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ARTICLE

LEGISLATIVE RESPONSE TO THE RAPID GROWTH OF CHARITABLE BAIL ORGANIZATIONS

Casey Mosley

I. INTRODUCTION

The American system of bail has, for centuries, disproportionately favored the wealthy and incarcerated the poor. Scholars have been writing about the injustices of what we now know as “cash bail” since this country was founded. Alexis de Tocqueville noted, upon visiting America in the mid-1800’s, “It is evident that such a [system of bail] is hostile to the poor, and favorable only to the rich. … [A]ll the penalties of the law are, for [the wealthy], reducible to fines. Nothing can [be] more aristocratic than this system of legislation.” Tocqueville’s findings are more relevant than ever. The U.S. prison population has nearly quadrupled since the

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1980’s, and 63% of that population increase can be attributed to pretrial detention. At a time when 63% of Americans live paycheck to paycheck, bail assigned at any amount can be a barrier to release.

Despite the glaring differences in outcomes for wealthy defendants and poor defendants, the present system of bail may be defensible if it is effective. However, studies have shown that pretrial detention does not produce any significant deterrent effect in regard to outcomes like failure to appear and rearrest. Conversely, pretrial detention for any amount of time has been associated with a “criminogenic effect”, leading to higher rates of rearrest. Pretrial detention has also been linked to longer sentences and increased likelihood that sentences must be served in confinement. This system of bail effectively creates public safety risks, rather than reducing them, by disrupting the lives of detainees and their families.

Low-income, marginalized communities have been irreparably harmed in many ways by the bail system. However, those communities were the inspiration behind the modern resurgence of charitable bail organizations, which use mutual aid and community organizing tools to crowdsource money for bail. The Bronx Freedom Fund, founded in 2007 and licensed in 2013, was the first licensed charitable bail organization in New York, and one of the first in the nation. Initially, like many other mutual aid efforts across the nation, the Bronx Freedom Fund began as an effort by public defenders to simply solicit donations and post bail for their clients. The desire of the state to regulate the Freedom Fund as a bail bond business resulted in a brief shutdown, but the Fund was able to become licensed in

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3 Wendy Sawyer & Peter Wagner, Pretrial Detention: Exploring cost and outcome of detaining people before trial or deportation (i.e. instead of bail or other alternatives), PRISON POLICY INITIATIVE, (Oct. 5 2023, 1:03PM).
4 Aimee Picchi, More than 60% of Americans are living paycheck to paycheck. Here’s what researchers say is to blame. C.B.S. NEWS: MONEYWATCH (Aug. 31, 2023, 3:40 PM).
5 Christopher Lowenkamp, The Hidden Costs of Pretrial Detention Revisited, ARNOLD VENTURES (Mar. 21, 2022).
6 Id.
7 Id.
9 Id. at 14–15.
10 Id. at 15.
compliance with New York law.\textsuperscript{13} However, challenges such as this one—requiring charitable bail efforts to be regulated by the government—will continue to be used as a means of limiting the efficacy and functionality of bail organizations going forward.\textsuperscript{14}

The Bronx Freedom Fund and other similar efforts spurred a movement of charitable bail organizations across the nation. The Bail Project, which has become a nationally renowned organization, was created in 2017, and many others like National Bail Out and National Bail Fund Network, have followed in its footsteps.\textsuperscript{15} These charitable bail organizations, along with their local and state counterparts, have become increasingly adept at using external intervention to address the systemic issues within the bail system.\textsuperscript{16} Most bail funds fundraise and crowdsourcing money from individuals in the community, grants, and corporate contributions.\textsuperscript{17} That money is then used to bail out pretrial detainees based on certain eligibility requirements with the expectation that the money will be returned to the bail fund following the detainee’s appearance in court.\textsuperscript{18} This system allows for a revolving-door style of bail outs using the same initial pool of funds.\textsuperscript{19} These organizations “hark back to the origins of bail” and are effective in ways that commercial bondsmen are not: “they screen defendants to make sure they are good risks, they maintain contact to help assure court appearances, and they are closely tied to the defendants’ communities.”\textsuperscript{20} The overwhelming expansion of charitable bail organizations over the past few years has undoubtedly helped free innumerable people from pretrial detention—nearly 23,000 from the Bail Project alone\textsuperscript{21}—but it has also caught the attention of conservative, "tough on crime" politicians and media organizations.

\textsuperscript{13} Id.
\textsuperscript{15} \textit{The Bail Project}, https://bailproject.org/mission/ (last visited 1/12/23).
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 462.
\textsuperscript{19} Id. at 462.
\textsuperscript{21} \textit{The Bail Project}, Annual Report, at 11 (2022).
II. LEGISLATIVE PUSHBACK TO CHARITABLE BAIL ORGANIZATIONS

As charitable bail organizations have grown both locally and statewide, state legislatures have taken an interest in their activities. Regional media organizations and newspapers have generated political hysteria over the release of certain pretrial detainees, particularly in situations involving criminal activity following the individual’s release.\(^{22}\) Bail bond companies and for-profit bail agents are generally able to avoid scrutiny as a result of the reoffending behavior of the individuals they helped release, even though studies in one region show higher rates of murder in individuals released by commercial bondsmen when compared to those released by charitable bail organizations.\(^{23}\) Anti-bail reform legislators loft the rare instances of rearrest and failure to appear\(^\)\(^{24}\) to condemn bail funds while also utilizing media attention to attract public support for legislation that would harm the efforts of these groups.\(^{25}\)

Throughout the past few years, there have already been small-scale changes that have impacted the work of charitable bail organizations within their communities. In Nashville, a local rule allows a defendant’s bail to pay fines and court costs instead of being returned to the payor.\(^{26}\) The rule was later amended to include bail paid by charitable bail organizations.\(^{27}\) Such changes have naturally impacted local bail funds in significant ways but have led to minimal harm


\(^{23}\) Id.

\(^{24}\) *After Cash Bail: A Framework for Reimagining Pretrial Justice*, THE BAIL PROJECT https://bailproject.org/learn/after-cash-bail/ (stating that 90% of their clients nationwide appear for their court dates).

\(^{25}\) Andrea, *supra* note 22.


nationwide. However, the newly enacted Indiana law is the most sweeping piece of harmful legislation passed to date.

The Indiana law, which took effect July 1, 2022, requires all individuals and organizations that bail out more than three defendants in a 180-day period to become certified by the commissioner. To become certified, the bail organization must be a licensed business or nonprofit, be registered to do business in Indiana, and be located in Indiana. Additionally, the bail organization must “exist for the purpose of depositing cash bail for an indigent defendant who: (a) is not charged with a crime of violence; or (b) if charged with a felony, does not have a prior conviction for a crime of violence.” Automatically, this language has the potential to impact small funds, unlicensed mutual aid funds, national funds located out-of-state, and any organization helping defendants charged with felonies or crimes of violence. A crime of violence is defined to include crimes as severe as murder, as well as less severe crimes like robbery and unlawful possession of a weapon. The financial costs of becoming a licensed nonprofit and receiving certification may be too great for many small community funds. There are also potential hidden costs, such as the increased background analysis that must be done on each potential client to ensure that the bail organization is following state law regarding felons and violent criminal history. The state of Indiana has created an entire system of regulation with the sole purpose of limiting charitable bail organizations, and such a sweeping change cannot be understated.

Perhaps even more insidious are the components of the Indiana law following those initial qualifications. The Indiana commissioner has the sole power to approve or deny applications for certification of a charitable bail organization, and there are numerous listed justifications for denial. Many of these justifications, such as “dishonesty”, “malfeasance”, “incompetence”, “untrustworthiness”, and “conduct detrimental to the public interest”, are vague and

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30 Id.
31 Id.
32 Id.
34 Id.
arbitrary, which has led to concerns by some bail funds that the commissioner will use this unfettered discretion to target their application.\(^{35}\) Many bail funds, particularly local bail funds, are created by community activists and leaders who actively engage in political advocacy and, at times, civil disobedience.\(^{36}\) If a state commissioner has the discretion to deny or revoke an application or certification based on behavior that they disagree with, all bail organizations could be at risk.

Even assuming that charitable bail organizations will be able to make it through the certification process without undue hardship, and that they can pay the $300 application fee, this law targets bail funds in the same way as the change in the Nashville local rules. Indiana law now requires charitable bail organizations to sign an agreement before the payment of bail, allowing all or part of the bail to be retained by the court for the defendant’s fines, costs, fees, and restitution.\(^{37}\) It is financially critical to the existence of a nonprofit bail organization to have a revolving fund that allows for the release of multiple defendants using the same recycled bail money.\(^{38}\) The new law intentionally targets the ability of bail funds to do just that, and in turn, will likely greatly reduce the efficacy of any bail funds in the state.

While Indiana’s anti-bail reform law is one of the first of its kind, it is unlikely to be the last. The Texas legislature passed a similar bill, enacted in January of 2022, that would also require the certification of nonprofit bail organizations.\(^{39}\) In the Texas bill, the requirements for certification seem to be more clearly defined than in Indiana, and the state appears to have less discretion over the denial of an organization’s certification. The Texas law also does not require the relinquishment of bail funds to be used for court costs and fees and does not limit the ability of bail organizations to provide bail only to certain types of defendants.\(^{40}\) However, Texas will require bail organizations located in the state to register with the county clerk in each county where they will pay bail and requires

\(^{35}\) Id.; Andrea, supra note 22.
\(^{36}\) Andrea, supra note 22.
\(^{37}\) Id.; see Ind. Code Ann. § 35-33-8-3.2(a)(2)(B).
\(^{38}\) Carroll, J., supra note 14.
\(^{39}\) TEX. CODE CRIM. PROC. ANN. art. 17.071.
\(^{40}\) Id.
a monthly report containing information relating to every defendant helped by the organization.\textsuperscript{41}

Prominent bail organizations in Texas, including the Texas Organizing Project, are concerned that their ability to aid detained Texans will be limited or revoked due to the strain of the enormous amount of paperwork required by the bill.\textsuperscript{42} The Texas chapter of the American Civil Liberties Union (ACLU) expressed concern that law enforcement, specifically the Sheriff, controls the certification process and may deny or revoke certification of legitimate nonprofit bail organizations due to minor clerical issues.\textsuperscript{43} Similar bills have recently been introduced in other states\textsuperscript{44}, including one in Kentucky which would make charitable bail organizations altogether illegal within the state.\textsuperscript{45}

III. POTENTIAL LEGAL CHALLENGES TO ANTI-BAIL REFORM LEGISLATION

The recent uprising of charitable bail organizations is intrinsically connected to the political advocacy of organizers heavily involved in the movement to abolish our current system of bail. The Bail Project’s highlights this concept in its mission statement:

The Bail Project combats mass incarceration by disrupting the money bail system, one person at a time. We restore the presumption of innocence, reunite families, and challenge a system that criminalizes race and poverty. We're on a mission to end cash bail and create a more just, equitable, and humane pretrial system. Because bail is returned at the end of a case, donations to The Bail

\textsuperscript{41} Id. at art. 17.071(e), (f).
\textsuperscript{43} Id.
Project National Revolving Bail Fund can be recycled and reused to pay bail two to three times per year, maximizing the impact of every dollar.\textsuperscript{46}

Scholars have argued that, in a “system of pleas, not a system of trials,” charitable bail funds have returned the power to communities to make communal decisions in favor of a just, if not legally favored, outcome, in the same way that jury nullification has historically given such power to juries.\textsuperscript{47} This concept has been coined “bail nullification.”\textsuperscript{48} “When community bail funds nullify the law, it is not the formal law on the books, but rather the law on the ground: the discretionary decisions of prosecutors and judges that render bail a tool of pretrial detention rather than a mode of release.”\textsuperscript{49} According to the ACLU, these practices are a form of protected political speech.\textsuperscript{50}

On May 4, 2022, The Bail Project, in conjunction with the ACLU of Indiana, filed a complaint for injunctive and declaratory relief and a notice of challenge to the constitutionality of the Indiana statute restricting charitable bail organizations.\textsuperscript{51} The organizations’ claims are based on two constitutional challenges. First, The Bail Project argues that its ability to pay bail for members of the community constitutes “expressive advocacy work,” and the statute’s limitations on that work are a violation of the First Amendment.\textsuperscript{52} The Bail Project’s payment of cash bail is a form of protest, with the intent of protecting its clients, their families, and its communities from the effects of pretrial detention, as well as to demonstrate “that requiring a criminal defendant to pay bail is not necessary to ensure court appearances and community safety.”\textsuperscript{53} Plaintiff asserts The Bail Project’s work is directly targeted by the Indiana statute, since the statute would revoke the certification of any bail fund providing bail to detainees charged

\textsuperscript{46} The Bail Project Website, supra note 12.
\textsuperscript{48} Id. at 588.
\textsuperscript{49} Id. at 588–89.
\textsuperscript{50} Lawrence Andrea, supra note 17 (referring to Plaintiff’s allegations in The Bail Project, Inc. v. Comm’r, Indiana Dep’t of Ins., 2022 WL 1431243 (S.D. Ind. May 4, 2022)).
\textsuperscript{51} The Bail Project, Inc., v. Comm’r, Indiana Dep’t of Ins., No. 1:22-CV-862, 2022 WL 1431243 (S.D. Ind. May 4, 2022).
\textsuperscript{52} Id. at *14.
\textsuperscript{53} Id. at *8.
with felonies or past violent crimes in any jurisdiction.\textsuperscript{54} Because The Bail Project is a nationwide nonprofit, and it currently represents numerous clients from both categories, its conduct across the country could disqualify it from certification under Indiana law.\textsuperscript{55}

Second, the organizations argue that the statute “imposes limitations on charitable bail organizations that are not imposed on other persons paying cash bail or on bail bond agents,” which violates the equal protection rights of nonprofit bail organizations, including The Bail Project.\textsuperscript{56} The bail of a person charged with a felony could be paid by anyone, including family, friends, churches, commercial bondsmen, except for a charitable bail organization. Indiana must show that there is a sufficient rational justification for such clear and express discrimination in order to overcome this 14\textsuperscript{th} Amendment Equal Protection challenge.\textsuperscript{57}

IV. CONCLUSION

Charitable bail organizations serve a vital function in the American bail system, as an indigent person’s final hope for freedom. Bail funds help indigent defendants preserve their right to aid in their own defense by allowing them to be free while awaiting trial, alleviating the overwhelming pressure to reach a plea agreement just so they may return to their families and their lives. The work done by charitable bail organizations, however, is not done solely for the benefit of the released detainee; these organizations are protesting the entire concept of money bail. Each time they bail someone out, they hope to prove to the court that bail is an unnecessary and ineffective tool. The ultimate goal of every charitable bail organization is to become unnecessary. Currently, our criminal justice system is far from reaching that point, and it is now time, in the face of adversarial legislation, to fight for the existence of bail funds and their unrestricted ability to help communities. The ability of community members to combine resources and make communal decisions regarding the legal consequences of others in their community is one of the last bastions of power held by the people.\textsuperscript{58} It must be preserved.

\textsuperscript{54} Id. at *12 & *15.
\textsuperscript{55} Id. at *13.
\textsuperscript{56} Id. at *2.
\textsuperscript{58} Simonson, supra note 36, at 596–99.