

THE STANDARD CONDITIONS OF PRETRIAL RELEASE ARE COUNTERPRODUCTIVE TOWARDS
THEIR POLICY GOALS – FAILING TO KEEP COMMUNITIES SAFE, WHILE TRAMPLING ON CIVIL
LIBERTIES AND PERPETUATING THE CYCLE OF MASS INCARCERATION IN THE 4th CIRCUIT

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A. INTRODUCTION

Pretrial release is the safety valve which preserves the presumption of innocence, thereby ensuring criminal *charges* are not *de facto* criminal *convictions*. Concurrently, pretrial release is not a free rein for criminal defendants. Communities where defendants reside are rightfully nervous about the possible actions of those accused of serious, often violent crimes. As such, pretrial release requires a criminal defendant comply with certain terms and conditions.¹ The policy purpose of the Standard Conditions is to balance the innocence presumptions of individual defendants against society's rights to be free from unlawful conduct, and to ensure defendants are present for adjudication of their charges.² Thus, critical analysis of the Conditions centers on the question: are the Conditions effective at balancing these rights?

This paper sets out to analyze just that, concluding that the Conditions are not only ineffective towards their policy aims but are in fact counterproductive towards such aims.³ This paper focuses on pretrial release conditions.⁴ Furthermore, this paper limits its geographic scope to the jurisdiction of the United States 4th Circuit Court of Appeals (hereinafter “the 4th Circuit.”)

The paper begins by exploring the Conditions' background and then outlines the legal, moral, social, economic, and policy arguments surrounding the Conditions. Next, this paper analyzes whether the Conditions have thus far been effective in achieving their stated policy aims, before

¹ These terms are collectively referred to as the “Standard Conditions,” or “the Conditions.”

² See Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 709, (May 19, 2022) <https://virginialawreview.org/articles/pretrial-detention-and-the-value-of-liberty/>.

³ Such aims being ensuring a defendant's lawful behavior pending adjudication of their charges, ensuring defendants presence for adjudication of their charges, and promoting community safety. Furthermore, the Conditions are overly burdensome on defendants, creating conditions which promote, rather than disincentive, continued criminal conduct. Finally, given existing disparities in the American criminal justice system, especially as they apply to the systemic biases in charging, sentencing and incarceration, faced by historically marginalized groups, the overburdensome nature of the Conditions, combined with their disparate and selective enforcement, serve to perpetuate the mass incarceration of historically marginalized groups, especially Black males.

⁴ As opposed to analyzing other forms of judicial supervision, including probation and house arrest.

proposing reforms to Standard Conditions in order to better meet such policy aims. Finally, this concludes by summarizing its main points.

B. BACKGROUND

This section provides relevant background. Starting with the history and policy of the Conditions before moving to enumerating the Conditions, then finishing with an overview of the Conditions as applied within the 4th Circuit.

I. History, Policy, & the Standard Conditions

The history of the Conditions is long and nebulous.⁵ In this paper, the discussion of the Conditions begins with the Bail Reform Act of 1984 (hereinafter “the BRA,”) which created the Conditions.⁶ Concurrently, the Anti-Drug Abuse Act of 1986 (hereinafter the “AADA”) created mandatory minimums for certain substance-related crimes.⁷ The next legislative enactment modifying the Conditions was the Violent Crime Control and Law Enforcement Act of 1994 (hereinafter “the ’94 Crime Bill.”)⁸ The final relevant legislative enactment modifying the

⁵ Kellen R. Funk, Sandra G. Mayson, *Bail at the Founding*, 137 HARV. L. REV. 1816, (May 2024) <https://harvardlawreview.org/print/vol-137/bail-at-the-founding/>; see also *History of Bail*, PBUS, (last visited Oct. 23, 2025) <https://www.pbush.com/page/14>; et seq.

⁶ The BRA resolved differing jurisprudence across the United States, established the original Standard Conditions of pre-trial release, and, for the first time, made continued threat to the community the primary consideration in determining whether to grant a defendant pretrial release. Bail Reform Act of 1984, S.R. 215, 98th Cong. (1984).

⁷ See H.R. 422, 99th Cong. (1986) (Anti-Drug Abuse Act of 1986) (importantly, the AADA did not create programs to help treat those with substance abuse issues, nor did it provide a pathway for drug offenders to become productive members of society following lengthy periods of incarceration); see generally See Ben Fabens-Lassen, *A Cracked Remedy: The Anti-Drug Abuse Act of 1986 and Retroactive Application of the Fair Sentencing Act of 2018*, 646 TEMP. L. REV. 87, (2015) <https://www.templelawreview.org/lawreview/assets/uploads/2015/06/Fabens-Lassen-87-Temp.-L.-Rev.-645.pdf> (during the period in which both the BRA and AADA were enacted America was facing a “moral panic,” addiction specifically, and crime generally, were seen as individual, moral failings, rather than systematic diseases); and see Andrew T. Daws, *Just Say No: the Media, Drugs, and the Anti-Drug Abuse Act of 1986*, UNIVERSITY OF ALABAMA, (2022) <https://ir-api.ua.edu/api/core/bitstreams/a6b3b3f9-eca3-41fd-b5d5-edc93d455428/content> (the prevailing antidote to addiction, as posited by the “moral majority” was simply to “just say no!”).

⁸ The ’94 Crime Bill instituted “truth in sentencing” laws, which required violent offenders to serve at least 85% of their incarceration sentences, and provided federal funding for one-hundred-thousand additional police officers – the vast majority of whom were deployed to low-income, majority-minority urban areas. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994); See also Lauren-Brooke Eisen, *The*

Conditions is the First Step Act.⁹ Finally, it would be impossible to analyze the legislative enactments giving rise to the Conditions and mass incarceration without considering the racial implications of the BRA, ADAA, '94 Crime Bill, and related legislative enactments.¹⁰

1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System, BRENNAN CENTER, (Sep. 9, 2019) <https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice>; see also Noam Biale, et al., *The Discriminatory Purpose of the 1994 Crime Bill*, 116 HARV. L. REV. 16, (2016) <https://journals.law.harvard.edu/lpr/wp-content/uploads/sites/89/2022/06/HLP106.pdf>. Importantly, at the time of the '94 Crime Bill's enactment, the prevailing theories regarding criminal justice understood racial disparities in sentencing but did not contemplate that disparities between sentencing around various, similarly situated crimes – as well as investigative and prosecutorial discretions before such charges came to fruition – would lead to mass incarceration, especially of young, Black men and other minorities. See Biale, *supra* note 12. As such, the '94 Crime Bill enjoyed widespread support from leaders in the Black community, who saw the bill as a means of combating the crack epidemic plaguing urban America. *Id.* In evaluating the '94 Crime bill, it is important to note the lack of oversight for disparate prosecutorial decisions, including the allocation of investigatory resources; the focus on punishment, with little to no thought being provided to rehabilitation for substance abuse; and the failure to provide means with which to comply with the terms of the Standard Conditions, including a lack of economic opportunity in the communities most subject to the provisions of the Standard Conditions. See Mary Rachel Gould, *Twenty Years After the Education Apocalypse: The Ongoing Fall Out From the 1994 Omnibus Crime Bill*, 33 ST. LOUIS L. REV. 4, (2014) <https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1061&context=plr>; see also Rayshawn Ray and William A. Galston, *Did the 1994 Crime Bill Cause Mass Incarceration*, BROOKINGS, (Aug. 28, 2020) <https://www.brookings.edu/articles/did-the-1994-crime-bill-cause-mass-incarceration/>.

⁹ Recognizing many of the policy failures of the '94 Crime Bill, the First Step Act provided means for substance abuse rehabilitation and created a judicial safety valve – which allowed judges to consider the disparate impact of racial biased criminal justice policies while crafting the sentences of individual criminal defendants. See First Step Act, Pub. L. 115-391 (2018); See also Liz Komar, *The First Step Act: Ending Mass Incarceration in Federal Prisons*, THE SENTENCING PROJECT, (Aug. 22, 2023) <https://www.sentencingproject.org/policy-brief/the-first-step-act-ending-mass-incarceration-in-federal-prisons/>; see also Raquel Wilson, *A Critical Assessment of the First Step Act's Recidivism-Reduction Measures*, 128 DICK. L. REV. 461 (2024), <https://insight.dickinsonlaw.psu.edu/dlr/vol128/iss2/3>. Concurrently, the First Step Act provides for reduced sentences for those convicted of crack cocaine related offenses – helping ameliorate the disparity created by the powder versus crack distinction in the ADAA. *Id.* At the same time, the First Step Act did not go far enough to provide meaningful economic rehabilitation for individuals reentering society following extended periods of incarceration. *Id.* While it did not explicitly modify the Standard Conditions, its safety valve provisions create a greater degree of latitude for individual judges in their enforcement. *Id.*

¹⁰ Most notably, drugs which were predominate used and sold in urban, lower income communities received considerably higher sentences than their counterparts in high-income, White communities. See Shima Baughman, *The Bail Book: A Comprehensive Look at Bail in America's Criminal Justice System - Introduction*, UTAH LAW DIGITAL COMMONS (2017), <https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1109&context=scholarship> [hereinafter “Baughman”]; see also *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125 (Feb. 2018), <https://harvardlawreview.org/print/vol-131/bail-reform-and-risk-assessment-the-cautionary-tale-of-federal-sentencing/>. Furthermore, the enforcement of such crime bills has largely occurred without consideration as to whether defendants can abide by their pretrial release terms, given their economic circumstances and existing networks. See Lauren Bennett, *Punishing Poverty: Robinson & the Criminal Cash Bond System*, 25 WASH. & LEE L. REV. 1, (2019) <https://scholarlycommons.law.wlu.edu/crsj/vol25/iss1/10/>; see also Funk, *supra* note 3. Finally, the occurrence of outright law enforcement misconduct – including coerced confessions and the planting of evidence – has resulted in a substantial number of innocent persons incarcerated – with the second order effects on such individuals and their families being felt to this day. See Jason Snead, *A Path Forward for Pretrial Justice Reform*, HERITAGE FOUNDATION, (May 17, 2019) <https://www.heritage.org/crime-and-justice/report/path-forward-pretrial-justice-reform> [hereinafter “Snead”]; but see Erin Eife, et al., *The Hidden Harms of Bond Reform: Examining the Impact of Bond Reform on Restrictive*

The Conditions encompass two-types of pretrial release conditions: mandatory¹¹ and discretionary.¹² Judges throughout the 4th Circuit routinely impose additional discretionary conditions.¹³ This paper focuses on mandatory conditions (2), (6), and (7), as well as discretionary conditions (1), (4), (5), and (7).¹⁴

II. The Standard Conditions in the 4th Circuit

Conditions of Release, 99 JOURNAL OF CRIMINAL JUSTICE 102475 (Aug. 2025), <https://www.sciencedirect.com/science/article/pii/S0047235225001242> [hereinafter “*Eife*.”]

¹¹ The mandatory Standard Conditions are that a defendant released pretrial:

- (1) Will not commit a Federal, State, or local crime during release;
- (2) Will pay any applicable restitution;
- (3) Will not possess or be found in possession of a controlled substance;
- (4) Will register for domestic violence counseling, where applicable based on the charged offense;
- (5) Will register as a sex offender, where applicable based on the charged offense;
- (6) Will provide DNA samples, as requested; and
- (7) Will submit to a drug test within 15-days of initial release and two-times after at the discretion of the relevant authorities.

See 18 U.S.C. § 3583(d).

¹² The discretionary Standard Conditions include, but are not limited to, requiring that a defendant released pretrial:

- (1) Maintain employment or an educational program;
- (2) Avoid contact with an alleged victim or potential witness;
- (3) Report to a law enforcement or pretrial service agency;
- (4) Comply with a curfew;
- (5) Refrain from possessing a firearm or using alcohol or narcotic drugs;
- (6) Undergo medical treatment;
- (7) Agree to forfeit designated property, including money, upon failure to appear; and
- (8) Return to custody at specified hours.

Bail Reform Act of 1984, S.R. 215, 98th Cong. (1984).

¹³ See Steve Garrison, *Inmates ask Fourth Circuit to Rein in Maryland County's Rogue Pretrial Release Program*, COURTHOUSE NEWS SERVICE, (May 6, 2025) <https://www.courthousenews.com/inmates-ask-fourth-circuit-to-rein-in-maryland-countys-rogue-pretrial-release-program/>; see also Phil Dixon Jr., *Case Summaries: Fourth Circuit Court of Appeals – (Dec. 2020)*, UNC SCHOOL OF GOVERNMENT, (Jan. 19, 2021) <https://www.sog.unc.edu/blogs/nc-criminal-law/case-summaries-fourth-circuit-court-appeals—dec-2020>.

¹⁴ See Lauren Bennett, *Punishing Poverty: Robinson & the Criminal Cash Bond System*, 25 WASH. & LEE L. REV. 1, (2019) <https://scholarlycommons.law.wlu.edu/crsj/vol25/iss1/10/>; see also Funk, *supra* note 3; *et. seq.*

The 4th Circuit’s most recent ruling on the Conditions came in 2020.¹⁵ Underlying the *Rodgers* holding was the notion that defendants subject to the Conditions often violate the Conditions unknowingly, or out of desperation brought on by overly restrictive conditions – thereby creating injustice.¹⁶ The *Rodgers* holding is important in that it is the first time in nearly a decade that the 4th Circuit has addressed the Standard Conditions.¹⁷ Additionally, 4th Circuit judges routinely impose additional conditions, including restrictions on internet access and requirements of social media supervision.¹⁸

C. ARGUMENTS

The arguments section of this paper is broken down into two sections. The first subsection details the legal arguments surrounding the Conditions.¹⁹ The second subsection discusses the moral, social, economic, and policy arguments for and against the Standard Conditions.

I. Legal Arguments

¹⁵ See *United States v. Rodgers*, 961 F.3d 291 (4th Cir. 2020) (holding that judges within the circuit could not verbally grant pretrial release with simply a mention of the “Standard Conditions,” instead, judges within the 4th Circuit must make it clear to a criminal defendant what such “Standard Conditions” are – either by enumerating the conditions during a hearing or by written communication to the defendant, via their attorney. Furthermore, the 4th Circuit held that a standing chambers order – which ostensibly puts attorneys and their clients on notice of the specific Conditions of pretrial release – even where such order was long-standing and adopted by all judges within the circuit – was insufficient to meet the requirement as articulated).

¹⁶ *Id.*

¹⁷ Until *Rodgers*, numerous defendants on pretrial release violated the terms of their release – with a large number of such defendants claiming they were unaware that the specific term they had violated had been imposed, or that they had tried to comply with the Standard Conditions, but circumstances made such compliance impossible. *United States v. Rodgers*, 961 F.3d 291 (4th Cir. 2020). Such assertions, taken at face value, demonstrate the gap between policy makers, the judiciary, and the persons subject to the criminal justice process within the 4th Circuit. See *id.*; see also Nicole M. Myers & Alyssa LeBlond, *Disciplining Risk: Governing Through Conditions on Bail in the Community Pre-Trial*, JOURNAL OF CRIMINAL JUSTICE 92, (2024) <https://www.sciencedirect.com/science/article/pii/S0047235224000473>; see also *Pretrial Bail: A Deprivation Of Liberty Or Property With Due Process of Law*, 40 WASH. & LEE L. REV. 1575, (1983) <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=2680&context=wlulr>.

¹⁸ See *Garrison*, *supra* note 28; see also *Dixon Jr.*, *supra* note 28.

¹⁹ Such arguments focus on the effects of the Standard Conditions on the presumption of innocence; whether the Standard Conditions are unconstitutional on the basis of unjust, disproportionate punishment; and whether the Standard Conditions are unconstitutional on the basis of disparate impact.

There are numerous legal arguments surrounding the Standard Conditions, this paper focuses on the three most common, which have the greatest body of scholarly work attached. First, there is substantial debate as to whether the Standard Conditions constitute punishment and thereby violate the principle that no person shall be punished by a court of law before being found guilty of a crime.²⁰ Next are arguments surrounding whether the Standard Conditions are unconstitutional on the basis of disparate impact theory.²¹ Finally, the Standard Conditions shift judicial power away from judges and towards prosecutors, with arguments for and against such a shift in power.²²

(a) The Presumption of Innocence

The presumption of innocence is a bedrock of the American justice system.²³ Fundamental to the presumption of innocence is the principle that no punishment shall be imposed until guilty has been adjudicated.²⁴ Concurrently, society has a right to be free from unlawful behavior.²⁵ At

²⁰ See Megan T. Stevenson, *et al.*, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 708, (2022) https://virginialawreview.org/wp-content/uploads/2022/05/StevensonMayson_Book.pdf; see also Rebekah Durham, *Innocent Until Suspected Guilty*, 90 U. CIN. L. REV. 2, (Dec. 2021) <https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1429&context=uclr>.

²¹ See *Skeem*, *infra* note 141; see also *Holsinger et al.*, *infra* note 181; and see *Hatton & Smith*, *infra* note 181.

²² See *Stephanopoulos*, *infra* note 53; see also *Zatz*, *infra* note 53.

²³ See Brandon L. Garrett, *The Myth of the Presumption of Innocence*, 94 TEXAS L. REV. 178-87, (2016) https://scholarship.law.duke.edu/faculty_scholarship/3842.

²⁴ Punishments need not mean incarceration, rather punishment can be any term which impacts a person's life, liberty, or personage. The Conditions necessarily impact a person's life, liberty, and personage by imposing behavioral and geographic restrictions. See Megan T. Stevenson, *et al.*, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 708, (2022) https://virginialawreview.org/wp-content/uploads/2022/05/StevensonMayson_Book.pdf; see also Rebekah Durham, *Innocent Until Suspected Guilty*, 90 U. CIN. L. REV. 2, (Dec. 2021) <https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1429&context=uclr>.

²⁵ See *Snead*, *supra* note 25; see also *Muhlhausen*, *infra* note 82.

times, these rights conflict, thus inherent in the arguments of both Proponents²⁶ and Opponents²⁷ are fundamental, underlying premises regarding societal function and views on the conflict between the individual and society.

Proponents conclude that the Conditions do not *punish* defendants, thereby undermining their presumption of innocence, but rather *regulate* an appropriate balance between individual rights and societal rights.²⁸ In arriving at their conclusions, Proponents analogize to similar regulatory balances – such as curtailment of free speech and free association rights.²⁹ Furthermore, Proponents assert the majority of Conditions require a defendant to engage in ordinary behavior fitting a productive member of society; thus implying a failure to comply with such Conditions represents a rejection of societies basic decencies and norms.³⁰

Opponents conclude that compliance with the Conditions places such an onerous burden on defendants, constituting punishment, which fundamentally undermines the presumption of innocence.³¹ Furthermore, Opponents argue, given the already overwhelming advantages enjoyed by the government during investigations and subsequent criminal proceeding, tipping

²⁶ Proponents of the Standard Conditions include those who consider the Standard Conditions adequate in their current form, those believe the Standard Conditions should be made moderately more stringent, and those who believe the Standard Conditions should be so stringent as to effectively end pretrial release (hereinafter collectively “Proponents.”)

²⁷ Opponents of the Standard Conditions include those who believe that some set of Standard Conditions should exist but would modify the existing Standard Conditions to be less strict and those who believe the Standard Conditions should be abolished in their entirety as a requirement of pretrial release (hereinafter collectively “Opponents.”)

²⁸ *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125 (Feb. 2018), <https://harvardlawreview.org/print/vol-131/bail-reform-and-risk-assessment-the-cautionary-tale-of-federal-sentencing/>; see also Brook Hopkins, et al., *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679 (2018), <https://scholarlycommons.law.northwestern.edu/jclc/vol108/iss4/2>.

²⁹ *Id.*

³⁰ *Id.*

³¹ See Megan T. Stevenson, et al., *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 708, (2022) https://virginialawreview.org/wp-content/uploads/2022/05/StevensonMayson_Book.pdf; see also Rebekah Durham, *Innocent Until Suspected Guilty*, 90 U. CIN. L. REV. 2, (Dec. 2021) <https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1429&context=uclr>.

the scales further against defendants will result in a greater number of unjust criminal outcomes.³² Finally, Opponents, point to instances where innocent defendants, after becoming overwhelmed by the burdens of compliance with the Conditions, plead guilty simply to avoid prolonging their hardships.³³

(b) Questions of Constitutionality - Disparate Impact

The enactment and enforcement of certain legislation and administrative policy may be held unconstitutional if such policy leads to Disparate Impact.³⁴ In relation to the Conditions, there is no debate that the government has legitimate interests at stake.³⁵ Concurrently, there is considerable debate as to whether the Conditions have a disparate impact on a particular group.³⁶

³² See Jordan A. Sklansky, *The Nature and Function of Prosecutorial Power*, 106 JOURNAL OF LAW AND CRIMINOLOGY 3, (2016) <https://law.stanford.edu/wp-content/uploads/2017/04/Prosecutorial-Power.pdf>; See also *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937, (Feb. 2010) https://harvardlawreview.org/wp-content/uploads/2010/02/prosecutorial_power.pdf.

³³ In highlighting these instances, Opponents assert that without the presumption of innocence, actual guilt is subject to becoming an immaterial consideration in the criminal justice process. *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125 (Feb. 2018), <https://harvardlawreview.org/print/vol-131/bail-reform-and-risk-assessment-the-cautionary-tale-of-federal-sentencing/>; see also Brook Hopkins, et al., *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679 (2018), <https://scholarlycommons.law.northwestern.edu/jclc/vol108/iss4/2> [hereinafter *Hopkins*].

³⁴ If, although such legislation or policy does not, on its face, prescribe differing treatment for differing, identifiable groups sharing common, inherent features, the application of such legislation or policy has the widely disparate effects on such groups. See Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, THE YALE LAW JOURNAL, (2019) https://yalelawjournal.org/pdf/Stephanopoulos_3rua1o85.pdf; see also Noah D. Zatz, *Disparate Impact and the Unity of Equity Law*, 97 BOSTON U. L. REV. 1357 (2017) <https://www.bu.edu/bulawreview/files/2017/09/ZATZ.pdf>. For an enactment of legislation or policy to be held unconstitutional under disparate impact, a party seeking constitutional invalidation must first identify the specific act or component of the policy or regulation substantially *causing* such disparate impact. *Id.* Next, the burden shifts to the entity or organization responsible for enactment and implementation of the policy or regulation to provide a sufficient, legitimate rationale, connected to a legitimate objective, which justifies the challenged policy or regulation. *Id.* Finally, after a court is satisfied by the provided rationale, the policy or regulation may still be held unconstitutional if a differing policy or regulation could be implemented, which would still suffice in achieving the entity or organization's legitimate goal, but would not cause a disparate impact to the specified group. See *Stephanopoulos*, *supra* note 53; see also *Zatz*, *supra* note 53.

³⁵ Such interests include promoting public safety, ensuring criminal defendants maintain lawful behavior while on pretrial release, reducing recidivism rates, and encouraging criminal defendants presence for adjudication of their criminal charges. See Barry Friedman, et al., *The Federal Government's Role in Local Policing*, 109 VA. L. REV. 1527, (Dec. 19, 2023) <https://virginialawreview.org/articles/the-federal-governments-role-in-local-policing/>; see also R. George Wright, *The Scope of Compelling Government Interests*, 98 NOTRE DAME L. REV. 147, (2023) <https://ndlawreview.org/the-scope-of-compelling-government-interests/>.

³⁶ See *Hopkins*, *supra* note 51; but see *Snead*, *supra* note 25.

Most arguments asserting the existence of Disparate Impact assert the group facing the negative effects of such disparate impact to be Black men, who incur significantly higher violation rates than similarly situated White defendants.³⁷ However, Disparate Impact Doctrine requires more than outcome disparities; it requires tying those disparities to a single challenged practice.³⁸

Within the literature presupposing the existence of Disparate Impact there is considerable debate as to which specific condition, or conditions, of the Conditions is the cause of the disparate impact.³⁹ Finally, there is considerable debate as to whether there are alternative policies which would accomplish the stated aims of the Conditions in a manner ameliorating the disparate impact, to the extent such disparate impact exists.⁴⁰

(c) Judicial Powers & Prosecutorial Discretion

Judges are apportioned broad powers within the justice system.⁴¹ Likewise, prosecutors are afforded broad, prosecutorial discretion in charging decisions.⁴² In wielding their broad discretionary power, the decisions made by prosecutors increasingly restrain the available sentencing outcomes judges may choose from.⁴³ This shift in power has been felt most acutely by defendants in relation to pretrial detention.⁴⁴ Debate on the changing discretionary dynamics

³⁷ See *Skeem*, *infra* note 141.

³⁸ See *Stephanopolos*, *supra* note 35.

³⁹ See *Hopkins*, *supra* note 51; see also *Skeem*, *infra* note 51.

⁴⁰ The debates surrounding the efficacy of policy alternatives to the Conditions diverge widely based on a particular scholar's views on the efficacy of the existing Standard Conditions in achieving their stated policy aims. See *Hopkins*, *supra* note 51; but see *Snead*, *supra* note 25.

⁴¹ The grant of such broad powers is based on the premise that their professional and moral judgement makes them the best arbiters of fairness and justice among the many actors who participate in the outcomes of the justice system. See *Hessick*, *infra* note 144; see also *Schuman*, *infra* note 144.

⁴² Prosecutorial discretion is meant to serve as a check on criminal investigators by reason that prosecutor's first duty is to justice, not convictions. *Id.*

⁴³ Such discretionary powers are wielded in concert with statutory presumptions, mandatory minimums, and the resources of the state. *Id.*

⁴⁴ Largely because the charge a prosecutor ultimately brings has a substantial impact on a defendant's ability to be granted release pending trial, and in the event a defendant is granted pretrial release, the set of Conditions the defendant will be subject to during their release. See *Hessick*, *infra* note 144; see also *Schuman*, *infra* note 144.

in the criminal justice system necessarily turn on several key distinctions. Those who view prosecutors as inherently moral, or who view judges as out of touch or unfair, welcome the shift.⁴⁵ Others, who view prosecutors as biased, or who believe judges are better final arbiters of criminal justice, view the shift with suspicion.⁴⁶

II. Moral, Social, Economic, and Policy Arguments

This section explores the moral, social, economic, and broader policy arguments for and against the Conditions. Such arguments, attempt to strike a balance between the rights of society,⁴⁷ with the rights of individual defendants.⁴⁸

(a) Moral Arguments

What is the purpose of the criminal justice system? Is it simply to punish past wrongdoing? Discourage future wrongdoing? Is it a necessary evil in preventing wrongdoers from hurting the innocent? What punishment is proportionate to the harms caused by a specific crime? The goals of the justice system are to answer all of these questions simultaneously.⁴⁹

⁴⁵ See Hessick, *infra* note 144; see also Schuman, *infra* note 144.

⁴⁶ Additionally, opinion on the shifting dynamics is necessarily influenced by broader views on criminal justice – opinions from those who favor harsher punishment, and weaker presumptions of innocence, view the shift positively, given the tendency for prosecutors to seek harsher sentences than those which judges impose. *Id.* On the other hand, opinions from those who favor rehabilitation as the primary goal of sentencing and therefore wish to provide judges exceptional discretion in considering a particular defendant’s mitigation factors in formulating a sentence, view the shift with extreme caution, worrying about the injustices inherent in a uniform sentencing system. *Id.*

⁴⁷ Such rights include the right to be free from crime, to have high social trust in the justice system, etc.

⁴⁸ Specifically, the presumption of innocence, the protection against excessive punishment, and the balance of rehabilitation versus retribution. See Megan T. Stevenson, *et al.*, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 708, (2022) https://virginialawreview.org/wp-content/uploads/2022/05/StevensonMayson_Book.pdf; see also Rebekah Durham, *Innocent Until Suspected Guilty*, 90 U. CIN. L. REV. 2, (Dec. 2021) <https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1429&context=uclr>.

⁴⁹ See Joshua Kleinfeld, *et al.*, *Social Trust in Criminal Justice: A Metric*, 98 NOTRE DAME L. REV. 817, (2023) https://ndlawreview.org/wp-content/uploads/2023/01/NDL206_KleinfeldDancig_cropped.pdf; see also Sarah Shelley, *What is the Criminal Justice System? Insights for Aspiring Legal Minds*, CUMBERLAND LAW SCHOOL, (last visited Nov. 25, 2025) <https://www.ucumberlands.edu/blog/what-is-the-criminal-justice-system>.

Proponents conclude the Conditions strike the optimal balance of the competing interests involved in pretrial release decisions.⁵⁰ Specifically, Proponents hold that a defendant's rights are minimally violated, while broader society is not exposed to unnecessary and avoidable risk.⁵¹ Proponents point to the lack of viable alternatives.⁵² Furthermore, Proponents argue that given the nature of modern criminal dockets, as well present day conviction rates, it is fair to assume that a person charged with a crime is more likely than not guilty.⁵³ Finally, Proponents posit that fundamentally, life and liberty should be maximized at the population level.⁵⁴

Opponents conclude the Conditions make a mockery of individual civil liberties and argue no balancing of interests should occur.⁵⁵ Opponents assert the presumption of innocence is the fundamental bedrock of the American justice system.⁵⁶ Furthermore, Opponents point to the notion that a justice system is unjust if it produces unequal outcomes for persons engaged in the same conduct, regardless of station in life or inherent characteristics.⁵⁷ Finally, Opponents note

⁵⁰ See *Snead*, *supra* note 25.

⁵¹ In doing so, Proponents substantially downplay the hardships necessary to comply with the Conditions. *Id.*

⁵² In doing so, effectively positing that any additional systemic safeguards to individual rights necessarily come at the expense of community safety. *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125 (Feb. 2018), <https://harvardlawreview.org/print/vol-131/bail-reform-and-risk-assessment-the-cautionary-tale-of-federal-sentencing/>; see also Brook Hopkins, et al., *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679 (2018), <https://scholarlycommons.law.northwestern.edu/jclc/vol108/iss4/2> [hereinafter *Hopkins*].

⁵³ See *Garrett*, *supra* note 41; see also *Durham*, *supra* note 49.

⁵⁴ Therefore, where the law presents a question of an individual's rights versus those same rights belonging to the population, justice demands that the population's rights prevail. See *Snead*, *supra* note 25; See also David Muhlhausen, *Get Out of Jail Free: Tax-Payer Funded Grants Place Criminals on the Street Without Posting Bail*, HERITAGE FOUNDATION, (Sep. 12, 2011) <https://www.heritage.org/crime-and-justice/report/get-out-jail-free-taxpayer-funded-grants-place-criminals-the-street>.

⁵⁵ Simply put, Opponents argue a society which does not take every step possible to protect the rights of the most culpable defendant, before such defendant's culpability is adjudicated, effectively guarantees the rights of none of its members. See Megan T. Stevenson, et al., *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 708, (2022) https://virginialawreview.org/wp-content/uploads/2022/05/StevensonMayson_Book.pdf; see also Rebekah Durham, *Innocent Until Suspected Guilty*, 90 U. CIN. L. REV. 2, (Dec. 2021) <https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1429&context=uclr>.

⁵⁶ Therefore, the Conditions, which to some degree impact a defendant's presumption of innocence, trample on such bedrock. *Id.*

⁵⁷ In the context of the Conditions, Opponents point to the widely disparate impacts of compliance based on economic status. See *Holsinger et al.*, *infra* note 181; see also *Hatton & Smith*, *infra* note 181; see also *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125 (Feb. 2018),

the impacts of the Conditions on defendant's willingness to accept plea bargains.⁵⁸ Specifically, compliance with the Conditions is so burdensome that many defendants choose to plead guilty for crimes they have not committed, simply to escape the Conditions.⁵⁹

(b) Social Arguments

Crime and criminal law impact the core fabric of society.⁶⁰ It is impossible to analyze criminal justice impacts without considering broader social consequences, including the psychological consequences that come with a sense of security.⁶¹

Proponents assert the Conditions help reduce recidivism rates and overall crime rates, thereby improving the social perception of safety.⁶² Furthermore, Proponents argue that the Conditions have a particularly positive impact in urban, high-crime environments.⁶³ Finally, Proponents

<https://harvardlawreview.org/print/vol-131/bail-reform-and-risk-assessment-the-cautionary-tale-of-federal-sentencing/>; see also Brook Hopkins, et al., *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679 (2018), <https://scholarlycommons.law.northwestern.edu/jclc/vol108/iss4/2> [hereinafter *Hopkins*]. The same or greater disparate impact can be seen on the basis of race as well. See *Skeem*, *infra* note 141.

⁵⁸ See Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining*, 57 W.M. L. REV. 8, (Mar. 15, 2016) <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3640&context=wmlr>; see also Johannes Andenaes, *The General Preventative Effects of Punishment*, 111 U. PENN. L. REV. 7, (May 1966) https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=6288&context=penn_law_review.

⁵⁹ *Id.*

⁶⁰ See Joshua Kleinfeld, et al., *Social Trust in Criminal Justice: A Metric*, 98 NOTRE DAME L. REV. 817, (2023) https://ndlawreview.org/wp-content/uploads/2023/01/NDL206_KleinfeldDancig_cropped.pdf; see also Sarah Shelley, *What is the Criminal Justice System? Insights for Aspiring Legal Minds*, CUMBERLAND LAW SCHOOL, (last visited Nov. 25, 2025) <https://www.ucumberland.edu/blog/what-is-the-criminal-justice-system>.

⁶¹ See *Eck-Miller*, *infra* note 192; see also *Skeem*, *infra* note 141.

⁶² In making such arguments, Proponents point to the downward trend in violent crime rates, and crime rates overall, since the enactment of the Standard Conditions and a host of other “tough on crime” laws. See *Snead*, *supra* note 25; see also *Muhlhausen*, *supra* note 82.

⁶³ Inherent in such arguments is that the aforementioned environments require the most strict pretrial release conditions, on the basis of geography and demographics. *Id.* Proponents point to the relative crime reduction in urban environments, positing that while the Conditions may appear to punish harshly for minor violations, such punishment encourages the highest standards of behavior, an especially important consideration in economically depressed and violent areas. See *Snead*, *supra* note 25; see also *Muhlhausen*, *supra* note 82.

argue that rather than disproportionately impacting Black families in a negative manner, the Standard Conditions have encouraged Black family and social development.⁶⁴

Opponents assert the Conditions are of little value in deterring criminal activity and do not contribute to societies' overall sense of safety.⁶⁵ In making such arguments, Opponents point to the average citizen's lack of understanding and awareness regarding the specifics of the Conditions.⁶⁶ Additionally, Opponents point to the disproportionate impact on Black individuals as a result of the harshness and relative inflexibility of the Conditions.⁶⁷ In highlighting these individuals, Opponents note the psychological impacts of incarceration, magnified by repeated incarceration, on such individual's psychology.⁶⁸ Finally, Opponents assert the Conditions are a poor policy tool in deterring those on pretrial release from committing crimes.⁶⁹

(c) Economic Arguments

Crime effects the economy, whether directly, via the impacts of a property crime for both the victim and perpetrator, or indirectly, such as by influencing macro investment decisions on the basis of business environment, including the risk of theft or fraud.

⁶⁴ Proponents argue these ends are achieved by creating safe environments within urban areas, as opposed to forcing Black families to choose between their support network and the safety associated with more suburban areas. *Id.*

⁶⁵ See *Eck-Miller*, *infra* note 192; see also *Skeem*, *infra* note 141.

⁶⁶ In making such arguments, Opponents concede that while "tough on crime" laws as a whole may engender a sense of safety, the Standard Conditions in a vacuum do not. See *Snead*, *supra* note 25; see also *Muhlhausen*, *supra* note 82.

⁶⁷ Specifically, Opponents point to the statistics showing that Black males are substantially overrepresented in prison populations, with many such persons being incarcerated as a result of their inability to comply with the Conditions. See Jennifer Skeem, *et al.*, *Place Matters: Racial Disparities in Pretrial Detention Recommendations Across the U.S.*, 86 U.S. COURTS 3, (Dec. 2022) https://www.uscourts.gov/sites/default/files/86_3_2_0.pdf.

⁶⁸ Arguing that failure to comply with the Conditions and subsequent reincarceration makes transitioning back into society as a productive member all the more difficult. See *Bennett*, *supra* note 24; see also *Funk*, *supra* note 3; *et. seq.*

⁶⁹ In support of such arguments, Opponents point to data showing the motivations for crimes committed during pretrial release – with the Standard Conditions being an insignificant factor in the decision-making process of defendants released pretrial who go on to commit crimes. See *Holsinger et al.*, *infra* note 181; see also *Hatton & Smith*, *infra* note 181.

Proponents presuppose the Conditions reduce crime, making their economic arguments in favor of the Conditions with the underlying assumption such Conditions act as a proxy for crime reduction.⁷⁰ As such, Proponents point to the monetary effects of crime reduction as a result of continued adherence to the Conditions.⁷¹ Proponents assert the price and supply effects of crime reduction are greatest in urban areas, which have historically been subject to substantially greater rates of per capita crime, compared to suburban and rural areas.⁷² Furthermore, Proponents argue the areas subject to receiving the greatest benefits from crime reduction are those primarily made up of historically marginalized peoples.⁷³ Finally, Proponents assert the monetary Conditions effectively disgorge criminals from the profits of their crimes.⁷⁴

Opponents disregard the monetary efficacy of the Conditions as such efficacy relates to economic growth impact, instead focusing on practical and economic individual fairness concerns in evaluating the economic impacts of the Conditions.⁷⁵ Opponents assert the hardships imposed as a result of the Conditions are substantially ameliorated by a defendant's wealth and network.⁷⁶ Furthermore, Opponents assert the financial hardships which result from imposition of the Conditions create an incentive, rather than discouraging, for the commission of crimes by defendants on pretrial release.⁷⁷ Specifically, the forfeiture Conditions, combined with the costs

⁷⁰ See *Snead*, *supra* note 25; see also *Muhlhausen*, *supra* note 82.

⁷¹ For example, reduced losses due to theft and other property crimes allow business to reduce the price of goods, thereby lowering the cost of goods for consumers. *Id.*

⁷² *Id.*

⁷³ Such arguments are based in part or in whole on the current underutilization of capacity and comparatively high crime rates. *Id.*

⁷⁴ Thereby eliminating the incentive to commit crime, therefore reducing future crime rates.

⁷⁵ See Megan T. Stevenson, *et al.*, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 708, (2022) https://virginialawreview.org/wp-content/uploads/2022/05/StevensonMayson_Book.pdf; see also Rebekah Durham, *Innocent Until Suspected Guilty*, 90 U. CIN. L. REV. 2, (Dec. 2021) <https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1429&context=uclr>.

⁷⁶ This is especially true for the curfew and geographic limitation Conditions, which create additional hardships for a defendant's employment and childcare obligations. See *Skeem*, *infra* note 141; See also *Bennett*, *supra* note 24; see also *Funk*, *supra* note 3.

⁷⁷ See *Holsinger et al.*, *infra* note 181; see also *Hatton & Smith*, *infra* note 181.

of criminal proceedings, leave released defendants in desperate need of funds; with such defendants lack of hire ability compounding the desperation.⁷⁸ Furthermore, the areas in which defendants originate and are subject to the most stringent enforcement of the Conditions tend to be areas already lacking substantial economic opportunity.⁷⁹ Finally, Opponents point to the economic impacts on members of a defendant's family.⁸⁰

(d) Policy Arguments

Policy arguments surrounding the Conditions diverge regarding whether the Conditions are effective in achieving their stated policy aims.⁸¹ Policy arguments surrounding the Conditions are unique in that there is hard data,⁸² which is sufficiently correlated to the relevant metrics,⁸³ which therefore allows for specific conclusions. Concurrently, Proponents and Opponents utilize widely varying data, and as a result come to widely varying conclusions.

Proponents conclude the Conditions are effective towards their policy goals.⁸⁴ Specifically, Proponents assert the Conditions reduce recidivism rates and are part of a broader overall decline in crime.⁸⁵ In support of this position, Proponents point to the decline in crime rates since the enactment of the Conditions and related Tough on Crime laws.⁸⁶ Furthermore, Proponents argue

⁷⁸ Compounding a released defendant's difficulties in securing employment during the period of their release is the unwillingness of employers to hire employees who have substantial uncertainty as to their availability in the near future. *Id.*

⁷⁹ *Id.*

⁸⁰ Such family including spouses, dependent children, and dependent relatives – none of whom have presumably engaged in criminal activity, as a substantial negative externality directly attributable to imposition of the Conditions. *Id.*

⁸¹ Specifically, whether the Conditions encourage lawful behavior by defendants while on pretrial release; whether the Conditions serve as a substantial deterrent against flight from adjudication of criminal charges; and whether the Conditions improve community safety. *See Holsinger et al., infra* note 181; *see also Hatton & Smith; but see Bennett, supra* note 24.

⁸² As opposed to social arguments and moral arguments which are mostly based on theory.

⁸³ As opposed to economic arguments, which utilize economic data impacted by a much wider range of variables.

⁸⁴ *See Snead, supra* note 25; *see also Muhlhausen, supra* note 82.

⁸⁵ *Id.*

⁸⁶ *Id.*

monitoring, especially electronic monitoring, substantially increases the likelihood that criminal defendants appear for adjudication of their criminal charges.⁸⁷ Additionally, Proponents assert specific conditions – namely, mandatory drug and alcohol testing – serve as *de facto* rehabilitation programs.⁸⁸ Finally, Proponents argue the Conditions relating to curfew and geographic restrictions sufficiently reduce the opportunities for defendants released pretrial to commit additional crimes.⁸⁹

Opponents conclude the Conditions fail to meet their stated policy aims entirety. Opponents assert the Conditions have no measurable impact on recidivism rates – Opponents believe that if the Conditions have any effect on recidivism rates, it is that they raise them, based on the near impossibility of compliance.⁹⁰ Furthermore, Opponents assert the Conditions have either a negligible effect on crime such that, the Conditions worsen public safety.⁹¹ Additionally, Opponents assert the Conditions are overly burdensome, such that they result in innocent defendants accepting guilty pleas, simply out of fatigue regarding compliance during the criminal justice process.⁹² Finally, Opponents argue the geographic and curfew conditions are overly burdensome,⁹³ thereby serving only to punish defendants before adjudication of their guilt.⁹⁴

⁸⁷ Proponents specifically point to the efficacy of the technology involved in electronic monitoring – and the difficulties of evading such monitoring – as case-in-point evidence of efficacy. Isabella Jorgensen, *et al.*, *The Current State of Bail Reform in the United States: Results of a Landscape Analysis of Bail Reforms Across All 50 States*, HARVARD KENNEDY SCHOOL (Dec. 2021).

⁸⁸ Proponents believe that the threat of punishment from a failed substance test is a sufficient deterrent, such that, pretrial release has the collateral consequence of treating a defendant's substance abuse issues. *Id.*

⁸⁹ *Id.*

⁹⁰ See Holsinger *et al.*, *infra* note 181; see also Hatton & Smith, *infra* note 181.

⁹¹ *Id.*

⁹² See Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining*, 57 W.M. L. REV. 8, (Mar. 15, 2016) <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3640&context=wmlr>; see also Johannes Andenaes, *The General Preventative Effects of Punishment*, 111 U. PENN. L. REV. 7, (May 1966) https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=6288&context=penn_law_review.

⁹³ With little to no effect on whether a pretrial released defendant commits a crime during such release.

⁹⁴ See Holsinger *et al.*, *infra* note 181; see also Hatton & Smith, *infra* note 181.

D. ANALYSIS

This analysis section is broken into two subsections. First, the legal theories and positions described in the previous section are analyzed on their merits. Next, this section examines the research and conclusions of existing literature to analyze the actual efficiency of the Conditions towards their policy aims.

I. Legal

This subsection examines and analyzes the relative strength of the legal arguments. Specifically, the three subsections of analysis analyze the presumption of innocence, disparate impact, and the balance of power between judges and prosecutors.

(a) The Presumption of Innocence

For practical intents and purposes, the presumption of innocence is functionally dead.⁹⁵ Public perception regarding the implications of an individual being arrested and indicted, the costs of a successful defense at trial, and social media's impact on mass consciousness effectively render a defendant guilty from the moment they are charged.⁹⁶ At a systemic level, the changing nature of criminal charges at both the state and federal levels favors speedy adjudication and punishment.⁹⁷ Compounding the erosion of the innocence presumption are statutory presumptions, such as

⁹⁵ See Garrett, *supra* note 41; see also Durham, *supra* note 49.

⁹⁶ See Monika Hanych, et al., *The Influence of Public Opinion and Media on Judicial Decision-Making: Elite Judges' Perceptions and Strategies*, 14 INTL. J. FOR COURT ADMIN. 3, (2023) <https://iacajournal.org/articles/10.36745/ijca.528>; see also Joseph W. Bellacosa, *Judging Cases v. Public Opinion*, 65 FORDHAM L. REV. 2381, (1997) <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3371&context=flr>.

⁹⁷ Such a shift has moved the criminal justice process from a question of who committed a crime, to a determination of how severely a person caught committing a crime should be punished. See Garrett, *supra* note 41; see also Durham, *supra* note 49.

those present in drug trafficking cases, which shift the burden onto defendants to prove why they are *not* a danger to society, thereby creating a presumption of guilty until proven innocent.⁹⁸

In analyzing whether the Conditions erode the presumption of innocence, it is important to understand that the justice system only achieves justice to the extent its constituents believe its outcomes just.⁹⁹ A justice system which routinely allows guilty defendants to go unpunished or minimizes and delays the imposition of punishment for wrongful acts, loses its legitimacy.¹⁰⁰ Furthermore, there are limits to the impacts of the law on the presumption of innocence.¹⁰¹

Thus, the Conditions represent a fair balance, and do not erode the presumption of innocence to any degree greater than other, legal and non-legal social developments. However, the cumulative effect may be greater than any single legal development, which is a part of the critique of the Conditions. While the Conditions do impose a substantial burden on those subject to them, such burdens are necessary to bare for purposes of systemic legitimacy.

(b) Constitutionality on the Basis of Disparate Impact

A law which is facially neutral yet has a disproportionately negative impact on a particular group of people sharing a distinct and fundamental characteristic may be unconstitutional on the basis such disparate impact.¹⁰² In reference to Conditions, it is clear that the Conditions taken

⁹⁸ *Id.*

⁹⁹ See *Kleinfeld*, *supra* note 76; see also *Shelly*, *supra* note 76.

¹⁰⁰ *Id.*

¹⁰¹ Public outcry, loss of reputation upon charging, and ostracization all erode the presumption of innocence, and are all consequences imposed by actors outside the legal system, based on emotion and individual morality, not statute. *Id.*

¹⁰² For a law or policy to be deemed unconstitutional on the basis of disparate impact party seeking to invalidate the law or policy must first clearly articulate the specific practice creating the disparate impact. See *Stephanopoulos*, *supra* note 53; see also *Zatz*, *supra* note 53. After which, the entity or organization responsible for enacting and implementing the challenged policy or practice bears the burden of proving a legitimate, not discriminatory purpose for such a policy. *Id.* After which, the party challenging the policy bears the burden of proving the existence of an alternative policy, which does not disparately impact the group members of a protected classification, which still achieves the enactor's policy aims. *Id.*

wholistically disparately impact Black men.¹⁰³ Concurrently, for a policy or statute to be challenged based on disparate impact, the challenging party must identify a *specific* policy or practice causing such impact.¹⁰⁴ It is unlikely the Conditions as a whole qualify as a single policy or practice, and at present, there is an insufficient body of research demonstrating a singular condition is the cause of the aforementioned disparate impact.¹⁰⁵ Thus, a disparate impact claim challenged the constitutionality of the Conditions likely fails based on the failure to identify a *specific* condition causing disparate impact.

(c) The Balance of Power Between Judges & Prosecutors

As discussed *above*, the enactment and continued enforcement of the Conditions has limited judicial discretion, shifting criminal justice power towards prosecutors.¹⁰⁶ Thus, the central question of criminal justice adjudications is no long deciding the punishment a particular criminal defendant will receive for their actions, but rather, how should a defendant's actions be characterized.¹⁰⁷ Therefore, an analysis of the shifting power dynamic must focus on whether the shift is a positive development towards more just outcomes in the criminal justice system?

It depends.¹⁰⁸ In assessing the nature of justice within the criminal justice system, the objective criteria for determining justice include whether a decision is made without outside influence;

¹⁰³ As evidenced by statistics showing Black male defendants incur, on average, a greater number of pretrial violations compared with similarly situated White male defendants – in a proportion likely sufficient to meet the threshold showing for a disparate impact claim. See Jennifer Skeem, *et al.*, *Place Matters: Racial Disparities in Pretrial Detention Recommendations Across the U.S.*, 86 U.S. COURTS 3, (Dec. 2022) https://www.uscourts.gov/sites/default/files/86_3_2_0.pdf.

¹⁰⁴ See Stephanopoulos, *supra* note 53; see also Zatz, *supra* note 53.

¹⁰⁵ *Id.*

¹⁰⁶ See Carissa Byrne Hessick, *Separation of Powers Versus Checks and Balances in the Criminal Separation of Powers Versus Checks and Balances in the Criminal Justice System: A Response to Professor Epps*, 74 VANDERBILT L. REV. 159, (2021) https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1557&context=faculty_publications; see also Jacob Schuman, *Prosecutors in Robes*, 77 STAN. L. REV. 629, (2025) <https://review.law.stanford.edu/wp-content/uploads/sites/3/2025/03/Schuman-77-Stan.-L.-Rev.-629.pdf>.

¹⁰⁷ See Hessick, *supra* note 144; see also Schuman, *supra* note 144.

¹⁰⁸ *Id.*

whether opposing parties, prosecutors and defendants, are similarly resourced; and whether the system produced consistent results, without regard for prior economic status or inherent characteristic.¹⁰⁹

In comparing a justice system driven by prosecutorial discretion against a justice system driven by judicial discretion it is important to analyze each of these metrics, while simultaneously accounting for the residual power held by the other party. A judicial system driven by prosecutorial discretion is not free outside influence.¹¹⁰ By comparison, judges, especially those sitting on state superior courts and in the federal court system, are relatively insulated.¹¹¹ Concurrently, judges are substantially more detached from personal ambition, based on their lifetime tenure – in the case of federal Article III judges – or almost guaranteed reappointment – in the case of state judges.¹¹²

Next, regarding the relative positions of parties, a system driven by prosecutorial discretion, in which prosecutors enjoy the investigative resources of the state and are not constrained by the hourly fees of retained counsel, does not lead to parity between prosecution and defense.¹¹³ In contrast, in a judicially driven justice system, judges do not take an adversarial position.¹¹⁴

Finally, in considering the consistency of outcomes, focusing on consistency across economic situation and racial demographic, the history of prosecutorial bias in charging decisions, plea

¹⁰⁹ *Id.*

¹¹⁰ Prosecutors are the recipients of numerous rumors – generally from biased sources, such as law enforcement and other prosecutors – and, at least within the state court systems under the jurisdiction of the 4th Circuit, elected, and thereby subject not only to the whims of public opinion, but also their own ambitions. *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ While judges undoubtedly sit above both prosecution and defendant during criminal proceeding, such superior status has limited consequences given the judges refereeing role in the proceeding. *See Hessick, supra* note 144; *see also Schuman, supra* note 144.

offers, and outright misconduct demonstrates increased prosecutorial discretion leads to increased injustice.¹¹⁵ Judges are not free from biases, at the same time, extensive federal conflicts and bias rules¹¹⁶ limit the opportunities for judges' personal bias to influence proceedings.¹¹⁷ Furthermore, the order in which criminal proceedings occur allow for judges to form opinions on defendants conduct, before background considerations may taint their views of the defendant.¹¹⁸

Thus, an objective comparison of a justice system driven by prosecutorial discretion versus a justice system driven by judicial discretion leads to the conclusion that a justice system driven by prosecutorial discretion produces less just results. Given that the Conditions shift the balance of discretion towards prosecutors, it can reasonably be concluded that the enactment and continued enforcement of the Conditions makes the justice system less just.

II. Policy & Other Considerations

This subsection focuses on some of the stated policy goals surrounding the Conditions. Specifically, recidivism rates, public safety, defendant's appearance for adjudication, and coercive plea bargaining.

(a) Recidivism Rates & Public Safety

¹¹⁵ *Id.*

¹¹⁶ Which apply to all judges sitting in the 4th Circuit.

¹¹⁷ *Id.*

¹¹⁸ In contrast, the preparation for a prosecutorial charging decision inherently involves learning about a potential defendant's background, characteristics, and social status. *See Hessick, supra* note 144; *see also Schuman, supra* note 144.

For the Conditions to effectively promote public safety they must serve as a deterrent to those considering, or those who may in the future consider, criminal activity.¹¹⁹ They do not.¹²⁰ A substantial body of polling and public resources definitively show the Conditions are not a relevant factor in an individual's decision regarding whether to engage in criminal activity.¹²¹ Concurrently, of the factors which do influence decisions on the commission of crime, only punishment is tangentially connected to the Conditions.¹²² Thus, it cannot be concluded the Conditions deter persons considering engaging in criminal activity and therefore the Conditions do not promote public safety as a deterrent.

Furthermore, existing literature, supported by substantial data and employing scientifically sound methodology, provides the clear conclusion that the relative harshness and breadth of the Conditions has little to no impact on recidivism rates.¹²³ A combination of lack of awareness regarding the specifics of the Conditions;¹²⁴ ineffective and inconsistent enforcement;¹²⁵ and the confluence of other, more motivating influences effectively renders the Conditions toothless as a tool against recidivism.¹²⁶ The economic hardship imposed as a result of the Conditions¹²⁷ provides economic incentives which outweigh fear of punishment, leading defendants released

¹¹⁹ See Brook Hopkins, *et al.*, *Principles of Pretrial Release: Reforming Bail Without Repeating Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679, (2018) <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7639&context=jclc>; see also *Eife*, *supra* note 25.

¹²⁰ See *Hopkins et al.*, *supra* note 158; see also *Eife*, *supra* note 25.

¹²¹ In fact, most individuals who engage in criminal activity are unaware of the existence, much less the specifics, of the Conditions at the time they undertake such criminal activities. *Id.* The lack of awareness holds true among repeat criminal offenders, many of whom were previously unknowingly subject to the Conditions. *Id.*

¹²² With such tangential connection being attenuated at best, given that “punishment” is generally perceived to be synonymous with incarceration. See Megan T. Stevenson, *et al.*, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 708, (2022) https://virginialawreview.org/wp-content/uploads/2022/05/StevensonMayson_Book.pdf; see also Rebekah Durham, *Innocent Until Suspected Guilty*, 90 U. CIN. L. REV. 2, (Dec. 2021) <https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1429&context=uclr>.

¹²³ See *Holsinger et al.*, *infra* note 181; see also *Hatton & Smith*, *infra* note 181.

¹²⁴ *Id.*

¹²⁵ See *Eife*, *supra* note 25.

¹²⁶ See *Holsinger et al.*, *infra* note 181; see also *Hatton & Smith*, *infra* note 181.

¹²⁷ Including property seizure, difficulties finding employment, and legal fees.

pretrial for certain offense types¹²⁸ to commit crimes at a higher rate *following* indictment.¹²⁹

Thus, to the extent the Conditions impact recidivism rates, they may increase them.

As such, given that the Conditions are neither a deterrence or impediment, it must be concluded that the Conditions are ineffective towards their stated policy goals.

(b) Appearances at Trial & Plea Bargaining

A defendant's decision regarding whether to appear for adjudication of their criminal charges is largely driven by the nature of such charges, the substantiality of evidence against the defendant, and the defendant's means for evading a court's jurisdiction.¹³⁰ Continued contact with persons involved in the judicial process, including pretrial supervision officers, does not generally have an impact on an individual defendant's weighing of these key factors.¹³¹ At the same time however, such continued contact may serve to alert a defendant to the consequences stemming from a failure to appear for adjudication.¹³² Concurrently, where a defendant has made the decision not to appear, the Conditions related to monitoring¹³³ serve important notice functions for law enforcement personnel, allowing such law enforcement personnel to apprehend a criminal defendant, thereby allowing for adjudication of the defendant's criminal charges.¹³⁴ The efficacy of such warning tools is severely limited by a lack of monitoring resources, including

¹²⁸ Most notably controlled substance offenses.

¹²⁹ *Id.*

¹³⁰ See Brian R. Johnson, *Who Skips? An Analysis of Bail Bond Failure to Appear*, JOURNAL OF APPLIED SECURITY RESEARCH, (Jan. 2014) https://www.researchgate.net/publication/271936698_Who_Skips_An_Analysis_of_Bail_Bond_Failure_to_Appear; see also Sean Freeland, *Bailing on the Bondsman: An Argument for Abolishing Monetary Bail*, 11 LINCOLN MEMORIAL UNIVERSITY L. REV. 1, (2023) <https://digitalcommons.lmunet.edu/cgi/viewcontent.cgi?article=1197&context=lmulrev>.

¹³¹ See Johnson, *supra* note 169; see also Freeland, *supra* note 169.

¹³² *Id.*

¹³³ Including electronic surveillance and scheduled appointments with justice system personnel.

¹³⁴ Isabella Jorgensen, *et al.*, *The Current State of Bail Reform in the United States: Results of a Landscape Analysis of Bail Reforms Across All 50 States*, HARVARD KENNEDY SCHOOL (Dec. 2021).

personnel.¹³⁵ Thus, while the Conditions have a limited effect on a defendant's decision to avoid adjudication proceedings, they provide useful resources in the event a defendant does decide to attempt to avoid adjudication proceedings.

The Conditions have a substantially greater impact on a criminal defendant's decisions regarding negotiation and potential acceptance of a plea agreement.¹³⁶ During the pretrial phase of a defendant's criminal adjudication, the Conditions impose substantial hardship on the defendant.¹³⁷ As a result, a plea agreement which provides for sufficiently minimal punishment may motivate an innocent defendant to plead guilty.¹³⁸ Unfortunately, this is particularly true for low-income defendants, and defendants belonging to historically marginalized groups, who generally experience the Condition's impacts in greater severity.¹³⁹

Thus, the Conditions do facilitate the negotiation of plea agreements but do so by undermining a defendant's fundamental liberty interests – often to the defendants who can least afford to bare such unjust punishments.

E. PROPOSAL FOR REFORM

The best way to modify the Standard Conditions is to abolish them in their entirety.

For a criminal defendant to be granted pretrial release, they must make a threshold showing that their release will not cause continued harm to victims of their alleged crimes and the community

¹³⁵ *Id.*

¹³⁶ See *Snead*, *supra* note 25; see also *Muhlhausen*, *supra* note 82.

¹³⁷ *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125 (Feb. 2018), <https://harvardlawreview.org/print/vol-131/bail-reform-and-risk-assessment-the-cautionary-tale-of-federal-sentencing/>; see also Brook Hopkins, et al., *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679 (2018), <https://scholarlycommons.law.northwestern.edu/jclc/vol108/iss4/2>.

¹³⁸ *Id.*

¹³⁹ See Lauren Bennett, *Punishing Poverty: Robinson & the Criminal Cash Bond System*, 25 WASH. & LEE L. REV. 1, (2019) <https://scholarlycommons.law.wlu.edu/crsj/vol25/iss1/10/>; see also *Funk*, *supra* note 3; *et. seq.*

more broadly.¹⁴⁰ Such a showing generally requires a defendant to provide the court with a third-party custodian, who becomes legally responsible for the defendant's compliance with the law while on pretrial release.¹⁴¹ Thus, only a criminal defendant who has provided evidence that they are not a continued danger – to the victim of their alleged crime and the broader community – is granted pretrial release.

This invites critical question: if a criminal defendant is deemed safe to be released into the community pending adjudication of their criminal charges, why must the law impose additional behavioral requirements, without judicial regard for a defendant's particular circumstances or needs? Are such behavior conditions helpful to the defendant bettering their life? Do they protect society? Or are they simply performative, the urge to do “something?”

Thus, continued imposition of the Conditions is entirely performative. Judges understand that such conditions do not meet their stated policy aims, but continue to impose them for fear of backlash, or in the cases of most state judges, a negative election result.¹⁴² Constraints on criminal justice resources – specifically state and local jail funding – prevents judges from keeping potentially dangerous defendants incarcerated.¹⁴³ Furthermore, judges are well aware

¹⁴⁰ For specific categories of crimes, such as drug and sex crimes, there are judicial presumptions that a criminal defendant is a continued danger to the community, which a defendant can only overcome by a clear and convincing showing. See Megan T. Stevenson, *et al.*, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 708, (2022) https://virginialawreview.org/wp-content/uploads/2022/05/StevensonMayson_Book.pdf; See also Jaden M. Lessnick, *Pretrial Detention by Preponderance: the Constitutional and Interpretative Shortcomings of the Flight-Risk Standard*, 89 UNIV. CHI. L. REV. 5, (2022) https://lawreview.uchicago.edu/sites/default/files/03_Lessnick_CMT_FINAL.pdf.

¹⁴¹ *Id.*

¹⁴² See Alexander M. Holsinger, *et al.*, *Is Pretrial Detention an Effective Deterrent? An Analysis of Failure to Appear and Rearrest Says "No,"* 87 U.S. PROBATION JOURNAL 1, (Jun. 2023) <https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services/federal-probation-journal/2023/06/pretrial-detention-effective-deterrent-analysis-failure-appear-and-rearrest-says-no>; see also Ross Hatton & Jessica Smith, *Research on the Effectiveness of Pretrial Support and Supervision Services: A Guide for Pretrial Service Programs*, UNC SCHOOL OF GOVERNMENT, (Jul. 2021) <https://cjl.sog.unc.edu/wp-content/uploads/sites/19452/2020/05/Research-on-the-Effectiveness-of-Pretrial-Support-Supervision-Services-5.28.2020.pdf>.

¹⁴³ See Holsinger *et al.*, *supra* note 181; see also Hatton & Smith, *supra* note 181.

that a lack of pretrial supervision personnel and monitoring equipment makes imposition of the Conditions theoretical at best.¹⁴⁴ Thus, the determinative actors within the criminal justice system – judges – know the Conditions are ineffective as a means of reaching their stated aims, but are forced to impose such conditions, either by statutory requirement or out of necessity.¹⁴⁵

Furthermore, in the event that a criminal defendant on pretrial release commits a new crime, it would be more effective, both in relation to deterrence and judicial efficiency, for such new criminal activities to be tried in a completely separate proceeding. In theory, a criminal defendant who commits a crime while on pretrial release will face a greater punishment as a result of knowingly violating the Conditions.¹⁴⁶ In practice, differing jurisdictions within the 4th Circuit will often “kick the bucket” between one another, in the hopes that being the last to prosecute a criminal defendant will result in a better negotiated plea.¹⁴⁷ Thus, this practical inefficiency in effect rewards a defendant released pretrial for committing additional crimes. Maintaining entirely separate prosecutions for successive criminal acts will not only produce judicial efficiency; by limiting the number of hearings in which prosecutors simply continue cases and adjudicating criminal charges faster, it will also remove the perverse incentive to commit additional crime.

Additionally, as discussed *above*, the Conditions do not reduce the risk of community harm and play little to no role in ensuring criminal defendants appear for adjudication of their charges.¹⁴⁸

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125 (Feb. 2018), <https://harvardlawreview.org/print/vol-131/bail-reform-and-risk-assessment-the-cautionary-tale-of-federal-sentencing/>; see also Brook Hopkins, et al., *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679 (2018), <https://scholarlycommons.law.northwestern.edu/jclc/vol108/iss4/2>.

¹⁴⁷ See *Holsinger et al.*, *supra* note 181; see also *Hatton & Smith*, *supra* note 181.

¹⁴⁸ *Id.*

As such, in practicality, the only purpose of the Conditions is to impose hardship on those accused of a crime – a reflection of society’s innate belief that those accused of a crime are likely guilty, and therefore believe punishment is justified from the moment an accusation is uttered.¹⁴⁹ This premature impulse to punish, while gratifying, undermines the notion of innocent until proven guilty and leaves the justice system ripe for abuse from bad actors.¹⁵⁰ Indeed, punishment before a determination of guilt fundamentally undermines society’s fundamental notions regarding punishment, fairness, and the rule of law – whether or not those calling for such understand so.¹⁵¹

Finally, the core moral premises underlying continued imposition of the Conditions – namely, that maintenance of employment and strict routine reduce the risk of committing crime – do not hold true after rigorous testing.¹⁵² While the Conditions do serve to reduce community *perceptions* about the rate of crime, their impact on defendants far outweigh their good for the community.¹⁵³ For example, while violent crime rates are lower across America – especially in urban environments – compared with the rates of violent crime thirty and even fifty years ago, perceptions of the prevalence of violent crime is at an all time high.¹⁵⁴ Concurrently, the restrictions and pretrial punishments faced by those accused of crimes have never been so harsh

¹⁴⁹ See Lauren Bennett, *Punishing Poverty: Robinson & the Criminal Cash Bond System*, 25 WASH. & LEE L. REV. 1, (2019) <https://scholarlycommons.law.wlu.edu/crsj/vol25/iss1/10/>; see also Funk, *supra* note 3; *et. seq.*

¹⁵⁰ *Id.*

¹⁵¹ See Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining*, 57 W.M. L. REV. 8, (Mar. 15, 2016) <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3640&context=wmlr>; see also Johannes Andenaes, *The General Preventative Effects of Punishment*, 111 U. PENN. L. REV. 7, (May 1966) https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=6288&context=penn_law_review.

¹⁵² See Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, (2014) https://www.virginialawreview.org/wp-content/uploads/2020/12/Brown_Book.pdf; see also Jacob Schuman, *Criminal Violations*, 108 VA. L. REV. 1817, (Dec. 29, 2022) <https://virginialawreview.org/articles/criminal-violations/>.

¹⁵³ See Sage L. Eck-Miller, *Real Versus Perceived Crime Rates: Examining Causes of the Disconnect Between Fear and Reality*, UNIVERSITY OF MONTANA, (2024) <https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1549&context=utpp>.

¹⁵⁴ See Eck-Miller, *supra* note 192; see also Skeem, *supra* note 141.

– those accused but not yet found guilty of a crime face immediate consequences ranging from loss of employment, to difficulties in securing housing, all the way to total social ostracization.¹⁵⁵

As such, it can reasonably be concluded that balance between individual rights and broader social considerations has shifted too heavily towards society's needs, at the expense of individuals.¹⁵⁶

Thus, this paper's proposal centers on the notion that justice demands society stop lying to itself with performative, ineffective acts which trample on individual rights for minimal social gains.

F. CONCLUSION

The Conditions are overly broad, lacking more precise mechanism for individualization to a defendant's particular circumstances, thereby creating near impossible conditions for compliance, and thus perpetuating the cycle of re-incarceration. The Conditions at best serve as a performative gesture to do *something* to prevent crime, and at worst, serve as a systemic incentive for innocent defendants to plead guilty. Furthermore, the Conditions are an ineffective policy measure towards their stated purposes – namely, ensuring a defendant is present for adjudication of their criminal charges and ensuring community safety. Finally, the Conditions have a disproportionate effect of historically marginalized groups – both in terms of difficulty of compliance and impact of non-compliance – such that, their existence and continued enforcement is a factor in perpetuating racial and economic disparities with regard to incarceration and recidivism rates.¹⁵⁷

¹⁵⁵ See *Holsinger et al.*, *supra* note 181; see also *Hatton & Smith*, *supra* note 181.

¹⁵⁶ *Id.*

¹⁵⁷ Given the practical limitations of this paper, both in terms of word length and duration of research, this paper proposes several related research questions to further develop and add nuance to its conclusions:

1. Is it possible to separate pretrial violations due to over restrictive Standard Conditions from legitimate violations caused by a defendant's continued criminal behavior, or would such separation create judicial

backlog and make the judicial system less efficient overall?

2. Does a criminal defendant's prior criminal history, or lack thereof, impact the likelihood of such a defendant committing a pretrial violation? Instead of a one-size-fits-all approach to incarceration alternatives, would a more tailored, ala carte set of pretrial alternative conditions serve more effectively to promote the goals of the Standard Conditions?
3. What share of pretrial Standard Condition violations are due to a criminal defendant's lack of knowledge regarding the specific conditions constituting the Standard Conditions, versus due to willful violation of such conditions?