# THE PRETRIAL RELEASE PROJECT: A STUDY OF MARYLAND'S PRETRIAL RELEASE AND BAIL SYSTEM

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## EXECUTIVE SUMMARY: THE PRETRIAL RELEASE PROJECT STUDY

**Nearly 40 years ago, Congress transformed this nation's federal pretrial release system. Recognizing that the use of money bail and dependence on bail bondsmen disadvantaged lower-income people, Congress concluded that "proper respect for law and order is jeopardized when the disposition of justice turns upon the financial status of the accused."[1] The new federal system relied extensively on a pretrial release agency's investigation and supervision and guaranteed legal representation to indigent defendants.**

**The federal system provided the model for legislating reform of Maryland's pretrial release system. But it is a model only in theory, not in practice. Like its federal model, Maryland's written pretrial release rules entitle most defendants to be released on the least onerous conditions.[2] However, its practices do not follow its rules. Indigent defendants, most facing nonviolent, District Court offenses,[3] are usually unrepresented by a lawyer at the bail stage. While Maryland judicial officers released half of arrestees on personal recognizance, they invariably ordered full financial bond for the remaining half.[4] About 75,000 detainees regained their liberty pending trial in 1998 and**

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[1] **18 U.S.C. section 3142. In 1963, Attorney General Robert F. Kennedy called for a national conference on bail and delivered a comprehensive report on Poverty and The Administration of Criminal Justice, leading to Congress' passage of the Bail Reform Act of 1966. *See*, *The Pretrial Release Project: A Study of Maryland's Pretrial Release System* (hereinafter APRP Study"), May 14, 2001, at 9-13.**

[2] **Md. R. 4-216(c) states that "a defendant is entitled to be released before verdict . . . on personal recognizance or with one or more conditions imposed." Md. R. 4-216(e)(3) states that "[i]f the judicial officer determines that the defendant should be released other than on personal recognizance . . ., the judicial officer shall impose on the defendant the least onerous condition or combination of conditions of release . . . that will reasonably (A) assure the appearance of the defendant . . . ."**

[3] **In fiscal year 1999 and 2000, approximately 92% of Maryland arrestees were charged with District Court mostly misdemeanor offenses.**

[4] **Maryland judicial officers required 93% of incarcerated etainees,**

**1999 by paying bondsmen a nonrefundable 10% fee. Collectively, Maryland's annual bail bond revenue totaled between $42.5 million and $170 million and caused economic hardship to many families who paid bail with money designated for rent, food and utilities.[5] Under Maryland's pretrial release rules, the overwhelming majority of these detainees should have been offered less onerous alternatives and been released without bondsmen. This would, of course, not include individuals who pose a threat to public safety or who represent a flight risk.**

**The Abell Foundation funded the Pretrial Release Project (PRP) after the Maryland State Bar Association requested that the Maryland Court of Appeals authorize "a study be undertaken to evaluate the entire bail review process."[6] Chief Judge Robert M. Bell agreed and suggested that "a comparative analysis [of Baltimore City] with other representative jurisdictions would be . . . helpful in that its findings would be more likely to lead to substantive changes in the bail and pretrial release system statewide."[7] Thereafter, the Abell Foundation**

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**i.e. defendants not released on recognizance, to meet the conditions of full financial bond, i.e. posting a 100% cash, property or security bond. *Id.* at note 133. Statewide, three of five detained defendants relied on bail bondsmen to meet the condition of a full bond.**

[5] **Seventy percent of interviewed arrestees for this Study reported that the expense of the bondsmen's fee would result in a delay paying rent and utilities and in buying less food. *Id.* at 51-52.**

[6] **Letter from then-President of the Maryland State Bar Association, Charles M. Preston, to the Hon. Robert M. Bell, April 20, 1999. *Id., at* Appendix A. Subsequently, Chief Judge Bell appointed a 12-person advisory committee to assist the PRP Study. For a listing of the members of the Pretrial Release Project's Advisory Committee, *see id.,* at note 3.**

[7] ***Id.* at Appendix B. The call for a study came after the Baltimore City Lawyers at Bail (LAB) Project, an 18-month Foundation-funded study, demonstrated the significant difference legal representation made for lower-income people charged with nonviolent charges. LAB's randomly selected clients were released on recognizance 2 1/2 times as frequently as defendants without counsel. Additionally, 2 1/2 times as many LAB clients gained release after bail was reduced to an affordable amount. Families living in poverty, or on the brink of it, were usually spared the bondsman's nonrefundable 10% fee and making the Hobson**

**made funding available, launching the two-year Pretrial Release Project (PRP). The PRP Study is the culmination of this project. It makes the following findings and recommendations:**

## Findings and Recommendations[8]

### a. Judicial Officers Require Additional Information

**Maryland pretrial release proceedings are usually conducted without a public defender or private counsel to represent the accused[9] and without a pretrial representative to provide judicial officers with verified background information about each defendant. Consequently, most judicial officers decide whether to order release on recognizance or a financial bail without having essential information about the person's employment status, family and community ties, and ability to afford bail.[10]**

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**choice between gaining the accused's release or buying food or paying rent, utilities or other basic necessities. LAB concluded that providing judges with additional verified information led to better informed decisions about defendants' likelihood of reappearing in court and resulted in substantial savings in pretrial detention costs. *Id.,* Appendix C, Ray Paternoster and Shawn Bushway, *An Empirical Study of the Lawyers at Bail Project*.**

[8] ***Id*. at 52-55.**

[9] **In Maryland's two-stage pretrial release system, *id*. at 19, public defenders do not represent indigent defendants at the initial appearance before a commissioner. At bail review hearings, public defenders provide representation in only two of Maryland's 26 counties (Baltimore City and Montgomery). *See*, *State v. McCarter*, 363 Md. 705 (decided April 16, 2001) (Md. Code Art. 27A, section 4 requires the public defender to represent indigent defendants at the initial appearance and at all stages of a criminal proceeding). Pretrial Services representatives rarely are present at the commissioner stage and are usually unable to provide bail review judges verified personal information about each defendant.**

[10] ***Id*, at 23-25 (commissioners' survey), 41-42 (bail review proceedings).**

**b. Less Onerous Alternatives To Full Financial Bond Needed**

**While Maryland law provides for placing a 10% cash deposit with the court clerk and having it refunded when the case concludes, judicial officers virtually ignore this less onerous financial alternative. Only three of 100 Maryland detainees not released on recognizance gained pretrial release by posting a 10% cash alternative.[11] In Baltimore City, *only one of 450 detainees* not released on recognizance were given the opportunity to post a 10% cash alternative.[12]**

**Maryland law also provides judicial officers with the option of using the less onerous unsecured collateral bond, which requires the defendant's personal commitment to assume financial responsibility for willfully failing to appear in court. Only 4% of detainees statewide were given this option.[13] In Baltimore City, unsecured bonds were almost non-existent: less than one out of 100 arrestees who had a financial bail were given the option to promise to pay the full bond in the event of nonappearance.[14]**

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[11] ***Id.*, at 38-39.**

[12] **In Baltimore City in calendar year 1998, not a single person of the 13,198 who were released at commissioner stations posted a 10% cash deposit. In calendar year 1999, a total of 49 people, or 6/10 of 1%, detained defendants posted a 10% cash deposit. *Id.* at note 137. Ten percent cash deposits also were exceedingly rare in Baltimore, Eastern Shore, Fredericks, and Prince George's counties. In contrast, Howard and Carroll County judicial officers permitted one in four detainees to post a refundable 10% cash deposit. *Id.***

[13] ***Id.***

[14] **In calendar year 1998, only 18 of 13,198 detained arrestees or 1/7 of 1% posted an unsecured bond in Baltimore City. In 1999, the figures increased slightly: judicial officers ordered unsecured bond for 116 people or 1.5% of detained arrestees for whom bail was set. *Id.* at 38. Similarly, arrestees rarely posted an unsecured bond in Baltimore, Frederick and Prince George's counties.**

## c. Bail Practices in Baltimore City

**Despite having the lowest per capita household income among the five counties studied,[15] Baltimore City defendants and families faced the second highest average bail amount for all offenses. The average, $13,657, set following a bail review hearing is more than 2 1/2 times greater than Harford County's average bail.[16] Baltimore City's median (50th percentile) $5,000 bail was midway among the counties studied; its $3,250 typical bail for nonviolent offenses was second lowest.[17]**

**Baltimore City judges released 60% of arrestees on personal recognizance, a higher proportion than the statewide 50% average. However, Baltimore City judges ordered full financial bond for 98% of detainees, more than any other Maryland county, which resulted in the highest proportion of detainees' using bondsmen to gain release. In addition, bail review judges in Baltimore City maintained the commissioner's bail ruling for three of four detainees, also more than any county studied. When the judges changed the bail, they *increased* bail for one of 10 detainees.[18]**

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[15] **According to the 1995 national census, the median (50th percentile) income for the typical household in Baltimore ($42,021), Frederick ($51,220), Harford (48,467) and Prince George's ($45,281) counties was 75 to 100% higher than for Baltimore City ($25,918). *See, id.*, at 51, notes 183-184. Consequently, the same dollar amount is likely to represent a greater financial hardship for individuals and families in Baltimore City.**

[16] ***Id.* at notes 113-116.**

[17] **For all crimes charged, Frederick County had the highest *average* post bail review bond amount, $15,566, and the highest median ($7,500). Harford County had the lowest average bail, $5,471, and the lowest median ($2,500) for all crimes charged. Baltimore City's *median* bail for all crimes charges was $5,000, the same as Prince George's and Baltimore County and midway between Fredericks and Harford County. *For non-violent offenses,* Baltimore City's median bail was $3,250, compared to Harford ($2,500), Baltimore and Prince George's counties ($5,000), and Frederick ($7,500). *Id.***

[18] ***Id.*, at notes 118-121.**

### d. Defendants Appear As Scheduled in Court

**The overwhelming majority of Maryland defendants released pretrial returned to court when required. No objective basis exists for believing bail bondsmen provide a greater assurance that defendants will appear in court.**

**During fiscal years 1999 and 2000, Maryland District Court's Annual Statistical Reports showed that nearly 94% of defendants appeared on their scheduled District Court date, considerably higher than the national appearance rate for felony prosecutions.[19] Recently obtained District Court statistics, suggests that defendants who posted a refundable 10% cash bond with the court reappear at a higher rate than bonded defendants.[20] Further analysis of the data regarding defendants' appearance rate in court is needed.**

**There are misconceptions not only about the overall reliability of defendants in appearing in court, but also about how absconders are located, apprehended and returned to court. In the vast majority of cases, it is the police, not bondsmen, who perform this role, even where defendants paid bondsmen to secure their release.[21] Maryland law offers many protections to bondsmen, making the multimillion-dollar industry appear nearly risk-free.[22]**

## CONCLUSION AND RECOMMENDATIONS

**The bail determination is crucial to the legitimacy of the criminal process. Judges' duty to balance individual liberty, judicial efficiency and public safety require that they have essential and reliable information about each individual defendant. When all critical players are involved --- a statewide pretrial release agency, a public defender to represent an indigent accused, and an assistant state's attorney --- judicial officers are assured of**

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[18] ***Id.*, at 45-46 and accompanying notes 155-156.**

[20] **In 1999, defendants released on cash bond had a higher appearance rate than defendants released on bail bond in 24 of Maryland's 33 reported District Court locations. In 1998, the rate was comparable for both groups. *See id.,* at notes 159-162.**

[21] ***Id.*, at 49-50.**

[22] ***Id.*, at 50-51 and accompanying notes 176-181.**

**receiving maximum information about an accused's likelihood to reappear when required. Offering such vital information should change the current court culture in which judicial officers condition pretrial release for nearly half of arrestees on the posting of a full financial bond, resulting in arrestees relying on the commercial bail bondsmen or remaining incarcerated for lengthy periods if bail is unaffordable. When financial conditions are ordered, judicial officers should view the 10% cash deposit as at least as good an incentive for defendants reappearing in court as the surety bond, since it permits families and individuals to recover their deposit at the conclusion of the case. Further study will ensure that Maryland's practices conform to existing pretrial release rules.**

**This Study recommends that:**

**1. Maryland should expand its pretrial release investigative statewide and invest greater resources in supervising pretrial detainees, particularly those charged with nonviolent offenses.**

**2. The Public Defender should comply with its statutory duty to represent indigent defendants statewide at the initial appearance and at bail review hearings.**

**3. An assistant state's attorney should be present at bail review hearings.**

**4. Maryland Rules should provide an automatic 10% refundable cash bond payable to the court for all bailable criminal or traffic offenses.**

**5. Monetary bail should be used sparingly, limited to situations when "no [other] condition of release will reasonably assure" the defendant's appearance and the complainant's safety. Md. R 4-216 (c).**

**6. Judicial officers should consider an unsecured bond in lieu of a collateral bond.**

**7. Upon implementation of recommendations #1 through #6, Maryland should further study the viability of eliminating the bail bondsman commercial surety, as recommended by the American Bar Association Standard Relating to Pretrial Release 10.1-3.**

**8. Judicial officers shall receive training and education with regard to pretrial release determination prior to assuming judicial duties and at annual training seminars.**

**9. A community-based revolving bail fund should be established to post 10% cash bond for individuals who are employed, are caretakers, or who otherwise have reliable community ties.**

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## I. INTRODUCTION

Nearly 40 years ago, a report by the United States Attorney General delivered three major conclusions: first, that conditions of pretrial release for criminal defendants should be carefully tailored to each individual situation; second, that there should be a preference for nonfinancial conditions of release; and third, that too large a role for commercial bail bondsmen endangered the fair administration of the criminal justice system. The report spurred Federal reform. Our study reaches similar conclusions about the pretrial release system in the State of Maryland.

Part II of this report provides the national historical background of pretrial release and bail. History reveals how the lessons learned in the past resonate today for Maryland. During the decades of the 60's and 70's, guided by the federal model's emphasis on eliminating the inequities of money bail and responding to corruption and scandal arising from the powerful bail bondsmen industry, many states instituted sweeping reforms of their pretrial release procedures. Part III of this study explores these states as a point of comparison with our own state.

In Maryland, a statutory framework provides for imposition of the least onerous conditions of pretrial release;[1] where financial bail is appropriate, the Maryland statute specifies what types of bail should be considered.[2] The decision whether to grant bail, what type and in what amount is to be guided by a long list of enumerated factors. Parts IV and V document the procedures actually followed statewide and in five particular counties and demonstrate that courts routinely disregard the statute. These sections also highlight

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[1] Md. R. 4-216(e)(3). Imposition of Conditions of Release. If the judicial officer determines that the defendant should be released other than on personal recognizance without any additional conditions imposed, the judicial officer *shall impose on the defendant the least onerous condition or combination of conditions of release* . . . that will reasonably (A) assure the appearance of the defendant . . . ."

[2] Md. R. 4-216(c). Defendants Eligible for Release By Commissioner or Judge. Rule 4-216(c) states that " a defendant is entitled to be released before verdict . . . on personal recognizance or with one or more conditions imposed . . . ." Defendants charged with crimes punishable by death or that carry a life sentence, Md. R. 4-216(d), or that are regarded as serious felonies, Md. Ann. Code Art.27 s.6161/2(c), may be denied bail where a judicial officer determines that no condition of release will reasonably ensure the defendant's appearance or the physical safety of another individual. Md. R. 4-216(d).

how, in setting bail, judicial attempts to fairly balance the prosecution's desire to ensure a defendant's appearance, public safety, and the defendant's desire for freedom are frequently hampered by the lack of representation for the accused and thus the lack of critical information on matters such as the defendant's community ties and financial situation. Consequently, judicial officers order full financial bond for most defendants not released on recognizance, which results in an overdependence on bail bondsmen in Maryland's pretrial release system. When conditioning release on financial bond, judicial officers rarely provide detainees with the alternative of posting a refundable 10% cash deposit with the court.

Part VI reveals surprising and disturbing facts about bail bondsmen, whose powerful role is based on misconceptions. There is an impression that defendants have low court-appearance rates and that bail bondsmen's aggressive efforts improve that rate. However, the truth is that Maryland defendants' appearance rate is very good to excellent - - higher than the national average - - and that Maryland defendants' reliability is as good, if not better, when a bail bondsmen is not involved. Moreover, bondsmen are usually passive and far less effective than local law enforcement in procuring the presence of defendants who fail to appear in court. They face little risk of financial loss for their clients' nonappearance and thus have little incentive to do their job. Yet their industry has grown into a highly lucrative, unregulated business in this state. This Study conservatively estimates that in 1998 bondsmen's' collective fees ranged between $42.5 million and $170 million.

The bail bondsmen's business success has come at the expense of defendants, who face economic hardship resulting from inappropriately high bail and nonrefundable fees, as discussed in Part VII. Gaining pretrial release usually required a detained defendant's family and friends to pay bondsmens' fees from money designated for rent, food and utilities.

In 1999, the Maryland State Bar Association wrote to the Maryland Court of Appeals requesting that "a study be undertaken to evaluate the entire bail review process."[3] Chief Judge Robert M. Bell indicated the Judiciary's approval for such a study and also suggested that "a comparative analysis [of Baltimore City] with other representative jurisdictions would be . . . helpful in that [such] findings would be more likely to lead to substantive changes in the bail and pretrial release system statewide."[4] Pursuant to these requests, the Abell Foundation made funding available, launching the Pretrial Release Project (PRP).

The call for a study came after the Baltimore City Lawyers at Bail (LAB) Pilot Project, also funded by the Abell Foundation, demonstrated the significant difference legal representation made for lower income people at bail review hearings. LAB lawyers provided judges additional verified information about their nearly 4,000 clients, enabling judges to make better informed decisions about defendants' reasonable likelihood of reappearing in court on personal recognizance. A University of Maryland Study tracked LAB's performance and concluded that for nonviolent offenses lawyers' advocacy led judges to release LAB clients on recognizance 2 1/2 times more often, and to reduce bails for many others to affordable amounts, when compared to cases of arrestees without counsel.[5] Legal representation at bail review helped to significantly reduce pretrial jail

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[3] Letter from then-President of the Maryland State Bar Association, Charles M. Preston, to The Honorable Robert M. Bell, Chief Judge of the Maryland Court of Appeals, dated April 20, 1999. *See,* Appendix A. Chief Judge Bell appointed an Advisory Committee to assist the Pretrial Release Project's statewide study. The Advisory Committee is chaired by C. Carey Deeley, Jr., Esq., Venable, Baetjer & Howard and includes the Hon. Stuart O. Simms, Secretary of Public Safety & Correctional Services; Hon. Andrew L. Sonner, Associate Judge, Court of Special Appeals; Hon. Angela M. Eaves, District Court Judge for Harford County; Hon. Scott G. Patterson, State's Attorney for Talbot County; Michael Elmore, District Court Administrator Commissioner for Charles County; Professor Douglas L. Colbert, University of Maryland School of Law; Robert L. Dean, Assistant State's Attorney for Prince George's County; Wilhelm H. Joseph, Jr., Executive Director Maryland Legal Aid Bureau, Inc.; Dennis J. Laye, Assistant Public Defender; Laura Kelsey Rhodes, President-elect Maryland Criminal Defense Attorneys Association; and Elizabeth Buckler Veronis, Esq., Legal Officer, Administrative Office of the Courts. Professor Colbert is the recipient of the Abell Foundation grant and serves as the Advisory Committee's main researcher and reporter.

[4] Letter from Chief Judge Bell to the Abell Foundation, May 19, 1999. *See,* Appendix B.

[5] From October to November 1998, University of Maryland Professors Ray Paternoster and Shawn Bushway of the Department of Criminology and Criminal Justice conducted a multiple regression statistical analysis in which they evaluated the effect of legal representation at the bail review hearing stage. Their report, *An Empirical Study of The Lawyers at Bail Project* (hereinafter "Paternoster-Bushway Study"), which

overcrowding at the Baltimore Centralized Booking & Intake Center (BCBIC), and resulted in substantial bed space and cost savings.[6] Moreover, 96% of LAB clients appeared in court when required.[7] The PRP Study provides follow up to LAB's representation. While a lawyer's presence at bail reviews is likely to result in more favorable bail conditions for an accused, much more is at stake: a person's ultimate liberty will depend upon the ability to afford and post bail. PRP examines Baltimore's (and Maryland's) judicial bail and pretrial release practices and evaluates the impact of requiring financial bail for low-income and working defendants, their families and dependents, and the larger community.

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was completed on May 14, 1999, compared a randomly selected group of 300 jailed defendants charged with nonviolent offenses. *See,* Daily Record, April 22, 2000. Though each defendant was eligible for representation by a LAB attorney, half were randomly assigned lawyers. The remaining individuals formed a control group that appeared without an attorney at the bail review hearing. LAB attorneys focused on corroborating their clients' residence, family and employment status. Lawyers also emphasized that their clients' financial circumstances limited their ability to post a full bail bond or to pay bail bondsmen a 10% nonrefundable fee. *See, infra*, Part IV at 17-18. In addition to finding a substantial increase in the number of detainees released on recognizance, the Paternoster-Bushway Study found that 21/2 times as many LAB clients gained release after having had their bails lowered to affordable amounts. Overall, one of two LAB clients had his or her bail reduced, compared to one out of seven for the unrepresented group. On average, judges decreased bail for represented detainees by $1,000, compared to $166 for the unrepresented group. *See,* Appendix C.

[6] When LAB began on August 25, 1998, the pretrial population at BCBIC was 1,211, nearly 50% greater than the maximum capacity of 811. During each of the next six months, the pretrial population declined steadily, until it fell below its maximum in March, 1999. LAB was not alone in its effort to address Baltimore City's overcrowded pretrial detention population. District and Circuit Court judges contributed significantly to a more manageable pretrial population by conducting twice-weekly habeas corpus bail proceedings. In addition, District Court judges, Assistant State Attorneys and Public Defenders disposed of some minor charges as part of an early disposition program. By August 1999, one year after LAB began, the pretrial population was 620, and remained in the low 600's during the Fall, 1999. Professors Paternoster and Bushway estimated that representation at bail for nonviolent offenders alone would result in a savings of 100,000 bed days and five million dollars. *See, supra,* note 7, pp. 2, 8-9

[7] The results of LAB persuaded Governor Paris Glendenning to allocate more than $500,000 to the Public Defender in July, 1999, and an additional $l.6 million in July, 2000 to represent indigent defendants in Baltimore City. In Maryland's eleven other judicial districts, only Anne Arundel, Harford, and Montgomery counties provided representation at bail review hearings when LAB commenced. In April, 2001, the Public Defender discontinued such representation in Harford County and Anne Arundel County. No Maryland county provides for representation at the defendant's initial appearance before a bail Commissioner. Conversation with David Weissert, Coordinator of Commissioner Activity, Maryland District Court, December 1999.

## HISTORICAL BACKGROUND

The public interest is not served by a pretrial release and bail system that punishes criminal defendants with onerous financial requirements to obtain release and gives bail bondsmen too powerful and profitable a role. This lesson, which emerged from the PRP study of Maryland's system, is a disturbing one. It is not, however, a new one. Indeed, nearly four decades ago, a federal report yielded similar conclusions.

In 1963 Attorney General Robert F. Kennedy delivered to Congress a comprehensive report[8] on the federal bail system. It described how bail disadvantaged individuals with little or no financial resources. Most detainees were incarcerated solely because they could not afford bail.[9] Pretrial detention translated to loss of jobs, disruption of family life, and interference with the ability to prepare a defense. At the typical bail hearing, the accused appeared without counsel.[10] Consequently, decisions on bail largely relied upon the nature of the charge, the accused's prior criminal record, and a prosecutor's recommendation. Judicial officers lacked reliable information concerning the accused's

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[8] 1963 Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice (hereinafter "Attorney General's 1963 Report"). *See also,* Daniel J. Freed and Patricia M. Wald, *Bail in the United States* (1964), which summarizes the findings of the National Conference on Bail and Criminal Justice the Attorney General organized. Cosponsored by the United States Department of the Justice and The Vera Foundation (now the Vera Institute of Justice), the conference focused public attention on the defects in a bail system which denied freedom to hundreds of thousands of people unable to raise the money necessary for bail. The conference also considered the law enforcement stakes and the human and monetary costs of pretrial detention and explored alternatives.

[9] The Attorney General's 1963 Report concluded that the ultimate determination of pretrial release depended upon the financial means the accused was able to command. *Id.*, at 66. In more than one half of jurisdictions, detainees could not afford bond amounts between $1,501 and $2,500. *Id.* Three decades later, approximately one third of Baltimore City's average pretrial population of more than 2,000 detainees remain incarcerated prior to trial because they are unable to afford bail of $500 or less. Conversation with George Fredericks, Statistics Office, Baltimore Central Booking & Intake Center, November 12, 1999; Stuart O. Simms, Secretary of Maryland Department of Public Safety, July 24, 2000.

[10] Attorney General's 1963 Report, *supra,* note 8, at 62-63. Prior to the United States Supreme Court's 1963 ruling in *Gideon v. Wainwright*, 372 U.S. 335 (1963), there was no guaranteed constitutional right to counsel at trial for indigent defendants facing state criminal charges and certainly not at bail proceedings. In *Gideon*, the Court declared that the right to counsel was "a necessity, not a luxury," and was fundamental to protecting an accused's liberty. *Id.*, at 344.

personal background, i.e. family, employment, residence, and availability of financial resources.[11]

The Attorney General's 1963 Report made several recommendations. These recommendations were based in part on the Vera Foundation's Manhattan Bail Project, which showed that people who had strong family and community ties had an extremely high reliability of returning to court without requiring bail.[12] Judges should make greater use of nonfinancial conditions of pretrial release, such as release on recognizance with personal bond and out-of-court supervision, the Report stated.[13] Also, when financial bail is ordered, judicial officers should provide an automatic 10% cash alternative or a percentage cash bond. Unlike the nonrefundable bondsman's fee, such an amount would be returned when the case concluded, for a defendant who appeared in court.[14]

To make decisions about bail, more information was needed, according to the Report. The Attorney General thus urged that pretrial services representatives should be present at bail hearings to verify information regarding the accused's personal background, including criminal history.[15] Moreover, the Report highlighted the necessity for guaranteeing counsel for an accused at bail hearings. Characterizing the lack of legal representation as "a prejudice of defendant's rights,"[16] the Report referred to counsel's many roles: advising the accused, assisting the magistrate, and securing prompt review

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[11] Attorney General's 1963 Report, *supra,* note 8, at 70-72.

[12] The Vera Foundation's Study demonstrated the importance of providing judicial officers with relevant information at bail hearings. The Project created two groups of defendants: for one group, Vera pretrial representatives recommended release on recognizance; for the second control group, Vera was prepared to recommend release but did not. Judges granted release for 120 of 200 Vera's clients in the first group, but for only 35 of 200 clients in the control group. Only two of the defendants granted pretrial liberty failed to appear for trial. *See*, Attorney General's 1963 Report, *supra*, note 8, at 63-64.

[13] *Id.*, at 76-77.

[14] *Id.,* at 81. *See also, infra,* Part IV (B), notes 62-63 and accompanying text.

[15] *Id.,* at 77.

[16] Attorney General's 1963 Report, *supra*, note 8, at 24.

when a court orders conditions beyond the person's financial ability.[17] Counsel also played a vital role in ensuring a client's speedy discharge from custody and a return to court when required.

Finally, the powerful role of bail bondsmen, characterized as "crucial in current federal pre-release practices,"[18] was explored. The Report concluded it was a bondsman's business decision, not a judicial determination, that governed who would be released and who would remain incarcerated prior to trial. As noted in a 1964 National Conference on Bail and Criminal Justice, organized by the Attorney General, many bail bondsmen refused to write bonds for people because of their race, the particular charge, and local hostility.[19] The Attorney General concluded that the bondsmen's decisions should be scrutinized because they "affected [the] public interest."[20] His Report called for a congressional inquiry to discover whether bail bondsmen advanced the policy of pretrial release of accused persons, or whether they were merely engaged in a practice[21] that required working and lower income people to pay nonrefundable 10% fees.[22]

Following the Attorney General's 1963 Report, the Senate held hearings in 1964 and 1965,[23] resulting in the Federal Bail Reform Act of 1966.[24] Referring to nearly 700 years in

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[17] *Id.,* at 24-25.

[18] *Id.,* at 67.

[19] *Id.,* at 32-34.

[20] *Id.*, at 67.

[21] *Leary v. United States*, 224 U.S. 567, 575 (1912) ("interest to produce the body of the principle in court is impersonal and wholly pecuniary."). *Id.*

[22] Attorney General's 1963 Report, *supra,* note 8, at 68. During the congressional hearings, Professor Bowman from the University of Illinois College of Law compared 10% deposit bail bond in Illinois with the use of commercial sureties. He concluded "no-shows by 10% deposit releases are not greater and perhaps considerably less than the 3% who forfeit commercial bail bond." According to Professor Bowman, "most [released defendants] have employment or family ties in the community and no desire to flee." Testimony of Charles H. Bowman, August 6, 1964, before the Senate Subcommittee on Constitutional Rights and Improvements in Judicial Machinery, p.161.

[23] H. R. Rep. No 1541, 89th Cong., 2nd Sess. 1966, 1966 U.S.C.C.A.N. 2293, 1966 WL 4286 (Leg.Hist.).

which common law, constitutional, and statutory principles recognized an accused's right to liberty pending trial for noncapital offenses, Congress concluded that pretrial detention was not consistent with the basic tenets of equality before the law and the presumption of innocence,[25] and that judicial responsibility for the administration of criminal justice had been abdicated to commercial bondsmen.[26]

Bail bondsmen countered that they performed a public service at little expense by assisting "good risk" indigents to make bond through family and friends and by rejecting defendants who represented a "bad risk" for reappearing in court. They insisted that the bail bonds industry was a free enterprise which the government need not regulate.[27]

Congress rejected the argument and moved to replace the existing system and implement the Attorney General's reform:

> Because Federal bail procedures rely primarily upon financial considerations rather than the accused's character or community ties, such procedures inevitably disadvantage person of limited means. Proper respect for law and order is jeopardized when the disposition of justice turns upon the financial status of the accused.[28]

Nearly twenty years later, Congress passed another reform act. Addressing concerns about individuals who had been rearrested after having been released pending trial, the Bail Reform Act of 1984[29] empowered judges to deny bail to a defendant who had

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[24] P.L. 89-465, amending 18 U.S.C. section 3146, et. seq.

[25] H.R. Rep. 89-1541, General Statement.

[26] *Supra*, note 26, at 170.

[27] *Id.,* at 177-182.

[28] §.1357, Bail Reform Act of 1966, section 2(a), Findings and Purpose.

[29] 18 U.S.C. section 3142.

been newly accused of committing a serious crime while on pretrial for an unrelated charge. Preventive detention was to be used only when there was "no condition or combination of conditions [that] will reasonably assure the appearance of the person as required and the safety of any other person and the community."[30] The Act prohibited the use of high bail to detain an otherwise bail-eligible defendant and indicated a clear preference for nonfinancial conditions of pretrial release for most defendants awaiting trial.

In *Salerno v. United States*,[31] the Supreme Court upheld the constitutionality of the provision, which required a judicial determination that no condition of release would eliminate the significant threat the defendant posed to the safety of another individual or to the community. The ruling rested upon the safeguards provided to an accused, including the right to counsel and to challenge the denial of bail. Emphasizing that "[i]n our society, liberty is the norm and detention prior to trial or without trial is the carefully limited exception,"[32] the Court concluded that the public safety consideration was narrowly tailored to meet a compelling government interest.

The spirit infusing the Bail Reform Acts guided standards of the American Bar Association, declaring that most detainees are entitled to pretrial release under less onerous nonfinancial conditions.[33] Under the 1984 Reform Act, denying pretrial release may be appropriate to a limited number of defendants who represent a potential danger to the community,[34] the ABA standards acknowledge. However, the ABA also urges judicial

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[30] 18 U.S.C. section 3142(e).

[31] 481 U.S. 739 (1987).

[32] *Id.*, at 755.

[33] Standard 10-1.1 Policy Favoring Release and Exceptions to Release, refers to conditional release pending diversion to further rehabilitation needs and diversion from prosecution. The ABA standard calls for additional funds to be provided for pretrial supervision, adding that many defendants could be safely released if only a small fraction of the costs of detention were diverted to supervision.

[34] In 1968, the American Bar Association published the first set of criminal justice Standards Relating To Pretrial Release. ABA Project on Minimum Standards for Criminal Justice: Standards Related to Pretrial Release 64-65 (1968). The 1968 standards incorporated the Bail Reform Act of 1966, including the Act's enumeration of specific factors judicial officers should take into account when making a pretrial release determination. Subsequently, the National Association of Pretrial Services Agencies and the National District

officers to refrain from using bail as punishment, such as when they impose a financial condition beyond the accused's ability to afford. Standard 10.1-3 recommends that money bail should only be used in limited circumstances and must always serve a legitimate government purpose of pretrial release.[35] The commentary suggests a 10% cash bond could serve such a purpose, since the defendant bears the risk of financial loss and has an incentive to appear to recover the money posted as security.[36] Bail bonds, on the other hand, would not serve such a legitimate purpose. Defendants did not fear an enhanced punishment for not appearing in court, and did not face a real risk of financial loss, since most were judgment proof. Consequently, Standard 10.1-3 reiterates the call for abolishing the compensated bail bondsman.[37]

The federal reform acts and the ABA guidelines are models for Maryland's rules regarding bail. Maryland Rule 4-216 entitles most defendants to be released pretrial on the least onerous conditions.[38] However, as discussed later in this study, the statute's intent

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Attorneys Association introduced the issue of potential danger to the community, which the 1985 ABA Standards followed. John Clark and Alan D. Henry, *The Pretrial Release Decision Making Process: Goals, Current Practices, and Challenges*, at 5, notes 17, 18, Pretrial Services Resource Center, November 1996.

[35] ABA Standard 10.1-3(c) proposes limiting the use of release on monetary conditions to situations when there are no other conditions to reasonably ensure a defendant's appearance. Judicial officers should impose "the lowest level necessary to ensure the defendant's reappearance and with regard for the defendant's financial ability to post bond."

[36] Twenty-five states, the District of Columbia, and the federal system use 10% cash bonds. Three other states provide judges with the discretion to determine the amount of a percentage cash bond. In six of the 28 states, a defendant is given the right to post 10% cash. D. Alan Henry, *Ten Percent Deposit Bail 1988 Update* (hereinafter "*Ten Percent Deposit Bail*"), Pretrial Services Resource Center; *infra*, at 12. When a case concludes, the 10% cash deposit is returned, less a small administrative fee. *Schilb v. Kuebel*, 404 U.S. 357 (1971). In contrast, the bondsman keeps the 10% payment as a fee, regardless of whether the defendant appears or the charges are dismissed. *Infra*, Part IV.

[37] ABA Standard 10.1-3. The 1985 Standards followed earlier ABA versions in 1980 and 1968, which had called for the abolition of surety bonds. ABA Project on Minimum Standards for Criminal Justice, Standard 10.5-5 (1980); ABA Project on Minimum Standards for Criminal Justice: Standards Related to Pretrial Release 64-65 (1968). In 1968, the -ABA Pretrial Release Project stated: "The professional bondsmen is an anachronism in the criminal process. Case analysis of his role indicates he serves no major purpose that could not be better served by public officers at less cost in economic and human terms."

[38] *Infra,* Part IV (A) at 16-18; *supra*, note 1.

has not been honored. For nearly half of arrestees, judicial officers ordered financial bail.[39] Indeed, release invariably results in the posting of the full amount of a bail bond that is guaranteed by a commercial surety. Those financially able to pay the 10% bondsmen's fee are freed, while many others remain incarcerated until their trial date. As the next section explains, other states pretrial release systems have been more successful than Maryland in implementing bail reform.

## II. OTHER STATES' PRETRIAL RELEASE SYSTEMS

After enactment of the Bail Reform Act of 1966, many states subsequently reformed their pretrial release system to favor nonfinancial supervised release and privately raised bail. These states were influenced by reasons Congress espoused in creating a federal pretrial release program that supervised many defendants awaiting trial and provided 10% cash deposit alternatives. First, legislators recognized the financial hardship to many defendants. Second, they resented bail bondsmen making decisions affecting individual liberty. Third, bail bondsmen were viewed as a self-interested group whose lucrative business created an appearance of impropriety and increased the likelihood of corruption. Finally, legislators believed that conditional release supervision would ensure a comparable defendant appearance rate.[40]

Illinois became the model for institutionalizing an automatic 10% cash deposit following a major corruption scandal in Chicago in 1959, when a municipal judge was indicted for accepting kickbacks in setting bail. Today, Illinois' automatic 10% cash alternative (defendant option) is followed in Kansas (Sheronee County), Kentucky, Nebraska, Ohio, Oregon, Pennsylvania, and Rhode Island. Twenty-two additional states, along with the District of Columbia and the federal courts, provide for a 10% cash bond at the discretion of the court (court-option).

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[39] *Infra,* notes 82-83.

[40] S*upra*, Part II, and notes 25-30.

Other states went further than Illinois and abolished the bail bond system. In the 1970's Kentucky passed a series of laws that regulated and then eliminated the bail bondsmen, based on fears of corruption and violent incidents by bounty hunters. Led by the Governor,[41] legislators created a statewide pretrial release program that required defendants be released on recognizance or on unsecured collateral bond, unless a judge determined they were a flight risk. Kentucky's 24 hour, seven day a week[42] pretrial agency has been extremely effective in reducing the state's pretrial detention population and in ensuring that defendants appear in court.[43] In fiscal years 1999 and 2000, more than 90%

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[41] John Palmore, former Chief Judge of Kentucky's Supreme Court, described Governor Julian Carroll's accomplishment of creating a statewide pretrial release and supervision agency to replace the bail bond system, as the "greatest thing the Governor ever did for the people of Kentucky and for the administration of our criminal justice system." Telephone conversation, July 11, 2000. As a former legislator and Speaker of the House and Senate, Julian Carroll had attempted unsuccessfully to regulate Kentucky's bail bond system. The Courier-Journal, which supported the Governor's efforts, wrote a series of investigative articles and editorials over a four-year period. *See*, *e.g.*, *Bondsman, Lawyer Practices Questioned, Courier-Journal*, May 4, 1973, at A6. The newspaper called for "a whole new way of arranging bail for persons accused of crime," and declared that "three things are wrong with the way the bail bond system works in Louisville and just about every other place it is employed:

> [First], [i]t's harshly discriminatory, and thus contributes to mistrust of and disrespect for our system of justice. [Second,] [b]ail bonds don't really guarantee that the accused will appear for trial. [And third,][f]ailure of the accused to appear for trial doesn't necessary lead even to the forfeiture of his bond. Courier-Journal, *The Professional Bail Bondsman Is An Unnecessary Evil in Court*, June 15, 1972, at A6.

Three years later, the Courier-Journal suggested that the "posting of bond with the court . . . wherever this method has been tried, the rate of return for trial is as good as or better than it is under the bail bondsman." Courier-Journal, *Time For Kentucky To End The Bail Bond Stranglehold,* Nov. 10, 1975, p. A22. Arguing that the bail bond system is difficult to defend, the editorial declared: "The concept of selling a man his freedom while he awaits trial should not be tolerated in a society that claims to believe in equal justice for rich and poor alike." *Id.*

Governor Carroll's proposed legislation sailed through the legislature, and was signed into law. Courier, *Bail On Bail Bond Industry Signed Into Law by Governor*, Feb. 11, 1976. Shortly thereafter, Kentucky's Supreme Court upheld its constitutionality. *Stephens v. Bonding Ass'n of Kentucky*, 538 S.W.2d 580 (1976). *See also*, *Johnson Bonding Co., Inc. v. Com. of KY*, 420 F. Supp. 331 (E.D. Ky. 1976); *Benboe v. Carroll*, 494 F.Supp. 462 (W.D. Ky. 1977).

[42] Kentucky's pretrial release representatives are available on an around-the-clock basis. Often, when court is not in session on weekends or evenings, pretrial will call judges at their home and request release on nonfinancial conditions. Defendants not released appear in court the following court session, where a public defender and prosecutor are present. Telephone conversation, Starkey Ray, general manager of Kentucky=s pretrial release system, December 8, 2000.

[43] The volume of arrests in Kentucky's criminal justice system is virtually the same as Maryland's. In fiscal year 2000, 197,102 people charged with misdemeanor and felonies were eligible for bail. Almost seven in ten people were released prior to trial. The breakdown of pretrial release follows below:

of Kentucky defendants appeared in court when required,[44] an extremely dramatic rate when compared to available statistics.[45]

Oregon also eliminated the professional bail bondsmen.[46] Reform occurred in 1973, after discovery of an elaborate kickback scheme in which bail bondsmen paid police and jail officials to gain speedy access to arrestees.[47] Bail bondsmen could easily recover a forfeited bail because of their cozy relationship with some judges. In place of the old system, Oregon created a "release agreement," which directed judges to place the most weight on a defendant's employment status, financial circumstances, family relationships, and residence.[48] An accused is presumed to be entitled to release on recognizance and

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|---|---|
| Release on recognizance | 22,160 |
| Unsecured bail | 13,453 |
| Nonfinancial conditions | 11,596 |
| 10% cash | 23,320 |
| 100% cash | 41,251 |
| Performance Bond | 116 |
| Judicial release on recognizance or nonfinancial conditions | 24,167 |

[44] The failure to appear rate was 8% for fiscal year 2000 and 9.4% for fiscal year 1999. The general manager of Kentucky's release system indicated that for data collection purposes, his agency --"overreports" failures to appear, i.e. the statistics includes defendants who arrive late to court on the same day when a case was scheduled. Conversation with Starkey Ray, December 8, 2000.

[45] *Infra*, notes 159. 163-169.

[46] *Burton v. Tomlinson*, 527 P.2d 123, 19 Or. App. 247 (1974) (holding that the Oregon pretrial release statute did not deprive bail bondsmen of their right to engage in the bail bond business and did not violate the Oregon Constitution or United States Constitution). *See*, William C. Snouffer, *An Article of Faith Abolishes Bail in Oregon*, 53 Or. L. Rev. 273 (1974).

[47] "In bail bonds "heyday", it was common for bondsmen to court correction officers and judges with favors. They had the power to refund or reduce a bond even when one of the bondsman's clients skipped bail. It was a spoils system, pure and simple, and it tarnished the criminal justice system's integrity." Editorial, Portland Oregonian, April 12, 1991, C10 (1991 WL 8462973); *see also*, Holly Danks, *"Making Bail"*, Portland Oregonian, Feb. 26, 1998, 1998 WL 418596 (interviewing the supervisor of Oregon's state release office who stated: "Having bail bondsmen was a real corrupt system. . . .[H]e sets up shop across the street from the jail, with neon lights. Your family sees the signs and pays him to get you out, and you never see the money again. " Our system is much fairer. You put up 10%, get the money back, or it is used to pay fines.").

[48] Snouffer, *supra*, note 46, at 275. The statute's first five pretrial release factors pertain to the accused's employment, financial condition, family relationships, residence, and people available to assist an accused's future court appearances. Or. Rev. Stat. s.135.230 (6). The method of release, i.e. release on recognizance, conditional release, and security release, is formalized by a "release decision," which considers the nine factors of "release criteria." *Id.*, at 135.245 (1998). Release assistance officers are available to

then to conditional release. If the circumstances do not allow either option and requires a financial bail, an automatic 10% cash deposit is available. Financial bail is used as a last option.[49] Bondsmen's efforts to repeal reform laws were rejected.[50]

Wisconsin's pretrial release system, also demonstrating sensitivity to defendants' financial condition, requires judges to consider the individual's ability to afford bail, and to set financial bail only when necessary to assure the defendant's appearance.[51] In the late 1970's, the State legislature eliminated the profit-making surety.[52] Wisconsin legislators then abolished money bail for indigent defendants who were charged with misdemeanor crimes.[53] The State established a correctional service fund in which revolving monies are

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assist magistrates by researching the accused's background information. *Id.*, § 135.235 (1).

[49] Snouffer, *supra,* note 46, at 305. Oregon legislators were concerned that magistrates would inflate security amounts to counteract the 10% cash option. Legislators included the following commentary: "The Commission discourages the concept of establishing the security amount 10 times the amount the magistrate considers necessary to assure appearance because the defendant may only deposit 10% of the security amount. The concept of setting the security amount 10 times higher would be counter to the intent and spirit of this Article and should not be followed." *Id.* at 308 (emphasis added).

[50] An editorial in the Portland Oregonian, April 12, 1991 (1991 WL 8462973) called for maintaining Oregon's current pretrial release system:

> The 18-year-old law that eliminated the commercial bail bondsmen from Oregon's state courts also closed the door on sleazy bonding practices. When the law passed, it was an overdue reform. It ended an era when some bondsmen would do favors for police and jail admissions officers to gain access to arrested persons. [The proposed bill] to bring the bondsmen back . . . should remain on the sideline, preferably buried so deep in paper that the overworked clerks in Judiciary won't be able to find it.

[51] Wis. Stat. section 969.01 (1998) enumerates the statutory criteria to be considered for pretrial release. In identifying twelve factors, Wisconsin's legislature began with (1) the ability of the person to give bail before proceeding to list factors (2-4) dealing with the offense and the defendant's prior criminal record. The financial hardship of monetary bail was recognized.

[52] Retired judge Fred Kessler, who previously served as a Wisconsin State assemblyman for ten years, is given the main credit for reforming the state's pretrial release system. Conversation with Milwaukee District Attorney Michael McCann, June 29, 2000. As a judge, Kessler had seen the professional surety as an "informal" corrupting force in the criminal justice system. Bondsmen had their "favorite" judges for setting bail or for returning forfeited bond money. As a legislator, Kessler knew that bondsmen had strong political support because they had contributed heavily to legislators' election campaigns. In 1979, Judge Kessler was instrumental in drafting and introducing a bill, modeled after the ABA Standards Relating to Pretrial Release, that made it illegal for suretys to charge a fee for their bonding services. Wis. Stat. section 969.12 (1998). The bill passed both houses, and Wisconsin's Republican Governor signed it into law. Conversation with Judge Kessler, July 11, 2000.

[53] In misdemeanor cases, judges' first option is to release the defendant on recognizance or with an

used to pay half the amount of bail bond for low risk defendants (the defendant or family pays the other half). In the early 1990's, Wisconsin also rejected bail bondsmen's efforts to undo bail reform.

Massachusetts and Pennsylvania also reformed their pretrial release systems.[54] Each relies heavily upon conditional release and severely limit the use of commercial bail sureties. Pennsylvania legislators acted after finding that judges too often required individuals to pay bail when none should have been ordered. Pennsylvania's Criminal Rules Committee Report recognized that people charged with nonviolent charges should be released, and endorsed the broad use of the unsecured collateral bond. Money bail is used only when necessary.

Contrary to these states' practices, Maryland's pretrial release system uses full financial bonds extensively for nearly half of arrestees,[55] many of whom are charged with misdemeanors. The following section explains how defendants in Maryland are compelled to rely on bondsmen to regain liberty pending trial, and explains the question whether judicial officers should be providing less onerous alternatives for low income defendants, particularly those charged with nonviolent offenses.

## IV. MARYLAND'S PRETRIAL RELEASE SYSTEM

### A. Nonfinancial and Financial Conditions of Pretrial Release

Maryland criminal procedure rules provide that an accused awaiting trial on all but the most serious charges is entitled to be released on personal recognizance or with one or

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unsecured bond; the second option is an appearance bond with solvent sureties; the third option is to place the defendant under a third party's supervision; the final option is to place restrictions on travel, including home detention. Wis. Stat. section 969.065 (1998). *See, Demmith v. Wisconsin Judicial Conference,* 166 W.2d 649 (1992) (striking down a misdemeanor bail schedule which allocated cash bail to the particular offense rather than the individual circumstances of the defendant).

[54] Esmond Harmsworth, *Bail and Detention: an Assessment and Critique of the Federal and Massachusetts Systems*, 22 New Eng. J. on Crim & Civ. Confinement 213 (1996).

[55] *See also, infra,* note 132-133.

more conditions imposed.[56] When personal recognizance is inappropriate, judicial officers are required to consider *the least onerous* nonfinancial or financial condition of release or a combination of conditions that would reasonably ensure the defendant's appearance in court.[57] Implicit in the statutory preference for liberty prior to trial is the deeply-rooted presumption of innocence and an understanding of the harsh impact pretrial detention has on defendants. Many detainees lose their jobs and are evicted from their homes.

Maryland's least onerous rule requires that a variety of nonfinancial pretrial release conditions be considered. They range in intensity to match the level of risk posed by the individual defendant. For instance, a judicial officer may direct that an accused be released to the custody of a parent or community organization.[58] Or the officer may place the individual under court supervision with a probation or pretrial release agency and require drug or alcohol testing.[59] Further restrictions may subject the defendant to reasonable limitations, such as a curfew or pretrial electronic monitoring.[60]

There are many advantages to nonfinancial conditions. First, they are more equitable to the person with limited financial resources who otherwise would remain incarcerated. Second, they allow the judicial officer, and not commercial bail agents, decide who is actually released. Third, pretrial supervision may deter criminal activity, and minimize the risk of pretrial misconduct. In addition, such supervision serves as an "early warning system" for defendants who present too high a risk to remain on pretrial release.[61]

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[56] Md. R. 4-216(c); *see*, *supra*, note 2. Commissioners are not authorized to decide pretrial release for serious felonies enumerated in Art.27 section 616(c), and do not make such determinations in cases involving a present bail or a bench warrant. Conversation with David Weissert, *supra*, note 9, Nov. 14, 2000.

[57] Md. R. 4-216(e)(3); *see, supra*, note 1.

[58] Md. R. 4-216(f)(1). Commissioners indicate that this alternative is not used because parents or community representatives rarely appear at hearings, which are usually held in jail detention facilities or inside police precincts. *See*, *infra*, notes 80-81.

[59] Md. R. 4-216(f)(2).

[60] Md. R. 4-216(f)(3).

[61] Henry, *Ten Percent Deposit Bail*, *supra*, note 36, at 10.

Nonfinancial release is not always sufficient. Where an accused is a flight risk or a danger to the community, the judicial officer must require bail bond. Maryland provides several alternative financial bail bonds:[62]

(A) bonds without collateral security ("unsecured");
(B) bonds with collateral security equal in value to the greater of $25 or 10% (10% cash or court deposit), or a larger amount ("percentage deposit")
(C) bonds with collateral security equal in value to the full penalty amount ("property"); or
(D) bonds with the obligation of a corporate surety in the full bond amount ("corporate surety or commercial bail bondsman'").

### B. The Different Types of Financial Bail Bonds

Unsecured bonds require only the defendant's signature and a commitment to assume the full obligation in the event that he fails to appear in court.[63] It may be appropriate for lower-income defendants who have strong community ties, are charged with nonviolent offenses, and lack the resources for bond collateral.

The 10% cash or court deposit is posted with the court clerk and is guaranteed by a surety, usually a family member or friend. If the defendant appears in court, the 10% cash deposit is returned to the surety, less administrative costs, once the case concludes. Obviously, the higher the amount of a percentage cash or court deposit bond, the more likely it will be beyond most defendants' ability to afford.

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[62] Md. R. 4-216(f)(4). A judicial officer also may subject a defendant to "any other condition reasonably necessary to ensure the appearance of the defendant." Md. R. 4-216(f)(5).

[63] Md. R. 4-216(f)(4)(A). Since noncollateral and percentage cash bonds are rarely used, *see, infra,* notes 132-134, there is no data available to evaluate concerns that such bonds may not be collectible in the event a defendant fails to appear in court. Considering Maryland's relatively low failure-to-appear rate, *see, infra,* notes 154-158, this problem is significant. Moreover, Maryland's minimal record for collecting forfeited surety bonds, *see*, *infra,* notes 175-180, has not persuaded judicial officers to turn to other less onerous financial incentives.

Property or full collateral bail bond[64] is used both by individuals and by professional bail bondsmen.[65] Each pledges property they own to secure the defendant's court appearance. In general, property bond is assessed at twice its tax value. However, Prince George's County (District Five) and Calvert, St. Mary's, Charles Counties (District Four) authorize professional bail bondsmen to post their own property as collateral and their calculate the bondsmen's property at *ten times* its assessed tax value.[66] Thus, bondsmen there underwrite many more bonds and substantially increase their business capacity. These bondsmen must remit a 1% payment of their total annual amount of bonds, making this arrangement profitable for local government, as well as the corporate surety.[67]

Most Maryland detainees gain pretrial release by transacting business with a local bail bondsman and paying a nonrefundable 10% fee, either as a lump sum or in installments.[68] The individual bail bond agent then shares this 10% fee with a licensed insurance company.[69] Bail bondsmen may also require individuals to post collateral security, or to cosign and take responsibility for the balance of the bond, in the event the defendant fails to appear or absconds from the jurisdiction.

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[64] 71 Md. R. 4-216(f)(4)(C).

[65] Detainees and families use the professional bail bondsman far more widely than they would use their own property (home) as collateral. Conversation with David Weissert, *see, supra*, note 7.

[66] 73 Md. 7th Jud. Circ. R. 714A(f)(1). *See, infra*, notes 138-140.

[67] Md. Ann. Code Art. 27, § 616 1/2(f)(2). When professional bail bondsmen post their own property, their profit margin increases considerably. Ordinarily, a bail bond agent is backed by a surety insurance company, licensed under state insurance laws. The company receives a portion of the customer's 10% premium fee. Usually, this amount ranges from 2% to 4% of each bond written by agents. Thus, it is greatly to the bondsman's advantage to secure bonds with his own property and avoid paying insurance companies this percentage expense. The special legislation in Prince George's, Charles, Calvert, and St. Mary's counties maximizes bondsmens' profits by retaining the defendant's entire 10% fee for them. Such unique pretrial release procedures have enabled professional bondsmen to become the dominant force there. *See, infra*, at notes 138-140 and accompanying text.

[68] *Insurance Com'r for the State v. Engelman*, 692 A.2d 474 (1997) (permitting installment payments to commercial bail bondsmen, which provides for payment of a smaller portion of the 10% fee and full payment following a detainee's release).

[69] *See, infra*, Part VI (C)(1).

C. Maryland's District Court Procedures

Maryland has a two-stage pretrial release procedure. First, the accused appears before a District Court Commissioner. Then, if still detained, he appears before a District Court judge at a bail review proceeding. The judicial officer is required to take many factors into account:[70]

(A) The nature and circumstances of the offense charged, the nature of the evidence against the defendant, and the potential sentence upon conviction, insofar as these factors are relevant to the risk of nonappearance;
(B) the defendant's prior record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings;
(C) the defendant's family ties, employment status and history, financial resources, reputation, character and mental condition, and length of residence in the community and the state;
(D) the recommendations of an agency which conducts pretrial release investigations;
(E) the recommendation of the State's attorney;
(F) information provided by defendant's counsel;
(G) the danger of the defendant to another person or to the community;
(H) the danger of the defendant to himself or herself; and
(I) any other factor bearing on the risk of a willful failure to appear, including prior convictions.

The availability of this information varies among the jurisdictions studied.[71] Judicial officers invariably have reliable information about the specific criminal charge, the

[70] Md. R. 4-216(e)(1)(A-I).

[71] *Infra*, Part V.

defendant"s criminal record, and any failure to appear on previous cases.[72] However, often lacking is salient information needed to make fair decisions, such as verified information about the detainee's ties to the community, employment status, or financial ability to afford a money bail.[73] Consequently, many judicial officers appear to give less weight to these latter factors in determining pretrial release.[74]

1. The Initial Appearance Before A Commissioner

Following arrest and processing, an accused remains in custody for up to 24 hours before appearing before a District Court Commissioner. Commissioners, who are appointed by an Administrative Judge, need not be lawyers.[75] Absent new information, a Commissioner's detention decision is likely to be sustained[76] by the District Court judge who presides at a bail review hearing, held during the next available court session (within one to three days). For this reason, and because the defendant's next court appearance is usually scheduled at least 30 days later, the Commissioner's hearing should be considered a crucial stage of the pretrial release process.

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[72] *Id.*

[73] *Id.* Pretrial Release conducts a background investigation of each arrestee to determine whether the individual is a good risk to reappear in court. Those findings are reported to the court, along with a recommendation for pretrial release on nonfinancial or financial conditions. A judge may release a detainee conditionally and require pretrial to ensure that the individual receive necessary social services, such as substance abuse counseling or testing. *Supra*, note 58-60.

[74] *Infra,* Part IV (C)(2).

[75] Recently, a four-year college degree became a requirement for the Commissioner position. A recent survey indicated that three of four Commissioners are college graduates; the remaining one quarter had been hired prior to the requirement. Appendix E, The Commissioners Survey, Table 2, at 2. More than three of four Commissioners stated that their legal training included a paralegal education. About 15% graduated from law school, and one of five commissioners had taken some law school courses. *Id.*, Table 3.

[76] *Infra*, note 144. Conversation with Weissert, *supra*, note 7, December 30, 1999. Professor Paternoster's analysis of bail review decisions in five Maryland counties revealed that judges affirmed Commissioner decisions in more than half the cases; in Baltimore City and Frederick, judges maintained the same bail for three of four defendants. Appendix H at 14.

The Commissioner's bail hearing does not occur inside a public courtroom, but rather at his "office", which often is located inside a jail facility or a police precinct.[77] In Baltimore's newest pretrial jail, for instance, a Commissioner sits on one side of a jail interview booth inside the central booking facility, and the accused remains on the other side. A plexiglass wall separates them, and they communicate through a speaker system. It is not uncommon for several defendants to be located in the same "booth" area and to listen to one another"s hearings. In other jurisdictions, Commissioners may be located inside a small room in the courthouse where the handcuffed defendant is brought. While Commissioner hearings are open to the public in most of Maryland, space limitations make it difficult to observe the proceedings.[78] In Baltimore City, people are denied entrance, although they may view the proceedings on television.

Generally at this initial appearance there is neither a pretrial release representative available to assist Maryland commissioners by providing essential information about the accused.[79] In addition, there is no public defender present to represent the accused.

Typically, only the defendant and commissioner are present at this initial appearance. The commissioner has information about the charges, the factual allegations, the potential sentence, and the accused's prior criminal history and record for previously

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[77] Apparently, this was the result of pressure to reduce local prisoner transportation costs and policies that allow police officers to return to street patrol. According to David Weissert, *supra,* note 7, Commissioner hearings are held inside jail detention facilities in District One (Baltimore City), District Two (Wicomico County), District Four (Charles and St. Mary's), District Five (Prince George's), District Six (Montgomery), District Nine (Harford), and District Eleven (Frederick). Commissioner hearings also are conducted in numerous police stations, in courthouses (Baltimore County), and in an even smaller private office in Kent County. Telephone conversation, Weissert, December 16, 1999. Montgomery County also conducts some commissioner hearings at police precincts. Conversation with Laura Kelsey Rhodes, Esq., August 22, 2000.

[78] The average commissioner's office holds only four people. David Weissert, *supra*, note 7.

[79] According to David Weissert, the Coordinator of Commissioner Activity, Pretrial Services are available to assist commissioners only in Baltimore, Montgomery and Prince George's counties. Communication (e-mail), May 18, 2001. Even in these few counties, Pretrial Services' assistance appears limited; Baltimore City's agency representatives only perform a criminal record check and do not appear before the Commissioner. *Id.* In the "old days", i.e. from 1971 to 1976, Baltimore City's Pretrial representative made recommendations to the commissioner and provided relevant background information. *Id.* In preparing for bail review hearings, pretrial interviews detainees and reports relevant information to the court. *See, supra*, note 96.

failing to appear in court. The commissioner compares the defendant's responses to his information, and asks the detainee about family, residence and employment background, but not about his ability to afford bail.[80] Since commissioners are unable to verify the accuracy of a defendant's reported information, they place considerable weight upon his demeanor and responses:

> Many defendants display poor communication skills and, . . . may appear evasive, argumentative or worse . . . . When the defendant loses credibility and appears to distort crucial information, this goes to the determination of their willingness to appear for trial.[81]

In 1998 and 1999, about 195,000 people appeared annually before Maryland District Court Commissioners. Commissioners released only half of these individuals on personal recognizance or on nonfinancial conditions of release during 1998[82] and 1999.[83]

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[80] Following a decision to set a financial bond, Commissioners consider the defendant's financial circumstances. David Weissert, *supra,* note 7. Cf*., infra*, note 85 (where only 20% of Commissioners thought that obtaining information about the defendant's financial circumstances was important in the pretrial release determination).

[81] Michael Elmore, District Court Administrator Coordinator for Charles County, correspondence dated July 22, 2000. Commissioner Elmore also advocated legal representation at bail and for a pretrial representative's investigation and recommendation during the pretrial and bail review stages.

[82] Appendix D, Tables 8(a)-(b). The 1998 Annual Report of the Maryland District Court Commissioner System ("Commissioners Report" or "1998 Report") indicates that between January 1, 1998 and December 31, 1998, 194,616 people were charged with offenses and appeared before a District Court Commissioner. Commissioners ordered release on recognizance (ROR) for 49.2% of the total of initial appearances. In addition, commissioners released on recognizance an additional 3.7% after finding no probable cause to support the offense. Md. R. 4-213. Consequently 53% of arrestees were released on recognizance prior to the bail review hearing. Additionally, commissioners ordered bail for 42.2%, and denied bail to 2.8%.

Harford County District Court Commissioners (District Nine) had the highest proportion of release on recognizance, 63.4%, followed by Calvert, Charles, and St. Mary's, which released 57.1% of defendants, (District Four) and Baltimore City (District One), which released 55.5%. The remaining nine districts ordered release on recognizance less frequently, ranging between 40 to 46%. Baltimore County (District Eight) Commissioners had the lowest release on recognizance rate, 40.3%, followed by a 41.5% rate in Eastern Shore (District Two) and a 41.8% rate in Howard/Carroll (District Ten). Interestingly, commissioners in Harford, Calvert, Charles, St. Mary's, and Baltimore City, who released the most people on personal recognizance, also had the highest statewide percentage for finding a lack of probable cause; they released between 5% and 6% for this reason.

Combining releases on personal recognizance with releases attributed to a lack of finding of probable cause reveals a disparity among Maryland's twelve districts. Harford County's (District Nine) figure of 69% was the highest, followed by Calvert, Charles, and St. Mary's at 62.2% and Baltimore City at 61.5%.

To learn more about commissioners' pretrial release decisions in each of the five counties, PRP developed a questionnaire with the cooperation of the Chief Judge of the Maryland District Court, Martha F. Rasin, and her staff.[84] The following section provides a detailed picture of the commissioners' decision-making.

2. Survey of Maryland Commissioners

The PRP commissioned a survey of Maryland District Court Commissioners, to which almost 80% of the 239 Commissioners replied. University of Maryland Professor Paternoster analyzed the data and produced a report revealing that the statutory mandate, requiring the least onerous options possible for release, is routinely contravened, because judicial officers lack critical information. He describes his findings in three separate sections. The first two sections detail the Commissioners' experience and educational background and the volume of cases they decide in their various urban, suburban, and rural jurisdictions. The third section is more detailed and presents valuable information about the pretrial release process. Highlights include:

- Seventy-one percent of Commissioners had no information about the defendant's financial ability to post bail. Less than 20% of Commissioners thought such information was important; 44% considered

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On the other end of the spectrum, Baltimore County's (District Eight) Commissioners released 41.1% of detainees, followed by Howard and Carroll County's (District Ten) rate of 42%.

[83] Between January 1, 1999 and December 31, 1999, defendants' initial appearances before the Commissioner increased only slightly: 196,304 people were arrested in 1999, compared to 194,616 in 1998. In addition, Commissioners' finding of no probable cause also remained relatively constant (3.6% versus 3.7%). But in 1999, Commissioners released fewer people (46.6%) on personal recognizance than they had in 1998 (49.2%). Consequently, more arrestees received bail in 1999 than 1998 (44% versus 42.2%). *See,* Appendix D, Tables 8(c)-(d).

[84] Chief Judge Rasin wrote a cover letter and mailed the questionnaire to each Maryland commissioner. Appendix E.

this factor the least important information they sought or thought it was irrelevant.[85]

- When imposing a financial condition, Commissioners used a full bond for four of five detainees. While Commissioners thought they used less onerous options one third of the time, they actually provided such options for only one of fourteen detainees.

- In determining pretrial release, Commissioners invariably had information available concerning the charge and possible sentence, and the detainee's past criminal record, including prior convictions (87%), failures to appear in court (92%), current parole and probation status (82%), and pending cases (86%). Primacy was given to such factors in making decisions.[86]

[85] Appendix E, at Table 7. In this question, Commissioners were asked whether they had information about detainees' financial ability to afford bail and what weight they attached to these responses. Most indicated such information was unavailable and not particularly important. In a separate inquiry (Table 6), Commissioners replied that they had information about defendants' financial circumstances in more than two of three cases and used it almost two thirds of the time in rendering a decision. One way to reconcile these responses is to believe that while two of three Commissioners inquired about defendants' financial circumstances, they considered such unverified information "unavailable" and consequently of less importance in rendering a pretrial determination.

[86] Appendix E, Table 7. A score of 5.0 indicates that a given factor is "Very Important" to the Commissioner in Setting Bail.

Table 7: Bail Commissioner's Assessment as to "How Important" Each Factor is in Setting Bail

| Factor | Average Importance Score* |
|---|---|
| Prior failure to appear for trial | 4.80 |
| Nature & circumstances of charge | 4.64 |
| Prior Convictions | 4.33 |
| Nature & weight of evidence | 4.24 |
| Pending cases | 4.24 |
| Possible sentence if convicted | 4.23 |
| Parole or probation status | 4.14 |
| Prior Arrests | 3.85 |

- Commissioners lacked reliable information on, and thus gave considerably less weight to community ties pertaining to employment (85%), reputation (74%), family (66%), current school status (21%), and military status (20%).[87]

- Commissioners relied on defendants as a primary source for information in almost 60% of the sample cases. When a detainee had counsel or when family/friends were present, commissioners reported considering each as a primary source for information in about one in seven cases.

3. Bail Review Hearing

Maryland's criminal procedure rules provide for a judicial bail review hearing for every person who is denied pretrial release by a Commissioner or who remains in custody for 24 hours after a Commissioner had set conditions of release.[88] The District Court judge is required to review the Commissioner's determination and may maintain or modify bail.[89]

Bail review hearings are unlike traditional criminal court proceedings, where an accused indigent appears in a public courtroom and is represented by counsel. It is rare for an accused to be inside the courtroom; most defendants remain inside a detention facility and observe the presiding judge through a two-way video and audio transmission.[90]

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[87] Appendix E. Table 7. Commissioners cumulative scores for family (3.42), employment history (3.59), school status (3.59 and military status (3.77) were considerably lower than factors related to the charge and the defendant's criminal history. *See*, *supra*, note 86.

[88] Md. R. 4-216(g).

[89] The Attorney General's 1963 Report opposed similar bail review hearings, because reconsideration often resulted in higher bails and longer time in detention. Bail reductions, for example, were infrequent in New York City where judges lowered bail in fewer than 4% of the cases. *Supra,* note 8, at 64.

[90] Four of the five counties included in the Pretrial Release Project's study use video bail reviews; only Baltimore County defendants appear before a judge in a courtroom. In Baltimore City, defendants appear on a twenty-seven inch color television monitor and usually are seen sitting in one of several rows with as many as twenty-five other men. Often, the picture does not identify the individual defendant. A reporter described the scene:

Eight men in orange jumpsuits are visible. At least, the jumpsuits are visible. The detainees' body

The accused is usually unrepresented by counsel. Until the Lawyers at Bail Project (LAB) began to represent many people accused of committing nonviolent offenses at Baltimore City bail reviews in 1998,[91] Harford and Montgomery counties were the only districts in which the Office of the Public Defender guaranteed such representation.[92] Providing legal representation to indigent defendants at the bail review hearing would significantly reduce Maryland's pretrial jail population.[93] LAB's results demonstrated that a lawyer's advocacy makes a substantial difference as to bail,[94] and that the popular stereotype of arrestees is inaccurate: most arrestees had strong ties within the community and were good risks to return to court.[95]

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> motion is jerky, their faces difficult to see, and their voices frequently are muffled. "Can you hear me? I can't hear you," said Judge H. Gary Bass. Then in an aside to no one in particular, "Since we've started video bail review, this equipment has never been good." An attorney added: "It's particularly hard to distinguish the faces of black detainees on the screen because of the lighting.". . . As bail reviews proceeded into the afternoon, the image quality never improved and the sound got worse. "This is pitiful," Bass moaned.

Joe Surkiewicz, *Just Waiting for the Videophone to Ring: Testimony Meets Technology in the Court*, Daily Record, pp. 1C-2C, September 25, 1999 (Appendix G). In December, 2000, the Public Defender successfully challenged the quality of the video bail system, and a new improved system began operating in April, 2001. *See*, Caitlin Francke, *Inmates To Be Bused To Courthouse For In-Person Hearings, Judge Rules*, Baltimore Sun at 3B, December 5, 2000 (describing a ruling by the Administrative Judge for Baltimore City, Keith E. Matthews, that the poor quality of video bail reviews violated defendant's due process rights). In May, 2001 the quality of the city's video broadcast had improved considerably.

[91] *See, supra*, notes 5-6.

[92] *See, infra*, at Appendix H, Comparing Bail Practices, indicating that within this project's study of five counties, only 23% of defendants had a lawyer at their bail hearing. Harford defendants represented two thirds of the comprised sample. In April, 2001 the Public Defender ceased representing indigent defendants at bail review hearings in Harford County. Conversation with District Court Judge Angela Eaves, April 30, 2001.

[93] Funded by the Abell Foundation, LAB succeeded in gaining the release of one half of the nearly 4,000 people it represented during an 18 month period, beginning on August 25, 1998. This release figure is about five times greater than had occurred for defendants without counsel. *See*, *supra,* note 5.

[94] Professor Paternoster's analysis of five counties confirmed that represented defendants were released on recognizance twice as often as people without attorneys. Appendix H at 15.

[95] LAB clients were all randomly selected among detainees charged with nonviolent offenses. *See*, *supra*, note 5. Paternoster-Bushway Empirical Study. The typical LAB client was 32 years old, had lived in the Baltimore community for 24 years, had relatives living in Baltimore city or county, and had been with their current employers an average of four years. Additionally, four of five had never been previously convicted for a violent felony crime, half had no prior conviction for a felony offense, two out of three were not under parole and probation supervision, and two out of three had no prior failures to appear in court. *Id.*

The court frequently had the assistance of a neutral pretrial representative to provide relevant information and to make a release recommendation, to which judges usually give strong consideration.[96] Not all judges ask the pretrial representation to make a full report on background information. Some ask only for pretrial's recommendation.[97]

An assistant State's Attorney is present at some District Court bail review hearings.[98] This may work to an unrepresented defendant's disadvantage where defense counsel is not present, since a lawyer's input is likely to influence the pretrial release recommendation.

The public is able to attend the bail review proceedings, which are scheduled at a regular time and place. Most judicial districts publish a court docket of cases.[99] Hearings usually move very quickly. The quality of justice at these proceedings depends on the amount of relevant information readily available.[100]

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[96] *Supra,* notes 79, 81. A Pretrial Services representative is present at bail reviews in Baltimore City and in Anne Arundel, Baltimore, Carroll, Frederick (serious traffic violations), Harford, Montgomery, Prince George's and Wicomico counties. Communication (e-mail), David Weissert, *see, supra* note 79.

[97] Courtroom observations in Baltimore City and Prince George's counties reveal that the colloquy between some judges and a pretrial representative may be extremely brief.

[98] In District Five (Prince George's) and District Eleven (Frederick/Washington), an Assistant State's Attorney is assigned to the bail review courtroom.

[99] Baltimore City, which conducted about one out of every three bail review hearings statewide, provided no itemized docket of bail review hearings from September 1994 through calendar year 1999. LAB attorneys often experienced bail review hearings being moved from one courtroom to another without receiving notice, making it more difficult to be present. Various conversations with LAB legal director, Chris Flohr. October to November, 1999.

[100] The LAB study timed the average Baltimore City hearing for a represented defendant at two minutes and 30 seconds. For the unrepresented accused, judges took an average of one minute and 45 seconds. In Frederick and Prince George's counties, judges took considerably *less* time in deciding bail reviews for the unrepresented defendant. *See*, *supra,* note 5, Paternoser-Bushway Study, at 2.

## V. SURVEY OF BAIL PRACTICES IN FIVE MARYLAND COUNTIES

PRP developed a questionnaire (Appendix F) and observed hearings in five judicial districts: Baltimore City, Baltimore, Frederick, Harford, and Prince George's counties. During summer 1999, observers attended 628 bail review hearings and recorded information about the individual defendant, including race, gender and age; the criminal charge; the current bail; the availability of information to the bail review court; the eventual outcome of the bail review proceeding; and the type of financial bail conditions judges ordered. Professor Paternoster's findings are included in Appendix G.[101] A summary highlighting the five-county comparative analysis follows.

### A.. Race

The typical pretrial incarcerated detainee, who is not released on recognizance at the initial appearance before a commissioner, is a 3l-year old, male (71%) African-American (67%). African Americans remain in jail awaiting trial because they cannot afford the bail amount at a strikingly higher rate compared to their overall population.[102]

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[101] Appendix H, Comparing Bail Practices. Professor Paternoster's objective in doing this study was to present a "snap shot" of how various counties process cases at the bail stage. Counties were selected to reflect a mix of urban, suburban and rural practices. The cases selected were studied over a six-to eight-week span. Because this time period for collecting data was "not atypical", Professor Paternoster concludes that his report provides an accurate "snap shot" of how different Maryland counties processes bail cases. Correspondence January 16, 2001.

[102] For example, in suburban Baltimore County, Maryland's third largest region, African-Americans constitute 12.4% of the general population, but were 54% of the pretrial detainees who appear at bail reviews. In smaller rural counties, such as Frederick and Harford counties, the ratio of African-American bail review detainees to their representation in the local population is even greater: about six times as many African-American defendants appeared at Frederick and Harford bail reviews than their single digit proportion within the county's population.

## B. Availability of Information

In each county, procedures differ as to whether a defense attorney, a prosecutor, and a pretrial release representative is present to provide judicial officers with information. Public defenders represented indigent defendants infrequently. A defense attorney's advocacy makes it significantly more likely that a judge will release a detainee on recognizance.[103] Often a State's Attorney and a pretrial representative are present. In Frederick, where a pretrial representative and a defense attorney were both absent, judges ordered the highest financial bail conditions.[104]

### 1. Defense Counsel

Lawyers represented only 23% of detainees.[105] More than two-thirds of the represented detainees were in Harford County. In the remaining four counties, it was unusual to see a lawyer speaking on behalf of an accused. For instance, during six consecutive days in Prince George's County, none of the defendants were represented at a bail review hearing; over an intermittent six-week period in Baltimore County, only one of 20 detainees was represented by counsel. In Baltimore City and Frederick County, the situation was somewhat better. Lawyers appeared on behalf of one in seven individuals.[106] Many represented defendants had retained private counsel.[107]

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[103] *See*, *supra,* note 5, Paternoster-Bushway Study.

[104] *Infra*, note 113.

[105] Appendix H, Comparing Bail Practices, at 6.

[106] *Id.,* at 7. In Baltimore City, lawyers appeared in 15% of the cases, while in Frederick County, private counsel was present on behalf of 13% of the detainees.

[107] In Prince George's, Baltimore, and Frederick counties, the Public Defender does not assign attorneys to bail reviews. In July 1999, Baltimore City Public Defenders began representing indigent defendants and provided full representation by Fall, 2000. At the time when this Study was conducted, the Public Defender had been representing indigent defendants in Harford and Montgomery counties. See, *supra*, note 7, indicating Harford public defender ceased representation in April, 2001.

### 2. The Defendant and Family or Friends

Only 6% of the sample group had family or friends present to provide favorable information to the presiding judge.[108] Moreover, many unrepresented detainees were unlikely to speak on their own behalf. Owing perhaps to a concern that they might utter a prejudicial remark[109] or that they lacked legal training, Baltimore City judges failed to offer an opportunity to speak to nearly four of five detainees. In Prince George's County, more than two of three defendants remained silent and were never asked to provide relevant information to the bail review judge. Consequently, in these jurisdictions, bail hearings, neither a defense counsel, a family member or friend, or the defendant speaks. Defendants in Baltimore, Frederick and Harford counties are much more likely to be given the opportunity to speak.[110]

### 3. State's Attorneys

An Assistant State's Attorney's odds of being present were about twice as great as their adversarial counterpart.[111] Prosecutors' practices, however, vary from county to county. In Prince George"s and Frederick, they attend 90% of the bail reviews. Harford prosecutors generally chose not to be present at the daily bail reviews, after having reviewed that day's docket of scheduled cases. Baltimore City and Baltimore County state attorneys attended fewer than 5% of the bail review hearings.

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[108] Appendix G at 8. The data does not include the proportion of family or friends who spoke to a pretrial representative.

[109] Some judges provide detainees with *Miranda* warnings just prior to being asked whether they wanted to say anything, causing many to remain silent.

[110] Baltimore County judges asked 88% of detainees whether they wished to say anything, while Frederick and Harford county judges made it a common practice to include the detainee's input. Appendix H, Table 7 at 10.

[111] An Assistant State Attorney was present for 43% of the 628 bail reviews that comprised the sample.

### 4. Pretrial Release Representative

Judges usually depend upon a pretrial release representative. With the exception of Frederick County, a pretrial representative was present in each county to provide information on the charge, the defendant's past record of arrests, convictions, and failures to appear, any pending cases, and probation or parole status. For only two of five detainees was information provided as to an accused's verified community ties, such as residence, family, and employment.[112]

## C. Contrasting Bail Practices in the Five Counties

Frederick and Baltimore County Commissioners set the highest mean (arithmetic average) bail.[113] In Harford County, Commissioners' initial bail amounts were 2 1/2 times *lower* than Baltimore City's bails and substantially lower than in the other counties.[114]

The typical median (50th percentile) initial bail was highest in Frederick County and lowest in Harford County.[115] As discussed in Part VII, because Baltimore City's per-household income level is considerably lower than that in the other four counties in this Study, the same dollar amount is likely to represent the greatest financial hardship for individuals and families living there.

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[112] Conversation with Professor Paternoster, January 9, 2001. *See*, Appendix G; *see also*, note 96.

[113] Excluding the rare extreme bail of $150,000 or higher, which may have been set in one or two cases, *see*, *infra*, note 116, commissioners in Frederick County averaged the highest bail, $20,454, followed closely by Baltimore County, $19,408, Prince George's County, $16,449, and Baltimore City, $14,954. These figures refer only to cases where bail was set. Appendix H at 4.

[114] Harford County's average $5,759 bail, excluding one extreme over $150,000 amount, was considerably lower than every other Maryland county and about two fifths of Baltimore City's average.

[115] When considering nonviolent crimes only, Frederick and Harford's Commissioners again represented the high and low positions: Frederick's prereview bails for nonviolent offenses averaged $7,500, while Harford County averaged $2,500. Baltimore City's typical bail for defendants accused of nonviolent crimes was $3,250. Baltimore and Prince George's counties typically ordered $5,000 bail for offenders charged with such crimes. Appendix H at 4.

The main players' different attendance records at a county's bail review hearing may help to explain the different outcomes. Reviewed bails were the highest in Frederick, where there is neither a defense lawyer nor a pretrial representative in court, and the lowest in Harford County which provided for a Public Defender representation and a pretrial representative.[116] In addition, represented detainees were twice as likely to be released on recognizance at bail review hearings as unrepresented detainees. Release on recognizance was granted for one in four represented Harford detainees, compared to only one in fourteen unrepresented Frederick detainees.

For the entire sample group, judges released about one of four detainees on personal recognizance (24.5%) and lowered bail for one in four individuals (27%). In nearly half the cases, judges maintained the prior bail conditions.[117] It was relatively rare for a judge to increase the amount.

Yet there were substantial differences in the counties proceedings. Baltimore County judges changed bail conditions in 72% of the cases, while Frederick judges maintained the same bail for 63% of defendants and Baltimore City judges for 55%.[118] Similarly, differences existed in the frequency with which judges changed bail and ordered release on recognizance. Baltimore and Harford county bail review judges granted release on recognizance to one of four detainees, compared to their colleagues in the three other

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[116] In calculating the mean (average) bail following a judge's review, Professor Paternoster excluded bails that were greater than $150,000. For example, Baltimore County had the most number of extreme bails: four bail amounts of $250,000, and one of $500,000. Baltimore City, on the other hand, had no bails that were "extreme" and over $150,000. Frederick County had one $200,000 bail and one $500,000 bail. Harford County had a $1 million bail for one of its cases, and Prince George's had a single $250,000 bail. When these unusual bails are excluded, Frederick County had the highest reviewed bail ($15,668), followed by Baltimore City ($13,657), Baltimore County ($12,359), and Prince George's County ($8,300). Harford County's reviewed bail was far and away the lowest at $5,471.

[117] Forty-four percent of commissioner bails remained the same after judicial review in the five counties. Some counties, however, maintained the prior bail far more frequently. Appendix H, at 14.

[118] While video jail bail reviews are the norm in the other four counties, Baltimore County detainees are the only defendants to physically appear before a judge in bail review court. This study was not designed to measure the impact of a detainee's personal courtroom appearance. Thus, it would be speculative to suggest the extent to which this factor is responsible for the likely change in Baltimore County's prereview bails.

counties who did so for fewer than one of ten individuals.[119] Baltimore County judges also reduced the dollar amount of bail in almost one half of its cases; at the other extreme, Prince George's judges rarely (3.7%) lowered the amount previously set.[120] Baltimore City and Harford judges were the most likely to *increase* bail; detainees in the remaining counties rarely suffered similar adverse rulings at bail reviews.[121]

The nature of the charge justified half of judges' review rulings in Baltimore City and County. In comparison, Harford judges declared that the particular charge was responsible for their ultimate determination in only one of five bail reviews. An accused's criminal past drove 15% of judges' decisions in the five jurisdictions. But Frederick County judges cited this factor three times as often. Finally, there were significant differences in the frequency with which judges identified a defendant's prior failure to appear in court.[122]

Only 5% of the judges based determinations on an accused's residential, family, or employment ties. It is not clear whether this is due to the lack of information or minimization of its value. It is clear that in the absence of a defense attorney, or a pretrial release representative, judges are unlikely to obtain a perspective on the detainee's reliability for reappearing in court, based on being a long-time resident of the community and having a stable or supportive home environment.

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[119] Appendix D, Commissioners Report. In reviewing commissioners' bail decisions, Baltimore City judges granted release on recognizance in less than 10% of its cases, second lowest to Frederick County. Prince George's judges have a unique practice: it provides for a "pretrial option" which permits the pretrial agency to decide whether to supervise a detainee while a case is pending. Consequently, judges' ordering release on recognizance for 1% of detainees is misleading. Prince George's pretrial release agency takes the "option" for about half of its detainees. *See, supra*, note 119.

[120] In Baltimore City and Frederick County, approximately one of four bail amounts were reduced following the review hearing; in Harford County, bail reductions occurred for roughly one of six detainees (17.8%). Appendix H at 14. While Prince George's judges do not often reduce bail, they follow Pretrial Release's active role and its recommendation for supervised release for one half of detainees.

[121] About one in ten Baltimore City and Harford detainees had their bail amount increased. In comparison, this was a rare occurrence in Baltimore (2.4%), Frederick (2.7%), or Prince George's counties. *Id*.

[122] Appendix E, Tables 6 and 7; Appendix H, Table 10, at 16.

D. Type of Bond

Because of the lack of defendants' representation, judges rarely heard applications for a less onerous financial alternative to a surety or commercial bail bond. Overall, such options were raised, presumably by the detainee or a pretrial representative, in only one out of six cases. Judges heard requests for unsecured collateral bonds nine times as frequently as they did for a cash alternative, suggesting detainees' inability to afford a money bail, even if it was refundable. Baltimore and Harford judges received the most suggestions, 20% in all, for permitting detainees to post unsecured collateral bonds. Frederick County judges heard the most requests for 10% cash alternatives: one in 10 unrepresented detainees made this application.

Finally, judges in Baltimore and Harford County and Baltimore City were the most likely to impose conditions on pretrial release. For example, one of two Baltimore County, two of five Harford, and one of three Baltimore City detainees were released upon complying with certain conditions. Stay-away orders were the most common, having been included in 43% of personal recognizance decisions. Pretrial supervision was the next most frequent condition. Judges directed 31% of released detainees to report to a pretrial agency, 15% to receive drug counseling, and 11% to be tested for drug substance abuse.

E. Impact of Bail Decision

The importance of the bail review decision is magnified when one considers the lengthy delay between the hearing and the next court appearance. Detainees typically wait 30 days and longer before returning to court.[123] As a practical matter, writs of habeas corpus offer little recourse, either because the defendant does not have an attorney or because the "emergency" writ is often not heard until many weeks after the filing date.[124]

[123] *Supra*, note Part IV (C)(1) at 21. For example, it is not uncommon for trials in Prince George's county to be scheduled 60 days after the bail review hearing is held.

[124] Baltimore City writs of habeas corpus usually take between two to four weeks before being heard. Beginning in November 1995 when the Centralized Booking & Intake Center opened, detainees could apply for an expedited habeas hearing. The Pretrial Release agency helped detainees who appeared eligible for

Consequently, many defendants remain incarcerated unnecessarily after their bail has been reviewed, because they cannot afford bail. Maryland's pretrial jails are burdened with managing a large population, consisting of many detainees who are charged with nonviolent offenses that ultimately do not result in a conviction.[125] This Report's next section explains that many detainees remain in pretrial detention because Maryland judicial officers set full financial bail conditions that are most onerous for economically disadvantaged people.

## VI. BAIL BONDSMEN's PROMINENT ROLE IN MARYLAND

Under Maryland law,[126] judicial officers must consider *the least onerous* option before moving to the next available choice.[127] However in practice, they generally opted for the most onerous choice, a full financial bond, and rarely used unsecured or percentage cash bonds. Inadequacy of information available appears to be at the root of the problem.

### A. Analyzing Maryland's Bail Bond Options in Calendar Year 1998

The 1998 Commissioners' Report provides a nearly complete picture of the extent to which the various types of financial bail bonds were utilized to secure the pretrial release of 59,574 defendants facing criminal charges in the twelve judicial districts.[128]

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pretrial release.

[125] In fiscal year 1999, 194,468 people (about 92% of arrestees) were prosecuted in Maryland's District Courts; 59,446 were found guilty, including individuals who received probation before judgment sentences. Statewide, Maryland's District Court conviction rate was slightly more than 30% percent (30.6%). District Court of Maryland, Statistical Report for Criminal Proceedings, July 1998 to June 1999. In fiscal year 2000, the conviction rate rose to just under one third (33.1%). Appendix F, District Court of Maryland, Statistical Report for Criminal Proceedings, July 1999 to June 2000.

[126] *Supra*, Part IV at 16-19.

[127] *Supra*, note 1.

[128] Appendix I, Commissioners Report, Tables 10(a)-(d).

According to David Weissert, Coordinator of Commissioner Activity, Maryland District Court, and Joan E. Baer, Operations Specialist for the District Court of Maryland, the Report indicates that approximately 90% of District Court bail bonds were posted at the commissioner's station following the defendant=s initial appearance, either before or after the bail review hearing.[129] While the Report excludes bail bonds paid at Court offices,[130] it provides the best available source on the types of bail and conditions imposed in releasing nearly 60,000 detainees pending trial.[131]

Most pretrial detainees for whom bail was set used a corporate surety bail bond, the last option enumerated in the Maryland Rules.[132] Such bonds were used for 60% of detainees at Maryland District Court commissioner stations in 1998. Property bonds represented 19% of the overall total. Close behind were full cash deposits with a court clerk, accounting for 13%. Thus, almost 93% of defendants awaiting trial were released after posting the full amount of the financial bail bond, by a corporate surety, property, or full cash bond.[133]

Of course, many detainees were not able to afford the full amount of a financial bail bond. They may not have owned any property or the property available might have been insufficient collateral. Others may not have had the full cash amount or found it difficult to

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[129] The Report categorizes 59,574 bail bonds that were posted at some point following the initial appearance, either before or after the bail review hearing. *See, supra,* note 90. The statistical breakdown does not include 4,097 bonds that defendants posted immediately following a Commissioner's pretrial release order. Weissert indicated that defendants usually paid the full amount of these 4,097 bonds by full cash or by credit card. Telephone conversation, October 9, 1999. The Report also does not include bail bonds that were posted at Maryland's Circuit Courts.

[130] *Id.*

[131] The Report's data do not provide precise numbers for when judicial officers imposed a particular type of financial option for defendants at bail hearings. It only indicates the type of financial bail bond people posted at Commissioner stations. While it is theoretically possible that a detainee chose to remain incarcerated on an unsecured or a percentage bond, most detainees likely remained in jail because they could not afford the amount of financial bail.

[132] Md. R. 4-216(d)(4)(D)

[133] Appendix D, Commissioners Report, Tables 10(a)-(b).

pay the bondsmen's 10% fee, knowing it would not be returned, even if the defendant reappeared in court and the charge was dismissed. For these detainees, the Maryland Rules theoretically provided two more accessible types of financial conditions, unsecured bail bonds and percentage cash bonds.

*Yet these were the least frequently used bonds. Less than 5% of detainees were released on an unsecured collateral bond; less than 3% deposited a 10% cash alternative.*[134]

Corporate surety bonds, the most onerous type of bond, were used nearly fifteen times as often as were unsecured bail bonds, the least onerous bond option. In addition, detainees and families paid the nonrefundable 10% fee for a corporate surety bond 20 times as frequently as they deposited the refundable 10% cash bond with a court clerk. Only one of 25 defendants signed an unsecured bond.

These results, so at variance with Maryland's statutory provisions, raise obvious questions. Why do judicial officers rely so extensively on full financial bonds? Are they aware that when they order a full bond, bail bondsmen are then the likely option for most detainees and families? Do bail bondsmen provide a greater assurance that defendants will appear? Are most defendants a poorer risk to reappear without the bondsmen's intervention? Before these questions are addressed, the next section discusses different bail practices among the five jurisdictions studied.

## B. Contrasting Statewide Bail Bond Practices

Within Maryland's twelve judicial districts, there are startling differences in the terms of pretrial release. Consider the following:

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[134] *Id.*

- In 1998 and 1999, 42 of 100 Baltimore City arrestees gained pretrial release through the corporate surety bail bondsmen, the highest percentage in the State. In contrast, only 16 of 100 Howard County incarcerated arrestees and 5 of 100 Montgomery County arrestees used bail bondsmen to gain release.

While almost 60% of Baltimore City's defendants were released on personal recognizance, 84% of the remaining detainees gained pretrial release by paying a bail bondsman a 10% nonrefundable fee. In four other judicial districts, District Two (Eastern Shore), District Seven (Anne Arundel), District Eight (Baltimore County), and District Eleven (Frederick/Washington), 75% to 80% of defendants not released on personal recognizance also relied on bail bondsmen to regain their liberty pending trial.[135] Additionally, more than 80% of Prince George's detainees likely depended on a bondsman.[136]

- Judicial officers in Baltimore City and Frederick/ Washington County almost never ordered an unsecured collateral bond.

In Baltimore City in 1998, only 18 of 13,198 defendants -- one seventh of one percent -- were released on unsecured bond; in 1999, the unsecured bond was used by 1.5% of detainees. In Frederick in 1998, only five of 3,910 defendants, and in 1999, only 8 of 4,033 detainees regained their liberty by assuming responsibility for not reappearing in court. In comparison, District Ten's (Howard/Carroll counties) judicial officers used unsecured bonds 17.5% of the time, while District 3's (Cecil, Kent, Queen Anne's, Talbot, Caroline) judicial officers permitted 11.7% defendants to sign for their release.

- In 1998, Baltimore City judicial officers did not order a single refundable 10% cash alternative; in 1999, only 49 detainees, or 6/10 of 1%, were given the

[135] The exact percentage for District Two (Eastern Shore) is 79.6%; for District Eleven (Frederick), 78.9%; for District Eight (Baltimore), 78.2%; and for District Seven (Anne Arundel), 74.8%. Commissioners 1998 Report, Appendix I, Table 10(b).

[136] *Id.* In Prince George's County, 32% of detainees were released directly through a surety bond; in addition, 51.4% posted property bonds, which are frequently those of professional bail bondsmen.

opportunity to post a 10% cash deposit. Anne Arundel, Baltimore, Eastern Shore and Prince George's judicial officers also made rare use of the 10% cash alternative. In contrast, Howard and Carroll county judicial officers permitted 23% to post refundable 10% cash deposits.

Overall, Maryland judicial officers overlooked the refundable 10% cash bail as a preferred financial condition. In 1998, only 3% of Maryland defendants posted such bail. In Baltimore, *none* of the defendants among the 13,198 people who obtained pretrial release posted such bail.[137] Prince George's, Baltimore, and Eastern Shore judicial officers declined to provide a 10% bail alternative for 99.9% of the individuals who eventually posted bail.

- **Two judicial districts, Prince George's (District Five) and Calvert, Charles, and St. Mary's (District Four) allow licensed bail bondsmen to profit from placing their own property as collateral. These districts rely on surety property bonds substantially more than any other Maryland jurisdiction**.

In Districts Four and Five, licensed bail bondsmen secure defendants' appearance by placing their own property with the court. Current Maryland law values the professional bail bondsman property in these districts at ten times its assessed tax value, five times more than the ordinary assessment rate.[138] Bail bondsmen still collect their standard ten percent nonrefundable fee, but avoid sharing the fee with an insurance company for

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[137] Some court personnel recalled hearing about an administrative judicial order that directed Baltimore City commissioners to refrain from ordering 10% cash alternatives. However, no one could locate any such order. Current officials denied that an official policy ever existed, and insist that historically 46 Baltimore City commissioners simply declined to issue 10% cash bonds as a general practice. This practice apparently continues: Maryland law students enrolled in the Spring, 1998 clinic did not observe a single case in which Commissioners used a 10% cash alternative. While acting as attorneys under the student practice order, students regularly asked bail review judges to provide for a 10% cash alternative. Attorneys of the Lawyers at Bail Project included similar applications; judges granted 10% cash bonds in about 100 cases during the Fall, 1998. *See, supra*, note 4.

[138] *Supra*, note 66.

underwriting the bond.[139] Instead, bondsmen pay a reduced 1% licensing fee to Prince George's and Calvert/Charles/St. Mary's counties, based on the total amount of bonds written annually.[140]

More than one out of two of Prince George's defendants and two out of five of Calvert/Charles/St. Mary's defendants (41%) were released on property bonds in 1998. Cumulatively, in Prince George's County, 83% of defendants were released either through property or corporate surety bonds.

- Howard/Carroll county (District Ten) has the most balanced use of less onerous bail bonds.

More than 40% of Howard/Carroll defendants gained release by posting a refundable ten percent cash or an unsecured bond. In contrast, fewer than 5% of detainees were spared full financial bond in Baltimore City (District One), and in Eastern Shore (District Two), Prince George's (District Five), Anne Arundel (District Seven), and Baltimore (District Eight) counties.141

It is not clear why so many judicial districts rely so extensively on full financial bond, or why counties' practices differ so dramatically.[142] It is clear that no objective evidence supports the notion that corporate sureties are a more reliable form of pretrial release than other less onerous conditions. It is also clear that the bail bond industry is extremely profitable. The following section examines the revenues generated by corporate surety bonds.

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[139] Districts Four and Five have established a unique property bail bond system from other judicial districts. In these jurisdictions, licensed bail bondsmen may post bonds annually to the full amount of the total assessed property value. Bondsmen still collect their standard 10% fee from the defendant, but avoid paying the 2% to 4% cost to insurance companies for underwriting a surety bond. *See*, *supra*, note 64-69.

[140] Md. Ann. Code Article 27, Sec. 616 1/2(f)(2).

141 Appendix I, Table 10(b).

## C. Revenue From Professional Surety Bonds

Statewide statistics are not maintained to indicate the annual dollar amount that corporate sureties, i.e. insurance companies and individual agents, earn from 10% premium fees. An investigation by this study revealed that in 1998, revenues from insurance companies and their agents ranged from $42.5 million to $170 million.

### 1. The Maryland Department of Insurance

The multimillion-dollar bond industry is largely unregulated. The Maryland Department of Insurance, responsible for licensing insurance companies and bail bond agents who are engaged in the insurance business within the State,[143] provides no oversight of the bail bond industry, except that each licensed insurance company must file an annual financial statement of the total business transacted here.[144] Individual agents are not required to file an annual financial statement. Indeed, the Insurance Department does not maintain even a list of the *individual* bail bond agents.

The District Court of Maryland, which requires every insurance company and every bail bond agent to register,[145] provided a complete list of 23 insurance companies licensed to do business in the State of Maryland through their 885 individual agents. In addition, 71 independent bail bond agents are authorized to write property bonds.[146]

The Department of Insurance provided annual statements for each of the 23 insurance companies, but not for any of the 71 independent bondsmen. In their annual statement, each company included a figure for direct premiums written and earned for surety bonds.

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143 Md. Ann. Code Article 10, Sec. 304.

144 Conversation with Kathleen Loughran, Department of Insurance, September 29, 1999.

145 Md. Ann. Code Article 16, Sec. 817.

146 Conversation with Cindy Spieth, Operations Specialist, Maryland District Court, May 8, 2001.

Many companies= surety premiums were divided between surety bail bonds and other types of surety bond. For example, the Lexington National Insurance Company, which is based in Baltimore and is one of the largest bail bond companies doing business in Maryland, reported total premiums for surety bonds in 1998 in the amount of $2,289,060. The company divided this amount between surety for bail bonds, $1,386,800, and surety-other, $902,260. In fiscal year 1999, the total estimated amount of bail bond premiums earned by these 23 insurance companies was $17 million.[147] However, the amount of earnings insurance companies reported is to be distinguished from its *gross* annual taxable revenue. For instance, in 1998 the Lexington National Insurance Company reported net premium earnings of $1,386,800, but actually received 10 times as much: $13,177,366.[148] *See,* Appendix J.

If every insurance company's annual financial statement reflected a similar calculation, the bail bond industry's reported revenue of $17 million should be multiplied by

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|---|---|
| Accredited Surety and Casualty Company | 31,175 |
| Allegheny Casualty Company | 307,987 |
| American Bankers Insurance Company | 28,336 |
| American Reliable Insurance Company | 2,124,985 |
| American Surety Company of Haywood | 313,225 |
| Amwest Surety Insurance Company | 356,100 |
| *(Amwest, too, reporting only net premiums received)* | |
| Atlantic Bonding Company | 948,225 |
| Bankers Insurance Company | 498,300 |
| Continental Heritage Insurance Company | 1,566,220 |
| First Community Insurance Company | 279,748 |
| Frontier Insurance Company | 1,825,524 |
| Granite State Insurance Company | -0- |
| International Fidelity Insurance | 1,749,894 |
| Legion Insurance Company | -0- |
| Lexington National Insurance Corporation | 1,386,800 |
| National American Insurance Company | 65,570 |
| National Surety Corporation of Chicago | 146,655 |
| Nobel Insurance Company | 41,329 |
| Ranger Insurance Company | 115,877 |
| Safety National Casualty Corporation | 60,677 |
| Seneca Insurance Company | 2,187,843 |
| St. Paul Mercury Insurance Company | 73,506 |

[148] *See*, Appendix J, Lexington National's Schedule of Premiums.

a factor of ten. Moreover, the $17 million reported revenue does not include the income of the 71 individual bail bond agents.[149]

Here's how the system works. Anyone seeking to obtain the release of an incarcerated family member or friend through a bail bondsman goes to the local bail bond office. There, the agent demands payment of 10% and the insurance company or independent agent underwrites the full amount of the bond and guarantees payment to the State if the defendant does not appear.[150]

The individual agent bondsman and the insurance company share the customer's 10% fee. Usually, the agent pays the company 2% to 4% of the bond's face value (or 20% to 40% of the customer's 10% fee). For example, for a full bond of $10,000, the defendant's family or friend pays an agent a nonrefundable fee of $1,000. The agent receives between $600 and $800, and the insurance company receives the balance.

Consequently, when calculating gross revenue for the bail bond industry in 1998, the annual reported $17 million premiums of each insurance company must be increased by one of the following multiples:

2.5 times if the agent paid the principal company 4% of the fee charged;
5 times if the agent paid the principal 2% of the fee charged; or
10 times based on insurance companies' estimated gross taxable income.

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[149] In Prince George's County, Commissioner Leila Newman, who is responsible for regulating the bail bond business, indicated that individual bail bondsmen there wrote bonds totaling $27 million in 1998. Conversation November 9, 1999.

[150] See,supra, note 68 and accompanying text (indicating that the bondsman accepts installment payments and often requires the individual payee to accept financial responsibility in the event the defendant absconds).

2. District Court and Circuit Court

An alternative method of calculating the annual revenue of corporate sureties would be to calculate the combined bail bonds posted in the District Court and in the Circuit Court. Unfortunately, the District Court does not maintain data on the dollar amount of bail bonds posted at the commissioner station or at the District Court clerk's office.

However, approximately 90% of bail bonds are posted at District Court commissioner stations, and these bail bonds are recorded daily. Totaling this daily amount would provide an annual figure for most of the financial bail bonds posted in an individual judicial district.[151] To this amount, one would add the bail bonds that were posted at the clerk's office and at the Circuit Court. Obtaining this revenue information would reveal the extent to which defendants and families use each type of bail bond.

The Circuit Courts of Maryland, which handle about one twelfth the volume of District Court cases, seem a more likely candidate to retrieve information about financial bail bonds. To test this belief, relevant data was obtained from Prince George's County.[152] Similar information should be available from most other Circuit Court judicial districts.[153]

3. Insurance Companies and Bail Bond Agents

Department of Insurance and the District Court personnel suggested contacting the surety company and individual bail bondsmen to obtain the revenue information. Adding

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[151] Baltimore City provided a list of the 14,858 bail bonds posted at commissioner stations during calendar year 1998. Totaling the daily amounts, the value of the full bonds set was more than $140 million; the average bond was $8,239. Since bail bondsmen receive a 10% fee and were responsible for 84% of pretrial detainees being released, they would have earned about $12 million dollars, exclusive of Baltimore City Circuit Court bonds, and the remaining bail bonds posted at the clerk's office.

[152] See, *supra*, note 149.

[153] Telephone conversation, The Honorable Paul H. Weinstein, Administrative Judge of the Circuit Court, November 1999.

the annual income of each registered bondsmen would produce an accurate overall amount for the industry.

A State agency, such as the Department of Insurance, is in the best position to obtain such information by requiring individual bondsmen to file an individual 1040 as part of the annual licensing requirement. The District or Circuit Court also might condition authorization upon receiving information on each agent's annual income.

At present, the annual financial statements filed by insurance companies appear to be the best source for estimating the revenue generated by bail bonds. These figures suggest a wide range of income, from $42 million to $170 million. While only an estimate, it is clear that substantial amounts extracted from economically disadvantaged persons, have created a high-profit, unregulated industry. Before considering the impact of the 10% bondsmen's fee, this study analyzes the most common justifications offered in support of the corporate surety.

## D. Examining Justifications for Corporate Surety Bonds

Maryland judicial officers usually order a full financial bond as a condition of pretrial release. Detainees usually must use bail bondsmen. Indeed, bondsmen are the means by which 60% of detainees gain pretrial release.[154]

Reliance on professional sureties is based on the belief that bail bondsmen are the best guarantor for ensuring that defendants appear in court and for locating and apprehending those who fail to appear. There is no truth in such belief.

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[154] *Supra,* notes 132-133 and accompanying text. Overall, almost 20% of Maryland arrestees depend upon paying a bondsman to be released from detention.

1. Defendants' Appearance Rate

Bail bondsmen claim that defendants released on surety bail have a higher appearance rate than defendants released on nonfinancial conditions and on less onerous types of bail. There is no objective support for this contention. According to the District Court's annual statistical reports, Maryland defendants appear in court at a high rate, regardless of the form of pretrial release. In fiscal year 1999, almost 95% of the 215,000 defendants charged with misdemeanor and felony offenses appeared at their scheduled District Court proceeding.[155] This rate remained relatively constant in fiscal year 2000.[156]

The no-show rates are substantially less than national figures and those in other states.[157] Maryland pretrial release programs also indicate that defendants who are supervised pending trial have a high appearance rate.[158]

Earlier last year, the Judicial Information System (JIS) for the Maryland District Court provided statistical data on the failure to appear rate for each type of pretrial release in

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[155] In fiscal year 1999, 213,343 people were charged with criminal offenses in Maryland. District Court statistics indicated that 5.3% failed to appear ("FTA") for their scheduled court date. District Court of Maryland, Monthly Statistical Reports, Criminal Filing and Disposition Statistics ("District Court Statistical Report"), July 1, 1998 to June 30,1999, Appendix F. This rate does not include defendants who failed to appear for cases that were ultimately dismissed or nolle prossed. *See*, *infra,* note 160, for more current data suggesting that the FTA rate is higher for District Court cases.

[156] In fiscal year 2000, 204,642 people were charged with criminal offenses. Of this number, 5.4% failed to appear in court. District Court Statistical Reports, July 1, 1999-June 30, 2000. This rate does not include defendants who failed to appear for cases that were ultimately dismissed or nolle prossed.

[157] Nationally, 14% of defendants charged with felonies in forty of this nation's seventy-five largest cities obtained pretrial release through bail bondsmen. *National Pretrial Reporting Program: Felony Defendants in Large Urban Counties 1990*, Bureau of Justice Statistics, May, 1993 at 8. The National Pretrial Services Release Center, which monitors the National Pretrial Reporting Program's data collection and reporting for the Department of Justice, has suggested a higher percentage of people use bail bondsmen in misdemeanor cases and when charged with felonies in suburban and rural areas. D. Alan Henry and Bruce D. Beaudin, *Bail Bondsmen, American Jails*, Nov/Dec 1990, at 10. *See*, *infra*, notes 165-169.

[158] In Baltimore City, 93% of defendants conditionally released to pretrial services appeared in court when required. Baltimore City Pretrial Release Agency, 1998-99 statistics.

Maryland counties.[159] These data belie the bondsmen's claim that bonded defendants have a higher appearance rate.

Defendants who posted refundable cash bond with the court reappeared at a higher rate than bonded defendants.[160] Bonded defendants generally reappeared in court at a higher rate than defendants released on recognizance and at a lower rate than people who posted property bond. The data, however, provide no indication of whether the difference in court appearance rate is related to the type of charge, i.e. felony or misdemeanor, or whether defendants were supervised when released on recognizance. Maryland's Circuit Courts, which includes fewer defendants facing only felony prosecutions, maintains statistics about the failure-to-appear rate for defendants who were released on various nonfinancial and financial pretrial conditions. Montgomery[161] and Prince George's[162]

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[159] In some respects, the data obtained from District Court is puzzling and requires additional study. First, the higher failure-to-appear rate is significantly different than the District Court's statewide statistics. In Baltimore City, 10.8% failed to appear in 1998, and 12.8% missed their court appearance in 1999; Baltimore County's FTA rate was 15% in 1998 and 17% in 1999; Frederick County's FTA rate was 11.1% in 1998 and 11.7% in 1999; Harford County's rate was 15.1% in 1998, and 14.1% in 1999; and Prince George's County's FTA rate was 17.9% in 1998 and 17.5% in 1999. Second, the recent information seems at odds with the number and type of bonds posted by detainees at commissioner stations. *See*, *supra*, notes 90-91. Third, some districts report an improbable failure to appear rate. For example, while Baltimore City was one of the few judicial districts with a single digit failure to appear rate, its two smallest districts showed that 66% and 94% of defendants missed their scheduled court appearance. David Weissert, Coordinator of District Court Commissioner Activity, also believes that the new data requires further analysis. Telephone conversation, February 12, 2001.

[160] In 1999, in 24 of Maryland's 33 reported district court locations, defendants released on cash bond had a higher appearance rate than defendants released on bail bond. In three other districts, the appearance rate was the same. In 1998, the appearance rate for both groups was comparable.

[161] The Montgomery County Circuit Court maintained annual data, which showed that in fiscal year 1999, a total of 558 bail bonds were set. Twenty-three percent failed to appear and ultimately forfeited their bail bond. Montgomery County's breakdown showed that defendants released on surety bond and cash bond had the highest non-appearance rate of 30%, while only 21% of people released on personal bond failed to attend court. Property bonds had a slightly lower rate of forfeitures at 20% percent. Telephone conversation with Circuit Court Judge Paul H. Weinstein, Nov. 9, 1999; telephone conversation with Commissioner Leila Newman, January 21, 2000.

[162] From January 1, 1998 to December 31, 1998, a total of 9,439 bail bonds were written for felony crimes in Prince George's County Circuit Court. More than half the defendants remained in pretrial detention awaiting trial. Of the 4,260 defendants released pending trial, 13% failed to appear in court. Prince George's County maintains bond forfeiture statistics for the different categories of pretrial release. According to Commissioner Leila Newman, bail bondsmen fall under two categories, corporate and surety. Compared to the overall 13% failure to appear rate for Circuit Court felonies, the rate for bonded defendants was 18%. People released on recognizance or pretrial supervision had a much better record for appearing in court: only

counties provided information which showed that defendants released on recognizance had a considerably higher appearance rate than surety bonded defendants.

Outside of Maryland, most studies have concluded that defendants appear in court less often when bail bondsmen are involved than when defendants are released on recognizance, conditional supervision, or private surety.[163] In 1981, for example, a Lazar Institute study, sponsored by the Department of Justice, showed that the failure to appear rate for nonfinancial bail (12.2%) was lower than the rate for financial bail (l3.6%).[164] In 1992, Connecticut also found a better appearance rate for defendants released on nonfinancial bail than those on financial bail: 11% versus 15%.[165] Similarly, a 1993 Arizona pretrial release study found that defendants released conditionally had a failure to appear rate nearly half that of bonded defendants.[166]

In 1992, a national study reached a different conclusion. Conducted by the Federal Bureau of Justice, the study focused on felonies in 40 of the most populous counties and revealed that bonded defendants failed to appear in 15% of their cases, while defendants conditionally released were no-shows 19% of the time.[167]

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9%, failed to attend their scheduled Circuit Court proceeding.

[163] Spurgeon Kennedy and Alan Henry, *Commercial Surety Bail: Assessing Its Role in the Pretrial Release and Detention Decision, Pretrial Issues*, Nov. 1996, at p. 5.

[164] *Id.*, citing The Lazar Institute, *Pretrial Release: A National Evaluation of Practices and Outcomes: Summary and Policy Analysis*, Volume 1981, p.15.

[165] *Id.,* citing Justice Education Center, Inc., *Alternatives to Incarceration Phase I: Pretrial Evaluation* (August 1993).

[166] *Id.*

[167] National Pretrial Reporting Program: Pretrial Release of Felony Defendants in Large Urban Counties 1992, (Washington, DC: Bureau of Justice Statistics) at 10, Table 14. The Pretrial National Resource Center attributed these differences to the use of aggregate statistics which varies from jurisdiction to jurisdiction. For example, in 13 of 28 jurisdictions, the FTA rate for conditionally released defendants was lower than for bonded defendants, ranging between 5% and 16%. *Id*. at 4; Kennedy and Henry, *supra*, notes 164-167. The Center also explained the difference to bondsmen gaining early access to low-risk detainees, who would have been released conditionally or on recognizance. *Id.*

Moreover, most of these outside studies focus on rates of failure to appear rates in felony cases, and may not apply to misdemeanor charges, which represent the overwhelming majority of cases entering Maryland's criminal justice system.[168] A statewide District and Circuit study would obtain accurate information about the likelihood of people returning to court for each type of pretrial release condition.

2. Apprehending Absconders

Despite widespread beliefs to the contrary, bail bondsmen assume a less active role in securing the return of clients who failed to appear in court. Indeed, police catch absconders far more often than do bail bondsmen. Moreover, in Maryland, bondsmen face virtually no risk of financial loss for failure to obtain their clients' appearance, so there is virtually no incentive to aggressively pursue absconders.

In 1998, corporate sureties surrendered only 245 Maryland defendants,[169] one sixth of the bonded defendants who failed to appear and forfeited bail.[170] This is comparable to the national rate.

Most national studies have concluded that, contrary to popular belief, bondsmen are "relatively passive about overseeing the appearance of their clients,"[171] and that "in reality, bail jumpers are far more often caught by the police than by the bail bondsmen."[172] A 1979 American Bar Association study, for instance, found that bondsmen had no

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[168] *See*, *supra,* note 56.

[169] 1998 Commissioners Report, Appendix I, Table 10(a). In 1999, bondsmen apprehended only 211 defendants who had failed to appear in court. *Id.*, at Table 10(c).

[170] This figure is based upon reviewing monthly forfeitures maintained by the District Court of Maryland's District Court Headquarters for the 1999 calendar year.

[171] James G. Carr, Bail Bondsmen and the Federal Courts: Federal Probation, March 1993, at 12, who referred to the Hearings on Bail Reform Before the Subcommittee on the Constitution of the Senate (Committee on the Judiciary at 205 (Statement of Jerry Watson)); Wayne H. Thomas Jr., Bail Reform in America 1976 at xi (forward by Floyd Feeney).

[172] *Id.* ("Society's reliance on a private bounty system for such a serious purpose seems unwarranted.")

involvement in 89% of cases in which defendants were apprehended and returned. Local studies in Harris County, Texas and Pima County, Arizona reported that the police, not the bondsmen, were responsible for returning absconders on bail bonds.[173]

As stated by United States Magistrate James G. Carr: "In an era of NCIC, instantaneous communication, and ever improving methods of ascertaining and verifying identities, the claim that bail bondsmen are able to respond more effectively than federal and local law enforcement agencies to a defendant's flight is more implausible and less tenable than ever."[174] Magistrate Carr further suggests that perhaps full financial bond and corporate bondsmen are used widely because judicial officers are acting "uncritically and on the basis of local custom and practice."[175]

In theory, bondsmen are financially responsible for paying the remaining 90% of the full amount whenever a criminal defendant fails to appear and becomes a fugitive from justice. In practice, bondsman rarely pay an outstanding amount. Some attribute the lack of enforcement to the lack of state regulation over bonding activities.[176] Others explain that bondsmen shift the responsibility for paying the full bond amount to the person paying the 10% fee.[177]

Special legislation permits bail bondsmen to delay the bond forfeiture by obtaining a 90-day and a 180-day extension for the defendant to reappear or to surrender.[178] Moreover, bail bondsmen may always apply for recovery of any forfeited money when a

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[173] Kennedy and Henry, *see, supra*, note 177 at 7.

[174] *Supra*, note 172 at 12 n.40. ("The claim that private agents can do a better job of finding and returning fugitives than Federal and local law enforcement officers has never had empirical support.") *Id*.

[175] *Id*. at 9.

[176] Kennedy and Henry, *supra*, note 177, at 6; Mary A. Toborg, et. al., *Commercial Bail Bonding: How It Works (Summary of Final Report)*, Washington, D.C., April 1986, at 7.

[177] National Pretrial Resource Center, *supra,* notes 71-73.

[178] Md. R. 4-217(i)(3); Md. Ann. Code Art. 27, s.616(e)(2)(i).

defendant appears in court *at any time* beyond the 180-day extension period.[179] Indeed, Maryland law permits the bondsmen to recover forfeited money during *a 10 year period* following a failure to appear by showing that the defendant is incarcerated at an out-of-state facility, and that the state is unwilling to issue a detainer and extradite the defendant to Maryland.[180] Finally, when forfeiture occurs, bondsmen usually are able to avoid Maryland's collection process. In 1998, Montgomery County recovered a paltry sum of $20,000 from bail bondsmen from among the 130 bonds that were forfeited.[181]

## VII. ECONOMIC IMPACT OF FINANCIAL BAIL[182]

When judicial officers condition pretrial release upon money bail, the financial hardship upon detainees and their families or friends is often substantial. To secure the defendant's release, they often must use money that is designated for rent, food, or utilities, or else borrow from others. Paying the bail bondsman an outright 10% fee to gain the release of an economic provider represents the loss of one or two weeks of that person's take home salary.

Obviously, people living in impoverished communities will be lest able to make money bail. According to the 1995 United States Census Bureau, Frederick County had the highest median income of the five counties, $51,220, compared to $25,918 in Baltimore City, $25,918[183] where one of four people are estimated to be living in poverty.[184]

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[179] Md. R. 4-217(i)(5) ("When the defendant is produced in court after the [180-day] period allowed . . . the surety may apply for the refund of any penalty sum paid in satisfaction of the forfeiture less any expenses permitted by law."); Md. Ann. Code Art. 27, s. 616(e)(2)(ii).

[180] Md. Ann. Code Art. 27 Sect. 616(e)(5)(ii)(1-3).

[181] The total amount collected for forfeited bonds was $25,600, the difference being the amount of surety cash bail that was recovered. While the aggregate amount of Montgomery County's 130 forfeited bonds is not available, one can gain a picture of just how small the collectibles were by assuming that the typical outstanding Circuit Court bond was $10,000. If bondsmen were liable for 90%, they would have owed the county $1,170,000 ($1,300,000 less $130,000).

[182] Appendix L, Report by Professor Ray Pasternoster, *Economic Impact of Financial Bail*.

[183] Baltimore County's 1995 median household income was $42,021, while Prince George's was $45,281.

PRP measured the economic impact of financial bail by interviewing pretrial detainees in each of the five Maryland counties. Professor Paternoster analyzed this data and confirmed that:

-- 75% of the people who were expected to be asked to post bond believed it would be "very difficult" or "difficult" to provide the money;[185]

-- Because of paying bail, 70% of those surveyed would have to delay payment of the rent and utilities, and would be able to purchase fewer groceries;[186]

-- The inability to post bail meant that during incarceration 25% feared they would lose their job, and two in five thought they would lose their home;[187] and

-- Baltimore City defendants made an average payment of $500 to bail bondsmen, twice the average median, despite the fact that its average household income is the lowest among the five counties studied.[188]

## VIII. CONCLUSION

Maryland has a sound pretrial release and bail law, requiring the least onerous possible conditions to be set for all but the most serious charges. However, judicial officers are thwarted in their efforts to honor the letter and spirit of the law because of a dearth of essential information. Lack of counsel for the accused, a complete pretrial release

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184 Baltimore County's poverty rate was 6.65%, while Prince George's was 8.1%.

185 Appendix L at Table 10.

186 *Id.* at Table 11.

187 *Id.* at 5.

188 *Id.* at Table 9 at 3.

investigation, and an assistant state's attorney input means a lack of critical data about the defendants' community ties and financial ability to pay. As a result, judicial officers impose full financial bond for nearly half of arrestees and set bail too high for low income defendants, particularly those charged with nonviolent offenses. In the absence of these critical players, a judicial culture has evolved in which bail bondsmen play too great a role, despite the widespread and longstanding knowledge that such a role is contrary to the fair administration of the criminal justice system. Such a culture is particularly damaging to individual criminal defendants and creates a devastating hardship on their financial and family situation and ability to obtain liberty before trial.

To assist in making the actual practice in Maryland in the use of bail consistent with the statutory provisions and with the fair administration of justice, this study offers a number of recommendations.

## RECOMMENDATIONS

Judicial Pretrial Release Proceedings

1. Maryland's pretrial release and supervision system should be expanded statewide to provide judicial officers with information relevant to pretrial release determinations and assistance in monitoring those determinations. Such personnel should:

    a) conduct a prerelease investigation into each defendant's background and provide, verified information about the defendant's financial circumstances and ability to afford bail, employment status and history, and family and community ties;

    b) answer queries from the defendant's family, victims, and witnesses about scheduling; ascertain the victim's interest in pursuing prosecution; and provide assistance to victims and witnesses by instructing them on

procedures and on requesting that release, if granted, may be conditioned on the defendant's staying away from victim(s) and witness(es);

c) monitor defendants prior to trial, including defendants who are on home detention and who are released to pretrial work release, treatment, or other programs, and assist them in compliance with all conditions of pretrial release; and

d) review, on an ongoing basis, the status and release eligibility of detained defendants and provide, information that may alter the release determination.

2. Maryland defendants should be provided with public defendant representation at the initial appearance and bail review hearings.

3. An Assistant State=s Attorney should be present at the bail review proceedings.

Financial Pretrial Release Conditions

4. Maryland Rules should provide an automatic 10% refundable cash bond payable to the court for all bailable criminal or traffic offenses. Md. Code Annotated, Art. 27, s.616 2 (b)(2).

5. Maryland Rules shall make clear that monetary bail should be used sparingly, limited to situations when "no [other] condition of release will reasonably assure (1) the appearance as required and (2) . . . The safety of the alleged victim." Md. R. 4-216 (c).

6. Judicial officers should consider an unsecured collateral bond and other modes of pretrial release in lieu of a collateral bond. Md. R. 4-216(f)(4)(A).

7. Upon implementation of recommendations #1 through #6 above, Maryland should study the viability of eliminating the use of the commercial surety, as recommended by American Bar Association Standards Related to Pretrial Release 10.1-3.

Judicial Officers

8. Judicial officers should receive training and education with regard to pretrial release determination prior to assuming judicial duties and at annual judicial seminars.

9. A Commissioner should determine the conditions of pretrial release for all bailable offenses after due consideration of the factors affecting pretrial release, except as to crimes punishable by death or a life sentence or instances when a judge specifies that no bail is allowable.

10. Each county's administrative judge should receive a weekly report detailing a complete list of detainees held in pretrial custody and consider whether any change is warranted in detection status. Md. R. 4-216(j).

Community-Based Revolving Bail Fund

11. In the short term detainees should be offered an alternative to paying the bondsmen's fee. A revolving bail fund would identify and post 10% cash bail for individuals who were employed, were caretakers, or otherwise had reliable community ties. Ideally, this bail project would have a visible location within the local detention facility. The bail project would educate detainees and families about the bail process.

# Addendums

Addendum 1

Addendum 2

Addendum 3

Addendum 4

Addendum 5