

# The Invisible Badge: Why Bounty Hunters Should Be Regarded as State Actors Under the Symbiotic Relationship Test [*United States v. Poe*, 556 F.3d 1113 (10th Cir. 2009)]

Stephen N. Freeland\*

*“I hunt down human beings and bring them back to justice.”<sup>4</sup>*

## I. INTRODUCTION

The night is still. The house is dark. Inside, three college roommates sleep quietly as the new day approaches. Suddenly, a loud crash shatters the peaceful calm. Armed men in dark clothes and body armor burst through the front door. They hustle up the stairs into a bedroom. Shining their blinding flashlights into the face of the startled occupant, they realize that they picked the wrong room and hurry down the hall. In the next room, they find their target—an individual who missed court earlier that day after being released on bail provided by a commercial bail bondsman. These armed men are bounty hunters, employed by the bondsman to return the absent defendant to custody. As private-contract enforcers, they enjoy considerable search-and-seizure privileges that the Constitution would normally prohibit.<sup>2</sup>

Consider the same hypothetical situation described above: Only the armed men are police officers. On the surface, the difference appears negligible. In both situations, armed men invade the sanctity of a home. However, police must submit a search-warrant affidavit to a neutral magistrate describing the persons or objects that the police intend to

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1. Realitybug.com, Dog the Bounty Hunter Show Updates: Catch 'em If You Can, May 23, 2008, <http://www.realitybug.com/dogthebountyhunter/update/89/Catch-em-If-You-Can> (quoting Duane Chapman “Dog the Bounty Hunter”).

2. See *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 371-72 (1872) (recognizing that once a person has taken bail, he or she can be seized by the bondsman or the bondsman’s agent at any time and at any place, and no further judicial oversight or permission is required); *People v. Houle*, 13 Cal. App. 3d 892 (1970) (holding that the exclusionary rule does not apply to evidence recovered by a bondsman due to private citizen status); *Nicolls v. Ingersoll*, 7 Johns. 145, 154 (N.Y. Sup. Ct. 1810) (stating that the bondsman has seizure authority because of the “nature” of the bail contract).

seize.<sup>3</sup> The search-warrant affidavit must establish probable cause that the persons or objects are present within the home before the magistrate will approve the warrant.<sup>4</sup> When executing the warrant, the police must stay within the boundaries of a reasonable search and seizure.<sup>5</sup> Police have knock-and-announce requirements and plain-view restrictions that they must respect.<sup>6</sup> Courts will normally use the exclusionary rule to suppress evidence when the police seize the evidence in violation of the Fourth Amendment.<sup>7</sup> In contrast, bounty hunters are not restricted by these constitutional limitations.<sup>8</sup>

In *United States v. Poe*,<sup>9</sup> the United States Court of Appeals for the Tenth Circuit for the first time faced the question of whether bounty hunters are state actors for Fourth Amendment purposes.<sup>10</sup> The court conservatively applied government-search tests from within the circuit and held that the bounty hunters were financially motivated private actors who did not intend to assist law enforcement.<sup>11</sup> With its decision, the Tenth Circuit joined the ranks of like-minded circuits that have rejected the notion of bounty hunters as state actors.<sup>12</sup> This Comment concludes that the Tenth Circuit should have broken new ground by providing a detailed examination of the functional role that modern bounty hunters fulfill in the U.S. justice system. Bounty hunters perform a vital role as quasi-law enforcement actors and in doing so provide multiple benefits for the state.<sup>13</sup> Therefore, courts should regard bounty hunters as state actors who are subject to constitutional restraints as they fulfill their law-enforcement role.

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3. See *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (“requiring [that search warrants include] a ‘particular description’ of the things to be seized”).

4. See *id.* (stating that “the magistrate’s scrutiny is intended to eliminate altogether searches not based on probable cause”).

5. See *United States v. Ramirez*, 523 U.S. 65, 71 (1997) (noting that “[t]he general touchstone of reasonableness which governs Fourth Amendment analysis . . . governs the method of execution of the warrant[.]” such that “[e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression”); see also *Coolidge*, 403 U.S. at 467 (holding that “searches deemed necessary should be as limited as possible” to guard against “a general, exploratory rummaging in a person’s belongings”).

6. See *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995) (holding “that [the] common-law ‘knock and announce’ principle forms a part of the reasonableness inquiry under the Fourth Amendment”); *Horton v. California* 496 U.S. 128, 135-37 (1990) (describing the limited circumstances under which police may seize evidence under the plain view doctrine).

7. See *Mapp v. Ohio*, 367 U.S. 643, 655, 656 (1961) (holding that “evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in . . . court” because “the exclusion[ary rule is] an essential part of the right to privacy”).

8. See JACQUELINE POPE, BOUNTY HUNTERS, MARSHALS, AND SHERIFFS: FORWARD TO THE PAST 4 (1998) (stating that “[r]ules of law and conduct under which police function [(including the need for a search warrant)] have no relevance for bounty hunters”).

9. 556 F.3d 1113 (10th Cir. 2009).

10. *Id.* at 1117.

11. *Id.* at 1123-24.

12. See *infra* Part III.D.3 (detailing the Fourth, Fifth, Eighth, and Ninth Circuits’ analysis of bounty hunters as state actors; of the four circuits to address the issue, only the Fourth Circuit ruled that bounty hunters should be regarded as state actors).

13. See *infra* Part V.B.

## II. CASE DESCRIPTION

A. *The Seizure*

On August 3, 2006, Aaron Dale Poe became a hunted man.<sup>14</sup> When he failed to appear for trial in Oklahoma state court, Johnson's Bail Bonds, the private bail bonds company that had contracted for his release from jail, hired five bounty hunters to retrieve him.<sup>15</sup> Poe was staying at the house of a friend, Kim Wilson, in Oklahoma City.<sup>16</sup> The bounty hunters quickly began surveillance of the home.<sup>17</sup> During their surveillance, a visitor arrived at the house and went inside to speak with Poe.<sup>18</sup> The bounty hunters took advantage of this distraction and rushed into the home to confront Poe.<sup>19</sup> They forced the visitor to the ground and violently wrestled Poe into submission.<sup>20</sup> During the struggle, the bounty hunters had to ward off two pit bulls that attacked them.<sup>21</sup>

The bounty hunters claimed that after they apprehended Poe, they saw in plain view a gun and what appeared to be drugs and drug-related paraphernalia.<sup>22</sup> The bounty hunters telephoned the Oklahoma City

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14. *Poe*, 556 F.3d at 1118.

15. *Id.*; Appellant's Brief at 4, United States v. Poe, 556 F.3d 1113 (10th Cir. 2009) (No. 07-6237). Poe had been charged in Oklahoma state court with possessing ammunition following a previous felony conviction. *Poe*, 556 F.3d at 1118; Brief of Plaintiff-Appellee at 1, United States v. Poe, 556 F.3d 1113 (10th Cir. 2009) (No. 07-6237). A jury later found Poe not guilty on this count. *Id.* at 4. Johnson's Bail Bonds had 90 days to find Poe and return him to custody or else forfeit the entire bond amount. Appellant's Brief, *supra*, at 4.

16. Brief of Plaintiff-Appellee, *supra* note 15, at 6. There was some debate as to the exact nature of the relationship between Poe and his friend, Kim Wilson. *Poe*, 556 F.3d at 1118 n.1. Both Agent Karen Hess, an agent for the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and one of the bounty hunters testified that Poe and Wilson were in a relationship. *Id.* However, "[o]thers, including Poe himself, testified that Wilson was an ex-girlfriend." *Id.*

17. See Appellant's Brief, *supra* note 15, at 4 (noting that the bounty hunters began surveillance on August 3, 2006, which is the same day the bounty hunters were hired to retrieve Poe). Before attempting to arrest Poe, two of the bounty hunters followed Kim Wilson to her workplace, where they confronted her about Poe's presence in her home. *Id.* Ms. Wilson left her house for work around 11:00 p.m. *Id.* She agreed to return with the bounty hunters so that they would not damage her front door with a forced entry. *Poe*, 556 F.3d at 1118. Neither the court's opinion nor any of the parties' briefs provide any facts to explain why Ms. Wilson believed that the bounty hunters would forcibly break into her home. See *id.* (giving no factual reasons for Ms. Wilson's fear). The Tenth Circuit states simply that she returned so that "they would not have to kick her door in." *Id.* Ms. Wilson did not consent to a search by the bounty hunters. *Id.* at 1118 n.2. Only after the bounty hunters apprehended Poe and the Oklahoma City Police arrived did she consent to a police search of her house. *Id.*

18. Brief of Plaintiff-Appellee, *supra* note 15, at 6-7. The visitor approached the back door of the house. *Id.* at 7. Poe answered the door and let him in, enabling the bounty hunters to positively identify Poe from their position. *Poe*, 556 F.3d at 1118. Later that evening, the police identified the visitor as Chris McGill and arrested him on outstanding warrants. *Id.* at 1119.

19. See Appellant's Brief, *supra* note 15, at 4.

20. *Poe*, 556 F.3d at 1118. The government's position was that the bounty hunters sat McGill on the ground. Appellant's Brief, *supra* note 15, at 8. In contrast, McGill testified that he was thrown to the ground and handcuffed by these men whom he thought were police officers. *Id.* at 15.

21. *Poe*, 556 F.3d at 1118. The bounty hunters responded by shooting one of the pit bulls with a Taser, forcing both dogs to retreat. *Id.*

22. *Id.* In contrast, McGill and Poe both testified at trial that most of the evidence recovered in the house was not in plain view, but rather the bounty hunters discovered it by rummaging through

Police Department, and shortly thereafter, an officer arrived on the scene.<sup>23</sup> The officer secured Ms. Wilson's consent to search the house and confirmed the presence of the gun, the drugs, and other contraband items.<sup>24</sup> The officer then arrested Poe, relieving the bounty hunters of custody.<sup>25</sup>

### B. The District Court

Following a four-count indictment on drug-trafficking and firearms charges, Poe stood trial in the United States District Court for the Western District of Oklahoma.<sup>26</sup> Poe moved to suppress the evidence recovered from Ms. Wilson's home.<sup>27</sup> He argued that the bounty hunters were "state actors" who had conducted an unreasonable search and seizure in violation of the Fourth Amendment.<sup>28</sup> Because the bounty hunters did not have a warrant when they entered Ms. Wilson's home—where Poe claimed he had an expectation of privacy—Poe asked the court to exclude the evidence discovered by the bounty hunters as "fruit of the poisonous tree."<sup>29</sup> Under this doctrine, the court will exclude evidence acquired through an unconstitutional search.<sup>30</sup>

The district court denied Poe's motion to suppress, holding that he did not have a reasonable expectation of privacy in Ms. Wilson's home.<sup>31</sup> The district court also held "that there was no 'search' for Fourth Amendment purposes."<sup>32</sup> Therefore, the district court ruled that

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desks and cabinets. See Appellant's Brief, *supra* note 15, at 16, 17-18 (giving both Poe and McGill's account of the bounty hunters' behavior).

23. Poe, 556 F.3d at 1118. The officer gave Poe his *Miranda* warnings, and Poe said that he understood his rights before claiming that the gun and the drugs belonged to him. *Id.* at 1118-19. At trial, Poe testified that he made this incriminating statement in order to protect Ms. Wilson and keep her out of jail. Appellant's Brief, *supra* note 15, at 18.

24. Poe, 556 F.3d at 1119. The officer only searched the room where Poe was apprehended, even though Ms. Wilson gave consent to search the entire house. *Id.* at 1119 n.4. The police seized from Ms. Wilson's house two guns, a video surveillance system monitoring various approaches to the house, several baggies containing differing amounts of methamphetamine, two sets of scales (digital and manual), and approximately 200 Ziploc bags. *Id.* at 1119. A drug expert testified at trial that drug distributors commonly use these items. *Id.*

25. *Id.*

26. Appellant's Brief, *supra* note 15, at 2-3. Count one was possession of ammunition in January 2006 following a previous felony conviction; count two was possession of a firearm and ammunition following a previous felony conviction; count three was "possession of methamphetamine with intent to distribute"; count four was "possession of a firearm in furtherance of a drug trafficking crime." *Id.* Counts two, three, and four were for offenses that allegedly occurred at Ms. Wilson's home on August 3, 2006. See *id.*

27. Poe, 556 F.3d at 1120.

28. *Id.* Poe particularly objected to the bounty hunters' lack of a search warrant. See *id.* (alleging "an unreasonable warrantless search") (emphasis added).

29. *Id.* (stating "fruit of the bounty hunters' unconstitutional search").

30. See *Wong Sun v. United States*, 371 U.S. 471, 484 (1963) (stating that "evidence seized during an unlawful search could not constitute proof against the victim of the search" and that such evidence would be excluded from trial).

31. Poe, 556 F.3d at 1120.

32. Brief of Plaintiff-Appellee, *supra* note 15, at 11-12. The district court determined "that the items which are key to this case were found . . . without the necessity of a search" because they were in plain view. Appellant's Brief, *supra* note 15, at 6.

Poe had no standing under the Fourth Amendment to challenge the search.<sup>33</sup> Having decided the threshold issue, the district court did not rule on whether the bounty hunters were acting as state actors.<sup>34</sup> Nevertheless, the district court suggested in dicta that it would not regard the bounty hunters as state actors.<sup>35</sup> A jury subsequently found Poe guilty on three of the four counts.<sup>36</sup>

### III. BACKGROUND

Before addressing the arguments made on appeal and the Tenth Circuit's decision, this Comment will examine the history of bounty-hunter involvement in the bail-bonds industry, the privileges granted to bounty hunters under the common law, and the statutory regulations that control bounty hunters today.<sup>37</sup> This background section will also address how different circuits view the issue of bounty hunters as state actors and the various tests courts use to determine when bounty hunter conduct becomes state action.<sup>38</sup>

#### A. *The History of Bounty Hunters*

Bounty hunters have roots stretching back to medieval England, where the practice of bail originated.<sup>39</sup> Many English counties did not

33. *Poe*, 556 F.3d at 1120. The district judge said that Poe was perhaps “little [more] than a trespasser,” a former boyfriend that just would not go away. Appellant’s Brief, *supra* note 15, at 6. As such, the court reasoned that Poe had no expectation of privacy. *See id.*

34. *Poe*, 556 F.3d at 1120. “[W]ithout reaching the state action issue,” the district judge “easily conclude[d]” that the motion to suppress should be denied. Appellant’s Brief, *supra* note 15, at 7. However, in dicta, the district court suggested that it would not have classified the bounty hunters as state actors. Brief of Plaintiff-Appellee, *supra* note 15, at 15.

35. Brief of Plaintiff-Appellee, *supra* note 15, at 14-15. In making this observation, the district court considered two cases: *United States v. Alexander*, 447 F.3d 1290 (10th Cir. 2006), and *People v. Houle*, 13 Cal. App. 3d 892 (1970). *Id.* at 15. The Tenth Circuit in *Alexander* used a two-pronged test “to determine whether a search by a private person should be classified as a government search.” 447 F.3d at 1295. The first prong was “whether the government knew of and acquiesced in the intrusive conduct,” and the second was “whether the party performing the search intended to assist law enforcement efforts or to further his own ends.” *Id.* (quoting *United States v. Souza*, 223 F.3d 1197, 1201 (10th Cir. 2000)). In *Houle*, the federal district court held that a bail bondsman was not a state actor (for purposes of the Fourth Amendment) when there was neither an agency relationship nor cooperative action between the bondsman and the police. 13 Cal. App. 3d at 895. According to the district court in Poe’s case, *Alexander’s* test and *Houle’s* holding supported the position that the bounty hunters were not state actors. *See* Brief of Plaintiff-Appellee, *supra* note 15, at 15.

36. *Poe*, 556 F.3d at 1120. Ironically, the one charge of which the court cleared Poe was the one that put him in jail and in need of bail in the first place (Count 1 was the January 2006 incident). *See* Appellant’s Brief, *supra* note 15, at 3. The judge sentenced Poe to 165 months in prison, “10 years of supervised release, and special assessments totaling \$300.” *Id.* at 3.

37. *See infra* Part III.A, B, & C.

38. *See infra* Part III.D.

39. *See* OLIVER WENDELL HOLMES, *THE COMMON LAW 195-97* (Mark DeWolfe Howe ed., Belknap Press 1967) (1881) (discussing the preserved English custom of suretyship, or bail, and noting that around “the reign of Edward III,” an English judge wrote on the structure and hazards of bail); *see also* 1 *ENCYCLOPEDIA OF CRIME AND PUNISHMENT* 94 (David Levinson ed., 2002) (stating that bail—to which bounty hunters are inextricably linked—“originated in English common law”); POPE, *supra* note 8, at 8 (stating that “[t]he current bail structure has its roots in English common law”); Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. TIMES, Jan. 29, 2008, available at <http://www.nytimes.com/2008/01/29/us/29bail.html> (stating that bail “has ancient

have resident magistrates, which forced the locals to rely on traveling magistrates who would appear for a short time, try the local cases, and then move on to the next county.<sup>40</sup> Because of the extended time between magistrate visits, the sheriff would release defendants to a friend or neighbor who would bear the responsibility of ensuring the defendant's appearance at the next magistrate's visit.<sup>41</sup> This practice put the custodians at risk, because if their charge fled or failed to appear in court, they could lose their lives.<sup>42</sup> Eventually, it became acceptable for a custodian to provide financial surety for the defendant's reappearance.<sup>43</sup>

When the bail bonds system came to the American Frontier, it transitioned from a personal to a commercial activity—private businesses replaced friends and neighbors as the defendants' surety.<sup>44</sup> Bail bondsmen, as they were called, would post bond for the defendant

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roots in English common law”).

40. WAYNE H. THOMAS, JR., *BAIL REFORM IN AMERICAN* 11 (1976). When judges would “travel[] ‘the circuit,’ going from town to town to hear cases and dispense justice[,]” months could pass in between their visits. 1 *ENCYCLOPEDIA*, *supra* note 39, at 94.

41. THOMAS, *supra* note 40, at 11. There were both financial and equitable reasons for the advent of bail. See 1 *ENCYCLOPEDIA*, *supra* note 39, at 94. Bail saved community resources that otherwise would be spent on the defendant's confinement. See *id.* Additionally, “it was considered unfair to detain in jail individuals who might later be acquitted.” *Id.* However, not all defendants were eligible for release on bail. *Id.* Crimes “such as treason, murder, and arson[] were not” bail-worthy offenses. *Id.* For some defendants, the weight of evidence against them was the deciding factor in their release. *Id.* According to Blackstone, a defendant in a manslaughter case who was “clearly the slayer,” could not be released, but one who was only “barely suspected,” could be bailed. *Id.*

42. See 1 *ENCYCLOPEDIA*, *supra* note 39, at 94 (stating that custodians “could be executed or fined if the defendant failed to appear for trial”); see also POPE, *supra* note 8, at 8 (noting that the custodian was “completely responsible and liable for the accused, so much so that he served the defendant's sentence, including death, if the accused failed to keep his/her court date”). Oliver Wendell Holmes, Jr. compared bail to “the surety of ancient law [which] was the hostage.” HOLMES, *supra* note 39, at 196. Holmes acknowledged the old English perception that the bailor, as the defendant's de facto jailor, could hang if the defendant escaped “‘body for body.’” *Id.* at 197 (citation omitted). See generally *Genesis* 42:19-20, 24 (in which Joseph allows his brothers to leave Egypt, but holds one of them hostage as surety for the others' return); *Acts* 16:27 (in which a jailor, believing his prisoners have escaped, prepares to commit suicide, presumably to escape the punishment that awaits him for allowing his charges to escape).

43. See THOMAS, *supra* note 40, at 11 (stating that the bail “system evolved to permit the custodian to forfeit a promised sum of money if the defendant failed to appear”); see also POPE, *supra* note 8, at 8 (noting that the people's aversion to “taking the defendant's place” helped lead to the adoption of financial surety). The transition from personal to financial surety was not meant to hinder the overall effectiveness of the bail system. See 1 *ENCYCLOPEDIA*, *supra* note 39, at 94 (stating that “[i]t was assumed that defendants' connection to their sureties would prevent them from jumping bail, and that the sureties' risk of losing their property would influence them to properly supervise the bailees”).

44. See 1 *ENCYCLOPEDIA*, *supra* note 39, at 94 (stating that previously “bail involved assurances by friends or family of the accused that they would ensure the defendant's appearance at trial”); Liptak, *supra* note 39 (noting that “America's open frontier and entrepreneurial spirit” allowed “private businesses . . . to post bail in exchange for payments from the defendants and the promise that they would hunt down the defendants and return them if they failed to appear”). Different reasons justified the transition from personal to commercial bail bonding. THOMAS, *supra* note 40, at 11. First, the Judiciary Act of 1789 and many state constitutions treated bail as an “absolute right” when the case was not a capital one. *Id.* at 11-12. Second, the early American population was so scattered and sparse that finding a personal custodian was more difficult. *Id.* at 12. Third, escape was such a real possibility that few individuals would voluntarily accept the risk of custodianship. See *id.*

in return for payment by the defendant, usually equal to ten percent of the bail amount.<sup>45</sup> However, should the defendant “skip” or “jump” bail, the bondsman would owe the entire bail amount to the court.<sup>46</sup> The financial liability that “no-show” defendants posed led many bondsmen to hire bounty hunters to ensure that their clients appeared for their court dates.<sup>47</sup> Modern bail bondsmen continue to use bounty hunters to recover fleeing defendants.<sup>48</sup>

### B. Common Law Treatment of Bounty Hunters

Early American case law helped shape the authority of bounty

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45. THOMAS, *supra* note 40, at 11. This Comment will use the term “bondsmen” because it is the industry title for people in this occupation even though a high percentage of bondsmen are women. See Gwynedd Stuart, *Female Persuasion: Female Bail Bond Agents Have Come to Dominate in Duval*, FOLIO WEEKLY, Sept. 2-8, 2008, at 15-16, available at <http://www.folioweekly.com/documents/September22008.pdf> (noting that forty-seven percent of all bail bond agents are female, but these women “still refer to themselves as ‘bondsmen’ and serve exactly the same function within the criminal justice system”).

46. Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731, 743 (1996). For further discussion of bail process, see *infra* note 47.

47. See *id.* at 750 (noting that because of the monetary risk for bondsmen, they “often hired bounty hunters to locate and retrieve defendants to ensure their proper appearance at trial”). Depending on the jurisdiction, there may be different types of bonds available for defendants looking for pretrial release. See 1 ENCYCLOPEDIA, *supra* note 39, at 95 (recognizing the different types of bail systems). Fully secured bail, or a cash bond, requires the defendant to “deposit with the court the full bond amount or collateral worth the full bond amount.” *Id.* Failure to appear for trial means the defendant will lose the full deposit and stand trial if found. *Id.* Because bonds are often too expensive for defendants to pay everything up front, “alternative bail systems” exist. *Id.* Most prevalent is the surety bond. MARCUS NIETO, PETER LEWICKI, & PAUL LEWICKI, WHAT ARE THE QUALIFICATIONS FOR BOUNTY HUNTERS IN CALIFORNIA? 8 (Nov. 2007), available at <http://www.library.ca.gov/crb/07/07-010.pdf>. With this bond, a bail bondsman “signs a promissory note to the court for the full bail amount and charges the defendant a fee for the service (usually 10 percent of the full bail amount).” *Id.* Because they will be “liable to the court for the full bail amount” if the defendant skips, many bondsmen also require “collateral from the defendant.” *Id.* Should the defendant skip, the bondsman “may receive a refund if a bounty hunter is able to return the [defendant] to court.” 1 ENCYCLOPEDIA, *supra* note 39, at 95. Deposit bonds are another bond alternative. See NIETO, *supra*, at 8. With deposit bonds, the defendant will post “a percentage (usually 10 percent) of the full bail amount” that the defendant will then get back at the end of the case. *Id.* However, failure to appear means the entire bail amount will be due. *Id.* There is also unsecured bail, where no money is put down, but the defendant will still be liable for the full amount if he or she skips. 1 ENCYCLOPEDIA, *supra* note 39, at 95. Even more generous is the recognizance bond where no fee incurs even if the defendant skips. *Id.* (noting this type of bond is used when defendants have been charged with “minor offenses” and the flight-risk is low). However, the defendant is still obligated to show up for trial; the court may issue a warrant for failure to appear. *Id.*

48. See 1 ENCYCLOPEDIA, *supra* note 39, at 94 (noting the legal rights and liberties of modern bail bondsmen and the bounty hunters they employ). Bounty hunters are also called “skip tracers.” *Id.* They are also called “bail enforcement agents.” REX VENATOR, MODERN BOUNTY HUNTING: A REAL-LIFE GUIDE FOR THE BAIL FUGITIVE RECOVERY AGENT 2 (2005). Statistics indicate that approximately 25% “of all released felony defendants fail to appear at trial,” and of these almost “30 percent [will] remain fugitives from the law” for up to a year. Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J.L. & ECON. 93, 93 (2004) (citing the State Court Processing Statistics (SCPS) program of the Bureau of Justice Statistics), available at <http://mason.gmu.edu/~atabarro/PublicvsPrivate.pdf>. Bounty hunters recapture an estimated 25,000 to 35,000 fugitives each year, meaning that they recapture around 95% of bail jumpers. *Id.* at 113 n.53 (noting that these statistics indicate “that almost all fugitives on surety bond are recaptured by [bounty hunters] and not by the police”).

hunters to search for and arrest fleeing defendants.<sup>49</sup> Many of the court decisions originated from civil suits by apprehended defendants, also called “principals,” who sued their capturers under tort law.<sup>50</sup> One of the early cases establishing bounty hunter authority was *Nicolls v. Ingersoll*.<sup>51</sup> In that case, the New York Supreme Court held that bondsmen had the right to apprehend, confine, and surrender their principals to the court whenever they wished.<sup>52</sup> The court also recognized the right of bondsmen to cross state lines, enter their principal’s house, and even break down the principal’s door if necessary.<sup>53</sup> The court compared bondsmen’s rights to those of a sheriff pursuing an escaped felon.<sup>54</sup>

In an 1869 decision, *Reese v. United States*,<sup>55</sup> the Supreme Court recognized bondsmen’s control over their principals’ movement and

49. See, e.g., *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366 (1872); *Reese v. United States*, 76 U.S. (9 Wall.) 13 (1869); *In re Von Der Ahe*, 85 F. 959 (C.C.W.D. Pa. 1898); *Read v. Case*, 4 Conn. 166 (1822); *Parker v. Bidwell*, 3 Conn. 84 (1819); *State v. Mahon*, 3 Del. 568 (1841); *Turner v. Wilson*, 49 Ind. 581 (1875); *State v. Cunningham*, 10 La. Ann. 393 (1855); *Nicolls v. Ingersoll*, 7 Johns. 145 (N.Y. Sup. Ct. 1810); *State v. Lingerfelt*, 109 N.C. 775 (1891); *Holsey v. Trevillo*, 6 Watts 402 (Pa. 1837); *Broome v. Hurst*, 4 Yeates 123 (Pa. 1804); *Respublica v. Gaoler of Philadelphia*, 2 Yeates 263 (Pa. 1798); *Worthen v. Prescott*, 60 Vt. 68 (1887). Although many of the court opinions in this Comment address only the rights of bail bondsmen, because of the agency relationship between bondsmen and bounty hunters, the opinions are applicable to both sides. See Drimmer, *supra* note 46, at 732-33 n.2 (stating that his “analysis of the rights of and restrictions on bounty hunters [was] equally germane to bondsmen”). Consequently, unless a distinction is made between the rights of bondsmen and the rights of bounty hunters, the reader should assume the terms “bondsmen” and “bounty hunters” to be interchangeable with respect to their legal privileges.

50. See *In re Von Der Ahe*, 85 F. at 959 (involving assault and false imprisonment); *Parker*, 3 Conn. at 84 (involving “trespass, assault and battery, and . . . false imprisonment”); *Nicolls*, 7 Johns. at 145 (involving “trespass, assault and battery, and . . . false imprisonment[ ]”).

51. 7 Johns. 145 (N.Y. Sup. Ct. 1810).

52. *Id.* at 156. The key to a bondsman’s authority over his principal is the private contractual nature of the bail agreement. See *id.* at 154 (noting that “[t]he power of taking and surrendering is not exercised under any judicial process, but results from the nature of the undertaking by the bail”). Citing “the books” on bail, the court stated that bondsmen “have their principal always upon a string, which they may pull whenever they please.” *Id.* at 153. Presumably quoting from the same source, counsel for the bounty hunter stated:

The doctrine is this; the bail may take the principal when and where he pleases; no time is so holy on which it may not be done; no place is so sacred into which he may not enter for that purpose. He has the principal always on a string, and though extended to the remotest corner of the earth, he may pull it when he pleases.

*Id.* at 151. But see *Read*, 4 Conn. at 171-72 (Peters, J., dissenting) (discussing the privileges of bail bondsmen). In his dissent, Judge Peters acknowledged that the bailor could apprehend his principal at all times and could even “break into his bed-chamber[] at mid-night, and drag him from his wife and children [without giving prior] notice [or showing] necessity” for the apprehension. *Id.* at 171. However, Judge Peters also stated that while the principal “may have been bound to submit to his bail, because he knew him, and had voluntarily committed himself to his custody[, the principal] was not bound to submit to the agent of his bail, a mere stranger . . .” *Id.* Judge Peters concluded that “no one can justify the breaking open [of] another’s doors to make an arrest, unless he first signify to those in the house the cause of his coming, and request them to give him admittance.” *Id.* at 171-72.

53. *Nicolls*, 7 Johns. at 154. The right to forceful apprehension is “a necessary consequence” of the bail agreement. *Id.* at 156. But see *Mahon*, 3 Del. at 569 (stipulating that a “person having authority to arrest another must do it peaceably, and with as little violence as [possible, for] if no resistance be offered or attempt at escape, he has no right rudely and with violence, to seize and collar his prisoner”).

54. *Nicolls*, 7 Johns. at 156 (noting that the bondsman’s power is “analogous to that of the sheriff, who may break open an outer door to take a prisoner, who has escaped from arrest”).

55. 76 U.S. (9 Wall.) 13 (1869).

their right to return them to the court at any time.<sup>56</sup> A few years later, in *Taylor v. Taintor*,<sup>57</sup> the Supreme Court reaffirmed the common law privileges of bondsmen and bounty hunters.<sup>58</sup> Closely mirroring the *Nicolls* opinion, the Supreme Court said that bondsmen could seize their principals at any time, detain them until trial, pursue them across state lines, and even break into their homes if necessary.<sup>59</sup> The Supreme Court also said that bondsmen could exercise this power themselves or appoint a bounty hunter to act as an agent on their behalf.<sup>60</sup>

Although sometimes criticized,<sup>61</sup> the “Rule of *Taylor*” remains in effect today and continues to influence court decisions involving bondsmen and bounty hunters.<sup>62</sup> *Taylor* affirmed the common law rule that the right of apprehension stems from the contractual relationship between bondsmen and their principals.<sup>63</sup> Therefore, as long as

56. *Id.* at 21. “[T]here is an implied covenant on the part of the principal with his [bondsmen], when he is admitted to bail, that he will not depart out of this territory without their assent.” *Id.* at 21-22.

57. 83 U.S. (16 Wall.) 366 (1872).

58. *See id.* at 371.

59. *Id.* In frequently quoted dicta the Court said:

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

*Id.*

60. *See id.* (stating that bondsmen “may exercise their rights in person or by an agent”). By recognizing the authority of the bondman’s agents, the U.S. Supreme Court in *Taylor* validated the holding in *Nicolls* where the New York Supreme Court held that bondsmen could authorize an agent or deputy to exercise the power of arrest for them. *See Nicolls v. Ingersoll*, 7 Johns. 145, 152 (N.Y. Sup. Ct. 1810) (finding no reason “against allowing [the bondsman’s] power to be exercised by an agent or deputy”). The New York court held that “[i]t is a general rule of law, even with respect to public officers, that their ministerial acts may be performed by deputy.” *Id.*

61. *See* Todd C. Barsumian, Note, *Bail Bondsmen and Bounty Hunters: Re-Examining the Right to Recapture*, 47 DRAKE L. REV. 877, 887-88 (1999) (noting that some critics have called the “Rule of *Taylor*” mere dicta).

62. Rebecca B. Fisher, *The History of American Bounty Hunting as a Study in Stunted Legal Growth*, 33 N.Y.U. REV. L. & SOC. CHANGE 199, 205 (2009). The holding in *Taylor* is “powerful as precedent because it applied an old principle [from medieval England] to an entirely new set of material conditions, thus undermining the potential of future arguments that social facts have changed.” *Id.*

63. *See* Fisher, *supra* note 62, at 209 (noting that *Taylor* “locat[ed] the source of bounty hunters’ legal authority in the private contract between the surety and the principal”); *see, e.g., Fitzpatrick v. Williams*, 46 F.2d 40, 40 (5th Cir. 1931) (holding that the “right of the surety to recapture his principal is not a matter of criminal procedure, but arises from the private undertaking implied in the furnishing of the bond”); *In re Von Der Ahe*, 85 F. 959, 960 (C.C.W.D. Pa. 1898) (noting the bondsman’s authority to arrest his principal “is based upon the relationship which the parties have established between themselves, and consequently, as between the parties, is not confined to any locality or jurisdiction”); *Shifflet v. State*, 560 A.2d 587, 590 (Md. Ct. Spec. App. 1989) (approving the lower court’s ruling that “under the law, the person who is in the position of serving as custodian of someone out on bail, in other words the bail bondsman, has a contractual right to” apprehend that person); *Nicolls*, 7 Johns. at 152-53 (holding “that the right to surrender [the principal back to judicial custody] results from the relation between the bail and principal” and that “[t]he power of taking and surrendering is not exercised under any judicial process, but results from the nature of the undertaking by the bail”).

bondsmen and defendants continue to form bail contracts, the Rule of *Taylor* will authorize bounty hunters' arrest privileges, unless contradicting state statutes dictate otherwise.<sup>64</sup>

### C. Statutory Regulations

In August 1997, five men claiming to be bounty hunters broke into a Phoenix home, killing two people in the process.<sup>65</sup> Although these men were not actually bounty hunters, the incident revealed to the public a general absence of bounty hunter regulations.<sup>66</sup> After the Phoenix shooting, many state politicians began introducing legislation to regulate bounty hunters.<sup>67</sup> In 1998, fourteen states proposed bounty hunter regulation bills, and twenty-six states proposed similar legislation the following year.<sup>68</sup> Although not all of the bills passed, the movement towards regulation of bounty hunters and the bail bond industry had begun.<sup>69</sup>

Currently forty-six states have statutes that regulate the bail bond industry in some way,<sup>70</sup> while the remaining four—Illinois, Kentucky, Oregon, and Wisconsin—prohibit commercial bondsmen and bounty hunters.<sup>71</sup> The State of Oklahoma extensively regulates its commercial

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64. See *Linder v. State*, 734 S.W.2d 168, 171 (Tex. Ct. App. 1987) (holding that “the common law rule as pronounced in *Taylor* is not the law in Texas since statutory guidelines have been promulgated and interpreted by Texas’ courts to define the law as it applies to sureties who seek to surrender principals”); Fisher, *supra* note 62, at 209 (noting “that so long as [bail] contracts continue to be made, and legislatures do not act to regulate them, bounty hunters will maintain the same legal authority as under common law”).

65. See Todd S. Purdum, *Bounty Hunter Raid Stirs Outcry and Baffles Police*, N.Y. TIMES, Sept. 6, 1997, <http://www.nytimes.com/1997/09/06/us/bounty-hunter-raid-stirs-outcry-and-baffles-police.html>. The self-professed bounty hunters supposedly believed they were breaking into the house of a man that had skipped bail in California. *Id.* Believing the men to be burglars, one occupant shot at the invaders, igniting a brief but deadly gun battle that left two dead and two wounded. *Id.*

66. Ann L. Merry, Comment, *S.B. 1257: Arizona Regulates Bounty Hunters*, 31 ARIZ. ST. L.J. 229, 231-32 (1999). In 1997, three states (Indiana, Nevada, and North Carolina) required bounty hunters to be licensed, and one state (Texas) required bounty hunters to secure warrants and the assistance of licensed private investigators/security guards. Purdam, *supra* note 65. Four states (Florida, Illinois, Kentucky, and Oregon) had no commercial bail bonds system. *Id.*

67. American Bail Coalition, *Compendium of State Bounty Hunter Laws*, [http://www.americanbailcoalition.com/new\\_html/compendium.htm](http://www.americanbailcoalition.com/new_html/compendium.htm) (last visited Oct. 7, 2009) (calling the enactment of bounty hunter legislation a “knee jerk reaction” to the Phoenix shooting even though the intruders were not bounty hunters).

68. *Id.*

69. *Id.* “By the end of April 2000, ten states had added bounty hunter specific provisions to their codes, and 13 states had pending legislation for that purpose.” *Id.*

70. See VENATOR, *supra* note 48, at 147-58 (summarizing state recognition and regulation of the bail bonds industry). Of these forty-six, Florida, North Carolina, and South Carolina allow bounty hunters to be “bail runners” (working for only one bondsman at a time), but they prohibit freelance bounty hunting. *Id.* at 149, 153-55. Not all states that regulate the recovery of bail jumpers distinguish between bondsmen and their contracted bounty hunters. American Bail Coalition, *supra* note 67 (noting that “[n]ot all [states] have laws making a distinction between the bondsman and his contracted agent, the bail recovery agent/bounty hunter”).

71. NIETO, *supra* note 47, at 1. However, Oregon is considering legalizing commercial bondsmen and bounty hunters; the current House Bill 2682 would require an interim committee to study the issue before the next legislative session. Janie Har, *Bounty Hunters May Soon Ply Their Trade in Oregon*, OREGONIAN, June 5, 2009, <http://www.oregonlive.com/politics/index.ssf/2009/06/>

bondsmen.<sup>72</sup> Oklahoma's commercial bondsmen must obtain a license from the state,<sup>73</sup> meet fitness and educational requirements,<sup>74</sup> and maintain certain standards of conduct.<sup>75</sup> Oklahoma authorizes its bondsmen to apprehend their principals at any time, anywhere within the state.<sup>76</sup> Bondsmen can also "empower any officer or person of suitable age and discretion" to make the arrest for them.<sup>77</sup> Aside from the "suitable age and discretion" requirement, the State of Oklahoma does little to constrain bounty hunters.<sup>78</sup>

Despite persistent effort, attempts to control bounty hunters through federal legislation have failed.<sup>79</sup> H.R. 3168, "Citizen Protection Act of 1998," would have made bounty hunters subject to the same laws and constitutional constraints as police.<sup>80</sup> However, the subcommittee hearing raised concerns over the vicarious liability that the bill created for states and commercial bondsmen.<sup>81</sup> Responding to these objections,

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bounty\_hunters\_may\_soon\_ply\_th.html. The bill, which has passed in the House, now heads to the Senate. *Id.* The bondsmen's lobbyist insists "that . . . there are criminals living in Oregon who are literally thumbing their noses at the law." *Id.* There is evidence to support the fact "that states that ban commercial bail pay a high price" by having a failure-to-appear rate that is "approximately 30 percent . . . higher." Helland, *supra* note 48, at 114.

72. VENATOR, *supra* note 48, at 154. See generally OKLA. STAT. tit. 59, §§ 1301-1340 (2003).

73. See OKLA. STAT. tit. 59, § 1303 (stating that "[n]o person shall act in the capacity of a bail bondsman or perform any of the functions, duties or powers prescribed for bail bondsmen . . . unless that person shall be qualified and licensed as provided" by state statute).

74. See *id.* §§ 1308(A), 1308.1, 1305 (requiring prospective bondsmen to have good character and reputation, to have no prior felony conviction, to take a written examination, to pay appropriate fees, and to maintain the bail license through continuing bail education).

75. See *id.* §§ 1305, 1310, 1315 (requiring bondsmen to actively engage in bail bond business, to maintain honest and fair dealings, and to avoid committing felonies or misdemeanors involving "moral turpitude or dishonesty").

76. See OKLA. STAT. tit. 22, § 1107 (2003) (stating that "[a]ny party charged with a criminal offense and admitted to bail may be arrested by his bail at any time before they are finally discharged, and at any place within the state . . . or by . . . any officer or person of suitable age and discretion" empowered by the bondsman).

77. *Id.*

78. VENATOR, *supra* note 48, at 154. However, if the bounty hunters are from out of state, a peace officer or licensed bondsman must accompany them while they apprehend principals. See OKLA. STAT. tit. 59, § 1750.14 (2000) (stating that any nonresident "who apprehends in this state, or attempts to apprehend a defendant, who . . . has forfeited bail, shall be required to be accompanied at the time of the apprehension by a peace officer or a person licensed in this state as a bail bondsman").

79. See NIETO, *supra* note 47, at 1 (noting that "[c]ongressional attempts during the 106th and 109th sessions to legislate bounty hunter licensing or certification requirements, similar to what many states have enacted failed primarily because of concerns over proposed civil and criminal liability provisions").

80. See *Citizen Protection Act of 1998: Hearing on H.R. 3168 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 9 (1998) [hereinafter *Hearing on Citizen Protection Act*] (statement of Rep. Canady, Chairman, Subcomm. on the Constitution) (stating that the bill would make "bail bondsmen and bounty hunters subject to the type of criminal and civil liability that state actors . . . are subjected to when violations of individual's [*sic*] constitutional rights occur"), available at [http://commdocs.house.gov/committees/judiciary/hju59922.000/hju59922\\_0.htm](http://commdocs.house.gov/committees/judiciary/hju59922.000/hju59922_0.htm). The bill would have subjected bounty hunters "to section 1983 liability, clarified that bounty hunters are agents of sureties for purposes of liability, and required bounty hunters to notify local law enforcement of their presence in-state." Fisher, *supra* note 62, 200 n.10.

81. *Hearing on Citizen Protection Act*, *supra* note 80, at 183, 186 (statements of Rep. Hutchinson). An opponent of the bill argued that imposing strict liability on bondsmen for the conduct of bounty hunters was unfair and would ultimately cripple the bail bonds industry. *Id.* at 183 (statement of Jerry Watson, Counsel, National Association of Bail Insurance Companies) (arguing

the drafters revised and resubmitted the bill for approval.<sup>82</sup> However, the subcommittee also raised objections to the revised version,<sup>83</sup> and the bill never made it through the committee.<sup>84</sup> The most recent attempt to regulate bounty hunters was H.R. 2621, “Bounty Hunter Responsibility Act of 2005,”<sup>85</sup> which faced similar objections and died in committee.<sup>86</sup> Though perhaps less prevalent than before, the incidents of misconduct continue to occur as bounty hunters abuse their legal privileges.<sup>87</sup>

#### D. Bounty Hunters as State Actors

Even though the Tenth Circuit considered the question of whether bounty hunters are state actors as a matter of first impression, the court had previously addressed state action tests.<sup>88</sup> In addition to this

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that the joint liability provision of the bill would be an unfair burden for the bail bond industry). The opposition also argued that defining bounty hunters as state actors would encourage lawsuits against the states for bounty hunter misconduct. *Id.* at 186 (statement of Rep. Hutchinson). Furthermore, opponents argued that the bill unnecessarily federalized an issue that is traditionally the responsibility of the state—the regulation of bondsmen and bounty hunters. *Id.* at 188.

82. *Bounty Hunter Responsibility Act of 1999; Hearing on H.R. 2964 Before the Subcomm. on the Constitution, of the H. Comm. on the Judiciary*, 106th Cong. 15 (2000) [hereinafter *Hearing on Bounty Hunter Responsibility Act*] (statement of Rep. Hutchinson), available at [http://commdocs.house.gov/committees/judiciary/hju65062.000/hju65062\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju65062.000/hju65062_of.htm). The bill relieved bondsmen of vicarious civil liability for bounty hunter misconduct if the bondsmen had “taken all reasonable steps to assure that the bounty hunter [was] licensed. . . .” *Id.* at 15. The bill also provided that parties who brought “frivolous lawsuits” against bail bondsmen would bear all legal costs. *Id.* Finally, the bill asked “the Attorney General to design model guidelines for States to use if they choose to regulate bounty hunters within their borders.” *Id.*

83. See generally *Hearing on Bounty Hunter Responsibility Act*, *supra* note 82, at 42-49 (statement of Jerry Watson, General Counsel, National Association of Bail Insurance Companies). Watson highlighted several of the key objections to the bill: (1) bounty hunters and bondsmen were inappropriately lumped together; (2) the category of state actors would be expanded beyond judicial intent; (3) states would lose incentive to regulate the industry; and (4) the bill would ultimately hinder the entire bail bonds industry. *Id.*

84. *Bounty Hunter Responsibility Act of 1999*, H.R. 2964, 106th Cong. (1999) (indicating that the H.R. 2964 never moved past the Subcommittee).

85. See *Bounty Hunter Responsibility Act of 2005*, H.R. 2621, 109th Cong. § 2 (2005) (clarifying that for purposes of 42 U.S.C. § 1983, any surety, surety’s agent, or bounty hunter seeking to apprehend a bail jumper would be “acting under color of a statute, ordinance, regulation, custom, or usage of that State,” thus making them state actors for purposes of civil liability), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_bills&docid=f:h2621ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h2621ih.txt.pdf).

86. See NIETO, *supra* note 47, at 1 (stating that the attempt to regulate during the 109th Congress, the *Bounty Hunter Responsibility Act of 2005*, failed due to concerns over “proposed civil and criminal liability provisions”).

87. See, e.g., Keegan Hamilton, *It’s No Country for Old Bail Bondsmen. Just Ask Jerry Cox*, RIVERFRONT TIMES, Dec. 9, 2008, <http://www.riverfronttimes.com/2008-12-10/news/it-s-no-country-for-old-bail-bondsmen-just-ask-jerry-cox/1>; Bryn Mickle, *Trio of Michigan Bounty Hunters Facing Charges in Shooting of Flint Fugitive in Arizona*, FLINT JOURNAL, June 2, 2009, [http://www.mlive.com/news/flint/index.ssf/2009/06/trio\\_of\\_michigan\\_bounty\\_hunter.html](http://www.mlive.com/news/flint/index.ssf/2009/06/trio_of_michigan_bounty_hunter.html); Thomas J. Morgan, *Woonsocket Police Arrest 2 “Bounty Hunters,”* PROVIDENCE JOURNAL, June 10, 2009, [http://www.projo.com/news/content/MUTINY\\_ON\\_THE\\_BOUNTY\\_HUNTERS\\_06-10-09\\_8KELS18\\_v12.3db5cd0.html](http://www.projo.com/news/content/MUTINY_ON_THE_BOUNTY_HUNTERS_06-10-09_8KELS18_v12.3db5cd0.html).

88. See, e.g., *United States v. Alexander*, 447 F.3d 1290, 1295-97 (10th Cir. 2006) (holding that an inmate was not a state actor when he volitionally induced a fellow inmate’s confession); *Johnson v. Rodrigues*, 293 F.3d 1196, 1206 (10th Cir. 2002) (holding that Utah’s adoption laws did not transform private parties—the child’s biological mother, adoptive parents, and adoption agency—into state actors); *United States v. Souza*, 223 F.3d 1197, 1202 (10th Cir. 2000) (holding that the actions of government narcotics agents, who induced a UPS employee to open a suspicious mail parcel that incriminated the defendant, made the search attributable to the state); *United States v. Smythe*, 84 F.3d 1240, 1243 (10th Cir. 1996) (holding that a bus station manager who merely

precedent, the court could have turned for guidance to other circuits that had already wrestled with the specific issue of whether bounty hunters were state actors.<sup>89</sup>

### 1. Finding State Action

Title 42 U.S.C. § 1983 provides a civil cause of action for the deprivation of rights secured by the Constitution when the deprivation is committed “under color of [state law].”<sup>90</sup> Bounty hunters raise potential deprivation issues under the Fourth and Fourteenth Amendments because of the intrusive nature of their work.<sup>91</sup> Because common law and statutory law authorize bounty hunters to make arrests, bounty hunters seemingly satisfy the requirement of conduct “under color of [state law].”<sup>92</sup> Consequently, many victims of bounty hunter abuse choose to sue under § 1983.<sup>93</sup>

However, in *Lugar v. Edmondson Oil Co.*,<sup>94</sup> the Supreme Court indicated that the inquiry was not so simple.<sup>95</sup> The Court held that when the constitutional right at stake has a state-action requirement, which most do,<sup>96</sup> the plaintiff must show the intrusive conduct was committed through state action.<sup>97</sup> A finding of culpable state action will

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consulted with police before opening a suspicious package was performing a private search and not performing a state search); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1457 (10th Cir. 1995).

89. See generally *Dean v. Olibas*, 129 F.3d 1001 (8th Cir. 1997); *Landry v. A-Able Bonding, Inc.*, 75 F.3d 200 (5th Cir. 1996); *Jackson v. Pantazes*, 810 F.2d 426 (4th Cir. 1987); *Jaffe v. Smith*, 825 F.2d 304 (11th Cir. 1987); *Ouzts v. Md. Nat'l Ins. Co.*, 505 F.2d 547 (9th Cir. 1974); *Green v. Abony Bail Bond*, 316 F. Supp. 2d 1254 (M.D. Fla. 2004); *McCoy v. Johnson*, 176 F.R.D. 676 (N.D. Ga. 1997).

90. 42 U.S.C. § 1983 (2000). In relevant part, the statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . . .

*Id.*

91. See U.S. CONST. amend. IV (protecting “against unreasonable searches and seizures”); U.S. CONST. amend XIV, § 1 (prohibiting states from depriving citizens of “life, liberty, or property, without due process of law”).

92. See generally *supra* note 39 (providing common law bounty hunter authority); *infra* note 217 (listing various state statutes that grant bounty hunters powers of arrest).

93. *Fisher*, *supra* note 62, at 209.

94. 457 U.S. 922 (1982). In his § 1983 lawsuit, the plaintiff argued that through the pre-judgment attachment of his property, his creditor “had acted jointly with the State to deprive him of his property without due process of law.” *Id.* at 925. The Supreme Court agreed and held that a finding of state action satisfied the “under color of state law requirement.” *Id.* at 942.

95. See *id.* at 935 n.18.

96. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978) (holding that “most rights secured by the Constitution are protected only against infringement by governments”). Although *Lugar* discussed the state action requirement of the Fourteenth Amendment, the discussion is equally applicable to a Fourth Amendment violation, as noted by the Tenth Circuit in *Poe's* case. *United States v. Poe*, 556 F.3d 1113, 1124 n.14 (10th Cir. 2009).

97. *Lugar*, 457 U.S. at 923. The state action requirement is intended to “preserve individual freedom by limiting the reach of federal law and federal judicial power.” *Id.* at 936. Additionally,

then satisfy the § 1983 requirement of “under color of state law.”<sup>98</sup> Consequently, lawsuits against bounty hunters under § 1983 for constitutional violations must establish state action.<sup>99</sup>

In *Lugar*, the Supreme Court furnished a two-part test for determining when state action exists.<sup>100</sup> “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.”<sup>101</sup> “Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.”<sup>102</sup> If the party charged with the deprivation has the “official character” of a state or government official, such as a police officer, then the two parts “collapse into each other.”<sup>103</sup> However, if no “apparent [state] authority” exists, as in the case of bounty hunters enforcing a private contract, then both parts must be satisfied before the private party’s conduct will be “attributable to the state.”<sup>104</sup>

Because of the increased state regulation of the bail bonds industry, courts usually hold that the first prong of *Lugar* is satisfied in § 1983 suits against bounty hunters.<sup>105</sup> Specifically, the courts regard the

the state action requirement “avoids imposing on the State[s], its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.” *Id.*

98. *See id.* at 935. The Supreme Court qualified this holding, noting that “state action” and “action under color of state law” remain two different inquiries. *Id.* at 935 n.18. The Court found that although in the case at hand “the state-action requirement of the Fourteenth Amendment satisfie[d] the statutory requirement of action under color of state law,” the reverse would not always be the case. *Id.*

99. *See generally* Landry v. A-Able Bonding, 75 F.3d 200 (5th Cir. 1996); Jackson v. Pantazes, 810 F.2d 426 (4th Cir. 1987); Green v. Abony Bail Bond, 316 F. Supp. 2d 1254 (M.D. Fla. 2004).

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

101. *Id.*

102. *Id.* The Supreme Court held that a party can be regarded as a state actor “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.* Poe argued that the bounty hunters were state actors under the third qualification. *See* Appellant’s Reply Brief at 4, United States v. Poe, 556 F.3d 1113 (10th Cir. 2009) (No. 07-6237) (arguing that “bondsmen’s conduct is chargeable to the [s]tate”).

103. *Lugar*, 457 U.S. at 937 (stating that while the two parts “collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions,” the two parts would “diverge when the constitutional claim is directed against a party without such apparent authority, *i.e.*, against a private party”).

104. *Id.* In his brief, Poe argued that the bounty hunters were state actors because their action was “attributable to the state” of Oklahoma. *See* Appellant’s Brief, *supra* note 15, at 25-26.

105. *See, e.g.*, Dean v. Olibas, 129 F.3d 1001, 1005 (8th Cir. 1997) (holding that the bondsman “exercised a right—the right to have fugitives arrested—having its source in state authority”); Landry v. A-Able Bonding, 75 F.3d 200, 204 (5th Cir. 1996) (holding that since “Louisiana law allows bail bondsmen to arrest their principals for purposes of returning them to detention facility officers,” the plaintiff had “satisfied the first prong of the *Lugar* test, by alleging that his deprivation was caused by the exercise of a privilege created for bail bondsmen by the State of Louisiana”); Jackson v. Pantazes, 810 F.2d 426, 429 (4th Cir. 1987) (holding that the bondsman “was exercising powers conferred on him by state law”); Green v. Abony Bail Bond, 316 F. Supp. 2d 1254, 1259 (M.D. Fla. 2004) (holding authority to arrest “was derived from Florida law”); McCoy v. Johnson, 176 F.R.D. 676, 680 (N.D. Ga. 1997) (holding the right to arrest was granted by Georgia common law); Bailey v. Kenney, 791 F. Supp. 1511, 1521 (D. Kan. 1992) (holding that Kansas law grants bondsmen both a statutory and common law right to arrest). *But see* Ouzts v. Md. Nat’l Ins. Co., 505 F.2d 547, 553 (9th Cir. 1974) (holding that out-of-state bondsmen were acting upon the authority of their private contract of bail, not California law).

statutory power of arrest given to bondsmen and their agent bounty hunters to be a state-created privilege.<sup>106</sup> Nevertheless, plaintiffs face more difficulty proving the second prong—that bounty hunters are state actors.<sup>107</sup> The Supreme Court ruled that being a state actor required more than solely acting pursuant to statutory authority.<sup>108</sup> Calling the question a “necessarily fact-bound inquiry,” the Supreme Court has recognized four tests that courts can use to identify state actors: (1) the “public function” test; (2) the “state compulsion” test; (3) the “nexus” (or “symbiotic relationship”) test; and (4) the “joint action test.”<sup>109</sup>

## 2. State Actor Tests for Bounty Hunters

The two tests most relevant to bounty hunters are the “joint action” test<sup>110</sup> and the “nexus” or “symbiotic relationship” test.<sup>111</sup>

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106. See *supra* note 105.

107. Compare *Landry*, 75 F.3d at 204-05, *Dean*, 129 F.3d at 1006, *Ouzts*, 505 F.2d at 554-55, *Green*, 316 F. Supp. 2d at 1261, and *McCoy*, 176 F.R.D. at 682, with *Jackson*, 810 F.2d at 430, and *Bailey*, 791 F. Supp. at 1523.

108. *Lugar*, 457 U.S. at 938-39.

109. *Id.* at 939. However, the Supreme Court did not resolve whether the “different tests [were] actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation” (with the “situation” being whether a private party should be regarded as a state actor). *Id.* The “public function” test applies when a private party performs “a function ‘traditionally exclusively reserved to the State.’” *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1456 (10th Cir. 1995) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974)). The strict requirements of this test make it difficult to satisfy. See *Flagg Bros., Inc. v. Brooks* 436 U.S. 149, 158 (1978) (noting that although “many functions have been traditionally performed by governments, very few have been ‘exclusively reserved to the State’”) (citation omitted). Some of the functions the Supreme Court has recognized “include administering elections of public officials, . . . the operation of a company-owned town, . . . and the management of a city park . . . .” *Gallagher*, 49 F.3d at 1456. The Supreme Court did not regard child education, “nursing home care,” or “enforcement of statutory lien by a private warehouse” as “exclusive state function[s].” *Id.* Some courts have expressly rejected the public function test as it relates to bounty hunters. See, e.g., *Green*, 316 F. Supp. 2d at 1260 (holding that the plaintiff did not establish that the bondsmen “were performing a public function that was traditionally within the exclusive prerogative of [Florida]”); *McCoy*, 176 F.R.D. at 680 (holding that “the authority to arrest does not appear to be a power that is traditionally the exclusive prerogative of the state”). But see *Hearing on Bounty Hunter Responsibility Act*, *supra* note 82, at 101 (statement of Sheldon Nahmod, Professor of Law, Chicago-Kent Law School, opining that the public function test was perhaps “the soundest basis for finding the challenged conduct of sureties, their agents and bounty hunters to be state action”). Similarly, courts rarely apply the “state compulsion” test to bounty hunters because while states doubtlessly benefit from the bounty hunters’ work, they hardly force or compel the bounty hunters to apprehend escaped principals. See *id.* at 100 (stating that “[s]ince sureties, their agents and bounty hunters are ordinarily not compelled by the state to seek to obtain or exercise custody, it is not likely that their allegedly unconstitutional conduct would constitute state action” under the state compulsion test). See generally *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 169-71 (1970) (discussing the state compulsion test).

110. See *Bailey v. Kenney*, 791 F. Supp. 1511, 1523 (D. Kan. 1992) (holding that the joint action of a bondsman and police officer transformed the bondsman into a state actor, thus, fulfilling the second prong of *Lugar*); see also *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1453 (10th Cir. 1995) (stating that in applying the joint action test, “courts examine whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights”); *Jackson v. Pantazes*, 810 F.2d 426, 429 (4th Cir. 1987).

111. See *Jackson*, 810 F.2d at 430 (recognizing that bondsmen can qualify as state actors if the relationship between them and the state is interdependent or “symbiotic”); see also *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (holding that because the state “so far insinuated itself into a position of interdependence with [the private party,] it must be recognized as a joint participant in the challenged activity”); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172-73 (1972)

Courts will apply the joint action test when bounty hunters act in concert with official state agents.<sup>112</sup> Because bounty hunters often enlist local police to help make an arrest, the joint action test often applies to bounty hunters and is by far the clearest indication of state action.<sup>113</sup>

Less frequently applied, the symbiotic relationship test finds state action when the private entity shares a mutually dependant and beneficial relationship with the state.<sup>114</sup> As with the other state-action tests, the challenged conduct must be fairly attributable to the state.<sup>115</sup> In *Burton v. Wilmington Parking Authority*,<sup>116</sup> the Supreme Court held that an interdependent relationship between a private restaurant and a state agency translated the restaurant's discriminatory conduct into state action.<sup>117</sup> Because of the physical co-existence and the mutual financial benefits of the parties' lease agreement, the Supreme Court regarded the restaurant's racial discrimination as attributable to the state.<sup>118</sup>

(expounding on *Burton's* discussion of the interdependent or "symbiotic" relationship test).

112. See, e.g., *Adickes*, 398 U.S. at 152 (holding that "[t]he involvement of a state official . . . plainly provides the state action essential to show a direct violation of [constitutional] rights, whether or not the actions of the police were officially authorized, or lawful"); *Landry*, 75 F.3d at 204; *Weaver v. James Bonding Co.*, 442 F. Supp. 2d 1219, 1226 (S.D. Ala. 2006); *Green*, 316 F. Supp. 2d at 1261; *McCoy*, 176 F.R.D. at 681.

113. See *Landry*, 75 F.3d at 204 (noting that most "federal courts that have addressed the state action issue in the context of bail bondsmen have based their decisions on whether the bondsmen enlisted the assistance of law enforcement officers in arresting their principals").

114. See *Gallagher*, 49 F.3d at 1451 (quoting *Burton*, 365 U.S. at 725); see, e.g., *Moose Lodge No. 107*, 407 U.S. at 174-76 (finding that a private club did not enjoy a "symbiotic relationship" with the state that would make the club's conduct attributable to the state); *Burton*, 365 U.S. at 723-24 (finding that a private restaurant's discrimination against African-American customers was state action because of the mutually beneficial relationship between the restaurant and the state agency that owned the building that housed the restaurant); *Johnson v. Rodrigues*, 293 F.3d 1196, 1204 (10th Cir. 2002) (finding that "the state [had not] insinuated itself into a position of long-term interdependence with either the adoption center or the adoptive parents" when the father seeking custody of his son tried to attribute the adoption proceeding to the State of Utah).

115. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295-96 (2001) (noting that only private conduct which is "fairly attributable" should constitute state action).

116. 365 U.S. 715 (1961). First articulated in *Burton*, the symbiotic relationship test received its proper name from the U.S. Supreme Court in *Moose Lodge No. 107* "when the Court referred to 'the symbiotic relationship . . . that was present in *Burton*.'" *Gallagher*, 49 F.3d at 1451 (quoting *Moose Lodge No. 107*, 407 U.S. at 175).

117. *Burton*, 365 U.S. at 724-25. The Court said "[i]t cannot be doubted that the peculiar relationship of the restaurant to the parking facility [owned by the state agency] in which it is located confers on each an incidental variety of mutual benefits." *Id.* at 724. The restaurant conducted its business in a parking garage building owned by the state agency. *Id.* at 716. The restaurant's patrons enjoyed convenient use of the state's parking facilities, and the restaurant received substantial tax benefits and let public funds cover building maintenance. *Id.* at 723-24. In turn, the restaurant's patrons used the agency's parking facilities, providing "a *physically and financially integral* and, indeed, *indispensable part* of the State's plan to operate its project as a self-sustaining unit." *Id.* (emphasis added).

118. *Id.* at 724-25. The Court ruled that the mutual benefits, "together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn." *Id.* at 724. The Court regarded it as a "grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public," racial discrimination is tolerated. *Id.* In *Moose Lodge*, the Supreme Court again accounted for the nature and location of a private entity in applying the symbiotic relationship test. 407 U.S. at 175. The Supreme Court held that the symbiotic relationship present in *Burton* was absent in *Moose Lodge*. *Id.* Unlike in *Burton*, where the state agency owned and operated the

Although courts have not clearly defined the “symbiotic relationship” test’s criteria for a finding of state action,<sup>119</sup> the general judicial consensus on the symbiotic relationship test is that the private party’s conduct must be both financially profitable and indispensable to the state.<sup>120</sup>

The Tenth Circuit provided its analysis of the symbiotic relationship test in *Gallagher v. Neil Young Freedom Concert*<sup>121</sup> and *Johnson v. Rodrigues*.<sup>122</sup> In *Gallagher*, concertgoers sued a university, a concert promoter, and a private security provider under § 1983, alleging that the pat-down searches prior to the concert violated their Fourth Amendment rights.<sup>123</sup> The Tenth Circuit found no state action because the private entity and the governmental body were not “functionally intertwined.”<sup>124</sup> Additionally, the governmental body had no financial dependence on the private entity’s conduct.<sup>125</sup> The Tenth Circuit ruled that without “long-term dependence on the operations of a private entity,” the alleged constitutional violations were not attributable to the state.<sup>126</sup>

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building that housed the restaurant and the parking facility, the club in *Moose Lodge* was “a private social club in a private building.” *Id.* The Court emphasized that the private social club fulfilled no public function and performed no service for the state. *Id.* The Court acknowledged the pervasiveness of the Pennsylvania Liquor Control Board’s regulation of the club’s alcohol sales. *Id.* at 176. However, the Court ruled that the regulations did not “foster or encourage racial discrimination” against members or guests of the club. *Id.* at 176-77. Thus, the Court concluded that “the regulatory scheme enforced by the Pennsylvania Liquor Control Board did not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to make the latter ‘state action.’” *Id.* at 177.

119. *Gallagher*, 49 F.3d at 1452. The absence of a “bright-line rule for determining whether a symbiotic relationship exists” makes the questions of (1) “how far the state has insinuated itself into the operations of a particular private entity,” and (2) “when, if ever, the operations of a private entity become indispensable to the state . . . matters of degree.” *Id.*

120. *See id.* at 1451 (stating that “[p]ost-*Burton* decisions have emphasized the *Burton* Court’s finding that the restaurant was an indispensable part of a state project and that the state profited from the restaurant’s discrimination”); *see, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 842-43 (1982); *Vincent v. Trend W. Technical Corp.*, 828 F.2d 563, 569 (9th Cir. 1987); *Frazier v. Bd. of Trs.*, 765 F.2d 1278, 1287-88 (5th Cir. 1985), *modified*, 777 F.2d 329 (5th Cir. 1985).

121. 49 F.3d 1442 (10th Cir. 1995).

122. 293 F.3d 1196 (10th Cir. 2002).

123. *Gallagher*, 49 F.3d at 1444-46. The state university leased its facilities to a concert bureau, whose private security guards conducted pat-down searches of attendees prior to the show. *Id.* at 1444-45.

124. *Id.* at 1453. The Tenth Circuit found no state action under any of the *Lugar* state action tests. *See id.* at 1448-57 (examining each test separately).

125. *Id.* at 1453. The Tenth Circuit ruled that the resulting profits were not “indispensable elements in the University’s financial success.” *Id.* Although the contract between the two sides generated profits for the governmental body, the indispensability element was missing since the benefits were no greater than would normally result from a business contract. *See id.* (holding that “[t]he economic benefits that the University derived from [renting its building to the concert bureau] are indistinguishable from those that could be obtained through contracts generally,” and indicating that “the element of indispensability [was] clearly lacking”); *see, e.g., Rendell-Baker*, 457 U.S. at 843 (finding that because “the school’s fiscal relationship with the State [was no] different from that of many contractors performing services for the government,” a symbiotic relationship did not exist); *Vincent*, 828 F.2d at 569 (noting that the contract with the private entity “was most certainly not an indispensable element in the Air Force’s financial success”).

126. *Gallagher*, 49 F.3d at 1452. The Tenth Circuit concluded that “[p]ayments under government contracts and the receipt of government grants and tax benefits are insufficient to establish a symbiotic relationship between the government and a private entity.” *Id.* at 1453. As

In *Johnson*, where a biological father alleged that his child's adoptive parents and the adoption agency "acted under color of state law," the Tenth Circuit discussed the symbiotic relationship test and the related doctrine of "entwinement."<sup>127</sup> Entwinement examines whether "an ostensibly private organization ought to be charged with a public character and judged by constitutional standards" because of its interaction with the state.<sup>128</sup> Recognizing that sometimes interaction is limited to "winks and nods," the Supreme Court emphasized the importance of an analysis that "looks not to form, but to underlying reality."<sup>129</sup> If state action was established only through apparent state authority, then the state-action doctrine "would vanish [due] to the ease and inevitability of its evasion."<sup>130</sup> Consequently, when applying the symbiotic relationship or entwinement tests, courts must analyze interaction and shared benefits that are not readily apparent.<sup>131</sup>

### 3. Bounty Hunter Precedent

In *Jackson v. Pantazes*,<sup>132</sup> the United States Court of Appeals for the Fourth Circuit examined the mutually-beneficial interaction between bondsmen and the state.<sup>133</sup> A Maryland woman sued a bondsman under § 1983 when he invaded her home with the assistance of a police officer and assaulted her while looking for her son, the bondsman's escaped principal.<sup>134</sup> Applying *Lugar*, the Fourth Circuit

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noted by the Tenth Circuit, the Supreme Court "has held that extensive state regulation, the receipt of substantial state funds, and the performance of important public functions do not necessarily establish the kind of symbiotic relationship between the government and a private entity that is required for state action." *Id.* at 1451.

127. *Johnson v. Rodrigues*, 293 F.3d 1196, 1202, 1204 (10th Cir. 2002).

128. *Id.* at 1204 (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 302 (2001)). Calling the question "a matter of normative judgment," the Tenth Circuit recognized that no single fact or specific set of circumstances could necessitate a finding of state action and that sometimes "there may be some countervailing reason against attributing activity to the government." *Id.* (quoting *Brentwood Acad.*, 531 U.S. at 295).

129. *Brentwood Acad.*, 531 U.S. at 301 n.4. In cases involving a privatized interscholastic athletic association, the Supreme Court said: "The most one can say on the evidence is that the State Board once freely acknowledged the Association's official character but now does it by winks and nods." *Id.* at 301. By so ruling, the Supreme Court affirmed the district court's finding that despite claims to the contrary, "the connections between [the Association] and the State [were] still pervasive and entwined." *Id.* at 302 (citation omitted). The Supreme Court also found entwinement because eighty-four percent of the association's members were public schools. *Id.* at 298. Moreover, members of the State board served as members of the Association, while the Association's "ministerial employees [were] . . . eligible for membership in the state retirement system." *Id.* at 300.

130. *Id.* at 302 n.4.

131. *See id.* (indicating that the symbiotic test requires in-depth analysis). The Association tried to argue that because the public function test failed, there should be no finding of state action. *Id.* at 302-03. The Court held that the argument was a moot point. *Id.* at 303. The Court ruled that the state action finding based on entwinement was not "unsettled merely because other criteria of state action may not be satisfied by the same facts." *Id.* at 302. If "the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action is not affected by pointing out that the facts might not loom large under a different test." *Id.* at 303.

132. 810 F.2d 426 (4th Cir. 1987).

133. *Id.* at 430.

134. *Id.* at 427. In his bail papers, the woman's son had listed his parents' address as his

determined that the bondsman was a state actor under both the joint action test and the symbiotic relationship test.<sup>135</sup> The Fourth Circuit said that the symbiotic relationship between bail bondsmen and the State of Maryland made the conduct of bail bondsmen attributable to the State.<sup>136</sup> Bondsmen enjoyed state protection of their livelihood, while the State of Maryland benefited by saving time and money on pretrial detention and supervision of its defendants.<sup>137</sup> Because the relationship was interdependent and beneficial for both sides, the Fourth Circuit determined that the state action test of *Lugar* was satisfied.<sup>138</sup>

In those federal circuits that have examined the issue of bounty hunters as state actors, the majority of courts have rejected the “symbiotic relationship” argument from *Jackson*.<sup>139</sup> Prior to *Jackson*, the United States Court of Appeals for the Ninth Circuit rejected the argument in *Ouzts v. Maryland National Insurance Co.*<sup>140</sup> The plaintiff in *Ouzts* argued that the bondsman was acting as an “unofficial agent or partner of the . . . court” when he apprehended him.<sup>141</sup> The Ninth

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residence. *Id.* His parents claimed he no longer lived with them, though he would occasionally spend the night there. *Id.*

135. *Id.* at 429-30. Maryland state law authorizes bondsmen to apprehend their principals, which means the bondsmen exercised a privilege created by the state, thus, acting pursuant to state law. *Id.* at 429. In support of its finding that the bondsman acted pursuant to state authority, the Fourth Circuit cited a Maryland appellate decision, *Frasher v. State*, 260 A.2d 656 (Md. Ct. Spec. App. 1970) and *Taylor v. Taintor*, 83 U.S. 366 (1872), as authority. *Id.* During the bondsman’s search, he received substantial help from a police officer, making the bondsman a state actor under the “joint action” test. *Id.* The officer who accompanied the bondsman assisted him by helping gain entrance to the home, “dragging Ms. Jackson from the doorway,” giving her verbal commands to submit to the bondsman’s search, and serving a “warrant on her for alleged assault and harboring a fugitive.” *Id.* According to the Fourth Circuit, both prongs from *Lugar* would have been satisfied with a finding of joint action alone. *See id.* (stating that “even in the absence of any state statute, custom or policy which authorizes the private party’s conduct[,] joint activity, alone, is sufficient” for a finding of state action).

136. *Id.* at 430. Giving as support *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the Fourth Circuit held that “both parts of the *Lugar* test are satisfied where the nature of the relationship between the state and private actors is one of interdependence, or ‘symbiosis.’” *Id.*

137. *Id.* Benefits enjoyed by the bondsmen included “judicial use of a bail bond system” and state licensing. *Id.*

138. *Id.* The Fourth Circuit’s holding was not dependent on the joint action test as both prongs of *Lugar* were equally satisfied by the “symbiotic relationship” test. *Id.* Two federal district courts have agreed with the Fourth Circuit’s symbiotic holdings. *Evans v. City of Etowah*, 2007 U.S. Dist. LEXIS 28408, \*\*17-18 (E.D. Tenn. Apr. 17, 2007) (holding the bondsmen and bounty hunters who burst into the plaintiff’s home were operating “in a symbiotic relationship with . . . law enforcement personnel,” thus satisfying “the second prong of *Lugar* [sic]”); *Maynard v. Kear*, 474 F. Supp. 794, 801 (N.D. Ohio 1979) (holding that by “statute, the State . . . lends its authority to private bondsmen who arrest persons pursuant to a bench warrant who have failed to appear in court, thereby transmuted the private action of bondsmen into state action”). Other district courts have recognized the holding in passing. *See, e.g., Perez v. Reno*, 2000 U.S. Dist. LEXIS 7228, 14 (S.D.N.Y. May 23, 2000); *Allen v. Columbia Mall, Inc.*, 47 F. Supp. 2d 605, 613 (D. Md. 1999); *Dow v. Terramara, Inc.*, 835 F. Supp. 1299, 1303 (D. Kan. 1993).

139. *See, e.g., Dean v. Olibas*, 129 F.3d 1001, 1006 n.4 (8th Cir. 1997); *Landry v. A-Able Bonding, Inc.*, 75 F.3d 200, 205 n.5 (5th Cir. 1996); *Ouzts v. Md. Nat’l Ins. Co.*, 505 F.2d 547, 554 (9th Cir. 1974); *Jacobs v. A Robert Depersia Agency*, 2009 U.S. Dist. LEXIS 23122, \*7 n.2 (D.N.J. Mar. 20, 2009); *Green v. Abony Bail Bond*, 316 F. Supp. 2d 1254, 1261-62 (M.D. Fla. 2004); *Hunt v. Steve Dement Bail Bonds, Inc.*, 914 F. Supp. 1390, 1394 (W.D. La. 1996).

140. 505 F.2d 547 (9th Cir. 1974).

141. *Id.* at 554.

Circuit was not persuaded by this argument and held that bondsmen were financially-motivated private actors that were “separate and distinct” from the individuals designated by the court to retrieve defendants.<sup>142</sup> In *Landry v. A-Able Bonding, Inc.*,<sup>143</sup> the United States Court of Appeals for the Fifth Circuit agreed with the Ninth Circuit’s rejection of the symbiotic relationship test,<sup>144</sup> and the Eighth Circuit followed suit in *Dean v. Olibas*.<sup>145</sup>

Although the Georgia district court in *McCoy v. Johnson*<sup>146</sup> found the symbiotic relationship test unpersuasive as applied to its case,<sup>147</sup> the court did not rule out the possibility that extensive licensing might influence a finding of state action.<sup>148</sup> However, in *Green v Abony Bail Bond*,<sup>149</sup> a Florida district court took a more direct stance on the

142. *Id.* at 554-55. The Ninth Circuit called the plaintiff’s argument “a strange thesis,” noting that no precedent was given in support of it. *Id.* at 554. The court noted “that [it] has its own official arms for securing the presence of a fugitive defendant. Moreover, the system of extradition which is available to the state is completely ‘separate and distinct’ from the private reclamation interests and procedures of the bondsman.” *Id.* at 554-55. The Ninth Circuit also emphasized the financial motivations of bondsmen, noting “that the bail bondsman is in the business in order to make money . . . not acting out of a high-minded sense of devotion to the administration of justice.” *Id.* at 555. Under the *Lugar* analysis, the Ninth Circuit held that neither prong was satisfied. *Id.* at 554-55. Because California statutory authority eliminated the out-of-state bondsman’s common law right of recapture, the bondsman could not have been exercising a privilege created by the state; therefore, the plaintiff failed under *Lugar*’s first prong. *Id.* at 554. Although the bondsmen falsely represented themselves as state officials when apprehending the principal, because the state did not actually vest authority in them, the Ninth Circuit held that they could not be state actors and, thus, could not satisfy *Lugar*’s second prong. *See id.*

143. 75 F.3d 200 (5th Cir. 1996).

144. *Id.* at 205 n.5. Like the Ninth Circuit, the Fifth Circuit rejected the argument that bondsmen were “unofficial agents of the courts.” *Id.* Quoting the Ninth Circuit’s language from *Ouzts*, the Fifth Circuit ruled that “[t]he bail bondsman is in the business in order to make money and is not acting out of a high-minded sense of devotion to the administration of justice.” *Id.* However, unlike the Ninth Circuit in *Ouzts*, the Fifth Circuit in *Landry* found that bondsmen were exercising a privilege created by the state when they arrested their principal, thus, satisfying *Lugar*’s first prong. *See id.* at 204 (noting that “Louisiana law allows bail bondsmen to arrest their principals for purposes of returning them to detention facility officers”). However, because the bondsman “neither purport[ed] to act pursuant to [a] warrant, nor enlist[ed] the assistance of law enforcement officials,” the court concluded that the bondsman should not be regarded as a state actor. *Id.* at 204-05.

145. 129 F.3d 1001 (8th Cir. 1997). The Eighth Circuit stated that it rejected the “symbiotic relationship” argument from *Jackson*, citing both *Ouzts* and *Landry* as support. *Id.* at 1006 n.4. The court regarded the absence of state action to be readily apparent since the bondsman did not even arrest the principal himself, but rather supplied information that led to the Arkansas police arresting the principal. *Id.* at 1006. The Eighth Circuit held that the bondsman’s communication of this information was “a traditional action of private citizens.” *Id.*

146. 176 F.R.D. 676 (N.D. Ga. 1997).

147. *Id.* at 681 (calling it dicta).

148. *Id.* At that time, bondsmen and bounty hunters in Georgia were not extensively regulated. *Id.* The district court noted that the new passage of legislation created licensing provisions for Georgia bondsmen. *Id.* However, because the statutes were not passed until after the alleged constitutional deprivations, the district court would not rule whether the presence of licensing regulations would affect the “symbiotic relationship” test. *See id.* Nevertheless, the district court referenced a dissenting opinion that viewed the “pervasive regulation and licensing of [the] bail system [as evidence of it being an] . . . integral part of [the] state’s pretrial release program.” *Id.* (citing *Ouzts v. Md. Nat’l Ins. Co.*, 505 F.2d 547, 558 (9th Cir. 1974) (Hofstедler, J., dissenting)). In Poe’s brief to the Tenth Circuit, he argued that the Georgia district court was indirectly suggesting that licensing would affect a finding of state action. Appellant’s Brief, *supra* note 15, at 27.

149. 316 F. Supp. 2d 1254 (M.D. Fla. 2004).

licensing issue.<sup>150</sup> The Florida district court held that a finding of state action required more than licensing and regulation of the private party.<sup>151</sup> The district court reasoned that if state licensing were the ultimate test, then many other private professions such as “doctors, engineers, lawyers, private investigators, and even concealed weapons holders would [also] be considered state actors.”<sup>152</sup>

In *People v. Houle*,<sup>153</sup> the California Court of Appeals used the exclusionary rule to confirm a bondsman’s status as a private actor.<sup>154</sup> The appellate court held that the Fourth Amendment did not apply to a private citizen protecting “his own private financial interest,”<sup>155</sup> reasoning that the exclusionary rule was intended to deter government misconduct.<sup>156</sup> The appellate court concluded that excluding evidence recovered by a private individual with no law enforcement motivations or incentives would not serve the deterrent purpose of the exclusionary rule.<sup>157</sup>

#### IV. COURT’S DECISION

The Tenth Circuit addressed both the threshold issue of Poe’s Fourth Amendment standing and the question of bounty hunters as state actors.<sup>158</sup> Contrary to the district court’s decision, the Tenth

150. *Id.* at 1261-62.

151. *Id.*

152. *Id.*; see also *Hunt v. Steve Dement Bail Bonds, Inc.*, 914 F. Supp. 1390, 1394 (W.D. La. 1996) (referencing the Supreme Court’s holding from *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), and stating that “a private entity’s action does not become state action simply because it receives a benefit or service from the state, or is subject to state regulation”). Similarly, Maryland’s Supreme Court held that licensing alone would not transform a private party into a state actor. *State v. Collins*, 790 A.2d 660, 668 (Md. 2002). The Maryland Supreme Court viewed the state action inquiry as requiring “a case by case analysis” with the focus being on the “acts of the parties and the circumstances involved in the particular case.” *Id.* at 667. Referencing a Maryland state court decision, the Maryland Supreme Court stated the conduct, not the occupation of the actor should be the basis for finding state action. *Id.* at 667-68.

153. 13 Cal. App. 3d 892 (1970).

154. *Id.* at 895. In *Houle*, while apprehending a bail jumper in his house, a bondsman found drugs, which he turned over to the police. *Id.* at 894. The bail jumper argued that the court should have excluded the evidence because of a Fourth Amendment violation. *Id.* at 895. Factually, *Houle* is analogous to Poe’s case. See *United States v. Poe*, 556 F.3d 1113, 1117 (10th Cir. 2009) (noting that Poe asked that the drug-related evidence be suppressed because of an alleged Fourth Amendment violation). Both the district court and the Government cited *Houle* as guiding precedent for the bounty hunter-state actor issue. See Brief of Plaintiff-Appellee, *supra* note 15, at 15. However, the Tenth Circuit made no mention of *Houle* in its opinion. See *generally Poe*, 556 F.3d 1113.

155. *Houle*, 13 Cal. App. 3d at 895.

156. *Id.*

157. *Id.*

158. *Poe*, 556 F.3d at 1121. The Tenth Circuit did not address the district court’s determination that no search had occurred. See *id.* The Tenth Circuit said it would review “whether the search violated the Fourth Amendment,” implying that the court did not accept the argument that no search occurred. *Id.* (emphasis added). The Government argued that no “search” occurred because the bounty hunters had observed only evidence already in plain view and had contacted the police based upon what they saw. Brief of Plaintiff-Appellee, *supra* note 15, at 12. In fact, the parties’ testimony at trial conflicted regarding the bounty hunters’ actions following their apprehension of Poe. See Appellant’s Brief, *supra* note 15, at 17-18. Both Poe and his visitor McGill testified that the bounty hunters went searching through drawers and cabinets. *Id.* Regardless, the Tenth Circuit implicitly

Circuit concluded that Poe possessed a reasonable expectation of privacy in Ms. Wilson's home, which gave him standing under the Fourth Amendment to challenge the bounty hunters' search.<sup>159</sup> The Tenth Circuit then addressed whether bounty hunters should be regarded as state actors answerable to the Fourth Amendment.<sup>160</sup>

Poe's position was that the bounty hunters should be regarded as state actors under the two-pronged "fair attribution" test from *Lugar*.<sup>161</sup> Poe argued that the first prong was satisfied because the bounty hunters were exercising a right created by the State of Oklahoma when they apprehended him.<sup>162</sup> Poe argued that the second prong of *Lugar* was

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recognized that a "search" under the Fourth Amendment does not occur solely when private belongings are physically disturbed, but whenever the state violates an individual's reasonable expectation of privacy. See generally *Poe*, 556 F.3d 1113. See also *Katz v. United States*, 389 U.S. 347, 353 (1967). For an expectation of privacy to be reasonable, the party challenging the search must "show 'that he had a subjective expectation of privacy in the premises searched and that society is prepared to recognize that expectation as reasonable.'" *Poe*, 556 F.3d at 1121 (quoting *United States v. Rhiger*, 315 F.3d 1283, 1285 (10th Cir. 2003)).

159. *Poe*, 556 F.3d at 1121-22. The district court had ruled that there was no "sufficiently concrete basis upon which to find that this defendant was settled in this location in any way that approaches the circumstances that would have to be found to exist in order for the Court to conclude that he had an expectation of privacy." *Id.* at 1121. Poe argued that as a customary social guest in Ms. Wilson's home he had a reasonable expectation of privacy. Appellant's Brief, *supra* note 15, at 23-24 (citing *United States v. Thomas*, 372 F.3d 1173, 1176 (10th Cir. 2004) (stating that "social guests who do not stay the night have a reasonable expectation of privacy in the host's home and may therefore challenge a search of the home on Fourth Amendment grounds")). Poe at one time lived in Ms. Wilson's house, but even after he moved out, she allowed him free access to her home. Appellant's Brief, *supra* note 15, at 24. She never tried to take his key to the house, never complained about his presence in her house, and never told the police or the bounty hunters that he was unwelcome. *Id.* The Government countered by pointing out that Poe confessed to having "finagled" a key away from Ms. Wilson and that she did not give him the key willingly. See Brief of Plaintiff-Appellee, *supra* note 15, at 14. The Tenth Circuit disagreed, holding that the facts in Poe's case confirmed his status as a social guest. *Poe*, 556 F.3d at 1121-22. The court held that Ms. Wilson's acceptance of Poe's presence demonstrated his status as a social guest. See *id.* She knew that he was in her home and allowed him to stay when she left for work. See *id.* at 1122. He was a regular visitor, a former resident, and he possessed a key to the house. See *id.* Furthermore, Poe was sufficiently comfortable in the house to invite a visitor inside the home on the night the bounty hunters apprehended him. See *id.* The Government argued that Poe's attempt to dissociate himself from the house was inconsistent with his argument to the trial court that he had an expectation of privacy in the house. See Brief of Plaintiff-Appellee, *supra* note 15, at 13 (noting that when the officer arrived on the scene he asked Poe's permission to search the house, and Poe replied that since he was not the owner, he could not give consent). The Tenth Circuit rejected the Government's argument that when Poe "disclaimed ownership" of the house he effectively relinquished his reasonable expectation of privacy. *Poe*, 556 F.3d at 1122 n.11. The case that the Government used to argue its point, *United States v. Denny*, is factually distinguishable from Poe's case because in that case the defendant who disclaimed ownership actually did own the item. See *id.*; *United States v. Denny*, 441 F.3d 1220, 1228 (10th Cir. 2006). According to the Tenth Circuit, "[a]bandonment of an object," the issue in *Denny*, was not comparable to a social guest "truthfully stating that he does not own the home he is visiting." *Poe*, 556 F.3d at 1122 n.11.

160. See *id.* at 1123. The Tenth Circuit determined that while the issue was undecided by the lower court, because of the parties' briefs and sufficiency of the record, the issue was developed enough for the Tenth Circuit to make a decision on the issue. *Id.* at 1123 n.12.

161. Appellant's Brief, *supra* note 15, at 25.

162. *Id.* See *supra* Part III.D.1. Oklahoma statutes confer on bondsmen and their employees—bounty hunters—the authority to arrest defendants released on bail. Appellant's Brief, *supra* note 15, at 25. Bondsmen may seize their principals anywhere within the state and return them to custody at any time, regardless of whether or not they are endeavoring to skip their court date. OKLA. STAT. tit. 22, § 1107 (2003). Consequently, Poe argued that when the bounty hunters arrested him, their conduct was attributable to the State of Oklahoma because the state specifically authorized them to take such action. See Appellant's Brief, *supra* note 15, at 26.

met because the bounty hunters' conduct was "chargeable" to the state.<sup>163</sup> If the bounty hunters were state actors pursuant to state law, Poe argued, the Fourth Amendment should govern their conduct.<sup>164</sup>

The Government's argument focused on the Fifth Circuit's decision in *Landry*.<sup>165</sup> The Government emphasized the rejection of the symbiotic relationship analysis by the *Landry* court and most other courts that have considered whether bounty hunters should qualify as state actors.<sup>166</sup> According to the Government, state licensing—an important consideration in the symbiotic relationship analysis—affects many professions, and, thus, cannot transform private parties into state actors by itself.<sup>167</sup>

In its analysis, the Tenth Circuit did not explore the relationship between the bail bond industry and the State of Oklahoma; instead, the court focused on the circumstances of the particular search in Poe's case.<sup>168</sup> To determine whether state action was present, the Tenth

163. Appellant's Brief, *supra* note 15, at 27. A party can be regarded as a state actor "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." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (emphasis added). The State of Oklahoma exercises broad authority over the bail bonds industry. See Appellant's Brief, *supra* note 15, at 26-27. See generally OKLA. STAT. tit. 22, § 1107; OKLA. STAT. tit. 59, §§ 1301-1340 (2003). Among other requirements, a bondsman must obtain a license from the state, meet educational and fitness prerequisites, and maintain certain standards of conduct. See *supra* notes 74-77. Poe argued that this extensive state regulation of the industry, combined with granting the powers of arrest, created a symbiotic relationship between the State of Oklahoma and bail bondsmen that was "the essence of State action through agents." Appellant's Brief, *supra* note 15, at 26-27.

The Fourth Circuit in *Jackson* held that "both parts of the *Lugar* test are satisfied where the nature of the relationship between the state and private actors is one of interdependence, or 'symbiosis.'" *Jackson v. Pantazes*, 810 F.2d 426, 430 (4th Cir. 1987). Using the reasoning of *Jackson*, Poe argued that "[b]ondsmen depend, for their livelihood, upon the judicial use of a bail bond system, and they are licensed by the states." Appellant's Brief, *supra* note 15, at 26 (quoting *Jackson*, 810 F.2d at 430). States benefit in turn by having the "bondsmen facilitate the pretrial release of accused persons, monitor their whereabouts and retrieve them for trial." *Id.* See *infra* Part V.B (discussing symbiotic relationship as applied to bounty hunters).

164. Appellant's Brief, *supra* note 15, at 24. If the Fourth Amendment applied, Poe argued that the district court should have suppressed the evidence against him as fruit of an unreasonable search. See *id.* at 28.

165. See Brief of Plaintiff-Appellee, *supra* note 15, at 17. Although the bondsman in *Landry* possessed an arrest warrant issued by the Louisiana state court, the Fifth Circuit regarded his conduct as unilateral private action because he did not claim authority under the warrant or enlist police assistance. *Landry v. A-Able Bonding, Inc.*, 75 F.3d 200, 204-05 (5th Cir. 1996).

166. Brief of Plaintiff-Appellee, *supra* note 15, at 17-19. According to the Government, the reasoning in *Jackson* was "clearly the exception to the majority view." *Id.* at 17-18 (citing *Dean v. Olibas*, 129 F.3d 1001, 1005-06 n.4 (8th Cir. 1997); *Weaver v. James Bonding Co.*, 442 F. Supp. 2d 1219, 1224-29 (S.D. Ala. 2006); *Green v. Abony Bail Bond*, 316 F. Supp. 2d 1254, 1260-62 (M.D. Fla. 2004); *Hunt v. Steve Dement Bail Bonds, Inc.*, 914 F. Supp. 1390, 1393-94 (W.D. La. 1996)). The Government also argued that *Jackson* was factually distinguishable from Poe's case. *Id.* at 19. Unlike in *Jackson*, the bounty hunters that apprehended Poe did not have or seek the assistance of the police until they secured Poe. *Id.* The presence and assistance of law enforcement was key to the *Jackson* court in its finding of state action. *Id.* But see *Jackson*, 810 F.2d at 430 (holding that the finding of state action was not dependent on the joint action test as both prongs of *Lugar* were equally satisfied by the symbiotic relationship test).

167. Brief of Plaintiff-Appellee, *supra* note 15, at 19. As pertaining to bail bondsmen, the United States District Court for the Middle District of Florida found the state licensing argument "unavailing." *Green*, 316 F. Supp. 2d at 1261. In its opinion, the court conceded that "the State of Florida qualifies, licenses, and appoints its bail bondsmen." *Id.*

168. *United States v. Poe*, 556 F.3d 1113, 1123 (10th Cir. 2009). The Tenth Circuit emphasized

Circuit applied the two-pronged test from another drug case, *United States v. Souza*,<sup>169</sup> asking “1) whether the government knew of and acquiesced in the intrusive conduct, and 2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends.”<sup>170</sup>

The Tenth Circuit held that the first prong of *Souza* was not satisfied because the State of Oklahoma did not “know of or acquiesce in” the bounty hunters’ intrusive conduct.<sup>171</sup> Unlike in *Souza*, in which Drug Enforcement Agents strongly encouraged a United Parcel Service employee to open a suspicious package, in Poe’s case, government involvement was limited to the time following his arrest by the bounty hunters.<sup>172</sup> The Tenth Circuit rejected Poe’s argument that “extensive statutory regulation of the bail bonds industry, coupled with conferring the powers of arrest, conclusively establishes the bondsmen’s conduct [as] chargeable” to the State of Oklahoma.<sup>173</sup> The court concluded, rather generally, that industry involvement was not enough to satisfy the knowledge-or-acquiescence requirement of *Souza*.<sup>174</sup>

Considering *Souza*’s second prong, the Tenth Circuit held that Poe could not satisfy it either because the bounty hunters were pursuing

that normally the Fourth Amendment does not apply to private parties, regardless of the egregiousness or unreasonableness of the private party’s search. *Id.* However, the Tenth Circuit noted an exception is when “the government coerces, dominates or directs” a private party into performing a search. *Id.* (quoting *United States v. Smythe*, 84 F.3d 1240, 1242 (10th Cir. 1996)).

169. 223 F.3d 1197 (10th Cir. 2000).

170. *Id.* at 1201 (citations omitted). The district court and the Government advocated using *United States v. Alexander*, 447 F.3d 1290 (10th Cir. 2006), to determine whether the bounty hunters’ conduct was state action. Brief of Plaintiff-Appellee, *supra* note 15, at 15-16. Although the *Alexander* decision was admittedly more recent, the Tenth Circuit relied on *Souza* “because *Alexander* did not modify the standard, but rather applied it to a Fifth Amendment challenge” instead of a Fourth Amendment challenge, as in *Souza. Poe*, 556 F.3d at 1123 n.13. In his reply brief to the Tenth Circuit, Poe argued that the *Lugar* test should be applied instead of the *Alexander* test. Appellant’s Reply Brief, *supra* note 102, at 3-4. According to Poe, the issue in *Lugar* was “whether the alleged ‘private party’ [was] by law simply an extension of law enforcement.” *Id.* at 4. Poe argued that in contrast, the issue in *Alexander* was “whether a private party [was] acting as an ‘agent’ of law enforcement for purposes of the complained of activity.” *Id.* at 3. Poe argued that *Lugar* was more appropriate because the central issue behind the case was more analogous to the issue in his own case—whether bounty hunters were an extension of state law enforcement. *Id.* at 4. The Tenth Circuit elected not to use *Lugar*, stating that the Tenth Circuit had “faithfully” applied the *Souza* test, even in the wake of the Supreme Court’s *Lugar* decision. *Poe*, 556 F.3d at 1124 n.14. The Tenth Circuit also held that even if the *Lugar* test had been used, Poe’s argument still would have failed because the court ultimately determined that the bounty hunters were not state actors, thus, failing *Lugar*’s second prong. *See id.*

171. *Id.* at 1123.

172. *See id.* at 1123-24. Oklahoma City police arrived on the scene after the bounty hunters’ apprehension of Poe and discovery of the drug-related evidence. *Id.* at 1118. Referencing a previous and similar result in *Smythe*, the Tenth Circuit ruled that “after-the-fact involvement of the police does not implicate the Fourth Amendment.” *Id.* at 1124. The Tenth Circuit compared the “after-the-fact involvement” of the Oklahoma City police to the conduct of the officer in *Smythe*, who was present as a “mere witness.” *See id.* (citing *Smythe*, 84 F.3d at 1243). The rule from *Souza* is that “the police must [not] instigate, orchestrate, encourage or exceed the scope of the private search.” *Souza*, 223 F.3d at 1201. However, the Tenth Circuit in *Souza* also held that “police are under no duty to discourage private citizens from conducting searches of their own volition.” *Id.* at 1202.

173. *Poe*, 556 F.3d at 1124.

174. *Id.* The Tenth Circuit emphasized that “involvement in the bail bonds industry is insufficient to satisfy [the knowledge-or-acquiescence] inquiry.” *Id.*

their own financial gain.<sup>175</sup> The Tenth Circuit determined that because of the monetary stake in Poe's capture, the bounty hunters did not intend to assist law enforcement officials and would have apprehended Poe regardless of any benefit to the Oklahoma City police.<sup>176</sup> The court rejected Poe's symbiotic relationship argument, which relied on the Fourth Circuit's holding in *Jackson*.<sup>177</sup> According to the court, the relevant inquiry for the second prong was not whether there was a mutually beneficial relationship, but rather whether the bounty hunters were acting on a "legitimate, independent motivation" when they seized Poe.<sup>178</sup> Because neither prong was satisfied, the Tenth Circuit held that the bounty hunters were not state actors when they seized Poe, thus, ruling that the district court properly admitted the evidence against him.<sup>179</sup>

## V. COMMENTARY

In its relatively brief analysis, the Tenth Circuit did not consider cases on point and failed to develop adequately the state-actor issue.<sup>180</sup> Jurisprudence on the issue shows a virtual rut, as court after court insists that a case-by-case, fact-bound inquiry is required to determine whether bounty hunters should be regarded as state actors.<sup>181</sup> The Tenth Circuit should have taken the opportunity to offer a fresh perspective on the role and impact of bounty hunters in society. Using the symbiotic relationship test, the Tenth Circuit should have held that bounty hunters—who are sanctioned and protected by the state—occupy a vital law enforcement role that yields multiple benefits to the state. For this reason, courts must regard bounty hunters as state actors subject to constitutional restraints when exercising their power of arrest.

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175. *Id.*

176. *Id.*

177. *See id.*

178. *Id.* (quoting *United States v. Smythe*, 84 F.3d 1240, 1240 (10th Cir. 1996)). The Tenth Circuit's reasoning stemmed from its decision to not apply *Lugar*. *Id.* at 1124 n.14. The second prong under *Lugar* was whether the private party could fairly be said to be a state actor. *Id.* The Supreme Court has recognized that a symbiotic relationship is a legitimate test for state action. *See id.* at 1124. However, because the Tenth Circuit applied *Souza* instead, Poe's argument did not correspond with *Souza*'s second prong. *See id.*

179. *Id.*

180. *See id.* at 1123, 1123 n.13 (indicating that it would use *United States v. Souza* in its analysis).

181. *See, e.g.,* *Landry v. A-Able Bonding*, 75 F.3d 200, 204 (5th Cir. 1996) (stating that "state action is necessarily a fact-bound inquiry which should consider the context in which state action is alleged"); *Weaver v. James Bonding Co.*, 442 F. Supp. 2d 1219, 1223 (S.D. Ala. 2006) (stating that "[t]he 'state actor' determination must be made on a case-by-case basis"); *McCoy v. Johnson*, 176 F.R.D. 676, 680 (N.D. Ga. 1997) (calling the state actor question a "necessarily fact-bound inquiry") (citation omitted); *State v. Collins*, 790 A.2d 660, 667 (Md. 2002) (calling for "a case by case analysis, where the presence of 'State action' depends upon the acts of the parties and the circumstances involved in the particular case").

### A. Analyze the Actor, Not the Action

By applying only *Souza*, the Tenth Circuit took the wrong approach in conducting its state-actor analysis. In *Lugar*, the Supreme Court identified four state-actor tests.<sup>182</sup> The Tenth Circuit both recognized and affirmed these tests in previous cases involving alleged state action.<sup>183</sup> In those cases, the Tenth Circuit recognized the importance of considering all state-actor tests.<sup>184</sup> The central inquiry is whether the court should fairly attribute the private party's conduct to the state.<sup>185</sup> The separate tests offer different perspectives on what constitutes state action.<sup>186</sup> Therefore, the Tenth Circuit should have evaluated all four state-actor tests—the public function, nexus, symbiotic relationship, and joint action tests. Even though *Lugar* was a civil case, its analysis of state action remains equally applicable to a question of state action in a criminal case.<sup>187</sup>

By virtue of its *Souza* analysis, the Tenth Circuit essentially addressed two of the four state-actor tests. *Souza's* first prong—“whether the government knew of and acquiesced in the intrusive conduct”—corresponds with the nexus test, which examines the level of

182. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982) (recognizing the public function, state compulsion, nexus, and joint action tests as appropriate state actor tests).

183. See *Johnson v. Rodrigues*, 293 F.3d 1196, 1203-05 (10th Cir. 2002); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447-48 (10th Cir. 1995). Although the Tenth Circuit in these two cases said it was using the state actor tests “delineated by the [Supreme] Court,” the Tenth Circuit omitted the state compulsion test listed in *Lugar* and added the symbiotic relationship test. See *Rodrigues*, 293 F.3d at 1202; *Gallagher*, 49 F.3d at 1448. In the subcommittee hearing for the Bounty Hunter Responsibility Act of 1999, Professor Sheldon Nahmod of Chicago-Kent Law School, an expert and author on § 1983 litigation, identified the same four tests as the Tenth Circuit: the symbiotic relationship, nexus, government (or public) function, and joint action tests. *Hearing on Bounty Hunter Responsibility Act*, *supra* note 82, at 100-01. Describing the nexus test, Professor Nahmod stated that the easiest way to satisfy this test was through a finding of state compulsion, thus, suggesting that the state compulsion test listed in *Lugar* collapsed into the nexus test. See *id.* The symbiotic relationship and nexus tests are also similar. See *Jackson v. Pantazes*, 810 F.2d 426, 430 (4th Cir. 1987) (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) as authority for the symbiotic relationship test, which is the same case given by the Supreme Court in *Lugar* as support for the nexus test). However, the symbiotic relationship test and the nexus test are usually regarded as distinguishable. See *Hearing on Bounty Hunter Responsibility Act*, *supra* note 82, at 100-01 (statement of Sheldon Nahmod, Professor of Law, Chicago-Kent Law School, distinguishing between nexus and symbiotic relationship tests); see also *Rodrigues*, 293 F.3d at 1203; *Gallagher*, 49 F.3d at 1447 (distinguishing between the nexus and symbiotic relationship tests by listing them separately).

184. See *Rodrigues*, 293 F.3d at 1203-05 (making sure to address each test separately); *Gallagher*, 49 F.3d at 1448-57 (choosing to analyze each state-actor test); see also *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (stating that the tests are designed “to assure that constitutional standards are invoked ‘when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains’”) (citation omitted).

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

186. See *Hearing on Bounty Hunter Responsibility Act*, *supra* note 82, at 100-01 (statement of Sheldon Nahmod, Professor of Law, Chicago-Kent Law School) (comparing and contrasting the different state actor tests as applied to bounty hunters). Professor Nahmod regarded the government function test as “the soundest basis for finding the challenged conduct of sureties, their agents and bounty hunters to be state action.” *Id.* at 101. However, Professor Nahmod also considered the symbiotic relationship test as an acceptable alternative. *Id.* at 96. The joint action test would also be appropriate, depending on the specific facts of each case. See *id.* at 101.

187. See, e.g., *Commonwealth v. Demor*, 942 A.2d 898, 899-900 (Pa. Super. Ct. 2008) (applying the two-pronged test from *Lugar* when the question of state action would decide whether evidence in a criminal case should have been suppressed under the exclusionary rule).

government involvement.<sup>188</sup> Both the first prong of *Souza* and its second prong—“whether the party performing the search intended to assist law enforcement efforts or to further his own ends”—correspond with the joint action test.<sup>189</sup> The joint-action test evaluates the level of interaction between the private party and state officials.<sup>190</sup> Because the Oklahoma City police had no pre-arrest contact with the bounty hunters, the state involvement necessary for either test was almost certainly lacking in Poe’s case.<sup>191</sup>

Even though *Souza* coincidentally addresses two of the four state action tests, the Tenth Circuit nevertheless erred in choosing to apply *Souza*. The focus in *Souza* was on the nature of a search, not on the private party conducting the search.<sup>192</sup> Because *Souza*’s test is search and case-specific, the resulting analysis would not correspond with the tests evaluating state-actor status based on the nature and identity of the actor.<sup>193</sup>

The Tenth Circuit rejected the *Lugar* state actor tests as “generic.”<sup>194</sup> First, this label is inaccurate because any of *Lugar*’s state-actor tests can apply to a specific situation: for example, the joint action test. However, the nature of bounty hunters provides adequate reasons for holding them to a general state-actor status. Bounty hunters occupy a role very similar to police.<sup>195</sup> Like police, bounty hunters can enter defendants’ homes by force, exercise powers of arrest, and confine defendants against their will while transporting them back to court.<sup>196</sup>

188. *United States v. Souza*, 223 F.3d 1197, 1201 (10th Cir. 2000); see *Gallagher*, 49 F.3d at 1448 (holding that under the nexus test the state will be responsible for a private party’s conduct when the state “has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State”) (citation omitted); *Hearing on Bounty Hunter Responsibility Act*, *supra* note 82, at 100 (statement of Sheldon Nahmod, Professor of Law, Chicago-Kent Law School) (stating that under the nexus test, “the question is whether the government was significantly involved in the nominally private conduct”).

189. *Souza*, 223 F.3d at 1201; see *Hearing on Bounty Hunter Responsibility Act*, *supra* note 82, at 101 (statement of Sheldon Nahmod, Professor of Law, Chicago-Kent Law School) (stating that the joint action test “covers those situations in which *the private actor acts jointly*, conspiratorially or otherwise, with a government official”).

190. *Gallagher*, 49 F.3d at 1453 (holding that “State action is also present if a private party is a ‘willful participant in joint action with the State or its agents’”) (citation omitted).

191. See *United States v. Poe*, 556 F.3d 1113, 1124 (10th Cir. 2009) (noting that “after-the-fact involvement of the police does not implicate the Fourth Amendment”).

192. See *Souza*, 223 F.3d at 1201 (applying the two-pronged test to determine when “a *search* by a private party becomes a government *search*”) (emphasis added).

193. See *Hearing on Bounty Hunter Responsibility Act*, *supra* note 82, at 101 (statement of Sheldon Nahmod, Professor of Law, Chicago-Kent Law School) (considering which state actor tests would offer the best “general determination” of state action and distinguishing them from the tests that were fact-specific).

194. See *Poe*, 556 F.3d at 1124 n.14 (stating that Poe asked the Tenth Circuit to “ignore *Souza* and apply the generic state action test established by *Lugar*”).

195. See *Hearing on Citizen Protection Act*, *supra* note 80, at 90 (statement of Leslie Hagin, National Association of Criminal Defense Lawyers) (stating that bounty hunters perform “the precise same, core police function for the benefit of state criminal justice systems”).

196. See Matthew L. Kaufman, Note, *An Analysis of the Powers of Bail Bondsmen and Possible Routes to Reform*, 15 N.Y.L. SCH. J. HUM. RTS. 287, 294 (1999) (stating that “citizens are being searched and arrested by other private citizens, which has traditionally been a power of the

Police and bounty hunters often collaborate in their pursuit of bail jumpers by exchanging tips on defendants' whereabouts and making arrests together.<sup>197</sup> Some states require bounty hunters to notify local authorities before making an arrest.<sup>198</sup> Even when it is not mandatory, bounty hunters often choose to have local police nearby in case the arrest goes poorly.<sup>199</sup>

In Poe's case, the Tenth Circuit held that the bounty hunters were financially motivated and, therefore, were not acting for the state.<sup>200</sup> This reasoning is problematic. Police officers, although undoubtedly instruments of state justice and law, are ultimately performing a job in return for financial compensation. Society does not require police officers to reaffirm their motive for working before each shift—it is enough that they are performing their law enforcement role. Likewise, courts should not disregard bounty hunters' police-like function just because a private actor pays them to perform a similar service.<sup>201</sup> For both police and bounty hunters, apprehending escaped defendants is a job. The bounty hunters' sole focus on capturing bail jumpers translates into an impressive apprehension rate, which keeps officers from having to do the same work.<sup>202</sup> Regardless of who makes the arrest, the state prospers.

The rights at stake for citizens provide additional justification for holding bounty hunters to state-actor standards. Because bounty hunters fulfill a police-like role in the justice system, citizens' constitutional rights can be implicated by the conduct of bounty hunters.<sup>203</sup> Individuals and organizations who oppose holding bounty

sovereign"); *Hearing on Citizen Protection Act*, *supra* note 80, at 90 (statement of Leslie Hagin, National Association of Criminal Defense Lawyers) (saying that bounty hunters perform "privatized" police work).

197. See *VENATOR*, *supra* note 48, at 110 (discussing the advantages, disadvantages, and sometimes necessity of bounty hunters working with local law enforcement in making an arrest).

198. See, e.g., OKLA. STAT. tit. 59, § 1750.14 (2003) (requiring nonresident bounty hunters to be accompanied by peace officers or licensed bondsmen). Arkansas, California, Connecticut, Delaware, Georgia, Iowa, Louisiana, Minnesota, Nevada, New Hampshire, Oklahoma, South Dakota, Tennessee, and Utah also require some level of notification to local law enforcement authorities before making an arrest. See *VENATOR*, *supra* note 48, at 148-56.

199. See *id.* at 110.

200. *United States v. Poe*, 556 F.3d 1113, 1124 (10th Cir. 2009). According to the court, the bounty hunters' pursuit was "intended to further [their] own [financial] ends" and not to "assist state officials," thus, failing the second prong of *Souza*. *Id.*

201. See *Hearing on Citizen Protection Act*, *supra* note 80, at 90 (statement of Leslie Hagin, National Association of Criminal Defense Lawyers).

Citizens should not be expected to accept that they will have an appropriate cause of action and remedies only when their fundamental rights and liberties are wrongfully abridged by a *tax dollar-financed* law enforcement officer. They should not be told that when their same rights and liberties are violated by a *privatized* law enforcement officer—performing the precise same, core police function for the benefit of state criminal justice systems—they . . . will have no civil rights action. In no other area of interstate commerce and civil rights does the government allow businesses to perform core police functions with such impunity.

*Id.*

202. *Id.* at 143 (statement of Jonathan Drimmer, Attorney).

203. See *Hearing on Bounty Hunter Responsibility Act*, *supra* note 82, at 59 (statement of

hunters to be state actors suggest that civil suits will adequately address violations.<sup>204</sup> However, this perception is inaccurate for several reasons.

First, the socioeconomic status of many victims prevents them from obtaining a remedy.<sup>205</sup> Because the victims are typically principals or close relations of the principals, their financial means are probably limited; otherwise, they would not have required a bondsman to bail them out of jail.<sup>206</sup> Financial means aside, the plaintiff still must locate the bounty hunter for service of process, which can prove difficult if the bounty hunter decides to run.<sup>207</sup> Bounty hunters frequently have limited financial resources themselves, which further discourages civil suits against them.<sup>208</sup> Because bounty hunters often work as independent contractors, they can be shielded from respondeat superior liability.<sup>209</sup> As private actors, bounty hunters not only enjoy broader arrest privileges, but they also escape the accountability of state actors.<sup>210</sup>

### B. *The Symbiotic Relationship*

Ascribing state actor status to bounty hunters might sound radical, considering that courts rarely hold bounty hunters to be state actors;<sup>211</sup> however, in light of the bounty hunters' present role in the judicial system, characterizing them as state actors is entirely reasonable.<sup>212</sup> The

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Jonathan Drimmer, attorney) (noting that constitutional restrictions for police, including the Fourth and Fifth Amendment restrictions, do not apply to bounty hunters even though they “perform the very same search and arrest functions”).

204. *Id.* at 93 (statement of Roger Moore, Attorney) (stating that victims of bounty hunter abuse could “obtain adequate redress for the wrong” because “every state in the United States permits recovery for the common-law torts of assault and battery, false arrest, false imprisonment and defamation”).

205. *See* Fisher, *supra* note 62, at 217 (stating that “[p]laintiffs are . . . likely to be indigent, or they would not have had to use the services of a bail bondsperson in the first place”).

206. *See id.*

207. *See* VENATOR, *supra* note 48, at 85-87 (advocating that bounty hunters preserve their anonymity). In his chapter devoted to identity protection, Mr. Venator suggested, among other things, setting up “a mail drop in the next town [with] a dummy address,” using an alternative address when registering to vote, dedicating a cell phone and vehicle to bounty hunting work only, and avoiding predictable lifestyle patterns. *Id.* at 86. While these tactics are suggested for protection from vengeful defendants fresh out of jail, they also serve the purpose of hindering service of process. *See Hearing on Citizen Protection Act, supra* note 80, at 69 (statement of Edwin M. Soltz, Attorney) (stating from personal experience that it was almost impossible to get service of process on an area bounty hunter who did not want to be found).

208. *See* Fisher, *supra* note 62, at 230 (stating that “without a requirement that bounty hunters carry liability insurance, those bounty hunters who are actually held liable for torts or section 1983 violations will likely be unable to pay damages”).

209. *See Hearing on Citizen Protection Act, supra* note 80, at 69 (statement of Edwin M. Soltz, Attorney) (stating that the “the bail bondsman is insulated by the independent contractor defense”).

210. *See* Fisher, *supra* note 62, at 216 (stating “[u]nlike police officers, bounty hunters are not subject to civilian review boards, are not controlled by elected officials, and are not accountable to the local communities in set geographic areas”).

211. *See supra* Part III.D.3.

212. *See* Andrew DeForest Patrick, Note, *Running From the Law: Should Bounty Hunters Be Considered State Actors and Thus Subject to Constitutional Restraints?*, 52 VAND L. REV. 171, 178 (1999) (noting that many scholars argue that “given the proliferation of crime, the increased incidence of bail-skipping, and the state’s shrinking pool of resources, modern bounty hunters have assumed a critical role in state law enforcement” and that the law should establish them as state

current relationship between states and bounty hunters typifies a symbiotic relationship.<sup>213</sup> The principal concepts behind the symbiotic relationship are mutual benefits and interdependence between the parties, and both concepts evidence themselves in the interaction between bounty hunters and the state.<sup>214</sup>

### 1. Mutual Benefits

The bail process provides mutual benefits for states and bounty hunters.<sup>215</sup> Long entrenched as a common law privilege, the bondsman's power of arrest has been established further through the enactment of state statutes.<sup>216</sup> While the state may not be aware of each specific arrest, the statutory regulations confirm that bounty hunters exercise their powers with both the knowledge and the tacit approval of the state.<sup>217</sup> These statutes sanction and protect the bail industry, thus, providing for the livelihood of bondsmen and bounty hunters.<sup>218</sup>

In return, the bondsmen and bounty hunters provide the states with an effective and cost-efficient pretrial release system. In the states that allow bounty hunting, bounty hunters are actually more effective in apprehending delinquent defendants than police.<sup>219</sup> This fact highlights the importance of bounty hunters to the states, particularly with the increasing economic crunch of over-crowded prisons and jails.<sup>220</sup>

actors); *Hearing on Bounty Hunter Responsibility Act*, *supra* note 82, at 56 (statement of Jonathan Drimmer, Attorney) (stating that because “bounty hunters play quasi-judicial roles as vital participants in the criminal justice system . . . [recognizing them] as state actors is thus both legally correct and a matter of common sense”).

213. See Kaufman, *supra* note 196, at 299 (indicating that the symbiotic analysis from *Burton v. Wilmington Parking Authority* makes it “apparent that an ‘intertwined relationship’ exists between the government and criminal sureties, necessarily making the actions of bondsmen ‘state action’”) (citation omitted).

214. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724-25 (1961) (identifying mutual benefits and interdependence as important factors in a finding of state action).

215. *Hearing on Citizen Protection Act*, *supra* note 80, at 131 (statement of Jonathan Drimmer, Attorney) (calling the interaction between bail bondsmen and the states “a classic symbiotic relationship”).

216. See *infra* note 217.

217. See OKLA. STAT. tit. 22, § 1107 (2003) (authorizing bondsmen and those they “empower” to arrest their escaped principals “at any time . . . and at any place”); see, e.g., ALA. CODE § 15-13-160 (1995); CONN. GEN. STAT. § 29-145 (2003); FLA. STAT. § 648.34 (2005); IND. CODE § 27-10-3 (2009); KAN. STAT. ANN. § 22-2809 (2008); MISS. CODE ANN. § 83-39-3(1) (West 2008); MO. REV. STAT. § 374.710 (2008); NEV. REV. STAT. § 697.090 (2009).

218. See John A. Chamberlin, Note, *Bounty Hunters: Can the Criminal Justice System Live Without Them?*, 1998 U. ILL. L. REV. 1175, 1176 (1998) (stating that “for all the negatives, bounty hunters provide a great service to the criminal justice system” as “a tax-free force that tracks down fugitives . . . saving police departments the time and the expense of having to do it themselves”).

219. See Helland, *supra* note 48, at 109 (stating that statistics confirm that “bounty hunters are highly effective at recapturing defendants who attempt to flee justice—considerably more so than the public police”); *Hearing on Citizen Protection Act*, *supra* note 80, at 27 (statement of Sen. Robert Torricelli) (noting that “publicly funded police officers recover only about 10 percent of the massive ranks of the defendants who . . . fail to appear, [but] bounty hunters catch an incredible 88 percent of them”).

220. See James Coburn, *Jail Cost Could Reach \$436M*, EDMOND SUN, July 16, 2009 (reporting that Oklahoma City needs a new jail to adequately house inmates after the Department of Justice found the current facility inadequate), available at

Releasing defendants on bail eases the burden on the prisons and saves untold amounts of resources that would be required to house additional prisoners.<sup>221</sup> However, pretrial release is only effective if the defendant's reappearance for trial is reasonably assured. With their sole focus being the apprehension of bail jumpers, bounty hunters provide that assurance at no expense to the state.<sup>222</sup>

## 2. Interdependence

The relationship between bounty hunters and the state is interdependent in much the same way it is mutually beneficial.<sup>223</sup> States depend on the bail bondsman to ensure bailed defendants' appearance at trial.<sup>224</sup> For their part, bounty hunters depend on the state for the authority to apprehend the fleeing defendants.<sup>225</sup> Although bounty hunters are commonly regarded as private contract enforcers, the state could still theoretically restrict their authority.<sup>226</sup> In essence, bounty hunters operate under the authority of an invisible badge given by the state.<sup>227</sup> Like police, bounty hunters can enter a defendant's home by force, exercise powers of arrest, and confine defendants against their

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[http://www.edmondsun.com/local/local\\_story\\_197013349.html](http://www.edmondsun.com/local/local_story_197013349.html); Adam Liptak, *1 in 100 U.S. Adults Behind Bars, New Study Says*, N.Y. TIMES, Feb. 28, 2008, (reporting that "prison costs are blowing a hole in state budgets . . . [as o]n average, states spend almost 7 percent on [sic] their budgets on corrections, trailing only healthcare, education and transportation"), available at <http://www.nytimes.com/2008/02/28/us/28cnd-prison.html>.

221. See *Hearing on Citizen Protection Act*, *supra* note 80, 143 (statement of Jonathan Drimmer, Attorney) (noting that by easing the strain on already overcrowded prisons the bounty hunters "save the public significant sums of money"); *id.* (attributing bounty hunters' impressive apprehension rate to their "focused expertise and economic incentives").

222. See Lori J. Zeglarski, Note, *New Jersey's Assembly Bill 2566 Finally Attempted to Regulate Bounty Hunters*, 28 SETON HALL LEGIS. J. 381, 412 (2004) (noting that "[w]ithout bounty hunters, the entire burden of apprehending fugitives would fall on 'state, local, and county governments'") (citation omitted).

223. Helland, *supra* note 48, at 118 (saying that based on fugitive apprehension percentages, "[b]ounty hunters, not public police, appear to be the true long arm of the law"); *Hearing on Bounty Hunter Responsibility Act*, *supra* note 82, at 60 (statement of Jonathan Drimmer, Attorney) (calling bounty hunters "crucial to the bail process"). Without the bail system, states would face the challenge and expense of monitoring or confining all those defendants that would normally obtain bail. See *id.*

224. *Id.* Aside from imprisoning every defendant—which would be hardly feasible, practicable, or fair—commercial bail bonding stands as the most effective method of pre-trial supervision. Liptak, *supra* note 39 (reporting that "[a]ccording to the Justice Department and academic studies, the clients of commercial bail bond agencies are more likely to appear for court in the first place and more likely to be captured if they flee than those released under other forms of supervision"); see also Helland, *supra* note 48, at 118 (stating that "findings indicate that bond dealers and bail enforcement agents (bounty hunters) are effective at discouraging flight and at recapturing defendants").

225. See NIETO, *supra* note 47, at 7 (attributing bounty hunters' broad arrest powers to the common law privileges articulated by the courts); see also Chamberlin, *supra* note 218, 1177 (stating that "bondsmen make their living by feeding off the federal and state bail systems").

226. See *Hearing on Bounty Hunter Responsibility Act*, *supra* note 82, at 61 (statement of Jonathan Drimmer, Attorney) (advocating that bounty hunters be restrained by constraints similar to those imposed on private prison officials).

227. See Holly J. Joiner, Note, *Private Police: Defending the Power of Professional Bail Bondsmen*, 32 IND. L. REV. 1413, 1419-20 (1999) (likening bounty hunters to "a private police force that chases defendants who flee and delivers them back to court").

will while transporting them back to court.<sup>228</sup> Bounty hunters enjoy these peculiar powers under the shadow of statutory regulations of the industry.<sup>229</sup>

### 3. A Narrow Interpretation

Courts typically interpret the symbiotic relationship test narrowly.<sup>230</sup> Mutual benefits and interdependence provide a foundation for the test, but the more telling questions are whether the private entity's conduct was indispensable to the state and whether the state profited financially from that conduct.<sup>231</sup> Bounty hunter conduct satisfies both inquiries.

As quasi-judicial actors that facilitate pre-trial releases and ensure defendant appearances for trial, bounty hunters are indispensable to the state justice system.<sup>232</sup> Their work provides a unique benefit to the state.<sup>233</sup> Bounty hunters are able to devote time and resources to their endeavors that official police cannot match.<sup>234</sup> By taking the figurative place of prisons and police, bondsmen and bounty hunters generate a financial benefit for the state by defraying expenses.<sup>235</sup> The law enforcement-like service and the financial benefits implicate the necessary degree of entwinement to make bounty hunter conduct attributable to the state under the symbiotic relationship test.

## VI. CONCLUSION

Bounty hunters fulfill an important role in the judicial process. By

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228. See Fisher, *supra* note 62, at 202 (detailing the various powers and privileges enjoyed by bounty hunters throughout American history).

229. See *supra* note 217.

230. Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1451 (10th Cir. 1995). “[E]xtensive state regulation, the receipt of substantial state funds, and the performance of important public functions do not necessarily establish the kind of symbiotic relationship between the government and a private entity that is required for state action.” *Id.*

231. See *id.* at 1451 (noting that the “[p]ost-Burton decisions have emphasized the *Burton* Court’s finding that the restaurant was an indispensable part of a state project and that the state profited from the restaurant’s discrimination”).

232. See Chamberlin, *supra* note 218, at 1193 (stating that although bounty hunters may be “private citizens, [they] are really quasi-law enforcement officers concerned with the enforcement of bail agreements”); *Hearing on Bounty Hunter Responsibility Act*, *supra* note 82, at 72 (statement of Jonathan Drimmer) (stating that “bondsmen and bounty hunters are indispensable to state bail systems”).

233. See Helland, *supra* note 48, at 118 (reporting that defendants who use bail bondsmen are “28 percent less likely to fail to appear than similar defendants released on their own recognizance, and if they do fail to appear, they are 53 percent less likely to remain at large for extended periods of time”); Chamberlin, *supra* note 218, at 1195 (warning that overregulation of bounty hunters could lead to “serious unwanted and unforeseen repercussions” if the “ties [that] bounty hunters have to the successful operation of the criminal justice system” are disrupted).

234. See Joiner, *supra* note 227, at 1434 (saying that bounty hunters “effectiveness and cost efficiency serve to justify” their unique powers).

235. See POPE, *supra* note 8, at 18 (noting that “bounty hunters and the bail bond industry recapture 80 percent of skips,” thus, saving “hundreds, if not thousands, of taxpayer dollars [that would be needed] to effectuate a capture by municipal police”).

ensuring the return of criminal defendants, bounty hunters preserve the function of the bail bonds industry. Their valuable service to society should not be underestimated. Similarly, state and federal law enforcement officials contribute to public welfare by making citizens' lives safer. However, constitutional provisions temper the exercise of police authority. While greater liberty might enable the police to fight crime more effectively, courts have recognized that the Fourth Amendment grants citizens the right to be free from unreasonable searches and seizures by government actors. Likewise, courts should hold privatized extensions of the judicial system to the same constitutional standards, even if the government only acknowledges these private actors by winks and nods.