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A Universal Pre-Arraignment Procedure

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Conclusion

A certain amount of conflict and lack of clarity is unavoidable in any court system with an intermediate appellate court. However, the most obvious conclusion that can be drawn from any study of the California stop and frisk rule is that the lack of clarity in this area is far greater than it should be. A definitive statement is needed on at least three points.

First, under what circumstances, if at all, may an officer make stops in the daytime or indoors? As was previously pointed out, every case which has actually been required to decide this issue has allowed daylight and indoor stops. However, the dicta in other cases will continue to cast doubt on this point until there is a definitive statement.

Second, must there be special circumstances which indicate danger to the officer before he may frisk, or may he automatically frisk anyone whom he may justifiably stop? Here the cases seem to indicate that the frisk may be automatic, but there are apparently no cases which actually state this.

Third, what are the limits of the frisk? This note has attempted to outline what appears from a synthesis of several cases to be the permissible extent of the frisk. However, the cases are far from clear, and there is an apparent conflict between some of them.

It does not appear necessary for California to follow New York's example and enact a statute in order to make the needed definitive statement. The basic stop and frisk rule is well established, and only the details need clarification. This the state supreme court could easily do and should do at the first opportunity.

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firm conclusion. See, People v. Sibron, 18 N.Y.2d 603, 272 N.Y.S.2d 374, 219 N.E.2d 196 (1966); People v. Peters, 18 N.Y.2d 238, 273 N.Y.S.2d 217, 219 N.E.2d 595 (1966); People v. Rivera, 14 N.Y.2d 441, 252 N.Y.S.2d 458, 201 N.E.2d 32, *cert. denied*, 379 U.S. 978 (1964). But see, People v. Pugach, 15 N.Y.2d 65, 255 N.Y.S.2d 833, 204 N.E.2d 176 (1964).

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A UNIVERSAL PRE-ARRAIGNMENT PROCEDURE

The standards of procedure for federal officers who desire to question a suspect are defined, whereas the states, which traditionally control their own police practices and procedures, have many and varied standards. The purpose of this note is to discuss the effect of *Miranda v. Arizona*[1] on this divergence, as well as the possibility of Congressional enactment of uniform rules of pre-arraignment procedure applicable to all the states.

[1] 384 U.S. 436 (1966).

Federal Pre-Arraignment

The *McNabb-Mallory*[2] Rule requires the exclusion of any evidence obtained by federal officers during illegal detention of an arrested person.[3] The purpose of the rule is to insure the enforcement of the federal prompt-arraignment statute[4] and to protect the arrested person from over-zealous police practices[5] and other dangers of secret interrogation.[6]

Under the rule it is not necessary that the confession or other evidence was obtained through physical or psychological coercion; mere illegal detention is sufficient to taint the evidence.[7] The unavailability of a commissioner does not license all-night interrogation.[8] However, if the period of illegal detention began after the confession was procured, it is not rendered inadmissible;[9] and the fact that the arrested person is being held for one offense will not render his confession to a different offense inadmissible.[10] The police are allowed adequate time for the usual procedures of booking, fingerprinting, and the like.[11]

State Pre-Arraignment

Although most states have prompt-arraignment statutes similar to the federal rule,[12] only two have adopted the exclusionary aspect of the *McNabb-Mallory* Rule.[13] The United States Supreme Court has held that the mere denial of prompt

[2] McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957).

[3] McNabb v. United States, 318 U.S. 332, 341-42 (1943).

[4] FED. R. CRIM. P. 5(a): "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 commissioner 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 commissioner or other officer, a complaint shall be filed forthwith." Section (b) provides that the commissioner is to inform the arrested person of his constitutional rights.

[5] McNabb v. United States, 318 U.S. 332, 343 (1943).

[6] *Id.* at 344.

[7] Upshaw v. United States, 335 U.S. 410 (1948).

[8] United States v. Middleton, 344 F.2d 78 (2d Cir. 1965).

[9] Mitchell v. United States, 322 U.S. 65 (1944).

[10] United States v. Carignan, 342 U.S. 36 (1951). The suspect was committed for assault, but confessed to a murder. The confession was admissible since the detention was lawful. But Mr. Justice Douglas, concurring in the judgment, argued that the rule of the case would sanction the "time-honored police method for obtaining confessions [which] is to arrest a man on one charge and use his detention for investigating a wholly different crime." *Id.* at 46.

[11] *E.g.*, Mallory v. United States, 354 U.S. 449, 453 (1957); United States v. Vita, 294 F.2d 524, 529-30 (2d Cir. 1961).

[12] *E.g.*, N.Y. CODE CRIM. PROC. § 165 (McKinney 1958); CAL. PENAL CODE § 849(a): "When an arrest is made without a warrant by a peace officer or private person, the person arrested, if not otherwise released, must, without unneccessary delay, be taken before the nearest or most accessable magistrate " In case of arrest with a warrant the arrested person "must in all cases be taken before the magistrate without unneccessary delay." *Id.* at § 825. See generally Culombe v. Connecticut, 367 U.S. 568, 584 n.26 (1961).

[13] People v. Hamilton, 359 Mich. 410, 102 N.W.2d 738 (1960). CONN. GEN. STAT. ANN. § 54-1c (Supp. 1965).

arraignment is a matter of state not federal law,[14] and the admission of evidence obtained during prolonged detention is neither a denial of equal protection of the laws[15] nor of due process of law.[16] Thus the complete absence of uniformity in state pre-arraignment procedures persists[17] as is demonstrated by a number of state decisions[18] some of which show the inequities which might result from the refusal to adopt the *McNabb-Mallory* Rule.[19] These decisions consistently hold that the only test for admissibility of a confession is whether or not it was voluntary, and even though prompt arraignment is required by law, failure to promptly arraign is merely one factor to be considered in determining the question of voluntariness.[20]

In considering the possibility that the *McNabb-Mallory* Rule should be applied to the states, it is important to note carefully the advantages and disadvantages of the rule.

Many experts in the area of crime detection and law enforcement believe that the rule has significant drawbacks. Some believe that innumerable convictions can be had only by eliciting a confession from the guilty party and by the evidence obtained through questioning of the arrested person.[21] It is also

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[14] Lyons v. Oklahoma, 322 U.S. 596, 597 n.2 (1944). See generally Culombe v. Connecticut, 367 U.S. 568, 601 (1961).

[15] Lyons v. Oklahoma, 322 U.S. 596, 597 n.2 (1944).

[16] Gallegos v. Nebraska, 342 U.S. 55 (1951).

[17] See Lafave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 WASH. U.L.Q. 331; Van Pelt, *The Meaning and Scope of Escobedo v. Illinois*, 38 F.R.D. 441, 459 (1965); ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE art. 4, comment (Tent. Draft No. 1, 1966).

[18] See Culombe v. Connecticut, 367 U.S. 568, 590-94 n.38 (1961) for a list of state decisions holding confessions obtained during illegal detention admissible and state decisions refusing to apply the *McNabb-Mallory* Rule. Another list of state decisions refusing to apply *McNabb-Mallory* is found in INBAU & REED, CRIMINAL INTERROGATION AND CONFESSIONS 161 n.44 (1962).

The following are examples of cases in which the court found that the suspect was illegally detained over a certain period of time yet admitted his confession: State v. Jordan, 83 Ariz. 248, 320 P.2d 446 (1958) (over twenty-four hours); Moore v. State, 229 Ark. 335, 315 S.W.2d 907 (1958) (six days); Rogers v. Superior Court, 46 Cal. 2d 3, 291 P.2d 929 (1955) (eight days); People v. Fox, 148 P.2d 424, *rev'd on other grounds*, 25 Cal. 2d 330, 153 P.2d 729 (1944) (forty-eight hours); Territory v. Aquino, 43 Hawaii 347 (1959) (five days); James v. State, 193 Md. 31, 65 A.2d 888 (1949) (mentally deficient suspect held two days); Winston v. State, 209 Miss. 799, 48 So. 2d 513 (1950) (One suspect held six days, the other one month; no preliminary hearing); State v. Davis, 253 N.C. 86, 116 S.E.2d 365 (1960) (fifteen days); State v. Gardner, 119 Utah 579, 230 P.2d 559 (1951) (twenty-seven days).

[19] An extreme example is Myhand v. State, 259 Ala. 415, 66 So. 2d 544 (1953). An allegedly insane Negro defendant, aged twenty, was accused of raping a twelve year old white girl. After the police took his clothes and some smears from his body for evidence, they threatened to turn him over to the mob to be lynched unless he confessed. The appellate court affirmed the conviction and death sentence saying that there was no physical evidence of coercion; and that the defendant's confessions were admissible though made during illegal detention.

[20] Cases cited note 18 *supra*.

[21] Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L., C. & P.S. 16 (1961).

urged that offenders will not readilly admit their guilt unless they are detained and questioned for at least several hours.[22] It has been said that the *McNabb-Mallory* Rule thwarts prosecution of the guilty because once a guilty man is informed of his rights by a court he probably will not confess.[23] In many cases then there will be insufficient evidence to obtain a conviction, and the suspect will have to be released. Since the rule requires that all arrested persons be quickly brought before a magistrate, the innocent arrested person is immediately stigmatized with a criminal record.[24] Had the police been allowed to question him for several hours and to hold him while checking an alibi, he might not have been exposed to this embarrassment[25] and might have been released without the necessity of arraignment, and without the high cost to the state of requiring court proceedings for all arrested persons.[26]

The proponents of the *McNabb-Mallory* Rule argue that our system of law enforcement is one of accusatorial as opposed to inquisitorial procedures, and therefore arrest is not a proper vehicle for investigation.[27] It would seem that the police should not have the power to arrest a person and detain him indefinitely on mere suspicion. The *McNabb-Mallory* Rule insures enforcement of the prompt-arraignment statute and thus prevents such detention by requiring an immediate appearance before a court, which will release the prisoner if proper grounds are not established for the issuance of a complaint. The rule also facilitates the enforcement of the right to bail,[28] in that while a suspect is held by the police he cannot be admitted to bail; if he is brought immediately before the committing officer his bail will be set at once.[29] Detention should be limited to a short period in light of the fact that long detention greatly increases the risk of coercion and abuse by the police.[30] When the innocent person is held incommunicado for any length of time the implicit threat that he will be held until he confesses becomes more and more overpowering.[31] Also, a judicial warning to the arrested person of his constitutional rights may be the only effective method of guaranteeing that he will understand what his rights are.[32] Thus prompt arraignment may be a necessity if coerced confessions are to be avoided and the fifth amendment privilege against self-incrimination is to be preserved.[33]

[22] *Id.* at 17.

[23] Wickersham, *The Supreme Court and Federal Criminal Procedure*, 44 CORNELL L.Q. 14, 21 (1958). See also Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 CALIF. L. REV. 11, 46 (1962).

[24] CAL. PENAL CODE § 849(b)1 provides that where the arrested person is released without having been arraigned his record then becomes one of mere detention not arrest.

[25] Wickersham, *supra* note 23, at 21. See also Barrett, *supra* note 23, at 46.

[26] Barrett, *supra* note 23, at 46.

[27] Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale, and Rescue*, 47 GEO. L.J. 1, 23 (1958). See also Malloy v. Hogan, 378 U.S. 1, 7 (1964).

[28] U.S. CONST. amend. VIII.

[29] FED. R. CRIM. P. 5(b). See Hogan & Snee, *supra* note 27, at 24-25.

[30] ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Reporters' Introductory Memorandum at xxiii (Tent. Draft No. 1, 1966).

[31] Thompson, *Detention After Arrest and In-Custody Investigation: Some Exclusionary Principles*, 1966 U. ILL. L.F 390, 409.

[32] *Id.* at 411.

[33] *Id.* at 410.

Although the Supreme Court has held that the *McNabb-Mallory* Rule is not applicable to the states,[34] it would be but a small step to apply it.[35] Perhaps the Court has already taken this step in *Ashcraft v. Tennessee*[36] where the Court implied that prolonged detention may be inherently coercive.[37] In addition, the Court has held that the right to counsel is required at the pre-arraignment stage.[38] Also, the fourth amendment privilege against illegal searches and seizures which applies to the states[39] might be applied to prevent prolonged pre-arraignment detention, which could be construed as an illegal seizure of the arrested person.[40]

In *Malloy v. Hogan*[41] the Supreme Court held that the fifth amendment privilege against self-incrimination is applicable to the states through the fourteenth amendment,[42] and that the states are forbidden to resort to imprisonment to

[34] See notes 14-16 *supra* and accompanying text.

In the past various proposals have been made regarding the possibility of altering the *McNabb-Mallory* Rule and applying it to the states. The most sweeping has been that the federal procedure should be modified to outlaw all questioning by the police until the arrested person has been taken before a committing officer. Comment, *Pre-arraignment Interrogation and the McNabb-Mallory Miasma: A Proposed Amendment to the Federal Rules of Criminal Procedure*, 68 YALE L.J. 1003, 1031 (1959). This would require a magistrate to be on duty at all times, which may be a small price to pay for protecting the suspected person's rights. *Id.* at 1035. Justice Walter V Shaefer of the Illinois Supreme Court suggests that all interrogation be conducted either by or before a judicial officer after there has been a proper warning, saying that this would prevent police misconduct. Shaefer, *Police Interrogation and the Privilege Against Self-Incrimination*, 61 NW. U.L. REV. 506, 518-21 (1966).

It has also been suggested that the state courts' refusal to apply an exclusionary rule to confessions obtained in violation of law does not make interrogation practices lawful. The issue is not how long interrogation may be carried on, but whether pre-arraignment interrogation is to be permitted at all. Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L., C. & P.S. 21, 31, 39 (1961).

On the other hand it has been urged that it would be a "dangerous experiment for the United States Supreme Court to adopt rigid rules for police conduct throughout the nation, given the wide range of conditions under which the criminal law is enforced." Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 437 (1954).

[35] Ritz, *State Criminal Confession Cases: Subsequent Developments in Cases Reversed by the U.S. Supreme Court and Some Current Problems*, 19 WASH. & LEE L. REV. 202, 230 (1962).

[36] 322 U.S. 143 (1944).

[37] Prolonged detention was one of several factors which led the Court to conclude that the situation shown by the evidence was "inherently coercive." *Id.* at 154. See Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. CHI. L. REV. 657, 667 (1966).

[38] Escobedo v. Illinois, 378 U.S. 478 (1964).

[39] Mapp v. Ohio, 367 U.S. 643 (1961).

[40] Traynor, *supra* note 37, at 679; Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483, 569 (1963). Broeder also argues that the Supreme Court considers *McNabb-Mallory* to be a part of the Constitution. *Cf.* Ritz, *Twenty-five Years of State Criminal Confession Cases in the United States Supreme Court*, 19 WASH. & LEE L. REV. 35, 68 (1962).

[41] 378 U.S. 1 (1964).

[42] *Id.* at 6.

compel the arrested person to answer questions that might incriminate him.[43] In that case Malloy had been jailed for contempt when he refused to answer questions of a state court-appointed referee investigating illegal gambling activities. The holding of the court may, by analogy, be applied to some cases of pre-arraignment detention, since the purpose of such detention may be virtually the same as the purpose for holding Malloy; namely to elicit answers to questions by the authorities. The *Malloy* dissent pointed out that the decision did in fact make the forms of federal criminal procedure applicable to the states through the fourteenth amendment.[44]

The position of some members of the Supreme Court has long been that *McNabb-Mallory* bars all confessions which are the result of both state and federal illegal detention.[45]

Miranda

Miranda v. Arizona[46] held that when a person is arrested or is otherwise deprived of his freedom by the authorities, certain procedural safeguards must be put into effect to protect the right against self-incrimination.[47] The arrested person must be informed of his right to remain silent, that anything he says may be used against him, that he has the right to the presence of an attorney, and that if he is indigent an attorney will be appointed for him if he so desires.[48] The arrested person must have the opportunity to exercise these rights throughout the period of detention, but may knowingly and intelligently waive them.[49]

The Court pointed out that there has been no need for this type of decision in the federal courts, since the arrested person has been assured of his rights under the *McNabb-Mallory* Rule;[50] the requirement of prompt arraignment is "responsive to the same considerations of Fifth Amendment policy that unavoidably face [the Court] now as to the states."[51]

Although this decision seems in effect to go beyond the safeguards of the *McNabb-Mallory* Rule, *Miranda* does not render moot the question of the application of *McNabb-Mallory* to the states.[52] A salient point of *Miranda* is that the warnings remain in the hands of the police[53]—a dubious safeguard for the arrested person who (unless he is an experienced criminal) is frightened and confused

[43] *Id.* at 8.

[44] *Id.* at 15 (Harlan, J., dissenting).

[45] *E.g.*, Culombe v. Connecticut, 367 U.S. 568, 639 (1961) (Douglas and Black, J.J., concurring); Reck v. Pate, 367 U.S. 433, 448 (1961) (Douglas, J., concurring).

[46] 384 U.S. 436 (1966), 19 VAND. L. REV. 1379. 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 (1966).

[47] 384 U.S. 436, 478-79.

[48] *Id.* at 479.

[49] *Ibid.*

[50] *Id.* at 463.

[51] *Ibid.*

[52] The Court was careful to point out that *McNabb-Mallory* is not to be disregarded by federal officers. *Id.* at 463 n.32. Therefore *Miranda* does not supersede *McNabb-Mallory* as to federal pre-arraignment procedure, and the latter rule is still not applicable to the states.

[53] *Id.* at 478.

by the atmosphere of the police station.[54] Even if he is able to comprehend the police warning, he might be unable to "intelligently and knowingly" waive his rights, and therefore the advantages of a judicial warning, as insured by *McNabb-Mallory* are still a very vital issue.

One important effect of *Miranda* may be to spur the state legislatures to action in the area of pre-arraignment procedure. The police have generally been unhappy with *Miranda*[55] and probably would prefer a legislative guide for the future. Such action has long been urged by those concerned with the rights in question, and with the effectiveness of law enforcement in general.[56]

Police procedures have evolved in a hit-or-miss fashion, depending on each Supreme Court decision and its requirements.[57] This has created an "atmosphere of uncertainty"[58] which leaves the police in a quandary as to what is expected of them. The action by the courts in this field has been necessitated by the inaction of the legislative branch in providing a code of pre-arraignment procedure. The United States Supreme Court has sensed a vacuum of rules and has had to provide these rules in a case-by-case development.[59] The Court itself has said that its decisions do not preclude the states from developing workable rules of their own in this area.[60] The Court has been criticized for not giving the legislative process a chance to react to its decisions;[61] but the states in fact have not reacted.[62] This situation led the American Law Institute to prepare A Model Code of Pre-Arraignment Procedure.[63]

The Model Code

The reporters of the Model Code look upon their work as a starting point for legislative action by the states.[64] They believe that one of the prime advantages to legislation in this area is that legislators are able to analyze the process from

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[54] Thompson, *supra* note 31, at 411.

[55] See Life, October 21, 1966, p. 34. See generally *A Symposium on the Supreme Court and the Police 1966*, 57 J. CRIM. L., C. & P.S. 237 (1966).

[56] Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62 (1966); Broderick, *The Supreme Court and the Police: A Police Viewpoint*, 57 J. CRIM. L., C. & P.S. 271 (1966); Griswold, *The Long View*, 51 A.B.A.J. 1017 (1965); Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449 (1964); Inbau, *Democratic Restraints Upon the Police*, 57 J. CRIM. L., C. & P.S. 265 (1966).

[57] Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 CALIF. L. REV. 11 (1962).

[58] Ker v. California, 374 U.S. 23, 45 (1963) (Harlan, J., concurring).

[59] Barrett, *supra* note 57; Packer, *The Courts, The Police, and the Rest of Us*, 57 J. CRIM. L., C. & P.S. 238, 240 (1966).

[60] Ker v. California, 374 U.S. 23, 34 (1963).

[61] Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 930 (1965).

[62] Mueller, *The Law Relating to Police Interrogation Privileges and Limitations*, 52 J. CRIM. L., C. & P.S. 2, 11 (1961).

[63] ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Tent. Draft No. 1, 1966) [hereinafter cited as the MODEL CODE].

[64] MODEL CODE Forward at x.

first police contact to arraignment in a systematic manner.[65] This is impossible for the courts which must rule on whatever cases happen to be brought before them.[66] If the legislature were to deal with the subject, the police might then be taken out of the atmosphere of uncertainty, and the courts might be spared the task of solving many procedural questions.[67]

A Model Code of Pre-Arraignment Procedure is a comprehensive treatment of procedures from investigation to court appearance. In the area of police interrogation the reporters have emphasized what they believe to be one of the basic principles of the rights of an arrested or suspected person; namely the privilege of making an intelligent decision whether or not to cooperate with the police and to give possibly incriminating evidence.[68] The reporters have taken into account all preceding decisional law and have not deviated from its requirements. Although the draft was conceived before *Miranda*, the reporters, in their attempt to arrive at adequate safeguards for the arrested person, have incorporated the requirements of *Miranda* in their Model Code.

The Model Code provides for a warning to be issued by the arresting officer[69] and also by a station officer as soon as the party is brought to the police station.[70] If the arrest was made under a warrant there may be no questioning of the suspect before he is brought before a magistrate, unless in the presence of counsel.[71] On the other hand, if the arrest was made without a warrant, the reporters have provided for a "period of preliminary screening" which is not to exceed four hours.[72] In certain circumstances the officers are allowed a "period of further screening,"[73] but in no case is the arrested person to be held without arraignment for more than twenty-two hours.[74] The reporters have allowed these screening periods in the belief that justice will be furthered by allowing the police to investigate before they are required to take action which will result in the filing of a complaint against the suspect.[75]

The Model Code contains many other provisions[76] which are meant to protect the rights of the arrested person and at the same time encourage effective law enforcement, including exclusionary rules comparable to *McNabb-Mallory* which insure that its safeguard provisions are complied with.[77]

Although the Model Code satisfies the *Miranda* requirements, it rejects the *McNabb-Mallory* Rule as presently applied in the federal courts.[78] The Model

[65] MODEL CODE Reporters' Introductory Memorandum at xviii.

[66] MODEL CODE art. 4 commentary at 137. See Shaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956).

[67] The reporters also believe that when clear rules are laid down, the police will be encouraged to become more concernd with the protection of individual rights. MODEL CODE Reporter's Introductory Memorandum at xix.

[68] See MODEL CODE Reporters' Introductory Memorandum at xxiii.

[69] MODEL CODE § 3.08.

[70] MODEL CODE § 4.01.

[71] MODEL CODE §§ 4.03, 4.06.

[72] MODEL CODE § 4.04.

[73] MODEL CODE § 4.04(6).

[74] MODEL CODE § 4.05.

[75] See MODEL CODE art. 4 commentary at 132.

[76] See MODEL CODE § 4.09.

[77] MODEL CODE art. 9 & commentary.

[78] MODEL CODE art. 4 commentary at 137.

Code adheres to the rule in cases where an arrest is made pursuant to a warrant. In cases of non-warrant arrests the reporters have modified the federal procedure by allowing the periods of screening. In light of the advantages of the *McNabb-Mallory* Rule,[79] the wisdom of these provisions for prolonged detention and interrogation seems questionable.

Possibility of Congressional Action

Most of the legal scholars, such as the reporters of the Model Code, have considered the problem of the universal application of a pre-arraignment procedure in terms of state action only.[80] However, in light of recent developments, the possibility of Congressional action should be considered. Since *Palko v. Connecticut*[81] there has been a series of decisions by the United States Supreme Court in which the privileges and immunities of the first eight amendments of the Constitution have been absorbed into the due process clause of the fourteenth amendment under those circumstances where "neither liberty nor justice would exist if they were sacrificed."[82]

Since many of these landmark Supreme Court cases have interpreted the fourteenth amendment to include pre-arraignment procedural rights,[83] it is possible that Congress may now enact under the power of the fourteenth amendment a Uniform Code of Pre-Arraignment Procedure applicable to the states without fear of judicial disapproval.[84]

The fifth clause of the fourteenth amendment provides that "the Congress shall have power to enforce by appropriate legislation, the provisions of this article."[85] Legislation is appropriate if it is "plainly adapted to constitutional and legitimate ends; laws not prohibited, but consistent with the letter and spirit of the Constitution; law really calculated to effect objects entrusted to the government."[86]

[79] See notes 27-33 *supra* and accompanying text.

[80] The reporters recognized that state action would be through either legislation or promulgation of rules of court. MODEL CODE Reporters' Introductory Memorandum at xviii.

[81] 302 U.S. 319 (1937).

[82] *Id.* at 326.

[83] *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (evidence obtained by illegal searches and seizures inadmissible); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (the fourteenth amendment protects the privilege against self-incrimination); Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964) (right to counsel assured at pre-arraignment stage).

[84] Dowling, *Escobedo and Beyond: The Need For a Fourteenth Amendment Code of Criminal Procedure*, 56 J. CRIM. L., C. & P.S. 143, 152, 156 (1965). See Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 460 (1948); Pope, *Escobedo, then Miranda, and Now Johnson v. United States*, 40 F.R.D. 351, 357 (1966). But note that any legislative action must be within the judicial guideposts of the past and future. Craig, *To Police the Judges—Not Just Judge the Police*, 57 J. CRIM. L., C. & P.S. 305, 307 (1966).

[85] U.S. CONST. amend. XIV, § 5.

[86] Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 615 (1869). See also *Ex parte* Virginia, 100 U.S. 339, 346 (1879); Kharaiti Ram Samras v. United States, 125 F.2d 879, 881 (9th Cir. 1942).

As early as 1869 the California Supreme Court held that internal police regulations of the states could be controlled by the federal government under the appropriate legislation clause of the thirteenth amendment. People v. Washington, 36 Cal. 658, 668

The Supreme Court itself in *Miranda* suggested that such congressional action would be welcome and would be appropriate.[87] Recognizing that it could not foresee all the possible alternatives which the Congress or the states might devise,[88] the Court did not intend its decision to be taken as the only possible solution; it did not intend that it should create a "constitutional straightjacket," but rather the Court encouraged "Congress and the states to continue their laudable search for increasing effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws."[89]

Conclusion

Traditionally the control of police procedure has been a matter of local concern. However, in light of the recent United States Supreme Court decisions, local control has been superseded in great measure by federal constitutional requirements. The fourteenth amendment, as presently interpreted, restricts the actions of local police in a variety of significant ways. The impetus for this court action has been an increased concern for the rights of the accused, and an effort is being made to protect those rights effectively.

These decisions have provided a degree of uniformity never before seen in American police practice. However, the need for uniformity demands more than a case-by-case development of rules. In an increasingly mobile society, it is imperative that each citizen know his rights in facing interrogation and restraint by the police of any jurisdiction. Such knowledge is not possible in a system having fifty-one different patterns of procedure. In addition, if the police of all jurisdictions were governed by a uniform body of rules, the chances of reversal of criminal convictions by the United States Supreme Court would be substantially decreased.

Action by Congress seems to be the best method of achieving uniformity. This body apparently has the authority to act.[90] If it continues its course of inaction a reasonable alternative would be the adoption of the Model Code by the states.

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(1869). See also Shaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956) discussing the use of the fourteenth amendment to implement federal control over state criminal procedure.

[87] Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[88] *Ibid.*

[89] *Ibid.*

[90] See notes 84-89 *supra* and accompanying text.

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