Hofstra Law Review

Volume 4 | Issue 3 Article 12

1976

Maney v. Ratcliff

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Recommended Citation
Mullman, Lawrence N. (1976) "Maney v. Ratcliff," *Hofstra Law Review*: Vol. 4: Iss. 3, Article 12.
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol4/iss3/12

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MANEY v. RATCLIFF

CONSTITUTIONAL LAW—*Fourth Amendment—Computerized Law Enforcement Records—Where an individual is subjected to repeated arrests as a result of an NCIC entry, there is a violation of the fourth amendment cognizable under 42 U.S.C. § 1983.* 399 F. Supp. 760 (E.D. Wis. 1975).

The National Crime Information Center (NCIC), a computerized index of individuals' criminal records and of outstanding fugitive from justice warrants, was designed by Congress to provide assistance to state law enforcement agencies.[1] In *Maney v. Ratcliff*[2] the District Court for the Eastern District of Wisconsin considered the issues raised by allegations of misuse of the system. The plaintiff brought suit under 42 U.S.C. § 1983[3] against the Chief of Police of Baton Rouge, Louisiana, a police officer, the District Attorney for the East Baton Rouge Parish, and an assistant district attorney.

The suit challenged the defendants' use of the NCIC in locating and causing the detention of the plaintiff for extradition to Louisiana. The defendants had placed a fugitive from justice entry into the system on the basis of an arrest warrant issued in May 1973. The warrant charged Maney with the felonious distribution of marijuana in February of that year.[4] As a result of this entry, Maney was jailed on three separate occasions, twice in Wisconsin and once in New York. In each instance, after the

1. *See generally* SUBCOMM. ON CONSTITUTIONAL RIGHTS OF SENATE COMM. ON THE JUDICIARY, 93d Cong., 2d Sess., REPORT ON FEDERAL DATA BANKS AND CONSTITUTIONAL RIGHTS (Comm. Print 1974) [hereinafter cited as FEDERAL DATA BANKS].

Statutory authority for the NCIC is found in 28 U.S.C. § 534 (1971), which provides in pertinent part:

> (a) The Attorney General shall—
>
> (1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records; and
>
> (2) exchange these records with, and for the official use of, authorized officials of the Federal Government, the states, cities, and penal and other institutions.

2. 399 F. Supp. 760 (E.D. Wis. 1975).

3. 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

4. Maney v. Ratcliff, 399 F. Supp. 760, 766 (E.D. Wis. 1975).

Published by Scholarly Commons at Hofstra Law, 1976

plaintiff was stopped for an unrelated purpose, a routine NCIC check revealed the existence of the fugitive from justice warrant. Although the Baton Rouge authorities twice indicated that they desired extradition and that they would forward the necessary papers, these papers were never forwarded; after each of the three arrests, the plaintiff was eventually released. Although they failed to take the steps necessary to secure extradition, the defendants nevertheless neglected to remove the entry requesting the plaintiff's detention as a fugitive.[5] After his third arrest, Maney brought suit against the Baton Rouge officials for injunctive relief and compensatory and punitive damages.[6]

Before ruling on the substantive claim, the court considered the defendants' procedural objections involving venue,[7] personal jurisdiction,[8] prosecutorial immunity,[9] mootness,[10] and absten-

5. *Id.* at 773.

6. *Id.* at 764.

7. Venue in federal courts is controlled by 28 U.S.C. § 1391 (1971). Since none of the defendants resided in the Eastern District of Wisconsin, the court proceeded to analyze the claims. It concluded that each arrest constituted a separable claim of violation of the plaintiff's constitutional rights and, analogizing the alleged section 1983 violations to tort claims, held that the cause of action arose where the injury occurred. Maney v. Ratcliff, 399 F. Supp. 760, 766-67 (E.D. Wis. 1975). The court therefore held that venue was proper for the two Wisconsin arrests but dismissed, with approval of the plaintiff, the third claim involving events that took place in New York. *Id.* at 767.

8. The court concluded that it had personal jurisdiction over the defendants by virtue of the Wisconsin long-arm statute, WIS. STAT. ANN. § 262.05(4) (Supp. 1975), and thus rejected the defendants' argument that the statute "was not intended to apply to the use of the NCIC system by police and prosecutors . . . ." Maney v. Ratcliff, 399 F. Supp. 760, 767-68 (E.D. Wis. 1975). The court held that the defendants' conduct constituted adequate "minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id., quoting* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

9. In dealing with the motion to dismiss by defendants Brown and Chaffin, the court was confronted with the issue of prosecutorial immunity. The court analyzed the *Maney* facts to determine whether the conduct of the defendants was "quasi-judicial as opposed to investigatory activit[y] normally performed by laymen, such as police officers." Maney v. Ratcliff, 399 F. Supp. 760, 770 (E.D. Wis. 1975), *citing* Hampton v. City of Chicago, 484 F.2d 602, 608 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974). The court held that the initial decision to extradite was a quasi-judicial function, but concluded that the decision to leave the entry in the NCIC after deciding not to extradite was outside the scope of prosecutorial immunity. Therefore, not all of Assistant District Attorney Chaffin's conduct was protected from the plaintiff's claim for damages. Maney v. Ratcliff, 399 F. Supp. 760, 770 (E.D. Wis. 1975).

After the *Maney* decision, the Supreme Court considered the issue of prosecutorial immunity in Imbler v. Pachtman, 44 U.S.L.W. 4250 (U.S. Mar. 2, 1976). The Court held that prosecutors have absolute immunity from civil actions for damages brought under section 1983. Basing its decision on the common law immunity afforded to prosecutors, the Court found that to provide anything less than an absolute bar to such actions "would

tion.[11] The court concluded that none of these claims was fatal to the suit. Reaching the merits, the court held that the complaint stated a cause of action and issued a preliminary injunction requiring the defendants to remove the NCIC entry and restraining another entry during the pendency of the action.[12]

To come within the scope of section 1983, a plaintiff must allege that he or she has been deprived of a right, privilege, or immunity secured by the Constitution by one acting under color of state law.[13] If both elements are established, the statute authorizes legal and equitable remedies.[14] The *Maney* court found that the plaintiff's complaint was sufficient to make out a prima facie violation of his rights under the fourth amendment.[15]

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prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Id.* at 4256. The Court, however, specifically refrained from deciding whether this absolute immunity applied to "aspects of the prosecutor's responsibility that cast him in the role of an administrative or investigative officer rather than an advocate." *Id.* at 4257. Therefore, the *Maney* court's holding that the original entry of the warrant was quasi-judicial in nature is still of legal significance.

Throughout NCIC policy statements, the local law enforcement agency is considered to be the party responsible for entering and ensuring the accuracy of NCIC information. *See, e.g.*, FEDERAL DATA BANKS, *supra* note 1, at 2218. Since this function is an "investigatory activit[y] normally carried out by laymen such as police officers," (Hampton v. City of Chicago, 484 F.2d 602, 608 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974)), it appears that immunity should not attach at all.

10. On plaintiff's motion for a temporary restraining order during the pendency of the action, the court dealt with problems of mootness and abstention. The court noted that although the defendants had voluntarily removed the entry from the NCIC, they were nevertheless "free to return to [their] old ways." Maney v. Ratcliff, 339 F. Supp. 760, 771 (E.D. Wis. 1975), *quoting* United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953). The court held that since the issue was not moot, it was obligated to protect against any future violations. Maney v. Ratcliff, 399 F. Supp. 760, 771 (E.D. Wis. 1975).

11. The plaintiff's request for orders restraining future prosecution and requiring the removal of the NCIC entry raised the issue of abstention. Relying on Younger v. Harris, 401 U.S. 37 (1971), and Kugler v. Helfant, 421 U.S. 117 (1975), the court found that there was a failure to demonstrate a showing of bad faith and therefore denied the plaintiff's motion to restrain the pending criminal proceeding. Maney v. Ratcliff, 399 F. Supp. 760, 772 (E.D. Wis. 1975). The court held that since the defendants knew of the plaintiff's whereabouts, the removal of the NCIC entry and an order restraining its re-entry would not interfere with an extradition request. The court further noted that a fundamental principle of the abstention doctrine "is that the federal plaintiff will be able to assert his constitutional rights in the state criminal prosecution." *Id.* at 772-73. Since there was no guarantee that the defendants would ever extradite and thereby provide the plaintiff with a forum, the court held that the *Younger* doctrine would not prohibit enjoining the NCIC entry.

12. Maney v. Ratcliff, 399 F. Supp. 760, 774 (E.D. Wis. 1975).

13. 42 U.S.C. § 1983 (1970). *See* note 3 *supra*.

14. *Id.*

15. Maney v. Ratcliff, 399 F. Supp. 760, 773 (E.D. Wis. 1975). The fourth amendment provides:

In the court's analysis, the arrests constituted unreasonable seizures. The court cited *Terry v. Ohio*[16] and *Wolf v. Colorado*[17] to support the proposition that the fourth amendment guarantees the right "to be free from arbitrary and unreasonable interference by police."[18] Apparently, the *Maney* court read *Wolf* and *Terry* as establishing the principle that the fourth amendment proscribes all reprehensible police conduct. There is little in either opinion to support this construction.[19]

In both *Wolf* and *Terry* the Supreme Court considered whether the police had probable cause upon which to act—whether the underlying facts were sufficient to justify the intrusions. In *Terry*, the petitioner sought reversal of a state conviction for carrying a concealed weapon. He alleged that the trial court improperly admitted evidence obtained after the police had frisked him in the absence of probable cause to believe that he had committed a crime. The Court concluded that the police officer's concern for his own safety justified the minimally intrusive search for weapons.[20] It held that the fourth amendment's "general proscription against unreasonable searches and seizures"[21] was not offended and that admission of the evidence was therefore not improper.

In *Maney*, probable cause was not at issue. The question considered by the court was whether repeated arrests for the same offense are unreasonable seizures within the meaning of the fourth amendment even if each arrest is supported by probable cause. The *Terry* Court's references to reasonableness, however, related solely to justification to search and seize. There was no question of prosecutorial intent. Thus, the *Maney* court's reliance on *Terry* was at least questionable.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

16. 392 U.S. 1 (1968).

17. 338 U.S. 25 (1948).

18. Maney v. Ratcliff, 399 F. Supp. 760, 773 (E.D. Wis. 1975).

19. The *Terry* Court specifically noted that "the issue is not the abstract propriety of the police conduct, but the admissibility against petitioner of the evidence uncovered by the search and seizure." Terry v. Ohio, 392 U.S. 1, 12 (1968).

20. *Id.* at 30.

21. *Id.* at 20.

The inappropriateness of an application of a fourth amendment analysis to the facts of *Maney* is further demonstrated by the court's reliance on *Marland v. Heyse*,[22] a Tenth Circuit Court of Appeals decision. The plaintiff in *Marland* was arrested on three separate occasions but never prosecuted. The *Maney* court cited *Marland* to support the proposition that multiple arrests in the absence of prosecution constitute a violation of the fourth amendment.[23] Although the *Marland* court did find that the plaintiff's constitutional rights had been violated, this conclusion did not rest on the fact of repeated arrests as the *Maney* court had suggested. The violation in *Marland* was the fact that the plaintiff was arrested on the "different occasions"[24] in the absence of probable cause. Thus, the view that multiple arrests without prosecution constitute a fourth amendment violation is not supported by *Marland*.

The *Maney* court also cited *Jenkins v. Averett*.[25] The petitioner in *Jenkins*, who was shot and wounded by a police officer, brought suit under section 1983. He alleged a violation of his fourth amendment rights. Reversing the holding below, the court found that there was a constitutional injury in the police intrusion upon petitioner's physical integrity. The court explained that the right to be free from unreasonable searches and seizures includes protection of an individual's physical integrity.[26] Although the language employed by the *Jenkins* court is arguably broad enough to apply to the facts of *Maney*, the *Maney* court's reliance on it evidences a misconception of the constitutional injury involved.

This reliance on *Jenkins* reflects the true legal basis for the result reached by the *Maney* court. The beatings in *Jenkins* and the repeated arrests in *Maney* are analogous in that the conduct of the public officials in both cases was unconscionable. Although policy considerations might favor a construction of the fourth amendment which would effectively control such conduct, the Supreme Court has yet to embrace such an approach. Even if one accepts the proposition that the fourth amendment imposes a due process-like restraint on police conduct,[27] the validity of the result

22. 315 F.2d 312 (10th Cir. 1963).
23. Maney v. Ratcliff, 399 F. Supp. 760, 773 (E.D. Wis. 1973).
24. Marland v. Heyse, 315 F.2d 312, 314 (10th Cir. 1963).
25. 424 F.2d 1228 (4th Cir. 1970).
26. *Id.* at 1232.
27. *Cf.* Rochin v. California, 342 U.S. 165 (1952). The petitioner sought to have his

in *Maney* is not free from doubt.

A careful analysis of the facts of the case reveals the fourth amendment analysis to be legally unsound. After the first arrest in Milwaukee, the defendants received notice of Maney's whereabouts. The court concluded that the defendants' failure to act upon the notification raised the inference that they had decided not to extradite.[28] Although this is a reasonable inference, the fact that the defendants did not extradite *after* the first arrest does not speak to the reasonableness of that arrest. Thus, the court's analysis would not support the conclusion that the plaintiff's rights were violated prior to the second arrest.

As the *Maney* court noted, despite the failure of the Baton Rouge officials to extradite after the first arrest, the NCIC entry remained active and it was, therefore, "only a matter of time until [Maney] would again be arrested . . . ."[29] The second arrest occurred in October 1974. After the police had stopped him for a minor traffic violation, Maney was again charged with being a fugitive from justice and was incarcerated for 30 days. The Baton Rouge officials indicated that they would forward the papers necessary for extradition but again failed to do so.[30]

The failure to delete the entry after the first arrest does not, however, appear to be unreasonable within the meaning of the *Maney* court's construction of *Terry*. The Baton Rouge officials did not seek extradition after the first arrest because they lacked sufficient evidence at that time.[31] The defendants apparently

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conviction for the illegal possession of morphine reversed on the ground that the court should have excluded the evidence obtained as a result of the pumping of his stomach. The Supreme Court held that this police conduct violated the petitioner's rights under the due process clause of the fourteenth amendment and found that it "shocked the conscience." *Id.* at 172. Holding that the states must pursue criminal prosecutions within certain limitations, the Court stated:

> Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions can not be brought by methods that offend "a sense of justice." [Citation omitted.]

Id. at 173. The conduct at issue in *Maney* was not so offensive as to bring it within the meaning of *Rochin*. *See* United States v. Robinson, 414 U.S. 218 (1973) (thorough search of individual incident to a lawful arrest not so extreme as to violate due process); United States v. Russell, 411 U.S. 423 (1973) (police infiltration of drug-making operation and provision of essential ingredient not violative of due process); Schmerber v. California, 384 U.S. 757 (1966) (withdrawal of blood upon suspicion of driving while intoxicated held not to offend due process).

28. Maney v. Ratcliff, 399 F. Supp. 760, 773 (E.D. Wis. 1975).

29. *Id.*

30. *Id.* at 765.

31. *Id.*

cured this deficiency during the period between the first and second arrests.[32] In light of the court's specific finding that there was no intentional bad faith or harassment,[33] it is difficult to see how the court's conclusion that the defendants' conduct "evince[d] a reckless and callous disregard for plaintiff's constitutional rights"[34] is applicable to the failure to delete the NCIC entry after the first arrest or to the second arrest itself.

Despite their failure to act on the information supplied after the second arrest, the defendants again neglected to remove the fugitive from justice entry and subjected Maney to a third arrest. This arrest, which occurred in Plattsburgh, New York, was clearly unreasonable in terms of the *Maney* court's construction of *Wolf, Terry,* and *Jenkins.*[35] Thus, a rigorous application of the court's reasoning would lead to the conclusion that the cause of action did not arise until the third arrest. If the court had engaged in a careful analysis of the facts, however, it would have been forced to dismiss the suit since venue did not lie with respect to the incidents which occurred in New York.[36]

The ill-fit of the fourth amendment analysis applied by the *Maney* court suggests the application of an alternative analysis—one focusing on the invasion of the individual's constitutional right to privacy which results from a confrontation with governmental computers. Under this analysis, Maney's constitutional rights were violated once it became clear that the authorities lacked sufficient evidence or intent to prosecute but nevertheless continued the NCIC entry. The original entry and subsequent failure to delete constituted an invasion of the plaintiff's constitutional right to privacy. The three arrests should be properly viewed as consequential injuries which give rise to a claim for compensatory damages. The analysis of the *Maney* court concentrated on the plaintiff's arrests in determining whether there was a constitutional injury. Instead, the court should have focused on the initial governmental intrusion.

Although the bases of the constitutional right to privacy have

32. *Id.*

33. *Id.* at 772.

34. *Id.*

35. After the plaintiff's third arrest, defendant Chaffin informed the Plattsburgh, New York, District Attorney that he would not forward extradition papers. *Id.* at 765-66. Thus, it is beyond dispute that the defendants had decided not to prosecute.

36. *See* note 7 *supra.*

not been definitively articulated, the existence and protections of the right have been consistently recognized in three areas: sexual privacy,[37] fourth amendment search and seizure,[38] and informational misuse.[39] It is the analysis developed in the context of misuse of information cases that is most relevant here.

Menard v. Mitchell[40] and *Tarlton v. Saxbe*[41] dealt with the problem of FBI dissemination of arrest records.[42] In each case the

37. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

38. Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388 (1971); Terry v. Ohio, 392 U.S. 1 (1968).

39. Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974); Menard v. Mitchell, 328 F. Supp. 718 (D.D.C. 1971), *aff'd in part on other grounds sub nom.* Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974); *see* Utz v. Cullinane, 520 F.2d 467 (D.C. Cir. 1975); Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App. 1975).

While this article was going to press, the Supreme Court, in a surprising decision, Paul v. Davis, 44 U.S.L.W. 4337 (U.S. Mar. 23, 1976), held that a claim for injury to reputation committed under color of state law was not cognizable under 42 U.S.C. § 1983. In reversing the determination of the Sixth Circuit Court of Appeals, Paul v. Davis, 505 F.2d 1180 (6th Cir. 1974), the Court held that the respondent's appearance in a "shoplifter flyer" constituted nothing more than "a claim for defamation under state law" which was not altered by the fact that the flyer was prepared by a state official. Paul v. Davis, 44 U.S.L.W. 4337, 4339 (U.S. Mar. 23, 1976).

The Court held that "the interest in reputation asserted in this case is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law," *id.* at 4343, and thus found it necessary to consider the respondent's alternative theory of recovery not reached by the court of appeals. His "complaint alleged a violation of [his] 'right to privacy guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.'" *Id.* The Court rejected this argument by holding that the disclosure of the fact of his arrest on a shoplifting charge did not come within the "zones of privacy" previously recognized by the Court. *Id.*

Respondent's privacy claim in *Davis* was based on the stigma resulting from the State's publication of the fact of his arrest. Although *Maney* is distinguishable in that Maney's injury—being subjected to repeated arrests and deprivations of liberty—is both more real and substantial in constitutional terms, the Court's language in *Davis* is disturbingly broad. In his dissent, Justice Brennan strongly disagreed with the majority's holding, and noted that "the potential of [this] decision is frightening for a free people." *Id.* at 4346. But more importantly in terms of the *Maney* decision, Justice Brennan referred to the effect of the majority opinion in *Davis* on the developing body of case law pertaining to informational misuse, and expressed his "fear that after today's decision, these nascent doctrines will never have the opportunity for full growth and analysis." *Id.* at 4350 n.18.

40. 328 F. Supp. 718 (D.D.C. 1971), *rev'd in part on other grounds sub nom.* Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974). Since the district court and the court of appeals considered different issues, the opinion of each will be treated separately.

41. 507 F.2d 1116 (D.C. Cir. 1974).

42. It should be emphasized that the *Menard* and *Tarlton* decisions involved the FBI's Identification Division while *Maney* concerned the FBI's operation of the NCIC, a very different type of storage system. The "NCIC appears designed for rapid reference to specific current information while the Identification Division . . . is [designed] to store information more static in nature." United States v. Mackey, 387 F. Supp. 1121, 1124 (D.

court was concerned with the potential for misuse of a legitimate law enforcement system.

In *Menard v. Mitchell*,[43] decided in 1971, the District Court for the District of Columbia considered a suit brought to compel the Attorney General and the Director of the FBI to remove certain information from FBI criminal identification files. Plaintiff Menard sought removal of his fingerprints and the accompanying notation of an arrest without prosecution. Examining Menard's assertion of an invasion of his constitutional right to privacy resulting from the maintenance and potential dissemination of his record, the district court noted that "[t]hroughout the years Courts have sought to preserve a citizen's right to privacy against changes in our culture and developing modes of governmental regulation."[44] The court also observed that:[45]

> [T]echnological advances . . . facilitate massive accumulation and ready regurgitation of far-flung data . . . [and] emphasize a pressing need to preserve and to redefine aspects of the right of privacy to insure the basic freedoms guaranteed by this democracy.

The district court in *Menard* determined that the government must carry the burden of maintaining "a proper equilibrium between acquisition of information and the necessity to safeguard privacy."[46] The court's consideration of the conflict between individual rights and society's need for efficient law enforcement prompted the observation that the FBI's identification system was "out of effective control."[47] As a result, the court held

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Nev. 1975). A reasonable inference would be that the potential for misuse is even greater in the operation of the NCIC with its wider use and accessibility.

43. 328 F. Supp. 718 (D.D.C. 1971).

44. *Id.* at 725. Plaintiff argued that:

> [I]n the absence of a conviction, the maintenance and use of his arrest record for any purpose whatsoever violates several constitutional guarantees—the presumption of innocence, due process, the right to privacy, and the freedom from unreasonable search under the Fourth Amendment.

Id. at 724.

45. *Id.* at 725.

46. *Id.* at 726. The court noted:

> While conduct against the state may properly subject an individual to limitations upon his future freedom within tolerant limits, accusations not proven, charges made without adequate supporting evidence when tested by the judicial process . . . should not be indiscriminately broadcast under governmental auspices.

Id. at 725.

47. *Id.* at 727. The court also discussed the necessity of "adequate sanctions and administrative safeguards," and the need for legislative guidance in the area. *Id.*

that the FBI was "without authority to disseminate arrest records outside the Federal Government for employment, licensing or related purposes . . . ."[48]

With respect to the use of the same records for law enforcement purposes, however, the *Menard* court reached a different result. Here the court concluded that the balance favored the government's interest in facilitating the operations of the criminal justice system.[49] Additionally, the court concluded that the individual plaintiff would be afforded due process protections in this setting so that any misuse would be checked by judicial action.[50] The *Menard* court held that dissemination outside the federal government, if limited to law enforcement purposes, was permissible; expungement was therefore denied.[51]

Menard appealed from the order of the district court insofar as it had sanctioned retention of arrest records. On appeal, the plaintiff argued that the mere retention of his records violated his constitutional rights.[52] The court avoided the constitutional issues and decided the case on statutory grounds.[53] It concluded that the plaintiff had alleged a "cognizable legal injury" despite the fact that he could not "point with mathematical certainty to the exact consequences . . . ."[54] The court, therefore, ordered the removal of Menard's records from the FBI's centralized criminal files.[55] Underlying the court's decision was the recognition of the

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 728. The collateral issue of the federal government's use of arrest records for governmental employment was held to be "a proper exercise of the President's responsibilities in the name of national security." *Id.* at 727. The court noted in dictum, however, that this procedure should be reevaluated in the light of "fair play" and suggested that all applicants for federal employment receive a copy of their record so they can "correct or explain any data therein contained." *Id.* at 728.

52. Menard v. Saxbe, 498 F.2d 1017, 1023 (D.C. Cir. 1974). Menard alleged that he was subject to "harsh penalties without being accorded due process of law," denied equal protection, and subjected to a violation of his right of privacy. *Id.*

53. *Id.* at 1029-30.

54. *Id.* at 1023, *citing* Finley v. Hampton, 473 F.2d 180, 184 (D.C. Cir. 1972).

55. 498 F.2d 1017, 1030 (D.C. Cir. 1974). The court found that the presence of the records in the neutral noncriminal files was permissible provided that there was no reference of any kind to their criminal origin. *Id.* The reason for the distinction was obvious; the potential for, and effect of, misuse in the former was far greater than in the latter.

In its inquiry into the necessity for maintenance of the arrest records, the court examined the unique role of the FBI in the process. The court of appeals reversed the decision below and held that the FBI was not "a mere passive recipient" of information received from others, but, instead, more of a "step-up transformer that puts into the system a capacity for both good and harm." *Id.* at 1026. The FBI's retention of the records

potential for misuse of the informational system and the necessity of deterring such activity.[56]

In *Tarlton v. Saxbe*[57] appeal was brought from a district court order dismissing a pro se complaint on the ground that it failed to state a cause of action. The case concerned the extent to which the FBI has a duty "to take reasonable measures to safeguard the accuracy of information in its criminal files which is subject to dissemination."[58]

Tarlton alleged injury from the existence of several arrest entries in the FBI's "criminal file" which failed to indicate any ultimate disposition, and other entries which concerned convictions allegedly obtained in violation of his constitutional rights.[59] He asserted that this incomplete and inaccurate information led to a denial of parole from federal prison and claimed that further dissemination would result in similar injury.[60]

In considering the complaint, the court noted that the case involved "a particularly sensitive area of law, concerning the developing relationship between values of individual privacy and the record-keeping functions of the executive branch."[61] As in *Menard*, the court in *Tarlton* was concerned with the potential for misuse of the FBI's Identification System and underscored the need for guidelines:[62]

> [G]overnment collection and dissemination of inaccurate criminal information without reasonable precautions to ensure accuracy could induce a levelling conformity inconsistent with the diversity of ideas and manners which has traditionally charac-

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after learning that Menard's arrest was "purely fortuitous," *id.* at 1027, was a direct violation of its duty to maintain and disseminate criminal identification records, a duty which involves the "responsibility to discharge this function reliably and responsibly and without unnecessary harm to the individuals whose rights have been invaded." *Id.* at 1026.

56. In *Menard* suit was brought against the federal agency, not the local police. Menard argued that the FBI was liable based on the fact that the agency maintained and disseminated the inaccurate records. Menard v. Saxbe, 498 F.2d 1017, 1024-25 (D.C. Cir. 1974). The *Menard* court noted that it would have to deal with a number of issues to determine the liability of the FBI for dissemination. Implying that it was not prepared to hold the federal agency responsible, the court decided that expungement proceedings should properly be "maintained against the local law enforcement agencies involved." *Id.* at 1025.

57. 507 F.2d 1116 (D.C. Cir. 1974).

58. *Id.* at 1121.

59. *Id.* at 1120.

60. *Id.*

61. *Id.* at 1121.

62. *Id.* at 1124. This concern was articulated by Judge Gerhard Gesell in Menard v. Mitchell, 328 F. Supp. 718, 726 (D.D.C. 1971).

> terized our national life and found legal protection in the First Amendment.

Although the court recognized the value of the system, it was equally cognizant of its potential dangers. The court was particularly sensitive to the possibility that criminal files might be disseminated in the absence of a legitimate purpose. It was the likelihood of future abuse that demanded the court's most serious attention.[63]

The essential question concerned who should have the burden of ensuring the accuracy and integrity of the system. The *Tarlton* court concluded that the FBI could not extricate itself from responsibility by claiming that it was a "mere passive recipient" of information.[64] The court held that the FBI was, in fact, an active link in the informational flow. Because of practical limitations—administrative burdens, federalism, and efficiency—the *Tarlton* court decided that the responsibility was more appropriately placed with the local agency.[65] The court noted, however, that the FBI was responsible for performing a duty of inquiry to be evaluated by reference to a standard of reasonableness in light of the factual setting.[66]

The argument for application of the analysis developed in the informational misuse cases to the *Maney* facts is compelling. The same issues upon which the *Menard* and *Tarlton* courts focused are involved in *Maney*. The potential for abuse of the NCIC Wanted Persons File is evident from the facts as outlined by the *Maney* court.[67] As a consequence of the defendant's misuse of the computerized network, Maney was subjected to the type of governmental interference and constitutional injury with which the *Menard* and *Tarlton* courts were concerned. It was not the separate arrests or seizures which represented the constitutionally improper governmental action, but rather the initial unjustified NCIC entry and its subsequent maintenance.

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63. The court referred to the dissemination of "inaccurate criminal records without reasonable precautions to safeguard the record's accuracy." Tarlton v. Saxbe, 507 F.2d 1116, 1126 (D.C. Cir. 1974). The FBI did not assert that its dissemination was justified by a legitimate purpose, but rather that considerations of federalism and administrative convenience warranted the allocation of the burden of safeguarding accuracy to the local agency. *Id.*

64. *Id.* at 1126, *quoting* Menard v. Saxbe, 498 F.2d 1017, 1026 (D.C. Cir. 1974); *see* note 55 *supra*.

65. Tarlton v. Saxbe, 507 F.2d 1116, 1127 (D.C. Cir. 1974).

66. *Id.* at 1128-29.

67. Maney v. Ratcliff, 399 F. Supp. 760, 764-66 (E.D. Wis. 1975).

Maney, like the plaintiff in *Tarlton*, did not allege constitutionally impermissible conduct on the part of the arresting agency, but rather on the part of those who made the arrests possible—the Baton Rouge officials. The defendant authorities who were responsible for entering the data in the NCIC in *Maney* are in an analogous position to those making the initial arrests in *Menard* and *Tarlton*—the local law enforcement agency. In *Menard* and *Tarlton* it was held that the local agency was appropriately saddled with the burden of ensuring that accurate information be introduced and maintained in the system. Thus, the burden of properly using the NCIC must be imposed on the Baton Rouge authorities.

The *Maney* court's analysis fails to identify correctly the constitutional wrong. By failing to thoroughly analyze the facts and concentrating on the resulting damage—the arrests—the court was forced to apply an imperfect fourth amendment analysis.

The district court's determination that the defendants' conduct "evince[d] a reckless and callous disregard for plaintiff's rights"[68] brings the case within the principles outlined by Judge David Bazelon in *Tarlton*. Significantly, according to NCIC policy,[69] only the contributing agency could delete the entry. If the defendants neglected to remove the information, the entry would continue to circulate throughout the country and would subject Maney to the possibility of continual arrests.

The injury suffered by Maney preceded the separate arrests. The transmitting authorities lacked either sufficient evidence to extradite or the prosecutorial intent to do so. It was this conduct which violated Maney's constitutional right to privacy.

The *Maney* decision is important because it further underscores the necessity to control the government's use of computers in law enforcement operations. More significant, however, is the court's recognition of its role in providing remedies for those individuals injured as a result of the misuse of these devices.[70] The *Maney* court sanctioned both legal and equitable relief and thus spoke to two overriding concerns—compensation for past wrongs and deterrence of future abuses.

The NCIC represents an effort by the federal government to

68. *Id.* at 772.

69. FEDERAL DATA BANKS, *supra* note 1, at 2218.

70. *Cf.* Bivens v. Six Unknown Named Fed. Agents, 403 U.S. 388, 395-96 (1971).

assist local law enforcement agencies. Federal involvement must be accompanied by effective supervision. The development of a reasoned constitutional analysis will help make judicial supervision possible until effective legislative guidelines and restraints are developed.[71]

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71. *See* Comment, *Protection of Privacy of Computerized Records in the National Crime Information Center*, 7 U. MICH. J.L. REFORM 594-614 (1974).