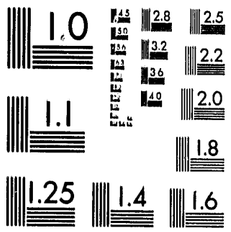

Arrest by Police Computer

John J. Murphy

Lexington Books

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The Controversy over Bail and Extradition

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To Eileen, Johnny, Janey and Deirdre

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Preface

A revolution in police patrol operations is quietly beginning. It has to do with police computers and fugitives. By the end of 1974, about 2,500 computer terminals were installed in police cars, and it is estimated that half of the nation's 75,000 police cars will be equipped with terminals by 1983. Competing with the vehicle-installed terminals will be hand-held terminals for patrol officers that are now in the developmental stages. These terminals will give police on patrol direct, electronic access to national computerized files on wanted persons. The patrol officer will have a reply to a national search of wanted persons files in as little as five to ten seconds.

The revolution is the integration of fugitive retrieval in ordinary police patrol, and its beginning can be seen in the escalation of police dependency on computerized wanted persons files to make decisions to arrest. Inquiries by local, state, and federal police to the national computerized file on wanted persons increased tenfold since 1968 to over nine and one-half million inquiries in 1973. The number of persons located after computer inquiry increased fivefold in the same period.

There are dangers in this explosion in the technological capacity of police to know the wanted status of persons. Both the persons included in computerized fugitive files and the police acting upon those files could be harmed by the pell mell rush to technical refinement. The problem is not too much sophistication in police communication equipment or too tenuous a relationship between crime reduction and equipment, such as mobile terminals. It is the faint understanding of the social and legal implications in the enormous increase in the technological capability of police to know the wanted status of persons. There are potential privacy invasions to persons subject to arrest by officers with direct electronic access to computerized files on fugitives. In this type of arrest, the police are not relying upon accumulated perceptions of events, but upon a system of storing and updating information. All discussion of privacy and police computers to date has centered on dissemination of arrest and conviction records. There has been silence on the privacy issues implicit in the expected reliance by police on national computerized files on wanted persons. Left unexplored is the right of persons to be relieved from harm due to arrest based on stale or inaccurate information in these computers.

The police could also be harmed. The rules of law governing police in fugitive retrieval between states are intolerably inadequate to meet the growing

capacity of police to acquire and exchange information on fugitives. Under extradition law, nine separate state agencies must act before an out-of-state fugitive is available for the first step in the criminal process. In many cases the legal procedure in retrieving a fugitive amounts to an antiquated catapult designed to protect interstate harmony and individual liberty when a slingshot would do.

Past toleration of this procedure was based on footings that have now become insecure. Police disregard of extradition law, which was once sanctionless, has been recently challenged successfully in courts. These challenges have included claims against officers personally and requests for dismissal of criminal charges because of illegal retrievals. Furthermore, it is no longer reasonable to avoid extradition law by demanding waivers of extradition as a *quid pro quo* for parole, probation, or other benefits in the criminal process. There is an unconstitutional taint to a waiver of extradition law extracted from a defendant who has no leverage to refuse the waiver.

Pressure to revise extradition law will mount as the use of the computer further integrates fugitive retrieval into ordinary police patrol, and police disregard of extradition law ceases to be sanctionless.

A radically changed extradition law is proposed for adoption by states. The proposal is based on the view that the nucleus of federal law on extradition mandates only a minimum level of support and cooperation among states, consistent with the root goal of precluding asylum status to any state. A state's power to effectuate its own criminal and correctional law ends at its borders, yet nearly one-fourth of the nation's population lives in socially and economically integrated areas that spread across state borders. States need an extradition law that protects the individual interest in personal liberty and serves the state interest in a reasonably efficient system of reaching fugitives. Present extradition law serves neither interest.

Continuation of present extradition law also could stultify the gains made in bail reform since 1965. One present problem in bail is the retrieval of persons who fail to appear. Matched against the police system of retrieval that is harnessed by an expensive, cumbersome extradition law is the system of bondsmen with more power to retrieve fugitives than federal or state police. Unless the police system of retrieval is revised, current bail reform efforts will be retarded, and the danger of more dependency on bondsmen will increase. Revision of extradition law for more efficiency without loss of civil liberties would encourage the final replacement of bondsmen with police in fugitive retrieval—a socially desirable goal.

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1 The Computer and Official Retrieval of Fugitives

Introduction

In Palm Beach, Florida, a police officer reaches to a computer terminal in his car and types in the license numbers of the two drivers just involved in a slight collision. About seven seconds later, the screen in the terminal displays information indicating that one of the drivers is wanted in Cincinnati, Ohio, for the commission of a burglary. The Florida officer is now engaged in an official retrieval of a fugitive across state lines. Such retrievals have increased and will continue to increase because of the sharp growth in police use of computers to track and identify wanted persons that commenced in the mid-sixties. The police departments throughout the country have begun to provide patrol officers with the capacity to know the wanted status of persons with whom the officers may have contact, albeit innocent.

This new technological capability of police has two marks: (1) the advent, since 1967, of a network of connected state, regional, and national computerized data bases on persons subject to arrest warrants, including persons who fail to appear after a bail release, and (2) the ability to equip police on foot or automobile patrol with mobile terminals that provide direct electronic access to computerized data bases on wanted persons. The first has been substantially reached, but the second is still in a state of experimentation.

These recent significant changes in the manner of police communications explain the increased involvement of police in retrievals and presage continued growth of official retrievals. The changes are also the reason for present pressure on the rules of law governing police retrievals—rules adopted when fugitive retrieval was not integrated with ordinary police patrol. The following is an exposition of the state of the art of police computerized communications on wanted persons.

The Advent of Computerized Data Bases on Wanted Persons

Since 1968, there have been at least four surveys[a] that describe the growth of police use of computerized data bases on wanted persons. The surveys have

[a] In addition to the four surveys discussed in this article, other surveys which have been conducted from time to time on behalf of the International City Management Association,

been conducted on behalf of police agencies,[1] the computer industry,[2] the International City Management Association (the Colton study),[3] and the federal government.[4] Three of the surveys were of police departments exclusively,[5] and the fourth questioned police, courts, corrections and other agencies in the criminal justice system.[6] All of these surveys were pointed toward measuring the extent of adoption of automated information systems[b] and the applications of these systems including rapid retrieval of information on wanted persons.

Although the base for each survey was different, the collective inquiry of police departments was sufficiently extensive and periodic[7] to show a shift from the early emphasis on computer application for crime statistics reporting and crime record keeping to rapid retrieval of information for patrol officers, particularly information on wanted persons.[8] In the earliest survey,[9] 110 of the 251 city police department respondents indicated that they were using automated data processing for police operations. Only 28 of these departments applied this technology to retrieval of information on the wanted status of persons, but a significant number of departments (68) stated that they were planning to use a computerized data base on wanted persons.

The Colton study conducted in the summer of 1971 substantiated the evolution of computer use by police departments from record keeping-reporting functions to rapid retrieval of information on wanted persons for police patrol officers. Based upon responses from 376 city police departments, computer use for statistics keeping and reporting functions stabilized between 1969 and 1971. Computer use to aid police patrol by rapid retrieval of information, including warrants on wanted persons, doubled in the same two years.[10] The most recent study by the federal government in 1972 located 101 discrete automated information systems that served police agencies with computerized data bases on wanted persons including bail violators. The dates when these systems became operational support the findings of the Colton study on the shift of police computer applications to rapid retrieval of information for patrol officers. The 1972 study reported that these systems were operating or would operate in the following years:[c]

1965	*1966*	*1967*	*1968*	*1969*	*1970*	*1971*	*1972*	*1973*
2	1	4	13	12	12	13	26	17

Since 1966, much literature has predicted and exhorted police use of computers to provide patrol officers with rapid response to requests for information on the wanted status of persons. The Science and Technology Report prepared for the 1967 President's Commission on Law Enforcement and Administration of Justice selected police operations out of all aspects of the criminal justice system as having "the greatest potential for immediate improvement by analysis and technological innovation."[11] The drum has continued to beat in favor of police use of computers relating to wanted persons. The 1973 National Advisory Commission on Criminal Justice Standards and Goals said that rapid response to the information needs of police patrol should be the primary objective of any computerized information system used by the police.[12] Highest on the list of information needs, according to the Advisory Commission, was information on wanted persons. These exhortations by public and quasi-public agencies merely reflect an earlier soothsaying study by the American Telephone & Telegraph Company in 1966 that predicted widespread police use of computers relating to wanted persons in the 1970-1975 period.[13]

Apart from exhortatory literature, little has been published explaining the recent concentration on police computers for rapid retrieval of information on wanted persons. The elements of this explanation presage even further growth.

Police are using computerized data bases on wanted persons because of the parallel occurrence of the following factors: (1) the sharply increasing availability of federal money for research and development on the use of computers in police operations; (2) the capability of computers to respond with information within

bear on the use of automated data processing by agencies of municipal government, including police departments. See, e.g., Kraemer, Automatic Data Processing in Local Government: A Review of the Experience, *The Municipal Year Book*, p. 276 (International City Management Association, Washington, D.C., 1967), and Kraemer, Automated Data Processing in Municipal Government: A Survey, *The Municipal Year Book*, p. 280 (International City Management Association, Washington, D.C., 1968). These surveys are not sufficiently oriented toward police use of computers to be helpful in understanding the growth of police computerized communications in relation to the wanted status of persons. See, e.g., P. Whisenand and T. Tamaru, *Automated Police Information Systems* (New York: Wiley, 1970), p. 46, for a discussion of the difficulties in using the 1965 Management Association Survey as a basis for describing computer-based police information systems.

[b]Although the earliest survey (P. Whisenand and J. Hodges, Jr., Automated Police Information Systems: A Survey, 15 *Datamation* 91, 96 [1969]) disclosed some use of electrical accounting machines by police, which is one means of processing information automatically, the later surveys have shown an exclusive use of the computer as the automation device. The conversion from electrical accounting machine to computer for police information systems has become so complete that the most recent survey suggests that the terms "computer" and "automated information systems" are synonyms. See *Directory of Automated Criminal Justice Systems*, p. H-3 (U.S. Dept. of Justice, LEAA, 1972).

[c]These figures were extracted from information contained in the *Directory of Automated Criminal Justice Information Systems* (U.S. Dept. of Justice, LEAA, 1972). The response of each of the 101 automated systems with a data base on wanted persons (*Directory*, p. D-58 to D-60) was examined and the dates at which each system reportedly became operational were collected. One system did not report an operational date, which accounts for the 100 systems reported in the textual table. Two caveats should be noted. First, the *Directory* editors reported the difficulty in obtaining standard responses to the inquiry about computer functions (*Directory*, p. 8). Second, a subsequent study by the Jet Propulsion Laboratory of the future communications needs of criminal justice agencies said several errors have been noted in the *Directory*. See R. Sohn, *National Criminal Justice Telecommunications Requirements*, p. 6-5 (Jet Propulsion Laboratory, California Institute of Technology, June 28, 1974). The editors of the *Directory*, which remains the most extensive listing of criminal justice automated information systems and their uses, have stated the limitations of the *Directory* and have encouraged correction of errors (*Directory*, p. 8).

seconds after an inquiry on a data base composed of wanted persons; (3) the diminishing responsiveness to police inquiries by manually maintained record systems on wanted persons; and (4) the allurement of an electronic linkage between a state or local computerized data base of wanted persons and a similar national data base. The attraction is the conversion of an inquiry by a local patrol officer into a national search of wanted persons with a response within a few seconds.

Police Dependency on Computerized Files on Wanted Persons

A computerized file on persons wanted by police departments throughout the nation that was initiated by the Federal Bureau of Investigation on January 27, 1967, with the acronym NCIC (National Crime Information Center), marked the advent of criminal justice computer systems.[14] State and local police agencies may enter names of persons subject to arrest warrants in connection with a felony or serious misdemeanor.[15] Entries into this national computerized file on wanted persons have increased in the first seven years of its operation; the entries for 1973, numbering 214,534, are approximately three and one-half times the number in 1968. The number of entries into the national computerized file on wanted persons are as follows for each year in the 1968–1973 period:[16]

1968	*1969*	*1970*	*1971*	*1972*	*1973*
64,878	110,076	137,446	182,795	198,550	214,534

Inquiries by agencies, predominantly police departments, about wanted status of persons have increased tenfold since 1968, with over nine and one-half million inquiries made in 1973. The number of inquiries into the national computerized file on wanted persons for each year in this period are as follows:[17]

1968	*1969*	*1970*	*1971*	*1972*	*1973*
970,613	2,456,354	3,994,063	5,534,374	7,795,480	9,565,350

Furthermore, inquiries into the NCIC vehicle file that are made by using a license plate number, or license plate state and vehicle identification number, can be converted into an inquiry of the wanted person file. The vehicle inquiry will also identify a wanted person when vehicular or license plate data has been entered into a wanted person file.[18] The enormous extent of this direct and indirect inquiry system into the wanted person file can be appreciated when the increase in direct inquiries is added to the increase in indirect inquiries by vehicle inquiry. Vehicle inquiries have increased elevenfold from 1968 to a total of 11,497,733 in

1973. This growth in direct and indirect inquiries into the national computerized file on wanted persons substantiates the increasing police dependency upon this file for informational needs of patrol officers.

This dependency resulted in large part from the adoption by states and cities of computerized data bases on wanted persons with electronic linkage to the national file operated by the Federal Bureau of Investigation. Since 1967, at least 64 city and state computerized files on wanted persons have been connected with the NCIC file on wanted persons,[19] presumably by an electronic rather than manual procedure.[d] Other local systems, particularly those serving city police departments, are part of state systems that connect electronically with the national file.[20]

These changes were posed as the police response to the interstate mobility of career criminals. The scant literature justifying these changes has relied upon a few studies on the mobility of recidivists in order to demonstrate the futility of using local records on wanted persons to deal with nomadic career criminals.

Studies on the mobility of recidivists have been published annually from 1963 to 1972 by the Federal Bureau of Investigation as part of the *Uniform Crime Reports.* These studies have "been used to document the need for the centralization of law enforcement information at state and national level in view of crime repeating and mobility."[21] The establishment of the NCIC, including its computerized file on wanted persons, has been attributed to the findings of these studies:

> Available at the close of 1965 were statistics concerning criminal histories of approximately 135,000 individual offenders. These statistics revealed that three out of four were repeaters; that is, they had a prior arrest on some charge. The mobility of these 135,000 offenders was established by a determination that approximately 57 percent had been arrested in two or more states.
>
> To combat this hard core of criminals, those who repeat their crimes and who are highly mobile, and to improve the overall solution rate as a prime means of crime deterrent, the National Crime Information Center came into being.[22]

The studies have consistently stated that a high percentage of rearrests for

[d]The manner of connections between computerized files on wanted persons was examined recently from the perspective of the users, the police patrol officers (See *National Criminal Justice Telecommunications Requirements* p. 6-2 to 6-4 (Jet Propulsion Laboratory, California Institute of Technology June 28, 1974). Most inquiries from patrol officers on wanted persons involve at least one manual operation (i.e., voice communication between the officer and terminal operator, and terminal entry. The introduction of a second manual operation in switching the inquiry to a terminal of a second computer can create an intolerable delay in response to the patrol officer. A study by the Jet Propulsion Laboratory showed that computerized systems that did not have automated message switching capacity to the national or other computerized wanted persons files experienced zero growth in transactions involving inquiries about wanted persons (*id.*, p. 6-6 and 6-7).

recidivists occurred in states other than the state of first arrest. Unfortunately, the criteria for selection of samples used each year has not been stated, and the little information on the constituency of the samples suggests a shifting of criteria from year to year.[23] Furthermore, the yearly samples appear biased toward a high degree of interstate mobility of recidivists. All of the samples in the ten studies published in the *Uniform Crime Reports* appear to have one shared characteristic—the persons in each sample were arrested for a violation of federal criminal statutes.[24] Many of these statutes, however, require interstate activity or movement as an element of the federal crime,[25] which, of course, increases the probability that arrests for the recidivists in the studies occur in different states.[e]

The need for state and local computerized files on wanted persons linked to a national file was more persuasively stated in the reports of primitive police communications on wanted persons. Police efforts to check the wanted status of persons encountered on patrol were frustrated by the limitations of manually maintained record systems. An example[26] is the process used by a patrol officer in the District of Columbia to check the wanted status of persons prior to the installation of a computerized wanted persons file linked to NCIC. The officer made telephone calls to three record locations and waited for the results of manual searches for local warrants. Warrants from other jurisdictions were discovered in one of two ways. First, they might appear on the officer's handwritten notes of "lookouts"—that is, information on wanted persons teletyped to the District from foreign jurisdictions and read to patrol officers at the commencement of their shift. Second, the foreign warrants might appear as the basis of a federal charge of unlawful flight to avoid prosecution, a revelation the patrol officer would receive as the result of one of his three telephone calls.

Since the late sixties, it has often been asserted that the manually maintained record systems on wanted persons were not sufficiently responsive to inquiries by patrol officers either in terms of accuracy or speed,[27] particularly in jurisdictions within or adjacent to metropolitan population centers.[28] Reports based on city[29] and state[30] police operations and on a 1966 national survey[31] of law enforcement needs have demonstrated that manually maintained wanted

[e]The problem of biased sampling is illustrated by the 1967 study, which centered on 71,731 recidivists with at least one criterion--an arrest in 1966 to 1967 "for a Federal crime or rearrested locally in these years after having been included in the Program previously due to involvement in the Federal Criminal Justice System subsequent to January 1, 1963." See *Uniform Crime Reports*, p. 34 (U.S. Dept. of Justice, 1967). The potentiality of bias in the sample arises from the inclusion in the sample of persons arrested by the Federal Bureau of Investigation in 1966 and 1967 for violation of the Fugitive Felon Act—a federal criminal statute with interstate movement of the defendant as its gravamen (18 U.S.C.A. § 1073). In 1966 and 1967, 6,688 persons were arrested under this statute—that is, in 1966, 3,488 interstate fugitives were arrested by the FBI (*FBI 1966 Annual Report*, p. 15), and in 1967, 3,200 were arrested (*FBI 1967 Annual Report*, p. 15). Although the 1967 study did not specify all criteria for inclusion in the sample, it did state that the sample included "violators arrested as fugitives under the Fugitive Felon Act" (*Uniform Crime Reports*, p. 34).

persons files were little help in the exercise of such police patrol judgments as the decision to arrest. Computerizing state and city record systems on wanted persons and adopting electronic links to the national computer base were improvements, but still not enough to assist police in patrol judgments about wanted persons.

Direct Access by Police Patrol to Computerized Wanted Persons Files

Computerizing files on wanted persons and linking local files with similar state and national computer data banks were not a panacea for informational needs of police patrol officers. Since 1973, a number of studies have discussed the matter of the benefit, if any, to patrol officers of the network of linked computerized information systems including those on wanted persons.[32] All of these studies identify the technological advances needed to provide patrol officers with direct electronic access to the computerized information files, including those on wanted persons. Collectively, these studies support the following propositions: (1) present mobile communication systems are not designed to provide patrol officers with information from computerized wanted persons files in sufficient time to affect patrol decisions; and (2) vehicle installed or hand-held terminals, which are in the early stages of development and testing, can give patrol officers direct and timely electronic access to computerized files on wanted persons.

Prior to these studies, there were very few published analyses of the voice message traffic over the mobile police radio networks.[33] One study in 1968 showed that request for information on wanted persons by patrol officers in approximately 800 patrol cars serving a large metropolitan area accounted for only 5 percent of traffic messages between patrol officers and dispatchers.[34] Procedural messages (car status), assignments, administrative and repeat messages comprised the balance. These studies have also noted the decreasing reliability of voice-only mobile police communication due to traffic congestion and inefficiencies arising from the intervention of the dispatcher in the transmission process.[35] The congestion and inefficiencies have become more pronounced because prevailing police mobile communications systems were not designed to facilitate patrol inquiries of computerized information systems, such as wanted persons files.[36]

The officer generally requests information about the wanted status of a person by voice radio request to the dispatcher. The dispatcher logs the request and either forwards the inquiry for processing by a terminal operator or interrupts his dispatch operation to perform the entry task himself. Although the computer response time to the point of entry of the inquiry is typically two to ten seconds, the delays occasioned by dispatcher or terminal operator inter-

vention often are great enough to frustrate the informational needs of the patrol officer. Furthermore, the recent studies of police mobile communications indicate that during peak activity hours in large urban areas, the data base inquiry system may be suspended because the voice radio system becomes saturated with non-inquiry message traffic.[37] In an analysis of the computerized information file serving police in Michigan, it was observed that a terminal operator receives a response from the computer within ten seconds, but the response to the officer originating the inquiry usually takes fifteen minutes from the point of his radio request to the operator. The conclusion was that the computerized system was of little use to patrol officers.[38]

A patrol inquiry to a computerized wanted persons file, verbally transmitted to a dispatcher and reformulated for entry into a terminal, is more likely to affect post-patrol judgments, such as bail requests by police. On the other hand, a fully automatic inquiry without intervention of dispatcher or terminal operator is likely to affect patrol decisions, such as arrest. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals recommended that police engaged in unpredictable field activities should receive information from computerized systems within thirty seconds from the time of request.[39] This recommendation has some support in the early communications industry prognostications[40] that tactical needs of police patrol in the seventies would require direct access to "immediate response" files such as those on wanted persons. Additional support can be found in a few surveys of police perceptions of their own communications needs.[41] The basic fuel, however, for the Commission's recommendation was the wide experimentation by police with mobile digital terminals in patrol cars.

A mobile digital terminal operated by a patrol officer provides a means for the transmission or receipt of messages and allows direct inquiry and response from a data base, such as that of wanted persons.[42] Because the inquiry and response are automatically coded into numeric characters for transmission, the information can be carried at a higher transmission rate. Therefore, a greater volume of information can be carried than with voice messages.[43] The key functional components of the mobile digital terminal are an alphanumeric[44] keyboard, a solid state alphanumeric display panel, coding and encoding equipment, and a supplementary status-only transmission system. A message inquiring about the wanted status of a person is entered by the patrol officer into the terminal by typing the appropriate identifiers on the alphanumeric keyboard. Before transmission, the message is displayed for verification and editing by the officer. A 224 character message of inquiry requires approximately 1.5 seconds for transmission.[45] A relatively modest mini-computer at a base station performs the switching required to relay the inquiry from the field unit to a computerized local or state data base on wanted persons, which, in turn, is electronically connected to the similar national data base. Names and identifiers associated with

inquiries about wanted persons can be transmitted by the mobile unit and a reply received from the national search in as little as five to ten seconds.[46]

The development of mobile digital terminals will permit nationally linked, automated wanted persons files to operate in "real time"[f] from the patrol officer's perspective—that is, the inquiry by the officer, the computer computation, and the response to the officer will transpire with sufficient speed so that results can be used in guiding patrol judgments, such as the decision to arrest. According to a report on user requirements of law enforcement communications sytems, successful experiments with mobile digital terminals have been conducted by fifteen to twenty police agencies since 1972.[47] As can be seen in Table 1-1, as of 1972, nine large city police departments planned to install nearly 2,500 mobile digital terminals in their patrol cars.

Since the Dorset and Bournemouth Constabulary of England proposed in 1971 the idea of installing mobile digital terminals in police vehicles to provide officers with direct access to computer files,[48] the technology has accelerated. Estimates of future use by police are astounding. A projection of police adoption of mobile digital terminals estimated that half of the 75,000 police patrol units in the United States will be equipped with mobile digital terminals by 1983.[49]

> Large scale use of MDTs by 1983 must be expected, although the rate of build up may not reach a peak until the late 1970s because of the many system changes required to accommodate the introduction of digital terminals.[50]

Competing with the vehicle installed terminals will be the portable, hand-held type that provide direct data base inquiry and response by sixteen and thirty-two character display. First suggested in 1967,[51] the hand-held digital terminals were also noted as a desired development in a survey of police views of needs within the system of digital transmission.[52] This type of terminal is cur-

[f] Although the literature on police application of computerized wanted persons files contains some differences on the meaning of "real time," a meaning related to the function of police patrol is preferable. In the only significant literature on police use of computers, over 80 percent of the police applications were characterized as "real time" applications in order to establish the interest in enhancing police patrol activities by computer assistance. See K. Colton, The Use of Computers by Police: Patterns of Success and Failure, *International Symposium on Criminal Justice Information and Statistics System*, p. 143 (Project Search, October 1972). Yet this literature assumes "real time" operation of a computerized wanted person file for informational benefit of patrol officers even though the terminal for computer inquiry and response is with the dispatcher or a terminal operator. Colton defines "real time" without reference to the patrol officer's control over the inquiry and response; "real time" refers to "direct access, through a terminal to computer files at any time so that all inquiries will receive immediate response . . ." (*id.* at n.7, p. 165). Within the "real time" systems visited by Colton and included in his report on the point of varying efficiencies in serving the information needs of patrol officers, both systems involved the intervention of dispatchers or terminal operators (*id.*, p. 161).

Table 1-1
Mobile Digital Terminal Test and Operational Programs

City/County	*Introduction Date*	*Terminals:*	
		Initial	*To be added*
Albany	1972	4	750
Chicago	Late 1974	150	500
Cleveland	June 1974	125	56
Kansas City	1972	20	
Las Vegas	Late 1974	52	100
Los Angeles	1975	200	750
Minneapolis	February 1974	35	150
San Francisco	March 1974	27	135
Palm Beach County	June 1972	30	20

Source: *Applications of Mobile Digital Communication in Law Enforcement—An Introductory Planning Guide*, p. 1, and *National Criminal Justice Telecommunications Requirements*, n. 47 at 6–28 (Jet Propulsion Laboratory, California Institute of Technology, June 30, 1974, and June 28, 1974, respectively).

rently being developed through a federal grant to the Washington, D.C., Metropolitan Police Department.[53] Under this grant, the greatest portion of the communications tests will be devoted to direct access by the foot patrolman to local and national computerized files, including that of wanted persons.

Studies on the consequences of this technology to police patrol operations are practically nonexistent. The few existing ones point to the dramatic increase in inquiries after perfecting access by patrol officers in real time to computerized files through mobile digital terminals. One study reported an increase in the number of inquiries by patrol officers after installation of a mobile digital system from 500 inquiries to between 70,000 to 80,000 per month.[54] Patrol inquiries after installation of mobile digital terminals in police vehicles are usually projected to increase by a factor of four or five. The Kansas City ALERT system is anticipating an increase of 400 percent (factor of four) based on extensive tests with patrol units already equipped with mobile digital terminals.[55]

The Financial Midwife of Computerized Wanted Persons Files

From time to time, suggestions are made that a relationship pertaining to police equipment exists between the data processing industry and the federal funding agency, Law Enforcement Assistance Administration.[56] This relationship is sometimes described as a benign association with a conscious parallel interest in increasing police computer applications.[57] Others view it as an unholy conspiracy to create a new "police industrial conspiracy."[58] Apart from ideological characterizations, the facts support the following 1970 prediction that

the normal course of development of police computer use would be vastly altered by the infusion of federal money:

> Moreover, all indications are that the percentage (of police departments involved with computer applications), both in terms of equipment and applications, will continue to increase, and, *because of current and federal assistance this increase will occur at a previously unanticipated rate.* By this we mean that the normal course of data processing development in the police field will be vastly changed through the infusion of federal financial aid to state and local law enforcement and criminal justice agencies [Italics in original text].[59]

LEAA has been the financial midwife for many computer applications by police. In a 1974 study of police departments, it was found that approximately 60 percent of the respondents using computers felt that, without LEAA funding, computer operations would have been smaller or impossible. The police departments using computers were about equally divided between those who had received LEAA funding (71 of 144 or 49.3 percent) and those who did not (73 out of 144 or 50.7 percent). Of those departments not using a computer but planning to do so, 64 percent were hoping to receive aid from LEAA, 20 percent were uncertain, and only 13 percent were planning computer application without LEAA aid.[60] These results are consistent with a similar 1971 study of police departments by the same agency.[61]

The significance of LEAA's role in computer assistance to police can be seen in its funding of computerized data files on wanted persons and germinal research studies on the technology of mobile digital terminals for police. The comprehensiveness of LEAA's sponsorship of research on mobile digital terminals is illustrated by six projects.[62] Collectively, these projects complete the pieces of the technological puzzle of mobile digital terminals for any curious police planner. One 1974 project by the Jet Propulsion Laboratory resulted in a documentary guide for a local police planner "to decide whether it is worth while to redesign his department's communications in order to speed up transmission and improve information access, and to increase the efficiency and save time of his officers in the field, balanced against the technical difficulties and costs associated with implementing digital communications systems."[63] A local police planner may be seduced by this suggestion of an agency with an $841 million budget in 1973, and approximately 80 percent of the money available to states and their agencies.[64] The planner could consult other LEAA sponsored documents that (1) analyze the wares of selected data processing vendors,[65] (2) describe the national voluntary equipment standards for police digital communication systems,[66] and (3) explore technical advantages of direct access by police to computerized files as compared with police inquiries relayed by voice through dispatchers.[67] If the planner faces a negative cost-benefit evaluation of proposed installation of mobile digital terminals in police vehicles, the planner can consult

Table 1-2
Grants for the Development of Computerized Data Files, Including Files on Wanted Persons

Year	*Total LEAA Funding*	*Total State or Local Funding*
1969	$ 426,541	$ 134,678
1970	2,790,869	2,508,173
1971	3,972,621	1,849,654
1972	6,677,011	3,191,139
1973	6,912,079	4,469,591

Source: LEAA, *Annual Report*, p. 100 (1970). The statistics were obtained from LEAA's Grants Management Information System, a computerized information base on grants and contracts extended by LEAA. The System was established in 1971.

the current development and testing of less expensive hand-held terminals to give patrol officers direct access to computerized files on wanted persons.[68]

The cumulative effect of these documents is the indirect, but influential, encouragement to police to establish computer assisted systems for retrieving fugitives. The direct element of LEAA's role in this area is the considerable money provided to police agencies to establish computerized data files, including a file on wanted persons (see Table 1-2). Although the figures in Table 1-2 are incomplete,[69] they substantiate a trend in LEAA funding toward computer assistance in police retrieval of fugitives consistent with the more subtle suggestions of LEAA funded germinal research on mobile digital terminals for police.

This discussion of the federal role in funding computer assistance in police retrieval of fugitives is not intended to imply that federal funding is excessively oriented toward police communication equipment.[70] The report by the President's Commission on Law Enforcement and Criminal Justice cited the importance of improving the primitive state of information available to police on the wanted status of persons.[71] Moreover, development of the computer-based systems to serve this need previously suffered under the same financial drought that weakened all research and development in the criminal justice field. For example, until 1965, the Department of Justice was the only cabinet-level department without a share in the federal research and development budget of approximately $15 billion, and research and development in other criminal justice agencies was negligible.[72] As a result of federal funding, police patrol officers will soon be supported by direct access to computerized information systems on wanted persons. This change probably serves the value of efficiency in police retrieval of fugitives, but the change does touch other values that should be identified and weighed in the rush to equip police with computers.

2 Police Computers and Fugitives: More Than a Matter of Equipment

The scant literature[1] on technological developments for police communications on wanted persons consists largely of uncritical commentaries with little exploration of the consequences of these developments to police operations and to the rules of law governing police operations. The promise of the computer for police has created its own bubbly enthusiasm, as reflected in these extravagant endorsements of the union of the police and the "brainchild" computer:

> The police are now at the threshold of a new era in which professional gains are beginning to dwarf even the fantastic achievements of the past quarter century. The appearance of the computer and its related technology promises a new renaissance in police affairs of major dimensions.[2]
>
> The fantastic ability of EDP, and its brainchild, the computer, to store enormous amounts of data with split second retrieval has prompted police administrators to extend their vision concerning the use of this equipment in law enforcement operations.[3]

Apart from the literature that assumes a positive intrinsic value in computer-assisted communication systems for police, the only other significant literature in this area is limited to the technological refinements necessary to permit the emerging system of police communications to operate more efficiently. For example, widespread adoption of mobile digital terminals by police will have negative technical consequences to other elements of the emerging police communication system. Savings in communications traffic due to the elimination of the dispatcher in the police inquiry process will be nullified as a consequence of the higher level of direct inquiry by police to computerized information bases.[4] Furthermore, the computerized information systems now being used by law enforcement agencies have been designed to handle a certain volume of inquiries, and this volume is limited by the requirements for relaying voice queries from mobile police units. If the projected increases in police inquiries occasioned by the adoption of mobile digital terminals are reasonably accurate, the equipment now used to switch messages automatically between data banks may be inadequate.[5]

Another technological refinement necessary to perfect the automated police communications systems on wanted persons is a method of connecting persons accurately and speedily with warrants retrieved from data banks. This problem

involves the accepted basis of positive identification—that is, first the transmission and then the matching of fingerprints.[6]

All of these needed refinements in the emerging police communications system on wanted persons have been identified, and the anecdotal technical research has been funded and begun. A study is being conducted by the Jet Propulsion Laboratory on the magnitude and form of current and projected information exchange requirements of agencies within the criminal justice system,[7] and in 1972, an experiment in the use of satellites to transmit fingerprints was conducted.[8] Apart from the dimension of technological sophistication in the current literature on computer-assisted police information systems, this literature is generally consistent with the manner in which communication changes in police operations have been traditionally treated—uncritically and heavily laden with anecdotes.[9]

The difficulty is not too much sophistication in police communication equipment, or too tenuous a relationship between crime cutting and such equipment as the mobile digital terminal. The difficulty is the faint understanding of the social and legal implications of enormous increases in technological capability of police to know the wanted status of persons by automated information systems that are directly accessible to patrol police through a national computerized communications network. Both the person included in the computerized warrant file and the police acting upon the file could be harmed by the rush to technical refinement. There are potential privacy invasions to persons subject to these files. Furthermore, the rules of law governing police in retrieval of fugitives are intolerably inadequate to meet the growing capacity of police to acquire and exchange information on wanted persons.

Privacy and Automated Warrant Files

There has been considerable discussion of the potentiality of privacy invasions by the growth of automated information systems, including systems that store contacts by individuals with the criminal justice process. The discussion has progressed from the level of policy considerations[10] to legislative proposals[11] setting forth, *inter alia,* public notice, security, and accuracy standards for agencies controlling computerized criminal data files, and rights to individuals to know and correct data in the files.

The legislative discussion, however, has centered on the storage and dissemination of arrest or conviction records.[12] Furthermore, the principal litigation on privacy and automated information systems controlled by police has been directed toward the expungement of records of arrest or other police contacts that have collateral civil or criminal consequences.[13] There has been no discussion of the privacy issues implicit in the expected reliance by police on national computerized wanted persons files. Left unexplored is the right, if any, of a

person to be relieved from harm due to stale or inaccurate information in computerized fugitive files. Also unexplored is the question of the correlative duty of agencies controlling computerized wanted persons files to assure the integrity of the information on wliich police may be expected to rely in decisions to arrest and detain.

In a major empirical study conducted in 1965 on police practices involving the decision to arrest,[14] most of the arrest sequences are based on information sources other than warrant files. The files on wanted persons prior to 1965 were manually maintained,[a] narrowly restricted in territorial coverage, and usually not available in time to affect decisions by patrol officers to arrest and detain. These files were primarily related to post-arrest matters, such as investigation, bail, or disposition.

The technological changes in police communications since the date of this study portend a fundamental change in the flow of information about wanted persons to patrol officers that will substantially influence police decisions to arrest. The duty of police agencies controlling files on wanted persons should be tested by standards reflective of the state of art of computerized communication between police and the geographical range of expected reliance by patrol officers in using this information for decisions to arrest and detain. Periodic checks should be made to verify the accuracy and current status of warrants in computerized files with the periodicity measured by the cost of manipulating the data and the extent of expected use by patrol officers in arrest and detention decisions.[b]

Issues of the structuring of computerized fugitive files with the expectation of potential reliance by patrol officers throughout the nation have not yet surfaced in judicial opinions. A brace of cases,[15] however, filed in the District of Columbia presage future litigation unless adequate controls are provided in proposed statutes or rules. The facts of both cases involve, apparently, police decisions to arrest and detain based upon inaccurate or stale information in computerized files on wanted prsons. In *Temple v. Meadows,*[16] a civil action for damages against a police dispatcher, the plaintiff alleged that he was stopped by police for a minor traffic infraction while on route to his home by motorcycle

[a]The lack of reliability in manually maintained files on warrants is illustrated by this admission about New York City's file: "In handling a central warrant file with over 100,000 cards where you are putting over 2,000 cards into a file each week and pulling out 2,100 or twenty-two plus, doing anywhere from 700 to 1,000 name checks a day, it's an almost impossible task to keep your file in order." See *Report of the New York State Commission of Investigation Concerning the Warrant Division of the New York City Police Department,* p. 30 (September 9, 1974).

[b]In *Tarleton v. Saxbe,* Civ. No. 1862–71 (D.C. Cir. Oct. 22, 1974), the court imposed a duty on the FBI to take reasonable measures to safeguard the accuracy of arrest records in criminal history files available for dissemination. The court recognized limits on the FBI's responsibility measured by administrative burden and cost (*id.* at 22). The *Tarleton* case presented issues analogous to the question of the duty to check, periodically, computerized files on wanted persons.

from a lesson at a culinary school. The patrol officers recited identifying information about the plaintiff by radio to the defendant dispatcher, who entered the information into a terminal electronically connected to a computerized file on wanted persons. The dispatcher soon informed the patrol officers that the plaintiff was wanted, armed, and considered dangerous. Based upon this information, later learned to be false, the patrol officers drew guns, handcuffed the plaintiff, and imprisoned him for a short period.

Although this action was dismissed by agreement of the parties, it provides the factual anchorage for issues about the structuring of a computerized system of wanted persons that is utilized by police to decide when and how to act toward persons. The issues do not center upon possible carelessness of patrol officers or dispatchers in reciting or copying identifying numbers during the composition of inquiries for the system or in reporting responses from the system; rather the issues relate to the structuring of the system, consistent with the state of the art, to guard against providing patrol officers with inaccurate or stale information.

Information about the modification or termination of warrants should be entered into the system with the same dispatch as the original entry of the warrant. This duty on the part of the agency entering the warrant arises from the understanding that the warrant in the computerized system could be a basis of police arrest and detention by police agencies throughout the nation. That this is an emerging problem is illustrated by a policy shift in the management of warrants filed in the national computerized file. In the published policy statements, a wanted person record will be automatically removed from the file after the person has been located four times and the agency originating the warrant has refused custody each time.[17]

The purpose of the policy is to account for shifts in prosecutorial decisions or considerations of expense in extraditing wanted persons over distances. After four refusals to act upon a warrant, the services of the national computerized warrant file are withdrawn from the execution of the warrant. When this policy is translated into its consequences to the person subject to the warrant, the policy envisions four arrests and detentions and then the message that the agency originating the warrant does not wish to take custody. Because of the abuse by originating agencies and the potential civil liability of arresting agencies, this policy has now been changed. After two locations and refusals by the originating agency to take custody, the managers of the system contact the agency to determine whether the warrant should be eliminated from the system or limitation should be stated on the warrant.[18] The new policy is not entirely curative. Presently, criteria for entry of warrants do not include any statement of limitation on the originating agency's intention to extradite. Therefore, any limitations would not be discovered by the arresting agency until the time of post-arrest communications with the agency that originated the warrant.

In addition to the problem of reasonable and timely efforts to enter modifications and quashes of warrants into the system, there is also a duty to inspect the warrants in the computerized system for accuracy. This is illustrated by *District of Columbia v. Banks.*[19] Patrol officers questioned Banks while he was standing near his bicycle. The officers requested by radio an inquiry of the computerized warrant file and were informed by the dispatcher that the file contained warrants for Banks' arrest for fifteen parking violations. Although Banks protested his innocence and stated that he did not drive and had no license, he was arrested, convicted and fined $240. Banks employed an attorney who was able to prove in a new trial that Banks had no connection with any of the automobiles that were involved in the violations. There was no explanation of the manner in which the inaccurate warrants were entered in the computerized file, and there was no evidence on procedures for periodic inspections for accuracy.

Agencies entering information into computerized warrant files and managing such files should be aware of the risk to persons of police arrest and detention based upon stale or inaccurate information. Measurement of this risk should include the national linkage of computerized warrant files and the emerging technology that will give patrol officers direct electronic access to these files. Warrants for wanted persons in the national computerized file have the widest geographical range of use by patrol officers. There are approximately 20,000 police and corrections agencies[20] that may enter warrants in this file, and 214,534 warrants were entered in 1973.[21] The duty to inspect the warrants in this file arises out of the expectable wide range of use of these warrants by patrol officers for arrest and detention and the risks of error inherent in the multiplicity of agencies that may enter warrants. The present level of inspection appears to be quarterly reports by the National Crime Information Center to the 87 agencies controlling NCIC terminals. These agencies in turn submit reports to the 20,000 police or corrections departments that may have entered warrants for a review for accuracy and current status of warrants.[22]

Proposed legislation and rules display an unfortunate neglect of the potential harm that may occur from arrest and detention based upon stale or inaccurate information contained in state, regional, or nationally linked warrant files. The proposed Criminal Justice Systems Act of 1974 expressly exempts warrant files from the operation of the statute,[23] and, therefore, there is no obligation of police departments and other criminal justice agencies to check warrants for accuracy and current status.[24] There is a similar exemption in the proposed rule for warrant files maintained by the Justice Department or the states or localities that utilize the services of the Department's criminal justice information systems.[25] The duty to maintain accurate and current information attaches only to information on individuals in the "Computerized Criminal History File"[26]—a file that is treated separately from the wanted persons file under the structure of the proposed rule.[27]

This neglect of the consequences that may attach from stale or inaccurate

information in nationally linked computerized warrant files directly accessible by patrol officers may be attributable to the simplistic view that there are no protectable interests in the management and use of these files. There is, admittedly, little basis for a protective rule against the full dissemination of an accurate warrant for arrest—a subject that dominates the proposed statutes and rule.[28] On the other hand, unlimited access to records of past arrests has become notorious and all of the proposed laws circumscribe the scope of dissemination of arrest records.[c] In addition, a warrant file is unlikely to be the subject of an action by an individual for review and correction of his or her criminal offender record—a new right that is proposed by the statutes and rule and is applicable to past arrest files.[29] The protectable interest in warrant files is not in unlimited dissemination, or in the lingering disabilities occasioned by past contact with police. It is in the accuracy and current status of warrants, and this is an interest that will grow in relation to the spread of techniques in providing patrol officers with direct access to nationally linked computerized files on wanted persons.

Arrests Based on Stale Information in Wanted Persons Files

In the absence of statutory sanctions for failure to use reasonable dispatch in entering warrant terminations into computer files or for failure to review warrant files for accuracy, legal recognition of these duties has been limited[d] to cases on police power to arrest based on information supplied by computerized files on warrants and stolen vehicles. The following facts illustrate the problem:

> Police were informed that an automobile owned by a dealer was stolen. A description of the automobile and plate number was placed immediately into the computerized stolen vehicle file serving the local police department and into the national computerized file. The automobile was recovered nine days later. Police computer units were immediately notified, but for some unexplained reason the local and national files were not cleared. Fifteen hours after notification to police computer units, defendant was observed by police patrol driving an automobile bearing plates revealed as stolen by local and national computer files. On this basis, defendant was arrested.[30]

[c] A survey of 75 employers indicated that 66 would not consider employing persons who had been acquitted after an arrest for assault. Hearings Before Subcommittee No. 4 of the Committee on the Judiciary, House of Rep. 92nd Cong. 2d Sess., on H.R. 13315, p. 1. Protection against civil disabilities in such areas as employment through the dissemination of arrest records is provided in the proposed statutes and rule by "sealing" records—a method of limiting access. See, e.g., Proposed Rule by Department of Justice, § 20.22(b), 39 *Fed. Reg.* 5636 (February 14, 1974).

[d] Some recent cases have established a private right to expunge information in the FBI's NCIC files that is inaccurate and, therefore, unnecessarily injures constitutionally protected interests. *Menard v. Saxbe,* 498 F.2d 1017 (D.C. Cir. 1974); *Tarleton v. Saxbe,* Civ. No. 72-1209, October 22, 1974 (D.C. Cir. 1974). These cases, however, involved records of arrests that did not lead to conviction, which were known to exist by the arrestees. In both cases, the arrestees were seeking to prevent prospective injury by expungement. The expungement remedy is inappropriate to a person who is the unwitting subject of a stale or inaccurate warrant. The person's first awareness of the warrant is at the point of injury to privacy and freedom of movement caused by an arrest based on the warrant.

These facts raise the matter of arrests based upon stale information in computerized files that might surface in the arrestee's motion to suppress evidence obtained as a result of the arrest,[31] or in tort claims against the officers for false arrest and imprisonment.[32] In the facts recited above, a court held that probable cause existed to believe that defendant had committed a crime, and evidence obtained as a result of the arrest was admissible.[33] The court reasoned that the officer was mistaken in his belief that the defendant was driving a stolen automobile, but his conclusion of the probability of defendant's guilt was reasonably based upon information received from local and national computer files. The court noted that the officer had never known these communication sources to be wrong.[34]

Although the result reached on these facts may be correct, the rationale unfortunately annoints computerized police files with an unreasonable legitimacy. Police officers may rely upon standard police information systems to make arrests, but an arrest cannot be insulated from challenge because of the reliance in itself.[35] The rationale in this case gives no limit to the time period in which probable cause to make an arrest can be based upon stale information in computerized wanted person or stolen vehicle files.

In *Carter v. Maryland,*[36] the court considered the admissibility of evidence seized after an arrest based upon information, which was stale by two months, on the stolen status of an automobile. The court ruled that the erroneous information was "properly chargeable to the collective information of the police team,"[37] and, therefore, the police officer did not have probable cause to arrest the defendant. The court noted that there was a failure to correct police records, but never explained why the police were presumed to know of the error.

Apart from the failure of explanation, the court's limitation on police arrests based on stale data in police computer files is inadequate because it is framed on rules with little relevancy to police patrol use of computerized information on wanted persons and stolen vehicles. Patrol officers often make arrests based upon information provided by members of the local or foreign police departments. In these instances, the patrol officer is visualized as the end point of a police channel of information that may provide the factual basis to support probable cause to arrest. It is not necessary that the arresting officer be person-

ally appraised of this factual basis.[38] Police arrests based on this flow of information are protected by the rule that permits patrol officers to act "on the assumption that fellow officers who call upon them to make an arrest have probable cause for believing the arrestees are perpetrators of a crime . . . ."[39] Expressed somewhat differently, the police department is considered a unit, and "[T]he arresting officer may rely on all the collective information in the police department."[40] These rules, sometimes referred to as the "fellow officer" or "collective information" rules, are not well related to arrests based on computerized wanted persons or stolen vehicles files. The rules validate an arrest if the elements supporting probable cause can be pieced together from a collection of facts known by other police, or informants, that contributed to the patrol officer's decision to arrest.[41] These rules cannot be sensibly applied to arrests made by police on the basis of stale information in computerized warrant or stolen vehicles files. In these instances, the patrol officer is not relying upon the accumulated perceptions of events by fellow officers, but upon a system for storing and updating information. Furthermore, the analysis of probable cause in these cases should not be based upon cases dealing with reasonable mistakes by arresting officers in their perception of events that suggest the probability of criminality.[42] Probable cause would always be present if the analysis were limited to the reasonableness of a patrol officer acting upon computerized information.[43] This is so because it is extremely unlikely that the officer would be personally aware of error in the computer system or that he reasonably should be.[44]

Analysis of probable cause in arrests by police computer systems should concentrate on the design and management of the systems. Where police departments have chosen to integrate fugitive retrieval into patrol functions by adopting computerized information systems on wanted persons and stolen vehicles, probable cause to arrest should continue after termination of the warrant or recovery of the property only for the time period reasonably necessary to enter the corrective messages into the system. The reasonableness of the decision to arrest based on stale computerized information should be analyzed in light of the available methods of entering corrective information into the system that were used by the police or reasonably should have been. Underlying the Fourth Amendment's prohibition of unreasonable seizures is a compromise between the citizen's interest in freedom from unreasonable interferences with privacy and from unfounded charges of crime and the community's interest in enforcing in law through reasonably acting patrol officers.[45] In these instances, the compromise should be struck in light of the police department's decision to enhance its law enforcement capability by computerizing its information on wanted persons and stolen property. That decision includes the reasonably foreseen risk that patrol officers will rely upon stale information to make arrests anywhere within the territory served by the computer. Consequently, arrests, made after

corrective information should have been entered into the computer and predicated only on the stale information, are unreasonable interferences with the citizen's interest in privacy.

Inadequacy of Extradition Laws

The major difficulty arising from the increased technological capability of police to know the wanted status of persons is the inadequacy of the legal rules governing police in the retrieval of fugitives. Computerized files on wanted persons, interconnected regionally and nationally and directly accessible to patrol police, will greatly enlarge the geographical range of police information on wanted persons. The rub will occur as police increase their activities in retrieval of wanted persons across state lines.

Nearly 25 percent of the nation's population live in socially and economically integrated areas that spread across state lines.[46] Each state border, however, marks the territorial limitation on the execution of the state's policy on criminal justice expressed in its criminal and penal statutes.[47] Without a reasonable process for retrieving persons indispensable to a state's policy on justice, that policy is frustrated.

The Uniform Criminal Extradition Act[48] occupies a central position[49] in the rules of law governing interstate retrievals of persons indispensable to state criminal justice. The Act is woefully cumbersome in its operation, far beyond needs of interstate harmony and of protection to individuals from mistaken retrievals or retrievals based upon insubstantial charges. Action by at least 9 agencies[e] from the asylum and demanding states must occur before the wanted person is available for the first step in the criminal justice process in the demanding state. Many of these agencies have no interest, or only an occasional interest, in the prosecution underlying the retrieval. In many cases, this procedure amounts to an antiquated catapult machine to protect interstate harmony and individual liberty when a sling shot would do. This is particularly true when the projected interstate retrieval is over a short distance. In metropolitan areas spreading across state borders, a substantial number of retrievals are for a short

[e]These nine agencies include: (1) police in asylum state, Uniform Criminal Extradition Act §§ 14 and 15, *supra*, n. 48 (hereinafter referred to as "Act"); (2) magistrate or judge in asylum state, §§ 13 and 15 Act; (3) prosecutor in demanding state, § 23 Act; (4) attorney general in demanding state (The attorney general by practice advises the governor on the adequacy of the prosecutor's request to extradite a person from another state. See Kansas Governor's Extradition Manual [1972], p. 5); (5) governor in demanding state, § 3 Act; (6) Secretary of state in demanding state (attestation of demanding state's documents; see Kansas Governor's Extradition Manual [1972], p. 5); (7) attorney general of asylum state, § 4 Act; (8) governor of asylum state, § 7 Act; (9) judge of asylum state, § 10 Act.

distance, albeit across state borders.[f] Despite objections to the cumbersome structure of the Uniform Criminal Extradition Act by the governors and attorneys general of the states,[50] the Act remains substantially as it was promulgated in 1926.[51]

[f]In 1973 the Washington, D.C., police had 1,064 requests from states for extradition of fugitives; 846 were from Virginia and Maryland counties that comprise the Washington, D.C., metropolitan area. (Statistics supplied by Lieutenant Glenn Ramey, Fugitive Unit, Metropolitan Police Department, Washington, D.C.). Sixty percent of extradition requests received by Johnson County, Kansas, are from police in Kansas City, Missouri, a distance of ten miles. (Telephone interview with J. Marques, Assistant District Attorney, Johnson County, Missouri, July 11, 1974.)

3 The Case for Revising State Extradition Law

Introduction

Three propositions will help to explain the coming demands for revision of the Uniform Criminal Extradition Act now enacted in all but three states.[1] First, the Act occupies a core position in the law of interstate transfer of not only fugitives but also other persons indispensable to state criminal justice. This is manifested by the skein of waivers of the Act that appear in other statutes bearing on interstate transfer of persons needed in state criminal proceedings.[2] Deference to the Act also appears in the practices of state and federal police in obtaining custody of fugitives under the Unlawful Flight to Avoid Prosecution statute.[3]

Secondly, further toleration of the Act in its present form is undesirable due to its inefficient and cumbersome structure. The toleration of the past was based on footings that have become insecure by recent decisional law. Police disregard of the Act, which was once sanctionless, has been recently challenged successfully in a spate of federal and state cases.[4] These challenges have related to the validity of the criminal process after an illegal interstate retrieval by federal or state officers and to the prospect of damage claims against the officers personally for the illegal retrievals. Toleration of the Act by demanding an advance waiver as a *quid pro quo* for parole, probation, detainer clearance, or other benefits is also insecure.[5] Recent decisional law has implied an unconstitutional taint to a waiver of the Act extracted from a person who has no realistic leverage to refuse the waiver.

The third proposition centers on significant social advantages that could be gained by revision of the Act. Revision of the Act to reflect the integration of fugitive retrieval within ordinary police patrol without loss of individual liberties will hasten the emergence of the police as the exclusive agency responsible for the retrieval of fugitives. This would be particularly significant with, perhaps, the largest class of fugitives—that is, persons who fail to appear in court after non-monetary bail release or monetary release without the involvement of professional bail bondsmen.[6] These types of bail releases have been central to the reform of state bail systems that begain in 1965.[7] The success of this reform depends partly upon the effectiveness of official retrievals—a subject unexplored by bail reform literature.[8] If the official retrieval systems become strained and deficient as a consequence of the increased adoption

of reform of state bail release systems and the cumbersome structure of the core Act governing official retrievals, the result is likely to be a reversion to a bail system dependent upon professional bail bondsmen. On the other hand, revision of the Act to respond to the pressing need for efficiency in official retrievals without loss of individual liberties would encourage recognition of the police as the agency with exclusive responsibility for retrievals. Reform of state bail systems will be completed by replacement of bondsmen with police in the retrieval system, which is a socially desirable and overdue idea.

Centrality of the Extradition Act

The Uniform Criminal Extradition Act operates in tandem with three other statutes governing interstate transfer of persons indispensable to state criminal justice. When an officer of one state makes an arrest in another state under the Uniform Act on Fresh Pursuit,[9] the arrestee is held for extradition process if the arrest is determined to be legal.[10] Two other interstate agreements recognize the tandem operation of the Extradition Act, but seek to avoid it by a skein of waivers exacted from the person subject to the agreement. If a prisoner requests a hearing on a detainer[11] filed by a foreign state under the Interstate Agreement on Detainers,[12] his request is deemed to be a waiver of extradition to permit transfer to the foreign state for trial on the detainer or the charges, and return to the sending state to serve any new sentence on the charge underlying the detainer.[13] In other words, if a prisoner wishes to clear a detainer from a foreign state, he has no right to an initial hearing in the imprisoning state on identity and the substantiality of the charge underlying the detainer.

Similarly, the tandem operation of the Extradition Act is recognized but avoided in cases where one state seeks the return of a probationer or parolee under the Interstate Compact for Parolees and Probationers.[14] Both states waive rights to insist upon extradition[15] and the parolee or probationer waives extradition "in consideration of being granted (parole) (probation)."[16]

Deference to the Extradition Act is also manifested in the procedures between federal and state authorities for the return of fugitives from state justice. The Bureau of Prisons has statutory authority to move a federal prisoner to "any available, suitable and appropriate institution,"[17] which may be outside the judicial district in which the prisoner was convicted. Therefore, if New York filed a detainer on a prisoner confined in the federal penitentiary in Marion, Illinois, the federal Bureau of Prisons could transfer the prisoner to an institution in New York at the end of the prisoner's federal sentence. On release from the federal institution in New York, the released prisoner would be arrested by New York authorities for trial on the charge underlying the detainer. Although professing the power to transfer a federal prisoner at the

end of his term for release in a demanding state, the Bureau of Prisons opts not to do so.[18] In deference to the hearing procedures under the Extradition Act, the Bureau would release the hypothetical prisoner to local police in Marion, Illinois, with whom New York authorities would conduct extradition procedures.

Cooperation between the Federal Bureau of Investigation and state prosecutors under the federal Fugitive Felon Act[19] has often been mistakenly characterized as a method for circumventing the extradition process.[20] Most of this misunderstanding arises from the implications of *United States v. Conley*,[21] which held that a fugitive from state justice federally removed to the place of his flight for prosecution under the Fugitive Felon Act may also be prosecuted for the state offense. The implication from this decision is that the cooperation between federal and state police amounts to a functional redesign of the extradition process. The fugitive from state criminal law is returned by federal authorities under the federal removal rule[22] for federal prosecution for interstate flight to avoid state prosecution and state prosecution for the original state charge. Since the Federal Bureau of Investigation reports approximately 3,000 arrests under the Fugitive Felon Act annually,[23] this procedure could constitute a significant circumvention of the Extradition Act.

The error arises from the implication that a fugitive from state prosecution is usually returned to the state by federal authorities for eventual state trial without the extradition process. This is the extraordinary exception. After an arrest by the FBI on a warrant issued under the Fugitive Felon Act, the demanding state is notified of the apprehension and the time and place of the federal removal hearing. After papers initiating the extradition process have been received[24] by local police, the federal removal hearing is dismissed and custody of the fugitive is transferred by the FBI to the local police.[25] The demanding state must then complete the extradition process with the state in which the federal arrest took place.

That the extradition process is central to the return of state fugitives under the Fugitive Felon Act is supported by two Department of Justice policies applicable to United States attorneys. First, the local prosecutor seeking assistance of the closest United States attorney in the issuance of a federal warrant for arrest under the Fugitive Felon Act must agree to extradite the fugitive from place of apprehension.[26] Secondly, fugitives from state criminal justice apprehended by the FBI must be turned over to the custody of the police of the state of apprehension unless permission to prosecute the fugitive is obtained from the attorney general.[27] Although the FBI has annually arrested approximately 3,000 fugitives from state justice since 1970 under the Fugitive Felon Act, less than five prosecutions have been approved by the Attorney General in the last five years.[28] The cooperative practices between federal and state police, therefore, under the Fugitive Felon Act involve the apprehension

power of the FBI that can be applied throughout the nation with the retrieval process left to the states under the Extradition Act.[29]

Sanctions for Police Disregard of the Extradition Act

Interest in revision of the Extradition Act has been dormant for decades due to the absence of any practical reasons for revision. The tedious extradition process could be tolerated because three factors converged to minimize the importance of the Act. Fugitive retrieval was not part of the ordinary functions of police patrol. Furthermore, waivers of the extradition process could be obtained with ease from the purported fugitive and were often obtained in advance of flight in exchange for benefits as parole, probation, or the clearance of a detainer. Finally, revision of the Extradition Act was only an intellectual exercise because the police could disregard the Act and engage in interstate kidnapping of fugitives with impunity. There has been a parallel erosion of all three factors that presages pressure for revision of the Act.

Integration of Fugitive Retrieval With Police Patrol

Warrant enforcement and fugitive retrieval have generally been unrelated to the traditional police patrol functions. One of the likely consequences, however, of computerizing warrant files and giving patrol officers direct access to these files is a sharp increase in warrant enforcement as a function of ordinary police patrol.[a] In one study of mobile digital communications for police conducted in 1973, it was asserted that law enforcement agencies had not examined how police functions would be affected by instantaneous flow of information on wanted persons to patrol officers.[30] The pell-mell purchase and use of mobile digital communications has not been accompanied by a careful analysis of impact on police patrol operations. The report asks hypothetically, "If, to use

[a]Planners are already acting upon the expectation that computerization of warrant files will lead to an integration of fugitive retrieval with police patrol functions. Warrants issued by courts in New York City have been filed and maintained manually, As a result fugitives from New York were not apprehended even after an arrest on a separate offense by the New York City police. See *Report of the New York Commission of Investigation Concerning the Warrant Division of the New York City Police Department*, p. 29 (September 9, 1974). Information in the manually maintained warrant file was not available to patrol officers to aid in arrest decisions and was also unreliable in post-arrest investigation. Therefore, a fugitive from New York City could be rearrested by the City police and released with his fugitivity concealed in an unmanageable card file. In order to integrate warrant enforcement and fugitive retrieval, computerization of warrant files was recommended (*id.* at 7, 35).

another example, he [a patrol officer] is given a mobile/digital terminal and increases his 'hit' rate on wanted . . . persons by a factor of eight, is this, per se, an indication of increased effectiveness on his part?"[31] The problem is not hypothetical. As a guage of the extent of positive responses to patrol inquiries on computerized wanted persons files (known as "hits" in police parlance), the following statistics show the sharp increase in location of wanted persons after inquiry in the computerized file maintained by the FBI:[32]

	1969	*1970*	*1971*	*1972*	*1973*
Wanted Persons Located	12,838	22,076	30,813	40,966	52,144

Furthermore, a 1974 survey supported in part by the National Science Foundation disclosed a change in police patrol operations especially in those cities with substantial investment in direct access by patrol officers in computerized files. These police departments reported a sharp increase in outstanding warrant checks and car stops made by patrol officers, and a consequential reduction of activity in response to service calls and order-maintenance.[33]

Illegal Interstate Retrievals by Police

With the advent of fugitive retrieval as an ordinary police patrol function through the computerization of wanted persons files, there has also come an erosion of the doctrines that permitted police to violate the Extradition Act with impunity. In a spate of state and federal cases decided since 1970, persons have challenged state and federal officers for failing to comply with rules governing the retrieval process, particularly the Extradition Act.[34] These challenges have related to the questioned validity of the criminal process after an illegal interstate retrieval by federal or state police and to the prospect of damage claims against the officers personally for the illegal retrievals.[35]

Although an indeterminate amount of official kidnapping was conceded to have occurred in the past,[36] the recent downpouring of cases on the subject is perhaps best explained on the basis of better chances of remedy for kidnapped fugitives than a recent increase in police disregard of the extradition process. With a concession to the absence of empirical evidence, it seems reasonable to assume that what has just surfaced in judicial opinions since 1970 is a continuum of police disregard of the extradition process, albeit a practice not followed frequently.[37]

Police impunity for violating the extradition process was established by two lines of cases that refused to invalidate the criminal proceedings subsequent to an illegal retrieval. The first denies the implication of a remedy to the fugitive from § 11 of the Extradition Act.[38] This section provides a criminal penalty to any state officer who disobeys the statutory duty[39] to bring the fugitive before a judge prior to delivery of the fugitive to an agent of an-

other state. In *People ex. rel. Lehman v. Frye,*[40] a person was returned to Illinois from Iowa by Iowa officials without a prior judicial hearing. The person, claiming that his right to a hearing had been violated, petitioned for a writ of habeas corpus in Illinois, and argued that his remedy implied by § 11 of the Act was a dismissal of charges. The court responded that "Section 11 of the Act makes it a misdemeanor to wilfully disobey the admonition (of a hearing) . . . but does not make the violation a waiver of the right to regain and hold custody . . . ."[41] Since there have not been any reported cases of prosecutions of officers for violating § 11 of the Act, and since fugitives do not have an implied remedy, this section does not operate to induce police compliance with the extradition process.

The major case that protects a criminal proceeding from taint due to the illegal retrieval of the defendant by the police is *Frisbie v. Collins,*[42] a 1952 decision by the Supreme Court. A Michigan state prisoner, petitioning for habeas corpus, alleged that he had been brought from Chicago to Michigan for criminal trial after he had been handcuffed, blackjacked, and kidnapped by Michigan police officers who had gone to Chicago to retrieve him. The prisoner argued that his arrest and abduction violated the Due Process Clause of the Fourteenth Amendment and the Federal Kidnapping Act[43] and, therefore, his conviction in Michigan was a nullity. The Supreme Court rejected both claims. Dismissal of criminal charges against a kidnapped defendant was not an implied remedy under the Kidnapping Act, and "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction."[44] The due process requirements were satisfied when the defendant was present in the Michigan court, fully apprised of the charges against him, and convicted in a trial process with constitutional safeguards. Despite flak[45] directed at *Frisbie* for failing to distinguish a technical flaw in arrest procedure from the allegations of brutal conduct by Michigan police, the opinion encased self-help retrievals by police with impunity. For decades, the Federal Kidnapping Act and the Fourteenth Amendment were nullified as inducements for police compliance with the extradition process because neither permitted an implied remedy to a kidnapped fugitive and there are no reports of direct action against police under either theory.

Within the past few years there has been a perceptible erosion of *Frisbie.* Some courts, while upholding *Frisbie,* have in dictum suggested that *Frisbie* is limited to cases of collateral attack on detention after conviction of a criminal charge by a court before which the defendant was illegally presented. Since the challenged restraint on liberty in these cases stems not from the illegal arrest and retrieval but from a judgment of conviction after a trial with constitutional safeguards, the restraint is not a violation of federal law.[46] This leaves open the question of whether *Frisbie* would apply in a case of direct challenge of detention wrought by illegal arrest and retrieval before a constitutionally valid trial supervened.[47]

The substantial breach in the *Frisbie* doctrine has been its recent rejection by the Second Circuit in *United States v. Toscanino.*[48] After a jury trial, Toscanino was convicted of conspiracy to import heroin into the United States. He did not question the sufficiency of the evidence or claim any error in the conduct of the trial. His major argument before and after the trial was "that the entire proceedings in the district court against him were void because his presence within the territorial jurisdiction of the court had been illegally obtained."[49] He complained that, at the behest of the United States, he had been kidnapped from his home in Uruguay, tortured, and finally abducted to the United States and brought to New York. By affidavit, Toscanino made an offer of proof implicating federal police and prosecutors in the kidnapping, torture, and abduction.[b] Relying on *Frisbie,* the District Court held "that the manner in which Toscanino was brought into the territory of the United States was immaterial to the court's power to proceed, provided he was physically present at the time of the trial."[50]

As one of alternative holdings, the Second Circuit held that the Supreme Court's "decisions in *Rochin* and *Mapp* unmistakably contradict its pronouncement in *Frisbie.*"[51] The court ordered the case remanded to the trial court for a hearing on Toscanino's allegations and dismissal of charges, if the allegations were proved.

On the basis of Toscanino's allegations, the result appears reasonable, but the court's rationale is somewhat faulty. First, the court suggests that *Frisbie* was undermined by *Rochin v. California,*[52] in which the Supreme Court invalidated a conviction for possesion of drugs because the police arranged to force an emetic solution into the defendant's stomach to produce vomiting.

[b]The affidavit read in part: "For seventeen days Toscanino was incessantly tortured and interrogated. Throughout this entire period the United States government and the United States Attorney for the Eastern District of New York prosecuting this case was aware of the interrogation and did in fact receive reports as to its progress. Furthermore, during this period of torture and interrogation a member of the United States Department of Justice, Bureau of Narcotics and Dangerous Drugs was present at one or more intervals and actually participated in portions of the interrogation . . . . [Toscanino's] captors denied him sleep and all forms of nourishment for days at a time. Nourishment was provided intravenously in a manner precisely equal to an amount necessary to keep him alive. Reminiscent of the horror stories told by our military men who returned from Korea and China, Toscanino was forced to walk up and down a hallway for seven or eight hours at a time. When he could no longer stand, he was kicked and beaten but all in a manner contrived to punish without scarring. When he would not answer, his fingers were pinched with metal pliers. Alcohol was flushed into his eyes and nose and other fluids . . . were forced up his anal passage. Incredibly, these agents of the United States government attached electrodes to Toscanino's earlobes, toes, and genitals. Jarring jolts of electricity were shot throughout his body, rendering him unconscious for indeterminate periods of time but again leaving no physical scars.

"Finally on or about January 25, 1973, Toscanino was brought to Rio de Janeiro where he was drugged by Brazilian-American agents and placed on Pan American Airways Flight #202 destined for the waiting arms of the United States government. On or about January 26, 1973, he woke in the United States, was arrested on the aircraft, and was brought immediately to Thomas Puccio, Assistant United States Attorney."

The liberated capsules of morphine were introduced at trial. *Rochin* does present a constitutionally based remedy for the type of police brutality alleged in *Toscanino,* but the difficulty with the assertion that *Rochin* undermines *Frisbie* is that *Rochin* was decided before *Frisbie.* Furthermore, Mr. Justice Frankfurter, who wrote the majority opinion in *Rochin* and the other concurring justices, joined in the unanimous opinion in *Frisbie.*

The difficulty with the *Toscanino* opinion is not merely a mistake in the chronology of Supreme Court opinions. The expansion of *Mapp v. Ohio*[53] as a basis for the rejection of *Frisbie* is a doubtful course. At least two circuit courts have by dictum suggested that the 1966 *Mapp* decision to exclude evidence illegally seized by police should be extended to persons illegally arrested by police.[54] However, there has been confinement rather than expansion of *Mapp* suggested in the most recent opinions of the Supreme Court. In *Coolidge v. New Hampshire,*[55] sustaining the *Mapp* exclusionary rule, Justice Harlan stated that he was ready to reexamine and vote to overrule *Mapp.*[56] Furthermore, three other justices in the same case opined that the *Mapp* exclusionary rule was not mandated by the Fourth Amendment.[57] In the most recent opinion on the *Mapp* exclusionary rule, the Supreme Court declined to extend the rule to grand jury proceedings.[58]

Another difficulty with *Toscanino* is the sweeping rationale leading to the denial of jurisdiction to hear criminal charges due to an illegal retrieval by police. The alleged police brutality in *Toscanino* (starvation, eyes and nose flushed with alchohol) match the brutality in *Rochin* (induced vomiting), and the result in *Toscanino,* therefore, could have been limited to instances of egregious police conduct. The rationale in *Toscanino,* however, does not distinguish retrievals tainted by procedural irregularity from retrievals accompanied by police brutality.

The Second Circuit has already faced the question of the limits of the *Toscanino* rationale, and has retreated in *United States v. Lujan*[59] to a position of applying *Toscanino* only to cases of retrievals with police brutality. Although the *Frisbie* doctrine remains unimpeached in most jurisdictions,[60] these exceptions to its formerly inexorable application are sufficient to caution against any deliberate police violation of the extradition process. In addition, impetus for revision of the extradition process will come from the erosion not only of *Frisbie* but also of the rule against recovery of damages against police for violating the extradition process.

Claims Against Police for Violating the Extradition Act

One of the reasons for the court's refusal to nullify a conviction of a kidnapped fugitive has been the alleged availability of other remedies against the police for failing to comply with the extradition process. In a recent federal

case of illegal police kidnapping by police from North to South Carolina, the court applied *Frisbie* but said that if the fugitive "were seeking damages . . . , serious thought would have to be given to his claim."[61] Until recently, the cupboard containing theories for recovery of damages against police for disregarding the extradition process has been entirely bare. The obstacles of presenting such claim under state tort law against the police from a prison cell were insuperable.[62] Since first enunciated by the Supreme Court in 1886,[63] the theory of the availability of damages under state tort theories against police for disregarding the extradition process has remained just theory.

Even the application to police of the federal civil rights act providing damages for violation of constitutionally protected rights[64] was not, until recently, helpful to kidnapped fugitives. In two recent cases,[65] state and federal prisoners sued police under the federal civil rights act for violating their constitutional rights during an interstate retrieval. Neither court identified the particular constitutional right alleged to have been violated, and both denied recovery because the "constitutional provision for the interstate extradition of fugitives and the federal statutes enacted thereunder were designed to benefit the states not to benefit fugitives."[66] Both cases rejected the prisoners' claims on an extremely narrow basis. State power through its police is controlled not merely by federal extradition law but also by constitutional safeguards against unreasonable intrusions found in the Due Process clause of the Fourteenth Amendment. Persons are protected against police interference with liberty and forcible transportation over distances by the constitutional requirement of a hearing before an independent person to justify the interference.[67]

Both cases were predictably rejected in 1973 by *Pierson v. Grant,*[68] the first case to hold that a prisoner has a claim against police for disregarding the extradition process. The claim for damages and declaratory relief was based upon the federal civil rights statute and was brought against Missouri police for retrieving a fugitive from mid-point in Iowa to the Missouri Penitentiary, a distance of three hundred miles. In a sparse opinion, the court rejected prior cases disclaiming any relief to a prisoner under the civil rights act for an illegal extradition. The court, however, barely intimated why kidnapped fugitives have a claim under civil rights act against police for the kidnapping. The basis should not be in any newly found enforcible interests by fugitives in the extradition clause of the Constitution; rather, the basis for this unprecedented decision should be found in the duty of the police, acting for the demanding or asylum state, to facilitate a hearing for the alleged fugitive before commencing the involuntary journey across state lines.[69] If this opinion is properly based upon the requirement of a hearing found in the Fourteenth Amendment, rather than the extradition clause, the states will be able to meet the Supreme Court's invitation to develop "creative solutions"[70] to obligations for hearing prior to the retrieval of fugitives.

Pierson and *Toscanino* have unsettled the footings of complacency about

the Extradition Act. As a result of these two cases, police disregard of the Act because of its cumbersome structure is unwise. Pressure to revise the Act will mount as fugitive retrieval is further integrated into ordinary police patrol and police disregard of the Act cases to be sanctionless.

The Unconstitutional Taint in Waivers of Extradition

The Attorneys General of the states viewed waiver of extradition by the fugitive as a fortunate device for "eliminating the tedious process otherwise required."[71] There is no empirical data on the number of waivers, and such information would be most difficult to gather because waivers need not be formerly recorded or approved.[72] The general opinion of practitioners, however, is that the fugitive waives extradition in a substantial number of extradition cases.[73]

Since the waiver of extradition has been a simple, successful device for avoiding the expensive and cumbersome structure of the Extradition Act, state legislatures have succumbed to the temptation to demand presigned waivers of extradition as a *quid pro quo* for benefits in the criminal process. For example, waivers of extradition are the price for clearance of a detainer,[74] or for the grant of probation or parole under foreign state supervision.[75] The Interstate Agreement on Detainers has stretched the bargained waiver idea to a point where a prisoner requesting a clearance of a detainer from another state becomes a virtual puppet to be moved at the will of the states. "The request . . . shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement . . . ."[76] The logical end to the aggressive demands for bargained waivers would be waivers of extradition extracted from all persons as a price for pre-trial release. Although unrecorded to date as a serious suggestion, the full use of bargained waiver has a special attraction as an alternative to the tedious extradition process. Bargained waivers, however, are not the basis upon which the tedious extradition process can be confidently tolerated. Although recently held valid,[77] there has begun a progression of cases that will establish an unconstitutional taint to the bargained waiver of extradition.[78]

The bargained waiver of extradition results in the loss of a constitutional right to a hearing to justify the intrusion upon liberty involved in an involuntary interstate journey. The Supreme Court has already held that the right to a revocation hearing is enjoyed by parolees and probationers under foreign state supervision[79] and, *a fortiori,* by those with less criminal indicia, such as persons who are wanted but not convicted. The right to a hearing before an involuntary interstate journey is found in the due process protections of the Fourteenth Amendment to persons whose presence is deemed essential to the criminal process of a foreign state.[80] It is not a right emanating from the Extradition Act. The Act, and other statutes controlling interstate transfer of persons needed for state criminal process, prescribe hearing procedures, otherwise mandated by the due process requirement of a justification prior to governmental intrusion into liberty.

The unconstitutional taint is in the process of the bargain by which the right to an extradition hearing is waived. Waivers of constitutional rights in criminal proceedings must be "made voluntarily, knowingly and intelligently."[81] Evidence that the waiver is extracted from all persons who may be similarly situated in seeking out-of-state parole or probation or pre-trial release shows that the bargain is an illusion. Imprisonment or waiver of extradition is a Hobson's choice,[82] a choice without alternatives. The Supreme Court has already indicated that evidence of disparity in bargaining power is relevant to show that a waiver of a constitutional right has been involuntarily made.[83]

Nor can the waiver of extradition be saved as a condition that may be attached to a benefit provided to a person by a state as a matter of grace. This argument is especially applicable to waivers of extradition extracted as a condition of probation or parole—benefits to which convicted persons generally have no rights. The Supreme Court has said that the extent of due process protection is not influenced by whether the grant of governmental grace (probation or parole) is a right or privilege of the person.[84] It is "influenced by the extent to which (the person) may be condemned to suffer grievous loss"[85] by the government's proposed summary action. The Court has already singled out the liberty of a parolee as including many of the core values of unqualified liberty. "It is hardly useful any longer to try to deal with (the problem of due process protections to parolees) in terms of whether the parolee's liberty is a 'right' or a 'privilege'."[86]

4 Replacing Bondsmen with Police in Bail Retrievals

Introduction

State bail reform since 1965 has been short-sighted in one major respect. The substantial interest in increasing non-monetary forms of bail[1] and monetary forms of bail designed specifically to eliminate bondsmen[a] has not been accompanied by analyses of the retrieval of fugitives who fail to appear after bail release. In response to bail reform proposals, bondsmen argued that they were the cotter pins of state bail systems and that the proposed reforms were an assault on private enterprise.[2] After the reforms were adopted by some states, the visible conflict between reformers and bondsmen turned to hurling statistics at each other on the default rates of persons released under various forms of bail.[3] This conflict is like the ineffectual swats delivered at a tempestuous party. The real issue is the retrieval system. Matched against the police system that is harnessed by an expensive, cumbersome Extradition Act is the system of bondsmen that has more power to effectuate retrievals than federal or state police and that operates at no cost to the public till. Unless the official retrieval system is revised, current bail reform efforts will be retarded,[b] and the danger of reversion to a system dependent on bondsmen will increase.[c]

[a]The 10 percent deposit form of bail was designed specifically to eliminate bondsmen from the state bail systems. It was held constitutional in *Schilb v. Kuebel,* 404 U.S. 357 (1972). See Hearings on S. 2839 and S. 2840 Before the Subcomm. on Constitutional Rights and Subcomm. on Improvements in Judicial Machinery, 88th Cong. 2d Sess. at 164 (1964). It recognizes the financial realities of pre-trial release by bondsmen. The bondsmen are usually paid 10 percent of the amount of bail listed on a bail schedule or set by a judicial officer, and the bondsmen, in turn, supply one of the forms of bail recognized by state law. Upon appearance, nothing is returned to the accused except any collateral demanded by the bondsman—a matter over which courts have no control. Under the 10 percent deposit form of bail, the accused deposits 10 percent of the bail amount with a state officer instead of the bondsmen, and all or 90 percent of the deposit is returned to the accused on fulfillment of court appearance obligations. The rationale supporting state adoption of 10 percent deposit bail is the elimination of unnecessary cost of pre-trial release to the defendant, introduction of a financial stake by the defendant in appearance, known and controlled by the court, and elimination of bondsmen.

[b]The absence of evidence on official retrievals retards bail reform efforts because the burden of producing this evidence is usually cast upon the reform proponents at state legislative hearings. This has been the author's personal experience with bail reform legislation in Massachusetts, Kentucky, and Ohio.

[c]A widely distributed and persuasively drafted pamphleteering campaign by the bail bonding industry is encouraging this reversion. At the Ohio legislative hearings in 1973 on the adoption of proposed rules of criminal procedure, including a change in bail release law,

Adjustment of the official retrieval system for more efficiency without loss of civil liberties could encourage the final replacement of bondsmen with police—a socially desirable goal.

Eliminating Bondsmen from the State Bail System

It is fashionable nowadays to vilify the bondsmen who are unique to the criminal processes of the United States and the Philippines.[4] Arguments for their elimination often concentrate on the sins of bondsmen, or their suspected sins. Reports resulting from investigations by state attorneys general,[5] grand juries,[6] bar associations,[7] and newspapers[8] are monotonous in their repetition of the usual catalog of abuses, such as fee splitting with lawyers or court clerks, participating in the "fixing" of minor criminal cases, and charges in excess of the regulated rate. In 1972, a Massachusetts trial judge was removed for accepting a bondsman's bribe to influence a criminal proceeding, and another judge was publically censured for the same incident.[9] A New York City Bar Association Report capped its description of bondsmen's influence on the administration of criminal justice in this manner:

> Whether demonstrably true or not, it is the belief of many, reached through close observation of the courts and their operation, that in an imperfect world the greatest danger of corruption of the administration of criminal justice lies in the existence of the bondsman as part of that administration.[10]

One truth in this statement is that abuses in bondsmen's operations rarely surface with enough visibility to permit complete analysis. When the rare occasion arises, the state or city usually declares still another act by bondsmen to be a crime—thereby administering a quick-acting palliative to an aroused public. The purity of the bail system is theoretically restored. For example, Tennessee has declared the fixing of cases by bondsmen to be a criminal act.[11] The Uniform Bail Bondsmen Licensing Act, adopted now by at least seven states,[12] has a list of seven acts deemed criminal and a stack of *peccata* for which a bondsman may suffer a loss of license.[13] Recently, the alleged brutality of tracers hired by a Columbus, Ohio, bondsman to retrieve an accused was highly publicized[14] with the predictable consequence that an antidotal bill was proposed to the Ohio legislature to prohibit the use of force by bondsmen.[15] Michigan prohibits the exchange or receipt of money or property between

eight pamphlets were distributed to the members of the legislature by the bail bondsmen lobby. See, e.g., *Continuing an Old Tradition* (Allied Agents, Inc., Indianapolis, Indiana, 1972).

bondsmen and attorneys or court clerks for purposes of obtaining bail bond business.[16]

Since sin is not unknown, however, for other actors in the criminal process, the biblical admonition against casting the first stone has made the sins of bondsmen an unpersuasive brief for their removal. Furthermore, bondsmen cling to a role in nearly all state bail systems because of the contention that fees paid by defendants to bondsmen purchase for society a private, highly efficient group of custodians of released defendants and hunters of fugitive defendants—and all this without cost to the public treasury. This is mostly myth. Within the handful of reported cases on bondsmen's operations, the proposition emerges that the bondsmen's interest in the release of a defendant is predominantly financial. This point seems obvious, but it carries with it a corollary: if that interest can be served by means other than retrieving and surrendering the fugitive defendant, then the bondsman usually makes no effort to satisfy the state's interest in the defendant's appearance for trial.[d]

This is demonstrated by the facts in *McCaleb v. Peerless Insurance Co.*,[17] a recent case where a bondsman actually ordered a defendant to leave Nebraska one hour in advance of the defendant's appearance time before an Omaha Municipal Court on traffic charges. Bail was set in the amount of $200, and McCaleb purchased a bail bond from a bondsman acting as agent for Peerless Insurance Company. The bonding company discovered that McCaleb left Omaha and was residing in California with relatives. A bonding agent went to California, arrested McCaleb, gained control of McCaleb's car, and for approximately four days took McCaleb on a series of trips throughout California. McCaleb was placed in prisons at night, and at all other times was shackled around his waist and wrists.[18]

The purpose of these trips in California was to demand security for the $200 bond and payment of costs of retrieval from McCaleb's relatives. These demands were unsuccessful and costs were increasing; consequently, the bonding agent went back to Omaha with McCaleb in McCaleb's car. The reason for the bondsman's retrieval efforts became clear once the bondsman and the shackled McCaleb arrived in Omaha. The bondsman promptly had McCaleb execute a bill of sale to his one-year old car and sign a release of all claims. McCaleb was released from custody and told to leave Nebraska. The bondsman never surrendered McCaleb to the court.[19]

The issue raised in the case was the propriety of the four-day detention and shackling of McCaleb under a federal civil rights statute.[20] Without minimizing the importance of this issue, the facts clearly demonstrate that the

[d] In Note, Bailbondsmen and the Fugitive Accused—The Need for Formal Removal Procedures 73 *Yale L. J.* 1098 (1964), there is a report of interviews with bondsmen in which the bondsmen state that some of their colleagues pursue bail-jumpers even where adequate security has been given by a third-party indemnitor "in order to maintain a reputation for relentless pursuit as a general psychological deterrent to flight" (*id.* at 1106, n. 40).

purpose of the arrest and detention of the fugitive McCaleb by the bondsman was not to satisfy the state's interest in exposing McCaleb to the criminal process, but rather for the advancement of the bondsman's interest in financial protection from loss on the bond. In spite of claims by some bondsmen to the contrary,[21] it can reasonably be concluded that in any case where a bondsman's financial interest in a bail bond is protected in advance by the signature of a reachable co-signing obligor or by collateral, the state's interest in the appearance of the defendant counts little.

The *McCaleb* case is one of the few published judicial records of the touted custodial and retrieval functions by a bondsman. It is quite reasonable to assume, however, that in a large number of releases effectuated by bondsmen, the bondsmen's interest in financial self-protection and the state's interest in the defendant's appearance do support each other. This is demonstrated by releases where neither full collateral nor a co-signing obligor is obtained before the appearance time of the defendant. In these cases, surrendering the defendant to court is a method by which the bondsman can exonerate himself of his financial obligation as surety on the bail bond or obtain a remission of an outstanding judgment on a forfeited bond. The state's interest in the appearance of the defendant is reinforced by the bondsmen's interest in financial self-protection. This leads to a kind of "bounty-hunter" mythology that supports the retention of bondsmen[22] and that is detailed by bondsmen when threatened by proposed legislation. One bondsman described his manhunting capacity in this way:

> In fact, we must locate the man. We do the tracking down. And there is a lot to be done. We have monthly publications which go to all police departments, all sheriff's offices. We run the man down.[23]

In addition to the *McCaleb* case, examples of the bondsmen's procedures in "running the man down" have appeared in two other recent cases. In *Shine v. State*,[24] a "pistol-type" shotgun with an eighteen-inch barrel was used in an attempt to retrieve a misdemeanant who had been sentenced by a state court to pay a $100 fine and costs. The purpose of the retrieval was to exonerate the bondsman on a $100 appeal bond. In *United States v. Trunko*,[25] two bondsmen entered a house in the middle of the night, forced their way into the room where the fugitive defendant, his wife, and children were sleeping, displayed a gun, and retrieved the defendant. The fugitive defendant had been charged with traffic offenses.

The basic issue is whether the state's interest in ensuring the appearance of defendants is well served through dependence upon a private retrieval system of bondsmen. The relevant factors are the presence or absence of accountability for procedures used in a private retrieval system, and the wisdom of

committing responsibility for retrieval to bondsmen operating without the popularly recognized symbols of civil authority and without the internal and external mechanisms for the discipline of overreaching conduct. The latter is particularly important when viewed from a society with diminshed respect for its criminal process.

The Absence of Accountability in the Private Retrieval System of Bondsmen

Source of Bondsmen's Power to Arrest

Most states by statute or court rule declare that the bondsman has the power to arrest the defendant released on bail bond purchased from the bondsman and to surrender the defendant to custody of the sheriff or other law enforcement officer.[26] The arrest and surrender of the defendant can be for the purpose of the bondsman's exoneration on a bond prior to the court appearance time of the defendant or for remission of judgment on a forfeited bond.[27]

These statutes and rules essentially repeat the common-law retrieval power of bondsmen prevailing prior to their adoption.[28] *Taylor v. Taintor*,[29] an 1873 decision, contains dicta that describe the common law power of bondsmen:

> When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of due process. None is needed.[30]

This extraordinary power in the bondsmen is not derived from any state power over the accused; rather, it arises from the private contractual relationship between the accused and the bondsman as surety on the bail bond contract. *Fitzpatrick v. Williams*[31] discussed the issue of the bondsman's right to seize a fugitive defendant in Louisiana and to transport him to Washington, the state from which the accused had fled. The accused was arrested in New Orleans on affidavits charging him with having committed an offense in Washington and with being a fugitive from justice. The charges were dismissed by the New Orleans court but before the accused was released from the custody of the sheriff,

the Washington bondsman intervened[c] and demanded custody of the accused. The court agreed with the bondsman and repeated the proposition that the bondsman's right is derived from his private relationship with the accused and is not derived by subrogation to the rights of the state. The court said that this right to arrest, imprison, and transport the accused can be exercised without resort to legal process. The bondsman can exercise this right wherever he finds the accused and needs ". . . no process, judicial or administrative, to seize [the accused] . . . ."[32]

The court concluded its description of the absence of judicial or administrative control over the bondsman's power to arrest, imprison, and transport an accused over state lines by comparing this power with that of the state. Predictably, the state placed second to the bondsmen. The state must go through extradition procedures–but not the bondsmen.

> The right of the surety to recapture his principal is not a matter of criminal procedure, but arises from the private undertaking implied in the furnishing of the bond . . . . It is not a right of the state but of the surety. If the state desires to reclaim a fugitive from justice, in another jurisdiction, it must proceed by way of extradition in default of a voluntary return.[33]

Nature of Bondsmen's Power over Defendants

The arrest and custody power of bondsmen is a degenerate vestige of a bail relationship between defendant and surety that either perished or never gained footing in this country. Bail was a transfer of custody of a defendant awaiting trial from the sheriff to a third party who had a personal, not a pecuniary, interest in the defendant.[34] The emphasis was on the personal stake of the third party in the interests of the defendant and the actual custodial efforts of the third party. It was a system based on trust and confidence rather than commercialism. The closest present-day analogy would be a release of a defendant to the custody of his family, or a social agency, where this form of bail is authorized by state law.[35] Emphasis on a personal rather than commercial relationship between the defendant and third party continues to have vitality in England. The furnishing of bail for profit is illegal, and there are no professional bail bondsmen in England. Agreements to idemnify the third party for any payment he must make to the court caused by the non-appearance of the defendant are illegal.[36]

[c]The procedure in *Fitzpatrick* is unclear. Apparently the defendant sought a writ of habeas corpus in a federal district court after charges had been dismissed by the state court, and the state sheriff refused to release the defendant. The bondsmen intervened in the hearing on whether the writ should issue.

In addition to the disappearance of any personal relationship between the defendant and the surety-for-profit, the assumed custodial efforts and dominion by the surety-for-profit over the defendant during the period of the release are simply nonexistent. The theory that a bail release is a continuation of the defendant's original imprisonment is based on the assumption that the surety will take a personal interest in the behavior and appearance obligation of the released defendant. This is not so. Caleb Foote, who has added much to the understanding of bail law by empirical studies,[37] calls bondsmen's claims to any significant custodial services "frivolous."[38] The number of persons released on bail through the services of bondsmen is too great to permit any extensive custodial efforts by bondsmen,[39] and the only extensive study of the practices of bondsmen found that their custodial efforts are limited to an "occasional phone call, letter, or 'grapevine' rumor."[40]

The most intolerable consequence of the change in bail is that the bondsmen's power to arrest, detain and retrieve can now be executed to serve his commercial interest. The bondsman's relationship, as commercial surety, with the defendant on the bail bond, is essentially that of a creditor to a debtor. In a recent case, where bondsmen's activities surfaced for judicial scrutiny, the bondsman was found by the court to have used his arrest and detention powers to collect a private debt of $40 owed by the defendant.[41] In this case, the defendant had purchased an appearance bond from the bondsman, appeared at trial, was convicted of a misdemeanor, and sentenced to pay a $100 fine and costs of $19. The bondsman paid the fine and costs and then sold an appeal bond to the defendant. The defendant paid some money to the bondsman, which left a debt of $40. The court found that the bondsman took the following steps to collect his $40. The bondsman and two armed agents went to their debtor's home at 5:00 a.m., displayed guns to the debtor, surrounded the home, and started to kick at the back and front doors. The front door broke, and the bondsman's agent thrust his shotgun through it. At that point, the debtor shot and killed the agent. Shine, the debtor, was arrested and charged with second-degree murder on affidavit of the bondsman that recited the Alabama statutory authority of bondsmen to arrest. Shine was convicted and sentenced to fifteen years imprisonment. The appellate court reversed, noting that "[T]his 'pay or get shot' attitude has too long been allowed to flourish with bonding companies."[42] Concerning the state statutory arrest and detention power of bondsmen, the court held that the purpose of this law was not to aid in the collection of private debts of the bonding company no matter what the origin of the debt.

> The Code cannot and must not be construed to license company officials to run around the countryside armed with . . . shotguns and pistols, in an effort to collect their personal debts . . . . The proper procedure for enforcing collection of a debt is not by means of an armed posse descending upon the debtor at 5:00 a.m. in his own domicile.[43]

The *McCaleb* case, which was discussed earlier,[44] is an astounding example of a bondsman using his power to arrest, shackle, and detain a defendant for four days to serve only the bondsman's financial interest in a bail bond. Once the bondsman satisfied his commercial interest through his state-bestowed power to arrest and detain, the defendant was released and told not to appear at court.

Bondsmen's Power to Execute Interstate Retrievals

Interstate retrievals of fugitives have occurred in many of the cases in which bondsmen's activities have surfaced for judicial attention. *United States v. Trunko*[45] involved arrest and transportation from Arkansas to Ohio; *McCaleb*, California to Nebraska; *Fitzpatrick*, Louisiana to Washington; *Thomas v. Miller*,[46] Cincinnati to Tennessee; and *Gola v. State*,[47] Pennsylvania to Delaware. A recent distant retrieval from West Virginia to Ohio received considerable newspaper publicity because of alleged brutality by the bondsmen in the course of transportation.[48]

The problem with these distant retrievals is the absence of an initial limited hearing to protect individuals from the expense and hardship of being forcibly transported great distances when the bondsman is actually using power to arrest and retrieve for purposes other than court appearance.[49] The hearing is also needed when there is a mistake in identity, or when the accusation of criminal conduct is patently mistaken or frivolous. That there is need for this type of limited hearing is demonstrated by the recent cases where courts have found that bondsmen used their arrest and transportation power for purposes other than production of defendants in court. With the exception of California,[50] no state appears to require any judicial or administrative process during the course of a retrieval by a bondsman. There has been one suggestion[51] for amelioration of this problem in distant retrievals by bondsmen through application of the formal procedures of the Uniform Criminal Extradition Act[52] for arrests and interstate transportation of defendants by bondsmen, but there is no evidence of acceptance of this suggestion by any state.

The requirement of an initial limited hearing was raised in 1957 in a Delaware case,[53] but the theory used to support this requirement missed the mark. The case arose on a petition for a writ of habeas corpus by a Delaware state prisoner in a state court alleging that he had been illegally transported to Delaware from Pennsylvania because he had not waived extradition nor had extradition been sought by Delaware. The court called the prisoner's claim "fanciful" and lacking in "even a fairly debatable point of argument"[54] and held that no extradition was necessary since the arrest in Pennsylvania was by agents of his bondsmen. According to the court, such an arrest was not an action by

the state and, therefore, no extradition was required. The fact of the arrest in Pennsylvania suggest that the petitioner's claim was not as fanciful as the court claimed. The arrest in Pennsylvania was by two Delaware police officers acting as agents of a Delaware bondsman. The extent to which the police officers used symbols of their office to obtain custody of the petitioner is not stated in the opinion, but this point might have been developed to show that the arrest was by the bondsmen's agents acting under color of Delaware law.[55]

The argument of the petitioner was quite understandable when the power of bondsmen to arrest and transport defendants over great distances is compared with that of federal and state law enforcement officials. Arrest and removal of a defendant by federal agents to a distant district for trial is controlled by Rule 40 of the Federal Rules of Criminal Procedure. The rule applies generally to cases where the arrest would result in transporting the defendant more than one-hundred miles to the point of trial.[56] In such cases, the rule requires that federal arresting officers take the defendant "without unnecessary delay" to the nearest available magistrate or judge in the district in which the arrest occurs for a hearing on whether an order should issue authorizing the distant removal or discharge of the defendant. The issues at the hearing are quite limited; if the removal is based upon an indictment, the federal government need only produce a certified copy of the indictment and proof of identity. If the removal is based only upon a complaint or information, reasonable cause to believe the defendant guilty must be shown.[57]

The drafters of Rule 40 recognized that it seemed illogical to require an extradition-type procedure to remove a fugitive from one federal district to a distant one, since the entire United States is a single jurisdiction from the point of the federal government,[58] and a federal arrest warrant runs through the United States.[59] But it was felt that ". . . in view of the long distances that are at times involved, some supervision and restrictions seem desirable on the transportation of an accused person from one part of the country to another."[60] The minimal hearing prevents cost and burden of distant transportation upon an individual where the charge against him is frivolous or mistaken, or where he is not the person against whom the charge was made.

Although the Rules are applicable to "all criminal proceedings"[61] in federal courts, no reported judicial decision has discussed the applicability of the minimal removal hearings in Rule 40 to transportation by bondsmen of defendants over great distances to a federal district court for trial. The practice of bondsmen is to ignore Rule 40 in conducting distant removals in federal criminal matters.[62] What the law says is minimally necessary for federal law enforcement officers engaged in distant removals does not apply to similarly occupied bondsmen.

Bondsmen acting on the express or implied[63] authority of a bail contract are also largely immune from judicial control in interstate removal of individuals accused of state crimes.[64] By comparison, state officers, visibly acting

under the authority of the state, are bound by the Uniform Criminal Extradition Act, which has been adopted by all but three states.[65] Although cumbersome in structure and in need of revision, the Act does protect against improvident retrievals based on mistaken or insubstantial grounds.

Absence of Remedy for Illegal Detention or Force by Bondsmen during Retrieval

The difficulty of obtaining a remedy for illegal force or distant retrieval is another sign of the lack of accountability within which bondsmen operate. Even the federal government has been successful in its one attempt to apply a criminal sanction to bondsmen's activities found by the court to be "high-handed, unreasonable and oppressive."[66] According to the court, two Ohio bondsmen burst through the door of a home in Arkansas before dawn one morning, pushed aside the eighty-one-year-old homeowner, entered a bedroom occupied by a man, his wife, and baby, and flashed a light in the eyes of the man--the sleeping object of their interstate search. The bondsmen displayed a gun, forced the man into an automobile, handcuffed him, and drove away at a terrific rate of speed to Ohio, while ignoring the pleas of their prisoner's wife to communicate with the sheriff of the local county in Arkansas. All of this was done to secure the remission of a $500 misdemeanor bond.[67]

The federal government prosecuted the bondsmen for wilfully depriving the man, under color of state law, of his right not to be deprived of his liberty without due process--the criminal counterpart[68] of the federal civil rights statute. The court found that the activities of the bondsmen violated the man's constitutional right and that these activities were performed under color of state law.[69] But the prosecution's case faltered on the proposition that the bondsmen did not have the specific criminal intent to violate constitutional rights and as support the court cited the bondsmen's testimony that a "bond-jumper" had no civil rights during arrest and return.[70]

A similar action, but civil in theory, based upon a federal civil rights statute[71] involved the automobile transportation of a fugitive from Cincinnati to Tennessee. The fugitive's legs were chained and his hands handcuffed, and the court stated that he had been treated "roughly, if not cruelly."[72] But again, the bondsmen were held not to be civilly liable because they "were acting by reason of a contractual relationship with him [the fugitive]."[73] Both cases suggested state tort actions against the bondsmen. "If plaintiff has a right of action for cruel and inhuman treatment against . . . his bonding company, it is a state court action."[74] This is a hollow suggestion in that, with one exception,[75] no recent case has been reported where a bondsman has been sued successfully under any civil theory for recovery against oppressive activities in retrieving individuals.

It is fair to conclude that there is no system of accountability in bondsmen's arrest and detention activities, and there are no clear rules on the amount of force bondsmen may use during the course of an arrest and detention of a fugitive. The bondsman's immunity to legal processes, which permits him to pursue his commercial interests in the bail bond contract, is truly startling when compared with the settled rules restricting activities of police officers in conducting arrests, retrieving defendants after arrest, and retrieving fugitives after prison escapes. In arresting a misdemeanant,[76] or retrieving a misdemeanant after arrest[77] or prison break,[78] the officer may not, absent a problem of self-defense, use firearms and is subject to civil or criminal sanctions for disregarding this rule. The rule is based on the view that "It is better that he (the misdemeanant defendant eluding arrest or escaping from prison) be permitted to escape altogether than that his life be forfeited, while unresisting, for such a trivial offense."[79] A court expressed that view in remanding for trial a wrongful death action by the father of a prison fugitive who was shot by a guard as he was running away from a prison work detail. The prisoner was serving a sentence for carrying a concealed weapon, a misdemeanor in the local jurisdiction. In another case, an Ohio police chief was convicted of discharging firearms for shooting a pistol in an attempt to apprehend a misdemeanant.[80] In convicting a police officer for criminal assault and battery in the use of firearms in apprehending a man for molesting a girl, a New Jersey court said:

> Police officers must learn, if they are not already aware, that there are definite limitations upon the amount of force that may be used in arresting a citizen for a crime . . . ; that they may be held liable, both civilly and criminally, for the use of excessive force either in making a lawful arrest or in attempting to capture a fleeing offender . . . .[81]

No such admonition has been directed toward bondsmen in retrieving fugitives.

Conclusion

Bondsmen should be replaced by police in the retrieval of fugitives. The police are highly visible and are accountable to both external and internal disciplinary procedures.[82] Police power to effectuate retrievals, particularly on an interstate level, should be adjusted to match the integration of fugitive retrieval with police patrol through computerized wanted persons files. Police are already assuming more retrieval responsibility for bail fugitives through newly installed information systems. For example, arrest warrants are issued for all persons who fail to appear after bail release in Washington, D.C.[83] All of these warrants are entered into the local computers and warrants on felony cases are entered into the national computer managed by the FBI. This informa-

tion on the wanted status of bail fugitives is consequently accessible to patrol officers throughout the nation, who may have contact with the fugitive, albeit innocent. The implications of this increased capability of police to know the wanted status of bail fugitives should be recognized by facilitating interstate retrievals by police without loss of civil liberties. The elimination of bondsmen from bail systems, recommended in 1968 by the ABA[84] and in 1974 by the Commissioners on Uniform State Laws[85] will be completed when police replace bondsmen in the retrieval process.

5 Extradition of Fugitives: A Blending of Principles

Extradition[a] is a process by which a fugitive is apprehended and detained by the authorities of one state and delivered to another state requesting the fugitive's return. In understanding the interplay of federal and state law in the extradition process, it is helpful to reshuffle the process and explore some root questions. The first asks about the need for extradition between states. What prevents the courts of an asylum[b] state from applying the foreign law allegedly breached by the fugitive? Secondly, if extradition is needed to satisfy the demanding[c] state's interest in prosecution and punishment, it then helps to ask what qualifies the power of the states to engage in mutual accommodations for the involuntary transfer of persons over state lines to satisfy state interests. The third question arises from the fact that many persons are recognized as interstate fugitives after an arrest by the police of an asylum state for violation of the law of the asylum state. The question then is what principles govern the conflict of simultaneous interest by two states in applying their criminal laws to the same person.

Extraterritorial Application of State Criminal Law

The Juror-Residence Requirement

The assumption underlying extradition laws is the inability of one state either to try or punish one who has violated the criminal laws of another state. This assumption has most recently been attributed to the "principle of terri-

[a] It is often suggested that the term *extradition* should apply only to the surrender of fugitives between nations, and *rendition*, surrender between states. See Note, Interstate Rendition and the Fourth Amendment, 24 *Rutgers L. Rev.* 551 n. 1 (1970); Scott, J., *The Law of Interstate Rendition* (Chicago: S. High, 1917), § 1. Since the statute principally controlling the process of surrender of fugitives among states refers to the process as *extradition*, the language of the statute is adopted. Uniform Criminal Extradition Act, 11 U.L.A. Crim. L. & Proc. 59 *et seq.* (Master ed. 1974).

Extradition of fugitives by states should be distinguished from *removal*, the process by which federal offenders are returned from the judicial district of apprehension to the district in which the criminal arrest or indictment has occurred (Fed. R. Crim. Proc. 40).

[b] *Asylum* state refers to the state in which the fugitive is arrested.

[c] *Demanding* state refers to the state that has suffered the alleged offense to its laws and is demanding custody of the fugitive for prosecution and punishment.

toriality,"[1] a traditional principle within conflicts of laws. The principle is in reality two propositions: (1) the sovereign has no power over persons in the territory of another sovereign, and (2) the law "applicable to an individual is the law to which he was subject at the time of the acts or omissions the legal effect of which are in question . . . ."[2] Both of these propositions leave open the question of why the courts in an asylum state refuse to act when the law applicable to the individual is the criminal law of another state. The refusal may be reasonable in some cases in light of the inconvenience in gathering evidence and difficulty in assuring the presence of witnesses.[3] Furthermore, it has been traditionally asserted that the criminal law of a state represents the peculiarly local policy of that state.[4] This assertion suggests the corollary that only the people and judges of a state can understand and apply the state's criminal law.

Both of these views--evidentiary inconvenience[5] and the local nature of criminal laws--have prevailed with state courts. Factors of convenience and characterizations of criminal law as local or general suggest, however, options to the asylum state on the question of applying the criminal law of another state, and there have been suggestions that "under some circumstances sound policy may require the trial of a person charged with violating foreign [state] law."[6] Whatever flexibility state courts may have had in this matter has apparently been lost by *Duncan v. Louisiana,*[7] a decision of the Supreme Court holding that defendants in state criminal trials enjoy the right to jury trial specified by the Sixth Amendment and applicable to the states by the Fourteenth. In *Duncan,* the court rejected Louisian's position that the states are not subject to the federal constitutional requirement to provide a jury trial in criminal cases.[8] After *Duncan,* the relevant question becomes whether the Sixth Amendment's juror-residence requirement is also applicable to the states through the Fourteenth, as a "procedure . . . necessary to an Anglo-American regime of ordered liberty."[9]

The pre-Constitution common-law features of a jury in criminal cases included a "jury of the vicinage," which generally meant jurors drawn from neighborhood where the deed was committed.[10] The common-law requirement of vicinage was expressly included in the first proposed draft of the Sixth Amendment,[11] but was considered too vague.[12] The debate led to the emergence of the Sixth Amendment, which requires that the jury be "of the State and district wherein the crime shall have been committed."

The debate about juror-residence in the Sixth Amendment is significant because the Constitution in Article III already stated a right to jury trial applicable to the federal judicial process. The need to amend the Constitution suggests that juror-residence was not considered within the scope of constitutionally essential procedures collectively subsumed within the term "jury trial" as expressed in Article III. This conclusion has already been suggested by dictum[13] in *Williams v. Florida,* which held that the twelve-juror requirement of common-law jury trial was not constitutionally essential and, therefore, not required of the states or federal government.[14] The court in *Williams*

said that the failure of the drafters of the Sixth Amendment to use language explicitly tying the jury concept to common-law requisites, such as "vicinage," manifested an intention to change the common-law concept of jury.[15]

Williams did not, however, present the question of the constitutional essentiality of juror-residence in state criminal trials. Two significant features distinguish this question from the matter of number of jurors and suggest that juror-residence at least from the state of the locus of alleged crime would be constitutionally mandated in state criminal trials. First, the debate relating to vicinage did result in language in the Sixth Amendment on juror-residence, which plausibly amounts to a redefinition of vicinage in light of the territorial structuring of the United States. In this light, juror-residence retains its constitutional essentiality to jury trial. Furthermore, the contrasting silence in debate on the number of jurors supports the view that redrafting of the juror-residence requirement for the Sixth Amendment reflects an understanding of the essentiality of juror-residence to jury trial.

Second, the jury number question in *Williams* presented a state practice in one aspect of criminal trials by jury in which there were supporting state interests. Costs and delays in convening a jury and the volume of state criminal trials aid the contention that states should not be controlled by an inflexible rule requiring twelve persons on a jury.[16] By contrast, there is no practice by asylum states of trying fugitive criminal defendants with jurors not residents of the state in which the crime was allegedly committed. It is true that an analysis of state interests and the existence of state practices are only peripherally related to divining the drafters' understanding of what procedures are constitutionally essential to the right of jury trial in state criminal cases under the Sixth Amendment. Yet the Supreme Court has already stated the need to turn to other than purely historical considerations to determine what features of the jury system are constitutionally mandated to the states.[17] The court used a test that involved an inquiry about the function performed by the disputed state practice on jury trials and the relationship of that function to the purposes of juries.[18] The court did say that the jury should be "a representative cross-section of the *community*" and that the jury's essential features are "the *community* participation and shared responsibility that results from that group's determination of guilt or innocence."[19] The court never defined the community, but this language clearly reflects some community tie as an essential characteristic of a jury for state criminal trials. The court's long established view of state criminal laws as expressing local policy[20] suggests a community defined by residence in the state in which the crime was committed.

Constructive Presence of a Defendant

Apart from the constitutional difficulties in a state's attempt to apply another state's criminal law, fugitivity of criminal defendants could also be

affected by a state's decision to give extraterritorial effect to its own law. Where an asylum state wishes to try and punish a person whose allegedly criminal deed is substantially connected with another state, the asylum state can follow fictional paths to finding the commission of the deed in its own state. Consequently, prosecution can be guided by its own state law and the rule against application of foreign state law remains intact. An illustrative case is *Simpson v. State*,[21] where a defendant, standing in South Carolina shot at a man in a boat in Georgia waters. The bullet missed the man but struck Georgia waters. The Georgia court upheld a prosecution for assault with intent to murder under its law because the defendant was constructively in Georgia. "Of course, the presence of the accused within this state is essential to make his act one done in this State; but the presence need not be actual. It may be constructive . . . ."[22] The court regarded the defendant as having accompanied the bullet across the state border into Georgia. The extensions of jurisdiction are obvious once defendants can be deemed to accompany their criminal missiles, such as a mailed letter containing fraudulent misrepresentations.[23]

The territorial limitations of state criminal law has not kept pace with the increased population mobility and the growth of socially and economically integrated population centers that spread across two or more state borders.[24] Fictionalized extensions of power of a state court to apply its own criminal law to multi-state or foreign state activities may be useful to absorb the shock of innovations necessary to deal fairly with multi-state mobility of persons accused of crime. These extensions are noticeable, however, in their infrequency, and control over multi-state mobility of defendants continues to be largely a question of the power of the states to reach accord for the involuntary transfer of persons over state lines in the interest of applying state criminal law.[25]

The Supreme Court said in 1892 that the extradition process was the only manner of dealing fairly with multi-state fugitives from state criminal justice:

> Crimes and offences against the laws of any state can only be defined, prosecuted and pardoned by the sovereign authority of that State; and the authorities, legislative, executive or judicial, of other States take no action with regard to them, *except by way of extradition* to surrender fugitives to the state whose laws they have violated, and whose peace they have broken [emphasis added].[26]

Since the proposition appears to have continued accuracy, new analysis of extradition is necessary in light of changes in communication,[27] transportation, and residence patterns.[28]

Involuntary Transfer of Persons Across State Lines in the Interest of State Criminal Law

A state's power to effectuate its own criminal law by arrest, prosecution, and execution of its correctional policy ends at its borders. Therefore, the administration of a state's criminal law can be frustrated in cases where the state is unable to reach persons located in foreign states who are indispensable to the arrest or prosecution processes. Furthermore, a state's correctional policy may suggest transferring a person to the custody of a foreign state agency for supervised rehabilitation. Since a state's correctional policy can be applied only by that state, a state must be able to reach persons who refuse to cooperate in the foreign rehabilitation program. Consequently, the administration of a state's criminal law often depends upon the voluntary return of persons from another state,[29] or the power of a state to compel return.

States have engaged in a potpourri of accommodations that collectively assert state interest in the involuntary transfer of persons across state lines, whose custody is necessary for the administration of the criminal laws.[30] The accommodations have taken the form of compacts[31] or uniform acts.[32] Their heterogeneity is due to three factors: (1) the lack of clarity on the source of power of the states to reach accommodations on the involuntary return of persons needed for execution of state criminal law; (2) the practice of expressing the accommodation in terms of the relationship of the sought person to the state criminal law; and (3) the failure to perceive all such accommodations as bottomed on the same principle—that is, without a reasonable process for reaching indispensable persons in foreign states, a state's policy of justice and order expressed in its criminal laws is artificially restricted by its boundaries.

The existing accommodations are expressed in terms of the person's relationship to the criminal law of the state seeking the involuntary return. Separate accommodations have been reached for the involuntary return from foreign states of material witnesses,[33] juveniles,[34] parolees and probationers,[35] persons believed to have committed a felony and pursued by police,[36] persons who have violated the conditions of pre-trial release,[37] persons charged with a crime who are located in another state,[38] and persons who have criminally failed to pay support and are located in another state.[39]

The elements of each relationship are defined precisely by the respective accommodation and difficulties can arise when a shift in state law does not correspond with these elements. For example, the accommodation permitting a state to demand return of a person on probation or parole to a foreign state agency requires that the probationer or parolee be convicted of an offense by the demanding state.[40] Some states have recently enacted legislation authorizing

probation without a conviction,[41] which places such probationers out of the power of a state to seek involuntary return.[42]

Power of States to Reach Accommodations for Interstate Transfer of Persons in the Interest of State Criminal Law

Modern conditions of resource allocation, transportation, communication, and population patterns have generated a variety of forms of interaction in the affairs of states. The problems of federalism prompted by the increased state interaction are often viewed in terms of the exclusive quality of law making by the Congress or by states acting individually, and arguments based on this view continue to be made relating to the power to legislate in the area of interstate transfer of persons in aid of administration of state criminal law.[43] In a 1925 article, Felix Frankfurter opined that the controversy over whether the power of the federal Congress or individual states should predominate in legislating areas of multi-state concern was sterile. The exclusiveness in choice of law making to deal with interstate problems was becoming increasingly inadequate. New legal forms were necessary "to devise a great variety of legal alternatives to cope with the diverse forms of interstate interests."[44]

One such form was reciprocal state legislation, whereby the capacity of one state to help another is exercised in a reasonable adjustment of interests. Reciprocal state legislation was a form of legal invention for solving problems touching more than one state.

The article asserted a broad proposition that states have the power to engage in accommodations for their mutual benefit. The basis of this proposition was the importance of common action by states in areas where states, acting individually, have the capacity to advantage or hinder other states.[45] In reciprocal state legislation, states would be simply reflecting the practice of state courts in adjudicating issues in transactions on the ground that the transactions required harmonious legal appraisal by states legally independent of each other.[46] Reciprocal state legislation was an "extra-constitutional form of legal invention for the solution of problems touching more than one State, . . . neither contemplated nor specifically provided for by the Constitution."[47] Nearly 35 years later, Justice Frankfurter had the opportunity to adopt an expanded version of the ideas expressed in his own article as constitutional doctrine underpinning reciprocal state legislation to obtain the involuntary transfer of persons across State lines in the interest of State criminal laws.

In *New York v. O'Neill,*[48] an Illinois citizen travelled to Florida to attend a convention. While in Florida, he was summoned to appear before a Florida court for a hearing to determine whether he was to be transferred to the custody of New York agents to be transported to New York to testify as a material

witness in a criminal proceeding in that state. The proceeding accorded with the provisions of reciprocal state law, the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings,[49] which at that time had been adopted by Florida and New York and forty other states.[50] The Florida trial and appellate courts held that the Uniform Act violated the United States Constitution because there was no specific constitutional authorization for this new form of relationship between the states.

This Uniform Act had elements distinguishable from the state legislation cited by Justice Frankfurter in his 1925 article.[51] Under the Uniform Act, one state (Florida) was ordering a person, over whom it had personal jurisdiction, to perform an act in another state (New York). Furthermore, the Uniform Act, as a Florida statute, benefited the criminal laws of other states, thereby giving extraterritorial effect to foreign state criminal laws. The 1925 article cited legislation involving conscious parallel action by states on the same area of legal control, such as the Uniform Negotiable Warehouse Receipts Act; whereas, the Uniform Act in the *O'Neil* case involved affirmative control by one state over a person for the exclusive benefit of the administration of the criminal laws of another state. The benefit was in the involuntary transfer across state lines of a person indispensable to a foreign state's criminal proceeding.

On the other hand, the Uniform Act was bottomed on a principle more compelling of interstate cooperation than the need for common action by states on the same area of legal control. This was the dependency *in extremis* among states arising out of the boundary limitations to the execution of a state's justice and order policies expressed in its criminal laws. Without a reasonable process of reaching persons in foreign states who are indispensable to a state's administration of its criminal laws, justice and order end at the metes and bounds of a state—an increasingly artificial circumscription.

In upholding the Uniform Act,[52] Justice Frankfurter emphasized the importance of the policies of preserving harmony among states and promoting criminal justice within their respective borders.[53] He then proceeded to structure an analysis of the constitutionality of cooperative arrangements among states for the effective administration of their respective justice systems. First, there was no need to find a specific provision of the Constitution authorizing such state cooperative efforts. They are constitutional because devising "fruitful interstate relationships . . . is within the unrestricted area of action left to the states by the Constitution."[54] Second, the only qualification of this state power would be a constitutional provision preventing interstate arrangements in a particular area of criminal justice, or invalidating the procedure used in an otherwise permissible arrangement.[55] Third, since state cooperative arrangements for the effective administration of justice were to be accorded the full benefit of presumed constitutionality, constitutional invalidity could be found

only upon a finding of "*clear incompatibility* with the United States Constitution"[56] or upon a constitutional provision "which *clearly prevents* States from accomplishing this end by the means chosen" [emphasis added].[57]

This analysis is a broad validation of interstate accommodations for the involuntary transfer of persons across state lines in the interest of state criminal law. It has been utilized recently by lower federal courts to uphold state accommodations for the involuntary interstate return of persons who fail to comply with state support orders after leaving the state[58] and persons who conspire to commit criminal acts in one state while residing in another.[59] It is unfortunate that Justice Frankfurter continued to refer to cooperative undertakings between states in aid of state criminal justice as "extra-constitutional arrangements" designed to "increase comity among the states"[60] in deference to the language of his own 1925 article. Comity does not confer power to legislate, but offers a good reason for its exercise.[61] The analysis in *O'Neil*, however, supports a constitutional power in states to legislate arrangements for the interstate return of persons indispensable to state criminal justice. The relevant question, now, is the scope of this power and its limitations.

6 The Extradition Clause, State Power, and Constitutional Controls

The Dampening Effect of the Federal Extradition Law

The opinion by Justice Frankfurter in *O'Neil* is beguiling with its logically consistent analysis of the constitutionality of state accommodations for the involuntary transfer of fugitives. It appeals to legal inventiveness—a desire to have the law reflect the realities of a society where state borders have little functional relationship to mobility and residence patterns of people. The *O'Neil* analysis, however, does not reflect the enormously dampening influence that had been exerted on state legislative inventiveness in this area by the court's interpretation of the extradition clause.

> 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.[1]

On the matter of defining state and federal law-making power on extradition, the clause has been called a "cryptic prescription,"[2] and Supreme Court decisions interpreting the clause have been charitably characterized as "not altogether harmonious."[3] Until *O'Neil*, the constitutionality of state accommodations for the involuntary interstate return of fugitives was tested by the compatibility of such accommodations with the extradition clause.[4]

The extradition clause deals with the involuntary transfer by states of fugitives from justice, a subject matter that was controlled by the principles of comity prior to the adoption of the Constitution.[5] A person "who shall flee from justice" under the clause has been held to be one who was physically present in the demanding state at the time of the occurrence of the alleged crime[6] and is located elsewhere.[7] In order to implement the extradition clause, Congress enacted the federal extradition statute, which has virtually remained unchanged since its adoption in 1793.[8] Therefore, the extradition clause and the implementing federal statute form the federal law specifically applicable[9] to the involuntary interstate return of one group of persons indispensable to the administration of state criminal justice.[10]

Since the early part of this century, the federal statute has not operated

as a guide for what is legally required of states in the involuntary transfer of fugitives from justice.[11] When the statute was followed, state courts reported difficulties because of the statute's cumbersome procedures and silence on issues such as arrest in the asylum state prior to action by the governors. In an early Wyoming case,[12] a state court considered a request for release from prison by a defendant who was returned involuntarily to Wyoming from Kansas by unilateral action of Wyoming police. The defendant argued that he should be released because the police acted illegally in not following the federal extradition statute. The court denied the request partly on the reason that the statute was hopelessly inadequate. "In its practical results, the constitutional provision (together with the implementing extradition statute) is nearly inoperative. . . . The consequence of the inefficiency of the constitutional provision has been that extraterritorial arrests have been winked at in every state. . . . "[13]

One contribution, therefore, of the federal statute to the law of extradition has been to provide a basis for rendering illegal police abductions sanctionless.[14] Another has been to enervate state cooperative efforts in the adoption of procedures for the involuntary return of persons indispensable to state criminal justice. The implication of federal control arising from the passage of this statute has led courts to deny state power in three areas:

1. To complete the federal statutory process for extradition by legislating procedures on matters untouched by the federal statute;[15]
2. To legislate an involuntary interstate return of persons indispensable to the administration of a state's criminal justice system, but not "fugitives from justice" within the meaning of federal extradition statute or constitutional provision;[16]
3. To adopt an extradition process for "fugitives from justice," reaching a higher level of cooperation than the minimum standard mandated by the Constitution.[a]

If the policy of the extradition clause in the Constitution was to mandate a minimum level of cooperation among states[17] toward a uniform extradition

[a]This issue is squarely presented by the Uniform Rendition of Accused Persons Act, promulgated by the Commissioners on Uniform State Laws in 1967. See *Handbook of the National Conference of Commissioners on Uniform State Laws,* p. 153 to 157 (1967). The Act replaces executive extradition specified in the federal statute and United States Constitution with judicially controlled extradition for persons federally defined as fugitives from justice. There are no cases, as yet, interpreting the Act, but an issue of its constitutionality is clearly presented by dictum in *Innes v. Tobin,* 240 U.S. 127, 134 (1916). "[T]hose cases (former Supreme Court decisions) . . . establish the exclusion by the Statute of all state action from matters for which the statute expressly or by necessary implication provided." For a recent restatement of this traditional view of preemption of state action by the federal extradition statute, see Note, Interstate Rendition and the Fourth Amendment, 24 *Rutgers L. Rev.* 551, 555 n.16 (1970).

procedure, thereby foreclosing asylum status to any state, state effort to this end should have been encouraged, not thrice denied.

Fugitives and Procedures Untouched by Federal Law

The federal extradition statute is silent on a number of matters, e.g., arrest in the asylum state before requisition by the governor of the demanding state, bail, habeas corpus, and extradition of persons charged with crime by information. In an 1842 decision upholding the constitutionality of the federal extradition statute on fugitives from justice and slavery, Justice Story stated that the federal statute covered the field of extradition of fugitives and, therefore, all state legislation relating to the same subject matter was unconstitutional. "In a general sense, this act may be truly said to cover the whole ground of the Constitution, both as to fugitives from justice, and fugitive slaves; that is, it covers both the subjects in its enactments . . . because . . . it points out fully all the modes of attaining these objects, which Congress, in their discretion have as yet deemed expedient or proper to meet the exigencies of the Constitution. If this be so, then it would seem . . . that the legislation of Congress . . . must supersede all state legislation upon the same subject; and by necessary implication prohibit it."[18]

The case involved a Pennsylvania criminal statute that prohibited removal of a slave from Pennsylvania—an anti-slavery state. As Chief Justice Taney stated in his concurring opinion, Justice Story's position on the exclusivity of the federal extradition statute was not involved in the dispute because the Pennsylvania statute was clearly in conflict with the federal statute.[19] There was no need, therefore, to nullify all state legislation that may be harmonious with the federal extradition statute by treating areas untouched by the federal statute.

The dictum by Justice Story in *Prigg* has never been expressly rejected by the Supreme Court. A federal district court in 1970 considered a state legislative accommodation for extradition of fugitives, the Uniform Criminal Extradition Act, and could only characterize as "doubtful today" the *Prigg* dictum on the exclusive power of Congress to legislate the subject matter of extradition.[20] The aged *Prigg* dictum was criticized by the two major writers on extradition, both of whom substantiated in detail the extensive state legislation adopted after *Prigg,*[21] and in disregard of the court's view that the states have no power to legislate the surrender of fugitives.

States have ignored the *Prigg* dictum. It seems, moreover, to be inconsistent with a later case by the Supreme Court on the power of states to legislate the extradition process for a fugitive from justice untouched by the federal statute. In *Innes v. Tobin,*[22] Georgia sought to extradite a person from Texas who clearly fell within the class of fugitives from justice covered by the con-

stitutional provision on extradition. The person was in Georgia at the time of the alleged offense and was located in another state, Texas.[23] The federal extradition statute, however, was not coterminous with the constitutional provision in that the statute did not cover extradition of a fugitive who entered the asylum state involuntarily.[b] The question was whether states could supplement the federal statute to provide for extradition of fugitives from justice uncovered by the statute but clearly within scope of the constitutional provision on extradition. The court held that the statute excluded state legislation only on "matters for which the statute expressly or impliedly or by necessary implication provided."[24]

Another limitation on states' power to legislate the area of extradition is based upon a "negative implication"[25] from the constitutional provision on extradition and the implementing federal statute. The Constitution sets forth extradition for the involuntary transfer across state lines of fugitives from justice. The negative application is the denial to states of the power to legislate surrender by other states of persons who are not fugitives from justice in the meaning of the Constitution, but who are indispensable to administration of state criminal justice. This would apply to present state accommodations for the interstate transfer of persons who presumably do not fall within the scope of fugitives from justice under the provision in the Constitution dealing with extradition. Included would be defendants not present within the state at the time of commission of the alleged crime,[26] parolees or probationers dispatched to a foreign state for supervision,[27] juveniles,[28] or material witnesses.[29]

Justice Douglas raised this argument in the *O'Neil* case.[30] As may be recalled, Justice Frankfurter, speaking for the majority, refused to adopt the extradition clause as the center of analysis of the constitutionality of state power to obtain custody of material witnesses from other states.[31] Justice Douglas' view was cut rather indelicately by a court interested in setting a new frame of reference for judging the constitutionality of state accommodations. "To argue from the declaratory incorporation in the Constitution, Art. IV, § 2, of the ancient political policy among the Colonies of delivering up fugitives from justice an implied denial of the right to fashion other accommodations for the effective administration of justice, is to reduce the Constitution to a rigid, detailed and niggardly code."[32]

There is no Supreme Court decision that supports Justice Douglas' view and the case cited by him for support is inapposite.[33] In this case, the court considered an extradition based upon the federal statute[34] and decided that the statute did not apply to fugitives who were not present in the demanding state at the time of the alleged crime. The court did not consider whether a state could constitutionally adopt a statute setting forth procedures for the interstate

[b]In *Innes*, the fugitive had been sent to Texas by the Oregon governor under an extradition process. The fugitive was acquitted of the Texas charges and was then sought by the Georgia governor under another extradition process.

surrender of persons outside the purview of persons covered by the constitutional provision on extradition or the federal implemental statute.

This question was presented for detailed discussion by one of the two major writers on extradition.[35] He asked how extradition could be accomplished for a person who is not present in the demanding state at the time of the alleged crime. He asserted that the constitutional provision does not apply "to a person who did not run away at all, who simply remained where he was, and in respect to whom there is not a solitary fact marking him as a fugitive."[36] With respect to such cases, extradition could be accomplished by amending the Constitution and then the federal statute; "or State laws may be enacted to furnish a remedy which is not now supplied by either. Either method is possible, and there certainly should be some method for awarding justice in this class of cases."[37] The state power to legislate extradition for persons not covered within the extradition clause in the Constitution but indispensable to state criminal justice was assumed.

States have assumed the constitutional power to enter accommodations for the involuntary return of persons indispensable to the state criminal justice system but not fugitives from justice in the constitutional sense. The *O'Neil* case upheld state accommodations for return of material witnesses, and other opinions by the Supreme Court have impliedly accepted state power to legislate the interstate return of persons outside of the constitutionally defined area.[c] The primary attention by the lower federal and state courts has been directed toward § 6 of the Uniform Criminal Extradition Act—state legislation that authorizes extradition of persons not present in the demanding state at the time of commission of the alleged crime.[38] In *Huddleston v. Costa*,[39] a 1970 case, petitioner sought a federal court order to restrain a state extradition under § 6 of the Act on the theory that this section was unconstitutional. He argued that the extradition clause in the Constitution limits state power to enact laws for the involuntary interstate transfer of persons. Since he was not present in the demanding state at the time of the alleged offense, he was not a fugitive from justice in the constitutional sense and, therefore, could not be subject to state extradition.[40] Quoting extensively from the *O'Neil* opinion, the court held that petitioner's argument did not raise a substantial constitutional question and dismissed the complaint. This result is consistent with a number of prior federal and state opinions asserting that states have the reserved power to legislate a process for the interstate surrender of persons who are not fugitives from

[c]In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the court considered the hearing procedures for revocation of probation under the Interstate Compact for the Supervision of Parolees and Probationers. Although this compact had been challenged as invalid under the extradition clause in the Constitution, *Gulley v. Apple*, 213 Ark. 350, 210 S.W.2d 514 (1948); *Ex parte Tenner*, 20 Cal.2d 670, 128 P.2d 338 (1942), the court in *Scarpelli* never mentioned the bearing of the extradition clause on the compact. On the basis of the due process clause of the Fourteenth Amendment, the court mandated a hearing procedure for revocation of parole and return of the parolee to the demanding state.

justice in the constitutional sense, but, nonetheless, are indispensable to state criminal justice.[41]

The Extradition Clause: Mandating Minimum State Cooperation

Arguments against the validity of state legislation on extradition persistently center on the meaning and purpose of the extradition clause in the Constitution. *O'Neil* does set out a theory of state power to legislate in this area, but *O'Neil* does not describe the manner in which the extradition clause relates to this power. With few exceptions,[42] courts have avoided formulation of this relationship in cases of state legislation either in the area of supplementing federal extradition law or providing extradition for persons outside the scope of federal extradition law. In the first of these areas, state extradition law has been validated by the traditional doctrine of permitting state law in aspects of a federal legislative field not expressly or impliedly precluded by Congress.[43] In the second, the *O'Neil* case has established a rationale of independent state legislative power.[44]

These doctrines, however, are insufficient in dealing with a new type of state legislation on extradition, which replaces the executive process with a speedier judicial process. The Uniform Rendition of Accused Persons Act, first promulgated in 1967[45] and now adopted in eight states,[46] clearly applies to persons covered by the extradition clause in the Constitution and the federal extradition statute. The Constitution and statute together prescribe an executive process for the demand and surrender of a fugitive; the Act eliminates the executive process.

The drafters cite *Innes v. Tobin*[47] as supporting the constitutionality of the Act under the extradition clause.[48] No such support can be found in *Innes*; rather, dicta in *Innes* would, if adopted, invalidate the Act. The question in *Innes* was whether states could supplement the federal extradition statute to provide for extradition for fugitives from justice untouched by the statute but clearly within the constitutional clause on extradition. Since the matter was untouched by the federal statute, the states could legislate.

A quite different question, however, is raised by the Uniform Rendition of Accused Persons Act.[d] In this Act, states are legislating on an aspect of extradition, which is expressly provided by the federal extradition statute—who demands the return of the fugitive from justice, and who orders the fugitive's return. In the federal statute, it is the executive officer of the asylum

[d]It appears that the drafters of the Act never discussed its constitutionality under the extradition clause. See Proceedings in Comm. of the Whole, Uniform Rendition of Accused Persons Act, August 1–2, 1967. (Available at Conference of Commissioners on Uniform State Laws, Chicago, Illinois.)

or demanding state; in the Act it is a judicial officer. On the constitutionality of this type of state legislation, *Innes* provided extensive dictum:

> [I]ts provisions (the federal extradition statute) were intended to be dominant and so far as they operated, controlling and exclusive of state power.[49]

The federal statute established the exclusion "of all state action from matters which the statute expressly or by necessary implication provided."[50] Although the dictum of *Innes* has been adopted as the foundation for a doctrine pre-empting states of legislative power in areas covered by the federal rendition statute,[51] no Supreme Court decision has struck state extradition legislation on this theory.

The scant records of debate on the adoption of the extradition clause in the Constitution and the early Supreme Court decisions interpreting this clause and the federal implementing statute disclose three interdependent purposes to this nucleus of federal law on extradition. Each state was to be foreclosed from obtaining a status of asylum for fugitives from justice of a sister state. Secondly, asylum status could not be attained indirectly by establishing widely varying standards for extradition requests by sister states, and, third, a system of minimum, mutual support between states on extradition was established.

The records of the Federal Convention of 1787[52] disclose very little debate on the clause relating to extradition of fugitives from justice. After the first two months of general discussion, during which there appeared to be no mention of fugitive extradition, a drafting committee[53] proposed a clause for debate. It read as follows:

> Any person charged with treason, felony or high misdemeanor in any State, who shall flee from justice, and shall be found in any other State, shall, on demand of the Executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of the offence.[54]

The proposed clause produced discussion on two points,[55] only one of which is relevant to the question of purposes to be achieved by the clause. The term "other crime" was inserted in place of "high misdemeanor," and the rationale for the change was to permit the extradition clause "to comprehend all proper cases; it being doubtful whether 'high misdemeanor' had not a technical meaning too limited."[56]

The interest precipitating the change was not merely semantical. The change was intended to shear the states of the aspect of sovereignty that treats extradition as a matter of comity. The change was considered by the Supreme Court in *Kentucky v. Dennison*[57] in which the Ohio governor asserted that

Ohio, the asylum state, retained discretion to determine what offenses are extraditable under the Constitution. Mr. Chief Justice Taney rejected this assertion and held that "every offense known to the law of the State from which the party charged had fled"[58] is included in the extradition clause. The purpose of precluding any state from obtaining the asylum status known to international extradition was clearly stated:

> For this (extradition clause) was not a compact of peace and comity between separate nations. . . . [N]othing would be more likely to disturb its (a state's) peace, and end in discord, than permitting an offender against the laws of a State, by passing over a mathematical line which divides it from another, to defy its process. . . .[59]

The *Dennison* case and later cases further delineated the purposes of the extradition clause. A state should not reach asylum status indirectly by varying standards for judging extradition requests of other states. Left uncontrolled by federal extradition law, "each state might require different proof to authenticate the judicial proceeding upon which the demand was founded."[60] Therefore, the extradition clause mandated that degree of uniformity in the law applying to the extradition process consistent with the policy against the existence of asylum states for fugitives.

Finally, the states were not to be inert in the process of developing rules for extradition. Chief Justice Taney's opinion in *Dennison* views the extradition clause as mandating a process of mutual support between states. The extradition clause was "a compact binding them (the states) to give aid and assistance to each other in executing their laws, and to support each other in preserving law and order within its confines, whenever such aid was needed and required."[61] The policy of mutual support between states underlying the extradition clause is clearly stated by Chief Justice Taney in the opinion in *Dennison*. Consequently, the nucleus of federal law on extradition does not dictate the law of extradition to the states. Rather it dictates a minimum level of support and cooperation between states consistent with the root goal of precluding any state from achieving asylum status.[62]

Since the extradition clause was enacted to assure the surrender of fugitives among states, it is reasonable to view the clause and implemental federal legislation as providing a minimum standard of cooperation to be followed in the absence of a more cooperative and uniform system adopted by the states. This view is entirely consistent with the few cases that have held state extradition statutes invalid due to an inconsistency with federal extradition law. These cases involved state statutes or state decisional law that impaired the effectiveness of extradition by setting higher standards for extradition than contained in the federal nucleus of extradition law.[63]

This theory of the extradition clause as mandating minimum cooperation among the states rather than a precise extradition process is also consistent

with the positioning of the extradition clause in the Constitution. It does not appear in Article I Section 10, which states limitations on the power of states, including a prohibition against state legislative participation in international extradition.[64] Rather it appears in the same article as the full faith and credit clause and the privileges and immunities provision, thus suggesting the assurance of state cooperation rather than its confinement.

This theory has begun to be reflected in court opinions, such as *People ex rel. Matochick v. Baker*.[65] In *Matochick* the New York Court of Appeals considered state extradition law that permitted extradition on the basis of an information and affidavits, rather than on the federally prescribed basis of indictment or affidavit made before magistrate.[66] The court could have asserted that the federal extradition law left untouched the information as a demanding instrument by states where information is a statutory method of prosecution. Since there was no preemption of this matter by federal law, the state extradition process could have been upheld by *Innes v. Tobin*.[67] The court chose to assume a conflict between state and federal law on what constitutes a demanding instrument, and held that "a state may enact legislation . . . permitting extradition on *less exacting terms* than those imposed by the (federal) statute."[68] The court further stated that insistence upon literal compliance with the federal statute before a state may voluntarily extradite is patently unsound. Accepting the test of "less strict terms" as a convenient reference to the purposes of the extradition clause in the Constitution, the test used and the result reached in *Matochick* are sensible. If the court in *Matochick* had read the federal nucleus of extradition law as a codification to be followed precisely by the states, the result would be a perversion of the root goal of the extradition clause in the Constitution—foreclosure of asylum status to states.

Replacing Executive Extradition with Judicial Extradition

State legislation replacing executive extradition with judicial extradition for constitutionally defined fugitives from justice would therefore be consistent with the extradition clause in the Constitution. This assumes that the total extradition process resulting from the change would operate as expeditiously as that prescribed by the nucleus of federal extradition law and with sufficient uniformity to foreclose attainment of indirect asylum status by a state. The reference to the state executive in the extradition clause in the Constitution and federal implementing statute does not have sacrosanct significance. It appears that the reference was a vestige of the extradition clause that appeared in the Articles of Confederation,[69] which had literal meaning because "the Confederation was only a league of separate sovereignties."[70] The Supreme Court, in discussing the role of the executive in the extradition clause of the

Confederation noted that "each State, within its own limits, held and exercised all the powers of sovereignty; and the Confederation had no officer, either executive, judicial, or ministerial, through whom it could exercise an authority within the limits of a state."[71] But the debate and changes[72] in the extradition clause in the Constitution clearly establish the view that this clause was not to have the marks of an extradition treaty between nations.[e] Moreover, there is evidence that the states extradited fugitives by a judicial process before and after the adoption of the Constitution.[73] Rather than reduce the power of the states to engage in extradition, the Constitution mandated its exercise by establishing a minimum level of cooperation between the states.[74]

Constitutional Controls over State Extradition Law

State power to replace the federal extradition process with more expeditious processes to gain custody of persons indispensable to state criminal law is not an excessive grant of state power to the disadvantage of the persons subject to state extradition. In addition to compliance with the purposes of the extradition clause of the Constitution,[75] state power would also be checked by other constitutional provisions that disable states from adopting legislative processes that unreasonably intrude upon constitutionally protected rights of individuals. Recent cases have established that state extradition processes are controlled by the constitutional requirement of a hearing justifying the asylum state's intrusion on the alleged fugitive's liberty.

By the Right to a Hearing in the Asylum State

The relationship of a wanted person to a demanding state must not necessarily be grounded in a criminal prosecution against the person. For example, a material witness or a probationer may be wanted by a demanding state in the interest of state criminal justice but not based on the need to prosecute the witness or probationer. This concept was the basis of an interstate legislative procedure that eliminated any hearing in the asylum state before the return of a probationer whose probation was revoked by the demanding state.[76] This was accomplished by a waiver of extradition requirements by

[e] A further indication that the extradition clause in the Constitution does not mandate a role for the executive in extradition between states comes from a plan for a Constitution, which was not submitted to the Convention, but expresses the personal opinion of Alexander Hamilton, one of the two delegates from New York. M. Ferrand, ed., *The Records of the Federal Convention of 1787*, Vol. 3, rev. ed. (New Haven: Yale Univ. Pr., 1966), p. 619. The proposed extradition clause found in Article IX, § 6 does not mention state executives (*id.* at 629).

both the asylum and demanding states, and permission to officers of the asylum state to enter the demanding state and apprehend the probationer without any formal procedures.[77]

There was a substantial number of persons who could be affected by this system of involuntary interstate transfer without initial hearing. In the year ending June 30, 1964, it has been estimated that over 18,000 persons were under supervised probation with foreign states,[78] and the number had risen to nearly 25,000 by 1971.[79] In cases challenging the constitutionality of this process for failure to provide a hearing even on the most liminal issues, such as identity, the courts upheld the process. The federal extradition procedures were not for the benefit of the alleged fugitives,[80] and the "constitutional guarantee of due process is fulfilled when the prisoner is originally convicted of the offense for which he is suffering punishment."[81]

In 1972, the Supreme Court rejected these cases and established the due process clause as a qualification on state power to reach accommodations with other states for the involuntary surrender of persons in the interest of state criminal justice. In *Gagnon v. Scarpelli*,[82] Scarpelli pleaded guilty in July 1965 to a charge of armed robbery in Wisconsin. His fifteen-year sentence was suspended and he was permitted to go to Illinois for supervised probation. On September 1, 1965, his probation was revoked by Wisconsin because of his alleged association with known criminals in Illinois and involvement in a crime in Illinois. He was returned to Wisconsin and incarcerated to serve the fifteen-year sentence. "At no time (after his sentencing in Wisconsin) was he afforded a hearing."[83]

The court acknowledged that revocation of probation and return to the demanding state were not part of a criminal prosecution. Nonetheless, the court held that the loss of liberty entailed is a serious deprivation requiring that the probationer be accorded due process. This included an initial hearing at the time of arrest to determine whether there was probable cause to believe that the probationer had violated his probation.

The court was fully aware that the rule was being applied to a multi-state arrangement for the involuntary return of probationers[84] and noted that the rule was applicable to interstate return of similarly situated parolees. The rule requiring an initial hearing was not based upon any implied right of a person to the benefits of federal extradition law, but on the personal protections of the due process clause of the Fourteenth Amendment. Although implications of criminal law were denied by the court, the due process requirement was expressed in terms similar to the test for arrests under the Fourth Amendment. This obviously presages adoption of the constitutional necessity of a similar probable cause hearing to justify arrests in asylum states of persons sought for prosecution in the demanding state.[85]

The emerging pervasiveness of the Fourteenth Amendment as a guard against capricious, summary involuntary transfer of persons between states in the interest of state criminal justice is further illustrated by *State ex rel.*

Garner v. Gray.[86] In *Gray*, Illinois authorities requested temporary custody of a Wisconsin state prisoner under Article IV of the Interstate Agreement on Detainers.[87] The governor of Wisconsin agreed to the request, but the prisoner, seeking an order restraining the warden from recognizing the Illinois request, filed a civil claim against the warden of the Wisconsin state prison. The essence of the prisoner's theory was that Article IV permitted him to be moved like a puppet between Wisconsin prison and the Illinois court on decision of the Wisconsin governor and the Illinois prosecutor. There was no requirement for a minimal hearing on the reasonableness of the Illinois request for transfer of custody, mandated by the Fourteenth Amendment. The court agreed with the prisoner and concluded that the prisoner must "be notified of his right to contest his delivery under that detainer either by petitioning the governor or by going to court."[88]

The difficulty with the opinion is the uncertainty of the constitutional basis for the requirement of a hearing before involuntary transfer from Wisconsin to Illinois. At one point the court bottomed its opinion on the equal protection clause of the Fourteenth Amendment. Illinois could choose between § 5 of the Uniform Criminal Extradition Act and Article IV of the Interstate Agreement on Detainers as a basis for obtaining temporary custody of Illinois prisoners. The availability of a hearing for prisoners under the Act discriminates against the similarly situated prisoners. The court concluded that the prisoner was entitled to an extradition-type hearing under the equal protection clause.[89] This is erroneous for two reasons. First, the Interstate Agreement on Detainers, as later legislation, would supersede those portions of the Uniform Extradition Act that cover the same subject matter.[90] Alternatively, there is doubt as to whether the hearing provisions in § 10 of the Uniform Criminal Extradition Act apply to the involuntary transfer of prisoners.[91]

The major danger in the use of the equal protection clause as a basis for the hearing requirement is the suggestion that an extradition-type hearing under § 10 of the Uniform Criminal Extradition Act must be afforded to all persons indispensable to state criminal justice prior to an involuntary transfer. This was impliedly rejected by *Gagnon*, in which the Supreme Court shaped the type of hearing and relevant issues in light of the degree of intrusion in the person's liberty and the relationship of the person to the criminal justice system in the demanding state.

A better basis for the court's opinion in *Gray* would be the due process clause of the Fourteenth Amendment. This is the basis on which hearings are mandated prior to the transfer of inmates to prisons in other states.[92] This permits a shaping of the hearing and its relevant issues to take into account both the defendant's and demanding state's stake in whether the involuntary transfer should be permitted. It avoids, however, the temptation to mandate the same type of hearing to all persons before an involuntary interstate transfer in the interest of state criminal justice.

7 A Person Wanted by More Than One Sovereign

Government's Use of Habeas Corpus

Fugitives from justice of a demanding state are often located in custody of police of the asylum state for violation of criminal laws of the asylum state.[a] Hypothetically, a North Carolina police officer may apprehend a person in the commission of a burglary. In the course of preparing the prosecution, identifying marks of the defendant are inserted into a computer terminal and the response indicates that a warrant for the person's arrest has been issued by a court in Missouri for an alleged burglary committed in Missouri. The North Carolina police verify the authenticity of the Missouri warrant. This paradigmatic fact situation involves the simultaneous interest by the criminal justice system of more than one state in the same person. Despite the reports of frequent resolutions of this conflict by informal bargains between prosecutors,[1] an understanding of extradition would be aided by an exposition of the relevant rules within which even prosecutorial bargains must be framed.

Comments by the Supreme Court in *Taylor v. Taintor*[2] unfortunately complicated the matter of simultaneous interest in one person by the criminal justice system of two states. In *Taylor*, Connecticut sought to enforce judgment against sureties on a bail bond forfeited by the non-appearance of McGuire. After McGuire's pre-trial release, he left Connecticut and was located by Maine authorities who convicted and imprisoned him. At the time for his appearance in the Connecticut court, McGuire was in a Maine prison. The Supreme Court was adjudicating, therefore, the relationship of a surety on a bail bond to the state and the bearing on that relationship of the state's right to seek the return

[a] One writer has suggested that the most frequently encountered fact situation involving extradition is one in which the fugitive is wanted only by the demanding state. See Note, Interstate Rendition and the Fourth Amendment 24 *Rutgers L. Rev.* 551, 552 (1970). Interviews with practitioners in extradition do not support this view (e.g., Interview, G. Clark and O. Spearman, Deputy United States Marshalls, District of Columbia, July 3, 1974). According to these interviews the most frequently encountered transaction raising issues of extradition between the District of Columbia and states is one in which both the District and the state have a custodial interest in the fugitive. This illustrates the lack of empirical evidence on the law of extradition, which further complicates the decision on what aspects of the law should be adjusted to reflect fair and reasonable practices. For example, if the information obtained from the above interviews is correct, the emerging conflict between rules on gaining custody of a fugitive imprisoned in another state (see discussion on pp. 69–73, *infra*.) could become a significant problem for practitioners of the law of extradition.

of fugitives through extradition. The opinion, giving judgment to the state on the forfeited bond, unfortunately contained language that benighted the relationship between states that have a simultaneous interest in the custody of a person in the administration of their respective criminal justice systems.

> Where a demand is properly made by the governor of one State upon the governor of another, the duty to surrender is not absolute and unqualified. It depends upon the circumstances of the case. If the laws of the latter State have been put in force against the fugitive, and he is imprisoned there, the demands of those laws may first be satisfied. The duty of obedience then arises, and not before.[3]

This dicta in *Taylor* was interpreted by some state courts as denying power to the governor of an asylum state to grant a request from a demanding state for the temporary return of a fugitive imprisoned in the asylum state.[4] This view of *Taylor*, troubling enough for some to recommend that "public expediency demands a comprehensive federal enactment,"[5] was unsound. It would seriously interfere with the administration of criminal justice in the demanding state by denying that state timely use of its evidence of criminality by the fugitive and of the presence of material witnesses. The *Taylor* dicta was also inconsistent with a long-established procedure by which one state could request the temporary custody of a witness or fugitive imprisoned in another state or by the federal government for the purpose of testimony or trial in a criminal proceeding.

The common-law writ of habeas corpus had two species in addition to the "Great Writ" (habeas corpus ad subjiciendum) that was used to test the legality of a confinement.[6] The other two species of habeas corpus writ would "issue when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the act was committed"[7] (writ of habeas corpus ad prosequendum, or ad testificandum). Although the cases on these two species of writ are few,[8] both have been, until recently,[b] a basis for the transfer of a prisoner between a state and the federal government for testimony or prosecution.

[b]Whether this proposition continues to be valid after the participation of the states and federal government in the Interstate Agreement on Detainers is an open question. See discussion on pp. 71–73, *infra*. No case was found treating the writ of habeas corpus ad prosequendum between states. *State v. Fabisinski*, 150 So. 207 (Fla. 1933) involved the use of the writ by a Florida judge to obtain custody of an accused detained in a Florida institution elsewhere in the state. The Supreme Court of Florida acknowledged that the writ of habeas corpus ad prosequendum was a common law writ to remove a prisoner to the jurisdiction in which the crime was committed, but held that the writ "was superseded by ample provision of the statute for the arrest of the accused [statutes permitted a capias or bench warrant to be served anywhere in the state]" (*id.* at 212). If the intrastate use of the writ has been superseded by statutory procedures for arrest of fugitives elsewhere in the state, a similar argument could be made of the interstate use of the writ as a result of adoption by nearly all states of § 5 of the Uniform Criminal Extradition Act. Section 5 established a procedure for involuntary transfer of prisoners between states for prosecution.

In *Ponzi v. Fessenden*,[9] Ponzi, a prisoner in a federal prison located in Massachusetts was temporarily transferred by federal authorities to a Massachusetts state court for prosecution. The state court judge had issued a writ of habeas corpus ad prosequendum and the United States Attorney General complied with the writ. Ponzi challenged in federal court the legality of his confinement by the state court by "alleging in substance that he was within the exclusive control of the United States, and that the state court had no jurisdiction to try him while thus in federal custody."[10]

Chief Justice Taft noted the absence of express authority to transfer a federal prisoner to a state court for prosecution, "yet we have no doubt that it exists and is to be exercized with the consent of the Attorney General."[11] Although the rule in *Ponzi* was based on comity, there was strong rationale for invariable compliance with state requests for temporary custody of federal prisoners for prosecution or testimony. Chief Justice Taft listed the problems suffered by a demanding state as a result of a delayed criminal trial: the disappearance of witnesses, less accurate memories and lessening of prosecutorial élan.[12] Even though the writs issued by state courts to reach federal prisoners are concededly unenforceable,[13] the writs continued to the early 1970s to be a primary method of obtaining custody of federal prisoners for testimony or prosecution.[14]

Interstate Agreement on Detainers: Unsettling Prior Law

Delay in prosecution because the accused, or a material witness, is imprisoned in a federal prison can also cut into protectable interests of the accused. In a series of cases since 1968, the Supreme Court has established a duty by demanding states to utilize procedures to obtain custody of persons imprisoned in federal or state institutions for testimony or prosecution.[c] The

The states apparently considered the writ of habeas corpus ad prosequendum superseded by § 5 of the Uniform Criminal Extradition Act for purposes of obtaining prisoners in prisons of other states for prosecution—at least it had been the practice of states to proceed by executive agreement under § 5 of the Act instead of the writ (Telephone interviews November 23, 1974 with Robert E. Dwyer, Deputy Attorney General for Indiana; Nolan Rogers, Special Assistant Attorney General for Maryland; and Reno S. Harp, III, Deputy Attorney General for Virginia). The supersession has apparently occurred again by recent state ratification of the Interstate Agreement on Detainers that provides in Article IV a new procedure for a state to obtain a prisoner located in the prison of another state. The states are now using the Article IV procedure to obtain prisoners located in prisons of other states.

With regard to the writ of habeas corpus ad testificandum between states to obtain custody of prisoners for testimony, there is a similar supersession by later legislation for states that have adopted the Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act. For states that have not adopted the Uniform Act the writ of habeas corpus ad testificandum would be available. See *Barber v. Page*, 390 U.S. 719, 723–724, n.4 (1968).

[c]In *Barber v. Page*, 390 U.S. 719 (1968), the defendant was convicted of armed robbery in an Oklahoma state court primarily on the reading of a transcript of the preliminary hearing testimony of a witness who was in a federal prison in Texas at the time of trial.

major controversy over the duty has centered on the prisoner's constitutional right to a speedy trial. For some time, the *Taylor* and *Ponzi* cases were read to establish a procedure based on comity between the imprisoning and demanding jurisdictions, but affording no rights to the prisoner.[15] The demanding state could file a "detainer"[d] with the imprisoning jurisdiction to give notice that a foreign criminal proceeding was pending against the prisoner and request the custodian to provide notice of change in the custodial status of the prisoner. Section 5 of the Uniform Criminal Extradition Act was a procedure that a state could initiate to obtain temporary custody of a foreign state prisoner for trial; in addition, prisoners could be exchanged for prosecution between states and the federal government by the writ of habeas corpus ad prosequendum.[16] The prisoner, however, did not control these procedures, and there was no other procedure available to test the validity of the charge underlying the detainer. Because of the informality of the process by which detainers were issued and the loose assortment of agencies[e] that may issue detainers, a substantial number of federal or state prisoners were reported to be subject to detainers.[f] The deleterious effects of detainers, which often resulted in a

Texas relied on a rule that absence from the state was a sufficient ground for dispensing with the constitutional right to confront adverse witnesses. See 5 Wigmore, Evidence § 1404, n.5 (Boston: Little, Brown Co., 3d ed., 1964 Supp.). The rule was based on the disability of Texas to enforce any extraterritorial process to obtain custody of the witness. The Supreme Court rejected the Texas contention and held that Texas must make a good faith effort to obtain the witness for trial. Central to the holding was the availability of writs of habeas corpus ad prosequendum and ad testificandum to transfer federal prisoners for prosecution or testimony in state courts. See *Barber v. Page*, 390 U.S. 719, 723–724, n.4 (1968).

[d]The detainer has been defined variously. The following definition appropriately incorporates the informality of issuance of detainers and the multiplicity of agencies in a demanding state that may issue detainers. It is "a copy of an arrest warrant, or indictment, or commitment order, or, less formally, simply a letter or note sent to the prison by a prosecutor, court, police chief, parole board, or any other official empowered to take people into custody, asking to be informed by the prison officials when the inmate in question is to be released." See E. Dauber, Reforming the Detainer System: A Case Study, 7 *Crim. L. Bull.* 669 (1972). For other definitions, see Shelton, A Study of the Use of Detainers, 1 *Prospectus* 119 (1968); and Jacob and Sharma, Justice After Trial, 18 *Kansas L. Rev.* 493, 579 (1970).

[e]If a state seeks to act upon a detainer and obtain temporary custody of a prisoner under the Interstate Agreement on Detainers, one court has recently held that the detainer must have been filed by a prosecutor in the demanding state. See *State ex rel. Garner v. Gray*, 59 Wisc.2d 323 333, 208 N.W.2d 161, 166 (1973). The court said that the Chicago Police Department was not an appropriate agency under the Agreement to file detainers. After giving this victory to the prisoner, the court took it away by concluding, "The particular procedural error did not prejudice any of the petitioner's fundamental rights and is, therefore, not fatal to the efforts by the Illinois authorities to obtain the return of petitioner" (*id.*).

[f]In D. Shelton, Unconstitutional Uncertainty: A Study of the Use of Detainers, 1 *Prospectus*, 119, 120 it was estimated that 12 to 20 percent of the prisoners in state prison and thirty percent in federal penitentiaries are subject to detainers. See also, Comment, 61 *J. of Crim, L., Crim. and Pol. Sci.* 352 n.10. The most exact study of the frequency of detainers is E. Dauber, Reforming the Detainer System: A Case Study, 7 *Crim. L. Bull.* 669, 675 (1971). It was found that 34 percent of the state inmates in the sample study were subject to at least one detainer sometime during their incarceration. However, the study also disclosed that the volume of interstate detainers filed against the sample of state prisoners

disruption of the rehabilitation process and loss of privilege,[17] has been mitigated in 1969 by *Smith v. Hooey*.[18]

Smith and its progeny[19] have established a prisoner's right to a hearing on the charge underlying detainers on the basis of a constitutional right to speedy trial. The consequence was an awakening in state and federal interest in the Interstate Agreement on Detainers,[20] which set forth a procedure for prisoner requests for hearings on detainers. During a two-year period following *Smith*, fourteen jurisdictions including the federal government ratified the Agreement.[21]

The Agreement, however, goes beyond the goal of facilitating prisoner requests for hearings on detainers. It also establishes procedures for requests by state or federal prosecutors for temporary custody of state or federal prisoners for prosecution and, consequently, unsettles prior law. With regard to the involuntary transfer of prisoners between states for prosecution, Article IV of the Agreement covers the same subject matter as § 5 of the Uniform Criminal Extradition Act and, therefore, presents the question of whether § 5 was intended to be superseded by the Agreement. It is, however, doubtful that this issue of supersession will be litigated because it is generally in the interest of both the state prisoner and the demanding state to proceed under the Agreement. An Article IV proceeding under the Agreement is preferable to the demanding state because it is less circuitous and cumbersome than the executive agreement under § 5 of the Act.[22] The Article IV proceeding also has conditions that benefit the prisoner that are not present in § 5 proceeding under the Act.[23] So long as the emerging protections of the Fourteenth Amendment[24] are fulfilled in an Article IV proceeding, such a proceeding would appear to be preferable in the interest of the state prisoner.

Since the federal government ratified the Agreement,[25] prior law for the transfer of prisoners between a state and the federal government through the writ of habeas corpus ad prosequendum has also been unsettled. The matter could arise in a judicial proceeding by a state prisoner to force a state warden to delay responding to federal writ of habeas corpus ad prosequendum for a thirty-day period provided under the Interstate Agreement on Detainers.[g] The

was not as great as expected. Only 17 percent of the detainers filed were from other jurisdictions (*id.* at 687).

[g]A state prisoner filed this type of action in the Federal District Court for the District of Oregon. See *Kessler v. Langford*, Civil No. 74-144 (1974). On December 18, 1973, a federal Grand Jury in Georgia indicted Kessler for murdering two persons and attempting to murder a third person while incarcerated in a federal prison in Georgia. At the time of the indictment, however, Kessler was in the Oregon State Penitentiary for the commission of other crimes. On February 13, 1973, the United States District Judge in Atlanta, Georgia issued a writ of habeas corpus ad prosequendum commanding the Warden of the Oregon State Prison and any United States Marshall to produce Kessler in the federal court in Atlanta on March 1, 1974. (Memorandum of Law in Support of Defendant's Motion, in the Alternative, for Summary Judgment, p. 2–3, May 22, 1974).

Kessler countered by filing a civil action in the federal court in Oregon against the Superintendent of the Oregon State Penitentiary and the United States Marshall for the District of Oregon. In an unpublished order dated June 17, 1974, the court dismissed the civil action referring to "reasons given by the Court in oral opinions".

prisoner could argue that the Agreement constitutes later legislation covering the involuntary transfer of state prisoners for federal prosecution and, consequently, supersedes the prior procedure of the writ of habeas corpus ad prosequendum. In the alternative, the state prisoner could argue that, minimally, the later legislation sets out conditions that now attach to the operation of the writ issued by federal courts.[h] These arguments do not pose problems of the supremacy of federal over state law. The arguments center on the relationship of two federal laws that cover the same transaction—the involuntary transfer of state prisoners for federal prosecution under the federal writ of habeas corpus ad prosequendum and under the congressionally ratified Interstate Agreement on Detainers.

Continuation of the use of federal writ of habeas corpus could be bottomed on the theory that the writ was not intended to be superseded by congressional ratification of the Agreement. This proposition could be based on two contentions. First, the federal writ reached state prisoners by right, whereas the Agreement permits involuntary transfer of state prisoners only by comity.[26] The weakness of this contention is its premise—the federal writ of habeas corpus ad prosequendum reaches state prisoners by right. Although the Supreme Court has expressly reserved decision on whether a state must render a state prisoner for prosecution in response to the federal writ,[27] the writ has traditionally been cast in terms of comity.[i] Furthermore, the legislative history of congressional ratification of the Agreement speaks of preserving the right of a governor to refuse to make a prisoner available to a prosecutor,[28] which is utterly superfluous language if there were no gubernatorial right to preserve.

The second contention is that the legislative history manifested congressional intent that the United States be a party to the Agreement only for purposes of receiving state prosecutorial requests for federal prisoners and not

[h]It is, of course, possible for federal prisoners to raise similar arguments against a writ of habeas corpus ad prosequendum issued by a state court. In such a case, the discussion in the text would be directly analogous. It is unlikely, however, that such a case will arise because state prosecutors are apparently reaching federal prisoners for prosecution under the Agreement rather than the writ (Interviews, *supra*, n. b). Proceeding Under Article IV of the Agreement to reach a federal prisoner is less expensive than proceeding under the writ. Under the writ the federal prisoner is accompanied by a Federal Marshall who remains with the prisoner during the state trial and returns to the federal prison. The demanding state must pay for these services, which are not required under the Agreement. See Article V (a) Interstate Agreement on Detainers. See also letter to author dated October 23, 1974, from J. Marquez, Assistant District Attorney, Tenth Judicial District, Kansas.

[i]The reservation of judgment expressed in *Carbo, supra* n. 27 was curiously coupled with the following textual proposition about the federal writ to reach state prisoners: "That comity is necessary between sovereignties in the administration of criminal justice in our federal-state system is given full recognition by affording through the use of the writ both respect and courtesy to the laws of the respective jurisdictions" (*id.* at 621). The writ was called "arrangement of comity between the two governments" by Chief Justice Taft in *Ponzi v. Fessenden*, 258 U.S. 254, 266 (1921). *Ponzi* involved a state writ seeking to reach a federal prisoner for state prosecution.

for purposes of requesting state prisoners for federal prosecution.[29] Support for this contention is in the congressional history, which is replete with the need to provide the states with an uncomplicated procedure to reach federal prisoners.[30] On the other hand, the same congressional history contains at least two references to prosecutorial requests for prisoners that are not limited to requests by state prosecutors.[31] Furthermore, Article IV of the Agreement, which sets forth the procedure for prosecutorial requests, does not contain any language that expressly or impliedly suggests an intention to limit the procedure to state prosecutors.

It appears that the federal writ to reach state prisoners, if not entirely superseded by Article IV of the Agreement, is at least qualified by conditions stated in the Agreement that benefit the state prisoner. Of these conditions the least onorous to the federal government would be the thirty-day delay before surrender of the state prisoner.[32] The most onorous would be the dismissal of any federal indictment or complaint left untried on return of the prisoner to the state prison.[33] When federal prosecutors request custody of a state prisoner, however, the dismissal apparently applies only to untried federal indictments or complaints that resulted in detainers lodged with the state custodians.[34] The federal government could attempt to sustain this burden by a central repository of detainers filed against state prisoners—an apparent requirement in light of the congressional interest in providing prompt tests of all detainers placed against prisoners.[35]

CONTINUED

1 OF 2

8 Alternatives for Revising the Extradition Act

A Proposed Act

The proposed act is set forth below for the limited purpose of displaying the policy judgments that should operate in the revision of the Extradition Act. The proposal is stripped of some matter to lay bare these policy questions. For example, it does not deal with arrest in the asylum state prior to an extradition request by the demanding state or right to counsel in extradition hearings. Furthermore, the language was chosen to crystallize the policy questions rather than to structure a statute comfortably articulated with other state statutes on the criminal process.

The proposed act is a concrete basis for discussion of protection of individual interests of personal liberty in extradition and state interests in a reasonably efficient system of reaching fugitives from state criminal justice. The proposed act is also iconoclastic. It recognizes that persons sought for extradition are not all similarly situated in terms of inconvenience and hardship in transportation to another state to answer criminal charges. Therefore, a two-tier system of state extradition is designed with more procedural safeguards around an extradition greater than one hundred miles. The more summary procedure for extraditions of less than one hundred miles reflects the fact the nation contains socially and economically integrated population centers that spread across state lines. In extraditions within these centers and in other extraditions of less than one hundred miles, crossing the state border is functionally unrelated to the estimate of inconvenience to the alleged fugitive.

Finally, the proposed act also substitutes courts for governors in the process of requesting extradition, but retains the historic power of the governor of the asylum state to refuse extradition. This is a gubernatorial power that has responded to equitable pleas that are not traditionally entertained by courts of the asylum state. Under the proposal, this power is exercised by gubernatorial interposition in an extradition proceeding that is otherwise controlled by the courts of the asylum state.

Proposed Extradition Act

If a person has been charged with a crime in a demanding state and is present in an asylum state, that person may be extradited by the following process:

1. *Extradition Request.* A request for the issuance of warrants for arrest and return to the demanding state may be filed by any designated agent of a judge or magistrate of the demanding state. Before the arrest warrant is issued, the agent must file with a judge of the asylum state:
   a. A certified copy of a warrant for arrest of the person, request for extradition and designation of affiant as agent, issued by a judge or magistrate of the asylum state.
   b. A certified copy of the conviction, indictment, complaint, or information and any affidavits that form the basis for the warrant for arrest.
   c. An affidavit stating (1) the name of the person whose extradition is being sought; (2) the crime with which the person was charged, and the status of proceedings against the person in the asylum state.
2. *Arrest Warrant in Asylum State.* Upon a determination that the affiant is a designated agent of a judge or magistrate of the demanding state, that there is probable cause to believe that the person named in the affidavit committed a crime in the demanding state, the judge shall issue a warrant to police officers of the asylum state for the person's arrest.
3. *Preliminary Hearing After Arrest and Waiver of Extradition.* Immediately after arrest the person shall be brought before a judge who shall:
   a. Advise the person of the demand for extradition and its basis;
   b. Set a time for an extradition hearing which shall be within thirty days from time of arrest;
   c. Advise the person of right to assistance of counsel;
   d. Set bail.

   The person may at this time waive the extradition hearing in writing.
4. *Extradition Hearing and Warrant for Return.* If the judge finds:
   a. That the person whose extradition is being sought is the person subject to the arrest warrant issued by the asylum state; and
   b. That there is probable cause to believe that the person committed a crime in the asylum state,

   a warrant for the return of the person to the custody of the demanding state shall issue. If the request for extradition is based upon an indictment issued in the demanding state, the indictment constitutes a prima facie case of probable cause of the person's guilt.
5. *Delay of Execution of Warrant for Return.* Where the place of arrest in the asylum state is more than one hundred miles from the place of trial in the demanding state, execution of the warrant for removal shall be delayed for thirty days within which period the governor of the asylum state may disapprove the extradition request, either upon his or her own motion, or upon motion of the person subject to the extradition request. A warrant for return may not be opposed or denied on the ground that the executive authority of the asylum state has not affirmatively consented to or ordered such return.
6. *Review of Extradition Proceeding.* There shall be no appellate review of an issuance of a warrant for return where the place of arrest in the asylum state and the place of trial in the demanding state is within one hundred miles. There shall be no appellate review of a final order in a habeas corpus proceeding to test the validity of any warrant to return or to test the validity of any detention pending the extradition hearing.
7. *Extradited but Unconvicted Persons.* On final release from custody of the demanding state of a person extradited from another state at a distance over one hundred miles but not convicted, the court may, in its discretion, order the [county] to pay the person so released transportation and subsistence to the place of his arrest or to his residence, if such cost is not greater than to the place of arrest.

Neccessity of an Arrest Warrant from Demanding State

This requirement protects persons from the use of the extradition process for enforcement of private claims and reduces the complexity of initiating an extradition request in the demanding state. Under the Extradition Act,[1] an arrest warrant by the demanding state is not a prerequisite to an extradition request. The position of the Act and cases interpreting the Act are probably based upon the Supreme Court's decision in *Compton v. Alabama*[2] that requisition requests can be initiated by affidavits before "notary publics" of a state—that is, persons not empowered to issue arrest warrants. Therefore, the Act has not required judicial scrutiny of requisition requests in the demanding state.

The danger of perverting the extradition process to a mechanism for enforcement of private claims was treated by the Act by a requirement that prosecutors in the demanding state include in their requisition application to the governor a representation that the application is not instituted to enforce a private claim.[3] Protection to persons from this perversion of the extradition process[4] is afforded by a less cumbersome method in the proposal that all extradition requests must be accompanied by an arrest warrant issued by a judge of the demanding state.

This proposal is not unduly restrictive of reasonable police operations in retrieval of fugitives. The proposal is complemented by the uniform act permitting arrest by police of the demanding state in pursuit of a fugitive in the asylum state.[5] The proposal also assumes continuation of the power to arrest fugitives in the asylum state by police of the asylum state on communications

from agencies in the demanding state that constitute probable cause to believe the fugitive's criminality.[6]

Moreover, the proposal would markedly reduce the delay between arrest by asylum police on request of demanding state and resolution of the extradition issue. There is no necessity for action by agencies of the demanding state with only peripheral interest in the prosecution underlying the extradition request. The conversion of extradition initiation from executive control to judicial control[7] is based upon the view that gubernatorial interest in extradition has been historically located in the decision to return fugitives rather than to request the return.[8] The initiation of the extradition request is, therefore, controlled by the agencies in the demanding state with direct interest in the prosecution.

A Two-Tier System of Extradition

The proposal sets forth a two-tier system of extradition to balance the interest of the person against improvident removals and the interest of the demanding state in prosecution without obstructive delays. If the distance between the place of arrest and place of trial is less than one hundred miles, the decision to return the person is made by the judiciary of the asylum state not the governor, and the decision is not appealable in the asylum state. The decision to return a person to a place of trial over one hundred miles from the place of arrest to the place of trial is subject to a number of controls. First, probable cause to believe criminality by the person must be found by a judge in the asylum state, which is a requirement that is not now present in many states. Second, a decision by the governor of asylum state to refuse the extradition request may be interposed. Third, the judicial decision to return the person is appealable in the asylum state.

Extraditions under 100 Miles

Persons sought for extradition are not all similarly situated in terms of the inconvenience and hardship in transportation to another state to answer criminal charges.[9] If the proposed extradition is less than one hundred miles, the inconvenience is comparable to many intrastate arrest situations. In cases of extradition of less than one hundred miles, the crossing of a state border is functionally unrelated to the estimate of inconvenience to the person. Furthermore, the nation's population includes substantial population centers—spreading across state lines—that are socially and economically integrated areas.[10] As may be expected, a substantial number of extradition requests received by states in metropolitan population centers apparently come from demanding

states within the same metropolitan areas.[11] Moreover, the proposal does not set forth an unreasonably summary procedure for extradition of persons under one hundred miles. Under this proposal, these persons have more protections against improvident retrievals than either persons in similar intrastate arrest situations or persons subject to extradition under the current Extradition Act. Judicial scrutiny in the demanding state of extradition requests and a judicial finding in the asylum state of probable cause to believe criminality would be new protections to a person subject to an extradition request under one hundred miles.[a]

Weighed against this modicum of inconvenience to the person sought for extradition under one hundred miles is the nature of the demanding state's interest. Execution of the demanding state's policy of justice and protection of its people expressed in its criminal laws is vulnerable to artificial constriction by the state boundaries. There is very little extraterritorial application of a state's criminal laws.[12] The state must depend upon a reasonable process to reach persons believed to be offenders of state criminal law and located just outside the state border. As the Supreme Court stated in a major case concerning interstate extradition, "[N]othing would be more likely to disturb its (state's) peace and end in discord, than in permitting an offender against the laws of a State, by passing over a mathematical line which divides it from another, to defy its process. . . ."[13]

Extraditions over 100 Miles

It is not unusual to cluster more procedural safeguards around the retrieval of an alleged fugitive for a distance of more than one hundred miles.[14] In view of the large expanse of the nation, considerable hardship may result from an improvident retrieval over hundreds or thousands of miles. The proposal requires that at the outset of a retrieval over any distance, the person arrested

[a] Since a person who is compelled to enter a state to answer one criminal charge is subject to an arrest for another charge committed prior to his entry (*United States v. Conley*, 80 F.Supp. 700 [D. Mass. 1948]), it is possible that a person could be forced to travel more than one hundred miles from the place of arrest. For example, if courts in Cincinnati, Ohio, extradited a person from Newport, Kentucky, (these cities have common borders and are within the Cincinnati Standard Metropolitan District), the person would then be subject to criminal process issued by courts in Cleveland, Ohio. The consequence would be involuntary transfer of the person for a distance of more than one hundred miles from the initial place of arrest, Newport, Kentucky. This exceptional situation should not be posed as an argument against the adoption of the proposal. The protections afforded the person prior to extradition from Newport to Cincinnati would clearly pass muster before the Fourteenth Amendment even with the addition of involuntary travel to Cleveland. Cf. *Gagnon v. Scarpelli*, 411 U.S. 778 (1972); *Morrissey v. Brewer*, 408 U.S. 471 (1971). Furthermore, this exceptional situation should not be a basis for state legislative judgment against the adoption of the proposal. This assumes a highly improbable conspiracy between the courts of Cincinnati and Cleveland to subvert the proposed legislation.

must be identified as the accused and probable cause to link the person to the crime must be established. These requirements obviate mistakes in identity and provide a basis for governmental intrusion upon the person's liberty. Additional protections against error would be available before extraditions over long journeys through appeal to higher courts and the governor of the asylum state. Also precedented is the proposal that the court in the demanding state have discretion to award transportation and subsistence to a person discharged or acquitted after an extradition over a great distance.[15] This subject was first raised by the drafters of the federal removal rule. It was thought that financial hardship to a person occasioned by a release of a person after a retrieval over a great distance converts the person to a potential menace to local law enforcement.

> One of the problems that arises in the removal procedure is taking the defendant a considerable distance from his home, and then if he is discharged or acquitted they leave him there, and he has to get his own way home. That causes a great deal of trouble, particularly if it is a considerable distance, and it sometimes makes the man something of a menace to law enforcement.[16]

It may be thought that the proposal for payment of return transportation to a person released after a distant extradition is excessive protection to the person who was once an alleged fugitive. On the other hand, the payment, if any, is decided by the court and is responsive to the occasional predicament of penury caused by state extradition, for which the state morally should provide relief.

Measuring the 100-Mile Distance

The choice of a one-hundred-mile distance to distinguish state extraditions was dictated not only by an estimate of relative degrees of inconvenience to the person extradited but also by the availability of helpful precedent measuring this distance in the context of fugitive retrievals. The meaning of the one-hundred-mile distance as the mark for triggering procedural safeguards in the federal removal rule was debated by the drafters of the rule in 1946.[17] Judge Holtzoff rejected proposals by the representative of the Justice Department to measure the distance by straight line or "as the crow flies." Since the purpose of the rule was to estimate relative degrees of inconvenience to persons subjected to retrievals, measurement of one hundred miles by straight line "would introduce a much longer distance than we had in mind."[18] The drafters agreed that the distance should be measured by the usual customarily travelled route, and this test has been adopted by courts interpreting the federal removal rule. The distance over the best highway between place of arrest and trial was used in

one case;[19] in another the court used railroad timetables to show the distance between Philadelphia and Baltimore to be less than one hundred miles.[20] Since the purpose of the measurement of distance is the same in both the federal removal rule and the proposed state extradition statute, the federal debate and decisional law on the measurement of the one-hundred-mile distance would be analogous authority available to states.

Controlling Unnecessary Delay in Extradition

The proposal recognizes the right to challenge detention during an extradition process in the asylum state by habeas corpus,[21] but final orders in habeas corpus proceedings are not appealable. Decisions by the asylum state to extradite are currently subject to appeal—another potential delay in the extradition process. The proposal denies appellate review over decisions to extradite to a distance of less than one hundred miles and preserves review of extraditions over greater distances.

In adjusting the potential for review in asylum states of decision to extradite, the proposal assumes that unreasonable delays in extradition are made possible by a misunderstanding of the issues triable in an extradition proceeding and reviewable by habeas corpus.[22] Delays are also possible by the use of habeas corpus and appellate review of warrants of return. It is true that the hardship of retrieval has grown with the growth of the United States, and there is a natural desire to prevent it when possible.[23] The proposal permits a person subject to any extradition to challenge the basis of his detention by two proceedings in the asylum state and in extraditions over one hundred miles, by three. The proposed extradition law gives ample opportunity to a person to escape a mistake or ill-founded prosecution by the demanding state. At the same time, by analogy to the federal removal procedure,[b] abuse of the

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[b] Since removal orders under Rule 40 of the Federal Rules of Criminal Procedure are interlocutory, there is no direct appeal even in cases of removals over thousands of miles. See *Galloway v. United States*, 302 F.2d 457 (10th Cir. 1962). Furthermore, equitable remedies and mandamus cannot be used to circumvent the prohibition against appeal from a removal order. See *Frost v. Yankwich*, 254 F.2d 633 (9th Cir. 1958); *In re Ellsburg*, 446 F.2d 954 (1st Cir. 1971); and *Steiner v. Hocke*, 272 F.2d 384 (9th Cir. 1959). Since the removal order is not appealable, it became a frequent practice to apply for writs of habeas corpus as a substitute for direct appeal. As a final delay tactic, an appeal would be taken from an order dismissing a petition for a writ of habeas corpus. Finally, Congress abolished appellate review of habeas corpus proceedings to test the validity of a removal order. See 28 U.S.C.A. § 2253 (1951). The purpose of this congressional limitation on review of removal proceedings was "to plug a purely technical loophole in criminal procedure which is used for the purpose of delaying trials, thereby impeding the administration of justice" (House Report No. 1543, 75th Cong. 1st Sess., August 13, 1937).

extradition process by obstructive delay is curbed, thereby harmonizing justice and efficient administration in the extradition process.

Probable Cause To Support Extradition

Under the proposed extradition act, a finding of probable cause to believe the person committed a crime in the demanding state is a prerequisite to an extradition order. This would end an unnecessary conflict among the states on whether the documents from the demanding state should manifest probable cause prior to extradition.[24] This conflict is symptomatic of the failure of the Uniform Criminal Extradition Act to place any clear, substantive test on documents submitted by the demanding state and is disruptive of the uniformity in state extradition law mandated by the extradition clause of the Constitution.[25] Furthermore, the person subjected to an extradition procedure logically requires the same degree of constitutional protection that is given to an arrestee in a non-extradition context. Therefore, the probable cause requirements of the Fourth Amendment should attach to the extradition process in the asylum state.[26]

There are at least two[c] rationales for placing arrests for extradition outside the zone of application of the process clause of the Fourth Amendment. First, the legality of the arrest for extradition is within the jurisdiction of the courts of the demanding state. Courts of the asylum state will not listen to a probable cause challenge because extradition is merely one step in bringing the accused before the courts of the demanding state. Extradition "is designed to furnish an expeditious and summary procedure for returning a fugitive to the demanding state,"[27] and the requirement of a showing of probable cause in the asylum state would be disruptive of this summary procedure. Furthermore, a probable cause determination by the asylum state would operate in many cases as a review of the same determination by the demanding state.[28]

Another theory would analogize arrest for extradition to the "stop and frisk decisions."[29] Therefore, the arrest for extradition could be effected by a somewhat lesser grade of justification than applies to the usual arrest situation.

Neither of these theories stands the test of reasonableness required of governmental action under the Fourth Amendment.[d] This test requires a

[c]A third rationale is to analogize arrest for extradition in the asylum state to the deportation area, to which the Fourth Amendment historically has been conceded not to extend. See Note, Interstate Rendition and the Fourth Amendment, 24 *Rutgers L. Rev.* 551, 577 (1970).

[d]The major case by the Supreme Court on the quality of the documents that must be produced for extradition is *In re Strauss*, 197 U.S. 324 (1905). The court did not require the documents of the demanding state to demonstrate probable cause. This case, however, was decided long before *Wolf v. Colorado*, 338 U.S. 25 (1949) and *Mapp v. Ohio*, 367 U.S. 643 (1961). *Wolf* made the probable cause requirement found in the Fourth Amendment applicable to the states through the Fourteenth, and *Mapp* made the Fourth Amendment enforceable against the states by same standards that prohibit unreasonable seizures by the federal government.

balancing of the need for governmental intrusion in the asylum state against the extent of the intrusion upon personal liberty.[30] On one side of the equation, there is no governmental interest that compels a result other than the usual undiluted probable cause test for arrest for extradition. If the demanding state does have probable cause, it should have no difficulty in attaching evidence of probable cause to the request for extradition. If the demanding state does not have probable cause, why should the person be required to travel from the asylum state to the demanding state to secure freedom by a habeas corpus proceeding. Furthermore, the demanding state's interest in custody of the person will not be frustrated by errors in producing evidence of probable cause or by producing incomplete evidence. The demanding state can always renew its request for extradition if sufficient evidence is subsequently discovered.[31] In addition, courts that have held affidavits produced by the demanding state to be insufficient evidence of probable cause usually grant time to the demanding state to cure the defect.[32]

On the other side of the equation, the intrusion into personal liberty by arrest in asylum state for extradition to another state is usually more painful than non-extradition arrests. As the Supreme Court said, "To require a citizen to undertake a long journey, . . . to incur the expense of taking his witnesses to, and of employing counsel in a distant city, involves a serious hardship to which he ought not to be subjected,"[33] unless there is a sufficient justification to outweigh the enormous loss of liberty. The demanding state's preference to delay the occasion for a contested hearing on probable cause until sometime after extradition is not shared by the person who faces an involuntary journey to another state to raise the constitutionality of his detention.

Part of the responsibility for the disharmony among state courts on the requirement of probable cause for arrest to extradite is due to the unclear test in the Extradition Act applicable to documents submitted to the demanding state. Under the Act, the documents submitted by the demanding state must "substantially charge the person demanded with having committed a crime under the law of that state. . . ."[34] Prior to the adoption of the Act, state courts used either this test or a probable cause test to justify arrests to extradite.[35] The choice of the "charge rule" instead of probable cause was probably due to two factors. The extradition clause of the Constitution uses the word "charge." More importantly, under the Extradition Act the extradition decision is by the governor of the asylum state not the courts—the agency that historically intervened between the intruding government and the person by an assessment of probable cause for governmental action. It is telling that the lead case requiring probable cause to justify extradition comes from a unique jurisdiction

in which a judge acts in the role of the chief executive in all extradition matters.[36]

The proposed extradition act preserves the historic gubernatorial role in extradition but transfers primary responsibility for the decision to extradite from the governor to the courts. This will facilitate the acceptance of probable cause as the test for documents of the demanding state to effectuate extradition. Probable cause is applicable to federal removal proceedings that are initiated to vindicate an analogous governmental interest.[37] A similar test applied by courts in the asylum states would not be burdensome on demanding states[38] and would end the emerging disharmony among the states in extradition matters.[39]

The Governor of the Asylum State and Extradition

The proposed extradition act retains the historic power of the governor in the asylum state to refuse to extradite. The power, however, is exercised by interposition in an extradition proceeding, which is otherwise controlled by the courts of the asylum state. This is not an unprecedented procedure and has been adopted by nearly all states in an extradition procedure restricted to fugitives who are imprisoned in the asylum state.[40]

Preserving a role for the governor only in the extradition cases of the governor's choice and not in every case will be a substantial improvement over the cumbersome structure of the Extradition Act. Furthermore, decisions about the ordinary criminal process in particular cases are traditionally more appropriate for decision making by judges rather than governors. This would be particularly so if the substantive test of the documents produced by the demanding state becomes "probable cause"—a test of frequent application by the courts.

The governor of the asylum state should not, however, give up all authority to intervene in the process of involuntary transfer of a resident of the state to a demanding state. The history of extradition shows that the extradition process often functioned to protect persons, particularly Negroes from discriminatory application of state criminal law or threatened civil rights violations including the ultimate violation of lynching. The history began in 1860 with the refusal of the governor of Ohio to permit extradition of a resident accused of assisting a slave to reach freedom in another state and continued for at least eighty years. This 1860 case, *Kentucky v. Dennison*[41] led to the rule that the governor's duty to extradite from the asylum state is not mandatory in that there is no legal means to compel performance of the duty. In 1937, Governor Hurley of Massachusetts refused to extradite a Negro who had escaped thirteen years previously from a chain gang of another state.[42] These gubernatorial refusals to extradite based on past or anticipated due process violations in the demanding state constituted the most severe interstate conflict in extradition.

It was not, however, the governors alone who used the extradition process as a barrier to future due process violations in the demanding states. In *Commonwealth ex rel. Mattox v. Superintendent*,[43] a 1943 case, a Negro was sought by Georgia from Pennsylvania for trial on the charge of assault with intent to kill a Caucasian. The governor of Pennsylvania found the extradition request sufficient under the Extradition Act and issued a warrant to extradite. The Negro applied for a writ of habeas corpus in a Pennsylvania court, which was granted. The court admitted evidence by the Negro that prejudice against him in Georgia was so virulent that he could not receive a fair trial and that he was in danger of being lynched. The court held that this evidence was adequate reason for denying extradition notwithstanding Georgia's undisputed compliance with the Extradition Act.

The *Mattox* and *Dennison* cases led to proposals to control the governors of demanding states[44] and to expand the scope of habeas corpus review of extradition decisions by governors.[45] Both proposals are still open but the pressure for answers has considerably lessened. The notorious incidence of lynching[46] has subsided. In 1953, the Tuskegee Institute discontinued its Annual Lynch Letter that had recorded annually the gruesome record of lynchings throughout the country since 1890.[47] The application of the federal civil rights act and other rules, such as the right to challenge a jury array on discriminatory selection,[48] have reduced the importance of the function of the extradition process as a civil rights equalizer. As a result, there has been no recent use of gubernatorial power to this end. Moreover, the overwhelming trend in habeas corpus cases is to grant extradition where the accused makes pleas that were successfully used in *Mattox*.[49]

The proposed extradition act does not envision gubernatorial decision making in the asylum state in many extradition cases. The role of the governor of the asylum state in extradition is retained because it is engrained in extradition history. Furthermore, governors continue to be responsive to equitable pleas, the foremost of which is rehabilitation since flight from prosecution or imprisonment.[50] The record and testimonial evidence to support equitable pleas is more accessible in the asylum rather than demanding state. Since courts of asylum states generally refuse to consider equitable pleas in habeas corpus hearings, the governor may be the only recourse.

Conclusion

The proposed extradition act is intended to provoke. It will not please zealots of civil liberties because it proposes a system of reaching fugitives from state criminal justice based on efficiency and functional means of measuring inconvenience to persons in extraditions. It will not please zealots on the other side either. It recognizes that extradition law had a historical function of protecting persons from threatened or actual discriminatory application of

state power through its criminal laws. It retains the gubernatorial power to respond to equitable pleas of rehabilitation since flight from prosecution or prison. Finally, it asserts a moral duty by the state to relieve a person from a predicament of penury caused by the exercise of the summary extradition process.

Law, however, is like a knife. It can cut bread, or it can maim, depending upon the motive of the wielder. This proposed extradition act is intended to balance between both extremes. It seeks to protect individual interests in personal liberty in extradition and the state interest in a reasonably efficient system of reaching fugitives.

The work to be done is some empirical testing of the current practices of extradition in light of the policy judgments exposed by the proposed act. The act suggests matters of importance in extradition that should be replaced or retained. Fitting these suggestions to the experience of extradition is the last step in the modernization of the extradition process. At that point the dangers to citizens and police from the integration of fugitive retrieval with police patrol will be controlled.

Appendix

Appendix
Population Centers Crossing State Borders

Standard Metropolitan Statistical Area: Definition

A standard Metropolitan Statistical Area (SMSA) includes one central city or twin cities with a population of at least 50,000, the county in which the central city is located, and adjacent counties that are metropolitan in character and are economically and socially integrated with the central city. An SMSA may cross state boundaries. See U.S. Bureau of Census, *County and City Data Book, 1972* (Washington, D.C.: G.P.O., 1973), pp. xxi-xxii.

Standard Consolidated Area: Definition

"In view of the special importance of the metropolitan complexes around New York and Chicago, the Nation's largest cities, several contiguous SMSAs and additional counties that do not appear to meet the formal integration criteria [for SMSAs] but do have strong relationships of other kinds have been combined into the New York, New York-Northeastern New Jersey and Chicago, Illinois-Northwestern Indiana Standard Consolidated Areas (SCAs), respectively" (*id.* at xxiii).

SMSAs and SCAs Crossing State Borders

Determination of whether or not an SMSA crossed state boundaries was made by examining the "Area Components of Standard Metropolitan Statistical Areas" (*id.* at 952 to 955), which lists cities and counties contained within each SMSA. Population statistics are based on the 1970 Census and are derived from Table 3, "Standard Metropolitan Statistical Areas" (*id.* at 548, 558, 568, 578).

Following are thirty SMSAs and two SCAs that cross over state borders:

SMSA	*Population*
1. Allentown-Bethlehem-Easton, Pa.-N.J.	543,551
2. Augusta, Ga.-S.C.	253,460

3. Binghamton, N.Y.-Pa.	302,672
4. Chattanooga, Tenn.-Ga.	305,755
5. Cincinnati, Ohio-Ky.-Ind.	1,384,851
6. Columbus, Ga.-Ala	238,584
7. Davenport-Rock Island-Moline, Iowa-Ill.	362,638
8. Duluth-Superior, Minn.-Wis.	265,350
9. Evansville, Ind.-Ky.	232,775
10. Fall River, Mass.-R.I.	149,943
11. Fargo-Moorhead, N. Dak.-Minn.	120,238
12. Fort Smith, Ark.-Okla.	160,421
13. Huntington-Ashland, W. Va.-Ky.-Ohio	253,743
14. Kansas City, Mo.-Kansas	1,253,916
15. Lawrence-Haverhill, Mass.-N.H.	232,452
16. Louisville, Ky.-Ind.	826,553
17. Memphis, Tenn.-Ark.	770,120
18. Omaha, Nebr.-Iowa	540,142
19. Philadelphia, Pa.-N.J.	4,817,914
20. Portland, Oreg.-Wash.	1,009,129
21. Providence-Pawtucket-Warwick, R.I.-Mass.	912,907
22. St. Louis, Mo.-Ill.	2,363,017
23. Sioux City, Iowa-Nebr.	116,189
24. Springfield-Chicopee-Holyoke, Mass.-Conn.	529,883
25. Steubenville-Weirton, Ohio-W. Va.	165,627
26. Texarkana, Tex.-Ark.	101,198
27. Toledo, Ohio-Mich.	692,571
28. Washington, D.C.-Md.-Va.	2,861,123
29. Wheeling, W. Va.-Ohio	182,712
30. Wilmington, Del.-N.J.-Md.	499,493
SCA	
31. New York, N.Y.-Northeastern N.J.	16,178,684
32. Chicago, Ill.-Northwestern Ind.	7,608,273
Total	46,235,884
Total Population of United States, 1970 (*id.* at 2):	203,212,877
Percentage of SMSAs and SCAs that cross state boundaries based upon total population:	22.75%

Notes

Notes

Chapter 1
The Computer and Official Retrieval of Fugitives

1. Unpublished survey by Chase, Rosen & Wallace, Inc., Alexandria, Virginia, for International Association of Chiefs of Police, dated October 1970 (LEAA Library).
2. P. Whisenand and J. Hodges, Automated Police Information Systems: A Survey, 15 *Datamation* 91 (1969). This survey was conducted during 1968 and supported in part by the North American Rockwell Corp.
3. K. Colton, Police and Computers: Use, Acceptance, and Impact of Automation, *The Municipal Year Book* 119 (1972). A further analysis of this survey appears in Colton, The Use of Computers by Police: Patterns of Success and Failure, *International Symposium on Criminal Justice Information and Statistics System*, p. 139 (Project Search, October 1972). Although denominated a "second look," a third analysis of this survey with additional data appears in Colton, Computers and the Police Revisited: A Second Look at the Experience of Police Departments in Implementing New Information Technology, Preprint, to appear in *The Municipal Year Book* for 1975 (preprint available at Operations Research Center, M.I.T.).
4. *Directory of Automated Criminal Justice Information Systems* (U.S. Dept. of Justice, LEAA, 1972). An earlier LEAA study of criminal justice information systems was conducted in 1970, but was not published. A preliminary draft is in the files of the National Criminal Justice Statistics and Information Services, LEAA, and a general description of the survey has been published. H. Bratt, Survey of State Criminal Justice Information Systems, *National Symposium on Criminal Justice Information and Statistics Systems*, p. 73 (California Crime Technological Research Foundation, Sacramento, California 1970).
5. See ns. 1, 2, 3, *supra*.
6. See n. 4, *supra*.
7. The 1970 survey conducted for the International Association of Chiefs of Police does not state the criteria by which the 144 police department subjects were selected. See n. 1, *supra*. Police departments at the 592 cities with populations over 250,000 were sent questionnaires in the 1968 survey. See n. 2, *supra*. The 1971 survey by the International City Management Association sent questionnaires to 498 police departments, which sample included all departments in cities over 50,000 population and 25 percent of

departments in cities between 25,000 and 50,000. See n. 3, *supra*. The 1972 federal survey by LEAA was not directed to police departments exclusively but to 141 jurisdictions including the 50 states and 91 selected cities. Twelve additional jurisdictions volunteered a response. From the 153 jurisdictions, 454 separately defined automated information systems were uncovered that served a number of criminal justice functions, including rapid retrieval of information on wanted status of persons having contact with police. See n. 4, *supra*.

8. This shift in police application of computers parallels the growth of computer usage for all police purposes. In the Colton study, 146 of the 376 police department respondents (or 38.8 percent) used computers for some part of their operations in 1971. By 1974, almost two-thirds (62.5 percent) of the police department respondents planned to use computers. See K. Colton, The Use of Computers by Police: Patterns of Success and Failures, *International Symposium on Criminal Justice Information and Statistics Systems*, p. 139, 140–1 (Project Search, October 1972).
9. See P. Whisenand and J. Hodges, Automated Police Information Systems: A Survey, 15 *Datamation* 91, 95–96 (1969).
10. K. Colton, The Use of Computers by Police: Patterns of Success and Failure, *International Symposium on Criminal Justice Information and Statistics Systems*, 139, 143 (Project Search, October 1972).
11. *Task Force Report: Science and Technology*, Report to President's Commission on Law Enforcement and Administration of Justice, p. 5 (1967).
12. See *Police*, Report of National Advisory Commission on Criminal Justice Standards and Goals, 24.3 at 578 (1973).
13. *Law Enforcement Communications, 1970–1975, A Long Range Study* (A.T. & T. Co., July 1966, I.A.C.P. Library). The study was conducted during 1964–1965 by the engineering and marketing divisions of American Telephone and Telegraph Company, for the purpose of predicting the communications need of law enforcement agencies between 1970 and 1975.
14. See *Directory of Automated Criminal Justice Information Systems*, p. C–1 to C–12 (1972) for a listing of criminal justice computer system names or acronyms. Some of the more interesting are Sea-King Alert, Outlaw, Clean and Clear.
15. NCIC, *Operating Manual*, p. 7 (1970). A second criterion for entry in the wanted person file is a person (1) who has, or is reasonably believed to have, committed a felony and (2) who may seek refuge by crossing jurisdictional borders, and (3) circumstances preclude the immediate procurement of a felony warrant. Such an entry is called a "Temporary Felony Want" and is automatically removed from the file in forty-eight hours unless supported by a warrant (*id.*, at 8). The third criterion is a person subject to any federal arrest warrant.
16. Statistics obtained from files of John M. Cary, System Operations Unit Chief, NCIC, in Washington, D.C., August 1974. All entries in the wanted persons file are coded EW (Wanted Person), EN (Supplemental Record of Alias or other Identifier), and ET (Temporary Felony Want). For the meaning of "Temporary Felony Want", see n. 15, *supra*. See NCIC, *Operating Manual*, Part II, p. 1 (1970) for a listing of all message codes permitted against all seven data files of NCIC, including the file on wanted persons. The statistics in the text are the total of EW and ET entries into the wanted persons file on an annual basis from 1968 through 1973.
17. The message code for all inquiries into the wanted person file is QW. The statistics in the text are the annual total for all such messages from 1968 through 1973.
18. NCIC, *Operating Manual*, Part I, p. 86 (1970).
19. These figures were extracted from information contained in the *Directory of Automated Criminal Justice Information Systems* (1972). The response of each automated system with a data base on wanted persons (*Directory*, at D–58 to D–60) was examined and the responses to the inquiry on interfacing were tabulated. For interpretations of these responses, see *Directory*, at 9.
20. The Indianapolis and Chicago computerized files on wanted persons are connected to state computer systems that, in turn, are connected to the NCIC computerized file on wanted persons. See *Directory*, n. 30 at B–305 and B–296.
21. *Uniform Crime Reports*, 1969, p. 35 (U.S. Dept. of Justice, 1970).
22. D. Roderick, The National Crime Information Center, *Law Enforcement Science and Technology*, p. 529–30, S.A. Yefsky, ed. (IIT Research Institute, Chicago, 1967).
23. The 1968 sample was 18,333 "offenders released from the Federal criminal justice system in 1963." See *Uniform Crime Reports*, p. 37 (U.S. Dept. of Justice, 1968), The 1969 sample was 240,322 persons who "became involved in the Federal process by arrest or release" (*id.* at 35). One clarification of the constituency of the 1969 sample was the exclusion of "chronic violators of the immigration laws and fingerprints submitted by the military."
24. For example, the 1972 sample includes 228,032 offenders and "the basis of selection in this study was a federal offense." See *Uniform Crime Reports*, p. 36 (U.S. Dept. of Justice, 1972).
25. E.g., 18 U.S.C.A. §1073 (1970).
26. This description of the procedures used by a District of Columbia patrol officer to check on the wanted status of a person was provided in an interview with Captain William Harlow, III, of Operations Planning and Data Processing Division, Metropolitan Police Department, Washington, D.C., August 12, 1974.
27. *Law Enforcement Communications, 1970–1975, A Long Range Survey*, p. 13 (A.T. & T. Co., July 1966, I.A.C.P. Library).
28. See, e.g., J.R. Plants, Statewide Computer Based Law Enforcement Information Systems, *Law Enforcement Science and Technology*, p. 523, S.A. Yefsky, ed. (IIT Research Institute, Chicago, 1967).
29. *Command Control Communications Study for the City of Tulsa Police and Fire Departments* (North American Rockwell Corp., December 20, 1968);

and *Los Angeles Regional Automated Want/Warrant System* (undated report by Los Angeles Police Department, I.A.C.P. Library).

30. See, e.g., J.R. Plants, Statewide Computer Based Law Enforcement Information Systems, *Law Enforcement Science and Technology*, p. 523, S.A. Yefsky, ed. (IIT Research Institute, Chicago, 1967).
31. *Law Enforcement Communications, 1970–1975, A Long Range Study* (A.T. & T. Co., July 1966, I.A.C.P. Library).
32. See, e.g., *A Study of Digital Communication Equipment for Law Enforcement Use*, prepared for Law Enforcement Standards Laboratory, National Bureau of Standards (Urban Sciences, Inc., October 1973); *Application of Mobile Digital Communication in Law Enforcement*, prepared for National Criminal Information and Systems Service, U.S. Dept. of Justice (Jet Propulsion Laboratory, California Institute of Technology, June 30, 1974); *National Criminal Justice Telecommunications Requirements* (Jet Propulsion Laboratory, California Institute of Technology, June 28, 1974); *An Analysis of Selected Vendors' Approaches to Two-Way Mobile Digital Communications* (IIT Research Institute, Chicago, October 1973); T. Kelley and J. Ward, *Investigation of Digital Mobile Radio Communication* (National Institute of Law Enforcement and Criminal Justice, U.S. Dept. of Justice, October 1973).
33. "At the outset of this task, it was thought that the majority of data (police voice message traffic) would be obtained through previous work on studies already completed in this area. However, as the research continued, it became evident that a large volume of published data that described police radio exchanges was not readily available." See *Study of Digital Communication Equipment for Law Enforcement Use*, n. 32 at 2–1 (Urban Sciences, Inc., October 1973).
34. Mobile Radio Teleprinters for Public Safety Communications, 34 *APCO Bulletin* (December 1968). See also *Resources and Requirements of Police Communications in the State of Minnesota*, p. 3–29 (Kelly Scientific Corp., July 1970). Another study of the Boston and Fall River Police Departments revealed that 50 percent of mobile traffic messages were car status-type messages. See *Study of Digital Communication Equipment for Law Enforcement Use*, n. 32 at 4–5 (Urban Sciences, Inc., October 1973).
35. See, e.g., *National Criminal Justice Telecommunications Requirements* p. 6–26 (Jet Propulsion Laboratory, California Institute of Technology, June 28, 1974).
36. *Study of Digital Communication Equipment for Law Enforcement Use*, n. 32 at 4–3 (Urban Sciences, Inc., October 1973).
37. *An Analysis of Selected Vendors' Approaches to Two-Way Mobile Digital Communications*, p. 2–3 (IIT Research Institute, Chicago, October 1973).
38. "We are presently working with some manufacturers of police radio equipment to provide the ability to make inquiries directly into the computer file and return, bypassing the desk officer, or terminal operator, completely . . . . [E]quipment of this type is necessary if police information systems are ever to realize their full potential because it does little good to have a computer based network capable of returning information in a few seconds if a terminal operator, overloaded with other work, takes 15 minutes to get the inquiry on its way to the officer." J.R. Plants, Michigan's Law Enforcement Network, *Police Patrol Operations*, G.P. Felkenes and P.M. Whisenand, eds., (Berkeley, Calif.: McCutchan, 1972), p. 320. For a discussion of the difficulties in dispatcher intervention in patrol inquiries in the Kansas computerized data base on wanted persons, see M. Bockelman, On Line Computers, *Communications* 12 (June 1973).

39. *Police*, Report of the National Advisory Commission on Criminal Justice Standards and Goals (1973).
40. *Law Enforcement Communications, 1970–1975, A Long Range Study*, p. 14 to 15 (A.T. & T. Co., July 1966, I.A.C.P. Library).
41. In a survey of San Francisco police personnel, 98 percent wanted a direct link between the vehicle and remote computer files. *Project Summary, San Francisco Digicom System: A Program to Evaluate the Effectiveness of Digital Communications for Law Enforcement Agencies*, p. 3 (Sylvania Electronic Systems, July 1970, I.A.C.P. Library).
42. For a detailed description of the typical equipment for mobile digital communications and of the operation of this equipment in the course of mobile police inquiry and response, see *Application of Mobile Digital Communication in Law Enforcement—An Introductory Planning Guide*, App. B 37–41 (Jet Propulsion Laboratory, California Institute of Technology, June 30, 1974).
43. *Study of Digital Communication Equipment for Law Enforcement Use*, p. 1–1 (Urban Sciences, Inc., October 1973).
44. This pertains to a character set that contains letters, digits and usually other characters such as punctuation marks. *Vocabulary for Information Processing*, p. 13 (American National Standards Institute, Inc., 1970).
45. *Application of Mobile Digital Communication in Law Enforcement—An Introductory Planning Guide*, n. 42 at 38 (Jet Propulsion Laboratory, California Institute of Technology, June 30, 1974).
46. *Id.* at 2.
47. *National Criminal Justice Telecommunications Requirements*, p. 6–26 (Jet Propulsion Laboratory, California Institute of Technology, June 28, 1974).
48. *Direct Computer Access by Police Mobile Terminals*, Dorset and Bournemouth Constabulary Entry for the IACP Police Science Award (1971), I.A.C.P. Library.
49. *National Criminal Justice Telecommunications Requirements*, n. 47 at 6–29 (Jet Propulsion Laboratory, California Institute of Technology, June 28, 1974). See also *Study of Digital Communication Equipment for Law Enforcement Use*, p. 3–1 (Urban Sciences, Inc., October 1973) for a survey of the views of police departments on their perception of the need to install mobile digital terminals in police patrol vehicles.
50. *National Criminal Justice Telecommunication Requirements*, n. 47 at 6–27 (Jet Propulsion Laboratory, California Institute of Technology, June 28, 1974).
51. D. Rodericks, The National Crime Information Center, *Law Enforcement*

Science and Technology, p. 529, 532 (IIT Research Institute, Chicago, 1967).

52. See *Study of Digital Communication Equipment for Law Enforcement Use*, p. 3–19 (Urban Sciences, Inc., October 1973).
53. *Pilot Police Man–Portable Digital Communications Systems*, LEAA Grant 74–SS–99–3311 (U.S. Dept. of Justice, April 17, 1974). The tests are being conducted under a $274,500 grant with development and testing by Burroughs Corporation and the Electromagnetic Sciences Corporation. One of the questions to be resolved is whether a 16 to 32 character display for response from a computer data base is too limited to serve adequately the information needs of patrol officers.
54. See *Study of Digital Communication Equipment for Law Enforcement Use*, p. 4–22 (Urban Sciences, Inc., October 1973).
55. *National Criminal Justice Telecommunications Requirements*, p. 6–27 to 6–29 (Jet Propulsion Laboratory, California Institute of Technology, June 28, 1974). "[I]ncreases of over 1,000 percent were noted in some tests, but generally in situations in which deficiencies in the existing manual system caused lower than average usage" (*id.* at 6–28).
56. 42 U.S.D. §3701 (1973). K. Colton, Computers and the Police Revisited: A Second Look at the Experience of Police Departments in Supplementing New Information Technology, p. 38 to 40, preprint, to appear in *The Municipal Yearbook* for 1975 (preprint available at Operations Research Center, M.I.T.).
57. K. Colton, Computers and the Police Revisited: A Second Look at the Experience of Police Departments in Implementing New Information Technology, to appear in *The Municipal Yearbook* for 1975 (reprint available at Operations Research Center, M.I.T.), p. 38.
58. *Law and Disorder III*, State and Federal Performance Under Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (Lawyers Commission for Civil Rights Under Law 56, 1972).
59. P. Whisenand and T. Tamaru, *Automated Police Information Systems* (New York: Wiley, 1970), p. 57.
60. See n. 57 *supra*, at 39–40.
61. In the 1971 study, four out of ten city police departments using computers had received funds from LEAA to aid their automation effort. "Another two out of ten indicated that they had not yet received aid but had applied, or planning to apply (for LEAA financial assistance). In addition, more than half of the non-users planning to transfer to computer use (51.6 percent) indicated that they were hoping to receive aid from the LEAA." K. Colton, The Use of Computers by Police: Patterns of Success and Failure, *International Symposium Criminal Justice Information and Statistics Systems*, p. 139, 148 (Project Search, October 1972).
62. *Application of Mobile Digital Communication in Law Enforcement* (Jet Propulsion Laboratory, California Institute of Technology, June 30, 1974); *Pilot Police Man–Portable Digital Communications System*, LEAA Grant 74–SS–99–3311 (U.S. Dept. of Justice, April 17, 1974); *Study of Digital Communication Equipment for Law Enforcement Use* (Urban Sciences, Inc., October 1973); T. Kelly and J. Ward, *Investigation of Digital Radio Communication* (National Institute of Law Enforcement and Criminal Justice, U.S. Dept. of Justice, October 1973); *An Analysis of Selected Vendors' Approaches to Two-Way Mobile Digital Communications* (IIT Research Institute, Chicago, October 1973); *Project Summary, San Francisco Digicom System: A Program to Evaluate the Effectiveness of Digital Communications for Law Enforcement Agencies* (Sylvania Electronic Systems, July 1970, I.A.C.P. Library).
63. *Application of Mobile Digital Communications in Law Enforcement* (Jet Propulsion Laboratory, California Institute of Technology, June 30, 1974).
64. LEAA, *Annual Report* (1973).
65. *An Analysis of Selected Vendors' Approaches to Two-Way Mobile Digital Communications* (IIT Research Institute, Chicago, October 1973).
66. *Study of Digital Communication Equipment for Law Enforcement Use* (Urban Sciences, Inc., October 1973).
67. T. Kelly and J. Ward, *Investigation of Digital Radio Communication* (National Institute of Law Enforcement and Criminal Justice, U.S. Dept. of Justice, October 1973).
68. *Pilot Police Man–Portable Digital Communications System*, LEAA Grant 74–SS–99–3311 (U.S. Dept. of Justice, April 17, 1974).
69. The totals are incomplete because the information system, from which they were drawn, does not contain grants for planning the computerized wanted persons files which should involve substantial sum of money. Planning grants are made by LEAA under the authority of 42 USCA §3701 Part A, and the total of funds spent by LEAA for planning has increased from $19 million in 1969 to $48 million in 1973. See LEAA, *Annual Report*, p. 129 (1973).
70. This issue is developed in detail in *Law and Disorder III*, p. 41 to 57 (Lawyers' Commission for Civil Rights Under Law 56, 1972).
71. *Task Force Report: Science and Technology*, President's Commission on Law Enforcement and Administration of Justice, p. 68 (1967).
72. *Id.* at 2–3.

Chapter 2
Police Computers and Fugitives: More Than a Matter of Equipment

1. For a bibliography on police communications, see V.A. Leonard, *The Police Communication System* (Springfield, Ill.: C.C. Thomas, 1970), p. 77. Recent major contributions to this literature are P. Whisenand and T. Tamaru, *Automated Police Information Systems* (New York: Wiley, 1970); R. Reider, *Law Enforcement Information Systems* (Springfield, Ill.: C.C. Thomas, 1972); V.A. Leonard, *The Police Communication System* (Springfield, Ill.: C.C. Thomas, 1970); A. Burton, *Police Telecommunications* (Springfield, Ill.: C.C. Thomas, 1973).

2. V.A. Leonard, *The Police Communication System* (Springfield, Ill.: C.C. Thomas, 1970), p. 44.
3. *Id.*
4. See *Study of Digital Communication Equipment for Law Enforcement Use*, p. 2-27 (Urban Sciences Inc., October 1973).
5. *Application of Mobile Digital Communications in Law Enforcement*, p. 21 (Jet Propulsion Laboratory, California Institute of Technology, June 30, 1974).
6. *Satellite Transmission of Fingerprint Images: The Results of a Feasibility Experiment*, Technical Report No. 7 (Project Search, 1972); *National Criminal Justice Telecommunications Requirements*, §7.2 (Jet Propulsion Laboratory, California Institute of Technology, June 28, 1974).
7. LEAA, *5th Annual Report*, p. 116 (1973). The Jet Propulsion Laboratory has drafted four reports on a proposed national law enforcement telecommunications network: *National Law Enforcement Telecommunications Network Functional Requirements* (June 21, 1974); *An Implementation Plan for a National Criminal Justice Telecommunications System* (June 17, 1974); *National Law Enforcement Communication Network Users Guidelines* (June 6, 1974); and *National Criminal Justice Telecommunications Requirements* (June 28, 1974).
8. R. Bykowski, Project SEARCH Satellite Communications Experiment, *International Symposium on Criminal Justice Information and Statistics Systems* (Project Search, October 1972); and *Satellite Transmission of Fingerprint Images: The Results of a Feasibility Experiment*, Technical Report No. 7 (Project Search, June 1972).
9. See, e.g., V.A. Leonard, *The Police Communication System* (Springfield, Ill.: C.C. Thomas, 1970), pp. 52-54; A. Burton, *Police Telecommunications* (Springfield, Ill.: C.C. Thomas, 1973), pp. 47-48; and V.A. Leonard, *Police Communications Systems* (New York: Wiley, 1938), p. 38.
10. A Westin, *Privacy and Freedom* (New York: Atheneum, 1967); S. Wheeler, *On Record: Files and Dossiers in American Life* (New York: Russell Sage, 1969); A. Westin and M. Baker, *Databanks in a Free Society* (New York: Quadrangle, 1972); *Records, Computers and the Rights of Citizens*, Report of the Secretary's Advisory Committee on Automated Personal Data Systems (U.S. Department of Health, Education and Welfare, July 1973); A. Miller, *The Assault on Privacy* (Ann Arbor: U. of Mich. Pr., 1971); and *Project Search Security and Privacy* (May 1973).
11. See, e.g., S. 2963, S. 2964, S. 3418 93d Cong. 2d Sess.; in addition, the Department of Justice has proposed the adoption of a rule governing the dissemination of criminal record information in accordance with the authority granted to LEAA under sections 501 and 524 of the Omnibus Crime Control and Safe Streets Act, 42 U.S.C. §3701 *et seq.* and the more general grant of rule-making power in the attorney general by 28 U.S.C. 509, 510. See 39 *Fed. Reg.* 5636 (February 14, 1974).
12. See, e.g., *Criminal Justice Data Banks 1974*, Subcomm. on Constit. Rts., Senate Comm. on the Judiciary, 93d Cong. 2d Sess., Hearings on S. 2542, S. 2810, S. 2963 and S. 2964, March 5, 6, 7, 12, 13 and 14, 1974.

13. *Menard v. Saxbe*, 430 F. 2d 486 (D.C. Cir. 1970), 498 F. 2d 1017 (D.C. Cir. 1974); and *Tarleton v. Saxbe*, Civ. No. 1862-71 (D.C. Cir. Oct. 22, 1974).
14. W.R. LaFave, *Arrest: The Decision to Take a Suspect Into Custody* (Boston: Little, Brown & Co., 1965).
15. *Temple v. Meadows*, Civ. No. 450-73, United States District Court, District of Columbia; and *District of Columbia v. Banks*, Crim. No. 26060-74, Superior Court, District of Columbia.
16. Civ. No. 450-73, United States District Court, District of Columbia.
17. See NCIC, *Operating Manual*, p. 87a (April 30, 1970).
18. Interview with John M. Cary, System Operations Unit Chief, NCIC, August 15, 1974.
19. Crim. No. 26060-74, Superior Court, District of Columbia.
20. See NCIC, *Operating Manual*, Part III (1970), for a listing of all police agencies that may enter a warrant into the national computerized file on warrants.
21. See Chapter 1, n. 16 and accompanying text.
22. See NCIC, *Operating Manual*, §3.4 (October 30, 1970).
23. S. 2964, §4(c), *Cong. Rec.* (Feb. 5, 1974).
24. *Id.* at §7(a) and (b).
25. U.S. Department of Justice, Proposed Rule Relating to Criminal Justice Information Systems, §20.20(b), 29 *Fed. Reg.* 5636 (Feb. 14, 1974).
26. *Id.* at §20.37.
27. *Id.* at §20.31(a)(1) and (2).
28. See e.g., S. 2964, §5, 8 and 9.
29. Proposed Rule by Department of Justice, §20.22(d), 39 *Fed Reg.* 5636 (Feb. 14, 1974).
30. The facts were drawn from *Patterson v. United States*, 301 A.2d 67 (D.C. Ct. of App., 1973).
31. Ibid. See also, *Carter v. Maryland*, 305 A.2d 856 (Ct. of Spec. App., May 1973).
32. *Hollis v. Baker*, 45 Mich. App. 666, 207 N.W.2d 138 (1973).
33. *Patterson, supra*, n. 30.
34. *Id.* at 69.
35. Cf. *Whiteley v. Warden*, 401 U.S. 560, 568 (1969).
36. 305 A.2d 856 (Ct. of Spec. App., May 1973).
37. *Id.* at 860.
38. *State v. Mabra*, 61 Wis.2d 613, 213 N.W.2d 545 (1974). The leading Supreme Court decision on a police arrest based upon information known to other police is *Whiteley v. Warden* 401 U.S. 560 (1970).
39. *Whiteley, supra*, n. 38 at 568 (dictum).
40. *Mabra, supra*, n. 38 at 621, 213 N.W.2d at 551.
41. See, e.g., *Whiteley, supra*, n. 38.
42. See, e.g., *Hill v. California*, 401 U.S. 797 (1971); *Brinegar v. United States*, 338 U.S. 160 (1949); and *Carter v. United States*, 244 A.2d 483 (D.C. App., 1968).
43. *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

44. In *Hollis v. Baker*, 45 Mich. App. 666, 207 N.W.2d 138 (1973), state police arrested plaintiff on the basis of a four-year old warrant on a traffic offense. In this claim against the officers for false arrest and imprisonment, the court held that the officers should have been aware of an error in the warrant because a recent renewal of plaintiff's license could not have occurred with outstanding traffic warrants.
45. *Id.*
46. See Appendix for compilation of metropolitan areas that are intersected by state borders.
47. See discussion pp. 47–52, *infra.*
48. 11 U.L.A. 52 (Master ed. 1974).
49. See discussion pp. 24–26, *infra.*
50. *Policy Positions of the National Governors' Conference*, Policy A–12 at 10 (June 1973); and *Report on the Office of the Attorney General*, p. 332 (National Association of Attorneys General, Raleigh, North Carolina February 1971).
51. 11 U.L.A. 52–54 (Master ed. 1974).

Chapter 3
The Case for Revising State Extradition Law

1. For a compilation of citations to all state statutes adopting the Act, see 11 U.L.A. 51 (Mast. Ed. 1974).
2. See discussion pp. 24–25, *infra.*
3. 18 U.S.C.A. §1073 (1964). See discussion pp. 24–26 *infra.*
4. See discussion pp. 26–32, *infra.*
5. See discussion pp. 32–33, *infra.*
6. Bondsmen received the status as a "professional" from the statutes that have regulated his business, e.g., Okla. Stat. Ann. tit. 59 §1301(7) Supp. (1966). The terms "professional bail bondsman" and, simply, "bondsman" are used interchangeably and refer to a person who provides bail for a fee by using his own assets or by acting as an agent for a surety company.
7. See, J. Murphy, Revision of State Bail Laws, 32 *O. St. L. J.* 451 (1971).
8. Attention to bail by legal scholars during the past decade has been directed toward analytical studies of bail as a cluster of unresolved constitutional issues or toward empirical studies on the operation of bail as a system of pretrial release. See, e.g., Foote, The Coming Constitutional Crisis in Bail, 113 *U. Pa. L. Rev.* 1125 (1965); Silverstein, Bail in the State Courts—A Field Study and Report, 50 *Minn. L. Rev.* 621 (1966).
9. Uniform Act on Fresh Pursuit, Cal. Penal Code §852 (West 1970).
10. *Id.* at §352.2.
11. For a discussion of the meaning and consequences of a detainer, see pp. 70–73 *infra.*
12. *ABA Minimum Standards Relating to Speedy Trial*, Appendix B (1967).

13. *Id.* at Article III(e).
14. *Handbook on Interstate Crime Control*, p. 1' (Council on State Governments, 1967).
15. *Id.* at §3.
16. *Handbook on Interstate Crime Control*, p. 16 (Council of State Governments, 1967). Section 2 of the rules promulgated under the Compact requires use of a form entitled "Agreement to Return." The waiver of extradition is contained in this form.
17. 18 U.S.C.A. §4082(b) (1964). Under 18 U.S.C.A. §4042 the Bureau of Prisons is the authorized representative of the attorney general in directing transfer of federal prisoners from one institution to another.
18. Interview with Ira Kirschbaum, Esq., Office of Legal Counsel, Bureau of Prisons, June 24, 1974. This policy of refusal to transfer federal prisoners to demanding states at the conclusion of the federal sentence, is to be contrasted with in-term transfers to states for trial on state charges. See 18 U.S.C.A. §4085 (1964).
19. 18 U.S.C.A. §1073 (1964).
20. See, e.g., Note Interstate Rendition: Executive Practices and the Effects of Discretion, 66 *Yale L. J.* 97, 113 (1956).
21. 80 F. Supp. 700 (D. Mass. 1948).
22. Violations of the Fugitive Felon Act may be prosecuted only in the federal judicial district in which the original crime was alleged to have been committed (18 U.S.C.A. §1073). Therefore, the fugitive arrested by the Federal Bureau of Investigation would be removed under Rule 40 of the Federal Rules of Criminal Procedure to the state in which the original crime was committed. (There is at least one federal judicial district for each state.)
23. In 1973, 3,156 persons were arrested by the FBI under complaints for violation of the Fugitive Felon Act (*FBI 1973 Annual Report*, p. 8); 2,900, on 1972 (*FBI 1972 Annual Report*, p. 15); 2,800, in 1971 (*FBI 1971 Annual Report*, p. 13); and 2,700, in 1970 (*FBI 1970 Annual Report*, p. 15). In 1966, 3,441 persons were arrested (*FBI 1966 Annual Report*, p. 15).
24. The papers would be those required by the Uniform Criminal Extradition Act for arrest by police of the asylum state prior to requisition by the governor of the demanding state (Uniform Criminal Extradition Act §§14, 15).
25. Interview with Carl Hurst, Special Agent, Federal Bureau of Investigation, Washington, D.C., August 16, 1974.
26. 2 *United States Attorneys' Manual*, Criminal Division, p. 133 (1970).
27. 2 *United States Attorneys' Manual*, Criminal Division, p. 135 (1970).
28. Statistics supplied by Gerhard Kleinschmidt, General Crimes Section, United States Department of Justice. The fugitive Felon Act requires formal approval in writing by the Attorney General or Assistant Attorney General as a condition precedent to federal prosecution for violation of the Act (18 U.S.C.A. §1073 (1964)).
29. This is consistent with the congressional purpose in enacting the Fugitive

Felon Act. See, e.g., *United States v. Diaz*, 351 F.Supp. 1050 (D.Conn. 1972).

30. See *An Analysis of Selected Vendors' Approaches to Two-Way Mobile Digital Communications*, p. 3–2 (IIT Research Institute, October 1973).
31. Ibid.
32. Statistics on NCIC were obtained from John M. Cary, System Operations Unit Chief, NCIC. All messages indicating the location of a "wanted person" or "temporary felony want" are coded LW and LT. The statistics on the number of persons located after inquiry of the NCIC are the total of LW and LT messages on an annual basis from 1969 through 1973. Note, however that a LW or LT message is not entered into NCIC after each location of wanted persons. If the apprehending agency is also the agency that entered the warrant into NCIC files, the apprehending agency will enter a message clearing the warrant rather than indicating a location. Therefore, the statistics on the increase in location of wanted persons after inquiry in the computerized FBI file are *minimum* figures.
33. K. Colton, Computers and the Police Revisited: A Second Look at the Experience of Police Departments in Implementing New Information Technology, p. 41, 42, 50, preprint, to appear in *The Municipal Year Book* for 1975 (preprint available at Operations Research Center, M.I.T.).
34. *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974) reh. denied 43 U.S.L.W. 4175 (Oct. 8, 1974) *United States v. Cotton*, 471 F.2d 744 (9th Cir. 1973); *United States v. Edmons*, 432 F.2d 577 (2d Cir. 1970); *Virgin Islands v. Ortiz*, 427 F.2d 1043 (3d Cir. 1970); *State v. Stone*, 294 A.2d 683 (Me. 1972).
35. *Pierson v. Grant*, 357 F.Supp. 397 (N.D.Iowa 1973); *Hines v. Guthrey*, 342 F.Supp. 594 (W.D.Va. 1972); *Johnson v. Buie*, 312 F.Supp. 1349 (W.D.Mo. 1970).
36. Note, Bailbondsmen and the Fugitive Accused—The Need for Formal Removal Procedures, 73 *Yale L. J.* 1098, 1100 (1964). See also, Note, Illegal Abductions by State Police: Sanctions for Evasion of Extradition Statutes, 61 *Yale L. J.* 445, 448 (1952).
37. General compliance by police with the extradition process may be inferred from the sizeable amount of reported litigation on the technical aspects of the process. See cases on the meaning of §3 of the Act cited at 11 U.L.A. 92–154 (Mast. ed. 1974). There is, however, no reported empirical evidence on police practices in interstate retrieval of fugitives.
38. Uniform Criminal Extradition Act §11, 11 U.L.A. 246 (Mast. ed. 1974).
39. Uniform Criminal Extradition Act §10, 11 U.L.A. 209 (Mast. ed. 1974).
40. 35 Ill.2d 343, 220 N.E.2d 235 (1966).
41. *Id.* at 346, 220 N.E.2d at 237.
42. 342 U.S. 519 (1952).
43. 18 U.S.C.A. §1201.
44. 342 U.S. 519, 522 (1952).
45. Scott, Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud, 37 *Minn. L. Rev.* 91 (1953); The Supreme Court Review, 1951 Term, 66 *Harv. L. Rev.* 89, 126 (1952); Allen, Due Process and State Criminal Procedures: Another Look, 48 *Northwestern L. Rev.* 16 (1953); and Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 *Calif. L. Rev.* 579 (1968).
46. *United States ex rel. Orsini v. Reincke*, 286 F.Supp. 974, 979 (D.Conn. 1968). *State ex rel. Lutchin v. County Court*, 42 Wis.2d 78, 165 N.W.2d 593 (1969). See also *United States v. Edmons*, 432 F.2d 577, 583 (2d Cir. 1970) (dictum by Friendly, C.J.).
47. Such a direct challenge was recently rejected by the Maine Supreme Court in *State v. Stone*, 294 A.2d 683 (1972). There is, however, a line of cases in Connecticut commencing with *State v. Licari*, 153 Conn. 127, 214 A.2d 900 (1965) that dismissed criminal charges because of an illegal arrest in violation of the Fourteenth Amendment. See also, *State v. Saidel*, 159 Conn. 96, 267 A.2d 449 (1970); and *State v. Anonymous*, 30 Conn. 584, 312 A.2d 1 (1973). All of these cases, however, involved arrests that were illegal because warrants were not supported by a factual basis on which to predicate probable cause. It is doubtful that these cases would be applied to an illegal arrest under the extradition process of a person about whom there was probable cause to believe criminality.
48. 500 F.2d 267 (2d Cir. 1974), reh. den. 43 U.S.L.W. 4175 (Oct. 8, 1974).
49. *Id.* at 269.
50. 500 F.2d 267, 271 (2d Cir. 1974).
51. *Id.* at 274.
52. 342 U.S. 165 (1952).
53. 367 U.S. 643 (1966).
54. *Virgin Islands v. Ortiz*, 427 F.2d 1043, 1045, n.2 (3d Cir. 1970); and *United States v. Edmons*, 432 F.2d 577, 583 (2d Cir. 1970).
55. 403 U.S. 443 (1971).
56. *Id.* at 490.
57. *Id.* at 492, 498, 510.
58. *United States v. Calandra*, 414 U.S. 338 (1974).
59. *United States v. Lujan*, Docket No. 74–2084, United States Court of Appeals, Second Circuit, January 8, 1975.
60. See, e.g., *O'Shea v. United States*, 395 F.2d 754 (1st Cir. 1968); *Commonwealth of Pennsylvania v. Maroney*, 348 F.2d 22 (3d Cir. 1965); *Brown v. Fogel*, 387 F.2d 692 (4th Cir. 1967); *Greene v. Michigan Department of Corrections*, 315 F.2d 546 (6th Cir. 1963); *Sheldon v. Nebraska*, 401 F.2d 342 (8th Cir. 1968); and *Lofland v. United States*, 357 F.2d 472 (9th Cir. 1966).
61. *Brooks v. Blackledge*, 353 F.Supp. 955, 957 (W.D.N.C. 1973). See also, *Sewell v. United States*, 406 F.2d 1289, 1293, n.2 (8th Cir. 1969).
62. For a brief but somewhat dated discussion of the doctrines that hinder tort recovery against officers, see Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 *Yale L. J* 1149 (1960).
63. *Ker v. Illinois*, 119 U.S. 436 (1886) involved a "clear case of kidnapping" in violation of international extradition treaties (*id.* at 443). The court, in refusing to invalidate a conviction following the kidnapping, said that the defendant "would probably not be without redress, for he could

sue . . . in an action of trespass and false imprisonment, and the facts set out in the plea would without doubt sustain the action" (*id.* at 444).

64. 42 U.S.C.A. §1983 (1970); see *Monroe v. Pape*, 365 U.S. 167 (1961).
65. *Hines v. Guthrey*, 342 F.Supp. 594 (W.D.Va. 1972); and *Johnson v. Buie*, 312 F.Supp. 1349 (W.D.Mo. 1970).
66. *Hines v. Guthrey, supra*, n. 65 at 595.
67. Cf., *Gagnon v. Scarpelli*, 411 U.S. 778 (1972); and *Morrissey v. Brewer*, 408 U.S. 471 (1972).
68. 357 F.Supp. 397 (N.D. Iowa 1973).
69. See n. 65 *supra*.
70. *Gagnon v. Scarpelli*, 411 U.S. 778, 782–783, n.5 (1973).
71. Report of the Office of Attorney General, p. 331 (National Association of Attorneys General, February 1971).
72. The Extradition Act sets forth an elaborate mechanism for waiver in writing in the presence of a judge and recordation of the office of the governor (Uniform Criminal Extradition Act §5A). In the same section, however, all of the requirements for formality in waiver are nullified. "*Provided, however,* that nothing in this Section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure. . . . "
73. *Report of the Office of Attorney General*, p. 331 (National Association of Attorneys General, February 1971).
74. Under the Interstate Agreement on Detainers, a request for a hearing on detainer is deemed a waiver of extradition either to the receiving state or to the sending state. The request also constitutes "a consent by the prisoner to the production of his body in any court where his presence may be required to effectuate the purposes of this agreement." (See Interstate Agreement on Detainers, Article III(e), *ABA Minimum Standards on Speedy Trial*, Appendix B (1967).
75. See Comment, The Operation of the Uniform Parole Act—Is it Fair? 37 *S. Calif. L. Rev.* 556, 564 (1964).
76. Interstate Agreement on Detainers, Article III(e), *supra*, n. 74.
77. *State ex rel. Swyston v. Hedman*, 179 N.W.2d 282 (Minn. 1970); and *Young v. Griffin*, 179 S.E.2d 260 (Ga. 1971). Earlier cases are *Ex parte Tenner*, 128 P.2d 338 (Cal. 1947); and *Pierce v. Smith*, 195 P.2d 112 (Wash. 1948).
78. See, e.g., *Thompson v. State*, 482 P.2d 627 (Okla. 1971).
79. *Gagnon v. Scarpelli*, 411 U.S. 778, 782, n.5 (1973).
80. *Id.*
81. *Miranda v. United States*, 384 U.S. 436, 444 (1966). See also, *Brady v. United States*, 397 U.S. 742, 748 (1970).
82. Thomas Hobson had livery stables in Cambridge, England. He permitted customers to choose horses so long as they took the animal in the stall nearest to the stable door. See E. Klein, *A Comprehensive Etymological Dictionary of the English Language*, vol. 1, p. 735 (New York: Elsevier Pub. Co., 1966). Although Mr. Hobson died in 1631, his trickery is memorialized in cases where courts have pierced choices without alternatives. See, e.g., *Pictorial Review Co. v. Helvering*, 68 F.2d 766 (D.C.Cir. 1934); and *New v. Smith*, 94 Kan. 6, 10, 145 Pac. 880, 881 (1915).

83. *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972). This case involved waiver of a right to a hearing prior to the loss of property rather than liberty. The Court assumed, however, that "the standard for waiver in a corporate-property-right case of this kind is the same standard applicable to waiver in a criminal proceeding—that is, that it be voluntary, knowing and intelligently made" (*id.* at 185).
84. Cf., *Goldberg v. Kelly*, 397 U.S. 254, 262–263 (1970).
85. *Id.*
86. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972).

Chapter 4
Replacing Bondsmen with Police in Bail Retrievals

1. See, e.g., statutes authorizing release of defendants on their own recognizance (unsecured promise to appear at court). For a compilation of these statutes, see, J. Murphy, Revision of State Bail Laws, 32 *Oh. St. L. J.* 451, 485, Appendix II (1971).
2. See, e.g., Bowman, Illinois Ten Percent Bail Deposit Provision, 1965 *U. Ill. L. J.* 35, 37–38.
3. Contrast *New Illinois Bail Figures Refute Claims of Backers* (Allied Agents Inc., Indianapolis, Indiana, 1972) with J. Murphy, Revision of State Bail Laws, 32 *O. St. L. J.* 451, 474–6 (1971).
4. *ABA Project on Minimum Standards for Criminal Justice*, Standards Relating to Pretrial Release, §5.4 (1968).
5. Comm. of Penn., *Report of the Attorney General on the Investigation of the Magisterial System*, Ch. X, at 304, 342 (1965).
6. Report of the Third February 1954 Grand Jury of New York County, 17 *Lawyers Guild Rev.* 149 (1957).
7. Funk, The Bondsman Problem, 19 *Ky. St. B. J.* 14 (1954); and Sweet, Bail or Jail, 19 *Record of N.Y.C.B.A.* 11 (1964).
8. See, e.g., *Christian Science Monitor*, May 24, 1967, p. 5, cols. 1–5; *id.* at 6, cols. 1–3; *Cincinnati Enquirer*, January 21, 1962, p. 1, cols. 1–4; *id.*, January 22, 1962, p. 1, cols. 3–8; *id.*, January 23, 1962, p. 1, cols. 1–8; *id.*, January 24, 1967, p. 1, cols. 1–6. See generally D. Freed and P. Wald, *Bail in the United States: 1964* (Washington, D.C.: G.P.O., 1964).
9. *In re De Saulnier*, 279 N.E.2d 296 (Mass. 1972).
10. Sweet, Bail or Jail, 19 *Record of N.Y.C.B.A.* 11, 18 (1964); see also, P. Wice, *Freedom For Sale* (Lexington, Mass.: Lexington Books, D.C. Heath & Co., 1974), pp. 50–63.
11. Tenn. Code Ann. §40–1409 to 1411 (1955).
12. Colo. Rev. Stat. Ann. §§72–20–1 to –10 (1963), as amended (Supp. 1965); Fla. Stat. Ann. §§648.25–.57 (Supp. 1971); Ind. Ann. Stat.

§§9-3701 to 3738 (Supp. 1970); Ky. Rev. Stat. Ann. §§304.30-010 to -140 (1969); N.C. Gen. Stat. §§85A-1 to 34 (1965); Okla. Stat. Ann. tit. 59, §§1301-40 (1971); and S.D. Comp. Laws Ann. 958-22 (1967).

13. Uniform Bail Bondsmen Licensing Act, §§308, 401, National Assoc. of Insurance Comm'rs., 1 *Proceedings* 116 (1963).
14. *Columbus Dispatch*, July 28, 1970, p. 1B, cols. 2-5; *id.*, July 29, 1970, p. 8A, col. 3.
15. H.B. 777, 109th Ohio Gen. Assembly, Reg. Sess. 1971-1972.
16. Mich. Comp. Laws §750.167(b) (1969).
17. 250 F.Supp. 512 (D.Neb. 1965).
18. *Id.* at 514.
19. *Id.* at 515.
20. 42 U.S.C.A. §1983.
21. See n.d, *supra*.
22. D. Freed and P. Wald, *Bail in the United States: 1964* (Washington, D.C.: G.P.O. 1964).
23. Hearings, *supra*, n. a at 181.
24. 204 So.2d 817 (Ala. 1967).
25. 189 F.Supp. 559 (E.D.Ark. 1960).
26. For a compilation of the bondsmen's statutory power to arrest, see J. Murphy, Revision of State Bail Laws, 32 *O. St. L. J.* 451, 483-4, Appendix I (1971).
27. See, e.g., Fla. Stat. Ann. §§903.22, 903.26(5)(d) (Supp. 1971-72).
28. The court in *Cartee v. State*, 162 Miss. 263 (1932), speaking of the statutes setting forth the bondsmen's power to arrest, said, "These sections are, in substance, declaratory of the common law" (*id.* at 272).
29. *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366 (1873).
30. *Id.* at 371.
31. 46 F.2d 40 (5th Cir. 1931).
32. *Fitzpatrick v. Williams*, 46 F.2d 40, 41 (5th Cir. 1931).
33. *Id.* at 40.
34. F. Pollock and F. Maitland, *The History of English Law*, Vol. II, (Cambridge, England: Camb.U.Pr., 1968), pp. 589-90; and Note, Bail: An Ancient Practice Reexamined, 70 *Yale L. J.* 966 (1961). "Bail originated with the practice of releasing the defendant in the custody of his family or friends, who undertook to guarantee his court appearance. They generally minimized their risk by acting as private jailers." See Arez and Sturz, Bail and the Indigent Accused, 8 *Crime & Delinquency* 12, 13 (1962).
35. Alaska Stat. §12.30.020(b)(1) (Supp. 1970).
36. National Conference on Bail and Criminal Justice, *Proceedings* 339-40 (Washington, D.C., 1964); see Note, Indemnification Contracts in the Law of Bail, 35 *Va. L. Rev.* 496, 497-500 (1949).
37. C. Foote, Introduction: The Comparative Study of Conditional Release, 108 *U. Pa. L. Rev.* 290 (1960); C. Foote, Compelling Appearance in Court: Administration of Bail in Philadelphia, 102 *U. Pa. L. Rev.* 1031 (1954). See also Foote, The Coming Constitutional Crisis in Bail: II, 113 *U. Pa. L. Rev.* 1125, 1162 (1965).

38. "The claims that bondsmen provide any significant functions in policing those on bail and finding them once they have absconded seem frivolous to me. There is no evidence that they actually perform any significant custodial function, and it is unreasonable to expect them to do so." *Id.*
39. Foote, Introduction: Comparative Study of Conditional Release, 108 *U. Pa. L. Rev.* 290, 300 (1960).
40. D. Freed and P. Wald, *Bail in the United States: 1964* (Washington, D.C.: G.P.O. 1964).
41. *Shine v. State*, 204 So.2d 817 (Ct. App. Ala. 1967).
42. *Id.* at 826.
43. *Id.*
44. See text, *supra*, at 37.
45. 189 F.Supp. 559 (E.D.Ark. 1960); see also cases cited at Annot., 73 A.L.R. 1370 (1931).
46. 282 F.Supp. 571 (E.D.Tenn. 1968).
47. 135 A.2d 137 (Del. 1957).
48. Columbus Dispatch, *supra*, n. 14.
49. *Shine v. State*, 204 So.2d 817 (Ct. App. Ala. 1967). *McCaleb v. Peerless Ins. Co.*, 250 F.Supp. 512 (D.Neb. 1965).
50. Cal. Penal Code 847.5 (1970).
51. Note, Bailbondsmen and the Fugitive Accused—The Need for Formal Removal Procedures 73 *Yale L. J.* 1098 (1964).
52. Uniform Criminal Extradition Act, 11 U.L.A. 59 (Mast. ed. 1974).
53. *Golla v. Delaware*, 50 Del. 497, 135 A.2d 137 (1957).
54. *Id.* at 501, 135 A.2d at 139.
55. See, e.g., *United States v. Trunko*, 189 F.Supp. 559 (E.D.Ark. 1960) where the court found arrest action by bondsman was under color of state law when bondsman showed his Ohio Deputy Sheriff's badge to effectuate the arrest.
56. For a statement of the scope of Rule 40, see J. Moore, *Federal Practice*, Vol. 8A, 2d ed. (Matthew Bender, New York 1967), §40.01 at 40-4.
57. "[T]he distinction reflects the fact that in the case of an indictment, the grand jury, an independent body, 'which is an arm of the court', has already found probable cause. . . . In the case of a complaint or information, no such determination has been made and, therefore, separate proof of reasonable cause is required. In either case, the defendant is entitled to a judicial hearing in the asylum district." See Note, Bailbondsmen and the Fugitive Accused—The Need for Formal Removal Procedures, 73 *Yale L. J.* 1098, 1104, n.30 (1964).
58. Holtzoff, Reform of Federal Criminal Procedure, 3 *F.R.D.* 445, 450 (1944).
59. Fed. R. Crim. P. 4(c)(2), see J. Moore, *Federal Practice* Vol. 8, Matthew Bender, New York 1970, §404(3), p. 4-20.
60. Holtzoff, Reform of Federal Criminal Procedure, 12 *Geo. Wash. L. Rev.*

119, 128 (1944). Holtzoff was Secretary of the Advisory Committee on Federal Rules of Criminal Procedure that drafted Rule 40.

61. Fed. R. Crim. P. 1.
62. Interview with Judge Max Schiffman, Magistrate, Federal District Court for Eastern District of New York.
63. In *Fitzpatrick v. Williams*, 46 F.2d 40 (5th Cir. 1931) the bondsmen's power to arrest and cross state lines was based on an implied promise on the part of the defendant not to leave the state where the bail bond was written.
64. Note, Bailbondsmen and the Fugitive Accused--The Need for Formal Removal Procedures, 73 *Yale L. J.* 1098, 1100 (1964).
65. Uniform Criminal Extradition Act, 11 U.L.A. Crim. Law & Proc. 59 *et seq.* (Master ed. 1974). This Act has not been adopted by Mississippi, North Dakota and South Carolina (*id.* at 51).
66. *United States v. Trunko*, 189 F.Supp. 559, 565 (E.D.Ark. 1960).
67. *Id.*
68. 18 U.S.C. §242 (1964).
69. The conclusion that the activities were under color of state law was decided on the narrow facts that one of the bondsmen held a deputy sheriff commission in Ohio and that he displayed his badge to the man at the time of the arrest. See *United States v. Trunko*, 189 F.Supp. 559, 562 (E.D.Ark. 1960).
70. *United States v. Trunko*, 189 F.Supp. 559, 565 (E.D.Ark. 1960).
71. *Thomas v. Miller*, 282 F.Supp. 571 (E.D.Tenn. 1968).
72. *Id.* at 572.
73. *Id.* at 573.
74. *Id.* at 572.
75. *McCaleb v. Peerless Ins. Co.*, 250 F.Supp. 512 (D.Neb. 1965). One court denied a motion by a bondsman to dismiss a complaint under 42 U.S.C.A. §1983 brought by an accused for an alleged beating by the bondsman during a retrieval. See *Hill v. Toll*, 320 F.Supp. 185 (E.D.Pa. 1970).
76. See, e.g., *State v. Elder*, 120 N.E.2d 508 (Zanesville Mun. Ct. Ohio 1953); and *State v. McLean*, 49 N.E.2d 778 (Ct. App. Ohio 1942).
77. See, e.g., *Rischer v. Meehan*, 11 Ohio C.C.R. 403 (Columbiana Co. Cir. Ct. 1896); and *Noback v. Town of Montclair*, 33 N.J.Super. 420, 110A.2d 339 (1954).
78. *Holloway v. Moser*, 193 N.C. 185, 136 S.E. 375 (1927).
79. *Id.* at 189, 136 S.E. at 377.
80. *State v. Elder*, 120 N.E.2d 508 (Zanesville Mun. Ct. Ohio 1953).
81. *Noback v. Town of Montclair*, 33 N.J.Super. 420, 428, 110 A.2d 339, 343 (1964).
82. B. Cohen, *The Police Internal Administration of Justice in New York City* (New York: Rand Institute, November 1970), pp. 39–41; J. McNamara, Uncertainties in Police Work: The Relevance of Police Recruits' Backgrounds and Training, *The Police: Six Sociological Essays*, D. Bordua, ed., (New York: Wiley, 1967), p. 163.
83. Interview with Warren King, Deputy Chief, Superior Court Division, Office of the United States Attorney for the District of Columbia, Washington, D.C., September 24, 1974.
84. *ABA Project on Minimum Standards for Criminal Justice*, Standards Relating to Pretrial Release, §5.4 (1968).
85. The Uniform Rules of Criminal Procedure, §341(b)(1), permits pre-trial release by bail bond, but the sureties must be *uncompensated*. The purpose of this qualification on sureties is the elimination of professional bail bondsmen. See, Comment, Uniform Rules of Crim. Proc. §341(b), 10 U.L.A. 79–82 (Master ed. 1974).

Chapter 5
Extradition of Fugitives: A Blending of Principles

1. Note, Interstate Rendition and the Fourth Amendment, 24 *Rutgers L. Rev.* 551 n. 5 (1970). For citation to early state cases enunciating the rule that a state cannot try or punish a violator of the law of another state, see E. Stimson, *Conflict of Criminal Laws* (Chicago: Foundation 1936), p. 20.
2. E. Stimson, *Conflict of Criminal Laws* (Chicago: Foundation, 1936), p. 4.
3. See P. Jessup, *Transnational Law* (New Haven: Yale Univ. Pr., 1956), pp. 43–4.
4. This is the rationale offered by the Restatement. See Restatement of Conflicts of Law §427 (1934). "Laws to punish crimes are essentially local, and limited to the boundaries of the state prescribing them." *Commonwealth v. Uprichard*, 69 Mass. (3 Gray) 434, 439 (1855).
5. "Obviously it (the rule against state court application of criminal law of another state) is founded on convenience. The witnesses are likely to live near the place where the crime was committed. Their presence at the trial can be obtained with less expense to the state. . . . The rule is sort of local doctrine of forum non conveniens." See Stimson, *Conflict of Criminal Laws* (Chicago: Foundation, 1936), p. 24. "For convenience of assembling evidence, and ensuring the attendance of witnesses and allowing the neighbors of the vicinage to try the facts as jurors, the place where the deed was done was obviously the most suitable, and so a rule of venue grew into the principle of territorial jurisdiction." See Jessup, *Transnational Law* (New Haven: Yale Univ. Pr., 1956), pp. 43–44.
6. Stimson, *supra*, n. 2, at 25.
7. 391 U.S. 145 (1968).
8. *Id.* at 149.
9. *Id.* at 149–50, n. 14.
10. F. Heller, *Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development* (Westport, Conn: Greenwood Press, Inc., 1967), pp. 31–33. "Jury of the Vicinage" means jury of the neighborhood. 4 W. Blackstone, Commentaries * 350–351.
11. 1 *Annals of Cong.* 435 (1789).

12. James Madison reported on the debate on the proposed Amendment in a letter to Edmund Pendleton, September 23, 1789. "They (members of the Senate) are . . . inflexible in opposing a definition of the *locality* of Juries. The vicinage is either too vague or too strict a term . . ." *Letters and Other Writings of James Madison* (Philadelphia: J. Lippincott & Co., 1865), p. 492.
13. "[E]ven though the vicinage requirement was as much a feature of the common-law jury as was the twelve-man requirement, the mere reference to 'trial by jury' in Article III was not interpreted to include that feature." See *Williams v. Florida*, 399 U.S. 78, 96 (1969).
14. For a discussion of the application of *Williams* to federal criminal trials, see The Supreme Court, 1969 Term, 84 *Harv. L. Rev.* 1, 168 (1970).
15. "[P]rovisions that would have explicitly tied the 'jury' concept to the 'accustomed requisites' of the time were eliminated. Such action is concededly open to the explanation that the 'accustomed requisites' were thought to be already included in the concept of a 'jury'. But that explanation is no more plausible than the contrary one. . . . Indeed, given the clear expectation that a substantive change would be effected by the inclusion or deletion of an explicit 'vicinage' requirement, the latter explanation is, if anything, the more plausible." See *Williams v. Florida*, *supra*, at 96–7.
16. For a discussion of the state interests in convening juries with less than twelve members, see The Supreme Court, 1969 Term, 84 *Harv. L. Rev.* 1, 166–8 (1970).
17. *Williams v. Florida*, 399 U.S. 78, 99 (1969).
18. *Id.*
19. *Id.* at 100.
20. The Court has long held that states are not obliged to recognize criminal judgments of sister states under the Full Faith and Credit clause. This issue usually arises in cases involving an attempt at foreign execution of a money judgment which is essentially a penalty. See, e.g., *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888); and *Huntington v. Attrill*, 146 U.S. 657 (1892). These early cases based their decisions on the local nature of state criminal laws. *Huntington*, *supra*, at 669.
21. 92 Ga. 41 (1893).
22. *Id.* at 43.
23. Where the locus of the crime is on boundary waters between two states or on territory claimed by more than one state, there arises the question of which state's criminal law applies. To avoid these difficulties, states have entered into agreements that apportion penal authority. Under Article I, Section 10 of the Constitution, these agreements are subject to the consent of Congress. For a listing of such agreements, see F. Frankfurter and J. Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments. 34 *Yale L. J.* 685, App. A, III (4), (19), (23), (25), and (32) (1925).
24. See discussion, *supra* at p. 21.
25. This is the only alternative urged by the American Law Institute. See Restatement of Conflict of Law, §427, Comment b (1934).

26. Huntington, *supra*, n. 20 at 669.
27. See discussion, *supra* at p. 13.
28. See discussion, *supra* at p. 21.
29. For a discussion of the process by which a person may waive rights under the Uniform Extradition Act, see pp. 32–33, *infra*.
30. See *Handbook on Interstate Crime Control*, rev. ed. (Council of State Governments, Lexington, Kentucky 1966). Since 1966, at least one more state accommodation has been added to those listed in the *Handbook, Id.* The Uniform Rendition of Accused Persons Act was promulgated by the Commissioners on Uniform State Laws. See *Handbook of the National Conference of Commissioners on Uniform State Laws* (1967), p. 153–7. For a discussion of the constitutionality of the Act and list of eight states that have adopted it, see pp. 60–63, *infra*.
31. See, e.g., Uniform Act for Out-of-State Parolee Supervision, Cal. Penal Code §11175 *et seq.* (West 1970), which contains the exact wording of the Interstate Compact for the Supervision of Parolees and Probationers.
32. See, e.g., Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, 11 U.L.A. Crim. Law and Proc. 5 *et seq.* (Master ed. 1974).
33. Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, 11 U.L.A. Crim. Law and Proc. 5 *et seq.* (Master ed. 1974). This Act has been adopted in 48 states and the District of Columbia. It is not in force in Alabama and Georgia. 11 U.L.A. Crim. Law and Proc. 1 (Master ed. 1974).
34. Interstate Compact on Juveniles, Cal. Welf. & Inst. Code §1300 (West 1972). This compact has been adopted in 43 states and the District of Columbia. It is not in force in Alaska, Arkansas, Colorado, Georgia, Kentucky, New Mexico, and South Carolina. Cal. Welf. & Inst. Code §1300 p. 383 (West 1972).
35. Uniform Act for Out-of-State Parolee Supervision, Cal. Penal Code §1175 *et seq.* (West 1970). This Act has been adopted in all states. Cal. Penal Code §1175 p. 541 (West 1970).
36. Uniform Act on Fresh Pursuit, Cal. Penal Code §852 (West 1970).
37. Uniform Rendition of Accused Persons Act, 11 U.L.A. Crim. Law and Proc. 544 *et seq.* (Master ed. 1974). This Act has been adopted in Hawaii, Idaho, Illinois, Michigan, Nebraska, North Dakota, and Washington. 11 U.L.A. Crim. Law and Proc. 541 (Master ed. 1974).
38. Uniform Criminal Extradition Act, 11 U.L.A. Crim. Law and Proc. 59 *et seq.* (Master ed. 1974). This Act has been adopted in 47 states. It is not in force in Mississippi, North Dakota, and South Carolina. 11 U.L.A. Crim. Law and Proc. 51 (Master ed. 1974).
39. Uniform Reciprocal Enforcement of Support Act (1968 Act) 9 U.L.A. Matr., Fam. & Health Laws 809 *et seq.* (Master ed. 1973). This Act has been adopted in Arizona, Arkansas, California, Colorado, Idaho, Illinois, Kansas, Kentucky, Maine, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. 9 U.L.A. Matr. Fam. & Health Laws 805 (Master ed. 1973).

40. See n. 35, *supra*, §1177.
41. See, e.g., Fla. Stat. Ann. §948.01(2).
42. Some states refuse to accept supervision of foreign probationers without a prior conviction. See Council of State Governments, *Summary of Twenty-Sixth Annual Meeting, Parole and Probation Compact Administrators' Association* (Lexington, Kentucky August 14, 1971), p. 4.
43. In *Huddleston v. Costa*, 314 F.Supp. 278 (W.D. Penn. 1970), petitioner sought to enjoin extradition on the theory that a state cannot engage in interstate accommodations for the involuntary transfer of persons in the interest of state criminal law except where expressly authorized by the Constitution. The court refused to convene a three-judge district court because no substantial constitutional question was presented. *Huddleston, supra,* at 280.
44. F. Frankfurter and J. Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 *Yale L. J.* 685, 688 (1925).
45. *Id.*
46. The policy of construing and applying state law on the basis of needed harmony among laws of other states is mandated in the Uniform Commercial Code. See Uniform Commercial Code, §1–102 (1) and (2) (c).
47. *Supra* n. 44 at 691.
48. 359 U.S. 1 (1958).
49. The Uniform Act is reciprocal because it operates only between states that have enacted it or similar legislation for compelling witnesses to travel to, and testify in, sister states.
50. 9 U.L.A. 86 (1957).
51. *Supra* n. 44 and n. 45.
52. A precursor to the Uniform Act was held by a New York court to be constitutional as against claims of unconstitutional extraterritorial application. *Massachusetts v. Klaus*, 145 App. Div. 798, 130 N.Y.S. 713 (1911).
53. *New York v. O'Neil*, 359 U.S. 1, 5 (1958).
54. *Id.* at 6.
55. *Id.* at 5.
56. *Id.* at 6.
57. *Id.* at 5.
58. *Miller v. Decker*, 411 F.2d 302, 306 (5th Cir. 1969).
59. *Huddleston v. Costa*, 314 F.Supp. 278, 280–281 (W.D. Penn. 1970).
60. *New York v. O'Neil*, 359 U.S. 1, 10 (1959).
61. *Massachusetts v. Klaus*, 145 App. Div. 798, 803, 130 N.Y.S. 713, 716 (1911).

Chapter 6
The Extradition Clause, State Power, and Constitutional Controls

1. U.S. Constit. art. IV, §2.
2. Note, Extradition Habeas Corpus, 74 *Yale L. J.* 78 (1964).

3. 43 Columbia L. J. 379, 380 (1943).
4. "[N]o person can or should be extradited from one state to another unless the order falls within the constitutional provision. . . . Power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by states." See *People ex rel. Corkran v. Hyatt*, 172 N.Y. 176, 182, 64 N.E. 825, 826, aff'd 188 U.S. 691 (1902); see also, dissenting opinion by Justice Douglas in *New York v. O'Neil*, 359 U.S. 1, 14–18 (1958). See cases cited in notes 45–47 of Note, Extradition Habeas Corpus, 74 *Yale L. J.* 78, 88–89 (1964).
5. *Innes v. Tobin*, 240 U.S. 127, 130–131 (1915). For an historical account of the adoption of the clause, see S. Spear, *The Law of Extradition* (Albany, N.Y.: Weed, Parsons & Co., 1879), p. 29; and J. Moore, *A Treatise on Extradition and Interstate Rendition*, Vol. 2 (Boston: Boston Book Co., 1891), p. 819–61.
6. *Hyatt v. New York*, 188 U.S. 691 (1903).
7. A person need only be located in the asylum state; his motive or intention in leaving the demanding state is immaterial. The person need not have fled the demanding state to avoid prosecution. *Appleyard v. Massachusetts* 203 U.S. 222, 227 (1906). It is also immaterial if location in the asylum state occurs as a result of an involuntary process. *Innes v. Tobin*, 240 U.S. 127 (1917).
8. 18 U.S.C. §3182:

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

For an historical account of the reason for adoption of this statute, see J. Moore, *A Treatise on Extradition and Interstate Rendition*, Vol. 2 (Boston: Boston Book Co., 1891), §§531–41. The 1793 version is reproduced in J. Moore, *A Treatise on Extradition and Interstate Rendition*, Vol. 2 (Boston: Boston Book Co., 1891), p. 847.

9. Interstate compacts without approval of Congress are prohibited by U.S. Const. art. I §10. Congress has, however, authorized states to enter compacts for cooperative administration of criminal laws. Other provisions of

the Constitution can apply to state extradition, such as the Fourteenth Amendment. See discussion p. 64, *infra*.

10. For a listing of other persons whose involuntary interstate return has been deemed by states to he indispensable to state criminal justice, see text and notes p. 51, *supra*.
11. For a list of the state accommodations that have effectively replaced the federal extradition statute, see statutes cited in notes pp. 51 to 52, Ch. 5, *supra*.
12. *Kingen v. Kelley*, 3 Wyo. 566 (1891).
13. *Id.* at 575.
14. On the matter of sanctions for failure of police to comply with the Uniform Extradition Act, see discussion p. 26, *infra*.
15. See, e.g., *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (dictum). As examples of recent denials of state power to supplement the federal statute, see *McCline v. Meyering*, 75 F.2d 716 (7th Cir. 1934); and *People ex rel. Lipshitz v. Bessenger*, 273 App. Div. 19, 75 N.Y.S.2d 392 (1947). In *Lipshitz*, the question was the validity of §3 of the Uniform Criminal Extradition Act adopted by New York and Florida. This section permitted extradition based on a charging instrument consisting of a copy of an information, whereas the federal statute mentioned only an indictment or affidavit. The court reasoned that strict compliance with the federal statute was required and held the state law invalid. Although the *Lipshitz* case has been rejected on this point by New York, *People ex rel. Matochik v. Baker*, 306 N.Y. 32, 36 (1953), the case illustrates a current application of the aged dictum in *Prigg, supra*.
16. "But I find no authority on the part of the states to enlarge and expand the power of extradition specifically restricted by the Constitution to criminals." See *New York v. O'Neil*, 359 U.S. 1, 14–15 (1958) (Justice Douglas, dissenting opinion).
17. See discussion p. 60, *infra*.
18. *Prigg v. Pennsylvania*, 41 U.S. 539, 617 (1842).
19. *Id.* at 627 (concurring opinion by Chief Justice Taney).
20. *United States ex rel. Grano v. Anderson*, 318 F.Supp. 263, 268 n.2 (Del. 1970). See also, cases cited in n. 15, *supra*.
21. "The principle laid down by the Supreme Court of the United States (*Prigg* dictum), though strongly stated, and perhaps without the necessary qualification, has not, by the States, been practically understood to exclude legislation of this character." See S. Spear, *Law of Extradition* (Albany, N.Y.: Weed, Parsons & Co., 1879), pp. 245–6. "[W]e do not think that the Supreme Court of the United States intended such an exclusion by the language used in *Prigg v. Commonwealth of Pennsylvania*. State legislatures and State courts have not so understood the Supreme Court" (*id.* at 253). See also J. Moore, *A Treatise on Extradition and Interstate Rendition*, Vol. 2 (Boston: Boston Book Co., 1891), pp. 863–9.
22. 240 U.S. 127 (1916).
23. *Id.* at 131–2.
24. *Innes v. Tobin*, 240 U.S. 127, 134 (1916).

25. See e.g., Comment, 43 *Minn. L. Rev.* 1005, 1009.
26. Uniform Criminal Extradition Act §6, 11 U.L.A. Crim. Law & Proc. 59 *et seq.* (Master ed. 1974).
27. See, e.g., Uniform Act for Out-of-State Parolee Supervision, Cal. Penal Code §11175 *et seq.* (West 1970), which contains the exact wording of the Interstate Compact for the Supervision of Parolees and Probationers.
28. Interstate Compact on Juveniles, Cal. Welf. & Inst. Code §1300 (West 1972).
29. Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, 11 U.L.A. Crim. Law & Proc. 5 *et seq.* (Master ed. 1974).
30. *New York v. O'Neil*, 359 U.S. 1, 14–15 (1958).
31. See discussion pp. 53–55, *supra*.
32. *New York v. O'Neil*, 359 U.S. 1, 5–6 (1958).
33. *People ex rel. Corkran v. Hyatt*, 172 N.Y. 176, 64 N.E. 825 (1902) aff'd 188 U.S. 691 (1903). A similar misreading of the Supreme Court's opinion in the *Hyatt* case appears at Note, Extradition Habeas Corpus, 74 *Yale L. J.* 78, 88–89 n.45 (1964).
34. *Hyatt v. New York*, 23 S.Ct. 456, 458 (1903). Another case denied the view that a person could be a fugitive from justice by being "constructively" present in the demanding state at the time of the alleged offense. *Munsey v. Clough*, 196 U.S. 364 (1905). Similar to *Hyatt*, this case considered an extradition under the federal statute, not under any state statute.
35. S. Spear, *The Law of Extradition* (Albany, N.Y.: Weed, Parsons & Co., 1879), pp. 306–16.
36. *Id.* at 313.
37. *Id.* at 316.
38. Uniform Criminal Extradition Act, §6. A similar provision appears in §5 of the Uniform Reciprocal Enforcement of Support Act.
39. 314 F.Supp. 278 (W.D. Penn. 1970).
40. *Id.* at 280.
41. *Miller v. Decker*, 411 F.2d 302 (5th Cr. 1969); *In re Cooper*, 53 Cal.2d 772, 3 Cal. Rptr. 140, 349 P.2d 956, cert. den. 364 U.S. 294 (1960); *English v. Matowitz*, 148 O.St. 39 (1947); *People v. Herberich*, 276 App. Div. 852, 93 N.Y.Supp.2d 272 (1949).
42. See, e.g., *Miller v. Decker*, 411 F.2d 302 (5th Cir. 1969). The court briefly considered the purpose and history of the extradition clause in the Constitution as bearing on the question of the state's power to legislate extradition for persons who were not fugitives from justice in the constitutional sense.
43. See discussion pp. 57–58, *supra*.
44. See discussion pp. 52–54, *supra*.
45. *Handbook of the National Conference of Commissioners on Uniform State Laws*, p. 153 to 155 (1967).
46. 11 U.L.A. Crim. Law & Proc. 541 (Master ed. 1974).
47. 240 U.S. 127 (1916).
48. *Supra* n. 45 at 154.

49. *Innes v. Tobin*, 240 U.S. 127, 131 (1916).
50. *Id.* at 134.
51. Note, Interstate Rendition and the Fourth Amendment, 24 *Rutgers L. Rev.* 551, 555 n. 16. "Thus, any legislation adopted by the states regarding rendition procedures is valid so long as the rendition clause and the Federal Rendition Act do not preempt the subject either expressly or by necessary implication." The only Supreme Court decision cited for support is *Innes*.
52. The Federal Convention was authorized by a resolution of the Congress of the Confederation, adopted February 21, 1787. See 32 *Journals of Continental Congress* 71–74. The purpose of the Convention was to consider "revising the Articles of Confederation . . . " (*id.* at 74). The most helpful source of debate at the Convention is M. Ferrand, ed., *The Records of the Federal Convention of 1787*, rev. ed. (New Haven: Yale U.Pr., 1966). It appears that James Madison was regarded as the reporter of the proceedings by his fellow delegates to the Convention, and, as a result the delegates provided Madison with copies of their speeches and motions (M. Ferrand, ed., *The Records of the Federal Convention of 1787*, Vol. I p. xvi). Congress purchased Madison's notes and documents, which were published in 1840. See H.D. Gilpin, ed., *The Papers of James Madison* (Washington, D.C.: Langtree & O'Sullivan, 1840).
53. A committee of five members, known as the Committee on Detail, prepared a draft of the Constitution as a basis for further discussion. See M. Ferrand, ed., *The Records of the Federal Convention of 1787*, Vol. I, rev. ed. (New Haven: Yale U.Pr., 1966), p. xxii.
54. M. Ferrand, ed., *The Records of the Federal Convention of 1787*, Vol. 2, rev. ed. (New Haven: Yale U.Pr., 1966), pp. 187–8.
55. It was moved "to require fugitive slaves and servants to be delivered up like criminals." The proposal was withdrawn in favor of a special provision to cover the return of fugitive slaves (M. Ferrand, *The Records of the Federal Convention of 1787*, Vol. 2, p. 443).
56. *Letters and Other Writings of James Madison*, Vol. 3 (Philadelphia: J.B. Lippincott & Co., 1865), p. 1447. A draft with the words "other crime" substituted for "high misdemeanor" was submitted to a Committee on Style. M. Ferrand, ed., *The Records of the Federal Convention of 1787*, Vol. 2, rev. ed. (New Haven: Yale U.Pr., 1966), pp. 565, 577. After a minor grammatical change (*id.* at 621), the clause was adopted by the Convention as part of the Constitution to be submitted to the states. 33 *Journals of the Continental Congress* 501–3.
57. 65 U.S. 66 (1860).
58. *Id.* at 102.
59. *Id.* at 100.
60. *Id.* at 104. See also, *Roberts v. Reilly*, 116 U.S. 94 (1885).
61. *Id.* at 100.
62. Cf. *Grano v. Anderson*, 318 F.Supp. 263 (Del.D. 1970).
63. See, e.g., *State ex rel. Brown v. Grosch*, 177 Tenn. 619 (1941) (attempt by state statute to limit the governor's power to issue warrants for extradition); and *Carr v. Murray*, 357 Ill. 326, 192 N.E. 198 (1934) (attempt by state

statute to require good motive in requisition request by governor of demanding state). In *United States ex rel. Grano v. Anderson*, 318 F.Supp. 263 (Del.D. 1970), the court struck state decisional law that set a standard for arrest in the asylum state higher than that of the Fourth Amendment. The court held that "a higher standard would merely be a circumvention of the federal (extradition) statute and a frustration of the extradition clause through the vehicle of probable cause" (*id.* at 269).
64. *Holmes v. Jennison*, 39 U.S. 540 (1840). Chief Justice Taney's opinion against the power of a state to negotiate an international extradition was only dicta because the court in *Holmes* responded primarily to a procedural issue and on that issue the court was divided. Chief Justice Taney's opinion was adopted as law by *United States v. Rauscher*, 119 U.S. 407, 412–414 (1886).
65. 306 N.Y. 32 (1953).
66. 18 U.S.C.A. §3182.
67. 240 U.S. 127 (1916).
68. 306 N.Y. 32, 37 (1953); see also *In re Tenner*, 20 Cal.2d 670, 128 P.2d 338 (1942) where the case adopted the same test of the constitutionality of state law relating to the involuntary interstate surrender of parolees. The result in *Tenner* has been qualified by *Morrisey v. Brewer*, 408 U.S. 471 (1971) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).
69. The interstate extradition clause in the Articles of Confederation read: "If any person guilty of or charged with treason, felony or other high misdemeanor in any State, shall flee from Justice and be found in any of the United States, he shall, upon demand of the governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence." M. Jensen, *The Articles of Confederation* (Madison: Univ. of Wisc. Pr., 1948), p. 264.
70. *Kentucky v. Dennison*, 65 U.S. 66, 103 (1860).
71. *Id.*
72. See discussion at pp. 61–62, *supra*.
73. *Holmes v. Jennison*, 39 U.S. 540, 596 (1840). See also, J.B. Moore, *A Treatise on Extradition and Interstate Rendition*, Vol. 2 (1891), pp. 820–1.
74. *Holmes v. Jennison*, 39 U.S. 540, 596 (1840).
75. See discussion pp. 60–63 *supra*.
76. Interstate Compact for the Supervision of Parolees and Probationers, §3, *Handbook on Interstate Crime Control*, rev. ed., p. 3 (Council on State Governments, 1966).
77. *Id.*
78. *Handbook on Interstate Crime Control*, rev. ed., p. 9 (Council of State Governments, 1966).
79. *Gagnon v. Scarpelli*, 411 U.S. 778, 782, n.5 (1973).
80. *In re Tenner*, 20 Cal.2d 670, 677 (1942), cert. den. 314 U.S. 585 (1941), 317 U.S. 597 (1943).
81. *In re Young*, 121 Cal.App. 711, 716, 10 P.2d 154, 157 (1932). See, also, *In re Tenner, supra* n. 6 at 674.
82. 411 U.S. 778 (1973).

83. *Id.* at 780.
84. *Id.* at 782 n. 5.
85. See discussion on pp. 82–84, *infra.*
86. 55 Wisc.2d 574, 201 N.W.2d 163 (1972). After arguing successfully in October 1972 that the Illinois request for temporary custody was constitutionally defective, the prisoner then argued that Illinois and Wisconsin denied his constitutional right to a speedy trial. In June, 1973, the Wisconsin court held that it had no jurisdiction to decide this question because this claim must be litigated in Illinois, the demanding state. *State ex rel. Garner V. Gray*, 59 Wisc.2d 323, 208 N.W.2d 161 (1973).
87. For a discussion of the procedure, see pp. 69–73 *infra.*
88. 55 Wisc.2d 574, 585, 201 N.W.2d 163, 167 (1972).
89. *Id.* at 588, 201 N.W.2d at 169.
90. See discussion pp. 71–73 *infra.*
91. Cf. *People v. Quiller*, 263 N.Y.S.2d 203, 47 Misc.2d 810 (Nassau County Ct. 1965).
92. *Gomes v. Travisono*, 353 F.Supp. 457, 468 (D.R.I. 1973).

Chapter 7
A Person Wanted by More Than One Sovereign

1. Interview with O. Altshuler, Chief, Special Proceedings, Office of the United States Attorney, for the District of Columbia, August 16, 1974.
2. 83 U.S. 366 (1872). The *Taylor* opinion also contains a lamentable paragraph encasing the bounty-hunting activities of professional bail bondsmen in legality:

> When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed (*id.* at 371).

Apparently bondsmen carry this paragraph on a card as a manifestation of their authority. For a discussion of the activities of bondsmen, see pp. 35–45, *supra.*

3. 83 U.S. 366, 370–371 (1872).
4. Opinion of the Justices, 201 Mass. 609 (1909).

5. Note, Inadequacy of the Present Federal Statute Regulating Interstate Rendition, 10 *Columbia L. Rev.* 208, 214 (1910).
6. 3 Blackstone, *Commentaries** 129; and 4 M. Bacon, *Abridgment of the Law* 563 (A. Strahan, London 1852); see also *Carbo v. United States*, 364 U.S. 611, 613 (1961).
7. 3 Blackstone, Commentaries* 129.
8. *Ponzi v. Fessenden*, 258 U.S. 254 (1922) (transfer of prisoner in a federal prison in Massachusetts to Massachusetts state court for criminal trial); *People v. Berardi*, 332 Ill. 295, 163 N.E. 668 (1928) (transfer of prisoner in federal prison in Kansas to Illinois state court for prosecution); *Carbo v. United States*, 364 U.S. 611 (1961) (transfer of a New York prisoner to United States District Court for the Southern District of California for prosecution); and *Barber v. Page*, 390 U.S. 719 (1968) (dictum discussion by Supreme Court of transfer of prisoners as witnesses between states by writ of habeas corpus ad testificandum [*id.* at 723 to 724, n. 4]). See also, *Trigg v. Moseley*, 433 F.2d 364 (10th Cir. 1969); *Smith v. Hooey*, 393 U.S. 374, 381 n.13 (1968).
9. 258 U.S. 254 (1922).
10. *Id.* at 256.
11. *Id.* at 262. According to one comment on *Ponzi*, it is the first case that passed directly upon the power to transfer federal prisoners to states for trial. See 22 *A.L.R.* 886, 887 (1923).
12. 258 U.S. 254, 264 (1922).
13. *People v. Bernardi*, 332 Ill. 295, 297 163 N.E. 668, 670 (1928).
14. In a memorandum by the Solicitor General in *Smith v. Hooey*, 393 U.S. 374 (1969), the writ of habeas corpus ad prosequendum was described as the normal procedure for transfer of federal prisoners to state courts. "Almost invariably, the United States has complied with such . . . " (*id.* at 381, n.13). According to the same memorandum, the statutory mechanism for transfer of federal prisoners for trial for state offenses (18 U.S.C.A. §4085) has been used in "a relatively small number of instances" (*id.*). See also, *Trigg v. Moseley*, 433 F.2d 364 (10th Cir. 1970).
15. "[T]he question of jurisdiction and custody is essentially one of comity between the two sovereignties and not a personal right of the individual." See *United States v. Jackson*, 134 F.Supp. 872, 873 (E.D.Ky. 1955). Also see cases cited in Note, 18 *Rutgers L. Rev.* 828, 846 n.153 (1964).
16. *Ponzi v. Fessenden*, 258 U.S. 254 (1922); *Carbo v. United States*, 364 U.S. 611 (1961).
17. *Lawrence v. Blackwell*, 298 F.Supp. 708 (N.D.Ga. 1969); D. Shelton, Unconstitutional Uncertainty: A Study of the Use of Detainers, 1 *Prospectus* 119, 122 (1968).
18. 393 U.S. 374 (1969).
19. *Braden v. 30th Judicial Circuit Court of Kentucky*, 93 S.Ct. 1123 (1973).
20. In 1954 the Council on State Governments began discussion of procedures to be used by prisoners to facilitate hearings on detainers. See Note, 18 *Rutgers L. Rev.* 828, 854–858 (1964). The Council proposed two types

of legislation: a uniform act and an interstate agreement. The text of both the act and agreement may be found in *ABA Minimum Standards Relating to Speedy Trial* (1967), p. 43–56.

21. Law Report, 7th Annual Extradition Conference, Nat'l Assoc. of Extradition Officials (May 23–26, 1971).
22. See Note, *Rutgers L. Rev.* 828, 858 (1964).
23. For example, under Article IV (e) of the Agreement all untried indictments, informations or complaints "contemplated hereby" in the receiving state must be dismissed on return of the prisoner to the original place of imprisonment. It appears that the qualification "contemplated hereby" means that the dismissal attaches only to proceedings that resulted in "lodged detainers" referred to in Article IV (b).
24. See discussion pp. 64–66, *supra*
25. 18 U.S.C. Appendix, §§1–5 (1970).
26. A prosecutorial request for temporary custody of a state prisoner is subject to a thirty-day period during which the governor of the imprisoning state may disapprove the request. See Article IV (a) Interstate Agreement on Detainers.
27. *Carbo v. United States*, 364 U.S. 611, 621, n.20 (1961).
28. 1970 U.S. Cong. & Admin. News 4864, 4865.
29. In the language of the Agreement, the argument would be posed that United States is a "Sending state" but not a "Receiving state." See Article II Interstate Agreement on Detainers.
30. 1970 *U.S. Cong. & Admin. News* 4864, 4868.
31. *Id.* at 4865.
32. See n. h., *supra*. There are also timing conditions which could benefit a state prisoner. See Article IV (c) Interstate Agreement on Detainers.
33. Article IV (e) Interstate Agreement on Detainers.
34. See n. 23, *supra*. By contrast when a state prisoner requests a hearing on a federal detainer under Article III of the Agreement, the request operates as a request for final disposition on all federal indictments and complaints. See Article III (d).
35. 1970 *U.S. Cong. & Admin. News* 4865.

Chapter 8
Alternatives for Revising the Extradition Act

1. Uniform Criminal Extradition Act, 11 U.L.A. Crim. Law & Proc., p. 59, §3 (Master ed. 1974) (hereinafter cited Extradition Act); see, e.g., *People ex rel. Leo v. Hoy*, 225 N.Y.S.2d (1962); *Application of Williams*, 279 P.2d 882 (Idaho 1955); and *People ex rel. Gates v. Mulcahy*, 392 Ill. 498 (1946).
2. 214 U.S. 1 (1909).
3. Extradition Act §23.

4. For cases involving extradition initiated by private persons for improper purposes, see D. Snow, The Arrest Prior to Extradition of Fugitives from Justice of Another State, 17 *Hastings L. J.* 767, 780 n. 65 (1966).
5. See, e.g., Uniform Act on Fresh Pursuit, Cal. Penal Code §852 (West 1970).
6. See discussion pp. 18–21, *supra*.
7. For a discussion of the constitutionality of this change, see pp. 60–66, *supra*.
8. The only published study on executive practices in interstate extradition concentrated upon the decision by the governor of the asylum state to deliver a fugitive to the demanding state. Note, Interstate Rendition; Executive Practices and the Effects of Discretion, 66 *Yale L. J.* 97 (1956). The literature and case law on the gubernatorial role in extradition also concentrates on the decision by the governor of the asylum state to honor or reject an extradition request rather than the decision of the governor of the demanding state to request extradition. See, e.g., Note, Extradition Habeas Corpus, 74 *Yale L. J.* 77 (1964); and H. Horowitz and L. Steinberg, The Fourteenth Amendment—Its Newly Recognized Impact on the "Scope" of Habeas Corpus in Extradition, 23 *S. Calif. L. Rev.* 441 (1950).
9. This discussion of the fairness of distinguishing extraditions under one hundred miles from those over one hundred miles on the extent of procedural safeguards for the individual is drawn from the Supreme Court's discussion in *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In *Morrissey* the Court set forth the Fourteenth Amendment's requirements for a hearing in the asylum state before involuntary return of a parolee to the demanding state.
10. See Appendix.
11. See discussion p. 21, *supra*.
12. See discussion pp. 47–50, *supra*.
13. *Kentucky v. Dennison*, 65 U.S. 66, 100 (1860).
14. Cf. Fed. Rules of Crim. Proc., Rule 40.
15. Cf. 18 U.S.C.A. §4282 (1969).
16. United States Supreme Court Advisory Comm. on Rules of Crim. Proc., Notes and Proceedings, p. 145 (N.Y. Univ. School of Law Institute, 1946).
17. *Id.* at 143 to 144.
18. *Id.* at 144.
19. *Evans v. United States*, 325 F.2d 596, 601 (8th Cir. 1963) cert. den. 382 U.S. 881 (1965).
20. *United States v. Sineiro*, 190 F.2d 397 (3rd Cir. 1951).
21. Constit. Art. I §9. The writ is also preserved by most state constitutions. See, e.g., Calif. Constit. Art. 1 §5.
22. On the limitation of issues triable in the asylum state in an extradition proceeding and review by habeas corpus, see, e.g., *Tyler v. Henderson*, 453 F.2d 790 (5th Cir. 1971); and *Watson v. Montgomery*, 431 F.2d 1083 (5th Cir. 1970).
23. R. Hardy, *Removal of Federal Offenders* (Washington, D.C.: J. Byrne & Co., 1929), p. 91, summarizing the sentiment of the Supreme Court in *Tinsley v. Treat*, 205 U.S. 20 (1907).

24. Requiring probable cause, see, e.g., *District of Columbia: Kirkland v. Preston*, 385 F.2d 670 (D.C. Cir. 1967); *Wisconsin: State v. Towe*, 174 N.W.2d 251 (Wisc. 1970); *New York: People v. Artis*, 300 N.Y.S.2d 208 (Sup. Ct. App. Div. 1969); *Nevada: Marshall v. Sherriff*, 488 P.2d 1157 (Nev. 1971); and *Delaware: Grano v. State*, 257 A.2d 768 (Del. Sup. Ct. 1969). Not requiring probable cause, see, e.g., *Illinois: People v. Woods*, 284 N.E.2d 286 (Ill. 1972); and *Indiana: Bailey v. Cox*, 296 N.E.2d 422 (Ind. 1973).
25. See discussion pp. 60–63, *supra*.
26. For an excellent discussion of the requirement of probable cause finding by courts in the asylum state during the extradition process, see, Note, Interstate Rendition and the Fourth Amendment, 24 *Rutgers L. Rev.* 551 (1970).
27. *People v. Woods*, 284 N.E.2d 286, 289 (Ill. 1972).
28. This was the central point relied upon by the Supreme Court in Indiana in rejecting the necessity of a finding of probable cause in the asylum state. *Bailey v. Cox*, 296 N.E.2d 422 (Ind. 1973).
29. Within the confines of the "reasonableness" test of the Fourth Amendment, the Supreme Court has allowed governmental intrusions upon personal liberty that are unsupported by probable cause. In *Terry v. Ohio*, 392 U.S. 21 (1968), the Court concluded that the Fourth Amendment permitted a police officer to stop a suspicious individual and to conduct a limited search for weapons in the absence of probable cause to arrest (*id.* at 27).
30. *Terry v. Ohio*, 392 U.S. 1, 20 (1968).
31. See, e.g., *Reed v. Colpoys*, 99 F.2d 396 (D.C. Cir. 1938); and *La Sasso v. McLeod*, 137 N.J.L. 45, 57 A.2d 661 (Sup. Ct. 1948).
32. In *Kirkland v. Preston*, 385 F.2d 670 (D.C. Cir. 1967), the major case requiring probable cause for extradition, the court granted a two week delay to permit Florida to cure a defect in affidavits. The affidavits had been framed in conclusionary language (*id.* at 673).
33. *Hyde v. Shine*, 199 U.S. 62, 78 (1905).
34. Extradition Act §3.
35. D. Snow, The Arrest Prior to Extradition of Fugitives from Justice of Another State, 17 *Hastings L. J.* 767, 772 (1966).
36. Requests by states for extradition of persons in the District of Columbia are governed by the basic federal statute on interstate extradition. See 18 U.S.C. §3182 (1971). By 23 D.C. Code §704(a), the Chief Judge of the United States District Court for the District of Columbia acts in the same manner as the governors of the several states.
37. Fed. R. Crim. P. 40(b)(3).
38. If the extradition request is supported by indictment from the demanding state, probable cause has substantially been established.
39. As an illustration of the extent of disharmony among the states on the test for documents produced by the demanding states and the consequential difficulty for practitioners, see The Virginia Prosecutor, a document issued by Reno S. Harp III, Virginia Deputy Attorney General, in July, 1973. The document seeks to compile the law of each state on requirements for extradition documents.
40. Interstate Agreement on Detainers, Article IV, Standards Relating to Speedy Trial, *ABA Project on Minimum Standards for Crim. Justice*, Appendix B (1967).
41. *Kentucky v. Dennison*, 65 U.S. 66 (1860).
42. *N.Y. Times*, July 28, 1937, p. 9, col. 2. For other examples, see Note, Interstate Rendition: Executive Practices and the Effects of Discretion, 66 *Yale L. J.* 96, 110 n. 74 (1956).
43. 152 Pa. Super. 167, 31 A.2d 576 (1943).
44. Note, Interstate Rendition: Executive Practices and the Effects of Discretion, 66 *Yale L. J.* 97, 112–20 (1956).
45. See, e.g., Note, Extradition Habeas Corpus, 74 *Yale L. J.* 78 (1964); Case Comment, Future Irreparable Harm: A Ground for Release in Federal Extradition Habeas Corpus Proceedings, 25 *Wash. & Lee L. Rev.* 300 (1968); H. Horowitz & L. Steinberg, The Fourteenth Amendment—Its Newly Recognized Impact on the "Scope" of Habeas Corpus in Extradition, 23 *S. Calif. L. Rev.* 441 (1950).
46. J. Ames, *Changing Character of Lynching: Review of Lynching 1931–1941* (New York: AMS Pr. 1942); and J. Chadborn, *Lynching and the Law*, repr. of 1933 ed. (New York: Johnson Repr., 1970).
47. *N.Y. Times*, December 31, 1953, p. 17, col. 4. In the 1940 Lynch Letter, law officers were reported to have prevented 22 lynchings—three in the North and nineteen in the South. Of the four persons lynched, one was Caucasian and three were Negroes. They had been lynched in response to the following acts: attempting to qualify to vote, wife-beating, altercation with a Caucasian, and attempted rape. See *N.Y. Times*, December 31, 1953, p. 13, col. 6.
48. *Swain v. Alabama*, 380 U.S. 202, 223 (1965) (dictum).
49. *Murray v. Burns*, 405 P.2d 309 (Hawaii 1965); *Stewart v. State*, 475 P.2d 600 (Ore. 1970); *State ex rel. LaRose v. Granquist*, 140 N.W. 2d 700 (Minn. 1966); *People ex rel. Hogan v. Ogilvie*, 219 N.E.2d 491 (Ill. 1966); *Koch v. O'Brien*, 131 A.2d 64 (N.H. 1957).
50. In 1969, Governor Huges of Pennsylvania refused to return a fugitive from imprisonment in another state because of evidence of rehabilitation in Pennsylvania. See *N.Y. Times*, August 24, 1969, p. 67, cols. 1, 2. For other examples, see Note, Interstate Rendition: Executive Practices and the Effects of Discretion, 66 *Yale L. J.* 97, 106 n. 47 (1956).

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