

New Orleans's criminal justice system has a funding structure that requires the court and other justice system agencies to raise revenues by imposing fees on people who come in contact with the system. This approach has unintended negative consequences.

How is the criminal justice system funded?

The principal agencies of the New Orleans local criminal justice system—the state and municipal criminal courts, the district attorney's office, the public defender's office, and the sheriff's office—rely significantly on revenues from fees imposed on people who are arrested. Only the police department is fully funded directly through the city budget. This funding structure is the product of state law, state and local budgetary decisions, and long-standing local practice.

There are many ways in which the agencies impose fees and other “taxes” on the families of people who are arrested, detained, diverted from prosecution, or convicted. The two that apply most frequently and have the greatest impact on the local system and the individuals involved are (1) the imposition of financial bail and accompanying bail bond fees at the front

end of the process; and (2) the imposition of conviction fees that accompany the sentence at the back end of the process.

Although state law requires some use of financial bail and conviction fees, local practice applies them more often than required. The bail statutes require that a dollar amount be set for every charge the arresting officer lists. Although in some cases judges can allow release without requiring a person to pay up front, in many cases the statutes prohibit release unless a person pays either the total bail amount in cash or through the purchase of a commercial bail bond for 12 percent of the total amount. Under state law, 3 percent of that 12 percent “premium” for purchase of a bail bond is passed back to the four agencies—criminal district court, district attorney, public defender, and sheriff—in bail bond fees.

Louisiana statutes require that a large number of fees in specified amounts be assessed at the time of conviction. They also authorize judges to impose discretionary fees, sometimes in unspecified amounts, allowing the court to raise money to support itself and/or other criminal justice system agencies.

Bail versus bond

What is “bail”? Bail is a centuries-old conditional right to release from custody after arrest. One is admitted to bail (i.e., released) on a pledge to return to court, sometimes with the promise to pay money if one does not return. The right to release on bail gives meaning to the presumption of innocence before trial and is found in the bills of rights of both the federal and Louisiana constitutions. In the past century, however, the historical use of bail by personal surety (a person's promise to pay if the defendant fails to return for trial) has largely been replaced by secured financial bail (a requirement that the defendant pay up front as a condition of release).

What is “bond”? A bail bond is a form of insurance that one can purchase to satisfy secured financial bail set by the court. When financial bail is required, posting a bond is one way to be admitted to bail.

Fines versus fees

What is a “fine”? A fine is one form of sanction imposed as part of the sentence for conviction of a crime. It can accompany other sanctions, such as incarceration or community supervision under probation, or it can stand alone. Fines and other sanctions are meant to punish wrongdoing and deter future criminal activity.

What is a “conviction fee”? A conviction fee is not part of the sentence for a crime but is imposed at the same time. Its purpose is not to punish or deter but to generate revenue to support some part of the operation of the criminal justice system.

Other practices used to fund the criminal justice system

- > • Fees that indigent people must pay to apply for the services of the public defender
- > • Significant surcharges for phone calls made from the jail to family members
- > • Charges for drug testing required as a condition of pretrial release or diversion
- > • Monthly probation fees for those convicted but not given a jail or prison sentence
- > • Up to 70 percent of gross wages earned while on work release at the end of a prison sentence

Consistent with the authority the Louisiana legislature gives to the court and other agencies to impose and collect fees, the legislature does not fully fund these agencies through its general fund budget. Similarly, parish and city governments are reluctant to fill the gap. As a result, agencies use fines and fees imposed on people who come in contact with the criminal justice system to pay for a significant portion of their operating expenses. In New Orleans, it has long been their practice to do so.

A targeted tax

One consequence of this funding model is that it imposes a large financial burden on people who are in the worst position to be able to afford it; nearly 90 percent of people arrested in New Orleans are too poor to hire a lawyer. In New Orleans, the dual practices of requiring financial bail as a condition of pretrial release and imposing conviction fees extracts over \$9 million each year from the families of people who are arrested.

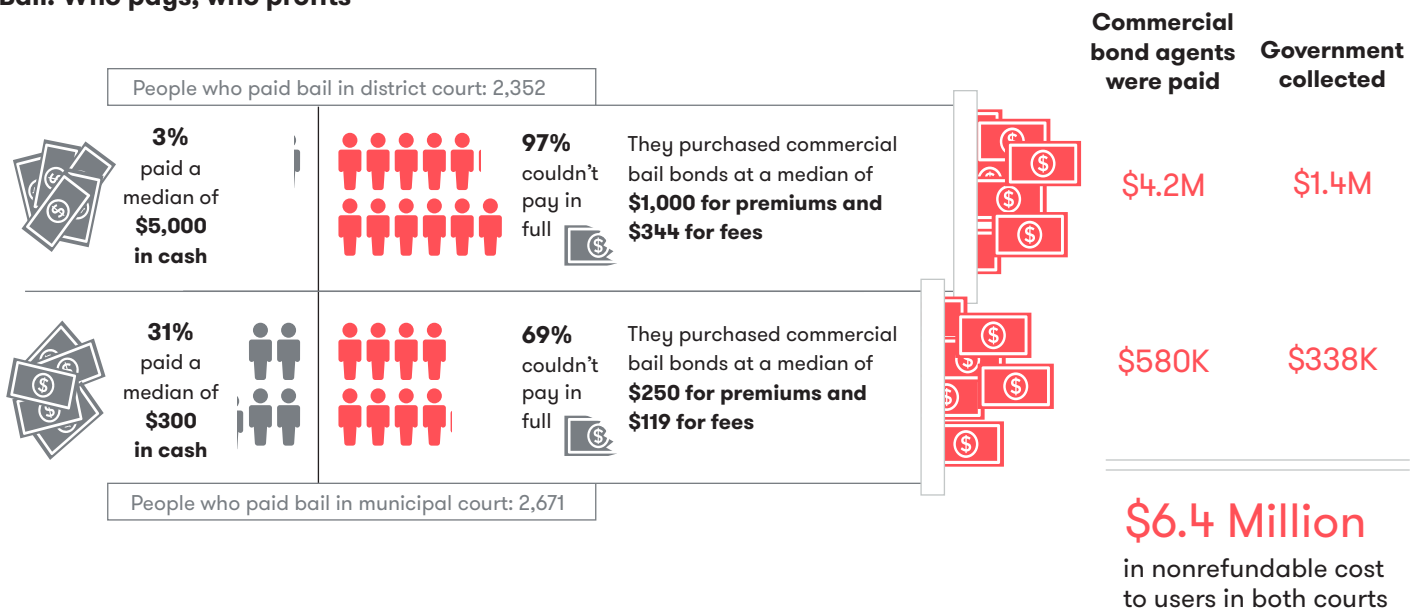
The effects of underfunding the criminal justice system

The current approach to criminal justice system funding may have been meant to shift some of the system's costs from all taxpayers to the people who have contact with the system. This method of funding the criminal justice system's agencies has many unintended consequences. In fact, even the intended consequence—reduced general fund tax expenditures—turns out to be illusory in practice. The current criminal justice funding model ends up costing taxpayers money.

Financial bail and bail bond fees

In 2015, these families paid \$1.7 million in nonrefundable bail bond fees, with 60 percent going to the court and the other 40 percent divided among the sheriff, district attorney, and public defender. These families also paid \$4.7 million to bail bond agencies. Most people who are able to pay financial bail do so by purchasing a bail bond because most arrested people cannot afford to pay the full amount of the bail. If they could pay the full amount, they would get the money back, as cash bail is refundable if one returns to court. Instead, 97 percent of people who are able to post financial bail after being arrested for

Bail: Who pays, who profits



a felony purchase a bail-bond for 12 percent of the full amount. That 12 percent is non-refundable, even if the prosecutor decides not to move forward with the case.

Conviction fees

Also in 2015, New Orleanians were charged \$3.8 million in conviction fines and fees in non-traffic criminal cases. Most of that \$3.8 million was for fees rather than fines. Because many people were not able to pay in full, the court collected only \$2.8 million of the \$3.8 million.

Increased incarceration

For those who are unable to pay financial bail, the direct and immediate result is pretrial incarceration. On any given day, 30 percent of the people locked in the New Orleans jail are there solely because they cannot afford to pay the 12 percent required to purchase a bail bond, let alone the full amount of financial bail. This figure does not include the people judges intend to keep detained by setting very high bail amounts (\$100,000 or more) or people who are detained for some other reason other than the requirement that they pay to be released.

The pretrial incarceration that results from financial bail causes additional harms for those who cannot pay. They are more likely to end up with a criminal conviction because pretrial incarceration correlates with higher rates of conviction—many plead guilty simply to be allowed to go home. When convicted, those who were detained receive harsher sentences. In addition, many who are convicted and sentenced to probation are unable to pay conviction fees and are arrested and jailed until a friend or family member makes a payment.

Decreased public safety

Another unintended consequence of the current criminal justice system funding model is that it diminishes the most important purpose of the criminal justice system, to promote public safety.

Relying on financial bail to determine who is released and who is detained ignores potential safety risks. The bail system should focus on determining who presents such considerable risk of harming a specific individual or the community at large that their right to pretrial release must be withheld. This doesn't happen when everyone is given a financial bail amount and the opportunity to purchase their freedom, regardless of the risk an individual may present to the community. There is no evidence that detaining people because they cannot pay increases public safety. Indeed, pretrial incarceration itself is correlated with an increased likelihood of future re-arrest, even after only a few days in jail. Thus there is some evidence that making money the determinant of release is decreasing public safety.

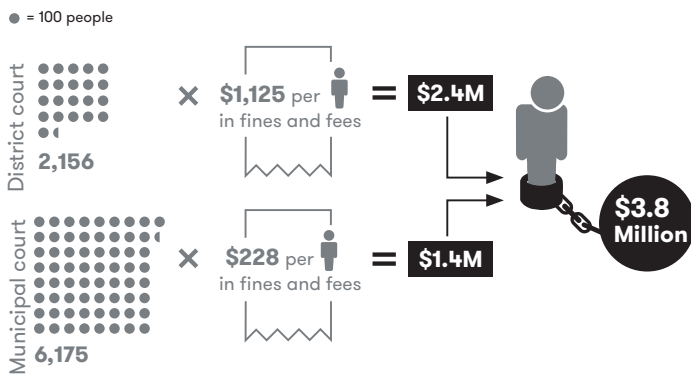
At the back end of the process, imposing the burden of conviction fees alongside the requirements of a criminal sentence can undermine the goals of punishment and rehabilitation. Those fees cannot legally be used to punish; they are not set out in the law as a valid part of the sentence. Fees put people in debt at precisely the time the system demands they change their behavior in positive ways. It is a time of compounding burdens: overcoming the effects of incarceration, job loss and other economic challenges, family separation, and the stigma a criminal conviction. Adding a direct financial burden may interfere with the positive change that is needed.

Exacerbated racial disparities

In New Orleans, race and poverty are intertwined. Almost half (47 percent) of black New Orleans households were in the bottom 20 percent (under \$23,327/year) for national household income level, while only 14 percent of white households were in the bottom 20 percent. Black households earned 63 percent less than white households on average in 2016. The criminal justice system exacerbates these disparities. Black families bear the burden of the financial cost of the system. Black New Orleanians paid 84 percent of the \$6.4 million in bail bond fees and premiums and were charged 69 percent of the \$3.8 million in conviction fines and fees in 2015.

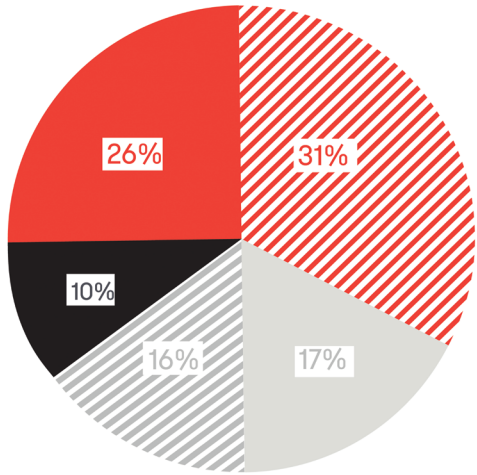
Black New Orleanians and their families also bear the burden of the increased incarceration that results from tying pretrial release to ability to pay. Black people between the ages of 15 and 64 make up 57 percent of the New Orleans

The weight of fines and fees

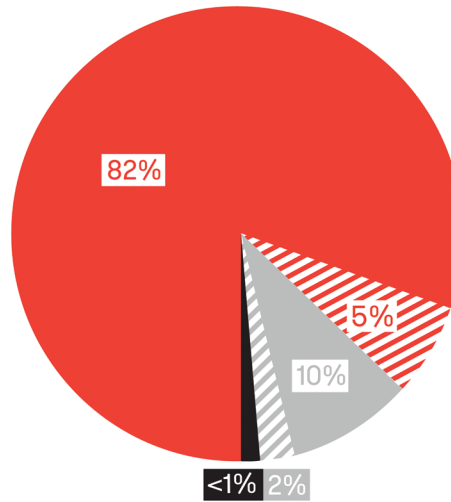


New Orleans population and jail population by race and sex

■ Black men
 ▨ Black women
 ■ White men
 ▨ White women
 ■ Men and women of other races



Population of adults ages 15-64 in New Orleans



Population in New Orleans jail

population, yet they fill 87 percent of the beds in the jail. Most are pretrial detainees unable to pay financial bail and most were not arrested for, let alone convicted of, a violent crime. Also, black New Orleanians were jailed at one-and-a-half times the rate of white New Orleanians for failure to pay conviction fines and fees in 2015.

And, it ends up costing more

Jailing people is expensive: the city spends \$120 per incarcerated person per day to operate the jail. Louisiana's pretrial detention rate among people ages 15 to 64 is the highest in the nation and more than twice the national average. New Orleans, until recently, had the highest jail incarceration rate of any urban jurisdiction in the nation. Incarceration due to inability to pay financial bail and fees costs the city \$6.4 million/year. That figure is based on a much lower rate of \$32 per person per

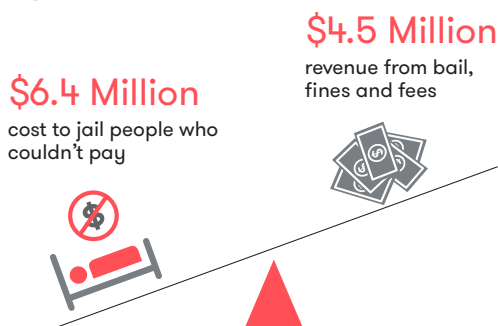
day, calculated to estimate the savings that could be recouped from having one person fewer in jail for one day. Criminal justice agencies bring in only \$4.5 million in bail bond fees and conviction fees. Taxpayers are supporting a system that is designed to lose them money.

There is a better way: an alternative funding structure

New Orleans is not alone in trying to fund its criminal justice system through fees imposed on people who come into contact with it. It may be alone in the extent to which it does so. In considering an alternative approach, it is worth looking at how other states and the federal system use bail and conviction fees.

Most states' statutes allow—and many encourage—financial bail. But very few attach significant fees to the posting of a bail bond. Kentucky outlawed for-profit bail bonding. Some allow a refundable 10 percent cash deposit to the court as financial bail, as does Louisiana—but only in two parishes. The federal system, including the federal court operating in New Orleans, has long prohibited pretrial detention based on an inability to pay financial bail. Financial bail may be imposed, but only if it can be paid immediately without undue hardship. At least two states—New Jersey and New Mexico—have virtually eliminated financial bail in the past two years and others are moving in that direction. They rely instead on nonfinancial conditions of release

More money spent than collected



or preventive detention when strictly necessary, using a research-based pretrial risk assessment to determine risk of flight or danger to the community.

Many states allow for conviction fees, but often they are minimal and waivable. Few states impose conviction fees to the degree Louisiana does. Nor do states generally allow the court that imposes the fees to benefit from the revenues. Indeed, a federal court ruled in August 2018 that it is an unconstitutional conflict of interest for New Orleans's criminal district court to both impose and benefit from conviction fees. Another federal court in New Orleans also ruled in August 2018 that the court may not both impose financial bail and benefit from the bail bond fees that people are made to pay to gain release.

Funding the system properly

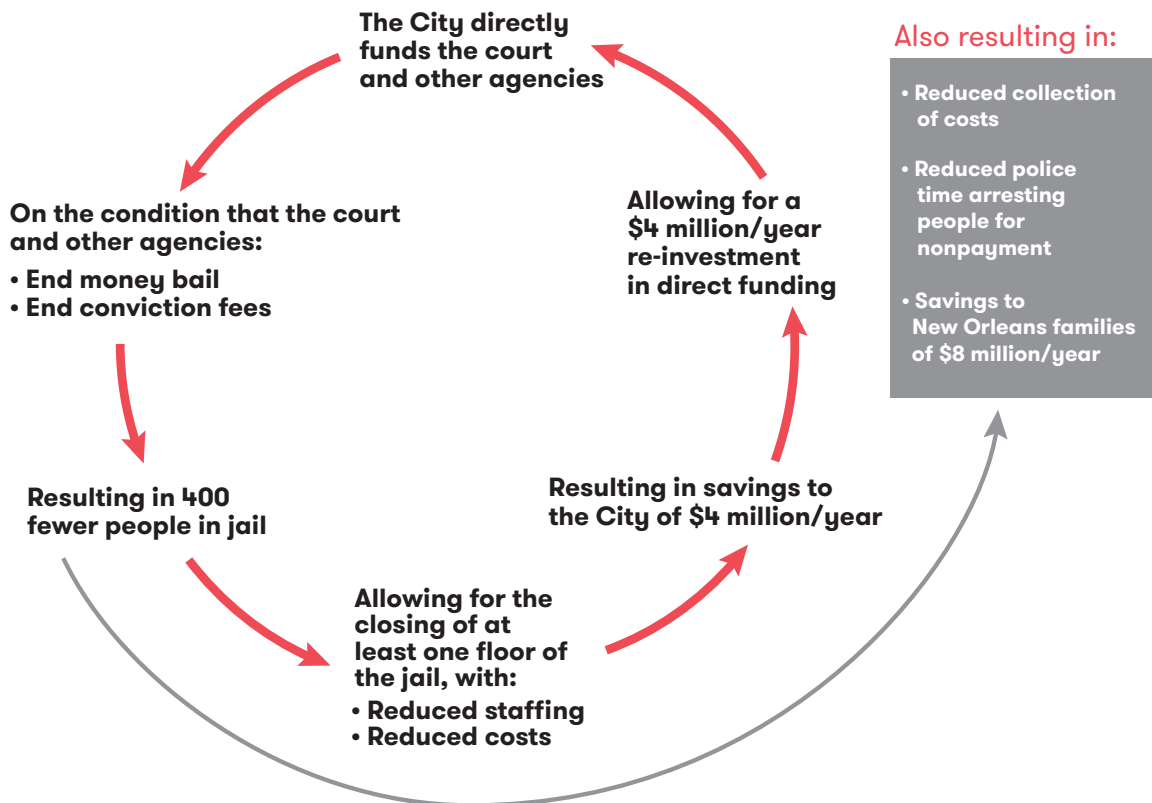
New Orleans can change its funding structure by moving away from financial bail and conviction fees. That would allow the city to replace the revenues those fees generate for the system's agencies by eliminating the excess incarceration costs. (New Jersey experienced a 20 percent reduction in its pretrial detention population in the first year after shifting away from financial bail.) In New Orleans, that

excess incarceration presents a potential cost savings of \$6.4 million/year, which is more than the \$4.5 million/year in revenues. By re-investing the savings, the city can pay the agencies directly and save nearly \$2 million/year.

It is the city's responsibility to say whether its criminal justice agencies should operate to maximize revenues or to maximize justice and safety. The court, prosecutor's office, public defender, and jail all serve the residents of the city. The city loses its principal tool for ensuring that taxpayers' money is being spent to achieve public safety when it dismisses its responsibility for funding them. Public safety can be achieved when people are jailed only when they present an unmanageable risk and never because they are poor.

Ultimately, state law must change. The bail statutes, written largely by the bail bond industry, set out a framework that strongly promotes financial bail and the collection of conviction fees. If the city and criminal justice system agencies collaborate, however, it is possible—without state law change—to refocus on justice and public safety by eliminating the two major forms of wealth extraction and replacing those revenue sources with direct funding. If community and government marshal resources for this effort in New Orleans as the groundwork is laid for statewide

A better alternative



change, the city can demonstrate that there is a better way, one in which the system, the public, and the individuals involved all benefit.

It is proposed that an alternative approach to financial bail, conviction fees, and system funding be presented for action in the 2020 city budget (crafted during the 2019 budget season). This alternative should be developed through a combination of community engagement, policy development, and research. The city could use its budget leverage both to remove the incentive to use financial bail and conviction fees as well as to encourage change among criminal justice system actors.

Extracting cost savings from the jail budget is not automatic even when the jail's reduced population allows for it. It would mean closing housing units and reducing

staffing, and this would take time, requiring a period of initial investment. However, the city's efforts have already led to a significant reduction: the June 2018 average daily jail population was 1,236. That's 200 people fewer than the 1,438 beds in the city's new jail. It will soon be appropriate to close housing units.

At the national average jail incarceration rate, New Orleans would have 910 people in jail and could save \$3.7 million/year in jail costs. That's nearly the amount the criminal justice agencies would need to replace all of the money they now receive in bail fees and conviction fees. Paying the criminal justice agencies directly provides a sustainable alternative and would eliminate the costs—human and financial, to families and to New Orleans taxpayers.

Acknowledgments

This fact sheet was supported by Baptist Community Ministries and the Laura and John Arnold Foundation. The views expressed in this fact sheet are those of the authors and do not necessarily reflect the views of the funders.

© Vera Institute of Justice 2018. All rights reserved.

For more information about this fact sheet contact Jon Wool, director of justice policy in Vera's New Orleans office, at nolaoffice@vera.org.

Sources

Page 1–2:

For constitutional and statutory bail provisions, see the U.S. Constitution, Eighth Amendment; Louisiana Constitution, art. 1, § 18; La. Code of Criminal Procedure, arts. 314(B) & 321; La. Revised Statutes, Title 22, §§ 822 & 1344; and United States Code, Title 18, § 3142(c)(2).

Page 1:

For the history of bail in Louisiana, see Flozell Daniels Jr., Benjamin D. Weber, and Jon Wool, *From Bondage to Bail Bonds: Putting a Price on Freedom in New Orleans* (New Orleans, LA: The Data Center, 2018), <https://perma.cc/8YTU-KJVV>.

Pages 2–4 and 6:

For data regarding the economic and incarceration effects of the user-funded justice system, see Mathilde Laisne, Jon Wool, and Christian Henrichson, *Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans* (New York: Vera Institute of Justice, 2017), <https://perma.cc/YW8F-6RLD>.

Page 3:

For data regarding the effects of pretrial incarceration on case outcomes, see Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (New York: Laura and John Arnold Foundation, 2013), <https://perma.cc/6BJP-BET5>. For the effects on future re-arrest, see Laura and John Arnold Foundation (LJAF), *Pretrial Criminal Justice Research* (New York, LJAF, 2013), <https://perma.cc/JXY2-JSBC>.

Page 3:

For data regarding household income by race, see Allison Plyer and Lamar Gardere, *The New Orleans Prosperity Index:*

Tricentennial Edition (New Orleans, LA, The Data Center, 2018), 18, <https://perma.cc/JVE3-UJ5Q>.

Page 3–4:

For data regarding the racial breakdown of the jail, see Vera Institute of Justice, “New Orleans: Who’s in Jail and Why?,” <https://perma.cc/N5HS-42KE>.

Pages 4 and 6:

Data regarding the jail population and the average cost of a day in jail are from the Mayor's Office of Criminal Justice Coordination.

Page 4:

For data regarding states' detention rates, see Vera Institute of Justice, “Incarceration Trends,” accessed August 21, 2018, <https://perma.cc/CR4C-MP8R>.

Page 4–5:

For various state bail laws and practices see Kentucky HB 254 (1976); N.J. Rev. Stat § 2A:162-17 (2017); and New Mexico Constitution, art. 2, § 13 (adopted 2016).

Page 5:

For the federal court rulings in New Orleans, see *Cain v. City of New Orleans*, Case 2:15-cv-04479-SSV-JCW (Declaratory Judgment, August 3, 2018); and *Caliste v. Cantrell*, Case 2:17-cv-06197-EEF-MBN (Declaratory Judgment, August 14, 2018).

Page 5:

For data regarding pretrial jail population reduction in New Jersey, see New Jersey Courts, *2017 Report to the Courts and the Legislature* (Trenton, NJ: New Jersey Judiciary, 2018), 4, <https://perma.cc/M539-KKDS>.