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NONE OF THEIR BUSINESS: THE NEED FOR ANOTHER ALTERNATIVE TO NEW YORK'S BAIL BOND BUSINESS

*Andrea Clisura**

INTRODUCTION

On a Friday afternoon at approximately 5:00 p.m., the phone rings in the office of Vanguard Bail Bonds (“Vanguard”).¹ A woman is calling to bail someone out of jail²—a friend, a family member, someone she cares for enough to help. The judge has set bail at \$2,000.³ John Medina, a New York bail bondsman, quickly sums up what he needs from the caller.⁴ The fee will be \$200, in accordance with New York statutory law limiting the fee to ten percent of the bond.⁵ But the caller will need \$800 upfront, \$600 of which will be deposited into an escrow account.⁶ This \$600 is the collateral requirement imposed by Mr. Medina and the large national insurance company backing Vanguard.⁷ An agent contract

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¹ Interview with John Medina, Bail Bondsman, Vanguard Bail Bonds Agency, Inc., in Queens, N.Y. (Oct. 2, 2009) (observed during personal interview).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ See N.Y. INS. LAW § 6804(a) (McKinney 2009). A ten percent charge is the limit for bonds or deposits not in excess of \$3,000. Where bonds or deposits exceed \$3,000, the licensee may charge an additional eight percent of the excess up to \$10,000 and six percent of any amount exceeding \$10,000. *Id.*

⁶ Interview with John Medina, *supra* note 1.

⁷ *Id.*; see also *People v. James*, N.Y. L.J., June 3, 1999, at 31, col. 2 (Sup. Ct. Bronx County June 3, 1999) (describing procedures typically employed by

with such an approved insurance company is a requirement for conducting a bail bond business in New York.⁸ The bond posted by the bondsperson, as agent, is in essence an agreement that the insurance company will pay the state the full amount of the bond if the defendant fails to appear in court.⁹ Vanguard and the insurance company are betting \$2,000 that the accused will make all of his or her court appearances¹⁰ and they want collateral to back their wager.¹¹ The caller will need to come into Vanguard's office with identification, a utility bill, and her most recent paystub.¹² The judge will want to know who she is, where she lives, and what she does for a living, Mr. Medina explains.¹³ If the defendant appears as required by the court throughout the action, the \$600 collateral

an International Fidelity Insurance Company agent to determine the sufficiency of collateral).

⁸ See N.Y. INS. LAW § 6801 (McKinney 2009) (providing that no person, firm, or corporation may engage in a bail bond business “[e]xcept for a corporation authorized to write fidelity and surety insurance and to do a bail bond business pursuant to the provisions of article eleven” of the Insurance Law); N.Y. INS. LAW § 6802(a) (McKinney 2009) (“No person, firm or corporation or any officer or employee thereof shall act in this state as an agent or solicitor of an insurer doing a bail bond business in soliciting, negotiating or effectuating any such deposit or bail bond by such insurer unless licensed by the superintendent as an agent pursuant to the provisions of this section.”); see also *Bail Bonds Active Agent Listing*, N.Y. INS. DEP’T, https://awebproxyprd.ins.state.ny.us/onepage/StartForm.jsp?link=/LICAppsAlice/LIC_BB_Search.jsp (choose “Bail Bondsman Type”) (last visited Sept. 15, 2010) (listing insurance companies that have agents licensed in New York as well as individual and corporate agents).

⁹ See Mary T. Phillips, *Making Bail in New York City: Commercial Bonds and Cash Bail*, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., 19, 96 (Mar. 2010), <http://www.cjareports.org/reports/bailmaking2010.pdf> [hereinafter *Making Bail in New York City*].

¹⁰ See N.Y. CRIM. PROC. LAW §§ 540.10–.30 (McKinney 2009) (regarding bail forfeiture and remission).

¹¹ See *Making Bail in New York City*, *supra* note 9, at 30–34 (discussing types and amounts of collateral accepted by bond agents in Manhattan and Brooklyn).

¹² Interview with John Medina, *supra* note 1.

¹³ *Id.*; see also N.Y. CRIM. PROC. LAW § 520.20(4)(a)(ii) (McKinney 2009) (providing that a justifying affidavit on an insurance company bail bond must include the name, occupation, and residential and business address of each indemnitor on the bond).

payment will be returned to the caller.¹⁴

Two thousand dollars is a fairly common bail amount.¹⁵ In fact, it was the median amount set at criminal court arraignments in New York City in 2008.¹⁶ Because the court is required to take the defendant's criminal history into account when setting bail, the amount of bail may not reveal very much about the nature of the current offense.¹⁷ If the defendant has a prior criminal record, the offense might not be particularly serious.¹⁸ Since the court set bail bond at \$2,000, it is possible, though not particularly likely, that a cash alternative was set in a lower amount of perhaps \$1,000.¹⁹

¹⁴ See *supra* note 5 (explaining New York's statutory limit on bail bonding fees).

¹⁵ See *Annual Report 2008*, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., 21 (Dec. 2009), <http://www.cjareports.org/reports/annual08.pdf> (reporting that twenty-four percent of New York City bail amounts were set in the range of \$1,001 to \$2,500); see also *id.* at 22 (explaining that when bond is ordered with a lower cash alternative, the agency sometimes reports only the lower amount as the bail amount).

¹⁶ *Id.* at 21.

¹⁷ See N.Y. CRIM. PROC. LAW § 510.30(2)(a) (McKinney 2009) (listing the possible sentence upon conviction as just one of a variety of factors that the court is directed to consider when setting bail). In fact, unlike under federal law, where a court is permitted to consider the safety of the community when determining whether a defendant should be detained pretrial, see *United States v. Salerno*, 481 U.S. 739, 741 (1987) (upholding the constitutionality of preventive detention as provided for in the Bail Reform Act of 1984), New York law currently provides that when a court exercises its discretion in setting the form or amount of bail, it should take into account only "the kind and degree of control or restriction that is necessary to secure his court attendance when required." CRIM. PROC. § 510.30(2)(a); see also CRIM. PROC. § 510.30 cmt.; JOHN S. GOLDKAMP ET AL., *PERSONAL LIBERTY AND COMMUNITY SAFETY: PRETRIAL RELEASE IN THE CRIMINAL COURT* 6 (1995) [hereinafter *PERSONAL LIBERTY*]. Nonetheless, a New York court must consider the principal's character and criminal record, CRIM. PROC. § 510.30(2)(a), which could indirectly bear on any potential threat an accused's release might pose to the community.

¹⁸ See CRIM. PROC. § 510.30(2)(a)(iv) (providing that the court must take into account the defendant's criminal record in exercising its discretion to set bail). *But see id.* § 510.30(1) (providing that in limited circumstances applications for bail must be determined as a matter of law).

¹⁹ See Mary T. Phillips & Elyse J. Revere, *Factors Influencing Release and Bail Decisions in New York City: Part 1. Manhattan*, N.Y.C. CRIMINAL JUSTICE

Regardless of whether a lower cash alternative has been set, a defendant who has the financial resources has no need to secure pretrial release through a bail bondsperson; that defendant can simply put up the full amount in cash,²⁰ avoiding the premium charged by the bondsperson.²¹

An individual who lacks enough cash to post bail and must instead seek out a bondsperson might face two distinct problems. First, where bail is set low, it may not be possible to locate a bondsperson who is willing to post bond.²² Bondspersons rarely ever write bonds for less than \$1,000.²³ Under a typical agent contract, the bondsperson might pocket approximately \$345 on a \$5,000 bond, \$150 on a \$2,000 bond, and \$75 on a \$1,000 bond.²⁴ For the work involved, most bail bond businesses will not see a

AGENCY, INC., 13 (July 2004), <http://www.cjareports.org/reports/bail1.pdf> [hereinafter *Factors Part I*]. By observing Manhattan arraignments for seven months during 2001 and 2002, the New York City Criminal Justice Agency, Inc. (“CJA”) found that in eighty-three percent of cases no lower cash alternative was set, and that when an alternative was set, it was usually at least half of the bond amount. *Id.* at 1, 13. The CJA report notes that a cash alternative is not really an alternative to bond unless it is set at less than the amount that a bondsperson would require as collateral. *Id.* at 13. *See also Making Bail in New York City, supra* note 9, at 52–57 (reporting similar results for a 2005 sample).

²⁰ *See* N.Y. CRIM. PROC. LAW § 520.15(1) (McKinney 2009) (providing that, where the court has fixed bail, “cash bail in the amount designated in the order fixing bail may be posted even though such bail was not specified in such order”).

²¹ The city does, however, retain a three percent fee when a case ends with a conviction. N.Y. GEN. MUN. LAW § 99-m (McKinney 2007); *What You Should Know Before You Pay Bail*, N.Y.C. DEP’T FIN. (Apr. 14, 2009), <http://www.nyc.gov/html/dof/html/pdf/07pdf/pay-bail.pdf>.

²² *See Making Bail in New York City, supra* note 9, at 18.

²³ *Id.*

²⁴ On a \$5,000 bond, there would be a ten percent premium on the first \$3,000 and an eight percent premium on the remaining \$2,000. *See* N.Y. INS. LAW § 6804(a) (McKinney 2009). The resulting \$460 premium would be apportioned between the insurance company and the bondsperson in accordance with their agent contract. Interview with John Medina, *supra* note 1; *see also* *People v. James*, N.Y. L.J., June 3, 1999, at 31, col. 2 (Sup. Ct. Bronx County June 3, 1999) (“The proportion of the split is determined through negotiation between the agent and the insurance company.”). Accordingly, on the \$5,000 bond, if a contract provided that twenty-five percent of the premium would be collected by the insurance company, the bondsperson would collect \$345.

profit of less than \$100 as worth the time or energy.²⁵ Even smaller companies, like Mr. Medina's, have limits on how low a bond they will post.²⁶ Bondspersons are businesspeople. With a ten percent premium, and a percentage of that premium going to the insurance company that is underwriting the bond, it is rarely worth the paperwork, time, and gasoline that it takes to bail a person out of jail for a profit that could amount to less than \$50.²⁷ The second, more obvious problem is that even when bail is set in amounts that a bondsperson is willing to post, many of the defendants caught in New York City's criminal justice system have difficulty producing sufficient collateral.²⁸ They, or their friends or relatives, may lack the cash, property, or real estate to secure the bond.²⁹ One of the consequences of the current system is that some defendants are incarcerated pretrial simply because they cannot afford bail set at just a few hundred dollars.³⁰ A New York City Criminal Justice

²⁵ Interview with John Medina, *supra* note 1.

²⁶ *Id.*

²⁷ A bond of \$500 or less would bring a profit of under \$50. *See supra* note 24 (calculating fee distributions).

²⁸ *See, e.g., Annual Report 2008, supra* note 15, at 9 (finding fifty-one percent of defendants between the ages of twenty and twenty-nine employed full-time); *Prisoner Profile*, CORR. ASS'N OF N.Y. (Mar. 2006), http://www.correctionalassociation.org/publications/download/pvp/factsheets/prisoner_profile_2006.pdf; *see also Reentry Facts*, NAT'L REENTRY RES. CTR., <http://www.nationalreentryresourcecenter.org/facts> (last visited Sept. 15, 2010) (citing high instances of mental health issues and substance abuse problems and low rates of education and employment among prisoners and jail inmates nationwide).

²⁹ *See Making Bail in New York City, supra* note 9, at 30 (showing that, typically, Manhattan and Brooklyn bond agents accepted cash collateral alone); *see also* Adam Liptak, *World Spurns Bail for Profit, But It's a Pillar of U.S. Justice*, N.Y. TIMES, Jan. 29, 2008, at A1 (“[This Florida bondsman] has accepted rugs, an airplane and a winning Rhode Island lottery ticket. But mostly he is interested in houses.”).

³⁰ *See, e.g., Mary T. Phillips, Research Brief No. 14: Bail, Detention, & Nonfelony Case Outcomes*, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., 7 (May 2007), <http://www.cjareports.org/reports/brief14.pdf> [hereinafter *Research Brief No. 14*] (“[N]early half of detained defendants [in the sample] served time in jail only because they were unable to post bail.”); *Annual Report 2008, supra* note 15, at 22 (“The ability to post bail at arraignment was rare even when the amount of bail was very low. For cases with bail amounts of \$500 or less, bail was made at arraignment in 16% of cases.”).

Agency, Inc. (“CJA”) study determined that in over a quarter of nonfelony cases where bail was set at just \$750 or less, detention lasted for a week or longer.³¹ For some defendants, bail set in almost any amount can constitute an extreme hardship.³²

In the 1980s, New York City bail bondspersons, also referred to as bail bond agents, nearly disappeared, but because the money bail system did not disappear with them, levels of pretrial incarceration remained high.³³ One researcher concluded that the role of the commercial bondsperson had decreased so dramatically in New York City that “bail bonds were too rare to be of much policy relevance.”³⁴ Of much greater significance, the study concluded, was the judicial bail determination, particularly, the decision whether to set a lower cash alternative.³⁵ Since the time of that study, the fee a bondsperson is permitted to charge has doubled in most cases, increasing the industry’s profit potential.³⁶ In March of 2010, the CJA released findings from the first phase of an analysis of bail-making in New York City connected to a dataset of arrests that occurred over three months in 2005.³⁷ By gathering information manually from paper documents maintained in courthouses and detention facilities throughout the Bronx, Brooklyn, Manhattan, and Queens, researchers collected data on the form of bail posted and the amount of cash bondspersons

³¹ *Research Brief No. 14, supra* note 30, at 7.

³² *See, e.g., id.; see also infra* notes 70–72 and accompanying text (noting possible consequences of pretrial incarceration).

³³ *See* Michele Sviridoff, *Bail Bonds and Cash Alternatives: The Influence of “Discounts” on Bail-Making in New York City*, 11 JUST. SYS. J. 131, 133, 135, 144–46 (1986).

³⁴ *Id.* at 135. The research, which involved matching bail records up with a unique CJA dataset, *id.* at 133–34, revealed that only three percent of defendants who made bail used the services of a bondsperson. *Id.* at 135.

³⁵ *Id.* at 141 (“The availability of a cash alternative seems more important to a defendant’s bail-making ability than the face amount of the bail set . . .”).

³⁶ *Compare id.* at 145 n.20 (noting that the fee at the time was five percent of the bond), with N.Y. INS. LAW § 6804(a) (McKinney 2009) (setting out New York’s fee structure for bail bonds). This holds true for most cases, but where the bond exceeds \$3,000, a slightly lesser amount is charged on the excess. *See id.*

³⁷ *Making Bail in New York City, supra* note 9, at 2, 9.

collected in fees and collateral.³⁸ The report confirms that bail bond agents are more active today than they were in the 1980s;³⁹ however, there are still many defendants who derive no benefit from their existence—those who cannot afford their fee and those with very low—and thus unprofitable—bail amounts.

The debate continues between groups who see the commercial bonding industry as unjust and unfair⁴⁰ and those who see it as a public service, or at least a lesser evil—important and effective.⁴¹ A Florida bondsman profiled in the *New York Times* sums up one perspective, saying: “[T]axpayers have to pay for [government pretrial release] programs.⁴² Why should they . . . [w]hen we can provide the same service for free[?] I’d rather see the money spent in parks, [on] mental health issues, the homeless. Let the private sector do it. We do it better.”⁴³ But bondspersons are not providing a service for free.⁴⁴ Defendants—accused of crimes, but not convicted—pay them for release.⁴⁵ And if bondspersons do not care to participate when bail is set low, taxpayers still pay to incarcerate those individuals who cannot afford to post cash bail on their own.⁴⁶ Nonetheless, just four states have abolished the

³⁸ *Id.* at 6, 9.

³⁹ *Id.* at 67.

⁴⁰ See, e.g., *Advocacy Brief: The Truth About Commercial Bail Bonding in America*, NAT’L ASS’N OF PRETRIAL SERVICES AGENCIES 1–4 (Aug. 2009), <http://www.napsa.org/publications/napsafandp1.pdf> [hereinafter *Advocacy Brief*].

⁴¹ See generally Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J.L. & ECON. 93 (2004) (purporting not to take sides in the debate, but offering data to show that the commercial bonding industry is effective).

⁴² Pretrial programs vary widely in the types of services they provide. See JOHN CLARK & D. ALAN HENRY, U.S. DEP’T OF JUSTICE, PRETRIAL SERVICES PROGRAMMING AT THE START OF THE 21ST CENTURY: A SURVEY OF PRETRIAL SERVICES PROGRAMS 1, 39–42 (2003) (explaining that some programs are limited to collecting and verifying information about defendants, whereas others are engaged in pretrial supervision of varying degrees of intensity).

⁴³ Liptak, *supra* note 29.

⁴⁴ See, e.g., *Making Bail in New York City*, *supra* note 9, at 28 (reporting that bond agents generally charge the maximum fee permitted by law).

⁴⁵ See, e.g., *id.*

⁴⁶ See, e.g., *Cost of Pre-Trial Detention in City Jails Takes Bite Out of Big*

commercial bail system—Illinois, Kentucky, Oregon, and Wisconsin.⁴⁷ Nationally, reliance on commercial bail remains high.⁴⁸

While some continue to call for more systemic reform, others have tried to affect change through the money bail system itself.⁴⁹ By investing money to bail the indigent out of jail, these activists may not achieve the fundamental reform that many advocates prefer,⁵⁰ but the tactic has the more immediate benefit of helping defendants to obtain their release. In *Bail Out: The Community*

Apple's Budget, N.Y.C. INDEP. BUDGET OFFICE (Jan. 24, 2000), <http://www.ibo.nyc.ny.us/publicationsSocialCommunity.html> (follow “Cost of Pre-Trial Detention in City Jails Takes Bite Out of Big Apple’s Budget” hyperlink under “Criminal Justice”).

⁴⁷ *Advocacy Brief*, *supra* note 40, at 4. Reliance on commercial bail is far from inevitable. See F. E. DEVINE, COMMERCIAL BAIL BONDING: A COMPARISON OF COMMON LAW ALTERNATIVES 15 (1991) (“[O]nly one country, the Philippines, has adopted a commercial bail bonding system similar to the American system.”). Some common law countries have even made profiting from posting another’s bail a crime. *Id.* However, in the United States, as the country grew through the 1800s, professional bondspersons took over the role that friends and family had once filled, returning defendants to court if they failed to appear. See Rebecca B. Fisher, *The History of American Bounty Hunting as a Study in Stunted Legal Growth*, 33 N.Y.U. REV. L. & SOC. CHANGE 199, 208 (2009) (“[I]t was no longer sensible to insist on the personalized surety system, as people lived in communities in which their neighbors were strangers and their families were often in other states or other countries.”). The United States Supreme Court affirmed the bondsperson’s power, based in contract, to return the accused to court in *Taylor v. Taintor*, 83 U.S. 366 (1872). *Id.* at 209.

⁴⁸ See THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1, 4 (2007). “In the United States, the use of commercial bail bonds is rising, and they became the most popular form of pretrial release in 1998. More than 40 percent of felony defendants released before trial paid a bail bond company in 2004, up from 24 percent a decade earlier, according to the Justice Department.” Liptak, *supra* note 29.

⁴⁹ See *infra* discussion accompanying notes 51–57, 103, 128, 145, 152–55.

⁵⁰ See Peggy M. Tobolowsky & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditions*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 267, 279 n.51 (1993) (explaining that some reformers feel that bailing defendants out directly “would only perpetuate the reliance on financial conditions of release”).

Bail Fund Organizing Manual, Marc Mauer addresses this point.⁵¹ “[W]hy then did we start a bail fund that accepted the existence of the money bail system?” he asks; “[b]ecause it’s there.”⁵²

With that view in mind, this Note contrasts two efforts to combat the inequities of the pretrial process by working through New York’s bail system,⁵³ and discusses one of these efforts in relation to concerns that were raised in the summer of 2009 by a Bronx County Supreme Court judge in *People v. Miranda*.⁵⁴ The earlier effort, the Vera Institute of Justice’s (“Vera’s”) nonprofit, licensed bail bond agencies, was a collaborative experiment intended to assist certain high-risk defendants by posting their bail pretrial in exchange for their agreement to abide by a strict supervised release program.⁵⁵ The second, more recent effort is called the Bronx Freedom Fund (the “Freedom Fund”), a nonprofit bail fund set up by the Bronx Defenders.⁵⁶ It was also developed to assume responsibility for the pretrial release of certain defendants who would otherwise face pretrial incarceration simply because they could not afford bail.⁵⁷ While the Freedom Fund’s model is very different from the Bronx agency that Vera closed in 1994,⁵⁸ the challenges that Vera faced may help to explain why the relatively modest idea of a bail fund could more cost-effectively help a greater number of indigent pretrial detainees. However, in rejecting bail that had been posted by the Freedom Fund on the grounds that the organization was operating as an unlicensed bail

⁵¹ MARC MAUER, BAIL OUT: THE COMMUNITY BAIL FUND ORGANIZING MANUAL 2 (1980) (writing about the American Friends Service Committee’s Washtenaw Community Bail Fund in Ann Arbor, Michigan).

⁵² *Id.* at 5. “Until the time when we are able to change the money bail system, people will still be suffering . . . and languishing in jail. . . . [B]y demonstrating that a citizens’ group can get involved in the bail process, we hoped to show that bail bondsmen were not essential to the system.” *Id.*

⁵³ See discussion *infra* Parts II–III.

⁵⁴ See generally *People v. Miranda*, No. 012208C2009, 2009 WL 2170254 (N.Y. Sup. Ct. Bronx County June 22, 2009) (rejecting bail posted by the Bronx Freedom Fund on legal and policy grounds).

⁵⁵ See discussion *infra* Part II.

⁵⁶ See discussion *infra* Part III.

⁵⁷ See *infra* text accompanying notes 128–29.

⁵⁸ See *infra* text accompanying notes 181–91 (comparing the Freedom Fund with Vera’s bail bond agencies).

bond business under New York's Insurance Law,⁵⁹ the Bronx court, in *People v. Miranda*, raised concerns about the Freedom Fund's methods and its connection with the Bronx Defenders.⁶⁰

Part I of this Note will describe the significance of the pretrial period to accused individuals, along with some of the early efforts to make the pretrial system more equitable and the limits of those efforts. Part II will discuss Vera's bail bond agencies, which attempted to assist a high-risk portion of the pretrial population. Part III analyzes the policy concerns that the Bronx court raised in *People v. Miranda*⁶¹ and discusses why certain aspects of the Freedom Fund's model, some of which were disapproved by the court, could allow it to perform well in the Bronx, where Vera's bail bond agency did not. This Note concludes that the court's concern regarding the criteria employed by the Freedom Fund to select defendants is one that might be addressed effectively by a bail fund through careful structuring and a stricter client selection process. In order to win judicial support, a bail fund may need to set firmer criteria to guide its determination to post bail at no expense to its clients. This is perhaps especially so where the fund shares a connection to a particular defense organization—a relationship that might give rise to more judicial concern.

I. SIGNIFICANCE AND BACKGROUND OF THE MOVEMENT TO REFORM OUR PRETRIAL SYSTEM

The United States Supreme Court has recognized that the pretrial stage is the “most critical period” for an accused to prepare a defense.⁶² Research shows that individuals who are incarcerated pretrial regularly receive more severe sentences than defendants who are released on recognizance⁶³ or affordable bail.⁶⁴ Even

⁵⁹ *Miranda*, 2009 WL 2170254, at *1, *10.

⁶⁰ *See generally id.*

⁶¹ *Id.*

⁶² *See, e.g.*, Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 1, 2 (1998) (quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932)).

⁶³ Release on recognizance means that a defendant is released based on his or her personal promise to return to court as required. *See* N.Y. CRIM. PROC. LAW § 500.10(2) (McKinney 2009) (“A court releases a principal on his own

“affordable bail” may be out of reach for an indigent defendant.⁶⁵ The problem the indigent defendant faces is compounded when, as a result of pretrial incarceration, he or she may be exposed to the possibility of a more severe case outcome.⁶⁶ Moreover, indigent defendants who are incarcerated pretrial frequently would not have had to serve any extended time in jail but for their inability to post bail.⁶⁷ One study reported that forty-eight percent of nonfelony defendants who were detained pretrial were ultimately acquitted, had their cases dismissed, or received noncustodial sentences.⁶⁸ That period of pretrial detention can last for months.⁶⁹ This time spent in jail not only hinders the accused’s defense, it disrupts work, school, social relationships, and any physical or psychological treatment.⁷⁰ Because some defendants are unable to post bail, but are desperate to avoid incarceration, they may plead guilty to crimes they did not commit, or to charges that might

recognizance when, having acquired control over his person, it permits him to be at liberty during the pendency of the criminal action or proceeding involved upon condition that he will appear thereat whenever his attendance may be required and will at all times render himself amenable to the orders and processes of the court.”).

⁶⁴ Colbert, *supra* note 62, at 13. Some researchers have hypothesized that it is the probable case outcome that affects a judge’s decision to remand or set bail. *Research Brief No. 14, supra* note 30, at 1. However, recent research on New York City defendants supports the hypothesis that pretrial detention *does* have a negative impact on both felony and nonfelony case outcomes. *Id.* at 7; Mary T. Phillips, *Research Brief No. 18: Bail, Detention, & Felony Case Outcomes*, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., 5–7 (Sept. 2008), <http://www.cjareports.org/reports/brief18.pdf> [hereinafter *Research Brief No. 18*].

⁶⁵ See sources cited *supra* notes 28, 30.

⁶⁶ See *supra* note 64 and accompanying text.

⁶⁷ *Research Brief No. 14, supra* note 30, at 7.

⁶⁸ *Id.* A similar result was found for the felony sample, where “[n]early half of the detained . . . were either not convicted (27%) or received a noncustodial sentence (19%).” *Research Brief No. 18, supra* note 64, at 7.

⁶⁹ *E.g.*, Colbert, *supra* note 62, at 4 (“[The] pretrial prison system [is] bursting at its seams with poor people awaiting trial.”); *Read More*, BRONX FREEDOM FUND, <http://www.bronxfreedomfund.org/read-more.html> (last visited Sept. 15, 2010).

⁷⁰ Colbert, *supra* note 62, at 43; *Read More*, BRONX FREEDOM FUND, *supra* note 69.

otherwise be lessened or dropped.⁷¹ The consequences of the criminal record and possible lengthy probation that results from such a plea can be severe, threatening job prospects, leading to loss of public benefits, disrupting families, and affecting immigration status.⁷² The costs of pretrial detention on taxpayers are substantial;⁷³ the costs on the defendants and their families may be devastating.⁷⁴

In 1961, the Vera Institute of Justice, through the Manhattan Bail Project, set out to show that rather than depending on financial bail to ensure a defendant's appearance in court, the strength of a defendant's community ties could serve as a strong basis for release on recognizance,⁷⁵ a method commonly known as ROR. The success of Vera's method,⁷⁶ which involved verifying defendants' background information and assigning a numerical

⁷¹ See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2468, 2491–93, 2493 n.116, 2540 (2004); *Read More*, BRONX FREEDOM FUND, *supra* note 69. The undue pressure that pretrial detention can put on a defendant to plead guilty can be particularly severe for those accused of less serious offenses. *Research Brief No. 14*, *supra* note 30, at 7 (“A defendant facing a conditional discharge, a fine, or a sentence of time served—unlike a defendant facing serious jail or prison time—can gain immediate release by pleading guilty. This creates a strong incentive to do so.”).

⁷² See generally *Collateral Consequences of Criminal Charges: New York State*, COLUMBIA UNIVERSITY, <http://www2.law.columbia.edu/fourcs/> (last visited Sept. 15, 2010) (providing information and links to other resources concerning collateral consequences in New York).

⁷³ See, e.g., source cited *supra* note 46; see also *Basic Prison and Jail Fact Sheet*, CORR. ASS'N OF N.Y. (Mar. 2006), http://www.correctionalassociation.org/publications/download/pvp/factsheets/basic_prison_fact_2006.pdf (“It costs the city about \$59,900 a year to keep an inmate in a New York City Jail.”) (emphasis removed); Colbert, *supra* note 62, at 42.

⁷⁴ See *supra* text accompanying notes 70–72.

⁷⁵ *A Short History of Vera's Work on the Judicial Process*, VERA INST. OF JUSTICE, 2 (June 2003), http://www.vera.org/download?file=403/hist_summ_judicial_process.pdf [hereinafter VERA 2003].

⁷⁶ *Id.* (“[T]he experimental group released on nothing more than their promise to return had twice the appearance rate of those released on bail. The project also saved more than \$1 million in the correction department's budget.”); see also Don Oberdorfer, *The Bail-Bond Scandal*, SATURDAY EVENING POST, June 20, 1964, at 66, 66–67 (describing the positive impact of Vera's efforts).

score for judicial reference, helped lead to national reform.⁷⁷ These pretrial services comprised a mechanism upon which judges could rely to make more informed release decisions.⁷⁸ Because it is time consuming and somewhat unreliable for a judge to make a detailed inquiry into a defendant's background at an initial appearance, judges often depend on straightforward criteria when making their bail determination.⁷⁹ An absence of such criteria and an overall lack of available information can contribute to inconsistent decision making.⁸⁰ That reality prompted bail projects like Vera's, which were designed to accurately assess defendants' backgrounds and community ties for the purpose of developing release recommendations.⁸¹ One of the objectives of this movement was to "incorporate explicit, objective criteria into pretrial decision making . . . with the [aim of] . . . minimizing the disparate outcomes resulting from arbitrary and subjective decisions."⁸²

In New York City, Vera's efforts led to the creation of the CJA, a nonprofit corporation that exists today under contract with the city.⁸³ Through personal interviews, CJA collects information relating to criminal court defendants' employment, residency, family status, prior convictions, and appearance history, however, not all of the information is used to calculate the objective score that forms the basis of CJA's release recommendation.⁸⁴ Following

⁷⁷ See VERA 2003, *supra* note 75, at 2 (referring to the federal Bail Reform Act of 1966). Caleb Foote credited Vera's "remarkable reform efforts" with sparking change in the area of bail. See CALEB FOOTE ET AL., *STUDIES ON BAIL*, at v (Caleb Foote ed., 1966).

⁷⁸ Oberdorfer, *supra* note 76, at 66 (explaining that while judges had the power to release defendants without bail, they rarely did so because they lacked sufficient information upon which to base that determination).

⁷⁹ WAYNE R. LAFAYE ET AL., 4 CRIM. PROC. § 12.1(b) (3d ed. West 2008).

⁸⁰ See Christopher T. Lowenkamp et al., *The Development & Validation of a Pretrial Screening Tool*, 72 FED. PROBATION 2, 3 (2008).

⁸¹ LAFAYE ET AL., *supra* note 79, § 12.1(b).

⁸² Lowenkamp et al., *supra* note 80, at 3.

⁸³ *About the Agency*, N.Y.C. CRIM. JUST. AGENCY, INC., <http://www.nycja.org/about/about.htm> (last visited Sept. 15, 2010). The agency was originally established in 1973 as the Pretrial Services Agency and today exists under contract with New York City's Office of the Coordinator for Criminal Justice. *Id.*

⁸⁴ See *Annual Report 2008*, *supra* note 15, at 5, 13. Much of the

the current mandate of New York's Criminal Procedure Law,⁸⁵ CJA has made release recommendations based on what the agency understands to reflect a defendant's risk of flight, rather than community safety concerns.⁸⁶ Nonetheless, in what CJA described as a "source of some frustration," research completed before 2005 indicated that prosecutors' bail requests were the only significant predictor of bail amount, and a potent factor in ROR determinations.⁸⁷ Because other CJA research shows that prosecutors' bail requests are generally informed by factors other than likelihood of court appearance, bail determinations are probably based upon community safety and other concerns despite the mandate of the statute.⁸⁸ Some judges acknowledged to CJA that they have disregarded the agency's recommendation because it failed to reflect factors they feel are important.⁸⁹ In June of 2003, two criminal history elements were added to CJA's adult

information that is not used to calculate the objective score is used for research purposes or to assess a defendant's social service needs. *See id.* at 5. To determine whether an adult defendant is categorized as low risk, moderate risk, high risk, or no recommendation, points are awarded or subtracted for (i) a working telephone number, (ii) a New York City area address, (iii) full time employment, school, or training program, (iv) someone expected at arraignment, (v) any open cases, and (vi) any prior bench warrants. *See id.* CJA's most recent available annual report, from 2008, shows that sixty-five percent of defendants whose cases were not disposed of at arraignment (which was about half of all cases), were released on recognizance and bail was set for thirty-four percent. *Id.* at 16. The remaining one percent was remanded without bail. *Id.*

⁸⁵ *See* N.Y. CRIM. PROC. LAW § 510.30(2) (McKinney 2009).

⁸⁶ Qudsia Siddiqi, *Research Brief No. 19: Pretrial Failure Among New York City Defendants*, N.Y.C. CRIM. JUSTICE AGENCY, INC., 1, 7 (Jan. 2009), <http://www.cjareports.org/reports/brief19.pdf>.

⁸⁷ Mary T. Phillips, *Research Brief No. 9: Prosecutors' Bail Requests and the CJA Recommendation: What Do They Tell the Judge?*, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., 2 (Aug. 2005), <http://www.cjareports.org/reports/brief9.pdf> [hereinafter *Research Brief No. 9*].

⁸⁸ *See id.* at 7.

⁸⁹ *Factors Part 1*, *supra* note 19, at 48. Since that time, some factors have been changed to better reflect judicial concerns. *See id.* In 2008, of those defendants who CJA recommended for ROR, eighty-one percent were granted it. *Annual Report 2008*, *supra* note 15, at 19. On the other hand, forty-three percent of defendants who were not recommended for release by CJA were granted ROR. *Id.*

recommendation system—whether the defendant has (1) any prior bench warrants or (2) open cases⁹⁰—but CJA does not consider offense type or severity in its recommendation.⁹¹ More judges may now give weight to CJA’s score in light of the changes the agency made to their objective criteria.⁹² But the inconsistent use of CJA’s recommendations highlights the fact that release and bail-setting decisions are judicial determinations.⁹³ If judicial opinion is not aligned with the agency’s assessment criteria, the effect of the service is diluted. A similar result occurs when judges do not exercise their statutorily granted discretion to set bail in less burdensome forms.⁹⁴ Statutory authority for setting less onerous types of bail, such as unsecured bonds,⁹⁵ makes little difference if judges rarely exercise those options.

⁹⁰ *Research Brief No. 9*, *supra* note 87, at 3.

⁹¹ *See id.* at 7.

⁹² *See Factors Part 1*, *supra* note 19, at 48.

⁹³ *See* John S. Goldkamp, *Judicial Responsibility for Pretrial Release Decisionmaking and the Information Role of Pretrial Services*, 57 *FED. PROBATION* 28, 29 (1993) [hereinafter *Judicial Responsibility*].

⁹⁴ *See Making Bail in New York City*, *supra* note 9, at 3; *see also Research Brief No. 18*, *supra* note 64, at 7 (“More use could be made of cash alternatives and rarely used bail options such as personal recognizance bonds for . . . low- and medium-risk defendants if ROR is not appropriate.”); Peter A. Crusco, *Uncovering Tainted Bail*, *N.Y. L.J.*, Feb. 20, 2004, at 4, col. 4 (“New York gives preferential treatment to insurance company bail bonds as compared to the other types of statutory bail.”); Martha Rayner, *Conference Report: New York City’s Criminal Courts: Are We Achieving Justice?*, 31 *FORDHAM URB. L.J.* 1023, 1046 (2004) (observing that more research should be done to “explore the feasibility of the increased use of non-traditional, though statutorily based, bail options, such as secured and unsecured bonds”).

⁹⁵ *See* N.Y. CRIM. PROC. LAW §§ 500.10, 520.10 (McKinney 2009); *see also* CRIM. PROC. § 520.10 cmt. (“By amendment in 1972, the Legislature reversed [the] presumption so that now . . . when the court fails to specify, the defendant may post unsecured bail in the least onerous form—*i.e.*, an unsecured surety bond or an appearance bond secured only by the defendant’s promise to pay. However it is doubtful that the defendant would receive this largess by oversight, since the court must approve the form in which the bail is posted prior to release of the principal.”) (citing N.Y. CRIM. PROC. LAW § 510.40).

II. A NEW TACTIC: VERA'S BAIL BOND AGENCIES

While Vera's efforts did spur the movement toward more nonfinancial pretrial release,⁹⁶ the community ties model has a somewhat obvious limit. Those who lack financial resources frequently lack strong community ties; the two characteristics are often directly related.⁹⁷

[The model] had little relevance to the type of person most commonly processed by the criminal courts. These defendants often had no jobs, no good record of employment, no stable residence, no upstanding community members to vouch for their reliability, and little education. In short, just as they were unlikely to be able to post very low amounts of cash bail, they were also unlikely to receive high community-ties ratings to earn recommendations for release on personal recognizance (nonfinancial release).⁹⁸

Vera undoubtedly recognized this problem and in the mid-1980s began to focus its pretrial efforts on a different segment of the defendant population.⁹⁹ From 1987 to 1994, Vera established three nonprofit bail bond agencies to post bond at no cost for certain defendants who had been denied ROR.¹⁰⁰ In exchange, each defendant signed a contract agreeing to take part in an intensive pretrial supervision program, which involved daily physical monitoring of participants.¹⁰¹ The intensive supervision

⁹⁶ See CLARK & HENRY, *supra* note 42, at 1 (“[H]undreds of pretrial programs have been established in rural, suburban, and urban jurisdictions.”).

⁹⁷ See, e.g., PERSONAL LIBERTY, *supra* note 17, at vii.

⁹⁸ *Id.*

⁹⁹ See Christopher Stone, *Forward to Bail Bond Supervision in Three Counties*, VERA INST. OF JUSTICE (Aug. 1995), <http://www.vera.org/download?file=73/bailbond.pdf>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*; *Bail Bond Supervision in Three Counties*, VERA INST. OF JUSTICE, 1, 23 (Aug. 1995), <http://www.vera.org/download?file=73/bailbond.pdf> [hereinafter VERA 1995] (“Vera’s bail bond supervision projects [were] among the most intensive community supervision programs ever attempted.”); VERA 2003, *supra* note 75, at 3 (“[The program involved] an initial period in a 24-hour residence, drug testing, curfews, unannounced home visits, and job monitoring.

was intended both to deter misconduct and to give staff notice if there was reason to return a participant to jail.¹⁰² In order to post bonds and to exercise this authority, some staff became licensed bail bond agents.¹⁰³ For the population that the agencies were working with, the possibility of returning a defendant to custody was important for the message it sent to both the defendant and the Department of Correction—that “the program was serious about controlling behavior and preserving community safety.”¹⁰⁴

Vera sought to create “a pretrial supervision program so good that it [could] compete with jail—one that [could] virtually guarantee that defendants under supervision [would] neither abscond nor commit new crimes.”¹⁰⁵ This kind of supervised release as an alternative to pretrial detention raises some concerns. One of the most troubling aspects of pretrial detention is that it in effect punishes a defendant before he or she has been convicted of a crime.¹⁰⁶ When, for a defendant who cannot afford bail, the alternative to pretrial incarceration is intensive supervised release, that defendant’s freedom is still restricted in a way that it would not have been if the defendant had been able to post bail.¹⁰⁷ Even when participants voluntarily agree to comply with this type of program, it is questionable whether a detained person meaningfully consents to the restrictive conditions the program imposes when he or she has so few alternatives.¹⁰⁸ On the other hand, for the population of “high-risk” defendants with whom Vera was

Most important, the defendants agreed that the agency could return them to jail if they failed to comply.”).

¹⁰² Stone, *supra* note 99.

¹⁰³ *Id.*

¹⁰⁴ VERA 1995, *supra* note 101, at 7.

¹⁰⁵ Stone, *supra* note 99.

¹⁰⁶ See *supra* notes 70–72 and accompanying text (describing consequences of pretrial detention).

¹⁰⁷ See *supra* note 101 (describing strict restrictions on participants’ daily lives).

¹⁰⁸ For a discussion of the constitutional issues that are raised by this problem and the “tension created when an arrested person is asked to chose between sacrificing the privacy rights he normally enjoys . . . and forgoing an opportunity to avoid indefinite pretrial detention” in the federal context, see generally Melanie D. Wilson, *The Price of Pretrial Release: Can We Afford to Keep Our Fourth Amendment Rights?*, 92 IOWA L. REV. 159 (2006).

working,¹⁰⁹ this kind of supervision afforded participants an opportunity not just to avoid pretrial detention, but also to connect with treatment and training programs and, most importantly, to demonstrate to the judge that, if convicted, a jail sentence would be unnecessary.¹¹⁰ Still, Vera reported that “[i]n some cases, the Bronx Bail Bond Agency was supervising defendants long after they would have been released from jail had they not been bailed out by the agency.”¹¹¹

Apart from liberty and due process concerns,¹¹² the length of time that participants were subject to supervision also posed practical difficulties.¹¹³ The release contracts included a detailed schedule of all required and permitted activities; minor breaches of the contract led to even more restrictions.¹¹⁴ Particularly in the Bronx, where the period of supervision was especially long, defendants’ commitment to their rigid schedules waned over the lengthy pretrial period.¹¹⁵ But it was one of Vera’s goals to target

¹⁰⁹ Some participants were homeless, many had criminal records, and most had substance abuse problems. VERA 1995, *supra* note 101, at 5.

¹¹⁰ See Stone, *supra* note 99. One author has observed:

[I]f programs of supervised release were truly alternatives to pretrial custody, and did not result in widening the net so as to control defendants who previously would not have even been detained, and if defendants in the supervised programs can have their cases dismissed without prejudice if they successfully complete them, the idea might be worth exploring. None of that will erase the fact, however, that significant intrusions into citizen’s lives are being made previous to trial and without criminal convictions. This fact might be insurmountable for those who would design new alternatives in pretrial release today.

Candace McCoy, Tribute, *Caleb Was Right: Pretrial Decisions Determine Mostly Everything*, 12 BERKELEY J. CRIM. L. 135, 144–45 (2007).

¹¹¹ VERA 1995, *supra* note 101, at 21.

¹¹² See generally Wilson, *supra* note 108.

¹¹³ See VERA 1995, *supra* note 101, at 20.

¹¹⁴ *Id.* at 6.

¹¹⁵ *Id.* at 20 (“The Bronx District Attorney’s office proved unwilling to reward compliant defendants with probation. As a result, defendants in the program delayed the disposition of their cases Extending the duration of supervision dramatically increased the surrender rate As people became more frustrated by what seemed to be a pointless as well as endless situation, they broke more and more rules.”).

people who “would represent a net savings in corrections resources.”¹¹⁶ To that end, Vera offered to supervise defendants who were likely to be detained for at least ninety days before trial and who were eligible for probation.¹¹⁷ That way, space was not only saved pretrial, but when defendants successfully complied with pretrial supervision they were more likely to receive probation at sentencing.¹¹⁸ Because supervising defendants so closely cost as much as incarceration, it was the prospect of achieving a non-jail sentence that could make the largely government-funded program cost-effective.¹¹⁹ What Vera’s reports make fairly clear is that its goal was not to get as many individuals out of jail as possible.¹²⁰ Vera was working with the city to craft an alternative to pretrial incarceration for people who were unlikely to benefit from the movement toward personal recognizance.¹²¹

Vera’s Bail Bond Agencies reached out to a population of

¹¹⁶ *Id.* at 1.

¹¹⁷ *Id.* Vera’s 1995 report on the projects explains that “[s]imply put, it doesn’t save money to remove people from jail who later receive jail sentences because pretrial detention is deducted from the sentence.” *Id.* at 3. This statement may not account for the possibility that removing people who are ineligible for probation from jail could result in acquittal, dismissal, or a shorter jail sentence overall. *See supra* note 64 and accompanying text (discussing evidence of more favorable case outcomes when defendants are released pretrial). Vera also observed that “[r]eleasing 100 defendants, who each would have spent two days in jail, saves 200 bed days; releasing two people, who each would have spent 100 days in jail, conserves the same amount of space.” VERA 1995, *supra* note 101, at 3. If Vera had targeted short-term detainees it presumably would have been able to assist more individuals. This alternative approach would have required supervising a greater number of defendants, but each individual would probably have required less oversight because the relationship between the defendant and project staff would have less time to become strained. On the other hand, long-term detainees stand to gain the most when supervision is effective.

¹¹⁸ Stone, *supra* note 99 (“[A] defendant’s good behavior and achievements while under supervision helped persuade prosecutors and judges to impose a sentence of probation.”); VERA 1995, *supra* note 101, at 2.

¹¹⁹ VERA 1995, *supra* note 101, at 5 (stating that Vera’s model was “as expensive as jail”).

¹²⁰ *See supra* discussion accompanying notes 114–19.

¹²¹ *See supra* text accompanying notes 97–98 (noting that some defendants would not benefit from the ROR movement).

defendants who faced extreme challenges.¹²² Even in Nassau County, twenty-seven percent of participants in the bail project were surrendered and four percent were rearrested.¹²³ In the Bronx, too many people had to be surrendered for the program to be workable¹²⁴ and so the Bronx agency was closed in 1994.¹²⁵ In 2007, another group of advocates launched a different project in the Bronx, with different goals and on a more modest scale.

III. THE BRONX FREEDOM FUND

The Bronx Defenders is a public defenders practice that, in addition to providing indigent defense, works to address the various civil and social service needs of their clients.¹²⁶ Many of the Bronx Defenders' indigent clients cannot afford even very low bail.¹²⁷ After years of seeing clients in jail pretrial, sometimes for lack of even a few hundred dollars, and witnessing many plead

¹²² VERA 1995, *supra* note 101, at 5.

¹²³ *Id.* at 4 n.6. Two percent of Nassau participants absconded. *Id.* The agencies in Nassau County, New York and Essex County, New Jersey ultimately lost no bonds and were incorporated into nonprofit organizations with county contracts. VERA 2003, *supra* note 75, at 3. Vera reported that the Nassau County project was transferred to the Education and Assistance Corporation in 1992 and the Essex County project was transferred to Volunteers of America in 1993. *Id.* at 13.

¹²⁴ VERA 1995, *supra* note 101, at 19–21. In the Bronx, forty-nine percent of participants were surrendered, *id.* at 7, twelve percent were rearrested, and five percent absconded. *Id.* at 15.

¹²⁵ VERA 2003, *supra* note 75, at 3.

¹²⁶ *Advocacy for Clients*, BRONX DEFENDERS, <http://www.bronxdefenders.org/our-work/advocacy-for-clients> (last visited Sept. 15, 2010). This “holistic” approach is based on the experience that most of their clients’ criminal cases are symptoms of more complicated and long-term problems. *See id.*; *see also We Stabilize Lives Through Civil Advocacy*, BRONX DEFENDERS, <http://www.bronxdefenders.org/our-work/we-stabilize-lives-through-civil-advocacy> (last visited Sept. 15, 2010) (describing provision of services for issues such as employment, housing, health, and addiction).

¹²⁷ Robin Steinberg & Zoë Towns, *The Bronx Freedom Fund: A Model Bail Fund*, CORNERSTONE (Nat’l Legal Aid & Defender Ass’n, Washington, D.C.), Jan.–Apr. 2009, at 21; *Read More*, BRONX FREEDOM FUND, *supra* note 69 (“More than half of the Bronx defendants who have bail set remain behind bars for their entire pretrial period.”).

guilty just to avoid that time in jail, the Bronx Defenders set up a project called the Bronx Freedom Fund—a revolving bail fund that would provide bail at no cost to clients who met certain criteria.¹²⁸ The hope of the project was that those defendants would be able to achieve a more favorable result in their criminal matter and avoid the severe consequences of pretrial detention, while obtaining social services earlier in the process.¹²⁹ The Bronx Freedom Fund’s website states that since opening in 2007, ninety-three percent of the defendants who benefited from the fund made all of their court appearances and over fifty percent of cases “were dismissed or resulted in a non-criminal disposition.”¹³⁰ A project of this kind depends on a high success rate because when a case closes with the defendant having made all court appearances, bail is returned and the fund is replenished—hence the revolving nature of the fund.¹³¹ By June of 2009, the Bronx Freedom Fund had posted bail for approximately 130 indigent clients.¹³² However, that same month a judge in Bronx County Supreme Court rejected bail that had been posted for a defendant by the Freedom Fund.¹³³ In an unreported decision, *People v. Miranda*, the court found that the Bronx Freedom Fund had “become a ‘bail bond business’ as well as an ‘insurance business’ as defined in Insurance Law § 6801 [and,

¹²⁸ See Steinberg & Towns, *supra* note 127, at 21; *Read More*, BRONX FREEDOM FUND, *supra* note 69. See also *infra* notes 252–53 and accompanying text (discussing the criteria used).

¹²⁹ See *Read More*, BRONX FREEDOM FUND, *supra* note 69.

¹³⁰ *Id.* But see *People v. Miranda*, No. 012208C2009, 2009 WL 2170254, at *10 (N.Y. Sup. Ct. Bronx County June 22, 2009) (“[The Freedom Fund] does not apparently keep statistics about whether a judge agreed to stay the issuance of a warrant upon request of the Bronx Defenders’ attorney . . . and the District Attorney’s Office challenges the validity of this statistic.”).

¹³¹ *Read More*, BRONX FREEDOM FUND, *supra* note 69; see also *What You Should Know Before You Pay Bail*, *supra* note 21 (explaining the process for return of bail funds by the Department of Finance and that pursuant to section 99-m of the General Municipal Law, the Department will retain a three percent fee when a case ends with a conviction).

¹³² *Miranda*, 2009 WL 2170254, at *8 (finding that from the time of its incorporation to the time of the decision, bail had been posted for approximately 130 Bronx Defenders’ clients).

¹³³ *Id.* at *1.

therefore], it had to be licensed.”¹³⁴ In consequence, the court rejected the bail posted for the Bronx Defenders’ client “on both legal and public policy grounds.”¹³⁵

In defining a “bail bond business,” section 6801(a)(1) of the New York Insurance Law states that:

[a]ny person, firm or corporation in any court having criminal jurisdiction or in any criminal action or proceeding who shall for another deposit money or property as bail . . . who within a period of one month prior thereto shall have made such a deposit or given such bail in more than two cases not arising out of the same transaction shall be deemed to be doing a bail bond business and doing an insurance business as defined in article eleven of this chapter.¹³⁶

New York’s law further provides that no person or entity shall engage in such business unless licensed to do so.¹³⁷ In *People v. Miranda*, the Bronx County Supreme Court found that the Bronx Freedom Fund had posted bail in eight cases within the thirty day period prior to posting bail for the defendant.¹³⁸ Therefore, the court determined, the organization was operating as a bail bond business and an insurance business under the law and it had to be licensed.¹³⁹ The *Miranda* court reasoned that the violation cast the validity of the bail into question.¹⁴⁰

To call a charitable bail fund a bail bond business is counterintuitive. The term “bail bond *business*” suggests that the person or entity posting bail must intend to profit from the undertaking. But elsewhere the insurance law provides that “the fact that no profit is derived from the making of insurance contracts, agreements or transactions, or that no separate or direct

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ N.Y. INS. LAW § 6801(a)(1) (McKinney 2009).

¹³⁷ *Id.* § 6801(b)(1) (“No person, firm or corporation shall in this state do an insurance business or a bail bond business as defined in subsection (a) of this section unless authorized by a license issued and in force as provided under article eleven of this chapter.”).

¹³⁸ *Miranda*, 2009 WL 2170254, at *11.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

consideration is received therefor, shall not be deemed conclusively to show that the making thereof does not constitute the doing of an insurance business.”¹⁴¹ Nor is the definition of “bail bond business” limited to those posting *bond*, as opposed to those “deposit[ing] money or property as bail.”¹⁴² This definition could be interpreted expansively enough to require licensing of almost any person or entity that regularly posts bail.¹⁴³

However, bail funds are not an unknown phenomenon in New York.¹⁴⁴ The Bronx court acknowledged that “[i]n New York State, several organizations, including the United Way of Tompkins County, which has loaned bail money to defendants, and Catholic Charities of Onondaga County, which posted half the bail, have administered bail funds with money appropriated by the local county legislatures.”¹⁴⁵ The Bronx Freedom Fund’s counsel suggested, reasonably, that if such organizations regularly post bail, apparently with local legislative sanction, then it too should be permitted to post cash bail without being subject to the licensing requirement of the insurance law.¹⁴⁶ The Freedom Fund pointed to section 4522(a)(3) of the New York Insurance Law,¹⁴⁷ which exempts from the requirements of the insurance law, particularly licensing requirements, “[o]rganizations of a religious, charitable, benevolent or fraternal character, which are not organized or maintained primarily for the purpose of providing insurance

¹⁴¹ N.Y. INS. LAW § 1101(b)(4) (McKinney 2009).

¹⁴² See *supra* note 136 and accompanying text (defining “bail bond business”).

¹⁴³ The law requiring licensing of bondspersons does explicitly provide a limited exception for insurers authorized to issue policies of motor vehicle and aircraft insurance who “undertake[] to pay . . . the cost of bail bonds required of the insured because of accident or asserted traffic law violations arising out of the use of a vehicle insured under the terms of the policy.” N.Y. INS. LAW § 6802(o) (McKinney 2009).

¹⁴⁴ See *infra* notes 145, 154 and accompanying text.

¹⁴⁵ *Miranda*, 2009 WL 2170254, at *10. Opportunities, Alternatives, and Resources of Tompkins County Inc., which administers a Bail Funds Program with public and private money is an independent nonprofit agency. See OAR, <http://www.oartompkins.com/index.html> (last visited Sept. 15, 2010).

¹⁴⁶ *Miranda*, 2009 WL 2170254, at *15 n.23.

¹⁴⁷ *Id.* at *2.

benefits.”¹⁴⁸ The court determined that despite the charitable nature of the Freedom Fund,¹⁴⁹ since it was “organized [and] maintained primarily for the purpose of providing”¹⁵⁰ bail, the exemption did not apply.¹⁵¹

Though the *Miranda* decision is not binding on other courts, its interpretation of the insurance law raises interesting questions. Aside from charitable purposes, bail funds have historical and political significance. Bail funds have been utilized by suppressed groups, including civil rights activists and communists.¹⁵² In the 1960s, bail funds played an instrumental role in the civil rights movement.¹⁵³ During the 1970s, Professor Angela Y. Davis, a feminist and human rights activist, was involved in organizing a bail fund for sex workers in New York’s Women’s House of

¹⁴⁸ N.Y. INS. LAW § 4522(a)(3) (McKinney 2009).

¹⁴⁹ The Bronx Freedom Fund’s certificate of incorporation, filed with the Secretary of State, indicates that the fund operates for “charitable purposes.” *Miranda*, 2009 WL 2170254, at *4.

¹⁵⁰ INS. LAW § 4522(a)(3).

¹⁵¹ *Miranda*, 2009 WL 2170254, at *15. According to the opinion, at some point counsel for the Bronx Freedom Fund acknowledged on the record that the exemption did not apply to the nonprofit, despite earlier advice from another law firm to the contrary. *Id.* at *3. Subsequently, the Freedom Fund invoked the argument that only the Commissioner of Insurance could determine whether an entity was exempt from licensure. *Id.* at *13.

¹⁵² See, for example, Comment, *Communists and the Right to Bail*, 20 U. CHI. L. REV. 330, 342 (1952–1953), for a discussion of a series of cases in which federal courts rejected bail posted for communist defendants by the Civil Rights Congress and proposing that although the Second Circuit rejected the bail because the bail fund’s trustees had indicated a disregard for their duties as sureties, “[t]he court might have argued that bail funds donated to the surety by other persons without consideration provide no incentive to produce the accused, since the surety bears no risk of loss.” See also *United States v. Flynn*, 190 F.2d 672, 673 (2d Cir. 1951) (per curiam) (discussing grounds for rejecting bail posted by the Bail Fund of the Civil Rights Congress of New York).

¹⁵³ See, e.g., David Benjamin Oppenheimer, Essay, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 657, 660 (1995) (explaining that volunteers for demonstrations and sit-ins in Birmingham had been promised “that they would have to spend only a few days in jail before being bailed out[.]” but that the Alabama legislature manipulated statutory bail limits to deplete the fund).

Detention.¹⁵⁴ In Ann Arbor, Michigan, in the 1970s, a Quaker organization's bail fund aimed more broadly to "impact . . . the criminal justice system itself by laying the groundwork for social change [to] create a more just and equitable system"¹⁵⁵ Under New York's expansive definition, some such efforts could constitute "bail bond businesses," giving courts statutory grounds to reject the bail. Since the definition only applies to people or entities that have posted bail in "more than two cases *not arising out of the same transaction*,"¹⁵⁶ it could exclude certain funds with a political bent, where money is used to bail out a group of demonstrators.¹⁵⁷ The Bronx court's view of the matter put the Bronx Freedom Fund, a nonprofit corporation created to regularly bail out indigent defendants,¹⁵⁸ in a somewhat unique situation: although a charity, it fit the insurance law's definition of "bail bond business."¹⁵⁹ The definition does leave open the option of posting bail no more than twice within a thirty day period in order to stay outside the reaches of the licensing requirement.¹⁶⁰

This begs the question of whether it would be possible for a revolving bail fund to be licensed so that it would not have to work in such a limited manner. New York law specifies that the Insurance Department's superintendent has the power to authorize a fidelity and insurance company to conduct a bail bond business, but that individuals shall not be licensed to engage in such a business.¹⁶¹ Any agents of a licensed entity must be named as sublicensees.¹⁶² This means that, in addition to passing a written

¹⁵⁴ Siobhan Brooks, Symposium, *Economic Justice for Sex Workers: Interview*, 10 HASTINGS WOMEN'S L.J. 181, 182 (1999).

¹⁵⁵ See MAUER, *supra* note 51, at 2–3.

¹⁵⁶ N.Y. INS. LAW § 6801(a)(1) (McKinney 2009) (emphasis added).

¹⁵⁷ See source cited *supra* note 153 and accompanying text (noting usefulness of bail funds to the civil rights movement).

¹⁵⁸ See *supra* note 149 (regarding the Freedom Fund's certificate of incorporation).

¹⁵⁹ See INS. § 6801(a)(1) (defining "bail bond business").

¹⁶⁰ See *id.*

¹⁶¹ *Id.* § 6801(b)(2).

¹⁶² *Id.* § 6802(d). Sublicensees are authorized at the superintendent's discretion. *Id.* § 6802(c). It is a misdemeanor for any person or entity to solicit, negotiate, or effect a deposit or bail bond for an insurer engaged in a bail bond

test “appropriate to the doing of a bail bond business,”¹⁶³ and satisfying requirements of “trustworthiness and competence”¹⁶⁴ and “good character and reputation,”¹⁶⁵ a bail fund could theoretically contract with an agent of a licensed fidelity and insurance company in order to run a bail bond business.¹⁶⁶ This is what the Vera Institute’s bail bond agencies had to do in order to post bond.¹⁶⁷ However, even for the Vera Institute of Justice, which received government funding¹⁶⁸ and whose influence sparked a national reform movement,¹⁶⁹ getting licensed was a challenge.¹⁷⁰ It was not easy for Vera to find a company willing to work with them,¹⁷¹ and once it had, the company charged a fee for every bond posted.¹⁷² But the premiums charged on each bond pale

business without being licensed. *Id.* § 6802(a).

¹⁶³ *Id.* § 6802(h). In a city with a population exceeding one hundred seventy-five thousand, the examination may cover “the pertinent provisions of the criminal procedure law and the pertinent rules and practices of the courts and district attorneys’ offices within the area of the applicant’s proposed operations.” *Id.* For additional requirements of licensees in such cities, see *id.* § 6803(a).

¹⁶⁴ *Id.* § 6802(e) (“Before the issuance of a license every applicant shall satisfy the superintendent as to his trustworthiness and competence . . .”).

¹⁶⁵ *Id.* § 6802(g) (“Every applicant . . . shall file . . . written evidence by those who know his character and reputation and by such other proof as the superintendent may require, including his fingerprints, that he is a person of good character and reputation and has never been convicted of any offense involving moral turpitude or of any crime.”).

¹⁶⁶ For insurance companies that have agents licensed in New York, see Bail Bonds Active Agent Listing, *supra* note 8.

¹⁶⁷ In order to become licensed, Vera’s bail bond agencies worked with Bail USA, Inc., then managing agents for American Bankers Insurance Company. E-mail from Susan Rai, Special Counsel, The Vera Inst. of Justice, to author (Oct. 22, 2009, 11:05 EST) (on file with author).

¹⁶⁸ The copyright page of Vera’s 1995 report on its bail bond supervision programs notes that the project received partial funding from both New York City and New York State. See VERA 1995, *supra* note 101.

¹⁶⁹ See *supra* discussion accompanying notes 75–84 (discussing the Manhattan Bail Project and creation of the CJA).

¹⁷⁰ Telephone Interview with Susan Rai, Special Counsel, The Vera Inst. of Justice (Oct. 22, 2009).

¹⁷¹ *Id.*

¹⁷² VERA 1995, *supra* note 101, at 28 (listing a fee of one and one half percent on each bond posted).

in comparison to the other expenses that such an arrangement could cost. Aside from the fees associated with the licensing process,¹⁷³ licensing would require compliance with the demands and expectations of the insurance company.¹⁷⁴ Vera's licensed projects were heavily staffed¹⁷⁵ and funded,¹⁷⁶ in part to meet those demands, and also to implement one of "the most intensive community supervision programs ever attempted."¹⁷⁷ As expensive as Vera's projects were, today they could be even more so. Effective 2001, New York amended article 7 of the general business law to regulate "bail enforcement agents,"¹⁷⁸ defined to include persons or entities "engage[ed] in the business of enforcing the terms and conditions of a person's release from custody . . . including locating, apprehending and returning any such person,"¹⁷⁹ which Vera's agencies certainly were.¹⁸⁰ In view of the

¹⁷³ Section 6802 of the Insurance Law provides for a yearly licensing fee of twenty-five dollars for each applicant and each "proposed sublicensee" of such applicant, N.Y. INS. LAW § 6802(f) (McKinney 2009), the administrative costs of the required written examination, *id.* § 6802(i), and the filing of a "qualifying bond" of five thousand dollars with the superintendent to insure against injury or loss resulting from misconduct of the bail bond business. *Id.* § 6802(j).

¹⁷⁴ For instance, Bail USA, Inc., agent of Seneca Insurance Company, Inc., provides on its website that in order for an agent application to be processed, contract collateral must first be filed with their office. *Licensing Regulations and Requirements*, BAIL USA, http://www.bailusa.net/learningCenter/sr_licensingRegulations.php (follow "Collateral Guidelines" hyperlink) (last visited Oct. 28, 2010). The form provides for minimum cash collateral of \$25,000 or \$50,000 property collateral, but notes that "[e]ach applicant is reviewed on an individual basis." *Id.* The fund would also have to comply with New York's reporting requirements. *See* N.Y. COMP. CODES R. & REGS. tit. 11, § 28.2 (2009).

¹⁷⁵ Projects were usually staffed by a "director, an administrative assistant, an intake coordinator, a jail screener, a support services coordinator, a transitional counselor, and four release monitors. Two enforcement coordinators oversaw community supervision in the three sites." VERA 1995, *supra* note 101, at 13.

¹⁷⁶ *See supra* note 119 and accompanying text (discussing the cost of Vera's program).

¹⁷⁷ VERA 1995, *supra* note 101, at 23.

¹⁷⁸ *See* 2000 N.Y. Sess. Laws Ch. 562 (A. 1432-B) (McKinney).

¹⁷⁹ N.Y. GEN. BUS. LAW § 71 (1-a) (McKinney 2004). *See also id.* § 71 (4).

¹⁸⁰ *See supra* text accompanying note 104 (describing importance of bail enforcement for Vera's projects). The new requirements include posting of a

various financial burdens that stem from the requirements of the insurance law, a bail fund is unlikely to have the financial means or the powers of persuasion to contract with an entity engaged in this for-profit industry. The important question from a policy standpoint is whether the state should require licensing of a nonprofit bail fund or whether the activities of such a fund should be subject only to the judicial oversight that would apply if the fund posted bail too infrequently to qualify as a “bail bond business” under New York’s law.

The Vera Institute of Justice saw licensing as essential to its bail bond agencies.¹⁸¹ In Vera’s view, the threat that project staff might exercise their power under the bond agreement to arrest participants and return them to the Department of Corrections “helped the projects control individuals in structured and logical ways.”¹⁸² Moreover, “the financial risk [of forfeiting the bonds] focused program staff on the need for the principal’s strict compliance.”¹⁸³ A bail fund operates with that same element of financial risk; if a defendant fails to appear in court, bail is forfeited, the fund is not replenished and the project cannot be sustained over time.¹⁸⁴ That threat provides an incentive for the fund to carefully select its clients. For Vera, the monitoring powers of the licensed bondsperson were essential because the agencies were purposefully choosing to work with higher risk defendants.¹⁸⁵ For commercial bonds businesses the monitoring powers are essential because the bondsperson’s profit motive leads him or her to select clients with higher bail, which often corresponds to higher

\$500,000 bond as a prerequisite to licensing. N.Y. GEN. BUS. LAW § 74 (1)(b) (McKinney 2010).

¹⁸¹ VERA 1995, *supra* note 101, at 24 (“Vera’s planners, project directors, and enforcement officers agree[d] that this power [was] essential to preventing additional crime and ensuring that defendants [did] not evade court proceedings.”).

¹⁸² *Id.* at 5 (observing additionally that participants “were not a naturally compliant population”).

¹⁸³ *Id.* at 24.

¹⁸⁴ *See supra* note 131 and accompanying text (discussing revolving nature of the Freedom Fund).

¹⁸⁵ *See supra* notes 116–18 and accompanying text (describing Vera’s selection process and the rationale behind it).

flight risk.¹⁸⁶ But bondspersons do not solely rely on their powers of arrest; rather, they employ a variety of ways to minimize the risk of flight.¹⁸⁷ Such practices include maintaining contact with clients by phone, mail, and personal visits, as well as requiring third parties (usually close to the defendant) to co-sign and put up collateral for the defendant's release.¹⁸⁸ Especially for less serious offenses, a missed court appearance is often simply a matter of forgetfulness.¹⁸⁹ Given the Freedom Fund's reported success rates,¹⁹⁰ the project suggests that if a bail fund is motivated to select lower-risk defendants, it can function successfully without holding the threat of arrest over participants' heads.¹⁹¹ The fact that

¹⁸⁶ See Thomas H. Cohen, *Commercial Surety Bail and the Problem of Missed Court Appearances and Pretrial Detention* 373 (3rd Annual Conference on Empirical Legal Studies Papers, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1130964## ("Higher bond amounts translate into more profits for surety agents, meaning that the profit potential, rather than flight risk, could be the primary driver behind who surety agents accept."). This is not to say that commercial bondspersons do not directly consider flight risk when making their determination. "The power of surety agents to use their absolute discretion in selecting which defendants to release should not be understated." *Id.* at 345–46. Queens bail bondsman, John Medina, described this assessment as determining whether a defendant "pre-qualified" for release. Interview with John Medina, *supra* note 1. Thomas H. Cohen, of the Bureau of Justice Statistics, engaged in preliminary research asking "whether monitoring practices or selection effects account for the efficacy of [commercial] surety bond." Cohen, *supra*, at 333. He posited that "if selection effects explain the lower missed court appearance rate, the implications are that the commercial bond industry does no better at preventing missed court appearances compared to other forms of pretrial release." *Id.* at 336. Using data from the U.S. Department of Justice Bureau of Justice Statistics' State Court Processing Statistics, *id.* at 351, the study's methodology involved comparing flight risk characteristics of felony defendants in counties where surety bond agents are heavily utilized with counties where they play little or no role. *Id.* at 336–37. Cohen determined that "SCPS data cannot be used to definitively establish whether surety agents are selectively choosing the best defendants or using various pretrial monitoring or retrieval techniques to ensure court appearances . . ." *Id.* at 381.

¹⁸⁷ Cohen, *supra* note 186, at 347–48.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 348; Interview with John Medina, *supra* note 1.

¹⁹⁰ See *supra* note 130 and accompanying text.

¹⁹¹ *Cf. supra* text accompanying note 104 (noting the significance of the

bail funds have been known to receive county funding¹⁹² indicates that at least some legislators also believe they can work successfully.

Of course, licensing is about more than having the power to surrender a defendant back to authorities. In *Miranda*, the Bronx court raised a number of concerns that went beyond licensing, some of which were distinct to the Bronx Freedom Fund.¹⁹³ The following portion of this Note assesses the court's concerns and determines that some of the aspects of the Freedom Fund that the court viewed as contrary to good policy are actually among the reasons why the Bronx Freedom Fund's model can be effective.

One of the court's concerns was the fact that the Freedom Fund was established and run with donated funds.¹⁹⁴ The project was initially funded by grant¹⁹⁵ and subsequently began accepting donations from the general public.¹⁹⁶ There are a number of advantages to a bail fund that operates off of donations. For one, this strategy helps to conserve space in jails without using taxpayer dollars, a point the bail bond industry often touts for itself.¹⁹⁷ Additionally, dependence on donors may serve to give such a bail fund a heightened sense of responsibility. If the project fails to operate well, funds would be depleted, donors would be scarce and reputations could suffer as a consequence. In contrast, when a bail fund receives legislative funding, that funding may be tied as closely to fiscal health as it is to the fund's performance.¹⁹⁸ And

power of arrest to Vera's projects).

¹⁹² See *supra* note 145 and accompanying text (noting that other New York bail funds have received public funds).

¹⁹³ See generally *People v. Miranda*, No. 012208C2009, 2009 WL 2170254 (N.Y. Sup. Ct. Bronx County June 22, 2009).

¹⁹⁴ *Id.* at *15.

¹⁹⁵ Steinberg & Towns, *supra* note 127, at 21.

¹⁹⁶ See BRONX FREEDOM FUND, <http://www.bronxfreedomfund.org> (last visited Sept. 15, 2010) (allowing visitors to donate by credit card); see also Katha Pollitt, *'Tis the Season to Be Generous*, THE NATION, Jan. 5, 2009, available at <http://www.thenation.com/article/tis-season-be-generous> (listing the Freedom Fund as one of ten suggestions for year-end donations).

¹⁹⁷ See *supra* text accompanying notes 42–43 (concerning the claim that commercial bonding saves taxpayer funds).

¹⁹⁸ See John Mariani, *Stanczyk Wants Mahoney to Restore Onondaga County Bail Expeditor*, THE POST-STANDARD (Feb. 24, 2009), <http://www>.

regardless of the fund's success rate, if legislators believe that the fund has become unpopular in the eyes of their constituents, the project could come to an abrupt halt.¹⁹⁹

In addition, the *Miranda* court was troubled that the initial grant money had since been mixed with donations from unknown individuals.²⁰⁰ The court reasoned that although charities generally need not have a screening mechanism to determine the source of donations, the fact that the money would be used to post bail put a “special responsibility” on the parties seeking donations.²⁰¹ The legal grounds for examining the source of money or property deposited as bail stems from section 520.30(1) of the New York State Criminal Procedure Law.²⁰² The *Miranda* court cited *People*

syracuse.com/news/index.ssf/2009/02/stanczyk_wants_mahoney_to_rest.html.

The [Onondaga County] Bail Expeditor Program was among more than two dozen contracts with human service providers that [County Executive Joanie] Mahoney canceled last month as part of her effort to close a \$10.7 million budget gap The county provided the lion's share of the program's budget, which included \$108,000 to pay two full-time and one part-time staff members and to maintain a \$15,000 revolving bail fund. From that pool, the program posted half of the the [sic] bail set for poor defendants accused—not convicted—of non-violent misdemeanors. The program got the money bail back if the defendant showed up for court.

Id.

¹⁹⁹ This is not to say that a bail fund receiving legislative funding would not be motivated to perform well for fear of losing those funds. Rather, a taxpayer-funded project might lose funding on political whim, regardless of its success rate.

²⁰⁰ *People v. Miranda*, No. 012208C2009, 2009 WL 2170254, at *7 n.8 (N.Y. Sup. Ct. Bronx County June 22, 2009).

²⁰¹ *Id.*

²⁰² N.Y. CRIM. PROC. LAW § 520.30 (1) (McKinney 2009).

The court may inquire into any matter stated or required to be stated in the justifying affidavits, and may also inquire into other matters appropriate to the determination, which include but are not limited to (a) [t]he background, character and reputation of any obligor, and, in the case of an insurance company bail bond, the qualifications of the surety-obligor and its executing agent; and (b) [t]he source of any money or property deposited by any obligor as security, and whether any such money or property constitutes the fruits of criminal or unlawful conduct; and (c) [t]he source of any money or property delivered or agreed to be delivered to any obligor as indemnification on

*v. Agnello*²⁰³ as support for its reasoning that “[p]ublic policy dictates that the source of all money intended to be used to post bail be ascertainable.”²⁰⁴ However, in interpreting section 520.30, both *People v. Agnello* and *People v. Esquivel*,²⁰⁵ the case whose rationale *Agnello* follows, concluded that when an obligor, such as a bonding company, is indemnified by a third party, it is the indemnitor who bears much of the risk of the defendant’s flight.²⁰⁶ Accordingly, the court must be allowed to consider the relationship between the defendant and the indemnitor and to determine the indemnitor’s motive for assuming the risk of forfeiture. If, for example, the indemnitor shares no special relationship with the defendant, but instead had been coerced into assuming this risk, the arrangement would hardly deter the defendant’s flight.²⁰⁷ The *Esquivel* court worried that accepting the bond simply because it had been posted by a licensed company would make it easier for defendants to bribe or coerce third parties to post collateral.²⁰⁸

the bond, and whether any such money or property constitutes the fruits of criminal or unlawful conduct; and (d) [t]he background, character and reputation of any person who has indemnified or agreed to indemnify an obligor upon the bond; and whether any such indemnitor, not being licensed by the superintendent of insurance in accordance with the insurance law, has within a period of one month prior to such indemnity transaction given indemnification or security for like purpose in more than two cases not arising out of the same transaction; and (e) [t]he source of any money posted as cash bail, and whether any such money constitutes the fruits of criminal or unlawful conduct; and (f) [t]he background, character and reputation of the person posting cash bail.

Id.

²⁰³ *People v. Agnello*, 705 N.Y.S.2d 525, 528 (Sup. Ct. Queens County 2000).

²⁰⁴ *Miranda*, 2009 WL 2170254, at *7 n.8.

²⁰⁵ *People v. Esquivel*, 601 N.Y.S.2d 541, 547 (Sup. Ct. N.Y. County 1993).

²⁰⁶ *Agnello*, 705 N.Y.S.2d at 528.

²⁰⁷ *See id.*

²⁰⁸ *Esquivel*, 601 N.Y.S.2d at 541. In *Esquivel*, the indemnitors had pledged their home as collateral for a defendant whom they barely knew. *Id.* at 542–43. For an argument that the defendant should not bear the burden of proof in bail sufficiency hearings, see generally John C. Longmire, *CPL § 520.30: New York Supreme Court Holds that Defendant Has the Burden of Proving that Collateral*

That concern—that a defendant could raise bail money by illegal activity or threaten a third party to post collateral while avoiding a bail source inquiry—²⁰⁹is sharply mitigated, if it exists at all, as long as the fund makes an independent assessment of each defendant when determining whether to post bail.²¹⁰ Defendants would have no means to ensure that they would in any way benefit from a donation that they had obtained through coercion or other illegal activities. This means that the identity of the fund's contributors is not material to whether a defendant will be more or less likely to flee. Rather, since a bail fund assumes the risk of forfeiture directly, the court need only look to the relationship between the fund and the defendant to make an informed decision as to whether to accept the bail. A bail fund that solicits anonymous donations does not pose the same concerns that were present in *Esquivel* and *Agnello*. The rationale in those cases does not support scrutinizing general donations that are not targeted toward any particular defendant. Instead, those two decisions stand more for the proposition that the sole fact of licensure cannot legitimize bail money; the judiciary must be free to scrutinize the relationship between the defendant and the person or entity assuming the financial risk when examining the sufficiency of the bail.

The more fundamental question that arises when bail money is provided by anonymous donors is whether the accused will feel motivated to appear in court when friends or family do not have to forfeit money or property because of his or her failure to appear. In other words, it is important to consider other incentives that may exist when someone close to the defendant is not putting money or property on the line. Vera's bail bond supervision projects confirmed that the increased possibility of receiving probation from a judge could provide a powerful incentive for defendants to comply with the conditions of release.²¹¹ Avoiding time served in

Posted to Indemnify a Bail Bond Obligor Is Not the Fruit of Criminal or Unlawful Activity, 68 ST. JOHN'S L. REV. 297 (1994).

²⁰⁹ *Esquivel*, 601 N.Y.S.2d at 547.

²¹⁰ See *People v. Miranda*, No. 012208C2009, 2009 WL 2170254, at *8 (N.Y. Sup. Ct. Bronx County June 22, 2009) (noting that the Bronx Freedom Fund made such an independent assessment).

²¹¹ VERA 1995, *supra* note 101, at 2.

jail was a shared goal for both the projects and the accused.²¹² A bail fund and its beneficiaries also share that goal.²¹³ In addition to the hope of a lighter sentence, the threat of a bail jumping charge,²¹⁴ or even a simple reminder of a court date, can motivate a defendant to appear in court.²¹⁵ But for more serious offenses or more troubled clients, a simple reminder may not suffice. For Vera's Bronx agency, which maintained a high degree of supervision over defendants, sustaining contact with participants was not enough to ensure compliance.²¹⁶ It is in this regard that the particulars of the Bronx Freedom Fund become important to whether its basic model can fare well in the Bronx, where Vera's agency, by its own accounts, failed.

Vera's project faced severe challenges in the Bronx.²¹⁷ Even at the intake stage, because of the vast and bureaucratic nature of the New York City system, the Bronx agency had difficulty identifying and making contact with defendants.²¹⁸ By contrast, the Bronx Freedom Fund's connection to one defense organization enabled it to identify suitable clients with much greater ease.²¹⁹ Vera's agency faced even greater challenges once it had bailed

²¹² *Id.*

²¹³ See *Read More*, BRONX FREEDOM FUND, *supra* note 69 (discussing aim of avoiding jail sentences).

²¹⁴ See N.Y. PENAL LAW §§ 215.55–57 (McKinney 2010).

²¹⁵ See *supra* text accompanying note 189 (stating that, particularly for less serious offenses, missed court dates are often the result of forgetfulness); see also *Miranda*, 2009 WL 2170254, at *9 (noting that the Freedom Fund's project director would remain in contact with clients, reminding them of scheduled appearances throughout the release period).

²¹⁶ See *supra* text accompanying notes 124–25 (explaining that Vera's Bronx agency had to be discontinued).

²¹⁷ See VERA 1995, *supra* note 101, at 19.

²¹⁸ *Id.*

²¹⁹ See *Miranda*, 2009 WL 2170254, at *8 (explaining that a Bronx Defenders attorney would contact the Freedom Fund's project director with information about a defendant to whom the attorney had been assigned as counsel and, based upon that information as well as information from the CJA report included in the client's court file, the director would determine whether the Freedom Fund should post bail in that case); see also *supra* notes 84–86 and accompanying text (detailing information included in a defendant's CJA report).

each defendant out of jail.²²⁰ The area surrounding Vera's project office was distressed and it was difficult to engage participants in programs or productive activities.²²¹ The agency was unable to find space for participants in local residential drug treatment centers and even outpatient services were insufficient.²²² Vera's report states that some felt that the agency "was detached from the borough's social service community and that inexperienced staff did not know where and how to access services other than outpatient drug treatment."²²³ These deficiencies highlight one of the more important differences between Vera's Bronx agency and the Bronx Freedom Fund. By working with only Bronx Defenders' clients, the Freedom Fund benefited from the roots that organization has put down in the Bronx community and the social service net that it already has in place.²²⁴ Additional support for this proposition lies in Vera's reasoning as to why its Nassau and Essex agencies performed well. The Nassau agency benefited from using one provider for drug treatment; this allowed the staff from Vera's agency and the drug treatment provider to become familiar with each other, and with each other's rules and procedure.²²⁵ Working with many different providers, however, led to instability.²²⁶ In Essex, in-house services provided an effective means of supervising and controlling project participants.²²⁷ Similarly, the strong support system that the Bronx Defenders provides to its clients²²⁸ is really what helped the bail fund project

²²⁰ See VERA 1995, *supra* note 101, at 20.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ See *Community Connections*, BRONX DEFENDERS, <http://www.bronxdefenders.org/our-work/community-connections> (last visited Sept. 15, 2010).

²²⁵ VERA 1995, *supra* note 101, at 25.

²²⁶ *Id.*

²²⁷ *Id.* at 22.

²²⁸ See *Holistic Defense*, BRONX DEFENDERS, <http://www.bronxdefenders.org/our-work/holistic-defense> (last visited Sept. 15, 2010) ("Located in the heart of the South Bronx, our office has been engaged in a constant dialogue with the community we serve As holistic defenders we are committed to providing our clients with seamless access to services to meet [their legal and social support] needs."); *Read More*, BRONX FREEDOM FUND, *supra* note 69 ("We connect our clients with services and support for the duration of their cases,

to get off the ground.²²⁹

The *Miranda* decision focuses on problems that the Bronx court found in the relationship between a bail fund and a defenders office.²³⁰ In distinguishing the Freedom Fund from other New York bail funds, the court noted that “[e]very indigent member of the communities served by [those] . . . organizations has an opportunity to apply for the bail money.”²³¹ Without discussing the point in detail, the court went on to state that the Freedom Fund “operates according to a [prohibited] ‘pre-arrest’ agreement—its own certificate of incorporation indicates that it has agreed to post bail exclusively for future clients of the Bronx Defenders.”²³² But given that it is the court system that assigns indigent defendants from the community to the Bronx Defenders, and that the Freedom Fund would then make an independent determination whether to post bail in a given case,²³³ it is difficult to imagine that regulators could have had this kind of arrangement in mind when they defined and prohibited “pre-arrest agreements” in order to “prevent the use of the bail bond business in the furtherance of organized crime.”²³⁴

The opinion does touch on an aspect of the relationship that raises a more fundamental question. Although the court did not

ensuring that they not only meet their court obligations but also get assistance to stabilize their lives in the long term.”).

²²⁹ The Freedom Fund’s connection with the Bronx Defenders is also what drew initial donors in the first place. Telephone Interview with Robin G. Steinberg, Executive Dir., The Bronx Defenders & Zoë Towns, Project Dir., The Bronx Freedom Fund (Sept. 26, 2009).

²³⁰ *People v. Miranda*, No. 012208C2009, 2009 WL 2170254, at *1, *10–19 (N.Y. Sup. Ct. Bronx County June 22, 2009).

²³¹ *Id.* at *10.

²³² *Id.* at *12. New York regulation provides that no licensed bail bond agent “shall enter into any agreement with any party, the purpose of which is to provide, on a continuing basis, for the furnishing of any bail bond, or other security in lieu of bond, on behalf of any person other than the aforesaid party who may be arrested on criminal charges.” N.Y. COMP. CODES R. & REGS. tit. 11, § 28.1(a) (2009). Automobile clubs or insurers are explicitly exempted. *Id.* § 28.1(c).

²³³ *See Miranda*, 2009 WL 2170254, at *8 (describing the process through which the Freedom Fund decides whether to post bail).

²³⁴ N.Y. COMP. CODES R. & REGS. tit. 11, §§ 28.0–28.1 (2009).

rule on the issue, citing a lack of clear legal precedent,²³⁵ the District Attorney's office suggested that the involvement of defense attorneys with the bail fund might present a possible ethical violation.²³⁶ An article cited in the *Miranda* opinion,²³⁷ *Take the Money or Run: The Risky Business of Acting as Both Your Client's Lawyer and Bail Bondsman*, discusses this issue in detail.²³⁸ After surveying statutes and ethics opinions across the nation, the authors determined that it is the "prevailing view" that an attorney should not act as bondsperson for his or her client.²³⁹ However, this view rests almost entirely on the financial relationship that exists when an attorney posts his or her own funds as bail for a client, and the risk that the attorney's personal financial interests will conflict with his or her ability to act in the client's interests.²⁴⁰ The Freedom Fund avoided that conflict because the Bronx Defenders attorneys would take on no personal financial risk when donated funds were used to post bail for their clients.²⁴¹ Moreover, Rule 1.8(e) of the Rules of Professional Conduct,²⁴² which provides that "a lawyer shall not advance or guarantee financial assistance to the client," goes on to carve out

²³⁵ *Miranda*, 2009 WL 2170254, at *19.

²³⁶ *Id.* at *16.

²³⁷ *Id.* at *18 n.25.

²³⁸ See generally Dayla S. Pepi & Donna D. Bloom, Article, *Take the Money or Run: The Risky Business of Acting as Both Your Client's Lawyer and Bail Bondsman*, 37 ST. MARY'S L.J. 933 (2006).

²³⁹ *Id.* at 948.

²⁴⁰ See *id.* at 976–77 (“[T]he practice of acting as bail bondsman for a criminal defendant client raises ethical concerns in four areas: (1) conflict with the client involving the lawyer’s own potentially adverse pecuniary interest; (2) protection of client confidentiality; (3) improper solicitation of clients; and (4) financial relationships between a lawyer and his client.”). New York’s legislature has made it clear that it disapproves of lawyers having a financial interest in bail, providing that “[a]ny member of the bar *having any financial interest by which he is to profit* from the giving of bail shall be guilty of a misdemeanor.” N.Y. INS. LAW § 6804(c) (McKinney 2009) (emphasis added). See also N.Y. St. Bar Ass’n Comm. on Prof’l Ethics, Op. 647 (1993), available at http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&CONTENTID=5427&TEMPLATE=/CM/ContentDisplay.cfm.

²⁴¹ See *Miranda*, 2009 WL 2170254, at *3 (indicating that funding is derived from charitable donations).

²⁴² *Id.* at *16.

an exception for “a lawyer representing an indigent or pro bono client [who] may pay court costs and expenses of litigation on behalf of the client.”²⁴³ American Bar Association Formal Ethics Opinion 04-432, addresses that rule directly, stating that posting a client’s bail *can* be considered among “court costs and expenses of litigation.”²⁴⁴

A more serious question is whether, when there is a connection between a defense organization and a bail fund, the client might see the two organizations as one and the same.²⁴⁵ Clients will understand that the fund risked money to bail them out of jail and might not want to forfeit those funds.²⁴⁶ In *Take the Money or Run*, the authors posed the problem this way:

If the client screens . . . information because of worries about what the attorney may choose to disclose to the court, she may censor relevant information Given the necessity for complete candor . . . any confusion about the attorney’s role influencing the client to withhold information is a serious risk²⁴⁷

But a client’s recognition that her defense organization played a role in helping her to attain pretrial release, at no cost to herself, is far more likely to foster a stronger attorney-client relationship. Additionally, clients who are not incarcerated pretrial can contact their attorneys with ease, do not have to meet with counsel in the confines of a detention center, and can appear in court after having

²⁴³ N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0 (2009) (Rule 1.8(e)).

²⁴⁴ ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 04-432 (2004). The opinion begins, “[a] lawyer may post, or arrange for the posting of, a bond to secure the release from custody of a client whom the lawyer represents . . . in those rare circumstances in which there is no significant risk that her representation of the client will be materially limited by her personal interest in recovering the amount advanced.” *Id.* “[T]he jurisdictions addressing this issue are split.” Pepi & Bloom, *supra* note 238, at 995.

²⁴⁵ See *Miranda*, 2009 WL 2170254, at *4 (showing concern over the Freedom Fund’s shared office space).

²⁴⁶ See *id.* at *9 (noting that the Freedom Fund’s project director would impress upon clients that if they failed to appear, the bail money could not be used for future clients).

²⁴⁷ Pepi & Bloom, *supra* note 238, at 984.

slept, bathed, and dressed outside of a detention facility.²⁴⁸ In reality, there is less reason to wonder whether a bail fund can fulfill its responsibilities to its clients than to ask whether the fund is capable of meeting its obligations to the court.

As the *Miranda* opinion notes, a person who bails an individual out of jail enters into a contract with the court.²⁴⁹ Upon posting cash bail, that person signs an undertaking that states in part: “I undertake that the defendant will appear in this action whenever required . . . and I acknowledge that the bail will be forfeited if the defendant does not comply with any requirement or order of process to appear in this action.”²⁵⁰ One of the concerns underlying most of the Bronx court’s discussion is the view that the Freedom Fund had not taken proper steps to fulfill that responsibility.²⁵¹ The court noted that the Freedom Fund’s board had authorized the project director to use her independent discretion to bail clients out of jail when accused of violent felonies,²⁵² and that the Freedom Fund’s method of determining whether or not to bail out a client was, as compared to the factors a court considers pursuant to section 510.30 of the Criminal Procedure Law, not a full “flight risk” assessment.²⁵³ In response to these concerns, one might argue

²⁴⁸ See BRONX FREEDOM FUND, <http://www.bronxfreedomfund.org> (last visited Sept. 15, 2010) (observing that the Freedom Fund enables clients to “fight their cases from a position of strength and freedom”).

²⁴⁹ *Miranda*, 2009 WL 2170254, at *11.

²⁵⁰ *Id.* at *2.

²⁵¹ See *id.* at *8–9, *10.

²⁵² *Id.* at *6. But see Thomas Adcock, *Pilot Program Provides Bail Money for Indigent*, N.Y. L.J., Dec. 7, 2007, at 24, col. 2 (describing the clients who would benefit as those who had been “arrested for non-violent offenses and whose Criminal Justice Agency pretrial evaluation shows little risk of flight”).

²⁵³ *Miranda*, 2009 WL 2170254, at *8 n.10. The original written criteria that the Freedom Fund used to determine whether to post bail were developed by the Freedom Fund’s founders and project director and attorneys from both inside and outside the Bronx Defenders. *Id.* at *4. The final criteria were ultimately approved by the Freedom Fund’s Board of Directors. *Id.* Those criteria included four factors: “the person must be a ‘client of the Bronx Defenders;’ the client’s ‘bail is \$1500 or below;’ the ‘top charge is misdemeanor or non-violent felony;’ and the ‘CJA score or adjusted/corrected CJA score [is] 3 or above.’” *Id.* (alteration in original). The Freedom Fund did not view a defendant’s criminal history as relevant to whether they would appear in court. *Id.* at *8 n.10.

that since the court set bail in the first place by conducting its own flight risk assessment, we should rely only on the surety's willingness to take on the financial risk for assurance that the defendant will appear.²⁵⁴ But that view has been rejected in other cases, which have held that a court acts within its discretion if it finds that a lack of relationship between a principal and surety is reason to disapprove cash bail.²⁵⁵ More importantly, in the absence of legislative funding and licensing, neither of which is ideal for a bail fund because of the drawbacks each presents,²⁵⁶ it is judicial oversight that can lend legitimacy to the bail fund's operations.²⁵⁷ If we accept that the judiciary should examine a bail fund's reasoning or motives in posting bail, what then is it that should guide the court's inquiry?

The judiciary does not expect commercial bail bond agents to conduct a full flight risk assessment.²⁵⁸ Rather, judges recognize that "[t]he surety is a business enterprise [whose] primary concern is to be indemnified if the bail is forfeited."²⁵⁹ Accordingly, judges adjust the monetary value of the bond to account for both the risk that a defendant will abscond and the financial resources available to the defendant.²⁶⁰ Whether or not a system of financial release is the most effective method, it is the basis upon which judges make the bail determination; therefore, if a bail fund does not require the defendant to incur the financial risk the judge believes he or she will incur, that bail fund may undermine the judicial decision. Judge Lasker, in the Southern District Court of New York, once

²⁵⁴ See *infra* text accompanying notes 258–59 (indicating that to a certain extent the judiciary will not examine the business decisions of a commercial surety).

²⁵⁵ *People v. Baker*, 729 N.Y.S.2d 580, 585 (Sup. Ct. N.Y. County 2001).

²⁵⁶ See *supra* text accompanying notes 170–80, 198–99 (discussing such drawbacks).

²⁵⁷ The fact that the legislature has captured within the definition of "bail bond business" any person or entity posting bail more than two times in one month, supports that this idea of "legitimacy" is important. See *supra* text accompanying notes 136–40.

²⁵⁸ See *People v. McIntyre*, 640 N.Y.S.2d 386, 390 (Sup. Ct. Kings County 1996).

²⁵⁹ *Id.*

²⁶⁰ See N.Y. CRIM. PROC. LAW § 510.30 (McKinney 2009).

noted this concern:

[T]he establishment of a bail fund might well undermine the bail decisions made by state court judges. When judges set bail, they are obligated to do so on the basis of the resources available to the defendant or his sureties. If judges are not aware of the existence of a bail fund, they may be setting bail based on inaccurate assumptions about the resources available to the defendant. If they are aware of such a fund, they are left uncertain as to whether their bail rulings will be effective.²⁶¹

Judges have been instructed to consider certain statutorily mandated factors, including the defendant's financial resources, in making their release decisions.²⁶² If judges—figures central to the pretrial process—²⁶³feel that their decisions are being undermined, one risk is that release and bail decisions may become more inconsistent, arbitrary, and inequitable.²⁶⁴ But as long as judges *are* fully informed of the existence and nature of any bail fund, including the criteria the fund employs in its bail determination, the judiciary is still positioned to fulfill its own responsibilities with regard to bail and the conditions of pretrial release. The bail fund, as surety, can be expected to provide the court with that information when requested or risk the court rejecting the bail. Judicial oversight can provide a more flexible and nuanced means of “legitimizing” an active bail fund than licensing or legislative funding would permit. That kind of oversight could allow more advocates the opportunity to craft solutions to what has been an enduring problem.

From the perspective of an advocate, adjusting internal decision making in order to appeal to more members of the judiciary is not without its disadvantages. Vera's bail bond agencies illustrate this point. The agencies were a collaborative

²⁶¹ Benjamin v. Sielaff, No. 75 Civ. 3073 (MEL), 1990 WL 212911, at *2 (S.D.N.Y. Dec. 14, 1990).

²⁶² CRIM. PROC. § 510.30.

²⁶³ See *Judicial Responsibility*, *supra* note 93, at 29.

²⁶⁴ See *supra* text accompanying note 93; see also *supra* notes 77–82 and accompanying text (explaining that one goal of bail reform was to enable judges to base their release decisions on objective criteria in order to reduce inequities).

effort, operating with direct involvement from the courts and the city and state.²⁶⁵ That involvement did pose some problems for Vera. For one, there was a focus on conserving jail space,²⁶⁶ which would likely be unimportant to an organization that was not receiving public funds. Given the evidence that lengthier periods of pretrial supervision led to more difficulties in controlling participants,²⁶⁷ that emphasis might have been misguided. Judicial oversight sometimes presented other difficulties for Vera. Because the projects were accountable to judges for the degree of supervision exercised, Vera's staff members were unable to use their discretion to ease pressure on a defendant without judicial approval, which in the Bronx was rarely given.²⁶⁸ That effect of judicial control is probably frustrating for advocates who see the general pattern of judicial decisions as flawed.²⁶⁹ But in order for the judiciary to be the body overseeing a bail fund's operations, the fund's internal decision making must be subject to judicial review. When an entity posting bail has some sort of legislative sanction, through either funding or licensing, the court is likely to show more deference in approving the bail. In contrast, where a fund has not received such sanction, the court may be concerned if the fund is not taking into consideration the factors that the legislature has deemed important to the bail determination. In order for the judiciary to have confidence in a bail fund, which necessarily exercises much less control over its clients than a program like Vera's, the criteria the fund uses to select defendants takes on more importance. Hence the Bronx court's concern that the Freedom

²⁶⁵ See VERA 1995, *supra* note 101, at 10, 18. When the Nassau Agency opened "[t]he project received enthusiastic support from the Chief Judge of New York State, the Nassau County Chief Administrative Judge, and the county sheriff. Long-standing charitable organizations rallied the cooperation of county support-service organizations." *Id.* at 18. Judges were given progress reports on defendants' performance. *Id.* at 10.

²⁶⁶ See *supra* note 117 and accompanying text (explaining Vera's rationale in choosing defendants who would likely be incarcerated for longer periods in order to conserve jail space).

²⁶⁷ See *supra* text accompanying note 115 (noting that drawn out periods of supervision strained participants' commitment to the program).

²⁶⁸ See VERA 1995, *supra* note 101, at 21 n.18.

²⁶⁹ See, e.g., *supra* note 87 and accompanying text (noting CJA's frustration that many judges did not utilize the release recommendation).

Fund was not performing a full flight risk assessment.²⁷⁰

This concern is perhaps increased where the bail fund is connected to a defense organization. The Bronx Defenders' solution to this foreseeable problem seems to have been to insulate the decision making process from the defense attorneys.²⁷¹ But considering that the defense attorneys took part in drafting the initial criteria for release,²⁷² one might expect that the Freedom Fund's goals and considerations largely mirror that of the defense organization, which does nothing to alleviate the court's concern that the Freedom Fund failed to conduct appropriate release assessments. A bail fund could directly address the court's complaint that the Freedom Fund seemed to be operating pursuant to "secret rules,"²⁷³ by, first, having a board lay down more concrete criteria, rather than authorizing a director to exercise his or her discretion in all cases, and, then, being open about those criteria. This is particularly fitting for a fund that accepts donations from the public.²⁷⁴ The tactic of the Washtenaw bail fund²⁷⁵ was to exclude staff and attorneys from board membership with the belief that it would allow the board to operate more objectively.²⁷⁶ After receiving relevant information from a staff person, a majority vote of the Washtenaw bail fund's board was required to post bail.²⁷⁷

Besides being more difficult to implement, laying out more concrete criteria or involving members of the community in the decision of whether to post bail could frustrate a bail fund's goals. It could delay the release process and it could make certain

²⁷⁰ See *supra* note 253 and accompanying text.

²⁷¹ See *supra* note 219 (describing how attorneys would submit a bail request to the Freedom Fund's director).

²⁷² *People v. Miranda*, No. 012208C2009, 2009 WL 2170254, at *4 (N.Y. Sup. Ct. Bronx County June 22, 2009).

²⁷³ *Id.* at *4 n.4 ("Public policy certainly requires . . . that corporations posting bail as a business do not do so pursuant to any secret rules or agreements.").

²⁷⁴ See *supra* note 196 (noting the Freedom Fund's practice of accepting public donations).

²⁷⁵ See *supra* note 51 (referring to the American Friends Service Committee's Washtenaw Community Bail Fund in Ann Arbor, Michigan).

²⁷⁶ MAUER, *supra* note 51, at 18.

²⁷⁷ *Id.*

defendants ineligible for the bail money if such criteria took into account one's criminal history or the charge severity. That harkens back to the problem inherent in the current system—that some defendants who have been charged with more serious offenses, can easily pay for their release while a defendant charged with misdemeanor assault may remain in jail pretrial, with less ability to mount a defense and more incentive to plead guilty even when innocent.²⁷⁸ However, increased board involvement in the actual bail determination, more definite guidelines, and more clarity as to what those guidelines are, would be achievable means through which a bail fund could operate with a higher degree of accountability, laying the foundation for more widespread support from judges.

CONCLUSION

Having successfully posted bail for approximately 130 defendants before the *Miranda* court rejected bail posted by the Bronx Freedom Fund,²⁷⁹ it is likely that a number of judges in the Bronx would disagree that a nonprofit bail fund is cause for any concern. But while there is bound to be disagreement over some or all of the points made by the court in *Miranda*, what should not be so contentious is that the judge raised these issues and took them seriously. As one pretrial researcher put it:

The bail decision, to release or detain a defendant pending trial and the setting of terms and conditions of bail, is a monumental task which carries enormous consequences not only for the pretrial defendant but also for the safety of the community, the integrity of the judicial process, and the utilization of our often overtaxed criminal justice resources. The bail decision is the responsibility of the Court.²⁸⁰

²⁷⁸ See *supra* notes 64–72 and accompanying text (describing the burden of financial release conditions on the indigent).

²⁷⁹ See *People v. Miranda*, No. 012208C2009, 2009 WL 2170254, at *8 (N.Y. Sup. Ct. Bronx County June 22, 2009).

²⁸⁰ MARIE VANNOSTRAND, *CRIME & JUSTICE INST. & NAT'L INST. OF CORR., LEGAL AND EVIDENCE-BASED PRACTICES: APPLICATIONS OF LEGAL PRINCIPLES, LAWS, AND RESEARCH TO THE FIELD OF PRETRIAL SERVICES 1* (2007).

Indigent defendants are not served by the money bail system.²⁸¹ Because such defendants also frequently lack strong community ties, bail is set and, without financial assistance or a more “appealing” plea bargain, many remain in jail pretrial.²⁸² The cost-effectiveness and feasibility of the Bronx Freedom Fund’s effort to address this problem is in large part attributable to its relationship with the Bronx Defenders.²⁸³ A relationship with a well-established defense organization enables a bail fund to give meaningful support to released clients without subjecting them to extreme levels of supervision that in some cases may be counterproductive.²⁸⁴ If advocates taking this approach hope to attract a broader base of support or to have their projects replicated elsewhere, some of the concerns raised in the *Miranda* opinion remain. While oversight can be accomplished to some degree through licensing or by putting public funds toward a bail fund, a privately run fund that is subject to judicial oversight has the benefit of potentially greater financial security and the advantage of more flexibility in making its bail determinations.²⁸⁵ Some flexibility is important if we hope to develop innovative ways of addressing pretrial injustice. However, in order to win support from the judiciary, a bail fund may benefit from laying out criteria to be used in their bail determination that takes into account the factors that the judiciary must consider by legislative mandate.

²⁸¹ See *supra* notes 22–30 and accompanying text (describing how the indigent are left out of commercial bail practices).

²⁸² See *supra* notes 30–31 and accompanying text.

²⁸³ See *supra* Part III (describing relationship between the Freedom Fund and the Bronx Defenders).

²⁸⁴ Compare *supra* notes 101, 105, 110, 114, 268 and accompanying text (describing Vera’s strict model), with *supra* notes 215, 228 and accompanying text (noting the Freedom Fund’s more flexible approach).

²⁸⁵ Cf. *supra* notes 117, 198–99, 266 and accompanying text (describing the drawbacks to public funding, particularly the emphasis on conserving jail space).