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Saudi Search and Seizure Law Compared with the Fourth Amendment

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Introduction

I. Saudi Religious Police Beat an Arrestee to Death Following a Raid

On May 23, 2007, more than a dozen officers of Saudi Arabia's religious police, The Committee for the Promotion of Virtue and Prevention of Vice (or simply, *Haia*) stormed into the Riyadh home suspected bootlegger Salman al-Huraisi in search of illegal alcohol.¹ They found large quantities of alcohol in the apartment. They then proceeded to detain all members of the family within the house. Huraisi was taken to a local station where he was severely beaten and left barely conscious.² The *Haia* officers called an ambulance when Huraisi started coughing up blood during one such beating and interrogation. Huraisi's family was apparently present during the beatings.³ The autopsy revealed that the beatings caused his death.⁴ When al-Huraisi's father, Muhammad, age seventy-three, received the body for burial, he reported that "He was so badly beaten it was hard for us to recognize him. There was a

¹ Human Rights Watch, Saudi Arabia: Hold Religious Police Accountable for Killing Human Rights Watch (Jul. 25, 2007), <http://www.hrw.org/en/news/2007/07/24/saudi-arabia-hold-religious-police-accountable-killing>; See also Raid Qusti, *Vice Cops Change Testimony in Huraisi Retrial*, Arab News (Apr. 9, 2008), <http://www.arabnews.com/node/310793>. Saudi Arabia has three police forces, a regular police force, analogous to state troopers, a secret police, the General Investigation Directorate (Mabahith), analogous to the U.S. Department of Homeland Security, and the religious police force, the Committee for the Promotion of Virtue and Prevention of Vice.

² *Id.*

³ *Id.*

⁴ Raid Qusti, *Al-Huraisi Murder Trial Begins at Riyadh High Court*, Arab News (Oct. 31, 2007), <http://www.arabnews.com/node/305122>.

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crack in his skull, his right eye was popped out, his jaw was broken...His mother could not absorb the entire thing and she fainted in the washroom.”⁵

In addition to the homicide, the *Haia* agents violated multiple provisions of the Saudi Law of Criminal Procedure, including entering a private home without judicial authorization or a prosecutor-issued warrant, and detaining several women without either a male family member or neutral female escort present.⁶

In the months that followed, Saudi Arabia’s Interior Ministry investigated the incident, detaining eight men involved. The entire investigation and resulting trial appeared to have been a sham. All *Haia* officers were cleared of all charges, and only one man was held responsible in al-Huraisi’s death.⁷ The man was a private citizen who accompanied the police on the raid – a volunteer. The case was appealed, albeit with some resistance from the judiciary, including surprise vacations announced on the morning of which oral arguments were scheduled, in late 2008. According to available information, the appeal is apparently still pending.⁸

This case is illustrative of the current state of Saudi Arabia on several levels. All levels of police appear to abuse their authority and do not appear to have ever been held liable for official misconduct. Nevertheless, there appears

⁵ Raid Qusti, *Family Members Bury Al-Huraisi in Riyadh*, Arab News (Jul. 31, 2007), <http://www.arabnews.com/node/301285>.

⁶ Law of Criminal Procedure, Arts. 2, 40, 41, 53.

⁷ Raid Qusti, *Commission Cleared in Huraisi Death*, Arab News, (Jun. 26, 2007). <http://www.arabnews.com/node/297170>.

⁸ Mansour al-Shehri, *Commission Trial Cancelled, Judges on Vacation*, Saudi Gazette, <http://www.saudigazette.com.sa/index.cfm?method=home.regcon&contentid=200804163393>; See also Human Rights Watch, *Award to Saudi Human Rights Lawyer*, Human Rights Watch (Nov. 11, 2008), <http://www.hrw.org/news/2008/11/11/award-saudi-human-rights-lawyer>.

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to be enough resistance from the Saudi population that the monarchy is now pressing the police, albeit on a small level, to rein in on their excesses or be held accountable.⁹

II. Statement of Purpose: A Comparison of American and Saudi Search and Seizure Law and Practice

The purpose of this paper is to prove that not only is the United States more protective of individual liberties than the constitution of Saudi Arabia (which will probably not surprise the reader), but to explain exactly why this is so. This paper will investigate each country's search and seizure rules, their laws will be examined and compared along the following lines: historical basis for current law, the current rules governing searches and seizures of persons and property, whether law enforcement must obtain prior authorization to conduct a search or to seize evidence, and the process for doing so, exceptions to the general rules, limitations on the manner and scope of judicially authorized searches or seizures, remedies or sanctions for violations of the rules and their exceptions, and how well existing laws are followed in practice.

⁹ Contrast the above case with one that occurred earlier this year, where the head of the *Haia*, Sheikh Abdul Latif Abdul Aziz al-Sheigh appeared at the funeral of a man killed in a car chase with his agents and consoled the grieving father, claiming that "he was [t]here to fulfill his duty." Al Arabiya, *They were Innocent: Saudis React to Religious Police Car-Chase Death*, Al-Arabiya (Sept, 29, 2013), <http://english.alarabiya.net/en/News/middle-east/2013/09/29/-They-were-innocent-Saudi-Arabia-reacts-to-religious-police-car-chase-deaths.html>.

Saudi Law: A Modern Interpretation of Medieval Law

Saudi Arabia's closest analogue to a constitution is the monarchy's statement of "Basic Law," published on March 1, 1992. Article One of the basic law states that

The Kingdom of Saudi Arabia is a sovereign Arab Islamic State. Its religion is Islam. *Its constitution is Almighty God's Book, The Holy Qur'an, and the Sunna (Traditions) of the Prophet* (PHUB). Arabic is the Language of the Kingdom. The City of Riyadh is the capital.

The Basic Law of Governance, art. I.¹⁰ The basic law states clearly that the constitution consists of scripture and prophetic tradition. Included within this definition is a traditional religious law, Sharia, which functions as the default criminal law in Saudi Arabia, albeit without actually being codified as such.¹¹ While the Saudi monarchy does pass statutes to cover new problems as they arise, such as modern drug trafficking, much of its criminal law and procedure follows centuries old tradition.¹²

¹⁰ Basic Law of Governance, art. 1. Art. 7 further emphasizes that "...the Book of God and the Sunna of the Prophet...are the ultimate sources of reference for this law and the other laws of the state.

¹¹ Rudolph Peters, *Crime and punishment in Islamic Law: Theory and Practice form the Sixteenth to the Twenty-First Century*, 148 (2009).

¹² English text of the narcotics statutes and regulations are not easily obtainable. Summaries of the statutes may be found at the Saudi Ministry of the Interior website: Ministry of Interior, General Director of Narcotics Control, Penalties, https://www.moi.gov.sa/wps/portal/narcoticscontrol/lut/p/b1/04_SjzQ0MzMzNzaztDDRj9CPykssy0xPLMnMz0vMAfGjzOLd_cKCjd09jA0NXM2cDTwDTT38vU1DDbyDzfSDU_P0c6McFQHOYXNI/?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/narcotics+control/narcotics+control/penalties/&WCM_Parent_Path=/narcotics+control/narcotics+control/penalties.

In order to understand modern Saudi search and seizure procedure, it will therefore be helpful to investigate how the Quran and Sunna treat the topic. The following sections will examine the scriptural basis for Islamic search and seizure rules and then explain how they were subsequently interpreted.

As a preliminary note, the Quran provided for the establishment of religious police. The verses state: “Let there arise out of you a band of people inviting all that is good, enjoining what is right, and forbidding what is wrong...”¹³ They were referred to as *muhtasib*, and had the duty of walking the streets to enforce religious provisions, such as prohibitions on drinking and owning or playing musical instruments.¹⁴ In later centuries when the Muslim state grew and split, they worked alongside and in addition to state-employed police. The Committee for the Promotion of Virtue and Prevention of Vice is a continuation of this old institution.

¹³ Quran 3:104.

¹⁴ Sadiq Reza, *Islam’s Fourth Amendment: Search and Seizure in Islamic Doctrine and Muslim Practice*, 40 *Georgetown Journal of International Law*, 703, 732-33 (2009).

I. Scripture and Tradition as the Starting Point for Search and Seizure Law.

A. Searches: A General Protection of Private Homes

The starting point for search rules comes from the following verses:

O you who have believed, do not enter houses other than your own houses until you ascertain welcome and greet their inhabitants. That is best for you; perhaps you will be reminded. And if you do not find anyone therein, do not enter until permission has been given you. And if it is said to you, "Go back," then go back; it is purer for you. And Allah is Knowing of what you do."¹⁵

The scriptural source for search rules comes from another passage:

O you who have believed, avoid much [negative] assumption. Indeed, some assumption is sin. And do not spy or backbite each other. Would one of you like to eat the flesh of his brother when dead? You would detest it. And fear Allah; indeed, Allah is accepting of repentance and merciful.¹⁶

One last verse prescribes a final search rule: "...It is not righteous to enter houses from the back, but righteousness is in one who fears Allah. And enter houses from their doors. And fear Allah that you may succeed."¹⁷ This is essentially an extension on the prior two commandments, and commands readers not to sneak in the back door of a building.

Two of the three verses are directed toward *all believers*, and so presumably apply to all Muslims, including state actors. Collectively, these

¹⁵ Qur'an, 24:27-28. Translation taken from the following source: <http://quran.com/24/27-28>

¹⁶ Qur'an 49:12. Translation: <http://quran.com/49/12>. The word "assumption" is sometimes replaced by the word "suspicion" in other translations.

¹⁷ Qur'an 2:189. Translation: <http://quran.com/2/189>

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verses prescribe three rules: (1) Muslims should not enter the homes of other Muslims, whether empty or not, without permission, (2) Muslims should not spy on one another, and (3) if Muslims do enter others believers' homes, they should use the main entrance.

Some sayings of Muhammad have been passed down through tradition to elaborate on these rules, but they were primarily developed by his companions and successors.¹⁸ Several stories of the second Muslim ruler, Caliph Umar ibn al-Khattab served as examples for the formation of Muslim law and criminal procedure. In one such story, Umar and a companion were wandering around Mecca late at night. They came across a home with loud sounds coming from inside. Umar and his companion concluded that the people inside were drinking, which is contrary to Muslim law. Nevertheless, Umar left without bothering the party inside, concluding that he had learned of the drinking through spying.¹⁹ On another occasion, Umar was informed that a man was drinking wine. He went to the man's house and climbed over the wall without permission to find him drinking. The homeowner persuaded Umar to leave without inflicting any penalty, since Umar had entered the house without permission to investigate, which was equated with spying.²⁰ These two

¹⁸ For example, Muhammad was said to have established a specific procedure for seeking permission to enter a home and would not look through open doors before receiving permission to enter. III Sunan Abu Da'ud 1429, nos. 5158, 5167. He also threatened to stab a man through the eye who spied on him inside his home without permission. VIII Sahih Bukhari 8, no. 258.

¹⁹ Reza, *supra* note 4, at 724. Citing Abd Al-Qadir, 1 Tashri' Al-Jina'ī Al-Islami 220, 503 (1963).

²⁰ *Id.* citing Abdul Latif Al-Humayyim, Ihtiram Al-Hayah Al-Khassah ("Al-Khususiyah") Fi Alshariah Al-Islamiyyah Wa Al-Qanun Al-Muqaran (2004), 174. See also A. Q. Shaheed, *Criminal Law of Islam*, 217-18(S. Zakir Aijas trans., 2005).

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stories suggest that otherwise guilty parties may be able to either suppress evidence or avoid charges if authority figures violate the law in the process of uncovering wrongdoing.

Another story ended differently. A woman was suspected of committing adultery. Four men hid inside the house and surprised the woman and her partner when they came inside. Despite violating the prohibitions on home entry and spying, Umar nevertheless allowed their testimony into evidence against the man and woman. The four men were still punished for their wrongdoing.²¹ In this case the ruler, Umar, did not suppress the evidence (which by itself was insufficient evidence to prove adultery), and was willing to punish both parties for their respective wrongdoing. There is some dispute among sources, but it is arguable that there may have been an analogue to the American exclusionary rule for illegally obtained evidence in early Islamic law.

²¹ *Id.* at 727-28.

B. Seizures: Strong Evidentiary Requirements

Early traditions also prescribe procedures for judicial restraint and oversight of pre-adjudication seizure of persons. Under these traditions, persons could not be thrown in prison without being given an opportunity to defend themselves in open court.²² Detentions could be made, but only for good reason. If the arresting party could not provide compelling justification to the court for detention, then the prisoner would be released.²³ Evidence – generally eyewitnesses – was necessary to justify detention, and detention could be no longer than is necessary to determine whether further prosecution is appropriate.²⁴ Umar, for example, refused to seize a suspected thief without a witness:

I set out with some riders and, when we arrived at Dhii al Marwah, one of my garment bags was stolen. There was one man among us whom we thought suspicious. So my companions said to him: "Hey, you, give him back his bag". But the man answered: "I didn't take it." When I returned, I went to 'Umar ibn al Khattrb and told him what had happened. He asked me how many we had been, so I told him [who had been there]. I also said to him: "Amir al Mu'minin, I wanted to bring the man back in chains". 'Umar replied: "You would bring him here in chains, and yet there was no witness? I will not recompense you for your loss, nor will I make inquiries about it". 'Umar became very upset. He never recompensed me nor did he make any inquiries.²⁵

Without some evidentiary basis beyond the fact of accusation, suspected wrongdoers could not be detained or even charged with an offense.

²² Abul A'la Mawdudi, *Human Rights in Islam* 25 (1977).

²³ *Id.*

²⁴ Taha J. al-Alwani, *Rights of the Accused (Part Two)*, 10 Arab. L. W., 234, 242.

²⁵ *Id.* at 242-43, citing Abd al Razzdq, *al Musannaf*, vol. 10, p. 193.

These stories, along with the above scriptural verses, are the starting point for Islamic search and seizure law, at least so far as Sharia law is concerned. They serve as the foundation for later jurists whose doctrines would form much of the body of Sharia law and procedure.²⁶

II. Medieval Jurisprudence: Reinterpreting Personal Law in Following the Formation of a Centralized State Government.

Muslim scholars reinterpreted and expanded upon the Quran verses and tradition stories during the middle ages. For example, search rules could be applied differently depending upon who is doing the searching – they might be more relaxed for state actors, particularly those with a high level of authority. This is reflected in modern Saudi criminal practice, which has procedures for obtaining search warrants.²⁷ The development of differing rules for private and state actors reflects that early Islamic law was designed to deal with disputes between private persons, rather than between the state and an individual, as well as the fact that private citizens could serve as a type of religious police, and bring others to court for committing offenses.²⁸

Mawardi, a political theorist and leading judge in eleventh century Baghdad held state actors to a different standard than *muhtasib*, or the Sharia

²⁶ While many crimes are traditional, five, at least, are found in scripture. The crimes and evidence required for conviction are highly specific. Nevertheless, some, like theft and highway robbery, have been extensively modified and expanded in modern Saudi Arabia. These are (1) *zina*, or adultery, (2) *qadf*, or wrongful accusation of adultery, 3 *shrub al-khamr*, or drinking alcohol, 4 *sariqa*, or theft, and (5) *qat al-tariq*, or highway robbery. Other offenses, such as insurrection, apostacy, homicide, and bodily injury have also been recognized since the first Muslim state. Wael B. Hallaq, *Sharia: Theory, Practice, Transformations* 310-22 (2009).

²⁷ Law of Criminal Procedure, Art. 41, Royal Decree No. (M/39) (2001).

²⁸ Hallaq, *supra* note 16 at 308-09. See also Reza, *supra* at note 4, 732-33. *Muhtasib* could be either state actors or private citizens.

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courts – the state’s law enforcement powers exceeded those of volunteer *muhtasib* and the ordinary Sharia courts, the *qadi*.²⁹ Local magistrates (“amir”) could conduct spying, order pre-adjudicative detention, and even require that prisoners submit bail as a condition of release. Magistrates can have prisoners beaten to force confessions, although forced confessions should not be used as a basis for punishment.

A. Search: Exceptions to the Sanctity of Private Homes

Multiple exceptions developed to the general prohibition on police entering homes. Entering a home was forbidden unless: (1) the wrongdoing traveled outside the home onto the street, (2) or when there was evidence that the home’s inhabitants had committed wrongdoing on prior occasions (because the sinner’s bad reputation essentially rendered the bad conduct public).³⁰ (3) Necessity, such as to put out a fire, was another excuse, (4) as was entry to search for a wanted criminal.³¹

The prevention on spying was similarly modified. Not all spying was contrary to God’s command: “what distinguishes the kind of suspicion that must be avoided from all other kinds of suspicion is that the kind of suspicion for which no proof or apparent reason is known must be avoided.”³² This

²⁹ Abu'l-Hasan 'Ali ibn Muhammad ibn Habib al-Basri al-Baghdadi al-Mawardi, *The Ordinances of Government* 309-11 (Trans. Asadullah Yate).

³⁰ Eli Alshech, “Do Not Enter Houses Other than your Own”: *The Evolution of the Notion of a Private Domestic Sphere in Early Islamic Thought*, 11 ISLAMIC L. & SOC'Y 291, 298–300 (2004), citing Ibn Abi Zayd al-Qayrawani, 14 *al-Nawadir wa'l-ziyadat 'ala ma fial-Mudawwana* 316 (1999).

³¹ Reza, *supra* at note 4, 731.

³² Taha J. al-Alwani, *Rights of the Accused (Part One)*, 10 Arab. L. W., 3, 14.

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meant that surveillance, eavesdropping, and searches could be justified if there was enough pre-existing suspicion.

The threshold for justifiable surveillance and search varied between the medieval schools of law. The scholar Hanbal, for example, whose thought forms the basis for the modern Saudi legal system, told his followers to not even attempt locating a house in which forbidden music was being played, even if the music could be heard from the street, because “what is covered [by the house] one [should] not search.³³ The early Hanbalite School of law thus appeared to have offered protection against spying and searches of private homes even if the criminal conduct was apparent from public spaces. The Hanbalis would not allow search of a house unless police inadvertently came across an offense, and if it was immediately apparent without further search.³⁴ If wrongdoing or evidence was out in the open and immediately apparent, then there was no spying in the first place.³⁵ Under this view, police could destroy any contraband or try to stop any wrongdoing that they encountered in public.³⁶ Furthermore, if religious police had evidence or sufficient reason to believe that a closed container or other personal effect contained contraband, the contraband’s presence and nature was clear and the religious police could seize and destroy it.³⁷

³³ Eli Alscheck, “Do Not Enter Houses other than Your Own”: *The Evolution of the Notion of a Private Domestic Sphere in Early Islamic Thought*, 11 *Islamic L. & Soc’y*, 291, 300 (2004), citing 2 *Abd Allah b. Ahmad B. Hanbal* 293 (1981).

³⁴ *Id.* at 301.

³⁵ Reza, *supra* at note 4, 732.

³⁶ Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought* 100 (2001).

³⁷ *Id.*

Surveillance and search rules were different outside the home. When in public places, *muhtasib* were allowed to make inferences based on their observations and intuition. For example, if a *muhtasib* encountered a person on the street with a musical instrument partially sticking out of their pocket or the smell of alcohol on their breath, the *muhtasib* could confiscate the instrument or investigate further to see whether the suspect had been drinking. This bears some resemblance to the American *Terry* standard, which allows police to search suspects based on reasonable suspicion of criminal conduct.

B. Criteria for Arrest: Personal Reputation and Seizure

Under the eleventh century jurist Mawardi's political theory, secular law enforcement existed and operated parallel to religious law enforcement – *muhtasib* and the *qadi* courts. Secular law enforcement had greater arrest powers than religious law enforcement, which were restricted by *sharia*'s limitations on investigation and preventative detention. Secular law enforcement were not subject to the same rules. A governor's agents could seize a person upon mere *accusation* of a crime and jail them pending investigation into guilt or innocence.³⁸ The length of such preventative detention appears to have varied based on the opinion of local rulers and the facts of each case.³⁹ Not every medieval writer advocated having a dual

³⁸ Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* 234 (2004).

³⁹ *Id.*

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criminal justice system, but Mawardi's writings may have reflected actual practice in eleventh century Mesopotamia.⁴⁰

Relevant factors for deciding whether to arrest and jail a person pending trial included: (1) the gravity of the alleged crime, (2) quality and quantity of evidence, with special concern for eyewitnesses, (3) and the accused's personal reputation.⁴¹ Crime seriousness was relevant more because of flight risk than out of any concern for public safety or concern about revenge from a victim's family – serious offenses tended to carry harsher sentences and law enforcement did not want suspects to flee during an ongoing investigation or before trial. The concern for number and quality of witnesses is easily explained, in that witness testimony was the primary means of evidence in an era before modern forensics – without witnesses it would not be possible to prove who committed an offense. In addition, the set religious crimes, *hadad* all required testimony from multiple witnesses. As for reputation, it could fall into one of three categories: (a) a person could be well known in a community as a good, hard-working and pious person, (b) could be publicly known as lazy, sinful, or as a criminal, and (c) or have an unknown reputation, or anything between the two extremes. Accused persons in the first category would probably not be detained or beaten, since law enforcement could be confident that they would be honest enough to submit to judgment. The second category would be detained, beaten, and forced to confess to the crime – their bad

⁴⁰ The dual criminal system continued in practice at least through the thirteenth and into the fourteenth century according to the medieval north African jurist ibn Khaldun. Abd al Rahman bin Muhammed ibn Khaldun, *Muqaddimah*, 294 (Franz Rosenthal trans.1969).

⁴¹ Reza, *supra* at note 4, 754-55.

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reputation meant that they were likely guilty and a flight risk. Persons in the third category would be detained until law enforcement could learn enough about them to decide whether to release or detain them pending further investigation and trial.

Detention could take the form of imprisonment but did not always do so. A person could also be placed under house arrest, deposit a surety bond, or obtain personal surety from a third party who would personally assume responsibility for producing them later at court.⁴² Again, relevant factors in determining whether to imprison a person pending investigation included the gravity of the crime, flight risk, and the accused's reputation.

⁴² *Id.* citing Ibn Qayyim Al-Jawziyah, *Al-Turuq Al-Hukmiya Fi Al-Siyasah Al-Shar'iyah [Procedures Of Administration]* 89–92 (2002).

III. Current Saudi Law: The Practice of Extreme Judicial Discretion

Saudi Arabia, as stated in Article I of the monarchy's Basic Law, tries to follow *sharia* traditions as closely as possible, and comes closer to doing so than any other country in the world. Except for a few ethnic minorities, the vast majority of courts subscribe to the Hanbalite school of law. Hanbalites do not subscribe to the view of binding precedents.⁴³ Instead, Saudi judges use their own legal reasoning, and derive appropriate rulings on a case-by-case basis. Hanbalites use only the following as legal resources: *Qur'an*, *Hadith* (traditional sayings of Muhammad), historic consensus of Muhammad's companions, and legal analogy.⁴⁴ There is no analogue to *stare decisis* in Saudi Arabia and appeals court decisions apply only to individual cases. As a result, both verdicts and sentences are unpredictable and can vary widely even with cases that have similar fact patterns. Judges are able to exercise extreme discretion, provided only that their rulings do not blatantly contradict Islamic scripture or tradition. Given the lack of codified laws and extreme judicial discretion, lawyers have little power in court and are less useful than in the United States.

⁴³ *Precarious Justice*, 20 Human Rights Watch 12-13 (March 2008).

⁴⁴ Muhammad Sa'Ad Al-Rasheed, *Criminal Procedure in Saudi Judicial Institutions* 23 (1973) (published thesis, Durham University) (Available at Durham E-Theses Online: <http://etheses.dur.ac.uk/1857/>).

A. Modernizing the Law: Movement to Codify Criminal Procedure and Criminal Law in Order to Limit Judicial Discretion and Provide for Predictable Verdicts.

The Saudi Monarchy, at least in theory, has been attempting to limit judicial discretion and introduce predictability into criminal law and procedure for the last two decades. In 1990, King Fahd attempted to codify rules of procedure for *sharia* courts, but quickly retracted it due to judicial outcry.⁴⁵ The monarchy reissued the rules of court procedure in 2000, and codified Saudi Arabia's first rule of criminal procedure in 2002.⁴⁶ Under the criminal procedure law searches are prohibited without force of law. Homes are specially protected and may not be searched without a warrant (although warrants are issued by investigators, rather than the judiciary).⁴⁷ Searches are limited in scope to the crime for which the subject is accused and homes may not be searched unless the owner or an adult family member is present.⁴⁸ In order to enforce these rules, the criminal procedure requires that records be kept of each warrant search, including the text of the warrant, the date, time, and location of the search, a description of the items seized, and the signature of the home's owner or witnesses.⁴⁹ Arrestees must be informed of the reason for their arrest and be given an opportunity to inform family members of their detention.⁵⁰ There are procedures to prevent excessively long pretrial detention, although these are relatively simple to overcome under

⁴⁵ Human Rights Watch, *supra* at note 43, 22.

⁴⁶ *Id.*

⁴⁷ Law of Criminal Procedure, Arts. 2, 40, 41. 122.

⁴⁸ *Id.* Arts. 45-46.

⁴⁹ *Id.* Art. 47.

⁵⁰ *Id.* Art. 35.

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administrative processes within the criminal procedure code.⁵¹ Arrestees may not be physically harmed, meaning, in theory, that police cannot beat confessions out of arrestees.⁵² Finally, accused persons have a right to the assistance of a lawyer during preliminary police investigation and trial.⁵³

There is also some pressure among Saudi intellectuals to codify parts of the *sharia* into a substantive criminal law. Sheikh Abdullah Al-Mani, a member of Saudi Arabia's Council of Senior Scholars (the highest religious body in Saudi Arabia), stated in an interview with the newspaper Asharq Al-Awsat that

I have been calling for [codifying the law] for over 25 years. I called for codification according to the four schools of thought, not only the Hanbali School. If an official party took on this responsibility it would undoubtedly reduce differences and would constitute a strong factor in hastening the verdict in judicial proceedings. It would also make rulings much clearer for litigants before going to court. I would like to emphasize that codification would be one way of judicial reform in Saudi Arabia.⁵⁴

And in 2007, the monarchy proclaimed that it would over the following years reinvest in and reorganize the country's judicial system, which would create specialized commercial, labor, and administrative courts.⁵⁵

⁵¹ *Id.* Arts. 109, 113, 114.

⁵² *Id.* Art. 35.

⁵³ *Id.* Art. 4.

⁵⁴ Interview with Saudi Council of Senior Ulama Member Sheikh Abdullah Al Manee, Asharq al-Awsat (March 23, 2006). Available at: <http://www.aawsat.net/2006/03/article55267381>. It is worth noting, that when asked if penal law should be codified, he responded somewhat vaguely that "The law cannot be changed, manipulated, or reinterpreted."

⁵⁵ Esther van Eijk, *Sharia and National Law in Saudi Arabia*, reprinted in *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* 149-50 (Michiel Otto ed. 2010).

B. Saudi Practice: Police Ignore the Rules

These legal reforms have had little practical effect. Saudi residents are often not aware of what their rights are or that they even have rights to begin with. Detainees must know their rights and insist that they be followed.⁵⁶ Police and prison officials are not familiar with criminal procedure standards, and even “judges are not very conversant in the criminal procedure code.”⁵⁷

The *Haia* in particular does not observe the Law of Criminal procedure when arresting. Agents can enter homes without warrants if they learn that a crime is in progress and police do not inform persons of their crimes upon arrest.⁵⁸ Arbitrary arrests are also common: grounds for arrest can include those such as “doubting the approach of the ruler and the present entity of the state based on the application of the Book and the Sunna...and of doubting the independence of the judiciary, and of deceiving the people.”⁵⁹ Police often detain people without charges or access to legal counsel, and foreign detainees often have little or delayed consular access if involved in a criminal case.⁶⁰

⁵⁶ Human Rights Watch, *supra* at note 43, 18.

⁵⁷ *Id.*

⁵⁸ *Id.* at 9 and 59.

⁵⁹ *Id.* at 57.

⁶⁰ United States Department of State, Saudi Arabia Country Specific Information, (Oct. 21, 2013, 4:44 PM), http://travel.state.gov/travel/cis_pa_tw/cis/cis_1012.html#country.

United States Law: Fourth Amendment **Prohibition on Unreasonable Searches**

The United States, unlike Saudi Arabia, has a textual constitution which functions, at least in the area of search and seizure, as a general statement of policy. Specific interpretation of constitutional text falls to individual courts. Criminal defendants (only) may appeal a trial court's ruling, potentially multiple times. The United States Supreme Court is the court of last resort. Its rulings serve to define a floor for permissible search and seizure practices. All other levels of federal and state court are bound to follow constitutional interpretations set by the United States Supreme Court. Furthermore, all lower courts are bound by appellate court rulings within their respective jurisdiction, and individual courts tend to follow previous rulings unless there is a compelling reason to the contrary (a common law concept referred to as *stare decisis* – let it stand). *Stare decisis* allows for consistent and predictable rulings across cases with similar sets of facts, while still allowing higher level courts enough discretion to modify the law when either justice requires, or when a court reinterprets a constitutional provision.

Since the federal constitution mentions both search and seizure explicitly, the starting point in the Supreme Court's jurisprudence is the text of the constitution itself. The Fourth Amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,

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supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁶¹

The Fourth Amendment creates two rules: searches must be reasonable and warrants require probable cause, supported by police assurances, and a description of the areas to be searched and the persons or things to be seized. The precise nature of these two rules – especially the one prohibiting unreasonable searches – have varied both over time and with the facts of different cases. This section will start with a brief history of United States search and seizure law, proceed to current law, examine current cultural concerns, and then proceed to a sample case to illustrate how well police follow the law, and what consequences may occur when they do not.

⁶¹ U.S. Const. amend. IV.

I. Fourth Amendment as Protection of Property, Not Persons

Until 1967, the Supreme Court determined the bounds of police search and seizure by use of the criminal trespass doctrine. If police, without a warrant (i) intruded (ii) on a protected area of private property (iii) to obtain information, then any information learned thereby was obtained illegally and *may* have been suppressible at trial. For example, in Silverman v. United States, the Justice Stewart wrote that “eavesdropping accomplished by means of such a physical intrusion [wa]s beyond the pale.”⁶² In that case, police passed a microphone through a heating duct to listen in on a conversation without the speakers’ consent or knowledge. The court ruled that the police practice here was “an actual intrusion on a constitutionally protected area.”⁶³ This older rule measured Fourth Amendment privacy concerns in terms of property, rather than personal rights. The trespass doctrine was not concerned so much with privacy in and of itself or privacy in a personal sense as it was with privacy in private property – especially the home. The trespass doctrine reflected early American preoccupation, particularly among the social elites of the revolutionary and industrial eras, with government infringement upon private property. I mention the trespass standard because it was recently resurrected in United States v. Jones. It is not yet clear how closely lower

⁶² *Silverman v. United States*, 365 U.S. 505, 509 (1961). The trespass doctrine originated at the Supreme Court level in *Olmstead v. United States*, 277 U.S. 438 (1928).

⁶³ *Silverman*, 365 U.S. at 512.

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courts (or the Supreme Court) will follow this ruling, so its consequences cannot yet be predicted.⁶⁴

II. Current Law: Fourth Amendment Protection of Persons, Rather Than Property

A. Social Privacy Expectations as the Basis for Reasonableness

Since 1967, rules surrounding reasonable searches have turned on personal and social privacy expectations. In Katz v. United States, the Court explicitly departed from the earlier property-based test. Justice Stewart wrote that “the Fourth Amendment protects people – and not simply ‘areas’ – against unreasonable searches and seizures...the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.”⁶⁵ Justice Harlan’s concurrence was later adopted by the Supreme Court to define the bounds of what are and are not reasonable searches – ‘a person must both have exhibited an actual, subjective expectation of privacy and, that expectation must be one that society is prepared to recognize as reasonable.’⁶⁶ A person can demonstrate a personal expectation of privacy by taking precautions to ensure that their words and actions are not public – in Katz, shutting the door of an otherwise public telephone booth was sufficient to show a personal privacy expectation. The second prong of the test proves more problematic. The Court tends to base public willingness to recognize privacy interests based upon the reasoning of a majority of the court. The Supreme Court over the last twenty five years has created such a high bar for

⁶⁴ *United States v. Jones*, 132 S.Ct. 945 (2012).

⁶⁵ *Katz v. United States*, 389 U.S. 347, 353 (1967).

⁶⁶ *Id.* at 361.

‘reasonable’ privacy expectations – for example homeowners must literally wall and roof their back yards in order to constitutionally shield the area from police view.⁶⁷ Such a rule is clearly absurd on its face. If homeowners thought that aerial shielding was necessary to ensure privacy of their yards, more would enclose such spaces with roofs or tarps. This is not a common practice, while five to eight foot high fences are relatively common. This lack of overhead shielding shows that that homeowners expect their yards will typically be private from aerial surveillance. As a general rule in the last thirty-five years, the Supreme Court has gone out of its way to find the vast majority of police search practices reasonable.

B. Seizures: Probable Cause and Warrant Requirements

All seizures must follow the reasonableness standard. Seizures may be of either a person or of property. Arrests are reasonable if the police (i) see a person in the process of committing a crime, (ii) have probable cause to believe that the person currently is committing or has committed a crime, or (iii) if they have a warrant for a person’s arrest.⁶⁸ Unlike in Saudi Arabia, United States arrest warrants do not expire with passage of time. Police may seize two types of property: evidence of a crime and contraband, which is property for which the state has criminalized all possession. Police may seize such property if (i) it is in plain view, (ii) if the property’s owner consents to a search, (iii) if they come across it during an otherwise lawful search, (iv) or if they have a valid

⁶⁷ *California v. Ciraolo*, 576 U.S. 207 (1986).

⁶⁸ *United States v. Watson*, 423 U.S. 411 (1976).

warrant to seize the property. Warrants for searches and seizures of property can go stale over time and eventually become invalid.⁶⁹

C. Constitutional Requirements for a Valid Warrant

If a warrant is valid, all searches and seizures pursuant to the warrant are presumptively reasonable. In order for warrants to be valid, (i) the issuing party must be a neutral magistrate. They do not have to be educated in the law, but generally are lawyers.⁷⁰ For a magistrate to be neutral, they must not be compensated for issuing warrants or show overt partiality toward law enforcement.⁷¹ (ii) Police must present probable cause to the magistrate either that an individual is committing or has committed a crime, or that evidence of a crime is or will soon be at a specific location. Evidence or persons to be seized must be described with particularity, although this requirement is a low bar. A simple list, ending with a phrase like ‘all other evidence of X crime’ will suffice.⁷²

⁶⁹ Whether a warrant has gone stale is generally left to the trial court’s discretion, although appellate courts or even police themselves (however unlikely this may be) could potentially declare a warrant stale.

⁷⁰ *Shadwick v. City of Tampa*, 407 U.S. 345 (1972).

⁷¹ *Connally v. Georgia*, 44 U.S. 245 (1977).

⁷² *Andresen v. Maryland*, 427 U.S. 464 (1976).

D. Warrant Exceptions: When Police May Constitutionally and Reasonably Search Persons or Property Without a Warrant.

While warrants are presumptively required to legitimate a search and some seizures, there are eight exceptions to the warrant requirement: consent, plain view, exigent circumstances, search incident to arrest, inventory searches, automobile searches, suspicion searches, and special needs searches.

Consent and plain view are different from the others in that the Fourth Amendment is not even implicated. In a consent search, the actual or apparent property owner willingly gives up their right to exclude police from their property to permit a search.⁷³ In theory, the property owner retains control over the duration and scope of the search.⁷⁴ Consent searches are permissible on the grounds that citizens have the ability to waive their rights. Plain view describes a situation in which no search actually occurs. When police are lawfully in a location in which they can plainly see and access evidence or contraband, and immediately recognize the property as such, they may seize the property. In such circumstances, the property owner has simply been negligent in leaving the property in an area where police have access.⁷⁵

There is another category of exceptions that arise from arrest or impoundment – search incident to arrest and inventory searches. The Court has held it reasonable for police to search suspects and areas within their

⁷³ *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

⁷⁴ *Florida v. Jimeno*, 500 U.S. 248 (1991).

⁷⁵ *Arizona v. Hicks*, 480 U.S. 321. Plain view searches do not have to be accidental or inadvertent. Police simply must be in an area where they have lawful view and access to the evidence or contraband. *Horton v. California*, 496 U.S. 128 (1990).

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reach upon arrest in order to disarm them and preserve evidence.⁷⁶ The justifications are first, police safety, and second, a lack of reasonable privacy interest in evidence of a crime.

A third category of warrant exceptions authorize searches of automobiles or persons' bodies based on probable cause or suspicion. Police may search any automobile and corresponding containers if they have probable cause – essentially a high degree of suspicion – that the vehicle contains contraband or evidence of a crime.⁷⁷ Police may additionally stop and detain a person for an open-palmed pat down based on reasonable suspicion that they have been engaged in criminal activity, either in the past, currently, or in the near future.⁷⁸ The level of suspicion necessary is less than probable cause – police must be able to articulate a reason to justify the pat down. These are called *Terry* searches, after the Supreme Court case which authorized their use.

There is another catch-all warrant exception called “exigent circumstances.” This exception allows the government to enter homes or other private buildings because of pressing need. For example, firefighters and associated police may enter a burning building without a warrant to fight a fire or render aid to inhabitants that they believe to be injured.⁷⁹ The Supreme Court also considers it reasonable to allow police to chase a suspected criminal

⁷⁶ *United States v. Robinson*, 414 U.S. 218 (1973); *Chimel v. California*, 395 U.S. 752 (1969).

⁷⁷ *California v. Carney*, 471 U.S. 386 (1985) justifies automobile searches based on being readily mobile. There is no reasonable expectation of privacy in automobiles because they are subject to pervasive state and federal regulation. *California v. Acevedo*, 500 U.S. 565 (1991) justifies searches of containers within automobiles.

⁷⁸ *Terry v. Ohio*, 382 U.S. 1 (1968).

⁷⁹ *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006). This is called ‘emergency aid’ doctrine.

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into a private building without a warrant because criminals could either escape or take hostages simply by entering private property.⁸⁰

Finally, there is a special category of suspicion-less searches based on special government needs.⁸¹ The most common form of special needs searches are drug tests at schools or sobriety checkpoints on highways. Special needs searches do not require any suspicion of criminal activity. The justification for such searches is that the search is minimal, whereas there is a strong government interest in prohibiting use of illegal drugs or driving while intoxicated. If a special needs search becomes too invasive, or the government interest is minimal, then a warrant becomes necessary.⁸² Special needs searches are unique among the warrant exceptions, because the Court departs from the ‘reasonable expectation of privacy’ analysis, introduced in *Katz*.

⁸⁰ *Steagald v. United States*, 451 U.S. 204 (1981). This is called the ‘hot pursuit’ doctrine.

⁸¹ *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

⁸² In *Safford Unified School District #1 v. Redding*, 557 U.S. 364 (2009). In this case, the Court overturned a strip search of a middle school girl because the government did not have a strong enough interest in preventing her from using prescription ibuprofen.

III. Enforcement Mechanisms and Police Practice With a Focus on the New York-Northern New Jersey Metropolitan Area

The United States judicial system provides several mechanisms by which defendants may challenge an illegal search and seizure. These include, challenging the warrant upon which a search was based, the exclusion rule for illegally obtained evidence, and a limited federal abrogation of sovereign immunity against state police forces.

A. Challenging Warrants: The Circumstances Under Which Warrants May be Insufficient

While warrant searches are presumptively reasonable, warrants may still be challenged. The person subject to a warrant may challenge it if they can show that police supplied false information when seeking the warrant, either intentionally or with reckless disregard for the possibility that the information might be false.⁸³ Of course, it is difficult, if not impossible, for a defendant to obtain strong enough evidence to prove to a court that police knowingly or recklessly lied to a judge in order to obtain a warrant.

Warrants may also be challenged if they fail to describe with enough particularity the location to be searched or the evidence to be seized. These standards are fairly generous. For example, in *Maryland v. Garrison*, the Supreme Court upheld a warrant describing the top floor of an apartment building that had two units on that floor was upheld as being sufficiently

⁸³ *Virginia v. Moore*, 533 U.S. 164 (2008). Mere negligence on the part of the police is not enough. A suspect must be able to show that police acted with some sort of volition when supplying false information to the issuing magistrate.

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particular.⁸⁴ And even though the police made a mistake by searching an innocent person's apartment (which ended up containing illegal drugs) in addition to their intended target's apartment, this accidental search was still valid. And even a warrant authorizing search for "other fruits, instrumentalities, and evidence of crime at this time unknown" was sufficiently particular when the warrant at least specified the crime for which police were seeking evidence.⁸⁵

A defendant may also challenge a warrant if it was not properly executed. Police must comply with the limitations found in the warrant and may not search outside of the warrant's scope.⁸⁶ Finally, there is a general rule requiring police to knock at a door, announce their presence, and give a property owner time to open a door. The purpose of this rule is to provide some limited privacy and property protection.⁸⁷

Under the above standards, it is generally difficult for defendants to successfully challenge a warrant as the particularity requirement is not very strong and since it is difficult for defendants to prove that police obtained or improperly executed a warrant. A more common and generally more

⁸⁴ *Maryland v. Garrison*, 480 U.S. 79 (1987).

⁸⁵ *Andresen v. Maryland*, 427 U.S. 463 (1976).

⁸⁶ *Maryland v. Garrison*, 480 U.S. 79 (1987). In this case, the court upheld a search technically outside the scope of the warrant due to an accidental police mistake. If the police had purposefully acted outside of the warrant's scope, the illegally obtained evidence could have been suppressible.

⁸⁷ There are multiple exceptions to this rule, including danger to police or risk of destroying evidence. Failure to follow a knock and announce rule is not likely to result in suppression of evidence since the rule is intended to protect privacy and property – it does not affect the legitimacy of otherwise legally obtained evidence.

successful strategy is to challenge the process of the search itself in order to prevent evidence from being presented at trial.

B. Exclusionary Rule: Preventing Introduction of Evidence at Trial to Encourage Police Compliance with the Fourth Amendment

Federal and State courts may choose to punish police for obtaining evidence illegally by excluding evidence from potential use at trial.⁸⁸ Evidence is considered illegally obtained if police perform an unreasonable search or seizure. Unreasonable searches are those that: are done pursuant to an improperly obtained or improperly executed warrant, or are implemented without a warrant or relevant warrant exception. In order to suppress illegally obtained evidence, a defendant must prove that they have standing to challenge the search. A defendant can prove standing by showing that they had a reasonable expectation of privacy in the property searched. Generally, this amounts to establishing personal ownership of the property, since courts will generally hold that defendants do not have a reasonable expectation of privacy in others' property.⁸⁹

There are several exceptions to this rule that do limit its effectiveness. If police would have inevitably discovered the same evidence legally, or similar evidence from an independent source legally, then a court will still admit the

⁸⁸ *Mapp v. Ohio*, 367 U.S. 643 (1961). The exclusionary rule was incorporated onto the states in this case. The rule was first formally introduced in *Weeks v. United States*, 232 U.S. 383 (1914).

⁸⁹ *Rakas v. Illinois*, 439 U.S. 128 (1978).

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evidence.⁹⁰ For example: in *Nix v. Williams*, police were transporting a known murderer between two cities to meet with his attorney.⁹¹ The officer driving the defendant, knowing that he was religious, remarked how it would be a shame that the child victim's parents would never be able to find the body to give her a proper Christian burial. The defendant felt guilty and directed the officer to the body's location. Typically, a court should suppress this information, since the officer deliberately elicited incriminating information from a man that the officer knew was represented by a lawyer, outside of the lawyer's presence. In this case, however, the Supreme Court ruled that the incriminating statement should still be admitted, since police were already searching in the immediate area of the body's location and would have most likely found it even without the defendant's help.

One final limitation is that a police officer must commit the error in order for evidence to be suppressible. For example: if a judge makes an error in finding probable cause and police act on that error, using the warrant to conduct a search or arrest, any evidence obtained thereby will generally not be suppressed. This is because the justification for excluding evidence is to punish police for violating the Fourth Amendment. In a scenario where a judge erred in finding probable cause, the judge made the mistake – not the police –

⁹⁰ For example, if police force a suspect to confess, leading them to evidence in an area that they were about to search anyway, the evidence is still admissible.

⁹¹ *Nix v. Williams*, 467 U.S. 431 (1981).

meaning that there would be no reason to punish the police by suppressing evidence.⁹²

C. Civil Causes of Action: State Liability for Police Violations of Citizens' Civil Rights

42 U.S.C. § 1983 was enacted in 1871 as part of the Civil Rights Act. As currently amended, it creates a civil cause of action against the state for violating the constitutional or other legal rights of any person within the United States. In *Monroe v. Pape*, the Supreme Court held that police could be acting “under color of any statute...” even when they were violating the law. Thus, victims could bring a civil rights cause of action against the state, even when police act outside their authority.⁹³ The Supreme Court expanded Section 1983 to include municipalities in *Monell v. Department of Social Services of the City of New York*.⁹⁴ This meant that local government could be sued for damages based on official policy or governmental custom that deprived citizens of constitutional rights. Section 1983 was again expanded in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* such that victims could obtain monetary damages for injuries inflicted by federal police while in the process of violating their Fourth Amendment rights.⁹⁵

⁹² A person must have standing before they can challenge a search. Standing is created by having a reasonable expectation of privacy in the area searched or the property seized. Functionally, one must have ownership in order to have standing to challenge a search. The logic goes that if a person does not have a reasonable expectation of privacy in the object seized or place searched, then their Fourth Amendment rights could not have been violated under the Katz test. *Rakas v. Illinois*, 439 U.S. 128 (1978).

⁹³ *Monroe v. Pape*, 365 U.S. 167 (1961).

⁹⁴ *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978)

⁹⁵ *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388, 395-96 (1971).

In order to state a cause of action under 42 U.S.C. § 1983, a plaintiff must allege that a *person* (according to *Monell*, person can include local government bodies) must act *under color of law* (in official capacity as a state government employee by virtue of the actor's power as a state employee) and *subject or cause to be subjected* (cause; note that there is no intent requirement) a *deprivation of rights* (rights protected by federal statute or the United States Constitution) and *shall be liable...in action at law, suit in equity, or other proper proceeding for redress* (The defendant may be sued in federal court).

Section 1983 does not create *respondeat superior* liability against local government solely based on the actions of government employees. The government employee must have been following some sort of government law or policy that suggested violation of constitutional rights in order for Section 1983 to apply.⁹⁶ It is therefore difficult, from a practical standpoint, to state a cause of action against a single rogue police officer. And even when a victim is able to state a cause of action under Section 1983, it is often difficult for a victim to win either damages or injunctive relief in a Section 1983 suit at trial.⁹⁷

⁹⁶ *Id.* at 691.

⁹⁷ *City of Los Angeles v. Lyons*, 461 U.S. 95. In this case the Supreme Court held that in order to obtain injunctive relief under Section 1983, a plaintiff must be able to establish real and immediate threat that they, personally, will be injured again by the policy at issue, that the conduct at issue is police policy, and that it is uniformly applied in all similar circumstances. In this case, the conduct at issue was a dangerous police choke hold. See also Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. Cal. L. Rev. 1453, 1504-05 (1993). The article investigates the difficulty of bringing Section 1983 claims given the absence of *respondeat superior* liability. Alleged misconduct must be proven to be a part of department policy or custom in order to give rise to civil liability.

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Nevertheless, as seen in the following section, municipalities do sometimes settle when there appears to be sufficient risk of loss.⁹⁸ An example of a local Section 1983 lawsuit follows.

**D. Allegations of Police Misconduct in Newark, New Jersey:
*Qualls v. City of Newark***

This local sample case illustrates the kinds of police abuses that are often alleged in violent, high-crime areas, and to investigate how municipalities subject to such pressures might respond. The case was not taken to trial, so the facts alleged in the complaint were not proven in court. Given the small damage settlement, the allegations below are probably exaggerated. Even so, there may be some evidence supporting the claims – otherwise the plaintiff's attorney would not have taken the case.⁹⁹ The sheer volume of complaints and settlements between 2008 and 2010 cited in the ACLU study also suggest problems within the Newark Police Department.

According to the complaint, the plaintiff, Sharonda Qualls, was been called to testify as a witness in the May 1999 trial of *State of New Jersey v. Kareem Coleman* at the Essex County courthouse.¹⁰⁰ She intended to provide information that would confirm an alibi for the defendant in that case. Ms. Qualls alleged that while she was waiting to testify outside the courtroom, Essex County Detective Kurt Swindell attempted to intimidate her. The

⁹⁸ Or when offering a settlement is less expensive than defending against a Section 1982 claim.

⁹⁹ In the Matter of A Petition for An Investigation into the Newark, New Jersey Police Department by the United States Department of Justice Pursuant to 42 U.S.C. § 14141.

¹⁰⁰ All information below is taken from the following complaint: *Qualls v. City of Newark*, Civil Action No. 2:01cv02860, District of New Jersey, 2003.

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detective allegedly referred to the inhabitants of her apartment complex as “animals” and threatened to ‘come pay them a visit’ and “knock down some doors.” On May 5, 1999, Ms. Qualls testified, providing defendant Kareem Coleman with an alibi. On May 6, 1999, City of Newark Officer Willie Thomas obtained a search warrant for Ms. Qualls’ unit at the Bradley Court apartment complex in Newark. On May 12, 1999, the *Coleman* jury was hung and the Court declared a mistrial. On May 14, 1999, at 5:30 A.M., between ten to twenty law enforcement officers broke into Ms. Qualls’ apartment on the basis of the May 6, 1999 warrant. Ms. Qualls alleged that the Newark Police failed to knock and announce their presence before battering down the apartment door, which was knocked off its hinges. She also alleged that the warrant was stale and that the Newark Police searched beyond the defined scope of the warrant.¹⁰¹ She also suggested that police assaulted her twelve year old son, Lawrence, and handcuffed him to a chair. Ms. Qualls was also then allegedly stripped searched and cavity searched by a female officer in the presence of multiple male officers. After the incident, Lawrence was treated for injuries sustained during the incident at Newark Beth Israel. As the police left, one was alleged to have stated “I bet you won’t go testify at the next trial.”

Later on May 14, 1999, Ms. Qualls submitted a complaint with the Newark Police Department of Internal Affairs. The department claimed no knowledge of the raid and would not give them a copy of the incident report.

¹⁰¹ The search warrant was to look for illegal Controlled Dangerous Substances (drugs). According to the complaint, the search was extensive and careless. The police were alleged to have overturned most of the furniture and emptied out all possible containers. She also alleged that they stole money and property.

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The department did not return any further calls. She then proceeded to complain to the city government. At a meeting in the mayor's office, Internal Affairs claimed to have no record of her May 14 visit. Internal affairs refused to take the case, so Ms. Qualls sought independent legal help, which in turn led to the filing of a civil suit against the City of Newark in 2001.

Ms. Qualls alleged that the May 6, 1999 warrant to search her apartment had been obtained using false and misleading information and that without such information the warrant could not have been issued. She charges that the search was part of a conspiracy amongst certain Essex County detectives and Newark Police to punish her for testifying and providing a defendant with an alibi in the above criminal case. Ms. Qualls was never charged with committing a crime.¹⁰²

On June 2, 2010, Newark reached a settlement with Ms. Qualls, whereby it passed a statute that paid her a sum of \$35,000 in damages.¹⁰³

Because of this case and others like it, the American Civil Liberties Union petitioned the United States Department of Justice to conduct an external investigation of the Newark Police Department for constitutional rights violations.¹⁰⁴ The petition noted four hundred and seven (407) allegations of

¹⁰² Petition, at 26, *In the Matter of A Petition for An Investigation into the Newark, New Jersey Police Department by the United States Department of Justice Pursuant to 42 U.S.C. § 14141*, 2011.)

¹⁰³ Newark, N.J. Resolution 10-0768 (2010). In the Stipulation of Settlement, the Newark explicitly disclaims any liability. Since this case was not taken to court, all that the settlement proves is that the Newark government preferred to pay a settlement of \$35,000 rather than take the case to trial.

¹⁰⁴ See Petition, *supra* at note 93. According to the American Civil Liberties Union of New Jersey, the Department of Justice granted their petition and began investigating the practices of the Newark Police Department on May 9, 2011, for constitutional rights violations.

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Newark Police Department over a period of two and a half years between 2008 and 2010, which resulted in thirty eight settlements with a value in excess of \$4,700,000.¹⁰⁵ The Justice Department granted the petition and began an investigation on May 9, 2011.¹⁰⁶ The volume of complaints, lawsuits, and successful settlements suggest some truth to allegations of police misconduct in Newark. Nevertheless, not only are some victims able to obtain compensation for having their rights violated, but the Federal Government is willing to investigate and fix the problems in the Newark Police Department.

E. New Jersey State Police: Substantial Compliance with the Fourth Amendment

It is difficult to make generalizations about American Police compliance with the Constitution, given the large number of police departments across the country and their differing situations. Internal reports from the New Jersey State Police suggest that they are at near full compliance with state law and that traffic stops are subject to three levels of supervisory review in order to ensure compliance, which include review of audio and video recording equipment installed in every police car.¹⁰⁷ In 2011, the New Jersey State Police were subject to 591 misconduct allegations, 238 of which proceeded as cases and 146 of which were closed.¹⁰⁸ All allegations were investigated, and roughly

American Civil Liberties Union, *Petition to Investigate the Newark Police Department* (Oct. 21, 2013 at 5:01 PM), <http://www.aclu-nj.org/legaldocket/petitiontoinvestigatethene/>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Seventeenth Progress / Status Summary of the Consent Decree Entered Into by the United States of America and the State of New Jersey Regarding the New Jersey Division of State Police, 39-40, 44.

¹⁰⁸ Office of Law Enforcement Professional Standards, *First Public Aggregate Misconduct Report* (February, 2013), 6.

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35% were found to be unsubstantiated.¹⁰⁹ Complaints were evenly distributed across the state.¹¹⁰ Of closed misconduct cases, the largest category of infractions was for violations of administrative procedure or failure to follow police procedure (which can include everything from excessive force to simple attitude and demeanor).¹¹¹ 41 such cases were investigated and closed in 2011, resulting in some sort of internal discipline.¹¹² This was the first study of its type, so it is not possible to analyze statistical trends. The New Jersey State troopers' general compliance with the Constitution contrasts sharply with the anecdotal information given by the American Civil Liberties Union regarding Newark, which suggest widespread disregard for the law.

¹⁰⁹ *Id.* at 13.

¹¹⁰ *Id.* at 10.

¹¹¹ *Id.* at 14.

¹¹² *Id.*

Conclusion

Both American and Saudi law place limits on searches and seizure. The United States has done so by judicial interpretation of the Fourth Amendment, whereas Saudi Arabia has done so by royal decree and statute. The two different schemes offer differing levels of protection, but both provide basic protections against arbitrary arrest and unreasonable property searches. Furthermore, it is clear that both American police and Saudi police are susceptible to abusing their power and committing misconduct. Ultimately, the Fourth Amendment provides greater protection than the Saudi Basic Law and Criminal Procedure for three reasons: culture, codified laws, and enforcement mechanisms.

I. Differing Societies: Privacy Concerns in America as Compared to Privacy in Saudi Arabia

Islamic search and seizure rules suggest concerns similar to those behind the Fourth Amendment in the United States' constitution – protection of property and persons from uninhibited intrusion. Both 'constitutions' suggest some sort of privacy interest as well. The American Supreme Court currently defines this privacy interest in terms of reasonableness, whereby the reasonableness of searches is measured by social expectations. Islamic law also appears concerned with privacy interests, but for reasons other than social expectations. Breaches of search and seizure rules violate divine commands, and are thus considered sinful. Judging from medieval jurisprudence, it does not appear that law enforcement was punished for violating religious rules.

Islamic search and seizure rules, as embodied in the Sharia, are based on underlying cultural concerns for modesty, personal reputation, and trust which are not protected under the United States Constitution.¹¹³ This makes sense when considering the religious basis for the law and underlying Arab culture that pre-existed the law. Medieval Arabia was primarily tribal, with a handful of small towns scattered about – none numbering more than a few thousand inhabitants, except for Mecca during the pre-Muslim pilgrimages.¹¹⁴ In such a society, business dealings with others were generally more personal than in the modern world. This helps to explain the concerns over personal reputation. No merchant would make a contract to buy goods from a merchant, nor would a tribal chieftain agree to guide a caravan across the desert if either were concerned about the honesty of Arab caravan organizers.

Muslim concern over modesty was also extreme. For example: children and slaves were required to ask permission before reentering their households in the mornings or following the afternoon rest because they might see their parents or owners undressed or in their undergarments.¹¹⁵ This same reasoning carries over to the commandments not to enter or spy. The concern was not so much about personal property rights, but over citizen-police viewing people doing something private.

¹¹³ The Supreme Court held explicitly in *Paul v. Davis*, 424 U.S. 693, 711-12 (1976) that there is no constitutional interest in reputation.

¹¹⁴ The Kaba shrine in Mecca and accompanying pilgrimages were originally pagan in nature and predate Islam by at least a century.

¹¹⁵ Quran 24:58-59.

Given differing concerns, Islamic and American law offer somewhat different protections. While both types of law theoretically forbid police entry into private homes, only Islamic law prohibits police from engaging in covert surveillance. And while both American and Muslim religious police may stop and arrest if they come across a crime in progress, American police may utilize proactive investigation and warrants to make arrests in order to prevent future crimes from occurring.

The American Concern's current Fourth Amendment test, which measures socially recognizable expectations of privacy may reflect the underlying values of society to some extent, at least in the test itself. It arguably does not, however, reflect American cultural values in how it is applied. The Supreme Court has used the reasonable expectation of privacy test to allow everything from telephone and utility record searches to aerial surveillance of suburban back yards. Such allowances do not match up with social expectations.¹¹⁶ On the other hand, however - while no one wishes to be observed by law enforcement through invasive techniques, society at the same time has not launched massive protests at Congress to pass statutes that would provide for more protection. This may mean that Americans either (1) cannot be bothered, or (2), that Americans, despite their concerns over lost privacy, value the added security against crime that is provided by proactive and invasive law enforcement investigatory procedures. It is difficult to make a definitive statement either way, since the Supreme Court is removed from

¹¹⁶ The mere fact that the average homeowner does fence their yard, but does not cover it with a tarp suggests that they desire privacy, but do not expect to be viewed from the air.

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and unaccountable to society. This is not to say that the Justices are unconcerned with how their rulings may affect society. Rather, the justices may just not understand the American people.

Saudi law does, despite suggestions in the Basic Law to the contrary, differ somewhat from the ideals espoused in theoretical religious law. The Basic Law and sample case show that all levels of Saudi police conduct proactive investigations to seek out crime. And, once found, they are able to conduct raids to arrest criminals and seize evidence. This type of conduct, in and of itself, should be expected from any law enforcement in the modern world, even if it does contradict Sharia teachings. Sharia treats offenses as either personal or against God – it does not have a concept of offenses against the state. The modern Saudi state could not function if it relied solely on Sharia because many modern offenses, such as embezzling money did not exist during the middle-ages. Furthermore, if the Saudi state were not allowed to proactively investigate crime, as required by sharia law, more crime would occur and more citizens would be victimized. This is not to mean that the cultural concerns over modesty have disappeared. If anything, the current law, which drives women to cover themselves from head to toe and stay inside at most times shows that such privacy concerns have intensified over the intervening centuries. Rather, the Saudi monarchy's interest in enforcing laws and maintaining public overcome the ordinary citizen's interest in modesty and privacy.

II. Codified Laws Provide Predictability

Codified laws are also important, since they inform all parties to a criminal suit what actions are a crime, what the state must do to prove guilt, and how the state is allowed to treat a defendant during arrest, investigation, and trial. Having an established set of rules that is known to all parties can prevent multiple abuses. If police can only arrest for specific activity, then it becomes much more difficult for police to arbitrarily arrest political dissidents or other unpopular minorities along general grounds of preserving public order.¹¹⁷

As things stand now, Saudi citizens cannot know what all conduct, besides obvious crimes like theft or assault, could lead to arrest. Of course, the same thing can also be said of U.S. citizens – the federal penal code alone, 18 U.S.C., has over six thousand sections. While most people in the United States may not be aware of the intricacies of criminal law, criminal defense attorneys, along with law enforcement and the court system most certainly are. United States law enforcement must justify arrests by showing probable cause of a statutory violation. And United States courts can only convict a defendant if the state proves that the defendant committed every element of a crime, as enumerated in the statute. Most metropolitan areas in the United States have so much crime that prosecutors must choose cases in which they will press charges. Prosecutors are unlikely to charge a defendant when there is little or

¹¹⁷ Perhaps one of the reasons that the monarchy has not codified more of its criminal law is that it prefers that police have the flexibility to arrest political dissidents without having to come up with a better pretext than being publicly disruptive.

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no evidence that the suspect committed each element of the crime for which police arrested him. This contrasts with Saudi Arabia, where prosecutors, who do not have to prove elements of criminal statutes, can call any potentially disruptive behavior criminal, and essentially create an offense that matches the suspect's conduct.

III. Enforcement Mechanisms Help to Prevent Police Misconduct

Finally, codifying the Sharia would be meaningless without proper enforcement mechanisms. The *Haia* regularly violates existing written laws, engaging in raids without warrants, beating suspects while in custody, and engaging in dangerous high speed automobile chases. Most complaints are made against the *Haia* and the *Mabahith*, rather than the regular police force. The *Haia* act without warrants, beat suspects, engage in dangerous activity, and act as much as a vigilante group as law enforcement. Complaints against the *Mabahith*, on the other hand, surround prison abuses. Prisoners allege that they are not informed of their charges, are refused attorneys, and are even held past the duration of their sentences. A large proportion of such complaints are from foreigners, which may suggest that the legal system is biased against non-citizens. There do not appear to be any major allegations regarding abuse by the regular police force. Whether this is because the regular police follow the rules or because complaints do not make it to foreign media is not clear.

Furthermore, the courts themselves are either unfamiliar with or actively ignore criminal procedure rights. Saudi Arabia does not have an existing

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framework similar to the exclusion rule, civil rights suits against the government, or even internal affairs offices tasked with disciplining police misconduct. The Saudi judicial system and law enforcement agencies will likely continue to ignore the criminal procedure and any statutory rights introduced in the future unless the Saudi monarchy establishes internal enforcement mechanisms that create negative consequences for police and judges who violate or ignore the law.

The situation is different in the United States. State and federal governments have established mechanisms for holding police accountable, such as regular internal review of police actions, administrative discipline of police, the exclusionary rule for illegally obtained evidence, and waiver of state immunity for civil rights violations. This is not to say that abuse does not occur, or that it is a simple task for an American to prevail upon a suppression motion or civil rights suit. Furthermore, as Ms. Qualls's case showed, victims often allege internal affairs units try to cover up the wrongdoing. If true, this means that existing enforcement mechanisms may be inadequate where those in charge of disciplining police are unwilling to do so. It is difficult to make any kind of definitive statement about the country, because regions can differ widely and because few empirical studies regarding police misconduct exist. If the New Jersey State Police report is indicative of the rest of the country, however, only about five percent of police face allegations of misconduct, and only around five percent of those allegations involve serious infringement upon

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constitutional rights. For this one law enforcement agency, at least, existing enforcement mechanisms appear effective.

As the Huraisi case showed, the Saudi government is currently flirting with the idea of police discipline by allowing criminal prosecution of *Haia* officers who killed a suspect in their custody. As the case also showed, the judicial system responded by acquitting all the religious police, leaving only a private volunteer to face trial. Until the Saudi government forces its courts to take such trials seriously, and until it establishes and enforces disciplinary procedures against the *Haia* and *Mabahith*, civil rights abuses will continue.