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Guilty? Or Just Poor? Potential International Human Rights Violations in the U.S. Bail System

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GUILTY? OR JUST POOR? POTENTIAL INTERNATIONAL HUMAN RIGHTS VIOLATIONS IN THE U.S. BAIL SYSTEM

*Alireza Nourani-Dargiri**

“The defendant with means can afford to pay bail, he can afford to buy his freedom. But the poor defendant cannot pay the price . . . he stays in jail for one reason only—because he is poor.”¹

– United States President Lyndon B. Johnson (1966)

ABSTRACT

The current bail system in the United States violates international human rights standards. Although the United States often thinks of itself as the world leader in social change, its bail system has lagged far behind the rest of the world in this aspect. Historically disadvantaged groups are subjected to disproportionate rates of pretrial detentions in the United States, often because of the imposition of cash bail. The United States bail system has led to innocent people spending years incarcerated simply because they are too poor to pay an abhorrently high bail fee. This paper discusses the potential international law violations implicated by the United States bail system and discuss how international intervention may be an avenue for significant reform.

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1. President Lyndon B. Johnson, Remarks at the Signing of the Bail Reform Act of 1966 (June 22, 1966), <https://www.presidency.ucsb.edu/documents/remarks-the-signing-the-bail-reform-act-1966> [<https://perma.cc/45MG-4LZ7>].

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I. INTRODUCTION

The United States bail system is broken, and international law might be the means to fix it. While international human rights law permits money bail, any pretrial restrictions must be consistent with the right to equality under the law.² This consistency, however, appears to be missing in the United States system.³ Consider the story of Kalief Browder.⁴

On May 15, 2010, Browder was wrongfully arrested for stealing a backpack.⁵ Although the police searched Browder and did not find the backpack, they still took Browder to the police station where he was charged with robbery, grand larceny, and assault.⁶ Browder’s bail was

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2. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171 [hereinafter ICCPR]; see also Human Rights Committee, General Comment no. 32, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) [hereinafter GC 32].
 3. See generally Ariana K. Connelly & Nadin R. Linthorst, *The Constitutionality of Setting Bail Without Regard to Income: Securing Justice or Social Injustice?*, 10 ALA. C.R. & C.L. L. REV. 115 (2019); see also Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What’s Next*, 108 J. CRIM. L. & CRIMINOLOGY 701 (2019); Wendy R. Calaway & Jennifer M. Kinsley, *Rethinking Bail Reform*, 52 U. RICH. L. REV. 795 (2018).
 4. Jennifer Gonnerman, *A Boy Was Accused of Taking a Backpack. The Courts Took the Next Three Years of His Life*, NEW YORKER (Sept. 29, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law> [https://perma.cc/PNB2-7B5J].
 5. *Id.*
 6. *Id.*

set at \$3,000.⁷ Because Browder and his family were unable to raise this amount of money,⁸ Browder was forced to await his trial at Rikers Island for a crime he did not commit.⁹ Browder would eventually spend three years, including two years in solitary confinement, on Rikers Island.¹⁰ He was never convicted of any crime.¹¹ In 2013, Browder was finally released after it was clear that the prosecution could not prove its case.¹² After his release, Browder struggled with his mental health due to abuse by officers and inmates while he was wrongfully imprisoned.¹³ He committed suicide just two short years after his release from his arbitrary detention.¹⁴

Unfortunately, Browder's tragic tale is not an isolated incident. Browder's story is one of the many stories of innocent people imprisoned because they simply could not pay the bail fee and who refused to take a plea deal that would require them to admit to something they did not do.¹⁵ Today, close to half a million people are

7. *Id.*

8. *Id.*

9. Prosecutors in Browder's case continually requested adjournments in his trial, even after he already had been in jail for nearly a year. *Id.*; Connelly & Linthorst, *supra* note 3.

10. Gonnerman, *supra* note 4; *see also* Nicole Johnson, *Solitary Confinement of Juvenile Offenders and Pre-Trial Detainees*, 35 *TOURO L. REV.* 699, 699 (2019) ("The [United States] Supreme Court has long recognized that juvenile offenders should not be held to the same standards of accountability or degrees of punishment as adults. Despite recent changes in federal and state laws prohibiting the use of solitary confinement for juvenile offenders, it continues to be used as a routine form of punishment for juveniles in most states. Although its use has been banned in New York State prisons, county facilities within the state are not held to the same regulations, and therefore continue to implement this harsh punishment regardless of its detrimental impact on juveniles.").

11. Gonnerman, *supra* note 4.

12. Jennifer Gonnerman, *Kalief Browder, 1993-2015*, *THE NEW YORKER* (June 7, 2015), <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015> [<https://perma.cc/YZ43-5B4D>].

13. *Id.*; *see also* Dana Ford, *Man Jailed as Teen Without Conviction Commits Suicide*, *CNN* (June 15, 2015, 4:49 PM), <https://www.cnn.com/2015/06/07/us/kalief-browder-dead/index.html> [<https://perma.cc/V74V-CN58>].

14. Gonnerman, *supra* note 4.

15. Often, prosecutors use a defendant's inability to pay bail as leverage for plea deals so they can secure a conviction without trial. This was the case in Browder's story, as well as many others. *See, e.g.*, Rebecca Rosenberg, *Bail-Reform Poster Boy Pedro Hernandez Says Police are Targeting Him*, *N.Y. POST* (Aug. 18, 2019, 6:32 PM), <https://nypost.com/2019/08/18/bail-reform-poster-boy-pedro-hernandez-says-police-are-targeting-him/>

in jail awaiting trial on charges of minor offenses, many of whom remain incarcerated only because they cannot afford cash bail.¹⁶ In some states, over eighty percent of the jail population is pretrial and unconvicted.¹⁷ Forty-three percent of this population is Black,¹⁸ even though approximately twelve percent of the total population is Black.¹⁹ Furthermore, this system *costs* the United States approximately \$13.6 billion a year,²⁰ due to the costs associated with detaining so many people who cannot pay the exorbitant bail fee.²¹

The use of cash bail in the United States has created a system where it is often better to be rich and guilty than poor and innocent.²² Although international human rights law permits cash bail, any pretrial restrictions must be consistent with the right to liberty, the

[<https://perma.cc/RGP8-LER4>]; see also Peter Krouse, *Longer Jail Stays Pretrial Result in Greater Chance of Conviction*, OHIO ACLU CONCLUDES, CLEVELAND.COM (Mar. 16, 2021, 10:03 AM), <https://www.cleveland.com/news/2021/03/longer-jail-stays-pretrial-result-in-greater-chance-of-conviction-ohio-aclu-concludes.html> [<https://perma.cc/N7XN-YLTZ>].

16. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/726D-PLQB>]. Although bail can be any kind of conditional release from custody, judges in the United States almost always impose money as a condition of release. See discussion *infra* Section II.A.3.
17. Joshua Aiken, *Era of Mass Expansion: Why State Officials Should Fight Jail Growth*, PRISON POL'Y INITIATIVE (2017), <https://www.prisonpolicy.org/reports/jailsovertime.html> [<https://perma.cc/3KL7-KAZK>].
18. Wendy Sawyer, *How Race Impacts Who is Detained Pretrial*, PRISON POL'Y INITIATIVE (2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/ [<https://perma.cc/3KL7-KAZK>].
19. *Id.*
20. *Pretrial Detention*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/research/pretrial_detention/ [<https://perma.cc/GGL9-UUZC>]. It is very likely, however, that the estimated costs could be much higher. *After Cash Bail: A Framework for Reimagining Pretrial Justice*, BAIL PROJECT, <https://bailproject.org/after-cash-bail/> [<https://perma.cc/4Q75-6DE9>] [hereinafter *After Cash Bail*].
21. See *Pretrial Justice: How Much Does It Cost?*, PRETRIAL JUST. INST. (2017), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c2f50513-2f9d-2719-c990-a1e991a57303&forceDialog=0> [<https://perma.cc/UD9E-KQ8C>]; see also Christopher T. Lowenkamp et al., *The Hidden Costs of Pretrial Detention*, NAT'L INST. OF CORRECTIONS (2013).
22. *Bryan Stevenson Talks to Oprah About Why We Need to Abolish the Death Penalty*, EQUAL JUST. INITIATIVE (Nov. 28, 2015), <https://ej.org/news/bryan-stevenson-tells-oprah-winfrey-why-we-should-abolish-death-penalty/> [<https://perma.cc/Y5J9-5HM3>].

presumption of innocence, and *the right to equality* under the law.²³ As currently applied, the United States system may violate these international requirements, and international human rights procedures might provide a vehicle for reform.

This Note examines whether the current bail system in the United States violates international human rights standards. It explores the strengths and limitations of initiating an investigation by international institutions into this system as a way to apply pressure on the United States to create meaningful changes to its bail system. This Note begins by analyzing the compatibility of the United States bail system with international law standards. Specifically, the first section discusses the legality of cash bail, both in the United States and internationally. Next, this Note examines alternative forms of pretrial systems that other countries use and assesses whether the United States system falls short of the global standard. After appraising various reform proposals, this Note concludes by evaluating the efficacy of possible strategies that use international law mechanisms to bring about change.

II. CASH BAIL UNDER INTERNATIONAL LAW

A. *Is the United States Bail System Inconsistent with International Law?*

Numerous international instruments, resolutions, and reports emphasize that detentions should not be arbitrary.²⁴ The right to liberty, the right to equality, and the right to a fair trial are all salient aspects of human rights law.²⁵ The United States bail system, however, violates these three international norms. It disproportionately impacts racial minorities²⁶ and keeps individuals unlawfully detained, even when they are innocent, solely because they cannot pay high bail fees.²⁷ Cash

23. See ICCPR, *supra* note 2; see also GC 32, *supra* note 2; see also Q & A: *Pretrial Incarceration, Bail and Profile Based Risk Assessment in the United States*, HUM. RTS. WATCH (June 1, 2018, 7:00 AM), <https://www.hrw.org/news/2018/06/01/q-pretrial-incarceration-bail-and-profile-based-risk-assessment-united-states> [https://perma.cc/8988-MU5N].

24. See, e.g., *International Standards: Working Group on Arbitrary Detention*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/EN/Issues/Detention/Pages/standards.aspx> [https://perma.cc/9U6L-5HD4].

25. See ICCPR, *supra* note 2; see also GC 32, *supra* note 2.

26. See Calaway & Kinsley, *supra* note 3; see also LAUREN E. GLAZE, U.S. DEP'T OF JUST. CORRECTIONAL POPULATIONS IN THE UNITED STATES (2011), www.bjs.gov/content/pub/pdf/cpus10.pdf [https://perma.cc/2J5A-DPTY].

27. See Calaway & Kinsley, *supra* note 3.

bail does not apply equally throughout society and undermines defendants' right to a fair trial.²⁸ Moreover, it is also common practice in the United States criminal justice system to coerce a defendant into accepting a plea bargain in order to be released from pretrial custody.²⁹

1. Background on the ICCPR

International law prohibits arbitrary detentions.³⁰ The International Covenant for Civil and Political Rights ("ICCPR"),³¹ which is interpreted through the Human Rights Committee's General Comments,³² seeks to protect individual liberties.³³ The United States is a party to this treaty, having ratified it in 1992.³⁴ While the United States, therefore, is obligated to uphold the standards that the treaty promulgates,³⁵ its federal legislators have not enacted implementing

28. *Id.*

29. See generally Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349 (2004).

30. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 840 (1997); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 702 (AM. L. INST. 1987); see also U.N. Human Rights Committee, General Comment No. 29: Article 4: Derogations during a State of Emergency, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) [hereinafter GC 29].

31. ICCPR, *supra* note 2.

32. GC 32, *supra* note 2.

33. ICCPR, *supra* note 2; GC 32, *supra* note 2.

34. See *United Nations Human Rights Treaty Bodies*, U.N. TREATY BODY DATABASE, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=187&Lang=EN [<https://perma.cc/79WF-7PV8>].

35. ICCPR, *supra* note 2. This standard, however, is not always applied in the United States. Frustratingly, the Supreme Court has observed that the United States Constitution supersedes treaty obligations. Although this is not always the case, there is Supreme Court precedent that the Constitution would prevail regardless of the contents of the treaty that it signed and ratified. See, e.g., *Ware v. Hylton*, 3 U.S. 199, 236–37 (1796) (“A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way. If the constitution of a state . . . must give way to a treaty, and fall before it; can it be questioned, whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States, that every treaty made by the authority of the United States, shall be superior to the constitution and laws of any individual state; and their will alone is to decide.”); see also *Treaties as Law of the Land*, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/article-2/section-2/clause-2/treaties-as-law-of-the-land> [<https://perma.cc/D42G-DETY>].

legislation because United States legislators believe its domestic civil rights laws already implement the ICCPR's requirements.³⁶ As this Note will further detail, however, this is not always the case. There is a gap between domestic legislation and the requirements of the ICCPR.³⁷

The ICCPR is a multinational treaty that commits its parties to respect the human rights of individuals as enumerated in its text.³⁸ It is enforceable in United States courts by virtue of various domestic civil rights statutes, including the Alien Tort Statute.³⁹ The ICCPR is part of the International Bill of Human Rights and is monitored by the ICCPR's Human Rights Committee, which reviews regular reports of State Parties on how the rights are being implemented.⁴⁰ State Parties must initially report one year after acceding to the Covenant.⁴¹ In addition, all State Parties are obligated to submit reports on specific issues of concern whenever the Committee requests, which is typically every four years.⁴² The Committee examines each report and addresses its concerns and recommendations to the State Party in the form of "concluding observations."⁴³ The United States has regularly complied with its obligation to provide reports to the Committee.⁴⁴

36. When the United States Senate gave its advice and consent regarding the ICCPR, it declared the treaty non-self-executing, which rendered it not directly enforceable in United States courts. David Kaye, *State Execution of the International Covenant on Civil and Political Rights*, 3 U.C. IRVINE L. REV. 95, 96 (2013).

37. See discussion *infra* Section II.A.3 (analyzing the legality of cash bail).

38. See ICCPR, *supra* note 2.

39. 28 U.S.C. § 1350. The Statute, however, can only apply in limited contexts. See *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1390 (2018) ("The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international law violations when the absence of such a remedy might provoke foreign nations to hold the United States accountable.").

40. See ICCPR, *supra* note 2, at art. 28.

41. *Monitoring Civil and Political Rights*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprin dex.aspx> [<https://perma.cc/FB7Q-4WKS>].

42. *Id.*

43. *Id.*

44. See, e.g., *Human Rights Committee Considers Report of the United States*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS. (Mar. 14, 2014), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14383&LangID=E> [<https://perma.cc/447Z-CJFH>]; see also *List of Issues Submission to the United Nations Human Rights Committee During its Periodic Review of the US*, HUM. RTS. WATCH (Jan. 14, 2019, 5:30

Articles 9 and 14 of the ICCPR solidify the importance of prohibiting arbitrary detentions.⁴⁵ Article 9 of the ICCPR describes the general right to liberty.⁴⁶ This article expressly prohibits arbitrary arrests, and explicitly provides that “it shall not be the general rule that persons awaiting trial shall be detained in custody.”⁴⁷ Article 14 of the ICCPR describes the right to a fair trial.⁴⁸ Specifically, this article states “[a]ll persons shall be equal before the courts and tribunals” and “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”⁴⁹ In addition, both articles describe the importance of a speedy trial.⁵⁰

The Human Rights Committee is the body of independent experts that monitors implementation of the ICCPR by its State Parties⁵¹ and that is charged with interpreting the ICCPR’s provisions.⁵² The Committee’s General Comment 32 articulates to what extent the ICCPR’s Article 14 ensures the proper administration of justice.⁵³ To this end it guarantees a series of specific rights: equality before courts and tribunals; a fair and public hearing by a competent, independent, and impartial tribunal; and a presumption of innocence.⁵⁴ It further enumerates the rights of persons charged with a criminal offense and sets forth the relationship of Article 14 with other provisions of the covenant.⁵⁵

2. How the United States Bail System Works

In its most basic sense, the current United States bail system requires that a criminal defendant must pay a particular cash amount

PM), [https://www.hrw.org/news/2019/01/14/list-issues-submission- united-nations-human-rights-committee-during-its-periodic \[https://perma.cc/9T5E-HUEF\]](https://www.hrw.org/news/2019/01/14/list-issues-submission- united-nations-human-rights-committee-during-its-periodic [https://perma.cc/9T5E-HUEF]).

45. ICCPR, *supra* note 2, at art. 9, art. 14.

46. *Id.* at art. 9.

47. *Id.*

48. *Id.* at art. 14.

49. *Id.*

50. *Id.* at art. 9.

51. *Id.* at art. 28.

52. *Id.*; *see also* GC 29, *supra* note 30.

53. GC 32, *supra* note 2.

54. *Id.* ¶¶ 7, 15.

55. *Id.* ¶¶ 31–41 (discussing, in particular, the right to equality under the State’s laws).

to be released before his or her trial.⁵⁶ After a defendant is arrested, the defendant usually appears before a magistrate, who informs the defendant of the charges and sets the bail amount.⁵⁷ The judge is given broad discretion surrounding the type of bail to set, whether to waive bail, or whether bail should be denied.⁵⁸ Bail is set for two reasons: (1) the court is concerned that the defendant poses a significant risk to the community; or (2) the court is concerned that the defendant will not appear for his trial.⁵⁹

Because individuals charged with a crime are entitled to a presumption of innocence,⁶⁰ pretrial releases should be the rule and pretrial detentions should be the exception.⁶¹ Nevertheless, United States courts have often given the presumption of innocence short shrift in setting bail to ensure the accused's appearance at trial.⁶²

3. Legal Analysis

The cash bail system prevalent in the United States violates the ICCPR as interpreted by the Human Rights Committee. Although the ICCPR clearly prohibits arbitrary detentions,⁶³ requiring the rights to liberty and equality, the United States cash bail system has historically detained persons for long periods of time simply because they are unable to pay the bail amount.⁶⁴ Additionally, studies have repeatedly shown

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56. Nicholas P. Johnson, *Cash Rules Everything Around the Money Bail System: The Effect of Cash-only Bail on Indigent Defendants in America's Money Bail System*, BUFF. PUB. INT. L.J. 29, 36–37 (2019).
 57. See PAUL BERNARD WICE, BAIL AND ITS REFORM: A NATIONAL SURVEY (U.S. Dep't of Just., 1973).
 58. Johnson, *supra* note 56 (“A judge is given wide discretion in determining the type of bail to set or whether bail should be denied.”).
 59. See, e.g., Roman L. Hruska, *Preventive Detention: The Constitution and the Congress*, 3 CREIGHTON L. REV. 36, 57 (1970) (noting bail could be used to address public safety concerns).
 60. The presumption of innocence is a long-standing ideal in the United States judicial system. See, e.g., *Coffin v. United States*, 156 U.S. 432, 454 (1895).
 61. See, e.g., Laura Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1331 (2012) (asserting past legislation affirmed pretrial releases as the norm).
 62. See, e.g., *Trujillo v. State*, 483 S.W.3d 801, 806 (Ark. 2016); see also *Saunders v. Hornecker*, 344 P.3d 771, 781 (Wyo. 2015); *State v. Gutierrez*, 140 P.3d 1106, 1107–08 (N.M. 2006).
 63. See GC 32, *supra* note 2; see also GC 29, *supra* note 30.
 64. See Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1353–56 (2014) (explaining that pretrial

that this system disproportionately affects people of color, violating their right to a fair trial and liberty compared to their white counterparts.⁶⁵

Although there is some room to debate the meanings of several ICCPR provisions, the cash bail system also violates how the Human Rights Committee has interpreted the ICCPR's provisions.⁶⁶ General Comment 32 Sections IV and V confirm that any pretrial restrictions must be consistent with the right to liberty, the presumption of innocence, and the right to equality under the law.⁶⁷ It is well-established that the cash bail system unequally affects people of color.⁶⁸ If the bail system was as equitable as some argue,⁶⁹ the demographics of incarcerated individuals awaiting trial would reflect the general population more closely.⁷⁰ But, as noted above, that is simply not the case.⁷¹

Finally, the current cash bail system arguably violates the United States' own Constitution.⁷² The Constitution's Eighth Amendment

detainees are more likely to be convicted because detention induces pleading guilty); *see also Bail Reform*, ACLU, <https://www.aclu.org/issues/smart-justice/bail-reform> [<https://perma.cc/YK28-L2ZH>]. Even when defendants are guilty of committing the crimes they are accused of, detaining such individuals for long periods of time without trial still runs afoul of the ICCPR. The inability to pay cash bail has deeper effects than just procedural issues. When defendants are in jail for long periods of time, they feel pressured to accept plea deals in which they admit to crimes they may not have actually committed in order to maintain their employment statuses and feed their families.

65. *See generally* Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CTR. FOR JUST. (Feb. 24, 2021), <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works> [<https://perma.cc/3VYH-MLWG>].

66. *See* GC 32, *supra* note 2, ¶ 35.

67. *Id.* ¶¶ 30–37.

68. *See generally* Onyekwere, *supra* note 65.

69. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 747 (1987) (holding that pretrial detentions can be “a potential solution to a pressing societal problem” and that the Bail Reform Act was constitutional because the government’s interest outweighs individual liberty).

70. *See generally* Connelly & Linthorst, *supra* note 3, at 145; *see also* Van Brunt & Bowman, *supra* note 3, at 738; *see also* Calaway & Kinsley, *supra* note 3, at 798.

71. *See* Connelly & Linthorst, *supra* note 3, at 145.

72. *See generally* Kellen Funk, *The Present Crisis in American Bail*, YALE L.J.F. 1098, 1099–1103 (2019) (surveying the constitutional theories and circuit splits regarding bail in the United States).

prohibits excessive bail or fines,⁷³ and its Fourteenth Amendment provides equal protection⁷⁴ to all those in the United States.⁷⁵ Cash bail, however, is often set so extraordinarily high that it is nearly impossible for middle- and low-income persons to pay it.⁷⁶ As people of color are the ones most affected by this system, the state is, consequently, also failing to provide for equal protection under the law.⁷⁷

Although the United States has hesitated to apply international standards domestically,⁷⁸ legal scholars and United States courts have increasingly considered the use of international law as it relates to domestic law.⁷⁹ Notably, in determining the constitutionality of the juvenile death penalty in *Roper v. Simmons*, Justice Anthony Kennedy stated, “[i]t is proper that we acknowledge the overwhelming weight of international opinion.”⁸⁰ Although the makeup of the Supreme Court has changed since *Roper*,⁸¹ Justice Kennedy was not, and is not, alone in believing international laws and customs play a part in analyzing and deciding cases domestically.⁸²

73. U.S. CONST. amend. VIII.

74. U.S. CONST. amend. XIV, § 1.

75. See generally Connelly & Linthorst, *supra* note 3, at 154; see also ACLU, *supra* note 64.

76. See generally Connelly & Linthorst, *supra* note 3; see also ACLU, *supra* note 64; *The Ins and Outs of Bail*, MARSHALL PROJECT, <https://www.themarshallproject.org/2020/10/28/the-ins-and-outs-of-bail> [<https://perma.cc/D7AT-4S9U>] (stating that bail amounts vary with a nationwide median of \$10,000 for felonies).

77. See generally Connelly & Linthorst, *supra* note 3, at 154; see also ACLU, *supra* note 64.

78. Justice Stephen Breyer, Address at the American Society of International Law 97th Annual Meeting (Apr. 4, 2003), https://www.supremecourt.gov/publicinfo/speeches/view/speech/sp_04-04-03 [<https://perma.cc/RWW6-LP8U>].

79. *Id.*

80. *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that the Eighth Amendment forbids the death penalty on juvenile offenders under the age of eighteen).

81. Peter J. Benekos & Alida V. Merlo, *A Decade of Change: Roper v. Simmons, Defending Childhood, and Juvenile Justice Policy*, 30 CRIM. JUST. POL'Y REV. 102, 104 (2016) (discussing how the Supreme Court has addressed the severity of juvenile sentencing).

82. Stewart M. Patrick, *The Global Implications of Justice Kennedy's Retirement*, COUNCIL ON FOREIGN REL. (June 28, 2018, 12:32 PM), <https://www.cfr.org/blog/global-implications-justice-kennedys-retirement> [<https://perma.cc/LR66-KT5V>].

The United States cash bail system has created a situation where defendants are treated better if they are rich than if they are poor.⁸³ Those who are unable to post bail are held against their will, regardless of their ability to eventually prove their innocence. Further, the obvious racial disparities violate both international and domestic standards.⁸⁴ This system is plagued with such legal, social, and ethical problems that it simply cannot be the best way to operate pretrial detentions. An assessment of other countries' systems for pretrial release strongly suggests that it is not.

B. Pretrial Systems Around the World

The cash bail system employed in the United States is not the international norm.⁸⁵ Globally, most countries reject cash bail systems similar to the one the United States uses.⁸⁶ Around the world, countries use various pretrial systems⁸⁷ and some even employ better ways to run cash bail systems that do not have the same discriminatory effects as the United States system.⁸⁸ Alternatives exist that the United States should consider when reforming its own system.

1. Examples of Pretrial Systems Used Around the World

The international consensus is to reject the cash bail system.⁸⁹ Although cash bail is used in some other parts of the world,⁹⁰ only the United States and the Philippines have a cash bail system that is

83. EQUAL JUST. INITIATIVE, *supra* note 22.

84. ICCPR, *supra* note 2, at art. 2; *see also* GC 32, *supra* note 2.

85. *See generally* ROY WALMSLEY, WORLD PRE-TRIAL/REMAND IMPRISONMENT LIST, INST. FOR CRIME & JUST. POL'Y RSCH. (3d ed. 2016).

86. *See* CATHERINE HEARD & HELEN FAIR, INSTIT. CRIME & JUST. POL'Y RSCH, PRE-TRIAL DETENTION AND ITS OVER-USE (2019); Louis Jacobson, *Are U.S., Philippines the Only Two Countries with Money Bail?*, POLITIFACT (Oct. 9, 2018), <https://www.politifact.com/factchecks/2018/oct/09/gavin-newsom/are-us-philippines-only-two-countries-money-bail/> [<https://perma.cc/KM5K-WNDM>]; *see also* Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. TIMES (Jan. 1, 2008), <https://www.nytimes.com/2008/01/29/us/29bail.html> [<https://perma.cc/CD5R-GWQ2>].

87. *See* HEARD & FAIR, *supra* note 86; *see also* Liptak, *supra* note 86.

88. *See* HEARD & FAIR, *supra* note 86; *see also* Jacobson, *supra* note 86; Liptak, *supra* note 86.

89. *See* HEARD & FAIR, *supra* note 86; *see also* Jacobson, *supra* note 86; Liptak, *supra* note 86.

90. *See, e.g.*, A.M. VAN KALMTHOUT ET AL., PRE-TRIAL DETENTION IN THE EUROPEAN UNION 934 (C. Morgenstern ed. 2009) (ebook).

dominated by commercial bondsmen.⁹¹ This makes a difference because a commercial bail industry has a financial stake in the system's continued use, which creates a significant roadblock to reform.⁹² The rest of the world considers the American approach an example of how not to set up a pretrial system, noting the commercial aspect of the United States bail system is an obstruction of justice.⁹³ Some countries use a mix of methods to ensure that defendants appear for trial but avoid cash bail.⁹⁴ Others just ask defendants to promise to show up for trial.⁹⁵ Some make failure to appear a separate crime.⁹⁶ Some attach strict conditions to release, like reporting to the police frequently.⁹⁷ Some make defendants liable for a given sum should they fail to appear but do not collect it upfront.⁹⁸ Others require a deposit in cash from the defendant, family members or friends, which is returned when the defendant appears, but avoid the use of a commercial bondsman.⁹⁹

Although some countries, such as some in the European Union, have cash bail, it is treated much differently than in the United States.¹⁰⁰ EU Member States require very specific procedures before EU courts impose bail on defendants¹⁰¹—it is not nearly¹⁰² as automatic as

91. Jacobson, *supra* note 86.

92. HEARD & FAIR, *supra* note 86.

93. *See generally* F.E. DEVINE, COMMERCIAL BAIL BONDING: A COMPARISON OF COMMON LAW ALTERNATIVES (1991) (examining how fifteen common law countries provide effective alternative to the United States commercial bail system).

94. Liptak, *supra* note 86 (citing DEVINE, *supra* note 93).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* Although the current structure of the United States bail system only maintains 10% payment of the bond that will not be refunded, the median bail amount in the United States is \$10,000. *See* MARSHALL PROJECT, *supra* note 76. This means 10% of that amount would still be between \$1,000 and \$1,500 which is much more money than most defendants have on hand. This high cost is not found in other international systems. *See generally* KALMTHOUT ET AL., *supra* note 90.

100. KALMTHOUT ET AL., *supra* note 90.

101. *See, e.g.*, EUR. CT. H.R., GUIDE ON ARTICLE 5 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: RIGHT TO LIBERTY AND SECURITY 41 (Apr. 30, 2021).

102. *Id.* (“[T]he amount set for bail must be duly justified in the decision fixing bail . . . and must take into account the accused’s means . . . and his capacity to pay.”).

it is in the United States.¹⁰³ A prominent study by the European Commission showed that although the EU Member States are plagued with their own pretrial detention issues, those issues are nowhere near as concerning as those of the United States.¹⁰⁴ That study also found that (1) Europe's rate of pretrial detentions is much lower; (2) the EU Member States are pushing to end pretrial detentions in Europe altogether; and (3) bail is not imposed automatically on every arrested defendant.¹⁰⁵ Even if the United States were irrevocably committed to continuing a cash bail system, the EU model demonstrates the possibility of a more effective and less discriminatory method of doing so.¹⁰⁶

Even purged of a commercial bondsman, most countries avoid a pretrial system based chiefly on financial security deposits.¹⁰⁷ Cash bail is not the only pretrial system the United States could employ, and the current system is in desperate need of reform. Currently, approximately half a million people in the United States are detained pretrial—meaning they are awaiting trial and are legally innocent until proven guilty.¹⁰⁸ Forty-three percent of this population is Black,¹⁰⁹ even though approximately only twelve percent of the country's total population is Black.¹¹⁰ Furthermore, this system *costs* the United States approximately \$13.6 billion a year,¹¹¹ due to the institutional and administrative costs associated with detaining so many people who cannot pay the exorbitant bail fee.¹¹² Objectively, there is a pressing need for reform.

Fortunately, the United States has many options to replace its current flawed system. To list a few, the United States could fully

103. *See generally* KALMTHOUT ET AL., *supra* note 90.

104. For example, the United Kingdom's pretrial detainees accounted for less than twenty percent of its total prison population each year from 1999 to 2007. *Id.* at 938.

105. *Id.* at 946.

106. *Compare United Kingdom: England & Wales*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/country/united-kingdom-england-wales> [https://perma.cc/K3AG-W2EF], *with* PRISON POL'Y INITIATIVE, *supra* note 20.

107. KALMTHOUT ET AL., *supra* note 90, at 950.

108. PRISON POL'Y INITIATIVE, *supra* note 20.

109. *Id.*

110. Sawyer, *supra* note 18.

111. PRISON POL'Y INITIATIVE, *supra* note 20. It is very likely that the estimated costs could be much more. BAIL PROJECT, *supra* note 20.

112. Median bail bond amounts are estimated to be \$10,000. PRISON POL'Y INITIATIVE, *supra* note 20; *see also* PRETRIAL JUST. INST., *supra* note 21.

refund cash bail,¹¹³ end cash bail altogether, and/or use ankle-monitoring and phone tracking systems.¹¹⁴

Money put the United States in this predicament, and money can take the United States out of it. Like other countries that use cash bail,¹¹⁵ the individual states within the United States could shift their systems to a fully refundable model.¹¹⁶ This means the money posted for bail would be refunded to the defendant or applied to their overall court fees. Instead of the current “ransom” model where money is never returned, the money would only be held up until the defendant shows up to court for their trial, at which point it is released to them.¹¹⁷ Because the states would be less incentivized to detain individuals in order to make a profit,¹¹⁸ the only individuals who would be detained are the ones who truly serve a danger to the community.¹¹⁹

Outside of strictly financial solutions, pretrial systems could also resemble the current system of parole. In lieu of jailing people who cannot post bail, a judge could let them go free on the condition that they agree to meet with a social worker a designated number of times per month and maintain regular phone contact with that person until the resolution of their case.¹²⁰

Additionally, since bail is based on a fear that people who committed crimes will leave the jurisdiction to avoid prosecution, the system could employ tracking devices.¹²¹ Some examples of tracking systems include ankle monitors or even simply tracking cellphones.¹²²

113. See generally KALMTHOUT ET AL., *supra* note 90.

114. Wiseman, *supra* note 64, at 1366.

115. Jacobson, *supra* note 86.

116. See, e.g., *Being Charged with a Crime*, GOV.UK, <https://www.gov.uk/charged-crime/bail> [<https://perma.cc/Z3S5-YSL5>].

117. Although the defendant rarely has to pay the full bail bond amount, the current system still requires thousands of dollars to be paid to a commercial bondsman. This would also make the commercial bond industry resistant to change as it would put them out of business. Gillian B. White, *Who Really Makes Money Off of Cash Bail*, THE ATLANTIC (May 12, 2017), <https://www.theatlantic.com/business/archive/2017/05/bail-bonds/526542/> [<https://perma.cc/M6BJ-NN6D>].

118. The commercial bail industry makes approximately \$2 billion in profit each year. *Id.*

119. Sawyer & Wagner, *supra* note 16.

120. Liptak, *supra* note 86 (citing DEVINE, *supra* note 93).

121. There may be racial and ethical issues associated with this proposal as well. BAIL PROJECT, *supra* note 20.

122. See Johnson, *supra* note 56, at 90. Some commentators have taken this a step, or perhaps several steps, further and proposed all accused criminals

Instead of keeping the accused in jails, they would have the ability to go home to await their trial, and the government can ensure that the defendant will remain within its jurisdiction until their trial.¹²³

Finally, any reform effort should address the underlying reasons that lead law enforcement officers to detain a disproportionate number of poorer persons and people of color.¹²⁴ The problem associated with bail is not merely one of low-income people not being able to afford bail—the problem lies also in policing in general. It is well-documented that police patrol more often in poorer communities and communities of color,¹²⁵ and this over-policing results in profiting off these communities when combined with the existing bail issues.¹²⁶ Therefore, a reform that changes policing to be more generally equitable could address the issues associated with bail as well.¹²⁷

Critics of these approaches would likely argue that these methods shift the burden onto taxpayers to ensure that the charged person is showing up to court.¹²⁸ Although there will be some costs associated

be fitted with shock collars. See Milt Policzer, *Bail Alternatives*, COURTHOUSE NEWS SERV. (Aug. 27, 2018), <https://www.courthousenews.com/bail-alternatives> [<https://perma.cc/234U-7F9N>].

123. Returning to court could be as simple as sending text messages with reminders of your court date. Calaway & Kinsley, *supra* note 3, at 807.
124. Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUSTICE (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [<https://perma.cc/7K43-VYY2>].
125. See, e.g., Michael A. Robinson, *Black Bodies on the Ground: Policing Disparities in the African American Community—An Analysis of Newsprint from January 1, 2015, Through December 31, 2015*, 48 J. BLACK STUD. 551, 558 (2017).
126. The commercial bail industry brings in \$2 billion in profit per year. When poorer communities and people of color are over-policed, disproportionately arrested, and subjected to the bail system, that profit comes from those marginalized communities. White, *supra* note 117.
127. For a discussion on many of the implicated sociological issues, see ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY (FIELDWORK ENCOUNTERS AND DISCOVERIES)* (2014) (detailing Goffman's fieldwork and observations during the six years she lived in a disadvantaged neighborhood in Philadelphia).
128. See Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1363 (2014) (noting that pretrial supervision programs, while highly beneficial, can be highly expensive), reprinted in Nicholas P. Johnson, *Cash Rules Everything Around the Money Bail System: The Effect of Cash-Only Bail on Indigent Defendants in America's Money Bail System*, 36 BUFF. ENV'T. L.J. 29, 31 (2019); John S. Goldkamp & Michael R. Gottfredson, *Bail Decision Making and*

with some of these options (e.g., purchasing surveillance systems), these alternatives would still not cost nearly as much as the current method.¹²⁹ As most of the costs associated with pretrial detentions relate to housing and booking hundreds of thousands of individuals,¹³⁰ lowering the number of pretrial detainees would consequently lead to overall cost savings,¹³¹ no matter which options are chosen.

Furthermore, critics of reform would likely argue that releasing defendants could increase the danger to the community because their release could lead to an increase of crime.¹³² This fear is unsupported by current crime statistics.¹³³ In fact, current data indicates the opposite.¹³⁴ Studies show that pretrial releases do not negatively impact public safety, and, in some instances, even resulted in a decrease in crime.¹³⁵ The current data suggests that reliance on cash bail has merely led to an increase in pretrial detentions—and has not met its intended goal of protecting the public.¹³⁶

While these are only *some* alternatives that could be considered as part of a bail-reform effort, each could alleviate many of the system's existing problems. Even though there may be some initial costs associated with some of the reforms, the result would lead to an overall cost savings for the states.¹³⁷ These options would also lower the number

Pretrial Detention, L. & HUM. BEHAV. 227, 228–29 (1979), reprinted in Wendy R. Calaway & Jennifer M. Kinsley, *Rethinking Bail Reform*, 52 U. RICH. L. REV. 795, 797 (2018).

129. PRETRIAL JUST. INST., PRETRIAL JUSTICE: HOW MUCH DOES IT COST? (2017); CHRISTOPHER T. LOWENKAMP ET AL., NAT'L INST. OF CORRECTIONS, THE HIDDEN COSTS OF PRETRIAL DETENTION (2013).
130. *New ACLU of Ohio Report Estimates Ohio Could Save \$199 to \$264 Million Each Year by Adopting Common Sense Bail Reform Policies*, ACLU OHIO (Sept. 17, 2020), <https://www.acluohio.org/en/press-releases/new-aclu-ohio-report-estimates-ohio-could-save-199-264-million-each-year-adopting> [<https://perma.cc/QN5V-CVFG>].
131. Shima B. Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 30 (2017).
132. Dermot Shea, *New York's New Bail Laws Harm Public Safety*, N.Y. TIMES (Jan. 23, 2020), <https://www.nytimes.com/2020/01/23/opinion/shea-nypd-bail-reform.html> [<https://perma.cc/RW28-LQZA>].
133. Sawyer & Wagner, *supra* note 16.
134. Tiana Herring, *Releasing People Pretrial Doesn't Harm Public Safety*, PRISON POL'Y INITIATIVE (Nov. 17, 2020), <https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases/> [<https://perma.cc/5J3X-JVUD>].
135. *Id.*
136. Sawyer & Wagner, *supra* note 16; *see also id.*
137. Henry F. Fradella & Christine S. Scott-Hayward, *Advancing Bail and Pretrial Justice Reform in Arizona*, 52 ARIZ. ST. L.J. 845, 849.

of pretrial detainees and would resolve many of the disparity issues associated with the current system.¹³⁸ Ultimately, each one of these alternatives could bring us closer to what we think of as justice.¹³⁹

2. Limits of the Tenth Amendment

The Tenth Amendment to the United States Constitution¹⁴⁰ limits how the federal government can regulate each state's money-bail practices for criminal defendants.¹⁴¹ The Supreme Court of the United States has generally viewed pretrial release to be a regulatory matter, rather than a penal matter, that would implicate due process.¹⁴² As long as the government asserts that it has a legitimate interest in limiting pretrial releases, the Court has refused to involve itself.¹⁴³

Further, under the Tenth Amendment, the federal government likely cannot directly impose its own will on the states' regulatory matters.¹⁴⁴ Although the United States Congress could legislate on regulatory matters as they relate to federal crimes tried in federal courts, those standards would not, and likely could not, directly apply in state-level proceedings.

That being said, the United States federal government often imposes federal regulatory policies that have state-level effects.¹⁴⁵ These effects often indirectly pressure states into implementing similar standards across the board.¹⁴⁶ Through financial incentives, the federal

138. PRISON POL'Y INITIATIVE, *supra* note 20.

139. *See* 7 LAWRENCE K. MARKS, NEW YORK PRETRIAL CRIMINAL PROCEDURE § 4:3 (2d ed. 2021); *see also* Johnson, *supra* note 56, at 68–72; *see also* Calaway & Kinsley, *supra* note 3, at 137.

140. U.S. CONST. amend. X.

141. ALISON M. SMITH, CONG. RSCH. SERV., R45533, U.S. CONSTITUTIONAL LIMITS ON STATE MONEY-BAIL PRACTICES FOR CRIMINAL DEFENDANTS 11 (2019).

142. *Id.*; *see, e.g.*, United States v. Salerno, 481 U.S. 739, 739 (1987).

143. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 739 (1987).

144. *See* U.S. CONST. amend. X; *see also* Morgan v. Ford Motor Co., 224 W. Va. 62, 68–69 (2009) (“As we have frequently indicated, ‘[p]re-emption of state law by federal statute or regulation is not favored ‘in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.’”). *But see* Missouri v. Holland, 252 U.S. 416, 434 (1920) (noting that the treaty is not forbidden by the Tenth Amendment to be enforceable in court).

145. Taleed El-Sabawi, *MHPAEA & Marble Cake: Parity & the Forgotten Frame of Federalism*, 124 DICK. L. REV. 591, 612 (2020).

146. *Id.* at 606.

government now indirectly regulates areas in regular state governance, such as highway funds,¹⁴⁷ educational testing,¹⁴⁸ and medical care.¹⁴⁹

Additionally, past United States Supreme Court precedent has held that Congress may implement statutes that enforce international treaties, regardless of the Tenth Amendment.¹⁵⁰ In *Missouri v. Holland*, the Court held that a statute that protects migratory bird patterns between the United States and Canada trumps the Tenth Amendment.¹⁵¹ The Court reasoned that the Supremacy Clause¹⁵² renders treaties part of the “supreme law of the land,”¹⁵³ overriding state-level concerns regarding the treaty because the national interest could only be fulfilled by federal action.¹⁵⁴ Therefore, if an organization such as the Human Rights Committee rules that the United States bail system must be reformed in order to comply with the ICCPR, Congress could get around Tenth Amendment concerns citing *Holland* as mandatory authority.¹⁵⁵

C. Policy Considerations and Recommendations

Bail reform is currently at the center of United States social justice reform.¹⁵⁶ Several non-profits have dedicated their work entirely to this issue¹⁵⁷ and a significant number of politicians have called for reform.¹⁵⁸

147. See, e.g., 23 U.S.C. §§ 101(a)(6), 101(a)(11).

148. See Matthew Lynch, *Understanding Federal Funding Part I: 3 Types of School Funding*, THE EDVOCATE (Sept. 18, 2016), <https://www.theedadvocate.org/understanding-federal-funding-part-3-types-school-funding/> [perma.cc/MR5M-ZUZZ].

149. See TAX POL’Y CTR., *Key Elements of the U.S. Tax System*, in BRIEFING BOOK 346–47 (2020).

150. *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

151. *Id.* at 434.

152. U.S. CONST. art. VI, § 2

153. *Missouri v. Holland*, 252 U.S. at 433.

154. *Id.* at 435.

155. *Id.* at 433, 435.

156. Lea Hunter, *What You Need to Know About Ending Cash Bail*, CTR. FOR AM. PROGRESS (Mar. 16, 2020), https://cdn.americanprogress.org/content/uploads/2020/03/23094429/04-23_Ending-Cash-Bail.pdf?_ga=2.108384774.527451271.1600607442-1341126521.1599065186 [https://perma.cc/5JGY-94V8].

157. See generally *The Bail Project*, THE BAIL PROJECT (2020), <https://bailproject.org/> [https://perma.cc/LW8T-X88Z] [hereinafter *The Bail Project*].

158. See generally *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1130 (Feb. 9, 2018),

Unfortunately, there is no tangible end to the current system in sight.¹⁵⁹ As the situation continues to evolve, there is an overwhelming need for intensive investigations, recommendations, and subsequent reforms to follow.¹⁶⁰ Although any intervention by an international body has its limitations,¹⁶¹ international human rights institutions have often been successful in facilitating domestic reforms.¹⁶²

1. Current Issues with Enforcing the ICCPR

In *Medellin v. Texas*,¹⁶³ the United States Supreme Court held that non-self-executing treaties,¹⁶⁴ even ratified human rights treaties, cannot be enforced in United States courts unless the treaty is accompanied by domestic legislation.¹⁶⁵ This would include the ICCPR.¹⁶⁶ Although the United States has ratified the treaty, there is an obvious absence of accompanying legislation to make it self-executing. Although some commentators believe that courts will still be receptive to treaties by treating them as non-binding, persuasive

<https://harvardlawreview.org/2018/02/bail-reform-and-risk-assessment-the-cautionary-tale-of-federal-sentencing/>; Kamala Harris & Rand Paul, *To Shrink Jails, Let's Reform Bail*, N.Y. TIMES (Jul. 20, 2017), <https://www.nytimes.com/2017/07/20/opinion/kamala-harris-and-rand-paul-lets-reform-bail.html> [<https://perma.cc/STX6-HFQY>].

159. See generally *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, *supra* note 158, at 1141.

160. Harris & Paul, *supra* note 158.

161. See, e.g., Hans Kelsen, *Limitations on the Functions of the United Nations*, 55 YALE L. REV. 997 (1946); see also Chiara Villani, *The United Nations: Strengths and Weaknesses*, INT'L ASS'N FOR POL. SCI. STUDENTS (Mar. 12, 2015), <https://www.iapss.org/2015/03/12/the-united-nations-strengths-and-weaknesses/> [<https://perma.cc/4ZJC-J4LY>].

162. Villani, *supra* note 161.

163. *Medellin v. Texas*, 552 U.S. 491 (2008).

164. Carlos Vasquez, Prof. L. Geo. U. L. Ctr., Presentation on the Distinction Between Self-Executing and Non-Self-Executing Treaties in International Law at University of Oxford (May 10, 2018).

165. *Medellin*, 552 U.S. at 552 n.2 (Breyer, J., dissenting).

166. David Sloss, *The Domestication of International Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE L.J. INT'L L., 129, 167 (1999).

authority,¹⁶⁷ the fact remains that the treaty currently does not bind the United States or its states in domestic courts.¹⁶⁸

Because the ICCPR is a non-self-executing treaty,¹⁶⁹ the only potential it currently has for enforcement in United States courts would be through litigation. Such litigation, however, would be plagued with problems of its own. For example, the Alien Tort Statute (“ATS”)¹⁷⁰ only applies to tort claims against non-United States nationals,¹⁷¹ but the ICCPR pertains to the civil rights of all individuals within a State’s territory and subject to its jurisdiction.¹⁷² Therefore, the ATS would only apply to ICCPR violations against foreign nationals in United States territory. Additionally, the Supreme Court in *Sosa v. Alvarez-Machain*¹⁷³ ruled that the ATS would not apply to minor violations of customary international law,¹⁷⁴ and the Court could likely hold a case involving bail to be such a minor violation. Further, such a litigation campaign would be overly costly and complicated.¹⁷⁵ Therefore, it is unlikely that such a litigation campaign would succeed, so it is more efficient to, instead, strive for codified legislative reform.

167. Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism After Medellin*, 115 PENN ST. L. REV. 1051, 1053 (2011).

168. There could be a way for the United States to be held liable at the International Court of Justice. This option would require its own dedicated discussion but could nonetheless be an avenue for accountability. *See generally Uphold International Law*, UNITED NATIONS, <https://www.un.org/en/sections/what-we-do/uphold-international-law/> [<https://perma.cc/3M39-ZPGW>].

169. Sloss, *supra* note 166, at 167.

170. 28 U.S.C. § 1350 (1964). The ATS grants United States federal courts original jurisdiction for an alien who committed a tort violating international law or a United States treaty.

171. *Id.*

172. ICCPR, *supra* note 2, at art. 2.

173. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

174. *Id.* at 724.

175. *See, e.g.*, Megan Ming Francis, *The Price of Civil Rights: Black Lives, White Funding, and Movement Capture*, 53 L. & SOC’Y REV. 275, 279 (2019). Even if creating a litigation campaign for cash bail could be possible, the details of that campaign would require its own dedicated paper on the topic. Accordingly, this paper will not attempt to delve into a discussion on the intricacies of such a campaign.

2. History of Failed Bail Reform within the United States

Bail reform in the United States has continually fallen flat despite overwhelming public support to end cash bail.¹⁷⁶ Not only that, but the few reforms that have come to fruition have resulted in a plethora of their own problems and have often resulted in the mere replacement of one discriminatory system with another.¹⁷⁷

The political structure in the United States has inhibited any kind of bail reform.¹⁷⁸ For the reasons previously stated, reform of the United States bail structure would either require coordinated state action or indirect federal action.¹⁷⁹ In order to implement meaningful federal legislation, however, a bill must jump through numerous hoops.¹⁸⁰ At any point in the process the drafted bill can “die.”¹⁸¹ In the 116th Congress, only one percent of bills drafted by Congress became enacted laws.¹⁸² Although the United States President may bypass Congress and issue executive orders, the political community often disfavors this option.¹⁸³ Furthermore, executive orders have limits and obstacles of its own.¹⁸⁴

The United States has left it to the individual states to reform their own respective bail systems,¹⁸⁵ and that has proven to be disastrous.¹⁸⁶

176. See generally Hunter, *supra* note 156.

177. Jeremy B. White, *California Ended Cash Bail. Why Are So Many Reformers Unhappy About It?*, POLITICO MAG. (Aug. 29, 2018), <https://www.politico.com/magazine/story/2018/08/29/california-abolish-cash-bail-reformers-unhappy-219618> [<https://perma.cc/9BWC-DYDL>].

178. Mac Walton, *Bail Reform and Intimate Partner Violence in Maine*, 71 ME. L. REV. 139, 146 (2019).

179. See *supra* Section II.B.2.

180. *How Laws Are Made and How to Research Them*, USAGOV, <https://www.usa.gov/how-laws-are-made> [<https://perma.cc/ERX7-P9MP>].

181. *Id.*

182. See *Statistics and Historical Comparison*, GOVTRACK, <https://www.govtrack.us/congress/bills/statistics> [<https://perma.cc/UVD7-5VUC>].

183. Tara L. Branum, *President or King – The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEG. 1, 9 (2002).

184. See, e.g., *Medellin v. Texas*, 552 U.S. 491 (2008) (overruling an executive order by the president to enforce a non-self-executing treaty on state courts. Without the necessary Congressional action, there is no binding authority on the states); see also Branum, *supra* note 183, at 61–62.

185. Because this power is not explicitly given to the federal government, it is given to the state. See U.S. CONST. amend. X.

186. See, e.g., White, *supra* note 177.

In a recent example, California tried to end cash bail but only succeeded in creating another discriminatory system.¹⁸⁷ In 2018, the state passed a law promising criminal justice reform, but instead became a lesson in the inherent political and legal difficulties of enacting successful criminal justice reform.¹⁸⁸ The new law replaced the old system of money-based freedom with a new one of risk-based assessments and preventive detention.¹⁸⁹ While the goal of ending cash bail was to have fewer people in jail before their trial, California headed in the opposite direction: giving local judges sweeping authority to keep people incarcerated before they were convicted of anything.¹⁹⁰ The new system sorted alleged offenders into categories: (1) people accused of committing misdemeanors who will be released without going through a risk assessment; and (2) people accused of more serious crimes who will be held until their arraignment or trial, depending in large part on the decisions of judges and prosecutors.¹⁹¹ Additionally, the law did not mention defense counsel.¹⁹² The legislation led to people being held in preventive detention based on the government's subjective assessment of who is risky and who is scary,¹⁹³ a power that historically has been wielded with racially discriminatory undertones.¹⁹⁴

The United States criminal justice system emphasizes politics over justice.¹⁹⁵ There are currently too many shortcomings in current criminal justice efforts to make meaningful, necessary change.¹⁹⁶ The

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* The role of defense counsel is critical to the administration of fair justice. Francis, *supra* note 175, at 288; *see also* Powell v. Alabama, 287 U.S. 45, 71 (1932).

193. White, *supra* note 177.

194. Radley Balko, *The Consequences of Fearmongering About Crime*, WASH. POST (Jan. 5, 2016), <https://www.washingtonpost.com/news/the-watch/wp/2016/01/05/the-consequences-of-fearmongering-about-crime/> [<https://perma.cc/H2MX-QCG2>].

195. *Restoring Integrity and Independence at the U.S. Justice Department*, CTR. FOR AM. PROGRESS (Aug. 13, 2020, 9:01 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/08/13/489387/restoring-integrity-independence-u-s-justice-department/> [<https://perma.cc/7494-BGX4>].

196. *See, e.g.*, Eugene Volokh, *12 Reasons to Worry About Our Criminal Justice System, from a Prominent Conservative Judge*, WASH. POST (July 14, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/w>

failed attempts for reform have much to do with the fact that reformers did not carefully assess the implications of their proposed changes.¹⁹⁷ Therefore, before the next wave of unsuccessful bills is proposed, legislators need a deeper understanding of how all the pieces fit together. International intervention could help further this understanding.

3. Why International Intervention Could Be Helpful

Insight by an international institution could help to publicize the need for bail reform in the United States.¹⁹⁸ Successful international intervention would likely take one of two different avenues: (a) the Human Rights Committee could take up the matter of whether the United States bail system contravenes the ICCPR; or (b) the U.N. Human Rights Council could appoint a Special Rapporteur to investigate this issue.¹⁹⁹ Although support for international institutions varies among political parties and States,²⁰⁰ international mechanisms have proven to be helpful many times in the past.²⁰¹

p/2015/07/14/12-reasons-to-worry-about-our-criminal-justice-system-from-a-prominent-conservative-federal-judge/ [https://perma.cc/3645-KHR Y].

197. *See, e.g.*, White, *supra* note 177. Deeper understanding of the situation also involves understanding and addressing the concerns of reform. *See, e.g.*, Jamiles Lartey, *New York Tried to Get Rid of Bail. Then the Backlash Came*, POLITICO MAG. (Apr. 23, 2020), <https://www.politico.com/news/magazine/2020/04/23/bail-reform-coronavirus-new-york-backlash-148299> [https://perma.cc/GJ4B-FU9R].

198. For a discussion of what this process would generally look like, *see Human Rights Bodies – Complaints Procedures*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R (2020), <https://www.ohchr.org/en/hrbodies/tbpetitions/pages/hrtbpetitions.aspx> [https://perma.cc/2HUH-QZUY] [hereinafter *Human Rights Bodies*].

199. *Id.*

200. It should be noted that although the Biden Administration, Democratic states, and Democrats in the United States Congress may be responsive to U.N. involvement, there is a long-standing conservative skepticism of global organizations among red states and Republicans. *See* Charles T. Call et al., *Is the U.N. a Friend or Foe?*, BROOKINGS (Oct. 3, 2017), <https://www.brookings.edu/blog/order-from-chaos/2017/10/03/is-the-un-a-friend-or-foe/> [https://perma.cc/XF23-XSTN].

201. *See, e.g.*, Philip Alston (Special Rapporteur), *Rep. of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the U.S.*, U.N. Doc. A/HRC/38/33/Add.1 (May 4, 2018).

a. *ICCPR's Human Rights Committee Takes Up the Issue of
Cash Bail*

The Human Rights Committee has the ability to investigate the United States bail system to an extent that non-profits are unable to.²⁰² The Committee sets forth initial and periodic reporting mechanisms to ensure Member States of the ICCPR uphold the values within the Covenant.²⁰³ Importantly, the Human Rights Committee has listed the United States as a State that will likely be subjected to review in 2021.²⁰⁴

Because bail has not been addressed in these reports in the past,²⁰⁵ a formal complaint to this international body is necessary.²⁰⁶ The Committee has defined mechanisms to bring a complaint regarding a treaty violation and usually takes one of three forms: individual communications, state-to-state complaints, and inquiries.²⁰⁷ As it is unlikely another State would bring forward a complaint against the United States²⁰⁸ and the ICCPR is not a treaty that allows for initiation of inquiries,²⁰⁹ only the individual complaint procedure will be discussed below.

The ICCPR allows individuals to bring forward alleged violations of the ICCPR.²¹⁰ The complaint procedure is straightforward: an

202. *How We Work with Others*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/EN/AboutUs/Pages/WorkWithOthers.aspx> [<https://perma.cc/9EEM-EKWR>].

203. *Human Rights Committee*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> [<https://perma.cc/RXS2-DW85>].

204. *Predictable Review Calendar*, HUM. RTS. COMM. (May 29, 2020), <https://www.ohchr.org/Documents/HRBodies/CCPR/ListOfCountries.pdf> [<https://perma.cc/45M7-W8WT>].

205. *CCPR Reports*, U.N. HUM. RTS. TREATY BODIES, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=45&DocTypeID=29 [<https://perma.cc/EK6L-HLYJ>].

206. *Human Rights Bodies*, *supra* note 198.

207. *Id.*

208. Articles 41–43 of the ICCPR set out a rather elaborate procedure for resolving disputes between States Parties over a State's fulfillment of its obligations under the Covenant. Among other procedures, it requires the establishment of an ad hoc Conciliation Commission. ICCPR, *supra* note 2, at art. 41–43.

209. *Human Rights Bodies*, *supra* note 198.

210. *Human Rights Treaty Bodies - Individual Communications*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/EN/HRBodies>

individual submits a formal complaint, either for herself or on behalf of someone else, detailing the alleged violations,²¹¹ and the Committee serves as a mediator to work with States to make full reparation to the victims,²¹² as well as to implement measures aimed at preventing reoccurrences.²¹³ Importantly for the topic of bail, the Committee indicates whether there is, in fact, a violation of the Covenant and assists States with meaningful reform to guarantee non-repetition.²¹⁴

As of March 2021, no individual complaint has been sent on behalf of a United States citizen.²¹⁵ An individual complaint, therefore, could be a successful measure to highlight whether the civil rights measures in the United States are inconsistent with the ICCPR as it relates to bail.²¹⁶ An obvious drawback, however, is it is unclear how quickly these individual complaints would be addressed.²¹⁷ Without any pressure to address the complaint quickly, it could take a fair amount of time²¹⁸ before the complaint is fully addressed. Therefore, a federal official, such as Vice President Kamala Harris or United States Senator Rand Paul, could submit a complaint on behalf of those wrongfully detained because her status would facilitate public pressure to hold the Committee accountable to address the issue quickly and provide its findings.²¹⁹

/TBPetitions/Pages/IndividualCommunications.aspx [https://perma.cc/KKU7-CUNB] [hereinafter *Human Rights Treaty Bodies*].

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Jurisprudence*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://juris.ohchr.org/> [https://perma.cc/EEV9-8CM].

216. *Human Rights Treaty Bodies*, *supra* note 210.

217. *Individual Complaint Procedures Under the United Nations Human Rights Treaties - Fact Sheet No. 7, Rev. 2*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, 6, 10–11 (2013), <https://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf> [https://perma.cc/DF69-ZHY2].

218. For example, in a complaint concerning arbitrary detention in Belarus, it took the international organization nearly seven years before issuing its findings. Hum. Rts. Comm., *Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No.2337/2014*, U.N. Doc. CCPR/C/129/D/2337/2014 (Oct. 16, 2020).

219. Public pressure has long been held as essential to the policymaking process, both in the United States and around the world. *See, e.g., The Media's Role in the Policymaking Process*, ASS'N OF ACCREDITED PUB. POL'Y ADVOC. TO THE E.U. (Jun. 17, 2013), <http://www.aalep.eu/media%E2%80%99s-role-policymaking-process> [https://perma.cc/DC9V-AL6F].

b. *U.N. Human Rights Council Appoints a Special Rapporteur*

Another avenue to bail reform is to appoint a Special Rapporteur to investigate this issue. A prominent example that demonstrates the success of this method is the work of Philip Alston, U.N. Special Rapporteur on extreme poverty and human rights in the United States.²²⁰

At the invitation of the federal government, Alston was able to conduct a full inquiry to provide full and accurate information that United States legislators could review and address.²²¹ Alston's investigation and subsequent report were instrumental as the report clearly showed just how bad poverty was in one of the world's richest countries.²²² The report designated precisely what the issues were, clearly indicating problems with existing policies in the United States that could be addressed.²²³

Similarly, a Special Rapporteur could be authorized to investigate the issues presented by the cash bail system.²²⁴ At invitation of the federal government, such as an invitation by the Vice President or the Democrat-controlled Congress, in conjunction with a Human Rights Committee mandate,²²⁵ this Special Rapporteur would be able to conduct an in-depth review, bring violations or abuses to the attention of United States officials, raise public awareness of the issues, and provide advice for meaningful changes.²²⁶

Individuals in the United States, however, are likely to oppose the appointment of a Special Rapporteur for this issue.²²⁷ Critics to reform, as discussed above, believe that the current system is the best system to disincentivize crime, and that any reform would undermine crime

220. See Alston, *supra* note 201.

221. *Id.* ¶ 2.

222. *Id.* ¶¶ 70–79; see also *Richest Countries in the World 2021*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/richest-countries-in-the-world> [<https://perma.cc/A8CJ-8FY9>].

223. See Alston, *supra* note 201, ¶ 17.

224. *FAQs: United Nations Special Rapporteurs*, ACLU, <https://www.aclu.org/other/faqs-united-nations-special-rapporteurs> [<https://perma.cc/9N4W-RWQ8>].

225. *Id.*

226. *Special Procedures of the Human Rights Council*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcompage.aspx> [<https://perma.cc/X5EF-K3RF>].

227. Call et al., *supra* note 200.

prevention and lead to an unsafe society.²²⁸ Additionally, the current cash bail system has become its own financial institution²²⁹ and this institution is unlikely to go down without a fight.²³⁰ Therefore, it is key that this investigation is framed in such a way that emphasizes its information-gathering function. If it were presented in such a way that made it seem as if the Special Rapporteur was coming to completely change the bail system, opponents of bail reform might prevent the investigation from even starting.

c. Mediating Concerns of International Investigations

Admittedly, government officials in the United States may be resistant to any international investigation concerning cash bail.²³¹ Courts within the United States often do not apply international law, so politicians may be skeptical about the usefulness of such an investigation.²³² Even if the United States does not adhere to the international laws themselves, the report by a Special Rapporteur or the Human Rights Committee can provide an in-depth review of this system to an extent that has not been explored in the country that incarcerates more people than anywhere else in the world.²³³ The more information that is provided, the better the United States can understand its shortcomings and better address those problems.

228. See, e.g., Dan Frosch & Ben Chapman, *New Bail Laws Leading to Release of Dangerous Criminals, Some Prosecutors Say*, WALL ST. J. (Feb. 10, 2020, 10:21 AM), <https://www.wsj.com/articles/bail-reform-needs-reform-growing-group-of-opponents-claim-11581348077>.

229. Once again, the commercial bail industry makes approximately \$2 billion in profit each year. White, *supra* note 177.

230. Critics against bail reform argue that ending bail could put the community at an increased danger that is otherwise avoided by imposing bail. See, e.g., Dan Frosch & Ben Chapman, *New Bail Laws Leading to Release of Dangerous Criminals, Some Prosecutors Say*, WALL ST. J. (Feb. 10, 2020), <https://www.wsj.com/articles/bail-reform-needs-reform-growing-group-of-opponents-claim-11581348077> [<https://perma.cc/HYE8-4MV5>].

231. Call et al., *supra* note 200.

232. See *supra* Section II.C.1.

233. See, e.g., *The World Prison Brief*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/> [<https://perma.cc/7A6P-HPHH>]. Studies have also shown that every state in the United States relies too heavily on jails and prisons, compared to the rest of the world. Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POLY INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html> [<https://perma.cc/RYK5-AP9E>] (displaying the excessive rate of incarceration in each state in the United States compared to the rest of the world).

Even if the federal government allows Special Rapporteur to investigate, however, it is not guaranteed that the report will be welcomed with open arms. Legislators will likely claim that the United States is not bound by international laws regarding cash bail or other pretrial systems, and, therefore, the report would not have any bearing on them.²³⁴ Aside from the callousness of this viewpoint, the United States legal system is beginning to look to other countries to see how its laws stack up with the rest of the world.²³⁵

To prevent any initial roadblocks, the Biden Administration should submit a formal invitation to investigate the United States bail system for human rights violations.²³⁶ As Vice President Kamala Harris has previously made her position on bail reform known,²³⁷ such an invitation would be consistent with her platform and likely supported by the Democratic Party.²³⁸ If the appointment is met with substantial objection within the Democratic Party, the Congressional Research Service could be another avenue to proceed with this investigation.²³⁹ This institution is known to take on complex issues from all sides, and it often requests the assistance of experts.²⁴⁰ Especially since the goal is to inform legislation, such an investigation would fall into its purview.

Alternatively, a non-profit organization could be at the forefront of the complaint to the international body.²⁴¹ These organizations can submit a complaint to the Human Rights Committee on behalf of an individual who has had his or her rights violated.²⁴² Several

234. See generally Anthony D'Amato, *Is International Law Really 'Law'?*, (Nw. Univ. Sch. L. Fac. Working Paper, Paper No. 103, 2010), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1102&context=facultyworkingpapers> [<https://perma.cc/HM6Y-YJ85>].

235. Patrick, *supra* note 82; see also *Roper v. Simmons*, 543 U.S. 551, 554 (2005) (emphasizing the importance of an “overwhelming weight of international opinion” in American judicial rulings).

236. See *supra* Sections II.C.3.a–b.

237. Harris & Paul, *supra* note 158.

238. As of 2021, the Democratic Party controls both the executive and legislative branches of the United States government. As long as the Democratic members are on board with the invitation, the appointment would not be blocked. See *Members of the U.S. Congress*, CONGRESS.GOV, <https://www.congress.gov/members?q=%7B%22congress%22%3A117%7D> [<https://perma.cc/H2QK-U74J>].

239. *About CRS*, LIBR. OF CONG., <https://www.loc.gov/crsinfo/about/> [<https://perma.cc/65UP-LVXS>].

240. *Id.*

241. See, e.g., The Bail Project, *supra* note 157.

242. See *supra* Sections II.C.3.a–b.

organizations have highlighted the issues concerning the cash bail system,²⁴³ and their involvement could be a successful way to launching an international investigation on the issue.²⁴⁴

Another alternative altogether could be to participate in a worldwide investigation into pretrial detentions.²⁴⁵ This neutral inquiry could investigate the issue of using cash bail globally and compare practices of ICCPR Member States. Comparison factors could include rates of pretrial releases, as well as demographics of those who are held in pretrial detentions.²⁴⁶ In this approach, United States officials would not feel singled-out by the international community and may be more receptive to the investigation. This alternative, however, would draw out the length of the investigation significantly as the Rapporteur would have to visit multiple countries and perform a full investigation of each.²⁴⁷

There is an opportunity for an effective report on cash bail systems, but it is important that it is handled delicately to ensure that the idea is not killed immediately.

D. Efficacy of the Process and Strategies for Success

Logistics of beginning an investigation aside, let us assume that there is international involvement, and this investigation gets the green light. Then what? How do we make sure proposed reform follows? How do we socialize this change into the United States? How do we start any kind of meaningful change? How long may it take until we see significant improvements?

Federal officials should make an invitation to the international bodies and give investigators, such as a Special Rapporteur, reasonable access to relevant statistics and documents compiled by the various

243. The Bail Project, *supra* note 157.

244. Vaibhav Goel & Manoj Kr. Tripathi, *The Role of NGOs in the Enforcement of Human Rights: An Overview*, 71 INDIAN J. POL. SCI. 769, 782–84 (2010).

245. Worldwide investigations can provide important comparative metrics regarding the strengths and limitations of different pretrial systems. The World Prison Brief is a good example of the possible findings that a similar investigation can find. *The World Prison Brief*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/> [<https://perma.cc/WF2S-WG2C>].

246. *Id.*

247. While there are any number of ways to limit the number of countries, concerns will still arise concerning why certain countries are chosen for the study but not others. Felice D. Gaer, *Picking and Choosing? Country Visits by Thematic Special Procedures*, in THE UNITED NATIONS SPECIAL PROCEDURES SYSTEM 87, 89, 94 (Brill, 2017).

levels of government.²⁴⁸ The Rapporteur will then be able to verify and assess complaints relating to the bail system and investigate possible ICCPR violations.²⁴⁹ It is imperative to the investigation, however, that the Rapporteur does not meet unnecessary obstacles or resistance, so that the report can be as detailed and accurate as possible.²⁵⁰ A dedicated office within the federal government could provide such security.²⁵¹

Just because an investigation is done, however, does not mean that change will automatically occur, nor that all of the problems associated with cash bail will be alleviated. There is also a need for codified reform that reasonably accommodates the problems brought up in the report.²⁵² This would likely need to be in the form of a federal bill that applies to all the states.²⁵³ State reform has been very unsuccessful, so it comes down to the federal government to make the necessary, sweeping reform.²⁵⁴

248. Sawyer & Wagner, *supra* note 16.

249. *See supra* Section II.C.3.b.

250. *See e.g., UN Expert on Torture Suspends Comoros Visit After Continued Obstructions*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R. (June 18, 2019), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24704&LangID=E> [<https://perma.cc/Z4BL-EC84>].

251. As mentioned previously, this could be the Congressional Research Service. LIBR. OF CONG., *supra* note 239. The Department of Justice may also be an appropriate liaison to the Special Rapporteur under either its Division of International Affairs or its Civil Rights Division. *See Office of International Affairs (OIA)*, U.S. DEP'T. OF JUSTICE, <https://www.justice.gov/criminal-oia> [<https://perma.cc/XP6D-UDU8>]; *see also Civil Rights Division*, U.S. DEP'T. OF JUST., <https://www.justice.gov/crt> [<https://perma.cc/V6X9-9GHL>]; *see also Human Rights and Special Prosecutions Section (HRSP)*, U.S. DEP'T. OF JUST., <https://www.justice.gov/criminal-hrsp> [<https://perma.cc/8CDU-ETCA>].

252. *See, e.g., United Nations Independent Investigation on Burundi*, U.N. HUM. RTS. COUNCIL, <https://www.ohchr.org/en/hrbodies/hrc/uniib/pages/uniib.aspx> [<https://perma.cc/K9JG-GF52>]; *Commission of Inquiry Burundi Vital in Prompting Meaningful Human Rights Progress*, HUM. RTS. WATCH (Aug. 21, 2020), <https://www.hrw.org/news/2020/08/21/commission-inquiry-burundi-vital-prompting-meaningful-human-rights-progress#> [<https://perma.cc/FST8-EBHG>] (explaining that “systemic changes and meaningful reforms are necessary to bring about sustainable improvements” after independent investigations coordinated by the Human Rights Council).

253. As mentioned previously, this would only be constitutional through federal legislation that affects state regulations indirectly. *See supra* Section II.B.2.

254. *See supra* Section II.C.2.

The federal solution would likely have to come in one of two ways: (1) executive order²⁵⁵ or (2) congressional legislation.²⁵⁶ Neither option is perfect, and each has its own set of problems.²⁵⁷ The fact that congressional reform is a lengthy process brings executive orders to the forefront for its ease and quickness.²⁵⁸ This is not an ideal situation, however, as there is an underlying fear that these orders undermine democracy.²⁵⁹ Additionally, executive orders are much easier to overturn and, under the *Medellin*²⁶⁰ holding, it is likely that an executive order without accompanying congressional legislation would be held unconstitutional.²⁶¹

The fact remains, however, that since Congress has been unable to address the will of its constituents,²⁶² it could reasonably fall on the President to take charge of the situation and pressure Congress to enact accompanying legislation.²⁶³ As there is now a new Presidential Administration, and a change in the political party in power, an executive order of this magnitude could be fruitful since it falls in line with members of the current administration's ideals.²⁶⁴ Admittedly, this is a rather bold proposal because it rides the line of unconstitutional involvement by the President.²⁶⁵ In theory, however, the executive order

255. *But see* *Medellin v. Texas*, 552 U.S. 491 (2008). Critics of this approach would argue that such an executive order would undermine states' internal management of their criminal justice systems. Therefore, if an executive order is signed it would need to be also passed alongside congressional legislation to be enforced, or else it might run afoul to state rights under the Tenth Amendment.

256. *How Laws Are Made and How to Research Them*, USAGov (2020), <https://www.usa.gov/how-laws-are-made> [<https://perma.cc/5KM3-D9ZY>].

257. Branum, *supra* note 183, at 78–79.

258. *Compare id.*, with *Executive Orders 101: What Are They and How Do Presidents Use Them?*, NAT'L CONST. CTR. (Jan. 23, 2017), <https://constitutioncenter.org/blog/executive-orders-101-what-are-they-and-how-do-presidents-use-them/> [<https://perma.cc/D9YL-74QW>].

259. Branum, *supra* note 183, at 17.

260. *Medellin v. Texas*, 552 U.S. 491 (2008).

261. *Id.* at 521.

262. *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, *supra* note 158, at 1137.

263. An executive order would push Congress to either pass accompanying legislation, or to pass over-riding legislation. *How Laws Are Made and How to Research Them*, *supra* note 256.

264. Harris & Paul, *supra* note 158.

265. *How Laws Are Made and How to Research Them*, *supra* note 256; Branum, *supra* note 183, at 9.

would serve the sole purpose of pressuring legislators to pass the laws necessary to effect change.²⁶⁶ Therefore, an executive order should only take place in the event Congress is unable or unwilling, to implement the changes recommended by an international institution.²⁶⁷

Although some may argue, instead, for individual states to create their own statutes, this would not be successful.²⁶⁸ First, this is the system that is currently employed and, as previously discussed, it has proven to be tremendously unsuccessful and has exacerbated problems.²⁶⁹ Second, and more importantly, the United States has a history of failures in using this method when it seeks to assist insular minorities.²⁷⁰ Bail reform needs to be accomplished through broad reform that creates a federal standard that is in line with the standards of the rest of the world.²⁷¹ As the *Holland*²⁷² decision indicated, federal legislation over-rides states' rights concerns when a national interest can only be furthered by federal legislation.²⁷³

If the standard is not codified and is, instead, expected to be litigated in court, which is unlikely to work out well.²⁷⁴ United States courts generally avoid using international laws and standards for domestic cases.²⁷⁵ This ideal is starting to become outdated,²⁷⁶ but we are far from a time where international law holds any powerful weight in court.²⁷⁷ Codified laws internalize the overwhelming weight of

266. *How Laws Are Made and How to Research Them*, *supra* note 256.

267. *See id.*

268. *See supra* Section II.B.2.

269. *See, e.g.*, White, *supra* note 177.

270. *See, e.g.*, Jelani Cobb, *The Failure of Desegregation*, NEW YORKER (Apr. 16, 2014), <https://www.newyorker.com/news/news-desk/the-failure-of-desegregation> [perma.cc/9PH4-9QRG].

271. *See also* *Shelby County v. Holder*, 570 U.S. 529, 543 (2013) (noting that in limited circumstances, it is constitutional for federal oversight regarding the states' laws as long as the government's purpose is not outdated).

272. *Missouri v. Holland*, 252 U.S. 416 (1920).

273. *Id.* at 433–34.

274. *See supra* Section II.C.1.

275. Call et al., *supra* note 200.

276. Patrick, *supra* note 82; *see also* *Roper v. Simmons*, 543 U.S. 551 (2005) (emphasizing the importance of an “overwhelming weight of international opinion” in American judicial rulings).

277. Patrick, *supra* note 82.

international opinion in a way that United States courts can swallow and understand.²⁷⁸

III. CONCLUSION

The current bail system in the United States violates international human rights standards. Stories such as that of Kalief Browder²⁷⁹ are far too common and injustice has become engrained in the United States criminal justice system. Innocent people like Browder should not spend years awaiting trial because they cannot pay an abhorrently high bail fee.²⁸⁰

The United States bail system is clearly inconsistent with international law.²⁸¹ The current system should be consistent with the right to equality under the law,²⁸² but the system has clear disparate impacts as it concerns poorer communities and communities of color.²⁸³ If the cash bail system was an equitable system, it would reflect the general demographic of the country, but that is not the case.²⁸⁴ Although the United States often thinks of itself as the world leader in human rights and social change, low-income persons and people of color continue to be subjected to this system at disproportionate rates.²⁸⁵

The international community generally rejects pretrial systems similar to the United States' system.²⁸⁶ Although bail reform is at the center of criminal justice reform,²⁸⁷ the United States has failed to enact that much-needed reform.²⁸⁸ Its current laws leave a substantial gap in the rights of United States citizens,²⁸⁹ but international institutions could help to remedy these issues. Through the Human Rights

278. *Id.*

279. Gonnerman, *supra* note 4; *see also* Gonnerman *supra* note 12.

280. *See* Sawyer & Wagner, *supra* note 16; *see also* Sawyer, *supra* note 18.

281. *See supra* Section II.A.3.

282. ICCPR, *supra* note 2; *see also* GC 32, *supra* note 2.

283. Sawyer & Wagner, *supra* note 16.

284. *See generally* Connelly & Linthorst, *supra* note 3; Van Brunt & Bowman, *supra* note 3; Calaway & Kinsley, *supra* note 3.

285. *See generally* Connelly & Linthorst, *supra* note 3.

286. *See generally* DEVINE, *supra* note 93.

287. *See, e.g.*, Hunter, *supra* note 156.

288. *See, e.g.*, White, *supra* note 177.

289. *See supra* Section II.A.3.

Committee²⁹⁰ or the U.N. Human Rights Council,²⁹¹ these gaps can be identified, and specific remedies can be recommended and implemented.

Because these measures are likely to meet resistance, it is important that a federal office, such as one within the United States Department of Justice,²⁹² is assigned to make sure these investigations run smoothly, and the recommendations are promptly addressed by legislators. With recommendations by international bodies, legislators should strive for broad reform of the bail system in order to achieve the meaningful change necessary.²⁹³ Without this broad reform, individual states will continue proposing unsuccessful, disjointed reforms that may even lead to even more discriminatory systems.²⁹⁴

The sobering reality remains that it may be several years until we can see significant changes in the United States pretrial systems. As with any reform, however, there needs to be a catalyst for change. International insight could be just the push the United States needs.

290. *See supra* Section II.C.3.a.

291. *See supra* Section II.C.3.b.

292. *See supra* Section II.D.

293. *Id.*

294. *See supra* Section II.C.2.