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Extradition: Computer Technology and the Need to Provide Fugitives with Fourth Amendment Protection in Section 1983 Actions

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Notes

Extradition: Computer Technology and the Need to Provide Fugitives with Fourth Amendment Protection in Section 1983 Actions

I. INTRODUCTION

In April, 1974 Wisconsin police arrested Ronald Maney for a minor traffic violation. Following standard procedure, the officers consulted the National Crime Information Center (NCIC)[1] computer to determine whether there were any warrants outstanding for Maney's arrest. NCIC computer data revealed that Maney was wanted in Louisiana on a felony charge. On the basis of that information, Maney was arrested and forced to spend four weeks in a Wisconsin jail; he was released after the Louisiana authorities,[2] contrary to their stated intention, failed to send the papers necessary for Maney's extradition.[3] In October, 1974 Maney was stopped for a vehicle

1. The National Crime Information Center (NCIC) is a national system, managed and operated by the Federal Bureau of Investigation (FBI) which uses computers and telecommunication technology for transferring and sharing criminal justice information among federal, state, and local agencies. The center is physically located in the FBI's computer facility in Washington, D.C. and includes a telecommunication network that reaches automated or manual teletype terminals in all of the 50 States, the District of Columbia, Canada, Puerto Rico, and some large cities. The service of NCIC is free to the participating States and the funds for it come from the FBI's authorization.

OFFICE OF TECHNOLOGY ASSESSMENT, A PRELIMINARY ASSESSMENT OF THE NATIONAL CRIME INFORMATION CENTER AND THE COMPUTERIZED CRIMINAL HISTORY SYSTEM 7 (1978) [hereinafter cited as PRELIMINARY ASSESSMENT]. Authority for the NCIC program is derived from 28 U.S.C. § 534 (1976).

2. The Louisiana authorities involved were the Chief of Police of Baton Rouge, Louisiana, a police officer of the Baton Rouge Police Department, the District Attorney, and an Assistant District Attorney for the East Baton Parish. *See* Maney v. Ratcliff, 399 F. Supp. 760, 764-65 (E.D. Wis. 1975).

3. Extradition is the transfer of fugitives between states. Although "rendition" is technically the correct term to describe the interstate transfer of fugitives, and "extradition" is technically the transfer of fugitives between independent nations, *see* 2 J. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 819 (1891); Note, *Interstate Rendition and the Fourth Amendment*, 24 RUTGERS L. REV. 551, 551 n.1 (1970), this Note will use the term extradition to refer to rendition because of the common usage of the former by both laypersons and courts.

A fugitive is a person who has been charged by a state with having committed a crime, but who is absent from the state. The person need not have fled the state in order to avoid prosecution; one is a fugitive if one leaves the state,

registration violation. Because a NCIC computer check revealed that he was still wanted in Louisiana, Maney was again arrested and forced to spend four weeks in jail; again, he was released after the Louisiana authorities failed to send the extradition papers. At a port of entry in New York two months later, Maney was once more arrested on the basis of the same NCIC computer information. On this occasion, Maney sought various types of injunctive relief against the Louisiana authorities, as well as compensatory and punitive damages.[4] A federal district court denied Maney's request for damages, but issued an injunction requiring the removal of Maney's "fugitive from justice" entry in the NCIC computer.[5]

Maney's experience demonstrates the importance of the NCIC computer in the current extradition process. It is routinely used by the police,[6] and a fugitive who is arrested on the basis of information supplied by the NCIC computer is subject to a number of possible abuses: arrest based on outdated information or misidentification;[7] detention in jail until the demanding state informs the asylum state that it has no intention of seeking the fugitive's extradition;[8] repeated arrest and detention based on the same information supplied by a state with little serious desire to extradite the fugitive;[9] and extradition

for whatever reason, after being charged with a crime. *See generally* Biddinger v. Commissioner of Police, 245 U.S. 128 (1917); Roberts v. Reilly, 116 U.S. 80 (1885); 2 J. MOORE, *supra*, at 887.

4. Maney based his cause of action on 42 U.S.C. § 1983 (1976). For further discussion of this cause of action, see notes 61-64 *infra* and accompanying text.

5. Maney v. Ratcliff, 399 F. Supp. 760, 773-74 (E.D. Wis. 1975). The court denied Maney's request for damages, stating that "the remedy does not fully compensate a plaintiff nor deter future misconduct." *Id.* at 773. The court apparently felt that an injunction, without damages, was the only proper redress to offer the plaintiff. For a criticism of the disposition of the case, see note 102 *infra* and accompanying text.

6. During 1979, police contacted the NCIC twenty-five million times from their patrol cars to find out, among other things, *see* note 35 *infra*, about the possible fugitive status of persons they had stopped. Telephone conversation with Gary Boatman, Communications Correspondence Operator, NCIC, Washington, D.C. (Sept. 22, 1980).

7. *See* note 108 *infra* and accompanying text. In his dissenting opinion in Baker v. McCollan, 443 U.S. 137 (1979), Justice Stevens stated that the risk of misidentification is substantial when an arrest is made through a computer check. *Id.* at 2700 (Stevens, J., dissenting).

8. *See* Note, *Indigents' Right to Appointed Counsel in Interstate Extradition Proceedings*, 28 STAN. L. REV. 1039, 1043 (1976).

9. The facts of Maney v. Ratcliff, 399 F. Supp. 760 (E.D. Wis. 1975), *see* text accompanying notes 1-5 *supra*, provide an example of this abuse. The injunction issued in *Maney* was limited to the plaintiff's situation, and did not prevent the similar detention of other fugitives.

without a judicial determination of probable cause.[10] Although no computerized system is perfect, the potential for harm from inaccurate or incomplete records can only increase as the police increase their use of and reliance on the NCIC computer.[11]

Today, fugitives who bring state tort actions for false arrest and imprisonment are not likely to succeed.[12] Fugitives may also bring actions in federal court under section 1983 of the Civil Rights Act,[13] which guards the citizen's federal rights against infringement by state action,[14] but most federal courts have taken a limited view of the fugitive's federal extradition rights and have failed to recognize the computer's importance in the extradition process.[15] As a result, the federal courts have failed to provide the fugitive with any meaningful protection against extradition abuse, and thus, contrary to the purpose of section 1983, have failed to offer effective redress for the citizen who has suffered from state action.[16]

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10. In Gerstein v. Pugh, 420 U.S. 103 (1975), the Supreme Court held that a judicial determination of probable cause must precede any significant pretrial restraint of liberty in order to guarantee a proper check upon the functions of the police. *Id.* at 117-18. For a definition of probable cause, see W. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 4.3 (1979). An indictment and a warrant issued subsequent to a probable cause finding by a judge satisfies the fourth amendment requirement of probable cause, *see* Gerstein v. Pugh, 420 U.S. 103, 117 n.19 (1975), but an affidavit or information alone does not because a judge has not made the requisite independent finding of probable cause. *See generally id.* at 116-17. The Supreme Court has not yet ruled on whether a probable cause determination must be made prior to a fugitive's extradition. *See* text accompanying notes 103-06 *infra*.

11. *See* PRELIMINARY ASSESSMENT, *supra* note 1, at 3.

12. The police have a good faith defense open to them in a tort action for false arrest and imprisonment, and the plaintiff is rarely able to overcome that defense by showing that the police did not act in good faith. *See* note 16 *infra*.

13. 42 U.S.C. § 1983 (1976). For further discussion of section 1983, see notes 61-64 *infra* and accompanying text.

14. *See* note 62 *infra*.

15. The district court in Maney v. Ratcliff, 399 F. Supp. 760 (E.D. Wis. 1975), is the only federal court that has explicitly dealt with the problems that computer technology poses for the fugitive, even though according to one author, computers now form the heart of the extradition process. Note, *supra* note 8, at 1042.

16. *See* note 62 *infra*. For a discussion of what rights the fugitive should be the accorded, *see* notes 147-82 *infra* and accompanying text.

An additional reason for the failure of section 1983 to protect the fugitive may be that the police (who are the most frequent defendants in section 1983 actions, *see* W. RINGEL, *supra* note 10, § 22.4(c)(3)) can assert a good faith defense against the charge of depriving a citizen of federal rights. *Id.* Due to jury bias, which is often in favor of the police and against the defendant, *see generally* Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 783 (1979), the plaintiff is often unsuccessful in overcoming the good faith defense of the police. *See* Owen v. City of Independence, Mo., 445 U.S. 622, 650-53 (1980).

The effectiveness of section 1983 as a remedy for the fugitive who has suffered extradition abuses may thus remain circumscribed, even if the proposals

This Note first examines the federal and state extradition provisions that relate to fugitives who have been charged with crimes but who are not already prisoners or parolees.[17] The Note then explores how the extradition process presently works in those states that have adopted the Uniform Criminal Extradition Act (UCEA),[18] and discusses how the federal courts have treated the extradition provisions with regard to a section 1983 cause of action for abuses in this process. Finally, the Note proposes an outline of the fugitive's extradition rights, predicated on the reasonableness clause of the fourth amendment of the United States Constitution.

II. EXTRADITION PROVISIONS

A. FEDERAL CONSTITUTION AND STATUTE

The source of federal extradition procedures is the extradition clause of the United States Constitution. This brief clause provides:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime.[19]

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in this Note are accepted. *See generally* text accompanying notes 147-82 *infra*. Section 1983 may become a more effective tool for the plaintiff as courts seek to redress violations of federal rights by limiting the use of the good faith defense. *See, e.g.*, Owen v. City of Independence, Mo., 445 U.S. 662 (1980).

17. Prisoners, and arguably parolees, are also subject to extradition. Uniform Criminal Extradition Act § 5 [hereinafter cited as UCEA], *reprinted in* 11 UNIFORM LAWS ANNOTATED 51 (1974). This Note, however, will neither address the procedures for extraditing prisoners and parolees, nor consider the kinds of protections they should receive in the process.

18. Only the District of Columbia, Mississippi, and South Carolina have failed to adopt the UCEA. For a discussion of the extradition practices followed in these three jurisdictions, see note 33 *infra*. Further information concerning the UCEA may be found in notes 31-33, 42-52 *infra* and accompanying text.

19. U.S. CONST. art. IV, § 2, cl. 2. The authors of this constitutional provision were influenced by a federalist philosophy, and thus limited the power of the states over persons to those within their territories, but recognized the need for guidelines on the return of fugitives. *See* Kentucky v. Dennison, 65 U.S. (24 How.) 66, 100 (1860). The extradition clause embodied no new principle when it was written; it simply prescribed what the courts had been doing up to and even after the adoption of the Articles of Confederation of 1778. *See* 2 J. MOORE, *supra* note 3, at 820-22. The "principle of territorality" is at the core of the clause: (a) the state sovereign has no power over persons in another state; (b) the law to be applied is the law where the alleged crime was committed; (c) the criminal laws of a state are essentially local. *See* J. MURPHY, ARREST BY POLICE COMPUTER 47-48 (1975).

The extradition clause is not self-executing:[20] it does not specify the methods to be followed in recovering the fugitive, nor the form of the demand for the return of the fugitive. To correct this deficiency, Congress passed the extradition statute in 1793;[21] this statute has remained essentially unchanged.[22]

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20. This problem was noted by Edmund Randolph, Attorney General of the United States, in a report dated July 20, 1791. The report was presented by President Washington to Congress for its consideration prior to the passage of the extradition statute. *See* J. SCOTT, INTERSTATE RENDITION 5-7 (1917).

21. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302 (1793) (current version at 18 U.S.C. § 3182 (1976)). It is the view of some federal courts, *see* notes 65-69 *infra* and accompanying text, that the federal statute was primarily intended for the benefit of the states, rather than citizens. This view is untenable, both because it would make the language in the statute concerning the necessity of producing an indictment or affidavit superfluous, and because concern had been expressed before Congress for the protection of innocent persons. *See* UNITED STATES CONGRESS, 37 AMERICAN STATE PAPERS 41-42 (Misc. 1834). The purpose of the statute would be better viewed as striking a balance between state and private interests.

The federal legislation could, however, be viewed as providing only a minimum standard of cooperation to be followed by the states, precluding any state from setting extradition standards higher then those contained in the federal law. According to this theory, the states may enter into agreements providing for the return of fugitives on less exacting terms than the federal extradition statute, because the basic goal is the return of the fugitive. *See* United States *ex rel.* Grano v. Anderson, 446 F.2d 272, 278 (3d Cir. 1971) (Van Dusen, J., dissenting); J. MURPHY, *supra* note 19, at 62-63.

Criticism of this theory comes from an early Supreme Court case discussing the purpose of the federal requirements:

> The Executive authority of the State, therefore, was not authorized by this article to make the demand [for the party's return] unless the party was charged in the regular course of judicial proceedings. And it was equally necessary that the Executive authority of the State upon which the demand was made, when called on to render his aid, should be satisfied by competent proof that the party was so charged. This proceeding, when duly authenticated, is his authority for arresting the offender.
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> . . . [I]f it was left to the States, each State might require different proof to authenticate the judicial proceeding upon which the demand was founded . . . . And this led to the act of 1793, of which we are now speaking. All difficulty as to the mode of authenticating the judicial proceeding was removed by the article in the Constitution, which declares, ". . .[that] the Congress may by general laws prescribe the manner in which acts, records, and proceedings, shall be proved, and the effect thereof."

Kentucky v. Dennison, 65 U.S. (24 How.) 66, 104-05 (1860).

There is no hint in any of the early cases construing the federal extradition provisions that Congress merely intended to provide a minimum standard of state cooperation. Indeed, Justice Taney in *Dennison* went on to state that Congress clearly specified the judicial acts which are necessary to authorize the governor's extradition demand. *Id.* at 106.

Although the states may not extradite fugitives on less exacting terms than those required by the extradition statute, the states may nevertheless "fashion other cooperative arrangements for the effective administration of justice." New York v. O'Neill, 359 U.S. 1, 6 (1959). For example, many states have adopted, under the express authorization of Congress, 4 U.S.C. § 112(a) (1976),

The current federal extradition statute[23] details the procedure the states are to follow: (1) the governor (executive authority) of the demanding state[24] presents to the governor of the asylum state a copy of an indictment or an affidavit made before a magistrate (and certified as authentic by the governor or chief magistrate of the demanding state[25]) charging the person with having committed a crime;[26] (2) the governor of the asylum state arranges for the person to be arrested and detained, and notifies the demanding state of the fugitive's detention;[27] and (3) the person is delivered to the authorized agent of the demanding state.[28] If the agent does not appear within thirty days from the time of the person's arrest, the person may be discharged.[29]

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legislation such as the Uniform Act on Fresh Pursuit, the Interstate Agreement on Detainers, and the Interstate Compact for Parolees and Probationers. *See* J. MURPHY, *supra* note 19, at 24.

22. The original statute has been modified to include any state or territory of the United States; also, the time in which the agent must appear has been reduced from six months to thirty days, and the language concerning costs and expenses incurred has been dropped. *See* 18 U.S.C. § 3182 (1976).

23. 18 U.S.C. § 3182 (1976).

24. The state seeking the fugitive's return is the demanding state; the state detaining the fugitive is the asylum state. *See generally* 2 J. MOORE, *supra* note 3.

25. UCEA § 3 also embodies this requirement.

26. When the UCEA was written, the federal statute was not to be superceded, but rather supplemented; as such, this first requirement of 18 U.S.C. § 3182 appears in UCEA §§ 2, 3. Unlike the federal provisions, however, the UCEA explicitly provides for the situation where the fugitive is responsible for the crime but was not in the state at the time of its actual commission. *See* UCEA § 6.

Because an affidavit does not require that a neutral judicial officer determine if there is probable cause to believe that the fugitive committed the crime, *see* W. RINGEL, *supra* note 10, § 4.1(b), the federal statute and the UCEA arguably violate the commands of the fourth amendment by allowing extradition on the basis of an affidavit. *See* notes 168-75 *infra* and accompanying text. By contrast, an indictment satisfies the probable cause requirement.

27. UCEA § 2 also embodies this requirement. For a discussion of the relevancy of this provision, see text accompanying notes 98-99 *supra*.

28. The UCEA refines this requirement by its express allowance to the fugitive of the right to contest his or her extradition by habeas corpus if so desired. *See* UCEA §§ 10, 25-A.

29. The federal statute does not address the question of what happens to the fugitive who is not discharged after thirty days. Because the extradition statute does not use the word "shall" in reference to the fugitive's release, the states, without directly contradicting the federal extradition requirements, have allowed the judge to extend the fugitive's detention for another sixty-day period. *See* UCEA § 17. For discussion of the difficulties with this practice, see note 178 *infra* and accompanying text.

B. STATE LAW

The federal statute remained the guideline for states in the area of extradition until the early part of this century, when state authorities began to realize that the federal statute was inadequate.[30] The statute failed to provide guidelines for the states in several important areas, including: the method of arrest and detention of the fugitive prior to, and after, the formal demand for his or her return; the manner of applying for a requisition for the fugitive's return; and, the method of applying for a writ of habeas corpus.[31] As a result of federal silence in these areas, many states adopted the UCEA so that uniformity might be achieved in the extradition of fugitives.

The present UCEA, written in 1936, has been adopted by fifty-two states and territories.[32] In jurisdictions that have not adopted the UCEA, the extradition guidelines are not as specific,[33] and thus the fugitive is subject to greater discretionary treatment.

III. CURRENT EXTRADITION PROCEDURE UNDER THE UCEA

When a warrant is issued for the arrest of a person charged with a "felony" or "serious misdemeanor"[34] and the person cannot be immediately located by the police, that person's name is automatically entered in the NCIC computer's

30. *See* J. MURPHY, *supra* note 19, at 55-56.

31. Also covered by the UCEA are: bail; the right to withhold the fugitive's extradition when criminal prosecution in the asylum state is pending; and the extradition of a person who, while not physically present in the demanding state, indirectly caused a crime in that state. *See* 11 UNIFORM LAWS ANNOTATED 53 (1978).

32. *See* note 18 *supra*.

33. The District of Columbia has the most detailed extradition procedures of the three jurisdictions that have not adopted the UCEA. Under the extradition guidelines of the District of Columbia, however, the warrantless arrest and waiver of extradition provisions are much less specific than the UCEA counterparts. *See generally* D.C. CODE ANN. §§ 23-401 to -411 (1967 & Supp. 1979). The extradition statutes of Mississippi, MISS. CODE ANN. §§ 99-21-1 to -11 (1972), and South Carolina, S.C. CODE §§ 17-9-10 to -70 (1976), are silent on all of the areas that the UCEA was intended to cover, with the exception of bail. The jurisdictions that have not adopted the provisions of the UCEA do, however, use the NCIC computer as an aide in law enforcement. *See* note 1 *supra*.

34. The penal statutes of the jurisdiction entering the fugitive's name with the NCIC computer will determine whether an act is a felony or a serious misdemeanor. *See Appendix* to *Hearings Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, Pt. 3, 95th Cong., 2d Sess. 831 (1979) (hearings on FBI Statutory Charter).

"Wanted Persons File."[35] In some circumstances the police can enter the person's name without the issuance of a warrant,[36] and, whether or not there is a warrant, the name will remain indefinitely in the computer until the agency that entered the name formally withdraws it.[37] In some situations, limitations on the extradition of the fugitive will be entered in the computer. For example, a county might seek extradition only if the fugitive is apprehended within a five-state area. More often, however, the difficulty of forecasting the desired limitations precludes the entry of such considerations.[38] As a result, the fugitive can be arrested anywhere in the country on the basis of the original entry in the NCIC computer. Currently, over 6,000 agencies submit data to the computer.[39]

35. There are nine different categories of records in the NCIC Computer: Wanted Person File, Stolen Vehicle File, Stolen License Plate File, Stolen Article File, Stolen/Missing Gun File, Securities File, Boat File, Computerized Criminal History File, and Missing Person File. *Id.*

There are three categories of wanted persons: (a) a person who is subject to an arrest warrant in regard to a felony or serious misdemeanor; (b) a person who has, or is believed to have, committed a felony and who is believed to have, or will have, crossed the state borders, and circumstances do not permit the immediate obtainment of a felony warrant; and (c) a person who is subject to a federal arrest warrant. *Id.*

36. According to FBI policy on the use of the Wanted Person File, if an agency desires the return of a fugitive and there is no warrant for his or her arrest, the agency must indicate upon entering the fugitive's name with the NCIC computer that it is a "Temporary Felony Want" and is "subject to verification and support by a proper warrant within 48 hours following the initial entry of a temporary want." *Id.* It is the responsibility of the originating agency to see that this requirement is followed. *Id.*

37. *Id.* at 832. All liability for damages resulting from inaccurate information rests with the agency that entered the information on the NCIC computer. Although the officials responsible for the NCIC computer advise the entering agency to correct errors in the entry of data if they are detected, and have the authority to cancel the entry if the agency does not comply, *see* Telephone conversation, *supra* note 6, several problems with inaccurate information remain: there is no guarantee that errors will be detected, or that detection will occur within a reasonable time; and errors of omission, such as the failure to provide complete data, exist. *See* note 108 *infra* and accompanying text.

38. *See* Note, *supra* note 8, at 1043.

According to MINCIS/NCIC QUALITY CONTROL AND VALIDATION PROGRAMS 16.3.1 (1979), the "unforeseen circumstances" that make it difficult to forecast extradition limitations include: distance between the originating agency and the agency where the fugitive is located, budget limitations, and the degree of seriousness of the alleged crime. It is debatable, however, just how unforeseen these circumstances are: a reasonable approximation with respect to the specified circumstances at the time of record entry seems at least desirable; otherwise, an agency, using the rationale of unforseen circumstances, could enter any fugitive's name with the NCIC computer without making the slightest attempt to decide any extradition limitations.

39. *See* Maney v. Ratcliff, 399 F. Supp. 760, 764 n.1 (E.D. Wis. 1975); PRELIMINARY ASSESSMENT, *supra* note 1, at 7.

Police use the NCIC computer as part of their daily routine, consulting the computer, for example, by entering the license plate data of the vehicle of a person who has been detained for a traffic violation.[40] In most cases, a computer check is part of the arrest procedure. If the person is wanted in another state as a fugitive from justice, the NCIC computer will register a "hit."[41] A police agency satisfied with the accuracy of the NCIC data will retain custody of the alleged fugitive.

The UCEA requires that the person thus arrested be brought before a judge or magistrate "with all practicable speed," and that a "complaint . . . be made against him"[42] when there is no local arrest warrant.[43] If the entering agency indicates to the arresting agency that it desires the fugitive's extradition, a "fugitive from justice" complaint is invariably issued.[44] The UCEA next requires that the judge or magistrate determine whether the person being detained is the one

40. Vehicle inquiries increased by over two million from 1978 to 1979 to a total in 1979 of approximately twenty-five million. *See* Telephone Conversation, *supra* note 6.

41. *See* Note, *supra* note 8, at 1042. NCIC policy states that the inquiring agency "must check with the agency identified as the source of the record to verify that the warrant is still outstanding and the person inquired upon is identical with the subject of the warrant, and to obtain extradition information." DEPARTMENT OF JUSTICE, FBI, EXTRADITION OF WANTED PERSONS AND THE NATIONAL CRIME INFORMATION CENTER 3 (1979). The effectiveness of this procedure as a method for protecting the fugitive is questionable, however. Even though the inquiring agency may follow the NCIC policy of checking with the originating agency, there are no guidelines delineating how the originating agency should ensure, for example, that the warrant is still outstanding or that the person arrested is the one who is actually wanted. This problem is compounded because the data in the NCIC computer may be both stale and inaccurate. *See* note 108 *infra* and accompanying text. Further, when there is a question of identification, the originating agency is not always cooperative in providing additional data. *See* Note, *supra* note 8, at 1042-43.

42. UCEA § 14.

43. A warrant is not required for a fugitive's arrest if the crime charged is punishable by death or imprisonment exceeding one year. *See id.*

Because of the heavy police use of the NCIC computer, it is no surprise that a fugitive is usually arrested without a warrant. *See* Note, *supra* note 8, at 1044 n.24. The use of computers in the extradition process has so greatly affected the way in which the fugitive is normally extradited that certain federal and state provisions have become almost anachronistic: the provisions require that the governor initiate the fugitive's arrest and detention after the extradition papers arrive, *see* note 27 *supra* and accompanying text, but since the papers normally do not arrive until one month after the fugitive is arrested, *see* note 51 *infra* and accompanying text, this merely leads to the extended detention of the fugitive.

44. Interview with John Tierney, Assistant Hennepin County Attorney, in Minneapolis, Minnesota (Dec. 5, 1980). Although no information is available concerning the practices of other counties in this regard, one may assume that Hennepin County is not atypical.

charged with the crime, and whether the person fled from justice.[45] Information from the NCIC computer may be sufficient to satisfy the judge on the question of identification.[46]

The judge must inform the alleged fugitive that he or she may either waive or contest extradition.[47] If the fugitive decides to waive extradition, the judge executes the waiver and no bond is set.[48] The authorized agents of the demanding state then take custody of the accused, although the UCEA specifies no set time in which the agents must take custody.[49] If the fugitive decides to test the legality of the arrest and extradition, the fugitive will normally be committed to a county jail until the demanding state has sent the formal extradition papers for the fugitive's return.[50] The papers usually arrive within thirty days, but the demanding state is allowed up to ninety days.[51] Once the papers arrive, the governor of the asylum state may issue an extradition warrant[52] to detain the fugitive until transfer to the demanding state.

Once the warrant is issued, the fugitive may submit an application for an extradition writ of habeas corpus[53] to challenge his or her detention. Due to the restricted scope of review in an extradition habeas corpus proceeding,[54] the fugitive is often

45. UCEA § 15.

46. *See* Note, *supra* note 8, at 1044.

47. *See* UCEA §§ 10, 25-A.

48. *See* UCEA § 25-A.

49. *See* UCEA § 25-A.

50. Although a judge normally sets bail for the fugitive, many fugitives are indigent and cannot pay. Also, it is not unusual for the judge to set bail at an amount higher than that which would have been set had the crime been locally committed. *See* Note, *supra* note 8, at 1045.

51. Conley, *Clearing the Fog*, 4 ORANGE COUNTY B.J. 157, 159 (1977); *see* Note, *supra* note 8, at 1043, 1045.

52. UCEA § 7. If the papers do not arrive, the fugitive must be released. UCEA §§ 15, 17.

53. Although the relevant federal habeas corpus statutes are found in 28 U.S.C. §§ 2241-2255 (1976), the exact source of the right of the fugitive to apply for an extradition writ of habeas corpus is unclear. *See* Crumley v. Snead, 620 F.2d 481, 483 n.7 (5th Cir. 1980). The general purpose of the writ of habeas corpus is to test the legality of the restraints on liberty. *See* R. SOKOL, FEDERAL HABEAS CORPUS 29-30 (1969). *See also* Note, *Development of Federal Habeas Corpus Since* Stone v. Powell, 1979 WIS. L. REV. 1145, 1147-48.

54. The Supreme Court has recently repeated that the scope of review in an extradition habeas corpus proceeding is limited to a determination of four items: "(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive." Michigan v. Doran, 439 U.S. 282, 289 (1978).

It has been at least one writer's opinion that the "laws on extradition habeas corpus seem to remain one of the strictest, one might say 'old fash-

unsuccessful in challenging the legality of the detention.[55] The fugitive who fails to obtain an extradition habeas corpus writ has no other legal recourse; the fugitive is transferred without further delay to the demanding state. Once in the demanding state, the fugitive can bring either a section 1983 action[56] or, after exhaustion of state remedies, a federal writ of habeas corpus.[57]

Although many police agencies enter names in the NCIC computer, they may decline to proceed with the extradition of a fugitive arrested in another state. Financial considerations and the likelihood of successful prosecution are major factors in the decision of whether to proceed with the fugitive's extradition.[58] While the fugitive waits in jail, the demanding state may take up to three weeks before it must inform the authorities in the asylum state that it does not plan to seek the fugitive's extradition.[59] Even if released as a result of the demanding state's decision not to extradite, the fugitive is subject to possible rearrest on the basis of the same information in the NCIC computer.[60]

IV. SECTION 1983 REMEDIES FOR EXTRADITION ABUSES

A. INTRODUCTION

Once extradited, a fugitive who believes that his or her federal constitutional or statutory rights have been violated may seek redress under section 1983.[61] In order to maintain a sec-

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ioned' areas of the criminal law." Conley, *Fighting Extradition: The Venerable Writ of Habeas Corpus*, 4 ORANGE COUNTY B.J. 337, 338 (1977). The ostensible reason for this strict approach is the concern that extradition be summary and mandatory. *See* Michigan v. Doran, 439 U.S. 282, 288-89 (1978). *See generally* Pacileo v. Walker, 446 U.S. 1307 (Rehnquist, Circuit Justice, 1980). Adherence to this belief is strengthened by the policy arguments that habeas corpus wastes judicial resources and upsets the balance of federalism. *See* Note, *Federal Habeas Corpus: The Relevance of Petitioner's Innocence*, 46 U. MO.-KAN. CITY L. REV. 382, 388 (1978). *See generally* Note, *Extradition Habeas Corpus*, 74 YALE L.J. 78 (1964).

55. *See* Conley, *supra* note 54, at 342.

56. *See generally* Brown v. Nutsch, 619 F.2d 758 (8th Cir. 1980).

57. *See* 28 U.S.C. §§ 2241-2255 (1976).

58. *See* Note, *supra* note 8, at 1043.

59. *Id.*

60. *See generally* notes 1-5 *supra* and accompanying text.

61. *See* 42 U.S.C. § 1983 (1976). "Prior to his removal to the demanding state, the charged party can only challenge his confinement by the asylum state authorities through the writ of habeas corpus. This would require exhaustion of state remedies. A section 1983 action is not available." Brown v. Nutsch, 619 F.2d 758, 763 (8th Cir. 1980). The writ of habeas corpus and section 1983 are

tion 1983 cause of action,[62] the plaintiff must not only allege that the defendant acted under color of state authority, but must also allege a violation of a federal right.[63] Whether a fugitive can claim a violation of a federal right for an alleged improper extradition is an issue that has divided the federal courts.[64]

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designed to fulfill the same purpose, namely, to protect constitutional rights. The fugitive can only apply for an extradition writ of habeas corpus when held in the asylum state; when in the demanding state, the fugitive can only bring a section 1983 action. *See* Brown v. Nutsch, 619 F.2d 755, 763 (1980); Note, *Res Judicata and Section 1983: The Effect of State Court Judgments on Federal Civil Rights Actions*, 27 U.C.L.A. L. REV. 177, 215-18 (1979).

62. According to a recent pronouncement of the Supreme Court,

> [t]he central aim of the Civil Rights Act [*i.e.*, section 1983] was to provide protection to those persons wronged by the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."
>
> . . . .
>
> Moreover, [section] 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well.

Owen v. City of Independence, Mo., 445 U.S. 622, 650-53 (1980) (quoting Monroe v. Pape, 365 U.S. 167, 184 (1961)).

Just how section 1983 is to compensate the individual for constitutional deprivations, however, is unclear. In Carey v. Piphus, 435 U.S. 247 (1978), the Supreme Court held that one cannot recover damages for procedural due process violations unless proof of actual harm is shown. *Id.* at 263-64, 266. Because *Carey* did not offer redress for the deprivation of the right itself, it is unclear how far the Supreme Court will be willing to extend the doctrine that one must prove damages before one can recover for the deprivation of a constitutional right. This restriction by the Court on section 1983 actions has been sharply criticized. *See, e.g.*, Note, *Damage Awards for Constitutional Torts: A Reconsideration After* Carey v. Piphus, 93 HARV. L. REV. 966, 967, 979-85 (1980). *See generally* Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242 (1979); Comment, Carey v. Piphus *and Remedying Constitutional Torts*, 21 ARIZ. L. REV. 871 (1979).

63. *See* Scheuer v. Rhodes, 416 U.S. 232, 249-50 (1974) (federal courts must adopt a liberal attitude toward section 1983 complaints, and must not dismiss a complaint unless the plaintiff can prove no set of facts in support of the claim for which relief is sought). The courts generally find that state officials act under color of law as long as they act with the appearance of authority, even if the acts are illegal under state law. *See generally* Monroe v. Pape, 365 U.S. 167 (1961).

64. This has resulted in a number of different, sometimes totally opposite, positions with regard to extradition. One reason for this is that the Supreme Court has not dealt squarely with the issue of a fugitive's rights; as a consequence, the federal courts, with only a few related Supreme Court cases from the turn-of-the century on which to rely, have been free to formulate their own positions on extradition without feeling compelled to refute the positions adopted in other circuits.

Another reason for this division lies in the confusion among federal courts concerning the requirement that the plaintiff additionally allege a violation of a federal right. Section 1983 provides redress not only for violations of "rights, privileges, or immunities secured by the Constitution," but also for those rights secured by the "laws." There is difficulty in determining what is meant by the

B. Federal Court Views on the Availability of Section 1983 Remedies for Extradition Abuses

1. *Federal Extradition Provisions Give No Rights to the Fugitive*

One view taken by federal courts is that the federal extradition clause and statute provide no rights to the fugitive,[65] and that there is thus no possibility of section 1983 relief. The courts that have adopted this position generally follow the rationale of *Johnson v. Buie*.[66] The court in *Johnson* stated that "the rights granted under the federal provisions for extradition are granted to the states rather than to the fugitives who might be the subject of extradition."[67] The court suggested that, al-

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word "laws," and whether the federal extradition statute falls in this category. It would seem obvious that there should not be the same remedy for the violation of every law or statute passed by Congress as there is for the violation of constitutional rights—not only would the federal courts be swamped with cases, but Congress could easily encroach upon the power of the states by passing laws all of which are constitutionally mandated. Indeed, the jurisdictional counterpart of section 1983, 28 U.S.C. 1343 (1978), which gives the federal courts subject-matter jurisdiction in section 1983 actions, refers to "laws" in relation to the equal rights of the citizens, which arguably delimits the scope of "laws." *See* S. Nahmod, Civil Rights & Civil Liberties Litigation: A Guide to § 1983, § 2.10 (1979).

Contrary to common sense, however, and emphasizing the "plain language" of the statute, the Supreme Court has recently adopted the unqualified rule that section 1983 encompasses claims based on pure statutory violations of federal law. *See* Maine v. Thiboutot, 100 S. Ct. 2502, 2505-06 (1980). The dissent by Justice Powell emphasizes the extreme consequences of the Court's position by a brief examination of the various federal laws section 1983 would apply to. *Id.* at 2507-21 (Powell, J., dissenting).

Given the expansive holding in *Thiboutot*, it is tempting to argue that the fugitive should now have no difficulty asserting that his federal rights had been violated in an improper extradition. This argument assumes, though, that the courts will adhere to the unqualified decision of *Thiboutot*. Because Congress has passed so many laws, and because so many statutory laws could provide the basis for a section 1983 action, it is doubtful that the courts will embrace *Thiboutot* wholeheartedly.

65. *See* Siegel v. Edwards, 566 F.2d 958, 960 (5th Cir. 1978); Adams v. Cuyler, 441 F. Supp. 556, 558 (E.D. Pa. 1977), *rev'd on other grounds*, 592 F.2d 720 (3d Cir. 1979), *affirmed*, 49 U.S.L.W. 4105 (1981); United States *ex rel.* Bryant v. Shapp, 423 F. Supp. 471, 475 (D. Del. 1976); Hines v. Guthrey, 342 F. Supp. 594, 596 (W.D. Va. 1972); Johnson v. Buie, 312 F. Supp. 1349, 1350-51 (W.D. Mo. 1970). *See also* Sami v. United States, 617 F.2d 755, 774 (D.C. Cir. 1979) (federal provisions on interstate extradition confer no rights on the individual).

66. 312 F. Supp. 1349 (W.D. Mo. 1970). The courts that cite *Johnson* to reach a similar conclusion often do so without making any attempt at analyzing the soundness of the decision. For example, the Court of Appeals for the Fifth Circuit simply states that "[o]nce a fugitive has been brought within custody of the demanding state, legality of extradition is no longer proper subject of any legal attack by him." Siegel v. Edwards, 566 F.2d 958, 960 (5th Cir. 1978) (citing Johnson v. Buie, 312 F. Supp. 1349, 1351 (W.D. Mo. 1970)).

67. Johnson v. Buie, 312 F. Supp. 1349, 1351 (W.D. Mo. 1970). The court in

though the fugitive has the right to test the legality of extradition by means of habeas corpus, the right is severely confined due to limitations on the type of questions that can be raised *before* transfer to the demanding state.[68] Comparing a fugitive with an incarcerated prisoner, the court contended that a forcible abduction or improper extradition violates no rights of the fugitive: upon entering the demanding state the fugitive cannot claim a violation of due process rights so long as he or she receives a "fair trial."[69]

The position of the *Johnson* court and other federal courts that have adopted a similar view is untenable. An examination of the federal extradition clause and statute does not support the view that they were "designed to benefit the states, not to benefit fugitives";[70] rather, these provisions raise the opposite inference, namely, that certain procedures must be followed before a person can be extradited, to ensure against arbitrary state interference with the fugitive's liberty.[71] The legislative history of the extradition statute, while limited, confirms that sufficient care must be provided to protect the rights of individ-

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Johnson cites a few related cases to support its assertion. *See id.* (citing United States *ex rel.* Simmons v. Lohman, 228 F.2d 824 (7th Cir. 1955) (states are not bound by the federal extradition provisions when providing for the return of fugitives); Woods v. State, 264 Ala. 315, 87 So.2d 633 (1956) (fugitive can be extradited on less exacting terms than those required by the federal extradition statute)).

68. 312 F. Supp. at 1351.

69. "[D]ue process of law is satisfied when one present in court is convicted of crime after having been fairly apprized [sic] of the charges against him and after a fair trial in accordance with constitutional procedural safeguards." Frisbie v. Collins, 342 U.S. 519, 522 (1952) (quoted in Johnson v. Buie, 312 F. Supp. 1349, 1351 (W.D. Mo. 1970)).

Reliance by the *Johnson* court on *Frisbie* is misplaced, however, for a number of reasons: first, *Frisbie* did not rule out redress for violations of constitutional rights other than due process; second, *Frisbie*, if taken literally, requires the person to be convicted before its holding can apply; and, finally, *Frisbie* involved an entirely different question, namely, the applicability of the exclusionary rule in an abduction case once the person has been found guilty.

70. Hines v. Guthrey, 342 F. Supp. 594, 595 (W.D. Va. 1972); Johnson v. Buie, 312 F. Supp. 1349, 1351 (W.D. Mo. 1970).

71. The argument of defense counsel that the extradition statutes are based on comity and are solely for the benefit of the states is not worthy of serious notice. The requirement that a person arrested as a fugitive be advised of his right to counsel and be taken before a court patently benefits the prisoner, not the state.

Sanders v. Conine, 506 F.2d 530, 532 (10th Cir. 1974). Although the court in *Sanders* does not make a clear distinction between the state and federal extradition statutes, the logic of the argument is applicable to both—the procedures the states are to follow are for the fugitive's benefit. *See also* Pierson v. Grant, 357 F. Supp. 397, 398 (N.D. Iowa 1973), *aff'd on other grounds*, 527 F.2d 161 (8th Cir. 1975).

uals. Only upon compliance with certain judicial acts may the executive branch of government, headed by the governor, extradite the fugitive.[72] Support for the view that the fugitive has no extradition rights cannot be drawn from any Supreme Court decision relating to extradition.[73] Even the court in *Johnson* recognized that the fugitive has one right, namely, the right to test the legality of the extradition by means of a writ of habeas corpus.[74] Because the basis of the writ and a section 1983 action is the same—to protect one's constitutional rights[75]—it is unreasonable to maintain that the ability to seek redress for a violation of those constitutional rights is lost simply because one has already been extradited.[76] The argument that a fair trial is the adequate remedy for the fugitive who has, for example, been forcibly abducted to the demanding state is also without merit. Not only does this remedy fail to make the fugitive whole in the manner of a damage award, but it also fails to protect the individual in the asylum state from arbitrary state action violative of the fourth amendment.[77]

2. *UCEA Does Not Involve Federal Rights*

A second approach used by courts examining the question of extradition abuse fails to examine the federal provisions and instead focuses solely on violations of the UCEA. These courts assert that because the states' procedural safeguards "derive from state rather than federal law, [section] 1983 does not pro-

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72. *See* note 21 *supra*.

73. The best attempt at using a Supreme Court case to bolster its argument that the federal extradition provisions were not to benefit the fugitive can be found in Hines v. Guthrey, 342 F. Supp. 594 (W.D. Va. 1972). The court in *Hines* quotes from Biddinger v. Commissioner of Police, 245 U.S. 128, 133 (1917): the federal extradition provision must be liberally construed to achieve its important purpose, namely, "to eliminate . . . the boundaries of States, so that each may reach out and bring to speedy trial offenders against its laws from any part of the land." 342 F. Supp. at 595. It is unclear how the *Hines* court believes that *Biddinger* supports the more radical belief that the fugitive had no rights under the federal guidelines.

74. This right was recognized by the Supreme Court almost 100 years ago in Roberts v. Reilly, 116 U.S. 80 (1885), although its exact source was not specified in that case.

75. *See* note 61 *supra*.

76. *See generally* Brown v. Nutsch, 619 F.2d 758 (8th Cir. 1980).

77. *See generally* notes 117-29 *infra* and accompanying text. Contrary to the assertion in Johnson v. Buie, 312 F. Supp. 1349, 1351 (W.D. Mo. 1970), Frisbie v. Collins, 342 U.S. 519 (1952) does not support the view that a fair trial is the adequate "remedy" for a forcible abduction. *Frisbie* instead declares that a court may take jurisdiction over a case even when the defendant has been abducted. 342 U.S. at 522-23.

vide a remedy for their breach."[78] Absent conduct by the police that "shocks the conscience" in violation of fourteenth amendment due process,[79] the police may forcefully transport a fugitive without creating a remedy for that fugitive under section 1983. This position, it is argued, comports with "modern conceptions of due process."[80]

This approach may be criticized for assuming that the federal extradition provisions are irrelevant simply because the states have adopted the UCEA. Taken to an absurd extreme, this view would imply that the states can ignore any act of Congress if they decide to act in the same area, an idea at odds with the doctrine of federal supremacy. The UCEA did not supersede the federal extradition provisions, but rather supplemented them.[81] A violation of a UCEA rule may also be a violation of the federal statute, and thus support a section 1983 action for a violation of a federal right.[82]

Furthermore, the view that the UCEA does not involve federal rights may be criticized in light of *Cuyler v. Adams*,[83] a recent decision in which the United States Supreme Court held that the Interstate Detainer Agreement, providing for the temporary return of prisoners to face criminal prosecution in another state, established federal rights that were actionable under section 1983.[84] The rationale of the *Cuyler* decision, while expressly limited to the Interstate Detainer Agreement,[85] might be applied to the UCEA: it could be argued that the UCEA is federal law under the federal Compact Clause[86] because Congress consented to passage of the UCEA by the states and because the UCEA covers an area that is appropriate for federal legislation.[87]

78. Raffone v. Sullivan, 436 F. Supp. 939, 941 (D. Conn. 1977); *accord*, Brown v. Nutsch, 497 F. Supp. 75, 76 (E.D. Mo. 1979), *rev'd on other grounds*, 619 F.2d 758 (8th Cir. 1980); Robinson v. Vaclavik, 477 F. Supp. 75, 76 (E.D. Mo. 1979).

79. Raffone v. Sullivan, 436 F. Supp. 939, 941 (D. Conn. 1977).

80. *Id.*

81. *See* notes 26-29 *supra*. *See generally* text accompanying notes 30-31 *supra*.

82. For example, both state and federal provisions require the governor of the demanding state to send an indictment or affidavit to the governor of the asylum state before the extradition of the fugitive can proceed. *See* note 26 *supra* and accompanying text.

83. 101 S. Ct. 703 (1981).

84. *Id.* at 711.

85. *Id.* at 708 n.10.

86. U.S. CONST. art. 1, § 10, cl. 3 provides that "No State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State."

87. According to Justice Brennan, writing for the majority in Cuyler v. Ad-

But even if one could successfully argue on the grounds of *Cuyler* that the UCEA is federal law and thus is actionable under section 1983, the fugitive may still be left without adequate protection. The UCEA has not been adopted by all states, and, even where adopted, the UCEA does not fully protect the fugitive under the current extradition process. The UCEA was written long before the widespread use of computers, and therefore does not address problems such as those that result when a state enters a fugitive's name in the NCIC computer and later decides not to seek the fugitive's extradition. Moreover, the constitutional right to be free from unreasonable searches and seizures under the fourth amendment suggests that even if the UCEA establishes federal rights, these rights are insufficient.[88]

3. *Fugitive's Federal Rights Are Limited to Federal Extradition Provisions*

Some federal courts, taking a third view, recognize that the federal extradition provisions provide a fugitive with federal rights, and that a person may seek redress for a violation of those rights under section 1983. There are two subtle variations of this view, however. In *Crumley v. Snead*,[89] the Court of Appeals for the Fifth Circuit stated that because the fugitive's right to challenge extradition by a writ of habeas corpus is "secured by the Constitution and laws of the United States,"[90] a denial of that federal right—as through a forcible abduction—will give rise to a section 1983 cause of action, "for Section 1983 protects *all* rights, privileges, or immunities secured by the Constitution and laws of the United States."[91] Because it is the federal extradition safeguards that are enforced through a habeas proceeding,[92] the court in *Crumley*, by guaranteeing the

ams, 101 S. Ct. 703, 707-09 (1981), a state act, as part of an agreement with other states, becomes federal law if it meets two requirements of the Compact Clause of the United States Constitution, art. 1, § 10, cl. 3. According to the dissenting opinion of Justice Rehnquist, however, the requirements for a state agreement to come under the Compact Clause are slightly different: only when a state agreement "requires" the consent of Congress does the agreement fall under the Compact Clause—in other words, the state legislation must encroach upon or interfere with the supremacy of the United States, not simply be a matter of federal interest. 101 S. Ct. at 714 (Rehnquist, J., dissenting). It is questionable if the UCEA meets the standard set forth by the dissent.

88. *See* notes 117-82 *infra* and accompanying text.

89. 620 F.2d 481 (5th Cir. 1980).

90. *Id.* at 483.

91. *Id.* (emphasis in original).

92. *See* notes 54, 61 *supra*.

availability of a habeas hearing, indirectly guaranteed fugitives the protection of their rights as provided by the federal extradition provisions.

In *Brown v. Nutsch*,[93] the Court of Appeals for the Eighth Circuit advanced the second variation of the view that recognizes federal extradition rights for fugitives under the federal extradition statute. Despite the availability of a habeas corpus proceeding, the court argued that all federal extradition provisions provide a fugitive with rights enforceable under section 1983.[94] The court in *Brown* noted the similarity between habeas corpus and section 1983, and remarked that the fugitive's right to contest the legality of the extradition is compelling when the fugitive has had absolutely no judicial review prior to the transfer to the demanding state.[95] The court further noted that a violation of a state statute will give rise to a section 1983 cause of action only insofar as the requirements of the federal extradition clause or statute are also violated.[96]

While courts using both variations of this third view provide the fugitive with some federal extradition rights, they do not as a practical matter afford the fugitive any more meaningful rights than the courts that either fail to recognize any rights for the fugitive under the various extradition provisions or that view such rights as arising solely from state provisions. The federal statute, written in the latter part of the eighteenth century, is silent on several vital points such as the method of arrest and detention of the fugitive prior to the formal demand for his or her return to the demanding state.[97] Moreover, the federal statute was not designed to approach problems resulting from the current reliance on computers in the extradition process. The statute anticipates that the fugitive will not be arrested and detained until after the governor of the asylum state has received the requisite papers and has issued an extradition warrant.[98] Reliance on the NCIC computer, however, results in the fugitive's arrest and detention prior to the issuance of an

93. 619 F.2d 758 (8th Cir. 1980); *see* McBride v. Soos, 594 F.2d 610 (7th Cir. 1979); Wirth v. Surles, 562 F.2d 319 (4th Cir. 1977), *cert. denied*, 435 U.S. 933 (1978); Sanders v. Conine, 506 F.2d 530 (10th Cir. 1974).

94. The emphasis in this variation is not on whether the habeas hearing was denied or not, but rather on whether the extradition provisions have been violated.

95. 619 F.2d at 764.

96. *Id.* at 764 n.8.

97. This was the reason for the creation of the UCEA. *See* notes 30-31 *supra* and accompanying text.

98. *See* text accompanying notes 24-27 *supra*.

extradition warrant.[99] As a result of the inadequacies of the federal statute, the courts need to look elsewhere, particularly toward the fourth amendment, in order to provide the fugitive with meaningful federal rights.

4. *Fugitive Has a Federal Right to be Free from Arbitrary and Unreasonable Interference*

The federal district court opinion in *Maney v. Ratcliff*[100] provides still another view of a fugitive's rights. Unlike the previous three approaches, the approach taken in *Maney* was directed toward the rights of fugitives who have never been extradited to the demanding state. The court stated that repeated arrests without subsequent prosecution violate the fourth amendment right to be free from arbitrary and unreasonable police interference.[101] This application of the fourth amendment to the area of extradition, while fairly novel for the federal courts, rests on the assumption that there is no reason to exclude such an application simply because an arrest and detention is incident to a possible transfer to another state. The court in *Maney* did not attempt to support this assumption, but simply required that the demanding state authorities remove the fugitive's name from the NCIC computer because it was clear that they did not intend to extradite the fugitive.

The approach of the court in *Maney*, while laudable for recognizing the applicability of the fourth amendment, fails to go far enough. By only granting an injunction—and then only after repeated arrests—the court did not focus on the detention of the fugitive in jail, but rather on the fugitive's right to be free from "arbitrary" interference. This approach offers the plaintiff no redress for the hardships suffered while detained,[102] and does not specify the point at which interference becomes "arbitrary." In addition, the injunctive relief given to the plaintiff

99. *See* note 43 *supra*.

100. 399 F. Supp. 760 (E.D. Wis. 1975).

101. *Id.* at 773. The fugitive-plaintiff in *Maney* had been arrested three times and had spent more than two months in jail without the demanding state taking any action toward his extradition. *Id.* at 774.

102. *Cf.* Owen v. City of Independence, Mo., 445 U.S. 622, 651 (1980) ("A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees . . . ."). *See also* Gomez v. Toledo, 100 S. Ct. 1920, 1923 (1980). The Supreme Court in *Owen* went on to note that the absence of a damages remedy could result in a lack of incentive both for the aggrieved individual to seek redress for constitutional deprivations and for the wrongdoer to avoid illegal practices. *See* 100 S. Ct. at 1416 nn.33 & 35.

provides scant deterrence with respect to similar conduct by the state authorities.

Since 1975, when *Maney* was decided, the United States Supreme Court has had opportunities to clarify the applicability of the fourth amendment to extradition cases, but it has thus far refused to provide the lower federal courts with appropriate guidance. The majority in *Michigan v. Doran*,[103] a 1978 Supreme Court decision, avoided the fourth amendment issue in its holding that the courts of an asylum state may not review a demanding state's judicial determination of probable cause.[104] The Court based its decision on early Supreme Court cases that held that extradition must be kept summary and mandatory in order to effect its purpose; judicial review in the asylum state is now limited to the consideration of a narrow scope of issues in an extradition habeas corpus proceeding.[105] In his concurring opinion, however, Justice Blackmun chided the Court for not deciding whether the fourth amendment requires a probable cause determination. He argued that the earlier decisions were premised on assumptions that were no longer valid in light of the extension of the fourth amendment to the states.[106]

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103. 439 U.S. 282 (1978).

104. *Id.* at 290. The Court felt that it was unnecessary to determine whether the fourth amendment required a probable cause determination since the demanding state had already made a judicial finding of probable cause. *Id.* at 285 n.3. For criticism of the *Doran* case, *see generally* Note, *The Extradition Clause: Asylum From the Warrant Requirements of the Fourth Amendment*, 16 HOUS. L. REV. 975 (1979); Note, *Criminal Law: Probable Cause—A New Standard*, 18 WASHBURN L.J. 643 (1979).

In Zambito v. Blair, 610 F.2d 1192 (4th Cir. 1979), the Court of Appeals for the Fourth Circuit recognized that a probable cause determination must be made in the demanding state prior to extradition under the fourth amendment. The *Zambito* decision, though, is deficient in two respects: (a) the court did not believe that the extradition papers must state that a probable cause finding has been made; (b) the court ignored the significant pretrial confinement a fugitive may face prior to extradition. In *Zambito*, the plaintiff was arrested on August 14, 1978, but the asylum state court did not learn until January 18, 1979 that a probable cause determination had been made by the demanding state. Although the plaintiff had been free on bail during that time, the court ignored the implications for the indigent fugitive—if the plaintiff in *Zambito* could not have afforded bail, there is no indication that the court would have offered redress to the plaintiff for the time spent in jail waiting for evidence to arrive indicating that a probable cause finding had been made. Given the relative ease with which the demanding state can attach an affidavit stating that a finding of probable cause has been made, the court in *Zambito* was clearly wrong when it declared that it "is the actual fact [of a probable cause determination], not the statement or lack of a statement that, in the end, matters." *Id.* at 1196.

105. 439 U.S. at 288-89.

106. *Id.* at 290-94 & nn.1-2 (Blackmun, J., concurring).

C. The Failure of the Federal Courts to Provide Fugitives with Meaningful Rights

Many of the abuses associated with extradition result from judicial insensitivity to the extensive use of computers in the extradition process.[107] In a society that values freedom, it is essential that any computer information used as the basis for an arrest be accurate. The Federal Bureau of Investigation has acknowledged, however, that "the data verification and certification procedures employed by NCIC do not prevent 'at least some stale and incorrect data from being in NCIC at any given time.' "[108] The fugitive may thus be subject to arrest and detention on the basis of inaccurate identification or a stale warrant. In addition, the fugitive may wait in jail two to three weeks before the demanding state informs the asylum state that it has no intention of seeking his or her extradition;[109] even when released, the fugitive has no guarantee that he or she will not be arrested again on the basis of the same information in the NCIC computer.[110] Under current practice, the fugitive does not even have the assurance, prior to extradition, that a probable cause determination has been made—a determination that is required in all non-extradition arrests.[111]

By failing to provide a meaningful remedy in this context, the federal courts exacerbate the abuses suffered by a fugitive. A fugitive who believes that his or her rights were violated in an improper extradition can bring an action for false arrest and imprisonment in a state court, but due to the good faith defense available to the state authorities involved, and the possible bias of the state court in favor of its own criminal justice system, the fugitive is not likely to succeed.[112] The fugitive can

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107. *See* notes 6, 15-16 *supra* and accompanying text.

108. Federal Bureau of Investigation, FBI Statutory Charter—Appendix Part 3, at 710 (1979). This comment by the FBI was made in response to a report by the Task Force on Science and Technology in the Criminal Justice System of the Scientists' Institute for Public Information. The report was critical of the data verification procedures used in NCIC. The FBI went on to say that the "question becomes one of how much effort can be reasonably expended on data validation." *Id.*

109. *See* text accompanying note 59 *supra*.

110. *See generally* text accompanying notes 1-5 *supra*.

111. *See* note 10 *supra*.

112. *See* note 16 *supra*. It is also possible that a fugitive might bring an action against the officials of the asylum state under section 11 of the UCEA, which makes it a misdemeanor for the state official to violate section 10 of the UCEA. Section 10 requires that the person arrested on the basis of the extradition warrant be taken before a judge or a court of record of the asylum state before the person can be delivered to the agents of the demanding state. There is, however, almost no history of litigation under section 11, and it is doubtful

bring a section 1983 action in federal court, but currently the federal courts either deny the fugitive all rights or allow the fugitive only certain rights predicated on state law or an inadequate federal statute.[113] Although one federal court has recognized a constitutional basis for a fugitive's rights, its remedy for the violation of those rights was limited to that of preventing further, undefined, arbitrary interference.[114]

Section 1983 remains a method for remedying extradition abuses, notwithstanding the actions taken in this area by the federal courts. This section was intended by Congress to protect the constitutional rights of citizens and to limit the power of the states over citizens. Because Congress apparently is reluctant or unable to remedy the abuses of extradition suffered by fugitives,[115] the federal courts should utilize section 1983 to enforce the fugitive's fourth amendment rights and thereby prevent these abuses.[116]

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that section 11 would significantly benefit the fugitive. First, it is not clear whether section 11 covers arrests without a warrant. Second, many of the states that have adopted this penalty provision vary the standard of conduct for punishment—many states require "wilfull disobedience." Third, and most important, the fugitive can receive no redress for damages under section 11.

113. *See* text accompanying notes 65-106 *supra*.

114. *See* text accompanying notes 100-02 *supra*.

115. Congress has not acted in the area of extradition in any substantial degree since the passage of the federal extradition statute in 1793. When that statute proved inadequate, Congress left it up to the states to rectify the situation through the creation of the UCEA. The reason for Congressional silence in this area may lie in the decentralized nature of the United States' criminal justice system. As a result of decentralization, "[a]ttempts at comprehensive Federal legislation to control the collection and dissemination of criminal justice information have failed to produce legislation or a consensus as to how authority for this important area of control of the system should be allocated between the States and the Federal Government." PRELIMINARY ASSESSMENT, *supra* note 1, at 3.

116. Although one may argue that the federal courts should wait until Congress enacts laws to specifically deal with extradition abuses, the courts would be ill-advised to adopt such a course. Not only is it doubtful that Congress will act, but the courts would be abrogating the clear duty they have to enforce and define a citizen's constitutional rights. *See* Morrissey v. Brewer, 408 U.S. 471 (1972) (Court specified minimum parole revocation procedures required by the Constitution). *Cf.* Mitchum v. Foster, 407 U.S. 225, 242 (1972) (federal courts are the guardians of the people's rights). *But cf.* Stone v. Powell, 428 U.S. 465, 493 n.35 (1976) ("Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States.").

V. PROPOSED FOURTH AMENDMENT EXTRADITION RIGHTS

A. INTRODUCTION

The fourth amendment provides in part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."[117] The first clause, the reasonableness clause of the fourth amendment, requires a balancing test to determine the constitutional rights of the individual.[118] Although no precise or quantitative balance is possible, the initial scope of the fourth amendment's mandates may be determined by weighing the individual's liberty interest against the state and federal interests in the action under question.

The protections of the fourth amendment against unreasonable searches and seizures, applicable to the states through the fourteenth amendment,[119] extend to the full range of criminal procedures, including not only the arrest of an individual[120] but also his or her brief detention.[121] Extradition, involving both the arrest and detention of an individual for a period of up to three months,[122] should be considered within the scope of

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117. U.S. CONST. amend. IV.

118. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 654 (1979).

The fourth amendment has two principal clauses: the reasonableness and the warrant clause. The Supreme Court, in search and seizure cases, vascillates between these two clauses without any consistent analysis. For example, the Court in Delaware v. Prouse, 440 U.S. 648 (1979), stated that the "essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials." *Id.* at 653-54. This was more emphatically stated by the dissenting opinion of Justice White in Payton v. New York, 445 U.S. 573 (1980): "Our cases establish that the ultimate test under the Fourth Amendment is one of 'reasonableness.' " *Id.* at 620 (White, J., dissenting). The opposite approach was taken by the Court in Arkansas v. Sanders, 442 U.S. 753 (1979), when it declared that the "mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment." *Id.* at 758.

119. *See* Payton v. New York, 445 U.S. 573, 576 (1980), for a recent reaffirmation of the holding, first espoused in Wolf v. Colorado, 338 U.S. 25 (1949), that the fourth amendment applies to the state via the fourteenth amendment.

120. An arrest is "quintessentially a seizure." 445 U.S. at 585 (quoting United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring)).

121. "The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); *see* Delaware v. Prouse, 440 U.S. 648, 653 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 556-58 (1976); Terry v. Ohio, 392 U.S. 1, 16 (1968).

122. *See* note 51 *supra* and accompanying text.

the amendment.[123] On their face, the extradition clause and the fourth amendment are not in conflict, and there is no other apparent reason to deny application of the fourth amendment to extradition.[124] On the contrary, as Justice Blackmun stated in his concurring opinion in *Michigan v. Doran*, "[t]he words of the Amendment provide no grounds for a distinction between 'seizures' of persons for extradition and seizures of persons for any other purpose."[125] Furthermore, the interest to be protected by the fourth amendment—the "security of one's privacy against arbitrary intrusion by the police"[126]—is present with greater force in the extradition context than in many other arrest situations. Since extended detention and forced transportation between states imposes a restraint on liberty that is often far greater than detention within a single state,[127] the fugitive facing extradition deserves the protection of the fourth amendment.[128]

123. "The extradition process involves an 'extended restraint of liberty following arrest' even more severe than that accompanying detention within a single State. . . . It surely is a 'significant restraint on liberty.' " Michigan v. Doran, 439 U.S. 282, 296 (1978) (Blackmun, J., concurring).

124. *See id.* at 294 n.5.

125. *Id.* at 295 (Blackmun, J., concurring).

126. Wolf v. Colorado, 338 U.S. 25, 27 (1949).

127. Michigan v. Doran, 439 U.S. 282, 296 (1978) (Blackmun, J., concurring).

128. Dicta in several other Supreme Court decisions may be viewed as providing added support for the proposition that one can use the fourth amendment to define the fugitive's rights, *i.e.*, to provide the fugitive with procedural safeguards. For example, the Supreme Court stated in Delaware v. Prouse, 440 U.S. 648, 654 (1979) that the "permissibility of a particular law enforcement practice is judged" by the fourth amendment. This statement implies that, in addition to proscribing certain practices, the fourth amendment can also be used prescriptively. *Cf.* Michigan v. Doran, 439 U.S. 282, 293 (1978) ("But one really cannot know whether the Fourth Amendment was satisfied without examining and determining the procedural protections the Amendment provides . . . .") (Blackmun, J., concurring); Gerstein v. Pugh, 420 U.S. 103, 111 (1975) ("Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents.").

One may argue, however, that it is wrong to use the fourth amendment to define the fugitive's rights, even though the fourth amendment is made applicable to the states through the fourteenth amendment. The due process clause of the fourteenth amendment, which limits state action, has two aspects: procedural and substantive. Because procedural due process has been defined as setting the conditions "which must attach to deprivatory governmental action," *see* Saphire, *Specifying the Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 113 nn.9-10 (1978), one may argue that any extradition safeguards which could be specified are properly classified as procedural due process protections. *See* Carey v. Piphus, 435 U.S. 247 (1978) (discussed in note 62 *supra*), concerning the burden of proof placed on the plaintiff if this argument is accepted.

The above argument is specious, however, because the Court has normally defined procedural due process to apply to situations when the person has been deprived of a liberty interest such as the right to attend school, or to hold

Thus far, no federal court has taken full advantage of Justice Blackmun's lead in *Michigan v. Doran*[129] to rule on whether the fourth amendment's protection extends to the fugitive. Nevertheless, the federal courts' duty to protect the constitutional rights of citizens can be fulfilled only by recognizing the applicability of the fourth amendment in this context, and then determining the extent to which its aegis covers the fugitive.

Under a fourth amendment analysis, the fugitive's liberty interests should be balanced against the state and federal interests in extradition. In the extradition context, the fugitive's liberty interest is great—the individual's innocence must be assumed at the pretrial stage.[130] This liberty interest is greater than, for example, a parolee's conditional liberty interest.[131] A fugitive subject to pretrial confinement suffers not only loss of freedom of movement, but also separation from family and friends, plus negative repercussions on present or future employment.[132] Because extradition may involve either transfer

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a job. *See generally* Owen v. City of Independence, Mo., 445 U.S. 622 (1980). The liberty interest of a fugitive is different than those addressed in the above cases, however, because the right to remain free is basic to a free society. Indeed, the Supreme Court has emphatically declared that the "Fourth and Fourteenth Amendments' prohibition of searches and seizures that are not supported by some objective justification governs all seizures of the person, 'including seizures that involve only a brief detention short of traditional arrest.' " Reid v. Georgia, 100 S. Ct. 2752, 2753 (1980) (citations omitted).

It is interesting to note that the Supreme Court uses a balancing test to determine both a person's procedural due process rights (*see, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 482-84 (1972)) and a person's "substantive" due process rights—such as the fourth amendment right to a probable cause determination (*see* note 118 *supra* and accompanying text). The use of the same test underscores that the dividing line between the two types of due process is blurred. *See* Saphire, *supra*, at 123.

129. *See* notes 103-06 *supra* and accompanying text.

130. There is current confusion over "assumption of innocence" versus "presumption of innocence": the latter phrase has been held not to apply to the pretrial stage because it is really a rule of evidence that allocates the burden of proof at a criminal trial. *See generally* Fox, *The "Presumption of Innocence" as Constitutional Doctrine*, 28 CATH. U.L. REV. 253 (1979). *But see* Gerstein v. Pugh, 420 U.S. 103, 127 (1974) (Stewart, J., concurring); Thaler, *Punishing the Innocent: the Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 WIS. L. REV. 441, 463.

131. A parolee's interest is conditional, and therefore less, in the sense that a prisoner's early release may be reasonably conditioned upon the observance of certain rules. Even though the parolee's interest is less, he or she is still given procedural protection, albeit under the procedural due process clause of the fourteenth amendment. *See* Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

132. Other harmful effects include: an erosion of the belief that the criminal justice system is fair, exposure to jail conditions worse than those encountered in penal institutions for those convicted, and an increased likelihood of convic-

to a distant state or significant pretrial confinement, or both,[133] the requirement that any interference with the fugitive's liberty interest be "reasonable" should be recognized by any society that purports to be civilized and democratic.[134]

The state's interest in extradition is ancillary to its "duty to control crime":[135] as part of the state's overall concern for its criminal justice system, the state has an interest in preventing other states from operating as asylums for fugitives.[136] It is with this view in mind that the United States Supreme Court has repeatedly emphasized that extradition should not be burdened with difficult and costly procedures that may greatly retard the effectiveness of a state's criminal justice system.[137]

The federal interest in extradition includes both the need to preserve harmony among the states,[138] and the concern that the federal government should not unduly interfere in state matters.[139] On the other hand, the overriding federal interest is to safeguard the dignity of the individual;[140] the priority assigned to this interest is necessary in a democratic society. The dignity of the individual is assured through the constitutional limitations on a state's criminal procedures. Through fair and reasonable treatment, society promotes the continued cooperation of the citizen with society, which in turn promotes the smooth functioning of democratic institutions.[141] It is the duty

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tion as a result of continued confinement. *See generally* Project, *supra* note 16, at 781.

133. *See* notes 49-59 *supra* and accompanying text.

134. *See* Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

135. Gerstein v. Pugh, 420 U.S. 103, 112 (1974).

136. *See, e.g.*, Michigan v. Doran, 439 U.S. 282, 287 (1978).

137. *Id.* at 288. Note that the Supreme Court cites in support of the proposition a case decided before the fourth amendment was held applicable to the states. *See id.* (citing Biddinger v. Commissioner of Police, 245 U.S. 128, 132 (1917)).

138. *See* notes 19, 21 *supra*.

139. Related to this concern has been the reluctance of the federal courts to give section 1983 an overly liberal interpretation —not only would state independence suffer, but the federal courts' caseload would be overstrained. In 1979, private plaintiffs commenced 23,000 private civil rights actions in federal court. This represented about 14.7% of the civil caseload. Note, *Derivative Immunity: An Unjustifiable Bar to Section 1983 Actions*, 1980 DUKE L.J. 568, 574 n.39. This concern for the federal courts' caseload, however, may not be highly significant in light of the Supreme Court's recent broadening of section 1983 to include violations of any federal statute. *See* note 64 *supra*.

140. "A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process." Gerstein v. Pugh, 420 U.S. 103, 118 (1975).

141. Arbitrary or unjust treatment of even the fugitive who is later found to be guilty of a crime is against the state's interests because the possibility of reincorporating the fugitive into society as a productive citizen decreases as the

of the courts, within whose province the constitutional limitations on state action are interpreted and applied, to assure the just treatment of the fugitive. The Supreme Court has not hesitated to interpret the Constitution to provide safeguards to the parolee when the denial of his or her conditional liberty is involved.[142] In the case of the fugitive who is arguably innocent of any crime, it cannot seriously be entertained that the courts overstep their authority when they define safeguards for the fugitive.

In light of the varied and competing individual, state, and federal interests in the extradition process, no absolute definition of the rights of the fugitive can be derived—reasonableness is an "amorphous" standard.[143] Fear of imprecision, however, does not excuse the courts from the task of defining the fugitive's rights, which would in effect deny the fugitive the protection offered by the fourth amendment. A "commonsense" approach to the problem is the only solution:[144] any argument that effective extradition will suffer if certain safeguards are constitutionally mandated should be viewed "with skepticism."[145]

B. Proposed Extradition Rights Under the Fourth Amendment

Upon a balancing of the various interests involved in the extradition context, a fugitive's rights under the reasonableness clause of the fourth amendment should include: the right to the procedural safeguards of the extradition process, the right not to be detained in the absence of a continuing intent to

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fugitive's cause for animosity increases. *See* Morrissey v. Brewer, 408 U.S. 471, 484 (1972).

142. *See id.*

143. *See* Payton v. New York, 445 U.S. 573, 600 (1980).

144. This point may be debated in light of Justice White's analysis in his dissenting opinion in Payton v. New York. *See generally id.* at 1389-97 (White, J., dissenting). Justice White believes that reasonableness should be determined by what was reasonable at the time of the adoption of the fourth amendment. *See id.* at 1393 (White, J., dissenting). Aside from the difficulty of a historical search for reasonableness, such an approach freezes the development of constitutional law—a result that can only have deleterious effects in a rapidly changing society.

145. *Cf. id.* at 1388 ("In the absence of any evidence that effective law enforcement has suffered in those States that already have such a requirement . . . we are inclined to view such arguments with skepticism. More fundamentally, however, such arguments of policy must give way to a constitutional command that we consider to be unequivocal."). *Payton* was a fourth amendment case that dealt with, among other things, a warrantless and nonconsensual entry into a suspect's house in order to make an arrest.

extradite, the right to an initial appearance and a preliminary examination before a judge, the right to a probable cause determination, and the right not to be detained more than thirty days if the extradition papers do not arrive.

1. *Right to the Procedural Safeguards of the Extradition Process*

As mentioned earlier,[146] some federal courts provide no remedies to the fugitive who has been forcibly abducted by the police from one state to another, arguing, for example, that the fugitive possesses no right to the extradition process.[147] The fugitive who is abducted to a distant state may suffer not only severe psychological effects, due to a sudden separation from family, friends, and familiar surroundings (in addition to the possibly rough treatment by the abductors), but also serious economic consequences—the fugitive may lose income from his or her job, the chance of promotion, and the right to the job itself. The citizen should, therefore, have a right not to be transferred to a distant state in the absence of procedural safeguards. This right is supported on grounds of fairness to the fugitive, and also because it would be difficult to argue that state interests suffer by according the fugitive basic procedural rights. Evidence that the state's interest would not appreciably suffer can be inferred from the number of states that have adopted the detailed requirements of the UCEA, despite any deleterious effect on the state's interest.[148] The procedural safeguards that should accompany this right to the extradition process should include in general the provisions of the UCEA, and in particular the procedures proposed in the discussion that follows.[149]

146. *See* notes 65-77 *supra* and accompanying text.

147. *See, e.g.*, Johnson v. Buie, 312 F. Supp. 1349 (W.D. Mo. 1970).

148. The latest state to adopt the UCEA provisions was North Dakota in 1979. *See* N.D. CENT. CODE §§ 29-30.2-01 to -29 (Supp. 1979).

149. The rights to counsel, to a speedy trial, and to bail, are not explored in depth in this Note because these rights are specifically guaranteed in other parts of the federal Constitution. *See generally* NAT'L ASS'N OF PRETRIAL SERVICES AGENCIES, PRETRIAL RELEASE (1978).

The right to the procedural safeguards of the extradition process has a possible caveat: the reasonableness of the right to extradition changes when one considers the situation of a metropolitan area divided by an invisible state line. The burden on the liberty interest of a fugitive is less when the fugitive is transferred from one state to another within the same metropolitan area; the fugitive arguably suffers no more than in an intrastate arrest situation. *See* J. Murphy, *supra* note 19, at 78-81. Moreover, the state's interests in the speedy retrieval of the fugitive are greater in the metropolitan situation. Because approximately one fourth of the nation's population lives in metropolitan areas

2. *Right Not to be Detained in the Absence of a Continuing Intent to Extradite*

Currently, a state can enter a person's name in the NCIC computer without intending to seek that person's extradition.[150] The fugitive may wait in jail two to three weeks before the asylum state is informed that the demanding state does not intend to seek the fugitive's return.[151] Even if the demanding state tells the asylum state that it intends to seek the fugitive's extradition, there is no guarantee that the demanding state will keep its promise. In *Maney*, for example, the plaintiff waited in jail a month while the asylum state waited for the promised extradition papers from the demanding state.[152] The fugitive may spend time waiting in jail for extradition papers that will never arrive, and has no guarantee that, if released because the papers do not arrive,[153] he or she will not be arrested again on the basis of the same data in the NCIC computer.[154]

A fugitive who has been subject to any of the above abuses should be allowed to bring a section 1983 action against the authorities of the demanding state. Although it may be argued that the state authorities will carry an intolerable burden, the burden is only imaginary. State officials must only act in a reasonable fashion along the lines of current NCIC policies, which provide that an agency is only supposed to enter or keep a per-

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divided by state lines, *id.* at 21, a state's criminal justice goals may be easily frustrated by a fugitive who takes advantage of state boundaries. If the fugitive in the same metropolitan area, but within another state, must always be accorded full extradition procedures, then the state's criminal justice interest may be impeded; before the fugitive is available for the first step in the demanding state's criminal justice process, at least nine agencies from both the demanding and asylum states must become involved. *See id.* at 21 note e; Murphy, *Uniform Criminal Extradition Act: Time for Change?*, in THE HANDBOOK ON INTERSTATE CRIME CONTROLS 95 (1978). Requiring the states always to set the entire extradition process in motion places a needless burden on them. On the other hand, there may be extradition situations which, while occurring in a metropolitan area, mandate that the fugitive be given full extradition rights. What the situations are—when the extradition safeguards may be ignored and when they may be not—cannot be readily specified, however, because what is reasonable will vary with the facts. There is the problem of defining what a metropolitan area is, and of exposing the police to such a vague standard that they will never know in advance of litigation when it is "reasonable" to dispense with the extradition process. Because of these problems, the full explication of the caveat to the right to the extradition process may be best left to the legislature to decide.

150. *See* notes 1-5 *supra* and accompanying text.

151. *See* note 59 *supra* and accompanying text.

152. Maney v. Ratcliff, 399 F. Supp. 760, 764 (E.D. Wis. 1975).

153. *See* note 52 *supra*.

154. *See generally* Maney v. Ratcliff, 399 F. Supp. 760 (E.D. Wis. 1975).

son's name in the NCIC computer if it maintains a firm commitment to gaining the extradition of that person.[155] The right not to be detained in the absence of an intent to extradite will not only protect the significant liberty interest of the fugitive, but will also advance the state and federal interest in avoiding the harassment or unjustified detention of its citizens.[156]

Thus, a state agency should be required to determine whether extradition will be pursued before it can enter a person's name in the NCIC computer. The county prosecutor who normally makes the decision whether to pursue extradition should be required to use specific guidelines before entering a person's name with the NCIC. Guidelines might include consideration of, for example, the seriousness of the alleged crime, the financial limitations on the extradition of the fugitive over a great distance, and the length of time during which the agency will seek extradition.[157] Owing to practical limitations, it is not always possible for the prosecutor to determine, at the time the warrant is first issued, that the fugitive's extradition will definitely be sought. Once it is determined that the fugitive will not be extradited, however, the fugitive's name should be deleted from the NCIC computer.[158] If the demanding state has been informed that the fugitive has been detained, it should immediately determine whether it still desires extradition. If extradition is not sought, steps should be taken to ensure that the fugitive will not be arrested and detained again.[159] In addition, to avoid the detention of the wrong person, the originating agency should be held to a standard of reasonable assurance that the information supplied to the NCIC computer concerning the fugitive's identity is both accurate and sufficient to permit positive identification of the fugitive by the police in the asylum state.

155. *See generally* DEPARTMENT OF JUSTICE, FBI, EXTRADITION OF WANTED PERSONS AND THE NATIONAL CRIME INFORMATION CENTER (1979). The courts have a duty to provide the proper stimulus to ensure that the state authorities adhere to the NCIC policy of using the NCIC computer only if there is a firm commitment to gaining the fugitive's extradition. *Cf.* Gerstein v. Pugh, 420 U.S. 103, 117-18 (1975) (in our democracy there must be a series of checks and balances—law enforcement cannot be entrusted to a single functionary).

156. *See* text accompanying notes 141-42 *supra*.

157. These considerations are included to prevent a person's name from remaining indefinitely in the NCIC computer.

158. This requirement can be found in the NCIC policy document, EXTRADITION OF WANTED PERSONS AND THE NATIONAL CRIME INFORMATION CENTER, *supra* note 155, at 2.

159. This is also a current policy of the NCIC. *See id.* at 4.

3. *Right to an Initial Appearance and a Preliminary Examination*

Although the extradition statutes of the states that have adopted the UCEA require that the person being detained be brought before a judge or magistrate to determine whether the person is the one charged with the crime, and whether the person fled from justice in the demanding state,[160] the extradition statutes of at least one state do not have a provision for a preliminary hearing.[161] Even in the states that have adopted the UCEA, there is no assurance that there will be adequate identification procedures at the preliminary hearing. A judge may be disposed, for example, to accept the information entered in the NCIC computer as conclusive on the issue of identification, even though the information is incomplete or inaccurate.[162] On the basis of such inaccurate data, the fugitive can be held in jail for up to a month or more.[163]

Given the grave consequences for the fugitive if the arrest is based on faulty computer data, courts should recognize that the fourth amendment requires that the fugitive be allowed an initial appearance and a preliminary examination to insure that his or her detention comports with reasonableness. In a non-extradition arrest, the person who is arrested is accorded certain procedural safeguards, designed to ensure both that there is good reason to detain the person and that the person thus detained is aware of his or her rights.[164] Because the fugitive's liberty interest is at least as great as that of the person arrested in a non-extradition situation, the safeguards available to the latter person should also be made available to the fugitive. Any additional burden imposed on the states by affording the fugitive certain pretrial procedures should be viewed as minimal, because almost identical procedural protections are offered at a later stage in the fugitive's extradition.[165]

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160. *See* note 45 *supra* and accompanying text.

161. *See* S.C. CODE § 17-9-10. In Mississippi, the judge determines whether there is "reasonable cause to believe that the complaint is true." MISS. CODE ANN. § 99-21-3 (1972).

162. *See* note 46 *supra* and accompanying text.

163. *See* text accompanying notes 50-52 *supra*.

164. FED. R. CRIM. P. 5; *see id.* 5.1.

165. *See* notes 53-54 *supra*.

Although the preliminary examination would probable reduce the utility of the writ of habeas corpus, because most of the issues raised in the habeas proceeding would already have been settled, this may be a desirable result. *See, e.g.*, Murphy, *supra* note 149, at 105-06. The fugitive needs the protections at an earlier stage in detention, rather than after being held for one to three months

Thus, when arrested in the asylum state, the fugitive should be taken without undue delay before a judge to be informed of the complaint against him or her (the reason for detention), of the right to retain counsel (or to be assigned counsel if indigent), of the right to remain silent, and of the right to a preliminary examination. The preliminary examination, if not waived by the fugitive, should be held not later than ten days following the initial appearance before the judge if the fugitive is in custody, or not later than twenty days if the fugitive is not in custody.[166] At the preliminary examination, the fugitive should be allowed to have the issues of identification and probable cause[167] settled.

4. *Right to a Probable Cause Determination*

Currently, a fugitive can be extradited without having been allowed the basic fourth amendment right to a judicial determination of probable cause.[168] As noted earlier, the majority in *Michigan v. Doran* chose not to clarify the right of the fugitive in this regard. There is no guarantee that a probable cause determination has been made when an agency enters a person's name in the NCIC computer.[169] Similarly, there is no requirement that a probable cause determination be made in the demanding state prior to the fugitive's transfer from the asylum state.[170] It is anomalous that, despite the hardships a fugitive can suffer from pretrial detention or from transfer to a distant state, and despite the Supreme Court's decision in *Gerstein v. Pugh*[171] that a significant pretrial restraint on liberty must be based on a judicial determination of probable cause, the fugitive today still is not assured the right to a probable cause finding.

The probable cause finding is necessary in order to ensure that the fugitive is not being held arbitrarily. Even though the

in jail. It is questionable whether the writ of habeas corpus has any real usefulness today other than as a tactic for delay. *See* Conley, *supra* note 54, at 341.

166. *See* FED. R. CRIM. P. 5(c).

167. *See* notes 168-75 *infra* and accompanying text.

168. *See* note 10 *supra*. *See also* Murphy, *supra* note 149, at 109-11.

169. An agency is only supposed to enter a person's name in the NCIC computer if there is a warrant for his or her arrest, or if the agency will procure a warrant within forty-eight hours after the entry. *See* J. MURPHY, *supra* note 19, at 94 n.15. There is no guarantee that the agencies will comply with this requirement, however, or that a fugitive will currently be able to seek redress.

170. *See* Murphy, *supra* note 149, at 101-03; note 104 *supra*.

171. 420 U.S. 103 (1975). The Court in *Gerstein* held that the Florida procedures, whereby a person could be arrested and detained in jail simply on a prosecutor's assessment of probable cause, were unconstitutional.

burden on the state may be increased by requiring, for example, that no fugitive entry be kept in the NCIC computer without a probable cause finding, the burden would not be unreasonable in light of the harsh consequences to the fugitive arrested, detained, and transferred to another state on the basis of information in the computer. The requirement that the demanding state obtain a probable cause finding early in the extradition process not only affords the judges of the asylum state a quick and easy means of assurance that there is just cause to detain the fugitive, but has the added advantage of promoting state comity. The Supreme Court's decision in *Michigan v. Doran*,[172] requiring that the judge of the asylum state simply accept the judicial determination of the state where the alleged crime was committed, aids in preserving the integrity of each state's judicial system—the very purpose of the extradition process.[173]

Application of the reasonableness clause of the fourth amendment, then, dictates that a neutral judicial officer in the demanding state make a probable cause determination before an entry is made in the NCIC computer for the fugitive's arrest, or in a reasonable time thereafter.[174] Moreover, the demanding state should forward evidence that a probable cause determination has been made, by sending an indictment, a warrant, or a certified copy thereof to the asylum state as soon as possible after the demanding state is notified of the fugitive's detention.[175] Presented at the preliminary hearing, such evidence of a probable cause finding would be sufficient to justify the detention of the fugitive.

5. *Right Not to be Detained More than Thirty Days If the Extradition Papers Have Not Arrived in the Asylum State*

A fugitive who decides to oppose his or her extradition may wait in jail for up to ninety days before he or she can submit an application for a writ of habeas corpus.[176] The fugitive is thus

172. 439 U.S. 282 (1978); *see* notes 103-06 *supra*.

173. *See* notes 19, 21 *supra*.

174. What is reasonable will, of course, vary with the circumstances of each specific situation, although one may assume that a forty-eight hour period is presumptively reasonable. *See* note 36 *supra*.

175. An indictment satisfies the probable cause requirement because it represents a grand jury's determination that it is more probable than not than the person committed the alleged crime. *See* Michigan v. Doran, 439 U.S. 282, 295 n.6 (1978) (Blackmun, J., concurring).

176. *See* notes 50-53 *supra* and accompanying text.

faced with a difficult choice when told by the judge in the asylum state that he or she can either waive or contest extradition:[177] the fugitive may consent to transfer to another state if extradition is waived, or the fugitive may wait in jail for a prolonged time before the legality of the detention can be tested. The fugitive's decision to test the legality of detention through habeas corpus in effect punishes the fugitive for asserting constitutional rights.[178]

The reasonableness requirement of the fourth amendment suggests that the fugitive should only be required to wait in jail a minimal time before he or she can apply for a writ of habeas corpus. The demanding state should, therefore, be required to make its best efforts to send the extradition papers to the asylum state so that the fugitive can submit a habeas corpus application. Although it would not be practical to mandate that the demanding state be held to an inflexibly short time period in which the extradition papers must be sent, it is not reasonable to allow the demanding state a period of two to three months to send papers from one state to another while a fugitive may be waiting in jail.

Therefore, because it normally takes the demanding state thirty days before it can prepare and send the extradition papers to the asylum state,[179] and because a fugitive cannot apply for a writ of habeas corpus until the extradition papers

177. *See* note 47 *supra* and accompanying text.

178. "Punishment" is technically only imposed after a finding of guilt has been made. *See* Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979). Punishment, however, may also be used in the behavioral sense of negative reinforcement, *i.e.*, when its imposition has the effect of decreasing or inhibiting a certain set of behavioral responses. In the extradition context, the fact that the fugitive may have to wait in jail for up to ninety days before he or she can bring a writ of habeas corpus will have the probable effect of decreasing the likelihood that the fugitive will choose the option of contesting extradition. The Supreme Court's obliviousness to the practical effects of imposing certain conditions on the person detained before trial has been seriously questioned. *See generally* Comment, *"Hands-Off" the House of Detention: Pretrial Detainees and the Illusion of Innocence*, 49 U. CIN. L. REV. 462 (1980); Comment, Bell v. Wolfish: *A Balk at Constitutional Protections for Pretrial Detainees*, 48 U. MO.-KAN. CITY L. REV. 466 (1980).

179. It is unclear why it normally takes at least thirty days for the extradition papers to be sent to the asylum state, but according to one source it normally takes the county prosecutor a week, once it is decided to extradite the fugitive, before all the required papers can be prepared and sent to the attorney general of the demanding state. Conversation with John Tierney, Assistant Hennepin County Attorney, Minneapolis, Minnesota (Dec. 5, 1980). The delay must usually occur, then, from the time it reaches the attorney general to the time it is attested to by the Secretary of State, and the only excuse appears to be a lack of time.

arrive,[180] it would be reasonable to require the release of the fugitive thirty days after arrest if the extradition papers have not arrived.[181] Contrary to current practice,[182] the detention of the fugitive beyond thirty days in order to await the arrival of the extradition papers should not be granted in the absence of extenuating circumstances.

VI. CONCLUSION

The federal courts have almost uniformly ignored the importance of computers in the extradition process as well as the practical workings of the process itself. The widespread and routine use of data in the NCIC computer to arrest and detain fugitives has increased the number of cases in which fugitives suffer unreasonable restraints on their liberty. In section 1983 actions for improper extradition, however, the federal courts have focused mainly on the federal extradition provisions or on the UCEA, and as a result have been consistent only in their failure to provide the fugitive with meaningful rights. By giving scant attention to the constitutional rights of the fugitive, the federal courts have abrogated their special duty to protect the person facing extradition from arbitrary state interference with his or her liberty.[183]

The reasonableness clause of the fourth amendment provides a source for the fugitive's extradition rights. By defining the rights that inhere under the fourth amendment in section 1983 actions, the courts will not only be able to provide the prospective relief of injunctions, but also the compensatory and deterrent benefits of a damage award.[184] "In a country like

180. *See* text accompanying note 53 *supra*.

181. This thirty-day period should begin from the time the demanding state is informed of the fugitive's detention in the asylum state, which should be as soon as practicable after the fugitive is arrested.

The right to be released after thirty days is based on the assumption that the courts will continue to use the extradition writ of habeas corpus. For discussion of whether the courts should continue this practice, see notes 54, 165 *supra*. If the courts no longer use the extradition writ of habeas corpus, the focus of this right would change from the right to be released within thirty days if the extradition papers do not arrive to the right not to be confined in the asylum state more than thirty days absent transfer to the demanding state.

182. *See* Note, *supra* note 8, at 1043 n.21.

183. *See* notes 62, 63, 116 *supra*.

184. The issues of the timing of section 1983 actions and the choice between injunctive and compensatory relief are beyond the scope of this Note, although it is clear that during the period of detention in the asylum state the fugitive cannot bring a section 1983 action—the only available remedy is an extradition writ of habeas corpus. *See* note 61 *supra*. Further, it is apparent that once the fugitive is extradited the abstention doctrine of Younger v. Harris, 401 U.S. 37

ours [the] power [to extradite] is useful and indispensable. It was intended, however, to subserve great public interests. When otherwise used it becomes an evil."[185]

(1971), would prohibit certain relief. For example, an action for an injunction under section 1983 to restrain a pending criminal prosecution in the demanding state would violate the policies of *Younger*.

185. *See* J. MOORE, *supra* note 3, at 1057 (quoting Compton v. Wilder, 40 Ohio St. 130 (1883)) (the Supreme Court of Ohio made this comment in a case holding that it is legal to commence a civil suit against one who has been extradited).