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BENT, NOT BROKEN:

Assessing Maryland's Bail System and Reforms in Context

BY SEAN KENNEDY

EXECUTIVE SUMMARY

Bail reform is a topic of controversy in Maryland that has produced competing paths forward. Unfortunately, the two immediate options appear to be diametrically opposed—de facto elimination of bail or its largely unreformed retention—with neither side willing to compromise. Instead, Maryland lawmakers should press pause on any substantial changes to the bail system and study the data more closely before enacting substantial changes. Meaningful and improving reforms require deliberative debate with full information.

This paper finds:

- Bail, under current Maryland statute, is constitutional.
- The elimination of bail as proposed under the pending Court of Appeals' rules change may, paradoxically, increase the disparities critics charge are endemic to the present system.
- Lawmakers need more and better data before enacting changes to the present system.
- Greater accountability through transparency and data would improve outcomes for defendants, public safety, and the criminal justice system overall.

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INTRODUCTION

In Maryland, like most U.S. jurisdictions, arrested individuals must be "arraigned" or read the charges laid against them by the government. In addition to the right to an attorney to represent their interests in court, the accused must be given a hearing as to whether they must be detained or released. The common condition imposed on released defendants is bail or a money payment to the court.

Upon paying bail, the defendant is released from custody, but if he should fail to return for future court proceedings, he forfeits the bail or security that he posted, and a warrant likely will be issued for his arrest. Thus, bail functions much like a security deposit, helping to ensure that the accused returns for his day in court. If the defendant cannot afford the set bail, or if the judge denies bail altogether, the accused remains jailed until trial.

How *much* bail a defendant must post varies significantly from case to case, and has been a subject of political and legal debate for centuries.[1] And that debate still rages today.

In Maryland today, critics of the state's bail system argue it unfairly burdens defendants financially who can least afford to pay bond to the court.[2]

Many of these critics go further than suggesting changes to the bail system and instead call for bail's outright elimination.[3]

This paper examines the Old Line State's bail system and its proposed alternatives in the broader context of their constitutionality, efficiency, and efficacy. It seeks to aide policymakers and advocates in their debate and deliberations on changes to Maryland's criminal justice system.

MARYLAND'S BAIL CONTROVERSY IN CONTEXT

Though the academic and legal debate about cash bail has persisted for decades, it never fully permeated policymaking circles as a priority concern in Maryland until recently.

How *much* bail a defendant must post varies significantly from case to case, and has been a subject of political and legal debate for centuries.

The issue came to a head when members of the state General Assembly wrote a letter requesting an opinion from state Attorney General Brian Frosh assessing the constitutionality of Maryland's cash bail system in October 2016.[4] [5]

Frosh's response (written by the General Assembly's General Counsel Sandra Benson Brantley) sent shockwaves through criminal justice and legal circles in Maryland—and throughout the country. As the state's top prosecutor, Frosh's office advised the state's General Assembly that Maryland's bail policy violated the constitutional bar on "excessive bail" in the Eighth Amendment to the U.S. Constitution.[6]

Subsequently, the Maryland Court of Appeals (the state's highest court) issued a rule (Rule 4-216.1) for Maryland courts, stating that a condition with financial terms shall not be imposed in form or amount that results in pretrial detention solely because the defendant is incapable of meeting that term, taking into consideration all lawful sources of income.[7] This is commonly understood as requiring the application of a standard of affordability to bail-eligible defendants.

The Maryland legislature has responded to the new rule with Senate Bill 983—a bill that, if enacted, would revise state law in light of the Court's new bail policy that was due to take effect July 1, 2017. Bill 983 would prohibit judges from imposing bail higher than necessary to ensure the defendant returns for trial or to protect the community.[8]

The Brantley-Frosh letter initiated the process that would de facto eliminate bail in the state of Maryland.[10] Brantley concluded that the state's highest court would rule that Maryland's bail policies violated the Fourteenth Amendment's due process protection and "[i]f pretrial detention is not justified yet bail is set out of reach financially for the defendant, it is also likely the court would declare that the bail is excessive under the Eighth Amendment of the U.S. Constitution and Article 25 of the Maryland Declaration of Rights."[11]

Although the Court and Frosh letter did not explicitly call for the elimination of bail, the "least onerous" conditions standard—that court commissioners, who initially set bail in Maryland, must follow to ensure a defendant appears at trial and does not commit any new crimes—effectively precludes money bail as an option for all but the wealthiest of defendants who are deemed eligible for release and can "afford" to post bond according to the court's assessment.

BAIL IN THE U.S. CONSTITUTION: THE EIGHTH AMENDMENT AND ITS ORIGINS

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Bail had its origins under the Anglo-Saxon laws of England that allowed county sheriffs to set money bond on the accused to ensure their appearance at trial. Its abuse prompted reforms under the 1275 Statute of Westminster. The right to bail was affirmed by the English Habeas Corpus Act (1679) and again in the English Bill of Rights (1689). In early America, similar statutes were enacted, conferring the right to bail and limiting its abuse. The founders adopted the Eighth Amendment's language almost verbatim from these earlier constitutions and laws, including the Northwest Ordinance (1787) and Virginia Declaration of Rights (1776).[9]

FACTORS FOR DETERMINING DEFENDANT'S PRETRIAL STATUS

(A) The nature and circumstances of the offense charged, the nature of the evidence against the defendant, and the possible sentence upon conviction
(B) The defendant's prior record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings
(C) The defendant's family ties, employment status and history, financial resources, reputation, character and mental condition, length of residence in the community, and length of residence in this State
(D) Any recommendation of an agency that conducts pretrial release investigations
(E) Any recommendation of the State's Attorney
(F) Any information presented by the defendant or defendant's attorney
(G) The danger of the defendant to the alleged victim, another person, or the community
(H) The danger of the defendant to himself or herself;
(I) Any other factor bearing on the risk of a willful failure to appear and the safety of the alleged victim, another person, or the community, including all prior convictions and any prior adjudications of delinquency that occurred within three years of the date the defendant is charged as an adult.

—Maryland Code and Court Rules, prior to February 2017[15]

The unanimous decision of the Court's seven-member Rules Committee directed that "preference should be given to additional conditions without financial terms."[12] Those conditions include electronic monitoring, pretrial supervision, and drug testing of those awaiting trial.

The state Senate's bill (SB 983) restores bail as a real option for most defendants, altering the standard from "least onerous" and "affordable" to one of necessity to ensure trial appearance and public safety.

THE BAIL SYSTEM IN MARYLAND, PRE-FROSH LETTER

Although there is preliminary evidence that court commissioners and judges (who hear bail reviews) have altered their practices since the Frosh letter's release,[13] the bail system under Maryland statute and common practice was rather straightforward, though uneven in its application and outcome.

First, unlike many other jurisdictions, Maryland did not use bail schedules or statutorily mandated bail amounts for specified offenses. Without mandated fixed sums attached to the arraigned offenses, state law required judges and commissioners to consider an array of factors to decide upon detention status: release on recognizance, release on money bail, or detention until trial.[14]

The judge or commissioner must consider seven factors that may contribute to the accused's appearance for future court dates.

Lost in the heated debate about "affordability" of bail for many defendants with limited financial resources is that the Maryland code explicitly calls on judicial officers to consider "the defendant's family ties, employment status and history, financial resources…" among the factors to determine eligibility for release with or without bail or detention until trial.

Although many defendants are eligible to "bail out" and be released until trial, critics charge that too many of the accused are unable to afford the bail as set by court officials.

Furthermore, Maryland's code affords the accused substantial rights upon arrest including an attorney at no cost, a pretrial detention determination (bail hearing) within 24 hours of arrest, and an appeal of the bail determination to a judge.[16]

This process has drawn the ire of critics who argue that it leads to inequities in who remains detained after their hearings. Although many defendants are eligible to "bail out" and be released until trial, critics charge that too many of the accused are unable to afford the bail as set by court officials.

According to a June 2016 analysis by John Clark of the Pretrial Justice Institute for the Abell Foundation, the bail system under current law creates racial and economic disparities since defendants who are poor are less likely to be able to post the requisite bond amounts. Notably, in six jurisdictions studied by a state commission in 2013, "71 percent of defendants appearing at a bond review hearing had a secured financial bond set, with an average bond amount of $39,041. Two-thirds of these defendants were unable to post their bonds and remained in jail."[17]

Clark's paper also points to a racial disparity in bail determinations. The paper acknowledges that the racial disparity is a product of geographic differences, not demonstrable racial bias.[18] The City of Baltimore and Prince George's County, both jurisdictions with larger concentrations of African-American and other non-white minorities than the rest of the state, have higher than average bail amounts. But geography, not race, contributes to how the bail is established.

That geography is a bail determinant is largely the product of the court officials who work in the respective jurisdictions.

A November 2016 report by the Maryland Office of the Public Defender confirms this geographic disparity, with Baltimore City comprising 44 percent of bail premiums, Baltimore County 26 percent, and Prince George's County 7 percent of the bail premiums collected between 2011 and 2015.[19]

Although high bail disproportionately impacts poor communities and communities of color, neither the Abell nor Public Defender's analysis accounts for offense severity and criminal case load in drawing the overly broad conclusion that economic and racial disparities in bail's application are causal, instead of correlated. In other words, the system is designed to ensure public safety and the defendant's appearance at trial, courts adjust bail according to their own biases and the need to satisfy the abovementioned criteria.

The demonstrated gaps may be easily accounted for if bail application is adjusted for commissioner bias by jurisdiction, offense severity by jurisdiction, and case load by jurisdiction.

Critics of statutory money bail in Maryland also point to the number of defendants detained despite being bail eligible. But the 2014 state study of six jails found that of the 3,244 cases examined, 78 percent of defendants were released within days of their initial hearing—fully 70 percent were released (on their own recognizance, unsecured or secured bond) at their first hearing.[20] Similarly, the Maryland Judiciary's 2016 data show that only 30 percent of arrestees remain detained due to either court order or inability to meet money bond conditions (i.e., pay bail).[21]

As economists Eric Helland and Alexander Tabarrok, who conducted the most exhaustive study of failure-to-appear (FTA) outcomes on bail, found: commercial bail is highly effective in reducing FTAs. Furthermore, bail bondsmen quickly and efficiently return fugitives to the authorities.[22]

The reason is simple: bail incentivizes trial appearance because those who post bail (the defendant themselves or their loved ones) do not want to forfeit their funds or property if the accused absconds. Moreover, if the accused does become a fugitive, the bail bondsman has the right and a compelling interest to recover his investment by returning the defendant to justice.

MARYLAND'S BAIL POLICY AND THE U.S. CONSTITUTION

Contrary to what some bail critics have asserted, Maryland's bail practices—including the proposed rules under Senate Bill 983—do not violate the U.S. Constitution's due process or Eighth Amendment protections.

Significantly, the Supreme Court has never held that the accused have an affirmative right to bailed release[23] or that "unaffordable" bail is "excessive" and therefore unconstitutional. In 1951, the Court held in *Stack v. Boyle* that federal courts must consider the defendant's individual circumstances in setting bail, but did not rule that the Eighth Amendment required such an assessment.[24]

The Court merely stated that "[b]ail set at a figure higher than an amount reasonably calculated to [assure the presence of an accused] is 'excessive' under the Eighth Amendment."[25] Thus, Senate Bill 983's limits on setting bail no higher than necessary to protect the community and to ensure a defendant's return for trial align with the Court's jurisprudence in *Stack*.

The Maryland Attorney General's office mischaracterized *Stack* in writing to the state's General Assembly, when it wrote: "The Supreme Court has expressly stated that the Eighth Amendment requires that a judicial officer consider 'the financial ability of the defendant to give bail' when deciding the financial terms of release."[26] First, the letter's quoted language was in a concurring opinion in *Stack*, not the majority opinion as the letter erroneously suggests. Second, *Stack* did not state that the Eighth Amendment imposed such a requirement on judicial officers; rather, that requirement was made by the Federal Rule of Criminal Procedure 46(c).[27] In any event, as noted, Senate Bill 983 requires Maryland judges to consider the defendant's financial capacity when setting bail.

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Beyond Eighth Amendment concerns, the Maryland Attorney General's office also argued that Maryland policy may violate rights of due process and equal protection when a court sets bail that a defendant cannot afford. The Maryland Attorney General's office concedes in its letter that "[n]o court has explicitly stated that there is a constitutional right to affordable bail," just as no court has held that unaffordable bail violates equal protection—but the Attorney General insists on such a right anyway.[28]

In his concurrence in *Stack*, Justice Jackson took the decidedly opposite view when he opined that a defendant is *not* "entitled to such bail as he can provide…"[29] Significantly, in *United States v. Salerno*, the Supreme Court held that pretrial detainment is a "permissible regulation" rather than an "impermissible punishment," and does not violate constitutional rights to due process.[30] Congress, the Court reasoned, intended pretrial detainment as a regulation to prevent danger to the community, rather than as a form of punishment that due process protections would prohibit.

The *Salerno* Court went on to explain that the Eighth Amendment places no restrictions on the factors that the legislature may allow courts to consider in setting bail—only that bail must be set to "ensure the stated goal[s], and no more."[31] Thus, *Salerno* supports the view that constitutional limits on excessive bail are limits on the judiciary, not the legislature. The legislature, therefore, may establish a framework and regulatory purposes for setting bail amounts. Courts are then bound by that framework and bail cannot exceed what is necessary to fulfill the legislature's legitimate purposes.

THE PATH FORWARD: ELIMINATION, RETENTION, OR REAL REFORM?

As the July 1, 2017 deadline imposed by the Court of Appeals looms, the Maryland legislature must respond if it disagrees with the rules change that would, in effect, eliminate bail in the state of Maryland.

In contrast, the state Senate-passed version of SB 983 retains most of Maryland's bail procedures with a new standard of "necessity" used to set conditions for release (recognizance, special conditions, money bail, or detention until trial).

Thus, inaction affirms the Court's *de facto* elimination of money bail in the state.[32] In contrast, Senate Bill 983 would alter but not eliminate the bail system in Maryland—preempting the Court's rules change.[33]

Bail critics realize that the elimination of money bail would have serious consequences for the criminal justice system and the fate of defendants in state custody. Without secured bond as an option, bail review officials (commissioners and judges) would have to utilize different mechanisms to ensure public safety and the accused's appearance at trial.

The tools available and in use in other jurisdictions include a risk-assessment algorithm that assigns values to an arrestee's likelihood of endangering the public and failing to appear for trial. Once assessed, a defendant would either be released without conditions, released with conditions, or detained until trial. Those conditions are the subject of much controversy since they impose limitations on the freedom of a non-convicted defendant that can include GPS monitoring (e.g., ankle bracelets and movement limitations), narcotics testing, and state supervision (e.g., a probation-like check-in system).

Bail critics' two chief complaints are the economic unfairness and racial disparities in its application and its unconstitutionality. Ironically, the available alternatives to money bail fail on both counts. First, the risk assessment tool, which advocates say is "evidenced-based" and limits judicial bias in setting bail, actually have a disproportionately negative impact on racial minorities and the poor.[34]

Baltimore City's court commissioners already use this tool, as do other jurisdictions (though not all) in Maryland. There is preliminary evidence that this tool may actually be aggravating the negative impact on minorities and the poor in bail application since Baltimore City is the source of most state-wide bail disparities.

The algorithm-based approach to decision-making on pretrial release has a demonstrated bias as well, with similarly situated African-Americans more likely to be deemed higher risk and having more onerous terms imposed on their release.[35] Although two state Supreme Courts (Wisconsin and Indiana) have found algorithm- based risk assessments are constitutional, some scholars contend the method has not been fully litigated and the racial disparities inherent in their determinations violate the Constitutional guarantee of due process.[36]

Furthermore, pretrial release conditions may well violate the rights of defendants to due process and trial by jury, since these serve as punishments and infringements on liberty absent from those who receive release on their own recognizance or money bail alone.[37]

And despite the use of the misleading phrase "non-financial" when referring to the conditions for the terms imposed in lieu of money bail, these are not "free." Court supervision is costly to the taxpayers in monetary terms, as well as to overstretched courts, law enforcement agencies, and the accused themselves who often must pay non-recoverable "user fees" for access to monitoring services, including supervision and drug-testing.

Bail critics realize that the elimination of money bail would have serious consequences for the criminal justice system and the fate of defendants in state custody.

One analysis by Towson University estimated that a state-wide pretrial supervision regime necessary to implement a no-bail system in Maryland would exceed $300 million per year.[38]

But there are other yet unconsidered alternatives to either approach that would protect defendants' liberties, public safety, ensure trial appearance, and limit the burden on law enforcement and the criminal justice system while improving the efficiency, efficacy, and fairness of the bail system.

CONCLUSION: MORE DATA NEEDED TO IMPROVE SYSTEM AND ACCOUNTABILITY

The biggest challenge facing the bail system and well-intended policymakers who seek to improve the criminal justice system is a lack of independent, unbiased and high quality data. The state's 2014 report, "Commission to

Reform Maryland's Pretrial System," found that "[t]o date [December 2014] there has been no independent examination of" failure – to – appear (FTA) rate data.[39]

Furthermore, the racial and economic discrepancies across jurisdictions are correlated with geography, with Baltimore City releasing 44 percent of defendants on personal recognizance and/or unsecured bond while more rural counties saw 70 percent defendants released without having to post secured bond (or being detained until trial).[40]

It is likely that court commissioners and judges' personal preferences and habits contribute to the inconsistent bail amounts, as well as the offense type and severity, defendant's circumstances, including personal finances and history, and jurisdictional case load and types of offenses before court officials.

Thus, Maryland's lawmakers should stay the court's rule change until more information is available to inform any decision-making on the future of bail in the Old Line State.

These studies should include:

1. A systematic analysis of Failure-to-Appear (FTA) rates and contributing factors
2. A review of commissioners' and judges' FTA and re-offense rate viz. bail practices
3. An analysis of risk-assessment tool bias and outcomes viz. traditional money bail

Additional policy alternatives to eliminating bail:

1. Fixed-sum offense-based bail schedule
2. Prosecutorial accountability for bailed offenses that do not proceed to trial
3. Statutory reduction in allowable bail fees and premiums charged to defendants, based on offense type, severity, and personal characteristics

Barring these changes, significant challenges still face the bail system in Maryland in terms of fairness and court challenges that face political pressure from outside groups and communities with real concerns about bail's application in its present form.

Nonetheless, Maryland's bail system is constitutionally sound, and existing alternatives to money bail actually exacerbate the bail system's inequities in many ways. In their zeal to address the system's problems, critics and their allies risk instituting a dangerous and probably unconstitutional change. Instead, the problem requires thoughtful reform based on better and more data and a broader examination of the bail system.

SEAN KENNEDY *is a visiting fellow at the Maryland Public Policy Institute.*

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