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NOTE

THE McNABB-MALLORY RULE: IS THE BENEFIT WORTH THE BURDEN?

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I. INTRODUCTION

The *McNabb-Mallory* rule is a composite of the supervisory power of the Supreme Court over the federal courts and the federal prompt arraignment requirement of Rule 5(a) of the Federal Rules of Criminal Procedure. The rule was not formulated as a constitutional doctrine,[1] nor was it made a "due process" standard for the states.[2] It is an exclusionary rule of evidence which provides that any statement obtained from a defendant during a period of "unnecessary delay" in bringing him before a magistrate in violation of Rule 5(a) is inadmissible at trial, irrespective of whether it was given voluntarily.[3] While the great majority of the states have prompt arraignment statutes which are similar if not identical to Rule 5(a) of the Federal Rules of Criminal Procedure,[4] only a handful have *McNabb-Mallory* exclusionary rules.[5] Montana is among the handful. The vast majority of the state courts passing on the question have rejected the *McNabb-Mallory* rule, choosing instead a traditional voluntariness test of the admissibility of confessions.[6]

This note briefly examines the rule, its history and its purpose. Finally, the note analyzes the law in those states which have adopted the *McNabb-Mallory* rule in an effort to predict what

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1. McNabb v. United States, 318 U.S. 332, 341 (1943).
2. Gallegos v. Nebraska, 342 U.S. 55 (1951).
3. Upshaw v. United States, 335 U.S. 410, 413 (1948).
4. FED. R. CRIM. P. 5(a) provides:
   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, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041.
5. Michigan, Wisconsin, Delaware, Maryland, Pennsylvania, and Montana.
6. A comprehensive list of state decisions rejecting the *McNabb-Mallory* rule may be found in F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS, 165 n.46 (2d ed. reprint 1974).

problems Montana courts are likely to encounter in future litigation.

II. PROMULGATION OF THE RULE

Long before the Supreme Court decided *McNabb v. United States*[7] in 1943, the requirement of prompt arraignment was a well established provision of criminal procedure.[8] The statutes provided no penalty for noncompliance, however, and for all practical purposes a violation was without consequence. The *McNabb* decision put "teeth" into the once impotent Rule 5(a).

During the investigation of the murder of a federal revenue agent, federal law enforcement agents raided an illegal still in the backwoods of Tennessee late one night. Several members of the McNabb clan were arrested and held for several days. The agents questioned them intermittently for prolonged periods of time and did not take them before a United States Commissioner for arraignment.[9] Three of the McNabbs confessed to the murder. The Government tried to introduce these confessions at the trial. The defense objected, claiming a violation of the fifth amendment. The Court ruled that the confessions were inadmissible, not because they were involuntary but because the officers who arrested the defendants had not arraigned them promptly, in violation of Rule 5(a).

The exclusionary rule embodied in *McNabb* provided that any confessions secured during "unnecessary delay" in arraignment are inadmissible in a federal court.[10] The theory behind the rule is that by refusing to admit evidence obtained as a result of illegal conduct, courts will "instill in . . . particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused."[11] The purpose for the rule is clear: the protection of one's right to a speedy arraignment, one's right to know the charges against him, and the right to counsel. Application of the rule, unfortunately, has never been as precise. The ambiguous phrase "unnecessary delay" has caused considerable consternation

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7. *McNabb*, 318 U.S. 332.

8. 18 U.S.C. § 3771 (1976) (originally enacted as Act of June 18, 1940, ch. 445, 54 Stat. 688). *See also* Act of June 18, 1934, ch. 595, 48 Stat. 1008; Act of August 18, 1894, ch. 301, 28 Stat. 416; Act of March 1, 1879, ch. 125, 20 Stat. 341.

9. Michigan v. Tucker, 417 U.S. 433, 447 (1974).

10. *McNabb*, 318 U.S. at 341.

11. Actually, the defendant had been promptly arraigned, but this fact did not appear in the trial court record. On retrial of the case, the McNabbs were once again convicted, and this conviction was upheld on appeal. *See* McNabb v. United States, 142 F.2d 904 (6th Cir. 1944).

among lawyers, judges, and peace officers alike.

Not until 1957 in *Mallory v. United States*,[12] did the United States Supreme Court pass directly on the question of what is "unnecessary delay." One afternoon in the District of Columbia a woman was raped in the laundry room of an apartment house in which she lived. The following day at about two-thirty p.m. Andrew Mallory was arrested. He was taken to the police station and questioned for approximately thirty minutes by a team of police detectives. At four p.m. Mallory agreed to take a lie detector test, but the test was not given until eight p.m. Within an hour Mallory began to make a series of confessions. At this point the police made a token effort to locate a judge to proceed with arraignment. The trial court admitted the confession, and the court of appeals upheld the decision. The Supreme Court overruled the lower courts based on the unnecessary delay standard of Rule 5(a). The decision clearly forbade delay used for the purpose of interrogation[13] but did not define the outer limits of the term "unnecessary delay." Thus, the federal courts continued to battle out the precise meaning on an ad hoc basis.[14] Eleven years later, after extensive litigation and no tenable solution to the unnecessary delay dilemma, the federal government through Congress, abandoned the *McNabb-Mallory* rule.[15]

III. State Experience with the McNabb-Mallory Rule

Of the six states which claim to have adopted a *McNabb-Mallory* rule, only four, Delaware, Maryland, Pennsylvania, and Montana have retained an exclusionary rule based on a test of unnecessary delay rather than a fifth amendment test of voluntariness. The Michigan and Wisconsin Supreme Courts claim to have adopted the *McNabb-Mallory* rule in *People v. Hamilton*[16] and *Phillips v. State*,[17] respectively, but careful scrutiny indicates a

12. Mallory v. United States, 354 U.S. 449 (1957).

13. *Id.* at 455.

14. C. McCormick, Handbook of the Law of Evidence § 155, at 338 (E. Cleary 2d ed. 1972).

15. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 701(a), 82 Stat. 197, 210 (1968) (codified at 18 U.S.C. § 3501 (1976)). United States v. Halbert, 436 F.2d 1226, 1231 (9th Cir. 1970) held that:

> it is obvious that the prime purpose of Congress in the enactment of § 3501 was to ameliorate the effect of the decision in *Mallory v. United States* . . . to remove delay alone as a cause for rejecting admission into evidence of a confession and to make the voluntary character of the confession the real test of its admissibility.

16. People v. Hamilton, 359 Mich. 410, 102 N.W.2d 738 (1960).

17. Phillips v. State, 29 Wis. 2d 521, 139 N.W.2d 41 (1966).

great reliance on voluntariness criteria.[18] Both states have adopted the exclusionary rule based solely on delay yet refuse to apply the rule unless the defendant can prove that there is a causal link between the delay and the confession.[19] Requiring the accused to show proof of the connection between the delay and his confession seems but another way of demanding he prove his confession was not voluntary.

Three of the four states which have adopted a per se *McNabb-Mallory* exclusionary rule have addressed the intractable problem of defining unnecessary delay by providing for a specific, arbitrary time period in which an arraignment must take place. Montana alone has not named a specific time frame as a standard for unnecessary delay. Delaware by statute[20] and Maryland by court rule[21] have each adopted a twenty-four hour arraignment rule. In both states the period of delay is measured from arrest to confession. In 1965, the Delaware Supreme Court applied the statute and held that a confession obtained in excess of twenty-four hours after arrest was automatically inadmissible.[22] A test for reasonableness of the delay is used for all confessions obtained within the twenty-four hour period.[23] What is meant by "reasonable" has yet to be specifically defined but has been discussed in nearly every *McNabb-Mallory* case in Delaware since *Vorhauer v. State*.[24] In 1978, the Maryland high court promulgated an exclusionary rule under its supervisory power.[25] In the same year the Maryland Court of Appeals ruled that any confession obtained after the twenty-fourth

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18. *See* Comment, *The Ill-Advised State Court Revival of the McNabb-Mallory Rule*, 72 J. CRIM. & CRIMINOLOGY 204, 212 (1981).

19. *See* People v. Skowronski, 61 Mich. App. 71, 232 N.W.2d 306 (1975); People v. Stanley, 27 Mich. App. 90, 183 N.W.2d 460 (1970); People v. Turner, 26 Mich. App. 632, 182 N.W.2d 781 (1970); People v. Carlton, 5 Mich. App. 20, 145 N.W.2d 853 (1966); People v. Farmer, 380 Mich. 198, 156 N.W.2d 504 (1968); People v. Ubbes, 374 Mich. 571, 132 N.W.2d 669 (1965); People v. Walker, 371 Mich. 599, 124 N.W.2d 761 (1963); Wagner v. State, 89 Wis. 2d 70, 277 N.W.2d 849 (1979); Klonawski v. State, 68 Wis. 2d 604, 229 N.W.2d 637 (1975); McAdoo v. State, 65 Wis. 2d 596, 223 N.W.2d 521 (1974); Hemauer v. State, 64 Wis. 2d 62, 218 N.W.2d 342 (1974); State v. Estrada, 63 Wis. 2d 476, 217 N.W.2d 359 (1974), *cert. denied*, 419 U.S. 1093 (1974); State v. Wallace, 59 Wis. 2d 66, 207 N.W.2d 855 (1973); State v. Schoffner, 31 Wis. 2d 412, 143 N.W.2d 458 (1966).

20. DEL. CODE ANN. tit. 11, § 1909 (1974).

21. MD. DIST. R. 723(a) (Supp. 1980).

22. Vorhauer v. State, 59 Del. 35, 47, 212 A.2d 886, 893 (1965).

23. Webster v. State, 59 Del. 54, 213 A.2d 298 (1965).

24. Fullman v. State, 389 A.2d 1292 (Del. 1978), *rev'd on other grounds*, 400 A.2d 292 (Del. 1979); Poli v. State, 418 A.2d 985 (Del. Super. Ct. 1980); Weekley v. State, 222 A.2d 781 (Del. Super. Ct. 1966); Parson v. State, 222 A.2d 326 (Del. Super. Ct. 1966), *cert. denied*, 386 U.S. 935 (1967).

25. MD. DIST. R. 723(a) (Supp. 1980).

hour would be automatically excluded without exception.[26] As in Delaware, confessions obtained within the twenty-four hour period are subject to a reasonableness test to determine the cause of delay. The problem of determining the reasonableness of delay, therefore, creates the same dilemma for judges and law enforcement officials as that of the open unnecessary delay standard. Such imprecise language places the rights of the accused in a constant state of uncertainty. The Maryland courts have been reluctant to apply the twenty-four hour limitation in all cases. Exceptions to the twenty-four hour rule include those confessions used for impeachment purposes[27] and statements made by an accused while in custody for another offense.[28] In an attempt to elude the twenty-four hour limit, the Maryland courts have developed a narrow definition of arrest so as to postpone the running of the self-imposed time limit.[29] Thus, Maryland and Delaware have both faced difficulties presented by the pre-twenty-four hour "reasonableness" test as well as by the courts' apparent reluctance to strictly adhere to the twenty-four hour time limit. The twenty-four hour rule has not eliminated the problems inherent in the administration of the rule, but it has narrowed the scope of the difficulties.

The Pennsylvania Supreme Court adopted the *McNabb-Mallory* exclusionary rule in the 1972 case of *Commonwealth v. Futch*.[30] By a bare majority, the court interpreted the Pennsylvania delay statute[31] to mean that all confessions obtained after a period of unnecessary delay would be excluded unless it could be shown that there was no connection between the delay and the confession. The Pennsylvania rule is different from the rules of Delaware and Maryland in that the period of delay is measured from the arrest to the arraignment and not from the arrest to the confession. Later cases undertook to define the vague term "unnecessary delay"[32] but with little success. In 1977, in an attempt to

26. Johnson v. State, 282 Md. 314, 384 A.2d 709 (1978).

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

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

29. *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).

30. Commonwealth v. Futch, 447 Pa. 389, 290 A.2d 417 (1972).

31. PA. R. CRIM. P. 130.

32. Commonwealth v. Coley, 466 Pa. 53, 351 A.2d 617 (1976); Commonwealth v. McDade, 461 Pa. 414, 341 A.2d 450 (1975), *cert. denied*, 424 U.S. 909 (1976); Commonwealth v. Milton, 461 Pa. 535, 337 A.2d 282 (1975); Commonwealth v. Whiston, 461 Pa. 101, 334 A.2d 653 (1975); Commonwealth v. Hamilton, 461 Pa. 686, 334 A.2d 588 (1975); Commonwealth v. Davis, 460 Pa. 644, 334 A.2d 275 (1975); Commonwealth v. Goodwin, 460 Pa. 516, 333 A.2d 892 (1975); Commonwealth v. Barilak, 460 Pa. 449, 333 A.2d 859 (1975); Commonwealth v. Wilson, 463 Pa. 1, 329 A.2d 881 (1974); Commonwealth v. Garnett, 458 Pa. 4, 326

resolve the ambiguous phraseology of the statute, the Pennsylvania Supreme Court held in *Commonwealth v. Davenport*[33] any confession obtained in excess of a six hour pre-arraignment delay would be automatically excluded in the absence of "exigent circumstances." Unlike Delaware and Maryland, Pennsylvania has no "reasonableness" test for delays under six hours; rather, the only standards imposed by the court were the accepted constitutional standards of admissibility.[34]

The Pennsylvania rule also raised a number of problems. First, the rule promulgated by *Davenport* applied only to those instances where the accused was arrested after May 16, 1977. Numerous cases decided by the Pennsylvania courts[35] subsequent to the *Davenport* case but prior to its required application mentioned the six hour rule but chose instead to follow the unnecessary delay and reasonable relationship criteria of *Futch* and its progeny.[36] Second, *Davenport* included its own exception based on "exigent circumstances." The first post-*Davenport* case to reach the appellate court, *Commonwealth v. Ryles*,[37] helped to define exigent circumstances. The defendant was arraigned six hours and twenty-five minutes after his arrest, but the court held that the confession was admissible due to the exigent circumstances exception to the *Davenport* rule.[38] The exigent circumstances consisted of the tem-

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A.2d 335 (1974); Commonwealth v. Blagman, 458 Pa. 431, 326 A.2d 296 (1974); Commonwealth v. Rowe, 459 Pa. 163, 327 A.2d 358 (1974); Commonwealth v. Terry, 457 Pa. 185, 321 A.2d 654 (1974); Commonwealth v. Williams, 455 Pa. 569, 319 A.2d 419 (1974); Commonwealth v. Tingle, 451 Pa. 241, 301 A.2d 701 (1973); Commonwealth v. Simmons, 239 Pa. Super. 220, 362 A.2d 402 (1976); Commonwealth v. Edwards, 237 Pa. Super. 485, 353 A.2d 462 (1975); Commonwealth v. Dickerson, 226 Pa. Super. 425, 313 A.2d 337 (1973).

33. Commonwealth v. Davenport, 471 Pa. 278, 370 A.2d 301 (1977).

34. *Id.* at 286-87, 370 A.2d at 306.

35. Commonwealth v. Smith, 487 Pa. 626, 410 A.2d 787 (1980); Commonwealth v. McGeachy, 487 Pa. 25, 407 A.2d 1300 (1979); Commonwealth v. Bowen, 482 Pa. 453, 393 A.2d 1194 (1978); Commonwealth v. Morton, 475 Pa. 374, 380 A.2d 769 (1977); Commonwealth v. Smith, 472 Pa. 414, 372 A.2d 761 (1977); Commonwealth v. Lowery, 276 Pa. Super. 569, 419 A.2d 604 (1980); Commonwealth v. Boykin, 276 Pa. Super. 56, 419 A.2d 92 (1980); Commonwealth v. Harris, 275 Pa. Super. 361, 418 A.2d 763 (1980); Commonwealth v. Jefferson, 274 Pa. Super. 140, 418 A.2d 335 (1979); Commonwealth v. Palmer, 273 Pa. Super. 184, 417 A.2d 229 (1979); Commonwealth v. Presley, 270 Pa. Super. 360, 411 A.2d 760 (1979); Commonwealth v. Henson, 269 Pa. Super. 314, 409 A.2d 906 (1979); Commonwealth v. Steele, 269 Pa. Super. 299, 409 A.2d 898 (1979); Commonwealth v. Allessie, 267 Pa. Super. 334, 406 A.2d 1068 (1979); Commonwealth v. Hill, 267 Pa. Super. 264, 406 A.2d 796 (1979); Commonwealth v. Rose, 265 Pa. Super. 159, 401 A.2d 1148 (1979).

36. Commonwealth v. Van Cliff, 483 Pa. 576, 397 A.2d 1173 (1979), *cert. denied*, 441 U.S. 964 (1979); Commonwealth v. Williams, 455 Pa. 569, 319 A.2d 419 (1974); Commonwealth v. Tingle, 451 Pa. 241, 301 A.2d 701 (1973); Commonwealth v. Futch, 447 Pa. 389, 290 A.2d 417 (1972).

37. Commonwealth v. Ryles, 274 Pa. Super. 547, 418 A.2d 542 (1980).

38. *Id.* at 551, 418 A.2d at 543 (quoting Commonwealth v. Davenport, 471 Pa. 278, 286

porary unavailability of the judge who was out to dinner.

The first case to enforce the exclusionary rule was *Commonwealth v. Haggarty*.[39] The court excluded the confession because the arraignment took place six hours and forty-five minutes after arrest. The court had difficulty defining when "arrest" took place. Even though the defendant voluntarily accompanied the police officers, the court concluded he was not free to leave and was, therefore, under arrest. In a well-reasoned dissent, Judge Hester voiced his dislike for the new rule: "I would hold that the six (6) hour rule as promulgated by *Davenport* (supra), should not be so rigidly applied as to prevent a valid arraignment conducted six (6) hours and forty-five (45) minutes following the detention of appellant."[40]

The following year, the Pennsylvania Supreme Court overruled the superior court by determining the defendant was not under arrest when he accompanied the police.[41] The court held the actual time of arrest was some three and a half to four and a half hours later, bringing the period between arrest and arraignment well within the six hour rule. Under the new ruling the confession was admissible. In *Commonwealth v. Bennett* the Pennsylvania Superior Court carved another exception to the rule. The court held that confessions obtained during a delay in arraignment which exceeds six hours can be used for impeachment purposes.[42] Those confessions obtained during a pre-arraignment delay of less than six hours have consistently been admitted into evidence.[43]

The reluctance to apply the harsh *Davenport* rule in Pennsylvania indicates a general disdain for the self-imposed procedural rule. The chief means of side-stepping the rule consist in manipulating the time of arrest and expanding upon the definition of exigent circumstances.

IV. MONTANA'S EXPERIENCE WITH THE McNABB-MALLORY RULE

Montana's delay statute provides only that an arrested person be brought before the nearest committing judge without unnecessary delay.[44] Neither is there a time-based provision in the statute

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n.7, 370 A.2d 301, 306 n.7 (1977)).

39. Commonwealth v. Haggerty, 282 Pa. Super. 369, 422 A.2d 1336 (1980).

40. *Id.* at 375, 422 A.2d at 1339.

41. Commonwealth v. Haggerty, 495 Pa. 615, 435 A.2d 175 (1981).

42. Commonwealth v. Bennett, 287 Pa. Super. 485, 430 A.2d 994 (1981).

43. Commonwealth v. Miller, _ Pa. _, 439 A.2d 1167 (1982); Commonwealth v. Penn, _ Pa. _, 439 A.2d 1154 (1982); Commonwealth v. Nash, _ Pa. _, 436 A.2d 1014 (1981); Commonwealth v. Haggerty, 495 Pa. 615, 435 A.2d 175 (1981); Commonwealth v. Jones, 492 Pa. 433, 424 A.2d 1268 (1981); Commonwealth v. Sourbeer, 492 Pa. 17, 422 A.2d 116 (1980).

44. MONT. REV. CODES ANN. § 95-901(a), -603(d)(3) (recodified at MONT. CODE ANN. §

nor did the Montana Supreme Court choose to create one in *State v. Benbo*,[45] the first *McNabb-Mallory* case to reach the Montana Supreme Court. In adopting the *McNabb-Mallory* rule the Montana court relied upon the reasoning of the Pennsylvania *Futch* case. The court expressly chose not to establish a time-based period[46] but, rather, adopted the broad unnecessary delay and causal connection standards of *Futch*.[47] In so doing, the Montana court has also adopted the inherent problems of deciding when "arrest" occurs, what are necessary or unnecessary delays, what are exigent circumstances, and who carries the burden of proving any one of these elements.

Since the *Benbo* decision in 1977, only two reported cases even mention the *McNabb-Mallory* issue. The rule was held inapplicable in both *State v. Lenon*[48] and *State v. Rodriguez*.[49] In *Lenon*, decided the same day as *State v. Benbo*, the defendant was arrested around midnight on a Friday evening and was arraigned on the following Monday morning. The court found that while the justice of the peace was out of town there were three other judges in the county who were never contacted. The court held the exclusionary rule inapplicable in this case because:

> Defendant failed to prove that his failure to be presented before a magistrate until the Monday morning after his Friday night arrest constituted "unnecessary delay," since the justice of the peace was out of town until Monday, and there was no evidence that there was any other judge available in the county over the weekend.[50]

In *Rodriguez* a juvenile defendant was arrested and held for twenty days before he was arraigned. Under the Youth Court Act, sections 41-5-301 through 924 of the Montana Code Annotated, a juvenile does not have to be brought immediately before a judge for an initial appearance. The case was subsequently transferred to district court where he was convicted of deliberate homicide. The court held: "We will, in the future, closely scrutinize these situations. If the defendant can show prejudice or a deliberate attempt by the prosecution to circumvent a speedy arraignment, we will not

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46-7-101).

45. State v. Benbo, 174 Mont. 252, 570 P.2d 894 (1977).
46. *Id.* at 262, 570 P.2d at 900.
47. *Id.*
48. State v. Lenon, 174 Mont. 264, 570 P.2d 901 (1977).
49. State v. Rodriguez, _ Mont. _, 628 P.2d 280 (1981).
50. *Lenon*, 174 Mont. at 275-76, 570 P.2d at 908.

hesitate to fashion an appropriate remedy."[51]

V. CONCLUSION

The federal experience of defining and applying an unnecessary delay standard was catastrophic. Forty-four states have rejected outright the *McNabb-Mallory* rule, opting instead for a traditional due process voluntariness test of the admissibility of confessions. Of the six states adopting this rule, two, Michigan and Wisconsin, have adopted the rule in name only. Maryland and Delaware have eliminated many of the problems inherent in the exclusionary rule by limiting its scope to cases in excess of twenty-four hours, but even then exceptions have been made.[52] The twenty-four hour limit is broad enough so that the exclusionary rule is applied in very few cases. After finally making a definite commitment to what is "unnecessary delay" in 1977,[53] the Pennsylvania courts have yet to enforce their new rule.

For whatever reason, Montana has yet to embroil itself in any lengthy litigation as to how the *McNabb-Mallory* rule should be interpreted. At present, the court has chosen to address the problem of when the rule is to be applied but not how it is to be applied. When the proper case arises, as it shall, Montana will have occasion again to weigh the utility of the rule against its burdens.

51. *Rodriguez*, _ Mont. at _, 628 P.2d at 284.

52. *See* Survey, *Developments in the Law: Confessions*, 79 HARV. L. REV. 938, 988-92 (1966).

53. Commonwealth v. Davenport, 471 Pa. 278, 370 A.2d 301 (1977).