

MUNICIPAL LIABILITY FOR JUDICIALLY PROMULGATED  
BAIL SCHEDULES AFTER *DAVES V. DALLAS COUNTY*

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*As the flaws, injustices, and harmful effects of cash bail systems have come under the spotlight, some plaintiffs have successfully brought § 1983 claims against municipalities in federal court challenging the constitutionality of judicially promulgated bail schedules. Adherence to these bail schedules deprives detainees of individualized bail-setting hearings and results in the detention of those who are unable to pay the prescheduled bail amount. But, as recent lawsuits—culminating in the Fifth Circuit’s January 2022 en banc decision in *Daves v. Dallas County*—demonstrate, bail litigants must first overcome technical hurdles that provide federal courts with escape valves before they even reach these lawsuits’ constitutional merits.*

*This Comment explores the application of the Monell doctrine to challenges to judicially issued bail schedules. It examines how the circuits have answered the question of whether local judges act as “final municipal policymakers” in the bail-schedule context. It concludes that the majority of circuits characterize local judges who promulgate standing bail schedules as state officers engaged in a judicial act, blocking plaintiffs’ ability to hold municipalities accountable for arbitrary, unindividualized bail policies. In light of these developments, this Comment identifies other potential openings for future litigants seeking to hold local governments accountable for unconstitutional, judicially promulgated bail schedules.*

INTRODUCTION

Each year, millions of people are detained in U.S. jails and are assigned bail amounts that many defendants, who are disproportionately

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people of color,<sup>1</sup> cannot afford to pay.<sup>2</sup> In many counties and cities across the United States, judges issue standing bail schedules, which list recommended bail amounts for different types of offenses.<sup>3</sup> While officials holding individual bail hearings have the discretion to deviate from the corresponding amount on the bail schedule, they typically adhere to the recommended amount.<sup>4</sup> Many individuals are then detained pretrial because they are unable to pay the prescheduled bail amount.<sup>5</sup> In many jurisdictions, the use of cash bail is arbitrary—certainly not calculated to guarantee an individual’s appearance in court or to promote safety in the community.<sup>6</sup> Pretrial detention not only affects a person’s “livelihood, health, [and] family” but can also impact the outcome of the judicial process.<sup>7</sup>

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1. See Amended Brief of Amici Curiae NAACP Legal Defense and Educational Fund, Inc. and Harris County Commissioner Rodney Ellis in Support of Plaintiffs’ Amended Motion for Preliminary Injunction (D.E. 143) at 5–11, *ODonnell v. Harris County*, 251 F. Supp. 3d 1052 (S.D. Tex. 2017) (No. 16-cv-1414), ECF No. 265-1 (detailing how Harris County’s wealth-based pretrial detention policies “disproportionately impact Black people, the poor, and vulnerable” members of the community).

2. See Nick Wing, *Our Bail System Is Leaving Innocent People to Die in Jail Because They’re Poor*, HuffPost (July 14, 2016), [https://www.huffpost.com/entry/cash-bail-jail-deaths\\_n\\_57851f50e4b0e05f052381cb](https://www.huffpost.com/entry/cash-bail-jail-deaths_n_57851f50e4b0e05f052381cb) [<https://perma.cc/YD8D-56JG>] (last updated Feb. 23, 2017) (“Today, millions . . . churn through U.S. jails each year, with the majority facing low-level charges. . . . [M]any jurisdictions operate under ambiguous laws that allow them to assign bail without considering a defendant’s risk profile or ability to pay. This can lead to bail being set indiscriminately, often at arbitrary amounts.”).

3. See Kellen Funk, *The Present Crisis in American Bail*, 128 *Yale L.J. Forum* 1098, 1100 & n.16 (2019) (citing Pretrial Just. Inst., *Pretrial Justice in America: A Survey of County Pretrial Release Policies, Practices and Outcomes* 2, 7 (2010), [https://biblioteca.cejamerica.org/bitstream/handle/2015/3094/PJI\\_Pretrial\\_Justice\\_in\\_America\\_Survey\\_2010.pdf?sequence=1&isAllowed=y](https://biblioteca.cejamerica.org/bitstream/handle/2015/3094/PJI_Pretrial_Justice_in_America_Survey_2010.pdf?sequence=1&isAllowed=y) [<https://perma.cc/7FB2-FP6N>]); see also, e.g., Christine S. Scott-Hayward & Sarah Ottone, *Punishing Poverty: California’s Unconstitutional Bail System*, 70 *Stan. L. Rev. Online* 167, 173 (2018) (noting that “the vast majority of the bail hearings . . . observed were not individualized and . . . the main factor determining the bail amount set appeared to be the county bail schedule”).

4. See, e.g., *ODonnell v. Harris County*, 251 F. Supp. 3d 1052, 1092–97 (S.D. Tex. 2017), *aff’d in part and remanded in part*, 882 F.3d 528 (5th Cir. 2018), *aff’d on reh’g*, 892 F.3d 147 (5th Cir. 2018), overruled by *Daves v. Dallas County*, 22 F.4th 522 (5th Cir. 2022) (*en banc*) (describing the “system of virtually automatic adherence to a bail schedule” that was in place at the time for Harris County misdemeanor cases).

5. See Funk, *supra* note 3, at 1122 (“[M]ost regimes identify the charge and release a defendant within minutes, hours, or at most a day *if the defendant can pay* a prescheduled bail amount.”).

6. Melissa Neal, *Just. Pol’y Inst., Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail* 22–23 (2012), <https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/bailfail.pdf> [<https://perma.cc/QVK2-EPTJ>].

7. Steven D. Schwinn, *The Bail Bond System and Rule of Law*, *Am. Bar Ass’n* (Jan. 27, 2022), [https://www.americanbar.org/groups/public\\_education/publications/insights-on-law-and-society/volume-21/issue-3/the-bail-bond-system-and-rule-of-law/](https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-21/issue-3/the-bail-bond-system-and-rule-of-law/) [<https://perma.cc/M3Z6-SRZR>] (explaining that pretrial detention may threaten a detainee’s job, housing, and healthcare and make them “more likely to accept a prosecutor’s plea offer . . . and plead guilty to a lesser crime without going to trial”); see also Will Dobbie, Jacob Goldin

Although plaintiffs challenging the constitutionality of these kinds of bail regimes through § 1983 claims have enjoyed some recent successes,<sup>8</sup> a survey of the recent bail-litigation landscape (and decisions in different but related contexts) shows that other more procedural or technical questions pose significant obstacles to these constitutional challenges.<sup>9</sup> As evident in the Fifth Circuit’s recent en banc decision in *Daves v. Dallas County*, having to resolve threshold procedural questions in these lawsuits means that federal courts may not get to the merits of the constitutional claims for a long time—if at all.<sup>10</sup> One of the main threshold barriers to these constitutional challenges is the question of whether municipalities can be held liable for unconstitutional bail schedules issued by municipal judges—a determination that involves an application of the *Monell* doctrine.<sup>11</sup>

Part I of this Comment provides an overview of *Monell* liability and how, in constitutional challenges to judicially promulgated bail schedules, a main barrier for plaintiffs is the requirement of establishing that judges act as final policymakers for the municipality when promulgating local bail

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& Crystal S. Yang, The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence From Randomly Assigned Judges, 108 Am. Econ. Rev. 201, 203–05 (2018) (finding that pretrial release decreases the probability of conviction, has no effect on future crime up to two years after the bail hearing, and improves defendants’ employment prospects).

8. See, e.g., *ODonnell*, 251 F. Supp. 3d at 1167–68 (finding that “Harris County’s policy is to detain indigent misdemeanor defendants before trial, violating equal protection rights against wealth-based discrimination and violating due process protections against pretrial detention without proper procedures or an opportunity to be heard” and granting injunctive relief). For a fuller discussion of constitutional theories that have served (or have the potential to serve) as the foundation for challenges to money bail systems, see generally Funk, *supra* note 3 (surveying the “constitutional terrain of federal court bail litigation” and three constitutional theories driving litigants’ challenges to local bail systems: equal protection, substantive due process, and procedural due process); Memorandum from Josh Bowers & Sandy Mayson to Alts. to Bail Drafting Comm. (Nov. 9, 2018), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=0cf819a0-c260-2624-f71b-21b3128032e2> [<https://perma.cc/ZMU5-jBLJ>] (summarizing judicial opinions addressing constitutional challenges to bail and pretrial detention systems and noting that “[c]laimants have recently brought challenges pursuant to equal protection, substantive due process, procedural due process, and the Excessive Bail Clause of the Eighth Amendment”).

9. While this Comment focuses on bail-reform litigation, scholars have addressed the very real limitations of litigation in driving meaningful reform and highlighted the need for extrajudicial alternatives. See Wendy R. Calaway & Jennifer M. Kinsley, Rethinking Bail Reform, 52 U. Rich. L. Rev. 795, 822, 824–29 (2018) (making note of litigation’s “inability to fashion court-crafted relief that addresses the full range of flaws” with the money bail system and advising lawyers and activists to supplement litigation with extrajudicial alternatives and grassroots initiatives).

10. See 22 F.4th 522, 527–28, 531–48 (5th Cir. 2022) (en banc) (discussing municipal liability, standing, and *Younger* abstention as applied to a § 1983 challenge alleging that the county and various county officials employed an unconstitutional system of wealth-based detention).

11. See *infra* section I.A.

rules. Part II discusses the Fifth Circuit's treatment of the issue in *Daves*. It then explores how other circuits have addressed the question, both in the bail context and elsewhere, and explains that a majority of circuits have concluded that municipal judges exercising their judicial power act for the state and not for local governments. Part III considers whether, in light of the circuits' decisions and particularly after *Daves*, there is any viable path forward for litigants seeking to sue municipalities for bail schedules issued by judges.

### I. SUING MUNICIPALITIES FOR BAIL SCHEDULES

Because states are not suable "persons" under § 1983,<sup>12</sup> municipal liability is especially important in civil rights litigation in federal court. Section 1983 provides individuals with a cause of action to sue "person[s] who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory," deprive these individuals of their rights guaranteed under the Constitution or federal law for damages or injunctive relief.<sup>13</sup> Although the Supreme Court held that municipalities and other local government entities *can* be sued under § 1983,<sup>14</sup> it was careful to emphasize that "a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, . . . held liable under § 1983 on a *respondeat superior* theory."<sup>15</sup>

#### A. *Municipal Liability Under Monell*

In *Monell v. Department of Social Services of City of New York*, the Court outlined when a municipality may be sued for the acts of its officials. Specifically, the Court concluded that a local government can be held liable under § 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the [complained of] injury."<sup>16</sup> Local government practices that are "so permanent and well settled as to constitute a 'custom or usage,'" even if informal and unwritten, may also be grounds for municipal liability.<sup>17</sup> In other words, *Monell* requires the plaintiff to establish three elements: (1) a local government policymaker; (2) an official policy or custom; and (3) a constitutional violation whose "moving force" is the policy or custom.<sup>18</sup>

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12. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989).

13. 42 U.S.C. § 1983 (2018).

14. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

15. *Id.* at 691.

16. *Id.* at 694.

17. *Id.* at 691 (internal quotation marks omitted) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167–68 (1970)).

18. *Id.* at 694.

The Court has continued to flesh out the doctrine's contours. In *Pembaur v. City of Cincinnati*, the Court explained that "[t]he 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible."<sup>19</sup> While "'official policy' often refers to formal rules or understandings . . . that are intended to, and do, establish fixed plans of action to be followed under similar circumstances,"<sup>20</sup> the Court concluded that, in some circumstances, a municipality could be held liable even for a single decision by local policymakers.<sup>21</sup> Municipal liability may be imposed, the Court continued, when the local officer has *final* authority to establish the policy and, if the unlawful action stems from a single decision, when the official makes a "deliberate choice to follow a course of action" from among various alternatives.<sup>22</sup> If an official's decisions are constrained by another official's policies or are subject to review by another policymaker, that official does not exercise *final* authority to make policy.<sup>23</sup> While the tight definition of *Monell* liability accommodates policy concerns about potentially draining limited municipal treasuries, the doctrine has nonetheless faced criticism from judges and scholars alike.<sup>24</sup>

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19. 475 U.S. 469, 479 (1986).

20. *Id.* at 480–81.

21. *Id.* at 480.

22. *Id.* at 483–84.

23. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988).

24. Justice William Brennan, in his concurring opinion in *Praprotnik*, criticized the plurality's definition of when an official has final policymaking authority, arguing that the plurality's theory of municipal liability was "unduly narrow and unrealistic, and . . . ultimately would permit municipalities to insulate themselves from liability for the acts of all but a small minority of actual city policymakers." *Id.* at 132 (Brennan, J., concurring in the judgment). Judges have continued to express their discomfort with the doctrine today. See, e.g., *Weary v. Foster*, 33 F.4th 260, 278 (5th Cir. 2022) (Ho, J., dubitante) ("Worthy civil rights claims are often never brought to trial. That's because a holy trinity of legal doctrines—qualified immunity, absolute prosecutorial immunity, and *Monell* . . . —frequently conspires to turn winnable claims into losing ones."). And scholars have noted how various aspects of the *Monell* doctrine, as subsequently developed by the Court, actually provide broad protections to local governments from suit or fail to fully reflect how governments shape and affect individual employees' acts. See Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 *Fordham L. Rev.* 479, 482 n.11 (2011) ("Under cases decided subsequent to *Monell*, the standards for establishing the liability of local governmental entities for constitutional violations committed by their officials are exceedingly difficult to satisfy."); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 *Yale L.J.* 1836, 1867–70 (2015) ("[T]he Court's denial of respondeat superior liability [in *Monell*] precludes consideration of all the ways that government agencies control and shape actions by the employees separate from official policies or customs."); Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons From Tort Law and Organization Theory*, 77 *Geo. L.J.* 1753, 1777–79 (1989) (noting that the *Monell* "official policy" doctrine "precipitated a quest not only for a . . . readily definable norm (the 'policy') but also for an easily identifiable, high-level progenitor of the norm (the 'final policymaking authority'), even though 'entities of that kind turn out not to exist in the real world'"); Fred Smith, *Local Sovereign Immunity*, 116 *Colum. L. Rev.* 409, 414–15 (2016) ("[T]he

B. *Judges: Final Policymakers for Local Government Entities?*

In the bail context and in other situations in which the plaintiff's theory of municipal liability rests on a judge's actions, two issues have presented much difficulty for plaintiffs seeking relief against municipalities via § 1983. The first key question is whether local judges are acting for the *municipality*—as opposed to for the *state*. The second major issue is whether these judges are exercising final policymaking authority.

Establishing that a local judge acts for the county in promulgating a bail schedule is a critical part of the analysis because a finding to the contrary essentially stops litigation challenging these bail systems in its tracks.<sup>25</sup> Although plaintiffs can still, in theory, attempt to seek prospective injunctive relief against the individual judges acting in their official capacity (assuming they are state actors) through *Ex parte Young*,<sup>26</sup> there is no clear path to such relief in practice, especially given the broad immunity afforded to judges for their judicial acts.<sup>27</sup>

The question of whether an official is a final policymaker for the local government is a question of state law. Thus, a court's "understanding of the actual function of a governmental official, *in a particular area*, will necessarily be dependent on the definition of the official's functions under

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municipal causation requirement nonetheless often inoculates local governments from accountability . . . . When this causation requirement interacts with other immunities that local governmental officials receive, survivors of governmental abuse are often left with no defendant to sue at all." (footnote omitted)).

25. See, e.g., *Daves v. Dallas County*, 22 F.4th 522, 540 (2022) (en banc) (holding that county judges who developed a bail schedule within the state's judicial hierarchy exercised state judicial power and were thus acting for the state, even if the schedule applied only to one county). But see *id.* at 555 (Haynes, J., dissenting) (arguing that the county judges were actually county officials incapable of asserting state sovereign immunity and noting that the two matters—state sovereign immunity under the Eleventh Amendment and county liability under § 1983—are "undeniably intertwined").

26. 209 U.S. 123, 159–60 (1908) ("[T]he officer [acting in violation of the Constitution] . . . is . . . stripped of his official or representative character and is subjected . . . to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.").

27. See *Stump v. Sparkman*, 435 U.S. 349, 355–57 (1978) (stating the well-established proposition that judges have absolute immunity from damages liability for judicial acts as long as they are not acting in the "clear absence" of all jurisdiction (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872))); *Ex parte Young*, 209 U.S. at 163 ("[T]he right to enjoin . . . a state official, from commencing suits under circumstances already stated, does not include the power to restrain a court from acting in any case brought before it, . . . nor does it include power to prevent any investigation or action by a grand jury."). Although the Supreme Court held in *Pulliam v. Allen* that judicial immunity is not a categorical bar to prospective injunctive relief against a judicial officer acting in their judicial capacity, it also acknowledged that injunctive relief against a judge is rarely awarded. See 466 U.S. 522, 528, 539, 541–42 (1984) (noting that employing judicial immunity to limit the availability of injunctive relief against judges was unnecessary in light of the "limitations already imposed by principles of comity and federalism" while reaffirming "the need for restraint by federal courts called on to enjoin the actions of state judicial officers").

relevant state law.”<sup>28</sup> Courts do not—or should not—approach the inquiry in a “categorical, ‘all or nothing’ manner.”<sup>29</sup> In *McMillian v. Monroe County*, the Court illustrated these principles by looking to the Alabama Constitution and Alabama law to conclude that Alabama sheriffs acted for the state when executing their law enforcement duties.<sup>30</sup> Even though sheriffs were paid by the county, provided with equipment and lodging by the county, elected by voters in their county, and jurisdictionally limited to the county’s borders,<sup>31</sup> the Court accorded greater weight to the fact that the Alabama Constitution reflected its framers’ intent that sheriffs be considered executive officers of the state and that the *specific function* at issue was the sheriffs’ “complete authority to enforce the *state* criminal law in their counties.”<sup>32</sup> As applied to the bail context, then, a key threshold question is whether local judges—even if they may count as municipal actors when taking actions in other areas—act for the state when they exercise their judicial power to issue standing bail orders.

## II. DAVES AND OTHER CIRCUITS’ ANALYSES: *MONELL* LIABILITY FOR JUDICIAL ACTION

Although not all the circuits have squarely addressed the question of whether municipal judges who engage in judicial acts are municipal policymakers, most of the circuits that have analyzed the issue seem to view municipal judges exercising the judicial power as state actors—in almost categorical terms (if not completely so).<sup>33</sup> That said, a handful of circuits have either reached a different conclusion or announced narrower rules, potentially leaving some doors open for *Monell* liability in challenges to judicially promulgated bail schedules.<sup>34</sup>

### A. *Fifth, Sixth, Seventh, Ninth, and Tenth Circuits: Municipal Judges Engaged in Judicial Functions Act for the State*

In the majority of circuits that have addressed municipal judges’ policymaking authority, courts, after interpreting state law, tend to conclude that these judges are state actors because the judicial power flows from the state.<sup>35</sup>

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28. *McMillian v. Monroe County*, 520 U.S. 781, 786 (1997) (emphasis added).

29. *Id.* at 785.

30. *Id.* at 793.

31. *Id.* at 791.

32. *Id.* at 790 (emphasis added).

33. See *infra* section II.A.

34. See *infra* section II.B.

35. Bail systems are local in character, and a fifty-state survey of state laws establishing and governing state and local courts is beyond the scope of this Comment. Without diving deep into the weeds of state constitutions and laws, the decisions discussed in this section nonetheless offer some broader insights and more general principles that may inform future litigation within federal courts in the bail context.

The Fifth Circuit, sitting en banc in *Daves v. Dallas County*, held that Dallas County judges act for the state, not the county, in creating a bail schedule.<sup>36</sup> Although a section of the Texas Constitution specifies that these judges are “county officers” subject to a certain removal procedure,<sup>37</sup> and the Fifth Circuit had previously relied on those same state constitutional provisions to conclude that county judges were county officers,<sup>38</sup> the *Daves* court backtracked. Instead, the Fifth Circuit in *Daves* concluded that the county courts are vested with the state judicial power and are part of a state system; so, when county judges exercise their judicial authority, they are state actors.<sup>39</sup> Turning to the next step of the analysis, the Fifth Circuit found that just as a “judge’s setting an arrestee’s bail . . . is part of the state adversary proceedings and a judicial function[,] . . . creating a bail schedule for later applications to specific arrestees is also a judicial act that enforces state law.”<sup>40</sup> In particular, the court noted that “the act of creating guidance for setting bail is ‘inextricably linked’ to the subsequent setting of bail and is a judicial act.”<sup>41</sup> In reaching these conclusions, the Fifth Circuit spoke in broad, categorical terms about a single, unified “judicial power of the state.”<sup>42</sup> Applying much of the same analysis to district judges, the court also concluded that these judges acted as “officers of the state judicial system” when they developed a bail schedule.<sup>43</sup>

Judge Catharina Haynes, in a dissenting opinion, criticized the majority’s decision for overruling the Fifth Circuit’s precedents and reframing the merits of the plaintiffs’ claims as jurisdictional issues.<sup>44</sup> As relevant

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36. 22 F.4th 522, 534 (5th Cir. 2022) (en banc).

37. *Id.* at 535 (citing Tex. Const. art. V, § 24).

38. *O’Donnell v. Harris County*, 892 F.3d 147, 155 (5th Cir. 2018), overruled by *Daves*, 22 F.4th 522.

39. *Daves*, 22 F.4th at 537–38 (“A helpful foundation for our analysis is that local judges are part of a state system . . . . Texas law divides state judicial power among the different courts . . . . [T]he defendant County Judges have authority over a category of criminal offenses established by state statutes.” (emphasis omitted)).

40. *Id.* at 539. The court considered four factors the circuit had previously used for deciding whether a judge’s actions were judicial in nature: (1) whether a “‘normal judicial function’ [was] involved”; (2) whether “the relevant act occur[red] in or adjacent to a court room”; (3) whether the “‘controversy’ involve[d] a pending case in some manner”; and (4) whether the “act [arose] ‘directly out of a visit to the judge in his official capacity.’” *Id.* (quoting *Davis v. Tarrant County*, 565 F.3d 214, 222 (5th Cir. 2009)).

41. *Id.* at 540 (quoting *Davis*, 565 F.3d at 226).

42. *Id.* (“We also conclude that it was the judicial power of the state that was being used: the Texas constitution provides that judges exercise state judicial power generally . . . ; bail is a right granted by the state constitution . . . ; and the process for determining bail is controlled by state statutes . . .”).

43. *Id.* at 540–41. The Fifth Circuit, in other contexts, has held that a municipal judge acting in their judicial capacity does not act as a municipal officer, explicitly distinguishing a judge’s administrative or other nonjudicial duties from their judicial actions. See *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992).

44. See *Daves*, 22 F.4th at 551 (Haynes, J., dissenting). Notably, Judge Haynes herself had served as a Texas state district court judge before her appointment to the federal bench. See Catharina Haynes, U.S. Court of Appeals for the Fifth Circuit, The White House:



here, Judge Haynes argued that the county judges' conduct in promulgating the bail schedule was the kind of policymaking for which Dallas County could be held liable.<sup>45</sup> She criticized the majority for setting aside factors it had previously used to determine whether an officer is acting for the state or for a municipality simply because the decision that gave rise to those factors involved the Eleventh Amendment, rather than a § 1983 claim.<sup>46</sup> Applying those factors, and putting special emphasis on the source of funding factor, Judge Haynes observed that the county judges are paid by the county; the fees they collect go to the county; and they exercise their *local* rulemaking powers to promulgate a misdemeanor bail schedule.<sup>47</sup> Additionally, she argued that the county judges, in setting a bond schedule for others to apply, acted beyond their judicial capacity: Here, they engaged in policy-setting conduct because they were “merely directing other judges in a manner divorced from any given case.”<sup>48</sup>

The Sixth, Seventh, Ninth, and Tenth Circuits appear to have reached the same conclusion as the Fifth Circuit: Local judges acting in their judicial capacity to enforce state law are not local actors for *Monell* purposes. In *Johnson v. Turner*, the Sixth Circuit rejected the plaintiffs' argument that a county juvenile court judge created “policy” for the county in issuing a memorandum outlining the process for initiating an attachment *pro corpus*. Instead, the court found that the judge's action constituted a “general restatement of *state* law as perceived by the juvenile court judge.”<sup>49</sup> In

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President George W. Bush, <https://georgewbush-whitehouse.archives.gov/infocus/judicialnominees/haynes.html> [<https://perma.cc/8T33-TGXW>] (last visited Aug. 14, 2022) (“In 1998, Judge Haynes was elected Judge of the 191st District Court in Dallas, winning reelection in 2002.”).

45. *Daves*, 22 F.4th at 555 (Haynes, J., dissenting).

46. See *id.* at 555–56 (“[T]he majority opinion misconstrues a statement from a footnote in *Hudson*—‘While we look at the function of the officer being sued in the latter context, we do not in our Eleventh Amendment analysis.’” (quoting *Hudson v. City of New Orleans*, 174 F.3d 677, 681 n.1 (5th Cir. 1999))); see also *supra* note 25. The factors the Fifth Circuit had used to distinguish between state and local officials were: (1) whether state law treats the official as primarily local or as an arm of the state; (2) whether the official is paid by the local government; (3) whether the official has local autonomy; and (4) whether the official is primarily concerned with local affairs. *Hudson*, 174 F.3d at 681.

47. *Daves*, 22 F.4th at 557 (Haynes, J., dissenting). Judge Haynes also noted several other factors indicating that the county judges are county officials. First, the County Commissioners Court fills any interterm vacancies, “can increase [the judges’] salary, is in charge of providing their facilities and personnel, and can give them longer terms on the bench.” *Id.* at 557; see also Tex. Gov’t Code Ann. §§ 25.0005, .0010, .0016 (West 2022). Second, “Texas courts themselves also recognize that statutory county judges . . . are generally county officers.” *Daves*, 22 F.4th at 557 (Haynes, J., dissenting) (citing *Jordan v. Crudgington*, 231 S.W.2d 641, 646 (Tex. 1950); *State ex rel. Peden v. Valentine*, 198 S.W. 1006, 1008 (Tex. Civ. App. 1917)).

48. *Daves*, 22 F.4th at 559–60 (Haynes, J., dissenting).

49. 125 F.3d 324, 335–36 (6th Cir. 1997) (emphasis added) (noting that “[t]he functions of the juvenile court are established by state law” and that “alleged unconstitutional actions taken by the juvenile court judge . . . are judicial decisions reviewable on appeal to the Tennessee appellate courts”).

*Woods v. City of Michigan City*, a challenge to a bond schedule issued by a state superior court judge that made reckless driving a bondable offense, the Seventh Circuit concluded that though the judge did have “final authority” for fixing bail under Indiana law, “judges of Indiana’s circuit, superior and county courts are judicial officers of the State judicial system.”<sup>50</sup> And in *Ledbetter v. City of Topeka*, the Tenth Circuit held that a municipal judge who failed to sign an arrest warrant was not a municipal policymaker because the authority of the municipal judge was established by state law, and his “authority to issue arrest warrants was circumscribed by his judicial duty to follow state law.”<sup>51</sup>

The Ninth Circuit, in a case involving a § 1983 challenge to a city judge’s “policy” of failing to advise indigent defendants of their right to counsel, similarly concluded that the city judge was functioning as a *state* judicial officer.<sup>52</sup> Under Montana law, the court explained, a city judge’s “treatment of indigent defendants was an exercise of judicial discretion drawn from the authority of the state” and appealable to higher state courts.<sup>53</sup> The court also rejected the plaintiffs’ arguments that the conduct at issue was the “mere ‘administrative duty’ of reciting defendants’ rights,” not an act that involved judicial discretion,<sup>54</sup> and that by failing to follow state or federal constitutional law, the judge acted *outside* of his state judicial capacity.<sup>55</sup> As the *Eggar* court summarized, “A municipality cannot be liable for judicial conduct it lacks the power to require, control, or remedy, even if that conduct parallels or appears entangled with the desires of the municipality.”<sup>56</sup>

In these circuits, then, it seems that when municipal judges issue orders in their judicial capacity, they are acting as state, not local, officials. That municipal judges operate within a judicial hierarchy defined by state constitutions and state laws and exercise their judicial authority to enforce state law appears to all but dictate that conclusion.<sup>57</sup>

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50. 940 F.2d 275, 279 (7th Cir. 1991) (“County courts in Indiana are exclusively units of the judicial branch of the state’s constitutional system.”).

51. 318 F.3d 1183, 1189–90 (10th Cir. 2003).

52. *Eggar v. City of Livingston*, 40 F.3d 312, 314–15 (9th Cir. 1994).

53. *Id.*

54. *Id.* at 315 (“That Judge Travis allegedly performed his duty to advise indigents of their rights in a way that makes a mockery of those rights does not make that duty administrative.”).

55. *Id.* (“The Judge’s failure to follow state law or federal constitutional law does not transform his ‘cattle-call’ method of counseling into municipal policymaking. As state law makes clear, the Judge’s obligation to address the rights of defendants arises from his membership in the state judiciary.”).

56. *Id.* at 316.

57. The Supreme Court has held that immunity applied to individual officers sued under § 1983 does not extend to municipalities. See *Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (“[T]here is no tradition of immunity for municipal corporations . . . . We hold, therefore, that the municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.”). The Fifth Circuit, however, has functionally ruled

B. *Eighth, Eleventh, and D.C. Circuits: Some Breathing Room?*

Although most of the circuits have concluded that municipal judges acting in their judicial capacity are not final municipal policymakers, the Eighth, Eleventh, and D.C. Circuits' treatment of the issue seems to provide a sliver of hope—however slim—to civil rights plaintiffs.

The Eighth Circuit has provided somewhat diverging guidance regarding whether a municipality can be held liable for the conduct of a municipal judge. In *Hamilton v. City of Hayti*, the plaintiff filed a § 1983 action against a municipal judge and the city of Hayti alleging that the bond schedule issued by the judge was unconstitutional.<sup>58</sup> The panel held that the municipal judge, in setting a bond schedule to govern the pretrial release of individuals accused of municipal ordinance violations, was engaged in a judicial act.<sup>59</sup> The panel further concluded that, because municipal judges setting a bond schedule were judicial officers of the state judicial system under Missouri law, the judge's adoption of the bond schedule was not a final decision by a municipal policymaker.<sup>60</sup> But in *Williams v. Butler*, an en banc Eighth Circuit held that a municipal judge in Arkansas exercised final municipal policymaking authority in firing a municipal court clerk, so the municipality could be subject to suit.<sup>61</sup> The trickiest issue in *Williams* was drawing a line between *policymaking* authority and mere *decisionmaking* authority.<sup>62</sup> The majority concluded that because, under

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the other way, at least when it comes to municipal liability for local judges acting in their judicial capacity. See, e.g., *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992) (“We have repeatedly held . . . that a municipal judge acting in his or her judicial capacity to enforce state law does not act as a municipal official or lawmaker.”); *Harris v. City of Austin*, No. A-15-CA-956-SS, 2016 WL 1070863, at \*1, \*4 (W.D. Tex. Mar. 16, 2016) (agreeing with the City that “actions taken by municipal judges in their judicial capacities cannot constitute municipal policy” and thus declining to hold the City liable for a municipal judge’s alleged practice of jailing people who were too poor to pay their fines for petty misdemeanors). In other words, the Fifth Circuit has not just concluded that municipalities cannot be held liable for the judicial acts of local judges when those judges act for the state rather than the municipality; rather, local judges, when engaged in any judicial act, *are simply not policymakers* at all. And when judicial action does not constitute “policy” for *Monell* purposes, the *McMillian* analysis, see *supra* notes 28–32 and accompanying text, becomes secondary, since the proposition that judicial acts are not “policies” essentially means that judicial action can *never* give rise to municipal liability.

58. 948 F.3d 921, 924 (8th Cir. 2020).

59. *Id.* at 928.

60. *Id.* at 929; see also *Granda v. City of St. Louis*, 472 F.3d 565, 568–69 (8th Cir. 2007) (concluding that a municipal judge’s decision to incarcerate a mother for her child’s truancy wasn’t a final policy decision that could give rise to municipal liability because it was “subject to . . . reversal by higher state courts” and the municipal court “is a division of the state circuit court”).

61. 863 F.2d 1398, 1402–03 (8th Cir. 1988) (en banc) (finding that the city granted municipal judges “absolute authority to determine and administer employment policy in his court, a municipal court exercising traditional municipal functions”).

62. See *id.* at 1402 (“[A] very fine line exists between delegating final policymaking authority to an official, for which a municipality may be held liable, and entrusting

Arkansas law, the judge “had been delegated *carte blanche* authority . . . and was exercising that authority” when he hired and then fired the court clerk, the judge’s authority was not constrained by any other policymaker and thus constituted final policymaking.<sup>63</sup>

Meanwhile, the Eleventh Circuit has held that a city can be sued for a constitutionally deficient standing bail order issued by the municipal court. In *Walker v. City of Calhoun*, the court concluded that because Georgia law grants a city the legislative power to adopt ordinances relating to its property, affairs, and local government, and the city’s municipal charter itself includes a broad grant of authority, the city “could regulate bail if it wished to and so may be held responsible for acquiescing in an unconstitutional policy and practice by its Municipal Court and its police.”<sup>64</sup> Notably, although *state* statutes also granted authority to courts to establish bail schedules, the Eleventh Circuit declined to conclude that such a grant of authority flowing from state law preempted all *municipal* regulation of bail.<sup>65</sup>

Finally, the District Court for the District of Columbia has discussed some of the underlying debates and principles at issue here. *Singletary v. District of Columbia* involved a plaintiff’s § 1983 action against the District alleging that the D.C. Board of Parole, an executive entity, wrongfully revoked his parole.<sup>66</sup> Addressing the District’s arguments, which relied heavily on the cases discussed above,<sup>67</sup> and acknowledging that the court in *Singletary* was “not presented with, and makes no decision regarding, the District’s liability for decisions made by municipal judges,” Judge Colleen Kollar-Kotelly observed that “the cases relied upon by the District do not . . . establish the overarching principle that judicial action can *never* give rise to municipal liability.”<sup>68</sup> Instead, Judge Kollar-Kotelly added that “these cases stand for the much more limited proposition that a municipality may not be held liable under Section 1983 for actions taken by a municipal judge *pursuant to his or her authority under state law*, as the judge’s actions in such a case are properly attributed to the state rather than the municipality.”<sup>69</sup>

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discretionary authority to the official, for which no liability attaches. The distinction . . . lies in the amount of authority retained by the authorized policymakers.”).

63. *Id.* The dissenting judges, however, came out on the other side of the policymaking–decisionmaking debate. They argued that the municipal judge merely had discretion to decide to fire the court clerk, not authority to set city personnel policy. *Id.* at 1405–07 (Gibson, J., dissenting).

64. 901 F.3d 1245, 1255–56 (11th Cir. 2018).

65. *Id.* at 1256.

66. See 685 F. Supp. 2d 81, 83 (D.D.C. 2010).

67. See *supra* section II.A.

68. *Singletary*, 685 F. Supp. 2d at 92–93 (emphasis added).

69. *Id.* at 92 (emphasis added); cf. *supra* note 57. But see *El-Amin v. Downs*, 272 F. Supp. 3d 147, 152–53 (D.D.C. 2017) (concluding that D.C. couldn’t be held liable for a trial judge’s allegedly improper decision to remove a lesser included offense from the jury’s consideration because a decision rendered at the plaintiff’s criminal trial—where the judge

## III. IMPLICATIONS FOR FUTURE BAIL LITIGATION

While most circuits have concluded that local judges acting in their judicial capacity are not final municipal policymakers under *Monell*, the decisions from the circuits that have not yet slammed the door shut on municipal liability, and the dissenting opinion in *Daves*, offer some lessons for how plaintiffs looking to sue municipalities in federal court for judicially promulgated bail schedules may proceed.

A. *Characterizing the Judge's Action*

First, Judge Haynes's dissent in *Daves* and the Eleventh Circuit's decision in *Walker* suggest that plaintiffs may still have a path forward if they can convince a court that issuing a bail schedule is an administrative or policymaking act, not a judicial one. Indeed, at least in the circuits that seem to conceive of the authority that local judges wield as part of an indivisible state judicial power,<sup>70</sup> being able to analogize the creation of a bail schedule to the type of employment decision at issue in *Williams*,<sup>71</sup> as distinguished from a decision rendered by a judge at a specific defendant's trial,<sup>72</sup> will be crucial. The Fifth Circuit majority in *Daves* rejected this proposition, asserting instead that "when judges decide on a procedure for taking what indisputably will be judicial acts in the future, that decision is so intertwined with what will follow as to be a judicial act as well."<sup>73</sup> But, as Judge Haynes's vigorous dissent suggests, there is at least a plausible argument, depending on the circuit and how a specific state's law sets up the court system, that when municipal judges develop a bail schedule for *other* judges to apply—instead of deciding cases and controversies, a "classic" judicial function—and they do so on their own initiative, with full discretion, they are acting not as judicial officers but as policymakers.<sup>74</sup>

Plaintiffs may be able to sue municipalities if they can establish that the municipal courts' ability to regulate bail stems from a *municipal* ordinance or some other local grant of authority. In *Walker*, the Eleventh Circuit concluded that municipal courts exercising judicial authority flowing from state law also had the ability to take the same kind of judicial

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acted in his judicial capacity to enforce state law—didn't constitute municipal policymaking).

70. See *supra* note 42 and accompanying text.

71. See *supra* notes 61–63 and accompanying text.

72. See, e.g., *Daves v. Dallas County*, 22 F.4th 522, 539 (5th Cir. 2022) (en banc) ("A judge's setting an arrestee's bail at that time is part of the state adversary proceedings and a judicial function."); *supra* note 69.

73. *Daves*, 22 F.4th at 539.

74. See *id.* at 558–60 (Haynes, J., dissenting) (noting that the Fifth Circuit had previously found that "issuing general orders regarding how to process stages of litigation does not qualify as a judicial act" and explaining that county judges were "issuing generally applicable bond schedules, not holding bail hearings" (emphasis omitted)).

action pursuant to a municipal grant of authority.<sup>75</sup> In other words, particularly in states that give municipal governments expansive authority to regulate local affairs, plaintiffs challenging municipal bail schedules may find openings for § 1983 suits against the local government if (1) state law *permits* municipalities to issue local rules like standing orders regulating bail but does not *require* them to do so<sup>76</sup> and (2) they can trace municipal judges' authority to create bail schedules to some kind of local rule or ordinance.

B. *Custom, Practice, or Usage*

Even if pursuing an action against a municipality based on the “judge as a municipal policymaker” theory is unlikely to be fruitful, plaintiffs can still try to invoke the *Monell* doctrine on a separate ground, against different municipal officials: that the enforcement of a bail schedule was a local “custom or usage.”<sup>77</sup> In *Woods*, the Seventh Circuit pointed out that the plaintiff had failed to raise the “custom or usage” argument in his pleadings before summary judgment and denied his motion to amend<sup>78</sup> and that, in any case, the plaintiff’s invocation of this separate ground for municipal liability was duplicative of his basic theory that the judge was a final policymaker.<sup>79</sup> In *Walker*, the Eleventh Circuit seemed to be open to the argument that the city could “set bail policy through its control of its police department,” though it did not resolve the validity of this secondary theory of liability.<sup>80</sup> And in an unpublished decision, the District Court for the District of New Mexico concluded that plaintiffs bringing a § 1983 lawsuit against a city for a municipal judge’s alleged wrongdoing (the improper charging of fines and fees and wrongful imprisonment) had pled sufficient facts to support their allegation that the city itself maintained a discriminatory official policy or well-settled custom or practice.<sup>81</sup>

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75. See *supra* notes 64–65 and accompanying text.

76. *Walker v. City of Calhoun*, 901 F.3d 1245, 1255–56 (11th Cir. 2018) (finding that in Georgia, “a municipality’s authority flows ‘from the state, manifested in the constitution, state laws, and the municipal charter’” and “municipalities in Georgia act on the same understanding that Georgia law permits them to regulate bail by city ordinance” (quoting *Porter v. City of Atlanta*, 384 S.E.2d 631, 632 (Ga. 1989))); see also *Daves*, 22 F.4th at 559 (Haynes, J., dissenting) (“[Issuing generally applicable bond schedules] is not a state-imposed duty; Texas law *lets* [county judges] issue local rules, it does not *require* them to do so—and it certainly does not require them to issue local rules that set the bail applicable to every misdemeanor . . .”).

77. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978).

78. *Woods v. City of Michigan City*, 940 F.2d 275, 279–80 (7th Cir. 1991).

79. *Id.* at 280.

80. *Walker*, 901 F.3d at 1256 n.3.

81. *Russell v. Dominguez*, No. CIV 12-1171 RB/ACT, 2013 WL 12328846, at \*6 (D.N.M. Nov. 13, 2013). The district court, without deciding whether the judge was a municipal policymaker and recognizing Tenth Circuit precedent that had appeared to decide the issue, see *supra* note 51, found that the plaintiffs’ complaint included facts that supported

In future constitutional challenges to bail systems, plaintiffs can try to skirt the state-judicial-power problem altogether.<sup>82</sup> Instead, plaintiffs can try to demonstrate how other municipal actors—police officers, jailers, and others—enforced a constitutionally deficient bail schedule as a matter of local custom or practice, or even that the municipality itself had a policy or well-settled custom that violated the plaintiffs’ constitutional rights.

#### CONCLUSION

Generally, circuits that have addressed the question of whether a municipal judge who acts in their judicial capacity is a final municipal policymaker have increasingly answered in the negative, insulating municipalities from § 1983 liability. Nowhere is this proposition clearer than in the Fifth Circuit’s recent decision in *Daves*. And although civil rights advocates have outwardly downplayed the significance of the *Daves* opinion,<sup>83</sup> other commentators, including commercial bail industry lobbyists, have recognized that *Daves* “is not a procedural hearing on an insignificant issue; it is a sea change.”<sup>84</sup> The driving force behind this trend seems to be the fact that many state constitutions and laws purportedly conceive of a single, categorical state judicial power and characterize municipal courts as one part of a larger state court system. Plaintiffs challenging judicially promulgated bail schedules in federal court can still, however, draw some lessons from decisions in the circuits that have not fully rejected *Monell* liability in similar contexts. They can try to characterize a judge’s creation of a bail schedule as a *policy*-setting act, not a judicial one, or, where possible, to locate a source of local authority for the judge’s regulation of bail—or they can try to establish *Monell* liability by focusing on the actions of other local officials or on the policies, customs, and practices of the municipalities themselves.

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the inference that the city “maintains policies that expressly prohibit its municipal court judge from imposing community service in lieu of a fine, and require the judge to collect improper fees and costs.” See *id.* at \*6–7, \*6 n.3.

82. See *supra* section II.A.

83. See, e.g., Hous. Pub. Media, Harris County Commissioners Weigh Proposal to Void Recent Bail Reforms, Def. Network (Jan. 24, 2022), <https://defendernetwork.com/news/local-state/harris-county-commissioners-weigh-proposal-to-void-recent-bail-reforms/> [<https://perma.cc/ETX5-A2QM>] (“The Civil Rights Corps represented the plaintiffs in the [*ODonnell*] case and . . . said that the *Daves* case does nothing to undermine the plaintiffs’ basic contention . . .”).

84. Ken W. Good, The Plaintiffs Suffer Rug Burns: *Daves v. Dallas County*, Att’y at L. Mag. (Jan. 27, 2022), <https://attorneyatlawmagazine.com/the-plaintiffs-suffer-rug-burns-daves-v-dallas-county> [<https://perma.cc/QWJ6-TNMX>] (“[*Daves*’s] seismic impact will be felt . . . in . . . any jurisdiction in Texas and the Fifth Circuit—and beyond—under threat of suit for bail-related issues. The Fifth Circuit has spoken. Will the plaintiffs proceed to the U.S. Supreme Court? Do they have any other choice? Stay tuned.”).