UNITED STATES V. POE: A MISSED OPPORTUNITY TO REEVALUATE BOUNTY HUNTERS' SYMBIOTIC ROLE IN THE CRIMINAL JUSTICE SYSTEM

INTRODUCTION

Every year, bounty hunters apprehend over thirty thousand fugitives who fail to show up for court proceedings without spending a single cent of taxpayer money.[1] Defendants released on surety to bondsmen are twenty-eight percent less likely to miss a court appearance and fifty-three percent less likely to remain at large for long periods of time than those defendants released on their own recognizance.[2] Bondsmen, and the bounty hunters they hire, have gradually developed into an inextricable part of the criminal justice system, and states heavily rely on the industry to detain, search for, and recapture fugitives in a cost-effective manner.[3] Some have gone as far to say that the American criminal justice system "needs" bounty hunters,[4] and that bounty hunters are "indispensable actors in the state's program of pretrial detention."[5]

Despite their deeply rooted role in the modern legal system, bounty hunters are not considered state actors in a majority of jurisdictions.[6] This result is troublesome because it allows bounty hunters to exercise broader powers of search and arrest than police officers.[7] Because bounty hunters are not usually considered state actors, they are not constrained by the constitutional and regulatory safeguards that law enforcement officers must adhere to.[8] In *United States v. Poe*,[9] the Tenth Circuit Court of Appeals considered, as a matter of first impression, whether bounty hunters should be classified as state actors for the purposes of the Fourth Amendment.[10] In a short-sighted decision with troubling implications, the *Poe* court ignored the realities of the modern bond industry and ap-

1. John A. Chamberlin, *Bounty Hunters: Can the Criminal Justice System Live Without Them?*, 1998 U. ILL. L. REV. 1175, 1195 (1998).

2. Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J.L. & ECON. 93, 118 (2004).

3. *See* Chamberlin, *supra* note 1, at 1195–97; Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731, 757–64 (1996) (discussing the increasing reliance of states on bounty hunters).

4. Chamberlin, *supra* note 1, at 1195.

5. Drimmer, *supra* note 3, at 784.

6. *See, e.g.*, Landry v. A-Able Bonding, Inc., 75 F.3d 200, 204–05 (5th Cir. 1996); Ouzts v. Md. Nat'l Ins. Co., 505 F.2d 547, 555 (9th Cir. 1974). *But see* Jackson v. Pantazes, 810 F.2d 426, 429-30 (4th Cir. 1987) (holding that bounty hunters are classifiable as state actors).

7. Taylor v. Taintor, 83 U.S. 366, 372 (1872).

8. *See* Chamberlin, *supra* note 1, at 1184–85; Drimmer, *supra* note 3, at 733–34; Rebecca B. Fisher, *The History of American Bounty Hunting as a Study in Stunted Legal Growth*, 33 N.Y.U. REV. L. & SOC. CHANGE 199, 204–206 (2009).

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

10. *Id.* at 1117.

plied precedent founded on outdated rationale to hold that bounty hunters are not state actors.[11] In *Poe*, the court flatly dismissed the defendant's arguments founded on the dissenting opinions from the Ninth Circuit and an analysis accepted in the Fourth Circuit, and instead applied a test for determining state action that narrows Supreme Court precedent.[12]

This Comment argues the Tenth Circuit missed an opportunity to rule in favor of classifying bounty hunters as state actors, a decision that would have introduced constitutional and civil rights protections to an industry greatly in need of a balance of authority. Part I begins by tracing the U.S. bond system from its early English common law roots to its current role in American jurisprudence. Part II continues by outlining the tests used to determine when courts will impose state actor status on a private party. Part III outlines the federal circuit court decisions that have addressed the issue of bounty hunters as state actors. Part IV then argues the law governing the bond industry is no longer sufficient to provide the safeguards citizens expect from their government, and suggests adopting an analysis which would allow both the continued function of the states' existing systems of pretrial detention and curb the wanton violations to civil and constitutional liberties that frequently transpire within the unregulated bond industry.

I. THE HISTORY OF THE BOND SYSTEM

A. The English System

The United States bail system was modeled after the pretrial detention ideology of the English common law.[13] Under English common law, a surety was bound "body for body," meaning that if the defendant failed to appear for trial, the surety, or bondsman, was "liable to suffer the punishment that was hanging over the head of the released prisoner."[14] To prevent flight, the surety was given custody of the defendant, allowing them to act as a type of jailor.[15] During this period of history, however, flight was rare because the compact nature of English development allowed for widespread public recognition of defendants.[16] English common law classified custody of a defendant as a "single, continuous event, when the surety exercised authority over a suspect, the law considered his actions the offspring of the state's."[17] Because the surety was the le-

11. *See id.* at 1121.

12. *See id.* at 1123–24 & n.14 (applying the test for determining state action under the Fourth Amendment used in United States v. Souza, 223 F.3d 1197 (10th Cir. 2000) instead of the Supreme Court case Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982)); *see also* Ouzts v. Md. Nat'l Ins. Co., 505 F.2d 547, 556–61 (9th Cir. 1974) (Hufstedler, J., dissenting); Jackson v. Pantazes, 810 F. 2d 426, 430 (4th Cir. 1987).

13. Drimmer, *supra* note 3, at 744 n.57 (citations omitted).

14. *Id.* at 744 (citation omitted).

15. Chamberlin, *supra* note 1, at 1179–80; Drimmer, *supra* note 3, at 747.

16. Chamberlin, *supra* note 1, at 1180; Drimmer, *supra* note 3, at 748.

17. Drimmer, *supra* note 3, at 747.

gal equivalent of a jailor, there developed an "inextricable link between his conduct and that of the state."[18]

The English system was originally adopted by the United States in its entirety, but because of rapid expansion in both land development and population, the small, personalized system that worked so efficiently in England failed to perform similarly in the United States.[19] As America became more diversified, the bond system grew increasingly commercialized. This commercial system replaced the personalized approach that relied on the cooperation of friends and family as an effective disincentive to skipping bail.[20] Despite this change, the idea that a bondsman was equivalent to a jailor, and that bond was a continued imprisonment from the initial capture by the state, lived on.[21] Defendants released on bail were treated as being in a state of "perpetual flight," giving bondsmen the authority to recapture them on a whim, notwithstanding the idea that defendants were presumed innocent until proven guilty.[22]

The English bond system had been effectively policed by night watchmen, but the commercialization of the American bond system and the geographic expansion of police forces throughout the country made it less and less feasible for American police to assume responsibility for returning fugitives to distant courts.[23] This lack of performance by state officials was the underlying issue that led the U.S. Supreme Court to their reasoning in *Taylor v. Taintor*, the outdated piece of law that continues to grant bounty hunters the extremely broad, constitution-skirting powers they enjoy today.[24]

B. The American System

1. Early Cases Delineating Bounty Hunter Authority

a. *Nicolls v. Ingersoll*[25]

One of the earliest American cases to recognize the extensive authority of a bounty hunter over a bailee was the New York Supreme Court's decision in *Nicolls v. Ingersoll*. Before a trial in New Haven, Connecticut, P. Edwards, the bond company for the defendant Nicolls, ordered two bounty hunters to retrieve Nicolls from his New York home in the middle of the night.[26] The bounty hunters broke down Nicolls' door and removed him from his home without his coat or vital posses-

18. *Id.*
19. Fisher, *supra* note 8, at 207–08.
20. *Id.* at 208.
21. Drimmer, *supra* note 3, at 749–50.
22. *See* Taylor v. Taintor, 83 U.S. 366, 371–72 (1872); Drimmer, *supra* note 3, at 749.
23. *See* Fisher, *supra* note 8, at 208.
24. *See id.*
25. 1810 N.Y. LEXIS 191 (N.Y. Sup. Ct. 1810).
26. *Id.* at *3.

sions, and extradited him to Connecticut.[27] Nicolls brought suit against the bounty hunter for battery, assault, trespass, and false imprisonment.[28]

The court rejected these claims, stating "the law considers the principal as a prisoner, whose jail liberties are enlarged or circumscribed, at the will of his [bondsman]."[29] The court held that bondsmen may exercise their control over the accused at "all times and in all places"[30] because the defendant is "always upon a string, which [the bondsmen or bounty hunters] may pull whenever they please."[31] The court further held that a bounty hunter or bondsmen "may break open the outer door of the principal . . . in order to arrest him."[32] This line of reasoning was an early indication of the broad power to search that bounty hunters enjoy today.

b. *Taylor v. Taintor*[33]

The U.S. Supreme Court adopted the general common law principles of *Nicolls* in its 1872 decision, *Taylor v. Taintor*.[34] The defendant in *Taylor*, Edward McGuire, was arrested for grand larceny and released on bond in Connecticut.[35] His bondsmen permitted him to return to his home in New York, where the governor of Maine had him extradited to answer for a burglary in Maine.[36] McGuire was incarcerated in Maine and failed to appear for his Connecticut hearing. The Connecticut superior court held the Connecticut treasurer was entitled to recover the amount of the bond from McGuire's sureties.[37] The sureties appealed, and the U.S. Supreme Court, while affirming common law bond principles, determined that because the sureties were liable for McGuire, it was their negligence that caused them to forfeit the bond.[38]

Taylor remains the authoritative case on the rights of bounty hunters, and the "Rule of *Taylor*" continues to influence courts that seek to establish operational boundaries for the industry.[39] The "Rule of *Taylor*" is the notion that bounty hunters "may pursue [the principal] into another

27. *Id.*
28. *Id.* at *1.
29. *Id.* at *17.
30. *Id.* at *18.
31. *Id.* at *16.
32. *Id.* at *18.
33. 83 U.S. 366 (1872). *Taylor* has been superseded by statute in some jurisdictions, but the U.S. Supreme Court has not overruled the opinion. *See, e.g.*, Taylor v. Gardner, No. 8:09-2605-CMC-BHH, 2009 U.S. Dist. LEXIS 113027, at *5, n.1 (D.S.C. Nov. 18, 2009) ("Although the Supreme Court of the United States has not overruled Taylor v. Taintor, an unrelated portion of the decision in Taylor v. Taintor, which concerned the right of sureties to apprehend principals, has been superannuated by statute in Texas.)
34. *Taylor*, 83 U.S. at 371–72 & n.10.
35. *Id.* at 368–69.
36. *Id.*
37. *Id.*
38. *Id.* at 373 & n.15.
39. *See, e.g.*, Jackson v. Pantazes, 810 F.2d 426, 429 (4th Cir. 1987); Ouzts v. Md. Nat'l Ins. Co., 505 F.2d 547, 551 (9th Cir. 1974).

State; may arrest [the principal] on the Sabbath; and, if necessary, may break and enter his house."[40] The *Taylor* Court affirmed English common law by stating, "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."[41] As attorney Rebecca Fisher summarizes, "'The Rule of *Taylor*' . . . gives extraordinary common law powers to bounty hunters, which makes it unusually difficult to criminally prosecute them."[42]

c. *In re Von Der Ahe*[43]

Taylor was further interpreted in 1898 by *In re Von Der Ahe*, which sheds further light on the unique relationship between bounty hunters and their principals.[44] The *Von Der Ahe* court explained that the powers of the bondsman—and implicitly, bounty hunters as the agents of bondsmen—arose from the "relationship between the parties," and was founded in contract instead of judicial process.[45] The court went on to say that this relationship created "a fundamental difference between the right of arrest by [a bondsman] and arrest under warrant where such right to arrest is based upon a court process, which, per se, can have no extra-jurisdictional power or efficacy."[46]

The rules established in *Nicolls*, *Taylor*, and *Von Der Ahe* are still good law. As one commentator stated, "[a]lthough these early decisions granting extraordinary powers to bounty hunters may seem more like a memorable piece of United States history than good law, these basic principles still survive today in many jurisdictions."[47] As Part III reveals, many courts still cite to these outdated cases as the grant of authority to modern bounty hunters.[48]

2. An Ancient Legal Fiction in a Modern Legal Environment

The *Taylor* case, its application to *Von Der Ahe*, and various commentaries continually analogize bondsmen to jailors and the arrests bounty hunters make to those made by sheriffs.[49] Despite this acknowledged relationship, most courts nonetheless reach the conclusion that bounty hunters are not classifiable as state actors for the purposes of imposing constitutional and civil liability.[50] The primary rationale for this

40. *Taylor*, 83 U.S. at 371.
41. *Id.*
42. Fisher, *supra* note 8, at 204.
43. 85 F. 959 (C.C.W.D. Pa. 1898).
44. *Id.* at 962–63.
45. *See id.* at 960.
46. *Id.*
47. Chamberlin, *supra* note 1, at 1184.
48. *See, e.g.*, Jackson v. Pantazes, 810 F.2d 426, 429 (4th Cir. 1987); Ouzts v. Md. Nat'l Ins. Co., 505 F.2d 547, 551 (9th Cir. 1974).
49. *See Von Der Ahe*, 85 F. at 963 (quoting Taylor v. Taintor, 83 U.S. 366, 371 (1872)); Chamberlin, *supra* note 1, at 1180; Drimmer, *supra* note 3, at 747.
50. *See, e.g.*, *Von Der Ahe*, 85 F. at 960; *see also* Drimmer, *supra* note 3, at 763.

classification is that because the arrest of a defendant stemmed from a private contract (instead of a judicial order such as a warrant), the fact that the bounty hunters were functioning as state proxies is irrelevant.[51] Attorney Jonathan Drimmer calls this conceptualization of bounty hunter rights by nineteenth century courts a "legal fiction," and notes its implications by stating that, "because bounty hunters' participation in the criminal justice system did not originate by any . . . state action, federal courts determined that the constitutional protections that generally preserved the rights of criminal defendants did not limit the conduct of bounty hunters."[52] Consequently, bounty hunters even today enjoy the search and arrest powers of a sheriff without the constraints of the Constitution.[53]

Despite the concerns raised by the "Rule of *Taylor*," state reliance on bounty hunters within the criminal legal system has expanded drastically because of the cost effectiveness of the private bail system.[54] "While a court sets the bail amount, most frequently the bondsman determines whether the financial risk posed by a particular defendant should allow for actual release, and thus whether a suspect must languish in prison until guilt can be determined."[55] Over the past several decades, cuts in police budgets have caused the recovery of fugitives to become almost completely impractical.[56] These cuts have forced the justice system to use bounty hunters to perform activities traditionally reserved to the police, such as "searching for, arresting, and transporting the [fugitives] to court."[57] Because the performance of these duties by bounty hunters stems from the original arrest and not from judicial decree, courts continue to treat the relationship between the bounty hunter and the fugitive as one of contract.[58] Thus, the legal fiction established in 1872 remains effective today, despite the drastic societal and legal developments that have occurred over the last 138 years.

Despite the heightened frequency of their use in the American criminal justice system, most jurisdictions still do not consider bounty hunters state actors. They still enjoy disproportionately broad, police-like powers without having to adhere to constitutional safeguards.[59] These broad powers have, on several occasions, led to tragic homicides and violations of constitutionally protected rights.[60] Such incidents have trig-

51. *See In re* Von Der Ahe, 85 F. at 960; Drimmer, *supra* note 3, at 754.
52. Drimmer, *supra* note 3, at 754–55.
53. *Id.* at 756, 758.
54. *Id.* at 757–59.
55. *Id.* at 761.
56. *Id.* at 762.
57. *Id.*
58. *See Von Der Ahe*, 85 F. 959, 961 (C.C.W.D. Pa. 1898).
59. Drimmer, *supra* note 3, at 763.
60. *See* Chamberlin, *supra* note 1 at 1175–76 (discussing the tragic double homicide in an Arizona case where bounty hunters entered the wrong house and a shootout ensued, and another incident of bounty hunters breaking a fugitive's neck).

gered several attempts to regulate the industry, both from state legislatures and the federal government.[61] Though never enacted, the Bounty Hunter Responsibility Act of 1999[62] "remains the most comprehensive legislation proposed to date on bounty hunting."[63] This legislation sought to hold bondsmen statutorily liable for constitutional violations of their bounty hunters by classifying them as state actors[64] Further, the bill would have required "the U.S. Attorney General to publish model guidelines for states to control and regulate . . . whether bounty hunters should be required to complete a State approved course in the criminal justice system [and] . . . whether they should be required to submit to a fingerprint-based criminal background check before beginning to perform their duties of employment."[65] This proposed legislation sought to limit the excessive authority granted to bounty hunters under the "Rule of *Taylor*."[66]

The Bounty Hunter Responsibility Act demonstrates the federal government's willingness to reform bounty hunter practices in America. However, in the absence of legislation commencing a reform initiative, courts are only left with the outdated precedent of *Taylor*, *Nicolls*, and *Van Der Ahe*. Following that dubious guidance, courts are increasingly in agreement as to an absence of state action within the bond industry.

II. THE "STATE ACTOR" PROBLEM

In order to understand the circuit court decisions addressing bounty hunters as state actors, it is important to give attention to the test used to determine when a private actor may become classified as a state actor.

A. Early Cases

1. *Lugar v. Edmondson Oil Co.*[67]

Lugar v. Edmondson Oil Co. established the "generic state action test" for determining when a party is acting as an agent of the state.[68] *Lugar* provides a two-prong test for when a party acts under color of state law. Namely, the party must (1) cause a deprivation of a constitutionally protected right; and (2) "the deprivation must be caused by the exercise of some right or privilege created by the State . . . [and] the party charged with the deprivation must be a person who may fairly be said to be a state actor."[69]

61. *See* Fisher, *supra* note 8, at 218–21, 223–25.
62. Bounty Hunter Responsibility Act of 1999, H.R. 2964, 106th Cong. (1999).
63. Fisher, *supra* note 8, at 223.
64. H.R. 2964 § (2)(a).
65. Fisher, *supra* note 8, at 225; *see* H.R. 2964 § (4).
66. Fisher, *supra* note 8, at 225.
67. 457 U.S. 922 (1982).
68. United States v. Poe, 556 F.3d 1113, 1124 (10th Cir. 2009).
69. *Lugar*, 457 U.S. at 937.

The *Lugar* test was derived from an action for enforcement of § 1983.[70] This section of the code was originally intended to provide redress for African-Americans adversely affected by Southern governments by allowing for "enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . to the extent of the rights guaranteed to him by the Constitution."[71] Section 1983 requires state action causing a constitutional deprivation in order for a plaintiff to have a cause of action.[72] Because common bounty hunting activities like searches and arrests potentially violate rights under the Fourth and Fourteenth Amendments, plaintiffs seeking redress for bounty hunter abuse usually elect to sue under § 1983, but must prove state action.[73]

The *Lugar* test assigns § 1983 liability to state officials such as sheriffs and policemen, but is less informative when the actor is a private party.[74] This is because the second prong of the *Lugar* analysis does not offer any insight into *how* a private party may become a state actor. Subsequent court decisions, such as that in *Green v. Abony Bail Bond*, have addressed this sub-issue in greater detail.

2. *Green v. Abony Bail Bond*[75]

Green v. Abony Bail Bond provides guidance on the second prong of *Lugar* within the bounty hunter context. In *Green*, bounty hunters seeking to seize a principal on an outstanding five hundred dollar bond forcibly entered the principal's home and assaulted him and his wife.[76] The man's injuries resulting from the intrusion were so severe that they required a twenty-three day hospitalization.[77] When the principal brought suit under § 1983, the court found that bounty hunters were not state actors and dismissed the action with prejudice.[78]

Although its precedent as a federal district court case is limited, *Green* provides a relatively comprehensive synopsis of the theories under which a private party bounty hunter may be considered a state actor.[79] The court stated that there existed only three situations when a private party may have its actions attributed to the state.[80] First, the court outlined the "state compulsion test," which will assign state actor status to a

70. *See id*. at 924.
71. *Id.* at 934 (alteration in original) (quoting CONG. GLOBE, 42d Cong., 1st Sess., 569 (1871)); Fisher, *supra* note 8, at 209; *see* 42 U.S.C. § 1983 (2006).
72. *See* 42 U.S.C. § 1983 (2006).
73. Fisher, *supra* note 8, at 209
74. *Id.* at 210.
75. 316 F. Supp. 2d 1254 (M.D. Fla. 2004).
76. *Id.* at 1256–57.
77. *Id.* at 1257
78. *Id.* at 1258–1262.
79. *See id.* at 1259–60 (citing Rayburn v. Hogue, 241 F.3d 1341, 1347 (11th Cir. 2001)).
80. *Green*, 316 F. Supp. 2d at 1259.

private party if "the State has coerced or at least significantly encouraged the action alleged to violate the Constitution."[81]

Second, the court discussed the "public function" test, which assigns status to a private party when the party performs a public function that was "traditionally the exclusive prerogative of the state."[82] The Rule of *Taylor* virtually precludes the application of the public function analysis by considering the bounty hunter–fugitive relationships as a voluntarily formulated private contract.[83] Moreover, it has been noted that since the earliest instances of the bail bonding, bondsman have almost always been privately operated companies.[84] Thus, the public function test to impart state actor classification on bounty hunters fails to address the reality that the bounty-hunter industry has never been "traditionally the prerogative of the state" and the Supreme Court's decision in *Taylor* specifically identifies the function of a bounty hunter as private.

Third, the court discussed the "nexus/joint action test," commonly referred to as the "symbiosis" test.[85] To assign state actor status to a private party under the symbiosis test, a plaintiff must demonstrate that the "State had so far insinuated itself into a position of interdependence with the [private parties] that it was a joint participant in the enterprise."[86]

B. The Symbiosis Test

One of the earliest applications of the symbiosis test came in the U.S. Supreme Court's decision in *Burton v. Wilmington Parking Authority*. *Burton* involved a state-run parking building that provided space for a privately owned restaurant that refused to serve African-Americans.[87] A customer who was refused service brought an action for a declaratory judgment and injunctive relief against the restaurant, claiming that the private discrimination constituted state action because of the economic relationship between the restaurant owner and the parking authority.[88]

The Court found that because both parties benefited from the relationship—the restaurant having the ability to operate in a government building, and the parking facility the ability to provide public parking while receiving revenues from the restaurant—a symbiotic relationship

81. *Id.*
82. *Id.* at 1259–60.
83. *See* Taylor v. Taintor, 83 U.S. 366, 371 (1872); *In re* Von Der Ahe, 85 F. 959, 961 (C.C.W.D. Pa. 1898); *see also* Fisher, *supra* note 8, at 209.
84. *Green*, 316 F. Supp. 2d at 1260.
85. *See id.* (quoting Rayburn v. Hogue, 241 F.3d 1341, 1347 (11th Cir. 2001)); *see also* Fisher, *supra* note 8, at 210 n.78.
86. *Green*, 316 F. Supp. 2d at 1259–60 (alteration in original) (citation omitted); *see, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).
87. *Burton*, 365 U.S. at 716.
88. *Id.*

existed.[89] Therefore, the Court concluded, the discrimination constituted state action.[90]

Cases subsequent to *Burton* have determined that the threshold requirement in demonstrating a symbiotic relationship between a private party and the state is a "mutual benefit" between the parties.[91] Once this requirement is met, factors such as licensing and regulation are relevant to the symbiosis analysis, but no single factor is determinative.[92] However, courts often afford greater weight to relationships where the state reaps financial benefits from arrangements with private parties.[93] As Drimmer summarizes, "lower courts continue to rule that when a private entity plays an indispensable role in a state program, provides economic benefits to the state, and the state and the entity enjoy mutual advantages from the entity's involvement with the state, state action exists and the entity must abide by constitutional limitations."[94]

The three tests outlined in *Green* offer significant guidance in classifying private parties as state actors for the purposes of the second prong of *Lugar*. In the bounty hunter context, the symbiosis test has been used to successfully classify bounty hunter action as symbiotic to the state.[95] This argument appears to be the most promising method available in reforming bounty hunter jurisprudence so that constitutional liberties are protected.[96] The following section outlines the approaches taken by the federal circuit courts that have addressed the issue.

III. BOUNTY HUNTERS AS STATE ACTORS: THE CIRCUIT COURT DECISIONS

Five circuits have decided whether or not bounty hunters as state actors. The Fifth, Eighth, Ninth, and Tenth circuits are in accord with the precedent of *Taylor*.[97] The Fourth Circuit has departed from strict adherence and assigned bounty hunters state actor status for the purposes of constitutional rights enforcement.[98]

A. Ouzts v. Maryland National Insurance Co.

The Ninth Circuit's 1974 opinion in *Ouzts v. Maryland National Insurance Company* was one of the first cases to thoroughly address the

89. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972) (analyzing the holding of *Burton*).
90. *Burton*, 365 U.S. at 725.
91. *Id.* at 724–25; *see also* Drimmer, *supra* note 3, at 783.
92. Drimmer, *supra* note 3, at 782 & n.289.
93. *Id.* at 782.
94. *Id.* at 783.
95. *See, e.g.*, Jackson v. Pantazes, 810 F.2d 426, 429 (4th Cir. 1987).
96. *See* Drimmer, *supra* note 3, at 784–88.
97. Fisher, *supra* note 8, at 210; *see* United States v. Poe, 556 F.3d 1113, 1123–24 (10th Cir. 2009) (holding that bounty hunters are private actors, though not citing directly to *Taylor*).
98. *Jackson*, 810 F.2d at 429.

issue of bounty hunters as state actors. *Ouzts* involved the extradition of a Nevada defendant by bounty hunters in California.[99] After a failed attempt to recover the defendant Ouzts with their own agents, Maryland National Insurance Company hired contract bounty hunters who forcibly apprehended Ouzts at his residence in California.[100] Ouzts claimed the bounty hunters represented themselves as affiliates of the Los Angeles County Police Department and displayed badges of authority.[101] After his arrest, he was extradited to Nevada against his will.[102] The plaintiff claimed that the bounty hunters violated his civil rights under § 1983.[103]

The majority in *Ouzts* explicitly affirmed the Rule of *Taylor* in its decision by stating:

> [W]e note that the common law right of the bondsman to apprehend his principal arises out of a contract between the parties and does not have its genesis in statute or legislative fiat. Because it is a contract right it is transitory and may be exercised wherever the defendant may be found.[104]

The court explicitly rejected the appellants' symbiosis argument that the bounty hunters were "an arm of the court," calling it a "strange thesis."[105] In doing so, the court noted that the justice system had its own "official arms" available for securing fugitive defendants.[106] They continued by stating that the state system of extradition is "separate and distinct from the private reclamation interests . . . of the bondsman."[107]

The *Ouzts* majority also introduced the idea of analyzing a bounty hunter's intent to assist the justice system in determining state action by observing that "the bail bondsman is in the business in order to make money and is not acting out of a high-minded sense of devotion to the administration of justice."[108] The court in this case seemed to find it persuasive that bounty hunters were not subjectively intending to assist the government.[109] This view is also popular in later cases, but fails to consider the objective police roles that bounty hunters play, and similarly, the jailor roles that bondsmen play in the American justice system.[110]

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99. *Ouzts*, 505 F.2d at 549–50.
100. *Id.* at 549–51.
101. *Id.* at 550.
102. *Id.*
103. *Id.* at 550; *see also* 42 U.S.C. § 1983 (2006).
104. *Id.* at 551.
105. *Id.* at 554.
106. *Id.*
107. *Id.* at 554–55 (quoting Fitzpatrick v. Williams, 46 F.2d 40, 41 (5th Cir. 1931)) (internal quotation marks omitted).
108. *Id.* at 555.
109. *Id.*
110. *See, e.g.*, United States v. Poe, 556 F.3d 1113, 1124 (10th Cir. 2009) (finding no state action, even when the state benefitted, because bounty hunters were primarily motivated by financial gain).

While its rigid adherence to *Taylor* and introduction of subjective bounty hunters's intentions was not extraordinary, the more interesting, and perhaps more intuitive, part of the *Ouzts* case was the dissenting opinion by Judge Hufstedler.[111] Judge Hufstedler was more sympathetic to the appellant's symbiosis argument than the majority and explained that state involvement "need not be exclusive or direct."[112] Extensively citing Supreme Court decisions, she stated that the real question the court should be addressing was "whether the state significantly involved itself with the defendant's unlawful conduct,"[113] and pointed out that significance was evaluated only by "sifting facts and weighing circumstances."[114]

The dissent continued by explaining that only through a system of substantial government cooperation was it possible to maintain the structure of a "quasi-private bail," noting that the bail system "does not inure solely to the benefit of the private bondsman" because the system saves time and money associated with incarceration, and helps to insure the continued function of the justice system.[115] The dissent concluded by stating that "[t]he state, through its law enforcement and judicial officers, and private sureties are joint participants in the present system of bail," and noted that that the prerequisites of *Burton* were met because the parties were insinuated into a position of interdependence so that conduct "cannot be considered to have been . . . purely private."[116] Judge Hufstedler's dissent in *Ouzts* seemed to leave the issue ripe for argument in other circuits, but it was not until 1987 that another circuit would address the issue.

B. Jackson v. Pantazes

In *Jackson*, a Fourth Circuit case from Maryland, a bounty hunter and a police officer forcefully entered the home of the plaintiff looking for the plaintiff's son.[117] The plaintiff was assaulted and physically restrained while the two intruders kicked down doors and searched the house.[118] When asked if the bounty hunter—Mr. Pantazes—was allowed to behave this way, the police officer replied that Mr. Pantazes could "do whatever he wants."[119]

111. *See Ouzts*, 505 F.2d at 555 (Hufstedler, J., dissenting).
112. *Id.* at 556 (citing United States v. Guest, 383 U.S. 745, 755 (1966)).
113. *Ouzts*, 505 F.2d at 557 (quoting Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972); Reitman v. Mulkey, 387 U.S. 369, 380 (1967)) (internal quotation marks omitted).
114. *Ouzts*, 505 F.2d at 557 (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961)) (internal quotation marks omitted).
115. *Ouzts*, 505 F.2d at 557.
116. *Id.* at 558 (quoting *Burton*, 365 U.S. at 725) (internal quotation marks omitted).
117. *See* Jackson v. Pantazes, 810 F.2d 426, 427–28 (4th Cir. 1987).
118. *Id.* at 428.
119. *Id.*

The *Jackson* opinion made clear that the Fourth Circuit would use the test in *Lugar* to determine if Mr. Pantazes qualified as a state actor.[120] The court then outlined two separate reasons why the circumstances of the case satisfied the *Lugar* test and imposed state actor status on Mr. Pantazes.[121]

First, the *Jackson* court addressed whether the right to arrest a principal without process satisfied the first prong of *Lugar*.[122] The court paid special attention to the fact that Mr. Pantazes was exercising power conferred on him by state law that could deprive individuals of their liberty—specifically, the power to arrest.[123] This power was a right or privilege created by the state, and therefore satisfied the first part of *Lugar*.[124]

The *Jackson* court then discussed the second part of the *Lugar* test, and held that because Pantazes and a law enforcement officer were working together, the state actor element of *Lugar* was also satisfied.[125] The court explained that, "in cases where a private party and a public official act jointly to produce the constitutional violation, both parts of the *Lugar* test are simultaneously satisfied."[126]

In a brief paragraph, the Fourth Circuit adopted the dissenting opinion in *Ouzts* and embraced the symbiosis argument for imposing state actor status upon bounty hunters.[127] The court explained that "both parts of the *Lugar* test are satisfied where the nature of the relationship between the state and private actors is one of interdependence, or 'symbiosis.'"[128] The court articulated this analysis by stating that bondsmen depend for their livelihood on the bail bond system and that they must be licensed by the state.[129] "In return, [they] facilitate the pretrial release of accused persons, monitor their whereabouts and retrieve them for trial."[130] The *Jackson* court appeared to recognize that bounty hunting within the bond industry, and the modern justice system had developed into a state of interdependence.[131] The court cited many examples of bounty hunters performing the functions of the court and the law enforcement system, and noted that the government-run licensing program

120. *Id.*
121. *Id.* at 429.
122. *Id.*
123. *Id.*
124. *Id.* at 428–29.
125. *Id.*
126. *Id.* at 429.
127. *Id.* at 430; *see* Ouzts v. Md. Nat'l Ins. Co., 505 F.2d 547, 557 (9th Cir. 1974) (Hufstedler, J., dissenting).
128. *Jackson*, 810 F.2d at 430 (citing Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)).
129. *Jackson*, 810 F.2d at 430.
130. *Id.*
131. *See id.* (concluding that "the symbiotic relationship between bail bondsmen and the Maryland criminal court system suffices to render Pantazes's conduct state action").

that was present in Maryland helped to demonstrate how intertwined the bond industry was with the legal system.[132]

By identifying bounty hunting duties as symbiotic to the state court system, it appeared that *Jackson* had taken the first step to reigning in the days of bounty hunting unrestrained by constitutional limitations. Despite its potential sweeping implications for reform, this analysis has not been embraced by any other circuit. For the next nine years, the circuit courts were silent on the issue of bounty hunters as state actors. Then in 1996 and 1997, there was a brief resurgence of cases presenting the symbiosis argument.

C. Landry v. A-Able Bonding, Inc.[133]

In *Landry*, the plaintiff was charged with felony theft and released on bond provided by the defendant, A-Able Bonding. The plaintiff Landry then violated the terms of his bond by leaving Louisiana and fleeing to Texas.[134] Upon locating Landry, the defendants drove to Texas, apprehended Landry, handcuffed him, transported him back to Louisiana, and presented him to the sheriff. Landry brought a § 1983 action against the bondsman for deprivation of liberty, which required showing the bondsman's conduct involved state action.[135]

The Fifth Circuit stated in a footnote that they were not persuaded by the reasoning in *Jackson*,[136] and maintained that, when addressing the issue of bondsmen and state action, the "majority of federal courts . . . have based their decisions on whether the bondsmen enlisted the assistance of law enforcement."[137] This analysis parallels the first part of analysis in *Jackson*, which found both prongs of *Lugar* were satisfied when law enforcement aided bondsmen.[138] The court declined, however, to follow *Jackson*'s reasoning behind the symbiosis approach to its natural conclusion. Instead, the *Landry* court chose to follow the reasoning of the *Ouzts* majority by considering the bounty hunters' subjective personal intentions and by agreeing with the idea that bounty hunters operate for their personal gain and not for a "high-minded sense of devotion to the administration of justice."[139]

132. *See id.*
133. 75 F.3d 200 (5th Cir. 1996).
134. *Id.* at 203
135. *Id.*
136. *Id.* at 205 n.5.
137. *Id.* at 204.
138. *See* Jackson v. Pantazes, 810 F.2d 426, 429 (4th Cir. 1987).
139. *Landry*, 75 F.3d at 205 n.5 (quoting Ouzts v. Md. Nat'l Ins. Co., 505 F.2d 547, 554–55 (9th Cir. 1974)).

D. Dean v. Olibas[140]

In 1997, the Eighth Circuit followed *Landry*'s analysis. In *Dean v. Olibas*, a man charged with a DWI falsely convinced the arresting officer and the bondsman, Olibas, that he was Michael Dean.[141] When the arrestee failed to appear in court, Olibas tracked down the real Michael Dean in Arkansas and had him arrested by the Arkansas police.[142] Subsequently, Dean brought an action for malicious prosecution, false imprisonment, and violation of his civil rights.[143]

Just as the Fifth Circuit had done in *Landry*, the *Dean* court only briefly considered the reasoning in *Jackson* before dismissing it in a footnote.[144] The *Dean* court flatly rejected the symbiotic relationship between bondsmen and state actors by following the reasoning in *Ouzts* and *Landry* with little additional consideration of its own.[145] This decision placed *Dean* with the majority of circuit courts, conforming to *Ouzts* and placing a strong emphasis on bounty hunter intent.

After *Dean*, very little attention was given to this question at the appeals level for several years. The circuit courts were split in their holdings, with the Fifth, Eighth and Ninth Circuits finding no state action through symbiotic relationship, and the Fourth Circuit recognizing state action. In 2009, the Tenth Circuit Court of Appeals added its view to the mix.

E. United States v. Poe*: The Tenth Circuit Weighs in on Bounty Hunters as State Actors*

The Tenth Circuit addressed the question of bounty hunters as state actors in *United States v. Poe*.[146] The case presented the Tenth Circuit with a chance to align itself with the circuit majority or to adopt the Fourth Circuit's minority analysis. The court chose the former.

Aaron Dale Poe, who was released on bond, failed to appear at his criminal trial in Oklahoma.[147] Bounty hunters attempting to locate Poe stalked Poe's girlfriend to her place of work, questioned her about her relationship with Poe, threatened to break down her door, and staked out her house to wait for Poe.[148] Upon seeing one of Poe's acquaintances leave the house, they ordered him to get on the ground.[149] After positively identifying Poe, the bounty hunters entered the home and wrestled

140. 129 F.3d 1001 (8th Cir. 1997).
141. *Id.* at 1003.
142. *Id*.
143. *Id.*
144. *Id.* at 1006 n.4.
145. *Id.* at 1005–06.
146. United States v. Poe, 556 F.3d 1113, 1124 (10th Cir. 2009).
147. *Id.* at 1117.
148. *Id.* at 1118.
149. *Id.*

him to the ground.[150] During the arrest and a subsequent search of the room in which Poe was apprehended, the bounty hunters discovered drugs, drug-related paraphernalia, and a loaded gun.[151] Police were called after Poe was restrained and, upon obtaining consent to search the premises from the homeowner, located and catalogued the contraband originally identified by the bounty hunters.[152]

Poe moved to suppress the drug and gun evidence at trial, arguing the bounty hunters that located the drugs, paraphernalia, and the gun were state actors conducting a warrantless search in violation of the Fourth Amendment.[153] The district court denied his motion, and Poe was convicted on three counts: possession of methamphetamine with intent to distribute, possession of a firearm in furtherance of a drug trafficking crime, and possession of a firearm after having been convicted of a felony.[154] Poe appealed.

In its analysis, the Tenth Circuit relied on the U.S. Supreme Court's decision in *United States v. Jacobsen*[155] and its own decision in *United States v. Smythe*.[156] In *Jacobsen*, employees of a private shipping company searched through a suspicious package that appeared to contain drugs.[157] The employees notified federal drug agents to report their findings, and agents eventually determined that the package contained cocaine.[158] In denying Jacobsen protection under the Fourth Amendment, the Supreme Court stated that when a private individual conducts a search "not acting as an agent of the Government or with the participation or knowledge of any governmental official," the Fourth Amendment is not implicated no matter how unreasonable the search.[159] In *Smythe*, the Tenth Circuit applied *Jacobsen* to similar actions by a private individual and acknowledged that a private search may be transformed into a governmental search "if the government coerces, dominates or directs the actions of a private person conducting the search or seizure."[160] In *Poe*, the Tenth Circuit applied principles from *Jacobsen* and *Smythe* to determine whether the bounty hunters who searched Poe were state actors subject to the Fourth Amendment, or whether the bounty hunters were acting for their own benefit without government influence.

150. *Id.*
151. *Id.*
152. *Id.* at 1118–19.
153. *Id.* at 1120.
154. *Id.* at 1117.
155. 466 U.S. 109 (1984).
156. 84 F.3d 1240 (10th Cir. 1996).
157. *Jacobsen*, 466 U.S. at 111.
158. *Id.* at 111–12.
159. *Id.* at 113.
160. *Smythe*, 84 F.3d at 1242 (quoting Pleasant v. Lovell, 876 F.2d 787, 796 (10th Cir. 1989)) (internal quotation marks omitted).

This application of *Smythe* and *Jacobsen* suggests that the Tenth Circuit has adopted a narrower version of the *Lugar* analysis to determine state action because the language seems to be derived solely from the state compulsion test outlined in *Green*.[161] This idea, while consistent with the Fourth Circuit's application of the *Lugar* test when government officials are involved,[162] narrows the scope of the government action to coercion, domination, or direction when imposing state actor status on a private party performing a search. This framework appears to embrace the state compulsion argument, but discards the symbiotic relationship arguments discussed in *Green*.[163]

The *Poe* court then applied the test established in *United States v. Souza*[164] to determine if a search by a private individual constitutes state action.[165] *Souza* involved a delivery service employee who searched a suspicious package after she was essentially instructed to do so by a government agent.[166] The search was held to violate the Fourth Amendment despite the private actor status of the employee.[167] In *Souza*, a government search occurs when (1) the government knew of and acquiesced to the individual's intrusive conduct, and (2) the party performing the search intended to assist law enforcement efforts rather than furthering their own ends.[168]

Applying *Souza*, the *Poe* court concluded that the state was not involved in the intrusive conduct until after the bounty hunters entered the house, apprehended Poe, and located the drugs.[169] The court also concluded that the second prong of the inquiry was not met "because the bounty hunters primarily intended . . . to further [their] own ends—their financial stake in Poe's bail—rather than to assist" the state.[170] When Poe argued that there was a symbiotic relationship between law enforcement and bail bondsmen, the court flatly rejected the idea as "unpersuasive."[171] The court made clear that the inquiry was not whether "the police benefited from the private conduct, but if the bounty hunters had a legitimate, independent motivation to conduct the search."[172] "Because the bounty hunters [in this case] did not intend to assist law enforcement," the court concluded, "they are not state actors."[173]

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161. *See* Green v. Abony Bail Bond, 316 F. Supp. 2d 1254, 1259 (M.D. Fla. 2004), discussed *supra* Part II.A.2.
162. Jackson v. Pantazes, 810 F.2d 426, 428–29 (4th Cir. 1987); *see supra* Part III.B.
163. *See Green*, 316 F. Supp. 2d at 1261.
164. 223 F.3d 1197, 1201 (10th Cir. 2000).
165. United States v. Poe, 556 F.3d 1113, 1123–24 (10th Cir. 2009).
166. *Souza*, 223 F.3d at 1200.
167. *Id.* at 1201.
168. *Id.* (quoting Pleasant v. Lovell, 876 F.2d 787, 797 (10th Cir. 1989)).
169. *Poe*, 556 F.3d at 1124.
170. *Id.* (alterations in original) (internal quotation marks omitted).
171. *Id.*
172. *Id.* (internal quotation marks omitted).
173. *Id.*

IV. *POE* FOLLOWS A NARROW INTERPRETATION OF *LUGAR* AND UNDULY EMPHASIZES ACTOR INTENT

The Tenth Circuit's dismissal of the symbiosis analysis advanced by Poe on appeal represents a missed opportunity to introduce restraints on an otherwise unrestrained industry. In *Poe*, the bounty hunters entered and searched Poe's girlfriend's home without a warrant; an offense clearly in violation of the Fourth Amendment if performed by state actors.[174] Because the court determined that Poe had a reasonable expectation of privacy despite his not being settled at the location, and because the bounty hunters worked in a symbiotic relationship with the state, this search should have been held unconstitutional.[175] Instead, the court chose to apply a test that unduly emphasizes subjective intent over objective realities.

The *Souza* inquiry embodies rationale from earlier decisions on how to classify private actors as state actors. The first half of *Souza* requiring "knowledge and acquiescence" sets a very high bar for classifying a search as government action, and if applied loosely, could ultimately blend into the inquiry of whether the state acted in concert with the private party.

The second half of the *Souza* test reflects the Ninth Circuit's rationale in *Ouzts v. Maryland National Insurance Co.* by placing a heavy emphasis on the subjective intent of the searching party—in this case, the bounty hunters.[176] The *Poe* court concluded that the *Souza* inquiry is in essence the same test as the second leg of *Lugar*, a rule for defining state actors.[177] This result departs from the rules synthesized in *Green* by artificially narrowing the inquiry to government knowledge and subjective intent.[178] This prong fails to appreciate the objective role that bounty hunters play in the legal system, and instead focuses on their personal intentions—most prominently, whether they were working for money or in order to further a deep-seated sense of justice.

This logic is flawed. To distinguish between state and private actors on the basis of intent suggests that official state actors are motivated by some altruistic pursuit of justice without regard to their own financial gain. Sheriffs and police officers are, at some level, merely doing their jobs. While police officers are clearly state actors, the financial compensation they receive also clearly furthers their self-interests. There is no change in the status of these civil servants from state actors to non-state

174. *See* U.S. CONST. amend. IV; *see also* Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (holding that the Fourth Amendment guards against unreasonable searches and seizures).

175. *See Poe*, 556 F.3d at 1122–23 (clarifying that a person "does not need to be 'settled' at a location to have a reasonable expectation of privacy" (citing Minnesota v. Olson, 495 U.S. 91, 96–97 (1990))).

176. *See* Ouzts v. Md. Nat'l Ins. Co., 505 F.2d 547, 555 (9th Cir. 1974).

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

178. *See* Green v. Abony Bail Bond, 316 F. Supp. 2d 1254, 1259–60 (M.D. Fla. 2004).

actors depending on their subjective intentions in carrying out their duties—whether for the money or for some greater good. It seems that simply being employed as a sheriff or police officer is enough to overcome the fact that these actors are working to further their own ends. Today, bounty hunters perform duties traditionally performed by law enforcement.[179] They too receive financial compensation for their efforts. Thus, because bounty hunters are quasi-employed as police, it stands to reason that, like law enforcement, their independent financial motivations should play no role in their determination as state actors.

Despite the problems with identifying state action through subjective intent, the *Poe* court seemed set on applying the narrower version of *Lugar* articulated in *Souza*. The court stated that it doubted the panel "could abandon this line of authority at this late date," suggesting that even if the symbiosis analysis was a legitimate argument, they would not accept it.[180] This analysis of state actor status looks only to the state compulsion test articulated in *Green* and the subjective intentions of the searching party emphasized in *Ouzts*, while completely dismissing the broader, over-arching symbiotic relationship between the bond industry and the criminal justice system.[181]

The Tenth Circuit's reasoning in *Poe* is consistent with the reasoning of the Fifth, Eighth, and Ninth Circuits, and while it applies a narrower test than the other circuits, the underlying rationale is consistent with the majority of other decisions on the subject.[182] While the *Poe* court chose to follow the majority of circuits, had it followed the Fourth Circuit's minority view in *Jackson*, they would have embraced a more comprehensive ideology that takes into account the objective roles of bounty hunters in the modern legal system by holding them civilly liable for constitutional violations. The circuit majority approach places entirely too much emphasis on bounty hunters' intent, and completely ignores the extensive police-like role that these actors play in the criminal justice system. *Jackson*'s minority approach—finding state action through symbiosis—accounts for this discrepancy because it accepts that bounty hunters are performing traditionally police activities that are inextricably integrated with the pretrial detention system. *Jackson*'s holding suggests that the inquiry into subjective actor intent is overridden by the reality of the bounty hunting industry as symbiotic to the justice system.

179. Drimmer, *supra* note 3, at 762.

180. *See Poe*, 556 F.3d at 1124.

181. *See Ouzts*, 505 F.2d at 555; *Green*, 316 F. Supp. 2d at 1259; Drimmer, *supra* note 3, at 784–88.

182. *Compare Poe*, 556 F.3d at 1123–24, *and* Dean v. Olibas, 129 F.3d 1001, 1006 n.4 (8th Cir. 1997), *and* Landry v. A-Able Bonding, Inc., 75 F.3d 200, 205 n.5 (5th Cir. 1996), *and Ouzts*, 505 F.2d at 555 (holding that bounty hunters are not actors of the state and placing emphasis on the intent of the bounty hunter), *with* Jackson v. Pantazes, 810 F.2d 426, 430 (4th Cir. 1987) (holding that bounty hunters are actors of the state and examining their objective role in the justice system).

The Tenth Circuit—and the other circuit courts of appeal—would have done well to recognize the same.

CONCLUSION: A MISSED OPPORTUNITY

The Tenth Circuit's reasoning in *Poe* unpersuasively dismisses the symbiotic role of bounty hunters in the modern justice system. The tests the court applied are artificially narrow and fail to account for the instrumental roles of these types of actors. Had the court found bounty hunters to be acting under the color of the state, they would have afforded constitutional protections to citizens who could be potentially harmed by these "private" actors performing official duties. The decision in *Poe* is a step in the wrong direction, crystallizing a history of decisions further isolating the bond industry from the constitutional limitations historically assigned to those performing the same police duties that bounty hunters perform today.

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