TRAPPED IN A BROKEN BAIL SYSTEM: Re-thinking pre-trial detention practices in the Philippines

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"Anyone who has struggled with poverty know[s] how extremely expensive it is to be poor."
- James Baldwin

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I. INTRODUCTION

Philippine jails are another realm where social injustice reigns. Notably, there is a connection that can be established between an accused's length of stay in detention facilities and his ability to pay; financial status has been correlated to one's inability to exercise the right to bail, and harsher pre-trial practices can also be linked to poorer socioeconomic conditions.

An indigent may not be able to afford bail and is therefore constructively forced into pre-trial detention until acquittal.[1] On the other hand, a wealthy individual may find that losing any money posted to cash bail is "inconsequential" and thus not an incentive to return to court.[2] What appears to be a reasonable sum of money to a wealthy individual may be unreasonable viewed from the perspective of one of lesser means, assuming that both have been charged with a similar offense.

Presently, only two countries in the world—the United States and the Philippines—have cash bail systems controlled by commercial bail bondsmen, that require a defendant to pay cash to be released during the pendency of their case.[3]

II. THE HISTORICAL ROOTS OF BAIL AND THE RISE OF COMMERCIAL BAIL BONDSMEN

Bail is defined under Section 1, Rule 114 of the Rules on Criminal Procedure as the security given for the release of a person in custody of the law, furnished by him or a bondsman, to guarantee his appearance before any court as required under the conditions specified in said Rule.

Bail can be traced to Anglo-Saxon roots:

> To understand the bail system in medieval England, one must first understand the system of criminal laws and penalties in place at that time. The Anglo-Saxon legal process was created to provide an alternative to blood feuds to avenge wrongs, which often led to wars. As Anglo-Saxon

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[1]Palafox, E., & McLeod, B., Scholarly Commons @ UNLV Law, University of Nevada, Las Vegas -- William S. Boyd School of Law Research, https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1013&context=nljforum (last accessed February 7, 2021).

[2] *Id.*

[3] Sebastian, T., & Karakatsanis, A., Challenging money bail in the courts, American Bar Association, (August 1, 2018), https://www.americanbar.org/groups/judicial/publications/judges_journal/2018/summer/challenging-money-bail-the-courts/.

> law developed, wrongs once settled by feuds were settled through a system of "bots," or payments designed to compensate grievances…Essentially, crimes were private affairs [,]and suits brought by persons against other persons typically sought remuneration as the criminal penalty. In a relatively small number of cases, persons who were considered to be a danger to society ("false accusers," "persons of evil repute," and "habitual criminals,") along with persons caught in the act of a crime or the process of escaping, were either mutilated or summarily executed. All others were presumably considered to be "safe," so the issue of a defendant's potential danger to the community if released was not a primary concern.[4]

Since the freedom of the accused were not restricted, it is possible that they would not honor the debt owed to the injured. Given the steep costs of detaining an individual in prison, arrestees were habitually released, provided that some sureties undertook the burden of securing the accused's appearance in court. To facilitate this transaction, the Anglo-Saxons erected a new system wherein the defendant was tasked to produce a surety who would serve as an advocate, assuring both the payments of the bot and the appearance of the accused before the court. The value of the advocate's pledge would be equivalent to the amount or worth of the penalty imposed. Should the accused flee prior to the resolution of the dispute, it falls to the surety to compensate the private accuser the damages sought.

The bail process established by the Anglo-Saxons was perhaps the very last rational application of bail since the bail bond amount was identical to the amount of the fine imposed upon the conviction of the accused. All prisoners facing penalties payable by fine were bondable, and the bail bond was perfectly linked to the outcome of trial – money for money.

For their pre-trial release, the Anglo-Saxons relied on a surety who can stand in for the accused if the latter absconds. The surety was usually a friend, a neighbor, or a family member of the accused. As this system evolved, sureties were later on allowed to pledge personal or real property.

Prior to the Norman invasion, the property pledged matched the monetary fine. However, after the Norman invasion, with the increased use of corporal punishment, it became difficult to evaluate the amount to be pledged. Evaluating such amounts became heavily discretionary. Moreover, the threat of corporal punishment led to increasing numbers of offenders who flee.

Factors such as procedural delays and constant modifications in the substantive criminal law created difficulties, requiring new regulations for pre-trial release and criminal sanctions. Individuals facing harsher sentences were

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[4] Schnacke, T., Jones, M., & Brooker, C., The history of bail and pretrial release., studylib.net, (March 4, 2016), https://studylib.net/doc/8137480/the-history-of-bail-and-pretrial-release.

far more likely to flee possible judgement than those facing monetary penalties. Judicial officers had no method in place to ensure that the worth of the pledge or number of sureties would be sufficient to dissuade individuals from jumping bail. Meanwhile, pre-trial releases became more essential, as the time between indictment and trial lengthened. This predicament created opportunities for corruption and abuse. Importance now shifted from the amount of the bot to who should instead be released.

The number of defendants incapable of paying money bail bond amounts increased giving birth to a profitable new venture unique to the field of American criminal justice – the commercial money bail bond industry.

Bail bondsmen acting as bounty hunters can be traced back to *Taylor v. Taintor*, a U.S. Supreme Court case decided in 1872. Although it is unclear whether the sureties were operating in a commercial capacity, Peter and Thomas McDonough were commonly believed to be the first true bail bondsmen in San Francisco.[5] As commercial money bail bondsmen, they represented sureties pledging money or property on behalf of criminal defendants to fulfill bail bond conditions to the court. Peter and Thomas McDonough began underwriting bonds as favors to lawyers who frequented their father's bar.

Upon learning that lawyers would charge their clients a fee for these bonds, Peter and Thomas McDonough began demanding payment as well. As their business expanded, they established their firm in 1898, called the McDonough Brothers. Underwriting bonds for defendants who have been formally accused of a crime in the nearby Hall of Justice or police court, the brothers had found their business niche. The company, which became known as "The Old Lady of Kearny Street," rose and fell in only fifty years, leaving a legacy prototypical of the growing commercial surety industry.

III. THE RIGHT TO BAIL AND RECOGNIZANCE IN THE PHILIPPINES

Individual freedom is one of the most precious rights zealously protected by the Philippine Constitution. The traditional mode of securing the release of any accused on trial or appeal is through bail or recognizance.

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[5] *Id.*

The right to bail or recognizance is expressly afforded by Section 13, Article III of the Constitution, as follows:

> x x x All persons, except those charged with offenses punishable by *reclusion perpetua* when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released on recognizance as may be provided by law. The right to bail shall not be impaired even when the privilege of the writ of habeas corpus is suspended. Excessive bail shall not be required.

This constitutional provision is repeated in Section 7, Rule 114 of the Rules of Court, as follows:

> Section 7. Capital offense or an offense punishable by *reclusion perpetua* or life imprisonment, not bailable. — No person charged with a capital offense, or an offense punishable by *reclusion perpetua* or life imprisonment, shall be admitted to bail when evidence of guilt is strong, regardless of the stage of the criminal prosecution.

Under the Revised Rules of Criminal Procedure, bail is the security given for the release of a person in custody of the law, furnished by him or a bondsman, to guarantee his appearance before any court. Generally, all persons are entitled to the right to be released on bail. However, the grant of bail is subject to several conditions and requirements.[6]

In *People v. Escobar*, the Court explained that the right to bail is premised on the presumption of innocence:

> Bail is the security given for the temporary release of a person who has been arrested and detained but "whose guilt has not yet "been proven" in court beyond reasonable doubt. The right to bail is cognate to the fundamental right to be presumed innocent. In People v. Fitzgerald: The right to bail emanates from the [accused's constitutional] right to be presumed innocent. It is accorded to a person in the custody of the law who may, by reason of the presumption of innocence he [or she] enjoys, be allowed provisional liberty upon filing of a security to guarantee his [or her] appearance before any court, as required under specified conditions ....[7]

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[6] Sec. 2. *Conditions of the bail; requirements.* – All kinds of bail are subject to the following conditions:
(a) The undertaking shall be effective upon approval, and unless cancelled, shall remain in force at all stages of the case until promulgation of the judgment of the Regional Trial Court, irrespective of whether the case was originally filed in or appealed to it;
(b) The accused shall appear before the proper court whenever required by the court of these Rules;
(c) The failure of the accused to appear at the trial without justification and despite due notice shall be deemed a waiver of his right to be present thereat. In such case, the trial may proceed *in absentia*; and
(d) The bondsman shall surrender the accused to the court for execution of the final judgment.
The original papers shall state the full name and address of the accused, the amount of the undertaking and the conditions required by this section. Photographs (passport size) taken within the last six (6) months showing the face, left and right profiles of the accused must be attached to the bail.

[7] *People of the Philippines v. Manuel Escobar,* G.R. No. 214300, July 26, 2017.

In other words, the right to bail is a constitutional right to freedom prior conviction. It has three (3) known purposes: first, to relieve an accused from the rigors of imprisonment until his conviction while securing his appearance at the trial; second, to honor the presumption of innocence until his guilt is proven beyond reasonable doubt; and third, to enable him to prepare his defense without being subjected to punishment prior to conviction.

Notably, the right to bail only accrues when a person is arrested or deprived of his liberty. It presupposes that the accused is under legal custody.[8] Hence, the right to bail can only be availed of by a person who **is in custody of the law or otherwise deprived of his liberty;** and it would be premature to file a petition for bail for someone whose freedom has yet to be curtailed.[9]

Under the Rules on Criminal Procedure, bail is a matter of right: 1. before or after conviction by the MeTC, MTC, MTCC or MCTC; 2. before conviction by the RTC of an offense not punishable by death, *reclusion perpetua* or life imprisonment; and 3. Upon final conviction by all children in conflict with the law for an offense not punishable by *reclusion perpetua* or life imprisonment.[10] Notably, where bail is a matter of right, the prosecution cannot adduce evidence for the denial of bail.

On the other hand, bail is a matter of discretion: 1. upon conviction by the RTC of an offense not punishable by death, reclusion perpetua, or life imprisonment; 2. regardless of the stage of the criminal prosecution, when a person charged with a capital offense, or an offense punishable by reclusion perpetua or life imprisonment, and evidence of guilt is not strong; and 3. when a child in conflict with the law is charged with an offense punishable by death, reclusion perpetua or life imprisonment when evidence of guilt is not strong.[11]

Where bail is a matter of discretion, the remedy of the accused is to file a petition for bail. Once a petition for bail is filed, the court is mandated to set a hearing and the prosecution may be allowed to a proof that the evidence of guilt is strong. If the prosecution is able to do so, bail must be denied.

Lastly, bail is not allowed in the following circumstances: 1. when a person is charged with a capital offense, or an offense punishable by *reclusion perpetua* or life imprisonment and evidence of his guilt is strong;[12] 2. after judgment of

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[8] *Paderanga v. Court of Appeals,* G.R. No. 115407, August 28, 1995.
[9] *Alva v. CA,* G.R. No. 157331, April 12, 2006.
[10]Rules of Court, rule 114, sec. 4.
[11]Rules of Court, rule 114, sec. 5..
[12]Rules of Court, rule 114, sec.7.

conviction has become final;[13] or 3. after the accused has commenced serving his sentence.[14]

Rule 114, Section 16 of the Rules of Court also provides for instances when posting bail is no longer required:

> When a person has been in custody for a period equal to or more than the possible maximum imprisonment prescribed for the offense charged, he shall be released immediately, without prejudice to the continuation of the trial or the proceedings on appeal. If the maximum penalty to which the accused may be sentenced is *destierro*, he shall be released after thirty (30) days of preventive imprisonment. A person in custody for a period equal to or more than the minimum of the principal penalty prescribed for the offense charged, without application of the Indeterminate Sentence Law or any modifying circumstance, shall be released on a reduced bail or on his own recognizance, at the discretion of the court.

Moreover, in 2014, the Court, through A.M. No. 12-11-2-SC, issued guidelines to implement the accused's rights to bail and speedy trial to decongest detention jails and to humanize the conditions of detained persons pending the hearing of their cases. Section 5 thereof provides:

> SECTION 5. *Release After Service of Minimum Imposable Penalty.* -The accused who has been detained for a period at least equal to the minimum of the penalty for the offense charged against him shall be ordered released, motu proprio or on motion and after notice and hearing, on his own recognizance without prejudice to the continuation of the proceedings against him.[15]

There are three (3) forms of bail bond: corporate surety bond, property bond, and cash bond.

In a **corporate surety bond**, the accused employs the services of an authorized bonding company, for which he will **pay a premium** on the bond in the amount of a non-refundable percentage of the total bond. In return, the bonding company will then execute an undertaking, or a "security bond" in the amount of the bail bond in behalf of the accused. Such undertaking states that if the accused's appearance in court is required, the bonding company will ensure compliance. If the accused jumps bail, the bond will be cancelled, and the bonding company will be given sufficient time to locate the accused. By assuming responsibility for the accused, notice to the bonding company is deemed notice to the accused.

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[13]Rules of Court, rule 114, sec 24.

[14] *Id.*

[15] S A.M. No. 12-11-2-SC, sec. 5.

In a **property bond**, the title of the property shall serve as collateral for the provisional release of the accused in the form of a lien over the property. The property must be sufficient to cover the undertaking after considering any pending or future obligations.

In a **cash bond**, cash shall be in the amount fixed by the court or recommended by the prosecutor who investigated the case. If the accused does not appear when required, the whole amount of the cash bond will be forfeited in favor of the government, and the accused shall be arrested.

As mentioned earlier, a corporate surety bond or a bail bond may be obtained by the accused by paying a premium. Both corporate surety and property bonds do not entail a transfer of assets into the possession of the court. On the other hand, the posting of the cash bond would entail a transfer of assets into the possession of the court.

Meanwhile, **release on recognizance** is generally allowed if it is provided by law or the Rules of Court. Rule 114, Section 15 of the Revised Rules of Criminal Procedure states:

> SECTION 15. *Recognizance*. -Whenever allowed by law or these Rules, the court may release a person in custody on his own recognizance or that of a responsible person.

In *People v. Abner*, the Court defined recognizance as a record entered in court allowing for the release of an accused subject to the condition that they will appear for trial:

> Section 1, Rule 110, of the Rules of Court, provides that "bail is the security required and given for the release of a person who is in the custody of the law, that he will appear before any court in which his appearance may be required as stipulated in the bail bond or recognizance." Under this, there are two methods of taking bail: (1) by bail bond and (2) by recognizance. A bail bond is an obligation given by the accused with one or more sureties, with the condition to be void upon the performance by the accused of such acts as he may legally be required to perform. *A recognizance is an obligation of record, entered into before some court or magistrate duly authorized to take it, with the condition to do some particular act, the most usual condition in criminal cases being the appearance of the accused for trial.* (Moran, Comments on the Rules of Court, 2d ed., Vol. II, page 592.) In U S. vs. Sunico et al., 48 Phil., 826, 834, this court, citing Lamphire vs. State, 73 N. H., 462; 62 Atl., 786; 6 Am. & Eng. Ann. Cas., 615, defined a recognizance as "a contract between the sureties and the State for the production of the principal at the required time."[16]

In **recognizance,** there is no financial outlay involved. There is merely an obligation of record, entered into before some court or magistrate duly

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[16] *People of the Philippines v. Abner,* G.R. No. L-2508, October 27, 1950.

authorized to take it with the condition to do some particular act. It is an undertaking of a disinterested person with high credibility who must execute an affidavit of recognizance to the effect that when the presence of the accused is required in court, the custodian will bring him to that court. If the accused does not appear despite notice to the custodian, or the person who executed the recognizance does not produce the accused, he may be cited for contempt of court.

Under Republic Act No. 10389, or the Recognizance Act of 2012, release on recognizance is allowed if any person in custody or detention "is unable to post bail due to abject poverty."[17]

It is a matter of right when the offense is not punishable by death, *reclusion perpetua*, or life imprisonment, so long as the application is timely filed.[18] Republic Act No. 10389 further enumerates the procedure, requirements, and disqualifications for release on recognizance.[19]

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[17] An Act Institutionalizing Recognizance as a Mode of Granting the Release of an Indigent Person in Custody as an Accused in a Criminal Case and for other Purposes, Republic Act No. 10389, sec. 3 (2013).

[18] Republic Act No. 10389 , sec.5 : *Release on Recognizance as a Matter of Right Guaranteed by the Constitution.* – The release on recognizance of any person in custody or detention for the commission of an offense is a matter of right when the offense is not punishable by death, *reclusion perpetua*, or life imprisonment: *Provided,* That the accused or any person on behalf of the accused files the application for such: (a) Before or after conviction by the Metropolitan Trial Court, Municipal Trial Court, Municipal Trial Court in Cities and Municipal Circuit Trial Court; and (b) Before conviction by the Regional Trial Court: *Provided, further,* That a person in custody for a period equal to or more than the minimum of the principal penalty prescribed for the offense charged, without application of the Indeterminate Sentence Law, or any modifying circumstance, shall be released on the person's recognizance.

[19] Republic Act No. 10389 (2013), secs. 6 and 7 : SEC. 6. *Requirements.* – The competent court where a criminal case has been filed against a person covered under this Act shall, upon motion, order the release of the detained person on recognizance to a qualified custodian: *Provided,* That all of the following requirements are complied with:

(a) A sworn declaration by the person in custody of his/her indigency or incapacity either to post a cash bail or proffer any personal or real property acceptable as sufficient sureties for a bail bond;
(b) A certification issued by the head of the social welfare and development office of the municipality or city where the accused actually resides, that the accused is indigent;
(c) The person in custody has been arraigned;
(d) The court has notified the city or municipal sanggunian where the accused resides of the application for recognizance. The sanggunian shall include in its agenda the notice from the court upon receipt and act on the request for comments or opposition to the application within ten (10) days from receipt of the notice. The action of the sanggunian shall be in the form of a resolution, and shall be duly approved by the mayor, and subject to the following conditions:

(1) Any motion for the adoption of a resolution for the purpose of this Act duly made before the sanggunian shall he considered as an urgent matter and shall take precedence over any other business thereof: *Provided,* That a special session shall be called to consider such proposed resolution if necessary;

The resolution of the sanggunian shall include in its resolution a list of recommended organizations from whose members the court may appoint a custodian.

In *Espiritu v. Jovellanos*, the Court enumerated the instances when release on recognizance is allowed under Rule 114 of the Revised Rules of Criminal Procedure:

> Under Rule 114, Section 15 of the Rules of Court, the release on recognizance of any person under detention may be ordered only by a court and only in the following cases: (a) when the offense charged is for violation of an ordinance, a light felony, or a criminal offense, the imposable penalty for which does not exceed 6 months imprisonment and/or P2,000 fine,

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(2) The presiding officer of the sanggunian shall ensure that its secretary shall submit any resolution adopted under this Act within twenty-four (24) hours from its passage to the mayor who shall act on it within the same period of time from receipt thereof;
(3) If the mayor or any person acting as such, pursuant to law, fails to act on the said resolution within twenty-four (24) hours from receipt thereof, the same shall be deemed to have been acted upon favorably by the mayor;
(4) If the mayor or any person acting as such, pursuant to law, disapproves the resolution, the resolution shall be returned within twenty-four (24) hours from disapproval thereof to the sanggunian presiding officer or secretary who shall be responsible in informing every member thereof that the sanggunian shall meet in special session within twenty-four (24) hours from receipt of the veto for the sole purpose of considering to override the veto made by the mayor.

For the purpose of this Act, the resolution of the sanggunian of the municipality or city shall be considered final and not subject to the review of the Sangguniang Panlalawigan, a copy of which shall be forwarded to the trial court within three (3) days from date of resolution.

(e) The accused shall be properly documented, through such processes as, but not limited to, photographic image reproduction of all sides of the face and fingerprinting: *Provided,* That the costs involved for the purpose of this subsection shall be shouldered by the municipality or city that sought the release of the accused as provided herein, chargeable to the mandatory five percent (5%) calamity fund in its budget or to any other available fund in its treasury; and

(f) The court shall notify the public prosecutor of the date of hearing therefor within twenty-four (24) hours from the filing of the application for release on recognizance in favor of the accused: *Provided,* That such hearing shall be held not earlier than twenty-four (24) hours nor later than forty-eight (48) hours from the receipt of notice by the prosecutor: *Provided, further,* That during said hearing, the prosecutor shall be ready to submit the recommendations regarding the application made under this Act, wherein no motion for postponement shall be entertained.

SEC. 7. *Disqualifications for Release on Recognizance.* – Any of the following circumstances shall be a valid ground for the court to disqualify an accused from availing of the benefits provided herein:
(a) The accused bad made untruthful statements in his/her sworn affidavit prescribed under Section 5(a);
(b) The accused is a recidivist, quasi-recidivist, habitual delinquent, or has committed a crime aggravated by the circumstance of reiteration;
(c) The accused had been found to have previously escaped from legal confinement, evaded sentence or has violated the conditions of bail or release on recognizance without valid justification;
(d) The accused had previously committed a crime while on probation, parole or under conditional pardon;
(e) The personal circumstances of the accused or nature of the facts surrounding his/her case indicate the probability of flight if released on recognizance;
(f) There is a great risk that the accused may commit another crime during the pendency of the case; and
(g) The accused has a pending criminal case which has the same or higher penalty to the new crime he/she is being accused of.

> under the circumstances provided in R.A. No. 6036; (b) where a person has been in custody for a period equal to or more than the minimum of the imposable principal penalty, without application of the Indeterminate Sentence Law or any modifying circumstance, in which case the court, in its discretion, may allow his release on his own recognizance; (c) where the accused has applied for probation, pending resolution of the case but no bail was filed or the accused is incapable of filing one; and (d) in case of a youthful offender held for physical and mental examination, trial, or appeal, if he is unable to furnish bail and under the circumstances envisaged in P.D. No. 603, as amended (Art. 191).[20]

IV. MONEY BAIL: WEALTH AND INFLUENCE AS THE ARBITER OF LIBERTY

Prolonged pre-trial detention is a key issue facing the Philippine criminal justice system.[21] Detainees stay in jail for years while undergoing trial and awaiting conviction. Inability to post bail is one of the factors of prolonged pre-trial detention. Arguably, it is a hurdle faced only by the poor but not by the wealthiest members of society.

Under the present Rules, pending the raffle of the case to a regular branch of the court, the accused may move for the fixing of the amount of bail, in which event, the executive judge shall cause the immediate raffle of the case for assignment and the hearing of the motion.[22] The court shall, after finding sufficient cause to hold the accused for trial, fix the amount of bail that the latter may post for his provisional release, taking into account the public prosecutor's recommendation and any relevant data that the court may find from the criminal information and the supporting documents submitted with it, regarding the following:

1. Financial ability of the accused to give bail;
2. Nature and circumstances of the offense;
3. Penalty for the offense charged;
4. Character and reputation of the accused;
5. Age and health of the accused;
6. Weight of the evidence against the accused;

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[20] *Espiritu v. Jovellanos*, A.M. No. MTJ-97-1139, October 16, 1997 as cited in the Separate Opinion of Jusice Leonen in *Almonte v. People*, G.R. No. 252117, July 28, 2020.

[21] Conde, C. H., Injustice and misery in PH jails, Human Rights Watch, (March 8, 2016), https://www.hrw.org/news/2016/03/08/injustice-and-misery-ph-jails.

[22] A.M. No. 12-11-2-SC, sec. 2.

7. Probability of the accused appearing in trial;
8. Forfeiture of other bonds;
9. The fact that the accused was a fugitive from justice when arrested; and
10. Pendency of the cases in which the accused is under the bond.[23]

After the accused is admitted to bail, the court may, upon good cause, either increase or reduce its amount. When increased, the accused may be committed to custody if he does not give bail in the increased amount within a reasonable period.[24] In cases when the accused does not have the financial ability to post the bail initially fixed by the court, the accused may move for its reduction by submitting documents and affidavits that may warrant his claim for reduction.[25] A motion to reduce the amount of bail likewise requires a hearing before it is granted in order to afford the prosecution the chance to oppose it.[26] Such motion shall enjoy priority in the hearing of cases.[27] The order fixing the amount of the bail shall not be subject to appeal.[28]

The justice system is premised on the notion that the rich and the poor are treated equally. For thousands of pre-trial detainees every year, however, the difference between freedom and jail frequently depends on wealth status.

Pre-trial detention is a significantly different issue in developing countries than in developed countries. This is no more evident than in the Philippines, where the use of pre-trial detention has led to alarming human rights issues within the country's jails. Many individuals are subject to pre-trial detention as a result of the slow-moving nature of the country's court systems. This substantial delay has resulted in overwhelmingly overcrowded jail facilities which greatly affects the standard of living of those awaiting trial.

In addition to being a question of ethics, holding these individuals during pre-trial for a prolonged period raises significant concerns for the administration of justice in the Philippines.

The average length of stay of an individual in pretrial detention is severely understudied, especially in developing countries. Only a couple of studies have investigated the average length of stay in the Philippines, finding that individuals in pretrial detention stayed on average for 355 days. In a later study,

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[23] A.M. No. 12-11-2-SC, sec. 1.
[24] Sec. 20, Rule 114, Rules of Court.
[25] A.M. No. 12-11-2-SC, sec. 3.
[26] *Bangayan v. Butacan,* A.M. No. MTJ-00-1320, November 22, 2000 citing Rule 114, Sec. 18, Rules of Court.
[27] A.M. No. 12-11-2-SC, sec. 3.
[28] A.M. No. 12-11-2-SC, sec. 4.

it was found that the average length of stay in pretrial detention for 2,868 inmates was 658 days, which included 15 individuals who stayed 10 years or longer.[29]

According to the World Prison Brief: "In 2018, the Philippines held the sixth-highest prison population out of 21 Asian countries. As of 2019, the Philippines' population rested at 108.31 million people, and 215,000 of those people were incarcerated. Therefore, the Philippines has an incarceration rate of about 200 per 100,000 citizens. According to The World Prison Brief, 75.1% of incarcerations within the Philippines' incarceration system are pre-trial. In 2018, 141,422 of 188,278 prisoners were pre-trial detainees."[30]

A. How money bail system reinforces social inequalities and why such systems violate the equal protection and due process clauses of our Constitution.

Rich and poor alike are guaranteed by the Constitution the same measure of justice, regardless of financial status. However, for many detainees, that is simply not the case. The difference between freedom and confinement depends on their ability to pay.

In his study, Professor Caleb Foote, a professor emeritus of law at UC Berkeley's Boalt Hall School of Law[31], observed that those who remained in detention pre-trial were mostly poor and unable to raise the bond amount**.** Moreover, Foote found that those defendants who were unable to pay their money bail bond amounts were more likely to be convicted and to receive higher sentences than those defendants who were able to pay their money bail bond amounts. Other studies in the 1950s and early 1960s showed similar outcomes and laid the foundation for the bail reform movement of the 1960s:

> [these] studies had shown the dominating role played by bondsmen in the administration of bail, the lack of any meaningful consideration to the issue of bail by the courts, and the detention of large numbers of defendants who could and should have been released but were not because **bail, even in modest amounts, was beyond their means.**[32]

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[29] Ingram, M., Philippines. World Prison Brief | an online database comprising information on prisons and the use of imprisonment around the world, (August 26, 2020), https://www.prisonstudies.org/country/philippines.

[30] *Id.*

[31] Simon, J., Kadish, S., & Cole, R. (n.d.). Caleb Foote., Welcome to the Academic Senate, https://senate.universityofcalifornia.edu/_files/inmemoriam/html/calebfoote.html (last accessed June 29, 2021).

[32] *Supra* note 5 at 11.

The studies also found that "bail was often used to 'punish' defendants prior to a determination of guilt or to 'protect' society from anticipated future conduct, neither of which is a permissible purpose of bail; that defendants detained prior to trial often spent months in jail only to be acquitted or to receive a suspended sentence after conviction; and that jails were severely overcrowded with pretrial detainees housed in conditions far worse than those of convicted criminals."[33]

Due process clause

The due process clause, as enshrined in Article III, Section 1 of the 1987 Constitution, states:

> SECTION 1. No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

To determine if an individual has been denied due process of law, inquiry should be made whether the restriction on the person's life, liberty, or property is not fraught with arbitrariness, discrimination and caprice. The same standard applies to both procedural and substantive due process. In *Legaspi v. Cebu City*, the Court held:

> The guaranty of due process of law is a constitutional safeguard against any arbitrariness on the part of the Government, whether committed by the Legislature, the Executive, or the Judiciary. It is a protection essential to every inhabitant of the country, for, as a commentator on Constitutional Law has vividly written:
>
> > . . . If the law itself unreasonably deprives a person of his life, liberty, or property, he is denied the protection of due process. If the enjoyment of his rights is conditioned on an unreasonable requirement, due process is likewise violated. Whatsoever be the source of such rights, be it the Constitution itself or merely a statute, its unjustified withholding would also be a violation of due process. Any government act that militates against the ordinary norms of justice or fair play is considered an infraction of the great guaranty of due process; and this is true whether the denial involves violation merely of the procedure prescribed by the law or affects the very validity of the law itself.[34]

White Light Corporation v. City of Manila discussed the difference between substantive due process and procedural due process. In *White Light Corporation*, the Court held:

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[33] *Id.*

[34] *Legaspi v. City of Cebu,* G.R. No. 159110, December 10, 2013.

> The primary constitutional question that confronts us is one of due process, as guaranteed under Section 1, Article III of the Constitution. Due process evades a precise definition. The purpose of the guaranty is to prevent arbitrary governmental encroachment against the life, liberty and property of individuals. The due process guaranty serves as a protection against arbitrary regulation or seizure. Even corporations and partnerships are protected by the guaranty insofar as their property is concerned.
>
> The due process guaranty has traditionally been interpreted as imposing two related but distinct restrictions on government, "procedural due process" and "substantive due process". Procedural due process refers to the procedures that the government must follow before it deprives a person of life, liberty, or property. Procedural due process concerns itself with government action adhering to the established process when it makes an intrusion into the private sphere. Examples range from the form of notice given to the level of formality of a hearing.
>
> If due process were confined solely to its procedural aspects, there would arise absurd situation of arbitrary government action, provided the proper formalities are followed. Substantive due process completes the protection envisioned by the due process clause. It inquires whether the government has sufficient justification for depriving a person of life, liberty, or property.

In *Associated Communications & Wireless Services, Ltd. v. Dumlao*:

> In order to fall within the protection of this provision, two conditions must concur, namely, that there is a deprivation and that such deprivation is done without proper observance of due process. When one speaks of due process of law, a distinction must be made between matters of procedure and matters of substance. In essence, procedural due process "refers to the method or manner by which the law is enforced," while substantive due process "requires that the law itself, not merely the procedures by which the law would be enforced, is fair, reasonable, and just. "[35]

Jurisprudence developed three (3) levels of scrutiny in determining the validity of a government regulation vis-à-vis the due process and equal protection clauses of the Constitution: (1) the rational basis test; (2) the heightened or immediate scrutiny test; and (3) the strict scrutiny test.

The lowest level of scrutiny is the rational basis test. Under the **rational basis test**, so long as it facilitates a legitimate government interest, regulations and laws affecting life, liberty, or property of persons are considered to be valid. The next level of scrutiny is the immediate scrutiny test. Under the **heightened or immediate scrutiny test**, such a regulation or law cannot be deemed valid until the government interest has been thoroughly examined and all possible less restrictive means of advancing it have been taken into account. The highest level of scrutiny is the strict scrutiny test. Under the **strict scrutiny**

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[35] *Id.*

test, there must be a compelling government interest, and there must exist no other alternatives for advancing that interest. Each test is more stringent than the last depending on the government act, the rights impeded by the act, and the means used to perform the act.

The right to liberty is a fundamental freedom and any infringement of such right shall be subject to the highest level of scrutiny, the **strict scrutiny.** While it appears that statutes implementing and regulating cash bail should be reviewed under the rational basis test because the classification is based on wealth, heightened scrutiny is required because it converges with the fundamental right to liberty.

In the Separate Opinion of Justice Leonen in *SPARK v. Quezon City*, he stated that:

> "The focus of the strict scrutiny test is on the presence of compelling, rather than substantial, governmental interest and on the absence of less restrictive means for achieving that interest. Hence, to pass the strict scrutiny test, a statutory classification must be a necessary means of accomplishing a compelling state purpose. Furthermore, the distinction must be precisely formulated in terms neither substantially overbroad nor underinclusive so as to achieve the compelling purpose by the least drastic means."[36]

Applying the above standards to the system of cash bail, the initial inquiry is whether the state's purpose of ensuring the appearance of defendants at trial is compelling. States do have a compelling interest in deterring an accused's flight from court custody. When considering the available alternatives at the state's disposal, one must question whether cash bail is the most effective way of preventing the accused from fleeing. Non-cash, or non-commercial bail bond alternatives, such as release on recognizance is a far less restrictive means of achieving the state's interest.

The American Bar Association (ABA) Standard for Criminal Justice cited at least four (4) reasons for its long-standing position against commercial bail bonds. Of these four reasons, two of which are: "First, under the conventional money bail system, the defendant's ability to post money bail through a compensated surety is completely unrelated to possible risks to public safety. A commercial bail bondsman is under no obligation to try to prevent criminal behavior of the defendant. Second, in a system relying on compensated

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[36] Separate Opinion of Justice Leonen, *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City,* G.R. No. 225442, August 8, 2017.

sureties, decisions regarding which defendants will be released move from the court to the bondsmen."[37]

Insofar as the bail system hinges on cash bonds as a deterrent to flight, it is arguable whether bail would even pass the rational basis test. When a court fixes bail, it does not know what it is requiring unless the defendant himself pays the entire bond. Otherwise, the extent of financial deterrence to flight depends on the bondsman's requirements. [38]

Equal protection clause

As jurisprudence elucidates, equal protection simply requires that all persons or things similarly situated should be treated alike, both as to rights conferred and responsibilities imposed. The early case of *Victoriano v. Elizalde Rope Workers' Union* is instructive:

> The guaranty of equal protection of the laws is not a guaranty of equality in the application of the laws upon all citizens of the state. It is not, therefore, a requirement, in order to avoid the constitutional prohibition against inequality, that every man, woman and child should be affected alike by a statute. Equality of operation of statutes does not mean indiscriminate operation on persons merely as such, but on persons according to the circumstances surrounding them. It guarantees equality, not identity of rights.
>
> The Constitution does not require that things which are different in fact be treated in law as though they were the same. The equal protection clause does not forbid discrimination as to things that are different. It does not prohibit legislation which is limited either in the object to which it is directed or by the territory within which it is to operate.
>
> The equal protection of the laws clause of the Constitution allows classification. Classification in law, as in the other departments of knowledge or practice, is the grouping of things in speculation or practice because they agree with one another in certain particulars. A law is not invalid because of simple inequality. The very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality. All that is required of a valid classification is that it be reasonable, which means that the classification should be based on **substantial distinctions** which make for real differences; that it must be **germane to the purpose of the law**; that it **must not be limited to existing conditions only**; and that it **must**

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[37] American Bar Association, & American Bar Association. Criminal Justice Standards Committee, ABA standards for criminal justice, *(pretrial release*, 3rd ed., 2007).

[38]Cohen, R., Wealth, Bail, and the Equal Protection of the Laws., Digital Repository - Villanova University Charles Widger School of Law, (1977), https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=2200&context=vlr.

> **apply equally to each member of the class**. This Court has held that the standard is satisfied if the classification or distinction is based on a reasonable foundation or rational basis and is not palpably arbitrary.[39] (emphasis supplied)

The prohibition against requiring excessive bail is enshrined in the Constitution. The obvious rationale, as declared in the leading case of *De la Camara vs. Enage*[40]*,* is that imposing bail in an excessive amount could render meaningless the right to bail. Thus, in *Villaseñor vs. Abano*, the Court pronounced that it will not hesitate to exercise its supervisory powers over lower courts should the latter, after holding the accused entitled to bail, effectively deny the same by imposing a prohibitory sum or exacting unreasonable conditions.

> xxx There is grim irony in an accused being told that he has a right to bail but at the same time being required to post such an exorbitant sum. What aggravates the situation is that the lower court judge would apparently yield to the command of the fundamental law. In reality, such a sanctimonious avowal of respect for a mandate of the Constitution was on a purely verbal level. There is reason to believe that any person in the position of petitioner would under the circumstances be unable to resist thoughts of escaping from confinement, reduced as he must have been to a state of desperation. In the same breath as he was told he could be bailed out, the excessive amount required could only mean that provisional liberty would be beyond his reach. It would have been more forthright if he were informed categorically that such a right could not be availed of. There would have been no disappointment of expectations then. It does call to mind these words of Justice Jackson, "*a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will.*"[41]

When is bail considered excessive?

These guidelines are culled from the decision in *Villaseñor v. Abano* wherein Justice Conrado Sanchez succinctly said:

> Expressions in varying language spell out in a general way the principles governing bail fixing. One is that the **amount should be high enough to assure the presence of defendant when required but no higher than is reasonably calculated to fulfill this purpose. Another is that 'the good of the public as well as the rights of the accused', and 'the need for a tie to the jurisdiction and the right to freedom from unnecessary restraint before conviction** under the circumstances surrounding each particular accused', should all be balanced in one equation.

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[39] *Victoriano v. Elizalde Rope Workers' Union,* G.R. No. L-25246 September 12, 1974.
[40] *De la Camara v. Hon. Enage,* G.R. Nos. L-32951-2, September 17, 1971.
[41] *Villaseñor v. Abano,* G.R. No. L-23599, September 29, 1967.

> **We are not to consider solely the inability of a defendant to secure bail in a certain amount.** This circumstance by itself does not make the amount excessive. **For, when an accused has no means of his own, no one to bail him out, or none to turn to for premium payments, any amount fixed no matter how small would fall into the category of excessive bail;** and he would be entitled to be discharged on his own recognizance.[42] (emphasis supplied)

The excessive bail clause was intended to preclude denial of bail by setting an amount higher than what the accused could furnish.[43] Jurisprudence, such as *Villasenor*, nevertheless, rejects the notion that mere inability to raise bail makes it excessive.

Imprisonment due to inability to post bail violates the equal protection clause because the accused is essentially being punished on account of his poverty. While it is true that courts consider the accused's ability to pay, it cannot be denied that many pre-trial detainees still languish in jail for failure to post bail as the amount remains beyond their means.

B. Reviewing Cases On Bail Decided By The Supreme Court

Article 8 of the Civil Code expressly states that "judicial decisions applying or interpreting the laws, or the Constitution shall form a part of the legal system of the Philippines." Thus, decisions of the Supreme Court forms part of the legal system of the land. Likewise, as earlier stated, the Constitution gives the Supreme Court its rule-making power concerning the protection and enforcement of constitutional rights. Since the Constitution provides for state policy for the protection of liberty, the rule-making power extends to the enforcement of the right to bail or recognizance.

Based on the aforementioned provision, this article will revisit three (3) relevant cases on bail decided by the Supreme Court.

A. *People v. Fitzgerald*

In the case of *People v. Fitzgerald,* the Supreme Court ruled that bail is not a matter of right merely for medical reasons.

Fitzgerald, an Australian citizen was charged with the violation of Art. III, Section 5, paragraph (a), subparagraph (5) of Republic Act No. 7610 for allegedly inducing complainant "AAA", a minor, to engage in prostitution by

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[42] *People of the Philippines v. Hon. Resterio-Andrade,* G.R. No. 79827, July 3l, 1989.
[43] *Supra* note 39 at 6.

showering said "AAA" with gifts, clothes, and food, and thereafter having carnal knowledge with her. The Regional Trial Court(RTC) found Fitzgerald guilty beyond reasonable doubt. Thereafter, his application for bail was denied on the ground that he is a flight risk and that he may commit a similar offense if released on bail because pedophilia is a sexual disorder and a sexual dysfunction which is intense and recurrent. Fitzgerald appealed before the Court of Appeals(CA) but the latter affirmed the decision of the RTC. He thereafter filed a Motion for New Trial which was granted. Petitioner filed a Motion for Reconsideration. Meanwhile, Fitzgerald filed a Motion to Fix Bail with Manifestation. Both motions were denied by the CA. With respect to the bail, it was denied because the maximum imposable penalty under Republic Act 7610 is *reclusion perpetua* and as it is, the evidence of his guilt is strong. Nevertheless, as to his alleged physical condition, the CA held that Fitzgerald is not precluded from seeking medical attention if the need arises provided the necessary representations with the proper authorities are made.

Later, Fitzgerald filed a Motion to Bail, which the CA granted considering primarily the fact that appellant is already of old age and is not in the best of health. Thereafter, the RTC ordered Fitzgerald's temporary release upon his filing of a cash bond. Petitioner filed a Petition before the Supreme Court to have the CA Resolution annulled and set aside.

The Court, in cancelling the bail bond posted by Fitzgerald, ruled that:

> **Bail is not a sick pass for an ailing or aged detainee or prisoner needing medical care outside the prison facility.** A mere claim of illness is not a ground for bail. It may be that the trend now is for courts to permit bail for prisoners who are seriously sick. There may also be an existing proposition for the "selective decarceration of older prisoners" based on findings that recidivism rates decrease as age increases. But, in this particular case, the CA made no specific finding that respondent suffers from an ailment of such gravity that his continued confinement during trial will permanently impair his health or put his life in danger. It merely declared respondent not in the best of health even when the only evidence on record as to the latter's state of health is an unverified medical certificate stating that, as of August 30, 2000, respondent's condition required him to "xxx be confined in a more sterile area xxx." That medical recommendation was even rebuffed by the CA itself when, in its November 13, 2000 Resolution, it held that the physical condition of respondent does not prevent him from seeking medical attention while confined in prison.[44] (emphasis supplied)

B. *Enrile v. Sandiganbayan*

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[44] *People v. Fitzgerald,* G.R. No. 149723, October 27, 2006.

In *Enrile*, however, the Court made special mention of Senator Enrile's "social and political standing" and "currently fragile state of health" as fundamental factors in granting his petition for bail.

Senator Enrile and several others were charged with the crime of plunder in the Sandiganbayan on the basis of their purported involvement in the diversion and misuse of appropriations under the Priority Development Assistance Fund (PDAF). When his warrant of arrest was issued, Senator Enrile voluntary surrendered. Thereafter, he filed a Motion for Detention at the PNP General Hospital and a Motion to Fix Bail.

Senator Enrile anchored his claim on the following grounds: first, that he is entitled to bail as matter of right; second, that the Prosecution failed to establish that he, if convicted of plunder, is punishable by *reclusion perpetua* considering the presence of two mitigating circumstances – his age and his voluntary surrender; third, that he cannot be considered a flight risk taking into account that he is already over the age of 90, his medical condition, and his social standing.

The Sandiganbayan, however, denied his motion on two (2) grounds: first, he is charged with a capital offense; and second, it is premature for the Court to fix the amount of his bail because the prosecution have not yet presented its evidence. Senator Enrile then filed a petition for certiorari before the Supreme Court.

In granting the provisional release of Senator Enrile, the Court held that the Sandiganbayan arbitrarily ignored the objective of bail to ensure the appearance of the accused during the trial and unwarrantedly disregarded the clear showing of the **fragile health and advanced age of Enrile.** Furthermore, the Court held that it is mindful of the Philippines' responsibility in the international community arising from the national commitment under the Universal Declaration of Human Rights to:

> x x x uphold the fundamental human rights as well as value the worth and dignity of every person. This commitment is enshrined in Section II, Article II of our Constitution which provides: "The State values the dignity of every human person and guarantees full respect for human rights." The Philippines, therefore, has the responsibility of protecting and promoting the right of every person to liberty and due process, ensuring that those detained or arrested can participate in the proceedings before a court, to enable it to decide without delay on the legality of the detention and order their release if justified. In other words, the Philippine authorities are under obligation to make available to every person under detention such remedies

> which safeguard their fundamental right to liberty. These remedies include the right to be admitted to bail.[45]

Moreover, the Court held that Senator Enrile's social and political standing and his having immediately surrendered to the authorities upon his being charged in court indicate that the risk of his flight or escape from this jurisdiction is highly unlikely. And that with Senator Enrile's solid reputation in both his public and his private lives, his long years of public service, and history's judgment of him being at stake, he should be granted bail.

The ruling in *Enrile* left the Court open to a justifiable criticism in granting a privilege ad hoc: for one person only – Senator Enrile.[46] It is worthy to note that Senator Enrile was accused of plunder, a non-bailable crime. Supreme Court Associate Justice Marvic Victor Leonen, in his Dissenting Opinion, stated that Senator Enrile is unbelievably fortunate. Justice Leonen re-stated that bail is not a matter of right in cases where the crime charged is plunder and the imposable penalty is *reclusion perpetua*. Furthermore, he argued that **bail for humanitarian considerations** is neither presently provided in our Rules of Court nor found in any statute or provision of the Constitution. Lastly, he pointed out that such ground was never raised before the Sandiganbayan or in the pleadings filed before the Supreme Court.[47]

Notably, former First Lady Imelda Marcos, who was convicted of plunder before the Sandiganbayan was granted bail in 2018 by invoking the 2015 case of *Enrile.* In its decision, the Sandiganbayan Fifth Division cited the former First Lady's age and health condition in granting her bail.[48]

C. *Almonte v. People*

The case of *Almonte v. People* involve a group of detainees praying to be provisionally released, citing humanitarian considerations, spurred by the rapid spread of COVID-19 in the crowded jails. They belong to the group of individuals considered to be more at risk by the World Health Organization given their age and health status. Petitioners alluded to the inability to follow social distancing guidelines in the cramped detention centers, as well not being provided the proper personal protective equipment to curtail the spread of the deadly disease. Petitioners also cited health concerns, considering the more

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[45] *Enrile v. Sandiganbayan,* G. R. No. 213847, July 12, 2016.
[46] Separate Opinion of Justice Lazaro-Javier, *Almonte v. People,* G.R. No. 252117, July 28, 2020.
[47] Dissenting Opinion of Justice Leonen, *Enrile v. Sandiganbayan*, G. R. No. 213847, July 12, 2016.
[48] Nicholls, C. A., Sandiganbayan cites SC ruling on Enrile in granting Imelda Marcos bail, CNN Philippines, https://cnnphilippines.com/news/2018/12/03/sandiganbayan-Imelda-Marcos-bail-ruling.html. (last accessed June 29, 2021).

restrictive access to the outside world imposed by the emergence of COVID-19.

In light of these matters, petitioners proclaimed that continued detention blatantly violated their right against cruel, degrading, and inhuman punishment, under Article III, Section 1 of the 1987 Constitution. The petitioners also invoked the cases of *Enrile v. Sandiganbayan*[49] and *Dela Rama v. People*[50] as grounds for their provisional release, indicating that the court granted the petitioners in said cases bail on account of their health conditions.

Petitioners likewise invoke their rights under international law principles and conventions, particularly the United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

Respondents rejected the case of *Enrile v. Sandiganbayan* as a precedent due to being a *pro hac vice* ruling. Considering that the petitioners belonged to a designated terrorist organization called CPP-NPA-NDF, such a case would not apply to them. Respondents also claim that because petitioners previously violated the terms of their provisional release, they are now classified as flight risks and are therefore not qualified for temporary release. Lastly, they posited that the CPP-NPA-NDF is using the pandemic as a vehicle to liberate its more notorious officers.

After five (5) months of extensive deliberations, the Supreme Court unanimously decided to remand the case to appropriate trial courts to determine whether there are factual bases to support petitioners' temporary release. The 301-page decision and opinions contained extensive deliberations on whether the Supreme Court decision on the bail granted to Senator Enrile, which was based on humanitarian grounds, should be applied to the petition, or if it should be recognized at all as a precedent.

There are 2 divergent views on the matter, particularly by Justice Leonen and Justice Amy Lazaro-Javier.

Justice Leonen joined Justices Caguioa and Perlas-Bernabe in reaffirming that *Enrile* is a pro hac vice ruling, applicable only to the unique considerations accorded to Enrile. He agreed that the ruling in *Enril*e does not support the Constitution, the rules, and jurisprudence. It is a stray decision that cannot be a binding precedent because there was no hearing to determine whether the evidence of his guilt was not strong.[51]

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[49] *Supra* note 46.

[50] *Dela Rama v. People,* G.R. No. L-982, October 2, 1946.

[51] Separate Opinion of Justice Leonen, *Almonte v. People,* G.R. No. 252117, July 28, 2020.

On the other hand, Justice Lazaro-Javier stated that by acknowledging that *Enrile* was pro hac vice, Justice Leonen's claims of a separate justice system for the powerful and powerless would be validated. She emphasized that it was the Supreme Court itself that established the *Enrile* ruling. She noted that if the Supreme Court were to retract the ruling, it must at least afford those who have already invoked it, regardless of their status. Until the *Enrile* ruling is overturned, it should continue to be regarded as a binding precedent.[52]

As can be surmised from the cases above, in select instances, certain provisions have been granted to unconventional cases faced by the Supreme Court. There have been a few cases where bail has been granted in accordance with an individual's station, establishing that bail historically benefitted a selected privileged few who can afford focused legal assistance.

Meanwhile, it has been observed that many pre-trial detainees lacking the same attributes suffer in silence while awaiting the decision of the court.

C. *The Philippines and the US: The only two (2) countries with money bail system dominated by commercial bondsmen.*

The commercial bail bond system capitalizes on the indigence of the overwhelming majority of criminal defendants, confining them based on the certain knowledge that they will never be able to afford the price set for their pre-trial liberty.[53] As presently constructed, the current system permits wealthy individuals to obtain temporary liberty. Meanwhile, the less fortunate live in perpetual anguish in jail for the simple fact that they are unable to post bail.

Aside from the US, the **Philippines is the only other country in the world to allow a commercial bail bond industry.**[54]

Bail is now the dominant method for obtaining pre-trial release, surpassing release on recognizance in 1998, and bail amounts set by judges have risen steadily.[55] The profitability of commercial bail depends on the fact that accused individuals rarely have the financial means to exit jail on their own.[56] Bail

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[52] *Supra* note 47.

[53] Van Brunt, A., & Bowman, L., Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next, The Journal of Criminal Law and Criminology, https://www.jstor.org/stable/48572970 (June 29, 2021).

[54] Page, J., Piehowski, V., & Soss, J.,A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation, RSF: The Russell Sage Foundation Journal of the Social Sciences, 5(1), 150-172. doi:10.7758/rsf.2019.5.1.07 (2019).

[55] *Id.*

[56] *Id.*

companies and their agents are on the frontlines of an industry that delivers vast, reliable profits to sureties every year.[57]

The US Supreme Court acknowledged in *Leary v. United States*, that the "distinction between bail and suretyship is pretty nearly forgotten . . . for the interest to produce the body of the principal in court is impersonal and wholly pecuniary."[58] In effect, professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety – who, in their judgment, is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees, remain in jail. The Court and the Commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.[59]

In its first expression on the topic, the ABA stated:

> [t]he bail system as it now generally exists is unsatisfactory from either the public's or the defendant's point of view. Its very nature requires the practically impossible task of transmitting risk of flight into dollars and cents and even its basic premise – that **risk of financial loss** is necessary to prevent defendants from fleeing prosecution – is itself **of doubtful validity**. The requirement that virtually every defendant must post bail causes **discrimination against defendants** and imposes personal hardship on them, their families, **and on the public** which must bear the cost of their detention and frequently support their dependents on welfare.[60]

The theory that the bail system, through bonding, aids society by giving a defendant a financial stake in appearing in court is fallacious, *viz*:

> It is frequently urged that eligibility for release and the amount of the bond are intimately related, because the higher the bail the less likelihood there is of appellant fleeing or going into hiding. This argument presupposes that an appellant with higher bail has a more substantial stake and therefore a greater incentive not to flee. This may be true **if no professional bondsman is involved**. But if one is [involved], it is he and not the court who determines [an] appellant's real stake. Setting a higher bail under the bonding system does not necessarily give a defendant a greater interest in appearing at trial, because the fee paid to the bondsman is **not refundable** under any circumstances. The higher setting merely allows the bondsman to collect a larger fee.[61]

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[57] *Id.*

[58] United States. Advisory Commission on Intergovernmental Relations. (1984). *Jails: Intergovernmental dimensions of a local problem : a commission report*.

[59] *Pennel v. United States* (concurring opinion: Justice S. Wright), 320 F.2d 698, 699 (D.C. Cir. 1963).

[60] *Supra* note 5 at 13.

[61] Duffy III, P. (n.d.). The Bail System and Equal Protection, Digital Commons at Loyola Marymount University and Loyola Law School |Loyola Marymount University and Loyola Law School Research, https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1153&context=llr (March 10, 2021).

In the Philippines, the liability of the bondsmen is only civil. As cited in *Reliance Surety & Insurance Co., Inc. v. Hon. Amante, Jr:*

> The liability of the bondsmen on the bail bond arises not from the violation of, or an obligation to comply with, a penal provision of law. It emerges instead from *a contract*, the bond subscribed jointly by the accused and the surety or bondsmen. The obligation of the accused on the bond is different from that of the surety in that the former can be made to suffer a criminal penalty for failure to comply with the obligations on the bail bond. However, the surety is not under a similar pain of punishment, as its liability on the bail bond would merely be civil in character. *Nothing in the Rules of Court authorizes the imprisonment of the surety for the failure to produce the accused* when called for in court, his obligation being contractual in source and character.[62]

The trend away from money bail is a welcome development. However, the monetary bail system persists today since Congress refuses to acknowledge that such a system fails to effectively guarantee an accused's presence in court. Perhaps, it could also be due to the strong efforts of those who lobby to protect the lucrative franchise of the bail bond industry.

The result has been that the bondsmen have perverted the people's system of justice by effecting purposeless and unconstitutional discrimination against the poor.[63]

The commercial bail bond system not only discriminates against the poor but also fails to achieve its objective of ensuring the presence of an accused in court. Commercial bail bondsmen have become mere parasites feeding upon this system—a system that is not only discriminatory, but is also ineffective.

V. PRE-TRIAL DETENTION AS THE LAST RESORT RATHER THAN THE NORM: REDUCING RELIANCE ON THE TRADITIONAL MONEY BAIL SYSTEM

Socioeconomic impacts of long pre-trial detention

Aside from the apparent economic impact, pre-trial detention also has a social impact. Imprisonment disproportionately affects individuals and families living in poverty. When an income-generating member of the family is imprisoned, the rest of the family must adjust to this loss of income. The

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[62] *Reliance Surety & Insurance Co., Inc. v. Hon. Amante, Jr.,* G.R. No. 150994, June 30, 2005.
[63] *Supra* note 62 at 78.

impact can be especially severe in poor, developing countries where the state does not provide financial assistance to the indigent, and where it is not unusual for one breadwinner to financially support an extended family network. Thus, the family suffers financial losses as a result of the imprisonment of one of its members, exacerbated by the new expenses that must be met, such as the cost of a lawyer, food for the imprisoned person, transport to prison for visits, and so on.[64]

This financial struggle will prove to be quite taxing on the mental health of the family, as well as any developing youth. In the case of a nuclear family, a single-member assumes the responsibilities of both parental units, depriving the children of the stability previously enjoyed. Already disadvantaged families can quickly find themselves destitute when the income generated by the absent member proves difficult to replicate.

Once released, often with no prospects for employment, former prisoners are generally subject to various socio-economic exclusion due to the attached stigma plaguing individuals in their position, and are thus vulnerable to an endless cycle of poverty, marginalization, criminality, and even further incarceration. This unfair treatment and rejection extend to those unjustly incarcerated as well. Innocence notwithstanding, they too find themselves virtually expelled from the society they once belonged to, rendering near impossible the opportunity for a normal life. Through no fault of his, he will be relegated to a second-class citizen. Thus, imprisonment contributes directly to the impoverishment of the prisoner, his family, and society by creating future victims and reducing future potential economic performance.

Furthermore, deplorable prison conditions present very serious health implications for prisoners. Prisoners are likely to have existing health problems on entry to prison, as they are predominantly from poorly educated and socio-economically deprived sectors of the general population, with minimal access to adequate health services. Their health conditions deteriorate in overcrowded prisons, where nutrition is poor, sanitation inadequate, and access to fresh air and exercise often unavailable.[65]

Psychosis, clinical depression, PTSD – these are just a few of the variety of serious and diagnosable psychological disorders a sweeping number of prisoners struggle with on a daily basis. The exact onset and causal origins of these disorders cannot always be determined – some are undoubtedly

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[64] Prison reform and alternatives to imprisonment. (n.d.). United Nations: Office on Drugs and Crime. Retrieved April 18, 2021, from https://www.unodc.org/unodc/en/justice-and-prison-reform/prison-reform-and-alternatives-to-imprisonment.html.

[65] *Id.*

preexisting conditions, some are exacerbated by the harshness and stress of incarceration, and others derive from the turmoil and trauma generated by prison experiences.[66]

Not surprisingly, pretrial detention tends to coerce guilty pleas. The prosecutor knows that the longer the accused remains in jail awaiting trial, the more likely the accused will plead guilty. Severely hampered in preparing a defense and suffering from his incarceration, a pretrial detainee is much more likely to plead guilty [to] bring his case to a conclusion.[67]

Numerous studies have demonstrated that, compared to people who are released from jail within a few days of their bail hearings, people who are detained for longer periods are more likely to be convicted.[68] Pretrial detainees commonly face more severe sentences, likely to incorporate incarceration to a greater degree than that of their counterparts. Having to await the case disposition while detained potentially raises the probability of future charges against the accused. Surprisingly, even temporary pretrial detention largely increases the probability of a person being charged with a future offense.

Evidently, individuals detained until their trial usually experience more unfavorable outcomes than those allowed to remain free. Families are especially affected, as their loved one is stuck in jail and is unable to contribute to the household. Being in jail, even just for a few days, often leads to loss of employment, housing, and even custody of children. These results can impact individuals and families for years to come.

Governmental costs of long pre-trial detention

In addition, pre-trial detention has accompanying governmental costs. In the US, government spending on incarceration has increased dramatically over the last several decades. Much of this spending goes toward incarcerating

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[66] Chapter 6: the experience of imprisonment, The growth of incarceration in the United States: Exploring causes and consequences,The National Academies Press. (n.d.). The National Academies Press, https://www.nap.edu/read/18613/chapter/8, (last accessed June 30, 2021).

[67] Bennett H. Brummer & Bruce S. Rogow, An End to Ransom: The Case for Amending the Bail Provision of the Florida Constitution, 6 Fla. St. U. L. Rev. 775 (1978), . https://ir.law.fsu.edu/lr/vol6/iss3/9.

[68] Digard, L., & Swavola, E., Justice Denied: The Harmful and Lasting Effects of Pretrial Detention. Vera Institute of Justice, https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf, (last accessed June 30, 2021).

pretrial detainees-inmates not convicted of a crime-who constitute the majority of individuals in [their] nation's jails.[69]

The Correctional System in the Philippines is composed of six agencies under three distinct and separate departments of the national government: first, the Department of Interior and Local Government (DILG); second, the Department of Social Welfare and Development (DSWD); and third, the Department of Justice (DOJ).[70]

Under the DILG is the Bureau of Jail Management and Penology (BJMP) which runs the city, municipal, and district jails; and the provincial jails through their respective provincial governments. Offenders meted with lighter sentences, as well as those with pending cases before the Regional Trial Courts, are detained in provincial jails under the local government. Meanwhile. those awaiting trial in Municipal Trial Courts or serving light penalties (e.g., infractions of the city or municipal ordinances) are detained in city, municipal, or district jails under the BJMP.[71]

Under the DSWD is the Juvenile and Justice Welfare Council which oversees the rehabilitation of young offenders. Juvenile delinquents are normally sent to youth rehabilitation centers under the Juvenile Justice and Welfare Act of 2006 (R.A. 9344) unless the sentencing judge specifically orders for them to be confined at the national penitentiary, as in cases where the juvenile convict acted with discernment, or the offense committed was grave.[72]

Under the DOJ is the Bureau of Corrections (BuCor), Parole and Probation Administration and the Board of Pardons and Parole. Offenders convicted by the courts to serve a prison sentence of three years or more are kept at the prison facilities of the BuCor.[73]

The BJMP reported that the congestion rate in existing jails in the country has hit almost 600 percent in April 2018. The city jails, for instance, suffer from a 701 percent congestion rate, which may lead to several more problems, among them the spread of infectious diseases.[74] To address pressing issues on high congestion rates of jails nationwide, the budget of the BJMP for 2019 has

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[69]Baughman, S. (n.d.), Costs of pre-trial detention, Boston University, https://www.bu.edu/bulawreview/files/2017/03/BAUGHMAN.pdf, (last accessed April 7, 2021).

[70] *Bureau of corrections/About*. (n.d.). Bureau of Corrections. https://www.bucor.gov.ph/about.html.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *2019 budget of BJMP increased to address jail congestion*. (n.d.). Home. Retrieved June 30, 2021, from https://www.dbm.gov.ph/index.php/secretary-s-corner/press-releases/list-of-press-releases/1237-2019-budget-of-bjmp-increased-to-address-jail-congestion.

been increased to PhP18.9 billion from its 2018 cash-based equivalent of PhP14.5 billion[75]

The proposed BJMP budget for 2020 is Php P18,600,018,000 for the projected inmate population of 182,556. Based on 2020 proposed appropriations and projected inmate population, the annual cost of housing, feeding, guarding, and transporting one BJMP detainee is about Php 101,887.[76] Conversely, the proposed BuCor budget for 2020 is Php 4,297,047,000 for the projected inmate population of 47,010. Based on the proposed appropriations and projected inmate population, the BuCor allocates a budget of P91,407 per prisoner per year. A prisoner in any of the facilities run either by the BJMP or the BuCor has an annual food budget of Php 25,550, and Php 5,475 for medicines.[77]

In the press statement of Senate President *Pro Tempore* Ralph G. Recto, he stated that while the Php 70 budget for three daily meals per prisoner is inhumanely low, it is still higher than the Php 18 per meal cost of the DepEd and DSWD feeding programs, which benefit 3.7 million children. Moreover, the annual cost of the 15-peso daily medicine allowance for the prisoners is twice the national government's per capita health spending of Php 2,638 for 2020. Hence, he opined that a prisoner is a hundred-thousand-peso annual expense, a taxpayer burden that is four times the annual Php 23,125 cost of sending a child to a public school or college.[78]

Reducing the excessive use of pre-trial detention

The Philippine government has an array of alternative programs other than pre-trial detention, which ranges from electronic monitoring (e.g., ankle monitor), or release on recognizance. Bail should only be reserved for those who are charged with a capital offense, or an offense punishable by *reclusion perpetua* or life imprisonment and when evidence of guilt is strong.

As technology advances, electronic monitoring is a progressively becoming an alternative to detention. Proponents of [this tool] argue that the cost of the

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[75] *Id.*

[76] Press release - Press statement of Senate president pro tempore Ralph G. Recto "The billions in national penalty we pay for our slow justice system". (2019, September 18), https://legacy.senate.gov.ph/press_release/2019/0918_recto1.asp, (last accessed June 30, 2021).

[77] *Id.*

[78] *Id.*

devices [is] cheaper than incarceration and, unlike pretrial detention, defendants have the freedom to return to their communities and workplaces.[79]

On the other hand, release on recognizance creates a presumption of release for all defendants who did not commit a capital offense. Consequently, where a pre-trial defendant is not released on personal recognizance, the court must justify its forbiddance. Furthermore, the court must adopt the least restrictive alternative condition, if it believes that release on recognizance would be inadequate in assuring the pretrial detainee's appearance at trial. Only those charged with capital offenses [shall be] given a different standard of release, a standard that factored in the defendant's potential danger to the community.[80]

The Vera Foundation (now known as the Vera Institute of Justice) and the New York University Law school conducted a study exploring alternatives to release on financial conditions. The study began in October of 1961 and was named the Manhattan Bail Project. The Manhattan Bail Project was Vera's first initiative and showed that an accused who has strong ties to the community can be released from custody and can be relied on to appear in court without having to post bail. Therefore, the money bail requirement does not bear any relationship to achieving the state purpose of bail of insuring the presence of the accused at trial.

The Manhattan Bail Project proved to be successful:

> In its first months, the Project recommended only 27 percent of their interviews for release. After almost a year of successful operation, with the growing confidence of judges, the Project recommended nearly 45 percent of arrestees for release. After three years of operation, the percentage grew to 65 percent with the Project reporting that less than one percent of releases failed to appear for trial. The project generated national interest in bail reform, and within two years programs modeled after the Manhattan Bail Project were launched in St. Louis, Chicago, Tulsa, Washington D.C., Des Moines, and Los Angeles.[81]

Measures to reduce and avoid pre-trial detention are grounded on the fundamental international human right of presumption of innocence of the accused. Based on international standards, pre-trial detention should only be

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[79]Muhammad B. Sardar, Give Me Liberty or Give Me . . . Alternatives?: Ending Cash Bail and Its Impact on Pretrial Incarceration, 84 Brook. L. Rev. (2019),https://brooklynworks.brooklaw.edu/blr/vol84/iss4/9.

[80] *Id.*

[81] *Supra* note 5 at 10.

allowed under certain limited circumstances. International treaties and standards require policymakers to limit the use of pretrial detention.[82]

One of the major achievements of the Eighth UN Congress was the adoption, by consensus, of the UN Standard Minimum Rules for Non-custodial Measures (the "Tokyo Rules").

The Eight UN Congress adopted the UN Standard Minimum Rules for Non-custodial Measures ("the Tokyo Rules"). The rules provide the following: first, pretrial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offense and the protection of society and the victim; second, alternatives to pretrial detention shall be employed at an early stage as much as possible. It shall last no longer than necessary and shall be administered humanely and with respect for the inherent dignity of human beings; third, the offender shall have the right to appeal to a judicial or other competent independent authority in cases where pretrial detention is employed.[83]

VI.WRIT OF KALAYAAN: A PROACTIVE STEP IN SOLVING CHRONIC OVERCROWDING IN JAILS

Jail congestion is a consequence of a defective criminal justice system rather than increasing criminal activity. Excessive use of pre-trial detention contributes to overcrowding in jails.[84] Overcrowding in jail is a legitimate and convincing reason for jurisdictions to reduce their reliance on the traditional money bail system.

Temporary solutions, such as constructing new prison facilities, have not proven to decrease or eliminate the detrimental effects posed by jail overcrowding. In addition, building and maintaining them are expensive and not cost-effective in the long run.

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[82] Shaw, M. (n.d.), Reducing the excessive use of pre-trial detention, Open Society Justice Initiative - Open Society Justice Initiative, https://www.justiceinitiative.org/uploads/2f65cc09-c4da-4a48-9929-c8bff4110f53/Justice_Initiati.pdf (last accessed February 20, 2021).
[83] *Id.*
[84] *Id.*

To say that Philippine detention facilities are overcrowded is an understatement. In many places, detention prisoners have nowhere to get sound sleep.[85]

Section 19, Article III of the Constitution addresses the conditions of detention and service of sentence[86], *viz*:

> xxx 2. The employment of physical, psychological, or degrading punishment against any prisoner or detainee or the **use of substandard or inadequate penal facilities under subhuman conditions shall be dealt with by law.** (emphasis supplied)

In relation to this, Justice Leonen opined that:

> "Section 19, Article III of the Constitution may be invoked by a detainee or a convict through either mode: (1) a motion for release when the case is still on trial or on appeal; or (2) a petition for habeas corpus as a post-conviction remedy, consistent with Gumabon v. Director of Prisons. However, in deference to the other constitutional organs, a violation of the constitutional rights of persons deprived of liberty anchored on existing jail or health conditions should first be addressed by the executive and legislative branches. Thus, before a court may give due course to such a cause of action, there must be a showing that the movant or petitioner has made a clear demand on the relevant agencies and that there has been a denial or unreasonable negligence on their part."[87]

Hence, Justice Leonen proposed to consider implementing a "Writ of *Kalayaan"*. It is a remedy grounded on social justice and shall be issued when all the requirements to establish cruel, inhuman, and degrading punishment are present**.** According to Justice Leonen, such remedy will be similar to the "Writ of *Kalikasan*" or the "Writ of Continuing Mandamus," only that the **Writ of Kalayaan will address the systematic problem of jail congestion.** Further, according to him: "It shall also provide an order of precedence to bring the occupation of jails to a more humane level. Upon constant supervision by an executive judge, the order of release will prioritize those whose penalties are the lowest and whose crimes are brought about not by extreme malice but by the indignities of poverty."[88]

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[85] *Supra* note 48 at 9.
[86] *Supra* note 52 at 3.
[87] *Id.*
[88] *Id.*

VII. CONCLUSION

"It is better to liberate a guilty man than to unjustly keep in prison one whose guilt has not been proved by the required quantum of evidence."

Historically, bail has not benefited those unable to afford the set amount decreed by a judge. Alternatively, it serves as an ineffective deterrent for dangerous individuals with monetary means, from re-entering the community. For wealthier individuals who can afford to post bail, their experience in the criminal legal system varies vastly from that of the underprivileged – resulting in the latter being subjected to pre-trial detention, whereas the former is granted the ability to roam about freely, even after conviction. The less capable party is made even more disadvantaged once entangled in the justice system, further expanding the social chasm between the two.

An individual's freedom should not be dependent on his economic status, and his wealth should never be a measure in gauging release while awaiting trial. The Constitution affirms that there is a presumption of innocence when a person is charged with a crime unless his guilt is proved beyond reasonable doubt. While in theory, bail is a security to guarantee an accused's presence during trial, oftentimes, however, his freedom is contingent not on the risk of his non-appearance but on his ability to post bail.

Failure to appear in court by an accused is often not due to a conscious effort to sidestep the law, but a result of personal struggles that the person is facing, such as poverty. An accused is presented with very few avenues to improve his or her situation while detained. Aside from the financial distress, this individual risks losing their standing in the community as well. This sometimes results in a prominent member of the community being regarded as a potential threat to the welfare of its members.

If an accused is not a risk to public safety, electronic monitoring or release on recognizance may be a better solution. A criminal justice system that supports a just pre-trial release may not be without some societal risk, but in the end, it is the only tolerable outcome under our constitutional system.

The pre-trial detention of an accused is not only unnecessary and expensive, but it also transgresses on the constitutional principles of due process, equal protection, and the presumption of innocence.