmen profit the most—which is typical of state bail systems—courts in Louisiana take a percentage of each bail amount, which is not at all typical. Requiring mainly poor and low-income people to buy their freedom pretrial is part of what keeps the state’s courts running.

In August 2018, when a federal court ruled in *Caliste v. Cantrell* that the money-based bail practices in Criminal District Court are unconstitutional, it wasn’t the first time. Twenty-seven years earlier, in 1991, a federal court held similarly: “the need to raise revenue to run the criminal justice system is simply not a compelling enough reason to allow the deprivation of a fundamental right,” which the court identified as the conditional right to pretrial liberty.<sup>a</sup> As in *Caliste*, the 1991 ruling also stated that defendants’ due process rights are violated because the court benefits financially when judges require upfront payment of money bail.<sup>b</sup> Importantly, the 1991 ruling noted that bondsmen were not actually paying their own 2 percent fee required under the law, but were passing on this cost to defendants and their families.

So why is a federal court ruling on the same issue nearly three decades later? It all stems from a legislative sleight of hand. In the wake of the 1991 ruling, Louisiana lawmakers passed the Bail Reform Act of 1993.<sup>c</sup> But it wasn’t much of a reform. The act eliminated the 2 percent fee families were required to pay and imposed that fee on bondsmen instead. But, it also increased the premium families had to pay to purchase a bond by the same 2 percent. In practice, nothing changed except the route that money from defendants and their families took to eventually reach the coffers of the court and other justice agencies.

That 2 percent fee—money from individuals and families—was originally distributed evenly among the court and three other agencies, after the first \$150,000, which went

exclusively to the court. In 2001, the legislature increased the cut of the Orleans Parish Criminal District Court to 0.8 percent, leaving the other agencies with 0.4 percent each.<sup>d</sup> When that produced insufficient revenue, the court in 2005 asked the legislature to increase the bond fee from 2 to 3 percent, only in New Orleans and with the court reaping the full additional 1 percent. The legislature complied.<sup>e</sup> Today in New Orleans, the Criminal District Court collects 1.8 percent of every bail bond paid, whereas district courts in the rest of the state are allotted 0.5 percent.<sup>f</sup>

But because the legislature did not increase the mandatory bail premium amount to accompany the additional 1 percent fee that bondsmen were required to pay, the bondsmen were left having to chip in to fund the court. This arrangement apparently didn’t sit well with bail bondsmen. As the Louisiana Department of Insurance recently found, most bondsmen simply began charging an unlawful premium of 13 percent, passing on their costs to families who post bail, just as they were doing in 1991. The department’s February 2019 directive reiterated what has been clear in the law since 1993: premiums are fixed at 12 percent and the additional 1 percent for the court cannot be tacked on.<sup>g</sup> The department ordered bondsmen to refund an estimated \$6 million in overcharged premiums taken from New Orleans families over more than a decade.<sup>h</sup>

If the recent federal court decision in *Caliste v. Cantrell* holds (the Criminal District Court judges are appealing the conflict of interest portion of the ruling), it should prompt genuine reform of state law, not another legislative sleight of hand. That would mean all Louisiana taxpayers, not just the families of arrested people, fund the state’s courts, prosecutors, and defenders. In the meantime, judges in New Orleans can achieve real bail reform locally by changing their practices within the outlines of existing state law, as the plan set out in this report recommends.\*

\* Endnotes to text boxes can be found at the end of this report.

### III. Pursuing safety and justice instead of money: A blueprint for action

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Ending money injustice in New Orleans requires eliminating the unfair costs imposed on people at both the beginning and end of the criminal court process. At the front end, judges in Orleans Parish Criminal District Court need to adopt a process for making pretrial release decisions that is fair to all and actually promotes community safety, instead of relying on money bail, which siphons money from struggling families and leads to unnecessary and costly incarceration. They also need to take the much simpler step of eliminating burdensome fines and fees imposed at conviction. The following plan describes the specific steps needed to accomplish both. The plan emerged through extensive discussions with key stakeholders in government and the growing number of community-based organizations pushing for deep and lasting reform.

These recommended changes in court practice are not feasible, however, without funding to replace the revenue from bail, fines and fees that the court and, to a lesser extent, other justice system agencies stand to lose. Fortunately, that replacement funding, and more, will come from what the city saves by no longer incarcerating people simply because they cannot pay what the system demands. Because the city has already significantly increased funding for the court, in anticipation of future cost-savings, this plan begins by describing direct funding for justice as the foundation of deep and lasting reform. (See Blueprint for Change at <https://www.vera.org/blueprint-for-change>.)

#### Direct funding for justice

The City of New Orleans and many judges recognize the essential unfairness of the status quo, and the city in particular is motivated to prevent unnecessary and costly incarceration. For this reason, the

administration and city council have taken a critical first step toward ending money injustice by providing additional funding to the Criminal District Court. At the judges' request, the city committed an additional \$1.4 million for the final three months of 2018 and an additional \$3.8 million above its prior year baseline appropriation for calendar year 2019 to offset anticipated lost revenue in the wake of the August 2018 federal court rulings.<sup>28</sup>

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## For their part, judges must break with convention and embrace new practices.

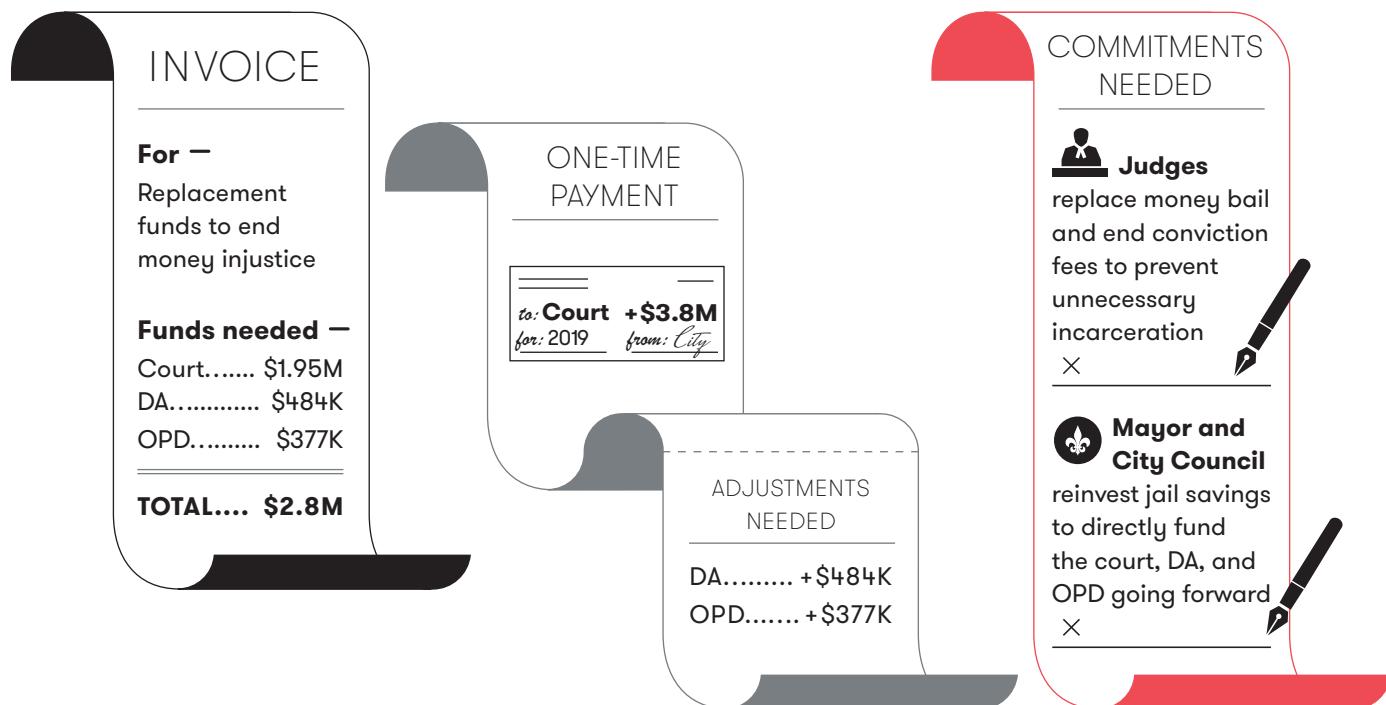
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Replacement appropriations are also needed for the offices of the public defender and district attorney. They too will lose revenue from the elimination of money bail and conviction fees, although on a smaller scale than the court. The sheriff's office and clerk of criminal court similarly stand to lose revenue but, because they will experience substantial cost savings as a result of having to care for significantly fewer people and process significantly less paperwork, respectively, additional city funding is not needed.

Because revenue streams decreased somewhat in the wake of the August 2018 federal court rulings in *Caliste* and *Cain*, replacement appropriations for all three agencies should be based on total revenue collected in 2017. In that year, the court reaped \$925,000 in bail bond fees and more than \$1 million in conviction fees; the district attorney took in \$270,000 in bail bond fees and \$215,000 in conviction fees; and the public defender benefited from \$200,000 in bail bond fees and \$177,000 in conviction fees.

Going forward, an annual investment by the city of just \$2.8 million above the current baseline appropriations to these agencies would replace all revenue lost by ending unfair money-based practices. Importantly, this does not represent a new cost to the city and its taxpayers because the city stands to save far more by no longer incarcerating people simply because

## A system that is paid in full



they cannot pay bail. (See “Impact of the recommended reforms” at page 32.) And it is less than the city’s \$3.8 million additional investment to the court alone for 2019. As a whole, the system is paid in full.

Financially, New Orleans is poised to end money injustice, and the city’s increased investment in the court is a good foundation on which real collaboration can be built. Going forward, there are responsibilities on all sides: the mayor and city council must commit to sufficient and sustained funding for all three criminal justice agencies beginning with the 2020 budget. For their part, judges must break with convention and embrace new practices.

There is much to gain for everyone. The court finally can have what many judges have been pleading for—an alternative to funding their operations on the backs of poor residents. They, along with prosecutors and public defenders, can concentrate on doing justice without the competing need to raise revenue to cover their own operating expenses. And together, the city and its core criminal justice agencies can truly promote public safety by having a system that detains the small minority of people who present an unmanageable danger instead of the great majority who are merely poor. All of this can be accomplished while saving taxpayers’ money.

## Shifting the focus away from money to make fair and safe decisions about whom to release pretrial

Although the most sweeping bail reforms to date have taken place at the state level, many localities could end the harmful use of money bail and simultaneously enhance public safety, even within existing state laws. New Orleans is one of those cities. Although the vagaries of Louisiana law require setting money bail in some cases, Criminal District Court judges could do that in ways that allow most people to be safely released. They can use their discretion within the confines of state law to ensure that the small number of people who pose a severe and imminent risk to others are detained instead of using bail in ways that allow them to buy their freedom. And with full replacement funding for the court, there is no longer an economic incentive to continue the unfair and unsafe use of money bail.

The decision-making tree on page 17 shows how judges could eliminate the central role of money bail and focus instead on safely releasing and supporting most people, while detaining those who present a clear and imminent danger. The process leads to three possible outcomes: (1) unconditional release for people whose risk of re-arrest is low; (2) release with some degree of support and/or supervision tailored to the person's needs for those who fall in the middle range of risk for re-arrest; or (3) preventive pretrial detention when a finding is made that no combination of community support and supervision can mitigate an individualized, fact-based determination of significant danger.

Much of the infrastructure required to support this shift in court practice is already in place. New Orleans has had a pretrial services program since 2012 and, in 2018, the court adopted the Public Safety Assessment (PSA), a risk assessment process designed to reduce reliance on money bail and instead make release and detention decisions based on actuarial predictions. Drawing on a database of over half a million criminal cases nationwide, the PSA gauges the risks of failure to appear in court and re-arrest—both in general and specifically for violent crimes—during the pretrial period.<sup>29</sup>

Using the PSA and a locally constructed decision-making framework (DMF), staff assess every person arrested for a felony offense and forward the resulting risk level to the judge, district attorney, and public defender prior to the person's initial appearance in court. (A copy of the DMF, as developed and used by the court and other system actors in New Orleans, is included as Appendix B at page 54.) This provides the information judges would need to safely release the vast majority of people, including some with support and supervision, while also helping to identify those who require closer scrutiny before a fair and reliable release decision can be made. As an established part of the court system in New Orleans, full and proper use of the PSA can support a money-free approach to pretrial decision making that will enable many more people to remain with their families and in their communities pending the resolution of their court cases.

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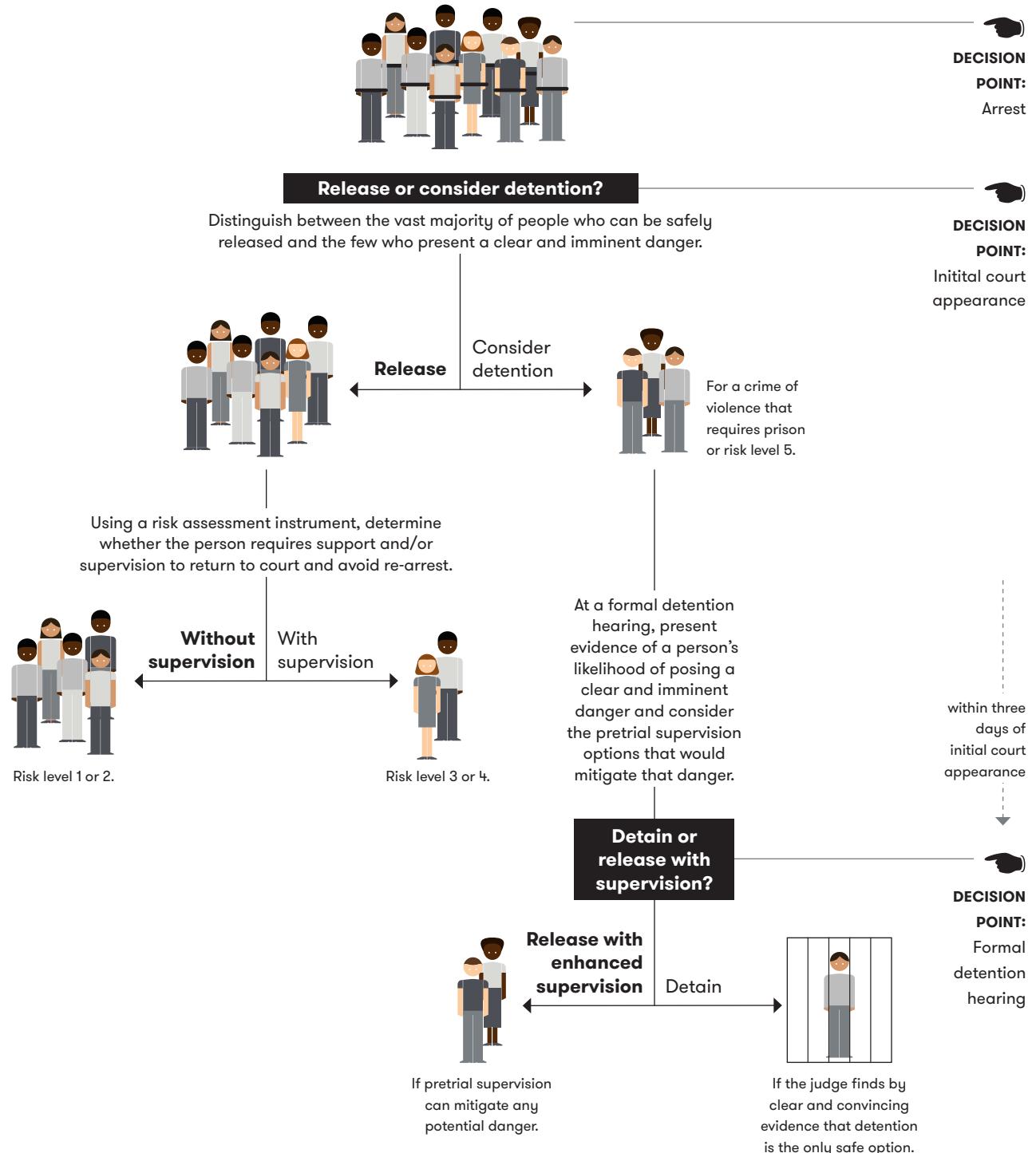
## The infrastructure to support this shift in court practice is already in place.

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Vera does not endorse use of the PSA or any other risk assessment tool lightly. Debate happening nationally among researchers, advocates, court system stakeholders, and others highlights the use and misuse of risk assessment in the criminal justice system, including in the pretrial context. The potential for exacerbating racial bias and using these tools to justify the expansion of detention is real. (For more information, see "Benefits and limitations of the Public Safety Assessment" at page 28.)

For this reason, certain safeguards are essential. They include only using transparent risk assessment tools where the factors and scoring are easily identifiable (as they are with the PSA), independently validated, and the results can be examined or challenged as needed in court. In addition, although a risk assessment finding on its own can justify releasing a person, if detention is a possibility the court must conduct a full hearing to give individualized consideration well beyond the simple risk score, as this

## Release and detention decision tree



plan recommends, before taking away someone's liberty. Finally, routine review and discussion about the efficacy of the tool, including through ongoing data collection and analysis, should be built into the infrastructure that supports its use.

There are clear and successful precedents for adopting the pretrial decision-making process outlined in the specific recommendations below. Both New Jersey, which has fully moved away from money bail, and New Mexico, which is on that path, follow these steps.<sup>30</sup> The outcomes in New Jersey are especially encouraging: a 30 percent decline statewide in the total number of people held pretrial, while preventively detaining roughly two out of every 10 people for reasons of public safety.<sup>31</sup> These gains happened in the first two years post-reform and during that time both violent and nonviolent crime decreased in New Jersey.<sup>32</sup>

A number of counties and cities have begun to address money bail ahead of statewide reform. Some of these efforts have been led by prosecutors. In Philadelphia, for example, the district attorney has identified 25 offenses (about 60 percent of all arrests) for which prosecutors should consider not asking for money bail. Follow-up research shows that the people released on their own recognizance under this initiative did not fail to appear and were not re-arrested any more frequently than people who were made to pay money to get out of jail.<sup>33</sup> Dallas's District Attorney also recently took action, explaining, "My own moral compass does not allow me to sit and wait for others to decide to act when I also have the power to do so. I am proposing an approach that makes public safety, not wealth, the determining factor in bail decisions."<sup>34</sup>

Judges, meanwhile, took the lead in New York City, before the state legislature enacted changes significantly eliminating the use of money bail for the vast majority of people charged with less serious and nonviolent crimes. New York City judges have released 76 percent of people without requiring the posting of money bail, and with good results: 86 percent return to court as required and the city jails fewer people per capita than any city in the country.<sup>35</sup> In Houston, newly elected judges who support bail reform took the first step in eliminating money injustice in pretrial detention. Working together with prosecutors and the sheriff's office, these judges implemented a new system to eliminate money bail in misdemeanor cases.<sup>36</sup> In New Orleans as well, Criminal District Court judges can and should take the lead.

## Bail and money bail: A brief history

Bail in New Orleans, as in most other cities and states, has come to be understood as money one must pay to be released pretrial. Bail and money are so closely linked at this point that the more precise term “money bail” sounds nonsensically redundant to most people. Yet for the first hundred years in this country, and for hundreds of years before that in England, this is not at all what bail meant.<sup>a</sup>

Historically in America, every state constitution—and Louisiana was no exception—included the right to bail, reflecting the presumption of innocence and upholding the more general right to liberty. The right to be “admitted to bail” in all but the most serious cases guaranteed an individual’s pretrial release under reasonable conditions. An upfront payment was not one of those conditions. In practice, when a judge set a monetary bail amount, that was the amount the arrested person, or someone vouching for that person, would have to pay if they failed to come to court.

Edward Livingston, a foremost legal scholar at the time of Louisiana’s first constitution, explained: “As it would be oppressive in most cases to deprive the accused of his liberty before trial, if he can give sufficient pledge for his appearance at the trial, the law restores him his liberty on his giving such a pledge. This pledge is called bail. When bail is given, the prisoner must be discharged without extracting from him the payment of any fees.”<sup>b</sup>

Things started to change in the late 19<sup>th</sup> century, as courts began requiring up-front payment to release some people out of concern that otherwise they might not return to court. In many places, the change was purely pragmatic: the frontier was vast and people more transitory. In the post-Reconstruction South, making people pay money to secure their freedom was used like poll taxes to keep black people from exercising newly won rights.<sup>c</sup>

Then, beginning in the 1890s, in a uniquely American way, bail was commercialized. A change that began incrementally is now in full flower. Bail was largely turned on its head—from a presumptive right to be released on no more than a promise to pay if one fled to a barrier to release for anyone who cannot pay up front. Bail is now a revenue-generating practice that benefits, first and foremost, the bail bond industry and, in places like Louisiana, justice system agencies, rather than the broader interests of justice.

The facts are clear: having money at stake—either a lump sum or being on the hook to a bondsman—doesn’t make people more likely to come to court or less likely to commit a crime. Nearly everyone released on their own recognizance, with appropriate support and limited supervision when needed, voluntarily returns to court—for example, 88 percent in Washington, DC, and 83 percent in the entire state of Kentucky.<sup>d</sup> Furthermore, 88 percent of people released in each of these jurisdictions—which abandoned or marginalized money bail years ago—were not re-arrested during the pretrial period.<sup>e</sup>

Those with a vested financial interest continue to claim that money bail protects public safety, when actually it does just the opposite. The perverted form of bail now in use allows people with money to buy their freedom even if they present a significant and imminent danger. And the bail bond itself does not promote safety; under Louisiana law, a bail bond cannot be forfeited if the released person commits a crime.<sup>f</sup> Indeed, courts have ruled that making people pay money as a condition of release as a way to promote public safety is irrational and thus unlawful.<sup>g</sup>

At the same time, money bail leads many people with fewer resources to languish in jail. As an added negative twist, pretrial detention itself has been shown to have a criminogenic effect, increasing the chances that someone detained today will commit a crime in the future.<sup>h</sup> The reasons why are obvious: time spent in jail is incredibly destabilizing, undermining family and community ties and often causing people to lose their jobs and accumulate debt.

Public safety is a valid concern, and the legal concept of bail has evolved in ways that could promote safer communities. In 1987, the Supreme Court ruled that bail can be withheld in the rare cases in which the person poses an objective and credible danger.<sup>i</sup> Importantly, the Court noted that money bail has no meaningful relationship to ensuring safety. But the widespread practice of requiring up-front payment of money bail, and the false security it provides, creates an impediment to making good decisions about whom to release and whom to detain. The modern day use of money bail has become a habit that is very hard to kick, propped up by false narratives about crime and safety—and millions of dollars in revenue.

## **Recommended changes in Criminal District Court practice**

### **Recommendation 1**

Although release pretrial is common under current court practices, it is often delayed while people struggle to collect money for bail and, as noted earlier, many people are unfairly and unnecessarily detained for the entirety of their court cases. A system that is fair to all and safe, by contrast, would reliably identify the small number of people who present a significant and imminent danger and immediately release everyone else. This principle is rooted in the constitutional mandate that “in our society, liberty is the norm, and detention prior to trial... is the carefully limited exception.”<sup>37</sup> A judge’s first obligation, in other words, is to determine whether there is any objective basis to consider detention.

To avoid variation in how judges interpret what constitutes a danger and respect the presumption of release, court systems must clearly define and sharply limit the circumstances that trigger the possibility of detention. It would be inappropriate, for example, to consider detaining someone simply because he might miss a court date, or she might be re-arrested for a crime that doesn’t harm anyone. The two factors known to the court in every case are the arrest charge and assessed risk level as described above. In most cases, these factors will justify the person’s immediate release. In the minority of cases in which the gravity of the charge or high risk level makes someone eligible for detention, these factors alone are not enough for a judge to actually detain the person; further judicial inquiry is required. Following that line of reasoning, this plan recommends:

- 1. At initial court appearances, judges apply the presumption of release and only consider detaining someone who (a) has been arrested for a crime of violence for which state law requires a prison sentence if convicted; or (b) was assessed at the highest level of risk (level 5 of the DMF) and there is reason to believe the person presents an imminent danger to someone else or the community at**

**large.\* Under either circumstance, further judicial review is required before making a release or detention decision (see Recommendations 7 & 8). Absent these circumstances, the person will be released immediately without having to pay money.**

Based on arrest charge and PSA results from 2018, judges will be able to immediately release an estimated 73 percent of people arrested for a felony offense.

## **Recommendation 2**

For that great majority of people who can be safely released at first appearance under the criteria defined in Recommendation 1, the judge must determine whether there is reason to impose conditions that require certain behaviors and/or limit others during the pretrial period. Here as well, the assessed risk level provides guidance.

People who fall into the lower levels of risk on the DMF are very likely to meet their obligations without mandated programming or supervision. All they need is information about the time and place of their next hearing. Reminder calls or texts are an effective form of pretrial support.<sup>38</sup> Imposing unnecessary conditions of release is actually counterproductive, because raising the bar of what's required merely increases the chances a person will fall short.<sup>39</sup> Imposing unnecessary conditions is also unlawful: any restriction on an individual's liberty may be no greater than what is necessary to ensure the person returns to court and avoids arrest.<sup>40</sup> Following this line of reasoning, the plan recommends:

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\* There are a number of ways to define “crime of violence.” This plan uses a list of crimes produced by a working group convened by the mayor’s office, Supreme Court, and Criminal District Court to guide implementation of the PSA and its decision-making framework. That list is based on the definition used for the research on which the PSA is grounded: intentionally causing or attempting to cause physical injury by use of force or violence against another person. Because many of these violent offenses are in fact relatively minor (including misdemeanors), this plan recommends narrowing the net to consider detaining only those people who, under state law, would serve time in prison if convicted. The result is a set of 46 “mandatory prison violent offenses.” See Appendix C at page 55 for a list of these offenses.

- 2. Judges release people who fall into the lowest levels of risk (levels 1 and 2 on the DMF) without imposing any conditions of release, financial or otherwise.**

### **Recommendation 3**

People who fall in the middle range of risk on the DMF are likely to benefit from some support and possibly supervision to meet their pretrial obligations. Although judges are unlikely to have enough information at the initial hearing to mandate specific services or levels of supervision, they can still release the person and require compliance with a plan to be developed by the pretrial services agency pursuant to an individualized needs assessment.

Such a plan would identify the person's salient needs related to returning to court and remaining arrest free and match those needs with appropriate community-based services and resources. The pretrial services agency already serves much of this function. To further strengthen its work, in 2019 the city funded the addition of two supervision case managers, bringing the total number to four.

Separately, the mayor's office has committed funds from the Safety and Justice Challenge to develop a community-supported release program that will engage community members in helping their neighbors overcome challenges during the pretrial period. The goal is to tap the strength of New Orleans's neighborhoods, enlisting fellow residents to support one another. That might include, for example, giving someone a ride to court, caring for their children while they attend a court hearing, or simply providing emotional support during a difficult period. Given the expanded capacity of pretrial services, along with these promising developments, this plan recommends:

- 3. Judges release people who fall into the middle range of risk (levels 3 and 4 on the DMF) with the condition that they (a) comply with requirements set by pretrial services' supervision team based on an individualized needs assessment; or (b) participate in a community-supported release program once up and running.**

## **Recommendations 4 & 5**

This plan further recommends:

- 4. Going forward, pretrial services become even more effective by shifting emphasis from supervision to support for the majority of people, reserving supervision for those at the higher levels of risk and need.**
- 5. Any mandatory condition of release be available free of charge to the defendant to avoid possible financial barriers to accessing those services and the accumulation of criminal justice debt.**

## **Recommendation 6**

Louisiana, perhaps unique among the states, bars judges from releasing people on their own recognizance (known as ROR) if they were arrested for any one of a wide range of offenses involving drugs or violence. In these situations, judges must set money bail. But they can impose a genuinely nominal bail amount every person could easily pay (or that could be paid for them by a standing fund). As U.S. District Judge Sarah Vance wrote in finding that Louisiana's statutes restricting judges' ability to use ROR are not unconstitutional in all applications, "If the judge agrees [that release is appropriate], she may set bond in an amount the defendant can satisfy, be it a hundred dollars or ten dollars or even ten cents."<sup>41</sup> To comply with state law without impeding the goal of immediate release, this plan recommends the following form of release:

- 6. Judges release people (with or without conditions) on their own recognizance or, if the offense for which they were arrested is "ROR-restricted" under state law, set a nominal money bail amount of one dollar "or even ten cents" to ensure their release without delay.**

## **Recommendation 7**

Although the great majority of people can be safely released based on basic information available during their initial court hearing, deciding between release and detention for the much smaller number of people identified at first appearance as possibly presenting a danger to others requires further careful consideration.

The federal courts, including in New Orleans, have made clear that a stringent judicial process, applying heightened legal standards, is required before a person may be detained.<sup>42</sup> Any time the government deprives a person of his or her constitutional liberty, it must justify that denial with the strongest demonstration of necessity. Moreover, public safety depends on the appropriate use of preventive detention. Detaining someone without sufficient cause is not only unfair, it is counterproductive, since the experience of incarceration has been demonstrated to have a criminogenic effect, increasing the chances a person will commit future crimes.<sup>43</sup> For these reasons, this plan recommends:

- 7. For people identified at first appearance as possibly presenting a danger to others based on the severity of their arrest charge or high risk level (as outlined in Recommendation 1), judges conduct a full evidentiary hearing centered on the likelihood, degree, and specificity of the danger posed and exploring ways to potentially mitigate that danger with support and supervision in the community. Such a hearing will be held no more than three days following the person's initial appearance. The arrested person will be provided counsel and be given clear notice of the issues to be decided and a full opportunity to be heard, including the opportunity to call witnesses and present evidence.**

**To actually detain someone, the judge must make a finding on the record, supported by clear and convincing**

**evidence, that serious and imminent danger to a particular individual or the community exists that cannot be mitigated by applying conditions of release. That finding will specify the facts on which it relies. Absent such a finding, the judge releases the person with enhanced support and supervision as specified by the pretrial services agency.**

Most people who meet this strict standard for detention are detainable under the Louisiana Constitution. Article 18 of the Declaration of Rights limits detention to people charged with crimes of violence and drug distribution and who are determined to pose an imminent danger.<sup>44</sup> This would cover everyone arrested for a mandatory prison violent felony offense and most, if not all, those assessed at risk level 5 for whom the court makes the necessary finding of danger that cannot be mitigated. However, there may be a small number of people whose charge makes them ineligible for detention under the constitution and must be released. They should be released with enhanced support and supervision.

### **Recommendation 8**

Grounded in an expansive right to pretrial release, Louisiana statutes appear to allow courts to deny release on bail to a smaller subset of people (those charged with capital murder, domestic violence, or sex offenses) than does the state constitution, or in limited circumstances (when the arrested person has certain prior failures to appear or is a noncitizen charged with causing a fatality).<sup>45</sup> Nevertheless, Louisiana courts have determined that people who fall outside these groups may be detained when money bail is set in an amount they cannot afford. Therefore, the courts operate under the assumption that an unreachable money bail is lawful in Louisiana and should be used in situations when detention is determined to be necessary but state statutes do not allow bail to be denied outright—assuming of course the state constitution allows it. With these legal constraints in mind, this plan recommends:

8. **To achieve preventive detention for the relatively small number of people found to present an imminent danger to others that cannot be managed through supervised release (following the process defined in Recommendation 7), judges deny bail when expressly allowed under state statute or, when not allowed by statute, set a clearly unreachable bail amount, such as \$10 million, to ensure detention.**

#### **Recommendation 9**

The above recommendations would yield substantial reductions in unnecessary and unfair pretrial detention (see “Impact of the recommended reforms” at page 32). However, one additional safeguard would need to be implemented to prevent against another form of unnecessary detention—specifically for people who are arrested while on probation. When someone on probation is arrested for a new felony offense, it is common to detain the person simply for the fact of being arrested, which is presumed to be a violation of the terms of community supervision. In other words, even if the judge presiding over the new arrest believes the person can be safely released pretrial, the so-called probation “detainer” trumps that judicial determination.

A recent change in policy by the Louisiana Division of Probation and Parole addressed the same problem for people on parole.<sup>46</sup> But the problem persists among people on probation and is a major driver of local incarceration in New Orleans. On any given day in August through December of 2018, approximately 220 people (18 percent of the entire jail population) were held in jail on a probation detainer accompanying a new arrest. And 78 percent of those new arrests were not for a violent felony offense that carries a mandatory prison sentence (mandatory prison violent felony offense) or of people assessed at risk level 5 on the DMF. If not addressed, this dynamic will mute the impact of moving away from money bail.

The state should limit the use of probation detainees as it has done for people on parole. Parole cases are generally more serious than probation

cases; people on parole are serving the final part of a prison sentence, while probation is a punishment given in lieu of incarceration. Moreover, most people detained for an alleged violation of probation are allowed to return to the community once the allegations are adjudicated.<sup>47</sup> A parallel can be drawn with people detained pretrial who are released as soon as their cases are resolved: jailed while presumptively innocent, freed when pronounced guilty—the exact opposite of how a justice system should operate. If the state doesn't act, the court should. To address this persistent injustice and driver of unnecessary detention, this plan recommends:

- 9. The Louisiana Division of Probation and Parole ends the unconsidered use of probation detainees through a change in policy or, absent action by the state, judges exercise their authority to terminate a probation detainer when it is based solely on a new arrest and the judge intends to release the person in that new case.**

#### **Recommendation 10**

In order to have maximum impact and be truly fair, the practices described in the recommendations above should be applied retrospectively to people currently held in the New Orleans jail, facilitating their release where safe and appropriate. Specifically, this plan recommends:

- 10. Judges consider releasing people presently detained because they cannot pay the money bail set, following the same decision-making process they apply in new cases. And, absent a change in policy by the Louisiana Division of Probation and Parole, judges use their authority to release those held solely because of a probation detainer based on a new arrest for which release is appropriate.**

## Benefits and limitations of the Public Safety Assessment

Developed by the Laura and John Arnold Foundation, the Public Safety Assessment (PSA), is an actuarial pretrial risk assessment process. It draws on weighted risk factors that include age; current charge; and criminal history, including failure to appear in court and prior violent convictions. Both the risk factors and their respective weights have been validated to a high level of predictive accuracy—for both failure to appear in court and re-arrest during the pretrial period using a large sample of criminal cases nationwide.<sup>a</sup> The PSA is most helpful in identifying the great majority of lower-risk individuals who should be immediately released.

The PSA scores both the risk of re-arrest and the risk of failing to appear in court from a low of one to a high of six. Those scores are combined in a locally constructed matrix, or decision-making framework (DMF), made up of five risk levels with corresponding recommendations about release and possible accompanying support and supervision. (A copy of the DMF, as developed and used by the court and other system actors in New Orleans, is included as Appendix B at page 54.) Release without money bail is recommended for people who fall into risk levels 1 through 4 on the DMF, with increasing degrees of support and supervision recommended for risk levels 2, 3, and 4. For people who fall in the highest risk category, level 5, the framework recommends that detention be considered, but not required or even presumed. The DMF separately considers any increased risk that someone will be arrested for a violent offense during the pretrial period. People flagged in this way automatically score one risk level higher than they would absent this flag.

The PSA, as with all actuarial pretrial risk assessments, has inherent limitations, which continue to be the subject of debate.<sup>b</sup> Critical to applying the PSA and the DMF is understanding that assessing risk is not the same as predicting the future—something no tool can do. A person's risk level is not his or her fate. Based on the data from which

the PSA was created, the great majority of people released pretrial make all of their court appearances, and many people who miss a single court date come back to court soon after on their own accord. The same data also shows that fewer than 20 percent of people who score at the highest level of risk are re-arrested if released, and those arrests are typically for a minor or nonviolent crime.<sup>c</sup> Re-arrest for a violent crime while on pretrial release is truly rare. Even among people who trigger the PSA's flag for potential re-arrest for a violent crime, only 7 percent are in fact arrested for a violent crime while their original cases are pending.<sup>d</sup>

Like any risk assessment tool, the PSA has other inherent limitations. Because its predictive power depends largely on factors based on a person's criminal history, it imports the racial disparities of the criminal justice system into its calculations of risk. The use of criminal history data is inherently problematic because police enforcement practices disproportionately target communities and people of color.<sup>e</sup> In addition, because the PSA is based on a large body of cases from the past, when practices supporting released people were less refined than they are in many places today, it overstates the risk a person poses if released with appropriate support and supervision in a high functioning court system.

For all these reasons and because the law requires an individualized review of all of the facts, applied with a strong presumption of release, the PSA—or any actuarial risk assessment process—should never be the sole or even the central basis for detaining a person pretrial. The PSA can be used to guide the release of the majority of people arrested for felonies in New Orleans. And it can provide an initial indicator of whether there is reason to consider detention. But any decision to detain someone must flow from identification and evaluation of real—not merely actuarial—risks specific to that person and his or her circumstances.

## Lifting the burden: Eliminating fines and fees imposed at conviction

Courts in New Orleans also extract money, or try to, at the conclusion of a criminal case. Louisiana law requires certain fees and, more rarely, fines be imposed whenever someone is convicted of a crime. In theory, fines and fees have different purposes. As a type of sentence, fines can be used to hold people accountable for wrongdoing, if levied in amounts that are possible to pay without great hardship. Fees, on the other hand, exist solely to raise money to support the system's operating costs. Under Louisiana law, however, the line between fines and fees is blurry at best since the court and district attorney also reap the revenue from fines. The law also permits judges to levy additional costs at their discretion, which historically they have done routinely. But both the law and its common application are facing serious legal challenges because of the court's financial conflict of interest that the law sets up. The two August 2018 federal court rulings require reform.

Burdensome financial charges, out of sync with people's financial resources, were created and are almost always imposed purely to generate revenue for the Criminal District Court and other agencies and should be immediately eliminated. Indeed, judicial practice in this regard already seems to be changing in the wake of the federal court rulings.

## Recommended changes in Criminal District Court practice

### Recommendations 11 & 12

The recent substantial increase in city funding for the Criminal District Court is intended, at the judges' request, to eliminate the court's need for revenue from conviction fines and fees (as well as bail bond fees). It provides both a financial incentive and a clear message of support to the court to end this unfair and counterproductive practice. Given the

demonstrated commitment of the mayor and city council in this area, this plan recommends:

- 11. Judges immediately stop imposing any type of monetary charge at conviction.**
- 12. Applying a retrospective lens, judges: a) expunge existing conviction fees; and b) recall outstanding warrants issued for failure to pay or appear in court for a payment hearing.**

Both recommendations are in fact necessary to comply with the federal court ruling in *Cain v. City of New Orleans* and the U.S. Supreme Court and Fifth Circuit decisions that ruling is based on. *Cain* addresses “court debt,” whether from fines or fees. Although the ruling distinguishes debt owed to the court from debt owed to other agencies and does not bar the latter, it restates decades of constitutional law in holding that in no instance can someone be jailed or threatened with jail for failing to pay what they cannot afford.

Because the vast majority of people convicted are too poor to hire a lawyer, it makes little sense to continue the practice of imposing and collecting conviction fees from the slim minority who might be able to afford them and only to benefit agencies other than the court. Moreover, the recent U.S. Supreme Court decision in *Timbs* calls into question the lawfulness of state-mandated fines and fees, whomever they financially benefit, as they inevitably are constitutionally “excessive” for those who cannot afford the mandatory amount.

These simple changes in practice could free thousands of New Orleanians from having to choose each month between paying off their debt to the system and meeting their own and their families’ basic needs. Those stripped of the right to drive because of unpaid fees—a common practice—could apply for new licenses, giving them access a broader range of jobs. The trauma that comes from living under constant threat of arrest and incarceration would end. And, instead of spending hours trying to collect unpaid fees from poor people, judges and court staff could focus on their core responsibilities of advancing justice and public safety.

## Bail, fines and fees in municipal court

This report focuses on people arrested for felony offenses whose cases are heard in the state Criminal District Court, where money bail still has a central role in determining pretrial release decisions and where burdensome fines and fees are routinely imposed at conviction. Owing to recent reforms, these dynamics are somewhat less pervasive and onerous in the city's Municipal and Traffic Court. But even there, injustices persist.

**Bail:** Gaps in reform. In January 2017, the city council passed a municipal bail ordinance intended to eliminate the use of money bail as a condition of pretrial release and prevent people from being detained simply because they cannot pay bail. The ordinance requires municipal court judges to "make an inquiry into the person's ability to pay and a finding that the person has the present ability to pay the amount set."<sup>a</sup> Although it appears that judicial practice does not always match what is required under the ordinance, the law itself provides a basis for enforcing compliance and is a model for additional measures to encourage fair court practices, which the city should do.

More problematic, the municipal bail ordinance does not cover people arrested for state misdemeanor crimes, even though their cases are also adjudicated in municipal court. The most straightforward way to close this gap in fairness and efficiency would be for police to use the municipal code rather than state statute whenever making a misdemeanor arrest that involves booking the arrested person into jail.<sup>b</sup> On any given day in 2018, approximately 77 people arrested for state misdemeanor crimes were in jail because they were unable to pay bail. (See Appendix A for a description of the data sources used and analyses conducted for this report.)

There are parallel municipal crimes for every state misdemeanor crime, with the same definitions and similar penalties. The city council should equalize the penalties, and the mayor's office should direct the police department to rely exclusively on the municipal code when making custodial arrests for misdemeanor offenses. These simple reforms would extend the protections offered by the city's own bail ordinance to everyone adjudicated in municipal court. And they would free district attorney staff to focus solely on felony crimes in Criminal District Court.

There is one caution: Vera found that nearly a quarter of the people held pretrial for a state misdemeanor arrest (19 of the 77 people) were arrested for domestic abuse

battery. Additional precautions may be necessary to protect alleged victims in these cases. Present law already provides an option. Municipal court judges may detain a person without bail for up to five days if the misdemeanor arrest involves domestic violence. During this period, the law envisions holding a full evidentiary hearing to determine whether the person can be safely released and, if so, under what conditions, or whether preventive detention—which is expressly allowed for domestic violence offenses—is necessary.<sup>c</sup> With careful use of this authority, municipal court judges can actually make more fair and safe decisions about pretrial release and detention than they would if relying on money bail as the determining factor in whether an arrested person is released.

**Conviction fees:** Reduced incentive but still commonplace. In conjunction with the merger of the Municipal and Traffic Courts in 2017, the city and municipal judges agreed that any revenue from fines and fees imposed at conviction would go directly into the city's general fund. In turn, the city began funding the municipal court at a level consistent with the court's needs. This is a major step; it eliminates any overt conflict of interest and reduces the incentive to levy these financial charges.

However, these practices continue to be a source of injustice. Although the financial burden and potential debt is far lower than the costs imposed on people prosecuted in state court, the municipal court's use of conviction fees poses a significant financial burden and does so unequally. In the past, these fees have led to thousands of arrest warrants being issued annually for failure to pay or failure to appear in court to make a payment (4,004 warrants in 2015). Their use thus raises the same concerns about equal protection under the law and due process articulated in *Cain v. City of New Orleans*, which addresses unconstitutional practices in Criminal District Court. Also troubling, the reach of fees levied in municipal court, even on a reduced scale, is much wider: many more people are arrested for misdemeanors than felonies, not even counting people charged with traffic offenses, which the municipal court also hears.

The judges of the municipal court should end the use of all conviction fees not mandated by state law, as the Juvenile Court recently did, and only impose fines when the person can pay without hardship. In turn, the city should sustain its increased funding for the court despite the loss in revenue from fees.

## IV. Impact of the recommended reforms

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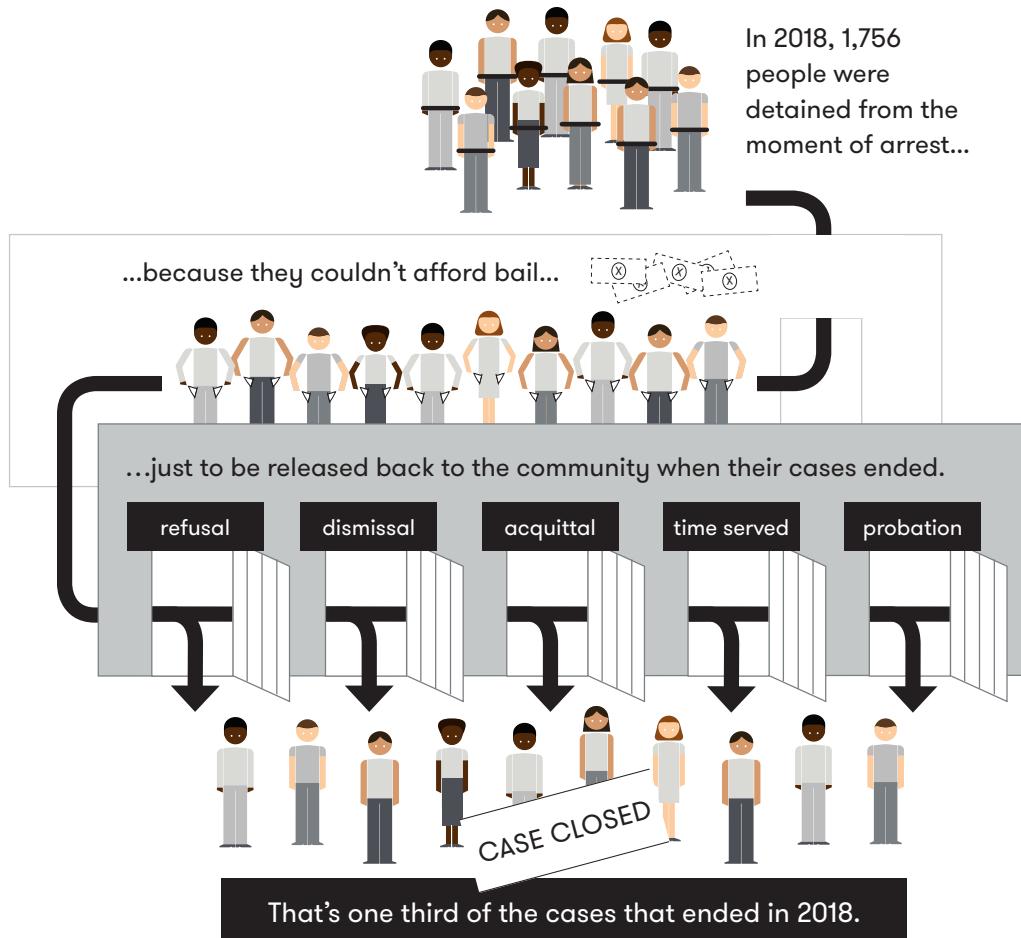
Ending the two biggest drivers of money injustice—bail and conviction fees—and replacing lost revenue with direct funding from the city makes sense and is a winning proposition for everyone other than the for-profit bail bond industry. It refocuses the use of jail to actually promote public safety, reducing the overall jail population significantly; treats poor and low-income people fairly; and is a far better use of public resources. Using the tax dollars in hand—and with some money to spare—New Orleanians can have more safety and more justice. These impacts are discussed below.

### Preventing unnecessary, unfair, and harmful incarceration

Despite significant reforms undertaken over the last few years—and a steadily declining jail population—money injustice continues to cause significant unfair and unnecessary incarceration. In a city in which 85 percent of people arrested are too poor to hire a lawyer, the cost of bail or a bail bond is more than many can afford.<sup>48</sup> Some people sit in jail for weeks or months even before being formally charged. And those who are prosecuted often plead guilty to get out of jail, whether they committed the crime or not.<sup>49</sup> In 2018, 1,756 people—encompassing roughly a third of all cases resolved in Orleans Parish Criminal District Court that year—were detained from the moment they were arrested, then released when their cases ended. And the research is clear: people detained pretrial for any length of time have much less favorable outcomes in their criminal cases and in their lives overall.<sup>50</sup>

The bigger picture: in 2018, fully 37 percent of the entire jail population on any given day—448 people—were locked up simply because they couldn't afford bail. And this excludes people with bail set at an amount

## Unnecessarily detained while legally innocent—then released



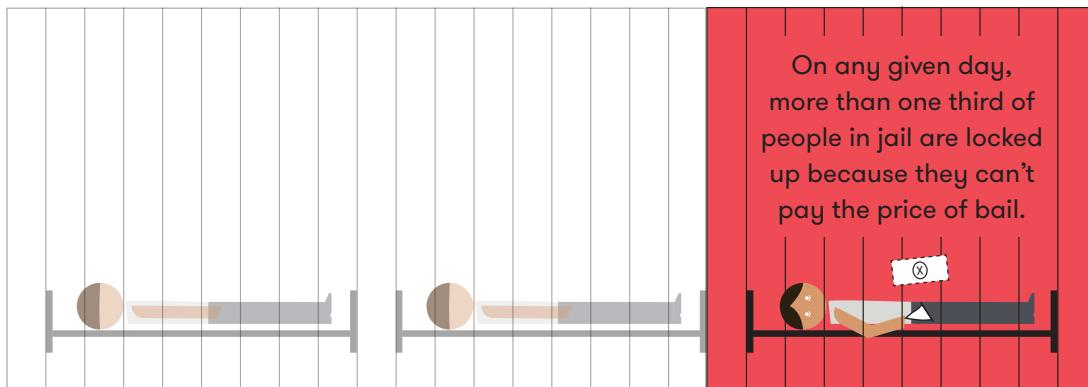
exceeding \$100,000, which would require paying more than \$12,000 to purchase a bond. When a judge sets such a high bail amount, the presumed intention is to prevent the person's release.<sup>51</sup> This count also excludes anyone held for an alleged probation or parole violation or for extradition to another state—that is, people who wouldn't get out even if their money bail were paid.

*"He wound up sitting there [in jail] four months, and they wound up just dropping it because they didn't have proof. So, this is like a countdown."\**

\* Quotations used in this report were collected during focus groups conducted in 2018, see Appendix A at page 48 for details.

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## Wealth determines who's in jail



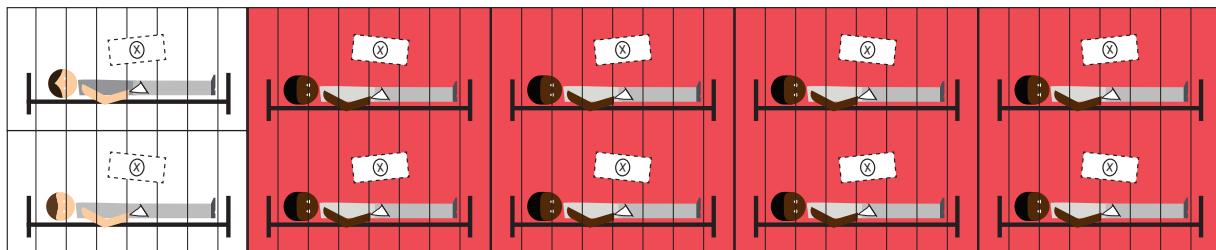
It is easy to get swept up in the numbers and overlook the people involved and common hardships of being incarcerated. There is the separation from loved ones and loss of a job and money your family depends on. There are the endless hours without anything productive to do in an environment that is painful: harsh lighting, constant noise, every surface either metal or concrete, lack of fresh air and sunlight, unappetizing or even inedible food.<sup>52</sup> There is the physical insecurity, including fear of being attacked by others who are locked up or by staff. Illnesses and injuries are often misdiagnosed or left untreated, sometimes with devastating consequences. People's mental health deteriorates, pushing some to take their own lives. In jails nationwide, suicide is the leading cause of death.<sup>53</sup> And more than a third of all deaths, whatever the cause, happen in the first seven days of admission, so even very short jail stays can end tragically.<sup>54</sup>

*"The dehumanization. . . . If you're an intelligent person who reads and talks to people, and you care, it's like you think you know how horrible it is, but you don't know."*

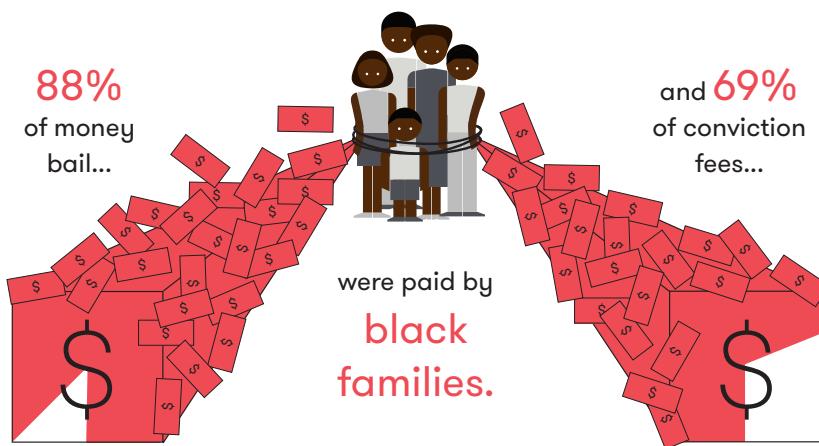
For the past six and a half years, the New Orleans jail has been under federal court oversight because conditions fail to meet minimal constitutional standards. Although conditions may have improved somewhat, spending even a day in jail is still a harsh experience with real risks. And yet the vast majority of people in jail today haven't been convicted of any crime and are mainly held because they can't pay money bail.

## Disproportionate burden on black New Orleanians

8 out of 10 people jailed because they're too poor to pay bail **are black.**



...and for those who managed to pay



Racially disproportionate arrest practices and economic inequality mean that the jailing of people who can't afford the price of freedom is concentrated among black New Orleanians. In comparison with whites, black people between the ages of 15 and 64 are arrested two and a half times more frequently relative to their share of the city population, and black families in New Orleans earn only 37 percent of what white families earn.<sup>55</sup> In 2017, eight out 10 felony defendants who spent more than two days in jail simply because they couldn't pay bail were black. Together, these black New Orleanians spent a total of 52,657 days in jail—the equivalent of 144 years—all in the space of a single year. A system that concentrates its inherent harmful effects among black people, families, and communities is doubly unjust.

*"During my father's incarceration the lights got cut off. . . . my mom was going through a lot of stress and though she was compensating,*

*you know, trying to help, but still it caused a lot of strain between the entire family . . . emotional strain and especially financial strain. Because, I mean, if you're renting, you know, not all of us own homes, you are scrounging to pay the rent and then also, you know, pay the lights, and you know, eat."*

Releasing the vast majority of people while detaining the small minority who pose a significant imminent danger would result in hundreds fewer people in jail on any given day. The exact decrease depends on how often Criminal District Court judges actually detain people flagged at first appearance as presenting a potential threat—a judicial finding that depends entirely on each person's circumstances, measured against a heightened legal standard as discussed in the previous section of this report. Vera's estimate, based on the recent composition of the jail population, yields a range of possible decreases in the number of people who would be jailed.

A quarter of people arrested for a felony-level offense are accused of committing a violent crime that carries a mandatory prison sentence or are assessed at risk level 5—the two circumstances that trigger consideration of detention as discussed in Recommendation 1. Even if judges were to detain all of them, there would be an estimated 304 fewer people in jail at any one time, producing a 25 percent reduction of the current jail population. Instead of roughly 1,200 people in jail on any given day, there would be around 900.

This is the smallest possible decrease under the recommended reforms, and it easily could be surpassed. Why? Because no system should detain everyone eligible for detention, for that would mean the necessary individualized review is meaningless. Even now, well under half of the people who fall into these categories are detained because they can't pay bail: 29 percent of people arrested for a mandatory prison violent felony and 42 percent of people assessed at risk level 5 on the PSA, based on jail admissions in the latter part of 2018. If, for example, judges detained people in these two groups at the same rate, albeit through the fair judicial process recommended in this plan, the average daily jail population would drop by an estimated 516 people—a 42 percent reduction. Although even greater reductions are conceivable, it is also possible that some people in these two groups who are currently released on money bail should in fact be detained

to protect public safety. At least initially, the actual reduction is likely to lie somewhere between 304 and 516 people.

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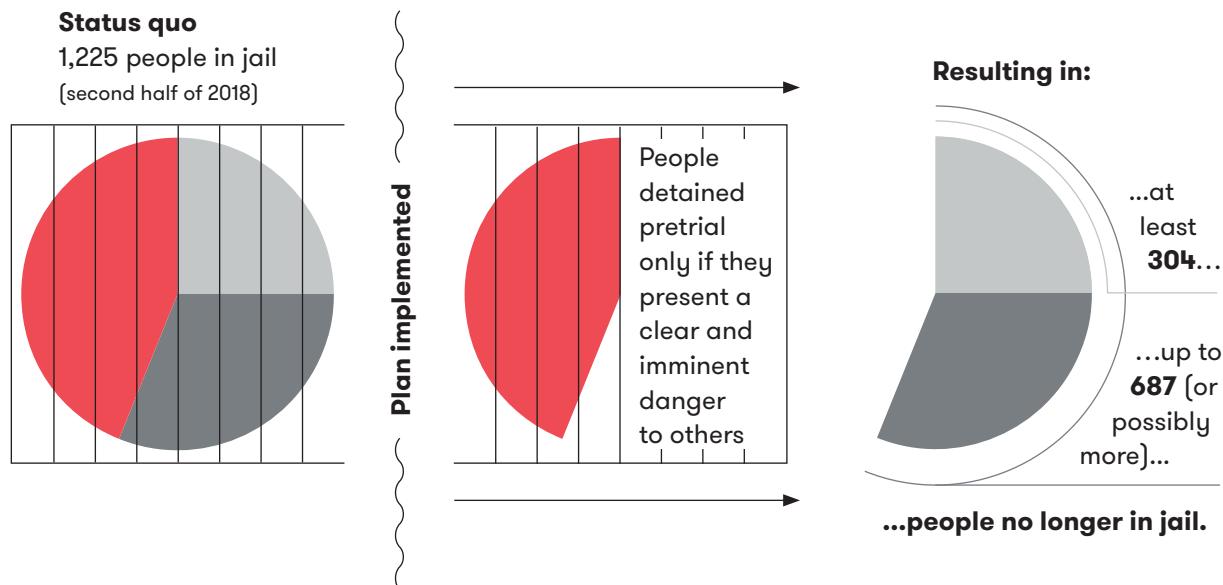
If judges also immediately release everyone initially detained because of an alleged probation violation accompanying a new arrest (excluding people arrested for a mandatory prison violent felony offense or assessed as risk level 5), the jail population would decrease by an estimated additional 171 people. Many of these people would be released eventually anyway to continue serving out their terms of probation in the community.

The total projected incarceration impact of replacing money bail with the fair and safe court practices outlined in this plan is likely to range from a minimum of 304 fewer New Orleanians in jail every day up to 687—a jail population reduction of between 25 and 56 percent. This projection is based on jail data from the second half of 2018 when the average daily population was 1,225 people.

*"It seems to always be about just making that financial compensation off of a person. And sometimes these people can't give that, you know. So, they end up getting warrants. They end up getting put in jail, you know."*

Failure to pay conviction fees does not lead to incarceration nearly as frequently or for as long as does money bail. Based on the data analysis

## Incarceration impact of implementing the plan



published in *Past Due*, eliminating conviction fees would decrease the average daily jail population by 10 people. But it would remove the debilitating threat of arrest and incarceration from thousands of people. The emotional weight of the debt, coupled with the threat of jail—even if jail can be avoided by paying a little something on demand—marginalizes and undermines people who already have a hard time making ends meet. That kind of pressure and constant life disruption can, at the extreme, lead people to commit new crimes.<sup>56</sup>

## Generating savings for all New Orleanians

Jailing people is expensive, and jailing people unnecessarily is a waste of money. In 2018, the City of New Orleans spent \$5.4 million to detain people who could not afford to pay their way out. As already discussed, the city alone bears this expense, while revenue from bail bond fees and conviction fees supports the Criminal District Court, which imposes these costs, along with four other state agencies. But even if all of the revenue were channeled into the city's coffers, the cost of this unnecessary detention would exceed the revenue collected by nearly \$2 million.

The sheriff's office spends \$76 million a year to operate its jail. That's an average cost per person of \$169 per day. Because many of those costs are fixed and not subject to fluctuations in the jail population, the marginal daily savings of keeping one person out of jail is around \$33. But even at this modest amount, the aggregate potential savings is enormous. Based on the range of possible decreases in the jail population outlined above, the city could save between \$3.7 million and \$8.3 million over the course of a year by eliminating the unnecessary incarceration that results from a reliance on money bail and unnecessary probation detention at the higher end of the range.

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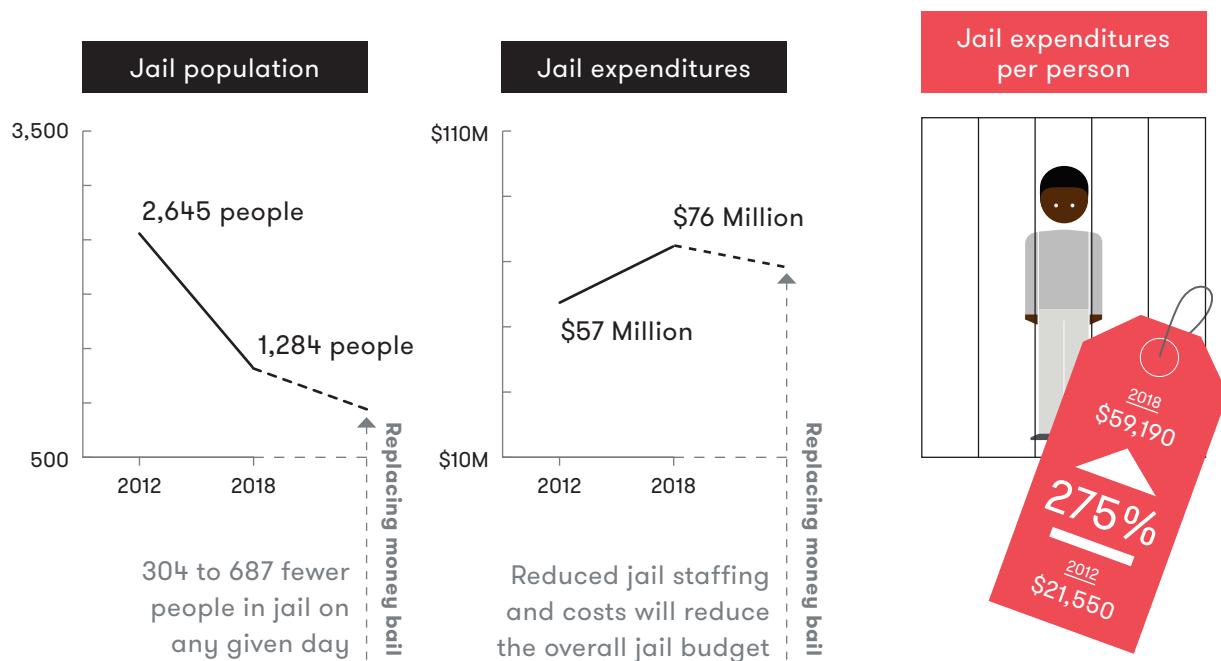
The city could save between \$3.7 million and \$8.3 million over the course of a year by eliminating the unnecessary incarceration that results from a reliance on money bail and unnecessary probation detention.

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Achieving the full savings would require a reduction in the number of housing units and accompanying jail staff to reflect the reduction in the average daily population. However, because the jail and its budget are under federal court oversight, reducing the facility's budget is somewhat more complicated than it would be otherwise. The city will need to demonstrate to the federal judge overseeing the consent decree that any lingering deficiencies in jail conditions are not the result of insufficient funding.

There is strong evidence to support a proportional reduction in the jail budget as the population continues to decline. The sheriff's office's spending to operate the jail has increased from \$57 million in 2012, the year the

## A reduced jail population is an opportunity to reduce the jail budget



consent decree went into effect, to \$76 million in 2018. During that period the number of people in custody declined from 2,645 to 1,225. In other words, spending increased by 34 percent while the number of people that investment supported decreased by 54 percent. So, jail expenditures per detained person nearly tripled. Ideally, the sheriff and the plaintiffs in the case (the U.S. Department of Justice and the MacArthur Justice Center) will support the city's effort to gain the federal court's approval of a proportional reduction in spending on incarceration to support the considerable expansion of safety and justice outlined in this plan.

If the jail population were to decrease by an additional 304 people, the bare minimum estimated under these recommended reforms, it is reasonable to expect the city to reduce its investment in the jail and redirect a portion of those savings to the Criminal District Court, district attorney, and public defender, replacing revenues from bail bond fees and conviction fees in future years. And even with additional appropriations totaling \$2.8 million annually to replace those lost revenues, there is a net savings to the city as a result of incarcerating fewer people: \$900,000 at the lowest end of the range (304 fewer people in jail) and up to \$5.5 million a year if the higher jail reductions forecast under this plan were to

be achieved (687 fewer people in jail, not including the small number now jailed for inability to pay fines and fees).

## Keeping hard-earned dollars where they belong: At home

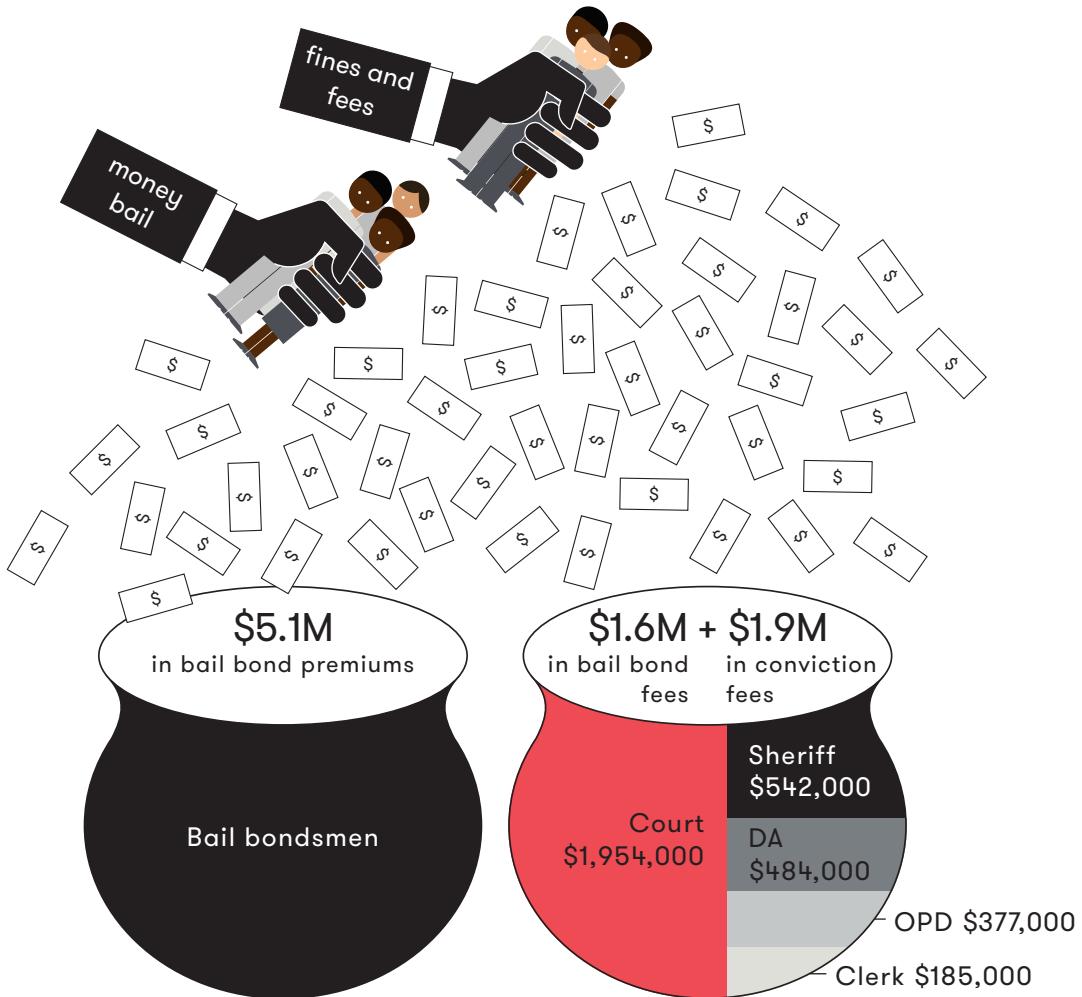
The cumulative financial savings for people who are arrested and convicted and, by extension, their families, is even greater than what the city stands to save. Consider what people currently sacrifice to pay bail. Fully 81 percent of people arrested for a felony offense in 2017 were required to pay bail as a condition of release—decisions made in the course of hearings lasting a few minutes or even less. The median bail amount in these cases was \$5,000. To avoid being jailed pretrial, people with at least some financial resources purchased a commercial bail bond. Even a cost of just a few hundred dollars is a real financial hardship for low-income people and their families. And the money isn't temporarily out of pocket, it's gone forever.

*"It just goes on and on and on and on. . . . Even if everything goes the way it's supposed to go, you're still stuck in this never-ending cycle of all of the costs that people don't even ever talk about."*

State law sets the bond premium at 12 percent of the entire bail amount and allocates 9 percent to the bondsman. The remaining 3 percent is split among four agencies, with the court receiving the lion's share at 1.8 percent. The district attorney, public defender, and sheriff take the rest. Across thousands of cases annually, the dollars add up. In 2017, residents of New Orleans purchased their pretrial liberty at a cost of \$6.8 million. Bail bondsmen walked away with \$5.1 million, \$925,000 went to the Orleans Parish Criminal District Court, and three other justice agencies split the remaining nearly \$700,000.

*"It financially broke me . . . I'm the type of person, I didn't want to let him go in there and rot. I just wasn't going to do that. . . . I was the one who put up their house to get him out of jail."*

## Millions taken from New Orleans families



Moreover, a cruel irony of the focus on money is that people who are able to pay bail often lose their public defender. The ability to scrape together the cost of a bail bond is taken as a sign that the person can afford to hire a lawyer, despite a Louisiana statute stating, “Release on bail alone shall not disqualify a person for appointment of counsel.”<sup>57</sup>

While the total amount extracted in the form of conviction fees is less than the total extracted through money bail, it is still significant and in fact sends more money to government than bail bond fees. In 2017, residents sentenced in Orleans Parish Criminal District Court who paid off at least a portion of their conviction fees channeled \$1.9 million to government

agencies, including more than \$1 million in revenue to the court itself. By comparison, the sheriff's office took in \$322,000, the district attorney \$215,000, the clerk of criminal court \$185,000, and the public defender \$177,000. (Following an August 2018 federal court ruling, described at page 13, revenue from conviction fees appears to be declining.)

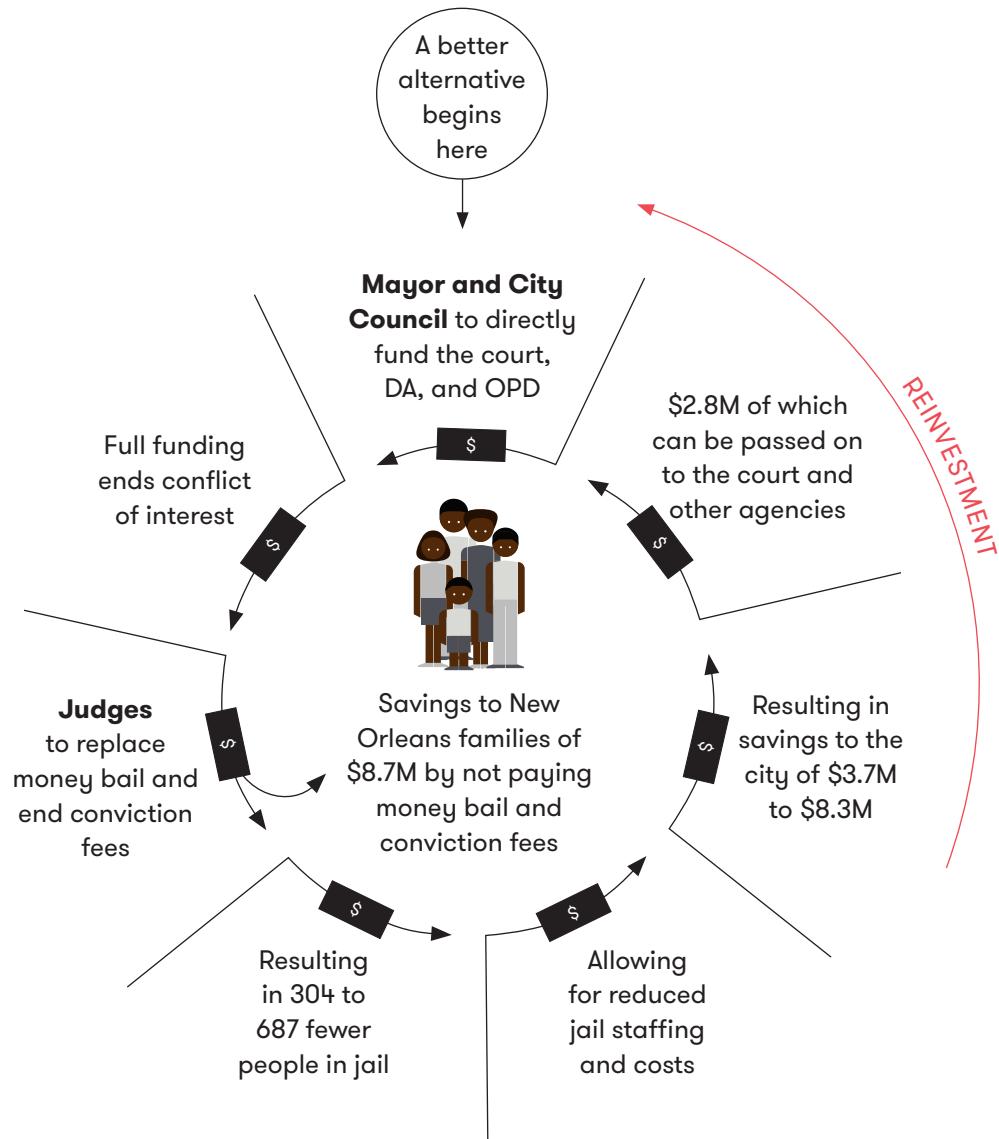
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The bulk of the savings will benefit black families, as they pay the lion's share of money bail and conviction fees. Fully, 88 percent of money bail paid in felony cases in 2017 came from black families.

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By replacing money bail and eliminating fines and fees, families who by and large are already struggling financially will save \$8.7 million a year. The bulk of the savings will benefit black families, as they pay the lion's share of money bail and conviction fees. Fully 88 percent of money bail paid in felony cases in 2017 came from black families. As documented in *Past Due*, the precursor to this report, 69 percent of conviction fees imposed in all types of cases were charged to black defendants. Although mostly black men are arrested, women bear most of the financial cost of money injustice. They pay for the bail bonds to free their loved ones or, if they can't, they pay all the costs of keeping families together while the men are jailed.<sup>58</sup> Now is a critical time to unburden struggling black New Orleanians. Economic disparity by race has been growing.<sup>59</sup> This plan will take a huge bite out of the money injustice that undercuts racial equity citywide.

## A better alternative



## Enhancing safety

The ways in which the status quo undermines public safety are clear. Money bail results in the wholesale detention of people because they are poor, not because they present a significant danger to anyone, and research shows that spending time in jail, even just a few days, is associated with future criminal behavior.<sup>60</sup> Also troubling, money bail allows the small number of people who might cause serious harm to buy their way out of jail; it is the key to release for 65 percent of all people arrested for a

mandatory prison violent felony or assessed at the highest level of risk. Although the full impact is impossible to quantify, replacing money bail with a system that reliably detains people who present a serious and imminent threat will undoubtedly help build a safer community.

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Money bail allows the small number of people who might cause serious harm to buy their way out of jail.

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And at the tail end of the criminal justice process, fines and fees imposed at conviction financially burden and undermine people precisely when they need to focus on putting their lives in order. Eliminating them will end the destabilizing impact they have on people's lives. Money injustice puts all of us at risk. Ending it will produce the gains in public safety we all want.

## Conclusion

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Everyone wants to live in a safe community and one that is thriving economically—and the two are connected. The criminal justice system should be one force among many that strengthens neighborhoods citywide. But when the system extracts money from people who are struggling economically and unnecessarily jails those who can't pay, those decisions drag down families and whole communities and ultimately undermine public safety.

The city can make transformative changes within existing state law that will benefit all New Orleanians. The tools to support such change are in place. The city has a court-operated pretrial services program, a record of success in reducing the jail population without compromising public safety, a commitment to lifting up struggling communities and building racial equity, and a budget that removes the financial barriers to ending money injustice. That budget can also serve as a moral document—a statement of the city's priorities, its vision of justice, and its commitment to spending public money wisely. And the budget can be mechanism for holding city officials and those the city funds accountable for operating a justice system that is fair and safe for all New Orleanians.

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The budget can also serve as a moral document—a statement of the city's priorities, its vision of justice, and its commitment to spending public money wisely.

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It is critical for the mayor to take a leadership role with strong support from the city council. On the court's part, strong and clear leadership by the chief judge and others on the bench is essential. As for when the various pieces of this approach should be implemented, it should be remembered that the court already has full replacement funding, indeed significantly more than it will lose. The court can immediately stop imposing fines and fees, clear all existing debts, and release anyone jailed for failure to pay—actions that would answer the federal court's order in *Cain*.

As for replacing money bail with a decision-making process focused on safety and justice, it will take some months to put these new practices in place. Planning and early implementation should occur concurrently

with the formation of the mayor's proposed 2020 budget to ensure commensurate city investment going forward: fully supporting the operation of the court, district attorney, and public defender without extracting money from poor defendants and their families. With help from the justice system leaders, the city can then turn to right-sizing the jail budget and reinvesting the savings accrued by eliminating the costly and unnecessary pretrial detention of poor people—a correct response to the federal court's ruling in *Caliste*.

By taking these actions, Criminal District Court judges, the mayor, and city council members will fulfill their obligations as local leaders and provide an inspiring model of local collaboration. They will make New Orleans the first city in the country to replace money bail and conviction fees—the twin pillars on which money injustice stands—with a fair, safety-promoting, and financially stable system of justice.

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## Appendix A: Methodology

This appendix provides detail on Vera’s data sources and methods for the administrative data, budget, and focus group analyses.

## Administrative data analysis

**Data sources.** Vera used four data sources to estimate the impact of the proposed policy changes: (1) five jail population “snapshot” tables that include booking, charge, release, and disposition data for people held in the jail on August 2, 2018, September 10, 2018, October 9, 2018, November 1, 2018, and December 3, 2018; (2) Public Safety Assessment (PSA) tables that contain risk scores for all people who were booked into the jail on new felony charges and were administered the PSA from August through December 2018; (3) booking tables that contain information about release terms (such as bail amounts) set at first appearance for people admitted to the jail between August and December 2018; and (4) release tables, which contain data for the dates of and reasons for release for people who were discharged from jail between August 2018 and March 2019.

The Orleans Parish Criminal District Court began using the PSA in July 2018. The assessment is administered to people with new felony arrest charges as they are booked into the jail. August 2018 was the first month for which risk-score data was available. People who were in jail on the snapshot dates but who did not have risk scores, either because they were not assessed or were assessed with the previously used risk assessment, are included in analysis and their risk scores coded as “null” (an average of 145 people each month).

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Table 1

### Average number of people in jail, August–December 2018\*

Arrested for MPVF, no probation or parole holds, no out-of-state warrants	280
Assessed at risk level 5, no probation or parole hold, no out-of-state warrant	25
All others with felony arrest charges	304
<b>Subtotal all new felony arrests</b>	<b>610</b>
Felony probation holds with no MPVF, no risk level 5	171
All other felony probation holds	48
<b>Subtotal all felony probation holds</b>	<b>220</b>
All others (people arrested for misdemeanors, municipal charges, etc)	395
Average number of people in jail	1,225

\* Totals may not sum due to rounding

The analysis includes people who were in jail custody because they were arrested on new felony charges and had no out-of-state warrants or parole holds. People who were admitted to the jail with new felony arrest charges and out-of-state warrants and/or parole holds were excluded from analysis because, even if they were to make bail, their holds would prevent their release.

The sample was further categorized into two groups: those without a probation hold and those with a probation hold. Within each category, the analysis counts the number of people in jail who were arrested for a mandatory prison violent felony (MPVF) charge and those assessed at risk level 5 on the PSA's decision-making framework (DMF). People with both an MPVF and a risk level 5 were included in the MPVF group. The results were averaged across the five months.

**Estimating jail population reduction.** As part of this analysis, researchers calculated the rate of release before final case disposition for people who were arrested for an MPVF or assessed as risk level 5 from August through December 2018. In that period, 146 people were admitted to the jail on an MPVF arrest charge with no probation hold, parole hold, or out-of-state warrant. By mid-March 2019, 81 of these people had either been released pretrial and/or their cases had reached disposition: 38 people (47 percent) had been released pretrial, while 43 people (53 percent) had remained in jail until their final case disposition. For people assessed at risk level 5, 113 entered the jail and 47 people (42 percent) remained in jail until their final case disposition.

Vera researchers estimated the likely impact of the recommendations made in this report on the jail population. To do so, researchers used the average jail populations from August to December 2018, described above. The minimum impact estimated is a reduction of 304 people—the number of people in jail on a felony arrest charge with neither an MPVF nor assessed at risk level 5—out of a total jail population of 1,225. These people would be automatically released as they are not eligible for detention under the plan.

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Table 2

**Estimated jail population reduction**

	Average population	Percent reduction	Jail reduction
Felony arrests with neither MPVF nor risk level 5	304	100%	304
MPVF	280	71%	198
Risk level 5 with no MPVF	25	58%	15
All probation holds with no MPVF, no risk level 5	171	100%	171

However, not all people held in jail on an MPVF or who are assessed at risk level 5 are detained throughout their pretrial period. If, in addition to the 304 people identified above, people in jail on an MPVF or assessed at risk level 5 were released by a judge at the same rate that those people are currently being released on bail, an additional 198 people on MPVF charges and 15 at risk level 5 would be released. This would result in a total reduction of 516 people. However, this number is not intended to be either a recommended or maximum reduction, but rather is presented as a point of reference. In Vera's sample, an additional 171 people who were neither arrested for MPVFs nor assessed at risk level 5 were detained because of probation holds. If those people were also released, the total reduction would be 687 fewer people in jail.

**Estimating number of people in jail because they cannot pay money bail.** To estimate the number of people held in jail because they cannot afford to pay money bail, Vera calculated how many people were held in jail because their bail was set at \$100,000 or less, drawing on snapshot tables for August to December 2018. The figure is averaged over the five-month period for people with no probation or parole holds and no out-of-state warrants and excludes people who were released on recognizance (ROR).

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Table 3

**Average number of people held on bail set at \$100,000 or less**

	<b>Number</b>	<b>Percentage</b>
Average number held on bail set at \$100,000 or less	448	37%
People with felony charges	358	29.2%
People with state misdemeanor charges	77	6.3%
People with municipal charges	11	0.9%
People with traffic charges	4	0.3%
Average jail population, August–December 2018	1,225	

## Budget analysis

The budget analysis was conducted using data from reports called “budget templates,” which each agency provides to the city council with their annual budget request. Vera obtained budget templates from the Criminal District Court (CDC), District Attorney (DA), Orleans Public Defenders (OPD), and the Clerk of the Criminal District Court for 2017, and the Orleans

Parish Sheriff's Office for 2016 (the template for 2017 was unavailable). These five agencies received \$3.5 million in bail fee and conviction fines and fees revenue, with \$2.8 million in revenue to the Criminal District Court, District Attorney, and Orleans Public Defenders alone.

**Table 4**

**Total collected bail fees and conviction fines and fees by agency**

<b>Agency</b>	<b>Bail fees</b>	<b>Conviction fines and fees</b>	<b>Total of bail fees + conviction fines and fees</b>
Criminal District Court	\$925,000	\$1,028,700	\$1,953,700
District Attorney	\$269,569	\$214,599	\$484,168
Orleans Public Defenders	\$200,000	\$176,500	\$376,500
Orleans Parish Sheriff's Office	\$220,000	\$321,500	\$541,500
Clerk of the CDC		\$185,000	\$185,000
<b>TOTAL</b>	<b>\$1,614,569</b>	<b>\$1,926,299</b>	<b>\$3,540,868</b>
Subtotal [CDC, DA, OPD]	\$1,394,569	\$1,419,799	\$2,814,368

The Criminal District Court collected \$925,000 in bail fees in 2017. Because the court receives a 1.8 percent fee on all bonds, researchers estimated that total bonds in 2017 were \$51 million and that the commercial bail bond industry collected \$5.1 million, based on the knowledge that the commercial bail industry retained a 10 percent premium in 2017 rather than the statutory amount of 9 percent.

**Table 5**

**Estimated total bond amounts assessed and court and bond agent's profits, 2017**

CDC bail bond revenue (1.8% of total)	\$925,000
Estimated total bond	\$51,388,889
Estimated commercial bail bonds share (10% of total)	\$5,138,889

**Estimating cost savings.** Vera estimated annual cost savings by multiplying the anticipated reduction in the jail population by the marginal cost of incarcerating one person per day—\$33.21. This value was then multiplied by 365 days. The predicted loss of revenue from bails,

fines and fees was subtracted from the estimated savings in jail spending to reach a net cost saving.

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Table 6

**Estimated jail population reduction and savings**

	<b>Estimated population reduction</b>	<b>Jail savings</b>	<b>Bail fees and conviction fines and fees to CDC, OPD, and DA*</b>	<b>Net cost savings</b>
Total (minimum reduction)	304	\$3,684,982	\$2,814,368	\$870,614
Total (further reduction)	516	\$6,256,420	\$2,814,368	\$3,442,052
Total (further reduction plus probation)	687	\$8,329,222	\$2,814,368	\$5,514,854

\* Figures in this column are calculated based on 2017 budget figures

## Focus group analysis

In August 2018, Vera researchers conducted two focus group sessions with 18 purposively sampled, self-described personal acquaintances (e.g., spouses/partners, parents, children, friends) of defendants in the New Orleans court system. Respondents were recruited from the general public using a variety of methods: advertisements posted to online platforms such as Craigslist and Facebook and at various legal aid organizations within New Orleans, as well as through in-person canvassing at the Orleans Justice Center's visitation facility.

All prospective focus group participants were screened using an online survey to assess their inclusion eligibility based on a series of selection criteria. These criteria were: (1) type of relationship to the defendant; (2) whether the defendant's case was adjudicated in New Orleans criminal and/or municipal court; and (3) the length of time since the respondent's last contact with the New Orleans court system. In total, 25 qualified people were invited and scheduled to participate in the two focus groups, and 18 appeared and participated on the day of the focus-group sessions. All 18 participants provided informed written consent to voluntarily take part in the focus groups, and they each received a \$100 prepaid gift card as compensation for their time and participation in the research study.

The first focus group included 11 respondents who indicated that they been asked to contribute financially to obtain money bail for a defendant in the New Orleans court system. The second focus group comprised seven respondents who self-reported that they had been asked to financially assist defendants with making payments associated with post-conviction-related fines and/or fees assessed by a New Orleans court.

The focus group discussions centered on the respondents' experiences with the decision-making process and the various ramifications of financially assisting someone they knew who was assessed money bail or post-conviction fines and/or fees in either of the courts. In addition, participants in both groups were asked about their thoughts on how the city's justice system is currently funded, as well as on how this system of funding could be improved in the future. The focus group sessions were audio recorded, and the audio files were subsequently transcribed by an external vendor. The research team coded and analyzed the transcripts using the software application MAXQDA for qualitative and mixed-methods data analyses.

**Table 7**

**Total collected bail fees and conviction fines and fees by agency**

<b>Respondent characteristics</b>	<b>Category</b>	<b>Focus group one (money bail) respondents</b>	<b>Focus group two (fines &amp; fees) respondents</b>
		<b>n = 11</b>	<b>n = 7</b>
Gender	Male	3	3
	Female	8	4
Defendant's adjudicating court	Orleans Parish Criminal District Court	7	5
	New Orleans Municipal Court	0	1
	Both courts	4	1
Type of financial support provided to defendant	Paid pretrial money bail	6	0
	Paid post-conviction fines/fees	0	4
	Paid both	5	3
Respondent's most recent interaction with the New Orleans court system	Within the past year	8	5
	1-2 years ago	3	2

## Appendix B: New Orleans decision-making framework

### New Orleans Public Safety Assessment Model Decision-Making Matrix and Release Recommendations

Step 1: Pretrial Services completes PSA and provides FTA and New Criminal Activity (NCA) scores

Step 2: Apply the scores from Step 1 to the Decision-Making Matrix to determine the risk level

Step 3: Use the risk level in Step 2 to determine release and supervision recommendations

Decision-Making Matrix							
		New Criminal Activity (NCA) Score					
		NCA 1	NCA 2	NCA 3	NCA 4	NCA 5	NCA 6
<i>Risk of Failure to Appear (FTA) Score</i>	FTA 1	Risk Level 1	Risk Level 1				
	FTA 2	Risk Level 1	Risk Level 1	Risk Level 2	Risk Level 3	Risk Level 4	
	FTA 3		Risk Level 2	Risk Level 2	Risk Level 3	Risk Level 4	Risk Level 5
	FTA 4		Risk Level 2	Risk Level 3	Risk Level 4	Risk Level 4	Risk Level 5
	FTA 5		Risk Level 3	Risk Level 3	Risk Level 4	Risk Level 5	Risk Level 5
	FTA 6				Risk Level 5	Risk Level 5	Risk Level 5

Release & Supervision Recommendations					
	Risk Level I	Risk Level II	Risk Level III	Risk Level IV	Risk Level V
<b>Release Recommendation:</b>	Release (ROR if eligible)  No Supervision	Release (ROR if eligible)  Administrative Supervision	Release (ROR if eligible)  Standard Supervision	Release (ROR if eligible)  Intensive Supervision	Detention Hearing  If released: Maximum Supervision
<b>Court Date Reminder Texts**</b>	✓	✓	✓	✓	✓
<b>New Arrest Checks</b>		Monthly	Monthly	Monthly	Monthly
<b>Face to Face Contact</b>		Initial	1x/month	2x/month	At least 3x/month
<b>Phone Contact</b>		1x/month	1x/month	2x/month	2x/month

\*Note: the presence of a Violent Activity flag increases a defendant's risk by one level, e.g. from Risk Level I to Risk Level II

\*\*Court date reminder texts will be sent by the City to defendants 48 hours in advance of upcoming court dates

Source: City of New Orleans, Office of Criminal Justice Coordination, <https://perma.cc/GRN5-REMH>.

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## Appendix C: Mandatory prison violent felony offenses

In this report, Vera uses the term “mandatory prison violent felony offenses” to refer to a set of Louisiana offenses that carry a mandatory prison sentence and are classified as violent according to the definition used for the Public Safety Assessment (PSA). The complete list of offenses is presented below. The definition of violence used by the PSA includes offenses in which a person intentionally causes or attempts to cause physical injury through use of force or violence against another person; as such, an attempt to commit any of the listed offenses is also considered a mandatory prison violent felony offense. Note that many crimes have subsections that include misdemeanors as well as felonies, and subsections that allow sentences other than prison in addition to those which carry a mandatory prison sentence. Only the specific subsections below are mandatory prison violent felony offenses. All offenses are found in Title 14 of the Louisiana Revised Statutes.

28.1 – Solicitation for murder	46.3(A)(3) – Trafficking of children for sexual purposes when permitted by a parent or guardian
30 – First degree murder	46.3(D)(1)(b) – Trafficking of children for sexual purposes when victim is under 14
30.1 – Second degree murder	46.3(D)(1)(c) – Trafficking of children for sexual purposes with prior conviction for sex offense
31(B) – Manslaughter if victim is under 10 years old	51 – Aggravated arson
32(C)(2)(a) – Negligent homicide when victim under 10 years old	60 – Aggravated burglary
32.1 – Vehicular homicide	62.8 – Home invasion
34(B) – Aggravated battery when victim was armed services member and battery committed because of that status	64 – Armed robbery
34.1(C) – Second degree battery when victim was armed service member and committed because of that status	64.1 – First degree robbery
34.2(2) – Battery of a police officer while in jail or other facility	64.2 – Carjacking
34.7(C) – Aggravated second degree battery when victim was armed service member and committed because of that status	81.2(B)(3)(a) – Molestation of juvenile when victim is 13 years to under 17
34.9.1(D) – Aggravated assault on a dating partner when minor child is present	81.2(D)(1) – Molestation of juvenile when victim is under 13
35.3(E) – Domestic abuse battery third conviction	81.2(D)(2) – Molestation of a person with physical or mental disability
35.3(F) – Domestic abuse battery fourth conviction	89.1 – Aggravated crime against nature
37.1 – Assault by drive-by shooting	93.3(E)(2) – Cruelty to persons with infirmities, subsequent conviction
37.7(D) – Domestic abuse aggravated assault when child present	94(C) – Illegal use of weapons second offense as long as 94(D) does not apply
40.2(2)(a) – Stalking when, after trial, victim was in reasonable fear of bodily injury or death	94(E) – Illegal use of weapons by discharging firearm from motor vehicle on a street in order to harm or frighten another person
42 – First degree rape	94(F) – Illegal use of weapons by discharging firearm during violation of controlled substances laws
42.1 – Second degree rape	113 – Treason
43.2(2) – Second degree sexual battery when victim is under 13	128.1(A)(1) – Terrorism coupled with intentional killing of a human being
43.3(C)(2) – Oral sexual battery when victim is under 13	128.1(A)(4) – Terrorism coupled with arson of a structure, watercraft, or movable
44 – Aggravated kidnapping	
44.1 – Second degree kidnapping	
45 - Simple kidnapping	
46.2(B)(3) – Human trafficking with victim under age 18	

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## Endnotes

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- 2 Charles Koch Institute, “New Survey: With Increased Understanding of Current Practices, Americans Support Reforms to Pretrial and Money Bail Systems,” <https://perma.cc/VAM6-E65F>.
- 3 *Stack v. Boyle*, 342 U.S. 1 (1952); *United States v. Salerno*, 481 U.S. 739 (1987); and *Bearden v. Georgia*, 461 U.S. 660 (1983).
- 4 In *Timbs v. Indiana*, 586 U.S. \_\_\_\_ (2019), the “fine” at issue was the seizure of the defendant’s car. The Court reiterated that the Excessive Fines Clause of the Eighth Amendment applies to all economic sanctions that are at least partially punitive, such as conviction fees as imposed in Louisiana.
- 5 See Youngjin Choi, “Lessons from California and New Jersey Bail Reform Legislation,” *New York Law Journal*, December 7, 2018, <https://perma.cc/7JR3-Q7ZB>; David Iglesias and Brett Tolman, “New Pretrial Release Rules are a Positive Step,” *Albuquerque Journal*, October 4, 2018 (opinion), <https://perma.cc/N55C-KJ89>; and New York State Office of the Governor, “Governor Cuomo and Legislative Leaders Announce Agreement On FY 2020 Budget,” press release (Albany, NY: Office of the Governor, March 31, 2019), <https://perma.cc/PF7Z-8UWH>.
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- 13 Orleans Parish Juvenile Court, “Standing Policy on Juvenile Administrative Fees,” effective June 20, 2018, <https://perma.cc/AU53-L7E8>.
- 14 Demario Davis and Benjamin Watson, “Jailing People Just Because They Can’t Afford Bail Doesn’t Make Us Safer,” *Times-Picayune*, September 30, 2018 [opinion], <https://perma.cc/7S9Z-A9RL>.
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- 16 Mayor-Elect LaToya Cantrell, *Transition Report*, [New Orleans: Forward Together New Orleans, 2018], 59. <https://perma.cc/5RQS-PEBQ>.
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- 18 For national jail data, see Zhen Zeng, *Jail Inmates in 2017* (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, 2019), <https://perma.cc/R7LE-FPQP>.
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- 22 *Salerno*, 481 U.S. at 750; and *Caliste v. Cantrell*, No. 2:17-cv-06197-EEF-MBN (E.D. La. August 6, 2018) [Order and Reasons], 14, <https://perma.cc/S2XE-QDMK>.

- <sup>23</sup> *Caliste v. Cantrell*, Order and Reasons, August 6, 2018; and *ibid.*, Declaratory Judgment, August 14, 2018, <https://perma.cc/WN5D-ZVJ>.
- <sup>24</sup> *Caliste v. Cantrell*, Order and Reasons, August 6, 2018; and *ibid.*, Declaratory Judgment, August 14, 2018, <https://perma.cc/WN5D-ZVJ>.
- <sup>25</sup> *Caliste v. Cantrell*, Declaratory Judgment, August 14, 2018, 2. For a comprehensive study of the conflicts, see Micah West, “Financial Conflicts of Interest and the Funding of New Orleans’s Criminal Courts,” *California Law Review* 101, no. 2 (2013), 521-552.
- <sup>26</sup> *Cain v. New Orleans*, Order and Reasons, August 2, 2018, <https://perma.cc/Y497-7K2N>; and *ibid.*, Declaratory Judgment, August 3, 2018, <https://perma.cc/4SVY-NDYG>.
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- <sup>28</sup> For 2018 figures, see Orleans Parish Criminal District Court, Revenue and Expenses (Unaudited) 6/30/2018-12/31/2018, on file with authors. For 2019 budget figures, see City of New Orleans, 2019 Annual Operating Budget (New Orleans: City of New Orleans, 2018), 698, <https://perma.cc/9VSX-F6KX>.
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- <sup>30</sup> In 2017, New Jersey implemented legislation that virtually eliminated money bail and addressed concerns about public safety through targeted increases in supported release and a modest expansion of preventive, no-bail detention for people who pose a clear and significant risk to public safety. See New Jersey Criminal Justice Reform Act, New Jersey Legislative Statutes § 2A:162-15 et seq. (2014), <https://perma.cc/82KZ-ADXG>; and New Jersey Judiciary, Jan. 1 – Dec. 31 2018 Report to the Governor and the Legislature (Trenton, NJ: New Jersey Administrative Office of the Courts, 2019), <https://perma.cc/UU2M-MTRH>. Also see Youngjin Choi, “Lessons from California and New Jersey Bail Reform Legislation,” *New York Law Journal*, December 7, 2018, <https://perma.cc/C9VV-NC24>. New Mexico did much the same, beginning with a constitutional amendment in 2016. New Mexico Denial of Bail Measure, Constitutional Amendment 1 (2016), <https://perma.cc/5Z3K-5KCG>.
- <sup>31</sup> New Jersey Courts, Criminal Justice Reform Statistics (Trenton, NJ: New Jersey Courts, 2019), Chart C: Nonsentenced Pretrial Jail Population, December 31, 2018, 8 & 9. <https://perma.cc/CM7Q-LGZA>.
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- <sup>35</sup> Aubrey Fox and Stephen Koppel, *Pretrial Release Without Money: New York City, 1987-2018* (New York: New York City Criminal Justice Agency, 2019), 2 & 9, <https://perma.cc/S5X5-5GLW>; and New York State Office of the Governor, “Governor Cuomo and Legislative Leaders Announce Agreement on FY 2020 Budget,” press release (Albany, NY: Office of the Governor, March 31, 2019), <https://perma.cc/2CLP-VRRS>.
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- <sup>38</sup> See generally Brice Cooke, Binta Zahra Diop, Alissa Fishbane, et al., *Using Behavioral Science to Improve Criminal Justice Outcomes: Preventing Failures to Appear in Court*. Chicago (Chicago: University of Chicago Crime Lab & Ideas 42, 2018); Léon Digard and Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention* (New York: Vera Institute of Justice, 2018), 8 <https://perma.cc/C7SA-W5T4>; and Timothy R. Schnacke, Michael R. Jones, and Dorian M. Wilderman, “Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program,” *Court Review: The Journal of the American Judges Association* 48, no. 3 (2012), 86-95, <https://perma.cc/GW7K-TX89>.
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- <sup>40</sup> *Stack v. Boyle*, 342 U.S. at 5.
- <sup>41</sup> *Faulkner v. Gusman*, No. 2:13-cv-06813-SSV-KWR (E.D. La. May 9, 2014) [Order and Reasons], 9-10, <https://perma.cc/NPM6-XUBD>. Article 334.4 is now codified at Louisiana Code of Criminal Procedure, art. 321(C)(2).
- <sup>42</sup> *Caliste v. Cantrell*, Order and Reasons, August 6, 2018, 16-21.

- <sup>43</sup> Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (Houston, TX: Laura and John Arnold Foundation, 2013), <https://perma.cc/9UHH-BNYC>; and Megan Stevenson, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes,” *Journal of Law, Economics, and Organization* 34, no. 4 (2018), 511-42.,
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- <sup>48</sup> Derwyn Bunton, “Public Defense’s Role in Fighting Injustice,” *Verdict* 22, no. 4 (2016), <https://perma.cc/F74F-2F68>.
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- <sup>57</sup> Louisiana Revised Statutes § 15:175[B][2].
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### “Twisting and breaking the law to keep the money flowing” p. 11

- a Augustus v. Roemer, 771 F. Supp. 1458, 1465, 1468 (E.D. La. 1991), <https://perma.cc/S26L-2AEX>. The bail bond fee at issue was first put in place by the legislature in 1988. Louisiana Revised Statutes § 13:1384<sup>f</sup>.
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- c Louisiana Revised Statutes. §§ 22:1065.1, 22:1381.5, & 22:1404.3.
- d Louisiana Revised Statutes § 22:1381.5.
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### “Bail and money bail: A brief history” p. 19

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- e Ibid.
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- g See for example *In re Humphrey*, 19 Cal. App. 5th 1006, 1029 (2018) (“Money bail, however, has no logical connection to protection of the public, as bail is not forfeited upon commission of additional crimes”), <https://perma.cc/RFB2-5WMP>; and *O'Donnell v. Harris County*, 251 F. Supp. 3d 1052, 1110 (S.D. Tex. 2017), <https://perma.cc/E2J2-5T3G>. See also American Bar Association [ABA], *Standards for Criminal Justice—Pretrial Release, Third Edition* (Washington, DC: ABA, 2007), Standard 10-1.4(d) (“Financial conditions [of release] should not be employed to respond to concerns for public safety”), <https://perma.cc/X2PH-RQL5>.
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- i *United States v. Salerno*, 481 U.S. 739 (1987).
- 
- “Benefits and limitations of the Public Safety Assessment”**
- p. 28**
- a See generally Lowenkamp, VanNostrand, and Holsinger, *Investigating the Impact of Pretrial Detention*, 2013; Marie VanNostrand and Christopher T. Lowenkamp, *Assessing Pretrial Risk Without a Defendant Interview* (Houston, TX: Laura and John Arnold Foundation, 2013), <https://perma.cc/9FP3-JZ8R>.
- b The Leadership Conference on Civil and Human Rights gathered these concerns in a July 2018 statement. *The Use of Pretrial Risk Assessment Instruments: a Shared Statement of Civil Rights Concerns*, 2018, <https://perma.cc/T5X9-UB3M>.
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### **“Bail, fines and fees in municipal court” p. 31**

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- b Using a custodial arrest—booking a person into jail—is itself a departure from the norm in these cases. The typical police practice in response to nonviolent municipal misdemeanor crimes is to arrest and detain the person just long enough to issue a summons without taking the person to jail. This has been the practice for more than a decade, following a 2008 city council ordinance. But the ordinance only applies to arrests made under the municipal code, not to state misdemeanors.
- c Louisiana Code of Criminal Procedure, art. 313.

### **“Benefits and limitations of the Public Safety Assessment”**

**p. 28**

- a See generally Lowenkamp, VanNostrand, and Holsinger, *Investigating the Impact of Pretrial Detention*, 2013; Marie VanNostrand and Christopher T. Lowenkamp, *Assessing Pretrial Risk Without a Defendant Interview* (Houston, TX: Laura and John Arnold Foundation, 2013), <https://perma.cc/9FP3-JZ8R>.
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In 2006, Vera came to New Orleans at the request of the city council, which saw an opportunity for the city to reduce unnecessary jail incarceration and thus change its approach to fostering public safety. For 13 years, Vera New Orleans has served as a nexus of initiatives that advocate forward-thinking criminal justice policies. Vera works with partners in community and government to build a local justice system that embodies equality, fairness, and effectiveness in the administration of justice. Using a collaborative data-driven approach, Vera New Orleans provides the high quality analysis and long-range planning capacity needed for the city to articulate and implement good government practices.

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