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In-Custodial Interrogation and the McNabb-Mallory Rule-A Proposal

Jeffrey C. Munnell

IN-CUSTODIAL INTERROGATION AND THE McNABB-MALLORY RULE—A PROPOSAL

Rule 5(a) of the Federal Rules of Criminal Procedure, enacted in 1944, provides that any person making a valid arrest "shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the United States." Despite this and similar state provisions, the question whether an illegal delay in pre-arraignment procedure renders inadmissible an otherwise acceptable confession made during this period is one which has plagued courts for a quarter century. Although the United States Supreme Court has at least nominally faced this problem on several occasions, the precise posture of these decisions is uncertain. A pronounced split of authority in state courts, and to a somewhat lesser degree in federal courts, has followed.

The problem to be considered in this Comment involves four major elements. First, the arrest of the suspect is presumed valid.[1] Second, the suspect must have been adequately advised of his rights in conformity with the Supreme Court's ruling in *Miranda v. Arizona*,[2] and he must have fully and intelligently waived these rights. Third, an "unnecessary" delay between arrest and arraignment must have occurred. Finally, the confession[3] obtained during this delay must have been uttered completely voluntarily. With these factors met, the problem becomes one of the admissibility of the statements into evidence against the accused in a criminal trial in which he is the defendant.[4]

HISTORY AND DEVELOPMENT OF THE PROBLEM

History in the Supreme Court

The first case generally acknowledged as attempting to meet

1. For a discussion of the effect of an illegal arrest upon a subsequent voluntary confession see Comment, *Voluntary Incriminating Statements Made Subsequent to an Illegal Arrest—A Proposed Modification of the Exclusionary Rule*, 71 DICK. L. REV. 573 (1967).

2. 384 U.S. 436 (1966).

3. For purposes of this Comment, no distinction is made between confessions and admissions. "Confession," as used herein, merely means an incriminating statement.

4. The scope of this Comment encompasses only the restrictions inherent in the last sentence. Thus related questions, such as the use of a confession merely to impeach a witness, or the use of a confession of one defendant as evidence against another defendant, are not considered. Similarly, the use of an inadmissible confession in a civil or quasi-criminal case is not treated. Finally, the question of a "reaffirmance" of a prior inadmissible confession will not be discussed.

the question whether violation of this or a similar prior provision rendered inadmissible any incriminating statement made during an illegal detention was *McNabb v. United States*.[5] Although often cited as demanding the exclusion of *all* confessions obtained during an "unnecessary delay," *McNabb* involved such an intimation of coercion and involuntariness[6] that the validity of this contention is uncertain.

In 1944, *United States v. Mitchell*[7] was decided. For a brief period, it was thought that this case had defined the limits of *McNabb*:

> Inexcusable detention *for the purpose of illegally extracting* evidence from an accused, and the successful extraction of such inculpatory statements by *continuous questioning* for many hours *under psychological pressure* were the determinative factors in the *McNabb* case which led us to rule that a conviction on such evidence could not stand.[8]

Mitchell, however, involved a confession obtained shortly after the arrest—*followed by* a delay in arraignment. Four years later *Upshaw v. United States*[9] distinguished *Mitchell* on this basis.[10] *Upshaw*, which involved a defendant who was questioned more or less continuously for thirty hours, was held to "fall squarely within the *McNabb* ruling and is not taken out of it by what was decided in the *Mitchell* case."[11] That *Upshaw* provided an appropriate situation for the invocation of *McNabb* is conceded, yet in this fact lies the weakness of the proposition that *Upshaw*, or even *Upshaw* plus *McNabb*, demands that *all* confessions made during a violation of rule 5(a) must be excluded.[12]

Mallory v. United States,[13] the last of the cases giving rise to the "rule" of absolute exclusion, was decided by the Supreme Court

5. 318 U.S. 332 (1943).

6. Two members of the McNabb family were arrested for complicity in the fatal shooting of a federal revenue agent and were questioned continuously for thirty hours before a confession was obtained. A third member of the family, arrested later, was questioned for six hours before confessing. These men were members of a Tennessee mountain clan and none had gone beyond the fourth grade in school. No friends, relatives, or counsel were permitted to see the McNabbs until after the confessions were obtained. The place of interrogation was a barren room with no place to sit except on the floor. Finally, at least one of the men was forced to completely strip while being questioned.

7. 322 U.S. 65, *reh. denied*, 322 U.S. 760 (1944).

8. *Id.* at 69-70.

9. 335 U.S. 410 (1948).

10. *Id.* at 412.

11. 335 U.S. at 412.

12. Another factor in *Upshaw* which may have been in the Court's mind was that the arresting officer testified that the reason the defendant had not been taken before a magistrate at once was because there was "not a sufficient case," and that once the defendant was arraigned, the officer would no longer be able to question him. 335 U.S. at 414.

13. 354 U.S. 449 (1957).

in 1957. There the delay was a mere seven and one-half hours. The argument that *Mallory* along with *Upshaw* and *McNabb* demand automatic exclusion is still not completely convincing, however, for even *Mallory* contained distinguishing factors. First, the defendant was nineteen years old and of limited intelligence. Secondly, the language of the Court itself weakens this argument: "The duty enjoined upon arresting officers to arraign 'without unnecessary delay' indicates that the command does not call for mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment. . . ."[14] Just what circumstances justify a delay and how brief that delay must be are questions which obviously have given other courts much room to justify individual decisions.

Although *McNabb*, *Upshaw* and *Mallory* form the basis for the so-called federal rule of exclusion, the development of this line of reasoning does not end here. More recent Supreme Court cases have a definite relation to the question of when a voluntary confession must be excluded. *Wong Sun v. United States*,[15] although dealing with an illegal arrest rather than an illegal detention, propounded a rationale which has a decided bearing on the problem. That case held that admissibility of a confession depends upon: "whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint";[16] whether the connection between the prior illegality and the confession "had 'become so attenuated as to dissipate the taint.'"[17] Although the Supreme Court has not yet applied this language to a situation involving a confession made during a violation of 5(a), it is submitted that the similarities of the two situations are so great as to warrant this extension of the "taint" test.[18]

Furthermore, as will be discussed later, the rationale of recent decisions such as *Miranda v. Arizona* has had a distinct effect on the reasons underlying the *McNabb-Mallory* rule, to the extent that the rule no longer serves its original purpose.[19] Thus, considerable doubt remains both as to when the exclusionary rule should be applied and to how[20] it should be applied.

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14. *Id.* at 455.

15. 371 U.S. 471 (1963).

16. *Id.* at 488, *quoting from* MAGUIRE, EVIDENCE OF GUILT 221 (1959).

17. 371 U.S. at 491, *quoting from* Nardone v. United States, 308 U.S. 338, 341 (1939).

18. The "taint" test has been applied to other situations and currently seems to be in favor with the Court. *See* Stovall v. Denno, 388 U.S. 293 (1967); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967).

19. It should be noted, however, that the Court in *Miranda* stated that its decision was not intended to overrule *McNabb-Mallory* but rather that the two "rules" were to exist coextensively. 384 U.S. at 463n.32.

20. A related question which will not be discussed at this point is

The Rule in the Lower Federal Courts

Since both rule 5(a) and the decisions of the Supreme Court are binding upon all federal courts, these courts would presumable apply the *McNabb-Mallory* rule uniformly. That they do not becomes apparent after examining some of the many cases on point. Although most federal courts have strictly applied the exclusionary rule to confessions obtained in violation of rule 5(a),[21] a few cases have held that a causal relation is needed before an illegal detention will invalidate a confession.[22] These latter decisions seemingly adhere to a *Wong Sun* type of test. An effort to restrict the effect of *McNabb-Mallory* can be seen in other ways. In *United States v. Gorman*,[23] the Second Circuit recently held that a state officer making an arrest for a federal crime need not obey rule 5(a) or its state counterpart, even though the confession obtained during an undue delay was to be used in a federal court.[24] It would seem that a version of the old "silver platter" doctrine[25] was employed.

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whether a violation of rule 5(a) requires an automatic reversal of any conviction supported by a confession obtained in violation of its provisions. Whether such is required, or whether a harmless error test can be applied, poses a most interesting question. Its application will be proposed at a later point in this Comment, based in part upon language of the Supreme Court in Chapman v. California, 386 U.S. 18 (1967) and United States v. Wade, 388 U.S. 218 (1967), which would appear to support this proposal.

21. *See, e.g.*, Butterwood v. United States, 365 F.2d 380 (10th Cir. 1966) (dictum), *cert. denied*, 386 U.S. 937 (1967); Young v. United States, 344 F.2d 1006 (8th Cir. 1965) (dictum); Jones v. United States, 342 F.2d 863 (D.C. Cir. 1964); Ricks v. United States, 334 F.2d 964 (D.C. Cir. 1964); Virgin Islands v. Solis, 334 F.2d 517 (3d Cir. 1964); Jones v. United States, 307 F.2d 397 (D.C. Cir. 1962); Ginoza v. United States, 279 F.2d 616 (9th Cir. 1960); United States v. Harris, 211 F.2d 656 (7th Cir. 1954) (dictum); Speers v. United States, 250 F. Supp. 698 (S.D. W. Va. 1966).

22. *See, e.g.*, Bright v. United States, 274 F.2d 696 (8th Cir. 1960); Joseph v. United States, 239 F.2d 524 (5th Cir. 1957). Watson v. United States, 234 F.2d 42 (D.C. Cir. 1956), seems to require a similar test. However, while never overruled, the *Watson* standard seems to have been largely ignored by later decisions of the same court. *See, e.g.*, Jones v. United States, 342 F.2d 863 (D.C. Cir. 1964) and Ricks v. United States, 334 F.2d 964 (D.C. Cir. 1964).

23. 335 F.2d 151 (2d Cir. 1964).

24. *Id.* at 156. *See also* Barnett v. United States, 384 F.2d 848, 856 (5th Cir. 1967) and Tucker v. United States, 375 F.2d 363, 370 (8th Cir. 1967), where the same reasoning was employed.

25. Elkins v. United States, 364 U.S. 206 (1960), discarded the original "silver platter" doctrine, which had permitted state officials to hand over evidence of a federal crime to federal officers even though the evidence was come at through a search and seizure which would have been illegal for federal officials to conduct. The language in *Elkins* supports the view that the Court was relying, at least in part, upon its supervisory powers to reach its decision; therefore, since the *McNabb-Mallory* rule rests upon the same basis, it is submitted that these powers would similarly forbid the action of the *Gorman* court should the question be raised. *See* 364 U.S. at 216.

Similarly, it has been held that the *McNabb-Mallory* rule is not available for collateral attack.[26] The apparent rationale is that no constitutional right is violated by an illegal detention; only a procedural rule is being violated. This is true of any application of *McNabb-Mallory*,[27] but the rule remains a mandate of the Supreme Court, based on a proper exercise of its supervisory powers,[28] and it binds all federal courts.[29]

It is submitted that these attempts to circumvent the *McNabb-Mallory* rule evidence the lower federal courts' dissatisfaction with the rule, a disaffection more prevalent than is apparent from the available case law.

The Rule's Development in State Proceedings

Since there is no federal constitutional basis for the *McNabb-Mallory* rule,[30] the states are not bound to apply its provisions. Although some writers have felt differently,[31] the state courts have unanimously recognized this inapplicability.[32] Most states, however, have statutory or quasi-statutory provisions similar to fed-

26. *See, e.g.*, Kent v. United States, 272 F.2d 795, 798 (1st Cir. 1959). *Accord*, United States v. Morin, 265 F.2d 291 (3d Cir. 1959).

27. The *McNabb* Court stated that although the Constitution forbids the use of coerced confessions, there is no constitutional provision precluding the use of voluntary ones. The Court said that in excluding the "voluntary" confessions of the McNabbs, it was merely exercising its supervisory powers over federal courts. 318 U.S. at 332, 341, 347. *See also* Upshaw v. United States, 335 U.S. 410, 414 (1948): "Our holding is not placed on Constitutional grounds." There is no indication that this does not remain true at the present.

28. *See* McNabb v. United States, 318 U.S. 332, 341, 347 (1943).

29. For cases dealing with the right of the Supreme Court to exercise its supervisory powers, and to thereby bind lower federal courts, *see, e.g.*, Elkins v. United States, 364 U.S. 206 (1960); Rochin v. California, 342 U.S. 165 (1952); Nardone v. United States, 308 U.S. 338 (1937).

30. *See* note 28 *supra*.

31. *See, e.g.*, Broeder, *Wong Sun—A Study in Faith and Hope*, 42 NEB. L. REV. 483 (1963).

32. *See, e.g.*, State v. Jordan, 83 Ariz. 248, 320 P.2d 446 (1958); Rogers v. Superior Court, 46 Cal. 2d 3, 291 P.2d 929 (1955); State v. Traub, 151 Conn. 246, 196 A.2d 755 (1963), *cert. denied*, 377 U.S. 960 (1964); Webster v. State, 213 A.2d 298 (Del. 1965); People v. Novak, 33 Ill. 2d 343, 211 N.E. 2d 235 (1965), *cert. denied*, 384 U.S. 1016 (1966); People v. Kees, 32 Ill. 2d 299, 205 N.E.2d 729 (1965); Pearman v. State, 233 Ind. 111, 117 N.E.2d 362 (1954); State v. Dobney, 199 Kan. 449, 429 P.2d 928 (1967); Commonwealth v. Chase, 350 Mass. 738, 217 N.E.2d 195 (1966); State v. Nelson, 139 Mont. 180, 362 P.2d 224 (1961); Brown v. Justice's Court, 428 P.2d 376 (Sup. Ct. Nev. 1967); State v. Lavallee, 104 N.H. 443, 189 A.2d 475 (1963); State v. LaPierre, 39 N.J. 156, 188 A.2d 10, *cert. denied*, 374 U.S. 852 (1963); People v. Lane, 10 N.Y.2d 347, 179 N.E.2d 339, 223 N.Y.S.2d 197 (1961); People v. Spano, 4 N.Y.2d 256, 150 N.E.2d 226, 173 N.Y.S.2d 793 (1958), *rev'd on other grounds*, 360 U.S. 315 (1959); State v. Shipley, 232 Ore. 354, 375 P.2d 237 (1962); Reimers v. State, 31 Wis. 2d 457, 143 N.W.2d 525 (1966), *cert. denied*, 385 U.S. 980 (1966); State *ex rel.* Van Erman v. Burke, 30 Wis. 2d 324, 140 N.W.2d 737 (1966).

eral rule 5(a).[33] Despite these provisions, the overwhelming majority of states have rejected the *McNabb-Mallory* exclusionary principle.[34] Apparently only Delaware and Michigan have elected to follow this rule,[35] and Delaware, at least, has done so only to a limited extent.[36] Neither state adopted the rule because it felt that the Federal Constitution required it.[37]

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33. *See e.g.*, CAL. PEN. CODE §§ 825, 849 ("without unnecessary delay, and, in any event, within two days after . . . arrest. . . ."); ILL. ANN. STAT. ch. 38, § 109-1 (Smith-Hurd 1964); MICH. STAT. ANN. § 28.872(1) (Supp. 1965) (deals only with an arrest made without a warrant. There appears to be no corresponding provision for arrests made pursuant to a warrant); N.Y. CODE CRIM. PROC. §§ 158, 165; PA. R. CRIM. P. 116(a) (Supp. 1964). *See generally* the excellent compilation of state prompt production statutes in Appendix IV of the American Law Institute, Tentative Draft No. 1, *A Model Code of Pre-Arraignment Procedure* (1966). *See also* McNabb v. United States, 318 U.S. 332, 342-43 n.7 (1943).

34. *See, e.g.*, State v. Jordan, 83 Ariz. 248, 320 P.2d 446 (1958); People v. Hilliard, 221 Cal. App. 2d 719, 34 Cal. Rptr. 809 (1963); People v. Freeland, 218 Cal. App. 2d 199, 32 Cal. Rptr. 132 (1963) (dictum); People v. Gauthier, 205 Cal. App. 2d 419, 22 Cal. Rptr. 888 (1962); State v. Traub, 151 Conn. 246, 196 A.2d 755 (1963), *cert. denied*, 377 U.S. 960 (1964); People v. Novak, 33 Ill. 2d 343, 211 N.E.2d 235 (1965), *cert. denied*, 384 U.S. 1016 (1966); People v. Kees, 32 Ill. 2d 299, 205 N.E.2d 729 (1965); People v. Reader, 26 Ill. 2d 210, 186 N.E.2d 298 (1962); Pearman v. State, 233 Ind. 111, 117 N.E.2d 362 (1954); State v. Dobney, 199 Kan. 449, 429 P.2d 928 (1967); Commonwealth v. Chase, 350 Mass. 738, 217 N.E.2d 195 (1966); State v. White, 146 Mont. 226, 405 P.2d 761 (1965), *cert. denied*, 384 U.S. 1023 (1966); State v. Nelson, 139 Mont. 180, 362 P.2d 224 (1961); Brown v. Justice's Court, 428 P.2d 376 (Sup. Ct. Nev. 1967); State v. Lavallee, 104 N.H. 443, 189 A.2d 475 (1963); State v. Mihoy, 98 N.H. 38, 93 A.2d 661 (1953); State v. Taylor, 46 N.J. 316, 217 A.2d 1 (1966), *cert. denied*, 385 U.S. 855 (1966); State v. LaPierre, 39 N.J. 156, 188 A.2d 10, *cert. denied*, 374 U.S. 852 (1963); State v. Smith, 32 N.J. 501, 161 A.2d 520 (1960), *cert. denied*, 364 U.S. 936 (1961); People v. Lane, 10 N.Y.2d 347, 179 N.E.2d 339, 223 N.Y.S.2d 197 (1961); People v. Spano, 4 N.Y.S.2d 256, 150 N.E.2d 226, 173 N.Y.S.2d 793 (1958), *rev'd on other grounds*, 360 U.S. 315 (1959); Thacker v. State, 309 P.2d 306 (Okla. Cr. App. 1957); Hendrickson v. State, 229 P.2d 196 (Okla. Cr. App. 1951); State v. Shipley, 232 Ore. 354, 375 P.2d 237 (1962); State v. Nunn, 212 Ore. 546, 321 P.2d 356 (1958); Commonwealth v. Graham, 408 Pa. 155, 182 A.2d 727 (1962) (dictum); Marrufo v. State, 172 Tex. Cr. 398, 357 S.W.2d 761 (1962); Childress v. State, 166 Tex. Cr. 95, 312 S.W.2d 247 (1958); Walker v. State, 162 Tex. Cr. 408, 286 S.W.2d 144 (1955), *cert. denied*, 350 U.S. 931 (1956); Reimers v. State, 31 Wis. 2d 457, 143 N.W.2d 525 (1966), *cert. denied*, 385 U.S. 980 (1966); State *ex rel.* Van Erman v. Burke, 30 Wis. 2d 324, 140 N.W.2d 737 (1966).

35. Delaware: Webster v. State, 213 A.2d 298 (Sup. Ct. Del. 1965); Vorhauser v. State, 212 A.2d 886 (Sup. Ct. Del. 1965). Michigan: People v. Ubbes, 374 Mich. 571, 132 N.W.2d 669 (1965); People v. McCager, 367 Mich. 116, 116 N.W.2d 205 (1962); People v. Hamilton, 359 Mich. 410, 102 N.W.2d 738 (1960) (first case to adopt the *McNabb-Mallory* rule).

36. In Vorhauser v. State, 212 A.2d 886, 892 (Sup. Ct. Del. 1965), it was stated that the *McNabb-Mallory* rule would be applied only if the delay in arraignment exceeded twenty-four hours.

37. *See* Vorhauser v. State, 212 A.2d 886 (Sup. Ct. Del. 1965) and People v. Hamilton, 359 Mich. 410, 102 N.W.2d 738 (1960), the leading cases on this problem in the respective states.

The test applied in states which reject the exclusionary rule is the traditional "voluntariness" test.[38] A few states, while adhering firmly to the voluntariness criterion, concede that the length of the delay between arrest and arraignment may be a factor in considering whether the confession was completely voluntary.[39] It is difficult if not impossible, however, to find any case holding that a particular delay was so unreasonable that it warranted absolute exclusion of a confession. Some jurisdictions are so unwilling to find a delay unreasonable that it is questionable whether a delay is even considered in determining the voluntariness of a confession.[40]

A small minority of states have taken a middle-of-the-road approach.[41] Apparently these states feel that since a statute is present, some effort should be made to see that it is enforced, but they reject the thought of exclusion of the product of every violation. These courts demand that any causal connection between the illegal delay and the incriminating statements be disproven before the confession is admissible.[42] In *State v. Traub*,[43] the Connecticut court said:

38. *See, e.g.*, People v. Gauthier, 205 Cal. App. 2d 419, 22 Cal. Rptr. 888 (1962); People v. Garner, 57 Cal. 2d 135, 18 Cal. Rptr. 40, 367 P.2d 680 (1961); State v. Traub, 151 Conn. 246, 196 A.2d 755 (1963), *cert. denied*, 377 U.S. 960 (1964); People v. Novak, 33 Ill. 2d 343, 211 N.E.2d 235 (1965), *cert. denied*, 384 U.S. 1016 (1966); State v. Nelson, 139 Mont. 180, 362 P.2d 224 (1961); State v. Mihoy, 98 N.H. 38, 93 A.2d 661 (1953); Commonwealth *ex rel.* Fox v. Maroney, 417 Pa. 308, 207 A.2d 810 (1965); Commonwealth *ex rel.* Light v. Maroney, 413 Pa. 254, 196 A.2d 659 (1964); Commonwealth v. Graham, 408 Pa. 155, 182 A.2d 727 (1962).

39. *See, e.g.*, People v. Hilliard, 221 Cal. App. 2d 719, 34 Cal. Rptr. 809 (1963); State v. Traub, 151 Conn. 246, 196 A.2d 755 (1963), *cert. denied*, 377 U.S. 960 (1964); State v. White, 146 Mont. 226, 405 P.2d 761 (1965), *cert. denied*, 384 U.S. 1023 (1966); Brown v. Justice's Court, 428 P.2d 376 (Sup. Ct. Nev. 1967); Commonwealth v. Graham, 408 Pa. 155, 182 A.2d 727 (1962) (dictum); Maruffo v. State, 172 Tex. Cr. 398, 357 S.W.2d 761 (1962); Walker v. State, 162 Tex. Cr. 408, 286 S.W.2d 144 (1955), *cert. denied*, 350 U.S. 931 (1956).

40. Pennsylvania, for example, while hinting that the length of an unreasonable delay is to be considered in determining the voluntariness of a confession (Commonwealth v. Graham, 408 Pa. 155, 182 A.2d 727 (1962)), has also held that a delay of seven days (Commonwealth *ex rel.* Light v. Maroney, 413 Pa. 254, 196 A.2d 659 (1964)), eight days (Commonwealth v. Graham, *supra*), and eight to ten days (Commonwealth *ex rel.* Fox v. Maroney, 417 Pa. 308, 207 A.2d 810 (1965)) were perfectly reasonable.

41. California (*See* People v. Hilliard, 221 Cal. App. 2d 719, 34 Cal. Rptr. 809 (1963)); Connecticut (*See* State v. Traub, 151 Conn. 246, 196 A.2d 755 (1963), *cert. denied*, 377 U.S. 960 (1964)); and Texas (*See* Maruffo v. State, 172 Tex. Cr. 398, 357 S.W.2d 761 (1962); Walker v. State, 162 Tex. Cr. 408, 286 S.W.2d 144 (1955), *cert. denied*, 350 U.S. 931 (1956)), at least, have taken this approach.

42. The state is charged with the burden of proving the absence of any such connection. *See* State v. Traub, 151 Conn. 246, 196 A.2d 755 (1963), *cert. denied*, 377 U.S. 960 (1964).

43. *Id.*

> But even though, from the evidence produced, a confession made during an illegal detention is properly found to have been truly voluntary, nevertheless, if the illegal detention was an operative factor in causing or bringing about the confession, then the confession will be considered the fruit of the illegal detention and will be inadmissible.[44]

It is submitted that these decisions represent a more realistic approach than those which simply ignore the possible effect of an unnecessarily prolonged detention. The hesitancy with which even this causal requirement is utilized is evidence of a widespread dislike for the strict requirements of the *McNabb-Mallory* rule among state courts.

THE RATIONALE FOR THE RULE

The reasoning behind any form of the exclusionary rule is basically twofold. First, the deterrence factor: exclusion of evidence illegally obtained forces law enforcement officials to refrain from illegal practices and to rely instead upon sanctioned methods of investigation and prosecution. Secondly, exclusion assures the public that no person will be convicted on the basis of evidence obtained in violation of his basic rights. Determining whether violation of a 5(a)-type rule warrants application of the exclusionary rule—that is, which basic rights rule 5(a) protects—is more difficult.

The classic reasons for the rule are no longer completely sound. *McNabb* implied that one purpose of a prompt production provision was to ensure that a criminal defendant would be advised of his rights by a committing magistrate, thereby precluding incriminatory statements obtained in violation of the fifth amendment privilege to remain silent.[45] *Miranda*, however, by requiring that detailed warnings be given immediately upon arrest, has rendered this reason invalid. A second reason for prompt arraignment, as stated in *McNabb*, was to prevent "third degree" tactics.[46] Because of the decline in recent years of resort to such tactics and the suspicion with which every confession must be viewed by a court, this reason, too, is of little validity.

Another classical reason for the rule, enunciated in *United States v. Mitchell*, retains much of its merit today. This is the argument that prolonged questioning implies a degree of psychological coercion which may render a confession less than completely voluntary.[47] As *Mitchell* held, it is not the length of the delay itself

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44. 151 Conn. at 248, 196 A.2d at 757.
45. 318 U.S. at 343-44.
46. *Id.* *See also Mallory*, 354 U.S. at 452; *Upshaw*, 335 U.S. at 412; *Mitchell*, 322 U.S. at 69-70.
47. 322 U.S. at 69-70.

which is important; the length of time before the confession is obtained is controlling. Continuation of the delay subsequent to the confession is immaterial, even though at some point thereafter the delay becomes illegal. Although not all cases have followed this reasoning, this fear of a coercive effect is apparently the major reason for 5(a)-type rules today.[48] Of course, these rules also ensure that the disposition of a criminal case will not be unduly delayed prior to arraignment.

The difficulty in the *Mitchell* reasoning is the impossibilty of establishing a fixed time limit beyond which questioning becomes coercive. But this is no reason why a time limit cannot be imposed which is brief enough to guarantee that a defendant will not be "psychologically browbeaten." If additional restrictions were imposed on police, such as requiring that all interrogations be recorded,[49] courts could be presented with tangible proof that a given confession is completely voluntary.

That some attempt to formulate a workable solution to the problem should be made is evidenced by the decisions of courts which have literally followed the *McNabb-Mallory* rule. In *Ricks v. United States*,[50] the District of Columbia Circuit held that a delay of thirty minutes between arrest and arraignment was prohibitive, and excluded an otherwise acceptable confession obtained during this period. In *Jones v. United States*,[51] the same court reached an even more absurd result. There the defendant was advised of his rights and confessed within *two to three minutes* of his arrest. The arresting officer discussed various aspects of the confession with Jones for one and one-half to two hours, reduced the confession to writing, and then immediately arraigned the defendant. There was no evidence that the confession had in any way been coerced. Totally ignoring the reasoning in *Mitchell*, the *Jones* court excluded all incriminating statements.[52]

These cases, although extreme examples, serve to demonstrate that even in federal courts, where literal application of *McNabb-Mallory* would seem to be required, strict application is

48. It is contended that this was behind the *Miranda* Court's reasoning when they stated that its decision was not to overrule the *McNabb-Mallory* line of cases. *See* 384 U.S. at 463 n.32 (the note does not state why *McNabb-Mallory* was still important).

49. *See* American Law Institute, Tentative Draft No. 1, *A Model Code of Pre-Arraignment Procedure* (1966), § 4.09(2) and (3) (hereinafter referred to as A.L.I. Code).

50. 334 F.2d 964 (D.C. Cir. 1964).

51. 342 F.2d 863 (D.C. Cir. 1964).

52. Some District of Columbia Circuit decisions have allowed the *oral* confession to be admitted in similar circumstances, but not the *typed* confession. *See* Coleman v. United States, 317 F.2d 891 (D.C. Cir. 1963); Naples v. United States, 307 F.2d 618 (D.C. Cir. 1962); Jones v. United States, 307 F.2d 397 (D.C. Cir. 1962). It is submitted that this latter approach is even more absurd than excluding all evidence of incriminating statements in such circumstances.

not always wise. Is it not "reasonable" to permit an arresting officer to obtain particulars of a confession and reduce them to writing before arraigning a person? No valid objection can be made to admission of a voluntary confession obtained within a brief period after arrest. A strict and literal application of the exclusionary rule, as in *Ricks* and *Jones*, produces only an undesirable detrimental effect upon proper investigation procedures.

Furthermore, strict application of *McNabb-Mallory* does not further the policy of the rule. Conceding that it is often possible to arraign a person within a few minutes of his arrest and that any delay beyond those few minutes may be termed a technical violation of a 5(a)-type statute, it cannot be said that exclusion of a voluntary confession obtained during this interval will compel police to utilize more "approved" methods of investigation. In the words of Professor Inbau: "Many criminal cases, even when investigated by the best qualified police departments, are capable of solution only by means of an admission from the guilty individual or upon the basis of information obtained from the questioning of other suspects."[53] Even when a confession is not absolutely necessary for a conviction, a prosecutor may go to trial relying almost entirely upon a confession only to have an acquittal result when the confession is excluded because of a delay which both he and the police justifiably felt was entirely reasonable.

On the other hand, by ignoring the *McNabb-Mallory* rule, state decisions have proven that absent the exclusionary rule, there is virtually no method of enforcing prompt production statutes. Internal sanctions upon police violations have historically been few. Even some form of workable punishment would not in any event protect the rights of the immediate defendant. The exclusionary rule, therefore, has evolved through a process of elimination to become the only presently effective means of both checking illegal police activities and protecting the victim of these activities. This does not mean, however, that the exclusionary principle is the only possible answer.

Accepting the contention that some questioning of an accused prior to arraignment may be desirable, or at least is not prohibitive, the problem is to establish a permissible period for such questioning and a punishment factor for violations. The latter factor must not only deter future violations, but must also ensure that the immediate defendant will not be prejudiced by a violation. It is submitted that for merely technical violations which do not prejudice the defendant, a harmless error test could be applied. Although not required in state courts, since an undue delay in arraignment is not violative of a federal constitutional right, the

53. Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442 (1948).

federal standard of harmless error[54] should be applied for this purpose in all jurisdictions. The test would require the prosecution to prove beyond a reasonable doubt that the illegal detention did not in any way produce or cause the incriminating statements before the confession could be admitted into evidence. For a flagrant violation, or one made in bad faith, automatic exclusion would seem to be the only effective solution.

The problem of establishing a maximum permissible period of questioning before arraignment remains. Possible solutions to the problem will be discussed in the next section.

A Possible Solution

The most recent suggestion directed to the problem of in-custody pre-arraignment detention and questioning is found in the American Law Institute's Proposed Model Code of Pre-Arraignment Procedure.[55] Although these proposals represent much detailed analysis of this area, an effort will be made to modify certain provisions in the hope that the end result will be more acceptable to the legislatures.

The Institute has taken the position that the only detention permissible between arrest and arraignment is for questioning of a person arrested without a warrant, and then only about certain specified subjects. Section 4.04(1) of the Model Code provides in part: "If a person is arrested without a warrant, he may be detained for a period of preliminary screening [not to exceed four hours][56] for the purpose of determining whether a complaint should be issued charging him with a crime." A "period of *further* screening" is provided for certain arrests without a warrant:

> If there is reasonable cause to believe that the arrested person has committed, or has conspired or attempted to commit [any of a specified number of "serious" felonies] and that further investigation and custody are necessary in order to determine whether the arrested person should be charged with such a felony, the station officer may . . . order the arrested person to be detained for a period of further screening. The station officer may also make such an order in the case of any other felony, but only if the arrested person is represented by counsel and both the arrested person and his counsel consent.[57]

Depending upon what time of day the arrest is made, this period of further screening may be as long as twenty-two hours.[58] The pur-

54. *See* Chapman v. California, 386 U.S. 18 (1967), *reh. denied*, 386 U.S. 987 (1967). *See also* Gilbert v. California, 388 U.S. 263 (1967); Wade v. United States, 388 U.S. 218 (1967).

55. Tentative Draft No. 1 (1966).

56. A.L.I. Code § 4.04(6).

57. A.L.I. Code § 4.04(6).

58. *Id.* § 4.05(1).

pose of these screening periods purports to be solely to determine whether and with what to charge the arrested person.[59] The Code is quite explicit concerning the investigation permissible during these periods. Investigation is limited to: fingerprinting and photographing the accused; conducting a lineup or other reasonable identification procedures; confronting the arrested person with an alleged accomplice or witness; and confronting him with any evidence or information gained during investigation of the crime.[60] The arrested person may also be asked whether he wishes to make a statement, and to clarify any such statement.[61] These periods are the only provisions in the Code permitting questioning in the absence of counsel, or without the consent of both the accused and his counsel.[62] When the arrest is made with a warrant, however, no interrogation whatsoever may take place prior to arraignment.[63]

It is submitted that this distinction drawn between arrests made pursuant to a warrant and those made in the absence of a warrant is neither desirable nor based on firm reasoning. In explanation of their position, the Institute states: "[T]he draft rejects the premise that an arrest without a warrant can properly be made only when a formal charge of crime is justified. . . ."[64] This view completely ignores decisions which indicate that the standard for an arrest without a warrant is the same as that required to obtain a warrant—probable cause.[65] The fourth amendment to the Constitution specifies that probable cause is necessary to support an arrest warrant. It follows that a lesser standard cannot possibly be accepted for an arrest without a warrant.[66]

Assuming this distinction to be without substance, it does not necessarily follow that questioning prior to arraignment should never be permitted. Rather, it is suggested that the screening pe-

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59. *Id.*

60. *Id.* §§ 5.01, 5.08.

61. A.L.I. Code § 5.08(2).

62. Questioning in the presence of defendant's counsel, or with the consent of both the defendant and his counsel, remains permissible at virtually all stages of the pretrial procedure. *See* §§ 4.04(6), 4.06(1), 5.01(1), 5.08.

It should also be noted that *Miranda* stated that at *no* time after a person is taken into custody may he be interrogated in the absence of counsel, unless the defendant has fully and intelligently waived counsel or counsel's presence at that time. Furthermore, if at any time during any pretrial proceeding, the defendant expresses a desire to stop any further questioning, all interrogation must cease. 384 U.S. at 444-45.

63. A.L.I. Code §§4.06(1), 5.09.

64. *Id.* Note on section 4.04.

65. *See, e.g.*, Beck v. Ohio, 379 U.S. 89 (1964); Wong Sun v. United States, 371 U.S. 471 (1963); Miller v. United States, 357 U.S. 301 (1958).

66. In Beck v. Ohio, 379 U.S. 89 (1964), the Supreme Court gave some indication that upon similar facts, an arrest with a warrant would be more likely to be upheld than would one made without a warrant. Thus, any contention that a lesser standard would be needed to support an arrest without a warrant would seem fallacious.

riods provided by the Code be carried over to all arrests. It is further contended, despite the reporters' explanation to the contrary,[67] that the Code did not contemplate use of the screening periods solely to determine whether and with what to charge the person arrested. One of the activities permitted during these periods is confrontation of the suspect with any evidence or information obtained during investigation of the crime.[68] How this would aid in determining whether to charge the suspect is unknown—unless the suspect utters an incriminating statement when so confronted. The seemingly obvious intent of this confrontation *is* to prompt a statement. There is no reason, however, why this procedure should not be permitted; it is neither coercive nor abusive. On the contrary, it may prove extremely expeditious.

The Code also permits police to ask a suspect whether he wishes to make a statement, and to clarify any such statement.[69] Again, the only way in which this could aid in determining whether to charge a person with a crime is by prompting an incriminating statement. If this is permissible screening of a person arrested without a warrant, there would seem to be no valid reason for precluding similar questioning of a person arrested with a warrant. If the protection required by *Miranda* is afforded all persons arrested, no inherent danger would be involved in such questioning. To further assure that no "involuntary" confession is used against a defendant, the Code requires that a record be kept of all incustodial interrogation.[70] Thus, if the validity of a confession made during this period is questioned at trial or on appeal, the court would have at hand virtually everything necessary to guarantee a just determination of the issue.

The Code provisions concerning the permissible period of questioning between arrest and arraignment are essentially satisfactory. The period of "preliminary screening" is not to exceed four hours.[71] Unless permission for a period of further screening is obtained, all questioning of the accused must cease at this point and no statements obtained thereafter may be used against the defendant[72] unless made in the presence of counsel or after consultation with counsel.[73]

The period of further screening is purportedly to determine whether and with what offense to charge the suspect. Assuming, however, that this is not an entirely valid purpose—since probable cause to arrest the suspect in connection with some specific crime must have existed at the time of the arrest—the reasons for

67. *See* A.L.I. Code, Note on section 5.01, at 42.
68. *Id.* §§ 5.08(2)(a), 5.01(e).
69. A.L.I. Code §§ 5.08(2)(a), (b).
70. *Id.* § 4.09(2), (3).
71. A.L.I. Code § 4.04(6).
72. *Id.* § 9.06(3).
73. A.L.I. Code § 9.04(4). *See also* Note on section 9.06, at 72.

permitting extended questioning should be stated with more particularity. When the suspect is possibly connected with additional offenses, or when accomplices are sought, police should be permitted to question the arrested person for a longer period of time. Also, when the crime with which the suspect is connected involves the public welfare, or the release of the suspect would endanger another person, prolonged questioning would be desirable. Absent such limitations upon the granting of a period of further screening, abuse of the privilege is invited.

Two additional modifications of these provisions are suggested. The Code provides that even volunteered statements made after the screening periods must be excluded.[74] This proscription is needlessly strict. Undoubtedly this provision is intended to assure that a "volunteered" statement is not in reality the product of illegal interrogation. If the prosecution is required to prove the voluntariness of a post-screening statement as a condition to its admissibility, however, by the harmless error standard previously suggested, there would be no reason for absolute exclusion. Some interrogation must necessarily take place at this time, if for no other reason than to clarify the defendant's expression. The Code itself expresses a desire not to be bound by such minor infractions.[75]

The second suggested modification pertains to waiver of the right to have counsel present during interrogation. With the exception of the provisions concerning screening, the Code does not mention waiver. Since even under *Miranda* a voluntary and intelligent waver is permissible, it would seem advisable to authorize waiver in the Code. Proof of the waiver's authenticity would of course be mandatory.

Conclusion

That there is a definite need for a modified application of the exclusionary rule to voluntary incriminating statements made during a period of illegal detention is amply demonstrated by the state and federal decisions following *McNabb*. Literal application of the rule has produced harsh and absurd results. Courts which have ignored the *McNabb-Mallory* rule, on the other hand, render the rule completely ineffective as a deterrent of illegal official conduct.

Hopefully the provisions of the Model Code with the suggested modifications would establish a workable solution to the problem.

74. A.L.I. Code, Note on section 9.04, at 68.

75. The Commentary to Article 9, at 208-09, states: "It would be patently undesirable to provide in the Code that a violation by an officer means that all statements thereafter made must be excluded from evidence. The violations should be curable if coercive effects are dissipated, so that a statement voluntarily made thereafter becomes usable in evidence." It is submitted that the very act of a defendant *volunteering* information would be sufficient to cure any technical illegality present in questioning at this time.

Relatively fixed time periods for questioning before arraignment are supplied. A requirement that the defendant be arraigned as quickly as possible following the screening periods would lend itself readily to proof or disproof of compliance. Noncompliance would raise a presumption that any delay longer than that necessary to physically produce a person before a magistrate is per se illegal.

To further assure the voluntariness of confessions obtained during a pre-arraignment delay, the prosecution would be required to prove the absence of a causal connection between the delay for screening purposes and the incriminating statements. Strict compliance with the Code would create a strong presumption of voluntariness and a harmless error standard would be available to mitigate the effect of technical infractions.

It is suggested that the legislatures give serious attention to the modified provisions of the Model Code. The *McNabb-Mallory* rule of exclusion could then achieve its proper status as a final check on flagrant violations of prompt arraignment statutes and rules.

JEFFREY C. MUNNELL