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The Professional Bondsman: A State Action Analysis

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ARTICLES

THE PROFESSIONAL BONDSMAN: A STATE ACTION ANALYSIS

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I. INTRODUCTION

> If it is true that the quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law, then the American bail system as it now operates can no longer be tolerated. At best, it is a system of checkbook justice; at worst, a highly commercialized racket.[1]

THE PROFESSIONAL BAIL BONDSMAN SYSTEM, antiquated and replete with documented deficiencies, remains in "full and odorous bloom"[2] throughout much of the United States. Although the founding axioms of the commercial bail system are contemporarily suspect and have been challenged by both jurists and commentators, reform has largely failed to eliminate the corporation surety as a cornerstone of the bail process.[3]

This Article is premised upon the axiom that the bail bondsman system is as persevering as it is draconian and is a reality which must be addressed if not eliminated. While the wheels of legislative reform turn slowly in quest of a remedy for the system and "all its abuses,"[4] it is pragmatic to direct attention to one small cure, to wit, the legal redress which may be sought by a principal who has been deprived of his rights by the bondsman[5] through exercise of the latter's quasi-police powers of arrest and retrieval.

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[1] A. Goldberg, forward to R. GOLDFARB, RANSOM, A CRITIQUE OF THE AMERICAN BAIL SYSTEM ix (1965) [hereinafter cited as RANSOM].

[2] Schilb v. Kuebel, 404 U.S. 357, 359 (1971), referring to the Illinois professional bail bondsman system which existed prior to legislative reform.

[3] Unfortunately, the following prophecy has failed to materialize: "The future of the surety bail can be summarized simply: It has no future. It does not now perform any important system function and will not long remain a part of the criminal justice system." W. THOMAS, BAIL REFORM IN AMERICA 254 (1976) [hereinafter cited as BAIL REFORM].

[4] Schilb v. Kuebel, 404 U.S. at 359, referring to the Illinois bail system.

[5] The terms bondsman, surety, corporate and commercial bondsman are used interchangeably throughout this Article as are the terms accused, defendant and principal.

Bondsmen typically enjoy the statutory right to arrest their principals, which is derived from the common law right established by the Supreme Court over one hundred years ago. This right includes the authority to break and enter a principal's house without a warrant for purpose of arrest. In short, "the bail [bondsmen] have their principal on a string, and may pull the string whenever they please."[6]

Principals who have been subjected to illegal or excessive arrest procedures by the bondsman have secured only minimal redress in state judicial forums upon initiating tort actions founded upon false imprisonment, trespass and assault and battery. This Article will explore how an abused principal can attempt to secure legal redress in the federal forum, utilizing 42 U.S.C. § 1983.[7] Section 1983 creates a cause of action for violations of constitutional rights incurred "under color of" law, the conceptual statutory equivalent of fourteenth amendment "state action." Whether the nexus between the private bondsman and the state is sufficient to transform the private conduct of the bondsman into action of the state for section 1983 purposes has resulted in contradictory judicial pronouncements which must be reconciled and examined in light of recent Supreme Court "state action" decisions. The difficulty of this analysis is compounded by the Supreme Court's inability to formulate a clear and coherent state action doctrine. The Supreme Court's attempt to differentiate between private and state action has resulted in what has been aptly noted a "conceptual disaster area."[8] This Article will attempt to apply state action analysis to the commercial bondsman process in an effort to determine whether section 1983 actions are cognizable against bondsmen and their agents.

II. THE BAIL BOND SYSTEM

A. *Nature of the Bail Bond System*

"Certainly the professional bondsman system . . . is odious at best. . . ."[9] An understanding of the nature of the bail bond system is essential to

[6] Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371-72 (1872).

[7] 42 U.S.C. § 1983 states in full:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1871).

[8] Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV L. REV. 69, 95 (1967). For a compendium of several major state action treatises see Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 227 nn.24-25 (1976). *See also* references in note 156 *infra*.

[9] Judge Skelly Wright observed in Pannel v. United States, 320 F.2d 698 (D.C. Cir. 1963) (Wright, J., concurring).

this discussion. Pretrial release, whether by bail, personal recognizance or some other method, is premised upon the maxim that every individual is presumed innocent until proven guilty beyond a reasonable doubt.[10] However, it does not follow that every person is innocent. Accordingly, any statutory system of pretrial release must be flexible enough to permit the judiciary to balance the accused's right to freedom with the right of society to assure his presence at trial. Factors commonly codified include the nature and circumstances of the alleged offense and the accused's prior arrest record, prior record of appearance, economic status, family and community status, character and mental condition.[11] When these factors are such that release on personal recognizance is deemed insufficient to assure the future presence of the accused, bail or other conditional release may be required or release denied altogether.[12]

> Certainly the professional bondsman system . . . is odious at best. The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety—who in their judgment is a good risk. The bad risks, in the bondsmen's judgment, *and the ones who are unable to pay the bondsmen's fees*, remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.

Id. at 699. The bondsman may accordingly withhold his services arbitrarily without judicial influence or review. *See* Ares, Rankin & Sturz, *The Manhattan Rail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. REV. 67 (1963). Three years subsequent to Justice Wright's opinion the "keys to the jail" were taken from the bondsman and returned to the court. *See* Bail Reform Act of 1966, 18 U.S.C. §§ 3146-3156 (1969), as discussed in note 43 *infra* and accompanying text.

[10] The Supreme Court has aptly stated:

> 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, *See Hudson v. Parker*, 1895, 156 U.S. 257, 285, 15 S.Ct. 450, 453, 39 L.Ed. 424. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

Stack v. Boyle, 342 U.S. 1, 3 (1951). *Accord, In re* Winship, 397 U.S. 358, 362 (1970); Dudley v. United States, 242 F.2d 656 (5th Cir. 1957); Sistrunk v. Lyong, 646 F.2d 64, 68 (3d Cir. 1971). *See also* Mostyn, *Bail and the Presumption of Innocence*, 61 LAW. SOCY'S GAZETTE 799 (1964).

[11] *See* note 127 *infra* for compilation of applicable state statutes. The Bail Reform Act of 1966, 18 U.S.C. §§ 3146-3156, which has been emulated by Alaska, Iowa, Maryland, Missouri, Nebraska, New Mexico, North Dakota, Ohio, Vermount, Wisconsin and Wyoming, directs the judicial officer to examine

> the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of conviction, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

18 U.S.C. § 3146(b) (1966). *See also* 8 AM JUR. 2d *Bail and Recognizance* § 7 (1980); Annot., 11 A.L.R.3d 1385 (1967) (insanity of accused as affecting right to bail).

[12] Statutes or state constitutional provisions which permit the prohibition of

With the exception of a discrete and progressive minority, all states permit utilization of a corporate or professional surety release.[13] The surety, or professional bondsman, is typically a licensed insurance agent who executes a contract whereby the accused tenders a nonreturnable premium or fee (usually ten percent of the bond) and the surety agrees to execute a second contract with the appropriate statutory official (usually the sheriff or a judicial officer). The accused is then released to the custody of the surety and the surety pledges that the accused will attend all judicial proceedings. If he fails to do so, the surety will be financially accountable for the face amount of the bond. The surety-accused contract invariably authorizes the former to arrest and surrender the latter at any time in exoneration of the surety's liability to the sovereign,[14] as the accused is deemed to be in the continued custody of the surety.

B. *The Problem*

> "The professional bondsman is an anachronism in the criminal process. Close analysis of his role indicates he serves no major purpose that could not be better served by public officers at less cost in economic and human terms."[15]

Support for the eradication of bail systems wherein the bondsman serves as the cornerstone began in the early 1960's as a result of studies which indicated that alternate methods of pretrial release, discussed

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pretrial release when the alleged offense is captial, where the proof is evident or the presumption great, or where the accused is adjudged a "danager to the community," are inherently at tension with the proscription of the eighth amendment to the United States Constitution, that "excessive bail shall not be required." U.S. CONST. amend. VIII. *See generally* Hruska, *Preventive Detention: The Constitution and Congress*, 3 CREIGHTON L. REV. 36 (1969); Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L.J. 1140 (1972); Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1123 (1969).

[13] *See* notes 33-49, 110-25 *infra* and accompanying text.

[14] The courts have upheld the validity of such contracts. *See* Leary v. United States, 224 U.S. 567, 575 (1912); United States v. Trunko, 189 F. Supp. 559, 565 (E.D. Ark. 1960).

A typical contract is provided at 3 AM. JUR. LEGAL FORMS 2d *Bail and Recognizance* § 35.26 (surrender of principal); 4 AM. JUR. PL. & PR. FORMS (REV.) *Bail and Recognizance*, Forms 91, 92 (authority to arrest principal). *See also* Note, *Indemnification Contracts in the Law of Bail*, 35 VA. L. REV. 496, 500 (1949).

[15] A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PRETRIAL RELEASE 64-65 (1968) [hereinafter cited as A.B.A. STANDARDS]. To a similar effect:

> Two principal arguments have thus far been advanced by the bondsmen to justify their continued existence: (1) Without their services, the failure to appear rate of defendants would skyrocket; and (2) They are necessary to apprehend defendants who skip out on their bail and flee prosecution. Both claims are quite clearly false.

BAIL REFORM, *supra* note 3, at 255.

below, would adequately assure the presence of the accused without implementation of a corporate surety.[16] Analysis of the corporate surety reveals that the bondsman lacks contemporary functional utility and further serves his quasi-judicial function in a manner which discredits an otherwise relatively integrated judicial system. What little service the bondsman may provide to the accused or to the sovereign is heavily outweighed by the pattern of institutional corruption and absence of internal and external accountability which has attended the existence of the bondsman.

The bondsman's lack of functional utility arises in part from a failure to satisfy one of the primary justifications for the inception of the bail system, that is, service to the judicial system by assuring the appearance of the accused.[17] Once release is procured, contract between the surety and the client is often *de minimus*, typically limited to a notice of the impending trial date.[18] The bondsman's ability to foreclose on a col-

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[16] The catalyst for bail reform was the Manhattan Bail Project, conducted in 1960 by the Vera Foundation, which promulgated guidelines which the New York City courts successfully utilized to release defendants using methods other than corporate bail. *See* Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. REV. 67, 71-75 (1963).

[17] The justifications for the corporate surety are derived from the deviation between historical England and the United States. Historically, England released individuals upon recognizance of the accused, the accused's family or friends. The fear of banishment from the country and confiscation of land and status provided the incentive against bail jumping. This method proved unadaptable to America which from its inception was uncharted, mobile and not land oriented. Instead, a system of pretrial release was instituted which required financial deposit as a prerequisite. Individuals without friends, property or the financial ability to satisfy the face value of the bail secured the services of a professional bondsman whose position grew as a natural consequence of the commercial bail system. For a fee, the bondsman would service the client by enabling pretrial release and service the sovereign by assuring the appearance of the accused and continued custody of the accused. These two primary justifications for the existence of the bondsman have become antiquated. For further historical discussion, see Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 699 (1961); E. D. HAAS, ANTIQUITIES OF BAIL (1940); RANSOM, *supra* note 1, at 6-32, 93-94 (a concise evolution of the bondsman); *see also* 2 POLLACK & MAITLAND, THE HISTORY OF ENGLISH LAW 589, 590 (2d ed. 1899).

[18] Not only is little required of bondsmen legally, but also they actually do very little in terms of service. Often bondsmen lose track of defendants, maintain mimimal contact with them before trial, or merely send a reminder note to the defendant to assure his presence for trial. They do very little work for their money. Criticizing bondsmen for forgetting even to advise their clients to appear for trial, one Rhode Island Superior Court judge accused them of "wallowing in wealth" and being "too busy collecting money to be bothered carrying out their obligations."

RANSOM, *supra* note 1, at 101. Note, however, that more recent commentators have presented a less optimistic picture of the bondsman's financial success. *See* P. WICE, FREEDOM FOR SALE 53-55 (1974) [hereinafter cited as FREEDOM FOR SALE] (bail reform projects result in release of the best potential clients). Wice concurs,

lateral pledge or obtain judicial postponement of forfeiture of the bond until the accused has been apprehended by the police has diminished the surety's initiative to assure the appearance of the accused.[19] The other primary justification for the presence of the bondsman, that of service to the client by enabling pretrial release through a financially-based bail system, has been nullified by the advent of alternative, non-financial pretrial release methods.[20] As a result, the bondsman's services are usually unnecessary.

The commercial bondsman operates with an alarming absence of internal or external accountability. This has predictably resulted in abusive procedures and practices which have caused both jurists and commentators to attach such terms as "low-lifes,"[21]

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however, in the the conclusion that the bondsman fails to maintain adequate contact with the principal:

> Although several bondsmen worked long and hard at maintaining adequate contact with their clients, the majority seemed to be lax and merely assumed that the defendant would appear for trial. It was only when the defendant failed to appear that the bondsman would spring into action and work through his network of informants and "skip tracers," modern day bounty hunters, to retrieve the missing defendant.

Id. at 58. *See also*, J. MURPHY, ARREST BY POLICE COMPUTER 41 (1977) [hereinafter cited as POLICE COMPUTER] ("the assumed custodial efforts and dominion by the surety-for-profit over the defendant during the period of release are simply nonexistent."); Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125, 1162 (1965) (referring to the bondsman's claims of significant custodial services as "frivolous").

[19] The Illinois legislature, upon promulgating theretofore unknown and unique bail reform, noted:

> As the value of bondsmen being responsible for the appearance of accused and tracking him down and returning him at the bondsmans' expense—the facts do not support this as an important factor. While such is accomplished occasionally without expense to the county, the great majority of bail jumpers are apprehended by the police of this and other states. Since bail jumping is now a distinct and separate crime, and with the nation-wide exchange of information between law enforcement agencies and the F.B.I., the average bail jumper has little chance of escape. The facts show that most of them are recaptured in this state, and even in the same county where they are to appear.

ILL. ANN. STAT. ch. 38, § 110-1-§ 110-17 (Smith-Hurd) (Committee Comments, 1963, revised in 1970 by Charles H. Bowman).

[20] *See* notes 33-49 *infra* and accompanying text.

[21] One of the forefathers of bail reform, Ronald Goldfarb, has stated:

> Who is this quasi-public servant for whom the law has created this sinecure? Many, too many, agents are undesirable persons, former felons, and generally repugnant characters. Some bondsmen are colorful Runyonesque characters. Some are legitimate businessmen. But too many are "low-lifes" whose very presence contaminates the judicial process.
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> . . . .
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> [V]ery frequently, if not generally, the bail bondsman is an unappealing and useless member of society. He lives on the law's inadequacy and his fellowman's troubles. He gives nothing in return, or so little as to serve

"evil"[22] and "unconscionable"[23] to the corporate surety. Virtually every study of the bondsman has revealed a pattern of institutional corruption, including connection with organized crime, kickbacks and payoffs to defense attorneys and judicial officers who refer the accused to the bondsman, bribes and abuse of the forfeiture pledge by obtaining grace periods during which the bondsman may attempt to surrender the accused.[24] Too often an accused is charged exorbitant fees in excess of statutory limitations for only a relatively short period of freedom.[25]

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no overriding utilitarian purpose. Society must share the blame for this creature. Our system created him.

RANSOM, *supra* note 1, at 101-02. Other commentators have advanced a less critical opinion of the bondsman. *See also* The Plain Dealer, August 3-8, 1980 (series of articles and editorials entitled "The Freedom Sellers").

[22] Feeney, forward to BAIL REFORM, *supra* note 3, at xi:

As one solution, the book suggests what nearly every current observer of the bail scene already knows: At a minimum, the present system of commercial surety bail should be simply and totally abolished. Whatever it may have accomplished in the past, it is now an anachronism. It is not so much that bondsmen are evil—although they sometimes are—but rather that they serve no useful purpose. The only benefit that they serously claim to confer—that of catching persons who jump bail—is largely illusory.

Id.

[23] The Supreme Court has observed:

The commercial bail bondsman has long been an anathema to the criminal defendant seeking to exercise his right to pretrial release. In theory, courts were to set such amounts and conditions of bonds as were necessary to secure the appearance of defendants at trial [citations omitted]. Those who did not have the resources to post their own bond were at the mercy of the bondsman who could exact exorbitant fees and unconscionable conditions for acting as surety. [citations to articles omitted]. Criminal defendants often paid more in fees to bondsmen for securing their release than they were later to pay in penalties for their crimes.

Schilb v. Kuebel, 404 U.S. 357, 373-74 (1971) (Douglas, J., dissenting).

[24] The practice of postponing or obtaining grace periods in which to void forfeiture of the bond is particularly prevalent in Cleveland, Ohio. L. KATZ & D. CLANCY, REPORT ON BAIL IN CUYAHOGA COUNTY 43, 47 (Dec. 1975); The Plain Dealer, Dec. 23, 1978, at A-12, col. 1. *See generally*, RANSOM, *supra* note 1, at 103-15 (excellent discussion undiminished by time); FREEDOM FOR SALE, *supra* note 18; *see also* United States v. Herman, 589 F.2d 1191 (3d Cir. 1978) (2 state court magistrates convicted of racketeering for accepting 50% of bond premiums from bondsmen as a kick-back).

[25] After release, the bondsman may become privy to additional information about the accused, the nature of the crime or the strength of the state's evidence, and may decide to arrest and surrender the individual into the custody of the sovereign, usually without return of the ten percent fee. *See* FREEDOM FOR SALE, *supra* note 18, at 62. The bondsman-principal contract which permits surrender of the accused without a return of the fee was unsuccessfully challenged as "illegal" in Smith v. Rosenbaum, 333 F. Supp. 35 (E.D. Pa. 1971), *aff'd*, 460 F.2d 1019 (3d Cir. 1972). These practices are in dire need of legislative reform.

Methods by which bondsmen may attempt to circumvent a statutory limitation on the amount of fee chargeable were revealed in Citizens for Pre-Trial

The most pronounced and potentially dangerous absence of bondsman accountability is the surety's virtually unlimited authority to arrest and surrender the principal without resort to legal process or a search warrant. Thus, the bondsman is permitted to circumvent the fourth amendment's proscription against unreasonable searches and seizures which attaches to law enforcement personnel acting under color of law.[26] The bondsman, untrained in arrest procedures and medical techniques, may therefore do that which the qualified police officer performing under color of uniform cannot, all for the purpose (as far as the bondsman is concerned) of preventing a forfeiture of the bond and thereby securing a profit from the bail undertaking.[27] Not surprisingly, the bondsman's utilization of this quasi-police power of arrest, which has been conspicuously unaccompanied by a corresponding judicial or statutory regulatory system of control, has resulted in tragedy to principals whose only offense was that of having been charged with a crime and who were forced to utilize the services of a bondsman to obtain pretrial release. Both the judiciary and commentators have documented the violence and death which have attended Procrustean arrests.[28]

Justice v. Goldfarb, 88 Mich. App. 519, 278 N.W.2d 653 (1979) (court held that bondsmen could charge only 10% of bondsmens' risk; also, taking collateral which, alone or with premium charged, exceeded 10% of face value on bond violated the statute).

[26] Discussed in note 53 *infra* and accompanying text.

[27] The bondsman appears to be unique in possessing the authority to arrest, which traditionally has been exclusively reserved to the sovereign to protect and promote the public welfare for the purpose of preventing a financial loss through forfeiture of the bond. Although business operators are often statutorily authorized to detain or arrest suspected shoplifters (which in essence is to prevent financial loss), such are distinguishable from bondsmen since businessmen detain or arrest an individual breaking the law, but bondsmen arrest an individual who has breached a bond contract. For a discussion of business operators see Thompson v. McCoy, 425 F. Supp. 407 (D.S.C. 1976); DeCarlo v. Joseph Horne and Co., 251 F. Supp. 935 (W.D. Pa. 1966), and statutes cited therein; Note, *The Merchant, the Shoplifter and the Law*, 55 MINN. L. REV. 825 (1971).

It is ironic that under attachment and garnishment law creditors may "arrest" property in the possession of the debtor only upon satisfying due process requirements, but a bondsman, whose interest is essentially that of a creditor, may arrest an individual without the same constitutional safeguards. *See, e.g.*, OHIO REV. CODE ANN. § 2715.03, Ohio's prejudgment attachment statute, which was held violative of the due process clause of the fourteenth amendment to the U.S. Constitution and Article 1, §§ 1, 16 and 19 of the Ohio Constitution. Peebles v. Clement, 63 Ohio St. 2d 314, 408 N.E.2d 689 (1980). *See also* Fuentes v. Sheven, 407 U.S. 67 (1972), where two summary repossession statues which failed to provide the debtor with a minimal due process hearing before the issuance of a writ of replevin ordering state seizure of the property at issue were held violative of the fourteenth amendment.

[28] *See, e.g.*, Nicolls v. Ingersoll, 7 Johns 145 (N.Y. 1810) ("great roughness" used); Read v. Case, 4 Conn. 166 (1822) (assault and imprisonment); State v. Lingerfelt, 109 N.C. 775, 14 S.E. 75 (1891) (principal shot and killed by surety's bounty hunter while resisting arrest); McCaleb v. Peerless Insurance Co., 250 F. Supp. 512 (D. Neb. 1966) (principal handcuffed and driven around state for eighty

The extent to which the authority of arrest has been and will continue to be utilized is not highly visible nor subject to empirical examination since such utilization is a function of several variables, including the following: the frequency at which the judiciary requires corporate bonds; the statutory or judicial regulation or control of the bondsman; and the number of principals who "skip bond" and the number of those who are not reapprehended by the police.[29] Also, an abused principal may be deterred from initiating civil litigation against the surety if incarcerated as a result of the original charge for which bail was required or if he is financially unable to do so.[30] Accordingly, the number of in-

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hours); Shine v. State, 44 Ala. App. 171, 204 So. 2d 817 (1967) (bondsman killed by principal resisting arrest); Livingston v. Browder, 51 Ala. App. 366, 285 So. 2d 923 (1973) (house of principal's mother forcefully entered); Poteete v. Olive, 527 S.W.2d 84 (Tenn. 1975) (bounty hunter broke principal's leg); United States v. Trunko, 189 F. Supp. 559 (E.D. Ark. 1960) (principal arrested at night, handcuffed, driven non-stop from Arkansas to Ohio); Thomas v. Miller, 282 F. Supp. 571 (E.D. Tenn. 1968) (principal chained and forced to ride on car floor); Maynard v. Kear, 474 F. Supp. 794 (N.D. Ohio 1979) (principal assaulted, handcuffed and dragged out of apartment clothed only in underwear in January); Dunkin v. Lamb, 500 F. Supp. 184 (D. Nev. 1980) (bondsman utilized excessive force in presence of police who refused to intervene); Hill v. Toll, 320 F. Supp. 185 (E.D. Pa. 1970) (principal beaten and robbed by bounty hunters); Austin v. State, 541 S.W.2d 162 (Tex. App. 1976) (forceful entry, principal assaulted and handcuffed). *See also* Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1067 (1954); FREEDOM FOR SALE, *supra* note 18, at 31 (citing one instance where a bondsman had vowed to return the principal "dead or alive," and another where an innocent third party was shot and killed at 2:00 a.m. while resisting a bounty hunter who mistakenly believed the victim was a principal); RANSOM, *supra* note 1, at 117-18 (citing instance where four bounty hunters forced a couple into their custody at gunpoint and, representing themselves as FBI agents, held them captive for eleven hours, questioning them about the whereabouts of a bail jumper); Note, *Bailbondsmen and the Fugitive Accused—the Need for Formal Removal Procedures*, 73 YALE L.J. 1098 (1964):

> Interviews with bondsmen reveal that some bondsmen pursue bail-jumpers even where adequate security has been given by a third-party indemnitor, in order to maintain a reputation for relentless pursuit as a general psychological deterrent to flight.

Id. at 1106 n.40; Note, *The Hunter and the Hunted: Rights and Liabilities of Bondsmen*, 6 FORDHAM URB. L.J. 333 (1978).

[29] However, even conservative speculation denotes the magnitude of the extent to which the arrest authority is utilized by the bondsman. Since it has been estimated that at least ten to twelve million bonds are issued per calendar year (*see* RANSOM, *supra* note 1, at 96), it can be assumed conservatively that only ten percent (1,000,000) of these are corporate bonds. It can be further assumed that the nonappearance rate documented in Illinois as ten percent is generally representative of the country. *See* BAIL REFORM, *supra* note 3, at 255. The conclusion is that 6,000 arrests per year will be made by bondsmen.

[30] These barriers have surfaced in the context of individuals abused by law enforcement officials. *See, e.g.*, Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CIN. L. REV. 345, 352 (1936); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 507 (1955); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1165 n.48 (1960).

stances in which abuses have been documented must be considered as representative of a larger class.

It is posited that even one abusive arrest is too many. The authority to arrest should exist solely with law enforcement personnel who are subject to internal policy accountability, statutory and constitutional restrictions both procedural and substantive in nature, physical and medical training, and whose ability to retrieve such principals has been facilitated through the advent of modern interstate communications and methods of record keeping.[31] Few states, however, have implemented reform in this area.[32]

C. *The Solution*

> "Certainly the legislature could take cognizance of the inherent evils and abuses of the compensated surety in the bail bond system."[33]

One method of reform or solution to the foregoing problem consists of statutory or judicial regulation and control of the bondsman. Both have been attempted in varying degrees in the majority of states and in many municipalities.[34] The typical regulation establishes conditions for

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[31] *See* POLICE COMPUTER, *supra* note 18, strongly advocating this position.

[32] Illinois, Oregon and Kentucky have eliminated the use of the corporate bond. In those states which have retained the corporate bond as a method of pretrial release, only New Jersey, South Carolina and Maryland do not expressly or implicitly provide statutory authority for the bondsman to arrest. Connecticut permits only law enforcement officers to arrest the principal. *See* CONN. GEN. STAT. ANN. §§ 54-65, 52-319 (West 1980 & Supp. 1980).

Texas requires that the bondsman obtain an arrest warrant. TEX. CODE CRIM. PROC. § 17.19 (Vernon 1977). This statute is exclusive of the common law rights of the bondsman as established in Taylor v. Tainter, 83 U.S. (16 Wall.) 366 (1872), and noncompliance with this statute exposses the bondsman to a false imprisonment action. *See* Austin v. Texas, 541 S.W.2d 162 (Tex. Crim. App. 1976). While this statute imposes some restrictions on the bondsman's virtually unlimited common law arrest powers, this superficial reform is insufficient to adequately protect the principal since the bondsman still retains the ultimate authority to effectuate an arrest.

[33] Stephens v. Bonding Ass'n of Kentucky, 538 S.W.2d 580 (1976).

[34] *See, e.g.*, ALA. CODE §§ 15-13-22 *et seq.* (Michie 1975); ALASKA STAT. § 9.65.030 (Michie 1962); ARK. STAT. ANN. §§ 43-734 to 43-747 (Bobbs-Merrill 1977); COLO. REV. STAT. §§ 12-7-101 *et seq.* (Harrison 1978); HAWAII REV. STAT. § 804-10 (1976); IDAHO CODE §§ 42-2601 *et seq.* (Bobbs-Merrill 1977); IND. CODE ANN. §§ 35-4-5-1 *et seq.* (Burns 1979) (extensive regulation); KAN. STAT. ANN. § 22-2806 (Weeks 1974); MASS. ANN. LAWS ch. 276, § 61B (Law. Co-op 1980); MICH. COMP. LAWS ANN. §§ 550.101 *et seq.* (West 1967); MINN. STAT. ANN. § 629.67-.70 (West 1974); MISS. CODE ANN. §§ 83-39-1 *et seq.* (1972); MO. ANN. STAT. §§ 544.580, 544.590 (Vernon 1974); NEV. REV. STAT. §§ 697.010 and 178.504 (1979); N.H. REV. STAT. ANN. § 598-A:1 (Equity 1977); N.J. STAT. ANN. §§ 59-32-1 *et seq.* (West 1982) (extensive regulation); N.D. GEN. STAT. §§ 85C-1 *et seq.* (West 1976) (extensive regulation); OKLA. STAT. ANN. tit. 33, §§ 1301 *et seq.* (West 1976); PA. CONS. STAT. ANN. §§ 5741 *et seq.* (Purdon 1979); S.C. CODE § 38-13-10 (Law. Co-op 1977); S.D. CODIFIED LAWS ANN. §§ 58-22-1 *et seq.* (1977) (extensive regulation); VA. CODE §

obtaining and maintaining a license. The pragmatic problem of enforcement, however, renders the regulatory method of bondsman control ineffective and easily circumvented.[35]

The ultimate solution obviously requires a direct or indirect elimination of the corporate surety from the bail process, as has been advocated by the American Bar Association since 1968.[36] Such reform axiomatically necessitates replacement of the surety system with an alternative system by which comparable appearance rates will be assured. The two primary and "proven" pretrial release methods which have been advocated as alternatives include release upon personal recognizance (possibly attended by restrictive conditions), which has in many jurisdictions become the presumed method of release,[37] and release under a "ten percent deposit" system which bypasses the bondsman. Under the latter method ten percent of the amount of an appearance bond is deposited with the court and such is thereafter returned (or ninety percent thereof) upon the performance of the conditions of release.

The ten percent deposit system, where the court serves as the bondsman, benefits both the accused and the state.[38] The accused recovers

58-371.2 (Michie 1974); WASH. REV. CODE ANN. §§ 48.11.010 *et seq* (1980); W. VA. CODE § 15-10-1 (West 1961).

[35] Regulation, which was almost nonexistent twenty years ago, has been increasingly promulgated by states and municipalities. *See* FREEDOM FOR SALE, *supra* note 18, at 54; Murphy, *State Control of the Operation of Professional Bail Bondsmen*, 36 U. CINN. L. REV. 375 (1967); Note, *Bail Bondsmen: An Alternative*, 6 SUFFOLK L. REV. 937, 945-52 (1972); *see also* Murphy, *Revision of State Bail Laws*, 32 OHIO ST. L.J. 451, 454 (1971) (noting several states which have adopted the Uniform Bail Bondsmen Licensing Act). For a discussion of the validity, construction and application of statutes regulating the bail bond business, see Annot., 13 A.L.R.3d 618-46 (1967).

[36] *See* A.B.A. STANDARDS, *supra* note 15, at 64.

[37] The bail Reform Act of 1966, 18 U.S.C. §§ 3146 *et seq.*, makes release on personal recognizance the presumptive form of bail in the federal forum. A similar conclusion attaches to those states which have emulated the Bail Reform Act of 1966, to wit: Alaska, Arizona, Iowa, Maryland, Missouri, Nebraska, New Mexico, North Dakota, Vermont, Wisconsin and Wyoming.

The success of release upon personal recognizance has been the subject of several studies. *See, e.g.*, Pettine, *Trends in Own Recognizance Release: From Manhattan to California*, 5 PA. L.J. 675 (1974); Howard & Pettigrew, *R.O.R. Program in a University City*, 58 A.B.A.J. 363 (1972); Hawthorne & McCully, *Release on Recognizance and the Dane County Bail Study*, 1965 WIS. L. REV. 156; Wice & Simon, *Pretrial Release: A Survey of Alternative Practices*, 34 FED. PROBATION 60 (1970); Note, *Release on Recognizance: A Proven System*, 18 LA. BAR. J. 183 (1970).

[38] *See generally* Rice & Gallagher, *An Alternative to Professional Bail Bonding: A 10% Cash Deposit for Connecticut*, 5 CONN. L. REV. 143 (1972); Conlin & Meagher, *The Percentage Deposit Bail System: An Alternative to the Professional Bondsman*, 1 J. CRIM. JUST. 299 (1973). *See also* citations to authorities in note 43 *infra*.

part of the bail, which does not occur through utilization of a corporate surety. As a result the initial acquisition of the necessary deposit amount from friends or relatives who can be repaid is facilitated. Such restriction further provides the accused with an incentive to appear for future proceedings. Recovery renders the financial factor of pretrial release less important and punitive, thereby eliminating to an extent the inherently discriminatory effects that any financially founded pretrial release process has upon the indigent accused and creates a more equitable system which is ultimately in the state's best interest.[39] Importantly, the ten percent system eliminates the corporate surety as a cornerstone of the bail process and restores control of the bail system to the judiciary with no detrimental effects to the accused or the sovereign. The ten percent deposit system manifests an implementation cost financially parallel to the corporate system.[40] Most importantly, emperical studies conclusively demonstrate that the appearance rates for individuals released upon a ten percent deposit bond and those released upon a corporate surety bond do not substantially deviate.[41] The benefits of the ten percent deposit system are intuitively obvious.

Illinois has utilized the ten percent deposit bail exclusive of corporate bail since 1965 with undisputed and documented success.[42] The federal

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[39] The inherent inequities of a financially founded pretrial release system and the rights of the indigent have proved to be major catalysts of the bail reform movement. Justice Douglas of the United States Supreme Court has stated:

> Further reflection has led me to conclude that no man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on "personal recognizance" where other relevant factors make it reasonable to believe that he will comply with the orders of the Court.

Bandy v. United States, 82 S. Ct. 11, 13 (chamber opinion), *cert. denied*, 368 U.S. 852 (1961). This progressive philosophy was adopted and utilized by Congress several years later through promulgation of the Bail Reform Act of 1966. *See also* Ares & Sturz, *Bail and the Indigent Accused*, 8 CRIM. & DELINQ. 12 (1962); Lay, *Pretrial Release for Indigents in the U.S.*, 12 U. TASM. L. REV. 300 (1966); Longedorf, *Is Bail a Rich Man's Privilege?*, 7 F.R.D. 309 (1947); Note, *Bail: Conditions of Pre-Trial Release for Indigent Defendants*, 75 DICK. L. REV. 639 (1971); Comment, *Indigent Court Costs and Bail: Charge them to Equal Protection*, 21 LA. L. REV. 627 (1961); Comment, *Bail and the Indigent: Is There Equal Justice Under the Law?*, 9 ST. LOUIS U.L.J. 268 (1964); Comment, *Institution of Bail as Related to Indigent Defendants*, 21 LA. L. REV. 627 (1961).

[40] *See* BAIL REFORM, *supra* note 3, at 195.

[41] *See e.g.*, BAIL REFORM, *supra* note 3, at 194.

[42] ILL. ANN. STAT. ch. 38, § 110-1 through § 110-17 (Smith-Hurd 1980), permits a ten percent deposit bail exclusive of the corporate bail, ninety percent of which is returned to the individual upon satisfying the conditions of the bond. The retention by the courts of ten percent of the bail to cover administrative costs was determined to be constitutional in Schilb v. Kuebel, 404 U.S. 357 (1971), wherein such practice was challenged (1) as violative of the Constitution of Illinois when such assessment was maintained against a discharged defendant, and (2) as violative of the United States Constitution as discriminatory against that class of individuals which could not financially invoke a parallel statutory provision which

government was second to initiate reform through promulgation of the Bail Reform Act of 1966[43] which greatly diminished, but did not eliminate, the role of the corporate surety. The Act provides the judicial officer with several options of pretrial release including parallel use of both corporate and ten percent deposit bonds which has resulted in the continued use of the commercial bondsman.[44] The continued use of the commercial bondsman may be due to the judicial officer's lack of comparative analysis of the two systems; lack of knowledge of the institutional corruption and abusive practices attending the corporate surety; reluctance to part with tradition; a *laissez-faire* attitude; a subjective conviction that appearance for trial is more likely assured when the accused is subjected to a bondsman's supervision and/or authority of surrender and arrest; or possibly a desire to totally prevent pretrial release of a dangerous individual by requiring a corporate surety bond which is unlikely to be secured.[45] Whatever the motivation may be, the

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permitted the accused to deposit the full amount of the bond with the court and thereafter receive 100% restitution. *See also* Smith & Reilley, *The Illinois Bail System: A Second Look*, 6 J. MAR. J. PRAC. & PROC. 33 (1972); Murphy, *Revision of State Bail Laws*, 32 OHIO ST. L.J. 451, 472 (1972); Bowman, *Illinois Ten Per Cent Bail Deposit Provision*, 1965 U. ILL. L.F. 35; Boyle, *Bail Under the Judicial Article*, 17 DE PAUL L. REV. 267, 272 (1968) (bail bondsman abruptly disappeared in Illinois due primarily to the success of the ten percent deposit statute); Kamin, *Bail Administration in Illinois*, 53 ILL. B.J. 674 (1965); Note, *The Administration of Illinois Bail Provisions: An Emperical Study of Four Downstate Illinois Counties*, 1972 U. ILL. L.F. 341.

[43] 18 U.S.C. §§ 3146, 3148-3149 (1969), incorporated in pertinent part into the Federal Rules of Criminal Procedure through Rule 46(a) thereof. The "reform" in the Bail Reform Act of 1966 consisted of the emphasis placed upon personal recognizance as the presumptive method of release and the implementation of a ten percent deposit bail alternative to the corporate bond. For further discussion see Bogomolny & Sonnereich, *The Bail Reform Act of 1966: Administrative Tail Wagging and Other Legal Problems*, 11 ARIZ. L. REV. 201 (1969); Wald & Freed, *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 A.B.A.J. 940 (1966); Note, *Bail Reform Act of 1966*, 53 IOWA L. REV. 170 (1967); BAIL REFORM, *supra* note 3, at 187.

[44] As shown in the Appendix, approximately twenty percent of the bonds required by the United States District Court, Northern District of Ohio, Eastern Division (which included Cleveland and Youngstown but not Akron, Ohio), during 1978, 1979 and 1980 were commercial bonds.

[45] Approximately two-thirds of the corporate surety bonds required in the United States District Court, Northern District of Ohio, Eastern Division, during the years 1978-1980, as noted in note 44 *supra*, were related to offenses involving guns or physical violence (usually armed bank robbery). Bondsmen are understandably reluctant to become involved:

> A guy that takes a gun and goes into a store or a bank must have it in the back of his mind that he'll use it if he has to. Now if I bail him and can't produce him in court, I've got to go get him. He didn't hesitate to pull a gun when he held you up and I make a good target, big as I am. Besides that the bonds in these cases run high, making the potential losses greater. Taking someone who has gone to the gun just isn't worth

result is that the logical alternative to the bondsman, the ten percent deposit, is often not utilized in the federal forum. Nevertheless, the Bail Reform Act of 1966 is universally recognized as a milestone in bail reform and has been emulated, along with its deficiencies, by several states.[46] For example, Oregon has totally eliminated the corporate surety as a method of securing pretrial release;[47] and Kentucky has assumed the ultimate reform posture of making the practice of issuing a corporate bond a criminal offense.[48] Unfortunately, however, the majority of states have failed to implement reform with an objective of eradicating the corporate surety.[49]

D. *A Recapitulation*

> "The proper approach is to ask whether, in view of the known abuses to which the business seems inevitably prone and its corrupting influence on the criminal courts, the bondsman's limited contribution to the system is worth preserving."[50]

Although the prominence of the professional bondsman has been severely restricted in many states and totally eradicated in a minority of others, the corporate surety has, to a large extent, withstood the bail reform movement of the past two decades. Those states which have retained the corporate bond have largely failed to curtail the bondsman's authority of arrest. The desirability of maintaining a bail system,

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> the risk. Besides a guy charged with that kind of offense knows he may be going away for a long time and that increases the chances he'll skip.

FREEDOM FOR SALE, *supra* note 18, at 15. Accordingly, the federal judiciary may prevent release of a potentially dangerous individual without violating the eighth amendment's proscription against excessive bail by setting a corporate bond of financially voluminous magnitude.

[46] *See, e.g.*, note 111 *infra*.

[47] Oregon permits pretrial release only through personal recognizance, supervised, or conditional release and ten percent deposit bond. *See* OR. REV. STAT. §§ 134.255, 135.260 and 135.265 (1979) respectively. Therefore OR. REV. STAT. § 29.630, which permits the surety to arrest the principal, can be considered as having been implicitly repealed. *See also* Snougger, *An Article of Faith Abolishes Bail in Oregon*, 53 OR. L. REV. 273 (1974).

[48] KY. REV. STAT. ANN. § 431.510 (Baldwin 1976). The Supreme Court of Kentucky determined that this statutory reform did not constitute a taking of the corporate surety's property without due process of law in deprivation of the fourteenth amendment to the United States Constitution, noting that the provision constituted a valid exercise of the police power and was justifiably promulgated to promote public welfare. Stephens v. Bonding Ass'n of Kentucky, 538 S.W.2d 580 (1976).

[49] Only Illinois, Oregon and Kentucky have eliminated the corporate bond as a method of securing pretrial release. *See* notes 42, 47 and 48 *supra* respectively. The bonding business has historically developed deep economic and political roots which have too often transgressed legislatures' shallow attempts of bail reform. *See* BAIL REFORM, *supra* note 3, at 184, noting that bondsmen strenuously opposed Illinois bail reform without success.

[50] 8B J. MOORE, MOORE'S FEDERAL PRACTICE 46-117 (3d ed. 1979).

whereby the private bondsman can elude the constitutional due process and fourth amendment restraints and extradition requirements of municipal and state law enforcement officers, is subject to serious scrutiny, if not objectionable *per se*.

The perseverance of the bondsman requires examination of the various methods of legal redress which may be invoked by the abused principal who is likely to continue as a victim of the corporate bail system. The balance of this article addresses these legal remedies with emphasis on 42 U.S.C. § 1983.

III. SOURCE AND SCOPE OF THE BONDSMAN'S AUTHORITY TO ARREST

The bondsman's authority to arrest and surrender the principal is derived from three overlapping sources: (1) the contractual nature of the undertaking between the surety and the principal, (2) the common law principles enunciated by the Supreme Court in *Taylor v. Taintor*,[51] and (3) statutory authorization. The parallel existence of these three sources of authority and the inability of the judicial forum to concur in which source is controlling (often failing to even distinguish among them), has resulted in ambiguous, confused and contradictory decisions which addressed primarily the procedural and substantive authority of the bondsman. Importantly, the rights of the accused and the liability of the surety deviate substantially depending upon which of the three sources the court views as being the basis for the bondsman's authority.

A. *The Contractual Undertaking*

> "[F]ocus on the nature of bail as a merely private undertaking ignores its reality as a method of securing the constitutional and statutory right to bail."[52]

The surety-principal contract typically authorizes the surety, or an agent thereof, to exercise jurisdiction and control over the principal during the period for which the bond is executed. Additionally, the contract authorizes the surety to arrest and surrender the principal at any time in exoneration of the bondsman's pledge to the sovereign.[53] When the agreement between the surety and the principal is viewed as strictly contractual in nature, it follows that the perimeters of the bondsman's conduct are derivative of (and limited only by) the terms of the contract. These contracts are invariably drawn in an adhesive format and afford little protection to the principal as to be unconscionable. Since the contract is private in nature, there is no "state action" performed by the bondsman when arresting the principal pursuant to the terms of the contract. Accordingly, the procedural and substantive con-

[51] 83 U.S. (16 Wall.) 366 (1872).

[52] Citizens for Pre-Trial Justice v. Goldfarb, 88 Mich. App. 519, 278 N.W.2d 653, 672 (1979).

[53] *See* note 14 *supra* and accompanying text.

stitutional restraints which attach to law enforcement agents in performing arrests will not apply to the bondsman.[54] Since the early 1800's the contractual nature of the surety-principal relationship has served as one primary focus of judicial examination wherein the perimeters of the bondsman's authority were at issue.[55] Both historical and more recent decisions have concluded that the bail undertaking authorizes the bondsman to arrest the principal without legal process or probable cause, limit the principal's freedom of movement and transport the principal across the state lines without extradition proceedings.[56] Simply, the private undertaking precludes application of constitutional standards, thereby creating in the bondsman powers which exceed those of law enforcement officers. The virtually unlimited powers of the bondsman as derivative of the contractual relationship are perhaps best summarized in the Fifth Circuit's oft-cited 1931 decision of *Fitzpatrick v. Williams*:[57]

> The right of the surety to recapture his principal is not a matter of criminal procedure, but arises from the private undertaking implied in the furnishing of the bond. In re Von Der Ahe [84 F. 959 (W.D. Pa. 1898)]. It is not a right of the state but of the surety. If the state desires to reclaim a fugitive from its justice, in another jurisdiction, it must proceed by way of extradition in default of a voluntary return. It cannot invoke the right of a surety to seize and surrender his principal, for this is a private and not a governmental remedy. It is equally true that the surety, if he

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[54] Conduct of law enforcement officers as agents of the sovereign is "under color of" law within the meaning of 42 U.S.C. § 1983 (cited in full at note 7 *supra*) and "state action" within the meaning of U.S. CONST. amend. V and XIV. Law enforcement officers must confine their conduct within the bondaries of constitutionally permissible standards as enunciated by the Supreme Court and as derivative of the Constitution itself. Failure to do so exposes the law enforcement officer to liability pursuant to actions founded upon 42 U.S.C. § 1983 or, in certain instances, directly under the United States Constitution. *See generally* Crocker, *When Cops are Robbers—Municipal Liability of Misconduct under Section 1983 and* Bivens, 15 U. RICHMOND L. REV. 295 (1981); Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980); *see also* Leuchtman, *Joint Liability in Police Misconduct Cases*, 60 MICH. BUS. J. (1981).

[55] Reese v. United States, 76 U.S. (9 Wall.) 13 (1869); Allied Fidelity Corp. v. C.I.R., 572 F.2d 1190 (7th Cir. 1978); Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547 (9th Cir. 1974) (*en banc*), *cert denied*, 421 U.S. 949 (1975); Hein v. United States, 135 F.2d 914 (6th Cir. 1943); Fitzpatrick v. Williams, 46 F.2d 409 (5th Cir. 1931); *In re* Von Der Ahe, 85 F. 959 (C.C.W.D. Pa. 1898); Curtis v. Peerless Ins. Co., 299 F. Supp. 429 (D. Minn. 1969); Thomas v. Miller, 282 F. Supp. 571 (E.D. Tenn. 1968); Golla v. State, 50 Del. 495, 135 A.2d 137 (1957); Nicolls v. Ingersoll, 7 Johns. 145 (N.Y. 1810).

[56] *See* Note, *Bailbondsmen and the Fugitive Accused—The Need For Formal Removal Procedures*, 73 YALE L.J. 1098 (1964) (advocating extradition reform).

[57] 46 F.2d 40 (5th Cir. 1931).

> has the right, is not required to resort to legal process to detain his principal for the purpose of making surrender. * * * As long as the principal remains within the jurisdiction, the right of bail to arrest and surrender him without process is conceded. As this right is a private one and not accomplished through governmental procedure, there would seem to be no obstacle to its exercise wherever the surety finds the principal. Needing no process, judicial or administrative, to seize his principal, jurisdiction does not enter into the question.[58]

Surprisingly, the surety-principal contract has rarely been challenged as unconscionable, illegal, against public policy or as an adhesion contract.[59]

It is myopic for the judiciary, in addressing the scope of the bondsman's authority of retrieval, to emphasize the contractual relationship between the surety and the principal while simultaneously ignoring or affording little importance to the existence of the sovereign as an active party to the contract or as a third-party beneficiary thereto. The bond undertaking is "essentially a tri-party agreement"[60] between the surety, the principal and the sovereign, and execution thereof is subject to the condition precedent of the state's consent. Ostensibly, the state authorizes the bondsman to engage in the business of being a private jailer,[61] funded by fees paid by the principal and without cost to the state, and thereby relieves itself of the financial expenses and legal liabilities incurred in guarding and maintaining the principal as a prisoner.[62] The sovereign, then, has a vested interest in the contract.

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[58] *Id.* at 40-41.

[59] A contract which allowed the surety to surrender the principal and retain the bond premium was challenged as "illegal" in Smith v. Rosenbaum, 333 F. Supp. 35 (E.D. Pa. 1971), *aff'd*, 460 F.2d 1019 (3d Cir. 1972). A trial on the merits was held before the court thereby implying that such a contract was valid. However, no contract principles were discussed thereby rendering this "contract" decision of negligible precedent.

Since the surety-principal contract implicitly authorizes the bondsman to utilize force if necessary, and thereby commit a tort upon the principal, such may be illegal as against public policy. *See generally* RESTATEMENT OF CONTRACTS § 512 (1932) ("[A] bargain is illegal . . . if either its formation or its performance is criminal, tortious, or otherwise opposed to public policy."); J. CALAMARI & J. PERILLO, CONTRACTS § 22-1 (2d ed. 1977).

[60] Allied Fidelity Corp. v. C.I.R., 572 F.2d 1190, 1193 (7th Cir.), *cert. denied*, 439 U.S. 835 (1978) (bail bond contracts for federal income tax purposes are not contracts of insurance).

[61] As the Supreme Court has appropriately noted: "When a prisoner is out of bond he is still under court control, though the bounds of his confinement are enlarged. His bondsmen are his jailers." Carlson v. Landon, 342 U.S. 524, 547 (1952).

[62] *See* Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 557 (9th Cir. 1974) (*en banc*) (Hufstedler, J., dissenting), *cert. denied*, 421 U.S. 949 (1975). *See also* Dill, *Discretion Exchange and Social Control: Bail Bondsmen in Criminal Courts*, 9 LAW AND SOC. REV. 639 (1975).

In addressing the perimeters of the bondsman's authority of retrieval, the proper judicial focus should be on the contract between the surety and the sovereign wherein the surety promises to provide what is essentially a police service,[63] that of the retrieval of the principal in the event of nonappearance at trial. Judicial focus on *this* aspect of the tri-party agreement permits a piercing of the principal-surety contract veil and also allows judicial examination of the ultimate result of this tri-party agreement, to wit, creation by the sovereign of a class of private individuals who serve as jailers and police. The sovereign constructively coerces the principal into waiving constitutional rights by mandating the posting of a corporate surety bond (wherein the waiver occurs) as a prerequisite to pretrial release. The state simultaneously executes a contract with the bondsman whereby the latter effectively becomes a quasi-agent of the state with police power to arrest the principal through the state's acknowledgement and approval of the surety-principal contract.[64]

The end result is that the state authorizes that which it could not do itself, namely, retrieval of the principal without application of constitutional standards. Accordingly, judicial focus on the contractual relationship between the principal and the surety, while ignoring the role of the state, constitutes a narrow and overly restrictive examination of a broad problem. Such focus also fails to address the pertinent issue of

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[63] Although the surety-sovereign contract requires the bondsman to forfeit the face amount of the bond in the event that the principal is not produced for trial, such contract is essentially for a *service* rather than finance oriented:

> Yet, as is obvious, the state can only be whole by the recapture of the accused and the resulting vindication of the rights of society. For it is society that the criminal process protects and the payment of a sum by [the surety] does not satisfy that interest until the state regains the ability to punish those who break the law. [The surety's] principal obligation is to produce the accused at trial. The monetary obligation is merely an assurance of, or inducement to perform that principal obligation. [Citation omitted.] [The surety's] contract thus resembles more a contract to perform services than a contract of insurance. The forfeiture of the surety's bond, if the accused fails to appear, is not to reimburse the state for an economic loss but serves more as a penalty for the surety's own failure to perform.

Allied Fidelity Corp. v. C.I.R., 572 F.2d 1190, 1193 (7th Cir.), *cert. denied*, 439 U.S. 835 (1978).

[64] The Supreme Court has noted that not only does the sovereign acknowledge the contract between the surety and the principal, but it also refuses to interfere with it: "There is also an implied covenant on the part of the government, when the recognizance of bail is accepted, that it will not in any way interfere with this covenant between them, or impair its obligation. . . ." Reese v. United States, 76 U.S. (9 Wall.) 13, 22 (1869). The ultimate result of this posture is demonstrated in Dunkin v. Lamb, 500 F. Supp. 184 (D. Nev. 1980), where police refused to intervene on the principal's behalf while he was being arrested with excessive force by the bondsman.

whether a state may contractually appoint private individuals to fulfill those duties which have been traditionally reserved to law enforcement officers and allow those private individuals to circumvent constitutional restrictions. Form is honored by this process, while substance is ignored.[65]

B. *The Common Law*

> "The seemingly absolute powers granted the bondsmen at common law are not without restriction and must be interpreted in light of modern common law and constitutional principles."[66]

The 1872 Supreme Court decision of *Taylor v. Taintor*[67] enunciated what has since become universally recognized as the common law rights of the bondsman:

> When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the re-arrest by the sheriff of an escaping prisoner. . . . [I]t is said: "The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge."[68]

The contractual nature of the bond undertaking, as discussed heretofore, must be considered as having constituted an important founding axiom upon which the common law scope of authority was premised since previous decisions, which emphasized such contractual

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[65] As has been aptly noted:

> The argument that bondsmen act as private agents and that their arrest and detention powers are based exclusively on a bail contract with the defendant, honors form and ignores substance. The bondsmen occupy an essential role in the criminal process of most states and their activities intertwine with the state interest in pre-trial release and appearance of defendants. In the arrest and return of a fugitive defendant the bondsman operates as a de facto agent of the state in that the purpose of his pursuit, the arrest and transportation of the defendant, is identical to the goal of state police officers involved in retrieval of fugitive defendants or interstate retrieval through extradition procedures.

Murphy, *Revision of State Bail Laws*, 32 OHIO ST. L.J. 451, 466 (1971).

[66] Maynard v. Kear, 474 F. Supp. 794, 802 (N.D. Ohio 1979).

[67] 83 U.S. (16 Wall.) 366 (1872).

[68] *Id.* at 371-72.

nature, were cited with approval by *Taylor*.[69] *Taylor*, however, more pertinently emphasized that the enormous responsibility placed upon the bondsman, *i.e.*, assuming custody of the accused and assuring his appearance, justified the bondsman's broad power.[70]

The virtually unlimited powers of the surety as enunciated in *Taylor* have not been relegated to antiquity and are often contemporarily construed as delineating the standards of permissible surety conduct.[71] Since *Taylor*, the Supreme Court has failed to subsequently address or curtail the rights of the surety despite having had the opportunity to do so.[72] Although the powers of the bondsman are inherently repulsive to the class of fourth and fourteenth amendment Supreme Court decisions which carefully restricted the rights of law enforcement personnel acting under color of law in situations involving search and seizure, the principles of *Taylor* cannot be considered as having been overruled and repudiated *sub silentio* by such constitutional decisions unless it is first determined that the activity of the surety is tantamount to "state action," a prerequisite to the invocation of constitutional principles.[73]

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[69] Cited with approval is Nicolls v. Ingersoll, 7 Johns 145 (N.Y. 1810) (the power of the bail does not depend upon any process, but results from the nature of the undertaking, and it is not affected by the jurisdiction of the court or of the state).

Also cited with approval is Commonwealth v. Brickett, 25 Mass. (8 Pick.) 138 (1829), wherein the court held that a bondsman may arrest the principal outside of the state's jurisdiction, noting: "It is contended that the liability does not arise from the contract. We think it does. . . ." *Id.* at 141. It was further summarized:

> By the common law the bail was the custody of the principal, and may take him at any time, and in any place. . . . The taking is not considered as the service of process, but as a continuation of the custody which has been, at the request of the principal, committed to the bail. The principal may therefore be taken on Sunday. The dwellinghouse is no longer the castle of the principal, in which he may place himself to keep off the bail. If the door should not be opened on demand at midnight, the bail may break it down, and take the principal from his bed, if that measure should be necessary to enable the bail to take the principal.

Id. at 140. The "midnight/bedroom" arrests authorized by Brickett have been executed. *See* United States v. Trunko, 189 F. Supp. 559 (E.D. Ark. 1960), where armed bondsmen entered the bedroom of the principal where his wife and infant child were also sleeping, handcuffed the principal, and drove away "at a high rate of speed" leaving the shocked wife "considerably excited about her husband's arrest." *Id.* at 561.

[70] *See* Allied Fidelity Corp. v. C.I.R., 572 F.2d 1190, 1192-93 (7th Cir.), *cert. denied*, 439 U.S. 835 (1978); Smith v. Rosenbaum, 333 F. Supp. 35 (E.D. Pa. 1971); Curtis v. Peerless Ins. Co., 229 F. Supp. 429 (D. Minn. 1969).

[71] *See* Cosgrove v. Winney, 174 U.S. 64 (1899); *Ex parte* Milburn, 34 U.S. 704 (1834); United States v. Goodwin, 440 F.2d 1152, 1156 (3d Cir. 1971).

[72] Certiorari was denied in Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547 (9th Cir. 1974) (*en banc*), *cert. denied*, 421 U.S. 949 (1975), an action wherein the Ninth Circuit considered *en banc* the state action issue.

[73] Constitutional limitations do not attach to private conduct "no matter how wrongful." Civil Rights Cases, 109 U.S. 3 (1883); *see also* Shelley v. Kraemer, 334 U.S. 1 (1948).

Whether a nexus exists between the surety and the sovereign sufficient to transform the private conduct of the bondsman into the action of the state so as to attach to the surety the constitutional limitations applicable to the sovereign, however, is an issue the Supreme Court has not addressed.

Contradictory judicial pronouncements have issued from both federal and state forums wherein "state action" has been addressed.[74] Where no state action is judicially found, and in the absence of statutory abrogation or modification of the common law,[75] it is typically determined that *Taylor* provides both the source and scope of the bondsman's authority of retrieval.[76] Further, when an abused principal attempts to secure redress in the state forum by initiating an action in tort such as false imprisonment, trespass or assault and battery, no "state action" will be pleaded since that is not an element of the tort. Thus, the tribunal will necessarily be constrained to apply the common law principles of *Taylor* in the absence of statutory modification.

The contractual nature of the bond undertaking, implicitly authorizing the use of reasonable force and permitting the surety to break and enter to effectuate an arrest, together with the explicit enunciations of *Taylor*, have proved to be major barriers to tort recovery.[77] In sum, *Taylor* is dispositive of the scope of the surety's authority except where state action is found to exist (in which instance the principal is protected, at least to an extent, by the Constitution) or the common law has been statutorily abrogated or modified.

When *Taylor* is viewed as the source of the bondsman's authority and power over the principal the pertinent issue becomes the scope of such power. In short, *Taylor* authorizes the surety to:

(1) continue custody over the principal,
(2) seize the principal without process,
(3) imprison the principal until the latter may be surrendered into the custody of the state,
(4) utilize agents,
(5) pursue the principal into another state, and
(6) break and enter the principal's dwelling.

Although "the principal is regarded as delivered to the custody of his sureties"[78] such custody does not authorize the bondsman to shackle,

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[74] The following cases have determined that the conduct of the bondsman constituted "state action." Citizens for Pre-trial Justice v. Goldfarb, 88 Mich. App. 519, 278 N.W.2d 653 (1979); *see* Hill v. Toll, 320 F. Supp. 185 (E.D. Pa. 1970). In contrast, many such cases found no state action. *See, e.g.*, Ouzts v. Nat'l Ins. Co., 505 F.2d 547 (9th Cir. 1974) (*en banc*), *cert. denied*, 421 U.S. 949 (1975); Thomas v. Miller, 282 F. Supp. 571 (E.D. Tenn. 1968).

[75] *See* notes 110-25 *infra* and accompanying text.

[76] *See* citations in note 74 *supra*.

[77] *See, e.g.*, State v. Lingerfelt, 109 N.C. 755, 14 S.E. 75 (1891).

[78] Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1872).

confine or impede the principal's daily movements.[79] Rather, the accused remains on the bondsman's "string."[80]

The outer boundaries of force which may be utilized by the surety are currently undefined. Although it has been noted that an arrest may only be effectuated through utilization of such force as is reasonably necesssary,[81] in *State v. Lingerfelt*[82] the Supreme Court of North Carolina, interpreting, *Taylor*, indicated that a bondsman may justifiably kill a principal who resists arrest as long as the principal was informed of the surety's authority and makes no objection thereto. The issue of whether the bondsman may justifiably utilize deadly force to arrest a principal when the underlying bailable offense is a misdemeanor has not been judicially addressed.[83] Similarly unresolved is the tangential issue of whether a bondsman may respond with deadly force in a public area when the principal resists with deadly force, and the bondsman's response is not necessary for purposes of self-defense but is reasonably necessary for the ultimate apprehension. It is posited that the public policy of promoting the the tranquility, safety and welfare of the principal, the bondsman and the community, significantly outweighs the public policy of assuring the appearance of the accused at trial.[84] Since the bondsman need not retreat when arrest is resisted and a principal may be reluctant to retreat if apprehension is attempted in his home, a classic confrontation is manifested, particularly if the principal is uncertain of the identity or intentions of the nonuniformed persons attemp-

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[79] McCaleb v. Peerless Ins. Co., 250 F. Supp. 512 (D. Neb. 1965) (principal handcuffed and controlled for eighty hours with no attempt to surrender same to the sovereign).

[80] Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1872); Ruggles v. Corey, 3 Conn. 419, 421 (Conn. 1820).

[81] Reese v. United States, 76 U.S. (16 Wall.) 13 (1869); Maynard v. Kear, 474 F. Supp. 794, 802 (N.D. Ohio 1979) ("reasonable or necessary force"); Smith v. Rosenbaum, 333 F. Supp. 35, 39 (E.D. Pa. 1971) (bondsman may implement "reasonable means needed to effect the apprehension"), *aff'd*, 460 F.2d 1019 (3d Cir. 1972).

[82] 109 N.C. 755, 14 S.E. 75 (N.C. 1891).

[83] The underlying bailable offense in *Lingerfelt* was murder. It is typically statutorily impermissible for a law officer to utilize deadly force to arrest an individual when the underlying offense is a misdemeanor. *See generally* Annot., 83 A.L.R.3d 174 (1978) (right of peace officer to use deadly force in attempting to arrest fleeing felon); Annot., 83 A.L.R.2d 238 (1978) (peace officer's civil liability for death or personal injuries caused by intentional force in arresting misdemeanant). Note that corporate bonds can be required for misdemeanor violations. Maryland v. Kear, 474 F. Supp. 794 (N.D. Ohio 1979) (misdemeanor traffic offense).

[84] In support of the proposition that such public exchanges of weapon fire occur, see The Plain Dealer, Jan. 1, 1982, at 10-A, col. 1-2 (bondsman shot by police responding to incident involving arrest wherein principal was fired upon by bondsman while attempting escape down a public street).

ting seizure. Understandably the amount of force which may be "necessary" to effectuate such retrieval may be considerable.

An arrest may be instituted without the issuance of process[85] since the contract effectively serves as the authority to arrest.[86] Although *Taylor* authorizes the surety to "break and enter [the principal's] house" to effectuate arrest, and further analogizes such seizure to "the rearrest by the sheriff of an escaping prisoner,"[87] common law decisions before and after *Taylor* have recognized that the surety must *first* announce his identity, reveal his intentions and demand peaceful surrender prior to utilizing forceful measures.[88] The bondsman's failure to satisfy these criteria may justify a self defense killing of the surety as demonstrated in *Shine v. State*.[89]

Little authority exists which addresses the issue of whether the bondsman may break and enter the dwelling of a third party to sieze a principal located therein. In *Livingston v. Browder*[90] the Court of Civil Appeals of Alabama, noting that *Taylor* "analogized the power of a bail bondsman to arrest his principal to the power of a sheriff to rearrest an escaping prisoner,"[91] consulted contemporary statutory and constitutional law to determine the permissible perimeters of entry attending such an arrest by a law enforcement officer. Since the sources consulted indicated that the sanctity of a third party dwelling may be breached if the officer's authority and purpose are announced and reasonable means of entry utilized, the same criteria were held applicable to the bondsman. The disturbing result of *Livingston* is that it gives the bondsman authority to arrest the principal wherever the latter may be found, may represent an impermissible extension of the *Taylor* "escaping prisoner" analogy.

In fairness to *Livingston*, it is noted that *Taylor* cited with approval Blackstone's commentaries wherein the following is provided: "[I]f the [defendant] be in the house of another, the bailiff or sheriff may break and enter it to effect his purpose, but he ought to be very certain that the defendant be, at the time of such forcible entry, in the house."[92] Perhaps such statement and authority were envisioned by *Taylor* as applicable to the bondsman. However, an examination of the two axioms which define the rights of the bondsman in *Taylor*, namely the contractual nature of the undertaking and the necessity of providing the surety

[85] 83 U.S. (16 Wall.) 366, 371 (1872).

[86] *Id.*; Livingston v. Browder, 51 Ala. App. 366, 285 So. 2d 927, 930 (1973).

[87] 83 U.S. (16 Wall.) 366, 371 (1872).

[88] *See* Read v. Case, 4 Conn. 166 (1822); Poteete v. Olive, 527 S.W.2d 84 (Tenn. 1975).

[89] 44 Ala. App. 171, 204 So. 2d 817 (1967).

[90] 51 Ala. App. 366, 285 So. 2d 923 (1973).

[91] *Id.* at 369, 285 So. 2d at 926.

[92] 3 BLACKSTONE'S COMMENTARIES 289, note 31.

with broad authority to effectuate the responsibility assumed, leads to an opposite conclusion.

Livingston specifically observed that "the right of a surety to capture his principal is not a matter of criminal procedure, but arises from private rights established by the bail contract between the principal and his surety."[93] If the rights and liabilities of the surety are viewed as derivative of the contractual nature of the undertaking, it follows that the dwelling of a noncontracting party may not be forcefully entered regardless of the terms of such contract. This conclusion is reasonable as neither the principal, the surety, nor the sovereign possess the authority to offer or accept such a condition as consideration or to authorize an illegal trespass.[94] Further, the public policy of assuring the appearance of the accused for judicial proceedings, through arrest by the surety or otherwise, is heavily outweighed by the contravening public policy of honoring the sanctity of the dwellings of innocent third parties from unreasonable searches and preventing potentially violent confrontations therein. The scope of protection afforded the dwelling owner from unreasonable intrusions is evidenced in the class of fourth and fourteenth amendment Supreme Court decisions which have severely restricted the permissible conduct of law enforcement officers; for example, the "fruit of the poisonous tree" doctrine, which excludes evidence in a criminal proceeding when the evidence is obtained in contravention of the fourth or fourteenth amendments, is premised upon the recognition that deterring law enforcement officers from violating the sanctity of the dwelling and the individuals therein outweighs the need of society to prosecute criminals.[95] The principal is less than a criminal during the period in which the bond is in effect, and has merely been *accused* of committing some offense. Simply, the propriety of *Livingston*, wherein the principal-surety battleground has been extended to any dwelling where the principal may be located, is subject to serious issue.

The principal must be arrested for the sole purpose of surrendering him to the custody of the sovereign.[96] Accordingly, in *McCaleb v. Peer-*

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[93] 51 Ala. App. at 369, 285 So. 2d at 930.

[94] *See generally* J. CALAMARI & J. PERILLO, CONTRACTS (2d ed. 1977).

[95] *See generally* 29 AM. JUR. 2d *Evidence* §§ 411-427 (1967); Annot., 43 A.L.R.2d 385 (1972) (discussion of fruit of poisonous tree doctrine as excluding evidence derived from information gained by illegal search); Annot., 84 A.L.R.2d 959 (1962) (federal Constitution as affecting admissibility of evidence obtained by illegal search and seizure); Annot., 50 A.L.R.2d 531 (1956) (rule governing admissibility of evidence obtained by unlawful search and seizure).

[96] "Whenever [the sureties] choose to do so, they may seize [the principal] *and deliver him up* in their discharge; and if that cannot be done at once, they may imprison him *until it can* be done." Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1872) (emphasis added). *Cf.* Shine v. State, 44 Ala. App. 171, 204 So. 2d 817 (1967) (Bondsmen may lawfully arrest and turn a principal over to the sheriff only when a bondsman owes an obligation to the court.).

less Insurance Company,[97] the boundaries of permissible conduct were clearly exceeded and damages for false imprisonment were assessed when the principal was shackled and controlled for approximately eighty hours without being surrendered into custody.[98]

The surety's common law authority of interstate retrieval is universally recognized and arises from the contractual nature of the undertaking which transcends the jurisdictional boundaries of the sovereign.[99] No judicial proceeding is conducted to ascertain the identity of the principal, the authority of the surety, or the continuing pendency of the underlying offense for which bond was originally required.[100] This authority of the surety is sharply contrasted with that of state law enforcement officers who must comply with extradition requirements[101] and federal law officers who must satisfy the hearing requirements of Rule 40, Federal Rules of Criminal Procedure, when the individual is to be transported in excess of one hundred miles.[102]

The foregoing demonstrates that the authority of the surety exceeds that of law enforcement personnel. The following justification is typically offered:

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[97] 250 F. Supp. 512 (D. Neb. 1965).

[98] The Court noted

> [t]hat whenever a bondsman takes undue advantage of his justly granted and needed authority in violation of his duty to the granting court and such undue advantage results in injury or damage to his principal or another party, that bondsman should and will be rendered liable for any damage caused as a result of an act or acts which would render liable any other person who was not vested with such authority.

Id. at 515.

[99] In support of the proposition that such authority is customarily utilized see Fitzpatrick v. Williams, 46 F.2d 40 (5th Cir. 1931) (Louisiana to Washington); Thomas v. Miller, 282 F. Supp. 571 (E.D. Tenn. 1968) (Ohio to Tennessee); *In re* Von Der Ahe, 85 F. 959 (C.C.W.D. Pa. 1898) (Missouri to Pennsylvania).

That such authority is derivative of the contract, see text accompanying note 58 *supra*. *Accord*, United States v. Goodwin, 440 F.2d 1152 (ed Cir. 1971), wherein it was stated: "A bondsman has the right to pursue his principal into a state other than the one where the bond was executed and arrest him for the purpose of returning him to the state from which he fled." *Id.* at 156.

[100] The absence of procedural safeguards has been justifiably criticized. *See* Murphy, *Revision of State Bail Laws*, 32 OHIO ST. L.J. 451, 462-69 (1971); Note, *Bailbondsmen and the Fugitive Accused—The Need For Formal Removal Procedures*, 73 YALE L.J. 1098 (1964) (exclusively addressing and advocating reform in the area of interstate bondsman retrieval).

[101] The vast majority of states have adopted the Uniform Criminal Extradition Act, 11 UNIFORM LAWS ANNOT. 59 (1967). *See* Murphy, *supra* note 100, at 465 n.90; Note, *Illegal Abductions by State Police: Sanctions for Evasion of Extradition Statutes*, 61 YALE L.J. 445 (1952); Annot., 90 A.L.R. 3d 1085 (1979) (necessity that demanding state show probable cause to arrest fugitive in extradition proceedings); Annot., 45 A.L.R. FED. 871 (1971) (arrest and transportation of fugitive without extradition proceedings as violative of civil rights actionable under 42 U.S.C. § 1983).

[102] For further discussion see Murphy, *supra* note 100, at 463-64; 8A J. MOORE, MOORE'S FEDERAL PRACTICES ¶¶ 40.01-40.04 (2d ed. 1980).

> There is a strong public policy in preventing the principal from "jumping bond" and because of this, the surety is permitted a large discretion as to the steps necessary to effect the apprehension of the principal. Clearly, this large amount of authority allowed the surety is justified by the responsibility imposed upon him.[103]

It is posited that the public policy of assuring the appearance of the accused at trial is outweighed by the public policy of assuring continued constitutional protection to an individual released prior to trial.[104] Since the principal will not attempt "escape" while in the presence of the surety, but will instead quietly disappear once direct surety supervision is relaxed, it appears to be more appropriate to empower the bondsman with no more authority than a law officer who seeks to apprehend an "escaped" prisoner rather than an "escaping" prisoner. The principal and third parties would then be protected by the "search and seizure" standards of the fourth and fourteenth amendments. An individual released by the sovereign should certainly possess no less of a constitutional status than does an escaped criminal. Since an individual *convicted* of a criminal offense may not be retrieved by private bounty hunters acting in circumvention of the Constitution, it is improvident to perpetuate a system of pretrial release wherein bounty hunters may be utilized to retrieve an individual merely *accused* of an offense simply because such individual has been coerced into a contractual relationship authorizing such retrieval as a condition precedent to exercising the fundamental right to bail.[105]

It is appropriate to analogize the fifth and fourteenth amendment due process liberty interest,[106] which should be afforded to the accused, to that interest possessed by an individual released on parole or probation, since all three are effectively released from custody upon terms which are established by the sovereign. The Supreme Court decision of *Morrissey v. Brewer*[107] firmly established that "the liberty interest of a parolee, although indeterminate, includes many of the core values of unqualified liberty,"[108] that such valuable liberty interest is within the protective ambit of the fourteenth amendment, and that a deprivation of

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[103] Livingston v. Browder, 51 Ala. App. 366, 285 So. 2d 923, 925 (1973).

[104] To the same effect: "It is my determination, therefore, that the liberty interest of a person released on bail significantly outweighs the state's interest in the current alternative arrest method provided to professional bondsmen." Citizens for Pre-Trial Justice v. Goldfarb, 278 N.W.2d 652-72 (Mich. App. 1979).

[105] That bail is a fundamental right, see Stack v. Boyle, 342 U.S. 1, 4 (1951); *see also* U.S. CONST. amend. VIII ("excessive bail shall not be required").

[106] Invocation of the fifth or fourteenth amendments' due process clauses necessitates demonstration of an appropriate "liberty or property" interest. Morrissey v. Brewer, 408 U.S. 471 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972).

[107] 408 U.S. 471 (1972).

[108] *Id.* at 484.

such liberty may not occur without a hearing.[109] Thus, the bondsman should not possess the authority to summarily apprehend the principal before the trial without demonstrating to the judiciary that the principal intends to escape or has violated a condition of the contractual undertaking, particularly since the principal has provided monetary consideration for such freedom.

Statutory modifications of the common law principles enunciated in *Taylor* must be applauded to the extent that they exist. Only Illinois, Oregon and Kentucky have directly eliminated commercial bail as a method of securing pretrial release.[110] Several states have emulated the Bail Reform Act of 1966, wherein the option of requiring corporate or ten percent bail is presented to the judicial officer, thereby creating an opportunity to indirectly eliminate the commercial bail through exclusive use of ten percent bail.[111] The limited studies which exist indicate that such indirect elimination has failed to materialize.[112]

Due process standards have been implemented in various forms. Connecticut has delegated the authority to arrest the principal to the exclusive jurisdiction of law enforcement personnel and requires, as a condition precedent to such arrest, that the surety verify under oath that the principal intends to escape.[113] The Texas surety may effectuate seizure only after obtaining a warrant of arrest from the judiciary.[114] Several other states require the bondsman to obtain a certified copy of the bond undertaking from the judiciary, which thereafter serves as process.[115] A large number of states permit arrest by agents of the bondsman only if they are of suitable age[116] and have obtained written authority endorsed on a certified copy of the bond.[117] Failure to comply

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[109] *Id. See also* Annot., 44 A.L.R.3d 306 (1972) (right to assistance of counsel at proceedings to revoke probation).

[110] *See* notes 42-49 *supra* and accompanying text.

[111] *See* ALASKA STAT § 12.30.020 (1980); IOWA CODE ANN. § 811.3 (West Supp. 1977).

[112] *See* note 44 *supra* and accompanying text.

[113] CONN. GEN. STAT. ANN. §§ 54-65, 52-319 (West 1978). Although Minnesota permits the surety to effectuate a seizure only upon the belief "that his principal is about to abscond, or that he will not appear as required by his recognizance, or not otherwise perform the conditions thereof," such standard is subjective and does not require a hearing to determine the validity of the surety's belief and, accordingly, offers no due process safeguards. MINN. STAT. ANN. § 269.63 (West 1947).

[114] TEX. CODE CRIM. PROC. ANN. Art. 17.19 (Vernon 1977).

[115] ALA. CODE § 15-13-62 (1975); MO. ANN. STAT. § 544.600 (Vernon 1949); TENN. CODE ANN. § 40-1227 (1945).

[116] *See, e.g.*, OHIO REV. CODE ANN. § 2713.22 (Page 1981).

[117] ALA. CODE § 15-13-02 (1975); ARK. STAT. ANN. § 43-717 (1977); CAL. PENAL CODE § 1301 (West 1969); IDAHO CODE § 19-2925 (1978); MO. ANN. STAT. § 544.600 (Vernon 1949); MONT. CODE ANN. § 46-9-205 (1967); OHIO REV. CODE ANN. § 2713.22 (Page 1981); OKLA. STAT. ANN. tit. 22, § 1107 (West 1951); TENN. CODE ANN.

with these conditions will render the arrest illegal.[118]

California prohibits out-of-state bondsmen from arresting principals who are seeking refuge therein.[119] The foreign bondsman must demonstrate probable cause for arrest before a county magistrate. After probable cause is shown, the magistrate will issue a warrant for the principal's arrest to an officer of the court. A hearing is then conducted at which time the principal is afforded the right to counsel and is surrendered to the custody of the surety for return to the issuing jurisdiction *only* if "the magistrate is satisfied from the evidence that the person is a fugitive."[120] Although failure by the bondsman to utilize these procedural methods renders such a seizure a misdemeanor,[121] the bondsman can typically be expected to circumvent attempts of prosecution by returning to the originating jurisdiction and thereby avoiding service of process.[122] California's attempts at requiring due process hearings present, however, an obvious financial burden and can be expected to be utilized by fugitive principals as a dilatory tactic. Conspicuously absent are similar due process restraints upon California bondsman who may arrest both inside and outside California without a hearing, although they are subject to the requirement that the principal must be surrendered into the custody of the sovereign within forty-eight hours after apprehension.[123]

Alabama, Nevada, Tennessee, Missouri and Oklahoma statutorily authorize the bondsman to arrest the principal only within the jurisdiction of the state.[124] Many states have attempted to discourage private retrieval by enabling the bondsman to employ law enforcement personnel to effectuate arrest.[125]

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§ 40-1227 (1955); UTAH CODE ANN. § 77-43-23 (1953); VA. CODE § 19.2-149 (1950); WISC. STAT. ANN. § 818.21 (West 1976).

[118] *See* Nicholson v. Killpatrick, 188 Ala. 258, 66 So. 8 (1914); Gray v. Strickland, 163 Ala. 344, 50 So. 152 (1909); Cooke v. Harper, 78 Ind. App. 267, 135 N.E. 349 (1922).

[119] CAL. PENAL CODE § 847.5 (West 1970), discussed in Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547 (9th Cir. 1974) (*en banc*), *cert. denied*, 421 U.S. 949 (1975).

[120] CAL. PENAL CODE § 847.5 (West 1969).

[121] *Id.*

[122] This senario is demonstrated in Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547 (9th Cir. 1974) (*en banc*), *cert. denied*, 421 U.S. 949 (1975).

[123] CAL. PENAL CODE § 1301 (West 1969) (surrender within forty-eight hours). For futher discussion and criticism of CAL. PENAL CODE § 847.5 as "one-way," see Note, *California Bail System*, 66 CALIF. L. REV. 1134 (1968).

[124] ALA. CODE § 15-13-63 (1965); MO. ANN STAT. § 544.600 (Vernon 1949); NEV. REV. STAT. § 178.526 (1979); OKLA. STAT. ANN. tit. 22, § 1107 (West 1951); TENN. CODE ANN. § 40-1227 (1955).

[125] *See* FLA. STAT. ANN. § 903.22 (West 1972); MICH. STAT. ANN. § 28.913 (1970); MINN. STAT. ANN. § 629.23 (West 1947); MISS. CODE ANN. § 99-5-29 (1972); OKLA. STAT. ANN. tit. 22, § 1107 (West 1951); TENN. CODE ANN. § 40-1228 (1955); VA. CODE § 19.2-149 (1950); W. VA. CODE § 62-1C-14 (1977).

C. *Statutory Authorization*

> "Statutory authorization to arrest vests in bondsmen 'the coercive power of the State.' "[126]

The bondsman's source of authority to arrest the principal may be viewed as derived from the contractual nature of the undertaking, the common law principles enunciated in *Taylor v. Tainter* or as provided by statute. Virtually every state which has retained the corporate surety as a cornerstone of the bail process has enacted a statute substantially similar to Ohio Revised Code section 2713.22 which provides in full:

> For the purpose of surrendering the defendant, the bail may arrest him at any time or place before he is finally charged, or, by a written authority endorsed on a certified copy of the bond, may empower any person of suitable age and discretion to do so.[127]

These statutes fail to establish express procedural or substantive standards that the bondsman must satisfy when performing the apprehension authorized by this statute. It is, however, common for the enacting state to statutorily delineate standards attending a similar arrest by a law enforcement officer.[128] The issue, therefore, arises as to the permissible scope of surety conduct when a state statute is relied upon as authorization for the seizure.

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[126] Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 558 (9th Cir. 1974) (*en banc*), *cert. denied*, 421 U.S. 949 (1975) (Hufstedler, Browning, Duniway and Ely, JJ., dissenting).

[127] OHIO REV. CODE ANN § 2713.22 (Page 1981). *See generally* ALA. CODE § 14-13-62 (1975); ALASKA CRIM. CODE § 41(h) (1977); ARIZ. REV. STAT. ANN. § 13-3885 (1978); ARK. STAT. ANN. §§ 43-717, 43-718, 34-628 (1977); CAL. PENAL CODE § 1301 (West 1969); COLO. REV. STAT. § 16-4-108(c) (1978); DEL. SUPER. CT. CRIM. R1 46(g); FLA. STAT. ANN. §§ 903.22, 903.29 (West 1972); GA. CODE ANN. § 27.904 (1978); HAWAII REV. STAT. § 709-14 (1976); IDAHO CODE § 19-2925 (1978); IND. CODE ANN. § 35-4-5-7 (Burns 1978); IOWA CODE ANN. § 811.8(3) (West 1977); KAN. STAT. ANN. § 22-2809 (1974); LA. CODE CRIM. PRO. ANN. § 340 (West 1967); ME. CODE CRIM. PRO. Rule 46(F); MASS. ANN. LAWS ch. 276, §§ 58-59 (Michie/Law. Co-op 1979); MICH. STAT. ANN. § 28.913 (1970); MINN. STAT. ANN. § 629.91 (West 1947); MISS. CODE ANN. § 99-5-27 (1972); MO. ANN. STAT. § 544.600 (Vernon 1949); MONT. REV. CODE ANN. § 46-9-205 (1967); NEB. REV. STAT. § 29.906 (1979); NEV. REV. STAT. § 178.526 (1979); N.H. REV. STAT. ANN. § *597.27-597.28 (1974); N.M. STAT. ANN.* § 31-3-3 (1978); N.Y. STAT. ANN. § 530.30(2) (1971); OKLA. STAT. ANN. tit. 22, § 1107 (West 1951); R.I. GEN. LAWS § 12-13-19; S.D. CODIFIED LAWS ANN. § 23A-43-29 (1979); TENN. CODE ANN. § 40-1277 (1955); TEX. CRIM. CODE ANN. art. 17.19 (Vernon 1977); UTAH CODE ANN. § 77-43-23 (1953); VA. CODE § 19-2-149 (1950); W. VA. CODE § 62-1C-14 (1977); WIS. STAT. ANN. § 818.21 (West 1976); WYO. STAT. §§ 7-110-113 and 7-110-114 (1980).

[128] *See, e.g.*, OHIO REV. CODE ANN. §§ 2933.01-.58 (Page 1981) (search warrants), and §§ 2935.01-.33 (Page 1981) (arrest). *Compare* MICH. COMP. LAWS ANN. § 765.26 (1967) (bondsman may summarily arrest principal) *with* MICH. COMP. LAWS ANN. §§ 600.6075-.6078 (1967) (procedural safeguards attending civil arrest).

A statutory provision expressly creates a condition precedent to arrest which is not mandated by common law, such as obtaining a certified copy of the bond, a bail piece or an arrest warrant. It is settled that such a condition is not cumulative to, but exclusive of, the common law, and failure to satisfy that requirement will render the seizure illegal.[129]

The more difficult issue is what are the permissible perimeters of surety conduct when the statute, which is considered as the source of such authority, does not modify common law principles. The outer boundaries of conduct will then be dependent upon classifying the arrest as "state action" or "private action." If classified as "state action," constitutional and statutory limitations which apply to the sovereign will attach to the surety. If classified as "private action," the statute will be viewed as merely cumulative and declaratory of the common law.[130] Although at least nine states enacted general "arrest statutes" prior to the 1872 *Taylor* decision, this does not foreclose the conclusion that these statutes may be declaratory of the common law which existed at the state and lower federal court level as early as 1810.[131]

State statutes are often deemed to incorporate common law powers. The general arrest statute of Minnesota has been held to "essentially ... codify the common law" and *Taylor* was judicially consulted as determining the scope of permissive authority.[132] The virtue of considering common law principles as incorporated into general arrest statutory

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[129] *See* Cooke v. Harper, 78 Ind. App. 267, 135 N.E. 349 (1922) (construing Indiana statute). *Compare In re* Von Der Ahe, 85 F. 959 (W.D. Pa. 1898) (noting that a "bail piece" which the bondsman was required to obtain by a Pennsylvania statute was simply evidence of the relationship between the parties and that the right to arrest is derivative of the contract) *with* Smith v. Rosenbaum, 333 F. Supp. 35 (E.D. Pa. 1971), *aff'd*, 460 F.2d 1019 (3d Cir. 1972) ("bail piece" created state action), and Hill v. Toll, 320 F. Supp. 185 (E.D. Pa. 1970) ("bail piece" created state action). *Compare* Poteete v. Olive, 527 S.W.2d 84 (Tenn. 1975) (holding Tennessee statute which required certified copy of the bond as a prerequisite to arrest to be exclusive of the common law) *with* Thomas v. Miller, 282 F. Supp. 571 (E.D. Tenn. 1968). *See* Austin v. State, 541 S.W.2d 162 (Tex. Crim. App. 1976) (Texas statutory requirement of arrest warrant exclusive of common law); *see also* Gray v. Strickland, 163 Ala. 344, 50 So. 152 (1909) (Alabama statute requiring certified copy of the undertaking exclusive of common law).

[130] *See* citations in note 74 *supra*.

[131] The following "arrest statutes" are identical or similar to statutes promulgated in the year which accompanies each citation: ALA. CODE § 15-13-62 (1977) (1852); CAL. PENAL CODE § 1301 (West 1970) (1872); HAWAII REV. STAT. § 804.14 (1976) (1869); IOWA CODE ANN. § 811.8 (1950) (1843); MICH. COMP. LAWS. ANN. § 765.26 (1967) (1840); PA. R. CRIM. P. § 4016A(3), 42 PA. CONN. STAT. ANN. (1981) (1860); TENN. CODE ANN. § 40-1227 (1975) (1827); W. VA. CODE § 62-1C-14 (1966) (1852).

The common law preceded even these statutes; *see* Read v. Case, 4 Conn. 166 (1822); Nicholls v. Ingersoll, 7 Johns. 145 (N.Y. 1810).

[132] *See* Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 552 (9th Cir. 1974) (*en banc*), *cert. denied*, 421 U.S. 949 (1975) ("The statute codifies the bondsman's common law right to arrest.").

provisions, is that only one scope of permissible conduct will exist: the common law. Thus, the judiciary will be relieved of the necessity of determining whether the surety subjectively considered the apprehension of the principal as authorized by common law or by a parallel statute.[133] Consistency and predictability in judicial proceedings will be promoted. Unfortunately, the virtue of such incorporation ends here.

The reported decisions of the federal and state forums are conspicuously devoid of litigation wherein the constitutionality of arrest statutes is challenged, even though many of these statutes were promulgated as early as the 1800's and appear to be constitutionally suspect. Many of these statutes have been recodified or slightly modified since their enactment.[134] A maxim of statutory construction is that legislatures are deemed cognizant of judicial decisions when promulgating legislation.[135] Accordingly, in those instances in which a statute has been recodified subsequent to a judicial incorporation of *Taylor* as the scope of permissible conduct, it is arguable that legislative adoption of the incorporation through reenactment is sufficient to render the statute unconstitutional, particularly since such statutes may also be facially obtrusive to constitutional principles in the absence of judicial interpretation.[136] In such instances legislatures have simply done indirectly what they could not do directly: authorize the retrieval of accused individuals without application of constitutional standards.

The only constitutional challenge to a surety arrest statute is reported in the Michigan appellate decision of *Citizens for Pre-Trial Justice v. Goldfarb*.[137] The pertinent statute, which permitted the surety to summarily arrest the principal without a hearing, was determined by all three justices to constitute "state action," thereby invoking constitutional analysis.[138] Justice Cavanagh balanced the liberty interest of the

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[133] The Supreme Court has established that knowledge of statutory provision is a prerequisite to liability under 42 U.S.C. § 1983 when the statute is asserted as "under color of" law. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156 (1978).

The subjective knowledge of the bondsman was considered dispositive in Maynard v. Kear, 474 F. Supp. 794 (N.D. Ohio 1979), which distinguished decisions wherein the bondsman "did not act or purport to act" under the authority of a state bench warrant. *Id.* at 801.

[134] *See, e.g.*, legislative history of statutory provisions cited in note 131 *supra*.

[135] *See, e.g.*, Young v. Brashears, 560 F.2d 1337 (7th Cir. 1977).

[136] *See* notes 137-42 *infra* and accompanying text. *See also* Reitman v. Mulkey, 387 U.S. 369 (1967), which held as violative of the fourteenth amendment an amendment to the California Constitution which was racially neutral.

[137] 88 Mich. App. 519, 278 N.W.2d 653 (1979).

[138] The dissent of Justices Brennan and Holbrook does not appear to refute Justice Cavanagh's determination that state action existed. Instead, the Justices deemed the statute to be constitutional when the "balancing process" included not only the liberty interest of the individual and the interest of the state in rearresting the accused, but also the "private nature of [the] bail contract, and the bondsman's interest therein." *Id.* at 565, 278 N.W.2d at 674.

released individual against the state's interest in authorizing a summary arrest and concluded that the former "significantly"[139] outweighed the latter and declared the statute unconstitutional. Supreme Court decisions which addressed the procedural safeguards that should accompany the arrest of an individual possessed of a quasi-liberty interest, such as a bailed individual, revealed that "at a minimum, judicial participation prior to these occurrences and the opportunity for a hearing is required."[140] These analyses support Justice Cavanagh's findings.

Unfortunately, however, the two controlling Justices, Brennan and Holbrook, while acknowledging the liberty interest of the individual, proceeded to examine the contractual nature of the undertaking and the common law principles enunciated in *Taylor*. They concluded that summary arrests did *not* constitute a deprivation of the released individual's due process liberty interest.[141] It was noted by the majority that the "bondsman's right to recapture and surrender the bailed defendant represents a significant factor in the bondsman's undertaking."[142] This seems to support the proposition that unless summary arrest authority is provided to them, no bonds will be written, and that the writing of surety bonds is in the state interest. However, existence of alternate methods of pretrial release, the ability of the surety to demand collateral, and the legislative ability to authorize surety arrest in accordance with statutory procedural safeguards (arguments which do not appear to have been presented or considered) displays the fallacy of the majority's logic. It would be myopic to conclude that the constitutionality of statutes which permit the surety to summarily arrest the principal is a settled topic.

IV. SECTION 1983 LIABILITY

> "[I]n modern times, the bail bondsman is an arm of the court performing a service in aid of criminal law. As such, he should be subject to procedures that recognize and protect the rights of the accused as much as do the other agents of law enforcement."[143]

A principal seized in an abusive manner or otherwise in circumvention of constitutional standards may attempt to secure legal redress in

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[139] *Id.* at 560, 278 N.W.2d at 671.

[140] *Id.* at 560, 278 N.W.2d at 672.

[141] Justice Cavanagh severely criticized the majority's contractual analysis: "This focus in the nature of bail as a merely private undertaking ignores its reality as a method of securing the constitutional and statutory right to bail." *Id.* at 561, 278 N.W.2d at 672.

[142] *Id.* at 566, 278 N.W.2d at 674.

[143] *Hearing on S.2855 Before the Subcomm. on Constitutional Rights and the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary, United States Senate*, 89th Cong., 2d Sess. 6 (1966) (remark of Hon. Sam. J. Ervin, Jr.).

the federal forum by initiating an action under 42 U.S.C. § 1983.[144] Such an action will be permitted only upon a demonstration that the alleged wrongful conduct occurred "under color of" law, the quasi-conceptual equivalent of fourteenth amendment "state action,"[145] and that a deprivation of constitutional rights resulted from such conduct.[146] The determination of whether state action exists is therefore pertinent to both the utilization of a section 1983 action and delineation of the permissible scope of surety conduct. The difficulty of applying a state action analysis to the bondsman is reflected in the diverse judicial pronouncements discussed below.

A. *State Action Analysis*

> "The Supreme Court's state action doctrine 'has the flavor of a torchless search for a way out of a damp echoing case.' "[147]

Section 1983 provides no legal redress for *private* conduct "however discriminatory or worngful,"[148] and aptly so since limiting application of constitutional standards to state entities "stops the Constitution short of preempting individual liberty."[149] However, that the bondsman does not purport to act as a direct agent of the sovereign does not preclude a determination that a nexus exists sufficient in stature so as to transform the private conduct of the surety into the action of the state for purposes of section 1983. The bondsman's conduct falls into the gray area, somewhere between purely private and purely state action, where the Supreme Court's attempt to formulate a doctrine pursuant to which the "private" may be separated from the "state" has been aptly categorized as a "conceptual disaster area."[150]

1. Bondsman's Employment of Law Officers

When an off-duty law enforcement officer is employed as an agent of the bondsman to effect the arrest, the state action requirement will be

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[144] *See* note 7 *supra.*

[145] The "state action" requirement of the fourteenth amendment and the "under color of" law requirements of § 1983 have been construed by the Supreme Court to be substantially the same. *See* United States v. Price, 383 U.S. 787, 794 n.7 (1966). *Accord,* Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547 (9th Cir. 1974) (*en banc*), *cert. denied,* 421 U.S. 949 (1975); Ruffler v. Phelps Memorial Hosp., 453 F. Supp. 1062 (S.D.N.Y. 1978). *Cf.* Adickes v. S.H. Kress & Co., 398 U.S. 144, 211 (1970) (Brennan, J., concurring) ("[T]he statutory term 'under color of any statute' has a narrower meaning than the constitutional concept of 'state action.' ").

[146] Both aspects of § 1983 are necessary and constitute separate areas of inquiry. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157 (1978); Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970).

[147] Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14,* 81 HARV. L. REV. 69, 95 (1967).

[148] Civil Rights Cases, 109 U.S. 3 (1883); *see* Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

[149] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1149 (1978).

[150] Black, *supra* note 147, at 95.

satisfied if the agent represents to the principal that the seizure is performed in an official capacity, even if the apprehension constitutes a clear excess of authority or the officer is otherwise without jurisdiction to arrest.[151] Accordingly, in *United States v. Trunko*,[152] the bondsman's agent was an Ohio deputy sheriff who performed an out-of-state armed arrest by "showing his badge,"[153] and the "under color of" law requirement was satisfied. It was held that the officer was a direct agent of the sovereign, the court rejecting the argument that "he was acting purely as an agent of the bonding company."[154] Judicial examination of the bondsman-sovereign nexus is unnecessary. Law enforcement personnel may not directly utilize nor invoke the coercive powers of the sovereign by acting under color of uniform to simplify arrest without becoming subject to liability for deprivation of constitutional rights as secured by federal statutes such as section 1983.

2. State Action Doctrines

> The Supreme Court, after decades of struggle, has reached the conclusion that the dichotomy of "private" and "state" action has "no easy answer."[155]

Commentators are uniform in their criticism of the Court's inability to formulate clear and coherent factors pursuant to which the dichotomy may be relieved or to apply with consistency those theories which had evolved.[156] The "astounding unpredictability of the doctrine and the

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[151] *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) (§ 1983 action); Monroe v. Pape, 365 U.S. 167, 172 (1961) (§ 1983 action); Williams v. United States, 341 U.S. 97 (1951) (a private detective holding a special policeman's card issued by municipality acting under color of law when he apprehended individuals accused of theft and extorted confessions under physical duress); Screws v. United States, 325 U.S. 91 (1945); Snowden v. Hughes, 321 U.S. 1, 11 (1944) ("state action"); Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 244, 246 (1931) ("state action"); Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278 (1913) ("state action").

[152] 189 F. Supp. 559 (E.D. Ark. 1960). This action was a prosecution for willfully depriving, under color of law, an inhabitant of Arkansas of rights, privileges or immunities secured by the Constitution and initiated under 18 U.S.C. § 242, the criminal analogue to § 1983. The Court found state action and a constitutional deprivation, but did not find a "willful" deprivation, an element of § 242 which is not present in § 1983. *Id.*

[153] *Id.* at 561.

[154] *Id.* at 562.

[155] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974).

[156] See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978); Ely, *The Supreme Court, 1977 Term—Foreword*, 92 HARV. L. REV. (1978) [hereinafter cited as *1977 Foreword*]; Antoun, *State Action: Judicial Perpetuation of the State/Private Distinction*, 2 OHIO N.U.L. REV. 722 (1975); Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP.

uncertain potential of its application"[157] has prompted some commentators to advocate a departure from the "traditional" approach of considering state action as a threshold criteria. Some have called for the adoption of a "revisionist" approach of considering state action as only one factor in determining whether constitutional standards should apply to the ostensibly private conduct.[158] However, the revisionist theory has been soundly rejected by the Supreme Court; state action remains a threshold criteria which must be satisfied in its own right before an examination of the magnitude of the constitutional deprivation may be conducted.[159]

Essentially three pertinent "doctrines," however unworkable and unpredictable, have emerged from Supreme Court analysis of state action and will be discussed *seriatim*: (1) public function, (2) encouragement or authorization, and (3) significant state involvement. Application of these doctrines to the conduct of bondsmen will demonstrate that bondsmen

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CT. REV. 221; Rowe, *The Emerging Threshold Approach to State Action Determinations: Trying to Make Sense of* Flagg Brothers, Inc. v. Brooks, 69 GEO. L.J. 745 (1981); Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on The Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966); Thompson, *Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application to Self-Help Repossession*, 1977 WIS. L. REV. 1; Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Note, *State Action: Theories for Applying Constitutional Restrictions to Privacy Activity*, 74 COLUM. L. REV. 656 (1974) [hereinafter cited as *State Action: Theories*]; Note, *State Action After* Jackson v. Metropolitan Edison Co.: *Analytical Framework for a Restrictive Doctrine*, 81 DICK. L. REV. 315 (1977) [hereinafter cited as *State Action After* Jackson]; Note, *Presence of State Action in* United States v. Weber, 1980 DUKE L.J. 1172 [hereinafter cited as *State Action in* Weber]; Note, *The State Action Conundrum Reexamined: A New Approach and its Application to the Constitutionality of Creditor Self-Help Remedies*, 62 MARQ. L. REV. 414 (1979) [hereinafter cited as *Conundrum Reexamined*]; Note, *State Action and the Public Function Doctrine: Are There Really Public Functions?*, 13 U. RICH. L. REV. 579 (1979) [hereinafter cited as *State Action and the Public Function Doctrine*]; Note, *State Action and the Burger Court*, 60 VA. L. REV. 840 (1974) [hereinafter cited as *State Action and the Burger Court*]; Note, *Creditors' Remedies As State Action*, 89 YALE L.J. 538 (1980) [hereinafter cited as *Creditors' Remedies*].

[157] Thompson, *supra* note 156, at 9.

[158] *See generally* Thompson, *supra* note 156; Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221.

[159] The Rehnquist trilogy has considered state action as a threshold issue. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). The revisionist approach has been severely criticized:

> Even though the proposed balancing text assures that not every private wrong would be a constitutional violation, still it makes every private action a subject of constitutional scrutiny and thereby largely ignores the role that the states have in protecting their citizens. The only way to preserve the institutional values that are reflected in the state action limitation is to retain some threshold test. . . .

1977 Foreword, *supra* note 156, at 127 n.36.

act "under color of" law and that constitutional limitations are applicable to their conduct.[160]

a. *The Public Function Doctrine*

Under the public function theory a private entity performing a function which is traditionally and exclusively reserved to the sovereign is held to the constitutional limitations thereof, regardless of governmental involvement in such conduct.[161] The principle was initially established in a series of actions challenging the exclusion of blacks from participation in primary elections,[162] and was thereafter applied to a series of actions challenging the prohibition of exercise of first amendment rights on private property functionally equivalent to the streets or sidewalks of a municipality such as a company-owned town[163] or a shopping center.[164]

The public function doctrine applies only to those powers which are traditionally reserved to the sovereign. In *Jackson v. Metropolitan Edison Company*,[165] a privately owned and operated utility corporation was challenged as violating the due process rights of a customer by terminating the latter's electric service without notice or opportunity to pay outstanding obligations. The court found no state action under the public function theory. The rationale was that the sovereign had no obligation to furnish utility services and such service was not "traditionally associated with sovereignty."[166]

The latest Supreme Court "state action" decision, *Flagg Brothers, Inc. v. Brooks*,[167] firmly limited application of the public function doctrine to those powers which are "traditionally *exclusively* reserved to

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[160] *See* Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

[161] For more detailed discussion of the public function theory see *State Action and the Public Function Doctrine*, *supra* note 156; Antoun, *supra* note 156, at 735-36; *State Action: Theories*, *supra* note 156, at 690-98; *State Action After* Jackson, *supra* note 156, at 334-35.

[162] Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932).

[163] Marsh v. Alabama, 326 U.S. 501 (1946) (Jehovah's Witness possessed first amendment right to distribute religious literature on streets of company-owed town).

[164] Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (holding that a state constitutional provision giving an individual the right to solicit signatures and distribute pamphlets at a private shopping center does not violate the owner's property rights under the fifth amendment).

[165] 419 U.S. 345 (1974).

[166] *Id.* at 353.

[167] 436 U.S. 149 (1978). For discussion of *Flagg Brothers*, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 105-09 (1978 & Supp. 1979); *Creditors' Remedies*, *supra* note 156 (criticizing Supreme Court for not applying the "significant state involvement" test of state action to the fact situation); Rose, *supra* note 156.

the State."[168] In *Flagg Brothers*, a sale by a warehouseman pursuant to a self-help provision of the New York Uniform Commercial Code was challenged as violative of the due process and equal protection clauses of the fourteenth amendment. No state action was found under the public function theory since "the settlement of disputes between debtors and creditors is not traditionally an exclusive public function."[169] The requirement of exclusivity was determined in *Flagg Brothers* to implicitly exist in all previous public function decisions and was specifically enunciated and recognized, correctly or incorrectly, as a direct element of the public function doctrine.

Application of the public function theory to the bondsman necessitates an examination of whether the power to arrest a principal is reserved to the state exclusively. It is initially noted that exercise of the police power to secure and promote the general welfare of the public is a right reserved to the states by the tenth amendment.[170] A private individual who has been delegated such power is generally recognized as exercising state action. For example, arrests of suspected shoplifters by private security guards as authorized by statute constitute action "under color of" law as delegation of the sovereign's police power.[171] That the sovereign statutorily authorizes the bondsman to arrest the principal is evidence in itself that such arrest authority is within the exclusive jurisdiction of the sovereign. Delegation of such power does not divest the state of the "traditional" power to arrest or of the "exclusive" authority to control such power by revoking any delegation. By prohibiting surety arrests, or establishing conditions precedent to arrest such as the requiring of a certified copy of the con-

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[168] 436 U.S. at 157.

[169] *Id.* at 161.

[170] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[171] Thompson v. McCoy, 425 F. Supp. 407 (D.S.C. 1976) (false arrest by store security guard held state action since statute authorizing detectives to make arrest was effectively a grant of a police power); *accord*, DeCarlo v. Joseph Horne & Co., 251 F. Supp. 935 (W.D. Pa. 1966). Distinguishably, statutes which authorize department store detectives to temporarily *detain* suspected shoplifters do not render such detention "under color of" law. *See* White Schrivner Corp., 594 F.2d 140, 143 (5th Cir. 1979); Draeger v. Grand Central, Inc., 504 F.2d 142 (10th Cir. 1974); Battle v. Dayton-Hudson Corp., 388 F. Supp. 900 (D. Minn. 1975); Warren v. Cummings, 303 F. Supp. 803 (D. Colo. 1969); Weyandt v. Mason's Stores, Inc., 279 F. Supp. 283 (W.D. Pa. 1968).

State licensing of detectives also does not create state action. *See* Jenkins v. White Castle Systems, Inc., 510 F. Supp. 981, 982 (N.D. Ill. 1981); Estate of Iodice v. Gimbels, Inc., 416 F. Supp. 1054 (E.D.N.Y. 1976). For further discussion see Note, *The Merchant, The Shoplifter, and The Law*, 55 MINN. L. REV. 825 (1971); Annot., 44 A.L.R. FED. 225-96 (1979) (actionability, under § 1983, of claims against persons other than police officers for unlawful arrest or imprisonment).

tract, a bail piece or an arrest warrant, the state can exercise its power to control arrest. *Citizens for Pre-Trial Justice v. Goldfarb*[172] represents the only reported decision which applied the public function theory to the bondsman. The majority concluded that "professional bondsmen . . . exercise a power which is clearly a traditional adjunct of the state's sovereignty: the power to arrest,"[173] and adjudged unconstitutional a statute which permitted the surety to summarily arrest the principal without due process protections.

The issue, therefore, is whether the long-standing common law rights of the surety preclude a determination that the sovereign's right to arrest *the principal* (as opposed to exercising a general power of arrest) is "traditional" or "exclusive." Common law rights existed only because the sovereign was an active party to the contractual undertaking and chose to implicitly delegate that which would otherwise be an exclusive responsibility of the state, namely custody and retrieval of an accused individual. Delegation of that which is traditionally exclusively within the sovereign's jurisdiction, for however long a period or in whatever manner, should not be dispositive in ascertaining what functions are public.

In sum, a strong argument can be made that the public function theory is applicable to the bondsman and that surety conduct may properly be considered as state action to invoke constitutional limitations.

b. *State Encouragement or Authorization*

A second doctrine which has emerged from Supreme Court decisions is the state encouragement or authorization theory, whereby private conduct is held to be properly attributable to the sovereign because the latter has enacted a statute or otherwise authorized or encouraged the conduct. The best example of this doctrine is *Reitman v. Mulkey*.[174] California's Proposition 14, an amendment to the California Constitution which prohibited the state legislature from denying, limiting or abridging, "directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property to such person or persons as he, in his absolute discretion, chooses,"[175] was held to constitute state action and violative of the equal protection clause of the fourteenth amendment. Although Proposition 14 was racially neutral, its ultimate effect was to repeal antidiscrimination statutes and thereby "authorize racial discrimination in the housing market"[176] and "significantly encourage and involve the state in private discriminations."[177]

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[172] 88 Mich. App. 519, 278 N.W.2d 653 (1979).

[173] 278 N.W.2d at 670.

[174] 387 U.S. 369 (1967).

[175] *Id.* at 371 n.2.

[176] *Id.* at 381.

[177] *Id.*

Approximately a decade later the encouragement and authorization theory was severely curtailed in *Flagg Brothers*.[178] The Court in *Flagg Brothers* added the criteria that the state "compel" the private action and not simply encourage or authorize the same.[179] Applying this restrictive and perhaps "unduly narrow"[180] test, the Rehnquist Court determined that a New York statute which permitted a warehouseman to sell goods to cover unpaid obligations could not be considered as a basis of state action since such statute "permit[ted] but [did] not compel" the sale.[181]

Application of the encouragement or authorization theory to the bondsman necessitates an examination of whether a state statute, which provides the surety with an arrest power, "compels" the ultimate apprehension. Since no action which is fundamentally private and voluntary may be compelled or mandated by the sovereign, it is perhaps too stringent to define "compel," as utilized in *Flagg Brothers*, as *mandating* affirmative conduct. Rather, in *Flagg Brothers* the "compel" test appears to be satisfied by a demonstration that the statute authorized and encouraged the conduct *and* no alternate means or methods were available to achieve the ultimate desired result. The warehouseman in *Flagg Brothers* possessed obvious alternative (though arguably more burdensome) methods of pursuing his rights as a creditor, such as an action at law or arranging a payment schedule with the debtor. The statutory authorization to sell the debtor's possessions merely constituted an addi-

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[178] 436 U.S. 149 (1978). *See* notes 167-76 *supra* and accompanying text for further discussion of *Flagg Brothers*.

[179] The Court noted:

> Our cases state "that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act." Adickes, [398 U.S. 144, 170 (1969)]. This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State.

436 U.S. at 164. Interestingly, the Court made no attempt to distinguish Reitman v. Mulkey, 387 U.S. 369 (1967), even though Proposition 14 clearly did not compel discriminatory conduct.

[180] *Flagg Brothers* has been the subject of much-deserved criticism:

> The Court's approach to the state encouragement doctrine is also unduly narrow. It is true enough, as Justice Rehnquist observes, that a state's "mere acquiescence" in a private action does not by itself constitute state action, but this truism misconceives the issue. The simplistic dichotomy of "compulsion" and "mere acquiescence" renders that state encouragement doctrine meaningless because the cases addressed by the doctrine are precisely those where the private act is not directly compelled by the state. In these cases the Court should broadly consider the effect of the state's laws on the system or private relationships and the pattern of private actions, rather than make everything depend on the search for some decisive direct connection between the state and the specific private act that is at issue.

The Supreme Court, 1977 Term, 92 HARV. L. REV. 57, 123-30 (1978).

[181] 436 U.S. at 156.

tional method pursuant to which the warehouseman could obtain financial redress. Had the statute in *Flagg Brothers* been more compelling and not just an alternative method, the court could possibly have found the action to be "state action."[182]

Bondsmen, however, may not only be authorized and encouraged to arrest their principal pursuant to a statute, but may be compelled to do so. This would be true whenever there were no alternate means available for fulfilling the responsibility of surrendering the principal to the sovereign and thereby achieving the desired result of preventing a forfeiture of the bond. When arrest and surrender of the principal provide the only method, not an additional method, by which the surety may prevent a financial loss, the bondsman is "compelled" to arrest.

The "compel test" is not so easily satisfied, however, when the bondsman has alternate methods of preventing a financial loss. When the pertinent statute enables the surety to employ the services of law enforcement personnel and when the ultimate apprehension may be effected within the jurisdiction of such peace officers, or when foreclosure may be undertaken on a collateral pledge which is sufficient to cover and financial loss, arrest is but one alternative.

Arguably the "compel test" will fail if the statutory source of arrest is viewed as cumulative and declaratory of the common law rights of the surety since such statute cannot be considered as encouraging, authorizing or compelling conduct which was not previously permissible. However, this proposition merely shifts the focus of examination from the state's statutory agency to its judicial agency. As the Supreme Court noted as early as 1880, "a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the [fourteenth] amendment extend to all action of the State."[183] In *Reitman v. Mulkey*, the Court held Proposition 14 unconstitutional even though the proposed amendment merely constitutionalized common law property rights. The Court further held that Proposition 14 created "state action" since the ultimate effect would be sovereign encouragement of racial discrimination in the housing market.[184] If state constitutionalization of common law rights may be considered state action, it appears obvious that state codification of common law rights might equally be considered as state action under the encouragement and authorization doctrine.[185] Thus, the bonds-

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[182] *Id.*

[183] Virginia v. Rives, 100 U.S. 313, 318 (1880).

[184] *See* notes 174-77 *supra* and accompanying text.

[185] The effect of codification of common law rights within a state action context is unresolved. As has been noted:

> Some courts have suggested that for state action to be found under the "reliance" theory, the statute in question must create rights that did not exist at common law or must be enacted in contravention of a constitu-

man is compelled to effect an arrest whether the source of such power is viewed as derivative of the state's common law, custom or codification thereof.

In sum, application of the encouragement or authorization theory of state action to the bondsman necessitates an examination of the surety's alternate methods of avoiding financial loss and/or surrendering the principal. When the factual situation is such that the only method of preventing a forefeiture of the bond is through the arrest and surrender of the principal, and a statute or common law right encourages and authorizes the apprehension, it appears that such conduct may be considered "compelled" within the meaning of *Flagg Brothers*, and state action exists.

Actions wherein the conduct of bondsmen has been considered as state action pursuant to an implicit or express reliance upon the encouragement or authorization theory have not addressed the "compel test" of *Flagg Brothers* and are thereby questionable precedent. In *Hill v. Toll*[186] bondsmen who allegedly beat and robbed the principal were determined, under principles of *Reitman v. Mulkey*, to act "under color of" law for section 1983 purposes since the Pennsylvania statute authorized such arrest and thereby "placed the imprimatur of the state on the conduct permitted by that section and . . . thereby encouraged such conduct."[187] *Maynard v. Kear*[188] was an action wherein bondsman's agents allegedly forcibly entered the principal's apartment, seized and beat him, then coercively transported him from Ohio to Virginia, all to avoid forfeiture of a $100 bond. A Virginia statute providing that "upon the

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tional goal. Others have argued convincingly that the issue should not be left to turn upon the "vagaries of the past."

State Action After Jackson, *supra* note 156, at 331, referring to Davis v. Richmond, 512 F.2d 201, 203 (1st Cir. 1975); *see* Kenly v. Miracle Properties, 412 F. Supp. 1072, 1074-75 (D. Ariz. 1976) (presence or absence of common law origin of a right is only one factor to be considered in state action analysis). *See also* Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 216 (1957) (state action analysis is not dependent upon separating rights derivative from common law from those rights defined by legislation); Rowe, *supra*, note 156, at 746, wherein it is observed: "For example, a state's common law of defamation is subject to first amendment challenge without regard to the official or private capacity of the actors."

[186] 320 F. Supp. 185 (E.D. Pa. 1970).

[187] 320 F. Supp. at 187. It was further stated that "here, when [the surety] or its agent arrest and surrender its principals, we *assume* that they knowingly act pursuant to [the arrest statute]." *Id.* at 187 (emphasis added). This assumption of the knowledge of statutory authority may constitute an impermissible judicial conclusion:

> We have previously noted, with respect to a private individual, that "[w]hatever else may also be necessary to show that a person has acted 'under color of [a] statute' for purposes of § 1983, . . . we think it essential that he act with the knowledge of and pursuant to that statute."

Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156 (1978) (citation omitted).

[188] 474 F. Supp. 794 (N.D. Ohio 1979).

application of the surety, the court, . . . shall issue a capias for the arrest of such principal, and such capias may be executed by such surety, or his authorized agent,"[189] was determined to provide the requisite state action since "[b]y this statute, the State of Virginia [lended] its authority to private bondsmen."[190]

In the 1979 decision of *Citizens for Pre-Trial Justice v. Goldfarb*,[191] the constitutionality of a statute which authorized a summary arrest of the principal without procedural safeguards was challenged, and the court concluded, without benefit of examining either *Reitman* or *Flagg Brothers*, that a state action finding could not "be premised on the statute's 'encouragement' of the rearrest procedures."[192] The precedential value of this statement must be considered *de minimus*.

In *Ouzts v. Maryland National Insurance Company*,[193] agents of a Nevada bondsman allegedly apprehended the principal within California and transported him to Nevada. The California statute, which allowed California bondsmen to summarily arrest their principals, was not interpreted as promoting[194] or fostering[195] the conduct since another California statute specifically prohibited foreign bondsman from effecting an arrest within California until certain procedural safeguards had been satisfied.[196] The logic of this conclusion is without challenge. Unfortunately, the pertinent issue of whether the Nevada statute authorized or encouraged the apprehension was not addressed, presumably because it authorized retrievals only within the jurisdiction of Nevada.[197]

Both logic and legal precedent support the proposition that the conduct of the surety may be encouraged, authorized or compelled by a state statute thereby rendering such conduct state action even within the restrictive definition of *Flagg Brothers*.

c. *Significant State Involvement*

A third doctrine of state action analysis assumes a variety of titles including "entwinement," "symbiotic relationship," "interdependence,"

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[189] *Id.* at 801, *citing* VA. CODE ANN. § 13.1-.144 (1960).

[190] 474 F. Supp. at 801. In addition to implicitly applying the "authorization" theory, it appears that the court considered the bondsman's agents as quasi-agents of the sovereign since it cited with approval Griffin v. Maryland, 378 U.S. 130 (1964). 474 F. Supp. at 800.

[191] 88 Mich. App. 519, 278 N.W.2d 653 (1979).

[192] *Id.* at 555, 278 N.W.2d at 669.

[193] 505 F.2d 547 (9th Cir. 1974) (*en banc*), *cert. denied*, 421 U.S. 949 (1975).

[194] 505 F.2d at 553.

[195] *Id.* at 554.

[196] *See* notes 119-22 *supra* and accompanying text for a discussion of CAL. PENAL CODE § 847.5 (West 1970), which establishes procedural criteria for out-of-state bondsmen.

[197] *See* NEV. REV. STAT. § 178.523 (1969). Note, however, that dissenting Justices Hufstedler, Merrill, Cuniway and Ely felt that the agents acted "under color of" Nevada law. *See* 505 F.2d at 555-62.

"partnership," "significant state involvement," "joint venture," "joint enterprise" and "sufficiently close nexus."[198] This doctrine was first utilized in *Burton v. Wilmington Parking Authority*.[199] Hence, the Court held the private conduct of a restaurant owner leasing space in a building financed by public funds and owned by a state agency to constitute state action and a deprivation of equal rights. The restauranteur had excluded black patrons solely on account of their race. This constituted a deprivation of rights as secured by the equal protection clause of the fourteenth amendment:

> The state has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity, which on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.[200]

The significant state involvement theory has been applied in numerous post-*Burton* decisions.[201] Unfortunately, this doctrine is as difficult in its application as it is necessary as a method of judicial analysis. Vacuous terms such as "nexus" or "entwinement," which by their nature defy a functional legal definition, must be interpreted within the context of the factual situation in which they have been utilized. The precedential value of such narrow decisions in a factually deviant context is never obvious. Rather, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[202]

Certain state conduct such as federal funding,[203] licensing[204] or regula-

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[198] *See generally* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); United States v. Price, 383 U.S. 787 (1966); Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). For further discussion see L. TRIBE, *supra* note 156, at 1271; Antoun, *supra* note 156, at 729; Nevin, *State Action: The Significant State Involvement Doctrine After* Moose Lodge *and* Jackson, 14 IDAHO L. REV. 647 (1978) (state action theory coherent); Thompson, *supra* note 156, at 6; *State Action in* Weber, *supra* note 156, at 1180; *State Action After* Jackson, *supra* note 156, at 336; *State Action and the Burger Court*, *supra* note 156.

[199] 365 U.S. 715 (1961).

[200] *Id.* at 725.

[201] *See* citations in note 198 *supra* and notes 203, 221 *infra*.

[202] Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

[203] Receipt of federal funding does not convert conduct of institutions such as private universities into state action. *See* Greenya v. George Washington Univ., 512 F.2d 556 (D.C. Cir.), *cert. denied*, 423 U.S. 955 (1975); Spark v. Catholic Univ., 510 F.2d 1277 (D.C. Cir. 1975); Wahba v. New York Univ., 492 F.2d 96 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Madon v. Long Island Univ. C.W. Post Center, 518 F. Supp. 246 (E.D.N.Y. 1981).

[204] Feldman v. Jackson Memorial Hosp., 509 F. Supp. 815 (S.D. Fla. 1981) (state licensing of private hospital insufficient nexus).

tion,[205] will generally not satisfy the involvement theory. In *Jackson v. Metropolitan Edison Company*,[206] a privately owned and operated utility corporation was found to lack a "sufficiently close nexus"[207] to the sovereign so as to invoke the applicable constitutional limitations despite extensive governmental regulation. The theory that state regulation of a corporation will support a sufficient state action nexus was virtually abolished in *Jackson* since a situation involving *more* extensive governmental regulation is improbable.[208]

It is posited that the sovereign is significantly involved with the conduct of the bondsman so as to attach to the latter the constitutional limitations applicable to the former. A summary of the bondsman-state nexus is appropriate. The sovereign, as custodian over the person of the accused, possesses the exclusive authority to dictate the conditions pursuant to which pretrial release may be secured. The posting of a corporate bond is required even though the state's interest of assuring the appearance of the accused may be protected through utilization of alternate proven pretrial release methods.[209] In order to secure the fundamental constitutional right to bail,[210] the accused is essentially coerced

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[205] Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

[206] *Id.*

[207] *Id.* at 351. The "sufficiently close nexus" test of *Jackson* must be considered as a variation of the symbiotic relationship test of *Burton* discussed in notes 198-99 *supra* and accompanying text. Obviously *Jackson* does not overrule *Burton*. *See* Chalfant v. Wilmington Inst., 574 F.2d 739 (3d Cir. 1978) (*en banc*); Downs v. Sawtelle, 574 F.2d 1 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978); Braden v. University of Pittsburgh, 552 F.2d 948 (3d Cir. 1977) (*en banc*); Holodnak v. Avco Corp., 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975).

[208] The Court noted: "The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." 419 U.S. at 350. In Lemmons v. Tranbraw, 425 F. Supp. 496 (E.D. Tenn. 1976), the principles enunciated in *Jackson* were applied directly to the bondsman. Regulation, in and of itself, was determined to be "[insufficient] to convert [the bondsman's] conduct into that of the state for the purpose of the 14th Amendment or 42 U.S.C. §§ 1983." *Id.* at 498-99. *Compare*, however, Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547 (9th Cir. 1974), *cert. denied*, 421 U.S. 949 (1975) (Hufstedler, Browning, Duniway, Ely, JJ., dissenting), wherein state action was found to exist when state regulation was considered as one of several cumulative factors. *See* note 225 *infra* and accompanying text.

Commentators have observed that "[a]s regulation in no way enhances private powers of the regulated party, but rather limits those powers, challenged conduct cannot be made more effective by this form of involvement. It is difficult, therefore, to understand how a 'state action' finding could be predicated upon regulation." *State Action: Theories*, *supra* note 156, at 659. *See also* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (Pennsylvania State Liquor Control Board regulations did not encourage racial discrimination in a private club so as to provide a nexus for state action); *State Action After* Jackson, *supra* note 156, at 326-28 (and citations therein).

[209] *See* notes 34-49 *supra* and accompanying text.

[210] *See* note 10 *supra*.

into executing a contractual undertaking where the bondsman demands conditions repugnant to the principles of the Constitution.[211] This contract secures the full blessing of the sovereign and possesses the authority to require a condition precedent for entering into this "tri-party arrangement,"[212] namely that the surety-principal contract permits seizure only as attended by procedural and/or substantive safeguards. By releasing the principal to the bondsman the sovereign is relieved of the financial expenses and legal liabilities incurred in the guarding and maintenance of the principal as a prisoner.

Most importantly, the state delegates by statute to the surety those powers which are typically reserved to the exclusive jurisdiction of a sovereign, *i.e.*, power to arrest.[213] These statutes provide a source of authority which must be considered as independent of the contractual and common law sources of arrest powers. It is typical for a statute to enable the bondsman to utilize the services of state law enforcement personnel while effecting the seizure.[214] Even if peace officers do not directly participate in the apprehension, refusal to intervene on the principal's behalf implies consent, particularly when the surety utilizes force in excess of that which is necessary.[215]

The absence of procedural or substantive standards attending this statutory arrest authority displays at best a legislative *laissez-faire* attitude towards the apprehension procedures utilized by bondsmen, and at worst a direct approval and encouragement thereof. The judiciary often becomes directly involved in the arrest procedure by issuing to the surety a certified copy of the bond, a bail piece or an arrest warrant which serves as the authority to effect a seizure.[216]

It is customary for law enforcement personnel to aid the bondsman in locating the accused by providing access to nonpublic investigatory records and to assist the retrieval by permitting utilization of jail facilities during transportation.[217] A foreign jurisdiction, serving as

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[211] *See* notes 53-65 *supra* and accompanying text.

[212] Allied Fidelity Corp. v. C.I.R., 572 F.2d 1190, 1193 (7th Cir.), *cert. denied*, 439 U.S. 835 (1978).

[213] *See* notes 127-34 *supra* and accompanying text.

[214] *See, e.g.*, ARK. STAT. ANN. § 34-628 (1947).

[215] Dunkin v. Lamb, 500 F. Supp. 184 (D. Nev. 1980) (police refused to intervene); Hill v. Toll, 320 F. Supp. 185 (E.D. Pa. 1970) (detention center officials allegedly refused to aid principal who was beaten and robbed by bondsmen in their presence). *But see* Maynard v. Kear, 474 F. Supp. 794, 800 (N.D. Ohio 1979) ("[t]he police officers took precautions initially to prevent trouble from occurring, responded to the call for assistance, prevented further fighting between [the principal] and the bondsmen, and investigated at great length the bondsmen's authority to act as they did.").

[216] *See* citations in note 129 *supra* and statutes construed therein.

[217] Investigatory assistance is discussed in Note, *Bail Bondsmen: An Alternative*, 6 SUFFOLK L. REV. 937, 938-40 (1972).

custodian over the principal, will often surrender the same into the direct custody of the surety upon application.[218] Finally, bondsmen are often heavily regulated by statute or judicial rule.[219]

Simply, the bondsman is created by the sovereign and then given coercive powers to provide custodial and retrieval services as the state's alter ego. The "nonobvious involvement of the State"[220] is facially evident, and the nexus between the sovereign and the bondsman is arguably so sufficient in statute as to satisfy the significant state involvement test which has been held applicable in instances where the sovereign's conduct was far less obvious.[221]

The symbiotic relationship between the surety and the sovereign has received only two significant judicial examinations. In *Citizens for Pre-Trial Justice v. Goldfarb*[222] Justice Cavanagh found such a relationship within the meaning of *Jackson* and *Burton*. He noted that the sovereign received significant benefits by releasing the individual to the custody of the bondsman whose "relationship with the court is quasi-official."[223] A more extensive examination was undertaken in *Ouzts v. Maryland*

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[218] Golla v. State, 50 Del. 497, 135 A.2d 137 (1957); *see* Fitzpatrick v. Williams, 46 F.2d 40 (5th Cir. 1931).

[219] *See* notes 34-35 *supra* and accompanying text.

[220] Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

[221] *See* Barnhorst v. Missouri State High School Activities Ass'n, 504 F. Supp. 449 (W.D. Mo. 1980) (close identification of functions served by state high school activities association with the state's provision of education was sufficient nexus to transmute challenged rule of association into state action); Swann v. Gastonia Housing Authority, 502 F. Supp. 362, 365 (W.D.N.C. 1980) (conduct of private landlord was state action since a sufficient nexus existed with the federal government pursuant to the "numerous benefits [derived] from participating in [a federal Housing program]"); Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 506 F. Supp. 147 (N.D.N.Y. 1980), *rev'd*, 650 F.2d 430 (1981) (State fair operators' requirement that solicitation of money for religious purposes be restricted to a booth was "state action" since state funded operation of fair, provided grounds and police patrols); Yaretsky v. Blum, 629 F.2d 817 (2d Cir. 1980) (hospital with Medicaid patients sufficiently close in nexus to federal government), *cert. denied*, ___ U.S. ___, 101 S. Ct. 1379 (1981). *Cf.* Rendell-Baker v. Kohn, 641 F.2d 14 (1st Cir. 1981) (conduct of teachers at small, nonprofit school not state action even though funded from government sources, school extensively regulated and diploma was certified by town school committee), *cert. denied*, 50 U.S.L.W. 3278 (U.S. Oct. 13, 1981) (No. 80-2102); Foster v. Ripley, 645 F.2d 1142, 1147 (D.C. Cir. 1981) (government's involvement in operation of Smithsonian Science Information Exchange sufficient to constitute the type of symbiotic relationship found in *Burton*); Bloomer Shippers Ass'n v. Illinois Cent. Gulf R.R. Co., 655 F.2d 772 (7th Cir. 1981) (use of courthouse not state action); Joseph v. Community Action Comm'n to Help the Economy, Inc., 503 F. Supp. 73 (S.D.N.Y. 1980) (community action agency not state action though public officials sat on board and substantial public funds received); Lestrange v. Consolidated Rail Corp., 501 F. Supp. 964 (M.D. Pa. 1980).

[222] 88 Mich. App. 519, 278 N.W.2d 653 (1979).

[223] *Id.* at 558, 278 N.W.2d at 671.

National Insurance Company[224] where the dissenting Justices determined that the state had "insinuated itself into a position of interdependence"[225] with the surety by licensing and regulating the same, receiving benefits therefrom and delegating an "important public function"[226] thereto. It was concluded that the conduct of the bondsman was tantamount to state action, since "only through substantial governmental cooperation [was] it possible to maintain the system of quasi-private bail that led to the violation of [the principal's] civil rights."[227]

The significant state involvement test is, by its nature, unpredictable. However, it is difficult to imagine a nexus more complete than that which exists between the surety and the sovereign, particularly when the right to bail is constitutionally protected. Even a superficial analysis of the interdependence between the bondsman and the state constrains the conclusion that the conduct of the surety must be considered as state action pursuant to the principles established in *Burton* and *Jackson.*

3. Miscellaneous State Action Bondsmen Decisions

Several decisions which have addressed the conduct of bondsmen as state action should be mentioned. In *McCaleb v. Peerless Insurance Company*,[228] a bondsman's agents shackled and controlled the activity of the principal for approximately eighty hours without surrendering the latter to the sovereign's custody. Action was initiated in the federal forum under state tort law and section 1983. The court concluded that "[j]urisdiction exists . . . under the provisions of 28 U.S.C.A. § 1331,"[229] the federal question statute, thereby implying that a variable constitutional action had been plead. The court did not address the existence of state action which constitutes a prerequisite to constitutional application, thus rendering the decision of little precedential value for "state action" cases.

In *Thomas v. Miller*,[230] where sureties allegedly shackled the principal and treated him "roughly,"[231] a section 1983 action was dismissed pursuant to the determination that the bondsmen "were acting by reason of a contractual relationship with him" and "[t]hat which was done by the [bondsmen] was not a state action."[232] No state action analysis was conducted, whereby the court could first determine its jurisdiction to con-

[224] 505 F.2d 547 (9th Cir. 1974), *cert. denied*, 421 U.S. 949 (1975).

[225] 505 F.2d at 558.

[226] *Id.* at 557.

[227] *Id.*

[228] 250 F. Supp. 512 (D. Neb. 1965).

[229] *Id.* at 513.

[230] 282 F. Supp. 571 (E.D. Tenn. 1968).

[231] *Id.* at 572.

[232] *Id.* at 573.

sider a contractual defense. In *Curtis v. Peerless Insurance Company*,[233] a section 1983 action founded upon the principal's averred constitutional right to be free from unlawful seizure was dismissed since the principal had not plead "even a vapor of evidence"[234] that the surety's conduct was under color of law. Last, in *Easley v. Blossom*[235] a section 1983 action was dismissed for lack of state action. In a classic example of the blind leading the blind, the *Easley* court conducted no independent state action analysis but simply cited as controlling *Thomas v. Miller* and *Curtis v. Peerless Insurance Company*.[236]

It is noted that several actions[237] have been asserted unsuccessfully against bondsmen under 42 U.S.C. § 1985(3),[238] which provides a federal cause of action against persons who conspire to deprive another of the "equal protection of the laws."[239] The 1971 Supreme Court decision of *Griffin v. Breckenridge*[240] eliminated the state action requirement of section 1985(3), thereby creating a quasi-constitutional action to be asserted against private individuals. The Court, obviously concerned that elimination of the state action requirement would preempt many areas of tort law which had traditionally been reserved to the states and thereby violate principles of federalism, noted that "[t]he language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."[241]

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[233] 299 F. Supp. 429 (D. Minn. 1969).

[234] *Id.* at 434.

[235] 394 F. Supp. 343 (S.D. Fla. 1975).

[236] *Id.* at 345. The Court also dismissed the action as founded upon 42 U.S.C. § 1985(3) pursuant to an absence of state action, even though the state action "requirement" of that statutory provision had been eliminated by the Supreme Court four years earlier in Griffin v. Breckenridge, 403 U.S. 88 (1971).

[237] Curtis v. Peerless Ins. Co., 299 F. Supp. 429 (D. Minn. 1969); *see* Easley v. Blossom, 394 F. Supp. 343 (S.D. Fla. 1975); Smith v. Rosenbaum, 333 F. Supp. 35 (E.D. Pa. 1971), *aff'd*, 460 F.2d 1019 (3d Cir. 1972); *see also* Maynard v. Kear, 474 F. Supp. 794 (N.D. Ohio 1979).

[238] 42 U.S.C. § 1985(3) states:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Id.

[239] *Id.*

[240] 403 U.S. 88 (1971).

Accordingly, racial classes are expressly recognized as protected under section 1985(3). The Supreme Court left open the composition of classes, other than racial, which may be subjected to discrimination charges under section 1985(3). It is extremely doubtful that the class of "principals" would be such a protected class.[242] However, gender and religion are so protected.[243] Accordingly, a principal may state a recognized cause of action against bondsmen or their agents under section 1985(3) if the latter *conspires* to deprive the principal of a right secured by the equal protection of the laws and if the discriminatory acts are directed towards a protected class such as race, religion or gender. No reported decision where the conduct of the bondsman has been challenged has satisfied these criteria to date, although such a decision is certainly possible.

B. *Constitutional Deprivation*

A viable section 1983 claim necessitates a demonstration of state action and a constitutional deprivation.[244] Once the bondsman's conduct has been classified as state action, then constitutional limitations attach. The constitutional boundaries of permissible surety "state action" conduct are undefined but not beyond speculation. Until the principal flees or otherwise violates a contractual condition of the bail undertaking, the principal is arguably possessed of a due process liberty interest similar to a parolee.[245] If a principal absconds, he may be deemed to possess, at a minimum, those basic constitutional rights which attach to an individual

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[241] *Id.* at 102 (emphasis in original).

[242] The open-ended nature of *Griffin* has resulted in divergent but largely reconcilable decisions among the lower federal courts. Decisions have generally demonstrated a reluctance to extend the scope of § 1985(3) beyond the confines of *Griffin*. *See, e.g.*, Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972) (class of criminal attorneys not protected); Bricker v. Crane, 468 F.2d 1228 (1st Cir. 1972), *cert. denied*, 410 U.S. 930 (1973) (doctor who testified in malpractice suits not a § 1985 class); *see also* Carchman v. Korman Corp., 594 F.2d 354 (3d Cir.), *cert. denied*, 444 U.S. 989 (1979) (tenant organizers not protected); Baskin v. Parker, 602 F.2d 1205 (5th Cir. 1979) (white farm families not protected class); McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977) (*en banc*) (bankrupts not protected); Askew v. Bloemaker, 548 F.2d 673 (7th Cir. 1976) (homeowners raided by federal drug enforcement agents not protected); United States v. DeLaurentis, 491 F.2d 208 (2d Cir. 1974) (unfair Labor practice not cognizable under 18 U.S.C. § 241, the criminal analogue to § 1985(3)).

[243] Actions wherein a class-based conspiracy involved discriminations to a racial animus, such as religion, national origin or gender, have generally been held to create cognizable § 1985(3) suits. *Cf.* Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499 (9th Cir. 1979) (women protected class); Marlowe v. Fisher Body, 489 F.2d 1057 (6th Cir. 1973) (members of Jewish faith protected); *see also* Conroy v. Conroy, 575 F.2d 175 (8th Cir. 1978) (gender protected class); Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (worshippers at particular church protected class).

[244] *See* note 146 *supra*.

[245] *See* notes 106-09 *supra* and accompanying text.

who has escaped from the custody of the sovereign. A complete analysis of these rights exceeds the scope of this Article.[246] It is noted, however, that excessive force may not be utilized to effect an arrest.[247] An arrest warrant or the equivalent thereof, such as a judicially certified copy of the bond undertaking, will be required. Regarding arrests in third party dwellings, the Supreme Court has recently held in *Steagald v. United States*[248] that a law officer who enters the dwelling of a third party to effect the arrest of an individual therein violates the fourth amendment, absent exigent circumstances or consent, if a search warrant has not been obtained. An *arrest* warrant has been determined insufficient for affecting such an arrest. Application of this principle to the bondsman eliminates the viability of the narrow holding of *Livingston v. Browder*, as discussed above.[249] Other restrictions premised upon the first, sixth and eighth amendments may also attach.[250] It is sufficient to note that the existence of state action significantly limits the bondsman's permissible scope of conduct.

V. CONCLUSION

The professional bail bondsman is a legal anachronism whose tenacity and ability to survive legislative reform and constitutitional scrutiny is astounding. The justifications for the existence of the corporate surety are superficial even when subjected to a cursory examination. The lack of functional utility and absence of internal or external accountability renders the surety both unnecessary and dangerous.

This quasi-judicial officer, created by the sovereign and provided with its coercive powers, often escapes state action analysis and/or statutory regulation. Thus, the judiciary is constrained to view *Taylor v. Taintor* as the source and scope of the bondsman's powers even though the surety provides a police service which is traditionally within the exclusive jurisdiction of the sovereign. Judicial determinations that such powers are derivative of the contractual nature of the undertaking are specious

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[246] The reader is referred to the references in note 54 *supra*, and to those decisions wherein the conduct of bondsmen was construed as state action and the alleged constitutional deprivation was examined. *See* Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547 (9th Cir. 1974); Maynard v. Kear, 474 F. Supp. 794 (N.D. Ohio 1979); Smith v. Rosenbaum, 333 F. Supp. 35 (E.D. Pa. 1971), *aff'd*, 460 F.2d 1019 (3d Cir. 1972); Hill v. Toll, 320 F. Supp. 185 (E.D. Pa. 1970); United States v. Trunko, 189 F. Supp. 559 (E.D. Ark. 1960); Citizens for Pre-Trial Justice v. Goldfarb, 88 Mich. App. 519, 278 N.W.2d 653 (1979).

[247] Monroe v. Pape, 365 U.S. 167 (1961).

[248] ___ U.S. ___, 101 S. Ct. 1642 (1981).

[249] *See* notes 90-95 *supra* and accompanying text.

[250] In particular, examples include deprivations of freedom of association, extradition, and cruel and unusual punishment such as a denial of medical attention when such is warranted under the principles of Estelle v. Gamble, 429 U.S. 97 (1976). *See generally* references in note 246 *supra*.

and provide a superficial cloak for the role of the bondsman as the state's alter ego. Public policy justification for the existence and power of the bondsman, to the extent that such ever existed, is significantly outweighed by the counterveiling public policy of preserving the constitutional status of an individual merely *accused* of committing an offense.

The important issue of whether the conduct of bondsmen constitutes state action has received surprisingly little judicial attention. A small number of jurists have pierced the "private" veil wherein the bondsman seeks constitutional immunity and have characterized their conduct as state action. Analysis of contemporary state action "doctrines" reveals that the bondsman arguably possesses a symbiotic relationship with the sovereign, performs a public function, and is encouraged, authorized and even compelled to utilize police powers. Such analysis indicates the propriety of those decisions where conduct of the surety has been held to constitute state action. Indeed, implementation by the sovereign of a bail system in which the bondsman serves as the cornerstone and acquisition of the constitutionally protected right to bail may only be achieved through a waiver of other constitutional protections, is both ironic and absurd.

It is hoped that this Article will inform both litigants and jurists of the application of state action analysis and constitutional limitations to the bondsman. Sureties cannot be expected to engage in conduct which conforms to constitutional principles until the judiciary consistently and uniformly adjudges such conduct to be state action.

APPENDIX

Pre-Trial Release in the United States District Court, Northern District of Ohio, Eastern Division (excluding Akron).*

TYPE 1980	RELEASED	NOT RELEASED	TOTAL
Surety	18 (7%)	32 (13%)	50 (20%)
Ten Percent	33 (14%)	0 (0%)	33 (14%)
Personal Recognizance (unsecured)	160 (65%)	0 (0%)	160 (65%)
Cash	0 (0%)	3 (1%)	3 (1%)
TOTAL			246 (100%)

*Statistics are based upon all records which were sufficiently clear to ascertain the type of bond required, and do not reflect cases where bond was not applicable (*e.g.*, corporate defendant, transfer of venue, accused never rendered into custody, action dismissed, or bond set in transferring district).

TYPE	RELEASED	NOT RELEASED	TOTAL
1979			
Surety	8 (6%)	21 (13%)	29 (19%)
Ten Percent	14 (9%)	4 (3%)	18 (12%)
Personal Recognizance (unsecured)	100 (67%)	0 (0%)	100 (67%)
Cash	0 (0%)	3 (2%)	3 (2%)
TOTAL			150 (100%)
1978			
Surety	14 (7%)	21 (10.5%)	35 (17.5%)
Ten Percent	9 (4.5%)	1 (.5%)	10 (5%)
Personal Recognizance (unsecured)	154 (77%)	0 (0%)	154 (77%)
Cash	0 (0%)	1 (.5%)	1 (.5%)
TOTAL			200 (100%)