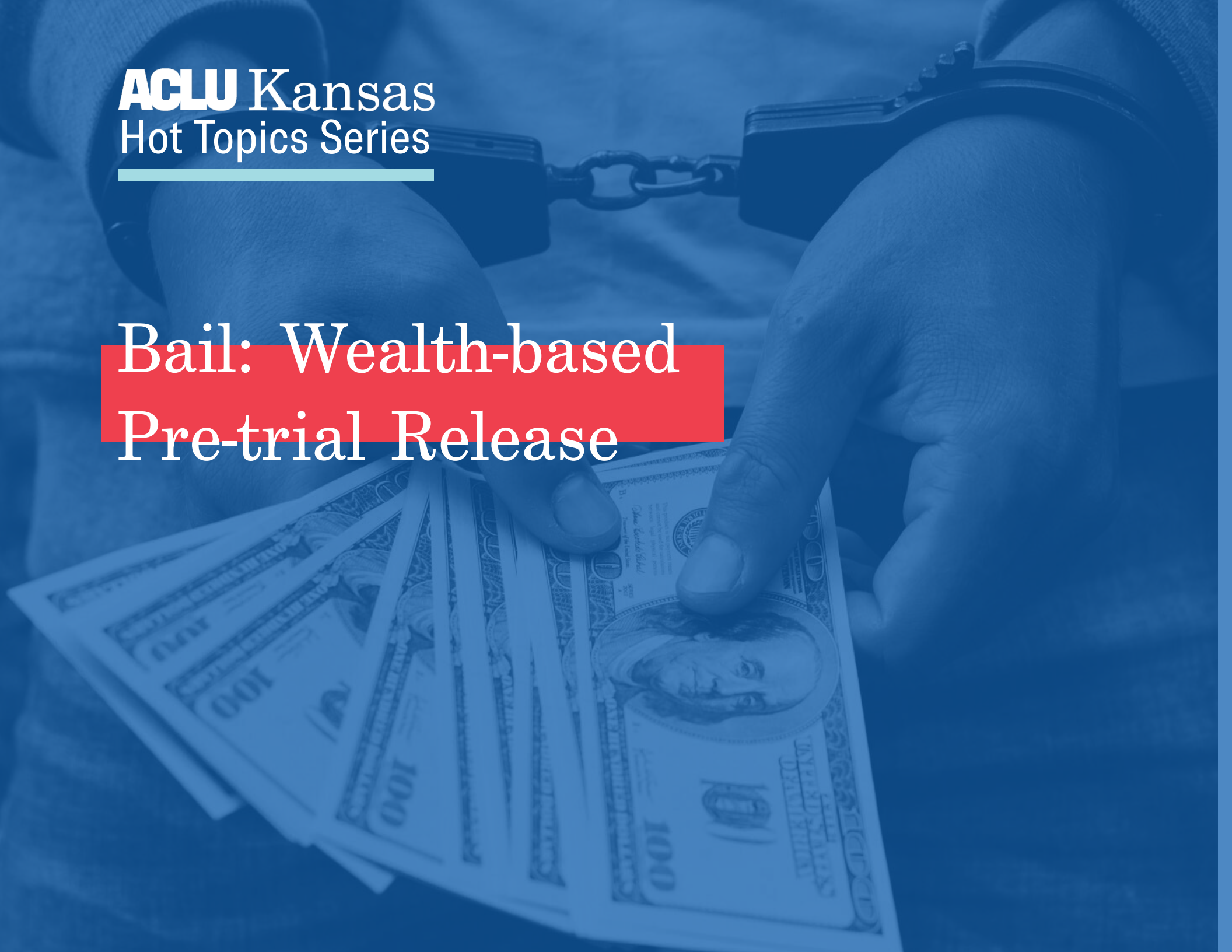


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# Bail: Wealth-based Pre-trial Release



# Bail: Wealth-based Pre-trial Release

The United States' criminal legal system claims to extend a "presumption of innocence" to those charged of a crime.<sup>1</sup> This presumption of "innocent until proven guilty" has widespread cultural recognition and is foundational to our criminal legal system.<sup>2</sup> However, people facing criminal charges are often incarcerated for long periods while awaiting trial. Pretrial detention can place coercive pressure on defendants to plead guilty, especially as it can hamper their ability to participate in preparing a defense<sup>3</sup> or cause them to lose their jobs and homes.<sup>4</sup>

Pretrial detention can have devastating consequences and should be used only when necessary. But in Kansas, this is not the case. Across Kansas, thousands sit in jail pretrial – many because they do not have enough money to afford cash bail. Kansas's system of money bail subverts the presumption of innocence to which criminal defendants are entitled and causes harm to individuals, their families, and entire communities. Understanding how bail works in Kansas and why cash bail undermines the presumption of innocence to which Kansans are entitled is necessary to crafting reforms aimed at reducing pretrial detention.

## What is bail?

Bail refers to the release of a defendant from jail before trial.<sup>5</sup> There is no absolute federal constitutional right to bail instead of detention.<sup>6</sup> In fact, Congress has authorized federal courts to deny bail to "arrestees charged with serious [federal] felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel."<sup>7</sup> However, federal courts have all but done away with money bail for federal crimes,<sup>8</sup> relying instead on

preliminary hearings, preventative detention, and restrictive conditions of pretrial release.

But bail for state offenses, rather than federal offenses, is governed by state law, and cash bail remains in effect throughout Kansas. Section Nine of the Kansas Bill of Rights provides a right to bail in Kansas courts except for those facing capital charges.<sup>9</sup> Nonetheless, as of 2020, fifty-three percent of people detained in Kansas's county jails were detained awaiting

disposition of their case,<sup>10</sup> many because they simply could not post bond.<sup>11</sup>

## What is bond?

The word "bond" describes the conditions of someone's release on bail.<sup>12</sup> Such conditions vary, but many require the defendant to pay money.<sup>13</sup> A money bond, for instance, requires the person to pay a fixed sum, which they get back after fulfilling requirements to appear in court.<sup>14</sup>

<sup>1</sup> *Coffin v. United States*, 156 U.S. 432, 453 (1895).

<sup>2</sup> *Pretrial Justice Task Force Report to the Kansas Supreme Court*, 5-6 (2020).

<sup>5</sup> *Id.* at 8.

<sup>6</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987).

<sup>7</sup> *Id.*

<sup>8</sup> *Release and Detention Pending Judicial Proceedings* (18 U.S.C. 3141 et seq.), The United States Department of Justice (2020), <https://www.justice.gov/archives/jm/criminal-resource-manual-26-release-and-detention-pending-judicial-proceedings-18-usc-3141-et> (last visited Jul 21, 2022). But that does not mean the federal system works well. Federal law imposes a presumption of *no* bail for many alleged crimes, resulting in similar overuse of pretrial detention. 18 U.S.C. § 3142(e)(2); Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate*, in *Context*, 82 Number 2 Federal Probation Journal 13, 13; 17 (2018).

<sup>9</sup> *Ex parte Ball*, 106 Kan. 536, 540 (1920).

<sup>10</sup> *Pretrial Justice Task Force Report to the Kansas Supreme Court*, 5.

<sup>11</sup> *Id.* at 16.

<sup>12</sup> *Id.* at 8.

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.* at 8-9; K.S.A. § 22-2802(4).

This ACLU of Kansas document has several citations to the Pretrial Justice Task Force Report to the Kansas Supreme Court. In response to successful lawsuits throughout the United States challenging types of money bail as wealth discrimination, the Kansas Supreme Court ordered the creation of the Pretrial Justice Task Force to "review Kansas pretrial detention policies and procedures" and to recommend improvements to such policies and procedures. *Pretrial Justice Task Force Report to the Kansas Supreme Court*, 1. The Task Force's members "include[d] district court and magistrate judges, criminal defense attorneys, prosecutors, and members of the court administration system" from throughout Kansas. *Id.* at 2. The Chief Judge of the Kansas Court of Appeals, Karen Arnold-Burger, chaired the Task Force. *Id.* at \_ (page 5 of pdf). Their report and a summary thereof is available at: <https://www.kscourts.org/About-the-Courts/Court-Administration/Court-Initiatives/Pretrial-Justice-Task-Force>.

<sup>3</sup> *Pretrial Justice Task Force Report to the Kansas Supreme Court*, 7.

<sup>4</sup> *Id.*

Defendants often satisfy money bonds through sureties or bonding companies, which typically charge a ten percent fee.<sup>15</sup> The court may also impose an unsecured bond, requiring that the defendant promise to pay a certain amount if they do not appear in court.<sup>16</sup>

In addition to a cash bond, conditions of release may include other fees or financial orders. For example, there may also be fees associated with pre-trial supervision for someone released to the community on bond.<sup>17</sup> Or, if the court orders someone to wear an ankle monitor, the person generally must pay a monthly cost for the device.

Other conditions of bond are non-monetary, yet still stringent. In Kansas, bond for person felonies and person misdemeanors, meaning those allegedly committed against a person, must include an order that the defendant not have contact with the victim for at least 72 hours.<sup>18</sup> Bond can also include requirements to undergo mental health or drug-dependency evaluations, and compliance with the evaluator's recommendations.<sup>19</sup> Beyond these statutorily available conditions, magistrate judges can "impose any...

condition deemed reasonably necessary to assure appearance as required."<sup>20</sup>

### **How does pretrial release work in Kansas?**

In Kansas, magistrate judges generally set conditions of release, and they have substantial discretion in doing so. But they must set conditions reasonably intended to assure the arrested person's appearance for court and that the community remains safe.<sup>21</sup> In state court, statute requires that the magistrate judges consider certain factors such as the weight of evidence against the defendant and the defendant's family ties, employment, and financial resources.<sup>22</sup> Despite these guiding principles, the exact path to a final bond determination varies slightly.

### **A person's wealth often dictates their freedom.**

Upon an arrest pursuant to a warrant, meaning that a judge has found probable cause that the arrestee has committed a particular crime, the judge will have specified conditions of release in the

warrant.<sup>23</sup> In that case, the defendant still goes before a magistrate judge after arrest, where the judge may change the defendant's pretrial release conditions.<sup>24</sup>

When the police arrest someone without a warrant, typically at a scene of an alleged crime, the process is different. For most misdemeanor allegations, the arresting officer can give the individual a court date and release them.<sup>25</sup> But for misdemeanors and felonies alike, the officer can detain the individual subject to a money bond specified in a fixed bond schedule,<sup>26</sup> thereby conditioning the person's release—at least initially—on their ability to pay a fixed amount.

A fixed bond schedule is a document that indicates what conditions of release to assign to arrestees based on the crime they allegedly committed. When such a schedule is used upon arrest in Kansas, the defendant must go before a judge within forty-eight hours for a bond hearing, where the judge sets bond based on case- and defendant-specific factors.<sup>27</sup>

A few judicial districts in Kansas have

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<sup>15</sup> K.S.A. § 22-2802(3-4); Pretrial Justice Task Force Report to the Kansas Supreme Court, 8-9.

<sup>16</sup> *Pretrial Justice Task Force Report to the Kansas Supreme Court*, 9.

<sup>17</sup> K.S.A. § 22-2802(1)(e).

<sup>18</sup> K.S.A. § 22-2802(1)(e).

<sup>19</sup> *Pretrial Justice Task Force Report to the Kansas Supreme Court*, 8.

<sup>20</sup> K.S.A. § 22-2802(1)(c).

<sup>21</sup> K.S.A. § 22-2802(1)(c); K.S.A. § 22-2802(8); *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951); *Salerno*, 481

U.S. at 748.

<sup>22</sup> K.S.A. § 22-2802(8).

<sup>23</sup> *Pretrial Justice Task Force Report to the Kansas Supreme Court*, 8.

<sup>24</sup> *Id.*

<sup>25</sup> *Pretrial Justice Task Force Report to the Kansas Supreme Court*, 8; K.S.A. § 22-2408.

<sup>26</sup> *Pretrial Justice Task Force Report to the Kansas Supreme Court*, 8; K.S.A. § 22-2802(8).

<sup>27</sup> *Pretrial Justice Task Force Report to the Kansas Supreme Court*, 8; *Walker v. City of Calhoun*,

local rules that vary from the norm. Specifically, the Third and Twelfth judicial districts—which include Shawnee, Cloud, Jewell, Lincoln, Mitchell, Republic, and Washington counties—have local rules suggesting that they use fixed schedules to set bond generally, instead of only until a magistrate judge can do so.<sup>28</sup> The Twenty-Second Judicial District, which includes Brown, Doniphan, Marshall, and Nemaha counties, requires as a “minimum condition[] of all bonds” that those entitled to an appointed attorney (because they cannot afford to pay for one) pay a \$100 fee as a condition of bail,<sup>29</sup> though the court can waive that requirement by finding “manifest hardship to the defendant.”<sup>30</sup>

An arrested person can challenge their bond. In Kansas state courts, if

the individual cannot pay, they can apply to the magistrate court for reconsideration pursuant to K.S.A. § 22-2802(10). If the person remains in custody after such reconsideration, they can appeal their application to a district judge.<sup>31</sup> A defendant must also “promptly pursue habeas corpus remedies in order to preserve for review on appeal questions concerning bail.”<sup>32</sup>

### **What are the primary problems with money bail?**

Money bail is deeply flawed. First, it perpetuates a wealth-based system of justice. Even though courts are supposed to consider a defendant’s financial status in setting bond, thirty-four percent (34%) of people arrested, charged, booked, and held on bail remain incarcerated because they cannot pay.<sup>33</sup> Pretrial detention worsens outcomes in the criminal legal system by making it

more difficult to meet with a lawyer and by coercing some defendants to plead guilty. Data suggests it leads to harsher sentences, higher chances of conviction, and even an increased risk of future criminal charges.<sup>34</sup> And several studies suggest that money bail does not increase the arrested person’s likelihood of showing up to court.<sup>35</sup>

Second, when a court imposes money bail without considering the defendant’s financial circumstances, for instance by using a fixed bail schedule, it constitutes unconstitutional and unacceptable wealth discrimination.<sup>36</sup> Remember that bail is intended to serve particular goals—ensuring the community’s safety and assuring the bailee’s appearance at court.<sup>37</sup> Anything beyond what is reasonably calculated to meet those goals is unconstitutional.<sup>38</sup> Money bail does not further an interest in community safety,<sup>39</sup> so the governmental interest it furthers must

GA, 901 F.3d 1245, 1252-1253 (11th Cir. 2018), cert. denied sub nom. *Walker v. City of Calhoun*, Ga., 139 S. Ct. 1446 (2019).

<sup>28</sup> See DCR 3.309 Pretrial Release, Third Judicial District, KS, <https://www.shawneecourt.org/170/DCR-3309-Pretrial-Release> (last visited Jul 11, 2022); Administrative Rules for the Twelfth Judicial District of Kansas, Rule 23, <https://www.kscourts.org/KSCourts/media/KsCourts/District%20Court%20Rules/12JDLocalRules.pdf>.

<sup>29</sup> Court Rules of the District Court 22nd Judicial District of Kansas, Rule 21, <https://www.kscourts.org/KSCourts/media/KsCourts/District%20Court%20Rules/22JDLLocalRules.pdf>.

<sup>30</sup> *Id.*

<sup>31</sup> K.S.A. § 22-2803.

<sup>32</sup> *Smith v. State*, 264 Kan. 348, 356 (1998).

<sup>33</sup> *Pretrial Justice Task Force Report to the Kansas Supreme Court*, 12.

<sup>34</sup> *Id.* at 7.

<sup>35</sup> *Id.* at 9; 133 n.373. If money bail truly does not affect a defendant’s likelihood to appear at court, it may be categorically “excessive” in violation of the Eighth Amendment of the Federal Constitution. See *Boyle* 342 U.S. at 4-5; *Pretrial Justice Task Force Report to the Kansas Supreme Court*, 133 n.373.

<sup>36</sup> See *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc); *Walker v. City of Calhoun*, GA, 901 F.3d 1245, 1259 (11th Cir. 2018), cert. denied sub nom. *Walker v. City of Calhoun*, Ga., 139 S. Ct. 1446 (2019); *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (quoting *Rainwater* 572 F.2d 1053); *United States v. Vasquez Flores*, No. 19-4190, 2021 WL 3615366, at \*4 (4th Cir. Aug. 16, 2021) (citing *Hernandez* 872 F.3d 976); *In re Humphrey*, 19 Cal. App. 5th 1006, 1043-44, (2018), approved in part, 472 P.3d 435 (Cal. 2020), and aff’d, 11 Cal. 5th 135 (2021) (interpreting both the California and Federal Constitutions); *Clark v. Hall*, 2002 OK CR 29, ¶ 6, 53 P.3d 416, 417 (interpreting OK Const. Art. 2, § 7, which states in-full, “No person shall be deprived of life, liberty, or property, without due process of law”); but see *Fields v. Henry Cnty., Tenn.*, 701 F.3d 180 (6th Cir. 2012).

<sup>37</sup> K.S.A. § 22-2802(1)(c); K.S.A. § 22-2802(8); *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951); *Salerno*, 481 U.S. at 748.

<sup>38</sup> See *Rainwater*, 572 F.2d at 1057; See *Boyle* 342 U.S. at 4-5. This language comes from cases under the Eighth Amendment’s “excessive bail” clause, which has not been squarely held to apply to states by the Federal Supreme Court. But see *Harmelin v. Michigan*, 501 U.S. 957, 962 (1991) (saying that the Eighth Amendment “applies against the States”); *Pilkinton v. Circuit Court of Howell Cty.*, 324 F.2d 45, 46 (8th Cir. 1963). The Kansas Supreme Court has stated

be the individual's appearance in court.

Assuming money bail even incentivizes someone to appear at court, their financial situation would affect how much is necessary to ensure such appearance. Depending on someone's financial situation, for instance, recouping \$50 by meeting their bond could determine whether they can afford to feed themselves or their family. On the other hand, for some wealthy people, recouping \$10,000 might just give them extra spending money. Thus, to set bail no higher than reasonably necessary requires the court to consider at least the bailee's ability to pay.

### **Pretrial release should be the presumption.**

Given the problems with money bail and certain policies surrounding it, we should consider alternatives. But it is imperative to acknowledge problems with such alternatives.

As a starting point, there should be a strong presumption of pretrial release. Very few people released pretrial fail to appear in court. According to data from 2009, eighty-three percent of people charged of a felony and released pretrial showed up for all scheduled court appearances, and only three percent remained "fugitives" after a year.<sup>40</sup> Increased pretrial release also does not seem to meaningfully affect crime rates,<sup>41</sup> and violent crime while on pretrial release is rare.<sup>42</sup> Beyond that, most people in the US agree that there should generally be a presumption of pretrial release.<sup>43</sup> That does not necessarily mean never imposing any conditions of bail. While bond is unwarranted for most defendants, there are options aside from money bail; unsecured bonds, requirements to stay away from victims, rehabilitative measures, pretrial supervision, or any number of other conditions may help the defendant and/or community when necessary.<sup>44</sup>

Some jurisdictions that have moved away

from money bail have turned to algorithmic risk assessment tools to determine who should be detained pretrial. But these tools are equally flawed and problematic. Risk assessment algorithms compare factors such as a defendant's criminal history, "length of current employment, or even ZIP code," to historical data to guess how likely the defendant is to commit a crime if released on bail.<sup>45</sup> And because pretrial violence is so rare, it is typically no more than that—a guess.<sup>46</sup>

In fact, it is worse than that. Risk assessment algorithms perpetuate racism in the criminal legal system. In at least one study, the algorithms were twice as likely to erroneously label Black people as high-risk than they were white people.<sup>47</sup> The main reason for that disparity is straightforward: using data derived from a system, like the criminal legal system, with racial and ethnic disparities produces skewed predictions.<sup>48</sup> The same problem arises with artificial intelligence; when a computer scientist trains

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that the Eighth Amendment applies against the states. *State v. Ruggles*, 297 Kan. 675, 679-680 (2013). The Kansas Constitution's prohibition of excessive bail under § 9 of the Kansas Bill of Rights similarly requires consideration of individual circumstances, *State v. Foy*, 224 Kan. 558, 562 (1978), and that bail be set no higher than necessary to meet the state's end, *State v. Ruebke*, 240 Kan. 493, 498 (1987). The Fourteenth Amendment requires that a court consider alternatives that would fulfill the state's goal. *Bearden v. Georgia*, 461 U.S. 660, 660 (1983); *Rainwater*, 572 F.2d at 1057. So, if the court does not consider whether lower bond would do so, it also violates the Fourteenth Amendment.

<sup>39</sup> *Pretrial Justice Task Force Report to the Kansas Supreme Court*, 9.

<sup>40</sup> *Id.*, 89-90 n.40.

<sup>41</sup> Tiana Herring, *Releasing People Pretrial Doesn't Harm Public Safety*, Prison Policy Initiative,

<https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases/> (last visited Jul 19, 2022).

<sup>42</sup> *Technical Flaws of Pretrial Risk Assessments Raise Grave Concerns*, 2, [https://dam-prod.media.mit.edu/x/2019/07/16/TechnicalFlawsOfPretrial\\_ML%20site.pdf](https://dam-prod.media.mit.edu/x/2019/07/16/TechnicalFlawsOfPretrial_ML%20site.pdf) (last visited Jul 19, 2022).

<sup>43</sup> *Pretrial Justice Task Force Report to the Kansas Supreme Court*, 5-6.

<sup>44</sup> *Id.* 8-10.

<sup>45</sup> Chelsea Barabas, Karthik Dinakar & Colin Doyle, *The Problems With Risk Assessment Tools*, THE NEW YORK TIMES (2019), <https://www.nytimes.com/2019/07/17/opinion/pretrial-ai.html?smid=nytcore-ios-share> (last visited Jul 19, 2022).

<sup>46</sup> *Id.*

<sup>47</sup> *Technical Flaws of Pretrial Risk Assessments Raise Grave Concerns*, 2 n.3.

<sup>48</sup> *Id.* at 3.

an artificially intelligent program using non-curated data, said program may replicate societal biases.<sup>49</sup> While many like to think of data as neutral, it just isn't. It reflects the systems and societies it comes from. So, relying solely on data from the criminal legal system to make bail decisions, like risk assessment programs do, perpetuates disparities.<sup>50</sup>

### What Can We Do?

Despite the complexity of bail policy, there is plenty that we can do to help make the presumption of innocence more real.

As with any policy, we can reach out to elected officials and advocate for change. Bail policy in Kansas is primarily set by statute, so legislators can improve it. They should impose a statutory presumption of pretrial release and end money bail.

We can also push for judges and prosecutors to use their discretion responsibly. As discussed throughout this piece, magistrate

judges have a lot of power in setting bond. They rarely, if ever, need to impose money bail. Judges should avoid doing so as much as possible and should set bond to allow pretrial release except in exceptional circumstances. Prosecutors should recommend pretrial release and favor non-monetary modes of assuring appearance. And, when money bail appears to be the only option, the amount required should be reasonably tailored to the individual's circumstances and ability to pay, to ensure that people are never incarcerated pre-trial merely because they lack funds to pay for their freedom.

Finally, we can donate to or get involved with bail funds. Bail funds are organizations that raise money to help post bail for people who cannot afford it. There are no bail funds currently based in Kansas, but there are several throughout the country. While bail funds are not meant to solve the problem, they have kept thousands out of pretrial detention.

### Conclusion: Ending money bail

Ending money bail and ensuring a strong presumption of pretrial release will limit the vulnerability of defendants before trial and reduce certain wealth disparities in the criminal legal system. It will reduce the number of people who lose their job because they cannot afford bail. It will allow people to work with their attorneys to develop their defense, and it will get defendants out from under the coercive pressure of pretrial detention. If people in the United States truly believe in a presumption of innocence, and studies suggest we do, then we must fight to end money bail and prolonged pretrial detention.

*If you have experienced illegal bail-related practices, such as a court using a fixed bail schedule past forty-eight hours of detention or setting bond without considering ability to pay, please provide information about your experience to the ACLU of Kansas at [www.aclukansas.org/get-help](http://www.aclukansas.org/get-help).*

<sup>49</sup> Pranshu Verma, *These robots were trained on AI. They became racist and sexist*. THE WASHINGTON POST (2022), <https://www.washingtonpost.com/technology/2022/07/16/racist-robots-ai/> (last visited Jul 19, 2022); Jill Rosen, *Flawed AI Makes Robots Racist, Sexist* (2022), <https://research.gatech.edu/flawed-ai-makes-robots-racist-sexist> (last visited Jul 19, 2022).

<sup>50</sup> *Technical Flaws of Pretrial Risk Assessments Raise Grave Concerns*, 2-3.

<sup>51</sup> See, e.g., *21 Principles for the 21st Century Prosecutor*, FAIR AND JUST PROSECUTION, [https://fairandjustprosecution.org/wp-content/uploads/2018/12/FJP\\_21Principles\\_Interactive-destinations.pdf](https://fairandjustprosecution.org/wp-content/uploads/2018/12/FJP_21Principles_Interactive-destinations.pdf) (last visited Jul 22, 2022).

<sup>52</sup> *The Bail Project* (2022), <https://bailproject.org/> (last visited Jul 19, 2022).

<sup>53</sup> *Pretrial Justice Task Force Report to the Kansas Supreme Court*, 5-6.