

IT TAKES A THIEF . . .

It is 3 a.m. and you are asleep in what you firmly believe is the sanctity of your bedroom. Even today's Supreme Court, often the butt of derision by the liberals, has sided with tradition and affirmed the bedrock privacy of the home in general, and the bedroom in particular. Nothing, you believe, can disturb you here.

Suddenly you hear noise outside. Someone's calling out a name. Before you can respond the sound of breaking glass is heard. There are loud voices and footsteps in the hallway. The dog barks. Within seconds the lights go on and you see armed men screaming at you, telling you not to move. They haul you out of bed, handcuff you, and then determine who you are. It turns out they have made a mistake. Wrong house, or the tip was bad. "Have a good night" they say as you are released back into the free world. The invaders make a noisy withdrawal crunching the broken glass on the floor. They fail to leave a business card.

This must be a nightmare, a bad dream. Surely it can't happen in America, the land of the free. Perhaps in Baghdad or some drug lab in Columbia, but not in the USA. It can and it does. Welcome to the wonderful world of the bounty hunter.

Modernly, the breed is best personified by Duane Chapman, aka "Dog", who rose to national prominence and acclaim when he and his team crossed the border into Mexico in search of cosmetics heir and convicted felon Andrew Luster, to bring him back to face the music. Bounty hunters work for bail bondsmen who guarantee to return prisoners to court by a date certain. If the prisoner or his death certificate is late, the bond is forfeited. Thus a prisoner who bails and flees presents an economic threat to his bondsman. The bounty hunter, usually working for one or more bondsmen, can seize the person, cross jurisdictional lines, and pay no homage at the shrine of the 4th Amendment. The capture has its genesis and authority in contract. When bailing out, the prisoner gives permission, in writing, to the bondsman to use "whatever means necessary" to effect recapture. Thus, even in a far away state the contract can be enforced without the judicial requirement of extradition. Usually the bounty hunter receives 10% of the bond as his reward. Dog claims 6,000+ fugitive captures over the course of his colorful career, so the pay isn't bad if you can handle the stress.

Qualifications for a bounty hunter are minimal. Rather than college or a background in law enforcement, the best bounty hunters seem to be poorly educated ex-cons. Dog served time for first degree murder and was arrested numerous times for armed robbery. Now he is a self-professed born again Christian. The adage, "it takes a thief to catch a thief" is apt. Bounty hunters need to understand the criminal element, be fearless, ready to travel at a moment's notice, work at night, have loud voices and big muscles. The irony is that this work is often entrusted to that segment of society who once shunned the law; now they are surrogates of the law.

Justices Warren and Brandeis, in their now classic Harvard Law Review article in 1890, spoke with great passion about the right to privacy, and what we now know as the privacy torts (misappropriation of identity, invasion upon one's seclusion, false light and publication of private facts). These two great jurists focused on one's right to be left alone, and even castigated the press for encroaching too far and revealing too much about what should remain private. One wonders how they would react today to the nocturnal invasion of a man's castle by a band of modern day vigilantes.

The 4th Amendment to the U.S. Constitution protects the people in "their homes ... against unreasonable searches and seizures," and requires a search warrant supported by probable cause to be issued first, unless circumstances are exigent. With the Katz decision and its bountiful progeny, the Supreme Court of the 20th century focused on, and then erected a wall around, 4th Amendment rights. Conventional law enforcement agencies such as the police or FBI have had so many cases dismissed because of their scant lip service to the 4th Amendment that now the guidelines are usually followed to a tee. Why should the bounty hunter be given so much more license to move freely and without Constitutional limitations? The theory is that the prisoner who is released into the custody of a bondsman is still in custody but the prison cell has been replaced by the bondsman as surety. The bondsman becomes the new jailer. In Wilson v. Arkansas, Justice Thomas said that the requirement that police knock and announce before they enter is "woven into the fabric of the 4th Amendment." More recently, the same court in Banks found that fifteen seconds was a reasonable time to wait after announcing. The police have to count from one to fifteen in most situations, but bounty hunters can dispense with the math. They march to a different drummer.

Historically, bail bondsmen and the whole concept of an unregulated, unlicensed field force of lay police functioning as law enforcement personnel, originated in medieval England. With modern day state budgets under pressure, it would be difficult to imagine a sea change, wherein the 10,000 or so bounty hunters making tens of thousands of arrests each year from coast to coast, were legislated out of business. Like them or not, the justice system works because there is a network of people, paid on commission, who are willing to risk life and limb to run criminals aground. Attempts to regulate the profession have not fared well. At the federal level, the Bounty Hunter Responsibility Act of 1999 failed to gain traction. State responses have been anemic.

Bounty hunters enjoy sweeping powers. Going as far back as 1810, the Supreme Court of New York in Nichols sanctioned what would otherwise have been a burglary under common law (breaking and entering into a home at night to commit a larceny or other felony therein) and gave its judicial blessing to a break-in by a bounty hunter to recover his 'ward' and return him to court. For all intents and purposes, bounty hunters are policemen without a badge and without the need to observe the Constitution. Indeed, they are "super-policemen." Intimately involved in the law enforcement process by removing criminals from the street, they serve a critical role. Without them there is no doubt that crime would rise and law enforcement agencies would fall further and further behind. Is their nexus to law enforcement so intimate that they rise to the level of being aptly called state actors? If so, why are bounty hunters not required to observe the 4th and 5th Amendments?

The very reason why Burton in Burton v. Wilmington Parking Authority was successful in his suit against the Eagle Coffee Shop for discrimination was because of the 'symbiotic relationship' between the private coffee shop (if private they could discriminate) and the state who owned the building and was the shop's landlord. The court saw such an interconnection between the private and public entities that the discrimination was found illegal. Would a modern day court dare to reach the same result regarding bounty hunters and throw the burden of their work back onto conventional law enforcement? It would be difficult to imagine such a result. To date, no court has been willing to pin the state actor label on the profession, and until this happens bounty hunters will roam free. Contractual common law is thus immune from the strictures of the Bill of Rights.

Prisons are overcrowded places and social therapeutics suggest that the majority of modern inmates, incarcerated for non-violent drug crimes, could be punished outside of prison by house arrest or community service, thus reducing space and costs significantly. But that is not likely to happen anytime soon, because it is politically and socially unacceptable. Neither is a broken law enforcement system likely to embrace reform of the bounty hunter business, if it means more costs being borne by the government. Economics will hold sway over Constitutional concerns.

The solution for one who is the victim of a bounty hunter's mistake is to sue for, among other things, damages and emotional distress, assuming, of course, that the victim can identify and locate the perpetrator(s). On October 9, 1994, a Rhode Island family on vacation in California was awakened by bounty hunters who kicked in the motel door in search of a bail-jumping prostitute. Holding a gun to the startled mother's head and screaming curses at everyone in the room (noise and the element of surprise are part of the bounty hunter's modus operandi) was viewed with alarm by the civil jury which awarded the family \$1,150,000. That same year another case of mistaken identity resulted in an innocent person being transported by bounty hunters from New York to Alabama, whereupon the mistake was discovered and the victim was released. The civil suit resulted in a jury award of \$1,200,000. Criminal charges against bounty hunters are relatively rare. Does law enforcement look the other way, leaving redress up to the civil courts? The failure to prosecute criminally may explain why these "wannabe" law enforcers are seemingly able to push the legal envelope to limits other citizens only dream of. It may also bolster the argument that bounty hunters are really state actors.

Isn't there something delightfully American about an ex-con like Dog who can resurrect his life and become a TV celebrity with his own show, and have Hollywood's filmmakers circling in the water? The old posters from the wild, wild west . . . Wanted: Dead or Alive . . . are not a vestige of the past, but are part and parcel of the modern bounty hunter's quest. It's déjà vu, all over again.