



# Arnold Ventures

## **Pretrial Reform: Reflecting on Our History, Our Moment, Our Movement**

**A Discussion at the Pretrial  
Innovators Convention**

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**Denver, CO**

**March 14, 2019**

## **Dear friends and colleagues:**

It is a true pleasure to be with you today in Denver at PI-Con, the Pretrial Innovators Convention.<sup>1</sup> It is always a special treat to spend time with people and organizations who are doing the cutting edge – and challenging – work of implementing criminal justice reform on the ground. I always learn from and am inspired by these interactions. For two reasons, however, being with you today is different from any other conference I have attended. First, as I will explain in a moment, I have a long history of working on issues of pretrial reform. After a long absence from engaging with these issues.

But the second reason is truly special. I consider Cherise Fanno Burdeen to be one of my closest professional colleagues. Indeed, I count her as a close friend. We have known each other for nearly a quarter century. When we were putting together a dream team at the National Institute of Justice (NIJ) to implement the historic research agenda made possible by the 1994 Crime Act, Cherise came to work with us. She quickly became a trusted advisor and a critical member of the brain trust in my office. I feel privileged that she continued to reach out to me as she built the reform engine now known at the Pretrial Justice Institute. She is a remarkably effective leader — super smart, fiercely independent, and passionately devoted to the cause of pretrial reform — and lots of fun to boot. She is — with your support — changing the country. When Cherise asked me to join you in Denver, the decision was easy. I am totally jazzed by this opportunity to reflect on the state of pretrial reform, to support Cherise and PJI, and to learn from you.

# I. Personal Reflections

My involvement in pretrial justice issues goes back 45 years.<sup>2</sup> It was 1973. I had just graduated from college. After a stint as a legal services assistant in New York City's public defender's office, I was hired at the Vera Institute of Justice to work on a federally funded demonstration project called the Pretrial Services Agency. New York City had asked Vera to come back into the bail reform work. It was a time of crisis. The City was still reeling from the riots in the Tombs and the Brooklyn and Queens Houses of Detention in 1970. The shock waves of the Attica riots in 1971 were still reverberating throughout New York. It was clear that the City had an urgent mission: to reduce the pretrial population in the City's jails. Vera was tasked with that job. Working on behalf of the City, Vera contacted the Law Enforcement Assistance Administration (LEAA) and secured a grant to create a new agency, the Pretrial Services Agency, in Brooklyn.

I was hired as an entry-level staff member and immediately was introduced to the complex and exciting world of bail reform, risk assessments, and research on judicial decision-making. We interviewed every defendant arrested in Brooklyn and used a point system validated by Paul Lazarsfeld at Columbia to assess their likelihood of return to court. We administered a supervised release program, experimented with different forms of community outreach, created a computerized notification system and started publishing results of our reforms. It was a heady experience for this young man in his 20s. I consider those years to be the equivalent of a graduate education.

Fast forward a few years to 1977. The Pretrial Services Agency had grown to a city-wide institution. It had spun out of Vera with the new name of the New York City Criminal Justice Agency. And I had been named Executive Director. We survived the blackout of 1977 when we proved our worth by going into the Tombs to interview defendants awaiting arraignment on charges of looting. We conducted these interviews by flashlight. That summer, we survived the controversy involving the Son of Sam case. David Berkowitz had been arrested and charged with the serial killings of young women. When it was later revealed that he had scored well on the CJA point system measuring his community ties — and, based on that score, CJA had recommended him for release — a firestorm of protest erupted. The agency survived loud, public calls to shut it down, or at least oust the Executive Director. And now CJA is a valued, influential, trusted entity in the New York City criminal justice reform ecosystem.

Throughout my years at Vera and CJA, and during my tenure at NIJ, I had occasion to work with — and learn from — some of the national leaders of the pretrial reform movement.<sup>3</sup> As I return to this work, I am struck by the fact that, back in the 1970s, we were debating the same fundamental issues. Should risk assessment instruments be part of the judicial decision-making process? Should judges be permitted, or required, to consider dangerousness in addition to risk of flight in making detention determinations? Should cash bail be abolished? Should people be supervised and required to meet certain conditions during their pretrial freedom? What are the metrics of success?

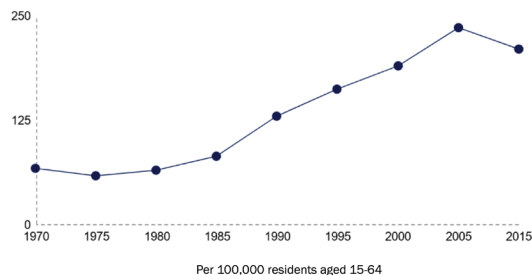
How ironic that I now oversee the Criminal Justice Initiative of Arnold Ventures, including the foundation's signature work on pretrial justice! Working with a talented team led by James Cadogan, our Vice President for pretrial justice, including two deeply experienced directors, Virginia Bersch and Becky Silber, and our highly regarded Director of Research, Dr. Kristin Bechtel, we are continuing the pioneering efforts of the Laura and John Arnold Foundation in promoting bail reform.

## II. The State of Pretrial Detention: > Four Challenges

Today I would like to share some thoughts on the issues facing our movement, starting with some data that describe the state of affairs in the current pretrial justice landscape. Most of you probably know the data I am about to share, but the combined effect of these realities of pretrial justice demonstrate that the modern movement is facing daunting challenges. Yet in each of these dark clouds I think we can find a silver lining.

The first challenge [see slide below] is that overall pretrial detention rates have been on the rise. From 1970 to 2015, the national pretrial jail incarceration rate (per 100,000 residents age 15-64) increased 217%, from 66 in 1970 to 209 in 2015. Perhaps we should not be surprised by this finding. Over the same time period, we have seen rates of incarceration in the nation's prisons increase by a factor of 4.<sup>4</sup> And we have seen the rate of community supervision — probation and parole — increase by more than 130% since 1980.<sup>5</sup>

### National Pretrial Jail Incarceration Rate 1970-2016



Data: Vera Institute of Justice, Incarceration Trends database

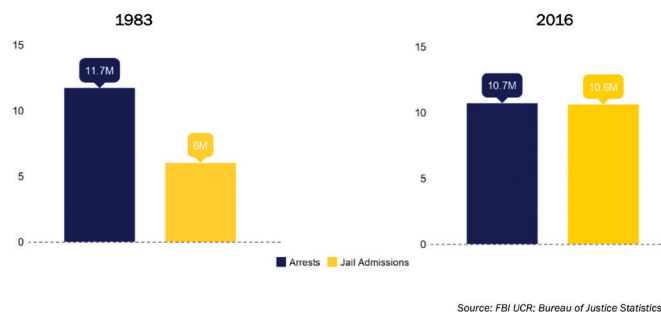
These trends fall most harshly on people of color: African Americans are 3.6 times more likely to be detained in jail than whites.<sup>6</sup> Our colleagues at FWD.us recently provided research that described a sobering statistic: we now live in an era when we can say that one in two Americans has had an immediate family member spend time in jail or prison.<sup>7</sup> Some scholars have named this the “era of punitive excess.”<sup>8</sup> At the center of this new reality is the front door to the criminal justice system: the jail. And over the past half century, the absolute number of men and women held in pretrial detention in our country has increased fourfold. We have a long way to go if we look at 1970 as our benchmark.

Yet I think we can find reform energy in the growing public realization that our nation's criminal justice system has gone off the rails. The sustained campaign to end mass incarceration, which has focused mostly on prisons, will add fuel to the parallel effort to reduce the levels of pretrial incarceration. Similarly, the focus on what is being called “mass supervision” will support our efforts to promote pretrial liberty. Finally, the exciting new spotlight on the

outrageous practice of charging people for their own criminal justice supervision through exorbitant fees only adds heightened public awareness of the ways that our use of cash bail to secure liberty is harmful to poor people.

The second challenge [see slide below] is that the ratio of arrests compared to bookings has also increased. In 1983, there were 11.7 million arrests and 6 million jail admissions; by 2016, those figures were nearly at parity: 10.7 million arrests and 10.6 million jail admissions. This shows that we are using jail more now than in the past as a response to an arrest (note that these figures are not an apples to apples comparison, as some jail admissions do not originate from arrests). Even if arrests were to drop in the years to come — and we are seeing important indicators that arrests are down<sup>9</sup> — the trends in use of pretrial detention means that jail populations will remain high. The fascinating development that police departments across the country are rethinking their arrest policies — supporting more diversion options, deciding to no longer arrest individuals for low level offenses — opens up a discussion of the value of criminal justice processing for certain crimes.

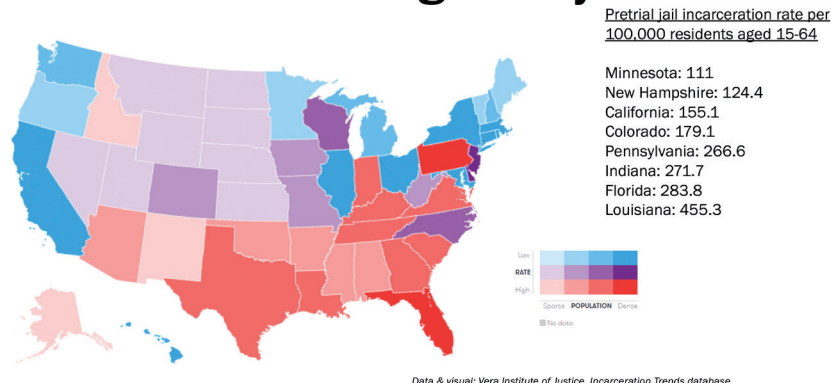
## Comparing Annual Arrests and Jail Admissions, 1983 vs. 2016



The third challenge we face is that pretrial detention rates are not uniform across the country [see slide below]. In fact, the regional variations are striking. In Louisiana, the pretrial detention rate is two-and-a-half times the rate here in Colorado. At the county level, the variation in urban jail incarceration rates is striking: In 2015, the most recent year for national data, New York City's jail incarceration rate was 162 per 100,000 residents age 15-64; LA County was 247; Houston, Harris County, Tex., was nearly 300, and the city of St. Louis was 556.

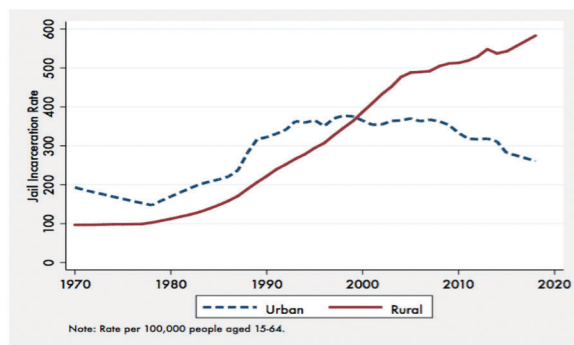
Even though these data may be frustrating for us — causing us to ask, “How can we effectively change practice when practices vary so widely?” — these variations can actually be turned into persuasive points of advocacy. Why, we might argue, does a jurisdiction comparable to ours have a pretrial detention rate half that of our city or town? If we are armed with these data, and translate them into cost savings and reductions in negative consequences for our neighbors, we can advocate for reform in our own jurisdictions.

## Great Variation Regionally



The fourth challenge we face is the troubling fact that rates of pretrial detention are rising in rural and exurban America, while they are falling in our urban centers [see slide below]. We can thank our colleagues at the Vera Institute for Justice for documenting this trend.<sup>10</sup> Unfortunately, compared to their urban counterparts, rural jurisdictions in our country do not have the same capacity to advocate for pretrial reform. They do not have the same media outlets, access to high profile elected officials, and financial resources. For them, the rising detention costs cut deep into strapped budgets.

## Urban vs. Rural Jail Incarceration



I think we should double down on our focus on pretrial reform in rural and exurban jurisdictions. Focusing on policy change in these areas will link our movement to a new group of elected officials; often, state legislators from smaller jurisdictions wield significant influence in state capitols. The impact of the opioid epidemic on small town America also raises opportunities for linking the focus on treatment, public health strategies, and the horrible loss of life to our belief that more comprehensive strategies can enhance public safety and reduce the reliance on jails and prisons.



## III. New Take on Age-Old > Issues in Bail Reform

I mentioned earlier that some of the issues facing the bail reform movement in the modern era have been with us for a while. Yet I am heartened by the fact that the new energy in the movement is allowing us to shape the debate and make measurable progress.

The campaign to end cash bail has enormous momentum. New Jersey has implemented comprehensive bail reform with very promising early results — in its first year of implementation, pretrial detention was reduced by 20 percent.<sup>11</sup> A key element of this reform was significant limitations on cash bail.<sup>12</sup> Although bail reform in California is currently on hold pending a referendum on SB10, Governor Brown and a broad coalition rallied around the goal of eliminating cash bail. In my home state of New York, Governor Cuomo has boldly proposed eliminating cash bail. Very importantly, the shorthand call to “end cash bail” has galvanized a vibrant and effective advocacy community that is pushing bail reform. And this is now part of the national political conversation as people running for local district attorney, judges, state legislators, governors even some presidential candidates are calling for the elimination of cash bail. Forty years ago, only the District of Columbia had taken the big step of eliminating cash bail.

There is a new discourse on issues of risk and risk assessment in the modern era. In the bail reform movement of the 1960s, the use of validated point systems, pioneered by the Vera Institute of Justice, was seen as revolutionary and highlighted the injustices of cash bail. Point systems were the rage and fueled the bail reform engine. Now, they are controversial, with some advocates saying they perpetuate the racial disparities of the criminal justice system. This is as it should be: robust debate is always an essential ingredient in the recipe of reform. But we should be honest about our system and the unheralded reality that virtually all state laws require judges to assess risk. The real question is: how do judges assess risk fairly and consistently without unduly denying fundamental liberty?

Another old debate has resurfaced: should judges be allowed to consider the risk of pretrial crime in making a decision whether to release a defendant pretrial. In the 1970s, the DC Pretrial Services Agency took the controversial view that preventive detention was permissible, that judges already detained defendants because of concern for public safety, and it would be better to have this decision in the open, with strict due process protections. Now, most states and the federal government allow consideration of risk of pretrial crime in making bail decisions. Indeed, in its 1987 Salerno decision, the Supreme Court specifically ruled that this practice does not violate the Constitution. But few jurisdictions have adopted statutory frameworks that bring this decision into the open. Instead, the practice of setting a cash bail amount beyond the reach of the defendant has become a de facto method for imposing preventive detention.

I suspect that these issues will forever be with us. They are foundational and cannot be easily resolved. My colleagues and I at Arnold Ventures, working closely with our Board, have developed a Statement of Principles that articulates our views on these issues. That document is also being released today. I encourage you to read it. These principles will guide our grant-making and policy advocacy in the coming years. We look forward to your reactions. As a reminder of the history of these issues, I keep on my office wall a copy of a bail bond issued in New York City in 1801 by Judge Jacob DelaMontague. On November 2, 1801, two people appeared before him — John Keef, a “trader,” and Elkanah Doolittle, a “sallow chandler.” John pledged \$300 and Elkanah pledged \$250

“of good and lawful money of New York, to be made and levied on their Goods and Chattels, Lands and Tenements, to the use of the People of the State of New-York, if the said John Keef shall fail in performing the condition following.” The “Condition of this Recognizance” was that John “shall personally appear at the next Court of General Sessions of the Peace ... and not depart, without leave of the Court; and in the mean time keep the Peace, be of good behavior towards the People of the State of New-York, and particularly toward Nancy Brady.” Everything we are discussing today is represented in this case — the pledge of bond, third-party surety, the assertion that the bond would be forfeited if John Keef did not appear, or violated other conditions of his release, an admonition that the defendant not flee the jurisdiction, and that he keep the peace, and a special protection granted to another member of the community, Nancy Brady, who perhaps had been harmed by John Keef in the past. As I said, these issues have been with us for a long time.

## **IV. Launch of the National Partnership > for Pretrial Justice**

As you know, Arnold Ventures is one of many foundations that are now involved in promoting pretrial justice reform, some of whom have joined us here today. We are particularly inspired by the Safety and Justice Challenge, an ambitious initiative designed by Laurie Garduque and her colleagues at the John D. and Catherine T. MacArthur Foundation. This initiative, now underway in more than 50 jurisdictions, has already transformed the pretrial reform conversation around the country. In Philadelphia, for example, the jail population has decreased by more than a third and they are closing a local correctional facility! In New Orleans, the jail population has decreased 25% since 2015.<sup>13</sup> We applaud their efforts and celebrate their successes as city after city witness reductions in their jail populations. My colleagues and I at Arnold Ventures are honored to join them and their national partners in this historic campaign to reduce the number of people held in jail, while presumed innocent, awaiting trial.

The efforts of Arnold Ventures have focused mostly on leveraging research and innovation to promote reform. We have made significant investments in building evidence on the impact of pretrial detention and conducting research on the bail decision itself. Our signature investment has been in research supporting the development of the Public Safety Assessment (PSA) and testing its effectiveness. Our mission is simple, and resonates with yours: to reduce unnecessary and unjust pretrial detention.

Over the past few months, we have been engaged with the Board — Laura and John Arnold, and our President, Kelli Rhee — and the leadership of Arnold Ventures in development of a strategy for the next generation of our work. This assessment began with a stunning fact: The PSA has been met with unexpected demand. Over 600 jurisdictions across the country have requested technical assistance in implementing the PSA. In our view, this demand has revealed a tremendous and unmet need for counties all over the country to reform pretrial practice and release decisions. Accordingly, we decided to develop national research and high-fidelity implementation assistance to meet that demand. We have decided to work intensively with up to 10 jurisdictions (we have chosen eight at this time) that will become research-action sites for the next chapter of our support for pretrial innovation. We decided to select a technical assistance provider to work in those sites and provide scalable on-line learning to hundreds more. We also saw a need for deeper investments in research and held a competition to select a national research partner to work in those research-action sites. Finally, we recognized a need for advocacy to support bail reform efforts in state legislatures and courthouses.

Our assessment of our investments over the past decade revealed another opportunity to advance the field: if we could link and elevate the many diverse pretrial reform efforts we have supported, we could leverage their successes to support the broader bail reform movement. Creating this visible and intentional community of practice among our grantees has another benefit. For many observers, the Arnold Ventures strategy in pretrial has been seen as limited to promoting implementation of the PSA and studying judicial decision-making. In fact, we have built a broad portfolio of projects and intend to expand even further in the pretrial justice domain. We hope that, by becoming more transparent and intentional about our work, we will create a new level of synergy among our partners.

Accordingly, to coincide with PI-Con, we are very pleased to announce the creation of the National Partnership for Pretrial Justice. This new entity will leverage Arnold Ventures' investments in 25 organizations. These organizations span a remarkable range of activities — including research on the impact of pretrial detention and understanding the dynamics of court appearances; eliminating bias and increasing fairness in risk assessments; understanding how prosecutorial discretion and engagement with defense impacts case outcomes and long-term outcomes for individuals and communities.

The National Partnership includes the exciting new Advancing Pretrial Innovation collaboration between the Center for Effective Public Policy, RTI and Stanford University – to launch a five-year research and high-fidelity implementation project in eight jurisdictions. These eight counties will serve as research-action sites, pairing research and implementation strategically to maximize local advancements and findings that will benefit the field as a whole. (The jurisdictions will be named next month.) Central to these efforts will be local validation, implementation and evaluation of the Public Safety Assessment (PSA) in those jurisdictions as part of their broader reform agenda. Over the next five years, the Advancing Pretrial Innovation will work with another 200 jurisdictions as they implement the PSA as a point of entry to support their larger bail reform efforts. Finally, we have made the PSA and related implementation guides available for any jurisdiction on a website ([www.PSApretrial.org](http://www.PSApretrial.org)). We are humbled by the strong demand for the PSA and hope that, through this work, we can translate that demand into a multi-jurisdiction reform initiative.

I encourage you to read more about the National Partnership on our new website [[pretrialpartnership.org](http://pretrialpartnership.org)], or talk with any of the Arnold Ventures staff who are here. And we look forward to reporting on our progress at future PI-Con gatherings.

## V. The Work Ahead

One of the most exciting developments in this field is the emergence of a robust field of practice, represented by the attendees at PI-Con. The Pretrial Justice Institute has been the essential ingredient in that success. Under the leadership of Cherise, Tim Murray before her, with leadership from Judge Morrison and the PJI Board, this organization has brought new energy and intellectual discipline to the work.

As this movement gains momentum and impact, we must keep our eye on the prize – ending unnecessary and unjust pretrial detention. We may have different views on issues that we consider important — such as the abolition of cash bail; the use of risk assessment instruments; the role of preventive detention, all of which we address in our Statement of Principles – but we are all motivated by the same fact: too many members of our communities are being held in pretrial detention. We hope that we can focus on our common goal of changing that reality, measure our progress every year, while also recognizing that there are many ways to achieve that goal. I am deeply optimistic that in this new era, with the wisdom and commitment represented in this room, we can finally bring a greater sense of pretrial justice to our country.



<sup>1</sup>This is the keynote address Jeremy Travis would have delivered at Pretrial Justice Institute's March 2019 Pretrial Innovators Conference if it was not canceled due to weather.

<sup>2</sup>A version of this story can also be found in a blog posted on the PJI website.

<sup>3</sup>Participation in this conference provides me an opportunity to express thanks to these colleagues. Among my mentors I am fortunate to count Herb Sturz, Dan Freed, Pat Wald and Burke Marshall, architects with Attorney General Kennedy of the legendary 1968 National Bail Reform conference. During my tenure at CJA and subsequently, I learned about the bail reform landscape from Jay Carver, Tim Murray, Bruce Beaudoin, Truman Morrison, Madeleine Crohn, John Goldcamp, Dick Rykken, Michael Smith, Jerome McElroy, Sally Hillsman and Benjamin Ward, to name a few. When I was NIJ Director, I watched the evolution of CSOSA in Washington, DC under the leadership of Susie Schaffer, Spurgeon Kennedy and Claire Johnson Fay. All true champions of justice.

<sup>4</sup>Travis, J.; Western, B. & Redburn, S., eds. (2014). *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington, DC: The National Academies Press, 33-37, available at <https://doi.org/10.17226/18613>.

<sup>5</sup>Bureau of Justice Statistics, Key Statistics, Community Supervision Rate, 1980-2016, available at <https://www.bjs.gov/index.cfm?ty=kfdetail&iid=494>.

<sup>6</sup>Subramanian, R.; Riley, K., & Mai, C. (2018). *Divided Justice: Trends in Black and White Jail Incarceration, 1990-2013*. New York: Vera Institute of Justice, 22, available at [https://storage.googleapis.com/vera-web-assets/downloads/Publications/divided-justice-black-white-jail-incarceration/legacy\\_downloads/Divided-Justice-full-report.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/divided-justice-black-white-jail-incarceration/legacy_downloads/Divided-Justice-full-report.pdf).

<sup>7</sup>Fwd.us. (2018). *Every Second: The Impact of the Incarceration Crisis on America's Families*, available at <https://everysecond.fwd.us/downloads/EverySecond.fwd.us.pdf>.

<sup>8</sup>Square One Roundtable, Oct. 11, 2018, Tr.Day 1: Opening and Launch, p. 28, available at <https://static1.squarespace.com/static/5b4cc00c710699c57a454b25/t/5c535b8afa0d60294ac332f8/1548966794615/1.+Opening+and+Launch+%282%29.pdf>.

<sup>9</sup>Chauhan, P.; Warner, T.C.; Fera, A.G.; Balazon, E.; Lu, O., & Welsh, M. with an Introduction by Jeremy Travis. (2015). *Tracking enforcement rates in New York City, 2003-2014*. Report presented to the Citizens Crime Commission, available at [http://datacollaborativeforjustice.org/wp-content/uploads/2016/08/Enforcement-Rate-Report-FINAL-C1-with-Cover.PRINT\\_SHOP\\_.pdf](http://datacollaborativeforjustice.org/wp-content/uploads/2016/08/Enforcement-Rate-Report-FINAL-C1-with-Cover.PRINT_SHOP_.pdf); Lofstrom, M.; Martin, B.; Goss, J.; Hayes, J. & Raphael, S. (2018). *New Insights into California Arrests: Trends, Disparities, and County Differences*, Public Policy Institute of California, available at <https://www.ppic.org/wp-content/uploads/new-insights-into-california-arrests-trends-disparities-and-county-differences.pdf>.

<sup>10</sup>Subramanian, R.; Henrichson, C. & Kang-Brown, J. (2015). *In Our Own Backyard: Confronting Growth and Disparities in American Jails*, Vera Institute of Justice, available at [https://storage.googleapis.com/vera-web-assets/downloads/Publications/in-our-own-backyard-confronting-growth-and-disparities-in-american-jails/legacy\\_downloads/incarceration-trends-in-our-own-backyard-fullreport.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/in-our-own-backyard-confronting-growth-and-disparities-in-american-jails/legacy_downloads/incarceration-trends-in-our-own-backyard-fullreport.pdf).

<sup>11</sup>ACLU of New Jersey. (n.d.). *Pretrial Justice Reform*, available at <https://www.aclu-nj.org/theissues/criminaljustice/pretrial-justice-reform>.

<sup>12</sup>While financial release was not completely eliminated in New Jersey, it is hardly used any longer. In 2017, the first year of the new pretrial system, only 44 of 44,319 defendants arraigned and subject to a pretrial release decision were subject to money bail. New Jersey Judiciary. (2018). *Criminal Justice Reform Report to the Governor and the Legislature for Calendar Year 2017*, 4, available at <https://www.njcourts.gov/courts/assets/criminal/2017cjrannual.pdf?c=FBR>.

<sup>13</sup>Lane, E. (Jan. 30, 2019). *Lowering N.O. jail population goal of \$2M grant to city*. New Orleans Times-Picayune, available at <https://www.nola.com/crime/2019/01/new-orleans-awarded-2m-to-extend-grant-aimed-at-lowering-jail-population.html>.