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Hunters and the Hunted: Rights and Liabilities of Bailbondsmen

Michael Goldstein

THE HUNTERS AND THE HUNTED: RIGHTS AND LIABILITIES OF BAILBONDSMEN

I. Introduction

For over 150 years bailbondsmen have had the right to arrest their principals[1] whenever and wherever they chose, and to recommit them to government custody in order to avoid forfeiture of their bond.[2] This right was upheld when a bailbondsman forcibly entered his principal's home in the middle of the night,[3] when the bondsman pursued his principal beyond state lines[4] and even when the bondsman used physical force in the act of apprehension.[5]

This Note will examine the development of this extrajudicial power to make arrests, the manner in which it is handled in the

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1. Read v. Case, 4 Conn. 166 (1822); Nicolls v. Ingersoll, 7 Johns. (N.Y.) 145 (1810).

2. In this area of the law, the principal is the party who has been arrested and is seeking release from prison pending his scheduled court appearance. The party that posts the required amount of bail is commonly called the bailbondsman and in older cases is often referred to simply as the bail or the surety.

When an arrest is made on the basis of a warrant, the amount of bail usually is set by the judge authorizing the warrant and is noted on the warrant. By posting the amount of the bond with the police officer in charge of the stationhouse, it is possible for the accused to obtain pre-trial release. P. WICE, FREEDOM FOR SALE 21 (1974) (hereinafter WICE).

When an arrest is made without a warrant, as most arrests are, the accused must wait to be arraigned, at which time the arraignment judge will set the amount of bail. A judicially fixed bail schedule, based on the offense for which the arrest was made, is often used to set the amount. WICE 22-23.

Usually a relative or friend contacts a bailbondsman who decides on the basis of the accused's background, criminal record, community ties and the seriousness of the offense whether the accused is a good risk. If he decides to write the bond he charges a fee based on a percentage of the bond, normally between 10 and 12 percent, varying from state to state. WICE 55-56.

If the person appears as scheduled in court, the bailbondsman is discharged from his liability. When the accused does not appear, the amount of the bond may be forfeited to the government. At this point the bondsman is in danger of losing his investment and will do all he can to rearrest the "bailjumper" and avoid the forfeiture of the bond.

The bondsman may also choose to rearrest his principal before the scheduled court appearance if he feels the person is about to abscond. The abuses have most often occurred when bondsmen have attempted to rearrest their principals. WICE 21, 23, 55.

3. Read v. Case, 4 Conn. 166 (1822); Nicolls v. Ingersoll, 7 Johns. (N.Y.) 145 (1810).

4. Fitzpatrick v. Williams, 46 F.2d 40 (5th Cir. 1931); Read v. Case, 4 Conn. 166 (1822); Nicolls v. Ingersoll, 7 Johns. (N.Y.) 145 (1810).

5. State v. Lingerfelt, 109 N.C. 755, 14 S.E. 75 (1891) (principal shot by bondsman's agent); Read v. Case, 4 Conn. 166 (1822) (principal struck during arrest); Nicolls v. Ingersoll, 7 Johns. (N.Y.) 145 (1810) (principal treated with "great roughness" by bondsman's agents).

context of tort law, and the impact of civil rights legislation on the rights of bailbondsmen.

II. Bailbondsmen In The Nineteenth Century

As early as 1810 *Nicolls v. Ingersoll*[6] established the bailbondsman's right, independent of government authority, to arrest his principal at any time before or after a scheduled court appearance. The New York court describing this power stated:

> The power of taking and surrendering is not exercised under any judicial process, but results from the nature of the undertaking by the bail. The bailpiece is not process, nor anything in the nature of it, but is merely a record or memorial of the delivery of the principal to his bail, on security given. . . . [T]his shows that the jurisdiction of the court in no way controls the authority of the bail; and as little can the jurisdiction of the State affect this right, as between the bail and his principal.[7]

Besides establishing that bailbondsmen derive their power of arrest not from the State, but from the private contractual relationship between bondsman and principal, *Nicolls v. Ingersoll* also established the right of bondsmen to appoint agents to make such arrests.[8] The *Nicolls* court stated that it saw "nothing on general principles, against allowing this power to be exercised by an agent or deputy, and no case is to be found where the right has been denied."[9] In addition the court in *Nicolls* propounded the doctrine that bondsmen could pursue and arrest a fugitive principal anywhere within the state or nation.[10] It likewise refused to disturb the jury's finding that the apprehension was not accomplished by means of unreasonable force.

Plaintiff Nicolls had been released on a $500 bond in Connecticut.[11] Before Nicolls' scheduled appearance the bondsman authorized his agent the defendant, to cross into New York and arrest Nicolls.[12] After being denied entry into plaintiff Nicolls' house, the

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6. 7 Johns. (N.Y.) 145 (1810).

7. *Id.* at 154.

8. *Id.*

9. *Id.* This principle of law has allowed bailbondsmen to employ what are, in effect, bounty hunters. *See* Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371-72 (1873); Reese v. United States, 76 U.S. (9 Wall.) 13, 21-22 (1869); *In re* Von Der Ahe, 85 F. 959 (C.C.W.D. Pa. 1898); State v. Lingerfelt, 109 N.C. 775, 14 S.E. 75 (1891).

10. Nicolls v. Ingersoll, 7 Johns. (N.Y.) 145, 154 (1810).

11. *Id.* at 146.

12. *Id.*

defendant broke into the house about midnight.[13] With the aid of two companions the defendant roused Nicolls from his bed, took him "with great roughness" without his coat, and transported him to Connecticut.[14]

Nicolls sued the bondsman's agent in tort for trespass, false imprisonment, and assault and battery.[15] The jury found for the defendant and the New York court accepted without question the jury's finding of fact that the defendant did not use unreasonable force in arresting Nicolls.[16] *Nicolls* thus gave bondsmen wide latitude in choosing when, where, and how to apprehend their principals. The *Nicolls* court termed these rights "indispensable for the safety and security of bail."[17]

Twelve years after *Nicolls,* a similar situation arose in *Read v. Case.* As in *Nicolls* the bondsman employed an agent to make the arrest.[19] The agent broke into the plaintiff's home, struck him and imprisoned him.[20]

The *Read* court, while finding for the defendant bondsman, was more explicit than *Nicolls* in stating what a bailbondsman could and could not do in arresting his principal. The court stated that before a bondsman or his agent could break into a principal's house to make an arrest the bondsman or agent must announce his identity and intention.[21] If peaceful entry is denied it would then be lawful to break in and make the arrest.[22] Although the bondsman's agent made no such announcement before breaking into the plaintiff's house, the *Read* court excused this omission because the plaintiff had declared publicly that he would meet with force any such

13. *Id.* at 147.
14. *Id.* at 148.
15. *Id.* at 145.
16. *Id.* at 157. The court stated:

> Whether the authority to arrest was not abused by the exertion of undue force, or unnecessary severity, has been decided by the jury in favor of the defendant. This was a matter of fact, proper to their determination, and was fairly submitted to them. The verdict, therefore, on this point, ought not to be disturbed.

Id.
17. *Id.* at 156.
18. 4 Conn. 166 (1822).
19. *Id.*
20. *Id.*
21. *Id.* at 170.
22. *Id.*

attempt to take him.[23] The court decided that "[I]t would be a palpable perversion of a sound rule to extend the benefit of it to a man, who had full knowledge of the information he insists should have been communicated; and who waited only for a demand, to wreak on his bail the most brutal and unhallowed vengeance."[24]

Thus the court in *Read* essentially agreed with the *Nicolls* holding but articulated in greater detail and with greater emphasis the restriction on bailbondsmen that the *Nicolls* court briefly noted.[25] That common law requirement emerged early as one small check on the broad powers of bailbondsmen.

It was not until 1869 that the United States Supreme Court dealt with the rights of bailbondsmen. In *Reese v. United States*[26] the Court stated that a bondsman may arrest his principal anywhere in the country and may do whatever is necessary to capture and return him to custody.[27] The *Reese* Court also referred to the private contractual nature of the bail-principal relationship in stating that the government impliedly convenanted not to interfere in any way with this right of the bondsman.[28] Such language from the highest court in the land amounted to nothing less than a carte blanche to bailbondsmen to take whatever liberties they felt were necessary in arresting their principals.

The Supreme Court decision in *Taylor v. Taintor*[29] soon gave further encouragement to bailbondsmen. Unlike *Nicolls* and *Read*, *Taylor* was not a tort action brought by a principal against his

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23. *Id.*

24. *Id.*

25. *See* Nicolls v. Ingersoll, 7 Johns. (N.Y.) at 156, where the court presumed that proper demand for entry was made before the defendant broke in. Given the fact of the plaintiff's threat, the court in *Read* made the correct decision. Even in the absence of a threat there will always be cases where the fugitive is truly a dangerous person warranting dispensing with the rule. However, bondsmen have shown no inclination to differentiate between traffic violators and armed felons when making arrests.

26. 76 U.S. (9 Wall.) 13 (1869). This was an action by the United States against a surety for forfeiture of a bond on an individual accused of land fraud. The accused was allowed to return to Mexico by the United States Attorney pending resolution of two civil cases involving the same facts. The accused's bondsman was not notified of this agreement. When the civil cases were decided against the accused and the criminal charges were brought against him, he failed to return from Mexico. The Supreme Court decided in favor of the bondsman, the government having interfered with the bondsman's right to protect his security.

27. *Id.* at 21.

28. *Id.* at 22.

29. 83 U.S. (16 Wall.) 366 (1873).

bondsman.[30] However the Court did expound on the nature of the bondsman-principal relationship and the rights of the parties. The Court aptly described the power of the bondsman over his principal: " 'The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge.' "[31] The Court further asserted that no right of the state was involved[32] nor was any judicial process necessary for the bail to assert his "dominion" over the principal.[33]

The *Taylor* Court also affirmed the right of a bondsman to authorize agents to arrest his principal for him[34] and most significantly the Court reiterated the *Nicolls* and *Read* doctrine that a bondsman may, if necessary, break and enter his principal's home to arrest him.[35]

Twenty years later in *United States v. Keiver*,[36] the United States Circuit Court for the Western District of Wisconsin similarly held that a bondsman could seize his principal at any time and any place, including his home, which in the Anglo-American legal tradition, was a man's castle.[37]

The outer limits of the bondsman's rights were reached in *State v. Lingerfelt*,[38] decided in the late nineteenth century. A bondsman's agent shot and killed the bondsman's principal when the man resisted arrest with a farm implement.[39] The agent was convicted of murder.[40] On appeal the North Carolina Supreme Court reversed the conviction and granted a new trial.[41] The court decided that the

30. *Id.* at 367-69. *Taylor* involved an action by a bondsman to recover the amount of his bond from his principal who had been arrested for grand larceny in Connecticut. The plaintiff had posted an $8,000 bond for the principal, whereupon the latter travelled to New York. In New York he was arrested by the local police at the request of the governor of Maine, in whose state he was wanted for burglary. He was tried, convicted and imprisoned in Maine causing the plaintiff to forfeit his bond in Connecticut. *Id.*

31. *Id.* at 371-72.

32. *Id.*

33. *Id.* at 371.

34. *Id.*

35. *Id.*

36. 56 F. 422 (C.C.W.D. 1893) (action by the federal government to obtain forfeiture of a bond).

37. *Id.* at 426. *Accord*, State v. Dwyer, 70 Vt. 96, 39 A. 629 (1897).

38. 109 N.C. 775, 14 S.E. 75 (1891).

39. *Id.* at 775, 14 S.E. at 76.

40. *Id.*

41. *Id.* at 776, 14 S.E. at 77. The trial court charged the jury that as a matter of law there

trial court had construed the rights of a bondsman in rearresting his principal too restrictively. Citing *Taylor* and *Nicolls* as the correct rule of law,[42] the court indicated that under the broad powers granted to bailbondsmen the defendant Lingerfelt may have been within his rights in using whatever force he felt was necessary to arrest the principal.[43]

The courts in the nineteenth century thus put few limits on the methods bailbondsmen could use in arresting their principals. The essential reason for judicial reluctance to interfere in this area was the private contractual nature of the bondsman-principal relationship from which the bondsman derived his sweeping power of arrest.[44] The essence of the contractual agreement was that the bondsman agreed to post bail for the principal in order that he (the principal) be freed temporarily from prison, pending resolution of the charges against him. In return the principal agreed that the bondsman could rearrest him whenever he chose, either before the principal was to appear in court or after he failed to do so. And as the Supreme Court stated in *Reese*, the government impliedly agreed not to interfere with the bondsman's right to safeguard his bond.[45]

Nor was process considered necessary for a bondsman to rearrest his principal.[46] Since no power of the state or federal governments was involved, there was no need to comply with constitutional requirements of due process or equal protection of the laws.[47] The courts in the early cases did not apply these constitutional principles. In *In re Von Der Ahe* wherein plaintiff argued that his constitutional rights were violated,[48] the court rejected his claim of deprivation of liberty without due process of law, again holding that the private contract between bail and principal was beyond the bounda-

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was no evidence that the defendant had any lawful authority to arrest the victim. *Id.*, 14 S.E. at 76.

42. *Id.* at 777-78, 14 S.E. at 76-77.

43. *Id.* at 779, 14 S.E. at 77.

44. *See* note 9 *supra*.

45. 76 U.S. (9 Wall.) at 22.

46. Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371-72 (1873); *In re* Von Der Ahe, 85 F. 959, 960-63 (C.C.W.D. Pa. 1898); Nicolls v. Ingersoll, 7 Johns. (N.Y.) 145, 154 (1810); State v. Lingerfelt, 109 N.C. 775, 777-78, 14 S.E. 75, 76 (1891).

47. U.S. CONST. amends. V and XIV.

48. *In re* Von Der Ahe, 85 F. 959 (C.C.W.D. Pa. 1898) (plaintiff claimed he was deprived of his liberty without due process of law).

ries of constitutional requirements.[49]

Aggrieved principals seeking redress against overzealous bondsmen and their agents have relied almost exclusively on the ordinary common law tort remedies for false imprisonment, assault and battery. As the cases reveal, the courts construe the bail contract to allow bondsmen wide discretion in how they conduct their business.[50] Thus, the tort approach has had little success.

III. The Development of Limits on the Rights of Bailbondsman since 1900

A. Adherence To the Nineteenth Century Doctrines

The decisions rendered during the first half of the twentieth century adhered closely to the holdings of the nineteenth century cases.[51]

One of the earlier cases in this century, *Fitzpatrick v. Williams*,[52] reaffirmed all the earlier common law principles which were so favorable to the bailbondsman. In restating the private contractual basis of the bail-principal relationship[53] the United States Court of Appeals for the Fifth Circuit held that bailbondsmen had the right to arrest their principals without a warrant,[54] pursue them across state lines, return them to the home state without extradition proceedings,[55] authorize agents to make such arrests for them,[56] and essentially use any means necessary to effect such an arrest.[57] These basic tenets of the bail-principal relationship have been upheld in numerous cases.[58]

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49. *Id.* at 962-63.

50. *See* note 44 and accompanying text *supra*.

51. *See* text accompanying notes 6-50 *supra*.

52. 46 F.2d 40 (5th Cir. 1931). The plaintiff was arrested in New Orleans on charges of being a fugitive from justice in the state of Washington. Although these charges were dropped by the local authorities, a Washington bail company intervened and requested that the plaintiff be placed in its custody, presumably to obtain a discharge of the bond it had written for him. Plaintiff appealed the court's order that the sheriff accede to that request.

53. *Id.* at 40.

54. *Id.* at 41.

55. *Id.*

56. *Id.*

57. *Id.*

58. *See, e.g.*, Smith v. Rosenbaum, 333 F. Supp. 35 (E.D. Pa. 1971), *aff'd*, 460 F.2d 1019 (3d Cir. 1972); Curtis v. Peerless Ins. Co., 299 F. Supp. 429 (D. Minn. 1969); Thomas v. Miller, 282 F. Supp. 571 (E.D. Tenn. 1968); McCaleb v. Peerless Ins. Co., 250 F. Supp. 512 (D. Neb. 1965).

By the middle of the twentieth-century there were few judicial restraints upon the activities of bailbondsmen. For example, in *State v. Liakas*[59] the Supreme Court of Nebraska stated in dictum that the bailbondsman may "forcibly arrest" his principal and deliver him to the authorities in order to obtain exoneration from his bond.[60] And in *Golla v. State*[61] the Supreme Court of Delaware upheld the right of a bondsman to pursue his principal anywhere in the United States and return him from an asylum state without extradition proceedings.

B. Development of Limits Through the Tort Approach

Despite a general lack of success in the mid-nineteenth and early twentieth century attempts to obtain relief against bailbondsmen through tort remedies,[62] such attempts have continued. The results have varied, and the implications for the future are still unclear.

A possible trend toward stricter controls is detectable in *McCaleb v. Peerless Ins. Co.*, a decision of the United States District Court for the District of Nebraska.[63] Plaintiff McCaleb sued his bond company in tort for false imprisonment, illegal detention and violation of his constitutional liberties.[64] McCaleb was arrested for traffic violations in Nebraska.[65] He obtained a $200 bond from the defen-

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To some extent these common law principles have been codified at 18 U.S.C. § 3142 (1970), which provides that to discharge his obligation, a bailbondsman may arrest his principal at any time and deliver him to a federal marshal.

A number of states have enacted similar provisions. *See, e.g.*, ALA. CODE tit. 15-13-62 (1975); MINN. STAT. ANN. § 629.63 (West 1947); N.Y. CRIM. PROC. LAW § 530.80 (McKinney 1971); PA. STAT. ANN. tit. 19, § 53 (1964 Purdon) (*suspended* by PA. R. CRIM. P. § 4018); TENN. CODE ANN. § 40-1227 (1975); TEX. CODE CRIM. PROC. Art. 17.16 (Vernon 1977); UTAH CODE ANN. tit. 77-43-22 (1953). At least two states have modified the common law. *See* TEX. CODE CRIM. PROC. Art. 17.19 (Vernon 1977) (which requires an arrest warrant) and CAL. PENAL CODE § 847.5 (1970 West) (which requires extradition procedures in order to transport a fugitive principal back to the jurisdiction from which he escaped). *See* section III(D) *infra*.

59. 165 Neb. 503, 86 N.W.2d 373 (1957) (proceeding on an application of a bail bondsman for discharge and exoneration of his bail bond where the state moved for forfeiture of the bond).

60. *Id.* at 507, 86 N.W.2d at 377.

61. 50 Del. 497, 501, 135 A.2d 137, 139 (1957) (writ of habeas corpus by a prisoner contending that he was improperly arrested by his bailbondsman in Pennsylvania and returned to Delaware without extradition proceedings).

62. *See* section II *supra*.

63. 250 F. Supp. 512 (D. Neb. 1965).

64. *Id.* at 513.

65. *Id.* at 513-14.

dant bond company and thereupon fled to California.[66] The defendant's agent followed him to Caifornia, arrested him with the aid of a local bailbondsman, and then drove him handcuffed around the state for eighty hours.[67] When the defendant's agent finally returned McCaleb to Nebraska he took title to McCaleb's car, apparently to reimburse the defendant bond company for its forfeited bond.[68] Instead of then turning the plaintiff over to the authorities, as was his duty under the bond, the agent ordered him to leave Nebraska immediately.[69]

Chief Judge Richard E. Robinson found the defendant liable in tort for false imprisonment and illegal detention.[70] He likewise found the arrest illegal and severely chastized the defendant for acting solely to protect itself financially and in circumvention of its legal duties.[71] In conclusion he stated: "This type of action will not be tolerated by this Court, and had this occurred with respect to a bond given before this Court, the defendant would be forever barred

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66. *Id.*

67. *Id.* This arrest was made in violation of CAL. PENAL CODE § 847.5 (West 1970). Apparently the defendant's agent was not arrested for violation of the statute and Judge Robinson made no mention of this violation. *See* note 58 *supra* and text accompanying notes 150-55 *infra.*

68. *Id.* at 514-15.

69. *Id.* at 515.

70. *Id.*

71. *Id.* Judge Robinson summarized the entire problem well, stating:

> One purpose of allowing a person his liberty by use of a bond is to prevent such person from being imprisoned for an unnecessary length of time without the [c]ourt losing the assurance that such person will appear in court at the appointed time. The bondsman has a duty signified by his written contract to present his principal before the court. This is the basic reason for the rule which gives the bondsman the right to pursue and arrest his principal. Fundamental interests of justice and society require that a surety in a criminal case be given greater authority than the other types of surities and bondsmen. But this authority is conditioned on the recognition of his duty to the court to present the principal before the court. If this fundamental condition is not obeyed, the entire purpose for which bonds are given and, collaterally, the rule vesting broad authority in the bondsman will be effectively thwarted. It is the finding of this [c]ourt that whenever a bondsman takes *undue advantage* of his justly granted and needed authority in violation of his duty to the granting court and such *undue advantage results in injury or damage* to his principal or another party, that bondsman should and will be rendered liable for any damage caused as a result of an act or acts which would render liable any other person who was not vested with such authority.

Id. (emphasis added).

Interestingly, while focusing on the tort liability of the defendant, Judge Robinson ignored the plaintiff's claim for violation of his civil rights. Presumably the required element of state action was missing. *See* section III(C) *infra.*

from writing a bail bond in this Court in the future."[72]

McCaleb represents a radical departure from the earlier cases which uniformly denied recovery to principals who may have been abused by their bondsman.[73] It is the first reported case to hold that a bondsman had overstepped the limits of his authority and was therefore liable in tort to his principal. The very establishment of some limits, however vaguely defined, on the nearly unrestricted powers of bailbondsmen was a long overdue development in this field of law.

An even more important case in terms of what it said, if not for what it accomplished, is *Shine v. State.*[74] Apparently Shine owed the bond company $40 on a bond which it had written for him.[75] Consequently three men armed with pistols and shotguns were sent to Shine's house at 5:00 a.m. to arrest him.[76] When one of the men tried to break into the house, Shine shot and killed him.[77] The Alabama Appeals Court reversed Shine's conviction and granted a new trial.[78]

The court harshly condemned the tactics and intent (collection of a $40 debt) of the "armed posse."[79] It pointed out that bond companies have no right to arrest people for debts and certainly not at 5:00 a.m., armed with pistols and shotguns.[80] The court found that Shine had been justified in believing that his victim was not a law officer and therefore was under no obligation to surrender to him.[81] Legitimately thinking himself to be in danger of great bodily harm, he could be guilty of no greater crime than manslaughter.[82] The court then suggested that "[t]he controls over the bail should henceforth be tightened to exclude the use of weapons when not justified, to provide for investigation into every instance where it is claimed that weapons are needed, and the mandatory accompani-

72. 250 F. Supp. at 515.

73. *See* section II *supra.*

74. 44 Ala. App. 171, 204 So. 2d 817 (1967). Though not actually a tort case, the elements of a trespass and an assault and battery were present.

75. *Id.* at 173, 204 So. 2d at 818.

76. *Id.* at 174, 204 So. 2d at 818-19.

77. *Id.* at 175, 204 So. 2d at 820.

78. *Id.* at 182, 204 So. 2d at 827.

79. *Id.* at 181, 204 So. 2d at 826.

80. *Id.*

81. *Id.* at 178-79, 204 So. 2d at 823.

82. *Id.* at 178, 204 So. 2d at 823-24.

ment by a law enforcement officer on such occasions."[83]

The decision of the court in *Shine* represents the strongest judicial attack to date on the liberties bailbondsmen are allowed to take with their principals. The Alabama Appeals Court not only condemned the methods used by bailbondsmen, but also emphatically advocated strong legislative action to place strict controls on the business. This call for legislative action was unprecedented.

The *McCaleb* and *Shine* decisions indicated a trend toward tighter controls on bailbondsmen. Yet in two subsequent cases there appears to be a reversal of the trend and a return to the earlier lax attitude.

Six years after *Shine*, the Alabama Appeals Court had another opportunity to deal with the rights of bailbondsmen and their principals in *Livingston v. Browder*.[84] In this case the principal's mother sued the bondsman for having entered her property, albeit peacefully, to arrest her son.[85] The court held for the defendant and stated that a bondsman has the authority to enter the dwelling of a third party to arrest his principal if he knows the principal is in the dwelling, properly identifies himself, and uses reasonable means to gain entry.[86]

While the *Livingston* court did articulate the applicable standards of conduct for a bailbondsman in arresting his principal, it did not add anything to the existing body of law. Instead, the court emphasized the strong public policy reasons for protecting the bail-principal relationship and the necessity of giving bondsmen broad discretion in apprehending bail jumpers.[87]

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83. *Id.* at 181, 204 So. 2d at 826. The judge also emphasized that the only legitimate purpose for such an arrest is to deliver the principal to the authorities, not to collect debts on bonds. *Id.* at 178, 204 So. 2d at 823-24.

As did the *McCaleb* court, the court here determined that the bondsman had "reached beyond the mantle of protection afforded by the law to a bondsman." McCaleb v. Peerless Ins. Co., 250 F. Supp. 512, 515 (D. Neb. 1965).

84. 51 Ala. App. 366, 285 So. 2d 923 (1973).

85. *Id.* at 368, 285 So. 2d at 924-25. The son had failed to appear at a court hearing on a drunk driving charge. *Id.* at 366, 285 So. 2d at 925.

86. Id. at 370, 285 So. 2d at 926-27. The court did not correctly construe this to be the law and therefore the verdict was reversed and the case remanded.

87. *Id.* at 368, 285 So. 2d at 925. The court stated:

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

Id.

The *Livingston* decision is most interesting for what it did not say. There is no mention whatsoever of the decision in *Shine v. State*[88] which came from the same bench and strongly advocated stricter controls on the activities of bailbondsmen. Presented with a clear opportunity to reinforce the stance taken in *Shine*, the *Livingston* court chose to retreat to the traditional common law principles which gave bailbondsmen "wide latitude . . . to arrest their principal."[89]

Soon after *Livingston*, in 1975, the Tennessee Supreme Court also took a step backward. In *Poteete v. Olive*[90] the plaintiff sued his bailbondsman for false imprisonment, assault and battery.[91] While making the arrest the bondsman's agents beat and kicked the plaintiff and broke the plaintiff's leg.[92] Although the plaintiff was awarded several thousand dollars in damages,[93] the court did not base its decision on the agents' egregious assault. Rather it focused on their failure to present the plaintiff with a certified copy of the bond when they arrested him, as Tennessee law requires.[94]

The *Poteete* court did not indicate that anything was wrong with the manner in which the arrest was effected and implied that had the bond been properly presented the plaintiff could not have recovered.[95]

The current utility of the tort approach is therefore uncertain. The earlier lack of judicial receptiveness to tort claims appeared to be giving way to a more restrictive view of the rights of bailbondsmen. But subsequent cases reveal a reluctance to effect a fundamental widespread change and seem to indicate that a principal suing

88. 44 Ala. App. 171, 204 So. 2d 817 (1967). *See* text accompanying notes 74-83 *supra*.

89. 51 Ala. App. at 368, 285 So. 2d at 925. The court gave little attention to the possible or actual occurrences of abuses, except to say that those making arrests could use no more force than is reasonably necessary. *Id.* at 369, 285 So. 2d at 927. The court could have voiced support for stricter controls on bailbondsmen while still holding that the defendant had not abused the powers traditionally granted bondsmen. In *Shine*, the court also acknowledged the need for these powers but did not allow those arguments to override the need for controls in view of the excesses of local bondsmen and their agents. 44 Ala. App. at 181, 204 So. 2d at 826.

90. 527 S.W.2d 84 (Tenn. S.Ct. 1975).

91. *Id.* at 85.

92. *Id.* at 86.

93. *Id.*

94. *Id.* TENN. CODE ANN. § 40-1227 (1975).

95. 527 S.W.2d at 89.

his bailbondsman in tort will continue to have difficulty in recovering for injuries inflicted by that bondsman.

C. Development of Limits Through A Federal Statutory and Constitutional Approach

An alternative to the tort approach which has become increasingly popular in actions against abusive bailbondsmen is the use of constitutional principles and the federal Civil Rights Acts.[96] Again, results have varied, but this approach appears to offer a greater possibility of reducing abuses by bailbondsmen.

One of the most serious reported instances of abuse was described in *United States v. Trunko*.[97] In *Trunko* a deputy sheriff, authorized by an Ohio bond company, tracked a bail jumper to Arkansas, arrested him and returned him to Ohio.[98] In making the arrest, the defendant burst into the fugitive's house at night, awakened him from sleep, identified himself as a law officer from Ohio, handcuffed him and then drove him nonstop back to Ohio.[99]

The deputy was indicted for violation of a 1909 civil rights statute which prohibits anyone from wilfully depriving a person of his constitutional rights and privileges under color of state law.[100] The United States District Court for the Eastern District of Arkansas found that the defendant had acted under color of state law since he had identified himself as an Ohio law officer.[101] The court also decided that the fugitive was deprived of his constitutional rights.[102] However, it was ultimately decided that the defendant was innocent

96. 42 U.S.C. §§ 1983, 1985 (1970) and 18 U.S.C. § 242 (1970) have been employed in these cases. *See* notes 100, 112, and 122 *infra*.

97. 189 F. Supp. 559 (E.D. Ark. 1960).

98. *Id.* at 560.

99. *Id.* at 561.

100. 18 U.S.C. § 242 (1970) which provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, *wilfully* subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term or for life.

(emphasis added).

101. 189 F. Supp. at 565.

102. *Id.* at 564. The violation was of constitutional due process.

of the charges because he had not acted wilfully in depriving the fugitive of his rights.[103]

The court, nevertheless, severely condemned the defendant's actions, describing them as "high-handed, unreasonable, and oppressive"[104] and further declaring that the "defendant's actions constituted an affront to the duly constituted authority of [the state and local governments] and were of a nature tending to bring law enforcement into disrepute."[105] While acquitting the defendant on possibly dubious grounds,[106] the district court emphatically criticized the violent tactics employed by the agent of the bailbondsman.[107]

Similarly, the decision in *Thomas v. Miller*[108] indicated a growing judicial disapproval of the methods used by bailbondsmen in arresting their principals, although the plaintiff in this civil case failed to recover. In *Thomas* the plaintiff failed to appear for imprisonment following the denial of his appeal of a grand larceny conviction.[109] He thereupon fled from Tennessee to Ohio.[110] His bailbondsman tracked him to Ohio, arrested him, chained him hand and foot, and allegedly forced him to ride on the floor of his car during the drive back to Tennessee.[111]

Plaintiff sued in the United States District Court for the Eastern District of Tennessee, claiming damages against his bondsman for violation of the Civil Rights Act of 1871, which makes it an action-

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103. *Id.* at 564-65. *See* note 100 *supra.*

104. *Id.* at 565.

105. *Id.*

106. The court may have construed the statute too narrowly when it upbraided the defendant in harsh terms for his actions, while on the other hand deciding that his actions were not accompanied by any specific intent to deprive the fugitive of his constitutional rights. 189 F. Supp. at 564. It is certain that the defendant was ignorant of the statute and perhaps even of the Constitution but ignorance of the law normally is not a valid defense. LAFAVE & SCOTT, CRIMINAL LAW 356 (1972). It is also certain that whatever Trunko did, he did wilfully. To require a conscious wilfulness to deprive a person of his constitutional rights is, in effect, to vitiate the statute and make convictions close to impossible. *See* Screws v. United States, 325 U.S. 91, 101-07 (1945) which discusses this question at length.

107. 189 F. Supp. at 565. The court also may have contradicted itself by damning the defendant for his in terrorem tactics while implying that if the defendant had identified himself properly his actions would have been beyond reproach. In other words, what is outrageous if done in the name of the law, is acceptable if done by private persons. *See* note 100 and accompanying text *supra.*

108. 282 F. Supp. 571 (E.D. Tenn. 1968).

109. *Id.* at 572.

110. *Id.*

111. *Id.*

able civil wrong to deprive any person of his constitutional rights and privileges under the color of state law.[112] He made no tort claim.

The court dismissed the action because the defendant had not acted under color of state law.[113] Since the defendants "were acting by reason of a contractual relationship with him,"[114] the court could supply no remedy for the plaintiff.

The court agreed that plaintiff was treated "roughly"[115] and suggested that he might have a cause of action in state court for "cruel and inhuman treatment" during the trip from Ohio to Tennessee.[116] While not as far reaching as *McCaleb, Shine,*[117] or *Trunko,* the *Thomas* court indicated that there are limits to how far a bailbondsman can go in apprehending fugitive principals. The court implied that those limits were exceeded and if the defendants were acting under color of state law the plaintiff may have recovered.[118]

A year after *Thomas v. Miller* was decided, the United States District Court for the District of Minnesota dealt with a similar problem in *Curtis v. Peerless Insurance Co.*[119] Curtis also was returned to Tennessee from Minnesota after jumping bail on a drunk driving charge.[120] Although he was handcuffed for a short time, his arrest was peaceful, and the defendants carried no firearms.[121] Curtis sued for false imprisonment and deprivation of his civil rights, also under the Civil Rights Act of 1871.[122] The court acknowledged that an action for unlawful seizure was cognizable under those stat-

112. *Id.* at 572-73. The plaintiff sued under 42 U.S.C. § 1983 (1970) which provides:
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

113. 282 F. Supp. at 573.

114. *Id.* at 573.

115. *Id.* at 572.

116. *Id.*

117. *See* section III(B) *supra.*

118. 282 F. Supp. at 572-73.

119. 299 F. Supp. 429 (D. Minn. 1969).

120. *Id.* at 431.

121. *Id.* at 432.

122. *Id.* at 431. Curtis sued under 42 U.S.C. §§ 1983 and 1985 (1970). For the text of section 1983 *see* note 112 *supra.* Section 1985 provides for a civil cause of action against two or more persons who conspire to deprive any person of his constitutional rights, privileges and immunities.

utes.[123] Again, the missing element was action under color of state law. In this case the plaintiff himself had failed to allege that the defendants had acted under color of state law. Therefore the action for violation of the plaintiff's civil rights was dismissed.[124] The court reiterated that the private contractual bail-principal relationship permitted such an arrest and that no state action was involved.[125]

As in *Thomas,* the court in dictum dealt with the problem of abuses: "So long as the bounds of reasonable means needed to effect the apprehension are not transgressed, and the purpose of the recapture is proper in the light of the surety's undertaking, sureties will not be liable for returning their principals to proper custody."[126]

In *Curtis* the bounds of reasonable means were not transgressed because the arrest was peaceful and the plaintiff was unharmed. The court rejected the plaintiff's allegation that the defendants were "malicious and wanton," but intimated that such a showing would make them liable.[127] Since the plaintiff was not harmed the court did not have to delineate the "bounds of reasonable means." Consequently no concrete standards can be derived from this decision. Nevertheless, the *Curtis* opinion is noteworthy for its assertion in dictum that there are limits to the power of bailbondsmen.

Another constitutional challenge to the rights of bailbondsmen was decided in *Smith v. Rosenbaum.*[128] Smith was out on bail when he was arrested on another charge. Under the terms of the bail contract, Smith had agreed that if he were arrested on another charge the bondsman could surrender him to the authorities and obtain exoneration of the bond.[129] The bondsman did surrender him in this manner, complying with Pennsylvania law which requires the bondsman to obtain a certified copy of the bond from an officer

123. 299 F. Supp. at 434.

124. *Id.* at 435.

125. *Id.* at 435. Curiously, the court did not address the plaintiff's tort claim for false imprisonment. The court in McCaleb v. Peerless Ins. Co., 250 F. Supp. 512 (D. Neb. 1965) *(see* text accompanying notes 63-72 *supra)* did the opposite, ignoring the civil rights claim of the plaintiff and holding for the plaintiff solely on the basis of his tort claim. In *Curtis,* the court could have found in the plaintiff's favor despite his lack of a civil rights action, if the arrest and imprisonment had been otherwise tortious. Clearly, in view of the facts and the prevailing law, it was not.

126. 299 F. Supp. at 435.

127. *Id.* at 433, 435.

128. 333 F. Supp. 35 (E.D. Pa. 1971).

129. *Id.* at 36-37, 39.

of the court before making the arrest.[130]

As in *Curtis* there was no mistreatment or physical abuse of the plaintiff. He merely charged that the act of obtaining a certified copy of the bond deprived him of his constitutional rights and privileges and he was therefore entitled to damages under the Civil Rights Acts.[131]

The court found that obtaining the certified copy of the bond constituted an act under color of state law because Pennsylvania law mandated this procedure.[132] However, the court concluded that neither the plaintiff's rights under the statute nor due process of law were violated.[133] Having agreed to the terms of the private bail contract, the plaintiff could not claim that his rights were violated when the defendants merely acted pursuant to the terms of that contract.[134]

Unlike the other cases brought under the Civil Rights Acts,[135] the *Smith* court found that there was action under color of state law. The Pennsylvania law under which the bailbondsman acted is similar to statutes in a number of other states.[136] Nevertheless, the *Smith* decision is the first case to hold that the action of obtaining a certified copy of the bond is an action under color of state law for the purposes of the Civil Rights Acts. This decision established a major precedent for extending the concept of state action to include the activities of bailbondsmen and thus removing one of the major obstacles to recovery under the Civil Rights Acts.[137]

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130. *Id.* at 37-38. Pa. Stat. Ann. tit 19 § 53 (1964 Purdon, suspended Supp. 1977-78).

131. 333 F. Supp. at 37. The suit was brought under 42 U.S.C. §§ 1983 and 1985 (1970). *See* notes 100, 122 *supra*.

132. 333 F. Supp. at 38-39.

133. *Id.* at 39.

134. *Id.* The court also held that there was no conspiracy in violation of 42 U.S.C. § 1985 (1970). Although his action was under color of state law, the court clerk was also exonerated because under § 1983 state judicial and quasi-judicial officers are immune from suit. *Id.* at 38-39.

135. Curtis v. Peerless Ins. Co., 299 F. Supp. 429 (D. Minn. 1969); Thomas v. Miller, 282 F. Supp. 571 (E.D. Tenn. 1968).

136. *See* note 58 *supra*.

137. If the activities of bailbondsmen were to be considered state action, requirements of due process would apply to those actions. Failure to meet those requirements would then make recovery under the Civil Rights Acts likely. Actual physical abuse, essential to any tort recovery, would not be necessary, although if it did occur there would be grounds for both civil rights and tort liability. At any rate, extension of state action to cover bailbondsmen would go far toward reducing abuses.

D. The Development of Limits Through Procedural Requirements—Greater Controls In Some States

The traditional common law allowed the bailbondsman to arrest his principal without a warrant, a certified copy (usually by the court clerk) of the bond undertaking being sufficient evidence of the bondsman's contractual right to make the arrest.[138] Several states have codified this common law requirement.[139] Furthermore, since the *Nicolls*[140] and *Read*[141] decisions, a bondsman or his agent, when attempting to arrest a principal in a dwelling, is required to announce his identity and demand peaceful surrender before breaking in to make the arrest.

Even when confronting his principal in a public place, the bondsman (or his agent) is required to announce his identity and intention and present the principal with a copy of the bond.[142]

Texas has gone furthest in controlling the procedural aspects of bailbondsmen's activities. In *Austin v. Texas,*[143] the bondsman was convicted on a criminal charge of false imprisonment.[144] He had written a $5,000 bail bond for a principal who later jumped bail.[145] In rearresting his principal to avoid forteiture of the bond, the bondsman, along with two private citizens, kicked in the man's door, wrestled him to the ground and handcuffed him.[146] The bondsman had no arrest warrant as required by the Texas Criminal Code[147] for a non-peaceable seizure. His conviction was affirmed, the bondsman having failed to comply with the statutory mandate.[148]

Despite the court's failure to condemn the forcible nature of the

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138. *See* note 46 and accompanying text *supra.*
139. *See* note 58 *supra.*
140. 7 Johns. (N.Y.) 145 (1810).
141. 4 Conn. 166 (1822).
142. Poteete v. Olive, 527 S.W.2d 84, 89 (Tenn. S.Ct. 1975).
143. 541 S.W.2d 162 (Tex. Cr. App. 1976).
144. *Id.* at 163.
145. *Id.*
146. *Id.*
147. TEX. CODE CRIM. PROC. Art 17.19 (Vernon 1977).
148. 541 S.W.2d at 164. Again, the defendant was convicted for failure to comply with procedures rather than for the violent tactics used to make the arrest. The court should have addressed the problem of such violence, but it rejected the invitation to reinforce Shine v. State, 44 Ala. App. 171, 204 So. 2d 817 (1967), just as the Tennessee court did in Poteete v. Olive, 527 S.W.2d 84 (Tenn. S.Ct. 1975). *See* notes 74-83 and 90-95 and accompanying text *supra.*

arrest, it is clear that the statute provides certain safeguards. Requiring bondsmen to go before a judge or magistrate and justify the need for a warrant has the effect of putting bondsmen under greater judicial supervision. Their conduct would be subject to the same scrutiny that the courts give to government law enforcement agencies. Perhaps even more important, the courts would then be more likely to consider arrests made with such warrants to be under color of state law.[149] Accordingly, a major obstacle to a finding of civil rights violations would be eliminated.

Another state to enact strict legislation controlling bailbondsmen is California. Under the California statute[150] a bailbondsman from another state seeking to arrest a fugitive bail-jumper from that other state must file affidavits and appear at a hearing before a local magistrate.[151] If the magistrate decides that there is probable cause to believe the bailbondsman, a warrant for the fugitive's arrest is issued and he is brought before the magistrate, who sets a time and place for a hearing and advises the individual of his rights to counsel and to the production of evidence at the hearing.[152] If the magistrate is convinced that the suspect is a fugitive from bail he will issue an order allowing the bondsman to return the fugitive to the jurisdiction from which he escaped.[153] Failure to comply with the statute is a misdemeanor.[154]

The California procedures, although not applicable to California bail-jumpers, are a great improvement over the common law. Protection against mistaken identities, a chance for a fair hearing in open court with the benefit of counsel and greater scrutiny of the activities of bailbondsmen are the results of this statute.[155] Indeed, there appears to be no reason why bailbondsman should not be subject to the same requirements of due process as are all federal, state and local law enforcement agencies.[156]

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149. As noted above, arrests made with a certified copy of the bond are not usually held to be under color of state law. *See* section III(C) *supra.*

150. CAL. PENAL CODE § 847.5 (West 1970).

151. *Id.*

152. *Id.* Pending the hearing the suspect may be admitted to local bail.

153. *Id.*

154. *Id.*

155. *See* Note, *Bailbondsmen And the Fugitive Accused—The Need For Formal Removal Procedures,* 73 Yale L.J. 1098 (1964) dealing extensively with the need for extradition procedures in this area and advocating nation-wide enactment of statutes such as that in California.

156. U.S. CONST., amends. V and XIV.

IV. Conclusion

As the court stated in *Nicolls v. Ingersoll,*[157] restricting bondsmen too severely could impair their right to protect their bonds.[158] This in turn could affect the freedom of accused persons not yet proven guilty. Deprived of their enforcement remedies, few bondsmen might be willing to write bonds, making it more difficult for accused persons to obtain bail. It is no less important, however, to protect the constitutional and civil rights of accused persons, preserve the public peace and avoid violence.

There are several steps which should be taken on the state and federal level to balance the needs of bailbondsmen with the rights of accused persons. They are: 1. requiring bondsmen to obtain a bench warrant for the arrest of any principal, whether or not the principal has fled the jurisdiction;[159] 2. requiring bondsmen to justify the need for firearms before a judge;[160] 3. requiring the accompaniment of a law officer when the carrying of firearms is approved;[161] 4. requiring a formal extradition hearing when a bondsman seeks to arrest a principal in another state and return him to the home jurisdiction;[162] 5. requiring that such an arrest be made with a locally obtained arrest warrant and under the supervision of local law enforcement officers.[163] 6. requiring that a bondsman who exceeds "the mantle of protection afforded by the law to bondsmen," be suspended or permanently prohibited from writing bonds in that jurisdiction in the future.[164]

Michael Goldstein

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157. 7 Johns. (N.Y. 145 (1810).

158. *Id.* at 156.

159. Austin v. Texas, 541 S.W.2d 162 (Tex. Cr. App. 1976); TEX. CODE CRIM. PROC. Art. 17.19 (1977 Vernon).

160. Shine v. State, 44 Ala. App. 171, 204 So. 2d 817 (1967). *See* text accompanying notes 74-83 *supra.*

161. *Id.*

162. CAL. PENAL CODE § 847.5 (West 1970). *See* text accompanying notes 150-55 *supra.*

163. *Id.*

164. McCaleb v. Peerless Ins. Co., 250 F. Supp. 512, 515 (D. Neb. 1965).