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Private Extradition Companies: A Benefit To The State At The Expense Of The Individual?

I. INTRODUCTION

The process of interstate extradition is a well established and fundamental aspect of the American criminal justice system. Historically, public law enforcement officials such as State sheriffs or United States marshals performed the interstate transportation of prisoners pursuant to valid extradition proceedings. In recent years, this process, like many other governmental functions, has been "privatized." To reduce the costs involved in transporting prisoners, states increasingly rely on private extradition companies to perform this task. This development raises important issues and creates problems which affect the treatment of individuals subject to the criminal justice system.

In August of 1986, a woman prisoner being transported from California to Missouri by a private extradition company was abused and ultimately raped by the "special agents" authorized to perform the extradition. The prisoner had not challenged the validity of the extradition order but had waived her extradition hearing in California. At the time of her extradition, she became subject to the "normal" criminal procedures utilized in interstate extraditions even though

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1. Interstate extradition is defined as "the surrender by one state... to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender." BLACK'S LAW DICTIONARY 585 (6th ed. 1990).

2. "The complete chaos which would have enveloped law enforcement in the American colonies in the absence of extradition agreements became evident long before the Constitution was written. Such an agreement was incorporated in the Articles of Confederation. Without debate it was continued in the Constitution." Johnson v. Matthews, 182 F.2d 677, 680 (D.C. Cir. 1950).

3. "[T]o transfer from public or government control or ownership to private enterprise." THE RANDOM HOUSE DICTIONARY 1541 (2d ed. 1987).


5. "She says she thought she would be quickly flown cross country to stand trial in Missouri." Id. § A, at 20, col. 1.
she had not been convicted of any crime.  

The injuries this prisoner suffered were unjust and inexcusable. This incident raises questions of liability and concerns of a public policy that delegates public law enforcement functions to private companies. In this context, there is considerable potential for abuse by private extradition companies and agents. Intentional acts which harm an individual are unacceptable not only in a situation involving the transfer of a prisoner from one state to another, but in any situation. Likewise, negligent actions which harm a prisoner cannot be ignored. 

This comment will focus on the events which occur after extradition proceedings have been waived by the prisoner, or the extradition order has been deemed proper in a valid court hearing. It will

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6. The executive authority of the State, usually the Governor, demands the return of an individual charged with a crime in that State from the executive authority of the state in which the individual is found. After the demanding State produces an indictment or affidavit setting forth the charges against the individual, the asylum State arrests the individual and delivers the prisoner to the appointed agent of the demanding State. 18 U.S.C. § 3182 (1982). Prior to relinquishing the accused, the asylum state generally provides a hearing to determine whether there is probable cause to sustain the charges and thus deliver the prisoner to the agent of the demanding state. See infra, notes 11 & 20. 

7. This may include the maintenance of poor conditions such as overcrowded and overheated vehicles; the deprivation of normal everyday needs such as sufficient sleep, adequate meals and rest stops, and any necessary medical attention. See Harrison, supra note 4.

8. "There is a definite tendency to impose greater responsibility upon a defendant whose conduct was intended to do harm, or was morally wrong." PROSSER AND KEeton ON THE LAW OF TORTS § 8, at 37 (W. Keeton 5th ed. 1984). Negligent actions may also result in serious injury to the prisoner, and thus, should not be underemphasized in comparison to intentional acts. 

9. See, The California Penal Code provides for a waiver of extradition proceedings. Any person arrested in this State charged with having committed any crime in another State . . . may waive the issuance and service of the Governor's warrant . . . and all other procedure incidental to extradition proceedings, by subscribing in the presence of a magistrate within this State a writing which states that he consents to return to the demanding State; provided, however, that before such waiver shall be subscribed by such person, the magistrate shall inform him of his rights to require the issuance and service a warrant of extradition . . . . CAL. PENAL CODE § 1555.1 (West 1982).

10. The term "prisoner" as used in this comment will refer principally to the pretrial detainee — that individual who is awaiting trial, and who has not yet been convicted of any crime. 

11. See, e.g., CAL. PENAL CODE § 1550.1 (West Supp. 1989). The statute provides: No person arrested upon such warrant shall be delivered over to the agent of the executive authority demanding him unless he is first taken forthwith before a magistrate, who shall inform him of the demand made for his surrender, and of the crime with which he is charged, and that he has the right to demand and procure counsel. . . . A warrant . . . shall be presumed to be valid, and unless a court finds that the person in custody is not the same person named in the warrant, or that the person is not a fugitive from justice, or otherwise subject to extradition . . . , or that there is no criminal charge or criminal proceeding against the person in the demanding state, or that the documents are not on
address the use of private companies to physically transport the prisoner from one state to another, and the standards and procedures which govern the extradition.

Specifically, this comment will center on the issues raised when the prisoner is injured by an act of the private extradition company. It will concentrate on the potential liability of both the private company performing the extradition and the authorizing state, placing particular emphasis on the potential responsibilities of the State and state agency. The relationship between the private company and the state agency will be discussed as a critical issue in the prisoner’s possible claims against the State. Constitutional theories of liability based on the violation of due process, and the Eighth Amendment prohibition against cruel and unusual punishment will be addressed. In addition, jurisdictional issues will briefly be covered.

Finally, the policy considerations involved in the use of private extradition companies will be presented, including a detailed discussion of the prisoner’s need for protective and preventative safeguards during transport. This comment concludes that the balancing of interests should weigh in favor of the individual and that action should be taken to implement the safeguards necessary to protect the “prisoner.”

II. The Laws of Interstate Extradition

The provision for interstate extradition is stated in the United States Constitution and is codified in federal statutes addressing crimes and criminal procedures. To implement the laws of extradition, the majority of states have adopted the provisions of the Uniform Criminal Extradition Act. Those provisions set forth the independent states’ procedures and requirements for interstate

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12. The laws, standards and procedures to be discussed in this comment may or may not be applicable in each of the States due to individual state variations. The discussion here will focus primarily on the federal system and the system in California.


extraditions. It has been stated that “[t]he federal constitutional provisions for extradition and the federal statutes implementing them are not intended primarily to safeguard the fugitive from justice, but rather to facilitate the discovery and bringing to speedy trial of fugitives from justice by the States.” Thus, “[t]he rights granted under the federal provisions for extradition are granted to the states rather than to the fugitives who might be the subject of extradition.”

However, this assertion fails to recognize that “extradition is not merely a matter of comity between states but rather is also a means of granting protection to citizens of one state from being arbitrarily taken to another state.” Protection against wrongful extradition is provided by the procedural safeguards set forth in most extradition proceedings. Extradition, whether wrongful or not, places the individual in the hands of extradition agents authorized to transport that individual to the demanding jurisdiction.

The prisoner’s protections against abuses during the course of transport are not found in the provisions for extradition proceedings, nor are they provided by the procedural safeguards in such

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18. Id. at 1351.
20. E.g., UNIF. CRIMINAL EXTRADITION ACT § 10, 11 U.L.A. (1936) which provides:

No person arrested upon such warrant shall be delivered over to the agent whom the Executive Authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus.

Id. “[A]n extradition proceeding is ordinarily designed to determine whether or not there is probable cause to transfer a criminal suspect from one jurisdiction to another for trial.” Campbell v. Smith, 308 F. Supp. 797 (S.D. Ga. 1970) (Petitioner alleged that he was extradited without a hearing, and was thus denied due process under the 14th amendment.) Although the Court did not rule on the extradition issue, it stated that “[a] trial and conviction in the receiving jurisdiction subsequent to a defective extradition proceeding probably cures any defect in that proceeding since such conviction is a determination of guilt and shows probable cause for extradition.” Id. Unfortunately, this after-the-fact approach seems to assume that the individual is guilty at the extradition hearing stage. More significantly, it fails to protect the individual from having to undergo the ordeals of physical transport, since a defective extradition proceeding subjects the prisoner to the delivery process, whether guilty or innocent at the time of the extradition hearing, and whether convicted or acquitted at the subsequent trial.

proceedings. When a state contracts with a private company for extradition services, it is the state agency\textsuperscript{23} which must determine and implement the requirements for the prisoner's safe transport. There are inadequate protections for the individual in this area of the extradition process.

III. Who Is The "Authorized Extradition Agent?"

It is ordinarily understood that "[t]he appointment of the agent to return the fugitives, by the Governor, is part of the duty of the executive branch of the state government."\textsuperscript{24} Although the federal provisions and the Uniform Act repeatedly refer to an "agent" authorized to receive the fugitive, they do not expressly establish the process for appointing such an agent to execute the transportation procedure.\textsuperscript{25} Moreover, the extradition statutes do not establish any prerequisites to become an agent, and do not enumerate the duties of the authorized agent.\textsuperscript{26}

The insufficiency of such standards may pose serious consequences to those prisoners injured by the employees of a private extradition company acting under the authority of the executive branch. The status and the scope of authority of the authorized individual in his or her capacity as "agent," and of the private company in its "agency" capacity, will establish and may limit the injured prisoner's causes of action and remedies. Thus, the requirements of the individual "agent" and the definition and interpretation of "agency" in this context are of great significance to the individual seeking relief.

\textsuperscript{23} For example, a state's Department of Corrections determines the requirements for safe transport when it contracts with the private extradition company.

\textsuperscript{24} Kitchens \textit{v.} Union County, 22 So. 2d 356, 359 (Miss. 1945). The appellant, an extradition agent, brought an action to recover expenses he incurred in the performance of a valid extradition. In interpreting the state extradition statutes governing the case, the court distinguished between the judicial nature of such a review by the court and the executive nature of the appointment of the agent. \textit{Id.} at 359.


\textsuperscript{26} Although it is likely that private individuals were commonly employed as authorized extradition agents, extradition statutes were not originally designed to apply to the recently created private extradition companies. However, with the development of extensive use of private extradition companies, states have promulgated statutes establishing requirements for "transportation officers." \textit{See, e.g., Cal Penal Code} §§ 831.6, 832 (Deering, 1983); \textit{see infra} note 30 and accompanying text.
A. The Relationship of the Employee to the Private Company and its Effect on the Liability of the Private Company

As a general guideline, "[i]t is only when there is a compliance with the Constitution of the United States and the Laws of Congress aided by any laws of a state not in conflict therewith that one becomes an agent within the terms and meaning of the extradition laws." The determination of specific standards and requirements for authorized individual extradition agents is left largely to the states and their corrections agencies. Thus, the delegation of the extradition function to a private company logically requires the state agency to demand of the private company cognizable standards for the individuals authorized to carry out the procedures. Although there are no clear guidelines governing the use of a private extradition company acting as an "agent" of the state executive branch, there are express requirements for the individuals authorized to carry out the delivery of prisoners.

California defines a "transportation officer [as] a public officer, not a peace officer, appointed on a contract basis by a peace officer to transport a prisoner or prisoners." The penal code confers on this officer "the right to carry or possess firearms, only while engaged in the transportation of a prisoner," and the authority to "use reasonable force in establishing and maintaining custody of persons delivered to him or her." The California provision further requires that the "transportation officer" complete a training course equivalent to that of a peace officer.

The Department of Corrections of the State of California has established standards governing the interstate transportation of prisoners that apply to private companies under contract with the State. These standards cover the areas of planning, personnel, vehicles, restraint equipment and operations. The personnel standards require the private company to complete a background check of all potential employees, hire only individuals who are at least twenty-one years of age, provide that the employees are properly licensed under all

29. Id.
30. CAL. PENAL CODE § 831.6(a) (Deering 1983).
31. CAL. PENAL CODE § 831.6(b) (Deering 1983).
32. CAL. PENAL CODE § 831.6(d) (Deering 1983).
33. CAL. PENAL CODE §§ 831.6(c), 832 (Deering 1983).
34. Corrections, supra note 28, Exhibit A. The employees of the private extradition company are transportation officers as defined by the California statute.
35. Id.
36. Id. at 3.
37. Id.
applicable State and Federal provisions, require that all employees carry appropriate identification, and ensure that each employee receive the training required under the statute.

The relationship between the private company and the individual it hires to transport prisoners is clearly that of a master to a servant. Thus, "[o]nce it is determined that the man at work is a servant, the master becomes subject to vicarious liability for his torts." Under this analysis, when an injured prisoner brings an action against the extradition company, the private company may be found liable for harm caused by the acts of its employee which were within the scope of the employment. Moreover, the employer may also be held liable for the employee's intentional acts where the purpose is to further the employer's business.

Alternatively, the employer may owe a duty directly to the prisoner making the employee responsible for the servant's acts. Thus, in the case of a private extradition company, the company may enter into a contractual agreement with the State which would create a relationship between the company and the prisoner requiring the company to be responsible for the protection of the prisoner.

Undoubtedly, the extradition company has a duty to the State to deliver the prisoner as requested and to prevent possible escapes. The company is hired specifically to transport prisoners pursuant to valid extradition orders. The private company, however, also must consider the prisoner, when performing its contractual duties. The extradition company's contractual duty to the State is not grounds for allowing the company to ignore its duties to the prisoner to maintain safe and sufficient conditions during transport. If the actions of the company employees result in harm to the prisoner during the trans-

38. Id.
39. Id.
40. CAL. PENAL CODE § 832 (Deering 1983).
41. A servant is a person employed to perform services in the affairs of another, whose physical conduct in the performance of the service is controlled, or is subject to a right of control, by the other. RESTATEMENT (SECOND) OF AGENCY § 220(1) (1957).
42. PROSSER AND KEETON ON THE LAW OF TORTS, supra note 8, at 501.
43. See id. at 502.
44. Id. at 505.
45. See RESTATEMENT (SECOND) OF AGENCY § 214 (1957). "This is true in particular in those cases where the master, by contract or otherwise, has entered into some relation requiring him to be responsible for the protection of the plaintiff." PROSSER AND KEETON ON THE LAW OF TORTS, supra note 8, at 506.
46. See Corrections, supra note 28, Exhibit A at 4-5 ("In all instances of transfer of prisoners there are concerns that must be kept in mind for the prisoners' safety and rights while assuring that they do not escape, that they are not injured. . . .").
portation process, the company may be liable to the prisoner based on a duty to protect the prisoner.

As an alternative to a respondeat superior theory of liability, the private company may be liable to the injured prisoner on a theory of negligent hiring or supervision of the employee. Although the state agency sets forth the standards governing the process of interstate extradition for the private company, it is the company that screens, selects and trains the individual extradition agents. Negligence in the performance of these functions may expose the prisoner to harms which could and should be avoided. Under such circumstances, the injured prisoner may be entitled to recover from the company.

Finally, employees of the extradition company may be found liable in an individual capacity for harm caused by their negligent or intentional acts, whether or not they were done in the course of their employment. The injured prisoner may file a complaint directly against an individual employee of the private company.

There are several courses of action which individuals can take against both the company and the employee of the company when they are injured or harmed during the physical transport to the demanding State. This should not be surprising as "[a] prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." The injured prisoner's alternatives against the State or the state agency, however, are fewer in number and involve more complicated legal issues.

B. The Relationship of the Private Extradition Company to the State and its Effect on the Liability of the State

The relationship between the private company and the state agency is crucial in determining the injured prisoner's rights and remedies against the State. The private company's designation as...
an employee, as an independent contractor, or as an actor of the State will determine the existence and degree of the state’s potential liability for harm resulting from the actions of the private company or its employees. Additionally, the State may incur liability based on theories of negligent hiring or supervision.53

1. The Private Company or an Employee of the State

If the private company is considered an employee of the State, the State is then responsible for the acts of the company under traditional masters-servant principles. However, it is difficult to contend that the private company is an employee of the State.

The state agency does establish the standards by which the private company must conduct its services.54 Thus, technically, the state agency may have some power to control and direct the private company in the material details of how the work is to be performed. However, the state agency does not directly supervise the conduct or actions of the private company on a daily basis, as is commonly associated with the traditional master-servant relationship.55 The California Department of Corrections, in its current contract, merely provides that the “State reserves the right to monitor compliance with contract requirements.”56 There is no indication that the State actually does monitor the actions of the private company through either an ongoing or fixed procedure.

Furthermore, the extradition company is a private enterprise not a public agency. Agencies of the State are under the direct supervision and scrutiny of the executive branch, and they must operate under the guidelines of that branch. Although private businesses may be subject to regulation by government agencies, they need only meet those requirements. They are otherwise free to conduct their businesses as they see fit, making their own decisions, free from the “control” of state or federal government. As compared to public law enforcement officials who act under the direct control and supervision of the state, the private extradition company acts only with the

53. See supra note 47.
54. See supra notes 34-35 and accompanying text.
55. See supra note 41.
56. Corrections, supra note 28, Exhibit A at 6.
state agency's standards as an indirect restraint on its activities. Accordingly, the private extradition company cannot accurately be considered an "employee" of the State.

2. The Private Company of an Independent Contractor to the State

If the private company is considered an independent contractor to the State, it is likely that the State would escape liability for injuries caused by the private company. The private extradition company fits easily within the definition of an independent contractor rather than within the definition of employee. Because the employer of the independent contractor does not have a right to control the way the work is performed, the activity is considered to be the independent contractor's own business. The private extradition company is under contract with the state agency to perform extraditions. What must be determined is the degree of control that the state agency has over the methods and procedures used by the private company in performing extraditions.

As stated above, the state agency establishes the standards by which the private company must conduct its services, but it does not directly supervise the activities of the private company. The private company is responsible for "furnish[ing] all labor, materials, supplies, and equipment." It is required to "provide a continuously updated list of . . . appropriately trained transportation officers." It is responsible for recruiting and training its own employees.

Even with the standards set forth by the state agency, it appears that the private extradition company is subject to the state agency's control only as to the delivery of the prisoner. In this sense, the private company can be considered an "independent contractor" to the State. However, such a designation would obstruct, if not completely prevent, an individual injured during extradition from obtaining relief from the state agency or its officials.

Generally, an employer is not vicariously liable for an independent contractor's employees. The private extradition company is subject to the state agency's control only as to the delivery of the prisoner. However, such a designation would obstruct, if not completely prevent, an individual injured during extradition from obtaining relief from the state agency or its officials.

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57. "Generally, one who, in exercise of an independent employment, contracts to do a piece of work according to his own methods and is subject to his employer's control only as to end product or final result of his work." BLACK'S LAW DICTIONARY, supra note 1, at 693.
58. PROSSER AND KEETON ON THE LAW OF TORTS, supra note 8, at 509.
59. Corrections, supra note 28, at 1.
60. Id. at 7.
61. See supra notes 36-40 and accompanying text.
62. See Corrections, supra note 28 at 5 stating, "Either party may discontinue the Contractor's services and be relieved of any consideration or service should the other party fail to perform the covenants herein contained at the time and in the manner herein provided."
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contractor's torts against third parties. Thus, the responsibility for preventing injuries to third persons and the liability for injuries that occur are placed on the independent contractor. As a consequence, the injured prisoner would not be able to bring an action against the state agency or its officials that are the "employer" of the extradition company. The individual would be limited to actions against the private company and its employees.

Conversely, some jurisdictions assert that the employer should be liable for the negligence of an independent contractor because the employer chooses the contractor and benefits from the activity. This assertion is applicable to the State's use of a private extradition company. The state agency selects the extradition company from among several companies and in lieu of performing the extraditions itself. By utilizing the services of the private company instead of its own resources the State receives benefits in the form of reduced costs. This view places some responsibility for the injured prisoner on the state agency.

However, the majority of the courts adhere to the general rule and do not impose liability for the acts of independent contractors. Thus, a determination that the private extradition company is an independent contractor to the State would not necessarily strengthen the prisoner's case, and may actually restrict it.

3. The Private Company as an Actor of the State

The type of relationship which lends the most support to the injured prisoner's claim is one in which the private company is regarded as an actor of the State. The special nature of the extradition process compels the finding of such a relationship.

Where the private company enters into a contract with a state agency to provide extradition services, the extradition contract results in the private company becoming the principal means by which the State effectuates its transport of prisoners to and from other States. What once was the duty of the state law enforcement official acting as a specifically appointed agent becomes that of the private

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63. Prosser and Keeton on the Law of Torts, supra note 8, at 509.
64. Id.
65. Id.
66. Harrison, supra note 4, at 21, col. 4.
68. "Actor" as used in this context refers to one whose actions "may fairly be said to be that of the State[]." Shelley v. Kraemer, 334 U.S. 1, 13 (1948).
company. The private company's status as an actor of the State is supported by the consequence that such a contractual agreement commonly results in the private company becoming the near exclusive means of extraditing individuals for the state.

The extradition company is directly involved in the process of extradition and takes an active role in the transportation procedures. Although the private company plans, implements and executes the procedures to accomplish the delivery of the prisoner, it must adhere to the standards established by the state agency. Such an arrangement is not unlike that of the state agency to the State executive branch.

The state agency is given the responsibility of achieving the objectives of the executive branch. The executive branch provides the agency with general standards to observe during its operations. It also confers on the agency the authority to establish and implement specific procedures to accomplish the stated objectives. In a similar manner, the private extradition company is given the responsibility of transporting prisoners for the state agency. The state agency establishes standards for the company to follow and it gives the company the authority to perform the extraditions using the procedures implemented by the extradition company. Under these circumstances, the private company unquestionably operates as an "authorized agent" for the state, and arguably, as an actor of the state.

A determination that the private extradition company is an actor of the state strengthens the individual's action against the state agency or its officials for injuries resulting from the actions of the private extradition company. Such a finding is also necessary to maintain an action against the private company on constitutional grounds. In either case, the question becomes whether there is a "sufficiently close nexus between the state and the challenged action of the [private company] so that the action of the latter may be

69. [T]he prisoner is to be delivered to and returned by a specially appointed agent and not by the State sheriff or a United States marshal. . . . Even though one who is a sheriff should be appointed such agent, he acts not as sheriff under his bond, but as special agent to extradite. . . . McLean v. State of Mississippi ex rel. Roy, 96 F.2d 741, 745 (5th Cir. 1938), cert. denied, 305 U.S. 623 (1938).

70. See, e.g., Corrections, supra note 28, note 1.

The State and Contractor enter into this agreement for the purpose of interstate and limited intrastate transportation of adult male and female prisoners (fugitives, escapees, inmates and parole violators) to and from any criminal justice agency or penal institution located within the contiguous United States and any State or County law enforcement agency (local jurisdiction) institution/facility located in California.

Id. at 1.

71. See Corrections, supra note 28.

72. See supra notes 34-35 and accompanying text.
fairly treated as that of the state itself.”

IV. CONSTITUTIONAL ISSUES

It has been stated that “[c]ivil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.” In our society, protections against “unrestrained abuses” must be implemented to prevent and reduce violations of individual civil rights. This is especially true in the context of the criminal justice system. All individuals charged but not yet convicted of crime, must be protected from the abuses inherent in such a system.

In the absence of these protections or in situations where harm results despite the existence of protections, it is of great significance to the prisoner and to the proper functioning of the criminal justice system that the individual be given recourse to the courts. Prisoners injured during the physical extradition process should have the choice of bringing a claim against the private extradition company or against the state agency and its officials for violating their constitutional rights under the Civil Rights Act.

Actions alleging violations of constitutional rights have been maintained in cases challenging the validity of extradition orders and proceedings. These challenges focused on the proceedings that occur prior to the transport of the prisoner. The question of a constitutional violation in the course of the physical transfer has not been directly addressed. A violation of the individual’s constitutional rights is a violation of that individual’s constitutional rights whether the offense occurred prior to or during transit. Thus, the prisoner who alleges a constitutional violation for injuries received during

75. The federal statute reads:

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.

transport should not be treated differently from the prisoner who asserts a claim for violations that occur in the earlier stages of the extradition process.

The extradited individual has the same rights as the pre-trial detainee being held in a permanent facility or the convicted prisoner serving a sentence. If the individual is injured during extradition by a person acting under color of law, that individual should have the same means for redress as the prisoner confined in a jail or penitentiary.

In order to bring an action under § 1983 the individual must establish that the action complained of was done "under color of state law." Additionally, the individuals must show that they were deprived of a protection that is guaranteed under the Constitution. These requirements will vary depending on whether the individual brings the action against the private company as a "state actor" or against the state agency as the entity responsible for the actions of the private company.

A. The State Action Doctrine

It is generally understood that claims under § 1983 must be based on actions of the state that allegedly violate an individual's constitutional rights. The fourteenth amendment "erects no shield against merely private conduct, however discriminatory or wrongful." Thus, the injured prisoner who brings an action under § 1983, against either the private company or the state, must establish that the offensive conduct by the private company can be fairly attributable to the state.

1. The Private Company as a State Actor

The standards for determining whether a private company is regarded as a state actor under § 1983, thus allowing a cause of action

77. See supra note 50 and the accompanying text.
78. "The appearance or semblance, without the substance, of legal right." BLACK'S LAW DICTIONARY, supra note 1.
81. Id.
82. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (holding that petitioner could maintain a claim under § 1983 if she proved that she was refused service because of a state-enforced custom of racial segregation in public restaurants); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (holding that a private restaurant leasing space in a publicly owned building was bound by the requirements of the fourteenth amendment); Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that private restrictive agreements prohibiting the sale of property to Blacks did not violate due process, but that judicial enforcement of such agreements did).
83. Shelley v. Kraemer, 334 U.S. 1, 3 (1948).
to be maintained against the private company, are addressed in Supreme Court decisions.\textsuperscript{84} The factors which ultimately determine whether or not the private company is a state actor for purposes of the fourteenth amendment are applied to the facts and circumstances of each individual case.\textsuperscript{85} When applied to the situation of a prisoner extradition, the analysis compels a finding that the private company is a state actor, and thus subject to the requirements of the Constitution. Consequently, the private company should be answerable to an action under § 1983.

In \textit{Burton v. Wilmington Parking Authority},\textsuperscript{86} a privately owned restaurant refused to serve the appellant solely because he was black. The appellant brought an action against the restaurant under § 1983 alleging a violation of his fourteenth amendment rights. Because the restaurant leased space in a publicly owned and operated building and was a financially integral part of the state’s operation, the court found that the state was a joint participant in the operation of the restaurant.\textsuperscript{87} The state had “so far insinuated itself into a position of interdependence”\textsuperscript{88} with the private restaurant that the private restaurant was deemed a state actor, and thus was obligated to comply with the provisions of the fourteenth amendment.\textsuperscript{89} If the restaurant failed to comply, it would be liable under § 1983.

The relationship between the private extradition company and the state closely resembles that of the private restaurant and the state in \textit{Burton}. The circumstances involved in the extraditions of prisoners is such that the state cannot be considered anything less than a joint participant in the operations of the private company. The individuals being extradited by the private company are transported for the public purpose of facing criminal charges and potential prosecution by the state.

Additionally, the \textit{Burton} Court determined that the private restaurant constituted a physical, financial, and indispensable part of the state’s plan to operate a public project.\textsuperscript{90} Maintenance of the public project was the responsibility of the state and was funded with public money.\textsuperscript{91} Similarly, a state that contracts for the services of a

\begin{itemize}
  \item \textsuperscript{84} \textit{See supra} note 82.
  \item \textsuperscript{85} \textit{Id}.
  \item \textsuperscript{86} 365 U.S. 715 (1961).
  \item \textsuperscript{87} \textit{Id} at 723-24.
  \item \textsuperscript{88} \textit{Id} at 725.
  \item \textsuperscript{89} \textit{Id}.
  \item \textsuperscript{90} \textit{Id} at 723-24.
  \item \textsuperscript{91} \textit{Id} at 724.
\end{itemize}
private extradition company integrates those services into the procedures of the state criminal justice system.⁹² Because the state assigns the extradition function to the private company, the services of the private company become an integral part of the criminal justice process, indispensable to the state system.⁹³ Moreover, payment for extradition services, like other state functions, is funded by the state whether performed by the private company or by the state.⁹⁴

These factors support a finding that the state has "so far insinuated itself into a position of interdependence" with the private extradition company that it must be recognized as a joint participant in the activities of the private company. As such, the private company is a state actor. Thus, the company must be held to the same constitutional standards as the state.

This finding is also supported by Evans v. Newton⁹⁵ where the Supreme Court observed that formally "private" conduct "may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."⁹⁶ In Evans, the city of Macon was serving as the trustee for a park designated by a private party for the use of white persons only. When the city began to allow blacks to use the park, the Board of Managers brought an action seeking to remove the city as trustee.⁹⁷ The Court held that the tradition of municipal control of the park was so firmly established that the mere substitution of trustees did not instantly transfer the park from the public to the private sector.⁹⁸ The Court further noted that a park traditionally serves the community and is "plainly in the public domain," likening its function to that of a fire or police department.⁹⁹

When compared to the park in Evans, the extradition process must also be considered as "plainly in the public domain." Because the purpose of the criminal justice system is to enforce the laws, such a system is unquestionably in the public domain. The extradition function operates within the criminal justice system as a means of bringing to justice those individuals accused of crime. Because extradition is an essential component in this system, it too must be in the

⁹² See Corrections, supra note 28 and accompanying text.
⁹³ Although the extradition function is not necessarily assigned exclusively to the private company, the result is essentially the same since the only other entity with the authority to perform the function is the State. Id. This means that if the private company does not perform the extradition, the State must. Id. at 5.
⁹⁴ Id. at 2-3.
⁹⁶ Id. at 299.
⁹⁷ Id. at 297.
⁹⁸ Id. at 301.
⁹⁹ Id. at 302.
public domain. Accordingly, extradition has traditionally been a function under the control of both the state and federal government.\textsuperscript{100} Because control of the extradition process originated in and remains with the state, the state’s use of a private company to perform its extraditions cannot instantly transfer the function from the public to the private sector. Thus, the private extradition company should be subject to the same constitutional standards as the state.

Another factor which is considered in determining state action is whether the conduct in question was compelled by the state.\textsuperscript{101} Clearly, the state would not order the private extradition company to intentionally harm prisoners or to treat them negligently. If it did, a violation of the Constitution has undoubtedly occurred. On the contrary, the state establishes standards and guidelines for the safety and protection of the prisoner which the private company is obligated to follow. In this respect the state has not compelled the private company to act in such a way as to injure individuals being extradited.

However, the state has compelled the private extradition company through their contractual relationship to engage in the process of extradition. In carrying out this contractual obligation, the methods used by the private company, as well as the actual delivery of the prisoner, are subject to the standards established by the state.\textsuperscript{102} If the private company fails to adhere to the standards, the state should be responsible for the deficiencies. Insofar as the state orders the services of the private company, it compels the private company to act. The fact that the state orders the end result should not absolve the state of all responsibility as to the means utilized.

In \textit{Jackson v. Metropolitan Edison Co.},\textsuperscript{103} the court considered whether a private utility company’s actions in terminating electric service could be considered acts by the state for purposes of a § 1983 action against the company. In holding that there was no “state action,” the court found that (1) state regulation of the company; (2) any monopoly status that the company may enjoy; (3) whatever pub-

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\textsuperscript{100} See U.S. CONST. art. IV, § 2, cl. 2; 18 U.S.C. §§ 3182-3195 (1982).
\textsuperscript{101} Adickes v. Kress & Co., 398 U.S. 144 (1970). (holding that a white school teacher who was refused service in a private lunchroom because she was in the company of Blacks could establish a claim under § 1983 if she could prove the existence of a state-enforced custom that required racial segregation.) “When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby ‘to a significant extent’ has ‘become involved’ in it.” \textit{Id.} at 170 (quoting Peterson v. City of Greenville, 373 U.S. 244, 248 (1963)).
\textsuperscript{102} See Corrections, supra note 28.
\textsuperscript{103} 419 U.S. 345 (1974).
\end{flushleft}
lic function the company may serve; and (4) state approval or authorization of the company’s actions were not determinative of whether the company’s actions in terminating electric service could be considered those of the state for purposes of a § 1983 action against the company. The court noted that the company simply filed a general tariff with the state agency for the right to terminate service for nonpayment and that the company alone was responsible for the provision of power to its customers.

An application of the factors considered in Jackson to the state’s use of a private extradition company does not lead to the same result as that in Jackson. Without approval and authorization by the state, the private extradition company would be unable to operate. The private extradition company is not only regulated by the state, but it is retained by the state to carry out the extraditions. Unlike the private company in Jackson, the extradition company is exercising “powers traditionally exclusively reserved to the state.” Consequently, it enjoys a virtual monopoly since the state relinquishes its right to perform the function to the particular extradition company under contract. Thus, the activities of the private company should be regulated to the same degree as other criminal justice functions that are performed by the state itself and the actions taken by the company should be properly attributable to the State.

The feature of exclusivity under the “public-function doctrine” was further examined in Flagg Bros., Inc. v. Brooks. In narrowly defining the meaning of exclusivity, the court noted that very few functions are so classified and that, in this case, “the settlement of disputes between debtors and creditors is not traditionally an exclu-

104. Id. at 358.
105. Id. at 354.
106. In the case of private utilities, “[T]he nature of governmental regulation is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body,” Id. at 357 (emphasis added). In the case of the private extradition company, the services are provided as part of the criminal justice system, the province of the State. The extradition company must obtain approval and authorization from the State in order to perform extraditions. See Corrections, supra note 28.
107. See Corrections, supra note 28.
110. 436 U.S. 149 (1978) (holding that a warehouseman’s proposed sale of goods entrusted to him for storage, as permitted under state law, was not state action).
111. The Court recognized a narrow definition of exclusivity in the case of elections, see, e.g., Terry v. Adams, 345 U.S. 461 (1953), and where a private company is performing all of the necessary municipal functions in a privately owned town, Marsh v. Alabama, 326 U.S. 501 (1946), the functions were of the kind that had been “exclusively reserved to the State.” Thus, the activities of the private entities were considered to be those of the State, and subject to the constraints of the Constitution. Flagg Bros., 436 U.S. at 158-59.
sive public function." After concluding that the state was in no way responsible for the actions of the private company, the court pointed out that the decision of the private company was permitted, but not compelled by the state. Instead, the state had "merely announced the circumstances under which its courts [would] not interfere with a private sale."

The analysis applied in Flagg Bros. supports a finding of state action when applied to the circumstances involved in the use of a private extradition company. Unlike the warehouseman in Flagg Bros., the private extradition company is performing a public function that has been, traditionally and exclusively, a function of the state. It cannot accurately be said that the state "merely announces" the circumstances which will govern the process of extradition when it contracts with a private company. On the contrary, the state actively participates in the enterprise by entering into the contract. The state is not simply a bystander to the activities, but rather, it is a party to the transaction when it instructs and authorizes the private company to perform the delivery of a prisoner in furtherance of its own criminal processes and in the interests of justice.

Indeed, the Supreme Court in Lugar v. Edmonson Oil Co. reiterated that "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment" and for purposes of a claim under § 1983. In Lugar, the fact that the County Sheriff, a state official, executed the writ of attachment figured strongly in the determination that there was state action for constitutional purposes. The procedural scheme utilized by the private company was the product of state action and was thus subject to constitutional restraints.

In the extradition process, the state officials are more intricately involved in the procedural scheme than in Lugar. The state officials enter into the contract with the private company and establish the relevant standards. They request the individual from the asylum

112. Flagg Bros., 436 U.S. at 161.
113. Id. at 165.
114. Id. at 166.
115. See supra notes 13-14 and accompanying text.
117. Id. at 941.
118. Id. at 942.
119. Id.
120. Id.
121. See Corrections, supra note 28.
state, thereby initiating the extradition process against the individual. Finally, they take custody of the prisoner when the prisoner is delivered into their jurisdiction. The state officials and the private company work together to deliver the prisoner. This process so closely involves the state with the extradition company that the relationship can accurately be characterized as “joint participation” between the two. The injured prisoner should thus be able to challenge the actions of the private company under § 1983.

Contrary to the decision in Lugar, the Supreme Court found no “state action” in Rendell-Baker v. Kohn. In Rendell-Baker, former employees of a private school brought a § 1983 action against the school, claiming that they were discharged in violation of their constitutional rights. The private school received referrals and funding from the city and from a state agency. In deciding that the alleged infringement of federal rights was not fairly attributable to the state for purposes of a § 1983 action, the Court distinguished Adickes and Lugar by noting the limited role played by the state agency in the employee discharges in Rendell-Baker. The Court also dismissed the significance of the school’s receipt of public funds and its performance of a public contract or public function.

The court’s conclusion that the private school was not performing a function “traditionally the exclusive prerogative of the state” cannot be conveniently applied to the private extradition company. Providing public education is certainly an important governmental function, but no barriers prevent private schools from also providing society’s educational needs. This is especially the case where special services are required for handicapped or maladjusted students.

The process of extradition, on the other hand, has traditionally been an exclusive function of the states and of their respective

123. Id.
125. Id. at 835.
126. Id. at 832.
127. Id. at 838-39, n.6.
128. Id. at 840-42.
129. Id. at 842 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)). The Court explained:
the education of maladjusted high school students is a public functions, but that is only the beginning of the inquiry. [The Massachusetts statute] demonstrates that the State intends to provide services for such students at public expense. That legislative policy choice in no way makes these services the exclusive province of the State. . . . [U]ntil recently the State had not undertaken to provide education for students who could not be served by traditional public schools.
Id. at 842.
130. See supra note 6.
This function is part of the criminal justice system. When a crime is committed, the criminal justice system seeks to vindicate the rights of society and at the same time, it attempts to ensure the fair and constitutional treatment of the accused. With its built-in checks and balances, the state rather than the private company, is best positioned to ensure that the individual's fundamental rights are not violated during the criminal process.

In the extradition process, the prisoner must be requested by the executive of the demanding state. The asylum state must then follow the required extradition procedures. Upon a valid extradition order, the prisoner must be delivered to an agent authorized by the demanding state. The governmental bodies effectuate the entire process, including the physical delivery of the prisoner. The private company that assumes the duty of transporting the prisoner is thus performing a function "traditionally the exclusive prerogative of the State." As a result, the state plays a substantial role in the process.

In the case of the private school, once the student is referred to the school, the state no longer plays an integral role in the system other than to fund the student's education. However, when the state requests an individual from another state, the process of delivering that individual remains part of the state's criminal justice process. Without the eventual presence of the individual in its jurisdiction, the state would be unable to complete its criminal prosecution against that individual. Physical delivery of the individual to the demanding state is a necessary and indispensable element of the system. The mere submission by the state of an "order" to the private extradition company to perform the delivery does not remove the function from the state's purview.

The state is authorizing the extradition company to perform one step in the criminal process that the state normally is required to perform itself. Because the extradition function is an important element in a system where the state has a strong interest in bringing those accused of crime to justice, the state remains an interested and active party in the process regardless of who delivers the prisoner.

131. Article IV, Section 2, clause 2 of the Constitution "is in the nature of a treaty stipulation between the states, and compliance is a matter of agreed executive comity." Johnson v. Matthews, 182 F.2d 677, 679 (5th Cir. 1950).
The activities of the private company are performed to further the state's criminal justice system and are so closely intertwined with the activities of the state itself that its conduct should accurately be regarded as "state action" for purposes of a § 1983 claim against the company.

2. The Liability of the State for the Actions of a Private Company

If the conduct of a private extradition company is established as "state action," the injured prisoner may be able to maintain a § 1983 action against the company. An action against the government agency presents greater obstacles.

The Supreme Court has concluded that "execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983." The government may also be subject to liability even if the challenged custom was not formally approved through official channels. The state agency obviously does not have a policy or custom of intentionally harming or negligently treating prisoners during the extradition process. A governmental body would not promulgate or approve of practices that clearly would result in harm to individuals.

Nevertheless, the governmental body does retain the private extradition company to carry out the extradition procedures. It is the government's use of the private company, rather than its own officials, that is the subject of an alleged constitutional violation. Despite the absence of any intent to injure, the state's use of the private company may result in harm to the prisoner.

The governmental agency that retains a private company to perform extraditions for local law enforcement agencies establishes a practice of using the private company rather than state officers for the function. The state agency adopts a policy whereby the local

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136. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 (1978) (holding that local government bodies can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where the challenged action effectuates a policy, regulation or decision adopted and promulgated by the government officials).

137. Id. at 690-91.

138. The agency that enters into the agreement with the private company may be a branch of the state government which contracts for service to all of the local government bodies in the state. See, e.g., Corrections, supra note 28. The Monell court, however, explicitly limited its holding to local government entities that are not considered part of the State for purposes of the eleventh amendment. Monell, 436 U.S. at 690, n.54. An action against the state agency would be subject to the restrictions of the eleventh amendment. See infra notes 201-02 and accompanying text. Because of this qualification, it may be necessary for the injured prisoner to bring an action against the local law enforcement agency rather than against the state agency in order to avoid dismissal of the suit based on the eleventh amendment.

139. See Corrections, supra note 28.
agencies are directed to utilize the private company for prisoner transfers. Whenever extradition services are required, the local agency simply submits an "order" to the private company which then carries out the delivery.140

The individuals authorized to perform the extraditions are not peace officers.141 They are not subject to the regular scrutiny of the state agency. The state agency permits the private company to screen, hire and train its own transportation officers subject to the standards prescribed by the state agency.142 Privately trained "police" are generally less qualified and less effective than public officers.143

The practice of effectuating extraditions through the use of a private company creates the danger of potential abuse and misconduct by "agents" who are poorly supervised and inadequately monitored.144 Although the state agency leaves the responsibility of training and supervision to the private company, it should not be removed from the process. Undoubtedly many private companies that provide services to the government do so with safe and effective procedures. However, a government procedure that results in injuries to prisoners or that creates a dangerous potential for harm to prisoners should be challenged. The practice of using a private extradition company presents such dangers, and the governmental body should be answerable to those injured.

However, the injured prisoner must still establish that the conduct of the private company is "state action." The Supreme Court recognized the importance of the state action requirement in cases where the complaining party attempts to hold the state liable for the actions of private parties.145 That requirement should be met in the

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140. Id.
141. See supra notes 30-34 and accompanying text.
142. See supra notes 34-40 and accompanying text.
144. Extradition agents may be analogized to police officers. The issue of whether poor supervision or inadequate training of law enforcement officials by government agencies constitutes a "policy" within the meaning of Monell is beyond the scope of this comment. For a thorough discussion on the issue, see Gerhardt, The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983, 62 S. CAL. L. REV. 539 (1989). An additional requirement in establishing a governmental "policy" is a showing of several instances of negligence or misconduct caused by the "policy." Id. at 587. This requirement may be shown in the case of extraditions by several prior instances of harm or misconduct caused by the private company of which the State was or should have been aware. See Harrison, supra note 4.
145. Blum v. Yaretsky, 457 U.S. 991, 1003 (1982). This case involved the transfer
case of criminal extraditions by private companies.

The integral position of private extradition agents in the criminal extradition process establishes the close relationship between the state and the private company that constitutes "state action." Additionally, the state's policy of utilizing the private company has resulted in harm to prisoners being transported to and from other states. Under these circumstances, the state should not be immune from liability.

It should be noted that claims alleging a violation of constitutional rights are limited in some cases to actions against the officers of the state agency, with no recognized claim against the state or state agency. It is generally recognized that "a state officer's acts which constitute an abuse of the power conferred on him by the state are actionable under the Civil Rights Act even though the acts lie outside the scope of the state officer's authority." Thus, the individual may maintain a claim under § 1983 against specific state officials if not against the state agency. "The involvement of a state official . . . plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment rights, whether or not the actions of the police were officially authorized, or lawful."

B. Constitutional Theories of Liability

The injured prisoner's claim under § 1983 may be based on a deprivation of the constitutional right to due process or on a violation of the eighth amendment prohibition against cruel and unusual punishment. These theories are not exclusive of one another, but often

of individuals in private nursing homes to lower levels of care based on the assessment of a private review committee. In order to continue receiving state Medicaid benefits, the patients were required to transfer to the designated facility. The Court determined that the activities of the private nursing homes did not amount to state action and thus did not violate rights secured by the fourteenth amendment. The Court did not reach the question of whether an action against the State could be maintained.

146. Harrison, supra note 4.
147. E.g., Wiltse v. California Department of Corrections, 406 F.2d 515 (9th Cir. 1968); Williford v. People of California, 352 F.2d 474 (9th Cir. 1965). The court in Williford relied on Monroe v. Pape, 365 U.S. 167, in holding that the complaint did not state a claim against the governmental body, and the court in Wiltse subsequently relied on Williford, to reach the same conclusion. In Monell v. Department of Social Services, 436 U.S. 658 (1978), however, Monroe was overruled insofar as it held that local governments are wholly immune from suit under § 1983. Id. at 701.
150. See Anderson v. Nosser, 456 F.2d 835 (5th Cir. 1972) in which plaintiffs were detained for a minor offense and were subjected to "punishment" while awaiting trial. ("The breaches of the plaintiff's rights . . . was, in light of the fact that they had been convicted of no crime, not only a violation of their Fourteenth Amendment rights, but their rights not to be subject to cruel and unusual punishment under the Eighth Amendment of the United States Constitution.

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overlap in application.

1. Due Process

"It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law." However, where the individual is being extradited pursuant to a valid hearing or a valid waiver of the extradition proceedings due process would likely be presumed. Thus, the individual claiming a violation of due process under either the fifth amendment or the fourteenth amendment may find such a claim difficult to maintain. However, injured prisoners, cannot be denied the opportunity to assert fundamental rights.

"A party seeking relief under the due process clause must establish first, that he has been deprived by the State of 'life, liberty, or property,' and second, that the deprivation occurred without 'due process.' " The prisoner being extradited is kept "in custody" by authorized agents throughout the length of the extradition process. Because the detention of such a prisoner during transport is equivalent to the detention of the prisoner held in a jail or stationary facility, the individual is certainly being deprived of "liberty."

Amendment." Id. at 842) (Tuttle, J., concurring in part and dissenting in part).
152. The Fifth Amendment states:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or taken for public use, without just compensation.
U.S. CONST. amend. V.
153. The Fourteenth Amendment states:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
U.S. CONST. amend XIV, § 1.
154. An analysis of the distinction between due process clause of the fifth amendment and the due process clause of the fourteenth amendment is beyond the scope of this comment. For purposes of this discussion, references to "due process" or the "due process clause" include both.
156. See Corrections, supra note 28.
The question then arises whether that deprivation was effected without due process. This question must necessarily evaluate "what process is due."\textsuperscript{157} Furthermore, it must be considered that "due process is flexible and calls for such procedural protections as the particular situation demands."\textsuperscript{158}

One court has determined that "the deprivations inherent in an interstate transfer of a [convicted] prisoner are sufficient to trigger the minimal due process safeguards . . . [of] written notice of charges, opportunity to prepare a defense, hearing, and a written statement of the evidence relied on as reasons for the decision."\textsuperscript{159} However, in that case, the plaintiff inmates were challenging the validity of the transfers themselves, not the means of transport.\textsuperscript{160} The individual faced with a potential extradition, like the convicted inmate facing the possibility of transfer to another prison, is given the opportunity to question and challenge the order.\textsuperscript{161} The prisoner who is extradited after a fair hearing or after a valid waiver of the extradition proceedings, and is subsequently injured during the process, is challenging the transportation process, not the validity of the order to extradite. It is the \textit{method} of carrying out the delivery that must be evaluated when inquiring into that prisoner's due process rights.

The constitutional validity of the methods utilized in the interstate transportation of prisoners has not been directly addressed. However, there are cases which raise the issue of whether illegal extraditions are violations of due process.\textsuperscript{162} These cases deal with the transportation procedures in the context of international extraditions. Despite this difference, they consider the manner in which extradition is carried out and thus, provide insight into the type of treatment that should be accorded individuals being extradited interstate.

The court in \textit{United States ex rel. Lujan v. Gengler}\textsuperscript{163} found that the petition alleging a violation of due process lacked "any allegation

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\item \textsuperscript{157} Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
\item \textsuperscript{158} Id.
\item \textsuperscript{159} Gomes v. Travisono, 510 F.2d 537, 539 (1st Cir. 1974) (Transferred inmates brought action challenging validity of interstate transfers as violative of due process. The Court determined the need for specific procedures to ensure due process.).
\item \textsuperscript{160} Id.
\item \textsuperscript{161} See, e.g., UNIF. CRIMINAL EXTRADITION ACT § 10, 11 U.L.A. (1936).
\item \textsuperscript{162} United States v. Lira, 515 F.2d 68 (2d Cir. 1975) (Foreign national alleged that he was abducted, tortured and brought to the United States illegally. The court found no direct evidence of any government misconduct on the part of the U.S. agents and no violation of due process.); United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975) (Foreign national was extradited to the United States pursuant to a valid arrest warrant in an "unconventional manner," but the court found no violation of due process.); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) (Foreign national was kidnapped, tortured and brought to the United States to face drug charges. The court held that the defendant should be allowed to prove that the conduct of the government agents violated his constitutional rights.).
\item \textsuperscript{163} 510 F.2d 62.
\end{itemize}
of that complex of shocking governmental conduct sufficient to convert an abduction which is simply illegal into one which sinks to a violation of due process." The court further stated, "but for the charge that the law was violated during the process of transporting him to the United States, [the petitioner] charges no deprivation greater than that which he would have endured through lawful extradition."

This analysis focuses on the conduct of the individuals carrying out the extradition and implies that an extradition may be illegal, yet not a violation of due process. Indeed, "[j]urisdiction gained through an indisputably illegal act might still be exercised, even though the effect could be to reward police brutality and lawlessness in some cases." The approach appears to be that there may be a violation of due process if the conduct of the extradition agents reaches a level which "shocks the conscience," "offend[s] even hardened sensibilities," or comes "too close to the rack and the screw." The legality of the extradition appears to have little bearing on the determination of whether there is a violation of due process. It is the manner in which the extradition was carried out that governs.

If the manner in which the extradition is performed is the standard that determines a violation of due process as to foreign nationals, the standard should not be anything less for citizens of the United States. However, this standard would still only protect against and compensate for acts the court determines to be intentional misconduct on the part of the extraditing officers. Nevertheless, it provides a framework which may eventually extend the protections of constitutional due process to individuals injured by less offensive conduct, such as the gross negligence or recklessness of extradition agents.

Finally, the fact that the private extradition company and its em-

164. Id. at 66 (emphasis added).
165. Id.
166. United States v. Toscanino, 500 F.2d 267, 272 (2d Cir. 1974).
167. See Toscanino, 500 F.2d 267; United Stats ex rel. Lujan v. Gengler, 510 F.2d 62 (1975). In his concurring opinion in Gengler, Judge Anderson noted:

ployees, rather than the state agency, are responsible for the injurious conduct should not impede the individual's claim against the state agency or the state. The court in United States v. Lira\textsuperscript{169} rejected the argument that the United States government was "vicariously responsible" for the tortures inflicted on the defendant by the foreign government effectuating the extradition.\textsuperscript{170}

The court reasoned that the United States government had only requested the foreign government to arrest and deliver the defendant according to the foreign government's procedures.\textsuperscript{171} In defense of the actions of the government officials, the court asserted that "United States agents" can hardly be expected to monitor the conduct of representatives of each foreign government to assure that a request for extradition or expulsion is carried out in accordance with American constitutional standards.\textsuperscript{172}

However, in the situation where the state agency contracts to have a private company perform criminal extraditions for the state, the Lira rationalization is less persuasive. The state agency does not merely ask the private company to deliver a prisoner in whatever way the company sees fit. The state agency provides standards for the private company. It cannot be doubted that implicit in those standards is the requirement that the contractual obligation be performed within constitutional bounds.

By requiring standards for the private company, the state agency takes an active role in the extradition process. Thus, unlike the government officials in Lira, the state agency should be expected to monitor the conduct of the private extradition company to ensure that the transportation of prisoners "is carried out in accordance with American constitutional standards." Only in this way will the individual’s right to due process be adequately protected. Accordingly, the injured prisoner should be permitted to state a claim based on a violation of due process rights and should be given the opportunity to prove the truth of the assertions.

2. Cruel and Unusual Punishment

Injured prisoners may also base their claims on a violation of the prohibition against cruel and unusual punishment. Issues involving the eighth amendment\textsuperscript{173} prohibition are raised primarily in cases where the plaintiff has already been convicted and is under some

\textsuperscript{169} 515 F.2d 68 (2d Cir. 1975).
\textsuperscript{170} Id. at 71.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.
form of incarceration. The term "punishment" suggests that a penalty is imposed against an individual because he or she is found to be at fault or guilty of some wrongdoing. Thus, what constitutes "cruel and unusual punishment" is generally interpreted in the context of penal incarceration.

One court expressed "considerable doubt that the cruel and unusual punishment clause is properly applicable at all until after conviction and sentence." However, the same court also recognized that "it would be absurd to hold that a pre-trial detainee has less constitutional protection against acts of prison guards than one who has been convicted." Thus, when a court determines whether an individual is being or has been subjected to cruel and unusual treatment, it is not limited to an inquiry into the conditions faced by the sentenced inmate. The court should also consider the state of the pre-trial detainee. The inquiry into a claim of cruel and unusual treatment should be undertaken whether the prisoner is confined pursuant to a trial and sentence or still awaiting trial. The definition of cruel and unusual punishment should not be governed by the status of the individual upon whom it is inflicted.

174. See, e.g., Louisiana v. Resweber, 329 U.S. 459 (1947) (Petitioner was convicted for murder and sentenced to be electrocuted for the crime); Johnson v. Dye, 175 F.2d 250 (3d Cir. 1949) (Petitioner had been convicted for murder and sentenced to hard labor for life prior to his petition for a writ of habeas corpus and his subsequent discharge).

175. Punishment is defined as "[a]ny fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him, or for his omission of a duty enjoined by law." BLACK'S LAW DICTIONARY 646 (6th ed. 1990) (emphasis added).

176. "[P]unishment [is] deliberately administered for a penal or disciplinary purpose, with the apparent authorization of high prison officials charged by the state with responsibility for care, control, and discipline of prisoners." Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973). More recent cases have also held that the 8th Amendment does not apply until a conviction has been rendered against the defendant. E.g., Lynch v. Cannatella, 810 F.2d 1363 (5th Cir. 1987); Palermo v. Rorex, 806 F.2d 1266, 1271 (5th Cir. 1987); Hewitt v. City of Truth or Consequences, 758 F.2d 1375, 1377 n.2 (10th Cir. 1985).

177. Glick at 1032.

178. Id.

179. Generally speaking, a punishment that amounts to torture, or that is grossly excessive in proportion to the offense for which it is imposed, or that is inherently unfair, or that is unnecessarily degrading, or that is shocking or disgusting to people of reasonable sensitivity is a "cruel and unusual" punishment. And a punishment that is not inherently cruel and unusual may become so by reason of the manner in which it is inflicted.
More recently, courts have recognized and acknowledged the necessity for treating those individuals not yet convicted of crime differently from their convicted counterparts.180 "Both classes are incarcerated, yet the purpose of incarceration is fundamentally different: Imprisonment prior to trial is sometimes justified to insure the appearance of the accused at trial; imprisonment after trial is imposed to accomplish the objectives of the criminal law."181 Thus, courts make a legal distinction between the two categories of individuals,182 asserting that "the only legitimate purpose of incarcerating those who are accused of crime is to guarantee their presence at trial."183 Notwithstanding this distinction, while in custody both groups of prisoners are often treated in the same manner regardless of their legal status.184

Due to prohibitive costs and limited resources, the pre-trial detainees often encounter the same conditions that convicted inmates face during their sentences.185 This situation elicits a sense of inequity, as "[h]aving been convicted of no crime, the detainees should not have to suffer any 'punishment', as such, whether 'cruel and unusual' or not."186 A finding that cruel and unusual punishment in confinement is a violation of the convicted prisoner's constitutional rights suggests that subjecting pre-trial detainees to the same conditions, whether or not characterized as "punishment", is a violation of the Constitution.187

The idea that the pre-trial detainee should not have to suffer "any punishment" in a jail or holding facility also applies to individuals who are extradited to other states to stand trial. The conditions of a vehicle used to transport prisoners may be as "inherently unfair," as "unnecessarily degrading," or as "shocking or disgusting to people of reasonable sensitivity" as that of a jail or penitentiary. The fact that the individual is being transported rather than incarcerated is not a

182. See cases cited supra note 180.
184. See cases cited supra note 180.
185. Id.
187. Obviously, if confinement in the [jail] is a cruel and unusual punishment forbidden to be employed against those who are in jail to be punished, it is hard to think of any reason why it should be permitted for those who are only in jail awaiting trial, and are, according to our law, presumed to be innocent of any wrongdoing.

sufficient distinction or justification for tolerating poor conditions or treatment that amount to "punishment."

Some of the conditions of which pre-trial detainees have complained include: prolonged confinement in cramped cells; gross overcrowding; a lack of recreation or exercise; grossly substandard heating, ventilation, plumbing and sanitation; inadequate health facilities; poor hygienic provisions; and insufficient nutrition. In cases where these conditions are determined to be "cruel and unusual," the facilities have often times been described as "subhuman," "primitive," "shocking and debasing," and "overall, unhealthy and depressing places." However, these types of conditions are not limited to penal institutions.

Pre-trial detainees who are transported from one jurisdiction to another may be faced with the same or similar conditions. The individual who is extradited interstate, via ground transport, must frequently endure a lengthy journey across several state lines. The vehicle in which the prisoner is transported can very closely resemble a prison cell. Because the extradition company's objective, like most other private enterprises, is to realize a profit, the vehicles are usually loaded to capacity with several prisoners. This results in extremely cramped and crowded vehicles. In addition, the prisoner may be required to wear restraint equipment for the entire journey.

The intervals in which the prisoners are permitted to leave the vehicle to make necessary restroom stops are kept at a minimum, and stops for meals are selected at random in order to prevent escapes. Although the need for precautions to prevent escapes is an

188. See cases cited supra note 180.
193. Although the California Department of Corrections requires that "[the prisoners] cannot be in transit more than 16 hours per day," Corrections, supra note 28, Exhibit A at 1, it also requires that prisoners "travel no less than an average of 250 straight-line miles each day from point of departure to point of destination." Id. at 2. (emphasis added).
194. See Corrections, supra note 28, Exhibit A at 4. "Vehicles must allow for the separation of transporting agents and prisoners... Prisoners must not be able to open doors and windows... Vehicle windows must be barred." Id.
195. See Harrison, supra note 4.
196. E.g., Corrections, supra note 28, Exhibit A at 4. "Appropriate restraint equipment must be available so that prisoners are restrained during transport; i.e., handcuffs, waist chains and leg irons, at a minimum." (emphasis added).
197. See Corrections, supra note 28, Exhibit A at 1-2.
important and legitimate concern for the extradition company, the prisoners are given virtually no opportunity to rest or move about. Additionally, prisoners in need of medical attention are sometimes ignored or neglected. In this context, the unconscionable conditions violative of the eighth amendment which were found to exist in some jails penitentiaries were, under some circumstances, even more “cruel and unusual.”

Interstate extradition is not a proper setting for any type of punishment, whether the prisoner is convicted or not. Extradition was not meant to be a means of retribution, restraint or deterrence, but rather a means of “bringing to speedy trial [] fugitives from justice. . . .” Thus, the prisoner being extradited, especially one who is not yet convicted of any crime, should not be subjected to conditions during transport which amount to “punishment.” Consequently, if the prisoner is subjected to such conditions, and suffers injury as a result, there should be some means for recourse.

V. JURISDICTIONAL ISSUES

Whether an “agency” relationship between the state and the private extradition company can be established and whether a claim under § 1983 may be maintained are obviously critical issues that must be thoroughly addressed by the injured prisoner in order to obtain relief from either the state or the private company. In addition, the individual must also consider whether the claim can and should be brought in federal or state court.

The injured prisoner may be barred by the eleventh amendment from bringing an action against the state directly in federal court. However, the individual may be able to bring an action in federal court against a state official. First, the individual must determine against whom the suit will be brought. The individual must then de-

198. Harrison, supra note 4, at 20, col. 1. “Some prisoners have arrived in need of hospitalization, complaining that the guards did not heed their pleas for medical attention.” Id.


200. An in-depth and extensive analysis of the jurisdictional issues involved is beyond the scope of this comment. For further discussion, see generally, BUNN. JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES (1949).

201. “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI.


203. A complete discussion of the remedies that the injured prisoner may seek is beyond the scope of this comment.
cide what types of remedies will be sought.\textsuperscript{204}

In order to avoid a dismissal based on the Eleventh Amendment, the individual may attempt to bring claims against the state agency which contracted with the extradition company and the high ranking officials in that agency. However, this strategy does not guarantee that the federal court will hear and decide the case or that it will allow recovery at all. If the claims are essentially against the state itself, obtaining monetary damages from the state agency or state officials may not be possible.\textsuperscript{205} Thus, in addition to the choice of defendants, the individual’s choice of relief, will determine the award to be granted, if any.

In determining whether or not to hear a case, a federal court must be attentive to the relationship between the federal government and each of the individual states,\textsuperscript{206} especially in cases involving state interests and constitutional issues. The state has an obvious interest in its criminal justice system to protect its citizens and to maintain order in the community. Not to be forgotten, are the constitutional rights of the individual which are inherent in and inseparable from that legitimate interest. The process of interstate extradition unmistakably falls within these concerns. However, the particular issue of whether a demanding state can be held liable for injuries to a prisoner being transported to that state by a private extradition company under contract with the extraditing state and authorized to perform the delivery has not been decided.

There are, however, cases which address the liability of the state or state officials in the context of confinement of pre-trial detainees in state jails and holding facilities.\textsuperscript{207} There are undeniable similarities between the prisoner being held in jail and the prisoner being transported while in custody. Both types of prisoners are usually confined in cramped and crowded quarters; both must endure the conditions of the detention facility in which they are held; and both are subject to the treatment of their guards. Thus, the cases involving the jailed prisoners provide useful guidance in evaluating the situation of the individual being extradited.

There is some variation in the way that federal courts handle such cases. In an earlier case, one federal court stated, “a sense of comity

\textsuperscript{204} See Edelman, 415 U.S. 651.

\textsuperscript{205} See Younger v. Harris, 401 U.S. 37 (1971).

\textsuperscript{206} See cases cited supra note 180.

\textsuperscript{207} Kelly v. Dowd, 140 F.2d 81 (7th Cir. 1944) (Inmate sought writ of habeus corpus in federal court).
and due regard for state jurisdiction demand that the applicant be left to his remedies with the state courts who, no less than those of the United States, are charged with the obligation to recognize and protect his constitutional rights.\textsuperscript{208}

However, more recently federal courts have been less hesitant to hear claims brought before them.\textsuperscript{209} It has been recognized that in situations involving the administration of state criminal and penal systems, "[f]ederal courts have a natural reluctance to interfere with such administration and will intercede only where paramount federal constitutional or statutory rights supervene."\textsuperscript{210} Nevertheless, "[t]he courts are unanimous in providing a federal forum for attacks on conditions of confinement alleged to violate the explicit constitutional mandate against cruel and unusual punishment."\textsuperscript{211}

The conditions surrounding the transportation of prisoners may constitute cruel and unusual punishment.\textsuperscript{212} The delivery process may result in a violation of the prisoner's rights to due process.\textsuperscript{213} Such claims cannot be considered to involve anything less than "paramount federal constitutional rights." As such, "when fundamental civil rights are at issue, federal courts should hesitate to abstain."\textsuperscript{214}

The individual who brings an action against the state agency or its officials may consider a decision from a federal court to be more impartial than that of the state court and thus, may prefer to file the claim in federal court. However, if the prisoner is unsuccessful in obtaining a federal forum, the suit may be tried in state court.

\section*{VI. Policy Considerations}

The individual injured by a private extradition company which is acting under the authority of the state should have some alternatives for seeking relief against both the private company and the state agency or its officers. There should be an equal or greater emphasis placed on the measures which may be taken to prevent and reduce the injuries which give rise to such claims. When absent or inadequate procedural safeguards result in harm to the individual, the ability to pursue a remedy in court affords the injured individual compensation for their injuries, and may also prompt the state to develop or improve the procedures and standards governing the ex-

\begin{itemize}
\item \textsuperscript{208} Jones v. Wittenberg, 323 F. Supp. 93, 98 (N.D. Ohio 1971), aff'd, 456 F.2d 854 (6th Cir. 1972).
\item \textsuperscript{209} See cases cited supra note 180.
\item \textsuperscript{210} Jones v. Wittenberg, 323 F. Supp. 93, 98 (N.D. Ohio 1971), aff'd, 456 F.2d 854 (6th Cir. 1972).
\item \textsuperscript{211} Brenneman v. Madigan, 343 F. Supp. 128, 132 (N.D. Cal. 1972).
\item \textsuperscript{212} See supra notes 173-99 and accompanying text (discussion on cruel and unusual punishment).
\item \textsuperscript{213} See supra notes 151-72 and accompanying text (discussion on due process).
\item \textsuperscript{214} Jones v. Metzger, 456 F.2d 854, 856 (6th Cir. 1972).
\end{itemize}
tradition process by private companies. There are important and competing interests at stake for both the individual prisoner and the state. These interests must be considered and weighed in order to make effective decisions concerning the administration of the interstate extradition process and the criminal justice system in general.

When the state contracts with a private extradition company to obtain extradition services, it does so to promote efficiency and reduce costs in the operations of its criminal justice system. There are definite advantages to the state in using a private company rather than its own officials and resources. Because the activities of the state agency are not limited to handling only the extradition process, the agency must administer and oversee other areas of the criminal justice system.

The private extradition company operates exclusively as a service to transport prisoners being extradited to and from states. Its activities are limited to the pick-up and delivery of such individuals. As such, it may organize itself to perform the services more efficiently and with less expense than the state agency. It can then provide its services to the state agency at a lower cost. The result is that the private company realizes a profit and the state saves money by reducing its expenditures for extraditions. The state also becomes more efficient because the reduced cost of extradition permits it to allocate more resources into other areas.

The state certainly has a legitimate interest in promoting efficiency and cost effectiveness in its operations. The practice of utilizing private extradition companies raises important competing concerns for the individual being transported. The benefits to the state must be considered against the effects and potentially harmful consequences to the individuals subject to the criminal procedures of the state.

As the private company becomes more independent from the state agency in its operations, it is subject to less scrutiny, and the potential for abuse of the prisoner increases. The prisoner may be neglected or intentionally harmed by the extradition agents while in transit, with no means of protection available over the course of the

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journey. The prisoner may have to endure conditions which result in injury and which violate the prisoner’s fundamental rights.

The concerns for individuals and their rights surely outweigh the economic and operational benefits to the state. The state’s need to reduce costs should not be superior to individuals’ safety, especially in a society where the individual is “presumed innocent, until proven guilty.” “Inadequate resources can never be an adequate justification for the state’s depriving any person of his constitutional rights. If the state cannot obtain the resources to detain persons awaiting trial in accordance with minimum constitutional standards, then the state simply [should] not be permitted to detain such persons.”

Neither should the state agency be allowed to enter into a contract with a private extradition company for the sake of efficiency, thereby freeing itself of responsibility in ensuring the safety of the prisoner. Justice Marshall cautioned that

a State’s decision to delegate a duty to a private entity should be carefully examined even when it has acted, not in bad faith, but for reasons of convenience. . . . [E]xercises of state authority pose a special threat to constitutional values. A private entity vested with state authority poses that threat just as clearly as a state agency.

Indeed, without adequate safeguards, the private entity poses a potentially greater threat than the state agency because the private company is generally not subject to the same governmental scrutiny as the state agency.

These considerations support the individual’s interest to be free from harm or “punishment” over the interest of the state to save money and resources. To ensure that a policy of preserving and protecting individual rights is promoted, the state agency must take measures to improve the conditions of interstate transfer. These measures should include direct interaction with the company in order to establish proper and acceptable procedures; closer scrutiny of the activities of the private company and its employees, especially in the areas of recruitment and training, to ensure that the established standards and procedures are closely adhered to; and regularly scheduled inspections and evaluations of the company’s performance, with specific demands for improvement if necessary.

If a prisoner is injured, the state’s recourse should not be limited to canceling the contract with the private company. The state should undertake to revise and improve its own procedures concerning the use of private companies for extradition and should take the measures necessary to protect the individual before permitting any

218. See supra note 62 and accompanying text.

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private company to perform the extraditions.

VII. CONCLUSION

This Comment has addressed the issues that arise when a state, through its appropriate state agency, contracts for the services of a private extradition company and the prisoner being transported is injured due to the actions of the private company’s employees. Particular attention was paid to the prisoner who is not yet convicted of any crime, but who must nonetheless endure the procedures and conditions of the criminal extradition process. Under these circumstances, the state’s responsibility to protect the prisoner’s constitutional rights should not be vitiated by the state’s ability to delegate the extradition function to a private company.

The individual being transported by a private extradition company, like the individual being held in a jail or penitentiary, should not be forced to endure substandard or inhumane conditions. The individual should be protected from the potential abuse of extradition agents. Adequate protection of the individual can be accomplished only by implementing thorough and regularly scheduled inspections of the activities of the private company and by increased direct supervision of its operations. These are functions that should be properly assigned to the state agency that contracts with the private company.

A breakdown in the extradition process which can and should be avoided should not leave the injured prisoner to bear all of the resulting losses or injuries. If the prisoner is, in fact, injured as a result of the actions of the private company, the company should be held accountable. More importantly, the state must take the responsibility to resolve the defects and it should not be completely immune from liability in an area where its role is crucial to the preservation of individual rights. The state simply should not be allowed to reap the benefits from the use of a private extradition company at the expense of individuals and their fundamental rights.

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