The Inequity of Third-Party Bail Practices

Judge Patrick Carroll[*]

For many criminal defendants, a common source of bail funds is their own family or friends. Such individuals typically assist in the expectation that if the defendant complies with court orders and satisfies all court appearances, their money will be returned to them. In revenue-motivated court systems, however, bail funds—even when owned by a third party—are often applied to the defendant's fines and court costs, resulting in the effective forfeiture of the friend or relative's money. This Article reviews the processes of third-party bonds, the risk that a third-party bond will be incorrectly identified as the defendant's asset, and the third party's rights regarding the ultimate disposition of the funds and other competing claims on the bail. It calls attention to a little-considered issue in current calls for bail reform and criminal justice reform generally—one that affects not only defendants, but also their families and support systems. The use of third-party funds to pay fines and fees is unfair to friends and relatives who, in their haste to collect bond for the defendant and perhaps with little knowledge of the criminal justice system, may not understand the full extent of their financial risk. It also produces a breakdown of justice in that a third party's payment of a fine fails to accomplish the goal of monetary penalties in the criminal justice system.

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INTRODUCTION

The scope of this Article involves the rights and consequences of a person who posts bail for a defendant in a criminal case. The Article reviews a third party's initial involvement in the court system when posting a cash bond, the risk of incorrectly including a third-party bond as the defendant's asset, the impact on the stakeholders in a criminal case, the rights of the third party regarding the money posted as bail against other competing claims, and the third party's rights regarding the ultimate disposition of the bail funds.

One of the underlying issues is the ultimate use of the bail money applied to the fines and court costs of the defendant to generate court revenue, resulting, effectively, in the third party's forfeiture of the money. Funding local courts is a constant problem. With a unified court system, such as Delaware, Massachusetts, or Pennsylvania, funding for courts on all levels is done on a statewide basis.[1] In most other states, however, the local municipal/traffic courts are separate from the rest of the court system and are dependent on local government funding, with pressure for courts to be financially self-sufficient.[2] Regardless of the funding source,

1. DEL. CODE ANN. tit. 10, § 105; MASS. GEN. LAWS, pt. III, ch. 221, § 34C; 42 PA. CONS. STAT. §§ 3521–32.

2. Rebekah Diller, *Court Fees as Revenue?*, BRENNAN CTR. FOR JUST. (July 30, 2008), https://www.brennancenter.org/our-work/analysis-opinion/court-fees-revenue [https://perma.cc/B7CY-6SYC].

misdemeanor and traffic courts are often viewed by local officials as revenue generators.[3]

Notwithstanding any statutory restrictions, judges possess inherent authority to control and process a case and enforce their own judgments, which includes the imposition of fines and court costs in a criminal case.[4] As a result, procedures may vary from court to court or among judges in the same court.[5] Third-party bail funds can become a revenue source that is already in the court's possession and control. In 2016, the National Center for State Courts convened a national task force on fines, fees, and bail practices addressing court self-funding by fines and court costs.[6] The task force report focused primarily on the negative impact of this practice on defendants in criminal cases and the public perception it creates by emphasizing revenue over the administration of justice and access to courts.

The ongoing discussion of bail practices and reform often overlooks a third party who posted the bond for the defendant.[7] The amount of a bond may range from a few hundred dollars in a low-level misdemeanor case

3. *See* PUB. AFFS. RSCH. COUNS. OF ALA., UNIFIED, BUT NOT UNIFORM: JUDICIAL FUNDING ISSUES IN ALABAMA 10 (2014), https://www.alabar.org/assets/2015/03/PARCA-Court-Cost-Study-FINAL-3-5-15.pdf [https://perma.cc/M5VD-KLYK] ("[T]he economic difficulties of recent years have led the Legislature to . . . increas[e] the reliance on court fees and temporary revenue sources . . . ."); YOLAINE MENYARD ET AL., CTR. FOR CT. INNOVATION, PRICE OF JUSTICE: CHALLENGING THE FUTURE OF FINES AND FEES 3 (2020), https://www.courtinnovation.org/sites/default/files/media/documents/2020-11/Guide_POJ_09302020.pdf [https://perma.cc/M8PC-CJT6] ("[Fines and fees] are . . . used to fund basic court operations in the absence of adequate state funding.").

4. Facebook, Inc. v. ConnectU, Inc., No. C 07-01389-JW, 2008 WL 8820476, at *3 (N.D. Cal. June 25, 2008) (finding that courts have inherent authority to order specific performance to comply with settlement agreements and impose fines alongside their statutory authority to enter a judgment). *See also* Johnson v. Johnson, 959 A.2d 637, 644 (Conn. App. Ct., 2008) (holding that lower court's act of holding defendant in contempt was not clearly erroneous when lower court drew inferences from facts on the record).

5. Not all policies and practices discussed in this article are practiced by all courts. Moreover, the exercise of a judge's discretion contributes to the varying practices. The purpose of this article is to highlight the practices that detrimentally impact either the third party who posted the bail or the defendant in a criminal case.

6. The findings of the task force were approved and adopted by Conference of Chief Justices and the Conference of Court Administrators. *See generally* NAT'L CTR. FOR STATE CTS., CONF. OF CHIEF JUSTS. & CONF. OF STATE CT. ADM'RS, RESOLUTION 4 IN SUPPORT OF THE NATIONAL TASK FORCE ON FINES, FEES, AND BAIL PRACTICES (Jan. 31, 2018), https://ccj.ncsc.org/__data/assets/pdf_file/0016/28042/01312018-support-principles-national-task-force-fines-fees-bail.pdf [https://perma.cc/TS45-QGBH].

7. This article is not about the professional bail bondsman who charges a nonrefundable percentage for the bail set by the court in exchange for guaranteeing the defendant's appearance.

to several thousand dollars in a major drug or fraud case.[8] Typically, third parties pay with the assumption that the money will be returned at the end of the case if the defendant complies with all court orders and appearances; however, a third party ultimately may lose that money if it is applied to the defendant's fines, court costs, restitution, or other fees.

The relationship and personal history between the defendant and the third party is critical. As that person is usually a relative or friend who knows the defendant, the bond is posted with a genuine belief that the defendant is a good risk, likely to show up for court appearances.[9] Implicit in this relationship is the defendant's incentive to appear in court to avoid the loss of funds to family members or friends if the defendant absconds.[10]

Without knowing the facts of the criminal charge, the friend or relative may believe the defendant is innocent and the case will soon be over, with

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8. *See, e.g.*, United States v. Wilks, 15 F.4th 842, 844–45 (7th Cir. 2021) (releasing defendant on a $5,000 bond for a drug offense). The *Wilks* court also acknowledged that while the lower court had discretion when setting bail, it was required to go beyond citing the statutory factors involved and to discuss, analyze, or explain the reason for denying bail or setting a high bail. *Id.* at 848. *See also Ex Parte* Briscoe, No. 02-15-00223-CR, 2015 WL 5893470, at *4 (Tex. App. Oct. 8, 2015) ("Relatively recent cases involving non-theft, non-drug, and first-degree felonies have approved bail in amounts ranging from $50,000 to $1,000,000."); Sullivan v. City of New York, No. 14-CV-1334, 2015 WL 5025296, at *7–8 (S.D.N.Y. Aug. 25, 2015) (denying excessive bail claim on grounds that amount of bail is discretionary within a wide range of amounts); *Ex parte* Alba, 469 S.W.2d 188, 188–89 (Tex. Crim. App. July 14, 1971) (affirming bail at $90,000 by weighing nature of offense, severity of potential punishment, and probability of conviction against finding an excessive sum). *But see* STANDARDS FOR CRIMINAL JUSTICE, THIRD EDITION: PRETRIAL RELEASE § 10-1.7 (AM. BAR ASS'N 2007) (stating that, although relevant to determining amount of type of bail or pretrial release, seriousness of charge should be reviewed in terms of other factors). *See also* State v. Brown, 338 P.3d 1276, 1278 (N.M. 2014) (reversing bail set solely based on gravity of offense).

9. CATHERINE S. KIMBRELL & DAVID B. WILSON, GEO. MASON UNIV., MONEY BOND PROCESS EXPERIENCES AND PERCEPTIONS 6, 9 (2016), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4ce69b9e-36d1-328f-30e3-416ee82abbdf [https://perma.cc/JVF4-4HYR] (finding that, among study participants who planned to post bond or were unsure at the time, fifty-one percent of participants reported planning to receive help from a family member); SANETA DEVUONO-POWELL ET AL., WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 13–14 (2015), http://whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf [https://perma.cc/B375-6LG8] (finding that sixty-three percent of participants reported that family members were primarily responsible for covering conviction-related costs); MARY T. PHILLIPS, N.Y.C. CRIM. JUST. AGENCY, A DECADE OF BAIL RESEARCH IN NEW YORK CITY 85 (2021), https://www.prisonpolicy.org/scans/DecadeBailResearch12.pdf [https://perma.cc/G64S-BR67] (reporting that family members are more likely to post bond than defendants themselves).

10. A concise and informative history and evolution of monetary bail is set out in *State v. Brooks*, 604 N.W.2d 345, 349–51 (Minn. 2000), pointing out that before the rise of commercial bondsmen, intrinsic in the bail system was the reliance that the accused or a reputable friend or relative would be willing to post sufficient cash or property to guarantee the defendant's appearance. *See also Brown*, 338 P.3d at 1283–88 (discussing historical origins of bail in English common law as well as modern concept of excessive bail in United States); State v. Hance, 910 A.2d 874, 878–80 (Vt. 2006) (rejecting cash-only bail for a secured appearance bond).

the bail funds returned. It is not uncommon for persons involved in illegal drugs, sexual misconduct, or embezzlement to conceal their activities from family or friends.[11] Drug use and drug-related offenses may come as a complete surprise to the person posting bond and unaware of the defendant's situation or potential criminal liability.

While the person posting the bond may be able to gauge the risks of the defendant's appearance in court, he or she is almost certainly not able "to gauge the merits of the case against the defendant and make a gamble as to its outcome."[12] Most likely, the only factor considered by the third party, whose money is held by the court, is the high probability the money will be returned if the defendant makes all of the court appearances. It is generally assumed that it will be the defendant, if found guilty, who will deal with any fines or court costs—not the third party, whose involvement was limited to posting bond for a friend. The defendant's nonappearance in court is a foreseeable risk that the third party assumes when posting bail. The amount of any fine or other financial obligations imposed on the defendant if found guilty, however, is an unforeseeable risk the third party neither agreed to nor intended when posting bail.

It is not practical to ensure that a third party fully understands the potential complete loss of the bail funds posted if the defendant is later found guilty. The unsuspecting or unsophisticated person with little or no exposure to the criminal justice system, called unexpectedly and working as fast as possible to obtain the release of a friend or relative, cannot be expected to understand what is commonplace to the police officer or clerk who is processing the bail. Specific legal terms are foreign to the average person, who may not realize the full consequences when instructed to pay a specific amount, sign a receipt, and wait for the defendant to be processed and released.

For misdemeanor offenses on a bond schedule, generally only ten percent of bail, or a few hundred dollars, is required to obtain the defendant's release.[13] In other cases, a judge may have previously set the bond.

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11. *See generally* Jeffrey T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship*, *in* THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY 377 (Kevin M. Beaver, J.C. Barnes & Brian B. Boutwell eds., 2014), https://www.sagepub.com/sites/default/files/upm-binaries/60294_Chapter_23.pdf [https://perma.cc/QDR6-WZ9B].

12. Commonwealth v. Kovalak, 17 Pa. D. & C.3d 719, 722 (Wash. Cty. Pa. Ct. Com. Pl. Mar. 10, 1981).

13. A bond schedule sets out predetermined monetary amounts for a defendant to post for release from jail when the court is not in session. The amount of the bond is generally set by level of offense. A bond schedule provides a speedy and convenient method for release of those who have no financial difficulty. Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978). A bond schedule,

Whether by schedule or court order, the defendant may be facing extended time in jail unless someone can come to his or her rescue and post bond. The well-intentioned friend or relative does not realize that the bond just became a down payment on a future fine for someone else's misdeed. This scene probably occurs every night throughout the country.

In many pretrial detentions, there is the issue of indigency. People with moderate or higher incomes, as well as successful drug dealers and other criminals, do not need to rely on someone else to post bail.[14] When a third party is called to post bail, it is because the defendant does not have the financial resources to post it and needs help from others.[15] The bond may also have a significant impact on the third party, who is called to make an unexpected cash payment intended for rent, food, or other family necessities.[16]

The purpose of a bond is to secure the defendant's appearance in future court hearings.[17] Factors to be considered when setting bond include the risk of flight; the defendant's financial resources, and in some cases, the risk of harm to the defendant, victim, or the community.[18] It is not a down payment for future fines. Numerous courts have repeatedly held that bail is not intended to punish a defendant or enrich the government and should

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however, is limited to the level of offense and the defendant's financial situation and does not take into consideration alternative conditions of release. *Cf.* Hernandez v. Lynch, No. EDCV 16-00620, 2016 WL 7116611, at *25 (C.D. Cal. Nov. 10, 2016) (holding that a bond amount, set pursuant to a bond schedule, that failed to account for individual defendant's financial situation and alternative conditions of release violated defendant's right to due process).

14. "The high rate of pretrial detention in the United States is due to both the widespread use of monetary bail and the limited financial resources of most defendants." Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 201 (2018).

15. *See* DEVUONO-POWELL ET AL., *supra* note 9, at 13–14 (discussing payment of bail borne by families); *see also infra* notes 143, 144.

16. In some cases, the risk to the third party may be more than financial. In *Francis v. Lake Charles Am. Press*, 265 S.2d 206, 209, 214 (1972), the third party recovered damages from a newspaper that published an article mistakenly naming the third party who posted the bond, instead of the defendant, who was arrested for voyeurism.

17. Bandy v. United States, 81 S. Ct. 197, 197 (1960) (Douglas, J.) (supervisory opinion). *See also How Courts Work*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail/ [https://perma.cc/93YE-HCS5] ("The purpose of bail is simply to ensure that defendants will appear for trial and all pretrial hearings for which they must be present.").

18. United States v. Salerno, 481 U.S. 739, 742–43 (1987) (construing federal Bail Reform Act of 1984, 18 U.S.C. §§ 3141–42, 3145). *See also* Harris v. United States, 404 U.S. 1232, 1232–33, 1235–36 (1971) (construing §§ 3146 and 3148 for post-conviction bail on appeal).

not be set with a view towards fines.[19] In *Cohen v. United States,*[20] Justice William O. Douglas, in a single-justice opinion, held that requiring a bail bond to operate as a *supersedeas*[21] to a judgment for a fine is beyond the bond's intended purpose and results in excessive bail under the Eighth Amendment to the United States Constitution.[22]

In the federal court system, 28 U.S.C. § 2044 provides that a third-party bond may not be applied to a defendant's fines or other financial obligations unless it can be shown that the defendant owns the funds.[23] This statute puts to rest, at least in the federal court system, the right of a third-party bond depositor to recover the bail funds when the case is

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19. *See* United States v. Powell, 639 F.2d 224, 225 (5th Cir. 1981) ("The purpose of bail is to secure the presence of the defendant; its object is not to enrich the government or punish the defendant."); United States v. Sparger, 79 F. Supp. 2d 714, 716–18 (W.D. Tex. 1999) (quoting *Powell*, 639 F.2d at 225).

In *DuBose v. McGuffey*, Slip Op. No. 2022-Ohio-8 (Ohio Jan. 4, 2022), the court held that in the absence of a specific statute, public safety should not be considered when setting monetary bail, but instead should be addressed by nonmonetary conditions of bond, such as no-contact orders, house arrest, GPS monitoring, or other requirements specifically focused on maintaining public safety. *Id.* at 9. A court may not impose excessive bail for the purpose of keeping an accused in jail. *Id.* at 13. Monetary bail for public safety is beyond the statutory framework and therefore excessive. *Id.* at 12–13.

20. Cohen v. United States, 82 S. Ct. 526, 527–28 (1962).

21. A *supersedeas* bond is an appellant's bond to stay execution on a judgment during the pendency of the appeal. *Purcell v. Thomas*, 28 A.3d 1138, 1144 (D.C. 2011) (citing BLACK'S LAW DICTIONARY 190 (8th ed. 2004)). A *supersedeas* bond is an appellate bond to stay the proceedings and is separate from a cost bond under Federal Rule of Appellate Procedure Rule 7. Adsani v. Miller, 139 F.3d 67, 70 n.2 (2nd Cir. 1998).

22. *Cohen*, 82 S. Ct. at 528. The decision by Justice Douglas was a supervisory, "in chambers" opinion, made without the participation or concurrence of the entire court. *See generally* Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159 (2008). Although a single-Justice opinion is limited and not binding precedent, other courts have also adopted Justice Douglas's reasoning. *See* United States v. Rose, 791 F.2d 1477, 1480 (11th Cir. 1986) (stating that any conditions requiring a bail bond to be used for payment of a fine are contrary to purposes of a bail bond under Eighth Amendment); *Sparger*, 79 F. Supp. 2d at 718; State *ex rel.* Baker v. Troutman, 533 N.E.2d 1053, 1056 (Ohio 1990) (stating that purpose of bail is to ensure appearance). *See also* United States v. Feiner, No. 92-00548-01, 1993 WL 440605, at *3 (E.D. Pa. Oct. 27, 1993) (holding that government's refusal to return defendant's bail post-conviction violated defendant's due process rights).

23. 28 U.S.C. § 2044, which provides in part:

> The court shall not release any money deposited for bond purposes after a plea or a verdict of the defendant's guilt has been entered and before sentencing except upon a showing that an assessment, fine, restitution or penalty cannot be imposed for the offense the defendant committed or that the defendant would suffer an undue hardship. This section shall not apply to any third party surety.

In *United States v. Ware*, Nos. 04 Cr. 1224 & 05 Cr. 1115, 2021 WL 3188248, at *1 (S.D.N.Y. July 28, 2021), one half of the bail was posted by the defendant and the other half by his mother. Although the defendant's mother's portion could not be applied to the defendant's fines by 28 U.S.C. § 2044, the defendant's mother died during the pendency of the case. *Id.* at *2. The court held that as a one-third beneficiary of the estate, one-third of the mother's portion of the bail funds could be applied to the defendant's fines. *Id.*

concluded.[24] Although issues still arise about ownership of the funds, once ownership is determined, a third party is protected from any loss of bail funds.[25] The system is not the same in state courts, when third-party bonds may be applied to a defendant's fines, court costs, or restitution without the third party's consent.[26]

State courts have provisions in statute or rule of court for the discharge of bail when the case is concluded: to either release the funds or apply them to court-imposed financial sanctions.[27] As a contract, a bail bond should be construed to give effect to the reasonable intentions of the parties, with the understanding that the construction should be in favor of the surety who may not be held liable for a greater undertaking than agreed to when bail was posted.[28] Recognizing this principle, some courts have applied contract principles when third parties post bond and agree to secure the presence of the defendant for court proceedings.[29] Once the case is over and the conditions are satisfied, the contract is completed with the trial court, and the third party is entitled to return of the funds.[30]

The primary purpose of applying third-party bail funds to fines and

24. FED. R. CRIM. P. 46(g) (requiring court to release any bail when bond conditions have been satisfied).

25. *See* United States v. Ener, 278 F. Supp. 2d 441, 449 (E.D. Pa. 2003) ("[A]ny bail funds belonging to friends and relatives were unavailable to pay the fines if an evidentiary hearing established their legitimate claim to the funds." (citing Bridges v. United States, 588 F.2d 911, 912–13 (4th Cir. 1978))); United States v. Bracewell, 569 F.2d 1194, 1200 (2d Cir. 1978) (noting that any bail funds belonging to friends and relatives were unavailable to pay fines if an evidentiary hearing established their legitimate claim to funds). *See also Bracewell*, 569 F.2d at 1200 ("If monies paid on a defendant's behalf actually belong to a third party, then they are not available for payment.").

26. *See* 8A AM. JUR. 2D *Bail and Recognizance* § 85 (2021). *See also* Michael G. Duprée, Annotation, *Propriety of Applying Cash Bail to Payment of Fine*, 42 A.L.R.5th 547 (1996) (stating that, in some instances, statute further authorizes application of cash bail to payment of defendant's fine or his fine and costs). Additionally, some courts have allowed the use of cash bail for payment of fines and costs without specific statutory authority. *Id.*

27. 8A AM. JUR. 2D *Bail and Recognizance* § 85 (2021).

28. United States v. Sparger, 79 F. Supp. 2d 714, 717 (W.D. Tex. 1999) (citing United States v. Jones, 607 F.2d 687, 688 (5th Cir. 1979)). *See also* United States v. Arnold, No. 1-18-CR-30-1, 2020 WL 957415, at *2–3 (N.D. Miss. Feb. 27, 2020) (following *Sparger*).

29. United States v. Wickenhauser, 710 F.2d 486, 487–88 (8th Cir. 1983) (holding that defendant was entitled to release of his bond because he satisfied the "condition" of his appearance in court); United States v. Powell, 639 F.2d 224, 266 (5th Cir. 1981) (discussing *Jones*, 607 F.2d at 688).

30. *See, e.g.*, Schilb v. Kuebel, 404 U.S. 357, 361–62 (1971) (discussing a provision of Illinois law which provided for return of bail funds to accused). Although the issue in *Schilb* involved the authority of a clerk of court to charge a bail fee, the underlying issue was the right to retain the bail funds after the case was terminated. *Id.* at 360–62. The Court upheld the bail fee but held when the defendant is discharged from all obligations in the case, after deduction of the fee, the balance of the bail money is required to be released. *Id.* at 367–68.

court costs is to generate court revenue.[31] Using courts as a revenue generator has been a long-standing problem,[32] receiving national attention in 2015 following the disturbance in Ferguson, Missouri, and the subsequent pattern-or-practice investigation and report by the U.S. Department of Justice (DOJ).[33] This report, as well as others, found an excessive emphasis on revenue rather than public safety and a disproportionate impact of fines on poor and minority persons.[34] The DOJ's report also found that this emphasis on revenue generation fundamentally compromised the role of the court to act as a neutral arbitrator.[35]

With the emphasis on revenue, a warrant becomes a collection tool. In her dissenting opinion in *Utah v. Strieff*, Justice Sotomayor noted the staggering increase in warrants when a person with a traffic ticket misses

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31. Not all applications of bail funds by the government are to enrich the government. Often the bail funds are applied to restitution. Considering a victim's rights, a judge may be concerned that the money posted as bail and the defendant's circumstances, the bail funds may be the only source of restitution for a crime victim. While a distinction may be made between restitution to compensate a crime victim and fines and court costs that accrue to the government, the impact on the innocent third party is the same.

32. *See* Dan Kopf, *The Fining of Black America*, PRICEONOMICS (June 24, 2016), https://priceonomics.com/the-fining-of-black-america/ [https://perma.cc/8P5N-A88T]; Note, *Development in the Law: Policing, Policing and Profit*, 128 HARV. L. REV. 1706, 1731–32 (2015) [hereinafter *Policing and Profit*] (discussing history of revenue-generating schemes by federal agencies, from fines and fees to civil forfeiture); Matthew Shaer, *How Cities Make Money by Fining the Poor*, N.Y. TIMES (Jan. 8, 2019), https://www.nytimes.com/2019/01/08/magazine/cities-fine-poor-jail.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer [https://perma.cc/5GUJ-7886] ("[J]ailing poor defendants has proved to be an effective way of raising money.").

33. U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–15 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/AQW3-VT34].

34. *See* COUNCIL OF ECON. ADVISORS, FINES, FEES, AND BAIL 1 (2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf [https://perma.cc/DVK4-GRWK] (examining effects on poor defendants of common monetary payments in criminal justice systems); *see also* Kiren Jahangeer, *Fines and Fees: The Criminalization of Poverty*, AM. BAR ASS'N (Dec. 16, 2019), https://www.americanbar.org/groups/government_public/publications/public_lawyer_articles/fees-fines/ [https://perma.cc/SJ5W-7PTK] (noting a disproportionate burden on racial minorities to account for costs associated with incarceration); Aravind Boddupalli & Sarah Calame, *Fines and Forfeitures and Racial Disparities*, TAX POL'Y CTR. (Aug. 14, 2020), https://www.taxpolicycenter.org/taxvox/fines-and-forfeitures-and-racial-disparities [https://perma.cc/DZU2-ZUS4] (discussing role that fines and forfeitures play in state and local government budgets).

35. The DOJ's March 2015 report of its investigation of the Ferguson Police Department found that officers and courts focused on generating revenue through fines and fees. U.S. DEP'T OF JUST., *supra* note 33 at 3, 97–98. *See also* Mike Maciag, *Skyrocketing Court Fines Are Major Revenue Generator for Ferguson*, GOVERNING (Aug. 21, 2014), https://www.governing.com/archive/gov-ferguson-missouri-court-fines-budget.html [https://perma.cc/SR55-SEF4] (noting that approximately one-fifth of total operating revenue for Ferguson's budget came from court fines in 2013).

a fine payment or court appearance in misdemeanor cases.[36] The DOJ's report found, "[t]hat the primary role of warrants is not to protect public safety but rather to facilitate fine collection is further evidenced by the fact that the warrants issued by the court are overwhelmingly issued in non-criminal traffic cases that would not themselves result in a penalty of imprisonment."[37] Reasons for nonappearance or nonpayment include lack of financial ability, lack of transportation (in many cases due to a suspended driver's license), inability to leave work, or fear of arrest for nonpayment.[38]

The increase in warrants for minor offenses also impacts pretrial detention. The number of friends or relatives a defendant may call to post bail is not only limited to the friend or relative's financial situation. A friend or relative with their own active bench warrant will be reluctant to go to a police station to post bail for another person.[39]

I. BASIS FOR APPLYING THIRD-PARTY BAIL TO FINANCIAL SANCTIONS

Methods used to apply third-party bonds to a defendant's fines or court costs include:

Local rule of court;

A bond receipt form containing language that the third party agrees to disposition of funds;

Local court requirements that the bond must be put in the defendant's name; and

Scare or coercive tactics, including

a) putting the bond in the defendant's name by telling the third party that if the defendant does not appear, the third party will not only forfeit the amount of funds deposited, but will also be required to pay the additional ninety percent balance;[40] or

b) upon conviction, threatening to levy additional surcharges or other

36. *See* Utah v. Strieff, 579 U.S. 232, 249–50 (2016) (Sotomayor, J., dissenting) ("Outstanding warrants are surprisingly common. When a person with a traffic ticket misses a fine payment or court appearance, a court will issue a warrant.").

37. U.S. DEP'T OF JUST., *supra* note 33, at 56; *see also Policing and Profit*, *supra* note 32, at 1746 (noting that people often avoid police to elude arrest for debt, rather than to hide illicit activity).

38. MATTHEW MENENDEZ ET AL., BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES 10 (2019).

39. *See, e.g.*, Rodriguez v. Milwaukee Cty., No. 16-CV-130, 2018 U.S. Dist. LEXIS 235938, at *1-4 (E.D. Wis. 2018) (involving woman arrested on warrant for nonpayment of fines when posting bail for her son).

40. With a ten percent cash bond, the person who posted the bond, whether third party or defendant, is technically liable to pay the remaining ninety percent balance if the defendant does not appear. The general practice, however, is to forfeit the amount posted, issue a new warrant with a new bond, and not pursue the remaining balance in a non-surety situation.

collateral sanctions for nonpayment, including suspension of the defendant's driver's license, unless the third-party bond is applied to the fines or court costs.

Although some of these methods have been upheld, courts have noted problems with them.

A local rule is a codification of a particular court's practices which are not in conflict with the state's enacted laws or rules of practice and procedure. *Ruckinger v. Weicht*[41] invalidated a local court rule applying third-party bail money to fines and court costs as in conflict with the state's rules of procedure.[42] The court in *Ruckinger* recognized that a friend or parent in a stressful situation might not understand the full consequences, including loss of funds, when posting bond.[43] Similarly, in *State v. Harshman*,[44] a bond form based on a local rule requiring a third party to apply a bail bond to the defendant's fines and court costs was invalid because the third party had not given voluntary consent and had no opportunity to dispute this term in order to post bond.[45] In addition, the local court rule the bond form was based on violated the state statute.[46]

The third party who posts the bond will likely have no notice of the local rule that bail funds can be applied to any subsequent fines or court costs.[47] A local rule restricting the post-judgment distribution of bail funds can be direct or indirect, converting bail into a performance bond until all fines and court costs are paid. Similar to a court order, it is beyond the scope of the purpose of the bond.[48]

In *State v. Iglesias*, the Wisconsin Supreme Court upheld a state statute permitting bond money to be applied to fines, costs, and restitution

41. Ruckinger v. Weicht, 514 A.2d 948, 950 (Pa. Super. Ct. 1986).

42. Court policies that automatically deprive a third party of return of bail funds risk exposing a municipality to monetary damages, injunctive relief, and attorney's fees. *See* Denton v. Bedinghaus, 40 F. App'x 974, 979–80 (6th Cir. 2002) (reversing dismissal of class action to determine if quasi-judicial immunity applied to a local government entity that benefitted from court's policy to automatically apply third-party bonds to defendant's child-support arrearage.).

43. *Ruckinger*, 514 A.2d at 951.

44. State v. Harshman, 806 N.E.2d 598, 602–04 (Ohio Ct. App. 2004).

45. *Id.*

46. *See also* United States v. Forte, No. 85-141-1, U.S. Dist. LEXIS 22869, at *6–7 (E.D. Pa. July 14, 1986) (holding that a local rule creating a lien in favor of government for bail was limited to defendant's funds and could not be applied to third parties).

47. In *Perry v. Aversman*, the attorneys posted the bond for the defendant and were not aware of the local rule. 168 S.W.3d 541, 543–44 (Mo. Ct. App. 2005). The appellate court reversed a judgment that the local rule was invalid because there was notice to the third party of the potential loss of the bail funds by the language of the bond receipt. *Id.*

48. Cantois v. Virgin Islands, 61 V.I. 257, 260–61 (2014) (invalidating a court order making release of bond money to third party contingent on defendant's paying all fines and court costs); *see also* State v. Austin, No. 95-CA-99, 1996 Ohio Ct. App. LEXIS 3061, at *1–2, *4 (July 5, 1996) (holding plain error for trial court to withhold release of bond until all fines were paid).

without regard to the ownership of the funds.[49] The court relied in part on the printed language on the bond receipt providing any money deposited for bail was conclusively presumed to be the defendant's property and could be applied to payment of the defendant's fines or other financial sanctions.[50] While this language was not pointed out at the time the bond was posted, the court stated that the language was clear and understandable and that the depositor signed the receipt acknowledging the terms of the bond.[51] Although upholding the language in the bond receipt, the court recognized the hurried circumstances when a bond is posted and suggested the language on the bond receipt should be written in large bold letters as a matter of public policy.[52] Some state statutes require the notice of potential loss of funds to be distinguishable from the surrounding text, in bold or underlined print, and larger than the surrounding type. [53]

II. CHILLING EFFECT

The decision in *Iglesias* is significant for the warning the dissenting opinion set out of the consequence of third-party bond forfeiture as payment of the defendant's fines:[54] As the dissent observed, while larger, bold print on a bond receipt will provide adequate notice to the person posting bond that the money can be applied to the defendant's fines and court costs, it may also cause a chilling effect for the third party willing

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49. State v. Iglesias, 517 N.W.2d 175, 182–83 (Wis. 1994).

50. This was based on Wisconsin case law and statute permitting any money posted as bond to be applied to fines and court costs. Specific references to state statutes are not included due to subsequent amendment or renumbering.

51. The court in *Iglesias* reasoned,

> The receipts were written in very understandable English (both Miller and Bochler can read, although Bochler claims he reads only at the fifth-grade level.) Moreover, they signed the receipts thereby acknowledging they had read them. In this case, we believe that procedural due process was clearly satisfied by publication of the statute, the length of time the statute has been in effect, and primarily by the notice language on the receipt itself, which both Bochler and Miller signed.

517 N.W.2d at 184.

52. In *Ellis v. Hunter*, 3 So.3d 373, 377 n.1 (Fla. Dist. Ct. App. 2009), the court acknowledged a legislative change to provide that cash bonds "prominently display a notice explaining that all funds are subject to forfeiture and withholding by the clerk of the court for the payment of court fees . . . regardless of who posted the funds."

53. In *People v. Williams*, 972 N.E.2d 1265, 1271 (Ill. App. Ct. 2012), the court upheld the decision applying the third party's bond to the defendant's fines and court costs. Although the bond receipt did not fully comply with the statutory requirement regarding size and type of print, the court found substantial compliance with the statute to give notice to the third party of the risk of loss of the bail funds. *Id.* The third party in *Williams* was also advised by defense counsel that the bond could be applied to any fines or court costs, providing additional notice to the third party. *Id.*

54. *Iglesias*, 517 N.W.2d at 185–86 (Bablitch, J., dissenting) ("Because bail is being used in this case for purposes for which it was not intended and is thus 'excessive,' and because its use in this manner will have a chilling effect upon a defendant's constitutional rights to pretrial release, I conclude that it is contrary to the dictates of the United States and Wisconsin Constitutions.").

to post bail for their friend or relative.[55]

Conspicuous notice to a third party on a bond receipt that the funds are not returnable is a two-edged sword. The dissent warned that once a third party realizes the posted funds may not be returned, the third party may not be willing to post bond.[56] The more prominent the notice to the third party that he or she is not just putting up money for the release of the defendant, but also effectively forfeiting the money to the court system, the greater the reluctance to post bail. The third party's relationship to the defendant also includes personal knowledge of the defendant's reliability and past infractions. As such, giving adequate notice to the third party may also prevent the bond from being posted, prolonging the defendant's detention solely for financial reasons.

Other courts have also recognized this chilling effect. *State v. Letscher*,[57] citing the dissent in *Iglesias*, held that disposition of pretrial bail money is not authorized as part of a sentence, and a third-party bond could not be applied to the fine as part of a defendant's sentence.[58] The concurring opinion in *State v. Thomas*[59] noted that the practice of applying third-party bonds to defendants' financial sanctions punishes the faith that friends and family have in the defendant and creates a disincentive

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55. Although the dissent in *Iglesias* warned of a chilling effect on the defendant's constitutional rights to pretrial release by conditioning the bail as part of a later fine payment and not its intended purpose, the policy of automatically applying the third party's bond to the defendant's subsequent fines and court costs would also have a chilling effect on the person posting the bail. The chilling effect on the third party also directly impacts the defendant's right of pretrial release if the third-party bail is reluctant to post the bond. *Id.* at 186.

56.

> In its decision, the majority suggests that the statement on the bail receipt, which warns parties that bail money may be used for fines, be printed in large, bold letters so as to adequately inform those parties posting bail. I completely agree that those parties should be warned. I am concerned, however, that once third parties are made aware of the potential use of the bail money they will no longer be willing to post the bail. Indigent people who have not yet been proven guilty, who rely on friends or relatives to post bail so that they may be released prior to trial, will suffer.

Id.

57. State v. Letscher, 888 N.W.2d 880, 887 (Iowa 2016) (citing *Iglesias*, 517 N.W.2d at 186) (Bablitch, J., dissenting)).

58. *See* United States v. Equere, 916 F. Supp. 450, 453 (E.D. Pa. 1996) ("If bail money belonging to third parties could regularly be applied to certain debts of defendants, there would be clear incentives for defendants to avoid repaying debts, and clear disincentives for third parties to post bond."); United States v. Hall, No. MC-10-0017-PHX-FJM, 2011 U. S. Dist. LEXIS 89645, at *3 (D. Ariz. Aug. 11, 2011) ("[T]hird parties will be unwilling to post bail funds that are unlikely to be returned."); Ruckinger v. Weicht, 514 A.2d 948, 951 (Pa. Super. Ct. 1986) ("If the risks are clear to the third party, they may well serve as a basis for refusing to make the funds available to the accused even though the third party is willing to assume the risk of the accused appearing for trial.").

59. State v. Thomas, 425 P.3d 437, 442 (Or. Ct. App. 2018) (Egan, C.J., concurring).

to post bail for a person who clearly qualifies for bail and fully complies with the terms of the bond.[60]

A third party's reluctance to post bail delays pretrial release, often for nonviolent offenses, when there is little or no risk of flight.[61] Delay of the defendant's pretrial release adds to unnecessary incarceration, overcrowded jails, and public expenses for the costs of incarceration.[62] In addition, there are the personal costs to the defendant, who may miss work or school, lose a job, or be unavailable for childcare.[63]

III. STATUTORY PRESUMPTION OF OWNERSHIP

Some states have a statutory presumption that bail funds are owned by the defendant.[64] Even when this presumption appears to be conclusive, most statutes afford the court some discretion by providing that the court *may,* rather than *shall,* apply the proceeds of the bond.[65] When the statute provides discretion, the court may consider the impact on and financial condition of the third party who posted the bond.[66] A rebuttable

60. *Id.*

61. JUST. POL'Y INST., FOR BETTER OR FOR PROFIT: HOW THE BAIL BONDING INDUSTRY STANDS IN THE WAY OF FAIR AND EFFECTIVE PRETRIAL JUSTICE 10, 19–22 (2012), https://justicepolicy.org/wp-content/uploads/2021/11/for_better_or_for_profit_.pdf [https://perma.cc/W4A2-RDPA].

62. *Id.* at 3; *see also* Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL'Y INITIATIVE (May 10, 2016), https://www.prisonpolicy.org/reports/incomejails.html [https://perma.cc/F5CJ-NR93] ("If . . . defendant[s are] unable to come up with the money either personally or through a commercial bail bondsman, they can be incarcerated from their arrest until their case is resolved or dismissed in court.").

63. With more courts adopting a nonmonetary bail schedule or policy, the number of these issues diminishes. *See* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 117–28 (2018) (regarding the substantial, detrimental economic impact of misdemeanors on indigent defendants).

64. A distinction may be drawn between a statute, passed by the state legislature that permits a bond to be applied to the defendant's financial sanctions and is subject to challenge in the court, and a local rule in which the court predetermines the disposition of bail funds.

65. Courts shall order bail funds owned by the defendant to be applied to any financial sanction imposed on the defendant. 28 U.S.C. § 2044. Notwithstanding the mandatory nature of this language, courts retain discretion due to the additional language. *See* United States v. Shkreli, No. 15-Cr.-637, 2018 U.S. Dist. LEXIS 114792, at *2–3 (E.D.N.Y. July 10, 2018), aff'd, 779 F. App'x 38 (2d Cir. 2019) ("[Bail funds] cannot be imposed for the offense the defendant committed or that the defendant would suffer an undue hardship." (citing 28 U.S.C. § 2044)); *see also* United States v. Hunger, No. H-05-337-02, 2008 U.S. Dist. LEXIS 88928, at *2–3 (S.D. Tex. Oct. 31, 2008) (finding that even though bail funds were in defendant's name, their release to government would impose an undue hardship on defendant and his family).

66. As it relates to the payment of court-appointed counsel, see, e.g., 725 ILL. COMP. STAT. 5/113-3.1(c) (1993):

> Any sum deposited as money bond with the Clerk of the Circuit Court under Section 110-7 of this Code may be used in the court's discretion in whole or in part to comply with any payment order entered in accordance with paragraph (a) of this Section. The court may give special consideration to the interests of relatives or other third parties who may have posted a money bond on the behalf of the defendant to secure his release.

presumption provides the court even greater discretion to determine the disposition of the funds, permitting a court to go beyond the name on a bond receipt.

IV. ASSIGNED-COUNSEL ISSUES

Assignment of counsel is based on the defendant's indigency.[67] Assessment of assigned-counsel costs is based on the defendant's ability to pay.[68] While both are within the discretion of the court, the bond posted by a third party is not a determinative factor for either.

A defendant's financially resourceful friends or family members should not be considered when deciding if the defendant qualifies for appointed counsel in a criminal case.[69] In *Illinois v. MacTaggart*,[70] the court held that a defendant could not be denied appointment of a public defender based solely on the bond posted by the defendant's parents.[71] The court in *MacTaggart* noted, "Bail is commonly posted by friends, family, and other supporters and the court cannot presume that the bond funds are available to the defendant. Provisions for bail do not mandate that funds made available by others are necessarily dedicated to the defendant's attorney fees."[72] Unless otherwise shown, bail posted by a third party is not an asset of the defendant and is not available for the defendant to assign to a private attorney for representation.[73] The same principle, that third-party bail funds are not the defendant's assets, applies equally to prohibit applying bail funds to the defendant's fines and court costs as

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67. John P. Gross, *Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of Their Sixth Amendment Right to Counsel*, 70 WASH. & LEE L. REV. 1173, 1174 (2013).

68. *See* United States v. Kelley, 861 F.3d 790, 800 (8th Cir. 2017),

> The constitutional right to a fair trial is implicated in the appointment of counsel for indigent defendants. . . . In granting court-appointed counsel, the court assesses a defendant's immediate ability to pay because "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."

(first citing Martinez v. Ryan, 566 U.S. 1, 12 (2012), then quoting Gideon v. Wainwright, 372 U.S. 335, 344 (1963)).

69. *See generally* People v. Darnold, 33 Cal. Rptr. 369 (Cal. Ct. App. 1963). The trial court distinguished between bail being posted by the defendant as evidence of the defendant's financial resources and bail posted by someone else, which would not be considered in the decision to appoint counsel for the defendant. *Id.* at 579.

70. Illinois v. MacTaggart, 151 N.E.3d 667, 671–72 (Ill. App. Ct. 2019).

71. *See* State v. Kasler, 995 N.E.2d 262, 268 (Ohio Ct. App. 2013) (reversing misdemeanor convictions for denial of court-appointed counsel to a college-student defendant based on household income that included her parents' income and property).

72. *MacTaggart*, 151 N.E.3d at 671–72.

73. *See* State v. West, No. A14-1630, 2015 LEXIS 609, at *16–19 (Minn. Ct. App. July 6, 2015) (holding that bail posted by defendant's father was not sufficient by itself to determine that defendant was ineligible for a public defender).

it does for consideration of appointment of counsel.

This issue generally arises with misdemeanor or low-level felony offenses. If public defenders are not available, private attorneys are assigned to indigent defendants. When a third-party bond is substantial, the defendant usually has retained counsel. Consequently, appointment of counsel has a disproportionate impact on defendants who are at or below the poverty level.[74] While it may appear that a person with the financial resources to post bond can also afford to hire an attorney, often the financial resources of both the defendant and his or her family or friends are exhausted by the expense of the bail.[75]

Similarly, assessment of assigned-counsel fees is based on the defendant's financial status and ability to pay.[76] Assessment of counsel fees also has a disproportionate impact on a defendant at or below the poverty level. Court costs, which are civil in nature, when added to assessed counsel fees and other court-imposed expenses, may eclipse the fine imposed for the offense. In light of this disproportionate impact, it is necessary to determine the defendant's ability to pay before assessing appointed-counsel fees.

Addressing the issue of whether a third-party security[77] should be considered for appointed-counsel fees, the court in *State v. Morales*[78] applied a two-step process:

1) Whether the defendant has or may in the future have an ability to pay, and if so,
2) The amount of the bond funds to be applied to court-appointed fees.[79]

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74. *See, e.g.*, People v. Portillo, 616 N.W.2d 707, 709 (Mich. Ct. App. 2000) (citation omitted):
> A defendant who can afford to retain counsel on his own cannot have that right restricted by the courts. Such a defendant has a constitutional right to defend an action through the attorney of his choice. In contrast, an indigent defendant is entitled to the appointment of counsel, but he does not have the right to have counsel of his choosing appointed.

75. *See* People v. Falls, 2020 IL App (1st) 170219-U, ¶¶ 25, 27–28 (holding that trial court's decision to deny appointment of counsel to defendant based on defendant's ability to post bond, even though funds were put up by a third party, was reversible error).

76. *See* Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323, 335–36 (2009) (detailing widespread state-court practice, authorized under *Fuller v. Oregon*, 417 U.S. 40 (1974), of requiring defendants for whom counsel is appointed to contribute toward cost of their representation if it can subsequently be demonstrated that they have ability to pay, and reviewing several methods of determining that ability).

77. Oregon uses the term security instead of bond or bail.

78. *See generally* State v. Morales, 476 P.3d 954 (Or. 2020).

79. *Id.* at 957. The Oregon statute permitted the court to apply any bond to the defendant's court-imposed financial obligations. *Id.* In addition, the bond receipt in this case gave written notice to the defendant's mother who posted the security that the funds could be applied to the defendant's court-imposed financial sanctions. *Id.* at 956.

The court in *Morales* explained that if there is no ability to pay, the process ends without determining any costs or other fees imposed on the defendant.[80] Until the trial court determines the defendant has the ability to pay, the court cannot assess assigned-counsel fees. Funds owned by a third party may be available for paying court-ordered expenses, but only after the defendant's ability to pay is determined. A trial court cannot consider a third-party bond as part of the defendant's financial resources for purposes of determining the defendant's ability to pay unless there is some evidence that the third-party family member or friend intended to transfer the funds to the defendant.[81]

The court in *Morales* distinguished between a spouse as the third party paying the security, which may be part of the defendant's financial resources, and a non-spouse whose funds (in the absence of a donative intent) are not part of the defendant's financial resources.[82] When, however, the defendant has jointly owned property or an interest in a business venture with another family member, the value of the property and the extent of the defendant's interest may be considered when determining defendant's ability to pay assigned-counsel fees.[83]

Most states, whether by statute or case law, require the trial court to make a finding on the defendant's financial situation and resources before assessing assigned-counsel fees.[84] Providing the defendant with a

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> Thus, before imposing fees, the trial court must complete a two-step process . . . . It appears to follow necessarily from the text of the statute that, if a trial court is unable to find that the defendant "is or may be able to pay" the fees—or, to phrase it in the affirmative, if the trial court finds that the defendant does not have the ability to pay—the inquiry ends, and the court may not impose fees in any amount.

Id.

81.

> When funds deposited by a third party nevertheless belong to a defendant, they may be used to satisfy the defendant's financial obligations. Without the presumption that security funds belong to a defendant, however, funds paid by and belonging to a third party cannot be the sole basis for a finding that a defendant has the "ability to pay" court-ordered costs.

Id. at 961.

82. *See id.* (discussing scrutiny of security deposit made by a defendant's spouse versus a non-spouse third party such as another family member who probably had no donative intent); *see also* State v. Scott, 488 P.3d 803, 807–08 (Or. Ct. App. 2021) (applying *Morales* and reversing order to defendant to reimburse assigned-counsel fees based on bail posted by defendant's mother).

83. United States v. Konrad, 730 F.3d 343, 349–50 (3d Cir. 2013).

84. *See* Anderson, *supra* note 76, at 340 ("Not all jurisdictions determine the defendant's ability to pay before imposing recoupment."); *see also* People v. Henderson, 596 N.E.2d 837, 842 (Ill. App. Ct. 1992) (recognizing that state law mandates a hearing on reasonableness of attorney fees for court-appointed counsel, where court must consider defendant's financial circumstances to determine if recoupment is appropriate).

meaningful right to be heard when determining his or her ability to pay is essential to avoid assessing additional expenses to indigent defendants. In *People v. Webb*, the court held that a hearing was required before a third-party bond could be applied to assigned-counsel fees.[85] When someone other than the defendant posted the bond, the third party was entitled to notice and the right to be heard before the bond was applied to any court-ordered fees.[86] Although a trial court may consider the financial impact on the third party when deciding if the bond should be applied to court fees or returned to the third party, this decision is not made until after the trial court determines the defendant's ability to pay.

Following the decision in *Webb*, Illinois courts require a hearing before bonds may be applied to assigned counsel fees.[87] Moreover, because an order to apply the bond constituted forfeiture, the defendant does not waive the right to assert this error on appeal by failing to object in the trial court to a failure to follow procedural requirements.[88]

The court in *Webb* noted that the ability to post bond does not create a presumption the defendant has the ability to pay appointed-counsel fees.[89] This presumption violates due process by discriminating against indigent defendants who posted bond. It also violates the right of procedural due process by effectively denying the opportunity to present evidence of the defendant's financial condition.

V. ISSUE OF STANDING

Generally, although not a party in a criminal case, a third party has standing in the case to request the return of bail posted at the conclusion of the case. The person who posted the bail suffers an injury and acquires

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85. People v. Webb, 658 N.E.2d 852, 855 (Ill. App. Ct. 1995).

86.

> The form informs third party payers only that bail may be forfeited and used for attorney fees if the defendant fails to comply with the conditions of the bail bond. Thus, where, as here, a defendant complies with the conditions, there is no reasonable notice that the public defender's services may be paid for out of the bond deposit.

Id. at 856.

87. *See* People v. Love, 687 N.E.2d 32, 39 (Ill. 1997) ("The hearing required by section 113-3.1 is a safeguard designed to insure [sic] that a reimbursement order entered under that section meets constitutional standards, as identified by this court in *Cook*."). The holding was subsequently adopted and codified as state law. *See* 725 ILL. COMP. STAT. 5/113-3.1.

88. *See Love*, 687 N.E.2d at 39 (affirming appellate court's judgment vacating trial court's reimbursement order, despite defendant's failure to object at trial); *see also* People v. Simmons, 2014 IL App (1st) 123225-U, ¶ 13 (holding that forfeiture is inappropriate without a procedural inquiry); People v. Carreon, 960 N.E.2d 665 (Ill. App. Ct. 2011) (stating that fee must be vacated where trial court fails to follow appropriate procedural requirements, even if defendant did not raise issue in trial court).

89. *Webb*, 658 N.E.2d at 854; *see also* People v. Cook, 407 N.E.2d 56, 59 (Ill. 1980) (explaining that court has never adopted a presumption that an ability to post bail indicates ability to pay counsel); *see generally Love*, 687 N.E.2d at 39 (citing *Cook*, 407 N.E.2d at 59).

standing by the loss of funds.[90] The third party's ability to assert their rights in court for return of the bail funds not only is grounded in due process, but also preserves the viability of the bail system by permitting a third party to deposit bail funds with the court with the understanding that the court will provide a forum for the third party.[91] A trial court has ancillary jurisdiction to consider a third party's motion for release of bail and to consider and determine ownership of the funds.[92] The third party's standing continues for appellate review.[93]

The right to assert a claim, however, is only one obstacle facing the third party who is attempting to recover the funds. When substantial funds are at issue, all persons asserting an interest in the funds will generally be represented by counsel.[94] In many misdemeanor or other low-level offenses, the person requesting the return of the bond is often *pro se.* The third party does not have an attorney or the right to appointed counsel, like the defendant does, and may not know the proper procedure to challenge a court order applying the bond to the defendant's fines or court costs.

In some cases, a direct appeal is not available because the third party is not a party in the criminal case and did not file a motion for return of bail funds, raise an objection to the release or application of the funds, or make any appearance in the case. In other situations, either the third party may be unaware of the right to appeal, or the appeal time has lapsed. The only remaining remedy is a writ of mandamus and/or prohibition against the judge who ordered the payment of the bond to fines or court costs.

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90. *See* Watanmaker v. Clark, No. 09-CV-3877, 2010 U.S. Dist. LEXIS 89958, at *15 (E.D.N.Y. Aug. 31, 2010) (finding third-party payor had standing to challenge bail forfeiture); People v. Courturier, No. 252175, 2005 Mich. App. LEXIS 3145, at *14 (Dec. 15, 2005) (per curiam) (holding that only third party who posted bail, not defendant, had standing to assert claim for release of funds). *But see* Coleman v. Cnty. of Kane, 196 F.R.D. 505, 507 (N.D. Ill. 2000). The plaintiff sought to certify a class-action lawsuit against the county sheriff for additional fees charged for and deducted from the bail amount. *Id.* The defendant sought to deny class certification on the grounds of lack of standing because a third party, not the plaintiff, had posted the plaintiff's bail. *Id.* Dismissing this argument as "silly," the trial court noted that the plaintiff incurred injury as the additional fee was owed by the plaintiff as part of the funds advanced by the third party. *Id.*

91. *See* United States v. Rubenstein, 971 F.2d 288, 295 (9th Cir. 1992) (articulating court's interest preserving bail fund system by assuring third-party payor of forum to petition for release of funds).

92. *See* United States v. Ener, 278 F. Supp. 2d 441, 447 (E.D. Pa. 2003) (stating that third party motions are ancillary to determine where to release bail funds); *see also* United States v. Arnaiz, 842 F.2d 217, 224 (9th Cir. 1988) (Schroeder, J., dissenting) ("[A] bail bond is property in the possession of the federal court, and even if express jurisdiction is otherwise lacking, ancillary jurisdiction may properly be invoked for disputes involving it.").

93. *See generally In re* Forfeiture of Bail Bond, 531 N.W.2d 806 (1995).

94. *See, e.g.*, People v. Love, 687 N.E.2d 32, 38 (Ill. 1997) (noting that third party who had posted bond obtained counsel prior to trial to get her money back).

Mandamus, often misunderstood even by attorneys, imposes an almost impossible barrier for *pro se* litigants.[95]

Appellate review, either by direct appeal or through mandamus and/or prohibition proceedings, is confusing, cumbersome, costly, and effectively unavailable to a third party without legal assistance. The cost of pursuing either remedy will most often exceed the amount of the funds involved.[96] Although the third party may ultimately recover the funds, both time and additional expenses are incurred.[97]

Moreover, as a direct action against the trial judge, a mandamus proceeding creates an adversarial relationship with the trial court, undermining the appearance of the trial court as the neutral arbitrator. The trial judge, not the prosecutor or other person claiming an interest in the bail funds, is effectively put into a position to dispute the ownership and disposition of the bond claimed by the third party. As the person who controls the distribution of the funds, the judge functions as the respondent in the writ proceeding, which implies an individual interest in the outcome. It also reinforces an unfortunate public image of the judge as concerned with generating revenue by imposing and collecting fines, regardless of the source of the funds.[98]

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95. Mandamus is a limited remedy which cannot be used to compel a judge to exercise discretion but is only available when the judge declines to exercise discretion or take any action when there is proper subject matter jurisdiction. Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384–85 (1953). Neither mandamus nor prohibition may be used as a substitute for a direct appeal. Thus, when a judge has discretion over how bail funds may be disbursed or applied, mandamus is not available. *Ex parte* United States, 287 U.S. 241, 248–49 (1932); Hudson v. Parker, 156 U.S. 277, 288 (1895).

96. In *State* ex rel. *Jennings v. Montgomery*, No. 98222, 2012 WL 2584863, at *1 (Ohio Ct. App. July 2, 2012), the third party was required to file a mandamus proceeding against the judge who applied the third-party bond to fines. This case involved a court policy to automatically apply all bonds to fines and costs. *Id.* The proceeding was dismissed after the trial court vacated its entry and refunded the bond to the third party without addressing the court's policy. *Id.* at *1–2.

97. The small amount of funds at issue, especially with a cash bond in a misdemeanor offense, explains the low number of appellate cases over the years. Although this is an ongoing and recurring problem, in many cases the small amount of money involved makes it economically unfeasible to obtain appellate review.

98. *See, e.g.*, U.S. DEP'T OF JUST., *supra* note 33, at 42–61, 100 (questioning Ferguson municipal court's excessive fines and collection enforcement practices and recommending the court stop using arrest warrants as means of collecting fees); *see also*, Cain v. White, 937 F.3d 446, 448 (5th Cir. 2019) (finding that trial judge's practices in collecting criminal fines and fees, a portion of which went directly into a judicial expense fund to pay court personnel salaries, violated Fourteenth Amendment's Due Process Clause). Regarding the possible conflict of interest from a judge occupying a dual role, the court in *Cain* relied on *Tumey v. Ohio*, 273 U.S. 510 (1927), recognizing the appearance of impropriety when there is a possible temptation to the average man as judge due to a financial interest in the outcome of a case. 937 F.3d at 451. In *Cain*, the court found that the standard of review was an average man as a judge, not an average judge. *Id.* at 453.

VI. IMPACT ON INDIVIDUAL THIRD PARTY

The obvious and direct impact on a third party is the loss of funds. The third party may consider bail a short-term loan, safe on deposit with the court, and may be relying on it to pay for rent, mortgage, a car payment, or utility bills. Instead, the short-term loan turns into a mandated payment of fines for someone else's misdeeds. Bail funds are limited to the agreement to secure the defendant's appearance and should not impose a greater liability on the third party than when the bond was posted.[99] As the court noted in *United States v. Equere*,

> If bail money belonging to third parties could regularly be applied to certain debts of the defendants, there would be clear incentives for defendants to avoid repaying debts, and clear disincentives for third parties to post bond. To avert such harms, the use of a third party's bail money should be limited to its core purpose—to secure a defendant's appearance in court. Once such purpose is satisfied, a third party's money should be promptly returned.[100]

If there is no voluntary reimbursement by the defendant, the third party's recourse is generally limited to a small-claims or other separate civil action against the defendant to recover the funds.[101] Ironically, a defendant convicted of a criminal offense has more protection than the third party who posted the bail. Regarding immediate payment, a defendant can raise an issue of ability to pay, which is not available to an innocent third party who posted the bond. If a defendant is financially unable to pay at the time the fine is imposed, arrangements can be made through a payment plan.[102] The third party does not have that option, as the entire amount is lost.

Beyond the criminal context, a third party's bond also has less protection than a civil judgment. With a civil bank account attachment, there is a right to object to the seizure of the funds with statutory exemptions and

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99. United States v. Sparger, 79 F. Supp. 2d 714, 7118 (W.D. Tex. 1999) ("[I]f the defendant satisfied the conditions of the bond . . . then it was mandatory that the courts exonerate the obligors and release any bail.").

100. 916 F. Supp. 450, 453 (E.D. Pa. 1996) (affirming bail was posted by defendant's brother).

101. Small-claims cases are generally informal proceedings with no right to pretrial discovery or jury trial. Rosse v. DeSoto Cab Co., 34 Cal. App. 4th. 1047, 1052 (Cal. Ct. App. 1995). Procedural rules may be relaxed and limited monetary damages. Even though this procedure is available for a third party to seek to recover from the defendant the money advanced for bail, the third party may be unaware of the process or disillusioned, having already been frustrated in prior attempts to recover the bail funds directly from the court.

102. *See* 725 ILL. COMP. STAT. 5/113-3.1 (explaining that method of payment may be modified in interests of justice).

monetary limitations of the amount that can be attached.[103] A third-party bond, however, is an automatic seizure of the third party's asset.[104] It also raises due-process issues by effectively imposing forfeiture without an opportunity to be heard and assert any ownership claim.

States that have enacted a strong policy for victim's rights, such as Marsy's Laws, provide notice of trial or plea, as well as the sentencing date to the victim.[105] Notice to the third party, however, is not statutorily mandated and often random and inconsistent, if given at all. Forcing the third party to forfeit bond for restitution replaces one victim with another.[106]

A. Impact on Nonprofit Community Bail Fund Organizations

Nonprofit bail organizations have become an important part of the criminal justice system in the United States.[107] Outside intervention to address pretrial detention of people who could not afford bail can be traced back to the Vera Institute of Justice and the Manhattan Bail Project in 1961.[108] Nonprofit bail organizations have developed and increased over the years primarily to provide bail funds for pretrial release of indigent defendants.[109]

Unlike a commercial bondsman, there is often no charge to the defendant.[110] Many cases involve misdemeanor or other low-level charges and a high likelihood that the defendant will appear in court and comply with

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103. *See, e.g.*, 14 A.L.R. Fed. 447 §§ 6–7 (outlining some federal and state statutory exemptions).

104. PAUL S. WALLACE, JR., CONG. RSCH. SERV., CRIME AND FORFEITURE: THE INNOCENT THIRD PARTY CRS-5 (1999).

105. *See What is Marsy's Law?*, MARSY'S L., https://www.marsyslaw.us/what_is_marsys_law [https://perma.cc/CS9N-Q4ZU] (last visited Jan. 5, 2022) (codifying victims' rights in criminal proceedings).

106. Commonwealth v. Rose, 58 Pa. D. & C.4th 505, 515, 2002 Pa. Dist. & Cnty. LEXIS 191, at *13 (Pa. Ct. Com. Pl. 2002).

107. Alysia Santo, *Bail Reformers Aren't Waiting for Bail Reform*, MARSHALL PROJECT (Aug. 23, 2016), https://www.themarshallproject.org/2016/08/23/bail-reformers-aren-t-waiting-for-bail-reform [https://perma.cc/UT4V-ST5X].

108. *Manhattan Bail Project*, VERA INST. OF JUST., https://www.vera.org/publications/manhattan-bail-project-official-court-transcripts-october-1961-june-1962 [https://perma.cc/PKE2-9T3T] (last visited Nov. 24, 2021).

109. Chelsea Dennis, *Bail Projects Proliferate—But Their Aim Is Reform, Not Growth*, NPQ (Jan. 22, 2019), https://nonprofitquarterly.org/bail-projects-proliferate-but-their-aim-is-reform-not-growth/ [https://perma.cc/NNP8-86H6]; Robin Steinberg et al., *Freedom Should Be Free*, THE BAIL PROJECT, https://bailproject.org/freedom-should-be-free/ [https://perma.cc/VU7D-NT3F] (last visited Jan. 5, 2022) (discussing different bail funds over the years).

110. *See Need Help Paying Bail?*, THE BAIL PROJECT, https://bailproject.org/help/ [https://perma.cc/C72N-U369] (last visited Jan. 5, 2022) ("The Bail Project is a nonprofit organization. We pay bail for people in need at no cost to them or their loved ones. . . . Our services are free of charge. If you receive an inquiry from someone claiming to be from The Bail Project and asking for money to pay bail for you or your loved one, please do not send any money.").

any conditions of pretrial release.[111] The amount of the bond has already been set by court order or bail schedule, and the defendant's financial resources are the only obstacle to release. If the defendant qualifies under the terms of the program, the money is posted by the nonprofit organization and the defendant is released.[112]

Nonprofit bail organizations provide a valuable service by not only reducing the jail population and pretrial detention time for indigent defendants, but also affording security for defendants' appearance in court.[113] In addition, organizations' screening processes provide family and employment contacts and other information that may not be available to the court.[114]

Many of these nonprofit organizations raise funds primarily through personal donations, corporate contributions, or grants.[115] The money is collected from donors to create a pool of funds available to post bail for indigent criminal defendants. The nonprofit organization accepts and reviews referrals and evaluates each case for eligibility. There is often no direct tie with the defendant.[116] A nonprofit bail organization operates

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111. O'Donnell v. Harris Cnty., 892 F.3d 147, 154 (5th Cir. 2018) ("The court's review of reams of empirical data suggested . . . that 'release on secured financial conditions does not assure better rates of appearance or of law-abiding conduct before trial compared to release on unsecured bonds or nonfinancial conditions of supervision.'"); *see also* Schultz v. State, 330 F. Supp. 3d 1344, 1363 (N.D. Ala. 2018) ("95% of nearly 2,300 criminal defendants whose bail was paid by charitable organizations, i.e. who had no 'skin in the game,' made all court appearances.").

112. *Our Approach*, THE BAIL PROJECT, https://bailproject.org/our-work/ [https://perma.cc/ZWA2-6R95] (last visited Jan. 5, 2022) ("If eligible for our program, we post bail directly to the court at no cost to the person or their family.").

113. United States v. Powell, 639 F.2d 224, 225 (5th Cir. 1981); *see also* STANDARDS FOR CRIMINAL JUSTICE, *supra* note 8, at § 10-1.7.

114. *Our Approach*, *supra* note 112 ("Once someone is referred to The Bail Project, a member of our staff will schedule an interview to learn more about the person's situation and needs."); *see also id.* ("Once free, we support them in coming back to court and we work with local partners to provide wrap-around services if needed.").

115. Andrea Clisura, *None of Their Business: The Need for Another Alternative to New York's Bail Bond Business*, 19 J.L. & POL'Y 307, 336–37 (2010); s*ee also* John F. Duffy & Richard M. Hynes, *Asymmetric Subsidies and the Bail Crisis*, 88 U. CHI. L. REV. 1285, 1322 (2021) ("The Bail Project and others are organized as 501(c)(3) organizations so that their donors can deduct donations from taxable income.").

116. Some courts have raised issues about the lack of ties between the defendant and the nonprofit organization when setting bail. *See, e.g.*, People v. Robinson, 131 N.Y.S.3d 810, 812 (N.Y. Sup. Ct. 2020) (rejecting bond payment attempted by unincorporated association from Twitter solicitations with no direct relationship to defendant or his family). The court in *Robinson* noted neither the defendant nor his family would suffer any economic harm or be motivated to return to court. Without the trust and reliance of a friend or relative or the loss of additional funds to a bondsman, the court noted the defendant had "no skin in the game" as an incentive to appear in court. *Id.* at 817.

with a revolving fund that permits numerous defendants to be released from jail by recycling the bail money after the case is concluded. The continued operation and success of the nonprofit bail organization is dependent upon its ability to regain the funds after a defendant has been discharged and then apply them to other defendants.[117]

Diverting bail money to pay a defendant's fines or court costs undermines the entire nature of the nonprofit organization's operation. The defendant has no ownership interest in the funds.[118] The bail funds are posted with a singular purpose: to obtain the pretrial release of the defendant.[119] There is no intention for the funds to be used to pay any future fine or court cost.

The impact of the loss of bail funds was clearly laid out in *Nashville Community Bail Fund v. Gentry*.[120] The nonprofit bail organization

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Similarly, in *United States v. Martinez-Tomas*, No. 19-cr-4847-LAB, 2020 U.S. Dist. LEXIS 79796, at *3 (S.D. Cal. May 5, 2020), the court declined a proposed bond by a nonprofit bail organization because the defendant had no connections or loyalty to the organization and little incentive not to abscond once the bond was posted. *See also* United States v. Martinez-Espinoza, No. 20-CR-0775-H, 2020 U. S. Dist. LEXIS 93213, at *10 n.3 (S.D. Cal. May 28, 2020) (raising without deciding adequacy of a bond posted by a third-party organization with no ties to defendant).

117. Steinberg et al., *supra* note 109 ("Because bail is returned at the end of a case, donations to The Bail Project National Revolving Bail Fund can be recycled and reused to pay bail two to three times per year, maximizing the impact of every dollar.").

118. State v. Morales, 476 P.3d 954, 961 (Or. 2020) (noting bail posted by nonprofit organization could not be considered a factor in a court's determination of a defendant's ability to pay assigned counsel fees.).

119. *See, e.g.*, CHI. CMTY. BOND FUND, https://chicagobond.org/the-revolving-fund#criteria [https://perma.cc/L8VY-AJKV] (last visited Dec. 27, 2021) ("Any money raised by CCBF that is not used to post bond will become part of CCBF's revolving bond fund and will be used to post bond for others in the future. In general, CCBF will only begin an action-specific fundraising campaign after it is clear that bond will be needed. CCBF feels it is important for the integrity of bond fundraising that asks for bond money be used to pay bond."); THE BAIL PROJECT, https://bailproject.org/faq/ [https://perma.cc/3MDM-CGWT] (last visited Dec. 27, 2021) ("Because bail is returned at the end of a case, The Bail Project National Revolving Bail Fund can be recycled and reused to pay bail two to three times per year, maximizing the impact of every dollar. 100% of online donations are used to bring people home."); *see also* Ariel Bibby, Note, *No Money, More Problems: The* Model Rules *and Bail Assistance Funds*, 27 GEO. J. LEGAL ETHICS 375, 382–83 (2014) ("The Bronx Freedom Fund derives most of the money that it uses from donations and grants. Then the funds are recycled back into the organization as the clients are no longer in need of them, and they have a very low rate of forfeit."); *see generally* C. Chisolm Allenlundy, Note, *Democratizing Bail: Can Bail Nullification Rehabilitate the Eighth Amendment?*, 71 ALA. L. REV. 575 (2019).

120. 446 F. Supp. 3d 282 (M.D. Tenn. 2020). There are two separate district court decisions in *Nashville Cmty. Bail Fund v. Gentry*. The first decision, (*Gentry I*) cited above, was issued on March 17, 2020, on a motion for a preliminary injunction that was granted in part and denied in part. *Id.* at 286–87. The court limited the scope of the preliminary injunction to cases when the nonprofit plaintiff, *NCBF*, posted or will post bail, recognizing the hardship to the nonprofit plaintiff and the public interest in the nonprofit plaintiff's continued operation. The court did not extend the preliminary injunction to all third parties due to the early stage of the litigation and the scope of the motion. *Id.* at 305. The second decision, *Gentry II*, 496 F. Supp. 3d 1112 (M.D. Tenn. 2020), was on the defendant clerk's motion to dismiss, which was denied. *Id.* at 1117.

challenged a local court rule applying the organization's bail funds to a defendant's fines and court costs.[121] Although nonprofit bail organizations were initially exempted, the local rule was amended in May 2019 to allow bail posted by nonprofit organizations to be applied to fines and court costs at the conclusion of the defendant's case.[122]

The clerk of court in *Gentry* prepared a bond receipt form that informed the person posting the bail that the funds were subject to payment of any fines, court costs, or restitution before release to the person posting the bond, regardless of whether it was posted by the defendant or a third party.[123] The bond receipt language was mandatory, and bail could not be posted or the defendant released until the receipt was signed by the depositor, acknowledging that some or all of the bail was subject to any payment for the defendant's subsequently imposed financial sanctions.[124]

The nonprofit bail fund organization in *Gentry* sought declaratory judgment and injunctive relief in its own right as well as on behalf of criminal defendants who had no other source for bail.[125] Overruling the defendant's motion to dismiss, the court found that at the preliminary stage of the case, the plaintiff had standing in its own right as well as on behalf of criminal defendants who would otherwise not be able to post bond.[126]

Regarding the standing issue, the court in *Gentry* found that the nonprofit organization incurred direct economic injury by the policy of withholding the bail funds owned by the nonprofit organization.[127] Without an opportunity to dispute the loss of the bail funds to a defendant's fines or court costs, the plaintiff's complaint raised a claim for deprivation of property without due process of law.[128]

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121. *Gentry I*, 446 F. Supp. 3d at 291.

122. *Id.* ("[T]he Criminal Court's local rules include a provision . . . stating that '*[a]ny individual* who desires to deposit a cash bond with the Clerk . . . shall be notified in writing by the Clerk that such cash deposit shall be returned subject to any fines, court costs, or restitution as ordered by the Court.' . . . [This rule] extends the garnishment policy to bail set by third parties, including NCBF, which poses an obstacle to NCBF's revolving fiscal model.").

123. *Id.* at 292.

124. *Id.* ("Bail amounts are paid through the Clerk of the Criminal Court . . . . [T]he office will no longer accept NCBF's payments unless the NCBF representative making the payment signs the office's notification form acknowledging that the bail amounts will be applied to fines, fees, costs, taxes, or restitution.").

125. *Id.* at 293.

126. *Id.* at 301. Only the clerk of court, not the state court judges, was named as a defendant in the case.

127. *Id.* at 304.

128. *Id.* at 293. The defendant clerk disputed the ownership of the bail funds under state law that only the defendant could post cash bail, and therefore, the defendant was presumed the owner

Ironically, the nonprofit organization's loss of available bail funds may be more costly to the government than any funds that could be applied to fines and fees. Depletion of available bail funds means longer pretrial detention periods.[129] Putting aside any constitutional issues, from an economic standpoint the government ends up spending more money to house a prisoner who cannot post even a moderate bail, especially if there are mental health, substance abuse, or medical issues which substantially increase the costs of incarceration.[130] Moreover, a policy to hold the bail funds for fines and court costs creates a misleading view of revenue generated by the court.[131] A court's revenues do not reveal the true costs of prolonged pretrial detention and other expenses, which typically are borne by police or a corrections department, rather than being absorbed into the courts' budget.[132]

The loss of recyclable bail funds also impacts the continued level and solicitation methods for incoming contributions when diverted to fines and court costs instead of pretrial release of other defendants. The Bail Project National Revolving Bail Fund, which serves fourteen states, advertises "100% of online donations are used to bring people home and will be recycled for someone else when their case closes."[133] The Vera Institute of Justice, serving forty states, reported that eighty-seven percent

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of the funds. *Id.* at 292–93. The court in *Gentry II* noted that this position was contrary to the clerk's own form which was not limited to the defendant. 496 F. Supp. 3d 1112, 1138 (M.D. Tenn. 2020). The court's ruling on the issue of standing was based on the pleadings at this preliminary stage, without consideration of factual findings that may be determined at a later stage in the litigation.

129. Santo, *supra* note 107. Using the bail to pay the court fees and fines impedes the recycling of the nonprofit bail organizations resources. They have to seek more donations or they will have to shut down once the court has taken all its funds. *See, e.g.*, *Gentry I*, 446 F. Supp. 3d at 291 ("In order to fund its efforts, NCBF relies on . . . 'a revolving fund of donated money.' . . . Accordingly, a single donation of $1,000, for example, can be used over and over again to secure pretrial release for a series of defendants with $1,000 bail amounts.").

130. *Total Cost of Pretrial Detention Estimated at Up to $140 Billion Annually*, PRISON LEGAL NEWS (Jan. 31, 2018), https://www.prisonlegalnews.org/news/2018/jan/31/total-cost-pretrial-detention-estimated-140-billion-annually/ [https://perma.cc/68S6-2EPP]. According to reports,

> U.S. taxpayers "spend approximately $38 million per day to jail people who are awaiting trial . . . ." Researchers recognized that the actual cost could be considerably higher, given that they used a conservative estimate for incarceration expenses of $85 per day—which includes food, medical care and security costs. "It is 60%–100% more expensive to jail people who have health, mental health, or substance abuse disorders," they wrote.

Id.

131. *See, e.g.*, *Analysis of Court Fines and Fees as Government Revenue Shows High Costs, Inefficiency, Waste*, ARNOLD VENTURES (Nov. 21, 2019), https://www.arnoldventures.org/newsroom/analysis-of-court-fines-and-fees-as-government-revenue-shows-high-costs-inefficiency-waste [https://perma.cc/RP29-WQ27]; *see also* Maciag, *supra* note 35.

132. Menendez et al., *supra* note 38, at 5 (noting that true collection costs for imposing, collecting, and enforcing criminal fees and fines are spread across different agencies and levels of government and are not readily ascertained).

133. THE BAIL PROJECT, *supra* note 110.

of its 2020 funding came from local, state, and federal government.[134] Applying these funds to a defendant's fines and court costs is little more than a diversion of funds from one governmental entity to another through the bail system.

B. Impact on Defendant

There is a larger and more significant issue than the loss of a third party's bond. There is a moral issue raised when a defendant is permitted to escape responsibility because someone else has been legally required to pay the defendant's fine. Enumerated statutory sentencing principles are intended to protect the public by deterring the defendant's future misconduct and rehabilitating and/or punishing the offender.[135] The basic concept of requiring someone else to pay a defendant's fine subverts justice and defeats each of these purposes. There is no financial impact on the defendant, which undermines the fundamental purpose of a financial penalty to correct past misconduct.[136] If one of the goals of punishment is deterrence, that goal is defeated by imposing responsibility for the offense on someone other than the defendant.

A fine, as the lowest penalty, is often appropriate for minor infractions to impress on a defendant that the conduct is not permitted and, hopefully, will not be repeated.[137] With a minor or unclassified misdemeanor

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134. VERA INST. OF JUST., *supra* note 108.

135. VALERIE WRIGHT, THE SENT'G PROJECT, DETERRENCE IN CRIMINAL JUSTICE 1 (2010), https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf [https://perma.cc/GZS9-2MCS] ("In recent decades, sentencing policy initiatives have often been enacted with the goal of enhancing the deterrent effect of the criminal justice system.").

136. Fines originated as a voluntary sum paid to the English Crown to avoid an indefinite prison sentence for a common-law crime. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 287–89 (1989) (O'Connor, J., dissenting). The basic concept was a penalty other than incarceration. Over time the voluntary nature of a fine was eliminated, and a monetary sum would be required instead of an indefinite sentence, and eventually, moving to the current system of a fine as a separate penalty for a criminal offense. *Id.*

137. *See* R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779, 1780 (2015) (citing as a purpose for the rising use of criminal fines "the increasing need for intermediate sanctions" greater than probation but less severe than incarceration).

> The purpose of the imposition of a fine is to maintain a standard of conduct, which the experience of a people has judged to be in the best interest of their particular civilization, and it follows from that, that the imposing of a fine is to maintain the peace and dignity of the state . . . and the maintenance of that standard of conduct which the state has decreed to be its normal standard.

Ocean Accident & Guar. Corp. v. Reynolds, 30 Ohio N.P. (n.s.) 550, 555 (Ohio Ct. Com. Pl. 1933).

offense, a fine is generally the only available penalty.[138] For more serious misdemeanors and felonies, a fine may be an effective tool to impose some impact on a defendant, while other, more severe penalties, such as house arrest or actual incarceration, are suspended as a means of keeping the defendant in line and obtaining compliance with probation.[139]

In many states, community work service may be substituted for a fine.[140] This policy recognizes the need to impose consequences that exert an impact on the wrongdoer and to balance the consequences with the defendant's financial status to determine an appropriate sentence for the offense. The basic principle, however, whether it is a fine or community work service, is that the punishment is imposed on the person guilty of the criminal act, not on a third party. A court could not require someone else to perform the defendant's community service obligation, and the same should apply to the payment of fines.

A court policy or procedure requiring a third party to pay the fine in whole or in part is also inconsistent with the public policy against shielding wrongdoers from responsibility for their own misconduct.[141] The bail, posted to secure the release of the defendant, is effectively transformed to protect the defendant from the impact of any financial sanctions. Similar to prohibition of insurance coverage for punitive damages, but grounded on the same principle, the court in *Northwestern National Casualty Co. v. McNulty* stated,

> Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct. It is not disputed that insurance against criminal fines or penalties would be void as violative of public policy.[142]

This public policy interest is inconsistent with a system requiring a third

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138. State v. Sanders, 752 N.W.2d 713, 730 n.6 (Wis. 2008) (recognizing classification of misdemeanors with no potential imprisonment in Ohio, Minnesota, Nebraska, New Hampshire, Texas, and Virginia).

139. *See generally* U.S. SENT'G COMM'N, ALTERNATIVE SENTENCING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf [https://perma.cc/W3YJ-GWP3].

140. *See, e.g.*, Wichita v. Lucero, 874 P.2d 1144, 1150 (Kan. 1994) (permitting a court to order community service in lieu of a fine upon finding defendant is indigent and unable to pay fine); State v. Lutgen, 606 N.W.2d 312, 314 (Iowa 2000) (stating that trial court has authority to convert fines to community service hours upon a finding that community service work will be adequate to deter defendant and to discourage others from similar criminal activity). *See also* Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153, 188 (2004) (describing program in King County, Washington, where court may withdraw fines from collections process and convert to community service); Ruback, *supra* note 136, at 1833–34 (noting Pennsylvania Commission on Sentencing's recommendation to replace fines with community service hours).

141. *See generally* Ruback, *supra* note 136.

142. 307 F.2d 432, 440 (5th Cir. 1962). Similarly, a trust fund set up to pay fines for criminal offenses is invalid. RESTATEMENT (SECOND) OF TRUSTS § 62, cmt. b (1959).

party to pay the defendant's fine from the third party's bail money.

Although a defendant will obviously benefit from a fine paid by someone else, it can also work to the defendant's detriment. When a court includes the amount of the third-party bond, in which the defendant has no financial interest, a higher fine may be imposed to the prejudice of the defendant.[143] Similar to when a court improperly considers a third party's bail money when determining if the defendant is entitled to court-appointed counsel, the third-party bond is a misleading factor for the court to consider in calculating any financial sanction imposed on the defendant. Two critical factors to consider when imposing a fine are the impact on the defendant and the defendant's financial ability to pay.[144] The third-party bond does not fit into either of these factors. It is not an asset available to the defendant and does not accurately show the defendant's ability to pay a fine, whether at the time the fine is imposed or subsequent, post-judgment collection proceedings.[145] If the amount of the third-party bond

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143. *See, e.g.*, State v. Morales, 476 P.3d 954, 961 (Or. 2020) (discussing how consideration of third-party resources may lead to a mistaken belief about defendant's ability to pay or amount they can pay).

144. *See, e.g.*, U.S. SENT'G COMM'N, U.S. SENT'G GUIDELINES MANUAL § 5E1.2(d) (2021) Fines for individual defendants: In determining the amount of the fine, the court shall consider:

> (1) the need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant), to promote respect for the law, to provide just punishment and to afford adequate deterrence;
>
> (2) any evidence presented as to the defendant's ability to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources;
>
> (3) the burden that the fine places on the defendant and his dependents relative to alternative punishments;
>
> (4) any restitution or reparation that the defendant has made or is obligated to make;
>
> (5) any collateral consequences of conviction, including civil obligations arising from the defendant's conduct;
>
> (6) whether the defendant previously has been fined for a similar offense;
>
> (7) the expected costs to the government of any term of probation, or term of imprisonment and term of supervised release imposed; and
>
> (8) any other pertinent equitable considerations.

The amount of the fine should always be sufficient to ensure that the fine, taken together with other sanctions imposed, is punitive.

State courts also have varied and overlapping required sentencing factors and guidelines. *See* NEAL B. KAUDER & BRIAN J. OSTROM, NAT'L CTR. FOR STATE CTS., STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 1 (2008) (comparing states' sentencing practices); Kelly Lyn Mitchell, *State Sentencing Guidelines: A Garden Full of Variety*, FED. PROB., Sept. 2017, at 28, 28 ("[T]he federal guidelines are just one system among many.").

145. Bearden v. Georgia, 461 U.S. 660, 664 (1982) (requiring courts to be sensitive to treatment of indigents in criminal justice system and avoid imposing penalties on criminal defendants due to an inability to pay fines or other financial sanctions); Timbs v. Indiana, 139 S. Ct. 682, 689–91 (2019) (applying Eighth Amendment prohibition of excessive fines to states and imposing limits on court's power to impose fines).

is considered as a source of payment of a fine or court costs, however, it may influence the financial sanction imposed.[146]

Regardless of its source, the defendant's ability to post a bond may not provide the court with an accurate assessment of the defendant's financial condition. To begin with, the defendant's financial condition may have negatively changed since the bond was posted. In addition, funds borrowed from a friend or relative without any ownership interest by the defendant are not relevant to either the intended purpose of the fine or the defendant's ability to pay. Moreover, if the bond is considered as a source of payment, it may result in an unduly harsh or excessive fine if the bail money is released to the third party and not applied to the fine.

C. Competing Claims

The primary focus of the right to the third party's bond is the ownership of the funds. Determining ownership is not always straightforward and is not based solely on the name on the bond receipt. The name on the bond receipt is one factor to consider but is not determinative in light of other evidence, especially if the third party was required to put the bond in the defendant's name.[147]

If the defendant is found guilty and a fine or other financial sanction imposed, competing claims for the bail funds may be asserted by the defendant, the family or friend who posted the bond or supplied the funds, and/or the government. Claims by the government include payment of fines and court costs or restitution on behalf of a crime victim. Other claimants may include defense attorneys,[148] civil judgment creditors,[149]

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146. On the other hand, the court's knowledge that the defendant could not have secured pretrial release without the financial assistance of someone else is relevant when deciding the appropriate fine from the available range for that criminal offense. *See* U.S. SENT'G COMM'N, *supra* 144, § 5E1.2 cmt. n.3 ("The inability of a defendant to post bail bond (having otherwise been determined eligible for release) and the fact that a defendant is represented by (or was determined eligible for) assigned counsel are significant indicators of present inability to pay any fine. In conjunction with other factors, they may also indicate that the defendant is not likely to become able to pay any fine.").

147. *See, e.g.*, State v. Lefever, 632 N.E.2d 589, 595 (Ohio Ct. App. 1993) (finding that defendant's name on bond was not conclusive proof of source of funds when defendant's father submitted proof of ownership).

148. *See, e.g.*, State v. Giordano, 661 A.2d 1311, 1314 (N.J. Super. Ct. App. Div. 1995) (reversing application of bail funds for restitution when funds had been assigned to defense counsel for fees by third-party bond depositor).

149. *See* Estate of Lyon v. Heemstra, No. 9-105/08-0934, 2009 Iowa App. LEXIS 578, at *9–11 (Iowa Ct. App. June 17, 2009) (finding that cash bail posted by a third party cannot be garnished for purpose of court-ordered restitution); People v. Mompier, 657 N.E.2d 1190, 1195 (Ill. App. Ct. 1995) (holding that bail funds posted by third party were not subject to tax lien attached to criminal defendant's property); Cessna Fin. Corp. v. Skelton, 700 S.W.2d 44, 46 (Ark. 1985) (holding that bond posted by third party was not subject to garnishment or attachment by criminal defendant's

and co-defendants.[150] Each claimant has their own varying interest.[151]

Issues of ownership become more complicated when the bond has been assigned and the acquiring person is not apparent from the record before the court. Often, bail funds are assigned to defense counsel to defray legal expenses without notice to the court that the defendant no longer owns the funds.[152] The defendant's bail funds may be assigned to avoid attachment from creditors.[153] An assignment of bail funds to a third party, although valid, may be subject to state statute.[154]

When a dispute arises between a defendant and a third party regarding ownership of bail funds for purposes of applying them to fines, court costs, or restitution, the burden of proof is on the government as the beneficiary of the funds if applied to fines and court costs.[155] Construing 28 U.S.C. § 2044, the court in *United States v. Gonzalez* noted that if Congress had intended to put the burden on the defendant or third party, the

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creditor). *But see* Garner v. Kempf, 93 N.E.3d 1091, 1098 (Ind. 2018) (finding that bond is the criminal defendant's asset and is subject to attachment after the case concludes).

150. *See, e.g.*, United States v. Arnold, No. 1-18-CR-30-1, 2020 U.S. Dist. LEXIS 33549, at *1, *9 (N.D. Miss. Feb. 27, 2020) (holding that government could not retain defendant's bail funds, which belonged to his wife, or apply them to his co-defendants' or his wife's restitution obligations arising from a different case).

151. *See, e.g.*, United States v. Dipofi, Nos. 04-80707-01 & 07-50695, 2008 U.S. Dist. LEXIS 51972, at *3, *5 (E.D. Mich. July 3, 2008) (finding that defendant, defendant's attorney, government, and defendant's parents each had an interest in claiming bail funds but only defendant's parents, as owners of funds, were entitled to claim it).

152. *See* United States v. Forte, Cr. No. 85-141-1, 1986 U.S. Dist. LEXIS 22869, at *1–2, *10 (E.D. Pa. July 14, 1986) (holding that bail funds paid by defendant's wife and assigned to defense counsel for legal expenses were not available to be applied to defendant's court-ordered restitution); *Giordano*, 661 A.2d at 1314 (holding that bond defendant's father posted and later assigned to defense counsel for attorney fees was not available to be applied to restitution after defendant's conviction).

153. *United States v. Rubenstein* involved a bank attempting to garnish bail funds. 971 F.2d 288, 290 (9th Cir. 1992). A third party paid the funds to the defendant's attorney who deposited the bail funds in the defendant's name. *Id.* at 290–91. To avoid garnishment, the defendant assigned the bail funds to the third party and disclaimed any ownership in the funds. *Id.* at 291. Later, the third party assigned one-half of the bail funds to the defendant to pay restitution with the hope of a more lenient sentence. *Id.* at 292. One of the issues raised was the third party's intent to provide the funds to the defendant as a gift or loan and the extent to which, if any, the defendant had any control over the use of the funds. *Id.* at 296, 298.

154. People v. Cerna, 2014 IL App (3d) 140225-U, ¶ 15. Although the court approved the assignment of the bail funds to defense counsel for legal fees, under statute, the assignment was limited to the balance of the funds after deductions for the fines and court costs. *Id.* ¶ 16. In this case the fines and court costs exceeded the bail funds, with no payment to defense counsel. *Id.* ¶¶ 16–17.

155. United States v. Gonzalez, No. 11-CR-80211-MARRA, 2013 U.S. Dist. LEXIS 24109, at *9 (S.D. Fla. Feb. 21, 2013). *See also* United States v. Melgen, No. 15-80049-CR-MARRA, 2017 U.S. Dist. LEXIS 215368, at *2 (S.D. Fla. Dec. 21, 2017) (holding that government bears burden to prove funds posted as bond belong to defendant).

statute would have done so by its plain language.[156] In *Gonzalez*, the third party testified that he paid some of the bail money himself and raised the rest from family and friends, although he did not have records of the amounts received from each person.[157] The government's argument that the defendant had obtained a significant amount of money from healthcare fraud and that the third party was unemployed was not sufficient to prove the bail funds belonged to the defendant.[158] When there is proof of ownership of the bail funds by a third party, the government must offer some evidence to show that the defendant owns the funds.[159]

A dispute over ownership of the funds is not limited to the government. A defendant may claim the bail funds posted by a third party.[160] The defendant also has a direct interest in prevailing on a claim for the funds to reduce any financial burden through a credit against a fine from the funds advanced by the third party. When the defendant's name is the only one on the bond receipt, the court has no way of knowing from the record that the funds were posted by a third party. In such a case, the defendant may consent to apply the bond to the fines and court costs without notice to the third-party owner of the funds.

A defendant, however, should not be permitted to avoid payment of a fine or court costs merely because someone else's name is on the bond receipt. The bail money may have been advanced by the third party, whom the defendant later reimbursed and who no longer has a claim to the funds. Mere unsupported statements by a defendant that the bond money was provided by a friend, when other evidence shows the defendant paid the bond from the defendant's own personal savings, does not

156. *Gonzalez*, 2013 U.S. Dist. LEXIS 24109, at *11–12.

157. *Id.* at *3.

158. *Id.* at *12–13 (finding that government failed to show by a preponderance of evidence that funds in question belonged to Gonzalez and not to any third party).

159. United States v. Hughes, No. 3:15-CR-11, 2017 U.S. Dist. LEXIS 86974, at *4–5 (S.D. Tex. June 6, 2017) (holding that government's position of community property with defendant was not sufficient to rebut a spouse's proof of sole ownership of bail funds without evidence that funds spouse had posted were held as community property). When, however, the bail funds are paid from a joint account with the defendant, the government may prevail on the claim for the bail funds. United States v. Hernandez, No. 11-20130-CR, 2011 U.S. Dist. LEXIS 131779, at *3 (S.D. Fla. Nov. 15, 2011). In *Hernandez*, the court noted that a different analysis would be applied if the bail funds came from the spouse's separate account. *Id.*

160. State v. Recanati, 724 A.2d 814, 818 (N.J. Super. Ct. App. Div. 1999). An affidavit of ownership by the co-defendant filed when the funds were deposited with the court established ownership and intent of parties. *Id.* at 816. Although drawn from the co-defendant's account, Recanati presented evidence he had repaid his co-defendant and was entitled to the funds. *Id.* Affirming the decision to release the funds to the co-defendant, the court noted that the proper remedy was a civil action between the two defendants. *Id.* at 818.

preclude the court from applying the bond to the fines and court costs.[161]

The name on a bond receipt creates a presumption of ownership unless challenged.[162] Although a good starting point, it is not conclusive. An evidentiary hearing may be required to resolve conflicting claims regardless of whose name appears on the bond receipt.[163] The printed language on the bond form or receipt is usually nonnegotiable and requires the person depositing the funds to sign it to secure the defendant's release.[164] When a local rule requires a bond must only be put in a defendant's name, the receipt may not be determinative of the ownership of the funds.[165] Bank statements or other records showing withdrawal of funds contemporaneous with or near in time to the bail being posted are relevant to rebut the name on the bond receipt as the owner of the funds.[166]

The source of the bail funds, while relevant, may not by itself establish ownership. Other considerations include the third party's intent if it was meant as a gift, loan, or payment of some other unrelated debt owed to the defendant.[167] In such cases, the determination of ownership of the funds is not based solely on the documents presented to the court, but also the credibility of the witnesses asserting disputed claims.[168]

When the issues are more complicated, such as assignment of the bail

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161. *See* State v. Cooper, No. 96-CA-28, 1997 Ohio App. LEXIS 2498, at *10 (Ohio Ct. App. May 28, 1997) ("[A]lthough appellant presented evidence that the money used to post bond belonged to appellant's friends rather than to appellant himself, the court was not bound to accept that testimony on its face.").

162. *See, e.g.*, United States v. Starkie, No. 98-4415, 1999 U.S. App. LEXIS 193, at *11 (4th Cir. 1999) (explaining that defendant's name on bond receipt was substantial evidence that bond belonged to him rather than third party who posted it).

163. *See* United States v. Ener, 278 F. Supp. 2d. 441, 441, 449–50 (E.D. Pa. 2003) (finding that, although defendant's name appeared on bond receipt, funds belonged to codefendant's wife and should be returned to her). *See also* Sharp v. State, 142 N.E.3d 435, 439 (Ind. Ct. App. 2019) (finding an issue of fact whether bail funds procured by now-deceased defendant selling his car belonged to his wife, who posted bail but never claimed money was hers, or to defendant's estate).

164. *See, e.g.*, Nashville Cmty. Bail Fund v. Gentry, 446 F. Supp. 3d 282, 292 (M.D. Tenn., 2020) (*Gentry I*) ("Bail amounts are paid through the Clerk of the Criminal Court . . . the office will no longer accept NCBF's payments unless the NCBF representative making the payment signs the office's notification form acknowledging that the bail amounts will be applied to fines, fees, costs, taxes, or restitution.").

165. *See* Cargill v. Spradlin, No. 17-85-26, 1987 Ohio App. LEXIS 10077, at *1-2, *11 (Ohio Ct. App. Dec. 9, 1987) (finding that local rule requiring bond funds to be deposited in defendant's name was not determinative of ownership of those funds).

166. *See, e.g.*, *Ener*, 278 F. Supp. 2d at 449–50 (finding that, although bond receipt listed only defendant's name, evidence that a third party paid bond from her personal account was relevant in determining ownership).

167. *See, e.g.*, State v. Morales, 476 P.3d 954, 961 (Or. 2020) (holding that when non-spouse, third-party family member posts security, court must assess in determining ownership whether donative intent or other evidence existed that money was defendant's property).

168. *See generally* United States v. Rubenstein, 971 F.2d 288 (9th Cir. 1992).

funds without court notice, an evidentiary hearing may be needed to resolve ownership issues. A hearing provides procedural safeguards and a forum, regardless of the outcome, with notice to the defendant, government, third party, or other person or entity to assert the merits of any claim on the funds.

D. A Cautionary Note

Third-party bond use may result in abuse beyond the loss of the third party's funds. In *Commonwealth v. Persavage*, coercion by a threat of third-party bond forfeiture was used to induce a guilty plea.[169] The defendant's mother had posted the bond for her son, putting up her home as collateral for the bond in an unrelated criminal case also involving her son.[170] Although the defendant had appeared for all court dates, the prosecutor warned that bond-forfeiture proceedings would begin in the other, unrelated case based upon noncompliance with the conditions of bond unless the defendant accepted the plea offer in the current case.[171] From the record, part of the plea agreement included the withdrawal of the bond-forfeiture motion in the other case.[172]

On appeal, the court found the bond forfeiture was a coercive factor in the defendant's decision to change his plea.[173] The court also found the plea was not knowingly made and was based on a legal misconception of bond forfeiture.[174] The court noted that while a bond could be forfeited for nonappearance, it could not be forfeited for noncompliance with other terms or conditions of the bond.[175] While this example is extreme, it is also a real-life situation.

CONCLUSION

Municipal and other misdemeanor and traffic courts are generally dependent on local funding and under pressure to raise revenue. Revenue in

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169. *See generally* Commonwealth v. Persavage, No. 1697 MDA 2017, 2018 Pa. Super. Unpub. LEXIS 4027 (Pa. Super. Ct. Oct. 29, 2018).

170. *Id.* at *8.

171. *Id.* at *7.

172. *Id.* at *9.

173. *Id.* at *12–13. *Cf.* Iaea v. Sunn, 800 F.2d 861, 867–68 (9th Cir. 1986) (reversing denial of writ of habeas corpus based on defendant's guilty plea when defendant's brother, who posted bail, threatened to withdraw bail if defendant did not plead guilty, combined with erroneous sentencing advice from counsel).

174. *Persavage*, 2018 Pa. Super. Unpub. LEXIS 4027, at *11–12. The appellate court agreed with the trial court's finding that the defendant's plea was invalid because bail forfeiture should not have been a factor in his decision to plead guilty, although it reversed the trial court's decision on procedural grounds. *Id.* at *11, 13.

175. *Id.* at *11 ("Bail forfeitures as to a family member's property should only be enforced as to a defendant's failure to appear.").

a court system, however, is an incidental benefit, not the goal in setting bonds or imposing fines. Compulsory application of third-party bond funds requires a third party with no criminal culpability, whether an individual or nonprofit organization, to guarantee not only the defendant's appearance in court, but also the payment of future, undetermined fines and other expenses.

The touchstone of any post-judgment inquiry for the disposition of money deposited as bail is ownership of the funds. First and foremost, the bail funds are always in the possession and control of the court. The court makes the final determination of distribution of the bail funds. This includes the authority to hold or release funds until all competing claims can be raised and decided.

Distribution of bail funds after the case is terminated is based on three fundamental principles: 1) the bail is posted to secure the appearance of the defendant for all phases of the proceedings in the trial court, 2) the bail funds should be released to their owner, and 3) a fine is imposed as a punishment for criminal behavior based on the conduct of the defendant and other relevant sentencing factors, not as a means to generate revenue.

Applying the third-party bond to the fine or court fee, instead of requiring payment directly from the defendant, is a breakdown of the justice system, for the fine does not accomplish its intended purpose. Instead, the third party's bond becomes the means to satisfy the defendant's fine and generate revenue, but there is neither a deterring effect nor a punitive impact on the defendant. In state courts, similar to the statutory requirement in the federal system,[176] once the case is terminated and ownership of the bail funds is determined to be someone other than the defendant, the bail has served its purpose and the funds should be released to the third party.

176. 28 U.S.C. § 2044.