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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  - Partially repealed after constitutional referendum, additional changes failed in 2022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  - Partially repealed in April 2020, partially reinstated in April 2021, as of April 28 will be scaled back a third time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

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## 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.

### **ODonnell 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 5<sup>th</sup> 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:**

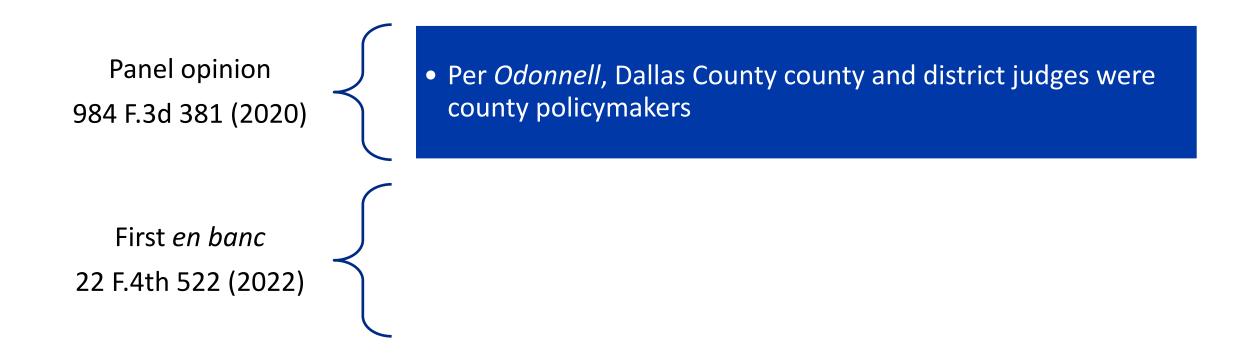
- County misdemeanor judges were county policymakers
- "Unwritten custom and practice" of automatically adhering to bail schedule in 90%+ of cases
- Fix -
  - 24 hours to have hearing
  - Defendant gets to present evidence
  - Judge must make written findings, based on evidence, that cash bail is "only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



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### 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

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### 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