"WITH A LITTLE HELP FROM MY FRIENDS:"[1] COUNSEL AT BAIL AND ENHANCED PRETRIAL JUSTICE BECOMES THE NEW REALITY

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Focusing on the overincarceration of pretrial detainees who await trial in caged cells for many weeks and months, this Article recognizes the important changes made in many states and local jurisdictions to guarantee poor people their right to counsel's representation at the judicial bail stage. A defense lawyer's ability to provide credible arguments, present verified information, rebut the prosecution's position, place context for prior convictions and other negatives, and highlight the positives often makes the difference in judicial decision-making. Without counsel's zealous and effective advocacy, many people accused of crime remain in jail indefinitely until their criminal cases conclude, causing additional hardship and deprivation to the disproportionately impacted African-American, Latino-American, and low-income white communities.

Aware of the many states that still do not provide counsel when defendants first appear before a judicial officer, this Article argues that representation alone cannot succeed at significantly reducing pretrial incarceration for poor, low-income, and working defendants without prosecutors asserting their role as ministers of justice and judges acting courageously as impartial arbiters in protecting individual liberty. The defense bar, too, plays a crucial role in collecting data justifying prosecutors' favorable recommendations and judges' release decisions. Each principal player must educate and explain pretrial release decisions when these decisions come under public attack. Such a unified effort provides the support and cover needed to even the playing field for the presumed innocent person accused of crime, to where the justice system limits pretrial incarceration to the most

1. THE BEATLES, *With A Little Help From My Friends*, *on* SGT. PEPPER'S LONELY HEARTS CLUB BAND (EMI 1967).

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dangerous defendants, and where clear and convincing evidence must exist to support a finding of a recent history of violence or of a flight risk from the jurisdiction. Protecting prosecutors who recommend and judges who order release from unfair or baseless public criticism becomes a matter of highest order in protecting individual liberty and reinforcing the checks and balances within our constitutional democracy.

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I. INTRODUCTION

In 1998, my clinical students helped bring national attention to a little-known and largely ignored reality within our country's criminal justice system, a system that has continuously prided itself on being the best and fairest at protecting an accused's liberty. Throughout the fifty states, poor people accused of crime often had no lawyer to defend their liberty when they first appeared before a judge or magistrate after arrest.[2] Indeed, we discovered that only eight of the fifty states guaranteed counsel to indigent criminal defendants at initial bail hearings.[3] One can imagine the surprise to practicing lawyers, many of whom consider the bail ruling critical to the ultimate outcome of a case and view the defense lawyer as a necessary prerequisite to giving individual defendants a fair shot at regaining their liberty against the all-powerful prosecutor and judge.[4] Many lawyers mistakenly thought that the landmark *Gideon v. Wainwright*[5] guarantee of counsel in felony cases—and the subsequent *Argersinger v. Hamlin*[6] guarantee for misdemeanors—commenced at the initial appearance after the government filed criminal charges.[7] We soon learned another alarming fact looming

2. Douglas L. Colbert, *Thirty-Five Years After* Gideon*: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 1 (1998) [hereinafter Colbert, *Thirty-Five Years After* Gideon].

3. *Id.* at 8–10.

4. Douglas L. Colbert, *The Maryland Access to Justice Story: Indigent Defendants' Right to Counsel at First Appearance,* 15 U. MD. L.J. RACE RELIGION GENDER & CLASS 1, 1 (2015) [hereinafter Colbert, *The Maryland Access to Justice Story*].

5. 372 U.S. 335 (1963).

6. 407 U.S. 25 (1972).

7. Colbert, *The Maryland Access to Justice Story*, *supra* note 4, at 2.

over the criminal justice system: in Maryland, and in most other states, the unrepresented population typically waited one month on average before their assigned *Gideon / Argersinger* lawyer arrived at the next scheduled court proceeding.[8] In fact, these individuals frequently had to wait even longer than that to provide their appointed attorney time to prepare an effective argument for their release from jail. After reviewing data showing that released defendants overwhelmingly returned to court[9] and usually avoided re-arrest,[10] we reached an inescapable conclusion: denying counsel at the initial appearance virtually assured that tens of thousands of low-income, disproportionately African-American and Latino-American detainees would remain in the local jail until their cases concluded.[11] The grave collateral consequences to jailed individuals extended to their families, to their communities, and to the general public.[12]

A closer analysis of the empirical data gathered in Baltimore, Maryland, confirmed these judicial stay-in-jail outcomes.[13] Without a lawyer's vigorous advocacy, unrepresented defendants charged with *nonviolent* crimes were denied freedom over two and a half times as frequently as people represented by counsel while facing similar

8. Colbert, *Thirty-Five Years After* Gideon, *supra* note 2, at 53–58 (indexing statutes for all fifty states). In many jurisdictions, detainees waited between thirty-one to sixty days—and sometimes as long as seventy days—before their appointed counsel appeared. *Id.* at 11–12.

9. According to the Annual Report published by the Maryland Department of Budget and Management, only 5–6.4 percent of individuals released on pretrial supervision in Maryland between 2013–2017 failed to appear for their scheduled court date. *FY2019 Budget Book, Volume II, Public Safety and Correctional Services*, MD. DEP'T OF BUDGET & MGMT. 343, https://dbm.maryland.gov/budget/Documents/operbudget/2019/Proposed/Volume2.pdf. In four of the five years, the "failure-to-appear" rate did not exceed 6 percent, meaning that over 94 percent of supervised defendants showed up for their scheduled court date. *Id.* The report also estimated that the "failure-to-appear" rate will continue to be 6 percent in 2018 and 2019. *Id.*

10. *Id.* In Maryland, between 2013–2017, the re-arrest rate of individuals released on pretrial supervision ranged between 2.4–4 percent. *Id.* In four of the five years, this 3 percent re-arrest rate meant that 97 percent of supervised defendants remained free without re-arrest. *Id.* The report also estimated that the re-arrest rate would continue to be 3 percent in 2018 and 2019. *Id.*

11. Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1721 (2002) [hereinafter Colbert et al., *Counsel at Bail*].

12. *Id.* at 1720 ("As jail populations continue to swell[,] . . . taxpayers pay the prohibitive costs of pretrial detention and new jail construction. At the same time, incarcerated detainees often lose jobs and face eviction from their homes; and families suffer the absence of an economic provider or child caretaker.").

13. *Id.* at 1720–21. Results of the Lawyers at Bail Project ("LAB") showed that represented indigent defendants charged with nonviolent offenses "were substantially more likely to be released on their own recognizance[,] were more likely to have their initially set bail reduced at the hearing[,] . . . were more likely to have affordable bail[,] . . . [and were more likely to] serve less time in jail." *Id.* at 1755–56.

charges.[14] The reasons for this disparity connected to a lawyer's duty to provide effective legal assistance. Representation for these individuals is imperative, as it allows lawyers to present verified information and provide the judiciary with objective reasons to release detainees on recognizance or affordable bail.[15] Since more than nine out of ten people who were arrested and entered states' criminal systems in 1999 were accused of nonviolent crimes,[16] the data on first appearance representation revealed substantial benefits and cost savings. First, a reduced pretrial jail population saved Baltimore taxpayers millions of dollars by cutting the pretrial prison population in half.[17] Second, it allowed detainees to return to family, continue employment or school, or enter needed rehabilitation programs, all considerably more productive outcomes than remaining in custody. Early release also made it possible for lawyers to prepare a meaningful defense at trial, which provided a genuine alternative to the incarcerated (sometimes innocent) defendant being coerced into pleading guilty as a bargaining chip for regaining freedom.[18]

By 2011, nearly three times as many states ensured assigned counsel's representation at most bail hearings conducted statewide.[19]

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14. *Id.* at 1753.

15. *Id.* at 1743–44.

16. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., CRIME IN THE U.S., 1999, at 212, 270–76 (USGPO 2000) ("Nationally, in 1999, an estimated 14,031,070 people were arrested. Of these arrests, 635,999 or about 4.5 percent were charged with violent crimes . . . .").

17. Colbert et al., *Counsel at Bail*, *supra* note 11, at 1757. Based upon the LAB study, the fiscal note for proposed legislation guaranteeing statewide representation at bail included a projected savings of $4.5 million for Baltimore City. *Id.*; DEP'T OF LEGIS. SRVS., MD. GEN. ASSEM., Fiscal Note to S.B. 138 (2000).

18. Peter A. Joy, *Sentencing Reform: Fixing Root Problems,* 87 UMKC L. REV. 97, 97–101 (2018) ("[A]pproximately 97 [percent] of federal cases and 94 [percent] of state causes are resolved by guilty pleas rather than trials . . . because our system punishes so severely those who go to trial and lose . . . . [T]he Supreme Court has approved trial penalties of life in prison compared to an offer of five years for pleading guilty."); Emily Yoffe, *Innocence is Irrelevant*, ATLANTIC (Sep. 2007), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/ ("Many . . . defendants are facing minor charges that would not mandate further incarceration, but they lack the resources to make bail and secure their freedom . . . [and] therefore feel compelled to take whatever deal the prosecutor offers, even if they are innocent.").

19. Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 428–53 (2011) [hereinafter Colbert, *Prosecution Without Representation*]. In 1998, a fifty-state survey revealed that only eight "yes" states guaranteed representation at bail hearings, compared to nineteen "no" states that denied counsel. The remaining twenty-three states provided representation in just one or two (mostly urban) municipalities. Colbert, *Thirty-Five Years After* Gideon, *supra* note 2, at 53–58 (indexing practices regarding representation at bail proceedings for all fifty states). Fifteen years later, the scorecard looked considerably different: States without representation had been cut to nine—nearly in half. Eleven states, including Maryland, provided representation in most (50–90 percent) counties. The remaining nineteen states also saw a

Additionally, within the remaining states, many more localities provided counsel at the first judicial proceeding than had done so a decade earlier.[20] Moreover, today's robust bail reform movement succeeded in addressing overincarceration of pretrial detainees who remained in lock-up because they lacked the money bail amount. In jurisdictions where counsel represented defendants at the initial bail hearing, a new breed of elected prosecutors joined reformers' efforts to reduce pretrial jail populations by relying less on money bail and sometimes eliminating it from consideration for select misdemeanors and nonviolent felonies.[21] When prosecutors embraced the defense lawyers' recommendations for release on recognizance or on nonfinancial conditions, judges tended to grant the defense motions.[22]

Here is where the promising outcomes of reform came to a screeching halt, and the backlash began. Resistance took many forms. In some states, legislators opposed spending public funds to hire the additional public defenders or the assigned counsel necessary to represent poor people at initial appearances.[23] In states that passed reforms and provided the necessary resources, supporters faced a vocal and persistent outcry from antireform opponents who

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significant uptick in counsel's presence. Colbert, *Prosecution Without Representation*, *supra* note 19, at 428–53.

20. *Id.* at 386, 400–10.

21. *See, e.g.*, Lynh Bui, *Prosecutors in Prince George's Will No Longer Recommend Cash Bail for Defendants*, WASH. POST (Sep. 15, 2019), https://www.washingtonpost.com/local/public-safety/prosecutors-in-prince-georges-will-no-longer-recommend-cash-bail-for-defendants/2019/09/15/27a1f274-d4bf-11e9-934340db57cf6abd_story.html ("Braveboy's new policy adds her to a growing list of progressive prosecutors around the country seeking to end cash bail as part of their criminal justice agendas. . . . [A]lternatives to cash bail include counseling, mental health evaluations and drug testing in addition to electronic monitoring through pretrial services."); Samantha Melamed, *Philly DA Larry Krasner Stopped Seeking Bail for Low-level Crimes. Here's What Happened Next*, PHILA. INQUIRER (Feb. 19, 2019), https://www.inquirer.com/news/philly-district-attorney-larry-krasner-money-bail-criminal-justice-reform-incarceration-20190219.html ("Philadelphia District Attorney Larry Krasner announced that his office would no longer seek money bail for a list of offenses that make up 61 percent of all cases in the Philadelphia criminal justice system. . . . 'What we had a year ago was not fair. We do not, we should not, imprison people for poverty,' Krasner said."); Sarah Ruiz-Grossman, *San Francisco District Attorney Ends Use of Money Bail*, HUFFPOST (Jan. 22, 2020), https://www.huffpost.com/entry/ san-francisco-district-attorney-chesa-boudin-cash-bail_n_5e290a76c5b6d6767fcedf48 ("San Francisco's new district attorney, Chesa Boudin, officially ended his office's use of money bail for all criminal cases. . . . [P]retrial detention will be based on public safety, not on wealth.").

22. *See* Colbert et al., *Counsel at Bail*, *supra* note 11, at 1736.

23. Fredrick Kunkle & John Wagner, *Maryland Politics*, WASH. POST, (Mar. 31, 2014), https://www.washingtonpost.com/local/md-politics/2014/03/31/2de47726-b943-11e3-9a05-c739f29ccb08_story.html?_=ddid-7-1590627240. In Maryland, "lawmakers balked at the sizable cost to provide a public defender around the clock, seven days a week, to every defendant who needs one . . . . [Cost e]stimates [for] providing public defenders and other staff . . . in the current system have ranged as high as $55 million." *Id.*

targeted the relatively few individual defendants who were rearrested on new crimes upon release.[24]

Perhaps the change with the greatest impact on pretrial incarceration occurred within the courtroom, where judges replaced the now-disfavored money bail by shifting to remand and holding defendants without bail.[25] These "no bail" orders quickly became the new norm for an increasing number of judges intent on maintaining the previous jail population.[26] Court delays followed, which blocked lawyers from seeking speedy judicial review and a new bail hearing.[27] The filing of emergency habeas relief, requiring incarcerated defendants to be brought before a judge "forthwith" to challenge the constitutionality of detention,[28] would be postponed and not heard for

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24. Jesse Mckinley et al., *Why Abolishing Bail for Some Crimes Has Law Enforcement on Edge*, N.Y. TIMES (Dec. 31, 2019), https://www.nytimes.com/2019/12/31/nyregion/cash-bail-reform-new-york.html ("[A] backlash has arisen among numerous district attorneys, judges, county legislators and law enforcement officials, who are sounding alarms and raising the specter of dangerous criminals on the loose."); Ashley Southall & Jesse McKinley, *Spike in Crime Inflames Debate Over Bail Law in New York*, N.Y. TIMES (Feb. 4, 2020), https://www.nytimes.com/2020 /02/04/nyregion/crime-stats-nyc-bail-reform.html ("New York City's police commissioner . . . blamed the state's new bail law for a sharp rise last month in serious crimes, warning again that the law allows violent criminals to go free and risk eroding the city's historic improvements in public safety.").

25. Jose Zelada, *The Ongoing Fight Against Opposing Bail*, UNIV. OF BALT. SCH. OF L.: LEGAL DATA & DESIGN CLINIC (Mar. 12, 2020), http://blogs.ubalt.edu/legaldatadesign/2020/03/12/the-ongoing-fight-against-oppressive-bail ("According to data obtained from Professor Colin Starger at the University of Baltimore School of Law, the percentage of defendants in pretrial detention has almost doubled since the passage of bail reform. . . . Specifically, after the rule, judges are more likely to order a defendant to be jailed without the option to pay bail and be released, and fewer judges are providing a bail option for defendants.").

26. *See id*. (presenting data showing the dramatic, post-reform flip in judicial officers now ordering "no bail" for nearly 50 percent of Maryland defendants, who previously received money bail). Zelada came to this conclusion by comparing the 19 percent "no bail" judicial results at 2015–2017 bail hearings before the new rule took effect with the subsequent 2017–2019 period when Maryland judicial officers ordered "no bail" for more than twice as many, or 45 percent of detainees; in 2017–2019, judicial officers ordered money bail for only 14 percent of detainees, compared to 47 percent of detainees during the pre-reform, 2015–2017 period. *Id.*

27. *See* COLIN DOYLE ET AL., BAIL REFORM: A GUIDE FOR STATE AND LOCAL POLICYMAKERS, 66–67 (Harvard L. Sch. Crim. Just. Pol'y Program ed., 2019) (examining the impact of New Mexico's bail reform efforts on the length of pretrial detention, procedural obstacles, and extensive detention hearings).

28. Habeas Corpus Act of 1867, 14 Stat. 385–86 (1867) ("That the several courts of the United States . . . shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution . . . *shall forthwith* award a writ of habeas corpus, unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the constitution or laws of the United States.")

weeks, further maintaining defendants' jail statuses.[29] At initial appearances, prosecutors refrained from making favorable recommendations for pretrial release. Instead, they chose the "neutral" path and took no position, stating only that "the People submit" and leaving it for the judge to decide.[30]

This Article builds upon the continuing work of the defense bar in bringing attention and meaning to indigent defendants' right to counsel at bail, often done through litigation and legislative strategies.[31] Acknowledging the importance of a lawyer's zealous and aggressive advocacy, this Article proposes a collaborative model that highlights the prosecutors' roles as ministers of justice,[32] as well as the professional guidelines of judges committed to equal justice and a balanced playing field for indigent defendants awaiting trial.[33] Take, for instance, the impact on the presiding judge when a prosecutor consents to release on recognizance or recommends a less onerous,

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(emphasis added); *Forthwith*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Immediately; without delay.").

29. Interview with Colin Starger, L. Professor, Univ. Balt. Sch. of L., in Balt., Md. (June 4, 2020). Professor Starger supervised clinical law students at felony habeas proceedings, which he found usually took two weeks to be docketed and scheduled. *Id.* When the author supervised clinical students between 1998 and 2013, he found that scheduling would occur three to four weeks after the lower courts' bail review hearings. *Id.*

30. *Id.* At initial appearances, the author frequently observed Baltimore prosecutors stopping short of making favorable release recommendations for pretrial release. Rather, the assigned prosecutor often told the judge that "the People submit," leaving it for the judge to decide. While that may be appropriate in some instances, judges also need prosecutors to share the risk and take a clear position in favor of release on recognizance or defense counsel's recommended bail.

31. Defense litigation efforts succeeded in establishing a right to counsel at initial appearance bail hearings. *E.g.*, Richmond v. DeWolfe, 76 A.3d 1019, 1026 (Md. 2013). Several years later, the American Civil Liberties Union (led by senior attorney Twyla Carter, staff attorney Andrea Woods, and deputy director for Smart Justice Brandon Buskey) launched a broad right to counsel at first appearance project throughout the country. *See, e.g.*, Class Action Complaint, White v. Hesse, No. 5:19-cv-01145-JD (W.D. Okla. Dec. 10, 2019); Motion for Class-Wide Preliminary Injunction, Allison v. Allen, No. 1:19-cv-01126-NCT-LPA (M.D.N.C. Nov. 12, 2019); Class Action Complaint, Ross v. Blount, No. 2:19-cv-110760LJM-EAS (E.D. Mich. Apr. 14, 2019); Intervenor Complaint, Hester v. Gentry, No. 5:17-cv-00270-MHH (N.D. Ala., Apr. 9, 2018); Complaint, Booth v. Galveston County, No. 3:18-cv-00104 (S.D. Tex., Apr. 8, 2018); Class Action Complaint, Mock v. Glynn County, No. 2:18-cv-00025-LGW-RSB (S.D. Ga., Mar. 9, 2018); Class Action Complaint, Daves v. Dallas County, No. 3:18-cv-00154-N (N.D. Tex., Jan. 21, 2018); Class Action Complaint, Bairefoot v. Beaufort, No. 9:17-cv-02759-RMG (D.S.C. Oct. 11, 2017); Plaintiff's Motion for Preliminary Injunction, Edwards v. Cofield, No. 3:17-cv-00321-WKW-TFM (M.D. Ala. May 18, 2017); Class Action Complaint, Yarls v. Bunton, No. 3:16-cv-00031-JJB-RLB (M.D. La. Jan. 14, 2016); Class Action Complaint, Burks v. Scott County, No. 3:15-cv-00745-HTW-LRA (S.D. Miss. Sept. 23, 2014).

32. *See* MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 1983).

33. *See* MODEL RULES OF JUD. CONDUCT r. 2.2 (AM. BAR ASS'N 2010).

nonfinancial condition of pretrial release. The sharing of the risk that a released defendant might commit a new crime provides a useful shield for judges facing a barrage of public criticism alone, unable to respond.[34] Similarly, a judge's release order receives validation when defendants return to court and comply with conditions of release. Public defenders and assigned panel lawyers should make a practice of providing judges with the follow-up information, which could be disseminated to the public-at-large to dispel the myth that released defendants fail to reappear or commit new crimes.

The idea of "with a little help from my friends" suggests a collaborative approach where the three principal players join in responding to baseless, yet potentially devastating, attacks on the judicial process or individual actors. This response would aim to educate the public about a prosecutor's or judge's appropriate role in freeing a defendant in particular cases, thereby avoiding the usual finger-pointing and invoking of "the blame game." Through a joint statement, the principal players would inform the public about the high percentage of defendants who voluntarily returned to court without requiring money bail. To lessen public fear, data also should be compiled and presented about the relatively few released defendants who are convicted of new crimes. The three-ingredient approach—a zealous defense bar, prosecutors as ministers of justice, and judges wedded to pretrial incarceration in "carefully limited exceptions"[35]—would go far toward reducing overincarceration and limiting pretrial imprisonment to the most serious crimes and dangerous offenders.

This Article takes a closer look at the interplay and ethical responsibilities of lawyers for the accused, prosecuting attorneys, and presiding judges. Part II focuses on the essential role of *defense lawyers* at indigent defendants' initial appearances and the difference that a lawyer makes. It explains why the bail proceeding must be considered a "critical stage" that requires states to guarantee legal representation to people unable to afford private counsel.

Part III explains the *prosecutors'* ethical and legal roles as ministers of justice at the initial appearance and bail stage. It highlights the importance of a prosecutor exercising discretion in recommending a defendant's release on recognizance or on nonfinancial conditions, as well as the appropriate use of money bail.

Part IV examines the role of *judges* and other judicial officers in administering impartial justice for indigent defendants—particularly for people of color—when making the pivotal decision to order pretrial release or incarceration. This Article concludes by proposing that lawyers' and judges' collective commitment toward fair and even-handed justice requires that they become conscious of defendants' financial status, race, and the impact on local communities when

34. *See id.* r. 2.10.

35. United States v. Salerno, 481 U.S. 739, 755 (1987).

pretrial jails include such a high percentage of low-income and indigent defendants.

II. DEFENSE LAWYERS: CHAMPIONS OF FREEDOM AND PROVIDERS OF EFFECTIVE ASSISTANCE

Certainly, it makes sense that the defense would assume the leading role in the historic struggle to apply an accused's Sixth Amendment guarantee of the assistance of counsel to safeguard individual liberty[36] at the initial proceeding of a criminal prosecution. There ought not be any mystery surrounding the defense lawyer's constitutional and ethical obligations when representing someone accused of crime. Once a lawyer agrees to defend an individual, that attorney is duty-bound to fulfill the requirements of being a vigorous and zealous advocate,[37] one whose knowledge of the law, preparation, thoroughness, dedication, and loyalty places the client's interest of regaining liberty at the forefront of representation.[38] Defending an accused presents many challenges, but the value of a lawyer's advocacy, independence, and commitment to the client represents the foundation of an adversarial criminal system's legitimacy and integrity. Leaving an accused without a defender to protect their freedom exposes a glaring hole in the system's fundamental promise of even-handed justice.

Defense lawyers understand the high stakes at play at the initial hearing when a client seeks to regain liberty and legally escape becoming another inmate statistic. With representation, data shows that an incarcerated defendant charged with a nonviolent crime stands five times as likely to be released on recognizance or affordable bail than an unrepresented defendant.[39] When facing violent and more serious crimes, a lawyer's advocacy becomes even more essential in persuading judges to order bail within defendants' means. With a freed client at the lawyer's side, preparing a meaningful trial defense, finding available witnesses, and gaining support from others become more achievable objectives.[40] At trial, jurors view the released defendant considerably more favorably than the courtroom defendant stationed in an area with security personnel hovering nearby.[41] Plea negotiations take place with a different mindset when

36. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.").

37. *See* MODEL RULES OF PRO. CONDUCT, *supra* note 32, r. 1.3.

38. *Id.* r. 1.1, 1.7.

39. Colbert et al., *Counsel at Bail*, *supra* note 11, at 1720, 1777 n.194. Reporting on the data obtained from the eighteen-month LAB Project, the author concluded that "[a] lawyer's representation at bail for people charged with non-violent offenses resulted in two and a half times as many incarcerated detainees released on recognizance, and two and a half times as many receiving an affordable bail." *Id.*

40. *Id.* at 1720, 1763.

41. *See* State v. Fann, 571 A.2d 1023, 1026 (N.J. Super. Ct. Law Div. 1990).

nonincarcerated defendants present themselves as productive members of society rather than looking like—and wearing the indicia of—a jail inmate.[42] Data confirms the significantly harsher sentences that await incarcerated defendants when compared to the individuals released from jail.[43] Lawyers know firsthand the different attitudes and cooperative attorney-client relationships that often develop when they succeed at bail hearings, as well as the enhanced respect it generates for the justice system.[44]

Prosecutors and judges recognize the value of effective legal representation in rendering the appropriate recommendation and decision at the initial appearance bail hearing. As described below,[45] each of their voices are essential components in guaranteeing legal representation to incarcerated defendants.

The conscientious and competent defense lawyer best understands the complexities of legal argument and the law surrounding bail and pretrial release,[46] knowing all too well the fundamental unfairness of expecting unrepresented defendants to adequately defend their future liberty.[47] Observing these lawyer-less hearings reveals the folly of judges and prosecutors going through the motions of an all-too-certain jail outcome in cases that might be decided otherwise with a defense lawyer's advocacy. For instance, the initial bail hearing requires judicial officers to deem the defendant likely to return to court before ordering release.[48] They seek *verified* information attesting to the defendant's ties to their community, such as family, local residence, employment, and other indicia showing the reliability of the person's reappearance at future court dates.[49] Most defendants cannot verify this information from jail. Further, they are not familiar with the legal criteria that should be addressed in court,[50]

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42. *See id.*

43. CHRISTOPHER T. LOWENKAMP ET AL., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 14 (Laura & John Arnold Found. 2013). The American Bar Association Standards Relating to Pretrial Release and studies conducted in Philadelphia, New York, and Washington, D.C., demonstrated the "strong relationship between detention and unfavorable disposition." *Fann*, 571 A.2d at 1026 (quoting Standards Relating to Pretrial Release Introduction at 3 (1968)). Earlier studies revealed that incarcerated defendants were much more likely to be convicted and receive sentences two or three times greater than individuals who were released pending trial. *Id.*

44. *See* MODEL RULES OF PRO. CONDUCT, *supra* note 32, r. 3.2 cmt. 1.

45. *See infra* Parts III, IV.

46. MODEL RULES OF PRO. CONDUCT, *supra* note 32, r. 1.1.

47. Barbara A. Babcock, *Inventing the Public Defender*, 43 AM. CRIM. L. REV. 1267, 1314 (2006) ("It is time to renew the original understandings and found aspirations of public defense as . . . a powerful, resourceful figure to counter and correct the prosecutor, to balance the presentation of evidence, and to make the proceedings orderly and just.").

48. Colbert, *Thirty-Five Years After* Gideon, *supra* note 2, at 15.

49. *Id.*

50. Powell v. Alabama, 287 U.S. 45, 69 (1932) ("Even the intelligent and educated layman . . . lacks both the skill and knowledge adequately to prepare

nor are they fully aware of the consequences of revealing information that should not be discussed, such as the alleged crime itself and other potentially inculpatory statements.[51] But even for the rare situation where a knowledgeable, unrepresented defendant provides only relevant information, most judges give little credibility to and disregard what the defendant says. As more than one judge has explained, they are *the defendants* and thus cannot be trusted or believed.[52]

It follows that only a lawyer can provide the necessary credible, verified information and succeed in providing the persuasive advocacy that would allow a judge to deem the client a good bet to return to court. A lawyer's understanding of the laws of pretrial release, credibility as an officer of the court, and vigorous argument provide the judicial officer with the legal and factual basis to order a defendant's release from custody.[53] The lawyer must also inform the court about a client's potentially limited financial resources and place this information in perspective when seeking an appropriate bail amount.[54] Simply put, absent meaningful representation, the chances of regaining freedom are severely diminished.

Perhaps most important, the defense lawyer can explain and provide context when rebutting some of the prosecutor's strongest arguments against release, which could include the defendants' prior conviction(s), missed court appearance(s), current charge, or their potential danger to others. All too often, defendants will provide incomplete or incorrect information when asked about prior criminal records and will certainly fail to present the information in the best possible light.[55] In contrast, this is the job of the skilled defense lawyer, who can highlight the positive steps taken in recent years to demonstrate the defendant's responsibility and reliability, significant progress as a productive member of society, and length of time that passed since the last encounter with the criminal justice system. A serious felony conviction committed as a youth or young adult (or even missed court appearances from long ago) has considerably less probative value for an older defendant when presented in the context

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his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.").

51. Douglas L. Colbert, *Coming Soon to a Court Near You—Convicting the Unrepresented at the Bail Stage: An Autopsy of a State High Court's Sua Sponte Rejection of Indigent Defendants' Right to Counsel*, 36 SETON HALL L. REV. 653, 659 (2006) [hereinafter Colbert, *Coming Soon to a Court Near You*].

52. *See* Colbert, *The Maryland Access to Justice Story*, *supra* note 4, at 9.

53. Colbert, *Thirty-Five Years After* Gideon, *supra* note 2, at 15.

54. *Id.* at 16.

55. Colbert, *Coming Soon to a Court Near You*, *supra* note 51, at 659 ("Absent counsel, custodial defendants, even when given Miranda advisements, are likely to answer a judge's broad . . . question in order to regain liberty and risk exposing themselves to conviction at the initial bail stage. When they do make an incriminating statement, the trial option becomes less realistic and available.") (citations omitted).

of the progress currently being made.[56] Moreover, the defense attorney often adds information and identifies weaknesses in the allegations that suggest conviction is unlikely without making careless, damaging admissions, and they can further address safety concerns by including release conditions that protect others.[57]

In brief, a lawyer's training, knowledge, skills, and expertise explain why every well-to-do person facing criminal charges (or has a loved one facing charges) makes every effort to retain and be represented by counsel. People with financial resources would never think of defending their most precious liberties without a lawyer present and do not hesitate in finding the best person for the job. It is no different for poor or low-income people. They, too, seek the best available legal assistance to prevent the government from taking their freedom. That is the central meaning of *Gideon*'s guarantee of counsel: equal and fair justice to poor people.[58] In a constitutional sense, the critical nature of the bail determination requires each state to provide counsel after a criminal prosecution commences at the initial bail proceeding so that the lawyer can make the most convincing argument on the client's behalf.[59] Absent a lawyer, the initial appearance bears strong resemblance to the pre-*Gideon* days where prosecutors and judges controlled everything that took place in a courtroom and states could deny the necessary financial resources.

A. Bail as a Critical Stage of a Criminal Prosecution

Throughout most of this nation's history, states and localities firmly opposed extending the Sixth Amendment right to counsel to indigent defendants and guaranteeing lower-income people the same opportunity as wealthy individuals to regain liberty when accused of crime. For nearly 175 years after the U.S. Constitution explicitly granted a defendant the constitutional right to the assistance of counsel, many states conducted criminal trials without counsel present and only allowed defendants to use a private lawyer if they could afford to.[60] The practice of empowering individual states to

56. Colbert, *The Maryland Access to Justice Story*, *supra* note 4, at 21.

57. DOUGLAS L. COLBERT, THE PRETRIAL RELEASE PROJECT: A STUDY OF MARYLAND'S PRETRIAL RELEASE AND BAIL SYSTEM 33 (Abell Found. 2001), https://www.abell.org/sites/default/files/publications/hhs_pretrial_9.01(1).pdf.

58. Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("From the very beginning, our state and national constitutions and law have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.").

59. Rothgery v. Gillespie County, 554 U.S. 191, 194–95 (2008) (holding the right to counsel attaches at the initial appearance before a judicial officer, and legal representation accordingly commences at that point).

60. William O. Douglas, *The Right to Counsel: A Forward*, 45 MINN. L. REV. 693, 693 (1960) ("The refusal to recognize the right of counsel in every criminal case has long . . . [been] a denial of the equal protection of the law. Certainly he

decide whether or not to provide counsel continued until 1963, when the Supreme Court's landmark ruling in *Gideon v. Wainwright* mandated states to assign a lawyer in felony trials, noting that the right "to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[61] Before *Gideon*, states took the position that lawyers were optional and not mandatory, wishfully believing that the presiding judge would adequately protect defendants' rights and that the state should decide how best to spend its money at criminal trials.[62] That same "states' rights" attitude likely explains why today's local and state governments are objecting to a guaranteed national right to counsel at initial appearances where a judge makes the crucial decision of liberty or continued jail.

States may soon find that the U.S. Constitution and the Sixth Amendment's critical stage analysis requires that they extend the guarantee of counsel to first appearance bail hearings. Following *Gideon*'s holding that lawyers are "necessities, not luxuries,"[63] the Supreme Court recognized that certain pretrial stages required counsel's presence and advocacy to ensure fairness during the state-accused confrontations. In *United States v. Wade*,[64] the Supreme Court considered the lawyer's essential role in assuring the reliability and fairness of police-arranged, post-indictment lineups and ordered that states must provide legal representation to indigent defendants to ensure admissibility of the identification evidence.[65] The Court's "critical stage" analysis focused on the particular pretrial confrontation and "whether potential substantial prejudice to [a] defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."[66] When defendants appear without counsel at the initial appearance, one envisions many situations where an accused's silence and intimidation from speaking without counsel results in a failure to provide relevant information. Thus, defendants' efforts would fall far short of the evidence that a prepared lawyer would have introduced, and the lawyer's presence and advocacy would have avoided the substantial prejudice that ensued.

Only the uninformed or biased person would deny the lawyer's irreplaceable role in defending the poor person's liberty with the same vigor and passion a paying client expects of retained counsel. Indeed, it is foolhardy to think that an untrained defendant could be an

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who has a long purse will always have a lawyer, while the indigent will be without one.").

61. *Gideon*, 372 U.S. at 344.

62. *See* Betts v. Brady, 316 U.S. 456, 472 n.31 (1942) ("Certainly my own experience in criminal trials over which I have presided . . . has demonstrated to me that there are fair trials without counsel employed for the prisoners.").

63. *Gideon*, 372 U.S. at 344.

64. 388 U.S. 218 (1967).

65. *Id.* at 227.

66. *Id.*

acceptable substitute and overlook the substantial damage being done to the justice system when observing the defenseless defendant brought before the experienced judge and prosecutor.

Reformers are familiar with the many explanations and excuses given by legislators, judicial officers, prosecutors, and defense lawyers to justify the status quo of maintaining the no counsel practice for poor people at the bail stage. Within each group, many reject the requirement of a lawyer and say that it is unnecessary and a waste of money, deny that lawyers even make a difference, or rationalize keeping defendants in jail to assure their return to court.[67] These purported justifications disguise what each person would do if they faced a similar situation as an accused. Surely, no one would hesitate in seeking the best lawyer they could afford. This is particularly true when facing the toughest judge (one known for viewing pretrial jail as the only appropriate option) and when the forceful lawyer's argument for release allows a reviewing court to reconsider and reverse the prior ruling. Justice for the poor person demands nothing less than extending this same fervor and dedication in protecting the indigent's liberty before trial.

III. THE PROSECUTOR AS MINISTER OF JUSTICE

Most defense lawyers know that as good as they are in advocating for pretrial release at bail hearings, they will find many judges who give significantly more weight to the prosecutor's recommendation. Consequently, the defense will likely achieve their objective by gaining the support of the opposing counsel. Certainly, that is a formidable challenge in the rough-and-tumble world of the trial arena, but probably less so for public defenders and prosecutors assigned to the daily docket of initial appearance cases. Prosecutors are taught and certainly remain aware that their ethical duty as public servants distinguishes them from other attorneys, who must commit to doing what's best for their client and are expected to take a partisan, client-centered perspective.[68] Because prosecutors do not represent a traditional client, they owe special responsibilities to the justice system.[69] As the Supreme Court explained long ago, a prosecutor acts as "the representative, not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling in its obligation to govern at all."[70] Whether the prosecutor represents the United States as an Assistant U.S. Attorney, or an individual state as an Assistant Attorney General or State's Attorney, they speak for "the People" who live

67. Colbert, *Prosecution Without Representation*, *supra* note 19, at 333, 347, 411.

68. *Compare* MODEL RULES OF PRO. CONDUCT, *supra* note 32, r. 1.3, *with id.* r. 3.8.

69. *Id.* r. 3.8.

70. Berger v. United States, 295 U.S. 78, 88 (1935).

within that governing jurisdiction. When the prosecution acts, each prosecutor shares and embraces a common mission as a "minister of justice,"[71] whose primary goal is "not that it shall win a case, but that justice shall be done."[72] In this sense, "doing justice" should be considered winning, which is true whether it occurs when a prosecutor dismisses a case, when they act to free a defendant unlawfully held in jail, or when they convict a guilty person of a serious crime and obtain the sentence requested. A minister of justice prosecutor delivers criminal justice in a manner that serves the larger community by upholding its values and ideals,[73] rather than doing what is politically expedient, self-serving, or in the interest of the powerful or elite.[74]

Many view the prosecutor as the most powerful and influential player in the criminal justice system—and with good reason.[75] Their exercise of discretion in the charging function, what plea bargain to offer, and what punishment fits the crime goes nearly unchecked and is often unreviewable.[76] That can be seen during the early stages of prosecution when prosecutors decide what position to assert at the bail stage: release or incarceration. A prosecutor's decision to charge the most or least serious degree of a felony offense or to pursue a high misdemeanor rather than a felony will be an extremely important factor in a judge ruling for or against pretrial release. While judicial officers must balance many factors,[77] most defense lawyers consider

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71. MODEL RULES OF PROF. CONDUCT, *supra* note 32, r. 3.8.

72. *Berger*, 295 U.S. at 88.

73. R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform,* 45 LOY. U. CHI. L.J. 981, 983 (2014) ("Prosecutors have a duty as 'ministers of justice' to . . . think about the delivery of criminal justice on a systemic level, promoting criminal justice policies that further broader societal ends.").

74. *See* Marilyn Mosby, *Marilyn Mosby: We Must Protect Good Officers*, BALT. SUN (Oct. 20, 2016), https://www.baltimoresun.com/opinion/op-ed/bs-ed-mosby-proposals-20161023-story.html ("Having learned the hard way through first-hand experience, when allegations of police misconduct arise, prosecutors are often seen as protective of police and unlikely to prosecute cases of wrongdoing. Despite taking an oath to administer justice equally and fairly to everyone regardless of one's race, sex, religion, socio-economic status or occupation, exacerbating factors, such as a fear of straining the police-prosecutor relationship that other casework depends upon, can make looking the other way on police misconduct seem like the lesser of two evils. . . . As the state's attorney for Baltimore City, my office's role is to ensure that the truth is known and justice is done when there are allegations of police misconduct the same way we ensure this with any other case.").

75. Bennett Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 393 (1992).

76. *Id*. at 407–08. Mandatory sentencing gives prosecutors enormous power and deprives judges of discretion. *Id.* at 407.

77. *See, e.g.*, MD. CODE ANN., CRIM. PROC. § 4-216.1(f)(2) (West). ("[T]he judicial officer shall consider the following factors: (A) the nature and circumstances of the offense charged, the nature of the evidence against the defendant, and the potential sentence upon conviction; (B) the defendant's prior

the impact of a prosecutor's recommendation second to none in terms of its influence on the presiding judge.[78] A prosecutor who is eager to detain a defendant may not obtain the exact dollar amount of bail sought, but they can count on most judges honoring their general objective of pretrial incarceration.

As a minister of justice, a prosecutor's input in recommending and arguing for a specific outcome often makes the biggest difference between a defendant regaining freedom or remaining incarcerated at the initial appearance. That explains why defense lawyers would be wise to communicate with a prosecutor before appearing before the presiding judge and sharing information relevant to the hearing that might favorably influence a prosecutor's recommendation.[79]

Prosecutors also must be well informed and take an active role at the bail hearing. Take the example of the "lenient" prosecutor, who asks for a "reasonable" money bail as a condition of release. Assume this prosecutor asks for a $2,500 or $5,000 bond for a low-level, felony or high misdemeanor larceny (such as shoplifting over $1,000) based upon the defendant previously missing a recent court date and receiving a failure-to-appear warrant, or having a prior record of many nonviolent convictions. The prosecutor rationalizes the bail recommendation by saying "some bail" is needed to motivate the defendant to return to court, and they believe that the defendant will post the necessary $250 or $500 by paying a bail bondsman's standard 10 percent nonrefundable fee.[80] In the prosecutor's world, people have little difficulty gaining access to that sum and are released from

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record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings; (C) the defendant's family ties, employment status and history, financial resources, reputation, character and mental condition, length of residence in the community, and length of residence in this State; (D) any request made under [subsection] 5-201(a) for reasonable protections for the safety of an alleged victim; (E) any recommendation of an agency that conducts pretrial release investigations; (F) any information presented by the State's Attorney and any recommendation of the State's Attorney; (G) any information presented by the defendant or defendant's attorney; (H) the danger of the defendant to the alleged victim, another person, or the community; (I) the danger of the defendant to himself or herself; and (J) any other factor bearing on the risk of a willful failure to appear and the safety of the alleged victim, another person, or the community, including all prior convictions and any prior adjudications of delinquency that occurred within three years of the date the defendant is charged as an adult.").

78. Colbert, *Thirty-Five Years After* Gideon, *supra* note 2, at 49.

79. As a NYC public defender assigned to the lower criminal court arraignment where arrestees arrested for various felony and misdemeanor crimes first appeared, the author found consultations with opposing prosecutors worthwhile. Depending on the assigned prosecutor, the parties could reach agreement for as many as half the docket or as few as one out of five cases.

80. The general practice of the bail bondsman requires the defendant or someone on behalf of the defendant to post money to pay a 10 percent non-refundable fee to the bail bondsman. United States v. Cowper, 349 F. Supp. 560, 565 (N.D. Ohio 1972) ("Under the surety bond system, the accused pays a non-returnable fee of about ten percent of the amount of the bond.").

jail. That, after all, was the prosecutor's intent in requesting bail. But the freedom outcome conditioned on money bail is certainly not a given either for the low-income, working person earning a modest hourly wage, or for the indigent defendant whose sole source of income comes from a monthly government disability compensation. The law of pretrial release expects prosecutors to take the defendant's financial circumstances into account when asking for an appropriate amount.[81] Yet, prosecutors rarely inquire into whether the defendant has the necessary money and often take issue with the amount the defense requests.[82] Consequently, a clear divide exists between the "have" and the "have-not" defendants regarding the practical meaning of $250 or $500. For the low-income wage earner or indigent person, an apparent "minimal" bail translates to staying in jail for weeks or months, while the same amount provides a get out of jail free pass for well-to-do individuals.

Minister of justice prosecutors act in the public interest when they arrive at a different outcome than the uninformed prosecutor who assumes the money bail is available in this familiar scenario, which most public defenders and assigned counsel witness regularly in state courts.[83] A prosecutor's recommendation to release the low-income defendant on nonfinancial conditions, such as reporting weekly to a pretrial agent or probation officer and being reminded of an upcoming court date, might spare many defendants from spending additional weeks and unnecessary time in jail.

Many more examples could be provided to illustrate the prosecutor's role as an active minister of justice seeking to correct injustice and to see that "justice shall be done." Too often, though, prosecutors are content to remain neutral and say nothing other than "People submit." Taking a voluntary default and choosing to "pass" is directly contrary to the affirmative, proactive measures expected from ministers of justice, particularly when appearing before judges who are hostile to the defense lawyer's arguments. Ministers' ethical duties require them to speak and advocate for a defendant's freedom in appropriate cases, doing so as strongly as they would when asking a judge to deny bail and incarcerate before trial. That is the essence of what it means to be a minister of justice. Freeing a wrongfully convicted defendant or releasing a presumptively innocent defendant from jail should bring the same sense of accomplishment and satisfaction as persuading a jury to convict and sentence the guilty.

When prosecutors seek money bail at the initial bail hearing, they also should inquire into the defendant's financial circumstances and consider what reasonable bail would look like from the accused's perspective. For the employed working person who takes home $400

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81. AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE, 17–18 (3d ed. 2007).

82. Colbert, *Thirty-Five Years After* Gideon, *supra* note 2, at 49 n.261.

83. Colbert, *Prosecution Without Representation*, *supra* note 19, at 423.

weekly to support a family of four on an annual $30–35,000 salary, recommending more than one week's paycheck virtually ensures the person remaining in jail. For the veteran who receives a $1,000 disability monthly check, any amount beyond the $100, 10 percent cash alternative is tantamount to asking for incarceration. One hundred dollars represents an enormous sum to a poor person.

Minister of justice prosecutors also must ensure that indigent defendants gain access to counsel. They are well aware of the inequities of unrepresented defendants speaking for themselves and the unfair advantage that it provides to government lawyers.[84] As ministers charged with enforcing even-handed justice, prosecutors must take an active role in embracing reforms that entitle a poor person to representation at initial bail hearings.[85]

Prosecutors should also take the initiative and speak up when opposing defense counsel fails to provide competent counsel or relevant information. Sometimes, a defense lawyer can be heard asking for "reasonable" bail without providing an amount that is affordable for the client. A prosecutor focusing on "doing justice" should not justify remaining silent by saying "that is the defense's job, not mine." Minister of justice prosecutors must be aware of the conditions and health risks inside the local jail and the length of time the individual remains in lock-up before the next court appearance. Prosecuting attorneys accomplish their mission of doing justice when they intervene and prevent an accused from being wrongfully detained because the bail amount is beyond what an accused can afford. In this collaborative model, prosecutors should offer help to release the presumed innocent defendant who presents no clear danger or risk of flight if released. Prosecutors joining with defense counsel can assume an important role in a judge's ultimate decision.

IV. THE JUDICIARY

Judges take on enormous responsibility in administering justice at initial appearances when they decide the pressing issue of whether the defendant should go free or remain jailed until trial. In many states, recently arrested detainees wait their turn to appear before the assigned local judge scheduled to handle that day's docket.[86] Judges' schedules call for rotating daily or weekly assignments (depending on the jurisdiction),[87] but usually require judges to take

84. *Id.* at 423–24.

85. R. Michael Cassidy, *supra* note 73, at 995 ("Being an administrator means that a prosecutor must have the courage to speak up about what works and what does not work in our criminal justice system, and to advocate for law reform whenever systemic inequities come to her attention.").

86. *See, e.g.*, MD. CODE ANN., CRIM. PROC. § 4-213(a) (West); N.C. GEN. STAT. § 15A-601.

87. In Maryland's District Court, judges alternate on a day-to-day basis. State v. Cook, 82 Md. App. 633, 668 (1990). In the state's two-tier system, the district court judge conducts weekday bail review hearings following a

alternating weekday shifts presiding over the intake docket of a group of first appearance defendants, who wait in jail until being escorted to arraignment.[88] Most judges consider the assembly-like system of defendants appearing one at a time, or sometimes *en masse*, one of their least favorite assignments.[89] As defendants' cases enter the local criminal court system, the presiding judge receives minimal information about the accused beyond details of the alleged crime, the defendant's criminal history, and computer-generated biographical information.[90] A prosecutor usually attends the initial bail proceeding in order to highlight the seriousness of the charge, the defendant's prior convictions, and any failures to appear in court.[91]

Judicial officers depend on the public defender or designated panel lawyer,[92] where one is provided, to learn about the indigent defendant's personal background and ties to community.[93] In some jurisdictions, a pretrial agent reports about a defendant's family and community ties before recommending either bail or release.[94] Agents traditionally do not act as advocates for the accused as a lawyer

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Commissioner's initial ruling, all occurring within twenty-four hours of arrest. MD. CODE ANN., CRIM. PROC. § 4-212(e) (governing individuals arrested with a warrant); *Id.* § 4-212(f) (governing individuals arrested without a warrant). On weekends, only magistrate judges preside at first appearance hearings. *See id.* MD. CODE ANN., CRIM. PROC. § 4-216.1. New York City judges used to be scheduled weekly to handle first appearances at arraignment court with one exception: for many years, one particular judge enjoyed the variety and volume of cases and chose to work each month in Manhattan's busiest court. *See* H.R. REP. NO. 91-116 pt. 28 at 37873 (1970). On weekends, however, the Manhattan judges rotated on Saturdays and Sundays. *Court Information by County*, NY COURTS, http://ww2.nycourts.gov/COURTS/nyc/criminal/generalinfo.shtml#NEW_YORK_COUNTY (last visited Oct. 18, 2020).

88. Where some localities refer to the defendant's first appearance as taking place at arraignment, others prefer calling it first appearance or magistrate's or commissioner's court. Colbert, *Prosecution Without Representation*, *supra* note 19, at 334–35 n.9. Some local jurisdictions, such as Baltimore, rely on video hearings transmitted from the jail to the courtroom. *Id.* at 337, 450 n.474.

89. Colbert, *The Maryland Access to Justice* Story, supra note 4, at 9–10.

90. Colbert, *Thirty-Five Years After* Gideon, *supra* note 2, at 16.

91. *See* Colbert et al., *Counsel at Bail*, *supra* note 11, at 1766 n.138.

92. Many jurisdictions, particularly those without a public defender system, rely on a panel of private criminal defense lawyers, who are qualified to represent indigent defendants and receive compensation on an hourly basis. *See, e.g.*, *Indigent Criminal Defense Program (ICDA)*, L.A. CNTY. BAR ASS'N, https://www.lacba.org/resources/indigent-criminal-defense-appointments (last visited Oct. 18, 2020); Lowell Brown, *Lack of Support Dooms Push to Create Public Defender's Office*, WACO TRIBUNE-HERALD (Feb. 17, 2013), https://wacotrib.com/news/government/lack-of-support-dooms-push-to-create-public-defender-s-office/article_97187da7-c76e-5fee-bfaf-3ef640728e0b.html.

93. Colbert, *Prosecution Without Representation*, *supra* note 19, at 1743–44.

94. Pretrial services are responsible for interviewing and gathering information from newly-arrested defendants, which can then be verified and form the basis for offering its recommendation to the court. *See, e.g.*, *PSA's Role in the Criminal Justice System*, PRETRIAL SERVS. AGENCY FOR D.C., https://www.psa.gov/?q=about/role (last visited Oct. 18, 2020).

would; they provide information to the presiding judicial officer and assume a neutral stance.[95]

As stated earlier,[96] many states and localities do not provide counsel for indigent and low-income defendants at initial hearings, leaving the individual to decide whether to say anything to the presiding judge. Many judges warn unrepresented defendants not to speak out of concern that they might say something incriminating or otherwise adverse to their interests, and most defendants comply.[97] In these defense-silent courtrooms, the hearings move swiftly and predictably: without defense counsel's input, judges usually follow the prosecutor's recommendation.[98]

Indeed, until two decades ago, standard judicial practice in most jurisdictions across the country involved conducting bail or freedom hearings without a defense lawyer advocating for the accused.[99] While some readers may find it surprising that judges in an adversarial system would conduct judicial hearings without a lawyer to protect individual liberty and respond to a prosecutor's arguments, this judicially-approved, lawyer-less practice is far from new. Despite the Sixth Amendment's guarantee of counsel, prosecution without representation remained an American tradition and a blot on equal and fair justice in death penalty trials until 1932,[100] and in state felonies until 1963.[101] Detainees facing common misdemeanor charges were not assured of counsel at trial until 1972—nearly 175 years after the nation ratified the constitutional right to counsel.[102]

States' long-standing practice of declining to appoint a defense lawyer at trial for the accused poor person carried over to bail hearings and provides an important perspective for understanding states' resistance to ensure counsel at today's initial appearances.

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95. *Id.*

96. *See supra* Part II.

97. Colbert, *Coming Soon to a Court Near You*, *supra* note 51, at 657 ("A lawyer's presence ensures that the attorney, not the accused, responds to a judge's general request for bail-related information and shields even the Mirandized defendant from the dangers of self-representation.").

98. Colbert, *Thirty-Five Years After* Gideon, *supra* note 2, at 3 n.10.

99. Colbert, *Prosecution Without Representation*, *supra* note 19, at 386.

100. Powell v. Alabama, 287 U.S. 45, 52 (1932) ("[M]ost, if not all, of [the defendants] were youthful, and . . . ignorant and illiterate . . . ."); *id.* at 69 ([W]ithout . . . the guiding hand of counsel . . . [the defendant] faces the danger of conviction because he does not know how to establish his innocence."). The Court later said that "where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process . . . ." *Id.* at 71.

101. Gideon v. Wainwright, 372 U.S. 335, 337 ("Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman."). *Gideon* reversed the Supreme Court's rejection of a constitutional right to counsel at felony trials just twenty-one years earlier in *Betts v. Brady*. *Id.* at 339.

102. Argersinger v. Hamlin, 407 U.S. 25, 34 (1972) ("[T]he volume of misdemeanor cases, [is] far greater in number than felony prosecutions . . . .").

Historically, poor and low-income people could count on very few elected officials or courts to champion the cause of equality in the law, with the exception of the brief, post-Civil War Reconstruction period,[103] as well as the 1960s, when a multiracial civil rights movement addressed the centuries-old neglect that had left one out of four people living below the poverty line and unable to defend themselves.[104] In addition to the prevailing antipoor prejudice, the deep and even uglier four-hundred-year history of racist, pro-slavery, and white supremacist sentiment in this country accounted for much of the continued opposition to criminal justice reform. Racial profiling and prosecution of African-Americans and Latino-Americans contributed substantially to the gross overincarceration of unrepresented people of color.[105]

Some judges, however, stood out and boldly rejected the prevailing practice of denying counsel to indigent defendants. In a series of state court appellate rulings, they expressed their strong belief that equal justice required states to fund legal representation to an accused poor person. As far back as 1854, justices sitting on Indiana's highest court declared that:

> It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial. The defense of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court and to the public.[106]

Five years later, Wisconsin's highest court joined the view that a state's prosecution of serious crime required it to provide legal representation to an accused unable to afford retaining private

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103. *See Reconstruction*, HISTORY, https://www.history.com/topics/american-civil-war/reconstruction (last visited Oct. 18, 2020).

104. *See Gideon*, 372 U.S. at 344 ("This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."). The U.S. Census Bureau indicates that approximately 22 percent of people in the United States fell below the poverty line in 1960. U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES: 1959 TO 1968 at 1 (1969), https://www2.census.gov/library/publications/1969/demographics/p60-68.pdf.

105. *See* E. Ann Carson, *Prisoners in 2018*, BUREAU OF JUST. STATS. (April 30, 2020), https://www.bjs.gov/content/pub/pdf/p18.pdf. "The Bureau of Justice Statistics reports that 35 [percent] of state prisoners are white, 38 [percent] are black, and 21 [percent] are Hispanic." Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/#II.%20Overall%20Findings ("Nationally, African-Americans are incarcerated at five times the rate of whites.").

106. Webb v. Baird, 6 Ind. 13, 18 (1854).

counsel. In *Carpenter v. Dane County*,[107] justices on the Wisconsin Supreme Court wondered aloud:

> [W]ould it not be a little like mockery to secure to a pauper these solemn constitutional guaranties for a fair and full trial of the matters with which he was charged, and yet say to him when on trial, that he must employ his own counsel, who could alone render these guaranties of any real permanent value to him. . . . Why this great solicitude to secure him a fair trial if he cannot have the benefit of counsel?[108]

Other states' appellate courts also recognized a trial judge's duty to appoint counsel and to desist from conducting criminal trials without a defense lawyer sitting next to an accused and providing legal assistance.[109] Oklahoma's appellate court adopted the view that in an adversarial system, an impartial criminal trial could not proceed until the presiding judge took the necessary steps to ensure counsel for the accused. In so holding, the court stated that "[w]e think the right and privilege of indigent defendants to have the assistance of counsel should be strictly guarded by the courts. . . . So deeply ingrafted in our criminal jurisprudence has this great right become that none are so low or so poor, but they may rely upon it."[110]

Judges today know fully well the pro-defendant outcomes that frequently occur when an accused obtains the effective assistance of counsel at the bail stage, especially when compared to indigent defendants who appear without representation.[111] Most judges look to the capable, competent, and trustworthy lawyer to provide relevant and verified information that contributes toward rendering an informed decision that gives assurance of an accused reappearing at future court proceedings while not endangering the safety of others upon release. Neutral, fair-minded, and impartial judges rely upon defense lawyers to balance the prosecutor's advantage against the

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107. 9 Wis. 274 (1859).

108. *Id.* at 276–77.

109. *See, e.g.*, Delk v. State, 26 S.E. 752, 753 (Ga. 1896) (declaring that the Georgia Constitution guaranteed legal representation and that "courts have uniformly adopted the practice of assigning counsel to represent indigent criminals in all cases when they were unable to employ counsel to represent them."); Johnson v. Whiteside County, 110 Ill. 22, 24 (1884) (holding that the Illinois constitution empowered trial courts with "[the] duty to assign counsel to defend persons charged with crime, who were unable to employ counsel"); Commonwealth. v. Richards, 169 A. 464, 466 (Pa. Super. Ct. 1933) ("The right to be represented by counsel is a fundamental right, going to the very basis of the administration of the criminal law, and places on the trial judge the onus to inform the defendant of his rights and to assist him in obtaining the benefits of those rights.").

110. Baker v. State, 130 P. 820, 821 (Okla. Crim. App. 1912).

111. LOWENKAMP ET AL., *supra* note 43, at 12.

impoverished and unrepresented defendant.[112] Balancing the scales of justice, the guarantee of counsel represents the essence of fairness and public confidence in the money bail pretrial justice system.[113]

The defense and prosecution bars also take great pride in the fair administration of justice. Each knows the conscientious judges, who are committed to fair play and who do their best to administer law impartially and even-handedly. When they witness one of these judges being pilloried and unjustly criticized for making an appropriate but unpopular decision to release a defendant at a bail hearing, the lawyers' ethical duties require them to step forward in support and protect the targeted judge.[114] Attorneys are aware that the judicial rules of conduct prohibit judges from speaking in their own defense[115] and recognize the importance of their confronting and countering the unfair criticism and the chilling effect it creates for other judges. By intervening, defense and prosecuting attorneys encourage other judges to act with similar courage and honor.

Realistically, judges doing their best to administer impartial justice for indigent defendants should expect to encounter criticism among colleagues, too, who disagree and consider their decisions "too pro-defendant" or not "sufficiently tough on crime." Changing the current judicial pretrial culture that leans heavily upon ordering "no bail" will require further steps from the "unpopular" judges, who tend to free rather than incarcerate detainees. Judges should take care to write and explain their controversial decisions by referring to the evidence that formed the basis for their decisions. They should place these written opinions in the court file so they are part of the public record and seek to publish their opinions in the state legal newspaper so the public can become better educated and understand their rationale. With the help of the defense bar, judges also should keep track of defendants' reappearances to further maintain the public safety. Enhancing public knowledge of the administration of justice, which currently only hears about defendants who commit wrongs

112. AM. BAR. ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE § 6-1.1 (3d ed. 2000) ("The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice.").

113. Lisa Foster, *Judicial Responsibility for Justice in Criminal Courts*, 46 HOFSTRA L. REV. 21, 26 (2017) ("We have created a bail system in the United States that not only punishes people for their poverty, it makes people accused of crimes, their families, and their communities poorer still. And it's being done by judges . . . in violation of the United States Constitution.").

114. MODEL RULES OF PRO. CONDUCT, *supra* note 32, PREAMBLE ("A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is also a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.").

115. MODEL RULES OF JUD. CONDUCT, *supra* note 33, r. 2.10(A) ("A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending* or impending*.").

after being released, remains one of the legal profession's highest responsibilities.[116] Accounts of defendants who return home to support family, remain employed, attend and graduate from school, and lead productive lives will help to change the practice of caging defendants awaiting trial for many months and years.

V. CONCLUSION

In an adversarial system of justice, trial prosecutors typically are pitted gladiator-style against defense lawyers, who seek to expose weaknesses and doubt of guilt in the government's proof. While it is difficult for opposing trial attorneys to view an adversary as a "friend," the defendant's initial appearance provides a different type of setting and an opportunity for prosecutors, defenders, and judges to reach consensus for a significant portion of cases scheduled for bail rulings on a given day. For collaboration to succeed, the principal players must recognize that they share a common interest or objective, whether it be managing a heavy caseload or court docket, being mindful of jail conditions, or viewing incarceration appropriately as a last resort after considering non-jail alternatives. Each principal player must be aware of the ramifications of overincarceration and jail overcrowding, which include the health and safety hazards as more defendants remain in custody over longer periods. They must also consider the collateral consequences to detainees' families and communities, as detainees suffer the loss of jobs and homes and family disruption while in custody. The players must also account for the limited attention prosecutors and judges can give to serious crimes, victims' safety and flight issues, and the public expense in maintaining a larger than necessary pretrial population. Though judges and prosecutors know the legal standards that favor pretrial release are based on an accused's presumed innocence and the requirement of clear and convincing proof of danger,[117] the presence and advocacy of defense lawyers promotes integrity and public trust in the fairness of the judicial process.

The unity needed to confront the current coronavirus pandemic provides a model and opportunity to create a different type of pretrial justice system, one that values collaboration, joint decision-making, equality of poor people's lives and freedom, and the limited resources available within the public budget. Guaranteeing counsel to indigent defendants at the initial bail hearing becomes the necessary first step

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116. *See, e.g.*, *supra* note 24 and accompanying text.

117. AM. BAR ASS'N, *supra* note 81, at 24 ("If, on conclusion of a pretrial detention hearing, the court determines by clear and convincing evidence that no condition or combination of conditions will reasonably ensure the appearance of the person as required, and the safety of any other person and the community pursuant to the criteria established within these Standards, the judicial officer should state the reasons for pretrial detention on the record at the conclusion of the hearing or in written findings of fact within [three days].").

toward creating a balanced playing field and regaining public confidence in an equitable justice system. The second step's practice and implementation require each principal player to select and assign reasonable-minded prosecutors, judges, and defense lawyers to the task of reaching agreement in most cases and releasing a substantial portion of a court's scheduled bail docket. Indeed, public defenders should select their strongest advocates to argue at initial appearance hearings, considering the importance of pretrial release for their clients and of modeling zealous representation for their less experienced attorneys. The third step focuses on the smaller number of remaining detainees, who will be adjudicated in contested hearings where defense lawyers are given adequate time to interview, investigate, and present information to ensure that pretrial incarceration occurs only in "carefully limited circumstances."