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## **THE MARYLAND ACCESS TO JUSTICE STORY: INDIGENT DEFENDANTS' RIGHT TO COUNSEL AT FIRST APPEARANCE**

Douglas L. Colbert<sup>\*</sup>

When faced with a government's criminal prosecution, an accused person's best protection against loss of freedom rests within the Sixth and Fourteenth Amendment's constitutional guarantee to counsel. A lawyer's advocacy at a defendant's first appearance usually makes the difference between remaining in jail on an unaffordable bail and regaining liberty before trial. Thus, people able to afford a private lawyer invoke their right to counsel's assistance immediately upon learning that they or a loved one have been arrested and will soon appear before a judicial officer on criminal charges.

Maryland's poor and low-income defendants, disproportionately people of color, have had a very different experience when accused of a crime. Though the Bill of Rights and Sixth Amendment guaranteed in 1791 that an accused "shall have the assistance of counsel in a criminal prosecution," as of 2011, more than 220 years later, Maryland's indigent defendants still appeared before a judicial officer without legal representation when their freedom was first at stake. In most Maryland counties, detainees waited at least thirty days before a lawyer was assigned to their case. That changed when the State's highest court, the Maryland Court of Appeals, ruled in 2012 and 2013 in *DeWolfe v. Richmond I* and *II* that indigent defendants' statutory and constitutional due process rights required counsel at the initial appearance and subsequent bail review hearing.

In this Article, Professor Doug Colbert describes the sixteen-year law reform effort in which Maryland Law School's Access to Justice clinical students, pro bono lawyers, and proponents of change

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succeeded in establishing indigent defendants' right to counsel at initial appearance and other pretrial bail reforms.

#### INTRODUCTION

Having moved from New York City to join the Maryland Law School faculty in August 1994, I looked forward to the challenge of clinical teaching and supervising law students' representation of indigent defendants in another state's legal system. While I brought ten years of clinical experience and two decades of defending New York's poorest population as a former Legal Aid criminal defense lawyer, I had a lot to learn in moving to a new jurisdiction. Unlike the unified procedures in the federal justice system, each state's practices could vary significantly and I knew nothing about Maryland court procedures. Still, I thought I could count on the same baseline – namely my belief that the Supreme Court's constitutional right to counsel rulings thirty years earlier in *Gideon v. Wainwright*<sup>1</sup> and then *Argersinger v. Hamlin*<sup>2</sup> would guarantee counsel once a criminal prosecution commenced.

I was wrong. Unlike New York City where indigent defendants could count on an assigned counsel's representation before a judge within twenty-four hours of arrest, Maryland detainees typically waited more than thirty days before an assigned lawyer defended their freedom.<sup>3</sup>

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<sup>1</sup> 372 U.S. 335, 345 (1963) (citing *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)) (guaranteeing counsel at felony trials and emphasizing the importance of “the guiding hand of counsel at every step in the proceedings” to ensure that the trial right is meaningful).

<sup>2</sup> 407 U.S. 25 (1972) (extending the constitutional right to counsel to misdemeanor trials where defendants faced the loss of freedom and to pre-trial negotiations and pleas). *See also*, The Constitution Project Nat'l Right to Counsel Comm., *Don't I Need a Lawyer, Pretrial Justice and The Right to Counsel at First Judicial Bail Hearing*, THE CONSTITUTION PROJECT 8, n28 (2015), [http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL\\_3.18.15.pdf](http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf).

<sup>3</sup> *See* Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1728 (2002). Only two Maryland counties, Montgomery and Harford, guaranteed a public defender's representation at a bail hearing typically

After the landmark decision in *Gideon*, Maryland's indigent population would wait *fifty* years before the State's highest court held in 2013 in *DeWolfe v. Richmond* ("*Richmond II*") that the constitutional due process right to counsel included a lawyer's representation at an accused's first appearance before a judicial officer.<sup>4</sup> Until that ruling, and the statutory guarantee that came the previous year from *DeWolfe v. Richmond* ("*Richmond I*"),<sup>5</sup> Maryland prosecuted low-income defendants without a defense lawyer present at the critical moment when judicial officers decided to incarcerate or order liberty for accused persons awaiting trial.<sup>6</sup> Delaying counsel's advocacy until after the bail ruling effectively meant automatic *one-month* postponements until the defendant's next court appearance and a lengthy jail stay for detainees unable to afford bail.<sup>7</sup> During this period of incarceration, many lost their jobs and homes, missed school, and suffered separation from family.

The successful *Richmond* litigation followed years of sustained law reform endeavors spearheaded by Maryland Law School's Access to Justice Clinic that began during the clinic's maiden year in 1997 to 1998. After legislative and administrative efforts between 1999 and 2005 achieved partial successes but fell short of guaranteeing counsel,

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held 2-5 days after arrest. *Id.* at 1770 n.155. Maryland defendants ordinarily faced thirty-day and longer postponements before next appearing in court. *Id.* at 1731 n.54.

<sup>4</sup> 76 A.3d 1019, 1026 (Md. 2013). The Maryland Constitution provides "that in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defense; to be allowed counsel." MD. CONST., Declaration of Rights, art. XXI (2014). Moreover, the due process clause of the Maryland Declaration of Rights reads: "That no man ought to be taken or imprisoned...or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." MD. CONST., Declaration of Rights, art. XXIV (2014).

<sup>5</sup> 76 A.3d 962, 965 (Md. 2012) (holding that indigent defendants' statutory right to counsel guaranteed representation at the initial appearance and bail review stage of a criminal proceeding). Following the high court's decision on January 4, 2012, the Maryland legislature responded by amending the Public Defender statute and eliminating *Richmond I*'s statutory right to legal representation at the defendant's initial appearance before a District Court Commissioner. Representation commenced at the bail review hearing. S.B. 422, 2012 Leg., 430th Sess. (Md. 2012).

<sup>6</sup> See Colbert et al., *supra* note 3, at 1728, 1732 & n.57.

<sup>7</sup> See, e.g., *id.* at 1731 n.54. The District Court's computerized procedure scheduled the next possible court appearance for one month later. Depending on courts' availability, detainees could wait longer periods.

clinic students and pro bono lawyers turned to a litigation strategy and filed a class action suit for right to counsel at first appearance in November 2006. During the next eight years, the *Richmond* legal team returned three times to Maryland's Court of Appeals before a majority of judges declared that the State's constitutional due process guarantee entitled poor people to representation at initial bail hearings.<sup>8</sup> Even after *Richmond's* constitutional victory, however, nearly another year passed before a temporary, twelve-month implementation plan commenced on July 1, 2014.<sup>9</sup>

This Article recounts Maryland's ongoing saga to give meaning to *Gideon's* ideal of equal access to counsel and the promise of representation to "any person haled into court, who is too poor to hire a lawyer"<sup>10</sup> and faces the loss of liberty before trial and prior to a finding of guilt.

Part I begins just before the start of the 1994-95 school year when I first observed a Maryland bail review hearing. This section explains the transition from teaching a traditional criminal defense clinic to developing an Access to Justice Clinic where student-lawyers would focus on early representation of indigent defendants. Three

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<sup>8</sup> *Richmond v. Dist. Court of Maryland*, 990 A.2d 549, 549 (Md. 2010); *Richmond I*, 76 A.3d 962, 965, 983; *Richmond II*, 76 A.3d 1019, 1026.

<sup>9</sup> Steve Lash, *Top Court Weighs Start Date For Lawyers-At-Bail Requirement*, MARYLAND DAILY RECORD, (May 6, 2014), <http://thedailyrecord.com/2014/05/06/top-court-weighs-start-date-for-lawyers-at-bail-requirement/#ixzz3QVpJuxbU>. Ian Duncan, *First Defendants Get Lawyers at Bail Hearings in Maryland*, THE BALTIMORE SUN, (July 1, 2014), [http://articles.baltimoresun.com/2014-07-01/news/bs-md-bail-lawyers-arrive-20140701\\_1\\_douglas-colbert-court-system-lawyers](http://articles.baltimoresun.com/2014-07-01/news/bs-md-bail-lawyers-arrive-20140701_1_douglas-colbert-court-system-lawyers). During the 2014 legislative session, Maryland's legislature balked at funding the Office of the Public Defender to represent indigent defendants at first appearances. Fredrick Kunkle & John Wagner, *MD Senate Wants to Streamline Bail System*, THE WASHINGTON POST (Mar. 31, 2014) [http://www.washingtonpost.com/local/md-politics/2014/03/31/2de47726-b943-11e3-9a05-c739f29ccb08\\_story.html](http://www.washingtonpost.com/local/md-politics/2014/03/31/2de47726-b943-11e3-9a05-c739f29ccb08_story.html). Thereafter, the District Court Judiciary assigned "Richmond" panel lawyers to first appearances throughout the State; each is paid an hourly \$50 rate or \$400 per eight-hour shift. Following the initial appearance, public defenders continue representation at the next bail review hearing. Steven Lash, *Bail, Day 1: 'Very Few Glitches'*, DAILY RECORD, (July 1, 2014) <http://thedailyrecord.com/2014/07/01/day-1-very-few-glitches/>.

<sup>10</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

years later, Access to Justice student-attorneys began representing detainees at the bail stage and engaged in law reform to enhance justice for Maryland's impoverished and low-income defendants.

Part II describes the first stage of the Clinic's law reform endeavor beginning in January 1998 and continuing until January 2006. During this eight-year period, students and a coalition of proponents focused upon generating support for legislative and administrative rule changes. Legislative bills focused on guaranteeing counsel at the bail stage and limiting judicial reliance on money bail and bail bondsmen that required economically-disadvantaged defendants to pay non-refundable, ten percent fees.

Part III details the second period, stretching from 2006 to 2014, and the transition to a litigation strategy that eventually led to the Court of Appeals' statutory and constitutional rulings in *Richmond* and the implementation of counsel at initial appearance that followed.

Part IV concludes by analyzing the ongoing pushback against indigent defendants' right to counsel and reform measures eliminating money bail and the commercial bondsman's surety.

## I. THE OUTSIDER'S VIEW OF MARYLAND PRETRIAL JUSTICE

### A. *The City Chain Gang*

Weeks before I began teaching Maryland students in late August 1994, I visited the Baltimore City criminal court designated for bail review hearings and positioned myself in the front row. Here, I expected to observe a District Court judge review the prior rulings of a commissioner, who had presided at defendants' initial appearance and ordered money bail that detainees could not afford. By now, I had become familiar with Maryland's two-prong, procedural system where within twenty-four hours following arrest, the jailed defendant would appear before a District Court commissioner, typically a non-lawyer empowered to release, set or deny bail for an accused.<sup>11</sup> If still incarcerated, a judge would review the commissioner's decision at a

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<sup>11</sup> MD. RULE 4-213 (a) (2015); *See* MD. RULE 4-216 (c) (2015). "Judicial Officer" refers to a District Court judge or commissioner. MD. RULE 4-102(f) (2015).

second “bail review” hearing held the next weekday court session between one and five days later.<sup>12</sup>

At first blush, it seemed Maryland’s “two bites at the apple” provided additional protection for the accused whose lawyer could take advantage of two opportunities to argue for pretrial release. However, I had once again made the mistake of assuming that indigent defendants could expect a lawyer’s representation. I soon learned that only the private defense lawyer could argue twice for the paying client while the indigent defendant, who lacked access to counsel, was left to self-representation at the initial appearance and bail review hearings. Additionally, I overlooked the impact of the first money bail ruling set by the commissioners. Because detainees wanted to be released from jail as soon as possible, many would use their limited financial resources to pay the bondsman’s ten percent, *non-refundable* fee to make that happen.<sup>13</sup> Those unable to afford the fee or the money amount remained in jail and prayed for a favorable bail review ruling.

As I waited for the judge to enter and take the bench, I looked around the almost empty courtroom. Aside from court officers, I saw only two people, a private lawyer and his client’s mother. That seemed strange to me, considering the court docket included between twenty and twenty-five named defendants.<sup>14</sup> I wondered when the public defender would arrive.

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<sup>12</sup> See MD. RULE 4-216.1 (a), (c) (2015). Judges’ bail review proceedings occurred Monday through Friday. Defendants arrested Sunday through Wednesday appeared within 48 hours of arrest. Defendants arrested on Thursday, however, would appear the next day before a commissioner; those unable to post bail would wait four days for a review hearing until Monday. On holiday weekends, bail review hearings would occur on the following Tuesday, five days after arrest.

<sup>13</sup> Maryland judicial officers rely on ordering a full 100% financial bond. For defendants lacking cash savings to cover this full amount, or who do not own a home with sufficient equity, the bondsman’s ten percent fee becomes their only realistic choice. Bondsmen usually accept partial installment payments. Ian Duncan and Justin Fenton, *In Maryland Jails, Release Often Comes Down to Who can Pay*, THE BALTIMORE SUN, (Jan. 18, 2014), [http://articles.baltimoresun.com/2014-01-18/news/bs-md-maryland-bail-reform-proposals-20140118\\_1\\_bail-system-bail-bondsmen-initial-bail/3](http://articles.baltimoresun.com/2014-01-18/news/bs-md-maryland-bail-reform-proposals-20140118_1_bail-system-bail-bondsmen-initial-bail/3).

<sup>14</sup> See Colbert et al., *supra* note 3, at 1728.

Once the judge appeared, the clerk called the private lawyer's case. Her precise and persuasive argument made me aware of the value of having a lawyer advocate for pretrial release. The presence of the client's mother helped too. It was a priority that showed the judge that the defendant had personal support and helped to alleviate concerns regarding an accused's future appearance. When family cannot be present, informing the judge of having spoken to family or friends who verified the client's community ties and likelihood to return makes it much easier for the lawyer to persuade a judge to grant pretrial release.<sup>15</sup> Since most Maryland defendants are arrested for non-violent, lesser crimes<sup>16</sup> – prosecutors indict only eight to nine percent of arrestees charged with more serious or violent offenses<sup>17</sup> – lawyers' advocacy often makes the crucial difference in gaining detainees' pretrial release.

After the judge ordered pretrial release for the private lawyer's client, the court clerk called the remaining jailed defendants on the docket. I thought the judge might inquire about the missing public defender but instead he indicated his readiness to begin. Then I saw a startling sight.<sup>18</sup> A group of twenty-five men entered the courtroom from the door leading to jail. Moving together slowly and in a shuffling-style, the men advanced until they settled in a vertical line facing the judge. As I looked more closely, I could see each prisoner handcuffed and shackled in leg irons. A loose metal chain wrapped around each prisoner's waist extended to the person in front and behind the individual. I had never seen a chain gang before and certainly not inside a courtroom. It was a powerful and frightening sight, the historical imagery of which became even more alarming

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<sup>15</sup> "A defendant is entitled to be released before verdict on personal recognizance or on bail, in either case with or without conditions imposed, unless the judicial officer determines that no condition of release will reasonably ensure (1) the appearance of the defendant as required and (2) the safety of the alleged victim, another person and the community." MD. RULE. 4-216(c).

<sup>16</sup> Colbert et al., *supra* note 3, at 1732 & n.55 (showing that in 1999, more than ninety-one percent of Maryland defendants faced District Court criminal prosecution for misdemeanor crimes).

<sup>17</sup> *Id.* at 1732 & n.56 (showing that in 1999, 8.8% of Maryland defendants faced felony indictment in Circuit Court).

<sup>18</sup> *Id.* at 1728, 1733.



upon noting that African-Americans comprised virtually the entire group, aside from two White defendants.

A public defender never appeared. The judge explained to the assembled group that anyone wanting a lawyer could apply for a public defender *after the hearing*. He told them that if they were found eligible for a lawyer, one would be appointed. The judge indicated that each person had a right to speak at the bail review but he advised against it, saying everyone would be wise to wait until talking to a lawyer since anything said could be used as evidence at trial. The judge then addressed each individual defendant, indicated the charge and the bail amount, and asked whether the individual had anything to say. Most remained silent, except the few who made damaging admissions in an effort to minimize culpability and regain freedom. One defendant asked to consult with a lawyer, “like they do in New York.” The judge repeated that would happen later and require a postponement because “that’s how we do things here.” The defendant withdrew his request.

*B. Maryland Law and Legal Culture Remembering the New York City Experience*

I remained seated long after the judge had completed calling the cases and affirmed most of the commissioner’s prior decisions.<sup>19</sup> I had read that Maryland’s Public Defender Act<sup>20</sup> entitled indigent defendants to representation at “all stages of a criminal proceeding.”<sup>21</sup>

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<sup>19</sup> “Between 1994 and 1998, clinic students observed District Court bail hearings for a two-week period on three occasions. They reported that, in the absence of counsel, judges generally maintained commissioners’ prior bail conditions.” *Id.* at 1736 n.72. Additionally, data compiled by law students and lawyers as a part of the Pretrial Release Project, revealed that bail review judges in Baltimore City and Frederick County reduced the commissioner’s bail ruling for only one out of four detainees, while Harford County judges lowered bail for one out of six defendants. *See THE ABELL FOUND., THE PRETRIAL RELEASE PROJECT: A STUDY OF MARYLAND’S PRETRIAL RELEASE AND BAIL SYSTEM*, 120 n.33 (2001) [hereinafter PRETRIAL RELEASE STUDY].

<sup>20</sup> MD. CODE ANN., art. 27A, section 4(d) (West, 1994).

<sup>21</sup> *Id.* Seven years later in *McCarter v. State*, the Maryland Court of Appeals unanimously agreed that public defenders’ statutory duty to provide counsel extended to indigent defendants’ initial appearance. 770 A.2d 195, 199–200 (Md. 2001). “All means all, and it encompasses the [defendant’s] August 13<sup>th</sup> [initial

The statute referred to the right of counsel at specific custodial hearings.<sup>22</sup> But these hearings, absent a lawyer's advocacy, had proceeded with little interruption and with detainees returning to their cells in speedy fashion. Had the defense bar objected to incarceration without representation? What explained public defenders' absence at this crucial stage of prosecution against jailed indigent defendants?

Being new to the state, I needed to learn more about the Maryland pretrial process. I thought back to my New York Legal Aid colleagues' usual zealous advocacy when defending poor people's liberty at first appearance hearings ("arraignment"). Most considered the arraignment to be their client's most important event. Get a person out of jail, they said, and you virtually assured most clients (who did well on the outside) would avoid jail and stand a much better chance at dismissal or acquittal if choosing to fight the charges. That customary practice became the lawyer's guidepost, as judges and jurors tended to view the freed defendant more as a person entitled to remain in the community rather than someone belonging in jail. And so, New York defenders often congratulated themselves and each other's valiant, creative and frequently successful arguments on behalf of their client's pretrial freedom because they knew it would impact favorably on the outcome of most cases.

But it was not always that way. Before the cultural change of the early 1970's, lawyers had been divided. Legal Aid veteran attorneys clashed with newly-hired, law school graduates who had insisted upon immediate change. The experienced lawyers, particularly the "star" trial lawyers, resented being told they should take regular shifts at first appearances with the new kids on the block. A cultural war nearly erupted between veterans accustomed to

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appearance] proceeding regardless of its categorization." *Id.* at 201. McCarter had appeared without a lawyer at his initial appearance, where he waived his right to a jury trial. The Court struck the waiver, holding that McCarter's statutory right to counsel required representation. *Id.* at 196–97, 199, 201. Despite the ruling, Maryland indigent defendants remained without counsel until the high court's 2013 ruling in *Richmond v. DeWolfe*, *supra* note 4.

<sup>22</sup> MD. CODE ANN., art. 27A, section 4(d) (West, 1994). The McCarter Court referred to the statutory language that specifically included custody proceedings involving a person's liberty. McCarter, 770 A.2d at 200–01. It added that "[t]he specific types of proceedings listed in the statute and rule are for purposes of illustration only." *Id.* at 201.

defending one defendant after another, and the brand new lawyers seeking to dismantle a system that they considered “assembly-line”<sup>23</sup> justice.

Things became really heated when the more racially diverse, newly-hired group of lawyers accused their all-White, elder colleagues of being racist for failing to produce strong arguments at first appearance arraignments for the disproportionately African-American and Latino defendant population. The veteran defenders denied that race had anything to do with their placing less faith in clients returning to court, accepting most bail decisions, and focusing instead upon persuading judges to offer “good deals.” Pleading guilty, often to low-level violation offenses – which was not considered a conviction under New York law<sup>24</sup> – in exchange for “time served” sentences and regaining freedom became the seasoned lawyers’ cultural norm. But the new attorneys saw it differently. They maintained that lawyers’ zealous advocacy at arraignment would result in a greater number of clients being released and provide the client with a real choice to exercise the right to trial rather than accept the often coerced plea.

In the end, each generation realized that they shared more in common regarding client representation than their perceived differences. The veteran New York lawyers witnessed how vigorous, first appearance representation gained better results, improved attorney-client relationships, and resulted in most clients returning to court. The newly-hired attorneys understood that their strident, self-righteous, know-it-all approach added to colleagues’ resentment. Most shifted toward a team-building approach and witnessed changes, as they applauded senior colleagues for presenting powerful arguments for clients’ freedom. In turn, the less experienced defenders appreciated colleagues’ assistance in smoothing an argument’s rough edges and learning to respect client choices. First appearance representation became a forum for Legal Aid defense lawyers to

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<sup>23</sup> See *Argersinger v. Hamlin*, 407 U.S. 25, 36, 58 (1972).

<sup>24</sup> “‘Violation’ means an offense, other than a ‘traffic infraction,’ for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed.” N.Y. PENAL § 10.00(3) (McKinney 2015). “A sentence of imprisonment for a violation shall be a definite sentence. When such a sentence is imposed the term shall be fixed by the court, and shall not exceed fifteen days.” *Id.* § 70.15.

employ proactive, effective advocacy that resulted in most clients' release from jail.

For decades since *Gideon*, Maryland's legal culture accepted public defenders remaining on the sidelines at indigent defendants' first appearance and bail hearings.<sup>25</sup> Like New York's evolution, change would take time and required reexamining practices. When asked to justify a lawyer's absence, Maryland public defenders gave different reasons. The State's Chief Public Defender explained that limited staffing made deployment difficult, but then noted his uncertainty as to whether public defenders would make a difference at early bail proceedings. He and other supervisors justified current deployment by pointing to public defenders' successful outcomes – three out of five detainees had charges ultimately dismissed or not prosecuted (“stetted”),<sup>26</sup> while others pled guilty and received “time served.” They believed that such favorable results would be assured only for defendants who appeared, and jail ensured a detainee's presence. It all sounded reminiscent of New York City's veteran lawyers justifying their lack of vigorous representation at arraignments by obtaining a favorable deal for in-custody defendants thereafter.

Unlike many New York City defendants, though, who lost one to three days of liberty before returning to court, Maryland detainees unable to post bail spent at least thirty days in jail before their next appearance. Did the end result of dismissal or no prosecution justify leaving indigent defendants without representation for such a lengthy period? Certainly, no defender could imagine allowing a loved one to remain in jail for one month without putting up a spirited argument for their freedom.

Moreover, under New York procedure, defendants could regain liberty by pleading guilty to a violation offense, which did not count as a conviction and carried no collateral consequences. In

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<sup>25</sup> See Colbert et al., *supra* note 3, at 1729 & n.40 (describing Maryland criminal defense lawyers' awareness of the practice of no representation, and believing it would continue).

<sup>26</sup> *Id.* at 1756 & n.121. MD. RULE 4-248(a) (2015) (stating that prosecutors can motion to postpone a trial; a charge may be rescheduled for trial at the request of either party for one year, and thereafter only for good cause shown).

contrast, Maryland's least serious guilty plea – a misdemeanor – *did* count: prior convictions often enhanced punishment for future convictions and could preclude individuals from public or government-assisted housing, job employment opportunities, and eligibility for public benefits.<sup>27</sup>

Would Maryland's defenders see the advantages of first-appearance representation replacing the only system they had known? As a new arrival to the Maryland justice system, I knew my colleagues and students counted on my teaching a first-rate clinic and providing the supervision needed to ensure student-lawyers' highly competent representation. I decided to let the disturbing practices of pretrial justice rest and see whether students raised the issue of pretrial incarceration of unrepresented clients.

I did not have to wait long.

### *C. From Trial Defense Clinic to Bail Representation*

I joined Maryland Law's faculty because of the school's substantial investment in clinical education. Most schools considered "live" client-representation clinics too expensive.<sup>28</sup> But Maryland had gained legislative funding for its "Cardin requirement," which mandates that all students undertake clinical work before graduation.<sup>29</sup>

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<sup>27</sup> See Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010) (explaining that collateral consequences are additional penalties resulting from a criminal conviction separate from the direct consequences of incarceration). "The most prominent of these collateral consequences in the United States are exclusion from public or government- assisted housing, employment-related legal barriers, ineligibility for public benefits, and felon disenfranchisement." *Id.* at 490.

<sup>28</sup> Philip M. Genty, *Essay: Clients Don't Take Sabbaticals: The Indispensable In-House Clinic and the Teaching of Empathy*, 7 CLINICAL L. REV. 273, 285 n.34 (2000) (noting that law school deans may question the value of expensive clinics with direct client-representation).

<sup>29</sup> See Michael Millemann, *Implementing Maryland Law School's Mandatory Clinical Requirement*, 47 MD. B. J. 46, 48 (2014) (describing how the University of Maryland School of Law developed its mandatory clinical requirement after a 1988 study conducted by the Maryland Legal Services Corporation (MLSC) commission, chaired by then-Congressman Benjamin Cardin, recommended that law schools require students to provide legal assistance to the poor).

The law school provides second- and third-year students a rich and diverse selection of “live” client-based experiences. Similar to the medical school model where interns and residents gain valuable skills by assuming the doctor’s role and treating patients with senior supervision, clinical law students represent actual clients facing legal proceedings in Maryland’s civil and criminal courts. The Criminal Defense Clinic, for example, gave student-lawyers the opportunity to defend indigent people accused of misdemeanors and non-violent felony crimes at trial or until a case concluded. Known as Rule 16 attorneys, Maryland’s highest court requires that student-lawyers function with faculty supervision and maintain the same ethical requirements as admitted attorneys.<sup>30</sup>

In my years of law school teaching, I became a huge fan of clinical students performing at the highest level of excellence. With very few exceptions, they impressed me with a willingness to serve clients, to connect with their families and community, and to enhance justice for disadvantaged populations. Most supervising faculty and Rule 16 student-lawyers would agree that the intense, rewarding and challenging clinic experience prepares students with the necessary skills, support and encouragement to enter the legal profession and to fulfill lawyers’ professional responsibility to enhance the administration of justice.<sup>31</sup> The close working relationship often leads to a sharing of ideas that goes beyond a lawyer’s obligation to clients.

The Clinic’s incoming class in 1994 reflected an unusually dedicated and hard-working group. Unlike many former New York law students who applied to the criminal defense clinic to prepare for becoming prosecutors, the Maryland students had a strong commitment to criminal defense. During the first weeks, they demonstrated an enviable work ethic that led to certification as Rule 16 attorneys. I took advantage of the Clinic’s relationship with the Office of the Public Defender to arrange for students’ first client assignments. Each client had been arrested for non-violent crimes, released from jail and now awaited trial.

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<sup>30</sup> See MD. RULES GOVERNING ADMISSION TO THE BAR, Rule 16 (2015).

<sup>31</sup> See MD. RULE 16-812, Preamble, Scope and Terminology (2015) (noting the Maryland Lawyer’s Responsibilities).

Students devoted substantial time to preparing for trial. They located witnesses, developed a theory of the case, submitted motions, prepared cross-examination of prosecution's witnesses, and developed opening and closing arguments. They enjoyed being lawyers. Students' readiness involved numerous rounds of practice. Their dedicated work gained optimal results for most clients. While criminal trials were rare, students' preparation usually convinced prosecutors to dismiss or not prosecute the charges.

I remember the joy students expressed when describing their first client experience in class. They had gained self-confidence, provided meaningful representation, and understood the difference they had made for clients unable to afford private counsel. Many recounted the growing attorney-client relationship that developed. Clients had placed trust and confidence in the student-lawyer's ability to provide competent representation. From the student perspective, they appreciated their new professional identity as an attorney for the accused. Most spoke glowingly about what clients had taught them and what they had learned as advocates.

One student shared a poignant conversation she had with her client after the case successfully concluded. She did not realize the impact that it would have upon the clinic's future work:

I had submitted a motion to dismiss the charge based upon the arresting officer's unconstitutional search. Before court began, I approached the prosecutor and prepared to ask for dismissal. I had just begun speaking when the prosecutor said, 'I agree. Nice motion.' I contained my excitement and immediately walked to where my client was sitting to deliver the good news. He breathed a sigh of relief. Having spent a week in jail, he feared a much longer sentence, if convicted of the four-year maximum charge. After giving a big thank you, he said something that has remained with me. 'Don't take this wrong but you and the students should see us right away, and not wait one-to-two weeks after arrest. Had you been there on day one, I probably would have been released. Instead I lost my

freedom, my job and my mom paid the bondsman \$500, money that we'll never see again.'

In the lively discussion that followed, several students expressed similar sentiments. They, too, had considered the consequences of clients not having a lawyer at the outset and being deprived of liberty and separated from family. Others reported defendants missing thirty to forty days of school while in jail and then learning that charges would be dismissed. One student said no one will return those days to my client and he will probably have to repeat his senior year. A White student referred to the Clinic's almost exclusively African-American and Latino clientele and doubted he would have been treated the same. Another student recounted the excruciating choice a family must make in deciding whether to pay bail from money designated for rent.

Some students asked whether they could begin representation at the initial appearance or bail review hearing, while others hesitated. They pondered the practical and logistical issues that might arise if the Clinic changed. Thus began a series of spirited conversations that eventually led the Baltimore City Administrative Judge to permit criminal defense students to represent a small sample of detainees,<sup>32</sup> who otherwise would have remained in jail waiting for representation of counsel at the next court appearance.

During the Spring 1995 semester, this group broke new ground by representing twelve incarcerated indigent detainees at city bail review hearings.<sup>33</sup> The results spoke volumes – nine detainees gained release, four on recognizance and five others on reduced bail.<sup>34</sup> Clinic student research teams also gathered information about the statewide practice of denying counsel. We learned that public defenders appeared at bail hearings in only two of Maryland's twelve judicial districts, Montgomery County and Harford County. In Maryland's remaining jurisdictions, neither a public defender nor an assigned lawyer represented indigent defendants' before a judicial officer until thirty-to-forty days following arrest. Students did a rough estimate of the cost savings that could flow from successfully representing

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<sup>32</sup> See Colbert et al., *supra* note 3, at 1729 & n.41; See also *infra* pp. 17–18.

<sup>33</sup> *Id.* at 1729 n.44.

<sup>34</sup> *Id.*



detainees within forty-eight hours of arrest: their calculations indicated many millions of dollars in savings. The students began collecting information in nearby states.<sup>35</sup> That led to a fifty-state survey, which revealed a crisis in the absence of representation at the bail stage. A resulting publication included the survey and asserted that defendants' constitutional right to counsel commenced at first appearances.<sup>36</sup>

When class concluded in May 1995, students and faculty both agreed on a two-year plan to transform the Clinic into one that focused on representation at bail. The objectives included gaining the law school's approval for a redesigned Access to Justice and Bail Clinic, developing a collaborative model with judges and public defenders that allowed student-lawyers to represent detainees, engaging in public education, and publishing scholarly articles. The ambitious agenda looked for assistance and cooperation from the academic and legal community.

## II. TRAVELING ALONG THE LAW REFORM PATH

### A. *The Formative Years: Faculty, Bar and Judicial Support*

Shortly after the 1994-95 year concluded, the Dean of the law school, Donald Gifford, conducted his customary end-of-year faculty review. He felt that my "honeymoon" year had gone well and generously asked what he could do to enrich my professional life and productivity.

I began by sharing the students' plan because curriculum changes require faculty approval. With the Dean's blessing, the Criminal Defense Clinic could transition to the less conventional Access to Justice and Bail Clinic. I explained that Rule 16 student-lawyers would gain more opportunities for courtroom argument, while

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<sup>35</sup> *Id.* at 1730, n.46.

<sup>36</sup> See Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1 (1998) (asserting that the bail determination is a critical stage of a criminal proceeding that requires states to guarantee counsel's advocacy and that not only does lack of representation at this stage lead to a loss of freedom, but the incarcerated defendant is much more likely to be convicted and receive a longer sentence).

engaging in law reform projects that were intended to enhance justice for indigent defendants. To make early representation a reality, we would need cooperation from the judiciary, public defenders and department of corrections. “Can you support us there, Dean?” I gently asked. He smiled and replied: “It all sounds doable so far.”

I thanked the Dean and explained that changing a legal system that had functioned without lawyers for so long would be the toughest part. I remember saying that “we will need to educate the bar and the public about counsel’s important role to protect people’s freedom and to reduce jail costs, too. Too few know about lawyers’ absence when people’s liberty is at stake.”

I went on to explain that most people are unaware of the system’s reliance on bail bondsmen and money bonds that keep poor and low-income people in jail at taxpayer expense, especially those charged with non-violent or less serious crimes. Educational endeavors might include opinion editorials, news articles, public talks, scholarly reports and media coverage. I suggested that at some point the practice of non-representation and reliance on money bail for freedom must be changed on a permanent basis. That’s when I expected to encounter strong opposition from vested interests, such as the bail bond industry and others who want to maintain the status quo. I expected clinic students would play a vital role in explaining how these proposed changes enhance the administration of justice. Many might regard their role in the reform process as one of their most memorable learning experiences. I emphasized the Dean’s important role throughout this process.

When I finished, the Dean was smiling broadly. His parting words were perfect. “Just keep me informed...and do publish that seminal law review article in a leading journal about poor people’s constitutional right to counsel at the bail stage. I’d like to read it.”

Over the next two years, the pieces of the Access to Justice Clinic began to come together. First, the Maryland Bar Association invited me to become a board member of its Correctional Reform Section, a prestigious group that included federal and state judges, correction and parole board officials, and leading members of the bar interested in issues related to jail overcrowding. At the following

summer's annual State Bar meeting in June 1996, Correctional Section members organized a keynote panel discussion about pretrial justice and bail reform. The following year, Section members approved a right to counsel resolution and forwarded it to the State Bar Association, asking that it embrace representation for indigent defendants at bail.<sup>37</sup> At its 1997 summer meeting, the Maryland State Bar Association Board of Governors unanimously approved the resolution.<sup>38</sup> The Bar's continued interest led Correctional Reform Section members to present a similar resolution the following year to the American Bar Association's (ABA) Criminal Law Council. The national resolution called upon all 50 states to guarantee representation at bail hearings. In March 1998, the ABA Council, comprised of judges, prosecutors and defense lawyers, unanimously recommended that the ABA House of Delegates approve it too. Unlike the lengthy process that typically accompanies a new bill, delegates voted to support the resolution that August.<sup>39</sup>

Joining the State Bar and Correctional Reform Section, Baltimore City judicial officials also demonstrated support for student and lawyer representation of indigent detainees at the bail stage. Administrative Judge Mary Ellen T. Rinehardt had previously indicated her support for student advocacy at bail review hearings during the Spring 1995 semester when clinic students began advocating for pretrial release.<sup>40</sup> Now, two years later, Judge Rinehardt lent her strong endorsement when Maryland law faculty considered the change to an Access to Justice Clinic. She pledged that District Court judges would hear Rule 16 clinic students' arguments at bail hearings. During the formative years of 1996-1997, students and faculty contributed to public understanding of poor people being denied legal representation at bail hearings by participating in public radio programs<sup>41</sup> and contributing to Baltimore Sun news and op-ed

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<sup>37</sup> See Colbert et al., *supra* note 3, at 1730–31, 1731 n.49.

<sup>38</sup> *Id.* at 1731 n.49.

<sup>39</sup> A.B.A Criminal Justice Section, *Report to the House of Delegates*, AMERICAN BAR ASSOCIATION (Aug. 1998), [http://www.americanbar.org/content/dam/aba/migrated/legal services/downloads/sclaid/20110325\\_aba\\_112d.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legal services/downloads/sclaid/20110325_aba_112d.authcheckdam.pdf).

<sup>40</sup> See Colbert et al., *supra* note 3, at 1729 n.41.

<sup>41</sup> *Id.* at 1731 n.52.

articles.<sup>42</sup> These early news reports would be the first of many articles about inequities in Maryland's pretrial justice system in the years to come.

When the Maryland Law faculty approved changing the Clinic to one that emphasized students providing counsel for unrepresented detainees at bail hearings in April 1997, it paved the way for the launch of the new Clinic the following school year. The 1998 Access to Justice Clinic coincided with the Illinois Law Review publishing a lead article, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*,<sup>43</sup> which argued that indigent defendants' constitutional right to counsel included the critical bail proceeding. When the Access to Justice Clinic opened its doors in January 1998, it welcomed an enthusiastic, over-capacity group of twelve law students.<sup>44</sup>

#### *B. A New Clinic and Legislative Reform*

The first months of the 1998 Spring semester stand out for the groundbreaking change that the Access to Justice Clinic brought to Maryland's pretrial justice system. The Rule 16 student-lawyers successful representation of seventy-five detainees at Baltimore City bail review hearings generated media attention and peaked legislators' interest during the next legislative session in Annapolis.<sup>45</sup> The Maryland Bar Association-sponsored bill to guarantee representation to indigent defendants held on money bail brought additional interest during the January-to-April legislative session. In March, the Abell Foundation committed initial funding for the non-profit Lawyers at Bail (LAB) Project. Five months later, LAB's twenty part-time lawyers and five paralegals commenced representing eligible city

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<sup>42</sup> See Ivan Penn, *Law Students Aid at Bail Reviews*, BALT. SUN, Feb. 26, 1998, at 1B; Doug Colbert, *For Want of a Lawyer, Many Do Time*, BALT. SUN, April 7, 1996, at 6F.

<sup>43</sup> See Colbert, *supra* note 36.

<sup>44</sup> The twelve enrolled students exceeded clinical professors' recommended 8:1 faculty to student ratio. See David A. Santacrose & Robert R. Kuehn, *Ctr. For The Study Of Applied Legal Educ., The 2010-2011 Survey Of Applied Legal Education*, 16 – 18 (2012) (identifying the most common student-teacher ratio for live clinics as 8 to 1).

<sup>45</sup> See Penn, *supra* note 42.

detainees charged with non-violent crimes at bail review hearings.<sup>46</sup> Judge Rinehardt provided office space at the courthouse.<sup>47</sup>

The combined support of Maryland's bar, judiciary, corrections and law students contributed to a shared belief that change might be coming soon to Maryland's pretrial justice system. Judge Rinehardt welcomed the Access to Justice students, who were eager to address the gap in representation at bail hearings. Her commitment to reduce pretrial jail overcrowding led to scheduling court sessions where student-lawyers presented information that showed most defendants posed little risk of flight or danger if released.<sup>48</sup> The students' successful arguments gained release for seventy percent of their clients awaiting trial.<sup>49</sup> News articles captured the story and showed the picture of African-American defendants thanking their young law student-attorneys upon regaining freedom.<sup>50</sup>

The Maryland Bar Association authorized its legislative lobbyist, Buzz Winchester,<sup>51</sup> to initiate an educational campaign to persuade elected officials about the many benefits of early representation at the bail stage. Lawyers' successful advocacy translated to a reduced jail population; the resulting cost savings coincided with the Bar's vision of a more just, cost-efficient pretrial system.<sup>52</sup> The Bar also highlighted the discriminatory use of money bail for economically-disadvantaged, disproportionately African-American and Latino defendants.<sup>53</sup> Delegate Kenneth C. Montague introduced House Bill (HB) 1092 calling for immediate representation

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<sup>46</sup> See Colbert et al., *supra* note 3, at 1739.

<sup>47</sup> *Id.* at 1729 n.41.

<sup>48</sup> MD. RULE 4-216.2(c) (2014) calls upon administrative judges in each county to "exercise supervision over the detention of defendants pending trial" and to seek ways "to eliminate unnecessary detention."

<sup>49</sup> See Colbert et al., *supra* note 3, at 1736.

<sup>50</sup> See Penn, *supra* note 42.

<sup>51</sup> See Colbert et al., *supra* note 3, at 1765 n.134.

<sup>52</sup> See *infra* note 58 and accompanying text.

<sup>53</sup> See Colbert, *supra* note 36, at 42 (noting that a large number of people are deprived of their freedom because they are poor); see also *id.* at 42 n.233 (discussing how many pretrial inmates are unable to post low cash bails); see also Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170, 179 (2005) (finding that only forty-seven percent of African American and thirty-three percent of Latinos are able to afford bail).

at bail hearings on the last filing day in January 1998.<sup>54</sup> He explained that legislation for the public interest usually takes two to three years to gain traction and majority support. Now the opportunity existed to assess the bill's strength and opposition, and to lay the foundation for future passage.<sup>55</sup> Proponents testifying for the bill included the Maryland State Bar Association, the Chief Judge of the Court of Special Appeals, Joseph F. Murphy, public safety (corrections) officials, and Access to Justice Rule 16 student-lawyers and practicing attorneys.<sup>56</sup>

The House Judiciary Committee, chaired by Delegate Joseph F. Vallerio, Jr., since 1993, eventually defeated the bill by a 12-6 vote during a contentious debate that revealed both expected and unexpected opposition.<sup>57</sup> The powerful bail bond industry remained the chief opponent of passage. It viewed counsel's early representation as harmful to business: bondsmen feared that judges would release more represented detainees on recognizance or on non-financial conditions, thereby eliminating bondsmen's substantial revenue from the ten percent fees they collected from family and friends of incarcerated defendants. Chair Vallerio maintained his unwavering support for the current bond system, viewing public defenders' early representation as unnecessary and interfering with private lawyers' law practice. He felt that a pretrial agency representative would provide judges with similar information and would be an adequate substitute for defenders' advocacy.<sup>58</sup>

Maryland's Public Defender, Stephen E. Harris, also testified in opposition to a bill that would have required his staff attorneys to begin representation at indigent defendants' first appearances. Though proponents had conditioned legislative approval upon additional state

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<sup>54</sup> See Colbert et al., *supra* note 3, at 1765 n.133.

<sup>55</sup> *Id.*

<sup>56</sup> See Colbert et al., *supra* note 3, at 1765 n.134, 1766 n.136.

<sup>57</sup> *Id.* at 1766 n.140.

<sup>58</sup> See Colbert et al., *supra* note 3, at 1766 n.138. Pretrial services exist in one half of Maryland counties and assist judges in determining pretrial release or bail. Its agents' interview detainees, provide background information, and recommend bail or release, based upon the defendant's charge, prior convictions, failure(s) to appear previously, and community ties. Pretrial is seen as a neutral party, unlike the defense lawyer's role as an advocate for the accused. *Id.*

funding, Public Defender Harris feared his lawyers would be overburdened with additional responsibilities but without resources. Harris questioned the testimony of Access to Justice Clinic students, who had recounted the benefits of early representation for their clients.<sup>59</sup>

*C. The Lawyers at Bail (LAB) Project*

During the legislative session, Marc Steiner, host of a National Public Radio show, broadcast a one-hour program that discussed the lengthy pretrial delay that ensued before the state assigned a lawyer.<sup>60</sup> The State Attorney for Baltimore City, Patricia Jessamy, appeared sympathetic, citing the unnecessarily long delay until an assigned counsel's appearance. Following the radio program, Robert Embry, President of the Abell Foundation, communicated his interest in exploring whether lawyers made a difference at the bail stage and would reduce the cost of pretrial incarceration for people accused of non-violent crimes.<sup>61</sup>

Six months later on August 25, 1998, the Abell-funded, Lawyers at Bail (LAB) Project commenced. Attorney Chris Flohr directed the program on a daily basis from the Baltimore City District Court. Chris provided hands-on supervision of the twenty attorneys whom we hired and trained, as well as the three paralegals who conducted morning interviews of detainees.

Over the next eighteen months, LAB attorneys demonstrated the difference an effective advocate made at bail review hearings through the representation of 4,000 detainees. LAB succeeded in gaining pretrial release for two out of three defendants, a substantial increase that had an immediate impact on reducing the pretrial jail population.<sup>62</sup> Within nine months after LAB began, the population

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<sup>59</sup> Law students Pace Duckenfield, Helen Lee, and Joe Key, and attorney Erin Schaden, testified at the 1998 hearing.

<sup>60</sup> *Id.* at 1737 n.75.

<sup>61</sup> For additional details, see Colbert et al., *supra* note 3, at 1738 nn.80–81.

<sup>62</sup> See Colbert et al., *supra* note 3, at 1757 (explaining that representation at bail hearings increased the percent of arrestees who were released prior to disposition from fifty percent to sixty-five percent).

was cut in half at Baltimore City's Central Booking and Intake Center detention facility, which had been operating at fifty percent over capacity.<sup>63</sup>

When University of Maryland Professor Ray Paternoster later analyzed the data,<sup>64</sup> he concluded that LAB's legal representation accounted for the substantial difference in judges' bail review decisions: five times as many LAB clients gained pretrial release on recognizance or on a reduced and affordable bail as similarly situated defendants who did not have the benefit of a lawyer's advocacy at their bail review hearing.<sup>65</sup> Professor Paternoster's empirical evaluation also identified additional benefits to early representation: defendants believed they had received more procedural justice.<sup>66</sup> That is, they experienced more fairness, a meaningful right to representation and voice, and a hearing where judges treated them with greater respect.<sup>67</sup> Such subjective benefits, Professor Paternoster

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<sup>63</sup> *Id.* at 1722–23. The Lawyers at Bail Project's six-month report to the Chief Judges of Maryland's Court of Appeals and District Court demonstrated the significantly reduced pretrial jail population. *Id.* at 1739 n.85.

<sup>64</sup> See *infra* Part D; see also Colbert et al., *supra* note 3, at 1741–47 (explaining how social science has increasingly been used to address legal issues). The LAB project was a controlled experiment where representation was randomly assigned to 300 cases- those with LAB lawyers were the experimental group and those without lawyers were the control group. A group of law students attended each bail review hearing to record important information about the cases and would interview suspects after the hearing to get their feedback. *Id.* at 1749–56.

<sup>65</sup> See Colbert et al., *supra* note 3, at 1752–56.

<sup>66</sup> See generally Gerald S. Leventhal, FAIRNESS IN SOCIAL RELATIONSHIPS, IN CONTEMPORARY TOPICS IN SOCIAL PSYCHOLOGY (John W. Thibaut et al. eds., 1976); E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 Cal. L. Rev. 541 (1978); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); Tom R. Tyler, Kenneth A. Rasinski & Nancy Spodick, *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72 (1985); E. Allan Lind, Ruth Kanfer & P. Christopher Earley, *Voice, Control, and Procedural Justice: Instrumental and Non-Instrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990).

<sup>67</sup> See Colbert et al., *supra* note 3, at 1758–62.



concluded, provided “legitimacy” to the bail proceeding and a greater likelihood of compliance with the judicial ruling.<sup>68</sup>

University of Maryland economist Shawn Bushway added an additional important dimension – cost savings – to the benefits of representation at the beginning of a criminal prosecution. Bushway showed that lawyers save taxpayers substantial money when defendants facing non-violent charges avoid unnecessary pretrial incarceration pending trial; his analysis demonstrated the “bed days” saved when LAB defendants gained release.<sup>69</sup> A legislative fiscal note projected annual savings of \$4.5 million in Baltimore City alone.<sup>70</sup>

While the empirical data and study would not become available until 2001, proponents of the guarantee of legal representation and pretrial reform made an impressive first-time showing at the 1998 legislative session. Yet, their efforts failed to overcome the stronghold that the bail bond industry had developed with legislative allies in Annapolis. Advocates anticipated that the next session in 1999 and thereafter, if necessary, would be their best hope for legislative action ensuring a lawyer’s representation at the beginning of a criminal prosecution. The following section describes the reform efforts that would continue until 2002.

#### *D. Close But No Cigar: Legislature Reform 1999 to 2002*

##### *1. A Reform Coalition’s Best Effort*

If the 1998 legislative session provided a preliminary skirmish between proponents of ensuring legal representation and defenders of the status quo, then the 1999 and 2000 legislative battles represented the main event which held surprise right up to the closing moments.

In assessing the 1998 session, proponents concluded that the formidable House Judiciary Committee would be the biggest obstacle

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<sup>68</sup> See *id.* at 1762.

<sup>69</sup> See *id.* at 1757 (“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.”). *Id.*

<sup>70</sup> S.B. 0138, Reg. Sess., Fiscal Note (Md. 2000).

to passing a reform bill. Finding the additional votes to overcome the Chair's opposition would be extremely challenging and virtually impossible as long as the lead agency, the Office of the Public Defender, continued its opposition. If proponents could survive the House Judiciary Committee, though, it would bring the bill before the entire elected House of Delegates where chances for a favorable vote improved considerably. In the Maryland Senate, proponents viewed the Judicial Proceedings Committee as evenly divided. They thought the outcome depended upon the vote of the Chair, Senator Walter Baker, and upon gaining the Public Defender's support. Ideally, proponents hoped that the Senate would be the first legislative body to consider and then approve the bill, placing additional reason for House Judiciary colleagues to join.

During the months leading up to the 1999 legislative session, proponents took several steps toward addressing the Public Defender's concerns and building a strong coalition that favored counsel at bail hearings. First, they looked for support from the executive branch. The State Attorney General had been wary of taking a position where potential litigation might develop and place the state in the unenviable position of defending a suit that it favored but the statewide Public Defender opposed. Proponents appreciated the dilemma; they agreed to place litigation on the back burner while the legislature considered the proposed bill.<sup>71</sup> Additionally, the revised right to counsel bill included specific language that satisfied the Public Defender's concern that representation required supplemental appropriation.<sup>72</sup> Both agreements accomplished proponents' objective. The Public Defender gave his support and thereafter, proponents gained the Governor's approval.<sup>73</sup>

Proponents created a broad coalition that included the principle players within the justice system and outside legal community. Led by the Maryland Bar Association and State Judiciary, the coalition soon included the State Attorneys Association, State Police, Department of Public Safety (Corrections), private and public criminal defense bar,

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<sup>71</sup> See Colbert et al., *supra* note 3, at 1764–65, 1767.

<sup>72</sup> See *id.* at 1767 n.143.

<sup>73</sup> See *id.* at 1767 n.145 (referring to Governor Glendenning's remarks on the Mark Steiner public radio program on February 22, 1999).

and prominent members of the legal community.<sup>74</sup> With this support, proponents braced for the 1999 legislative session.

Senator Leo Greene, joined by three colleagues, introduced Senate Bill (SB) 335 to the eleven-member Judicial Proceedings Committee, which held the first hearing and would conduct the first vote in late March.<sup>75</sup> Delegate Montague, joined by fourteen co-sponsors in the House, cross-filed House Bill 889 which was assigned to the twenty-three-member House Judiciary Committee where he assumed one of the leading positions. At the Senate Judicial Proceedings hearing, proponents offered testimony from the principal coalition members, as well as from prominent representatives of the law enforcement community, including Maryland Attorney General Joe Curran, former United States Attorney General Benjamin Civiletti, and former United States Attorney for Maryland, Jervis Finney.<sup>76</sup> Not a single witness testified against the bill.

Proponents gathered, hoping for the Senate Judicial Proceedings Committee's passage, when the expected swing vote, Chairman Walter Baker, voiced his approval during the Committee hearing.<sup>77</sup> Together with five other Committee colleagues who previously indicated they favored the bill, it appeared that a majority would approve the bill and forward it to the full Senate where strong support awaited. However, as the vote neared, one of the bill's most vocal supporters, Clarence Mitchell IV, suddenly changed his position and cast the decisive vote against SB 335. The Baltimore Sun reported that Senator Mitchell was a licensed bail bondsman, who had received a \$10,000 loan two years earlier from bail bond companies that remained unpaid at the time of his vote.<sup>78</sup> The apparent quid pro quo ended any hope for legislative reform in 1999.

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<sup>74</sup> See *id.* at 1767.

<sup>75</sup> See *id.* at 1767 n.143.

<sup>76</sup> See Colbert et al., *supra* note 3, at 1768–69.

<sup>77</sup> See *id.* at 1767.

<sup>78</sup> Ivan Penn, *Mitchell Sought Loan of \$10,000*, BALT. SUN, Feb. 12, 2002, at 1A. See also Thomas W. Waldron, *Panel Kills Bail-Review Lawyer Bill*, BALT. SUN, Mar. 24, 1999, at 1B; Ivan Penn, *Mitchell Given Reprimand Over Ethics Violation: Rebuke by Assembly Harshes Step Against Lawmaker in 4 Years*, BALT. SUN, Feb. 27, 2002, at 1A.

Reformers, though, scored an important victory when Maryland Governor Glendenning provided financial funding for public defenders' early representation. The Governor dedicated preliminary funding in fiscal year 2000 to Baltimore City defenders to represent eligible defendants at bail review hearings.<sup>79</sup> Beginning in mid-July 1999, defenders extended representation at city review hearings to sixty percent of eligible defendants; the Governor included full funding in the 2001 budget.

Having twice witnessed the bail bondsmen's behind-the-scenes lobbying influence – first in the House Judiciary Committee in 1998 and then the following year in the Senate Judicial Proceedings Committee – proponents braced for the unexpected as they moved closer to their biggest battle in the 2000 legislative session. Though the Governor considered the statewide legislation unnecessary after having funded Baltimore city defenders,<sup>80</sup> proponents offered additional supporting testimony from the judiciary, prosecutors, bar and law enforcement officials.<sup>81</sup> They presented preliminary findings from the LAB empirical study showing the substantial difference that lawyers' representation made for clients charged with non-violent crimes: defendants with counsel gained release on recognizance two-and-one-half times more frequently than similarly-situated defendants without counsel.<sup>82</sup> Lawyers' advocacy also persuaded judges to reduce bail to a lower, affordable amount for an additional two-and-one-half times as many represented clients.<sup>83</sup> LAB projected substantial cost savings from the reduced pretrial population in the Baltimore City jail.

The combined presentation proved persuasive. In March 2000, the Senate Judicial Proceeding Committee approved Senate Bill 138 by a 6-4 margin with Senator Mitchell reversing his prior opposition and providing the key swing vote. When the full Senate considered

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<sup>79</sup> S.B. 138, Fiscal Note (Md. 2000).

<sup>80</sup> See Colbert et al., *supra* note 3, at 1769.

<sup>81</sup> *Id.* at 1768–69. The Chief Judge of the Maryland Court of Appeals' representative testified as well as the State Attorneys Association. *Id.*

<sup>82</sup> See *id.* at 1752–53. After the bail review hearing only thirteen percent of defendants without lawyers were released on their own recognizance, while thirty-four percent of LAB clients were released. *Id.*

<sup>83</sup> See *id.* at 1753–55.

the legislation, Senators overwhelmingly voiced support by a 41-6 margin.

When the bill reached the House of Delegates, prospects for passage appeared excellent. A majority of House Judiciary Committee members had co-sponsored HB 889 and the full body of delegates stood ready to act upon the committee's approval. Yet, another stunning development blocked House action: Chair Vallerio never allowed the bill to surface for a vote. According to the bill's supporters, the Chair had invoked a legislative prerogative. He asked committee members not to ask for a vote as a personal favor, citing his devastation from the sudden, brutal killing of the wife of a close associate, a bail bondsman.<sup>84</sup> Colleagues honored the request and the 2000 session ended with no action taken. Several weeks later, the same bondsman faced felony murder-related charges for hiring his wife's killer. Chair Vallerio represented him at the initial appearance and bail review hearing.<sup>85</sup>

After the right to counsel legislation failed for a third time, legislative reformers made one final push during the 2001 session. Senate Bill 78 and House Bill 703 each called for public defender representation to commence at an indigent defendant's first appearance. Once again, proponents presented strong evidence that addressed the savings and cost of additional representation. They turned to the favorable legislative fiscal note that estimated the expense of hiring public defender lawyers at \$898,000 for the first year and rising to \$1.3 million. That cost, proponents contended, would be more than offset by the "potential significant decrease in incarceration costs for local governments."<sup>86</sup> The fiscal note cited the LAB empirical and economic study that predicted annual savings of

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<sup>84</sup> See *id.* at 1769 n.153–54 (citing Matthew Mosk, *Chairman Opposes City Courts Bill*, WASH. POST, Mar. 18, 1999, at 1A; Jaime Stockwell & David Nakumura, *Md. Bondsman Accused of Hiring D.C. Woman To Kill His Wife, Is Denied Bond*, WASH. POST, Apr. 29, 2000, at B3) (noting that Chair Vallerio prevented the bill from being considered and made these remarks after returning from the funeral of the wife of bail bondsman Dino Pantanzis).

<sup>85</sup> See Colbert et al., *supra* note 3, at 1769 n.154.

<sup>86</sup> S.B. 78, Fiscal Note (Md. 2001), *available at* [mlis.state.md.us/2001rs/fnotes/bil\\_0008/sb0078.pdf](http://mlis.state.md.us/2001rs/fnotes/bil_0008/sb0078.pdf).

\$4.5 million in Baltimore City alone.<sup>87</sup> In addition, proponents' witnesses included Milwaukee District Attorney Michael McCann, the national president of the State Attorneys Association, as well as Maryland's former Attorney General and United States Attorney, Stephen Sachs. Once again, though, the bill died in the House Judiciary Committee.

Following the 2000 session, proponents' reform measures turned to a related area, namely judicial reliance on full money bond that led many low-income defendants and families to seek the services of a bail bondsman, who charged a non-refundable ten percent fee to underwrite the bond amount payable in installments. Proponents focused on providing detainees with a less harsh alternative than spending their limited money to regain freedom; the ten percent cash option permitted families to deposit the same amount with the court and recover virtually all of it when the case concluded, as long as the defendant reappeared when required. Once again, the bail bond industry would flex its political muscle to defeat a challenge to its near-monopoly on people regaining freedom before trial.

## 2. The High Court's Advisory Committee: The Ten Percent Cash Deposit

Following the 2000 legislative session in which the Chair of the House Judiciary Committee blocked consideration of a guarantee of counsel bill that Maryland Senators overwhelmingly approved, the Chief Judge of Maryland's highest court created the Pretrial Release Project Advisory Committee.<sup>88</sup> Chief Judge Robert M. Bell charged its members with studying and proposing changes that would enhance the state's pretrial justice system. The broad-based membership included judicial officers, prosecutors, defense lawyers, correction officials and leading members of the Bar. Chaired by C. Carey Deeley, the Advisory Committee met six times between July 2000 and

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<sup>87</sup> *Id.* at 4.

<sup>88</sup> See C. CAREY DEELEY JR., REPORT OF THE PRETRIAL RELEASE PROJECT ADVISORY COMMITTEE, 5 (2001). The Honorable Robert M. Bell, Chief Judge of the Court of Appeals, created the Pretrial Release Project Advisory Committee on June 19, 2000. *Id.*

July 2001, and produced a full report on October 11, 2001.<sup>89</sup> The report included nine recommendations that ranged from a statewide pretrial release agency to monitor released defendants, counsel's guaranteed representation, judges' sparing use of money bond, and a mandatory ten percent cash deposit option.<sup>90</sup> Committee Chair Deeley delivered the collective work product to Chief Judge Bell, who forwarded it to the Rules Committee on October 23, 2001, just months before the 2002 legislative session commenced.

During the 2002 session, reformers relied upon the Advisory Report when proposing an alternative, less onerous financial means for economically-disadvantaged defendants and families to gain a loved one's release from jail. Instead of paying the commercial bondsman's fee, the proposed legislation offered by Senator Delores Kelly permitted posting the same dollar amount with the court whenever judicial officers ordered a money bond.<sup>91</sup> Unlike bondsmen, court officials returned the ten percent cash deposit (less a small administrative fee) once the case concluded and the defendant appeared as required. Proponents' research revealed that defendants' families often used money designated for rent, utilities and food to cover the bondsman's fee.<sup>92</sup> The less onerous and refundable cash deposit stood in contrast to the bondman's non-refundable commercial bail enterprise.

The proposed 2002 legislation modeled Maryland law. Maryland Rule 4-216(c) entitles most people accused of crime to pretrial release, either on personal recognizance or conditionally by

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<sup>89</sup> See *id.* The Committee met on July 18, 2000; August 22, 2000; September 12, 2000; December 11, 2000; January 9, 2001; April 30, 2001; and July 19, 2001. *Id.*

<sup>90</sup> See *id.* at 2–3.

<sup>91</sup> See MD. CODE ANN., Pretrial Release § 4-217 (West 2015). When a judge orders \$5,000 bond, the defendant may post the full \$5,000 cash with the court and regain the full amount when the defendant reappears and the case concludes. Few defendants, however, possess \$5,000 cash. A judge's 10% cash percentage (deposit) option enables the defendant to deposit \$500 cash with the court and recover the money (less a small administrative fee) after appearing in court and the case has concluded.

<sup>92</sup> See PRETRIAL RELEASE STUDY, *supra* note 19, at ii, ii n.5 (noting that seventy percent of those interviewed in the study reported that paying the bondsmen's fee would result in a delay paying rent and utilities, and in buying less food).

complying with a judicial order.<sup>93</sup> When judicial officers include a condition of release, Maryland law requires that they use the *least onerous* condition.<sup>94</sup> Since money represents the scarcest and harshest commodity for indigent and low-income defendants, many stay in jail because they lack the resources to pay a bondsman's fee or to post collateral as security. Although Maryland law provides for a *refundable* ten percent cash deposit, judicial officers in most counties refused to offer it. Maryland judicial officers, for example, who made pretrial decisions for about sixty percent of the people arrested in 2000 and not released on recognizance, offered the ten percent cash option to less than one out of twenty detainees;<sup>95</sup> conversely, they ordered full surety bond for nineteen out of twenty defendants.<sup>96</sup> Most defendants needed to engage a bondsman's services and pay the fee to regain pretrial liberty.

Proponents offered three different versions of the refundable cash deposit option for legislators' consideration. One mandated the ten percent cash option whenever a judicial officer ordered money bond; a second bill limited its use to bonds of \$10,000 or less; a third alternative mandated the ten percent cash deposit for non-violent and less serious crimes only.<sup>97</sup> Proponents argued that the ten percent

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<sup>93</sup> MD. CODE ANN., Pretrial Release § 4-216(c) (West 2015). "A defendant is entitled to be released before verdict on personal recognizance or on bail, in either case with or without conditions imposed, unless the judicial officer determines that no condition of release will reasonably ensure (1) the appearance of the defendant as required and (2) the safety of the alleged victim, another person, and the community." *Id.*

<sup>94</sup> MD. CODE ANN., Pretrial Release § 4-216(e)(3) (West 2015). "If the judicial officer determines that the defendant should be released other than on personal recognizance without any additional conditions imposed, the judicial officer shall impose on the defendant the least onerous condition [...]" *Id.*

<sup>95</sup> See PRETRIAL RELEASE STUDY, *supra* note 19, at iv (noting that only three of 100 Maryland detainees not released on recognizance gained pretrial release by posting a ten percent cash alternative).

<sup>96</sup> See COMM. ADMIN. DAVID WEISSERT, MARYLAND DISTRICT COURT ANNUAL COMMISSIONER'S REPORT (1998).

<sup>97</sup> See H.B. 792, 2002 Reg. Sess. (Md. 2002), available at <http://mgaleg.maryland.gov/2002rs/bills/hb/hb0792f.PDF>; see also S.B. 432, 2002 Reg. Sess. (Md. 2002), available at <http://mgaleg.maryland.gov/2002rs/bills/sb/sb0432f.PDF>; see also S.B. 9, 2002 Reg. Sess. (Md. 2002), available at <http://mgaleg.maryland.gov/2002rs/bills/sb/sb0009f.PDF>.



deposit with the court provided a strong incentive for defendants to return – they or their family would recover the much needed deposit. Advocates explained that judicial officers’ infrequent use of the ten percent option had the greatest impact on working and low-income defendants; they had no choice but to pay the bondsman’s fee if they wanted freedom. Detainees who could not pay remained in jail until their case concluded.

Bondsmen viewed the ten percent cash deposit option through a different lens: increased use by judicial officers meant fewer financial bonds and a loss of significant revenue. Once again, bondsmen found a sympathetic audience in the House Judiciary Committee where members rejected all three bills that advocated for the ten percent cash deposit. During the following legislative session in 2003, proponents returned with new findings and recommendations from the Deeley Committee,<sup>98</sup> which had recommended the increased use of ten percent cash deposit bond and restricted use of corporate surety bonds. House Judiciary members, though, rejected these proposed reforms, too. During the testimony, some legislators suggested that the matter be considered by the Maryland Rules Committee, a judicial body responsible for drafting procedural rules and submitting them for approval to the Court of Appeals. Proponents followed this suggestion.

### 3. Administrative Reform: Maryland Rules Committee 2002 to 2004

A frank assessment of the five-year, legislative reform effort shows that proponents had failed to change the statewide practice of denying counsel at indigent defendants’ initial appearance and had seen other reform endeavors stymied. Despite building a powerful coalition and presenting compelling statistical evidence, proponents never overcame the “home field” advantage that the bail bond and

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<sup>98</sup> See PRETRIAL RELEASE STUDY, *supra* note 19, at 3 n.3. Court of Appeals Chief Judge Robert Bell appointed Carey Deeley, a partner at Venable, Baetjer & Howard, to chair the Pretrial Justice Committee. Statewide representatives throughout Maryland included District Court commissioners, judges of the appellate and trial courts, prosecuting and defense attorneys (private and public), public safety officers (corrections) and sheriffs, and the Legal Aid Society. *Id.*

insurance industry held with key legislators. In some years, it appeared as though proponents might succeed in both legislative houses. At those moments, though, reformers could almost count upon a dramatic turn of events: a strong supporter would defect, legislators leaning toward passage would discover a loss of personal resolve after considering the consequences of defying a powerful colleague or a behind-the-scenes agreement would trump what was taking place publicly. Horse-trading favors – you vote for my favorite bill and I will do the same for yours –, political might and lobbyists' money interests remained integral to the legislative process.

On the brighter side, proponents could point to several positive outcomes. They succeeded at the judicial level in guaranteeing earlier representation to Baltimore City indigent defendants at bail review hearings. Defendants' wait time for their assigned public defender's advocacy could now be measured in days, rather than weeks following arrest. Proponents' reform measures also found support among an unlikely coalition of partners – judges, prosecutors, defense lawyers, corrections, the legal bar and police – as well as from many legislators and public officials. Their efforts heightened public awareness about one of the best-kept secrets within the justice system: it had functioned without lawyers for the accused when poor people's freedom was first at stake.

Immediately after the House Judiciary Committee rejected an alternative version of the ten percent cash deposit option, proponents pursued the one remaining opportunity available: the Rules Committee housed in the judiciary.<sup>99</sup> Chaired by Chief Judge Joseph F. Murphy, Jr., of Maryland's intermediate appellate court, the Court of Special Appeals, the Rules Committee met and held public hearings beginning on January 4, 2002, and continuing to the following Spring 2003.<sup>100</sup>

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<sup>99</sup> "To aid in the exercise of its rulemaking powers, the Court of Appeals may appoint a standing committee of lawyers, judges, and other persons competent in judicial practice, procedure or administration. A committee member shall serve without compensation, but shall be reimbursed for traveling and other expenses incurred on committee business." MD. CODE ANN., CTS. & JUD. PROC. § 13-301 (LexisNexis 2014).

<sup>100</sup> See Deeley, *supra* note 88; see also COURT OF APPEALS STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, (2002), *available at*

Proponents and opponents vigorously debated the ten percent cash bond as an alternative option to the full money bond. Proponents argued the necessity of a mandatory “ten percent” bond because, aside from two Maryland counties,<sup>101</sup> very few judges and commissioners provided the percentage option to financially limited defendants. Proponents contended that the ten percent cash deposit option provided a strong incentive for defendants to return to court.

Opponents countered that the full cash bond and a bail bondsman’s intervention provided judges with a proven, reliable method to assure the defendant’s presence in court. The Rules Committee included Joe Vallerio, Chair of the House Judiciary Committee, who had strongly defended the current system’s reliance on bondsmen and who assumed the key role in defeating reform legislation. Delegate Vallerio joined bail bondsmen in arguing vigorously against expanding the ten percent bond. Let the judges decide as a matter of discretion, they argued, a point that the judiciary’s representatives shared as well.

In the end, the Rules Committee opposed the mandatory ten percent cash deposit option where judicial officers ordered a full bond. The Committee made one exception when judicial officers ordered bonds of \$2,500 or less. In these limited circumstances, the ten percent cash option would automatically be available to defendants. The Committee justified this decision by explaining that \$2,500 bond amounts usually apply to less serious, non-violent offenses.

In the months that followed, some District Court judges indicated their opposition to the mandatory ten percent cash deposit for \$2,500 bonds and below. Students’ subsequent research revealed that certain judges repeatedly ordered previously unseen bail amounts

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<http://www.courts.state.md.us/rules/minutes/1-4-02.pdf> (providing the minutes from the January 4, 2002 Rules Committee meeting).

<sup>101</sup> In Maryland’s most affluent counties, Howard and Montgomery judicial officers consistently offered the ten percent option to roughly three out of ten defendants. In contrast, Maryland judicial officers in the state’s poorest per capita income districts, Baltimore City and Western Maryland, rarely made it available. The state’s largest jurisdictions – Baltimore city, Baltimore County and Prince George’s – offered the ten percent cash deposit for only one out of one hundred detainees.

of \$2,501, \$2,600, \$2,750 and \$3,000,<sup>102</sup> making defendants ineligible for depositing the percent portion in court and recovering it once the case concluded. These defendants had only one option for getting out of jail: a family member or friend retained a commercial bondsman and paid the ten percent non-refundable fee.

### III. THE STRATEGY SHIFTS TO LITIGATION: THE *RICHMOND* CLASS ACTION SUIT

#### A. *Access to Justice Spring 2005: Jail Brochures and Self-Representation*

The Fall 2005 Access to Justice Clinic students reflected upon the preceding years of legislative and administrative reform endeavors. Both the Maryland State Bar and the national American Bar Association overwhelmingly approved resolutions calling upon states and localities to guarantee counsel at the bail stage. The LAB findings produced empirical data that demonstrated the substantial cost savings and enhanced fairness for low-income defendants who had counsel's advocacy<sup>103</sup> and led Maryland's Governor to fund Baltimore City defenders at bail review hearings.<sup>104</sup> The Rules Committee's approval of judicial officers' mandatory ten percent cash deposit for bonds \$2,500 and less made it possible for some people to recover bail posted. Students also recognized that colleagues' scholarly contributions and media articles further educated the public, the bar and elected officials; they better understood the legal basis for extending the right to counsel and obtaining cost savings from a decreased jail population. Law review articles, the Court of Appeals' "Deeley" Pretrial Justice Report, the Paternoster/Bushway LAB study, and opinion editorials and news articles had raised public awareness about the importance of counsel, the impact of money bail on low-

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<sup>102</sup> Remington Bronson, Joseph Cousins, Meredith Healy, Jamar Marciano, Eric Menck, Aaron Naiman, Elizabeth Rosen, Brittany White, *The Law in Practice: A Draft Report on the State of Maryland's Pretrial Justice System*, Maryland School of Law Access to Justice Clinic, 17, 25-26, App. Figures 12, 16, April 27, 2011; Healy & Mancano, *The Need for Lawyers at Bail Hearings Post DeWolfe v. Richmond* 19-21, April 30, 2012.

<sup>103</sup> Colbert et. al., *supra* note 3, at 1720.

<sup>104</sup> See *id.* at 1740 n.87 (discussing the Governor's supplemental budget in 2001, where he provided the public defender with funds for bail review representations).

income, disproportionately people of color, and the bondsmen's powerful role in the criminal process.

That said, students reflected upon Maryland's indigent defendants who still remained without a lawyer when first appearing before a commissioner and at the subsequent bail review hearing before a judge. Left to fend for themselves, defendants frequently stayed incarcerated for lack of bail money and 10% non-refundable fees between \$100 and \$1,000. Two out of three defendants, typically charged with non-violent crimes, ultimately learned that the charges had been dismissed or would not be prosecuted.<sup>105</sup> During their pretrial incarceration, many suffered the loss of jobs, eviction from homes, and an inability to care for family.<sup>106</sup>

The Spring 2005 Clinic students carried on the tradition of representing individual detainees in Baltimore city and also traveled to less populated suburban (Howard) and rural (Frederick) counties. Their successes provided more evidence of counsel's importance. Students pondered what they could do for unrepresented defendants and embarked on a statewide law reform project to produce an information pamphlet for detainees. The pamphlet detailed the process and law of pretrial release and explained what information should be provided to a commissioner or judge. Obtaining permission from the Maryland Department of Public Safety and local jail wardens, students distributed 200,000 brochures to pretrial facilities throughout the state over the next two years. This educational project, which had the approval of the District Court and its judicial committee, provided information about self-advocacy that helped some detainees to regain liberty and avoid staying in jail at taxpayer expense.

*B. Spring 2006 Access to Justice Clinic: The Litigation Strategy Begins*

The next year's entering class continued to represent and obtain favorable rulings for incarcerated defendants at pre-review

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<sup>105</sup> See *id.* at 1722 n.3, 1763 (noting that many nonviolent charges are eventually dismissed or not prosecuted).

<sup>106</sup> See *id.* at 1722.

hearings. But the advocacy experience challenged the Clinic students to go much further and to consider a reform project that would address the continued deficiency of denying counsel to an accused poor person. Class discussions centered on a lawyer's professional responsibility to engage in activities that enhanced the administration of justice for people unable to afford a private lawyer.<sup>107</sup> Students pondered what they could do to ensure legal representation at the first appearance.

A return to the legislative arena was rejected. Reformers had waged a valiant five-year effort and developed a formidable coalition, yet could never overcome the power held by lobbyists for bondsmen and insurance companies. Students concluded that the Governor and executive branch could not be expected to allocate additional monies to public defenders beyond Baltimore City. The cost of operating local pretrial jails are the financial responsibility of counties, not the state, and local officials had more pressing priorities than funding lawyers for criminal defendants to address jail overcrowding.

Students considered the remaining alternative – litigation. They reviewed what happened when this strategy was entertained at the beginning of the reform effort in 1998.<sup>108</sup> Indeed, a three-way collaboration looked promising then, one that involved the Clinic, the Maryland ACLU and the prestigious D.C. law firm Arnold & Porter, which had represented Clarence Earl Gideon in his landmark ruling in 1963. Reformers, however, decided to put aside the adversarial Dream Team litigation model and instead favored pursuing legislation that focused upon coalition-building, educating legislators and seeking changes in the Rules Committee.<sup>109</sup>

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<sup>107</sup> Part 6 of the Preamble of the Model Rules of Professional Conduct reads: "A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest." MODEL RULES OF PROF'L CONDUCT: PREAMBLE & SCOPE (3) (1963).

<sup>108</sup> Colbert et al., *supra* note 3, at 1764–65.

<sup>109</sup> *Id.*

The students now acknowledged the limits of that strategy and began raising questions about litigation. Would the Clinic provide a good vehicle for succeeding in a major lawsuit? The one-semester Access to Justice Clinic anticipated new groups of students entering and exiting once or twice a year. Even assuming students embraced and continued the work of previous colleagues, they nevertheless had a limited time constraint. How much could they do in a thirteen-week semester? Students also questioned whether a lone clinical faculty lawyer would be able to manage the suit. After discussion, they concluded that it was unrealistic to expect a revolving group of students and a professor to respond adequately to the considerable resources of the State Attorney General and the vigorous defense anticipated in favor of maintaining no representation. One student asked whether we ought to look for support outside the Clinic. That sounded like a prudent idea.

We considered the positives and negatives of “shopping” our case to outside counsel. Students assessed the situation and concluded that Rule 16 attorneys had distinguished themselves as advocates at clients’ pre-review bail hearings. They knew more than most about the reality of people waiting in jail for an assigned attorney and the importance of counsel’s effective representation. They remained concerned that at initial appearance hearings, no transcript or recording reported what was said; no member of the public attended, observed or spoke on the defendant’s behalf. Student-lawyers wanted the Clinic to assume a significant role in the litigation.

But they could appreciate the benefits of a big firm’s involvement. It had the resources, the attorneys and staff, and the standing in the legal community to compete against the state’s lawyers and probably a large firm representing the Public Defender’s Office. Students asked the hard questions about collaboration, such as who controls and makes strategic legal decisions during the litigation, the firm or the clinic? How would that work? What role do clients exercise? After exchanging ideas and thoughts, we agreed that collaboration between the Clinic and pro bono attorneys had appeal that outweighed our concerns. The search for potential law firms led to a first meeting with Venable, Baetjer & Howard, whose lawyers had previously prepared a white paper on a closely related issue

concerning “preset bail” and the constitutional problems posed by setting bail in absentia. There, students met two Venable partners, Michael Schatzow and Mitchell Mirviss.

*C. Collaborative Model: Venable’s Pro Bono Lawyers Meet Clinical Students*

In class, students had studied Maryland’s Preamble to its Model Rules of Professional Conduct and the Rules themselves. They learned about a lawyer’s multiple ethical obligations to the client, to the court and to the public’s interest in ensuring fair and equal justice.<sup>110</sup> With this in mind, they prepared a presentation for a group of Venable attorneys, unsure of whether the firm would commit to embracing the project.

The students worked long hours preparing a ninety-minute presentation, and it showed. They handled the questions and give-and-take exchange following the presentation with confidence and passion. Several days later, Venable informed us that it had agreed to bring the case pro bono and that it would work with the law students and the Clinic to help develop and prepare the lawsuit. A more positive response could not have been scripted. Students celebrated the excellent news. They stood ready to assist the lawyers and to communicate with incoming students, who would be entering the Fall program. When the Spring 2006 semester concluded, they took pride in what they had accomplished.

*D. Richmond v. District Court of Maryland*

Lots of planning goes into major law reform litigation, including who to sue, what statutory and constitutional arguments to pursue, and the type of judicial relief to seek – declaratory, mandamus, compensatory – on behalf of individuals’ right to counsel and for the class of indigent defendants seeking first appearance representation. The unique blend of pro bono lawyers from Maryland’s largest firm

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<sup>110</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.1–1.18 (1963) (providing the rules that govern the lawyer-client relationship); see also *id.* at R. 3.3–3.5 (providing rules that govern the lawyer’s duties to the court).



working with clinical students and their law professor provided the ingredients for an exceptional collaboration.

The complaint included the District Court judges and commissioners as the primary defendants. The legal arguments first set forth a claim that the Maryland Public Defender Act and Maryland Court of Appeals case law gave indigent defendants a statutory right to counsel “at all stages” of a criminal proceeding, beginning at their initial appearance; a second claim argued that the federal and state constitutional guarantee of the assistance of counsel included the “critical stage” of bail determination.<sup>111</sup> Student teams researched relevant case law that was incorporated into the memoranda of law.

As the semester moved forward, students grew more comfortable in the student-lawyer’s law reform role. Many developed a better understanding of how their assigned research fit within the contemplated lawsuit. Yet I could see that the additional workload had taken a toll on students meeting their other coursework and responsibilities. They persevered and looked ahead to the target date for filing the suit. On Monday, November 13, 2006, the City Clerk accepted the *Richmond v. District Court of Maryland* complaint. Afterwards, students reflected on the memorable experience of working alongside top-flight lawyers, who produced a first-rate work product. Indeed, they laid the foundation for what would become a seven-year litigation battle.

#### E. Richmond I

The Venable attorneys had several rounds of dispositive motions and argument in the Baltimore City Circuit Court that would be followed with numerous briefs and oral arguments in the Court of Appeals. In February 2007, the attorneys added a constitutional ground for granting poor people’s right to a lawyer’s advocacy at the initial bail and release determination, namely indigent defendants’ state and federal constitutional right to procedural due process. Years later, in *Richmond II*,<sup>112</sup> Maryland’s Court of Appeals would rely upon

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<sup>111</sup> Br. for Appellant, Quinton Richmond, et al. v. District Court of Maryland, 412 Md. 672 (2010).

<sup>112</sup> 434 Md. 444 (2013).

this constitutional guarantee argument to declare that a poor person's entitlement to legal representation commenced at first appearance.

The defendants moved to dismiss the complaint, arguing mootness and failure to state a claim.<sup>113</sup> Plaintiffs responded by moving for summary judgment.<sup>114</sup> In May, Circuit Court Judge Stuart Berger heard arguments; the following month, he denied the State's motion to dismiss and certified plaintiffs' right to bring the class action lawsuit.

In July 2007, the defendants from the judiciary cross-moved for summary judgment. They argued, *inter alia*, that the Sixth Amendment right to counsel claim was rejected under existing Maryland law, citing a Court of Appeals decision in *Fenner v. State*<sup>115</sup> and an intermediate appellate court's 1971 ruling in *Hebron v. State*<sup>116</sup> that had rejected the bail-as-a-critical-stage argument. In October 2007, Circuit Court Judge Alfred Nance cited this case law and granted the Attorney General's cross-motion for summary judgment.<sup>117</sup> Plaintiffs appealed.

In 2008, the action shifted to Maryland's appellate courts. After plaintiffs filed their appellate brief in the intermediate Court of Special Appeals in mid-July 2008, the Court of Appeals issued its own writ of certiorari,<sup>118</sup> meaning the high court intended to decide the case directly from the lower court and bypass the intermediate appeals court. The high court ordered briefs due six weeks later and set argument for January 2009.

More than fifteen legal and human rights organizations participated as amici and submitted briefs in support of indigent defendants' right to counsel at first appearance. They included the Leadership Conference on Civil and Human Rights, the NAACP Legal

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<sup>113</sup> Reply Br. for Appellees, DeWolfe, et al. v. Richmond, 434 Md. 444 (2013).

<sup>114</sup> *Id.*

<sup>115</sup> 846 A.2d 1020 (Md. 2004).

<sup>116</sup> 13 Md. App. 134 (1971).

<sup>117</sup> Br. for Appellant at 6, Quinton Richmond, et al. v. District Court of Maryland, 412 Md. 672 (2010).

<sup>118</sup> Richmond v. Dist. Ct. of Md., 990 A.2d 549 (Md. 2010).

Defense Fund, the National Association of Criminal Defense Lawyers, the Society of American Law Teachers, as well as University of Maryland and Baltimore law school professors and the Maryland Public Justice Center.<sup>119</sup>

During the first week in January 2009, Mike Schatzow of Venable appeared before the Maryland Court of Appeals and argued plaintiffs' statutory and constitutional right to counsel. Fourteen months later, in March 2010, the Court of Appeals ruled that the Office of the Public Defender was a necessary party and issued a *per curiam* order that directed the *Richmond* plaintiffs to amend their complaint in the Circuit Court to include the Public Defender as a necessary party or accept dismissal.<sup>120</sup> In April 2010, plaintiff attorneys amended the complaint as directed to include the Public Defender as a co-defendant, represented by Wilmer Hale partner, A. Stephen Hut, Jr.

The next several months saw a flurry of activity.<sup>121</sup> Once added to the case, the Public Defender agreed that plaintiffs had "very strong constitutional and statutory claims" but urged the Circuit Court to decline ordering implementation for six-to-nine months in order to resolve budgetary constraints that would make implementation "impractical."<sup>122</sup> After another attempt by the defendants to dismiss the case in Circuit Court, Judge Nance invited both sides to submit memoranda. In August, plaintiffs renewed their motion for summary judgment.

In late September, Judge Nance issued a groundbreaking decision and reversed his prior ruling, declaring that poor people's constitutional right to counsel and to due process guaranteed legal

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<sup>119</sup> The American Civil Liberties Union (ACLU) national and Maryland chapter, the Brennan Center for Justice, Center for Constitutional Rights, National Legal Aid & Defender Association joined the National Association of Criminal Defense Lawyers brief. The International Cure, Alternative Direction, and the Justice Policy Institute joined the Public Justice Center brief.

<sup>120</sup> *Richmond v. Dist. Ct. of Md.*, 990 A.2d 549, at 549 (Md. 2010).

<sup>121</sup> For additional details of court proceedings, see *Richmond I*, 76 A.3d 962 (Md. 2012).

<sup>122</sup> *Id.* at 969–70.

representation when they first appeared before a judicial officer.<sup>123</sup> Judge Nance specifically held that the initial appearance is a critical stage that requires the State to provide counsel and that denying counsel violates defendants' due process rights. It would now be the Attorney General's turn to appeal.<sup>124</sup>

#### F. Richmond II

In March 2011, the Attorney General, representing the District Court defendants, and the Public Defender filed timely appeals to the Court of Special Appeals in the newly-captioned class action suit, *Paul DeWolfe et. al. v. Quinton Richmond*.<sup>125</sup> Plaintiffs petitioned the Court of Appeals for a writ of certiorari<sup>126</sup> that would address the Circuit Court's right to counsel rulings.<sup>127</sup> The Public Defender, too, asked the Court of Appeals to consider an additional issue raised below.<sup>128</sup>

The Court of Appeals granted certiorari "to address these important questions"<sup>129</sup> once again permitting a bypass of the intermediate appellate court. Attention now turned to plaintiffs' legal brief and once again the legal community demonstrated the same strong amicus support. At oral argument, plaintiffs received welcomed support for their legal position from one of the defendants, the Public Defender, who agreed that the statutory and constitutional due process arguments "are well taken."<sup>130</sup> The Attorney General, meanwhile, maintained an aggressive defense of the status quo,

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<sup>123</sup> *Id.* at 970.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 962 (Md. 2012).

<sup>126</sup> *Richmond II*, 21 A.3d 1063 (Md. 2011).

<sup>127</sup> *Richmond I*, 76 A.3d at 972. Questions 1–4 focused upon indigent defendants' statutory and constitutional right to counsel at initial bail hearings and when commissioners impose "preset" bail ordered by district court judges in defendants' absence. Questions 5 and 6 focused on the Circuit Court's granting of declaratory relief for statutory and constitutional violations and for denying injunctive relief. *Id.*

<sup>128</sup> *Id.* The Public Defender asked whether the circuit court erred in ordering "the declaration without in any way addressing remedy and how this undisputed funding shortfall might be practicably addressed." *Id.*

<sup>129</sup> *Id.*, citing *Richmond II*, 21 A.3d at 1063.

<sup>130</sup> *Richmond I*, 76 A.3d 962, 970 (Md. 2012).

namely, no right to legal representation for indigent defendants at the bail stage.

On January 4, 2012, Judge Mary Ellen Barbera delivered the unanimous decision of the Court of Appeals.<sup>131</sup> Relying exclusively upon the Public Defender Act, the Court concluded that indigent defendants' statutory right to counsel included first appearance hearings and bail review proceedings to protect individuals' freedom before trial.<sup>132</sup> The judges agreed that "whenever a Commissioner determines to set bail, the defendant stands a good chance of losing his or her liberty, even if only for a brief time," and that "the presence of counsel...can be of assistance to the defendant."<sup>133</sup>

The Court also cited an inter-disciplinary empirical study showing that without a lawyer "unrepresented suspects are more likely to have more perfunctory [bail] hearings, less likely to be released on recognizance, more likely to have higher and unaffordable bail, and more likely to serve longer detentions or to pay the expense of a bail bondsman's non-refundable ten percent fee to regain their freedom."<sup>134</sup>

The Court, by a 5 to 2 vote, also denied the Public Defender's request for a stay until funding is certain, saying "[w]e cannot declare that Plaintiffs have a statutory right to counsel at bail hearings and in the same breath, permit delay in the implementation."<sup>135</sup>

To be sure, *Richmond I* was a stunning legal victory that acknowledged the pretrial freedom rights of poor and low-income defendants required the advocacy of a lawyer. Who would have

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<sup>131</sup> *Id.* at 962. Two judges concurred with the majority on most of the issues, but dissented on whether to grant a stay to the Office of the Public Defender. *Id.*

<sup>132</sup> *Id.* at 972 ("For the reasons that follow, we answer 'yes' to the first question presented by the Plaintiffs and hold that they enjoy a right under the Public Defender Act to be represented at any bail hearing conducted before a Commissioner. We need not and therefore do not address the federal and state constitutional claims presented by the Plaintiffs' second, third and fourth questions.").

<sup>133</sup> *Id.* at 977.

<sup>134</sup> *Id.*, citing Brief. of Appellees/Cross-Appellants at 10-11, *Richmond I*, 76 A.3d 962 (Md. 2012) (Docket No), 2011 WL 4585688 at \*10-11.

<sup>135</sup> *Richmond I*, 76 A.3d at 983.

imagined when it was filed more than five years earlier – or when students began this venture fifteen years ago – that recognition of this long overlooked right would one day be voiced by the seven judges on the Court of Appeals? However, the celebration had barely begun when legislators in the House and Senate filed bills to undo the Court’s ruling.<sup>136</sup> After all, the *Richmond I* ruling was based on the Public Defender statute. Legislators therefore possessed the power to reverse the Court of Appeals decision by repealing the statute’s language to say that the right to counsel did *not* apply either at initial hearings or bail reviews.

Other legislators, however, tempered this immediate reaction against the Court of Appeals’ sweeping ruling. They, too, wanted to make *Richmond I* a short-lived victory but sought to avoid a direct confrontation and separation of powers clash with the judiciary, a co-ordinate branch of government. As the legislative session moved toward its closing date in early April, legislators reached a compromise. Consequently, the 2012 General Assembly session concluded with legislation that overrode the Court of Appeals’ unanimous right to counsel at first appearance decision but maintained representation at the subsequent bail review hearing. Legislators did so by re-defining the Public Defender Act’s guarantee of counsel at “all stages of a criminal proceeding” to commence only after the initial appearance.<sup>137</sup>

Legislators were not alone in pushing back against the Court of Appeals ruling. Executive branch officials also expressed opposition. Within thirty days of the *Richmond I* decision, the Attorney General filed a Motion for Reconsideration on behalf of the District Court defendants and asked for an extended stay of implementation. At the close of the session, the high court denied that motion. Public

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<sup>136</sup> See S.B. 165, 2012 Reg. Sess. (Md. 2012); see also H.B. 112, 2012 Reg. Sess. (Md. 2012).

<sup>137</sup> MD. CODE ANN., CRIM. PROC. § 16-204(b)(2) (West 2012). This amended section of the Public Defender Act(2)(i) now included representation at the bail review hearing: “representation shall be provided to an indigent individual in all stages of a proceeding . . . including, in criminal proceedings, custody, interrogation, bail hearing before a District Court or circuit court judge, preliminary hearing, arraignment, trial, and appeal.” *Id.*

defenders' representation at Maryland bail review hearings commenced on May 22, 2012.<sup>138</sup>

Over the remainder of 2012, various events led the Court of Appeals to schedule a third round of oral argument. First, following the legislative repeal of the Public Defender Act and the Court's refusal to reconsider its ruling, the District Court defendants and Public Defender sought a Circuit Court hearing focused on challenging immediate enforcement of *Richmond I* and finding ways "a funding shortfall...might be practically addressed."<sup>139</sup>

Plaintiffs responded by asking the Court of Appeals to grant a writ of certiorari and decide the unresolved federal and state constitutional arguments raised in *Richmond I*. At that time, the judges had focused only upon indigent defendants' statutory guarantee based upon 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." On August 22, 2012, the Court of Appeals granted certiorari and agreed to consider the state and federal due process and critical stage constitutional issues and remedial relief.<sup>140</sup> It ordered briefs filed in October and scheduled oral argument for early January 2013.

In anticipation of the Court's ruling, the 2013 legislative session focused on pretrial justice reform measures, including the first conversation about judicial officers employing an objective assessment of defendants' flight and safety risk, if released. The risk assessment recommendation would assist judicial officers' pretrial release and bail determinations,<sup>141</sup> and reduce the impact of money

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<sup>138</sup> *Richmond II*, 76 A.3d 1019, 1025 (Md. 2013).

<sup>139</sup> *Id.* at 1024.

<sup>140</sup> *Id.* at 1026. In granting certiorari, the Court denied defendants' motion to remand the case to the Circuit Court "for further development of the factual record," adding it was "unnecessary." *Id.*

<sup>141</sup> COMM'N TO REFORM MD.'S PRETRIAL SYS., FINAL REPORT 15 (2014), available at <http://www.goccp.maryland.gov/pretrial/documents/2014-pretrial-commission-final-report.pdf>. "Pretrial risk is defined as the likelihood of committing another crime or failing to appear in court[...]An effective pretrial program should make recommendations to the court based on the findings of this risk assessment. These

bail on economically disadvantaged defendants. Legislators also introduced bills to expand police use of citations for non-violent charges in lieu of custodial arrest.<sup>142</sup> During the session, legislators also expressed support for a Governor's Pretrial Justice Committee that would further study risk assessment, use of citations and bail reform.<sup>143</sup>

House Judiciary Committee Chair Vallerio, meanwhile, proposed a reform of a different kind. His bill challenged the accuracy of public defenders' assessment of prospective clients' financial eligibility. Believing that many should have been found ineligible and been required to hire private counsel, Chair Vallerio proposed limiting public defenders' representation to a one-time only appearance at bail review.<sup>144</sup> Thereafter, representation would cease until the defendant reapplied and recertified as eligible. Vallerio's bill did not pass, but would be reintroduced.<sup>145</sup> Before legislators recessed in April, they approved the Governor's State Task Force to Study the Law and Policies Relating to Representation of Indigent Defendants by the Office of the Public Defender (hereinafter, "Public Defender Task Force"). Soon thereafter, the Governor selected Public Defender Task Force members and they commenced work during the summer and fall months.

On September 25, 2013, the Court of Appeals issued its decision in *Richmond II*.<sup>146</sup> The Court declared that Article 24 of the Maryland Declaration of Rights guaranteed indigent defendants a

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recommendations should be the least restrictive to reasonably ensure court appearance and community safety." *Id.* at 13–14.

<sup>142</sup> See H.B. 742, 2013 Reg. Sess. (Md. 2013); see also S.B. 991, 2013 Reg. Sess. (Md. 2013).

<sup>143</sup> See REPORT TO THE PRETRIAL RELEASE SUBCOMMITTEE OF THE TASK FORCE TO STUDY THE LAWS AND POLICIES RELATING TO REPRESENTATION OF INDIGENT CRIMINAL DEFENDANTS BY THE OFFICE OF THE PUBLIC DEFENDER (Nov. 2013), available at <http://www.pretrial.org/download/pji-reports/Report%20to%20the%20MD%20Pretrial%20Release%20Subcommittee%20-%20PJI%202013.pdf>. The Pretrial Justice Institute, a non-profit organization focused on pretrial reform, authored the report and contributed to the discussion by sharing their research on early representation, the benefits of risk-based decision-making, holistic pretrial systems and more, which can be found at [www.pretrial.org](http://www.pretrial.org).

<sup>144</sup> H.B. 153, 2013 Reg. Sess. (Md. 2013).

<sup>145</sup> Doug Colbert, *Insecure Justice in Maryland*, BALT. SUN, Apr. 13, 2013, at 17A.

<sup>146</sup> *Richmond II*, 76 A.3d 1019 (Md. 2013).



constitutionally protected, procedural due process right to counsel when first appearing before a commissioner.<sup>147</sup> The 4-3 decision meant that an accused poor person now had the guarantee of a lawyer's representation and vigorous advocacy to protect his or her liberty following arrest. The majority cited pretrial incarceration's "devastating effects on the arrested individuals" – loss of jobs, health and safety risks, jail conditions<sup>148</sup> – and referred to pretrial release decisions where "bail amounts are often improperly affected by race."<sup>149</sup> It concluded that a lawyer's representation following the commissioner's ruling came too late and did "not cure"<sup>150</sup> the denial of counsel at first appearances where reviewing judges did "not often change [the amount]."<sup>151</sup>

Following *Richmond II*'s constitutional right to counsel mandate, the State of Maryland<sup>152</sup> petitioned the Court to recall the mandate. Two days later on October 25, 2013, the State filed two other motions: it asked the Court of Appeals to stay its ruling until after the legislative session concluded and it filed a Motion for Reconsideration where it sought to reargue the merits of the constitutional right to counsel ruling.<sup>153</sup> On November 6, the Court of Appeals denied each of the State's three motions.<sup>154</sup> The Court remanded the case to the lower Circuit Court with directions to enter a declaratory judgment. The Court of Appeals attached a proposed Order that informed the parties that the Circuit Court would be the proper forum for raising issues related to implementation, such as defendants needing more time.<sup>155</sup>

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 1023.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 1029 ("As a matter of Maryland constitutional law where there is a violation of certain procedural constitutional rights of the defendant at an initial proceeding, including the right to counsel, the violation is *not cured* by granting the right at a subsequent appeal or review proceeding.") (emphasis added).

<sup>151</sup> *Id.* at 1022–23.

<sup>152</sup> 76 A.3d at 1021, n.1. Following *Richmond I*, the Court of Appeals granted the State of Maryland's motion to intervene as an interested party. *Id.*

<sup>153</sup> *Id.* at 1035.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* The Court of Appeals Order referred to the State of Maryland requesting time to comply with *Richmond II*'s declaratory judgment and stated that "any arguments by the parties may be made in the Circuit Court if, and when, any party files in the

The Court of Appeals moved forward with implementation of *Richmond II*'s constitutional guarantee to counsel at first appearance. In late November, Chief Judge Barbera delivered an Administrative Order that directed District Court administrative judges to identify appointed panel attorneys, who would be available for representation.<sup>156</sup> In December, *Richmond* attorneys moved for injunctive relief to compel the District Court to provide counsel, a motion the Circuit Court granted in early January 2014.<sup>157</sup> When the Chief Judge of the District Court indicated his readiness, signs pointed to imminent implementation.<sup>158</sup> But that quickly changed when the Attorney General, representing the District Court defendants, petitioned the Court of Appeals for a stay and writ of certiorari.<sup>159</sup> On January 23, 2014, the Court of Appeals granted a temporary stay that would later be extended to July 1, 2014.<sup>160</sup>

The 2014 legislative session devoted considerable attention to the *Richmond* rulings. From the moment the session began, political leaders voiced opposition and openly expressed hope that the Court of Appeals would revisit *Richmond II*. On a live public radio program, Governor Martin O'Malley first hinted, and then Senate President Mike Miller boldly predicted that the Court of Appeals would grant

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Circuit Court an application for '[f]urther relief based on [the] declaratory judgment.'" *Id.*

<sup>156</sup> ADMINISTRATIVE ORDER ESTABLISHING APPOINTMENT PROCESS FOR ATTORNEYS REPRESENTING INDIGENT DEFENDANTS AT INITIAL APPEARANCES BEFORE DISTRICT COURT COMMISSIONERS 2 (2013), *available at* <http://www.courts.state.md.us/adminorders/20131126attorneyappointmentprocessrepresentingindigentdefendants.pdf>.

<sup>157</sup> Brief of Appellants, Ben C. Clyburn, v. Quinton Richmond, at 15 (No. 105) (2013).

<sup>158</sup> *Id.* Chief Judge Clyburn had indicated the District Court's readiness to provide counsel at first appearances at the January meeting of the Maryland Rules Committee. Steve Lash, *Top Court Won't Stay Lawyers-At-Bail Ruling*, DAILY RECORD (Nov. 6, 2013). On February 12, 2014, the Chief Judge reiterated that "the District Court was ready to go" and had lists of lawyers ready to provide representation.

<sup>159</sup> See *supra* note 156. On January 10 and 13, 2014, the Attorney General moved for a writ of certiorari, and to enjoin and stay the Circuit Court's granting of immediate Richmond relief.

<sup>160</sup> Order, Ben C. Clyburn v. Quinton Richmond, (No. 105), (Md. 2013), *available at* <http://www.mdcourts.gov/opinions/coa/2014/105a13.pdf>.

the State's motion to reconsider and overrule *Richmond II*.<sup>161</sup> Each public official made reference to changes in the Court's membership as reason for their optimism.<sup>162</sup> During the legislative session, Senator Zirkin, a member of the Judicial Proceedings Committee, offered a bill that called for a public referendum to overrule *Richmond II* and eliminate poor people's constitutional right to counsel.<sup>163</sup> Senator Zirkin also opposed a bill sponsored by the Chair of Judicial Proceedings, Senator Brian Frosh, which incorporated the Governor's Task Force recommendations for risk assessment, a statewide pretrial services agency and elimination of cash bail.<sup>164</sup>

While the Senate overwhelmingly rejected the public referendum bill and approved Senator Frosh's risk assessment proposal,<sup>165</sup> the legislation fared badly when presented to the House Judiciary Committee. Both the Chair and a majority of members indicated their opposition both to risk assessment and to funding the Public Defender to represent indigent defendants at first appearance. As the 2014 legislature reached its final days, legislators agreed on a temporary solution. The Judiciary budget would provide ten million dollars to fund private attorneys' representation of certified indigent defendants.<sup>166</sup> Legislators also approved the Governor's Commission to Reform Maryland's Pretrial System.<sup>167</sup>

When the *Richmond II* parties returned to the Maryland Court of Appeals on May 6, 2014, they appeared more in agreement than at any other time since litigation commenced seven-and-a-half years

<sup>161</sup> Michael Dresser, *O'Malley, Miller Don't See High Court Ruling as Final*, BALTIMORE SUN, (Jan. 8, 2014), [http://articles.baltimoresun.com/2014-01-08/news/bs-md-session-steiner-20140108\\_1\\_appeals-court-mike-miller-appeals-decision](http://articles.baltimoresun.com/2014-01-08/news/bs-md-session-steiner-20140108_1_appeals-court-mike-miller-appeals-decision).

<sup>162</sup> *Id.*

<sup>163</sup> See S.B. 1144, 2014 Reg. Sess. (Md. 2014), available at [http://mgaleg.maryland.gov/2014RS/fnotes/bil\\_0004/sb1114.pdf](http://mgaleg.maryland.gov/2014RS/fnotes/bil_0004/sb1114.pdf).

<sup>164</sup> See H.B. 973, 2014 Reg. Sess. (Md. 2014), available at <http://mgaleg.maryland.gov/2014RS/bills/sb/sb0973T.pdf>,

<sup>165</sup> See Nick Tabor, *Md. Senate Advances 'Moneyball' Bail System Bill*, WASH. TIMES, Mar. 28, 2014, <http://www.washingtontimes.com/news/2014/mar/28/senate-advances-moneyball-bail-system-bill/>.

<sup>166</sup> FINAL REPORT, COMMISSION TO REFORM MARYLAND'S PRETRIAL SYSTEM 1, 9, 2014, available at <http://www.goccp.maryland.gov/pretrial/documents/2014-pretrial-commission-final-report.pdf>.

<sup>167</sup> Md. Code Regs. 01.01.2014.08 (May 27, 2014).

earlier.<sup>168</sup> Both shared the principle of compliance with the *Richmond II* guarantee of counsel once the Court approved the Rules Committee's revision. The defendants, however, seemed more interested in plaintiffs relying on their "good will and good faith" than providing a date certain for implementation. Plaintiffs insisted upon the firm date of July 1, 2014, when the ten million dollar funding became available for providing counsel to Baltimore City defendants and offered flexibility in other jurisdictions. At the Rules Committee meeting on May 27, 2014, members heard from the interested parties and finally decided that statewide implementation would commence on July 1.<sup>169</sup>

#### IV. CONCLUSION

On July 1, 2014, more than sixteen years after the first Clinic students enrolled in the Access to Justice Clinic, *Richmond* panel attorneys began representing Maryland indigent defendants at initial appearances before District Court Commissioners. Five months later, the Governor's Commission to Reform Maryland's Pretrial System reported that lawyers' representation made a substantial difference: roughly seventy percent of represented detainees gained pretrial release at initial appearance, substantially higher than the previous fifty percent of unrepresented defendants who had regained their

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<sup>168</sup> Plaintiffs' brief explained their position of seeking injunctive relief, should the defendants delay implementation. "This case has had far too many delays and detours for the Court to accept the [defendants'] vague promise of future compliance at face value. They have fought implementation tooth and nail for the last seven months, to the point of taking positions in this Court that flatly contradicted repeated public statements by Chief Judge Clyburn that the [defendants] were ready to move forward. If the [defendants] do not want to be subject to an injunction, they should be clear and specific as to the dates when *full* implementation will occur in each jurisdiction." Brief for Appellees, Ben C. Clyburn v. Quinton Richmond, (No. 105) 2013, *available at* <http://courts.state.md.us/coappeals/highlightedcases/richmond/Brief%20of%20Appellees.pdf>.

<sup>169</sup> RULES ORDER, COURT OF APPEALS STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, (May 27, 2014), *available at* <http://mdcourts.gov/rules/rodocs/183ro.pdf>.

liberty.<sup>170</sup> Considering that most arrestees are charged with non-violent crimes,<sup>171</sup> the reduced expense of pretrial incarceration resulted in significant savings.

*Richmond's* judicially-administered right to counsel panel, however, encountered difficult issues. Perhaps the most disturbing involved the percentage of indigent defendants who waived their right to counsel. According to the final report of the Governor's Commission to Reform Maryland's Pretrial System, an exceedingly high proportion of defendants— between forty to ninety percent— chose to appear without a lawyer.<sup>172</sup> One reason identified by the Commission was the delay in waiting for an assigned lawyer.<sup>173</sup> Panel lawyers also raised issues about the attorney selection process and insufficiency of selection standards, the limited training they received, the difficulties encountered in conducting jail interviews and maintaining client confidentiality, and the inability to forward clients' information to public defenders for representation at the next bail review hearing.<sup>174</sup>

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<sup>170</sup> FINAL REPORT, COMMISSION TO REFORM MARYLAND'S PRETRIAL SYSTEM 1, 18, 2014, available at <http://www.goccp.maryland.gov/pretrial/documents/2014-pretrial-commission-final-report.pdf>.

<sup>171</sup> See *supra* note 16 and accompanying text.

<sup>172</sup> The Commission to Reform Maryland's Pretrial System released its final report on December 19, 2014. During a random week between November 14-20, 2014, a statewide survey showed that three out of five Maryland defendants waived counsel. FINAL REPORT, COMMISSION TO REFORM MARYLAND'S PRETRIAL SYSTEM 1, 10, 2014, available at <http://www.goccp.maryland.gov/pretrial/documents/2014-pretrial-commission-final-report.pdf>.

<sup>173</sup> In counties where panel attorneys appeared for a limited period each day of four, five or eight hours, defendants' waiver rates often exceeded eighty percent. *Id.* at 9. The lowest waiver rates usually occurred in jurisdictions which assigned defense lawyers 24/7, such as Baltimore City, Prince George's and Montgomery counties. Additionally, defendants' waivers occur without having seen or spoken to the assigned attorney before appearing at the closed commissioner's hearing that determines eligibility. Once found eligible, detainees are given the choice of requesting an attorney and returning to their cells for hours or until the next day to wait for a lawyer, or proceeding to an immediate hearing without counsel. MD. R. 4-216.1.

<sup>174</sup> See Steve Lash, *Pretrial Issues on Lawmakers' Docket*, DAILY RECORD (Dec. 7, 2014).

Renewed hope for reform grew with the anticipated work of the twenty-three member Governor's Commission. Beginning in July, the Commission met five times and its three subcommittees – Managing Public Safety through Risk-Based Decision Making, Pretrial System Improvement, and Individual Rights and Collateral Consequences – held five additional meetings. On December 19, 2014, the Commission issued a comprehensive report and highlighted fourteen recommendations, including a statewide pretrial services agency to supervise released defendants and administer a risk assessment determination, pilot programs to evaluate risk assessment and the results of representation, and the elimination of money bail and commercial bondsmen.<sup>175</sup> Proponents anticipated presenting their recommendations at the upcoming legislative session. They would be disappointed.

As the January 2015 session opened, legislators filed ten bills that opposed *Richmond's* right to counsel and supported bail bondsmen and money bond. Some bills argued for a constitutional amendment and a citizen referendum to eliminate *Richmond's* mandate.<sup>176</sup> Others limited public defenders representation to the one-day bail hearing and questioned the integrity of their eligibility process.<sup>177</sup> These proposed bills would terminate legal representation for indigent defendants until they reapplied and received eligibility recertification. Other legislation proposed extending the first appearance hearing from twenty-four to forty-eight hours before being brought before a judicial officer, enhancing bail bondsmen's power to avoid paying the forfeited bond, and authorizing judges to order "preset" bail for defendants who failed to appear in court. Aside from seeking the collection of data,<sup>178</sup> legislators ignored the remaining thirteen recommendations of the Governor's Commission.

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<sup>175</sup> See *supra* note 172.

<sup>176</sup> See H.B. 0496, 2015 Reg. Sess. (Md. 2015), available at <http://mgaleg.maryland.gov/2015RS/bills/hb/hb0496F.pdf>.

<sup>177</sup> See H.B. 0530, 2015 Reg. Sess. (Md. 2015), available at <http://mgaleg.maryland.gov/2015RS/bills/hb/hb0530F.pdf>.

<sup>178</sup> Proposed legislation sponsored by Delegate Jill Carter and co-sponsored by eight colleagues included an information gathering bill that reflected Recommendation Thirteen's call for the collection of data. See H.B. 0357, 2015 Reg. Sess. (Md. 2014), available at <http://mgaleg.maryland.gov/2015RS/bills/hb/hb0397F.pdf>.

No one should doubt the continuing challenges that lie ahead toward reforming Maryland's pretrial justice system. During the past seventeen years, every successful venture resulted in opponents renewed efforts to reverse the change. The topsy-turvy, up-and-down road of reform recalls the memorable words of the beloved philosopher, Yogi Berra, who always reminded that "it ain't over till it's over."

One item, though, remains certain: reform requires collaboration. The work of clinical students and members of the legal community made legislative and administrative change possible. *Richmond's* legal and constitutional victories required the dedication and persistence of Venable's pro bono lawyers and the law school clinic, and the support of the amicus public interest community. With a sustained and collective effort that includes the voices of people believing in a fair and just pretrial system, *Gideon's* guarantee of counsel for poor and low-income defendants at the beginning of a criminal prosecution will become a permanent reality.