PRIVATE POLICE: DEFENDING THE POWER OF PROFESSIONAL BAIL BONDSMEN

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Five masked men enter a Phoenix residence under cloak of night and begin shooting. When the chaos clears, a young couple who had been sleeping in the home is dead. The masked men claim to have been trying to apprehend a bail jumper. The bail jumper, however, did not live there. Though it is later revealed that the men were not legitimately working for a bail bondsman, an old debate has once again been revived.[1] The United States has long struggled with the system of criminal bail and its management. The use of a qualified person as a surety to guarantee the return of a bailed prisoner was accepted in England long before the formation of the United States.[2] The use of professional bail bondsmen in the U.S. criminal justice system, however, sparks considerable controversy.[3]

Media and political attention on professional bail bondsmen has focused only on their failures and not on the essential social functions they serve. Sensational stories detailing violence during the recapture of bail jumpers have dominated coverage. Based on this limited perspective, there have been efforts in some states[4] and in the federal government to limit or eliminate the role of professional bail bondsmen. Hasty efforts to address the perceived problems in the system are unwise and have the effect of decreasing control over bailed defendants.

Part I of this Note discusses the background of the professional bail bonds system and points out some common criticisms of the system. Part II addresses professional bail bondsmen and their valuable role in the criminal justice system, advocating a private, profit-driven bail bonds process. Part III addresses the need to have broad powers for professional bail bondsmen in order that they may continue to perform the many socially desirable tasks that they currently serve. Reducing the power of bail bondsmen only decreases the ability of defendants to make bail and secure release from jail. Additionally, the profitability and even the existence of the professional bail bonds system would be jeopardized. These

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1. *See* David D. Minier, *Bounty Hunters Currently the Target of Much Misplaced Outrage*, FRESNO BEE, Sept. 28, 1997, at B7. Mr. Minier is a Chowchilla Municipal Court judge. *See id.*

2. *See* Peggy Tobolowski & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditions*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 267, 274 (1993). A reputable person was qualified to serve as the surety. Typically, however, the surety was a relative or friend of the defendant. *See id.*

3. The rights and liabilities of bail bondsmen discussed in this Note also apply to agents of bail bondsmen commonly called bounty hunters, skip tracers, bail enforcement agents, and bail enforcement officers.

4. *See* MICHAEL D. KANNENSOHN & DICK HOWARD, BAIL BOND REFORM IN KENTUCKY AND OREGON (1978). Oregon and Kentucky have prohibited the use of professional bail bondsmen, and have instead adopted a system requiring defendants to either personally produce a percentage of the bail or find a relative who will pay a percentage of the bail to secure release. *See id.* at 5, 14.

disadvantages outweigh the advantages of changing the long-established power of sureties.

I. BACKGROUND OF THE PROFESSIONAL BAIL BONDS SYSTEM

A. History

The system of bail originated in medieval England as a way to free prisoners before trial.[5] "Bail literally meant the bailment or delivery of an accused to jailors of his own choosing."[6] The decision to grant bail was within the discretion of the local sheriff who could take the word of the accused that he would return or could require that an acceptable third party vouch for the defendant.[7] By the Thirteenth Century, the granting of bail was regulated by law and only certain offenses were bailable.[8] Third parties continued to serve as sureties, and the law required them to either surrender money[9] or themselves[10] if the defendant did not return to face judgment. The sheriff granted the surety custody over the accused, which the law viewed as a continuation of imprisonment though outside the jail.[11] This gave sureties broad power to regulate the activity of the accused.

Sureties were typically landowners who were friends or relatives of the accused because local sheriffs considered them capable of taking custody.[12] The fact that a defendant could produce a local landowner to guarantee his return at the time of trial was sufficient insurance against flight. Additionally, life in English society at that time did not often involve travel, and most defendants were without means to flee or places to go.[13] Defendants rarely fled because of the custodial powers of the surety, and because effective social control was maintained through personal relationships among the sheriff, the accused, and the

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5. *See* DANIEL J. FREED & PATRICIA M. WALD, BAIL IN THE UNITED STATES: 1964, at 1 (1964).

6. *Id*.

7. *See id*.

8. *See* Statute of Westminster, 1275, 3 Edw. 1, ch. 15 (Eng.). The Statute of Westminster regulated discretionary bail power of local sheriffs in an attempt to avoid corruption. Sheriffs with complete discretionary power were known to extort money from prisoners or sureties. *See* FREED & WALD, *supra* note 5, at 1.

9. *See* FREED & WALD, *supra* note 5, at 1.

10. Sureties could be made to suffer the penalty that the accused would have suffered if the accused failed to appear and the surety could not produce him. *See* FREED & WALD, *supra* note 5, at 1; 2 FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 590 (2d ed. 1923).

11. *See* William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 70 (1977).

12. *See* FREED & WALD, *supra* note 5, at 1.

13. *See id.* at 1-2.

surety.[14] Both the sheriff and the surety had custodial rights over the accused,[15] and therefore, either could apprehend an escaped defendant[16] using any reasonably necessary means.[17]

The American system of bail was originally similar, though not identical, to its English predecessor. Stopping short of guaranteeing a right to bail, the U.S. Constitution only guards against excessive bail.[18] The right to bail was secured by federal law in the Judiciary Act of 1789,[19] which required bail for offenses not punishable by death.[20] Most states incorporated a right to bail into their constitutions or passed statutes guaranteeing bail.[21] The guarantee of bail in most states mirrors the federal law.[22]

Over time, America outgrew the traditional bail system. Rapid population growth made it less likely that a sheriff or judge would be personally acquainted with either the defendant or the surety. The criminal justice system needed a new way of finding and evaluating sureties to enable the bail system to function as intended.[23]

> As a result, the institution of the bondsman arose to take over the function of posting bail. In return for a money premium, he guaranteed the defendant's appearance at trial. In the event of nonappearance, the bondsman stood to lose the entire amount of his bond. Selling bail bonds became a thriving commercial adjunct to the judicial function of setting bail.[24]

While sureties were changing, early American courts did not change their views as to the rights of the surety. By stepping forward as surety, the bondsman took "custody" of the defendant. U.S. courts continued to view bail as imprisonment outside the jail, and therefore, custodial rights also remained

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14. The sheriff was likely to know everyone in town, and this provided an additional incentive to honor the commitment to appear because hiding was infeasible. *See id*. at 2.

15. *See id.* at 1.

16. *See* Herman v. Jeuchner, 15 Q.B.D. 561 (1885).

17. Reasonable means included apprehension in the middle of the night, on Sundays, or inside the home. *See* Duker, *supra* note 11, at 71-72.

18. The Eighth Amendment states that: "Excessive bail shall not be required." U.S. CONST. amend. VIII.

19. 1 Stat. 73, 91 (1789).

20. The Judiciary Act of 1789 made bail in capital cases discretionary depending on the "nature and circumstances of the offence [sic], and of the evidence, and usages of law." *Id*.

21. *See* FREED & WALD, *supra* note 5, at 2-3 & n.8.

22. Some states provide for rights different than the federal law. Indiana, Michigan, Nebraska and Oregon limit the power to deny bail to treason and murder. Georgia, Maryland, and New York grant an absolute right to bail only in misdemeanor cases. Massachusetts, North Carolina, Virginia, and West Virginia allow almost complete discretion to judges in almost all cases. *See* FREED & WALD, *supra* note 5, at 2 n.8.

23. *See id.* at 2-3.

24. *Id*. at 3.

largely the same. Certain rights accompanied the responsibility of custody including the right to surrender the defendant at any time before trial, thereby releasing liability,[25] the right to apprehend a fleeing defendant,[26] and the ability to exercise those rights at any time.[27]

By acting as surety, not only did the bondsman have the right to exercise the privileges of custody, but he also had a duty to deliver the defendant to trial or face forfeiture.[28] This duty was similar to the duty of early sureties in England who were required to turn themselves in or to forfeit money and land if the accused did not appear.

Initially, the use of professional bail bondsmen was a compromise between the need to have acceptable sureties and the importance of bail. The inability of a judge to ascertain the reliability of sureties he did not know threatened to undermine the entire system of bail. Professional sureties helped solve this problem because their fitness as a surety could be evaluated once by the court, and they could then serve many defendants. Though it was not and is not a perfect solution, it allowed the bail system to continue.

Even though bail is not guaranteed by the U.S. Constitution, it has long been considered too important a right to be abandoned.

> From the passage of the Judiciary Act of 1789 to the present Federal Rules of Criminal Procedure, federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.[29]

B. Criticisms of the Professional Bail Bonds System

The use of professional bondsmen and the changes it brought caused and

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25. *See, e.g.*, State v. Lingerfelt, 14 S.E. 75, 77 (N.C. 1891) (recognizing the right of the bondsman to arrest the defendant before trial if the bondsman feels there is a risk of nonappearance).

26. *See, e.g.*, Parker v. Bidwell, 3 Conn. 84 (1819) (stating that a bondsman may catch and detain prisoners as he pleases); Respublica v. Gaoler, 2 Yeates 263, 264 (Pa. 1798) (recognizing the right of a bondsman to cross state lines to seize a defendant). *See also* Annotation, *Surrender of Principal by Sureties on Bail Bond*, 73 A.L.R. 1369 (1931).

27. *See, e.g.*, Reese v. United States, 76 U.S. 13 (1869) (stating that the principal is within the custody of the surety, and the surety can surrender or apprehend him at any time); Nicolls v. Ingersoll, 7 Johns. 145, 155 (N.Y. 1810).

28. *See* Taylor v. Taintor, 83 U.S. 366 (1872) (stating that the bondsman is obligated to return the defendant); Clark v. Gordon, 9 S.E. 333 (Ga. 1889) (stating that the bondsman has a duty to catch and return the defendant to escape liability on the bail bond).

29. Stack v. Boyle, 342 U.S. 1, 4 (1951) (citations omitted).

continue to cause considerable debate. Today's critics of the private bail bonds system contend that with the prevalence of professional sureties there is little incentive for defendants to return for trial because it is not the defendant's or his family's money at stake.[30] A defendant typically pays a fee to the bail bondsman equal to ten percent of the amount of bail,[31] and this fee is nonrefundable so it cannot provide a financial incentive to return.

> The theory behind money bail is simple: "It is assumed that the threat of forfeiture of one's goods will be an effective deterrent to the temptation to break the conditions of one's release." However, "under the professional bondsman system the only one who loses money for nonappearance is the professional bondsman, the money being paid to obtain the bond being lost to the defendant in any event."[32]

Additionally, the defendant and the bail bondsmen have only a contractual relationship, not a personal one. Privatization of suretyship arguably sacrificed family influence, a convenient source of social control.[33] Bail bondsmen and defendants meet briefly at the time of contracting and may have periodic contact, but the fear of harming the wealth of the defendant's family is no longer a significant deterrent to jumping bail because it is the professional bail bondsman whose money will be subject to forfeiture, not the defendant's family or friends' money.

Professional sureties are also criticized for disadvantaging the poor who cannot afford the bondsman's fee. "In a system which grants pretrial liberty for money, those who can afford a bondsman go free; those who cannot, stay in jail."[34] While this seems to be more of an indictment of the entire idea of monetary bail, arguably bail bondsmen have a significant amount of control over who stays in jail and who is released.[35]

A bail bondsman has complete discretion as to which clients he accepts and which he does not. Some critics of professional bail bondsmen believe that too much control lies outside the reach of the court.

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30. *See* Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring) (reasoning that with a professional bondsman, the defendant has no personal stake and is less likely to take the responsibility seriously).

31. *See* Mary A. Toberg, *Bail Bondsmen and Criminal Courts*, 8 JUST. SYS. J. 141, 142 (1983).

32. Pugh v. Rainwater, 557 F.2d 1189, 1199 (5th Cir. 1977) (quoting Bandy v. United States, 81 S. Ct. 197, 197 (1960); Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring)).

33. Bail bondsmen have, however, developed methods to exert social control over their clients after those clients are released from jail. *See infra* Part II.B.

34. *Pugh*, 557 F.2d at 1196 (quoting FREED & WALD, *supra* note 5, at 21).

35. The system of setting bail can in and of itself seem to disadvantage the poor who must pay someone to be released before trial, be it bail bondsman or the courts. *See Bandy*, 81 S. Ct. at 198. "[I]n the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release." *Id*.

> The extent to which the accused is financially committed to appear is determined by the amount of collateral the bail bondsman requires for writing the bond. The ultimate effect of such a system . . . is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety—who in their judgment is a good risk. The bad risks, in the bondsman's judgment, and the ones who are unable to pay the bondsman's fee, remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.[36]

While most bail bondsmen use logical criteria such as community ties, family, and employment to evaluate a prospective client, some bondsmen use instinct or other less desirable criteria.[37] As a private party, the bondsman is free to refuse any client for nearly any reason. Critics have accused bondsmen of refusing to work with defendants whose bail is small based on the fact that the profit would be small.[38] This can work to disadvantage the poor who can neither pay the small amount of bail nor contract with a bail bondsman to secure release.

By far the most criticism comes from those who oppose the ability of professional bail bondsmen to exercise powers of custody. To protect his investment, a professional bondsman can surrender a defendant at any time and can apprehend a fleeing defendant using "reasonable means necessary to effect rearrest."[39] Highly publicized incidents of violence, such as a shooting in Phoenix,[40] and the glamorization of television[41] dominate the popular view of bail

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36. *Pugh*, 557 F.2d at 1199.

37. *See* FREED & WALD, *supra* note 5, at 33. Bondsmen have been known to make decisions about which clients they will take based on instinct about the defendant's character or based on the type of crime with which a defendant is charged. For example bail bondsmen have avoided narcotics defendants because they don't wake up early enough in the day to make it to court, prostitutes because they have no community roots, forgers because they travel around too much. *See id*.

38. *See id*; *but see infra* Part II (discussing the advantages of the profit motive).

39. Lopez v. McCotter, 875 F.2d 273, 277 (10th Cir. 1989).

40. *See, e.g.*, Stacy H. Adams, *Bounty Hunter from Hopewell Gets 18 Years*, RICHMOND TIMES-DISPATCH, Dec. 20, 1994, at B5 (stating that bounty hunters kicked a handcuffed defendant and pulled his gold tooth out with pliers); Paula Barr, *Force, Authority of Bounty Hunters Come into Question*, TIMES-PICAYUNE, Jan. 4, 1995, at A2 (reporting that two children were maced during an arrest by a bounty hunter); Donald Bradley, *More Than Fugitives Fear Bounty Hunters*, KANSAS CITY STAR, Feb 21, 1993, at B1 (stating that bystanders were injured during high speed chase of defendant by bounty hunters); Peter Hermann, *Bondsman Shoots Man in Chase*, BALTIMORE SUN, July 8, 1995, at B2 (reporting that bondsman shot a fleeing man); John Woolfolk, *Bounty Hunters Get Wrong Guy*, S.F. CHRONICLE, Dec. 15, 1993, at C3 (stating that bounty hunters arrested the former classmate of a defendant).

41. For example, *Bounty Hunters* (Fox Television broadcast), lets viewers ride along as professional bondsmen and their bail recovery agents attempt to apprehend bail jumpers. Additionally, the 1980 movie, *The Hunter* starring Steve McQueen as legendary bounty hunter

bondsmen, who are widely seen as ruthless bounty hunters.

C. States Increasingly Rely on the Private Sector

Despite the criticisms of professional bondsmen, states, straining under the increasing cost of law enforcement, are relying heavily on these private actors to help keep the criminal justice system functioning. Political pressure to "get tough" on crime has led to the need for more law enforcement action and more jails and prisons. There has also been a substantial price tag. In 1994, *U.S. News and World Reports* estimated that the annual cost of crime in the United States totaled approximately $674 billion.[42] The cost to house one jail inmate has been estimated at $17,000 per year.[43] This country spends $60,000 for each police officer on the street.[44] The skyrocketing cost of crime has led many states to rely on the private sector to carry out functions traditionally performed by the states.[45] More and more police are relying on bail bondsmen to shoulder the responsibility to find those who jump bail and return them to the court.

II. PROFESSIONAL BAIL BONDSMEN SERVE VITAL SOCIAL FUNCTIONS

As a private individual,[46] the bondsman does not necessarily set out to perform a public service,[47] but instead sets out to make a living. The result,

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Ralph "Papa" Thorson glamorized bail enforcement. THE HUNTER (Warner Bros. 1980).

42. Sara Collins, *Cost of Crime: $674 Billion*, U.S. NEWS & WORLD REP., Jan. 17, 1994, at 40.

43. *See* Lynn S. Branham, *A Federal Comprehensive Community-Corrections Act: Its Time Has Come*, 12 COOLEY L. REV. 399, 403-04 (1995).

44. *See* Todd R. Clear, *"Tougher" is Dumber*, N.Y. TIMES, Dec. 4, 1993, at A2.

45. *See* Philip E. Fixler Jr. & Robert W. Poole Jr., *Can Police Services be Privatized?*, 498 ANNALS AM. ACAD. POL. & SOC. SCI. 108, 109 (1988) (discussing the push to privatize police services); Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 DUQ. L. REV. 41, 42 (1995) (discussing financial troubles of U.S. cities and the growing view that privatization is the answer); Larry Carson, *Plan Afoot to Privatize Police Jobs*, BALTIMORE SUN, Jan. 17, 1994, at B1 (discussing the nationwide move toward privatization of police services and one county's plans to join in).

46. There have been many efforts to have professional bail bondsmen declared state actors for the purposes of requiring their compliance with Fourth Amendment guarantees and subjecting them to liability under 42 U.S.C. § 1983. *See* Landry v. A-Able Bonding, Inc., 75 F.3d 200 (5th Cir. 1996) (holding that the fact that there was an arrest warrant issued for the defendant does not make a bondsman who apprehends the defendant a state actor); Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547 (9th Cir. 1974) (holding that purely private conduct such as the actions of a bail bondsman do give rise to a cause of action under 42 U.S.C. § 1983); State v. Tapia, 468 N.W.2d 342 (Minn. Ct. App. 1991) (stating that a bondsman has the same power to arrest others as a private citizen).

47. For a discussion of the bondsman as a state actor, see *infra* notes 131-48 and accompanying text. *See also* Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731 (1996); Emily

however, is something of a private police force that chases defendants who flee and delivers them back to court.

The bail bondsman's solicitation of business from criminals and constant contact with the criminal element has led to the misconception that the professional bondsman is somehow corrupt or shady.[48] The bondsman has been described as "an unappealing and useless member of society . . . [who] lives on the law's inadequacy and his fellowman's troubles."[49] A more accurate view, however, is that professional bail bondsmen, through the normal course of business, perform a variety of important social functions.

A. More People Are Able to Make Bail

Not the least of these functions is providing a way for accused persons to be free until trial.[50] One New York judge defended solicitation of business by bondsmen saying:

> There is a general misconception . . . that solicitation of business by bondsmen is illegal. It is entirely lawful—just as lawful as solicitation by life insurance agents. . . .
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> It is even necessary and desirable that this should be so—under proper regulation. Otherwise the casual offender, the inexperienced offender, the offender charged with minor crimes, would be confined in jail while the professional criminal with his outside contacts, experienced little difficulty in arranging bail. In this [c]ourt . . . I have found many defendants ignorant of the fact that bail has been fixed by the magistrate, ignorant of the amount of bail fixed and the method and cost of obtaining release on bail. And it is generally the minor or low bail offender, whose even temporary detention is not justified by the crime charged, who finds himself in that predicament. It is most desirable that this class of offender should be solicited and bailed.[51]

Bail bondsmen provide a way for the average citizen to secure enough money to

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M. Stout, *Bounty Hunters as Evidence Gatherers: Should they be Actors Under the Fourth Amendment When Working With the Police?*, 65 U. CIN. L. REV. 665 (1997); Gregory Takacs, *Tyranny on the Streets: Connecticut's Need for the Regulation of Bounty Hunters*, 14 QUINNIPAC L. REV. 479 (1994).

48. *See* FREED & WALD, *supra* note 5, at 34-35.

49. RONALD GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM 102 (1965).

50. *See supra* notes 23-29 and accompanying text (discussing the importance of bail). The presumption of innocence prohibits punishment before conviction and the opportunity to be free before conviction is extremely important. Bail can only be used as a way to secure appearance for trial and not as a means to punish. *See* Duran v. Elrod, 542 F.2d 998 (7th Cir. 1976); State v. Midland Ins. Co., 494 P.2d 1228 (Kan. 1972). Freedom before trial helps the defendant prepare his defense. *See* Stack v. Boyle, 342 U.S. 1, 4 (1951).

51. People v. Smith, 91 N.Y.S.2d 490, 494 (1949).

be released.[52] Although a privatized bail bonds system has been criticized for keeping the poor in jail, in reality, professional bail bondsmen help more people to avoid jail, which serves the needs of the defendant, the state budget, and the bail bondsman.[53] The plight of the indigent defendant is in no way served by decreasing the power of the bail bondsman to solicit and serve defendants. Without professional bail bondsmen, the problems of the poor and inexperienced would be made worse by the fact that they would be required to produce the full amount of bail.

The willingness of a bail bondsman to post a bond for a particular defendant can even affect the amount of bail set in that defendant's case.[54]

> The bondsman plays no formal part in this process, either. In many cases of this kind, the defendant or his attorney may contact a bondsman before the bail hearing and the bondsman may supply informal advice to the judge or the prosecutor concerning his willingness to post bail for the defendant. This may help the defendant by inducing the judge to set bail at a level which the defendant can afford. It can hardly work to the defendant's disadvantage.[55]

Without this service, it is likely that many defendants would not be able to make

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52. The court does have the authority however to refuse to allow a surety to post bond for a defendant if the court has reason to doubt the willingness or ability of the surety to produce the defendant. *See* American Druggist v. Bogart, 707 F.2d 1229, 1233 (11th Cir. 1983).

53. *See* Toberg, *supra* note 31, at 44; *see also infra* Part II.E.

54. The main factors considered by judges in determining whether bail is appropriate in a case are set by the Bail Reform Act of 1984, 18 U.S.C. § 3142(g) (1994):

> The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—
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> (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
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> (2) the weight of the evidence against the person;
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> (3) the history and characteristics of the person including—
>
> (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
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> (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law. . .

55. Forrest Dill, *Discretion, Exchange and Social Control: Bail Bondsmen in Criminal Courts*, 9 LAW & SOC'Y REV. 639, 653 (1975). Mr. Dill, however, rejects the idea that bondsmen are "purveyors of freedom" who decide which defendants will be released and which will not. That type of view exaggerates the influence that bondsmen have over the bail decision. *See id*. at 652.

bail at all.[56] The bondsman is able to evaluate a potential client's likelihood of nonappearance with an eye on his profit. He is not bound by statutes or guidelines, like the court system, and can help society by evaluating the risk of flight.

B. Social Control

Bail bondsmen play an important role in maintaining social control over bailed defendants. The bondsman and the defendant form a contract in which the bail bondsman agrees, for a fee,[57] to act as the defendant's surety.[58] In addition to paying the fee, the defendant agrees to appear in court for all scheduled appearances. The bondsman only makes a profit when he is able to collect fees from the defendant and avoid paying the amount of the bond to the court. Just as the traditional English surety, usually a family member, had a personal incentive to encourage the defendant to appear, so does the professional bail bondsman. His business depends on the appearance in court of his clients.

There is, of course, risk that the defendant will sign the contract with the bondsman, secure release and leave the jurisdiction or refuse to appear in court.[59] To protect his investment, the bondsman must be thorough not only in assessing the risk of flight before writing the bond,[60] but in keeping tabs on the defendant after the bond is written. "The profit motive is presumed to insure diligent attention to his custodial obligation."[61]

When entering the contract with the defendant, the bondsman may require that a third party, such as a friend or relative, cosign or post collateral.[62] The advantage to the bail bondsman is two-fold. First, in the event of nonappearance, the bondsman can try to recover costs from the third party. Second, the involvement of friends and family makes it easier for the bondsman to influence the actions of the defendant and keep tabs on him or her.[63] Requiring a friend or family member to accept liability helps to provide an incentive for the defendant

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56. *See* El Franco Lee, *Leave Harris County's Poor in Jail Without Bail Bonds?*, HOUSTON CHRON., June 26, 1994, at E1 (stating that county records showed that in Harris County, Texas 77,553 defendants were released using a bail bond in one year).

57. Usually 10% of the amount of bail. *See supra* notes 31-32 and accompanying text.

58. The bondsman posts a bond for the full bail amount with the court that does not come due until a set time after the court date of the defendant's case. If the defendant appears in court as scheduled, the bondsman is released from liability on the bond and makes a profit from the fee already collected. *See* Toberg, *supra* note 31, at 142.

59. Defendants accused of more serious crimes carrying long prison sentences are more likely to jump bail when they feel that being a fugitive is more attractive than facing prison. *See* Samuel L. Myers, Jr., *The Economics of Bail Jumping*, 10 J. LEGAL STUD. 381, 382 (1981).

60. See *supra* notes 37-38 and accompanying text (discussing the factors bondsmen consider when deciding whether or not to contract with a particular defendant).

61. FREED & WALD, *supra* note 5, at 22.

62. *See* Toberg, *supra* note 31, at 142.

63. *See id.*

to meet his legal and contractual obligations.[64] The bondsman is able to achieve a greater degree of social control over the defendant. From the oldest system of bail to the present, the main idea of a surety assumes that a defendant required to account to another for his actions will be more likely to honor his obligations.

C. Bail Bondsmen Help Courts Run Smoothly

In an effort to ensure appearance, the bondsman provides a variety of useful services to his clients, which in turn help the courts to run smoothly. Services designed to take the fear and guesswork out of court appearances help ensure that bailed defendants will appear, which helps the courts avoid wasted time and expense.

> Many bondsman mail reminders of future court dates to defendants, call them the day before court, or require them to telephone the office periodically, although some consider periodic contact unnecessary. A bondsman may also notify a bond's cosigners of the defendant's next court appearance, so that they can help ensure the appearance of the accused at the proper time.[65]

Bondsmen provide the defendants they serve with important details about their court appearances such as when to arrive, which courtroom to report to, how to find that courtroom, and what kind of proceeding will occur.[66] This helps to avoid nonappearance through mistake, forgetfulness or fear of the unknown.[67]

Bondsmen can also clear up administrative mistakes made by the courts, such as a defendant scheduled to appear in two courtrooms at the same time. A bondsman is familiar with the operation of the court system and is able to catch errors and bring them to the attention of the court before problems occur.[68] The bail bondsman's knowledge of the system and ability to act as a liason between the court and the accused serves all involved.

While bondsmen are unable to give legal advice, they can give defendants important information on how to hire a lawyer[69] and can encourage a defendant to cooperate with a lawyer's advice.[70] They can also explain the meaning and importance of legal procedures, types of actions, and can encourage a defendant to carefully make legal decisions.[71] Advice concerning lawyers, legal options,

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64. *See supra* notes 30-35 and accompanying text (discussing incentive problems caused by the lack of a personal relationship between the defendant and the professional bail bondsman).

65. Toberg, *supra* note 31, at 142.

66. *See* Dill, *supra* note 55, at 654-55.

67. *See id.* at 655.

68. *See id.* at 656; *see also* Toberg, *supra* note 31, at 143.

69. Attorneys can also help the bondsman by referring clients to a bondsman the attorney knows and has worked with before. *See* Dill, *supr*a note 55, at 648.

70. *See id.* at 655.

71. Bail bondsmen may, however, have a greater interest in encouraging defendants to plead guilty because that would decrease the time that the defendant is free on bond. The chances of

and legal decisions helps a defendant to navigate his way through a sometimes unfriendly and confusing criminal justice system. By acting as liason, the bail bondsman helps the court to avoid delays caused by a defendant's errors and confusion.

In addition to providing information to defendants, bail bondsmen supply information to court officials and attorneys about the defendant. This allows the courts to run more smoothly. The bondsmen act as liaison between the court and the defendant, helping each obtain needed information about the other.[72] In exchange, the courts and the state help the bondsmen to operate more profitably through lenient local rules regarding bonding.[73]

D. Desire to Avoid Forfeiture Leads to Effective Apprehension of Bail Jumpers

Profit is the driving force behind the thorough service bondsmen provide. The ability to make a profit depends on avoiding forfeiture, which provides a deterrent to poor service. The bondsman's profit comes from the fee, equal to ten percent of the bail amount, which he collects from the defendant at the time of contracting. If a defendant fails to appear, the bondsman stands to lose up to 100 percent of the amount of bail, which means that not only does the ten percent profit disappear, but the bondsman must pay the other ninety percent out of pocket.[74]

For example, if a defendant's bail was set at $2000, the bondsman would collect a fee and possible profit of $200 to write the bond. If the defendant does not appear and the bondsman is unable to return that defendant to the court, the bondsman must give up the $200 and also produce $1800 to cover the bond.

Forfeiture in the federal courts is covered by Federal Rule of Criminal Procedure ("Rule") 46(e)(1), which mandates bail forfeiture when a defendant breaches a condition of his release, such as failing to appear.[75] There are typically two steps to a forfeiture proceeding. First, in accordance with Rule 46(e)(1), the district court declares the forfeiture when the defendant fails to appear[76] or in some other way breaches the conditions of his bail, such as committing a crime.[77] Second, the surety becomes a debtor to the government

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nonappearance decrease, and the bondsman is more likely to make a profit. *See id.* at 656.

72. *See* Toberg, *supra* note 31, at 143.

73. *See id.* at 144.

74. *See* Liz Dupont-Diehl, *Bail Bondsmen Fill the Gap in the Criminal Justice System*, J. INQUIRER (Manchester, Conn.), Mar. 29, 1993.

75. FED. R. CRIM. P. 46(e)(1).

76. Notice of nonappearance need not be given to the surety because the surety is presumed to know the whereabouts of the defendant. *See* United States v. Minnesota Trust Co., 59 F.3d 87, 90 (8th Cir. 1995); American Druggist Ins. Co. v. Bogart, 707 F.2d 1229, 1235 (11th Cir. 1983); United States v. Vera-Estrada, 577 F.2d 598, 600 (9th Cir. 1978); United States v. Marquez, 564 F.2d 379, 381 (10th Cir. 1977).

77. *See* United States v. Gigante, 85 F.3d 83, 85 (2d Cir. 1996); United States v. Dudley, 62

and must pay after the order of forfeiture is entered.[78] Modern individual bail bondsmen are usually backed by a surety insurance company,[79] which maintains funds sufficient to cover forfeitures,[80] but losses can still be devastating to the individual bail bondsman who must pay insurance premiums.[81]

Forfeiture is not always absolute, and can be set aside in rare circumstances. Rule 46(e)(2) provides that "[t]he court may direct that a forfeiture be set aside upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture."[82] The court has "wide discretion" in setting aside a forfeiture judgment,[83] and the surety must prove that "an injustice is done by the forfeiture."[84]

When deciding whether or not to set aside a forfeiture judgment, the court considers several factors[85] including: (1) the willfulness of the defendant's breach of his bond conditions; (2) the participation of the sureties in apprehending the defendants;[86] (3) the cost, inconvenience, and prejudice suffered by the government as a result of the defendant's breach; (4) any explanation or mitigating factors; (5) whether the sureties were professionals or friends and family of the defendant;[87] and (6) the appropriateness of the amount

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F.3d 1275, 1277-78 (10th Cir. 1995); Unites States v. Vaccaro, 51 F.3d 189, 191-92 (9th Cir. 1995); United States v. Patricia, 948 F.2d 789, 793-94 (1st Cir. 1991); United States v. Santiago, 826 F.2d 499, 506-07 (7th Cir. 1987); United States v. Dunn, 781 F.2d 447, 449-50 (5th Cir. 1986).

78. In most jurisdictions, forfeiture occurs at a graduated rate where the surety is only required to pay a small percentage of the bail amount at first, then more and more as time goes by. *See* FREED & WALD, *supra* note 5, at 28.

79. *See id.* at 23. Most modern courts will not consider a bail bondsmen an acceptable surety unless he is backed by an insurance company. *See id*. Bail bondsmen used to be individual entrepreneurs with fairly scant resources, but that method of operation is a thing of the past. *See* Dill, *supra* note 55, at 645.

80. *See* FREED & WALD, *supra* note 5, at 23. Although they insure bail bondsmen against loss, insurance companies do not control the actions of the bondsmen any more than an auto insurance company can control the way insured motorists drive. *See* Dill, *supra* note 55, at 646.

81. Some bail bondsmen try to soften the blow of forfeiture by building up a buffer fund from which they can pay part of the forfeiture, thus relieving some obligation of the insurance carrier. This helps to keep premiums lower. *See* Dill, *supra* note 55, at 645; Interview with Joyce Carlson, Managing General Partner, State Bonding, Indianapolis, Ind. (Oct. 30, 1997).

82. FED. R. CRIM. P. 46(e)(2).

83. United States v. Amwest Surety Ins. Co., 54 F.3d 601, 602 (9th Cir. 1995); United States v. Gil, 657 F.2d 712, 715 (5th Cir. 1981); United States v. Stanley, 601 F.2d 380, 382 (9th Cir. 1979); United States v. Hesse, 576 F.2d 1110, 1114 (5th Cir. 1978).

84. *Gil*, 657 F.2d at 715; *see also* United States v. Nolan, 564 F.2d 376 (10th Cir. 1977).

85. *See* United States v. Frais-Ramirez, 670 F.2d 849, 852 (9th Cir. 1982). The factors are not a checklist and are to be weighed as the judge sees fit. *See Amwest Surety Ins. Co.*, 54 F.3d at 603.

86. *See infra* notes 89-96 and accompanying text.

87. *See* United States v. Bass, 573 F.2d 258, 260 (5th Cir. 1978).

of the bond.[88] The burden on the surety is difficult to meet, and, as a result, forfeitures are rarely set aside, especially for professional sureties like bail bondsmen who are well aware of the risk involved.

If a defendant does jump bail, the best course of action for a bail bondsman is to quickly find and return that defendant to the court. The faster the defendant can be apprehended, the less money the bondsman will lose.

Bail bondsmen have a distinct advantage over police officers in finding bail jumpers. The bondsman does nothing but deal with bail, therefore he has time to track down a fleeing defendant and has the resources with which to do it.

> This difference in retrieval authority for bondsmen and public officials, combined with the scarce resources available in many jurisdictions for serving warrants, creates an incentive for law enforcement officers to rely on bondsmen as much as possible to return defendants to court. Such reliance on bondsmen effectively transfers part of the costs of fugitive retrieval from the publicly funded criminal justice system to the privately funded bond system.[89]

Additionally, since most bondsmen keep track of the whereabouts of their clients while the clients are out on bail, the bondsman is more likely to find the defendant quickly. Most defendants who do not appear simply forgot their court dates, could not get to the courthouse because of transportation problems or illness, or misunderstood their attorneys and believed that they did not have to appear that day.[90] Most return to court with a phone call eliminating the expense of sending police to rearrest them.[91] The desire to minimize monetary loss drives the bondsman to respond quickly, and the defendant returns to court without serious loss to the sureties, expense to the state, or additional penalties for the defendant.

Even some defendants who deliberately fail to appear can be quickly found and talked back into court.[92] If a third party, such as a friend or relative, cosigned the bond, the bondsman will try to use that person to help locate the defendant and talk him or her into appearing. The third party's personal relationship comes in handy for the bondsman who can gather information about where the defendant would likely run and who would help him. Armed with this information, the bondsman begins to "skip trace" or try to trace the movements of the defendant.[93] With the resources and time to find defendants who jump bail, bail bondsmen have an impressive success rate for apprehension. Bondsmen or their agents apprehend between eighty-seven and ninety-nine

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88. *See* United States v. Mizani, 605 F.2d 739, 740 (4th Cir. 1979).

89. Toberg, *supra* note 31, at 143.

90. *See id.* at 142.

91. *See id.*

92. *See id.*

93. Many bondsmen hire professional skip tracers and bounty hunters for this work, although some bondsmen locate bail jumpers themselves.

percent of all bail jumpers.[94] The police only apprehend approximately ten percent, usually during traffic stops.[95] A small percentage of bail jumpers are never caught.[96] The odds, however, are in favor of getting caught.[97] The result is that fewer criminals are running free, possibly committing more crimes, while police are unable to locate and catch them.

Incidents involving violence during apprehension, while highly publicized and debated, are actually infrequent according to Bob Burton who heads the National Institute of Bail Enforcement in Tucson, Arizona, an institute set up to properly train bail bondsmen and their agents.[98] In 1996, "there were fewer than [twenty] 'incidents' of false arrest, unlawful entry, or misuse of firearms."[99] Burton noted that law enforcement agencies cannot claim as good a record.[100]

A deterrent to excessive behavior is the knowledge that although bail bondsmen cannot be sued as state actors, they can be sued as private individuals.[101] When bondsmen use unreasonable means, they are subject to civil liability just as any other regular citizen would be. Although the U.S. courts have consistently upheld the right of a bondsman to exercise custodial rights, courts are willing to acknowledge when a bondsman has crossed the line.[102]

E. Decreases Costs for State

One of the most substantial advantages to enforcement of bail provisions in the private sector is cost. Taxpayers, who are already shouldering the rising cost of crime and law enforcement,[103] are not required to foot the bill for apprehension

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94. *See* Marc Gunther, *Experts on Call: They're in the Book and They Thrive On Public Attention*, CHI. TRIB., Nov. 7, 1993, at 4; Minier, *supra* note 1, at B7; Roy Rivenburg, *Hunting for Humans*, L.A. TIMES, Aug. 8, 1993, at E7. There were approximately 23,000 apprehensions in 1996. *See* Minier, *supra* note 1, at B7.

95. *See* Minier, *supra* note 1, at B7.

96. *See id.*

97. The private bail bonds system has a 0.8% fugitive rate, while a public bail bonds system that relies on police officers for enforcement has an 8% fugitive rate. *See* Charles Oliver, *Nat'l Issue*, INVESTOR'S BUS. DAILY, May 12, 1994, at 1.

98. *See* Minier, *supra* note 1, at B7.

99. *Id.*

100. *See id.*

101. *See id.*

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> [W]henever 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 which would render liable any other person who was not vested with such authority.

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

103. *See supra* notes 42-45 and accompanying text.

of bail jumpers.[104] This allows state resources to be used for other purposes such as education, crime prevention, and state debt reduction. To protect his profit, the bondsman will be vigorous in tracking down defendants and returning them to justice at little or no cost to the state.

The close eye that bondsmen are able to keep on defendants can help judges make the decision to allow bail instead of sending a defendant to jail.

> Additionally, bondsmen diffuse responsibility for the release of defendants. By setting bail, a judge shares the responsibility for a defendant's release with both the bondsman and individuals who become parties to the bond, such as the defendant's relatives or friends, who may cosign the bond or provide collateral for it. This furnishes the judge with a "buffer" against any adverse publicity that may arise, if a defendant commits a heinous crime prior to trial.[105]

Every defendant who does not go to jail saves the taxpayers approximately $1600 per month.[106] Because the average time in jail between arrest and trial is eight months, the savings are substantial.[107]

The cost to apprehend bail jumpers is effectively shifted from the taxpayers to the private sector almost completely. Thus, police manpower and state resources can be devoted to other uses. Decreasing the power of bail bondsmen would shift the cost back, requiring taxpayers to shoulder the responsibility. With the considerable costs of crime and law enforcement that already burden taxpayers,[108] a system that allows the private sector to defray some of the cost is prudent.

III. PROFESSIONAL BAIL BONDSMEN NEED SPECIAL AUTHORITY

Sureties traditionally have had special rights arising from custody of the accused. Critics of the professional bail bonds system argue that the old idea of custody is outdated and inapplicable to modern sureties who have no personal relationship to the principal (the defendant).[109] Some advocate prohibition of professional bail bondsmen or a limiting of their authority.[110] The relationship between the bail bondsman and the defendant is, at its root, simply contractual in nature, yet the bondsman can remedy the contract's breach with the unusual remedy of self-help.[111]

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104. *See* Minier, *supra* note 1, at B7.

105. Toberg, *supra* note 31, at 143.

106. *See* Branham, *supra* note 43, at 403 (stating that it costs approximately $19,118 to confine one prisoner for one year).

107. *See id.*

108. *See supra* notes 42-45 and accompanying text.

109. *See* FREED & WALD, *supra* note 5.

110. *See id.*

111. Early American courts recognized the relationship as contractual, yet still giving rise to special rights for the bondsman. *See* Reese v. United States, 76 U.S. 13, 22 (1869) (stating that

A. The Special Contractual Relationship Between Bondsman and Defendant

Professional bail bondsmen enter two contracts with defendants. The first is a bilateral contract in which the bondsman agrees to post a bond to meet the defendant's monetary bail obligation, and the defendant agrees to pay a fee and appear in court at the time specified by the judge.[112] The defendant also agrees that the bondsman has custodial rights over him with the ability to surrender that defendant at any time or to pursue and apprehend the defendant in the case of nonappearance.[113] The second contract entered by the parties is the bond itself, which is a contract between the defendant, the government and the bail bondsman.[114] Though traditional contract law governs analysis of the contract,[115] the remedies for breach are unique.

Most contracts are remedied through either expectation or reliance damages.[116] The plaintiff sues the defendant for breach of contract in civil court hoping to collect money damages for either expected gains or out-of-pocket expenses spent in reliance on the contract's performance.[117] This remedy, however, is ill-suited to the contract between the bondsman and the defendant; while it may work to recover money already lost in forfeiture, it cannot serve to return the defendant to the court before forfeiture occurs.[118]

The plaintiff in a breach of contract action also has recovery options in the

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when a court accepts the bail from the surety, the government is impliedly agreeing not to interfere with the surety's right to protect his bond); Fitzpatrick v. Williams, 46 F.2d 40 (5th Cir. 1931) (holding that a bondsman need not resort to legal process to detain or arrest a defendant, but instead has the power through the contract); *In re* Von Der Ahe, 85 F. 959 (C.C.W.D. Pa. 1898); Nicolls v. Ingersoll, 7 Johns. 145, 154 (N.Y. 1810); Worthen v. Prescott, 11 A. 690, 693 (Vt. 1887).

112. *See* Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 551 (9th Cir. 1974). Early and current American courts recognize the contract between bondsman and defendant as giving the bondsman the right to apprehend that defendant.

113. This first contract will hereinafter be referred to as "the contract." It is really a "super contract" because its terms and remedies are unique to the bondsman.

114. A bail bond is "[a] three-party contract which involves [the] state, the accused and the surety and under which [the] surety guarantees that [the] accused will appear at subsequent proceedings." BLACKS LAW DICTIONARY 140 (6th ed. 1990). *See also* United States v. Vaccaro, 719 F. Supp. 1510, 1517 (D. Nev. 1989). This second contract will hereinafter be referred to as "the bond."

115. *See* United States v. Figuerola, 58 F.3d 502, 503 (9th Cir. 1995); United States v. Toro, 981 F.2d 1045, 1047 (9th Cir. 1992).

116. *See* JOHN EDWARD MURRAY JR., MURRAY ON CONTRACTS § 119 (3d ed. 1990) [hereinafter MURRAY ON CONTRACTS].

117. *See id.*

118. It is highly possible that a defendant could be judgment proof or have left the jurisdiction. The nature of the contract is such that if the defendant does not perform and cannot be returned in time to avoid serious forfeiture, he is likely not to be found for a civil case. Additionally, the cost of litigation might far exceed the recovery in cases of minimal bail, discouraging suits.

form of equitable remedies such as specific performance.[119] This remedy is also wholly inadequate because the bondsman has no way to enforce the remedy without the right to apprehend the defendant.

Traditional remedies for breach of contract also do not produce the same social benefits as allowing exercise of custodial powers through self-help. Requiring the bondsman to wait until a breach has occurred and take only civil legal action removes the profit motive to return defendants who flee. The result would be that fewer bail jumpers would be apprehended, and unapprehended jumpers would be free to commit additional crimes.

The possibility of self-help can provide an important deterrent to jumping bail. Defendants with the knowledge that the bail bondsman has the power and ability to apprehend him forcibly will likely think twice before fleeing.

> [P]ersonal bondmen in our country are a very aggressive group and relentlessly pursue the defendant who skips bail on which they have surety and bring them back in very many instances. . . . This hard attitude on the part of some of these sureties has put the fear of God into a lot of defendants who know what to expect in the event they skip bail.[120]

Self-help also allows the bail bondsman to mitigate his damages by returning the defendant before the entire bond has been forfeited. As a surety on the bond, the bondsman need not wait until the principal (the defendant) has breached the contract with the obligee (the court) and the obligee has instituted civil action against the surety. Litigation time and expense can be saved. This profit motive ensures immediate and vigorous action.

The old custodial rights of the surety survive in modern society. Perhaps it is as much because of the infeasibility of civil remedies and the social benefit of privatized bail enforcement as the fact that there is historical precedent. There appears to be no judicial movement toward reducing the power of bail bondsmen.[121]

The special and controversial powers that bondsmen have begin with the ability to enter into a "super contract" with the defendant and extend to the ability to enforce that contract. The defendant typically agrees that the bondsman can apprehend him using any means reasonably necessary.[122] Those means often

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119. *See* MURRAY ON CONTRACTS, *supra* note 116, at § 117.

120. FREED & WALD, *supra* note 5, at 30-31.

121. *See* Landry v. A-Able Bonding, Inc., 75 F.3d 200, 204-05 (5th Cir. 1996) (holding that an arrest warrant does not make the bondsman a state actor); United States v. Rose, 731 F.2d 1337, 1345 (8th Cir. 1984) (stating that arrest by a bail bondsman is enforcement of a private contract right, and therefore is outside the jurisdiction of the state.); Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 550 (9th Cir. 1974) (holding that private conduct like that of a bondsman does not give rise to a cause of action under 42 U.S.C. § 1983); *but see* Smith v. Rosenbaum, 333 F. Supp. 35, 38 (E.D. Pa. 1971) (holding that a bondsman was a state actor in this fact situation because he had obtained a "bail piece" from the courts).

122. The defendant is arguably in a significantly weaker contract position, facing jail or the

include home invasion,[123] crossing state lines,[124] force,[125] and deception.[126] The rights of the bondsman agreed to by the defendant in the contract are unparalleled. Debt collectors, who also stand to lose substantial profits if debtors do not pay, are far more restricted in their tactics than bondsmen.[127] Despite the contract signed by the debtor, a debt collector who attempts to physically restrain a debtor or enters a debtor's home without permission is subject to criminal liability as well as civil.[128]

The reason for this disparity in contract interpretation can only logically be explained by the different social contributions made by debt collectors and bail bondsmen. Debt collectors protect their own financial interests or the financial interests of the entity who hired them. While it is important to the economy that debts be paid, the social value of debt collection does not extend beyond that benefit. The social value of bail bondsmen, however, extends far beyond the financial interests of the individual bondsman. Profit drives the bondsman to protect his investment,[129] but the result is far beyond personal gain. The court system is able to operate effectively, the right to bail is protected, and fleeing criminals, of possible danger to society, are apprehended.[130]

B. State Actor Status

The means used by bail bondsmen also exceed, to some extent, the means

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terms of the contract, but the contract has never been found to be unconscionable. *But see* McCaleb v. Peerless Ins. Co., 250 F. Supp. 512, 515 (D. Neb. 1965) (holding that a bondsman had power to apprehend the defendant based on the contract, but could not exceed the power contracted for). In *McCaleb*, the bondsman apprehended the defendant, but did not immediately surrender him to the court, instead driving him around the country and telling him to appear, then to leave town when they returned home. *Id.*

123. *See* Nicolls v. Ingersoll, 7 Johns. 145, 156 (N.Y. 1810).

124. *See* Taylor v. Taintor, 83 U.S. 366, 371 (1872); Fitzpatrick v. Williams, 46 F.2d 40, 41 (5th Cir. 1931); *Nicolls*, 7 Johns. at 154.

125. *See* State v. Lingerfelt, 14 S.E. 75, 77 (N.C. 1891) (holding that the force used can even be deadly).

126. Bondsmen have been known to impersonate relatives, long-lost friends, and priests to obtain information and find defendants. *See* Teresa Walker, *Thrill of the Chase Snares Posse of Bounty Hunters*, SAN BERNIDINO COUNTY SUN, Sept. 27, 1992, at B3.

127. The Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (1994), limits the ways in which debt collectors can contact debtors, prohibits harassment and unfair collection practices.

128. *See, e.g.*, Fassitt v. United T.V. Rental, 297 So. 2d 283, 287 (La. Ct. App. 1974) (holding that debt collector could not legally break into debtor's home despite contract authorizing it); Kimble v. Universal T.V. Rental, 417 N.E.2d 597, 603 (Franklin County Mun. Ct. 1980) (stating that repossessing television by removing window pane and entering house not permissible).

129. Courts have long acknowledged the fact that profit motive leads to effective apprehension. *See, e.g.*, Pugh v. Rainwater, 557 F.2d 1189, 1200 (5th Cir. 1977).

130. *See supra* Part II.

available to police officers.[131] Since a police officer on duty is working for the government and not for himself, he is clearly a state actor.[132] State actors are bound by statutory and constitutional limits that do not bind private actors.[133] For example, a police officer cannot cross state lines to apprehend a fugitive. He must instead use the formal extradition process in cooperation with another jurisdiction.[134] Bondsmen are not required to use the extradition process.[135] They may cross state lines and apprehend the defendant in any jurisdiction. This makes bondsmen both more efficient and more effective at apprehension.

Police officers cannot act to deprive suspects of their constitutionally protected rights. Rights such as those protected by the Fourth Amendment[136] are

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131. While the contractual right of the bail bondsman does allow him to apprehend the defendant, it is limited by the bondsman's duty to the court to surrender the defendant immediately. Any other action does not fall within the contractual right and is not permitted. *See* McCaleb v. Peerless Ins. Co., 250 F. Supp 512, 515 (D. Neb. 1965).

132. State actors are subject to additional liability and their actions can put the state for which they work at risk of liability. *See* 42 U.S.C. § 1983 (Supp. II 1996). *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), established the two part test for liability under 42 U.S.C. § 1983. First,

> the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id. at 937.

133. While the law does not consider bail bondsmen to be state actors, they have been described as enjoying a "hybrid status somewhere between a free enterprise and a public utility." FREED & WALD, *supra* note 5, at 23. *See also* Dill, *supra* note 55, at 644 (describing bail bondsmen as governmental "subcontractors" who operate outside the government but directly affect the goings on in criminal courts).

134. *See* California v. Superior Court, 482 U.S. 400, 407 (1987) (finding that a state must use formal extradition proceedings); Comment, *Bail Bondsmen and the Fugitive Accused—The Need for Formal Removal Procedures*, 73 YALE L.J. 1098 (1964) (discussing the requirement that states use the formal process of extradition). Federal law also requires the use of the extradition process under 18 U.S.C. § 3182 (1994).

135. Bail bondsmen are not required to use extradition. *See* Lopez v. McCotter, 875 F.2d 273, 277 (10th Cir. 1989) (stating that bail bondsmen have the right to cross state line to apprehend defendants, and they are not required to use the extradition process); Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 554-45 (9th Cir. 1974) (stating that a bondsman's authority has nothing to do with extradition).

136. The Fourth Amendment protects citizens from police searches and seizures unless probable cause is previously established sufficient to justify a search warrant. It states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

designed to limit the power of the state and its agents to interfere with the property of U.S. citizens.[137] Evidence gathered in violation of the Fourth Amendment is generally not admissible against the person whose rights were violated in its collection.[138]

Bondsmen, not being state actors, are not bound by the constraints of the Fourth Amendment.[139] Evidence discovered by a bail bondsman's apprehension of a defendant is admissible even though no search warrant was ever issued.[140] Additionally, bail bondsmen are not required to give *Miranda* warnings in accordance with the Fifth Amendment.[141]

Different rules and liabilities apply to police officers and bail bondsmen because they serve different functions.[142] It is true that both, as part of their professions, apprehend those who have jumped bail, however, the similarity largely ends there. The rules binding police officers are subject to political will and a desire for a small and unintrusive government.

> [T]he changes in police practices which have been mandated by appellate decisions over the last two decades are so sweeping, and the lack of any alternative enforcement mechanism so patent, as to presuppose a substantially new function for local level judicial officials. Many of these decisions, indeed, seem aimed precisely at extending the political doctrine of separation of powers, and the companion doctrine of judicial supremacy, to the administration of local criminal justice. The core assumption in nearly all of them has been that criminal courts must counter-balance the activities of police agencies in order to prevent mistreatment of citizens accused of crime.[143]

Bail bondsmen, however, are not as readily subject to politics. Allowing their power to remain based on contract principles helps to insulate them from the whims of popular political thought. They are able to serve the criminal justice system, yet they operate outside of the sphere of government. Their effectiveness

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U.S. CONST. amend. IV.

137. *See* Katz v. United States, 389 U.S. 347, 357 (1967) (stating that searches conducted without warrants are per se unreasonable).

138. *See* Murray v. United States, 487 U.S. 533, 536 (1988).

139. However, if a bail bondsmen enlists the help of police officers in apprehending a defendant, the bondsman is then bound by the same constitutional restraints as the police officer. *See* Bailey v. Kenney, 791 F. Supp 1511, 1524 (D. Kan. 1992). Bail bondsmen may also not combat police when apprehending a defendant. *See Lopez*, 875 F.2d at 278.

140. *See* Drimmer, *supra* note 47, at 770.

141. The state is required to warn a suspect of his rights under the Fifth Amendment, and confessions or incriminating statements made without the warnings are inadmissible against the suspect. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

142. Bail bondsmen are not required to give *Miranda* warnings. *See* United States v. Rose, 731 F.2d 1337, 1345 (8th Cir. 1984); State v. Zeko, 407 A.2d 1022, 1024 (Conn. 1979); State v. Perry, 274 S.E.2d 261, 262 (N.C. Ct. App. 1981).

143. Dill, *supra* note 55, at 671.

and cost efficiency[144] serve to justify their power partly because the alternatives are undesirable. Without professional bail bondsmen, the alternatives would be to either devote more police manpower and resources to bail enforcement or to let most bail jumpers escape.[145] The damage to the system could be severe, resulting in fewer defendants being released on bail[146] and fewer bail jumpers being brought to justice.

Certainly it is not desirable to allow bail bondsmen to operate completely without restraint. Most states regulate bail bondsmen or require that they be licensed.[147] Evaluation of fitness to act as a surety and any undesirable activity can be evaluated when licenses are renewed. Additionally, the threat of civil liability helps to control activity.[148] There is little to gain by excessive restriction. Moving the rights and liabilities closer to or equal to that of police officers would result in decreased efficiency and increased cost. The broad powers, based on contract rights and historical precedent, enable the delicately balanced system to continue to operate. The disadvantages of declaring that bail bondsmen are state actors far outweigh the advantages. While it might ensure that homes were never entered without warrants and people were never apprehended across state lines without the formal extradition process, the cost would be the entire bail bonds system itself. Restraint of the bondsman's power jeopardizes the bondsman's profit, potentially leading to fewer bondsmen and consequently, fewer opportunities for defendants to make bail.

CONCLUSION

There is no simple answer to the debate that surrounds the professional bail bonds system. With the individual rights of criminal defendants on one side and the needs of a struggling criminal justice system on the other, it is clear that the controversy will not soon be resolved. On both sides is a desire to continue the system of bail in one form or another. Thus far, few acceptable alternatives to professional bail bondsmen can be found.

Some of the concerns about the professional bail bondsman are created by a media-drowned society, which fails to see the important functions that professional sureties serve in the community. Concerns that the idea of bail is contravened when the defendant's personal wealth is not at stake are answered by the thorough service bail bondsmen provide.

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144. *See supra* Part II.

145. The police have only about a 10% apprehension rate. *See* Minier, *supra* note 1, at B7.

146. *See* Comment, *supra* note 134, at 1105.

147. *See, e.g.*, ALA. CODE § 15-13-160 (1995); CAL. INS. CODE § 1802 (West 1993); CONN. GEN. STAT. ANN. § 29-145 (West 1990); FLA. STAT. ANN. § 648.34 (West 1996); IND. CODE § 27-10-3 (1998); KY. REV. STAT. ANN. § 304.34-030 (Michie 1988); MISS. CODE ANN. § 83-39-3 (1991); MO. ANN. STAT. § 374.710 (West 1991); NEV. REV. STAT. ANN. § 697.090 (Michie 1993); OKLA. STAT. ANN. tit. 59, § 1303 (West 1989); TEX. REV. CIV. STAT. ANN. art. 2372p-3 (West 1988 & Supp. 1996).

148. *See supra* notes 101-02 and accompanying text.

The ability to be free on bail is considered an important right worthy of protection. Freedom before trial helps a defendant prepare a defense, and bail bondsmen help more people take advantage of that right.

The old idea of bail has survived centuries, though it has changed in ways that the medieval English sheriffs who conceived of it could never have imagined. Despite the nearly constant rights of the surety, the face of the surety has changed as the nature of society has changed. No longer are people nontransitory and acquainted with everyone in the community. Now sureties are professionals, driven not only by the fear of losing personal wealth, but by the desire to turn a profit for their services. Striving for personal profit, the professional bail bondsman brings important benefits to the society in which he works. Changing the effective system of the status quo would be a mistake.