

APRIL 2017



NATIONAL SURVEY OF COMMUNITY BAIL FUNDS

REPORT TO THE COMMUNITY

PREPARED BY:

SARAH PHILLIPS

SARAH.PHILLIPS@WUSTL.EDU

ADDITIONAL CONTACTS:

ANNIE GRIER

AGRIER@WUSTL.EDU

CARRIE PETTUS-DAVIS

CPETTUSDAVIS@WUSTL.EDU

SMART DECARCERATION INITIATIVE
WASHINGTON UNIVERSITY IN ST. LOUIS

NATIONAL SURVEY OF COMMUNITY BAIL FUNDS

BACKGROUND

BAIL

Bail is the pretrial release of a defendant with conditions adequate to ensure a subsequent return to court – including periodic check-ins with the court, cash bonds, and property bonds.¹ In Anglo-American history, the right to bail emerged in the 13th century, established by documents laying the foundation for modern day constitutional systems, including the Magna Carta (1215) and the Statute of Westminster (1275).² Stemming from English common law based in this tradition, the right to bail for individuals in the United States charged with non-capital crimes was enshrined in federal law by the First Congress and persisted for 200 years. The vast majority of state constitutions also provided, like the federal government, that “All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.”³ Furthermore, all state constitutions but one provided robust protection against excessive bail.

In 1951, the U.S. Supreme Court found that “a defendant's bail cannot be set higher than an amount that is reasonably likely to ensure the defendant's presence at the trial...Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”⁴ This right, strongly protected at the federal and state levels, started down a steep decline during the 1970s. At this time, the federal government and numerous states began allowing the detention of defendants charged with non-capital crimes and the consideration of a person’s dangerousness and flight risk in bail determinations.⁵

Since that time, laws at the federal and state level have eroded the right to bail, and there has been a significant move away from pretrial release contingent upon factors other than money. Defendants are routinely held without bail, detained by bails set high due to a judge’s risk determination, or detained by bails of even small amounts set without inquiry into the ability to pay. For example, only 1 in 10 defendants in New York City courts are able to pay bail at arraignment, despite the fact that the city’s bails are set far lower than the national average.⁶

Although comparable nations including Australia, the United Kingdom, and Germany have bail systems similar to that of the United States, they use bail less frequently and it is easier to pay. Finland eschews cash bail entirely. The United States is also one of only two countries in the world to allow commercial bail, or the bail bond industry. Researchers estimate that this industry accounts for 43% of all U.S. pretrial releases.⁷ Critics argue the existence of this profit-driven industry perpetuates injustice by inflating bail, making it more difficult for defendants to be released without turning to a bail bondsmen and paying a nonrefundable portion of their bail amount.⁸ Furthermore, bail bondsmen make decisions, arguably discriminatory, to accept clients based on their assessment of risk to their business, rather than actual public safety risk to the community. Researchers have shown that factors potentially used by judges to set bail and by bail bondsmen

¹ Johnson, Kierkus, & Yalda, 2014. Who skips? An analysis of bail bond failure to appear. *Journal of Applied Security Research*, 9, 1-16.

² Hegreness, 2013. America’s Fundamental and Vanishing Right to Bail. <http://arizonalawreview.org/pdf/55-4/55arizrev909.pdf>.

³ *Ibid*, p. 916.

⁴ *Ibid*, p. 951.

⁵ *Ibid*, p. 956

⁶ Pinto, 2015. *The New York Times*. https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?_r=0.

⁷ Kyckelhahn & Cohen, 2008. Felony defendants in large urban counties, 2004. Washington, DC: Bureau of Justice Statistics.

⁸ Justice Policy Institute, 2011. <http://www.justicepolicy.org/research/2322>.

to accept applicants, including gender, race, age, and citizenship status, are not predictive of failure to appear (FTA).⁹

The destructive effects of pretrial incarceration on individuals' employment, housing, and education jeopardizes public safety by destabilizing individuals, families, and entire communities.^{10,11,12,13,14} Unmet needs in the areas of mental illness, substance abuse, and basic necessities often precipitate or compound criminal justice system surveillance and apprehension. Although jails have become the de facto institution to address these issues, they are unequipped to do so. In fact, incarceration can cause or exacerbate physical and psychological trauma, physical illness, and mental problems.^{15,16} Research also shows that pretrial detainees experience worse legal outcomes than those released on bond, often because these despairing conditions lead to guilty pleas that otherwise would not have occurred.^{17,18}

CHARITABLE BAIL FUNDS

As a result of cash bail systems, low-income individuals are disproportionately exposed to the harsh jail conditions and ensuing consequences of detention described above. Charitable bail funds, conceived by those who recognized the futility and injustice of detaining poor people simply because they are poor, are considered by their advocates a temporary solution on the road to total bail reform.¹⁹ The funds consist of pots of donated money used to bail out those who cannot pay.

Community-initiated charitable bail funds currently operate in several U.S. cities; one operates across an entire state. Today they are typically referred to as "community bail funds." The top priority for each fund is the swift identification, acceptance, and release of individuals who are in jail because they are unable to post bail. Additionally, some funds allocate significant effort and resources to addressing the non-legal needs of their accepted clients.

Smart Decarceration Initiative (SDI) set out to learn about key factors in the implementation and success of existing community bail funds. With the help of the National Bail Fund Network hosted at the Brooklyn Community Bail Fund, we spoke with seven professional stakeholders from community bail funds across the country. The funds range from the quite new to the long established. Each possesses valuable insight for other cities and states seeking to form similar funds.

THE SURVEY

The funds interviewed for this report constitute about half of those currently operating across the country using a revolving bail fund structure, in which bails paid out revolve back into the fund to pay future bails. Professional stakeholders represented employed or volunteer leaders with the following funds: Brooklyn Community Bail Fund (New York, NY), Bronx Freedom Fund (New York, NY), Chicago Community Bond Fund (IL), Massachusetts Bail Fund, Tennessee community bail funds (Memphis and Nashville), Minnesota

⁹ Johnson, Kierkus, & Yalda, 2014. Who skips? An analysis of bail bond failure to appear. *Journal of Applied Security Research*, 9, 1-16.

¹⁰ Massachusetts Bail Fund, "About." <http://www.massbailfund.org/about.html>.

¹¹ The Bronx Freedom Fund, "What We Do." <http://www.thebronxfreedomfund.org/what-we-do/>.

¹² Brooklyn Community Bail Fund, "The Problem." <https://brooklynbailfund.org/the-problem/>.

¹³ Hauser, 2016. *The New York Times*. http://www.nytimes.com/2016/04/02/us/unable-to-pay-100-bail-homeless-man-dies-in-new-hampshire-jail.html?_r=0.

¹⁴ Criminal Justice Policy Program at Harvard Law School. cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf.

¹⁵ Miller, N.A. & Navajits, L.M. (2012). Creating trauma-informed correctional care: A balance of goals and environment. *European Journal of Psychotraumatology*, 3(1). Retrieved from <http://www.tandfonline.com/doi/full/10.3402/ejpt.v3i0.17246>.

¹⁶ Cloud, D.H., Parsons, J., & Delany-Brumsey, A. (2014). Addressing mass incarceration: A clarion call for public health. *American Journal of Public Health*, 104(3), 389-391.

¹⁷ Pretrial Justice Institute. "The Problem." <http://www.pretrial.org/the-problem/>.

¹⁸ Criminal Justice Policy Program at Harvard Law School. cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf.

¹⁹ Pinto, 2015. "The Bail Trap." *the New York Times*. <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>

Freedom Fund (Hennepin County), and Northwest Community Bail Fund (Seattle, WA). The Massachusetts Bail Fund operates throughout the entire state.

We asked each fund to discuss their history, structure, partnerships, identification and referral process, decision making, other services offered if any, and local conditions that influenced them at any stage of design or implementation.

FUND BASICS

| Fund | First bail posted | Max. bail | Charges accepted | Success rate* |
|---|-------------------|-------------------|---------------------------|---|
| Bronx Freedom Fund | 2007 | \$2,000 | Misdemeanors | 95% |
| Brooklyn Community Bail Fund | 2015 | \$2,000 | Misdemeanors | 95% |
| Chicago Community Bond Fund | 2015 | \$5,000 (loosely) | Misdemeanors and felonies | 98% - 1 bail lost out of 55 |
| Massachusetts Bail Fund | 2013 | \$500 | Misdemeanors and felonies | 99% - 5 bails lost out of 492 |
| Memphis & Nashville Community Bail Funds | 2016 | \$5,000 | Misdemeanors and felonies | Nashville: 100% - 0 bails lost out of 42 Memphis: 100% - 0 bails lost out of 7 |
| Minnesota Freedom Fund | 2016 | \$1,000 | Misdemeanors | 80% - 4 failures to appear out of 20 |
| Northwest Community Bail Fund | 2016 | \$3,000 | Misdemeanors | 88% - 1 failure to appear out of 8 |

* The number of lost bails does not necessarily match the number of failures to appear (FTA), or vice versa. Several funds emphasized that the court may not automatically forfeit a bail if a person doesn't appear; an individual may be given a second chance depending on circumstances and whether an attorney or bail fund is permitted to advocate on their behalf. Additionally, bails may be forfeited for reasons other than FTA, including when clients are taken back into custody for violating supervision terms, are arrested, and/or pick up a new charge.

FINDINGS

THEMES

The funds differ in how they were started, their organizational structures, and how they operate on a day-to-day basis to pursue pretrial justice for their clients and everyone else in their cities or states. They also have important elements in common.

The rise of community bail funds is rooted in core beliefs about the inherent injustice of a cash bail system.

- Each of these funds exists because an individual or group decided to intervene in unjust pre-trial practices taking place in their cities or state. Aside from posting bails for those otherwise destined to experience a pre-trial punishment of weeks, months, or even years in jail, most funds engage in other long-term efforts to highlight the injustice of cash bail and ultimately abolish the practice entirely.

Most funds have an established relationship or understanding with the local public defender office, which identifies and refers potential bail fund clients.

- The Brooklyn, Bronx, Massachusetts, and Seattle funds accept referrals through the public defender only, with whom they have an established relationship.
- This public defender referral structure functions to eliminate a potentially large volume of general referrals, a problem cited by two funds, and to reach demonstrably indigent individuals quickly.
- In Memphis, the sheriff's office running the jail has started referring to the fund. Otherwise, the Memphis fund accepts referrals from the public defender only.
- Of the Minneapolis fund's clients, all but one were public defender clients.
- The Chicago fund has relationships with a few individual public defenders rather than the public defender office as a whole. They also work closely with local social service agencies, from which they also accept referrals. After expanding their volunteer base, in March they began accepting general referrals from outside the public defender and partner social service agencies.

Most funds have a maximum amount of money available per client, determined by local conditions.

- Most of the funds interviewed have self-imposed limits based on the average bail amounts in their locations. As such, these limits are flexible to changing circumstances. For example, there is no bail bond industry in Massachusetts, so bails are not artificially inflated; the Massachusetts fund set its maximum at \$500 because many bails with the desired characteristics fall below that level. On the other hand, the Tennessee funds encounter much higher bails, and as a result have set their maximums at \$5,000. These voluntary limits allow for the freedom to adjust if local conditions change or if an individual situation warrants it.
- New York is the only state in the country to impose limits on charitable bail funds. A state statute limits the two New York City bail funds, and any others in the state, to paying bails of \$2,000 or less. The statute does not consider the average bail amounts in different places or allow the funds to go above the limit under any circumstances.
- Chicago is the only fund without a firm self-imposed or compulsory upper limit. Loosely, it is \$5,000, but they have gone as high as \$50,000. This fund's overall model differs in several respects from that of the other interviewed funds.

Funds vary on which types of current criminal charges they cover.

- The same New York State statute limiting the payments made by charitable bail funds limits the types of charges for which the funds can bail out.
- Other bail funds, not limited by state statutes, have been able to choose criteria based on capacity and budget. The Minneapolis and Seattle funds limit to misdemeanors only at this point in time. The Chicago fund primarily accepts those charged with felonies, and has accepted at least one client charged with murder. No other funds mentioned homicide charges, although several funds have bailed out clients charged with crimes of violence (e.g., assault, domestic violence, and rape).
- The Tennessee and Massachusetts funds accept both misdemeanors and felonies.
- Context and capacity may influence charges that are accepted in one place versus another. For example, the Tennessee funds consider a domestic violence (DV) charge an automatic exclusion, while the Minneapolis fund posts bail almost exclusively for those charged with DV because these cases constitute the majority that fall under the fund's financial capacity.

Funds may consider past Failure to Appear (FTA) instances when reviewing applications.

- All 7 funds stressed that past history of FTA should be contextualized rather than taken strictly at face value and used to deny applicants.

None of the interviewed funds use formal or standardized risk assessments.

- Three funds (Brooklyn, Bronx, and Minneapolis) mentioned that the formal system utilizes a risk assessment of some kind to which they have access, but specified that it does not factor heavily into their decision making.
- Four funds (Bronx, Chicago, Massachusetts, and Seattle) expressed strong concerns about the use of standardized risk assessments tools, specifically their potential to further entrench racial bias in the system and/or the lack of context for the results of such a tool.
- Five funds (Brooklyn, Bronx, Chicago, Massachusetts, and Seattle) explicitly noted that reliance on risk assessment disallows the contextualization necessary to determine whether someone is truly a “risk.” For example, a risk assessment tool in use by the courts may categorize someone as a higher risk because of a past FTA, but fail to consider factors such as when it occurred or whether issues like transportation and childcare contributed. During the referral and/or interview process, these funds explore past FTAs to gain an individualized understanding.

Funds do not consider the guilt or innocence of the applicant, consistent with the presumption of innocence that defines the U.S. pre-trial justice system.

- In reality, a cash bail system does not actually protect the presumption of innocence. It merely sorts alleged offenders into those with enough money to await trial outside of jail and those without. Five funds (Bronx, Chicago, Massachusetts, Minneapolis, and Tennessee) explicitly mentioned that they do not factor in the possible guilt or innocence of the applicant when making decisions to accept or not.
- As a Chicago stakeholder put it, “Everyone is harmed by jail,” so they rely on their interactive criteria to guide them rather than attempting to assess who might “deserve” to be in jail. The Bronx stakeholder similarly stated, “The whole point [of our justice system] is that someone is innocent until proven guilty, and that is determined later.” The Bronx fund also rejects the idea that they should account for the palatability of the charge. If the base criteria are met, the fund will accept the applicant.

Most funds maintain contact after release, or would like to have the capacity to do so.

- Five funds make an effort to remain in contact with bailed out clients, especially to remind them of upcoming court dates through messages or calls. The two New York funds strongly advocated for reminder systems, citing the existing research that supports such efforts in increasing appearance rates.
- In Tennessee, pre-trial services initiates monitoring and follows up with released bail fund clients as if the client were any other released individual. Pre-trial services checks in through phone calls or in-person contacts, does court reminders, and notifies the two funds if clients do not show up to court. The funds would like to have the capacity to supplement this by maintaining contact and reminding clients of court dates, but they do not at this time.
- Massachusetts intentionally refrains from contacting individuals they have bailed out. Their sole focus is putting people in the same position they would be in if they had money.

Several funds provide some services and/or refer clients to services as needed, while others would like to build capacity to do so.

- Three funds (Brooklyn, Bronx, and Chicago) provide some assistance beyond the bail payments and refer clients to outside agencies for other needed services. For example, the Brooklyn fund tells clients to get in touch if they need anything. Clients then self-identify and are paired with an intake specialist who connects them with other services. The Bronx fund is able to help clients with transportation by providing Metrocards and fare, and they also connect some clients, especially those in unstable

situations, with housing, employment, treatment and education resources. Volunteers for the Chicago fund may help clients with rides, resumes, and other similar support. The fund turns to its partner organizations when clients need more substantial assistance.

- The funds that provide any extra assistance, no matter how small, do it out of a recognition that underlying needs often precipitate criminal justice involvement, and that outside support can mitigate these circumstances and increase appearance rates.

Several funds rely on a volunteer base for essential operations.

- Four of the funds (Chicago, Massachusetts, Minneapolis, and Seattle) operate almost exclusively or entirely on volunteer labor and deploy a larger volunteer base to complete tasks, including reviewing referrals and making decisions, meeting clients at jails upon release, posting bails and retrieving them after cases conclude, reminding clients of upcoming court dates, or providing a variety of other support to clients including rides, help with resumes, and connecting them to needed services.

KEY PROGRAM COMPONENTS

| Component | Description |
|---|---|
| Relationship with public defenders | Public defenders identify and refer incarcerated individuals and/or provide initial and ongoing client information to the fund. Most of the funds accept only public defender clients, which can serve as a proxy for determining need. |
| Formal or informal relationships with jails and courts | <p>These relationships can help smooth the referral and bail payment/pickup processes, facilitate information access, and result in waived fines and fees for bail fund clients. For example, the Memphis fund has a memorandum of understanding with pre-trial services, which helps with early identification of eligible individuals.</p> <p>Faced with an unsympathetic court culture, the Memphis fund also struggled to get judicial buy-in and is currently limited to operating in the few courtrooms that agreed to waive fines and fees. This is a critical factor for sustainability, since over time the fines and fees taken out of bails paid will eat away at the pot available for future applicants. At the same time, the relationship building accomplished with even these few judges has allowed the fund to reach at least some of its targeted population.</p> |
| Individualized decision making | <p>Beyond the firm limit on bail amounts set by most funds, and limits on eligible charges for several others, funds prefer to get a full picture of an individual’s history and current situation. For example, although the Bronx fund considers a past history of failure to appear (FTA), there is no hard and fast rule that automatically excludes applicants who have FTA histories. They always make an individualized determination after speaking with the client and public defender and reviewing the RAP sheet.</p> <p>On the other hand, some funds can and do accept nearly all clients who meet their initial criteria. Individualized decision making is less prevalent in such a scenario, because applicants do not vastly outnumber available dollars.</p> |
| Reminder system | Not all funds use a text message or phone call reminder system, but it is logical for funds that want to maximize court appearances and sustainability of the fund. |

| Component | Description |
|--|--|
| | Several funds make individualized phone calls to clients, while others suggested looking into an automated text message reminder service such as Uptrust (www.uptrust.co). Research shows that reminder phone calls can increase court appearance rates by up to 42%. ²⁰ |
| Core beliefs about the cash bail system | <p>Two core beliefs about the cash bail system emerged during the interviews. First was an indictment of the inherent unfairness of a system that releases some and incarcerates others for the same crimes – the only difference being the ability to pay for one’s freedom. Many of them cited research, data from other cities, or their own numbers that prove an inability to pay does not translate to a higher risk. This imbalance was the driving factor in the creation of all 7 funds.</p> <p>A clear extension of this is the belief that although necessary now, community bail funds are a temporary fix for a pre-trial system that must be utterly transformed. Most of the funds interviewed engage in some form of additional advocacy or public awareness efforts with the long-term goal of putting themselves out of this type of work.</p> |

RECOMMENDATIONS

Several general recommendations for governments and future bail funds emerged from the interviews. These recommendations arise from the barriers and facilitators to startup experienced by the funds, their experiences operating as relatively new or well-established funds, and their deeply held beliefs and research concerning the criminal justice system and its effect on individuals, families, and communities. Not all funds explicitly endorsed each recommendation; rather, this list reflects the different although sometimes overlapping experiences of the interviewed funds.

Recommendation #1: States should not abridge the ability of community bail funds or similarly intentioned individuals and organizations to post bond for those who cannot afford to. Statutes limiting bail amounts and charges that can be accepted by funds do not allow for as much of the thoughtful individualization considered essential by each of the interviewed bail funds. The ability to make decisions on a case-by-case basis, and adjust when necessary, is a key ingredient to the success of existing community bail funds.

Recommendation #2: Individuals and organizations considering launching community bail funds should keep their parameters as broad as possible. When state statutes do not constrict their ability to decide which applicants can be prioritized, community bail funds are free to set their own limits on the bail amounts they can pay and which types of charges they can accept. Community bail funds can set their acceptance parameters with the acknowledgement that predetermined, strict rules concerning bail amounts and charges do not make sense for all applicants or their mission.

Recommendation #3: Bail funds should seek the buy-in of key criminal justice system actors to enhance the sustainability of their organization. Formal and informal buy-in of key stakeholders with which a bail fund must interact could make the difference between long-term success and insolvency of a fund. Crucially, securing the waiver or reduction of fines and fees associated with bail payment can

²⁰ Stevenson, M. & Mayson, S. (2017). Bail reform: New directions for pretrial detention and release. *Faculty Scholarship*. http://scholarship.law.upenn.edu/faculty_scholarship/1745

ensure that the fund is not depleted over time despite clients' successful appearances in court. Working relationships with judges, clerks, public defenders, jail staff, and pretrial services can also smooth bail fund operations and even improve them in unexpected ways. Funds should anticipate resistance from some of these stakeholders and plan in advance for overcoming this and other barriers.

Recommendation #4: Bail funds should avoid using traditional risk assessments to determine whether or not to accept an applicant. In a way, all of the interviewed bail funds engage in a form of risk assessment, whether through circumscribing the charges they generally accept, in-person interviews with applicants and family members, a review of the information accessed through the formal system, or relying on public defenders (who have greater knowledge about an individual and a case) for referrals. Standardized risk assessments are criticized for economic and racial bias and providing oversimplified information, and are arguably less effective than the individualized consideration given to applicants by community bail funds.

Recommendation #5: Bail funds should aim to expedite the release process for accepted applicants whenever possible. After only a few days, jail can have devastating effects on an individual's health, employment, living arrangement, and family. Funds should plan for the quick identification of eligible individuals and payment processing for their release. This may be facilitated by formal relationships with attorneys, jails, and courts.

Recommendation #6: Bail funds should anticipate that some bonds will eventually be forfeited because of FTA, supervision violations, new arrests/charges, etc. Steps can be taken, however, to increase court appearances and reduce forfeited bonds. Community bail funds are not out to mimic the commercial bail bond industry in its pursuit of clients who fail to appear for court. Rather, if new funds are concerned about FTAs they should consider implementing strategies currently in use by some existing bail funds. Maintaining ongoing contact with clients, reminder systems, partnerships with public defenders, connection to social services, and ensuring transportation to court are all methods for increasing court appearances and the bonds revolving back into a fund.

Relatedly, community bail funds should be prepared to articulate to the court the underlying causes of a client's failure to appear. It may be possible to advocate for exceptions to forfeiture by underscoring the difference between fleeing and a failure to appear because of significant barriers related to transportation, childcare, employment, and more.

CONCLUSIONS & NEXT STEPS

Community bail funds vary in their approach to tackling the injustices of the cash bail system used throughout the United States. Despite their differences, they share components and core values about their work. The 7 funds interviewed for this report have seen high success rates with diverse individuals facing a variety of criminal charges.

Depending on local conditions, state law, and organizational capacity, bail funds might have limitations on what they can accomplish. The amount of money available per client, whether felony charges are accepted along with misdemeanors, and whether court fines and fees are waived and extra assistance available to accepted clients differs by location. Within whatever constraints a new fund may confront, it is recommended that it is designed to be as flexible as possible, particularly when it comes to amounts and charges accepted. Flexibility facilitates individualized decision-making that better reflects reality than the rigidity of standardized risk assessments, for example.

Individuals and organizations wishing to start a community bail fund should interface with public defenders and courts to understand where funds can best be leveraged and how. The National Bail Fund Network is an excellent resource for advocates interesting in starting new bail funds.

ACKNOWLEDGEMENTS

This report could not have been completed without the substantial assistance of Pilar Weiss, Project Director at the National Bail Fund Network (hosted at the Brooklyn Community Bail Fund), and the insight and feedback generously provided by the professional stakeholders representing other funds.

CONTACTS

Bronx Freedom Fund: info@thebronxfreedomfund.org

Brooklyn Community Bail Fund: info@brooklynbailfund.org

Chicago Community Bond Fund: info@chicagobond.org

Massachusetts Bail Fund: massbailfund@gmail.com

Minnesota Freedom Fund: mnfreedomfund@gmail.com

Northwest Community Bail Fund: facebook.com/NorthwestBailFund

Just City (Memphis, TN): info@justcity.org