

# The High Cost of Bail:

How Maryland's Reliance on Money Bail Jails the Poor and Costs the Community Millions



**Maryland Office of the Public Defender**

*Justice, Fairness and Dignity for All*

November 2016

## About

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This report by the Office of the Public Defender is the product of a collaboration among Arpit Gupta, Douglas Swanson, and Ethan Frenchman:

**Arpit Gupta** is Assistant Professor at the Stern School of Business, New York University. Professor Gupta's research focuses on using large datasets to understand dynamics in personal finance, and his previous published work includes, "The Heavy Costs of High Bail: Evidence from Judge Randomization," *Journal of Legal Studies*, vol. 45 (June 2016).

**Douglas Swanson** is the former Vice President of Development and Chief Technology Officer of Malwarebytes and is the co-founder of the data consulting firm, Zipline Scientific, LLC. He holds a M.S. in Physics from Princeton University.

**Ethan Frenchman** is an appellate attorney at the Maryland Office of the Public Defender, and is a co-author, with Professor Gupta, of "The Heavy Costs of High Bail: Evidence from Judge Randomization," *Journal of Legal Studies*, vol. 45 (June 2016).

**The Maryland Office of the Public Defender (OPD)** is an independent state agency created in 1971 by the Maryland General Assembly. With over 900 employees, including 570 attorneys, OPD is the largest legal services organization in Maryland. Its mission is to provide superior legal representation to indigent defendants in the State of Maryland.

## Acknowledgments

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This report would not have been possible without the support of the Abell Foundation and the technical expertise of Matthew Stubenberg of the Maryland Volunteer Lawyers Service, who generated the data set. We would also like to personally thank Amanda Owens from the Abell Foundation, Bonnie Sullivan and Ellyn Riedl of the Maryland Volunteer Lawyers Service, Prof. Colin Starger at the University of Baltimore School of Law, and Shawn Flower of Choice Research Associates.

For more information, please visit:  
<http://www.opd.state.md.us>.

For press inquiries, please contact:  
Melissa Rothstein  
[mrothstein@opd.state.md.us](mailto:mrothstein@opd.state.md.us).

## Executive Summary

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In Maryland, District Court commissioners and judges routinely require defendants to post bail in order to be released before trial. In practice, this system jails the poor and allows the rich to go free. Multiple studies, in Maryland and across the United States, have demonstrated that the key factor in the incarceration of people awaiting trial is not the risk they pose to society, or their risk of failing to appear in court, but simply whether they have enough money to pay bail.<sup>1</sup> Even more, studies show that the widespread use of “secured bail”—which requires payment or security, such as a property title, posted directly to the court, or posting of corporate bond to obtain release—causes new crime, coerces convictions, and has little or no impact on defendants’ return to court.<sup>2</sup> Relying on these studies and legal analysis, the United States Department of Justice, former U.S. Attorney General Eric Holder, Maryland Attorney General Brian Frosh, and the American Bar Association, among others, have all concluded that a pretrial detention system that jails people because they are too poor to pay bail is irrational and unconstitutional.<sup>3</sup>

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<sup>1</sup> For an introduction to Maryland money bail reform, see John Clark, Abell Foundation, “Finishing the Job: Modernizing Maryland’s Bail System” (Jun. 2016), available online at <http://www.abell.org/publications/finishing-job-modernizing-maryland%E2%80%99s-bail-system> (last visited Nov. 13, 2016); and Governor’s Commission to Reform Maryland’s Pretrial System, Final Report (Dec. 19, 2014), available online at <http://goccp.maryland.gov/pretrial/documents/2014-pretrial-commission-final-report.pdf> (last visited Nov. 13, 2016). For a general introduction to legal and empirical research on money bail, see Harvard Law School, Criminal Justice Policy Program, “Moving Beyond Bail: A Primer on Bail Reform” (Oct. 2016) (hereinafter, “Moving Beyond Bail”), available online at <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> (last visited Nov. 13, 2016).

<sup>2</sup> For a recent summary of this research, see “Moving Beyond Bail” at 6-7, and studies cited therein.

<sup>3</sup> Dear Colleague Letter from Vanita Gupta, Principal Dep. Ass’t Att’y Gen., Civil Rights Division, and Lisa Foster, Director, Office for Access to Justice 7-8 (Mar. 14, 2016), available online at <https://www.justice.gov/crt/file/832461/download> (last visited Nov. 13, 2016); Memorandum from Eric H. Holder, Jr., et al., to Md. Att’y Gen. Brian Frosh re: Maryland’s Wealth-Based Pretrial Detention Scheme (Oct. 3, 2016) available online at <http://bit.ly/2eXTf0r> (last visited Nov. 14, 2016); Letter from Md. Att’y Gen. Brian Frosh to the Hon. Alan Wilner, Chair, Md. Rules Committee (Oct. 25, 2016), available online at [http://www.marylandattorneygeneral.gov/News%20Documents/Rules\\_Committee\\_Letter\\_on\\_Pretrial\\_Release.pdf](http://www.marylandattorneygeneral.gov/News%20Documents/Rules_Committee_Letter_on_Pretrial_Release.pdf) (last visited Nov. 13, 2016); ABA Amicus Brief, Walker v. City of Calhoun, No. 16-10521 (11th Cir.) (filed Aug. 18, 2016), available online at [http://www.americanbar.org/content/dam/aba/administrative/amicus/walker\\_v\\_city\\_of\\_calhoun.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/amicus/walker_v_city_of_calhoun.authcheckdam.pdf) (last visited Nov. 13, 2016).

The purpose of this report is to quantify the cost of Maryland's wealth-based detention system to the community. Based on a statistical analysis of more than 700,000 District Court criminal cases filed from 2011 to 2015 in 18 jurisdictions, this report is the most comprehensive public study of Maryland's pretrial detention scheme to date. The results are staggering:

1. Maryland's reliance on money bail causes the routine, illegal incarceration of poor people: over a five year period, no fewer than 46,597 defendants were detained on bail for more than five days at the start of their criminal case. Of these, more than 17,434 defendants were detained on bail amounts of less than \$5,000.
2. For those who go to a bondsman, the price is steep. Maryland communities were charged more than \$256 million in non-refundable corporate bail bond premiums from 2011 to 2015.
3. Defendants who use a bail bondsman are obligated to pay a corporate bail bond premium regardless of the outcome of the case. More than \$75 million in bail bond premiums were charged in cases that were resolved without any finding of wrongdoing.
4. Corporate bonds extract tens of millions of dollars from Maryland's poorest zip codes, contributing to the perpetuation of poverty.
5. The money bail system has a disproportionate impact on racial minorities: over five years, black defendants were charged premiums of at least \$181 million, while defendants of all other races combined were charged \$75 million.
6. For all these costs, secured money bail that requires a payment for release is no more effective than unsecured bonds, for which defendants pay nothing unless they fail to appear for court.

This report documents not only the human toll of incarceration due to unaffordable bail, but also the lesser-known consequences of money bail for defendants who are able to purchase their freedom through bail bondsmen. Maryland's reliance on money bail has caused a huge transfer of wealth from Maryland communities to the bail bond industry.

Yet the results of this study are also encouraging: less onerous alternatives are available to commissioners and judges to secure defendants' return to court. Consistent with other research, we find that unsecured bonds are as effective as secured bonds at preventing defendants' failure to appear, without the costs of pretrial detention and non-refundable bail bond premiums.

## Data and Methodology

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**W**e obtained comprehensive court case histories for criminal cases filed in the District Court of Maryland from 2011 through 2015 from the Maryland Judiciary Case Search website, which provides free public access to the case records of the Maryland Judiciary.<sup>4</sup> Using standard query language and statistical software, we developed an array of descriptive statistics about pretrial detention in Maryland. Our study includes approximately 3.6 million cases from 18 District Court jurisdictions.<sup>5</sup> Our analysis does not include jurisdictions that have shifted to the Maryland Electronic Courts case management system,<sup>6</sup> Circuit Court cases (except as described below), incarcerable traffic cases, and expunged cases. Because money bail is used in these jurisdictions and cases, our study underestimates the scope of wealth-based pretrial detention in Maryland.

To estimate the failure to appear rate, our study focused exclusively on cases filed in the District Court for Baltimore City between 2011 and 2015, but includes failures to appear in the Circuit Court for Baltimore City in cases that were transferred from the District Court by indictment, information, or jury trial prayer.

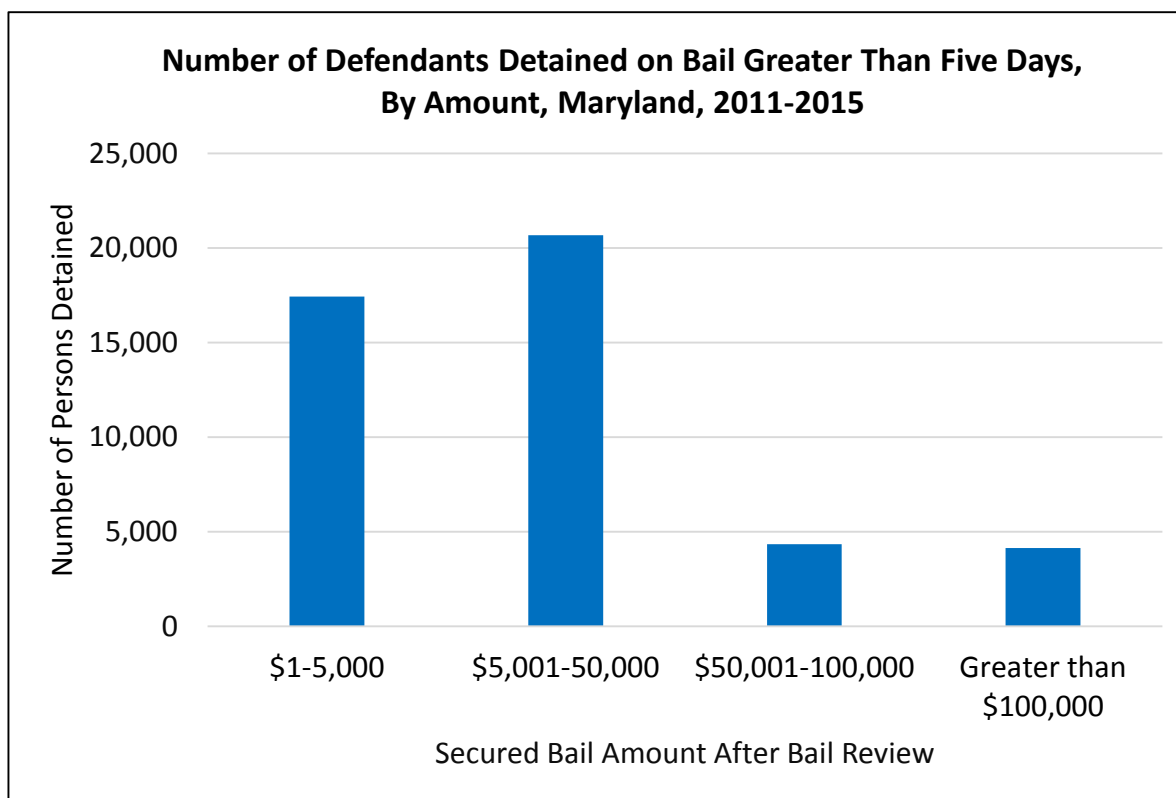
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<sup>4</sup> Maryland Judiciary Case Search is available online at [casesearch.courts.state.md.us](http://casesearch.courts.state.md.us).

<sup>5</sup> The jurisdiction included are: Allegany County, Baltimore City, Baltimore County, Calvert County, Carroll County, Charles County, Dorchester County, Frederick County, Garrett County, Harford County, Howard County, Montgomery County, Prince George's County, St. Mary's County, Somerset County, Washington County, Wicomico County and Worcester County.

<sup>6</sup> Those jurisdictions are Anne Arundel, Caroline, Cecil, Kent, Queen Anne's and Talbot Counties.

## Thousands of Presumptively Innocent People Are Detained On Unaffordable Money Bail.



**U**nder Maryland’s pretrial detention Rule 4-216, a judicial officer is obligated to impose the “least onerous conditions” of release necessary to reasonably ensure that a person charged with a crime will appear to court and to protect the safety of any alleged victim, other individuals and the public. In determining the least onerous condition of release, the judicial officer is required to consider a defendant’s “employment status” and “financial resources.” The Maryland Attorney General’s office has recently concluded that bail set in an amount that is not affordable to a defendant, “thus effectively denying release,” likely violates both the U.S. Constitution and the Maryland Declaration of Rights.<sup>7</sup>

Nonetheless, thousands of presumptively innocent Marylanders remain jailed pending trial on unaffordable bail amounts. During the study period of 2011–2015, more than 46,597 defendants were detained on bail for more than five days at the start of their criminal case. Of these, 17,434 defendants were detained on bail amounts of less than \$5,000.

To determine the number of defendants held on unaffordable bail, we first narrowed our inquiry to cases with a defendant held on bail immediately after arrest, at the initiation of

<sup>7</sup> Letter of Md. Att’y Gen, Brian Frosh to Del. Erek Barron, et al., at 1–2 (Oct. 11, 2016).

the criminal case, and continued to be held on bail after bail review.<sup>8</sup> We further isolated detentions at the beginning of a criminal case by excluding cases in which detention followed a defendant’s failure to appear or post-conviction violation of probation. Finally, we defined detention as a defendant’s incarceration for at least five days after the initial appearance before the District Court commissioner.

While excluded from our analysis, defendants are frequently held on bail after the initial appearance. Defendants who fail to appear in court, or who are accused of violating the terms of their probation, are subject to re-arrest on warrants. These defendants also appear before a commissioner and a judge for pretrial release consideration and are frequently assessed money bail as a condition of release. When other events like failure to appear and violations of probation are included, we find that the number of defendants detained for more than five days on unaffordable bail rose to 79,182.

<b>Defendants Detained More Than Five Days, By Amount, Maryland, 2011-2015</b>	
<b>Amount of Secured Bail</b>	<b>Number of Defendants</b>
\$1-5,000	17,434
\$5,001-50,000	20,674
\$50,001-100,000	4,346
Greater than \$100,000	4,143

In light of these figures, it is not surprising that the Pew Charitable Trust, as part of a statewide Justice Reinvestment Initiative, found that nearly one-quarter of people incarcerated in Maryland are merely awaiting trial.<sup>9</sup> Many of those presumptively innocent people would be released if they simply had more money.

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<sup>8</sup> Bail review is the first pretrial determination made by a judge, and occurs in cases where the defendant is not released after a commissioner’s initial bail determination.

<sup>9</sup> The Pew Charitable Trusts, “Maryland Criminal Justice System Assessment and Introduction to Policy Development,” presentation for the Maryland Justice Reinvestment Coordinating Council, Sept. 11, 2015, available online at <http://goccp.maryland.gov/wp-content/uploads/jrcc-assessment-intro-policy-development.pdf>

## Corporate Bond Premiums Cost the Community More Than \$256 Million from 2011 to 2015.

**D**uring the study period of 2011–2015, the bail bond industry posted at least \$2.56 billion in corporate bonds in cases filed in the 18 District Court jurisdictions across Maryland. To post a corporate bond, a bail bondsman typically charges the defendant (or someone on his or her behalf) a non-refundable premium of 10 percent of the total amount of corporate bond posted.<sup>10</sup> Based on the total amount of corporate bonds posted and the standard 10 percent fee, we estimate that premiums charged by the bail bond industry to defendants and their loved ones were no less than \$256 million, or approximately \$51 million per year.

Corporate Bond Premiums, Maryland, 2011-2015	
Year	Bond Premiums
2011	\$52,188,578
2012	\$52,105,761
2013	\$53,893,349
2014	\$47,095,341
2015	\$50,867,701
<b>TOTAL</b>	<b>\$256,150,729</b>

The 10 percent premium often is not paid all at once. Some bondsmen only require a portion of their fee, often as low as 1 percent, to be paid upfront. A payment plan is established for the remainder, which can result in years of debt and collection costs. This debt persists, even if the defendant appeared for all court dates and even if the criminal charges were dropped or the defendant acquitted. Our premium estimate includes both payments made and installment debts owed by the community to the industry, but does not include interest or debt collection fees.

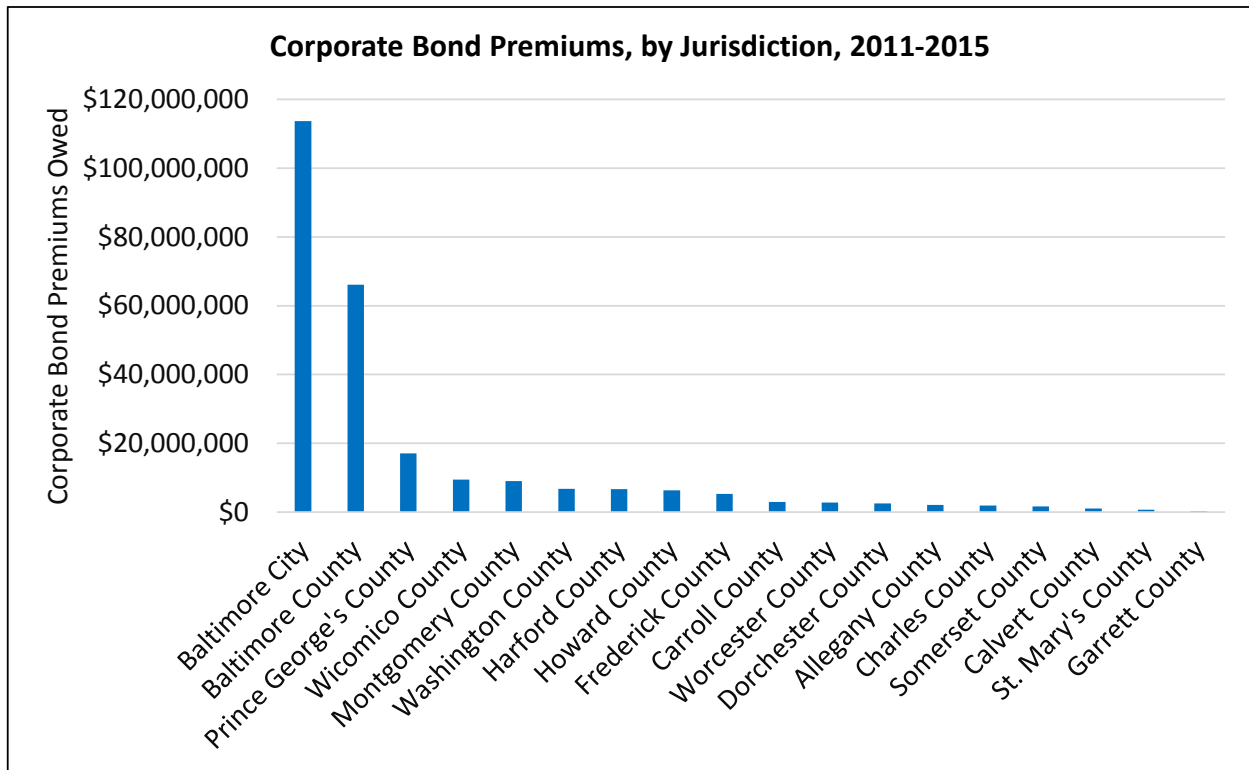
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<sup>10</sup> A 2015 Fiscal and Policy Note by the Maryland Department of Legislative Services determined:

A corporate bondsman charges the defendant 10% of the bail bond, an amount which must be filed with and approved by the Insurance Commissioner. The 10% premium is an industry standard and is not set by the Insurance Commissioner. However, because some consumers are unable to pay the entire 10% premium up front, a corporate bondsman may finance the premium by allowing the consumer to make installment payments. This practice often amounts to a marketing tool for corporate bondsmen. In an industry where the premiums are the same, a corporate bondsman is able to draw business in by advertising down payments as low as 1%.

Amy Devadas, Dept. of Legisl. Servcs., Fiscal and Policy Note, H.B. 32, 2015 Sess., at 2, available online at [http://mgaleg.maryland.gov/2015RS/fnotes/bil\\_0002/hb0032.pdf](http://mgaleg.maryland.gov/2015RS/fnotes/bil_0002/hb0032.pdf) (last visited Nov. 14, 2016).



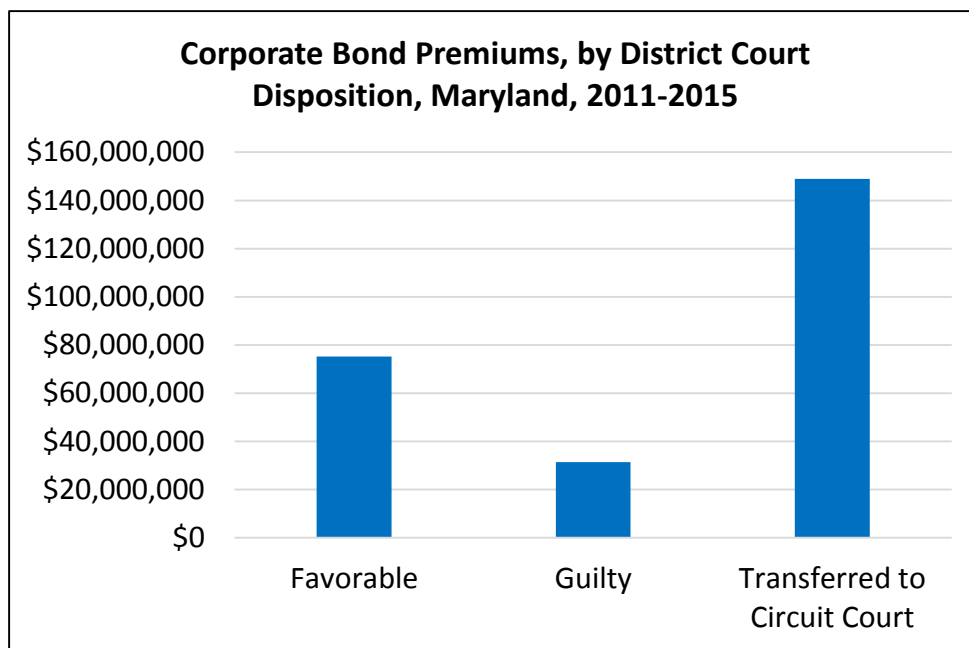


While Baltimore City accounts for the largest portion of bond premiums incurred (\$113 million of the \$256 million), corporate bonds are used in every jurisdiction surveyed. However, there is significant disparity in their use, even among similar jurisdictions. For example, in 2015 alone, bond premiums in Baltimore County totaled an estimated \$66 million, while in more-populous Montgomery County premiums totaled \$9 million. Bond premiums extracted more money from Wicomico County (\$9.47 million) than from the wealthier and larger Montgomery County, despite Montgomery County having nearly four times the criminal caseload.<sup>11</sup>

Altogether, corporate bonds cause presumptively innocent Marylanders and their families to pay or owe hundreds of millions of dollars in non-refundable premiums just to secure their freedom. This includes both money that is paid up-front to bail bondsmen, and the debt incurred for the full cost of the premium, which is frequently paid in installments for years after the resolution of the underlying criminal case.

<sup>11</sup> Md. Dept. of Planning, "Total Resident Population for Maryland's Jurisdictions, April 1, 2010 Thru July 1, 2015" (March 2016) (estimating 2015 populations of Baltimore County (831,128), Montgomery County (1,040,116), and Wicomico County (102,370)); Md. Judiciary, Annual Statistical Abstract FY 2015, Table DC-2 (reporting that in FY 2015, 15,039 non-traffic criminal cases were filed in the District Court in Montgomery County, and 4,001 such cases were filed in the District Court in Wicomico County).

## Individuals Paid More Than \$75 Million For Corporate Bonds In Cases Where the Defendant Was Not Convicted Of Any Crime.



The expectation that a presumptively innocent person must pay for his or her freedom is especially egregious for individuals who are ultimately not convicted. Individuals whose cases originated between 2011 and 2015, were resolved in the District Court, and who were not found guilty of *any* crime, were charged more than \$75 million in bail bond premiums—more than double the total premiums charged in cases resulting in a conviction in the District Court.<sup>12</sup> An additional \$148 million in bond premiums was charged to defendants whose cases were resolved in the circuit court. Many of those cases were also likely resolved favorably for the defendant, but circuit court dispositions were not reviewed for this study. For this reason, we underestimate the total amount of commercial bail premiums charged in cases where there was no finding of wrongdoing, insofar as we do not include favorable resolutions in the circuit courts, six District Court jurisdictions, incarcerable traffic cases, or expunged cases.

The premiums charged by the bail bond industry to defendants and their families for posting bond are non-refundable even when the defendant shows up to every court date and is not found to have committed any crime. Therefore, innocent people are still charged tens of millions of dollars to secure their freedom.

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<sup>12</sup> “Favorable” refers to cases in which all charges were disposed as not guilty, acquittal, dismissal, *nolle prosequi*, or stet; “Guilty” refers to cases in which any charge resulted in guilt, probation before judgment, not criminally responsible, or *nolo contendere*; “Transferred to Circuit Court” refers to cases transferred to the circuit court due to indictment, information, or jury trial prayer.

## Corporate Bonds Extract Millions in Premiums from Maryland's Poorest Communities.

Top 15 Zip Codes for Corporate Bond Premiums and Federal Poverty Statistics, Maryland, 2011-2015					
Rank	Zip Code	Premiums	Median Income	% in Poverty	Location
1	21215	\$11,662,274	\$34,968	26%	Park Heights, Baltimore
2	21217	\$11,086,999	\$27,139	35%	Sandtown-Winchester, Baltimore
3	21213	\$9,869,717	\$31,418	26%	East Baltimore
4	21222	\$8,998,729	\$48,390	13%	Dundalk
5	21223	\$8,885,372	\$25,217	42%	Southwest Baltimore
6	21229	\$8,847,638	\$44,723	20%	West Baltimore
7	21216	\$8,697,750	\$33,557	25%	West Baltimore
8	21218	\$8,008,825	\$38,141	28%	North Baltimore
9	21206	\$7,973,169	\$48,721	14%	Northeast Baltimore
10	21224	\$6,472,193	\$56,221	19%	Highlandtown, Baltimore
11	21207	\$6,373,552	\$52,462	13%	Woodlawn, Baltimore
12	21221	\$5,591,714	\$51,540	12%	Essex
13	21205	\$4,889,494	\$24,568	36%	East Baltimore
14	21234	\$4,685,637	\$58,559	10%	Parkville and Carney
15	21225	\$4,684,407	\$37,291	27%	Brooklyn, Baltimore

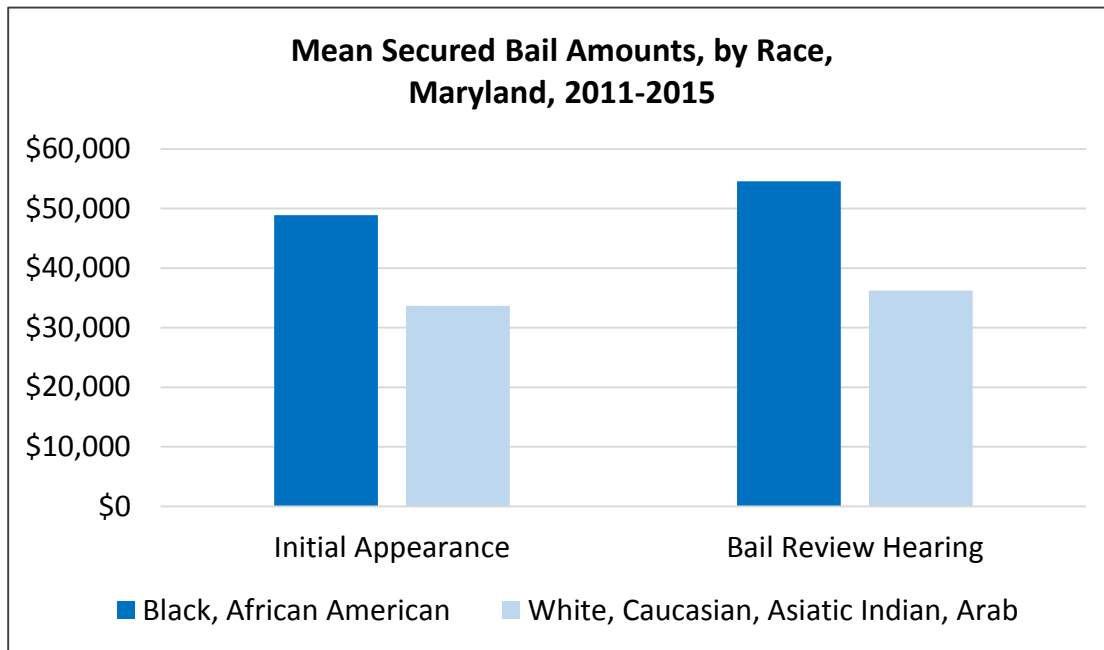
A ranking of premiums charged according to defendants' zip codes shows how corporate bonds extract millions of dollars from Maryland's poorest communities. The table above ranks the top 15 defendant zip codes for bond premiums. The median incomes for the neighborhoods charged the most in corporate bond premiums range from \$24,568 to \$58,599, far below the median Maryland household income of \$74,149.<sup>13</sup> Likewise, the poverty rates for these 15 zip codes, with a high of 42 percent and a low of 10 percent, are generally far above the Maryland statewide poverty rate of 9.7 percent. Although most of the top 15 zip codes for corporate bond premiums are in Baltimore City, three zip codes in Baltimore County are in the top 15, which together paid more than \$19 million to the bail bond industry.

The top two zip codes are also two of the poorest in Baltimore: Park Heights (21215) and Sandtown-Winchester (21217). These zip codes alone paid at least \$22.6 million in premiums, which is enough to send 219 students to the University of Maryland at College Park for four years or enough to provide a year of childcare for approximately 2,800 pre-kindergarten children in Baltimore City.<sup>14</sup>

<sup>13</sup> Poverty statistics included in this section are all derived from the U.S. Census Bureau American Community Survey. For more information see <http://www.census.gov/programs-surveys/acs/>.

<sup>14</sup> This is based on the University's estimate for 2016-17 that the in-state cost of attendance, including tuition, housing, meals, books, and other fees and costs, is \$25,742, and the Maryland Family Network's 2013 estimate that the annual childcare cost for a Baltimore family with two children ages 1-2 and 3-5 is \$16,174.

## Money Bail Disproportionately Impacts Black Defendants.

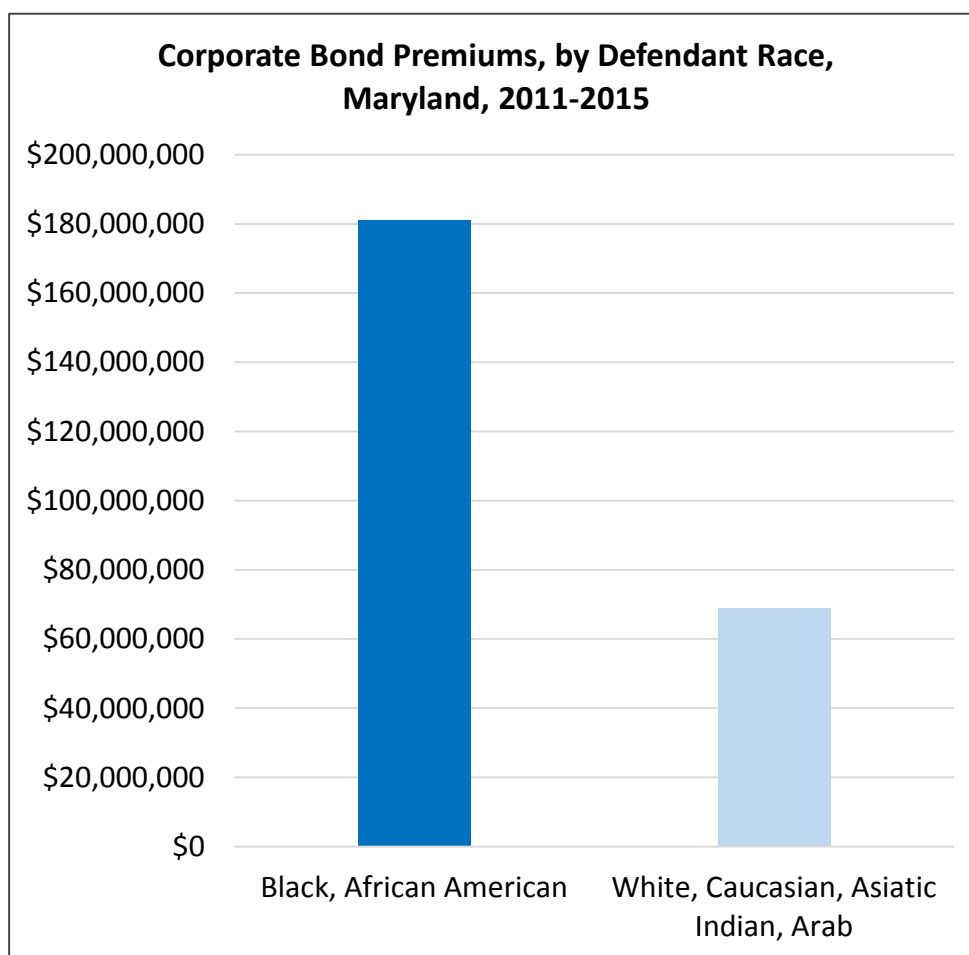


Racial disparities are evident in the assessment of money bail. The mean bail amount for black defendants is 45 percent higher than the mean amount for white defendants at the initial appearance before a District Court commissioner (\$48,895 versus \$33,678) and 51 percent higher at the bail review hearing before a District Court judge (\$54,565 versus \$36,224).

Many factors can affect the setting of bail, including a defendant’s criminal history, history of failures to appear, employment status, and other factors. These factors may have their own racial disparities and were not controlled for here. Therefore, we cannot and do not assert that commissioners and judges set bail in a way that is motivated by racial animus. Instead, we demonstrate that the money bail system, regardless of the underlying cause, has the consequence of imposing more onerous financial conditions of release on black defendants.

Although we do not control for the risk-level of defendants or their underlying charges, the difference in mean bail amounts is significant in light of previous findings that bail amounts in Maryland are unrelated to the underlying risk of the defendant. A leading empirical researcher on pretrial detention, Jim Austin, Ph.D., concluded after a 2014 study of Maryland bail practices that “[t]here was no relationship between risk and the amount of the bond that was set by the court.”<sup>15</sup>

<sup>15</sup> Jim Austin, JFA Institute, “Maryland Pretrial Risk Assessment Data Collection Study” (2014).



The racial disparity in mean bail amounts creates a racial disparity in the premiums charged to defendants. Black defendants were charged more than \$181 million in premiums by the bail bond industry—more than twice the premiums charged to defendants of all other races combined, even though only approximately 30 percent of the Maryland population identifies as black.<sup>16</sup>

<sup>16</sup> U.S. Census QuickFacts Maryland website, <http://www.census.gov/quickfacts/table/PST045215/24> (indicating that 30.5 percent of respondents reporting only one race in 2015 identified themselves as Black or African American; an additional 2.7 percent identified themselves as multi-racial).

## Unsecured Bonds Are As Effective As Corporate Bonds.

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There is an effective alternative to traditional money bail. Rather than imposing a “secured bail,” which requires payment or security, such as a property title posted directly to the court, or posting of corporate bond, some judges and commissioners are increasingly using “unsecured bonds.” With an unsecured bond, individuals accused of a crime are released before trial when they agree to pay a specified amount if they fail to appear to court. If they appear as required, they pay nothing.

After analyzing data from Baltimore City’s District and Circuit Courts, we find that

unsecured bonds are as effective as secured bonds at ensuring defendants return to court. We estimate that the failure to appear (“FTA”) rate in cases where defendants were released on unsecured bond was approximately 6.3 percent. In cases where defendants were released on secured bond, the failure to appear rate was approximately 6.5 percent.

Our FTA rate estimate is focused exclusively on cases filed in the District Court for Baltimore City between 2011 and 2015, but includes failures to appear in the Circuit Court for Baltimore City in cases that were transferred to the Circuit Court for Baltimore City by indictment, information, or jury trial prayer. To determine whether the defendant failed to appear, we looked at cases where an FTA warrant was issued, rather than cases where an FTA was merely noted, because the issuance of a warrant usually indicates that the court found no acceptable reason (e.g. illness) for the defendant’s absence.<sup>17</sup>

Our finding is consistent with a 2013 Colorado study that found that pretrial defendants appeared for court and stayed out of trouble pending trial at the same rates whether they had been released on unsecured bond or a secured bond.<sup>18</sup> We therefore present additional evidence that there is at least one effective means of ensuring defendants return to court without requiring financial payments to the court or a bail bond company.

FTA Rate, Secured v. Unsecured Bond, Baltimore City, 2011-2015	
Bond Type	FTA Rate
Unsecured Bond	6.3%
Secured Bond	6.5%

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<sup>17</sup> Our analysis identified cases where there was (1) a bail (secured or unsecured) set by the court, and (2) an FTA warrant was issued. It does not exclude cases where a FTA warrant was issued before the court imposed the bond, or after that bond was no longer in effect. As a result, the actual rates of FTA warrants issued while a defendant was free on bond are likely lower than our estimates.

<sup>18</sup> Michael R. Jones, Pretrial Justice Institute, “Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option” (Oct. 2013), available online at <http://www.pretrial.org/download/research/Unsecured+Bonds,+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf> (last visited Nov. 10, 2016).

## Conclusion

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As these data make clear, money bail practices in Maryland are counter to the District Court's stated mission "to provide equal and exact justice for all." Maryland's reliance on a wealth-based pretrial detention scheme causes the incarcerations of tens of thousands of people due to their inability to pay bail. The costs are also steep for those who are able to make at least a down payment to a bail bondsman. Bail bondsmen charge the community hundreds of millions of dollars in premiums to post bond so that presumptively innocent people can be free while awaiting trial. The communities that are charged the most in bond premiums are some of the poorest communities in Maryland.

However, our findings are also encouraging. We demonstrate, consistent with other research, that unsecured bond, where defendants are released upon a promise to pay an amount should they willfully fail to appear to court, is a viable alternative to secured bail. Unsecured bond can reasonably ensure that defendants return to court without the debt and incarceration wrought by the current pay-or-stay system.

Because unsecured bond allows for the release of defendants even if they cannot immediately afford an up-front payment, the broader use of unsecured bond will further the public interest in reducing Maryland's pretrial jail population.<sup>19</sup> The benefits of unsecured bonds extend further still. Unsecured bond do not require the satisfaction of a non-refundable premium. Consequently the broader use of unsecured bonds will guarantee that hundreds of millions of dollars will remain where it belongs, in the pockets of the Maryland community.

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<sup>19</sup> Although not measured in our report, other alternatives to secured bond have been found effective at reducing FTA rates, including automated court reminders, pretrial supervision, and GPS monitoring.