

Reforming
**CRIMINAL
JUSTICE**
in Louisiana

A Jobs and Opportunity Agenda
for Louisiana



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Louisiana's long history as the most incarcerated state in America has not served its citizens well. The legacy of heavy imprisonment has burdened the state with massive social and financial costs. But with a wealth of new data and exceptional bipartisanship on this issue, it's time for Louisianans to demand better from their criminal justice system.

A GREAT STEP IN THE RIGHT DIRECTION: THE LOUISIANA JUSTICE REINVESTMENT PACKAGE OF 2017

In 2017, Louisiana enacted a comprehensive overhaul of its criminal justice system.¹ The reforms were sorely needed: Louisiana had the highest imprisonment rate in the country (almost twice the national average); imprisoned up to three times as many non-violent offenders as neighboring states; and spent over \$700 million annually on corrections with no clear public safety benefit.² The Louisiana Justice Reinvestment Package³ was the product of a remarkable bipartisan effort,⁴ and saw immediate success. Within months, reincarceration rates dropped from 15 percent to 6 percent.⁵ The prison population dropped by 7.6 percent and non-violent offenders are no longer the primary occupants. Prison admissions declined by 2.9 percent, and probation and parole caseloads decreased

The Louisiana Justice Reinvestment Package enjoyed support from notable free-market and business leaders at the Pelican Institute, Right on Crime Louisiana, Smart on Crime Louisiana (a business leader coalition led by Jay Lapeyre and others), Americans for Tax Reform, the Louisiana Family Forum, Koch Industries, the Louisiana Association of Business and Industry, the Baton Rouge Area Chamber, the Lafayette Chamber and Greater New Orleans, Inc., among many others.

by 4.2 percent. Probation and parole officers saw their average caseload drop from 143 to 135.⁶ These and other changes were projected to save about \$6 million in the first year, but actually produced a savings of \$12 million.⁷ The reform package is expected to continue to bolster public safety as corrections officials reinvest those savings in programs aimed at reducing recidivism and supporting victims, as required by the new laws.⁸

The Justice Reinvestment Package was informed by findings from the Louisiana Justice Reinvestment Task Force. This bipartisan commission, which included lawmakers, community members and court and law enforcement officials, examined the state's criminal justice system and concluded that Louisianans "are not getting a good public

1 Louisiana's 2017 Criminal Justice Reforms. (2018, March). Retrieved from https://www.pewtrusts.org/-/media/assets/2018/03/pspp_louisianas_2017_criminal_justice_reforms.pdf

2 Louisiana's Justice Reinvestment Reforms: First Annual Performance Report. (2019, June). Retrieved from http://gov.louisiana.gov/assets/docs/JRI/LA_JRI_Annual_Report_FINAL.PDF

3 Louisiana Justice Reinvestment Package. Retrieved from https://www.doc.la.gov/media/1/Justice%20Reinvestment%20Task%20Force/la_final.package.summary_2017-6-7_final.pdf

4 Editorial Board. (2017, July 19). Louisiana's Big Step on Criminal Justice Reform. New York Times. Retrieved from <https://www.nytimes.com/2017/07/19/opinion/louisiana-justice-prison-reform.html>

5 Mire, M. (2018, October 1). Louisiana's Criminal Justice Reforms Show Early Success. Shreveport Times. Retrieved from <https://www.shreveporttimes.com/story/opinion/2018/10/01/louisianas-criminal-justice-reforms-show-early-success/1455340002/>

6 Performance Report, supra note 2.

7 Report to the Commissioner of Administration and the Joint Committee on Budget Regarding Calculated Savings Realized from Criminal Justice Reform for Fiscal Year 2018. (2018, July 9). Retrieved from <https://doc.la.gov/media/1/Justice%20Reinvestment%20Task%20Force/07.09.18.report.to.doa.comm.and.jlcb.for.fy18.calculated.savings.pdf>

8 The Louisiana Department of Corrections claims that only 112 of the nearly 2000 prison inmates released early under these reforms have returned to prison as the result of new crimes or supervision violations. See: Crisp, E. (2018, August 2). Two Louisiana inmates released early under reform accused of murder, but officials claim overall success. The New Orleans Advocate. Retrieved from https://www.theadvocate.com/baton_rouge/news/politics/article_4565f9d2-969e-11e8-99cf-f78b49e43110.html

safety return on investment.⁹ Lawmakers authored ten bills¹⁰ designed to enact the Task Force’s recommendations, which passed with broad bipartisan support, including from many notable conservative and free-market leaders.¹¹ The package’s passage, and even its name, mark an important departure for Louisiana from its failed tough-on-crime past.¹²

The Justice Reinvestment Package enacts proposals that Louisiana conservatives of all stripes have been promoting for years. Small-government proponents wish to concentrate public resources on essential roles of government like courts and corrections. Fiscal conservatives want criminal justice spending to produce actual rehabilitation. Social conservatives understand the need to address underlying causes of crime, such as drug addiction and mental illness, in order to foster strong families and communities. Business leaders find it strategic to prepare inmates to enter the workforce upon their release. Libertarians demand stronger checks on government’s broad authority to arrest, prosecute and imprison citizens. There are innovative, data-driven policy solutions to meet all these needs, which promise to curb needless public spending and protect the rights of both victims and offenders — unlike the catch-and-release cycle of imprisonment, reoffense and reincarceration that characterized the criminal justice policies of the past.

The Justice Reinvestment Package contained several such solutions, but there is more left to do. The following pages lay out five suggestions to continue building a better criminal justice system in Louisiana.

1. Don’t let police, prosecutors and judges profit by taking ownership of property belonging to legally innocent people.

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...civil asset
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“
Both free speech rights and property rights belong legally to individuals, but their real function is social, to benefit vast numbers of people who do not themselves exercise these rights.” (Thomas Sowell)

Louisiana law enforcement officers are authorized to seize private property that they suspect may have been the product or instrument of a crime. But a far more problematic policy is civil asset forfeiture, which allows law enforcement officers to forfeit — that is, take ownership of — seized property. The original owner need not be convicted of, or even charged with, a crime. The law enforcement agency forfeiting the property gets to keep 80 percent of the proceeds, with the remainder funneled into the criminal courts’ coffers.¹³ Forfeiture incentivizes police to prioritize certain types of crime¹⁴ and tempts judges to rule against the rightful owners.¹⁵

“[C]ivil forfeiture is fundamentally at odds with our judicial system and notions of fairness.” – former director of the Asset Forfeiture Office at the Louisiana Justice Department.

9 Louisiana Justice Reinvestment Task Force Report and Recommendations. (2017, March 16). Retrieved from <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-4>

10 Reinvestment Package, supra note 3.

11 Erspamer, D. (2017, November 2). Erspamer: In Defense of Louisiana’s Criminal Justice Reforms. The Hayride. Retrieved from <https://thehayride.com/2017/11/erspamer-in-defense-of-louisianas-criminal-justice-reforms/>

12 Rizer, A., & Mooney, E. (2018, July 21). Louisiana’s Criminal Justice Reforms Are About Second Chances. The Hill. Retrieved from <https://thehill.com/opinion/criminal-justice/397899-louisianas-criminal-justice-reforms-are-about-second-chances>

13 Creppelle, A. (2017, January 24). Civil law — but not-so-civil forfeiture. The New Orleans Advocate. Retrieved from https://www.theadvocate.com/baton_rouge/opinion/article_Oc29de2c-e259-11e6-974d-7b35e03cb87c.html

14 Rasmussen, D. W. (2018). Documented Abuses and Uncertain Benefits of Civil Asset Forfeiture. *Criminology & Public Policy*, 17(1), pp.97-100. Retrieved from <https://onlinelibrary.wiley.com/doi/full/10.1111/1745-9133.12356>

15 Carpenter II, D. M., Knepper, L., Erickson, A. C. & McDonald, J. (2015, November). Policing for Profit: The Abuse of Civil Asset Forfeiture. Retrieved from <https://ij.org/report/policing-for-profit/introduction/>

Since 2000, forfeitures in Louisiana have brought in nearly \$180 million for the state and federal government. This practice is frequently successful because it is remarkably complex. A property owner could be acquitted of a crime, but still have her property

Categories of criminal intent in Louisiana:

- **Specific intent:** “An individual actively desired ... criminal consequences to follow his act or failure to act.” LA Rev Stat § 14:10
- **General intent** exists “whenever there is specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act.” LA Rev Stat § 14:10
- **Criminal negligence:** “[T]here is such disregard of the interest of others that the offender’s conduct amounts to a gross deviation” from the expected standard of care. LA Rev Stat § 14:12

forfeited because state law allows district attorneys not only to pursue separate cases against the owner and her property, but to litigate them in two different court systems. While the owner may face charges in criminal court, the DA litigates another case against her property in civil court. This means that an owner acquitted of any wrongdoing still has to fight to keep ownership of his cash, car or other property and pay the cost of litigating that case in civil court.

State after state has reformed their civil asset forfeiture laws.¹⁶ While Louisiana has made some progress, its forfeiture laws remain among the worst in the nation.¹⁷ To clean up its act, the Pelican State should allow police to take temporary custody of a suspect’s property, but require them to wait for a conviction before taking permanent ownership (also known as criminal forfeiture). They should always be allowed to take temporary custody of contraband and suspect items, but the permanent transfer of ownership ought to be dependent upon an official finding of guilt on the part of the original owner.

2. Don’t convict people who didn’t intend to commit a crime.

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It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood.” (James Madison, writing in the Federalist No. 62).

The traditional definition of a crime includes two parts: a bad act (actus reus) and the intent to commit that act (mens rea). In other words, a person usually shouldn’t be found guilty of a crime unless the prosecution proves both that he engaged in illegal activity, and that he was mentally culpable. However, some crimes are written in such a way that an offender’s mental state is irrelevant, meaning that one could be prosecuted for breaking the law even while actively attempting to comply. Laws in this category are called strict liability crimes. Louisiana suffers from burdensome strict liability offenses, plus a unique, problematic legal precedent dealing with “general intent.”

¹⁶ Skorup, J. (2018, March 7). Civil asset forfeiture reform is sweeping the nation. The Hill. Retrieved from <https://thehill.com/opinion/civil-rights/376961-civil-asset-forfeiture-reform-is-sweeping-the-nation>

¹⁷ Policing for Profit: Louisiana. Retrieved from <https://ij.org/pfp-state-pages/pfp-louisiana/>

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While courts in other states typically hold offenders to one of four degrees of criminal intent (purposefulness, knowingness, recklessness and negligence), Louisiana uses three: specific intent, general intent and negligence. Moreover, its courts have interpreted general intent to mean that an offender’s intent can be implied from his actions and their consequences, regardless of his state of mind – which is practically the same thing as negligence – and even that general intent can be proved simply by showing that the offender committed the crime. In other words, prosecutors have a very low bar to prove that that an offender’s state of mind was sufficiently guilty to merit a conviction and sentence.

Loyola University law professor Dane Ciolino has explained the problem with general intent this way: “For example, if a reasonable person would have been aware that, ‘in the course of ordinary human experience,’ it was ‘reasonably certain’ that raising his arm at a crowded Mardi Gras parade would result in striking a fellow reveler ... a careless parade-goer who meant no one harm would be considered to possess general intent sufficient enough to land him six months in Orleans Parish Prison for the crime of simple battery.”¹⁸

States that have implemented solutions to the problems of overcriminalization, strict liability offenses and criminal intent provisions:



Solutions to the problems of overcriminalization, strict liability offenses and criminal intent provisions have already been implemented in several states, including Texas, Michigan, Minnesota, North Carolina, South Carolina, Ohio and Oklahoma.¹⁹ These reforms include setting up a task force to review criminal laws that fall outside the penal code to ensure that they are not outdated, duplicative, unclear or otherwise unnecessary. (When Minnesota set out to clean up its books, it slashed 1,175 obsolete or incomprehensible laws.²⁰) Louisiana should also rectify confusion caused by the fact that many criminal statutes do not specify the required level of criminal intent; Michigan set a default standard of intent for courts to use when statutes are silent on this.²¹ Texas has had a similar provision on the books for decades. Finally, the definition of “general intent” should be re-written to distinguish it from negligence. Making it consistent with its plain meaning would enable judges and juries to look at each offender’s individual intent to commit a criminal act.

¹⁸ Ciolino, D. (2019). Mens Rea in Louisiana.

¹⁹ Copland, J. R. & Mangual, R. A. (2018, August 8). Overcriminalizing America: An Overview and Model Legislation for States. Retrieved from <https://www.manhattan-institute.org/html/overcriminalizing-america-overview-and-model-legislation-states-11399.html>

²⁰ Salisbury, B. (2014, May 26). Minnesota ‘unsession’ dumps 1,175 obsolete, silly laws. Twin Cities Pioneer Press. Retrieved from <https://www.twincities.com/2014/05/26/minnesota-unsession-dumps-1175-obsolete-silly-laws/>

²¹ Reitz, M. J. (2015, December 17). Michigan Legislature Unanimously Passes Criminal Intent Reform. Retrieved from <https://www.mackinac.org/22003>

3. Don't imprison legally innocent people who are too poor to pay bail.

“

In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” (The Supreme Court of the United States, writing in *US v. Salerno*)

Bail refers to the process of releasing a criminal defendant from government custody during the period after arrest and before trial. It can also refer to the sum of money some courts require as collateral for her future appearance at trial. Citizens are constitutionally entitled to bail, with some exceptions.²² (Those credibly accused of the most heinous crimes are ineligible for bail.²³) Also, there is frequently a considerable delay between being charged with a crime and being tried for it, so detaining every defendant would not only be unconstitutional, it would also be expensive and overcrowd jails. It is in the interests of both practicality and individual liberty that criminal defendants are released to await their trial in the community.

“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.” (Daniels et al.)

However, justice demands a mechanism for ensuring that defendants actually appear at their hearings, so judges commonly require them to provide financial collateral — that is, bail. If defendants attend trial, the court returns their bail money (less any fines and fees incurred at trial). If they fail to appear, they forfeit the money.

Louisiana judges assign a defendant a bail amount for each crime with which the arresting officer has charged her.²⁴ State law provides for several types of pre-trial release, two of which — release on an unsecured bond and release on personal recognizance — set defendants free without requiring money up front.²⁵ But these two types are not available to defendants charged with many common crimes, including practically any violent, gun or drug offense.²⁶ A 2018 study of bail in New Orleans reports that this disqualifies more than half of arrestees in that city from obtaining pre-trial release without paying first.²⁷

Defendants falling into that category must either provide 100 percent of the bail amount to the court, or provide a commercial bail bondsman up to 12 percent of the total bail amount. Money paid to the court is refundable, but bondsmen keep 9 percent of the portion they're given as a fee. Some courts assign such high bail amounts that, in 2015, only 3 percent of felony defendants were able to pay them; the rest purchased commercial bonds.²⁸

22 Louisiana Code of Criminal Procedure, art. 312.

23 Louisiana Code of Criminal Procedure, art. 313.

24 Louisiana Code of Criminal Procedure, art. 334.

25 Louisiana Code of Criminal Procedure, art. 321.

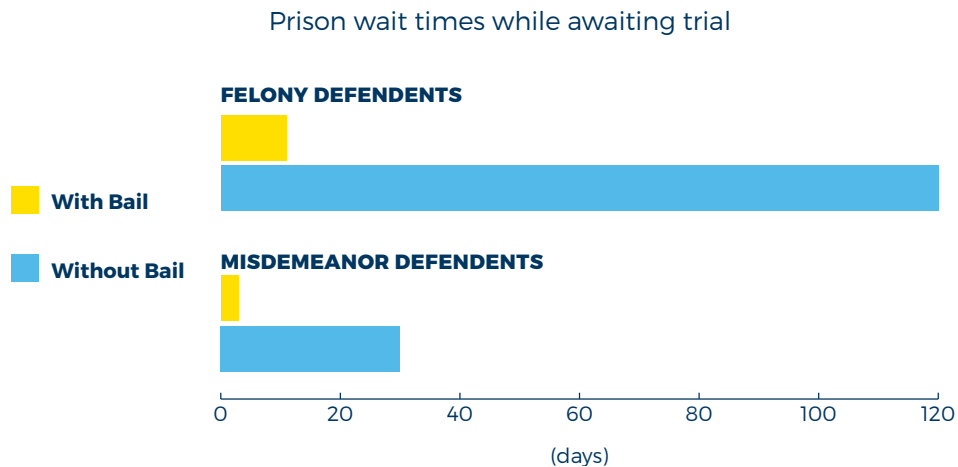
26 Ibid.

27 Daniels, F., Weber, B. D., Wool, J. (2018, May). From Bondage to Bail Bonds: Putting a Price on Freedom in New Orleans. Retrieved from https://s3.amazonaws.com/gnocdc/reports/Daniels_bondage_to_bail_bonds.pdf

28 Laisne, M., Wool, J. & Henrichson, C. (2017, January). Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans. Retrieved from https://storage.googleapis.com/vera-web-assets/downloads/Publications/past-due-costs-consequences-charging-for-justice-new-orleans/legacy_downloads/past-due-costs-consequences-charging-for-justice-new-orleans-fact-sheet.pdf

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Being arrested, jailed and bailed is costly and disruptive; felony defendants wait an average of 11 days before they're freed, and misdemeanor defendants wait about three days.²⁹ But it's far worse for those who cannot afford even a portion of their bail amount and must await trial in custody. They remain jailed an average of nearly 4 months if facing a felony charge and nearly a month for a misdemeanor or municipal offense.³⁰ And, in a city where 85 percent of people charged with crimes can't afford to hire an attorney,³¹ it is not a surprise that a snapshot of the inmates held in custody by the Orleans Parish Sheriff's Office in 2017 revealed that more than 1,400 of them were legally innocent (and serving a median of 76 days).³²



This points to one of the most glaring problems with the financial bail system: while wealthy defendants accused of very serious crimes can purchase their release, poor defendants who may pose little risk to public safety remain imprisoned due to their inability to pay. A conservative think tank in Ohio has documented the heinous crimes committed by individuals released on bail, demonstrating that it is no guarantor of public safety.³³ Moreover, some data shows that assessing money bail is an independent, causal factor that creates a greater likelihood of both conviction and recidivism.³⁴ This means that bail may actually be counterproductive, creating public safety risks and increasing prisoner populations at great social cost and public expense. Many defendants who can't afford bail choose to accept a guilty plea in exchange for time served, just so they can return to the relatives, employers, landlords and others who have had to cope with their absence. But their release comes with a conviction that will impact their prospects forever. Even those who are able to pay may face a consequent financial strain that pushes them back into criminal activity.³⁵ On top of all that, a federal judge recently ruled that New Orleans' bail system compromises judicial integrity

29 Daniels et al, supra note 27.

30 Daniels et al, supra note 27.

31 Orleans Public Defenders 2016 Annual Report. Retrieved from http://www.opdla.org/images/opd_user/2016-opd-annual-report.pdf

32 Orleans Parish Sheriff's Inmate Population Analysis. (2017, August). Retrieved from <http://metrocrime.org/wp-content/uploads/2017/08/OSPO-Inmate-Population-Analysis-Aug-2017.pdf>

33 Dew, D. (2017, December 11). Money Bail: Making Ohio a More Dangerous Place to Live. Retrieved from <https://www.buckeyeinstitute.org/library/doclib/2017-12-11-Money-Bail-Making-Ohio-a-More-Dangerous-Place-to-Live-By-Daniel-J-Dew.pdf>

34 Gupta, A., Hansman, C. & Frenchman, E. (2016, August 18). The Heavy Costs of High Bail: Evidence from Judge Randomization. Retrieved from <http://www.columbia.edu/~cjh2182/GuptaHansmanFrenchman.pdf>. See also: Dobbie, W., Goldin, J. & Yang, C. (2016, August). The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges. Retrieved from www.nber.org/papers/w22511

35 Ibid.

“
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because the judges set bails that include fees which generate revenue used to fund their courts — meaning that high bail amounts may have nothing to do with judges’ perceptions of their effectiveness.³⁶

Happily, Louisiana’s bail system is undergoing a series of promising changes. A federal judge has ordered state court officials to fix the unconstitutional court funding scheme. The New Orleans City Council passed an ordinance allowing people charged with certain municipal offenses to be released without having to pay bail.³⁷ The city also implemented a bail reform pilot program that evaluates an individual’s risk to public safety or of failing to appear for court if released pre-trial.³⁸ These reforms and others like them aim to help realign the bail system with its fundamental goal by giving judges the data they need to make objective bail decisions that account for each defendant’s flight risk and ability to pay.

The bail system is an important tool for balancing individual rights with our collective interest in ensuring criminal defendants appear at trial as required and behave lawfully in the meantime. It may not be a good idea to eliminate it entirely, but Louisiana’s heavy use of bail has shown no clear public safety return.³⁹ Rather, it has introduced significant financial and social costs in the form of additional public spending on jail beds, an increased likelihood of recidivism among the needlessly incarcerated,⁴⁰ and devastation in the lives of those too poor to purchase their freedom. Louisiana courts statewide must adopt pre-trial policies that tie the bail decision more closely to the factors that matter for ensuring court appearance, and give judges a mechanism for adjusting bail amounts for defendants who are unable to pay.⁴¹

4. Don’t incentivize judges to make convictions in order to fund their courts.

“

All rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary.” Andrew Jackson

Bail isn’t the only policy that ties money and justice together. Many criminal statutes authorize judges to sentence offenders to incarceration, the payment of a fine or both. And until recently Louisiana judges had also been empowered to impose a variety of

“Indigence should be considered when assigning fines or fees.”- Right on Crime

optional administrative fines and fees on convicted defendants to help the court recoup some of its operating costs.⁴² On average, these fines added an additional \$460 to each

36 Sledge, M. (2018, August 6). New Orleans judge has ‘substantial’ conflict of interest in setting bonds, federal court finds. The New Orleans Advocate. Retrieved from https://www.theadvocate.com/new_orleans/news/courts/article_62fb3ac0-99b9-11e8-80fc-8fa40bdfb3da.html

37 Williams, J. (2017, January 12). City Council unanimously passes overhaul to Municipal Court bail system. The New Orleans Advocate. Retrieved from https://www.theadvocate.com/new_orleans/news/courts/article_eb41d288-d90b-11e6-b99c-4bb3e5442d1b.html

38 Shen, A. (2017, October 19). New Orleans’ Great Bail Reform Experiment. Citylab. Retrieved from <https://www.citylab.com/equity/2017/10/new-orleans-great-bail-reform-experiment/543396/>

39 Olson, W. (2017, September 22). Maryland’s Bail Reform Is a Warning for Would-Be Moralizers. Wall Street Journal. Retrieved from <https://www.wsj.com/articles/marylands-bail-reform-is-a-warning-for-would-be-moralizers-1506119393>

40 Lowenkamp, C. T., VanNostrand, M. & Holsinger, A. (2013, November). The Hidden Costs of Pretrial Detention. Retrieved from https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf

41 Mayor Landrieu, Supreme Court of Louisiana, Criminal District Court, Stakeholders Announce New Public Safety Assessment Tool. (2018, April 23). Retrieved from <https://www.nola.gov/mayor/news/archive/2018/042318-pr-mayor-landrieu,-supreme-court-of-louisia/>

42 Simerman, J. (2017, January 15). Orleans judges vary widely in assessing fines and fees on defendants. The New Orleans Advocate. Retrieved from https://www.theadvocate.com/new_orleans/news/courts/article_0617c4a2-d9dc-11e6-88ff-2b81ec63714a.html

offender's justice system tab, making the "user fee" model of court funding a literal debt to society.⁴³

The administration of criminal justice is a core function of government that ought to be fully and sustainably funded using revenue derived from general taxes. Criminal offenders may be unsympathetic, but attempting to shift a portion of the courts' financial burden onto them creates several unacceptable outcomes. First, saddling offenders with massive debts that are discoverable on background checks may make it more difficult for them to secure employment, raising the odds that they may revert to illegal behavior just to make ends meet. This creates a risk to public safety and undermines the system's rehabilitative goals. Second, attempting to fund courts on offenders' backs is bad business; these individuals are overwhelmingly poor, meaning that whatever revenue stream they can provide to courts is irregular and insufficient. As a result, a core governmental service with incredible responsibility lacks the resources it requires to bolster public safety, make crime victims whole and protect individual rights. Finally, asking judges to act as tax collectors incentivizes them to find defendants guilty in order to collect the revenue they need to fund their courts.

Some oppose court funding changes on the grounds that the system depends on this revenue stream to continue functioning. However, courts have not been able to collect most of the fees they impose on defendants, even though judges are allowed to punish defendants for nonpayment by suspending their driver's licenses or even throwing them back in jail. One report calculated that even if the fees had all been collected they would only have made up a quarter of the courts' budget.⁴⁴ But the 2015 collection rate was only 42 percent. Meanwhile, 269 people were jailed that year for failure to pay fines and fees, which cost taxpayers twice: first for the unpaid justice system debt, then hundreds of thousands of dollars in jail expenses, which effectively turned the state jails into debtors' prisons.⁴⁵



A series of recent legal developments have raised big questions about the future of Louisiana court funding. A 2017 law forbade judges to jail offenders or suspend their licenses in punishment for nonpayment, unless their nonpayment was willful and not a result of poverty.⁴⁶ In December 2017, a federal judge found that New Orleans judges disregarded an offender's ability to pay before imprisoning them, and ruled that the practice violates due process.⁴⁷ She also held that allowing judges to impose up to \$2,500 on a felon and up to \$500 on a misdemeanor created a conflict of interest because judges rely on revenue generated from these

43 Laisne et al, supra note 28.

44 Laisne et al, supra note 28.

45 American Civil Liberties Union of Louisiana. (2015, August). Louisiana's Debtors Prisons: An Appeal to Justice.

Retrieved from https://www.laclu.org/sites/default/files/field_documents/2015_Report_Louisiana_Debtors_Prisons_0.pdf

46 Ellerbe, E. (2017, September 14). Louisiana's New Fines and Fees Law: Just a Start. Retrieved from <http://rightoncrime.com/2017/09/louisianas-new-fines-and-fees-law-just-a-start/>

47 Cain v. City of New Orleans. (2017, December 13). Retrieved from <https://lawyerscommittee.org/wp-content/uploads/2017/12/279-ORDER-grant-deny-Pls-PMSJ-251.pdf>

fees to staff their offices. Finally, in 2018, two federal judges issued rulings in a pair of lawsuits challenging Orleans Parish debtors' prisons.⁴⁸ The first forbade judges from collecting fines and fees unless defendants are provided a "neutral forum" to show that their poverty prevents them from paying. The second held that judges create a conflict of interest when they set bail amounts which include a court-funding fee.

These rulings created an opportunity for judges and the Legislature to come together and do the right thing by finding a way to fairly and sustainably fund the criminal justice system. But the judges, having already attempted to moot the lawsuit by waiving fees totaling over \$1 million,⁴⁹ decided to appeal it instead.⁵⁰ This means a protracted, expensive litigation process – the cost of which might be borne by the very taxpayers who will continue being charged fines and fees that violate constitutional principles while the suit proceeds.⁵¹ When Harris County, Texas decided to fight a federal ruling against its bail system, it spent more than two years and \$6.1 million on legal fees.⁵² And it lost.

While New Orleans has taken steps to fully fund its courts,⁵³ the Legislature should also implement policy changes to do so statewide, and thereby save money and bolster public safety. Many other states have already decided to get smart on crime by prosecuting fewer minor offenses and putting fewer people in jail, which frees up resources for social services like mental health and addiction treatment that can help stop the cycle of offending and reoffending. Officials should also consider ending automatic minimum bails, which would save money by releasing more of the nearly one in three inmates occupying jail cells simply because they are too poor to purchase their freedom. Above all, it's past time to stop asking judges to fund their courts through fees tied to criminal convictions. This practice is at odds with basic notions of impartiality and fairness, and harms individual offenders and the wider community alike.

5. Don't over-incarcerate Louisianans who haven't even been charged with a crime.

“

Justice delayed is justice denied.” (Attributed to William Penn)

The Bill of Rights defends Americans' right to have criminal cases against them resolved expeditiously, providing that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy trial.”⁵⁴ Various legal precedents, state statutes and federal laws offer more specific guarantees, but the general expectations are pretty universal: Some delays are necessary or inevitable, but it's coercive for the state to draw out a criminal case against a citizen with life, liberty and property on the line.

48 Sledge, M. (2018, August 11). New Orleans judges enter 'uncharted territory,' and budget peril, after federal court decisions. The New Orleans Advocate. Retrieved from https://www.theadvocate.com/new_orleans/news/courts/article_2503a6e0-9daa-11e8-bc2f-df4ccc402f0f.html

49 Sledge, M. (2017, June 25). Orleans judges say they have waived \$1M in court fees in response to 'debtors' prison' lawsuit. The New Orleans Advocate. Retrieved from https://www.theadvocate.com/new_orleans/news/courts/article_54e60ffa-5833-11e7-87be-e700e5498301.html

50 Sledge, M. (2018, August 21). New Orleans judges to appeal decision in fines and fees lawsuit. The New Orleans Advocate. Retrieved from https://www.theadvocate.com/new_orleans/news/courts/article_fbd197d6-a56b-11e8-befe-abaf6281ca54.html

51 Ibid.

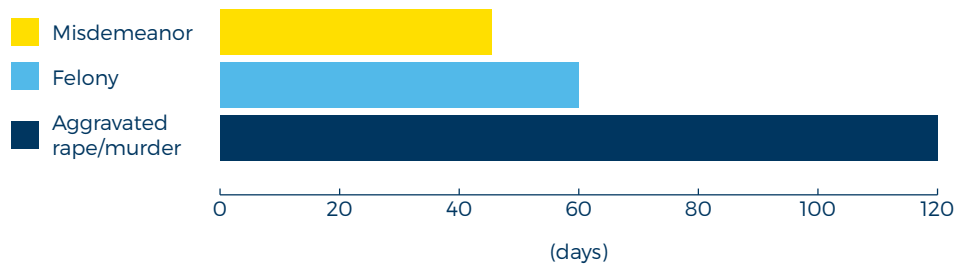
52 Banks, G. (2018 June 14). Harris County bail lawsuit in trial court for final revisions. Houston Chronicle. Retrieved from <https://www.chron.com/news/houston-texas/houston/article/Harris-County-bail-lawsuit-in-trial-court-for-12992428.php>

53 Sledge, M. & Simerman, J. (2018, November 13). New Orleans DA, criminal court and cops make budget pitches to council. The New Orleans Advocate. Retrieved from https://www.theadvocate.com/new_orleans/news/courts/article_ed110fa0-e78e-11e8-839d-af0f2a46754f.html

54 The Constitution of the United States, Amendment 6.

Speedy trial statutes limit the amount of time a defendant must wait to go to trial after the state files criminal charges against him. But in Louisiana, district attorneys have a very long time to decide whether or not to bring charges in the first place. The state code of criminal procedure provides that someone who has been arrested on suspicion of criminal activity may languish behind bars for up to 45 days if the offense was a misdemeanor, up to 60 for a felony, and up to 120 for aggravated rape or murder, before the district attorney must decide whether or not to prosecute.⁵⁵ Holding an arrestee for such a long time without charging him creates many of the same collateral consequences as needlessly detaining defendants who can't afford bail.

Prison wait times - arrested on suspicion of criminal activity



Other states do better by their citizens: Florida gives prosecutors up to 90 or 175 days to file misdemeanor or felony charges respectively, but considers defendants “in custody” as long as they’ve been served the paperwork – they’re not necessarily jailed for the duration.⁵⁶ New Jersey recently reformed its law to clarify that an arrestee may not be detained for more than 90 days without being charged or released.⁵⁷ Iowa even passed a “speedy indictment” rule (again, giving prosecutors up to 90 days) to reflect the idea that the right to a speedy trial ought also to include the right to be free from unjustified incarceration.⁵⁸

Louisiana ought to revisit time limitations ostensibly meant to uphold the spirit of the Sixth Amendment. While a certain amount of delay may be necessary in order for the state to fully investigate a case, or be justified if required by the defendant, other states have apparently struck a better balance between the practicalities of preparing a case, and the rights of the defendant. Louisiana law ought to uphold the right to a speedy trial in both spirit and practice, protecting citizens from a potentially coercive prosecutorial advantage that results in needless incarceration and all its fiscal and social consequences.

CONCLUSION

There is no more fearsome power of government than its ability to deprive citizens of their life, liberty and property. So although the criminal justice system is massive, complex and expensive, it is imperative that it function fairly and effectively. All Louisianans depend on it for their freedom and safety – indeed, no society can function effectively without the assurance of order and justice. Armed with the facts about the system’s deficiencies and examples of successful innovations from other states, we must now take steps to make it fairer, more transparent and better aligned with our values.

⁵⁵ Louisiana Code of Criminal Procedure, art. 701.

⁵⁶ Florida Rule of Criminal Procedure, Rule 3.191.

⁵⁷ New Jersey Revised Statutes § 2A:162-22.

⁵⁸ Iowa Rule of Criminal Procedure 2.22(3)(b).



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