

significant nonetheless, because it is an example of a court saying "slow down" and a legislature complying with that order.

#### CONCLUSION

While recent court cases addressing Utah's sex offender registration requirements have arguably slowed down the hysteria-based momentum of these laws in the last couple of decades, more needs to be done to fix the problems underlying these laws. Utah's sex offender registration laws should be aimed at monitoring those individuals most dangerous and likely to re-offend. Society's goal of protecting children can best be met by enacting legislation that considers the motivations and circumstances that drive sex offenders to re-offend. The conviction-based method employed by the Utah Legislature and legislatures across the nation disregards important empirical data regarding sex offender recidivism rates. Simply increasing the numbers of people who must register and increasing the punishments for non-compliance is not addressing the core problems leading to sex offenses. Risk-assessments must be made by Utah's legislators and judges when determining who must register if the sex offender registry is to have any practical benefit of protecting Utah's children. Now is the time to slow down the momentum of hysteria-based sex offender registration laws in order to begin a new era of evidence-based laws that can effectively respect the constitutional rights of sex offenders, assuage social panic, and protect the safety of children nationwide.

## Who Let (The) Dog Out? On the British Roots of American Bounty Hunting

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#### ABSTRACT

*This Essay provides the first-ever scholarly investigation of the conceptual and practical origins of "bounty hunting" in the United States. With an historical focus on British policies instituted around the turn into the eighteenth century, I argue that the scheme of regularized rewards for the arrest and prosecution of alleged criminal offenders constitutes the "roots" of American bounty hunting. This early system, whose practitioners were referred to as "thief-takers," formalized and legitimized the notion of incentivized pursuit of "fugitives" and—even though eventually phased out in Britain—provides an organizational parallel for the for-profit, private sector-level apprehension of individuals wanted by the law in the United States today. These early policies, in short, laid the groundwork for the work of modern-day practitioners in America, perhaps most notably the television personality "Dog" the Bounty Hunter.*

#### INTRODUCTION

Flipping through the channels one evening many years ago, I encountered an interesting program about a man (operating as "Dog"), his wife, and a supporting cast of individuals who were clad in black, whose wardrobes were replete with various accents of authority (e.g., one member had "Agent" printed on the back of his shirt), who were heavily—even obscenely—armed, and who appeared to drive around in S.U.V.s, perpetually pursuing fugitives.<sup>1</sup> It was clear that this group was not affiliated with any law enforcement agency. (The long hair,

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<sup>1</sup>The program is called "Dog the Bounty Hunter." See <http://www.dogthebountyhunter.com/> (last visited Mar. 10, 2010). For more on "Dog," see Duane "Dog" Chapman.

tattoos, methods, and antics gave this away). How then could they chase, accost, and arrest other citizens? What's more, why did they do this? Can anyone engage in such practices? Isn't this why we have police officers? I got to wondering why this is allowed, even glorified (on television, at least), in America. In short—and with apologies for dredging up the third most annoying song ever<sup>2</sup>—this Essay takes up the burning question: Who let (the) "Dog" Out?

In the space below, I argue that while rewards, or bounties, have long been used as a means of encouraging the apprehension of "wanted" individuals, "bounty-hunting" as an established, ongoing and for-profit practice (rather than an ad hoc, spontaneous, and intermittent endeavor), is of a more recent vintage. Specifically, my research suggests that the roots of bounty hunting in America—i.e., the ultimate source of "Dog"-like activities—can be traced to the establishment of an incentivized apprehension scheme devised by British Parliament in the late seventeenth century. In a society lacking any official entity for maintaining order (the London Metropolitan Police Force—the "Bobbies"—would not appear until 1829), regular and repeating rewards were seen as way of encouraging individual citizens to engage in law enforcement by appealing to their financial self interest. Crime *did* "pay" (and paid well) at this point and property crimes in particular overwhelmed British society; thus, the government responded by luring citizens onto more or less a platform of self-policing, whereby they would be compensated for apprehending—and, importantly, facilitating the prosecution of—alleged offenders. This pursuit of profit and justice (in theory) was referred to as "thief-taking" and what is significant is that the proto-bounty hunters engaged in this enterprise made it their habit (and even their "profession," if you will) to capture criminals and rewards.

I should note that the "thieves" being "taken" were not fugitives as we currently conceive of that term, since the era did not admit of pre-trial release in modern terms; what's more, the situations are not perfectly parallel, because modern bounty hunting is generally performed when individuals miss court dates, whereas police usually

man, You Can Run, But You Can't Hide (2007) and Duane "Dog" Chapman & Laura Morton, *Where Mercy is Shown, Mercy is Given* (2010).

<sup>2</sup>See "The 20 Most Annoying Songs," Rolling Stone (July 2, 2007), available at <http://www.rollingstone.com/rockdaily/index.php/2007/07/02/the-20-most-annoying-g-songs/> (last visited Mar. 9, 2010), and referring, of course, to "The Baha Men," Who Let the Dogs Out? (Edel Records: July 25, 2000).

<sup>3</sup>James Inciardi, *Criminal Justice* 143 (2010). By the seventeenth century, highway robbery in the grand manner of Jack Sheppard, Dick Turpin, Claude Duval, and Captain Lightfoot had made traveling through the English country side so perilous that no coach or traveler was safe.

perform the initial arrest. That said, the principal design and phenomenon are the same in the sense that *private* citizens (not police officers or agents of the court) performed an ostensibly *public* service for financial gain, engaged in the pursuit of those "wanted" in some capacity for violations of the laws of the state. And so, it was the British institutionalization of regularized rewards that "let the 'Dog' out," so to speak, in that it laid the foundation for the pursuit of fugitives for profit that still exists in the United States today and that distinguishes America in so many ways from the rest of the world.<sup>4</sup>

### "WANTED"

We are most familiar with bounty hunters of the celluloid variety. Marshal Matt Dillon regularly encountered bounty hunters in "Gun-smoke," Rooster Cogburn was referred to as a bounty hunter in "True Grit," Steve McQueen played the role of a hunter in "Wanted: Dead or Alive," Lee Majors was both a stunt man and a bounty hunter in "The Fall Guy," Robert DeNiro tracked down Charles Grodin in "Midnight Run," and of course for all perpetual twelve-year olds, Boba Fett and his ilk were typically referred to as "bounty hunters" in the Star Wars trilogy. Moreover, while there is some dispute regarding the historical accuracy of conventional conceptions of "bounty hunters" in the "Old West,"<sup>5</sup> it is fair to say that the imagery and tropes of the outlaw, the pursuit, the "WANTED" poster, etc., are part of our cultural D.N.A.<sup>6</sup> But why? That is, from whence came the notion that *private* citizens could (or should) be engaged in "hunting" other citizens, with at least implicit permission—if not outright encouragement—from the state? Answering this question requires a brief review of some of the relevant terminology and concepts at the outset.

Foremost, the individual who we conventionally refer to as a "bounty hunter"<sup>7</sup> is usually commissioned for service by a bail bondsman to locate and apprehend those who have "skipped" or "jumped" bail. As

<sup>4</sup>See Adam Liptak, *Illegal Globally, Bail for Profit Remains in the United States*, N.Y. Times, Jan. 29, 2008, available at [http://www.nytimes.com/2008/01/29/us/29/bail.html?\\_r=2&th&emc=th&oref=slogin](http://www.nytimes.com/2008/01/29/us/29/bail.html?_r=2&th&emc=th&oref=slogin) (last visited June 2, 2010).

<sup>5</sup>Compare Larry Ball, *Desert Lawmen: The High Sheriffs of New Mexico and Arizona, 1846-1912* 54 (1992) ("[T]he professional bounty hunter did not exist in the Southwest [in the late nineteenth century]."), with Morgan O. Reynolds, *Privatizing Probation and Parole*, in *Entrepreneurial Economics* 15 (Alexander Tabarrok ed., 2002). ("Real live bounty hunters were marshals, sheriffs and detectives. They included Pat Garrett, Bat Masterson, the Texas Rangers and the Arizona Rangers.").

<sup>6</sup>See Rachel Hall, *Wanted* (2009).

<sup>7</sup>Practitioners tend to prefer "bail enforcement agents," "skip tracers," "bail recovery agents," "bail bond enforcers," "bail solicitors," or, in some cases, "bail runners."

Arthur Beeley explains in his classic study of the bail system in Chicago, the term *bail* means "the release of a person from custody upon the undertaking, with or without one or more persons for him, that he will abide the judgment and orders of the court in appearing and answering the charge against him." And thus, "it is essentially a delivery or bailment of a person to his sureties—the jailers of his own choosing—so that he is placed in their friendly custody instead of remaining in jail."<sup>9</sup> Like many legal practices (e.g., the jury system), bail is an amalgam of historical and cultural influences going back almost a thousand years in one form or another.<sup>9</sup> However, by 1689 and the enactment of the English Bill of Rights,<sup>10</sup> the notion had gelled to a form recognizable today, providing citizens protection against its excesses, with the same to come in the American Constitution 100 years later.<sup>11</sup>

In practice then, bail represented both a philosophical stance against undue deprivations of freedom through burdensome detention protocols and a fundamentally pragmatic mechanism for securing an individual's pledge to return for their day in court. To be released before trial (i.e., to be "bailed out") meant that custodial powers were vested in a third party surety who was responsible for the principal (the defendant). As F.E. Devine explains of the bail system in England in the 1700s, the surety was "viewed as actively exercising a friendly custody of the accused with the right and ultimate recourse of imprisoning him and delivering him to the court to discharge their liability."<sup>12</sup> In time, sureties (who were usually required to be property owners) were permitted to forfeit promised sums of money in the event the accused failed to appear. Conditions of the time offered additional support for the custodial supervision of those released on surety relationships.

"Borrowing heavily" from traditional British bail practices, the American system of bailment proceeded along the same lines for non-capital offenses well into 1800s with the surety playing a "central

<sup>9</sup> Arthur Beeley, *The Bail System in Chicago* 161 (1966) (1927).

<sup>9</sup> See Elsa de Haas, *Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275* (1940); William Duker, *The Right to Bail: A Historical Inquiry*, 42 *Alb. L. Rev.* 39 (1977); F.E. Devine, *Commercial Bail Bonding: A Comparison of Common Law Alternatives* (1991).

<sup>10</sup> See *The English Bill of Rights*, available at [http://avalon.law.yale.edu/17th\\_cen\\_tury/england.asp/](http://avalon.law.yale.edu/17th_cen_tury/england.asp/) (last visited Mar. 15, 2010).

<sup>11</sup> See *United States Const.*, amend. VIII.

<sup>12</sup> See Devine, *supra* note 9, at 5.

role" in the process.<sup>13</sup> And, as had been the case for hundreds of years in England, in the United States a "reputable person" from the community "would appear before the court to agree to take custody of the defendant under terms set by the court."<sup>14</sup> That said, as the number of defendants increased, and as they enjoyed greater mobility—increasing the risk of flight—the commercial bond system began to emerge.

One implication of this transformation was the diminished liability of courts during the pretrial release period. At the same time, "judicial authority to deny bail was also diminishing as the number of crimes punishable by death was drastically reduced."<sup>15</sup> Ultimately, without the option of secure, supervised release and with less legal authority to deny bail, judicial officers would tend to "set financial conditions of release that exceeded the defendant's ability to pay, effectively ordering *sub rosa* pretrial definitions."<sup>16</sup> Thus, the reality was that unless individuals were released on recognizance they required someone to act as a surety—and for citizens of diminished means (the individuals who are still most adversely affected by this system<sup>17</sup>), that "someone" was a bail agent; or, as they are more commonly known, a (bail) bondsman.<sup>18</sup>

An arrangement with a bail bondsman begins once the bail has been set, at which point the defendant typically pays some percentage of the bail and the bondsman writes the bond, "guaranteeing" that the accused will appear in court. The defendant is now legally in the "custody" of the bondsman and this individual reserves substantial

<sup>13</sup> Betsy Kushlan Wanger, *Limiting Preventative Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 *Yale L.J.* 320, 320 n.2 (1987). See also Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 *Houston L. Rev.* 743 (1996); Jerry Watson & L. Jay Labe, *Bail Bonds*, in *The Law of Miscellaneous and Commercial Surety Bonds*, 127 (Todd Kazlow & Bruce King eds., 2001).

<sup>14</sup> See Wanger, *supra* note 13, at 323–24.

<sup>15</sup> See Wanger, *supra* note 13, at 324.

<sup>16</sup> See Wanger, *supra* note 13, at 324.

<sup>17</sup> See, e.g., Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 *U. Pa. L. Rev.* 1031, 1033 n.8 (1954) ("The ultimate abolition of the bail system is the only solution for the prejudice to jail defendants which results from their low economic status. A prerequisite for this development is a statute which sets up a direct sanction against non-appearance.")

<sup>18</sup> See Patricia M. Wald & Daniel J. Freed, *Bail in the United States* 22 (1964) ("Commercial bondsmen emerged in this country to meet the needs of accused persons whose right to bail would otherwise be thwarted by the lack of a personal surety, real estate or adequate cash. . . . The profit motive is presumed to insure diligent attention to his [the bondsman's] custodial obligations.")

authority over his principal.<sup>19</sup> When the defendant appears in court, the bondsman keeps the principal's contribution as a fee for his service. However, if the principal fails to appear, the bondsman is liable for the balance of the bond, unless he can deliver the principal to court before a specific date. Many bondsmen will themselves pursue those who have "jumped" or "skipped" bail<sup>20</sup> (who are now considered "fugitives" from the law). But the bondsman may also hire an individual to act on his behalf: a "bail/bond enforcement officer" or, as we commonly say, a bounty hunter.<sup>21</sup> This individual acts in a non-state capacity and is hired to locate the individual, while enjoying the power to arrest the fugitive by virtue of the bond agreement between the bondsman and the principal.<sup>22</sup> What makes the authorization of such "hunting" especially interesting, and troubling for many, is that the pursuit of fugitives is something that is also performed by formal law enforcement officials, although bounty hunters are not subject to the same

<sup>19</sup>For the most significant, illustrative, and rhetorically compelling case on point, see *Taylor v. Taintor*, 83 U.S. 366, 371, 21 L. Ed. 287, 1872 WL 15393 (1872) ("When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another state; may arrest him on the Sabbath, and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner.")

<sup>20</sup>According to the website of the Professional Bail Agents of the United States, most bail agents actually conduct their own recoveries, only turning over the charge bail enforcement agents when they cannot find the defendants. See *How to Become a Recovery Agent*, available at [www.pbua.com/displaycommon.cfm?an=3](http://www.pbua.com/displaycommon.cfm?an=3) (last visited Sept. 15, 2008). "Dog" the Bounty Hunter, for example, is also "Dog the Bondsman" (Da Kine Bail Bonds). But of course this does not sound as exciting and would not be as compelling on television. See John Heckathorn, *What Does "da kine" in Dog the Bounty Hunter's Da Kine Bail Bonds Mean?*, *Hawaii Mag.*, Sept. 18, 2009, available at [http://www.hawaiimagazine.com/blogs/hawaii\\_today/2009/9/18/Dog\\_Bounty\\_Hunter\\_da\\_kine\\_bail\\_bonds](http://www.hawaiimagazine.com/blogs/hawaii_today/2009/9/18/Dog_Bounty_Hunter_da_kine_bail_bonds) (last visited Mar. 12, 2010).

<sup>21</sup>Report of the Virginia State Crime Commission, *Study of Bail Bondsmen and Bounty Hunters* 12, House Document No. 21 (Richmond, Va.: 2003) ("Bounty hunters are agents of a bail bondsman who are contracted to recover a fugitive. They are unlike the bail bondsman in that they have no collateral securing a defendant's presence with the court. . . . Traditionally, bounty hunters do not receive compensation unless they retrieve and return the defendant. In some instances, bounty hunters attempt to recover a reward for the fugitive's capture without a contract or knowledge of a bail bondsman.")

<sup>22</sup>See Mark Roberts, *Bounty Hunters, All Things Considered*, National Public Radio (Sept. 6, 1997; originally broadcast in 1995) (As bounty hunter Bob Burton explains, "in the bail bond contract, they waive their rights" which is "what the whole thing boils down to.")

sort of supervision, training, etc., that are required of, for example, police officers, and there exist significantly fewer governmental limitations on the methods of "private" pursuit.<sup>23</sup>

To elaborate a bit on the notion that both state and non-state actors are effectively charged with the same task, it is important to stress that United States marshals "hunt" federal fugitives, local and state police officers regularly arrest those with outstanding warrants (e.g., during traffic stops), and in theory any ordinary citizen is urged to alert the authorities of the whereabouts of "wanted" individuals. (This is the thrust of programming such as "America's Most Wanted.") What distinguishes bounty hunters *per se* from other agents authorized or inclined to pursue fugitives is that these are individuals who generally operate in a *private* capacity and who are motivated by the potential for *profit*, rather than professional obligation or a sense of civic responsibility. Put differently, a bounty hunter is not someone who turns in his neighbor because he saw the mug-shot on a flier at the Post Office; a bounty hunter is someone who makes a habit of seeking out wanted individuals—and who does so principally, if not exclusively, for the associated financial compensation.<sup>24</sup>

### TO CATCH A THIEF

As noted above, rewards have for some time been used to encourage the apprehension of notoriously wanted individuals.<sup>25</sup> Indeed, "bounties" are to this day still employed to spur private pursuit of

<sup>23</sup>See, e.g., Jacqueline Pope, *Bounty Hunters, Marshalls, and Sheriffs* 18 (1998) ("Bounty hunters can and do cross state lines and, as has been explained, they are bound by very few rules."); Joshua Armstrong & Anthony Bruno, *The Seekers xxiv-xxv* (2000) ("Since the jumper is a fugitive from justice, the rules of due process do not apply. A search warrant is not necessary to enter his residence or any other location where he's believed to be. The bounty hunter needs only a copy of the 'bail piece' . . ."); Matthew Kaufman, *An Analysis of the Powers of Bail Bondsmen and Possible Routes to Reform*, 15 N.Y.L. Sch. J. Hum. Rts. 302, 312 (1999) (arguing that "bondsmen violate citizens' civil rights and other protections afforded by the Constitution when they perform arrests and searches without warrants or other processes").

<sup>24</sup>See Report of the Virginia State Crime Commission, *supra* note 21, at 12 ("Bounty hunters are agents of a bail bondsman who are contracted to recover a fugitive. They are unlike the bail bondsman in that they have no collateral securing a defendant's presence with the court. . . . Traditionally, bounty hunters do not receive compensation unless they retrieve and return the defendant. In some instances, bounty hunters attempt to recover a reward for the fugitive's capture without a contract or knowledge of a bail bondsman.")

<sup>25</sup>See, e.g., the discussion of Robin Hood in Richard Firth Green, *Violence in the Early Robin Hood Poems*, in *'A Great Effusion of Blood?': Interpreting Medieval Violence* 270 (Mark Meyerson et al. eds., 2001).

public enemies.<sup>28</sup> What we will explore in the balance of this Essay is the late seventeenth-century British institutionalization of standing incentives for the apprehension of offenders. To be clear, the critical institutional turn here is from ad hoc or occasional rewards to regular payments for those who sought to corral suspected criminal offenders. It is important to bear in mind that the decentralized, feudal society of late seventeenth-century England enjoyed no regular police force, for either the deterrence or investigation of crimes, and thus, there was not much of a system in place for the prosecution of serious offenses.<sup>27</sup> Victims generally had to obtain their own arrest warrants (collaborating with the constable) and provide the manpower for the effort—bearing the costs themselves along the way. As one would expect, this tended to discourage prosecutions even as crime rates were rising.<sup>28</sup>

To address the problem, and in the absence of a state apparatus as we would now imagine it, Parliament had for some time maintained a tradition of situation-specific and fleeting financial encouragements to preserve order and enable prosecutions.<sup>29</sup> But the “founding” moment for the suite of policies laying the groundwork for the American bounty hunter was 1692 when Parliament enacted a statute (4 & 5 W. & M., ch. 8, § 2) offering repeating rewards of up to £40 to persons who apprehended and convicted offenders accused of a range of crimes, including highway robbery, burglary, coining, theft of livestock, and various other offenses.<sup>30</sup> As the British historian Leon Radzinowicz explains, in their essence the rewards were for offenses “accompanied by aggravating circumstances,” and which were of “frequent occurrence, easy to commit, [and] difficult to detect.”<sup>31</sup>

In practice this meant that between £10–40 was offered to anyone who should be the “means of convicting” those found guilty of the offense(s)—each of which was punishable by death—and rewards were

<sup>28</sup> One can look no further than the United States Government’s “price” for the capture of Osama bin Laden, which reached \$50 million. See Steven Levitt, *For \$25 Million, No Way, But For \$50 Million I Will Think About It*, N.Y. Times, July 18, 2007, available at <http://freakonomics.blogs.nytimes.com/2007/07/18/for-25-million-no-way-but-for-50-million-ill-think-about-it/?scp=1&sq=bounty%20osama&st=cse> (last visited Mar. 9, 2010).

<sup>27</sup> But see Bruce P. Smith, *The Myth of Private Prosecution in England, 1750–1850*, in *Modern Histories of Crime and Punishment* 151, 152–53 (Markus Dubber & Lindsay Farmer eds., 2007).

<sup>29</sup> Frank McLynn, *Crime and Punishment in Eighteenth-century England* 21 (1989).

<sup>30</sup> Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750–84* (1957).

<sup>31</sup> Peter Linebaugh, *The London Hanged* 59 (2006).

<sup>32</sup> Radzinowicz, supra note 29, at 59.

to be paid by the sheriff of the county where the robbery had been committed, “upon the production of a certificate signed by the judge or the justices who had tried the offender.”<sup>32</sup> What is most significant about this program is that as long as such crimes continued to be committed (or could be claimed to have been committed) there was financial gain to be enjoyed by interested parties, rendering this an “established element in the system of criminal administration.”<sup>33</sup> Most importantly, for purposes of this Essay, the decision to incentivize the process whereby private citizens became detectives,<sup>34</sup> located offenders, facilitated their prosecutions, reaped financial rewards, received pardons and reprieves,<sup>35</sup> and kept the possessions of those they had prosecuted,<sup>36</sup> had the effect of encouraging individuals to get into the “business” of pursuit—a business that continues to this day in the United States.

To repeat, the claim here is not that this period saw the first instances of money being used as a lure for individuals to turn-in offenders—that strategy had been used for some time.<sup>37</sup> The standing rewards simply made the practice more routine because prosecutions were more lucrative and now even had the gloss of the “public good” as a crime control measure. And yet, while the policy *did* achieve its

<sup>32</sup> Radzinowicz, supra note 29, at 57. See also Patrick Pringle, *Hue and Cry: The Birth of the British Police* 35–36 (1955) (Burglars and housebreakers were “worth” as much as a highwayman, those who stole sheep were valued at only £10 and desert-ers from the army only garnered £1).

<sup>33</sup> John Beattie, *London Crime and the Making of the “Bloody Code”*, 1689–1718, in *Stilling the Grumbling Hive: The Response to Social and Economic Problems in England, 1689–1750* 52 (Lee Davison et al. eds., 1992).

<sup>34</sup> But incentivized pursuit took on a different, more curious form, with the institution of what came to be known as the “Tyburn Ticket.” As Radzinowicz describes, these tickets amounted to a “lifelong exemption from the burden of serving ‘all and all manner of parish and ward offices.’” Instituted in 1699, these “tickets” meant that “anyone bringing to justice an offender guilty of burglary, housebreaking, horse stealing or thieving in shops, warehouses or coach-houses” (if the value of the goods exceeded five shillings) “was entitled to a certificate exempting him from compulsory service as an officer of the parish in which the offence had been committed.” And, because all such offences were capital crimes, “a conviction for any one of them was likely to send the guilty person to Tyburn—hence the odd name, Tyburn Ticket, by which the certificate came to be known.” Radzinowicz, supra note 29, at 155–56; Anthony Babington, *Introduction to Percy Fitzgerald, Chronicles of Bow Street Police-Office ix–x* (1972).

<sup>35</sup> See Pringle, supra note 32, at 35–36. (“The reward was payable on conviction, and with it went a free pardon to the recipient if he needed one. He also received the highwayman’s horse, arms, and money unless these were proved to have been stolen.”)

<sup>36</sup> Carl Klockars, *The Professional Fence* 9 (1974).

<sup>37</sup> See Beattie, supra note 33, at 53.

objective—increased pursuit and prosecution—this institutionalized incentivization also bred a host of new problems. Indeed, the general consensus among historians of this era appears to be that consequences of these arrangements were by and large negative, particularly in the sense that the approach appeared to also encourage *more* criminal activities.

As the historian Ruth Paley puts it, “it is difficult to escape the conclusion that the major effect of the provision of £40 rewards was to provide an incentive not to the detection of crime but to the organization of thief-making conspiracies.” In other words, it soon became apparent that—with fees paid per prosecution—the more crimes (to “solve”), the more rewards (to collect). The perversity of all this was that thief-takers ended up being in business not to detect crime but “to commit it.”<sup>38</sup> At its most “morally hazardous”<sup>39</sup> point, thief-takers even “lured young people *into* crime” and then “dragged them into court for the price upon their head.”<sup>40</sup> What’s worse, many went so far as to “publicly offer to get back stolen goods in return for a reward commensurate with the value of the goods,<sup>41</sup> or they simply framed individuals and planted evidence against them.”<sup>42</sup>

Driving all this was the fact that, to collect, one needed to also facilitate the *prosecution* of the accused, meaning that thief-takers would “stage manage trials,” probably collude with other involved parties to ensure the “right” results,<sup>43</sup> and almost surely pursue charges

<sup>38</sup>Ruth Paley, *Thief-takers in London in the Age of the McDaniel Gang, c. 1745–1754, in Policing and Prosecution in Britain 1750–1850: Essays in the Social History of Criminal Law 323* (Douglas Hay & Francis Snyder eds., 1989).

<sup>39</sup>See Glenn Parker, *Self-Policing in Politics: The Political Economy of Reputational Controls on Politicians 22* (2004) (“A moral hazard arises whenever there are incentives for economic agents, who cannot be easily monitored, to behave in a manner contrary to what is expected of them.”).

<sup>40</sup>Jürgen Thorwald, *The Century of the Detective 36* (1964).

<sup>41</sup>See Thorwald, *supra* note 40, at 36.

<sup>42</sup>See Pringle, *supra* note 32, at 36. On the famous conspiracy perpetrated by the “McDaniels Gang,” involving such shenanigans and resulting in £120 rewards, statutory and local, see Paley, *supra* note 38, at 302. Here we have the proverbial “graying” of the lines between the fugitive and his pursuer. To ply their trade, agents were “well stocked with warrants, some forged, some genuine, with which to intimidate thieves and pickpockets,” and prison keepers even paid them to arrest individuals. John McMullan, *Criminal Organization in Sixteenth and Seventeenth Century London, 29 Soc. Probs. 311, 318–19* (1982).

<sup>43</sup>See Paley, *supra* note 38, at 328.

against innocent parties.<sup>44</sup> In this regard, there was no obvious incentive to deter crime. Ironically, as the historian Patrick Pringle observes, “the whole police force—if one could call it that—had a direct incentive to *encourage* it” because “all had a vested interest in crime.”<sup>45</sup> And yet this has to have been somewhat expected given that the underlying animus of the system was to “create an atmosphere of suspicion amongst criminals.”<sup>46</sup> In other words, the point was *not* necessarily to discourage crime by appealing to morality, religion, or civic responsibility; the point was essentially to take crime as a “given,” turning criminals on one another<sup>47</sup> and anticipating that the self-interest of would-be enforcers would have the effect of sustaining law and order.

Responding to this twist of events (from thief-takers to thief-makers), and deeply troubled by the endemic flaws of the reward system in general,<sup>48</sup> a reformer, Henry Fielding, sought to bring more credibility to the system by persuading government officials to institutionalize and partially-subsidize a police-detective outfit (an “unofficial investigative division”<sup>49</sup>) at Bow Street in London in 1748.<sup>50</sup> This outfit, known as the “Bow Street Runners,” enjoyed greater cred-

<sup>44</sup>J.M. Beattie, *Policing and Punishment in London, 1660–1750 404–05* (2001) (“Without corroborating evidence, it is impossible to be certain that prosecutions that seem suspicious on their face were in fact corrupt. But several of the cases that drew the largest rewards for thief-takers in 1730–3 have every appearance of being the prosecutions carried on ‘against innocent Persons for the sake of Rewards’ . . .”). See also Malcolm Gaskill, *The Displacement of Providence: Policing and Prosecution in Seventeenth- and Eighteenth-Century England, 11 Continuity & Change 341, 349–50 n.3* (1996) (“Undoubtedly, the lure of money and immunity from prosecution did encourage abuses, as in 1732 when a man who had hired an assassin to kill his father confessed all on learning about the pardon and reward for the discovery of the murderer.”).

<sup>45</sup>See Pringle, *supra* note 32, at 48 (emphasis added). Arranging for the return of stolen goods may also have been a regular part of their business—indeed it was the *modus operandi* of the most famous practitioner of the period, Jonathan Wild, the self-titled “Thief-Taker General of England and Ireland.” Pringle, *supra* note 33, at 3.

<sup>46</sup>See Paley, *supra* note 38, at 324.

<sup>47</sup>See Pringle, *supra* note 32, at 35–36 (“It was hoped that in this way criminals would be induced to betray one another . . .”). See also Gerald Howson, *Thief-Taker General: Jonathan Wild and the Emergence of Crime and Corruption as a Way of Life in Eighteenth-Century England 37–38* (1985) (“[T]he intention behind the paying of rewards was not so much to goad citizens into feats of heroism as to break up the knots and gangs of thieves by luring them to betray one another, and in this it was certainly successful.”).

<sup>48</sup>See Radzinowicz vol. III, *supra* note 29, at 34–35, 37–38 (referring to Fielding’s assessment of fees, i.e., reward money, as “the dirtiest money upon earth” and discussing the “corner stone” of the Fielding’s reform plans as “the complete discontinuance of fees”).

<sup>49</sup>See Inciardi, *supra* note 3, at 144.

ibility because they were at least formally attached to the Bow Street Magistrate's office where Fielding was the salaried chief magistrate.<sup>51</sup> With the initial six-man force (made up of former constables),<sup>52</sup> those working out of Number 4, Bow Street did not patrol in the manner we typically associate with policing, but they did "run," if you will, around the city and around the country, serving writs, arresting suspects, and generally carrying out the role of apprehension that had previously been exclusively the province of thief-takers.

At the same time, they also had their eyes on the rewards that were still generally in place for apprehension and prosecution of criminals. In this respect, the Runners were themselves essentially still "thief-takers"—and as a consequence they were tagged with many of the same criticisms from a skeptical and cynical public.<sup>53</sup> Indeed, Fielding was well aware of the tendency for his own men to succumb to the hazards built-in to the reward model.<sup>54</sup> It was commonly observed, for example, that with the £40 payable only on conviction for felony (as opposed to smaller) offenses, the temptation was to "nurse petty criminals until, in the slang phrase, they 'weighed forty pounds'" (meaning that they had graduated on to more serious criminal activities . . . and were therefore more valuable for those pursuing and prosecuting them). With this in mind, Henry's half-brother, John, lobbied the Government to withdraw various reward pledges for apprehension, stressing that such incentives had actually increased "evil" (rather than curing it) and had "multiplied the number of robber-

<sup>50</sup>David Phillips, 'A New Engine of Power and Authority: The Institutionalization of Law-Enforcement in England 1780-1830, in Crime and the Law: The Social History of Crime in Western Europe since 1500 164-65 (V.A.C. Gatrell et al. eds., 1980). ("From the middle of the century, the Fielding half-brothers, first Henry and then John, had been agitating for the government to take action to strengthen the magistracy and police, and crack down on what they saw as a rising tide of lower class immorality, crime and disorder.").

<sup>51</sup>Henry retired the position in 1754 and was succeeded by his blind half-brother, John Fielding, who eventually expanded the force, placed officers on horseback, took advantage of the evolving opportunities in information distribution, and stayed on as magistrate until 1780. See Phillips, supra note 50, at 165.

<sup>52</sup>R.H. Langworthy & L.F. Travis, *Policing in America* 61 (2003).

<sup>53</sup>See McLynn, supra note 28, at 33 (The Bow Street Runners were "no better than the men they pursued and arrested, performed only when paid, and in general were 'self-seeking knaves.'").

<sup>54</sup>T.F. Banks, *The Thief Taker: Memoirs of a Bow Street Runner* 30 (2001).

<sup>55</sup>See Pringle, supra note 32, at xii-xiii. See also Peter King, *Crime, Justice, and Discretion in England, 1740-1820* 48 (2000) ("Law-enforcement officers and private thief-takers were accused of ignoring minor offenders until they 'weighed forty pounds.'").

ies," "propagated the worst and wickedest perjuries," and "laid snares for youth and ignorance."<sup>56</sup>

The "public" nature of this proto-police unit was significant in many ways, perhaps most because in the words of Pringle, "the very word 'police' was regarded as dangerously un-English" and, in fact, the Runners even had to be founded in secret—"with the connivance of the Prime Minister." At the time, in fact, "Britain was the only country in Europe without a professional police force," and very proud of it too, because it was deemed to be a "sign of their love of freedom."<sup>57</sup> Ultimately, however, the House of Commons determined that rewards were "seriously weakening" the administration of justice and "ought to be abolished in their present form." As Gilbert Armitage writes of the scrutiny toward this issue at the time, many of the officers themselves "declared emphatically in their evidence before the Committee of 1816, that the system of distributing rewards to those responsible for a conviction for felony not only laid the officers themselves open to temptation, but also led juries to distrust police evidence on the ground that it might be interested," and thus the system might result in "miscarriages of justice, either in acquittals or convictions."<sup>58</sup>

The influences described above provided the momentum toward the "new police" system finally institutionalized in London in 1829.<sup>59</sup> To be sure, an institutionalized police force was still an unpopular notion in Britain at this point;<sup>60</sup> but with the Bow Street Police perceived as a corrupt organization well into the nineteenth century,<sup>61</sup> and in the wake of the Gordon riots "when much of the center of London was in the hands of rioting crowds for a number of days,"<sup>62</sup> the pieces came together to support the eventual establishment of the Metropolitan

<sup>56</sup>Quoted in Pringle, supra note 32, at 106-07.

<sup>57</sup>Patrick Pringle, Introduction, in *Memoirs of a Bow Street Runner* ix, ix-x (Henry Goddard ed., 1957). See also Thorwald, supra note 40, at 35 ("One of the principal reasons a police force took so long in Britain was that British concepts of civil liberty precluded such development."). That said, one might also surmise, as Pringle does, that the lack of a police force was actually simply "a sign of their aversion to change"—just "one of those habits, or traditions, that arose from the geological accident of the English Channel" which had the effect of securing Britain to some extent and thus rendering a standing army (and police force) unnecessary." Pringle, supra, at ix-x.

<sup>58</sup>Gilbert Armitage, *History of the Bow Street Runners* 266 (1932).

<sup>59</sup>See Beattie, supra note 33, at 58. ("The system of rewards encouraged the development of forms of policing that provided a foundation for the more fully regularized police established in London in 1829.")

<sup>60</sup>See Banks, supra note 54, at 41.

<sup>61</sup>See Armitage, supra note 58.

<sup>62</sup>See Phillips, supra note 50, at 164.

Police that year. As this happened, with the institutionalization of a regular and *paid* police, eventually the incentivized encouragement for private individuals to pursue and prosecute purported offenders fell by the wayside.<sup>63</sup> This is not to suggest an end to corruption by any means (police corruption has undoubtedly been around as long as the police themselves); it is only to note that when the "Bobbies" were established, compensated *citizen* pursuit was phased out as an official public policy within the administration of criminal justice.

### IN THE "DOG" HOUSE

And yet, incentivized private citizen pursuit of fugitives persists, and is even romanticized, in the United States (and only the United States) to this day. Why? In the spirit of the adopted pop-cultural frame for this Essay, if late seventeenth-century British policies let the "Dog" out, with thief-taking eventually morphing into an American form, why does the "Dog" still run more or less free? The practice of incentivized apprehension generally collapsed under the weight of scandal and corruption as it developed in England; and with the advent of a police force, citizens were no longer asked to play such parts in the interest of law enforcement. Why has it not been the same in the United States? Obviously America also has officers of the law who are vested with the authority to pursue and apprehend fugitives. Why then in America (unlike Britain, or anywhere else in the world) are private citizens also allowed to do this—and to do so for profit?

The primary reason for the continued utilization of bounty hunters in America would seem to be the continued prevalence of the commercial bond system for pre-trial release of state arrestees, a system maintained to this day only by the United States and the Philippines. Some states in the United States prohibit, in one way or another, commercial (or surety) bond<sup>64</sup> (effectively closing the market for bounty hunters); other states prohibit freelance bounty hunters, but allow for "runners" who work for only one bond agent at a time,<sup>65</sup> still others require licensing of some kind,<sup>66</sup> and a host of other states have various other requirements in place (e.g., insurance coverage and the

<sup>63</sup>David Taylor, *Crime, Policing, and Punishment in England, 1750-1914* 72 (1998).

<sup>64</sup>These states are: Wisconsin, Illinois, Oregon, and Kentucky. See *Bounty Hunter Laws*, available at [http://www.americanballcoalition.com/new\\_html/Bounty%20Hunter%20Laws.htm](http://www.americanballcoalition.com/new_html/Bounty%20Hunter%20Laws.htm) (last visited June 9, 2010).

<sup>65</sup>These states are: Florida, North Carolina, and South Carolina. See *Bounty Hunter Laws*, supra note 64.

<sup>66</sup>These states are: Indiana, Nevada, Mississippi, South Dakota, Connecticut, Arizona, Utah, Iowa, Louisiana, California, and West Virginia. See *Bounty Hunter Laws*, supra note 64.

prohibitions on criminal records).<sup>67</sup> In most of the United States then, the commercial bond system is an option for defendants; but when someone "skips" on their bail, the bondsman is liable for the amount and will attempt to track down the fugitive in order to recoup his outlay. As noted above, many if not most bondsmen conduct their own pursuits (i.e., they are their own bounty hunters), but when they contract out the assignment, they turn to individuals who make it their business to arrest those "wanted" by the law, return them to the authorities, and collect the fees for their service. This is essentially American-style "thief-taking" and it exists to this day, and in this form, I suggest, primarily due to the perpetuation of the commercial bond system.<sup>68</sup>

Which of course begs the question: Why then does the commercial bond system still exist in America? A complete response to that question is beyond the scope of this Essay—and will be addressed in detail in the book growing out of this research—but three of the most influential factors can be summarized here. For one thing, the commercial bond industry (and those who depend on it) is well organized, politically savvy, and effective at lobbying for or staving off legislation in correspondence with its interests.<sup>69</sup> There are occasional scandals that lead to legislation restricting the powers of either bounty hunters or bondsmen (or both),<sup>70</sup> but those who benefit from the status quo are effective at making their case. And their case—i.e., the second and third influences to stress here—boils down to issues of cost and public safety.

Regarding cost, recall that, unlike their British thief-taking ancestors, modern American bounty hunters are not paid by the state; they are paid by the bondsman, a private party, who is the one performing the "public" service of affording the means of pre-trial release to the defendant. In this sense, bounty hunters provide what is, for us (the

<sup>67</sup>These states are: New Hampshire, Georgia, Colorado, Tennessee, Arkansas, Texas, and Oklahoma. See *Bounty Hunter Laws*, supra note 64.

<sup>68</sup>This is not necessarily to suggest that, in the absence of commercial bond, there would be no such thing as bounty hunting in America. One could imagine individuals still making it their business to pursue those "wanted" by the F.B.I., for example, or those for whom rewards are posted by various other entities public or private; but, without the primary source of revenue (commissions on the outstanding bail amounts owed by bondsmen to the courts), the pool of would be "Dogs" would be substantially smaller.

<sup>69</sup>See Laura Sullivan, *Bondsman Lobby Targets Pretrial Release Programs*, National Public Radio (Jan. 22, 2010).

<sup>70</sup>See Lee Hochberg, *Pushing the Boundies*, PBS Newshour (Sept. 12, 1997), available at [http://www.pbs.org/newshour/bb/law/july-dec97/bounty\\_9-12.html](http://www.pbs.org/newshour/bb/law/july-dec97/bounty_9-12.html) (last visited June 2, 2010).



taxpayers), a "free" contribution to the collective well-being, by apprehending fugitives without state expense. Those in the business understand this well, as long-time bounty hunter Bob Burton explains: "We Bounty Hunters have the best incentive to engage in a pursuit. No body, no booty."<sup>71</sup> Or, in the words of Wayne Spath, a bondsman from Florida, taxpayers would have to subsidize any alternative to the commercial system and, "Why should they pay for them? Why should they? When we can provide the same service for free? I'd rather see the money spent in parks, mental health issues, the homeless."<sup>72</sup> "Let the private sector do it," he continues, "[because] we do it better."<sup>73</sup>

At the same time, bounty hunters stress their success rates and draw out the implied contributions they make toward safer communities by getting fugitives off the street and returning them to the courts to stand trial. Indeed, they stress, it is precisely because they are financially motivated that they pursue with greater vigilance than traditional law enforcement agents, allowing them success rates of 80% for apprehensions, according to one source.<sup>74</sup> Moreover, while different parties bring different statistics to bear on this question, there is at least some evidence suggesting that states that eliminated commercial bondsmen (and implicitly eliminated bounty hunters)—opting instead for court deposits, promises to appear (i.e., recognizance), and/or work or residence restrictions—have seen their failure-to-appear rates for defendants "skyrocket."<sup>75</sup> The implication here is that without the attention (and pursuit) of individuals with vested financial interests in the matter (the bail amount for the bondsman and the commission for the bounty hunter), instances of flight necessarily escalate.

### CONCLUSION

For a topic that has captured our collective imagination and that is fed by fascination, bounty hunters have received surprisingly little attention from scholars. In some ways this makes sense. Bounty hunters, unlike police officers, are not agents of the law per se, and thus we cannot trace their lineage or track their activities as we can with

<sup>71</sup> See Pope, *supra* note 23, at 22.

<sup>72</sup> See Liptak, *supra* note 4.

<sup>73</sup> See Liptak, *supra* note 4.

<sup>74</sup> See Pope, *supra* note 23, at 18. See also Robert McCrie, *Bounty Hunters: Unusual Service that Tracks Down Bail Bond Jumpers*, 13 *Security Letter* 3, 3-4 n.2 (1983) (quoting Stan Rivkin, bounty hunter: "We work better than the police. Police work bankers' hours. After 10pm they are told not to make arrests because it will run into overtime.");

<sup>75</sup> See Liptak, *supra* note 4.

agents of law enforcement. As private citizens engaged in an ambiguously defined practice of fugitive pursuit, bounty hunters are not a "force," or an institution, in the way that we think of a police department or the Federal Bureau of Investigation, for example; and so, to understand their emergence and evolution in our culture requires historical investigation and analytical reconstruction. With "Dog, the Bounty Hunter" as the frame of reference throughout, it is my hope that this Essay provides the first of the proverbial "dots" that we must connect in order to understand the origins, influence, and implications of these extralegal agents of law enforcement.