



**THE RISE AND FALL OF
MATERIAL WITNESS DETENTION
IN NINETEENTH CENTURY NEW YORK**

Wesley MacNeil Oliver*

Table of Contents

I. Introduction	727
II. The Long-Dormant Authority of Magistrates to Detain Witnesses	731
III. Professional Law Enforcement Makes Witness Detention a Practical Reality.....	738
The Earliest Known Witnesses Detained.....	739
The Early Effects of a Professional Police Force on Witness Detention.....	742
Increased Efficiency Correlates with More Detained Witnesses.....	746
Police Presence and Witness Detention After Legislative Investigation and Reform	749
Witness Detention Again Increases After 1870 Police Reorganization	760
IV. Decades of Unsuccessful Effort at Reform	763
The Movement for Reform in the Early 1840s.....	765
New York Constitutional Convention of 1846	767
Proposed Code of Criminal Procedure.....	771
A Decade of Silenced Reform and Ultimate Success.....	773
V. Conclusion.....	780

* Climenko/Thayer Lecturer on Law, Harvard Law School; J.S.D. candidate, Yale Law School. B.A., J.D., University of Virginia; LL.M. Yale Law School. My thanks to Alan Dershowitz, Bob Gordon, Andy Kaufman, Kate Stith, Bill Stuntz, John Witt and participants at workshops at Harvard and SMU for very helpful comments on previous drafts.

I. Introduction

The detention of witnesses in New York City in the nineteenth century largely began and ended because of the city's professional police force, first organized midway through the century. The city's system of constables and night-watchmen in the first half of the nineteenth century lacked the manpower or incentives to aggressively prosecute crime. Though statutes long permitted magistrates to detain witnesses if there was a risk they would not appear at trial, few if any persons identified as witnesses were brought to magistrates by these early, largely ineffective, officers.¹ As the city developed a professional police force, more aggressive (and questionable) investigative tactics began to be used.² As the force grew in manpower and efficiency, witnesses were increasingly arrested by officers and brought before magistrates who committed them to jail.³ Ultimately, these rising numbers proved counter-productive. The police found that citizens were becoming increasingly unwilling to speak with officers.⁴ As the public became increasingly aware that knowledge of a crime could lead to incarceration, the police asked the legislature to put an end to the detention of witnesses.⁵ The legislature obliged the police request about a decade after it was made and abolished the detention of material witnesses in 1883.⁶

¹ See 1787 N.Y. Laws 8; 1801 N.Y. Laws 70; 1 LAWS OF THE STATE OF NEW YORK 304 (James Kent and Jacob Radcliff revisors, 1802); 2 LAWS OF THE STATE OF NEW YORK 507 (William P. Van Ness and John Woodword revisors, 1813); 2 N.Y. REV. STAT., pt. 4, ch. 2 tit. 2, §§ 21-22 (1829); 2 N.Y. REV. STAT., pt. 4, ch. 2, tit. 2, §§ 21-22 (1836). The New York statutory revision and its codification scheme is described well by ERNEST HENRY BREUER, *THE NEW YORK REVISED STATUTES—1829: ITS SEVERAL EDITIONS, REPORTS OF THE REVISERS, COMMENTARIES AND RELATED PUBLICATIONS UP TO THE CONSOLIDATED LAWS OF 1909* (1961). There was some dispute in the nineteenth century about whether the statutes prior to the one enacted in 1829 actually permitted the detention of witnesses. See discussion *infra* at notes 18-20 and accompanying text.

New Yorkers certainly weren't the only Americans in the nineteenth century who were subject to incarceration merely because they had the misfortune of witnessing a crime. See *Witnesses Not to Be Imprisoned*, NEW YORK TIMES, Jan. 7, 1878, at 2 (noting proposal to provide for examination of witnesses in lieu of detention in California); *Treatment of Witnesses*, NEW YORK TIMES, May 13, 1883, at 8 (noting that Illinois recently abolished the detention of witnesses); S. CROSSWELL & R. SUTTON, *DEBATES AND PROCEEDINGS IN THE NEW YORK STATE CONSTITUTIONAL CONVENTION* 815 (1846) (describing witness detention in Maryland).

² This article is taken from one of the chapters of my pending J.S.D. dissertation at Yale University that examines how the creation of professional police forces created civil liberties concerns not contemplated by the Framers and how society responded to these new threats to liberty.

³ See discussion at *infra* notes 59-126 and accompanying text.

⁴ See discussion at *infra* notes 174-76 and accompanying text.

⁵ See BOARD OF METROPOLITAN POLICE, REPORT, Jan. 16, 1868, ASSEMB. DOC. 20 at 80. By the time witness detention was forbidden in New York, there was a perception that witness detention was fairly common. See 1 N.J. LAW J. 258, 258 (1878) (observing that "[i]t is no uncommon occurrence to imprison one, whose only crime is that he has been the innocent spectator of the commission of some crime, for weeks or even months; and in one case we have in mind, a witness was incarcerated for two years.") The reality is that no more than 600 persons were ever held as material witnesses in any given year and were thus a very small percentage of all the persons interviewed or even ultimately arrested by New York police officers in the nineteenth century. See discussion *infra* at note 121-122 and accompanying text.

⁶ 1883 N.Y. Laws 416. In 1904, the New York legislature restored the power to detain material witnesses. N.Y. CODE CRIM. PRO. 618-b (1904). See also *People ex rel. Fusco (Galvano) v. Ryan*, 124 N.Y.S.2d 690, 699 (S.Ct. Bronx Co. 1953) (noting origins of the twentieth century material witness statute).

Very sympathetic stories were told about completely innocent persons' being detained for long periods of time in nineteenth-century New York, stories that surely made citizens afraid to speak to police. A woman visiting New York City in 1846 had a bundle of her clothes stolen; when she reported the incident at the local police office, she was imprisoned as a witness against an undiscovered thief for nine months.⁷ A young woman who alleged she had been raped was held in default of bail; the alleged rapist went free on bond.⁸ A man who witnessed the murder of his wife was held for months in the House of Detention for Witnesses.⁹

These stories, however, were caricatures of the typical witness detention. Most witnesses in the nineteenth century were detained for approximately ten days or less.¹⁰ The police were therefore not arresting witnesses to preserve their trial testimony; cases could not have come to trial in ten days. These were strategic detentions either to extract information from witnesses or to hold them while it was determined whether to charge them with crimes. Not surprisingly, the number of witnesses detained overlapped with more aggressive policing and legislative criticism of the practice of detaining suspects "on suspicion" without any charge.¹¹

The legislature had not authorized detentions of suspects without charges. Detaining witnesses allowed police to use a method approved by the legislature to hold uncooperative persons without a charge. Suspects could be interrogated in a coercive environment before adequate evidence existed to charge them—and their flight could be prevented while the case was worked up against them. Material witness detentions also permitted the police to put pressure on witnesses who would otherwise be uncooperative—family or friends of suspects or those who could potentially be charged as accomplices. Critics of anti-terrorism efforts after September 11, 2001, complain that material witness statutes were never intended to effectively lower the standard of proof required to detain a suspect, or to put pressure on uncooperative witnesses.¹² The history of witness detention in New York City suggests that, as a practical matter, the power to detain witnesses has never been used any other way.

⁷ N.Y. PRISON ASS'N, ANNUAL REPORT 81 (1847) (hereinafter PRISON ASS'N REPORT).

⁸ JAMES F. RICHARDSON, THE NEW YORK POLICE: COLONIAL TIMES TO 1901, at 76 (1970).

⁹ Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1330 n.110 (2002).

¹⁰ See discussion *infra* at note 115 and accompanying text.

¹¹ See discussion *infra* at notes 97-108 and accompanying text. Professor Davies has similarly observed that "[t]he modern police and aggressive policing had become realities by the end of the nineteenth century." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 639 (1999).

¹² See Laurie L. Levinson, *Detention, Material Witnesses and the War on Terrorism*, 35 LOY. L.A. L. REV. 1217, 1224 (2002) ("When America adopted into its laws the power to detain material witnesses, the focus was on having an individual available to testify in a criminal proceeding."); Karen C. Tumlin, *Suspect First: How Terrorism Policy is Shaping Immigration Policy*, 92 CAL. L. REV. 1173, 1200 (citing arguments that "the government has manipulated the material witness provisions, like immigration statutes, to hold those it suspects of terrorist activities but for whom it does not have probable cause necessary to support a criminal detention.").

Material witness detention in the nineteenth century, however, was not described as a means to obtain leverage over suspects and uncooperative witnesses. Neither reformers nor defenders of the power to detain witnesses had an incentive to describe how this mechanism was actually being used. Critics of material witness detentions concentrated on the most egregious cases, detentions of completely innocent persons long enough to ensure their appearance at trial. Supporters of material witness detentions could not challenge this characterization of how the mechanism was being used. The legislature had authorized magistrates to commit witnesses to ensure their presence at trial, not to put pressure on witnesses or lower the burden of proof to charge a suspect with an offense. The only clearly authorized use of the statute was the most offensive and occurred very seldom.

The most common use of the power to detain—obtaining leverage over suspects, their families, and their friends—was an enormously powerful tool for the police in the nineteenth century. Nevertheless, the police asked the legislature in the late 1860s to forbid the detention of material witnesses as citizens were becoming unwilling to provide information to police for fear of being detained. The police force surely had an interest in publicly requesting the legislature to ban the practice. It needed to assure the public that it had no interest in jailing citizens for possessing helpful information. Yet the police also had an interest in retaining the ability to use the detentions to get leverage against the uncooperative.

The police, however, were left with little choice other than to accept, even earnestly request, the abolition of material witness detentions. Increasingly aggressive policing over four decades had significantly swelled the number of persons held as witnesses. The number of witnesses detained had risen from double-digit numbers in the late 1840s to over 600 persons a year by 1880. The police had observed that citizens were becoming unwilling to provide information to the police for fear that they would be detained. Reformers were able to play on these concerns and characterize bystanders and victims as typical detainees.

The protracted path toward a statutory prohibition on the detention of witnesses reveals something about when and why legislatures act to protect constitutionally guaranteed liberties. The end of witness detention in nineteenth-century New York is entirely a legislative story; the legislature did not act out of fear that the courts would impose limitations if it failed to do so. Courts in the nineteenth century did not interpret constitutional provisions to impose any limits on the detention of witnesses, a quite surprising fact given that the New York Constitution of 1846 specifically forbid the “unreasonable detention of witnesses.”¹³ As Larry Kramer has recently observed, nineteenth-century courts were not viewed as guardians of constitutionally protected liberties.¹⁴ No one in nineteenth-century

¹³ N.Y. CONST. art. 1, § 5 (1846).

¹⁴ See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 220 (2004) (noting that “[w]hen New Dealers advocated a two-tiered system of judicial review, they

New York seems to have even presented constitutional arguments against witness detention to any court.¹⁵

Reformers directed their efforts exclusively at the legislature, which was not motivated to act by civil liberties concerns. Civil liberties objections to the detention of material witnesses in New York began in the 1840s, the first point at which a witness was known to be detained, and continued until the legislature finally forbade the detention of witnesses in 1883.¹⁶ The legislature was, however,

probably envisioned [given prior experience] the courts' role protecting individual rights as a relatively small thing.”).

¹⁵ Newspaper accounts describe some of the arguments made by the lawyers who (surely rarely) represented detained witnesses. None of these accounts include constitutional objections to detaining witnesses as a general matter or in the example before the court. See e.g. *German Legal Aid Society*, NEW YORK TIMES, Nov. 20, 1869 (noting representation of detained witnesses); *German Legal Aid Society*, NEW YORK TIMES, Jan. 15, 1870 (same); *Detention of Witnesses – An Application for their Release*, NEW YORK TIMES, July 12, 1872 (describing argument against detention of witness by attorney John O. Mott); *The Stokes Witnesses*, NEW YORK TIMES, July 27, 1873 (same).

Only one published decision in the nineteenth century found a witness to be wrongfully detained – and this decision was rendered after the New York legislature had forbidden the detention of witnesses who were not also accomplices to crimes. *People ex rel. Pettit*, 44 N.Y.S. 256 (S.Ct. Erie Co. 1897) (witness wrongfully detained as there was no proof that he was an accomplice to the crime he witnessed). In 1904, the New York legislature enacted a new provision permitting the detention of witnesses. N.Y. CODE CRIM. PRO. 618-b (1904). This version was amended in 1915. N.Y. CODE CRIM. PRO. 618-b (1915). A New York judge in 1921 was asked to, and did find, that the then-existing material witness statute was unconstitutionally because it did not require a showing that the witness would not appear in court as a prerequisite to requiring sureties. *People ex rel. Maroney v. Sheriff of Kings County*, 192 N.Y.S. 553 (S.Ct. Kings Co. 1921), *overruled by* *People ex rel. Farina v. Wallis*, 202 N.Y.S. 945 (S.Ct. App. Div. 1924). See also *People ex rel. Bruno v. Mauldin*, 206 N.Y.S. 523 (S.Ct. Westchester Co. 1924) (finding statute constitutional); *People ex rel. Ditchik v. Sheriff of Kings County*, 12 N.Y.S.2d 341 (S.Ct. Kings Co. 1939) (same). New York courts in the twentieth century also reviewed the application of the statute to the detention of the witness, something their nineteenth century predecessors did not do. See, e.g., *In re Prestigiamco*, 255 N.Y.S. 289 (S.Ct. New York Co. App. Div. 1932) (court, questioning whether witness detention was a ruse to hold person against whom insufficient evidence existed to charge, found unauthorized a \$100,000 bond to appear before grand jury at some indefinite point in the future).

¹⁶ See e.g., ROBERT H. MORRIS, MAYOR'S MESSAGE, 8 DOCS. OF THE BOARD OF ALDERMEN OF THE CITY OF NEW YORK, 1, at 7 (1841) (hereinafter ALDER. DOCS.) (Mayor objects to incarceration of witnesses in same location as pretrial detainees); ROBERT H. MORRIS, MAYOR'S MESSAGE, 9 ALDER. DOCS. 4, at 27 (1842); ROBERT H. MORRIS, MAYOR'S MESSAGE, 10 ALDER. DOCS. 1, at 22 (1843) (same); M. FALLON, REP. OF THE KEEPER OF THE CITY PRISON (1843) in 10 ALDER. DOCS. 53, at 957 (1844) (keeper of the New York City prisons objected to the detention of witnesses); WILLIAM G. BISHOP & WILLIAM H. ATTREE, REP. OF THE DEBATE AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 196, 1050, 1062 (1846) (concern expressed in constitutional convention about practice of detaining witnesses); WILLIAM V. BRADY, MAYOR'S MESSAGE, 14 ALDER. DOCS. 1 (1847) (mayor objects to injustice of detaining those neither accused nor convicted of a crime); *People v. Lohman*, 2 Barb. 450 (N.Y. Gen. Term 1848) (Justice Hurlbut noted hardships imposed on detained witnesses); N.Y. PRISON ASS'N REPORTS 1848-56 (prison reform association objected to detention); 4 CHARLES Z. LINCOLN, MESSAGES OF THE GOVERNORS, COMPRISING COMMUNICATION TO THE LEGISLATURE AND OTHER PAPERS RELATING TO LEGISLATION FROM ORGANIZATION OF THE FIRST COLONIAL ASSEMBLY IN 1683 TO AND INCLUDING THE YEAR 1906, at 787 (1909) (annual message of Gov. Myron Clark in 1855); REP. OF THE SELECT COMM. ON CODE OF CRIMINAL PROCEDURE, at 2, N.Y. ASSEMB. DOC. 150 (1855) (legislative committee objecting to practice of detaining witnesses); J. COMM. ON POLICE MATTERS IN THE CITY AND COUNTY OF NEW-YORK, AND COUNTY OF KINGS, REP., N.Y. SEN. DOC. 97 (1856) (same); *German Legal Aid Society*, NEW YORK TIMES, Nov. 20, 1869, at 1 (society petitioned legislature to end witness detention); *Union League Ass'n of the Twenty Second Ward – Protests Against the Imprisonment of Material Witnesses*, NEW YORK TIMES, Aug. 7, 1869, at 8 (league passed resolution condemning detention of witnesses); COMM'RS OF METRO. POLICE DEPT., ANNUAL REP., N.Y. ASSEMB. DOC. NO. 20, at 8-9 (1868) (hereafter

persuaded by a false public perception that the police could not deny: that assisting police officers was likely to lead to one's detention. Forbidding the detention of witnesses restored the public's willingness to cooperate in police investigations. When it became politically expedient to protect civil liberties—specifically when law enforcement interests overlapped with civil liberties—the legislature was willing to act. And when it did so, it was able to appear responsive to a constituency of growing importance: immigrants, especially German and Irish immigrants, who comprised the majority of persons incarcerated in the House of Detention for Witnesses.¹⁷

II. The Long-Dormant Authority of Magistrates to Detain Witnesses

The power to detain witnesses existed for some time, perhaps for a very long time, before it was regularly used. Without any question, the New York legislature authorized magistrates to detain witnesses in 1829, but the power to detain witnesses may have been granted long before 1829.¹⁸ An English statute from 1555 permitted magistrates to demand recognizances of material witnesses to ensure their appearance at trial. A recognizance became a debt to the Crown (later the state) in the event the witness failed to meet his obligations to appear and give his testimony.¹⁹ This statute did not expressly authorize magistrates to require witnesses to either provide sureties for the amount of the recognizance or go to jail. Several statutes passed early in New York's statehood left the same ambiguity. New York's statutory revision in the late 1820s expressly gave magistrates authority to detain witnesses unable to provide sureties for the amount of recognizance

METRO. POLICE REP.) (police commissioners object to witness detention); METRO. POLICE REP., N.Y. ASSEMB. DOC. 38, at 9-10 (1869); METRO. POLICE REP., N.Y. ASSEMB. DOC. 17, at 10-11 (1870) (same); *Assembly Committee on Crime*, NEW YORK TIMES, Dec. 24, 1875, at 1 (Asst. U.S. District Attorney A.H. Purdy told Assembly Committee that he thought "system of detaining non-resident witnesses in the House of Detention was unjust and unnecessary."); *Treatment of Witnesses*, NEW YORK TIMES, May 13, 1883, at 8 (State Charities Aid Association retained a former state Attorney General to propose legislation to abolish material witness detention).

¹⁷ Many have described the growing influence of immigrants in New York politics in the mid- to late-nineteenth century. See e.g., Lawrence H. Fuchs, *Some Political Aspects of Immigration*, 21 LAW & CONT. PROBS. 270 (1956) (discussing rise in political power of Irish and German immigrants in latter half of nineteenth century); GEORGE J. LANKEVICH & HOWARD B. FURER, A BRIEF HISTORY OF NEW YORK 170 (1984) (noting that in the early 1870s, an "Irish-Tammany axis was being forged, and fundamental to its strength was the machine's unparalleled ability to provide concern and services to immigrants already in New York and those who would arrive over the next fifty years."); EDWIN G. BURROWS & MIKE WALLACE, *GOHAM: A HISTORY OF NEW YORK TO 1898*, at 979 (1999) (describing politicians "dispensing largesse to alien immigrant voters"); EDWARD ELLIS ROBB, *THE EPIC OF NEW YORK* 416 (1966) (noting that in the 1880s, more than twice as many aliens arrived in New York City than had immigrated in any two previous decades); KENNETH D. ACKERMAN, *BOSS TWEED: THE RISE AND FALL OF THE CORRUPT POL WHO CONCEIVED THE SOUL OF MODERN NEW YORK* 20-22 (2005).

¹⁸ Academics and judges have disagreed on this question for some time. See Ronald L. Carlson & Mark S. Voepel, *Material Witness and Material Injustice*, 58 WASH. U. L. Q. 1, 5 (1980) (asserting that the power to detain witnesses existed in England from the sixteenth century); Comment, *Pretrial Detention of Witnesses*, 117 U. PA. L. REV. 700, 714-15 (1969) (asserting that magistrates are not given authority to detain witnesses by statute that merely gives magistrate authority to bind witness by recognizance).

¹⁹ See JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776)*, at 507-18 (1970).

demanded by the magistrate.²⁰ Regardless of when magistrates first acquired the authority to do so, they did not actually begin to detain witnesses for a decade after the New York legislature in 1829 made their authority to do so clear.

The 1555 English statute gave magistrates authority “to bind all such b[y] Recognizance or Obligation, as do declare any thing material to prove . . . Manslaughter or Felony against such prisoner as shall be so committed to Ward.”²¹ There appears to be no contemporary commentary on whether this statute permitted the detention of those financially unable to pay the amount of the recognizance. A nineteenth century version of Richard Burn’s treatise on the powers of magistrates interpreted this provision to permit only the detention of those who refused to be bound by recognizances.²² According to Burn’s treatise, witnesses could not be detained for an inability to find sureties for the recognizance. A recognizance essentially functioned as a contract; those willing and able to enter into the contract would be released on the recognizance regardless of their financial status. Women and children, however, could not enter into contracts and magistrates were therefore permitted to demand sureties for their recognizances.²³ Under this interpretation, then, English law permitted the detention of women and children as witnesses who were unable to find sureties, but not adult men.

Recognizances were common in colonial New York but witness detentions appear to have been unknown. Magistrates frequently required recognizances of witnesses under this 1855 statute for misdemeanors as well as felonies.²⁴ Additionally, when a prosecution was commenced by information in colonial New York, the prosecutor, by a colonial statute, was required to provide sufficient sureties for a £20 penalty for failure to prosecute the action.²⁵ Julius Goebel and Raymond Naughton in their definitive work *Law Enforcement in Colonial New York*, however, make no note of anyone in the colonial era’s being committed to jail for having insufficient funds to cover a recognizance, personally or through sureties, though they extensively cover the topic of recognizances.²⁶

Early in its statehood, New York enacted a statute very similar to the sixteenth-century English statute, permitting a magistrate to demand a recognizance of a witness in cases of “treason, misprision of treason, murder, manslaughter, or felony.”²⁷ Like the English statute, New York’s first state statute on material wit-

²⁰ See N.Y. REV. STAT., pt. 4, ch. 2., tit. 2, §§ 20-21 (1829).

²¹ 2 & 3 PHIL. & MAR. c. 10 (1555) (quoted in Comment, Cessante Ratione Legis Cessat Ipsa Lex (*The Plight of the Detained Material Witness*), 7 CATH. U. L. REV. 37, 38 n.4 (1958)).

²² RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 1013 (24th ed. 1824).

²³ See 4 BLACKSTONE’S COMMENTARIES 296-97 (Wend. ed 1862). Describing New York law, which permitted a judge to require sureties of any witness, including adult men, the editor of this American edition observed: “What a strange provision!” *Id.* at 297.

²⁴ See GOEBEL & NAUGHTON, *supra* note 19, at 509.

²⁵ See 3 COLONIAL LAWS OF NEW YORK 1008 (1894); GOEBEL & NAUGHTON, *supra* note 19, at 510.

²⁶ GOEBEL & NAUGHTON, *supra* note 19, at 507-18.

²⁷ 1787 N.Y. Laws 8.

nesses was unclear on whether the magistrate had authority to detain witnesses who lacked the means to cover the amount of the recognizance. In 1801, the legislature replaced the statute with one containing a substantially identical provision on material witness detention. The 1801 statute differed from its predecessor only in requiring the magistrate to bind witnesses against defendants committed “for any treason or felony, or for suspicion thereof.”²⁸

From 1827 to 1829, the New York legislature engaged in a revision of all of its statutes. The goal of the revision was to entirely rewrite the existing laws “with a view to placing the topics in a logical order under titles and subtitles.”²⁹ As part of this redrafting of all of the laws of New York, a new provision on the detention of material witnesses was created. It provided in relevant part:

§ 21. If it shall appear that an offence has been committed, and that there is probable cause to believe the prisoner guilty thereof, the magistrate shall bind by recognizance the prosecutor, and all the material witnesses against such prisoner, to appear and testify at the next court having cognizance of the offence, and in which the prisoner may be indicted.

§ 22. Whenever such magistrate shall be satisfied by due proof that there is good reason to believe that any such witness will not fulfil the conditions of such recognizances, unless security be required, he may order such witness to enter into a recognizance with such sureties as he shall deem meet, for his appearance at such court.³⁰

The marginal notes to the revision observed that § 21 was taken directly from the 1801 statute relating to material witnesses; the marginal notes provide no annotation for the source of § 22.³¹ The revisers seem to have been perceived, at least at the time, to be logically answering a question left open in the long history of the material witness statute: what should a magistrate do when the witness is too poor to pay the amount of the recognizance if forfeited? Section 22 answered this question by permitting, but not requiring, a magistrate to require sureties for the amount of the recognizance. Section 24 of this title then provided that a magistrate was required to commit to prison any person who refused to comply with the magistrate’s order to provide sureties for the recognizance.³² Inability to provide sure-

²⁸ 1801 N.Y. Stat. 70. This exact language was re-enacted in 1813. *See* 1813 N.Y. Stat. 104.

²⁹ BREUER, *supra* note 1. *See also* CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 131-53* (1981) (describing New York’s statutory revision).

³⁰ N.Y. REV. STAT., part 4, tit. 2, §§ 21-22 (1829).

³¹ Section 21 was not, however, taken directly from the 1801 statute. The 1801 statute permitted witnesses to be detained only in cases of “treason or felony.” 1801 N.Y. Stat. 70; 1813 N.Y. 104. Section 21 of the 1829 statute permitted witnesses to any offense to be detained. N.Y. Rev. Stat., part 4, tit. 2, § 21 (1829).

³² *Id.* at § 24.

ties would be regarded by magistrates as synonymous with refusing to provide sureties.³³

The ambiguity of the previous statutes makes it unclear whether the statutory revision gave magistrates new powers. The revision of the material witness provision appears to have attracted little attention at the time. As witness detention became more common, however, it became a matter of some controversy whether this revision was responsible for the morally problematic practice of sacrificing the liberty of the innocent for the greater good of society. Even those in the nineteenth century who supported a magistrate's power to commit witnesses acknowledged the heavy burden placed on those committed—for the supporters of the practice, it was a necessary evil; for its critics, it was just evil. And the evil was attributed to different sources.

The origins of the power of magistrates to detain witnesses was first considered in 1855. That year, Governor Myron Clark, New York's first state-wide candidate to identify himself as a Republican, asked the legislature to consider a remedy to the incarceration of innocent witnesses. The majority of an Assembly Committee appointed to consider the issue supported the abolition of witness detention and attributed the detention of witnesses to the sixteenth-century statute.³⁴ The committee's minority report, signed only by Assemblyman N. P. Staunton, however, blamed the current circumstances on the revised statute of 1829.³⁵ This same year, the *New York Times* would blame the detention of witnesses on the legislative revision of 1829.³⁶

It seems likely that partisan politics played a role in assessing the origin of the power of magistrates to detain witnesses. This story is necessarily a complex one, however, as political parties were very much in a state of flux in the late 1820s and the mid-1850s. In the late 1820s, the first American party system had collapsed, leaving various factions of Jeffersonian Republicans who would be divided again into two parties with the polarizing ascendancy of Andrew Jackson.³⁷ The New York statutory revision was largely spearheaded by an ambitious young lawyer, Benjamin F. Butler, who would become Attorney General under both Andrew Jackson and Martin Van Buren.³⁸ It is therefore not surprising that an editorial in the

³³ See Carlson & Voepel, *supra* note 18, at 5-6 (historically "[c]ourts have deemed an inability to pay as synonymous with a refusal.")

³⁴ The majority report was signed by Charles C. Leigh, John W. Stebbins, and James Rider. MAJORITY AND MINORITY OF THE SELECT COMM. ON GOVERNOR'S MESSAGE, RELATIVE TO THE IMPRISONMENT OF WITNESSES, REP., N.Y. ASSEMB. DOC. 68, at 3 (1855). (hereafter REP. ON GOV. CLARK'S MESSAGE)

³⁵ *Id.* at 8.

³⁶ *Imprisoning Witnesses*, NEW YORK TIMES, March 24, 1855, at 4.

³⁷ See MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR 2-6 (1999).

³⁸ See WILLIAM D. DRISCOLL, BENJAMIN F. BUTLER: LAWYER AND REGENCY POLITICIAN 129-72 (1987). This was not the same Benjamin F. Butler, Union General, who became known as the Beast of New Orleans for his wartime occupation of the city. The two appear to be unrelated.

New York Times, which by the late 1850s would endorse Republican candidates, attributed the source of the morally problematic detention of witnesses to the work of a prominent Jacksonian.³⁹

Somewhat more difficult to understand is the attribution of the origins of the law to the 1829 statute by N. P. Staunton, who opposed the Governor Clark's desire to end witness detention. It is also difficult to explain why the majority, supporting Governor Clark's request to reform the law, would attribute the legal origin of the detention of witnesses to an ancient statute rather than to the work of Benjamin Butler. The answer likely lies in the complexity of identifying political allies and enemies in the 1850s as third parties were beginning to emerge. Clark drew support from abolitionist and temperance Whigs and Democrats; Butler himself was a teetotaler, known for his strong religious fervor that animated his political decisions.⁴⁰ It seems likely that Clark's Democratic supporters came from the Butler wing of the Jacksonian party, making them unlikely to blame Butler for the origins of statutory authority to detain witnesses.

Political motivations throughout the nineteenth century—though not always partisan considerations—often explain the origins attributed to the power to detain witnesses. Charles Flammer, a police justice from the late 1870s through the early 1880s, blamed the 1829 statute for the origins of the power to detain witnesses. He wrote a treatise for committing magistrates in which he described the 1829 provision as “an extraordinary exercise of legislative power.”⁴¹ Flammer's critique of the legislature seems odd in light of the considerable discretion the 1829 statute gave magistrates to require (or not require) sureties. Under the statute, once a magistrate was “satisfied by due proof, that there is good reason to believe that [a] witness will not fulfil the conditions of [a] recognizance, he *may* order such witness to enter into a recognizance with such sureties as he deem” sufficient to ensure the witness' appearance.⁴² The magistrate was required to detain witnesses who did not agree to be bound by a recognizance or who did not obtain required sureties, but the magistrate appears to have had absolute discretion to determine when to require sureties. Charles Flammer, in his capacity as a police justice, exercised that discretion to require the detention of at least 159 witnesses between 1876 and 1881.⁴³ During this same period, Flammer appears to have detained witnesses as readily as his colleagues, in fact more often than most. Flammer's treatise, however, blamed the legislature of 1829, not the judiciary of the 1870s, for a practice that was increasingly coming under attack.

³⁹ *Imprisoning Witnesses*, *NEW YORK TIMES*, March 24, 1855, at 4. See also MEYER BERGER, *THE STORY OF THE NEW-YORK TIMES (1970)* (describing the political orientation of the *Times*).

⁴⁰ See DRISCOLL, *supra* note 38, at 11-13.

⁴¹ CHARLES A. FLAMMER, *THE COMMITTING MAGISTRATE: A TREATISE ON THE ARREST, EXAMINATION, BAILING AND COMMITMENT OF OFFENDERS, INCLUDING FUGITIVES FROM JUSTICE* 41 (1881).

⁴² N.Y. REV. STAT., part 4, tit. 2, § 22 (1829) (emphasis added).

⁴³ Compiled from BOARD OF POLICE JUSTICES, *ANNUAL REPORTS (1876-1881)*.

It is pretty clear, however, that the 1829 statute was not perceived by magistrates (or anyone else) in 1829 to change the law relating to material witnesses. No editorials or politicians denounced this revised statute as an unwise exercise of legislative authority. Magistrates do not appear to suddenly have begun detaining witnesses in the wake of this statute—it appears that, in New York City, they would not do so for another decade.

The earliest reference to the detention of material witnesses occurred in May 1841 when Mayor Robert H. Morris, in his annual message, objected to the detention of witnesses with criminals and pretrial detainees and recommended their detention with debtors.⁴⁴ Discussions about jails from the first half of the nineteenth century further suggest that witnesses were not a regular component of the known incarcerated population. From the end of the revolution to 1830, witnesses, to the extent they were detained, were likely kept primarily in the Bridewell, the city's primary jail constructed in 1775 with funds raised from a lottery.⁴⁵ In 1830, the Common Council relocated pretrial detainees from the Bridewell to the Bellevue Penitentiary, which then served as the city's primary jail.⁴⁶ As it made this change, the Common Council expressed concern about the type of inmates who should be housed together, but made no reference to detained witnesses. The Council noted with concern in October 1829 that "[a]t the present time, all who are imprisoned for trial, whether for great or small offenses, are committed to the Bridewell, in common with murderers, thieves, and wretches of every description."⁴⁷ The Common Council proposed in 1829 and 1830 building a new jail so that persons awaiting trial would not be held in "a building which possesses the character and all the revolting attributes of a common prison."⁴⁸ If there is injustice in treating those bound over to answer a criminal charge like those convicted of a crime, there is at least as much injustice in treating witnesses to the crimes as those convicted of the crime. The Common Council's absence of concern about detaining witnesses with those convicted suggests that witness detention did not occur frequently, if at all, and that the Council had no reason to expect witness detention to become a frequent event.⁴⁹

⁴⁴ ROBERT H. MORRIS, MAYOR'S MESSAGE, 8 ALDER. DOCS. No. 1, at 7 (1842).

⁴⁵ 6 I.N.P. STOKES, THE ICONOGRAPHY OF MANHATTAN ISLAND 756 (1998) (citing 6 MINUTES OF THE COMMON COUNCIL 449, Nov. 21, 1765) (Common Council makes plans for Bridewell); *id.* at 845 (citing N.Y. MERCURY, Feb. 7, 1774) (lottery tickets sold for Bridewell); *id.* at 847 (citing N.Y. MERCURY, Feb. 28, 1774) (describing advertisement for lottery ticket).

⁴⁶ *Id.* at 1694 (citing 19 MINUTES OF THE COMMON COUNCIL 193-95 (1830)).

⁴⁷ *Id.* at 1687 (citing N.Y. EVENING POST, October 13, 1829).

⁴⁸ *Id.* (citing 19 MINUTES OF THE COMMON COUNCIL 76-80, May 31, 1830).

⁴⁹ It is not clear when a noticeable numbers of witnesses began to be detained outside New York. Delegates to the New York Constitutional Convention in 1846 observed that witnesses were detained in other jurisdictions, suggesting not only that detentions occurred elsewhere, but that this practice was well-known. See CROSSWELL & SUTTON, *supra* note 1, at 815 (describing detention in Baltimore). In 1845, Pennsylvania Prison Association observed that witnesses were detained in Boston, though in cells larger than the cells for ordinary prisoners in the Boston City Jail. The matter-of-fact manner in which the detention of material witnesses was reported in Boston suggested that it was a common and accepted practice; the

In the late 1830s, the city of New York constructed the first prison that appears to have housed witnesses. In 1835, the Old Bridewell was in poor condition and the Bellevue Penitentiary was some distance from the downtown courts, prompting the Common Council to authorize the construction of a new detention and courtroom facility.⁵⁰ Completed in 1838, this facility was named the Halls of Justice, but was informally known as the Tombs, for the building's design had been inspired by an Egyptian tomb.⁵¹ While the city did operate two much smaller facilities to house pretrial detainees, the Tombs was the city's primary institution for this purpose and appears to have been the first to house witnesses.⁵²

During his visit to New York in 1842, Charles Dickens observed that witnesses to crimes were incarcerated in the Tombs. Dickens was given a tour of the Tombs, where he found a ten or twelve year old boy being held there as a witness against his father.⁵³ The Tombs was a general repository, holding all types of persons who encountered the criminal justice system. As the New York Prison Association described it 1848: "Whoever wishes to see in one mass the suspected, and the witnesses against them, the guilty, the poor, the diseased and the insane, may find them in these misnamed Halls of Justice."⁵⁴

different manner of detention suggests that it occurred frequently enough for a policy on witness detention to develop. *Dr. Bell's Letter*, 2 PA. J. ON PRISON DISCIPLINE 97-98 (1846).

⁵⁰ BURROWS & WALLACE, *supra* note 17, at 636.

⁵¹ See CHARLES SUTTON, *THE NEW YORK TOMBS: ITS SECRETS AND MYSTERIES* 48 (1874). The committee appointed by the New York Common Council to determine how the prison should be constructed modeled the building on an illustration of an ancient Egyptian tomb from a popular book in the early nineteenth century, *Stevens' Travels*. *Id.*

⁵² In the late 1840s, there are records indicating that witnesses were housed in these smaller facilities, the Jefferson Market and Essex Street jails. See PRISON ASS'N REPS., ASSEMB. DOC. 243, at 159 (1849).

⁵³ CHARLES DICKENS, *AMERICAN NOTES* 111 (Random House 1996). The detention of very young witnesses in the mid-nineteenth century seems to have been relatively rare, but was certainly not unknown. A Senate Select Committee on Poor Houses, Work Houses, Jails and Penitentiaries in 1857 found that throughout the state witnesses and criminals were confined in the same jail, even in the same cells, in extremely unhealthy, damp and unventilated conditions. In one case, the committee found that an eight-year-old boy was confined with two adult men, one charged with rape, the other charged with burglary. See *Report of the Senate Committee on Poor Houses, Work Houses, Jails and Penitentiaries*, ALBANY EVENING JOURNAL, Jan. 8, 1857, at 2 (also describing deplorable conditions of detained witnesses generally).

⁵⁴ PRISON ASS'N REPORTS, ASSEMBLY DOC. 243, at 160 (1848).

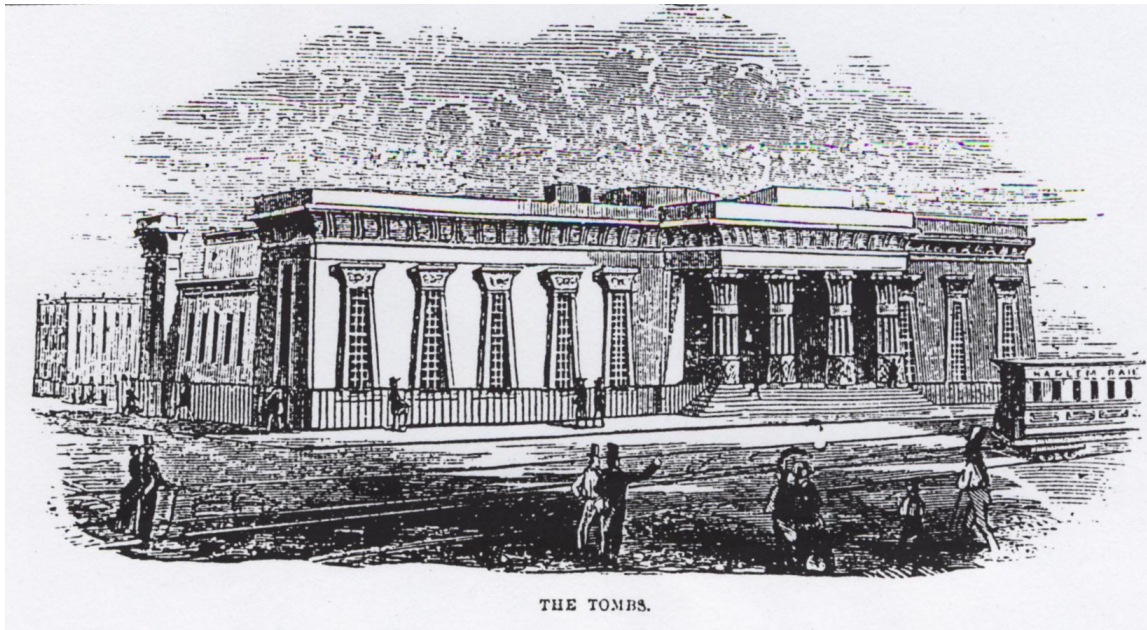


Figure One. The Tombs. Sketch appearing in Charles Sutton, *The New York Tombs* (1874)

Anecdotal evidence that witness detention first emerged as a reality in the late 1830s or early 1840s can be seen by comparing the observations of Charles Dickens, who visited New York City in 1842, with those of Alexis de Tocqueville, who visited New York City in 1831. Unlike Dickens, Tocqueville never mentioned that witnesses in America could be held to ensure their testimony. Certainly Dickens had a fascination with the suffering of those incarcerated for which Tocqueville was not known.⁵⁵ Tocqueville, however, did study the American penitentiary system in 1831.⁵⁶ Later he became a corresponding member of the New York Prison Association which, for nearly a decade beginning in 1846, made the abolition or reform of material witness detention one of its major platforms. Given his interest in the subject of prisons, it seems unlikely that such an astute observer of American society would omit a description of witness detention if it happened with any degree of frequency during his visit. In fact, the incarceration of innocent persons to assist the state in achieving the goal of successful prosecutions was dramatically contrary to the spirit of individualism Tocqueville is credited with first describing in America.⁵⁷

⁵⁵ See ALFRED TRUMBLE, *IN JAIL WITH CHARLES DICKENS* iii (1896) (“Readers of Charles Dickens must all have remarked the deep and abiding interest he took in that grim accessory to civilization, the prison.”)

⁵⁶ See GUSTAV DE BEAUMONT & ALEXIS DE TOCQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE* (1833).

⁵⁷ See HERBERT MCCLOSKEY & JOHN ZALLER, *THE AMERICAN ETHOS: PUBLIC ATTITUDES TOWARD DEMOCRACY AND CAPITALISM* 111-22 (1984) (contending that Tocqueville first described spirit of individualism in the United States). Once the detention of witnesses became a fairly common event, there

The existing evidence therefore suggests that while the power to detain witnesses may have existed since 1555—and certainly existed in New York since 1829—this power does not appear to have been exercised until some time around 1841.

III. Professional Enforcement Makes Witness Detention a Practical Reality

The emergence of witness detention—and the subsequent and significant rise in its frequency—in New York City in the nineteenth century was a function of more aggressive law enforcement activities. The city created its first professional police force in 1845. Professional 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. Some of these persons were held to ensure that convictions would not be lost because of missing testimony; most others were detained so that officers could exert leverage over them, whether they were themselves suspects or unwilling to provide evidence against suspects. Reforms throughout the mid-nineteenth century made police officers more efficient and, as a corollary, more aggressive in their tactics, increasing the number of such persons held. During this same period, legislative investigations began to attack a growing practice of holding suspects without charge until the police could obtain enough evidence to constitute probable cause for accusing the detainees of crimes. No legislative authority existed to arrest and hold a suspect without a charge but, at least since 1829, legislative authority existed to detain a witness to a crime. Not surprisingly, then, as the legislature continued to criticize the holding of suspects without charge, and as the police grew in efficiency (or aggressiveness) the number of persons held as witnesses grew substantially.

A. The Earliest Known Witnesses Detained

Witnesses began to be detained in the mid-nineteenth century before the creation of a professional police force, but these detentions were rare. Something had happened between 1830, when the Common Council was concerned about confining pretrial detainees with those convicted but was not concerned about the

was no dispute that such detentions amounted to a deprivation of individual rights in favor of the community's interests. Even many opponents of material witness detention asserted that if a societal good were served by witness detention then it would be acceptable. These opponents of the practice simply claimed that incarcerating witnesses encouraged under-reporting and was therefore harmful to society's law enforcement goals. See *Current Topics*, 18 ALB. L. J. 101, 101 (1878) ("As to the injustice worked upon the individual, it might be said that this is but part of the debt he owes to society, that he must give up his private rights for the public good: but if instead of leading to the more speedy detection and certain punishment of the offender, its influence is to fill the spectator with alarm lest he should be imprisoned as a witness, and thus lead him to conceal the fact of his knowledge, it is calculated to cover up the crime, and throw it into greater obscurity, and is not therefore for the public good."); MAJORITY OF THE SELECT COMM. ON THE GOVERNOR'S MESSAGE RELATIVE TO THE DETENTION OF WITNESSES, REP., N.Y. ASSEMB. DOC. 68, at 4 (1855) ("Your committee . . . will at once concede that if the safety of the people demand [the detention of witnesses], the individual, though at the sacrifice of property, character, and even life, must yield; the individual is nothing, the people everything, when their interests or safety come in contact.").

condition of witnesses, and the 1840s, when witness detention became a hot topic. It is not clear, however, what that was. At some point before May 1841, when Mayor Morris objected to the detention of witnesses in jails with pretrial detainees, witnesses began to be detained, but seemingly not long before. These detentions appear to have been part of an attempt by the police force (such as it was in the early 1840s) and magistrates to respond to a wave of a particular type of crime, petty thefts, specifically swindles. As the public became increasingly concerned about street swindlers, their conviction became a more pressing concern. The detention of their victims, who were often (then as now) visitors to the city, preserved testimony and secured convictions—and possibly gave officers a tool to investigate these crimes.⁵⁸ Though the characteristics of detained witnesses would soon change, the earliest witnesses detained appear to have been held solely to preserve their testimony; they largely appear to have been victims of crimes.

Crime rates sharply climbed in 1840 and 1841, which the district attorney in 1842, J.R. Whiting, attributed to a large increase in the number of petit larcenies.⁵⁹ Constables and night-watchmen, who policed the city at this point, were compensated by the reward system—when stolen or defrauded property was returned, these officers would receive a reward.⁶⁰ If constables and night-watchmen were aggressively investigating any type of crime in the early 1840s, it was most likely property crimes. A spate of property crimes likely increased public outrage to which officers were responsive, and created more victims, at least some of whom were willing to offer rewards. It is possible, though not likely, that police were using material witness detentions at this point to assist in the investigation of crimes. Mayor Morris had recognized the possibility that accomplices could be detained as witnesses, but thus far no one had reported the arrest of a person identified merely as a witness. Commission-based constables had a real incentive to creatively use existing mechanisms to solve these sorts of crimes. Detaining suspects as witnesses would have given these officers an opportunity to extract information about the location of stolen property.⁶¹

⁵⁸ Delegates to the Constitutional Convention of 1846, in discussing the problem with material witness detentions, mention only the detention of fraud victims. See discussion at notes 63-64 *infra* and accompanying text.

⁵⁹ J.R. WHITING, REP. OF THE DISTRICT ATTORNEY WITH STATISTICS OF CRIME IN THIS CITY FOR TWELVE YEARS PAST, 8 ALDER. DOCS. NO. 57, at 410 (1842). See *infra* note 84 and accompanying text.

⁶⁰ BURROWS & WALLACE, *supra* note 17, at 637.

⁶¹ See DAVID R. JOHNSON, POLICING THE URBAN UNDERWORLD: THE IMPACT OF CRIME ON THE DEVELOPMENT OF THE AMERICAN POLICE 1800-1877, at 23 (1979) (noting first complaint about “third degree” tactics during 1840 legislative investigation).

**Table One. Trials and Convictions in General and Special Sessions,
1830-1841⁶²**

Year	No. of Trials	No. of Convictions
1830	1,101	631
1831	1,208	694
1832	1,052	679
1833	1,194	609
1834	1,112	627
1835	1,004	612
1836	875	581
1837	940	600
1838	835	520
1839	1,000	569
1840	1,319	753
1841	1,479	905

Reformers in the early- to mid-1840s, however, mentioned only the detention of *victims* of fraud. Newspaper accounts in this period do not discuss the arrests of witnesses at all, much less the arrests of witnesses who seem to be suspects or persons who have motives not to be helpful. No legislative report during this period notes the arrest of persons identified as witnesses. The witnesses detained during this period seem to be people who presented themselves to magistrates—likely victims of crime—and were so unfortunate as to have been detained.

Public concern over a recent wave of petty larcenies may have created pressures to ensure convictions, particularly of a growing type of repeat offenders, swindlers. The victims of swindles were often transient, unfamiliar with the tricks

⁶² *Id.* at 416.

of the shysters of the metropolis, making their detention necessary to preserve testimony. The debates in the New York Constitutional Convention of 1846 suggest that these fraud prosecutions produced the majority of the first known detained witnesses. Robert H. Morris, the former mayor of New York who now objected to the law permitting the detention of witnesses, specifically mentioned only the emerging tendency to detain victims of the drop game, a type of swindle, as witnesses.⁶³ Indeed, it is reasonable to believe that these delegates were familiar only with the conventional use of material witness detentions. The fledgling police force had been organized only within the previous year and, to the extent it had discovered how it could use this power to obtain leverage over suspects and uncooperative citizens, the accounts of such use were likely not common.⁶⁴

Regardless of the actual motives for holding these witnesses, the number of persons detained as witnesses during this period was likely quite small. Though there were certainly critics of detaining witnesses in the early 1840s, notably two mayors of the city and the keeper of the city prison, none of the criticisms included numbers; the criticism focused on the wrongfulness of the treatment of all witnesses, not the frequency of the wrongfulness.⁶⁵ No one in the first half of the 1840s criticizing the detention of witnesses would even attempt to count the number of persons so held. And once witnesses began to be counted in the latter half of the decade, the number detained was quite low.

B. The Early Effects of a Professional Police Force on Witness Detentions

The creation of a professional police force—with greater powers and incentives to aggressively prosecute crime—increased the use of material witness detentions to solve and effectively prosecute crimes. While the number of witnesses detained after the creation of a professional police force initially remained low, reforms that increased aggressiveness of the police resulted in greater and greater numbers of witness detentions.⁶⁶ Police began to discover that material witness detentions gave them the opportunity put pressure on suspects and others to cooperate.

In 1844, Governor William C. Bouck had signed a law authorizing the creation of a professional police force in the city; the Common Council voted to create

⁶³ CROSSWELL & SUTTON, *supra* note 1, at 815. Morris had previously objected only to the detention of witnesses in the same facility with pretrial detainees. See discussion *infra* at notes 131-141 and accompanying text.

⁶⁴ Similarly, the Report of the Commissioners on Practice and Pleading, proposing a code of criminal procedure in 1849, described only one type of witness detention, the detention of victims of frauds. The Commissioners observed that the legislature had forbidden the detention of out-of-town witnesses because out-of-town victims of fraud had been held as witnesses. COMM'RS ON PRACTICE AND PLEADING, FINAL REP. – CRIMINAL CODE, N.Y. ASSEMB. DOC. 18, at 7 (1850).

⁶⁵ See ROBERT H. MORRIS, MAYOR'S MESSAGE, 8 ALDER. DOCS. 1, at 7 (1841); ROBERT H. MORRIS, MAYOR'S MESSAGE, 9 ALDER. DOCS. 4, at 27 (1842); ROBERT H. MORRIS, MAYOR'S MESSAGE, 10 ALDER. DOCS. 1, at 22 (1843); WILLIAM V. BRADY, MAYOR'S MESSAGE, 14 ALDER. DOCS. 1 (1847); FALLON, *supra* note 16, at 957.

⁶⁶ PRISON ASS'N REPORT, ASSEMB. DOC. 243, at 170 (1849).

the Municipal Police Force the following year.⁶⁷ Municipal officers had greater formal powers of arrest than their predecessors and had incentives to aggressively investigate crime that their predecessors did not. These new officers were therefore more likely than their predecessors to arrest and hold a suspect without charge until they gathered sufficient evidence to convict him or an accomplice. It is only after the creation of the Municipal Police Force that critics of material witness detentions began to count the number of persons detained.

The new police replaced the system of constables, marshals and night-watchmen that had proved insufficient to meet the demands of a rapidly growing city. Under this system, two constables were chosen by the Common Council for each of the city's seventeen wards and a total of 100 marshals were appointed by the mayor for the entire city. The constables and marshals were unsalaried; their only source of income came from rewards for recovering stolen property.⁶⁸ Watchmen received small salaries, but were also given rewards for recovered property.⁶⁹ These early officers were therefore likely to aggressively investigate only the sorts of crime that brought them financial rewards.

Legal limits—more precisely, the fear of tort suits—further capped the zeal of these early officers. Constables and marshals enjoyed an early form of qualified immunity: they could be sued for false arrest by an innocent person only if they acted frivolously or intentionally in making the arrest of an innocent person. Night-watchmen, however, not constables and marshals, made up the majority of the force and they did not enjoy this form of qualified immunity. If a night-watchman reasonably but wrongly arrested a citizen, he could be held civilly liable.⁷⁰ Roughly a thousand night-watchmen made up the bulk of the police force by the 1840s, but could arrest only for crimes committed in their presence, or when directed to arrest by a constable or marshal.⁷¹ Watchmen doubtlessly felt their powers were quite limited to arrest even the guilty and must have surely felt constrained against detaining citizens merely to investigate the possibility of crime.

Arrests were further deterred by the fact that all New York officers in the first half of the nineteenth century had other employment. An arrest would require

⁶⁷ 1844 N.Y. Laws 315; RICHARDSON, *supra* note 8, at 23-50. There had been a proposal in 1836 for the creation of a professional police force. Mayor Lawrence asked Police Justice Oliver M. Lownds to consider how the police department might be reorganized. "It won the support of Mayor Lawrence, but opponents killed it by rousing old fears of a standing army and playing on new antigovernmental sentiments, distrust of professionals, and fears that political parties might control the police." BURROWS & WALLACE, *supra* note 17, at 636.

⁶⁸ See BURROWS & WALLACE, *supra* note 17, at 637.

⁶⁹ RICHARDSON, *supra* note 8.

⁷⁰ *Id.* at 32. See also CHAIRMAN ON POLICE, WATCH AND PRISONS, COMMUNICATION, ALDER DOC. 21 (Sept. 30, 1844) (proposing that "every watchman should also be a day officer, with a marshal's power to arrest."); Davies, *supra* note 12, at 632-33 (describing liability of constables at common law for arrests supported by probable cause where no offense had in fact been committed).

⁷¹ *Id.* at 37-50.

an officer's attendance in court the following morning.⁷² These early officers therefore had a powerful disincentive against arresting even those known to be guilty, not to mention a disincentive against rigorously investigating crimes to determine if they could obtain sufficient evidence to charge a suspect.

The New York Municipal Police Force, created in 1845, had greater legal authority—and, practically speaking, greater ability and incentives—to aggressively investigate crimes. The new force's greater manpower permitted it to engage in investigative tasks with greater frequency than its predecessors. The act creating the Municipal Police Department authorized the appointment of no more than 800 patrolmen; the city employed 1,000 watchmen in the early 1840s. The new police force nevertheless had greater coverage of the New York streets than its predecessors ever had. The watchmen had been divided into two shifts, and each man was on duty only every other night. No more than 250 watchmen were on the streets at any given time, and none of these officers patrolled during the day at all. The new patrolmen spent much more time on duty than their night-watchmen predecessors. Officers had to be on duty for sixteen to eighteen hours a day and were permitted to sleep no more than four hours at a time.⁷³ Though the actual number of officers employed by the city was lower, at any given moment, more police, with more power and more organization, were covering New York's streets in 1846 than in 1843.

These new officers were given greater powers of arrest and the disincentives against exercising the powers were removed. The regulations of the new police force provided that "[e]very watchman should also be a day police officer, with a marshal's power to arrest."⁷⁴ Patrolmen who had a good-faith belief that a felony had been committed were given immunity for arrests of the innocent.⁷⁵ And these officers had no other employment. Municipal police officers were not torn between the responsibilities of making an arrest and the responsibilities of their day jobs, nor would they be susceptible to civil liability to the extent their predecessors were. With greater legal powers and no financial disincentives for arresting, municipal officers more aggressively encroached on the liberty of citizens. One manifestation of this police reform was a new civil liberty concern: the emergence of material witness detention as one of the tools policemen could use to aid in investigations.

While it was magistrates who were committing these witnesses to jails, police officers played a fundamental role in the increasing number of material witness detentions—they brought the witnesses to magistrates. Newspaper accounts reveal that the work of these new police included arresting witnesses. The *New York Times*, consistent and vehement in its opposition to detention of witnesses throughout the

⁷² See 3 STOKES, *supra* note 47, at 642-44.

⁷³ RICHARDSON, *supra* note 8, at 58.

⁷⁴ CHAIRMAN ON POLICE, WATCH AND PRISONS, COMMUNICATION, ALDER. DOC. 21, at 242 (1844).

⁷⁵ See RULES AND REGULATIONS FOR THE GENERAL GOVERNMENT OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK 35 (1848).

nineteenth century, in 1852 described a hypothetical case it claimed to be representative of the injustices worked upon material witnesses.

An emigrant arrives from Ireland *en route* to Iowa, to join his family. He has just enough money to reach them. Walking down the dock, he sees one sailor stab another mortally; [an officer] arrests the offender; a crowd collects; a policeman collars him; the Coroner is called; the emigrant becomes a witness, and with a thankful heart that he is permitted to contribute to justice his mite of information, finds his testimony reduced to writing; the verdict is wilful [*sic*] murder. He is about leaving when the polite Coroner says: "My good Sir, can you find bail in one thousand dollars to appear whenever required as a witness."

"Bail? one thousand dollars!" stammers the surprised emigrant who is without a friend or an acquaintance in the city. Of course he has none, and is forthwith committed as a witness to the Tombs, in the company with the murderer and other felons. The District Attorney, in his mercy, procures him transferred to Eldridge-Street jail. Months roll round to the next Oyer and Terminer. Dejected, sick and wanting exercise, he passes the time until court is over and his testimony in, and he is paid his fees.⁷⁶

An Assembly Committee report in 1855 similarly demonstrated that one of the tasks of the new police included bringing those identified as witnesses, forcibly if necessary, to magistrates who could detain them. The majority asserted that it was an ancient relic of a dark age of barbarism that "citizens charged with no crime and suspected of none, whose only misfortune is that they have witnessed by accident or necessity, the commission of a crime by another, should be arrested, and, unless able to procure bail, incarcerated in a loathsome jail."⁷⁷

Though the practice of detaining persons identified only as witnesses was discussed considerably more often after the creation of the Municipal Police Force than before, the actual number of persons detained in the early years of the Municipal Force was fairly low. When the New York Prison Association began in 1848 to record the number of persons detained in the jails of New York City, the number of witnesses detained was a very small percentage of the persons interacting with police in the 1840s.⁷⁸ In 1848, 66 witnesses were detained but of these, 49 were committed only for examination by a magistrate—17 were fully committed by magistrates after a preliminary examination.⁷⁹ The Association would not, in subsequent years, indicate whether detained witnesses counted had been merely held for examination or had been fully committed to jail by a magistrate. Between 1849 and 1852, the Association counted a total of 100 witnesses detained in New York City.

⁷⁶ *The Wrongs of Witnesses*, NEW YORK DAILY TIMES, Nov. 30, 1852. Charles Dickens observed the lack of exercise that detainees at the Tombs are permitted, noting that even men condemned in England are permitted exercise. DICKENS, *supra* note 53, at 110.

⁷⁷ REP. ON GOV. CLARK'S MESSAGE, *supra* note 34, at 3.

⁷⁸ PRISON ASS'N REP., ASSEMB. DOC. 243, at 170 (1849).

⁷⁹ *Id.*

This number likely reflects only the number fully detained by a magistrate as the number of witnesses identified as detained in 1849 is comparable to the number of witnesses fully committed by magistrates in 1848.

Table Two. Number of Witnesses Detained in New York City Prisons⁸⁰

Year	No. of Witness Detained
1848	66
1849	20
1850	27
1851	14
1852	39

The seeds of creative uses of material witness detentions had clearly been sown at this point. Magistrates who were committing witnesses for examination were allowing their detention until the suspect's preliminary examination. This procedure would be described in the 1850s as detention in the "discretion of the magistrate" while the case against the accused was "worked up."⁸¹ If police had identified a cooperative and material witness against the accused, probable cause would likely not be terribly difficult to establish. Police, requiring additional information to successfully charge a suspect, would have had no reason to limit their interrogations to the detained suspect. The practices in place in 1848 clearly permitted an officer to arrest a suspect and a material witness, even without sufficient evidence to charge the suspect, and detain them both in the "discretion of the magistrate." Once detained, pressure could be applied to the suspect and the witness to provide information helpful to the prosecution. It is now obvious that by the 1870s and early 1880s, the majority of those detained as witnesses would be in a class least likely to assist the prosecution: accomplices.⁸² It is not clear how early material witness detentions began to be used to obtain leverage over the uncooperative, but the mechanisms for the detentions to be so used were solidly in place in 1848.

C. Increased Efficiency Correlates with More Detained Witnesses

As the police presence in the city became more prominent, not surprisingly the number of witnesses detained increased. Reforms in 1853 made the police again

⁸⁰ PRISON ASS'N REP., N.Y. ASSEMB. DOC. 108, at 18 (1853).

⁸¹ See notes 99-101 *infra* and accompanying text.

⁸² See note 127 *infra* and accompanying text.

more aggressive in their investigation of crime. Arrests of all kinds increased substantially after the reforms of 1853 and a very sharp increase in the number of detained witnesses was observed.

When the Municipal Police was first created in 1845, city aldermen had been responsible for the appointment of officers and no uniform identified officers.⁸³ These characteristics of the early force were perceived to permit the establishment of a professional police force in a democratic society.⁸⁴ The new professional police were responsive to the people through local elected representatives and the quasi-military character of full-time officers was not visibly obvious. Abuses from constables and night-watchmen had not been feared because these officers were the people, not the guardians of the people. Constables and watchmen further lacked the manpower to police the city in ways contrary to public opinion. Enforcement depended on public consensus; constables were often forced to recruit citizens to assist them in making arrests.⁸⁵

This structure had its drawbacks, however, if the goal of the new professional police was aggressive investigation and prosecution of crime. Leaving the appointment of officers to the aldermen elected to represent the ward patrolled allowed the police to retain some of their republican character, but this interfered with the establishment of an efficient chain of command. Officers would seek the favor of aldermen in addition to, or in lieu of, their superiors; seemingly officers would be more likely to draw negative attention from aldermen for action rather than inaction. Complaints about questionable arrests would have produced an obvious complainant; there is no obvious victim of an officer's decision to forego an arrest.

In 1853, the state legislature reformed the fledgling police force, changing the command structure in a way that was heralded by its supporters as improving the efficiency of the force.⁸⁶ The police came under the command of a police board that consisted of the mayor, the recorder, and the city judge. The reforms made these officials ultimately responsible for the appointment and tenure of all police officers. Officers for the first time had to wear uniforms, which the police board provided.⁸⁷ Contemporaries contended that the uniforms led to a pride in the office,

⁸³ See RICHARDSON, *supra* note 8, at 64; JOHNSON, *supra* note 61, at 26.

⁸⁴ See JOHNSON, *supra* note 61, at 14.

⁸⁵ See KRAMER, *supra* note 14, at 26 (describing dependence of early law enforcement on public will). Even after the Municipal Force was created, citizens could be required by officers to assist with arrests; failure to do so was a misdemeanor. CITY OF NEW YORK, RULES AND REGULATIONS FOR THE GOVERNMENT OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK at 30, § 76 (1848) (hereafter POLICE REGS.).

⁸⁶ See JACOB A. WESTERVELT, MAYOR'S MESSAGE, ALDER. DOC. 1, at 11-12 (1854).

⁸⁷ See RICHARDSON, *supra* note 8, at 63.

which improved the work ethic of officers, but the uniform also clearly identified police officers, making it harder for them to shirk their duty.⁸⁸

The reforms were implemented midway through 1853; the number of persons detained in the city's jails increased somewhat from 1852 to 1853 and substantially from 1853 to 1854. With increased police activity came a significant increase in the number of witnesses detained. Four times more witnesses were detained in 1853 and 1854 than were detained in the preceding two years.

Table Three. Witness Detentions, Property Crime Detentions and Overall Arrests 1848-1854⁸⁹

Year	Witnesses Detained	Robbery	Burglary	Petit Larceny	Grand Larceny	Total Arrests
1848	66	36	98	2,029	455	n/a
1849	20	43	149	1,955	373	n/a
1850	27	46	245	2,940	660	n/a
1851	14	34	199	2,860	578	36,224
1852	39	65	221	2,977	631	36,258
1853	126	75	211	3,216	690	39,786
1854	110	187	274	6,630	1,113	52,719

Interestingly, New York experienced a sharp rise in the number of arrests for a particular type of crime, larceny, especially petty larceny, between 1853 and 1854, during which time the number of witness detentions was growing sharply. A similar pattern had occurred in 1840 and 1841, the annual number of petit larceny cases dramatically increased contemporaneously with the identification of the first known witness detentions.⁹⁰ Though officers were salaried, they could still receive rewards for stolen property, making them most likely to aggressively investigate property crimes.⁹¹ It is therefore quite possible that the increase in witness deten-

⁸⁸ See WILBUR R. MILLER, *COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON, 1830-1870*, at 36 (2d ed. 1997).

⁸⁹ POLICE ASS'N REP., N.Y. ASSEMB. DOC. 108 at 18 (1853); POLICE ASS'N REP., N.Y. ASSEMB. DOC. 149, at 31, 33 (1855).

⁹⁰ See discussion at notes 59-61 *supra* and accompanying text.

⁹¹ POLICE REGS., *supra* note 85, at 9, § 15.

tion was related to police department's aggressive prosecution of larceny. It is, however, quite clear that increased police action correlated with an increase in the number of witnesses detained—a correlation that would continue with the police reforms of 1857 and 1870.

D. Police Presence and Witness Detention After Legislative Investigation and Reform

Police reforms, better accommodations for detained witnesses, and legislative criticism of holding suspects without charge all combined in the mid- to late-1850s to increase the number of detained witnesses. In 1855 and 1856, the legislature conducted hearings into the practices of the Municipal Police and raised objection to, among other things, the detention of suspects without charge while officers “worked up the case.”⁹² New York law contained no provision for detaining suspects without a charge; identifying these detainees as witnesses allowed the police to follow legislatively authorized procedures. In 1857, the legislature gave the governor the power to appoint the police board governing a new police force, named the Metropolitan Police Force, with jurisdiction over Brooklyn as well as New York City.⁹³ With a force initially the same size as the Municipal Police, the new Metropolitan Police boasted increased efficiency (more arrests) with this reorganization. It is certainly reasonable to assume that the more aggressive tactics that produced more arrests with similar manpower led to either the increased detention of innocent persons to prove charges or detention of suspects on inadequate suspicion. Further, officers after 1857 would have been more willing to arrest, and magistrates more willing to commit, persons identified only as witnesses as the legislature provided for their housing separate from pretrial detainees.

Testimony during a legislative investigation of the Municipal Police Force in 1855 and 1856 revealed that a common practice of police officers was to hold a suspect without adequate evidence to support a criminal charge while officers gathered that evidence. Two police justices testified that they had temporarily committed arrested suspects “for examination,” meaning that they would be held pending a preliminary examination, while officers investigated the cases.⁹⁴ Both justices testified that they were aware of witnesses being held without probable cause for as much as a week; one of the justices testified that such detentions of three to four weeks were not unknown.⁹⁵ George W. Walling, a then-captain of the Eighteenth Ward, testified that he had on various occasions sought the permission

⁹² See RICHARDSON, *supra* note 8, at 60-61.

⁹³ See LEO HERSHKOWITZ, *TWEED'S NEW YORK: ANOTHER LOOK* 57 (1978) (describing this reform as “the brain child of District Attorney A. Oakey Hall.”).

⁹⁴ JOINT COMM. ON POLICE MATTERS IN THE CITY AND COUNTY OF NEW YORK, AND COUNTY OF KINGS, REP., N.Y. SEN. DOC. 97, at 15, 23, 24, 34 (1856).

⁹⁵ *Id.* at 15, 34.

of the mayor, who had the authority of a magistrate, “to keep [suspects detained] until the case was worked up.”⁹⁶

The frequency and common acceptance of this process is demonstrated by the common use of some variation of the phrase “working up a case.” Both Captain Walling and Police Justice Pearcey used this phrase without first explaining what it meant.⁹⁷ One of the legislators questioning Captain Walling asserted that such detentions were contrary to the regulations governing police conduct which required that those arrested be immediately taken before a committing magistrate to be committed or released.⁹⁸ The Commissioners on Pleading and Practice in 1855 similarly concluded that such detentions were unlawful. The Commissioners questioned the legitimacy of a magistrate’s power to grant an officer’s request to detain a person without adequate suspicion to support a charge.

Cases have existed, where the defendant, after a long detention, in what is termed the *discretion* of the magistrate, has been discharged, for want of proof sufficient to hold him; or when he could no longer be held, has been committed as a vagrant, as the only device by which time could be obtained for procuring testimony against him.

The Commissioners do not, in these remarks, intend to undervalue the importance of great vigilance on the part of public officers, in the detection and prosecution of crime; but they are entirely at a loss to perceive the justice of a system, by the practical operation of which, the liberty of a citizen, be who he may, is to be placed entirely at the discretion of a magistrate.⁹⁹

The criticisms of detaining an individual in the discretion of the magistrate put pressure on police to find a different mechanism to hold persons whom they lacked adequate grounds to charge. Detaining suspects as witnesses avoided using this criticized process and allowed the police to use a mechanism specifically authorized by the legislature.¹⁰⁰

⁹⁶ *Id.* at 92.

⁹⁷ *Id.* at 15, 92.

⁹⁸ *Id.* at 92. See POLICE REGS., *supra* note 85, at 8, § 12 (1848) (“All persons who shall be arrested during the time the Police Courts shall be directed to be open, shall be taken *immediately* to the Police Court in the Police district to which the policeman who may make the arrest shall be attached, unless otherwise ordered by the Mayor or Chief of Police.”) (emphasis added). This rule remained in place under the Metropolitan Police. See RULES AND REGULATIONS FOR THE GOVERNMENT OF THE METROPOLITAN POLICE 91, § 15, ASSEMB. DOC 80 (1860).

⁹⁹ SELECT COMM. ON CODE OF CRIM. PRO., ASSEMB. DOC. 150, at 94 (emphasis in original).

¹⁰⁰ Alan Dershowitz has similarly described a “balloon theory” of detention. As one mechanism of detaining dangerous citizens becomes more difficult to use, another mechanism will be used. Dershowitz asserts that “if two countries are experiencing similar crime problems in a similar socio-political context, and if one of those countries enacts a series of protection which has the effect of freeing more guilty persons . . . it should follow that this country will perceive a need for informal ‘preventive’ devices and will develop them.” Alan M. Dershowitz, *Origins of Preventive Confinement in Anglo-American Law – Part I, The English Experience*, 43 U. CIN. L. REV. 1, 58 (1974). Detentions for the purpose of investigation also appear to follow the balloon theory. In New York, the air flowed from informal to formal methods of

Detentions in the discretion of magistrates did continue after the creation of the Metropolitan Police in 1857, and they continued to face legislative criticism. Police Superintendent John A. Kennedy, during a legislative investigation of the police force in 1860, testified that he knew of no law authorizing such detentions, but that they were “nothing new” and had “always been done.”¹⁰¹ Legislators, in these mid-nineteenth century investigations of the New York police, however, never criticized the police for using the statutorily-authorized use of material witness detention. Criticisms were always directed at the law that enabled material witness detentions. The legislature therefore created a real incentive for officers to identify suspects as witnesses, at least until sufficient evidence existed to charge them.

As legislative pressure encouraged police to use the mechanism of witness detention more often, the police force was becoming more aggressive in its investigative techniques. The first President of the Metropolitan Board of Police, T. B. Stillman, noted a marked increase in the number of burglary arrests made by the new force. According to his calculations, the Metropolitan Police arrested nearly twice as many suspected burglars per year as their predecessors, during a period when the size of the force remained relatively constant. Stillman claimed that it was the improved efficiency of the new police force, rather than a spate of burglaries, that accounted for these markedly higher numbers.¹⁰²

Table Four. Metropolitan Police Board’s Demonstration of Increased Efficiency¹⁰³

Time Period	No. of Burglary Arrests
1851-1852	249
1853-1854	277
1855-1856	315
1857-1858	544
1858-1859	627

detention. Material witness detentions increased in New York as the legislature criticized the informal procedure of detaining suspects on the discretion of a magistrate, a mechanism never authorized by the legislature.

¹⁰¹ See MILLER, *supra* note 88, at 61.

¹⁰² BOARD OF METROPOLITAN POLICE, ANNUAL REPORT, N.Y. ASSEMB. DOC. 80, at 12 (1860).

¹⁰³ *Id.*

Much like in 1853, the reorganization of the command structure, not more manpower, accounted for more aggressive policing. The Metropolitan Police would acquire more manpower than their predecessors, but not until 1860. In 1855, the New York Municipal Police had just over 1,200 officers; the Metropolitan Police employed approximately 1,300 officers in 1858, 1,700 officers in 1860, and 2,000 officers in 1861, a number which would remain roughly constant throughout the decade.¹⁰⁴ And more aggressive policing under the new Metropolitan Police, along with legislative criticism of detaining suspects without charge, was quite predictably accompanied by more arrests and detentions of those identified only as witnesses.

¹⁰⁴ RICHARDSON, *supra* note 8, at 51; METRO. POLICE REPORT, ASSEMB. DOC. 80, at 4 (1859); METRO. POLICE REPORT, ASSEMB. DOC. 27, at 4 (1861); METRO. POLICE REPORT, ASSEMB. DOC. 14, at 3 (1862).

**Table Five. Witnesses Detained Compared with
Number of Arrests for Non-Violent Crime¹⁰⁵**

Year	Witnesses Detained	Robbery	Burglary	Petit Larceny	Grand Larceny
1859	409	230	523	4,535	1,305
1860	380 ¹⁰⁶	112	458	3,946	1,205
1861	376	32	383	4,187	1,003
1862	260	68	242	3,856	863
1863	266	n/a	267	3,497	1,553
1864	158	136	213	4,866	1,641
1865	388	115	294	5,241	2,621
1866	299	134	483	5,296	2,429
1867	249	131	425	4,785	2,128

The New York legislature in 1857 saw a connection between reforms designed to increase police efficiency and the detention of material witnesses, as it appeared to have seen this connection in 1844.¹⁰⁷ Reformers had for years objected to the detention of witnesses with those awaiting trial and those convicted of crimes. Reforms, however, providing for separate detention of witnesses were not enacted until the legislature created the Metropolitan Police Department.

The police reform of 1857 was passed only with a last minute addition of a provision improving the lot of material witnesses. The legislature of 1857 had debated police reform bills since its session began. The injustice of detaining material witnesses had been raised in a report of a Senate committee on jails and penitentiaries.

¹⁰⁵ Compiled from METRO. POLICE REPS. 1860-68. Though the Metropolitan Police had jurisdiction over New York City and Brooklyn, the numbers provided here are solely for the city of New York, so that a better comparison may be made with the numbers for the Municipal Police.

¹⁰⁶ This number is taken from a table recapitulating the number of witnesses held in the House of Detention between 1858 to 1871. 1 ANNUAL REPORT OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK 43 (1871). The numbers in this table vary from the numbers provided for the same years in the Annual Reports of the Metropolitan Police and therefore seem less trustworthy. The Metropolitan Police did not, however, include the number of witnesses detained in 1860 in its annual report for that year.

¹⁰⁷ See notes 67-68 *supra* and accompanying text.

ries, but was not a part of the discussion of the police bill—at least not until just before the bill passed.¹⁰⁸ A then-current draft of the bill entitled, “An Act to Create the Metropolitan Police” was published in the *Times* on April 11, 1857 and contained no reference to material witnesses. The act passed on April 15; the insertion of a very significant section evaded the attention of the press that had been very interested in reforming the law relating to detaining witnesses.¹⁰⁹ The New York legislature, in this provision, required the city of New York to build a separate facility for the detention of witnesses, the House of Detention for Witnesses. Significantly, it included this provision in a bill dealing with the creation of the police force. Beginning in the nineteenth century, state constitutions, including New York’s, required legislatures to limit the matters covered by a bill to a single subject which is covered by the bill’s title.¹¹⁰ The last minute insertion of this provision implies that it answered a lingering concern that at least some legislators had about the effect of the new police structure.

More aggressive policing surely increased the number of witnesses detained, but the construction of the House of Detention for Witnesses itself also surely played a role in increasing the number. New York Mayor Robert Morris had postulated in 1842 that detention of witnesses with the general prison population “induce[d] the magisterial authorities, from humanity, frequently to take slight, if not nominal bail for the attendance of witnesses.”¹¹¹ Better accommodations for witnesses doubtlessly had the opposite effect. Indeed, the *New York Times* suggested in 1859 that, for many detained in the House, the conditions in the House were “luxurious.” The *Times* did recognize, however, that the beds and bedding were “not such as people in independent circumstances usually purchase,” though they were “clean and comfortable.”¹¹² The House, which would occupy three different locations between 1857 and 1883, would vary in comfort throughout this time. Just before the legislature forbade the detention of witnesses who were not also suspected of crimes, the House of Detention was in terrible shape—a grand jury visited the facility in 1874 and found it unfit for human habitation.¹¹³ Even

¹⁰⁸ *Report of the Senate Committee on Poor Houses, Work Houses, Jails, and Penitentiaries*, ALBANY EVENING JOURNAL, Jan. 8, 1857, at 2.

¹⁰⁹ Oddly, the *Times* would observe in 1859 that, of the provisions of the Metropolitan Police Act, the provision for better treatment of witnesses “met with early and general approval.” *A Visit to the White-Street House of Detention*, NEW YORK TIMES, Oct. 4, 1859, at 8. The provision was added at some point between April 11 and April 15, 1857 when the bill was ultimately passed. The *Times*’ account is either simply incorrect or the legislature had approved of this provision as part of some other bill, which was added to the police bill at the eleventh hour.

¹¹⁰ New York’s Constitution of 1846 provided that “[n]o private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title.” N.Y. Const., art. 2, § 16 (1846). For a description of the nineteenth century origins of similar provisions in many state constitutions, see Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth in Legislation Amendment*, 1999 UTAH L. REV. 957, 965-67.

¹¹¹ ROBERT H. MORRIS, MAYOR’S MESSAGE, 9 ALDER. DOC. 4, at 27 (1843).

¹¹² *A Visit to the House of Detention*, NEW YORK TIMES, Oct. 4, 1859, at 8.

¹¹³ In 1874, a state grand jury in New York City inspected the condition of various public facilities including the Bellevue Hospital, the County Jail, the City Jail, the Police Headquarters, and the House of Detention for Witnesses. The grand jury found that the ventilation system in several of the dormitories of

when the House was in poor condition, however, it was likely better than the conditions to be found in the Tombs or any of the other facilities in New York City where pretrial detainees were held. Magistrates were likely more willing to put witnesses in a facility designed to accommodate them, regardless of its present condition, than they were to commit witnesses to the city jail.¹¹⁴

The legislature nevertheless appeared to have rightly seen a connection between the increased policing and the detention of witnesses. The legislature was not, however, savvy about the sort of people who would be held as witnesses. The creation of a House of Detention for witnesses alone, however, suggests that the legislature envisioned those detained to be innocent observers of crime, held to preserve their trial testimony, rather than suspects against whom sufficient evidence to charge was lacking. Nothing in the act creating the new police force prevented magistrates from committing witnesses for examination while Metropolitan officers sought to gather evidence, even though it had previously been concerned about this practice.

The records kept from 1861 to 1867 reveal that those detained as witnesses were detained precisely because officers sought a mechanism to temporarily hold them, not to preserve testimony. The bulk of witnesses simply were not detained long enough for their detentions to have been explained by a desire to preserve their testimony at trial—or even before the grand jury. For each of these years, the overwhelming majority of witnesses were held for ten days or less. Most cases could not have done to trial, or even before a grand jury, in that period of time.¹¹⁵

the House was defective. In one of the dormitories, the grand jury found that “the atmosphere was so very impure, owing, as it is understood, to the imperfect condition of the waste pipes and traps, that it was by us considered utterly unfit for the habitation of any human being.” *Local Miscellany. Grand Jury Presentments*, NEW YORK TIMES, Jan. 4, 1874, at 8.

¹¹⁴ See OLIVER L. BARBOUR, PRACTICAL TREATISE ON THE JURISDICTION, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE IN THE STATE OF NEW YORK IN CRIMINAL CASES 430 (1841) (“an indictment lies against [a magistrate], where, with the intent to pervert the course of law and justice, he discharges an offender brought before him, without requiring sufficient sureties for his appearance at a criminal court, to answer the charge.”) (citing *People v. Coon*, 15 Wend. 277 (N.Y. 1836)).

¹¹⁵ Some cases involving detained witnesses do appear to have proceeded all the way to trial in a week. The *New York Times* described the detention of a witness for a week before her trial in Special Sessions. Even this detention, however, was of a person potentially believed to be a suspect. The defendant was acquitted as the court could not determine whether the defendant or the detained witness had stolen the sheet. The *Times* further noted that most defendants, especially those with lawyers, when bound over for trial, elected to be tried in the Court of General Sessions, involving a considerably longer pretrial period. *The Wrongs of Witnesses*, NEW YORK TIMES, Oct. 27, 1877. The Court of Special Sessions, however, had jurisdiction over the least serious crimes in New York; more serious crimes would have been heard in more time-consuming courts. See JOHN H. COLBY, A PRACTICAL TREATISE UPON THE CRIMINAL LAW AND PRACTICE IN THE STATE OF NEW YORK 30-35 (1868).

**Table Six. Length of Incarceration in
House of Detention for Witnesses by Year¹¹⁶**

	1-5 Days	5-10 Days	10-20 Days	20-30 Days	1-2 Months	2-3 Months	Over 3 Months	Total
1861	136	65	59	33	34	34	25	386
1862	109	49	34	29	40	5	3	269
1863	115	42	49	21	25	16	5	273
1864	53	30	33	16	22	8	3	165
1865	159	68	66	39	44	21	13	410
1866	125	62	48	23	29	5	10	302
1867	122	41	34	26	27	9	4	263

Very detailed records kept by the Metropolitan Police from 1861 permit further generalizations about how material witness detentions were being used. The police appear to have been detaining persons without charge as part of the investigation of more serious crimes, as a modern observer would expect. Elimination of rewards under the Metropolitan Police left officers most concerned with the investigation of offenses of highest priority to their supervisors, rather than those with the possibility of financial gain.¹¹⁷ The reports filed by the Metropolitan Police with the legislature reveal that the correlation between the number of witnesses detained and the number of suspects arrested and charged with a crime was highest for murder, rape, felony assault, and battery and grand larceny. Predictably, the ratio of witnesses detained to suspects arrests was one order of magnitude higher for grand larceny than petit larceny; there was a similar relationship between felony assault and battery and ordinary assault and battery. It would tend to take more serious cases longer to get to trial than less serious cases.¹¹⁸ In these more se-

¹¹⁶ Compiled from PRISON ASS'N REPORTS 1862-1868.

¹¹⁷ See RULES AND REGULATIONS FOR THE GOVERNMENT OF THE METROPOLITAN POLICE 93, § 34, ASSEMB. DOC 80 (1861).

¹¹⁸ Serious cases could not be tried in the Court of Special Sessions, which had only jurisdiction to hear misdemeanor cases. See JOHN H. COLBY, A PRACTICAL TREATISE UPON THE CRIMINAL LAW AND PRACTICE OF THE STATE OF NEW YORK 30-35 (1868). More serious cases therefore necessarily required the lengthier process of the Court of General Sessions or the Court of Oyer and Terminer. See note 115 *supra* and accompanying text. Further, the prosecution would logically take longer to prepare more serious cases as the societal cost of an acquittal is considerably greater than the societal cost of an acquittal in a trivial case.

rious cases, brief week-long detentions could have not have preserved testimony until trial.

Table Seven. Witness Detentions and Arrests of Charged Suspects by Crime 1861-1869¹¹⁹

	1861	1862	1863	1864	1865	1866	1867	1868	1869
Assault & Battery	60	31	10	12	27	18	32	27	2
Arrests	9489	8226	7303	6591	7774	7222	6929	6819	6799
Burglary	7	1	9	4	4	9	7	10	2
Arrests	383	242	267	213	294	483	425	630	602
Disorderly House	87	47	20	9	2	2	13	3	2
Arrests	224	216	150	231	342	205	367	298	227
Felony A & B	32	--	9	12	13	7	2	--	11
Arrests	394	312	379	510	600	712	535	712	875
Grand Larceny	30	20	23	22	83	41	21	38	15
Arrests	1003	863	1553	1641	2621	2429	2128	2413	2122
Murder	47	24	16	8	6	10	4	5	3
Arrests	47	58	7	53	69	38	59	78	57
Petit Larceny	41	23	18	5	32	44	28	32	42
Arrests	4187	3856	3497	4866	5241	5296	4785	4913	4909
Rape	5	10	7	1	6	9	2	3	9
Arrests	30	16	21	34	78	--	--	--	--
Robbery	10	6	4	1	32	18	14	7	17
Arrests	100	30	--	136	115	134	131	132	217
Unknown	--	47	144	72	178	97	76	85	103
Total Witnesses	376	260	266	158	388	299	249	264	246
Total Arrests	71130	82072	61888	54751	68873	75630	80532	78451	72984

¹¹⁹ Compiled from METRO. POLICE REPORTS 1861-1869.

The creative use of material witness detentions was not always for benevolent purpose of facilitating criminal investigations. The high correlation between the number of witnesses detained and the number of suspects arrested and charged in rape cases is somewhat disturbing. It seems likely that these “witnesses” were often victims. Seldom, it seems, would there be sufficient evidence to support identifying an alleged assailant as a witness but insufficient evidence to charge him with a crime. Other than the suspect, the only witness in most cases would be the victim. If a suspect could be identified, it seems likely there would be sufficient evidence to charge him. In 1873, the *City Record* began to list the names of witnesses detained and the offenses to which they were witnesses. From 1873 to 1882, 40 women and three men were detained as witnesses to the crime of rape or attempted rape.¹²⁰ The conclusion seems inescapable that these witnesses were victims. And

¹²⁰ The following is a list of the women detained in the House of Detention as witnesses to rape and the period of their detention from 1873 to 1882. Citations are to the *City Record*, listing the volume, page number and date.

Katie Cook	Dec. 31, 1873 to Jan. 1874	Vol. II, p. 168, Feb. 11, 1874
Mary O'Brien	Jan. 24-27, 1874	Vol. II, p. 503, May 9, 1874
Emma Voight	May 13 to June 4, 1874	Vol. II, p. 897, Aug. 12, 1874
Lena Beyer	Sept. 13-24, 1874	Vol. II, p. 1336, Nov. 14, 1874
Katie Mohn	Dec. 15, 1874 to Jan. 12, 1875	Vol. III, p. 305, Feb. 16, 1875
Lizzie Fagan	Dec. 21-29, 1874	Vol. III, p. 305, Feb. 16, 1875
Mary Jane Still	Dec. 24-31, 1874	Vol. III, p. 305, Feb. 16, 1875
Mary Rogers	Dec. 26, 1874 - ?	Vol. III, p. 305, Feb. 16, 1875
Mary Jane Goggins	April 28 to June 7, 1875	Vol. III, p. 1266, Aug. 5, 1875
Louisa Merritt	Aug. 25 to Sept. 8, 1875	Vol. III, p. 1864, Nov. 12, 1875
Hannah Killeen	Aug. 24 to Oct. 1, 1875	Vol. III, p. 286, Feb. 16, 1875
Louisa Gorman	Sept. 13 to Nov. 12, 1875	Vol. III, p. 286, Feb. 16, 1875
Maggie Igoe	Aug. 4, 1875 to March 2, 1876	Vol. IV, p. 644, May 2, 1875
Christine Wilson	Jan. 12 to Feb. 25, 1876	Vol. IV, p. 644, May 2, 1875
Maggie Walsh	April 15 to May 2, 1876	Vol. IV, p. 1318, Sept. 4, 1876
Mary Park	April 20 to May 2, 1876	Vol. IV, p. 1318, Sept. 4, 1876
Lizzie Saunders	May 6-10, 1876	Vol. IV, p. 1319, Sept. 4, 1876
Margaret Smith	June 25-27, 1876	Vol. IV, p. 1319, Sept. 4, 1876
Minnie Selig	July 7-14, 1876	Vol. IV, p. 1573, Oct. 27, 1876
Bridgit Garrity	Aug. 18 to Sept. 12, 1876	Vol. IV, p. 1573, Oct. 27, 1876
Margaret Ryan	Sept. 18-20, 1876	Vol. IV, p. 1573, Oct. 27, 1876
Elizabeth Garrity	Nov. 1, 1876 to ?	Vol. V, p. 664, May 5, 1877
Mary E. Wilson	March 27 to April 12, 1877	Vol. V, p. 1080, July 31, 1877
Amanda F. Arenas	Sept. 10-13, 1877	Vol. V, p. 1612, Nov. 15, 1877
Eliza Hope	Feb. 12-15, 1878	Vol. VI, p. 635, May 7, 1878
Ada Page	Sept. 4-6, 1878	Vol. VI, p. 1725, Nov. 29, 1878
Sarah Boyle	March 7-9, 1879	Vol. VII, p. 1180, May 9, 1879
Anna Ditman	May 7-19, 1879	Vol. VII, p. 1180, Aug. 1, 1879
Catherine Quinn	May 30 to June 18, 1880	Vol. VIII, p. 1396, Aug. 18, 1880
Alice Bolan	Dec. 9, 1880 to Jan. 13, 1881	Vol. IX, p. 820, May 13, 1881
Anna Meyers	Feb. 4-12, 1881	Vol. IX, p. 1374, Aug. 8, 1881
Mary Callahan	March 29 to April 6, 1881	Vol. IX, p. 1374, Aug. 8, 1881
Margaret Donnelly	May 10-17, 1881	Vol. IX, p. 1374, Aug. 8, 1881
Louisa Kempt	May 17-24, 1881	Vol. IX, p. 1374, Aug. 8, 1881
Teresa Meyers	May 17-24, 1881	Vol. IX, p. 1374, Aug. 8, 1881
Sarah McClusky	May 17-25, 1881	Vol. IX, p. 1374, Aug. 8, 1881
Elizabeth Seward	Jan. 10-24, 1882	Vol. X, p. 848, May 5, 1882
Rose Lyman	Jan. 29 to May 3, 1882	Vol. X, p. 1462, Aug. 5, 1882

again, the use of material witness detention seems to have been for some purpose other than preserving trial testimony. Here, it appears to have been used to discourage rape charges—or, stated another way, discouraging false rape claims by imposing a substantial burden on those who would bring rape charges.¹²¹ This is a poignant example of how the material witness statute worked the greatest injustice when it was used to detain those who were truly innocent witnesses or victims—presumably the very group the drafters of the statute intended to permit to be detained.

The Municipal Police had not kept records of the types of crimes for which it detained witnesses. It is therefore difficult to compare the way in which material witness detentions were changing by crime, however it is clear that witness detention was increasingly becoming an investigative tool used by the New York Police Department. The Metropolitan Police, during its first decade, detained more than two-fold the number of witnesses the Municipal Police annually detained, though the total number of arrests under the Metropolitan Police increased less than fifty percent over the number of arrests made by the Municipal Police. This increase in witness detentions was attracting attention. Newspaper reports of witnesses being arrested became more and more common in the 1860s and 1870s as the number of witnesses grew—but increasingly, these arrests were of persons whom the police could have reasonably suspected of criminal activity.¹²² As witness detention became more frequent, its critics would galvanize and abolish it. The police would ultimately destroy the tool they were apparently finding increasingly useful.

E. Witness Detention Increases After 1870 Police Reorganization

The city government regained control over its police force in 1870. The legislature gave the mayor alone the power to appoint the police board.¹²³ Under the

Mary Selier	Sept. 15 to Oct. 23, 1882	Vol. XI, p. 244, Feb. 3, 1883
Mary McGough	Nov. 22 to Dec. 15, 1882	Vol. XI, p. 244, Feb. 3, 1883

The list of men detained during this period as witnesses to rape during this time obviously appears less striking in its length.

William H. Horton	Dec. 26, 1874 to ?	Vol. III, p. 305, Feb. 16, 1875
Michael Moran	Aug. 27 to Sept. 25, 1878	Vol. VI, p. 1724, Nov. 29, 1878
Robert Armstrong	Jan. 21 to March 9, 1883	Vol. XI, p. 960, May 10, 1883

¹²¹ Certainly nineteenth and twentieth century jurisprudence and legal thinkers were not particularly trusting of those who alleged rape. Dean Wigmore, in his famed treatise on evidence, asserted that women who alleged rape should be required to undergo a psychiatric evaluation to guard against the fear of a false charge. WIGMORE, EVIDENCE § 924a (Chadbourn rev. 1976).

¹²² See e.g., *Inquest by Coroner Collins on the Body of Henry Lazarus: Bernard Fiery, The Murderer, Committed to the Tombs, and the Witnesses Sent to the House of Detention*, NEW YORK TIMES, Jan. 5, 1865, at 8; *Court of Special Sessions (Before Justices Kelly and Dowling)*, NEW YORK TIMES, July 30, 1865, at 8; *The Stokes Case – Arrest of Three Principal Witnesses*, NEW YORK TIMES, June 14, 1873, at 5; *Desperate Stabbing Affray*, NEW YORK TIMES, Dec. 3, 1873, at 6; *Coroner's Cases*, NEW YORK TIMES, July 19, 1874, at 8; *Court Notes*, NEW YORK TIMES, Sept. 6, 1877, at 3; *Woolf Adams Murdered*, NEW YORK TIMES, Sept. 20, 1878, at 8; *Lottery Dealers Arrested*, NEW YORK TIMES, Feb 15, 1880, at 12.

¹²³ See RICHARDSON, *supra* note 8, at 165-245.

new police board, the number of persons detained as witnesses in the 1870s would nearly double the number of persons so detained in the 1860s. From 1861 to 1869, a total of 2,506 persons had been held in the House of Detention as witnesses to state crimes; from 1871-1879, 4,095 persons were so held; and from 1874-1882, the final years in the nineteenth century during which witnesses could be detained, 4,512 witnesses were detained. During the 1870s the total number of arrests by the police increased, but not nearly at the rate that material witness detentions were increasing. The police were increasingly relying on these detentions as investigative tools.

Table Eight. Witness Detentions and Overall Arrests 1871-1882¹²⁴

	Witnesses Detained	Total Days Witnesses Detained	Average Length of Detention	Total Number of Arrests
1871	283	Not recorded	Not recorded	75,092
1872	282	Not recorded	Not recorded	84,514
1873	286 ¹²⁵	Not recorded	Not recorded	63,510
1874	449	7286.66	22.63	92,112
1875	658	9707.67	14.75	91,363
1876	668	7051.33	10.56	92,830
1877	559	6535	11.69	88,239
1878	462	4165	9.02	76,484
1879	448	5108.67	11.04	66,703
1880	455	5212.33	11.46	71,540
1881	405	4288.67	10.59	69,631
1882	408	5012	12.28	67,729
1883	228	2646.33	11.61	70,124
1884	286	3311.66	11.58	70,254
1885	328	5135.67	15.66	74,324

¹²⁴ The numbers for 1871 and 1872 were compiled from the *Annual Report of the Police Department of the City of New York*. 1871: Vol. 1, 38-42; 1872: Vol. 2, 35-40. The numbers for the remaining years were compiled from Quarterly Reports filed by the Police Department and contained in the *City Record*: 1873 (Vol. I, at 286-90, Sept. 15, 1873; Vol. I, at 612, Dec. 3, 1873; Vol. II, at 167-68, Feb. 11, 1874); 1874 (Vol. II, at 502-04, May 9, 1874; Vol. II, at 894-97, Aug. 12, 1874; Vol. II, at 1334-37, Nov. 14, 1874; Vol. III, at 302-05, Feb. 16, 1875); 1875 (Vol. III, at 724-27, May 5, 1875; Vol. III, at 1264-67, Aug. 5, 1875, Vol. III, at 1862-65, Nov. 12, 1875; Vol. IV, at 284-87, Feb. 16, 1876); 1876 (Vol. IV, at 642-45, May 2, 1876; Vol. IV, at 1316-19, Sept. 4, 1876; Vol. IV, at 1570-73, Oct. 27, 1876; Vol. V, at 224-27, Feb. 8, 1877); 1877 (Vol. V, at 662-65, May 5, 1877; Vol. V., at 1078-81, July 31, 1877; Vol. V, at 1610-13, Nov. 15, 1877; Vol. VI, at 304-07, Feb. 25, 1878); 1878 (Vol. VI, at 732-35, May 7, 1878; Vol. VI, at 1150-53, Aug. 1, 1878; Vol. VI, at 1722-25, Nov. 29, 1878; Vol. VII, at 244-47, Feb. 15, 1879); 1879 (Vol. VII, at 696-99, May 9, 1879; Vol. VII, at 1178-81, Aug. 1, 1879; Vol. VII, at 1676-79, Nov. 1, 1879; Vol. VIII, at 240-43, Feb. 10, 1880); 1880 (Vol. VIII, at 700-03, April 23, 1880; Vol. VIII, at 1394-97, Aug. 18, 1880; Vol. VIII, at 1838-41, Oct. 28, 1880; Vol. IX, at 298-301, Feb. 17, 1881); 1881 (Vol. IX, at 818-20, May 13, 1881; Vol. IX, at 1372-74, June 30, 1881; Vol. IX, at 1902-04, Oct. 27, 1881; Vol. X, at 322-24, Feb. 18, 1882); 1882 (Vol. X, at 846-48, May 5, 1882; Vol. X, at 1460-62, Aug. 5, 1882; Vol. X, at 2050-52, Oct. 27, 1882; Vol. XI, at 242-44, Feb. 3, 1883); 1883: (Vol. XI, at 958-60, May 10, 1883; Vol. XI, at 1644-46, Aug. 4, 1883; Vol. XI, at 2330-32, Nov. 11, 1883; Vol. XII, at 311-13, Feb. 8, 1884); 1884 (Vol. XII, at 935-36, April 26, 1884; Vol. XII, at 1729-30, Aug. 2, 1884; Vol. XII, at 2697-98, Nov. 5, 1884; Vol. XIII, at 309-10, Feb. 11, 1885); 1885: (Vol. XIII, at 989-90, May 7, 1885; Vol. XIII, at 1584-87, July 24, 1885; Vol. XIII, at 2452-54, Nov. 2, at 300-01, Feb. 4, 1886).

¹²⁵ These numbers reflect only the portion of the year from May 1, 1873 to December 31, 1873.

The average length of witnesses' stay in House of Detention had not, however, changed substantially from the previous decade. Witnesses were still being held for periods of time much shorter than would have been required to hold them until the final disposition of their cases or even until the grand jury handed down an indictment. From 1874 to 1882, witnesses were detained in the House, on average, for 12.71 days.

This length of time reveals that the police were using the ability to detain witnesses for a strategic purpose other than ensuring the live testimony of witnesses at trial. Trials and most pleas could not have occurred in this short of a period of time. The *New York Times* crime reports reveal that the detentions were used to detain possible suspects, for interrogation or to prevent their escape while their culpability was determined, and those who might otherwise be unwilling to cooperate with investigations.¹²⁶ Though the *Times* continued to strongly object to the principle of material witness detentions, it, quite logically, did not use these stories as vehicles to complain about the evils of material witness detention.

The number of witnesses detained in 1883, 1884 and 1885 is even more telling about the actual uses officers were making of the power to detain witnesses. After May 16, 1883, only those reasonably suspected of being accomplices to crimes could be held as witnesses.¹²⁷ The number of persons held in the House of Detention for Witnesses surely dropped, but it did not drop below half the number of witnesses detained in 1881 and 1882. Further, the average length of detentions in the House from 1883 to 1885 remained comparable to the average length of detention for the preceding decade. If one can assume (as is probably safe) that patterns of detention didn't change greatly from 1871 to 1885, the majority of these "witnesses" detained prior to 1883 had been accomplices. And the purpose of their detention had logically been to encourage cooperation. Detentions of similar lengths of those other than accomplices surely had similar purposes.

Witnesses were held in only a small fraction of the total number of criminal cases in the nineteenth century. Officers therefore had developed a triage system to determine when witnesses would be brought before magistrates and detention would be sought. Quite logically, they used these detentions when a tactical advantage could be gained by the detention, when they could use the detention to pre-

¹²⁶ Often the police would round up a group of people in a raid—or at the scene of an affray—charge the clearly guilty and put the remainder in the House of Detention for Witnesses. See e.g., *Gambling Houses Closed*, NEW YORK TIMES, March 22, 1875 (dealer and "capper" at gambling house sent to House of Detention after raid). Interrogation was often a part of the detention. See e.g., *The Noe Murder*, NEW YORK TIMES, Oct. 16, 1875 (describing rigorous interrogation of persons detained in the House of Detention). Finally, police could use this detention to break the will of persons, like family members of suspects, who may be unwilling to cooperate with them. See *Rooney Killed by his Son*, NEW YORK TIMES, Jan. 15, 1881 at 8 (suspect accused of killing his father; victim's wife and suspect's mother sent to House of Detention for Witnesses); see also *Who Killed Thomas Rooney?*, NEW YORK TIMES, Feb. 1, 1881 at 8 (mother of suspect released on *habeas corpus* after judge finds that her testimony would not be material).

¹²⁷ 1883 N.Y. Laws 416.

vent the escape of a suspect, or when they could obtain information from uncooperative witnesses or suspects—and officers usually used this mechanism in more serious cases. As reforms pushed officers to become more aggressive in their investigative practices and the legislature criticized the mechanism of holding suspects in the “discretion of the magistrate” without charge, material witness detention increased substantially. The mechanism came to be used so frequently that it attracted enough attention to spark the legislature to ban the long-criticized practice of permitting the jailing a citizen merely because he or she possessed useful information.

IV. Decades of Unsuccessful Efforts at Reform

Debates about material witness detentions for the majority of the nineteenth century were not about the reality of how that power was being exercised in the majority of cases. The debate began in the 1840s as a discussion about the legitimacy of detaining persons suspected only of possessing helpful information. In the 1840s, material witness detentions were primarily (if not exclusively) used to preserve testimony, though this would change within a decade. In the early 1840s, only the most farsighted legislator could have envisioned the police using the power to obtain leverage over suspects and uncooperative witnesses. Arrests of witnesses were not even described by opponents of witness detention in the 1840s. The earliest conception of the detained witness was a complaining victim who had been incarcerated by a magistrate before whom he had voluntarily appeared—and nothing refuted this image. After a professional police force was created and became more powerful, it became increasingly clear that these detentions were instigated by the police, most often for purposes other than preserving testimony. Oddly, though, the end of material witness detention did not occur when it appeared that a few wholly innocent people were committed for a lengthy period of time. The end came after it was fairly clear that the police were using this power to temporarily detain suspects and uncooperative persons of varying degrees of culpability. Yet the terms of the debate changed little over the four decades of discussion of the issue. Reformers continued to complain about the rare long-suffering innocent witness held for months, though they took note of the increasing frequency of detentions. Defenders of the detentions, largely silent throughout the period, never pointed out how police were actually using this power.

Reformers had a real interest in keeping the debate where it began. Stories of long-suffering, completely innocent witnesses provided the most sympathetic justification for eliminating the law permitting the detention of witnesses or for providing detained witnesses better accommodations. The New York Prison Association told, among other accounts, the story of a victim of a scheme to sell fraudulent lottery tickets. The victim reported the crime, was detained and released after 57 days when the defendant pled guilty and received a \$10.00 fine.¹²⁸ The *New York*

¹²⁸ PRISON ASS'N REP., N.Y. ASSEMB. DOC. 108, at 28 (1853).

Times, among other accounts, reported the detention of a witness in default of \$300 bail after he witnessed the theft of his own \$4.00 hat.¹²⁹

Those seeking to preserve the power of the police to detain persons without charge could not argue that these detentions were only being used strategically to temporarily hold suspects or uncooperative witnesses. The records that survive of the forty-year path toward the abolition of material witness detention rarely include much detail from the defenders of the power to detain witnesses. Their relative silence is perhaps best explained by the fact that the best defense of the power to detain witnesses was one that could not be made. Defenders could not assert that the wholly innocent, cooperative witness, held until his testimony was needed, was unrepresentative of the bulk of those held. The legislature had never authorized the detention of suspects on evidence insufficient to sustain a charge or the detention of witnesses to apply pressure on them to talk. Witness detentions were authorized only to preserve evidence for trial, which, if used for this purpose, would involve the detention of innocent persons for long periods of time. Ironically, the legislature had authorized placing very high burdens on completely innocent and cooperative people, but had not authorized placing lesser burdens on suspected accomplices or uncooperative citizens.

As more and more witnesses were detained in New York, a public perception evolved that perfectly innocent people ran the risk of being locked up for merely seeing something. Citizens became afraid to be witnesses, reluctant to let the police know they had helpful information. The police in the late 1860s therefore very publicly asked the legislature to abolish the law that permitted the detention of witnesses. Yet the real police interest could not have been ridding itself of the power it was using to hold individuals without charging them. The police could have achieved this goal easily enough by internal regulations permitting the arrest only of persons reasonably suspected of crimes. The real law enforcement interest was creating a perception that witnesses could no longer be detained so that they would again be willing to talk to officers.

The legislature abolished the detention of witnesses just over a decade after the police first asked it to do so. In that decade, the number of witnesses annually detained roughly doubled and an interest group particularly affected by the state's right to hold witnesses gained political influence. The risk of being held as a witness was not evenly spread throughout society. Immigrants, particularly German and Irish immigrants, accounted for the majority of persons detained as witnesses – a group whose support was increasingly sought by politicians in late nineteenth-century New York. Abolishing material witness detentions therefore had the added benefit of appealing to an important constituency.

¹²⁹ *A Disgusted Hebrew*, NEW YORK TIMES, Jan. 23, 1878, at 3.

Civil libertarian concerns cannot explain the abolition of material witness detentions in 1883. The detentions seemed more objectionable in the 1840s than they did in the 1870s and early 1880s from a civil libertarian perspective. Briefly detaining uncooperative witnesses or suspects on something less than probable cause is not nearly as problematic as holding a cooperative bystander or victim too poor to provide bond for his appearance at trial. Yet the legislature was responsive to the problem of frequent and brief detentions rather than the rare, prolonged detentions.

The four-decade-long path toward the abolition of material witness detention in New York is entirely a legislative story. Though witnesses were occasionally represented by private counsel or by lawyers working with a legal aid society, arguments about the constitutionality of witness detention were never presented to judges during this time.¹³⁰ Reformers attempting to end the power of officers to detain witnesses never took their arguments to the courts, even though a New York constitutional provision created in 1846 specifically provided that witnesses would not be “unreasonably detained.”¹³¹ The legislature did not have to look over its shoulder, worried that the courts would impose limitations on investigative techniques if it failed to place some limits on witness detentions. And, as might be expected, the legislature, when left to interpret for itself constitutional limits on investigative methods, was responsive to this civil liberties concern only once it was politically expedient.

A. The Movement for Reform in the Early 1840s

Voices calling for the reform of material witness laws provided the first indication that witnesses were being detained. In his annual message to the Common Council in 1841, Mayor Robert H. Morris recommended that witnesses not be detained with those suspected, or convicted, of crimes. He stopped short of recommending ending the detention of witnesses, asserting that their detention was an essential part of the effectiveness of prosecutions.¹³² Morris, however, made a distinction between accomplices who were offering testimony for the prosecution and witnesses who were innocent of wrongdoing. He suggested no change in the practice of detaining accomplice-witnesses in the general prison population.¹³³ While Morris acknowledged that at least some of those detained were themselves potentially suspected of criminal wrongdoing, he regarded the detention of the entirely innocent as occurring frequently enough to warrant the first-ever attention given to this subject. Interestingly, this first known reference to witness detention foreshadowed the legislative reform of 1857, which provided separate housing for wit-

¹³⁰ See note 15 *supra*.

¹³¹ N.Y. CONST., art. 1, § 5 (1846).

¹³² See ROBERT H. MORRIS, MAYOR'S MESSAGE, 8 ALDER. DOC. 1, at 7-9 (1842).

¹³³ *Id.* at 7-8.

nesses, and the reform of 1883 that permitted only the detention of witnesses who were also accomplices.¹³⁴

Morris was not, at this point, an abolitionist. The overall effectiveness of the criminal justice system was a concern for Morris. In this message, he called for the creation of a police force designed to prevent crime, rather than merely respond to crime once it occurred. The unfortunate necessity of detaining witnesses to ensure their presence at trial was part of Morris' law and order package. "The protections of the community against the depredations of felons, frequently makes it necessary that innocent persons who happen to be witnesses against arrested rogues and cannot procure bail for their appearance at court, should be imprisoned to ensure to the people the benefit of their testimony."¹³⁵

Mayor Morris would repeat his concerns about the conditions of detained witnesses and the need for a preventative police force in his annual address for the following two years.¹³⁶ The Common Council never acted on Morris's proposed reform for better accommodations for witnesses. The Council appears to have never taken up the issue. In his 1843 annual message, Morris advocated better accommodation for witnesses for a third time, lamenting that "[o]ther business appears to have prevented attention to this important and humane suggestion."¹³⁷ While no records have been discovered indicating how many witnesses were detained between 1841 and 1843, as discussed above, it seems likely that few were.¹³⁸

In his report to the Common Council's Special Committee on Police, Watch, and Prisons in June 1843, the Keeper of the City Prison similarly objected to the lack of classification of inmates, which left witnesses, pretrial detainees, and those convicted in the same jails.

I would earnestly call the attention of the Committee to an evil which exists in the present arrangement, namely, the confining of witnesses among felons of every grade. It is my opinion that some of the waste room in the building could be fitted up, at a very little expense, for their reception. Much good would arise from it, and an act of justice be done to an unfortunate class, which has too long been delayed. . . .

As to the classification of different grades of crime, the apartments that could be provided to those who, through no fault of their own, are placed at the mercy of our laws.¹³⁹

¹³⁴ See Metropolitan Police Act, April 15, 1857; 1883 N.Y. Laws 416.

¹³⁵ ROBERT H. MORRIS, MAYOR'S MESSAGE, 8 ALDER. DOC. 1, at 7 (1842).

¹³⁶ See ROBERT H. MORRIS, MAYOR'S MESSAGE, 9 ALDER. DOC. 4, at 24-27 (1843); ROBERT H. MORRIS, MAYOR'S MESSAGE, May 29, 1843, 10 ALDER. DOC. 1, at 22-25 (1844).

¹³⁷ ROBERT H. MORRIS, MAYOR'S MESSAGE, 10 ALDER. DOC. 1, at 22.

¹³⁸ See discussion *supra* at notes 44-57 and accompanying text.

¹³⁹ See FALLON, *supra* note 16, at 957.

The annual reports of the New York Prison Association suggest that the Keeper's requested modifications, as well as the mayor's third plea, were also ignored by the Common Council. The New York Prison Association was a philanthropic, privately-funded organization incorporated by the New York legislature.¹⁴⁰ The Association's Committee on Detention had among its purposes "inquir[ing] into the causes of commitment of all persons detained for trial, or as witnesses in any of the Prisons of the Cities of New York or Brooklyn." The Committee, or its agent, was to "visit frequently the prisons under their charge and endeavor to improve the condition of prisoners."¹⁴¹ In the first decade of the Association's existence, its annual reports regularly reported on the conditions of detained witnesses. As late as the mid-1850s, these reports reveal that witnesses were still detained with the general prison population.¹⁴² In fact, the Common Council never appears to have looked up from its "other business" to consider this issue.

B. New York Constitutional Convention of 1846

When New York redrafted its Constitution in 1846, limits on the detention of witnesses became a fairly prominent issue.¹⁴³ Delegates to the convention quite reasonably viewed the detention of witnesses as the incarceration of wholly innocent persons to ensure their live testimony at trial. Creative use of this power by the police to further investigations were not yet commonplace. The detentions with which the delegates were familiar therefore involved very sympathetic stories, most often of victims who complained to magistrates, or police officers who took them to magistrates, and were incarcerated by them. A more compelling account of material witness detention supporting its abolition could hardly be imagined. Yet the convention would produce a meaningless provision that did nothing to alter the treatment of witnesses.

¹⁴⁰ The New York Prison Association counted several prominent citizens among its membership. Benjamin F. Butler, then the United States Attorney who had been instrumental in New York's statutory revision, served as vice president and as a member of the Prison Discipline Committee. Thomas Galludet, a professor at the Deaf and Dumb Institute, after whom Galludet University is named, was the Association's Recording Secretary.

Alexis de Tocqueville and Gustav de Beaumont were corresponding members of the Association. Senator Charles Sumner of Massachusetts, the abolitionist most famous for having been caned on the Senate floor by Congressman Preston Brooks of South Carolina, was also a corresponding member. The annual reports were submitted to the state legislature and can be located in the Assembly or Senate Documents for their respective years. The reports were also published by the Association. The inside front cover of several volumes of the reports in Harvard University's Widener Library note that the volume is a gift of Charles Sumner, Esq., Harvard College Class of 1830.

¹⁴¹ PRISON ASS'N REP. 6 (1844).

¹⁴² PRISON ASS'N REP., N.Y. ASSEMB. DOC. 243, at 160 (1849).

¹⁴³ See PETER GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE (1991) (describing Constitutional Convention of 1846); J. HAMPDEN DOUGHERTY, CONSTITUTIONAL HISTORY OF THE STATE OF NEW YORK (1915) (same); CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK FROM THE COLONIAL PERIOD TO 1905, SHOWING THE ORIGIN, DEVELOPMENT AND JUDICIAL CONSTRUCTION OF THE CONSTITUTION (1905) (same).

Its final version of the new state constitution contained a provision that witnesses should not be “unreasonably detained.”¹⁴⁴ This vague final product obscures the fact that a very specific proposal to eliminate the detention of witnesses was considered by the convention. The Committee assigned to draft the Rights and Privileges of Citizens unanimously recommended the adoption of a constitutional provision generally prohibiting the detention of material witnesses.¹⁴⁵ The provision did, however, authorize the legislature to enact a law “to secure if necessary the temporary detention of witnesses in criminal cases, and for their prompt examination *de bone esse*.”¹⁴⁶ In essence, the provision would have permitted the legislature to permit the prosecution to detain witnesses until their depositions could be taken. The select committee on revision, however, left this provision out of the version it submitted to the convention.

When Curtis Swackhamer of Brooklyn asked for consideration of the provision to be revived, Charles P. Kirkland, of Oneida County, explained that it had been omitted by the select committee because this was “a purely legislative matter” and “that its adoption might lead to serious inconvenience.”¹⁴⁷ It is not clear what sort of inconvenience Kirkland referred to. His language is telling, however. It is unlikely that he would have referred to lost convictions as a mere inconvenience. It is possible, though not terribly likely, that Kirkland foresaw the creative use to which these detentions could be put and did not want the newly formed police to be deprived of this convenience. He did not acknowledge that the mechanism could be used for any purpose other than preserving testimony – and reports of material witness arrests had not yet become common. Whatever his concern, it carried the day at the Convention and his position would prevail for nearly 40 more years over the arguments of reformers.

The motion to table this provision was passed by a 59-43 vote. Urban-dwelling representatives were particularly concerned about the practice of incarcerating witnesses, as such practices appeared only to have occurred with any fre-

¹⁴⁴ N.Y. CONST., art. I, § 5 (1846).

¹⁴⁵ One member of the committee, Daniel D. Campbell of Schenectady, voted for tabling the provision, even though the committee had been unanimous in recommending it. CROSSWELL & SUTTON, *supra* note 1, at 815.

¹⁴⁶ CROSSWELL & SUTTON, *supra* note 1, at 153, 418-19; BISHOP & ATTREE, *supra* note 15, at 196; 1 DOCUMENTS OF THE CONVENTION NO. 39, at 5; JOURNAL OF THE CONVENTION 285-86. Only one member of the committee came from what is now the New York metropolitan area, Conrad Swackhamer from Kings County. The other members of this Committee included James Tallmadge (Dutchess County), Allen Ayrant (Livingston County), Russell Parish (Lewis County), Daniel D. Campbell (Schenectady County), Abraham Witbeck, Jr. (Rensselaer County) and Peter Yawger (Ulster County). JOURNAL OF THE CONVENTION 70.

¹⁴⁷ CROSSWELL & SUTTON, *supra* note 1, at 815. Bishop and Attree report that Allen Ayrault of Livingston County moved for instructions to the committee on revision to include provision on witness detention from Tallmadge’s committee into the bill of rights. The matter was then debated by Tallmadge, Bishop Perkins of St. Lawrence, John W. Brown of Orange County, and Charles O’Conor of New York City. This question was submitted to a select committee, which was to report on Monday. BISHOP & ATTREE, *supra* note 15, at 1050-51; CROSSWELL & SUTTON, *supra* note 1, at 804.

quency in urban areas at this point.¹⁴⁸ Eleven representatives from New York City voted against tabling the provision; four from the city voted for tabling it.¹⁴⁹ Unlikely candidates spoke up in favor of eliminating the power to detain witnesses. Included among those against tabling the provision was John A. Kennedy, who would become a New York Police Superintendent whose record on civil liberties was often criticized.¹⁵⁰ Specifically, Kennedy would be accused of detaining suspects without adequate suspicion while the cases against the suspects were “worked up.”¹⁵¹ Robert Morris, the former mayor of New York City who had previously favored the power to detain witnesses, also objected to tabling this provision. Morris noted that a specific type of witnesses, victims of the “drop game,” were often detained. The former mayor’s concern before the Convention, as it had been in his address to the Common Council, was that innocent people would be held; based on his example, held when they complained about being the victims of crime. The drop game was a scheme in which victims, often immigrants, were defrauded into buying worthless lottery tickets.¹⁵² The greater population of New York City, and in particular the greater immigrant population, likely made the city’s delegates more sensitive to the detention of those unable to post bond.

After the defeat of this provision, the Convention considered and adopted a provision which looked much like the Eighth Amendment to U.S. Constitution, but included a vague limitation on the detention of witnesses. The committee on rights and privileges had recommended adoption of a provision providing that: “Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted.” After the defeat of the prohibition on witness detention, Henry Murphy of Brooklyn, a supporter of the original limitation, proposed this provision be amended by adding “nor shall witnesses be unreasonably detained.”¹⁵³ James Tallmadge, the chair of the committee on rights and privileges, then offered examples of witnesses who had been detained in New York and

¹⁴⁸ Material witness detentions had been noticed in major cities outside New York State. See discussion at note 49, *supra* and accompanying text.

¹⁴⁹ Allen Stephen, Henry Nicoll, Charles O’Conor, and Samuel J. Tilden voted for laying the provision on the table. William S. Coneley, John H. Hunt, David R.F. Jones, John A. Kennedy, George S. Mann, Robert H. Morris, Lorenzo B. Shepard, John L. Stephens, Solomon Townsend, A.F. Vache, and Campbell P. White voted against tabling it. CROSSWELL & SUTTON, *supra* note 1, at 815.

¹⁵⁰ See MILLER, *supra* note 88, at 61, 97 (2d ed. 1997) (describing legislature’s criticisms of police practices and magistrate’s criticism of police brutality under Kennedy); RICHARDSON, *supra* note 8, at 127 (describing police commissioners’ censure of Kennedy for detaining a suspect for months without a hearing before a magistrate). Kennedy had been a Barnburner and was a Republican member of the Board of Supervisors at the time he was made General Superintendent of the Metropolitan Police Force. *Id.* at 119.

¹⁵¹ See discussion *supra* at note 97-102 and accompanying text.

¹⁵² The particular type of injustice Morris recounted continued at least into the next decade. In 1852, the New York Prison Association described a victim of the game. A victim was cheated into buying a fraudulent lottery ticket. When she complained, she was incarcerated in default of bail; the defendant who sold her the fraudulent lottery ticket was released on bail. After 57 days of detention, the case came to trial, the defendant confessed and was fined \$10. “The law having no further use for the poor [victim], she also was discharged, but without one cent compensation for her loss of time and the derangement of her affairs, and probably taught by her sufferings never to seek redress from the law on a similar occasion.” PRISON ASS’N REPORT, N.Y. ASSEMB. DOC. 243, at 28 (1853).

¹⁵³ CROSSWELL & SUTTON, *supra* note 1, at 815.

elsewhere. He noted that the brother of one of the delegates to the convention had been detained while traveling through Baltimore. His trunk had been stolen and when he made a complaint, he was detained while the suspect went free on bond. After two weeks, the unfortunate traveler paid a large sum to the jailor who obtained bail for him.¹⁵⁴ Tallmadge observed that in New York City, complaining witnesses, particularly immigrants, were similarly held when they made complaints. Tallmadge noted that a common scheme was used to prey upon immigrants—scammers sold immigrants forged tickets for passage west. When those defrauded complained, they were held as witnesses. Tallmadge also recalled the accounts of two women who had been detained with the general prison population when they complained of having been beaten.¹⁵⁵

Tallmadge, an impassionate advocate of ending the practice of detaining material witnesses, bothered that the convention was considering only this vague provision, “insisted that the Convention act deliberately” on this question even if the Convention were “detained till winter.”¹⁵⁶ His concerns about the futility of this vague provision were well founded. No court even considered this provision until 1947, and the New York legislature was not inspired by this constitutional mandate to flesh out limits on witness detentions—at least not for almost forty years.¹⁵⁷ Tallmadge did not get a more specific limitation and the Convention unanimously adopted the vague prohibition on the unreasonable detention of witnesses.¹⁵⁸

In each of the examples Tallmadge and Morris offered, victims of crime had filed complaints. None of the reports of the Convention describe the detention of bystanders; indeed, only those who presented themselves to magistrates were detailed in Tallmadge’s examples of the problems with material witness detention. And certainly none of the witnesses described by Tallmadge were uncooperative suspects, accomplices or friends of suspects or accomplices. The arrests of those identified as witnesses had not become a common—or even known—experience.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See *People ex rel. Rao v. Adams*, 296 N.Y. 231, 234 (1947) (finding amount of bail required of witness to be excessive under this provision). Earlier cases in the twentieth century had surely considered the material witness detention statute, but none had considered the constitutional provision regarding material witnesses. See note 15 *supra*.

¹⁵⁸ CROSSWELL & SUTTON, *supra* note 1, at 815. It appears that this constitutional provision was cited only twice by appellate courts in New York in the nineteenth century and neither case involved an interpretation of the limit on witness detention. See *Kemmler v. Durston*, 7 N.Y.S. 813, (1889) (challenge to the country’s first use of the electric chair); *In re Bayard*, 61 How. Pr. 294 (NY Sup. 1881) (challenge to statute which provided greater punishment for same crime in some localities).

The Convention’s unanimous agreement on this vague prohibition, but inability to reach agreement on a remedy to the problem, encapsulates decades of conflict on this issue that was summed up over a decade later by the *Times*. “The impropriety and unconstitutionality of the thing [witness detention] had always been acknowledged, while the manner in which it could be cured, without paralyzing the arm of justice, was a question of great difficulty and tardy solution.” *A Visit to the White-Street House of Detention—How the Inmates Live—The Witnesses in the Case of Macdonald*, NEW YORK TIMES, October 4, 1859, at 8.

The Municipal Police Force had been in existence for approximately one year and had not likely begun to arrest material witnesses with sufficient frequency to attract attention. From the perspective of these delegates, magistrates alone were responsible for material witness detentions. Creative uses of this power – while perhaps envisioned by some – had not become a reality. It was the minimal benefit of protecting life, as opposed to deposition, testimony that preserved the detentions from a constitutional prohibition in 1846.

C. Proposed Code of Criminal Procedure

In the next few years, the legislature showed no more interest in reforming the laws relating to material witness detentions than the Constitutional Convention had shown. In 1849, 1850, and 1855, the legislature took up the issue that the delegates of the Constitutional Convention had left to it: whether there ought to be a more specific provision limiting the detention of witnesses. The Commissioners on Practice and Pleading, who in 1848 successfully submitted a Code of Civil Procedure to the legislature, submitted a Code of Criminal Procedure in 1849 under the direction of David Dudley Field.¹⁵⁹ The 1849 version never made it to a vote in either house; it was resubmitted the following year, with annotations to the origins of the provisions which were already part of New York law. This year the code passed the Assembly but not the Senate.¹⁶⁰

The proposed code would have amended New York's law on material witnesses by forbidding the detention of witnesses who were unable to provide sureties for the amount of recognizance required by the magistrate.¹⁶¹ The Commissioners in the annotations to the proposed code reasoned that admitting at trial the transcribed examination of a witness, whom the defendant had been given an opportunity to cross-examine, appropriately balanced the witness' liberty interest and the defendant's right to confront witnesses against him.¹⁶² The Commissioners noted, as others had and would, that often witnesses to, or victims of, a crime were detained while the accused went free on bond.¹⁶³ It is possible that those detained were still primarily innocent witnesses, held to ensure their live testimony. It is far more likely, though, that the Municipal Police had begun to use the power to detain witnesses primarily in cases where leverage was sought over the uncooperative, as the majority of witnesses detained around this time were held only briefly.¹⁶⁴ It is possible that the Commissioners were unaware of this creative use of the power, or chose to focus on the more problematic uses which could be made of material witness detentions: namely, the very use contemplated by the plain meaning of the statute authorizing the detentions.

¹⁵⁹ See John T. Fitzpatrick, *Procedural Codes of the State of New York*, 17 L. LIBR. J. 12, 20 (1923).

¹⁶⁰ *Id.*

¹⁶¹ COMM'RS ON PRACTICE AND PLEADING, FINAL REP. – CRIMINAL CODE, ASSEMBLY DOC. 18, at 102 (1850).

¹⁶² *Id.* at 7.

¹⁶³ *Id.*

¹⁶⁴ See discussion at *supra* note 115 and accompanying text.

Governor Myron Clark in his annual message in 1855 asked the legislature to consider the injustices visited upon material witnesses who were committed to jail. His timing was hardly surprising—the number of witnesses detained in 1853 and 1854 had more than quadrupled the number detained in 1851 and 1852.¹⁶⁵ The previously proposed Code of Criminal Procedure again came before the legislature and was referred to a Select Committee on Criminal Procedure.¹⁶⁶ The Committee recommended passage of the Code of Criminal Procedure largely as it was presented to the legislature in 1850. As in 1849 and 1850, if successful, the Code would have forbidden the jailing of witnesses unable to provide sureties for their appearance. The Committee on Criminal Procedure recommended the adoption of the entire Code, but was emphatic about the adoption of the provisions relating to material witnesses. The Committee concluded that the treatment of witnesses must be remedied by the legislature regardless of whether it adopted the remainder of the code.

The Code embraces subjects, some of which must be passed upon during the present session, as for example, the detention of witnesses, an evil which would have been long since remedied if the Legislature had acted upon this Code when submitted in 1850. This subject has been brought before the Legislature by the Governor and now occupies the attention of both houses.¹⁶⁷

Again this attempt to secure passage of the Code was unsuccessful; the Code does not appear to have even come up for a vote.¹⁶⁸ The legislature did not take any action on witness detention at all this term.

An Assembly Committee specifically considered Governor Clark's concern about the detention of material witnesses. The majority of the committee assailed the detention of material witnesses as a barbaric relic of the past and called for the legislature to release all witnesses after they had been examined.¹⁶⁹ Oddly, the majority recommended detaining all witnesses until they had been examined.¹⁷⁰ The minority report strenuously objected to abolishing witness detention, finding it necessary to ensure trial testimony in some cases.¹⁷¹ However, the minority report asserted that no witness should be detained because his financial circumstances prevented him from finding sureties for the amount of his recognizance.¹⁷²

¹⁶⁵ See discussion *supra* at note 89 and accompanying text.

¹⁶⁶ SELECT COMM. ON CODE OF CRIMINAL PROCEDURE, REP., N.Y. ASSEMB. DOC. 150 (1855).

¹⁶⁷ *Id.* The members of this committee were: J. V. Headley, Theodore Gates, N. C. Boynton, L. B. Johnson, McNeil Seymour. *Id.* at 7.

¹⁶⁸ See BREUER, *supra* note 1.

¹⁶⁹ REP. ON GOV. CLARK'S MESSAGE, *supra* note 34, at 3.

¹⁷⁰ *Id.* at 6.

¹⁷¹ *Id.* at 9.

¹⁷² *Id.* at 12.

Both of the reports seem internally inconsistent. The majority report, if adopted, would have detained a very large number of witnesses but only briefly, even though its premise was that witness detention was always wrong. The minority report, if adopted, would have virtually ended witness detention. Only those with the means to provide sureties would be held for failure to do so. It seems unlikely that anyone with the means to bail himself out of a nineteenth-century prison would not do so. The internal inconsistency in these two positions suggests that, for many, a fundamental tension existed between effective prosecutions and preserving the liberty of those guilty of no crime. The majority and minority each attempted to achieve these goals in part, even though each attributed a higher value to one of the competing goals.

Why such a tension existed at all is initially difficult to understand. Adopting the Commissioner's proposal would not cause the state to lose testimony; the witness' deposition would be admissible against the defendant. Confrontation Clause concerns could not have animated the rejection of the Commissioners' proposal since the legislature had previously allowed the release of out-of-town witnesses in New York City upon taking their deposition.¹⁷³

Like the Constitutional Convention's rejection of the limitations on material witness detention, the legislature's rejection seems difficult to understand. Eliminating the power to detain witnesses would have come at relatively little cost, if the sole benefit was the preservation of testimony. Surely live testimony is to be preferred over deposition testimony, but it has to be assumed that months of incarceration would do little to encourage an initially uncooperative witness to be more compelling in person than on a cold deposition. The civil libertarian concern had proved insufficient to spark the Common Council to act in 1841, or the Constitutional Convention in 1846, even when the state would lose little in protecting the liberty of witnesses. In the 1850s, a new benefit to material witness detention was becoming apparent—at least a benefit in the eyes of some legislators. *Arrests* of material witnesses were beginning to be reported¹⁷⁴ with most of these detentions lasting just long enough for police officers to “work up the case” against the witness or others. Retaining the law permitting witnesses to be detained gave legislators favoring police discretion a way to continue to authorize investigative detentions, even as other legislators criticized the unauthorized practice of holding suspects on the “discretion of the magistrate” for interrogation.

D. A Decade of Silenced Reform and Ultimate Success

By the mid- to late-1850s, over one hundred witnesses a year were being detained and, by this point, it was obvious that they were being arrested by officers and brought before magistrates who committed them to jail.¹⁷⁵ Savvy policy makers

¹⁷³ 1844 N.Y. Laws 315.

¹⁷⁴ See discussion at *supra* note 75 and accompanying text.

¹⁷⁵ See discussion at *supra* notes 75-79 and accompanying text.

at this point had to realize that these witnesses were not mere bystanders or victims, that officers were allocating their limited resources in a more judicious manner than to detain cooperative people with information. The civil libertarian concerns that proved insufficient to carry the day in previous debates would prove only successful enough in the late 1850s to improve the housing conditions of witnesses. These better accommodations temporarily quelled the reformers and made magistrates more willing to commit witnesses. When reformers were next heard, they offered a new objection to material witness detention, the frequency with which it occurred. The increased detentions in the 1860s and 1870s had created a fear that cooperation with police authorities could lead to one's incarceration, a perception that added an unlikely group to the list of reformers seeking the abolition of material witness detention: the Metropolitan Police Force of New York.

For individual witnesses detained, the House of Detention was surely an improvement over detention in the Tombs. The number of persons magistrates were willing to detain, however, dramatically increased after the creation of this separate facility and voices of abolition were no longer heard.¹⁷⁶ The New York Prison Association, beginning in 1848, vehemently opposed the detention of material witnesses under any circumstances, but particularly when witnesses were incarcerated in the general prison population.¹⁷⁷ The Association never noted that the legislature required the construction of better accommodations for witnesses, but after the legislature did so, the Association never again sought reform of the law relating to witnesses. Similarly, the *New York Times*, a frequent critic of this power, would not be heard to object to material witness detentions until late in the 1860s.¹⁷⁸

The voices of reform would largely be silent for over a decade. It was not until the late 1860s that reformers would again call for the abolition of witness detention—and the call would come from an unlikely source. The police, who had been arresting the witnesses placed in the House of Detention, now embraced the objections reformers had been offering to the incarceration of witnesses. In his annual report to the legislature, the President of the Metropolitan Police Board, Thomas C. Acton, asserted that the detention of witnesses was “the occasion of great and needless hardships in many cases.”¹⁷⁹ Acton noted that the law bore unevenly upon out-of-town witnesses, who were more often detained than residents of the

¹⁷⁶ For discussion of increase in numbers of witnesses detained after creation of the House of Detention for Witnesses, see discussion at *supra* note 111 and accompanying text.

¹⁷⁷ PRISON ASS'N REP., ASSEMB. DOC. 243, at 161 (1849).

¹⁷⁸ Bruce Mann has described a similar process occurring with reforms of laws permitting the incarceration of debtors. Reforms that housed debtors in separate facilities from the general prison population similarly stalled reform efforts to eliminate imprisonment for debt. See BRUCE H. MANN, *REPUBLIC OF DEBTORS* (2003).

¹⁷⁹ METRO. POLICE REP. 8, ASSEMB. DOC. 20 (1868).

city. Apparently, New York magistrates were no longer releasing witnesses from other places as an 1844 law had permitted them to do.¹⁸⁰

At first glance it seems odd that the police would advocate limiting their own powers. Material witnesses were not detained to ensure the preservation of testimony; this was the ruse that allowed officers to detain individuals without sufficient suspicion to charge. The capacity to detain suspects and uncooperative witnesses without charge enhanced the ability of the police to investigate crimes. The frequency of material witness detentions, however, had brought two institutional interests of the police into conflict. Surely the police were interested in securing convictions in those cases in which suspects, victims, and witnesses had been identified. The police also had an interest in discovering and solving other crimes. Acton noted that incarcerating witnesses encouraged victims and witnesses not to talk to police.¹⁸¹ Detaining witnesses, at least in numbers large enough to be noticed, interfered with the ability of the police to investigate crimes.¹⁸² The police therefore very publicly asked for the legislature to put an end to witness detention, though their actual interest was a return to the past: fewer detentions with less public attention.

Governor John Hoffman called the legislature's attention to the detention of witnesses in three of his four annual messages from 1869 to 1872.¹⁸³ "The magnitude of wrong and suffering resulting from this practice, especially in cities, is not, I am sure appreciated or understood, or it would not be permitted to continue," Hoffman contended in 1871.¹⁸⁴ His addresses, however, were simply echoing the concerns the police were offering in their annual reports to the governor. And while it was quite reasonable in 1846 to assume the primary use of material witness detentions worked substantial hardships on wholly innocent persons or cooperative bystanders or victims, by the late 1860s, it was clear that this was not the primary function of the detentions. Brief detentions were being used to extract information from the uncooperative by a means, admittedly, stripped of the traditional protections required for an arrest and pretrial detention. Hardships were thereby worked, but the issue was not as black and white as it reasonably appeared to the delegates of the Constitutional Convention in 1846. In taking up the police department's plea to forbid the practice, however, he repudiated the practice in the same terms that its critics had used for years.

¹⁸⁰ An Assistant United States Attorney in 1875 similarly objected to the fact that out-of-town witnesses were frequently detained to testify in state criminal proceedings. *Assembly Committee on Crime*, NEW YORK TIMES, Dec. 24, 1875, at 1.

¹⁸¹ METRO. POLICE REP., ASSEMB. DOC. 38, at 9 (1869)

¹⁸² This point would be made by a few other opponents of witness detention, but Acton appears to have been the first to have raised it. See e.g., *The Wrongs of Witnesses, House of Detention. Its Uses for Seventeen Years – The Place Considered as a Barrier to Proper Criminal Prosecutions*, NEW YORK TIMES, Oct. 29, 1877; *Current Topics*, 18 ALB. L. J. 101, 101 (1878) *The Jails*, HARPER'S WEEKLY, February 23, 1878; *Untitled*, NEW YORK TIMES, April 5, 1883, at 4.

¹⁸³ LINCOLN, *supra* note 16, at 19, 243, 366.

¹⁸⁴ *Id.* at 243.

The reform proposals of Hoffman—and the police—went nowhere in the legislature. The end of material witness detentions, however, was in sight. The police had realized that the public's perception of how material witness detentions were being used was interfering with their ability to investigate crimes. Citizens were no longer willing to be helpful. In the next decade, witness detentions continued to increase, reinforcing (with the assistance of the press) the idea that it was dangerous to cooperate with the police. At the same, it was becoming apparent that immigrants, a group to whom New York politicians were giving increasing attention, had a particular interest in the abolition of the power to detain witnesses.¹⁸⁵

Records of the nativity of those incarcerated in the House of Detention filed with the legislature from 1861 to 1869 reveal that the overwhelming majority of witnesses detained there were German or Irish immigrants. In 1869, the German Legal Aid Society, that frequently represented witnesses, petitioned the legislature to forbid the detention of witnesses.¹⁸⁶ Records were not kept of the nativity of inmates of the House of Detention from 1870 onward, but there is no reason to believe that this pattern was different in the decade that followed. The substantial increase in detained witnesses in the 1870s was, in all likelihood, accompanied by a sharp increase in the number of immigrants detained. Abolition of material witness detention therefore had the added benefit of allowing legislators to appear concerned about issues particularly affecting immigrants.

Table Nine. Nativity of Detainees in House of Detention for Witnesses.¹⁸⁷

	1861	1862	1863	1864	1865	1866	1867	1868	1869
England	15	7	27	20	35	24	16	22	19
Germany	79	59	32	13	29	44	29	33	29
Ireland	146	111	99	42	165	84	70	84	86
Scotland	--	4	8	6	10	7	5	10	4
United States	133	78	99	72	136	104	112	91	99

The substantial increase in the number of detentions in the 1870s gave reformers a way to make detentions seem considerably more troublesome than they actually were. The press took note of the rising numbers but continued to describe

¹⁸⁵ See discussion at note 17 *supra* and accompanying text.

¹⁸⁶ *German Legal Aid Society*, NEW YORK TIMES, Nov. 20, 1869, at 1.

¹⁸⁷ Compiled from METRO. POLICE REPORTS 1861-1869.

witness detentions in terms appropriate to the early 1840s, when the detainees were largely victims of crime. For example, the *Times* noted in 1877 that the House of Detention had recently begun to incarcerate a much larger number of witnesses. It noted that 651 witnesses were detained from November 1876 to October 1877.¹⁸⁸ The *Times* remarked that this number was much larger than the number of witnesses incarcerated for any given year in the 1860s and expressed concern that the trend was toward even more detentions of innocent persons.

During the last three months 182 have been committed to the House of Detention, which, at the same average throughout the year, would swell the numbers up to 728, a very large number to be locked up more securely than criminals because they unfortunately witnessed the commission of an offense, or werethemselves the party robbed or assaulted.¹⁸⁹

This had the effect of discouraging testimony, the *Times* concluded. “Witnesses to the perpetration of a crime close their eyes to it, flee from the scene, or if compelled to give testimony, they try to know as little as they can. . . . The dread of being locked up seals men’s lips.”¹⁹⁰

Material witness detentions were obviously still being characterized as the involving primarily the holding of a bystander or victim from the time of the crime until the defendant’s trial. *Harper’s Weekly* in February, 1878 provided an account of a woman who had been robbed and reported the robbery to the police. Suspects were arrested and she identified one of them as her assailant. As a result of the robbery, she had no money and was thus held in default of the required amount of bail. She remained in the House of Detention for three months when she appeared before the grand jury, which found no true bill against her alleged attacker, so both were discharged. The magazine noted that there was a strong possibility that this poor woman intentionally provided insufficient testimony to the grand jury so that her detention would come to an end.¹⁹¹

Harper’s would continue its interest in the injustice worked upon detained witnesses. In March, 1881, the magazine noted that when the list of witnesses detained in the House of Detention was released, their names appear alongside a list of crimes below the heading “offense charged.” It thus appeared as if those so held were themselves criminals.¹⁹² In May, 1881, the magazine noted that between 600 and 650 witnesses were detained in 1880. As part of this editorial against the detention of witnesses, it published a cartoon illustrating the oft-heard complaint that witnesses were detained while those accused went free on bond.

¹⁸⁸ *The Wrongs of Witnesses*, NEW YORK TIMES, Oct. 29, 1877, at 5.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *The Jails*, HARPER’S WEEKLY, Feb. 23, 1878.

¹⁹² *A Legal Outrage*, HARPER’S WEEKLY, March 26, 1881.

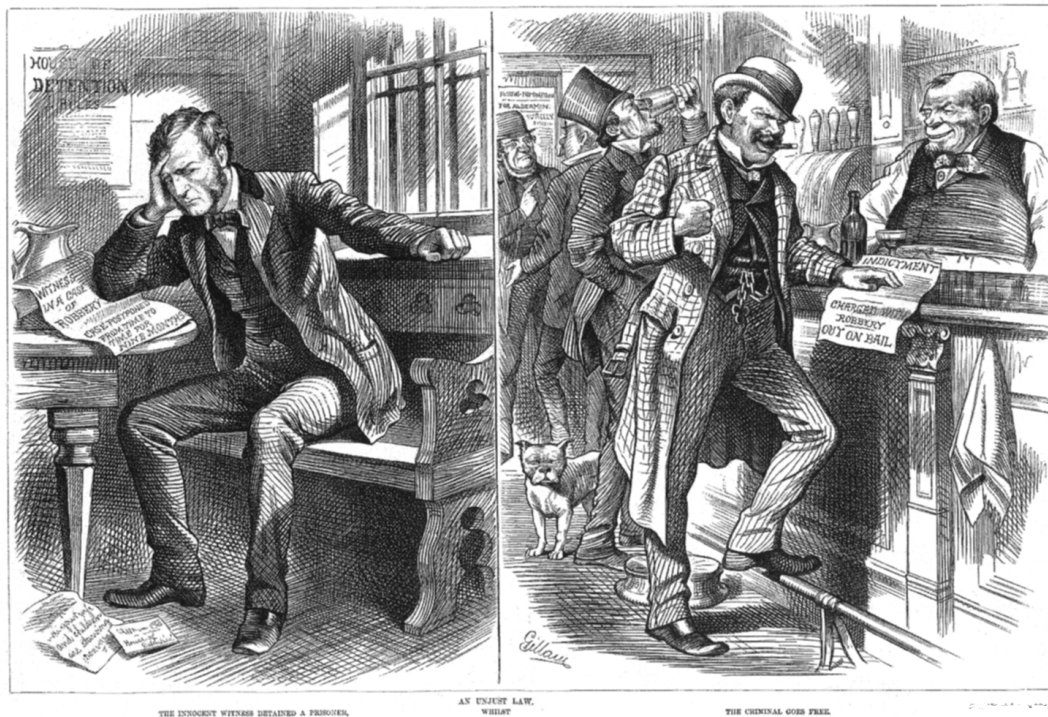


Figure Two. A Cartoon in *Harper's Weekly* in 1881 described "The Innocent Witness Detained as a Prisoner, whilst the Criminal Goes Free." From *An Unjust Law*, HARPER'S WEEKLY, April 9, 1881.

Stories like those published in *Harper's Weekly* certainly were not unheard of, but they were by no means typical. Witnesses, on average, were detained between ten and fifteen days in the 1870s and early 1880s. After the legislature limited the detention of witnesses to those reasonably believed to be accomplices, the average length of detention stayed approximately the same.¹⁹³ No voice was heard to explain how these detentions were actually being used; defenders of material witness detention could not explain that this mechanism was really just another means of permitting detentions in the "discretion of the magistrate." The public therefore had an incorrect perception of the common use of material witness detentions, one that was shaped by those favoring abolition of the practice.

The growing attention finally prompted the legislature to act on an issue that been presented to it for decades. A Code of Criminal Procedure was adopted in 1881 that permitted the taking of a witness's statement whenever "it satisfactorily appear[ed] by examination on oath that the witness is unable to provide sure-

¹⁹³ See discussion at note 127 *supra* and accompanying text.

ties.”¹⁹⁴ For reasons that are not clear, this did not effectively end the detention of witnesses in New York. Any person able to provide sureties for the amount of his recognizance would have done so. It seems inconceivable that a person would be willing to remain in a nineteenth-century jail when he had the option of freedom. In the remainder of cases in which magistrates required sureties, the witnesses should have been released for inability to obtain them. It seems likely that magistrates were regarding the inability to post a bond as a refusal to post one.¹⁹⁵

Pressure was maintained on the legislature to do something to end the practice of detaining witnesses. The September 1882 term of the grand jury for New York City brought in a presentment against the House of Detention for the poor conditions there and urged the abolition of witness detention.¹⁹⁶ Former New York Attorney General Fairchild, at the behest of the State Charities Aid Association, drafted a bill to permit only the detention of witnesses who were also accomplices to crimes.¹⁹⁷ This provision permitted a magistrate to demand a recognizance, with or without sureties, only of those reasonably believed to be accomplices in crimes.¹⁹⁸ After years of failed attempts to eliminate the detention of witnesses, this proposal was successful. The House of Detention for Witnesses remained open and provided better-than-ordinary jail conditions—an inducement for would-be cooperators.¹⁹⁹

The legislature had, however, clearly over-reacted to its failed attempt to end the detention of witnesses in 1881. Witnesses who ignored court appearances lived under no threat of forfeited recognizances. The New York grand jury that called for an end to witness detention in 1882 complained in August 1883 about the effect of the new law. There were a “large number of cases which have been impossible to procure the attendance of the material witnesses who appeared before the various committing magistrates when the prisoners were held for trial.”²⁰⁰ The movement toward ending the detention of witnesses had succeeded, even if it had been a little too successful.

¹⁹⁴ N.Y. CODE CRIM. PRO. § 219 (1881).

¹⁹⁵ Surely courts into twentieth century would assume the same. *See* Carlson and Voepel, *supra* note 18, at 5-6 (“Courts have deemed an inability to pay as synonymous with refusal.”).

¹⁹⁶ *Those Fraud Coupons*, NEW YORK TIMES, Aug. 25, 1883, at 3.

¹⁹⁷ *The Treatment of Witnesses*, NEW YORK TIMES, May 13, 1883. The State Charities Aid Association was founded in 1872 by Louisa Lee Schuyler, daughter of a prominent New York family and great-granddaughter of Alexander Hamilton and Gen. Phillip Schuyler. Ms. Schuyler had founded the Women’s Central Association of Relief during the Civil War, which became the United States Sanitary Commission, the predecessor of the Red Cross. The State Charities Aid Association was a general-purpose philanthropic organization that concerned itself, among other things, with issues of poverty, education, mental and physical health. *See* Historical Note, Schuyler Center for Analysis and Advocacy Records, 1872-2004, New York State Library, available at <http://www.nysl.nysed.gov/msscfa/sc19816.htm>.

¹⁹⁸ N.Y. Laws 416, May 16, 1883.

¹⁹⁹ *See House of Detention Nearly Empty*, NEW YORK TIMES, June 17, 1883, at 7.

²⁰⁰ *Those Coupon Frauds*, NEW YORK TIMES, Aug. 25, 1883, at 3.

Very little about the condition of detained witnesses had changed since 1857. The conditions of the House of Detention do appear to have gone from decent to poor, but New Yorkers had been willing to leave some witnesses detained in the Tombs from 1841 to 1857. New Yorkers were not, however, willing to leave witnesses in the Tombs once the numbers of detained witnesses began to rise substantially in 1853 and 1854. Between 1870 and 1883, the number of witnesses in the House of Detention again rose substantially, and this coincided with declining conditions in the House. Witnesses had already been removed from the prison population. If a sharp increase in the number of detained witnesses was to bring about reform in 1883, as it had previously done, this change would have to take the form of a limit on who could be detained as a witness, not a modification of the conditions in which witnesses would be confined.

Pressure for reform had been building in the 1860s and 1870s as the number of witnesses annually detained roughly doubled each decade. The increasing frequency of the detentions had created, with assistance from the press, a false impression that cooperation with the police could result in one being jailed. This was an impression that would lead even the police to petition the legislature to reform the law relating to the detentions.

V. Conclusion

The New York Police Department's aggressive use of the power to detain material witnesses led to the power's ultimate demise. The people, or more precisely their elected representatives, will tolerate occasional injustices in the interest of the greater good, particularly when those who suffer from the injustice are somehow outsiders. During the latter half of the nineteenth century, the detention of material witnesses was no longer an infrequent event primarily visited on outsiders. By the mid-1870s, over 600 people a year were detained without charge – detentions explained only by the fact that those incarcerated possessed information useful to the State of New York. And increasingly in the latter half of the nineteenth century, immigrants, who constituted the majority of material witnesses detained, were no longer outsiders. The aggressiveness of the New York police finally motivated the legislature to end the incarceration of presumptively innocent persons.

The police had also undermined their own interests in effective investigation. The police rarely had an interest in detaining innocent citizens who were assisting them, yet the material witness statute provided the only legal mechanism that allowed them to hold uncharged persons. The rising number of persons detained as witnesses made New Yorkers justifiably reluctant to become witnesses. The police therefore requested that the legislature abolish the detention of witnesses, a result which would only half satisfy the law enforcement interest. It was in the interest of the police to maintain the power to detain a few suspects or uncooperative witnesses without charge, as witnesses if this was the best mechanism to be found, so long as the public was unaware of the practice. The power to detain

witnesses was restored in 1904, after the public had lost its fear that such a statute made it dangerous to cooperate with the police.²⁰¹ And the police in the twentieth century would be much more circumspect in using this power than their nineteenth century predecessors so that the existence of such a statute—or at least the willingness of the police to use it—would not become obvious those otherwise willing to assist in investigations.

²⁰¹ See N.Y. CODE OF CRIM. PRO. 618-b (1904).