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Sanctions Designed to Deter Improper Arrest or Detention: A Comparative Study among U.S. and Kuwaiti Legal System

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Abstract

The improper arrest or detention of individuals represents a critical human rights concern with far-reaching implications for the rule of law, justice, and social harmony. This research paper addresses a vital and important topic, which is the reasons for the ineffectiveness of legislative measures in reducing the occurrence of illegal arrests. This paper undertakes a comprehensive comparative analysis of the legal systems in some of the United States and Kuwait states, focusing on the sanctions employed to deter and redress improper arrests and detentions. It became clear from this study that common and similar reasons between the two systems would prevent the effectiveness of legislative measures (criminal, functional, and the rule of excluding evidence resulting from the illegal procedure) from achieving its goal. This study concluded that the reasons for legislative measures not achieving their goals are of a different nature, including the lack of sincere desire to implement these measures by the relevant agencies, as well as the difficulty of implementing some of these measures in practice. Finally, this study recommended the need for a legislative, judicial, and executive review of these measures and the need to adopt means to monitor the effectiveness of these measures and the mechanism for their effective implementation.

Keywords: Improper Arrest, criminal, discipline, Exclusionary Rule, Sanction, Kuwait, United States

Introduction

The improper arrest or detention of individuals is a global issue that transcends geographical, cultural, and political boundaries. It poses a significant challenge to human rights, the rule of law, and the principles of justice and equity. The protection of human rights is currently considered one of the most important basic pillars upon which civilized countries and advanced legal systems are based. The field of the rights of the accused is considered one of the most important fields

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in this field due to the seriousness of the means used to undermine those rights, which is judicial trials. Therefore, we find that balancing between protecting these rights and the requirements of achieving justice and the public interest is one of the most important and difficult issues of our time. This balance finds its fertile field in the texts of procedural criminal laws, given that these texts are the main regulator of the criminal case and its procedures, which draw the boundaries between what is permissible and what is not permissible in terms of procedures aimed at reaching the truth and seizing evidence that ultimately serves to achieve justice, whether it is for acquittal or conviction.

The issue of what sanctions are needed to deter the police from making unlawful arrests or unlawfully detaining suspects has been debated. Unlike many important issues in criminal law administration, the question has been dealt with frequently by appellate courts. Certain sanctions, such as tort liability, place a penalty directly upon the police officer. However, the objection has been made that there are so many barriers to ultimate recovery by the injured party that such sanctions are ineffective. (Foote, 1955). Others have objected to them on the grounds that, since arrest is viewed as a ministerial function, the officer who acts in good faith but deviates from the established legal norms should have the immunity possessed by many other public officers (Davis, 1958).

Some other sanctions have no direct effect on the officer but do influence the outcome of the criminal prosecution, (*Weeks v. United States*, 232 U.S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652 (1914),[1] the Wisdom of excluding trustworthy and probative evidence, solely because the police acted illegally in obtaining it, has been debated. Most of the concern is related to the exclusion of physical evidence obtained by an unlawful search, (The Exclusionary Rule Regarding Illegally Seized Evidence an International Symposium, 52 J. Crim, L., C. & P.S. 245 (1961).[2] but in recent years the *McNabb-Mallory* line of cases has given rise to vigorous Controversy over the exclusion of a trustworthy confession because the police failed to bring the suspect promptly before the magistrate. (Admission of evidence (Mallory Rule), Hearings on H.R. 11477, S. 2970, S. 3325, and S. 3355 Before a Subcommittee of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. (1958).[3] Recently the United States Supreme Court considered a heretofore "neglected area of criminal procedure" (Kamisar, Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure, 1961 U. Ill. L.F. 78.) and held in *Wong Sun v. United States*, 371 U.S. 471, 83 Sup. Ct. 407, 9 L. Ed. 2d 441 (1963). that an illegal arrest in at least some circumstances will require the exclusion of subsequent statements by the arrestee. Most physical evidence and most confessions are obtained following, and often as an incident of, arrest. The threat to exclude physical

evidence or a confession is thus directly related to the question of the propriety of the arrest.

The Scope of the Study & its questions:

In terms of questions, this study raises many questions regarding the effectiveness of the measures adopted by legislation to respect the legal texts related to controls on the procedure of arresting police officers. The legal systems under study involved several measures, including criminal, functional, disciplinary, and procedural. This study aims to know the provisions of these measures or sanctions according to each legal system. This study also aims to determine the effectiveness of these sanctions and the achievement of their goals or objectives. The study also addresses the evaluation of the reasons for the ineffectiveness of these sanctions if this is proven. Finally, the study aims to identify the relevant agencies to make these sanctions effective and achieve their goals.

Methodology

In this study, the analytical and comparative method was used. This method was achieved through integration and not separation by allocating a part to each legal system separately. This is a method that the researcher found effective because of the closeness of the ideas and their presentation next to each other. There is no doubt that the tools or methods used in the study are judicial precedents in the United States of America and legal texts in the State of Kuwait. The reason for the difference in methods is due to the nature of each legal system separately, as the American system belongs to the Anglo-Saxon system, while the Kuwaiti legal system refers to the Latin system. There is no doubt that this is one of the difficulties that the researcher faced in this study.

The emphasis in this paper is on the effect of the various sanctions (criminal, discipline, and exclusionary rule) existing in Kansas, Michigan, Wisconsin state, and the State of Kuwait.

Criminal Prosecution and Departmental Discipline

There are some sanctions for improper arrest or detention which are internal to the criminal justice process itself. The officer may be subjected to criminal prosecution or to discipline within the police department. These sanctions can be effective only if there is sufficient motivation for this kind of policing by the prosecutor or police administrator.

Statutes carrying penal sanctions are often directed toward deviant (E.g., Wis. Stat. §940.30 (1955) police conduct of the kind described earlier. Statutes may proscribe the doing of an act by an officer when he knows it to be in excess of his lawful authority (E.g., Wis. Stat. §946.12(2) (1955)[4] or the confining of a person by

an officer when he knows he does not have authority to do so. (E.g., Wis. Stat. §940.30 (1955).[5] Unlike tort liability, these statutes are directed toward deliberate violation of arrest and detention laws and do not authorize punishment of officers acting in good faith. Other statutes penalize specific acts of misconduct such as concealing a prisoner entitled to a writ of habeas corpus (E.g., Mich. Stat. Ann. §27.2292 [1948 (revised, 1963)])[6] or denying a prisoner the right to consult with council. (Comment, 1962 U. Ill. L.F. 641).[7]

Under the Kuwaiti Legal system, the Criminal responsibility of a policeman as a representative of the executive authority of the State is determined by the nature and type of transgression he committed, thus differing from his Criminal responsibility in accordance with the text governing the incident of transgression. Article 12 of the Code of Criminal Procedure stipulates that "no investigator or any person with judicial authority may use torture or coercion to obtain the statements of an accused or witness or to prevent him from deciding what he wishes to give during trial, investigation or investigation proceedings, and any such act shall be punished in accordance with the provisions of the Penal Code." The legislator singled out from a criminal point of view a number of crimes that may be committed by a policeman if he exceeds his authority prescribed in laws and regulations in general, but in the event that he exceeds some of the procedures contained in the Code of Criminal Procedure in particular, the Kuwaiti Penal Code contains only one crime, which is contained in Law No. 31 of 1970 amending the Penal Code.

Article 53 of Law 31/1970 criminalizes the act of torture committed by a public official or by his subordinates to the accused, witness, or expert to induce him to confess to a crime or to make statements or information about it. This text, which criminalizes the acts of a public official, often a judicial officer, includes protection for the evidence constituting the criminal responsibility of the accused and derived from his statements or the statements of the witness or expert. This provision does not apply to the policeman unless he has used torture with the intention of proving the crime and collecting information and evidence about it. (Court of Cassation / Criminal Circuit 2 Judgment No. 14 of 2013 issued on 07 /07/2013. Mustafa Magdy Harga, Commentary on the Penal Code, Volume I, Mahmoud Publishing House, 1996, p. 1038).

Article 55 of the same law criminalizes the entry of a public official and the like into the homes of individuals without permission or without following the legal procedures in this regard. This article does not contain a clear reference that it is directly directed at the protection of evidence resulting from the search of the dwelling on the occasion of the investigation or investigation of a specific crime, as it, therefore, includes all public officials, whether those who entered the dwelling on the occasion of the search for evidence of a crime, its perpetrators or other

reasons that may not be on the occasion of a crime. Article 56 of the same law criminalizes the use of a public official to be cruel to people based on the job to disturb their honor or cause harm to them. This article does not aim to criminalize a policeman who commits a violation of the Code of Criminal Procedure only, but it generally includes all employees, whether they are policemen or other public officials, whether on the occasion of committing a crime or otherwise. (Appeal 664/2017, Circuit 2 Misdemeanor Cassation at the Court of Appeal, 10/12/2017).

Similarly, Article 123 of the Penal Code of 1960 criminalizes an employee's provision of information or testimony contrary to the truth and would have affected the rights of individuals. Article 184 of the Penal Code stipulates that anyone who arrests, imprisons, or detains a person in cases other than those approved by law, or without observing the procedures prescribed by him, and the penalties for this crime are increased if it is associated with torture or death threats. (Court of Cassation / Criminal Circuit 2 / Judgment No. 1062 of 2016 issued on 26/03/2018). It should be noted that this crime, like previous ones, may be committed by a policeman or other person, although the text uses terms mentioned in the Code of Criminal Procedure, such as arrest, detention, and imprisonment.

No instance of criminal prosecution against a police officer was noted, and police did not voice any concern over the threat of criminal prosecution. Indeed, there sometimes appeared to be complete Ignorance of the fact that certain practices are prohibited by statutes carrying penal sanctions.[8] This situation casts doubt upon the effectiveness of the criminal sanction's deterrent. ⁽Foote, Tort remedies for police Violations of Individuals Rights, 39 Minn. L. Rev. 493 (1955); Hall, The Law of Arrest in relation to Contemporary Social Problems, 3 U. Chi. L. Rev. 345 (1936); Note, 100 U. Pa. L. Rev. 1182, 1211 (1952).

The reasons for the infrequent use of the criminal sanction are obvious. (Study on the right of everyone to Be Free from Arbitrary Arrest, Detention and Exile, Commission on Human Rights, U.N. Doc. E/CN.4/813, p.209 (1961). First, the injured part is not likely to seek criminal prosecution, as the inducements found in the false imprisonment action are not present here. Secondly, “policemen and prosecution do flat punish themselves” (Foote, 1955). for conduct thought by them to be understandable even if perhaps improper.

Sanctions may also be imposed by the police department itself. Discharge, suspension, forfeiture of pay, reprimand, or similar penalties can be employed to deal with varying kinds of misconduct. Police officers in Kuwait are subject in their administrative responsibility to Law No. 23 of 1968 on the police force system, as this law includes the rights, duties, and obligations of policemen, including what article 10 of this law states: "The police force shall take the necessary measures to prevent the commission of crimes, seize what occurs, and conduct investigations,

investigations and research assigned to it by the competent authorities, all within the limits of the law."

Decree No. 124 of 1998 on disciplinary sanctions for members of the police force specified the penalties to be imposed on them in the event of violating Article 1 of this decree, which stipulates that "the violations punishable by members of the police force are disciplinary in the event that they commit any of them is any violation of the provisions of Law No. 23 of 1968 referred to and laws, regulations, decisions and military disciplinary instructions, and any behavior that may affect or harm the reputation of the police, breach public discipline or leave. In accordance with the duties of the office." Therefore, violating the law and requirements of the Code of Criminal Procedure is considered an administrative offense for a policeman that requires the penalties stipulated in Decree 124 referred to.

It is worth mentioning that this decree has specified the penalties starting from the penalty of warning and ending with the penalty of imprisonment that does not exceed 15 days for officers less than the rank of lieutenant colonel, and imprisonment that does not exceed 60 days for those below the rank of officer, provided that he may be discharged from service, expelled, stripped of his rank, or dismissed based on articles 96 and 97 of Law No. 23 of 1968 on the police force system.

Neither the Law nor the decree on disciplinary sanctions specify any explicit and specific reference to the administrative sanction imposed for violating the rights of suspects or accused and resulting in invalidity in criminal proceedings and trial, although a police officer can be held accountable based on general provisions specifying his duties and obligations.

However departmental discipline is not often used in arrest situations, (Foote, 1955). Particularly if the person arrested is in fact guilty. Even when an innocent person is arrested, departmental discipline is unlikely if the officer's conduct does not deviate greatly from practices commonly tolerated in the department.

Discipline, when it occurs, is most likely to be tied against the officer who has used extremely poor judgment and has put the entire department in a bad light. It may also be used if it is necessary to placate people bringing external pressures to bear upon the department. Thus, an indignant citizen may present his complaint not to the police department but to another agency higher in the governmental structure. Consequently, a through-channels inquiry may be made, which will require a report from the police department as to what action has been taken against the officer involved.[9] Or the injured party may report the incident to an organization that has the power to bring some pressure to bear on the department, in which case disciplinary action may again be taken.[10] It is important to note that in these cases

the department may take disciplinary action even though the officer was complying with the informal and unwritten rules of the department.

The Exclusion of Evidence

There has been long and vigorous debate over the exclusion of evidence as a sanction to induce police to conform their practices to the requirements of the law. The argument against exclusion is summed up most succinctly in Justice Cardozo's terse comment: "The criminal is to go free because the constable has blundered." (People v. Defore, 242 N.Y. 13, 21 150 N.E. 585, 587 (1926). The argument for exclusion is based on a belief that it serves to prevent the government from profiting from its own wrongs, to preserve the integrity of the judicial process, and particularly to deter further illegal acts by police.

To a degree, assumptions as to the necessity of an exclusionary rule are influenced by the adequacy of alternative sanctions for deterring police misconduct (Kamisar, 1962 & Paulsen, 1961).[11] The earlier discussion of criminal responsibility and departmental discipline is therefore relevant to the issue of the exclusionary rule.

It is difficult to assess the effectiveness of the exclusionary rule in practice. The rule does have a significant impact on police practice in some situations. It is equally clear that it does not produce police conformity with the requirements of the law in all cases. The extent to which the exclusionary rule does achieve its objective (Allen, 1953). Depends upon several factors which may vary from case to case:

(1) Whether the police know the legal requirements well enough to conform to them (Waite, 1955). It is clear, at least in the jurisdictions studied, that the police often are not aware of the norms laid down by the appellate courts of their states. Although there is greater awareness of the attitudes of the local judiciary with respect to specific arrest and detention practices, these attitudes come to the direct attention of only those officers appearing in court. Communication to the rest of the department. If it occurs, is usually only by word of mouth.

(2) Whether police desire a conviction sufficiently to take the steps necessary to conform to the requirements of the law. It is sometimes said that police are not concerned with conviction once a case is solved. (Inbau, 1957 & Inbau, 1948). However, in the jurisdictions studied officers frequently indicated a strong interest not only in solving a case but in ultimately bringing about the conviction of the offender. In situations involving serious offenses, the police are highly critical of instances of acquittal on any grounds where it appears certain that the defendant is guilty. In certain other cases, such as minor gambling violations, the desire for conviction may not be strong enough to induce compliance with existing norms. This is particularly likely to be true when the consequences of a conviction are slight

and the means of obtaining a conviction place great demands upon available police resources.

(3) Whether there are shortcuts to conviction. It is possible to create the impression that legal requirements have been complied with. This can be done, for example, in situations where arrests and searches are made upon inadequate grounds, but the officers testify later that the person arrested fitted a general description given in a police bulletin of a person wanted by the police. This process of making the law fit what was done, rather than conforming the practice to the requirement of law, produces an appearance of conformity and thus may make it possible to achieve conviction without having, at the same time, to change the practice.

The vigor of the debate over the merits of the exclusionary rule at least as applied to search, will no doubt diminish because of *Mapp v. Ohio and the Kuwaiti Supreme Court*, (367 U.S. 643, 81 Sup. Ct. 1684, 6 L. Ed. 2d 1001 (1961) & Kuwaiti Criminal Appeal No. 118/1982 issues on session 10/5/1982). Which held that the exclusionary rule is binding upon the states. Even so, there remains the question of the extent to which the rule will be applied in new situations. Therefore, the merits and effectiveness of the rule remain matters of importance. (Beattie, 1960). See also Kamisar, Public Safety v. Individual Liberties: Some "Facts" and "Theories," 53 J. Crim. L., C. & P.S. 171 (1962).[12]

Exclusion because of illegal taking of custody. At the time police practices were observed, (Mapp v. Ohio, 367 U.S. 643, 81 Sup.Ct. 1864, 6 L. Ed. 2d 1001 (1961).[13] the exclusionary rule had been adopted in Wisconsin and the State of Kuwait, (Hoyer v. State, 180 Wis. 407, 193 N.W. 89 (1923).[14] rejected in Kansas, and modified by constitutional amendment in Michigan so as not to be applicable to non-dwelling searches for weapons or narcotics. The Wisconsin and Michigan exclusionary rule did appear to have an effect upon some search practices and to contribute to the development of the practice of arresting for purposes other than prosecution. It did not, however, affect the decision to take a suspect into custody where the primary motive of the officer was to make an arrest, conduct an in-custody investigation, and subject the suspect to prosecution. Usually, in such cases, the officer was willing to sacrifice whatever physical evidence might be found in exchange for the opportunity to conduct an in-custody investigation and hopefully to obtain a confession.

This situation may be significantly different in the future because of the impact of the recent case of *(Wong Sun v. United States*, 371 U.S. 471, 83 Sup. Ct. 407, 9 L. Ed. 2d 441 (1963). In that case, the Supreme Court of the United States excluded a statement obtained incident to an unlawful arrest. However, as emphasized by a more recent federal district court case in which a statement subsequent to an illegal arrest was not excluded, (United States v. Burke, 215 F. Supp. 508, 511 (D. Mass.

1963).) the court in *Wong Sun* placed considerable emphasis upon the "oppressive circumstances" present in that case.[15] It remains to be seen, therefore, whether exclusion will be required in any or all of the following situations:

(1) After an illegal arrest the police search for the arrested person, uncovering evidence which clearly establishes guilt, such as narcotics or gambling paraphernalia. After the search, the suspect either makes a confession or leads the police to other evidence of his guilt.[16]

(2) After an illegal arrest the police search the arrested person, uncovering evidence which does not clearly establish guilt, such as a toy pistol or a substantial sum of money in small bills. After the search, the suspect either makes a confession or leads the police to more conclusive evidence of his guilt.

(3) After an illegal arrest but before any search is made, the suspect admits his guilt, which is established in whole or in part by a subsequent search.

(4) An illegal arrest is immediately followed by a spontaneous admission of guilt, although no physical evidence establishing this guilt is found.

(5) An illegal arrest is immediately followed by an attempt to bribe the arresting officer.[17]

(6) An illegal arrest is followed by questioning at the police station. The suspect gives an exculpatory statement which is later found to contradict provable facts, and which thus could be used against the arrestee.[18]

(7) An illegal arrest is followed by questioning at the police station, which results in the suspect making certain admissions or giving a confession of guilt.[19]

(8) An illegal arrest is followed by the taking of fingerprints at the police station. The prints are found to be identical to those discovered at the scene of the crime.[20]

(9) An illegal arrest is followed by a lineup at the police station, at which time the victim or a witness identifies the arrested person as the guilty party.

Which of these cases calls for exclusion under the *Wong Sun* rule remains uncertain,[21] although the reasons for exclusion are clearly more compelling in some of the situations than in others. If courts do decide that statements must be excluded in some of these situations it will probably have a significant effect upon police practice. Presently, police are aware that an arrest, legal or not, makes possible subsequent investigation techniques such as fingerprinting, lineups, and interrogation. Before *Wong Sun*, they also knew that the illegality of the arrest would not be likely to affect the admissibility of evidence obtained during the in-custody investigation. (police lectures in Admission of Evidence (Mallory Rule), Hearings on HR. 11477, S. 2970, S. 3325, and S. 3355 Before a Subcommittee of the Senate Committee of the Judiciary, 85th Cong., 2d Sess. (1958).[22]

Exclusion because of illegal continuation of custody. At the time of the field study, none of the jurisdictions,[23] indeed no state in the country, followed the federal rule of excluding evidence solely upon the basis of an illegal continuation of custody without bringing the suspect before a magistrate. More recently, in *(People v. Hamilton*, 359 Mich. 410, 102 N.W.2d 738 (1960), Michigan became the first state to adopt the *Mallory* sanction. The extent to which the practices observed in Michigan will change because of the *Hamilton* case is not clear. Subsequent decisions by the Michigan court make it uncertain whether illegal detention will alone suffice to require exclusion or whether there must be an additional showing of circumstances tending to establish that the statement is involuntary.[24]

Under current Michigan decisions, brief custody for such purposes as fingerprinting or holding a lineup is not likely to be characterized as illegal. Therefore, the risk of exclusion in these instances is so slight that the police are unlikely to alter their present practice of detaining for such investigations. Moreover, particularly in view of the Michigan court's subsequent emphasis on voluntariness as the test of exclusion, it may be that the court would not exclude such evidence even if obtained during a period of illegal detention. *Mallory* is sometimes explained on the ground that it is intended to keep out of evidence confessions that might be coerced but which the defendant could not prove were coerced,[25] and consequently, some federal courts have admitted other forms of evidence notwithstanding an illegal detention.[26]

If *Hamilton* does have an effect, it is most likely to be in cases where the detention is for purposes of interrogation, a category into which most cases fall. In Detroit, in-custody interrogation often occurs after the suspect has been remanded to police custody by a judge who has granted a continuance at a writ of habeas corpus hearing. The Michigan Court has recently said that upon remand the custody of the suspect is based upon "the superior authority of the habeas corpus" and consequently does not require the exclusion of a confession subsequently obtained. (People v. McCager, 367 Mich. 116, 116 N.W.2d 205 (1962). The Court reached this result without considering the propriety of the adjournment of the hearing in particular Subsequently the Michigan Supreme Court has directed the lower courts that "adjournments may be granted upon respondent's request only for such brief delay as may be necessary to permit respondents to prepare written (unless waived by petitioner) or to present to the court or judge issuing the writ or order testimonial or documentary evidence to establish the cause of detention as of the time for answer." (Michigan Supreme Court Order of Superintending Control-Habeas Corpus Proceedings, 369 Mich. XXX, 1, March 7, 1963). In the event of a brief adjournment, "the prisoner shall be advised by the judge, in the presence of respondent, that he has a right to counsel and that he need not incriminate

himself." This may have a significant impact upon in-custody interrogation practice.

Discussion & Findings

A criminal investigation or internal disciplinary action within the police force may be taken against the officer. Only if the prosecutor or police administrator has a strong enough incentive for this type of policing will these sanctions be effective. Statutes with criminal penalties are frequently intended to address the kind of errant police behavior we discussed before. No incidence of a courteous officer being criminally prosecuted was reported, and police made no mention of being concerned about the possibility of criminal prosecution. Also, it should go without saying why the criminal penalty is rarely applied. As the inducements discovered in the false imprisonment action are not present here, the aggrieved party is unlikely to seek criminal prosecution. Second, "policemen and prosecution do flat punish themselves" for what they believed to be acceptable, albeit possibly improper, behavior.

Dismissal, suspension, pay forfeiture, reprimand, or similar sanctions may be used to address various forms of wrongdoing. When discipline is administered, it is almost always directed at the officer who acted exceptionally irresponsibly and negatively affected the reputation of the entire department. It is challenging to evaluate the exclusionary rule's practical efficacy and it is evident that the rule does have a major impact on police practice in some circumstances, but it is also evident that it does not always result in police compliance with the law. Finally, the exclusionary rule's ability to achieve its goal depends on a number of variables that can change from case to case.

Conclusions

The improper arrest or detention of individuals remains a pervasive issue with profound implications for human rights and the rule of law. In this study, we examined options that could be used to deter police officers from making an illegal arrest. The study covered two procedural penalties, including the option of employing criminal texts and disciplinary texts as objective measures, as well as the rule of omitting evidence. The results of this comparative research show that, although with different characteristics influenced by their respective legal traditions, cultural backgrounds, and institutional frameworks, Kuwait and the United States have both constructed legal frameworks and sanctions to address unlawful arrests and detentions. Even while both judicial systems show a dedication to dealing with erroneous arrests and detentions, there are important opportunities and obstacles to take into account. These difficulties demonstrate how difficult it is

to strike a balance between maintaining public safety and safeguarding individual rights. In conclusion, by offering a careful analysis of the sanctions intended to discourage wrongful arrests and detentions in Kuwait and the United States, this research study has added to the worldwide conversation on human rights and the rule of law.

Recommendations

- Lawmakers in the States of Kuwait and the United States of America must establish protocols to guarantee the execution of steps to dissuade police officers from breaking the law considering the measures under study.
- Courts need to be aware of how crucial the exclusionary rule is in preventing police officers from breaking arrest-related laws, which means promoting the rule's adoption and minimizing exceptions to it.
- The Public Prosecution Office, which oversees handling criminal cases, needs to keep an eye on how police officers behave through cases and shouldn't think twice about suing them if it is determined that they were the ones who made an unlawful arrest.
- When it is established that police officers have violated any aspect of the arrest process, the Ministry of Interior has an obligation to hold them responsible and to keep an eye on how this may affect the evidence presented in court.

Notes

1. 232 U.S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652 (1914).
2. For a recent debate, see The Exclusionary Rule Regarding Illegally Seized Evidence an International Symposium, 52 J. Crim, L., C. & P.S. 245 (1961).
3. See Admission of evidence (Mallory Rule), Hearings on H.R. 11477, S. 2970, S. 3325, and S. 3355 Before a Subcommittee of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. (1958); Confession and Police Detention, Hearings Pursuant to S. Res. 234 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. (1958); Mallory and Durham Rules, Investigative Arrests and Amendments to Criminal Statutes of District of Columbia, Hearings on H.R. 7525 and S. 486 Before the Senate Committee on the District of Columbia, 88th Cong., 1st Sess. (1963). Most of the testimony, both pro and con, was addressed to the desirability of an exclusionary rule, rather than to the correctness of the Mallory norm.
4. E.g., Wis. Stat. §946.12(2) (1955), which provides for a fine and imprisonment of an officer who "[i]n his capacity as such officer or

employe, does an act which he knows is in excess of his lawful authority or which he knows he is forbidden by law to do in his official capacity …"

5. E.g., Wis. Stat. §940.30 (1955): "Whoever intentionally confines or retrains another without his consent and with knowledge that he has no lawful authority to do so may be fined not more than §1,000 or imprisoned not more than 2 years or both."
6. E.g., Mich. Stat. Ann. §27.2292 [1948 (revised, 1963)]: "Anyone having in his custody … any person … entitled to a writ of habeas corpus … who shall with intent to elude the service of any such writ, or to avoid the effect thereof, transfer any such prisoner to the custody, or place him under the power or control of another, or conceal him, or change the place of his confinement, shall be deemed guilty of a misdemeanor."
7. See the Kansas statue quoted at page 396. The statutes elsewhere are collected and analyzed on Comment, 1962 U. Ill. L.F. 641.
8. In Kansas, although denial of counsel at the police station is prohibited by penal statue, the practice of denying counsels continues, and no officers indicated that he knew of the statue. In Michigan, while officers said that transferring the suspect to avoid a writ was "tricky business," no mention was made of the statue setting penalties for such conduct.
9. For example, in one instance Michigan state troopers made an arrest without warrant far a misdemeanor which did not occur in their presence. A letter protest was sent to the office of the governor by the father of the arrested youth, which resulted in an inquiry being passed down through channels to the supervisor of the officers involved. The supervisor reprimanded the officer and reported on his action.
10. A Negro woman suspected of being a prostitute was arrested by a Detroit officer (probably for purposes other than prosecution, a Chapter 22). It was later decided that the officer 144 erred, and the Woman was released shortly after her arrival at the station. However, she reported the matter to the local chapter of the N.A.A.C.P., and that organization field a formal complaint. It was indicated that if the arresting officer could not give a satisfactory explanation of his action, the case would be referred to the police trial board. The circumstances of the arrest strongly suggest that the arresting officer took precisely the action which was expected of him by his superiors.
11. Thus the Supreme Court held Weeks inapplicable to the states, saying: "The jurisdictions which have rejected the *Weeks* doctrine have not left the right to privacy without other means of protection…. We cannot, therefore, regard it as a departure from basic standards

to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion may afford." Wolf v. Colorado 338 U.S. 25, 30-31, 69 Sup. Ct. 1359, 1362, 93 L. Ed. 1782 (1949). Then, in one of the leading state cases adopting the exclusionary rule, the court said : "If the unconstitutional [sic] guarantees against unreasonable searches and seizure are to have significance they must be enforced, and if courts are to discharge their duty to support the state and federal Constitutions they must be willing to aid in their enforcement. If those guarantees were being effectively enforced by other means than excluding evidence obtained by their violation, a different problem would be presented….Experience has demonstrated, however, that neither administrative criminal nor civil remedies are effective in suppressing lawless searches and seizures." People v. Cahan, 44 Cal. 2d 434, 447, 282 P.2d 905, 913 (1955). The Supreme Court, in recently overturning Wolf, took note of this language in Cahan, and then said: "The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court since Wolf. See *Irvine v. California* …" Mapp v. Ohio, 367 U.S. 643, 652-653, 81 Sup, Ct.1684, 6 L. Ed 2d 1001(1961). Even some opponents of exclusion have granted that other effective remedies are not readily available. See Kamisar, Public Safety v. Individual Liberties: Some "Facts" and "Theories," 53 J. Crim. L., C. & P.S. 171, 182 n.83 (1962). Proponents of exclusion admit that their case would be weakened were other effective sanctions readily available. Id. at 183; Paulsen, The exclusionary Rule and Misconduct by the Police, 52 J. Crim. L., C, & P.S 255, 261 (1961).

12. Attempts to show the effect of exclusionary rules usually involve use of crime statistics, which are of questionable reliability. Beattie, Criminal Statistics in the United States, 51 J. Crim. L., C. & P.S. 49 (1960). See Kamisar, Public Safety v. Individual Liberties: Some "Facts" and "Theories," 53 J. Crim. L., C. & P.S. 171 (1962), for a rebuttal of police assertion that the Cahan holding crippled law enforcement in California and that Mallory likewise affected enforcement in the District of Columbia.
13. The exclusionary rule has now been imposed upon the states as a matter of constitutional law. Mapp v. Ohio, 367 U.S. 643, 81 Sup.Ct. 1864, 6 L. Ed. 2d 1001 (1961).

14. Also see Article 159 of the Criminal Procedures Code.
15. The Government argues that Toy's statements to the officers in his bedroom, although closely consequent upon the invasion which we hold unlawful, were nevertheless admissible because they resulted from 'an intervening independent act of a free will.' This contention, however, takes insufficient account of the circumstances. Six or seven officers had broken the door and followed on Toy's heels into the bedroom where his wife and child were sleeping. He had been almost immediately handcuffed and arrested. Under such circumstances it is unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion" Wong Sun v. Unites States, 371 U.S. 471, 486, 83 Sup. Ct. 407, 416-417, 9 L. Ed. 2d 441, 444 (1963).
16. For example, see Gibson v. United States, 149 F.2d 381 (D.C. Cir. 1945), where the police arrested and searched without sufficient grounds and found a supply of narcotics. Later, at the station, the arrested man was asked whether he would surrender another supply of narcotics. He said he would and led the police to his hiding place. The evidence was admitted. In Brinegar v. United States, 165 F.2d 512 (10th Cir. 1948), the suspect's car was stopped by police, after which he admitted that he was illegally carrying liquor. The court said that it was not necessary to decide whether the stopping constituted an illegal arrest, as the statement would be admissible in any case. It has been noted that the approach taken by the Supreme Court in dealing with this case, 338 U.S. 160, 69 Sup. ct. 1302, 93 L. Ed. 1879 (1949), suggests that they reject the above view. Kamisar, Illegal searches and Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure, 1961 U. Ill. L.F. 78, 88. Another example is provided by People v. Macias, 180 Cal. App. 2d 193, 4 Cal. App. 256 (1960), where the admission of possession of narcotics was made while the suspect was being, driven to the police station for a complete search. Admission was excluded.
17. For example, see People v. Guillory, 3 Cal. Rptr. 415 (App. Ct. 1960), where subsequent to an apparently illegal arrest and search which uncovered narcotics the arrestee attempted to bribe the arresting officers. The court held the officers' testimony concerning the bribe admissible though the search and arrest may have been unlawful
18. For example, see United States v. Bonanno, 180 F. Supp. 71 (S.D. N.Y. 1960), where the court emphasized the fact that the statements given to the police at the station after what the court considered to be a "stopping and questioning" were exculpatory in nature.

19. For example, see Dailey v. United States, 261 F.2d 870 (5th Cir. 1959) and United States v. Walker, 197 F.2d 287 (2d Cir. 1952), where the courts distinguished this situation from that presented in the McNabb-Mallory line of cases.
20. For example, see Bynum v. United States, 262 F.2d 465 (D.C. Cir. 1958), where the court excluded from evidence the fingerprints taken subsequent to an illegal arrest, drawing an analogy to search cases. The court subsequently upheld the conviction of the defendant on retrial where the comparison of prints was between those found at the crime scene and those obtained by the F.B.I. on another occasion. The court rejected the 'fruit of the poisonous tree" argument that the F.B.I. prints should also be excluded because they were requested only after the prints obtained after the illegal arrest established the defendant's guilt. 274 F.2d at 767 (D.C. Cir. 1960).
21. Most appellate cases prior to Wong Sun assumed that exclusion was not required in such cases. See cases cited in notes 95 through 100 *supra*, and Kamisar, illegal Searches and Seizures and Contemporaneous incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure, 1961 U. Ill. L.F. 78, 81 n.16. This attitude has been traced back to Balbo v. People, 80 N.Y. 484 (1880), holding a confession obtained subsequent to an illegal arrest admissible, it has been noted that Balbo was decided at a time when no type of police illegality was sufficient in and of itself to bring about the exclusion of evidence. Kamisar, *supra*, at 84, 107-114.
22. The police in the observed jurisdictions are fully aware that exclusion results only where there has been an illegal search or where a confession has been coerced. And in the District of Columbia, where the Mallory rule prevails, the police have been instructed that a confession is admissible if there is no undue delay 'whether the arrest was legal or illegal." See police lectures in Admission of Evidence (Mallory Rule), Hearings on HR. 11477, S. 2970, S. 3325, and S. 3355 Before a Subcommittee of the Senate Committee of the Judiciary, 85th Cong., 2d Sess. (1958).
23. The Kanas court expressly decided that it would not invalidate confessions obtained during illegal detention, State v. Vargas, 180 Kan. 716, 308 P.2d 81 (1957); State v. Smith, 158 Kan. 645, 149 P.2d 600 (1944).

    Some indication that the Michigan court might adopt an exclusionary rule was to be found in earlier cases. While these cases emphasized that a confession is not rendered invalid just because a person is in custody, e.g., People v. LaPanne, 255 Mich. 38, 237 N.W. 38 (1931), they did not inquire into the legality of the detention. The Michigan court had arrested that it

would not allow a confession into evidence, even if clearly voluntary, "had improper means been used to secure it." People v. Gleveland, 251 Mich. 542, 232 N.W. 384 (1930).

In Wisconsin, the court has never found a detention time reasonable in a confession case and thus has never held a confession inadmissible because of illegal detention. In the great majority of these cases, however, the court has failed to consider the detention and has addressed itself only to the ultimate question of trustworthiness. Thus it is impossible to say with certainty whether the court considered the detention in these cases to be reasonable and the confession therefore admissible, or whether it considered the detentions unreasonable but the confessions nonetheless admissible. See Note, 1960 Wis. L. Rev. 164. However, the court has recently indicated that a lesser showing than testimonial trustworthiness might be sufficient to exclude a confession. State v. Bronston, 7 Wis. 2d 627, 97 N.W. 2d 504 (1959).

24. In People v. Harper, 365 Mich. 494, 503, 113 N.W.2d 808, 812 (1962), the court refused to exclude a confession received during a twelve and one-half hour delay, noting that 'nothing appears to indicate the defendants admissions and his confessional statement were other than voluntary…. None of the circumstances which so strongly compelled our finding Hamilton's confession was involuntary is present in the case at bar." See also People v. McCager, 367 Mich. 116, 116 N.W.2d 205 (1962).
25. There is not complete agreement as to whether this is the basis of the McNabb Mallory rule, however. Compare Douglas, The Means and the End, 1959 Wash. U. L.Q. 107, 113-114, with Hogan and Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L.J. 1, 29 (1958).
26. In Fredricksen v. United States, 266 F.2d 463, 464 (D.C. Cir. 1959), the suspect, after complaining that others being placed in a lineup did not resemble him, acknowledged that the victim would be able to identify him. The court said: "We believe that appellant's statement was properly admitted. It was a spontaneous and voluntary exclamation. It was in no sense sought or 'elicited'; it was not in an answer to police interrogation or in any way related to the lapse of time. Statements so volunteered without questioning before arraignment are admissible in evidence. Mallory . . . does not hold otherwise."

    Similarly, in Payne v. United States, 294 F.2d 723, 727 (D.C. Cir. f961), though the court found it unnecessary to decide whether a lineup identification during illegal detention could be admitted, it was asserted that

"the suppression of the testimony of the complaining witness is not the right way to control the conduct of the police," and the court added that "confrontation may be beneficial to the accused rather than damaging to him: Warren might have declared that Payne was the man who robbed him. Confrontation is thus a precaution against the making of baseless and unfounded charges it holds few of the dangers which led to the promulgation of Rule 5(a)." Compare United States v. Klapholz, 230 F.2d 494 (2d Cir. 1956), where the court excluded physical evidence obtained in a search by supposed consent during illegal detention on the grounds that rule 5(a) compels exclusion of all evidence obtained during such detention.

Cases:

- 232 U.S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652 (1914).
- 359 Mich. 410, 102 N.W.2d 738 (1960).
- 367 U.S. 643, 81 Sup. Ct. 1684, 6 L. Ed. 2d 1001 (1961).
- 371 U.S. 471, 83 Sup. Ct. 407, 9 L. Ed. 2d 441 (1963).
- 371 U.S. 471, 83 Sup. Ct. 407, 9 L. Ed. 2d 441 (1963).
- Appeal 664/2017, Circuit 2 Misdemeanor Cassation at the Court of Appeal, 10/12/2017.
- Bynum v. United States, 262 F.2d 465 (D.C. Cir. 1958).
- Court of Cassation / Criminal Circuit 2 / Jugement No. 1062 of 2016 issued on 26/03/2018.
- Court of Cassation / Criminal Circuit 2 Judgment No. 14 of 2013 issued on 07 /07/2013.
- Dailey v. United States, 261 F.2d 870 (5th Cir. 1959).
- Fredricksen v. United States, 266 F.2d 463, 464 (D.C. Cir. 1959).
- Gibson v. United States, 149 F.2d 381 (D.C. Cir. 1945).
- Hoyer v. State, 180 Wis. 407, 193 N.W. 89 (1923).
- Mapp v. Ohio, 367 U.S. 643, 81 Sup.Ct. 1864, 6 L. Ed. 2d 1001 (1961).
- People v. Guillory, 3 Cal. Rptr. 415 (App. Ct. 1960).
- People v. Harper, 365 Mich. 494, 503, 113 N.W.2d 808, 812 (1962).
- People v. McCager, 367 Mich. 116, 116 N.W.2d 205 (1962).
- People v. Defore, 242 N.Y. 13, 21 150 N.E. 585 (1926).
- United States v. Bonanno, 180 F. Supp. 71 (S.D. N.Y. 1960).
- United States v. Burke, 215 F. Supp. 508, 511 (D. Mass. 1963).
- United States v. Walker, 197 F.2d 287 (2d Cir. 1952).
- Wong Sun v. Unites States, 371 U.S. 471, 486, 83 Sup. Ct. 407, 416-417, 9 L. Ed. 2d 441, 444 (1963).

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