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The New Orleans Criminal Legal System: A Flowing River

William C. Snowden

No man ever steps in the same river twice, for it's not the same river and he's not the same man.

—Heraclitus

Ask anyone from New Orleans and they will tell you the city has not been the same since the storm. Although the city has persevered through many storms and hurricanes in its three-hundred-year history, this particular storm—Hurricane Katrina—is notorious for the transformation it brought to New Orleans in the years that followed.

The makeup, culture, and rhythm of New Orleans have changed, but so too have the various systems that give the city its tempo—particularly the criminal legal system. Hurricane Katrina was a disaster that revealed deficiencies, abnormalities, and injustices in the New Orleans criminal legal system. Some responses to these revelations were criticized and some were supported, and what we have today in 2020—fifteen years after the storm—is a city that is not the same.

To understand the change in the city's criminal legal system, we will start by looking at how the Vera Institute of Justice (Vera) came to work in New Orleans, then we will review Vera's involvement in various efforts to reduce the jail size—in population and in structure. Finally, we will list some lessons learned since Vera began its work in New Orleans.

Vera to New Orleans: The Backstory

When New Orleans Council member James Carter called the president of Vera, Michael Jacobson, for help in 2006, the two had never met. In the aftermath of Katrina, Carter, newly elected to the city council, would soon make criminal justice his central issue.

The tenor of New Orleans at the time was to rebuild various systems, including education, housing, and infrastructure, to pre-Katrina levels. As a defense attorney, Carter was familiar with the criminal legal system and its failings. He recognized the desperate need for New Orleans to avoid rebuilding the pre-Katrina system and began to reimagine what local justice could look like. Thus, along with his fellow councilmember Shelley Midura, he reached out to Vera for assistance.

Vera is a nonprofit organization that drives change in justice systems to ensure fairness, promote safety, and strengthen communities. It was started in New York City in 1961 with a focus on demonstrating, through the Manhattan Bail Project, that New Yorkers who were too poor to afford bail but had significant ties to their communities could be released from jail and still make their court dates. Vera has evolved to address a multitude of issues in our criminal legal system.

Today, Vera works in more than forty states, with its main office in New York City and other offices in Los Angeles, New Orleans, and Washington, DC. Vera works with local, state, and national government officials as well as community leaders to create change within the criminal legal system, employing a combination of research, data analysis, community engagement, technical assistance, and project management.

Vera's first task on arriving in New Orleans in 2006 was to assess the landscape and determine the steps New Orleans needed to take to develop a criminal legal system that was more just,

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reliable, and effective. That assessment included interviews with members of the New Orleans City Council, Criminal District Court judges, the district attorney, the chief public defender, the sheriff, the chief of police, and other justice system leaders as well as nonprofit research and advocacy organizations. Vera also analyzed the available data on the system's operation after the storm.

This assessment produced Vera's 2007 report "Proposals for New Orleans' Criminal Justice System: Best Practices to Advance Public Safety and Justice." This report identified areas that needed to be improved and made recommendations that were eventually adopted by the New Orleans City Council. The adoption of these recommendations demonstrated the city's commitment to a well-functioning criminal legal system and signaled the flow of changes to come.

Vera was adamant that the city lead this reform. And they did. With the guidance of Vera and support of a local philanthropic organization, Baptist Community Ministries, Carter organized a two-day retreat with all the city leaders to encourage them to commit to implementing the reforms the criminal legal system needed. At the end of the retreat, all of the leaders signed on in support of and commitment to the reforms. Later, the Criminal Justice Leadership Alliance came together to lead these reforms. The alliance comprised many of the same justice system leaders present at the retreat.

Vera also made a commitment to the city by opening and staffing its own local office in New Orleans in 2008. Diverging from its typical approach to jurisdictional assistance, which involved making phone calls, sending e-mail messages, and flying in New York staff, Vera made New Orleans one of its homes and hired local New Orleanians. Having Vera staff physically present, and made up of people from New Orleans, was a vital way to maintain the energy and direction of the reform strategies and their implementations.

An Oversized Jail

In August 2005, the month Hurricane Katrina hit New Orleans, the average monthly jail population was recorded at more than sixty-five hundred inmates.¹ It cannot be overstated how monumental this number is. Compared to nine other areas in the country, Orleans Parish—which is the same as the City of New Orleans—was an outlier (see Figure 1).²

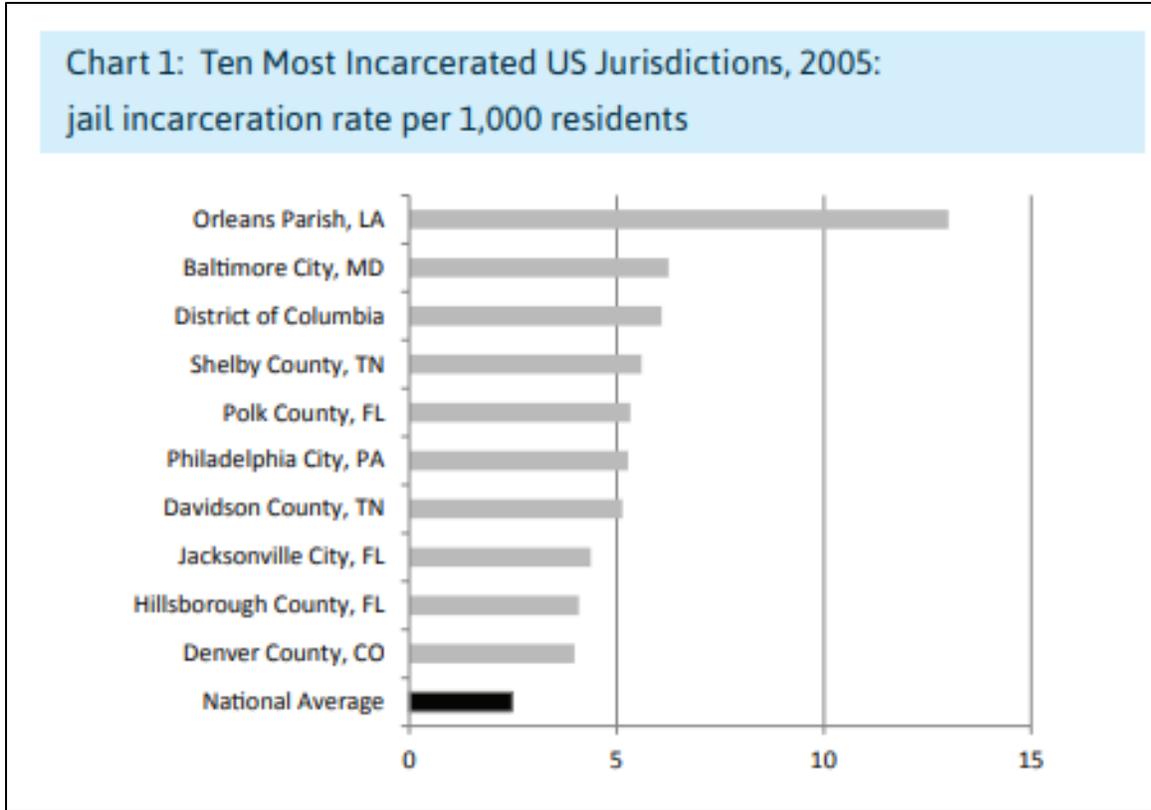


Figure 1. Ten most incarcerated US jurisdictions, 2005; jail incarceration rate per 1,000 residents (Bureau of Justice Statistics, “Jail Inmates at Midyear 2007,” US Census Bureau, 2008)

Orleans Parish (“parish” is used instead of “county” in Louisiana), for decades, consistently had incarceration rates significantly higher than those of other cities. The local jail, Orleans Parish Prison—so named though it was a jail, not a prison—unlike typical jails, housed more than just pretrial inmates. The system, however, which allowed the sheriff to be paid per inmate per day, provided a financial incentive to fill the jail.

The inmate population comprised juveniles and adults and was made up of people with different categorizations and at different stages of their journey through the system. Among the inmates were those who were in felony pretrial or misdemeanor or traffic pretrial, those who were in custody for competency restoration, those charged with violating parole or probation, those held on local warrants or for other jurisdictions for extradition, those sentenced to Orleans Parish Prison, and state inmates sentenced to Department of Corrections time. The practice of housing state inmates in local jails is unique in Louisiana and was abundant in Orleans Parish.

This variety of people in the jail was a main contributor to its bloated size. Because of reforms instituted over the past eleven years, the average monthly jail population has been reduced significantly.

In the summer of 2019, fourteen years after the storm, New Orleans was averaging a monthly population of between eleven hundred and twelve hundred inmates. The jail is no longer the same—in size or structure. The population and size reduction was a product of many strategies, including the halting of plans to expand the jail size, the creation of the New Orleans Pretrial Services Program, and a growing movement for bail reform. These strategies are discussed in the

following sections, which highlight Vera's involvement in a few of the many strategies to reduce the jail population.

Jail-Bed Cap of 1,438

One of the most significant strategies undertaken to reduce the jail population was to build a smaller, centralized jail to replace the ones destroyed by the storm. Before Katrina, the local jail was made up of twelve facilities spread out within a half-mile radius, each of which had inmates when Hurricane Katrina hit August 28, 2005. According to the sheriff's self-reported numbers, the inmate population of 7,520 was divided as follows: Community Corrections Center (1,280 inmates), Conchetta (408 inmates), Fisk School Work Release (200 inmates), House of Detention (825 inmates), Orleans Parish Prison (831 inmates), Rendon (200 inmates), South White St. Juvenile Facility (288 inmates), Templeman Phase 1 (840 inmates), Templeman Phase 2 (890 inmates), Templeman Phase 3 (1,204 inmates), Templeman Phase 4 (234 inmates), and Templeman Phase 5 (320 inmates). Compared to national averages, the city's average monthly jail population in 2005 should have been about 1,200 people. Instead, it was six times the average size it should have been the day the storm hit.

As the city recovered during the first year after Katrina, makeshift jails were erected to house inmates temporarily until there was a developed plan for a new, more permanent structure. In 2010, the City Planning Commission reviewed a proposal that the Orleans Parish sheriff, Marlin Gusman, submitted to the New Orleans City Council to build a new jail complex that would house up to 5,832 people. According to the sheriff, this was the size needed to replace the facilities that were lost by the storm, though at the time the jail population was about 3,400.³

Vera had different projections. After the sheriff's report was made public, Vera helped bring together the Orleans Parish Prison Reform Coalition, the Workers Center for Racial Justice, the New Orleans Coalition on Open Governance, and other community groups to organize the community demand for the city to commit to a smaller and safer jail.

As the sheriff's proposal was nearing a vote in city council, Vera helped persuade Stacy Head, a council member, and Susan Guidry, chair of the City Council Criminal Justice Committee, to delay the vote. Vera and local criminal justice community organizations also informed the Mayor's Office that New Orleans did not need or want a massive jail.

With the vote on the sheriff's proposal delayed, Mayor Mitch Landrieu assigned his first deputy mayor, Andy Kopplin, to review the proposal with a convening of the Criminal Justice Working Group. After meeting with Vera and other experts, as well as community leaders, this group concluded in its resolution: "If specific policy reforms are fully implemented, New Orleans would need approximately 1,485 beds to house local inmates by the year 2020."⁴ On the recommendation of the Criminal Justice Working Group, the city council approved construction for only one of the sheriff's proposed housing facilities with 1,438 beds. The council also called for the decommission or demolition of the other facilities.

New Orleans Pretrial Services

The issue of pretrial services comes right back to that same question: Who should be in jail? And who can safely be at home?

—Judge Calvin Johnson (Ret.), Orleans Parish Criminal District Court, 2014

When Vera did its 2007 assessment of the New Orleans criminal legal system, it immediately highlighted the absence of a pretrial services program.⁵ Without such a program, the judges were

not receiving the information they needed to help them determine the potential flight risk or risk to public safety of defendants brought before them during bail hearings.

According to the Louisiana Code of Criminal Procedure §230.2, an accused person must be brought in front of a magistrate judge or commissioner within forty-eight hours of their arrest.⁶ This hearing is called a first appearance. At the first appearance, the magistrate judge or commissioner will decide three things: whether or not probable cause exists for the person's arrest, whether or not the person qualifies for a public defender, and what type of bail the person should receive.

The outcome of the first appearance is critical to the person charged with a crime. Depending on the type of bail and one's financial circumstances, the decision could mean the difference between sitting in jail and getting out and keeping one's job, one's apartment, custody of one's children, and so on. At the time, New Orleans did not have a risk assessment process to assist the judges in determining who could be safely released from jail and who should be considered for detention.

Vera developed and launched the first New Orleans Pretrial Services program for the city in April 2012, and it was fully implemented in 2013.⁷ The plan was for Vera to start, develop, and operate the program until it could be spun off to another nonprofit or government agency. New Orleans Pretrial Services (NOPTS) produced reports with scores correlating with risk levels to give the judges additional information to consider when deciding whether to detain or release a defendant. The scores were based largely on an individual's criminal history, or lack of criminal history, and employment and residential stability.

NOPTS helped recommend defendants, on the low-end of the risk spectrum, for their nonfinancial release (a recognizance bond). That, in turn, helped reduce the jail population. Unless one had a private attorney calling in a favor from a judge, being released on one's own recognizance was almost unheard of before NOPTS and before the storm. Vera helped normalize this practice.

When NOPTS was introduced, the judges of the Orleans Parish Criminal District Court were pessimistic about it. Many judges dismissed the value such risk assessments could offer during their bail-setting hearings. Nonetheless, in March 2017, the city handed the program over to the Criminal District Court, with the oversight of the Supreme Court, and the court adopted it as its own. The risk assessment instrument now used by the court is the Public Safety Assessment process from the Laura and John Arnold Foundation. The transition to this instrument represents a significant change in the court and their desire to effectively contribute to reducing pretrial detention.

Ending Financial Injustice

Anyone who studies the criminal legal system in New Orleans will quickly recognize the significant weight money plays on the scales of justice. In 2017, Vera looked at the extraction of wealth from poor, often black and brown, communities in New Orleans through bail, fines, and fees and submitted a report titled "Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans." This report found that in 2015 New Orleanians paid \$4.7 million to bail bond agents, \$1.7 million in bail bond fees to government agencies, and \$3.8 million in conviction fines and fees.⁸

When a money bail is set at a person's first appearance, the person generally has two options: pay the full amount in cash to the court or pay a percentage to a bail bond agent. There are other forms of bond, but a majority of the types assigned in New Orleans are cash or commercial surety.

When the full amount of bail is paid in cash, the money is returned minus the assessed government fee. When a bail bond agent is used, the percentage paid is not returned. For example, according to the Vera report, on a \$10,000 bond, a person would pay a New Orleans bond agent a 10 percent premium, or \$1,000, plus a 3 percent fee, or \$300, which gets passed on to the government, and a separate flat government fee of \$44, for a total of \$1,344. When the person pays \$1,300, excluding the flat government fee, the person will not get any of that \$1,300 refunded regardless of the outcome of the case.

The 3 percent fee is divided among the government actors present in the courtroom. The court gets 1.8 percent, the district attorney gets 0.4 percent, the public defender gets 0.4 percent, and the sheriff gets 0.4 percent. The judge who sets the bail amount and receives a portion of the bail fee has a financial conflict of interest according to a 2018 decision by federal judge.

Generally, the purpose of bail is to ensure public safety and to ensure that the person returns to court. Research demonstrates, however, that people actually do not need to put up money to ensure that they will come back to court or not get rearrested. In jurisdictions that do not use money bail, people released through nonfinancial means have similar rates of court appearance and of no new arrests as those who are released through money bail.⁹

As cited in “Past Due” in 2017 and in a 2019 report discussed later, on any given day in New Orleans, three out of ten people were in jail not because they were a threat to public safety but because they were too poor to afford bail. This financial injustice happens at the start of a case, with money bail, and it occurs also at the end of the case, with fines and fees. A majority of the New Orleanians sentenced in 2015 were ordered to pay fines and fees totaling \$3.8 million.

The “Past Due” report helped expose the inequitable ways money was being injected into the criminal legal system. Advocates seized on these findings and brought two successful lawsuits against the Orleans Parish courts, both decided in 2018.

In the first of these, *Caliste v. Cantrell*, the federal court ruled it was unconstitutional to detain a person on money bail without determining their ability to pay, and that it was a conflict of interest for the local court to make a bail amount determination when they benefit financially from fees on bail bonds.¹⁰ In the other case, *Cain v. City of New Orleans*, a federal court ruled that it is unconstitutional to incarcerate a person because of their inability to pay fines and fees and that it is a conflict of interest for the courts to be the one determining the same person’s ability to pay.¹¹

Vera is often able to position itself to collect and report on data revealing injustices within the criminal legal system. Although we do not bring litigation ourselves, we often are in spaces where our findings help lay the framework for lawsuits, as we did in the *Cain* and *Caliste* cases.

According to the lawsuits, the judges no longer can rely on the revenue generated from bail fees or conviction fees. The city provided the judges with funds to fill the gap created by the lawsuits in 2018 and gave them a full budget for the subsequent fiscal year. Following these lawsuit decisions, the city is in a unique moment to replace the money bail system with one that does not include money as part of the calculus to determine whether someone is detained or released. Such a determination should be based on an assessment of a person’s potential threat, or lack of a threat, to public safety.

Seizing the moment created by the federal lawsuit decisions, Vera came out with a report in June 2019, “Paid in Full: Ending Money Injustice in New Orleans,” which includes a host of recommendations. If the twelve recommendations are adopted, the jail population could see a reduction of between approximately 304 and 687 people.¹²

Money bail does not keep us safe. “Paid in Full” advocates for the replacement of money bail with a decision-making framework anchored in public safety. It also argues for the elimination of

conviction fees. Since the court has been fully funded by the city, it no longer needs to rely on the revenue previously generated by money bail and conviction fees.

The lawsuits and the report will not automatically change the behavior of the judges. But the report does give advocates, nonprofit organizations, and community members a blueprint laying out the necessary changes the judges need to make. Vera will continue to work with the judges, the community, and city leaders to replace money bail and end conviction fees with a more equitable and safety-promoting system.

Lessons Learned

The people of New Orleans were very protective of their city after Hurricane Katrina. Its greatness had been rocked by a devastating storm leaving its infrastructure fractured, its residents displaced, and its future uncertain. New Orleans is a true treasure in the United States with a rich sense of history and pride. When national organizations, such as Vera, offered services during the recovery, they were not always immediately welcomed by the community.

Some of the pushback Vera experienced was due to the way the organization was rocking a boat floating on self-interest. In New Orleans, for-profit systems were used to being the sole beneficiary of government contracts. Because Vera is a nonprofit organization, it was perceived as a threat to these business opportunities, particularly with the creation of the NOPTS program. At a city council meeting in 2012, many members of the community came out in support of NOPTS. Others, however, spoke out against it and resisted Vera's work in New Orleans.¹³

Resistance rooted in entrenched interests is often difficult to overcome. The lesson learned in New Orleans is that the way to overcome this resistance is through maximizing engagement with a variety of long-standing community organizations and government leaders. Many community organizations got behind Vera and its plans and recommendations, as did strong government leaders on the city council, such as Stacey Head and Susan Guidry, and in the Mayor's Office, such as Andy Kopplin, who drove the transformation envisioned for the New Orleans criminal legal system with Vera's assistance.

In the years since that particular city council meeting, Vera has built its reputation with the New Orleans community as a trusted expert in the space of reform in the criminal legal system. Thirty-two local community organizations signed on endorsing and supporting the recommendations of the 2019 report "Paid in Full" to end financial injustice in New Orleans. This trust was built slowly, the product of meetings, partnerships, and recognition that justice reform is a collaborative process and that Vera had an important role to play in that movement.

Conclusion

In August 2005, other cities' jail populations were dwarfed in comparison to New Orleans'. The unconscionable size of the jail population in the city was a symptom of a cancer of injustice that had spread throughout the criminal legal system. Hurricane Katrina revealed many of these injustices.

The city rightly takes pride in the way it has significantly reduced its jail population. But despite this reduction, the racial disparities are nearly the same today as they were before Katrina. The population of New Orleans is about 60 percent black, 30 percent white, 5 percent Latinx, and 3 percent Asian, yet black males, on average, make up 80 percent of the jail population.¹⁴ This figure highlights work that still needs to be done.

New Orleans is not the same as it was when Vera arrived in 2006. The mayor has changed, the city council has changed, and the justice issues have changed. Vera is proud of the way we have been able to contribute to its transformation by envisioning a society that respects the dignity of every person and safeguards justice for all New Orleanians.

Notes

¹ Paige M. Narrison and Allen J. Beck, “Prison and Jail Inmates at Midyear 2005,” *Bureau of Justice Statistics Bulletin*, May 2006, <https://www.bjs.gov/content/pub/pdf/pjim05.pdf>.

² Figure 1 is reproduced from Judge Calvin Johnson (Ret.), Mathilde Laisne, and Jon Wool, “Justice in Katrina’s Wake: Changing Course on Incarceration in New Orleans,” Vera Institute of Justice, November 2015, https://storage.googleapis.com/vera-web-assets/downloads/Publications/justice-in-katrinawake-changing-course-on-incarceration-in-new-orleans/legacy_downloads/justice-in-katrinawake.pdf.

³ “Smaller, Safer, and More Secure Jail,” Orleans Parish Sheriff’s Office, <http://www.opcso.org/ppt/presentation20101018.pdf>, accessed November 25, 2019.

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⁶ Louisiana Code of Criminal Procedure 230.2, Justia US Law, <https://law.justia.com/codes/louisiana/2011/ccrp/ccrp230-2/>, accessed November 25, 2019.

⁷ “New Orleans Pretrial Services” (video), Vera Institute of Justice, <https://www.vera.org/research/new-orleans-pretrial-services>, accessed November 25, 2019.

⁸ Mathilde Laisne, Jon Wool, and Christian Henrichson, “Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans,” Vera Institute of Justice, January 2017, 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.pdf.

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¹⁰ Adrian Caliste, et al. v. Harry E. Cantrell, 329 F.Supp.3d 296 (2018), <https://www.leagle.com/decision/infdc020180807e72>.

¹¹ Alana Cain, et al., v. City of New Orleans, et al., 327 F.R.D. 111 (E.D. La. 2018), <https://www.leagle.com/decision/infdc020180803935>.

¹² Jon Wool, Alison Shih, and Melody Chang, “Paid in Full: Ending Money Injustice in New Orleans,” Vera Institute of Justice, June 2019, https://storage.googleapis.com/vera-web-assets/downloads/Publications/paid-in-full-a-plan-to-end-money-injustice-in-new-orleans/legacy_downloads/paid-in-full-report.pdf.

¹³ Tyler Bridges, “Squabble over Pre-Trial Program Erupts as Hearings Plow Forward,” *The Lens*, November 13, 2012, <https://thelensnola.org/2012/11/13/pre-trial-program-debated/>.

¹⁴ See the New Orleans City Council Criminal Justice Committee website at <https://council.nola.gov/committees/criminal-justice-committee/>.