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The Ill-Advised State Court Revival of the McNabb-Mallory Rule

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THE ILL-ADVISED STATE COURT REVIVAL OF THE *McNABB-MALLORY* RULE*

I. INTRODUCTION

The *McNabb-Mallory* rule once was described as a grenade which fizzled.[1] Until a few years ago, this seemed an appropriate epitaph for the discredited Supreme Court doctrine requiring exclusion of confessions obtained by federal officers after an "unnecessary" delay in taking an arrested person before a committing magistrate, regardless of the confession's voluntariness.[2] Confusion[3] and trepidation[4] characterized

* Much of the research for this comment was done under the guidance of Fred E. Inbau, John Henry Wigmore Professor of Law Emeritus at Northwestern University School of Law, for the forthcoming third edition of F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS. He graciously consented to its use here, for which the author is grateful. Thanks also to Professor James B. Haddad, also of Northwestern University, for his helpful comments.

1 Kamisar, *Fred E. Inbau: "The Importance of Being Guilty,"* 68 J. CRIM. L. & C. 182, 184 (1977).

2 The rule is named for two Supreme Court cases most commonly cited as delineating it. In McNabb v. United States, 318 U.S. 332 (1943), the Court excluded confessions obtained from several defendants after a prearraignment detention apparently lasting several days marked by periods of prolonged questioning on the ground that this procedure violated the predecessor statute to Rule 5(a) of the Federal Rules of Criminal Procedure. That statute directed that arrestees be brought before a committing magistrate without unnecessary delay. In a controversial opinion, the Court held that convictions based on evidence obtained through "such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of the law." *Id.* at 345.

In Mallory v. United States, 354 U.S. 449 (1957), the Court attempted to clarify the question of what constituted an unnecessary delay under Rule 5(a). Police arrested and detained Andrew Mallory for approximately eight hours before attempting to locate a committing magistrate. The Court reversed lower court rulings of admissibility, holding that, while time may be taken to "book" a suspect, *id.* at 454, a delay for the sole purpose of interrogation where a committing magistrate is readily accessible constituted "willful disobedience of the law." *Id.* at 453.

The confusion and controversy surrounding federal *McNabb-Mallory* cases have been well documented elsewhere and are not the main concern of this comment. Among the most comprehensive discussions of the problems and developments surrounding the *McNabb*-related cases are Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale & Rescue*, 47 GEO. L.J. 1 (1958), and Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442 (1948). *See also* Note, 56 HARV. L. REV. 1008 (1943); Note, *Supreme Court Interpretation of Admissibility of Criminal Confessions*, 40 ILL. L. REV. 273 (1945); Comment, *Admissibility in*

the framing of the principle. Few states accepted it.[5] Of those that did, most diluted its effect in application.[6] At the federal level, Congress repudiated the rule in 1968.[7]

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the Federal Courts of Confessions Obtained Prior to a Preliminary Hearing, 22 TEX. L. REV. 473 (1944); Comment, *Prearraignment Interrogation and the McNabb-Mallory Miasma: A Proposed Amendment to the Federal Rules of Criminal Procedure*, 68 YALE L.J. 1003 (1959).

For related cases applying *McNabb*, *see* Mitchell v. United States, 322 U.S. 65 (1944), and Upshaw v. United States, 335 U.S. 410 (1948), *noted*, 29 B.U.L. REV. 250 (1948); 97 U. PA. L. REV. 738 (1949).

[3] The confusion was twofold. First, contrary to the assumptions of the Supreme Court in *McNabb*, the defendants had been promptly arraigned and a conviction upon retrial was upheld in McNabb v. United States, 142 F.2d 904 (6th Cir. 1944). Secondly, the statutes upon which the *McNabb* Court relied grew out of policy considerations unrelated to those that the Court attached to it. *See* Inbau, *supra* note 2, at 454-59.

[4] Although some language in the *McNabb* opinion resembles the analysis in previous constitutional cases, the Court expressly declined to give the rule full standing as a constitutional requirement. 318 U.S. at 340-45.

[5] Prior to 1972, only Michigan, Wisconsin, and Delaware professed to follow versions of *McNabb*. *See* text accompanying notes 50-99 *infra*.

[6] Michigan and Wisconsin required the showing of a causal link between a confession and the delay before granting a motion to suppress. *See* text accompanying notes 50-89 *infra*. One court has termed the causation requirement a "mere reformulation of the voluntariness test." Johnson v. State, 282 Md. 314, 327, 384 A.2d 709, 716 (1978). *See also* Note, *Illegal Detention and the Admissibility of Confessions*, 53 YALE L.J. 758, 764-65 (1944).

[7] The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3501, was a reaction to Supreme Court rulings in cases such as *McNabb* and Miranda v. Arizona, 384 U.S. 436 (1966), which significantly raised the procedural and constitutional hurdles a prosecutor faces in introducing confessions into evidence at trial. The Act reads:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
>
> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> The presence or absence of any of the above mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of the voluntariness of the confession.
>
> (c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in to custody of any law enforcement officer or law enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to

In the 1970s, state courts renewed discussion of the rule. Since 1972, three states have embraced new versions of *McNabb-Mallory*, two of them since 1977.[8] Developments in other states indicate that more support is imminent.[9] An examination of federal and state experience with the rule reveals that, in light of the constitutional protections currently afforded arrestees, *McNabb-Mallory* is an unnecessary evil.[10]

II. BACKGROUND: *MCNABB-MALLORY* IN THE FEDERAL COURTS

The federal experience with *McNabb-Mallory* provides a necessary background for discussion of current state attitudes. In the 1943 case of *McNabb v. United States*[11] and subsequent, related cases,[12] the Supreme Court declared that a confession obtained by federal officials during a prearraignment delay[13] in violation of Rule 5(a) of the Federal Rules of Criminal Procedure and its predecessor statute[14] was excludible from

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be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided; That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(Section (d) omitted).

For a discussion of congressional reaction to *McNabb* and of abortive pre-1968 attempts to legislate regarding it, see Hogan & Snee, *supra* note 2, at 33-46.

8 Pennsylvania initially embraced the *McNabb* principle in 1972. Subsequent applications and modifications resulted in a strict per se rule that excluded all statements obtained from suspects held for a period of six hours prior to arraignment. *See* text accompanying notes 114-25 *infra*. Montana and Maryland adopted versions of the rule in 1977 and 1978, respectively. *See* text accompanying notes 126-32 & 100-13 *infra*.

9 *See* text accompanying notes 133-44 *infra*.

10 *See* text accompanying notes 145-216 *infra*.

11 318 U.S. 382.

12 *See* note 2 *supra*.

13 For the purposes of this comment, "prearraignment delay" will refer to the time elapsing between arrest and the initial appearance of an arrested individual before a committing official. Other labels for such an appearance used in various jurisdictions include "presentment," "preliminary hearing," and "preliminary examination." In the federal context, the term should not be confused with the "arraignment" procedure mandated by Rule 10 of the Federal Rules of Criminal Procedure. *See* Goldsmith v. United States, 277 F.2d 335, 338 n.2-a (D.C. Cir. 1960).

14 Rule 5(a) and the rest of the Federal Rules of Criminal Procedure actually were not adopted until the year following *McNabb*. In *Mallory*, however, the Court characterized Rule 5(a) as a "compendious restatement, *without substantive change*, of several prior statutory provisions" upon which it had relied in *McNabb*. 354 U.S. at 452 (emphasis added). The Court probably included this statement to quell controversy arising over the effect of the adoption of Rule 5(a) when, soon after *McNabb*, the Advisory Committee to the Supreme Court on Criminal Rules dropped proposed Rule 5(b) from its Final Draft. Proposed Rule 5(b) read: "No statement made by a defendant in response to interrogation by an officer or agent of the government shall be inadmissible in evidence against him if the interrogation occurs while the defendant is held in custody in violation of this rule." The statement in *Mallory* thus coun-

evidence at trial, regardless of the confession's voluntariness.[15] Rule 5(a) requires that an arrested individual be brought before the nearest available committing magistrate without unnecessary delay.[16] Under what will hereinafter be called the pure federal rule, the nature and purpose of the delay, rather than its effect on the defendant, was determinative of exclusion.[17]

In *McNabb* the Court invoked the exclusionary rule to help enforce compliance with (or at least discourage disregard for) Rule 5(a)'s predecessor. Justice Frankfurter noted that such legislation "requiring that the police must with reasonable promptness show legal cause for detaining arrested persons . . . . outlaws easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection."[18]

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tered the implication that, by approving the Rules without 5(b), the Supreme Court had backed away from its *McNabb* holding.

[15] Before *McNabb*, delay had little direct effect on the admissibility of a confession obtained during the prearraignment period. Pre-*McNabb* confessions needed only to pass constitutional muster as embodied in the due process test of voluntariness. *See* text accompanying notes 140-47 *infra*. Under this analysis, the courts examined the "totality of the circumstances" in which the confession was obtained in order to ascertain whether it was "coerced" or the product of an "overborne will." *Id. See also* Fikes v. Alabama, 352 U.S. 191 (1957), and Watts v. Indiana, 338 U.S. 49, 53 (1949). The suspect's age, education, mental or physical condition, and previous experience with the criminal justice system are examples of pertinent circumstances. Fikes v. Alabama, 352 U.S. 191. Police conduct also weighs heavily in the analysis. Torture, deprivation of food or sleep, isolation, and promises of leniency, each might render a resulting confession involuntary and therefore inadmissible. Brown v. Mississippi, 297 U.S. 278 (1936). Usually courts cited the presence of several factors in combination as constituting an improper totality, but a single, extreme circumstance, such as beatings or prolonged, incessant questioning sessions, might alone suffice. *Id.*

Prior to *McNabb*, prolonged prearraignment delay was another circumstance to weigh, carrying no more weight than other factors. For this reason, *McNabb* elicited surprise and protest from law enforcement circles. *See* Inbau, *supra* note 2. *See also* Hendrickson v. State, 93 Okla. Crim. App. 379, 398-400, 229 P.2d 196, 205-07 (1951).

[16] At the time of *Mallory*, Rule 5(a) read:

> An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a magistrate or other officer, a complaint shall be filed forthwith.

The wording of this rule has since changed, but its fundamental meaning has not. *See* 18 U.S.C. Rule 5(a) (1975).

The function of Rule 5(a) is twofold. First, it is cautionary. During the arrestee's appearance, the magistrate apprises him, *inter alia*, of the charge against him and of his rights to silence and counsel. Second, it is preventive, as it expresses a policy disfavoring lengthy prearraignment detention prior to neutral judicial examination of the grounds for holding the suspect. Implicitly, this minimizes the opportunity for police misconduct toward the suspect.

[17] Upshaw v. United States, 335 U.S. at 413. The D.C. Circuit Court of Appeals applied the rule strictly. *See* Killough v. United States, 315 F.2d 241 (D.C. Cir. 1962). Other federal courts, however, were reluctant to give full force to the rule. *See, e.g.*, United States v. Haupt, 136 F.2d 661 (7th Cir. 1943).

[18] 318 U.S. at 344.

Allowing a conviction based on evidence obtained with "flagrant disregard of the procedure which Congress has commanded . . . [would make] the courts themselves accomplices to willful disobedience of the law."[19] The Court declined to incorporate the prompt arraignment rule into a fifth and fourteenth amendment due process requirement binding on the states as it subsequently did in other situations where it deemed application of the exclusionary rule to be necessary.[20] Instead the Court promulgated the *McNabb-Mallory* rule under its authority to supervise procedure and evidence in the federal courts.[21] The states, nearly all of which have statutes similar to Rule 5(a),[22] were invited but not required to introduce such a rule in their criminal proceedings. State courts overwhelmingly rejected the Supreme Court's approach.[23]

The lower federal courts struggled for years, issuing contradictory opinions about the proper application of *McNabb-Mallory*.[24] Some courts refused to believe that the Supreme Court had done any more than restate the voluntariness test for confession admissibility.[25] Others enforced the rule with enthusiasm, finding delays of as little as five minutes to be unnecessary.[26] Such decisions incited the Congress and the public, who perceived the exclusion of reliable, voluntary confessions to be irrationally solicitous of criminals at the expense of society.[27]

After several unsuccessful attempts to legislate against *McNabb-Mal-*

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19 *Id.* at 354.

20 *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (evidence obtained in violation of due process held inadmissible in state criminal trials).

21 The basis for this power is unclear. *McNabb* marked the first time the Court made extensive use of it. *See generally* Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L.J. 1050, 1051-56 (1965).

22 *See* notes 33-34 *infra*.

23 In State v. Gardiner, 119 Utah 579, 588-89, 230 P.2d 559, 564 (1951), the court rejected *McNabb-Mallory*, reasoning:

> Rules of evidence should aid the court in correctly determining the facts in the case . . . . Excluding a confession because made while the maker was in custody and not promptly taken before a magistrate would greatly hinder rather than aid the court in correctly determining the facts, for there is nothing about being in custody in the absence of coercion which would show any reason or motive for fabricating a confession.

See also notes 36-41 & accompanying text *infra*.

24 *See* notes 201-02 *infra*.

25 *See, e.g.*, Ruhl v. United States, 148 F.2d 173, 175 (10th Cir. 1945). *See also* note 201 *infra*.

26 Alston v. United States, 348 F.2d 72 (D.C. Cir. 1965) (five-minute delay violated *McNabb-Mallory*). In Greenwell v. United States, the court wrote: "If the police detain an accused 'until he ha[s] confessed,' and only then, 'when any judicial caution ha[s] lost its purpose, . . . arraign him,' . . . the confession is inadmissible no matter how much, *or how little*, time was required to obtain it." 336 F.2d 962, 966 (D.C. Cir. 1964) (quoting Mallory v. United States, 354 U.S. at 455, and Muschette v. United States, 322 F.2d 989, 991 (D.C. Cir. 1963), *rev'd on other grounds*, 378 U.S. 569 (1964)) (emphasis added).

27 *See generally* Note, *Title II of the Omnibus Crime Bill: A Study of the Interaction of Law and Politics*, 48 NEB. L. REV. 193 (1968). *See* text accompanying notes 206-12 *infra*.

lory, Congress enacted the Omnibus Crime Control and Safe Streets Act in 1968.[28] The act codified the traditional due process-voluntariness test as the primary determinant of confession admissibility in the federal courts. Part (c) of the act mandates that a confession made by a suspect in federal custody:

> shall not be inadmissible solely because of a delay in bringing such a person before a magistrate . . . if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention . . . .[29]

This provision "more or less" repealed the *McNabb-Mallory* rule in the federal courts.[30] Congress could do this because the Supreme Court had declined to base the decision on constitutional grounds.[31] Although some confusion about the impact of this act remains, *McNabb-Mallory* is essentially dead in the federal courts.

III. THE *McNABB-MALLORY* RULE IN THE STATE COURTS

Nearly every state has enacted a statute similar to Rule 5(a) restricting prearraignment detention.[32] The precise terms vary by jurisdiction, although the term "without unnecessary delay" is the most common.[33] Some statutes place a specific time limit on such delay.[34]

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28 *See* note 7 *supra*.

29 *Id.*

30 Kamisar, *supra* note 1, at 183. The federal courts inconsistently interpret the effect and intended interaction of various provisions of the statute. For example, a finding of involuntariness, based solely on a delay of over six hours is arguably permissible under the statute despite the language prohibiting the exclusion of a confession solely on the grounds of delay. United States v. Halbert, 436 F.2d 1226, 1231-37 (9th Cir. 1970). *See also* United States v. Keeble, 459 F.2d 757 (8th Cir. 1972). On the other hand, delays of over six hours have been allowed under the statute as "reasonable" for reasons completely unrelated to problems of transportation. *See* United States v. Marrero, 450 F.2d 373 (2d Cir. 1971); Comment, *Admissibility of Confessions Obtained Between Arrest and Arraignment: Federal and Pennsylvania Approaches*, 79 DICK. L. REV. 309, 330-41 (1975). Generally, however, voluntariness is once again the controlling test for confession admissibility in the federal courts.

31 For a discussion of congressional authority to supersede the Supreme Court's evidentiary powers, *see generally* S. REP. No. 1097, 90th Cong., 2d Sess. 53-63, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2139-50.

32 *See* statutes cited in notes 33-34 *infra*.

33 The following statutes or rules specify that an arrestee be brought before a committing magistrate or similar official "without unnecessary delay," "with reasonable promptness," or similar terms: ARK. R. CRIM. P. 8.1 (*but see* corresponding statute ARK. STAT. ANN. § 43-601 (1977) ("forthwith")); CAL. PENAL CODE § 849(a) (warrantless arrests), § 825 (West 1970) (two day limit on prearraignment detention); COLO. R. CRIM. P. 5(a)(1); CONN. GEN. STAT. ANN. § 54-1(f) (West Supp. 1979) (warrantless); IDAHO CODE § 19-515 (1979); IOWA CODE ANN. § 804.21-22 (West 1979); KAN. CRIM. CODE & CODE OF CRIM. PROC. § 22-2901(1)-(2) (Vernon 1970); ME. R. CRIM. P. 5(a); MICH. STAT. ANN. § 28.919 (1978); MISS. CODE ANN. § 99-3-17 (1972); MONT. CODE ANN. § 46-7-101(1), (2) (1978); NEV. REV. STAT. § 171.178(i),

Warrantless, reasonable grounds arrests and arrests made pursuant to warrants are often dealt with in separate statutes, although most do not differ in the amount of delay allowed.[35]

All but six states thus far have rejected *McNabb-Mallory* as an enforcement tool for their own delay statutes.[36] A typical reaction is that in *Hendrickson v. State*,[37] where the Oklahoma Court of Criminal Appeals rejected the rule, citing widespread academic disapproval, legislative attempts to overturn it, the doubtful wisdom of extraconstitutional exclusion, and the availability of alternate relief in the form of a criminal or civil suit against the offending officer.[38] The court castigated the Supreme Court's decisions in *McNabb*-related cases:

> The public is to suffer by reason of judicial legislation that . . . is so radi-

(ii) (1977); NEW MEX. STAT. ANN. § 31-1-5(b) (1978); N.Y. CRIM. PROC. LAW § 120.90 (warrant), § 140.20 (warrantless) (1979); N.D. R. CRIM. P. 5(a); OHIO R. CRIM. P. 4(E)(1), (2); OKLA. STAT. ANN. tit. 22, § 181 (West 1969); PA. R. CRIM. P. 122 (warrant), 130 (warrantless); TEX. CRIM. PRO. CODE ANN. art. 15.17 (Vernon 1977); UTAH CODE ANN. § 77-12-14 (warrantless), § 77-13-17 (warrant) (1978); VT. R. CRIM. P. 3(b) (warrantless,), 4(F)(2)(c) (warrant); W. VA. CODE ANN. § 62-1-5 (1966); WIS. STAT. ANN. § 970.01(1) (West 1971); WYO. R. CRIM. APP. 5(a).

ALA. CODE § 15-10-7(e) (1975) specifies that an arrestee is to be taken before a committing official "forthwith" by a police officer after an initial arrest has been made by a private citizen.

VA. CODE § 19.2-82 (1975) mandates that an arrestee be taken "forthwith" before a magistrate in warrantless arrest situations, but where the arrest is on a warrant, § 19.2-80 (Supp. 1979) requires a hearing "without unnecessary delay."

[34] The following statutes specify a particular time limit on prearraignment delay: ALASKA STAT. § 12.25.150(a) (1972) (24 hours); ARIZ. R. CRIM. P. 4.1(a) (24 hours); DEL. CODE ANN. tit. 11, § 1909 (1979) (24 hours); FLA. R. CRIM. P. 3130 (24 hours); GA. CODE ANN. § 27-212 (1972) (48 hours on warrantless arrests), § 27-210 (1972) ("without unnecessary delay" on arrests upon warrants); HAWAII REV. STAT. § 803-9(5) (1976) (48 hours); IND. CODE ANN. § 18-1-11-8 (Burns Supp. 1980) (24 hours); KY. R. CRIM. P. 3.02(2) (Supp. 1978) (12 hours for warrantless arrests except in "exceptional" cases, then "without unnecessary delay"); LA. CODE CRIM. PRO. ANN. art 229 (West 1967) (requires notification of District Attorney within 48 hours), art. 230.1 (Supp. 1980) (limits detention to 72 hours prior to arraignment); MD. DIST. R. 723(a) (Supp. 1980) (requires arraignment within 24 hours of arrest); MINN. R. CRIM. P. 4.01;3.02(2)(3) (upon warrant, 36 hours), 4.02(5)(1) (warrantless, 36 hours); MO. R. CRIM. P. 21.14 (requires discharge after 20 hours in warrantless arrests), 21.11 (requires appearance before a magistrate as "soon as practicable"); NEB. REV. STAT. § 29-410 (1974) (allows one night or longer "as the occasion may require so as to answer the purposes of the arrest").

OR. REV. STAT. § 135.010 (1973) limits prearraignment delay to 36 hours, or 96 hours for "good cause shown" or upon the defendant's request. The statute has been read not to imply the remedy of exclusion if violated. States v. Jenks, 43 Or. App. 221, 602 P.2d 681 (1979).

[35] *See* notes 33-34 *supra*.

[36] A comprehensive list of state decisions rejecting *McNabb-Mallory* may be found in F. INBAU & J. REID, CRIMINAL INTERROGATION & CONFESSIONS 165 n.46 (2d ed. 1967) (1974 reprinting). Michigan, Wisconsin, Delaware, Maryland, Pennsylvania, and Montana have each adopted a version of *McNabb-Mallory*.

[37] 93 Okla. Crim. App. 379, 229 P.2d 196 (1951).

[38] *Id.* at 412, 229 P.2d at 211.

> cal a departure from the past as to seem inherently wrong where not initiated by the people through the legislative branch of our government. The sovereign is punished, which is an anomalous situation in a Democracy . . . . The Accused is protected with abstract ethical reasoning eminently satisfactory to the authors, and with high ethical purpose, but which the subject has never practiced and ordinarily would hold in contempt. The theoretical is dissolved in the searing light of experience.[39]

Similar sentiments were expressed in case after case rejecting *McNabb-Mallory*. In 1944, the Oregon Supreme Court derided the rule as placing unnecessary obstacles in the path of law enforcement: "It must be remembered that at least one of the purposes of a criminal trial is to bring murderers to justice."[40] After these original rejections, most of the states to reconsider the rule reaffirmed their repugnance for it.[41]

Although the federal *McNabb-Mallory* rule was introduced in 1943, it was not until 1961 that Michigan became the first state to adopt the same approach.[42] In 1966, Wisconsin also promulgated a version of the rule.[43] Both of these states were irresolute in applying the rule. Delaware developed a hybrid rule around its delay statute in 1965.[44] The movement stopped there. The faltering experimental versions in Michigan and Wisconsin coupled with congressional abolition of the federal rule convinced observers that the issue had been laid to rest.[45]

In 1972, however, the Pennsylvania Supreme Court set forth its own version of the rule.[46] Its original form resembled the Michigan and Wisconsin rules, but Pennsylvania modified and strengthened its rule. By 1977,[47] Pennsylvania adopted a strict per se rule banning all confessions obtained during or after a six-hour delay in presentment before a magistrate. Within a year, Maryland[48] and Montana[49] also adopted the *McNabb-Mallory* principle. State versions of the *McNabb-Mallory* rule

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39 *Id.* at 411-12, 229 P.2d at 211-12.

40 State v. Folkes, 174 Or. 568, 589, 150 P.2d 17, 25, *cert. denied*, 323 U.S. 779 (1944).

41 *See, e.g.*, Wilson v. State, 258 Ark. 110, 522 S.W.2d 413, *cert. denied*, 423 U.S. 1017 (1975); People v. Lucas, 88 Ill. App. 3d 942, 948-49, 410 N.E.2d 1040, 1044-45 (1980); State v. Jenks, 43 Or. App. 221, 602 P.2d 681 (1979).

42 *See* text accompanying notes 50-72 *infra*.

43 *See* text accompanying notes 73-89 *infra*.

44 *See* text accompanying notes 90-99 *infra*.

45 "Although the . . . Congressional abolition of the *McNabb-Mallory* rule affected only federal cases, it will probably dissuade the state courts or legislatures from any further experimentation with it." F. INBAU & J. REID, *supra* note 36, at 168.

It should be noted however, that while the original rule, at least as applied in the District of Columbia Circuit, contemplated almost no investigative delay, current state versions of the rule recognize the necessity for at least some prearraignment interrogation. *See* note 26 *supra*.

46 *See* notes 114-25 *infra*.

47 *See* notes 120-25 *infra*.

48 *See* notes 100-13 *infra*.

49 *See* notes 126-32 *infra*.

have fallen into two general types: the causation form and the per se form.

A. THE CAUSATION RULE: MICHIGAN AND WISCONSIN

The causation form of the *McNabb-Mallory* rule, as illustrated by the approaches of Michigan and Wisconsin, is a schizophrenic rule. On the one hand, an exclusionary rule based solely on delay is adopted, while on the other exclusion applies only when the defendant proves a causal connection between the delay and the challenged confession. This approach contains the seeds of its own dissolution and results from judicial reluctance to apply the pure federal rule to voluntary confessions. Michigan's experience with *McNabb-Mallory* is illustrative.

Michigan: The Hamilton Rule

At least some justices on the Michigan Supreme Court thought they were adopting the pure federal rule in the unanimous decision in *People v. Hamilton*.[50] In that case a nineteen-year-old murder defendant who could not speak English was held *incommunicado* for three days prior to arraignment, during which police periodically interrogated him and repeatedly denied his attorney access to him. The court found this delay violated Michigan's delay statute, which required an arrestee to be brought before a judicial officer "without unnecessary delay."[51] Although the confession probably would have been suppressed under the voluntariness test, the court instead cited the *McNabb-Mallory* cases and "inosculated" that reasoning to Michigan's statute.[52] However, the following pivotal phrase left doubts as to how the court perceived the *McNabb-Mallory* rule: "[A]n unnecessary and so unlawful delay of compliance with . . . [Michigan's delay statute] . . . when done for prolonged interrogatory purposes and without proven justification of the delay, *renders involuntary* and so inadmissible whatever confessional admissions the detained person may have made while so unlawfully de-

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[50] 359 Mich. 410, 102 N.W.2d 738 (1960).

[51] *Id.* at 411, 102 N.W.2d at 739.

[52] *Id.* at 415-16, 102 N.W.2d at 741-42.

Understandably, courts likely will select compelling cases to announce adoption of *McNabb-Mallory*. *See* Comment, *Pennsylvania Supreme Court Review: Developments in Pennsylvania Criminal Procedure: Confessions*, 47 TEMPLE L.Q. 49, 54-55 (1973). This can create confusion where later courts, reluctant to apply the rule in the absence of compelling (i.e., coercive) circumstances, distinguish cases on that basis. Thus the rule becomes one aimed at coercion rather than delay, which is the evil the statute aims to eliminate. *See, e.g.*, People v. Harper, 365 Mich. 494, 503, 113 N.W.2d 808, 812 (1962), where the court admitted a confession obtained after 12½ hours of interrogative prearraignment delay on the grounds that "none of the circumstances which so strongly compelled our finding Hamilton's confession was involuntary is present in the case at bar." *See also* Ruhl v. United States, 148 F.2d 173, 175 (10th Cir. 1945), for an example of the same reaction in the federal context.

tained."[53] This language seems to promulgate an alternate test for involuntariness, excluding confessions as involuntary where there has been a prolonged delay for the purpose of interrogation. That the court confused the *McNabb-Mallory* rule with the due process-voluntariness requirement is further evidenced by the court's later statement that adoption of the rule would "mean that constitutional due process means the same thing in Michigan, to an arrested person, whether he is charged or to be charged with violation of State or Federal law."[54] This remark exacerbated the confusion by invoking the state constitution as part of the basis for statutory exclusion. Furthermore, the court's use of terms like "renders involuntary" and "sweating"[55] a confession left the possible impression that qualifying confessions were excluded where events during the delay induced the confession, and that insufficient evidence of causation would defeat an attempt at exclusion.

An alternate interpretation of *Hamilton* requires only that the delay be prolonged and that the delay's purpose, rather than its effect, is to induce a confession. A confession occurring during such a delay would be excluded regardless of whether it actually was induced: in essence, the pure federal rule. This reading would make the phrase "renders involuntary" anomalous unless it is read to connote a legal conclusion unaffected by any rebutting evidence of voluntariness. This reading finds support in the court's professed intent to bring Michigan into line with the Supreme Court and the federal rule.

In any event, this ambiguity probably produced the unanimity of decision in the case; certainly later attempts to clarify it caused a sharp division of the court. In the 1962 case of *People v. McCager*, the court reaffirmed its adoption of the federal *McNabb-Mallory* rule in *Hamilton*.[56]

The first real split in the court over *Hamilton's* effect on voluntary confessions occurred in the 1963 case of *People v. Walker*.[57] Police held the defendant for two days prior to his production in court on a habeas corpus writ. The court dismissed the writ. Walker's confession had occurred four days after the dismissal of the writ while he was still in custody. Nine days after his arrest, he was finally taken for a preliminary hearing. By a four-to-four decision, the court upheld the admission of

53 359 Mich. at 417, 102 N.W.2d at 742 (emphasis added).

54 *Id.* at 418, 102 N.W.2d at 743.

55 *Id.* at 416, 102 N.W.2d at 742.

56 367 Mich. 116, 116 N.W.2d 205 (1962). Some doubt probably existed as to whether the court had adopted *McNabb-Mallory* after its decision in *People v. Harper*. *See* note 52 *supra*. In *McCager*, however, the court expressed no doubt about adoption but declined to apply it where the delay took place while the suspect was in judicial custody following the dismissal of a writ of habeas corpus.

57 371 Mich. 599, 124 N.W.2d 761 (1963).

this confession at trial for lack of a majority to reverse.[58] The upholding decision relied on the dismissal of the habeas corpus writ to make Walker's detention "prima facie legal."[59] Justice Souris dissented for the four, writing that the erroneous dismissal of the writ meant that *police* custody had never ceased, and so *Hamilton* applied.[60] He delineated the non-causal interpretation of *Hamilton*, distinguishing it from the voluntariness test:

> [Three] years ago this Court aligned itself with the United States supreme court's exclusionary principle announced in . . . [*McNabb*] by barring the courts of this State from participating in official illegality not limited only to those instances in which official illegality extends to the point of physical or mental brutality or threats thereof. Such extreme misconduct always in this state resulted in exclusion of confessions obtained thereby on the ground that they were involuntary. . . . In . . . [*Hamilton*] this Court extended the bar to all confessions obtained during periods of illegal detention.[61]

This precise issue split the court again in *People v. Ubbes*[62] two years later. By a divided vote, the court affirmed a remand of the case for a determination of the voluntariness of the defendant's confession although half the court felt *Hamilton* rendered it inadmissible as a matter of law. Prosecution witnesses admitted that police spent much of this delay questioning the defendant to obtain a confession. The remanding side opined, "The lapse of 16½ hours *per se* is not conclusive," and characterized the questioning as "bona fide . . . to determine the immediate issue of release or complaint, and complaint for what offense."[63] Justice Souris, again writing in favor of exclusion, repeated the arguments he had made in *Walker*. He noted the prosecution's admission as to the purpose of the delay, and the fact that there was probable cause to charge from the beginning.[64]

Ubbes illustrates the difficult choices courts face in implementing *McNabb-Mallory* when an apparently voluntary confession falls under its exclusionary rubric. In this case, those voting for possible admission characterized a clearly prolonged interrogative delay as "bona fide" and reasonable under the circumstances.[65] One has to suspect that the determinative circumstance was the voluntary character of the confession

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58 *Id.* at 604, 124 N.W.2d at 764.

59 *Id.* at 605, 124 N.W.2d at 764.

60 *Id.* at 617, 124 N.W.2d at 771.

61 *Id.* at 615, 124 N.W.2d at 769.

62 374 Mich. 571, 132 N.W.2d 669 (1965).

63 *Id.* at 576, 132 N.W.2d at 672.

64 *Id.* at 590-91, 132 N.W.2d at 679.

65 Justice Souris noted that such a characterization defied "even judicial credibility." *Id.* at 592, 132 N.W.2d at 679 (Souris, J., dissenting).

and its importance in the conviction. Since *Hamilton*, the Michigan Supreme Court has not once invoked the case to exclude a confession.

In 1968, the court in *People v. Farmer*[66] introduced a restricted formulation of the *Hamilton* rule although it purported to follow precedent. The new statement of the rule focused on a lack of coercive circumstances to determine that the purpose of a seventy-two-hour delay was not improper. The important circumstance was that a physician had examined and questioned the suspect concerning his treatment at the hands of the police soon after confessing; thus the court found that lack of coercion, rather than lack of interrogative purpose, took the confession out from under *Hamilton*.[67] In a questionable use of precedent to support its decision, the court cited the remanding opinion in *Ubbes*, but quoted Justice Souris' *dissenting* characterization of the facts![68] In 1974, the Michigan court eliminated any lingering notion that *Hamilton* operated independently of a delay's effect on the challenged confession, thus providing some protection supplemental to the voluntariness test. In *People v. White*[69] the court, citing *Farmer*, unanimously held that a confession given after a delay of thirty-four hours "was not the product of a police interrogation."[70] The court said that *Hamilton* applied "only where the delay has been used as a tool to extract a statement."[71] This formulation of the rule is so conceptually similar to the voluntariness test that, in effect, Michigan is back where it started.[72] Five years after Michigan, Wisconsin embarked on a similar experiment.

Wisconsin: The Phillips Rule

The Wisconsin experience with delay exclusion resembles Michigan's in that its test for an unreasonable delay, as applied, was indistinguishable from a voluntariness or coercion test. The initial rule was introduced in the 1966 case of *Phillips v. State*.[73] The state supreme court held that the state's delay statutes and its due process clause limited the

66 380 Mich. 198, 156 N.W.2d 504 (1968). By this time Justice Souris no longer sat on the court.

67 *Id.* at 207, 156 N.W.2d at 508. Throughout the opinion, the court described the *Hamilton* test as if it were a voluntariness test. "[T]he test as to whether such a detention renders a confession involuntary is not the reasonableness of the length of time a person is detained but whether the detention has been used to coerce a confession." *Id.* at 205, 156 N.W.2d at 507.

68 *Id.*

69 392 Mich. 404, 221 N.W.2d 357, *cert. denied*, 420 U.S. 912 (1974).

70 *Id.* at 424, 221 N.W.2d at 366. Although two justices dissented on other grounds, they expressly concurred in the delay analysis of the majority. *Id.* at 429, 221 N.W.2d at 374.

71 *Id.* at 424, 221 N.W.2d at 366.

72 In 1978, the Michigan Court of Appeals wrote of *Hamilton*: "The question isn't one of delay, but of whether the statement was voluntary or coerced." People v. Johnson, 85 Mich. App. 247, 253, 271 N.W.2d 177, 179 (1978).

73 29 Wis. 2d 521, 139 N.W.2d 41 (1966).

allowable interrogation of a suspect arrested without a warrant to that which was "for the express purpose of determining whether to release the suspect or . . . to make a formal complaint."[74] The court reasoned that legitimate interrogation of a person arrested upon a warrant was more limited because the warrant "would seem to presuppose sufficient evidence and its purpose is to cause the arrested person to be brought before a magistrate."[75] Detention for a longer period rendered inadmissible any confession obtained during the unreasonable portion.[76]

The Wisconsin Supreme Court has never used *Phillips* to exclude a confession; in *Phillips* itself the confession was admitted under the test promulgated by the court.[77] Despite repeated declarations that the voluntariness of a confession is not the issue under *Phillips*,[78] examination of the factors used to determine the reasonableness of delays in later cases belies the disclaimers. In *State v. Schoffner*,[79] the court said that "[t]he readiness of [the defendant] . . . to give information about a large number of crimes affects the determination of reasonableness of the delay." The kinds of confessions excludible under *Phillips* purportedly are those obtained where police delay in order to "sew up"[80] a conviction or arrest; yet in *Krueger v. State*[81] the court refused to exclude a confession even though police had sufficient evidence to charge the defendant before he confessed some fourteen hours after his arrest. "The question revolves solely on the point whether the delay is inordinate and the detention illegal," declared the court.[82] But again, in later cases, the criteria for inordinate or illegal delay resembled those for voluntariness. For example, in *Wagner v. State*[83] the court reasoned that "the police did not detain Wagner in order to subject him to a strong inquisitorial attack,

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74 *Id.* at 534, 139 N.W.2d at 47.

75 *Id.* This reasoning is curious in that it requires a conclusion that judicial examination of the grounds for detention is less urgent when the court has made no predetention determination of probable cause.

76 *Id.*

77 The court did indicate that a 51-hour prearraignment delay in State v. Burke, 30 Wis. 2d 324, 140 N.W.2d 737 (1966), would probably be held unreasonable, but declined to apply Phillips retroactively to the confession in that case. *Cf.* McAdoo v. State, 65 Wis. 2d 596, 223 N.W.2d 521 (1974), where the court construed circumstances to justify a five-day delay as reasonable.

78 In *Phillips* itself, the court wrote, "The *McNabb-Mallory* rule is basically an exclusionary rule not based upon any constitutional right of the accused or involuntariness of the confession." 29 Wis. 2d at 531, 139 N.W.2d at 45. *See also* State v. Wallace, 59 Wis. 2d 66, 75, 207 N.W.2d 855, 860 (1973); Krueger v. State, 53 Wis. 2d 345, 357, 192 N.W.2d 880, 886 (1972).

79 31 Wis. 2d 412, 434, 143 N.W.2d 458, 468 (1966).

80 Phillips v. State, 29 Wis. 2d at 535, 139 N.W.2d at 47.

81 53 Wis. 2d at 357, 192 N.W.2d at 885-86. *See also* Briggs v. State, 76 Wis. 2d 313, 323-24, 251 N.W.2d 12, 16-17 (1977).

82 53 Wis. 2d at 357, 192 N.W.2d at 885-86.

83 89 Wis. 2d 70, 277 N.W.2d 849 (1979).

. . . therefore the period of [his twenty-seven-hour] detention was not unreasonably long."[84] The length of the delay did not seem to be an important factor in the unreasonableness analysis. Language in other cases indicates that police could "reasonably" detain a prisoner for as long as they felt interrogation might turn up any evidence at all.[85]

Recognizing these basic inconsistencies, the court in *Klonowski v. State* reviewed the *Phillips* line of cases and wrote:

> While these cases indicate that *any* confessions made during an unreasonably long detention are inadmissible, there are cases stating that the purpose of the rule is to prevent an accused from having his resistance weakened by the psychological coercion of being detained and "worked upon" by the police to secure evidence.[86]

Citing the "extraction" test from the Michigan cases on *McNabb-Mallory*,[87] the court concluded that the confession at hand, obtained after a twenty-four-hour delay, was "not subject to the exclusionary rule under *Phillips* for two reasons: First, it was a volunteered statement . . . and second, it was not the result of the defendant's being 'worked upon' by the officers in order to obtain a 'sew up' confession."[88] In effect, the court held that no confession was excludible under *Phillips* unless it was also excludible under the voluntariness test, i.e., the delay or police conduct during the delay must have caused the confession.[89]

In both Michigan and Wisconsin, the introduction of a causal requirement diluted their versions of *McNabb-Mallory* to meaningless dicta. A reading of the cases suggests that the primary corrosive force was judicial reluctance to exclude voluntary confessions. Whether this was based on a concern for public or legislative response, or for effective law enforcement, at base the price was simply too high when it came time to

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84 *Id.* at 80, 277 N.W.2d at 854.

85 *See* State v. Hunt, 53 Wis. 2d 734, 742, 193 N.W.2d 858, 864 (1972), where the court noted that "Postarrest detention should be permitted as long as the purpose is reasonable and the period of detention is not unjustifiably long." The court carefully examined and upheld the reasonableness of separate portions of a two-day delay. One 15-hour segment of interrogation was "reasonable" because, although the police had insufficient evidence to charge the defendant, they might have jogged his memory regarding the identity of other suspects. The more probable purpose of the delay was to "break" the defendant's alibi.

See generally State v. Francisco, 257 Wis. 247, 43 N.W.2d 38 (1950) (pre-*Phillips* discussion of unreasonable delay under the voluntariness test).

86 68 Wis. 2d 604, 610, 229 N.W.2d 637, 640 (1975) (emphasis added).

87 *See* note 71 & accompanying text *supra*.

88 68 Wis. 2d at 611, 229 N.W.2d at 641.

89 In State v. Brown, 50 Wis. 2d 565, 570, 185 N.W.2d 323, 326 (1971), the court said "[I]n *Phillips v. State* . . . an unreasonable detention gave rise to an exclusionary rule . . . on the theory the unreasonableness conclusively caused the accused to react as he did as a matter of law." Thus, in practice, the Wisconsin courts construed "unreasonableness" as "coerciveness." As the cases discussed above show, they did not apply the rule as a conclusive matter of law, but rather as an easily rebutted presumption through a process analytically indistinguishable from the voluntariness test.

reverse the convictions of confessed criminals. Courts considering adoption of this form of *McNabb-Mallory* should note the probability of its erosion. A causation-based rule invites confusion with the voluntariness test. It promotes contradictory appellate decisions. If the Michigan-Wisconsin experience is any guide, adoption results in little, if any, additional protection for an arrestee over the voluntariness test. It is a waste of judicial time.

B. THE PER SE RULE: DELAWARE, PENNSYLVANIA, MARYLAND, AND MONTANA

Any meaningful application of *McNabb-Mallory* must exclude a causation requirement. Exclusion must be based on a violation of the applicable delay statute per se. If the statute provides specific time limits, implementation is easy. But if the standard is "unnecessary" or "unreasonable" delay, administrative problems arise. These terms, with their myriad legal connotations and definitions, present a dilemma to police officers on the street. Naturally the policeman will desire a particular time period within which he may safely question a suspect to obtain a voluntary confession. Such a guide would provide certainty to enhance the interrogative process generally. It also ensures that some voluntary confessions that might have been obtained afterwards will never occur. However, an adopting state must be willing to tolerate this.

Delaware: The Vorhauer and Webster Rules

One place to find a logical cut-off point for permissible delay is the delay statute itself. Because any objective limit will be arbitrary, a court might well look for guidance to the legislative standards set forth in the statute it purports to enforce. The Delaware Supreme Court did this in the 1965 case of *Vorhauer v. State*.[90] Delaware's delay statute mandates that "every person arrested shall be brought before a magistrate without unreasonable delay, and in any event he shall, if possible, be so brought within 24 hours of arrest . . . ."[91] In *Vorhauer*, the court concluded that a confession obtained more than twenty-four hours after arrest was automatically inadmissible, noting that the exclusionary rule is "the most practical and effective means" to enforce the statute.[92] Two months later in *Webster v. State*[93] the court held that confessions obtained before

[90] 59 Del. 35, 212 A.2d 886 (1965). The Delaware law on prearraignment delay prior to *Vorhauer* appears in Wilson v. State, 49 Del. 37, 109 A.2d 381 (1954). *See also* Lasby v. State, 55 Del. 145, 185 A.2d 271 (1962).

[91] DEL. CODE ANN. tit. 11, § 1909 (1974). This statute is essentially unchanged since the *Vorhauer* ruling.

[92] 59 Del. at 47, 212 A.2d at 893.

[93] 59 Del. 54, 213 A.2d 298 (1965).

the twenty-four-hour mark, but after an "unreasonable" delay, were similarly excludible. The court said there were "no clear cut standards of reasonableness" and emphasized that the question was strictly evidentiary, to be decided solely by the trial judge in each case.[94]

The court offered few clues as to where the judge should look in making that determination. However, one clue is that the *Webster* court allowed a confession obtained more than four hours after the arrest, largely on the grounds that the police treated the suspect well during that time. They spent a large part of the delay complying with requests of the accused.[95] *Webster* indicates that police conduct plays an important part in the reasonableness of a pre-twenty-four-hour delay, and that a court will scrutinize such actions for coercive impact.[96] In *Fullman v. State*[97] the court approved a twenty-one-hour delay and admitted the resulting confession where part of the delay was attributable to the defendant's request for a polygraph examination, and where "an atmosphere of cordiality and mutual trust permeated the surroundings."[98] Again the pertinent circumstances were those indicating the presence or absence of undue pressure or mistreatment. Thus the door is open in Delaware for dilution of the rule to the causation form for delays of less than twenty-four hours.[99] As for the automatic twenty-four-hour rule, no qualifying cases have been reported at the appellate level since *Vorhauer*. Either Delaware police have had little difficulty coping with the requirement, or those cases where problems have arisen have not prompted reconsideration of the rule by an appellate court.

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94 *Id.* at 59, 213 A.2d at 301.

95 *Id.* at 60, 213 A.2d at 301.

96 Compare Wilson v. State, 49 Del. 37, 109 A.2d 381, where coercive factors determined the reasonableness of a prearraignment delay under the pre-*Vorhauer* "totality of circumstances" test.

97 389 A.2d 1292 (Del. 1978), *overruled on other grounds*, 400 A.2d 292 (Del. 1979).

98 *Id.* at 1298.

99 Some cases, however, indicate that the Delaware rule may retain its own distinct vitality as more than an echo of the voluntariness test. In Warren v. State, 385 A.2d 137 (Del. 1978), the court declared that a customary eight-hour delay for all drunken driving arrestees was unreasonable although the custom stemmed from a desire to prevent the defendant from being prejudiced by his drunken demeanor in court. Coerciveness was not a factor in the decision. The court perceived the uniform delay to be unreasonable because of its arbitrariness, and required that in each case the arresting officer take the arrestee before a judge as soon as he reasonably deemed the danger of in-court prejudice to be minimal, i.e., when the defendant sobered sufficiently to protect his own interests. The court remanded the case for a determination of the reasonableness of the eight-and-one-half-hour delay in Warren's arraignment to decide the admissibility of statements he made during that time.

See also Priest v. State, 227 A.2d 576 (Del. 1967), where the court volunteered that the admissibility of a confession might have been challenged under *Webster* although it was not argued on the appeal. *But see* Parson v. State, 222 A.2d 326 (Del. 1966), *cert. denied*, 386 U.S. 935 (1967); Weekly v. State, 222 A.2d 781 (Del. 1966), where voluntariness factors were determinative in admitting delayed confessions.

Maryland: The Johnson Rule

Maryland, where prearraignment delay is limited to twenty-four hours by a rule of court,[100] adopted an exclusionary rule identical to Delaware's in 1978. After the most thorough examination of the delay problem made in any recent state decision, the Maryland Court of Appeals ruled in *Johnson v. State*[101] that any confession obtained after the statutory period was inadmissible "irrespective of the reason for the delay." Practices justifying a shorter delay included administrative procedures, determination of whether to issue a charging document, verification of the commission of the crime, procurement of information to avert harm to persons or property, and obtaining nontestimonial information as to the identity or location of other persons involved in the offense.[102] The court rejected the majority approach of the states:

> To say that an unlawful postponement of the initial appearance may be merely a factor in assessing the admissibility of a statement, is to imply that an unnecessary delay may be overlooked entirely if other indicia of voluntariness exist. Under this analysis, even a gross violation of the presentment requirement may be disregarded altogether . . . . Despite its relatively popular acceptance, therefore, the voluntariness standard is a hopelessly inadequate means of safeguarding a defendant's right to prompt presentment.[103]

The court also perceived that the Michigan form of *McNabb-Mallory* was "merely a reformulation of the voluntariness test."[104]

In a vigorous dissent, Judge Orth contended that the majority's ruling bestowed

> full constitutional import to the right of an arrestee to be promptly taken before a judicial officer. It makes the right the equivalent of the constitutional prohibitions against unreasonable searches and seizures and self-incrimination. . . .
>
> [T]he *most effective* protection of a nonconstitutional right is not the sole goal of criminal justice. There is also to be considered the protection of the right of society to have a person who has committed offenses against

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100 MD. DIST. R. 723(a) (Supp. 1978) read:

> A defendant who is detained pursuant to an arrest shall be taken before a judicial officer without unnecessary delay and in no event later than the earlier of (1) 24 hours after arrest or (2) the first session of court after the defendant's arrest upon a warrant or, where an arrest has been made without a warrant, the first session of court after the charging document has been filed. A charging document shall be filed promptly after arrest if not already filed.

The 1980 supplement version of the Maryland District Rule is more succinct: "A defendant who is detained pursuant to an arrest shall be taken before a judicial officer without unnecessary delay and in no event later than 24 hours after arrest. A charging document shall be filed promptly after arrest if not already filed." MD. DIST. R. 723(a) (Supp. 1980).

101 282 Md. 314, 384 A.2d 709 (1978).

102 *Id.* at 329, 384 A.2d at 717.

103 *Id.* at 325, 384 A.2d at 715.

104 *Id.* at 327, 384 A.2d at 716.

it answer for his acts according to the law of the land.[105]

The court excluded Johnson's confession despite evidence that his illness had caused much of the delay.[106] Thus the case provides no support for those who would attempt to distinguish later cases on the basis of their facts. State courts re-examining the *McNabb-Mallory* rule in the future should look to the carefully drafted *Johnson* opinion for guidance. The thorough analysis in both the majority and dissenting opinions will make it a leading case on the issue.

Subsequent applications of the rule in Maryland reflect the troubling consequences of a decision to implement delay-based exclusion firmly. Lower court opinions evince the sincere doubts and reluctance of the judges who must apply it.[107] The courts have held the rule inapplicable to cases where delayed statements are used only for impeachment purposes,[108] and where the confessor was already legally under detention for a different crime.[109] One case has upheld a "waiver of rights" form for *Johnson* rights.[110] Others have carefully formulated a precise and restrictive definition of arrest to aid in tolling the delay timeclock.[111] Significantly, the reasonableness test for pre-twenty-four-hour confession has retained its integrity in the first two years of its application.[112] Still the administrative problems of such a nebulous test may yet force its erosion.[113]

The time-based per se form of *McNabb-Mallory* makes the most sense

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105 *Id.* at 340-41, 384 A.2d at 723-24 (Orth, J., dissenting) (emphasis in original).

106 *Id.* at 317-18, 384 A.2d at 711-12.

107 The excerpt below poignantly reflects the agonized tone of a judge forced to apply a rule he simply cannot condone:

> Even assuming the delay was intentionally contrived to elicit the culpatory remark, the sanction of suppressing the truth is hard to justify as proper punishment for the tardiness in formally [judicially] apprising appellant why he was being held. In light of the completely voluntary nature of the admission of such despicably cruel conduct to a six-year-old child, the equal dispensation of procedural rights for technical rule violations is not always understandable. But justice must be equally dispensed, not distributed selectively. Despite its appearance of burning the barn to get rid of the mice, the judgment must be reversed and the case remanded for retrial.

Shope v. State, 41 Md. App. 161, 171, 396 A.2d 282, 288 (1979). *See also* Meyer v. State, 43 Md. App. 427, 406 A.2d 427 (1979), where the court found the disclosure of a *Johnson* violative confession to the jury to be "harmless error." Voluntary confessions are rarely held as a matter of law to have had no effect on a jury verdict.

108 Harris v. State, 42 Md. App. 248, 400 A.2d 6 (1979).

109 Chaney v. State, 42 Md. App. 563, 402 A.2d 86 (1979).

110 Logan v. State, 45 Md. App. 14, 410 A.2d 1110 (1980).

111 *See* Kennedy v. State, 44 Md. App. 662, 410 A.2d 1097 (1980); Davis v. State, 42 Md. App. 546, 402 A.2d 77 (1979).

112 *See, e.g.*, Shope v. State, 41 Md. App. 161, 396 A.2d 282 (1979), where a nine-and-one-half-hour delay was held unreasonable.

113 Despite its resolve to apply *McNabb-Mallory* meaningfully under a reasonableness standard, administrative problems forced Pennsylvania to adopt a relatively short, time-based standard. *See* text accompanying notes 114-25 *infra*.

administratively once a court decides to adopt at all. Maryland and Delaware concluded this, and specific time limits in their delay statutes aided in measuring permissible delays.

Pennsylvania: From the Futch Rule to the Davenport Rule

Pennsylvania's delay statute does not specify a maximum hour limit, but rather prohibits "unnecessary" delay.[114] Thus, in its first application of *McNabb-Mallory* principles, *Commonwealth v. Futch*,[115] the Pennsylvania Supreme Court banned all evidence obtained after an unnecessary delay except where no reasonable relationship existed between the delay and the evidence. Later courts had to decide what constituted an unnecessary delay and what comprised a reasonable relationship. Both ambiguities represent holes through which all but coerced confessions might escape exclusion. Evidently the court recognized the problem as subsequent cases reflected a concern for maintaining the rule's integrity.[116] In *Commonwealth v. Williams*,[117] the court refined the *Futch* analysis to three steps: the delay must be unnecessary, the evidence must be prejudicial, and the incriminating evidence must be related to the delay. The *Williams* decision went further to declare that "prearraignment delay will always be unnecessary unless justified by administrative processing—fingerprinting, photographing and the like."[118] Still the test was so general that defendants flooded the court's docket with appeals seeking judicial examination of the necessariness of prearraignment detentions.[119]

The court bowed to the pressure for a consistent way to administer the rule in the 1977 case of *Commonwealth v. Davenport*,[120] under which all

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114 PA. R. CRIM. P. 122, 130 (1979).

115 447 Pa. 389, 290 A.2d 417 (1972). *Futch* is also significant in that it excluded a line-up identification, a practice followed by California courts. People v. Williams, 68 Cal. App. 3d 36, 137 Cal. Rptr. 70 (1977). Other courts adopting *McNabb-Mallory* have differed on the line-up issue. *See, e.g.*, State v. Brown, 50 Wis. 2d 565, 185 N.W.2d 323 (1971).

Pre-*Futch* Pennsylvania law on the admissibility of confessions is exemplified by Commonwealth v. Koch, 446 Pa. 469, 288 A.2d 791 (1972), a case decided only two months prior to *Futch*. In *Koch*, delay merely constituted a factor in a voluntariness analysis.

116 *See, e.g.*, Commonwealth v. Tingle, 451 Pa. 241, 245, 301 A.2d 701, 702 (1973), where the court emphatically affirmed *Futch* and excluded a confession obtained after a 21-hour delay. *Accord*, Commonwealth v. Cherry, 457 Pa. 201, 321 A.2d 611 (1974) (14-hour delay disapproved). *See also* note 117 *infra*.

117 455 Pa. 569, 319 A.2d 419 (1974). In this case, the Pennsylvania court's determination to prevent dilution of the rule surfaced in its specific disapproval of the practice of delaying arraignment to check a defendant's story, a purpose most courts assume to be reasonable. *See, e.g.*, Quinn v. State, 50 Wis. 2d 101, 183 N.W.2d 64 (1971); and note 191 & accompanying text *infra*.

118 455 Pa. at 573, 319 A.2d at 421.

119 The court decided at least 14 cases on the issue between 1973 and 1975. Commonwealth v. Davenport, 471 Pa. 278, 286 n.7, 370 A.2d 301, 306 n.7 (1977).

120 471 Pa. 278, 370 A.2d 301 (1977).

confessions obtained during or after a prearraignment delay of more than six hours are automatically excluded.[121] For shorter delays, the court did not bother with an illusory reasonableness standard, but rather held that "prearraignment delay shall not be grounds for suppression of such statements except as may be relevant to constitutional standards of admissibility."[122] Breaking with all precedent, the court declared that the significant period to measure was that between arrest and arraignment, not between arrest and confession. Justice Roberts explained:

> This rule was adopted not simply to guard against the coercive influence of custodial interrogation, but to ensure that the rights to which an accused is entitled at preliminary arraignment are afforded without unnecessary delay. . . . [T]he exclusion . . . of statements made during the illegal delay in producing a person before a magistrate . . . is premised not only on the possible coercive effect of the delay itself, but on the postponing of the additional rights which attach on production.[123]

Under this rule, even confessions given well within a reasonable period, such as during administrative processing, are exlcuded if the total prearraignment period exceeded six hours.[124]

Davenport applied only to prospective arrests, and no post-*Davenport* arrests have been reported in appellate cases to date. Although this exceedingly strict rule has yet to be tested, the court hinted at some flexibility in a footnote: "We recognize that it is difficult to fix any time limit. Nevertheless, we conclude that it is desirable to set such a standard, and that six hours provides a workable rule which can readily be complied with *in the absence of exigent circumstances*."[125] As the court begins working with the rule, where and how it recognizes such exigent circumstances will shape its future effectiveness.

Pennsylvania's experience suggests that the successful administration of *McNabb-Mallory* requires a specific time limit. Yet in the same year Pennsylvania established such a limit, Montana adopted *McNabb-Mallory* without one.

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121 To support its choice of this particular time period, the court cited § 4.5 of the *Corrections*, STANDARDS AND GOALS OF THE NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE (1973), and the ALI MODEL CODE OF PREARRAIGNMENT PROCEDURE § 130.2 (1975). *See also id.* § 150.3. Curiously, the court failed to mention the similar time limit promulgated by Congress in the Omnibus Crime Act of 1968. *See* note 7 *supra*.

122 471 Pa. at 286-87, 370 A.2d at 306.

123 *Id.* at 284, 370 A.2d at 305.

124 *But see* Commonwealth v. Van Cliff, 483 Pa. 539, 397 A.2d 1173 (1979), where a pre-*Davenport* arrestee's oral confession obtained two-and-one-half hours after arrest and a transcript of the confession made three hours later were admissible although arraignment took place 17½ hours after arrest. This case was decided after *Davenport* but before it took effect.

125 471 Pa. at 286 n.7, 370 A.2d at 306 n.7.

Montana: The Benbo Rule

The Montana Supreme Court, relying heavily on the Pennsylvania court's reasoning in *Commonwealth v. Futch*, announced in the 1977 case of *State v. Benbo*[126] that it too would exclude all evidence obtained during an unnecessary delay in arraignment unless the evidence was unrelated to the delay. The court expressly declined to promulgate a particular time standard,[127] and the Montana delay statute specifies none.[128] No case has arisen to test the *Benbo* rule.[129] The court did, however, suggest a series of steps for challenging a confession under *Benbo*. The defendant must show that unnecessary delay occurred (unnecessariness being a function of the arresting officer's diligence and the time elapsing before arraignment), then the prosecution must prove the delay was not reasonably related to the confession to avoid exclusion.[130] The court then excluded statements made by the arrested defendant while he spent several days helping police locate incriminating evidence and where no effort was made to take the defendant before a judge as required by statute.[131]

After *Benbo*, Montana is in a unique position to test *McNabb-Mallory*. The retention of a reasonable relationship requirement may erode the rule into a causation form. The reliance on Pennsylvania precedent, however, may lead Montana to promulgate a time limit, such as that in *Commonwealth v. Davenport*.[132]

IV. THE ADOPTING DECISION

Thus far, this comment has compared the relative merits of existing state versions of *McNabb-Mallory*. The threshold question remains, however, whether to adopt it at all. The overwhelming majority of states still reject *McNabb-Mallory*. Yet if attempts in Maryland, Pennsylvania,

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126 174 Mont. 252, 570 P.2d 894 (1977).

127 "While the length of the time between arrest and initial appearance is not determinative of the 'necessity' of the delay, it is a factor to be considered." 174 Mont. at 262, 570 P.2d at 900.

128 REV. MONT. CODE §§ 95-901(a), 95-603(d)(3) (1947) require that an arrested person be brought before the nearest and most accessible judge without unnecessary delay.

129 Although no appellate case has implemented *Benbo*, the supreme court suggested that the rule might have applied in State v. Lenon, 174 Mont. 264, 570 P.2d 901 (1977), where the accused was arrested midnight Friday, confessed at nine a.m. Saturday, and was arraigned Monday morning. The police tried several times to contact one justice of the peace but found he was out of town. They did not seek out any of the other competent officials in the vicinity. The court held that this delay would be unnecessary, but that, in failing to show that another justice of the peace was available at the time, the defense had not made a proper case for suppression of the confession. *Id.* at 275, 570 P.2d at 908.

130 *Id.* at 262, 570 P.2d at 900.

131 *Id.* at 255-56, 570 P.2d at 896-97.

132 *See* notes 114-25 & accompanying text *supra*.

and Montana are successful, more states may reconsider their stands. Indeed several jurisdictions show signs of wavering. For example, the West Virginia Supreme Court declared recently in *State v. Mason*[133] that its statute requiring arraignment without unnecessary delay is "mandatory," not merely "directory." Such language usually indicates a state's willingness to adopt *McNabb-Mallory*.[134] In *State v. Candy*, however, the court said failure to comply with the statute "does not necessarily vitiate a confession obtained pursuant to a legal arrest . . . [citing *Mason*] but when non-compliance is combined with an illegal arrest, exclusion is the only remedy to insure . . . constitutional protections."[135] No subsequent cases clarify whether the *Candy* court reversed or merely qualified West Virginia's apparent inclination to adopt *McNabb-Mallory*.

Other states are wavering. In Florida, the supreme court apparently adopted *McNabb-Mallory* in 1971.[136] Lower courts, however, do not recognize this adoption, and the supreme court has yet to disabuse them of this notion.[137] In Illinois the supreme court has called for legislative action because of frequent disregard for the state's delay statute and perceived inadequacy of the traditional due process-voluntariness approach in stemming it.[138] The court intimated that it might review its decision to reject *McNabb-Mallory*.[139] California has adopted a rule excluding identifications in line-ups held during an illegal delay al-

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133 249 S.E.2d 793, 797 (W. Va. 1978).

134 *See, e.g.*, Johnson v. State, 282 Md. at 321, 384 A.2d at 713.

135 252 S.E.2d 164, 168 (W. Va. 1979). *See generally* Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Illinois, 422 U.S. 390 (1975).

136 In Milton v. Cochran, 147 So. 2d 137, 141 (Fla. 1962), the court noted, "We should be derelict in our duties if we did not here point out that continued violation of these [delay] statutes are certain to result in the *McNabb* rule, or some version thereof, being adopted in this state." Seemingly, the court carried out the threat in Oliver v. State, 250 So. 2d 888, 889 (Fla. 1971), where it said:

> This court has intimated that a failure to bring a defendant before a magistrate would likely result in strong action by this Court . . . [citing *Milton*]. We find that the totality of the circumstances in these cases requires nullification of these convictions on account of the failure of . . . officials to comply with . . . [Florida's delay statutes]. The rationale supporting our decision may be found in the cases of . . . [*McNabb* and *Mallory*].

137 State v. Roberts, 274 So. 2d 262, 266 (Fla. App. 1973). The district court held:

> In our view, . . . [*Oliver* did not hold] that *McNabb-Mallory* is now the law of Florida. The discussion of the circumstances . . . [in *Oliver*] reveals the concern . . . that the *totality of circumstances* surrounding the taking of the confessions collided with the spirit and purpose of *McNabb-Mallory*, and therefore the voluntariness of the confessions was sufficiently doubtful so as to justify granting new trials (emphasis in original).

The supreme court reversed, but on other grounds, and did not discuss the adoption issue. 285 So. 2d 385 (Fla. 1973). No further supreme court cases discuss the issue.

138 People v. Howell, 60 Ill. 2d 117, 122-23, 324 N.E.2d 403, 405 (1975).

139 *Id. See also* People v. Hood, 59 Ill. 2d 315, 324, 319 N.E.2d 802, 808 (1974). Perhaps a step in this direction is People v. Dees, 81 Ill. App. 3d 35, 400 N.E.2d 1050, 1054 (1980), where the court dismissed a criminal charge on the basis of an unexplained 14-day delay in arraignment. The court based its decision on due process, however, and carefully limited the holding to the facts of that case, which involved a misdemeanor offense.

though, as yet, confessions are not so excluded.[140] A Connecticut statute[141] seemingly incorporates *McNabb-Mallory* requirements for the admissibility of a confession, although it is generally disregarded.[142]

The Minnesota Supreme Court recently issued an ominous decision on the effect of a delay violation, with a special concurrence urging that an unexplained 57-hour delay per se warranted exclusion of a resulting confession.[143] For the majority, which remanded the case for an explanation of the delay, the determining factor was a prior Miranda violation, possibly exacerbated by the delay.[144] Still, delay-based exclusion was definitely countenanced.

In deciding whether to adopt *McNabb-Mallory*, state courts must consider some questions. What would adoption add to existing constitutional doctrines? What costs and obstacles will adoption place on law enforcement? Should a court be making such a consequential policy decision based on implied legislative intent?

A. *MCNABB-MALLORY* AND THE CONSTITUTION TODAY

Even adoption of a meaningful form of *McNabb-Mallory*—exclusion based solely on the illegality of a delay and unrelated to the voluntariness of the challenged confession—is of questionable value. In light of the monumental changes in constitutional doctrines after *McNabb* and *Mallory* were decided, little new is accomplished by adoption of the rule.

To begin with, a confession must be voluntary under the due proc-

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140 People v. Williams, 68 Cal. App. 3d 36, 137 Cal. Rptr. 70 (1977).

141 CONN. GEN. STAT. REV. § 54-1(c) (1965) reads: "Any admission, confession or statement, written or oral, obtained from an accused who has not been . . . presented to the first session of the court . . . or who has not been informed of his rights as provided by section 54-1b [i.e., by a judge] shall be inadmissible."

142 *See generally* Richardson, *Confessions in Connecticut: What is the Current Law?*, 44 CONN. B.J. 346, 351-58 (1970).

143 State v. Wiberg, [1980] 27 CRIM. L. REP. (BNA) 2375. The concurrence appears *id.* at 2376 (Rogosheske, Wahl, and Yetka, JJ., concurring). The majority declined to adopt a "rigid" rule excluding all confessions obtained after a delay statute violation. However the court held suppression would be required where the delay is unreasonable *and* it compounds the effects of prior police misconduct. *Id.* at 2375. Minnesota's delay statute states: "The effect of failure to comply with [the rule] on the admission of . . . evidence . . . is left to case-by-case development." MINN. R. CRIM. P. 4.02. In light of the inclination of three justices to suppress for delay alone, continued violations may spark a majority of the court to adopt some form of *McNabb-Mallory*.

144 On the present record, we would probably affirm the trial court's admission of the . . . statement if the violation of the prompt araignment rule were the only reason for suppression. However . . . .

> In view of the fact that the statement . . . was influenced by two separate incidents of state misconduct—the violation of Miranda rights with regard to the statement made at the time of arrest and the violation of the prompt arraignment rule—we feel that on retrial the court should, absent a reasonable and acceptable explanation for the delay in arraignment, suppress that statement . . . .

27 CRIM. L. REP. at 2375.

ess clause. Although both may result in exclusion, the *McNabb-Mallory* rule and the voluntariness rule involve different analyses. The voluntariness test requires an examination of all of the circumstances surrounding a confession or inculpatory statement for evidence of actual coercion. A court scrutinizes this evidence and balances it against the susceptibility of the suspect to determine whether the statement was "coerced."[145] A coerced confession violates the due process clause and is inadmissible at trial.[146] Once the judge determines not to exclude the statement as a matter of law, the jury may attach to it whatever weight it deems appropriate.[147]

By contrast, *McNabb-Mallory* triggers exclusion automatically once a court finds an illegal delay during which the confession occurred.[148] No evidence of voluntariness or reliability bears directly on this inquiry;[149]

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145 Commentators have suggested two rationales for the voluntariness test: judicial suspicion of unreliable evidence and deterrence of improper interrogation methods by police. Comment, *The Coerced Confession Cases in Search of a Rationale*, 31 U. CHI. L. REV. 313, 314 (1964). In Culombe v. Connecticut, Justice Frankfurter suggested a three-tier analysis to determine the voluntariness of a confession: determination of the physical events surrounding the confession, the psychological state of the defendant, and the legal conclusions to be drawn from these conclusions and precedent. That this analysis provided an inadequate guide is evident from the fact that the dissenters agreed on this test, but disagreed as to the conclusion it led to on the facts of the case. 367 U.S. 568, 603, 642 (1960). *See also* Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old Voluntariness Test*, 65 MICH. L. REV. 59, 99 (1966).

Chief Justice Warren noted in Blackburn v. Alabama, 361 U.S. 199, 207 (1959), that the term "involuntary" was "convenient shorthand" for a "complex of values," including concern for the "likelihood that the confession is untrue, . . . the preservation of the individual's freedom of will," and the "feeling that police must obey the law while enforcing the law." Professor Inbau has suggested that whether "voluntariness" or "trustworthiness" is the more appropriate standard, the practical effect of each on the same fact situations will produce the same conclusion regarding admissibility. *See* F. INBAU & J. REID, *supra* note 36, at 143. *But see* Kamisar, *What is an "Involuntary" Confession?: Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 738-43 (1963) (reliability is the more accurate and desirable standard).

146 Brown v. Mississippi, 297 U.S. 278 (1936).

147 *See generally* Jackson v. Denno, 378 U.S. 368 (1964); Meltzer, *Involuntary Confessions: The Allocation of Responsibility between Judge and Jury*, 21 U. CHI. L. REV. 317 (1954).

148 Upshaw v. United States, 335 U.S. 410, 413.

149 Circumstances evidencing coercion may also indirectly indicate the improper purpose of a prearraignment delay, rendering it illegal and the confession inadmissible. The failure to show such circumstances, however, should not be fatal to a motion to suppress under *McNabb-Mallory*. "[A] confession is inadmissible if made during illegal detention due to failure to promptly carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical or psychological.' " *Id.* at 413 (citing Mitchell v. United States, 322 U.S. 65 (1943)). The cite to *Mitchell* was ironic because state and federal courts had read that case to limit operation of *McNabb* to those confessions *induced* by prearraignment delay. *See, e.g.*, People v. Ubbes, 374 Mich. 571, 132 N.W.2d 669 (1965); Shadrick v. State, 491 S.W.2d 681 (Tex. Crim. App. 1973). In *Mitchell*, the court faced the problem of an unreasonable delay occurring after the suspect confessed, even though the confession itself had occurred shortly after arrest. Re-interpreting *Mitchell*, the *Upshaw* Court abandoned the inducement element and substituted an observation that, in such a case, the confession oc-

the rule provides for a blanket exclusion. The ground for exclusion is statutory and procedural, "quite apart from the Constitution."[150] Some commentators have suggested that the operation of the rule creates an irrebuttable presumption of involuntariness.[151] While the effect is the same, such a characterization is misleading. As the experiences of Michigan and Wisconsin show, the concept can lead to the creation of exceptions in the absence of "real," "reasonable," or "causal" relationships between the delay and challenged confession.[152] The *McNabb-Mallory* principle was an enforcement tool for delay statutes, not for the due process clause of the fifth amendment. Its history clearly indicates an intent to establish a threshold for exclusion that is lower and different in kind from the voluntariness test: lower because delay alone is dispositive, and different in kind because the trustworthiness-voluntariness of the confession itself plays no part in its exclusion.

Even voluntary confessions are inadmissible unless the confessor knowingly waives his rights to silence and counsel under the fifth and sixth amendments.[153] The police must advise arrested individuals of these rights and secure a valid waiver before any confession induced by custodial interrogation may be used.[154] Before the *Miranda* decision, courts considered the absence of such warnings or waiver as merely a factor in the voluntariness analysis.[155] Not until the preliminary hearing was an arrested person certain to receive the warnings.[156] Thus any

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cured before and not during an illegal delay. This interpretation removed the case from the requirements of *McNabb*. 322 U.S. at 413. Later cases were to refer to these predelay confessions as "threshold confessions." *See* United States v. Pettyjohn, 419 F.2d 651, 656-57 (D.C. Cir. 1969).

150 McNabb v. United States, 318 U.S. at 341. *See also* United States v. Fuller, 243 F. Supp. 178, 181 (D.D.C. 1965), *aff'd*, 407 F.2d 1199 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 1120 (1969), where the court noted that the *McNabb-Mallory* rule "is not based on any question as to whether the damaging statement was voluntary. It is not founded on any fundamental principles of substantial justice. It is merely a sanction or a means of enforcement of Rule 5(a) of the Federal Rules of Criminal Procedure."

151 McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239, 275 (1946); Note, 97 U. PA. L. REV. 738, 739 (1949).

152 *See* text accompaying notes 50-89 *supra*.

153 Miranda v. Arizona, 384 U.S. 436 (1966). The Supreme Court held that, prior to the custodial interrogation of criminal suspects, police officers must advise them of their rights to silence and counsel, and of the consequences of waiver before any statement resulting from the interrogation is admissible at trial. Once these rights are invoked, the police must cease questioning.

154 *Id.*

155 Davis v. North Carolina, 384 U.S. 737, 740-41 (1966).

156 Most delay statutes require judicial officers to advise arrested persons of such rights at the preliminary hearing. *See, e.g.*, former FED. R. CRIM. P. 5(b), *quoted in* United States v. Mallory, 354 U.S. at 449-50:

> The magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a preliminary

delay in the hearing represented a potential delay in informing a suspect of his rights. For the most part, *Miranda* obliterated this basis for *McNabb-Mallory*. Yet several authorities continue to advance the warning rationale because of a belief that a neutral party, not the police, should advise a suspect of his rights and secure the waiver.[157] This argument carries little weight, however, because a judicial officer must always review the circumstances surrounding the giving and waiving of *Miranda* rights, with the burden of proving validity on the government, before a resultant confession will be admitted into evidence at trial.[158] Furthermore, *Miranda* warnings will not save even a voluntary confession if it is obtained during illegal detention.[159] If police detain a person without probable cause merely to question him, the product of the detention is nonetheless inadmissible.[160]

In the final analysis, then, *McNabb-Mallory* affects only voluntary confessions by persons arrested upon probable cause who knowingly and voluntarily waive their rights to silence and counsel after being warned of the consequences of such a waiver. The exclusion of such evidence costs society dearly. The benefits of such exclusion should plainly warrant their expense. Logically the benefits should lie in the bases for delay statutes, or in the rationale for *McNabb-Mallory* as an enforcement tool for those statutes.

In their classic defense of *McNabb-Mallory*, Professors Hogan and Snee suggested these objectives behind the enforcement of Rule 5(a) of the Federal Rules of Criminal Procedure:

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examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

Rule 5(b) is essentially incorporated in what is now FED. R. CRIM. P. 5(c). *See also, e.g.*, ILL. REV. STAT. ch. 38, § 109 1(b) (Smith-Hurd 1970); N.Y. CRIM. PROC. LAW § 170.10 (1979).

157 Comment, *supra* note 52, at 53-54. Indeed a concern of the *McNabb* Court was that the "the awful instruments of the criminal law" without the rule were entrusted to a "single functionary." 318 U.S. at 343. *See also* Johnson v. State, 282 Md. at 330-32, 384 A.2d at 718-19 (*Miranda* and *McNabb-Mallory* serve different purposes), and Commonwealth v. Davenport, 471 Pa. at 284, 370 A.2d at 305 (1977) (*McNabb-Mallory* protects rights supplemental to those safeguarded by *Miranda*).

158 Jackson v. Denno, 378 U.S. 368 (1964).

See People v. Weaver, 179 Colo. 331, 333-34, 500 P.2d 980, 982 (1972), and Raigosa v. State, 562 P.2d 1009, 1015 (Wyo. 1977), for instances where courts found the giving of *Miranda* rights to vitiate any prejudice where there was prearraignment delay. In United States v. Poole, 495 F.2d 115 (D.C. Cir. 1974), United States v. Frazier, 419 F.2d 1161, 1164-67 (D.C. Cir. 1969), and United States v. Pettyjohn, 419 F.2d at 655-57, the courts held that the waiver of *Miranda* rights constituted waiver of *McNabb-Mallory* rights.

159 *See* Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Illinois, 422 U.S. 390 (1975). *See also* Note, *Fourth Amendment-Admissibility of Statements Obtained During Illegal Detention*, 70 J. CRIM. L. & C. 446 (1979).

160 Dunaway v. New York, 442 U.S. 200.

> (1) arrests on suspicion, an intolerable invasion of the citizen's fundamental right to liberty, are prevented; (2) the rights accorded one accused of crime are saved from subversion; (3) the substance of the accusatorial system of criminal justice is preserved; (4) resort to third degree tactics is made impossible.[161]

Assuming that *McNabb-Mallory* effectively enforces delay statutes, such as Rule 5(a),[162] the above examination of the type of confession left open for exclusion reveals that current constitutional protections satisfy the first three of these objectives. *Brown v. Illinois* and *Dunaway v. New York* virtually eliminated the pick-up for questioning.[163] An officer of the law must advise the accused of his rights, and counsel is available to him upon request.[164] Despite the optimistic contentions of Professors Hogan and Snee, resort to third-degree tactics will never be impossible so long as the courts recognize the necessity for interrogation at all.[165] The only realistic way to attack the third degree consistently with the security needs of society is to train the police, not free the guilty.[166]

The protection of judicial integrity constitutes an independent basis for *McNabb-Mallory*. Again, Hogan and Snee put it best in detailing the "real roots" of the *McNabb-Mallory* rule:

> Trials which are the outgrowth or fruit of the Government's illegality debase the processes of justice. They cannot be countenanced in any nation which expects its citizens to esteem those processes. It is important that the trial demonstrate the guilt of the accused, but it is important also that it not disclose the criminality of the accuser.[167]

This same argument appears in many decisions on the admissibility of evidence obtained through constitutional violations by police.[168] But

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161 Hogan & Snee, *supra* note 2, at 27.

162 The assumption that any exclusionary rule is an effective or desirable enforcement device for procedural protections is, of course, fiercely contested. *See, e.g.*, Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting). *See generally* Wingo, *Growing Disenchantment with the Exclusionary Rule*, 25 SW. L.J. 573 (1971).

163 *See* notes 159-61 *supra*.

164 *See* note 153 *supra*.

165 *See generally* Inbau, *supra* note 2.

166 The cure for third degree abuses is not in rules of exclusion of voluntary confessions but in improved personnel and facilities for police forces so that character and efficiency and scientific methods rather than brutality will be used to obtain evidence. If an officer is so stupid and brutal as to use third-degree methods, he will do so, despite rules of exclusion of voluntary confessions . . . .

Id. at 461.

167 Hogan & Snee, *supra* note 2, at 32.

In contrast, Professor Kamisar has argued that the "basic thrust of the *McNabb-Mallory* rule . . . is to bypass conflicts over the nature of secret interrogation and to minimize both the 'temptation' and the 'opportunity' to obtain coerced confessions." Kamisar, *supra* note 143, at 739-40. Hogan and Snee preferred to distinguish between the coercion concern (which they attributed to Rule 5(a)) and the integrity concern (which they associated with *McNabb-Mallory*). Hogan & Snee, *supra* note 2, at 27-33.

168 *See, e.g.*, Elkins v. United States, 364 U.S. 206 (1960).

the peace of mind resulting from the assertion of this abstract principle subsides when constitutionally valid confessions fall under *McNabb-Mallory*. At some point, blanket judicial refusal to countenance even the slightest technical violation of procedural rules by police is indistinguishable in its effect from sanctioning the illegal acts of those who are freed. In the context of current constitutional protections, *McNabb-Mallory* passes that point. The only remaining target for the rule today is prearraignment delay by itself, unrelated to constitutional rights of an arrestee or the validity of his confession. The only beneficiaries of the application of *McNabb-Mallory* are the undeniedly guilty. The integrity argument reflects a concern for the public image of the courts. In this a court must look to society's sense of propriety, but it must also consider its sense of outrage. In the words of the Connecticut Supreme Court, "Society, as well as the defendant, is entitled to equal protection of the law and to due process of law."[169]

Even in the constitutional context, the force of the judicial integrity argument has declined. In cases such as *Harris v. New York*[170] and *Stone v. Powell*,[171] the Supreme Court has increasingly recognized that integrity of the judiciary stems from its effectiveness as well as its purity.[172] Parallel decisions on the *McNabb-Mallory* question in Maryland reflect this trend also. Maryland has rejected *McNabb-Mallory* for confessions used for impeachment purposes.[173] In addition, Maryland defendants may not invoke *McNabb-Mallory* for federal habeas corpus,[174] which suggests that judicial integrity plays a limited role in the rule, even in a state ostensibly committed to its meaningful application.

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169 State v. Zusanskas, 132 Conn. 450, 460, 45 A.2d 289, 293 (1945). *See* notes 206-12 *infra*.

170 401 U.S. 222 (1971) (allowing use of *Miranda*-violative statements for impeachment purposes).

171 428 U.S. 465, 485 (1975): "While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence." *See also* United States v. Janis, 428 U.S. 433, 458-59 n.35 (1975): "[T]he 'prime purpose' of the [exclusionary] rule, *if not the sole one*, is to deter future unlawful police conduct." (emphasis added) (quoting United States v. Calandra, 414 U.S. 338, 347 (1974)).

172 There are several answers to the assertion that courts should exclude illegally seized evidence in order to preserve their integrity. . . . [W]hile it is quite true that courts are not to be participants in "dirty business," neither are they to be ethereal vestal virgins of another world, so determined to be like Caesar's wife, Calpurnia, that they cease to be effective forums in which both those charged with committing criminal acts and the society which makes the charge may have a fair trial in which relevant competent evidence is received in order to determine whether or not the charge is true. As Mr. Justice Stone noted in *McGuire v. United States*, 273 U.S. 95, 99 (1927), "[a] criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule."

California v. Minjares, 443 U.S. 916, 924-25 (1979) (Rehnquist, J., dissenting). This dissent provides an incisive history of the application of the exclusionary rule in the Supreme Court.

173 Harris v. State, 42 Md. App. 248, 400 A.2d 6 (1979).

174 Smith v. Warden, Maryland Penitentiary, 477 F. Supp. 500 (D. Md. 1979).

Thus a state accomplishes little in adopting *McNabb-Mallory* that is not accomplished by existing constitutional doctrines. The only remaining target is delay itself and not the danger such a delay might pose to the confession-related rights of the defendant.

Of course prompt arraignment safeguards other interests of suspects, such as the determination of and opportunity to post bail and the right not to be deprived of liberty for longer than legally allowable or necessary. Excluding constitutionally valid confessions for the purpose of enforcing these rights is irrational. Even assuming such exclusion would ultimately protect all arrestees from illegal delays whether the police seek a confession or not, the costs are prohibitive and the link between the confession and the statutory violation is tenuous at best.

> When evidence is seized by an illegal search, the illegality is the immediate and proximate cause which produces the evidence, but when the illegality, if any, consists merely in questioning the defendant, having failed first to take him before a magistrate, the confession, if voluntarily made, is only remotely, if at all, connected with the fact that the officer disobeyed the statute.[175]

The more rational, cost-effective way to enforce delay statutes would be to punish those who violate them, not reward those who happen to confess after such a violation at society's expense. Whether this were done administratively, legislatively, or judicially, sounder results would be achieved.

B. PROBLEMS WITH ADOPTING *MCNABB-MALLORY*

McNabb-Mallory developed because of the potential for abuse during a prearraignment delay.[176] Later constitutional doctrines, however, largely have removed this danger, leaving delay as the only target of the rule. By excluding confessions for the limited, and mostly unrelated, purpose of deterring delays, courts incur important problems and costs. A major problem is administration. Courts have difficulty in determining the elements of unnecessary or unreasonable delay. Courts may be unable to draw a line that allows for considerations of individual justice and still provides sufficient certainty to serve as a guide to law enforcement officials. Such a guide may necessarily be so restrictive that it impairs effective law enforcement. Public response to the rule poses another problem which takes on added significance in state court sys-

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[175] State v. Folkes, 174 Or. 568, 589, 150 P.2d 17, 25, *cert. denied*, 323 U.S. 779 (1944). The United States Supreme Court also rejected this sort of "but-for" causation argument as a sole basis for exclusion in Brown v. Illinois, 422 U.S. 590, 603 (1975).

[176] McNabb v. United States, 318 U.S. at 343. *But see* Inbau, *supra* note 2, at 454-59, for the contention that the original federal delay statutes originally were passed not to protect the accused, but rather to curtail excessive expenses claimed by officials during an unnecessary delay in bringing a suspect to court.

tems with an elected or periodically voter-affirmed judiciary. State courts must also examine the fundamental and practical differences between the needs and resources of law enforcement officials at state and federal levels, especially as they regard the necessity of interrogation.

Administering the Rule

A per se *McNabb-Mallory* rule may use a reasonableness test, as in Montana[177] and in Maryland (for delays of less than twenty-four hours),[178] or it may rely on a time standard such as in Pennsylvania.[179] Each test involves different problems.

Reasonableness

The federal courts, during their experiment with *McNabb-Mallory*, applied the unreasonable/unnecessary delay test.[180] Under the due process test, both state and federal courts determined the reasonableness of a delay as part of the voluntariness inquiry.[181] In addition, false imprisonment charges brought under delay statutes often necessitate a determination of the reasonableness of a delay even if no confession has occurred.[182] Despite some mixed and contradictory use of terms by federal and state courts, general patterns are discernible in judicial attitudes on the reasonableness of prearraignment delays.

The reasonableness of a delay usually depends on the court's perception of its purpose. Important factors include the reasons for the delay, the conduct of officers during the delay, the likely effect of the delay upon the particular arrestee, and the length of the delay. The weight given to one factor depends largely upon the presence or absence of the other factors.[183] For example, while courts typically permit long delays

177 *See* text accompanying notes 126-32 *supra*.

178 *See* text accompanying notes 100-13 *supra*.

179 *See* text accompanying notes 114-25 *supra*.

180 *See, e.g.*, United States v. Fuller, 243 F. Supp. 178 (D.D.C. 1965), *aff'd*, 407 F.2d 1199 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 1120 (1969).

181 *See, e.g.*, Davis v. North Carolina, 384 U.S. 737, 741 (1966); People v. Dees, 81 Ill. App. 3d 35, 400 N.E.2d 1050 (1980).

182 Comparison of what may be "unreasonable" for false imprisonment and confession purposes is difficult. A judge will determine reasonableness for a confession, while a jury usually decides the issue in false imprisonment cases as an element of a claim for damages. Occasionally, when the facts are undisputed in an action for false imprisonment, a judge may determine whether a particular delay violated the applicable delay statute. *See* cases collected in Annot., 98 A.L.R.2d 966, 991-1004 (1964).

183 "No hard and fast rule can govern as to what constitutes an unnecessary delay and each case must be determined on its own facts and circumstances." Williams v. United States, 273 F.2d 781, 798 (9th Cir. 1960). State cases to the same effect include People v. Jackson, 23 Ill. 2d 274, 178 N.E.2d 299 (1961); State v. O'Kelley, 175 Neb. 798, 124 N.W.2d 211 (1963); State v. Fry, 245 N.W.2d 878 (N.D. 1976); and Richmond v. State, 554 P.2d 1217 (Wyo. 1976).

due to the unavailability of a judicial officer,[184] they frown upon even brief delays for the purpose of extracting a confession from the accused before his arraignment.[185] The courts are tolerant of delays attributable to administrative processing, such as fingerprinting, photographing, and the like.[186] They generally countenance delays for arranging medical treatment of the accused,[187] for procuring necessary transportation,[188] or for satisfying conflicting demands on an officer's time,[189] provided the officers involved exercise due diligence thereafter in bringing the accused before a judicial officer.

The courts have failed to draw a distinct line for delay due to interrogation of the accused. Usually, the courts sanction delays for an immediate determination of whether to release the accused.[190] Checking a suspect's story is another legitimate practice.[191] But when the court de-

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184 United States v. Mendoza, 473 F.2d 697 (5th Cir. 1973); Commonwealth v. Mayhew, 297 Ky. 172, 178 S.W.2d 928 (1943); State v. Plantz, 155 W. Va. 24, 180 S.E.2d 614 (1971).

185 Coleman v. United States, 313 F.2d 576 (D.C. Cir. 1962); People v. Stroble, 36 Cal. 2d 615, 226 P.2d 330, *aff'd sub nom.* Stroble v. California, 343 U.S. 181 (1951).

186 Commonwealth v. Williams, 455 Pa. 569, 319 A.2d 419 (1974) (pre-*Davenport*). *See also* Upshaw v. United States, 335 U.S. at 413.

187 Commonly, such cases involve delays while the accused is hospitalized for injuries received during the crime or his capture. *See* People v. Lane, 56 Cal. 2d 773, 366 P.2d 57, 16 Cal. Rptr. 801 (1961); Green v. State, 257 Ind. 244, 274 N.E.2d 267 (1971); State v. George, 93 N.H. 408, 43 A.2d 256 (1945).

In *United States v. Bear Killer* the court found reasonable the time taken by police for the accused to sober up and for his transportation to a commissioner 100 miles away. 534 F.2d 1253 (8th Cir. 1976). *Cf.* Warren v. State, 385 A.2d 137 (Del. 1978) (uniform eight-hour prearraignment sobering-up period held unreasonable because arbitrary). *See* note 99 *supra*.

188 Complicated travel arrangements or arrests made far from a committing official contributed to the reasonableness of prearraignment delays in United States v. Edwards, 539 F.2d 689 (9th Cir. 1976); United States v. Odom, 526 F.2d 339 (5th Cir. 1976); and Commonwealth v. Nickol, 476 Pa. 75, 381 A.2d 873 (1977).

In People v. Mallett, 45 Ill. 2d 388, 259 N.E.2d 241 (1969), the accused's oral confession occurred five hours after arrest, but before a magistrate was available. Finding that a three-hour delay in transporting the accused to locate people and places mentioned in the confession was proper, the court admitted a written confession signed eight hours after arrest.

See also United States v. Standing Soldier, 538 F.2d 196 (8th Cir. 1976), where a blizzard and poor road conditions justified a delay of two days in arraignment. The Omnibus Crime Act of 1968 expressly provides for travel delays. *See* note 7 *supra*.

189 Commonwealth v. Darden, 364 N.E.2d 1092 (Mass. App. 1977). *See also* Hayes v. Mitchell, 69 Ala. 452 (1881).

190 State v. Johnson, 249 La. 950, 192 So. 2d 135 (1966), *cert. denied*, 388 U.S. 923 (1967); State v. Phillips, 29 Wis. 2d 521, 139 N.W.2d 41 (1966).

191 *See* United States v. Devall, 462 F.2d 137 (5th Cir. 1972); Commonwealth v. Whitson, 464 Pa. 101, 334 A.2d 653 (1975).

An investigative delay of 24 hours was held reasonable in Quinn v. State, 50 Wis. 2d 101, 183 N.W.2d 64 (1971), where the accused confessed to eight crimes in the first half-hour after arrest. *Cf.* Commonwealth v. Morton, 475 Pa. 374, 380 A.2d 769 (1977), where nine hours of investigative delay was held "unnecessary."

Courts have also upheld delays for locating stolen goods, *see* State v. Sings, 35 N.C. App. 1, 240 S.E.2d 471 (1978), and for placing the location of the alleged crime, *see* Mares v. Hill, 118 Utah 484, 222 P.2d 811, *cert. denied*, 341 U.S. 933 (1950). In State v. Wallace, 59 Wis. 2d

termines that the police intended to extract a confession, it is likely to exclude the resultant confession as involuntary or as the product of unnecessary or unreasonable delay.[192] Exclusion is less likely when the accused manifests a willingness to be interrogated, such as when he requests a polygraph examination.[193] Most jurisdictions do not find that delays attributable to requests by the accused are unreasonable.

Inextricably tied up in a reasonableness determination is the conduct of officials during the delay in question, particularly when defense counsel challenges the state's asserted reason for the delay. Good treatment of the accused,[194] time allowed for sleep and consultation with relatives, and relatively little actual questioning[195] of the suspect are all circumstances which will work against claims that the purpose of a delay is unreasonable. Conversely, intensive or violent questioning,[196] deprivation of sleep or food, and isolation[197] are examples of circumstances suggesting that a delay is unreasonable. The weight accorded police conduct during a delay will vary with the susceptibility of the particular suspect to coercive pressure. An individual with experience in the criminal process is less likely to be prejudiced or have his "will overborne" by delay than a first-time offender. The courts often take this factor, as well as the age and education of the accused, into account.[198] Theoretically, under *McNabb-Mallory* the susceptibility factor should carry little weight because the inquiry is not about voluntariness. Still, a court can infer the purpose of a delay from police conduct toward a person known to be particularly susceptible. Thus, the factor does have some limited relevance.

Length is probably the most important and least concrete determinant of a delay's reasonableness. As a general rule, the relevant period

66, 207 N.W.2d 855 (1973), the court found a three-day delay to be reasonable in light of the difficulty of investigating the crime committed seven years before the arrest.

192 In Watts v. Indiana, 338 U.S. 49 (1949), Justice Frankfurter said that it was at this point that interrogation became a "suction process" and that resulting confessions were "the reverse of voluntary." *Id.* at 53. *See* Thomas v. United States, 394 F.2d 247 (10th Cir. 1968), *cert. denied*, 394 U.S. 931 (1969), and State v. Phillips, 29 Wis. 2d 521, 139 N.W.2d 41 (1966).

193 Courts also have tended to uphold the reasonableness of investigative delays when the suspect turns himself in, or confesses spontaneously to crimes unrelated to the one under investigation. *See* Smith v. State, 252 Ind. 425, 249 N.E.2d 493 (1969).

194 Benign treatment of the accused was a factor justifying delays in State v. Wyman, 97 Idaho 486, 597 P.2d 531 (1976), and State v. Hausen, 225 N.W.2d 343 (Iowa 1975).

195 *See* State v. Estrada, 63 Wis. 2d 476, 217 N.W.2d 359 (1974).

196 *See* People v. Donovan, 13 N.Y.2d 148, 243 N.Y.S.2d 841 (1963), and Commonwealth v. Cherry, 457 Pa. 201, 321 A.2d 611 (1975).

Evidence of such conduct is more likely to go to the voluntariness of a confession rather than to the reasonableness of a delay during which it was obtained. *See* People v. Angello, 48 Misc. 2d 550, 265 N.Y.S.2d 509 (1965).

197 *See* Thomas v. North Carolina, 447 F.2d 1320 (4th Cir. 1971).

198 *See id.* at 1322.

of time in measuring the length of a delay is that elapsing between arrest and confession.[199] In the overwhelming majority of states, the reasonable length of a delay is a matter entirely within the discretion of the court.[200] Just as a legitimate purpose, such as administrative processing, will support a long delay, a short delay will mitigate against the exclusionary impact of a questionable practice.

The law enforcement officer will find little guidance from such distinctions. Many of the important reasonableness factors are discoverable only through hindsight, leaving the officer in an untenable position. The perceptions and biases of individual trial judges may also affect the relative weight of these factors.[201] The result in the federal courts was uncertainty, not continuity, as minor factual differences distinguished cases, confusing police and other judges.[202]

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199 *See* United States v. Montes-Zarate, 552 F.2d 1330, 1331 (9th Cir. 1977); Lewis v. State, 296 So. 2d 575, 577 (Fla. App. 1974); Dukes v. State, 109 Ga. App. 825, 829, 137 S.E.2d 532, 535 (1964); State v. Johnson, 383 A.2d 1012, 1017 (R.I. 1978).

200 The judge's discretion is circumscribed only in states in which a flat, time-based standard applies.

201 One of the significant problems encountered in the federal courts with the *McNabb-Mallory* rule was the reluctance of some judges to apply it. One federal judge wrote:

> With all due deference to the Supreme Court, and especially to Mr. Justice Felix Frankfurter, the author of . . . [*McNabb*] we are constrained to state that we entertain grave doubts that this recently promulgated rule of evidence will result in any improvement to the administration of criminal justice. . . . This new rule inures to the benefit of the guilty rather than the innocent and will seriously impair the work of law enforcement officers.

United States v. Haupt, 136 F.2d 661, 671 (7th Cir. 1943).

Some federal courts refused to believe that the Supreme Court had intended to create a standard so unrelated to the voluntariness test of the past. For example, in Ruhl v. United States, 148 F.2d 173, 175 (10th Cir. 1945), the court wrote of *McNabb*, "[A] careful reading of the case leads to the conclusion that failure to take the accused before an arraigning officer was not the reason the confession was held inadmissible. The real basis of the decision was the coercive and unfair treatment to which the defendant was subjected." *See also* Note, *supra* note 6, at 763-64.

202 Before reciting precedent to support a reasonableness decision under *McNabb-Mallory*, one court cautioned:

> In the interest of clarity, however, it is desirable to say something about the state of the decisions in the various circuits on the question as to what constitutes unnecessary delay. There are numerous decisions on this point in the District of Columbia Circuit, because in the District of Columbia common law felonies are prosecuted in the Federal court. The decisions are inconsistent with each other, depending very largely, I venture to say, on the composition of the panels of judges that decided the various cases.

United States v. Fuller, 243 F. Supp. 178, 181 (D.D.C. 1965), *aff'd*, 407 F.2d 1199 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 1120 (1969).

In Johnson v. State, 282 Md. 314, 343, 384 A.2d 709, 725 (1978), Chief Judge Murphy wrote in dissent:

> Defining just what delay in presenting an arrested person before a judicial officer was 'unnecessary' predictably caused great problems to courts required to grapple with such a vague and elusive concept. Because the rule was neither sensible nor clear, because it was unrealistic in application, unworkable in practice, and led to widely varying results, almost all states . . . rejected it.

See also Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 9-10 (1964).

Time-Based Standards

Time standards, while easily administered, are arbitrary. In his dissent in *Johnson v. State*, Maryland's adoption decision, Judge Orth phrased the objection this way:

> [T]o exclude a voluntary confession from evidence merely because a police officer has presented an arrestee before a judicial officer a fraction of a second too late under the mandate of the rule, no matter what the reason, debases the judicial process. It is so patently against the general public and sensible administration of criminal justice that I am not the least bit persuaded by the arguments advance by the majority.[203]

Time-based exclusion makes judges, not to mention police, slaves to the clock. In adopting it, courts abdicate their judicial function and make it possible for a confessed killer to go free because someone was late.

To its credit, the time-based standard focuses on delay alone as the triggering factor. Thus it relates more directly to the remaining unaddressed concern of delay statutes, which is prearraignment delay, not confessions. However, it still relies on the exclusion of confessions as the operative enforcement device for the statute. Such an approach contains the flaws discussed previously: it deprives society of the benefit of highly probative, constitutionally valid confessions without an express legislative basis for doing so. When state legislators mean for statutory violations to affect the admissibility of confessions, they have not been hesitant to do so. Some state statutes specify that the confessions of juveniles are inadmissible if special procedures are not followed upon their arrest.[204] Other direct expressions of legislative intent regarding the admissibility of confessions are not unknown to the law.[205] The absence of an express mandate to exclude in ordinary delay statutes is therefore significant, and the courts should heed it. If *McNabb-Mallory* is to be adopted regardless, then the time-based standard makes the most administrative and doctrinal sense.

Both a reasonableness version and a time-based version of *McNabb-Mallory* involve considerable costs. The former is often unworkable, and the latter is dangerously arbitrary. In light of the insignificant remaining utility of *McNabb-Mallory* with regard to confessions, the decision to incur such costs is a drastic one.

Public Response to McNabb-Mallory

Any court must be concerned with the public reaction to its decisions. Our legal system depends on society's perception of its continued

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203 282 Md. 314, 341, 384 A.2d 709, 724 (Orth, J., dissenting).

204 *See, e.g.*, OKLA. STAT. ANN. tit. 10, § 1109 (Supp. 1979-80).

205 *See, e.g.*, TEX. CODE CRIM. PRO. ANN. art. 38.22 (1979). *See also* McCormick, *supra* note 151, at 251-54; and note 141 *supra*.

effectiveness for its survival. This is the mirror image of the judicial integrity argument put forth to support adoption of exclusionary rules, including *McNabb-Mallory*.[206] In the absence of a showing of potential coercion, the public is apt to perceive exclusion of confessions and reversals of convictions as irrational, or at least overly solicitous of the rights of a confessed criminal at the expense of society. Furthermore, such developments can breed disrespect for the law and encourage crime by making convictions less certain.[207] As Professor Inbau has noted:

> Our civil liberties cannot exist in a vacuum. Alongside of them we must have a stable society, a safe society; otherwise there will be no medium in which to exercise such rights and liberties. To have these liberties without safety of life, limb, and property is a meaningless thing. Individual civil liberties, considered apart from their relationship to public safety, and security, are like labels on empty bottles.[208]

Public outrage in response to adoption may have more direct effects than a long range deterioration of esteem for the judicial function or for the laws. State legislators are as capable as their federal counterparts of

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206 *See* text accompanying note 167 *supra*.

207 In Olmstead v. United States, 277 U.S. 438 (1928), Justice Brandeis wrote in dissent: "In a government of law, existence of the government will be imperilled if it fails to observe the law scrupulously. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Chief Justice (then Judge) Burger responded:

> No one can take issue with the Brandeis thesis, but there is another side to the coin.
>
> If a majority—or even a substantial minority—of the people in any given community . . . come to believe that law enforcement is being frustrated by what laymen call "technicalities," there develops a sour and bitter feeling that is psychologically and sociologically unhealthy. . . .
>
> I do not challenge these rules of law. But I do suggest that we may have come the full circle from the place where Brandeis stood, and that a vast number of people are losing respect for law and the administration of justice because they think that the Suppression Doctrine [the exclusionary rule] is *defeating* justice.
>
> . . . [W]e must remember that the rule was made to protect the integrity of law enforcement, not to cripple it.

Burger, *supra* note 202, at 21-22 (citing Sondern, *Take the Handcuffs Off Our Police!*, READERS DIGEST, Sept. 1964, at 64-68).

The 16-year-old statement is certainly not outdated. Consider this 1980 news article:

> FEAR OF CRIME HAUNTS THE U.S.
>
> Fear of crime is as American as the Son of Sam or the Hillside Strangler. And this real anxiety, according to a new study of public attitudes in the United States, has turned more than half of the nation into a pack of cautious, gun-toting citizens who keep their doors locked and their dress inconspicuous to avoid becoming crime statistics. Four out of ten Americans surveyed say they are "highly fearful" that they will be victims of murder, robbery, rape or assault. . . .
>
> The study [a 163-page report by Research and Forecasts, Inc. of New York] also confirms other polls that show that the criminal courts have lost the respect of the public, and it indicates an increasingly strong punitive mood.

NEWSWEEK, Sept. 29, 1980, at 85.

208 Inbau, *Law Enforcement, The Courts, and Individual Civil Liberties*, in CRIMINAL JUSTICE IN OUR TIME 96, 134 (A. Howard ed. 1965).

passing legislation similar to the Omnibus Crime Act.[209] In addition, the elected or voter-approved state judge may question whether the *McNabb-Mallory* principle merits the uproar where the result on procedure after legislative reversal will be nil.[210] Concededly, obscure legal issues seldom spark such widespread interest as to make popular acceptance an important factor in a court's decision. Yet on the federal level the *McNabb-Mallory* rule was for more than twenty years the most hotly contested issue in federal criminal procedure.[211] The debate it inspired was intense; the arguments were of broad, emotional appeal. Senator Ervin's oft quoted remark illustrates some of the ferocity of the attack on *McNabb-Mallory*: "Frankly, I believe that in recent years enough has been done for those who murder, rape and rob; and that it is about time for Congress to do something for those who do not wish to be murdered, or raped, or robbed."[212]

Of course constitutional rights of individuals should not depend on the passions of the majority. *But McNabb-Mallory involves no constitutional rights*. The doctrine emanates from delay statutes, which almost never expressly mandate exclusion to enforce them. The decision to adopt has crucial consequences. Language quoted throughout this comment illustrates the controversy and acrimonious debate adoption engenders. The heavy costs of adoption, the doubtful modern necessity for extraconstitutional exclusionary protection, and the intuitive irrationality of exclusion for reasons so unrelated to the confession itself should give a court pause before deciding a legislature intended such a result by implication. In the original *McNabb* decision, the Supreme Court erred, and Congress eventually abolished the rule after twenty-five years of stormy and confusing jurisprudence. State courts should learn from the federal experience.

Federal versus State Necessity for Interrogation

The Supreme Court has noted the necessity for interrogation of suspects in criminal investigations. In *Culombe v. Connecticut*, Justice Frankfurter, the author of the *McNabb* opinion, wrote:

> Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains—if police investigation is not to be balked before it has fairly be-

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209 *See* notes 7, 28-31 & accompanying text *supra*.

210 *See* Beck & Reese, *Judge Bird on Trial*, NEWSWEEK, Oct. 23, 1978, at 53; *Bird Hunt*, TIME, Oct. 2, 1978, at 53; Reeves, *Bird Hunting in California; Attempt to Remove R.E. Bird as Chief Justice*, ESQUIRE, Sept. 12, 1978, at 7; Justice Bird's rulings in criminal cases, and the ensuing controversy, drew nationwide attention.

211 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, *Criminal* § 72, at 63 (1969).

212 104 CONG. REC. 17085 (daily ed. Aug. 19, 1958).

> gun—but to seek out guilty witnesses and ask them questions, witnesses that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it.[213]

Adoption of the rule unavoidably creates additional uncertainty or unwarranted arbitrary limits on the interrogation process.[214] These adverse effects affect all interrogations whether or not a court later finds that they occurred during an unreasonable delay. The Supreme Court determined that the benefits of *McNabb-Mallory* outweighed these effects on the interrogation process in the federal law enforcement system, but clearly recognized that states might come to different conclusions regarding their criminal systems.[215]

Federal law enforcement agencies may bring large amounts of specialized equipment and manpower to bear on fewer, more specialized crimes. The ability of federal agencies to gather circumstantial evidence reduces the importance of interrogation of suspects in solving crimes. Yet a state court might determine that local police, by the more limited capacity of their resources and the nature and number of the crimes they handle, depend on interrogation more than do their federal counterparts.[216] Murderers, rapists, and robbers would seem to produce less extrinsic, tangible evidence than narcotics dealers, if only because the former set of crimes generally involve fewer people and are repeated less systematically. Crimes that states prosecute, for the same reasons, may involve fewer innocent parties to serve as witnesses, increasing the need, as Justice Frankfurter noted, for the interrogation of suspects. On the basis of this need, and especially in light of the strong constitutional protections currently afforded arrested persons, a state court should consider carefully whether the effect of a *McNabb-Mallory* rule is too severe on state law enforcement for adoption by judicial fiat, even if the court believes that the rule might once have been workable in the federal system. In the absence of express legislative intent, adoption risks serious harm to important state interests.

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213 367 U.S. 568, 571 (1961).

214 *See* text accompanying notes 177-205 *supra*.

215 In Stroble v. California, 343 U.S. 181, 197 (1951), the Court made explicit what it had implied in *McNabb*: that it would not apply *McNabb-Mallory* in reviewing state criminal prosecutions for due process violations.

216 Professor Inbau cites the interesting case of Greenwell v. United States, 336 F.2d 962 (D.C. Cir. 1964), where FBI agents, when involved in a "local" rather than "national" crime case, found themselves caught in a *McNabb-Mallory* trap. The example tends to undercut those who reason that "If the FBI could live with *McNabb-Mallory*, so can other law enforcement bodies." F. INBAU & J. REID, *supra* note 36, at 151 n.18. *See also* Inbau, *More About Public Safety v. Individual Civil Liberties*, 53 J. CRIM. L. & C. 329, 331 (1962).

V. CONCLUSION

State courts reviewing their stands on *McNabb-Mallory* must consider not only whether to adopt the rule, but to what extent. Adopting a causation formula or a reasonableness standard leads to sporadic or ineffective application of the rule as evidenced in Michigan and Wisconsin. The per se rule based on flat time standards addresses the administrative problems, but may encourage police to continue their interrogations up to the limit in more cases, and abdicates the judicial function. Still, the rules in Pennsylvania and Maryland most accurately reflect the basic concerns of delay statutes. Perhaps a court should not decide between any of these options for enforcement. Although delay statutes express legislative intent, most of them provide no suggestions for methods of enforcement or remedies.[217] The extension of a drastic remedy normally reserved for constitutional violations is a tenuously justified exercise of judicial power, especially in light of the reaction to the original rule in Congress.[218]

Furthermore, current constitutional law addresses many of the original concerns underlying delay statutes, obviating the need for reliance on a doctrine of implied statutory exclusion. The Supreme Court now reads the fourth amendment practically to forbid the "pick-up" for questioning.[219] Once an accused is in custody, *Miranda* warnings must be given, understood, and voluntarily waived before a subsequent confession is admissible.[220] In any case, the confession must be voluntary.[221] The constitutional rulings undercut the delay statutes' protective function, which by itself supports a weak case for incurring the social cost of excluding the remaining confessions.[222]

Yet the deterrent goal of *McNabb-Mallory* retains its validity with regard to prearraignment delays per se. The time one is kept at a police station illegally, whether or not he confesses, should be eliminated. But *McNabb-Mallory* applies only where police obtain a confession; even then it raises the general doubts about the deterrent value of the exclusionary rule.[223] An increasing number of courts are impatient with increased violations of delay statutes and, faced with a lack of legislative response, are considering action.[224] The recent state decisions to adopt *McNabb-*

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217 *See* statutes cited in notes 33-34 *supra*.

218 *See* text accompanying notes 28-31 *supra*.

219 *See* text accompanying notes 159-60 *supra*.

220 *See* text accompanying notes 153-54 *supra*.

221 *See* text accompanying notes 145-47 *supra*.

222 *See* text accompanying notes 157-58 *supra*.

223 *See* note 162 *supra*.

224 *See* notes 133-44 & accompanying text *supra*. The same impetus ought to spark legislative searches for more efficient alternatives than *McNabb-Mallory* to stem police disregard for

Mallory assume that exclusion is the only viable way to deter violations.[225] The costs of *McNabb-Mallory,* however, far outweigh its utility, and its effect falls short of its goal. More careful analysis should engender greater resistance to *McNabb-Mallory* in the state courts in the future. Once it is determined that the problem warrants judicial rather than legislative or administrative action, other wiser possibilities should suggest themselves to judges concerned with striking a workable balance between the pressures for law enforcement and police control.[226]

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delay statutes. *See generally* Roche, *A Viable Substitute for the Exclusionary Rule: A Civil Rights Appeals Board*, 30 WASH. & LEE L. REV. 223 (1973). *See also* Burger, *supra* note 202.

225 In promulgating the *Johnson* rule, the Maryland Court of Appeals called the exclusionary rule "perhaps" the most effective device for curbing illegal prearraignment delays. 282 Md. at 326, 384 A.2d at 716. Other adopting state courts implemented the rule with no discussion of alternatives. State v. Benbo, 174 Mont. 252, 570 P.2d 894; Commonwealth v. Futch, 447 Pa. 389, 290 A.2d 417.

226 The balance must recognize the importance of redressing crime.

> A criminal justice system, by its very nature, frequently involves the delicate balancing of competing interests. A society dedicated to human liberty must be ever vigilant that a suspect never be compelled to incriminate himself. That same society, legitimately concerned with protecting itself from predators, must also be sensitive to the value of an admission or confession, properly obtained, as sometimes indispensable evidence of guilt. But for the confession in the case at bar, a brutal sexual assault and strangulation of a ten-year-old girl might have gone forever unredressed . . . .

Chaney v. State, 42 Md. App. 563, 563-64, 402 A.2d 86, 88 (1979).