Abolishing Bounty Hunters

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Bounty hunters are creatures of the for-profit bail industry. They are private citizens hired by private-sector bail bond companies and vested with the power to arrest their fellow citizens. Unlike police officers, they are free from constitutional constraints. Bounty hunting, which is legal in only the United States and the Philippines, is a little discussed and underregulated aspect of the American criminal legal system. The few legal scholars who have engaged with bounty hunting in the past have mostly argued that bounty hunters should either be designated as state actors for constitutional purposes or made subject to more stringent regulation by the states. This Note responds to both arguments and concludes that (1) any attempt to designate bounty hunters as constitutional state actors would face serious obstacles and, even if successful, produce only limited benefits and (2) Congress and the states, some of which do not regulate bounty hunting at all, should adopt common-sense regulations that, for example, impose upon bounty hunters educational, training, and insurance requirements. This Note ultimately concludes, however, that the practice of bounty hunting should be abolished in the United States. Abolition is not a radical idea; the states of Illinois, Oregon, Kentucky, and Wisconsin have already eliminated bounty hunters, and their experiences have shown abolition to be both a viable and durable—not to mention just—policy.

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INTRODUCTION

After a private-sector bail bond corporation hired them as bounty hunters in April 2017, five members of a paramilitary group in Montana—a state where bounty hunting was unregulated—visited Eugene Mitchell's home after nine o'clock at night, forcefully kicked in the door, entered his bedroom, and arrested him at gunpoint in front of his wife and four-year-old daughter.[1] Late one night the previous year, as police officers stood by, three private-sector bounty hunters in North Dakota—another state that does not regulate bounty hunters[2]—kicked down the door of a resident's home without a warrant in an effort to find the resident's brother; they did not find anyone home but did report to police that they found marijuana plants inside, resulting in the resident being arrested when he returned.[3] During a more recent incident that was partially captured on video,[4] privately employed bounty hunters from Pennsylvania—allegedly attired in "gear designed to make them look like police officers" and accompanied by Buffalo, New York, police—"burst" into a Buffalo home around midnight with guns drawn and conducted a "violent, terrifying, warrantless" search for an alleged bond-jumper who did not reside at the address.[5] Despite a lack of probable cause or consent from the occupants, the bounty hunters held the occupants—including a pregnant woman and a three-year-old girl—at gunpoint, according to a federal civil rights lawsuit filed in early 2021 under 42 U.S.C. § 1983.[6]

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1. Mitchell v. First Call Bail & Sur., Inc. (*Mitchell I*), 412 F. Supp. 3d 1208, 1214–15 (D. Mont. 2019).

2. *See* Curtis Waltman, *Bail Enforcement Agents (Insurance Department)*, MUCKROCK (Apr. 25, 2017), https://www.muckrock.com/foi/california-52/bail-enforcement-agents-department-of-insurance-36491/ [https://perma.cc/UK6B-M4LD] (containing statement of North Dakota official that the phrase "bounty hunter" and other like terms were "not recognized under North Dakota law"); *see also* Brian R. Johnson & Ruth S. Stevens, *The Regulation and Control of Bail Recovery Agents: An Exploratory Study*, 38 CRIM. JUST. REV. 190, 200 (2013) (finding that North Dakota had "no regulatory controls over the qualifications" of bounty hunters).

3. *See* State v. Hedstrom, 2017 ND 156, ¶¶ 4–5, 897 N.W.2d 909, 911–12.

4. *See* Daniel Telvock, *Armed Bounty Hunters Terrify Family with Midnight Warrantless Search*, WIVB-TV (Feb. 10, 2021, 10:18 AM), https://www.wivb.com/news/investigates/armed-bounty-hunters-terrify-family-with-midnight-warrantless-search [https://perma.cc/R3HH-P3T7].

5. Verified Complaint & Jury Demand at 3–4, 11, 14, 16–17, Reinhardt v. City of Buffalo, No. 1:21-cv-206 (W.D.N.Y. Feb. 4, 2021).

6. *Id.* at 4. In November 2021, one of the bounty hunters involved in the incident, who did not have a state license, pleaded guilty to ten misdemeanors for his actions during the incident; a second armed bounty hunter had not been identified or charged. *See* Daniel Telvock & Chris Horvatits, *'Terrifying' Raid by Unlicensed Bounty Hunters in Buffalo Ends with Guilty Plea*, WIVB-TV (Nov. 29, 2021, 7:24 PM), https://www.wivb.com/news/local-news/buffalo/terrifying-raid-by-unlicensed-bounty-hunters-in-buffalo-ends-with-guilty-plea/ [https://perma.cc/BM3B-QXXK]. As of late 2021, the civil lawsuit was still in the motion-to-dismiss stage. *See* Reinhardt v. City of Buffalo, No. 1:21-cv-206, 2021 WL 2155771 (W.D.N.Y. May 27, 2021).

Bounty hunters[7] are creatures of the commercial, or for-profit, bail industry. Bail bond companies hire them to rearrest defendants who fail to appear in court.[8] Unlike police officers, however, bounty hunters are free from constitutional constraints and have mostly avoided being designated by courts as state actors.[9] This privately held authority to capture human beings has resulted in injuries to suspects, third parties, and bounty hunters themselves.[10] Indeed, the above stories from Montana, North Dakota, and New York represent just some of the latest entries in a series of similar incidents involving bounty hunters from both the recent past and previous decades.[11] The stories suggest that bounty hunting continues to negatively impact Americans' lives, even in New York, a state that has arguably been at the forefront of implementing the demands of the current movement for bail reform.[12]

Bounty hunting is a little discussed[13] aspect of the criminal legal systems administered by state and local governments, and as a result, the practice may be poorly understood. Bail policies in the United States are carried out via a complex interstate web of public and private actors and of regulations that differ by jurisdiction, potentially obscuring the practice of bounty hunting and the identities and affiliations of those who do it. During the incident that gave rise to the Buffalo lawsuit, police officers stood on the front porch of the home, and a home surveillance camera picked up audio of police discussing the bounty hunters; one officer said, "I don't know what agency that is either," and the other responded, "Me, either. They're from [Pennsylvania], I think."[14]

Attempts to federally regulate bounty hunters have failed. In fact, more than two decades before the Buffalo lawsuit was filed, Buffalo's police commissioner traveled to Washington, D.C., to testify in support of a bill that represented one

7. Bounty hunters are also known as bail recovery agents, bail enforcement agents, runners, solicitors, surety recovery agents, and bail bond enforcers. Jordan Gross, *Devil Take the Hindmost: Reform Considerations for States with a Constitutional Right to Bail*, 52 AKRON L. REV. 1043, 1076 (2018).

8. *Id.*

9. Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731, 733–35, 763 (1996).

10. *Id.* at 735.

11. *See, e.g.*, *Citizen Protection Act of 1998: Hearing on H.R. 3168 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 105th Cong. 8–12 (1998) [hereinafter *Hearing on H.R. 3168*] (statement of Rep. Asa Hutchinson) (detailing more than two dozen incidents from across the United States involving "abuses" by bounty hunters).

12. New York's state legislature eliminated cash bail in 2019 for most misdemeanors and nonviolent crimes. Jesse McKinley & Vivian Wang, *New York State Budget Deal Brings Congestion Pricing, Plastic Bag Ban and Mansion Tax*, N.Y. TIMES (Mar. 31, 2019), https://www.nytimes.com/2019/03/31/nyregion/budget-new-york-congestion-pricing.html. Even after the legislature rolled back some of its changes to bail the following year, the "heart" of the reforms remained intact. Taryn A. Merkl, *New York's Latest Bail Law Changes Explained*, BRENNAN CTR. FOR JUST. (Apr. 16, 2020), https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained [https://perma.cc/T7F6-EJ97].

13. *See* Gross, *supra* note 7, at 1076–77 (calling the practices of bounty hunters "under-examined").

14. Telvock, *supra* note 4.

such attempt at regulation.[15] "Unfortunately, many of these bounty hunters are not trained and . . . pose a significant danger to innocent citizens and law enforcement agents," he said, discussing a 1998 incident in which a Buffalo officer was killed while helping a bounty hunter pursue an individual who was wanted in Maryland but who the Buffalo police would not otherwise have arrested because of extradition rules.[16] The bill and others like it never garnered enough support to pass.[17] In contrast, the states of Illinois, Oregon, Kentucky, and Wisconsin abolished commercial bail, and thus bounty hunting along with it, long ago.[18] As the experiences of those states show, *commercial* bail need not exist everywhere that *cash* bail exists.[19]

The under examination of private-sector bounty hunting can be contrasted with the extensive contemporary discussion of cash bail. A modern movement for bail reform has arisen, gained steam, won victories, and faced setbacks, all while generating significant public debate in recent years.[20] Yet bounty hunting has not received significant scholarly attention in decades, and scholars who have analyzed the issue in the past have mostly argued not that bounty hunting should be

15. *See Hearing on H.R. 3168*, *supra* note 11, at 87–88 (statement of R. Gil Kerlikowske, Police Comm'r, Buffalo, N.Y.).

16. *Id.*

17. *See* Stephen N. Freeland, Comment, *The Invisible Badge: Why Bounty Hunters Should Be Regarded as State Actors Under the Symbiotic Relationship Test [*United States v. Poe*, 556 F.3d 1113 (10th Cir. 2009)]*, 49 WASHBURN L.J. 201, 211–12, 212 nn.83 & 85 (2009) (stating that the bill faced opposition and never passed and that similar bills were introduced but died in committee).

18. *See* Matthew L. Kaufman, Note, *An Analysis of the Powers of Bail Bondsmen and Possible Routes to Reform*, 15 N.Y.L. SCH. J. HUM. RTS. 287, 313–17, 315 n.192 (1999) (stating that Illinois in 1964, Kentucky in 1976, and Wisconsin in 1979 abolished commercial bail); Cliff Collins, *The Question of Commercial Bail: Bail Industry Wants Oregon to Return to a System It Once Rejected*, OR. ST. BAR BULL., Oct. 2014, at 17, 18 (stating that Oregon abolished commercial bail in 1974); *see also* Sheila Cohen, *Bail Bond Industry Fights Back Against Moves to Limit or End Cash Bail*, WIS. PUB. RADIO (Jan. 21, 2019, 6:00 AM), https://www.wpr.org/bail-bond-industry-fights-back-against-moves-limit-or-end-cash-bail [https://perma.cc/WGV6-QBGH] (stating that Wisconsin abolished bail bonding in 1979).

19. In 2021, however, Illinois also became the first state to completely eliminate cash bail. Maria Cramer, *Illinois Becomes First State to Eliminate Cash Bail*, N.Y. TIMES (Feb. 23, 2021), https://www.nytimes.com/2021/02/23/us/illinois-cash-bail-pritzker.html. This Note uses the term *commercial bail* to refer to bail systems that allow private-sector actors, such as bail bondsmen and bounty hunters, to seek profit. The Note uses the broader term *cash bail* to refer to any system that sometimes requires defendants to pay money to secure pretrial release. Thus, all commercial bail systems are cash bail systems, but cash bail systems run solely by the state that do not involve profit-seeking private actors are not commercial bail systems. For example, although it abolished commercial bail in 1979, Wisconsin still uses cash bail. *See, e.g.*, Emily Hamer & Sheila Cohen, *Poor Stay in Jail While Rich Go Free: Rethinking Cash Bail in Wisconsin,* WIS. PUB. RADIO (Jan. 21, 2019, 6:00 AM), https://www.wpr.org/poor-stay-jail-while-rich-go-free-rethinking-cash-bail-wisconsin [https://perma.cc/KL55-Q3V3].

20. *See* Bethany Rodgers, *Utah Sought to Make Its Bail System More Fair to the Poor. And Months Later, Some Lawmakers Are Calling It a Disaster.*, SALT LAKE TRIB. (Feb. 26, 2021, 4:01 PM), https://www.sltrib.com/news/politics/2021/02/26/utah-sought-make-its-bail/ (stating that a bail reform movement has arisen across the United States in recent years); Jamiles Lartey, *New York Rolled Back Bail Reform. What Will the Rest of the Country Do?*, MARSHALL PROJECT (Apr. 23, 2020, 6:00 AM), https://www.themarshallproject.org/2020/04/23/in-new-york-s-bail-reform-backlash-a-cautionary-tale-for-other-states [https://perma.cc/3AZE-BLZM] (noting that the bail reform movement "looked like a national wave just a couple of years ago, as states from Vermont and New Jersey to Alaska and Georgia rolled out new bail policies").

abolished in light of the experiences of the four states that already have done so, but that bounty hunters should be designated as state actors[21] or made subject to more stringent regulation by the states.[22] Moreover, when scholars have discussed reforming or eliminating commercial bail in recent years, they have mostly avoided the intertwined issue of bounty hunting.[23]

Even under bail reformers' most optimistic scenarios, the bail system will remain a reality for criminal defendants in most states for years to come. This Note thus seeks to address the issue of bounty hunting in new ways—by revisiting it in today's era of debate over cash bail and by including it within the more specific discussion about commercial bail. The Note argues that bounty hunting should be more heavily regulated but ultimately concludes that the superior policy is to abolish the practice entirely.

The Note's argument will proceed as follows. Part I will provide an overview of the history of legal theory governing bounty hunting and supposed justifications for bounty hunting in the United States. Part II will explore whether there exists a viable judicial or legislative avenue for designating bounty hunters as state actors for constitutional purposes and analyze the potential benefits and limitations of such a designation, concluding that even if it were possible to make bounty hunters state actors, the designation would be insufficient by itself to address the problems presented by bounty hunting. Part III will then argue that—because bounty hunting results too often in violent acts by politically unaccountable private citizens, breeds corruption, and arose in response to conditions no longer present in the modern era—policymakers should consider adopting legislative regulations that would protect the public from the injuries that unregulated bounty hunters might inflict. Part IV will conclude, however, that abolishing, not merely regulating, the practice of bounty hunting is the better policy choice—a conclusion bolstered by the experiences of Illinois, Oregon, Kentucky, and Wisconsin, which have eliminated the commercial bail industry and implemented policies to ensure court appearances without using bounty hunters.

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21. *See, e.g.*, Drimmer, *supra* note 9, at 788; Kaufman, *supra* note 18, at 302; Adam M. Royval, United States v. Poe*: A Missed Opportunity to Reevaluate Bounty Hunters' Symbiotic Role in the Criminal Justice System*, 87 DENV. L. REV. 789, 790 (2010); Emily Michael Stout, Comment, *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).

22. *See, e.g.*, Andrew DeForest Patrick, Note, *Running from the Law: Should Bounty Hunters Be Considered State Actors and Thus Subject to Constitutional Restraints?*, 52 VAND. L. REV. 171, 199 (1999); John A. Chamberlin, Note, *Bounty Hunters: Can the Criminal Justice System Live Without Them?*, 1998 U. ILL. L. REV. 1175, 1204–05.

23. *See, e.g.*, Gross, *supra* note 7, at 1103; Alex Kornya, Danica Rodarmel, Brian Highsmith, Mel Gonzalez & Ted Mermin, *Crimsumerism: Combating Consumer Abuses in the Criminal Legal System*, 54 HARV. C.R.-C.L. L. REV. 107, 153–54 (2019); Rachel Smith, Note, *Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed*, 25 GEO. J. ON POVERTY L. & POL'Y 451, 458 (2018); Thanithia Billings, Note, *Private Interest, Public Sphere: Eliminating the Use of Commercial Bail Bondsmen in the Criminal Justice System*, 57 B.C. L. REV. 1337, 1342 (2016).

I. BOUNTY HUNTING IN THE UNITED STATES: HISTORY, THEORY, AND JUSTIFICATIONS

This Part will first explore the history of bounty hunting in England and the United States. It will then analyze the legal theory giving rise to the power vested in bounty hunters today. Finally, it will characterize some of the justifications often given for this involvement of the private sector in the criminal legal system and briefly provide responses to those justifications.

A. THE HISTORY OF BOUNTY HUNTING FROM ANCIENT ENGLISH COMMON LAW TO THE U.S. SUPREME COURT'S *TAYLOR V. TAINTOR* DECISION

Bounty hunters arose from a system that dates to pre-Norman England. The United Kingdom eventually did away with the practice of arresting citizens for private profit, but it survived and thrived on the other side of the Atlantic Ocean due to unique American conditions associated with the westward expansion of the United States in the 1800s. And the rules governing American bounty hunting have changed little since then.

First, to understand the way bounty hunters function in today's criminal legal system, one must know how bail bonds work. A previous commentator has provided a helpful overview:

> Foremost, the individual who we conventionally refer to as a "bounty hunter" is usually commissioned for service by a bail bondsman to locate and apprehend those who have "skipped" or "jumped" bail. . . . [T]he 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."
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> . . . .
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> . . . [W]ithout the option of secure, supervised release . . ., judicial officers would tend to "set financial conditions of release that exceeded the defendant's ability to pay . . . ." 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 . . ., that "someone" was a bail agent; or, as they are more commonly known, a (bail) bondsman.
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> 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 authority over his principal. 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 (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. 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.[24]

Of course, defendants with adequate finances can post the bond—usually equal to ten percent of the bail amount—themselves; in such cases, if the defendant fails to appear at trial, the defendant forfeits the bond and becomes liable for the remainder of the bail amount.[25]

The English practice of releasing defendants on bail pending trial has ancient origins that predate the eleventh-century Norman Conquest.[26] By the thirteenth century, the English bail system began to resemble the modern American one—sheriffs often released prisoners into the custody of a surety, typically one of the defendant's acquaintances and a responsible community member who promised to pay the sheriff a sum if the prisoner failed to appear at trial.[27] Attorney Jonathan Drimmer, who has been described as one of America's "few experts" on the law governing bounty hunters,[28] has explained that the common law "treated custody as a single, continuous event, recognizing no distinction between state imprisonment and a surety's guardianship" and "failed to differentiate between a sheriff's recapture of an escaped suspect and a surety's arrest of a suspect to transfer custody back to the sheriff to avoid forfeiting bail."[29]

In the late seventeenth century, Britain—still a decentralized society with no regular police force—institutionalized standing incentives for the capture of suspected criminals when Parliament enacted a statute offering rewards to people who apprehended those accused and later convicted of crimes such as highway robbery, burglary, and theft of livestock.[30] Private citizens thus obtained a pecuniary interest in entering what one scholar has called the "'business' of pursuit—a business that continues to this day in the United States."[31] But the British practice of arresting fellow citizens for private profit was plagued by corruption and scandal and began to be phased out with the formation of the London Metropolitan Police in 1829.[32]

The involvement of private-sector, profit-seeking actors in securing suspected criminals for prosecution survived in America because of the development of the commercial bail industry, which exists today only in the United States and the

24. Brian K. Pinaire, *Who Let (The) Dog Out? On the British Roots of American Bounty Hunting*, 47 CRIM. L. BULL. 1169, 1171–74 (2011) (footnotes omitted).

25. Drimmer, *supra* note 9, at 741.

26. *Id.* at 744.

27. *Id.* at 744–45.

28. *Hearing on H.R. 3168*, *supra* note 11, at 44 (statement of Rep. Charles T. Canady, Chairman, H. Subcomm. on the Const.).

29. Drimmer, *supra* note 9, at 745–46.

30. Pinaire, *supra* note 24, at 1176.

31. *Id.* at 1177.

32. *Id.* at 1181.

Philippines.[33] The American bounty hunting industry arose in response to the rapid expansion of the United States.[34] In England, citizens in most towns had limited mobility and knew each other, and a sheriff often could use his own acquaintance with defendants and sureties to gauge their trustworthiness. American defendants in frontier towns, meanwhile, lacked deep ties to the community and therefore found it difficult to obtain sureties familiar and acceptable to the courts.[35] The private market provided a solution in the form of commercial bail bondsmen, but westward expansion and its promise of potential escape for defendants presented a difficulty for the bondsmen, as well—thus the market gave birth to bounty hunters, who inherited via principles of agency law the bondsmen's contractual powers to pursue and arrest the accused.[36]

In 1873, the U.S. Supreme Court's opinion in *Taylor v. Taintor*[37] summarized the powers of bounty hunters in dicta that is still referenced often today.[38] Writing for the Court, Justice Swayne declared:

> 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. In 6 Modern it is said: "The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge."[39]

About 150 years later, American bounty hunters still celebrate the Court's language in *Taylor*, including it in instruction manuals and memoirs.[40]

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33. *See id.* at 1182; *see also* Louis Jacobson, *Are U.S., Philippines the Only Two Countries with Money Bail?*, POLITIFACT (Oct. 9, 2018), https://www.politifact.com/factchecks/2018/oct/09/gavin-newsom/are-us-philippines-only-two-countries-money-bail/ (recognizing that only the United States and the Philippines have a cash bail system dominated by commercial bail bondsmen).

34. *See* Drimmer, *supra* note 9, at 748–49, 749 n.94.

35. *See id.* at 748–49.

36. *See id.* at 749–51.

37. 83 U.S. (16 Wall.) 366 (1873).

38. *See Mitchell I*, 412 F. Supp. 3d 1208, 1216 (D. Mont. 2019) (characterizing the "oft quoted passage" from *Taylor* as dicta).

39. *Taylor*, 83 U.S. (16 Wall.) at 371–72 (footnote omitted).

40. Jeff Winkler, *The Troubling Business of Bounty Hunting*, GQ (July 1, 2019), https://www.gq.com/story/my-time-as-a-bounty-hunter [https://perma.cc/YT99-VPUX] ("There's not a bail enforcement how-to book out there that doesn't reference *Taylor v. Taintor* in the first three pages. It's mentioned, too, in the introductions of a half-dozen memoirs with titles like *Gotcha!* and *Trackdown*. It's in Dog the Bounty Hunter's bestseller.").

B. THE PRIVATE LAW-BASED THEORY OF BOUNTY HUNTERS' POWER

Nineteenth-century courts also made it clear that a surety's (and thus by extension a bondsman's and a bounty hunter's) authority over the defendant arose out of the private contract between or relationship established by the parties.[41] It followed, then, as a federal district judge held in the 1898 case *In re Von Der Ahe*, that a bounty hunter traveling across state lines to arrest an absconded defendant without a warrant did not violate the U.S. Constitution.[42] That judge said:

> [T]here is a fundamental difference between the right of arrest by bail and arrest under warrant where such right to arrest is based upon a court process, which, per se, can have no extrajurisdictional power or efficacy. The latter right depends upon the process of the court which issued it, and necessarily such process confers no power outside that jurisdiction. The former arrest, viz. of principal by bail, is based upon the relationship which the parties have established between themselves, and consequently, as between the parties, is not confined to any locality or jurisdiction.[43]

Drimmer has argued that these courts were deploying a legal fiction—judges determined that the rights of bondsmen and bounty hunters "emanated from terms *implicit* in the private bail contract."[44] Drimmer's argument on this point is persuasive. But if one accepted the proposition that such oppressive terms *were* indeed objectively implicit in bail contracts, it would have been uncontroversial under the prevailing legal doctrine of the Gilded Age and the *Lochner v. New York*[45] era—that is, under a strictly limited state police power,[46] an objective theory of contract,[47] and a newly fashioned state action requirement[48]—to say that courts should not improperly interfere with the enforcement of the contract, regardless of whether the defendant subjectively intended to accept the implicit terms or whether social forces coerced the defendant into consenting to them.[49]

41. *See In re* Von Der Ahe, 85 F. 959, 960–61 (C.C.W.D. Pa. 1898); Worthen v. Prescott, 11 A. 690, 693 (Vt. 1887).

42. *In re Von Der Ahe*, 85 F. at 959–61, 963.

43. *Id.* at 960.

44. Drimmer, *supra* note 9, at 754 (emphasis added).

45. 198 U.S. 45 (1905).

46. *See, e.g.*, *id.* at 56.

47. *See, e.g.*, Embry v. Hargadine, McKittrick Dry Goods Co., 105 S.W. 777, 779 (Mo. Ct. App. 1907). *Embry* is reproduced in many contract law casebooks for the proposition that regardless of the parties' subjective intent, a binding contract exists where a reasonable person could infer an intent to be bound from the parties' conduct. *See* Embry v. Hargadine, McKittrick Dry Goods Co., QUIMBEE, https://www.quimbee.com/cases/embry-v-hargadine-mckittrick-dry-goods-co [https://perma.cc/RDX3-PZQL] (last visited Mar. 22, 2022) (listing casebooks that use the case).

48. *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883).

49. *Cf.* Coppage v. Kansas, 236 U.S. 1, 17 (1915) ("[W]herever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. . . . [I]t is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.").

Whether such a conclusion comports with the legal doctrine that has developed since the emergence of devices such as the unconscionability defense[50] is another question. In any case, the idea that a bounty hunter's power arises out of a private contract continues to hold sway in modern courts and has served as the basis for holdings that bounty hunters are not state actors and thus are not subject to constitutional constraints.[51]

C. THE SUPPOSED JUSTIFICATIONS FOR THE INVOLVEMENT OF BOUNTY HUNTERS IN THE CRIMINAL LEGAL SYSTEM

Common arguments made by those who support the involvement of bounty hunters in the criminal legal system do not hold up against statistics or the experiences of American states without commercial bail. One argument asserts that because of the commercial bail industry's profit motive and its assumption of the risk that defendants will fail to appear and thus cause significant financial liability to be imposed upon bail bondsmen,[52] bounty hunters recapture fugitives more efficiently than the police.[53] For instance, statistics published in the 1990s showed that bounty hunters returned to custody more than ninety-nine percent of defendants who contracted with commercial bondsmen and then skipped bail, while the police only rearrested between seventy-three and ninety-two percent of fugitives who did not contract with bondsmen.[54] Similarly, a 2007 report analyzing the seventy-five largest American counties showed that felony defendants released on surety bond appeared in court at a higher rate (eighty-two percent) than those released on recognizance (seventy-four percent).[55] Of defendants who failed to appear, those released on surety bond were the least likely to remain at large after one year (nineteen percent remained at large, compared to twenty-eight percent overall).[56]

Statistics published elsewhere, however, suggest that the story may not be so simple. A 2014 article compared the eighteen percent nationwide failure-to-appear rate for felony defendants released on surety bonds from the 2007 report

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50. *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

51. *See* United States v. Rose, 731 F.2d 1337, 1345 (8th Cir. 1984) (holding that the Fifth Amendment does not apply to bondsmen who "were exercising on behalf of the bonding company a private contract right outside the jurisdiction of the courts and law enforcement officials of the State of Kansas"); Ouzts v. Md. Nat'l Ins. Co., 505 F.2d 547, 551, 555 (9th Cir. 1974) (en banc) (noting that bondsman's right "arises out of a contract between the parties," and holding the activities of the bond company and its agents were not state action); *Mitchell I*, 412 F. Supp. 3d 1208, 1216–17 (D. Mont. 2019) ("The bondsman's privilege is a private privilege that arises from the contractual relationship between the parties; it is not governed by criminal procedure." (citation omitted)). *But see* Jackson v. Pantazes, 810 F.2d 426, 430 (4th Cir. 1987) (holding that the bondsman was a "state actor" and could be, along with police officer with whom he cooperated, potentially liable for constitutional rights violation where they forcibly entered plaintiff's home and used force against her).

52. *See* Chamberlin, *supra* note 22, at 1181–82.

53. *See* Patrick, *supra* note 22, at 176 & n.33.

54. *Id.* at 176 n.33.

55. *See* THOMAS H. COHEN & BRIAN A. REAVES, DOJ, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 8–9 (2007).

56. *See id.*

to the felony failure-to-appear rate in Kentucky, where for-profit bail is outlawed, and found that the rate in Kentucky was only six percent.[57] Likewise, the District of Columbia's failure-to-appear rate was twelve percent despite a lack of bail bondsmen,[58] while the rate in bail-friendly Dallas was twenty-six percent.[59] And in commercial bail-free Wisconsin, populous Milwaukee County's failure-to-appear rate was just sixteen percent in 2012.[60]

Another argument in support of bail bonds and bounty hunters is that they grant defendants who would not otherwise secure pretrial release the ability to remain free before they are tried for the offenses they have been accused of committing, vindicating their liberty interests and the normative value that one should be considered innocent until proven guilty—and also saving the state the costs of jailing them.[61] Indeed, some data suggest that defendants detained before trial are three times more likely to serve a prison sentence than those charged with equivalent crimes but released prior to trial, perhaps reflecting the effect pretrial liberty has on an accused's ability to prepare a defense strategy.[62] Similarly, defendants released within twenty-four hours of arrest have been found to be less likely to commit new crimes than are defendants held for two to three days or longer.[63] If this argument holds up, driving away the commercial bail industry might leave

57. Shane Bauer, *Inside the Wild, Shadowy, and Highly Lucrative Bail Industry*, MOTHER JONES (May/June 2014), https://www.motherjones.com/politics/2014/06/bail-bond-prison-industry/.

58. Washington, D.C., moved away from cash bail in 1992; in 2017, the District "released 94[%] of all the people that [it] arrested without using money," and "[88%] made every single court appearance." Melissa Block, *What Changed After D.C. Ended Cash Bail*, NPR (Sept. 2, 2018, 7:43 AM), https://www.npr.org/2018/09/02/644085158/what-changed-after-d-c-ended-cash-bail [https://perma.cc/VL46-ARGZ]; *see also* Bauer, *supra* note 57 ("In Washington, DC, where there have been no bail bondsmen since 1992 . . . . 12% [of defendants] fail to appear for at least one court hearing . . . .").

59. Bauer, *supra* note 57.

60. *See* Dave Umhoefer, *Vos Says Study Shows Defendants Skip Court Appearances More Frequently in Wisconsin than in Other States*, POLITIFACT (June 24, 2013), https://www.politifact.com/factchecks/2013/jun/24/robin-vos/vos-says-study-shows-defendants-skip-court-appeara/ [https://perma.cc/CNQ6-54Z8]. One Wisconsin lawyer who supported a return to commercial bail acknowledged that she could not find statistics showing that Wisconsin's failure-to-appear rate is worse than the rate in other states because statewide data is elusive given county-based criminal court systems. *Id.*; *see also* Collins, *supra* note 18, at 19 (quoting lobbyist for criminal defense lawyers as saying there is no evidence that commercial bail-free Oregon experiences a relatively high failure-to-appear rate, and adding that because "appearance compliance is a county-based function . . . . Oregon's numbers would be like comparing apples to oranges").

61. *See* Drimmer, *supra* note 9, at 738 ("Bondsmen facilitate a defendant's release from prison before trial, saving the state significant expenses."); Patrick, *supra* note 22 ("Without [bounty hunters and bail bondsmen], . . . innocents are forced to linger in overcrowded jails . . . ."); *see also* Bauer, *supra* note 57 (reporting that New York pays a daily per-inmate cost of $460 to hold defendants pending trial).

62. Bauer, *supra* note 57.

63. *Id.* Framed in this way, the argument mirrors one made in response to the *Williams v. Walker-Thomas Furniture Co.* decision, in which the court held that because one of the parties to it lacked a meaningful choice about whether to consent to its terms, an installment contract might be unconscionable and thus unenforceable. 350 F.2d 445, 449 (D.C. Cir. 1965). *Williams* gave rise to a critique that the case's holding might result in decreased credit opportunities for the poor, *see* Gary Peller, *Privilege*, 104 GEO. L.J. 883, 904–05 (2016), ostensibly because the imposition of higher costs on those who provide such opportunities results in a higher probability that they will go out of business and that the market will no longer provide credit to the indigent at all.

defendants with no way to secure pretrial release, imposing onto the state the costs of keeping them in jail and onto defendants the costs of preparing a defense from behind bars.

But the argument only holds up if it is indeed true that the commercial bail industry *does* secure pretrial release for defendants who would not otherwise obtain it and if it is true that states *would* be forced to hold defendants in jail in the absence of commercial bail. And to the extent that those things are true, they are only true because states have chosen such outcomes. Certainly, a magistrate might not be satisfied that release on personal recognizance will assure a defendant's future appearance in court; the magistrate thus might impose a condition that the defendant, to secure release, deposit cash or execute a bail bond with sufficient surety.[64] But that imposition would reflect a mere policy determination about, among other considerations, the public costs of defendants' failures to appear for trials. There is no *requirement* that states allow commercial bail or even set bail at all.[65] Kentucky, for example, outlawed commercial bail, yet about three-fourths of defendants are released before trial, with the felony failure-to-appear rate at only six percent.[66] And the state has continued in its post-commercial-bail era to implement alternatives to pretrial detention.[67] Moreover, as just mentioned, commercial bail in Milwaukee County, Wisconsin, and Washington, D.C., is outlawed or rare, yet statistics suggest that the failure-to-appear rates in those jurisdictions compare favorably with the national average.[68] In sum, a system in which a defendant's choices are reduced to commercial bail or pretrial detention is the result of a policy choice rather than the inevitable outcome of the free market.[69]

II. THE STATE ACTION PROBLEM UNDER FEDERAL LAW

This Part will consider the argument, raised previously by scholars who have analyzed the issue of bounty hunting, that bounty hunters should be designated as state actors under federal law and thereby made subject to constitutional constraints, such as the Fourth Amendment prohibition against unreasonable searches and seizures.[70] First, this Part will discuss potential judicial avenues for

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64. *See* Todd C. Barsumian, Note, *Bail Bondsmen and Bounty Hunters: Re-Examining the Right to Recapture*, 47 DRAKE L. REV. 877, 882–83 (1999) ("The bondsmen's business has grown out of the need of those defendants who, even with the help of family and friends, are financially unable to pay the court-determined bail amount 'but who could afford the fee to pay the bondsman for assuming the full financial responsibility.'" (quoting RONALD GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM 94 (1965))).

65. *See* Cramer, *supra* note 19 (reporting that under the system recently approved in Illinois, "judges will no longer be able to set any kind of bail" and will only assess whether releasing the defendant puts the community at risk and "whether the defendant can be counted on to return to court").

66. Bauer, *supra* note 57.

67. *See infra* notes 186–87, 207–08 and accompanying text.

68. *See supra* notes 55–60 and accompanying text.

69. A similar response could answer critics of the *Williams* case. *See supra* note 63; Peller, *supra* note 63, at 905 ("But there is no 'natural,' 'unregulated,' 'market' supply of credit products.").

70. *See* sources cited *supra* note 21; U.S. CONST. amend. IV.

classifying bounty hunters as state actors, an approach that has mainly failed in federal courts. Next, it will discuss whether Congress could make bounty hunters state actors and the hurdles it would face if it tried. This Part will then acknowledge that designating bounty hunters state actors, if valid, may produce modest protections, such as the potential availability of the exclusionary rule, for people pursued by bounty hunters. Finally, this Part will argue, drawing on previous commentators' analyses but also taking the scholarship in this area in a new direction, that even if bounty hunters were classified as state actors, those seeking to redress or prevent bounty hunters' potential violations of constitutional law would still face numerous obstacles, and other problems associated with bounty hunting would remain unaddressed.

A. POTENTIAL JUDICIAL AVENUES FOR CLASSIFYING BOUNTY HUNTERS AS STATE ACTORS

Those who have previously argued that bounty hunters should be classified as state actors have invoked *Burton v. Wilmington Parking Authority*[71] and *Lugar v. Edmondson Oil Co.*,[72] two Supreme Court cases that asked whether plaintiffs could obtain remedies under the U.S. Constitution for injuries allegedly inflicted by parties that were nominally private rather than governmental;[73] however, the *Burton–Lugar* approach has mainly failed in federal courts when applied to bounty hunters. *Burton* concerned a private restauranteur who leased space in a publicly-owned parking facility and refused to serve a would-be customer on the basis of his race, and the Court held that the "benefits mutually conferred" between the restaurant and the City of Wilmington—the financing of the facility's construction depended on the government securing long-term leases with commercial tenants, including the restaurant—"together with the obvious fact that the restaurant is operated as an integral part of a public building," rendered the state government a "joint participant" in the challenged discrimination; the discrimination was consequently prohibited by the Fourteenth Amendment.[74] The Court's inquiry in *Burton* later became the basis for a test under which courts determine whether a sufficiently strong "symbiosis" or "nexus" between governmental and private parties exists and thus transforms what otherwise would be private action beyond the Constitution's reach into state action that *is* governed by the Constitution.[75] In *Lugar*, the Court outlined the general approach courts should take in deciding whether "deprivation of a federal right [may] be fairly attributable to the State":

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person

71. 365 U.S. 715 (1961).
72. 457 U.S. 922 (1982).
73. *See, e.g.*, Drimmer, *supra* note 9, at 781–83; Kaufman, *supra* note 18, at 296–99; Royval, *supra* note 21, at 795, 797–98; Stout, *supra* note 21, at 684–86.
74. *Burton*, 365 U.S. at 724–26.
75. *See Lugar*, 457 U.S. at 939; Jackson v. Pantazes, 810 F.2d 426, 430 (4th Cir. 1987).

> for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.[76]

The Court went on to say that applying the symbiosis, or nexus, test derived from *Burton* is one way to determine whether a party can be fairly considered a state actor under the second component of the *Lugar* state-action inquiry.[77]

Drimmer and other commentators have argued that the actions of bounty hunters should be imputed to the government under the symbiosis test because many (but not all) states regulate bounty hunters; bounty hunters save governments the costs of pretrial detention; bounty hunters depend on government policies to earn their livings; and the bail system presents the appearance of joint activity between the government, bondsmen, and bounty hunters.[78] There is at least one example of a court using a symbiosis rationale to designate bounty hunter conduct as state action. In *Jackson v. Pantazes*, the plaintiff in a 42 U.S.C. § 1983 action accused bail bondsman Pantazes and a police officer of forcibly entering her home against her will in order to find the plaintiff's son, who had failed to appear in court and turned out not to be present at the plaintiff's home.[79] The police officer did nothing to stop Pantazes's use of force against the plaintiff—which resulted in her arm being cut, her falling backward, and her being kneed in the thigh—and physically restrained her as Pantazes searched the plaintiff's home by kicking open and breaking unlocked doors, according to the plaintiff; the police officer also allegedly helped Pantazes drag the plaintiff out of the doorway before the men entered.[80] The Court of Appeals for the Fourth Circuit found that Pantazes's conduct was state action under *Burton* and *Lugar*:

> In this case, the symbiotic relationship between bail bondsmen and the Maryland criminal court system suffices to render Pantazes' conduct state action. Bondsmen depend, for their livelihood, upon the judicial use of a bail bond system, and they are licensed by the state. In return, bondsmen facilitate the pretrial release of accused persons, monitor their whereabouts and retrieve them for trial.[81]

Elsewhere on the federal appellate level, however, the Fifth, Eighth, Ninth, and Tenth Circuits—mostly presented with cases in which bounty hunters, unlike the bondsman in *Jackson*, were *not* assisted by police—rejected the symbiosis rationale.[82]

Thus contextualized, *Jackson* seems like it can be explained not because a nexus or symbiosis analysis would always necessarily yield state action when

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76. *Lugar*, 457 U.S. at 937.
77. *See id.* at 938–39.
78. *See, e.g.*, Drimmer, *supra* note 9, at 784–88; Kaufman, *supra* note 18, at 299–302; Royval, *supra* note 21, at 798, 807–08.
79. 810 F.2d at 427–28.
80. *Id.* at 428.
81. *Id.* at 430.
82. *See* Royval, *supra* note 21, at 798–808 (collecting and describing cases).

applied to bounty hunters but because of the alleged involvement in *Jackson* of a police officer who was a "joint participant"[83] in a bounty hunter's activities and affirmatively helped the bounty hunter by using force against the plaintiff. The majority approach in the federal courts is undoubtedly against using the symbiosis rationale to classify bounty hunters as state actors.

B. POTENTIAL LEGISLATIVE AVENUES FOR CLASSIFYING BOUNTY HUNTERS AS STATE ACTORS

Another potential avenue for designating bounty hunters as state actors under the U.S. Constitution is legislative rather than judicial—but this route, too, would present hurdles. Between the late 1990s and the mid-2000s, several bills that would have classified bounty hunters as state actors under § 1983 were introduced in Congress but failed to attract enough support to pass.[84] It is unclear, however, whether a congressional proclamation that bounty hunters are state actors under § 1983 would be enforced by the federal courts. The state action requirement and its symbiosis test are creatures of constitutional law[85] (and, more specifically, in the case of § 1983 litigation, the Fourteenth Amendment[86]) rather than of statute. And finding that private conduct is state action under the symbiosis test requires the conduct to be accompanied by a governmental act of *some* sort—in *Jackson*, the Fourth Circuit relied on Maryland's use of a bail bond system and its licensing of bondsmen,[87] and in *Burton*, the Supreme Court pointed to the local

83. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) ("The State has so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."); Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 196 & n.16 (1988) (rejecting respondent's contention that state university and National Collegiate Athletic Association (NCAA) were "joint participants" and that NCAA was thus a state actor under *Burton* because the university and the NCAA "were antagonists, not joint participants").

84. *See Hearing on H.R. 3168*, *supra* note 11, at 2 (statement of Rep. Charles T. Canady, Chairman, H. Subcomm. on the Const.) (stating during 1998 hearing that proposed bill would provide that bounty hunters act "under color of state law" for "purposes of civil and criminal liability," including under § 1983); Rebecca B. Fisher, *The History of American Bounty Hunting as a Study in Stunted Legal Growth*, 33 N.Y.U. REV. L. & SOC. CHANGE 199, 200 & nn.10 & 13 (2009) (noting that similar bills were introduced in 1999, 2005, and 2006); Freeland, *supra* note 17 (stating that the 1998 bill faced opposition and that similar bills designating bounty hunters as state actors were introduced but died in committee).

85. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982) ("As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments.'" (quoting Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156 (1978))).

86. *See id.* (noting that the Court in 1883 "affirmed the essential dichotomy set forth in [the Fourteenth] Amendment" between state power and private conduct (alteration in original) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 349 (1974))); Monroe v. Pape, 365 U.S. 167, 171 (1961) (stating that § 1983 was "one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment"); Albright v. Oliver, 510 U.S. 266, 271 (1994) ("Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979))).

87. *See* Jackson v. Pantazes, 810 F.2d 426, 428–30 (4th Cir. 1987).

government's solicitation of bids from potential commercial tenants and its ownership and operation of the facility in which the restaurant leased space.[88]

In the four federal appellate circuits that have already rejected the symbiosis rationale for bounty hunters, then, it is difficult to see how a mere congressional proclamation could change the Fourteenth Amendment state action analysis absent any new affirmative undertaking by state or local governments to cooperate with, regulate, or otherwise interact with bounty hunters because federal courts in these jurisdictions have determined that bounty hunters are not state actors under the Constitution, which overrides congressionally enacted statutes.[89] In other words, where courts have already decided that bounty hunters are not state actors as a matter of constitutional law, Congress cannot override that decision by statute.

It is possible, however, that—even though § 1983 was originally enacted to enforce the Fourteenth Amendment[90]—a proclamation that bounty hunters are state actors under § 1983, or a substantively equivalent proclamation that perhaps avoids phrases like "state action" and creates a cause of action independent of § 1983, might be enforceable as an exercise of Congress's Commerce Clause[91] power because bounty hunters and others in the commercial bail industry are engaged in for-profit activity.[92]

Congress could also impose the obligations of state actors upon bounty hunters by invoking its power under Section 5 of the Fourteenth Amendment to *prophylactically* enforce the provisions of that Amendment.[93] Under that strategy, Congress could, for instance, prohibit state officials from releasing a defendant from custody where the defendant would be subject at any point after release to the authority of someone not bound by constitutional obligations or obligations substantially identical to constitutional obligations.[94] Because it can only pass

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88. *See Burton*, 365 U.S. at 719–20, 723–25.

89. Moreover, a congressional proclamation that bounty hunters are state actors under § 1983 would fit uneasily within the conception of § 1983 as a vehicle for vindicating separately conferred rights rather than a source of substantive law. *See Albright*, 510 U.S. at 271 ("Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979))).

90. *Monroe*, 365 U.S. at 171; *Civil Rights Act of 1871*, FED. JUD. CTR., https://www.fjc.gov/history/timeline/civil-rights-act-1871 [https://perma.cc/GZ3E-PYS8] (last visited Mar. 23, 2022).

91. *See* U.S. CONST. art. I, § 8, cl. 3.

92. *See* United States v. Morrison, 529 U.S. 598, 613 (2000) ("[O]ur cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."). This would result in bounty hunters taking on state actor-like responsibilities as a matter of statutory rather than constitutional law. *Cf.* Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 241, 253 (using Commerce Clause authority to prohibit discrimination by private employers and private operators of public accommodations).

93. *See* U.S. CONST. amend. XIV, § 5; Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 727–28 (2003) ("Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.").

94. The prohibition would have to focus on state officials, not bounty hunters, because "the Fourteenth Amendment, by its very terms, prohibits only state action." *Morrison*, 529 U.S. at 621–22 (discussing Congress's power under Section 5 of the Fourteenth Amendment, and stating that the state action requirement is a "longstanding limitation on Congress' § 5 authority").

such a statute under Section 5 to deter or remedy constitutional violations, Congress might have to pair the prohibition with a finding acceptable to the federal courts that a pretrial system that, because of its imposition of bail, releases one class of defendants (those who can afford to post bail without resorting to a bail bondsman) who will *not* be subject to the authority of anyone without constitutional obligations and releases another class of defendants (those who cannot) who *will* be subject to that authority is unconstitutional under the Fourteenth Amendment, perhaps because it violates the Equal Protection Clause.[95] Even if a *particular* pretrial system wasn't imposing bail in a way that created the two classes of defendants, Congress has prophylactic power under Section 5 of the Fourteenth Amendment to *deter* an Equal Protection violation with legislation "congruen[t] and proportional[]" to the potential violation.[96]

It could be difficult to make the Equal Protection finding, since—because a classification based on ability to post bail is almost certainly not a "suspect classification"[97]—a pretrial system that results, via the imposition of bail, in some but not all defendants being released to the authority of those not subject to constitutional obligations would violate the Equal Protection Clause only if the imposition of bail bears no rational relation to a legitimate state interest.[98]

On the other hand, Congress could conceivably find support for the finding in an alternative branch of Equal Protection law that applies heightened judicial scrutiny where certain fundamental interests, such as interests in voting[99] and in

95. *See* U.S. CONST. amend. XIV, § 1. It is difficult to think of an avenue other than the Equal Protection Clause. The Fourth Amendment and the other Bill of Rights provisions that have been incorporated via the Fourteenth Amendment and that govern criminal trials and the investigation of crimes would not apply because, for instance, where bounty hunters conduct searches and seizures, no state official is involved in the search or seizure. And there is almost certainly no substantive due process right to be free from the authority of bounty hunters, as such a right would have to qualify, taking into account "[h]istory and tradition," as "so fundamental that the State must accord [the right] its respect." Obergefell v. Hodges, 576 U.S. 644, 664 (2015). Given the long history of bounty hunting in America, it is highly doubtful that a federal court would designate such a right. An additional avenue may be the Eighth Amendment's relatively obscure Excessive Bail Clause, which "has been assumed" to apply to the states via the Fourteenth Amendment. Schilb v. Kuebel, 404 U.S. 357, 365 (1971); *see infra* note 103 (discussing *Schilb*); McDonald v. City of Chicago, 561 U.S. 742, 764 & n.12 (2010) (citing to *Schilb* for the proposition that the Excessive Bail Clause applies to the states); Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 153 (2021) (stating that "the Supreme Court has devoted precious little attention to the Excessive Bail Clause").

96. *Hibbs*, 538 U.S. at 728 (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997)); *see id.* at 727–28 ("Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.").

97. *E.g.*, James v. Valtierra, 402 U.S. 137, 144–45 (1971) (Marshall, J., dissenting) (upholding challenged government provision over dissenters' complaint that provision "explicitly singles out low-income persons").

98. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 579–80 (2003) (O'Connor, J., concurring in the judgment) ("Under our rational basis standard of review, 'legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.'" (citations omitted)).

99. *See, e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969) (applying heightened Equal Protection scrutiny where "a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others").

access to courts,[100] are burdened, hoping that federal courts would extend cases like *Douglas v. California*[101] and *Halbert v. Michigan*,[102] in which the Supreme Court held that in the specific context of the right to appointed counsel for an initial criminal appeal, governments cannot draw lines "between rich and poor."[103] The upshot is that even if Congress mustered the political will to pass a bill imposing the obligations of state actors on bounty hunters, lawmakers would have to give serious thought to the question of how the statute would survive judicial review.

C. THE POTENTIAL BENEFITS OF DESIGNATING BOUNTY HUNTERS AS STATE ACTORS

If bounty hunters *could* be designated as state actors in an enforceable way, such a designation would, absent a waiver, grant new protections to the criminal defendants they pursue. Indeed, bounty hunters would have to issue *Miranda* warnings[104] when detaining their quarries and, absent exigent circumstances, obtain warrants based upon probable cause.[105] And the state-actor designation would make the exclusionary rule available where bounty hunters obtain evidence in violation of the Fourth, Fifth, or Sixth Amendments[106]—at least some of the time.[107] In a note opposing the classification of bounty hunters as state actors,

100. *See, e.g.*, *infra* notes 101–03 and accompanying text.

101. 372 U.S. 353 (1963).

102. 545 U.S. 605 (2005).

103. *Douglas*, 372 U.S. at 357. Extending *Douglas* and *Halbert* would require distinguishing *Schilb v. Kuebel*, where the Supreme Court, applying deferential rational-basis review, rejected an Equal Protection challenge to Illinois's bail system, which fully refunded bail to those who paid the whole amount but charged a fee to those who only made a down payment of ten percent. *See* 404 U.S. 357, 358–62, 372 (1971). The Court relied in part on its inability on the record before it to "assume that the Illinois plan works to deny relief to the poor man merely because of his poverty," *id*. at 370, and on the challenger's concession that Illinois had, by adopting the challenged legislation, improved upon its previous system, which allowed for commercial bail and cost similarly situated defendants even more money, *id*. at 366 & n.10. The Court also said, "[T]he Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment. But we are not at all concerned here with any fundamental right to bail or with any Eighth Amendment-Fourteenth Amendment question of bail excessiveness." *Id*. at 365 (citations omitted); *see supra* note 95.

104. *See generally* Miranda v. Arizona, 384 U.S. 436, 479 (1966) (holding that individuals in custody must receive a clear warning of their right to remain silent, that anything they say will be used against them in court, that they have the right to counsel, and that if they are indigent a lawyer will be appointed to them).

105. *See* Drimmer, *supra* note 9, at 788–92 (arguing that bounty hunters should be subject to constitutional constraints).

106. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961); Stephanie Jurkowski, *Exclusionary Rule*, LEGAL INFO. INST. (June 2017), https://www.law.cornell.edu/wex/exclusionary_rule [https://perma.cc/5LHN-CCRE] (stating that the exclusionary rule prevents the government from using most evidence gathered in violation of the Fourth, Fifth, or Sixth Amendments).

107. *See* Harris v. New York, 401 U.S. 222, 226 (1971) (holding evidence inadmissible under *Miranda* to show guilt can nevertheless be used to impeach credibility); Hudson v. Michigan, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring in part and concurring in the judgment) ("Today's decision determines . . . that in the specific context of the knock-and-announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression."); Herring v. United States, 555 U.S. 135, 137 (2009) (holding that the exclusionary rule does not apply where Fourth Amendment violation resulted from negligence).

however, Andrew DeForest Patrick argues that the primary theoretical justification for the exclusionary rule—deterring state actors' potential future misconduct—is not as persuasive when the rule is applied to evidence gathered by bounty hunters as it is when it suppresses evidence gathered by police:

> Bounty hunters' incentives are not related to the ultimate conviction of the defendant; professional manhunters need only return a fugitive to custody in order to secure a portion of the outstanding bond. Since a court's decision to 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 investigatory 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.[108]

Regardless of the theoretical justification for the exclusionary rule or the effect the rule would have on bounty hunters' incentives, Patrick's note does not appear to dispute that if bounty hunters were classified as state actors, the exclusionary rule would serve to suppress evidence in cases where bounty hunters gather it in violation of the Fourth, Fifth, or Sixth Amendments, which is not the case where bounty hunters are considered private actors and turn evidence over to police.[109]

In the § 1983 context, Patrick's note argues that designating bounty hunters as state actors and thus potentially subjecting them to civil liability for violating others' constitutional rights would serve to merely duplicate state tort law:

> [G]iven 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 search 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.[110]

But this argument fails to grapple with one of the main reasons § 1983 was enacted, which was "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and

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108. Patrick, *supra* note 22, at 194.

109. *See, e.g.*, State v. Hedstrom, 2017 ND 156, ¶¶ 6, 13, 897 N.W.2d 909, 911–13 (holding that the district court did not err in denying defendant's motion to suppress evidence where bounty hunters conducted warrantless search of defendant's home and subsequently informed police that marijuana plants were inside).

110. Patrick, *supra* note 22, at 193 n.150.

immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."[111] Indeed, someone hoping to bring a claim against a bounty hunter might prefer a federal forum, perhaps because state judges in the jurisdiction are not appointed but instead are elected by a community in which fugitives lack an influential political lobby.[112] And, as Patrick's note acknowledges, § 1983 may provide a remedy not available under state tort law if "bounty hunter misconduct can be tied to a discriminatory animus."[113] It is thus important not to diminish the benefits that *would* accrue to defendants if bounty hunters were subject to the duties of state actors.

D. THE LIMITATIONS OF DESIGNATING BOUNTY HUNTERS AS STATE ACTORS

If bounty hunters were considered state actors, obstacles would nevertheless remain for § 1983 plaintiffs. The Supreme Court has made clear that plaintiffs who bring § 1983 claims cannot recover by using a theory of vicarious liability such as *respondeat superior*.[114] Thus, even a plaintiff who successfully establishes a bounty hunter's violation of constitutional rights likely could not collect damages by reaching the assets of the bonding company that hired the bounty hunter.[115] And the bounty hunter may not be required to carry liability insurance because many states have declined to impose any regulations on the practice of bounty hunting.[116] Because bounty hunters rarely make large salaries,[117]

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111. Monroe v. Pape, 365 U.S. 167, 180 (1961).

112. *See Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures [https://perma.cc/ULY7-RM9L] (stating that thirty-nine U.S. states use elections to select judges "at some level of court").

113. Patrick, *supra* note 22, at 193 n.150.

114. Pembaur v. City of Cincinnati, 475 U.S. 469, 479 (1986) ("[W]e concluded that § 1983 could not be interpreted to incorporate doctrines of vicarious liability." (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692–94, 692 n.57 (1978))).

115. Assuming a world in which bounty hunters are state actors and the bondsmen who hire them remain private actors, one could try to argue that although there is no *respondeat superior* liability under § 1983 for municipalities, there should be such liability for private actors. To succeed, such an argument would likely have to distinguish between the two categories of liability by arguing that recognizing the latter category (§ 1983 *respondeat superior* liability for private actors) as valid would not be out of step with § 1983's legislative history, *see* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978), or with the common law at the time § 1983 was enacted, *see* Owen v. City of Independence, 445 U.S. 622, 638 (1980).

116. *See* Johnson & Stevens, *supra* note 2 (finding that eighteen states—Alabama, Alaska, California, Hawaii, Idaho, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Vermont, and Wyoming— "have no regulatory controls over the qualifications of bail recovery agents," although Idaho made bail agents responsible for bounty hunters acting on their behalf); *see also infra* note 146 (clarifying that California took subsequent legislative action to regulate bounty hunters).

117. *See* Patrick, *supra* note 22, at 198 ("Bounty hunters rarely make more than $50,000 a year . . . ."); Luke Winkie, *Odd Job: The Couple Who Bounty Hunts Together, Stays Together*, VOX (Jan. 3, 2020, 10:00 AM), https://www.vox.com/2020/1/3/21035114/bounty-hunter-money-income-job [https://perma.cc/9JB9-73Q3] (quoting bounty hunter as saying that in a "good month," he and his partner split $10,000 per month but sometimes only split $3,000 per month when "business was slow").

victorious plaintiffs may find it difficult to actually recover their damage awards.[118]

As for the municipal liability that the Supreme Court has recognized apart from vicarious liability, it is difficult to see—because even if bounty hunters were considered state actors for the purposes of § 1983 claims, they would still be private-sector workers—how a plaintiff could recover damages from a local government for injuries inflicted by a bounty hunter, given the level of difficulty involved in recovering damages from local governments for injuries inflicted by the government's own employees.[119] Additionally, the doctrine of sovereign immunity could prohibit a plaintiff from recovering directly from a state government damages for injuries inflicted by a bounty hunter.[120]

Finally, if bounty hunters were designated as state actors, defendants may face pressure from bondsmen to contractually waive their constitutional rights. There is evidence that many bail bond agreements already contain waivers of certain rights,[121] and there is thus no reason to think that bondsmen and bounty hunters would not seek waivers of constitutional rights if those rights were made applicable.

The Supreme Court has said that a defendant's waiver of a constitutional right in the criminal process must be a "knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances,"[122] that there is "a presumption against the waiver of constitutional rights,"[123] and that "for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.'"[124] But the Supreme Court has also held that in the Fourth Amendment context, if the subject of a search is not in custody

118. *See* Patrick, *supra* note 22, at 198 (noting that bounty hunters' salaries render them "often unable to cover the civil damages they generat[e]").

119. *See, e.g.*, City of Canton v. Harris, 489 U.S. 378, 392 (1989) (holding that plaintiff's claim that she suffered constitutional deprivation because of city's failure to train employees "can only yield liability against a municipality where that city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants"); *see also id.* at 389 ("[A] municipality can be liable under § 1983 only where its policies are the 'moving force [behind] the constitutional violation.' . . . '[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives' by city policymakers." (second and third alterations in original) (first quoting *Monell*, 436 U.S. at 694; and then quoting *Pembaur*, 475 U.S. at 483 (plurality opinion))).

120. If Congress validly imposed the obligations of state actors onto bounty hunters via its power to enforce the Fourteenth Amendment, *see supra* notes 93–103 and accompanying text, Congress could concomitantly abrogate state sovereign immunity by "unequivocally" expressing its intent to do so. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 635 (1999) (quoting Seminole Tribe v. Florida, 517 U.S. 44, 55 (1996)). But a bounty hunter would not share in any liability imposed upon the state for noncompliance with such a congressional scheme because the scheme would only indirectly regulate bounty hunters by imposing duties on government officials. *See supra* note 94 and accompanying text.

121. *See infra* notes 155–58 and accompanying text.

122. Iowa v. Tovar, 541 U.S. 77, 81 (2004) (alteration in original) (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

123. Brookhart v. Janis, 384 U.S. 1, 4 (1966) (citation omitted).

124. *Id.* (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

and the state attempts to justify a search on the basis of the subject's consent, the state is not required, in order to establish that the consent was voluntary, to demonstrate that the subject knew of their right to refuse the search.[125] The Court reached that holding after noting that "[a]lmost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial"—rights such as the rights to counsel, to confrontation, and to a jury trial, as distinguished from the "vast[ly] differen[t] . . . rights guaranteed under the Fourth Amendment."[126] In litigation, of course, someone who entered into a bail bond agreement subject to constitutional waivers could try to raise contractual defenses to the waiver provisions,[127] in addition to any available constitutional defenses.

In sum, though, even if it were possible to classify bounty hunters as state actors, such a classification's modest benefits may be outweighed by its significant limitations. Moreover, the state action doctrine would fail to impose important extraconstitutional requirements upon bounty hunters, such as a minimum level of education and liability insurance—a consideration that this Note turns to in the next Part.

III. POLICYMAKERS MUST, AT LEAST, MORE HEAVILY REGULATE BOUNTY HUNTERS

Since a simple congressional declaration that bounty hunters are state actors would, at best, only produce limited protections for those they pursue, policymakers should consider regulating (or, in states that already regulate bounty hunters, further regulating) bounty hunters. This suggestion, of course, assumes that it is desirable to impose additional costs and duties onto bounty hunters and that it is also desirable to extend more protections to those members of society who, to many, are far from sympathetic: criminal defendants who fail to appear at trial.

This Part will thus argue first that leaving the status quo in place (or rolling back bounty hunter regulations that do exist) would unacceptably and anachronistically leave the public exposed to harms inflicted by private citizens who are not accountable to voters or the Constitution but are nevertheless vested with law enforcement powers. Next, it will propose legislative regulations that policymakers should consider supporting and that would protect the public from the injuries that unregulated bounty hunters might inflict.

125. Schneckloth v. Bustamonte, 412 U.S. 218, 248–49 (1973).

126. *Id.* at 237, 241.

127. *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) (stating that a contract may be unenforceable where "a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms"); *infra* notes 155–62 and accompanying text.

A. THE STATUS QUO RESULTS IN UNACCEPTABLE RISKS FROM UNACCOUNTABLE BOUNTY HUNTERS

In a one-month stretch in early 2021, the following newsworthy incidents involving bounty hunters occurred, demonstrating the risks bounty hunters present to the public:

- On February 24, two bounty hunters in Tennessee pulled into the driveway at the home of a friend of a suspect who had failed to appear in court, according to local authorities.[128] The bounty hunters tried to block the suspect in the driveway, and both bounty hunters shot at the suspect's car at different times and several minutes apart, the authorities said.[129] The bounty hunters were later arrested and charged with aggravated assault, reckless endangerment, wearing a bulletproof vest during the commission of a violent crime, and violating bounty hunter law.[130]
- On March 15, a bounty hunter tried to arrest a suspect in California, but the suspect fired multiple rounds at the bounty hunter, hitting him in the bicep and leg, according to local police.[131] The suspect reportedly remained at large a week later, and the bounty hunter's family and friends started a fundraiser to help the bounty hunter pay his medical bills.[132]
- That same month, in Kansas, a bounty hunter pleaded guilty to false impersonation and surrendered his state license after authorities accused him of driving a pickup truck equipped with a siren without authorization to do so, chasing another vehicle, and falsely claiming to be affiliated with the local prosecutor's office.[133]

These incidents echo a long line of similar stories from previous years and decades[134] and help demonstrate that underregulated bounty hunting puts criminal defendants, innocent bystanders, and bounty hunters themselves at risk of injury. That risk, arising from a system whose medieval roots vest in private citizens the police power to arrest, is unacceptable in a world in which the modern state is idealized by many as requiring a public monopoly on violence.[135]

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128. *Bounty Hunters Arrested for Violation of Bounty Hunter Law, Assault Charges*, WKRN-TV (Mar. 3, 2021, 11:54 AM), https://www.wkrn.com/news/crime-tracker/bounty-hunters-arrested-for-violation-of-bounty-hunter-law-assault-charges/ [https://perma.cc/35NG-QKG5].

129. *Id.*

130. *Id.*

131. Chris Biele, *Bounty Hunter Shot While Serving Warrant Calls for Suspect's Arrest*, FOX 5 SAN DIEGO (Mar. 22, 2021, 5:20 PM), https://fox5sandiego.com/news/local-news/bounty-hunter-shot-while-serving-warrant-calls-for-suspects-arrest/ [https://perma.cc/5AGP-JDJP].

132. *Id.*

133. *See Bounty Hunter, PI Gives Up License After Illegal Chase in SE Wichita*, KWCH (Mar. 22, 2021, 5:30 PM), https://www.kwch.com/2021/03/22/bounty-hunter-pi-gives-up-license-after-illegal-chase-in-se-wichita/ [https://perma.cc/GF9P-CTRS].

134. *See, e.g.*, *Hearing on H.R. 3168*, *supra* note 11.

135. *See* André Munro, *State Monopoly on Violence: Political Science and Sociology*, ENCYC. BRITANNICA (Mar. 6, 2013), https://www.britannica.com/topic/state-monopoly-on-violence (stating that the state monopoly on violence is "widely regarded as a defining characteristic of the modern state").

Moreover, in the country to which the American bail system traces its ancestry and in four U.S. states, bounty hunting does not exist today, and that is due at least in part to a sense among the public in those jurisdictions that allowing private profits in the arena of law enforcement bred abuses such as corruption[136] and rent seeking.[137] And the reason that the American commercial bail system arose in the first place—the relatively anonymous and rootless conditions on the rapidly expanding nineteenth-century American frontier[138]—no longer obtains as convincingly in our modern era of digital surveillance and interconnectedness.[139]

136. *See* Pinaire, *supra* note 24, at 1182 ("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."); James Pitkin, *Manhunter: Almost Every State Lets Bounty Hunters Chase Down Its Most Wanted. Why Doesn't Oregon?*, WILLAMETTE WK. (July 1, 2008, 5:00 PM), https://www.wweek.com/portland/article-9210-manhunter.html [https://perma.cc/QV7F-E2EM] (stating that "[b]ail bondsmen had a reputation for corruption" when Oregon abolished the industry in the 1970s); Michael A. Kennedy, Comment, *A Constitutional Analysis of Kentucky's Noncommercial Bail Bondsmen System*, 4 N. KY. L. REV. 121, 122 (1977) (noting that preamble of 1976 law abolishing commercial bail "points to the corruption of the commercial bail bonding system"); Kahn v. McCormack, 299 N.W.2d 279, 283 (Wis. Ct. App. 1980) (upholding Wisconsin law outlawing commercial bail, and recognizing that bail bond industry has been accused of "alleged tie-ins with police and court officials, involving kickbacks for steering defendants to particular bondsmen, [and] collusion and corruption aimed at setting aside forfeitures of bonds where the defendants have failed to appear" (quoting A.B.A., AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PRETRIAL RELEASE 62 (drft. ed. 1968))).

137. *See* Schilb v. Kuebel, 404 U.S. 357, 359 (1971) (stating that before Illinois abolished commercial bail, "the professional bail bondsmen system with all its abuses was in full and odorous bloom," that "the bail bondsman customarily collected the maximum fee . . . and retained that entire amount even though the accused fully satisfied the conditions of the bond," and that "[p]ayment of this substantial 'premium' was required of the good risk as well as of the bad" (footnote omitted)).

138. *See* Drimmer, *supra* note 9, at 748–50.

139. In the Information Age, people may struggle to become anonymous and be haunted—wherever they go in the physical world—by digitally accessible reminders of the past, regardless of their own tech-savvy or lack thereof. *See, e.g.*, Douglass Dowty, *Town and Village Warrants Added to Onondaga County Database*, SYRACUSE.COM (Mar. 22, 2019, 9:45 PM), https://www.syracuse.com/news/2011/06/town_and_village_warrants_adde.html (reporting that a publicly searchable database of active warrants in New York, updated automatically every hour, was expanded to include all town and village police department warrants in addition to New York's county police agencies and that police had access to wider database that included state warrants); Megan Leonhardt, *A Poor Credit Score Affects More than Just Getting a Loan or Credit Card*, CNBC (Dec. 17, 2020, 9:01 AM), https://www.cnbc.com/2020/12/17/poor-credit-scores-affect-more-than-just-getting-a-loan-or-credit-card.html [https://perma.cc/NY76-EPRW] (reporting that a bad credit score can affect one's housing, career, and relationship opportunities); Adam Satariano, *'Right to Be Forgotten' Privacy Rule Is Limited by Europe's Top Court*, N.Y. TIMES (Sept. 24, 2019), https://www.nytimes.com/2019/09/24/technology/europe-google-right-to-be-forgotten.html (describing a limitation to the European Union's "right to be forgotten" law, which allows people to request that a website remove material that is old, inaccurate, irrelevant, or excessive); Chris Stokel-Walker, Opinion, *It's Time America Adopted 'The Right to Be Forgotten,'* INSIDER (Feb. 7, 2021, 10:07 AM), https://www.businessinsider.com/newspapers-offering-right-to-be-forgotten-practice-widely-adopted-consistent-2021-1 (stating that the United States does not have a "right to be forgotten" law, and that crime stories on newspaper websites have become "permanent collections of people's misdeeds, ready to pull up at the simple search of someone's name").

Finally, for all of the modern criticism of American police,[140] the police are—at least as a formal matter—accountable to the Constitution[141] and to voters via elected chief executives who have authority over police departments;[142] they also undergo significant training[143] and are indemnified for injuries they suffer on the job.[144] Bounty hunters in many jurisdictions may have none of these attributes.[145] Congress and the states should thus consider regulating, or further regulating, bounty hunters.

B. CONGRESS AND THE STATES SHOULD STRENGTHEN REGULATIONS ON BOUNTY HUNTERS

Given that bounty hunters are vested with the power to forcibly deprive others of their liberty and that allowing the use of that power without proper training presents a safety risk to both the public and to bounty hunters themselves, the states should mitigate that risk by regulating bounty hunters. There is currently wide variety among the approaches state governments take toward bounty hunters. A 2013 survey found that eighteen states, including highly populous states like Pennsylvania and Michigan, did not have any regulatory controls over the qualifications of bounty hunters at all.[146] At the other end of the spectrum, as of 2013, there were four states that outlawed the commercial bail industry entirely—Illinois, Oregon, Kentucky, and Wisconsin.[147]

140. *See generally, e.g.*, *Criticism of Police, A Curated Collection of Links*, MARSHALL PROJECT (June 5, 2021, 8:08 AM), https://www.themarshallproject.org/records/2841-criticism-of-police [https://perma.cc/G48A-SM7P] (providing a database of news articles critical of U.S. police).

141. Individual rights, such as Fourth Amendment protections from unreasonable searches and seizures, are applicable against the states, and thus police, via the Fourteenth Amendment. *See, e.g.*, Dunaway v. New York, 442 U.S. 200, 216 (1979) (holding that actions of "the Rochester police violated the Fourth and Fourteenth Amendments").

142. *See, e.g.*, *Leadership*, NYPD, https://www1.nyc.gov/site/nypd/about/leadership/leadership-landing.page [https://perma.cc/725R-6NPJ] (last visited Mar. 24, 2022) ("The New York City Police Department is headed by the Police Commissioner, who is appointed by the Mayor.").

143. *See, e.g.*, *Metropolitan Police Department*, DC.GOV, https://mpdc.dc.gov/page/metropolitan-police-academy [https://perma.cc/6TXV-SAX7] (last visited Mar. 24, 2022) (stating that police officers recruited in Washington, D.C., receive training for twenty-eight weeks, during which officers "complete a full program of physical endurance training, classroom training, and firearms training to prepare them for the challenges of being a police officer").

144. *See, e.g.*, Rose Wong, *Tampa Bay First Responders Open Up About Mental Toll of Frontline*, TAMPA BAY TIMES (Dec. 23, 2021), https://www.tampabay.com/news/health/2021/12/23/tampa-bay-first-responders-open-up-about-mental-toll-of-frontline/ (stating that the Florida governor in 2018 "signed a bill that extends worker's compensation benefits to first responders diagnosed with PTSD").

145. *See* Johnson & Stevens, *supra* note 2 (finding that eighteen states "have no regulatory controls over the qualifications of bail recovery agents"); Winkler, *supra* note 40 (noting that bounty hunters are often independent contractors); *see also, e.g.*, Biele, *supra* note 131 (noting that a bounty hunter's family and friends held a fundraiser so he could pay his medical bills).

146. Johnson & Stevens, *supra* note 2 (finding that eighteen states "have no regulatory controls over the qualifications of bail recovery agents"). From 2010 to 2014, California had no regulatory controls over the qualification of bounty hunters; however, the state subsequently adopted legislation governing bounty hunters in 2014. *See* Katie Bo Williams, *Does the Bounty-Hunting Industry Need Reform?*, ATLANTIC (July 23, 2015), https://www.theatlantic.com/politics/archive/2015/07/does-the-bounty-hunting-industry-need-reform/399224/.

147. Johnson & Stevens, *supra* note 2, at 196.

The states between those two extremes regulate bounty hunters to varying degrees. Four states, Texas and Florida among them, allowed those who *write* bail bonds to rearrest fugitives but prohibited *independent* bounty hunters, according to the survey.[148] Eighteen states imposed onto bounty hunters formal licensing requirements—some, like Mississippi, required a minimum age of twenty-one, prelicensing education, continuing education, and the absence of felonies in a bounty hunter's criminal history; South Dakota, on the other hand, only required a minimum age of twenty-one and even allowed some convicted felons to work as bounty hunters.[149] The remaining six states regulated but did not license bounty hunters, with most prohibiting convicted felons from becoming bounty hunters and half imposing modest educational requirements.[150] As a starting point for more adequate regulation, the states that currently impose few or no regulatory burdens on the bounty hunting industry should at least bring their standards into line with the states, like Mississippi, that license bounty hunters and require a minimum age, the absence of any felony conviction, and a certain level of education or training.[151] But there is much more that can be done to make sure there are reasonable checks on bounty hunters.

First, based on a recognition that the similarity between bounty hunters' and police's arrest powers presents the risk that bounty hunters might falsely pose as agents of the state[152] and thus potentially discredit police and other state officials, states should adopt laws making clear that any attempt by a bounty hunter to dress like a law enforcement officer or to represent oneself as a public law enforcement agent will result in permanent revocation of one's license.

Second, states should establish processes by which bounty hunters would be required to obtain arrest warrants before apprehending absconders. This would provide a public record that a bounty hunter is seeking a particular fugitive in the area and would allow states to make sure there is probable cause to apprehend the fugitive.

Third, bounty hunters should be required to carry liability insurance sufficient to allow those they harm to meaningfully recover damages in civil lawsuits,[153] and states should provide that bail bondsmen are liable for the acts of the bounty hunters they hire, regardless of whether the bounty hunters are employees or independent contractors. Additionally, at the federal level, Congress could further explore its legislative power to regulate the activity of bounty hunters, perhaps via the Commerce Clause or Section 5 of the Fourteenth Amendment.[154]

Legislatures, lawyers, and courts could also explore ways that they might wield contract law to guard against potential abuses by bounty hunters. For example, in

148. *Id.* at 196–97.
149. *Id.* at 198 tbl. 1.
150. *Id.* at 199 tbl. 2.
151. *Id.* at 198 tbl. 1.
152. *See supra* notes 5, 133 and accompanying text.
153. *See supra* notes 117–18 and accompanying text.
154. *See supra* notes 90–103 and accompanying text.

Mitchell I, a case whose facts were mentioned briefly at the beginning of this Note, Eugene Mitchell was arrested for driving with a suspended license and without proof of insurance, and the court set bail at $1,670.[155] Unable to pay the bail, Mitchell's wife entered into a private bail bond agreement with First Call Bail & Surety to secure Mitchell's release; she was hurried as she signed the contract, Mitchell had no opportunity to review its terms, and the couple paid a $228 nonrefundable premium.[156] The form contract required Mitchell to assume the risk of harm "to both himself and others and agree to indemnify the surety for any liability or action arising from these injuries, including payment of all attorney's fees."[157] It also "grant[ed] the surety the absolute right to enter the defendant's residence at any time, without notice and waiv[ed] all causes of action that might arise from such activity."[158]

Mitchell failed to appear for court, and First Call then hired an armed paramilitary group and sent five of its members to act as bounty hunters to arrest Mitchell.[159] One night, the five armed bounty hunters kicked in the door of Mitchell's home, entered the bedroom (where Mitchell and his wife were with their four-year-old daughter), and arrested Mitchell at gunpoint.[160] The five bounty hunters were charged with assault, burglary, and other crimes, and Mitchell filed a federal lawsuit that asserted a series of state and federal claims against First Call and other defendants.[161] A federal district judge held that the hold harmless and waiver clauses in the bail bond contract were void on public policy grounds under a Montana statute because they could be used to insulate the defendants from liability or payment to the plaintiffs for negligent, willful, or fraudulent acts.[162] The *Mitchell* case thus may be a model for regulating the contracts into which bail bondsmen—and, by extension, bounty hunters—are allowed to enter with criminal defendants.

Finally, states and municipalities should adopt explicit policies governing situations in which bounty hunters team up with law enforcement officials. *Jackson v. Pantazes*[163] was an example of one such situation, and the court there—presented with a claim that a bounty hunter and a police officer had worked together to forcibly enter the plaintiff's home and use force against her—determined that the bounty hunter's conduct was state action.[164] But results may be less favorable to criminal defendants and their relatives where the police

155. 412 F. Supp. 3d 1208, 1214 (D. Mont. 2019).
156. *Id.*
157. *Id.* at 1224.
158. *Id.*
159. *Id.* at 1214–15.
160. *Id.* at 1215.
161. *Id.* at 1215–16.
162. Mitchell v. First Call Bail & Sur., Inc. (*Mitchell II*), 425 F. Supp. 3d 1256, 1263 (D. Mont. 2019).
163. 810 F.2d 426 (4th Cir. 1987).
164. *See supra* notes 79–81 and accompanying text.

behavior is more restrained. In *State v. Hedstrom*[165] (a case whose facts were mentioned at the beginning of this Note), for example, the Supreme Court of North Dakota considered a case in which three bounty hunters, as police officers stood by, kicked down the door of Hedstrom's home while Hedstrom was not there in an effort to find Hedstrom's brother, a fugitive.[166] The bounty hunters entered the home and did not find the fugitive, but they did find "several large marijuana plants."[167] The bounty hunters told the police about the plants and showed them photographs the bounty hunters had taken inside the home, and the police obtained a search warrant based on that information.[168] When Hedstrom returned, he informed police that his brother had turned himself in, but Hedstrom himself was then arrested on marijuana charges.[169] Hedstrom argued that the evidence against him should have been suppressed because the police's cooperation with the bounty hunters transformed the warrantless search into state action in violation of the Fourth and Fourteenth Amendments,[170] but the court rejected his argument:

> The district court found that although the officers acquiesced to the search, they did not direct the bounty hunters to perform the search. Although an officer testified they secured the perimeter around Hedstrom's home in hopes of catching the fugitive if he tried to escape, the officer also testified they secured the perimeter for safety purposes. . . . The district court's findings support its conclusion that the bounty hunters' search was a private search, not a government search, and thus there was no Fourth Amendment violation.[171]

State and local governments should explicitly clarify how police should interact with bounty hunters in situations like the ones presented in *Jackson* and *Hedstrom*. In Buffalo, New York, a news outlet reporting on the lawsuit discussed at the beginning of this Note quoted a local police captain as saying the police officers involved in the bounty hunter raid did nothing wrong[172] and noted that Buffalo police did not have any policies governing how officers should interact with bounty hunters.[173] Finding the correct policy in this context is beyond the scope of this Note,[174] but one possibility is that local governments could simply

165. 2017 ND 156, 897 N.W.2d 909.
166. *Id.* at ¶ 4, 897 N.W.2d at 911.
167. *Id.*
168. *Id.*
169. *Id.* at ¶ 5, 897 N.W.2d at 911.
170. *Id.* at ¶ 6, 897 N.W.2d at 911.
171. *Id.* at ¶ 13, 897 N.W.2d at 913.
172. *See* Telvock, *supra* note 4.
173. Daniel Telvock, *Buffalo Council President Wants Answers on Policies, Laws Guiding Bounty Hunters*, WIVB-TV (Feb. 9, 2021, 7:26 PM), https://www.wivb.com/news/buffalo-council-president-wants-answers-on-policies-laws-guiding-bounty-hunters/ [https://perma.cc/RY3J-L9KY].
174. This Note recommends that the correct policy for dealing with bounty hunting is to abolish it and also presents a set of policy recommendations that should be considered if abolition is not accomplished. The issue of how the states and municipalities that keep bounty hunting should specifically regulate bounty hunters' interactions with police officers is beyond this Note's scope.

prohibit police from working with bounty hunters. On the other hand, one might reasonably conclude that the presence of police during a bounty hunter's raid might serve to increase safety and that such a refusal to work with bounty hunters would be counterproductive.[175] Either way, community members should know what to expect when bounty hunters, accompanied by public law enforcement officers, arrive at their homes.

The preceding regulatory proposals, if adopted, would bring bounty hunting closer to being in harmony with the American value of freedom from unreasonable searches and seizures, and they would make bounty hunting safer for bounty hunters, criminal defendants, and the public alike. But to say that bounty hunting should be more tightly regulated is to assume that bounty hunting should, or must, exist. It need not exist, however, and the experiences of the four states that have already abolished the commercial bail industry demonstrate that prohibiting bounty hunting is a viable reform.

IV. ABOLISHING BOUNTY HUNTERS: LEARNING FROM ILLINOIS, OREGON, KENTUCKY, AND WISCONSIN

This Part argues that abolishing bounty hunters is a superior policy as compared to merely regulating them. This Part first surveys the experiences of the four American states that have already eliminated the practice of bounty hunting. It then uses those experiences and this Note's previously discussed material to set out the normative case for abolition. Finally, it notes that the four states without bounty hunting have found other ways to ensure that criminal defendants appear at trial.

A. THE EXPERIENCES OF BOUNTY HUNTER-FREE ILLINOIS, OREGON, KENTUCKY, AND WISCONSIN SHOW ABOLITION IS POSSIBLE

This Section will discuss the experiences of the commercial bail- and bounty hunter-free states of Illinois, Oregon, Kentucky, and Wisconsin[176] and show not only that abolition is possible but also that those states have all declined to bring back commercial bail and bounty hunting despite opportunities in some states to do so. In fact, as this Section will show, at least two of the commercial bail-free states—Illinois and Kentucky—have instead continued in a reform-oriented direction.

175. *Cf. Hedstrom*, 2017 ND at ¶ 13, 897 N.W.2d at 913 ("[T]he officer . . . testified they secured the perimeter for safety purposes.").

176. The four states discussed here have abolished commercial, or for-profit, bail and thus also outlawed the practice of bounty hunting, whose existence depends on the commercial bail industry and its bondsmen. As a result, the ensuing discussion occasionally speaks of commercial bail generally instead of limiting itself to bounty hunting specifically. This Note deals primarily with bounty hunting and thus recommends that bounty hunting be abolished (or, absent abolition, reformed), but the Note does not discourage consideration of the more all-encompassing step of abolishing commercial bail. Presumably, a state could abolish bounty hunting and retain commercial bail, allowing bondsmen to track and check on defendants in various ways but abrogating their (and consequently bounty hunters') private power to break into homes and to arrest people.

1. Illinois

Illinois abolished commercial bail, and therefore banned bounty hunting, in 1964.[177] The U.S. Supreme Court, writing in 1971, described the bail system that existed in Illinois before the state decided to prohibit bail bondsmen from operating within its borders:

> Prior to 1964 the professional bail bondsman system with all its abuses was in full and odorous bloom in Illinois. Under that system the bail bondsman customarily collected the maximum fee (10% of the amount of the bond) permitted by statute and retained that entire amount even though the accused fully satisfied the conditions of the bond. Payment of this substantial "premium" was required of the good risk as well as of the bad. The results were that a heavy and irretrievable burden fell upon the accused, to the excellent profit of the bondsman, and that professional bondsmen, and not the courts, exercised significant control over the actual workings of the bail system.[178]

Nearly sixty years later, Illinois has not looked back—in fact, it has gone further. It recently became the first state to eliminate cash bail generally, extending its existing ban on commercial bail specifically.[179] One would not expect that such a result would occur if the decision to eliminate commercial bail and bounty hunters led to disaster.

2. Oregon

Oregon eliminated commercial bail in 1974, modeling its reform effort after American Bar Association standards for pretrial release that were developed by judges, prosecutors, defense attorneys, law enforcement officers, and correctional officers.[180] One criminal defense attorney, who began practicing law before the elimination of bail bondsmen, called the pre-1974 era "the bad old days" and said commercial bail "brings the potential for the corruption of the judicial system."[181] But in 2013 and 2014, the commercial bail industry lobbied state lawmakers for a return to a system allowing bail bonds and bounty hunters.[182] The state's public safety system and legal community stood "virtually united" against such a return, with the leader of the Oregon District Attorneys Association saying the group was "adamantly opposed" to commercial bail and the chair of the Oregon State Sheriffs' Association's legislative committee saying, "We do not support the bail bonds industry, and we haven't ever supported the bail bonds industry."[183]

177. *See* Kaufman, *supra* note 18, at 315–16.
178. Schilb v. Kuebel, 404 U.S. 357, 359–60 (1971) (footnote omitted) (citations omitted).
179. Cramer, *supra* note 19.
180. Collins, *supra* note 18.
181. *Id.* at 20.
182. *Id.* at 17.
183. *Id.* at 17–18.

3. Kentucky

Kentucky outlawed bail bonding in 1976[184] by passing a law whose preamble explicitly said that bail bondsmen had "reaped huge profits from the bail bonding business to the detriment of the rights of many citizens and have been a major cause of corruption in the administration of justice."[185] Like Illinois, Kentucky has not backtracked since it abolished commercial bail and has instead gone further in a reform-oriented direction. In 2005, the state implemented a "Monitored Conditional Release" program that used a risk assessment tool to recommend pretrial release for lower-risk defendants, keeping 540,709 arrestees out of jail, saving the state nearly $31 million over six years, and leading to "nearly 90% of participants appearing for trial and 90% of participants not committing new crimes during their release."[186] And in 2011, as lawmakers aimed to decrease the number of incarcerated adults, Kentucky instructed judges to release low-risk defendants on personal recognizance.[187] Moreover, as previously mentioned, a 2014 article compared the eighteen percent nationwide failure-to-appear rate in 2007 for felony defendants released on surety bonds to the felony failure-to-appear rate in Kentucky and found that the rate in Kentucky was only six percent despite the state's lack of a commercial bail industry.[188]

4. Wisconsin

Wisconsin rid itself of bounty hunters and commercial bail in 1979.[189] The atmosphere in which Wisconsin made that decision was similar to the atmosphere in Illinois in 1964. In a decision upholding the law that outlawed commercial bail, the Wisconsin Court of Appeals quoted Judge J. Skelly Wright for the propositions that "the professional bondsmen hold the keys to the jail in their pockets" and that bondsmen "determine for whom they will act as surety—who in their judgment is a good risk" while the "bad risks . . . remain in jail."[190] The Wisconsin court continued, this time quoting the American Bar Association:

> The bail bond business is subject to a variety of allegations of corruption. The charges range from alleged tie-ins with police and court officials, involving kickbacks for steering defendants to particular bondsmen, to collusion and

184. Kaufman, *supra* note 18, at 313.

185. *See* Kennedy, *supra* note 136, at 121 (quoting 1976 Ky. Acts 1).

186. ACLU, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES 43 (2011); *see* Smith, *supra* note 23, at 467 ("In one year, Kentucky kept 540,709 arrestees out of jail, saving the state millions of dollars.").

187. *See* Smith, *supra* note 23, at 459; Sarah Childress, *In Latest Reform, Kentucky Softens Approach to Juvenile Offenders*, PBS FRONTLINE (Apr. 25, 2014), https://www.pbs.org/wgbh/frontline/article/in-latest-reform-kentucky-softens-approach-to-juvenile-offenders/ [https://perma.cc/V4QF-JTVL].

188. *See* Bauer, *supra* note 57.

189. *See* Cohen, *supra* note 18.

190. Kahn v. McCormack, 299 N.W.2d 279, 282 (Wis. Ct. App. 1980) (quoting Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring)).

> corruption aimed at setting aside forfeitures of bonds where the defendants have failed to appear.[191]

As they did in Oregon, supporters of the commercial bail industry tried in 2013 to reestablish the legality of bail bondsmen and bounty hunters in Wisconsin, but Republican Governor Scott Walker—far from a bail or prison reformer[192]—vetoed for the second time a measure that would have done so, saying he had "unease with the policy" and pointing to the opposition it generated from law enforcement officials, including prosecutors.[193]

B. THE NORMATIVE CASE FOR ABOLITION

The experiences of the four states that have abolished bounty hunters can help supply a normative case for abolishing, rather than regulating, bounty hunters and commercial bail. As discussed above, it is difficult to obtain a clear statistical picture of the effects commercial bail has on the rates at which defendants fail to appear in court and at which fugitives are located and rearrested, but some figures suggest that bounty hunter-free jurisdictions such as Kentucky and Milwaukee County, Wisconsin, perform better than at least some of their peers that allow bounty hunting.[194]

This Note has also argued that commercial bondsmen and bounty hunters can only be characterized as saving states from paying the costs of jailing defendants before trial if one believes that jailing the defendants before trial is the states' only alternative to allowing commercial bail, which is not the case.[195] And the Note has shown not only that bounty hunters' actions over the years have often unnecessarily put themselves, fugitives, and bystanders at risk of suffering privacy invasions and bodily harm[196] but also that the current legal regime makes it difficult for those who are injured by bounty hunters to recover damages in court.[197] These risks arise out of an anachronistic[198] system that results in corruption[199] and an absence of political accountability[200] and are unacceptable in a world in which the modern state is idealized by many as requiring a public

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191. *Id.* at 283 (quoting A.B.A., AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PRETRIAL RELEASE 62 (drft. ed. 1968)).

192. *See, e.g.*, Scott Walker (@ScottWalker), TWITTER (Oct. 30, 2018, 6:19 PM), https://twitter.com/ScottWalker/status/1057396552833085441 ("Proud to have the endorsement of the Milwaukee Police Association. Like me, they are concerned about [a] plan to reduce the current prison population by 50% — which today would mean thousands of violent criminals on the streets.").

193. Patrick Marley, *Gov. Scott Walker to Veto Bail Bonds Measure*, MILWAUKEE J. SENTINEL (June 30, 2013), https://archive.jsonline.com/news/statepolitics/gov-scott-walker-to-veto-bail-bonds-measure-b99427812z1-213726561.html/ [https://perma.cc/W759-DQEZ].

194. *See supra* notes 55–60 and accompanying text.

195. *See supra* notes 61–69 and accompanying text; *infra* notes 203–12 and accompanying text.

196. *See supra* notes 1–6, 10, 79–81, 128–33, 155–62, 165–71 and accompanying text.

197. *See supra* Part II.

198. *See supra* note 135 and accompanying text.

199. *See supra* notes 136–37 and accompanying text.

200. *See supra* text accompanying notes 139–44.

monopoly on violence.[201] Finally, real-world experience has shown that misconduct by bounty hunters has occurred or been alleged even where bounty hunting is regulated.[202] Abolition is thus the simpler, more modern, and more just response to the risks posed by bounty hunters and is further justified by the experiences of the four states that have already gone down that path.

C. POLICYMAKERS DO NOT NEED BOUNTY HUNTING TO ENSURE COURT APPEARANCES

A question remains: If states abolished bounty hunters, how would they ensure, without overly relying on pretrial detention, that defendants appear in court? The experiences of the four states without bounty hunters are instructive on this front, as well, and show that it is still possible to ensure court appearances without bounty hunters.

1. Illinois

As Illinois recently began to transition away from cash bail, it was in the process of designing a system under which "judges will be presented with evidence to determine what kind of risk releasing a defendant poses to the community and whether the defendant can be counted on to return to court."[203] It is doubtful that Illinois would choose to transition to such a system, which is more lenient than the bounty hunter-free system established in 1964, if the abolition of bounty hunting resulted in a rash of failures to appear at trial.

2. Oregon

Oregon similarly uses a system involving individualized determinations. After it banned commercial bail, Oregon developed a system giving three options to officials who determine that a defendant should be released pending trial: (1) security release, requiring the defendant to pay a ten-percent deposit to the court clerk in order to be freed from pretrial detention; (2) conditional release, a release without security but subject to supervision and conditions; or (3) personal recognizance, a release without supervision but subject to conditions.[204] An official from one Oregon county explained in 2014 that the county, when deciding which of those release options is appropriate or deciding that the defendant should not be released pending trial, uses an individualized determination about the likelihood that a defendant would commit a new crime upon release; this system was seen even by the law enforcement community as preferable to the return of commercial bail and bounty hunting.[205]

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201. *See supra* note 135 and accompanying text.

202. *See, e.g.*, *supra* notes 5–6 and accompanying text (describing alleged activity in New York, which regulates and licenses bounty hunters); *supra* notes 127–29 and accompanying text (describing alleged activity in Tennessee, which regulates bounty hunters); *supra* notes 155–62 and accompanying text (describing alleged bounty hunter activity in Montana that was not deterred by threat of criminal penalties).

203. Cramer, *supra* note 19.

204. Collins, *supra* note 18, at 18–19.

205. *Id.* at 17–18, 20.

3. Kentucky

Kentucky—in addition to implementing the previously mentioned risk assessment tool[206]—began requiring courts to offer substance abuse counseling to individuals convicted of drug offenses when it abolished commercial bail in 1976.[207] Moreover, a bill enacted in 2006 created a pilot program that placed a social worker in the pretrial process in certain public defender offices to offer counseling and treatment; in the program's first year, recidivism rates were cut to less than half of the rates in counties where the program was not used, and the program saved $1.4 million in incarceration costs.[208] These initiatives may provide part of the reason that Kentucky has achieved a relatively low felony failure-to-appear rate despite a lack of bounty hunters.[209]

4. Wisconsin

Under Wisconsin's state constitution, offenders in most cases have the right to be released before trial with conditions—conditions that can include a prohibition on the use of drugs and alcohol, an agreement not to contact an alleged victim, a promise to pay a set amount if the offender violates the terms of release, or the payment of cash bail.[210] Milwaukee, the largest city in Wisconsin, has used risk assessment tools similar to Oregon's to determine the risk that a defendant will commit a new crime or fail to appear in court if granted pretrial release, and the city's use of such tools lowered the proportion of defendants who had cash bail imposed from sixty-four percent in 2009 to forty percent in 2012.[211] Milwaukee County's failure-to-appear rate was sixteen percent in 2012, a rate that statistics suggest compares favorably with the national failure-to-appear rate.[212]

In sum, by using modern risk assessment tools, providing support for those with substance-abuse or mental-health issues, and taking advantage of technology that allows for pretrial monitoring or supervision, policymakers should be able to achieve a criminal legal system that does not depend on bounty hunters, or the threat of bounty hunters, to secure appearances at trial. The states that have already prohibited the practice of bounty hunting have shown that taking such measures can—more humanely than and just as efficiently as do states that allow private citizens to forcibly capture fugitives—incentivize a defendant to show up for court. The practice should therefore be abolished. Why regulate it when there is no need for it to exist in a just criminal legal system?

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206. *See supra* notes 186–87 and accompanying text.

207. ACLU, *supra* note 186, at 42.

208. *Id.* at 43.

209. *See* Bauer, *supra* note 57.

210. Riley Vetterkind, *Legislature Considers Changes to Bail, Pretrial Justice Process*, WIS. ST. J. (Jan. 1, 2019), https://madison.com/wsj/news/local/govt-and-politics/legislature-considers-changes-to-bail-pretrial-justice-process/article_0d43a21f-c213-555b-ad55-ab6b95d35b28.html.

211. *Id.*

212. *See supra* notes 55–60 and accompanying text.

CONCLUSION

If Congress and the states do nothing else, they should rein in the anachronistic practice of bounty hunting by imposing regulations such as licensing, mandatory insurance, and education requirements. Congress—although its ability to provide remedies for those harmed by bounty hunters under 42 U.S.C. § 1983 and the state action doctrine may be limited because of the private, contractual nature of bounty hunters' powers—should consider adopting such regulations by invoking its Commerce Clause authority or its power to prophylactically enforce the Fourteenth Amendment. But even if it more heavily regulates bounty hunting, the United States would not be in line with the rest of the world, where (except for in the Philippines) the practice is illegal.[213] The experiences of Illinois, Oregon, Kentucky, and Wisconsin show that total prohibition of bounty hunting is a viable—and durable—reform. The practice should thus be abolished once and for all.

213. *See supra* note 33 and accompanying text; *see also, e.g.*, *The Bounty Hunters*, AL JAZEERA (Jan. 6, 2016), https://www.aljazeera.com/program/101-east/2016/1/6/the-bounty-hunters [https://perma.cc/9QH6-2PV7] ("The Philippines is the only country outside the US that permits bounty hunting.").