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Testimony from:

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Thank you for the opportunity to address the U.S. Commission on Civil Rights on questions relating to pretrial and bail reform. These are critical questions with significant and far-reaching implications for the civil rights and welfare of millions of Americans, and I am especially thankful that the Commission has chosen to investigate and shine a light on these issues.

My name is Lars Trautman and I am a resident senior fellow of criminal justice and civil liberties policy at the R Street Institute in Washington, D.C. In this role, I study bail and pretrial practices in the United States and advocate for improvements that will create a more equitable, effective and efficient criminal justice system. Earlier in my career, I served as an assistant district attorney in Essex County, Massachusetts. In that capacity, I participated in hundreds of arraignments, gaining firsthand experience with bail determinations as well as insights into some of the system's flaws.

The most relevant detail about money bail's history is the sheer length of that history. The practice can trace its origins all the way back to the resolution of blood feuds in Anglo-Saxon England, only slowly transforming across subsequent centuries of English history into a more recognizable system of personal sureties and conditional pretrial release.<sup>1</sup> Colonists that came to what would eventually become the United States brought the practice with them and ultimately enshrined it in the Bill of Rights.<sup>2</sup> Since this country's founding, it has metastasized into a colossus looming over the entire pretrial system.

Whether one looks at the founding era or all the way back to bail's origins across the Atlantic, the justice system of those times scarcely resembles that of today. Bail was conceived and evolved into its current form well before the development of the hallmarks of our current system: a byzantine criminal code that ensnares a substantial portion of the population, creates over 10 million jail admissions annually,

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<sup>1</sup> Timothy R. Schnacke, "A Brief History of Bail," *The Judges' Journal*, Vol. 57, No. 3 (Summer 2018).  
<http://www.supremecourt.ohio.gov/sites/PJRSummit/materials/bailHistory.pdf>.

<sup>2</sup> *Ibid.* <http://www.supremecourt.ohio.gov/sites/PJRSummit/materials/bailHistory.pdf>.

and sees the overwhelming majority of cases resolved through plea deals rather than trials.<sup>3</sup> Likewise, modern supervision technologies and evidence-based pretrial policies were nonexistent, as was the possibility of data-backed solutions to the question of pretrial release. In short, money bail grew up in a world without meaningful alternatives or the information necessary to assess its effectiveness. Yet, it is with these very capabilities that we should assess its continuing relevance now.

Today, many begin attempting to understand our bail system by viewing it through the lens of constitutionality. Although bail appears in the Eighth Amendment, the actual and ordinary use of bail in courtrooms across this country provides ample reason to believe that the 14<sup>th</sup> Amendment's Equal Protection and Due Process protections might be sufficient to upend some of these money bail practices. For example, only a particularly tortured reading of the term "excessive" in the Eighth Amendment could countenance a system in which thousands of individuals nevertheless find themselves subject to wealth-based detention each year.<sup>4</sup> Similarly, the significant racial and ethnic disparities in bail and pretrial detention in many jurisdictions, as well as evidence of bias in pretrial decision-making itself, support the notion that the Equal Protection Clause might prohibit many current pretrial practices.<sup>5</sup>

Indeed, these disparities highlight the nakedness of the bias of the money bail system and our willful blindness to it. As the available data bears out and even a relatively short stay in most courtrooms conducting bail hearings will make evident, wealth-based detention is a common occurrence and one disproportionately affecting minority defendants.<sup>6</sup> That an overtly money-based system of pretrial release in a system suffering from structural racism would create this outcome should not come as any

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<sup>3</sup> See, Becki R. Goggins and Dennis A. DeBacco, "Survey of State Criminal History Information Systems: A Criminal Justice Information Policy Report, 2016," U.S. Department of Justice, Bureau of Justice Statistics, February 2018, Table 1 (finding roughly 110 million individuals in state criminal history files in 2016). <https://www.ncjrs.gov/pdffiles1/bjs/grants/251516.pdf>; Zhen Zeng, "Jail Inmates in 2018," U.S. Department of Justice, Bureau of Justice Statistics (March 2020) (detailing over 10 million jail admissions each year). <https://www.bjs.gov/content/pub/pdf/ji18.pdf>; Jeffrey Q. Smith and Grant R. MacQueen, "Going, Going, But Not Quite Gone," *Judicature*, Vol. 101, No. 4 (Winter 2017) pp. 32-34 (discussing the prevalence of plea deals). <https://judicialstudies.duke.edu/wp-content/uploads/2018/01/JUDICATURE101.4-vanishing.pdf>.

<sup>4</sup> See, e.g. Brian A. Reaves, "Felony Defendants in Large Urban Counties, 2009," U.S. Department of Justice, Bureau of Justice Statistics (December 2013) (Finding that in large urban counties in 2009, 38 percent of felony defendants were detained prior to trial and nine in 10 of these defendants had a bail amount set, but were unable to post it). <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.

<sup>5</sup> See, Will Dobbie and Crystal Yang, "Proposals for Improving the U.S. Pretrial System," The Hamilton Project (March 2019) (detailing racial disparities in pretrial detention). [https://www.hamiltonproject.org/assets/files/DobbieYang\\_PP\\_20190319.pdf](https://www.hamiltonproject.org/assets/files/DobbieYang_PP_20190319.pdf); David Arnold, et al., "Racial Bias in Bail Decisions," *The Quarterly Journal of Economics*, Vol. 133, No. 4 (November 2018) (discussing the presence of racial bias in bail decisions). <https://academic.oup.com/qje/article-abstract/133/4/1885/5025665?redirectedFrom=fulltext>.

<sup>6</sup> Wendy Sawyer, "How race impacts who is detained pretrial," Prison Policy Initiative, Oct. 9, 2019. [https://www.prisonpolicy.org/blog/2019/10/09/pretrial\\_race/](https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/).

great surprise. And while impossibly high money bails may attract attention on occasion, frequently even relatively small amounts—\$500 or less—turn into de facto detention orders. How can this persist?

Although individual biases are no doubt part of the equation, the fundamental flaw rests with a system that would push these individuals toward inequitable outcomes even if such biases were eliminated. To begin with, the bail process often looks little like the careful weighing of risk factors and financial ability that one might expect from relevant legal rules. I can recall on more than one occasion having to rush to familiarize myself with a case and decide upon a bail recommendation all in the minute or two that it took for a court clerk to finish reading the list of charges formally to the defendant. Studies have similarly found that a bail hearing in some jurisdictions takes as little as one to three minutes on average to complete.<sup>7</sup> This is a process that invites inconsistency and error.

The problem is compounded by a lack of follow through. Low bails become detention orders not only because there was a failure to assess the initial ability to pay, but because those involved may be unaware of the consequences of that bail decision. For example, the organization Measures for Justice found in one Wisconsin county that roughly 40 percent of pretrial detainees unable to afford bail had a bail set at \$500 or less—a fact unknown to the local district attorney, who after discovering this disturbing information shifted his policies to reduce these unintentional detentions.<sup>8</sup> I am ashamed to admit that between an annual caseload measuring in the hundreds and the routine transfer of cases between prosecutors, I too lost track of the results of some bail determinations when I was a prosecutor. This speaks to a bail system so hurried and thoughtless as to jail individuals essentially by accident, making a mockery of our hallowed due process rights.

The immediate loss of freedom is not the only right threatened by this at times arbitrary and capricious system. Research has repeatedly demonstrated that pretrial detention increases the odds that a defendant will end up with a conviction.<sup>9</sup> The mere act of pretrial detention thus serves to interfere with an individual's ability to defend themselves, further undermining constitutional due process protections.

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<sup>7</sup> Megan Stevenson, "Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes," *The Journal of Law, Economics, and Organization*, Vol. 34, No. 4 (November 2018).

<https://academic.oup.com/jleo/article/34/4/511/5100740>.

<sup>8</sup> "Failure to Pay Low Monetary Bail," Measures for Justice (finding that in Winnebago County in 39.88 percent of cases in which a defendant failed to pay a monetary bail, that bail was set at \$500 or less).

<https://measuresforjustice.org/portal/exploration?l=WI&m=8&sl=WI139&sm=8&fg=1&f=1&c=m&p=WI013,WI139&md=0&ef=8.1>; Teresa Mathew, "Florida Will Bring more Transparency to Its Justice System," *Bloomberg CityLab*, March 22, 2018 (describing the Winnebago County District Attorney's response to the data provided by Measures for Justice). <https://www.citylab.com/equity/2018/03/florida-will-bring-more-transparency-to-its-justice-system/556139>.

<sup>9</sup> See, Will Dobbie and Crystal Yang, "Proposals for Improving the U.S. Pretrial System," The Hamilton Project, Policy Proposal 2019-05 (March 2019), pp. 10-11.

[https://www.hamiltonproject.org/assets/files/DobbieYang\\_PP\\_20190319.pdf](https://www.hamiltonproject.org/assets/files/DobbieYang_PP_20190319.pdf).

At the same time, research suggests that money bail not only results in racial disparities at the pretrial stage, but contributes to those found later in the process at conviction and sentencing.<sup>10</sup>

In theory, the U.S. Constitution and related state laws exist to guard against these kinds of outcomes and protect individuals from pretrial abuses. The Eighth Amendment, which discusses bail, explicitly states that it shall not be “excessive,” though it does not assert that bail must be available in all cases. The Fifth and 14<sup>th</sup> Amendments likewise establish the requirement of due process before the government may deprive an individual of their liberty. Either or both of these protections ought to be sufficient, in theory, to prevent wealth-based and otherwise unnecessary pretrial detentions. One might expect the 14<sup>th</sup> Amendment’s guarantee of equal protection to eviscerate similarly the economic, racial and ethnic disparities rife in the bail system.

Unfortunately, in practice these vaunted rights end up as little more than paper tigers. Courts have determined that the term “excessive” in the Eighth Amendment relates to the amount required to ensure appearance rather than a defendant’s ability to pay it, thereby reducing a defendant’s financial status to near irrelevancy.<sup>11</sup> Defendants have likewise found only sporadic relief from unaffordable bails in 14<sup>th</sup> Amendment-based claims alleging disparate treatment based on economic position.<sup>12</sup> Outside of the constitutional context, remedies frequently include a bail review by another court or judge, yet there is little evidence that these transform high bails into affordable ones in a significant number of cases.<sup>13</sup>

Court cases are hardly the only way in which supporters of bail reform have challenged the status quo, however. In recent years, actors from the executive, legislative and judicial branches as well as civil society have all championed new measures to improve bail practices or alleviate the misery they can cause. These have included New Jersey’s elimination of nearly all money bail; a series of prosecutors instituting new policies not to pursue money bail across a variety of offenses; judicial orders at least temporarily restricting the use of money bail; and the establishment of community bail funds that effectively eliminate bail one case at a time.<sup>14</sup> The COVID-19 pandemic has put further pressure on

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<sup>10</sup> Ellen A. Donnelly and John M. MacDonald, “The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration,” *Journal of Criminal Law and Criminology*, Vol. 108, No. 4 (Fall 2018). <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7641&context=jclc>.

<sup>11</sup> *Stack v. Boyle*, 342 U.S. 1, 3 (1951).

<sup>12</sup> See, Alison M. Smith, “U.S. Constitutional Limits on State Money-Bail Practices for Criminal Defendants,” Congressional Research Service, Feb. 26, 2019. <https://fas.org/sgp/crs/misc/R45533.pdf>.

<sup>13</sup> Dorothy Weldon, “More Appealing: Reforming Bail Review in State Courts,” *Columbia Law Review*, Vol. 118, No. 8 (2018). <https://columbialawreview.org/content/more-appealing-reforming-bail-review-in-state-courts/>.

<sup>14</sup> Criminal Justice Reform Act, N.J.S.A. 2A:162-15 to 26. (2014) (eliminating nearly all money bail in New Jersey); “New Washtenaw County prosecutor: No cash bail to get out of jail,” *The Detroit News*, Jan. 4, 2021. <https://www.detroitnews.com/story/news/local/michigan/2021/01/04/ann-arbor-prosecutor-cash-bail-jail/115256196/>; Chao Xiong, “Hennepin County prosecutor to end bail for several low-level offenses,” *Star Tribune*, Dec. 2, 2020. <https://www.startribune.com/hennepin-county-prosecutor-to->

jurisdictions to innovate and experiment with additional methods of reducing pretrial detention, which has included new bail reforms.<sup>15</sup>

Some of these reforms have made dramatic strides toward correcting the imbalances and injustices either created or exaggerated by money bail, though racial and ethnic disparities have proven more stubborn. For example, while New Jersey's reforms reduced overall pretrial detention rates, they did not lead to a similar reduction in racial or ethnic disparities.<sup>16</sup> Washington, D.C., which has operated for years without wealth-based detention, likewise nevertheless posted a 91 percent return to court rate and 88 percent arrest-free rate in FY 2020, suggesting it is possible to break a reliance on money bail without jeopardizing other criminal justice goals.<sup>17</sup> Even more limited efforts such as community bail funds have boasted success rates hovering around 90 percent, lending further credence to the notion that money bail is frequently unnecessary.<sup>18</sup> With most bail reforms still relatively new, additional data will be required to assess the effectiveness of each, and how to address the civil rights and moral concerns in pretrial decisions further.

The fact that criminal justice's local nature requires most reform to occur at the state level does not obviate the need for an affirmative federal response to these problems. Through grants to state and local governments, the federal government holds vast power to support and ultimately incentivize reform efforts. It should do so to reduce reliance on money bail and increase evidence-based experimentation with alternatives. While the inefficiency and injustice of money bail is increasingly apparent, the search for an optimal replacement is still ongoing and may well depend on a jurisdiction's unique conditions and goals. As such, whether policymakers support bail reform through new language attached to existing programs such as the Edward Byrne Memorial Justice Assistance Grant Program (JAG) or the creation of entirely new funding opportunities, these financial incentives ought to be flexible and goal-oriented rather than prescriptive.

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[end-bail-for-several-low-level-offenses/573266471/](https://www.wtop.com/fairfax-county/2020/12/fairfax-county-prosecutor-ends-cash-bail-system/); Abigail Constantino, "Fairfax County prosecutor ends cash-bail system," *WTOP*, Dec. 21, 2020. <https://wtop.com/fairfax-county/2020/12/fairfax-county-prosecutor-ends-cash-bail-system/>; Emergency Rules 1-11, California Judicial Council, April 6, 2020. <https://jcc.legistar.com/View.ashx?M=F&ID=8234474&GUID=79611543-6A40-465C-8B8B-D324F5CAE349>; "National Bail Fund Network," Community Justice Exchange. <https://www.communityjusticeexchange.org/nbfn-directory>.

<sup>15</sup> "COVID-19 Policy Response Survey," National Association of Pretrial Services Agencies, June 19, 2020. <https://drive.google.com/file/d/1-jkFffQRmTTcqQ0VOEJWlmyyJl--gExB/view>.

<sup>16</sup> Glenn Grant, "Jan 1. – Dec. 31 2018: Report to the Governor and Legislature," New Jersey Administrative Office of the Courts (2019). <https://perma.cc/U5SS-8T65>.

<sup>17</sup> "PSA Performance Outcomes – FY 2016-2020," Pretrial Services Agency for the District of Columbia (November 2020). <https://www.psa.gov/sites/default/files/Fact%20Sheet-PSA%20Performance%20Outcomes-FY2016-20.pdf>.

<sup>18</sup> Sarah Phillips, "National Survey of Community Bail Funds," Smart Decarceration Initiative (April 2017). <https://static1.squarespace.com/static/5a973b49ee1759a6e039e0f4/t/5c0666d1575d1fefff9645f2/1543923411576/national+survey.071417.pdf>.

In addition, the U.S. Department of Justice should leverage its capabilities and expertise to support local reform efforts and protect against abusive bail practices. As it does in other criminal justice areas, the U.S. Department of Justice can provide training, research support and technical assistance to help local jurisdictions grapple with alternatives to money bail. At the other end of the spectrum, in those places in which money bail is entrenched and change is not on the horizon, the U.S. Department of Justice's Civil Rights Division should monitor for and investigate local pretrial systems for potential civil rights violations.

The time has come to reevaluate the utility of money bail. Its proclivity to violate or abridge the civil rights of so many people each year point to the dire need to find alternatives. The relative successes of recent reforms suggest that these alternatives exist and that a pretrial system can operate effectively with little to no money bail. I welcome the addition of the U.S. Commission on Civil Rights to this discussion and I look forward to contributing however I am able. Thank you.