WASHBURN UNIVERSITY
SCHOOL OF LAW

BAIL, THE CONSTITUTION(S), AND THE STATUTES

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THE UNITED STATES CONSTITUTION AND FEDERAL LAW

The Constitution

<u>Eighth Amendment</u>

“Excessive bail shall not be required . . .”

Almost verbatim from the English Bill of Rights of 1689:

“excessive bail ought not be required . . .”

English Origins

The purpose of monetary bail was originally a surety that the accused would stand trial and as a means to prevent flight. If a person fled, they were presumed guilty and would forfeit their bail or property.

Not all offenses were required to be bailable. Offenses of a capital nature were not because "For what is there that a man may not be induced to forfeit to save his own life? And what satisfactory or indemnity is it to the public to seize the effects of them who have bailed a murder, if the murderer himself be suffered to escape with impunity. . . Such persons . . . have no sureties but the four walls of the prison."

Judiciary Act of 1789

“And upon all arrests in criminal cases, bail shall be admitted except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence, and the usages of law.”

Supreme Court Decisions
Stack v. Boyle, 342 U.S. 1 (1951)

"[F]ederal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. [Citation omitted.] Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

Supreme Court Decisions
Stack v. Boyle, 342 U.S. 1 (1951)

The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment.

Supreme Court Decisions
Stack v. Boyle, 342 U.S. 1 (1951)

"Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."

Supreme Court Decisions

Not all offenses have to be bailable, such as those where the punishment may be death.

- ***Carlson v. Landon*, 342 U.S. 524 (1952)**

Bail need not be given in cases where release on bail would result in danger to another person or the community.

- ***United States v. Salerno*, 481 U.S. 735 (1986)**

Supreme Court Decisions - Takeaways

There is a traditional right of freedom before conviction.

Bail can be categorically denied for capital offenses.

Bail can be denied in individual cases where release on bail would result in danger to another person or the community.

The fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of THAT defendant.

Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment.

Federal Law: 18 USC § 3142

The judge shall order the release of the person on personal recognizance or an unsecured appearance bond in an amount specified by the court UNLESS the judge determines that such release will not reasonably assure the appearance of the person or will endanger the safety of any other person or the community.

Federal Law: 18 USC § 3142

On such a determination, there is still a presumption of release subject to the least restrictive combination of conditions, including a bail bond.

Federal Law: 18 USC § 3142

Detention is only authorized upon a finding that "no condition or combination of conditions will reasonably assure the appearance of the person and safety of any other person and the community."

There is a presumption of this in violent or drug related offenses greater than 10 years.

The basic idea is that money conditions may only be imposed when nonfinancial conditions are inadequate. However, there is no requirement be financially able to post bail – the test is what is necessary to ensure the defendant's presence at trial.

Kansas Constitution, § 9

“All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great. Excessive bail shall not be required . . .”

Kansas Statute, K.S.A. 22-2802

“Any person charged with a crime shall, at the person's first appearance before a magistrate, be ordered released pending preliminary examination or trial upon the execution of an appearance bond in an amount specified by the magistrate and sufficient to assure the appearance of such person before the magistrate when ordered and to assure the public safety.”

The procedure allows for release on own recognizance as well.

Kansas Statute, K.S.A. 22-2802

“In determining which conditions of release will reasonably assure appearance and the public safety, the magistrate shall, on the basis of available information, take into account the nature and circumstances of the crime charged; the weight of the evidence against the defendant; whether the defendant is lawfully present in the United States; the defendant's family ties, employment, financial resources, character, mental condition, length of residence in the community, record of convictions, record of appearance or failure to appear at court proceedings or of flight to avoid prosecution; the likelihood or propensity of the defendant to commit crimes while on release, including whether the defendant will be likely to threaten, harass or cause injury to the victim of the crime or any witnesses thereto; and whether the defendant is on probation or parole from a previous offense at the time of the alleged commission of the subsequent offense.”

Kansas Law – Court Cases

Generally, no hard and fast rule can be laid down for fixing the amount of bail on a criminal charge, and each case must be governed by its own facts and circumstances. The amount of bail rests within the sound discretion of the presiding magistrate. The purpose of the statutes requiring bond from persons accused of crimes is to assure their presence at the time and place of the trial.

- *State v. Foy*, 224 Kan. 558, 562, 582 P.2d 581 (1978)

Kansas Law – Court Cases

Bail is excessive when it is set at an amount higher than necessary to insure appearance of the accused at trial.

- *State v. Ruebke*, 240 Kan. 493, 498, 731 P.2d 842 (1987)

Kansas Law – Court Cases

But see, *State v. Robertson*, 203 Kan. 647, 647-48, 455 P.2d 570 (1969):

The purpose of bail is to insure the presence of the prisoner at a future hearing. In fixing the amount a magistrate should be guided by a consideration of the nature of the offense as shown by the proof thereof. *He may consider the propensity of the defendant for crime as indicated by his previous convictions*. The magistrate must consider the probability of escape. (This is potentially a problem).

Kansas Law - Analysis

Factors Pertinent to Whether Bail Should be Granted at All or Conditions Added to Insure Public Safety

1. **The nature and circumstances of the crime charged**
2. **The weight of the evidence against the defendant**
3. **The likelihood or propensity of the defendant to commit crimes while on release**
4. **Whether the defendant is on probation or parole from a previous offense at the time of the alleged commission of the subsequent offense.**

Kansas Law - Analysis

Factors Pertinent to Conditions Placed on Release including Bail Amount to Insure Presence at Trial

All those listed in K.S.A. 22-2802 EXCEPT

“the likelihood or propensity of the defendant to commit crimes while on release”

FAQ

Q. Doesn't it violate some sort of constitutional thingy to impose a bail amount that the individual is unable to pay?

A. Not in the abstract. Despite what many commentators argue, the United States Supreme Court has never held this. Instead, the farthest the Court has gone is to require an individual assessment of the defendant. The question is whether the amount is necessary to "reasonably assure" the person's appearance. The problem occurs if the amount is set higher than that because of factors that don't have to do with such an assurance.

FAQ

Q. What about bail schedules? Are they a constitutional problem?

A. To the extent that they are preset and payable prior to the first appearance, they don't pose a constitutional problem. However, they cannot substitute for individual consideration at the first appearance.

FAQ

Q. Can the amount of the bond be set to keep someone in prison for community protection?

A. Here is where problems might arise with the Kansas law. Constitutionally, the purpose of bail is to assure that the person will be available at trial. Bail should not be used as a substitute for other conditions that protect other persons and the community. To the extent that the judge sets bail out of the range of the person to pay as a means of ensuring pretrial detention, the decision becomes problematic. If the defendant is a danger, the remedy is to impose conditions on release or to deny release altogether, not set a higher bail amount. Under the Supreme Court's opinion in Stack, the only standards relevant to the amount of bail are those to assure the presence of the defendant.

FAQ

Q. So, is Kansas's statute unconstitutional, then?

A. No. At least not on its face. It may, however, be unconstitutional as applied in certain cases should the judge fix an amount that ensures pretrial detention, and that amount is greater than the amount necessary to "reasonably ensure the appearance of the defendant".

FAQ

Q. But wait, doesn't the Kansas Constitution state that "all persons are bailable?" Doesn't that mean that if there isn't a capital offense, they have to be given bail, and can't be detained if they are a danger? Isn't setting a high bail the only way to keep them in jail pretrial?

FAQ

A. It is true that the Kansas Constitution establishes that all offenses are "bailable," but this just serves as a way to get to the individualized determination of bail and whether it should be awarded, rather than a categorical determination that certain offenses don't have to be bailable just by their nature. It doesn't mean, and shouldn't be interpreted to mean, that bail cannot be denied in a noncapital offense for a specific individualized reason.

FAQ

Q. Isn't it wrong to say that the setting of secured bail helps to ensure the appearance at trial because the defendant will be out the 10% to a bail bondsman whether they show up or not?

A. Not exactly. Although the defendant is out the money no matter what, it is possible that the added incentive for the bonding agent to ensure that the defendant shows up is valuable in ensuring the defendant's presence. This is stronger than any argument that the presence of a bonding agent might promote public safety.

FAQ

Q. Should Kansas change its law to be more like the federal one?

A. That's a policy decision. The federal law is unquestionably consistent with the Eighth Amendment. Current Kansas law is also consistent with the Eighth Amendment on its face, but because it blurs the considerations and purposes of bail it might be subject to challenge in certain situations in which it is applied.

Questions from Anyone?

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