Washington and Lee Law Review

Volume 42 | Issue 1 Article 12

Winter 1-1-1985

Liability of Bail Bondsmen Under Section 1983

LIABILITY OF BAIL BONDSMEN UNDER SECTION 1983

Various forms of bail[1] release currently exist in the United States.[2] In one form of bail release, the court requires the accused to contract with an individual or agency in the business of writing bonds.[3] If the professional bondsman writes and posts the bonds with the court,[4] the bondsman becomes

---

1. *See* Hatchett, *Filling In The Gaps of Virginia Bail Reform*, 14 U. RICH. L. REV. 483, 484 (1980) (discussion of bail reform movement in Virginia). Under common law the term "bail" means release secured by surety. *Id.* Recent usage of the term "bail" has expanded the definition to include any release from custody regardless of the conditions imposed. *Id. See generally* State v. Mitchell, 59 Del. 11, ____, 212 A.2d 873, 874-84 (Del. Super. Ct. 1965) (discussion of history of bail). Bail originated in medieval England as a device to free untried prisoners. *Id.* at ____, 212 A.2d at 880. In this early period, a sheriff would release a prisoner on the promise of either the prisoner or a third party that the prisoner would appear for trial. *Id.* If the prisoner failed to return for trial, the third-party surety had to take the prisoner's place. *Id.* Consequently, to protect the surety's risk, the sheriff gave the surety custodial powers over the prisoner. *Id.* In time, the bail system evolved to permit sureties to forfeit money, instead of themselves, when the principal did not appear. *Id.* Eventually, the state transferred bailing functions from the sheriff's office to the justice of the peace. *Id.; see* Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 966-69 (1961) (discussion of history of bail).

2. *See* Toborg, *Bail Bondsmen and Criminal Courts*, 8 JUST. SYS. J. 141, 142-43 (1983) (discussion of symbiotic relationship between bondsmen and criminal courts, and way in which bondsmen facilitate court operations). In determining bail, a trial judge has the authority to invoke one of four general forms of bail release. *Id.* at 141. First, the judge may release the accused on the condition that the accused promise to appear for subsequent court dates. *Id.* Second, the judge may release the accused to the custody of a pretrial release program, other agency, or a third party. *Id.* Third, the judge may require the accused to post a percentage of the amount of the bond, usually ten percent, with the court. *Id.* Courts using the third alternative generally refund most of the ten percent fee to a defendant who has appeared on the specified trial dates. *Id.* Finally, if a deposit bond is not feasible for the accused, the accused may contract with a professional bondsman. *Id.*

3. *See id.* at 141. The accused pays the bondsman a fee, typically ten percent of the amount of the bond, in return for writing the bond. *Id.* at 142.

4. *See id.* at 142. The bondsman has total discretion in deciding whether to write the bond. *Id.* The bondsman will base his decision on financial considerations and the expected ease or difficulty of producing the defendant. *Id.; see also* Reiss, *The Long Arm of John Light's Law*, 4 Wash. Post. Mag., Jan. 29, 1984 (description of Washington, D.C. bail bond business from bondsman's perspective) [hereinafter cited as *The Long Arm*]. In Washington, D.C., the complicated process of writing and posting a bond may take hours. *Id.* at 11. The jailed defendant or the defendant's lawyer calls the family who then calls a bondsman. *Id.* A family member then visits the bondsman and fills out the bond application. *Id.* Next, the bondsman investigates the family member's identification as well as the charge sheet and the bail agency's sheet, both of which describe the prior arrest record of the accused. *Id.* At this point, the bondsman decides whether to write the bond by assessing the risks involved. *Id.* Generally the bondsman writes bonds for 25 out of 100 applicants. *Id.* After deciding to write the bond, the bondsman fills out a bond sheet and a jail release sheet, and deposits the papers in the superior court finance office. *Id.* The finance office calls the jail, and the jail verifies the charges and the amount of the bond. *Id.* The bondsman then picks up the accused at the receiving and discharge area of the jail, escorts the accused to the finance office, and signs the bond swearing to abide by the rules and conditions that the judge has set. *Id.* As compensation, the bondsman receives ten percent of the bond. *Id.* A judge usually will give the bondsman

a surety on the contract.[5] The surety is liable to the court setting the bail for the full face value of the bond should the accused, or principal, not appear.[6] However, courts generally will provide the surety with a specified period of time in which to find and return the fugitive principal to the court's jurisdiction to avoid forfeiture on the bond.[7] Ironically, the law provides greater authority to a bail bondsman in returning a fugitive principal who has violated the conditions of bail, than the law provides to a law enforcement officer returning an escaped prisoner.[8]

The prevailing view in most courts today is that bondsmen possess extremely broad common-law grants of authority in effectuating the arrest of a principal.[9] The United States Supreme Court first addressed the issue of the authority of bondsmen in 1869 in *Reese v. United States.*[10] In *Reese,* the sureties had posted a bond for a principal charged with land fraud.[11]

---

fourteen days to catch a bail jumper, but if the police capture the jumper first, the bondsman probably will forfeit the bond money. *Id.* at 12.

5. *See* Toborg, *supra* note 2, at 142; *see also* State v. Mitchell, 59 Del. 11, ____, 212 A.2d 873, 884 (Del. Super. Ct. 1965) (description of bail bond as contract between government on one side and principal and surety on other).

6. *See* R. Fleming, PUNISHMENT BEFORE TRIAL 3 (1982) (comparison of widely divergent bail processes in Detroit and Baltimore). When writing a bond, a surety may require the principal to provide collateral in the form of personal property to secure release. *Id.* at 3.

7. *See id.* at 131.

8. *See A Proposal to Modify Existing Procedures Governing the Interstate Rendition of Fugitive Bailees: Hearing on S.2855 Before the Subcomm. on Constitutional Rights and the Subcomm. on Improvement in Judicial Machinery of the Senate Comm. on the Judiciary,* 89th Cong., 2nd Sess. 4 (1966) (statement of Joseph Tydings, Chairman, Subcomm. on Improvements in Judicial Machinery). *See generally The Long Arm, supra* note 4, at 8. *The Long Arm* included a description of the capture, by John Light, a Washington, D.C. bail bondsman, of a principal named Meredith Green. *Id.* at 8. Light traced Green from the District of Columbia to a Maryland apartment. *Id.* at 8. With the help of an agent, Light burst through the door and demanded that Green surrender. *Id.* At this point, Light shot Green, and in the process accidentally shot the agent as well. *Id.* Light claimed that Green had drawn a gun, but no gun was found. *Id.* Following the shooting, Light dragged Green, in the presence of police, 500 yards across the Maryland District of Columbia state line to where District of Columbia police were waiting. *Id.* Only then was Green taken to a hospital. *Id.*

9. *See, e.g.,* Kear v. Hilton, 699 F.2d 181, 182 (4th Cir. 1983) (professional bondsmen in United States enjoy extraordinary powers to capture and use force to compel return of principal); Allied Fidelity Corp. v. Commissioner, 572 F.2d 1190, 1193 (7th Cir. 1978) (surety has broad powers of custody over principal) *cert. denied,* 439 U.S. 835 (1978); Stuyvesant Ins. Co. v. United States, 410 F.2d 524, 525-27 (8th Cir. 1969) (surety needs no warrant and may go anywhere in United States to arrest principal); Curtis v. Peerless Ins. Co., 299 F. Supp. 429, 435 (D. Minn. 1969) (common law is clear on right of surety to take principal into custody, wherever principal may be, and deliver principal to proper authorities); Livingston v. Browder, 51 Ala. Ct. App. 366, 368, 285 So. 2d 923, 925 (Ct. Civ. App. 1973) (bondsman may exercise great discretion in arresting principal).

10. 76 U.S. (9 Wall.) 13 (1869) (Court held that United States could not recover against sureties who had not produced principal when government had consented to principal's travels beyond reach of sureties).

11. *Id.* at 14.

Without informing the sureties, the government gave the principal permission to leave the United States.[12] When the principal failed to appear at subsequent trial dates, the United States Circuit Court for the District of California ordered a forfeiture on the bond.[13] The United States Supreme Court reversed, holding that the precise terms of the contract between the surety and the principal limited the liability of the surety.[14] In reaching its decision, the *Reese* Court addressed the issue of the common-law authority of sureties.[15] The Court stated that a principal is subject to the complete custody of the surety to the extent that the surety at any time may arrest and surrender the principal to the court issuing the bond.[16] Additionally, the *Reese* Court stated that the surety may exercise the arrest power only within the territory of the United States.[17]

In 1872, the Supreme Court issued the seminal statement concerning the common-law powers of sureties in *Taylor v. Taintor*.[18] The issue in *Taylor*, as in *Reese*, concerned a forfeiture of a bond.[19] In *Taylor*, the bondsmen had posted an 8,000 dollar bond in Connecticut for a principal who faced a charge of grand larceny.[20] Before the principal could appear at trial, however, the Governor of Maine requested the arrest of the principal on a Maine burglary charge.[21] At the time of the principal's Connecticut trial for grand larceny, the principal was imprisoned legally in Maine.[22] The sureties sued to recover the amount of the bond claiming impossibility of performance of

---

12. *Id.* at 15.

13. *Id.* at 16.

14. *Id.* at 22.

15. *Id.* at 21-22. The *Reese* Court distinguished the liabilities of a surety on a personal recognizance from a surety on an ordinary bond or commercial contract. *Id.* at 21. According to the Court, the surety on a personal recognizance may discharge himself on the contract at any time by surrendering the principal to the court issuing the bond. *id.* The death of the principal also discharges the surety. *Id.* A surety on an ordinary bond or commercial contract is liable until payment of the debt or performance of the stipulated act. *Id.* The precise terms of the contract, however, limit liability for both types of sureties. *Id.*

16. *See id.* at 21 (surety may not subject principal to constant imprisonment).

17. *Id.* at 21-22.

18. 83 U.S. (16 Wall.) 366 (1872). Almost every court hearing a case concerning the extraordinary arrest powers and authority of sureties cites or quotes *Taylor v. Taintor. See, e.g.*, Kear v. Hilton, 699 F.2d 181, 182 (4th Cir. 1983) (citing *Taylor* as source for extraordinary powers of sureties); Allied Fidelity Corp. v. Commissioner, 572 F.2d 1190, 1193 (7th Cir. 1978) (citing *Taylor* as basis for broad powers of surety) *cert. denied*, 439 U.S. 835 (1978); Maynard v. Kear, 474 F. Supp. 794, 803 (N.D. Ohio 1979) (quoting *Taylor* as settling issue of common-law right of recapture by surety); Citizens for Pre-Trial Justice v. Goldfarb, 88 Mich. App. 519, 565, 278 N.W.2d 653, 676 (1979) (quoting *Taylor* for court approval of common-law authority of bondsman to arrest and surrender principal) (Brennan, J., concurring in part and dissenting in part), *modified*, 327 N.W.2d 910 (1982).

19. *Taylor*, 83 U.S. at 368-69.

20. *Id.* at 368.

21. *Id.*

22. *Id.*

the contract.[23] The Supreme Court held that since the sureties' dominion over the principal was so complete, the sureties were under obligation to keep the principal within the sureties' jurisdiction.[24] The sureties, therefore, had to forfeit the bond.[25] The *Taylor* Court reaffirmed the almost unlimited authority and discretion of sureties to arrest and deliver a principal to the court issuing the bond.[26]

The next major case addressing the issue of a surety's power over a principal was *Fitzpatrick v. Williams*.[27] In *Fitzpatrick*, the New Orleans police arrested Fitzpatrick on affidavits charging the accused with having committed an offense in the state of Washington, and with being a fugitive from justice.[28] Despite dismissal of the charges, Fitzpatrick remained in the custody of the New Orleans police.[29] Fitzpatrick applied for a writ of habeas corpus.[30] A bonding company intervened in the proceedings, alleging that the company had posted a 1,500 dollar bond.[31] The bonding company asked the court to order the sheriff to surrender Fitzpatrick to the company's agent.[32] The trial court denied Fitzpatrick's writ and ordered the sheriff to surrender Fitzpatrick to the agent.[33] The United States Court of Appeals for the Fifth Circuit affirmed the denial of the writ on the basis of the broad arrest powers granted to sureties.[34] While reaffirming the *Taylor* common-law principles, however, the *Fitzpatrick* court emphasized a slightly different rationale for granting broad arrest powers to sureties.[35] In the *Fitzpatrick* decision, the Fifth Circuit stressed the private contract aspect of the surety-principal relationship.[36] The Fifth Circuit stated that the authority of a surety to recapture a principal is not a matter of criminal procedure, but instead arises from a private contract between a surety and a principal.[37] Because

---

23. *Id.* at 368-69.

24. *Id.* at 371-75.

25. *See id.* at 369-75.

26. *Id.* at 371. The Supreme Court in *Taylor v. Taintor* specified certain arrest powers of sureties. *Id.* The *Taylor* Court stated that sureties may arrest and deliver a principal at any time and arrest a principal in any state. *Id.* Additionally, the *Taylor* Court stated that sureties may act in person or hire agents. *Id.* Furthermore, the Court stated that under common law, sureties may imprison a principal until delivery is possible. *Id.* Finally, the Court acknowledged that sureties have the authority to break and enter into a principal's house for the purpose of arresting the principal. *Id.*

27. 46 F.2d 40 (5th Cir. 1931).

28. *Id.* at 40.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 41-42.

35. *See id.* at 40-42 (discussion of powers of sureties as arising from private contract).

36. *Id.* at 40.

37. *Id.* at 40. In *Fitzpatrick v. Williams*, the United States Court of Appeals for the Fifth Circuit found no conflict between the interests of the state and the interests of the bondsman.

the right of recapture is a private right involving no governmental procedure, the *Fitzpatrick* court concluded that a surety has no need to obtain an arrest warrant or to seek extradition when returning a principal across state lines.[38] The lower courts have upheld the basic common-law principles enunciated in *Reese, Taylor* and *Fitzpatrick* on numerous occasions.[39]

The bondsman's source of authority to arrest and surrender the principal derives not only from the common law, but also from state statutes.[40] Several states have eliminated commercial bail as a method of pretrial release.[41] Some states have attempted to modify the common law concerning bail bondsmen by regulating surety arrest conduct.[42] In other states, however,

---

Id. at 40-41. The Fifth Circuit also stated that the right of the surety to recapture the principal was a private, not a governmental, remedy. *Id.* at 40. Furthermore, the *Fitzpatrick* court held that although the surety may arrest and surrender the principal before the bond is due, the state could not. *Id.* at 41. The Fifth Circuit, therefore, noted that since the state had no right of discretionary rearrest and removal, the surety could not acquire the right to arrest through subrogation. *Id.* at 42. The *Fitzpatrick* court held that the right to arrest was an original right arising from the relationship between the principal and the surety. *Id.* Additionally, the *Fitzpatrick* court indicated that the acquisition of rights through subrogation distinguished a civil surety from a surety on recognizance. *Id.* at 41; *see supra* note 15 (discussion by *Reese* Court of difference between surety on personal recognizance and surety on commercial contract).

38. *See Fitzpatrick*, 46 F.2d at 41.

39. *See e.g.*, Stuyvesant Ins. Co. v. United States, 410 F.2d 524, 525 (8th Cir. 1969) (court cited *Reese* as support for authority of bondsman to arrest principal anywhere in United States without warrant); Curtis v. Peerless Ins. Co., 299 F. Supp. 429, 435 (D. Minn. 1969) (court cited *Taylor* and *Fitzpatrick* as support for authority of bondsman to recapture principal without risking liability to principal); Thomas v. Miller, 282 F. Supp. 571, 573 (E.D. Tenn. 1968) (court cited *Taylor* and *Fitzpatrick* as support for authority of surety to arrest and remove principal from Ohio to Tennessee); Citizens for Pre-Trial Justice v. Goldfarb, 88 Mich. App. 519, 565-66, 278 N.W.2d 653, 674 (1979) (court cited *Taylor* and *Fitzpatrick* as support for constitutionality of Michigan statute codifying common-law rights and liabilities of sureties on bail bond contract, *modified*, 327 N.W.2d 910 (1982); *see also* Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1872) (Court stated common law powers of sureties to arrest and deliver principals); Reese v. United States, 76 U.S. (9 Wall.) 13, 21-22 (1869) (Court discussed almost unlimited authority of sureties over principals); Fitzpatrick v. Williams, 46 F.2d 40, 40-42 (5th Cir. 1931) (court affirmed *Taylor* common-law principles under private contract analysis); *supra* notes 15-17 and accompanying text (discussion of *Reese* decision concerning authority of sureties); *supra* notes 24-26 and accompanying text (discussion of *Taylor* concerning authority of sureties); *supra* notes 35-37 and accompanying text (discussion of *Fitzpatrick* decision concerning common-law powers of sureties).

40. *See generally,* Hansen, *The Professional Bondsman: A State Action Analysis*, 30 CLEV. ST. L. REV. 595, 604-09, 621-26 (1981) (survey of state statutes regulating bonding process).

41. *See* Ill. Rev. Stat. ch. 38, § 110-1 to § 110-17 (1980) (statute permits ten percent deposit bail exclusive of corporate bail); Ky. Rev. Stat. § 431-510 (Baldwin 1976) (practice of issuing corporate bond is criminal offense); Or. Rev. Stat. §§ 134.255, 135.260 and 135.265 (1979) (pretrial release permitted only through personal recognizance, supervised or conditional release, and ten percent deposit bonds).

42. *See generally* Hansen, *supra* note 40, at 621-26. Connecticut requires a surety to verify under oath that a principal intends to escape before issuing an arrest warrant. Conn. Gen. Stat. §§ 54-65, 52-319 (West 1978). Moreover, only law enforcement personnel in Connecticut may arrest principals. *Id.* § 52-319 (West 1978). In Texas, sureties may arrest principals only after obtaining arrest warrants from the judiciary. Tex. Code Crim. Proc. Ann. art. 17.19 (Vernon

courts view the relevant statute as merely codifying the common law, and determine the scope of the surety's authority by the principles described in *Taylor*.[43] Almost all states that permit the activities of professional bondsmen

---

1977). Many states require sureties to obtain written authority endorsed on a certified copy of the bond, or bail piece, before arresting principals. *See, e.g.*, Ala. Code § 15-13-62 (1975); Ark. Stat. Ann. § 43-717 (1977); Cal. Penal Code § 1301 (West 1982); Idaho Code § 19-2925 (1979); Mo. Ann. Stat. § 544.600 (Vernon 1949); Mont. Code Ann. § 46-9-205 (1984); Ohio Rev. Code Ann. § 2713.22 (Baldwin 1982); Okla. Stat. Ann. tit. 22 § 1107 (West 1951); Tenn. Code Ann. § 40-11-133 (1982); Utah Code Ann. § 77-43-23 (1982); Va. Code § 19.2-149 (1950); Wisc. Stat. Ann. § 818.21 (West 1977). Alabama, Nevada, Tennessee, Missouri and Oklahoma have enacted statutes permitting sureties to arrest principals only within the jurisdiction of the state. See Ala. Code § 15-13-63 (1975); Mo. Ann. Stat. § 544.600 (Vernon 1949); Nev. Rev. Stat. § 178.526 (1979); Okla. Stat. Ann. tit. 22, § 1107 (West 1951); Tenn. Code Ann. § 40-11-133 (1982). California requires California sureties to surrender a principal within forty-eight hours after the arrest. Cal. Penal Code § 1301 (West 1982); *see also* Cal. Penal Code § 847.5 (West 1970) (statute regulating surety arrests by foreign bondsmen).

Section 847.5 of the California Penal Code abrogates the foreign bondsman's common-law right to recapture and remove a principal from California. *Id.* The bondsman must file an affidavit with a magistrate in the California county where the fugitive is present, stating the name and location of the fugitive, the offense charged and other particulars. *Id.* If the magistrate concludes that probable cause exists for believing that the person alleged to be the fugitive is such, the magistrate may issue an arrest warrant. *Id.* Any arrest made, therefore, is upon authority of the warrant. *Id.* Following the arrest, the magistrate must hold an additional hearing at which the principal may have counsel. *Id.* After the hearing, if satisfied with the evidence, the magistrate may issue an order permitting the bondsman to return the fugitive to the court from which the fugitive escaped bail. *Id.* Any arrest not made pursuant to the statute is a misdemeanor offense. *Id.; see* Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 552-55 (9th Cir. 1974) (en banc) (interpretation of § 847.5 of California Penal Code), *cert. denied*, 421 U.S. 949 (1975). In *Ouzts v. Maryland Nat'l Ins. Co.*, Las Vegas police arrested and charged Ouzts with obtaining money under false pretenses in October, 1965. *Id.* at 549. The Justice Court for the Township of Las Vegas set bail at $2,500. *Id.*

Defendant Embrey, agent for the bonding company, posted bond. *Id.* Darrow and Iola Peterson executed the agreement as indemnitors. *Id.* Ouzts left Nevada and eventually resided in Long Beach, California. *Id.* The Petersons travelled to California and unsuccessfully attempted to arrest Ouzts on November 3, 1966, contrary to § 847.5 of the California Code. *Id.; see* Cal. Penal Code § 847.5 (West 1970) (provisions requires foreign surety to obtain arrest warrant). The Petersons then attempted to comply with the California Code by obtaining an arrest warrant. 505 F.2d at 549. Finally on November 18, 1966, the Petersons hired another agent, W. I. Lagatella, to take Ouzts into custody and deliver Ouzts to Las Vegas. *Id.* Lagatella and an associate arrested and delivered Ouzts to Embrey and the Petersons in San Pedro. *Id.* at 550. The arrest of Ouzts allegedly involved the use of force. *Id.* at 550. The Petersons and Embry delivered Ouzts to Las Vegas. *Id.* at 550. The police jailed Ouzts from November 18 to November 29, 1966. *Id.* at 556 (Hufstedler, J. dissenting). On January 6, 1967, the Justice Court for the Township of Las Vegas dismissed the criminal complaint against Ouzts without a hearing. *Id.* The United States Court of Appeals for the Ninth Circuit held that the bondsman completely violated, not merely exceeded, the authority granted to sureties by the California statute. *Id.* at 554. According to the Ninth Circuit, § 847.5 completely terminates a foreign bondsman's common-law recapture right. *Id.*

43. *See supra* notes 24-26 and accompanying text (discussion of common law powers of sureties); Citizens for Pre-Trial Justice v. Goldfarb, 88 Mich. App. 519, 564-67, 278 N.W.2d 653, 676-77 (1979) (court held Michigan statute codifying common-law powers of sureties constitutional), *modified* 327 N.W.2d 910 (1982). In *Citizens for Pre-Trial Justice v. Goldfarb*, the Court of Appeals of Michigan contended, in dicta, that Michigan Comp. Laws § 765.26

have failed to enact statutes which establish procedural safeguards controlling surety arrests.[44]

The lack of procedural safeguards in surety arrests has resulted in many cases of surety abuse of principals[45] and their families.[46] Because sureties possess such universally accepted authority to make arrests, courts may prefer to dispose of particular instances of surety abuse of principals by relying on tenuous analysis rather than impose liability on a surety for

---

regulating the activities of the bail bondsmen was unconstitutional. *Id.* at 551-61, 278 N.W.2d at 668-74; *see also* Mich. Comp. Laws § 765.26 (1982) (regulation of activities of bail bondsman). The *Goldfarb* court contended that the statute was an unconstitutional grant of an arrest power in violation of the due process clauses of the state and federal constitutions. *Goldfarb, Id.* at 551, 278 N.W.2d at 668. According to the *Goldfarb* court, the Michigan statute did not require a surety to articulate reasons for revocation of a bail bond, or establish standards defining permissible circumstances for revocation. *Id.* at 552, 278 N.W.2d at 668. Additionally the *Goldfarb* court contended, in dicta, that the statute was unconstitutional because the statute failed to require the procedural safeguards applicable to civil arrests in violation of the fourteenth amendment to the United States Constitution. *Id.* at 556, 278 N.W.2d at 670. The dissent, however, concurred with the majority opinion, except for the portion holding the statute unconstitutional. *Id.* at 564, 278 N.W.2d at 674 (Brennan, J., concurring in part, dissenting in part). The dissent stated that the pertinent statute represented the State of Michigan's return to the common-law rights and liabilities of sureties on a bail bond contract. *Id.* at 556, 278 N.W.2d at 674. Because the dissent constituted a majority of the three judge panel, the Michigan statute regulating bail bond practices was constitutional. *Id.* at 567, 278 N.W.2d at 675.

44. *See* Hansen, *supra* note 40, at 623 (survey of state statutes regulating bonding process).

45. *See, e.g.*, Dunkin v. Lamb, 500 F. Supp. 184, 188 (D. Nev. 1980) (bondsmen beat principal in presence of police at police station); Maynard v. Kear, 474 F. Supp. 794, 799 (N.D. Ohio 1979) (bondsmen seized, beat and dragged principal clad only in underwear from apartment at night in January); Hill v. Toll, 320 F. Supp. 185, 186 (E.D. Pa. 1970) (bail bonding agents allegedly beat and robbed principal at detention center in presence of detention center officials); Thomas v. Miller, 282 F. Supp. 571, 572 (E.D. Tenn. 1968) (bondsman allegedly forced chained and handcuffed principal to lie on the floor of car during trip from Ohio to Tennessee); McCaleb v. Peerless Ins. Co., 250 F. Supp. 512, 513-15 (D. Neb. 1965) (bondsman seized and held principal for eighty hours while demanding money from principal's parents and unspecified others); United States v. Trunko, 189 F. Supp. 559, 565 (E.D. Ark. 1960) (court characterized treatment of principal by bondsman as unreasonable, high-handed and oppressive); Nicolls v. Ingersoll, 7 Johns. 145, 147-8 (N.Y. 1810) (bondsman used "great roughness" in arresting principal); State v. Lingerfelt, 14 S.E. 75, 75 (N.C. 1891) (bondsman and agent shot and killed principal); Poteete v. Olive, Tenn., 527 S.W.2d 84, 86 (Tenn. 1975) (bondsman broke principal's leg).

46. *See* United States v. Trunko, 189 F. Supp. 559, 561-62 (E.D. Ark. 1960) (method of surety arrest excited and upset principal's wife); Mease v. State, 165 Ga. App. 746, 747-50, 302 S.E.2d 429, 430-31 (1983) (drunken bondsmen using abusive language and waving pistol forced way into home of principal's mother). *Mease v. State* involved a criminal trespass charge that the State of Georgia brought against two licensed female bondsmen. *Mease*, 165 Ga. App. at 747, 302 S.E.2d at 430. After drinking at six different bars during the night, bondsmen Mease and Burke arrived at the home of the principal's mother at 5:00 a.m. *Id.* at 749, 302 S.E.2d at 432 (Deen, J., dissenting). After pounding on the door and gaining entry, the bondsmen conduced a fruitless search of the mother's house without permission. *Id.* at 747, 302 S.E.2d at 430. The conduct of the bondsmen during the search included the use of profanity and obscene language, belligerent attitudes, and the pointing and waving of a pistol. *Id.* at 747-78, 302 S.E.2d at 430-31. The bondsmen continued the search despite the mother's insistence that

abusing his authority.[47] For example, in *McCaleb v. Peerless Insurance Co.*,[48] the principal, McCaleb, instituted suit to recover damages in tort for false arrest and imprisonment, illegal detention, violation of civil liberties.[49] McCaleb, who had violated certain traffic laws in Omaha, contracted with defendant Vinci, a bondsman for Peerless Insurance Company, to post a 200 dollar bond.[50] McCaleb left Omaha for California and did not return for the scheduled court appearance.[51] Vinci went to California and hired another agent who arrest McCaleb at his parents' home and took McCaleb to the local jail.[52] After Vinci gained control of McCaleb's car, Vinci took McCaleb out of jail and drove McCaleb around the state for eighty hours.[53] Vinci placed McCaleb in different jails throughout California during the 80 hour trip.[54] Vinci shackled McCaleb around the waist and wrists and kept the shackles on at all times that McCaleb was not in jail.[55] Vinci and McCaleb reached Omaha five days after the initial arrest.[56] Upon arriving in Omaha, Vinci took the title to McCaleb's automobile and forced McCaleb to sign a release.[57] Thereupon, Vinci told McCaleb to leave Nebraska, although McCaleb was scheduled to appear before the municipal court of the city of Omaha in one hour.[58] Vinci never did surrender McCaleb to the Omaha municipal

---

the principal was not there and despite the mother's demands that the bondsmen leave. *Id.* at 750, 302 S.E.2d at 432 (Deen, J., dissenting). The Court of Appeals of the State of Georgia held that the bondsmen were not guilty of criminal trespass because the bondsmen had entered the house for a lawful reason. *Id.* at 747-48, 302 S.E.2d at 430. Additionally, the *Mease* court held that bondsman Mease was not guilty of reckless conduct, but did affirm Mease's misdemeanor convictions of pointing a pistol at another. *Id.* at 718-49, 302 S.E.2d at 431. The dissent contended that the legal right to arrest one person does not include the right to run rampant through a third party's home in violation of the third party's constitutional rights. *Id.* at 749, 302 S.E.2d at 433 (Deen, J., dissenting).

47. *See* Poteete v. Olive, 527 S.W.2d 84, 88 (Tenn. 1975); *see also infra* notes 48-59 and accompanying text (discussion of *McCaleb v. Peerless*). In *Poteete v. Olive*, a bondsman's agents beat and kicked a principal and broke the principal's leg while making an arrest. *Poteete*, 527 S.W.2d at 86. The principal wore a series of casts for two months and required crutches for four more months. *Id.* The principal sued for false imprisonment, assault and battery. *Id.* at 85. The Tennessee Supreme Court decided the case on the narrow grounds that the arrest was illegal because the agents had violated a Tennessee statute by not obtaining and displaying a certified copy of the endorsed bond. *Id.* at 88; *see* Tenn. Code Ann. § 40-1 (1982) (copy of an endorsed bond substitutes for a warrant).

48. 250 F. Supp. 512 (D. Neb. 1965).

49. *Id.* at 513. (Plaintiff alleged violation of liberties under Title 42 U.S.C. § 1983, but court did not address § 1983 claim).

50. *Id.* at 514.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* (court also noted that Vinci fed McCaleb during return trip to Omaha and release McCaleb from shackles).

56. *Id.*

57. *Id.* at 514-15.

58. *Id.* at 515.

court.[59] *McCaleb*, a 1965 decision, is the first reported case in which a court held a bondsman, who had exceeded his authority as surety, liable to the principal in tort.[60] Despite the abuse of the principal by the surety, the *McCaleb* court awarded monetary damages to the principal on the grounds that the bondsmen had not arrested McCaleb for the purpose of surrendering McCaleb to the proper authorities.[61] The decision in *McCaleb* does not indicate whether the Nebraska court would have imposed tort liability on the surety if the surety had surrendered McCaleb to the court.

Recently, litigants have challenged the practices and authority of bondsmen under section 1983 of Title 42 of the United States Code.[62] Section 1983 provides a remedy for deprivation of rights secured by the Constitution and laws of the United States when the deprivation takes place "under color of state law."[63] To prevail against a surety in a section 1983 suit, a principal must show that a bondsman acted under color of state law.[64] Additionally, a principal must show that the action of the bondsman deprived the principal of a constitutional or legal right.[65]

To date, four courts have held that bondsmen were acting under color of state law in arresting a principal.[66] In *United States v. Trunko*,[67] a bondsman holding a commission as a special deputy sheriff displayed a

---

59. *Id.*

60. *See* Note, *The Hunters and the Hunted: Rights and Liabilities of Bailbondsmen*, 6 FORDHAM URB. L.J. 333, 342 (1978) (examination of bail bondsman's arrest power and various remedies through tort and civil rights suits).

61. *McCaleb*, 250 F. Supp. at 515. In *McCaleb v. Peerless Ins. Co.*, the principal received $4000 in damages from the bonding company for the value of McCaleb's automobile and for illegal imprisonment. *Id.* at 516.

62. *See* 42 U.S.C. § 1983 (1982) (person acting under color of any statute, ordinance, regulation, custom or usage, of any state, who deprives another of any right, privilege or immunity secured by United States Constitution, is liable in action at law); *infra* notes 97-104 and accompanying text (discussion of § 1983 requirements and relationship between "color of state law" and "state action" requirements); *infra* notes 67-96 and accompanying text (discussion of cases challenging the authority and practices of bail bondsmen under § 1983).

63. *See supra* note 62 (text of § 1983).

64. *See* 42 U.S.C. § 1983 (1982) (statute provides remedy for deprivation of constitutional or legal right by person acting under color of state law). Several courts have analyzed the elements necessary to establish a principal's claim under § 1983. *See, e.g.*, Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 550 (9th Cir. 1974); Maynard v. Kear, 474 F. Supp. 794, 797 (N.D. Ohio 1979); Smith v. Rosenbaum, 333 F. Supp. 35, 38 (E.D. Pa. 1971) *aff'd*, 460 F.2d 1019 (1972); Hill v. Toll, 320 F. Supp. 185, 186 (E.D. Pa. 1970). *See generally* Note, *The Supreme Court Corrals A Runaway Section 1983*, 34 MERCER L. REV. 1073, 1074-83 (1983) (discussion of history of § 1983 and threshold requisites).

65. *See supra* note 64 (cases discussing elements of claim under § 1983).

66. *See infra* notes 67-79 and accompanying text (discussion of federal court decisions holding that bondsmen acted under color of state law).

67. 189 F. Supp. 559 (E.D. Ark. 1960). In *United States v. Trunko*, the principal, Williams, owed a fee of $50 to the bonding company for a $500 bond posted on a charge of driving while intoxicated. *Id.* at 560. Williams left Ohio and returned to the Arkansas home of Williams' father. *Id.* The bonding company sent a special investigator, Trunko, to locate Williams. *Id.* at 560-61. Trunko and a companion, Pratt, arrived at the father's home before

badge and a court-issued bench warrant when arresting the principal.[68] The United States District Court for the Eastern District of Ohio held that because the bondsman possessed apparent authority of the state, the bondsman acted under color of state law.[69] In *Smith v. Rosenbaum*,[70] the United States District Court for the Eastern District of Pennsylvania held that the act of lodging a bail piece[71] against a principal pursuant to a Pennsylvania law constituted an act under color of state law.[72] Similarly, in *Maynard v. Kear*,[73] the agents of a bonding company purported to act pursuant to a

---

daylight. *Id.* at 581. Trunko and Pratt entered the house, and without knocking, entered the room where Williams, his wife and infant child were asleep. *Id.* Trunko shone a flashlight into Williams' face and directed Williams to get dressed. *Id.* Trunko handcuffed Williams and drove away at a high rate of speed, seemingly because Williams' wife threatened to call the sheriff. *Id.* at 561-62. Trunko did not advise Williams that Trunko was acting as an agent of the holding company. *Id.* at 562. The family did not know why Williams was arrested. *Id.* Trunko falsely told Williams that they were going to Little Rock, Arkansas. *Id.* Two days later, Williams pleaded guilty to the original charge of driving while intoxicated and the Municipal Court of Ravenna, Ohio fined Williams $250, of which the court would suspend $100 if Williams reimbursed the bondsman. *Id.* The United States District Court for the Eastern District of Arkansas characterized the actions of the bondsmen as high-handed, unreasonable and oppressive. *Id.* at 565.

68. *Id.* at 561.

69. *Id.* at 562.

70. 333 F. Supp. 35 (E.D. Pa. 1971), *aff'd*, 460 F.2d 1019 (1972). In *Smith v. Rosenbaum*, Smith paid Rosenbaum $30 to post a bail bond because of Smith's arrest on a charge of carrying a concealed weapon. *Id.* at 37. Smith also paid bondsman Marks to post bonds for three other arrest charges. *Id.* The charges on the three other arrests included illegal possession of narcotics, carrying a concealed weapon, attempted burglary and possession of burglary tools. *Id.*

71. *See generally* Note, *Bailbondsmen And The Fugitive Accused: The Need For Formal Removal Procedures*, 73 YALE L.J. 1098, 1102 (1964) (defining term "bail piece" as document obtained from court official that is evidence of existence of bond relationship between surety and principal).

72. *Rosenbaum*, 333 F. Supp. at 38. Under Pennsylvania state law, sureties are entitled to a bail place, issued by the court upon which sureties may arrest and surrender a principal. *See id.; see also* 19 Pa. Stat. Ann. § 53 (1964) (statute entitles sureties to possession of bail piece upon which sureties may arrest principals). The bail piece is sufficient warrant or authority for the sheriff to receive the principal. *Rosenbaum*, 333 F. Supp. at 38. Although the United States District Court for the Eastern District of Pennsylvania in *Smith v. Rosenbaum* held that the act of lodging the bail piece constituted action under color of state law, the principal failed to allege that the bondsmen violated any of the principal's rights, privileges or immunities secured under the Constitution. *See id.* at 39; *see also infra* note 88 and accompanying text (discussion of principal's constitutional claim).

73. 474 F. Supp. at 794 (N.D. Ohio 1979). In *Maynard v. Kear*, agents of a Virginia bonding company seized and beat Maynard late one January night in Ohio. *Id.* at 799. The agents dragged Maynard, who was clad only in underwear, out of his apartment and handcuffed Maynard in preparation for the trip back to Virginia. *Id.* Maynard's wife called the police, who took Maynard and the bonding agents to the station house. *Id.* at 798-99. Upon advice from the city prosecutor, the police released the bonding agents. *Id.* at 798. During the time the agents were inside the station house, Maynard remained in the agents' car and received no treatment for injuries. *Id.* The police, however, did give Maynard a coat and a pair of pants to wear. *Id.*

Virginia state bench warrant in arresting the principal in Ohio.[74] Consequently, the United States District Court for the Northern District of Ohio held that the bondmen were acting under color of state law.[75] The *Maynard* court reasoned that the State of Virginia had lent authority to the private bondsmen when the bondsmen arrested the principal in Ohio pursuant to a bench warrant obtained under a Virginia state statute.[76] Finally, in *Hill v. Toll*,[77] the United States District court for the Eastern District of Pennsylvania also held that a bondsmen, acting pursuant to a state statute that accorded bondsmen the right to conduct their business affairs by use of physical coercion,[78] was acting under color of state law.[79] Other courts, however, have refused to impose liability pursuant to section 1983 on bail bondsmen, determining that the bondsmen were not acting under color of state law.[80]

Presently, three courts have addressed the issue of which specific constitutional rights are applicable to the surety arrest procedure to meet the constitutional deprivation requirement in section 1983 actions.[81] In *Hill v. Toll*,[82] the principal attacked the validity of his arrest as a breach of state contract law.[83] The United States District Court for the Eastern District of Pennsylvania held that because the principal had not alleged that the arrest was unconstitutional, the single allegation of breach of contract law could not form the basis for relief under section 1983.[84] The *Hill* court held, however, that the beating and robbery allegations of the principal constituted

74. *Id.* at 800.

75. *Id.* at 801.

76. *Id.*

77. 320 F. Supp. 185 (E.D. Pa. 1970).

78. *See* 19 Pa. Cons. Stat. § 53 (1964) (sureties are entitled to bail piece upon which sureties may arrest and detain principals); *see also supra* note 71 (defining bail piece).

79. *Hill*, 320 F. Supp. at 187. In *Hill v. Toll*, two bonding agents entered the principal's home, and seized and transported the principal to the Philadelphia Detention Center. *Id.* at 186. At the Center, the agents allegedly beat and robbed the principal in the presence of the detention center officials. *Id.*

80. *See, e.g.*, Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 554 (9th Cir. 1974) (bondsman did not act under color of state law because California statute specifically forbade foreign bondsmen's common-law right of recapture); Thomas v. Miller, 282 F. Supp. 571, 572-73 (E.D. Tenn. 1968) (bondsman's acts were result of private contractual relationship and not under color of state law); *see also* Easley v. Blossom, 394 F. Supp. 343, 345 (S.D. Fla. 1975) (court cited *Thomas* and *Curtis* as support for blanket statement concerning lack of state action in bondsman's actions); Curtis v. Peerless Ins. Co., 299 F. Supp. 429, 431 (D. Minn. 1969) (court dismissed § 1983 complaint because plaintiff failed to sufficiently allege color of state law requirement).

81. *See infra* notes 81-95 and accompanying text (discussion of possible constitutional rights that would meet one of two threshold requirements necessary for § 1983 suit); *see also supra* notes 61-64 and accompanying text (discussion of two elements principal must establish in § 1983 action).

82. *See supra* notes 77-79 and accompanying text (discussion of facts in *Hill* and color of state law element).

83. *See Hill*, 320 F. Supp. at 187.

84. *Id.*

a claim cognizable under section 1983.[85] The court reasoned that allegations of beating and robbery qualified as a claim of an unreasonable search and seizure and, therefore, constituted a violation of the principal's fourth and fourteenth amendment rights.[86] One year after *Hill*, the United States District Court for the Eastern District of Pennsylvania faced a similar breach of contract argument in *Smith v. Rosenbaum*.[87] In *Rosenbaum*, the principal argued that the sureties had breached the bail contract by lodging bail pieces against the principal, thereby depriving the principal of liberty without due process of law.[88] The *Rosenbaum* court stated that the sureties had not deprived the principal of liberty without due process by revoking the bail bond contract because recent actions of the principal justified the revocation.[89] Consequently, the *Rosenbaum* court held that the principal had failed to prove that the sureties had violated any of the principal's rights secured under the Constitution.[90] Finally, in *Maynard v. Kear*,[91] the United States District Court for the Northern District of Ohio addressed the possible constitutional claims of the principal, under the fourth, sixth and eighth amendments in the principal's section 1983 action against the surety.[92] The *Maynard* court focused on the right of a principal to be free from the use of unreasonable means and force in a surety arrest as the most relevant and applicable fourth amendment right actionable under section 1983.[93] Additionally, the *Maynard* court stated that for the eighth amendment protections

---

85. *Id.*

86. *Id.*

87. *Rosenbaum*, 333 F. Supp. at 35 (E.D. Pa. 1971); *see supra* notes 70-72 and accompanying text (discussion of facts in *Rosenbaum* and color of state law element).

88. *Rosenbaum*, 333 F. Supp. at 37, 38.

89. *Id.* at 38. In *Smith v. Rosenbaum*, the United States District Court for the Eastern District of Pennsylvania stated that the principal's later arrest, which increased the surety's risk, justified the surety's revocation of the bail bond contract by lodging the bail pieces. *Id.* Additionally, the *Rosenbaum* court stated that the failure of the principal to inform the bondsman of a change of address also justified the revocation of the bond. *Id.* Furthermore, the *Rosenbaum* court noted that the principal had contracted to lose his liberty if the authorities rearrested the principal on another charge. *Id.* at 39. The *Rosenbaum* court addressed the issue of the revocation of the bail bond contract. *Id.* at 37-39. The *Rosenbaum* court did not address the issue of whether procedural requirements are necessary in making a surety arrest because the *Rosenbaum* principal already was incarcerated for a subsequent offense. *Id.* at 37.

90. *Id.* at 39.

91. *See supra* notes 73-76 and accompanying text (discussion of facts in *Maynard* and color of state law requirement).

92. *Maynard*, 474 F. Supp. at 801-04. In *Maynard v. Kear*, the United States District Court for the Northern District of Ohio concluded that by knowingly and purportedly acting under the authority of a state bench warrant, the bondsmen were acting under the color of state law required for a fourteenth amendment and fourth amendment claim. *Id.* at 801.

93. *Id.* at 801-03. In *Maynard v. Kear*, the United States District Court for the Northern District of Ohio stated that all of the protections of the fourth amendment applied with full force to surety arrests with the possible exception of the requirement of an arrest warrant. *Id.* at 802-03. The *Maynard* court focused on the rights guaranteed by the fourth amendment as the most relevant of the constitutional rights that an abused principal has. *Id.* at 801-03.

to extend to surety arrests, the alleged mistreatment must rise to the constitutional dimensions of cruel and unusual punishment.[94] Finally the *Maynard* court concluded that the principal had no claim under the sixth amendment of a violation by the bondsman of a principal's right to extradition proceedings.[95] The *Maynard* court noted that under the common law a recapture of the principal by a bondsman required no extradition proceedings.[96]

The United States Supreme Court's recent decision in *Lugar v. Edmondson Oil Co.*[97] clarifies the threshold requirements that a constitutionally deprived individual such as an abused principal must establish when bringing a section 1983 suit premised upon the fourteenth amendment.[98] The fourteenth amendment to the United States Constitution provides that no state may deprive any person of life, liberty or property without due process of law.[99] Because the fourteenth amendment applies to the states, only conduct

---

94. *Id.* at 803; *see* Estelle v. Gamble, 429 U.S. 97, 102-03 (1976) (punishments that are incompatible with evolving societal standards of decency, or which involve unnecessary and wanton infliction of pain, violate eighth amendment).

95. *Maynard*, 474 F. Supp. at 804.

96. *Id. See generally* Note, *Interstate Rendition Violations and Section 1983: Locating the Federal Rights of Fugitives*, 50 FORDHAM L. REV. 1268, 1268-91 (1982) (discussion of federal and state extradition provisions and requirements for maintaining a section 1983 action). Violations of federal and state extradition provisions by law enforcement officials do not support § 1983 actions because the provisions create no federal rights. *Id.* at 1270-87. Courts should permit § 1983 actions, however, for violation of a fugitive's constitutional right to challenge extradition by writ of habeas corpus. *Id.* at 1287-91; Note, *supra* note 71, at 1098-1111 (1964) (discussion of necessity of extending sixth amendment right to full extradition-type hearings to principals).

97. 457 U.S. 922, 923-39 (1982).

98. *See id.* at 923-39 (discussion of relationship between state action requirement of fourteenth amendment and color of state law requirement of § 1983, and analysis of term "state action"). In *Lugar v. Edmondson Oil Co.*, petitioner Lugar was indebted to Edmondson Oil Company, which sued on the debt in a Virginia state court. *Id.* at 924. Pursuant to a Virginia state law, Edmondson sought prejudgment attachment of some of Lugar's property. *Id.* Under the state statute Edmondson only had to allege that Lugar was disposing of or might dispose of his property in order to attach the property. *Id.* Because of Edmondson's allegations, the clerk of the state court issued a writ of attachment and the sheriff executed the writ. *Id.* A state trial judge conducted a hearing on the propriety of the attachment, subsequent to the execution of the writ and, thirty-four days after the levy, the judge ordered the attachment dismissed. *Id.* at 925. The state trial judge found that Edmondson had failed to establish statutory grounds for the attachment. *Id.* Lugar sued under § 1983, alleging deprivation of property without due process of law. *Id.* Lugar sought compensatory and punitive damages. *Id.* The United States Court of Appeals for the Fourth Circuit affirmed the trial court's decision that the actions of Edmondson did not constitute state action as required by the fourteenth amendment. *Id.* The Fourth Circuit, therefore, held that Lugar had failed to state a claim upon which a court could grant relief under § 1983. *Id.* On appeal, the United States Supreme Court stated that private misuse of a state statute did not describe conduct fairly attributable to the state. *Id.* at 941. The Court held, however, that insofar as Lugar's complaint challenged the constitutionality of the Virginia attachment statute, Lugar had presented a valid cause of action. *Id.* at 942. The Court demonstrated a concern with a statutory scheme in which officials could attach property on the *ex parte* application of one party to a private dispute. *Id.* at 942.

99. U.S. CONST. amend. XIV, § 1.

that a court may fairly characterize as state action, and not as private action, will constitute a violation of the amendment.[100] Section 1983 requires both a deprivation of a right secured by the Constitution or the laws of the United States, and that the deprivation result from an act under color of state law.[101] In *Lugar,* the Court addressed the relationship between the section 1983 requirement of action under color of state law and the fourteenth amendment requirement of state action.[102] The *Lugar* Court held that whenever state action is present, then action under color of state law is present for purposes of a suit under section 1983.[103] Consequently, in a section 1983 suit involving the fourteenth amendment, a trial court will limit its inquiry to the state action issue.[104]

The *Lugar* Court established a two-step procedure for determining whether state action is present.[105] First, the exercise of some right or privilege that the state has created, or the exercise of a state imposed rule of conduct, must cause the deprivation of the constitutional right.[106] Second, the party charged with the deprivation must be a person who the courts fairly may characterize as a "state actor."[107] The two steps merge when the accused individual is a state official, but a court must treat the two steps separately when the constitutional claim is against a private party.[108] When a section 1983 suit is directed against a private party, four tests apply in determining whether that private party is a state actor.[109] The *Lugar* Court declined to hold whether the tests identifying a state actor operate separately or as a whole.[110] In the first test, the "public function" test, a court considers whether the private party performs that traditionally is within the exclusive prerogative of the state.[111] Under the second test, the "state compulsion"

---

100. *Lugar*, 457 U.S. at 924.

101. *Id.*

102. *Id.*

103. *Id.* at 935.

104. Note, *supra* note 64, at 1073 (discussion of effect of Lugar and two other recent Supreme Court decisions on § 1983).

105. *Lugar*, 457 U.S. at 937.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 939.

110. *Id.* In *Lugar v. Edmondson Oil Co.*, the United States Supreme Court indicated that a court must sift the facts and weigh the circumstances of each case to determine the true significance of state involvement in private conduct. *Id.*

111. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974) (Court applied public function doctrine to only those powers traditionally associated with sovereignty). In *Jackson v. Metropolitan Edison Co.*, a customer of the defendant, Metropolitan Edison, challenged the actions of the privately owned and operated utility corporation as violating due process by terminating service without notice or opportunity to pay outstanding obligations. *Id.* at 347-48. The Court held that the state action was not present because the state had no obligation to furnish utility services and such service was not associated traditionally with sovereignty. *Id.* at 353-54; *see also* Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 157 (1978) (Court limited application of public function doctrine to powers traditionally reserved exclusively to state). *See generally* Hansen, *supra* note 40 at 630-32 (discussion of public function doctrine).

test, the state is responsible for a private decision only when the state has exercised coercive power or has provided significant encouragement, either covert or overt, to such an extent that the private decision becomes a state decision.[112] The "nexus" test, the third test, concerns the question of whether the state has reached a position of interdependence with the challenged activities of an otherwise private individual so as to make the state a joint participant in the challenged activity.[113] The fourth test applicable to the state actor issue, the "joint action" test, concerns whether the private party has participated jointly with state officials in a prohibited act sufficiently to characterize that party as a state actor.[114] In *Lugar*, the Court held that a private party's joint participation with state officials under a procedurally defective statute in the seizure of disputed property was sufficient to characterize that party as a state actor for purposes of the fourteenth amendment.[115] To meet the first step in the requirement for determining the presence of state action, the Court held that the statutory scheme permitting the unconstitutional attachment of property upon the *ex parte* application of one party to a private dispute was a product of state action.[116] Consequently, the plaintiff had presented a valid cause of action under section 1983 by challenging the state statute as procedurally defective under the due process clause.[117]

In light of the *Lugar* opinion, a principal must establish two elements to meet the state action, or color of state law requirement. First, a principal must demonstrate that the surety's conduct resulted from the exercise of a right or privilege which the state had created in a state statute.[118] Courts essentially have met this step by holding that state action occurs when a surety acts pursuant to a state statute authorizing surety arrests under a

---

112. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970) (Court stated that state is responsible for discriminatory act of private party when state, by law, has compelled act). In *Adickes v. S.H. Kress & Co.*, the United States Supreme Court stated that it makes no difference whether a statutory provision, or a custom having the force of law, compels the forbidden act. *Id.* at 171.

113. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 722-26 (1960) (discussion of relationship between state and restaurant as indicating existence of state action in conduct of restaurant). In *Burton v. Wilmington Parking Auth.*, a restaurant refused to serve a negro patron. *Id.* at 716. The restaurant was located in a parking building that an agency of the state of Delaware owned and operated. *Id.* The United States Supreme Court held that the state had participated in the discriminatory action of the restaurant because the state was in a position of interdependence with the restaurant. *Id.* at 725. The Court found the interdependent relationship from the mutual conferral of benefits between the agency and the restaurant, from the fact that the restaurant was an integral part of the public building, and from the obligations and responsibilities of the agency for the operation of the restaurant. *Id.* at 724.

114. *See Lugar*, 457 U.S. at 939-41 (discussion of joint activity test in context of prejudgment attachment of property).

115. *Id.* at 941.

116. *Id.*

117. *Id.* at 942.

118. *See supra* notes 105-07 and accompanying text (discussion of two-step procedure in determining presence of state action).

bench warrant or bail piece.[119] Alternatively, a principal may demonstrate that the surety's conduct resulted from a right exercised under a procedurally defective statute.[120] A statute is procedurally defective either because the statute has failed to establish appropriate safeguards governing surety arrests,[121] or permits the attachment of property upon the *ex parte* application of one party to a private dispute.[122] To meet the second element of the state action requirement, the principal must demonstrate that the surety is a "state actor" by applying one or more of the tests discussed in *Lugar*.[123] Under the public function test, a court may perceive the bondsman as exercising the power of arrest, the exercise of which constitutes a traditionally exclusive function of the state.[124] Under the state compulsion test, a court may conclude that the bondsman is a state actor when the bondsman acts pursuant to a state statute authorizing an arrest warrant or bail piece as the basis for the bondsman's authority to arrest.[125] A court may conclude under the nexus test that a sufficient symbiotic relationship exists between a state and the activities of a bondsman to make the bondsman a state actor.[126] A symbiotic

---

119. *See* Maynard v. Kear, 474 F. Supp. 794, 800 (N.D. Ohio 1979) (bondsmen's actions pursuant to state bench warrant obtained under state statute constituted state action); Smith v. Rosenbaum, 333 F. Supp. 35, 39 (E.D. Pa. 1971) (bondsman's actions pursuant to state statute authorizing bail piece constituted state action), *aff'd*, 460 F.2d 1019 (1972).

120. *See Lugar*, 457 U.S. at 939-41 (discussion of claim involving procedurally defective statute as properly actionable under § 1983 if claimant also meets "state action" element).

121. *See infra* notes 137-43 and accompanying text (discussion of procedural safeguards under fourth and fourteenth amendment applicable to surety arrests).

122. *See Lugar*, 457 U.S. at 942 (due process procedures applicable when state has created system permitting attachment of property on application of one party to a private dispute); *supra* text accompanying notes 115-17 (discussion of necessity for hearing prior to attachment of property on *ex parte* application of one party to private dispute).

123. *See supra* notes 109-14 and accompanying text (discussion of four tests used in determining whether private party is state actor).

124. *See* Citizens for Pre-Trial Justice v. Goldfarb, 88 Mich. App. 519, 556, 278 N.W.2d 653, 670 (1979) (bondsmen exercise arrest power that clearly is adjunct of state's sovereignty), *modified*, 327 N.W.2d 910 (1982); *cf.* Thompson v. McCoy, 425 F. Supp. 407, 409-11 (D.S.C. 1976) (state statute authorizing store security guard to make arrests is grant of police power and arrest is, therefore, under color of state law). *See generally* Hansen, *supra* note 40 at 630-32 (discussion of application of public function doctrine to surety arrests).

125. *See Hansen, supra* note 40 at 632-36 (discussion of state compulsion test in context of surety arrest). A demonstration that a statute authorizes and encourages bondsmen to arrest principals will not satisfy the state compulsion test if a bondsman has an alternative means available for surrendering the principal to court. *Id.* at 634. If the state statute permits the surety to employ police officers to aid in the arrest then surety arrest is only one alternative and, therefore, will not meet the compulsion test. *Id.* Courts that have found the conduct of bondsmen to constitute state action pursuant to the compulsion test have reached their conclusion by holding that the bondsmen relied on state statutes which encouraged or authorized surety arrests. *Id.* at 635; *see* Maynard v. Kear, 474 F. Supp. 794, 801 (N.D. Ohio 1979) (state action lent authority to state to bondsmen); Hill v. Toll, 320 F. Supp. 185, 187 (E.D. Pa. 1970) (state statute encouraged bondsman's conduct).

126. *See* Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 555-62 (9th Cir. 1974) (Hufstedler, J., dissenting) (discussion of bondsmen as state actors), *cert. denied*, 421 U.S. 949 (1975). In

relationship results from the state's regulation of, benefit from, and conferral of the arrest power on sureties.[127] Finally, a court may conclude under the joint activity test that the surety has been a joint participant with state officials in arresting a principal. A surety acts jointly with state officials when the surety obtains bail pieces and bench warrants.[128] A surety also acts jointly with state officials when the surety obtains a principal's release from jail or uses jail facilities while returning a principal to the jurisdiction of the court issuing the bond.[129] Additionally, a surety acts jointly with state officials when state law enforcement officers aid a surety in arresting a principal.[130]

Ouzts v. Maryland Nat'l Ins. Co., the United States Supreme Court of Appeals for the Ninth Circuit held that a bondsman's conduct did not constitute state action and, therefore, would not support a claim under § 1983. *Id.* at 555, *supra* note 42 (discussion of facts in *Ouzts*). Judge Hufstedler dissented however, stating that the bondsmen were acting under color of state law. *Ouzts*, 505 F.2d at 556. The judge reasoned that substantial governmental cooperation made possible the maintenance of the system of quasi-private bail ultimately leading to the violation of the principal's civil rights. *Id.* at 557. Judge Hufstedler determined that state action occurred when judicial officers determined eligibility and amounts for bail, imposed bail conditions, and revoked bail ordering recommitments of the principal. *Id.* The judge stated that state action also occurred when state police and judicial officers made the judicial process available to the bondsmen as well as when the state contributed its coercive power to aid in the rearrest and detention of the principal. *Id.* Additionally, Judge Hufstedler believed the state benefitted from the arrangement by saving the expense involved in housing, feeding, clothing and guarding prisoners. *Id.* The judge stated that the fact that the state extensively regulates bondsmen indicated the important public function that bondsmen serve. *Id.* at 559. Judge Hufstedler maintained that the state-licensed and regulated bondsmen are an integral part of the state's program of trial release, and, therefore, the actions of the bondsmen fulfilled the state action requirement. *Id.* In sum, according to the *Ouzts* dissent, state action occurs because of the general governmental nature of the bail system, the comprehensive statutory scheme for licensing and regulating bondsmen, the state's grant to bail bondsmen of police powers not enjoyed by private citizens generally, and the reliance by defendants upon their statutory powers in effecting the arrest of the principal. *Id.* at 556; *see also* Citizens for Pre-Trial Justice v. Goldfarb, 88 Mich. App. 519, 557-59, 278 N.W.2d 653, 670-73 (1979) (symbiotic relationship exists between professional bondsmen and state), *modified*, 327 N.W.2d 910 (1982). In *Citizens For Pre-Trial Justice v. Goldfarb*, the Michigan Court of Appeals stated in dicta that a symbiotic relationship between bondsmen and the state indicated that state action existed. *Id.* at 558, 278 N.W.2d at 672-73. According to the *Goldfarb* court, the bondsmen's relationship with a court is quasi-official. *Id.* at 558, 278 N.W.2d at 673. Furthermore, the *Goldfarb* court noted that the state receives benefits from the relationship because the bondsman relieves the state from the burden of caring for the accused. *Id.* at 558, 278 N.W.2d at 673.

127. *See supra* note 126 (discussion of state's regulation of, benefit from and conferral of the arrest power on sureties).

128. *See* Maynard v. Kear, 474 F. Supp. 794, 801 (N.D. Ohio 1979) (joint activity existed when court issued bench warrant pursuant to state statute upon which surety arrested principal); Hill v. Toll, 320 F. Supp. 185, 186-87 (E.D. Pa. 1970) (joint activity existed when court issued bail piece pursuant to state statute upon which surety arrested principal).

129. *See* McCaleb v. Peerless Ins. Co., 250 F. Supp. 512, 514 (D. Neb. 1965) (bondsman lodged principal in various jails during 80-hour trip home); United States v. Trunko, 189 F. Supp. 559, 562 (E.D. Ark. 1960) (court noted bondsman's intention to lodge principal at various jails enroute to jurisdiction of court issuing bond).

130. *See* MICH. COMP. LAWS ANN. § 765.26 (West 1982) (provision entitling surety to assistance of sheriff, chief of police of any city, or any officer in making arrest of principal);

By demonstrating that a surety is a state actor and that the surety's conduct has resulted from a right or privilege which the state has created, a principal will have met the state action or color of state law requirement necessary to bring suit under section 1983.[131]

After meeting the color of state law requirement under section 1983, a principal must demonstrate that the actions of a surety have deprived the principal of a right secured under the United States Constitution.[132] The principal must claim that the state has deprived the principal of liberty or property without due process of law conferred under the fourteenth amendment.[133] By means of the due process clause, the fourteenth amendment selectively incorporates certain provisions of the Bill of Rights.[134] Generally, the Supreme Court will incorporate under the fourteenth amendment a right that the Court considers fundamental to the American scheme of justice.[135] The Supreme Court has held that the fourth amendment protections against unreasonable searches and seizures and the requirements for obtaining search warrants are among the fundamental rights which the fourteenth amendment protects.[136] A principal, therefore, may assert fourth amendment rights in a section 1983 suit as violations of the fourteenth amendment due process clause.

Prior case law has not addressed specifically the bounds of fourth amendment rights in the context of a rearrest by a bondsman.[137] The fourth

---

see also United States v. Roper, 702 F.2d 984, 988-89 (11th Cir. 1983) (court stating that search for fugitives by bail bonding company is service to judicial system, and police assistance in search is reasonable).

131. *See supra* notes 100-104 and accompanying text.

132. *See supra* notes 62-65 and accompanying text (discussion of elements necessary for principal to establish in § 1983 suit).

133. *See* U.S. CONST. amend. XIV. (amendment prohibits states from denying to citizens equal protection of the laws).

134. *See generally* Daykin, *The Constitutional Doctrine of Incorporation Re-Examined*, 5 U.S.F.L. REV. 61, 61-63 (1970) (discussion of incorporation doctrine through analysis of United States Supreme Court cases applying provisions of first eight amendments to states through fourteenth amendment); *see also* Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 746-83 (1965) (collection of cases rejecting claims that certain provisions of first eight amendments to constitution apply to states through incorporation under fourteenth amendment).

135. *See* Benton v. Maryland, 395 U.S. 784, 793-796 (1969) (court held that fifth amendment prohibition against double jeopardy is fundamental right and should apply to states through fourteenth amendment). The United States Supreme Court in *Benton v. Maryland* rejected the idea that the states could deny basic constitutional rights if the totality of the circumstances did not disclose a denial of fundamental fairness. *Id.* at 795. The Court noted that once the Court decides that a particular Bill of Rights guarantee is fundamental to the American scheme of justice, the same constitutional standards apply against both the state and federal governments. *Id.*

136. *See* Zurcher v. Stanford Daily, 436 U.S. 547, 549 (1978) (fourth amendment is applicable to states by virtue of fourteenth amendment); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (fourth amendment rights are enforceable through due process clause of fourteenth amendment).

137. *See* Maynard v. Kear, 474 F. Supp. 794, 801 (N.D. Ohio 1979) (court attempted to

amendment to the United States Constitution protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.[138] By means of fourteenth amendment incorporation, the fourth amendment also requires that the state issue warrants only upon probable cause, naming the specific places to be searched and the persons or things to be seized.[139] Upon establishment of a surety's conduct as state action, certain areas of fourth amendment protections such as the requirements of the use of reasonable force and means,[140] warrants,[141] and hearings[142] are applicable to the surety arrest.[143]

Under the fourth amendment, arrests by police officers may not involve more than the use of reasonable or necessary force.[144] Reasonable force is that force necessary under the circumstances to make the arrest or prevent the escape of the accused.[145] The United States District Court for the District of Minnesota has noted that sureties must stay within the bounds of reasonable means, including force, in arresting principals, and has implied that sureties would be liable in tort to principals for improper custody.[146] The Alabama Court of Appeals has indicated that courts should control the use of unnecessary force by sureties by controlling the use of weapons.[147]

---

define fourth, sixth and eighth amendment rights applicable to arrests by bondsmen).

138. U.S. CONST. amend. IV.

139. *Id.*

140. *See infra* notes 144-58 and accompanying text (discussion of requirement of use of reasonable force and means in context or surety arrest).

141. *See infra* notes 159-82 and accompanying text (discussion of warrant requirements in context of surety arrests).

142. *See infra* notes 184-222 and accompanying text (discussion of notice and opportunity to be heard in hearing in context of surety arrest).

143. *See* Kear v. Hilton, 699 F.2d 181, 182 (4th Cir. 1983) (court noted need for hearing before surety arrest); Maynard v. Kear, 474 F. Supp. 794, 801-03 (N.D. Ohio 1979) (court stated that surety arrests are subject to requirement that arrests may involve use of only reasonable force and means but also stated that surety arrest does not require use of warrants).

144. *See* Costello v. United States, 298 F.2d 99, 100 (9th Cir. 1962) (court held that police used reasonable force in striking accused on head with sidearm when accused charged police officers after announcement of arrest). In *Costello v. United States*, the United States Court of Appeals for the Ninth Circuit affirmed the basic principle that police officers should make arrests peaceably if possible and only forcibly if necessary. *Id.*

145. *See* Moore v. Bishop, 338 F. Supp. 513, 515 (E.D. Tenn. 1972) (accused alleged that police used unnecessary force in subduing accused and unnecessary force after handcuffing accused). The United States District Court for the Eastern District of Tennessee in *Moore v. Bishop* emphasized the duty of a police officer to avoid using unnecessary violence in effecting an arrest. *Id.* Additionally, the *Moore* court emphasized that an officer may not use force or violence disproportionate to the extent of the resistance offered. *Id.* Finally, the *Moore* court indicated that an officer may shoot only when appearances justify a fear of suffering serious injury or loss of life. *Id.*

146. *See* Curtis v. Peerless Ins. Co., 299 F. Supp. 429, 435 (D. Minn. 1969) (purpose of rearrest by sureties must be proper in light of sureties' undertaking); *accord* Smith v. Rosenbaum, 333 F. Supp. 35, 39 (E.D. Pa. 1971) (court cited *Curtis* as support for nonliability of surety except in cases in which surety has transgressed bounds of reasonable means or improper purpose), *aff'd*, 460 F.2d 1019 (3rd Cir. 1972).

147. *See* Shine v. State, 44 Ala. App. 171, ____, 204 So. 2d 817, 826 (1967) (discussion

According to the Alabama Court of Appeals, courts should investigate every occasion in which a surety claims to need weapons and should require law enforcement officials to accompany the surety on such occasions.[148] Furthermore, arrests by police officers for misdemeanors when the arrestee's resistance is nonviolent will not justify the use of weapons.[149] As a general rule, in the case of a misdemeanor, an officer has no right, except in self-defense, to shoot or kill the offender in effecting the arrest, even when the offender flees.[150] Since many of the violent arrests in which bondsmen use weapons occur in cases of misdemeanors and involve small amounts of money,[151] a court may wish to extend the misdemeanor principle to surety arrests.

In addition to the requirement of reasonable force, courts have interpreted the fourth amendment to require an arresting officer to give notice of the officer's identity and purpose when demanding entrance into a dwelling place.[152] The prevailing view is that entry without notice is possible only when the officer acts on a reasonable good-faith belief that compliance with the notice requirement would frustrate an arrest, endanger lives, or permit the destruction of evidence.[153] In *Read v. Case*,[154] the Connecticut Supreme Court held that a bondsman in a surety arrest must notify a principal of the reason for the bondsman's appearance and must request admission before making any attempt to enter the principal's home forcibly.[155] The *Read* Court noted that the only valid excuse for a bondsman's failure to meet the demand-notice requirement was the bondsman's belief that his personal

---

of use of force in surety's arrest of principal). In *Shine v. State* the Alabama Court of Appeals stated that a court should reexamine the means used by bondsman in arresting principals. *Id.* at ____, 204 So.2d at 826. According to the *Shine* court, the "pay or get shot" attitude of bondsmen had continued for too long, and indicated the need for the court to control the bondsmen's use of weapons. *Id.*

148. *Id.* at ____, 204 So.2d at 826.

149. *See* Weissengoff v. Davis, 260 F. 16, 18-19 (4th Cir.) (discussion of use of force by police officer in misdemeanor arrest), *cert. denied*, 250 U.S. 674 (1919); *cf.* Shine v. State, 44 Ala. App. 171, ____, 204 So. 2d 817, 823 (1967) (discussion of use of force in arrest of principal by surety when force resulted in death of surety).

150. *Shine*, 204 So.2d at 823.

151. *See, e.g.*, Curtis v. Peerless Ins. Co., 299 F. Supp. 429, 431 (D. Minn. 1969) (principal's bond was $350 on charge of driving while intoxicated); McCaleb v. Peerless Ins. Co., 250 F. Supp. 512, 514 (D. Neb. 1965) (principal's bond was worth $200 on charge of violating traffic laws); United States v. Trunko, 189 F. Supp. 559, 560 (E.D. Ark. 1960) (principal's bond was $500 on misdemeanor charge of driving while intoxicated).

152. *See* Ker v. California, 374 U.S. 23, 38 (1963) (discussion of demand-notice requirement in arrest by police officer).

153. *See id.* (demand-notice requirements are not applicable when need to prevent destruction of evidence exists); People v. Maddox, 46 Cal. 2d 301, 306, 294 P.2d 6, 9 (Cal.) (court noted that three exceptions to demand-notice requirement include need to prevent destruction of evidence, increase in peril to officer's life and frustration of arrest), *cert. denied*, 352 U.S. 858 (1956).

154. 4 Conn. 166 (1822).

155. *See id.* at 168 (court limited damages to those actually sustained when bondsman broke door of principal's house).

safety or that of an agent was in jeopardy from the intended violence of a principal.[156] Requiring sureties to identify themselves and to give notice of their legal power and the reason for the arrest would benefit principals since recapture situations often involve agents, commonly called "bounty hunters" whom principals never have seen,[157] and who do not indicate the reasons for the arrest.[158]

In addition to requirements of reasonable force and means, the fourth amendment imposes certain warrant requirements on police officers.[159] Although the Supreme Court has expressed a strong preference that police officers should obtain arrest warrants when practicable, the Court has not required the use of arrest warrants in all circumstances.[160] Relying on a strong common-law tradition, the Supreme Court has held that warrantless public arrests are permissible if based on probable cause.[161] In *Payton v. New York*,[162] the United States Supreme Court addressed the issue of whether the Constitution requires a police officer to obtain a warrant to enter private premises to make an arrest.[163] Confirming that the fourth amendment draws

156. *Id.* at 168. In *Read v. Case*, the Connecticut Supreme Court did not require the surety to give notice of presence and to request entrance because the principal already knew the reason for the surety's presence and because the principal had barricaded and armed himself to defeat the surety's right of recapture. *Id.*

157. *See* Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 549-50 (9th Cir. 1974) (bonding agent hired bounty hunter unknown to principal, to take principal into custody), *cert. denied*, 421 U.S. 949 (1975); United States v. Trunko, 189 F. Supp. 559, 562 (E.D. Ark. 1960) (bonding agent Trunko did not advise principal that Trunko was acting as agent of bonding company).

158. *See* United States v. Trunko, 189 F. Supp. 559, 562 (E.D. Ark. 1960) (neither principal Williams nor family knew why bonding agent was arresting Williams).

159. *See infra* notes 160-65 and accompanying text (discussion of warrant requirements in context of arrests by law enforcement personnel).

160. *See* United States v. Watson, 423 U.S. 411, 421-23 (1976). The issue in *United States v. Watson* concerned whether a law enforcement official could make a public arrest for a felony without a warrant but with probable cause. *Id.* at 412-17. According to the facts in *Watson*, a postal inspector had made a warrantless arrest of a suspect based on information that a reliable informant had supplied. *Id.* at 412-13. The trial court held the arrest unconstitutional because the postal inspector had failed to secure an arrest warrant despite ample opportunity to do so. *Id.* at 414. The United States Supreme Court, despite a preference for warranted arrests, held that a warrantless public arrest based on probable cause was constitutional. *Id.* at 423.

161. *See id.* at 423. The Supreme Court in *United States v. Watson* not only considered the strong common-law tradition in holding that warrantless public arrests based on probable cause were constitutional, but the Court also considered congressional preferences. *Id.* The Court noted that, prior to 1951, Congress had conditioned the warrantless arrest powers of federal law enforcement officials upon the exigent circumstances of the arresting officers' reasonable grounds to believe that the accused would flee if the officers took the time to obtain warrants. *Id.* at 423 n.13. Congress eliminated the condition of exigent circumstances in 1951. *Id.*

162. 445 U.S. 573 (1980).

163. *Id.* at 575. In *Payton v. New York*, six police officers visited Payton's apartment at 7:30 a.m. intending to make a warrantless arrest of Payton for the murder of a gas station attendant two days earlier. *Id.* No one was present, but police seized a .30 caliber shell casing that lay in plain view. *Id.* 576-77. Payton challenged the admission of the casing into evidence at the trial because the officers had failed to seize the evidence properly. *Id.* 577. The *Payton*

a firm line at the entrance of a house for the seizure of either persons or property, the Supreme Court held that a warrant is necessary to cross the threshold of a home to make a routine felony arrest of a fugitive, absent exigent circumstances.[164] The Constitution also requires a police officer to obtain a search warrant before entering the house of a third party, absent exigent circumstances, to arrest a fugitive.[165]

In considering the issue of whether a surety must obtain an arrest warrant for a public arrest of a principal, courts have relied on the common-law tradition of *Taylor*[166] and *Fitzpatrick*[167] to hold that a surety does not need a warrant.[168] Even the *Maynard* court, the only court to consider in depth the fourth amendment rights of principals under the Constitution, was hesitant to require arrest warrants.[169] In *United States v. Holmes*,[170] however, the United States Court of Appeals for the Seventh Circuit addressed the issue of whether a warrantless rearrest by federal officers of a bailed defendant was valid.[171] While recognizing that law enforcement officers may

---

Court held that, through the fourteenth amendment, the fourth amendment prohibits state police officers from making a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest. *Id.* 583-603. Because the search of Watson's apartment was illegal, the United States Supreme Court reversed Watson's conviction and remanded the case to the New York Court of Appeals. *Id.* at 603.

164. *Id.* at 590. The Supreme Court in *Payton v. New York* found persuasive the reasoning that an arrest in a home involves not only the invasion of privacy attendant to all arrests but also an invasion of the sanctity of the home, an invasion which was too substantial to permit without a warrant. *Id.* at 588-89.

165. *See* Steagald v. United States, 451 U.S. 204, 211-16 (1981) (Court compared search for person to search for object in holding that search warrant is necessary before entering home of third party to arrest fugitive).

166. *See* Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1872) (no arrest warrant necessary in arrest of principal by surety). In *Taylor v. Taintor*, the United States Supreme Court reasoned that a surety did not need to obtain an arrest warrant as the arrest was comparable to the rearrest of an escaping prisoner by a sheriff. *Id.; see supra* notes 18-26 and accompanying text (discussion of *Taylor*).

167. *See* Fitzpatrick v. Williams, 46 F.2d 40, 41 (5th Cir. 1931) (surety does not need process to arrest principal wherever principal may be); *id.* at 40 (surety did not need to obtain arrest warrant because surety was acting upon private contract right of recapture).

168. *See, e.g.*, Maynard v. Kear, 474 F. Supp. 794, 802 (N.D. Ohio 1979) (surety does not need to obtain warrant before arresting principal); Curtis v. Peerless Ins. Co., 299 F. Supp. 429, 435 (D. Minn. 1969) (surety may take principal into custody without legal process); United States v. Trunko, 189 F. Supp. 559, 563 (E.D. Ark. 1960) (surety has right to recapture defaulting principal without resort to extradition or other legal process).

169. *See Maynard*, 474 F. Supp. at 802. In *Maynard v. Kear*, the United States District Court for the Northern District of Ohio discussed the fourth amendment rights potentially relevant to the bondsman who acts under color of state law. *Id.* In the discussion, the *Maynard* court, while hesitant to require a bondsman to obtain a warrant, did leave open the possibility that under the holding of *United States v. Holmes*, a court might impose a warrant requirement. *Id.; infra* notes 170-74 (discussion of decision by *Holmes'* court that warrantless rearrest by police officers of bailed defendant was not valid).

170. 452 F.2d 249 (7th Cir. 1971), *cert. denied*, 407 U.S. 909 (1972).

171. *See* United States v. Holmes, 452 F.2d 249, 260-61 (7th Cir. 1971), *cert. denied*, 407

rearrest principals for a variety of reasons, the Seventh Circuit concluded that the fourth amendment applied to the rearrest of a bailed defendant by federal officers.[172] The *Holmes* court emphasized that the fourth amendment requires both a reasonable foundation for a criminal charge and the avoidance of arbitrary and unreasonable interferences with privacy.[173] A court could apply the Seventh Circuit's reasoning in *Holmes* to a surety arrest situation, and conclude that warrants for public arrests by sureties are necessary.[174]

Similarly, a court may wish to impose a warrant requirement before permitting a bondsman to enter a principal's home or the home of a third party.[175] The *Taylor* court specified that, if necessary, a bondsman may break and enter a principal's house to make an arrest, but *Taylor* neither supports nor prohibits the proposition that a surety may enter the dwelling of a third party.[176] However, entry into a third-party dwelling was at issue in the case of *Livingston v. Browder*.[177] In *Livingston*, a mother brought suit against a bondsman who had entered the mother's house without permission and arrested her son.[178] The *Livingston* court held that a surety has the

---

U.S. 909 (1972). In *United States v. Holmes*, government agents without a new warrant rearrested defendant Oliver, who was free on bail. *Id.* at 260. The government argued that the return of a new indictment against Oliver established the probable cause necessary to make the rearrest. *Id.* Oliver argued that the warrantless arrest was unconstitutional. *Id.* According to the United States Court of Appeals for the Seventh Circuit, two factors were important in resolving the issue of whether the rearrest was constitutional. *Id.* First, the government must have reason to believe that the prospective arrestee is guilty of a crime. *Id.* Second, the arrest must serve some purpose. *Id.* According to the Seventh Circuit, probable cause existed because the defendant was under indictment. *Id.* at 260-61. The *Holmes* court concluded, however, that the rearrest served no purpose because in the contemplation of the law, the bailed defendant was already in custody. *Id.* at 261. While the *Holmes* court recognized that many valid reasons for rearrest existed, the court concluded that an arrest needed more justification than continuing knowledge of guilt of the offense charged. *Id.* Without more, according to the *Holmes* court, a defendant would be subject to the type of harassment prohibited by the fourth amendment. *Id.* In Oliver's case, if the judge had ordered a change in the defendant's custodial status as a result of the new charges, then the subsequent arrest would have served a purpose. *Id.* The *Holmes* court also noted the fact that the government originally had sought to justify Oliver's arrest on the ground that a warrant had, in fact been issued. *Id.* The government's assertion, however, was in error. *Id.*

172. *Id.* at 261.

173. *Id.*

174. *See id.* at 260-61. One may distinguish the decision in *United States v. Holmes* from a surety rearrest situation in that the United States Court of Appeals for the Seventh Circuit emphasized that the new charge and new warrant were necessary to avoid the harassment of the arrestee by the police. *Id.* at 261; *see also supra* note 171 (discussion of reasoning in *Holmes* decision).

175. *See infra* notes 176-82 and accompanying text (discussion of common law principles applicable to entry into third party dwellings by either sureties or police officers).

176. *Taylor*, 83 U.S. at 371.

177. 51 Al. App. 366, ____, 285 So. 2d 923, 924 (Ala. Civ. App. 1973).

178. *Id.* at ____, 285 So. 2d at 924-25.

authority to enter the dwelling of a third party to arrest the principal.[179] The *Livingston* court, however, imposed certain conditions on sureties entering third-party dwellings.[180] The *Livingston* court stated that the surety must have reasonable and just cause to believe the principal is in the dwelling, must properly identify himself, and must use reasonable means to gain entry.[181] Relying on the rationale expressed in *Livingston* and on the policies supported by the United States Supreme Court in recent decisions requiring police officers to obtain arrest and search warrants, a court reasonably could impose a warrant requirement on sureties acting under color of state law before allowing entry into homes or private dwellings.[182]

In addition to requiring the use of reasonable force and means, and the use of warrants in appropriate circumstances, the fourth and fourteenth amendments also require hearings in certain situations before a state may deprive an individual of liberty or property.[183] In examining violations of a principal's constitutional rights in a section 1983 suit, courts may compare the principal's right to a hearing to that right which is available to an arrestee.[184] Additionally, a court may compare the principal's right to a hearing to that of a probationer or parolee in the correctional process prior to revocation of probation or parole.[185] Finally, a court may compare the principal's right to a hearing to the right established for state enforcement of a private contract right.[186]

---

179. *Id.* at ____, 285 So.2d at 927. In *Livingston v. Browder*, the Court of Civil Appeals of the State of Alabama emphasized the strong public policy in preventing the principal from leaving the jurisdiction of the bond agreement. *Id.* at ____, 285 So.2d at 925. Additionally, the *Livingston* court noted that, because of this strong public interest, the state permits the surety wide discretion in determining the steps necessary to effect the apprehension of the principal. *Id.* Furthermore, the *Livingston* court stated that the responsibility of the surety to ensure the principal's appearance in court justifies the large amount of authority that the state affords the surety. *Id.*

180. *Id.* at ____, 285 So.2d at 926-27. In discussing the limits of a surety's authority, the Court of Civil Appeals of the State of Alabama in *Livingston v. Browder* compared the arrest of a principal by a surety to the arrest of a suspect by a police officer in discussing the issues of reasonable force and means and warrant requirements. *Id.* at ____, 285 So.2d at 926-27. The *Livingston* court concluded that the law governing the use of reasonable means and force and the lack of necessity for a warrant was the same for a surety as for a policeman. *Id.* at ____, 285 So.2d at 927. In *Livingston*, the surety entered the mother's house when the surety observed the principal leaving through a back alley *Id.* The presence of these exigent circumstances may explain the *Livingston* court's decision that a warrant was not necessary. *Id.*

181. *Id.* at ____, 285 So.2d at 926-27.

182. *See supra* notes 162-65 and accompanying text (discussion of warrant requirement prior to entry into homes and third party dwellings).

183. *See infra* notes 184-226 and accompanying text (discussion of hearing requirements as applied to different types of arrest and to property attachments).

184. *See* Livingston v. Browder, 51 Ala. App. 336, ____, 285 So.2d 923, 926-27 (1973) (comparison of surety arrest to arrest by police officer).

185. *See infra* notes 197-207 and accompanying text (discussion of right to hearing by parolee or probationer upon revocation of parole or probation).

186. *See infra* notes 209-26 and accompanying text (discussion of right to hearing by private party before attachment of property).

The United Sates Supreme Court has addressed the issue of an arrestee's right to a hearing during the arrest procedure. Under guidelines established by the Supreme Court, since an arresting officer may arrest without a warrant, the Constitution does not require a hearing to determine probable cause prior to an arrest.[187] Following the arrest, however, the fourth amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty.[188] In such a hearing, the fourth amendment does not require the full panoply of constitutional safeguards associated with an adversarial hearing.[189] Instead, the hearing may be an informal procedure before a judicial officer who is to make a determination of probable cause for detention using the same standard of probable cause as that required for an arrest.[190] If a hearing is not conducted prior to the arrest, the judicial officer must make the determination of probable cause promptly after the arrest.[191]

If a court determines that a bondsman has acted under color of state law and considers the bondsman's actions to be analogous to those of an officer rearresting an individual on bail, then the court may find that a hearing is necessary at some point in the surety-arrest procedure.[192] The purpose of the hearing would be to articulate the cause for the rearrest and to verify the identity of the arrestee.[193] Given the contractual nature of the bond agreement, valid causes for a rearrest would include breaking the bail contract by leaving the jurisdiction determined in the bail agreement, increased risk to the bondsman, or the simple desire of the bondsman to be relieved of the contractual obligation.[194] The United States Supreme Court

187. *See* United States v. Watson, 423 U.S. 411, 423 (1976) (warrantless public arrest based on law enforcement officer's determination of probable cause is constitutional); *see also supra* notes 160-61 and accompanying text (discussion of circumstances under which warrantless arrests are permissible).

188. *See* Gerstein v. Pugh, 420 U.S. 103, 113-14 (1975) (court struck down Florida statute permitting state to detain person charged by information for substantial period solely on decision of prosecutor).

189. *See id.* at 120 (Court reasoned that informal procedure is justifiable because of lesser consequences, and because it is not critical stage in prosecution).

190. *See id.* at 120.

191. *Id.* at 125.

192. *See* Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1872) (surety arrest is comparable to rearrest of fugitive by sheriff).

193. *See* CAL. PENAL CODE § 847.5 (West 1970). California Penal Code § 847.5 totally abrogates the right of a foreign bondsman to pursue, apprehend and remove a principal from California without resort to process that includes hearing. *Id.* The purpose of the first magistrate's hearing, as provided by the statute, is to review the surety's affidavit of facts in support of the surety's request for an arrest warrant. *Id.* Only after a finding of probable cause that the fugitive is present in the county and that the fugitive violated the conditions of bail, will the magistrate issue an arrest warrant. *Id.* Following the arrest, the statute requires an additional evidentiary hearing, with the fugitive present, to establish that the arrestee is the person alleged to have violated bail and that the arrestee is indeed a fugitive from bail. *Id.*

194. *See* Taylor v. Taintor, 83 U.S. (16 Wall.) 336, 371 (1872) (surety may seize principal whenever surety chooses); *see also supra* text accompanying note 193 (discussion of purposes of evidentiary hearing following surety arrest).

has stated that an arrest hearing, whether held before or after an arrest, should furnish meaningful protection from unfounded interference with an arrestee's liberty.[195] A court could provide meaningful protection against interference with a principal's liberty by requiring a surety to promptly present the principal to a judicial officer in the jurisdiction in which the arrest takes place.[196] Prompt presentation balances the rightful power of the surety to revoke the contract with the due process requirements of protection of the rearrested individual under the fourth and fourteenth amendments.

A court also may analogize the right of a principal to a hearing upon revocation of the bail bond to the right of a parolee or a probationer to a hearing on revocation of parole or probation.[197] Under the due process clause of the fourteenth amendment, a parolee has a right to a reasonably prompt informal hearing, conducted by an impartial hearing officer near the place of the alleged parole violation, to determine if reasonable grounds exist to believe that the arrested parolee violated a parole condition.[198] A probationer

---

195. *See* Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (discussion of purpose of hearing following arrest).

196. *See* CAL. PENAL CODE § 847.5 (West 1970) (statute requires prompt presentation of principal to magistrate immediately following arrest by surety).

197. *See infra* notes 198-208 and accompanying text (discussion of right to hearing by probationer and parolee upon revocation of probation and parole and analogy to surety revocation of bond); Citizens for Pre-Trial Justice v. Goldfarb, 88 Mich. App. 519, 559, 278 N.W.2d 653, 673 (1979) (comparison of liberty interests of parolee and principal), *modified*, 327 N.W.2d 910 (1982).

198. *See* Morrissey v. Brewer, 408 U.S. 471, 484-87 (1972). In *Morrissey v. Brewer*, the Supreme Court addressed the issue of whether the due process clause of the fourteenth amendment requires a state to afford a parolee an opportunity to be heard prior to revoking parole. *Id.* at 477. In *Morrissey*, the Court heard the appeals of two petitioners. *Id.* at 473. In both instances, the Iowa Board of Parole had revoked the petitioners' paroles without prior hearings. *Id.* The reason given by the Iowa board for revocation of both paroles was the violation of the territorial restrictions placed on the parolees. *Id.* at 473-74. In considering whether due process applied to the parole system, the *Morrissey* Court described the function of parole in the correctional process. *Id.* at 477. The Court described parole practices as an integral party of the penal system, serving as a variation on the imprisonment of convicted criminals. *Id.* According to the *Morrissey* Court, the parole system alleviates the costs to society of keeping an individual in prison. *Id.* Additionally, the Court noted that in some cases the Board grants parole automatically and in others, parole is a discretionary matter. *Id.* Furthermore, the *Morrissey* Court noted that the state, through the parole board, requires specific restrictive conditions on a parolee. *Id.* The restrictive conditions inhibit the parolee's liberty beyond that of an ordinary citizen, including the stipulation that the parolee remain under the guidance of, and report to, the parole officer. *Id.* at 478. The parole officer generally decides whether to order the revocation of parole. *Id.* at 478-79. The *Morrissey* Court distinguished revocation of parole from criminal prosecution. *Id.* at 480. The agency supervising parole may or may not be acting as an arm of the court. *Id.* Revocation deprives an individual only of a conditional liberty, not the absolute liberty of an ordinary citizen. *Id.* The issue of whether the requirements of due process apply to parole revocations turned on whether the nature of the interest is one within the contemplation of the "liberty or property" language of the fourteenth amendment. *Id.* at 481. The *Morrissey* Court concluded that the liberty, of a parolee, although circumscribed, includes many of the core values of unqualified liberty and the loss of liberty is grievous to the parolee. *Id.* at 482. Since liberty is valuable and is within the protection of the fourteenth amendment, a termination of liberty calls for an orderly process. *Id.*

also is entitled to a preliminary and final probation revocation hearing under the same conditions specified for a parolee.[199] Since parole and probation revocation are not part of the criminal prosecution, neither parolees nor probationers are entitled to a hearing subject to the full panoply of rights applicable to the criminal prosecution process.[200] For both parolees and probationers, however, the loss of significant liberty interests is involved in revocation of freedom, and due process mandates a hearing of some type.[201] If a court chooses to compare the revocation of parole and probation to the revocation of a bail bond, the issue of whether procedural protections demand a hearing for a principal will turn on the extent to which the principal will suffer a grievous loss and whether the nature of this loss is within the contemplation of the "liberty or property" language of the fourteen amendment.[202] Since a principal, like a parolee, suffers a loss of a significant liberty interest, a court could analogize the revocation of bail to the revocation of parole and probation, and impose a due process requirement of a hearing before the revocation of bail.[203]

If a court did analogize the hearing requirements for revocation of parole to the bail situation, the differences between principals and parolees indicate that the hearings would serve different functions.[204] Implicit in the system of

---

Principals are in analogous situation to parolees and probationers. The revocation agent, either the surety or the parole officer, may or may not be acting as an arm of the court. *Compare Morrissey*, 408 U.S at 480 (agency supervising parole may or may not be acting as arm of court) *with* Citizens for Pre-Trial Justice v. Goldfarb, 88 Mich. App. 519, 558, 278 N.W.2d 653, 673 (1979) (bondsman's relationship with court is quasi-official), *modified*, 327 N.W.2d 910 (1982). Both bail and parole are extensions of prison. *Compare Morrissey*, 408 U.S. at 477 (parole is variation of imprisonment) *with* Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1872) (dominion of surety is continuation of principal's original imprisonment). The position of a parolee and a principal differs only in the requirement of a valid reason to revoke freedom. *Compare Morrissey*, 408 U.S. at 479 (implicit in parole system is idea that parolee is entitled to liberty so long as parolee abides by conditions of parole) *with Taylor*, 83 U.S. (16 Wall.) at 371 (surety may arrest at any time and for any reason).

199. *See* Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973) (decision concerning need for counsel for indigent parolees and probationers is subject to case-by-case analysis).

200. *See* Morrissey v. Brewer, 408 U.S. 471, 480-89 (1972). The United States Supreme Court in *Morrissey v. Brewer* held that a hearing to determine probable cause and to evaluate contested facts was necessary upon revocation of parole. *Id.* at 488. According to the Court, however, the hearing should consist of a narrow inquiry that would be flexible enough to consider evidence not admissible in an adversary criminal trial. *Id.* at 489. The *Morrissey* Court also declined to decide whether the parolee was entitled to the assistance of retained or appointed counsel. *Id.; see* Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973) (revocation hearing for probationer is subject to same requirements of parolee).

201. *See* Gagnon v. Scarpelli, 411 U.S. 778, 789 (1973) (due process mandates hearing for revocation of probation because loss of significant liberty interests are involved; Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (due process mandates hearing for revocation of parole because loss of significant liberty interests are involved).

202. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (parolee's right to due process in parole revocation turns on whether nature of parolee's interest is one within contemplation of "liberty or property" language of fourteenth amendment).

203. *See id.* at 482 (parolee's liberty interest is within protection of fourteenth amendment).

204. *See infra* notes 205-08 and accompanying text (discussion of hearing for revocation

parole is the idea that the parolee is entitled to retain his liberty so long as the parolee abides by the conditions of the parole.[205] Implicit in the bail bond system is the right of the surety to revoke the bond for any reason the surety chooses.[206] The purpose of a parole hearing is to determine whether the parolee did, in fact, violate the conditions of parole and whether revocation of parole is the best solution.[207] In contrast to a parole revocation hearing, a hearing for a principal may occur before or after the arrest and should reflect both the interests of the bondsman on the contract as well as the interests of the state in assuring that a bondsman arrests pursuant to a valid contract and that the bondsman arrests the individual named in the contract.[208]

A court could also analogize the issue of whether due process requires a hearing for principals arrested by sureties acting under color of state law to cases concerning state deprivation of property.[209] According to traditional case law, the contract between the surety and the principal is a private contract and not a matter of criminal procedure.[210] Inserted into a typical bond contract is a clause authorizing the surety to arrest and surrender the principal at any time to the court issuing the bond.[211] Courts have continued to hold that the bonding contract is legal,[212] and, because the contract is private, some courts hold that the fourteenth amendment is not applicable to sureties exercising the arrest power.[213] When the surety is acting under

---

of bail as differing from hearing for revocation of parole).

205. *See* Morrissey v. Brewer, 408 U.S. 471, 479 (1972).

206. *See* Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1872).

207. *See* Morrissey v. Brewer, 408 U.S. 471, 487-88 (1972).

208. *See supra* note 193 (discussion of hearing requirements under California Penal Code § 847.5).

209. *See* Kear v. Hilton, 690 F.2d 181, 182 (4th Cir. 1983) (discussion of due process requirements applicable to bondsmen). In *Kear v. Hilton*, Kear a professional bondsman apprehended a principal in Canada and transported the principal to Florida. *Id.* The displeased Canadian officials sought to extradite Kear for kidnapping. *Id.* at 183. The United States Court of Appeals for the Fourth Circuit upheld the lower court's denial of Kear's writ of habeas corpus. *Id.* at 185. The Fourth Circuit stated that a surety's arrest power did not extend beyond the territory of the United States. *Id.* at 182. The Fourth Circuit proceeded on the assumption that the 1872 *Taylor* decision constituted the controlling law. *Id.* at 182 n.2. The Fourth Circuit noted, however, that since 1872, the Supreme Court had imposed procedural due process requirements on the reclamation of property and suggested that these requirements were applicable to the bondsman's situation. *Id.*

210. *See* Fitzpatrick v. Williams, 46 F.2d 40, 40-41 (5th Cir. 1931) (discussion of private contractual nature of bail bond agreement).

211. *See* Hansen, *supra* note 40, at 598 (discussion of typical bail bond contract); *see also* 3 Am. Jur. Legal Forms 2d *Bail and Recognizance* § 35.26 (1971) (provision authorizing surety to arrest and surrender principal at any time in exoneration of surety's liability); 4 Am. Jur. Pl. & Pr. Forms (Rev.) *Bail and Recognizance*, form 91, 92 (1968) (provision authorizing surety to arrest principal).

212. *See* Hansen, *supra* note 40, at 611 (discussion of legality of bail bond contracts).

213. *See* Citizens For Pre-Trial Justice v. Goldfarb, 88 Mich. App. 519, 566, 278 N.W.2d 653, 676 (1979) (court stated essence of bail bond contract is private undertaking), *modified*, 327 N.W.2d 910 (1982). *But cf. supra* notes 81-96 and accompanying text (courts held fourteenth amendment applicable to surety arrest).

color of state law, however, the analysis changes, because the state and the private party are enforcing a private contract right.[214] The issue then becomes whether due process rights, which apply to state deprivation of property interests under a bail bond contract, require notice and opportunity for a principal to be heard concurrent with the enforcement of specific provisions of the bail contract on the application of a surety.[215]

A leading United States Supreme Court case providing guidelines concerning the procedural due process required before a state can deprive an individual of a property interest pursuant to a private contract is *Fuentes v. Shevin*.[216] In *Fuentes*, the Court addressed the problem of replevin of goods purchased under an installment sales contract upon application of a private party.[217] The Pennsylvania and Florida statutes in question permitted a private party, without a hearing or prior notice to the other party, to obtain a prejudgment writ of replevin through a summary process of *ex parte* application to a court clerk.[218] The statutes required the sheriff to execute the writ by seizing the property.[219] The *Fuentes* Court held that the replevin provisions of the state statutes were invalid under the fourteenth amendment since the provisions constituted a deprivation of property without due process of law by denying the right of one party to the dispute an opportunity to be heard before the other party takes the chattels.[220] Additionally, the *Fuentes* court held that procedural due process requires an opportunity for a hearing before the state authorizes its agents to seize property in the possession of one person under the application of another.[221]

The *Fuentes* analysis arguably applies to the bail bond contract.[222] Under the bail bond contract, the liberty interest of a principal is at least as

---

214. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982) (fact that private individual jointly participated with state officials in seizure of disputed property is sufficient to constitute state action under fourteenth amendment).

215. *See id.* at 942 (court focused on state-created system whereby state officials attached property on *ex parte* application of one party to private dispute).

216. 407 U.S. 67, 80-84 (1972) (procedural due process requires opportunity for hearing before state authorizes agents to seize property in possession of person upon application of another).

217. *Id.* at 69-70. In *Fuentes v. Shevin*, the contract in issue was a printed form sales contract that included provisions for seller's repossession of the merchandise on buyer's default. *Id.* at 94. The terms of the contract appeared in small type without accompanying clarifications. *Id.*

218. *See id.* at 73-78; *see also* Fla. Stat. Ann. § 78.01 (Supp. 1972-1973) (amended 1973) (statute permits any person whose goods are wrongfully detained to have writ of replevin); Fla. Stat. Ann. § 78.07 (Supp. 1972-1973) (repealed 1973) (statute requires creditor to post bond payable to defendant if defendant recovers judgment); PA. STAT. ANN., Tit. 12, § 1821 (1967) (statute authorizes writ of replevin for prejudgment attachment of property).

219. *Fuentes*, 407 U.S. at 69.

220. *Id.* at 80-93.

221. *Id.* at 80-84.

222. *See infra* notes 223-26 and accompanying text (discussion of similarities in attachment of interests by one party in a private contract dispute, whether party is creditor or bondsman).

important to the principal as a property interest.[223] Since the right to be heard, whether liberty or property is at stake, is fundamental to the fourteenth amendment,[224] the right to be heard before rearrest under a bail bond contract is as constitutionally necessary as the right to be heard before replevin under an installment sales contract.[225] By analogy to *Fuentes*, therefore, a state court reasonably could mandate that a principal be accorded an opportunity for a hearing before a state authorizes bondsmen to seize the liberty interests of a principal in the principal's possession under the contract.[226]

The broad grant of authority to bail bondsmen by the courts[227] and by state statutes[228] has created a situation in which a surety may cause a principal to suffer a deprivation of rights.[229] To remedy this deprivation of rights, a principal may sue the bondsman under section 1983 of title 42 of the United States Code.[230] To prevail in an action under section 1983, the principal must prove that the bondsman acted under color of state law and that the bondsman deprived the principal of a right, privilege, or immunity secured under the constitution.[231] Under the *Lugar* analysis, a principal will present a valid cause of action under section 1983 if the principal challenges the state statute permitting surety arrests as procedurally defective under the due process clause of the fourteenth amendment.[232] Under the more traditional approach, a principal will present a valid cause of action under section 1983

---

223. *See* Owenbey v. Morgan, 256 U.S. 94, 110 (1921) (due process clause of fourteenth amendment restrains state action and requires hearing whether liberty or property is at stake).

224. *Id.*

225. *See* Citizens For Pre-Trial Justice v. Goldfarb, 88 Mich. App. 519, 559, 278 N.W.2d 653, 673-74 (1979) (person released on bail bond contract enjoys core values of liberty, and fourteenth amendment requires opportunity for hearing), *modified*, 327 N.W.2d 910 (1982).

226. *See Fuentes*, 407 U.S. at 84 (right to a hearing attaches to deprivation of interest encompassed within the fourteenth amendment's protection). According to *Fuentes v. Shevin*, the United States Supreme Court has permitted summary seizure of property only to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food. *Id.* at 91-92.

227. *See supra* notes 9-39 and accompanying text (discussion of broad common-law grant of authority to bondsmen).

228. *See supra* notes 40-44 and accompanying text (discussion of state statutes regulating and licensing bondsmen).

229. *See supra* notes 45-61 and accompanying text (discussion of surety abuse of principals and reaction of courts under basic tort law).

230. *See supra* notes 62-96 and accompanying text (discussion of cases challenging bail bond practices under § 1983).

231. *See supra* notes 62-65 and accompanying text (discussion of elements necessary in § 1983 claim); *supra* notes 97-131 and accompanying text (discussion of requirements necessary to meet the state action element); *supra* notes 132-226 (discussion of approaches applicable to deprivation of constitutional right requirements.

232. *See supra* notes 115-17, 209-26 and accompanying text (application of specific *Lugar* approach and analysis under fourteenth amendment).

by demonstrating state action[233] and a deprivation of a right under the fourteenth and fourth amendments.[234] Effective use of section 1983 will improve the quality of justice in the commercial bail bond system.

MARY LEE DOANE

233. *See supra* notes 118-31 and accompanying text (discussion of state action requirements).

234. *See supra* notes 132-208 and accompanying text (discussion of fourth and fourteenth amendment protections actionable under § 1983).