Bail Nullification

by Jocelyn Simonson, Assistant Professor, Brooklyn Law School

[draft excerpt of article, forthcoming in the Michigan Law Review in March 2017]

Abstract

The longstanding scholarly debate over the ability of community members to engage in nullification has been confined to the study of jury nullification—when jurors acquit someone despite knowledge of their legal guilt. This Article explores the possibility of community nullification beyond the jury by analyzing the growing and unstudied phenomenon of community bail funds, which post bail for strangers based on broader beliefs regarding the overuse of pretrial detention. When a community bail fund posts bail, it can serve the function of nullifying a judge's determination that a certain amount of the defendant's personal or family money was necessary to ensure public safety and prevent flight. This growing practice—what this Article calls "bail nullification"—is powerful because it exposes publicly what many within the system already know to be true: that although bail is ostensibly a regulatory pretrial procedure, for indigent defendants it often serves the function that a real trial might, producing guilty pleas and longer sentences when an individual cannot afford to pay their bail. By examining the ways in which community bail funds serve the functions that a nullifying jury might—allowing popular participation in an individual case to facilitate larger resistance to the policies and practices of state actors—this Article argues that community bail funds have the potential to change how local criminal justice systems operate on the ground, shifting and shaping political and constitutional understandings of the institution of money bail. Community bail funds give a voice to populations who rarely have a say in how criminal justice is administered, especially poor people of color. And the study of bail funds helps point toward other ways in which bottom-up public participation can help create a criminal justice system that is truly responsive to the communities that it is ultimately supposed to serve.

Introduction

Scholars have long studied the power of community actors to nullify official decisions by state actors in the criminal justice system.[1] This scholarship analyzes "nullification" as a process involving jurors: when citizens on a jury acquit someone despite their legal guilt, the jurors make a potent statement about a particular defendant or law, in the process transferring power from legislatures, judges, and prosecutors to a small group of citizens.[2] This focus on the jury as a site of nullification is understandable —jury nullification has been a prominent feature of American criminal justice since the country's founding, and the jury plays a singular role as the ultimate moment of community input into a criminal case.[3] But the power of the jury is waning. In our post-trial world, fewer than five percent of criminal cases end in a trial of any kind,[4] and the public at large has little input into the workings of everyday criminal adjudications.[5] If something akin to nullification could take place outside of the jury room, it would open up room for community input into the reality of criminal justice today: in the words of the Supreme Court, "a system of pleas, not a system of trials."[6]

In this Article, I argue that a form of community nullification can and does occur in the interstices of pretrial procedures and criminal case outcomes, in the form of community bail funds. I examine this growing phenomenon whereby community groups in jurisdictions across the United States have in recent years increasingly begun to use bail funds to post bail on behalf

---

[1] See generally Teresa L. Conaway et al., Jury Nullification: A Selective, Annotated Bibliography, 39 Val. U. L. Rev. 393, 394–424 (2004) (surveying 150 years of the scholarly debate around jury nullification).

[2] See Jeffrey Abramson, Two Ideals of Jury Deliberation, 1998 U. Chi. Legal F. 125, 145–51 (describing the controversial power of jury nullification); Darryl K. Brown, Jury Nullification Within the Rule of Law, 81 Minn. L. Rev. 1149, 1154 (1997) (describing ways in which jury nullification can be in line with, or subvert, the rule of law); Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 Yale L.J. 677, 681–88 (1995) (describing the power of racially based jury nullification in response to larger racial injustices in the criminal justice system); see also infra Section I.A.

[3] See Jenny E. Carroll, Nullification as Law, 102 Geo. L.J. 579, 584–609 (2014) (describing the history of jury nullification).

[4] More than ninety-five percent of criminal cases end in pleas. See Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics Online, tbl. 5.46.2004 http://www.albany.edu/sourcebook/pdf/t5242009.pdf [https://perma.cc/L53C-4SSD] (95 percent of state felony convictions in 2004 resulted in pleas); id. at tbl. 5.24.2009 (96.4 percent of federal criminal cases that did not end in dismissal ended with a guilty plea).

[5] See Stephanos Bibas, Transparency and Participation in Criminal Procedure, 81 N.Y.U. L. Rev. 911, 923–24 (2006); Jocelyn Simonson, The Criminal Court Audience in a Post-Trial World, 127 Harv. L. Rev. 2173, 2179–81 (2014) [hereinafter Criminal Court Audience] (describing the lack of community participation in everyday courtroom adjudication in the "post-trial world").

[6] Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) ("[T]he reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials.").

of strangers, using a revolving pool of money. These funds include new charities set up in partnership with public defender offices in Massachusetts,[7] the Bronx,[8] Brooklyn,[9] and Nashville[10] as well as identity-based bail funds that range from a bail fund for transgender sex workers of color in Queens, New York[11] to a bail fund supporting communities of color targeted by policing in Chicago,[12] and bail funds formed by activists within the Black Lives Matter movement,[13] who have used crowdsourced funding to post bail for hundreds of protesters and allies in Ferguson,[14] Baltimore,[15] Cleveland,[16] Oakland,[17] and Baton Rouge.[18] Each time a community bail fund pays bail for a stranger, the people in control of the fund reject a judge's determination that a certain amount of the defendant's personal money was necessary for the

---

[7] Alysia Santo, Bail Reformers Aren't Waiting for Bail Reform, Marshall Project (Aug. 23, 2016 10:00 PM), https:/www.themarshallproject.org/2016/08/23/bail-reformers-aren-t-waiting-for-bail-reform [https:/perma.cc/CA44-F4CY].

[8] Bronx Freedom Fund, One Year Report (2014), http://static1.squarespace.com/static/54e106e1e4b05fac69f108cf/t/54ebdd14e4b0f761f48d08c4/1424743700810/Bronx+Freedom+Fund+One+Year+Report.pdf [https://perma.cc/P4UZ-X4CD].

[9] Matt Sledge, Community Bail Fund for Poor Defendants to Launch in Brooklyn, Huffington Post (Mar. 17, 2015 4:26 PM (updated Mar. 23, 2015)) http://www.huffingtonpost.com/2015/03/17/brooklyn-community-bail-fund_n_6886836.html [https://perma.cc/7JB2-HZGB] (describing launch of Brooklyn Community Bail Fund).

[10] See Toby Sells, Just City's Bail Program Worked in Nashville, Can't Get Consensus in Memphis, Mem. Flyer (Jul. 14, 2016, 4:07 PM), http://www.memphisflyer.com/NewsBlog/archives/2016/07/14/just-citys-bail-program-worked-in-nashville-cant-get-consensus-in-memphis [http://perma.cc/52RH-ASGT] (describing Just City's Nashville Bail Fund).

[11] Zaira Cortés, Fund Seeks to Address Police Profiling of Transgender Women, Voices of N.Y. (May 22, 2012), http://voicesofny.org/2012/05/fund-seeks-to-address-police-profiling-of-transgender-women/ [https://perma.cc/M4HB-7NMB] (translating Zaira Cortés, Crean Fonde De Fianzas Para Transgéneros, El Diario (May 16, 2012), http:/www.eldiarony.com/2012/05/16/crean-fondo-de-fianzas-para-transgeneros/ [https://perma.cc/BVL4-764F]) (describing the Lorena Borjas Community Fund).

[12] Chi. Comm. Bond Fund, https://www.chicagobond.org/ [https://perma.cc/S5CJ-PHHU] (last visited Oct. 7, 2016) ("CCBF supports individuals whose communities cannot afford to pay the bonds themselves and who have been impacted by structural violence.").

[13] See Amna A. Akbar, Law's Exposure: The Movement and the Legal Academy, 65 J. Legal Educ. 352, 356–60 (2015) (describing the rise of Movement for Black Lives, also known as the Black Lives Matter movement).

[14] See, e.g., Molly Gott, Ferguson Jail Support Guidelines and Legal Collective Info, Missourians Organizing for Reform & Empowerment (July 13, 2015, 11:57 AM), http://www.organizemo.org/ferguson_jail_support_guidelines_and_legal_collective_info_updated_july_12_2015 [https://perma.cc/C3KL-2GFE] (describing the bond fund for protesters in Ferguson as part of the Ferguson Legal Collective).

[15] See, e.g., Valerie Richardson, GoFundMe Drops Campaign for Baltimore Rioters After Conservative Complaints, Wash. Times (May 3, 2015), http://www.washingtontimes.com/news/2015/may/3/gofundme-drops-campaign-for-baltimore-cops-keeps-e/ [https://perma.cc/EHQ2-42K4] (describing Baltimore Protesters Bail Bond Fund).

[16] Rachelle Smith Erste, Bail Fund Relief for Cleveland Activists, FundRazr, https://fundrazr.com/campaigns/cwIN3 [https://perma.cc/3MFK-QH53] (last visited Oct. 7, 2016).

[17] See, e.g., Bay Area Anti-Repression Committee Bail Fund, Rally.org, https://rally.org/arcbailfund [https://perma.cc/3YKK-EKRS] (last visited Oct. 7, 2016).

[18] See, e.g., Lilly Workneh, Hundreds Donate to Baton Rouge Fund to Help Bail Out Protesters, Huffington Post (July 10, 2016, 2:44 PM), http://www.huffingtonpost.com/entry/baton-rouge-fund-bail-protesters_us_57827424e4b0c590f7e9cce7 [https://perma.cc/2NLZ-T4E8].

defendant's release.[19] This can, at times, serve a function analogous to jury nullification: what this article calls "bail nullification."[20]

The analogy between community bail funds and nullifying juries is necessarily an imperfect one. Jury nullification is a longstanding communal power, protected by the Constitution, with undeniable results on case outcomes. The communal decision that bail funds make, in contrast, cannot be as neatly classified as a choice between conviction and acquittal, nor does the process enjoy constitutional protection. Moreover, community bail funds vary enormously in how they function—some are run by mobilized grassroots groups intent on abolishing the criminal justice system as we know it, while others operate as more of a private, pretrial-services agency, making sure that their neighbors return to court on time.[21] In this article, however, I engage in a sustained argument that community bail funds can and often do serve as a form of community nullification. This analogy facilitates an exploration of the power of a practice that is otherwise easy to dismiss as a mere extension of the ability of families, friends, and bail bondsmen to post bail in individual cases. By examining the ways in which community bail funds serve the functions that a nullifying jury might—allowing popular participation in an individual case to facilitate larger resistance to the policies and practices of state actors—I argue that community bail funds have the potential to contribute to legal and political change from the ground up.

Community bail funds inject community input into a critical moment in the public adjudication of a criminal case. For most indigent defendants, bail is the ballgame: if a judge sets bail in an amount that they can afford, then they are able to fight their case from a position of

[19] When a judge or magistrate sets money bail in a criminal case, they are making a finding that a specific amount of a defendant's personal money is necessary in order to ensure that the defendant returns to court and does not commit crimes pending trial. See, e.g., Kan. Stat. Ann. § 22-2802(1) (2007) ("Any person charged with a crime shall . . . be ordered released pending preliminary examination or trial upon the execution of an appearance bond in an amount specified by the magistrate and sufficient to assure the appearance of such person before the magistrate when ordered and to assure the public safety."). Although commercial third parties—bail bondsmen—often post the actual bail after receiving a set fee or percentage of the bond amount from a defendant, the concept remains the same: that the commercial entity will use the money from the defendant or her or her family to ensure that the defendant returns to court. See What is Bail?, Prof'l Bail Agents of U.S., https://pbus.site-ym.com/?1 [https://perma.cc/849U-JHAR] (last visited Oct. 7, 2016) ("A bail agent is paid a premium or fee to insure that a criminal defendant, released into the custody of the bail agent, fulfills the obligation to appear for subsequent hearings and for trial, as ordered by the court.").

[20] Thank you to Devon Carbado for initially suggesting this term to me.

[21] See infra Section I.**Error! Reference source not found.**.

freedom, without losing jobs, housing, or custody of their children.[22] On the other hand, if bail is set in an amount higher than a defendant can pay, that defendant is incentivized to plead guilty early in the process, without the benefit of extended discussions with counsel, case investigation, or discovery from the prosecution.[23] Studies have shown time and time again that pretrial detention increases the chances of a conviction, extends the probable length of a sentence, and decreases the chance that the charges will be dismissed altogether.[24] Moreover, as the public learned in the summer of 2015 with the deaths of Kalief Browder in New York City and Sandra Bland in Texas—both of whom had been in jail because they could not pay bail—jail is often a violent and damaging place.[25] When community bail funds post bail, they are not only facilitating the liberty of a defendant, they may also be changing the eventual outcome of that criminal case.

Over time, as community bail funds post bail for multiple defendants, these individual acts can add up to a larger statement about the fairness of money bail. Literal action—the posting of bail—itself becomes a form of on-the-ground resistance to the workings of the criminal justice system. The result is a powerful form of popular input into criminal justice from outsiders who rarely have a say in how their local justice systems are administered. Moreover, because they

---

[22] See generally Ram Subramanian et al., Vera Inst. Justice, Incarceration's Front Door: The Misuse of Jails in America 12–13 (2015), http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf [https://perma.cc/5PH3-LHXK] ("The[] consequences [of pretrial detention]—in lost wages, worsening physical and mental health, possible loss of custody of children, a job, or a place to live—harm those incarcerated and, by extension, their families and communities.").

[23] See generally Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 Harv. L. Rev. 2463, 2467 (2004) (describing the profound impact of the bail/pretrial decision on plea bargaining); Samuel R. Wiseman, Pretrial Detention and the Right to Be Monitored, 123 Yale L.J. 1344, 1354–56 (2014) (describing "plea-inducing" effects of pretrial detention); Human Rights Watch, The Price of Freedom 2–3 (2010), http://www.pretrial.org/download/The%20Price%20of%20Freedom%20-%20Human%20Rights%20Watch%202010.pdf [https://perma.cc/LA6B-9LE4] ("Most persons accused of low level offenses when faced with a bail amount they cannot make will accept a guilty plea; if they do not plea at arraignment, they will do so after having been in detention a week or two.").

[24] For recent reports summarizing studies that demonstrate these correlations, see Justice Policy Inst., Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail 24–26 (2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf [https://perma.cc/4TUF-6FFN]; Subramanian et al., supra note 22, at 14; Paul S. Heaton et al., The Downstream Consequences of Misdemeanor Pretrial Detention, 69 Stan. L. Rev. (forthcoming 2017) (manuscript at 13–22), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2809840 [https://perma.cc/A4VW-42T2]. See also Shima Baradaran & Frank L. McIntyre, Predicting Violence, 90 Tex. L. Rev. 497, 555 (2012) (aggregating studies over time); sources cited infra note 52 (collecting more recent studies).

[25] See Jennifer Gonnerman, Kalief Browder 1993–2015, New Yorker (June 7, 2015), http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015 [https://perma.cc/QZ8E-CQTC]; Leon Neyfakh, Why Was Sandra Bland Still in Jail?, Slate (July 23, 2015, 8:17 PM), http://www.slate.com/articles/news_and_politics/crime/2015/07/sandra_bland_is_the_bail_system_that_kept_her_in_prison_unconstitutional.html [https://perma.cc/WJQ4-CRNK].

operate publicly, community bail funds are able to engage with political and constitutional principles in ways that juries cannot.

When they engage in "bail nullification," community bail funds have the potential to shape and shift legal meaning in at least three important ways. First, community bail funds contest the meaning of "community" in the setting of bail. The prominent conception of a judge's bail decision is of a balancing game between a defendant and the community: a judge must weigh an individual defendant's interest in liberty and presumed innocence against the community's interest in preserving safety and making sure the defendant returns to court.[26] But when a "community" group posts bail, it calls into question the widespread assumption that the community and the defendant sit on opposite sides of a scale of justice. Second, community bail funds shift the conversation about the constitutional limits on money bail. In particular, community bail funds undermine the bedrock assumptions of a constitutional jurisprudence that has traditionally held that money bail systems do not violate the Excessive Bail[27] or the Due Process Clauses,[28] and has only just begun to consider the ramifications of modern money bail for Equal Protection.[29] And third, bail nullification has a demonstrable effect on political and legislative change.[30] Community bail funds provide to the public real-life examples of indigent

[26] See, e.g., United States v. Salerno, 481 U.S. 739, 750–52 (1987) (describing community safety and defendant's liberty interest as two sides of a scale).

[27] See Stack v. Boyle, 342 U.S. 1, 4–5 (1951) ("Bail set at a figure higher than an amount reasonably calculated to fulfill [its] purpose is 'excessive' under the Eighth Amendment." (citing United States v. Motlow, 10 F.2d 657, 659 (7th Cir. 1926))).

[28] See Salerno, 481 U.S. at 746–51 (articulating substantive due process standards for bail statutes).

[29] See, e.g., Pierce v. City of Velda City, No. 4:15-CV-570-HEA, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015) ("No person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond."). In recent years, a number of scholars have questioned aspects of the constitutionality of money bail. See, e.g., Laura I. Appleman, Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment, 69 Wash. & Lee L. Rev. 1297, 1321–23 (2012) (arguing that pretrial detention constitutes punishment); Shima Baradaran, Restoring the Presumption of Innocence, 72 Ohio St. L.J. 723, 746–54 (2011) (arguing that many current bail practices violate the Due Process Clause's presumption of innocence); Wiseman, supra note 23, at 1383–92 (arguing that the Eighth Amendment's excessive bail clause provides a right for a defendant to be electronically monitored rather than detained). Moreover, there are pockets of legal challenges that are succeeding. See, e.g., Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 780–91 (9th Cir. 2014) (en banc) (finding unconstitutional an Arizona bail law that automatically detained undocumented immigrants charged with violent offenses), cert denied, 135 S. Ct. 2046 (2015); Pierce, 2015 WL 10013006, at *1 (ordering a settlement agreement based on acknowledgement that city's bail scheme for low-level offenses violates the Equal Protection Clause). As I explain in Section III.B, infra, community bail funds are uniquely situated to contribute to these constitutional changes.

[30] In New York City, for example, local and state politicians have recently invoked the results of the Bronx Freedom Fund, a leading community bail fund, in calling for larger efforts at bail reform, and even in setting aside money for a bail fund funded and administered by the city. See David Howard King, Bronx Program Serves as Inspiration for Mark-Viverito's City-Wide Bail Fund Proposal, Gotham Gazette (Feb. 20, 2015),

defendants returning to court without having undermined public safety, despite an expert judicial determination that personal money was needed to prevent flight and mayhem.[31] The aggregate effect is to send a message to judges and to policymakers that something is awry in the current legal scheme governing bail.

Although prominent critics have questioned America's bail system for decades,[32] and even centuries,[33] by all accounts we are currently in the midst of a new wave of bail reform aimed at reducing the criminal justice system's reliance on money bail and pretrial detention.[34] Legal scholars have taken an active part in this new wave of change, suggesting ways in which bail can be smarter and more just—through prediction tools,[35] through judicial training,[36] through legislative change,[37] through the input of juries,[38] and through better oversight of bail-setting decisions.[39] The study of community bail funds has a unique role to play in this landscape, separate and apart from efforts to reform laws, policies, and procedures. The importance of community bail funds is tightly linked to their participatory quality, one which allows individual acts of posting bail, often in low-level amounts, to add up to a communal expression of frustration with legal and constitutional standards. This bottom-up participation pushes directly against the gaps in participation and power that characterize our contemporary criminal justice system, in which those most affected by the criminal justice system have the

---

http://www.gothamgazette.com/index.php/government/5588-bronx-program-serves-as-inspiration-for-mark-viveritos-city-wide-bail-fund-proposal [https://perma.cc/5YVM-E2BP].

[31] See id.

[32] See generally Timothy R. Schnacke, Nat'l Inst. of Corr., Fundamentals of Bail 7–18 (2014), http://static.nicic.gov/UserShared/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf [https://perma.cc/J2RW-SK7M] (collecting studies critical of money bail in American over the last century).

[33] See, e.g., 1 Alexis de Tocqueville, Democracy in America 45 (Phillips Bradley ed., Alfred A. Knopf 1945) (1835) ("[Bail] is hostile to the poor and favorable only to the rich. The poor man has not always a security to produce . . . .").

[34] Schnacke, supra note 32, at 7–9 (stating that America is "firmly in the middle of a third [generation]" of bail reform); Lorelei Laird, Court Systems Rethink the Use of Financial Bail, Which Some Say Penalizes the Poor, A.B.A. J. (Apr. 1, 2016), http://www.abajournal.com/magazine/article/courts_are_rethinking_bail [https://perma.cc/K4SJ-DQBA] (describing recent wave of reform efforts).

[35] See, e.g., Baradaran & McIntyre, supra note 24, at 557–60; Lauryn P. Gouldin, Disentangling Flight Risk from Dangerousness, BYU L. Rev. (forthcoming 2016) (manuscript at 28–33); Cynthia E. Jones, "Give Us Free": Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. Legis. & Pub. Pol'y 919, 956–57 (2013); cf. Sandra G. Mayson, Dangerous Defendants (Aug. 15, 2016) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2826600 [https://perma.cc/D6ZB-K48T] (suggesting policy reforms for pretrial risk assessment tools).

[36] See Jones, supra note 35, at 953–55.

[37] See, e.g, Gouldin, supra note 35 (manuscript at 34–42); Samuel R. Wiseman, Fixing Bail, 84 Geo. Wash. L. Rev. 417, 454–64 (2016).

[38] See Appleman, supra note 29, at 1302–06.

[39] See Jones, supra note 35, at 958–60.

least input into its everyday policies and practices.[40] The study of community bail funds thus shines a light on efforts by traditionally disempowered populations to resist, and ultimately change, the contours of local criminal justice practices.[41]

This Article proceeds in four parts. Part I introduces a theory of community nullification in the post-trial world. I describe the rise of community bail funds and explain how they can at times function as a potent form of nullification outside of the jury room. Parts II & III then explore the power of community bail funds to shift and shape legal meaning. Part II describes the rhetorical power of bail funds to disrupt and recast the place of community in pretrial procedures. In Part III, I connect this expressive function of community bail funds to the ability of bail funds to serve as both a form of constitutional engagement and a force for political change. Then, in Part IV, I revisit the concept of bail nullification. I take on two possible objections to the practice of community bail funds when they function as bail nullification—first as a subversion of the rule of law, and second as legitimizing force in an unjust system. I then argue that the nullifying power of community bail funds has emerged as a powerful and even necessary method of popular participation in a criminal justice system marred by profound democratic deficits, especially for the poor people of color most likely to fall under its ambit.[42]

I. Community Nullification in A Post-Trial World

Jury nullification in a criminal case occurs when jurors choose not to follow the law as it is given to them by the judge.[43] When juries engage in nullification by acquitting a defendant despite legal guilt, they do something powerful and controversial, exercising power over government actors and potentially pushing back against larger injustices in the system. There is no a priori reason to think that this ability of community members to nullify official decisionmaking must be confined to the jury box. However, the longstanding scholarly debate

[40] See generally Amy E. Lerman & Vesla M. Weaver, Arresting Citizenship: The Democratic Consequences of American Crime Control (2014) (describing democratic exclusion of groups most likely to be arrested and incarcerated); Stephanos Bibas, The Machinery of Criminal Justice (2012) (describing the participatory gap between insiders and outsiders in the criminal justice system).

[41] This is the third in a series of articles that analyzes grassroots forms of public participation in local criminal justice institutions. See Jocelyn Simonson, The Criminal Court Audience in a Post-trial World, 127 Harv. L. Rev. 2173 (2014); Jocelyn Simonson, Copwatching, 104 Calif. L. Rev. 391 (2016).

[42] See generally Lerman & Weaver, supra note 40.

[43] See Nancy S. Marder, The Myth of the Nullifying Jury, 93 Nw. U. L. Rev. 877, 881–86 (1999) (defining jury nullification).

over community nullification has been confined to the study of jury nullification, and especially nullification by petit juries adjudicating guilt and innocence.[44] This limited conception of community nullification underestimates the power of communities to intervene in criminal adjudication.[45] This Part puts forth a conception of community nullification[46] beyond the jury, one in which communities can contribute to—and reject—institutional decisions at other moments in a criminal case.

Locating moments of community participation outside of the jury deliberation room is important because in the world of plea bargaining, it is actually a series of discretionary institutional choices—to stop, to arrest, to charge, to appoint counsel, to set bail, to offer a plea deal—that taken together have a profound, if not complete, influence on the outcome of a criminal case.[47] To locate moments of community resistance or nullification at these institutional

---

[44] See generally Conaway et al., supra note 1, at 394–424 (describing the scholarly debate around jury nullification). But see Josh Bowers, Grand-Jury Nullification: Black Power in the Charging Decision, in Criminal Law Conversations 578, 578–80 (Paul H. Robinson et al. eds., 2009) (arguing that grand juries can and do engage in jury nullification). Nullification can potentially occur in the civil context as well. See Lars Noah, Civil Jury Nullification, 86 Iowa L. Rev. 1601 (2001); Kaimipono David Wenger & David A. Hoffman, Nullificatory Juries, 2003 Wis. L. Rev. 1115.

[45] Some scholars have proposed that we bring juries into other aspects of the criminal process—for example, sentencing hearings, suppression hearings, and even bail hearings. See, e.g., Appleman, supra note 29, at 1363–66 (2012) (bail juries); Laura I. Appleman, The Plea Jury, 85 Ind. L.J. 731, 750–59 (2010) (plea juries); Rachel E. Barkow, Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing, 152 U. Pa. L. Rev. 33, 102–16 (2003) (calling for juries to make some sentencing determinations); Bibas, supra note 5, at 959–60 (plea juries); Josh Bowers, The Normative Case for Normative Grand Juries, 47 Wake Forest L. Rev. 319, 343–49 (2012) (grand juries); Roger A. Fairfax, Jr., Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty, 19 Wm. & Mary Bill Rts. J. 339, 354–58 (2010) (grand juries that review pleas and sentencings); Jenia Iontcheva, Jury Sentencing as Democratic Practice, 89 Va. L. Rev. 311, 365–69 (2003) (sentencing juries); Adriaan Lanni, The Future of Community Justice, 40 Harv. C.R.-C.L. L. Rev. 359, 394–99 (2005) (grand and petit juries that review charging, sentencing, and policymaking decisions); Jason Mazzone, The Waiver Paradox, 97 Nw. U. L. Rev. 801, 872–78 (2003) ("plea panels"); Meghan J. Ryan, Juries and the Criminal Constitution, 65 Ala. L. Rev. 851, 892–98 (2014) (proposing that juries make findings regarding constitutional questions in criminal cases). Presumably, these hypothetical juries would also be able to use nullification in making their decisions. But scholars have not asked whether community nullification may already be occurring outside of the jury box.

[46] By using the term "community nullification," I mean to exclude from the concept of nullification the actions of government actors who may act beyond the letter of the law in their decisionmaking. For example, scholars have used the word "nullification" to explain ways in which judges and prosecutors, respectively, are able to steer guilty parties away from prosecutions or high sentences. See, e.g., Roger A. Fairfax, Jr., Prosecutorial Nullification, 52 B.C. L. Rev. 1243, 1243 (2011); Michael J. Saks, Judicial Nullification, 68 Ind. L.J. 1281 (1993).

[47] See generally Bibas, supra note 23, at 2467 (describing the "many structural impediments that distort bargaining", including quality of defense counsel, agency costs, and the bail/pretrial decision); Josh Bowers, Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute, 110 Colum. L. Rev. 1655, 1692–1703 (2010) (describing how discretionary decisions by police officers and prosecutors lead to the processing of misdemeanor arrests in a way that diverges from determinations of guilt and innocence); Issa Kohler-Hausmann, Managerial Justice and Mass Misdemeanors, 66 Stan. L. Rev. 611, 664 (2014) (describing how "the structure of incentives"—including bail—"and not necessarily the legal or factual merits of the case, often drives disposition"); Alexandra Natapoff, Misdemeanors, 85 S. Cal. L. Rev. 1313, 1346–47 (2012) (describing how, in low-level cases, "[t]he

decision points, rather than at the ultimate point of a verdict, opens up room for community input into criminal adjudication in the post-trial world.

The bail-setting determination is one such institutional decision point: shortly after an arrest, a judge or magistrate determines whether a defendant will be released pending resolution of her case and whether that release will be dependent on conditions that most often include the paying of money bail.[48] When a judge or magistrate sets bail at an amount outside of the financial reach of a criminal defendant— a common occurrence—that defendant remains incarcerated until her case is resolved. Across the United States, the use of money bail as a pretrial release condition increased by 32 percent between 1992 and 2006, and continues to rise.[49] Today, the majority of criminal defendants are required to post financial bail for their pretrial release.[50] At any one time, more than 450,000 people are detained pretrial because they have not posted money bail.[51] A defendant detained pretrial faces a greater likelihood of conviction and incarceration, as well as a longer sentence, than if she were free pending trial.[52]

---

confluence of police authority to trigger incarceration simply by asserting that a minor offense has been committed, combined with the pressures of bail and general acquiescence of the poor, can create the perfect storm of wrongful pleas").

[48] See generally Justice Policy Inst., supra note 24, at 10–16. Local jurisdictions vary enormously in their bail-setting trends, and some jurisdictions have outlawed money bail altogether. See Schnacke, supra note 32.

[49] See Justice Policy Inst., supra note 24, at 10–16. The average bail amount of bail set increased by more than $30,000 during that time as well. Id.

[50] Jessica Eaglin & Danyelle Solomon, Brennan Ctr. For Justice, Reducing Racial and Ethnic Disparities in Jails 19 (2015), https://www.brennancenter.org/sites/default/files/publications/Racial%20Disparities%20Report%20062515.pdf [https://perma.cc/HV9F-VDPZ].

[51] See Todd D. Minton & Zhen Zeng, U.S. Dep't of Justice, Bureau of Justice Statistics, Jail Inmates at Midyear 2014 (2015) http://www.bjs.gov/content/pub/pdf/jim14.pdf [https://perma.cc/RD9X-DAYJ]; Peter Wagner & Bernadette Rabuy, Mass Incarceration: The Whole Pie 2016 (2016), http://www.prisonpolicy.org/reports/pie2016.html [https://perma.cc/QQN9-2W69] (finding that there are 451,000 unconvicted defendants in local jails at any one time).

[52] Christopher Lowenkamp et al., Laura & John Arnold Found., Investigating the Impact of Pretrial Detention on Sentencing Outcomes 10–11 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf [https://perma.cc/CA7S-D7KS]; Subramanian et al., supra note 22, at 12–18; Meghan Sacks & Alissa R. Ackerman, Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?, 25 Crim. Just. Pol'y Rev. 59, 72 (2014); Christine Tartaro & Christopher M. Sedelmaier, A Tale of Two Counties: The Impact of Pretrial Release, Race, and Ethnicity Upon Sentencing Decisions, 22 Crim. Just. Stud. 203, 218 (2009). A series of rigorous studies released in 2016 have confirmed these correlations. Heaton, supra note 24; Will Dobbie et al., The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges (Harvard Univ., Working Paper No. 22511, 2016), http://scholar.harvard.edu/files/cyang/files/dgy_bail_july2016.pdf [https://perma.cc/V9U2-R3MM]; Arpit Gupta et al., The Heavy Costs of High Bail: Evidence from Judge Randomization (Colum. Law & Econ., Working Paper No. 531, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2774453 [https://perma.cc/3ENR-GMHF]; Megan Stevenson, Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes (Univ. of Pa. Law Sch., Working Paper, 2016), papers.ssrn.com/sol3/papers.cfm?abstract_id=2777615 [https://perma.cc/7AYF-MCG2].

The result is that hundreds of thousands of defendants across America, disproportionately people of color,[53] wait in local jails for dispositions of their cases, often held in on $500 bail or less.[54] The ostensible idea behind this pretrial detention is that if a defendant truly intends to come back to court and stay out of trouble, she would have the ability or inclination to secure money for her own release. Community bail funds challenge this concept directly, publicly, and from the bottom up, injecting a moment of community input into an adjudication that is otherwise controlled by insiders. In so doing, community bail funds can function as a form of community nullification of local bail practices, resisting both a judge's individual decision to set bail and the larger aggregate trend of pretrial detention through money bail.

In this Part, I introduce the idea of community nullification beyond the jury, presenting a conception of community nullification that includes the actions of many community bail funds. I begin below by fleshing out the central attributes of community nullification in its most common form, the petit jury. I identify three important features of nullification that can be replicated outside the jury: nullification as a form of communal participation in everyday justice, a check on governmental actors, and a method of resistance to larger policies and practices. I then apply these functions of nullification to the growing phenomenon of community bail funds, arguing that bail funds often function as a form of bail nullification. I argue that the public nature of community bail funds makes them even more powerful than nullification within the "black box" of the jury. As I then show in Parts II & III, the result is that through bail nullification, community members can not only engage in participation and resistance, they can also shift legal meanings—including the meaning of the place of the "community" in criminal procedure, and of the political and constitutional feasibility of the institution of money bail itself.

A. Jury Nullification as Community Nullification

[portion omitted for this excerpt]

B. The Rise of Community Bail Funds

Community bail funds have become a powerful presence in local criminal courthouses around the United States, posting bail for defendants who would otherwise remain in pretrial detention pending the resolution of their cases. The recent evolution of these bail funds has

[53] See Jones, supra note 35, at 938–45 (describing racial disparities in bail and pretrial detention).
[54] E.g., N.Y. City Criminal Justice Agency, Annual Report 2013, at 22 (2014), http://www.nycja.org/library.php [https://perma.cc/N8MX-34CT] (showing that in New York City, bail was set in an amount less than $500 in 33% of non-felony cases and 3% of felony cases).

disrupted the entrenched procedures of "bail" in everyday criminal cases. Historically, bail is the process of releasing a criminal defendant from pretrial custody with conditions for ensuring a defendant's return to court.[55] The most common of these conditions is money bail: a requirement that a defendant pay all or part of a sum of money before she is released; if the defendant returns to court, then the court returns the bail money, usually after taking a percentage of it as a fee or surcharge.[56] A judge or magistrate makes the initial bail-setting decision, and after a wave of reform in the 1970s and 1980s, most jurisdictions now also give a judge the ability to set bail or detain a defendant pretrial in order to protect "community safety."[57]

Although the original purpose of bail was to facilitate release, today the result of the setting of money bail is the pretrial detention of hundreds of thousands of defendants at any one time for the sole reason that they cannot afford to pay their own bail.[58] In low-level cases, these defendants often face a choice: plead guilty and go home, or fight the case and stay in jail. Pretrial detention is a destabilizing force for defendants, their families, and their neighbors, resulting in lost wages, jobs, homes, and child custody. It also leads to longer sentences and increased risk of future arrests and convictions.[59] Moreover, the results of the bail-setting decision have a disproportionately negative impact on communities of color, and stark disparities in bail outcomes persist between white defendants and African American and Latino defendants.[60] Even when defendants are able to post bail, doing so often requires the assistance of commercial bail bondsmen, who take a nonrefundable cut of the money in exchange for posting bail and are notorious for their predatory practices.[61]

Community bail funds intervene at this crucial moment in a criminal case by paying bail for defendants out of a revolving fund, with the goal of moving towards larger changes in local

---

[55] Pretrial Justice Inst., Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Decision 2 (2015) http://www.pretrial.org/download/pji-reports/Glossary%20of%20Terms%20%28July%202015%29.pdf [https://perma.cc/WWG5-ZTHY].
[56] See id. at 2.
[57] See Gouldin, supra note 35.
[58] See sources cited supra note 51.
[59] See supra note 52 and accompanying text.
[60] See Jones, supra note 35, at 941–45. For example, one study found that, controlling for a variety of legal and extralegal factors, African American defendants are 66 percent more likely than white defendants to be in pretrial detention and Latino defendants are 91 percent more likely to be in pretrial detention. See Stephen DeMuth, Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees, 41 Criminology 873, 880–82 (2003).
[61] See generally Justice Policy Inst., For Better or For Profit: How the Bail Bond Industry Stands in the Way of Fair and Effective Pretrial Justice (2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/_for_better_or_for_profit_.pdf [https://perma.cc/7SCJ-9W5].

criminal justice practices. Although the payment of a defendant's money bail can come from a host of different sources—family members and friends, commercial bondsmen, crowdsourced individual bail funds—what distinguishes community bail funds is that they are connected to bottom-up movements for change, and post bail for multiple defendants over an extended period of time using a rotating pool of money. Community groups and churches have long had a practice of passing a hat to collect funds to help people with bail and legal defense, but formal charitable bail funds—formed expressly for the purpose of posting bail—have truly taken off only in the last five years.[62] Most bail funds consist of a revolving pool of money: a bail fund posts bail for someone, and if that defendant returns to court the bail fund receives the money back; the fund can then use that money anew.[63] A community bail fund's interest in a defendant's case stems not from personal connections to that defendant, but rather from broader beliefs regarding the overuse of pretrial detention among particular neighborhoods, racial or socioeconomic groups, or political organizations.[64]

Consider the following examples:

- In the Bronx, New York, since 2012 the Bronx Freedom Fund has bailed out over 300 individuals charged with misdemeanors who cannot afford their bail.[65] The Freedom Fund receives referrals from attorneys at the Bronx Defenders, a public defender office, and then pays bail in misdemeanor cases in amounts up to $2,000. Their website states: "We exist to

[62] Precursors to current community bail funds include a bail fund set up by the Civil Rights Congress in the 1950s to post bail for accused communities and bail funds run by Catholic charities and other religious institutions. See, e.g., Arthur J. Sabin, In Calmer Times: The Supreme Court and Red Monday 49–50 (1999) (describing bail fund set up by the Civil Rights Congress); Zach Ezor, Sister Sue, The Nun At County Jail, WBUR News (Feb. 26, 2015), http://www.wbur.org/2015/02/26/kind-world-sister-sue. (profiling a nun who administers a longstanding bail fund); Brady Faith Center Ministries, http://bradyfaithcenter.org/ministries/ [https://perma.cc/MJ5X-32KF] (last visited Oct. 7, 2016) (describing the Brady Faith Center's Jail Ministry).

[63] See, e.g., How It Works, Mass. Bail Fund, http://www.massbailfund.org/how-it-works.html [https://perma.cc/G99C-BHC8] (last visited Oct. 7, 2016) ("Bail is a renewable resource. Once bail is returned your money can be used to post bail for the next person . . . .").

[64] See, e.g., Bail: A Costly Injustice, Brooklyn Cmty. Bail Fund, http://www.brooklynbailfund.org [https://perma.cc/V5YZ-JDY2] (last visited Oct. 7, 2016) ("90% [of people in our jail because they can't pay bail] are Black or Hispanic. Their poverty alone imprisons them. The result is two systems of criminal justice: one for those who have and one for those who do not.").

[65] See Bronx Freedom Fund, Second Annual Report 2 (2015), http://static1.squarespace.com/static/54e106e1e4b05fac69f108cf/t/5681561eb204d52319b86854/1451316766890/2015+Annual+Report.pdf [http://perma.cc/7Y96-T2AZ]. This is the second iteration of the Bronx Freedom Fund, the first iteration of which existed from 2007 to 2009, "posting bail for 120 Bronx residents before a judge declared it illegal [sic] a nonprofit to post bail on a defendant's behalf." Denis Slattery, Get Out of Jail Free, Courtesy of Bronx Fund, N.Y. Daily News (Oct. 31, 2013, 5:26 PM), http://www.nydailynews.com/new-york/bronx/jail-free-courtesy-bronx-fund-article-1.1503164 (on file with the Michigan Law Review). During that first experiment, "93% of the program's clients showed up for every subsequent court date, and 54% had their cases dismissed." Id.; see also infra notes 106–107 and accompanying text.

level the playing field by providing bail assistance to people charged with low-level offenses who can't afford to pay for their freedom."[66] Bail funds modeled on or inspired by the Bronx Freedom Fund have been replicated in Massachusetts, Brooklyn, Nashville, and Connecticut[67]

- In Baltimore in 2015, local activists protesting police violence in the wake of the death of Freddie Gray established the "Baltimore Protesters Bail Bond Fund" to pay the bail of those arrested while protesting police violence.[68] The Baltimore bail fund models itself after the jail support model of the Ferguson Legal Defense Committee[69] set up in 2014 association with The Movement for Black Lives. Similar funds have appeared in Oakland, Cleveland, Raleigh-Durham, and Baton Rouge, each of which posts bail for individuals who are arrested while protesting or who are part of a movement against police violence.[70]
- In Chicago, 2015 saw the founding of the Chicago Community Bond Fund, which pays bond in criminal court for Chicagoans who cannot afford to pay their bail. Although the primary mission of this all-volunteer fund is to administer the revolving bail fund, it also has a mission of organizing for larger change alongside "people most directly impacted by criminalization and policing: people of color, especially Black people, and the poor."[71] In

---

[66] Bronx Freedom Fund, http://www.thebronxfreedomfund.org [http://perma.cc/NT7K-WNJB] (last visited Oct. 7, 2016).

[67] See Sledge, supra note 9 (describing launch of Brooklyn Community Bail Fund in conjunction with local public defender office Brooklyn Defender Services); The Massachusetts Bail Fund, Classy.org, https://www.classy.org/events/massachussetts-bail-fund/e75475 [https://perma.cc/WCP4-2L6G] (last visited Oct. 7, 2016); Sells, supra note 10 (describing Just City's Nashville Bail Fund); Qi Xu, New Fund Combats "Wealth-Based Jailing", New Haven Indep. (Jun. 23, 2016, 1:24 PM), http://www.newhavenindependent.org/index.php/archives/entry/CT_bail_fund/ [http://perma.cc/9FAK-9XSS] (describing the process of launching the Connecticut Bail Fund).

[68] The bail fund was founded to raise money for an 18-year-old whose bail was set at $500,000 after he smashed a police windshield during a protest. After the boy was released, movement activists converted the fund into a larger bail fund. See German Lopez, Man Who Smashed Police Car Faces Higher Bail than Cop who Allegedly Murdered Freddie Gray, Vox.com (May 2, 2015, 10:05 AM), http://www.vox.com/2015/5/2/8534943/baltimore-bail-freddie-gray (on file with the Michigan Law Review) (describing initial bail fund for Allen Bullock); Richardson, supra note 15.

[69] In Ferguson, Missouri, activists associated with the Black Lives Matter movement founded the Ferguson Defense Committee in 2014. Within the first year, the Defense Committee had raised over $300,000 toward legal defense of protesters and paid bail bonds for more than 200 people. See Gott, supra note 14.

[70] See, e.g., Workneh, supra note 18; Bay Area Anti-Repression Committee Bail Fund, supra note 17; Erste, supra note 16 (website of bail fund for activists who are arrested during protests associated with the deaths of Tamir Rice and Tanisha Anderson); Freedom Bond Fund, Durham Solidarity Ctr., http://durhamsolidaritycenter.org/bondfund/ [https://perma.cc/QYP8-5RgT] (last visited Oct. 7, 2016); Jail and Court Support Updates, Bay Area Anti-Repression Comm., https://antirepressionbayarea.com/category/jail-and-court-support/ [https://perma.cc/3SVR-NHWH] (last visited Oct. 7, 2016).

[71] See Chi. Comm. Bond Fund, supra note 12. The Community Bond Fund has developed a list of criteria to use to evaluate whether to pay someone's bond, including the amount of bond to be paid, the risk of the individual being

December 2015, the Chicago Community Bail Fund received local media attention when it bailed out a woman accused of killing her husband and abuser by raising more than $35,000.[72]

- In Queens, New York, a coalition of community groups formed the Lorena Borjas Community Fund in 2009. The fund began as a reaction to New York Police Department "sweeps" of a particular neighborhood of Queens known for prostitution, which resulted in mass arrests of Trans Latina women, many of them sex workers.[73] The all-volunteer fund works to pay or raise money for bail for "transgender women of color . . . who because of systemic discrimination and profiling, are less likely to be able to pay bail and face particularly harsh abuses while incarcerated."[74]

These community bail funds all administer a revolving pool of money that they use to post bail for defendants—strangers—out of a dedication to a larger charitable or political mission. But the methods of these community bail funds differ substantially. Three dimensions of difference stand out as particularly important in thinking through the function of community bail funds within local criminal justice systems.

First, community bail funds vary in their decisionmaking processes, in who decides when to post bail and based on what criteria. Some bail funds have a formal, public list of criteria that they use to assess possible cases in which to intervene—criteria that can include, for example, a defendant's community connections, their warrant history, their connection to populations disproportionately affected by mass incarceration, or their vulnerability to violence in jail.[75] In

---

victimized in jail, and the person's existing support system—as well as the defendant's "position in relation to structural violence, community disinvestment, systemic racism, survival, and resistance." Id.

[72] See Jonah Newman, A Community Solution to Cash Bail, Chi. Reporter (Jan. 13, 2016), http://chicagoreporter.com/a-community-solution-to-cash-bail/ [http://perma.cc/J7CK-5VFF]; Alex Nitkin, Naomi Freeman, Mom In Jail for Killing Abuser, Released on Bond: Advocates, DNAInfo (December 24, 2015, 11:22 AM), https://www.dnainfo.com/chicago/20151224/north-lawndale/naomi-freeman-mom-jail-for-killing-abuser-released-thursday-advocates (on file with the Michigan Law Review); #FreeNaomiFreeman, Chi. Cmty. Bond Fund, https://chicagobond.org/free_naomi_freeman/index.html [https://perma.cc/J4CR-DP6R].

[73] See Cortés, supra note 11 (describing the founding of the Fund); Chase Strangio, Why Bail Reform Should be an LGBT Movement Priority, Huffington Post (July 20, 2015, 3:53 PM), http://www.huffingtonpost.com/chase-strangio/why-bail-reform-should-be-an-lgbt-movement-priority_b_7739166.html [http://perma.cc/F6Cq-E2NY].

[74] Chase Strangio & Rage M. Kidvai, Support Black Trans Women Fight for Survival, Sylvia Rivera Law Project (Aug. 15, 2015) http://srlp.org/support-black-trans-women-fight-for-survival/ [https://perma.cc/FX57-D644] ("The [Lorena Borjas Community] fund exists precisely to support transgender women of color . . . who because of systemic discrimination and profiling, are less likely to be able to pay bail and face particularly harsh abuses while incarcerated.").

[75] E.g., Bronx Freedom Fund, supra note 8, at 2 ("[W]e screen our clients using strict criteria that take into account an individual's ties to the community, history of court appearances, and existence of family or other primary contact person, among other factors."); Chi. Cmty. Bond Fund, supra note 12 (listing 11 criteria that it uses to decide for

contrast, other bail funds keep their referral and decisionmaking processes close to the chest. Some bail funds have instituted a group decisionmaking process, making sure that a range of stakeholders—including formerly incarcerated individuals—are involved in deciding for whom to post bail.[76] Other bail funds have more of a top-down model of decisionmaking, in which staff members or leaders decide on their own based on preexisting criteria. These variations in decisionmaking processes are important because they reveal the different ways in which bail funds may be pushing against (or not) established criteria for pretrial detention, and disrupting (or not) the power of elites to decide who goes free and who remains in jail pending disposition.[77]

Second, bail funds offer different stances toward defendants for whom they have posted bail. After posting bail for defendants, the involvement of bail funds can vary from frequent and substantive contact, including counseling and legal support, to minimal assistance with rides to court and reminder phone calls. Some bail funds provide a wide range of social and charitable services, such as drug treatment and job referrals to individuals with pending cases.[78] Others focus instead on involving these individuals in local social movements aimed at changing criminal justice practices, sometimes even conditioning money bail on fidelity to a movement.[79] Some bail funds exert deliberate and sustained pressure on defendants to return to court, while others support defendants without pressuring them to return to court or engage in any particular conduct. These different attitudes toward defendants and the range of services offered to them can in turn affect the relationship between the bail fund and the criminal justice system within which it operates.

Third, community bail funds vary in their mission; although bail funds are invariably connected to a discrete mission related to larger beliefs about the criminal justice system, these

---

whom to post bond, including amount of bond, inability to pay, existing support system, potential for victimization in jail, and "[p]osition in relation to structural violence, community disinvestment, systemic racism, survival, and resistance"); see also Mass. Bail Fund, supra note 63 (describing how the fund uses "a scoring tool to assess the applicants' situation, taking into account all relevant aspects of their case and life," but listing no further details).

[76] See, e.g., Xu, supra note 67 (describing this approach with the Connecticut Bail Fund).

[77] A public defender office, for example, may very well be taking the decisionmaking power away from elite judges and prosecutors, but without input from affected populations the bail fund may itself be dominated by elite decisionmakers.

[78] See, e.g., How it Works, Brooklyn Cmty. Bail Fund, http://www.brooklynbailfund.org/how-it-works-page/ [http://perma.cc/M56L-EXGX] (last visited Oct. 7, 2016) ("Fund clients will have access to re-entry support, such as social workers, immigration attorneys, education and employment lawyers and housing and benefits experts.").

[79] See, e.g., Freedom Fighter Bond Fund, Durham Solidarity Ctr., http://durhamsolidaritycenter.org/bondfund/ [https://[perma.cc/QYP8-5RGT] (last visited Oct. 7, 2016) (describing how recipients of bail fund money are asked to abide by a statement of unity with the fund).

missions can look very different. In Queens and Chicago, for instance, bail funds grew directly out of minority communities who felt targeted by local policing practices.[80] Bail funds affiliated with the Black Lives Matter movement sprouted up to support protesters, shifting over time to focus on the role of the money bail system in perpetuating inequality and funding local courts.[81] And bail funds associated with public defender offices grew out of frustration with the inability of their indigent clients to make any true "choices" when confronted with indefinite pretrial detention because of inability to pay bail.[82] Many community bail funds aim to make a powerful statement about the use of money bail in their local courthouses by posting bail for multiple defendants over a period of time.[83] As one advocate getting ready to open a fund in Nashville told me: "It says everything we need to say with a very simple tool of just laying down cash on the counter."[84] Others, in contrast, attempt to operate somewhat under the radar of mainstream court operations, with the purpose of internally strengthening their social movements aimed at larger change.

These three dimensions of difference in how community bail funds operate—variations in decisionmaking processes, stances toward defendants, and larger missions for change—mean that there is no one way to characterize community bail funds' impact on and relationship to local criminal justice. These differences also help demonstrate how some community bail funds may serve a function akin to community nullification, while others may serve more of a legitimating function, helping the bail system operate more smoothly rather than sparking large-scale change. Still, something essential unites these disparate practices: they involve local groups

[80] See Newman, supra note 72 (describing how the Chicago Community Bond Fund grew out of reactions to police shootings of people of color in Chicago); Interview with Chase Strangio, Founder, Lorena Borjas Cmt. Fund, in New York, NY (Aug 5, 2015) (describing the origins of the Lorena Borjas Community Fund in the fight against the overcriminalization of trans women of color).

[81] See, e.g., Gott, supra note 14 (describing the origins of the bail fund in the response to protests in the weeks after the killing of Michael Brown in Ferguson); Richardson, supra note 15 (describing the origins of the Baltimore Protesters Bail Bond Fund in protests against police violence in Baltimore).

[82] See, e.g., Nick Pinto, The Bail Trap, N.Y. Times (Aug. 13, 2015), http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html (on file with the Michigan Law Review) ("Every year, thousands of innocent people are sent to jail only because they can't afford to post bail, putting them at risk of losing their jobs, custody of their children—even their lives."); id. (describing the founding of the Brooklyn Community Bail Fund in response to cases of clients of the Brooklyn Defender Service); Slattery, supra note 65 (describing the second iteration of the Bronx Freedom Fund).

[83] See, e.g., Pinto, supra note 82 (discussing how one bail fund program helped bail out nearly 200 defendants and, in doing so, illustrated that bail makes poor people who would otherwise win their cases plead guilty).

[84] Telephone Interview with Josh Spickler, Executive Director, Just City, and Sarah Smith, Law Student Volunteer, Just City (Jan. 7, 2016).

posting bail for multiple defendants over a period of time, connected to a larger set of beliefs or purposes beyond securing the freedom of those individuals.

This connection between community bail funds and larger movements for change makes them different in kind from the common phenomenon of crowdfunding bail for individual defendants. At any one time, there are thousands of GoFundMe.com campaigns[85] by individuals and their families asking for help with bail or legal defense.[86] These one-off bail funds, while an interesting phenomenon, do not qualify as community bail funds or as bail nullification. With crowdfunded bail, the defendant or the family who actually posts the bail raises the money. The money belongs to the family, and is not returned to a revolving fund that will then post bail for other defendants—there is no expectation of return or of long-term connection to a community group. There is no broader cause.

This distinction between crowdfunded bail and a community bail fund is complicated, though, when the crowdfunded bail is raised in a high-profile prosecution or is connected to a larger cause. Consider, for example, the bail fund associated with the defense George Zimmerman, accused of murdering 17-year-old Trayvon Martin. After a judge set $150,000 bond in Zimmerman's case,[87] Fox News host Sean Hannity nightly encouraged viewers to visit a website raising funds to help George Zimmerman with his legal costs, including his bail.[88] Zimmerman's family eventually paid the bail with those crowdsourced funds.[89] When advocating contributions to Zimmerman's fund on Fox News, Hannity invoked the right to bear arms and the right of self-defense, emphasizing that larger ideas of justice were at stake in the case.[90] This rare example where an individual bail fund drew public attention and debate over larger criminal justice issues stands somewhere between simple crowdfunded bail and a

[85] GoFundMe and other crowdfunding online platforms allow individuals to raise money in small increments from a large number of individuals to pay for particular causes, events, or challenges. See, e.g., How it Works, GoFundMe.com, https://www.gofundme.com/tour [https://perma.cc/2T56-9V26] (last visited Oct. 7, 2016).
[86] See Amanda Robb, George Zimmerman, Darren Wilson and the Kickstarted Defense: You Call This Justice?, Guardian (Oct. 1, 2014, 7:45 AM), http://www.theguardian.com/commentisfree/2014/oct/01/george-zimmerman-darren-wilson-crowd-sourced-legal-fees [https://perma.cc/KC4U-39NT].
[87] CNN Wire Staff, Zimmerman Released After Posting Bail, CNN (July 6, 2012, 7:45 PM), http://www.cnn.com/2012/07/06/justice/florida-teen-shooting/ [https://perma.cc/Y4LP-J9HC].
[88] Robb, supra note 86.
[89] The fact that these funds came from public support then became the reason that the judge revoked the bail and raised it to a million dollars—which Zimmerman also paid with public support. See Elizabeth Chuck & James Novogrod, Florida Judge Sets Bond at $1 Million for George Zimmerman, NBC News (July 5, 2012, 6:55 PM), http://usnews.nbcnews.com/_news/2012/07/05/12579030-florida-judge-sets-bond-at-1-million-for-george-zimmerman [https://perma.cc/H5QC-Z2YN].
[90] See Robb, supra note 86.

community bail fund. For the purposes of the discussion of nullification below, however, I focus on an idealized type of community bail fund that is local, organized, connected to larger bottom-up movements for change, and posts bail for multiple defendants over a period of time.

When the "community" posts bail from a revolving, long-term bail fund, it takes the pretrial decisionmaking power away from powerful insiders—judges, magistrates or bondsmen. Instead, an outsider organization can nullify an insider decision by independently determining whether someone merits release pending trial, using whatever criteria they choose. When they perform this act for multiple defendants, over time it becomes a larger expression of the community's stake in local criminal justice. In the next Section, I consider the ways in which these practices can at times function as a form of communal nullification.

C. Bail Nullification

When a community bail fund posts bail, the act can take on important qualities that mirror those of jury nullification: a group of citizens comes together to make a decision about an individual criminal case, which decision impacts not only that case but also larger systems of power and justice. Like jury nullification, the community's decision can undo, or nullify, a discretionary decision that official actors have made. Like jury nullification, that communal intervention can disrupt the legal status quo and undermine the power of institutional actors who otherwise control most of the criminal justice process. And, like jury nullification, this can go wrong[91]—groups may post bail for reasons we don't like, or for people who we don't think should be free pending trial. Community bail funds thus have the potential to serve the crucial functions of community nullification: to reject an official result or decision, and, in the process, to inject community input, check government actors, and resist larger criminal justice practices. This intervention may be most powerful when the community bail fund is one that gives the decisionmaking power to members of traditionally powerless populations who interact most frequently with the criminal justice system.

Community bail funds intervene at a paradigmatic moment of judicial discretion, when a judge or magistrate decides whether to release a defendant, to detain her without bail, or—as they do in the majority of cases—to specify an amount of money that a defendant must pay to be

[91] Cf. Jeffrey Abramson, Two Ideals of Jury Deliberation, 1998 U. Chi. Legal F. 125, 146 ("[H]istory also gives us its share of revolting instances [of jury nullification].").

released while the case is pending.[92] The traditional idea of money bail is that an individual's appearance in court is guaranteed by a surety, someone with close ties to the defendant—a defendant thus returns to court because she does not want a court to confiscate her brother's savings or a bail bondsman to claim possession of her mother's house.[93] But when a community bail fund posts bail for a defendant who comes back to court, without having committed any criminal acts in the meantime, it may show that the judge was wrong that a certain amount of personal or family money needed to be on the line for that individual to come back to court and stay out of trouble. And when bail funds post bail, defendants do come back: community bail funds in Massachusetts, the Bronx, and Brooklyn all report that over multiple years, over 90 percent of defendants for whom they post bail return to court.[94] Community bail funds thus call into question the conceptual origin of money bail: that only a threat to the economic security of a close relation or friend is a compelling incentive for most defendants to return to court.[95]

The power of community bail funds goes a crucial step beyond nullifying the pretrial decision; by posting bail, community bail funds can in some cases nullify convictions and sentences as well. For, as actors inside the criminal justice system know well, the pretrial decision has a profound effect on the eventual outcome of a criminal case.[96] Most centrally, the setting of bail beyond what an individual can pay—or even the looming threat of such bail—incentivizes a defendant to plead guilty so as to receive a sentence of less time than they would

---

[92] See Eaglin & Solomon, supra note 50, at 19 ("Nationally, 61 percent of all defendants [are] required to post financial bail for their release.").

[93] See Baradaran, supra note 29, at 733. See generally Schnacke, supra note 32, at 28 (describing historical origins of the personal surety). Bail bondsmen often serve as an intermediary in this process. See id. at 38–39.

[94] Bronx Freedom Fund, supra note 65, at 2; Brooklyn Cmty Bail Fund, 2015–2016 Annual Report 9 (2016), http://www.brooklynbailfund.org/2015-annual-report [http://perma.cc/Z8TM-CTYN] ("95% of clients return for all required court appearances . . . ."); Massachusetts Bail Fund: Campaign Details, Classy.org, https://www.classy.org/events/Massachusetts-bail-fund/e75475 [https://perma.cc/WCP4-2L6G] (last visited Oct. 7, 2016) ("Over 90% of our clients come back to court as required.").

[95] This premise has also been undermined by studies demonstrating that posting money bail does not increase the chances that a defendant will return to court. See, e.g., Claire M.B. Brooker et al., Pretrial Justice Inst., The Jefferson County Bail Project 7 (2014), http://www.pretrial.org/download/pji-reports/Jeffersion%20County%20Bail%20Project-%20Impact%20Study%20-%20PJI%202014.pdf [https://perma.cc/T6Y8-RVHH] (finding no significant difference in appearance or public safety rates for defendants released on money bail compared to defendants released without having to pay money); see also Schnacke, supra note 32, at 25 ("[E]ver since 1968, when the American Bar Association openly questioned the basic premise that money serves as a motivator for court appearance, no valid study has been conducted to refute that uncertainty.").

[96] See Justice Policy Inst., supra note 24 at 25 (noting that judges, prosecutors, and defense attorneys all approach the bail-setting decision knowing that it will affect future pleas).

serve while waiting out their case.[97] Moreover, a defendant incarcerated pretrial, all else being equal, is much more likely to receive a sentence of jail or prison than an otherwise similarly situated defendant.[98] Even a few days in jail are profoundly destabilizing: defendants experience declines in physical and mental health, and potentially lose wages, jobs, stable housing, and custody of their children. This, in turn, leads to more disruptions to families and neighborhoods than would occur if a defendant were released without bail.[99] So when a community bail fund posts bail, the fund may be nullifying not simply the bail-setting decision, but also the likely reality that follows from bail being set beyond a defendant's capacity to pay: a guilty plea and a jail sentence. By doing this, a nullifying bail fund may be intervening at a more important point than a nullifying jury does, for money bail is set in the majority of criminal cases, while trials occur for only a few.[100]

Community bail funds thus serve as a check on judges and prosecutors, who may be facilitating the use of bail for more than its ostensible purpose. Judges, when setting bail for an indigent defendant, know full well that bail can serve to incarcerate the defendant for the remainder of their case. A California judge admitted this to a journalist as recently as June 2015, saying "bail is really being set to keep the person in custody. You have to kind of concede that, . . . [even though] it's not supposed to be that."[101] Since the mid –twentieth century, studies of judicial decisionmaking in the bail context have continually found a widespread practice of "sub rosa" pretrial detention, in which judges sometimes set bail with the knowledge that a defendant cannot afford to post it.[102] And prosecutors, in turn, have an incentive to request high

---

[97] See supra notes 23–24 and accompanying text; see also Jed S. Rakoff, Why Innocent People Plead Guilty, N.Y. Rev. Books, Nov. 20, 2014, at 16 (describing bail as one reason that innocent people plead guilty).

[98] See, e.g., Lowenkamp et al., supra note 52, at 10. When defendants held pretrial are sentenced to jail or prison, they also tend to receive longer jail or prison sentences than defendants similarly situated who were released pretrial. Id. at 10, 14–15, 18–19; see also sources cited supra note 52 (collecting studies).

[99] See Justice Policy Inst., supra note 24, at 14, 26.

[100] See id. at 10, 26.

[101] Shaila Dewan, When Bail Is Out of Defendant's Reach, Other Costs Mount, N.Y. Times (June 10, 2015), http://www.nytimes.com/2015/06/11/us/when-bail-is-out-of-defendants-reach-other-costs-mount.html (on file with the Michigan Law Review).

[102] See Roy B. Flemming, Punishment Before Trial: An Organizational Perspective of Felony Bail Processes 18 (1982) (describing how a judge setting bail and worrying about future criminal conduct may be thinking, "how large a bail will assure his detention while still not appearing excessive or unreasonable?"); Ronald Goldfarb, Ransom: A Critique of the American Bail System 46–49 (1965) (describing the widespread practice of setting bail so as to give defendants "a taste of jail"); Wayne Thomas, Jr., Bail Reform in America 245–46 (1976) (describing tacit understanding of "sub rosa" pretrial detention by setting bail higher than defendants can pay); Caleb Foote, Compelling Appearance in Court: Administration of Bail in Philadelphia, 102 U. Pa. L. Rev. 1031, 1037–43 (1954); see also Wiseman, supra note 37, at 465 (discussing skewed incentives of judges to set bail).

bail to ensure leverage over plea bargaining negotiations.[103] When a community bail fund posts bail, especially in a low-level case that would otherwise receive a sentence other than jail time,[104] the fund is outing the reality that people experience on the ground—that when bail is set, the choice of whether or not to plead guilty is taken away. Bail nullification becomes not just an act of intervention, but also one of resistance.

The fact that institutional actors bristle—and retaliate—when community bail funds post bail demonstrates the power this act of resistance wields. The history of the Bronx Freedom Fund in particular provides a potent example of judicial retaliation against a community bail fund. The Freedom Fund initially began operations in 2007, before there was an official law in New York State providing for the existence of charitable bail funds. Working in conjunction with the Bronx Defenders, a public defender office, the Freedom Fund posted bail for more than 130 clients in just under two years.[105] But these acts did not sit well with local judges, whose decisionmaking power was taken away when the Freedom Fund posted bail for defendants who would otherwise remain incarcerated pretrial. One judge, in particular, was angry enough to shut down the fund entirely. When the judge witnessed an indigent man walk into the courtroom on his own, even though he had been detained on $3,000 bail, the judge declared loudly to the courtroom: "He says he never worked, has no source of income. . . .[W]here is the money coming from?"[106] Even though bail had served its purpose—the defendant appeared in court voluntarily, and had harmed no one in the interim—the presiding judge was irate. The bail fund had eviscerated the judicial power to incarcerate a defendant pending trial. The judge proceeded to investigate the workings

---

[103] Justice Policy Inst., supra note 24, at 25 ("Prosecutors can and often do ask judges for pretrial detention as leverage in plea-bargaining discussions with people of limited financial resources."); cf. Samuel Walker, Taming the System The Control of Discretion in Criminal Justice 1950-1990, at 58 (1993) ("Virtually all studies of bail have found that the prosecutor is the dominant nonjudicial figure in the bail-setting process."); Bibas, supra note 23, at 2470–71 ("Trials are much more time consuming than plea bargains, so prosecutors have incentives to negotiate deals instead of trying cases.").

[104] Misdemeanors constitute the vast majority of prosecutions in state court. See Natapoff, supra note 47, at 1320 (cataloguing evidence that misdemeanors account for at least eighty percent of new state criminal cases each year).

[105] Nick Pinto, Making Bail Better, Village Voice (Oct. 10, 2012, 4:00 AM), http://www.villagevoice.com/2012-10-10/news/making-bail-better/full/ [https://perma.cc/5PLX-GLEX] (describing the first iteration of the Bronx Freedom Fund and stating that they posted bail for nearly 200 people between 2007 and 2009).

[106] Email from Robyn Mar, Attorney for Mr. Miranda, Bronx Defs., to Jocelyn Simonson (Aug. 30, 2016) (on file with author); see also Andrea Clisura, Note, None of Their Business: The Need for Another Alternative to New York's Bail Bond Business, 19 J.L. & Pol'y 307, 326–30 (2010) (describing the case of People v. Miranda, No. 012208C2009, 2009 WL 2170254 (Bronx Cty. Sup. Ct. June 22, 2009)); Pinto, supra note 105 (describing Miranda and the judge's reaction).

of the Freedom Fund, preside over a series of hearings and ultimately shut the Freedom Fund down as a violation of the state's insurance laws.[107]

This strong, public judicial opposition to a community bail fund demonstrates the power of bail funds as a form of resistance. That resistance not only inserts community input into the bail-setting decision, but also unearths publicly some of the injustices of the money bail system—for instance, the link between a defendant's wealth and pretrial status, and the impact of pretrial detention on communities of color. By doing so, bail nullification, like jury nullification, has the potential to do what Professor Paul Butler has described as "dismantle[ing] the master's house with the master's tools."[108] Butler describes his hope for change via jury nullification this way: "I hope that there are enough of us out there, fed up with prison as the answer to black desperation and white supremacy, to cause retrial after retrial, until, finally, the United States 'retries' its idea of justice."[109] As I discuss in more detail in the next two Parts, there is evidence that something like this may already happening with community bail funds and bail: by publicly demonstrating the links between poverty and outcomes in criminal cases over time, bail funds have been part of a shift in the public conversation around bail.[110] This conversation, in turn, has led to some tangible changes in local laws, policies, and practices.[111] Community bail funds can use the master's tools—money bail—to chip away at the façade of the master's house. As a result, when bail funds publicly connect their actions to larger efforts to push back against the system of money bail, they can and often do court controversy and spark change.

With community bail funds, individual acts can add up to an assertion of popular input into the contours of the criminal justice system writ large. A quick, crowdsourced fund to bail out an individual may not serve any larger purpose—it may even do society a disservice by releasing someone dangerous. While there is no guarantee that each community bail fund decision will be a beneficial one, the fact that bail funds engage in their practice over time, gaining expertise and frequently publishing their results, means that their significance transcends the freedom of any one defendant. The communal input supplied by these bail funds is especially

---

[107] See People v. Miranda, No. 012208C2009, 2009 WL 2170254, at *1 (Bronx Cty. Sup. Ct. June 22, 2009) ("The Bronx Freedom Fund has posted bail for more tha[n] 130 Bronx Defenders' clients. Because the corporation has become a 'bail bond business' as well as an 'insurance business' as defined in Insurance Law § 6801, it had to be licensed.").
[108] Butler, supra note 2, at 680 (referencing Audre Lorde, Sister Outsider 110 (1984)).
[109] Id. at 724–25.
[110] See infra Section II.C.
[111] See infra Section III.A.

notable because it occurrs at a moment in the criminal process where there are no other opportunities for input from the community.[112] Moreover, the input comes from a population that generally has little political power to influence the criminal justice system more broadly.[113] Ultimately bail funds may be returning the bail function to the community at large—a return that harks back to the origins of bail, when entire Norman clans would vouch for the return of their community members,[114] and to colonial times in America, when charitable strangers would post surety for defendants and ensure their return to court.[115]

Rather than amplify the importance of an institution of popular participation that already exists, such as a jury, the act of bail nullification can elevate a mundane procedural practice into an important communal act. Some of the differences between bail nullification and jury nullification actually strengthen the function of community bail funds as a method of bottom-up resistance to larger criminal justice policies and practices. Bail funds possess a key feature that nullifying juries do not: their actions are public.[116] Moreover, unlike juries, bail funds involve repeat players. Because the same actors are doing the actions over and over again, these repeat players—the administrators of the bail fund itself—can publicize what they are doing and make explicit public connections between their actions and their larger beliefs about the fairness of the criminal justice system.[117] Bail nullification therefore has powers that are only hinted at by jury nullification—powers to publicly contest understandings of community in the world of criminal

---

[112] Recognizing this participatory gap, Professor Laura Appleman has argued that we should empanel formal bail juries to assist judges in making bail determinations. See Appleman, supra note 29, at 1355–59. Community bail funds are in many ways like these hypothetical juries would be, but they operate outside of the system, on their own terms.

[113] Cf. Brown, supra note 2, at 1171–93 (distinguishing between forms of jury nullification based on the reasons for that nullification); Butler, supra note 2 (claiming that jury nullification has greater moral legitimacy when it is done by African Americans); see also Simonson, supra note 5, at 2184–90 (discussing the power of participation from marginalized groups with little input into the criminal justice system).

[114] See Elsa de Haas, Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275, at 30–51 (1966) (describing the system of frankenpledge, in which entire Norman clans vouched for the return of individuals to court).

[115] See, e.g., John Augustus, A Report of the Labors of John Augustus: First Probation Officer 4–6 (1852) (describing the first man in Massachusetts to post surety for a stranger with a promise that he would ensure his return to court). Although known as America's "first probation officer," Augustus really served the function that we might attribute today to a bail bondsman—but he did so out of a sense of charity rather than for profit. By 1858, Augustus had bailed 1,946 individuals, and he continued his work until his death in 1859. See Sheldon Glueck, Foreword, in A Report of the Labors of John Augustus: First Probation Officer, supra, at v–vi.

[116] See Allison Orr Larsen, Bargaining Inside the Black Box, 99 Geo. L.J. 1567, 1572–73 (2011) ("Courts are adamant about protecting the mystery and secrecy of 'the black box'; jury discussions are among the most private and privileged in our legal system.").

[117] In this way, community bail funds are inherently different than the other repeat players in the world of money bail, bail bondsmen, who post bail over a period of time for reasons of profit.

procedure, and powers to engage in demosprudence, whereby collective action by social-movement actors contributes to broader legal change.[118] The next two Parts flesh out two of the most powerful aspects of the public nature of bail nullification: the rhetorical power to redefine the role of the community in the setting of bail, and the demosprudential power to engage with the law of bail on the ground.

II. Redefining Community in the Setting of Bail

This Part lays out the ways in which "bail nullification" in its ideal form—a public, bottom-up, popular intervention into multiple criminal cases with a mission of disrupting the money bail system—has the power to disrupt reigning conceptions of the function of bail. In particular, much of the expressive power of community bail funds lies in their ability to destabilize the rhetoric of "community" in the setting of bail. The modern conception of the bail-setting decision is that a judge or a magistrate must weigh the interests of an individual defendant against those of a larger community; they must set an amount of money bail that reflects "[a] proper balance between the rights and interests of the individual and those of society."[119] Although judges and magistrates set bail according to a host of factors and recommendations from legislators, the concept of "community" consistently pervades and justifies the bail-setting process. When a judge sets bail, she does so on behalf of the community and for the protection of the community. Community bail funds disrupt this reigning definition of community, undermining the defendant-community dichotomy in the setting of bail. By nullifying bail determinations, community bail funds tell judges: do not set bail in our name.

This Part begins by laying out the two main ways in which the rhetoric of community infuses the discretionary bail-setting process—through the protection of "community" safety to justify detention and the search for "community ties" to justify release. Overall, what emerges is

[118] Lani Guinier & Gerald Torres, Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements, 123 Yale L.J. 2740, 2750, 2757–58 (2014) ("[D]emosprudence focuses on the ways that ongoing collective action by ordinary people can permanently . . . chang[e] the people who make the law and the landscape in which that law is made.").

[119] Thomas, supra note 102, at 229 (quoting Rep. of the Judicial Council Comm. to Study the Operation of the Bail Reform Act in the Dist. of Columbia: Hearings on Preventive Det. Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, 91st Cong. 736 (1969)); see also Caleb Foote, The Coming Constitutional Crisis in Bail: II, 113 U. Pa. L. Rev. 1125, 1151 (1965) ("[F]or the hypothetical defendant we would be required to weigh the risk of prejudice to him as a result of detention against the risk to the community that if released he might abscond, commit further crimes, or injure the Government's informer.").

a conception of community that pits the interests of local residents against those of a lone defendant and her family. The assumption is that the larger community interest is never on the side of a defendant's release, that local residents will always prefer the setting of money bail to the risk of flight or crime posed by releasing a defendant without surety. But this limited vision of community is not set in stone. This Part concludes by setting forth the alternative vision of community presented by bail nullification: one in which the community exists on both sides of the scale, and has interests in both safety and freedom.

A. Community Safety

[portion omitted for this excerpt]

Again and again, the assumption is that communities always benefit from pretrial detention, and that community safety cannot align with a defendant's liberty interests. Bail statutes and leading judicial decisions do not acknowledge that a community might actually want a fellow community member to be free pending trial—to earn money at their job, raise their children, participate in their own defense, and otherwise contribute to the community while waiting for a trial or resolution of their case. The reigning conception of "community safety" allows prosecutors and judges to invoke the term and feel secure that they are serving communal interests by imposing bail and detaining a defendant pretrial.

B. Community Ties

Although community safety is the most prominent way in which the concept of community plays out in the bail decision, there is another concept of "community" that carries a specific connotation in the context of bail. The "community" offers a means of securing someone's return to court when they fit into traditional ideas of "community ties": employment, stability, and respectable family connections.[120] This idea of "community ties" was a core part of the first wave of bail reform that spread across the United States in the 1960s, a wave aimed at reducing the use of pretrial detention.[121] This wave of reform saw the widespread creation of new, local agencies that interview defendants before a bail decision and provide recommendations to judges as to whether to release a defendant pretrial.[122] Meant to facilitate the

[120] Malcom M. Feeley, Court Reform on Trial: Why Simple Solutions Fail 32 (1983).
[121] Id. at 31–33 (describing the rise of the concept of community ties); John S. Goldkamp, Two Classes of Accused: A Study of Bail and Detention in American Justice 224 (1979) ("[I]t is no understatement to conclude that the community-ties rationale has been at the heart of bail reform activity for many years.").
[122] See John Goldkamp & Michael Gottfredson, Policy Guidelines for Bail: An Experiment in Reform 21 (1985); Walker, supra note 103, at 66 (describing as a "major institutional innovation" the creation of "pretrial services

release of more people pretrial, these agencies usually look to what they term "community ties"—stable homes, stable jobs, working telephone lines, or reachable family members—as indicators that someone should be released without bail.[123]

This idea of "community ties" came to the foreground of bail reform with the success of the Vera Institute of Justice's Manhattan Bail Project, which began operations in 1961.

[portion omitted for this excerpt]

Together, the concepts of "community ties" and "community safety" ensure that the rhetoric of community underlies and justifies nearly every decision to set money bail. The setting of bail ensures the protection of a larger "community," and the existence of the defendant's smaller "community"—family members with stable addresses and the ability to attend court proceedings—ensures the return of the defendant to court. This rhetoric of community, however, does not envision members of neighborhoods, ethnicities, or social movements who may not know a defendant personally, yet possess interests that overlap with those of the defendant—for instance, reducing jail populations, increasing community wealth through employment, or building long-term community stability. Community Bail Funds demonstrate through action that the community whose safety the court seeks to ensure may actually benefit from a defendant's release rather than from the setting of bail.

C. When the "Community" Posts Bail

When the "community" posts bail through the use of a revolving bail fund, it recasts the place of the community in setting bail. When a bail fund pays a defendant's bail or bond, the group is expressing its views that that there are some members of the community who, although they do not have close ties to the defendant, value the liberty of their fellow community members over the remote possibility of violence in their community. That fund may not represent the local population, or of any definable "community," but the fund's members are at least a subset of the larger "community" around which the traditional concept of bail revolves. A judge's role in setting bail can be reconceptualized as balancing a range of different community interests: on the one hand, protecting safety through the setting of bail, and, on the other, respecting the interest of the community, broadly defined, in ensuring that neighbors, colleagues, or allies in struggle are

---

agencies with staff who would interview arrestees, obtain the necessary information on their background, attempt to verify the information, and make bail recommendations to the judge, and noting that "many used a formal point system").

[123] Walker, supra note 103, at 66.

able to remain free while awaiting trial. The "community" interest exists on both sides of the scale.

Community bail funds demonstrate that a community's own vision of "community safety" need not always weigh on the side of pretrial detention. Indeed, releasing defendants while cases are pending can actually increase community safety, even in its traditional measurement of incidents of violent crime. Studies have shown that pretrial detention is a criminogenic force: because detention destabilizes lives, the setting of bail leads to more, rather than less, crime in the long run.[124] As one bail fund describes its mission, it "pays . . . bail so that low-income people can stay free while they work toward resolving their case, allowing individuals, families, and communities to stay productive, together, and stable."[125] Bail funds publicize examples of clients who, but for the fund posting their bail, would have pled guilty, lost jobs, homes, and custody of their children, and been much more likely to be a burden to their communities in the future.[126]

Bail funds contest the traditional notion of "community ties" as well. Bail funds express, instead, a more nuanced conception of a defendant's relationship to the community and to the court, one in which even those without stable jobs and family members who can have community support. Under that conception of community, more diffuse connections between people who share neighborhoods, identities, and even visions of (in)justice can solidify an individual's connection to her local criminal justice system and ensure that a defendant returns to court. . Take, for example, the Lorena Borjas Community Fund, a bail fund in New York City that posts bail on behalf of women charged with prostitution who are Latina and transgender—a population for which traditional markers of "community ties" may be absent, but who

[124] For example, researchers recently calculated that every day of the first thirty days spent in pretrial detention has a statistically significant correlation with increased future criminal activity. See Christopher Lowenkamp et al., Laura & John Arnold Found., The Hidden Costs of Pretrial Detention 19 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf [https://perma.cc/5FSV-84PB]. The study found that an individual is 1.16 times more likely to recidivate if detained 2 to 3 days, increasing to 1.43 times if detained 15 to 30 days. Id. For studies with similar results, see Gupta et al., supra note 52; Heaton et al., supra note 52; see also Wiseman, supra note 23, at 1354–56 (describing how bail can be criminogenic). But see Dobbie et. al., supra note 41 (finding pretrial detention had no detectable effect on future crime, but led to decreases in pretrial crime and failures to appear in court).

[125] About The Fund, Mass. Bail Fund, http://www.massbailfund.org/about.html [https://perma.cc/3SBM-47M6] (last visited Oct. 7, 2016).

[126] See, e.g., New Media Advocacy Project, Brooklyn Community Bail Fund, Vimeo (2014), https://vimeo.com/111652649 [https://perma.cc/QP8T-H5JV] (highlighting the story of bail fund client Miguel); see also Newman, supra note 72 ("[H]igh-profile cases can be useful for garnering support for the fund's broader efforts.").

nevertheless are connected to larger community groups and networks.[127] As one founder of the Fund writes: "[for] the TransLatina community in Queens today, our community's ties are woven with history and resilience that is not measured by pretrial services assessing flight risk."[128]

The actions of community bail funds thus undermine entrenched notions of community, leaving system actors unsure of what the term precisely means. Although a stable family and residence can surely be helpful in supporting a defendant, it may also be that the sense of responsibility to a larger group or community can be part of what brings someone back to court.[129] Or perhaps there is no community necessary to make someone come back to court at all—perhaps the notion of money bail makes little sense in the modern world, when a court can simply call a defendant and remind them to come back to court.[130] Although many bail funds take ownership of the term "community" in the names of their funds, ultimately they resist the idea that there is one definition of community that should guide judicial decisionmaking.[131] Instead, they ask of us that we not invoke "community" as a justification for the widespread use of money bail to detain, rather than release, defendants pretrial. Recasting the role of community in this way is not merely a feat of rhetorical change. As the next Part shows, destabilizing the concept of community can play a part in changing both the constitutional and political status quo in the world of money bail.

III. Bail Nullification & Legal Change

When community bail funds contest the meaning of community in the setting of bail, this rhetorical challenge is in turn connected to the potential for legal and constitutional change. I flesh out this potential below by identifying points of engagement within the constitutional

---

[127] See Cortés, supra note 11.
[128] Strangio, supra note 73.
[129] Like community bail funds, microfinance is dependent on small donations to assist individuals in need. Some scholars of microfinance have argued that peer pressure is a key element of the success of microcredit initiatives. See generally Daryl J. Levinson, Collective Sanctions, 56 Stan. L. Rev. 345, 395–98 (2003) (summarizing the literature surrounding the group lending form of microcredit).
[130] Timothy R. Schnacke et al., Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program, 48 Ct. Rev. 86, 89 (2012) (finding that phone call reminders of court dates led to a 43% reduction in the failure to appear rate in one county in Colorado).
[131] Cf. Laura I. Appleman, Defending the Jury: Crime, Community, and the Constitution 70–91 (2015) (discussing the difficulties with defining community in relation to criminal justice); Robert Weisberg, Restorative Justice and the Danger of "Community", 2003 Utah L. Rev. 343 (critiquing the idea of community in the context of the restorative justice and "community justice" movements).

jurisprudence and political dialogue surrounding money bail. First, I demonstrate the connection between community bail funds and broader political efforts at bail reform. Second, I argue that bail nullification can constitute a form of constitutional engagement, positing places in the constitutional jurisprudence—particularly under the Excessive Bail, Due Process, and Equal Protection Clauses—where the ideas and actions behind community bail funds can serve as a destabilizing force.

[portion omitted for this excerpt]

A. Political Change

Community bail funds have the ability to play a unique role in pushing forward real legal change in how money bail is administered in the United States. Although there have been widespread attempts at bail reform in the past, enduring change has remained elusive. We are now at the beginning of what many have characterized as a third wave of bail reform,[132] but we have yet to see how far this new wave will push actual change in the administration of bail. The bottom-up, participatory nature of community bail funds means that they have the potential to support legal and political reforms of America's money bail system that have a greater chance of succeeding than some of the failed reforms of generations past.

[portion omitted for this excerpt]

How, then, can we change not just the law of bail, but also the political and social conversation around bail? Community bail funds, situated at the intersection of formal procedure and local social movements, are in a unique position to chip away at the political obstacles to real change. I do not mean to suggest that they are the only method of political change, but rather that they are in a singular position of bringing voices from communities most affected by mass incarceration into the conversation—and to do so with actions, not merely statements.

[portion omitted for this excerpt]

To be sure, this is just one story, and a unique one at that. A host of factors have led to the real possibility of bail reform in New York City, but there is no denying that community bail funds have been a visible and important part of that story.[133] The Bronx Freedom Fund is the

[132] Schnacke, supra note 32, at 1 ("In America, bail has been the focus of two significant generations of reform in the 20th century, and appears now to be firmly in the middle of a third.").

[133] Indeed, we are already seeing a host of politicians and journalists refer to the Brooklyn Community Bail Fund, which only began posting bail in 2015. See, e.g., Pinto, supra note 82 (profiling the Brooklyn Community Bail Fund in a New York Times Magazine cover story); John Surico, 'The DMV on Steroids': Paying Bail in New York is

oldest community bail fund that fits the model of bail nullification I have been describing. If I am right about the power of bail nullification, then in the coming years we should expect to see the names of other bail funds, their clients, and their success rates, used in successful fights for bail reform. Community bail funds bring names and stories to the abstract concept of bail. Because they are connected to movements to build political power in conjunction with legal change, they are able to mobilize larger constituencies to see bail in new ways. And they do this all from the standpoint of real-life experience rather than scientific expertise. Indeed, the "statistics" that bail funds use to demonstrate their successes are far less rigorous than studies by social scientists that tell us the same things—that money bail does not incentivize return to court any more than release;[134] that pretrial detention leads to more time in jail and more guilty pleas.[135] And yet, local political leaders cite the statistics of community bail funds more frequently than more rigorous social science.[136] By changing the conversation around the relationship between the community and money bail, community bail funds can thus provide living proof that the push toward bail reform need not be an elite-driven enterprise, but instead can come from the populations most affected by everyday local criminal justice.

B. Constitutional Change

Community bail funds also have the potential to shift our understandings of the constitutional jurisprudence governing the setting of bail: the Fifth Amendment right to due process in a criminal proceeding, the Eighth Amendment right against excessive bail, and the Equal Protection Clause of the Fourteenth Amendment.[137] This process of constitutional engagement is even less direct than that of political change. Social movement actors perform acts of resistance—namely, the posting of bail—that rub up against established ideas of how to

---

Next to Impossible, VICE (Aug. 17, 2015), http://www.vice.com/read/the-dmv-on-steroids-paying-bail-in-new-york-is-next-to-impossible-817 [http://perma.cc/35EK-ENGJ] (describing the work of the Fund).

[134] See, e.g., Brooker et al., supra note 95, at 8 (finding that for felony cases in Colorado, court appearance rates and public safety risks were the same for defendants who were released on unsecured bond versus those who paid money for a secured bond).

[135] See studies cited supra note 52.

[136] They are often cited by journalists, as well, in explaining the effects of pretrial detention. See, e.g., King, supra note 30 (highlighting Bronx Freedom Fund statistics); Pinto, supra note 82 (describing studies by the Brooklyn and Bronx funds as proof that "[b]ail makes poor people who would otherwise win their cases plead guilty.").

[137] I have chosen not to address in this Section the issue of whether pretrial detention should be considered punishment, thus triggering more vigorous due process protections. Although there are reasons to believe that the Supreme Court got it wrong when it determined in Salerno that pretrial detention is not punishment, that precedent will be difficult to unsettle. United States v. Salerno, 481 U.S. 739 (1987). For compelling arguments that pretrial detention is a form of punishment, see Appleman, supra note 29, at 1304–23; and Miller & Guggenheim, supra note **Error! Bookmark not defined.**, at 342, 351–57, 361–70.

understand the institution of money bail. Those shifts in the on-the-ground understanding of how criminal procedure operates then interact with constitutional questions regarding those procedures. This shift in constitutional culture then makes its way into courtrooms and judicial decisionmaking, so that bottom-up actions can actually shift the constitutionality of money bail.[138] This Section sketches out some points in the constitutional jurisprudence surrounding money bail in which community bail funds might play a part in shifting the constitutional meanings of bail in America, especially when they function as a form of community nullification.[139]

[portion omitted for this excerpt]

IV. Subversion or Legitimation?

In the first three Parts of this Article I have tried to create a picture of a powerful and growing practice—community bail funds—that can at times function as a form of community nullification in the world of plea bargaining. This Section returns to this Article's central analogy between community bail funds and nullifying juries as a way to highlight possible normative objections to—and, eventually, a defense of—the growing phenomenon of community bail funds. The question remains: Are community bail funds normatively desirable? Below I address two possible objections to the practices of community bail funds. On the one hand, one might object to community bail funds—especially when they resemble bail nullification—as a subversion of the rule of law; and on the other hand, one might worry that a belief in the power of community bail funds risks legitimizing an unfair procedural scheme. I contend that a normative defense of community bail funds need not fall to either of these critiques. I argue, instead, that the practice of some community bail funds can fall under a more positive conception

[138] A number of scholars have articulated similar processes in the context of other social movements. See, e.g., Jack M. Balkin, How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure, 39 Suffolk U. L. Rev. 27, 28 (2005) (discussing how social movements can change constitutional law by moving the boundaries of what is plausible); Guinier & Torres, supra note 118, at 2750–69 (describing how demosprudence can shift constitutional meaning); Martha Minow, Law and Social Change, 62 UMKC L. Rev. 171, 176 (1993) ("Law is also the practices of governance and resistance people develop behind and beyond the public institutions. Those practices may alter formal, public law; they also alter the meaning and shape of law and provide a potentially rich context for social change."); Reva B. Siegel, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA, 94 Calif. L. Rev. 1323, 1323 (2006) (arguing that "constitutional culture channels social movement conflict to produce enforceable constitutional understandings").

[139] This discussion is not meant to provide a comprehensive analysis of each doctrine, but rather to identify moments in the muddy jurisprudence in which bail nullification can play a role in clearing up the picture. My intention is to show how constitutional demosprudence can happen, even within individual procedural rights that seem outside the bounds of groups and communities.

of nullificatory participation in the contours of criminal justice, one in which citizens join with the formal branches of government to interpret laws and procedures and ensure their fair implementation. At the same time, in order to stem the risk of legitimation, bail nullification will work best if it is accompanied by social movements to eliminate the use of money bail and substantially reduce the use of pretrial detention overall.

A. Rule of Law Concerns

[portion omitted for this excerpt]

B. The Risk of Legitimation

At the other end of the spectrum, though, one interested in a paradigmatic shift in how America views pretrial detention might worry that community bail funds actually legitimate an unjust system. This is not a new concern. In the 1960s, reformers at the Vera Institute of Justice—the same reformers who initiated the Manhattan Bail Project and a new wave of bail reform—initially considered creating a bail fund to help young defendants between the ages of sixteen and twenty one.[140] They later reported that they instead decided that a bail fund would "promote the idea that an unfair system could somehow be made to function equitably with the help of private philanthropic support."[141] The contemporary iteration of community bail funds may pose a similar risk of legitimation through charity. When the act of bail nullification "works"—when a defendant returns to court without having committed any new crimes—bail funds seem to act as something of a private, pretrial-services agency, using charitable funds to help a procedural process work smoothly. People are released, they often come back, and the community renews its stake in local criminal justice. There is thus a clear danger of bail funds legitimizing the system of money bail that we have now, rather than transforming it.

[portion omitted for this excerpt]

But when community bail funds engage in bail nullification they do more than smooth the wheels of the existing system of criminal justice. Community bail funds build power. Bail nullification is a form of dissent through performance, a demonstration to institutional actors and the public alike that the status quo of money bail is not "working" as it claims to be doing. It is the action of posting bail that gives bail nullification its power—community bail funds are

[140] See Vera Inst. of Justice, Programs in Criminal Justice Reform Ten Year Report 1961–1971, at 23 (1972).
[141] Id. at 24.

"acting radically" rather than "speaking radically,"[142] and they are doing so using the very processes whose meanings they seek to shift. Just like the black box of a jury, there can be infinite reasons why a bail fund sets bail for a stranger. But when a community bail fund with a stated mission—to support a marginalized community,[143] to bolster a movement against police brutality[144]—is the entity to post bail, and when the action is made by decisionmakers who are part of traditionally marginalized communities,[145] that action constitutes a larger social and political statement. This is not to say that the normative good of bail nullification is participation for its own sake—it is not a theory of procedural justice in which having a say in the matter is its own reward.[146] Instead, the goal of bail nullification is to shift legal conceptions of the institution of bail toward a more honest, substantive understanding of how and why we incarcerate defendants pending trial, and toward an understanding that is informed by the experiences of marginalized populations who most frequently become defendants themselves. The practice of bail nullification on its own in no way guarantees large systemic change as a result, but the potential for true transformative change is there.

Conclusion

Community bail funds demonstrate how bottom-up communal actions outside of formal, state-driven processes can play an important part in unearthing everyday practices and shifting the legal status quo. Community bail funds reveal the interplay between procedure and substance, disrupting the normalcy of a procedure that impacts the majority of criminal cases. In the world of plea bargaining, to locate moments of popular input into criminal procedure is actually to locate some of the only moments where popular input—including nullification—can occur at all. The bail-posting decision is not the only such moment. For example, in the past I have argued that community groups who observe courtroom proceedings[147] and organize

[142] See Gerken, supra note **Error! Bookmark not defined.**, at 1766 ("Decisional dissent gives us a concrete practice to examine, a real-world example to debate. We not only get to see whether the idea works, but how the new policy fits or clashes with existing institutional practices. Speaking radically thus looks different from acting radically.").
[143] See, e.g., supra notes 73–74 and accompanying text (describing the Lorena Borjas Community Fund).
[144] See, e.g., supra notes 68–70 and accompanying text (describing the Baltimore Protesters Bail Bond Fund).
[145] See, e.g., Cortés, supra note 11 (discussing the foundation of the Lorena Borjas Community Fund).
[146] Cf. Guinier & Torres, supra note 118, at 2762–63 (explaining that the Mississippi Freedom Democratic Party's goal when it engaged in demosprudence was not political participation on its own, but rather the results that can flow from political power).
[147] See Simonson, Criminal Court Audience, supra note 5, at 2183–84.

copwatching groups[148] are engaging in powerful forms of participation through observation. Similarly, "participatory defense" has emerged as a growing form of popular input into the everyday workings of public defense.[149] But community bail funds do something especially powerful because they facilitate actual intervention into one of the most crucial moments of all: the moment when a judge decides the fate of a case by determining whether or not money bail will be set so high that it will lead to a defendant's pretrial detention. When community bail funds intervene at this moment, they shift the meaning of bail—and ultimately, justice—back into the hands of the people most affected by the practice. Community bail funds move us closer to a democratic ideal, helping us imagine a system of criminal adjudication that is truly responsive to popular demands for justice.

[148] See Simonson, Copwatching, supra note 41, at 412–27.
[149] See Janet Moore et al., Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform, 78 Alb. L. Rev. 1281 (2014–2015).