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Arrest in Criminal Justice Administration: Important Unresolved Issues

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Abstract

This paper delves into examining the practical problems facing the police during the implementation of the arrest procedure within the realm of criminal justice administration. Employing a comparative analytical approach, the study juxtaposes the legal framework of the United States of America and the State of Kuwait, where the study traced the legal texts, judicial rulings, and regulations regarding the behavior of police officers in both systems. It has been shown through this study that some of these problems are due to legislative texts, others are related to practical practices, others are due to social problems, and some are related to the scientific (academic) aspect. Through a comprehensive exploration of these critical aspects, the paper contributes valuable insights to the ongoing discourse on the challenges within the arrest process and underscores the need to address unresolved issues to enhance the efficacy of criminal justice administration.

Keywords: Arrest procedure, evidentiary requirements, in-custody investigation, access to counsel, judicial participation.

Introduction

The administration of justice is a multifaceted endeavor, and the process of arrest plays a pivotal role in maintaining law and order within society. The legal systems in civilized states are concerned with protecting the rights and basic freedoms of individuals, and the means for this protection are linked to the constitutional texts and the principles and provisions they contain. There is no doubt that these texts have repercussions and effects on the lower-ranking texts, which are legislative texts, and in the field of legislation concerned with regulating criminal affairs and public litigation. We find that the presumption of innocence is a prominent example of these constitutional principles.

The presumption of innocence is usually used to demonstrate the lack of soundness of legislative texts or provisions, whether substantive or procedural, from a constitutional standpoint. Legislation that regulates the freedom of the accused before trial is one of the fertile areas in which the issue of conflict with the presumption of innocence is raised, and the issue boils down to the trade-off

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between the interest of society and the interest of the individual. We find that these two interests may move in the same direction or may conflict at the same time.

There is no doubt that one of the most important measures affecting the freedom of the accused is the arrest procedure carried out by the police (Aleifan, 2016). This procedure raises many problems and difficulties from a practical standpoint for the police and may have many important and serious effects that affect the conduct of criminal prosecution procedures (Aleifan et al., 2023).

Therefore, it is fair to say that courts have been left without adequate knowledge or guidance concerning the problems that face police, particularly in large cities, in the enforcement of criminal law. It is also acceptable to conclude that police do not fully comprehend the responsibility placed on the courts to ensure that law enforcement practices adhere to the principles necessary to preserve a democratic society. And, as Judge Lumbard points out, Congress and the state legislatures have made very little effort to deal adequately with the range of issues that the arrest decision involves.

Much of the current difficulty results from the lack of adequate meaningful communication between the agencies which share the responsibility for effective and fair administration. The police feel, and not without some basis in fact, that courts do not understand many of their problems. This results in part from the kind of sifting of information that occurs before cases reach the appellate court. In a typical criminal appeal, the attorney would completely rely on instances that have already been decided, not attempt to provide the appellate court with a sufficient factual picture of the law enforcement setting in which the issue has arisen. Too often prosecuting attorneys proceed in litigation without even consulting the police agency to learn how the issue appears from an enforcement point of view.

On the other hand, the responsibility of the judiciary for the fair administration of criminal law is seldom adequately understood by the police agency. Rather than being an organization that shares accountability for the creation and upkeep of a just and efficient enforcement system, the court is frequently viewed as a barrier to enforcement. Police agencies frequently seem to expend more effort in attacking judicial decisions than in trying to develop policies and practices that will achieve both effective enforcement and conformity with constitutional safeguards. In part, this may result from the fact that courts seldom take the time or have the means to communicate effectively to the police what a particular decision is, the reason for it, or the implications of the decision upon police practice. Consequently, police seldom understand the decision or the

objective of the court in a particular case, and the decision does not have the desired effect upon arrest practice.

Some of the difficulties in the current administration result from the long-time adherence to certain "ideals" of enforcement without serious attention to whether they are achievable under present circumstances. Thus, some appellate courts continue to stress that the use of the arrest warrant is the preferred method for making an arrest, apparently oblivious to the fact that meaningful judicial review of the evidence before the issuance of the warrant is known in many localities. Suppose the myth of complete enforcement of the law is maintained. In that case, the police will continue to use a great deal of discretion without admitting it or trying to reexamine and clarify the standards by which it is used.

Too little attention has been given to discovering how procedures work in practice and, particularly, whether they satisfactorily achieve all the objectives that they are designed to achieve. The rule excluding evidence illegally obtained may in some situations have the effect of encouraging illegal action by the police rather than deterring it. This does not mean that the exclusionary rule ought to be discarded or that courts ought not to assume responsibility for controlling police practices, but only that the unanticipated and undesired consequences that occur in practice ought to be discovered and that attention should be given to devising new and more adequate ways of preventing these consequences.

The lack of communication, the perpetuation of "ideals" without sufficient regard to their feasibility, and the continuation of rules, particularly sanctions, without adequate evaluation of their consequences in practice, combine to cause difficulty for criminal justice administration.

This study, which takes the United States of America and the State of Kuwait as its scope, aims to review the history and legislative development on the subject of the arrest procedure, as it is noted that this development witnessed a noticeable change in the legislator's policy regarding that procedure. To achieve that goal, this study raises many questions, including: What is the nature of the problems that police officers face when carrying out an arrest procedure? What are the causes of these problems (legislative or otherwise)? What is the role of each of the other agencies (prosecutors, courts, legislature, or scientific institutions) in solving these problems?

Methodology

This study adopted the descriptive approach, as it described the problems facing policemen in practice during the implementation of the arrest procedure, whether it was done with permission or without permission. The study also adopted the analytical approach for the elements of this study, as it analyzed the

nature of the problems, their causes, and the solutions needed in the future to avoid such problems. Finally, the study took a comparative approach, comparing the system in the United States of America and the system in the State of Kuwait and identifying the areas of agreement and difference between the two systems regarding the subject of the study. The study's questions were answered through the following research plan:

1) *Evidentiary requirements for arrest.*
2) *In-custody investigation*.
3) *Access to counsel and other controls on in-custody investigation.*
4) *Judicial participation in the arrest decision*.

Important Problem Concerning Arrest Procedure

The effort in this research has been to give systematic attention to some important aspects of the arrest decision that are inadequately understood, or at least inadequately dealt with, in the current criminal justice administration. Instead, of criticizing police, prosecutors, or judges for their shortcomings, the goal is to develop a compassionate grasp of the challenges they encounter, especially the issues that arise when they work together to uphold a continuous criminal justice administration system.

The arrest decision gives rise to some issues, of which the following appear to be the most important and the most in need of attention:

a. Evidentiary Requirements for Arrest

Another primary task of the criminal justice process is that of identifying those persons who have engaged in criminal conduct and doing this by methods that minimize interference with those who are innocent. Although the importance of this function is universally recognized, attention to it by legislatures and appellate courts has been sporadic.

Existing arrest law focuses primarily on the amount of evidence needed to justify taking custody of a suspect. Many state statutes contain “in presence,” “reasonable grounds,” or similar tests, and the great majority of appellate litigation concerns the application of these standards to a variety of fact situations. There are, however, important unresolved problems because some significant, recurring situations are seldom dealt with in appellate litigation.

The Kuwaiti legislator used an ambiguous standard of proof in cases of arrest without a warrant. For example, an accusation based on strong evidence (Article 54/First of the Criminal Code), or accusation of a misdemeanor (Article 54/Second), serious suspicion (Article 54/Third), or strong evidence (Article 55/Third) of the Code of Criminal Procedure and Trials (Al-Aifan et al., 2021).

Before (Mapp v. Ohio, 1961), there was no effective way, in many states, of challenging the validity of an arrest in a criminal case. Even in states that had long recognized the exclusionary rule, courts were required to face only a limited number of situations that confront police in day-to-day practice. Until the recent case of (Wong Sun v. United States, 1963), the only evidence that could be contested was physical, discovered during an arrest. As a result, only offenses involving tangible evidence—such as drug offenses—were likely to give rise to questions about the validity of the arrest. This has led to an abundance of cases concerning the question of whether information obtained from a drug informant is adequate to support an arrest. However, there's not much guidance available regarding when, if at all, an officer can make a felony arrest based on suspicious conduct he witnesses, or when he can arrest one or more suspects in a group who all physically match the description provided by an eyewitness. Every day, law enforcement officers are faced with these rarely thought-out questions (People v. Tyler, 1961), and (People v. Mickelson, 1963).

In contrast, the Kuwaiti Court of Cassation decided that the information received from the informant in drug cases is considered strong evidence that allows an arrest to be made without a warrant following Article (54/First) of the Code of Criminal Procedure and Trials (Appeal No. 19 of 1999).

There is doubt as to whether the appellate judicial system is capable of systematic development and re-evaluation of detailed rules to govern the conduct of law enforcement officers. If *Wong Sun* is ultimately broadly interpreted and generally followed, it will have the incidental benefit of creating the opportunity for appellate courts to review arrest procedures in a broader range of cases; arrests that do not lead to the discovery of physical evidence but do result in the suspect making an admission can also be challenged (United States v. Burke, D. Mass. 1963).[1] Even so, it is questionable whether appellate courts can fully develop detailed rules in a system where only the defendant is given the right to appeal. Indeed, even in those jurisdictions where the state can seek appellate review of a trial court order suppressing evidence, the opportunities presented to the higher courts are likely to be few. The prosecutor is unable to file an appeal in every case where there is reason to doubt the trial judge's determination that the police behavior was improper due to the limited resources in his office. When choosing appeal cases, the prosecutor usually goes for the "big" ones—those that involve major offenses and receive a lot of media attention. However, from the perspective of the police, there may be a much greater need for clarification regarding the enforcement strategies employed against relatively minor offenses, like misdemeanor gambling.

Closer attention to the evidentiary requirements for arrest seems more likely if legislatures adequately articulate the broad policy objectives[2] and encourage, or perhaps require, enforcement agencies to consider, develop, and publish specific rules that they will follow in practice and which they can be called upon to defend successfully or to change if an individual suspect challenges the propriety of the rule as applied in his case.

b. In-Custody Investigation

Most of the attention that has been given to in-custody investigation has centered on the issue of whether it is desirable to allow enforcement officers to convict a suspect "out of his mouth," and upon the closely related question of whether the danger of "third-degree" methods is so great that in- custody interrogation should be prohibited. However, much of the current uncertainty about the propriety of in-custody investigation is attributable to the fact that too little attention has been given to one very basic question Is it ever proper to arrest a suspect based on insufficient evidence, without further investigation, for prosecution? An investigation while the person is in custody is not necessary before charging someone if an arrest is only appropriate when there is enough evidence to support a charge. On the other hand, there will unavoidably be pressure to carry out an in-custody investigation if there are persistent circumstances in which it is appropriate to make an arrest but incorrect to charge without more proof.[3]

This question does not arise in Kuwaiti law because the policeman in Kuwaiti law does not have the right to interrogate the accused unless he is assigned by a competent investigator, which is almost rare in practice (NasserAllah et al., 2011).

In current practice in-custody investigation is common despite ambiguity about its propriety under varying circumstances. State appellate courts seldom face the issue directly,[4] and state legislatures have typically employed an ambiguous requirement that the police bring a suspect before a magistrate "forthwith," "within a reasonable time," or "without unnecessary delay." These phrases do not reflect a legislative judgment on the underlying policy questions involved.

In contrast, we find that the Kuwaiti legislator was decisive as it adopted a specific time limit for presenting the suspect to the investigation authority, which is 48 hours for misdemeanor crimes and four days for felony crimes (Art. 60 of the Kuwaiti Criminal Procedures Code).

The dilemma is easy to state. There is a widely held view that conviction based on the results of in-custody interrogation is an undesirable law enforcement

method because of the risks involved.[5] There is at the same time a prevalent view that a fairly conducted in-custody interrogation is both proper and indeed essential under the conditions existing in the current criminal justice administration.[6] The ambiguity of current legislative and judicial formulas reflects an unwillingness to confront the issue directly.

Even though police detention has received considerable attention in recent years, little is known about some essential aspects of the problem. For example, it is sometimes erroneously assumed that, in current practice, the initial appearance of the arrested person before the magistrate enables the magistrate to review the propriety both of the arrest and any prior or subsequent detention. This is not the case. There is seldom, if ever, any inquiry into the propriety of the arrest, and some period of police detention has already taken place. Only a few states have expressly provided for a remand system by which an arrested person is promptly brought before a magistrate, who decides whether and for how long he may be kept in police custody before being allowed to obtain his release on bail.[7] Informal remand procedures do develop, as in Detroit, where it is common for the suspect to be brought before a judge on a writ of habeas corpus for a determination of whether the police can continue to keep him in custody. In such situations, it might seem logical for the magistrate to decide (a) whether the arrest was lawful, (b) whether further in-custody investigation is needed to decide whether to charge or release the suspect, and (c) if further in-custody investigation is needed, how much additional time is reasonably required. In practice, however, there is no judicial inquiry into whether the arrest was lawful, there is almost complete reliance upon the police as to the need for further investigation, and the total time allowed is usually set by rule of thumb as seventy-two hours without regard to the circumstances of the individual case. If the Detroit experience is typical, then it appears that judges are no more likely to exercise supervisory control over police at the initial appearance than they are in connection with the issuance of arrest warrants.

The Kuwaiti and American law agree that the investigation into the issue of the legality of the arrest or detention procedure does not take place except during the trial stage and to determine the admissibility of the evidence resulting from the arrest procedure or in an independent trial to determine the validity of the compensation award (Sorour, 2016).

It appears that some kind of questioning of suspects is required in at least some kinds of cases, to the extent that observation of current practice provides a sufficient foundation for generalization. The questions that need to be decided then become: What agency or agencies ought to be given responsibility

for such interrogation, at what stage of the process, and under what kinds of controls?

As we mentioned before, Kuwaiti law does not assign this task (interrogation accompanied by detention) to the police but rather assigns it to investigative bodies independent of the police, which mediate the initial investigation stage and the trial stage (Al-Newabiet, 2008).

c. Access to Counsel & Other Controls on In-Custody Investigation

The dilemma involved in deciding upon the propriety of in-custody investigation is manifest in the equally difficult issue of early access to counsel in the police station. It is said, on the one hand, that allowing counsel during this time will impede the investigation[8] and, on the other hand, that a defendant needs a lawyer most immediately after arrest (Allison, 1958). Although it has been suggested that there must be some "middle ground" which "will give reasonable protection against improper procedures and still permit fruitful police inquiry," (Lumbard, 1963), it is not clear how this balancing of interests can best be accomplished.

Unlike the case in American law, the Kuwaiti legislator did not adopt during the initial investigation stage by the police the right to seek the assistance of a lawyer for the suspect. (Al-Aifan, 2011) At a later stage, the Kuwaiti legislator allowed the accused before the investigating authorities to refuse to be interrogated unless he obtained legal assistance (Al-Sakoti, 2014).

If, as often assumed, a lawyer will always advise his client not to talk to the police, then the right to counsel at the station and any police right to conduct an in-custody interrogation are incompatible. This compounds the difficulty and is, no doubt, why courts, including the Supreme Court of the United States, have refrained from confronting the question squarely.[9]

If in-custody interrogation is proper under some circumstances, then either access to counsel must be denied for some time, or else counsel will have to view his function as not necessarily involving routine advice to all suspects to refuse to answer any questions. There is some evidence that the latter alternative is not completely unrealistic. Cases were noted in Milwaukee in which a suspect was stated to the police with the full approval of counsel, who was present during the questioning. Since the police in current practice does have an important role in the determination of whether to prosecute, how serious an offense to charge, and how serious a penalty may be imposed, such cooperation may often be beneficial to the suspect. However, it is questionable whether lawyers, who regularly advise their clients to plead guilty because it is in their interest to do so, will generally advise cooperation with the police for the same reason. For one thing, defense counsel is unlikely to have sufficient information at this earlier stage of the process to know

whether cooperation or silence is the best course. In Kuwaiti law, this fear may increase because the Kuwaiti legal system does not adopt a system of the guilty plea (Al-Sati, 2015).

A large part of the problem of access to counsel at the police station concerns what provision, if any, should be made for providing the indigent suspect with counsel at this early stage in the process. Certainly, most suspects lack sufficient funds to hire an attorney. "[I]t can be forcefully argued that if [the] law permits a financially able person promptly to secure a lawyer, but does not permit an indigent person to do so, 'there is lacking that equality demanded by the Fourteenth Amendment" (Aleifan et al., 2023).[10] But, because of the incompatibility of the two positions set forth above, there is no great demand to furnish counsel for indigents immediately after arrest. The unfortunate consequence is that advice of counsel to indigent suspects is completely lacking, when it is apparent that a great deal of assistance could be furnished to a suspect if counsel were available to do no more than explain to him what his rights are and what alternatives he has, and to leave to the suspect the decision, based on the facts of the particular case, of whether to cooperate with the enforcement authorities. Providing counsel at an early stage for the indigent offender may result in substantial financial cost, but this seems a less difficult problem than that relating to the compatibility between access to counsel and reasonable in-custody interrogation. Some efforts are being made to provide for early access to counsel,[11] and the problem is receiving increased attention.[12]As we previously indicated, in Kuwaiti law, it is not permissible at this stage to seek assistance from a lawyer, whether the suspect is financially capable or not.

Little attention has been given to other possible controls and safeguards on in-custody interrogation, such as requiring that a full record be kept of the circumstances of the arrest and the detention. Booking, a step provided for in police manuals but ordinarily not expressly required by statute, has the advantage for the suspect of giving visibility to the fact that he has been arrested and is being detained. Failure to follow the usual booking process usually occurs when police believe that this will operate to their advantage. Of course, in one sense booking may also operate to the disadvantage of the suspect, since it will constitute a record of his involvement with the police. To deal with this problem, a few states have provided for the destruction or return of certain records under some circumstances, and some have also placed limitations upon access to these records.[13] Beyond these partial attempts, however, little has been done. Largely unexplored is the basic question of precisely what kind of records, with what distribution, and of what permanency are appropriate.

In Kuwaiti law, Article (59) of the Code of Criminal Procedure and Trials stipulates the following: "The person in charge of the police station must record all cases of arrest in the station's register, specifying the time of the start of the arrest, its reason, and the time of its end. A list of these cases shall be communicated to the police director and the investigator on periodic dates specified by regulations and orders. The registration and notification shall include all cases of arrest, based on or without an order, whether the arrest occurred due to the actions of police officers or individuals." We believe that this information, which must be mentioned by the text of the previous law, is not sufficient to determine the legality of the arrest and its other circumstances.

There are other possible methods of control. Requiring police to notify a suspect of his right to remain silent is frequently suggested. This is common practice in some police departments but is not done in others, and opinion differs on whether such a warning seriously interferes with interrogation. It has also been suggested that either using a neutral observer or by dividing responsibility for custody and investigation, it would be possible to prevent coercive questioning or to increase the opportunity to prove such practices in court. The use of observers is commonly resisted by those who advise on proper and effective methods of interrogation. But in Milwaukee, many interrogations are open to members of the press, and this fact seems to contribute to a general confidence in the propriety of police methods. Separate responsibility for custody and investigation is common in current practice only to those who are further detained after their initial appearance because of their inability to make bail. Unfortunately, Kuwaiti law does not require policemen to inform the arrested person of his legal rights - including the assistance of a lawyer - nor does it require policemen to install monitoring devices when the policeman deals with the arrested person.

d. Judicial Participation in the Arrest Decision

While police need not obtain a warrant before making an arrest in felony cases or for misdemeanors committed in their presence, procuring a warrant of arrest from a judicial officer has long been considered the ideal way of invoking the criminal justice process. One court has gone so far as to say that "while the ease and practicability of obtaining the warrant of arrest" does not alone render an arrest without warrant invalid, the "availability of the safeguards afforded by an impartial, judicial magistrate is a factor bearing on reasonable, probable cause." (Clay v. United States, 5th Cir. 1956). (Carter v. United States, 5th Cir. 1963); Hopper v. United States, 9th Cir. 1959). Additionally, a commentator recently stated that it is "imperative" to interpret the Fourth Amendment to require a warrant before making an arrest, except for a few specific circumstances in

which the exigencies of the situation do not permit taking this action beforehand (Broeder, 1963).

The case is different in Kuwaiti law, where the competent investigator is given the competence to issue an arrest warrant, whether it is the Public Prosecution in felonies or the General Directorate of Investigations in Misdemeanor Crimes. If the case is at the trial stage and there is a need to issue an arrest warrant, the competent court, whether the Criminal Court or the Misdemeanor Court, shall have jurisdiction (Abu Shadi, 2002).

It appears that the idea behind the warrant procedure is that the person is given more protection because an arrest can only be made if a neutral court officer finds, after carefully reviewing the evidence, that there are sufficient grounds to make an arrest. But clearly, the warrant process does not accomplish this goal, at least not in Kansas, Michigan, or Wisconsin. Instead, the prosecutor's office makes the decision, and the judge usually signs the arrest warrant without first carefully reviewing the particular case's facts and circumstances.

Practice in the State of Kuwait is consistent with what is happening in the United States of America, perhaps due to the lack of a specific evidentiary standard for issuing an arrest warrant. Article 62 of the Code of Criminal Procedure and Trials stipulates the following: "The investigator may arrest or order the arrest of the accused against whom serious evidence is based, and he shall also have the right to arrest in all cases where this right is established to the police." The term serious evidence is ambiguous (Al-Marsafawi, 1970).

Another common assumption is that, even in cases where the arrest is made without a warrant, the initial appearance before the magistrate achieves a judicial review of the grounds for arrest. While the initial appearance does serve as an occasion for setting bail and perhaps for notice to the accused of the charge against him, it does not, in current practice, involve a judicial review of the legality of the arrest.

Unfortunately, in Kuwaiti law, when presenting an arrestee, the competent investigator does not review the legality of the arrest procedure made by police officers based on the idea that this jurisdiction is established in the court at the trial stage. We believe that this is because the competent investigator is considered an adversary in the criminal case, as he represents the interest of society and always stands by the policeman who is considered his assistant.

The difference between the stated ideal and the practice raises the question of the extent to which it is practical to structure the System to involve the judge at the arrest stage of the process. It is unclear for what reasons judicial officers have given up their ability to decide case-by-case whether an arrest warrant should be issued and whether an arrest made without a warrant was legal.

It could be partially explained in urban areas by the pressure from other demands on the judges' time. Furthermore, a lot of judges believe that the job can be done well enough by other agencies. They might also defend their abdication by arguing that reviewing arrest procedures is made possible by the contested case trial, which they see as their main duty.[14]

Although this solution was adopted by the Kuwaiti legislator (the trial judge is competent in determining the legality of the arrest procedure) has many advantages, considering that determining the legality of the arrest and its impact on the exclusion of evidence has a major role in the decision of the verdict, whether guilty or acquitted, the problem arises because of the time that the case may take at the preliminary investigation stage (pre-trial stage), which may reach several months or years.

A choice must be made. If the trial judge should be involved in the arrest decision, new ways must be developed to make effective judicial participation feasible at this stage. The obvious alternative is to abandon the "ideal" of judicial participation in the arrest decision and structure the system in a way that will give primary responsibility for these decisions to the police or prosecutor. To say this is not inconsistent with the view that the trial judge is the one with responsibility for ensuring that the total criminal justice process, from detection to final release from parole, is fair, effective, and consistent. This can be achieved without the actual involvement of the judge in the arrest decision; the responsibility for fashioning arrest policies could be expressly given to police and prosecutors, and an opportunity for judicial review of those policies and their application in specific cases could be afforded, as is done with other administrative agencies. This might provide more effective and meaningful judicial control over the arrest decision and, at the same time, encourage participation by enforcement agencies in the development and articulation of enforcement policies.

Although this solution (the policeman or prosecutor determines the legality of the arrest procedure) is the solution adopted by the Kuwaiti legislator, in practice this solution has proven to be useless or ineffective due to the lack or lack of independent subsequent oversight of the legitimate decision. Therefore, it would be appropriate for the Kuwaiti legislator to adopt such judicial control over the decision of the policeman or prosecutor.

Conclusion

The work examines the problems facing police when they carry out the arrest procedure in practical aspects in both the United States and the State of Kuwait. The authors noticed that police problems regarding arrest procedures are common among the two compared systems. Those problems are: The current

practice of the custody investigation, denial of access to counsel and other controls on in-custody investigation, and the weakness of the Judicial participation in the arrest decision.

Authors found that the public and the police themselves view the task and the responsibility of the police as ministerial and the traditional attitudes of legislatures, appellate courts, and perhaps the public, toward police are no doubt influenced by the assumption that important policy decisions ought to be made the prosecutor or the court. Also, the authors discovered that the literature on police, including surveys and studies by various commissions, abounds in adverse criticism. It is based on an implied "bad man" theory and assumes that by exhortation and scolding, police services can be improved. The difficulty with that approach is not so much that it is unfair to the police, but that it does not investigate the basic causes of police abuse and ineffectiveness. Authors light upon police themselves contribute to this situation. Their attempt to maintain the public support necessary for their operation seems to lead them to act beyond the restrictions placed upon them rather than to act within these limitations. The pressure to conform to public expectations is greater than that to conform to the requirements of law. The work spot courts are undoubtedly influenced by their assumption as to how police will react to legal requirements. If there is confidence that they will stay well within defined limits, their powers may be stated broadly; but, if it is thought that they will regularly exceed the limits, the tendency is to impose severe and perhaps unrealistic limitations upon their authority. Authors identified that universities have failed to recognize the problems of the police and their role in the administration of criminal justice and consequently have not engaged in the kind of research and teaching required for the development of effective law enforcement in a democratic society.

Finally, the work found that legislative attention to the arrest stage of the criminal justice process has been sporadic, and procedural codes have dealt primarily with details relating to the trial of contested cases and have given much less attention to issues such as those confronting the police at the arrest stage.

Recommendations

- In the current administration, however, police are required to make social decisions in the formulation and implementation of an arrest policy that are perhaps more important than those left to the prosecutor or the judge. This is particularly true in large metropolitan areas. If the objective is to have the prosecutor and the court assume full responsibility for making important policy decisions, then the structure of those agencies must be substantially changed.

- Careful attention ought to be given to ensuring that there are proper and effective ways for the police to discharge their responsibility and that there are effective sanctions to deter irresponsibility.
- There is need, and ample precedent in other fields, for the development of methods of communicating the existence of police expertness to trial or appellate courts which are called upon to decide arrest issues.
- Universities should pay attention – in its studies - to the difficult social problems which policemen must confront in practice.
- The prosecutor must articulate his arrest policies and communicate them to the police.
- Adequate judicial control over law enforcement practices can be best achieved by requiring that important decisions be made by a judicial officer or by delegating that responsibility to law enforcement agencies and devising methods for adequate judicial review of the administrative action.

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Notes

[1] However, if courts read Wong Sun as not barring statements received after arrest, but only those obtained as a result of "oppressive circumstances," then the circumstances for inquiring into the lawfulness of arrest will again be limited. Wong Sun does lend itself to this narrower interpretation, and some courts have so viewed the case.

[2] If, for example, it is thought desirable to authorize some form of brief detention on grounds less than those needed For arrest, this may be best accomplished by legislation, as an officer attempting to justify such a stopping in court will usually characterize it as an actual arrest, the only generally recognized detention privilege.

Another possibility, which was suggested several years ago, is that legislatures should try to identify certain specific fact situations which recur with some frequency, and which are viewed as adequate grounds for arrest. Ploscowe, A Modern Law Arrest, 39 Minn. L. Rev. 473, 475-476 (1955). Although most of the refinements of arrest law will probably always have to come from the courts which deal with the details of specific instances of arrest, such legislation might afford added guidance to the police on those kinds of cases which have not reached the appellate courts.

In addition, data could be collected to identify situations in which arrest and search should be allowed. Legislative action could be taken on the basis of this, authorizing arrest and search in cases in which they are presently in jeopardy of being declared contrary to the guarantees of the federal Constitution. The most interesting question raised by Mapp v. Ohio, 367 U.S. 645, 81 Sup. Ct. 1684, 6 L. Ed. 2d 1081 (1961), holding the constitutional prohibition of unreasonable searches and seizures enforceable against the states through the Fourteenth Amendment, is whether the states still have some leeway in defining their own laws of arrest, search, and seizure. See Traynor, Mapp v Ohio at Large in the Fifty States, 1962 Duke L.J. 319, 320. Although the matter is still in doubt, the Supreme Court's most recent pronouncement on the question is that "the States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States," and that the governing standard "implies no derogation of uniformity in applying federal constitutional guarantees but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques." Ker v. California, 374 U.S. 23, 34, 83 Sup. Ct. 1623, 1630, 10 L. Ed. 2d 726. 738 (1963). A state legislature, with its ability to investigate, hold hearings, and otherwise bring about the collection of a vast amount of relevant data, may be in a much better position to establish the existence of "conditions and circumstances" justifying arrest in certain specific situations than is a court, which is limited to information which is brought before it by the litigants or is properly a subject of judicial notice.

[3] Obvious though this is, analysis of this kind is seldom to be found. Exceptional in this regard is the case of Goldsmith v. United States, 277 F.2d 335 (D.C. Cir. 1960). However, one commentator has denominated Goldsmith as "utterly indefensible." Broeder, Wong Sun v. United States: A Study in Faith and Hope, 42 Neb. L. Rev. 483, 493 n.40 (1963).

[4] This is partly because tort actions challenging instances of such detention by the police are rare. And, because the states have not adopted the Mallory sanction of excluding, statements obtained during illegal detention, the defendant's conviction is not likely to be affected by his detention after arrest. (Since the observations in Michigan the court there did adopt a Mallory-type sanction in the Hamilton case [People v. Hamilton, 359 Mich. 410, 102 N.W.2d 738 (1960)], but since then appears to have abandoned it. See page 330.) Of course, the voluntariness of a confession may depend in part upon the length of time the individual was held prior to the confession, but it is not necessary for the court to decide that the detention was proper before finding the statement voluntary or to decide that the detention was improper before concluding that the confession is inadmissible.

[5] There is, of course, the risk of a coerced confession which the defendant may not be able to challenge successfully later. See Douglas, The Means and the End, 1959 Wash. U. L.Q. 103, 114. But there are other risks as well, such as the possibility that even an innocent man may give a false alibi. Borchard, Convicting the Innocent 373-374 (1932).

[6] "Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses nothing remains — if police investigation is not to be balked before it has fairly begun — but to seek out possibly guilty witnesses and ask them questions . . ." Culombe v. Connecticut, 367 U.S. 568, 571,81 Sup. Ct. 1860, 1861, 6 L. Ed. 2d 1037, 1040 (1961).

[7] Del. code Ann. tit. 11, §1911 (1953); N.H. Rev. Stat. Ann, §§594:20, 594:22, 594:23 (1955); R.I. Gen. Laws §12-7-13 (1957). The remand provision is a part of the Uniform Arrest Act, adopted in these three states with some minor variations.

[8] "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." Watts v. Indiana, 338 U.S. 49, 59, 69 Sup. Ct. 1357, 1358, 93 L. Ed. 1801, 1809 (1949) (Jackson, J., concurring).

[9] Previous to the recent case of Escobedo v. Illinois, 378 U.S. 478, 84 Sup. ct. 1758, 12 L. Ed. 2d 977 (1964), but subsequent to a number of earlier cases in which the issue of counsel at the police station had been raised before the Supreme court, it was noted that the question of when the right to counsel begins remains "as unilluminated after the Supreme court's recent decisions as before." Kamisar and Choper, The Right to counsel in Minnesota: Some Field Findings and Legal-Policy Observations, 48 Minn. L. Rev. 1, 33 (1963). The courts treatment of the problem in Escobedo still leaves the question in considerable doubt.

[10] Id. at 59. The reference is to Douglas v. California, 372 U.S. 353, 357-358, 83 Sup. Ct. 814, 816-817, 9 L. Ed. 2d 811, 814-815 (1963).

The pattern of the state legislation is discussed in some detail in Comment, 1962 U. Ill. L.F. 641. Although some of the statutes are not entirely clear, most of them seem to contemplate that the right arises immediately, and the only basis for denial of an opportunity to consult with counsel ever expressed by statute is where escape of the prisoner is "imminent." Id. at 649-650. Although these statutes are seldom the subject of judicial interpretation, some courts have made substantial inroads upon what is apparently stated by statute to be an unqualified right. E.g., People v. Escobedo, 28 Ill. 2d 52, 190 N.E.2d 825 (1963), reversed on constitutional grounds, Escobedo v. Illinois, 378 U.S. 478, 84 Sup. Ct. 1758, 12 L. Ed. 2d 977 (1964). Even where this has not occurred, the sanctions provided do not induce strict compliance. A few of the statutes provide a civil

remedy in lieu of or in addition to criminal prosecution, which is the usual sanction prescribed.

[11] "We are informed that ... [the California] public defender often enters a case while the accused is in police custody and before preliminary hearing and that these practices have in no way disrupted or adversely affected the orderly prosecution of criminal cases in that state." Attorney General's Committee, Report on Poverty and the Administration of Federal Criminal Justice 38 (1963).

[12] The American Bar Foundation has recently undertaken a nationwide study of representation of indigent defendants, in cooperation with the American Bar Association and other groups. See 1962 A.B.A. Rep. 468. The project includes field research in several states. For an article using some of the data from the project, see Kamisar and Choper, The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations, 48 Minn. L. Rev. 1(1963).

[13] On these statutes and other record-keeping problems, see Comment, 1963 U. Ill. L.F. 685.

[14] For all practical purposes, however, this review is limited to situations in which there has been a search incident to the arrest. One consequence of the fact that judges are not interested in making arrest decisions in the first instance is that a judge may suppress evidence by declaring illegal an arrest based upon a warrant previously signed *pro forma*. Such an occurrence has been observed in one jurisdiction (not one of those studied here) on more than one occasion. Although it is common for warrants there to be prepared by the police without the concurrence of the prosecutor, many judges still tend to issue warrants as a matter of course. A subsequent hearing on a motion to suppress before the same judge may result in his deciding, in effect, that he should not have issued the warrant.

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