DO ATTORNEYS REALLY MATTER? THE EMPIRICAL AND LEGAL CASE FOR THE RIGHT OF COUNSEL AT BAIL

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INTRODUCTION

Contrary to common belief, our legal system does not guarantee a lawyer to every person whose freedom is at stake. Instead, the indigent accused usually stands alone, without counsel to protect his liberty when first appearing at a bail hearing. Most states do not consider the right to counsel to apply until a later stage of a criminal proceeding—days, weeks or months after the pretrial release determination. During this time, many unrepresented detainees accused of nonviolent crimes languish in

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jail. Would legal representation at the bail stage make a difference? Is there an objective yardstick that would measure the value of counsel at this stage? Can the constitutional right to counsel be evaluated to demonstrate its value to the criminal justice system?

A social science study recently completed in Baltimore, Maryland answered these questions. The project was unique, in that it was designed not only to provide counsel to suspects at an important decision point in the criminal justice process, but also to provide a rigorous empirical examination of the effect of such representation. The study presented convincing empirical data that the benefits of representation are measurable and that representation is crucial to the outcome of a pretrial release hearing. Moreover, the study revealed that early representation enhances defendants' respect for the system's overall fairness and confidence in assigned counsel.

For eighteen months at bail hearings, the Baltimore City Lawyers at Bail Project ("LAB") defended the liberty of nearly 4,000 lower-income defendants accused of nonviolent offenses. The study showed that more than two and one half times as many represented defendants were released on recognizance from pretrial custody as were unrepresented defendants. Additionally, two and one half times as many represented defendants had their bail reduced to an affordable amount. Indeed, delaying representation until after the pretrial release determination was the single most important reason for lengthy pretrial incarceration of people charged with nonviolent crimes. Without counsel present, judicial officers made less informed decisions and were more likely to set or maintain a pretrial release financial condition that was beyond the individual's ability to pay.

This is no trifling matter, considering the consequences of pretrial incarceration. As jail populations continue to swell, correction officials must deal with the added dangers of severe overcrowding, while taxpayers pay the prohibitive costs of pretrial detention and new jail construction. At the same time, incarcerated detainees often lose jobs and face eviction from their homes; and families suffer the absence of an economic provider or child caretaker. Moreover, the delay in defense investigations and witness interviews caused by pretrial incarceration, impedes preparation of a defense and is a sure-fire prescription for miscarriages of justice and convicting innocents at trial. In brief, denying representation at the bail stage makes a mockery of the claim to protect individual liberty and provide justice. Without an attorney at bail, the pretrial release hearing becomes little more
than a public relations gimmick. Lower-income pretrial detainees, who are disproportionately people of color, continue to be likely to stay in jail, unable to make bail until their next court appearance.

The LAB study offers a national blueprint for improving pretrial release systems. If the right to counsel at bail became a reality in this country, the criminal justice community’s players would pay greater attention to the front end of the process, where most arrestees face minor, lower court misdemeanor charges. Immediate decisions would be made to dismiss, to refrain from prosecution, or to offer diversion after arrest. At a time when many jurisdictions are seeing an increase in misdemeanor arrests because of “no tolerance police practices” and an increase in local pretrial jail populations, this representation model becomes essential for managing and reducing the costs of overburdened jail and court systems and for enhancing respect for those systems.

Part I of this Article provides a national perspective of the right to counsel at bail hearings in state and local courts. This section reveals that the great majority of states fail to provide lawyers for poor people at the pretrial release stage and delay representation for substantial periods thereafter. An overview of Supreme Court jurisprudence on the right to counsel, relevant to pretrial release determinations, is also set forth in the opening section of this article.

Part II presents a study of Maryland law students’ and LAB lawyers’ groundbreaking efforts to change Baltimore’s criminal justice system at the bail stage. Baltimore had been typical of many jurisdictions: judges conducted bail reviews without the presence of a public defender or assigned attorney and usually maintained the financial bail conditions previously set. Following the hearing, judges postponed defendants’ cases for an average of thirty to forty-five days until the next court appearance. Baltimore’s bifurcated court system is representative of the overall divide between misdemeanors and felony cases: nearly nine out of ten Baltimore City defendants are prosecuted for misdemeanor crimes in the lower District Court. More than two out of three

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2 In fiscal year 1999, Maryland’s Department of Public Safety reported that 87 percent
District Court cases are ultimately dismissed or placed on the inactive calendar. Consequently, many pretrial detainees spend lengthy periods in jail awaiting trials that will not occur on charges that will never be prosecuted.

Part II also discusses the impact of LAB on Baltimore’s bail proceedings. The privately funded project was organized as a cooperative venture between its staff of lawyers, paralegals, the judiciary, and State Department of Public Safety. It was based upon the premise that a lawyer’s presence would make a substantial difference, particularly for detainees who were charged with minor, nonviolent, misdemeanor offenses. The project also predicted correctly that early representation would reduce severe detention overcrowding, result in saved bed days, and prove cost-effective. Part II concludes by critiquing the project’s successes and law reform that remains to be implemented to make representation at bail hearings a reality nationwide.

Part III introduces the role of social science in empirically examining the effect of counsel at the bail review stage. The value of social science methodology is demonstrated by examining similar multiple regression studies involving death penalty sentencing. This section then sets forth LAB’s methodology, analysis and conclusions. It highlights the typical, randomly selected defendant charged with a nonviolent crime, who is considerably different from the common stereotype of the criminal defendant. While most subjects had a history of substance abuse, they also had strong community, residential, and family ties, appeared in court when required, and had never been convicted of a violent felony crime. In addition, many held stable jobs.

The study confirmed the remarkable results obtained when attorneys represented people at bail review hearings and showed the significant decrease in pretrial jail overcrowding at the new Baltimore Centralized Booking and Intake Facility. During the first nine months of the project, the detention population plummeted from 50 percent over capacity to 20 percent below

of incarcerated Baltimore City pretrial detainees faced misdemeanor charges. Faye Taxman & Karl Moline, Development of a Pretrial Release Risk Assessment Instrument (2000) (unpublished manuscript, on file with author). See also infra note 55 (indicating that 91 percent of Maryland arrests were for District Court offenses, which are predominantly misdemeanor offenses).

3 In fiscal year 1999, three out of five of the 194,468 cases prosecuted in Maryland District Court were either dismissed (44 percent) or stetted (i.e. placed on the inactive docket) (16 percent). In fiscal year 2000, this total of dismissed or non-prosecuted cases decreased to slightly over 55 percent. In Baltimore, almost two of three defendants had their cases dismissed (51 percent) or stetted (15 percent) in fiscal year 1999. DISTRICT COURT OF MARYLAND, STATISTICAL REPORT FOR CRIMINAL PROCEEDINGS, JULY 1999 TO JUNE 2000 (2000).
capacity, resulting in substantial cost savings. Part III also describes the study’s procedural fairness model and the subjective benefits of early representation. Regardless of the objective outcome, represented subjects were more likely to accept the legitimacy of a court’s findings and to respect the impartiality of the process. These conclusions suggest that representation at bail can help restore dwindling public confidence in the fairness of the criminal justice system.

Part IV discusses legislative and litigation strategies for change. While the concept of representation at bail is not new, it is an idea that has been overlooked, primarily because strong institutional forces and self-interest groups favor the status quo. Consequently, legislators are unlikely to provide additional funding, unless reform is seen as beneficial to the criminal justice system. Yet, even when confronted with empirical proof, legislators may resist change, as shown by the saga of reform efforts in Maryland. Thus, litigation may be an essential component of reform. National recognition of lawyers’ critical role at bail hearings will require revisiting the Supreme Court’s 1974 decision in *Gerstein v. Pugh*\(^4\) and addressing the reality of lawyers’ absence from the early stages of a criminal proceeding. State constitutional guarantees, including statutes that guarantee indigent defendants representation at all stages of a criminal proceeding, may offer the best opportunity for success at the local level. This Article concludes by suggesting the optimal use of social science data for obtaining legislative funding and for achieving favorable court rulings.

I. **The Problem: States Deny Legal Representation At Bail Proceedings**

In most state and local courts, legal representation of the poor does not commence at the crucial bail stage. Indeed, in most jurisdictions, a lawyer’s presence is usually delayed until considerably later in the criminal process.\(^5\) In a country that prides itself on guaranteeing poor people equal access to justice, eighteen states refuse to provide lawyers at this initial proceeding anywhere

\(^4\) 420 U.S. 103 (1975) (holding defendant not entitled to counsel on Fourth Amendment grounds to challenge a judicial officer’s probable cause determination).

within their borders. The remaining twenty-four states decline to provide representation at bail in all but a few of their counties.

Only eight states and the District of Columbia uniformly protect an indigent person's need for counsel at the bail stage. It is not immediately apparent why this minority of jurisdictions—"D.C. Plus Eight"—distinguish themselves from the rest of the country. This group is geographically diverse. Their size is not uniform either.

A key may be that all but one state in the group maintains a jurisdiction-wide public defender office. Certainly, a statewide public defender office is in the best position to establish a uniform policy for representation at bail hearings. In addition, such an office would find it difficult to justify advocating for the pretrial

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7 Twenty-six states decline to provide representation at bail in all but a few of their counties. See ALASKA R. CRIM. P. 5 (Alaska); ARIZ. R. CRIM. P. 6.1 (Arizona); ARK. R. CRIM. P. 8.3 (Arkansas); COLO. R. CRIM. P. 5(a)(2)(III) (Colorado); GA. CODE ANN. § 17-12-4 (a)(1) (1997) (Georgia); HAW. REV. STAT. ANN. § 802-1 (Michie 1994) (Hawaii); 55 ILL. COMP. STAT. 5/3-4006 (West 1994) (Illinois); IOWA CODE § 815.10 (1994) (Iowa); KAN. STAT. ANN. § 22-4503 (1995) (Kansas); KY. REV. STAT. ANN. § 31.110 (Michie 1992) (Kentucky); LA. CODE CRIM. PROC. ANN. art. 511, 513 (West 1991) (Louisiana); MD. CODE ANN., MD. RULES §§ 4-213(2), 4-216(b) (1998) (Maryland); MICH. COMP. LAWS ANN. § 5.01(b) (Minnesota); MO. R. CRIM. P. 3.02 (Missouri); NEB. REV. STAT. § 29-3902 (1995) (Nebraska); N.H. REV. STAT. ANN. § 604-A:3 (1986) (New Hampshire); N.J. STAT. ANN. § 2A:158A-5 (West 1985 & Supp. 1997) (New Jersey); N.Y. CRIM. PROC. LAW §§ 170.10, 180.10 (McKinney 1993) (New York); OHIO REV. CODE ANN. § 2937.03 (Anderson 1996) (Ohio); OR. REV. STAT. ANN. § 135.040 (Butterworth 1990) (Oregon); PA. R. CRIM. P. 303 (Pennsylvania); S.D. CODIFIED LAWS §§ 23A-4-3 (Michie Supp. 1997) (South Dakota); VT. R. CRIM. P. 5(d)(2) (Vermont); VA. CODE ANN. § 19.2-157 (Michie 1995) (Virginia); WASH. SUP. CT. CR. R. 3.1(b) (Washington); WYO. STAT. ANN. § 7-6-104 (Michie 1997) (Wyoming).

8 Eight states and the District of Columbia uniformly protect an indigent person's need for counsel at the bail stage. See CAL. PENAL CODE § 859 (West 1998) (California); CONN. GEN. STAT. § 54-1b (West 1994) (Connecticut); DEL. SUPER. CT. CRIM. R. 44 (Delaware); FLA. R. CRIM. P. 3.130(c)(1) (Florida); MASS. R. CRIM. P. 8 (Massachusetts); N.D. CT. R. CRIM. P. 44 (North Dakota); W. VA. R. CRIM. P. 44 (West Virginia); WIS. STAT. ANN. § 970.02 (West 1985 & Supp. 1996) (Wisconsin).

9 These include the New England area (Connecticut and Massachusetts), the Mid-Atlantic and interior region (Delaware and West Virginia), the South (Florida), the Midwest (Wisconsin and North Dakota), and the West (California).

10 Compare the large populated states of California and Florida with the small and parsley populated states of Delaware and North Dakota.

11 The only state that contains such an office is North Dakota.
release of indigent people living in some counties but not others.\textsuperscript{12}

The absence of counsel at local bail proceedings may come as a surprise. Most Americans are familiar with the constitutional guarantee to counsel. Many have seen actor Henry Fonda's sympathetic portrayal of Clarence Earl Gideon,\textsuperscript{13} read Anthony Lewis' Pulitzer-prize-winning novel \textit{Gideon's Trumpet},\textsuperscript{14} and heard police officers' familiar chant of \textit{Miranda}\textsuperscript{15} rights to an accused: You have a right to a lawyer. One will be appointed if you cannot afford to hire your own lawyer. Like \textit{Miranda}, \textit{Gideon v. Wainwright}\textsuperscript{16} has become embedded in the American culture. Most people can support the concept that our legal system is fair and entitles indigent people to the same access to justice as an accused who can afford private counsel. By viewing lawyers as "necessities, and not luxuries,"\textsuperscript{17} the \textit{Gideon} Court brought to life a founding principle in our system's quest to fairly protect every person's individual liberty.

During most of the decade following \textit{Gideon}, the Supreme Court extended the right to counsel to misdemeanor charges,\textsuperscript{18} and to the pretrial stage.\textsuperscript{19} Indeed, the Court held that a lawyer's early appearance was essential to advise an accused whether or not to enter a guilty plea,\textsuperscript{20} and to evaluate, through cross-examination, a prosecution witness' testimony at a felony preliminary hearing.\textsuperscript{21} The Court went so far as to recognize a lawyer's influence in the

\textsuperscript{12} In January 1998, Maryland's public defender was able to represent indigent defendants in only two of the state's twelve judicial districts. In July 1999, the public defender extended representation to Baltimore City defendants. \textit{See infra} note 155.

\textsuperscript{13} \textit{See GIDEON'S TRUMPET} (Worldvision HV Inc. 1980). In the film, Fonda plays itinerant and unrepresented indigent defendant Clarence Earl Gideon. Convicted of a Florida felony, Gideon and court-appointed counsel (future Supreme Court Justice) Abe Fortas gain the landmark right to counsel United States Supreme court ruling. On retrial, Gideon is acquitted. \textit{See id.}

\textsuperscript{14} \textit{ANTHONY LEWIS, GIDEON'S TRUMPET} (Random House 1964).


\textsuperscript{16} 372 U.S. 335 (1963) (holding that an indigent defendant's Sixth Amendment right to counsel applies to state felony proceedings).

\textsuperscript{17} \textit{Id.} at 344.

\textsuperscript{18} \textit{See Aergersinger v. Hamlin}, 407 U.S. 25 (1972) (holding that an accused's Sixth Amendment right to counsel extends to state misdemeanor charges).


\textsuperscript{20} \textit{See Aergersinger}, 407 U.S. at 34.

\textsuperscript{21} Assigning counsel at the preliminary hearing "may expose fatal weaknesses" through cross-examination and impeachment, \textit{Coleman}, 399 U.S. at 9, and "safeguards the accused against groundless and vindictive prosecutions, and avoids for both the accused and the state the expense and inconvenience of a public trial." \textit{Id.} at 8, n.3 (citing M. CLINTON McGEE, CRIMINAL PROCEDURE IN ALABAMA 41 (Univ. of Alabama Press 1954)).
outcome of a pretrial release bail determination, and connected the importance of pretrial release to more favorable outcomes for an accused in a criminal case. However, in 1974, the Supreme Court abruptly applied its judicial brakes to the interpretation of constitutional guarantee to counsel. In Gerstein v. Pugh, the Court ruled that states were not required to provide an attorney for indigent defendants at their initial court appearance when judicial officers made a probable cause determination and invited states to experiment with procedural practices that combined bail hearings with probable cause determinations. Most local systems eagerly embraced the opportunity. They concluded that since the United States Supreme Court did not require attorneys at the probable cause stage, lawyers were not mandated for pretrial release determinations. Thus, just eleven years after Gideon and its progeny had declared that lawyers were fundamental and essential to a fair system of justice at the trial and pretrial stages, the Supreme Court held that the Sixth Amendment guarantee did not include representation at the initial judicial bail proceeding.

It has become common for state court judges to preside over pretrial release hearings of lower-income people without counsel present. Hearings are perfunctory. They move swiftly, aided by video jail broadcasts, which make it unnecessary even to transport arrestees to the local courtroom. In many jurisdictions, a prosecuting attorney is present and recommends bail, thus stacking the odds even more against an accused. Under these circumstances, many defendants choose to remain silent, while others speak and make inculpatory statements, even as they try to minimize their culpability. Whether or not an unrepresented accused speaks, the outcome is typically adverse: absent an advocate to provide verified information about an accused’s...
reliable ties to the community, most judges maintain or set bail conditions beyond what the individual can afford.\(^{30}\)

Equally disturbing are the long continuances that follow and cause lower-income detainees to remain incarcerated without the assistance of counsel until their next court appearance. In cities like Detroit, Michigan, and Santa Fe, New Mexico, judicial officers ordinarily grant continuances for ten to twenty days before scheduling the next court proceeding.\(^{31}\) In Charleston, South Carolina, and Belleville, Illinois, incarcerated detainees wait twenty to thirty days before returning for the next court appearance;\(^{32}\) their counterparts in Cleveland, Ohio, Trenton, New Jersey, Prince Georges, Maryland and Greensboro, North Carolina wait one month and often longer before being brought from jail to court, where they will usually meet their appointed lawyer for the first time.\(^{33}\) Such lengthy deprivations of personal liberty without the assistance of counsel offend traditional and deeply rooted notions of due process protection for every person accused of a crime.

Moreover, denying counsel to an accused indigent during the crucial period following arrest has disastrous consequences on the legal system’s ability to render fair and just verdicts. This is the period lawyers recognize as “most critical” for conducting a “thoroughgoing investigation” and evaluation of the State’s evidence.\(^{34}\) Delaying a lawyer’s immediate entry often translates into prosecuting witnesses becoming unavailable or unwilling to speak to defense counsel and severely impedes the preparation of a meaningful defense. By the time counsel enters the ongoing proceeding, too much valuable time has been lost. The typical detainee is left with little hope of receiving adequate and effective legal assistance at trial.

\(^{30}\) See Taxman & Moline, supra note 2, at 15 (indicating that Baltimore’s pretrial release agency recommends the maintaining of the bail conditions in 88 percent of bail review cases).

\(^{31}\) See Colbert, supra note 5, at 12 n.48, 56-57.

\(^{32}\) See id. at 12 n.48.

\(^{33}\) See id. at 56-57.

\(^{34}\) Powell v. Alabama, 287 U.S. 45, 57 (1932) (holding that the Fourteenth Amendment due process right to a fair trial in a capital case entitles an indigent defendant to appointed counsel).
II. MOVING MOUNTAINS ROCK BY ROCK: CHANGING THE CULTURAL LANDSCAPE TO BRING LAWYERS TO BAIL

A. Genesis of LAB Project

I arrived in Maryland from New York in 1994, after having practiced criminal law for twenty years and having taught law students for over a decade.\(^{35}\) I did not think I had led a cloistered life as a professional. I regularly attended national criminal justice conferences and communicated with colleagues. I thought I had my finger on the pulse of cutting edge criminal justice issues. I published articles on political trials,\(^{36}\) police brutality,\(^{37}\) and racism during jury selection.\(^{38}\) To my astonishment, I learned that it was the rare Maryland locality that guaranteed legal representation when an accused first appeared for a pretrial release determination, and Maryland was typical of most states. Like many of my colleagues who had been trained to defend people's liberty, I thought that every state's criminal justice system provided counsel at bail hearings. After all, the Sixth and Fourteenth Amendments guaranteed that poor people are assigned lawyers in criminal cases.\(^{39}\)

As a faculty supervisor of law students who represented individuals accused of misdemeanors charged in Baltimore City, I soon realized that not a single incarcerated indigent defendant had a lawyer to advocate for pretrial release when appearing before a commissioner and a bail review judge. We would observe groups of twenty-five men, almost all African-American, almost all charged with non-violent crimes, shuffle into the bail review courtroom chained in leg irons, handcuffed to one another. A short time later, after a judge had left their bail status unchanged, they would return to severely overcrowded jail cells filled with other similarly situated African-American men. Most knew that they would remain incarcerated until they next returned to court, thirty to forty-five days later.

\(^{35}\) As the visionary for the Lawyers at Bail Project, Professor Colbert provides a first-hand account of the events leading to the launching of the project.


\(^{39}\) See Gideon v. Wainwright, 372 U.S. 335 (1963); Powell, 287 U.S. at 45.
The racial and historical imagery of these scenes invoked anger in many of my students. Few expected to find a system still operating where black men were denied lawyers and jailed for lengthy periods on unaffordable bails when the charge was relatively minor. In class, students pondered whether anything could be done to bring the lawyer to this early stage. The Maryland Public Defender asserted that inadequate staff prevented his lawyers from appearing until after the pretrial release hearing. He also maintained that given other pressing needs, early representation was not a priority. He would not request such funding in his budget proposal to the legislature. Local lawyers and criminal defense associations readily acknowledged the problem, but explained this was a practice that was unlikely to change.\textsuperscript{40} We had better success with Baltimore's administrative judge, who was appalled by pretrial overcrowding and by the initial absence of, and substantial delay in securing, legal representation for accused indigents.\textsuperscript{41} She immediately accepted the law students' offer to represent detainees before commissioners\textsuperscript{42} and bail review judges.\textsuperscript{43} Though students represented a modest number of clients, they achieved impressive results.\textsuperscript{44} These outcomes were encouraging because they supported our theory

\textsuperscript{40} In October 1995, I presented the issue of non-representation at bail to the Maryland Criminal Defense Attorneys Association ("MCDAA") at its Fall meeting. Lawyers present were sympathetic but indicated that the practice had existed for many, many years and was likely to continue. In the 1999 General Assembly and thereafter, the MCDAA supported statewide legislation that would have guaranteed such representation. See infra Part V. During the discussion on the proposed legislation, a small but vocal group of private criminal defense attorneys indicated that their business often depended upon representing incarcerated detainees following the bail review hearing, and seeking bail reductions at a subsequent proceeding. Maryland Criminal Defense Attorneys Association Meeting (Feb. 2, 1999).

\textsuperscript{41} Judge Mary Ellen Rinehardt, Administrative Judge for Baltimore City from 1991-1998, was immediately receptive to law students involvement at our first meeting in January of 1994.

\textsuperscript{42} Maryland District Court pretrial release procedures provide for an accused's initial appearance before a commissioner within twenty-four hours from arrest; if detained, the individual is brought before a District Court judge for a bail review proceeding the following day court is in session. Commissioners are appointed by the Administrative Judge in each county; typically they are college graduates without prior law school experience or education. Md. Code Ann., Md. Rules § 4-213.

\textsuperscript{43} Maryland's criminal procedure rules provide for a judicial bail review hearing for every person who is denied pretrial release or who remains in custody for 24 hours after a commissioner determined the conditions of release. At the hearing, the District Court judge is required to review the commissioner's pretrial release determination and may maintain or modify the amount and type of financial bail. See id. § 4-216(g).

\textsuperscript{44} During the 1995 Spring semester, students represented twelve individuals who were charged with a variety of felony and misdemeanor charges. They succeeded in gaining release on recognizance for four people and bail reductions for five others.
that legal representation was crucial to a fair pretrial release determination.

By the conclusion of the year-long program, we had identified several ingredients for reform. First, our clinic should be restructured to focus on advocacy at the pretrial release determination, rather than selecting cases after the bail stage and concentrating on trial representation.\textsuperscript{45} Second, successful reform would require the involvement and leadership of the State Bar Association. Third, the legal profession and the public needed to be educated about the lack of representation at bail hearings and the lengthy period of incarceration before detainees next appeared in court. Fourth, a law review article would be essential to support implementation of the right to counsel at the bail stage.

Students' enthusiasm for this project grew as our own research revealed that Baltimore's non-representation model was typical of practices in most Maryland counties and in other jurisdictions.\textsuperscript{46} Students had experienced the value of advocating for release by providing judges with additional information about a client's background. Therefore, we began to consider the impact guaranteed representation would have upon the hundreds of thousands of people awaiting trial nationally.\textsuperscript{47} We added a fifth element to our plan: we should develop a legislative or litigation strategy to implement the goal of representation at bail.

Two years later, most of the main pieces of the reform project were in place. The law school faculty approved the new Access to Justice and Bail Clinic, and I was relieved of my other teaching duties and committed to teach there.\textsuperscript{48} The Maryland State Bar Association, led by the Section on Correctional Reform, endorsed

\textsuperscript{45} In the Fall of 1994, when I began teaching at Maryland, the criminal defense clinics had developed a working relationship with the Office of the Public Defender in which faculty supervisors selected and assigned pending public defender cases to students. Students then prepared to represent the individuals at trial. While this type of case selection had the advantage of choosing cases which the faculty believed would be good learning experiences for students, it also meant that students commenced representation weeks after the pretrial release determination had been made.

\textsuperscript{46} In the 1995 Spring semester, students conducted telephone interviews with public defenders and attorneys practicing in different localities in Pennsylvania, New Jersey, Delaware, Virginia, and Maryland. They indicated that indigent defendants in Pennsylvania, New Jersey, and Virginia were denied representation at the bail stage with the exception of Philadelphia, Newark, and Alexandria. In comparison, Delaware and Washington D.C. public defenders were present and represented detainees at bail hearings.

\textsuperscript{47} See MARK MAUER, RACE TO INCARCERATE 19 (1999).

\textsuperscript{48} After teaching a two-semester, criminal defense clinic during my first year at Maryland's School of Law, I spent three of the next five semesters teaching courses such as Constitutional Law and Criminal Law seminars. When the faculty approved the revised Access to Justice and Bail Clinic in April of 1997, I exclusively taught the new Access to Justice clinical course from January of 1998 until May of 2000.
a resolution to guarantee representation at Maryland bail review hearings.\textsuperscript{49} The State Bar led the charge for reform and sponsored statewide legislation during the 1998 General Assembly, including additional funding to the public defender.\textsuperscript{50} Public awareness increased during the legislative session, following a series of news and op-ed articles\textsuperscript{51} and the broadcast of national public radio and television programs.\textsuperscript{52} Finally, a law review article set forth the constitutional basis for asserting the right to counsel at bail and to reform state criminal justice systems nationally.\textsuperscript{53} But none of these events was as important as the law students who enrolled in the Access to Justice Clinic. They were the first lawyers to enter Baltimore's pretrial facility, interview indigent detainees, and provide representation at the next day's bail review hearing.

B. Spring 1998: The Access to Justice Clinic

Maryland's law clinic students' efforts highlighted the glaring gap in representation for the State's indigent population. Students encountered a criminal justice system which generally operated without the courtroom presence of appointed counsel for an entire month and longer following the commencement of prosecution.\textsuperscript{54}

\textsuperscript{49} In June of 1997 at its annual meeting, the Maryland State Bar Association Board of Governors overwhelmingly voiced support for a resolution entitling every accused person to counsel at the bail stage. The Board directed that the Section on Correctional Reform, which had presented the motion, focus its efforts on obtaining funding for such representation. Maryland State Bar Association, Board of Governors Meeting (June 12, 1997). The following year, the American Bar Association House of Delegates passed a similar nationwide resolution at its annual meeting in August in Toronto. SUMMARY OF ACTION OF AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES, ANNUAL MEETING, REP. 112D, at 22 (Aug. 3-4, 1998). During the 1998, 1999, 2000, and 2001 sessions of the Maryland General Assembly, the Maryland State Bar Association actively supported statewide legislation to guarantee representation at bail. See infra Part V.A.2.

\textsuperscript{50} In January of 1998, Maryland Delegate Kenneth C. Montague introduced House Bill 1092 to the House of Delegates. The bill was contingent upon supplemental funding being provided to the Office of the Public Defender to represent indigent defendants at Maryland bail review hearings. Surprisingly, the Public Defender was the lone party testifying against the bill, which failed to survive a vote in the House Judiciary Committee. See infra notes 133-36 and accompanying text.

\textsuperscript{51} See, e.g., Doug Colbert, For Want of a Lawyer, Many Do Time, BALT. SUN, Apr. 7, 1996, at 6F; Ivan Penn, Law Students Aid at Bail Reviews, BALT. SUN, Feb. 26, 1998, at 1B; Doug Colbert, Attorneys at Bail Hearings Would Unclog the Court System, BALT. SUN, Jan. 17, 1999, at 1C.


\textsuperscript{53} See Colbert, supra note 5.

\textsuperscript{54} In Baltimore, District Court cases for incarcerated defendants are ordinarily postponed for 30-45 days after the bail review hearing. A detainee charged with a traffic
This was all the more remarkable considering that the typical defendant was overwhelmingly a person facing a nonviolent charge. Indeed, like most state jurisdictions, more than nine of ten Maryland defendants faced lower court, mostly misdemeanor charges.  

Yet, with the exception of two of Maryland's twelve counties, lower income arrestees charged with misdemeanors and felonies shared the common experience of having appeared before a judicial officer without an attorney. Roughly half were released on recognizance after having been brought before Maryland commissioners empowered to make the initial pretrial release determination. For the remaining group, the likelihood was great that their bail would remain unchanged after a judge's review and that many would be unable to afford the bail amount.

55 In the fiscal year of 1999, there were a total of 213,343 people who faced criminal charges in the State of Maryland. Of this number, 194,588, or slightly over 91 percent, faced prosecution in Maryland's District Court, which predominantly prosecutes misdemeanor offenses. Baltimore's numbers were similar to Maryland's: 86,964 individuals were charged with criminal offenses, and just under 91 percent were prosecuted in District Court. DISTRICT COURT OF MARYLAND, MONTHLY STATISTICAL REPORTS, CRIMINAL FILING AND DISPOSITION STATISTICS, JULY 1998-JUNE 1999 (1999).

56 In the fiscal year of 1999, 18,875 defendants faced felony prosecutions in Maryland Circuit Court, which represented about 8.8 percent of the annual total of individuals charged with offenses. In Baltimore, 7,949 defendants, or 9.1 percent of the city's arrests, faced felony prosecutions in Baltimore Circuit Court. Id.

57 In January, 1998, when the Access to Justice and Bail Clinic commenced, only public defenders in Harford and Montgomery counties represented indigent detainees at bail review hearings. In every other Maryland county, lower income and poor people appeared unrepresented by counsel. Dep't of Legislative Servs., Maryland Gen. Assem., Fiscal Note to H.B. 1092 (1998). See also infra note 155.

58 According to the District Court Commissioners 1998 Report, Maryland commissioners released 52 percent of arrestees on recognizance. COMM. ADMIN. DAVID WEISSERT, MARYLAND DISTRICT COURT ANNUAL COMMISSIONER'S REPORT, at tbl.8 (1998).

59 In September of 2000, Professor Paternoster analyzed data compiled by law students and lawyers, who observed bail review hearings in five Maryland counties. The data, which is part of a statewide Pretrial Release Project study being conducted by Professor Colbert, revealed that judicial officers in the five counties maintained the prior bail in about three of five cases. Baltimore judges affirmed the same bail for 55 percent of detainees, reduced bail for 25 percent, released 10 percent on recognizance, and increased the bail for 10 percent of the detainees. See ABELL FOUNDATION, PRETRIAL RELEASE REPORT: A STUDY OF MARYLAND'S PRETRIAL RELEASE AND BAIL SYSTEM (2001) [hereinafter PRETRIAL RELEASE STUDY]. David Weisssert, District Court Commissioner Administrator, also stated that judges often maintained bail conditions set by commissioners. Telephone Interview with David Weisssert, Maryland District Court Commissioner Administrator (October 8, 1999).
In Baltimore, detainees are brought to the Centralized Booking and Intake Center, processed following arrest and wait up to twenty-four hours before being brought to a commissioner's station, where bail is set. Detainees sit on one side of a plexiglass wall and face the commissioner, who speaks to them through a speaker system from the other side. It is not uncommon to find many detainees squeezed together in the small 10' by 5' booth to listen to one another's hearings. Baltimore's jail proceedings prevent the public from attending the commissioner's hearing, although it is possible for family or friends to see a televised broadcast. While theoretically a private lawyer may represent a client before a commissioner, the jail's limited space and physical layout makes this exceedingly rare. Public defenders and pretrial representatives are never present at commissioner proceedings.

Bail review hearings held on the next court day are also conducted from the jail. Groups of twenty-five men enter and sit in several rows in a classroom-style "courtroom". Before the hearing begins, a video is shown and provides general information about the court process. Detainees then observe the presiding judge through a two-way video and audio transmission. The quality of the sound and picture transmission is often poor. From within the courtroom, the hearings move quickly, as the judge receives the recommendation of a neutral pretrial release representative, asks whether the detainee wishes to say anything,


61 At Baltimore City's Centralized Booking and Intake Center, only the knowledgeable observer would know that there is a room inside the jail that is open to the public for observing the commissioner's proceeding. From 1995 until 1999, there were no signs informing the public that they may view the hearing. Kate Schatzkin, Address to the Maryland State Bar Association, Correctional Reform Section Meeting (Nov. 1998).

62 See Joe Surkiewicz, Just Waiting for the Video Phone To Ring: Testimony Meets Technology in the Court, MD. DAILY REC., Sept. 25, 1999, at 1C-2C. The report described the scene at Baltimore City bail reviews:

Eight men in orange jump suits are visible. At least, the jump suits are visible.

The detainees' body motion is jerky, their faces difficult to see, and their voices are frequently 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."

Id. at 2C. In December 2000, the Office of the Public Defender successfully challenged the quality of the jail's video bail technology. Following a court ruling that ordered inmates to be transported to court, see Caitlin Franke. Inmates to Be Bused to Courthouse, BALT. SUN., Dec. 5, 2000, at B1, the Maryland Department of Safety installed an improved system in April 2000.

63 In Baltimore, a pretrial release representative appears at bail review hearings and is present at the jail in the same room with approximately twenty-five detainees. Some judges may limit the representative's background investigation of each detainee and allow
and then briefly explains the final decision. Occasionally, a retained lawyer or the detainee’s family will appear at the near-empty bail review courtroom. Public defenders and prosecuting attorneys are usually not present.

Thus, law clinic students had to overcome two major obstacles before they could become advocates for their clients. First, they had to gain entry to the detention jail to conduct a client interview. Second, they had to insert a place for themselves at the next day’s bail review hearing, which judges had become accustomed to conducting without lawyers present. Logistically, students also had to make travel arrangements to appear at two different places on consecutive days: the jail and the judge’s courtroom.

With the administrative judge’s blessing, jail officials gave us the green light to enter the pretrial detention facility. Our twelve students’ interest in gaining a learning experience during a school semester hardly seemed to pose a threat to the jail’s usual operation. Gaining entry, however, turned out to be the easy part. Finding and interviewing eligible clients was more time-consuming than expected. Our daytime, weekday presence at the jail, while

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64 From 1995 to 1999, Baltimore City District Court did not post a court docket, which would inform the public of the time and place when individual bail hearings would be held that day. Consequently, it was rare to find a defense lawyer or members of a detainee’s family or friends at the hearing. On many occasions, LAB attorneys and law students experienced clients who did not appear or court files which were missing, which usually required the hearing to be postponed. In addition, without notice to lawyers or family, new bail review courtrooms would suddenly open to handle overcrowded dockets.

65 Baltimore’s Centralized Booking & Intake Center is located approximately three miles from the nearest Eastside District Court building and about seven miles from the other main Wabash District Courthouse. During the semester, students entered the jail facility Tuesday at noon and left at 6 p.m. While inside jail, students attempted to verify information with family and employers. Afterwards, we met for dinner at my home and reviewed cases for the next morning. Students returned to their homes, and continued preparation. In the morning, we would meet at 11 a.m. for scheduled morning bail review hearings. During the lunch recess, we traveled to the second courthouse for afternoon bail proceedings.

66 Students learned quickly the impossibility of freely moving around the different tiers of the institution. Officer escorts were always required, and we often waited lengthy periods before one arrived. Even with an escort, some eligible clients could not be located or were in the infirmary or a different part of the institution. Students also adjusted to the lack of interview rooms. Often they could be seen speaking to clients at a table located in an open dormitory space or at a makeshift “office” they had arranged in a private corner of a common hall or waiting area. Jail personnel tried to be helpful, but were not used to
convenient for us, occurred during the least busy shift, when the volume of incoming detainees was the lowest.\textsuperscript{67} In addition, our eligible client pool was limited to individuals who were charged with nonviolent offenses and who were neither on probation, parole, or had an outstanding out-of-county warrant.\textsuperscript{68}

Students appeared in bail review court the next day looking and sounding like lawyers determined to gain their clients' release. At first, some judges complained about lawyers wasting precious time. Some questioned why lawyers were needed at all when a pretrial representative was present. But as the semester progressed, students convinced judges of the value of representation. They presented rich, concise snapshots of a client's family, employment, and personal reliability within the same time it had taken judges to explain the proceedings to unrepresented defendants. Most judges appreciated the additional corroborated information and recognized the different roles played by advocates and the neutral court representatives previously relied on.

Students performed phenomenally. During their Wednesday court appearance at five bail review proceedings, students represented seventy-five clients charged with a variety of misdemeanor traffic, drug, public nuisance, and theft charges. They represented people like:

- John Holtman, who could not afford the $2,500 bond for driving with a suspended license and who was expecting to remain in jail until his next court date, 60 days later. A construction worker and the custodial parent of two young children, Holtman was instead released five days following arrest, after students provided documentation to show that a prior failure to appear was a court error and that he risked the loss of his job and his children if he remained in jail.\textsuperscript{69}

- James LaCorta, who had already been incarcerated for twenty-eight days after a bail review judge increased

\textsuperscript{67} For many reasons, we were only available as a group to enter the jail during the noon to six o'clock hours. Consequently, we lost considerable time when one shift replaced another at 3 p.m. since we could not conduct interviews during this time. Most arrestees appeared during the "B" (3 p.m. - 11 p.m.) or "C" shifts (11 p.m. - 7 a.m.).

\textsuperscript{68} As a learning experience, it made considerably more sense for students to test their advocacy skills on behalf of clients who did not have the added burden of having pending cases or court supervision.

\textsuperscript{69} District Court of Baltimore City, Part 40, habeas corpus proceedings (Feb. 25, 1998).
bail from $5,000 to $15,000 on a driving-while-impaired charge. Law students confirmed LaCorta's employment as a roofer, and presented his pregnant wife and their eighteen-month-old baby, who had been evicted during his incarceration and were living in a homeless shelter. The judge released LaCorta on personal recognizance.70

- Benjamin Green, a seventeen-year-old high school senior, who had never been previously arrested, but who spent four weeks in jail on $2,500 bail before being released on recognizance to appear for trial on an assault charge, involving a fistfight with an older man who allegedly was sexually abusing Green's younger sister.71

Before assuming the role of attorneys, students had monitored the bail court proceedings and had observed judges near-automatic “same bail” response for 85 to 90 percent of the cases they heard.72 Students were aware of the limited information judges received and were determined to supplement the data base by providing confirmed information about a client's community ties. Judges released 70 percent of students' clients, either on personal recognizance or by reducing the bail to an affordable amount.

Toward the end of their five-week stints, some students volunteered to take on the most difficult pretrial release case: the reconsideration of a preset bail which a prior judge had ordered at the time when a defendant missed a court proceeding. Despite having had little or no information to explain the defendant's absence, most reviewing judges routinely refused to consider modifying their colleague's preset bail when the defendant eventually appeared on the warrant. Consequently, students in the court audience quietly applauded their colleague's effort after he succeeded in persuading a judge to eliminate a preset bail for Steven Jones, age twenty, held on a marijuana charge. The student lawyer proved that Jones had changed his address and had not received court notification of a new date. Students' appreciation of their adversary role grew when the review judge ordered Jones' release on his own recognizance.73

70 See id.
71 See id.
72 Between 1994 and 1998, three different groups of clinic students observed and monitored District Court bail hearings for a two-week period at the start of a semester. Students reported that, in the absence of counsel, judges generally maintained commissioners' prior bail conditions.
73 See supra note 69.
During the semester, students also worked on statewide reform legislation that would guarantee public defender representation for each indigent detainee at bail review hearings.\textsuperscript{74} Students' successes received local media attention and led to my appearance on a National Public Radio program.\textsuperscript{75} This appearance provided a huge boost from a private funding source and added a sixth factor to the reform plan: gain the support of a foundation to test the theory.

C. August 1998: The Lawyers at Bail Project Commences

In March, 1998, I appeared with the State Attorney for Baltimore City on The Mark Steiner Show, a Baltimore-based, National Public Radio program.\textsuperscript{76} A local case involving dismissal of murder charges on speedy trial grounds had captured media attention.\textsuperscript{77} I suggested that when an accused felon did not meet counsel until arraignment several months after arrest,\textsuperscript{78} it placed added strain on the attorney-client relationship and contributed to a culture that approved lengthy continuances. I questioned how the system could function without an advocate to conduct factual investigations and to enforce discovery requests. I suggested the following basic principle: counsel's immediate assignment and representation at the bail stage was essential for eliminating unnecessary delay.

\textsuperscript{74} See infra notes 133-40 and accompanying text.
\textsuperscript{75} See, e.g., Ivan Penn, Law Students Aid at Bail Reviews, BALT. SUN, Feb. 26, 1998, at 1B; The Mark Steiner Show (National Public Radio broadcast, Feb. 6, 1998).
\textsuperscript{76} See id.
\textsuperscript{77} Maryland v. Spivey, et al., 355 Md. 205 (1999) (dismissing on speedy trial grounds, vacated and remanded for consideration in light of State v. Brown, 355 Md. 89 (1999) (holding that the 180-day rule stands on different legal footing than constitutional right to speedy trial)). The defendants had been incarcerated for two-and-one half years while awaiting trial. After the trial court dismissed the murder charge on speedy trial grounds, a public outcry against the State Attorney's office resulted in a federal prosecution on similar charges. Ultimately, each defendant was convicted and sentenced to life imprisonment. See Caitlin Francke, 4 Men Again Face Charges in 1995 Killing, BALT. SUN, Dec. 3, 1999, at 3C; Murder Charges Reinstated: Judge to Re-evaluate Counts Against Four in 1995 Killing, BALT. SUN, Aug. 13, 1999, at 1B; Caitlin Franke & Scott Higham, 'Swift Trial' Ruling Voided, Court of Appeals Says Delay By Itself Doesn't Matter Under Maryland Law, BALT. SUN, July 29, 1999, at 1A.
\textsuperscript{78} Following a bail review hearing, a preliminary hearing is usually scheduled within 30-45 days. Md. R. 4-221. At this court date, an assigned public defender or appointed counsel appears. Assuming that the State proceeds to a preliminary hearing (rather than present evidence to a Grand Jury), and that the judge rules that the prosecution has met its evidentiary burden, the case is transferred to the Circuit Court. A Circuit Court clerk then schedules a felony arraignment 45-75 days later. At the Circuit Court arraignment, an accused meets his or her assigned Public Defender trial attorney.
Highlighting students’ achievements, I argued that representation at bail helped unclog a congested system by identifying people unnecessarily incarcerated on minor offenses, despite having lived and worked in the community for years. I spoke about the pending statewide legislation that would guarantee representation, and concentrated on the impact that pretrial incarceration of an economic or home care provider had upon an accused’s family.

Following the show, I received a call that would be as close as I will ever come to having Mike Todd ring my doorbell and inform me that I had been selected by John Baresford Tipton to become the next millionaire. Robert Embry, President of the Abell Foundation, introduced himself and told me he found many of my ideas interesting. We met the next morning and spoke for almost three hours. I explained my desire to create a pilot program providing lawyers to represent people at bail proceedings to reveal the substantial benefits of such representation until statewide funding allowed the public defender to take over this responsibility. Mr. Embry stated that his foundation’s interest was fostering projects in Baltimore City for offenders charged with nonviolent crimes. He suggested that I submit a proposal the following day for Board consideration at its upcoming meeting. Three weeks later, I received official word that Abell had approved the necessary start-up funds to explore creating this project.

During the next three months, LAB built a cooperative relationship with the judiciary. We received immediate assistance from the Administrative Judge Mary Ellen Reinhardt. She provided office space at each District Courthouse. The judge also agreed to inform her colleagues and jail officials that she fully endorsed this program. We addressed other judges’ concerns about the additional time they anticipated lawyers would require and about the overall usefulness of our program.

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79 See infra notes 133-40.
80 The Millionaire was a popular television show during my childhood and formative years. The Millionaire (Paramount Television Group television broadcast, 1955-1960).
81 See Dan Fesperman, Man Who Wields Millions Makes His Mark in Many Areas, Embry Combines Experience, Readiness To Embrace New Ideas, BALT. SUN, Aug. 6, 2000, at IA (regarding the Abell Foundation and President Robert Embry).
82 Chris Flohr, LAB’s legal director, and I met frequently with the judiciary and with State Department of Public Safety jail officials to do our best to respond to their concerns.
83 Baltimore’s District Court bench presides at separate morning and afternoon court dockets. In addition, on a rotating basis, a judge presides at a bail review session that is held either in the late morning or early afternoon. Consequently, it was understandable why many judges were initially resistant to lawyers appearing in their bail review courtrooms. It would simply exhaust precious court time. We met with a leading
DO ATTORNEYS REALLY MATTER?

We were less sure how to respond to Public Safety’s concerns. These ranged from the logistics of our paralegals entering and moving around the facility, to locating and speaking to eligible clients on the same day they would be taken to a bail review hearing room, to the unavailability of office space. We listened closely, followed suggestions, and made numerous compromises, including agreeing to initially work three days a week.

By the end of July, 1998, legal director Chris Flohr and I had hired our staff of three paralegals and twenty panel attorneys who would work half-day shifts once a week. We conducted a three-day training session to coordinate the team relationship between paralegals and attorneys, and provided everyone with extensive material about the bail stage and the impact of money bail upon lower income people.84

On August 25, 1998, LAB launched its operation. The reduced three-day-a-week schedule was important to smooth over potentially frictional issues with correction officials and to develop close, working relationships with many officers. Most saw the immediate benefits of managing a smaller pretrial population, as more detainees facing nonviolent charges were released than before. In court, lawyers became ever more effective. One month after we began, several judicial skeptics congratulated our lawyers for assisting their bail determination and not causing additional delay. During our first three months, we extended our operation to a full work week and observed a consistent decline in the pretrial population of the Centralized Booking and Intake Center. When we began, the facility was fifty percent over capacity. Nine months after LAB had begun, Centralized Booking’s population had been reduced to almost half its usual number of detainees.85

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84 At training, we critiqued lawyers’ simulated presentations and demonstrated that in most cases an attorney needed only two or three minutes to deliver an effective argument for pretrial release. Paralegals would carry out the crucial task of separating detainees charged with non-violent offenses from people accused of violent crimes. Arriving at the Centralized Booking and Intake Center at 5:30 a.m., paralegals interviewed as many nonviolent offenders as they could before 8:30 a.m., at which point they would begin calling the client’s family and employer to confirm home residence and employment status. Paralegals faxed their interview information from our office at the jail to the lawyers’ courtroom office.

85 The Lawyers at Bail Project submitted a six-month report to the Abell Foundation, the Chief Judge of Maryland’s Court of Appeals, and the Chief Judge of Maryland’s District Court, which indicated the declining pretrial jail population. See LAWYERS AT BAIL PROJECT, SIX-MONTH REPORT (Sept. 29, 1999) (on file with author).
Despite these results, LAB fell short of accomplishing each of its objectives during its first twelve months. We had hoped that early representation would lead to greater communication between the State Attorney and the Public Defender, but each preferred to remain outside the bail review court. We anticipated that our lawyers would identify more cases for referral to both offices for immediate disposition, but we were usually stymied in our efforts. Logistical difficulties prevented our lawyers from meeting with clients and required that they be totally reliant upon the paralegal’s interview. Finally, the nearly 4,000 clients represented were but a fraction of the individuals charged with nonviolent offenses.

On the brighter side, the Project’s final six months saw considerable movement toward a collaborative model. Following a flurry of news articles that criticized Baltimore’s criminal justice system, the city’s Criminal Justice Coordinating Council was revived and has championed the necessity of representation at bail. Bolstered by the political support of Baltimore’s new Mayor, Martin O’Malley, the Public Defender received additional resources to represent every indigent defendant beginning September 1, 2000. The Mayor’s support for zero tolerance enforcement has mandated that the State Attorney, Police, and Public Defender communicate, which should result in earlier disposition and dismissal of less serious offenses. Finally, the Public Defender is insisting that attorneys interview and represent clients at the booking center.

While LAB received general support, naysayers continued to challenge reform efforts. Some judges expressed annoyance and frustration with published op-ed articles and critical news

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86 Beginning on February 14, 1999, the Baltimore Sun began a series of editorials entitled Getting Away with Murder, which called for an immediate reform of Baltimore City’s criminal justice system. See Editorial, Getting Away with Murder, BALT. SUN, Feb. 14, 1999, at 2C (criticizing prosecutors for failing to successfully prosecute homicide and weapons crimes, judges for not taking a leadership role in eliminating unnecessary overcrowding and addressing serious crime, and legislators for not providing adequate funding and for not holding judges and prosecutors accountable).

87 Press Release, Maryland Governor’s Office, Governor Glendening Releases Final Supplemental Budget for FY2001; Budget Focuses on Education, Smart Growth, Public Safety (Apr. 1, 2000), available at http://www.gov.state.md.us/gov/press/2000/apr/html/supplemental.html (indicating the supplemental budget provided for $5.2 million to Baltimore City’s criminal justice system, including “sufficient funds to [the Public Defender] provide representation at bail hearings for all non-violent, indigent defendants.”). See also infra note 151.

88 Interview with Dennis Laye, Assistant Public Defender, Baltimore City, at the Centralized Booking & Intake Center, Baltimore, Md. (Aug. 8, 2000). During this period, prosecutors, defenders, and judges also devoted additional attention to the front-end of the criminal process by creating an early disposition court for select cases.
editorials. Others remained doubtful that a lawyer’s presence would affect the bail outcome. The State Public Defender wondered whether LAB’s courtroom accomplishments were attributable to a skewed case selection process, and questioned the overall wisdom of investing resources at the bail stage, while some private lawyers thought that public defender representation would be harmful to their business. Out of the public’s view, bail bondsmen argued vehemently in favor of maintaining the status quo. Anticipating opposition, LAB had commissioned social scientists to conduct a study to demonstrate the benefits of representation. The following section introduces social science and multiple regression methodology generally and describes how the study measures the difference a lawyer makes at the bail and pretrial release stage.

III. SOCIAL SCIENCE AND THE LAW

A. The Role of Social Science in the Law

The law and social science have generally been considered distinct and separate disciplines, especially as to methodology. While legal research principally takes the form of case analysis and legal reasoning, the social sciences are far more empirical. They are based on the scientific method of data collection, statistical analysis, and the bearing of observable data on specific questions or hypotheses. Within the past few decades, however, law and

89 At a meeting of the District Court’s judicial executive board, a judge asked whether I was “intending to publish a law review article or another scurrilous op-ed article criticizing the judiciary?” In a meeting on May 20, 1999, several judges disagreed with their colleague, saying the articles had brought much needed attention to the front-end of the criminal justice system.

90 See infra note 152. At meetings of the Maryland Criminal Defense Attorneys Associations, a minority of lawyers opposed reform because they believed they would lose prospective clients to the office of the public defender. See supra note 40.

91 The lobbyist for the bail bondsmen did not testify at the legislative hearing, but spoke privately with members of the judiciary committees in both houses of the Maryland General Assembly. Conversations with sponsoring State Senator Leo Greene (Prince George’s) and Delegate Kenneth C. Montague (Baltimore City) (Jan.-Feb. 1999). See infra notes 146, 148, 154.

92 See discussion supra Introduction.

93 Early attempts to integrate legal analysis with social science methods was undertaken by scholars such as Roscoe Pound and the school of “sociological jurisprudence,” and Karl Llewellyn and the school of “legal realism”. See Roscoe Pound, The Scope and Purpose of Sociological Jurisprudence, 25 Harv. L. Rev. 489 (1912); Karl N. Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222 (1931); John Monahan & Laurens Walker, Social Science in Law (Foundation Press, 1985).
social science have moved closer together; social science methods are now being routinely used to address legal problems or issues.

For example, the possible role played by racial factors in imposing the death penalty has been a prominent issue that has been addressed by social science methods. In 1972, the U.S. Supreme Court struck down existing state capital punishment statutes in *Furman v. Georgia* because of the risk that defendants' death sentences had been tainted by racial considerations. In 1976, the Court accepted rehabilitated state capital punishment statutes with the expectation that procedural reforms would eliminate or seriously reduce the influence of race in determining who lives and who dies. The Court had no evidence that these reforms provided an effective remedy for the influence of race; it simply concluded that "on their face," procedurally reformed capital punishment statutes promise to eliminate or reduce the role of race to a tolerable level. The issue, however, was an empirical one.

Social scientists and legal scholars began to collect empirical data about the manner in which states actually imposed their death sentences under these reformed statutes to determine if either the offender's or victim's race had any effect on capital charging or sentencing outcomes. Detailed information was collected about individual homicide cases and attempts were made to calibrate empirically such factors as the seriousness of the offense and the defendant's culpability. Multiple regression analysis was used to ascertain whether or not the offender's or victim's race had an effect apart from legitimate legal factors. A prominent study by law professor David Baldus and his colleagues of the Georgia capital sentencing system collected information on over 500 possible factors that could influence Georgia prosecutors' charging and jury sentencing decisions. They conducted a multiple regression analysis and found that, even after taking into account relevant characteristics of the offender, victim, and the nature of the homicide, offenders who killed white victims were over four times more likely to be sentenced to death than those who killed non-whites. Here was a clear instance where a legal question was

94 408 U.S. 238 (1972).
96 See Gregg, 428 U.S. at 198.
addressed with the methods of social science.\textsuperscript{99}

LAB provided another unique opportunity to integrate legal and social science. Initially, LAB was purely a legal idea: a legal claim could be made that the provision of counsel at a bail review hearing is required under the Sixth and Fourteenth Amendments.\textsuperscript{100} In addition, a lawyer would bring beneficial consequences: the hearing officer would receive additional information or have erroneous information corrected. The net effect of this data would be that the suspect may be more likely to be immediately released or have his or her bail lowered to a more affordable level. Significant cost savings for the court would ensue. LAB seized the opportunity to do an empirical study to measure whether a lawyer would indeed be beneficial—and to what degree—for the suspect and the criminal justice system. A threshold question was what would be the expected beneficial consequences of legal representation.

B. Expected Benefits of Legal Representation at the Bail Review Hearing

The Authors classified the expected benefits of legal representation into two general categories—objective and subjective benefits. The primary role served by legal counsel at the bail review hearing would be that of information provider to the court. A lawyer would be expected to investigate the suspect’s circumstances and prior history and provide information to the court about their community ties, financial hardships, and prior experiences with arrests, convictions, and court appearances. An attorney would, therefore, have the requisite knowledge to correct any mistaken data about the suspect or her case that the court

\textsuperscript{99} In McCleskey, the United States Supreme Court, in a 5-4 decision, rejected defendant’s equal protection argument that the death penalty was imposed in a racially discriminatory manner. The Court also rejected defendant’s Eighth Amendment argument that the death penalty was cruel and unusual punishment because the Baldus Study did not demonstrate a constitutionally significant risk of racial bias affecting Georgia’s capital sentencing process.

Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.

\textit{Id.} at 313.

\textsuperscript{100} See \textit{infra} Part V.B.1.; notes 156-207 and accompanying text.
might receive from other sources (for example, from the prosecutor or pretrial services). The facts provided by one’s legal counsel would ultimately be expected to have objective (i.e., tangible) effects.

Suspects with lawyers might be more likely to be released on their own recognizance, rather than held for bail, because their attorney was successful in getting information about their community and family ties to the court. If not released, suspects with lawyers might be more likely to have their bails reduced, to an affordable level than suspects without lawyers. Accused offenders with lawyers, therefore, would be predicted to spend less time in jail than those without. In addition to these expected objective benefits, we would expect collateral benefits. More suspects released on their own recognizance and making bail could mean fewer pretrial detainees, with corresponding cost savings to local jails. These savings presume that suspects released because of their attorney’s efforts are not more likely to commit new offenses while released nor more likely to fail to appear for trial. In sum, we would expect that the provision of legal representation at the bail review hearing would have important objective outcomes for individual suspects and the criminal justice system.

Moreover, we expected important subjective consequences. In their dealings with authorities, defendants want more than just fair or favorable outcomes—they want to be treated fairly. They want legal decisions by authorities to be made in a fair and impartial manner. Fair treatment shapes their view that authorities are acting not just with power, but with legitimacy. When defendants so believe, they are more likely to comply with rules.

A key component of procedural justice is the notion of representation or voice, that is the extent to which defendants believe they have the opportunity to take part in the decision-making processes of authorities. While defendants may not feel they have the right to determine the outcome of the process, it is important to their sense of fairness that they be given the opportunity to present their case to authorities. When


defendants are given the opportunity to speak to authorities about
their case, i.e., tell "their side of the story", they feel like fully
valued members of the group. When defendants are provided with
voice, they are more likely to perceive that they are being treated
fairly by authorities. Experiencing fair procedures makes
compliance more likely.

It is enough that defendants' legal representatives bring their
views to the attention of authorities. Representation at the bail
reviewing hearing gives suspects that critical voice. In the absence
of legal representation, even if suspects are asked if they have
anything to say, few would know what to say or how to say it. In
providing voice, therefore, legal representation becomes a key
component of procedural justice at the bail review hearing.

C. Validly Assessing the Effects of Legal Representation
at the Bail Review Hearing

LAB was intended to provide criminal suspects with lawyers
at their bail review hearings so that it could be determined what
effect lawyers actually had. One way to determine the impact that
legal representation may have at a bail review hearing would be to
collect information in a criminal court from such hearings where
lawyers were present and a comparable number from that same
court where lawyers were absent. Such a strategy, however,
provides only weak causal inference. Suspects who bring their
own lawyers to their bail review hearings will likely differ in many
characteristics from than those who do not. For example, suspects
who can afford a lawyer at a bail review hearing are likely to be
more affluent than those without lawyers, and a corollary of
affluence is employment, a home, supportive friends, and other
ties to the community. A lawyer may make no difference at a bail
review hearing, but people who bring lawyers to bail review
hearings may both fare better and feel that the process is fairer
because of these other factors correlated with having a lawyer.
The problem in making a causal inference in this context is that we
cannot be sure that the lawyer made the difference. At this point,
we could do exactly what social scientists in the capital punishment
area have done—employ multiple regression analysis.

In the capital punishment context, social scientists were
interested in the possibility that race (the defendant's or the

& SOC. PSYCHOL. 72 (1985); E. Allan Lind, Ruth Kanfer & P. Christopher Earley. Voice,
Control, and Procedural Justice: Instrumental and Non-Instrumental Concerns in Fairness
victim's) may affect the sentencing decision. They could not simply determine whether African-American defendants or those who kill whites are more likely to be sentenced to death than others because there may be real differences between the kinds of killings that African-Americans do and the kinds that are committed against whites. For example, social scientists could evaluate whether killings by African-American offenders (or against white victims) may be substantially more egregious than those perpetrated by white offenders (or against non-white victims). In other words, there may be a multitude of legally relevant factors that could account for initial disparities in treatment that correlate with race. The effect of these other factors have to be considered or “controlled for.” That is the purpose of a multiple regression analysis: it allows you to look at the effect of one variable on another, while simultaneously considering other important and relevant factors.

The limitation of multiple regression analysis is that one is never sure that she has controlled for most of the important other considerations. To the extent that there are important factors left out of these models, the strength of our causal inference is weakened. In trying to make the causal inference that the presence of a lawyer is influential in the bail review process, we need the confidence that we are able to measure most, if not all, of the important other factors at work.

There is a better strategy: a randomized experiment. The crucial variable is assigned to persons on a chance or random basis. For example, in a pool of sick subjects, a medicine that is hypothesized to provide a cure or alleviate the symptoms of the disease is randomly given to one half of the subjects, while the other half receive a placebo or sugar pill. Since who received the medicine was assigned by chance, any difference in recovery or the seriousness of the symptoms between the two groups could more confidently be attributed to the medicine, not other factors (such as patients' preexisting medical conditions). In fact, a randomized experiment is the soundest procedure to employ to make valid causal inferences. Therefore, LAB was conducted as a randomized controlled experiment during the evaluation period. From a pool of eligible (nonviolent) criminal suspects in the Baltimore City Criminal District Courts, subjects who were about to have a bail review hearing were randomly assigned legal representation. Since we have randomized the critical variable of interest (legal representation), we are more confident that any  

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103 See DAVID NACHMIAS & CHAVA NACHMIAS, RESEARCH METHODS IN THE SOCIAL SCIENCES (3d ed. 1987).
post-hearing differences in bail outcomes were due to the presence of counsel.

D. Previous Research on the Role of Lawyers in the Pretrial Process

There is evidence from previous studies that the provision of legal counsel at the bail process may have substantial benefits in terms of early release, enhanced satisfaction with the system, and financial savings to courts and jails. These prior attempts to provide legal counsel in the bail process have been neglected, however, and our attempt is to revitalize interest in the issue and build upon this base. During the 1960s, in the Manhattan Bail Project, law students interviewed suspects (generally accused of nonviolent crimes) before their arraignment hearings to establish a record of the suspects' community ties, with the goal of convincing the court to release them on their own recognizance. While students were not randomly assigned to suspects, their efforts appeared to be instrumental in securing the non-bail release (on recognizance) of a substantial number of suspects who normally would not have been released.\textsuperscript{104} There also was evidence that those released because of the project were as likely to appear for court as those released by a cash bail.\textsuperscript{105}

A comprehensive effort to examine the effect of counsel in the early stages of the criminal process and throughout that process was the Evaluation of the Early Representation by Defense Counsel Field Test, funded by the National Institute of Justice in the mid-1980s.\textsuperscript{106} In this project, involving the court systems in New Jersey, Tennessee and Florida, public defenders were randomly assigned to criminal suspects within twenty-four hours of their arrest and prior to their first appearance before a magistrate. The public defender assigned to a case remained with that case throughout the entire process.\textsuperscript{107} Clients with attorneys fared better in the pretrial process. Represented defendants were released earlier (on average, from two to five days) than suspects in the control group that were not assigned public defenders, spent substantially less time in pretrial detention, and were more likely

\textsuperscript{104} See Malcolm M. Feeley, Court Reform on Trial (1983).
\textsuperscript{105} See id. at 46.
\textsuperscript{107} See id. at 4.
to be immediately released on their own recognizance.\textsuperscript{108} There was also evidence of more subjective benefits of early representation: suspects with lawyers expressed more confidence in and satisfaction with the criminal justice system.\textsuperscript{109} Because these previous studies showed the positive benefits of providing legal counsel at bail proceedings, the expectation was that LAB could produce similar benefits.

E. Social Science and Empirical Data: Studying Baltimore City’s Lawyers at Bail Project

LAB hired attorneys to represent indigent suspects of non-violent crimes at their bail review hearing. Such representation was expected to provide several objective benefits:

- more suspects would avoid jail time and would be released on their own recognizance;
- lawyers would be successful in convincing the bail review hearing officer to reduce suspects’ existing bail to an affordable amount;
- the jail population of the city of Baltimore would be reduced, resulting in substantial costs savings for the city;
- clients released as a result of a favorable bail review hearing would pose no greater risk of rearrest than other suspects.

In addition, several important subjective outcomes were anticipated. These included the expectation that the provision of counsel would give indigent suspects legal “voice” or the subjective experience that their side of the story was presented and given consideration. It was hypothesized that suspects provided with counsel would:

- feel that legal authorities were treating them fairly;
- feel that they were able to provide information to the authorities before the decision on their case was made;
- feel more satisfied with the outcome in their case;
- feel more likely to comply with the decision in their case.

During and after the bail review hearing, law students gathered data about the information presented to the hearing officers and the outcome from cases with LAB lawyers and those

\textsuperscript{108} See id. at 180-240.
\textsuperscript{109} See id. at 241-324.
without. In addition, law students interviewed a subsample of suspects in both categories to measure their attitudes about their bail review hearing. After six months, there was follow-up to determine whether or not defendants were rearrested. The following section describes the project's empirical data, along with the results of lawyer representation.

F. The Study

The Lawyers at Bail Project was designed as a controlled experiment. In the summer of 1998, lawyers were hired to provide legal representation at the bail review hearing. During the evaluation period of the Project, legal representation was randomly assigned to a pool of approximately 300 nonviolent cases from the Baltimore City Criminal Court. The random assignment was done by a staff of paralegals who initially investigated each defendant's charges and determined eligibility for the study. Eligibility was determined solely on whether the alleged crime was non-violent.\textsuperscript{110} After making the eligibility decision, the paralegals then placed each non-violent case into a "LAB lawyer" (experimental group) or "non-lawyer" (control group) category. Paralegals interviewed LAB clients. They then communicated with the LAB lawyers about which clients they would be representing at bail hearings later that day and provided them with bail information they obtained from the interview. The purpose of the random assignment of nonviolent cases was to ensure that the group of criminal suspects provided with LAB attorneys were as comparable as possible to those not provided lawyers. Random assignment of suspects to the lawyer and no-lawyer groups would ensure that any observed differences in outcomes between the two would not be due to selection mechanisms, i.e., preexisting differences between the groups would be eliminated. Therefore, we would have a stronger basis for making a causal inference that it was the presence of legal counsel that was responsible for outcome differences between the two groups.

Approximately 57 percent (175) of the suspects were assigned a LAB lawyer, while 43 percent (125) were not. There were some slight departures from the assigned treatment for various reasons

\textsuperscript{110} Paralegals' pre-selection information was limited to knowing the nature (but not the circumstances) of the charge and the commissioner's prior bail conditions. See supra note 63 and accompanying text. The paralegals had no additional information for each suspect, such as length of residence, employment status, family or community ties, prior criminal record, or previous failures to appear in court.
(suspects refused lawyers, could not be found, or posted bail before the hearing).\textsuperscript{111} As a check on the extent to which the two groups were similar, suspects were compared on a number of characteristics relevant in the review of bail (i.e., age, prior arrest or conviction histories, or prior failures to appear in court). A number of different characteristics of the two groups are reported in Table 1. All of the differences are quite small. Three of these differences were statistically significant.\textsuperscript{112} A significantly higher proportion of the suspects without lawyers (56 percent) had pending charges against them at their bail hearing, compared with those who had lawyers (44 percent). This would suggest that the LAB clients were at lower risk of not appearing for trial and correspondingly, should receive lower bails. However, two other differences suggest that the LAB suspects would receive higher initial bails. Compared to those without lawyers, LAB clients were more likely to have had an arrest in the past five years (87 percent v. 74 percent) and were more likely to have had a conviction in the past year (44 percent v. 31 percent). Each of these three differences is small, and the collective landscape of our comparisons reported in Table 1 convince us that the two groups were very comparable. We were persuaded by this comparison that the randomization of legal counsel was successful and that the group of suspects without lawyers was not initially different from those who were provided representation.

A research staff comprised of law students attended each bail review hearing and recorded critical information about each case, such as the number and nature of the charges, whether the offense involved the use of violence or narcotics, the offender’s criminal history, the nature of the offender’s ties to the community, personal and demographic characteristics of the offender,\textsuperscript{113} what the initial bail was, if this initial bail was modified by the bail review hearing officer, if the defendant was released on his own recognizance, if the suspect made bail, and the length of the

\textsuperscript{111} As in many field experiments, the treatment that was randomly assigned to a person was not always the one delivered. In a small proportion of cases, defendants assigned to receive a lawyer did not receive one, while a defendant randomly assigned not to receive a lawyer may have been represented. In the process of such misassignment, the experimental group may end up being different from the control group.

\textsuperscript{112} Technically, since we do not have a random sample of respondents from some known population, tests of statistical significance are not meaningful. We use them in this paper, however, in order to provide some benchmark or way to gauge any observed differences we find between the two groups.

\textsuperscript{113} All suspects in the LAB Project were male, due to the limited number of law students (and supervisors) who could cover two different detention facilities, and because of the difficulties in accessing and moving freely between the two male and female sections of the jail.
hearing.\textsuperscript{114} After the bail review hearing, the law students interviewed suspects. The purpose of this interview was to obtain information about the suspects as to the extent to which they perceived that the outcome of their case was fair, whether the court personnel treated them fairly, whether they believed that the procedures followed were fair, and how willing they were to accept the decision in their case.\textsuperscript{115} Each of these components is an essential dimension of substantive or distributive justice. The literature in the social psychology of authority shows that the provision of "voice" to the suspect via an attorney would lead to feelings of fair outcomes, fair treatment, and a greater inclination to accept the decisions of authorities. There is, then, an important component of procedural as well as substantive fairness in the provision of legal representation at a bail review hearing.\textsuperscript{116}

\textit{Table 1: Characteristics of Suspects in Bail Review Hearings With (LAB) and Without (non-LAB)}

<table>
<thead>
<tr>
<th></th>
<th>LAB Lawyers</th>
<th>Non-LAB Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Avg. Age</td>
<td>34.4</td>
<td>32.9</td>
</tr>
<tr>
<td>Avg. Years in Community</td>
<td>21.5</td>
<td>22.9</td>
</tr>
<tr>
<td>Avg. % with Family in City</td>
<td>93.5</td>
<td>96.7</td>
</tr>
<tr>
<td>Avg. Years with Employer</td>
<td>4.7</td>
<td>3.1</td>
</tr>
<tr>
<td>Avg. Number of Prior Arrests</td>
<td>3.4</td>
<td>3.5</td>
</tr>
<tr>
<td>Avg. Number of Prior Convictions</td>
<td>3.2</td>
<td>3.4</td>
</tr>
<tr>
<td>Number of Prior Failure to Appears</td>
<td>1.6</td>
<td>1.9</td>
</tr>
<tr>
<td>Total Number of Current Charges</td>
<td>2.0</td>
<td>1.8</td>
</tr>
<tr>
<td>Original Bail Set</td>
<td>$3,357</td>
<td>$3,178</td>
</tr>
<tr>
<td>% African American</td>
<td>83%</td>
<td>82%</td>
</tr>
<tr>
<td>% Employed</td>
<td>58%</td>
<td>61%</td>
</tr>
<tr>
<td>% Drug Charge</td>
<td>22%</td>
<td>16%</td>
</tr>
<tr>
<td>% Pending Charges</td>
<td>43%</td>
<td>56%</td>
</tr>
<tr>
<td>% Prior Jail Time</td>
<td>60%</td>
<td>61%</td>
</tr>
<tr>
<td>% Any Prior Arrests</td>
<td>90%</td>
<td>92%</td>
</tr>
<tr>
<td>% Any Arrest Past 5 Years</td>
<td>87%</td>
<td>74%</td>
</tr>
<tr>
<td>% Any Arrest Past Year</td>
<td>70%</td>
<td>62%</td>
</tr>
<tr>
<td>% Any Prior Conviction</td>
<td>72%</td>
<td>74%</td>
</tr>
<tr>
<td>% Prior Conviction-Past 5 Years</td>
<td>72%</td>
<td>69%</td>
</tr>
<tr>
<td>% Prior Conviction-Past Year</td>
<td>44%</td>
<td>31%</td>
</tr>
</tbody>
</table>

\textsuperscript{114} See Appendix A for the full instrument.
\textsuperscript{115} See Appendix B.
\textsuperscript{116} See infra notes 136-39.
Table 1: Characteristics of Suspects in Bail Review Hearings With (LAB) and Without (non-LAB) (cont.)

<table>
<thead>
<tr>
<th></th>
<th>LAB Lawyers</th>
<th>Non-LAB Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td>% Prior Conviction for Violence</td>
<td>19%</td>
<td>26%</td>
</tr>
<tr>
<td>% Currently on Probation</td>
<td>35%</td>
<td>36%</td>
</tr>
<tr>
<td>% Prior Failure to Appear</td>
<td>34%</td>
<td>44%</td>
</tr>
<tr>
<td>% Prior Drug/Alcohol History</td>
<td>95%</td>
<td>89%</td>
</tr>
</tbody>
</table>

G. The Sample

A large percentage (greater than 80 percent) of the sample were minority men, and they were on average slightly older than thirty. More importantly, these nonviolent criminal suspects did not easily fit into a common stereotype of the urban, high-risk criminal offender. For the most part, they had strong community ties and nonviolent histories. While most had prior drug/alcohol substance abuse, a majority were nonetheless employed when arrested and averaged better than three years with their current employer. There also was a consistent level of community stability. Both groups of suspects lived on average more than twenty years in the community, and over ninety percent had some family or relatives living in the city or adjacent county. Furthermore, only 19 percent of the suspects in the LAB group and 26 percent of those in the non-LAB group had a prior conviction for a violent offense. A minority in both groups (34 percent in the LAB and 44 percent in the non-LAB) had a prior failure to appear for court during their lifetime. Finally, the amount of the initial bail for the suspects in both groups was virtually identical. The average initial bail for LAB clients was $3,357, while for non-LAB cases it was $3,178.

H. Objective Findings: Did a Lawyer Improve Substantive Justice?

Did suspects provided with counsel have substantially better bail decisions than those without counsel? To answer this question, the first consideration was whether those defendants with lawyers were more likely to be released on their own recognizance, and we discovered that they were. Figure 1 reveals
that after the bail review hearing only 13 percent of those defendants without lawyers were released on their own recognizance, while 34 percent of LAB clients were. In other words, the LAB clients were over two and a half times more likely to be released on their own recognizance than were jailed defendants without lawyers. The presence of a lawyer, therefore, has made a substantial difference in the likelihood that a suspect would be released on recognizance. However, most jailed suspects were not immediately released on their own recognizance, but had to travel down the bail process.\footnote{\textit{See supra} notes 60-64. Maryland has a two-stage pretrial release procedure. First, the accused appears before a District Court commissioner, who considers numerous factors in deciding to order release or bail. Md. R. 4-216(e)(1)(A-I). Then, if still detained, he appears before a District Court judge at a bail review proceeding. Md. R. 4-216(g).}

\textbf{Figure 1: Percent of Defendants Who Were Released on Their Own Recognizance}

![Diagram showing percent of defendants released on their own recognizance with lawyer and no lawyer categories]

The next issue to address was how successful the presence of a lawyer was in lowering the amount of bail. The initial bail was set by a bail commissioner immediately after arrest and then reviewed at the bail review hearing. The bail review hearing officer could leave the dollar amount intact, lower it, or increase it. Before the bail review hearing the two groups had approximately the same amount of bail set. After the review hearing, LAB clients fared significantly better. The bail review hearing judge reduced the bail for over one-half of the LAB clients (59 percent), but for only 14 percent of the unrepresented defendants. In other words, defendants who had a lawyer were over four times more likely to have their bail reduced. Moreover, the amount of the reduction was significant.

The amount of bail after the bail review hearing is shown in Figure 2. The average bail after the hearing for suspects with lawyers was $2,441, while for those without lawyers it was $3,012.
Figure 3 graphs the pre-post bail review hearing difference in the bail set for the two groups of cases. On average the bail for LAB clients was reduced nearly $1,000, while the bail amount for the non-LAB clients was reduced only by an average of $166. Another way to look at this is that LAB clients had their original bail amount reduced almost by one-third, while those without lawyers had their initial bails reduced by less than 5 percent.

![Figure 2: Amount of Cash Bail After Bail Review Hearing for Defendants With and Without Lawyers](image)

There are a number of other ways to examine the effectiveness of LAB counsel at the bail review hearing. One is to examine if the LAB lawyers were successful in reducing their clients’ bail to a more affordable level, say $500 or under.\(^{118}\) Before the bail review hearing, a comparable percentage of defendants with and without lawyers had bails under $500; 9 percent of the LAB clients and 10 percent of the non-LAB clients had bails that were $500 or under. At the conclusion of the bail review hearing, however, the total of those with bail set at $500 or

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\(^{118}\) Should a judge set a 10 percent cash alternative, the individual could be released by posting $50 as security for a $500 bail bond. Absent a cash alternative, the individual would turn to a bail bondsmen, and pay the non-refundable $50, 10 percent fee.
under increased by 13 percent for the LAB clients, and only by 3 percent for the non-LAB clients. As Figure 4 shows, at the conclusion of the bail review hearing, 22 percent of jailed suspects with lawyers had bails of $500 or under, but only 13 percent of those without lawyers did.

![Figure 4: Percent of Defendants Who Had Cash Balls of $500 or Under After Bail Review Hearing](image)

One obvious consequence of the fact that suspects with lawyers at their bail review hearing were more likely to be released on their own recognizance or to have their bails reduced to a more affordable level was that they spent less time in jail. They were almost twice as likely as those without lawyers to be released on the same day they were arrested (38.7 percent v. 20.5 percent). Nearly two-thirds of those who were represented were released from jail within nine days of their arrest, while only half of those without lawyers were. The median time spent in jail was two days for represented suspects, nine days for the unrepresented.

The obvious question was why the appearance of counsel would make such a difference in the bail review hearing, often a very perfunctory event in the criminal justice process. One reason is that represented defendants could better present beneficial and verified information concerning the appropriate bail that supplemented the information provided by the pretrial release representative.\(^{119}\) The hearing took slightly more time when an attorney was present: on average, two minutes and thirty-seven seconds, versus one minute, forty-seven seconds without counsel.

In sum, nonviolent criminal suspects who were provided lawyers at their bail review hearings fared substantially better than those without lawyers. Although comparable before the bail

\(^{119}\) See supra note 63.
review hearing, suspects who were represented by LAB:

- were substantially more likely to be released on their own recognizance;
- were more likely to have their initially set bail reduced at the hearing;
- had their bails reduced by a greater amount;
- were more likely to have affordable bails ($500 or under) set;
- served less time in jail; and
- had longer bail review hearings.

The presence of a lawyer improved the substantive justice of clients at the bail review hearing. The next sections will address the cost savings representation achieved and whether there were any differences in perceived procedural fairness.

I. Collateral Benefits

The main effect of LAB was an increase in the number of people who were either released on their own recognizance or had their bail lowered such that they were able to make bail or be released prior to final disposition of their case. This effect is reflected in the change in the median number of days in jail from nine to two for all arrestees who had a lawyer at their bail hearing. This simply says that the “middle” person in LAB served seven days fewer than the “middle” person in the control group.

But the arrestees who benefit most from having a lawyer at the bail hearing are not the “middle” arrestees, but rather the individuals who would not have made bail without the intervention of a lawyer. If they fail to make bail, they are held in jail until their cases are resolved. The mean average days until disposition for those who do not make bail has been estimated in Baltimore to be 67.6 days, with a median of 38 days.\(^\text{120}\) This is a substantial period of time to be incarcerated before receiving a decision, especially when considering that nearly 3 of 5 detainees will ultimately receive either a nolle prosequi or outright dismissal, or a stet.\(^\text{121}\) Although we do not have evidence on the extent of

\(^{120}\) Faye S. Taxman, Karl I. Moline & Jason Marcello, Exploring Three Decision Points: An Analysis of the Baltimore Pretrial Process, at 25 (Md. Dep’t of Public Safety & Correctional Srvs. 2000) (unpublished manuscript, on file with author). The fact that the median is so much smaller than the mean tells us that the distribution is positively skewed (i.e., a number of people were in jail for substantially longer that 67.6 days before receiving a disposition).

\(^{121}\) In 1999, criminal charges against 58.1 percent of detainees were either dismissed or stetted, i.e., placed on the inactive docket. See id. Stetted cases are rarely prosecuted and
disruption in an individual's life, it is safe to assume that the cost is substantial.

To broaden this discussion, consider the result reported in the above section, namely that representation at the bail hearing increases the percent of arrestees who are released prior to disposition from 50 percent to 65 percent. This means that, for every 100 defendants, 15 will not have to spend time in jail prior to disposition. These 15 defendants would have remained incarcerated for an average of 67.6 days, even though 9 of them would ultimately have their cases dismissed or not prosecuted. Or, to put it another way, for every person given a lawyer at the bail hearing, we expect to save about 10 bed days overall, and 6 bed days for people who ultimately, have their cases dropped. It was not possible in the present project to quantify the cost of these bed days to the criminal justice system, but we conclude that these costs, too, are substantial.\footnote{Based upon the Lawyers at Bail study, a fiscal note for proposed legislation that would guarantee statewide representation at bail included a projected savings of $4.5 million in Baltimore City. Dep't of Legislative Srvs., Maryland Gen. Assem., Fiscal Note to S.B. 138 (2000).}

Given the relatively minor nature of the intervention, these effects could have a surprisingly large impact on the system in Baltimore if a) LAB was implemented system-wide and b) the program could maintain its integrity and effectiveness with larger size. For example, LAB served 4,000 clients during the time period of the study. Extrapolating the results of the experiment to these 4,000 clients, we estimate that 600 people avoided pretrial detention, reflecting a net savings of approximately 6,000 bed days. Of these, 340 ultimately had charges dropped, which reflects roughly 2,400 "unnecessary" bed days. We believe that the results of this experiment justify expanding LAB. Further study would determine whether the initial positive and large effect of LAB can be replicated as the program grows statewide. A more detailed and cost-benefit analysis is also warranted at this stage.\footnote{One potential cost of LAB involves the rearrest of individuals released on offense prior to the disposition on the first offense. To explore this possibility, for all defendants in this study who were released within nine days of arrest, we estimated the rate of rearrest rate for the next six months. We found nearly identical rates of rearrest of 10 percent for those who had a lawyer at the bail hearing and those who did not, suggesting that the extra releases resulting from representation did not lead to additional crime/arrest.}
J. Perceptual Findings: Did a Lawyer Improve Procedural Justice?

The law students in LAB interviewed a subset of suspects with lawyers and those without lawyers to obtain information about how they felt they were treated at their bail review hearing. It was expected that defendants with lawyers would think that they were treated more fairly. Seventy-eight represented clients and sixty-two unrepresented clients were interviewed.

1. Satisfaction with the Outcome of the Bail Review Hearing

The interviewed defendants were asked several general questions to calibrate their satisfaction with the outcome of their cases. In two out of three of these general assessments, defendants who had LAB lawyers were significantly more satisfied. For example, defendants were asked to estimate on a scale from 1 (very unsatisfied) to 10 (very satisfied) "how satisfied they were with the outcome of the bail review hearing." The average score for LAB clients was 7.14, while the for those without lawyers, it was only 5.44.124 In response to a query as to how satisfied they were with the way the judge treated them,125 the average score for LAB clients was 7.00, but only 5.78 for non-LAB clients. Thus, on two measures of overall satisfaction, represented defendants expressed a significantly higher level of satisfaction with how they were treated.

![Figure 5: Mean Level of Satisfaction With Bail Review Hearing for Defendants With and Without Lawyers](image)

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124 See infra Figure 5.
125 On one measure, there was no difference between the two groups. The mean answer level of satisfaction in response to the question, "How fairly do you think you were treated by the judge at your bail review hearing?" was 5.55 for LAB clients and 5.73 for defendants without lawyers. This difference is trivial and not statistically significant.
We were also interested in suspects' specific assessment as to how well they thought they had fared at the bail review hearing. Asked if they thought that the outcome was better, the same, or worse, than what most people received, 26.9 percent of defendants with lawyers thought that the outcome they received was better than what other defendants receive. Only 11.3 percent of defendants without lawyers thought that they received better outcomes. Nearly twice as many defendants without lawyers thought they received worse outcomes than others (56.5 percent v. 29.5 percent). Moreover, defendants with lawyers were also more likely to state that they received a more favorable outcome than what they expected to receive. Nearly one-half (44.9 percent) of defendants with lawyers thought that they received a better outcome than what they expected, while only 30.6 percent of those without lawyers thought that their outcome was better than expected. In addition, defendants without lawyers were almost twice as likely to state that they received a worse outcome than what they expected to receive, compared to those with LAB lawyers (40.3 percent v. 24.4 percent). In sum, represented clients were more satisfied with the outcome of their bail review hearing.

2. Suspects' Satisfaction with Their Treatment by Legal Authorities

 Defendants represented by counsel were also queried about how fairly they thought they were treated and how satisfied they were with the procedures. In virtually every dimension investigated, defendants who had lawyers were more satisfied with the manner in which they were treated. For example, while 32.1 percent of defendants with lawyers thought that they were treated better at the bail review hearing than expected, only 24.2 percent of the unrepresented thought they were treated better than expected. Nearly twice as many defendants without lawyers (40.3 percent v. 20.5 percent) thought that they were treated worse than what they expected. Sixty percent of the defendants with lawyers thought that the hearing officer devoted the right amount of time to the bail review hearing, compared to only 48.4 percent of those without lawyers. Defendants without lawyers were almost twice as likely to state that the bail review hearing officer failed to devote enough time to their bail review (41.9 percent v. 28.2 percent).

 Defendants with lawyers also were substantially more likely to think that they were treated more respectfully than those without counsel. Compared to those without lawyers, defendants
with counsel were more likely to think that the hearing officer in their case was polite and respectful toward them (91 percent v. 79 percent). Almost 20 percent (18 percent) of defendants without lawyers thought that the judge was "somewhat" rude to them, compared to only 5.3 percent of represented defendants. Of those defendants with lawyers, nearly 25 percent reported that the bail review judge showed a "great deal" of concern for their legal rights, compared with only 16.1 percent of those without lawyers. Moreover, a substantially larger proportion of defendants without lawyers thought that the hearing officer showed "very little" concern with their legal rights, compared to those with counsel (38.7 percent v. 26 percent).

One advantage of having a lawyer at the bail review hearing is that the lawyer is the conduit through which information flows to the court. Figure 6 shows that defendants with lawyers were substantially more likely than those without attorneys to report that the hearing officer had a "great deal" of information about their case before they made their bail decision (38.5 percent v. 22.6 percent). Figure 7 reveals that 65.8 percent of defendants with lawyers thought all of the information the bail review hearing officer had was correct, compared to only 50 percent of unrepresented defendants. Figure 8 reveals that almost twice as many defendants with lawyers thought that the hearing officer had considered their side of the story (48.1 percent v. 24.6). While nearly two-thirds of those defendants without lawyers (65.6 percent) thought that the hearing officer considered none of their views, only 36.4 percent of those with legal representation thought that their side of the story was not considered. Unrepresented defendants felt impotent at their bail review hearing: 75.8 percent felt that they had no influence over the decision made, compared with 56.4 percent of those with lawyers.

Figure 6: Percent of Defendants Who Thought That the Bail Hearing Officer Had A "Great Deal" of Information

![Graph showing percent of defendants who thought the hearing officer had a "great deal" of information, broken down by whether they had a lawyer or not.律师和无律师的增长线图。]
3. Suspects’ Perceived Effectiveness of Lawyers at Bail Attorneys

Clients were asked a series of questions regarding the effectiveness of their legal representation. They felt counsel had a substantial impact on their case. Nearly 90 percent of represented defendants thought that their attorneys had either “some” or “a lot of” opportunity to present their cases to the bail review hearing officer. Moreover, over 60 percent (61.5 percent) of jailed defendants with lawyers thought that their attorneys did influence the bail decision. Over two-thirds (70.5 percent) thought that their LAB lawyers made a difference in the amount of bail they had to pay, and nearly two-thirds (64.1 percent) thought that their lawyer made a difference in how they were treated by the bail review hearing officer. Finally, 64 percent of the LAB clients reported that their attorneys could not have been better.
4. Effect of Procedural Fairness on Intended Compliance

Fair procedures make it more likely that resulting decisions by authorities will be accepted by subjects even if they are unfavorable. Defendants with lawyers were more likely to express an intention to comply with the bail decision. Figure 9 shows that about two-thirds (67.7 percent) of those without lawyers reported that they were willing to accept the decision, while nearly 9 out of 10 (89.7 percent) of those with lawyers indicated the intention to abide by the bail decision. Of course, all defendants are required to "accept" the bail decision made for them. However, our evidence shows that this decision is more easily accepted when defendants feel they were fairly treated by authorities, and one key element of fair procedures is the provision of legal representation.

In our empirical evaluation of the Lawyers at Bail Project we have found substantial evidence that the presence of an attorney does make a substantial difference in the bail review hearing. Indigent suspects accused of non-violent offenses received a constellation of benefits from having an attorney. Suspects with lawyers were more likely to be released, released early, and with lower bails, than comparable suspects without lawyers. In addition, there were subjective benefits. Suspects who had legal representation were more likely to think that they were treated fairly, with respect, and more likely to have their views considered by the court than lawyerless defendants. These advantages to indigent criminal suspects come at a non-trivial cost savings to the local jail, and come at no greater risk of repeated criminal conduct. Given these numerous advantages of legal representation, we began to consider strategies that would broaden the impact of the Lawyers at Bail Project, such that legal counsel at the bail hearing would be more widely available in the state's criminal courts.

![Figure 9: Percent of Defendants Who Reported Willing to Comply With Their Bail Decision](image-url)
V. THE STRATEGY FOR CHANGE

The LAB study confirms that a lawyer's advocacy is the critical difference for determining whether indigent defendants will be released or will spend substantial periods of time in pretrial incarceration. The difference in this initial outcome has serious ramifications. Many nonviolent charges are ultimately dismissed or not prosecuted.\textsuperscript{126} During pretrial incarceration, detainees' loss of freedom results in many losing jobs and homes. Taxpayers are left to pay the rising costs of detention, while absorbing the social and financial impact of newly dislocated family members. When criminal charges are prosecuted, delaying lawyers' immediate entry jeopardizes the right to a fair trial by severely impairing the opportunity to conduct a prompt investigation, interview prosecution witnesses, and prepare a meaningful defense. Pretrial detainees are more likely to be convicted and to receive a harsher sentence than people freed pending trial.\textsuperscript{127} The right to counsel at bail hearings should be a reality in every state criminal court. The data is conclusive and it reveals manifest injustice, as well as costly inefficiency. Change in American law is likely to occur through two avenues: legislative enactment and funding, or judicial decision-making.

A. Legislative Enactment

Judicial and jail administrators, as well as prosecutors and assigned counsel, should welcome the LAB study's conclusions. Nonviolent, lower court offenses represent roughly nine of ten cases entering local criminal justice systems.\textsuperscript{128} Reform legislation

\textsuperscript{126} See supra note 3.
\textsuperscript{127} See id.; see also Barry C. Feld, Juvenile and Criminal Justice Systems' Responses to Youth Violence, 24 CRIME & JUST. 189, 230 (1998) ("[Y]ouths held in pretrial detention typically receive more severe sentences than do those who remain at liberty."); Stevens H. Clarke & Susan T. Kurtz, Criminology: The Importance of Interim Decisions to Felony Trial Court Dispositions, 74 J. CRIM. L. & CRIMINOLOGY 476, 502 (1983) (stating that as the length of time an individual spends in pretrial detention increases, the likelihood of the charges being dismissed decreases and the severity of the sentence increases); Jeffrey A. Kruse, Substantive Equal Protection Analysis Under State v. Russell and the Potential Impact on the Criminal Justice System, 50 WASH. & LEE L. REV. 1791, 1824 (1993) (stating that the probability of conviction increases drastically when a defendant remains in detention prior to trial).
\textsuperscript{128} See supra notes 2, 55. Nationally, in 1999, an estimated 14,031,070 people were arrested. Of these arrests, 635,999 or about 4.5 percent were charged with violent crimes, defined as murder, non-negligent manslaughter, forcible rape, robbery and aggravated assault. In Maryland, in 1999, less than 3 percent of arrests were for violent crimes. U.S. DEPT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE U.S., 1999, at
would remove many nonviolent offenders from the system early, reduce jail crowding and eliminate many cases from further prosecution, freeing attorneys to concentrate on more serious charges. While the LAB study provides objective data that representation at bail and during the preliminary pretrial stage will save taxpayers money and be cost effective, resistance will be formidable. As detailed below, since 1998, legislative efforts to pass reform measures have been met with open opposition from elected officials and behind-the-scenes lobbying by powerful interest groups. Bail bondsmen, in particular, have been instrumental in defeating proposed legislation that would protect individuals' rights and save taxpayers' money but might diminish bail bondsmen's profits by resulting in the release on recognizance of many detainees who otherwise would pay the standard 10 percent nonrefundable fee.129

1. A Case Study: Reform in Maryland

During the planning stages of LAB, many individual judges, correction officials, and even public defenders expressed skepticism about the idea of guaranteeing lawyers at a bail hearing for accused indigents. Skeptics argued that lawyers would take too much of a court's and a lawyer's precious time and would make little difference in the outcome.130 The legal culture had long accepted the public defender's late appearance in a case. There was no reason to rock the boat and argue for increased funding in the context of severely restricted resources.

LAB worked to overcome these misperceptions and ultimately obtain funding for the State Public Defender to provide representation at bail hearings. During its first months of operation, LAB showed that such representation assisted judges, reduced Baltimore's pretrial jail population, and was time-efficient. However, project supporters—primarily lawyers and law students—were divided in choosing the best strategy to achieve reform. Initially, they favored litigation, rather than a legislative strategy, since they were familiar with planning strategy in the courtroom, not the statehouse, and were more confident they could predict uncertainties within the judicial process. They cringed at the unwieldy horse trading practiced by elected officials and thought they had a better chance at convincing a few judges

212, 270-76 (USPGO 2000).

129 See supra note 91; see also infra notes 146, 148, 154.
130 See supra notes 82-83 and accompanying text.
than at gaining the votes of key legislators.

At the same time, lawyers recognized that litigation would be expensive and would likely involve lengthy appeals. They were concerned that an adversarial approach might undo the support LAB had gained and needed for lasting change. Even if litigation succeeded, it might cause greater resistance by the legislative and executive branches, denied the opportunity to correct the problem. Further, a court might hesitate to intervene in the absence of proof that a legislative or executive remedy was unavailable. To explore the litigation choice, Project supporters enlisted as co-counsel the Maryland American Civil Liberties Union and a large Washington, D.C. firm.\textsuperscript{131} To give full consideration to the legislative option, the Maryland State Bar Association provided an experienced lobbyist and pledged its full support.\textsuperscript{132}

\section{Choice of Strategy: Maryland's General Assembly 1998-2000}

Supporters agreed to begin with a legislative strategy in order to educate the public and garner broad interest. Late in the 1998 legislative session, a sympathetic legislator proposed a statewide bill, which the Maryland State Bar Association strongly supported.\textsuperscript{133} Joined by the judiciary, proponents conditioned the proposed bill upon additional government funding for the under-resourced office of the Public Defender.\textsuperscript{134} Since this session occurred prior to LAB, proponents relied upon a favorable fiscal note\textsuperscript{135} and on first-hand accounts by attorneys and Maryland law

\textsuperscript{131} Arnold & Porter, Washington D.C.
\textsuperscript{132} See infra note 134.
\textsuperscript{133} On January 28, 1998, the General Assembly's final day for filing a bill and being guaranteed a public hearing, Delegate Kenneth C. Montague, a Baltimore City representative and the co-chair of the Maryland Legislative Ethics Committee, introduced House Bill 1092. Though proponents thought that there was too little time to plan the hearings, the legislator reasoned that new bills rarely pass the first time and this would be an opportunity to evaluate legislative support. The bill was assigned to the House Judiciary Committee, chaired by Delegate Joseph F. Vallerio (Prince George's County). In 1998, there was no bill cross-filed in the Senate. Had House Bill 1092 received a favorable vote in the judiciary committee, it would have been considered by the full House of Delegates. A majority vote in favor of passage would have sent the bill directly to the Senate and to its Judiciary Committee for consideration. See B. Winchester, The Mousse That Roared, 8 MD. STATE BAR ASSOC. LEGISLATIVE UPDATE, Feb. 27, 1998.
\textsuperscript{134} In introducing the bill, Buz Winchester, representing the Maryland State Bar Association, indicated that the measure required additional funding and should not be considered as asking the Public Defender to take on additional responsibility without the ability to hire more attorneys and intake staff. See id. Maryland's Chief Judge of Special Appeals, Joseph Murphy, and Professor Colbert also testified and emphasized this point in their remarks. See id.
\textsuperscript{135} The Department of Legislative Services of Maryland's General Assembly prepared
students, who recounted the benefits of early representation from their experience conducting bail hearings as part of the Access to Justice law school clinic.\textsuperscript{136} Some House Judiciary legislators challenged the testimony and questioned the adequacy of anecdotal evidence.\textsuperscript{137} In addition, the bill’s prospect for passage suffered a blow when the influential committee chair argued that the Public Defender was not needed, since a pretrial release representative was usually present to provide the judge with information.\textsuperscript{138}

The most surprising development was the testimony of the Maryland Public Defender as the lone witness in opposition.\textsuperscript{139} Belittling the accomplishments of law students, he expressed concern that the bill did not seek specific funding for bail representation and could require his current staff to take on an added responsibility without additional funding. The House of Delegates defeated the measure.\textsuperscript{140}

Following the 1998 session, proponents again weighed legislative versus litigation initiatives. They were encouraged by several developments. First, the Abell Foundation made a grant to predict that the $2.2 million cost for House Bill 1092 would be offset depending “largely upon the success with which the Office of the Public Defender could demonstrate to courts that individual defendants are low flight risks and are not a danger to the community.” Dept of Legislative Svrs., Maryland Gen. Assem., Fiscal Note to H.B. 1092 (1998). The fiscal note used “for illustrative purposes” the following: if the Public Defender “is successful in reducing . . . pretrial detainees by more than 6 percent as a result of this bill, the theoretical savings . . . would more than offset the costs of the bill.” Id. at 3. In his prepared testimony, Professor Colbert estimated that representation would result in release on recognizance for at least 20 percent of detainees; he predicted that one of three individuals represented by the public defender’s office would be released from jail following the bail hearing.

\textsuperscript{136} Law students Pace Duckenfield, Helen Lee, and Joe Key, and attorney Erin Schaden testified.


\textsuperscript{138} House Judiciary Committee Chair, Joseph F. Vallerio, Jr., a private criminal defense attorney in Prince George’s County, expressed his view that the public defenders were not necessary because a pretrial release representative was present in the courtroom. Proponents replied that a defense attorney would provide judges with additional verified bail information about an accused’s employment, family and community ties, and serve as a check against inaccurate or incorrect information. Proponents added that an attorney’s role as an advocate is entirely different than a pretrial representative’s role. Moreover, they added that most Maryland jurisdictions do not fund a pretrial release agency; where such an office existed, the pretrial representative’s caseload made it very difficult to speak knowledgeably about each individual detainee. See id.

\textsuperscript{139} Stephen H. Harris has served as the Public Defender of Maryland since 1991. In the 2000 General Assembly, Public Defender Harris testified in favor of the legislation, stating “I think justice will be done where a defendant’s lawyer is able to get into the case at a very, very early date.” M. Dion Thompson, Administration, Advocates at Odds Over Bill to Expand Bail Project, BALTIMORE SUN, Mar. 8, 2000, at 2D.

to establish LAB. Second, the Maryland Bar Association and the judiciary pledged continued support. Third, proponents had time to form a coalition and make a more complete legislative presentation. By November 1998, they had reached an agreement at the office of the State Attorney General: pending the outcome of the 1999 legislative session, proponents would place litigation on the back-burner; in return, the Public Defender would publicly support the legislation.

During the 1999 General Assembly, the Maryland State Bar sponsored similar counsel-at-bail legislation and conditioned implementation upon a supplemental appropriation for the Public Defender. Support had grown considerably, and now included the Maryland judiciary, State’s Attorneys’ Association, state police, corrections, private and public defense bar, the business and religious community, favorable editorials and a statement of support by the Governor.

At the public hearings, many witnesses testified in favor and no public opposition came forward. Though the House Chair continued to oppose the bill, the first vote was scheduled in the Senate Judiciary. During testimony, the Senate committee chair embraced the bill, but a key supporter changed his position and cast the decisive vote against the bill. The media identified the State Senator as a licensed bail bondsman. The bondsmen’s

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141 See supra Part II.B.
142 Conversations with Maryland State Bar President, Charles M. Preston, and Maryland Court of Appeals Chief Judge Robert M. Bell (Jan. 1999).
143 Delegate Kenneth C. Montague, joined by fourteen colleagues, introduced House Bill 889. H.B. 889, 1999 Reg. Sess. (Md. 1999). Senator Leo Greene, a member of the Senate Judiciary Committee, introduced Senate Bill 335, which three colleagues co-sponsored. S.B. 335, 1999 Reg. Sess. (Md. 1999). Both bills were filed in a timely manner, see supra note 133, and contained similar language, the only notable difference being whether the state and locality would share in funding the cost of public defenders.
144 See Editorial, Lobbyists’ Ploy Risks Bid To Unclog Courts, BALT. SUN, Mar. 19, 1999, at 22A; Editorial, Doing the Bidding of Bail Bond Businesses, BALT. SUN, Mar. 25, 1999, at 28A [hereinafter Doing the Bidding]. In addition to the principal players within the state criminal justice system, Maryland Attorney General Joseph Curran, former United States Attorney General Benjamin Civiletti, and former United States Attorney for Maryland Jervis Finney also wrote in support of the legislation.
145 On February 22, 1999, Governor Paris Glendenning appeared on the Mark Steiner National Public Radio program. When asked whether he supported the public defender representation at bail bill, Governor Glendenning indicated that he believed in a poor person’s right to an attorney and favored the bill because it was fair and prudent. See The Mark Steiner Show (National Public Radio broadcast, Feb. 22, 1999).
146 State Senator Clarence Mitchell IV, representing one of Baltimore’s most impoverished neighborhoods, had been one of the Bill’s most vocal supporters. See Thomas W. Waldron, Panel Kills Bail-Review Lawyer Bill, BALT. SUN, Mar. 24, 1999, at 1B. His eleventh-hour defection was the decisive vote against the bill and prevented the full Senate from considering it. See id. According to the Baltimore Sun, Senator Mitchell was a licensed bail bondsman, who had business signs posted at his home office indicating
powerful lobby had conducted a vigorous behind-the-scene campaign against the proposed legislation. They considered the guarantee of counsel as a threat to their lucrative business in which arrestees were required to repurchase their freedom by paying a mandatory 10 percent fee.147 Supporters recovered in time to gain a partial victory. Following a series of scathing editorials against the bail bondsmen,148 supporters convinced the Governor to provide additional funding for the Baltimore City's Public Defender office to represent poor people at bail review hearings.149

During the 2000 General Assembly, the consensus in favor of the bill was stronger than ever and included the support of Maryland's Attorney General. Witnesses included a representative for Maryland's Chief Judge, a senior prosecuting

that he was still operating his business. See id. at 5B. Subsequent news reports revealed that bondsmen had loaned Senator Mitchell $10,000 in 1997. This amount remained unpaid at the time the Senator reversed his position and voted against the 1999 legislation. See Ivan Penn, Mitchell Sought Loan of $10,000: Two Bail Bondsmen, Bus Company Owner Aid State Senator, BALT. SUN, Feb. 12, 2002, at 1A; Ivan Penn, Mitchell Given Reprimand Over Ethics Violation: Rebut by Assembly Harshest Step Against Lawmaker in 4 Years, BALT. SUN, Feb. 27, 2002, at 1A.

147 For most offenses Maryland's Rules entitle an accused to pretrial release on the least onerous conditions, beginning with non-financial conditions and then moving to financial bond. Md. R. 4-216. When considering financial bond, judges have several options: they are required to first look to the less onerous unsecured collateral bond, then to a 10 percent cash alternative, and finally to a full bond. Full bonds may be secured either by depositing the full 100 percent cash amount with the court, by posting a property deed for the value of the bail, or by paying a bail bondman a non-refundable 10 percent fee to underwrite the bond. In 1998 and 1999, Maryland judges ordered the less onerous, preferred options of the unsecured bond and the 10 percent alternative for only 7 percent of detainees. In comparison, 60 percent of detainees gained pretrial release by paying a bail bondsmen. In some counties, such as Baltimore city, Baltimore County, Western Maryland, and parts of the Eastern Shore, more than three out of four detainees relied on bail bondsmen to regain their liberty while awaiting trial. See PRETRIAL RELEASE STUDY, supra note 59.

148 See generally Doing the Bidding, supra note 144; D. Berger, Bergerisms, BALT. SUN, Mar. 30, 2000, at 11A (“If the General Assembly must choose between the interests of the bail bond industry and those of the citizenry, guess who wins?”); B. Rascovar, Lawmakers Undermine Court Reform, Getting Away with Murder, BALT. SUN, Mar. 31, 1999, at 23A (criticizing Sen. Clarence Mitchell IV, a bail bondman, for opposing a bill beneficial to his constituents); Getting Away with Murder, BALT. SUN, Mar. 19, 1999, at 22A (asserting that greed is the real reason for opposition); Matthew Mosk, Chairman Opposes City Courts Bill, Valerio, Bail Firms Campaign Against It, WASH. POST, Mar. 18, 1999, at 1A.

149 At the conclusion of the 1999 General Assembly, Governor Glendenning's supplementary budget included two items, one for $300,000 and the second for $250,000, which were designated for public defenders to represent Baltimore City indigent defendants at bail review hearings during the fiscal year of 2000. In mid-July, 1999, public defenders began to represent some defendants; by September and for the rest of the fiscal year, public defenders extended representation to include roughly 60 percent of Baltimore City defendants. During the fiscal year of 2001, Governor Glendenning increased funding to public defenders to permit them to represent every indigent defendant at bail review hearings. Dep't of Leg. Srvs., Fiscal Note, S.B. 138, 2000 Gen. Assem. (Md. 2000). See also supra note 87.
attorney representing the State's Attorneys' Association, and state bar officials. The bill gained full Senate support, but was once again derailed. The Governor withdrew his support. The Public Defender, who had not criticized the bill publicly, falsely charged in Maryland's daily legal newspaper that the LAB study was skewed and not worthy of acceptance. Even with these setbacks, supporters moved forward. They proposed a late starting date for the proposed legislation in order to convince local and state government to share in the cost of funding. They lobbied House Judiciary committee members and appeared to have majority support for sending the bill to the full House, where passage was likely. But the bill never reached the House floor. The Chair of the House Judiciary committee buried the bill and never permitted members to vote. According to several members, the Chair had asked the committee not to push toward a vote as a personal favor, citing the recent murder of the wife of a dear friend and well-known bail bondsmen.

3. Legislative Recap

Legislative reform efforts in Maryland were reminiscent of playing Chutes and Ladders. The closer reformers came to reaching the coveted finish line, the more likely they were to slide backwards to begin again. Future success will depend upon

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150 The Judicial Proceedings Committee approved the bill, six to four. Senate of Maryland, Judicial Proceedings Committee Voting Record (Mar. 16, 2000). The full Senate then voted in favor, forty-one to six. Senate of Maryland, Vote Record 0576, 2000 Gen. Assem. (Md. 2000).
151 Maryland Department of Budget & Management, Position Statement on Senate Bill 138 (2000).
152 See Doug Colbert & Ray Paternoster, Law Professors Respond to Claims of 'Skewed' Bail Study, DAILY REC., April 22, 2000, at 3C (replying to Maryland Public Defender Stephen E. Harris, who had been previously quoted as criticizing the methodology of the “Paternoster Study”: “[W]hat Colbert did was take three to five clients a day, all nonviolent offenders. The general characteristics were that the defendants had been employed for up to five years by the same employer and lived at the same address. . . . He's skewed the study with these kinds of clients.” Joe Surkiewicz, Little Hope for Statewide Bail Bill, DAILY REC., Mar. 16, 2000, at 1A.
153 Chair Joseph F. Vallerio, Jr. chose to prevent the bill from being considered by the House Judiciary committee. See Matthew Mosk, Chairman Opposes City Courts Bill, WASH. POST, Mar. 18, 1999, at 1A.
154 Legislative supporters revealed that the Chair made these remarks shortly after returning from the funeral of the wife of bail bondsmen Dino Pantanzis. Several weeks later, Mr. Patanzis was charged with hiring his wife's killer. Chairman Vallerio represented Mr. Pantanzis at his bail hearing. See Jaime Stockwell & David Nakumura, Md. Bondsmen Accused of Hiring D.C. Woman To Kill His Wife, Is Denied Bond, WASH. POST, Apr. 29, 2000, at B3.
whether supporters are able to galvanize public support in favor of law reform by showing its necessity in the management of criminal justice systems statewide. The proposed legislation received much public attention and educated many about the shortcomings of the legal system’s promise to guarantee counsel for accused indigents. Within two years, reformers succeeded in funding early representation in Baltimore, the jurisdiction with the highest volume of criminal cases. Currently, Maryland guarantees representation at bail for 60 percent of arrestees, a three-fold increase of those guaranteed representation prior to the Lawyers at Bail Project.\textsuperscript{155} Reformers’ future legislative efforts will target the remaining counties by showing the cost saving benefits of early representation elsewhere in the state. Supporters are now prepared to reconsider a litigation strategy. In the following section, several different legal theories are discussed for gaining judicial approval.

B. Judicial Decision-Making and Litigation Reform

Advocates seeking to guarantee representation at bail through litigation should consider federal and state constitutional arguments, and rely upon state statutes that entitle an accused indigent to representation in a criminal case. Specifically, a court may find persuasive the following arguments. First, bail is a critical stage that requires states to provide counsel based upon a federal Sixth and Fourteenth Amendment analysis and a state constitutional analysis. Second, an accused’s federal and state due process right to a fair trial requires the immediate presence of counsel at bail hearings and immediately thereafter. Third, an accused’s procedural due process right to counsel is essential to avoid erroneous decisions at the bail determination. In the end, advocates’ best opportunity for reform may be based upon arguing that an accused’s statutory right to counsel includes representation at the bail stage.

\textsuperscript{155} Prior to LAB, the office of the public defender only represented indigent defendants in Montgomery and Harford counties, which represent about 20 percent of Maryland’s total arrest in 1998 and 1999. Beginning in mid-July, 1999 and continuing to date, the office of the public defender has represented indigents in Baltimore City, which contains Maryland’s highest volume of criminal cases. Conversation with Ted Weiseman, Office of the Public Defender (May 25, 1999).
1. Bail As a Critical Stage

In the absence of a United States Supreme Court ruling\textsuperscript{156} or a state court ruling\textsuperscript{157} that bail is a critical stage of a criminal case, state governments have felt free to deny counsel to indigents for judicial pretrial release determinations. To achieve recognition that the right to counsel, as guaranteed by the Sixth and Fourteenth Amendments, requires lawyers at these proceedings, one must revisit the Supreme Court's 1974 decision in \textit{Gerstein v. Florida},\textsuperscript{158} and address the reality of lawyers' absence from the early stages of the typical state criminal proceeding.

As previously detailed,\textsuperscript{159} the doctrinal underpinnings for a constitutional right to counsel at bail hearings began in \textit{Powell v Alabama},\textsuperscript{160} where the Supreme Court reversed the defendants' capital convictions because they had been denied a lawyer until the actual day of trial. In holding that delayed representation deprived the defendants of a fair trial, the Court emphasized that an accused's due process right required counsel's assistance during the "\textit{most critical period of the proceedings . . . the time of . . . arraignment . . . until the beginning of trial when consultation, thoroughgoing investigation and preparation \textit{are} vitally important}.”\textsuperscript{161} Powell's unmistakable clear understanding of the lawyer's essential role from the moment charges are initiated until trial is the foundation from which to build a successful argument for the right to counsel at bail. However, the holding in \textit{Powell}

\textsuperscript{156} The Supreme Court has never decided whether the constitutional right to counsel applies to the bail stage. State courts, too, have rarely been asked to decide this issue. \textit{See} Colbert, \textit{supra} note 5, at 35-40. Scholars have indicated that the right to counsel should include bail proceedings. \textit{See} WAYNE R. LAFAVE & GERALD H. ISRAEL, \textit{CRIMINAL PROCEDURE} § 12.1(c) (2d ed. 1992); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, \textit{CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS} §§ 20.03, 31.03 (3d ed. 1993); YALE KAMISAR, \textit{MODERN CRIMINAL PROCEDURE} 872 n.8 (8th ed. 1994).

\textsuperscript{157} Relatively few state courts have considered this issue. In \textit{State v. Fann}, 571 A.2d 1023 (N.J. Super. Ct. L. Div. 1990), a New Jersey Superior Court held that the bail determination stage was critical under federal and state constitutional guarantees. The \textit{Fann} ruling reviewed the New Jersey law which had considered the right to bail a statutory right since 1844, and concluded that a lawyer's presence was necessary because pretrial detention had serious liberty and property consequences for detainees. \textit{See} Colbert, \textit{supra} note 5, at 37-39. Several state appellate courts have rejected the argument that bail is a critical stage, absent a showing that the lawyer's absence prejudiced the trial outcome. \textit{See}, e.g., Green \textit{v. State}, 872 S.W.2d 717, 719 (Tex. Crim. App. 1994); Ridenour \textit{v. State}, 639 S.E.2d 288 (Ind. Ct. App. 1994); \textit{State v. Williams}, 210 S.E.2d 298, 301 (S.C. 1974); \textit{Hebron v. State}, 281 A.2d 547, 549 (Md. Ct. Spec. App. 1971).

\textsuperscript{158} 420 U.S. 103 (1975).

\textsuperscript{159} \textit{See supra} notes 18-23 and accompanying text.

\textsuperscript{160} 287 U.S. 45 (1932).

\textsuperscript{161} \textit{Id.} at 57 (emphasis added).
was limited to capital cases.\textsuperscript{162}

Powell's due process analysis was applied to the Sixth Amendment guarantee to counsel in \textit{Gideon v. Wainwright},\textsuperscript{163} where the Court emphasized the importance of a lawyer's advocacy to achieve "a fair system of justice"\textsuperscript{164} and to give substance to a poor person's right to be defended at felony trials. \textit{Gideon} reiterated Powell's conclusion: every person accused of a serious crime must have "the guiding hand of counsel at every step in the proceedings to ensure that the trial right is meaningful."\textsuperscript{165} Within the next decade, Court decisions extended an accused indigent's right to counsel to the pretrial,\textsuperscript{166} as well as trial,\textsuperscript{167} stages of misdemeanor and felony charges. \textit{Gideon} and its progeny recognized that "[i]n an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel."\textsuperscript{168}

The Supreme Court formalized Powell's general reference to the "critical" arraignment-to-trial stage by mandating that states provide lawyers for indigent defendants at specific pretrial proceedings. In \textit{United States v. Wade}\textsuperscript{169} and in \textit{United States v. Ash},\textsuperscript{170} the Court elaborated on criteria used in determining what constituted a critical stage. In \textit{Wade}, the Court declared that counsel was needed to ensure that an accused "not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."\textsuperscript{171} The Court added that counsel's presence at such a critical stage would "assure a meaningful 'defen[s]e,'"\textsuperscript{172} and "help avoid a potential substantial prejudice to defendant's rights."\textsuperscript{173}

\begin{thebibliography}{99}
\bibitem{162} See \textit{id.}
\bibitem{163} 372 U.S. 335 (1963).
\bibitem{164} \textit{Id.} at 344 ("[E]very defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with [a] crime has to face his accusers without a lawyer to assist him.").
\bibitem{165} \textit{Id.} at 345.
\bibitem{167} See Argersinger v. Hamlin, 407 U.S. 25 (1972) (holding that the constitutional right to counsel includes misdemeanor offenses). \textit{But see} Scott v. Illinois, 440 U.S. 367 (1979) (limiting Argersinger's application to misdemeanors where the defendant received a jail sentence.)
\bibitem{169} 388 U.S. 218 (1967).
\bibitem{170} 413 U.S. 300 (1973).
\bibitem{171} \textit{Wade}, 388 U.S. at 226 (emphasis added).
\bibitem{172} \textit{Id.} at 225.
\bibitem{173} \textit{Id.} at 227.
\end{thebibliography}
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In *United States v. Ash*, the Supreme Court explained that states must provide counsel for indigent defendants “at trial-like confrontations,” where the lawyer is needed “to act as a spokesman for, or advisor to, the accused.” The Court identified arraignment and preliminary felony hearings as such confrontations. At these proceedings, “[t]he function of the lawyer has remained essentially the same as his function at trial”—to guarantee that the accused had “counsel acting as [her] assistant.” These proceedings triggered a right to counsel because the “unaided layman [defendant] had little skill in arguing the law or in coping with an intricate procedural system.” A lawyer’s presence was critical to balance “inequality in the adversarial process” for the unrepresented accused.

Representation at bail fits within the Court’s critical stage analysis under *Wade* and *Ash*. A lawyer’s presence at bail “avoids substantial prejudice to defendant’s trial rights” by providing the opportunity for counsel to commence an immediate “thoroughgoing investigation” and to prepare an adequate defense. The lawyer’s advocacy also guards against an accused inadvertently making an incriminating statement in an effort to regain freedom. As the LAB study revealed, legal representation at bail often makes the difference between an accused regaining freedom and remaining in jail prior to trial. Since pretrial detention leads to higher conviction rates and longer sentences, the potential for substantial prejudice and to “derogate from the

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175 Id. at 312.
176 Id.
177 Id. at 307.
178 Id. at 319.
182 See infra Part III.
accused’s right to a fair trial\footnote{Wade, 388 U.S. at 226.} is great for unrepresented detainees. The LAB study will be an important tool in meeting Ash’s showing that a lawyer’s advocacy is necessary to level the playing field for unrepresented indigent defendants. Unrepresented indigent defendants are rarely able to respond effectively to a prosecutor’s bail argument that places great weight on allegations of guilt and other considerations in seeking pretrial incarceration.\footnote{In Maryland, commissioners are responsible for rendering the initial pretrial release decision. See MD. R. 4-213. Maryland’s Rules provide numerous factors for judicial officers to consider; the first factor listed is the nature and circumstances of the charge. In a statewide survey conducted in January of 2000, 97 percent of the commissioners indicated that they give the most weight to this factor in deciding pretrial release. Ninety-four percent said that a defendant’s prior criminal record and failure to appear in court were the second most decisive factor. Community ties, such as residence, employment, and family, and the detainee’s ability to afford bail were given considerably less weight. See PRETRIAL RELEASE STUDY, supra note 59, at app. E (Prof. Paternoster’s analysis of Maryland commissioners’ pretrial release adjudicative practices).}

In \textit{Gerstein v. Pugh},\footnote{Id. at 124-25 n.25 (referring to the proposal in the Uniform Rules of Criminal Procedure that would have guaranteed representation at bail within five days of arrest). The Court also referred to an American Law Institute Model Code which provided for assigned counsel within two days following a magistrate’s hearing. See id. at 55. In \textit{County of Riverside v. McLaughlin}, 500 U.S. 44, 55 (1991), the Court also referred to its belief that “the appearance of counsel [would be] arranged” at the accused’s initial court appearance. Id. at 55; see also McNeil v. Wisconsin, 501 U.S. 171, 180-81 (1991) (referencing the fact that “most states” provide “free counsel” for “serious” offenses, in a case where the defendant was represented by counsel at the bail stage).}\footnote{See supra Part I.} by a five-vote majority, the Court rejected counsel’s necessity at the probable cause hearing, based on its mistaken belief that a lawyer would soon appear to represent the accused.\footnote{See Gerstein, 420 U.S. at 123-24, (encouraging “flexibility and experimentation by the States,” adding that states might choose to “incorporate” the probable cause determination “into the procedure for setting bail”).} In fact, many jurisdictions deny representation at bail and do not guarantee counsel during significant portions of the pretrial stage.\footnote{See Colbert, supra note 5, at 32-37.} The Court compounded its error when it inadvisably suggested that states could combine bail with probable cause determinations, thereby implying that bail determinations were not critical stages.\footnote{Id.} Consequently, it is easy to understand states’ reliance upon \textit{Gerstein} to authorize their refusal to assign counsel for poor people at bail hearings.\footnote{Id.} More than twenty-five years later, it is time for the Court to revisit \textit{Gerstein} and to acknowledge the failure of states’ experimentation with lawyerless bail/probable cause hearings. In the absence of defense counsel, too many judges are making
incorrect pretrial release decisions, factual investigations are being significantly delayed, and detainees are spending inordinate time in overburdened jails at great social cost. While Gerstein did not find that a lawyer’s absence at a probable cause determination “impair[ed] a defense on the merits”, it is doubtful that the Court would have reached a similar conclusion had it known that counsel would make such a tardy appearance.

Bail proceedings have much in common with the formal felony arraignment, which has long been recognized as a critical stage requiring counsel. At each proceeding, an accused is informed of the charges, enters a plea, is given notice of statutory and constitutional rights, faces the loss of pretrial liberty, and must cope with the “intricacies of substantive and procedural law.” Since Gerstein, court decisions have blurred the distinction between an accused’s Sixth Amendment right to counsel at arraignment of a felony indictment and at a lower criminal court arraignment. Once adversarial proceedings commence, said the Supreme Court, “a suspect has become an accused within the meaning of the Sixth Amendment” and he is entitled to the assistance of counsel. Recognizing that there is no perceptible difference between the lawyer’s critical role at the arraignment stage, the Court need take but a short step to recognize that lawyers’ presence at the outset is essential for protecting an accused’s right to a fair trial and ensuring accurate pretrial release outcomes.

2. Fourteenth Amendment Due Process Right To a Fair Trial

In jurisdictions where the practice in state courts significantly delays the lawyer’s entry for a significant period following the bail determination, a Fourteenth Amendment due process argument should succeed in revealing the damage to an accused’s right to obtain a fair trial. Indeed in Powell v. Alabama, decided sixty-five years ago, the Supreme Court recognized that an accused is denied the fundamental right to be heard and to present a defense where a local court’s “designation of counsel . . . was either so indefinite or so close upon the trial as to amount to a denial of effective and

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190 Gerstein, 420 U.S at 122.
192 In Michigan v. Jackson, 475 U.S. 625, 632 (1986), the Court followed the bright-line rule established in Kirby v. Illinois, 406 U.S. 682 (1972). In Kirby, the Court held that the right to counsel commenced at the “initiation of judicial criminal proceedings,” since it was then that “the government has committed itself to prosecute . . . and a defendant finds himself faced with the prosecutorial forces of organized society.” Id. at 689.
substantial aid.”

Powell’s experience of meeting his lawyer on the day of trial will resonate with many current detainees, who do not learn their appointed lawyer’s identity or confer with trial counsel until long after the bail hearing, and frequently in misdemeanor charges not until the day their case is scheduled for trial or resolved by plea.

As described above, lawyers’ early representation is necessary to conduct a prompt investigation and to locate and interview witnesses necessary to build a successful defense. The longer an accused is without counsel, the less likely important witnesses will be available or willing to speak. Moreover, the defense’s ability to locate witnesses is greatly enhanced when a lawyer’s advocacy succeeds in gaining a client’s pretrial release. Many potential witnesses are more likely to cooperate and provide information when the lawyer, an unfamiliar face and frequently from a different race and class background, is accompanied by someone they know.

Pretrial detention also undermines the attorney-client relationship. Unrepresented detainees will usually have little confidence in a lawyer with whom they have not spoken, nor heard argue in court, and indeed often meet for the first time on the date of trial. Lawyers who remain passive sideline observers during the crucial stage following arrest add to an accused’s doubt of counsel’s ability to mount a meaningful defense. In practical terms, a lawyer’s late appearance increases the probability that an accused will opt to plead guilty, rather than risk conviction at trial with an apparently unprepared lawyer. Incarceration without representation saps many people’s will to fight, including detainees who steadfastly maintain their innocence. Consequently, a due process challenge, based upon a detainee remaining in jail and without counsel for a lengthy pretrial duration, may succeed in some jurisdictions.

3. Procedural Due Process

An accused’s right to procedural due process protection should be triggered whenever a state’s criminal procedure practices denies counsel to an accused at the bail stage where individual liberty interests are at stake. The LAB study shows that the risk of an erroneous pretrial release decision is unacceptably

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high for unrepresented detainees.\textsuperscript{194} In such circumstances, the adversarial due process safeguard of guaranteeing counsel to poor people would appear necessary to constrain government action which otherwise would wrongly deprive an individual of personal liberty prior to trial. Indeed, if a court were to apply the Supreme Court's three-prong procedural due process balancing analysis in Matthews v. Eldridge,\textsuperscript{195} it would surely tip the scales in favor of the accused: guaranteeing counsel would reduce the likelihood of an erroneous judicial bail decision and would protect the individual's weighty liberty interest against unjust pretrial incarceration at an insubstantial cost to the government. Litigation reformers, however, would soon discover a major obstacle blocking its reliance on Matthews.

In Medina v. California,\textsuperscript{196} the Supreme Court rejected Matthews' due process analysis in upholding a state's evidentiary rule which placed the burden of proof on an accused to prove incompetence to stand trial by a preponderance of the evidence. The Medina Court broadly declared that "the Matthews balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which . . . are part of the criminal process."\textsuperscript{197} Instead, said the Medina Court, states possess the power to regulate their criminal procedure rules, except in the relatively rare situation where state practices violate fundamental fairness by "offend[ing] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."\textsuperscript{198}

Is the judicial determination of liberty pending trial a "procedural rule" that is "part of the criminal process," and therefore within states' power to regulate? Or is it distinguishable from evidentiary standards of burden and persuasion of proof to

\textsuperscript{194} Considering that a lawyer's representation at bail for people charged with non-violent offenses resulted in two and a half as many incarcerated detainees released on recognizance, and two and a half as many receiving an affordable bail, see discussion supra notes 132-34, judges risk rendering erroneous bail determinations because of inadequate or incorrect information pertaining to each individual defendant. See supra note 63.

\textsuperscript{195} 424 U.S. 319, 335 (1976). In Matthews, the Court identified three relevant factors for determining whether procedural due process required adversarial safeguards. The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected if those safeguards are not provided. See id. at 335.

\textsuperscript{196} 505 U.S. 437 (1992).

\textsuperscript{197} Id. at 443.

be applied at trial?\textsuperscript{199} Medina's cursory, one-line declaration provides little assistance.\textsuperscript{200} But there would appear sufficient room to argue, and for a court to accept, that the bail hearing is fundamental to individual liberty and is considerably different from automatically deferring to a state's procedural evidentiary rules.

While the Supreme Court may be unwilling to interfere in state criminal process procedures which do not involve issues of fundamental fairness, it should have little difficulty in finding a due process violation when the state practice impedes an accused's right to present a defense and denies meaningful access to justice. In \textit{Ake v. Oklahoma},\textsuperscript{201} the Supreme Court applied \textit{Matthews} and struck down a trial court's refusal to provide the defense with the necessary resources to present rebuttal psychiatric testimony. In such situations, the Court expressed its "belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."\textsuperscript{202}

Denying an accused access to an attorney at the bail stage deprives an accused meaningful participation in a judicial pretrial release decision that determines whether the individual remains incarcerated or is freed. In addition, the lawyer's absence during the crucial early stage of a criminal prosecution would be fundamentally unfair when it severely restricts an accused's ability

\textsuperscript{199} In \textit{Patterson}, Justice White stated that "[a]mong other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion.'" \textit{Id.} at 201 (citations omitted).

\textsuperscript{200} The Court's majority opinion, written by Justice Kennedy, abruptly concluded that "the Matthews balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process." \textit{Medina}, 505 U.S. at 443.

Since Medina, the Court has not applied its reasoning to other criminal process issues beyond ruling that upon the permissible state evidentiary standard for proving a defendant's competence to stand trial. See Cooper v. Oklahoma, 517 U.S. 348 (1996) (holding that state law requiring defendant to prove incompetence by clear and convincing evidence violated procedural due process). Lower-court post-Medina decisions also appear limited to competency proceedings. See, e.g., Rhode v. Olk-Long, 84 F.3d 284 (8th Cir. 1996) (applying a presumption of competence to a post-conviction competency proceeding does not violate defendant's due process rights); Coe v. Bell, 89 F. Supp. 2d 922 (D.C. Tenn. 2000) (placing burden of proving competency on defendant facing capital charges does not violate due process).

Pre-Medina decisions had indicated that Matthews' due process analysis applied at trial. See, e.g., United States v. Raddatz, 447 U.S. 667 (1980); Ake v. Oklahoma, 470 U.S. 68 (1985). See also Donald A. Dripps, Miscarriages of Justice and the Constitution, 2 BUFF. CRIM. L. REV. 635, 633 (1998) ("[H]idden within the Medina opinion is the ghost of procedural due process, struggling to be heard").

\textsuperscript{201} 470 U.S. 68 (1985).

\textsuperscript{202} \textit{Id.} at 76.
to mount an adequate defense at trial. In many instances, a court could conclude that requiring an accused to appear alone at a bail hearing is one of those prohibited situations where “the State proceeds against an indigent defendant without making certain that he has access to the raw materials [namely an attorney] integral to the building of an effective defense.” But *Medina* still presents a formidable hurdle to overcome in convincing a court to apply *Matthews* procedural due process analysis.

If *Medina* is followed, litigators should attempt to establish that denying counsel at bail to indigent persons violates a deeply rooted principle of our criminal justice system. Right to counsel decisions are so embedded in our system and in “the traditions and conscience of our people as to be ranked as fundamental.” Few today would disagree that fundamental fairness requires counsel’s presence once adversarial proceedings are initiated. To do otherwise would risk legitimizing state practices where an accused does not meet appointed counsel until the day of trial.

For procedural due process to succeed, a court must distinguish *Medina’s* non-interference with a state’s criminal

203  *Id.* at 77.

204  The right to counsel has strong historical roots. In *Powell v. Alabama*, 287 U.S. 45 (1932), the Supreme Court reversed the defendants’ capital conviction on due process grounds because they were denied counsel during the “most critical period of the proceedings … from … arraignment until the beginning of … trial when consultation, thorough-going investigation and preparation [are] vitally important.” *Id.* at 57. Reviewing this nation’s history of respecting counsel’s necessity to protect an accused’s life and liberty, the Court deplored Alabama’s decision to assign counsel on the day of trial:

Where a prisoner … without legal knowledge, is confined in jail, absent from his friends, without the aid of legal advice or the means of investigating the charge against him, it is impossible to conceive of a fair trial where he is compelled to conduct his cause in court, without the aid of counsel. … Such a trial is not far removed from an *ex parte* proceeding.

*Id.* at 72 (internal citations and quotations omitted).


206  In *Kirby v. Illinois*, 406 U.S. 682 (1972), the Supreme Court drew a bright line for when the right to counsel attaches: it is triggered when an adversarial judicial proceeding commenced, whether “by way of formal charge, preliminary hearing, indictment, information or arraignment.” *Id.* at 689; see also *McNeil v. Wisconsin*, 501 U.S. 171 (1991) (affirming the right to counsel to commence at the initial judicial proceeding); *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (suppressing statements for a represented defendant following arraignment by declaring that “[w]hatever else it may mean, the right to counsel … means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him.”).

207  In *Powell*, the Supreme Court condemned the practice of assigning counsel on the day of trial. *Powell*, 287 U.S. at 53 (“[The] designation of counsel … was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid.”). The reality in many local courts today is that indigent defendants meet their assigned counsel on the day their misdemeanor trials or felony preliminary hearings are scheduled. See Colbert, *supra* note 5, at 52.
process rules with its duty to intervene when a state denies a right essential to accurate judicial decision-making when individual liberty is at stake. Procedural due process' appeal also will grow when the proof presented demonstrates that the denial of counsel impairs a defense on the merits.

4. Best Bet: State Mandate to Provide Counsel

The most straightforward strategy for ensuring representation at bail would seek judicial enforcement of state statutes that require a public defender or assigned counsel to represent indigent defendants who face felony or misdemeanor charges. Following Supreme Court rulings in Gideon v. Wainwright and Argersinger v. Hamlin, every state legislature acknowledged government's constitutional duty to represent indigent defendants who are charged with a crime, and made explicit provision for some type of defender system that ensures counsel for the poor. Often, a state's statute guaranteeing counsel contains broad and sweeping language which would include representation at bail proceedings.

Maryland's public defender statute, for example, requires that legal representation be provided for every indigent defendant who faces a criminal or juvenile charge in its trial and appellate courts. The "primary duty" of Maryland's public defenders mandates that they "shall provide legal representation for any indigent defendant eligible for services. . ." Legal representation includes criminal and juvenile proceedings where a person is charged with a serious criminal offense in Maryland's misdemeanor and felony courts. The Public Defender's duty to represent "shall extend to all stages of a criminal proceeding including but not limited to custody, interrogation, preliminary, arraignment and trial."

A judge would be hard-pressed to construe the statute's "all stages of a criminal proceedings" language as meaning anything other than including the public defender's duty to represent poor

210 State representation models for providing counsel to indigent defendants include funding a statewide office of the public defender, limiting public defender offices to some localities (usually the most populous), designating individual attorneys to assume representation in the remaining jurisdictions as part of an assigned counsel plans, and awarding contracts to lawyer groups based on cost and other factors.
212 See id. § (4)(a).
213 See id. § (4)(b)(2).
214 See id. § (4)(d).
people at the bail stage. A court could easily construe the public
defender’s specific obligation to represent arrestees at the custody
stage as requiring that they represent detainees at a pretrial
release proceeding. Or a court could interpret the public
defender’s duty to defend people charged with criminal offenses at
the arraignment stage as including representation at an accused’s
initial lower court appearance where a judge reviews bail and
ensures that an accused is aware of the charges and is informed of
specific rights.\footnote{215}{See discussion supra note 186.}

Indeed Maryland’s Court of Appeals recently followed the
statutory construction in ruling that an unrepresented defendant
had a statutory right to counsel at his initial appearance and could
not waive his right to a jury trial in counsel’s absence. In McCarter
v. State,\footnote{216}{363 Md. 705 (2001).} the Court declared the public defender’s statutory duty
to represent indigent defendants “extends to all stages of a
criminal proceeding.”\footnote{217}{Id. at 716; see also supra note 212 and accompanying text.} In ruling that McCarter had the right to a
public defender at his initial appearance, the Court explicitly noted
that “the right to counsel under the Public Defender Act is
significantly broader than the constitutional right to counsel.”\footnote{218}{Id. at 713. The Court of Appeals avoided ruling upon the constitutional issue of
whether the defendant’s initial appearance at arraignment was a “critical stage.” See supra
notes 169-84. “[T]his court adheres to the established principle that a court will not
decide a constitutional issue when a case can properly be disposed of on a non-
constitutional ground.” McCarter, 363 Md. at 713 (citing Baltimore Sun v. Mayor & City
Council of Baltimore, 350 Md. 653, 650 (2000)).} The Court’s sweeping language appeared to embrace indigent
defendants’ right to counsel at the bail stage.\footnote{219}{“All means all, and it encompasses the August 13th [initial appearance] proceeding
regardless of its categorization. The specific types of proceedings listed in the statute and
rule are for purposes of illustration only.” Id. at 716. Maryland procedural rules require a
judicial officer to render a pretrial release determination at the initial appearance, lending
further weight to an accused’s contention that s(he) is entitled to a public defender’s
representation at the bail proceeding. See Md. R. 4-213(a).}

A litigation strategy would seek a court’s mandamus order to
require public defender representation. Mandamus is appropriate
when a government’s administrative agency fails to carry out its
explicit statutory responsibility.\footnote{220}{See Prince George’s County v. Aluisi, 731 A.2d 888, 903-04 (Md. 1999); see also
Goodwich v. Nolan, 680 A.2d 1040, 1047 (Md. 1996) (“Mandamus is generally used ‘to
compel … public officials … to perform their function or to perform some particular duty
imposed upon them which in its nature is imperative and to the performance of which duty
the party applying for the right has a clear legal right.’”) (citation omitted).} Mandamus is limited to enforce
acts which are ministerial, rather than discretionary.\footnote{221}{See id. The court stated:
The writ ordinarily does not lie where the action to be reviewed is discretionary}
mandated act also must not involve a court ordering additional funding.\textsuperscript{222} Here the Public Defender's duty is clear and non-discretionary: they must defend the poor at all stages of a criminal proceeding. The legislature provides general funding for this purpose, not specific appropriations for particular stages of a criminal proceeding. Consequently, additional funds are not required to begin redeployment.\textsuperscript{223} The Public Defender need only require its staff to commence representation at bail, rather than at the next scheduled court appearance. It may do so, for instance, by scheduling public defenders on a rotating basis to staff the bail review court. If the Public Defender should find that this redeployment necessitates additional staffing, it can request increased funding in its next budget to the legislature. It may very well be that redeployment and diversion and resolution of numerous cases at the front end will, in the long run, reduce the burden on the Public Defender and make increases in funding unnecessary.

Mandamus provides the judiciary with the opportunity to enforce poor peoples' right to counsel at all stages of a criminal proceeding. As such, reformers should seriously consider a mandamus petition when formulating a litigation strategy. Reformers also will want to consider, as a practical matter, whether its state judiciary is willing to use this "extraordinary remedy"\textsuperscript{224} to protect the right to counsel for indigent defendants.

CONCLUSION

Throughout this nation hundreds of thousands of poor people, many charged with nonviolent offenses, languish in jail for days, weeks, and months because they had no lawyer at the crucial bail stage. No doubt the denial of counsel comes as a jolt to most Americans, including the legal profession, who share the mistaken

\textsuperscript{222} See \textit{Aluisi}, 731 A.2d at 904.
\textsuperscript{223} \textit{Cf. id.} at 888 (denying mandamus action for appointment of constables to serve process in landlord-tenant actions since no specific money was appropriated and no other funds were available).
\textsuperscript{224} See, \textit{e.g.}, George's Creek Coal & Iron Co. v. County Comm'r of Alleghany County, 59 Md. 255, 259 (Md. 1883).
belief that every accused currently receives the benefit of a lawyer's advocacy when liberty is threatened.

Lawyers do make a difference. The randomized controlled experiment conducted by the Lawyers at Bail Project in Baltimore supports the conclusion that having a lawyer present at a bail hearing to provide more accurate and complete information has far-reaching consequences. The accused is considerably more likely to be released, to respect the system and comply with orders, to keep his job and his home, and to help prepare a meaningful defense. The public at large benefits, too, from the unclogging of congested court systems and overcrowded jails and the resulting savings in taxpayer dollars. The Lawyers at Bail Project's empirical data shows these benefits are real and not speculative.

We hope the odyssey of the Baltimore reformers will spur similar efforts—from bar associations and law school clinics to legislative and litigation initiatives—in other jurisdictions throughout the country. Such endeavors may well begin the same way as this one: with shock at the realization that a lawyer is often not provided to accused indigents at this initial stage. We hope that the fierce determination that fueled the efforts of all those who collaborated to achieve successes in Baltimore will inspire and instruct others to persist in the face of resistance from vested interests and prevail to vindicate the rights of the accused, and for the good of the criminal justice system and the public.

Our country prides itself on guaranteeing equal justice. Providing lawyers at bail is a fundamental step toward achieving this goal. Our ethical duty as a people and the legitimacy of our criminal justice system require that we make the guarantee of counsel at bail a reality for all.
APPENDIX A

BAIL REPRESENTATION PROJECT
SUSPECT QUESTIONNAIRE

1. Defendant’s Name ______________________________
2. Defendant’s Case # _____________________________
3. Defendant’s SID # _____________________________
4. Defendant’s CC # ______________________________
5. Defendant’s Age _____ Years
6. Defendant’s Race
   _____ White
   _____ African American
   _____ Hispanic
   _____ Other
7. Defendant’s Gender
   _____ Male
   _____ Female
8. Legal Representation?
   _____ None
   _____ LAB Client
9. What was the defendant’s original bail? _________________
10. At the bail review hearing, did the judge release the defendant on his/her own recognizance?
    _____ No
    _____ Yes
11. At the bail review hearing, did the judge reduce the defendant’s bail?
    _____ No
    _____ Yes
12. If yes, what is the current bail? _______________________
13. Is the defendant able to post bail this time?
    _____ No
    _____ Yes
14. How long has the defendant been detained? _____ days
PENDING CHARGES

15. What are the pending charges against the defendant? (List each charge)

____________________________
____________________________
____________________________

16. How many offenses was the suspect charged with
   ____ 1 offense
   ____ 2
   ____ 3
   ____ 4
   ____ 5 or more offenses

17. Does any charge involve the use or threat of violence?
   ____ No
   ____ Yes

18. Does any charge involve the selling of narcotics?
   ____ No
   ____ Yes

19. Does any charge involve a felony offense?
   ____ No
   ____ Yes

SUSPECT'S PRIOR RECORD

20. Did the defendant have any prior convictions?
    ____ No
    ____ Yes

21. If yes, how many? ____

22. Were any of these offenses in the past year?
    ____ No
    ____ Yes

23. Were any of these offenses in the past five years?
    ____ No
    ____ Yes

24. Does the defendant have a prior conviction (at any time) for a felony offense?
    ____ No
    ____ Yes
25. Does the defendant have a prior conviction (at any time) for a violent offense?
   _____ No
   _____ Yes

26. Did the defendant have any prior arrests?
   _____ No
   _____ Yes

27. If yes, how many?_____

28. Are any of these arrests in the past year?
   _____ No
   _____ Yes

29. Are any of these arrests in the past five years?
   _____ No
   _____ Yes

30. Does the defendant have a prior arrest (at any time) for a felony offense?
   _____ No
   _____ Yes

31. Does the defendant have a prior arrest (at any time) for a violent offense?
   _____ No
   _____ Yes

32. Has the defendant ever served time in jail?
   _____ No
   _____ Yes

33. Is there a pending charge against the defendant?
   _____ No
   _____ Yes

34. If yes, is one of the pending charges for a felony offense?
   _____ No
   _____ Yes

35. If yes, is one of the pending charges for a violent offense?
   _____ No
   _____ Yes

36. Was the defendant on probation, or parole at the time of the current offense?
   _____ No
   _____ Yes

37. Has the defendant failed to appear for any other prior charge?
   _____ No
   _____ Yes

38. How many times has the defendant failed to appear for a prior charge?
   _____ times
COMMUNITY TIES/EMPLOYMENT

39. Is the defendant currently employed?
   ____ No
   ____ Yes/part time
   ____ Yes/full time

40. If yes, how long has the defendant been employed by his current employer?  _______________________

41. Approximate monthly income?  $____________________

42. Was the employer present at the bail review hearing?
   ____ No
   ____ Yes

43. If yes, did any employer speak on the defendant’s behalf at the hearing?
   ____ No
   ____ Yes

44. What is the defendant’s marital status?
   ____ Single
   ____ Divorced/Separated
   ____ Cohabiting
   ____ Married

45. Does the defendant have any relatives living in the county (city)?
   ____ No
   ____ Yes

46. Was the defendant’s spouse or any family member present at the bail review hearing?
   ____ No
   ____ Yes

47. If yes, did the spouse or any family member speak on the defendant’s behalf?
   ____ No
   ____ Yes

48. How long has the defendant resided in the community?  _______________________

49. Was any member of the community/neighborhood present at the hearing for the defendant?
   ____ No
   ____ Yes

50. If yes, did any community member speak on behalf of the defendant?
   ____ No
   ____ Yes
51. Does the defendant own property in the jurisdiction?
   ____ No
   ____ Yes

52. Does the defendant own any business in the jurisdiction?
   ____ No
   ____ Yes

53. What is the defendant’s education?
   ____ Did not finish high school
   ____ high school
   ____ some college or vocational school
   ____ college graduate

54. Does the defendant have any prior history of drug or alcohol use?
   ____ No
   ____ Yes

55. Is the defendant currently under medical care?
   ____ No
   ____ Yes

56. Is the defendant a veteran?
   ____ No
   ____ Yes

57. How long did the bail review hearing take?
   ____ Seconds
   ____ Minutes

58. What was the judge’s reason for the determination of the outcome? (You may check more than one).
   ____ nature of the charge
   ____ defendant was a threat or danger to the community
   ____ prior conviction
   ____ prior failure to appear in court
   ____ employment
   ____ family or community ties
   ____ presence of lawyer
   ____ presence of family member/employer/community member in the court
   ____ other reason (Please specify)

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
APPENDIX B

BAIL REPRESENTATION PROJECT
SUSPECT INTERVIEW FORM

1. Defendant’s Name _______________________
2. Defendant’s Case # _______________________
3. Defendant’s SID # _______________________
4. Defendant’s CC # _______________________

FIRST, I WOULD LIKE TO ASK YOU SOME QUESTIONS ABOUT WHAT YOU THINK ABOUT THE OUTCOME OF YOUR BAIL REVIEW HEARING - YOU KNOW WHETHER OR NOT YOU WERE GRANTED BAIL OR RELEASED.

5. On a scale from 1 to 10, 1 is very dissatisfied and 10 is very satisfied, overall, how satisfied are you with the outcome of your bail review hearing?
   ____ rating

6. Compared to what you thought was going to happen to you, was the outcome you received what you expected, worse than you expected or better than you expected?
   ____ worse than I expected
   ____ about what I expected
   ____ better than I expected

7. Compared to how other people are treated in bail review hearings, was the outcome you received in your case what most people receive, worse than what most people receive, or better than what most people receive?
   ____ worse than most receive
   ____ about what most receive
   ____ better than what most receive

8. Did you feel that the outcome in your case was what you deserved to get, worse than what you deserved, or better than what you deserved to get?
   ____ worse than I deserved
   ____ what I deserved
   ____ better than I deserved
NOW I WOULD LIKE TO ASK YOU SOME QUESTIONS NOT ABOUT THE OUTCOME OF YOUR BAIL REVIEW HEARING, BUT ABOUT HOW YOUR CASE WAS HANDLED AT THE BAIL REVIEW. THAT IS, ABOUT HOW DECISIONS WERE MADE ABOUT YOUR HEARING AND ABOUT HOW YOU WERE TREATED BY THE AUTHORITIES.

9. On a scale from 1 to 10, 1 is very dissatisfied and 10 is very satisfied, overall, how satisfied were you with how the judge treated you at your bail review hearing?
   _____ rating

10. On a scale from 1 to 10, 1 is very fair and 10 is not very fair at all, overall, how fairly do you think you were treated by the judge at your bail review hearing?
    _____ rating

11. Do you think the judges in Baltimore treat people like yourself the same as the average citizen, or do you think people like yourself get better or worse treatment?
    _____ worse than others
    _____ the same
    _____ better

12. Were you treated in the manner that you expected to be treated before you went to the hearing, worse than what you expected or better than what you expected to be treated?
    _____ worse than I expected
    _____ about what I expected
    _____ better than what I expected

13. How much time did you think that the judge gave to your hearing?
    _____ not enough time at all
    _____ almost the right amount of time
    _____ the right amount of time
    _____ more time than was necessary

14. How polite was the judge to you?
    _____ very rude and disrespectful
    _____ somewhat rude
    _____ somewhat polite
    _____ very polite and respectful

15. How much concern did the judge show for your rights?
    _____ very little concern at all
    _____ not much concern
    _____ some concern
    _____ a great deal of concern
16. How much information did the judge have before he/she made the decision in your case?
   ____ not much information at all
   ____ a little bit of information
   ____ some information
   ____ a great deal of information

17. Was the information presented to the judge generally correct?
   ____ none of it was correct
   ____ some was correct but most was not correct
   ____ most was correct but some of it was not correct
   ____ all of it was correct

18. Did the judge do anything that you thought was dishonest or unfair?
   ____ No
   ____ Yes

19. How much opportunity did you have to tell your side of the story at the hearing before any decision was made?
   ____ no opportunity at all
   ____ not much of an opportunity
   ____ some opportunity
   ____ a lot of opportunity

20. How much opportunity did your lawyer have to tell your side of the story at the hearing before any decision was made?
   ____ there was no lawyer
   ____ the lawyer had no opportunity at all
   ____ the lawyer had not much of an opportunity
   ____ the lawyer had some opportunity
   ____ the lawyer had a lot of opportunity

21. How much of your side of the story did the judge consider in deciding your bail?
   ____ considered none of my side of the story
   ____ considered only a little of my side of the story
   ____ considered some of my side of the story
   ____ considered a great deal of my side of the story

22. How much influence do you think you had over the decision that was made?
   ____ no influence at all
   ____ not much influence
   ____ some influence
   ____ a great deal of influence
23. How much influence do you think your lawyer had over the decision that was made?
   - there was no lawyer
   - no influence at all
   - not much influence
   - some influence
   - a great deal of influence

24. Did the judge seem to be impartial in your case or did he/she seem to favor one side?
   - impartial - did not favor one side
   - not impartial - favored one side

25. How hard do you think the judge tried to do the right thing?
   - not hard at all to do the right thing
   - just a little hard to do the right thing
   - more than a little hard to do the right thing
   - tried real hard to do the right thing

26. How hard did the judge try to take your needs into account?
   - not hard at all to take my needs into account
   - just a little hard to take my needs into account
   - more than a little hard to take my needs into account
   - tried real hard to take my needs into account

27. How much did the judge seem to care about your problem and situation?
   - not much at all
   - not much
   - some
   - a great deal

28. How angry did you feel at the judge after your hearing was over?
   - very angry
   - somewhat angry
   - not very angry
   - not angry at all

29. How willing were you to accept the decision made at your bail review hearing?
   - very unwilling - I didn’t want to accept it
   - somewhat unwilling
   - somewhat willing
   - very willing - I was glad to accept the decision
30. How much better do you think the judge could have handled your hearing?
   _____ a whole lot better
   _____ a lot better
   _____ somewhat better
   _____ could not have been better

31. How much better do you think your lawyer could have handled your hearing?
   _____ no lawyer
   _____ a whole lot better
   _____ a lot better
   _____ somewhat better
   _____ could not have been better

32. Do you think that your lawyer made a difference in the amount of bail you had to pay?
   _____ no lawyer
   _____ yes, he/she made a difference
   _____ no, he/she made no real difference

33. Do you think that your lawyer made a difference in how you were treated by the judge?
   _____ no lawyer
   _____ yes, he/she made a difference
   _____ no, he/she made no real difference

34. If you were to find yourself in this situation in the future, would you like to see your hearing handled the same way it was this time or different?
   _____ same way
   _____ different