Bail Reform in Maryland

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# Executive Summary

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**To:** Governor Larry Hogan

**From:** Meshal Alkhowaiter, Doug Hummel-Price, Caroline Reppert, Alyssa Snider, Analysts, State Attorney General Frosh’s Office

**Date:** December 4th, 2018

**Subject:** Monetary Bail Disproportionately Affects the Poor: Recommendation for Bail Reform Legislation

**Recommendation**

We recommend that the Governor call for legislation that:

1. Abolishes monetary bail in Maryland.
2. Replaces bail with a risk assessment model to help judges make release decisions.
3. Mandates funding for robust pretrial services programs to provide alternatives for detention for individuals with low or moderate risk.

Cities and states around the country are modernizing the way they approach monetary bail. We recommend that Maryland take advantage of the lessons learned in these cities and states to implement an overhaul of monetary bail.

# Background

* **What is Bail?**

A defining characteristic of the United States justice system is the presumption of innocence. The American public, at least in theory, considers depriving an innocent person of their liberty to be significantly more morally egregious than allowing a guilty person to walk free. So long as the person accused is not at risk of committing violence, the U21 `S has a strong preference for allowing that person to retain their liberty during the trial process. If a judge determines that no condition or combination of conditions will guarantee that a defendant will appear for trial, the judge declares the them *non-bailable* and holds them in jail during the pre-trial process. The preference for pretrial release of these individuals, however, must be weighed against the risk that the individual will leave the jurisdiction or otherwise fail to attend their required court appearances.

To ensure that defendants determined to be eligible for release appear in court, judges have several options: *release on personal recognizance*, *conditional release*, or *release upon payment of bail or bond*.[[1]](#footnote-0) Release on personal recognizance effectively means that the court trusts the defendant’s promise to show up in court. Some individuals are given conditional release, under which they are released but held to certain conditions prescribed by the judge, such as home arrest, ankle monitoring, or substance abuse treatment programs. When a judge determines that the first two options do not sufficiently guarantee the appearance of the defendant, the judge can set a dollar amount that becomes the defendant's *cash bail* or *money bail,* the amount that the defendant sacrifices should they fail to appear for their court date. The defendant must provide the money bail to the court to be released. As long as they meet their obligations to appear in court, the bail is typically returned to them upon completion of the trial process, though court fees are often extracted from the amount.

Many defendants do not have the resources to pay their bail in full, so most courts allow the defendant the option to be released on a bond, a written agreement issued by a third party promising to pay the bail if the defendant fails to appear.[[2]](#footnote-1) Defendants who opt for bond must contract with a bail bonds agent, also known as a surety. The agent agrees to pay the bond to the court on behalf of the defendant, in exchange for a fee from the defendant, often 10% of the total bail amount. Because the agent then owes the court the full bail amount if the defendant fails to appear, the bond agent has a strong incentive to ensure the defendant’s appearance. Importantly, the fee paid to the bail bonds agent is nonrefundable, so defendants who cannot afford bail must choose between forfeiting the bond fee and remaining behind bars during the pretrial period. **The bond fee amounts to a poor tax**, since it necessarily only impacts those unable to pay their full bail amounts. Because of the disproportionate impact of bail, criminal justice advocates have enacted three waves of bail reform.

* **The First Wave of Bail Reform: 1966**

Despite its origin as a tool to enable greater liberty, bail has been plagued with a number of problems historically. Throughout the early 1900s, academics worked to build awareness and coalitions to reform bail practices.[[3]](#footnote-2) By the 1960s, US officials could see the disproportionate impact of the practice. The then US Attorney General Robert F. Kennedy stated in 1964, “Usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. The factor is simply money. How much money does the defendant have?”[[4]](#footnote-3) As a result of the growing public support for reform, Congress passed the Bail Reform Act of 1966. The Act made explicit that judges are to use the least restrictive method of ensuring court appearance and should opt for release on personal recognizance whenever possible. On this basis, the first wave focused on release over detention.

* **The Second Wave of Bail Reform: 1984**

Over the next two decades, the increasing levels of crime, and the “Tough on Crime” rhetoric that came with it, shifted the momentum back in favor of detention over release.[[5]](#footnote-4) The Bail Reform Act of 1984 gave judges more leeway to detain defendants on public safety grounds. Despite both the Act and at least one court decision making clear the procedural rules in place to ensure that the decision to detain a defendant allows for due process, most state courts ignored these rules in practice.[[6]](#footnote-5) Federal Courts have consistently maintained that bail cannot be set prohibitively high as a way of ensuring pretrial detainment, but data suggests that this practice is common.[[7]](#footnote-6)

# 

* **The Third Wave: Current Problems with Bail**

Today, money bail continues to be plagued with many of the same problems that the previous two waves attempted to fix. A variety of metrics demonstrate that bail still disproportionately impacts the poor and people of color, presented in the Harvard Primer on Bail Reform:

[A] 2013 review of New York City’s jail system showed that “more than 50% of jail inmates held until case disposition remained in jail because they couldn’t afford bail of $2,500 or less.” Most of these people were charged with misdemeanors. Of these non-felony defendants, thirty-one percent remained incarcerated on monetary bail amounts of $500 or less. Nationwide, 34% of defendants are kept in jail pretrial solely because they are unable to pay a cash bond, and most of these people are among the poorest third of Americans. National data from local jails in 2011 showed that 60% of jail inmates were pretrial detainees and that 75% of those detainees were charged with property, drug or other nonviolent offenses. In fiscal year 2014 alone, local jails admitted 11.4 million people and the nationwide average daily population included 467,500 pretrial defendants.[[8]](#footnote-7)

As an example of how this plays out, consider a defendant who must spend three months in jail prior to their trial. Even if they are found not guilty or the charges even dropped, the defendant may have already faced irreparable harm in the form of losing their job or housing. On the extreme end are cases like that of Jeffrey Pendleton, 26, and Sandra Bland, 28, both of whom died while in jail because they were unable to pay bail.[[9]](#footnote-8) There’s also the story of Lavette Mays, 47, who was jailed for over 14 months waiting for her trail. As journalist James Dennin puts it: “[B]ecause she didn’t have the means for bail, Mays’ jail time cost her a business and home, separating her from her children, whom she could not support, from March 2015 to May 2016. She had no income while her legal costs mounted, and her kids had to leave home to stay with their father. Mays eventually pleaded guilty, but only because she didn’t want to keep waiting for her trial, she said.”[[10]](#footnote-9) Not only was her life completely upended due to her detainment, it ultimately led her to plead guilty in a case that she otherwise might not have.

Armed with these and similar facts, criminal justice reform activists have worked at the city and the state level to pass reform. This report specifically examines reform in California, New Jersey, Pittsburgh, and Washington, DC for guidance for addressing the problems that still plague Maryland.

* **Issues Remaining in Maryland’s Bail System After the Appeals Court Reform**

In July 2017, the Maryland Court of Appeals issued a decision that judges must consider a defendant’s ability to pay when setting bail; specifically, judges were discouraged from intentionally setting bail too high for a person to afford with the intention of keeping them detained.[[11]](#footnote-10) Since this decision was implemented, the most significant change has been in the number of people who could not afford their bail. Before the rule, 40% of Maryland detainees were being held because of an inability to afford bail. After the rule, that had fallen to 20 %.[[12]](#footnote-11) Additionally, the bonds being imposed are significantly lower on average.

However, advocates are concerned about some trends that have emerged. Baltimore Democratic State Delegate Curt Anderson says that judges are now more reluctant to release individuals they would have previously given bail, including some charged with misdemeanors such as theft, driving on a revoked license, or second-degree assaults stemming from fights.[[13]](#footnote-12) Local news station WBAL-TV reported that the number of individuals being held in jail without the option of bail has increased significantly. Before the rule, 7.5% of individuals were held without the option of bail; that number is now 20%.[[14]](#footnote-13) In Baltimore, the rate of individuals being detained without bail increased by 26%.[[15]](#footnote-14) It is apparent that in many cases, rather than making cash bail more affordable, Maryland judges are choosing not to set bail at all in cases where they previously would have.

Finally, early reports showed that the failure to appear rate in Maryland had increased from 9.5% to 14.5% in only three months after the rule’s implementation.[[16]](#footnote-15) These data suggest that further reform is needed.

# Key Stakeholders and Political Considerations

## 

When considering avenues for reforming Maryland’s bail system, it is helpful to understand the key stakeholders and players who would be involved in such a reform.

* **Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure**

The Committee on Rules of Practice and Procedure, commonly known as the Rules Committee, is the body that has the most direct path to reform Maryland’s bail system. This committee, authorized by the state constitution and formed by the Maryland Court of Appeals, considers amendments and additions to the Maryland Rules of Procedure and submits recommendations for changes to the Court of Appeals.[[17]](#footnote-16)

The Rules Committee has previously made its power on this issue known. In 2016, it undertook a study of cash bail in Maryland and found it to be racially discriminatory and devastating to families.[[18]](#footnote-17) The Committee then drafted the rule change which was unanimously adopted by the Maryland Court of Appeals in 2017, requiring that judges take a defendant’s ability to pay into account when setting bail, and not impose high bail solely to keep the defendant detained.[[19]](#footnote-18)

The Rules Committee is made up of twenty-four active members, primarily Maryland lawyers, some of whom were former state prosecutors or public defenders, as well as six active judges and two legislative representatives. The Committee is chaired by retired judge Hon. Alan Wilner.[[20]](#footnote-19) Notably, one of the legislative members is Delegate Joe Vallario, Chair of the House Judiciary Committee- see “Bail Bond Agencies” and “State Legislature” sections below.

* **State Legislature**

The Maryland State legislative bodies have the broadest power to reform the cash bail system through the passage of legislation. However, there is strong opposition to reform in key positions within the legislature, particularly by State Senator Bobby Zirkin, Chair of the Senate Judicial Proceedings Committee; Delegate Joe Vallario, Chair of the House Judiciary Committee; and Senator Michael Hough, a powerful Republican on the Judicial Proceedings Committee.

In 2017, these legislators helped push forward a bill that enumerated the charges that require bail, as opposed to release without financial conditions, and would have required that judges set bail at the level the defendant can afford.[[21]](#footnote-20) The bill passed the State Senate, but its counterpart in the House, co-sponsored by Delegate Joe Vallario, failed due to opposition by the Legislative Black Caucus. The Caucus vowed to work on bail reform in the 2018 session, but there has been no substantial progress yet this year.

Despite the relative complexity of a legislative solution to the bail problem, we contend that it is necessary. For example, legislative action would be needed to fund and implement pretrial services programs, which supervise defendants who are released.[[22]](#footnote-21) The legislature could additionally choose to act beyond what the Court of Appeals has already required, such as implementing the use of a risk assessment tool to reduce some of the subjectivity in the bail setting process and mandating funding for alternative solutions.

* **Bail Bond Agencies**

The bail lobby is the loudest and most powerful voice opposed to bail reform in Maryland. Maryland ranks third in the country for campaign donations to elected officials by the bail bond industry. These donations totaled $288,550 from 2011-2017, including $87,100 in the last year alone.[[23]](#footnote-22) The contributions were targeted to legislators who hold the most direct power over the bail industry; the largest donations went to Sen. Bobby Zirkin, Del. Joe Vallario, and Sen. Michael Hough.[[24]](#footnote-23)

Notably, the majority of the campaign contributions came from local bail bond companies, including significant donations from Fred W. Frank Bail Bonds, FWF Bail Consultants, Lexington National Bail Services, Burch Bail Bonding, and the Maryland Bail Bond Association. The only large donation from outside Maryland was from the National Association of Surety Bonds Producers.[[25]](#footnote-24)

Barry Udoff , President of the Maryland Bail Bond Association, argues that reducing the use of bail actually results in more defendants being held without the option for bail (generally, those who are deemed dangerous and who would have previously had a very high bail set).[[26]](#footnote-25) Bail industry representatives also caution that pretrial services, such as electronic monitoring, can be more costly to defendants than bail bonds.[[27]](#footnote-26)

However, the bail lobby has been struck by scandal. In January of this year, Democratic State Senator Nathaniel Oaks was found to have accepted a bribe from bail bond lobbyists. Barry Udoff, President of the Maryland Bail Bond Association and head of Fred W. Frank Bail Bonds, denied that his company or the Association had anything to do with the bribery.[[28]](#footnote-27) Since then, some anti-bail bond legislators have advocated that the legislature stop accepting donations from the lobby.

* **Interest Groups**

There is a substantial group of national-level and local-level organizations in Maryland advocating for bail reform. These organizations include the American Civil Liberties Union (ACLU), the Baltimore Jewish Council, the Maryland State Bar Association, Maryland Job Opportunities Task Force, and the Pretrial Justice Institute.

Local advocates see this as an ideal time to push for further bail reform in the legislature, to build on the rule adopted by the Maryland Court of Appeals. Pro-bail reform groups were key in the effort to stall the bail lobby’s bill in the House of Delegates in 2017, by winning over the Legislative Black Caucus.[[29]](#footnote-28)

Advocates’ main goal moving forward is the institution of robust pretrial services throughout Maryland.[[30]](#footnote-29) An op-ed published in the Washington Post by a member of the House Judiciary Committee and Policy Director of the ACLU of Maryland stated:

*Maryland needs robust and effective pretrial services in every jurisdiction. ...Pretrial services can include job training, educational opportunities, substance-use-disorder treatment, anger management, supervision and trial date reminders that will ensure the accused's appearance at court and help avoid further entanglement with the criminal-justice system. Moreover, the state now has an opportunity to capitalize on a heretofore untapped resource: community-based service providers, who are geographically practical, culturally proficient and likely more effective than the traditional state-centered services.[[31]](#footnote-30)*

They also advocated for better data collection in order to be able to track progress.

* **Judges**

Judges across Maryland appear to have differing opinions on the best approach to bail reform. While they support alternatives to cash bail, including community services, home detention, and drug treatment programs, many also express caution about eliminating bail entirely and frustration at the lack of options available to them.[[32]](#footnote-31)

This tendency toward caution may be the reason for the increase in defendants held without bail since the Court of Appeals rule implemented in 2017. Before the rule, judges would set very high bail for individuals they perceived at high risk of endangering the community; the judges are now simply not giving the option of bail.[[33]](#footnote-32) The Cato Institute has hypothesized that when unsure of the risk a defendant poses and without the option of a high bail, judges will err on the side of caution and keep the defendant in jail.[[34]](#footnote-33)

However, Baltimore District Court judges have also chosen to hold individuals without bail who could hardly be considered flight or public safety risks, including those charged with misdemeanors.[[35]](#footnote-34) Any further attempts at reform would require clear guidance to judges on how to implement new rules or laws.

* **Maryland Attorney General, State Attorneys, and Prosecutors**

Brian Frosh, the State Attorney General, supports bail reform. In late 2016, he wrote a letter to the Rules Committee prompting their study into monetary bail and subsequent rule change.[[36]](#footnote-35) In his letter, Frosh stated that excessive cash bail intended to detain the defendant violates the Eighth Amendment.[[37]](#footnote-36) Baltimore City State Attorney Marilyn Mosby has issued a similar opinion. In 2017, she signed onto a court brief (for a case in another state) recommending the complete abolition of cash bail.[[38]](#footnote-37)

However, this opinion is not held unanimously. Baltimore County State Attorney Scott Shellenberger, a conservative Democrat, is in favor of using standardized risk assessments in the pretrial system, but also supports cash bail as an incentive to increase the likelihood of appearance at court.[[39]](#footnote-38)

# Alternatives

In order to assess what sort of policy solutions may be most appropriate to address the issues with Maryland’s bail system, we studied attempts at reform that were undertaken by four other jurisdictions: New Jersey, California, Washington, D.C., and Pittsburgh, Pennsylvania. We then integrated the lessons learned from each of these reforms to develop a final recommendation for Maryland.

## Pretrial Services and Risk Assessment Instrument in Washington, D.C.

Washington, D.C., has the nation’s oldest risk-based assessment system used to determine pretrial release, operated by the Pretrial Service Agency since 1992. While the District has not officially abolished the cash bail system, it has rarely been implemented in the last two decades.[[40]](#footnote-39) In fact, no one is currently being held in the District’s jail pending trial on a criminal case because of unpaid bail.

The District’s pretrial system evaluates each individual’s case independently. The risk assessment procedure is conducted by a government official and incorporates seventy factors and questions into the model. The questions asked by a pretrial officer include: “How long have you lived in Washington?”, “Do you have children?”, and “Do you hold a full or part time job?” The model produces a decision that is then reviewed by a judge who ratifies, rejects, or amends the decision.

* **Developments in D.C.’s Risk-Assessment Model**

D.C. has made several changes to its risk assessment instrument since its institution, in some cases with the assistance of the Urban Institute, which has provided an annual independent performance evaluation report since 2001.[[41]](#footnote-40)

One major change adopted in 2009 gave each question or factor in the algorithm a unique weight, updated annually; previously, the risk model treated all prior arrests equally.[[42]](#footnote-41) For instance, a person arrested for selling drugs would be given the same risk score as an individual arrested for selling tobacco without a license, thus resulting in both high and low risk individuals spending time in jail before trial.

Another change adopted in 2015 divided the risk score into two parts, an appearance score and a safety risk score.[[43]](#footnote-42) Each score ranges from 0 to 50, with greater values implying higher risk. Based on feedback from the Urban Institute, the Pretrial Service Agency also incorporated negative and positive weights into its algorithm, with negative weights reducing an individual’s risk score and positive weights increasing the risk score.[[44]](#footnote-43) For example, a safety risk question about whether the person has failed a drug test has a weight of -1.07, which means that if the person has not, then the individual’s risk score decreases, indicating a lower risk to the public.

The Pretrial Service Agency has also expanded its risk categories from three to five types, with the score thresholds for each and the associated release recommendations illustrated below.[[45]](#footnote-44)

|  |  |  |  |
| --- | --- | --- | --- |
| **Risk Category** | **Appearance** | **Safety** | **Release Recommendation** |
| Low | 0 | 0 | Release on personal recognizance |
| Condition Monitoring | 12 | 11 | Release on personal recognizance with conditions not restrictive of liberty (e.g., surrender of passport) |
| Moderate | 14 | 16 | Release under restrictive conditions (e.g., substance abuse testing or treatment, curfew, or personal reporting) |
| High | 35 | 34 | Release under the most restrictive conditions (e.g., intensive supervision, house arrest, halfway house placement) |
| Severe | 44 | 46 | Detention in most circumstances |

* **The Effectiveness of D.C.’s Risk-Assessment Model**

A common critique by opponents of bail reform is that the lack of cash bail reduces the incentive among defendants to appear for their trial, thus lowering court appearance rate. However, D.C.’s risk model has an 89% trial appearance rate, which is similar to that of other jurisdictions with cash bail.[[46]](#footnote-45) Additionally, in the past five years, 90% of released defendants were not re-arrested before trial.[[47]](#footnote-46) Of the remaining 10%, the majority were arrested for a nonviolent crime. This indicates that a system without cash bail does not pose a public safety risk.

Furthermore, Washington’s Pretrial Service Agency applies three main performance indicators to evaluate its risk assessment model: the ratio of defendants who are released before trial; the percentage of defendants who appear in court; and the ratio of defendants without a pending request for removal due to a violation of their pretrial release conditions.[[48]](#footnote-47) The table below summarizes the District’s Pretrial Service Agency’s performance between 2011 and 2015:

*Performance of D.C.’s Pretrial Service Agency, 2011-2015[[49]](#footnote-48)*

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Outcome** | **FY 2011** | **FY 2012** | **FY 2013** | **FY 2014** | **FY 2015** |
| ***Percentage of Defendants Who Remain Arrest-free During the Pretrial Release Period*** | | | | | |
| Any crimes | 88% | 89% | 90% | 89% | 91% |
| Violent crimes | 99% | 99% | >99% | 99% | 98% |
| ***Percentage of Defendants Who Make All Court Appearances During the Pretrial Period*** | | | | | |
|  | 88% | 89% | 88% | 88% | 90% |

The Pretrial Service Agency claims that its model is not only effective in terms of release rates, but also cost-effective. In 2015 alone, the Agency estimates that it saved $200 per day for each of the 2,650 defendants released before trial. The Agency further states it would have cost taxpayers in the city a minimum of $398 million a year to detain those defendants pretrial.[[50]](#footnote-49)

* **The Limitations of D.C.’s Risk-Assessment Model**

Despite the noticeable progress and pioneering role that Washington D.C.’s risk assessment tool has made in the past 10 years, the model continues to have some limitations. One is its conservative nature in assigning risk. According to the Urban Institute’s evaluation report, the model has a high false positive rate (65%), representing defendants who were classified as risky and recommended for detention, but were nonetheless released and ultimately attended their trial date.[[51]](#footnote-50)

Some research has shown that false positive rates are more likely to exist among minority male defendants, possibly reflecting racial biases.[[52]](#footnote-51) However, whether this is occurring in D.C. is more difficult to determine. A study by UC Berkeley explains that answering whether a risk assessment tool exacerbates, improves, or has no impact on racial and economic disparities is a complex task, as is reaching a conclusion that applies to all jurisdictions’ risk assessment models.[[53]](#footnote-52)

Despite these flaws, empirical evidence shows that the use of the risk assessment model has reduced the city’s jail population, primarily low-level offenders who count not afford bail, as well as the number of violent defendants, who were released on a high bail.[[54]](#footnote-53)

## Early Example of the Risk Assessment Model: Pittsburgh, PA

Pittsburgh serves as a model for how one city can lead the charge for reform within a state. The city originally started the reform process in 2007 after the publication of a report detailing the problems with the city’s bail system.[[55]](#footnote-54) In response to the report, Pittsburgh began to move away from a cash bail model and towards a non-monetary bail model by using a risk assessment tool which evaluates both a defendant’s flight risk and risk of reoffending during the pretrial period.[[56]](#footnote-55)

To establish those risks, a Bail Investigative Unit agent conducts an in-person interview and a background check of the defendant; the answers are used to assign a risk level and make a pretrial sentencing recommendation to a judge. These recommendations are non-binding, ultimately leaving the final decision up to the judge. These sentencing options can include: release on one’s own recognizance; release with monitoring; release with unsecured bail (that is, the individual owes the bail amount if they fail to appear but does not need to make any payment before release); release with nominal bail; release on standard bail; and detention without bail.[[57]](#footnote-56)

Based on the result of the risk assessment evaluation, a defendant will be designated low, moderate, or high risk.[[58]](#footnote-57) Low risk defendants are recommended for release with either no required check-ins, or phone or in-person check-ins with a pretrial services agency, but no other release conditions. Moderate risk defendants are recommended for release with in-person check-ins at a pretrial services agency and possible electronic monitoring. High risk individuals are typically not recommended for release, given that most of these individuals are accused of violent crimes.

As shown in the chart below, high risk individuals make up about 39% of the total pretrial recommendations.[[59]](#footnote-58) While this number may seem high, this leaves 60% of those arrested eligible for release, reducing the number of individuals who are awaiting trial in jail.

*Risk Assessment and Release Recommendation (Pittsburgh, PA), 2014[[60]](#footnote-59)*

|  |  |  |
| --- | --- | --- |
| **Pretrial Initial Risk Assessment** | **Total Individuals Assessed** | **Percent of Total** |
| Low (Released on own recognizance) | 2,165 | 13% |
| Low (Supervised release) | 2,802 | 16% |
| Medium (Supervised release) | 5,633 | 33% |
| High (No recommended release) | 6,670 | 39% |
| Total | 17,270 | 100% |

* **Effectiveness of Pittsburgh’s Model**

Pittsburgh’s program has greatly improved the pretrial system for defendants. 80% of all defendants released pretrial appear for all scheduled hearings. Additionally, 79% commit no new offenses during the pretrial period. Of those who do reoffend during the pretrial period, only 6% of those crimes are violent offenses.[[61]](#footnote-60) These rates are comparable to before the implementation of the tool.

The risk assessment tool has also proven cost effective. The pretrial system as reduced bookings into the county jail by 18%, for significant savings.[[62]](#footnote-61) It costs the county only $10.32 per day to monitor someone via pretrial services, but $78.59 per day to house them in jail.[[63]](#footnote-62)

Additionally, the response from judges in Alleghany County has been positive. Judges appreciate that the risk assessments are purely advisory, but nonetheless describe them at “invaluable” in the pre-trial process.[[64]](#footnote-63) Specifically, judges appreciate that the tools gives them insight into the past of a defendant, thus better informing their decisions even if they do not follow the recommendation of the assessment.[[65]](#footnote-64)

* **Problems with Pittsburgh’s Model**

The first and most prominent problem with Pittsburgh’s pretrial model is that the risk assessment tool itself has been shown to be biased.[[66]](#footnote-65) The tool is based on past trends in criminal justice data, which came about through problematic and racially-biased policies. As a result, the tool disproportionately, and incorrectly, categorizes people of color as high risk.[[67]](#footnote-66)

Another problem with Pittsburgh’s model is the high level of discretion afforded to judges.[[68]](#footnote-67) While not a problem in and of itself, it could become one if a judge were to misuse their power. Even with proven alternatives to cash bail, elected judges who do not believe in these alternatives can continue to require monetary bail, perpetuating inequities for poorer defendants.

## New Jersey’s Risk Assessment Model

New Jersey first implemented bail reform in 2017, after a ballot initiative won 62% of the vote in 2014.[[69]](#footnote-68) This made New Jersey the first statewide to implement a risk assessment model. Since the start of this program, the state decreased the number of individuals held in jail awaiting trial for minor offenses by 20%.

New Jersey uses a risk assessment tool called the Public Safety Assessment, which is similar to the Pittsburgh and Washington assessments. The Assessment produces two scores on a scale of one to six; one assesses the defendant's likelihood of appearing for their court date and the other assesses their risk to the community.[[70]](#footnote-69) Like Pittsburgh and Washington, there are several tiers to the pretrial assessment. The most severe offenders are given GPS monitoring bracelets; however, only about 10% of those released through the program fall into this category. For lower risk defendants, judges can impose as a condition of release include mental health and addiction programs, enabling defendants to begin rehabilitation before trial.[[71]](#footnote-70)

As in Pittsburgh, judges use the score from the Public Safety Assessment only as a guide. They may also consider other factors, such as the strength of the evidence, the nature of the crime, and the likelihood that the defendant may attempt to intimidate witnesses.[[72]](#footnote-71)

The central problem with New Jersey’s pretrial system is that it is not funded by the state budget; instead, its pretrial services, such as rehabilitative programs, are funded by court fees.[[73]](#footnote-72) As a result, the one-year-old program is already experiencing financial sustainability problems.

## California’s Efforts to Abolish Bail

By October of 2019, California will become the first state to fully abolish the cash bail system and instead adopt a risk assessment procedure.[[74]](#footnote-73) While the details of California’s risk assessment tool and the legal procedure have not been finalized yet by the state legislature, there are some distinct policy differences between the California model and what has been used in other areas of the country.

First, unlike pretrial risk assessment procedures operated in other jurisdictions, the states legislators are considering a model that would neverrecommend detention. Instead, if release is not recommended by the model, then the defendant’s release decision would determined in a pretrial release hearing.[[75]](#footnote-74) Additionally, while the risk score would categorize defendants as high, medium, and low risk individuals, it has not been determined at which level defendants would be recommended for release. Furthermore, state legislatures are debating whether full discretion should still be given to judges in deciding a defendant’s release, or whether that should be built into the algorithm. Proponents of the risk assessment model have cautioned against giving judges full discretion in reversing the model’s release recommendation. For instance, supporters of a risk assessment model have noted that in states like Kentucky, judges frequently ignore an individual’s risk score, rendering the risk assessment instrument ineffective on the state’s jail population.[[76]](#footnote-75)

# Recommendation

**We recommend that the Governor call for legislation abolishing monetary bail in Maryland, and replacing it with a risk assessment model to help judges make release decisions, as well as a robust pretrial services program to provide alternatives for detention for individuals with low or moderate risk.** As demonstrated by the reforms implemented in other jurisdictions, a risk assessment model can be a valuable tool to judges to more accurately determine an individual’s risk of reoffending in the pretrial period and their risk of failing to appear at trial. In those jurisdictions which have implemented these models, the number of individuals detained pretrial has decreased.

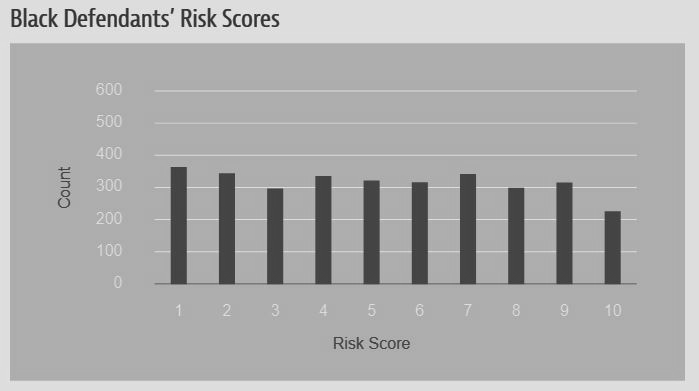
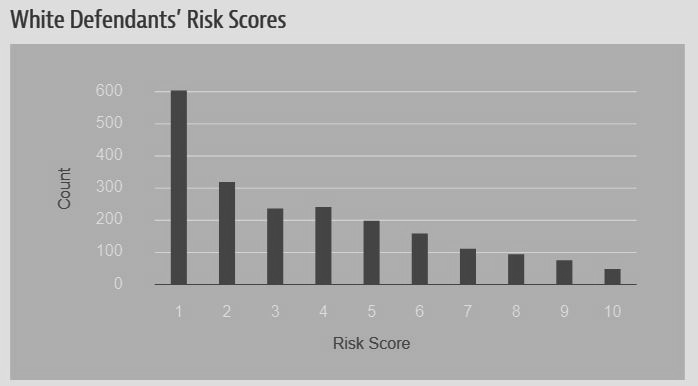
However, we are very sensitive to the concerns about the algorithms used in other models being racially biased. The proposed legislation must include explicit provisions to minimize potential bias, maximize transparency, and guarantee due process. This is crucial for long-term success of the legislation. We suggest proactively taking these challenges head-on with a two-pronged approach: minimizing the failures of the risk assessment model, such as the false positives that occurred in Washington’s model, and acknowledging the issues that remain and developing policies to minimize the effects of those issues on individual defendants.

* **Minimizing Bias in the Model**

Algorithmic models detect patterns in the data fed into them. Therefore, we must be vigilant in examining the source and context of any data fed into the system, because any bias the data already contains will also result in biased output. For an analogy of how this might manifest, consider a basic cat-dog recognition algorithm. This algorithm is designed to take in an image of either a dog or a cat and determine which of the two it is. To achieve this, the algorithms are “trained,” or fed thousands of images of cats or dogs with an indication of what each image is. Over time, the algorithm detects physical characteristics it thinks are common to cats or dogs categorically. When the algorithm trains on thorough, unbiased data, it comes up with characteristics that accurately differentiate dogs from cats. Suppose instead that the only images of dogs fed into the algorithm are images of large dogs. The algorithm would likely decide that size is an overwhelming factor in distinguishing images of cats from images of dogs. Now suppose the algorithm is tested on an image of a chihuahua or similar tiny dog. The algorithm would confident declare the image a cat, despite our knowledge of how incorrect this is. Bringing the analogy back to bail, the chihuahua represents a defendant unnecessarily detained.

In the risk assessment model, perhaps the area with the most potential for this predictive bias to enter the algorithm is through variables that could be considered proxies for race. The risk assessment models used by other jurisdictions often include questions about a person’s family situation, living situation, employment status, and income, and, of course, their previous arrests, charges, and conviction. All of these factors may help in predicting risk; however, they may also largely be indicators of race. This type of error by the risk assessment model could result in very real consequences for the defendant, erroneously recommending detention for a low-risk individual based on biased data.

There is evidence of this bias occurring in real-life applications of risk assessment tools. For example, a ProPublica Report found that a model used in Broward County, FL is significantly more likely to find a black person to be high-risk than a white person.[[77]](#footnote-76) The charts below show the risk score distribution for black defendants and white defendants. The model consistently labeled more black people as very high risk, a 10 on the chart, and white people as low risk, a 1 on the chart, courtesy of ProPublica

The authors of one study argue that a common issue with several pretrial risk assessment models is that they predict failure to appear in court or probability of any arrest, thus often overestimating an individual’s risk score as all potential arrests are treated equally.[[78]](#footnote-77) However, newer risk assessment tools can focus on the defendant’s probability of committing a violent crime as opposed to all crime.[[79]](#footnote-78) We believe that a few steps should be taken to mitigate this bias:

1. **The model must be developed as a fully-public or via a public-private partnership, rather than a strict outsourcing to independent contractors.** Contracting the development out to a private company dramatically restricts the ability of the state and outside actors to verify that the model isn’t compounding racial bias. These organizations are incredibly restrictive of their intellectual property, and so are not the right choice for Maryland.[[80]](#footnote-79)
2. **The legislation should guarantee that the team developing the risk assessment model reflects Maryland’s diversity**, for the simple reason that individuals of color may recognize bias built into the algorithm that white people may not.[[81]](#footnote-80) Similarly, the legislation should include an explicit commitment to minimizing the racial bias in the algorithm.
3. **The legislation should give judges the freedom to overrule the algorithm, but only in the direction of release.** This will help prevent individual judges’ bias from entering the release decision. We hope that it will also illustrate a strong preference for release. Judges tend to err on the side of caution, i.e. detention, because the professional risks for them are high if a defendant they released reoffends or fails to appear for a hearing. This approach will provide judges with political cover for releasing a defendant against popular opinion.

* **Ensuring Transparency**

To ensure that the reform retains the public support required for lasting change, the Governor should recommend that the legislation include several elements designed to increase transparency. This should include the public or public-private model mentioned previously. It should also include guarantees that any algorithm developed will be available to organizations who wish to validate the results of the model. The legislation should also provide for a yearly audit conducted or overseen by the Office of the Inspector General, producing an annual report that at minimum examines the results of the algorithm for bias. Because the legislation would already include transparency provisions, NGOs would be able to and should be encouraged to provide independent validation of the models. The Governor might consider working with the students in Georgetown’s MS in Data Science for Public Policy for data scientists with both the motivation and training to tackle a public policy problem like bail reform.

* **Guaranteeing Due Process**

The third pillar to maximize public confidence in the model is protecting due process rights. All defendants must have the right to have any pretrial hearings in public and to appeal pretrial decisions in a timely manner. Attorney General Frosh’s office can play an integral role in demanding that courts take even a day or two of unnecessary detention seriously. To prevent the abuse that followed the Bail Reform Act of 1984, due process analysis should be included in the yearly audit of the model.

* **The Importance of Pretrial Services**

The legislation must include funding for pretrial services, including GPS ankle monitors, staff to conduct check-ins with released defendants (in person or by phone), and pretrial drug and alcohol testing and treatment programs. These services are necessary in any system without monetary bail because they effectively replace it, providing incentives and monitoring for the many defendants who do not clearly qualify for release on their own recognizance, but who also likely to not need to be detained to guarantee appearance at court.

Although Maryland’s courts currently discourage the imposition of excessive bail, most counties and the state have largely failed to provide these alternatives to judges.[[82]](#footnote-81) Without pretrial services as an alternative to cash bail, judges tend to more frequently impose detention, as has been seen in Maryland since the 2017 Appeals Court decision.[[83]](#footnote-82)

# Cost-Benefit Analysis

While it is difficult to know with certainty the exact costs of reform without knowing exactly how judges will interpret and implement any rules, there has been substantial interest in the question of whether and to what extent bail reform saves money.

* **The Costs of Detention and its Alternatives**

The costs of pretrial detention for those who cannot afford bail are high. A 2014 report found:

*Pretrial detention costs the state somewhere between $83 and $153 a day for each of the 7,000 plus defendants who are detained in jail awaiting trial at any given time in Maryland. Using these numbers, state and local correction agencies are spending $500,000 to $1,000,000 a day on pretrial detention.[[84]](#footnote-83)*

In contrast, the cost of pretrial services is estimated to be about $7 per person per day.[[85]](#footnote-84)

The savings coming from reducing detention costs by expanding pretrial services have already been shown in our own state. St. Mary’s County implemented a pretrial services program in 2015 at a cost of about $200,000, but saved $400,000 as a result of the program in the first year of its operation.[[86]](#footnote-85) This program includes GPS ankle monitoring for the riskiest releases, drug tests and treatment programs, curfews, and other supervisory services.[[87]](#footnote-86) The program was championed in a largely Republican county because of the large cost savings to taxpayers, even given the relatively large expense that the county has chosen to take on by covering the cost of ankle monitors for defendants (unlike in other jurisdictions).[[88]](#footnote-87) The program also includes a risk assessment tool to help judges determine whether to release someone and what pretrial services to require.

Unfortunately, throughout most of Maryland the pretrial services are not robust, and in counties where a risk assessment tool exists, it is generally poorly implemented.[[89]](#footnote-88) As a result, the primarily costs of this reform to the state will include funding to develop a risk assessment tool, any expenses associated with maintaining the tool, the annual audit of the tool’s usage, as well as funding to expand pretrial services. However, these costs will quickly be recouped through savings in reduced pretrial detention costs.

* **The Costs of Bail and Detention to Families and Communities**

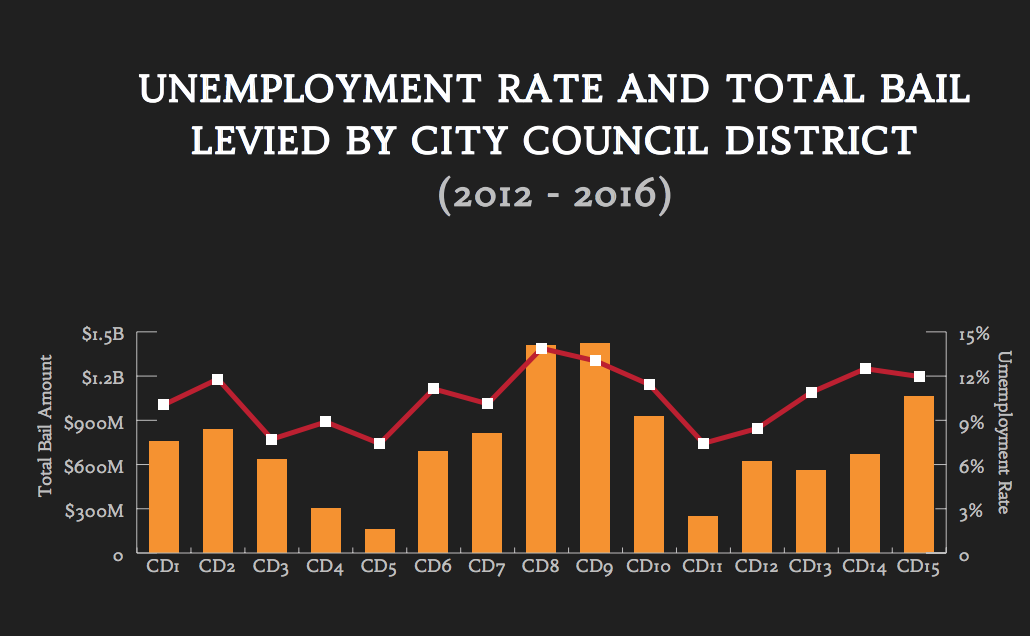
A 2016 study by the Maryland Office of the Public Defender found that defendants paid an average of over $51 million per year in nonrefundable bail bond premiums from 2011-2015, including $15 million per year in cases in which the defendant was not ultimately convicted.[[90]](#footnote-89) These costs ultimately have the greatest negative effects on communities that are already disadvantaged, especially poor minority communities concentrated in Baltimore. In fact, black defendants and their families paid more in bail premiums than all other races combined.[[91]](#footnote-90)

The costs are also high to individuals who remain detained. During the same five-year period, nearly 50,000 individuals were detained on bail for at least five days, including nearly 20,000 who were detained on small bail amounts of less than $5,000.[[92]](#footnote-91) Numerous studies have shown how even just a few days in detention can disrupt a person’s life, putting them at high risk of unemployment and homelessness. In fact, a recent study found that low risk individuals who spend more than two days in jail have a 50% higher chance of reoffending in the next two years.[[93]](#footnote-92) Thus, ensuring individuals are not in jail unless absolutely necessary not only is beneficial in the short term in terms of expenditures, but also in the long term to the community.[[94]](#footnote-93)

* **Bail Revenue**

One economic concern may be the potential for lost revenue from bail. In most jurisdictions, this takes the form of fees levied on bail paid by individuals who are ultimately convicted, and the bail that is kept for individuals who fail to appear in court. There is no public information readily available on the revenue that Maryland receives from bail, and little public information from other states and jurisdictions. However, the information available suggests that the revenue lost from abolishing cash bail would be marginal.

For example, New York City is estimated to gain approximately $1.5 to $2.5 million annually in revenue from bail forfeitures.[[95]](#footnote-94) This is approximately 2.5% of the estimated $100 million the city spends annually detaining those who cannot afford bail.[[96]](#footnote-95) Although Maryland is not New York City, we can expect that the ratio might be similar throughout Maryland; the savings from reduced detention would far outweigh the lost revenue from bail forfeitures and fees.



Moreover, research suggests that setting excessive bail may undermine cities’ economic interests in other ways. A UCLA study of bail in the city of Los Angeles shows that the excessive cash bail amounts levied create an economic cycle whereby defendants are detained (being unable to afford bail), and after release have difficulty securing jobs. This is turn hinders the city’s capacity for economic growth and undermines their tax revenue.[[97]](#footnote-96) The graph below, from this report, suggests a positive correlation between a city’s unemployment rate and the overall bail amount imposed annually in Los Angeles.

# Conclusion

In order to make Maryland’s criminal justice system more fair and more cost-effective, **we recommend that the Governor call for legislation replacing cash bail with a risk assessment model and expansive pretrial programs through the state budget.** This legislation would go a long way to ensuring more equal treatment under the law regardless of the defendant’s socio-economic class. In order to ensure that such progress is made, we suggest that the legislation include several protections: specific measures to reduce racial bias, such as a diverse data team; transparency in the way the risk assessment model is developed and implemented; and protections for defendants’ due process right. This change will make Maryland’s criminal justice system more equal for all our residents, and will result in large savings to taxpayers by reducing the financial burden of pretrial detainees on our jails. For both economic and moral reasons, this legislation would make the state of Maryland a model for criminal justice reform.

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