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Illegal Delay and Confessions in State and Federal Courts – A "Civilized Standard"

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COMMENTS

ILLEGAL DELAY AND CONFESSIONS IN STATE AND FEDERAL COURTS - A "CIVILIZED STANDARD" [1]

The question of admitting into evidence a confession obtained during a period of detention beyond that permitted by law has produced two opposing answers. The answer in any given case has been determined by an accidental factor, namely, the court of origin. Such confessions have been rejected by the federal courts, [2] but have been freely admitted in state courts. [3]

It is the purpose of this article to analyze cases which consider the admissibility of confessions obtained without apparent force - physical or psychological - but which grow out of an illegal detention; to indicate the opposing concepts on the admissibility of such confessions; and to examine the desirability of resolving the conflict by the application of "civilized standards." [4]

The Federal Rule

The need for "civilized standards" to govern criminal procedure and evidence was manifested by the Wickersham Report. [5] Such standards, however, were not employed until more than ten years after the publication of the National Commission's Report when Mr. Justice Frankfurter delivered his celebrated opinion in the McNabb case. [6]

The McNabb case involved an arrest of the McNabb brothers by federal officers for the murder of an Internal Revenue agent engaged in a liquor raid. After their arrest the McNabbs were detained three days without arraignment; [7] and during this period of illegal detention Benjamin

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1. "Judicial supervision of the administration of criminal justice in federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." McNabb v. United States, 318 U.S. 332, 340 (1943). (emphasis added).
2. Upshaw v. United States, 335 U.S. 410 (1948).
3. See cases cited in Appendices B and C.
4. McNabb v. United States, supra, note 1.
5. Reports No. 8 and 11 issued by the National Commission on Law Observance and Enforcement (1931). See also McCormick, Some Problems and Developments in the Admissibility of Confessions, 24 Tex. L. Rev. 239, 243 (1946).
6. McNabb v. United States, supra, note 1.
7. "(a) APPEARANCE BEFORE THE COMMISSIONER. 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

(Continued on next page)

McNabb confessed that he had fired "the first shot, but denied that he had fired the second," [8] which was said to have killed the agent. Two of his brothers also made incriminating statements. Upon these statements were based the McNabbs' convictions. [9] Reviewing these convictions and considering only the illegal delay, the Supreme Court of the United States reversed them and announced the rule which forbids "inexcusable detention for the purpose of illegally extracting evidence from an accused." [10]

This deviation from the ordinary norm caused writers to speculate. Did the Supreme Court mean what it said in the McNabb case? Would illegal delay, of itself, render a confession inadmissible? The test for the new rule came in 1944 when the Supreme Court granted certiorari in United States v. Mitchell. [11] The Court, however, did not consider the Mitchell case a test; it refused to apply the McNabb rule, saying that the confession did not grow out of the illegal delay. [12]

After establishing the McNabb rule and delimiting its use in the Mitchell case, the Supreme Court was said to have been presented with a dilemma when it granted certiorari in the Upshaw case. [13] If there were such a dilemma, the Court took the bull by the horns by reversing Upshaw's conviction, affirming the McNabb rule, and distinguishing the Mitchell case. Delivering the opinion for the Court, Mr. Justice Black pointed out that these cases do not involve a constitutional issue. [14] The issue involved is a breach by federal officers of a Federal Rule of Criminal Procedure, [15] and the reversal stems from the power of the Supreme Court to govern the rules of evidence in federal courts.

Thus the Federal Rule, avoiding the constitutional issue and deriving its force solely from a procedural rule, renders inadmissible any confession obtained during a period of illegal detention.

The State Rule

Although almost every state legislature has enacted a statute [16]

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nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States." 18 U.S.C. sec. 3060, Rule 5(a), Federal Rules of Criminal Procedure.

8. McNabb v. United States, supra, at 338.
9. McNabb v. United States, 123 F. 2d 848 (1941).
10. United States v. Mitchell, 322 U.S. 65, 67 (1944).
11. ibid.
12. In the McNabb Case, supra, note 8, there was an arrest, an illegal delay following, and a confession elicited during the illegal period; while in the Mitchell Case, supra, note 10, the confession preceded the period of illegal delay. This precluded the Court's using the McNabb Rule.
13. Upshaw v. United States, supra; See Inbau, The Confession Dilemma in the United States Supreme Court, 43 Illinois L. Rev. 442 (1948).
14. Upshaw v. United States, supra, at 414.
15. See note 7 supra.
16. Maryland, New Mexico, and Vermont have no legislation on the point. The other jurisdictions' statutes vary only as to language. All require the arresting officer to take the accused before an appropriate officer without unnecessary delay. For a compilation of these statutes see Appendix A. For interpretations thereof see cases cited in Appendix B.

similar in substance to Rule 5(a) of the Federal Rules of Criminal Procedure, [17] none has employed the "civilized standard" pronounced in the McNabb case. Since the decision in that case was not based on constitutional grounds, [18] but on a federal procedural rule, the states are legally correct in rejecting it and declaring it inapplicable to their own proceedings.

A rejection of the McNabb rule is the departure point of all the state cases reviewed. [19] Following this perfunctory rejection, the courts search for a better rule. The successful search usually produces a rule which permits the admission of a confession that has been obtained from a person held in violation of state law. The fact that the defendant was illegally held at the time of his confession has not yet precluded the state courts from admitting the confession. [20]

In the cases examined [21] there seem to be three theories upon which the admissibility of these confessions is justified. These theories shall be referred to as (1) the coercion theory; [22] (2) the causal connection theory; [23] and (3) the analogy theory, [24] which is the same doctrine upon which the admission of illegally seized evidence is rationalized. [25]

The coercion-theory states look primarily to the conduct of the police and investigating officers during the illegal detention. If it can be shown that these officers did, in fact, coerce the confession by physical violence, by promises of immunity, by battery type interrogation, or by any other act that would immobilize the will of the confessor, the confession will be excluded. It is held by the states that adhere to this theory that the voluntary or involuntary nature of a confession controls its admissibility.

The causal connection theory is closely related to the coercion-theory in that its proponents are concerned only with the voluntariness or involuntariness of the confession. Illegal detention, however, will be considered as a factor which could induce the confession and it will be weighed with the other evidence. Although this consideration is given the illegal delay, there is no indication of a tendency in states that have been examined to exclude confessions solely on the grounds that they are the products of an illegal detention.

The third theory which, for want of a better name, is called the analogy theory is the same theory that was propounded by the United States

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17. See note 7 supra.
18. See note 14 supra.
19. See Turner v. Commonwealth, 358 Pa. 350, 365, 58 A. 2d 61, 65 (1948), and the cases cited in Appendix B.
20. For a unique dictum stating the consideration to be given an illegal detention, per se, as a factor to exclude a confession, see Commonwealth v. Mayhew, 297 Ky. 172, 178 S.W. 2d 928, 932 (1943).
21. See Appendix B.
22. Walker v. State,__ Okl.__, 205 P.2d 335 (1949); Williams v. State,__ Okl.__ 205 P. 2d 524 (1949).
23. Moore v. State,__Miss.__, 41 So. 2d 368 (1949); certiorari denied 338 U.S. 844 (1949).
24. Commonwealth v. Mercier, 257 Mass. 353, 153 N.E. 834 (1926).
25. The dissenting-concurring opinion of Mr. Justice Jackson in Watts v. Indiana, 338 U.S. 49, 57 (1949), exemplifies this theory.

Supreme Court in Wolf v. Colorado, [26] a case involving the admissibility of illegally seized evidence. Condemning the "time-honored method - detention without arraignment - for keeping the accused under exclusive control of the police," [27] the advocates of this theory admit into evidence the confession that is taken during the illegal period, saying that the procedural rule which requires an immediate arraignment does not govern the court on evidentiary matters. These rules are said to be directives to the law-enforcing officers; should they be violated, the officers should be punished according to the statute, but the confession, unless it can be shown to have been forced, will be admitted. [28]

Whatever may be said for the theories advanced to justify the states' action, one principle is clear and almost consistently followed by every state: illegal detention, per se, will not serve as a basis for excluding a confession. This principle is the state rule.

Review of State Decisions by the Supreme Court [29]

Although state courts have been reversed on their decisions on the admissibility of confessions, they have not been reversed in their basic contention that the confessions taken during an illegal period are admissible, unless they can be shown to have been coerced. No state has ever been reversed solely on the grounds that it admitted a confession which was the fruit of an irregular procedure. Exercising that delicate power of review, the Supreme Court of the United States seems always to find one or more factors which the states have overlooked and which provide a basis for using the exclusionary rule. [30] Except in federal cases, however, the Court has never reversed a conviction because it was based on a confession that was obtained during a period of illegal detention. [31] The "civilized standards" of the McNabb case are reserved for the federal cases. Perhaps the rationale of the McNabb case and the cases following the rule in that case make its application to state-confession cases im-

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26. 338 U.S. 25 (1949).
27. Mr. Justice Douglas dissenting, Watts v. Indiana, supra, at 57.
28. The purpose of these prompt arraignment statutes is set forth in an historical note in McKinney's New York Code Crim. Pro., sec. 187. Briefly stated, the purpose is the vitiation of the conditions under which "third-degree", "cold-storage", and other coercive police practices thrive. That this purpose cannot be achieved by the use of alternative devices, see Mr. Justice Murphy's trenchant dissent in Wolf v. Colorado, 338 U.S. 25, 41 (1949). See also "Defense in Criminal Cases Prior to Trial", an address delivered by Lemuel B. Schofield, Esq., before the Philadelphia Bar Association, December, 1939. [Published in pamphlet form by the Phila. Bar Assn.; cited also in brief for Petitioner, p. 45, Turner v. Commonwealth, 338 U.S. 62 (1949)].
29. See Appendix C. All cases cited involve a question of due process, and coercion of some form was decisive in each case.
30. ibid.
31. Perez v. People, 300 N.Y. 208, 90 N.E. 2d 40 (1949); certiorari denied 338 U.S. 952, S. 70 Ct. 483 (1950); rehearing denied 338 U.S.__, 70 S. Ct. 483 (1950). In refusing to hear this case the Supreme Court avoided the possibility of having to determine whether or not an illegal detention of itself would invalidate a confession.

possible. If this is so, a new rule - a civilized rule - must be established for the regulation of non-federal confession cases.

A Civilized Rule for States

Since Mr. Justice Cardozo's statement that the Due Process Clause of the Fourteenth Amendment included all those basic notions which are implicit in ordered liberty, [32] the scope of that Clause has been broadened more and more "by a gradual and empiric process of 'inclusion and exclusion'." [33] As our free society advanced, the standards of what is deemed reasonable and right have advanced; for this reason it has become impossible to determine once and for all the limits or essentials of fundamental rights. [34] Just as our failure to see a traffic signal does not refute the existence of the signal, neither does our failure to recognize a fundamental right imply its nonexistence.

Without hiding behind some technicality which a law might produce in these confession cases, one conclusion cannot be refuted: the basic issue involved is one of due process. Simply stated, this means that no person shall be deprived of life or property, unless this deprivation be accomplished by the means prescribed by law. Such has been the basis of Anglo-American criminal justice since that famous meeting at Runnymede in 1215, and since that day no English or American court has declared the rule to be otherwise. Although the concept has a changing content and the content has been changed, the notion that a person shall not forfeit life or property without due process of law has never been erased from the system. An examination of the system discloses what is essential for the achievement of due process and shows that the requirement of a prompt hearing before a magistrate is one of those fundamental principles of liberty and justice which lie at the base of our civil and political institutions. [35] The pervasiveness of the statutory requirements of a prompt hearing before a magistrate, [36] a recognition of its traditionally important place in the common law, [37] the inclusion of it in An International Bill of Rights, [38] and the intimations of the United States Supreme Court in Watts v. Indiana [39] certainly give strong support to the belief that the

32. Palko v. Connecticut, 302 U.S. 319 (1937).
33. Wolf v. Colorado, 338 U.S. 25, 27 (1949).
34. ibid.
35. This notion was suggested, but not too strenuously, in the Brief for Petitioner, p. 21, Turner v. Commonwealth, 338 U.S. 62 (1949).
36. See note 7, supra, and Appendix A.
37. Wright v. Court and Others, 4 B&C 596, 107 Eng. Rep. 1182 (1825); See also 4 Blackstone, Commentaries, p. (*) 296, 8 R.C.L. 104.
38. Department of State Publication, No. 3055, p. 4; 18 Department of State Bulletin 200 (Feb. 15, 1948).
39. "Ours is the accusatorial system as opposed to the inquisatorial system. Such has been characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the continent whereby an accused person was interrogated in secret for hours on end... The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confession extorted through whatever form of police practices, the right to a prompt hearing before a magistrate...these are all characteristics of the accusatorial system and manifestations of its demands." Watts v. Indiana, supra at 54. (emphasis added).

preliminary hearing is necessary for the existence and continuance of the "accusatorial system" [40] and is one of those precepts which are implicit in our system of ordered liberty. Considering the support given to this contention by such impressive authority, the requirement of a prompt hearing before a magistrate should be declared [41] to be one of those elements which are indispensable to the maintenance of our system of criminal justice and which are made operative against the states through the Due Process Clause of the Fourteenth Amendment. A court that does this, however, has solved only half of the problem; it must take the second step and employ the exclusionary rule which has been used in the federal cases and which is said to be indicative of "civilized standards." [42]

To declare the illegal detention a violation of the Due Process Clause of the Fourteenth Amendment and then to admit into evidence the confession elicited during such a period is to give tacit sanction to the lawlessness of the law-enforcing body and to reduce the Fourteenth Amendment "to a mere form of words". [43] To reject the confession - and this is the only satisfactory approach-is to give vitality to the Due Process Clause as against the states and to preserve its "historic function of assuring appropriate procedure before liberty is curtailed and life taken." [44]

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APPENDIX A: ARRAIGNMENT STATUTES

Alabama: Code 1940, Title 15, Sec. 160; Alaska: Compiled Laws, 1946, Chap. 66, Sec. 5-33, 66, Sec. 5-34; Arizona: Code 1939, Title 44, Sec. 107; Arkansas: Statutes 1947, Title 43, Sec. 601; California: Penal Code 1949, Sec. 825; Colorado: Statutes 1935, Chap. 48, Sec. 428; Connecticut: General Statutes, 1949, Sec. 465; Delaware: Rev. Code 1935, Chap. 119, Sec. 11, 4456, 149, Sec. 17, 5173; District of Columbia: Code 1940, Title 4-140, 23-301; Florida: Statutes 1943, Title 45, Sec. 901.6; Georgia: Code 1933, Chap. 27, Sec. 210, Sec. 212; Hawaii: Rev. Laws, 1945, Chap. 230, Sec. 10709; Idaho: Code 1949, Sec. 19-515, 19-518, 19-614, 19-615; Illinois: Smith-Hurd, Chap. 38, Sec. 655, 660; Indiana: Burns Stat. Chap. 7, Sec. 9-704; Iowa: Code 1946, Chap. 755.14, 757.2; Kansas: Gen. Statutes, 1935, Sec. 62-610; Kentucky: Code 1938, Sec. 45, 46; Louisiana: Rev. Statutes 1950, Sec. 15-79, 15-80, 15-84.2; Maine: Rev. Statutes 1944, C. 134, Sec. 9; Massachusetts: Gen. Laws 1932, C. 276, Sec. 22, Sec. 29, Sec. 34; Michigan: Comp. Laws 1948, Sec. 764.13, 764.14; Minnesota: Mason's Stat. 1927, C. 104, Sec. 10575, Sec. 10581; Mississippi: Code 1942, Title 11, Ch. 2, Sec. 2473; Missouri: Rev. Statutes 1939, Ch. 30,

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40. Watts v. Indiana, see note 39 supra.
41. This is not to say that rights are created by the court; rather it is meant that rights already existent are judicially recognized and declared.
42. McNabb v. United States, 318 U.S. 332 (1943).
43. Holmes, J., cited in the dissenting opinion of Mr. Justice Murphy, Wolf v. Colorado, supra at 42.
44. Watts v. Indiana, supra at 55.

Art. 5, Sec. 3862, Sec. 3883; Montana: Rev. Code 1947, Sec. 94-5804, 94-5907, 94-5908; Nebraska: Rev. Statutes 1943, Sec. 29-412; Nevada: Comp. Stat. 1929, Secs. 10744-10748, 10762-10764; New Hampshire: Rev. Laws 1942, Ch. 423, Sec. 3, 4, 6; New Jersey: Rev. Stat. 1937, 2:216-219; New York: Code Crim. Proc. 1939, Sec. 158-159, 165, 185; North Carolina: Code 1943, Secs. 15-24, 15-46; North Dakota: Rev. Code 1943, Secs. 29-0511, 29-0520, 29-0623-29-0625; Ohio: Crim. Code 1945, 13432-3, 13432-4; Oklahoma: Stat. 1941, Title 22, Sec. 176-177, 181, 205; Oregon: Code 1940, Secs. 26-1538, 26-1547; Pennsylvania: Purdon's Perm. Ed. Tit. 19, Sec. 3, 4; Rhode Island: Gen. Laws 1938: C. 625, Sec. 68; South Carolina: Code 1942, Secs. 907, 920; South Dakota: Code 1939, Secs. 34.1608, 34. 1919-34.1624; Tennessee: Michie's Code 1938, Secs. 11515, 11544; Texas: Verman's Texas Stat. 1948, Title 5, Sec. 217; Utah: Code 1943, Secs. 105-4-4, 105-12-14, 103-26-51; Virginia: Code 1950, Title 19-77; Washington: Remington's Rev. Stat. 1932, Title 13, C. 4, Sec. 1949, C. 1, Sec. 1926; West Virginia: Code 1949, Sec. 6150; Wisconsin: Stat. 1947, Sec. 361.08; Wyoming: Comp. Stats. 1945, Chap. 10- 306, 10-307, 10-310.

APPENDIX B: CASES CONSTRUING ARRAIGNMENT STATUTES

Alabama: Ingram v. State, Ala., 42 So. 2d 30 (1949): Ingram v. State, Ala., 42 So. 2d 36 (1949); Arkansas: Palmer v. State, 213 Ark. 956, 214 S. W. 2d 372 (1948) certiorari denied 336 U.S. 921 (1949); California: People v. Nagle, 25 Cal. 2d 216, 153 P. 2d 344 (1944); Connecticut: State v. Buteau, 136 Conn. 113, 68 A. 2d 681 (1949) certiorari denied 338 U.S., 18 L. W. 3239, Feb. 20, 1950; Florida: Finley v. State, 153 Fla. 394, 14 So. 2d 844 (1943); Idaho: State v. Behlar, 65 Ida. 464, 146 P. 2d 338 (1944); Illinois: People v. McFarland, 386 Ill. 122, 53 N. E. 2d 884 (1944); Indiana: Hicks v. State, 213 Ind. 277, 11 N. E. 2d 171 (1937) certiorari denied Hicks v. State, 304 U.S. 564 (1937); Kansas: State v. Smith, 158 Kan. 645, 149 P. 2d 600 (1944); Kentucky: Commonwealth v. Mayhew, 297 Ky. 172, 178 S. W. 2d 928 (1944); Maryland: Grear v. State, Md., 71 A. 2d 24 (1950); Massachusetts: Commonwealth v. Di Stasio, 294 Mass. 273, 1 N. E. 2d 189 (1936), Commonwealth v. Di Stasio, 297 Mass. 347, 8 N. E. 2d 923 (1937) certiorari denied 302 U.S. 683 (1937). certiorari denied 312 U.S. 759 (1937); Mississippi: Moore v. State, Miss., 41 So. 2d 368 (1949) certiorari denied 338 U.S. 844 (1949); Missouri: State v. Ellis, 354 Mo. 998, 193 S. W. 2d 31 (1946): State v. Sandford, 354 Mo. 1012, 193 S. W. 2d 35 (1946) certiorari denied 328 U.S. 873 (1946); New Jersey: State v. Klausner, 4 N. J. S. 436, 67 A. 2d 468 (1949); New York: People v. Perez, 300 N. Y. 208, 90 N. E. 2d 40 (1949) certiorari denied Feb. 6, 1950, 18 L. W. 3227, rehearing denied March 13, 1950, 18 L. W. 3257; North Dakota: State v. Nagel, 75 N. D. 495, 28 N. W. 2d 665 (1947); Ohio: State v. Collett, 58 N. E. 2d 417 (1944) appeal dismissed 144 Ohio St. 639, 60 N. E. 2d 170 (1945); Oklahoma: Walker v. State, Okla. Cr., 205 P. 2d 335 (1949): Williams v. State, Okl. Cr., 205 P. 2d 524 (1949); Oregon: State v. Folkes, 174 Ore. 568, 150 P. 2d 17 (1944) certiorari denied 323 U.S. 779 (1944); South Carolina: State v. Brown, 212 S. C. 237, 47 S. E. 2d 521 (1948) certiorari denied 335 U.S. 834 (1948).

APPENDIX C: AN ANALYSIS OF FACTORS CONSIDERED BY THE UNITED STATES SUPREME COURT IN THE REVIEW OF CASES INVOLVING THE ADMISSIBILITY OF CONFESSIONS. *

Case	Police Tactics	Character of Defendant	Holding and Importance of the case
BROWN v. MISSISSIPPI, 297 US 278 (1936)	Physical violence	D's had no formal education	By reversing this conviction, the S/C gave additional protection to the accused under the 14th Amendment.
CHAMBERS v. FLORIDA, 309 US 227 (1940)	Physical violence; 5 day delay	Ignorant Negro	Conviction reversed; Supreme Court showed that it would make a determination of fact - the voluntariness of a confession - from uncontroverted evidence.
LISENBA v. CALIFORNIA, 314 US 210 (1940)	D claimed he was slapped once	No formal education; business experience	Conviction sustained; the S/C was still looking to the voluntary or involuntary nature of the confession.
WARD v. TEXAS, 316 US 547 (1942)	Conflict on the violence; 3 day delay; incarceration in several jails	Ignorant Negro	Conviction reversed; moving D from place to place was said to be coercion. Court also considered the persistent questioning.
ASHCRAFT v.TENNESSEE, 322 US 143 (1944)	No physical force; 36 hrs of battery-type interrogation.	Well-to-do, educated defendant	Conviction was reversed on the grounds that psychological force was applied and that such force would vitiate the confession.
LYONS v. OKLAHOMA, 322 US 596 (1944)	Two confessions obtained; one by coercion; the other was given freely. Only the second was used.	Ignorant Negro	Conviction sustained, because the second confession was not coerced.
MALINSKI v. NEW YORK, 324 US 596 (1945)	Conflict on violence; D taken from hotel to hotel; intermittent questioning.	Jewish boy; although police made remarks about D's race, this factor did not play a part in the reversal.	Conviction reversed; based partly on the coercion. No advance made in this case.
HALEY v. OHIO, 332 US 596 (1948)	Five hour grilling and a three day period incommunicado after confession.	Fifteen year old Negro	Conviction reversed; the D's age seemed to be the most important factor. Shortest period of delay yet considered.
WATTS v. INDIANA, 338 US 49 (1949)	D kept in the "hole" for seven days; confession resulted.	Mature person	S/C reversed conviction on the grounds that this kind of treatment was physical torture.
TURNER v. PENNSYLVANIA, 338 US 62 (1949)	Conflict on violence: D held five days incommunicado; third degree.	Mature person	Conviction reversed; delay and treatment said to violated due process.
HARRIS v. SOUTH CAROLINA, 338 US 68 (1949)	Three day delay; intermittent questioning; one twelve hour period.	Unschooled person	Conviction reversed.

* In almost every case listed above there was a failure by the police to advise the accused's relatives that he was being detained. Further, the accused was usually deprived of counsel. The Supreme Court did consider these factors.