

## A Butterfly in COVID: Structural Racism and Baltimore's Pretrial Legal System

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## A BUTTERFLY IN COVID: STRUCTURAL RACISM AND BALTIMORE'S PRETRIAL LEGAL SYSTEM

DOUG COLBERT & COLIN STARGER\*

*Summer of 2020 represented a potentially pivotal moment in the movements against mass incarceration and for racial justice. The authors commenced a study of Baltimore's pretrial legal system just as the convergence of the COVID-19 pandemic and urgent cries of Black Lives Matter appeared to present a once-in-a-generation opportunity for meaningful decarceration. Over forty-four weekdays in June and July, the team observed bail review hearings in 509 cases and collected extensive data from the arguments and recommendations offered by the pretrial agency and prosecuting and defense attorneys. Unfortunately, the hoped-for reform failed to materialize as judges held nearly 62% of all defendants "without bail," sending detainees back to jail indefinitely despite the pandemic and despite their legal presumption of innocence. Even worse, stark racial inequalities persisted.*

*This Article argues that the failed reform of Baltimore's pretrial legal system represents a larger triumph of structural racism and that nothing short of radical transformation of the body politic will end such systemic racism. After describing the original empirical study, presenting a critical history of pretrial justice struggles in Maryland, and relating representative narratives of detainee experiences, the Article employs a novel analysis that reveals a basic pattern of structural injustice replicating itself, like DNA in cells. When plotting the addresses of study defendants onto maps of Baltimore, the unmistakable pattern of a butterfly emerges. This evokes the vital work of Dr. Lawrence Brown who has famously observed that "hypersegregation" in Baltimore looks like a Black butterfly. The Black butterfly represents the physical manifestation of systemic racism; it reveals a pattern of inequality that cuts across economic, political, and other socio-cultural systems.*

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*Using data from the Baltimore Neighborhood Indicators Alliance, this Article visualizes the connection between pretrial injustice and structural racism through a series of original computer-generated maps. These maps connect neighborhood indicators measuring racial composition, median household income, transportation services, access to home Internet, and other non-criminal markers of advantage and disadvantage to the stories of individual criminal defendants from the Article’s study. The contours of the Black butterfly continuously re-appear, suggesting an inextricable relationship between judicial institutions of “criminal justice” and institutions meting out economic, political, and socio-cultural opportunity.*

*Though it is dispiriting that unequal pretrial detention continued relentlessly in Baltimore despite the pandemic and then-Chief Judge Barbera’s call for racial justice, Baltimore’s experience in the time of COVID exemplifies the challenges faced everywhere by those seeking to dismantle structures of racism. Lessons learned from Baltimore apply to the entire nation. Ultimately, analysis of the butterfly in the time of COVID underscores the necessity of connecting all reform efforts aimed at confronting inequality across all domains. Indeed, structural racism has a Hydra-like quality. If you ignore the body and simply cut off one head, two will grow back in its place. Only Herculean focus and a willingness to burn out injustice across the whole monster can lead to meaningful change.*

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## INTRODUCTION

In discourse where participants accept “structural racism”<sup>1</sup> as a given, but debate how best to confront its harmful reality, two conceptual metaphors

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1. “Structural racism” is a phrase used very differently by different people when discussing racism at a systemic/institutional level. Rather than provide a neat analytic definition of the term, we initially use scare quotes to emphasize the concept’s messy and contested meaning. We then consider how competing conceptions of structural racism affect debates over how best to confront systemic inequality.

compete.<sup>2</sup> These competing metaphors operate below the surface of debate, shaping collective intuitions about the concept of “structural racism” and how it affects society.<sup>3</sup> Competing intuitions about how structural racism affects society, in turn, suggest different strategies for ending the phenomenon. In other words, the two metaphors for structural racism—a concept with other labels including “institutional racism” or “systemic racism”—inspire disputes over possible solutions to overcome the stubborn persistence of American inequality.

The first metaphor regards structural racism as a *virus* that attacks an otherwise healthy body politic. Per the virus metaphor, although our social body seeks to live by ideals of democracy, fairness, and equality, its organs sometimes become infected by racist disease. To fight a foe thus conceived, this metaphor supports intuitions about strategies like inoculation (think: *diversity training*) or isolation and quarantine (*find bad actors, remove them from the system*). Since targeted interventions effectively curb viruses, those who subconsciously embrace the virus metaphor are sanguine about the prospects of focused, incremental efforts to heal the wounds of racism. The virus metaphor dominates at the back of much liberal reform discourse.

The second metaphor alternatively conceives racism as embedded in our *systemic DNA*. Rather than a foreign virus attacking a body committed to equality, this competing metaphor regards inequality as inherent in the cellular structure of American capitalist society’s founding institutions. As the cells of founding generations divided and American institutions

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2. This Article aims to engage deeply with those who accept the premise of structural racism’s existence and normative inequity. Paraphrasing Aristotle, those who deny the existence of structural racism need perception rather than argument. Cf. CHAIM PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 56 (John Wilkinson & Purcell Weaver trans., 1969) (“Not every problem, not every thesis, should be examined, but only one which might puzzle one of those who need argument, not . . . perception. For people . . . who are puzzled to know whether snow is white or not need perception.” (quoting 1 ARISTOTLE, *TOPICS* 11, 105a (W.A. Pickard-Cambridge trans., 350 B.C.))). Academic freedom is a different matter. See Andrew Koppelman, *Scandalous Suppression at a Law Review*, *CHRON. HIGHER EDUC.* (Jan. 12, 2022), <https://www.chronicle.com/article/scandalous-suppression-at-a-law-review> (commenting on controversy surrounding a law review’s decision to withdraw the publication of an article skeptical to systemic racism). In our view, our readers will benefit more from time spent in a conversation on confronting racial injustice rather than in one questioning its conceptual legitimacy.

3. Using the framework made famous by George Lakoff and Mark Johnson, “structural racism” can be understood as a *conceptual metaphor*. See generally GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980). This is to say that the words “structural racism” describe a cognitive concept, not a sensorial phenomenon that can be “tasted, touched, seen, heard, or smelled.” See Amy E. Sloan & Colin Starger, Essay, *New Wine in Old Wineskins: Metaphor and Legal Research*, 92 *NOTRE DAME L. REV. ONLINE* 1, 8 n.38 (2017) (positing “law” as a conceptual metaphor). As a higher order complex metaphor, structural racism is necessarily understood through other lower-order conceptual metaphors. See *id.* at 7 (describing the “concept-building-through-metaphor process”). Identifying conceptual metaphors helps flag “situations where conceptual change is needed” to overcome “hidden metaphors [that] potentially calcify thinking and stifle innovation.” *Id.* at 8.

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multiplied, racism was inherited and remains an essential trait. Those whose conceptions of structural racism align with the DNA metaphor intuit that nothing short of wholesale transformation of the body politic will end systemic inequality. Strategies suggested under the logic of the DNA metaphor include overthrowing institutions (think: *defund and abolish*) and establishing entirely new narratives (*begin with 1619 not 1776*). Radical progressive discourse tends to embrace the DNA metaphor.

Since conceptual metaphors usually operate below the surface of articulated debate, those embracing different metaphors for structural racism often talk past each other and may become exasperated by opponents proceeding under incompatible intuitions. This can happen despite all participants in a particular dispute agreeing on institutional racism's existence and normative inequity. Put simply: *When people conceive of reality differently, they will disagree on what is realistic*. Those guided by the virus metaphor, for example, might regard proposals like abolishing the police or convening a new constitutional convention as outright magical thinking. Conversely, those guided by the DNA metaphor might hear proposals for incremental reform as insane calls to repeat failed behavior and hope for a different outcome. Unfortunately, when the very rationality of discursive participants comes into question, productive dialog can break down.

This Article seeks to contribute to productive dialog around structural racism within a city's pretrial detention and over-incarceration system, while ultimately defending a position consistent with the DNA metaphor. Yet we do not deride the reform logic that regards systemic inequality as a malignant disease requiring focused treatment. In point of fact, this Article had its genesis in an empirical project to study a once-in-a-generation opportunity to reform a city's pretrial legal institution profoundly infected by structural racism. The incremental reform solution suggested by the virus metaphor seemed possible and this Article's authors were optimistic. But when reform floundered,<sup>4</sup> critical analysis of the study's results demonstrated how subconscious acceptance of the virus metaphor's logic had obscured clear thinking. The reform's failure to account for the interconnected systems, processes, and norms structuring the reproduction of racism had likely doomed the focused treatment approach from the start. Only after reflection did the DNA metaphor emerge as a better fit for the evidence observed.

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4. See *infra* notes 67–77 and accompanying text (detailing results of study); cf. Donna M. Owens, *Baltimore Rising: Two Years After Freddie Gray's Death, Shaken City Mends*, NBC NEWS (Apr. 19, 2017, 1:52 PM), <https://www.nbcnews.com/storyline/baltimore-unrest/city-divided-baltimore-mending-two-years-after-freddie-grays-death-n748101> (detailing how efforts to reform and improve the administration of criminal justice after the uprising in response to Freddie Gray's killing in Baltimore failed, despite expanded funding from the state and federal government and broad promises by city leaders).

To vindicate the proposition that nothing short of radical transformation of the body politic will end systemic racism, this Article first reports on its original empirical study and then analyzes the study’s results using a novel method rooted in geography, data, and computer code, as well as in narrative storytelling.<sup>5</sup> This analysis reveals a basic pattern of structural racism and injustice replicating itself—like DNA in cells—over and over. Though the specific injustices chronicled in this Article occurred in the realm of the criminal legal system (the domain in which this Article’s authors are “experts”<sup>6</sup>), the replicated pattern of inequality cut across disparate domains and institutions. This finding leads to the conclusion that narrow institution-specific efforts to confront structural racism inevitably will fail. What’s more, the cross-domain nature of structural phenomena suggests that academic specialization, the dominant model of scholarly knowledge production, might also inhibit meaningful change. It is time to step out of our lanes, collaborate, and connect the dots.

This Article proceeds in four parts.

Part I tells the story of the original “in our lane” study and the hope for successful reform. The general object of examination is Baltimore’s so-called “criminal justice system” with specific focus on the city’s *pretrial legal system*. The pretrial system determines whether presumptively innocent criminal defendants are detained, released, or required to pay bail after charging but before resolution by trial or plea. This system serves as the “front door” to Maryland’s larger mass incarceration apparatus, which has long been criticized for its disproportionate impact on Black Marylanders.<sup>7</sup> Critically, the study began in 2020 at a potentially pivotal moment in the

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5. Data and the computer code used to analyze and visualize these data are available on an open-source GitHub repository. See Colin Starger, *A Butterfly in COVID: Structural Racism and Baltimore’s Pretrial Legal System Code Supporting Article Analysis and Images*, GITHUB (Oct. 24, 2022, 8:31 PM) [hereinafter Jupyter Notebook], [https://github.com/Colinstarger/Butterfly\\_in\\_COVID\\_Spring22/blob/master/Black\\_Butterfly\\_Sp22\\_public.ipynb](https://github.com/Colinstarger/Butterfly_in_COVID_Spring22/blob/master/Black_Butterfly_Sp22_public.ipynb). Providing data and code facilitates verification of reported results and encourages continued collaboration. *To protect privacy, all the defendant names in the publicly available data are pseudonyms.*

6. Though the authors do not lack bona fides, see *infra* note 43, we acknowledge the perils of academic specialization and worry that exalting “expertise” can inhibit discourse and reproduce educational inequality.

7. See *infra* note 42; Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1 [hereinafter Colbert, *Illusory Right to Counsel*]; 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 (2006) [hereinafter Colbert, *Convicting the Unrepresented*]; Doug Colbert, Opinion, *Justice Before the Trial*, BALT. SUN (Sept. 6, 2010, 12:00 AM) [hereinafter Colbert, *Justice Before the Trial*], <https://www.baltimoresun.com/opinion/bs-xpm-2010-09-06-bs-ed-pretrial-incarceration-20100906-story.html>.

movements against mass incarceration and for racial justice.<sup>8</sup> After the COVID crisis created pressure to decarcerate, then-Chief Judge Barbera issued an order encouraging reduction in jailed populations.<sup>9</sup> Meanwhile, the intense national conversation triggered by George Floyd's murder and ensuing protests created pressure to address systemic racism.<sup>10</sup>

Though the potential for reform appeared profound, this Part reports that reform failed to fully materialize. Over the course of two months, the study observed 509 bail hearings where pretrial incarceration decisions were made.<sup>11</sup> Remarkably, 61.5% of all defendants were "held without bail" ("HWOB").<sup>12</sup> In other words, nearly two out of three defendants were subjected to preventive detention and sent back to jail indefinitely with no opportunity for freedom until trial, despite the pandemic, despite a judicial order encouraging reduced incarceration numbers, and despite their legal presumption of innocence.<sup>13</sup> While this statistical reality caused disbelief and dismay, individual instances of injustice shocked the conscience. Time and again, pretrial detention orders were given in cases where such an outcome seemed unjustified and unnecessary.<sup>14</sup> Part I highlights some individual stories to remind the reader of the human cost of abstract policy decisions.<sup>15</sup>

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8. See, e.g., VINCENT SCHIRALDI & JASON ZIEDENBERG, JUST. POL'Y INST., RACE AND INCARCERATION IN MARYLAND (2003), <https://www.opensocietyfoundations.org/uploads/cdfec26d-fca4-4b44-9f42-98c71ff5a893/finalmrd.pdf>; *Maryland Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/MD.html> (last visited Oct. 11, 2022); Kelly Broderick, *University of Maryland Report Details Racial Justice in Prosecution in Baltimore City*, WMAR 2 NEWS (Mar. 16, 2022, 5:56 PM), <https://www.wmar2news.com/news/local-news/university-of-maryland-report-details-racial-justice-in-prosecution-in-baltimore-city> (detailing a February 2022 report by the University of Maryland on racial justice in the state).

9. See *In the Court of Appeals of Maryland Administrative Order Guiding the Response of the Trial Courts of Maryland to the COVID-19 Emergency as it Relates to Those Persons who are Incarcerated or Imprisoned*, MD. JUDICIARY (April 14, 2020) [hereinafter *Order Guiding the Response of the Trial Courts*], <https://mdcourts.gov/sites/default/files/admin-orders/20200414guidingresponseoftrialcourts.pdf>.

10. See *George Floyd Death: Violence Erupts on Sixth Day of Protests*, BBC NEWS (June 1, 2020), <https://www.bbc.com/news/world-us-canada-52872401>; *Protests Across the Globe After George Floyd's Death*, CNN (June 13, 2020, 3:22 PM), <https://www.cnn.com/2020/06/06/world/gallery/intl-george-floyd-protests/index.html>; Matt Furber, Audra D.S. Burch & Frances Robles, *What Happened in the Chaotic Moments Before George Floyd Died*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/us/derek-chauvin-george-floyd-worked-together.html>.

11. See *infra* Section I.A.; Jupyter Notebook, *supra* note 5, ¶ 11.

12. See Jupyter Notebook, *supra* note 5, ¶ 12; see also *infra* notes 71–76 and accompanying text.

13. See *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

14. See *infra* Section I.A.

15. See *infra* Section I.B.

Part II turns to consider why meaningful reform failed to materialize.<sup>16</sup> It begins by placing the dashed promise of 2020 into the context of the Maryland pretrial domain’s long history of setbacks and frustrated reform. Stepping back from the pretrial domain, this Part then reflects on a key finding from the empirical study: 83.1% of all defendants observed in the Baltimore study were Black while only 12.4% were white.<sup>17</sup> Per the 2020 Census, Baltimore is 57.3% Black and 26.9% white.<sup>18</sup> While pretrial actors were not responsible for this severe racial imbalance—judges did not make the arrests that resulted in 83% of pretrial defendants being Black in a 57% Black city—they were nonetheless complicit in reproducing the structural inequality presented to them.<sup>19</sup> This initially suggests that a narrow domain-focused approach might miss the big picture of systemic racism.

Part II then introduces a method to grasp the big-picture hinted at by the study’s finding of baseline inequality—geospatial mapping.<sup>20</sup> Plotting defendant home addresses atop regional and Baltimore City maps reveals a striking pattern:

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16. See *infra* Section II.A.

17. See Jupyter Notebook, *supra* note 5, ¶ 13. Maryland’s catch-all “Other/Unknown” category accounted for the remaining 4.5%. *Id.*

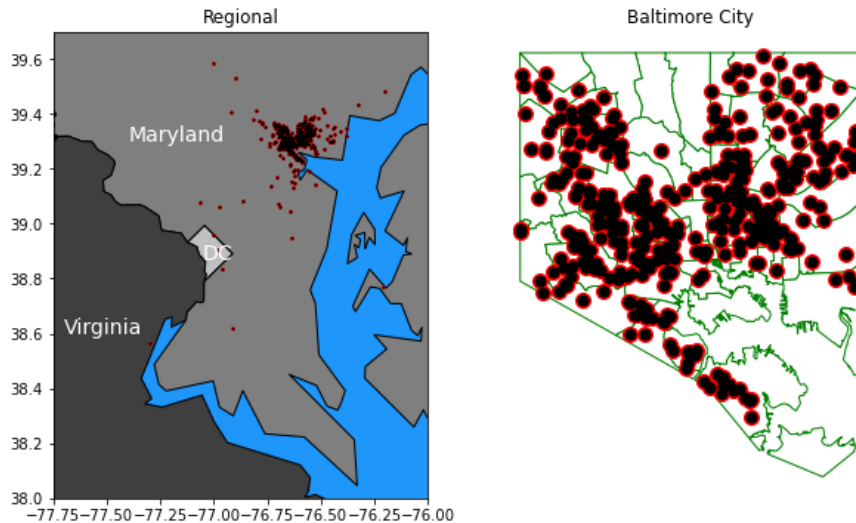
18. See Jupyter Notebook, *supra* note 5, ¶ 14 (collecting 2020 Census data from Baltimore Neighborhood Indicators Alliance API). Census data further indicates that Baltimore is 7.8% Hispanic, 3.6% Asian, 3.6% two or more races, and 0.8% all other races. *Id.*

19. See *infra* notes 145–147 and accompanying text.

20. See *infra* Section II.B.



**Figure 1**  
**Defendant Home Address Dispersion**  
**(Regional and Baltimore City)<sup>21</sup>**



On the maps, the unmistakable shape of a black butterfly emerges. This evokes the vital work of Dr. Lawrence Brown who has famously observed that “hypersegregation” in Baltimore looks like a butterfly.<sup>22</sup> Per Dr. Brown, the butterfly shape shows “where Black Baltimoreans are geographically clustered [and] where capital is denied and structural disadvantages have accumulated due to the lack of capital access.”<sup>23</sup> The Black butterfly is thus the physical manifestation of systemic racism; it suggests a deeper pattern of inequality that cuts across economic, political, and other social-cultural

21. See Jupyter Notebook, *supra* note 5, ¶ 17 (mapping defendant addresses reported during bail review hearings).

22. See LAWRENCE T. BROWN, *THE BLACK BUTTERFLY: THE HARMFUL POLITICS OF RACE AND SPACE IN AMERICA* (2021) [hereinafter BROWN, *BLACK BUTTERFLY*]; see also Lawrence Brown, *Two Baltimores: The White L vs. the Black Butterfly*, *BALT. SUN* (June 28, 2016, 5:34 PM), <https://www.baltimoresun.com/citypaper/bcpnews-two-baltimores-the-white-l-vs-the-black-butterfly-20160628-htmlstory.html>. Dr. Brown adopts the term “hypersegregation” from the Massey-Tannen scheme. See BROWN, *BLACK BUTTERFLY*, *supra*, at 9 n.15 (citing Douglas S. Massey & Jonathan Tannen, *A Research Note on Trends in Black Hypersegregation*, 52 *DEMOGRAPHY* 1025–34 (2015)).

23. BROWN, *BLACK BUTTERFLY*, *supra* note 22, at 9. The structurally disadvantaged parts of Baltimore form the butterfly’s wings. Structural advantage is conferred upon the butterfly’s “body,” which Dr. Brown calls the “White L” given the geographic shape’s resemblance to the letter “L.” *Id.* at 14 (“[T]he White L is more than a demographic description but a political, economic, and social-cultural description.”). As Dr. Brown notes, the shape is not rigid. White enclaves exist within the Black butterfly just as Black enclaves exist in the White L. *Id.* at 9, 14.

systems.<sup>24</sup> This Part concludes that the Black butterfly offers *prima facie* justification for the DNA metaphor of structural racism.

Part III deepens the DNA metaphor’s justification using an innovative method rooted in geography, data, and computer code. Pairing this Article’s original empirical research with an extraordinary but underused data source, the Baltimore Neighborhood Indicators Alliance (“BNIA”), this Part presents a series of original computer-generated maps that graphically illustrate the replicating patterns of inequality in Baltimore.<sup>25</sup> These maps connect neighborhood indicators measuring racial composition, median household income, access to home Internet, and other non-criminal markers of advantage and disadvantage to the stories of individual criminal defendants from the Article’s study. The contours of the Black butterfly continuously reappear, suggesting an inextricable relationship between institutions of “criminal justice” and institutions meting out economic, political, and social-cultural oppression and opportunity. Just as a targeted medicinal approach would fail to relieve a genetic condition, efforts to reform criminal legal institutions that ignore these connections are almost certainly doomed to fail.

Part IV concludes. Though it is grim and dispiriting that unequal pretrial detention continued relentlessly in Baltimore despite the pandemic and widespread calls for racial justice, Baltimore’s experience in the time of COVID exemplifies the challenges faced everywhere by those seeking to dismantle structures of racism. Lessons learned from Baltimore apply not only to other hypersegregated cities—Chicago, Detroit, Flint, St. Louis, Cleveland, Birmingham, Milwaukee<sup>26</sup>—but also to the entire nation. Ultimately, analysis of the butterfly in the time of COVID underscores the necessity of connecting all reform efforts aimed at confronting inequality across all domains and silos. Bail reform is education reform is economic reform is housing reform. And so on, and vice versa. Structural racism has a Hydra-like quality. If you simply cut off one head, two will grow back in its place. Only Herculean focus and a willingness to burn out injustice across the whole monster can lead to meaningful change.

## I. BALTIMORE PRETRIAL IN THE TIME OF COVID

*On Thursday, June 25, 2020, Baltimore District Court Judge Catherine Chen presided over the bail review hearings in Courtroom Four of the Wabash Avenue District Court.<sup>27</sup> The third defendant called that day was*

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24. *Id.*

25. BALT. NEIGHBORHOOD INDICATORS ALL., <https://bniajfi.org/> (last visited Aug. 28, 2022).

26. Dr. Brown identifies these cities, along with Baltimore, as the eight “category 5” hypersegregated cities in the United States. BROWN, BLACK BUTTERFLY, *supra* note 22, at 9.

27. Audiotape: Bail Review Hearing, held by the District Court of Maryland for Baltimore City, Judge Catherine Chen (June 25, 2020) (on file with authors) (supporting entire narrative that follows). The authors’ access to observe bail proceedings was limited to Courtroom Four, aka “Part

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*Zoey Griffin*,<sup>28</sup> a 28-year-old Black man from the southwest of Baltimore.<sup>29</sup> As explained by his lawyer, Mr. Griffin had flagged a police car following tragic events and provided a full statement. This statement explained that Mr. Griffin had been working as an Uber driver when one of his passengers robbed him at gunpoint. With a gun pointed at his head, Mr. Griffin lost control of his car resulting in a pedestrian's unintended death. Based on these circumstances, the defense lawyer first argued that her client had been grossly overcharged. She then explained Mr. Griffin's perilous health: his kidney functioned at only 5–10%, he received dialysis three times weekly, and he currently awaited a transplant operation.

After detailing her client's mitigating circumstance, defense counsel turned to the pretrial release question and acknowledged that the seriousness of a murder charge combined with her client's 2013 conviction for gun possession meant that "release on recognizance" ("ROR") was unlikely.<sup>30</sup> Instead, the lawyer urged Judge Chen to release Mr. Griffin on home detention so that he could continue receiving his needed dialysis treatment. Despite these extraordinary circumstances and the fact that judges were under an explicit pandemic directive to "identify at-risk incarcerated persons for potential release" and to consider the release of adult defendants from pretrial detention by weighing COVID as a factor,<sup>31</sup> Judge Chen was unfazed. Without pausing to consider defense counsel's argument, Judge Chen recited a stock mantra indicating she had considered all factors and ordered detention for Mr. Griffin, setting the next date for 60 days later. Three weeks later, Mr. Griffin died while incarcerated, well before his case was ever adjudicated.<sup>32</sup>

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4," the primary pretrial courtroom for male defendants charged with serious offenses in Baltimore City. Other courtrooms hold bail hearings for additional male defendants charged with misdemeanors and less serious offenses, as well as for female defendants who represent about 10% of arrestees. This Article's study took place exclusively in Courtroom Four.

28. Because of the tragic circumstances of his case, we do not use a pseudonym for Mr. Griffin. Based on his home address, Mr. Griffin came from the Westport/Mount Winans/Lakeland neighborhood. This neighborhood ranks forty-first out of fifty-five in terms of median household income, making it one of the city's poorer areas. See Jupyter Notebook, *supra* note 5, ¶¶ 21–23. Its median household income in 2019 was approximately \$36,000 per year. *Id.* ¶ 22. By comparison, the city's richest neighborhood by this measure (Canton) had a median income of \$128,000. *Id.* ¶¶ 24–25. The poorest neighborhood by this measure (Upton/Druid Heights) had a median income of \$21,000. *Id.* ¶¶ 26–27.

29. See *id.* ¶¶ 19–21 (defendant number 215; case number 4B02423005).

30. Based upon the murder charge, both the Maryland Division of Pretrial Detention and Services in Baltimore City ("Pretrial Services" or "Pretrial") and the Baltimore City State's Attorney's Office had recommended pretrial detention (also known as "Held Without Bail") for Mr. Griffin. See *id.* ¶ 28.

31. See *infra* note 37 and accompanying text (explaining April 14, 2020, order by Maryland Court of Appeals Chief Judge Mary Ellen Barbera).

32. *Obituary of Zoey Sterling Griffin*, VAUGHN GREENE FUNERAL SERVS. P.A. (July 6, 2020), <https://vaughncgreene.com/tribute/details/3946/Zoey-Griffin/obituary.html>.

Though extreme in outcome, the injustice of the reflexive decision to hold Mr. Griffin in pretrial detention was all too typical in the summer of 2020 in Baltimore City. Mr. Griffin’s hearing was one of 509 bail hearings observed in our comprehensive June–July 2020 study of Baltimore pretrial release adjudications. This Part tells the story of how that study unfolded, provides a big-picture overview of its results, and recounts representative narratives to relate the human impact of the pretrial system in a way that numbers alone cannot.

The story begins with the not-at-all-metaphorical COVID-19 virus wreaking havoc.<sup>33</sup> In the pandemic’s early frightening phase, lockdowns swept across the country.<sup>34</sup> By early April 2020, all group-housing situations—from nursing homes to prisons and jails—were suddenly perceived as uniquely dangerous places.<sup>35</sup> Advocates argued that the time was ripe for decarceration and some authorities seemed to recognize the sense in this argument.<sup>36</sup> On April 14, 2020, the then-Chief Judge of the Maryland Court of Appeals, Mary Ellen Barbera, issued a sweeping order unmistakably encouraging measures to decrease Maryland’s pretrial and sentenced prison population.<sup>37</sup> Inspired by the order’s potential to enact

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33. *WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19 – 11 March 2020*, WORLD HEALTH ORG. (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

34. *Archive for March 12th, 2020*, OFF. OF MD. GOVERNOR LARRY HOGAN (Mar. 12, 2020), <https://governor.maryland.gov/2020/03/12/> (archiving orders from Maryland Governor Lawrence J. Hogan at the onset of the pandemic, including prohibitions of large gatherings and the activation of the Maryland National Guard).

35. *Order of the Governor of the State of Maryland Number 20-03-30-01 Amending and Restating the Order of March 23, 2020, Prohibiting Large Gatherings and Events and Closing Senior Centers, and All Non-Essential Businesses and Other Establishments, and Additionally Requiring All Persons to Stay at Home*, MD. EXEC. DEP’T (Mar. 30, 2020), <https://governor.maryland.gov/wp-content/uploads/2020/03/Gatherings-FOURTH-AMENDED-3.30.20.pdf>.

36. Calls for decarceration came from a range of perspectives, from local grassroots coalitions to prominent policy organizations. *See, e.g.*, Carlene Pavlos, *Public Health Leaders Call for Swift Decarceration in Face of Pandemic*, MASS. PUB. HEALTH ASS’N (May 5, 2020), <https://mapublichealth.org/wp-content/uploads/2020/05/Press-release-Public-Health-Leaders-call-for-Decarceration-5.5.20-final.pdf>; NAT’L ACADS. OF SCIS., ENG’G, & MED., *DECARCERATING CORRECTIONAL FACILITIES DURING COVID-19: ADVANCING HEALTH, EQUITY, AND SAFETY* (Emily A. Wang et al. eds., 2020), <https://doi.org/10.17226/25945>.

37. *See Order Guiding the Response of the Trial Courts*, *supra* note 9. In her order, Chief Judge Barbera noted the COVID crisis and encouraged judges to: (a) “*identify at-risk incarcerated persons for potential release*”; (b) “*set[] prompt hearings*” to resolve probation violations, failure to appear warrants, and similar matters; (c) “*consider carefully the introduction of defendants into Maryland prisons, detention facilities, and other congregate placements*”; (d) hold hearings “*for detained adults pending trial for a nonviolent criminal act or acts*” or other minor matters; (e) “*consider[] the release of adult defendants from pretrial detention*” weighing COVID as a factor for release; (f) “*determin[e] whether to incarcerate a new defendant on a pretrial basis*” weighing COVID; and (g)-(j) generally act with COVID in mind when it comes to sentencing, release, and modification of sentence. *Id.* at 2–5 (emphasis added).

needed reform, the authors arranged to examine pretrial release practices during the months of June and July in Baltimore City's primary courtroom processing male defendants.<sup>38</sup>

At this time, bail hearings had shifted to a quasi-online mode; pretrial detention reviews were streamed over Skype. Judges sat in their physical courtrooms, defendants appeared on closed circuit TV ("CCTV") from the detention facility<sup>39</sup> and then defense attorneys, prosecutors, and the Maryland Division of Pretrial Detention and Services ("Pretrial Services" or "Pretrial") dialed into the Skype video call. The authors obtained permission<sup>40</sup> to "attend" the livestream daily for a two-month period. In addition, the authors were provided with audio recordings of all hearings observed, which allowed for rigorous verification of the recorded observations.

Here it warrants emphasis that the study was conceived with a so-called "criminal justice system" concern.<sup>41</sup> The planned focus was on Baltimore's *pretrial legal system* that determines whether presumptively innocent criminal defendants are detained, released, or required to pay bail after they are charged with crimes but before trial occurs. Baltimore's pretrial system serves as the front door to Maryland's larger mass incarceration apparatus.<sup>42</sup> Though COVID also had massively disrupted education, the economy and many other facets of life, the authors did not presume to study COVID's

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38. This is Courtroom Four at the Baltimore City District Court on Wabash Avenue. *See supra* note 27.

39. CCTV for defendants was a much-criticized pre-COVID practice that ironically seemed to make sense during a pandemic. *See generally* Edie Fortuna Cimino, Zina Makar & Natalie Novak, *Charm City Televised & Dehumanized: How CCTV Bail Reviews Violate Due Process*, 45 U. BALT. L.F. 57 (2014).

40. This permission came from John Morrissey, Chief Judge of the District Court of Maryland, and Barbara Waxman, then the Administrative Judge of Maryland's First Judicial District encompassing Baltimore City (documents on file with authors).

41. Contemporary activists reject the "criminal justice system" phrase, insisting that complicated webs of bureaucratic processes meting out criminal judgment and punishment are more accurately referred to as "criminal legal systems" since all too often they fail to supply substantive "justice." *See, e.g.*, Alice Speri, *The Criminal Justice System Is Not Broken. It's Doing What It Was Designed to Do.*, INTERCEPT (Nov. 9, 2019, 10:32 AM), <https://theintercept.com/2019/11/09/criminal-justice-mass-incarceration-book/> (referring to Alec Karakatsanis' refusal to use "criminal justice system" to describe "U.S. mass punishment bureaucracy."); *see also* ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM (2019). Even if our prior experience had not already confirmed the aptness of this rephrasing, the injustices seen during the course of this study would have.

42. For an excellent data-driven snapshot of Maryland's carceral apparatus, see *Maryland Profile*, *supra* note 8.

impact on domains outside our “expertise” in the pretrial system.<sup>43</sup> The impetus to question strict adherence to academic specialization came later.<sup>44</sup>

On May 25, 2020, six days before Courtroom Four observations were to begin, George Floyd was murdered by police officer Derek Chauvin.<sup>45</sup> Mr. Floyd’s killing was captured in a viral video that made visceral the ongoing brutality of American racism.<sup>46</sup> Despite the pandemic, masses filled the streets demanding racial justice.<sup>47</sup> Many who had never spoken up before joined an intense national conversation—a true “racial reckoning” seemed imminent.<sup>48</sup> By June 1, protests were morphing into widespread calls for awareness and change.<sup>49</sup> Institutions across America, including law schools and court systems, issued statements calling for an end to structural racism.<sup>50</sup>

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43. Though of different generations, both authors are law professors who have run clinics engaging in pretrial criminal defense in Baltimore City. One of the authors, Doug Colbert, has worked in Maryland since 1994 and has actively participated in reform efforts and conversations since then. See, e.g., Colbert, *Illusory Right to Counsel*, *supra* note 7; Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2002) [hereinafter Colbert et al., *Do Attorneys Really Matter?*]; Douglas L. Colbert, “With a Little Help from My Friends:” *Counsel at Bail and Enhanced Pretrial Justice Becomes the New Reality*, 55 WAKE FOREST L. REV. 795 (2020); Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333 (2011); Colbert, *Convicting the Unrepresented*, *supra* note 7; Colbert, *Justice Before the Trial*, *supra* note 7. The other author, Colin Starger, has labored in the pretrial space since the Baltimore uprising sparked by the killing of Freddie Gray in 2015. See, e.g., Colin Starger, *The Argument that Cries Wolfish*, 1 MIT COMPUTATIONAL L. REP. (Aug. 17, 2020, 10:48 AM), <https://law.mit.edu/pub/theargumentcrieswolfish/release/2>; Colin Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589 (2018). While we undeniably have perspectives shaped by relevant real-world experience, we nonetheless put “expertise” in scare quotes to emphasize the perils of overly specialized and siloed forms of knowledge production.

44. See *infra* note 203.

45. See Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020, 6:49 AM), <https://time.com/5847967/george-floyd-protests-trump/>.

46. *Id.*

47. *Id.*

48. See *id.*; Dana R. Fisher, *The Diversity of the Recent Black Lives Matter Protests is a Good Sign for Racial Equity*, BROOKINGS INST. (July 8, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/07/08/the-diversity-of-the-recent-black-lives-matter-protests-is-a-good-sign-for-racial-equity/> (“As sociologist Doug McAdam remarks while looking back over his career studying social movements, ‘We have never seen protests like these before, in turnout, perseverance, and the ethnic and racial diversity of those participating.’”).

49. See Altman, *supra* note 45.

50. See, e.g., Donald B. Tobin et al., *Maryland Carey Law Statement on the Killing of Black and Brown People*, UNIV. OF MD. FRANCIS KING CAREY SCH. OF L., <https://www.law.umaryland.edu/News-and-Events/Maryland-Carey-Law-News/Maryland-Carey-Law-Statement-on-the-Killing-of-Black-and-Brown-People.php> (last visited Sept. 21, 2022); *USM Institutions Stand in Solidarity Against Structural Racism and Resulting Violence Against Minority Communities*, UNIV. OF BALT. (June 1, 2020), <https://www.ubalt.edu/news/news-releases.cfm?id=3527>; Gillian Lester, *Staying Anchored to Our Purpose as We End the Year*, COLUM. L. SCH. (June 5, 2020), <https://www.law.columbia.edu/news/archive/staying-anchored-our-purpose-we-end-year>; Mary Ellen Barbera, *Statement on Equal Justice under Law*, MD.

Adding explicit demands to confront institutional racism to the ongoing COVID crisis should have increased the pressure to decarcerate the Black-overrepresented pretrial system in Baltimore. The question seemed called; material conditions were ripe for incremental reform.

*A. Legal Framework and Procedure; Study Results*

Before reporting on study findings, a brief review of Maryland's pretrial release framework and procedures is in order.

On paper, legal procedures governing judicial pretrial release decisions favor the accused's right to regain liberty after first appearing in court. Like most states, Maryland's statutes entitle most criminal defendants to release either on personal recognizance ("ROR")<sup>51</sup> or under the least onerous conditions.<sup>52</sup> Conditions of release more onerous than ROR but less onerous than outright detention include Unsecured Personal Bond ("UPB"), release on Home Detention ("ROR-HDTN") and release on cash bail ("MONEY").<sup>53</sup> Two exceptions to the presumed rule of release apply: "[U]pon a finding by the judicial officer that, if the defendant is released . . . the defendant (i) will not appear when required, or (ii) will be a danger to an alleged victim, another person, or the community."<sup>54</sup> When one of these exceptions is triggered, the defendant is detained—aka Held Without Bond ("HWOB").

The burden of proof to justify detention on the grounds of dangerousness is high: It must be "clear and convincing."<sup>55</sup> To justify HWOB based on the risk of non-appearance, the burden of proof in Maryland is less

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JUDICIARY (June 9, 2020), <https://mdcourts.gov/sites/default/files/import/coappeals/pdfs/statementonequaljustice060920.pdf>.

51. Release on personal recognizance, also known as release on own recognizance ("ROR"), refers to a defendant's release from pretrial custody usually without any conditions, although ROR may be conditioned on pretrial supervision. Essentially, the defendant promises to appear at the next court date and future court proceedings. *See* MD. R. 4-216.1(a)(6) (defining release on personal recognizance).

52. Maryland Rule 4-216.1 is the state's main pretrial release rule. The rule's explicit purpose is "to promote the release of defendants on their own recognizance or, when necessary, unsecured bond." MD. R. 4-216.1(b)(1)(A); *see also* Bradds v. Randolph, 239 Md. App. 50, 79, 194 A.3d 444, 461 (2018) (noting that Rule 4-216.1 "specifically prioritizes release over detention, release on own recognizance over release with conditions, and non-financial conditions over financial conditions").

53. Cash bail ("MONEY") involves the deposit of a surety bond, which is returned when the defendant appears at court. Although cash bails used to be common in Maryland, they were subject to intense criticism due to the disproportionate impact on poor people and the unscrupulous practices of bail bondsmen. *See generally* Starger & Bullock, *supra* note 43. Unsecured Personal Bond works like cash bail but without the defendant paying a deposit. Instead, the defendant promises to pay money if he or she fails to appear. Finally, home detention is self-explanatory and results in home confinement, often with GPS ankle monitors.

54. MD. R. 4-216.1(b)(1)(B).

55. *See* Wheeler v. State, 160 Md. App. 566, 579, 864 A.2d 1058, 1065 (2005) (stating that the "clear and convincing evidence" standard regarding the danger of a defendant is a strong procedural protection for the defendant's liberty interest).

clear.<sup>56</sup> Regardless of this ambiguity, judicial orders remanding the defendant to jail until the case resolves by plea or trial are supposed to be rare. As Chief Justice Rehnquist reminded judges more than thirty years ago in *United States v. Salerno*,<sup>57</sup> pretrial “liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>58</sup>

This Article’s study observed district court bail review hearings in Baltimore City. District court bail reviews are the second step in Maryland’s unusual two-stage pretrial release procedure. The first judicial step after the arrest and booking of defendants involves an appearance before a district court commissioner conducted inside the jail.<sup>59</sup> The commissioner, who need not be a lawyer, has limited discretion whether to release or incarcerate the individual on serious felony charges.<sup>60</sup> Defendants not released at the commissioner stage remain in jail until the next weekday, when they appear before an actual district court judge for bail review.<sup>61</sup> For shorthand, this Article uses “BALR” to refer to bail review hearings.<sup>62</sup>

District court judges have more discretion than commissioners to make release decisions for all crimes. Maryland’s statutory rules provide a host of factors for a judge’s consideration in deciding whether an accused is entitled to release and can be trusted to reappear in court.<sup>63</sup> While judges differ in the

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56. See MD. R. 4-216.1(b)(1)(B). The inconsistent standard for detention on the grounds of dangerousness versus risk of non-appearance is an oddity. See Brian Saccenti, *Pretrial Release & Detention in Maryland After the 2017 Amendments to the Pretrial Release Rules*, 17 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 307, 315 (2017) (“At present, no Maryland case, statute, or rule establishes the standard of proof applicable when the State seeks to detain someone based on risk of non-appearance.”).

57. 481 U.S. 739 (1987).

58. *Id.* at 755.

59. See MD. R. 4-213. Unfortunately, commissioner hearings in Baltimore City are closed to the public and take place inside a jail cell where a defense lawyer interviews the accused, while a commissioner sits on the other side of a plexiglass divide. Unsuccessful litigation challenging this practice notwithstanding, bail review hearings still take place inside the bowels of the jail and out-of-sight of the public and family of the accused.

60. See MD. CODE ANN., CRIM. PROC. § 5-202 (2022).

61. District courts do not conduct bail reviews on weekends. Consequently, a person arrested on Thursday appears before a commissioner the following day. If not released on that Friday by the commissioner, the person then waits three more days in jail for a reviewing judge to appear on Monday.

62. The BALR acronym is used by Maryland Judiciary Case Search, Maryland’s online court records portal. *Event Codes Criminal*, MD. JUDICIARY, <https://mdcourts.gov/sites/default/files/import/casesearch2/pdfs/criminaleventcodes.pdf> (last visited Nov. 10, 2022).

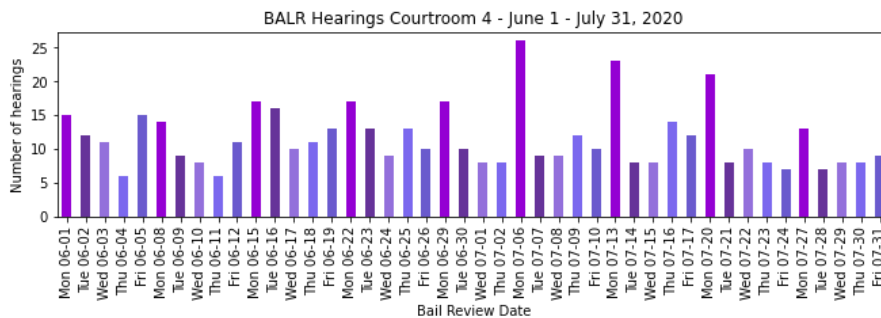
63. See MD. R. 4-216.1(f) (listing the factors that a judicial officer should consider in determining whether a defendant should be released and the conditions of the release, including, among other factors, “the defendant’s prior record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings; . . . 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; . . . [and] any other factor bearing on the risk of a willful failure to appear . . . including all prior convictions”).



various weight they assign to given factors, they generally agree with the importance of the following: the nature of the charge, the defendant's record of prior convictions and failure(s) to appear in court, the defendant's danger to others if released, and the defendant's ties to the community.<sup>64</sup>

In Baltimore City, bail review hearings unfold in a standard order. After calling the case, the judge listens to the presentation of Pretrial Services.<sup>65</sup> The pretrial agent makes a recommendation (ROR, HWOB, MONEY, etc.) based on an evaluation of the defendant's prior arrest, conviction, and appearance history, as well as on other information including employment and family ties.<sup>66</sup> Then the prosecutor argues for a pretrial outcome, often focusing upon the gravity of the crime, any injuries sustained by the crime victim, and the defendant's prior criminal history. Finally, defense counsel's advocacy usually stresses the defendant's employment, family, residence, and community ties to support the likelihood of re-appearing and not re-offending. The whole process is over quickly. A single bail hearing involving Pretrial Services, a prosecuting and defense lawyer, and the district court judge is typically completed in seven to eight minutes. Most judges take less than a minute when ordering detainees to remain in jail (HWOB) indefinitely.

**Figure 2**  
**Observed BALR Hearings**



As shown in Figure 2 above, the faculty/law student team observed forty-four days of hearings in June and July (twenty-two days each in June

64. MD. R. 4-216(e)(1).

65. Pretrial Services assesses criminal history, provides community supervision to defendants released on recognizance awaiting trial, and also engages in risk classification for bail review. *See Maryland Division of Pretrial Detention and Services*, MD. DEP'T OF PUB. SAFETY & CORR. SERVS., <https://www.dpsscs.state.md.us/agencies/dpds.shtml> (last visited Aug. 29, 2022); *see also* George Joseph, *Justice by Algorithm*, BLOOMBERG (Dec. 8, 2016, 12:00 PM), <https://www.bloomberg.com/news/articles/2016-12-08/is-baltimore-s-risk-assessment-tool-working> (describing Pretrial Services and critiquing use of risk assessment instrument).

66. The judge may condition release on Pretrial Services supervising and monitoring the defendant while charges remain pending.

and July).<sup>67</sup> In total, 509 hearings of individual BALR defendants were recorded and coded.<sup>68</sup> On average, judges heard nearly twelve bail review hearings a day.<sup>69</sup> Mondays usually saw increased numbers since judges' bail review hearings are not held on weekends.

**Figure 3**  
**All Defendant Outcomes (n=509)<sup>70</sup>**

| Outcome                           | Number | Percent |
|-----------------------------------|--------|---------|
| Held Without Bail (HWOB)          | 313    | 61.5%   |
| Unsecured Personal Bond (UPB)     | 85     | 16.7%   |
| Release on Own Recognizance (ROR) | 71     | 13.9%   |
| Cash Bond (MONEY)                 | 26     | 5.1%    |
| Home Detention (ROR-HDTN)         | 14     | 2.8%    |

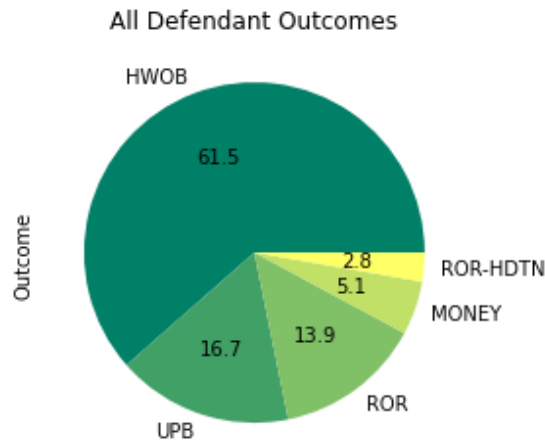


Figure 3 shows the pretrial outcomes for all defendants. The numbers are gravely disappointing. An overall 61.5% detention rate translated to more people behind bars—a result very much at odds with Chief Judge Barbera's

67. See Jupyter Notebook, *supra* note 5, ¶ 29, for the data and code used to produce Figure 2. We observed hearings on every weekday except July 3, which was a court holiday.

68. Note that Courtroom Four heard matters that had to do with more than 509 defendants during this period. Though bail reviews constitute the primary business, other matters including the issuance of warrants and re-listing of cases also occur. Data collection for this study was limited to *bona fide* bail review cases decided on the day. Delayed bail reviews—where relisting occurred multiple times—were recorded just once, on the day the review was finally conducted.

69. The precise average was 11.57 hearings per day with a median of 10. See Jupyter Notebook, *supra* note 5, ¶ 30.

70. For code and data used to create Figure 3, see *id.* ¶¶ 31–32.

April 2020 directive issued in response to the COVID pandemic.<sup>71</sup> Instead of pretrial detention being a “carefully limited exception,”<sup>72</sup> it had remained the default rule even during a dangerous global pandemic. Unfortunately, district court judges received encouragement to reach HWOB decisions by the other state actors in the courtroom—the prosecution and Pretrial Services. Surprisingly, when the prosecution made recommendations, it argued for detention 94% of the time.<sup>73</sup> Pretrial Services, meanwhile, recommended HWOB 75% of the time.<sup>74</sup> In the relatively few cases when the prosecution or Pretrial Services recommended ROR or UPB, judges usually rejected their recommendation.<sup>75</sup>

As grim as these numbers were, the picture only worsened when accounting for race. As shown in Figure 4 below, Black defendants were detained 62.6% of the time while the detention rate for white defendants was 55.6%. This discrepancy points towards structural racism affecting bail outcomes. Note that the third catch-all racial category (unknown and other) had a detention rate of 56.5% that was much closer to the white rate than the Black rate. These particular outcomes are more consistent with institutional anti-Blackness than with the pretrial system conferring white privilege.<sup>76</sup>

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71. See *supra* note 37 and accompanying text (discussing April 14, 2020, directive). Here it is worth noting that Baltimore’s pretrial jailed population did initially drop at the beginning of the pandemic, primarily because of reduced arrests. See *infra* Figure 5 and accompanying text. However, the high detention rate set the condition for the subsequent rebound of the pretrial incarcerated population when arrests resumed to “normal” levels. See *infra* Figure 6.

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

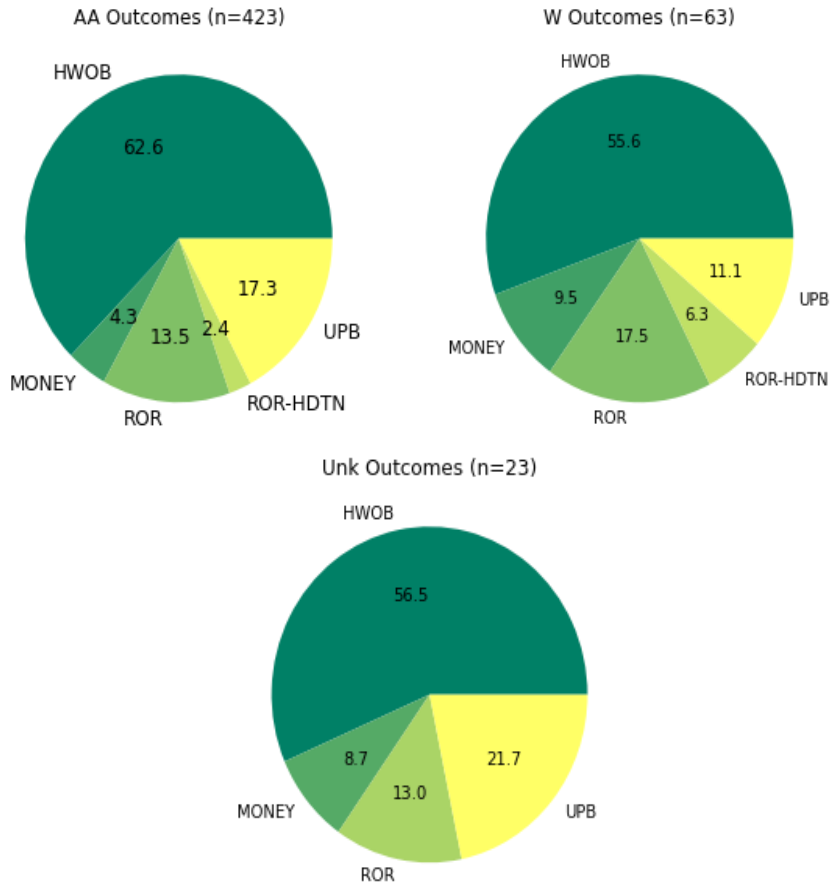
73. See Jupyter Notebook, *supra* note 5, ¶ 33. The prosecution made recommendations in 480 out of 509 cases: 451 HWOB (94%), 28 ROR (6%), and a single MONEY (<1%). *Id.*

74. See *id.* ¶ 34. Pretrial Services made recommendations in 500 out of 509 cases: 377 HWOB, 107 ROR (21%), 10 UPB (2%), and 6 MONEY (1%). *Id.*

75. See *id.* ¶ 35. With respect to Pretrial Services, judges only followed ROR recommendations 43% of the time (46 out of 107), UPB 40% (4 out of 10) and money bail 50% (3 out of 6). *Id.* By contrast, judges followed Pretrial Services’ HWOB recommendation 79% of the time (299 out of 377). *Id.* With respect to the prosecution, judges followed the prosecution’s ROR recommendation just 29% of the time (8 out of 28) and MONEY bail in the one case when a prosecutor suggested a money bond. *Id.* ¶ 36. Once again, judges were most likely to follow a prosecutor’s HWOB recommendation and did so in 62% of the cases (281 out of 451 times). *Id.*

76. Cf. Michele Goodwin, *Law and Anti-Blackness*, 26 MICH. J. RACE & L. 261 (2021).

**Figure 4**  
**Bail Outcomes by Race<sup>77</sup>**



Once again, it bears emphasis that this study occurred during a national conversation around structural racism that featured high-profile commitments to confronting inequality. Indeed, on June 9, 2020, then-Chief Judge Barbera issued a “Statement on Equal Justice under Law” on behalf of the Maryland courts.<sup>78</sup> This statement contained strong rhetoric—“[t]he protests of the last several weeks have coalesced into a truth that cannot be ignored: people of color are being denied their rightful equality”— and signaled a change in consciousness—“[t]his recognition of the need for collective resolve is not new, but perhaps our determination to address the long-term inequities spawned by slavery and Jim Crow, has, at last, become

77. For the code and data used to create Figure 4, see Jupyter Notebook, *supra* note 5, ¶ 38.

78. See Barbera, *supra* note 50.

new.”<sup>79</sup> The statement even highlighted pretrial reform as one “systemic inequit[y] that affect[s] the poor and people of color more often and with greater detriment” and pledged to work “to eliminate the pretrial detention of those who do not pose a risk, but cannot afford even a low monetary bail.”<sup>80</sup> Despite these soaring words, little changed.

### B. Representative Narratives

Some critics might defend this lack of change and disproportionately high 61.5% Black pretrial detention rate as merely reflective of a notoriously violent city that also happens to be majority Black. Such perspective would be wrong on multiple levels. First, Baltimore’s status as a majority Black city does not absolve it of the obligation to seek equity in the criminal legal system. Second, pretrial defendants are presumed innocent no matter how serious the charges—and more often than not in district court, this presumption of innocence is effectively vindicated when all charges against a defendant are unceremoniously dropped.<sup>81</sup> And third, even if all the charges levied against the defendants had merit, the fact is that only a minority of defendants in the study stood accused of crimes of violence.<sup>82</sup>

Putting empirical data to the side, the judgment that the 61.5% detention rate was not warranted stems from the experience of listening to 509 bail reviews and hearing similar tales repeated once and again. Although several hearings observed involved defendants charged with violent felonies where

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79. *Id.* at 1.

80. *Id.* at 2.

81. In Maryland, dropping of charges is referred to by the Latin phrase *Nolle Prosequi*—colloquially “*nolle pross.*” According to a comprehensive study conducted by one of this Article’s authors, the four largest district court systems in Maryland (Baltimore City, Baltimore County, Montgomery County, and Prince George’s County) had a total *nolle pross* rate of 61% from 2013–2017. See Starger, *supra* note 43. This means that in more than half of the cases charged in district court, *all* the charges against the defendant will be dropped. Though ultimate outcomes were not tracked for all cases in this Article’s study, a similarly high *nolle pross* rate was observed in cases resolved within a year of the study’s completion.

82. Maryland criminal law explicitly defines “crimes of violence” for the purposes of mandatory sentencing. See MD. CODE ANN., CRIM. LAW § 14-101(a) (2022). Using this statutory definition, only 28.9% of study defendants (147 of 509) faced a violent charge. See Jupyter Notebook, *supra* note 5, ¶ 54. The most common violent charges were first degree assault, robbery, attempted first degree murder, and first degree murder. While 71.1% (362 of 509) of defendants did not face a crime of violence charge, it should be noted that the close to half of these defendants (171) faced a second degree assault charge. *Id.* ¶ 55. The most common charge in Maryland, second degree assault, was also the most common top charge in our study (33.6%). *Id.* ¶ 56. The peculiar difficulties presented by this crime are discussed *infra* at notes 88–92 and accompanying text. In sum, 37.5% of study defendants (191 of 509) faced a non-violent top charge other than second degree assault. Jupyter Notebook, *supra* note 5, ¶¶ 56–58. The most common of these non-violent charges were CDS (drugs) possession, firearm possession, and violation of an ex parte order. *Id.* ¶ 59. The HWOB rates for violent and non-violent top charged defendants were 77.6% and 55%, respectively. *Id.* ¶¶ 62–63. The second degree assault HWOB rate was 40.9%. *Id.* ¶ 64. The HWOB rate for non-violent crimes excluding second degree assault was 67.5%. *Id.* ¶ 65.

detention was justified based on the record presented to the court, those cases truly were the exception rather than the rule.<sup>83</sup> More typically, “charged with a violent felony” was a headline obscuring a more complicated narrative. The following narratives are representative of cases observed.

*On June 10, Alvis Tellman, a 31-year-old Black man from western Baltimore, appeared before Judge Diana Smith.<sup>84</sup> Mr. Tellman stood accused of resisting arrest and second degree assault. Pretrial Services explained that Mr. Tellman had no history of violence among his five non-violent convictions, the most recent for trespass (2019) and disorderly conduct (2018).<sup>85</sup> Per the prosecution’s account, Mr. Tellman had disobeyed a police officer who had placed his hands on Mr. Tellman’s wife. According to the defense, Mr. Tellman suffered from mental health issues and became upset when the officer touched his wife. The officer approached the defendant after his wife had grabbed him around the neck. (She was also charged with assault.) When the officer made contact, the defendant yelled “don’t touch her” and attempted to kick, headbutt, and bite the officer, who sustained a possible concussion and broken nose.*

*Though the allegations of assault were somewhat serious, initial police contact with Mr. Tellman’s wife and his own mental health struggles clearly complicated the situation. Yet this context counted for little at bail review. Judge Smith ordered Mr. Tellman detained without bail where he remained*

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83. The authors accepted as justified HWOB rulings in violent felony cases where the prosecutor presented plausible evidence of guilt or recent serious criminal history combined with recent failures to appear. For example, on June 17, 2020, Judge Flynn M. Owens held Mr. Thomas Junes (a pseudonym) without bail when he was charged with murder in the first degree. Mr. Junes allegedly shot and killed a WEAA radio announcer, an incident which had eyewitnesses and video surveillance footage. *See id.* ¶¶ 66–68 (defendant number 141; case number 3B02422927); *see also* Phil Davis, *WEAA Announcer Shot and Killed Outside Baltimore Home While Trying to Stop Dispute Between Neighbors, Documents Show*, BALT. SUN (June 17, 2020, 4:34 PM), <https://www.baltimoresun.com/news/crime/bs-md-ci-cr-richard-green-arrest-20200617-rn4fjuy3angut6w764vgu3tui-story.html>. Additionally, on June 19, 2020, Judge Smith held Mr. Travell Pelliam (a pseudonym) without bail when he was charged with armed robbery and five additional robbery and assault and theft charges. His most recent failure to appear (“FTA”) occurred only months prior and he had five pending matters. *See* Jupyter Notebook, *supra* note 5, ¶¶ 69–71 (defendant number 168; case number 4B02416782). Finally, we agreed with Judge Mark F. Scurti’s decision on July 20, 2020, when he held Mr. Nigel Ingaglia (a pseudonym) without bail when he was charged with burglary in the first degree, first degree assault, motor vehicle unlawful taking, and thirteen other charges including gun charges. Mr. Ingaglia also had fifteen prior convictions and two prior FTAs. *See id.* ¶¶ 72–74 (defendant number 413; case numbers 0B02420719, 6B02419626, 5B02398989, 3B02396495, 1B02420125, 2B02422828, and 1B02423590).

84. Audiotape: Bail Review Hearing, held by the District Court for Baltimore City, Judge Diana A.E. Smith (June 10, 2020) (on file with author) [hereinafter Judge Smith Audiotape] (supporting entire narrative that follows). Alvis Tellman is a pseudonym. *See* Jupyter Notebook, *supra* note 5, ¶¶ 75–77 (defendant number 85; case number 0B02419018). Based on his home address, Mr. Tellman was from the “Howard Park/West Arlington” neighborhood. *Id.* ¶ 76. This neighborhood is 89% Black and ranks 21 out of 55 in median household income (\$53,534 in 2019). *Id.* ¶¶ 78–79.

85. Despite this relatively mild criminal record, Pretrial Services and the prosecution recommended HWOB in Mr. Tellman’s case. *Id.* ¶ 76.

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for nearly eighteen months waiting for trial. Ultimately, Mr. Tellman pled guilty on December 7, 2021.<sup>86</sup>

With no history of violence and only minor misdemeanor convictions, and with no mention of a concern that Mr. Tellman would fail to appear in court, Mr. Tellman's long months of pretrial incarceration were unduly harsh and undoubtedly created pressure for him to take an eventual plea.<sup>87</sup> Based on the information provided, he never presented the kind of extreme danger to the community that should be required to overcome the norm of pretrial liberty.

Not only does Mr. Tellman's story typify the factual complexity and ordinary human drama of many cases requiring pretrial resolution in District Court, but it also stands as an example of the most common charge seen in Maryland and in the study—second degree misdemeanor assault. Of the cases heard in the study, 34% had “Assault 2” as a top charge.<sup>88</sup> Without doubt, this crime created problems for judges at bail review; the crime is a peculiar type of misdemeanor that technically can carry from no jail time all the way up to a ten-year sentence.<sup>89</sup> The scope of behavior that can be categorized under the capacious misdemeanor assault category is thus ridiculously vast.<sup>90</sup> A trivial shove could count as misdemeanor assault, but so too could a vicious domestic violence attack resulting in broken bones, stitches, and hospitalization. Yet on paper, both incidents would appear as assault in the second degree. Though misdemeanor assault allegations have the *potential* to involve alarming violence, most truly serious assaults will be charged as assault in the first degree, a felony.<sup>91</sup> Based on our observations during this study and over the years, it is common for misdemeanor assault to involve no tangible injury at all nor require any medical treatment. Too often, judges in our study appeared to reflexively detain defendants based on

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86. After Mr. Tellman requested a jury trial, the district court transferred the case to the Circuit Court for Baltimore City on October 20, 2020—case number 820294002. According to Maryland Judiciary Case Search his guilty plea was retroactive to April 20, 2021. MD. JUDICIARY, *Maryland Judiciary Case Search Criteria*, <https://casesearch.courts.state.md.us/casesearch/> (last visited Nov. 10, 2022) [hereinafter *Case Search*].

87. This is not to say that his guilty plea was warranted or unwarranted on the facts. Rather, the point is that eighteen months of pretrial incarceration is a highly coercive factor in the context of his decision to plead guilty.

88. See *supra* note 82 (showing that 171 of 509 defendants had second degree assault as their highest charge).

89. See MD. CODE ANN., CRIM. LAW § 3-203 (2022).

90. *Id.*

91. First degree assault requires either the use of a firearm or the intent to “cause serious physical injury.” *Id.* § 3-202(b)(1). However, “serious physical injury” is in turn required to create a substantial risk of death or cause serious and permanent disfigurement or loss or impairment of the function of any bodily member or organ. MD. STATE BAR ASS’N, MARYLAND CRIMINAL PATTERN JURY INSTRUCTIONS § 4:01.1A (2d ed. 2018).

thin misdemeanor assault allegations.<sup>92</sup> Less-than-convincing evidence was used in particular to justify pretrial detention in criminal possession of weapons cases.

*On July 9, 2020, Judge Joyce Baylor-Thompson heard the misdemeanor gun possession case of Kevin Scutt a 20-year-old Black man from Baltimore County.*<sup>93</sup> *Mr. Scutt had been the passenger in a car searched by the police, which recovered a loaded gun in the purse of a female passenger, now Mr. Scutt's co-defendant. Mr. Scutt himself faced the identical series of gun-possession charges. This was Mr. Scutt's first and only arrest, but Pretrial again recommended "no bail" despite considering him low risk. Judge Baylor-Thompson agreed and ordered HWOB. Mr. Scutt then spent twelve days in jail before he was released ROR with home detention (ROR-HDTN) at a bail re-review.*<sup>94</sup> *Several months later, on September 11, Mr. Scutt pled guilty to a loaded handgun in vehicle charge and received a one-year probation sentence.*<sup>95</sup>

*Less than two weeks after Mr. Scutt's initial bail review, on July 21, Judge Baylor-Thompson heard the case of another young Black man, 22-year-old Andre Eppurson.*<sup>96</sup> *Mr. Eppurson was charged with possessing an unloaded rifle found in the trunk of the car he was driving but did not own.*<sup>97</sup> *Self-employed and with no prior Maryland convictions (he was on probation for misdemeanor assault in Oregon), Mr. Eppurson was hardly anybody's idea of a violent felon who required preventative detention to keep the public safe. Judge Baylor-Thompson, a thoughtful judge with one of the lowest*

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92. Without question the difficulty in adjudicating second degree assault cases is further complicated by its connection to intimate partner violence ("IPV"). Many IPV cases are charged as misdemeanor assaults. Though judges might laudably wish to confront this entrenched and persistent problem, research suggests that incarceration tends to make the problem worse, not better. See generally LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* (2018).

93. Audiotape: Bail Review Hearing, held by the District Court for Baltimore City, Judge Joyce M. Baylor-Thompson (July 9, 2020) (on file with authors) [hereinafter Judge Baylor-Thompson Audiotape] (supporting entire narrative that follows); see Jupyter Notebook, *supra* note 5, ¶¶ 80–81. Kevin Scutt is a pseudonym. Jupyter Notebook, *supra* note 5, ¶¶ 80–81 (defendant number 328; case number 4B02420541). Mr. Scutt did not have a Baltimore City address, but rather was from Towson, a small city, and the county seat of Baltimore County. His charges included: handgun on person, loaded handgun on person, handgun in a vehicle, loaded handgun in a vehicle, handgun within 100 yards of a park, and handgun in vehicle within 100 yards of a park. See *id.* ¶ 81.

94. This was likely done "on paper" since Mr. Scutt did not appear in person on the date indicated on Maryland Judiciary Case Search for ROR release. *Case Search*, *supra* note 86.

95. Confirmed on Maryland Judiciary Case Search. *Id.*

96. Judge Baylor-Thompson Audiotape, *supra* note 93; see Jupyter Notebook, *supra* note 5, ¶¶ 82–83. Andre Eppurson is a pseudonym. Jupyter Notebook, *supra* note 5, ¶¶ 82–83 (defendant number 433; case number 1B02420286). Based on his home address, Mr. Eppurson hailed from Lauraville, in the northeastern part of Baltimore. *Id.* ¶ 82. This is a more middle-class neighborhood with a median household income of approximately \$75,000. *Id.* ¶¶ 84–85.

97. He was also charged with illegal possession of ammunition. See Jupyter Notebook, *supra* note 5, ¶ 83.



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*judicial detention rates in the study,<sup>98</sup> set the stage by describing herself as a “stickler when it comes to guns.” Judge Baylor-Thompson then ordered detention, announcing “just the idea of having a rifle in the trunk of a car is enough to hold you without bail.” With these words, Judge Baylor-Thompson virtually acknowledged a bias for jailing anyone charged with gun possession, even when proving possession might be challenging. And proving possession was always going to be challenging in Mr. Eppurson’s case, as indicated by the prosecution dropping all the charges against Mr. Eppurson on September 2. All the time he spent in jail based on the mere accusation of gun possession—forty-three days—was unnecessary and unjustified.<sup>99</sup> Mr. Eppurson will never get that time back.*

The experiences of Mr. Scutt and Mr. Eppurson are unfortunately common. Baltimore bail judges worry about guns and often order HWOB whenever the word “gun” is mentioned. At first blush, this impulse is understandable. Gun violence plagues Baltimore and the city suffers from a painfully high murder rate.<sup>100</sup> Yet reflexive detention for defendants accused of mere gun *possession* makes little sense upon closer examination. All “gun crimes” are not equal; there is a world of difference between using a gun while committing a crime and keeping a gun for self-defense. Indeed, the fact is that Baltimore’s very dangerousness often means that individuals living in hyper-segregated neighborhoods carry guns for self-defense and protection.<sup>101</sup> Overlooking this reality reflects judicial privilege and the judges’ distance from the day-to-day reality of certain parts of Baltimore. When judges see the gun but not the person, they reproduce systemic dehumanization.

Callous disregard and total rejection of Pretrial supervision for released detainees is also seen in the final narrative in this Part.

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98. Judge Baylor-Thompson’s detention rate of 46.5% was the second-lowest among the 16 Baltimore City District Court judges. *Id.* ¶ 87. Judge Scurti had the lowest detention rate—46.4%. *Id.* The average detention rate for judges who presided at bail hearings of presumptively innocent defendants was 66%, and the median was 64.5%. *Id.* In short, for judges as a whole, the “presumption of innocence” did not translate to better than even a 40% release rate. *Id.*

99. See Jupyter Notebook, *supra* note 5, ¶ 88 (calculating days held in jail).

100. See generally Justin Fenton & Carl Johnson, *Baltimore Homicides*, BALT. SUN, <https://homicides.news.baltimoresun.com/> (last visited Aug. 5, 2022); N.Y. DIV. OF CRIM. JUST. SERVS., *CRIME IN NEW YORK STATE 2019 FINAL DATA* 8 app. 4 (2020), <https://www.criminaljustice.ny.gov/crimnet/ojsa/Crime-in-NYS-2019.pdf>. In 2019, for example, the number of homicides Baltimore City was 348, a total which exceeded the total amount of murders in all of New York City. Fenton & Johnson, *supra*; N.Y. DIV. CRIM. JUST. SERVS., *supra*, at 6 app. 2 (showing that there were 319 homicides in New York City in 2019).

101. *Cf.* Brief of the Black Attorneys of Legal Aid, The Bronx Defenders, Brooklyn Defender Services, et al. as Amicus Curiae in Support of Petitioners at 20–25, *N.Y. State Rifle & Pistol Ass’n, Inc. v. Corlett*, 141 S. Ct. 2566 (2021) (No. 20-843) (recounting stories of The Bronx Defenders’ clients who carried weapons for self-defense).

*Judge William Dunn had the distinction of being the judge with the highest pretrial incarceration rate of detainees who appeared before him.<sup>102</sup> Like every Baltimore City bail review judge, Judge Dunn first hears from Pretrial when considering whether to release a defendant. Pretrial conducts a variety of tasks that judges find important, including review of a defendant's criminal history, verifying employment, and contacting family. Critically, Pretrial can also supervise defendants who are released on recognizance or on unsecured personal bond by requiring phone calls and/or in-person check-ins at their offices. Although Baltimore's Pretrial has an impressive record of helping defendants appear in court,<sup>103</sup> Judge Dunn effectively eliminated ROR with pretrial supervision as a viable release option before ever listening to the facts of any case. Across four different June–July bail review sessions,<sup>104</sup> Judge Dunn engaged in the following stock dialogue with a Pretrial representative at the start of that day's bail review docket:*

**Judge Dunn:** [T]he last time I sent the bail review docket was last week, and as a result of my voir dire of the pretrial investigator on that date I discovered that the Baltimore City Division of Pretrial Detention and Services is not capable of adequately ensuring the safety of the community, or assuring the appearance of the defendant at trial in the event I want to consider conditions or accommodations of conditions of release when imposing the least onerous conditions. In other words, the last time I voir dire'd your office, I discovered that your agency is incapable of monitoring released defendants with GPS and/or ankle bracelets, that your organization has no additional sources of electronic monitoring, that you're not able to adequately monitor defendant's movements or enforce residency restrictions, and that you're not able to adequately enforce no-contact orders or enforce work requirements. Has anything changed either with your Division's staffing and/or funding which has changed your ability to more

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102. Audiotape: Bail Review Hearing, held by the District Court for Baltimore City, Judge William Dunn (July 16, 2020) (on file with authors) [hereinafter Judge Dunn Audiotape] (supporting entire narrative that follows). While Judge Kerry technically had a 100% HWOB rate, this statistic was based on a single hearing for just one defendant. *See* Jupyter Notebook, *supra* note 5, ¶¶ 86–87. In contrast, among the forty-one defendants whose bail reviews he conducted, Judge Dunn never released a single person on recognizance, unsecured bond or home detention. The judge ordered money bail for eight detainees. *Id.* ¶¶ 89–90.

103. According to Robert Weisengoff, Executive Director of the Department of Public Safety and Correctional Services' Pretrial Release Program, the average Failure to Appear ("FTA") rate for those under pretrial supervision from 2014–2021 was 5.18%. *See* E-mail from Robert Weisengoff, Exec. Dir., Md. Dep't of Pub. Safety & Corr. Servs. Pretrial Release Program, to authors, (Sept. 19, 2022, 11:06 AM EST) (on file with authors). In 2020–2021, the average FTA rate for those under pretrial supervision was very low—2.46%. *Id.*

104. Judge Dunn conducted bail reviews on June 2, June 11, July 16, and July 31. *See* Jupyter Notebook, *supra* note 5, ¶¶ 91–93.

effectively monitor defendant's pre-trial in the event I want to consider releasing a defendant as the least restrictive alternative to incarceration?

**Pretrial Investigator:** No, it hasn't Your Honor.

**Judge Dunn:** Alright, thank you.<sup>105</sup>

*Following an exchange like this on four separate days, Judge Dunn failed to release a single one of forty-one defendants on recognizance, with or without pretrial supervision.<sup>106</sup> Instead, he ordered detention without bail for thirty-three individuals (80%) and then cash money bond for the remaining eight (20%). The judge never selected an unsecured personal bond or regular home detention for any person appearing before him.*

*Judge Dunn's never-changing colloquy with Pretrial regarding their supposed inability to protect the community without GPS monitoring assumed the aspect of absurdist theatre as he repeated it day after day. His implicit argument failed to justify the harshness meted out, as the law does not require GPS monitoring as a condition of ROR and the remarkable success record of Pretrial in their ordinary-course non-GPS supervision is a matter of public record.<sup>107</sup> Indeed, other judges routinely employ Pretrial Services to supervise ROR'd defendants with success. Yet Judge Dunn persisted with the same script, keeping the machine humming, sending presumed innocent defendants to jail with little discernable attention to individual circumstances.*

The stories related above from Courtroom Four when presided over by Judges Chen, Smith, Baylor-Thompson, and Dunn, could just as easily be replaced with stories from most of the other twelve judges who sat in June and July of 2020. As it happens, Judges Dunn and Smith had the highest HWOB detention rates of judges observed (80% and 79% respectively with Judge Chen not far behind at 74%), but Judge Baylor-Thompson had the second-to-lowest (46%).<sup>108</sup> In this way, their decisions represent the system's spectrum, which favored detention across the board. In the end, no matter

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105. Judge Dunn Audiotape, *supra* note 102, at 3:56–5:03.

106. See Jupyter Notebook, *supra* note 5, ¶¶ 89–90.

107. See E-mail from Robert Weisengoff, *supra* note 103 (confirming that the FTA rate of Pretrial-supervised defendants has steadily decreased since 2016, falling from 6.97% in 2016, to 4.83% in 2019); MD. DEPT. OF PUB. SAFETY & CORR. SERVS., DIVISION OF PRETRIAL DETENTION AND SERVICES REPORT 4 (Nov. 2016) (finding that of the 710 defendants under Pretrial's supervision at the end of September 2016, 53 failed to appear in court or were re-arrested); MD. DEPT. OF PUB. SAFETY & CORR. SERVS., DIVISION OF PRETRIAL DETENTION AND SERVICES REPORT 4 (May 2017) (finding that of the 966 defendants under Pretrial's supervision at the end of March 2017, 67 failed to appear in court or were re-arrested).

108. See Jupyter Notebook, *supra* note 5, ¶ 95; *supra* note 98.

how the data is sliced, or stories are told, the bottom line was that decarceration and a turning-away-from-detention did not occur despite the crises and promises of summer 2020.

## II. FAILED REFORM AND THE BLACK BUTTERFLY

What happened? How had meaningful change failed to transpire in Baltimore when material conditions—the public health emergency and explicit racial reckoning—seemed so uniquely aligned to facilitate carceral reform? At one level, it is clear that despite operating under far-from-normal circumstances, pretrial actors had lacked the courage to disrupt “business as usual.” When it came down to it, Baltimore’s bail judges lacked the collective nerve to break the momentum of a pretrial machine primed to relentlessly incarcerate Black bodies.

At the same time, judges do not control the racial makeup of defendants brought into their courts by the police. Judges did not make the arrests that resulted in 83% of pretrial defendants being Black in a 57% Black city. Yet, the disparity observed in bail outcomes (a 63% HWOB rate for Black defendants versus a 55% HWOB rate for white defendants) compounded the far more extreme disparity found in the initial defendant population (83% Black versus 12% white). The reality of twin disparities points to a larger conundrum. Pretrial actors did not create the observed structural inequality, but neither did they confront it. How does one apportion fault among cogs in a machine that seemingly runs on inertia and customary practices?

This Part takes a first pass at unraveling this conundrum by placing the dashed promise of 2020 into the context of the Maryland pretrial domain’s long history of setbacks and frustrated reform. The repeating pattern of unsuccessful reform points out the limits of a reform model predicated on a virus metaphor of structural racism described in the Introduction.<sup>109</sup> This Part then turns to the Black butterfly and shows how it reveals the deeper DNA of structural racism in Baltimore. The work of Dr. Brown on the Black butterfly is explained in further detail and the graphical methodology of the remainder of the Article is introduced.<sup>110</sup>

### A. *The Perennial Struggle of Maryland Pretrial Reform*

While pretrial defendants are theoretically protected by the presumption of innocence, critics have noted that this presumption is most often honored in its breach.<sup>111</sup> Across the nation and in Maryland, pretrial incarcerated

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109. See *supra* text accompanying notes 2–3.

110. See *generally supra* note 22.

111. See Starger, *supra* note 43, at 2 (“The true affront to our cherished POI [presumption of innocence] tradition is the phenomenon of *mass pretrial incarceration*.”); Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 725 (2011) (“The practical results

populations have soared over the past decades despite this presumption.<sup>112</sup> This spike in pretrial incarcerated population is due to a combination of defendants being given unaffordable money bails (that they cannot post and therefore remain in jail) and being subjected to outright pretrial detention.<sup>113</sup> During the past two decades, there has been a flurry of reform activity in Maryland attempting to address the unaffordable bail problem.<sup>114</sup> These reform efforts followed from earlier reforms.<sup>115</sup> A brief review of that history illustrates how reform efforts inevitably encountered push-back and how apparent victories quickly become undermined.<sup>116</sup>

For decades, the most visible opponent of pretrial reform in Maryland was the bail bond and insurance industry.<sup>117</sup> The lucrative bail bond business thrived on collecting ten percent non-refundable fees from defendants' families and friends in exchange for underwriting each individual bond that freed a loved one from jail.<sup>118</sup> As a rule, the industry opposed any efforts to change a bail system that so steadily generated exorbitant profits based on poor people paying to get out of jail.<sup>119</sup>

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of the presumption[ of innocence]'s diminution are apparent and troubling. The number of defendants held pretrial has steadily increased such that the majority of people in our nation's jails have not been convicted of any crime." (footnote omitted)).

112. See Starger, *supra* note 43, at 4 fig. 1 (reproducing Prison Policy Initiative graphic on rise in pretrial incarcerated population). While the COVID pandemic did initially cause a significant drop in pretrial incarcerated populations, jail populations have already begun to rebound to their pre-pandemic levels. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POLY INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html#covid>; see also *infra* notes 141–142.

113. An analysis of large urban counties found that nearly 90% of felony defendants in pretrial detention were detained because of their inability to meet the financial conditions to secure their release. BRIAN A. REAVES, U.S. DEP'T OF JUST., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 15 (2013), <https://bjs.ojp.gov/content/pub/pdf/fdluc09.pdf>.

114. See *infra* notes 117–121 and accompanying text.

115. See *infra* notes 122–139 and accompanying text.

116. See Colbert et al., *Do Attorneys Really Matter?*, *supra* note 43.

117. A 2017 report noted that Maryland ranks third in the country for campaign contributions from the bail bonds industry, with more than \$288,000 in donations between 2011 and January 2017. For two Maryland Senate chairs who oversee the committees addressing bail bond issues, contributions from the bail bonds industry constituted more than ten percent of their respective fundraising totals. COMMON CAUSE MD., PAY TO PLAY? HOW SPECIAL INTERESTS SEEK INFLUENCE IN ANNAPOLIS 1–2 (2017), <https://www.commoncause.org/maryland/wp-content/uploads/sites/14/2018/03/pay-to-play-report.docx>. Although this report covers a later time period, the dynamics of financial influence and well-resourced lobbying were also prevalent as early as 1998.

118. See ABELL FOUND., THE PRETRIAL RELEASE PROJECT: A STUDY OF MARYLAND'S PRETRIAL RELEASE AND BAIL SYSTEM 18, 41–45 (2001), [https://abell.org/wp-content/uploads/2022/02/hhs\\_pretrial\\_9.011.pdf](https://abell.org/wp-content/uploads/2022/02/hhs_pretrial_9.011.pdf) (estimating statewide earnings of the bail bond industry between \$42.5 and \$170 million from professional surety bonds in 1998).

119. *Id.* at 41.

Bail industry opposition to change included efforts to defeat legislation aiming to grant the right to counsel at the initial bail hearing.<sup>120</sup> Starting in 1998 and continuing through the 2002 legislative session, a diverse reform coalition formed and testified in Annapolis in favor of extending indigent defendants' right to counsel at the initial bail hearing.<sup>121</sup> But the reformers proved no match for the industry's influence in the Maryland legislature. Eventually, pretrial justice advocates engaged in years-long litigation, initially culminating in 2012 when the Maryland Court of Appeals recognized indigent defendants' *statutory* right to counsel at the initial appearance.<sup>122</sup> Yet this victory was immediately undermined by legislators who enacted a revised law that effectively repealed the high court ruling.<sup>123</sup> More litigation followed. The high court eventually decided the *constitutional* issue, holding that accused indigents did indeed have a right to counsel at the initial bail proceeding.<sup>124</sup> While this represented progress in principle, in practice the ruling has had less impact than hoped: Evidence suggests that 90% of detainees in some counties and 50% and higher in others waive their constitutional right to counsel at initial appearances to obtain an immediate hearing and avoid further incarceration based on the false belief that waiver of counsel will secure their release more quickly.<sup>125</sup>

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120. As recently as 1998, only eight states guaranteed counsel's advocacy to defend and protect an accused's liberty before trial. *See* Colbert et al., *Do Attorneys Really Matter?*, *supra* note 43, at 1724.

121. The story is laid out in detail in 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 (2015). The coalition included support and testimony on behalf of then-Chief Judge Joseph F. Murphy of the Maryland Court of Special Appeals and representatives of the Maryland judiciary, bar association, and State Police; the private criminal defense bar, civil rights organizations, and legal academics also advocated for the necessity of indigent defendants' early representation. *Id.* at 21–26. While the bail bond industry represented the strongest opposition, the Maryland Office of the Public Defender also testified against the bill. *Id.* at 21–22.

122. *DeWolfe v. Richmond (DeWolfe I)*, 434 Md. 403, 430–31, 76 A.3d 962, 978 (2012) (holding that under Maryland's Public Defender Act, indigent defendants' representation by appointed counsel commences at the initial appearance bail determination stage, based on the plain language of the Act that representation shall be provided in "all stages" of proceedings).

123. *See* S.B. 165, 2012 Reg. Sess. (Md. 2012); *see also* H.B. 112, 2012 Reg. Sess. (Md. 2012). Under the new law, a mandatory right to counsel no longer existed at initial appearances. Legislators delayed counsel's representation until the subsequent bail review hearing. MD. CODE ANN., CRIM. PROC. § 16-204(b)(2) (West 2012) ("Representation is not required to be provided to an indigent individual at an initial appearance before a District Court commissioner."); *see also* Colbert, *supra* note 121, at 45 (explaining the legislative response to *DeWolfe I*).

124. *DeWolfe v. Richmond (DeWolfe II)*, 434 Md. 444, 456, 76 A.3d 1019, 1026 (2013); MD. CONST., Decl. of Rts., art. 24; *see also DeWolfe I*, 434 Md. at 421–22, 76 A.3d at 972–73 (declining to address the constitutional claims raised in the case because the issue could be addressed based on statutory language).

125. COMMISSION TO REFORM MARYLAND'S PRETRIAL SYSTEM: FINAL REPORT 1, 10 (2014), <https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/020000/020731/unrestricted/20150070e.pdf>. Unfortunately, the judiciary has refused to investigate why so many relinquish such a fundamental right. Anecdotal accounts suggest that commissioners obtain waivers at closed

The pattern of reform gaining hold only to be undermined by system actors becomes even sharper after examining the struggle to end cash bail. The predatory nature of cash bail and its disproportionate impact on poor people of color has been long known.<sup>126</sup> In 2004, reformers won a battle to change judicial rules to provide low-income detainees an alternative to paying bail bondsmen's non-refundable fee.<sup>127</sup> The idea was to permit detainees to make a ten percent cash deposit directly to the court where it would be refunded once the case concluded instead of paying the same non-refundable amount to bondsmen.<sup>128</sup> The bail bond industry obviously viewed the proposal as "bad for business" but could not entirely defeat it. In the end, a divided sub-committee reached a compromise: It mandated the ten percent cash deposit but only for smaller bonds of \$2,500 or less.<sup>129</sup> For higher bonds, a judge could exercise discretion, but the ten percent was not required. Judges regularly provided a full bond without a cash percentage option.<sup>130</sup>

Yet even this compromised reform effort soon floundered. While judges initially appeared to accept the rule changes, they soon employed ways to subvert the \$2,500 mandatory ten percent cash option.<sup>131</sup> Several judges began ordering bond amounts not previously seen, such as \$2,501, \$2,550, \$2,600 or \$3,000.<sup>132</sup> The judges' purpose could not be more apparent: They

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court sessions where they tell defendants, appearing without counsel, that they can return to jail and wait for assigned lawyers to appear or opt to have the hearing right at that moment and be listened to carefully and given a fair decision.

During 2015–2021 when the right to counsel at first appearance commenced, an astonishing two out of three Maryland incarcerated defendants relinquished their right to counsel and self-represented when first appearing before a District Court Commissioner. MD. DIST. CT., INITIAL APPEARANCE STATISTICS (2022). Indeed, in 20 of the 24 statewide judicial districts, more than four out of five detainees waived counsel. *Id.* In comparison, only two Maryland counties—Baltimore and Montgomery—each having the greatest number of detainees had the lowest waiver rate; Baltimore clearly led the way with "only" one in four detainees choosing to appear without a lawyer. *Id.*

126. Sean Kennedy, *Abolish Rule, Fix Bail*, BALT. SUN. (Apr. 5, 2017), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-bail-rule-con-20170404-story.html>. See generally Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CTR. FOR JUST. (Feb. 24, 2021), <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>.

127. Colbert, *supra* note 121, at 32–34.

128. *Id.* at 30. The plan allowed for a small administrative fee to cover costs of running the program and would not return deposits to defendants who failed to appear.

129. MD. R. 4-216.1(e)(4)(B) (West 2017) ("[I]f the judicial officer sets bail at \$2500 or less, the judicial officer shall advise the defendant that the defendant may post a bail a bail bond secured by either a corporate surety or a cash deposit of 10% of the full penalty amount . . .").

130. MD. R. 4-216.1(d)(2)(M) ("[S]pecial conditions of release imposed by a judicial officer under this Rule may include, to the extent appropriate and capable of implementation . . . execution of a bond in an amount specified by the judicial officer secured by the deposit of collateral security equal in value to not more than 10% of the penalty amount of the bond or by the obligation of a surety, including a surety insurer, acceptable to the judicial officer . . .").

131. Colbert, *supra* note 121, at 34–35. Judges were setting bail at amounts that left defendants ineligible to make the percent deposits in court.

132. *Id.* at 34–35.

wanted to force poor and low-income defendants to retain a bondsman's services and pay the non-refundable ten percent fee. This behavior was best explained by implicit bias. Judges did not trust poor, predominantly Black defendants to act responsibly and return to court without the "services" of a bondsman.<sup>133</sup> Similar cynical actions by judges prevented the 2004 rules change from substantially improving the lot of defendants.<sup>134</sup>

The next major round of Maryland pretrial reform efforts occurred in 2016. By this time, a national conversation around ending the practice of unaffordable money bail had started picking up steam.<sup>135</sup> National campaigns to eliminate money bail intersected with burgeoning movements to confront and end mass incarceration and it again seemed as if change were possible. At the urging of activists and campaigners, the Maryland Rules Committee recommended revising judicial procedures that previously had relied

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133. It is no coincidence that the history of bail bondsmen overlaps with the history of slave catching. Benjamin Weber, *Beyond Money Bail*, VERA INST. OF JUST. (June 27, 2018), <https://www.vera.org/blog/beyond-money-bail> ("The private industry of man-hunting, for instance, grew because there was money to be made from capturing and jailing black people who were alleged to be fugitives, called dangerous, or appeared out of place . . . profits flowed to government and private actors when enslaved people were booked and released, hired out, or caged for 'safe-keeping.'").

134. Several judges initiated an additional cruel and mean-spirited financial condition of a "cash-only" bond to keep low-income—the unemployed and homeless, often veterans living on government benefits—and predominantly Black defendants in jail typically on non-violent charges. Previously, defendants' families were often forced to forego paying rent and posted the "cash-only" option in order to bring home a needed breadwinner or caretaker. That left the prisoner with the difficult Hobson's choice: ask their family to pay the bondsman's non-refundable fee from money designated for necessities, or, remain incarcerated. Many decided to remain in jail. In some instances where defendants were able to ask their family for help, judges attached a further, virtually impossible condition, "cash only, defendant only." This effectively made it impossible for incarcerated defendants to post the necessary bail.

135. See, e.g., Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 21 (Erik Luna ed., 2017); SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 157–85 (2018); Zina Makar, *Bail Reform Begins with the Bench*, N.Y. TIMES (Nov. 17, 2016), <https://www.nytimes.com/2016/11/17/opinion/bail-reform-begins-with-the-bench.html>; Alan Feuer, *Bronx Charity Founder Wants to Pay Bail for Poor Defendants Nationwide*, N.Y. TIMES (Nov. 13, 2017), <https://www.nytimes.com/2017/11/13/nyregion/bail-project-fund-poor-defendants.html> (describing a multi-city effort to leverage nearly \$30 million in funding to pay bail for indigent pretrial defendants). Organizations such as the Civil Rights Corps and Equal Justice Under Law have challenged unfair money bail practices through litigation. See, e.g., O'Donnell v. Harris Cnty., 892 F.3d 147, 157 (5th Cir. 2018) (affirming the district court's rulings that the county's bail system, which failed to achieve individualized assessments when setting bail, violates equal protection and due process, although basing its due process conclusion on different reasoning), *overruled on other grounds by Daves v. Dallas County*, 22 F.4th 522, 540 (5th Cir. 2022); Buffin v. City & County of San Francisco, No. 15-cv-04959, 2019 U.S. Dist. LEXIS 34253, at \*57 (N.D. Cal. Mar. 4, 2019) (finding that the jurisdiction's use of a bail schedule that arbitrarily assigns bail amounts based on offense type and fails to consider risk factors significantly deprives indigent defendants of their fundamental right to liberty).



substantially upon money bail;<sup>136</sup> the new rules required judges to prioritize *non-financial* conditions of release and to order money bond only as a last resort for low-income defendants.<sup>137</sup> The revised procedures took effect on July 1, 2017.<sup>138</sup>

Once more, what initially appeared as a major victory turned out differently. Despite the clear language indicating judges could order money bail as a last resort, judges typically interpreted the revised rule to require that they choose either release on non-financial conditions or pretrial incarceration. During the next two-and-a-half years, changes occurred that can best be described as a good-news, bad-news scenario: Though judges decreased by six-fold their use of money bail (the good news), they offset that substantial reduction by increasing four-fold the percentage of defendants held without bail (the bad news).<sup>139</sup> As shown in Figure 5 below, the net result was a minimal decrease in the pretrial jail population across Maryland, not nearly the major impact expected from severely limiting the use of money bail.

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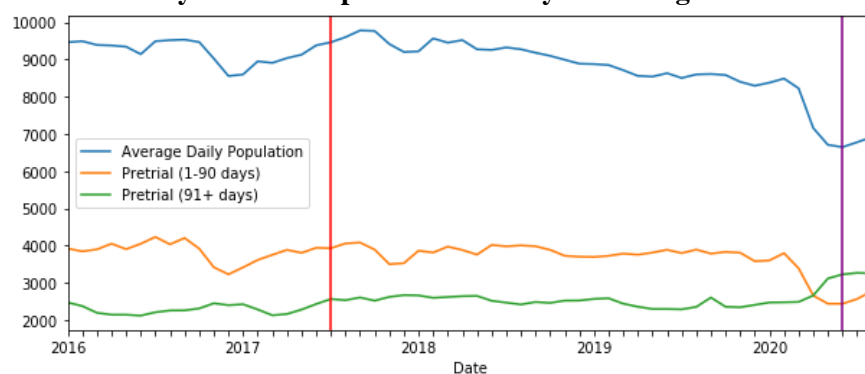
136. See Ovetta Wiggins, *Bail Reform in Maryland Clears Major Hurdle*, WASH. POST (Nov. 18, 2016), [https://www.washingtonpost.com/local/md-politics/bail-reform-in-maryland-clears-major-hurdle/2016/11/18/374c5340-ac22-11e6-8b45-f8e493f06fcd\\_story.html](https://www.washingtonpost.com/local/md-politics/bail-reform-in-maryland-clears-major-hurdle/2016/11/18/374c5340-ac22-11e6-8b45-f8e493f06fcd_story.html); STANDING COMM. ON RULES OF PRAC. & PROC., NOTICE OF PROPOSED RULES CHANGES 2 (Nov. 22, 2016), <https://www.mdcourts.gov/sites/default/files/rules/reports/192nd.pdf>.

137. MD. R. 4-216.1(b)–(c) (“[U]nless the judicial officer finds that no permissible non-financial condition attached to a release will reasonably ensure (A) the appearance of the defendant, and (B) the safety of each alleged victim, other persons, or the community, the judicial officer shall release a defendant on personal recognizance or unsecured bond . . .”). Despite the high court’s clear language authorizing reasonable bail as a third option, some judges in our study incorrectly stated in court that the rules only gave them two choices: to release defendants (ROR) or to order defendants detained to jail (HWOB). For a further discussion on the troubling issue of money bail, see generally Miguel F.P. de Figueiredo & Dane Thorley, *Pretrial Disparity and the Consequences of Money Bail*, 81 MD. L. REV. 557 (2022).

138. MD. R. 4-216.1 (effective July 1, 2017; amended effective July 1, 2021).

139. Since the 2016 rule change, Maryland has seen the proportion of defendants held without bail skyrocket while the unaffordable bail problem has decreased. Letter from Debra Gardner, Legal Dir., Pub. Just. Ctr., to Daniel A. Friedman, Judge, Md. Ct. Spec. App., Chair, Rules Rev. Subcomm., Equal Just. Comm. (July 1, 2021), <http://www.publicjustice.org/wp-content/uploads/2021/07/CSJM-submission-on-pretrial-detention-to-CEJ-Rules-Review-Subcommittee-7-1-21.pdf>. Within three months of the implementation of Rule 4-216.1, the percentage of individuals held without bail rose to 25.1%, compared to 6.7% just fifteen months prior. *Id.* at 2.

**Figure 5**  
**Maryland Jail Population January 2016–August 2020<sup>140</sup>**

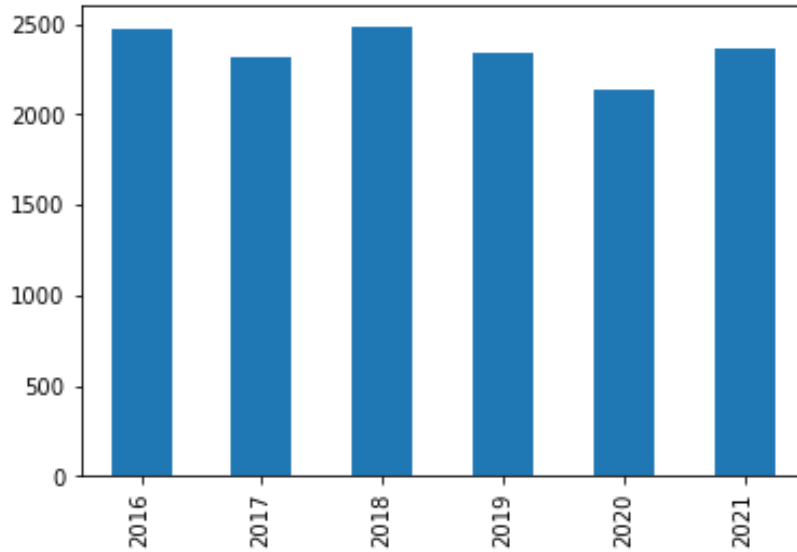


The vertical red line on the lefthand side of Figure 5 represents when the new pretrial rule went into effect on July 1, 2017. As the figure shows, the pretrial population (represented by the orange and green lines) was essentially stable from this time right up until March 2020—when the pandemic struck. However, the graphic also shows how the early days of the pandemic resulted in more pretrial defendants being held for longer periods, even as the 1–90 days pretrial population dipped. By the time this Article’s study began in June 2020 (shown by the vertical purple line on the right of the figure), the overall pretrial incarcerated population was already beginning to rise again. By 2021, as shown in Figure 6 below, Baltimore City’s average daily pretrial population had essentially returned to pre-pandemic levels.<sup>141</sup>

140. The data displayed in Figure 5 comes directly from the Maryland Department of Public Safety and Correctional Services (“DPSCS”). The data track jail populations for every county in Maryland, with pretrial populations logged separately, as of the first day of each month from January 2016 through August 2020. See Jupyter Notebook, *supra* note 5, ¶¶ 96–97.

141. See *DPSCS Annual Data Dashboard*, MD. DEP’T OF PUB. SAFETY & CORR. SERVS., [https://dpscs.maryland.gov/community\\_releases/DPSCS-Annual-Data-Dashboard.shtml](https://dpscs.maryland.gov/community_releases/DPSCS-Annual-Data-Dashboard.shtml) (last visited Sept. 19, 2022) (data found on page 1 of 8 on the dashboard; figures for average daily population available in top right chart). The average daily pretrial population dipped from 2342 to 2140 from 2019–2020, but then rose back to 2359 in 2021. *Id.* For code to create this data visualization, see Jupyter Notebook, *supra* note 5, ¶ 98.

**Figure 6**  
**Baltimore City Pretrial Average Daily Population 2016–2021**



Of course, the story about how hoped-for decarceration did not materialize in Baltimore has already been related.<sup>142</sup> Given the history of failed reform related above, this should perhaps have been unsurprising. Time and again, focused efforts at improving the pretrial system have seemed to move two steps forward only to stumble one or more steps back. Yet somehow the promise of “this time it will be different” rarely fades from liberal discourse. This is the virus conceptual metaphor at work, hiding simple truth.<sup>143</sup> Many reformers perceive the system they are trying to reform as otherwise righteous. They suggest that the institutions of justice merely need course correction to get back on track, focused interventions to get the body politic healthy. Yet experience time and again suggests that systemic racism is a feature, not a bug. Inequality is in our institutional DNA.

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142. See *supra* Part I. The Baltimore data is consistent with national trends. As noted by the Prison Policy Initiative, “Jail populations dropped early in the pandemic, mostly due to reduced admissions. However, as the pandemic drug on, jail populations steadily climbed, nearly back to their pre-pandemic levels.” See *COVID-19 in Prisons and Jails*, PRISON POL’Y INITIATIVE (Feb. 3, 2022), <https://www.prisonpolicy.org/virus/> (surveying national data). While prison populations have seen an average 15% drop in population since the beginning of the pandemic, *id.*, the data give every indication that mass incarceration is returning to “business as usual.” See Sawyer & Wagner, *supra* note 111.

143. See *supra* text accompanying notes 2–3.

*B. Baltimore's Black Butterfly*

If focused reform only results in cycles of failure, then perhaps focused academic inquiry only answers less-than-useful questions. Might broadening the inquiry beyond domain expertise bring a bigger picture of structural inequality into view? Here it bears repeating that the most pronounced racial disparity observed in our study appeared in the initial defendant population (83% Black versus 12% white) rather than in bail outcomes (63% Black HWOB versus 56% white HWOB).<sup>144</sup> While the onus for the racial disparity of arrestees entering the pretrial system may not fall on the shoulders of judges and other pretrial actors, this cannot absolve those actors of responsibility for failing to confront this structural inequality. If pretrial actors unthinkingly accept racial imbalance of pretrial defendants as given, then pretrial actors will unthinkingly reproduce and exacerbate inequality.<sup>145</sup> Premises need to be questioned. Connections between subsystems in the larger system need to be understood.

One way to visualize connections involves geo-spatial mapping, a process wherein address data is converted into latitude and longitude coordinates and then overlaid onto open-source images of a given geographical area.<sup>146</sup> Figure 7 below was created by plotting Baltimore City-residing defendants based on addresses taken from public court records onto maps of Baltimore.<sup>147</sup>

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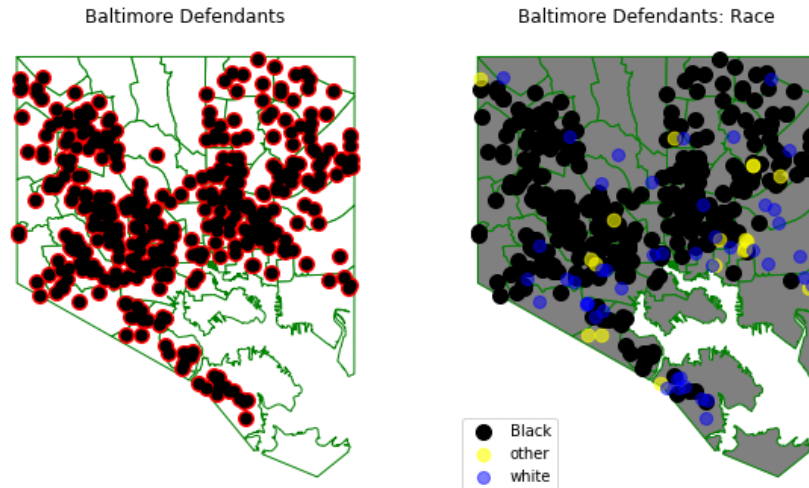
144. See Jupyter Notebook, *supra* note 5, ¶¶ 99–101.

145. Here it bears emphasis that the pretrial system did indeed exacerbate inequality. Because Black people were arrested *and* detained at higher rates, this resulted in 85% of all people held without bail being Black. *Id.* ¶ 102. Only 11% of those suffering pretrial detention were white. *Id.* In a city that is 27% white and where so much wealth and power is concentrated in white hands, the very low percentage of detainees who were white speaks volumes. *See id.*

146. Prior to the advent of Google Maps, this process was arcane and expensive. Now, however, all it takes is a little computer coding know-how to create geo-spatial data displays. Even law professors can do it! *See generally id.*

147. Of the 509 defendants in the study, 429 had Baltimore City addresses (83%). *See id.* ¶¶ 104–05. The racial breakdown is similar to the larger study—85% Black (362), 11% white (45) and 4% other (18). *See id.* ¶¶ 106–10.

**Figure 7**  
**Residences of Baltimore Defendants by Race<sup>148</sup>**



The pattern of defendants' geo-spatial distribution immediately evokes the Black butterfly. As noted in the Introduction, Dr. Lawrence Brown famously coined the Black butterfly term to describe the pattern of hypersegregation in Baltimore.<sup>149</sup> In its simplest sense, the butterfly shape shows where Black Baltimoreans live. The butterfly, however, is “more than a demographic description;” it signifies a deeper “political, economic, and sociocultural” reality.<sup>150</sup> For the neighborhoods where Black residents are geographically clustered represent the same neighborhoods where “capital is denied and structural disadvantages have accumulated due to the lack of capital access.”<sup>151</sup> Critically, the Black butterfly has a counterpart—the “white L,” which describes both where white Baltimoreans live and “where access to capital is most readily available and structural advantages have

148. *See id.* ¶ 103.

149. *See generally* BROWN, BLACK BUTTERFLY, *supra* note 22. Brown specifically builds on Douglas Massey and Jonathan Tannen’s work, which classifies as “hypersegregated” those metropolitan areas where African Americans are segregated along at least four of five dimensions: (1) *unevenness* (the degree to which Blacks and whites are unevenly distributed across neighborhoods); (2) *isolation* (the extent to which African Americans live in predominantly Black neighborhoods); (3) *clustering* (the degree to which neighborhoods inhabited by African Americans are clustered together in space); (4) *concentration* (the relative amount of physical space occupied by African Americans within a given metropolitan environment; and (5) *centralization* (the degree to which Blacks reside near the center of a metropolitan area). *Id.* at 12 n.18 (citing Massey & Tannen, *supra* note 22, at 1025–34).

150. *See id.* at 9.

151. *Id.*

accrued.”<sup>152</sup> The Black butterfly thus represents the blueprint of a system that confers advantage to some and metes out disadvantage to others. It evokes a deeper pattern of inequality that cuts across economic, political, and other socio-cultural systems. The Black butterfly is systemic, institutional, and structural.

Is the distribution of study defendants connected to this profound racial and geographic concept? Or is the butterfly-like resemblance of images in Figure 7 just a visual coincidence? Such questions find answers in an extraordinary and authoritative data source. For over twenty years, the Baltimore Neighborhood Indicators Alliance (“BNIA”) has collected and geospatially coded Baltimore citywide data into 55 Community Statistical Areas (“CSAs”).<sup>153</sup> CSAs provide a rich and consistent lens through which to view and compare “vital signs” of Baltimore’s neighborhoods.<sup>154</sup>

One of the key indicators tracked by BNIA is the percentage of a neighborhood that is African American (“PAA”).<sup>155</sup> Figure 8 below is a “choropleth” display of the percentage of the PAA indicator based on 2020 Census data.<sup>156</sup> Choropleths, commonly known as “heat maps,” show how much of a particular variable exists in an area using darker or lighter color shades. In the case of Figure 8, the darker purple color indicates a high concentration of African Americans in a neighborhood and a light-yellow color indicates the opposite. The darkest purple color on the maps is in the Greater Rosemont neighborhood, which is 94% Black. The lightest yellow color is in the Canton neighborhood, which is 4% Black. The segregation shown by this figure is thus extreme—the extremity shows hyper-segregation in Baltimore and the basic butterfly pattern.

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152. *Id.* at 14.

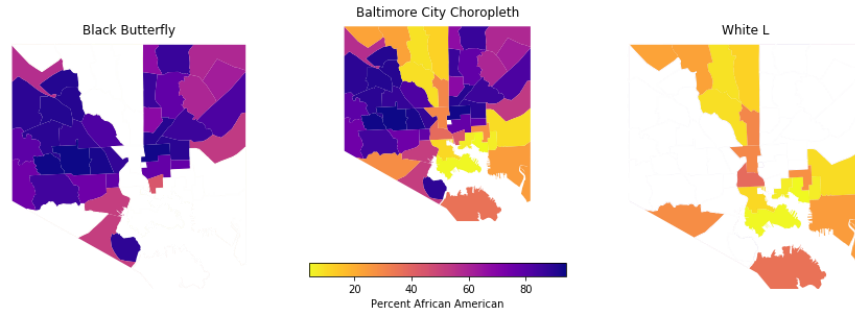
153. See *Vital Signs: Community Statistical Areas*, BALT. NEIGHBORHOOD INDICATORS ALL., <https://bniajfi.org/communities/> (last visited Nov. 10, 2022) (“BNIA-JFI uses the 55 Community Statistical Areas (CSAs) to present a wide range of data from multiple sources as well as providing data for Baltimore City in a consistent way over time. Clustering neighborhoods into CSAs was necessary since most of the 270+ neighborhoods in Baltimore City do not have boundaries that fall along census tracts. As the city changes, Baltimore residents may shift their neighborhood’s boundaries or even change its name. Neighborhood lines often do not fall along CSA boundaries but CSAs are a consistent representation of the conditions occurring within particular neighborhoods.”).

154. Though BNIA data has long been available, its key indicators had not previously been mapped side-by-side to show the persistent pattern. In early stages of this project, Colin Starger wrote a computer program to read BNIA’s CSA data and generate graphical images and mathematical matrices represented how inequalities are distributed between Baltimore neighborhoods. This work was presented at BNIA’s 2021 “Data Week.” See Donte Kirby, *So You Want to Be a Software Developer? How to Use Open Data with Your Code*, TECHNICAL.LY (July 23, 2021, 2:43 PM), <https://technical.ly/baltimore/2021/07/23/open-data-code-bnia/> (analyzing BNIA Data Week presentation by Starger explaining Black butterfly stack and providing links to underlying sources).

155. Though this Article generally employs the term “Black,” we present the BNIA data and indicators using BNIA’s own terms. In this case, BNIA employs the term “African American.”

156. See Jupyter Notebook, *supra* note 5, ¶¶ 111–12.

**Figure 8**  
**Basic Butterfly Pattern by PAA Indicator**



Going further, the relationship between the butterfly pattern seen by mapping the PAA indicator and study defendants can be visualized and represented mathematically. Figure 9 below shows the distribution of all Baltimore City study defendants overlaid on the Figure 8 choropleth. It is immediately obvious that study defendants largely reside in Black butterfly neighborhoods rather than white L neighborhoods. A more precise mathematical expression of this same relationship is *correlation*.<sup>157</sup> Specifically, the correlation between PAA neighborhoods and all study Baltimore defendant neighborhoods can be expressed by a single number, known as a correlation coefficient. In this case, the correlation coefficient is .62.<sup>158</sup>

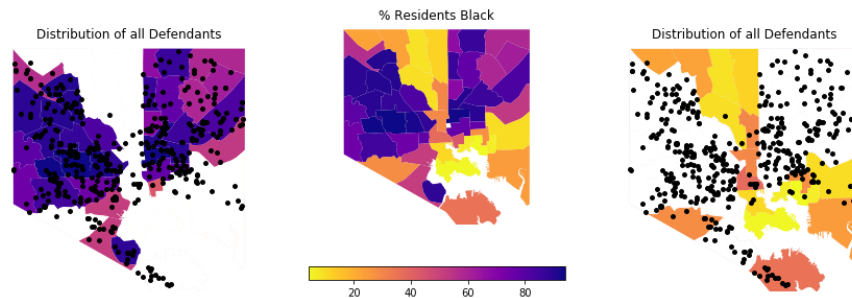
157. For an excellent introductory discussion of correlation, see generally CHARLES WHEELAN, *NAKED STATISTICS: STRIPPING THE DREAD FROM THE DATA* 58–67 (2013). As Wheelan explains:

[T]he power of correlation as a statistical tool is that we can encapsulate an association between two variables in a single descriptive statistic: the correlation coefficient. The correlation coefficient has two fabulously attractive characteristics. First . . . it is a single number ranging from -1 to 1. A correlation of 1, often described as perfect correlation, means that every change in one variable is associated with an equivalent change in the other variable in the same direction . . . . The second attractive feature of the correlation coefficient is that it has no units attached to it. We can [for example] calculate the correlation between height and weight—even though height is measured in inches and weight is measured in pounds.

*Id.* at 60.

158. See Jupyter Notebook, *supra* note 5, ¶ 116. We used the “Pearson” correlation (other types of correlation include “Kendall” and “Spearman”). See *pandas.DataFrame.corr*, PANDAS <https://pandas.pydata.org/docs/reference/api/pandas.DataFrame.corr.html> (last visited June 23, 2022) (documenting Pandas code for calculating correlations).

**Figure 9**  
**All Defendants and the Black Butterfly<sup>159</sup>**



What does a correlation coefficient of .62 mean? Correlation coefficients can be thought of as a range from 0 to 1, where 0 is “no correlation” and 1 is “perfect correlation.”<sup>160</sup> Any correlation coefficient above .5 is considered “high correlation.”<sup>161</sup> Thus, a .62 correlation coefficient between PAA neighborhoods and all study Baltimore defendant neighborhoods is high. This high correlation, in turn, suggests that the butterfly pattern seen in the defendant pretrial population distribution is not the product of coincidence, visual or otherwise.

Further evidence of the non-coincidental nature of the relationship between the Black butterfly and pretrial defendants can be seen in Figure 10, which illustrates the distribution of just Black defendants in the study. When refined this way, the correlation coefficient rises from .62 to .73.<sup>162</sup> In other words, the correlation is even higher between Black defendants in the study and Black neighborhoods. While the fact that Black defendants in our study came from Black neighborhoods is itself unsurprising, the increase in degree of correlation usefully demonstrates both how confidence in propositions asserted can rise to a higher correlation level and how multiple correlations work to negate the possibility that an asserted relationship merely derives from chance.<sup>163</sup>

159. See Jupyter Notebook, *supra* note 5, ¶ 117, for the data and code used to produce Figure 9.

160. Correlations technically range from -1 to 1, where negative numbers indicate “negative correlation” (when one variable goes up, the other variable goes down). Any number less than -.5 is considered a high negative correlation,

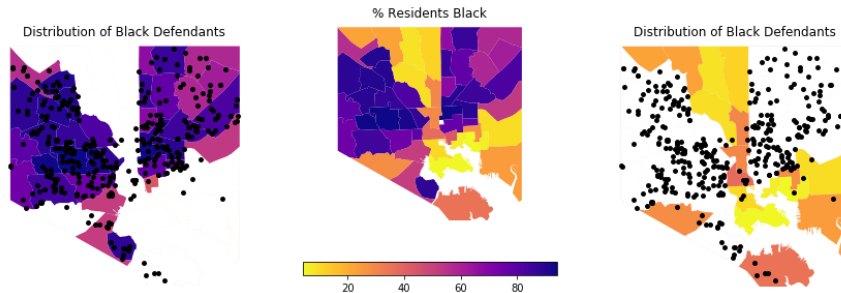
161. See *Pearson’s Correlation Coefficient*, STATS. SOLS., <https://www.statisticssolutions.com/free-resources/directory-of-statistical-analyses/pearsons-correlation-coefficient/> (last visited Nov. 10, 2022). Coefficients between .3 and .49 are considered “moderate”; less than .3 is “low” correlation. *Id.*

162. See Jupyter Notebook, *supra* note 5, ¶¶ 116, 118.

163. Concern that an observed correlation results from chance undergirds the oft-repeated truism that *correlation is not causation*. Without question, we run the risk of being “fooled by randomness” if we discount the possibility observed mathematical relationships between two variables are coincidental. See VIKTOR MAYER-SCHÖNBERGER & KENNETH CUKIER, *BIG DATA* 53 (2014)



**Figure 10**  
**Black Defendants and the Black Butterfly<sup>164</sup>**



This brings us to a bottom line. The proposition now asserted is that the correlation between study defendants and the Black butterfly demonstrates how *both patterns ultimately derive from the same underlying system*. No matter how one chooses to label this underlying system—really a set of overlapping and intersecting systems—it reflects the operation of structures and institutions that have long reproduced inequality in predictable ways. The basic pattern of the Black butterfly and the pattern of study defendants echo

(attributing the phrase “fooled by randomness” to empiricist Nassim Nicholas Taleb). Yet as the number of variables and datapoints observed increases, the probability that observed relationships result from pure chance decreases. *See id.* at 71 (exploring the Chris Anderson quote: “With enough data, the numbers speak for themselves. Petabytes allow us to say: ‘Correlation is enough.’”). Correlation in these circumstances can be trusted to reveal precisely *what* is happening in the world (albeit not neatly *why*). The BNIA-CSA data presented in the next Part exemplify this point. The asserted relationship between percentages of African Americans in city neighborhoods and markers of inequality derive from multiple variables that are all highly correlated to each other. The probability that the observed patterns derive from coincidence or randomness in this context approach zero. This is especially true given what we know about American history from slavery to the Civil War and from Reconstruction to redlining. *See generally* DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* (2021); BROWN, *BLACK BUTTERFLY*, *supra* note 22; MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (10th anniversary ed., 2020) (connecting slavery and the Jim Crow era to contemporary mass incarceration and the criminal legal system as instruments of a racial caste system); ANTERO PIETILA, *NOT IN MY NEIGHBORHOOD: HOW BIGOTRY SHAPED A GREAT AMERICAN CITY* (2010) (examining the ongoing effects of real estate discrimination in American cities, particularly in Baltimore); Peggy Cooper Davis, Anderson Francois & Colin Starger, *The Persistence of the Confederate Narrative*, 84 TENN. L. REV. 301 (2017) (analyzing the relationship between assertions of civil rights and calls for the protection of local autonomy and control and the jurisprudential effects); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (10th anniversary ed., 2006) (analyzing the racial wealth gap in America and the failure of public policies to address the problem). In short, the links between class, race, and persistent inequality shown by the data are undeniable even if the precise mechanics of causation remain elusive.

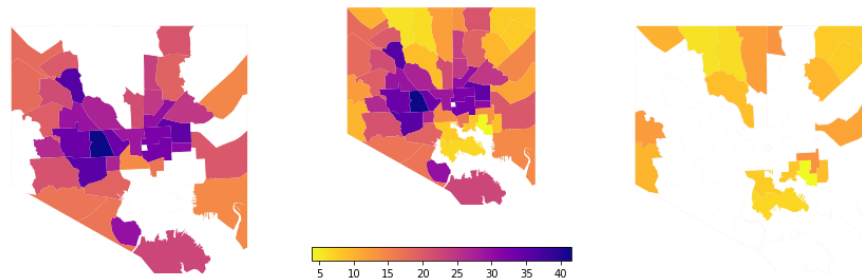
164. *See* Jupyter Notebook, *supra* note 5, ¶ 119.

the replicating pattern of structural racism in Baltimore. It's in the DNA of the city.

### III. THE DNA OF STRUCTURAL RACISM IN BALTIMORE

This Part dives deeper into the DNA metaphor using BNIA data and geo-spatial mapping. The Black butterfly pattern recurs in other economic, social, and cultural indicators collected by BNIA and made publicly available. Although these indicators do not on the surface track criminal justice concerns, the point is that any attempt to understand or reform the criminal legal system without consciousness of these non-criminal indicators will inevitably end in familiar failure. It is simply not possible to silo criminal justice away from “non-criminal” economic, social, and cultural systems. Dots need to be connected. At the same time, exclusive reliance on abstract data risks obscuring the day-to-day human impact of the system critiqued. Put differently, the defendants in our study are not just dots on a map. They are real people; many suffered real injustice. To keep the troubling reality of their individual experiences ever present, this Part therefore also intersperses numerical analysis with storytelling.

**Figure 11**  
**Percent of Population Using Public Transportation to Travel to Work**



This Part's inquiry begins with Figure 11, above, which shows a choropleth for BNIA's public transportation indicator.<sup>165</sup> As its name suggests, the public transportation indicator shows the percentage of neighborhood residents who take public transportation to work. The neighborhood with the highest percentage of residents taking public transportation is Sandtown-Winchester/Harlem Park (42%) and the lowest is Canton (4%).<sup>166</sup>

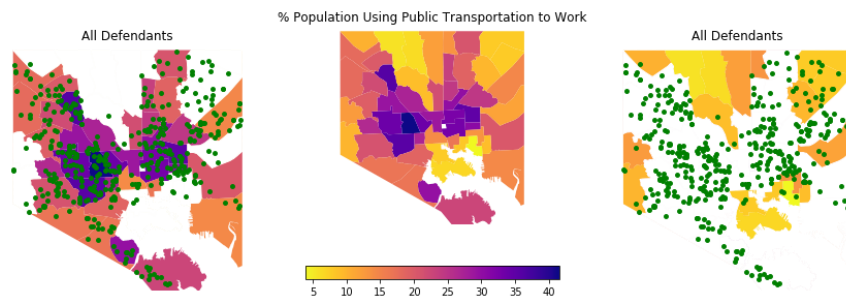
165. See Jupyter Notebook, *supra* note 5, ¶ 123. The indicator pubtran19 is based on 2019 data.

166. See *id.* ¶ 124. The Sandtown-Winchester neighborhood was where Freddie Gray lived. Of course, Freddie Gray's death in police custody led to widespread protests and “unrest” in Baltimore.

Note that although the shapes of the leftmost and rightmost maps strongly resemble the Black butterfly and white L, they do not precisely match. This is the result of a design choice to help contrast indicator data. The leftmost map always shows the thirty-seven neighborhoods with highest indicator values whereas the rightmost map shows the eighteen neighborhoods with the lowest indicator values (a two-thirds to one-third split across fifty-five neighborhoods). Thus, the variation seen between the Black butterfly and the public transportation maps is because the two-thirds of neighborhoods with the highest percentage of African American residents do not exactly align with the two-thirds of neighborhoods with the highest percentage of residents who take public transportation. Though not the same, it bears emphasis that the percentage of African American residents and public transportation indicators are highly correlated. Indeed, their correlation coefficient is .69.<sup>167</sup> As a reminder, any number higher than .5 signifies high correlation, with 1 being “perfect” correlation.

Given that the public transportation indicator is highly correlated to the Black butterfly, and that the Black butterfly is highly correlated to study defendants, it seems a safe bet that public transportation would be highly correlated to study defendants. And indeed, it is. The all-Baltimore defendant/public transportation coefficient is .62.<sup>168</sup> Figure 12 below visualizes this correlation.

**Figure 12**  
**All Defendants and Public Transportation**



Putting math and pictures to the side, does public transportation have anything to do with the pretrial legal system? Indirectly and directly, it does.

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The language used to describe those events was hotly contested at the time, though now it is best remembered as “the Baltimore uprising.” For more on Freddie Gray and the uprising, see Justine Barron, *Freddie Gray, Five Years Later*, APPEAL (Apr. 23, 2020), <https://theappeal.org/freddie-gray-five-years-later/>.

167. See Jupyter Notebook, *supra* note 5, ¶ 125.

168. *Id.* ¶ 126. Unsurprisingly, the correlation between public transportation and Black defendants in the study is even higher: .66. *Id.* ¶ 127.

Indirectly, needing to take public transportation generally relates to poverty and class, and poverty and class (as explored immediately below<sup>169</sup>) has everything to do with the criminal legal system. Directly, the fact that many Baltimore criminal defendants rely highly on public transportation means that getting to and from court dates can prove challenging. Due to a long and profoundly anti-Black history, public transportation in Baltimore is slow, sparse, and unreliable.<sup>170</sup> When court dates are missed because of unreliable transportation, warrants issue and criminal records grow longer.<sup>171</sup> Defendants with missed court dates are more likely to be denied pretrial release. Public transportation woes thus form part of the vicious cycles of structural racism.

Turning now to the question of poverty and class, consider the BNIA indicator relating to the median household income of Baltimore's neighborhoods. This indicator is highly correlated to the two variables already discussed: percentage of African American residents (correlation coefficient of  $-.76$ ) and public transportation (correlation coefficient of  $-.77$ ).<sup>172</sup> Median household income is also highly correlated to all Baltimore City study defendants ( $-.57$ ).<sup>173</sup> Here the raw numbers speak volumes about the depth of Baltimore's inequality. The median household income of the richest, predominantly white neighborhood per this indicator (Canton) is \$128,460 per year.<sup>174</sup> On the other end of the scale, the median household income of the disproportionately Black Upton/Druid Heights is \$21,319 per year.<sup>175</sup> This is a six-fold difference.

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169. See *infra* text accompanying notes 172–175.

170. Professor Sheryll Cashin pointedly recounts this troubling history and its relationship to Baltimore's segregation. See SHERRYL CASHIN, *WHITE SPACE, BLACK HOOD: OPPORTUNITY HOARDING AND SEGREGATION IN THE AGE OF INEQUALITY* 21–33 (2021).

171. In our experience, we have even seen judges issue FTA warrants when defendants arrived late and failed to answer a 9:15 AM calendar call. This seemed unnecessarily harsh and failed to take into account transportation issues.

172. See Jupyter Notebook, *supra* note 5, ¶ 129. Note that the negative coefficient numbers here signify negative correlation—as median income goes up, the percentage of residents who are African American or take public transportation goes down. Negative correlation works in exactly the same way as positive correlation.

173. *Id.*

174. *Id.* ¶ 130.

175. *Id.*

**Figure 13**  
**Median Household Income and All Defendants**

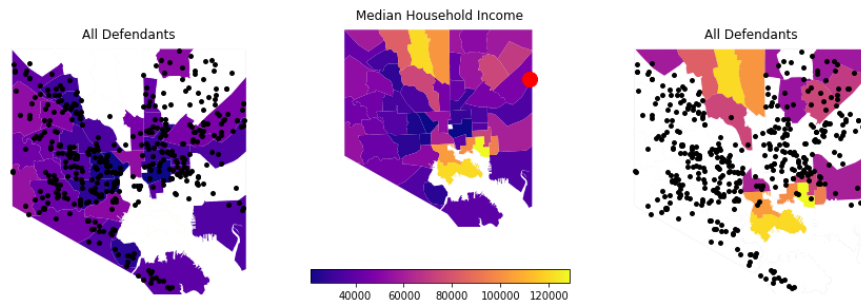


Figure 13 visualizes the median household income choropleth with Baltimore study defendants overlaid. This graphic also features a red dot in the middle map. This represents the approximate home address of Herbert Smath, a Black man charged with a lesser misdemeanor of violating a protective order, who appeared before Judge Michael Studdard on July 1, 2020. Mr. Smath hailed from the 83% Black, Cedonia/Frankford neighborhood on the east side of Baltimore, a neighborhood with a median annual household income of \$47,258.<sup>176</sup>

*When Mr. Smath appeared before Judge Studdard, he admitted to violating a peace order taken out by his foster mother. However, even Pretrial Services stipulated that it was unclear if the peace order was a temporary one or final.<sup>177</sup> According to Mr. Smath's defense counsel, since his client's birth mother passed away earlier that year, he had struggled with housing and went to his foster mother's home to charge his phone.<sup>178</sup> Despite these apparent exigent circumstances and the decidedly low-level nature of the charge that carried a maximum ninety-day sentence (sixty-two days with good time credit), Judge Studdard ordered pretrial detention for Mr. Smath. Maddeningly, Mr. Smath then remained in jail for eighty-five days—more than three weeks beyond the maximum sentence—until the charge against him was dismissed on September 24th.<sup>179</sup>*

During the entire time he languished in jail, the law theoretically presumed Mr. Smath innocent. This theoretical presumption was then ignored for nearly three months. Given the over-the-maximum sentence for

176. *Id.* ¶¶ 131–34; Audiotope: Bail Review Hearing, held by the District Court of Maryland for Baltimore City, Judge Michael S. Studdard (July 1, 2020) (on file with authors) [hereinafter Judge Studdard Audiotope] (supporting entire narrative that follows). Herbert Smath is a pseudonym. Jupyter Notebook, *supra* note 5, ¶¶ 133–34 (defendant number 268; case number 0B02420565).

177. Judge Studdard Audiotope, *supra* note 176.

178. *Id.*

179. See Jupyter Notebook, *supra* note 5, ¶ 135.

the charge he faced, it is hard to imagine any scenario could have justified the initial no-bail order. It is perhaps harder still to imagine what it felt like for Mr. Smath to spend eighty-five days in jail during the early uncertain time of the COVID pandemic, accused of doing minor things that seemed necessary to deal with life struggles, only to have all charges unceremoniously dropped. Eighty-five days behind bars for no good reason. This would not likely have happened to an affluent white person. The same system that permits a poor Black Cedonia/Frankford resident to be detained unnecessarily for eighty-five days, would surely not allow an affluent white Roland Park resident to experience the same fate. This is the meaning of white privilege.

To review, this Part has so far used three BNIA indicators—*paa20* (percentage of African American residents in 2020), *pubtran19* (percentage of residents taking public transportation to work), and *mhhi19* (median annual household income)—to measure the production and reproduction of inequality in Baltimore. Not only do these indicators all show high correlation to study defendants, they also show a high correlation to each other. The interrelated nature of the indicator correlations is shown in Figure 14.

**Figure 14**  
**Correlation Matrix (*paa*, *pubtran*, *mhhi*)<sup>180</sup>**

|                  | <b>paa20</b> | <b>pubtran19</b> | <b>mhhi19</b> | <b>All Defs</b> |
|------------------|--------------|------------------|---------------|-----------------|
| <b>paa20</b>     | 1.0          | 0.69             | -0.76         | 0.62            |
| <b>pubtran19</b> | 0.69         | 1.0              | -0.77         | 0.62            |
| <b>mhhi19</b>    | -0.76        | -0.77            | 1.0           | -0.57           |
| <b>All Defs</b>  | 0.62         | 0.62             | -0.57         | 1.0             |

That these indicators in Figure 14 “move together” suggest that they express different aspects of the same system. This hints at “the system” of *systemic* racism. Of course, far more than three indicators point towards this system. Using the same matrix technique as above, three additional indicators can quickly be introduced. These additional indicators similarly quantify inequality between neighborhoods. As seen in Figure 15, they are *tanf19* (percentage of families in neighborhoods receiving Temporary Assistance for Needy Families), *nohhint* (percentage of households with no home internet), and *voted18* (percentage of the over-18 population in a neighborhood who voted in the 2018 gubernatorial general election).

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180. *Id.* ¶ 136.

**Figure 15**  
**Correlation Matrix (tanf, nohhint, voted)<sup>181</sup>**

|                  | <b>tanf19</b> | <b>nohhint19</b> | <b>voted18</b> | <b>All Defs</b> |
|------------------|---------------|------------------|----------------|-----------------|
| <b>tanf19</b>    | 1.0           | 0.72             | -0.81          | 0.58            |
| <b>nohhint19</b> | 0.72          | 1.0              | -0.79          | 0.61            |
| <b>voted18</b>   | -0.81         | -0.79            | 1.0            | -0.6            |
| <b>All Defs</b>  | 0.58          | 0.61             | -0.6           | 1.0             |

Once again, the indicators are all interrelated. Neighborhoods with relatively high percentages of families receiving federal TANF assistance also have relatively high percentages of households with no home internet.<sup>182</sup> Both these indicators, in turn, have a strong negative correlation to voting—residents of neighborhoods that lack home internet and require TANF at higher rents vote less.<sup>183</sup> And all three indicators correlate with the defendants in our study. The poverty expressed by TANF, the disinvestment expressed by lack of home internet, and the disempowerment expressed by low voting rates are related to who ends up as a criminal defendant in Baltimore City. This is no coincidence.

By now, the DNA-like replicating nature of inequality in Baltimore should be apparent. It bears repeating that BNIA tracks many more indicators of race and class inequality than introduced already. Yet rather than overwhelm with endless detail, let us instead consider a single final revealing indicator—life expectancy. Figure 16 below shows the life expectancy choropleth with study defendants overlaid. The correlation coefficient between life expectancy and study defendant neighborhoods is high and negative: -.65.<sup>184</sup> This means neighborhoods with high numbers of criminal defendants have low life expectancy. An even higher negative correlation exists between Black butterfly neighborhoods and life expectancy (-.68).<sup>185</sup> The raw inequality is painful. Residents in the Downtown/Seton Hill neighborhood can expect to live twenty-two years fewer than residents in Cross-Country Cheswolde—an average life expectancy of sixty-three years versus eighty-five years.<sup>186</sup> When residents of one neighborhood live twenty-

181. *Id.* ¶ 137.

182. *Id.* ¶¶ 137–39. The neighborhood with the highest TANF indicator is Cherry Hill (19%) and lowest is Canton (<1%). *Id.* ¶ 138. The highest rate of no home internet is 39% (Sandtown-Winchester) and lowest is 4% (Greater Roland Park/Poplar Hill). *Id.*

183. *Id.* ¶ 137. The neighborhood with lowest percentages of residents voting is Brooklyn/Curtis Bay/Hawkins Point (28%). *Id.* ¶ 138. Highest is Greater Roland Park/Poplar Hill (71%). *Id.*

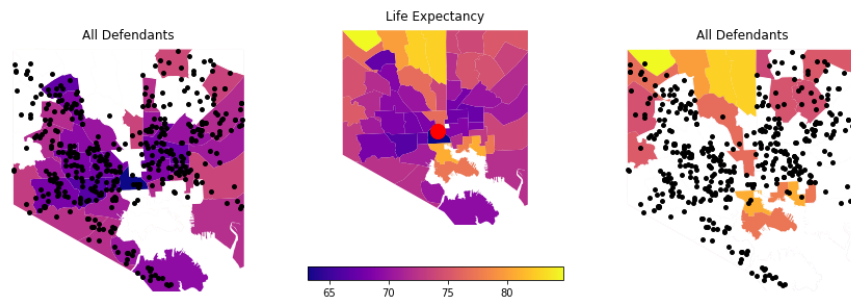
184. *Id.* ¶ 141.

185. *Id.*

186. *Id.* ¶ 140.

two years fewer than residents of another neighborhood just miles away, it is like structural robbery of an entire generation.

**Figure 16**  
**Life Expectancy and All Defendants**



To keep the human experience underlying these grim statistics present, consider one last story from the study. *The red dot in the middle of the center map above represents the residence of Dionicio Wordrick, a 25-year-old Black man who appeared before Judge Diana Smith on June 10, 2020. Mr. Wordrick faced non-violent felony and misdemeanor charges of burglary in the fourth degree and malicious destruction of property after he got into an argument with the mother of his child.<sup>187</sup> After buzzing him inside her building for an agreed-to visit, the mother asked for money before she would allow him to see his child. To avoid an argument, Mr. Wordrick left. According to his defense lawyer, the mother then slammed the door behind him, causing slight damage to the door. The mother nonetheless instigated charges against Mr. Wordrick based on the door damage. Ordering HWOB, Judge Smith referred to a pending non-violent case with a similar property charge (with a different complaining witness) and to the fact of a minor child being present during the incident.<sup>188</sup> Judge Smith's HWOB order resulted in Mr. Wordrick remaining incarcerated for 106 days before learning that the charges against him would be dismissed.<sup>189</sup>*

*Even if valid, the allegations against Mr. Wordrick hardly justified detention. At the end of the day, only the door was alleged to have suffered damage. Though Mr. Wordrick had a minor criminal history, he lived in an over-surveilled, under-resourced neighborhood where catching a criminal*

187. Judge Smith Audiotape, *supra* note 84 (supporting entire narrative that follows). Dionicio Wordrick is a pseudonym. See Jupyter Notebook, *supra* note 5, ¶¶ 140–44 (defendant number 82; case number 2B02416766).

188. Judge Smith Audiotape, *supra* note 84.

189. See Jupyter Notebook, *supra* note 5, ¶ 145.



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*case is as easy as catching a cold or COVID-19.*<sup>190</sup> *But Mr. Wordrick's life and time was not highly valued by the system. His story was not heard with sympathy or as anything other than one in an endless chain of hard-luck excuses. Yet the system's initial judgment was wrong. The always-flimsy charges against Mr. Wordrick were fully dropped on September 24th after three-and-a-half months in jail awaiting trial.*

Mr. Wordrick's story is typical in that it is full of contested details and particular complications. Yet all of the messiness should not obscure the injustice suffered. Nor should it obscure that Mr. Wordrick's injustice is a typical injustice in Baltimore. It is typical that messy and contested facts are viewed as evidence in favor of detaining a presumptively innocent person. Even more critically, such typical injustices are not shared equally across the city. Rather, they disproportionately fall on communities that suffer other inequalities. And that suffering is necessary, under structural racism's twisted logic, to maintain the peace, tranquility, and prosperity of privileged spaces.<sup>191</sup>

#### IV. CODA AND CONCLUSION

This Article represents a perspective-altering journey for its authors. As noted in the Introduction, we began this project somewhat in thrall of the virus metaphor for structural racism. We were optimistic that a focused, pre-trial-specific reform could be successful in confronting the disease of inequality, and that a focused, pre-trial specific study was the appropriate way to bring our years of domain expertise to the collective healing effort. We hoped that the COVID crisis combined with the post-George Floyd national reckoning on structural racism might finally usher in lasting and meaningful reform.

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190. *Id.*; cf. *Exploring the Impacts of COVID-19 on Baltimore's Neighborhoods*, BALT. NEIGHBORHOOD INDICATORS ALL., <https://coronavirus-bniajfi.hub.arcgis.com/> (last visited Sept. 23, 2022) (providing a choropleth map indicating the prevalence of COVID-19 in Baltimore City and County by neighborhood); *Maryland COVID-19 Data Dashboard*, MD. DEP'T OF HEALTH, <https://coronavirus.maryland.gov/> (last visited Sept. 23, 2022) (documenting daily reports of COVID-19 cases in Maryland with a break-down by county and demographics, and indicating that Black Marylanders accounted for upwards of 30% of all new cases and deaths despite being 12.4% of the state population); *Coronavirus 2019 Disease (COVID-19)*, BALT. CITY HEALTH DEP'T (Mar. 24, 2022), <https://coronavirus.baltimorecity.gov/> (documenting daily reports of COVID-19 cases in Baltimore with a break-down by neighborhood and demographics, and indicating that Black Baltimoreans accounted for approximately 60% of all new cases and upwards of 70% of deaths despite being 57% of the city population).

191. This point is critical. As Professor Sheryll Cashin has meticulously documented, "concentrated Black poverty facilitates poverty-free affluent white space . . . . White space would not exist without the hood and government at all levels created and still reifies this racialized residential order." CASHIN, *supra* note 170, at 6; *see also id.* at 7 ("While state and private actors plunder, extract, surveil, and contain in the hood, they overinvest in and protect white space."). The inequality of the system makes white privilege—which can also be class privilege—possible.

Following the June–July 2020 data collection, we devoted the 2020–2021 school year to tracking cases, analyzing data, and offering preliminary public feedback in op-ed articles and faculty fora.<sup>192</sup> During this period, it became apparent our optimism had been misplaced. Very little positive change had occurred and certainly nothing on order of the loftier promises made during the post-Floyd reckoning. We began to question why we had ever imagined otherwise and examined our assumptions.

Searching for new ways to comprehend our results, we mapped defendant data geo-spatially. When the Black butterfly unfolded its wings in our maps, it changed our direction and perspective. The butterfly prompted us to “step out of our lane” and consider structural racism more broadly. Inspired by Dr. Brown’s analysis of the distributive patterns of advantage and disadvantage in Baltimore City, we sought out BNIA data regarding the inextricable relationship between institutions of “criminal justice” and other institutions meting out economic, political, and social-cultural oppression and opportunity.<sup>193</sup> The deeper repeating patterns of inequality provided the wider lens through which we could view the narrow failure of pretrial reform.

Meanwhile, the pandemic raged on, killing hundreds of thousands. Vaccines were developed and the nation started to emerge from lockdown. After suspending jury trials in April 2020, Baltimore courts slowly resumed trials more than one year later in May 2021.<sup>194</sup> That same month, we obtained permission to take another look at Baltimore’s judicial bail review hearings. Returning to Wabash Avenue Courtroom Four would function as a Coda to our original study.

By the summer of 2021, we were no longer optimistic that judges might have softened the 61.5% detention rate observed in the prior summer of 2020. Attending 112 bail hearings conducted by ten different district court judges

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192. See, e.g., Doug Colbert & Colin Starger, Commentary, *Bail Injustice in the Time of COVID-19*, BALT. SUN (Sept. 7, 2020, 7:00 AM), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0906-bail-reform-20200907-crgclw6s4jhavmmdks4ebniqm-story.html>; Doug Colbert & Colin Starger, Commentary, *Detention Fees Unfairly Burden Poor People*, BALT. SUN (Jan. 29, 2021, 6:24 AM), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0129-home-detention-fees-20210129-e4v7h723tndklc52gpzbd62z4-story.html>.

193. See *supra* note 22.

194. On March 12, 2020, then-Chief Judge Barbera suspended jury trials due to the COVID-19 pandemic. *In the Court of Appeals of Maryland Administrative Order on the Statewide Suspension of Jury Trials*, MD. JUDICIARY (March 12, 2020), <https://www.courts.state.md.us/sites/default/files/admin-orders-archive/20200312suspensionofjurytrials.pdf>. On April 26, 2021, then-Chief Judge Barbera resumed jury trials. *In the Court of Appeals of Maryland Amended Administrative Order on Expanding Statewide Judiciary Operations in Light of the COVID-19 Emergency*, MD. JUDICIARY (Feb. 16, 2021), <https://mdcourts.gov/sites/default/files/admin-orders-archive/20210216amendedorderexpandingstatewidejudiciaryoperationsinlightofthecovid19emergency.pdf>. For over a year, jailed defendants seeking to contest their criminal charges at a jury trial could only wait in line in their caged cells, while courts systematically postponed cases of those unwilling to “cop a plea.”

over ten days in May through June 2021, we discovered that indeed the situation had only worsened.<sup>195</sup> These results bolstered our confidence that the harshness we had seen in 2020 was not aberrational but reflected a presumption of incarceration for the accused. The detention rate in 2021 had now increased to 71%; a mere 29% of defendants regained liberty at bail review hearings.<sup>196</sup> In raw human numbers, this means that a paltry thirty-two people were granted pretrial freedom while the remaining eighty souls remained in jail for exceedingly lengthy periods during COVID. This result was as alarming as it was predictable. Baltimore City judges ordered nearly three of four presumed-innocent people accused of crime to stay in jail until their cases were resolved.<sup>197</sup>

Looking closer, judges released only 16 of the 112 pretrial defendants—real people with real names and stories—on personal recognizance,<sup>198</sup> a clear sign that judges trusted few of those ensnared in the criminal legal system to return to court on their own. The issue of trust might also be labelled implicit bias, for the data revealed a substantial difference in judges’ treatment of Black and white detainees. Judges denied bail to 75% of Black defendants while holding 62% of white defendants without bail.<sup>199</sup> And once again, the bail system only compounded the inequality in policing and prosecution that brought people to court in the first place—only 8% of defendants were white, while fully 85% were Black.<sup>200</sup> One year later, rank inequality persisted. Structures, institutions, and systems had not meaningfully changed.

The DNA metaphor presented in the Article emphasizes structural racism’s apparent tendency to replicate and reproduce inequality across

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195. See Jupyter Notebook, *supra* note 5, ¶¶ 148–52. We attended hearings May 18 to May 21, May 24 to May 28, and June 1. *Id.* ¶ 149.

196. *Id.* ¶ 153. Compared to our summer 2020 study, a higher percentage of 2021 judges embraced a tougher, lock-'em-up approach. At 2020 bail reviews, six of sixteen (38%) judges held more than 70% of defendants without bail (“HWOB”). *Id.* ¶¶ 153, 162–63. One year later, this minority perspective appeared the dominant position among the city’s district court bench, as seven of ten judges (70%) denied release to 70% of detainees or more. *Id.* ¶¶ 153, 164–66. HWOB simply ruled the day among these judges. Even when a defendant faced non-violent charges and Pretrial or the prosecution recommended release, liberty was denied. Some judges refused to even consider “less onerous” options like ROR with supervision, money bail, or home detention. They also continued to decline to review preset bails or detention orders that docket judges had ordered against absent defendants without considering the reasons underlying why defendants had failed to appear.

197. The time to trial had slowly started to decrease after courts re-opened. Though the “we want a jury trial” line inched forward as courts began holding trials, it moved slowly and labored under a tremendous backlog.

198. See Jupyter Notebook, *supra* note 5, ¶ 153. Moreover, judges refused to turn to other non-financial options to compensate for their under-use of recognizance bonds: Only fourteen people received an unsecured bond (13%). *Id.* Beyond this, just one person regained liberty by posting a money bond and one other person received ROR/home detention. *Id.*

199. *Id.* ¶¶ 155–56.

200. *Id.* ¶ 157.

institutions and across time.<sup>201</sup> We see the metaphor as a useful way to challenge the dominant liberal view that systemic racism is akin to a virus attacking an otherwise healthy body. The DNA metaphor suggests the problem is much more deep-seated, that racism exists in the cells of our social institutions. Racism is a feature, not a bug. Reforms that do not confront these deeper patterns and sources of inequality in the system will inevitably fail.

In the end, however, the metaphorical nature of this construct must not be forgotten. Our society is not a carbon-based life form, and the DNA metaphor inevitably breaks down when considering certain aspects of the profoundly complex problem. The purpose of introducing the DNA metaphor always was to facilitate thinking about the concept of variously labelled systemic, structural, or institutional racism. When the DNA metaphor breaks down, it frustrates its purpose and should quickly be abandoned. The point is not to insist on the literal truth of a metaphor. The point is to advance and inspire conversation.

The conversation in this Article has centered on Baltimore and its pretrial legal system. Yet the lessons learned are generalizable. The seemingly indestructible nature of inequality in Baltimore's pretrial legal system is symptomatic of similar inequalities in other systems, institutions, and structures beyond Baltimore. Indeed, as recognized by Professor Sheryll Cashin, "Baltimore is illustrative of a wider pattern, of a past and present of investing in exclusionary areas and disinvesting in Black neighborhoods. Other metropolitan regions with large populations of descendants are caught in the same vicious cycle."<sup>202</sup> For better or for worse, Baltimore is not atypical. Black butterflies and white Ls exist across America—though their precise geographic shapes vary.

To confront the inequality represented by the Black butterfly, this Article has argued that concerted cross-domain efforts are required.<sup>203</sup> Focusing on bail alone will not address racism in policing practice; focusing on policing alone ignores how racism in education affects the criminal legal system; focusing on education misses the role that poverty plays. The intersectional and cross-systemic nature of structural inequality demands

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201. Cf. CASHIN, *supra* note 170, at 4 ("Each time the United States seems to dismantle a peculiar Black-subordinating institution, it constructs a new one and attendant myths to justify the racial order.").

202. *Id.* at 9. For the very reason of Baltimore's representativeness of the larger problem, Cashin opens her extraordinary inquiry into the "three anti-Black processes that undergird the entire system of American residential caste—boundary maintenance, opportunity hoarding, and stereotype-driven surveillance" with an extended case study of Baltimore. *Id.* at 6, 9–37.

203. The fundamental importance of cross-domain connection to confront persistent underlying systems also has methodological implications. This Article has therefore questioned the logic of academic silos with its fetishizing of expertise. Instead of "staying in our lane," we deliberately looked beyond our field of specialization at BNIA indicators dealing with income, public transportation, internet access, and more—even though we claim only lay knowledge of these areas. We also experimented with geo-spatial analysis and novel visualizations.

intersectional and cross-systemic responses. Bail reform is education reform is economic reform is housing reform. And so on, and vice versa.

Perhaps “reform” is the wrong word. This Article has argued that radical solutions are required and that the incremental change associated with “reform” cannot succeed. As Professor Cashin puts it:

Healing a nation that began with, and still suffers from, white supremacy requires *abolition* of the processes of residential caste *and repair* in poor Black neighborhoods. To use the word “abolition” is to acknowledge that we should seek enduring transformation and not modest ephemeral reform. If the processes of caste . . . are not abolished, we, like earlier generations of Americans, will be leaving to future generations the undone work of reconstruction and of reckoning with our nation’s original sin.<sup>204</sup>

Though critics may characterize those calling for the abolition of racist institutions as unrealistic, we suggest that these critics have not grasped the reality of structural inequality.<sup>205</sup> Radical change does not need to mean upheaval or violence, but it will require upsetting long established hierarchies.

Of course, the need for radical change does not mean that local interventions that could make a difference in day-to-day lives should be abandoned. We do not advocate inaction on “small” matters until all “big” problems are demolished. Thus, we do have recommendations concerning Baltimore’s pretrial legal system. This most local of interventions centers on judges.<sup>206</sup> We have been critical of judges who follow an unwavering script and reflexively detain defendants and reject defense lawyers’ arguments. In our view, judges who detain more often than they release do dishonor to the presumption of innocence and to the U.S. Supreme Court’s command that detention should be a carefully limited exception to the rule of pretrial release.<sup>207</sup> At the same time, we recognize that judges sit in a difficult position and that they need support from academics and others if they buck against the dominant practice.<sup>208</sup>

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204. CASHIN, *supra* note 170, at 202.

205. See, e.g., Andrew C. McCarthy, *Systemic Racism? Make Them Prove It.*, NAT’L REV. (Sept. 19, 2020, 6:30 AM), <https://www.nationalreview.com/2020/09/systemic-racism-criminal-justice-system-make-critics-prove-charge/> (conservative critique); Thomas Ward Frampton, Essay, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013 (2022) (surveying discourse between prison abolitionists and skeptics).

206. Though we focus our pretrial-specific recommendations on judges, we recognize that other pretrial actors have major roles to play. For instance, defense attorneys could be more active in filing “bail appeals,” which are styled as habeas petitions in Maryland. Prosecutors and pretrial services might also broaden their perspective and advocate more forcefully for pretrial release.

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

208. Without question, judges face structural challenges in making bail review decisions. They proceed on a limited record. Though they can read the charging document, judges cannot question the arresting officer or alleged crime victim at the hearing. Judges thus must rely upon a prosecutor’s

Though statistically rare, the possibility of a released defendant committing an egregious crime after being freed haunts every judge. As a group, judges regard themselves as easy targets for media, the public, and elected officials holding them responsible for having released the individual—and ethical rules prohibit their responding to such attacks.<sup>209</sup> Seeking reappointment or promotion and fearing criticism, most bail review judges learn a basic maxim when first adorning the black robes: When in doubt, incarcerate. People in power rarely complain when a judge holds someone in jail; yet they become quite vocal and agitated when the person released is charged with a new crime.

Because these dynamics all point towards incarceration, it is imperative to support judges who act with courage when making unpopular but correct release decisions. We need to help foster a public discourse where judges are not pilloried based on rare and unfortunate instances of released pretrial defendants committing horrid acts of violence. Instead, the public and those in power need to be guided to understanding the far more common injustice of unwarranted detention and how it exacerbates and reproduces structural racism. Judges need help to decide to protect the weakest and most vulnerable members of the community. While prosecutors and pretrial representatives should more actively recommend pretrial release, judges certainly ought to follow such recommendations more frequently than they do. Within Baltimore’s pretrial system, it is the poorest defendant, usually a Black person from a neighborhood oppressed in many ways, who is most likely to remain incarcerated while awaiting trial.

Despite everything, hope remains. Though the pretrial system saw little progress during the pandemic, prosecution patterns did meaningfully change after a temporary moratorium on drug possession, prostitution, trespassing, and other minor charges was followed by a major decrease in overall crime in Baltimore.<sup>210</sup> State’s Attorney Marilyn Mosby subsequently announced that the temporary hold on prosecutions would be made permanent. Her office vowed to “decline prosecution of all drug possession, prostitution,

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or Pretrial’s third-party account of what led to arrests. Similarly, judges must rely on defense- or Pretrial-supplied information about defendants’ employment or community ties. In situations where the defendant failed to appear at a prior court proceeding or is charged with committing a probation violation, judges often lack court files and express strong reluctance to modify a colleague’s previous “preset bail” ruling or to consider pretrial release for probationers. And then, of course, there is the volume problem. Judges work under pressure to decide many cases in a limited period of time.

209. See MD. R. 18-102.4(a) (“A judge shall not be swayed by public clamor or fear of criticism.”); MD. R. 18-102.10(a) (“A judge shall abstain from public comment that relates to a proceeding pending or impending in any court and that might reasonably be expected to affect the outcome or impair the fairness of that proceeding . . .”).

210. See Tom Jackman, *After Crime Plummeted in 2020, Baltimore Will Stop Drug, Sex Prosecutions*, WASH. POST (Mar. 26, 2021, 8:00 AM), <https://www.washingtonpost.com/dc-md-va/2021/03/26/baltimore-reducing-prosecutions/>.

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minor traffic and misdemeanor cases, and [] partner with a local behavioral health service to aggressively reach out to drug users, sex workers and people in psychiatric crisis to direct them into treatment rather than the back of a patrol car.”<sup>211</sup> Though some critics voiced disapproval of these policy changes, this decision shows that sensible and less punitive approaches to criminal justice are possible. It also shows that cities can course-correct based on data.

If change can happen in Baltimore, it can happen anywhere. Baltimore is a city with famously intractable problems.<sup>212</sup> Yet the problems seen in Baltimore are simply the logical conclusion of trends seen elsewhere in the United States. The structures of racism and inequality in Baltimore are really distilled versions of an American pattern. The fight for justice—whether bail, education, jobs reform, or any other connected struggle—must confront those patterns. Structural racism has a Hydra-like quality. If you simply cut off one head, two will grow back in its place. Only Herculean focus and a willingness to burn out injustice across the whole monster can lead to meaningful change.

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211. *Id.*

212. *See generally* PIETILA, *supra* note 163.