In the Sweat Box: A Historical Perspective on the Detention of Material Witnesses

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After the September 11 terrorist attacks, the Justice Department detained scores of allegedly suspicious persons under a federal material witness statute—a tactic that provoked a great deal of controversy. Most critics assume that the abuse of material witness laws is a new development. Yet, rather than being transformed by the War on Terror, the detention of material witnesses is a coercive strategy that police officers across the nation have used since the nineteenth century to build cases against suspects. Fears of extraordinary violence or social breakdown played at most an indirect role in its advent and growth. Rather, it has long been used to obtain prosecution evidence in ordinary cases of murder, robbery, prostitution, and other street crimes. Historically, no stark divide between the innocent witness and the suspected criminal existed in the minds of the police. Indeed, material witness detention contributed to the rise of incommunicado *interrogation and numbered among the tactics identified in the Wickersham Commission's exposé of the third degree in 1931.*

This Essay demonstrates that the story of material witness detention is one of stasis, not of change. For more than a century, the field practices of police and magistrates have been unresponsive to reforms in statutory and constitutional law or to sporadic public pressure on behalf of detainees deemed to have knowledge of a crime. In telling such a story, this Essay seeks, not to defend the Justice Department, but to suggest that intense scholarly focus on September 11 as a watershed in the history of criminal procedure obscures ways in which the gradual consolidation of governmental power over more than a century has fostered an increasingly coercive and secretive relationship between the individual and the police.

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I. INTRODUCTION

In the wake of the September 11, 2001 attacks on the Pentagon and the World Trade Center, scholars have criticized the Justice Department for arresting and detaining many individuals of Middle-Eastern origin under a federal material witness statute[1] without pressing charges against them.[2] In this and other ways, September 11 has acquired the status of a watershed—a definitive, transforming moment in criminal procedure. However, although the War on Terror has involved increased surveillance and searches of both citizens and non-citizens, intense scholarly focus on the September 11 tragedy has exaggerated its importance in the history of the state's exertion of power over the individual. This Essay explores the legal history of one tool of law enforcement—the detention of material witnesses—to suggest that September 11 did not change everything in criminal procedure.[3] Rather than marking a momentous transition, this tragic date simply accelerated pre-existing trends in state control.

Most evaluations of the government's anti-terror policy understate or ignore the roots of material witness detention in the aggrandizement of power by law enforcement agencies, starting in the second-half of the nineteenth century.[4] The late 1800s and early 1900s witnessed the rise of an "institutional state" that provided the people with municipal services, such as fire fighting, water treatment, and sanitation, but also devised new means of exercising coercive control over them.[5] Indeed, the expansion of state power in the late nineteenth and early twentieth centuries included the unstated assumption that police and prosecutors

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[1] 18 U.S.C. § 3144 (1986).

[2] *See* Ricardo J. Bascuas, *The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VAND. L. REV. 677, 678–80 (2005); Laurie L. Levenson, *Detention, Material Witnesses & the War on Terrorism*, 35 LOY. L.A. L. REV. 1217, 1223 (2002); Stacey M. Studnicki & John P. Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, 76 ST. JOHN'S L. REV. 483, 486 (2002).

[3] For scholarly discussion of whether September 11 constituted a turning point in such areas as American foreign policy, domestic culture, language, citizenship, and international law, see generally SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT? (Mary L. Dudziak ed., 2003) (presenting an interdisciplinary collection of essays that illuminate these topics).

[4] *See* Bascuas, *supra* note 2, at 681 (arguing that the Founders never authorized and the Supreme Court never approved the detention of a material witness unless the witness refused to sign a recognizance); Levenson, *supra* note 2, at 1223 ("With the War on Terrorism, the legal seas have changed. The designation of material witness has often become a temporary moniker to identify an individual who will soon bear the status of defendant."); Studnicki & Apol, *supra* note 2, at 486 (contending that the investigatory detention of witnesses in the wake of September 11 constituted the misuse of laws intended only to guarantee the appearance of a witness at trial).

[5] *See* ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880 149, 164–65, 223, 230–31 (1989). *Cf.* Robert G. Barrows, *Urbanizing America*, *in* THE GILDED AGE: PERSPECTIVES ON THE ORIGINS OF MODERN AMERICA 113 (Charles W. Calhoun ed., Scholarly Resources 2007) (discussing positive aspects of increased state presence, such as municipal improvements in water treatment and sewage management).

had broad authority to investigate crime in any way that was not expressly forbidden to them. Judicial and legislative bodies only sporadically imposed limits or penalties that threatened that assumption. This sense of entitlement to pursue law-enforcement goals at any cost, sometimes in defiance of the formal law, is evidenced in the detention of material witnesses in the nineteenth and twentieth centuries.

Yet, in the academic literature, it has gone virtually unnoticed that, as a historical matter, material witness detention contributed to the rise of *incommunicado* police interrogation and that it numbered among the tactics identified in the Wickersham Commission's exposé of the third degree in 1931.[6] For example, Laurie Levenson mistakenly describes the arrest and detention of dozens of people suspected of links to Al Qaeda as the misuse of a legitimate, old power to insure the appearance of witnesses at trial.[7] In her view, the September 11 attack was a catalyst that produced a sea change in the way material witness laws are employed. Dating back to the First Judiciary Act of 1789, she argues, "material witnesses were conceptually different from defendants who were incarcerated."[8] In contrast, she contends that during the twenty-first century War on Terror, the government has used material witness laws for the novel purpose of preventively detaining "an individual who will soon bear the status of defendant."[9]

Material witness statutes had detractors prior to the advent of the Bush Administration's anti-terror policies. In the law journals of the 1960s, for example, authors complained that the revolution in criminal procedure accomplished by the Warren Court failed to generate protections for "innocent witness(es) to the crime."[10] However, like Levenson's, earlier scholarly critiques of material witness statutes assumed that the long-standing use of such laws was to detain persons unwilling or unable to guarantee their appearance in court.[11] These writers complained about hardship on the witness, who languished in jail for weeks

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[6] *See* NAT'L COMM. ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 54, 93, 129 (1931).

[7] Levenson, *supra* note 2, at 1223.

[8] *Id.*

[9] *Id.* Nearly ninety percent of the September 11 dragnet detainees were never charged with any terrorist acts. *See* Michael Isikoff, *Periscope: A Sharp Look at Material Witness Arrests*, NEWSWEEK, July 4, 2005, at 6. Two notable exceptions include the prosecution and conviction of Zacharias Moussaoui for conspiring with the September 11 hijackers and the entry of a guilty plea by James Ujaama, who was charged with aiding the Taliban.

[10] Ronald Carlson, *Jailing the Innocent: The Plight of the Material Witness*, 55 IOWA L. REV. 1, 1 (1969).

[11] *See id.* at 17; Comment, *Pretrial Detention of Witnesses*, 117 U. PA. L. REV. 700, 714–15 (1969); Robert Coyle, Case Comment, *Confining Material Witnesses in Criminal Cases*, 20 WASH. & LEE L. REV. 164, 165 (1963). *Cf.* Lisa Chanow Dykstra, Note, *The Application of Material Witness Provisions: A Case Study—Are Homeless Material Witnesses Entitled to Due Process and Representation by Counsel?*, 36 VILL. L. REV. 597, 601–02 (1991) (describing purpose behind state and federal statutes).

or even months without monetary compensation or legal counsel.[12] But they, too, perpetuated a false dichotomy between the innocent witness and the crime suspect[13]—a dichotomy that rarely existed in the minds of the interrogating officer.

I am aware of only one scholarly article—a legal history by Wesley MacNeil Oliver—that recognizes the role of material witness detention, beginning in the nineteenth century, as a tool for constructing a case against the witness himself.[14] Oliver associates the rise of material witness detention with the creation of New York City's first professional police force, claims that potential defendants were often detained as witnesses, and traces the role of reform campaigns in achieving the temporary abrogation of material witness detention in 1883. Yet Oliver fails to emphasize that, notwithstanding sporadic efforts at reform, the story of material witness detention is largely one of stasis, not of change.

Despite a professionalism movement that transformed the police into a crime-fighting bureaucracy equipped with new technologies like the call-box, the two-way radio, and the automobile,[15] the confinement and interrogation of witnesses survived into the twentieth century and proved intransigent to reform. Such negative intrusion in the lives of individuals meant that officers, increasingly isolated from the urban public by the advent of a centralized command structure and the reduction of police charity toward the homeless and the mentally ill, came to be seen as agents of coercive control.[16] Placed in this context, the brief "fall" of

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[12] *See* Carlson, *supra* note 10, at 2–4, 6, 8; Dykstra, *supra* note 11, at 646. *See also* Coyle, *supra* note 11, at 166 (noting that a detained witness lacked "the right to have the court appoint counsel for him if he [was] unable to obtain counsel for himself.").

[13] *See* Carlson, *supra* note 10, at 1. *See also* Coyle, *supra* note 11, at 167–68 ("Even after considering the protections afforded a material witness, it still seems quite unfair to confine a completely innocent person in jail simply because he had the misfortune of witnessing a crime."); Comment, *Pretrial Detention of Witnesses*, *supra* note 11, at 703 ("A competing interest is that of the witness, an individual who has committed no wrong, to have maximum freedom of movement."). Journalists in the late nineteenth and early twentieth centuries also emphasized that most detained witnesses were innocent. *See, e.g.*, *Uncle Sam's Crime School*, LOS ANGELES TIMES, June 10, 1928, at K13 (criticizing the incarceration of a material witness accused of no crime, but detained to make sure he will testify in some important case in the same facilities as convicts, the mentally ill, and others); Untitled Article, CHICAGO DAILY TRIBUNE, May 15, 1873, at 4 (complaining that "innocent witnesses" were remanded to county jail simply because they could not afford to post bond for their appearance). Yet, this view existed in tension with awareness on the part of newspapers and their readers that police and prosecutors sometimes sought to indict so-called witnesses once they had worked up a case against them. For more discussion of this issue, see *infra* text accompanying notes 24–35, 93, 107–08.

[14] *See* Wesley MacNeil Oliver, *The Rise and Fall of Material Witness Detention in Nineteenth Century New York*, 1 N.Y.U. J. L. & LIBERTY 726, 729 (2005) [hereinafter Oliver, *The Rise and Fall of Material Witness Detention*].

[15] Among the best analyses of the achievements and limits of the police professionalism movement are ERIC MONKKONEN, POLICE IN URBAN AMERICA, 1860–1920 (1981); SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM (1977).

[16] *See* MONKKONEN, *supra* note 15, at 154–55, 158.

material witness detention in late nineteenth-century New York has minimal significance.

More central to the history of criminal procedure is the fact that such detentions continued to occur as part of an investigative strategy of questioning individuals in secret until they made incriminating statements—without pressing formal charges against them or granting them court-appointed legal counsel. Indeed, this Essay will demonstrate that, for more than a century, the field practices of police and magistrates have been unresponsive to reforms in statutory and constitutional law or to occasional pressure from the public on behalf of particular individuals deemed to have knowledge of a crime.

Part II of this Essay explores the detention and questioning of Oscar Thompson, a Chicago resident at the beginning of the twentieth century, to show that the detained witness was actually a suspect and that the public disapproved of the police department's abuse of him. Part III places Thompson's case in the larger context of material witness detention from the 1800s through the twentieth-century movement to professionalize the police. Concentrating on California and Illinois, Part III demonstrates that the actual treatment of detained witnesses often contravened statutory limits. The public knew about and occasionally criticized material witness detention. However, as Part III shows, such sporadic criticism did not represent a full-scale reform effort that enjoyed the support of elite activists, nor did it succeed in changing police practices. The coercive questioning of detained witnesses thus remained a feature of ordinary crime detection and prosecution in the twentieth century.

In telling such a story, this Essay seeks, not to defend the Justice Department's anti-terror tactics, but to suggest that the obsessive focus on September 11 as a catalyst in the history of criminal procedure obscures ways in which the gradual consolidation of governmental power over more than a century has fostered an increasingly coercive and secretive relationship between the individual and the police.

II. OSCAR THOMPSON'S CASE

The case of a laundry-wagon driver in 1902 provides a vivid example. For Oscar Thompson, the mysterious death of his landlady led to an exhausting and terrifying period of detention as a witness in a Chicago police station. On August 9, 1902, investigators discovered the body of Annie Bartholin in the basement of her home on Calumet Avenue. She had been choked to death.[17] At first, the police suspected Annie's son, William, whom they also linked to the murder of his fiancée, Minnie Mitchell.[18] But William was nowhere to be found. Instead, they arrested and detained Thompson—Annie's lodger for almost twenty years.[19]

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[17] *See Mrs. Bartholin Dead; Body Hid in the Cellar*, CHI. TRIB., Aug. 10, 1902, at 1.

[18] *See id.*

[19] *See id.*

The official line from Police Chief Francis O'Neill depicted Thompson as an innocent man who merely might have knowledge of the murders.[20] Yet, this did not prevent the police from "locking [him] up for safe-keeping" with the stated goal of holding him until the coroner's inquest.[21] In fact, Thompson languished in custody for more than a month, and for much of that time, he was not charged with any crime. When English journalist William T. Stead visited Chicago in the 1890s, he described the Armory Station in the First Precinct as "a reeking, filthy place, unfit in which to incarcerate a human being."[22] Thompson's cell in the Englewood Station less than a decade later must have been similar.

Despite initially being deemed a "witness," not a suspect,[23] Thompson was "put in the sweat box" by interrogators for hours at a time and forced to endure rigorous, often confrontational questioning designed to produce a confession about his complicity in the murders of the two women.[24] The police believed that his laundry wagon was used to convey young Minnie's body to the vacant lot where it was dumped.[25] They also found his delay in reporting the disappearance of the older woman, Annie Bartholin, deeply suspicious.[26]

Intending to "break down the wall of stolidity with which Thompson surrounded himself since his arrest,"[27] interrogating officers repeatedly subjected him to the now infamous good cop/bad cop routine, [28] in which Inspector Nicholas Hunt (known for his brutal suppression of the Teamsters' Strike of 1902) sometimes played the bad cop.[29] The police also staged a number of accusatorial moments with items of physical evidence and a hostile witness. The day after they

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[20] *See id.*

[21] *See id.*

[22] RICHARD C. LINDBERG, TO SERVE AND COLLECT: CHICAGO POLITICS AND POLICE CORRUPTION FROM THE LAGER BEER RIOT TO THE SUMMERDALE SCANDAL, 1855–1960 116 (1991) [hereinafter LINDBERG, TO SERVE AND COLLECT].

[23] *Mrs. Bartholin Dead*, *supra* note 17; *Flees for Fear of Bartholin*, CHI. TRIB., Aug. 11, 1902, at 1.

[24] *See Mrs. Bartholin Dead*, *supra* note 17, at 1; *see also, e.g.*, *Secret Society Aids Bartholin*, CHI. TRIB., Aug. 12, 1902, at 1 (describing how Thompson "was put through severe courses of questioning" designed to break his statement that he did not know the identity of the killer).

[25] *See Mrs. Bartholin Dead*, *supra* note 17, at 1.

[26] *See Secret Society Aids Bartholin*, *supra* note 24, at 1.

[27] *Sheds Light on the Batholin Case*, CHI. TRIB., Aug. 14, 1902, at 1.

[28] For a discussion of the psychological ploy of the "Mutt and Jeff routine," see *Miranda v. Arizona*, 384 U.S. 436, 452 (1966) (describing a technique involving two officers—one relentless, unfriendly, and accusatorial and the other "obviously a kindhearted man").

[29] *See Mrs. Bartholin Dead*, *supra* note 17, at 1 (describing the differing tactics of Chief O'Neill and the more accusatorial Inspector Hunt); *Sheds Light on the Batholin Case*, *supra* note 27, at 1 ("Lieut. Stephen Wood tried hard to get a statement from Thompson by kind treatment, and assured him that his course in holding out against all evidence was much against him. This course of argument had no more effect than the other . . . ."). For a discussion of Inspector Nicholas Hunt's role in breaking the Teamsters' Strike in 1902, see LINDBERG, *supra* note 22, at 73–75.

discovered the body of Annie Bartholin, for example, they showed Thompson his own bloodstained shirt "to force him to tell more" about the killings.[30] Several days later, they brought him face-to-face with a woman who claimed that, at dawn on the morning after Minnie Mitchell's disappearance, she overheard Thompson arguing about a horse and wagon with another man who worked at the laundry's barn.[31] After a week of such confrontational sessions, investigators were confident that they had broken Thompson's will and that he would "confess to a share in the murders."[32] The *Chicago Tribune* reported that Thompson "is in such a nervous state that it is feared he will collapse" and also that he begged to be transferred to the county jail "where he [might] find relief from the trying cross questioning of the police."[33] Instead, the police continued to badger him and entangle him in contradictions until, at eleven p.m. on August 14, he promised to "tell all he knew" if the questioning ceased.[34]

Hours of psychologically devastating interrogation had converted this material witness into the key suspect. A few days later, on August 17, Thompson was formally charged with murdering his landlady, Annie Bartholin, and with acting as an accessory to the murder of Minnie Mitchell.[35] By this time, however, securing fair treatment for the prisoner had become something of a cause *célèbre*. The owner of the laundry for which Thompson worked filed a habeas corpus petition on his behalf but agreed to withdraw it when formal charges were brought.[36] Two days later, the *Chicago Tribune* reported that Thompson's sympathizers had engaged counsel to represent him and that one of the lawyers was none other than the esteemed Clarence Darrow.[37]

Thompson's travails took an unexpected turn on September 7 with the discovery of a suicide note that the dead landlady's son, William Bartholin, had penned. The note exculpated Thompson and another suspect, a laborer at the laundry's barn. Yet, even this happy occurrence failed to result in Thompson's immediate release. Indeed, he spent another ten days in jail because his grand jury hearing was calendared for later in September.[38] He and the laundry-barn laborer were finally released on September 17 when the grand jury refused to indict them. The victory for Thompson was bittersweet and far too late. Threatening to sue the City of Chicago for damages, he complained:

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[30] *Flees for Fear of Bartholin*, *supra* note 23, at 1.

[31] *Sheds Light on the Bartholin Case*, CHI. TRIB., Aug. 14, 1902, at 1.

[32] *Id.*

[33] *Secret Society Aids Bartholin*, CHI. TRIB., Aug. 12, 1902, at 5.

[34] *Sheds Light on Bartholin Case*, CHI. TRIB., Aug. 14, 1902, at 1.

[35] *Thompson Held to Grand Jury*, CHI. TRIB., Aug. 17, 1902, at A2.

[36] *See id.*

[37] *See Lawyers to Aid Murder Suspect*, CHI. TRIB., Aug. 16, 1902, at 2.

[38] *See Prisoners Hope for Release*, CHI. TRIB., Sept. 8, 1902, at 2; *Bartholin Suspects Freed; Threaten to Sue City*, CHI. TRIB., Sept. 17, 1902, at 7.

> Even in the days of Roman tyranny . . . a man would not have been treated as I was. Inspector Hunt kept at me day and night while I was in the station, trying to force me to say things which I did not know. I knew nothing about the case. But when they get you in the "sweat box" the police try to make you admit yourself a villain, no matter if they know you are innocent.[39]

III. MATERIAL WITNESSES, *INCOMMUNICADO* INTERROGATION, AND THE RISE OF QUASI-LEGAL POLICE POWERS

A. *Contextualizing Thompson's Case*

Oscar Thompson's travails in Chicago were a small but significant part of a shift toward greater police powers over the suspect that began in the nineteenth century. John Langbein correctly contends that the rise of the adversary system silenced defendants at trial.[40] However, as several other legal historians have shown, this silencing did not extend to the pre-trial phase.[41] Out of contrition or hopelessness, less sophisticated suspects continued to talk, and they sometimes even confessed to crimes they had not committed.[42]

As long as the magistrate had given a standardized warning, as statutory law required, courts did not perform a searching analysis of whether the suspect voluntarily incriminated himself.[43] Moreover, police interrogation became commonplace by the mid-to-late nineteenth century,[44] thus reducing the significance of the probable-cause hearing as an occasion for magisterial questioning of suspects. Enhanced and increasingly secretive police powers existed in tension with judicial scrutiny of confessions for coercion or

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[39] *Bartholin Suspects Freed; Threaten to Sue City*, CHI. TRIB., Sept. 17, 1902, at 7.

[40] *See* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 258–61, 266–73 (2003).

[41] *See* Wesley MacNeil Oliver, *Magistrates' Examinations, Police Interrogations and* Miranda*-like Warnings in Nineteenth Century New York*, 81 TUL. L. REV. 777, 796–97 (2007) [hereinafter Oliver, *Magistrates' Examinations*]; Bruce Smith, Miranda*'s Prehistory*, at 34–40 (unpublished manuscript, on file with the author).

[42] *See* Smith, *supra* note 41, at 40. This is true today, as well, and it presents one of the most frustrating realities of *Miranda*'s prophylactic scheme. *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 (1996) (finding a waiver rate of seventy-eight percent among suspects informed of their *Miranda* rights); George C. Thomas III, *Stories About* Miranda, 102 MICH. L. REV. 1959, 2000 (2004) (concluding, based on empirical study, that "warnings do not change suspect behavior in any significant way"); WELSH WHITE, *MIRANDA*'S WANING PROTECTIONS 9 (2001) (arguing that manipulative police tactics and subsequent decisions by the Rehnquist and Burger Courts rendered *Miranda* ineffective at protecting suspects).

[43] *See* Smith, *supra* note 41, at 43–44.

[44] *See* Oliver, *Magistrates' Examinations*, *supra* note 41, at 796–97.

inducements.[45] Yet, in the late nineteenth and early twentieth centuries, police conduct in questioning suspects and witnesses was less rigorously scrutinized than magistrates' procedures were because officers were not required to give warnings and defense lawyers were rarely present to observe interrogation practices.

The rise of police interrogation and the assertion by law enforcement of quasi-legal, investigatory powers figured prominently in Thompson's case and those of many other individuals detained as witnesses in the nineteenth and twentieth centuries. This Essay concentrates on the treatment of such witnesses in Illinois and California and thus builds on the research that Oliver has done on the practice in New York. Taken together, this historical work on material witness detention illustrates how *incommunicado* police interrogation largely supplanted questioning by magistrates and allowed officers to "work up" cases against individuals before designating them as defendants or even as suspects.

The plight of detained witnesses might seem like either a frightening twenty-first century innovation or a holdover from a pre-modern stage in Anglo-American history when geographic distance and poor communications made confining individuals in jail cells the only means of insuring their appearance in court. In reality, it was neither. Rather, material witness detention's resilience as a crime-solving strategy had much to do with the modern state that began to take shape in the second half of the nineteenth century.

B. *The Limits of Statutory Authorization to Detain Witnesses*

At least in theory, material witnesses were detained, either in regular jails or in special witness-detention facilities, to insure their appearance at trial. There was no common-law basis for the practice,[46] nor did the primary authority to detain witnesses reside with the police. Rather, it loosely derived from the same sixteenth century English statute that required magistrates to examine criminal suspects before trial.[47] Under early modern English law, it was the justice of the peace, not the constable, who was required to make a record of pre-trial evidence and to insure the appearance of prosecution witnesses in court. Moreover, the English statute only instructed the justice of the peace to "bind all such by Recognizance or Obligation, as do declare anything material to prove the said Murder or

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[45] Bram v. United States, 168 U.S. 532, 542, 565 (1897) (holding that an involuntary confession was wrongfully admitted at a federal trial in violation of the Fifth Amendment). Nineteenth-century state courts also examined confessions for voluntariness, though Oliver suggests that state courts may have become more permissive towards deceitful, high-pressure police tactics as the century progressed. Oliver, *Magistrates' Examinations*, *supra* note 41, at 780–81, 810–21.

[46] *See* Bacon v. United States, 449 F.2d 933, 939 (9th Cir. 1971) ("Of the state courts that have considered the question, a majority have held that in the absence of statutory authority there is no common law power to detain witnesses before disobedience of a subpoena.").

[47] Marian Bail Statute, 1 & 2 Philip and Mary c.13 (1554–1555), *reprinted in* JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 257 (1974).

Manslaughter Offenses or Felonies."[48] It did *not* expressly give him the power to jail witnesses pending trial. Rather, in England and colonial America, a recognizance became a debt to the Crown (or the state) if the witness failed to appear.[49]

In contrast, when similar laws were adopted in the United States after the American Revolution, they did include clear authority for the judge, at his discretion, to incarcerate recalcitrant witnesses. The legal history of material witness detention in Illinois, the state in which Thompson was held, illustrates this difference. It also shows that, by the time of Thompson's 1902 case, police and magistrates had begun to exceed their statutory powers.

In Illinois in 1845, judges were required to bind witnesses to appear at the next circuit court, and

> [i]f any person, upon being required to enter into recognizance . . . shall refuse, it shall be lawful for such judge or justice of the peace to commit him or her to jail, there to remain until he or she shall enter into such recognizance or be otherwise discharged by due course of law.[50]

Illinois judges apparently interpreted this language to mean that they could require a witness to provide sureties for the amount of his recognizance and to jail him if he could not comply. The judges' assumption may have been based on the legal procedures of other states. For example, the bench in California enjoyed express statutory power to demand financial security and to incarcerate witnesses who refused to provide it.[51] Illinois law developed differently, however.

In 1874, the Illinois legislature clarified the material witness detention statute and brought it into line with federal law. The amended Illinois Criminal Code now provided that "no . . . witness shall be required to give other security than his own recognizance for [his] appearance."[52] In other words, under Illinois law, a witness could only be jailed for refusing to promise that he would appear, but not for failing to provide sureties. This clarification presumably responded to public criticism of the inequality and hardship faced by poor, friendless witnesses who could not post bond.[53]

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[48] *Id.*

[49] Oliver, *The Rise and Fall of Material Witness Detention*, *supra* note 14, at 731 (citing JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664–1776), at 507–18 (1970)).

[50] ILL. CRIM. JUR. Div. 18, ch. 30, § 204 (1845).

[51] California's law on this issue remained unchanged from its early statehood until at least the 1930s. *See* CAL. SESS. L., tit. 3, §§ 170–173 (1851); CAL. PENAL CODE pt. 2, §§ 878–881 (1872); CAL. PENAL CODE §§ 878–881 (1901); CAL. PENAL CODE pt §§ 878–881 (1906); CAL. PENAL CODE §§ 878–881 (1915); CAL. PENAL CODE §§ 878–881 (1920); CAL. PENAL CODE §§ 878–881 (1931).

[52] ILL. CRIM. CODE ch. 38, § 364 (1874).

[53] *See infra* text accompanying note 125; *cf. infra* text accompanying note 124 (noting such criticisms in New York). Unfortunately, the floor debates of the Illinois legislature were not

It also harmonized Illinois law with federal provisions, dating back to the First Judiciary Act of 1789, which "limited the courts' authority to imprison a witness to instances when . . . [he] willfully refused to promise to appear."[54] At least until 1948, a refusal to promise, not a refusal to pay, was the only behavior that could lawfully land a federal witness in jail.[55] According to statutory law, neither federal witnesses nor their counterparts in Illinois could be required to give sureties.[56] There is no evidence that Oscar Thompson refused to sign a recognizance, as required by Illinois law. In fact, at one point, the police even rejected his employer's offer to post bond for him.[57] Hence, his detention in 1902 exceeded the permissible power of the courts or the police to hold him.

California continued to allow sureties to be required but established an alternate procedure whereby witnesses who could not give sureties might be deposed in the presence of the defendant, instead of being jailed.[58] Furthermore, from its inception in 1849, the California Constitution specifically admonished that no witnesses could be unreasonably restrained[59]—language that provided a basis for successful habeas corpus petitions by a few detainees fortunate enough to have lawyers.[60] By 1931, the California Constitution also included language barring the confinement of witnesses "in any room where criminals are actually imprisoned."[61]

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preserved, so historians are can only conjecture about the rationale behind the revised material witness provisions.

[54] Bascuas, *supra* note 2, at 707.

[55] *See id.*

[56] *See id.*

[57] *Couple Edwards with Bartholin*, CHI. TRIB., Aug. 15, 1902, at 1.

[58] The earliest mention of the deposition procedure in California appears in 1851. *See* CAL. SESS. L., tit. III, § 174 (1851). This provision remained on the books into the twentieth century but was modified so that it did not apply to homicide witnesses. *See, e.g.*, CAL. PENAL CODE § 882 (1931).

[59] CAL. CONST. of 1849, art. 1, § 6.

[60] *Ex parte* Dressler, 7 P. 645 (Cal. 1885) (holding that 90-day detention of petitioner due to unexplained continuances violated the state constitution). *See also Pugilist Freed as Witness to Garage Killing*, LOS ANGELES TIMES, Aug. 24, 1926, at A1 (reporting the release on habeas corpus of Pico Ramies, who had been held in county jail as a material witness to a murder); *Released on Bail*, L. A. TIMES, Nov. 19, 1905, at H6 (reporting the release on habeas corpus of Refugio Ochoa, a material witness in a rape case). *Cf. In re* Prestigiacomo, 234 A.D. 300 (N.Y. App. Div. 1932) (ordering the release of a witness held without a showing that he posed a flight risk or that his testimony was needed for a specific criminal case, aside from a trumped-up "John Doe" case filed to facilitate his detention); *In re* Lewellyn, 62 N.W. 554 (Mich. 1895) (granting writ of habeas corpus to a witness who had been held five months in county jail without a hearing and without being housed separately from those charged or convicted of crimes); State *ex rel* Howard, 18 Minn. 398 (1872) (deeming detention of witness simply because he could not pay bail to be unjust and oppressive).

[61] CAL. CONST. of 1879, art. 1, §6.

C. *Material Witness Detention in Practice*

1. Length and Conditions of Confinement

As American practice took shape, however, it deviated from the protections provided by statute and by state and federal constitutions. In jailhouses around the nation, the detention of material witnesses was not limited to uncooperative individuals who refused to give their recognizance or who were held briefly pending a formal deposition. Rather, police seemed to operate above the law by prolonging the detention and interrogation of those connected with a crime scene. If such individuals were accorded a formal hearing, many magistrates simply rubber-stamped the officer's determination that a flight risk existed. Constitutional and statutory provisions establishing deposition procedures, in lieu of incarceration, for witnesses in California appear to have been under-used. And reports of witnesses held under very high bonds—hundreds and even thousands of dollars—regularly appeared in the *Chicago Tribune* well into the twentieth century,[62] despite the 1874 statute that made requiring sureties illegal in Illinois.[63]

In both California and Illinois, police routinely held all homicide witnesses until the coroner's inquest occurred.[64] Those detained in relation to murders and other offenses included children, as well as adult men and women. Minors were typically victims of crimes, including statutory rape,[65] or had witnessed an intimate

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[62] *See, e.g., Day's Development in the Case*, CHI. TRIB., May 3, 1890, at 1 (reporting that four men were being held at the Criminal Court under $3,000 bond in a state election fraud case); *Arrest 12 Men for Fire Horror at the Iroquois*, CHI. TRIB., January 1, 1904, at G1 (stating that the Assistant Chief of Police arrested chorus girls and other members of a theatrical company and held them on $300 bond after they witnessed a theater fire that killed more than 500 people).

[63] ILL. CRIM. CODE, ch. 38, sec. 364 (1874).

[64] *It was a Fatal Wound*, CHI. TRIB., Feb. 1, 1890, at 2 ("The Coroner said that in murder cases it was customary to have important witnesses detained until an inquest could be held."). Holding murder witnesses pending an inquest also seems to have been a common practice in California. *See Sailor Seized in Death Fray*, L. A. TIMES, May 9, 1929, at A2 (reporting that several young women and sailors would be held pending the inquest into the death of a Filipino man shot by a sailor in a jealous quarrel); *Jury Finds Homicide Justified*, L.A. TIMES, May 5, 1928, at B7 (reporting that two young witnesses to a homicide were released after a coroner's jury determined the killing to be self-defense); *Fight Too Much for Striker's Heart*, L.A. TIMES, Oct. 19, 1919, at 19 (reporting that a strike-breaker who was involved in a fight with a striking shipyard worker who later died would be held as a witness pending the coroner's inquest); *Bullets End Lives of Man and Woman*, L. A. TIMES, Sept. 24, 1903, at 1 ("Arthur M. Laurie, with whom the dead woman had made her home, will be held by the police until after the inquest. There is no evidence connecting him with the shooting, but he is detained as a witness.").

[65] *See City News in Brief: Why is a Detention Home?*, L.A. TIMES, June 3, 1913, at 116 (reporting that five girls under the age of sixteen who were being held as "witnesses against men accused of statutory crimes" nearly escaped from the detention rooms of the juvenile court by prying the lock off the door); *Brutally Assaulted a Boy*, L. A. TIMES, Feb. 28, 1895 (stating that a fourteen-year-old boy was "locked up to be held as witness" after being brutally beaten by six men); *Items*, CHI. TRIB., Dec. 16, 1882, at 11 (noting that an eleven-year-old girl has been held as a witness against her father, who allegedly has assaulted her). In 1948, the *Los Angeles Times* reported that, between

murder or another offense involving a family member.[66] However, the police suspected some of the juvenile witnesses, like their adult counterparts, of being perpetrators or accomplices.[67]

The length of detention of material witnesses varied widely. Some were only held for a couple of days;[68] others languished in jail for months.[69] In California in 1913, a federal trial judge expressed dismay when he learned that three Chinese men had been held as witnesses in the San Diego County jail for nearly two years.[70]

The conditions of the witnesses' confinement were difficult and even dangerous because many were housed with the general population of convicts and criminal defendants. One California man committed suicide rather than undergo a second period of detention in the "foul and fetid den" of the Sacramento Jail.[71] Other witnesses lost their jobs[72] and even their health.[73] In both California and Illinois, jailhouse detentions continued until at least the mid-twentieth century.

1945 and 1947, 421 juveniles were detained as witnesses in that city and that the majority of these detentions related to "serious sex crimes" perpetrated by adult offenders. *Plight of Juvenile Witnesses Told*, L.A. TIMES, Feb. 22, 1948, at C1.

[66] *See Woman is Shot by Husband During Quarrel at Home*, CHI. TRIB., May 5, 1906, at 5 (stating than an eight-year-old girl was being held as a witness after her adoptive father shot and seriously injured her adoptive mother); *Aged Woman is Murdered*, CHI. TRIB., Feb. 27, 1900, at 3 (reporting that a twelve-year-old boy was under arrest as a witness in the murder of his mother).

[67] *See, e.g., Escape from the Armory: A Boy Held as Witness Jumps Twenty Feet, and Secures Freedom*, CHI. TRIB., Feb. 19, 1870 (reporting on the escape of a fourteen-year-old boy who had been held as a witness in a burglary case and "induced to testify against his companions").

[68] In California, a passenger in a fatal car crash "was held over night in the County Jail as a witness for the Coroner's inquest." *Bay City Man Held in Death*, L. A. TIMES, July 1, 1924, at 10. Witness detentions in Chicago sometimes aroused criticism even if they were relatively short. *See Police Stupidity*, CHI. TRIB., Feb. 7, 1885, at 8 (presenting a sympathetic account of a robbery victim whom the police detained in a jail cell for five days). When the victim-witness complained, a police justice said "the officers who had detained him should certainly be censured." *Id.*

[69] *Federal Law v. Romance*, L. A. TIMES, Mar. 9, 1907, at II1 (recounting the travails of a young woman held in the county jail for eleven months under orders of the U.S. Department of Justice after the defendant in the case jumped bail); *The Hesper Murderers*, L.A. TIMES, May 28, 1894, at 2 (reporting that nine men were held on Alcatraz Island for fifteen months as witnesses to a murder on the high seas); *The Courts*, L. A. TIMES, Apr. 4, 1883, at 4 (recording that a witness was awarded $60 after being detained in county jail for forty-seven days); *County Affairs*, CHI. TRIB., Apr. 22, 1873, at 3 (printing a communication from a witness, who has been detained for more than two months in county jail and who "has lost a position thereby"); *The Gregory Case—Detaining Witnesses*, CHI. TRIB., Oct. 14, 1859, at 1 ("The young man Gregory who being poor and friendless was unable to give recognizances for his appearances, has been a prisoner in our jail for nearly three months on common jail fare.").

[70] *See On Their Way: Chinese Long Held in Jail*, L. A. TIMES, May 2, 1913, at H8.

[71] *Miscarriages of Justice*, L.A. TIMES, June 26, 1909, at H4.

[72] *See County Affairs*, *supra* note 69 (printing a communication from a witness, who has been detained for more than two months in county jail and who "has lost a position thereby").

[73] *The City in Brief*, L.A. TIMES, Sept. 22, 1872, at 6 (reporting that a victim-witness suffered health problems after a long detention).

Hotels, offices, wayward women's homes, and juvenile halls were also used to hold witnesses,[74] but separate public detention facilities, such as those built in New York City in 1857,[75] did not exist in many cities. In 1873, the *Chicago Tribune* complained about "the outrageous practice of using the same jail for detaining as witnesses persons who have been guilty of no crime, those who are incarcerated to wait trial and who may be innocent, and those who are serving out punishment under verdicts."[76] According to the *Tribune*, "The practice, from all accounts, extends pretty generally to all cities."[77] Yet, despite such calls for county governments to fund the construction of separate detention centers, or for private entities to provide better housing for witnesses,[78] the use of un-segregated jail facilities continued. For example, as late as 1948, the *Los Angeles Times* complained that minor children held as witnesses were "forced to use the same facilities delinquents use..."[79]

2. The Blurred Line Between Witness and Suspect

Sources from Illinois and California in the 1850s through the 1930s indicate that the majority of detainees were either complaining victims or other witnesses who simply could not post bond and that they remained in jail until a specific event (e.g. the inquest or the trial) had concluded.[80] The flight-risk rationale probably did underpin many material witness detentions in the past. However, in a significant minority of cases, another motive emerged: the interrogation of individuals whom the police lacked probable cause to charge with a crime but whom they suspected of being accomplices or principals.[81] Oliver has

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[74] *3 Young Crime Pupils Accuse a Modern Fagin*, CHI. TRIB., Oct. 30 ,1938 at 2 (juvenile home); *Ex-Police Officer in New Case*, L.A. TIMES, Apr. 16, 1924, at A14 (juvenile hall); *Death and Theft Mystery Revived; Suspect Held*, L.A. TIMES, Nov. 18, 1915, at H1 (hotel); *Skipper Cecil Falls A-foul*, L.A. TIMES, Nov. 19, 1912, at H9 (office of the Chief of Police in Santa Barbara, CA); *From the Erring Women's Refuge*, CHI. TRIB., Feb. 25, 1890, at 10 (erring women's refuge).

[75] *See* Oliver, *The Rise and Fall of Material Witness Detention*, *supra* note 14, at 754. *See also* Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1330 n.110 (2002) (noting the existence of a House of Detention for Witnesses in late nineteenth-century New York City).

[76] Untitled Article, CHI. TRIB., May 15, 1873, at 4.

[77] *Id.*

[78] *See id.*; *Better Accommodations Needed for Witnesses*, CHI. TRIB., Feb. 23, 1890, at 12.

[79] *Plight of Juvenile Witnesses Told*, *supra* note 64.

[80] *See supra* text accompanying note 64 (discussing the routine practice of holding homicide witnesses until the coroner's inquest had occurred).

[81] *See, e.g.*, *supra* Part II (describing Oscar Thompson's case) and *infra* notes 84, 93, 107–09, 114 (providing examples of suspected witnesses). Like Thompson, some individuals arrested as witnesses subsequently faced criminal charges. For example, police in California arrested Dave Hearns as a material witness to a fatal stabbing and held him, without formal charges, pending a coroner's inquest. *Slashed Vein is Declared Cause of Venice Death*, L.A. TIMES, April 8, 1924, at 2. Hearns was later charged with murder for the "love duel," while the woman over whom the accused

demonstrated that, in New York City by the 1840s, "[p]rofessional law enforcement officers, more vigilant in their prosecution of crime than their constable and night-watch predecessors, began to detain persons who were not charged with crimes."[82] To evade legislation barring the detention of a suspect without a charge, newly zealous police took advantage of statutory authority allowing them to hold witnesses.[83] This manipulation of witness detention statutes led to abuse in Illinois, California, and other states as well, and the abuse continued into the twentieth century. For example, in Los Angeles in 1913, a nurse held as a witness against a notorious swindler was kept in the City Jail for "further quizzing" because the police envisioned her as "the brains of [the swindler's] operations."[84]

Did the detentions stem from fear that the detainees might commit more crimes upon release? One answer is that few, if any, witnesses were held preventively due to formal, scientific predictions about their future dangerousness. In this respect, Levenson may correctly identify a gradual transformation of the practice. Although Levenson errs in assuming that, historically, witnesses were not treated as potential suspects, her insight that "the War on Terrorism has capitalized" on American society's comfort with preventive detention has some validity.[85]

An important caveat, of course, is that September 11 did not start the trend toward preventive detention.[86] Actuarial methods have influenced criminal justice administration since the 1930s, or even the 1920s, when prediction tools developed by University of Chicago sociologists began to shape parole decision-making.[87]

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and the deceased fought continued to be held as a witness. *Hearing Date Set for Fatal Love Quarrel*, L.A. TIMES, April 12, 1924. Law enforcers also arrested illegal immigrants as witnesses during border-control efforts or because they were believed to have knowledge of other crimes. These individuals were later deported. *See infra* notes 97–98.

[82] Oliver, *The Rise and Fall of Material Witness Detention*, *supra* note 14, at 740.

[83] *See id.*

[84] *Eternal Three Face to Face*, L.A. TIMES, Jan. 29, 1913, at 15.

[85] *See* Levenson, *supra* note 2, at 1218–20.

[86] September 11 at most accelerated the growth of a troubling thicket of police practices and sentencing authority that now encompasses criminal profiling, habitual-offender laws, and the civil confinement of convicted sex offenders who have completed their prison terms. The profiling of potential aircraft hijackers and drug smugglers became an established tool of law enforcement in the 1960s and 1970s, if not earlier. *See* BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 103–05 (2007). Criminal incapacitation, based on past offending and projections of future dangerousness, was also a controversial practice in many states prior to the 2001 terrorist attacks. *See* Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes & Criminal Incapacitation*, 87 GEO. L.J. 103 (1998); Michael Louis Corrado, *Punishment and the Wild Beast of Prey: The Problem of Preventive Detention*, 86 J. CRIM. L. & CRIMINOLOGY 778 (1996); Stephen Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113 (1996); Carolyn B. Ramsey, *California's Sexually Violent Predator Act: The Role of Psychiatrists, Courts, and Medical Determinations in Confining Sex Offenders*, 26 HASTINGS CONST. L.Q. 469 (1999).

[87] *See* HARCOURT, *supra* note 86, at 47–48, 59, 69.

Moreover, although criminal profiling did not emerge as a formal law enforcement strategy until the 1960s, "it arguably had antecedents in the early-twentieth century eugenics movement.[88] As discussed below, police officers routinely took such factors as race into account in identifying individuals to be held as witnesses[89]—a practice that dovetailed with the increasing criminological emphasis of the 1920s and 1930s on social typing as a means of predicting criminality.[90]

a. Class, Ethnicity, and Profiling

The police often possessed very slim evidence connecting the witness to the alleged crime. They may have had no more than the feeling that they did not like his looks and wanted to inquire into his character—the reported grounds for detaining a man in connection with an attempted train robbery in Illinois in the early 1890s.[91] Racial or ethnic stereotypes frequently substituted for hard facts indicating that the detainee had information to impart. For instance, during the Prohibition Era, police targeted Asians suspected of illegal alcohol or gambling operations. In such cases, large groups of individuals—whether Chinese or Japanese—were indiscriminately rounded up as "witnesses"[92] and later deported. Other types of profiling occurred as well. For example, law enforcers sometimes made assumptions based on an individual's occupation. In a memorable California case, the police arrested two individuals as material witnesses to a murder simply because they walked with a "sailor's roll" and the murder victim was supposed to have kept an "open house" for seafaring men. The officers found a small quantity of marijuana on one of the sailors and thus were able to charge him with a drug crime. They continued to hold his mate as a witness.[93]

Thus, while there is little evidence that material witness detentions were largely preventive measures based on formal actuarial methods, the tendency of investigating officers to use such factors as race, employment, and marital status as barometers for involvement in crime resonates with the reliance of sociologists and parole boards on social typing in the first half of the twentieth century. Parole decisions during this period often favored the white and the married.[94] And the sociologists who developed the first prediction tools relied on categories as subjective as "recent immigrant," "substantial citizen," "ne'er-do-well," and

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[88] *Id.* at 103.

[89] *See infra* text accompanying note 92.

[90] *See* HARCOURT, *supra* note 86, at 180–83.

[91] *Wreck Barely Averted*, CHI. TRIB., Sept. 15, 1891, at 1.

[92] *See, e.g., Japanese "Blind Pigs,"* L.A. TIMES, Oct. 9, 1908, at H6.; *Special Correspondence of The Times*, L.A. TIMES, Oct. 24, 1908.

[93] *Two Sailors Seized as Suspects in Brutal Murder of San Pedro Clothing Merchant*, L.A. TIMES, Dec. 20, 1929, at A2.

[94] *See* HARCOURT, *supra* note 86, at 69 (discussing the findings of a 1939 inquiry into the federal parole system).

"country bully" to understand the criminal mind.[95] It was perhaps not a coincidence that Illinois and California—two states in which material witness detention was a prevalent police tactic—also ranked as pioneers in the use of actuarial methods to predict the dangerousness of parole candidates.

The profiling of certain groups both arose from and reinforced stereotypes about their likely guilt. Moreover, in border and port cities, witness detention became a close ally of deportation. For example, in California, Chinese persons were often held as witnesses in federal smuggling cases, prior to being deported along with other smuggled aliens.[96] Despite public sympathy for the financial woes of many detainees, the government incurred criticism for paying the Chinese smuggling witnesses a dollar per day during their stay in county jail "if their evidence [was] wanted. . . ."[97]

This lack of sympathy for Asians and other foreign witnesses on the West Coast contrasts with the situation in New York, where Oliver contends that politically powerful immigrant communities, such as the Irish and the Germans, pressed for the abolition of material witness detention.[98] The temporary success of a reform campaign fueled by politicians' desire to woo immigrant voters had no parallel in California or other western states. There, reformers expressed concern for the welfare of almost all witnesses, except the foreign-born. The contrast likely arose from the differing composition of west-coast cities. In Los Angeles, for example, "machine politicians, venal policemen, civic reformers and the electorate were mainly native-born, white, middle class Protestant Republicans," and there was correspondingly less pressure to respond to immigrant interests than in New

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[95] *See id.* at 180–83 (describing the work of sociologists Ernest Burgess, George Vold, and Ferris Laune).

[96] *See, e.g.*, *Double Hoodoo on Prisoners*, L.A. TIMES, Nov. 10, 1914, at II3 ("The thirty contrabands were landed on the sand . . . about daylight, and it is the contention of the government that [the defendant] was on the beach with his auto, ready to load them in and bring them to Los Angeles . . . . The Chinese were afterward captured by immigration authorities, and all except two or three who are held as witnesses, were deported to China."); *Chinese are Deported*, L.A. TIMES, Dec. 20, 1911, at I3 (reporting that five Chinese persons would be held as witnesses in a San Francisco smuggling case, while more than twenty had been shipped back to China on an ocean liner); *Deport Chinese By Wholesale*, L. A. TIMES, Sept. 17, 1911, at IV12 (stating that sixty-five Chinese had been ordered deported, but that "twenty are being detained as witnesses in the five smuggling cases that [were] set for hearing" in the United States District Court); *Coolies*, L. A. TIMES, June 24, 1909, at I3 (reporting that several smuggled Chinese were held as witnesses in Seattle, while others had been deported). Similarly, an approving report from Denver revealed that "sweeping investigations" by an immigration agent of all penal institutions in the state would result in the "[w]holesale deportation of criminals, anarchists" and other "notorious 'reds,'" some of whom were being held as witnesses. *Undesirable Citizens: Colorado to Deport Five Hundred Reds*, Direct Wire to the Times, L. A. TIMES, May 26, 1908, at I4.

[97] *Dig at Officers Draws Reprimand*, L.A. TIMES, Nov. 13, 1914, at II2. *See On Their Way: Chinese Long Held in Jail*, *supra* note 70, at II8 (noting the "roll of coin collected from Uncle Sam" by Chinese witnesses held in a San Diego Jail for nearly two years).

[98] Oliver, *The Rise and Fall of Material Witness Detention*, *supra* note 14, at 777, 780.

York or Chicago.[99] Despite evidence that the criminal classes in California were also predominantly white and native-born, the public often associated urban criminality with immigration, which made the plight of the Chinese detainees seem less sympathetic.[100]

b. Coercive Tactics

A major argument of this Essay is that, instead of constituting a watershed in criminal procedure, the Justice Department's response to the September 11 terrorist attacks merely extended a historical trajectory toward state-imposed coercion that had been operating for more than a century. Coercion has long been a feature of police interaction with witnesses. Indeed, the lack of separate detention facilities in the late nineteenth and early twentieth centuries magnified the likelihood that suspected individuals officially labeled as "witnesses" would be held under *incommunicado* conditions. This happened to a lodger in Los Angeles whose landlady's corpse turned up in a vacant lot. Booked under a fictitious name, the lodger was secretly held first at the University Police Station and then at the City Jail.[101] Such witnesses were frequently subjected to rigorous questioning without being brought before a magistrate. Moreover, interrogating officers employed coercive tactics to force the detainee either to confess or to incriminate others. In 1892, the *Chicago Tribune* reported that two witnesses to a saloon killing were "put through the *regular* 'sweat box' by the officers" to make them divulge the murderer's name[102]—thus suggesting that the confrontational encounters, Mutt-and-Jeff routines, and prolonged questioning that Thompson faced in 1902[103] were already widespread a decade earlier.

Perhaps most importantly, officers questioning a person held as a witness always told him that he was a witness, not a suspect, regardless of the officers' subjective belief about the detainee's criminal involvement. Interrogators certainly do not seem to have given such detainees warnings, even when their main objective was to secure incriminating statements. Outside the context of terrorism, police today typically Mirandize a material witness before subjecting him to custodial interrogation.[104] Of course, "custody" is determined using a totality-of-

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[99] GERALD WOODS, THE POLICE IN LOS ANGELES: REFORM AND PROFESSIONALIZATION 4 (1993) (indicating that the political machine in Los Angeles was not the "product of immigrant cultures"). In contrast, after the Civil War, Chicago was dominated by "a coalition of loosely affiliated ward organizations composed of immigrants." LINDBERG, TO SERVE AND COLLECT, *supra* note 22, at 35. For a brief description of machine politics in New York, see Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, *supra* note 75, at 1338–40.

[100] *See* WOODS, *supra* note 99, at 4.

[101] *See Bare Fearful Story of Mrs. Kennedy's Death*, L.A. TIMES, Oct. 20, 1914, at II1.

[102] *To Probe a Mystery*, CHI. TRIB., Dec. 28, 1892, at 3 (emphasis added).

[103] *See supra* text accompanying notes 28–29.

[104] *See, e.g.*, United States v. McVeigh, 940 F. Supp. 1541, 1550, 1560 (D. Colo. 1996) (noting that Terry Nichols received *Miranda* warnings before being questioned as a material witness

the-circumstances test that deems questioning at the scene of the crime or even at the police station, if the witness voluntarily accompanies the officers there, to be "non-custodial."[105] However, in the nineteenth century and the first half of the twentieth, there were not even any prophylactic rules of this sort shielding witnesses from coercion.[106]

The interrogation of suspects, under the subterfuge that they were merely witnesses, sometimes allowed the police to get a confession in that case. In Chicago in 1902, for example, two boys held as witnesses for three days "weakened . . . and confessed that they themselves were the murderers" of a grocery clerk.[107] Similarly, a woman whom police held as a material witness to a drowning death confessed that she pushed the victim off a yacht.[108] Other times, the officer detained an individual as a witness to one crime but subjected him to rigorous questioning that revealed he might be guilty of an entirely different offense. For instance, a man detained in regard to a Chicago saloon shooting was also questioned about the murder of a Northwestern University student whose killer he resembled.[109]

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in the Oklahoma City bombing case and stating in dicta, "it is assumed that the rights of a person in custody as a material witnesses are, in this respect, identical with those of a person arrested as a suspect"); State v. Worlock, 569 A.2d 1314, 1316–17 (N.J. 1990) (stating that an individual held as a material witness was given *Miranda* warnings); State v. Sugar, 417 A.2d 474, 475–76 (N.J. 1980) (same); State v. Neeley, 244 S.E.2d 522, 527 (S.C. 1978) (same); Walker v. State, 560 P.2d 1040, 1041–42 (Okla. Crim. App. 1977) (same); Comm. v. Edwards, 353 A.2d 462, 462 (Pa. Super. Ct. 1975) (same). *But see* United States v. Anfield, 539 F.2d 674, 677 (9th Cir. 1976) ("The custody of appellant as a material witness was not of the type requiring *Miranda* warnings.").

[105] *See* State v. Faircloth, No. A03-468, 2004 WL 1152479, at *2–4 (Minn. Ct. App. May 25, 2004) (holding that, based on the totality of circumstances, a material witness whom the police took to the police station was not "in custody"); State v. Harris, 725 P.2d 975, 978 (Wash. 1986) ("[P]ersons voluntarily accompanying police to the police station as material witnesses are not under custodial interrogation if their freedom of action is not curtailed to a degree associated with a formal arrest."); State v. Green, 588 P.2d 1370, 1373–74 (Wash. 1979) (indicating that the police need not Mirandize a material witness whom they have taken to the police station, as long as the witness is "free to leave" and the investigation has not focused on him as a suspect). *Cf.* People v. Riddle, 83 Cal. App. 3d 563, 579 (holding that material witness may be questioned in custody without *Miranda* warnings if an extreme emergency exists).

[106] Nor had the United States Supreme Court held that the Fifth Amendment self-incrimination clause applied to the states through the Fourteenth Amendment, though states had widely adopted the privilege in their own constitutions and laws. Twining v. New Jersey, 29 S.Ct. 14, 16, 26 (1908). Moreover, at this time, the privilege was not generally considered to apply to police interrogations.

[107] *Boy Prisoners Confess Murder*, CHI. TRIB, Feb. 19, 1902, at 5.

[108] *Woman's Conscience Forces a Confession*, L.A. TIMES, Sept. 10, 1902, at 10 (reporting the details of a New Orleans, Louisiana incident).

[109] *Carville Gives Himself Up For Hurley Killing*, CHI. TRIB., Mar. 20, 1920, at 5.

3. The Relationship of Detention to Social or Political Crises

It does not appear that the detention of witnesses—either those actually suspected of crimes or those held solely to ensure their testimony at trial—arose as a direct response to crisis. In the nineteenth and early twentieth centuries, some correlation existed between the arrest of certain types of witnesses and changing social conditions. For example, the passage of the Mann Act regulating prostitution and immorality resulted in a spate of arrests of young women in the 1910s and 1920s as witnesses against alleged Mann Act violators.[110] And as we have seen, concern about the influx of illegal immigrants to states like California led to a growing connection between material witness detention and deportation efforts.[111] However, when viewed over time, the arrest of witnesses generally did not occur in isolated spurts in response to actual or perceived criminal-justice alarms.

Here, my research differs from Oliver's. Oliver suggests that material witness detention arose in New York in response "to a wave of a particular type of crime, petty thefts, specifically swindles" which victimized people from outside the city and necessitated holding them to ensure their appearance at trial.[112] By contrast, in California and Illinois, the detention of so-called "witnesses" seems to have been a routine and steadily increasing[113] part of law enforcement that most often affected

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[110] *Mann Act Case Has New Angles*, L.A. TIMES, Jan. 22, 1914, at II3; *Held as a Witness: Self-Styled Victim of Alleged White Slaver Finds That She Must Also Put up a Fat Bond*, L.A. TIMES, Feb. 6, 1915, at II3; *Cupid in Trouble: He's Charged with Baiting Love Trap for Country Girl and Betraying Her to Tia Juana*, L.A. TIMES, Oct. 19, 1915, at II5; *Wife Pleads To Go To Jail in Fear of Persecutors*, CHI. TRIB., May 7, 1916, at 5; *U.S. Will Investigate Petrie-Hansen Romance*, CHI. TRIB., Dec. 4, 1917; *Girls Like Phone Romance; Balk at Elopement*, CHI. TRIB., April 19, 1920, at 17; *Woman to Testify in Mann Act Case*, L.A. TIMES, May 27, 1922, at II3; *Detectives Use Guns to Obtain Girl as Witness*, L.A. TIMES, Nov. 24, 1923, at II2; *Toledo Man to Face Mann Act Charge in East*, L.A. TIMES, Dec. 30, 1924, at B7; *Officers Make Good Promises: Find Woman for Man Now Held to Answer Long List of Charges*, L.A. TIMES, Feb 6, 1925, at 9; *Mann Act Case Girl Gives Bond: Bail in $5000 Provided for Bessie Pritchett as White Slave Witness*, L.A. TIMES, April 17, 1925, at A2; *Girl Accuser Held in Mann Act Case*, L.A. TIMES, Dec. 12, 1925, at A2; *Girl Put in County Jail as Witness: Tale of Auto Ride Started in Utah Investigated in Mann Act Case*, L.A. TIMES, Jan. 16, 1926, at A2; *Trip Here from East Jails Man: Chicago Promoter Taken as White Slave Suspect; Girl Held as Witness*, L.A. TIMES, Jan. 16, 1926, at A6; *Canadian to Face Mann Act Charge: Wealthy Rancher Arrested in Pasadena While Niece Held as Witness*, L.A. TIMES, Feb. 16, 1926, at A9; *Mann Act Case Deny Charges*, L.A. TIMES, June 12, 1926, at A2; *Mann Act Accusation Nets Pair: Man Placed Under Arrest at Santa Barbara While Girl Faces Questioning*, L.A. TIMES, Aug. 31, 1926, at A3; *Chinese Wife of Federal Official in Mann Act, Net*, L.A. TIMES, Nov. 24, 1926, at 11; *Mann-Act Charge Holds Portlander*, L.A. TIMES, June 21, 1927, at A8; *Parked Car Leads Wife to Husband: She Also Finds Girls and Companion with Mate and All Four Go to Jail*, L.A. TIMES, March 20, 1928, at A2.

[111] *See supra* text accompanying note 96.

[112] Oliver, *The Rise and Fall of Material Witness Detention*, *supra* note 14, at 741.

[113] Oliver reports that witness detentions in New York rose from less than one hundred in 1848 to more than six hundred per year by the 1870s. *See id.* at 746, 781. Nevertheless, by his estimate,

those deemed to possess information about murders, robberies, prostitution, and other ordinary street crimes.[114] No specific crisis is evident in the genesis of the practice in these two states.[115]

The investigative tactic of detaining witnesses had spread across the nation by the end of the nineteenth century. Yet, rather than being a stop-gap response to a particular type of threat, this development seems to have been the practical result of key features of the nascent institutionalized state—the existence of a full-time police force with fewer disincentives to solve crimes than in the past,[116] as well as

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"[w]itnesses were held in only a small fraction of the total number of criminal cases in the nineteenth century." *Id.* at 763. Such data is corroborated by my largely anecdotal evidence from Los Angeles. For example, in 1890, the *Los Angeles Times* reported that, of 2575 arrests in the city that year, only thirty-six witnesses were detained. *Police Business: The Annual Report of the Chief Submitted*, L.A. TIMES, Dec. 7, 1890, at 3. While the charity functions of the police began to decline in the late nineteenth century, the number of lodgers accommodated, sick and wounded persons receiving medical treatment, and lost children restored to their parents still exceeded witness detentions in 1890. *See id.* However, neither newspaper articles nor police blotters provide very reliable quantitative data due to the secret nature of some witness detentions and interrogations. *See infra* text accompanying note 151 (discussing this research problem).

[114] My research yielded hundreds of newspaper articles about cases fitting each of these categories between the 1850s and the 1940s. Listing all of them is beyond the scope of this Essay. In the sub-category of witnesses whom the police suspected of committing crimes, the cases ran the gamut from murder and robbery to burglary and fraud. *See, e.g.*, *Arrest in Langley Killing*, L.A. TIMES, Aug. 11, 1924, at A1 (noting that detectives indicated more serious charges might be brought against a material witness held in connection with a theater robbery-murder); *Admits Seeing Hickey Murder*, CHI. TRIB., April 20, 1903, at 2 (reporting that both the police and a psychiatric examiner thought a material witness had concealed facts about a murder and that he might be "the guilty man"); *Sold Tickets Twice*, CHI. TRIB., May 10, 1893, at 1 (stating that "nothing so far ascertained" showed that a material witness whom detectives pumped for information had criminal responsibility for a fraudulent ticket-selling scheme); *Escape from the Armory*, *supra* note 67 (reporting that a juvenile witness provided evidence against his fellow burglars). *See also supra* Part II (discussing Oscar Thompson's case), and text accompanying notes 64, 67, 93, 107–09, 110 (providing additional examples).

[115] Material witness detention thus may shed light on a broader debate about the professionalization of the police. Several prominent historians argue that riots and disorder were the precipitating factors in the advent of police forces and other institutions, such as professional fire departments and full-time, salaried district attorneys. *See* STEINBERG, *supra* note 5, at 119–20, 164; *see also* WALKER, *supra* note 15, at 4 ("The new police were born of conflict and violence, as a direct consequence of an unprecedented wave of civil disorders that swept the nation between the 1830s and the 1870s."). Indeed, this has become the widely accepted view. In contrast, Erik Monkkonen contends that policing arose as part of an innovative consolidation and rationalization of governmental power that diffused across the country "without regard for specifically threatening situations." MONKKONEN, *supra* note 15, at 56. My short Essay cannot realign scholarship in this larger field of debate, nor does it seek to do so. However, the research presented here does suggest that fears of violent social breakdown had only an indirect relationship to the detention and interrogation of material witnesses.

[116] *See* Oliver, *The Rise and Fall of Material Witness Detention*, *supra* note 14, at 742–43 (discussing how the rise of professional police forces led to the detention of witnesses) and *infra* text accompanying note 118–20 (discussing the reduced tort liability of arresting officers which accompanied the professionalization of policing).

a public that increasingly looked to the government to fix urban problems and that expected criminal convictions to be part of the solution.[117]

D. *Efforts to Reform Material Witness Detention*

1. Legal Proceedings by Detained Witnesses

Although the actual practice of material witness detention stretched and even broke legal parameters, relatively few detainees instigated habeas corpus proceedings, and there is little evidence that tort suits were filed against arresting officers or magistrates for false imprisonment. A false imprisonment action had good prospects for success if brought against a third party who maliciously urged officials to hold a witness,[118] but the common law established that officers who arrested on reasonable grounds and magistrates who acted within their jurisdiction could not be found liable.[119] Oliver notes that this distinction came into being at the time when professional police forces were created and that the reduction of the liabilities officers faced was a vital stimulant to investigative activity.[120]

Given the poor fit between state statutory and constitutional authority and the actual practice of witness detention, the jurisdictional power of the officials involved and the reasonableness of their conduct may have been open to legal challenge.[121] But bringing a tort case for damages, as Oscar Thompson threatened

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[117] Ramsey, *supra* note 75, at 1312–13, 1322, 1343–45, 1392 (describing public pressure on police and prosecutors to control crime by apprehending and convicting perpetrators).

[118] *See* Bates v. Kitchel, 132 N.W. 459, 460 (Mich. 1911) (affirming tort judgment against defendant who maliciously sought to have plaintiff, a prosecution witness in defendant's automobile speeding case, compelled to appear in appellate proceeding). *Cf.* Winegar v. Chicago B & Q. R. Co., 163 S.W.2d 357, 365 (Mo. Ct. App. 1942) (discussing difference in potential liability of arresting officer and non-official citizen who urges plaintiff's arrest). A police officer who had reasonable grounds for making an arrest could not be held liable, whereas an arrestee who was not convicted of any crime might win a judgment for damages against any non-official person who urged his arrest. *See id.*

[119] *See, e.g.*, Lynn v. Weaver, 231 N.W. 579, 580 (Mich. 1930) (affirming directed verdict for defendant police officers who arrested plaintiff "in good faith and upon proper and probable cause" and did not unreasonably delay in releasing him on his promise to appear in court); McBurnie v. Sullivan, 153 S.W. 945, 947 (Ky. 1913) (holding that plaintiff could not recover damages for false imprisonment against a Justice of the Peace who acted within his jurisdiction in jailing plaintiff for contempt, even if he did so maliciously); Johnson v. Collins, 89 S.W. 253, 254–55 (Ky. 1905) (holding that police officers were not liable for false imprisonment where they conducted a warrantless arrest upon reasonable grounds and promptly took arrestee before a magistrate); McCarthy v. DeArmit, 1 Pennyp. 297, *312 (Penn. 1881) ("An innocent man is unfortunate when he is suspected of having committed a high crime, and is deeply injured when imprisoned upon suspicion; but he has no redress if his injury came through the proper action of a public officer while in the faithful performance of his duty.").

[120] Oliver, *The Rise and Fall of Material Witness Detention*, *supra* note 14, at 744–45.

[121] *See supra* note 60 (discussing successful habeas corpus petitions).

to do,[122] required substantial initiative and resources on the part of detained witnesses, many of whom were poor, socially marginalized, and even residing in the country illegally.[123] Hence, for the most part, the wrongs against them remained unredressed.

2. Case Law and Legislation

Sporadic cries for the reform of material witness detention produced limited results in courts and legislatures. In New York, sympathy for poor witnesses, victim-witnesses, and out-of-towners led, first, to the construction of a separate House of Detention and, then, to the temporary repeal of the material witness statute in 1883.[124] The reform campaigns in Illinois and California also tended to focus on the inconvenience that jailed witnesses endured because they were from another city or were not affluent enough to post bond.[125]

Reformers' concern about hardship on detainees embodied an explicit critique of the bounds of state power to enforce a duty to testify on citizens. A common argument challenged the tradeoff between liberty and crime control by suggesting that the prospect of dangerous and burdensome detention deterred individuals from reporting crimes.[126] Here, critics of material witness detention encountered pushback from judges, as well as from police and prosecutors. In one of the few

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[122] *See supra* text accompanying note 39.

[123] *See supra* text accompanying notes 51, 62, 96, 99–100. In recent history, thanks in part to the rise of public-interest lawyers, civil-rights causes of action, and congressional authorization of attorneys' fees for civil-rights plaintiffs, witness detention lawsuits have become more of a reality, and the expense of such suits has forced some police departments to change their practices. The City of Detroit, for instance, has paid millions of dollars to settle civil cases arising from illegal witness detentions. *See $3.4 Million Paid to Jailed Witnesses*, DETROIT NEWS, July 13, 2003, at 1A. In 2003, Detroit entered two consent decrees mandating changes in myriad police department policies, including a requirement that officers obtain court approval before detaining material witnesses. *See Feds Order Overhaul of Detroit Police*, DETROIT NEWS, June 13, 2003, at 1A.

[124] *See* Oliver, *The Rise and Fall of Material Witness Detention*, *supra* note 14, at 768, 765, 779.

[125] For example, the *Chicago Tribune* recounted the story of a theft victim "detained over four weeks in the unwholesome County Jail as a witness, and [reported] that his health had seriously suffered thereby." *The City in Brief*, *supra* note 73. *See also, e.g.*, *Untitled Article*, CHI. TRIB., May 15, 1873, at 4 ("Our county jails, as a rule, are scarcely fit receptacles for the most hardened criminals, but when innocent witnesses are remanded to them because they are not able to furnish bail for their appearance, the hardship is considerably increased."); *County Legislation: Better Quarters to be Provided for Detained Witnesses*, CHI. TRIB., Sept. 24, 1872, at 6 ("Commissioner Wahl said if a stranger came to town and was robbed he was put in jail, having no friends, until the thief was tried; the latter, having friends, being able to secure bail.").

[126] For instance, an editorial in a Chicago paper in 1859 lamented that "the witness is so harshly treated as to inspire a dread of letting it be known, even if he possesses the means of bringing down justice upon an offender." *The Gregory Case-Detaining Witnesses*, THE CHI. PRESS AND TRIB., Oct. 14, 1859, at 01. Oliver notes a similar line of criticism in New York. *See* Oliver, *The Rise and Fall of Material Witness Detention*, *supra* note 14, at 765.

published nineteenth-century cases addressing this issue, a court maintained that uncompensated detention might be ordered "not because [the witness] could not give the security, but because he could not be trusted to perform his duty as a citizen, voluntarily and without compulsion."[127] The judicial conception of detention, not as a punishment or a hardship, but as a "public duty" survived throughout the twentieth century and was affirmed by the United States Supreme Court in 1973.[128] Several decades later, the assumption that certain aspects of individual liberty must be sacrificed for the police to do their jobs underlies many "homeland security" measures imposed in the aftermath of the September 11 terrorist attacks.[129]

Reformers in the late 1800s and early 1900s still had modest success in curbing the worst abuses against witnesses. Beginning in the late nineteenth century, case law reinforced that some lengthy detentions were unreasonable;[130] pre-trial depositions were a desirable and less restrictive alternative;[131] separate detention facilities should be utilized;[132] and it was "unjust and oppressive" to jail a witness simply because he could not give bail.[133] Hearings became an intermittently-enforced formality designed to ensure that magistrates scrutinized the state's probable cause to believe the witness posed a flight risk and possessed information material to the case.[134]

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[127] Markwell v. Warren County, 5 N.W. 570, 571–72 (Iowa 1880).

[128] Hurtado v. United States, 410 U.S. 578, 588–89 (1973).

[129] *See* David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1702 (2005) (describing one possible view of democratic policing).

[130] *See Ex parte* Dressler, 7 P. 645, 645 (Cal. 1885) (discharging witness on habeas corpus because ninety-day detention due to unexplained continuances was unreasonable); *Ex parte* Grzyeskowiak, 255 N.W. 359, 361 (Mich. 1934) (holding that although initial imprisonment of witness was proper because he posed a flight risk, holding him for four months while the murder suspect still remained at large was unreasonable).

[131] *See* State v. Kemp, 124 La. 85, 88 (La. 1909); People v. Lee, 49 Cal. 37, 38 (Cal. 1874).

[132] *See In re* Llewellyn, 62 N.W. 554, 554 (Mich. 1895).

[133] State of Minnesota *ex rel.* Howard and Cook v. Grace, 1872 WL 3316 *4 (Minn. Jan. 1, 1872).

[134] *See In re* Llewellyn, 62 N.W. 554, 554 (Mich. 1895) ("We have no doubt of the power of the proper court to detain witnesses upon a proper showing, but such showing should in all cases be made and the witnesses given a hearing, and an opportunity to be heard before commitment."); Comfort v. Kittle, 46 N.W. 988, 990 (Iowa 1890) (holding that there must be a preliminary hearing before a magistrate before a witness could be detained or placed under bond); Quince v. Langlois, 149 A.2d 349, 351 (R.I. 1959) (discharging witnesses to a murder because no examination or hearing had been held to determine that they possessed material information). Clarification of the proper procedures for detaining witnesses in federal cases was still needed in the late twentieth century. In 1984, amendments to the Federal Bail Reform Act and Federal Rules of Criminal Procedure officially empowered a judge to order the arrest of a witness "if there are no conditions of release which would assure his appearance" but also required district-court supervision of that pretrial detention and periodic reports from the government attorney indicating why the witness should not be released. *See* Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied?*, 40 WAYNE L. REV. 1533, 1538–39 & nn.32–33 (1994). *See also* Steve Fainaru & Margot Williams, *Material Witness*

However, the coercive questioning of individuals whom the police conjectured might be offenders was less often criticized than the incarceration of those assumed to be "innocent." Oliver indicates that the New York police acquiesced in abolishing material witness detention only as long as they retained the power to hold a few persons whom they suspected of crimes.[135] When public outcry in New York resulted in the passage of the abolition bill, the law retained a clause allowing magistrates "to demand a recognizance, with or without sureties, only of those reasonably believed to be accomplices in crimes."[136] Similar language appeared in judicial opinions from other states during approximately the same time period. For example, a Pennsylvania judge stated in 1902 that "[i]t is only the unsettled vagabond or wayfarer, or *a person suspected of complicity with the defendant* . . . who may be held to bail."[137]

Oliver contends that, due to the reform campaign's focus on "innocent" witnesses who could not post bond, the New York public was unaware of an important reason for detaining witnesses: the interrogation of potential suspects.[138] In contrast, such ignorance about the incarceration of suspected witnesses does not seem to have existed in California or Illinois. Newspaper reporters and their readers in these states clearly knew that the police conducted fishing expeditions in which detained witnesses were viewed as possible perpetrators, but such knowledge did not produce uniform attitudes toward the potential suspects' plight. Whereas many journalists simply reported that witnesses had been subjected to the sweat-box method without commenting negatively on the practice,[139] the prolonged interrogation of uncharged detainees occasionally generated loud criticism, as it did in Thompson's case in Chicago.[140]

Law Has Many in Limbo, THE WASH. POST, Nov. 24, 2002, at A1 (describing the necessary showing to detain a witness under a federal statute passed in 1984).

[135] *See* Oliver, *The Rise and Fall of Material Witness Detention*, *supra* note 14, at 774–76, 780.

[136] *Id.* at 779.

[137] *See In re* Mary Engelke, No. 514, 1902 WL 2855, at *2 (Pa. Quar. Sess. Feb. 17, 1902).

[138] *See* Oliver, *The Rise and Fall of Material Witness Detention*, *supra* note 14, at 728, 779, 781.

[139] *See supra* note 102, at 3 (reporting that witnesses to a murder "have been put through the regular 'sweat box' by the officers, but refused to say anything about the case."); *see also, e.g.*, *M'Cord Says Allen Had the Chisel*, CHI. TRIB., Apr. 9, 1893, at 1 ("Allen was placed under arrest, ostensibly to be held as a witness, but really that evidence might be collected.").

[140] *See supra* text accompanying notes 36–37 (describing efforts to secure Thompson's release from a Chicago jail). *See also, e.g.*, *Friends to the Rescue*, L. A. TIMES, Feb. 10, 1920, at II6 (reporting on the detention of Julia Smith as a witness in a graft case and noting that "[t]he fight to secure the young woman's liberty has been watched with much interest and curiosity").

3. Police Reform and the Interrogation of Detained Witnesses

A nineteenth-century *Los Angeles Times* editorial lamented "the illegal method . . . of holding persons on suspicion, without booking them, or placing any charge against them."[141] This editorial and others like it eventually flowed into a broader stream of concern about police misconduct and inefficiency that culminated in the *Report on Lawlessness in Law Enforcement*, one of two Wickersham Commission volumes published in 1931.[142]

Nevertheless material witness detention was hardly the central focus of the most influential reform efforts in the interim decades. Thompson's controversial detention in 1902 coincided with a Progressive agenda of sweeping change in criminal justice administration. However, the primary zeal of Chicago reformers was directed elsewhere—toward eliminating the fee system, replacing political bosses with professional experts, and using socialized courts to deal with "domestic" ills, such as juvenile offending and spousal non-support.[143] Arguably, the temporary detention of individual witnesses was not anathema to the principles of Progressive reformers whose drive to consolidate and professionalize municipal government produced a discretionary, inquisitorial style of judging[144] and the subordination of individual rights to the balancing of social interests.[145]

Later, in the 1920s and 1930s, urban elites bent on introducing systemic efficiency to policing and prosecution produced a series of crime-commission analyses designed to enhance and legitimize crime control.[146] One of these, the 1931 Wickersham report, briefly complained about material witness detention as part of its larger indictment of the third degree. *Lawlessness in Law Enforcement* "ignored the more mundane areas of recruitment, training, and records where considerable progress had been made" in professionalizing law enforcement and instead offered a scathing critique of police misconduct during interrogations.[147] Shining a spotlight on brutality toward suspects, the report specifically mentioned the detention and questioning of witnesses among its catalog of unreformed abuses.[148] It noted with disapproval the mental suffering that might result from months of detention, characterized this suffering as "equivalent to the third

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[141] *A Broken Pledge—The Police Still Incarcerating Prisoners Secretly*, L.A. TIMES, Jan. 31, 1899, at 11.

[142] REPORT ON LAWLESSNESS IN LAW ENFORCEMENT, *supra* note 6.

[143] *See* MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO 19, 25, 27, 31, 123 (2003).

[144] *See id.* at 122.

[145] *See id.* at 61, 83, 110, 123.

[146] *See id.* at 290–307.

[147] WALKER, *supra* note 15, at 134.

[148] *See* REPORT ON LAWLESSNESS IN LAW ENFORCEMENT, *supra* note 6, at 93, 129.

degree," and stated that "[d]etentions may work particular hardship for persons merely held as witnesses."[149]

The secrecy of police interrogations ranked among the Commission's top concerns. In Chicago, the police were especially "slow about bringing prisoners into court or even booking them. As far as the records show, men [were] usually produced in court not later than 48 hours after arrest; but in fact, the true date of arrest [was] often not entered in the police blotter."[150] Moreover, witnesses and other *incommunicado* detainees might be held somewhere other than the police station. The report cited a book on Chicago detentions revealing that "witnesses in sensational cases [were] taken to newspaper offices, hotels, etc, and there grilled for evidence."[151] The abuse of detained witnesses might never come to light, the Wickersham report indicated, because the third degree was "used mainly to get clues leading to objective evidence or the arrest of some other person."[152]

Yet, despite this brief discussion of the problem, witness detention nevertheless remained at the margins of the Commission's reform agenda and did not attract attention the way more graphic descriptions of beatings and other police brutality did. Rather than constituting one of the main foci of the Wickersham investigation due to their perceived innocence, the detained witnesses became a small, nearly forgotten part of an exposé of coercive approaches to the potentially guilty.

IV. CONCLUSION

This Essay suggests two departures from prior scholarship. First, it presents alternatives to the limited analysis of material witness detention previously available in historical scholarship on criminal procedure. Second, and perhaps most importantly, it offers a counterweight to the common assumption that the Justice Department's response to the September 11 attacks fundamentally transformed criminal procedure in the United States.

This Essay not only traces the roots of witness detention to the nineteenth century but also shows that this coercive law enforcement tactic did not wane in the twentieth. The latter point contrasts with Oliver's work on the topic. Oliver contends that, when statutory authority to detain witnesses was restored in New York in 1904, it had lost much of its controversial sting because it would

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[149] *Id.* at 93 (describing the effect of lengthy detentions in New York City).

[150] *Id.* at 127. The falsification of police blotters represents a significant impediment to historical research on the practice of detaining witnesses because, although some police blotters survive, particularly in Chicago, they do not contain truthful, accurate information about the length and reasons for confinement.

[151] *Id.* at 129 (quoting A.I. BEELEY, THE BAIL SYSTEM IN CHICAGO (1927)).

[152] *Id.* at 54. The coercion of detainees in this context seems all the more likely, given the Supreme Court's holding that the Fifth Amendment privilege against compelled self-incrimination does not protect individuals who are never prosecuted. *See* Chavez v. Martinez, 538 U.S. 760 (2003).

henceforward be used against potential accomplices, rather than innocent individuals. He further suggests that "police in the twentieth century would be much more circumspect in using this power than their nineteenth century predecessors . . . ."[153] In contrast to Oliver's analysis, this Essay shows that material witness detention did not decline in the twentieth century, nor did public criticism of the practice cease. However, because reform efforts were limited and often focused more intensely on other ills of law enforcement, police officers continued to arrest, confine, and interrogate witnesses. The detainees included those who were unofficial suspects, as well as those mainly deemed to pose a flight risk.

Moreover, in contrast to recent critiques of the Justice Department's terror-fighting tactics,[154] this Article demonstrates that the *incommunicado* incarceration and questioning of so-called witnesses has a long history embedded in the consolidation of governmental power over the individual, rather than being impelled by a specific crisis. The War on Terror has become a justifying ideology, but it is not a full explanation of the government's intrusion. Instead, the detention of witnesses belongs to an old story of conflict between constitutional and statutory protection of personal freedom and the increasingly invasive practices of the state, beginning in the nineteenth century.

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[153] Oliver, *The Rise and Fall of Material Witness Detention*, *supra* note 14, at 782.

[154] *See supra* text accompanying notes 2, 4, 7–8, 86.