

The logo for Husch Blackwell, consisting of a stylized white 'H' shape on a blue background. The top part of the 'H' is a rounded, double-arched shape, and the bottom part is a solid horizontal bar with a vertical stem in the center.

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Local Bail Practices: Municipal Liability

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Bail Reform – (Still) A Hot Topic

- **Washington D.C., 1992** – zero cash bail, 94% of defendants released pretrial without cash bail
 - D.C., like N.J. and federal system, allows preventive detention in wide range of cases + risk assessment
- **New Jersey, 2017** – law largely eliminated cash bail
 - New Jersey law allows for preventive detention for *any* offense upon judicial findings
- **California, 2018** – legislation designed to eliminate cash bail
 - Partially repealed after constitutional referendum, additional changes failed in 2022
- **New York, 2019** – eliminated bail for most nonviolent offenses
 - Partially repealed in April 2020, partially reinstated in April 2021, as of April 28 will be scaled back a third time
- **Illinois, 2023** – SAFE-T act eliminates cash bail foremost offenses
 - Preventive detention similar to New Jersey

Harris v. City of Austin

2016 WL 1070863 (W.D. Tex. Mar. 16, 2016)

- Under, 42 U.S.C. 1983, alleged City practice of “jailing people who are too poor to pay their fines and fees for traffic tickets and other petty misdemeanors.”
- Austin Municipal Court – jurisdiction over Class C misdemeanors
- Section 1983 requires a “policymaker”
- Plaintiff alleged municipal judges were policymakers
- Austin Municipal Court’s Rules say – if fine not paid, warrant will be issued

Harris v. City of Austin (cont.)

2016 WL 1070863 (W.D. Tex. Mar. 16, 2016)

- Case dismissed:
 - City cannot be liable under Section 1983 for having a ‘policy’ of wrongfully incarcerating indigent defendants because the relevant decisions were made by a municipal judge acting in his judicial capacity
- Need municipality for attorneys’ fees. 42 U.S.C. 1988.

O'Donnell v. Harris County

251 F.Supp.3d 1052, S.D. Tex. Apr. 28, 2017

- County misdemeanor judges were county policymakers
- “Unwritten custom and practice” of automatically adhering to bail schedule in 90%+ of cases
- Fix: 24 hours to have hearing and make written findings that cash bail is “only reasonable way” to assure return to trial.
- Partially reversed by 5th Circuit: “outright elimination of secured bail for indigent misdemeanor arrestees not warranted.”



ODonnell v. Harris County

251 F.Supp.3d 1052, S.D. Tex. Apr. 28, 2017

District Court:

- County misdemeanor judges were county policymakers
- “Unwritten custom and practice” of automatically adhering to bail schedule in 90%+ of cases
- Fix -
 - 24 hours to have hearing
 - Defendant gets to present evidence
 - Judge must make written findings, based on evidence, that cash bail is “only reasonable way” to assure return to trial

Fifth Circuit:

- Agree – with minimal analysis
- Agree
- Fix - Constitution requires only
 - Notice
 - an opportunity to be heard and submit evidence within 48 hours of arrest
 - reasoned decision by an impartial decisionmaker”

Daves v. Dallas County

Three Fifth Circuit opinions, two *en banc*

Panel opinion
984 F.3d 381 (2020)



- Per *Odonnell*, Dallas County county and district judges were county policymakers

First *en banc*
22 F.4th 522 (2022)



Daves v. Dallas County

Second *en banc* opinion – 64 F.4th 616 (2023)

Challenges to pretrial procedures barred by *Younger* abstention doctrine:

- Federal proceedings “interfere with ongoing state judicial proceedings”
- State has an important interest in bail
- Adequate opportunities in state proceedings to raise constitutional challenges

Alternative holding: case is mooted by passage of intervening bail reform legislation

What's the Law in Texas?

Texas Code of Criminal Procedure Chapter 17

- Arrest
- Individualized consideration before magistrate within 48 hours (Tex. Code Crim. Proc. 17.028)
 - Personal bond, w/ or w/o conditions
 - Surety or cash bond, w/ or w/o conditions
 - No bond (only for certain serious offenses)
- Factors (Tex. Code Crim. Proc. 17.15)
 - Bail “sufficient to give reasonable assurance that the undertaking will be complied with”
 - Not an instrument of oppression
 - Nature of the offense and circumstances under which offense was committed
 - Ability to make bail – “proof may be taken”
 - Future safety of the victim, law enforcement, and the community
 - Criminal history record
 - Citizenship status

What does all this mean for cities?

- Bail reform cases started with cities, may come back to cities
- Don't yet have a *Daves* for municipal judges
- Municipal judges are “magistrates” under Chapter 17
- Even with *Younger* holding, bail reform not likely to go away
- Each city/county relationship is different