

The New Orleans Prosperity Index: Tricentennial Collection

From Bondage to Bail Bonds: Putting a Price on Freedom in New Orleans

FLOZELL DANIELS, JR., FOUNDATION FOR LOUISIANA
BENJAMIN D. WEBER, VERA INSTITUTE OF JUSTICE
JON WOOL, VERA INSTITUTE OF JUSTICE

Putting a Price on People's Freedom

Bail in Louisiana was once a system that enforced a constitutional right to be free after arrest and before a determination of guilt or innocence. Over time, it has been transformed into a money bail system in which that freedom is conditioned on the ability to pay money up front. What was originally designed as a right to pretrial freedom has become a means of control and extracting money from people who are arrested, and jailing those who cannot pay.

The money bail system takes \$6.4 million from New Orleans families each year, with over \$1 million going to the court, \$227,000 to each of three other agencies (the sheriff, district attorney, and public defender offices), and \$4.7 million to commercial bail bond companies.¹ For those whose families cannot afford to pay the price of pretrial freedom, the non-financial costs are even greater. Many poor and low-income people stay in jail until their cases are resolved, regardless of the seriousness of the charges or the likely outcome of the case. In fact, most arrests and detention do not lead to a conviction with a sentence of incarceration; most plead guilty and are sentenced to probation or to the time they've already served before conviction. As a result, the only incarceration most people end up serving is the pretrial detention they suffer because of the requirement that they pay to gain their freedom, despite being legally innocent. Once their cases are resolved, most are released.²

The length of this money-based detention can be devastating. Those who cannot afford to pay bail stay in jail nearly four months while facing a felony charge and nearly one month for a municipal or state misdemeanor charge until their case is resolved. Even those who were able to pay bail were jailed an average of 11 days for a felony and three days for a misdemeanor before being freed.³ More than 500 people were in jail on any given day in 2015 for no other reason than that they could not afford to pay cash or purchase a bail bond.⁴ There are also enormous costs to the city's taxpayers, who pay more than \$6 million each year to subsidize the cost of unnecessarily jailing these 500 people.⁵

People who are arrested in New Orleans are often poor—85 percent are too poor to hire a lawyer.⁶ They are also disproportionately black; black people are arrested at two and a half times the rate of white people.⁷ Fully 84 percent of the \$6.3 million paid in money bail is paid by black people.⁸ Worse yet, black people are less likely to be able to pay the price set for their freedom; average income for black households is \$25,324 while for white households it is \$67,884.⁹ Consequently, most of the people in the jail—87 percent—are black. The money bail system intrinsically harms those least able to afford it, whether by extracting scarce dollars or jailing those with insufficient dollars to pay. Black people, whether subject to implicit biases or by virtue of being economically disadvantaged, suffer the greatest harm.¹⁰

New Orleans has led all U.S. cities in jailing its people.¹¹ Why does a majority-black city pursue policies and practices that lead to the jailing of black people at starkly higher rates than people of other races? Why does this city—300 years old, half of that post-emancipation—continue to exact the heavy human toll of conditioning freedom on the ability to pay the price set? One place to



THE DATA CENTER

look for answers is in the historical practices of exploitation of people of color, driven or sanctioned by the state, that trade on the fiction of black dangerousness and criminality to extract revenue and exert control.

This essay examines the extent to which money bail in New Orleans is a descendant of slavery and subsequent practices of racial exploitation. It describes bail and related practices across the city's 300-year history, identifying echoes in the present-day regime of money bail. It then explains the processes and costs of modern money bail. Finally, it presents some ways in which the city has been moving to a less harmful criminal legal system and offers models from jurisdictions that have rejected money-based detention as inconsistent with the core principle of innocent until proven guilty.

The Antecedents of Money Bail in New Orleans

Tracing the history of money bail requires that one examine the connections between money and notions of risk, alongside institutions that ensured freedom for some and degrees of unfreedom and bondage for others. The modern day system of money bail in New Orleans has roots in the city's history as a center of the slave economy. Although the legal right to bail was not originally intended to apply to enslaved people, the institution of slavery shaped the financial relationship between the city's property owners and the use of jail, eroded the presumption of innocence, and created a market for man-hunting. Slaveholders developed a set of ideas about black people as inherently dangerous and criminal that, while changing over time, remained disturbingly durable.¹²

In colonial and antebellum Louisiana, bail worked as a mechanism to ensure pretrial freedom for propertied white men. The city of New Orleans was shaped by the distinctive overlapping of French and Spanish civil law and British common law traditions.¹³ By the time of the Louisiana Purchase in 1803, the formal right to be "admitted to bail" was a core principle of English common law, and had been recently codified in the Eighth Amendment to the U.S. Constitution.¹⁴ Indeed, when President Thomas Jefferson instructed Governor William C. Claiborne to establish the Court of Pleas in New Orleans in 1804, a right to pretrial freedom was enshrined in state constitutions and in laws governing the territories.¹⁵ The rules of those first courts provided that defendants be "set at large" by giving "good and sufficient security."¹⁶ But that security did not necessarily have to come in the form of an upfront payment.

The earliest Louisiana Constitution (1812) provided a right to bail, understood as release on a promise to pay if one did not return to face charges.¹⁷ The required security generally was the signature of a property owner who acted as personal surety. As Edward Livingston, Louisiana's foremost nineteenth century legal thinker, put it: "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."¹⁸ Such a pledge was formalized when the person being detained and the person acting as surety signed a "recognizance" promising to appear in court. "When bail is given," Livingston reasoned, "the prisoner must be discharged without extracting from him the payment of any fees." The amount of bail, however, "must not render the privilege useless to the poor," he concluded. Poor white people were generally required to be released on bail without paying money so long as the person acting as surety was a holder of property in an amount double the sum he was posting as security.¹⁹

The antebellum system of bail was distinctively shaped by slavery. In eighteenth and nineteenth century Louisiana, enslaved people not only performed the labor that built massive fortunes, but were used as financial instruments: bought, sold, and mortgaged. In New Orleans, the value of enslaved people was capital, the collateral and security upon which much of the local, national, and global economy depended.²⁰ The slave economy bred fear of rebellion among those who depended on it, which gave rise to financial markets based in white fear. Private citizens made money, for instance, from capturing, accusing, and eventually returning enslaved people to slaveholders. Indeed, slave patrols and bounty hunters were deputized to perform police functions, such as stopping, searching, seizing, and detaining anyone they suspected might be a fugitive or runaway slave. These private agents worked together with local police and federal marshals who enforced the Fugitive Slave Act when alleged runaways crossed state lines.²¹

Over time, the relationship between slaveholders and the use of the jail in New Orleans became entrenched. Because slave owners could have slaves detained for "safe keeping," money changed hands when certain people, for whatever reason, were deemed suspect or potentially dangerous. The police brought enslaved people to jailors who collected money as a condition of returning them to slaveholders. The officer collecting these "discharge fees" deposited the money with the city Treasurer.²² Those who were not claimed within three days were forced to do manual labor on public works until their owner paid to get them back. By using discharge fees and forcing enslaved people held in the jail to work, the city extracted value as a form of punishment and as payment for police involvement in slave-catching.

In a world that already put a price on human beings, it was a short step to normalize monetary payment as a condition of release. The development of money bail was linked to the legal and financial instruments of slavery. The institution of slavery shaped the concept of bail beyond its original meaning as a source of pretrial freedom for propertied white men. It built a financial market based on white fear, empowered private actors to capture people alleged to be criminal, and eroded the presumption of innocence.

MONETIZING BAIL THROUGH CONVICT LEASING AND JIM CROW

After the Civil War, the meaning of bail became contested in new ways as formerly enslaved men gained political rights. During Reconstruction, black politicians pushed for racial equity in defining the right to bail.²³ The 1868 state constitution resolved that all persons of every race and color, without regard to previous condition, shall have the same rights and be subject to like punishment, pains, and penalties. While maintaining the original right to bail with sufficient sureties of the 1812 Constitution, it laid out, as in the U.S. Constitution's Eighth Amendment, that excessive bail shall not be required. Every person is entitled to the "remedy of the law," wrote members of the convention, "he ought to obtain justice freely and without being obliged to purchase it."²⁴

Despite legislators' intention to use the new state constitution's bill of rights to ensure racial equity in the use of bail, it was soon applied according to a racial double standard as white supremacists fought to control how justice would be administered in parish courts. When black Union Army veteran Jacob Burgest was arrested for opposing a white Vigilance Committee in Alexandria, Louisiana, in 1866, the local judge set his bail at \$150. When a friend came to bail out Burgest, however, the Sheriff would not accept him as a personal surety, tripled the amount, and required upfront payment instead. In an open letter to the newspaper, Burgest decried the judge's actions, lamenting the way the law was being "administered wholly in the interest of the white man and the colored people have no justice whatsoever."²⁵ At the same time, federal authorities, such as the Freedmen's Bureau, were outraged at the way bail was used to ensure detention for black people while being used to release certain white men. In the records documenting white killings of black people in towns across Louisiana, for example, Freedmen's Bureau officials were shocked that white men who admitted to the murders were released on low bail.²⁶

Following the end of Reconstruction, white politicians across the South enacted a host of racially-targeted laws aimed at re-enslaving black people through the convict leasing system.²⁷ Black-owned newspapers were especially attuned to how money bail was used unfairly to detain people of color. Some papers ran daily columns that publicly listed bail amounts set by the courts, in order to provide some measure of public accountability. Eyeing changes in the criminal justice system across the South, the *Weekly Louisianan* ran a story denouncing an inmate leasing bill in Texas that would make anyone who was arrested work before their trial. "On the surface it makes no discrimination between blacks and whites," the article explained, yet "is clearly intended to operate against blacks." The right to bail was supposed to protect black people from being arrested for some "trifling offense," detained, and immediately hired out to their former owners until trial. In contrast, the Texas bill, like others pushed by white racist "Redeemer" politicians in Southern states, would "bring the negro into bondage ... by keeping him in debt," the article concluded. As with this attempt to generate revenue from pretrial detention—the period a person is jailed between arrest and trial—many aspects of the criminal legal system were being used to extract value from the formerly enslaved: "It is a shrewd device of the ex-slaveholders to get compensation for the loss of their slaves."²⁸

During the convict leasing era, the power of bail sureties grew to mirror the power of slave catchers. In the 1872 case of *Taylor vs. Taintor*, the U.S. Supreme Court noted that sureties may seize and deliver up a bailed person and, "if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and if necessary, may break and enter his house for that purpose."²⁹ Sureties could exercise these powers through agents, known as bounty hunters, continuing the commerce begun with slave hunting. By this time in the nineteenth century, the shift from personal guarantees to money bail set the United States on course to be the only common law country in the world to employ a system of commercial bail bonding.³⁰

OPPORTUNITIES LOST IN THE TIME OF CIVIL RIGHTS-BLACK POWER

During the long Civil Rights era, predatory arrests and abuses of pretrial detention again became a flashpoint in struggles for racial equality and justice. As black activists had before them, members of New Orleans' civil rights groups called out the use of jail detention as the continuation of past oppression and violence. According to leaders like Ronnie Moore, Louisiana's field secretary for the Congress of Racial Equality, the arrests, beatings, and court trials that characterized southern "justice" amounted to little more than legal lynching.³¹

For many activists and organizers in the 1960s and 1970s, bail reform was seen as important to the push for justice. Policy makers and government actors also recognized the need for reform. The Release on Recognizance program launched in 1968, for example, sought to counteract inequities in people's ability to purchase their constitutional right to pretrial freedom. Endorsed by all of the Criminal District Court judges, the program was given an office in the jail and tasked with reviewing all charges and making recommendations to the magistrates as to which people arrested should be released without being made to pay money.³²

However, in New Orleans and around the country, the fight for criminal justice reform faced more durable opposition than the push for equal political rights.³³ After the passage of the Voting Rights Act, a political consensus emerged during the Johnson administration's "War on Poverty" to encourage local police forces, by providing block grants and military style equipment, to root out anything they

feared might turn into urban rebellion.³⁴ The over-use of policing, like the justifications for keeping people locked up before their trial, continued to be fueled by racist myths about black people as inherently dangerous and criminal. With the surge in hyper incarceration beginning in the 1970's, bail bondsmen and government agencies reaped ever-increasing profit from a market not unlike its historic predecessors, one that routinely set a price for freedom and traded on imaginary fears of black criminality. State bail laws and practices, described below, further widened the floodgates to local mass jailing. As civil rights lawyer Bryan Stevenson put it: "Though it was the most insidious engine of the subordination of black people throughout the era of racial terror and its aftermath, the criminal justice system remains the institution in American life least affected by the civil rights movement."³⁵

The Modern Money Bail System in New Orleans

The intent to re-define bail as a tool to extract money for government entities and the commercial bail bond industry, with jail as the leverage, is evident in current law.

HOW MONEY BAIL WORKS

Louisiana statutes mandate that judges set a monetary bail amount for every charge the police officer cites when arresting a person.³⁶ Judges are explicitly barred from releasing people without their paying up front to purchase their freedom for a range of offenses that cover more than half of people arrested for a felony in New Orleans.³⁷ Even when not barred, judges generally require payment. Regardless of the reason, when made to pay up front, the statutes require that a person either pay 100 percent of the total bail amount in cash or purchase a commercial bail bond for the state-mandated "premium" of 12 percent of the bail amount.³⁸ The 100 percent cash bail is refundable. The commercial bail bond premium is not. Most people can only afford to pay the non-refundable 12 percent, if they can pay bail at all. Ninety-seven percent of people arrested for a felony charge and 69 percent for a misdemeanor who are able to pay bail do so by purchasing a commercial bail bond.³⁹

The current legislative scheme drives a revenue stream from defendants and their friends and families to commercial bail bondsmen and government agencies. Unlike when paying cash bail, 3 percent of the 12 percent the bail bondsman charges is passed on to the court, the sheriff, the district attorney, and the public defender (the bondsman retains the other 9 percent).⁴⁰ State law also singles out the court in Orleans Parish as a special beneficiary of the money bail system. Fully 1.8 percent of the aggregate bail amount goes to the court in New Orleans, more than three times greater than to the courts in other parishes in the state.⁴¹ The neutrality required of the court to make appropriate decisions about defendants' pretrial freedom is regularly challenged by this financial conflict of interest.⁴²

Beyond limiting defendants' freedom and costing them money, these revenue streams present an obstacle to reforming the system. Because the legislature has built a system that benefits powerful government and commercial institutions, the money bail system is entrenched. This perpetuates the harm to those subject to the system and, indeed, to all taxpayers, who must pay for the unnecessary incarceration that results.

WHAT MONEY BAIL COSTS NEW ORLEANIANS

This money bail system uses jail to coerce payment to government and for-profit bail bondsmen. Black New Orleanians bear the great bulk of the burdens of over-incarceration and wealth extraction. Black people make up more than 80 percent of those who are incarcerated for their inability to pay bail and pay 85 percent of all the money paid in bail and bail fees to bondsmen and government agencies.⁴³ Given the city's history of slavery and race-based economic exploitation (including through policing and jailing), it is easy to see connections between past and present.

Money bail ensnares people in a system in which one's freedom hangs on the ability to pay and removes people who are important to their families and communities. The money paid to secure a person's freedom is not available for other essentials, thus over-burdening family and community support structures. Those who can't pay, or stay in jail even a few days before they can gather the money, are put at increased risk of losing their employment and housing and of being re-arrested than if they had not been detained.⁴⁴ They are subject to the degradation, violence, and trauma (including serious physical injury and death), of New Orleans' jail—a jail in which conditions fall below bare constitutional standards.⁴⁵ Indeed, even when people purchase their freedom through a commercial bail bond they live in fear because the bondsman has the power to seize and surrender them at will.⁴⁶

The centuries-old right to release on bail was turned on its head and replaced with a system that conditions release on the upfront payment of money bail, funding the system on the backs of poor New Orleanians, most of whom are black. But, it's not only the people who are arrested and their friends and families who pay the cost; every taxpayer pays to subsidize this money bail system. The excess incarceration caused by jailing those who cannot pay money bail costs the city more than \$6 million each year. That taxpayer money is spent unnecessarily—in fact, harmfully—and is not available to be used on efforts to promote community safety and prosperity.

Notably, money bail is part of an even broader systemic problem that links freedom with the ability to pay and disproportionately harms black and low-income people. Government agencies extract money from defendants and their families at multiple points, for example by charging to apply for a public defender, to make a phone call from the jail, for drug testing as a condition of pretrial release, for services supporting diversion from prosecution, for numerous fees tied to a criminal conviction, for working in a prison work-release program, and for being on probation or parole. These fees force an enormous transfer of wealth from struggling communities to criminal justice agencies and commercial bondsmen and, as with money bail, lead to unnecessary incarceration.

Toward a Society where Freedom is Free

It is possible for New Orleans to have a system of pretrial release and detention that promotes both community safety and the commitment to freedom for people who are presumed innocent and does so in a way that does not target poor black people. It cannot be done, however, under a system of money bail.

PROGRESS ACHIEVED

Before turning to the future, it is important to recognize that progress has been made to move away from money bail as the determinant of pretrial release or detention in New Orleans. First, the city has adopted a system that provides research-based, objective information to guide judges' decision-making at the initial detention/release hearing within 24 hours of arrest. The pretrial services program, begun in 2011, provides an assessment of the likelihood of pretrial success (appearing in court and not being re-arrested while on release) of everyone arrested for a felony charge. And it offers supervisory services as an alternative to money-based release or detention for those whom judges determine need support to successfully return to court or not be re-arrested. This is an important step toward the ultimate goal of ensuring that everyone enjoys the same right to pretrial freedom regardless of their ability to pay.

Second, beginning in 2016, the Landrieu administration, in partnership with the city's criminal justice agencies, embraced the Safety and Justice Challenge to reduce the use of jail incarceration and to reduce racial disparities in its system of detention.⁴⁷ One of the Challenge's initiatives is the adoption of a new pretrial decision-making framework that is intended to avoid using money as the determinant of pretrial release or detention. That framework will guide the application of a new risk-assessment tool that distinguishes projected risk of re-arrest from that of not appearing in court, and that is designed to minimize the inherent racial disparities of pretrial risk assessments that rely on factors such as prior convictions.⁴⁸ Through another initiative, the judges have committed to maximize their use of release on recognizance for all arrested people who are assessed in the lowest two of four risk levels, an application of risk assessment that is explicitly directed at reducing money-based detention and its accompanying racial disparities. Similar to the original concept of bail, release on recognizance in Louisiana is essentially an unsecured personal bond, a promise to pay if the person fails to meet the conditions of release. It requires no payment up front, and none at all if one meets the conditions of release.

Finally, in early 2017, the City Council responded to calls by community and policy leaders for a new approach to bail that bars the use of money-based pretrial detention in the Municipal Court, a significant step in moving away from money bail altogether.⁴⁹ The Council enacted an ordinance directing the Municipal Court to establish a bail schedule that does not use money as a factor, instead requiring the Sheriff's office to release most people immediately upon being booked into the jail with a directive to appear in court on their own volition. Only people who have been arrested for the five offenses deemed most serious are to be detained until they are brought before a judge within 24 hours. At that point, the ordinance directs that no pretrial defendants "after the initial appearance hearing, shall be detained only because they do not have enough money to post bond."⁵⁰

These achievements lay a good path to a better future. But, money bail and its stark racially disparate impacts continue to dominate. What would that better future look like if New Orleans summoned the will to reach for it?

BEYOND ECONOMIC AND RACIAL EXPLOITATION

It starts with a return to the principle of innocent until proven guilty, made real through a presumption of pretrial freedom. As the U.S. Supreme Court has stated, "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."⁵¹ No one should be caught in that carefully limited exception simply because they do not have the means to pay for the liberty to which they are entitled. This echoes Livingston's point that, "When bail is given, the prisoner must be discharged without extracting from him the payment of any fees."⁵² New Orleans could commit to a pretrial detention and release system that focuses on keeping communities safe, not jailing people because they are poor. Detaining those who are poor and releasing those who can pay does not make New Orleans communities safe. Rather, it is inherently unfair and divides communities along lines of class and race. As the city commemorates its 300th year of existence, it has the opportunity to take stock of this unfair practice and stop putting a price on the freedom of its people.

This will require that government actors stop using the justice system to extract money from the families and friends of people who are arrested, detained, and convicted of crimes. To do so requires that all aspects of the user-funded justice system be replaced with a stable revenue stream toward which all New Orleanians contribute. New Orleanians then could hold their elected officials accountable for supporting a system that provides rather than impedes justice, from how police and prosecutors are deployed to how the courts and jail function.

New Orleans would not be the first to do away with money-based detention; it has models to follow. Money-based detention has been unlawful in the entire federal criminal justice system for decades and Washington, D.C. has long followed that approach. In both, money bail may be set but may not result in detention. More recently, New Mexico adopted a state constitutional amendment barring money-based detention following a ruling of its supreme court. New Jersey enacted statutes and court rules that prioritize all other alternatives to upfront payment of money bail as a means of ensuring return to court and avoiding re-arrest. California, Connecticut, and New York are moving in similar directions. And, four states outlaw commercial bail bonds as a form of money bail.⁵³ Nor should New Orleans be bound by other models. It could grow its own participatory process for imagining alternatives to the costly money bail system. New Orleans could go from being a national leader in jail incarceration to being a leader in a growing movement away from money-based detention and the race-based harms that result.

JUST COMMUNITIES ARE SAFE COMMUNITIES

The city's tricentennial offers an opportunity to examine history, reflect on where we stand, and commit to a better future. It is an opportunity to confront systems that produce harmful racially disparate outcomes, systems grounded in the city's history of racial exploitation and poor investment of public dollars, and to lift up rather than hold down those among us who are struggling. We can make a complete break from practices rooted in past abuses—especially practices carried out by government in the people's name—that put a price on the freedom of human beings.

Endnotes

1. Laisne, M., Wool, J. & Henrichson, C. (2017). *Past Due: Examining the costs and consequences of charging for justice in New Orleans*. New York: Vera Institute of Justice. Retrieved from <https://www.vera.org/publications/past-due-costs-consequences-charging-for-justice-new-orleans>. All data describing the impacts of money bail, including the flow of money and the incarceration that results, is based on the quantitative and qualitative research set out in "Past Due" and an accompanying technical report, Vera Institute of Justice (2017), *The Costs and Consequences of Bail, Fines and Fees in New Orleans*. <https://www.vera.org/publications/past-due-costs-consequences-charging-for-justice-new-orleans>
2. Sixty-four percent of the 5,308 people with dispositions in Criminal District Court in 2017 had their cases dismissed, were found not guilty, or were convicted and received a sentence of probation. This does not include people who had their cases refused before the institution of prosecution or people who received an incarceration sentence that had already been served by the time of sentence. Vera Institute of Justice, unpublished analysis, 2018.
3. Laisne, M., Wool, J. & Henrichson, C. (2017). *Past Due: Examining the costs and consequences of charging for justice in New Orleans*. New York: Vera Institute of Justice. In 2015, 1,275 people facing felony charges were unable to pay bail and were detained an average of 114 days until their cases were resolved; 1,153 people facing misdemeanor charges were detained an average of 29 days until resolution.
4. Laisne, M., Wool, J. & Henrichson, C. (2017). *Past Due: Examining the costs and consequences of charging for justice in New Orleans*. New York: Vera Institute of Justice. In 2015, 548 people were in jail on any given day solely because they could not pay bail in the amount of \$100,000 or less.
5. Laisne, M., Wool, J. & Henrichson, C. (2017). *Past Due: Examining the costs and consequences of charging for justice in New Orleans*. New York: Vera Institute of Justice. The \$6 million cost to the city was \$4 million more than the criminal justice agencies received in bail bond fees. It represents a marginal daily rate of \$31.38 applied to 548 people held in jail solely because they were unable to pay up to \$12,000 for a commercial bail bond.
6. Orleans Public Defenders. (2017). *2016 annual report*. Retrieved from http://www.opdla.org/images/opd_user/2016-opd-annual-report.pdf
7. Black people were arrested at a rate of 18.2 per 1,000 residents aged 15 – 64; white people were arrested at a rate of 8.3 per 1,000. Black men of that age group were booked more than twice as frequently as white men (31.5 compared to 12.6 per 1,000 residents), and the arrest rate for black women was nearly twice as high as for white women (7.2 compared to 3.9 per 1,000 residents). Wilson, R., McKinney, T., Laisne, M., & Yazbek, C. (2018). *New Orleans: Who's in jail and why? 3rd quarter report 2017*. New York: Vera Institute of Justice. Retrieved from <https://www.vera.org/publications/new-orleans-jail-population-quarterly-report>. In 2015, black New Orleanians accounted for 85 percent of marijuana-related arrests, 90 percent of possession of marijuana with intent to distribute arrests, and 94 percent of felony marijuana possession arrests. Ragan, M., Wilson, R., & Wool, J. (2016). *Racial disparity in marijuana policing in New Orleans*. New York: Vera Institute of Justice. Retrieved from <https://www.vera.org/publications/racial-disparity-in-marijuana-policing-in-new-orleans>
8. Laisne, M., Wool, J. & Henrichson, C. (2017). *Past Due: Examining the costs and consequences of charging for justice in New Orleans*. New York: Vera Institute of Justice. Retrieved from <https://www.vera.org/publications/past-due-costs-consequences-charging-for-justice-new-orleans>
9. The Data Center. (2018). *Who lives in New Orleans and metro parishes now?* Retrieved from <https://www.datacenterresearch.org/data-resources/who-lives-in-new-orleans-now/>
10. For discussion of implicit bias, see Banaji, M. R., & Greenwald, A. G. (2013). *Blindspot: Hidden biases of good people*. New York, NY: Delacorte Press of Random House, Inc.; Greenwald, A. G., Poehlman, T. A., Uhlmann, E. L., & Banaji, M. R. (2009). Understanding and using the Implicit Association Test: III. Meta-analysis of predictive validity. *Journal of Personality and Social Psychology*, 97(1), 17-41; Greenwald, A. G. & Krieger, L. H. (2006). Implicit bias: Scientific foundations. *California Law Review*, 94(4), 945-967.
11. Johnson, C., Laisne, M., and Wool, J. (2015). Criminal justice: changing course on incarceration. *The New Orleans Index at Ten*. New Orleans, LA: The Data Center. Retrieved from https://www.datacenterresearch.org/reports_analysis/criminal-justice-changing-course-on-incarceration/
12. As Khalil Gibran Muhammad's work demonstrates, the myth of black criminality was based in the deeply embedded fiction that black people were a dangerous race of criminals. This became engrained not only in stereotypes and popular culture, but in crime statistics and social scientific discourse that were used to justify criminal justice policies and practices across the country, in the North as well as the South. See, Muhammad, K.G. (2011). *The condemnation of blackness: Race, crime, and the making of urban America*. Cambridge, MA: Harvard University Press.
13. See, for example, Fernandez, M. F. (2001; 2014). *From chaos to continuity: The evolution of Louisiana's judicial system, 1712-1862*. Baton Rouge: Louisiana State University Press.
14. Verrilli, D.B., Jr. (1982). The Eighth Amendment and the right to bail: Historical perspectives. *Columbia Law Review*, 82(2), 328-362. Devine, F.E. (1991). *Commercial bail bonding: A comparison of common law alternatives*. New York: Praeger Publishers.
15. On the right to bail in the territories see, Continental Congress. (1787). *An ordinance for the government of the territory of the United States north-west of the River Ohio*. Miscellaneous Papers of the Continental Congress, 1774-1789, Record Group 360. United States National Archives. Retrieved from <https://www.loc.gov/rr/program/bib/ourdocs/northwest.html>
16. Rules of the Court of Pleas (1804), Art.6, in Fernandez, M. F. (1997). The rules of the courts of the Territory of Orleans. *Louisiana History: The Journal of the Louisiana Historical Association*, 38(1), 63-86, 71.

17. Louisiana State Constitution (1812), Article VI, Section 19: "All prisoners shall beailable by sufficient securities, unless for capital offences, where the proof is evident or presumption great, and the privilege of the writ of Habeas Corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it." *The Constitution of the State of Louisiana*, January 22, 1812. National Archives. Retrieved from <https://www.archives.gov/legislative/features/louisiana-statehood/louisiana-constitution.html>
18. Livingston, E. (1833). *A system of penal law for the State of Louisiana*. Philadelphia, PA: John Kay, Jun. and Co.
19. Livingston, E. (1833). *A system of penal law for the State of Louisiana*. Philadelphia, PA: John Kay, Jun. and Co; On the contemporary resonance of money and trust see Loupe, G. (2016). The lack of money is the root of all evil: Louisiana's ban on bail without surety. *Louisiana Law Review*, 77(1), 109-141.
20. See, Johnson, W. (2016, October 26). To remake the world: Slavery, racial capitalism, and justice. *Boston Review*. Retrieved from <http://bostonreview.net/race/walter-johnson-slavery-human-rights-racial-capitalism>. Johnson points out that the value of enslaved people in 1860 was more than all the capital invested in railroads, manufacturing, and agricultural land combined.
21. See, Johnson, W. (2013). *River of dark dreams: Slavery and empire in the cotton kingdom*. Cambridge, MA: Belknap Press of Harvard University Press; Rousey, D.C. (1997). *Policing the southern city: New Orleans, 1805-1889*. Baton Rouge, LA: Louisiana State University Press. Hadden, S.E. (2003). *Slave patrols: Law and violence in Virginia and the Carolinas*. Cambridge, MA: Harvard University Press. Parenti, C. (2003). *The soft cage: Surveillance in America from slavery to the War on Terror*. New York, NY: Basic Books. Calhoun, F.S. (1991). *United States marshals and their deputies, 1789-1989*. New York, NY: Penguin Books.
22. See, New Orleans Public Library, City Archives. Records of Correctional Institutions. According to the records from the police jail, the majority of detained slaves were being held on the charge of "running away." *The Police Record Book, 1840-1851*, lists over 4,500 slaves held in the police jail over that 10-year period. See, *Record book of the police jail*. Xavier University of Louisiana, Archives and Special Collections, Charles Hartman Collections of Manuscripts Relating to Slavery. Retrieved from <http://cdm16948.contentdm.oclc.org/cdm/landingpage/collection/p16984coll6>. See also, *Records of prisoners committed to the Parish Prison, 1852-1862*. New Orleans Public Library, City Archives, Records of Correctional Institutions. Retrieved from <http://nutrias.org/~nopl/inv/neh/nehTx.htm>
23. See, *Official journal of the proceedings of the Constitutional Convention, for framing a Constitution for the State of Louisiana*. (1868). New Orleans, LA: J.B. Roudanez and Co., Printers to the Convention.
24. *Official journal of the proceedings of the Constitutional Convention*, 35-36.
25. (1866, September 23). Persecution of Colored Men. *New Orleans Tribune*. According to Burgest, when the white Vigilance committee felt out-matched by armed veterans, they determined to "give them law instead."
26. Bureau of Refugees, Freedmen and Abandoned Lands, 1865-1869. *Records of the Assistant Commissioner for the State of Louisiana: Records relating to murders and outrages*. National Archives, Microfilm M1027, Roll 34. Retrieved from <http://freedmensbureau.com/louisiana/outrages4.htm>
27. See for example, Blackmon, D. A. (2008). *Slavery by another name: The re-enslavement of black Americans from the Civil War to World War II*. New York, NY: Random House. Oshinsky, D. (1996). *Worse than slavery: Parchman Farm and ordeal of Jim Crow justice*. New York, NY: Free Press. Haley, S. (2016). *No mercy here: Gender, punishment, and the making of Jim Crow modernity*. Chapel Hill, NC: University of North Carolina Press.
28. (1874, November 28). Attempt to revive slavery in Texas. *The Weekly Louisianan*.
29. *Taylor v. Taintor*, 83 U.S. 366, 371 (1872).
30. Devine, F.E. (1991). *Commercial bail bonding: A comparison of common law alternatives*. New York: Praeger Publishers.
31. See, Moore, R. (1964, March 16). *Louisiana Diary*, National Educational Television. Retrieved from <http://loc.gov/exhibits/civil-rights-act/multi-media/core-voter-registration-in-louisiana.html>
32. Board of Directors. (1969). *New Orleans release on recognizance program: a prospectus*. New Orleans, LA; Follis, R.J. (1971). *A study of pastoral care in Orleans Parish Prison*. PhD diss., Orleans Baptist Theological Seminary.
33. Singh, N.P. (2004). *Black is a country: Race and the unfinished struggle for democracy*. Cambridge, MA: Harvard University Press.
34. Hinton, E.K. (2016). *From the war on poverty to the war on crime: The making of mass incarceration in America*. Cambridge, MA: Harvard University Press. See also, Alexander, M. (2010; 2012). *The new Jim Crow: Mass incarceration in the age of colorblindness*. New York, NY: The New Press.
35. Stevenson, B. (2017, July 13). A presumption of guilt. *The New York Review of Books*, p. 10.
36. Louisiana Code of Criminal Procedure, Art. 314(B).
37. Louisiana Code of Criminal Procedure, Art. 321(C).
38. Louisiana Revised Statutes, Sec. 22:1443.

39. Laisne, M., Wool, J. & Henrichson, C. (2017). (p.7).
40. Louisiana Revised Statutes, Secs. 22:1443 (12 percent premium) and 22:822 (3 percent fee). A recent complaint filed with the Department of Insurance, which regulates commercial bail bonding, alleges that the common practice among New Orleans bail bondsmen of charging 13 percent violates the law. West, M. (2017, September 7). *Complaint against multiple bail companies and their insurance underwriters for charging excessive and illegal premiums*. Southern Poverty Law Center. Retrieved from https://www.splcenter.org/sites/default/files/insurance_complaint.pdf
41. Louisiana Revised Statutes, Secs. 22:822 and 13:1381.5. In the rest of the state the court receives 0.5 percent of the aggregate bail amount as its share of an even split among the four agencies of the standard 2 percent bail bond fee. In New Orleans, the court receives 1.8 percent, made up of a 0.8 percent share of the 2 percent bail bond fee (the other three agencies receive 0.4 percent each) plus an additional 1 percent fee that only goes to the court in New Orleans.
42. A federal judge in New Orleans recently ruled that it violates due process for the judges to both impose conviction fees and be the beneficiary of those fees using reasoning that would apply equally to the setting of bail and the reaping of bail bond fees. *Cain, et. al. v. City of New Orleans, et. al.*, Case No. 2:15-cv-04479, Eastern District of Louisiana, Order on motion for summary judgment, December 13, 2017.
43. Eighty-seven percent of the people in the jail are black and 81 percent of people detained seven days after arrest are black, among those assessed in the lower two risk categories with bail set at \$10,000 or less. Wilson, R., McKinney, T., Laisne, M., & Yazbek, C. (2018). *New Orleans: Who's in jail and why? 3rd quarter report 2017* (Fig. 9). Vera Institute of Justice. (2017, November). *Monthly Report: Seven-day bond review initiative*. On file with authors.
44. Subramanian, R, Delaney, R., Roberts, S., Fishman, N., & McGarry, P. (2015). *Incarceration's front door: The misuse of jails in America*. New York: Vera Institute of Justice. Retrieved from <http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/01/incarcerations-front-door-report.pdf>
45. In its January 2018 report on progress under the jail consent decree, the monitoring team wrote, "vital, urgent work is required to comply with the provisions of the Consent Judgment in order to bring and sustain the OPSO facilities and operations to constitutional standards. Currently the environment is not safe for inmates or staff." Orleans Parish Jail Monitors. (2018). Report No. 8 of the Independent Monitors (p.x- xi). Retrieved from http://www.nolajailmonitors.org/uploads/3/7/5/7/37578255/_8_compliance_report.pdf. For a historical perspective, see, Armstrong, A. (2018). The impact of 300 years of jail conditions. *The New Orleans Prosperity Index: Tricentennial Collection*. New Orleans, LA: The Data Center. Retrieved from https://www.datacenterresearch.org/reports_analysis/300-years-of-jail-conditions/
46. "A surety may surrender the defendant at any time. For the purpose of surrendering the defendant, the surety may arrest him." Louisiana Code of Criminal Procedure, Art. 331(C). In June 2016, a class action lawsuit was filed against commercial bail companies in New Orleans for extortion, kidnapping, and violation of the Truth in Lending Act related to their alleged misuse of this surrender authority in holding clients against their will to extract payments beyond what are allowed. *Egana, et al. v. Blair's Bail Bonds, Inc., et al.*, Case No. 2:17-cv-5899, Eastern District of Louisiana, filed 6/16/17.
47. The Safety and Justice Challenge is a national effort supported by the John D. and Catherine T. MacArthur Foundation, which selected New Orleans as one of 11 core implementation sites.
48. VanNostrand, M. (2016, December). Pretrial risk assessment: Perpetuating or disrupting racial bias? *Luminosity: Data Driven Justice Solutions*. Retrieved from <http://luminosity-solutions.com/pretrial-risk-assessment-perpetuating-disrupting-racial-bias/>. Skeem, J. & Lowenkamp, C. (2016, June 14). *Risk, race, & recidivism: Predictive bias and disparate impact*. Retrieved from <https://ssrn.com/abstract=2687339>
49. The Municipal and Traffic Court of New Orleans adjudicates criminal charges brought under the city's municipal code, through which the city may establish a range of misdemeanor-level crimes.
50. New Orleans Municipal Code, Sec. 54-23. The five offenses excepted from the requirement of immediate release are battery, assault, illegal carrying of weapons, impersonating a peace officer, and domestic violence.
51. *United States v. Salerno*, 481 US 739, 755. (1987). *Salerno* made clear that the Constitution does not prohibit preventive detention but that considerations of due process significantly restrict how that "carefully limited exception" may be used.
52. Livingston, E. (1833). *A system of penal law for the state of Louisiana*. Philadelphia, PA: John Kay, Jun. and Co.
53. The four are Illinois, Kentucky, Oregon, and Wisconsin. They all allow for some form of money bail but do not allow commercial bail bonding.

This page intentionally left blank.

Acknowledgments from the Authors

The authors would like to thank Andrea Armstrong, Calvin Johnson, Lawrence Powell, Walter Stern, and Charles West for their valuable comments on an earlier draft of this brief.

For More Information

Flozell Daniels
President & CEO
Foundation for Louisiana
fdaniels@foundationforlouisiana.org

Ben Weber
ACLS Mellon Postdoctoral Fellow
& Senior Program Associate
Vera Institute of Justice
bweber@vera.org

Jon Wool
Director of Justice Policy
Vera Institute of Justice, New Orleans
jwool@vera.org

About The Data Center

The Data Center is the most trusted resource for data about greater New Orleans and Southeast Louisiana. Since 1997, The Data Center has been an objective partner in bringing reliable, thoroughly researched data to conversations about building a more prosperous, inclusive, and sustainable region.

The Data Center (formerly known as the Greater New Orleans Community Data Center) became the local authority for tracking post-Katrina recovery with *The New Orleans Index*, developed in partnership with the Brookings Institution.

About The New Orleans Prosperity Index: Tricentennial Collection

The New Orleans Prosperity Index: Tricentennial Collection includes contributions from more than a dozen local scholars. These reports will assess the long reach of historical practices on contemporary policies and practices contributing to today's racial disparities across multiple systems (criminal justice, education, housing, business ownership, health care, etc.), and provide recommendations for furthering future progress. In addition, The Data Center will release a comprehensive set of metrics that address the question: "Have black New Orleanians experienced increased economic inclusion since the end of the Civil Rights era?"

Acknowledgments from The Data Center

Many thanks go to Elaine Ortiz for editorial assistance, and Southpaw Creative for design.

The Data Center wishes to thank the Ford Foundation, JPMorgan Chase Foundation, Surdna Foundation, Entergy Corporation, and the W.K. Kellogg Foundation for their generous support of this inaugural edition of *The New Orleans Prosperity Index*. Additional gratitude goes to Baptist Community Ministries, Foundation for Louisiana, The Keller Family Foundation, Methodist Health System Foundation, RosaMary Foundation, and United Way of Southeast Louisiana for their generous support of the work of The Data Center.

For More Information

Lamar Gardere
Executive Director
The Data Center
lamarg@datacenterresearch.org

Allison Plyer
Chief Demographer
The Data Center
allisonp@datacenterresearch.org

Disclaimer

The New Orleans Prosperity Index: Tricentennial Collection includes studies and reports on timely topics worthy of public consideration. The views expressed are those of the authors and should not be attributed to The Data Center, its trustees, or its funders.