Vanderbilt Law Review

Volume 52
Issue 1 *Issue 1 - January 1999*

Article 11

1-1999

Running from the Law: Should Bounty Hunters Be Considered State Actors and thus Subject to Constitutional Restraints?

Andrew DeForest Patrick

Running from the Law: Should Bounty Hunters Be Considered State Actors and Thus Subject to Constitutional Restraints?

I. INTRODUCTION

The issue of bounty hunter misconduct catapulted into the public spotlight in September, 1997, when a team of commando-like criminals who claimed to be searching for a bail-jumper gunned down a Phoenix couple in their own bedroom.[1] Though the perpetraters' story was later uncovered as a hoax,[2] and though the men would likely have been convicted of second-degree murder regardless of their profession,[3] their case and others like it aroused impassioned demands for bounty hunter regulation and, more radically, constitutional restraints on the bail bond industry.[4]

Constitutional protections are applicable only against the government and "state acters."[5] Bounty hunters have long been recognized by the courts as private actors, and thus immune from constitutional restraints.[6] Consequently, while bounty hunters do enjoy police-like powers—courts have held that they may conduct nonconsensual searches[7] and use reasonable force in arresting defendants[8]—they are not restricted in their tactics in the same maimer as state agents. Specifically, they are free from the strictures of the Fourth, Fifth, and Sixth Amendments, as well as the relevant sections of the U.S. Code.[9] Thus, bounty hunters may conduct warrantless searches and arrests[10] and pursue a defendant beyond state lines.[11]

---

1. *See* Matt Kelley, *Victims' Kin Denounce Lax Laws on Bounty Hunters*, CHARLESTON GAZETTE, Sept. 3, 1997, at 7A.

2. It was later revealed that the gunmen posed as bounty hunters to rob the shooting victims. *See* Abraham Kwok, *Students Learn How to Hunt Bail Jumpers*, ANCHORAGE DAILY NEWS, Sept. 27, 1997, at D2.

3. *See id.* (reporting that the assailants in the Arizona incident were being tried for second degree murder even before the true identity of the perpetrators was revealed).

4. *See, e.g.*, Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731, 739 (1996) (arguing that bounty hunters play an extensive role in the criminal justice system and should therefore be considered state actors subject to constitutional restraints); Emily Michael Stout, *Bounty Hunters as Evidence Gatherers: Should They Be Considered State Actors Under the Fourth Amendment when Working with the Police?*, 65 U. CIN. L. REV. 665, 689 (1997) (arguing that bounty hunters should bo subject to Fourth Amendment restrictions when working with police to apprehend fugitives); Gregory Takacs, *Tyranny on the Streets: Connecticut's Need for the Regulation of Bounty Hunters*, 14 QUINNIPIAC L. REV. 479, 526 (1994) (calling for increased statutory regulation of bounty hunters).

5. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715, 721 (1961).

6. *See, e.g.*, Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 370-71 (1872); Fitzpatrick v. Williams, 46 F.2d 40, 41-42 (5th Cir. 1931); *In re* Von Der Abe, 85 F. 959, 960 (W.D. Pa. 1898).

7. *See, e.g.*, People v. Houle, 91 Cal. Rptr. 874, 875 (Cal. Ct. App. 1970); State v. Nugent, 508 A.2d 728, 732 (Conn. 1986).

8. *See* State v. Everett, 530 So. 2d 615, 623 (La. Ct. App. 1988).

9. *See, e.g.*, Landry v. A-Able Bonding, Inc., 75 F.3d 200, 204-05 (5th Cir. 1996) (holding that a bondsman in possession of an arrest warrant is not a stato acter under 42 U.S.C. § 1983).

10. *See, e.g.*, Maynard v. Kear, 474 F. Supp. 794, 802 (N.D. Ohio 1979).

Scholars and pundits have reasoned that the expanding role of bounty hunters in the American criminal justice system mandates the imposition of constitutional standards on the bail bond industry.[12] They argue that the absence of such restrictions, particularly in light of the state's conferral of "police powers" upon bounty hunters, is patently illogical.[13] Underlying their cries for reform is the immutable public perception that, without such safeguards, bounty hunters are free to apprehend their prey at any cost.[14]

The truth, however, is that bounty hunters are not completely unfettered by the law. To the contrary, the bail bond industry is bound by the threat of criminal sanction,[15] notions of reasonable force,[16] and other principles of tort law.[17] Indeed, very few bounty hunters employ the kind of spectacular violence reported by the media.[18] More typical is the use of psychological warfare—bounty hunters employing various forms of deception and seduction in the apprehension of fugitives.[19]

---

11. *See Taylor*, 83 U.S. (16 Wall.) at 371-72; Lopez v. McCotter, 875 F.2d 273, 277 (10th Cir. 1989); United States v. Goodwin, 440 F.2d 1152, 1156 (3d Cir. 1971).

12. *See e.g.*, Drimmer, *supra* note 4, at 758-63.

13. *See id.* at 764.

14. *See, e.g.*, Donald Kaul, *Outrageous Verdict in Polk County*, DES MOINES REG. June 15, 1997, Opinion, at 3 (labeling jurisprudence governing bounty hunters as "open season on immigrants"); *Outlaw Bounty Hunters*, ARIZ. DAILY STAR, Sept. 5, 1997, Comment, at 16A (speculating that "there is nothing to stop the average Joe—or convicted felon—from calling himself a bounty hunter and acting out his or her grade B movie fantasies"); *Rein in the Bounty Hunters Series: Editorials*, ST. PETERSBURG TIMES, Sept. 6, 1997, at 14A (erroneously claiming that, under Florida law, bounty hunters are at all items free to use lethal force in apprehending bail jumpers).

15. *See, e.g.*, Stephen Hudak, *County Goes After Bounty Hunters: Prosecutors Say Pursuers Guilty of Crimes*, PLAIN DEALER, Aug. 22, 1997, at 1B (referencing local case in which a bounty hunter, after breaking into an innocent's home in search of a fugitive, pleaded no contest to burglary); Kaul, *supra* note 14, at 3 (discussing a case in which a bounty hunter was charged with burglary).

16. *See Lopez*, 875 F.2d at 277 (stating that bounty hunters could employ "reasonable force" in arresting fugitives); State v. Nugont, 508 A.2d 728, 732 (Coun. 1986) (also applying a "reasonable force" standard).

17. *See* McCaleb v. Peerless Ins. Co., 250 F. Supp. 512, 515 (D. Neb. 1965); *Nugent*, 508 A.2d at 734 (acknowledging that civil liability can arise when a bounty hunter exceeds the bounds of his authority).

18. In the recent Arizona incident, the "bounty hunters" broke into the house with a sledgehammer, then riddled the deceased with 29 gunshots. *See* Dermot Purgavie, *He Came in Search of Bounty (but ended up Behind Bars)*, OBSERVER, Sept. 28, 1997, at 5.

19. *See Bounty Hunters: Why Do They Act Like Lawless Renegades?*, COLUMBUS DISPATCH, Sept. 12, 1997, at 10A (quoting a spokesman for the Ohio Attorney General's Office: "[T]he majority of people who make their living this way make their living in a professional manner."); David M. Gross, *Bounty Hunters Are Necessary for Bail Enforcement*, MINNEAPOLIS—ST. PAUL STAR-TRIB., Sept. 13, 1997, at 21A (stating that "[t]he smart enforcement agent uses stealth, seduction, trickery and surprise . . . to make an apprehension, not brute force . . . enforcement agents who are not smart don't survive in the business very long:

Given these realities, this Note analyzes what steps, if any, are appropriate for redressing the issue of bounty hunter misconduct. It delineates the critical role bounty hunters and the bail bond industry play in our judicial system, and suggests that bounty hunters are not state actors subject to constitutional restraints. Further, it argues that, even if bounty hunters were state actors, the strictures contained in the Fourth, Fifth, and Sixth Amendments would not deter bounty hunter misconduct. This Note concludes, therefore, that states should legislate to control bounty hunter abuses with reference to the constitutional structure that governs state police.

Part II provides a brief overview of the bail bond industry and its place in our criminal justice system. Part III addresses the recent push to treat bounty huntors as state actors. Part IV discusses each arm of modern state action doctrine. Part V applies that framework to the bail bond industry and concludes that bounty huntors are, indeed, private actors. Part VI suggests that even if constitutional restraints were applicable to the bail bond industry, the Fourth, Fifth, and Sixth Amendments would not deter bounty hunter misconduct. Lastly, Part VII proffers more effective, theoretically sound approaches to bounty hunter reform.

II. OVERVIEW OF THE BOUNTY HUNTER'S ROLE AND AUTHORITY IN THE BAIL BOND PROCESS

A. The Bail Bond Process

Unless charged with a capital offense, a criminal defendant who poses no serious threat to society is entitled to post bail.[20] If the defendant exercises this option, he is released from state custody pending the outcome of his trial. Bail acts as surety for the defen-

---

Darwinism at work."); *Rivera Live* (CNBC television broadcast, Aug. 27, 1997) (airing an interview with Bob Burton, president of the National Institute of Bail Enforcement, who stated that, while some "botched arrests" were inevitable, bounty hunters effected fewer of them than public law enforcement agencies); Wayne Woolley, *Bounty Hunters Have Unique Powers, More Than Cops: They Have Wide Latitude in Arrests, Which Can Lead to Abuse*, DETROIT NEWS, Sept. 25, 1997, at A13 (quoting a veteran bounty hunter: "In 17 years of doing this, I think I've kicked down maybe three doors."); *see generally* Sasha Abramsky, *Citizen's Arrest*, NEW YORK, Jan. 5, 1998, at 32 (attributing the violent preconception of bounty hunters to popular television programs).

20. *See* Drimmer, *supra* note 4, at 740.

dant's appearance in court—the bail money is recoverable only if the defendant is present for trial.[21]

Defendants without adequate personal resources may hire a bail bondsman to post surety on their behalf.[22] The bondsman files a portion—usually ten percent—of the defendant's bail with the court.[23] The bail money is returned to the bondsman if the defendant appears at trial. However, if the defendant fails to appear at trial ("skips" or "jumps" bail), the balance of the bail becomes due, and the bondsman alone is liable.[24]

Nearly ten percent of criminal defendants who post bail skip, exposing bail bondsmen to massive liability.[25] To recapture such fugitives and retain economic viability, bondsmen contract privately with bounty hunters, who seek out and return fugitives for a percentage of the outstanding bail (usually ten percent).[26] Bounty hunters are paid by the bail bondsmen only after returning the fugitive they have contractod to capture.[27]

B. The Essential Function of Bounty Hunting in American Criminal Justice

Bail-skipping is endemic to the American criminal justice system. In 1994, the Justice Department reported that twenty-five percent of felony defendants released on their own recognizance failed to appear at trial; of these, eight percent were at-large a year after arraignment.[28] Other studies suggest that *half* of all defendants released prior to criminal proceedings have a history of skipping bail.[29] In New York alone, an estimated 35,000 people jump bail each year.[30] Not surprisingly, therefore, public law enforcement is ill-

---

21. *See id.* at 740-41.
22. *See id.*
23. *See id.* at 741-42.
24. *See id.*
25. *See* Stout, *supra* note 4, at 668.
26. *See id.*
27. *See id.*
28. *See* Andrea Gerlin, *On the Loose: Criminal Defendants Released Without Bail Spark a Heated Debate*, WALL ST. J., July 9, 1996, at A1. This problem is particularly rampant where the bond posted is not financed with the defendant's own resources. Because commercial bondsmen assume the financial risk of bail forfeiture, defendants who contract with them may lack the incentive to appear at trial. *See* Caleb Foote, Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1062 (noting that bail-skipping is more prevalent when a defendant's bond is financed by a commercial bondsman).
29. *See* Gerlin, *supra* note 28, at A1.
30. *See* Abramsky, *supra* note 19, at 37.

equipped to retrieve all the fugitives that the criminal justice system produces.[31]

Bounty hunters apprehend approximately 25,000 fugitives within the United States each year.[32] They return to custody over ninety-nine percent of the criminal defendants who contract with bondsmen and then skip bail.[33] Given this efficiency and the state's limited resources, the bail bond industry plays a critical role in our judicial system. Without it, the state's ability to prosecute would be impinged, the deterrent effect of legislation would be compromised, and dangerous fugitives would remain at large indeterminately.[34] Bondsmen would grow increasingly reluctant to post bail, and many more innocent defendants would spend time languishing in already overcrowded jails.

C. The Scope of the Bounty Hunter's Authority

Given the essential role bounty hunters play in the American criminal justice system, courts have granted them wide latitude in effecting their duties. *Nicolls v. Ingersoll* first outlined these broad powers in 1810.[35] Nicolls, a criminal defendant, had been released on bail after enlisting the help of a commercial bondsman. After release, Nicolls left the state, and the bail bondsman hired a bounty hunter to return Nicolls to custody. The bounty hunter broke into Nicolls' home at midnight and made the arrest.[36]

Reasoning that bounty hunters have broad authority to apprehend bail skippers, the court rejected the plaintiff's claims of trespass,

---

31. *See, e.g.*, Gerlin, *supra* note 28, at A1 (noting that "many locally run programs have outgrown their capacity to assess and monitor defendants released under their auspices").

32. *See* Stout, *supra* note 4, at 670; *see also* Marc Gunther, *Experts on Call: They're in the Book and They Thrive on Public Attention*, CHI. TRIB., Nov. 7, 1993, § 5, at 4 (reporting that, in 1992, bounty hunters made 30,000 arrests).

33. *See* Charles Oliver, *National Issue*, INVESTOR'S BUS. DAILY, May 12, 1994, at 1. Also, police are considerably less efficient at arresting defendants who haven't been committed to the custody of a bail bondsman. *See id.* (reporting that police rearrest between 73 and 92 percent of fugitives who have not contracted with commercial bondsmen); *see also* Abramsky, *supra* note 19, at 37 (noting that, of New York's 35,000 annual bail jumpers, the state-operated Warrant Squad returns only 6,000-10,000).

34. *See, e.g.*, Gerlin, *supra* note 28, at A1 (noting that, according to Justice Department statistics, 11 percent of bail skippers commit felonies while fleeing from the law); *see also* Woolley, *supra* note 19, at A13 (quoting Matthew Maddock, president of the Michigan Professional Bail Agents Association: "To take away the right of the bondsman to bring somebody back to a judge—by the ear, if necessary—takes away a lot of the teeth of the criminal justice system. It would be like taking away the right of a policeman to pursue a felon.")

35. Nicolls v. Ingersoll, 7 Johns. 145 (N.Y. Sup. Ct. 1810).

36. *See id.* at 146-47.

assault, and false imprisonment.[37] In so doing, the court granted bounty hunters the right to arrest fugitives at any time and in any place.[38] Moreover, the *Nicolls* court authorized bounty hunters to use a degree of force in the process—for instance, the court held that breaking down a fugitive's door would not necessarily trigger state tort liability.[39]

The United States Supreme Court expanded on *Nicolls* in *Taylor v. Taintor*.[40] There, the Court reasoned that a bondsman acquired custody of a criminal defendant upon the consecration of a bail contract.[41] This relationship vested bondsmen and their agents (namely, bounty hunters) with broad powers of search and arrest over their clients. Bounty hunters could pursue and extradite fugitives across state boundaries, break and enter into a fugitive's home, and use all necessary force in effecting an arrest.[42]

The broad powers outlined in *Taylor* remain the law today. Bounty hunters may bring criminal defendants te jail at any time after arraignment and use reasonable force in the process.[43] Moreover, courts have held that bail bondsmen and their agents are private actors, and therefore free from constitutional restraints.[44] Their searches and seizures need not be "reasonable" under the Fourth Amendment;[45] they are immune from the warrant requirement;[46] and they need not advise fugitives of their Miranda rights.[47]

---

37. *See id.* at 153-54, 156.
38. *See id.* at 156.
39. *Id.*
40. Taylor v. Taintor, 83 U.S. (16 Wall.) 366 (1872).
41. *See id.* at 371.
42. *See id.* at 371-72.
43. *See* Theresa Walker, *Thrill of the Chase Snares Posse of Bounty Hunters*, SEATTLE TIMES, Sept. 27, 1992, at A11.
44. *See, e.g.*, United States v. Rose, 731 F.2d 1337, 1345 (8th Cir. 1984) (insulating bounty hunters from the strictures of the Fourth Amendment). *But see* Jackson v. Pantazes, 810 F.2d 426, 428-29 (4th Cir. 1986) (holding that a bounty hunter working jointly with police to effect an arrest could be constrained by the Fourth Amendment).
45. *See, e.g., Rose*, 731 F.2d at 1345.
46. *See id.*
47. *See id.* (stating that the Fifth Amendment is inapplicable in bounty hunter cases).

III. THE PUSH FOR CONSTITUTIONAL RESTRAINTS

Recent editorials on the bail bond industry have demanded bounty hunter reform.[48] These editorials have suggested that constitutional restraints offer the only logical solution to bounty hunter misconduct.[49]

Scholars, too, have urged that bounty hunters—long considered private actors by the courts—be subject to the strictures of the Fourth, Fifth, and Sixth Amendments.[50] These writers argue that *Taylor* is an antiquated decision.[51] They note that, given the proliferation of crime, the increased incidence of bail-skipping, and the state's shrinking pool of resources, modern bounty hunters have assumed a critical role in state law enforcement.[52] This increased responsibility, they conclude, is sufficient to establish state action.[53]

Underlying this position is the facially appealing, but deeply flawed assumption that likes should be treated alike: that, because bounty hunters perform police-like functions, they, like the police, should adhere to the Fourth, Fifth, and Sixth Amendments.[54] Proponents of this approach rely heavily on the hysteria created by the media's coverage of bounty hunter misconduct. They characterize bounty hunters as lawless renegades and cite the severity of bounty hunter abuse.[55] Moreover, they suggest that only constitutional restraints are sufficient to rebut the problems inherent in the bail bond industry.[56]

As this Note will show, these arguments neglect judicial precedent. A careful application of state action doctrine reveals that constitutional restraints remain inapplicable to the bail bond

---

48. *See, e.g., Bounty Hunters: Unfettered Danger*, ARIZ. REPUBLIC, Sept. 13, 1997, at B6 (calling for bounty hunter reform); *A Throwback to the Wild West*, HARTFORD COURANT, Sept. 4, 1997, at A22 (same).

49. *See, e.g.*, Kaul, *supra* note 14, at 3 (questioning why bounty hunters are not subject to the same restrictions as police).

50. *See, e.g.*, Drimmer, *supra* noto 4, at 739 (arguing for constitutional restraints); Stout, *supra* note 4, at 689 (same).

51. *See* Takacs, *supra* note 4, at 489 (stating that "it seems anachronistic that actions of recapture in today's society are based on precedent over one hundred years old.").

52. *See* Drimmer, *supra* note 4, at 737-39 (noting states' increased reliance on commercial bail bondsmen).

53. *See id.* at 739 (concluding that, because bondsmen and their agents play "integral roles" in the criminal justice system, state action arises).

54. *See id.* at 764 (distinguishing bounty hunters from other private actors on the ground that other private actors do not enjoy police-like powers of search and arrest).

55. *See id.* at 737-39 (noting bounty hunters' propensity for "habitual violence" and the "social harms" which result).

56. See Drimmer, *supra* note 4, and Stout, *supra* note 4, neither of which discuss the possibility of legislative reform.

industry. Furthermore, even if they were applicable, the restrictions posed by the Fourth, Fifth, and Sixth Amendments would fail to deter bounty huntor misconduct.

IV. STATE ACTION DOCTRINE

A. *Introduction*

Constitutional constraints seek to limit governmental infringement on individual liberties.[57] In limited contexts, however, a private actor can behave in ways that trigger restrictions normally reserved for federal and state entities.[58] The Supreme Court has struggled to define what private activity lies within the sphere of public—i.e., constitutionally proscribable—conduct. Generally, its dispositions recognize four scenarios in which private behavior can constitute state action:[59] (1) privately-initiated, stato-aided activity;[60] (2) private assumption of a traditional state function;[61] (3) state-regulated privato action;[62] and (4) symbiotic relationships.[63]

Implicit in each of these theoretical strands is the notion that a sufficient "nexus" must exist between the state and the private action at issue before a finding of stato action is possible. *Jackson v.*

---

57. *See, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982) (recognizing that "most rights secured by the Constitution are protected only against infringement by governments . . . .").

58. *See* Marsh v. Alabama, 326 U.S. 501, 508-09 (1946) (finding state action in the context of a corporate-owned town).

59. *See generally* Thomas R. McCoy, *Current State Action Theories, the* Jackson *Nexus Requirement, and Employee Discharges by Semi-Public and State-Aided Institutions*, 31 VAND. L. REV. 785 (1978). Note, also, that other strands of state action analysis have been proffered and later abandoned by the Court. Chief among these is the "mere enforcement" theory promulgated in *Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948). There, the Court found that landowners were forced to act in a racially discriminatery manner by virtue of a state court's ruling that upheld the enforceability of a racially-biased restrictive covenant. *See id.* at 20. Contral to the Court's holding was the idea that the court-ordered enforcement of a legal, private contract constitutod the requisite public participation for a finding of state action. *See id.* at 14-18. The fatal import of this rule is its inherent overbreadth: under the *Shelley* analysis, *any* legal action undertaken by a private individual could be deemed state action so long as it is challenged and upheld in state or federal court.

60. *See* Norwood v. Harrison, 413 U.S. 455, 463-68 (1973) (holding that the state could not lend textbooks to private schools engaging in racial discrimination).

61. *See Marsh*, 326 U.S. at 505-10 (1946) (involving a corporate-owned town).

62. *See Lugar*, 457 U.S. at 941-42 (1982) (holding that a statutery self-help scheme that required government aid gave rise to state action).

63. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 723-26 (1961) (holding that a coffee shop locatod inside a publicly-owned building was subject te Equal Protection claims).

Metropolitan Edison Co. delineated this requirement, holding that, in the context of a state regulatory scheme, state action will not arise unless the state compels, requires, or coerces the challenged activity.[64] Conversely, the state's failure to eradicate a privately established practice will not give rise te state action.[65] As a general proposition, then, a state's casual involvement will not establish the required nexus between the government and the private action at issue.[66]

Beyond this general proposition, however, the jurisprudence on state action offers little direction. The Court's holdings have been inconsistent, confusing, and often nonsensical. The decision in *Jackson*[67] is demonstrative of this fact: If *Jackson's* proposition that all mandatory government regulations give rise to state action is correct, constitutional restraints would be imposed on anyone acting in compliance with the law. Motorists, for example, would act as the state when driving the speed limit. A pedestrian would subject himself to constitutional restraints by using a crosswalk.

Since the Court could not have intended such an expansive definition of public activity, another explanation must be sought. One possibility is that the Court's state action decisions relate as much to the social importance of the underlying claim as to any coherent analytical theory. The Court may be more willing to impose constitutional restraints on an activity which it feels threatens the fabric of the national order. For instance, the most recent era of state action expansion coincided with the civil rights movement and the Court's commitment to racial equality.[68] It is at least plausible that,

---

64. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974). In *Jackson*, a privately-owned utility terminated a customer's electric service without notice. *Id.* at 347. The plaintiff brought a procedural due process claim under the Fourteenth Amendment. *Id.* at 347-48. The Court held that, even though the utility was a government-regulated monopoly (the state had approved termination procedures established by the utility), the company was not subject to constitutional restraints. *See id.* at 358-59.

65. *See id.* at 357.

66 Though *Jackson* involved the state regulation of a private activity, "nexus" is intuitively central to each strand of state action analysis. *See generally* McCoy, *supra* note 59, at 817-22 (relating the nexus requirement to employee discharge cases). For example, in *Hudgens v. NLRB*, 424 U.S. 507, 508 (1976), the Court considered whether individuals had the First Amendment right to picket within a privately-owned shopping center. In resolving the issue of whether mall owners had usurped a traditional state function, the Court did not ask whether a mall assumed state characteristics in the *general* sense. Rather, the key determination was whether the state, in its maintenance of downtown shopping districts, had traditionally furnished a venue in which individuals expressed political views. The Court, therefore, required a *Jackson* nexus between the specific activity performed by the plaintiffs and the traditional government function alleged. *See id.* at 513-21.

67. *Jackson*, 419 U.S. at 357.

68. *See, e.g., Burton*, 365 U.S. at 726 (holding that a shop owner leasing space in a government building had a symbiotic relationship with the stato, and, therefore, could not discriminate against black customers). In case after case following *Burton*, the Court rejected

in adjudicating civil rights claims brought in the 1960s, the Court used state action doctrine as a lever to effect a national policy of nondiscrimination.

Also relevant to this Note's discussion is the modern Court's general reluctance to find the nexus required to establish state action. Soon after the equal rights explosion of the 1960s, the volume of judicial dispositions finding state action began to evaporate.[69] For instance, in *Hudgens v. NLRB*, the Court reversed its holding in *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, a 1968 decision asserting that privately-owned shopping malls were functionally equivalent to a state enterprise.[70] Likewise, *Jackson* and its progeny heightened the bar for state action claims involving regulatory schemes.[71] State aid cases evolved in a similar fashion.[72] Other strands of the analysis, such as that proffered in *Shelley v. Kraemer*, were left to atrophy.[73]

Thus, it is essential when analyzing the various strands of state action theory to consider the subtext of Supreme Court decisions. While the Court has enunciated some general principles, the case law is largely incoherent unless viewed with respect to the underlying claim and the general trend towards the enlargement of the private sphere of activity.

---

the notion that contractual relationships between the government and private individuals would, by themselves, give rise to state action. *See, e.g.*, Rendell-Baker v. Kohn, 457 U.S. 830, 841 (1982) (stating that "[a]cts of . . . private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."). Yet, absent the landlord/lessee relationship in *Burton*, it is difficult to see how the Court could have ruled in favor of the plaintiff. Should we expect that the shop owner in *Burton* would have remained a state actor, even if the government did not own the portion of the building in which the shop was situated? Note, finally, that one of the few affirmations of the *Burton* rationale occurred in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), a case involving race-based peremptory challenges.

69. *See, e.g.*, Jackson v. Norton-Children's Hosps., 487 F.2d 502 (6th Cir. 1973); Martin v. Pacific Nw. Bell Tel. Co., 441 F.2d 1116 (9th Cir. 1971). *But see, e.g., Edmonson*, 500 U.S. at 628 (1991) (reaffirming *Burton*'s vitality by holding that race-based peremptory challenges by a private attorney constituted state action).

70. Hudgens v. NLRB, 424 U.S. 507, 512-21 (1976) (reversing Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968))

71. *Jackson*, 419 U.S. at 351; *see also* Flagg Bros. v. Brooks, 436 U.S. 149, 164-66 (1978) (holding that the state statutory creation of a private warehouseman's lien on stored goods did not require warehousemen to satisfy the lien, and thus did not satisfy the nexus requirement).

72. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1011 (1982) (holding that, even though the government was funding 90 percent of patients' care, physicians' decisions to transfer Medicaid patients did not constitute state action); *Rendell-Baker*, 457 U.S. at 840 (holding that a private school that derives its income primarily from public sources is not necessarily a state actor).

73. *See* McCoy, *supra* note 59, at 792.

B. *Privately-Initiated, State-Aided Activity*

Government aid to privately-initiated activity can give rise to an inference of state action in limited contexts.[74] Generally, the Supreme Court has intimated that the quality, rather than the volume of the aid, will determine whether constitutional restrictions apply.[75] In particular, state assistance that is imposed on private bodies is likely to produce state action.[76]

The Court's holdings have indicated that even substantial amounts of government aid will not necessarily yield state action.[77] For example, in *Blum v. Yaretsky*, Medicaid patients challenged a nursing home's recommendations for transfer on due process grounds.[78] The Court refused to find state action even though the government had subsidized ninety percent of the patients' health care.[79]

Therefore, the crucial determination in the state aid/state action analysis is not the quantity of aid supplied by the government, but rather the type of aid or its significance te the private activity. If, for instance, a private body is required to receive aid (either by the terms of a statute or by lack of meaningful choice), state action may arise.[80] A hospital which remains economically viable due only to government assistance provides a good example. Such an organization, though privately owned, is likely to bend to state pressures to ensure subsidization. Therefore, some of its actions could be characterized as an extension of state policy, rather than the result of an independent decision-making process. The "private action" in such cases is actually the fruit of a coercive scheme of state aid—the hospital is more akin to the state than a private actor.[81] Put another way,

---

74. *See, e.g.*, Norwood v. Harrison, 413 U.S. 455, 463-68 (1973) (holding that private schools receiving textbooks on loan from the state could not maintain religious affiliations).

75. *See, e.g.*, *Blum*, 457 U.S. at 1011 (implicitly rejecting volume as a significant factor in state aid/state action analysis).

76. *See, e.g.*, United States v. Bennett, 729 F.2d 923, 925 (2d Cir. 1984) (holding that an informant, acting outside the scope of instructions given by a federal agent, could not be considered a state actor).

77. *See, e.g.*, *Blum*, 457 U.S. at 1011.

78. *Id.*

79. *See id.* Again, this is probably a function of the fact that, intuitively if not intontionally, the Court considered the nature of the underlying claim.

80. *See, e.g.*, *Bennett*, 729 F.2d at 925 (holding that an informant must comply with state instructions in order to trigger constitutional restraints); *cf.* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 357 (1974) (holding that a coercive nexus is required in state regulatory cases).

81. State aid may also trigger constitutional restraints where it creates the *public perception* of state-generated action—i.e., a "symbiotic" relationship between the government and the

when a regulatory regime irradicates—or at least severely impinges—private initiative, the private actor functioning under the regulatory regime assumes the will of the state. Under such circumstances, stato action may result.

C. Private Assumption of a Traditional State Function

An individual is considered to act as the state when he executes a function traditionally reserved for the government.[82] The scope of traditional stato functions, however, has been interpreted narrowly,[83] and may be limited to the context of corporate towns.

The traditional stato function strand of state action analysis was first propounded in *Marsh v. Alabama*.[84] There, a Jehovah's Witness had been convicted of trespassing on the streets of a town owned by a corporate enterprise. The Court reasoned that a privately-owned municipality was sufficiently analogous to a public town to warrant stato action. Therefore, Alabama was unable to prosecute Marsh under the trespassing statute without implicating the First Amendment.

Subsequent Court decisions have severely limited the import of *Marsh*.[85] Recent Court dispositions involving shopping centers[86] and public utilities[87] demonstrate that the Court refuses to expand public function analysis beyond the contoxt of privately-owned villages.[88] In particular, the Court will not find state action based on simple analogies between private action and roles traditionally assumed by the stato. Rather, the Court has interpreted "traditional state function" to require actual state involvement in the activity at issue, followed by private usurpation of that function.[89]

---

private actor. *See* Jackson v. Pantazes, 810 F.2d 426, 429-30 (4th Cir. 1987) (intimating that the degree of aid received may inform a court's decisions regarding "symbiosis").

82. *See* Marsh v. Alabama, 326 U.S. 501, 505-10 (1946) (holding that the usurpation of traditional state functions may give rise to state action).

83. *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507, 512-21 (1976).

84. *Marsh*, 326 U.S. at 505-10.

85. *See, e.g.*, *Hudgens*, 424 U.S. at 512-21.

86. *See id.*; Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

87. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

88. *But see* Evans v. Newton, 382 U.S. 296, 301 (1966) (using the "public function" rationale as an alternate theory on which to find that the maintenance of a city park constituted state action).

89. *See id.* In *Evans*, the park at issue had been operated by the city government prior te the incident giving rise to plaintiff's claim. *Id.* at 297.

D. State-Regulated, Private Action

State action may arise where the government regulates the challenged activity. However, the state regulatory scheme must coerce, compel, or require the challenged activity to trigger constitutional restrictious.[90]

The seminal state regulation/state action case is *Jackson v. Metropolitan Edison Co.*[91] There, the Court required a strict nexus between the challenged activity and state legislation.[92] Under the *Jackson* standard, permissive legislation—i.e., that which *allows for* private action—will not likely give rise to state action.[93] However, the Court in *Jackson* made clear that legislation which *mandates* privato behavior can trigger constitutional restraints.

Still, it is unclear which mandatory legislation suffices. Because the *Jackson* holding presents no logical limitation on the Court's ability to find state action in such contexts, the social importance of the underlying claim and the Court's general reluctance to enlarge the sphere of stato action will likely inform the Court's future decisions.[94]

E. Symbiotic Relationship

Perhaps the most nebulous of all state action doctrines is that governing "symbiotic" relationships between the government and otherwise private actors. Under this theoretical strand, an individual who partners or acts jointly with the stato may, in limited contexts, be subject to constitutional restraints.[95]

For example, in *Burton v. Wilmington Parking Authority*, the plaintiff brought an equal protoction claim against a privately-owned coffee shop which refused to serve African-American customers.[96] The coffee shop had leased space in the bottom floor of a government-

90. *See, e.g., Jackson*, 419 U.S. at 357 (holding that state approval of a utility's termination procedures is insufficient to establish state action).

91. *Id.*

92. *See id.*

93. *See, e.g.*, Moose Lodge v. Irvis 407 U.S. 163, 175-77 (1972) (holding a club's racial discrimination was not state action simply by virtue of a state-conferred liquor license).

94. *See supra* Part IV.A.

95. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 723-26 (1961); Grijalua v. Shalala, 152 F.3d 1115, 1119-20 (9th Cir. 1998) (recognizing that "[g]overnment action exists if there is a symbiotic relationship with a high degree of interdependence between the public and private parties"); Reitz v. County of Bucks, 125 F.3d 139, 148 (3d Cir. 1997) (noting that, where private and public parties act as "joint participants," state action may arise).

96. *Burton*, 365 U.S. at 716.

owned parking garage. The lease, however, contained no provision banning discrimination. Moreover, the building derived only fifteen percent of its funding from public sources. Even so, the Court held that the shop owner's enterprise was inexorably intertwined with the government and, therefore, the discrimination could be imputed te the state.[97]

Unfortunately, *Burton* raises more questions than it answers. It is unclear, for instance, what features will characterize a "symbiotic" relationship between the state and a private actor. Though the lessor/lessee relationship seems of pivotal importance in *Burton*,[98] other decisions reject the notion that contractual relationships, alone, will trigger constitutional protections.[99] Still, *Burton* provided no evidence of an actual partnership between the state and the private acter outside the terms of the lease.[100]

One interpretation of the *Burton* analysis is that "symbiotic" relationships can arise through *implied* partnerships. By this reasoning, a court should ask whether the relationship between the state and the private actor is such that an ordinary, reasonable citizen would imputo the challenged activity to the stato.[101] Of course, the salient shortcoming of this approach is its propensity for unpredictability.[102] However, the Court has been fairly consistent in its hold-

---

97. *See id.* at 726.

98. *Id.* (holding that "when a State leases public property . . . the proscriptions of the Fourteenth Amendment must be complied with by the lessee.").

99. *See, e.g.*, Rendell-Baker v. Kohn, 457 U.S. 830, 841 (1982) (stating that "[a]cts of . . . private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."); Community Med. Ctr. v. Emergency Med. Servs., 712 F.2d 878, 881 (3d Cir. 1983) (same); Fletcher v. Florida, 858 F. Supp. 169, 171 (M.D. Fla. 1994) (same).

100. There was no evidence that the government compelled, coerced, or condoned the challenged behavior. Rather, the state's *in*action was sufficient to support the Court's holding. *See Burton*, 365 U.S. at 725.

101. This formulation has some appeal, especially in view of the Court's approach to accidental state aid in Establishment Clause cases. There, decisions have traditionally considered factors such as the form of the government aid offered to religious institutions (e.g., tax exemptions as oppesed to hard goods), the identity of the recipient (e.g., parochial school vs. individual student) and the location in which the aid is administered (e.g., on-campus vs. off-campus in a parochial school context). *See* Agostini v. Felton, 521 U.S. 203, —, 117 S. Ct. 1997, 2001-02 (1997) (summarizing the factors that inform the Court's decisions in Establishment Clause cases). These factors are hardly probative of whether the state has rendered aid to a nonsecular organization. However, they speak volumes as to how the public perceives the government's involvement.

102. Drawing again from the Establishment Clause analogy, it is intoresting to note that the Court's decisions in that contoxt have been something short of consistent. *Compare* Wohnan v. Walter, 433 U.S. 229, 250-51 (1977) (prohibiting the state from lending tape recorders to parochial schoels), *with* Board of Educ. v. Allen, 392 U.S. 236, 248 (1968) (allowing the loan of books).

ings restricting the application of the symbiotic relationship doctrine.[103]

The current Court's unwillingness to find symbiotic relationships can be explained in one of two ways. First, the Court may have recognized the unworkability of the *Burton* approach, and thus abandoned it as it did *Shelley v. Kraemer*.[104] Second, and more likely, its failure to expand *Burton* may be symptomatic of a general judicial trend towards reducing the sphere of state action.[105]

V. STATE ACTION IN THE BOUNTY HUNTER CONTEXT

A. Introduction

For years, critics of the bail bond industry have lobbied to restrict, if not altogether abolish, the practice of bounty hunting.[106] Proponents of these measures rely on the now-familiar stories of bounty hunter misconduct—anecdotes involving an unlicensed renegade, himself a convicted felon, battering and humiliating an innocent party.[107] Such reports are, of course, appalling. However, they do not necessarily demonstrate the need for constitutional restraints.

Even assuming rampant bounty hunter misconduct, a finding of state action requires the application of principled legal standards.

---

103. *See, e.g.*, San Francisco Arts & Athletics v. United States Olympic Comm., 483 U.S. 522, 542-47 (1987) (refusing to apply a *Burton* analysis to the U.S. Olympic Comm., which selectively enforced its copyright in the word "Olympic" against the "Gay Olympic Games"). *But see* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991) (holding that race-based peremptery challenges trigger constitutional restraints, even though the state does not impose the use of such challenges on litigants).

104. Shelley v. Kraemer, 334 U.S. 1 (1948).

105. *See* McCoy, *supra* note 59, at 789-90 (noting the Court's shift towards conservative state action findings). This explanation is particularly appealing in view of the Court's decision in *Edmonson*, 500 U.S. at 614. There, the Court held that litigants making race-based peremptery challenges could be subjected to constitutional restraints. *See id.* at 628. Given the lack of state involvement (the decision to make such challenges originates with the attorney), the Court's decision seems rooted in the public perception that litigants, as participants in the judicial process, are somehow extensions of the state itself. It is possible that *Edmonson* is a narrow ruling, applicable only to procedural devices used in judicial proceedings. Moreover, the Court likely gave weight to the nature of the underlying claim in reaching its decision. *See supra* note 59 and accompanying text. Nonetheless, *Edmonson* signifies the vitality of *Burton*.

106. *See, e.g.*, *Bounty Hunters are Lethal Throwback to Frontier Justice*, PANTAGRAPH (Bloomington, Ill.), Sept. 12, 1997, at A14 (calling bounty hunter licensing and training requirements "timid at best"); Art Sanera, *Don't Regulate Bounty Hunters—Eliminate Them*, ARIZ. REPUBLIC, Sept. 12, 1997, at B4 ("We don't need them licensed or regulated—we need them eliminated!").

107. *See, e.g.*, Kaul, *supra* note 14, at 3 (describing a case in which two bounty hunters broke into a home, handcuffed its occupant and conducted a fruitless search of the premises).

Framed in this manner, precedent and jurisprudential trends suggest that bounty hunters are not state actors.

B. Privately-Initiated, State-Aided Activity

In the course of apprehending a fugitive, bounty hunters sometimes enlist the aid of police officers.[108] Generally speaking, this assistance does not create a presumption of state action unless the police require a bounty hunter to comply with a state instruction, or the aid is significant enough to create the inference of a "symbiotic relationship."

Courts have repeatedly held that bounty hunters receiving de minimis aid from the state are not necessarily exposed to constitutional restraints. For instance, in *United States v. Rhodes*, a bounty hunter received information from police officers in order to ascertain the whereabouts of a bail jumper.[109] Reasoning that state action was not present because the bounty hunter received no remuneration from the government and the state issued no specific instructions regarding how to apprehend the fugitive,[110] the court held that the state assistance failed to produce state action.[111]

The facts in *Rhodes* are typical of fugitive apprehension in that bounty hunters rarely receive financial compensation or instructional guidance from state enforcement agencies.[112] Traditionally, bounty hunters contract privately with bonding agents.[113] These bondsmen offer the bounty hunter a percentage of the outstanding bail in return for rearresting the fugitive.[114] The state, therefore, is not usually involved in the bounty hunter's remuneration. Furthermore, police rarely have the time te offer instructions regarding the apprehension of particular fugitives. It is precisely due te a dearth of resources and an inability to track bail jumpers that police rely on bounty hunters.[115]

---

108. *See, e.g.*, Jackson v. Pantazes, 810 F.2d 426, 428-30 (4th Cir. 1987) (involving a police officer who physically assisted a bounty hunter in making an arrest).

109. United States v. Rhodes, 713 F.2d 463, 467 (9th Cir. 1983).

110 *See id.*

111. *See id.*

112. *See* Abramsky, *supra* note 19, at 35 (discussing Arizona's push te require bounty hunters to notify local police of busts); Woolley, *supra* note 19, at A13 (noting that there are "occasions when local law enforcement [is not] aware of someone boing picked up for skipping bail.").

113. *See* Drimmer, *supra* note 4, at 743.

114. *See id.*

115. *See* Woolley, *supra* note 19, at A13 (noting that bounty hunters provide a valuable service to overworked police departments).

Of course, the exceptional case does arise. For instance, in *Jackson v. Pantazes*, a police officer physically assisted a bounty hunter in making an arrest.[116] The Fourth Circuit held that when working jointly with public law enforcement in such a manner, bounty hunters are state actors.[117]

The *Pantazes* holding is questionable in light of the nexus requirement outlined in *Jackson* and its progeny.[118] These cases hold that state aid which does not *compel* individual action is not sufficient to trigger constitutional restraints. For example, in *United States v. Bennett*, an informant entered a suspect's bedroom without consent and took incriminating photographs of a sawed-off shotgun.[119] The court reasoned that, because the informant's actions contravened specific instructions given by federal agents, the informant had not acted as an instrument of the state when taking the photographs.[120] In other words, since the government had not specifically compelled the informant's actions, the nexus between the state and the challenged activity could not trigger Fourth Amendment protections. Likewise, as the government did not compel the bounty hunter's misconduct in *Jackson v. Pantazes*, the police officer's assistance was an insufficient proxy for stato action.

Jackson v. Pantazes may be understood, if at all, by the potential "symbiotic relationship" between the government and its informant. That is, given the existence of "joint" activity (and, perhaps, a significant degree of government aid), the court may have reasoned that the state had inexorably insinuated itself inte the challenged activity, thus producing state action.[121]

---

116. Jackson v. Pantazes, 810 F.2d 426 (4th Cir. 1987). The officer accompanied the bounty hunter inside the suspect's home and physically restrained the suspect during the arrest. Additionally, the officer gave the bounty hunter advice as to how to effectuate the arrest. *See id.* at 428-30.

117. *See id.* (holding that, because a public officer assisted physically in the plaintiff's apprehension, the bounty hunter could be considered a state acter for purposes of § 1983).

118. Jackson v. Metropolitan Edison, 419 U.S. 345, 351 (1974).

119. United States v Bennett, 729 F.2d 923, 924 (2nd Cir. 1984).

120. *See id.*

121. *See Pantazes*, 810 F.2d at 430. For a more detailed discussion of "symbiotic relatiouship" in the bounty hunter context, see *infra* Part V.E.

C. *Private Assumption of a Traditional State Function*

Bounty hunting—as distinct from state police work—is *not* a state-generated enterprise. Rather, it is the product of a market economy. The phenomenon of bounty hunting arose from the unique vulnerabilities of bondsmen: As the commercial bail bond industry grew, it became impossible for bondsmen to apprehend each fugitive personally.[122] To recoup bonds and maintain economic viability, bail bondsmen enlisted the aid of professional manhunters.[123]

If bounty hunting satisfies the "traditional state function" strand of state action analysis, then "traditional state function" requires neither "tradition" nor "state function." In short, such an approach suggests that action which merely resembles a duty normally assumed by the government triggers constitutional restraints. This reasoning is fundamentally flawed for two reasons. First, it is inconsistont with judicial precedent. Supreme Court cases suggest that "public function" will not yield stato action unless the private actor has nsurped a duty *actually* performed by the state. The Court has gone so far as to require that qualifying activities be "*exclusively* reserved to the state."[124] "Traditional," then, is synonymous with "exclusive" for purposes of public function analysis. By this definition, an activity which has been privatoly initiated from its inception (e.g., bounty hunting) is catogorically precluded from the sphere of "traditional state function."[125]

Second, if a "traditional stato function" can arise through analogy, courts are without logical guidelines with which to assess the parameters of stato action. For instance, if bounty hunting "smells" like police work, why not extend constitutional restraints to shopping mall security guards or doormen in private apartment buildings? The broad power of analogy could create a dangerous slippery slope, trammeling the primary function of the Bill of Rights (i.e., preventing

---

122. *See* Drimmer, *supra* note 4, at 750 ("[A]s the growing nation's frontiers broadened and its citizenry came to lack deep communal roots, so grew the risk that a bondsman who failed to monitor his principal's movements would lose his security. [Therefore,] [b]ondsmen often hired bounty hunters to locate and retrieve defendants to ensure their proper appearance at trial.").

123. *See id.*

124. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157 (1978) (emphasis added).

125. In contrast, the Court has consistently held that private usurpation of an activity that has actually been performed by the state can constituto state action. For example, in *Evans v. Newton*, 382 U.S. 296, 301 (1966), the Court held that the trustees of a privato park could be state actors where the state had previously maintained the *same* park as a public facility. Likewise, in *Terry v. Adams*, 345 U.S. 461, 473-77 (1953), state action existed where the government delegated electoral tasks to a private pelitical association.

the state from interfering with individual liberties secured by the Constitution).

D. State-Regulated, Private Action

In an attempt to pacify public outrage and curtail misconduct in the bail bond industry, a few states have enacted regulations aimed specifically towards bounty hunters. Under the *Jackson* analysis, however, such regulatory schemes are unlikely to produce state action unless they compel or require the activity at issue.[126]

To date, the effort to regulate bounty hunters has been regrettably lax. As of September 1997, only six states mandated bounty hunter licensing.[127] Many states have no regulations.[128] Furthermore, Congress has not acted to curtail the broad rights conferred on bounty hunters by the Supreme Court.[129] Therefore, the degree of state involvement in the bail bond industry is generally de minimis, and, logically, unlikely to create stato action.

Moreover, the regulations which do exist do not compel or require bounty hunters te act in contravention of constitutional principles. For example, Florida's state code requires bounty hunters to obtain a license from the state.[130] Such licenses are not issued unless the applicant receives twenty hours of training, undergoes a background check, and submits fingerprints to the government.[131]

Requirements like those outlined in the Florida statuto do not satisfy the nexus required to establish stato action in *Jackson v. Metropolitan Edison*.[132] The state has not required, compelled, or coerced the bounty hunter te seek fugitives, or to commit tortious acts against innocent third parties. Thus, the activity challenged in bounty hunter misconduct cases cannot fairly be attributed to the government under this strand of state action analysis.

---

126. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974).

127. *See* Jonathan Drimmer, *America's Least Wanted: We Need New Rules to Stop Abuses*, WASH. POST, Sept. 21 1997, at C6.

128. *See* Kelley, *supra* note 1, at 7A (citing the lack of regulation across the nation); Purgavie, *supra* note 18, at 5 (lamenting the absence of bounty hunter legislation in Arizona).

129. *See* Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1872). *Taylor* states as follows:

> When bail is given, the principal is regarded as delivered te the custody of his sureties. . . . Whenever they choose te do so, they may seize him and deliver him up in their discharge . . . . They may pursue him inte another state; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose.

130. *See* Drimmer, *supra* note 127, at C6.

131. *See id.*

132. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 357 (1974).

E. Symbiotic Relationship

For those advocating constitutional restraints on the bail bond industry, the "symbiotic relationship" strand of state action analysis offers a persuasive argument.[133] Given the Court's narrow application of this doctrine and the absence of supportive precedent, however, "symbiosis" is not likely to impact the bail bond industry.

While the theoretical underpinnings of "symbiosis" doctrine are vague,[134] it appears clear that the "joint" action referred to in various cases[135] does not require actual state involvement. Rather, the challenged activity need only create the appearance of joint activity.[136] A symbiotic relationship, therefore, is formed by the confluence of various factors influencing the public's perception of the challenged action. If the activity appears inexorably linked with the government, constitutional restraints will apply; if not, a claim of state action will fail.

No case has held that a bounty hunter's individual action to apprehend a fugitive creates a symbiotic relationship with the state. In *Edmonson v. Leesville Concrete Co.*, however, the Court did hold that "joint" action involving the judiciary may give rise to state action.[137] In *Edmonson*, litigants making race-based peremptory challenges were subject to the restraints of equal protection.[138]

The facts of *Edmonson*, however, are easily distinguishable from the typical case of an abusive bounty hunter. Most importantly, bounty huntors are significantly more removed from the judicial process than courtroom attorneys. The bounty hunters' activity takes place in the field and is not enmeshed with a court's procedural rules. Indeed, bounty hunters are commonly viewed as lonesome mavericks, operating outside the reach of the law.[139] The public's perception, therefore, is not that bounty hunters act "jointly" with the state, but that they operate without any semblance of state guidance.

---

133. *See, e.g.*, Drimmer, *supra* note 4, at 784 (arguing that bounty hunters maintain a symbiotic relationship with the state).

134. *See supra* Part IV.E.

135. *See, e.g.*, Jackson v. Pantazes, 810 F.2d 426, 429 (4th Cir. 1987) ("[E]ven in the absence of any state statute, custom or policy which authorizes the private party's conduct . . . joint activity, alone, is sufficient.").

136. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (emphasizing that the state had "*insinuated*" itself into the challenged activity) (emphasis added).

137. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991).

138. *Id.*

139. *See Bounty Hunters: A Wild West Tradition Worth Scrapping*, MINNEAPOLIS-ST. PAUL STAR-TRIB., Sept. 8, 1997, at 10A (characterizing bounty hunting as an "anarchic" profession).

A different case arises where bounty hunters act closely with police in making an arrest.[140] As in *Jackson v. Pantazes,*[141] the line between state and private activity is blurred where public law enforcement physically assists in the apprehension process, or where police devise a plan for capture that the bounty hunter faithfully executes. However, as discussed earlier,[142] these scenarios rarely arise in the real world, and, therefore, do not give rise to the sweeping conclusion that bounty hunters, in general, maintain a symbiotic relationship with the state.

More generally, "symbiosis" theory has been narrowly applied by the Court in the years following *Burton.*[143] There is no clear reason for this trend to reverse itself with respect to the bail bond industry. Of course, an unpredictable factor in the equation is the Court's interest in the underlying claim of bounty hunter misconduct. Given the crush of media attention this topic has received in recent months,[144] a court's decision on this issue might buckle under social and political pressure.[145]

Outside the rubric of race relations, however, the Court has declined to stretch the bounds of state action doctrine.[146] Moreover, given the rare occurrence of bounty hunter misconduct[147] and its general insignificance to the national order,[148] it is unlikely that the Court would depart from its normal course for the purpose of regulating the bail bond industry. By the same reasoning, the Court may be more likely te find state action if the bounty hunter's violations involved discrimination against minority suspects.[149] But again, this is hardly justification for the blanket proposition that bounty hunters are, categorically, state actors.

---

140. *See, e.g.*, Pantazes, 810 F.2d at 428-30.

141. *Id.*

142. *See supra* Part V.B.

143. *See* McCoy, *supra* note 59, at 789-90.

144. See sources cited *supra* notes 14 and 19.

145. *Cf. supra* note 68 and accompanying text (discussing the Court's state action holdings in the Equal Rights context).

146. *See generally* sources cited *supra* note 68; Frederick G. Antown, Jr., Note, *State Action: Judicial Perpetuation of the State/Private Distinction*, 2 OHIO N.U. L. REV. 722 (1975); David S. Elkind, Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974); *see also supra* notes 59-64 and accompanying text.

147. *See* Abramsky, *supra* note 19, at 35; Woolley, *supra* note 19, at A13.

148. Despite a handful of highly politicized episodes, the incidence of bounty hunter misconduct is decidedly low. *See* Abramsky, *supra* note 19, at 35 (reporting that, of the nearly 23,000 busts made by bounty hunters in 1996, less than two dozen resulted in complaints of misconduct).

149. *See* Kaul, *supra* note 14, at 3 (asserting that racial minorities fall victim to bounty hunter abuse in disproportionate numbors).

VI. THE DEFICIENCY OF CONSTITUTIONAL RESTRAINTS:[150] CONSTITUTIONAL RESTRAINTS WILL NOT DETER BOUNTY HUNTER MISCONDUCT

The primary limits on police conduct are detailed in the Fourth, Fifth, and Sixth Amendments. The Fourth Amendment guarantees an individual's right te be free from "unreasonable" searches and seizures.[151] The Fifth ensures a criminal defendant's right against self-incrimination.[152] The Sixth Amendment guards an accused's right to an attorney after commencement of judicial proceedings.[153]

When these rights are violatod, a court may remedy the injustice by application of the exclusionary rule. That is, it may, at its discretion, exclude evidence produced as a result of the constitutional violation.[154] The exclusionary rule is justified on two grounds: deterrence of future misconduct and judicial integrity.[155] However, because

---

150. If judged as state actors, bounty hunters might also fall under the reach of 42 U.S.C. §§ 241, 242, and 1983 (1994). Under *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982), a party is vulnerable to such claims if he functions as a state actor and acts under the color of state law. While this legislation would certainly govern many of the abuses committed by bounty hunters, it is unlikely that it would reach boyond the scope of existing state tort and criminal law.

Section 1983 would open bounty huntors te civil damages for committing Fourth, Fifth, or Sixth Amendment violations. 42 U.S.C. § 1983 (1994) (creating a tert claim for the violation of constitutional rights). However, given the range of state tort claims to which bounty hunters are already susceptible, it is unlikely that § 1983 does anything more than duplicate common law liability. If, for instance, a bounty hunter breaks into the home of an innocent party, § 1983 creates liability for an unreasonable searcli under the Fourth Amendment. Absent § 1983, however, the bounty hunter is still open to the state tort claims of trespass, invasion of privacy, and intentional infliction of emotional distress.

Similarly, §§ 241 and 242 create federal criminal prohibitions against civil rights violations. 42 U.S.C. §§ 241-42. However, bounty hunters are already bound in all significant ways by state criminal codes. For example, if the bounty hunter beats a fugitive who is not resisting arrest, the state can already prosecute the boundy hunter under criminal statutes governing assault and battery.

Note, however, that where bounty hunter miscenduct can be tied to a discriminatory animus, §§ 241, 242, and 1983 may reach crimes not contemplated by state law. These provisions of the U.S. Code were passed precisely bocause state legislation did not adequately provide for racial equality. *See, e.g.*, 42 U.S.C. § 1983 (1994) (discussion of legislative purpose). Thus, a bigoted bounty hunter may well escape state sanction, but incur liability under the U.S. Code.

151. *See, e.g.*, Wilson v. Arkansas, 514 U.S. 927, 934 (1995) (holding that the Fourth Amendment's "reasonableness" requirement does not mandate a "knock and announce" rule).

152. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 458-66 (1966) (detailing the histery and impertance of the Fifth Amendment privilege).

153. *See, e.g.*, Brewer v. Williams (Williams I), 430 U.S. 387, 401 (1977) (holding that, after arraignment, police could not question a defendant outside the presence of his attorney).

154. *See, e.g.*, United States v. Leon, 468 U.S. 897, 907 (1984) (noting that "unbending application of the exclusionary sanction . . . would impede . . . [the] functions of judge and jury.").

155. *See, e.g.*, *id.* at 918-21 & n.22.

the judicial integrity rationale has rarely surfaced in the Supreme Court's dispositions, deterrence is recognized as the rule's primary theoretical basis.[156]

The exclusionary rule, therefore, would find application in bounty hunter cases only if it had a deterrent effect on future misconduct. Such an effect is unlikely. Bounty hunters' incentives are not related to the ultimate conviction of the defendant; professional manhunters need only return a fugitive to custedy in order to secure a portion of the outstanding bond. Since a court's decision te exclude evidence would not affect this remuneration, the exclusionary rule would not likely influence the bounty hunter's behavior in the field.

Even if the exclusionary rule had a deterrent effect, it would, nonetheless, do little to remedy injuries caused by bounty hunter misconduct. The bounty hunter is not an evidence gatherer in the same sense as police. He is not an active participant in the investigatery process; rather, the bounty hunter is engaged solely in the business of arrest. Thus, any deterrent effect created by the exclusionary rule is mitigated by the fact that bounty hunters generally produce very little evidence to exclude.

Some have argued that bounty hunters have an incentive to gather evidence simply because police are more likely to assist bounty hunters who obtain evidence than those who do not.[157] However, this reasoning is based on the erroneous assumption that police have the luxury of favoring one fugitive recovery agent over another. Given the realities of law enforcement and the critical lack of resources available to fight crime, it is unlikely that police would dissuade anyone willing to assist in the fugitive recovery process.[158] The need to recover the defendant outweighs the need to secure additional evidence—encouraging investigation at the expense of securing arrests is like placing the cart before the horse.

156. *See, e.g.*, Stone v Powell, 428 U.S. 465, 485-86 (1976) (noting that judicial intogrity plays a limited role in determining whether the exclusionary rule applies in specific cases).

157. *See* Stout, *supra* noto 4, at 688.

158. *See supra* Part V.B.

VII. ALTERNATIVE REMEDIES

A. Introduction

Given the improbability of state action in bounty hunter cases and the lack of meaningful proscriptions found in the Constitution and the U.S. Code, bounty hunter regulation is best undertaken by the states themselves. The advantages of legislative (as opposed to federal constitutional) remedies have long been recognized by judges and scholars.[159] Legislation allows discreto geographical regions to imtiate solutions specific to their particular needs. In the process, it encourages experimentation, trial and error, and the ultimate distillation of the optimal approach to the issue at hand.

In the case of bounty hunter misconduct, the advantages of a legislative approach are compounded by the inapphcability and inefficacy of constitutional restraints. Not only are bounty huntors privato actors, and thus immune from the strictures of the Fourth, Fifth, and Sixth Amendments, but, even if these proscriptions were applicable, they would not effectively deter or remedy bounty hunter misconduct.

Sensing this conundrum, a growing number of states have enactod laws regulating the bail bond industry. These steps are laudable. However, legislatures should be wary that adequato regulation will require a multi-layered approach.

B. Licensing Requirements

First, and most critically, legislation should restrict entry into the profession of bounty hunting. As with any skilled labor, minimum requirements ensure competency and reduce the incidence of mistake and misconduct in the field. More importantly, and unlike constitutional measures, threshold critoria are proactive. Such regulations do more than redress bounty huntor misconduct; they prevent it.

Nevertheless, only a handful of statos have enactod laws requiring bounty huntors to obtain licenses.[160] Among these, Nevada's

159. Courts, for instance, will avoid constitutional issues if it is possible to resolve a case on other grounds. Moreover, federalist values dictato that governing power should vest in the statos whenever possible. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 402 (stating that "[t]he powers of the general government . . . are delegated by the states . . . and must be exercised in suberdination to the states, who alone possess supreme dominion.").

160. *See* Drimmer, *supra* note 127, at C6.

approach is the most comprehensive. There, felons and individuals under twenty-one years of age are categorically prohibited from chasing fugitives.[161] Moreover, an applicant can not obtain a license unless he passes a drug screen, obtains eighty hours of training, and undergoes a psychological evaluation.[162]

Nevada's approach effectively precludes most psychologically unstable, criminally inclined, immature, and incompetent individuals from becoming bounty hunters. However, it lacks a mechanism by which the state can detect an applicant's dormant problems.[163] If a legislative scheme is to encompass every precaution possible, follow-up evaluations of licensed bounty hunters should be required at two- or three-year intervals. This procedure would reveal criminal proclivities, psychological imbalances, and other incompetencies that arise after the date a license is issued. When combined with an aggressive screening policy for first-time applicants, it ensures that the pool of licensed bounty hunters is consistently sterile.

C. Regulations Governing Bounty Hunters in the Field

Licensing requirements alone will likely be insufficient in addressing the issue of bounty hunter misconduct. Even the most qualified professionals are likely to commit tortious—and even criminal—acts if not properly regulated in the field. Bounty hunters, therefore, must face some restrictions in the administration of their duties.

Such restraints already exist in the form of state tort and criminal law. For example, a bounty hunter who oversteps the bounds of "reasonable force" may subject himself to claims of assault, battery, wrongful death, manslaughter, or murder.[164] Nevertheless, anecdotal evidence suggests that, at least some of the time, established rules have failed to dissuade bounty hunter misconduct.[165] While sporadic acts of noncompliance with the law are inevitable,

---

161. *See* Purgavie, *supra* note 18, at 5.

162. *See id.*

163. The Nevada statute does require bounty hunters to renew their licenses every three years. *See* 19 NEV. REV. STAT. ANN. § 697.230 (Michie 1998). However, the Nevada scheme provides no mechanism by which to judge whether renewal applicants have fallen below the threshold criteria. Rather, such applicants are required merely to submit a fee and written request for renewal to the state commissioner. *See id.*

164. *See, e.g.*, Kwok, *supra* note 2, at D2 (noting that, in the recent Arizona case, the assailants were initially charged with second-degree murder).

165. *See, e.g.*, Kaul, *supra* note 14, at 3 (detailing the facts of a case involving beunty hunter misconduct).

further regulation of bounty hunter conduct may reduce the incidence of claims against bail bondsmen and their agents.

A few states have already taken steps in this regard. Illinois, Wisconsin, Oregon, and Kentucky proscribe extradition of fugitives by out-of-state bounty hunters without judicial permission.[166] At least one other state—Minnesota—prohibits bounty hunters from breaking into homes of third parties in order to catch criminal defendants in misdemeanor cases.[167] On the federal level, Senator Robert Torricelli has introduced legislation which would impose a "knock and announce" requirement on fugitive recovery agents.[168]

These measures constrain a bounty huntor's discretion in the field without unduly sacrificing the efficacy and safety of the fugitive recovery process. Other regulation would be equally constructive. States could require that bounty hunters obtain warrants before effecting searches and arrests within the home. Legislatures might also prevent bounty huntors from using particular firearms.[169]

Significantly, such measures would impose constitutional-like restraints on the bail bond industry without implicating the issue of state action. Moreover, because legislatures can prescribe penalties for non-compliance, these statutes would pack the deterrent force lacking in the Fourth, Fifth, and Sixth Amendments.[170]

However, care should be taken not te overregulate bounty hunters in the field. Like police work, bounty hunting is a profession characterized by split-second decision making and extraordinary danger to personal safety.[171] Bounty hunters endure enormous risk to life and hinb in providing a substantial benefit to society. Therefore, bounty hunters should enjoy special privileges over and above those conferred upon the average citizen. At the very least, bail bondsmen and their agents are entitled to the same discretion as state law enforcement officers.

Indeed, the constitutional scheme governing police represents years of judicial thought, and, hypothetically, the optimal balance

---

166. *See* Woolley, *supra* note 19, at A13.

167. *See Bounty Hunters: A Wild West Tradition Worth Scrapping*, *supra* note 139, at 10A.

168. *See* Purgavie, *supra* note 18, at 5.

169. *See id.* (quoting experts who advocate a complete ban on firearms in the practice of commercial fugitive recovery).

170. *See* Stout, *supra* note 4, at 688 (recognizing that the exclusionary rule does not dissuade bounty hunters from violating fugitives' constitutional rights).

171. *See, e.g.*, George Coryell, *The Bounty Hunter: It's His Money at Stake When a Suspect Skips on Bond, and the Law Says Robert Hallback Can Do What it Takes to Protect his Interests*, TAMPA TRIB., Aug. 14, 1995, at 1 (describing an incident in which a bounty hunter was shot while pursuing a fugitive).

between the empowerment of arresting bodies and the protection of individual rights.[172] By mirroring the constitutional framework in their statutory schemes, states could be sure that they have pursued a sound, well-reasoned approach to the issue of bounty hunter misconduct. That is, while squarely addressing the tortious and criminal behavior of a minority of bounty hunters, state codes would recognize and respect the importance of fugitive recovery in our judicial system.

D. Mandatory Insurance

Legislation should also require that bounty huntors and bail bondsmen obtain liability insurance. This would address two deficiencies in the current state of the law.

First, it would ensure that successful plaintiffs obtain adequate remedies for their injuries. Bounty hunters rarely make more than $50,000 a year, and, therefore, are often unable to cover the civil damages they generato.[173] Liability insurance would counteract (at least nominally) this gap in accountability.

Second, insurance would help stabilize the economic security of the bail bond industry. Bail bondsmens' economic viability is of critical importance to the criminal justice system. Without bondsmen, bail becomes prohibitive to a large number of defendants, the Eighth Amendment bar on excessive bail is implicated, jails swell, and potential innocents are forced to languish in custody.

Yet, under the doctrine of *respondeat superior*, bail bondsmen may incur liability for the terts of their agents. Even one civil suit arising out of a bounty hunter's misconduct would be sufficient to drive a bail bondsman te insolvency.[174] Moreover, given the recent media coverage of bounty huntor misconduct,[175] the political pressure for reform,[176] and the public's current hostility towards the bail bond industry,[177] the number of claims brought against bail bondsmen is likely to increase.

---

172. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973) (balancing the need for effective law enforcement against defendants' individual rights).

173. *See Arizona to Rein in Bounty Hunters After Killing: Phoenix Raid that Went Terribly Wrong*, SING. STRAITS TIMES, Sept. 8, 1997.

174. *See, e.g.*, Purgavie, *supra* note 18, at 5 (describing a case in which a victim of bounty hunter abuse recovered $1.15 million in damages).

175. *See, e.g.*, Martin Kasindorf, *Without Boundaries?*, USA TODAY, Sept. 4, 1997, at 4A (addressing the Arizona incident).

176. *See, e.g.*, Purgavie, *supra* note 18, at 5 (decribing a New Jersey Senator's push for reform).

177. *See, e.g., Bounty Hunters: A Wild West Tradition Worth Scrapping*, *supra* note 139, at 10A (stating that bounty hunters have "wildly expansive rights"); *Outlaw Bounty Hunters*,

Insurance mitigates the risk of insolvency in the bail bond industry. Therefore, in order to preserve the integral role of bail bondsman in our criminal justice system, both bondsmen and their agents should be required to obtain coverage.

VIII. CONCLUSION

While the incidence of abusive bounty hunting is, at worst, infrequent, further regulation of the bail bond industry would stem future misconduct. Care must be taken, however, not to overstep the bounds of constitutional doctrine. If bounty hunting does not fall squarely within the sphere of state action as a matter of sound constitutional analysis, no measure of public policy validates saddling the bail bond industry with the restrictions of the Fourth, Fifth, and Sixth Amendments.

In lieu of a constitutional approach, states should legislate to control bounty hunting in accordance with local need. Licensing requirements, mandatory insurance, and statutory provisions preventing "unreasonable" searches and seizures are all advisable. However, in no event is it appropriate to endanger the personal safety of bounty hunters or the economic solvency of bail bondsmen. Without them, bail skyrockets, innocents are forced to linger in overcrowded jails, and the Eighth Amendment rights of defendants are impinged.

*Andrew DeForest Patrick**

---

supra note 14, at 16A (stating that Arizona "would do well to consider eliminating" bounty huntors); *Rein in the Bounty Hunters Series*, *supra* note 14, at 14A (characterizing bounty hunters as "Rambos" and demanding regulation of the bail bond industry).

* This Note would not have boen possible without the diligent and insightful assistance of Professor Tom McCoy, Scott Fielding, Tonya Gray, Kate Tromble, Howie Monadi, and the 2L staff of the *Vanderbilt Law Review*. Thanks also to Ed, Jonah, Rich, John, Billy, and Tom, whose unique insights into the criminal underworld aided my research. I also wish to extend my sincerest appreciation to my parents, Janet and Larry, without whom I could not lift pen to paper.