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Midnight Run Re-Run: Bail Bondsmen, Bounty Hunters, and the Uniform Criminal Extradition Act

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I. INTRODUCTION

"Your mother ever teach you how to react to strangers? Not shoot at 'em. Huh?"[1]

Nobody taught Texas bail bondsmen Alberto Lopez and Thomas K. Colson, or bounty hunter George Sandoval, how to react to strangers, and not shoot at them.

In November of 1984, Rudy Ojinaga was arrested in El Paso, Texas, for drunk driving and possession of marijuana.[2] He posted bond in the amount of $9,500 and was released.[3] Lopez was his bail bondsman.[4]

Ojinaga returned to the home in which he resided with his parents in Central, New Mexico.[5] In spring of the following year, Lopez learned that Ojinaga had failed in some respect to comply with the conditions of his pretrial release.[6] Lopez sent Sandoval to take Ojinaga into custody and return him to jail in El Paso.[7]

When Sandoval arrived at the Ojinaga household, Rudy Ojinaga's parents telephoned a local police officer, Daniel Garcia.[8] Officer Garcia told Sandoval to return after the Memorial Day weekend, during which time Garcia would check with the local district attorney regarding the status of Ojinaga's pretrial release.[9] Assuming that matters were as Sandoval claimed they were, Garcia "would [then] assist with Mr. Ojinaga's

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1. MIDNIGHT RUN (City Light Films 1988) (bounty hunter Jack Walsh (played by Robert De Niro) to captured fugitive Monroe Bouchet (played by John Toles-Bey)).

2. State v. Lopez, 734 P.2d 778, 780 (N.M. Ct. App. 1986).

3. *Id.*

4. *Id.*

5. *See id.*; Lopez v. McCotter, 875 F.2d 273, 274 (10th Cir. 1989). El Paso and Central are on different sides of the state line, but less than 150 miles apart.

6. *McCotter*, 875 F.2d at 273–74; *Lopez*, 734 P.2d at 780.

7. *See McCotter*, 875 F.2d at 274; *Lopez*, 734 P.2d at 780–81.

8. *McCotter*, 875 F.2d at 274.

9. *See id.*; *Lopez*, 734 P.2d at 781.

arrest . . . ."[10]

Rather than take Garcia's advice, Lopez, Colson, Sandoval, and two other men—at least four of the party armed—returned to the Ojinaga home.[11] Rudy's father confronted the men while his mother again telephoned Officer Garcia.[12] Local police showed up, and an armed standoff followed until state police arrived in force.[13] Lopez and his crew were then arrested and charged with a variety of serious felonies.[14]

Interrupt the narrative here and *State v. Lopez* hardly seems like the sort of raw material from which jurisprudential revolutions are made: Somewhere near a small town in New Mexico a handful of bail bondsmen and bounty hunters probably committed aggravated assault, and certainly committed felony bad judgment. In the event, Lopez was convicted of three criminal charges and Colson of two.[15]

In affirming Lopez's conviction,[16] however, the intermediate appellate court announced a rule of law that was revolutionary enough: The age-old common law authority of a bail bondsman or bounty hunter to transport a fugitive across state lines had been superseded by the Uniform Criminal Extradition Act ("UCEA").[17] As a matter of law, "a bondsman may not, without consent of the [fugitive], remove him from th[e] state [to which he has fled] without compliance with the provisions of the Uniform Criminal Extradition Act."[18]

In the two decades since it was pronounced, the holding in *Lopez* has produced no great reaction. A handful of courts around the country have embraced its doctrine.[19] Other courts have resolved the *Lopez* issue, or closely related issues, without citing or considering *Lopez* at all.[20] And there is at least anecdotal evidence that bail bondsmen continue to transport fugitives across state lines, blithely unaware of the

10. *McCotter*, 875 F.2d at 274.

11. *See id.*

12. *Id.*

13. *Id.*

14. *See id.*

15. *Lopez*, 734 P.2d at 780.

16. Colson's conviction was reversed on grounds unrelated to the subject matter of this article: the prosecutor had commented adversely before the jury upon Colson's exercise of his constitutional right to remain silent at trial. *Id.* at 785, 788.

17. *See id.* at 782.

18. *Id.* Pursuant to the UCEA, a fugitive must be promptly afforded a hearing in the state in which he is recaptured. If it is determined that he is in fact wanted in another American jurisdiction, the states involved, rather than a private bail bondsman, provide the mechanism for rendition. *See* discussion *infra* Part III.

19. *See, e.g.*, Commonwealth v. Wilkinson, 613 N.E.2d 914 (Mass. 1993), discussed *infra* Part V.C.

20. *See, e.g.*, Lee v. Thorpe, 147 P.3d 443 (Utah 2006), discussed *infra* Part V.

teachings of *Lopez*.[21]

But if *Lopez* is correct—if the UCEA, promulgated decades ago, supersedes the common-law bail agent's privilege, recognized centuries ago—then *Lopez* is entitled to a great deal more recognition in the legal community and the bail industry than it has received. Part II of this article considers the law and practice of bail: what it is, how it works, and what it entitles the bail bondsman to do. Part III of this article discusses the law of interstate rendition, both before and after the promulgation of the UCEA. Part IV gives more detailed consideration to *Lopez* and post-*Lopez* cases that have considered, or failed to consider, the interaction between the law and tradition of bail and the UCEA. In Part V, this article concludes that the UCEA is properly construed and readily applied to supersede the bail bondsman's common-law privilege to transport a fugitive across state lines.

II. THE LAW OF BAIL

A bail bond is a three-party contract among a criminal defendant, a surety, and the government.[22] In the language of the law of suretyship,[23] the criminal defendant is the "principal" to the suretyship, the bail bondsman (or the insurance company whose agent the bondsman is) is the surety, and the government is the "obligee."[24] In a bail bond submitted in a criminal case in state court the obligee is typically identified as the state (or the governor of the state), for the use and benefit of its political subdivision, the county.[25]

As with any suretyship, a bail bond embodies mutual and interlock-

21. Nor, it appears, did Hollywood read the *Lopez* opinion. *Midnight Run*, in which bounty hunter Jack Walsh drags fugitive "Duke" Mardukas from one end of the country to the other, came out in 1988, two years after *Lopez*. MIDNIGHT RUN, *supra* note 1.

22. Pinellas County v. Robertson, 490 So. 2d 1041, 1042 (Fla. 2d Dist. Ct. App. 1986).

23. The usages of bail have engendered a language all their own. The word "bail" may be a verb, for example, "You will not bail me, then, sir?" WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 3, sc. 2; or a noun; and when a noun, may be plural, for example, "A Discharge of the principal, is in law a discharge of his bail. . . . [A]nd then the bail are discharged." ANTHONY HIGHMORE, A DIGEST ON THE DOCTRINE OF BAIL 66–67 (David Berkowitz & Samuel E. Thorne eds., Garland Publishing 1978) (1783), as well as singular. As the foregoing quotation suggests, common law scholars frequently used the word "bail" as a noun to refer not only to the institution of bail, the law of bail, the practice of bail, but also to the person whom we nowadays call the surety. *See* State v. Nugent, 508 A.2d 728, 732 (Conn. 1986). Modern usage treats "bail" as a noun only and speaks of "admitting the defendant to bail" rather than "bailing the defendant." A bail bondsman may prefer to be referred to as a bail agent, and a bounty hunter as a "fugitive recovery agent."

24. Bail bonds are governed by principles of suretyship and contract law. *See* United States v. Dudley, 62 F.3d 1275, 1278 (10th Cir. 1995); United States v. Terrell, 983 F.2d 653, 655 (5th Cir. 1993); United States v. Carr, 608 F.2d 886, 888–89 (1st Cir. 1979); S. Sur. Co. of Des Moines v. United States, 23 F.2d 55, 58 (8th Cir. 1927).

25. *See, e.g.*, State *ex rel* Metro. Dade County v. Am. Bankers Ins. Co., 558 So. 2d 539 (Fla.

ing rights and obligations. As between the surety and the principal, the surety promises to arrange for the principal's conditional liberty in exchange for the principal's promise of payment.[26] As between the surety and the obligee, the surety promises to produce the person of the principal, or a sum certain in his stead, at time of trial in exchange for the obligee's promise to permit the surety to arrange for the principal's conditional liberty while at the same time exercising constructive custody over him. As with any contract or suretyship, no party may hinder (or perhaps more precisely, no party may benefit from hindering) another party in the exercise of the latter's obligations. Thus, for example, if a surety seeks to exercise his right to surrender a principal, i.e., to return him to custody,[27] the obligee may not act to prevent him from doing so.[28]

A surety is an absolute guarantor of the appearance of his principal. He does not pledge his best efforts to encourage the accused to appear for trial; he pledges to produce the body of the accused, or to pay the amount of the bail bond in liquidated damages for his failure to do so.[29] To exercise this function, the criminal justice system vests the bail bondsman with powerful rights and remedies.

3d Dist. Ct. App. 1990); State *ex rel* Metro. Dade County v. Quesada, 529 So. 2d 792 (Fla. 3d Dist. Ct. App. 1988).

26. Typically the bail bond premium is a percentage fixed by law, perhaps 10% or 15%, of the amount of the bail. The bail bondsman also has a right to demand collateral in the full amount of the bail. The premium, once paid, is lost to the principal forever. Some part of it becomes the bail bondsman's income, some part is remitted to the insurance company whose agent the bail bondsman is, and some part is set aside in a "build-up fund," or "BUF," as a reserve against future losses. The collateral, however, will be returned to the principal (or whoever posted it on his behalf) if and when the principal duly appears for trial. *See generally* Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987 (1994) (describing the process of returning collateral and forfeiture in the context of differential treatment between black defendants and white defendants).

27. *See* discussion *infra* Part IV.B, regarding the surety's right to surrender.

28. *See, e.g.*, McConathy v. State, 545 S.W.2d 166, 168 (Tex. Crim. App. 1977). *Accord* Johnson v. Hicks, 702 S.W.2d 797, 797–98 (Ark. 1986); Commonwealth v. Stuyvesant Ins. Co., 321 N.E.2d 811, 815–16 (Mass. 1975). A related but not identical example: If a defendant while still at liberty flees the jurisdiction, the bail bondsman has a duty to find him and to bring about his return. But if the obligee (*i.e.* the state, or other governmental entity), upon being informed by the bail bondsman that he has located the fugitive defendant, fails or refuses to make a formal demand for interstate rendition to the jurisdiction to which the defendant has fled, thus frustrating the bail bondsman's performance of his obligation under the suretyship, the bail bondsman is constructively discharged as a matter of law. *See* discussion *infra* Part II.B.

29. That a bail bondsman made his best efforts to prevent a defendant from fleeing, or to locate that defendant after he has fled, may fuel the bail bondsman's claim for remission, in whole or in part, after forfeiture of the bail. But a request for remission, "an appeal *ad misericordiam*[,] . . . [is a]t best . . . granted as an act of grace. . . . [not as] a plea in bar." United States v. Mack, 295 U.S. 480, 488–89 (1935) (Cardozo, J.). *See* discussion *infra* Part II.C.

A. *Indemnification*

During some periods of the common law it was prohibited, and even criminal, for a surety to seek indemnification as to his obligation under the bail bond.[30] The theory was simple: The bail bondsman's incentive to invigilate the criminal defendant, to prevent his flight from justice and to assure his appearance before the court, was fear of financial loss in the amount of the bail bond. If the defendant or his well-wishers could enter into an enforceable agreement to make the bail bondsman whole for any loss, the incentive ceased to exist; in effect, the defendant had entered into a criminal conspiracy with the bail bondsman to buy his (the defendant's) way out of jail (and probably out of town).

Whatever the merits of that theory, it no longer obtains as a matter of general American jurisprudence. Bail bondsmen are routinely permitted to seek, and routinely obtain, indemnification from defendants or their solvent friends and relatives.[31]

B. *Surrender*

To surrender a defendant is to return him to custody *prior to* breach of a material condition of bail.[32] Once a defendant has been surrendered, the surety is entitled to exoneration of the bail bond. The suretyship ceases to exist.

At common law, a surety exercised an all-but-absolute power to surrender his principal.[33] This plenary common law power is at present codified in the statutes and procedural rules of many American states.[34]

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30. "[A]n agreement by an accused person to indemnify his bail is illegal in that it tends to produce a public mischief, and the parties to the agreement are therefore guilty of the offence of conspiracy, although they may have entered into the agreement without any wrongful intent." JOHN JERVIS, ARCHBOLD'S PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES 88 (Henry Delacombe Roome & Robert Ernest Ross eds., Sweet & Maxwell 25th ed. 1918).

31. *See, e.g.*, FLA. STAT. ANN. § 903.14 (West 2007); Bethel v. State, 898 So. 2d 176 (Fla. 3d Dist. Ct. App. 2005).

32. *See* discussion *infra* Part II.C regarding the authority of a bail bondsman to arrest a defendant who has already breached his bond by fleeing or failing to appear.

33. *See, e.g.*, Jordan v. Knight, 35 So. 2d 178, 180 (Ala. 1948) ("[A]t common law, it was the right of the bail at any time to arrest and surrender the principal into the custody of the law in discharge of their obligation to the State under the bond."); State v. Mahon, 3 Del. (3 Harr.) 568, 569 (Del. Ct. Oyer. & Terminer 1842) (discussing that bail "has always the right to surrender" his principal); *see also* Shifflett v. State, 572 A.2d 167 (Md. 1990); WM. L. CLARK, JR., HANDBOOK OF CRIMINAL PROCEDURE § 42, at 114 (William Mikell ed., West Publ'g Co. 2d ed. 1918) (1895) [hereinafter CLARK] ("The sureties are not compelled to act as bail for a longer time than they wish. . . . [T]he accused is, in the eye of the law, in the custody of his sureties, who are considered his keepers. If they fear his escape, or for any other reason wish to be released, they may rearrest him, and surrender him before the magistrate or court by which he was bailed. They will then be discharged.").

34. *See, e.g.*, ARK. CODE ANN. § 16-84-114 (West 2007); CONN. GEN. STAT. ANN. § 54-65 (West 2007); DEL. SUPER. CT. CRIM. R. 46(f); FLA. STAT. ANN. § 903.20 (West 2007) ("[A]

This is not to say that a surety may surrender his principal in discharge of *all* of the surety's obligations.[35] Rather, a surety may surrender his principal in discharge of all of the surety's obligations *to the obligee.* The surety's covenant to the obligee is to produce the person of the principal, on pain of paying the bail bond in full; the surety's covenant to the principal is to bring about his conditional liberty. The surety has a unilateral right to surrender the principal to the obligee and thus obtain discharge from any further duty to that obligee. That the exercise of this unilateral right may trigger a remedy for the principal does not make the right any the less unilateral as concerns the relation between the surety and the obligee. As to the surety's absolute power of surrender, the cases speak with one voice. In *Karakey v. Mollohan*,[36] for example, a criminal defendant sued his surety for surrendering him to the custody of the sheriff well prior to trial, and demanded the return of his bond premium.[37] The court quite properly perceived that the rights and duties that existed between the surety and the government lay along a different leg of the suretyship triangle than did the rights and duties that existed between the surety and the principal:

> After executing the bonds as surety Karakey had the right, as between him and the state, at any time to relieve himself of his undertaking under his agreement to remain surety on the bonds, by surrendering Mollohan into the custody of the sheriff . . . . [S]uch might be done whenever Karakey so desired. However, by exercising his right to surrender his principal to the sheriff . . . means [*sic*] only that by doing so the surety relieves himself on his obligation to the state. Such surrender does not release him from his agreement to Mollohan. His agreement with Mollohan is separate and apart from his obligation to the state as surety on the bonds.[38]

Citing *Karakey*, a more recent Texas opinion comes to the same conclusion: "A surety on a bail bond assumes an obligation to the State that is separate and apart from any obligation owed to the principal under the agreement between them. The surety may discharge its obligation to the

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surety may surrender the defendant at any time before breach of the bond."); MASS. GEN. LAWS ANN. ch. 276, § 68 (West 2007) ("Bail in criminal cases may be exonerated at any time before default upon their recognizance by surrendering their principal into court or to the jailer in the county where the principal is held to appear . . . ."); MD. CODE ANN., CRIM. PROC. § 4-217(h) (West 2007); TEX. CODE CRIM. PROC. ANN. art. 17.16 (Vernon 2007) ("A surety may before forfeiture relieve himself of his undertaking by . . . surrendering the accused into the custody of the sheriff of the county where the prosecution is pending . . . .").

35. *But see* Tyler v. Capitol Indem. Ins. Co., 110 A.2d 528, 532 (Md. 1955) (holding principal not entitled to recover premium paid to surety for bail bond even though surety surrendered principal only a few days after principal released from jail).

36. 15 S.W.2d 692 (Tex. Civ. App. 1929).

37. *Id.* at 692.

38. *Id.* at 693.

State in the criminal case by surrendering the principal."[39]

The success of a principal's claim for redress as a consequence of the putatively wrongful exercise by the surety of the surety's power of surrender may turn upon where the demised conduct occurred. In "good faith" jurisdictions the surety can defeat a claim for the return of bond premium or for civil damages simply by demonstrating that his surrender of the principal was in good faith. In "good cause" jurisdictions the surety will be obliged to remit some portion of the bond premium or to pay damages unless he can demonstrate that his surrender of the principal was supported by good cause.

The "good faith" standard is, of course, the easier one for the surety to meet. In *Tyler v. Capitol Indemnity Insurance Co.*,[40] a criminal defendant (Tyler) sued his surety "to recover the premium he paid . . . for a bail bond on the ground that the contract between him and the bail was void *ab initio*. His claim was that the bail had surrendered him to the State but a few days after he had been released from jail."[41] Because the surety benefited from an unfettered discretion to surrender Tyler to custody, argued Tyler, the contractual relationship into which he had entered did not truly oblige the surety to do so, or refrain from doing, anything; the contract was thus illusory, and no contract at all.

This argument the Maryland court rejected. "The case would seem to come within the rule that where the insurer has taken upon himself the whole peril, he becomes entitled to the whole premium, and although this may result in a profit to the insurer, it is just compensation for the danger or peril assumed."[42] The court relied upon an earlier case for the proposition that "if the contract of insurance is indivisible, once the risk attaches, the premium is considered earned."[43]

In reaching these conclusions, the court emphasized the following:

> No question is raised as to fraud or bad faith. It is not suggested that the bonding company at the time of the filing of the bond did not intend to remain as surety until trial, as generally it would have. [Tyler] was free to set his own value on his release from jail, knowing and agreeing that the right to remain at liberty could be terminated by the surety at any time, and that in such case, the premium

39. Robbins v. Roberts, 833 S.W.2d 619, 621–22 (Tex. App. 1992) (citing Karakey v. Mollohan, 15 S.W.2d 692, 693 (Tex. Civ. App. 1929)); *see also* Jordan v. Knight, 35 So. 2d 178, 180 (Ala. 1948); Johnson v. Hicks, 702 S.W.2d 797 (Ark. 1986); Commonwealth v. Stuyvesant Ins. Co., 321 N.E.2d 811 (Mass. 1975) (holding that the state as obligee cannot act to hinder the exercise of the surety's unilateral power of surrender).

40. 110 A.2d 528, 529 (Md. 1955).

41. *Id.*

42. *Id.* at 532.

43. *Id.* (citing Parker-Young Co. Smith v. Am. Sur. Co. of N.Y., 12 F. Supp. 987, 988 (D.N.H. 1935)).

would not be returned.[44]

In contrast to *Tyler* are the "good cause" authorities. In "good cause" jurisdictions the surety will be obliged to return some portion of the bond premium or to pay money damages unless he can demonstrate that his surrender of the principal was supported by good cause. A Louisiana appeals court has stated:

> When a surety surrenders a defendant who has not failed to appear or has not violated any order of the court ordering the defendant's detention, the surety shall refund to the defendant the total amount paid by the defendant to the surety for the bail bond by delivering, within twenty-four hours after surrender of such defendant, the entire refund to the account maintained for the defendant by the officer charged with his detention. The court, on motion of the surety and after notice and opportunity for hearing is given to the defendant, shall order the return to the surety of his fee upon a showing that good cause existed for the surrender of the defendant.[45]

C. *Remission*

The forfeiture of a bail bond and the ensuing payment of that forfeiture by the bondsman does not discharge the bondsman of responsibility. As long as the defendant is a fugitive and is wanted by the law, the bondsman has an ongoing duty to attempt to locate him and return him to justice. Most states provide a period of months or years during which the bondsman can recoup, by remission, some portion of his forfeited bond by producing the person of the fugitive defendant. For example, a Wisconsin court stated the following:

> The state desires that the surety seek out, apprehend and surrender the defaulting principal to bring the principal to justice and to save the state cost and delay. We must preserve an incentive for the surety to return the defaulting principal. That incentive must be a possible reduction in the amount of forfeiture, for if the surety can salvage nothing after a principal has defaulted, the surety will not throw good money after bad.[46]

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44. *Id.* at 531. How, exactly, Tyler or a similarly situated principal would establish bad faith is a nice question. If Tyler's bail bondsman had a pattern or practice of accepting premiums from criminal defendants and then returning them to jail within a matter of days, rather than permitting them to remain at liberty until the time of trial, Tyler might be able to make some evidentiary hay from that pattern or practice. Of course, reliable, credible testimony as to an admission by the bail bondsman (a priest, a rabbi, and a minister all of whom heard the bondsman say, "I acknowledge that I'm surrendering you in bad faith") would go far. Unsurprisingly, such evidence is seldom to be had and thus claims for bad-faith surrender are seldom brought.

45. Knauf v. Cont'l Bail Bonds, Inc., 549 So. 2d 905, 907 (La. Ct. App. 1989) (citing LA. CODE CRIM. PROC. ANN. art. 338(D) (1989)); *see also* People v. Goldsmith, 955 P.2d 561 (Colo. Ct. App. 1997).

46. State v. Ascencio, 285 N.W.2d 910, 913 (Wis. Ct. App. 1979).

As noted above, a request for remission is a plea *ad misericordium*, a plea addressed to the court's equitable discretion.[47] In passing upon a request for remission, the court will consider what efforts the surety made to invigilate the principal before the principal failed to appear; what efforts the surety made to recapture the principal after the principal failed to appear; the prejudice, if any, to the obligee arising from the principal's failure to appear; the costs or expenses incurred by the obligee in connection with the principal's failure to appear, and with his recapture; and like factors.[48]

D. *The Common Law Bail Agent's Privilege*

Central to the exercise of all of a surety's rights and remedies is the common-law bail agent's privilege. A bail bondsman is privileged to take physical custody of his principal, and to use reasonable force against the person, property, or effects of the principal to do so.[49] The bondsman relies upon the privilege to surrender the principal before he flees from justice or to recapture the principal after he has fled from justice. Without the privilege, forfeiture of bail must be inevitable, and remission of forfeiture impossible.

> The institution of bail is premised upon the legal fiction that [t]he custody of the bail [bondsman] is, in law, substituted for that of the sheriff, and [the bondsman] ha[s] the same power over the defendant to keep him and bring him into court. [The bondsman is] substituted for the common gaol. In the language of the customs of Normandy, [the bondsman is] "a living prison."[50]

A criminal defendant admitted to bail "is, in supposition of law, still in custodia marescalli,"—still in the custody of the marshal, sheriff, or warden.[51] By operation of this legal fiction, sureties exercised all the powers of jailers.[52] They could lay hands on a defendant at any time and in any manner they deemed reasonable to prevent his flight or to recap-

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47. *See* United States v. Mack, 295 U.S. 480, 488–89 (1935).

48. *See, e.g.*, Accredited Sur. & Cas. Co. v. Putnam County, 528 So. 2d 430, 431 (Fla. 5th Dist. Ct. App. 1988); State v. Poon, 581 A.2d 883, 890 (N.J. Super. Ct. App. Div. 1990).

49. Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731, 771 (1996) ("[B]ounty hunters have the authority to break into defendants' homes and take them into custody, and can seize or elicit incriminating evidence and statements that, whether voluntary or coerced, will be admissible against the defendant in court.") (internal footnote omitted).

50. United States v. Milburn, 26 F. Cas. 1243, 1249 (C.C.D.C. 1835) (No. 15766) (Cranch, C.J.).

51. *Id.* at 1248.

52. Of course, at early common law, there were few restrictions on the authority of jailers. Blackstone describes them as "a merciless race of men . . . conversant in scenes of misery, steeled against any tender sensation." 4 WILLIAM BLACKSTONE, COMMENTARIES *300. Because common-law sureties were typically friends or family of the accused rather than commercial bail

ture him after flight. The legal fiction supporting the relationship between surety and principal crossed the Atlantic with much of the common law and took hold in America. American cases discussing the power of bail agents typically begin with citation to the following *dictum* from *Taylor v. Taintor*:

> 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.[53]

Most of the propositions appearing in the foregoing paragraph—that the surety may, in his sole discretion, seize his principal, do so with reasonable force, and return the principal to the custody of the obligee, for example—were so well-entrenched at English common law that they invited no citation to authority. The failure of citation after the allegation that the surety "may pursue [the principal] into another State," however, is another matter.[54] Certainly, English common law provides no precedent for such a proposition, because the American polity of states within a federal system did not (and does not) exist in England. No doubt an English bail bondsman could, at common law, pursue his fugitive principal from town to town or shire to shire; but English towns and shires were no congeners for American states—particularly in the 19th century, when the center of political and legal gravity in the American system was located more in state government, and less in federal government, than is the case today. Yet case after case in early American jurisprudence treats it as an article of faith that a bail bondsman is empowered to cross state lines, recapture a fugitive principal, and transport him back across state lines.[55]

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agents, they could be expected to exercise their authority as substitute jailers more reasonably and generously than real jailers, that "merciless race of men."

53. Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1872); *see also* State v. Burhans, 89 P.3d 629, 633–34 (Kan. 2004); Commonwealth v. Cabral, 819 N.E.2d 951, 955–56 (Mass. 2005). Why *Taylor v. Taintor* has long been the authority of choice for the cited legal propositions remains a mystery. The excerpted paragraph is, as noted, mere dictum in *Taylor*, and the *Taylor* court clearly did not consider itself to be announcing anything original or controversial. *See* Todd C. Barsumian, Note, *Bail Bondsmen and Bounty Hunters: Re-Examining the Right To Recapture*, 47 DRAKE L. REV. 877, 885–88 (1999) [hereinafter *Bail Bondsmen*].

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

55. *See, e.g.*, Commonwealth v. Brickett, 25 Mass. (8 Pick.) 138, 146 (1829). *Nicholls v. Ingersoll*, 7 Johns. 145, 154 (N.Y. Sup. Ct. 1810) reaches the same conclusion, although it

The legal fiction of substitute custody is still the general rule in the America today. Modern cases considering the bail agent's privilege, however, cite an additional justification for it: the "right of the bondsman to apprehend his principal arises out of a contract between the parties . . . . Because it is a contract right it is transitory and may be exercised wherever the defendant may be found."[56]

III. INTERSTATE RENDITION[57] BEFORE AND AFTER THE UNIFORM CRIMINAL EXTRADITION ACT

The Constitution provides for the rendition of persons from one U.S. jurisdiction to another:

> A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.[58]

From the outset of our constitutional history it was the consensus of legal scholars that the foregoing provision "requires the action of Congress to put the constitutional provision in operation, [in] that it is in no sense self-executing."[59]

> In 1791, Pennsylvania demanded the extradition of three men charged with kidnaping [sic] a free black man and selling him into slavery. Virginia refused to comply with Pennsylvania's demand. The controversy was finally submitted to President Washington who, relying upon the advice of Attorney General Randolph, personally appeared before the Congress to obtain the enactment of a law to

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includes dictum posing the question, "[h]ow far the government [of the State of New York] would have a right to consider its peace disturbed, or its jurisdiction violated, or whether relief would not be granted on *habeas corpus*" in such circumstances.

56. Ouzts v. Md. Nat'l Ins. Co., 505 F.2d 547, 551 (9th Cir. 1974); *see also* State v. Blake, 642 So. 2d 959, 963 (Ala. 1994) ("[T]he right of arrest . . . is a contractual right under the bond . . . .") (citing Livingston v. Browder, 285 So. 2d 923 (Ala. Civ. App. 1973)); State v. Tapia, 468 N.W.2d 342, 344 (Minn. Ct. App. 1991) ("The surety-principal contract generally authorizes the bail bondsman, or his agent, to exercise jurisdiction and control over the principal during the period for which the bond is executed.").

57. Ideally, the word "extradition" should be reserved for the international transfer of persons, and the word "rendition" used to describe the transfer of persons from one American jurisdiction to another. Case and statute law seldom live up to this ideal, however, and the two terms are carelessly used as if they were interchangeable. In an address to the conference of governors in Washington in 1910, Governor Martin F. Ansel of South Carolina made the same distinction by using the term "requisition" to refer to the transfer of persons within the U.S. system. *See* MARTIN F. ANSEL, A BRIEF REVIEW OF THE LAW OF EXTRADITION (1910); *see also Ex parte* Swearingen, 13 S.C. 74, 75–76 (1880) (also employing the term "requisition").

58. U.S. CONST. art. IV, § 2, cl. 2.

59. 2 WHARTON'S CRIMINAL EVIDENCE § 851a, at 1613 (O.N. Hilton, ed., 10th ed. 1912) [hereinafter WHARTON'S] (citing Hyatt v. New York, 188 U.S. 691, 708–09 (1903)).

> regulate the extradition process. Congress responded by enacting the Extradition Act of 1793.[60]

Section 3182 of Title 18, the present-day version of the statute, is largely unchanged from the version of 1793.[61] It provides:

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District, or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District, or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.[62]

The passage of the federal statute, however, did not bring an end to interstate conflict as to powers and duties under the Constitution's rendition clause. Chancellor Kent recalls that

> in 1839, the Governor of Virginia made application to the Governor of New York for the surrender of three men, charged by affidavit as being fugitives from justice, in feloniously stealing and taking away from one Colley, in Virginia, a negro slave, Isaac, the property of Colley. The application was made under the act of Congress of . . . 1793 . . . founded on the [interstate rendition clause of the] Constitution of the United States . . . . The Governor of New York refused to surrender the supposed fugitives, on the ground that slavery and property in slaves did not exist in New York, and that the offence was not a crime known to the laws of New York, and consequently not a crime within the meaning of the Constitution . . . . But the legislature of New York, by concurrent resolutions of the 11th of April, 1842, declared their opinion to be, that stealing a slave within the jurisdiction and against the laws of Virginia was a crime within the meaning

60. California v. Superior Court, 482 U.S. 400, 406–07 (1987) (citation omitted).

61. *See* P.R. v. Branstad, 483 U.S. 219, 223 n. 2 (1987) ("The statute has remained substantially unchanged since its original enactment in the Extradition Act of 1793, 1 Stat. 302."); *see also* Barton v. Norrod, 106 F.3d 1289, 1296 (6th Cir. 1997) (noting that the present statute differs from original only in that it makes no reference to slaves; applies, by its terms, to any state or territory of the United States; and reduces the time period within which an agent of the demanding state must present himself in the asylum state from six months to thirty days).

62. 18 U.S.C.A. § 3182 (West 1996).

of the [interstate rendition clause].[63]

New Yorkers were not alone in their reluctance to apply the interstate rendition clause to fugitive slaves. A "statute in Pennsylvania, in February, 1847, was more stringent in its opposition to all state aid and accommodation in the recovery of fugitive slaves. . . . There are provisions of a similar effect in some of the other free states, and they amount in their consequences almost to a repeal of the [interstate rendition clause]."[64]

Some time after the Civil War, the "governors of the different states in conference . . . agreed upon . . . [certain] rules, which govern in all cases of interstate extradition."[65] This gubernatorial compact was the progenitor of the present day UCEA.[66]

Although the form in which the UCEA is adopted may vary slightly from state to state, the general sense of the statute is as follows: The governor (sometimes referred to in the UCEA as the "executive authority") of the state seeking to prosecute an individual not present in that state (the "demanding state") makes a demand for rendition to the governor of the state in which the individual is present (the "asylum state"). The demand must be accompanied by an authenticated copy of a charging document, a warrant, or an order of judgment and commitment, i.e. some customary legal document capable of "demonstrat[ing] either that there has been a judicial determination of probable cause to believe that the accused committed the crime for which [ ]he is wanted or that [ ]he has been convicted of" such crime.[67] If the governor of the asylum state determines that the demand is in order, he must issue a warrant for the

63. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 44 (Charles M. Barnes ed., 13th ed. 1884) (emphasis omitted).

64. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 43 (Charles M. Barnes ed., 13th ed. 1884).

65. WHARTON'S, *supra* note 59, § 851b, at 1614.

66. UNIF. CRIMINAL EXTRADITION ACT, 11 U.L.A. 44–167 (Supp. 1994). The National Conference of Commissioners on Uniform State Laws (NCCUSL) approved a draft of the UCEA in 1926. That draft was revised and finalized in 1936. *See* Barton v. Norrod, 106 F.3d 1289, 1296 (6th Cir. 1997). The UCEA was withdrawn by the NCCUSL in 1980 when the NCCUSL adopted the Uniform Extradition and Rendition Act. To date, however, the only U.S. jurisdiction to supplant the UCEA with the newer uniform act is North Dakota. *See* N.D. CENT. CODE §§ 29-30.3-01–29-30.3-21 (2007). Regarding the work of the Uniform Law Commissioners and the National Conference of Commissioners on Uniform State Laws, see Uniform Law Commissioners, http://www.nccusl.org (last visited Sept. 23, 2007).

67. France v. Judd, 932 So. 2d 1263, 1264 (Fla. 2d Dist. Ct. App. 2006) (citing Shapiro v. State, 456 So. 2d 968 (Fla. 2d Dist. Ct. App. 1984); State v. Diaz, 440 So. 2d 1318 (Fla. 3d Dist. Ct. App. 1983); Chesser v. Dougherty, 417 So. 2d 1164 (Fla. 1st Dist. Ct. App. 1982)).

arrest of the fugitive,[68] i.e. a "rendition warrant."[69]

It sometimes happens that a fugitive is located in an asylum state in circumstances in which it would be inadvisable to wait for the demand by one governor for, and the issuance by another governor of, a rendition warrant. In such circumstances, a court in the asylum state "may order the pre-requisition arrest of an accused fugitive by issuing an arrest warrant, commonly known as a 'fugitive warrant.'"[70] To obtain such a warrant, all that is required is that a "credible person" present reliable evidence to the asylum-state court that the fugitive has committed or been convicted of a crime in the demanding state, and that the fugitive is presently to be found within the territorial jurisdiction of the asylum-state court.[71] Alternatively, a fugitive may be arrested without warrant provided that the crime from which he has fled is a felony (*i.e.* one punishable by imprisonment for a term exceeding one year), and provided that he is promptly presented before the appropriate court in the asylum state.

When a fugitive is taken into custody, whether pursuant to a fugitive warrant or otherwise, he is entitled to a judicial hearing.[72] At that hearing, he may voluntarily submit to the jurisdiction of the demanding state (customarily but misleadingly referred to as "waiving extradition"), or he may insist on being presented with a rendition warrant in the asylum state.[73] If the fugitive declines to "waive extradition," the asylum state must produce a rendition warrant within thirty days.[74] The court has power to extend the thirty-day period for up to sixty additional days,

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68. The use of the word "fugitive" conveys a misimpression. Once upon a time it was necessary to be physically present in a given state in order to violate that state's criminal laws. Certainly that is no longer the case. One can reside in State A and, by use of telephone, mail, email, fax, or other means, commit criminal violations in State B without ever physically entering State B. The person who engages in such conduct, and who is wanted for prosecution in State B, is, for purposes of interstate rendition, a "fugitive;" this despite his never having entered, much less fled from, State B.

69. *France*, 932 So. 2d at 1265. *See generally* Edwards v. Bowles, No. 3:03-CV-2624-M, 2004 WL 1788658, at *1 (N.D. Tex. Mar. 16, 2004).

70. *France*, 932 So. 2d at 1265.

71. *Id.* The fugitive is then arrested by an officer of the asylum state on the fugitive warrant. When, in due course, the governor of the asylum state issues a rendition warrant, the fugitive—already in custody—will be "arrested" on the rendition warrant. The second arrest occurs in contemplation of law only, the fugitive having been physically arrested earlier.

72. *See* Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 22 (2006) ("A typical defendant is processed within the criminal system through some combination of pretrial steps, which commonly include certain judicial hearings.").

73. *See, e.g.*, Beauchamp v. Murphy, 37 F.3d 700, 702 (1st Cir. 1994) (discussing how in the case of a criminal defendant who had been convicted of second-degree murder in Massachusetts and fled to Illinois the "governor of Illinois issued a rendition warrant, but [the defendant] refused to waive extradition").

74. State v. Phillips, 587 N.W.2d 29, 34–35 (Minn. 1998). The fugitive may challenge the warrant by petition for writ of habeas corpus.

but no longer.[75] If no rendition warrant is forthcoming within that time period, the fugitive must be discharged.[76]

Assuming, then, that the UCEA applies to the conduct of bail bondsmen and bounty hunters—an assumption that will be examined herein—there are three courses of action open to the bail bondsman in pursuit of a criminal defendant who has crossed state lines, and whose whereabouts are known to the bail bondsman. He can call upon the governor of his state (through the local prosecutor) to demand the rendition of the fugitive from the governor of the asylum state.[77] The fugitive will then be apprehended by law enforcement officials of the asylum state, presented before the courts of the asylum state, and in due course given over to law enforcement officials of the demanding state.

A second option is for a "credible person"[78] to apply to a judge in the asylum state for a warrant for the arrest of the fugitive. If the warrant issues, the fugitive will be apprehended by law enforcement officials of the asylum state, presented before a court of the asylum state, and in due course given over to law enforcement officials of the demanding state.

If the fugitive is charged in the demanding state with a felony, there exists a third option pursuant to which the bail bondsman or bounty hunter may arrest the fugitive wherever he is found and immediately surrender him to the courts. Once before the courts, the fugitive will be afforded such process as may be due, and then be given over to law enforcement officials of the demanding state.

Three options, all—depending on the factual circumstances—within the ambit of the UCEA. But does the UCEA control the conduct of bail bondsmen?

IV. *LOPEZ* AND SUBSEQUENT CASES

The *Lopez* court stated categorically and unflinchingly the change in law that it was announcing: The UCEA supplanted the long-standing power of bail bondsmen and bounty hunters to recapture fugitives and transport them across state lines (at least if one of those lines delimited

75. *Id.*

76. *Id.* Of course, no double jeopardy bar accompanies this discharge.

77. *See* discussion *infra* Part IV.A. The failure or refusal of the executive authority of the state from which the fugitive fled to perfect a demand upon the asylum state works a constructive discharge of the surety, discharging him from any further liability on the bail bond; *see also infra* note 116.

78. A bail bondsman, or his lawyer, can be such a "credible person." State v. Flores, 962 P.2d 1008, 1015 (Haw. Ct. App. 1998) ("Clearly, a bail surety would qualify as a 'credible person' who could request the arrest of an alleged fugitive from justice, and courts in states with a UCEA provision . . . have so held.").

the State of New Mexico). No court had reached such a conclusion, or at least no court had articulated it so boldly. But there had been inklings.

A. *The Inklings*

Grady Ouzts, the plaintiff in *Ouzts v. Maryland National Insurance Co.*,[79] was arrested in Las Vegas in 1965 for a relatively minor offense and released on $2,500 bail.[80] The bondsman who posted the bail was William Embry, a bail agent for the Maryland National Insurance Company.[81] Darrow and Iola Peterson agreed to act as indemnitors.[82]

Ouzts fled from justice and was located in Long Beach, California.[83] He alleged that on November 3, 1966, "the Petersons came to his home and attempted to take him into custody."[84] The police showed up and, in what must have been a compromise that pleased no one, took Ouzts to the local jail.[85] At a hearing the next day a judge released Ouzts on bail and reset the matter to December 12th for a hearing on the issue of the Petersons' asserted right to transport Ouzts back to Nevada.[86]

Rather than await the hearing, the Petersons—this time accompanied by Embry—returned to California on November 18th.[87] At that time they hired two bounty hunters who promptly and "forcibly took Ouzts into custody . . . and delivered him to Embry and the Petersons . . . [who] then transported him to Las Vegas, Nevada, where Ouzts was delivered to the custody of the police."[88]

At issue in *Ouzts* was whether the conduct of the bounty hunters, who "claimed they were special police officers of Los Angeles County and displayed badges of authority,"[89] was action under color of state law so as to justify a civil suit by Ouzts against the bounty hunters under 42 U.S.C. § 1983.[90] The court found the conduct of the bounty hunters

79. 505 F.2d 547 (9th Cir. 1974).
80. *Id.* at 549.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 550.
89. *Id.*
90. *Id.* at n.2 ("42 U.S.C. § 1983 provides as follows: 'Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

"purely private," and thus not actionable under the demised statute.[91] The conduct was that of private actors because the relationship between Ouzts and the bounty hunters (the latter acting as surrogates or agents for the bail bondsmen and indemnitors with whom Ouzts was in privity of contract) was exclusively contractual in nature; the bounty hunters did not, and indeed could not, allege a statutory or other basis for the purported assertion of their authority over Ouzts.[92]

The court noted, however, that a state "may . . . enter the field and regulate the business and practices of bail bondsmen" and that "California has done precisely that."[93] A 1961 state statute

> totally abrogates the foreign bondsman's common law right to pursue, apprehend and remove his principal from California without resort to process. Instead, [it] interjects a mandatory series of court proceedings into the arrest and removal of a fugitive from bail from another jurisdiction. The foreign bondsman must first appear before a magistrate and submit an affidavit of facts in support of his request for an arrest warrant. Only after a finding of probable cause is made will the warrant issue. Any arrest made by the bondsman thereafter is upon the authority of the magistrate's warrant, and the bondsman's common law recapture right. Following the arrest, [the statute] requires an additional evidentiary hearing before the magistrate with the fugitive present. Only then can the bondsman be legally authorized to remove his principal from California.[94]

Thus, although the conduct of the bounty hunters was not actionable in federal court under the federal civil rights statute, it was clearly wrongful under state law. The state was empowered to abrogate entirely or limit particularly the common-law bail bondsman's privilege, and it had done so. Of course this observation was mere dictum in *Ouzts*.

Four years later an appellate court in Oregon went even further. The defendants in *State v. Epps* were California bail bondsmen.[95] They had posted bond for "one Morrow to effectuate his release from incarceration in Bakersfield, California. In violation of the terms of the [bail] agreement, Morrow then left California without the consent of either the surety or the court and took up residence in Portland, Oregon."[96] The California bail agents found him there, took custody of him, and brought him back to California; for which conduct they were prosecuted in Ore-

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liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.'").

91. *Id.* at 550.

92. *Id.* at 551–52.

93. *Id.* at 551.

94. *Id.* at 552–53.

95. 585 P.2d 425 (Or. Ct. App. 1978).

96. *Id.* at 427.

gon for kidnapping.[97] Under the applicable Oregon statute, kidnapping was defined to consist of the taking of a person from one place to another "without consent or legal authority."[98] On appeal from their convictions, the defendants argued that their actions were indeed the fruit of "legal authority," the authority in question being the common-law bail bondsman's privilege.[99]

This argument was not cordially received by the appellate court. The court began its analysis with a citation to the relevant portion of Oregon's version of the UCEA: "The warrantless arrest in Oregon by a private person of a person accused of a crime in another state is authorized and regulated by [Oregon's codification] of the Uniform Criminal Extradition Act."[100] As for the common-law privilege, "[i]t is unlikely that the common law rule was ever enunciated in Oregon,"[101] and even if it was, "common law rules are not immutable. The common law rule [upon] which defendant relies is inconsistent with contemporary requirements of civility."[102] And apart from considerations of civility, the UCEA procedure "provides judicial notice and identification safeguards which are more consistent with contemporary standards of due process."[103]

Epps was cited and relied upon in *People v. National Automobile & Casualty Insurance Co.*[104] *National* arose out of the criminal prosecu-

97. *Id.*

98. *Id.* (citing OR. REV. STAT. § 163.225(1)(a) (1971)).

99. *Id.* at 427–28. Defendants also argued that by signing a standard bail agreement form, Morrow had consented to being recaptured and transported back to California in the event that he breached the conditions of his bail (including, of course, the condition that he not flee the jurisdiction). *See id.* at 427. The court made short work of this argument, noting that, "[w]hatever legal effect such a contractual provision might have, it does not constitute consent as that term is used in the statutory definition which, as it applies in this case, is based solely upon the use of force in the taking." *Id. See* discussion *infra* Part V. regarding the efficacy of such standard consent provisions in bail agreement forms.

100. *Epps*, 585 P.2d at 427–28.

101. *Id.* at 428 n.2. The *Lopez* court never denied the existence, prior to the enactment of the UCEA, of the common- law bail bondsman's privilege in New Mexico; it simply held that the UCEA modified the privilege. State v. Lopez, 734 P.2d 778, 778–82 (N.M. Ct. App. 1986). The *Epps* court is unwilling to acknowledge the clear existence of the privilege in Oregon even before the UCEA. *Epps*, 585 P.2d at 429 (questioning "[i]f . . . the common law rule ever existed in Oregon"). In this important respect the two cases differ.

And they differ in a second, albeit closely related, particular. In 1973, Oregon eliminated bail entirely. *Id.* From that day to this, commercial bail and bail bondsmen have not existed in Oregon. When, in 1977, California bail bondsmen arrived in Oregon in pursuit of Morrow, they were practicing a trade that no Oregonian could practice.

102. *Epps*, 585 P.2d at 428. The court quoted from RONALD GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM 117–18 (1965) to instance some of the "undesirable workings of the [common-law] rule." *Epps*, 585 P.2d at 428–29.

103. *Epps*, 585 P.2d at 429 (citing Ouzts v. Md. Nat'l Ins. Co., 505 F.2d 547, 552–53 (9th Cir. 1974)). This particular passage from *Epps* most nearly prefigures the holding in *Lopez*.

104. 154 Cal. Rptr. 872 (Ct. App. 1979).

tion for robbery of a Roy Burkhart.[105] Burkhart was admitted to bail in the amount of $5,000, which was underwritten by National Automobile and Casualty Insurance Company ("National"). When Burkhart failed to appear for trial, the bail bond was ordered forfeited.[106]

National subsequently located Burkhart in Hawaii. It "requested the Los Angeles Sheriff's Fugitive Detail to teletype a fugitive warrant to Hawaii."[107] The district attorney's office, however, declined to request the rendition of Burkhart from Hawaii to California.[108] On that basis, National sought the vacation of the order of forfeiture of the bail bond and exoneration from any further obligation under the bond.[109]

The appellate court affirmed the trial court's denial of relief with this jaw-dropping misstatement of the law: "[T]here is no legal authority for the proposition that the mere refusal by the government to extradite a defendant from a foreign jurisdiction operates to excuse the surety of performance and exonerate the bond."[110] Nothing can be said about that legal pronouncement but that it is flatly wrong, and that all authorities are to the contrary.

A bail surety's obligation is to produce the body of the principal before the court when that body is called for. The obligee is entitled to demand that the surety honor that obligation. The obligee is not entitled to a choice between the body of the principal or a cash payment. The amount of the bail bond is liquidated damages; it is a solatium for nonperformance, not an alternative—at the option of the obligee—to performance.

It is a principle of black-letter law too fundamental to require citation to authority that the parties to a contract or suretyship must act in good faith. They must attempt in good faith to discharge their own duties under the contract or suretyship, and they must deal in good faith with the other parties. They may not impede the other parties from the discharge of their respective duties, nor fail to do that which good faith requires to enable the other parties to discharge their respective duties. All authorities seem to recognize that if one party to the suretyship acts to hinder the performance of another party's duties, the latter party is constructively discharged from any obligation under the suretyship. "The sureties are . . . discharged by any . . . action by the state, . . . prejudicing their rights."[111] Thus, for example, if a bail bondsman

105. *Id.* at 873.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 872.
110. *Id.* at 873.
111. CLARK, *supra* note 33, § 42, at 113.

agrees to serve as surety for a particular defendant subject to the court-imposed condition that the defendant not leave the county, and agents of the obligee subsequently transport that defendant out of the county, the effect of the obligee's conduct is the constructive discharge of the surety.[112] The obligee's breach is a sin of commission. It consists in doing that which should not have been done, not in failing to do that which should have been done. But the analysis, and the legal principle involved, would be identical if the breach were a sin of omission, viz. if the breach of suretyship duty arose from failing to do that which the party was obliged to do rather than in doing that which the party was obliged not to do.

If a criminal defendant flees the jurisdiction that admitted him to bail and is subsequently located in another American jurisdiction, the surety has an obligation to do those things permitted by law to bring about the return of the fugitive.[113] Assuming that the UCEA sets forth those things permitted by law to bring about the return of the fugitive, the surety must proceed according to the terms of the UCEA. But those terms, and the remedies they encompass, will be unavailing if the state from which the defendant fled does not formally indicate to the state to which the defendant fled its desire for his return.[114] The prosecuting or executive authority of the state from which the defendant fled may, if it chooses to do so, decline to demand the rendition of the fugitive; but it may not decline to make such a demand and then call upon the surety to pay the bond. By declining to make the necessary demand, the obligee brings about a constructive discharge of the surety and an exoneration of the bail bond. The surety has an ongoing duty to recapture a fugitive defendant and return him to custody; and the surety has a correlative, albeit contingent, right to seek remission once its duty is discharged.[115] Nonfeasance on the part of the obligee that prejudices the surety's rights and duties works a discharge as certainly as would malfeasance or misfeasance having the same effect.[116]

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112. *See* United States v. Aguilar, 813 F. Supp. 727, 728–29 (N.D. Cal. 1993).

113. *See generally Bail Bondsmen*, *supra* note 53.

114. The demanding state is, of course, entitled to have the surety make it whole for any costs associated with the fugitive's return.

115. *See Bail Bondsmen supra* note 53, at 879.

116. As a practical matter, the prosecutor or "executive authority" in the state from which the fugitive defendant has fled may have a disincentive to seek that defendant's return: If he demands rendition he ends up with one more criminal case to prosecute; if he makes no demand, his workload is decreased by one, and he may obtain for his state or county a cash windfall in the amount of the bail bond. But the choice is not his to make. As a matter of the law of suretyship he must prefer the production of the person of the accused to the collection of the bond. As a matter of suretyship, and as a matter of public policy:

> [I]t is of vital importance to the public administration of criminal justice, and the security of the respective states, that criminals, who have committed crimes therein,

The obligee's options are to request the rendition of the fugitive defendant, in which case it may look to the surety to pay any reasonable costs associated with that rendition; or to make no such request—in effect, to abandon any further prosecution of the fugitive defendant—in which case it may not look to the surety for anything at all.[117] Any other option would deracinate the entire concept of bail within the criminal justice system. Neither the commercial bail system in particular nor the criminal justice system in general is intended as a money-making enterprise for the government. Both the commercial bail system in particular and the criminal justice system in general contemplate an obligation on the part of the obligee and the surety to pursue, prosecute, and incarcerate perpetrators of crime. The state cannot opt instead to shrug its shoulders at the unlawful flight by such perpetrators to sister states and, when that flight is successful, demand and pocket a cash bonus from a surety.

According to the *National Automobile & Casualty Insurance Co.* court, the holding of *Epps* is that "National [should have] sen[t] an agent to Hawaii to arrest Burkhart pursuant to the Uniform Criminal Extradition Act"[118] and surrendered him to authorities there. What this would have achieved must remain a mystery. Recall that the Los Angeles District Attorney's Office expressly refused to demand the rendition of Burkhart from Hawaii.[119] Had Burkhart been arrested in Hawaii by National's agents or bounty hunters, and had those agents or bounty hunters then taken Burkhart before a judge in Hawaii, what would that judge have been obliged to do? He would have conducted a hearing,

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> should not find an asylum in other states; but should be surrendered up for trial and punishment. It is a power most salutary in its general operation, by discouraging crimes, and cutting off the chances of escape from punishment. It will promote harmony and good feeling among the states . . . . It will, moreover, give strength to a great moral duty, which neighbouring states especially owe to each other, by elevating the policy of the mutual suppression of crimes into a legal obligation.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1803, at 676 (1833).

117. *See, e.g.*, Sur. Cont'l Heritage Ins. Co. v. Orange County, 798 So. 2d 837 (Fla. 5th Dist. Ct. App. 2001); County Bonding Agency v. State, 724 So. 2d 131 (Fla. 3d Dist. Ct. App. 1998). Both *Continental Heritage* and *County Bonding* involved requests for international extradition rather than interstate rendition, but are in all other respects instructive. *Continental Heritage*, for example, involved criminal defendants who fled to Jamaica. *Sur. Cont'l Heritage Ins. Co.*, 798 So. 2d at 838. The surety located the defendants and made arrangements to have them returned to the Florida jurisdiction from which they had fled. *Id.* The surety presented a "letter from the Jamaican authorities . . . [in which those authorities] informed [the demanding jurisdiction] that the arrest of [the defendants] could not be accomplished without an arrest warrant being issued by [American authorities]." *Id.* "The State Attorney's Office, however, refused to initiate extradition proceedings." *Id.* Such a refusal, held the court, had the effect of preventing the surety from performing its contractual duty, and thus relieved them of that duty and of the financial consequences of non-performance. *See id.* at 840. *County Bonding* is to the same effect.

118. People v. Nat'l Auto. & Cas. Ins. Co., 154 Cal. Rptr. 872, 874 (Ct. App. 1979).

119. *Id.* at 873.

found that there was no rendition demand from California, and then ordered Burkhart's immediate release. Whether National's agents or bounty hunters would then face legal consequences of their own is a nice question.

The *National* court's conclusion that *Epps* teaches that the correct procedure in this or any similar case is for the surety to send an agent to the asylum state to arrest the fugitive can be derived neither from *Epps* nor from the text of the UCEA. The UCEA offers three options for the recovery of a fugitive[120]: (1) The demanding state can, acting through its executive authority, convey a request for rendition to the executive authority of the asylum state. The asylum state will then bring about the arrest of the fugitive by means of its (the asylum state's) criminal justice process, and notify the demanding state to send a law-enforcement officer to transport the fugitive. (2) A "credible person" can appear before the courts of the asylum state with appropriate documentation evidencing the fugitive status in the demanding state of the fugitive, and evidencing the fugitive's whereabouts in the asylum state. The asylum state will then bring about the arrest of the fugitive by means of its (the asylum state's) criminal justice process, and notify the demanding state to send a law-enforcement officer to transport the fugitive. (3) If the charge from which the fugitive has fled is a felony, he may be arrested in the asylum state (by, for example, a bail bondsman or bounty hunter from the demanding state) and immediately surrendered to the authorities in the asylum state. The asylum state, after affording the fugitive such process as is due, will notify the demanding state to send a law-enforcement officer to transport the fugitive.

It is at least a fair illation from the structure of the UCEA that the three options are listed in order from most to least desirable. The purpose, after all, of the UCEA (at least in this context) is to supplant the self-help of the common-law bail bondsman's privilege—with all its attendant dangers of false arrest, physical abuse, harm to bystanders—with a system characterized by "civility" and "contemporary standards of due process."[121] Of the three options, the third—in which an out-of-state bail bondsman or bounty hunter makes an arrest, by force if necessary—offers the greatest offense against civility, and is conducted outside the justice process.

But even if no such illation is fairly drawn—even if the UCEA offers its three options as being equally desirable and consistent with the UCEA's goals—it certainly cannot be said that *Epps* supports the proposition that the third option is the only appropriate one, or the one that

120. *See supra* Part III.

121. State v. Epps, 585 P.2d 425, 429 (Or. Ct. App. 1978).

the demanding state can force the surety to employ. It cannot be said; and yet it was said, by the court in *National*.[122]

This much, and no more, can be said in defense of the opinion in *National*: that it recognized, by its citation to (and in spite of its mischaracterization of) *Epps*, that the UCEA acts as a limitation upon the common-law power of an out-of-state bail bondsman or bounty hunter to transport a fugitive across state lines. In that respect, and only in that respect, *National* was a small, wobbly step toward *Lopez*.

B. *Lopez*

As discussed above, *Lopez* was a criminal case in which bail bondsmen and bounty hunters were arrested and prosecuted as a result of an armed stand-off with police at the home of a fugitive. On appeal from their convictions the defendants assigned as error the failure of the trial judge to grant a directed verdict in their favor, as well as the trial court's refusal to give certain requested jury instructions relating to the common-law bail bondsman's privilege.[123] Of course these two assignments of error were merely two sides of the same coin. In the defendants' view, the trial judge should have dismissed the case pretrial, or granted a directed verdict at the close of evidence, because by operation of the common-law privilege they were entitled to engage in the conduct for which they were prosecuted. Having denied those motions, the judge—again, on the defendants' theory of the case—should have instructed the jury on the capacious nature of the common-law privilege.

After two paragraphs of perfunctory discussion of the historical common-law privilege (one paragraph consisting entirely of a quote from *Taylor v. Taintor*), and a short paragraph summarizing New Mexico statutes regulating bail, the *Lopez* court was prepared to drop its bombshell:

> We are persuaded that the common law authority of the bondsman to transport a principal out-of-state, without the principal's consent, has been modified by enactment of the Uniform Criminal Extradition Act. Under [New Mexico's enacted version of the UCEA], a bondsman may not, without consent of the principal, remove him from this state without compliance with the provisions of the Uniform Criminal

122. The only court that even comes close to the position taken by *National*—the position that the obligee can decline to demand the rendition of a fugitive and still expect payment of the bail bond by the surety—is *State v. Flores*, 962 P.2d 1008 (Haw. Ct. App. 1998). *Flores*, however, is distinguishable from *National* in a number of particulars. Apparently the *ratio decidendi* in *Flores* was that the bail agency "never triggered an obligation on the part of the State . . . to decide whether to requisition the Governor of [the asylum state] to extradite Defendant to [the demanding state]." *Id.* at 1016. If that is indeed the lesson of *Flores*—that the surety simply never perfected its remedy under the UCEA—then *Flores* is not at odds with the *Lopez* line of cases.

123. State v. Lopez, 734 P.2d 778, 781 (N.M. Ct. App. 1986).

> Extradition Act. The purpose of this statute is to provide an orderly means of extradition, and to accord procedural due process to persons sought to be removed without consent from this state.[124]

The court then briefly discussed *Epps* with approval.[125] No other authority was considered, for the very good reason that no other authority existed.

The *Lopez* defendants sought—and received—relief in U.S. district court on habeas corpus.[126] On appeal from the district court's decision, the Tenth Circuit affirmed the grant of relief.[127] In so affirming, the appellate court conceded that its "inquiry in this case is *not* into what the law of New Mexico now is with respect to the recapture by a foreign bail bondsman of his principal in New Mexico. The New Mexico courts have spoken to this issue: henceforth, a foreign bondsman must comply with the UCEA . . . ."[128] Rather, the issue for the federal courts was whether the rule announced in *Lopez* was so "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue" that a conviction had on the basis of that rule was barred by considerations of due process.[129]

The UCEA had been on the books in New Mexico since 1937.[130] In the intervening five decades prior to the decision in *Lopez*, no New Mexico court had suggested that the enactment of the UCEA was intended to extend, or did extend, to the conduct of out-of-state bail bondsmen. No court anywhere in the United States had so suggested. "We must observe," said the Tenth Circuit, "that *State v. Lopez* is the only case we have encountered holding that the long-standing UCEA, by itself, modifies the established rule that a bail bondsman need not resort to process—particularly extradition—in rearresting his principal in another state."[131] The Tenth Circuit then properly distinguished *Epps*, because *Epps* "relied heavily" on the complete elimination of commercial bail, and of the trade of bail bondsman, in the state of Oregon.[132]

Thus the due process infirmity in the conviction of the *Lopez* defendants. Criminal statutes must give fair notice of their meaning, and the consequences for their violation. But "[t]he language of the UCEA could not have conveyed to Mr. Lopez a fair warning that his conduct

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124. *Id.* at 782 (citation omitted).
125. *Id.* at 782–83.
126. Lopez v. McCotter, 875 F.2d 273, 273 (10th Cir. 1989).
127. *Id.*
128. *Id.* at 275.
129. *Id.* (quoting Bouie v. City of Columbia, 378 U.S. 347, 354 (1964)).
130. *Id.* at 274.
131. *Id.* at 277.
132. *Id.*; *see also* State v. Epps, 585 P.2d 425, 429 (Or. Ct. App. 1978).

would be regarded as criminal."[133] "Because the decision of the New Mexico Court of Appeals was unforeseeable and retroactively rendered Mr. Lopez's conduct criminal by depriving him of the bail bondsman's privilege, it violated the due process clause" of the Constitution.[134]

C. *The Law After Lopez*

As the Tenth Circuit acknowledged, the due process infirmity inherent in the conviction of the *Lopez* defendants was a source of relief to those defendants, but to no one else.[135] From and after that time, out-of-state bail bondsmen and bounty hunters entering New Mexico had fair warning: In apprehending fugitives and bringing about their return to the states from which they had fled, all such bondsmen and bounty hunters would be obliged to conform their conduct to the strictures of UCEA. Failure to do so would result in criminal punishment.

Viewed from a historical standpoint, *Lopez* is fair game for criticism. It is unlikely that the Uniform Law Commissioners, in drafting the UCEA; or legislators of the State of New Mexico, in enacting the UCEA; gave a moment's thought to the problem of the out-of-state bail bondsman. Certainly the *Lopez* court cites no legislative history or other evidence that such a moment's thought was ever given. From the first implementation of the UCEA until the decision in *Lopez*, lawyers and judges who gave consideration to the purpose of the UCEA conceived of it as a device for regulating the conduct of state actors and state entities in connection with interstate rendition. Apart from such inklings as could be tortured out of *Ouzts* (which the *Lopez* court did not even cite) or *Epps* (which was, as the Tenth Circuit noted, readily distinguished), the *Lopez* court was writing on a blank slate, and with chalk of its own devising.[136]

None of which is to say that the holding in *Lopez* was wrong. The law often puts new wine in old bottles. Assuming that the UCEA was never *intended to apply* to the conduct of bail bondsmen; and granting that prior to *Lopez* the UCEA had never *been applied* to the conduct of bail bondsmen; it does not necessarily follow that the UCEA should not *be applied* to the conduct of bail bondsmen.

The sense of the *Lopez* ruling is clear. It is one thing to say that if a defendant is at liberty on bail and fails to appear for trial his bail bondsman may search the neighborhood frequented by that defendant, use reasonable force to apprehend him, and return him to the court having

133. *McCotter*, 875 F.2d at 277.
134. *Id.* at 278.
135. *Id.*
136. *Id.* at 277.

jurisdiction over him. It is a very different thing to extend the exercise of the same power across state lines. Recall that a bail bond is a three-party suretyship among the criminal defendant as principal, the surety, and the state as obligee.[137] By permitting the practice of commercial bail generally, and by authorizing the admission to bail of a given defendant particularly, the state expresses its determination that the dangers associated with the prospect of that defendant's flight and recapture are justified by the benefits and cost-savings to the state resulting from the commercial bail system. When a bail bondsman crosses state lines, however, no such balancing has been done, and no such determination made, as to the defendant whom he seeks. His presence in the foreign state is fraught with the potential for violence and harm, not only to the defendant and himself, but to passersby and property; and this potential for violence and harm is one that the foreign state never agreed to accept, indeed was never even asked to accept it.

Worse yet: If the defendant has fled, not merely to a neighboring state, but to a state far removed from the one in which he was admitted to bail, the bail bondsman's exercise in self-help in recapturing that defendant and transporting him across several state lines poses a danger to the peace and good order of not one but several states, none of which is the obligee on the bail bond pursuant to which the bondsman acts, and none of which has agreed to, or has any incentive to, accept that danger. Common sense and common experience suggest that the farther the bail bondsman must transport the fugitive to return him home, the greater the ongoing risk of conflict or escape, and the more force that must be applied to meet that risk.[138]

The UCEA replaces this hazardous and uncertain system of self-help with the orderly process of public law.[139] The fugitive is arrested by local police,[140] who can be expected to have a useful degree of familiarity with the vicinage in which the fugitive has taken refuge. The fugitive is then promptly presented before a local judge, who makes certain threshold determinations (such as whether this is, in fact, the person sought in the demanding state).[141] The fugitive is afforded the basics of

137. *See supra* Part II.

138. In *Midnight Run*, fugitive "Duke" Mardukas pleads with bounty hunter Jack Walsh, "I . . . suffer from acrophobia and claustrophobia." To which Walsh responds, "I'll tell you what: If you don't cooperate, you're gonna suffer from fistophobia!" MIDNIGHT RUN, *supra* note 1.

139. *See, e.g.*, State v. Epps, 585 P.2d 425, 429 (Or. Ct. App. 1978) ("The common law rule is abandoned in favor of [Oregon's codification of the UCEA] which provides judicial notice and identification safeguards which are more consistent with contemporary standards of due process.").

140. An out-of-state bondsman or bounty hunter may still make an arrest if the fugitive is charged with or convicted of a felony. *See supra* Part III.

141. *See, e.g.*, MONT. CODE. ANN. § 46-30-303 (2005).

due process. His transportation across state lines is done by sworn law-enforcement officers of the demanding state.[142] Presumably—it is impossible to do more than presume—it was these and like-kind considerations that prompted the *Lopez* court to rule that the UCEA supplants the common-law bail bondsman's privilege.

Most express in its approval of *Lopez* is the opinion of the Supreme Judicial Court of Massachusetts in *Commonwealth v. Wilkinson*.[143] *Wilkinson* concerned the odyssey of Danny Lee Nole, who was admitted to bail in Oklahoma and fled to Massachusetts.[144] Wilkinson, a bounty hunter acting on behalf of Nole's Oklahoma bail bondsman, apprehended Nole in Massachusetts, transported him to New Hampshire, and from there took him back to Oklahoma.[145] Wilkinson was then charged in Massachusetts with kidnapping and assault with a dangerous weapon.[146]

Prior to trial, the prosecution moved in limine to preclude Wilkinson from asserting a defense based upon the common-law bail bondsman's privilege, and asked the trial court instead to instruct the jury on the provisions of Massachusetts's enactment of the UCEA.[147] The trial judge granted the motion; that ruling was reviewable pursuant to terms of Massachusetts law permitting interlocutory appeal of novel legal questions.[148]

Lopez's acknowledgment that the common-law privilege had been a settled matter of law long prior to the promulgation of the UCEA had been tepid; *Wilkinson*'s was forthright. The common-law bail bondsman's privilege had been the law of Massachusetts time out of mind. "This right was held to follow the principal over State lines, and a surety could arrest his principal in any State and surrender him to the State where the principal was charged without new process."[149] Thus, the issue whether the UCEA supplanted the common-law privilege was squarely presented. After quoting from both *Lopez* and *Epps*, the *Wilkinson* court resolved that issue in the affirmative. Proceeding under the UCEA

> is a more efficient, predictable, and uniform method of interstate extradition. Moreover, it is a far "more civilized" process than that which simply allows the agent of a bondsman to come into the Com-

142. § 46-30-215.
143. 613 N.E.2d 914 (Mass. 1993).
144. *See id.* at 915.
145. *See id.*
146. *Id.*
147. *See id.*
148. *See id.* (citing MASS. R. CRIM. P. 34).
149. *Id.* (citing Commonwealth v. Brickett, 25 Mass. (8. Pick.) 138 (1829)).

> monwealth, forcibly seize an alleged fugitive, and remove him from the State with no procedural protections.[150]

That said, the *Wilkinson* court recognized what the Tenth Circuit had pointed out in *Lopez v. McCotter*: subjecting the conduct of out-of-state bail agents to the limitations of the UCEA was entirely neoteric.[151]

> We have never before applied the [Massachusetts adoption of the UCEA] in these circumstances to foreign bail bondsmen or their agents, and the provisions of the Act itself do not give adequate notice to bondsmen that their common law rights had been abrogated. . . . The decision we announce today, thus, should not be retroactively applied to the defendant. Accordingly, since the defendant did not have fair notice that his conduct was forbidden by the Act, he may offer as a defense to the charges pending against him that he possessed lawful authority to remove [the criminal defendant] from the Commonwealth without complying with the Act.[152]

The United States Court of Appeals for the Fifth Circuit was presented with facts all but identical to those of *Lopez* in *Landry v. A-Able Bonding, Inc.*[153] Brian Landry was "charged with felony theft in Lafayette, Louisiana."[154] He subsequently fled the state and failed to appear on his court date.[155] His bail had been posted by A-Able Bonding.[156]

When A-Able's owner, Gerold Burrow, learned that Landry had been located in Port Arthur, Texas, he enlisted the help of two of his employees and set out to recapture Landry.[157] The three men found Landry at the home of a friend in Port Arthur, handcuffed him, and drove him directly back to Lafayette.[158] Landry subsequently filed suit in U.S. district court for civil rights violations and related state-law claims.[159] Judgment was for the defendants, from which judgment Landry appealed.[160]

The Fifth Circuit's discussion of Landry's state-law claim for false imprisonment included no reference at all to *Lopez* or to the common-law bail bondsman's privilege.[161] Instead, the court's analysis began

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150. *Id.* at 917 (citing State v. Epps, 585 P.2d 425, 426 (Or. Ct. App. 1978)).
151. *See* Lopez v. McCotter, 875 F.2d 273, 277 (10th Cir. 1989).
152. *Wilkinson*, 613 N.E.2d at 917.
153. 75 F.3d 200 (5th Cir. 1996).
154. *Id.* at 203.
155. *See id.*
156. *See id.*
157. *See id.*
158. *See id.*
159. *Id.*
160. *See id.*
161. The district court had quoted from *Ouzts*, and opined in dictum that the common-law privilege, "perhaps is archaic and contrary to contemporary requirements of civility." Landry v.

with the UCEA: Texas had adopted the UCEA, and Texas's adoption of the UCEA governed the conduct of private persons.[162] Pursuant to the UCEA, Burrow and his colleagues were empowered to arrest Landry.[163] But "[l]iability for false imprisonment is not foreclosed by a lawfully executed initial arrest, for false imprisonment may result from an unlawful detention following a lawful arrest."[164] Under the terms of the UCEA, Burrow and his co-workers were obliged to present Landry before a local judge in Texas:

> Burrow and his employees acted . . . unlawfully, when they failed to present Landry before a judge or magistrate in Texas after his arrest, and instead unilaterally transported Landry back to Louisiana. . . . [T]he district court erred in concluding that Landry did not establish an absence of legal authority for his detention during his transport from Texas to Louisiana.[165]

The trinity of *Lopez-Wilkerson-Landry* speaks with one voice: The UCEA regulates conduct private as well as public. The effect of such regulation is to abrogate the common-law bail agent's privilege to transport a fugitive across state lines. Such a change in law is desirable, tending as it does to promote "civility" and to comport with contemporary notions of due process of law.

There are other voices. *Cramblit v. Fikse*[166] antedates both *Wilkerson* and *Landry* and makes no reference at all to *Lopez*. The *dramatis personae* in *Cramblit* include Samuel Cramblit as the criminal defendant turned civil plaintiff; Eddie Fikse as the jilted indemnitor; Michael Hargis as the latter-day Javert, the bounty hunter whose pursuit was relentless; and Melba Adams of Huntington, West Virginia, as the *femme fatale*.[167]

Cramblit was arrested in San Bernardino, California, on drug charges.[168] His employer, Fikse, paid a $5,000 bail bond for him; whereupon Cramblit fled the jurisdiction.[169] Fikse then retained the services of bounty hunter Michael Hargis to return Cramblit to justice.[170]

After much travail not worth recounting here, Hargis entered into an arrangement with Melba Adams, wife of a deputy sheriff in Hunting-

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A-Able Bonding, Inc., No. 1:92-CV-0257, 1994 U.S. Dist. LEXIS 14912, at *8–9 (E.D. Tex. May 9, 1994).

162. *See Landry*, 75 F.3d at 205.

163. *See id.* at 206. ("Thus, Landry's arrest was authorized by Texas law.").

164. *Id.*

165. *Id.* (footnote omitted).

166. No. 91-4002, 1992 U.S. App. LEXIS 28343 (6th Cir. Oct. 23, 1992).

167. *See id.* at *2–4.

168. *See id.* at *2.

169. *See id.*

170. *See id.*

ton, West Virginia: "Mrs. Adams would test drive a car, which Cramblit had for sale, drive it into West Virginia, and have Cramblit pick up the car in Huntington [West Virginia] at which time Hargis could apprehend Cramblit."[171] Matters proceeded according to plan; Cramblit was "tackled and handcuffed by Hargis," tossed into a car, and driven back to California.[172] Cramblit subsequently brought suit in U.S. district court claiming civil rights violations under 42 U.S.C. §§ 1983 and 1988.[173] The district court granted a directed verdict in favor of defendants, and Cramblit appealed.[174]

Cramblit argued, inter alia, that West Virginia's codification of the UCEA supplanted the common-law bail bondsman's privilege.[175] The Sixth Circuit, however, relying on an opinion that antedated the general adoption of the UCEA,[176] insisted that Cramblit's attempted "[r]eliance on [West Virginia's adoption of the UCEA] confuses the law of extradition with the law of bail."[177] Having assumed its conclusion—that the

171. *Id.* at *3.

172. *See id.* at *4.

173. *Id.* at *4. 42 U.S.C. § 1983 states:

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

42 U.S.C. § 1983 (2000). Section 1988 provides, in pertinent part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

42 U.S.C. § 1988(a) (2000).

174. *See Cramblit*, No. 91-4002, 1992 U.S. App. LEXIS 28343 at *1.

175. *See id.* at *12–13.

176. Fitzpatrick v. Williams, 46 F.2d 40 (5th Cir. 1931). The UCEA was first drafted in 1926, but not promulgated in final form until 1936, nearly half a dozen years after the opinion in *Fitzpatrick*. *See* Barton v. Norrod, 106 F.3d 1289, 1296 n.6 (6th Cir. 1997).

177. *Cramblit*, No. 91-4002, 1992 U.S. App. LEXIS 28343 at *11–12.

UCEA does not apply to the conduct of a bail bondsman (because the UCEA did not apply to the conduct of a bail bondsman according to a case *decided before the UCEA was widely promulgated*)—the *Cramblit* court was obliged to hold as follows:

> The State of California made no demand for the return of Cramblit. West Virginia's version of the Uniform Criminal Extradition Act therefore does not apply. Hargis, acting upon a private contract, was entitled to apprehend Cramblit and return him to California. Since Cramblit was not being extradited to California, but, instead, was being apprehended by a representative of his surety, Deputy Adams was not required to follow the procedures set out in [West Virginia's enactment of the UCEA].[178]

It therefore followed that Hargis was entirely within his rights in tossing the handcuffed Cramblit into the back seat of a car and driving him the breadth of the nation to California. What use of force was necessary to bring this about is something as to which the Sixth Circuit's opinion is pithy in the extreme; the reader is told only that "Cramblit testified [that] Hargis mistreated him during this journey"[179] and that when the two men arrived in California the charges against Cramblit were first reduced to a misdemeanor, then dismissed outright.[180]

The facts and holding in *Cramblit* make a strong case for the rule that *Lopez* announced but that *Cramblit* refused to consider: that the conduct of an out-of-state bail bondsman or bounty hunter must be subject to the strictures of the UCEA. California, the obligee on Cramblit's bail bond, declined to demand his rendition from West Virginia,[181] indicating that California had lost interest in prosecuting Cramblit. In point of fact, California *had* lost interest in prosecuting, and dismissed the charges against Cramblit upon his return.[182] In the interim, however, Hargis had carted the handcuffed (and probably hog-tied) Cramblit from the Blue Ridge of the Appalachians to the blue waters of the Pacific. (Life imitates art: Midnight Run bounty hunter Jack Walsh dragged his captured fugitive "Duke" Mardukas from New York to California, an only slightly more protracted journey.)[183] Cramblit had every motive to escape, even if he had to use violent or illegal means to do so. Hargis was determined to prevent his escape, even if he had to use violent and perhaps illegal means to do so. The people and property of seven or

178. *Id.* at *13.

179. *Id.* at *4.

180. *Id.*

181. *See id.* at *13 ("California made no demand for the return of Cramblit.").

182. *Id.* at *4 ("Upon his return to California, the charges against Cramblit were ultimately reduced to a misdemeanor and later dismissed.").

183. MIDNIGHT RUN, *supra* note 1.

eight states were exposed to the prospect of violence and illegal conduct. When the *Epps* court spoke of the greater "civility" of the UCEA's processes in comparison to the self-help of the common-law privilege, surely this is what it had in mind.[184] When the *Epps* court spoke of "safeguards which are more consistent with contemporary standards of due process," surely this is what it had in mind.[185]

Apart from policy arguments against self-help in transporting fugitives across state lines, and apart from arguments proceeding from the plain language of the UCEA, there is an argument proceeding from constitutional due process. As long ago as 1983, the U.S. Court of Appeals for the Fourth Circuit expressed its reservations about the continuing vitality of the oft-quoted language from *Taylor v. Taintor*:

> We proceed on the assumption that the *Taylor* decision, which has never been overruled, remains the law. . . . However, we note, in passing, that it has been a long time since 1872. In the meantime, the Supreme Court has imposed requirements of recourse to the judicial process to reclaim property interests. *E.g., Fuentes v. Shevin*, 407 U.S. 67, 72, 92 S.Ct. 1983, 1995, 32 L.Ed.2d 556 (1982) ("But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred."). It seems reasonable to suppose that liberty interests may be entitled to similar protection.[186]

Lopez is not discursive about its rationale and does not cite to *Fuentes*.[187] It is, however, a fair inference from *Lopez*—particularly to the extent that *Lopez* relies upon *Epps,* with its expressed concerns for "standards of due process"—that the *Lopez* court viewed the transportation across state lines of a fugitive by a bondsman or bounty hunter without any before-the-fact judicial review as a deprivation of procedural due process.

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184. State v. Epps, 585 P.2d 425, 428 (Or. Ct. App. 1978).

185. *Id.* at 429 (footnote omitted). *Cramblit* makes no reference to *Epps*, as it makes no reference to *Lopez*.

186. Kear v. Hilton, 699 F.2d 181, 182 n.2 (4th Cir. 1983). The court was being too generous in its assessment that *Taylor v. Taintor* "has never been overruled [and] remains the law." *Id.* The language from *Taylor* routinely cited by bail bondsmen, see *supra* note 53, and accompanying text was nothing more than dictum in the *Taylor* case. *See* Landry v. A-Able Bonding, Inc., No. 1:92-CV-0257, 1994 U.S. Dist. LEXIS 14912, at *9 n.1 (E.D. Tex. May 9, 1994) ("Although Taylor is frequently cited for its enunciation of the rights of bail bondsmen, such language constitutes *dicta*. The actual holding of the case was that common law exceptions from liability on a bail bond, i.e. impossibility due to act of God, act of obligee, or act of law, did not exonerate a Connecticut bondsman in a case where Art. IV, § 2 of the United States Constitution enabled the governor of Maine to demand that the governor of New York turn aver [sic] the Connecticut bondsman's principal to Main [sic] for prosecution after the bondsman allowed the principal to leave the state and reside in New York.") (emphasis added).

187. State v. Lopez, 734 P.2d 778 (N.M. Ct. App. 1986).

V. CONCLUSION

In understanding the change in law that *Lopez* and progeny have wrought, it is important to understand what *Lopez* and progeny do not hold. The UCEA does not prohibit an out-of-state bail bondsman or bounty hunter from pursuing a fugitive, or even from arresting a fugitive. On the contrary, the UCEA amply accommodates such activity.[188] *Lopez* and progeny do not—indeed could not—construe the UCEA otherwise.

What *Lopez* holds is that, *absent consent*, a foreign bail bondsman or bounty hunter may not transport a fugitive across state lines.[189] Such transportation can be accomplished only through compliance with the due process provisions of the UCEA. The wiggle-room, if any, is to be found in the meaning of "consent."

Recall that modern American cases offer, as rationales for the bail bondsman's privilege to use force to recapture his principal, both common-law precedent and contract theory.[190] A criminal defendant seeking corporate surety bail will be obliged to sign a bail agreement that includes, among its many other contractual conditions, an acknowledgment by the defendant that the bail agent (or someone to whom the agent delegates his power, viz. a bounty hunter) is entitled to use reasonable force against that defendant, and against that defendant's property and effects, to recapture that defendant. In *Epps*, the bail bondsmen argued that such a pro forma consent provision was a complete defense to a criminal charge of kidnapping, because an element of that crime under the law of Oregon was the absence of consent.[191] The *Epps* court rejected that argument: "Whatever legal effect such a contractual provision might have, it does not constitute consent as that term is used in the statutory definition which, as it applies to this case, is based solely upon the use of force in the taking."[192]

But of course that was a question of statutory construction. The larger question is whether bail agreements can be drafted around the UCEA. Can, for example, the addition to the bail agreement of a paragraph such as

> I am aware of the provisions of the UCEA as they affect this contract. I waive the benefits of said provisions, and will not assert said provisions in any court of law. If I am located in a state other than the one in which I am admitted to bail, any representative of the surety may,

188. *See supra* Part III.
189. *Lopez*, 734 P.2d at 782.
190. *See supra* Part II.
191. State v. Epps, 585 P.2d 425, 427 (Or. Ct. App. 1978).
192. *Id.* at 427; *see also supra* Part IV.A.

> with use of reasonable force, transport me to the state in which I was admitted to bail without regard to the terms and conditions of the UCEA.

reduce *Lopez* and progeny to a nullity?

Similar language appeared in the bail agreement at issue in *Lee v. Thorpe*.[193] Gerald Lee was charged with crimes in Colorado and admitted to bail.[194] Among the terms of the bail agreement that he executed was the following:

> If I depart the jurisdiction of the Court wherein my bail bond(s) is posted by Ranger [Insurance Company] for any reason, and I am captured by Ranger and/or its Agent . . . in a State other than the one in which my bail bond(s) is posted, I hereby agree to voluntarily return to the State of original jurisdiction, and I hereby waive extradition proceedings and further consent to the application of such reasonable force as may be necessary to effect such return.[195]

Sometime thereafter Lee "fled Colorado, failed to appear for court hearings, and chose Utah as his sanctuary."[196] The bail bondsman hired a bounty hunter to bring about Lee's return, which he did.[197]

Lee and a co-plaintiff then sued the bounty hunter, the bail bondsman, and Ranger Insurance for assault and battery, reckless endangerment, and false imprisonment.[198] The trial court directed a verdict as to one claim, and the jury—less than sympathetic to the jeremiad of a felon-turned-fugitive—found for the defendants on the remaining claims.[199] On petition for certiorari to the Utah Supreme Court, the sole issue was "whether the public policy of Utah permits a bail recovery agent who is licensed in another state, but not in Utah, to apprehend a fugitive in Utah when the fugitive has consented to the apprehension."[200] The statement of the issue is curious. Presumably the strength of the plaintiff's case (such as it was) lay in the transportation of the plaintiff across state lines from Utah to Colorado by the defendants without recourse to judicial process, rather than in the mere arrest of the plaintiff in Utah. And by taking it as a given that the fugitive had "consented to the apprehension," the court rendered its conclusion foregone.

In any event, the Utah Supreme Court saw the matter as a simple question of contract construction. "Nothing befell [the plaintiff] to

193. 147 P.3d 443 (Utah 2006).
194. *See id.* at 444–45.
195. *Id.* at 445.
196. *Id.*
197. *See id.*
198. *See id.*
199. *See id.*
200. *Id.* at 444.

which he had not consented [in the bail agreement]. In other words, [he] endorsed the manner in which he was apprehended"[201] (and, presumably—although the issue was not considered—the transportation that followed that apprehension). The "presence of contractual assent" rendered irrelevant the provisions of statute law that would have otherwise governed the defendants' conduct.[202] There was no discussion of the UCEA;[203] there was no discussion of *Lopez*; there was no need for such discussion. The sole question was one of contract law, and the court saw the waiver provisions in the bail agreement as being valid, enforceable, and consistent with public policy.[204]

Thus *Lee* hints at, but does not squarely answer, the question whether *Lopez* and the UCEA can be rendered moot by a sufficiently explicit bail agreement. *Lee*'s deference to the right to contract notwithstanding, there are problems with the conclusion that *Lee* suggests.

Lee focuses on the out-of-state bondsman's arrest of his fugitive, not on his subsequent cross-country transportation of that fugitive. It is the cross-country transportation that, according to *Lopez* and progeny, the UCEA seeks to regulate. The relevant provisions of the UCEA protect not only the fugitive defendant (or the person believed to be, and arrested as, the fugitive defendant), but also the general public, from the potential for violence and destruction of property likely associated with lugging an unwilling criminal from state to state by the scruff of his neck. Even assuming that the unwilling criminal can, consistent with constitutional due process and public policy, waive the protections of the UCEA as to himself, he cannot waive them for others. Each American state has an interest in seeing to it that arrests made within its borders are made according to law and in a manner consistent with the peace and dignity of the body politic. Each American state has an interest in protecting its domiciliaries from unreasonable, because reasonably avoidable, danger to life, limb, and property. Each American state has an interest in affording due process of law to those within its borders, whether home-born or foreign-born. These are all weighty public policy concerns. A pro forma waiver clause in a lengthy bail agreement of adhesion, signed by an immured defendant feverish for liberty, offers little to resolve such concerns.

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201. *Id.* at 446.

202. *See id.* ("The presence of contractual assent to the very events that gave rise to this lawsuit shifts the focus of this case away from an interpretation of the bail process to a discussion of whether public policy constrains Gerald from bargaining away benefits he might otherwise enjoy under the Bail Bond Recovery Act.").

203. The court, however, did make reference to Utah's Bail Bond Recovery Act, UTAH CODE ANN. §§ 53-11-101-124 (West 2002). *See Thorpe*, 147 P.3d at 445.

204. *See Thorpe*, 147 P.3d at 448.

Of course *Lopez* and progeny were not called upon to consider an express waiver of the UCEA, and do not consider it. But consistent with those cases—and with principles of due process, and with concerns for public policy—the better rule of law is easy to discern. No contractual waiver, however capaciously drafted, can deprive a state of its power to define crimes and enforce punishment for their commission. If a state has determined that arrest within and transportation out of its jurisdiction cannot be accomplished other than according to the terms of the UCEA, and that any arrest and transportation not comporting with the terms of the UCEA is criminal, then the offending bail bondsman or bounty hunter will not be heard to plead the waiver provision of a bail agreement in defense of such criminal charges.

Civil liability, however, is another matter entirely. As a matter of jurisprudential theory there is no reason that a criminal defendant cannot waive, for and as to himself, the benefits and limitation of the UCEA as against his bail bondsman and the insurance company underwriting his bond. Whether the waiver language of a given bail agreement is efficacious; whether a given bail agreement constitutes a contract of adhesion; are questions that will turn on the circumstances and evidence in each particular case. Some waivers may prove adequate to their purpose and others not; some bail agreements may be determined to be contracts of adhesion as to some criminal defendants in some situations. But the larger principle expressed, or at least adumbrated, in *Lee* is not altered by factual determinations particular to each case.

There is, of course, nothing inherently inconsistent in treating identical conduct differently in the criminal and civil justice systems. The civil law places great emphasis on freedom of contract. The parties to a contract, be they bail bondsmen or criminal defendants, are presumed to know where their own best interests lie, at least until the contrary is made to appear. The criminal law places great emphasis on public order and the safety of the citizenry. It is the business of a bail bondsman or bounty hunter to know the requirements and limitations of the law of the jurisdiction in which he purports to act, and it is appropriate to hold him responsible for transgressions of those requirements and limitations. True, the same misconduct may lead to the criminal conviction of a bail bondsman or bounty hunter but the dismissal of a civil lawsuit against the insurance company that underwrote the bail bond. But that seeming inconsistency is itself consistent with good law and good sense. It is of a piece with the wisdom inherent in the questions Jack Walsh asked Monroe Bouchet in Midnight Run: "Your mother ever teach you how to react to strangers? Not shoot at 'em. Huh?"[205]

205. MIDNIGHT RUN, *supra* note 1.