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MATERIAL WITNESS AND MATERIAL INJUSTICE

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I. INTRODUCTION

No serious student of the adversary system can ignore the grave threat to the integrity of the American witness process posed by this nation's material witness statutes. These outmoded laws,¹ some dating back to the territorial period of a state's history, are not invoked in every case, perhaps not even routinely, but when dusted off and put into operation, these archaic statutes result in innocent citizens spending weeks—even months—in custody.²

Impossible? Not for Josephine Garitt. She spent thirty-six days in a Washington county jail. Her "crime"? She witnessed one man's assault on another.³ Not for Titus Ward of New Orleans. He saw a homicide in Rhode Island, dutifully reported it to the local authorities, and in return found himself locked in a Rhode Island penitentiary for

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1. See, e.g., *In re Singer*, 134 Cal. App. 2d 547, 285 P.2d 955 (1955) (14 days); *Gebhardt v. Buchanan*, 175 So. 2d 803 (Fla. 1965) (eight months); *Rao v. Adams*, 296 N.Y. 231, 72 N.E.2d 170 (1947) (per curiam) (92 days); *Gross v. Sheriff of New York*, 277 A.D. 546, 101 N.Y.S.2d 271 (1950) (77 days). See also *In re Grzyeskowski*, 267 Mich. 697, 255 N.W. 359 (1934); *In re Prestigiacomio*, 234 A.D. 300, 255 N.Y.S. 289 (1932); 40 NEB. L. REV. 503 (1961).

2. See Appendix B.

3. *Garitt v. Sorenson*, No. 2478 (E.D. Wash. Feb. 18, 1970); see note 135 *infra*.

158 days.⁴

A decade ago, the senior author of this article published a survey of state material witness laws and concluded with a plea for reform.⁵ Shockingly, the tragedy continues today. In 1977, for example, Timothy Wayne Thomas lost his freedom for eighty-four days in an Oklahoma jail, where he frequently subsisted on a diet of beans.⁶ And in 1979 Norman Cochran, after spending fifty-two days in a Nebraska jail waiting to testify at a trial in which the defendant was ultimately found not guilty, received absolutely no compensation or witness fees for his period of incarceration.⁷

4. *Quince v. State*, 94 R.I. 200, 179 A.2d 485 (1962). In what has been described as one of the worst cases of abuse under the witness statutes, two migrant farm workers, Titus Ward of New Orleans and General Quince of Baltimore, observed a homicide in Rhode Island and were arrested as material witnesses. Unable to raise bail of \$5,000 each, they remained in a state penitentiary among convicted felons for 158 days. Eventually, they brought their desperate situation to light through petitions to the Rhode Island Supreme Court, and were released. In summarizing the affair, the court commented: "To the innocent even a momentary deprivation of liberty is intolerable; 158 days is an outrage. Confinement of the plaintiffs for so long a period among criminals and forcing them to wear prison garb added the grossest insult to injury." *Id.* at 202, 179 A.2d at 486.

Some states require that witnesses held in custody be separated from the general jail population. *See* CAL. CONST. art. I, § 6; N.J. STAT. ANN. §§ 2A:162-163 (West 1971). On occasion a confined witness may be kept in a hotel. The need to improve the treatment of jurors and witnesses is generally discussed in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 90-91 (1967).

5. Carlson, *Jailing the Innocent: The Plight of the Material Witness*, 55 IOWA L. REV. 1 (1969). *See* R. CARLSON, CRIMINAL JUSTICE PROCEDURE 83-86 (2d ed. 1978). Sporadic newspaper attention has been accorded the problem. *See, e.g.*, Luna, *Outrageous Laws Free Criminals and Jail Witnesses*, National Enquirer, Sept. 18, 1979, at 12, col. 1; *Law Professor Suggests Reform In Material Witnesses' Detention*, N.Y. Times, Feb. 11, 1979, at 57, col. 3; Carlson, *Let's Stop Jailing Innocent Witnesses*, Parade, Sept. 21, 1969, at 22, col. 4; Kimbrough, *Jailing Material Witnesses*, St. Louis Globe-Democrat, June 2, 1979, § E, at 1, col. 1.

6. Carter, *Witness to Slaying Is Bitter Over Jailing*, Tulsa World, July 3, 1977, at 1, col. 1. In Thomas' words, "For not doing anything but cooperating with justice, I totally lost my freedom." *Id.*

7. *Cochran v. County of Lincoln*, 203 Neb. 818, 280 N.W.2d 897 (1979). The Nebraska Supreme Court tersely rejected Cochran's claim for compensation: "While the result of this position may work a hardship on a material witness who is unable to post bond, the solution to that problem is for the Legislature. . . ." *Id.* at —, 280 N.W.2d at 900. Earlier, Cochran had won his release from jail in a federal habeas corpus proceeding challenging the constitutionality of Nebraska's material witness statute. *In re Cochran*, 434 F. Supp. 1207 (D. Neb. 1977). "Because the entire custodial restraint of the petitioners has been at odds with the Constitution, the petitioners should be released immediately." *Id.* at 1216. In releasing Cochran, the federal judge warned that there was no constitutional right to compensation, a clairvoyant statement in view of the action of the Nebraska Supreme Court. *Id.* at 1215. *See* notes 95-102 *infra* (other cases denying recovery).

These laws, in short, stand ready to ensnare the innocent observer of a crime in at least forty-five states.⁸ Many remain in their early, anachronistic form—virtually unchanged since their original passage in the 1880's. Moreover, despite recently enacted revisions in federal material witness procedures,⁹ significant questions persist on the number of witnesses imprisoned in federal jails today. Statistics collected, published, and analyzed here for the first time suggest that the United States Government may be operating a witness detention program of substantial dimensions—a program resulting in the incarceration of hundreds upon hundreds of witnesses each year!

How do these laws work? Suppose that Mr. Smith, a New Yorker, is visiting Chicago. While windowshopping at a jewelry store, a robber suddenly runs from the store, firing a revolver, and escapes. Smith describes the culprit to the police, who then ask him to view several men in a lineup. He picks out the guilty man, who is charged with armed robbery. Smith now becomes a candidate for treatment under the material witness laws. He may be released; on the other hand, he may be required to post a sizable bond guaranteeing his return to testify at trial. If he cannot scrape up the necessary cash, he can be held until trial. Thus ironically, while the person who committed the crime may be out on bail, Mr. Smith—an innocent witness to that crime—may be confined for a substantial period before the case comes to trial.

Adding to the irony is the frequent denial of certain rudiments of fair process to witnesses jailed because of their inability to make bail, including compensation for days spent in jail waiting to testify,¹⁰ appointment of counsel,¹¹ and special provision for early release.¹² The

8. A survey of applicable statutes from each state is located in Appendix B.

9. Federal law, by and large, is more modern than the numerous state statutes. As recently as 1978, Congress amended federal law by raising detained witness fees to thirty dollars per day. 28 U.S.C. §§ 1821(b), (d)(4) (Supp. 1979). See note 216 *infra* and accompanying text. Despite a number of commendable provisions, however, federal law still contains gaps in coverage. See note 208 *infra*.

10. See *Cochran v. County of Lincoln*, 203 Neb. 818, 280 N.W.2d 897 (1979) (citing *Barber v. Moss*, 3 Utah 2d 268, 282 P.2d 838 (1955)); notes 87-94 *infra*. See also 5 UTAH L. REV. 119 (1956); 21 YALE L.J. 327 (1912). Of historical significance is *Markwell v. Warren County*, 53 Iowa 422, 5 N.W. 570 (1880), which denied recovery to a witness confined for 95 days. Statutory correction of the problem came with the 1978 revisions of the Iowa Criminal Code. See IOWA CODE ANN. § 815.6 (West 1978).

11. See *Carlson*, *supra* note 5, at 2 n.2, 13-15. In *In re Cochran*, 434 F. Supp. 1207 (D. Neb. 1977), the court noted: "[A] material witness should be afforded an unqualified right to counsel." *Id.* at 1214. The opinion concluded that due process required counsel for the witness and, if necessary, that counsel be appointed at state expense. The court also held that the witness should

opportunity for prompt appeal of confinement orders also would seem appropriate for witnesses not charged with a public offense.¹³

For the most part, these jailings are not for the protection of witnesses, but for the convenience of litigants—typically, to assure prosecutors that witnesses will be present to testify at trial.¹⁴ Unlike protected witnesses who perhaps want the security of confinement, the witnesses discussed in this article are largely unwilling admittees to the nation's jails. In an era when Americans are urged to "get involved" and assist the administration of justice by volunteering information to clear up crimes, harsh material witness statutes operate to discourage citizen participation in the criminal justice system. Under several state laws, an out-of-state witness who advances important information may be locked up for an extended period if he lacks the money to post bond. Cases on record reveal that witnesses have been told to either put up as much as \$50,000 in bail or go to jail until the accused is tried.¹⁵

To remedy such injustices the authors, after examining cases decided¹⁶ and legislation adopted¹⁷ during the last ten years, will propose a model material witness law¹⁸ that would ameliorate the harshness of many statutes now on the books and strike a balance between the need for courtroom testimony and the individual liberty of citizens.¹⁹

be afforded other procedural protections such as an opportunity to be heard in person and to confront adverse witnesses. *Id.*

12. *Hearings on S. 1357 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 89th Cong., 1st Sess. 305 (1965); 40 NEB. L. REV. 503, 508 (1961). Petition for writ of habeas corpus is one of the most frequently employed procedural vehicles for attacking imprisonment of witnesses. See *Richards v. Warden*, 277 A.D. 87, 98 N.Y.S.2d 173 (1950).

13. See Appendix B (model provision for expedited appeal).

14. For cases in which witnesses are held for the defense, see notes 101-16 *infra*.

15. Bail for witnesses is treated in depth in notes 43-52 *infra* and accompanying text.

16. See notes 20-135 *infra* and accompanying text.

17. See notes 136-205 *infra* and accompanying text. Some states have made important and progressive strides. See notes 178-92 *infra* and accompanying text. Other states have retained their outmoded laws. See notes 193-205 *infra* and accompanying text. Appendix A briefly summarizes the law in each state.

18. See Appendix B.

19. This model statute includes opportunity for preservation of evidence, deposition and release of witnesses, counsel for witnesses proceeded against, and provisions for separate confinement, compensation, and expedited appeal.

II. CASE LAW DEVELOPMENTS

A. *Historical Antecedents*

There can be no quarrel with the proposition that every witness has a duty "to appear when commanded to testify to aid the courts in the administration of justice."²⁰ The strength of this principle, however, has not prevented courts from analyzing the validity of schemes, statutory and otherwise, for the detention of material witnesses. Cases decided since 1969 reflect much of society's new attitude toward human rights. Surprisingly, many of the recent decisions advocating a progressive, humane approach to witness imprisonment follow judicial pronouncements dating as far back as the early 1800's. Thus, the current liberal approach to selected aspects of the witness incarceration process reflects the adoption of a more equitable position, but it is a position long advocated by certain judges.

The origins of the power to confine material witnesses has been a subject of debate among the authorities. Several jurists have contended that the power originated in the common law,²¹ but some courts have traced modern material witness detention laws to an English statute passed in the mid-1500's under the monarchy of Phillip and Mary.²² Whether by common law or statute, however, numerous jurisdictions limited the power to incarcerate witnesses to justices of the peace and coroners in cases in which the accused had been committed on a preliminary examination and held to await action by the grand jury.²³ Many modern authorities still follow this approach, but further limit exercise of the power to committing magistrates alone.²⁴ By statute detention of witnesses is available only in criminal proceedings actually pending, not mere investigations.²⁵

Under the early cases, imprisonment of witnesses was authorized only "in the event of refusal of the witnesses to appear or to furnish recognizances as ordered."²⁶ As bail became a recognized requirement to insure the attendance of witnesses, imprisonment also was authorized in the event of a refusal to post bail. Courts have deemed an in-

20. *Di Palma v. Wiesen*, 163 Conn. 293, 297-98, 303 A.2d 709, 711 (1972).

21. *See e.g., In re Craig*, 20 Hawaii 447, 450 (1911).

22. *Id.*; *Linsky v. County of Luzerne*, 101 Pa. Super. Ct. 42, 44 (1931).

23. *In re Craig*, 20 Hawaii 447, 450-51 (1911).

24. *Carlson*, *supra* note 5, at 6-7 nn. 19 & 20.

25. *La Tempa v. Hughes*, 182 Misc. 1078, 50 N.Y.S.2d 433 (Sup. Ct. 1944).

26. *In re Craig*, 20 Hawaii 447, 451 (1911).

ability to pay as synonymous with a refusal.²⁷

B. *Federal Cases*

Over the years the power to bind witnesses by recognizance to testify before grand juries and at trials became a well-accepted principle, "essential to the due administration of justice."²⁸ *United States v. Durling*²⁹ was one of the earliest cases to confirm the power of the federal government to bind witnesses; *Bacon v. United States*³⁰ and *United States v. Feingold*³¹ are among the more recent.

Bacon and *Feingold* hold that the federal government's power to arrest and detain material witnesses may be inferred from section 3149 of the Bail Reform Act of 1966³² and rule 46(b) of the Federal Rules of Criminal Procedure.³³ Neither provision, however, contains any direct authority for the material witness warrants issued in those cases. The *Bacon* court reasoned that rule 46(b)'s bail provisions would make little sense if they empowered courts to impose bail but denied "the power to issue a warrant for the purpose of bringing the witness before the court in the first instance."³⁴ The *Feingold* case, moreover, alluded to judicial authority to review preliminarily the validity of a proposed arrest. Because the power to issue material witness warrants is based

27. *Howard & Cook v. Grace*, 18 Minn. 398, 402 (1872); *Carlson*, *supra* note 5, at 6 n.15.

28. *In re Craig*, 20 Hawaii 447, 453 (1911).

29. 25 F. Cas. 944 (N.D. Ill. 1869) (No. 15,010).

30. 449 F.2d 933 (9th Cir. 1971). See *In re September 1971 Grand Jury*, 454 F.2d 580, 584 n.4 (7th Cir. 1971), *rev'd on other grounds sub. nom.* *United States v. Mara*, 410 U.S. 19 (1973).

31. 416 F. Supp. 627 (E.D.N.Y. 1976).

32. If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, a judicial officer shall impose conditions of release pursuant to section 3146. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

18 U.S.C. § 3149 (1976).

33. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail.

FED. R. CRIM. P. 46(b).

34. 449 F.2d at 937.

on an inferred power, "restraint of that power by suitable judicial action in appropriate circumstances may also be inferred."³⁵ The court thus affirmed its jurisdiction over an application to quash a material witness warrant prior to its service.

The reasoning applied in *Bacon* and *Feingold* is indicative of the considerable discretion exercised by judges in material witness matters. In 1928 *Cunningham v. Barry*³⁶ held that the choice of process to secure the attendance of a witness "is a matter resting in the sound discretion of the court issuing the writ."³⁷ Since that time, courts have greatly expanded and detailed those factors which should guide judicial discretion in determining whether to take a witness into custody. These factors include the materiality and necessity of the witness' testimony,³⁸ the degree of diligence that would be required of the prosecutor to produce the witness if not confined,³⁹ and the likelihood of flight by the prospective witness.⁴⁰

Discretion in applying these criteria is vested in the courts because of the nature of the material witness detention process itself. A court should not act on the representations of the prosecutor alone, but should exercise its independent judgment. In exercising its discretion, the nature of the prosecution's request dictates caution. As stated recently in *State v. Reid*,⁴¹ the "[c]onfinement of a witness, even for a few days, not charged with a crime, is a harsh and oppressive measure which we believe is justified only in the most extreme circumstances." The court in *Little v. Territory*⁴² also considered the power to bind witnesses to be an extraordinary one—one that should be exercised only in urgent situations—and suggested the need to adopt specific statutory guidelines and safeguards for use of the power to bind witnesses.

35. 416 F. Supp. at 628.

36. 25 F.2d 733 (E.D. Pa.), *rev'd on other grounds*, 29 F.2d 817 (3rd Cir. 1928), *rev'd on other grounds*, 279 U.S. 597 (1929).

37. *Id.* at 735.

38. *Beaver v. Carey*, 426 F. Supp. 301, 303 (N.D. Ill. 1977).

39. *People v. Baldwin*, 74 Mich. App. 700, 702-04, 254 N.W.2d 619, 621 (1977), *rev'd on other grounds*, 405 Mich. 550, 275 N.W.2d 253 (1979); *People v. Harringer*, 65 Mich. App. 649, 650, 237 N.W.2d 598, 599 (1975).

40. *Ex parte Sheppard*, 43 Tex. Crim. 372, 374, 66 S.W. 304, 306 (1902).

41. 114 Ariz. 16, 25, 559 P.2d 136, 145 (1976), *cert. denied*, 431 U.S. 921 (1977).

42. 28 Okla. 467, 469, 114 P. 699, 699-700 (1911). *See also* *People v. Louis D.*, 82 Misc. 2d 68, 368 N.Y.S.2d 746 (Fam. Ct. 1975).

C. *Bail Procedures*

Lawyers seeking to challenge confinement of a witness must first determine whether valid bail-recognizance procedures were followed. Unfortunately, no decisions handed down after 1969 appear to deal specifically with this important aspect of witness procedures. In light of the paucity of current litigation, several older precedents apparently govern this nuts-and-bolts feature of the detention problem. *Bickley v. Commonwealth*⁴³ drew a distinction between requiring a witness to enter his recognizance for appearance at trial and the more burdensome requirement that a witness put up bail. The latter requirement, in the court's view, could be authorized only by statute. Absent a specific authorizing statute, a judge could only order the witness to enter into personal recognizance.⁴⁴ No inherent judicial power to require security could be implied, according to the court, because at stake is the "liberty of a law-abiding citizen, who, through no fault of his own, has become a material witness [in] a criminal prosecution."⁴⁵

In most cases in which special security is required, the court extracts bail from a witness because the district attorney believes that the witness is material and intends to move out of the country,⁴⁶ *not* because the witness has made any demonstrable attempt to evade the process of the court.⁴⁷ For this reason, a serious crime must be involved to deprive a witness of his liberty. As a general rule, a witness cannot be held to bail in a misdemeanor case.⁴⁸

Judicial discretion is a critical factor in setting the amount of bail. The judge must balance the necessity of a witness' presence at trial and his "constitutional right to freedom from unnecessary restraint."⁴⁹ Bail for a witness can be made so excessive that it becomes "tantamount to

43. 25 Ky. (2 J.J. Marsh.) 573 (1829).

44. *Id.* at 574. See *Ljubsich v. Brown*, 276 Ill. 186, 114 N.E. 583 (1916); Andrew Latshaw's Case, 1 Ohio Dec. Reprint 96 (Ct. Common Pleas 1842).

45. *Troy v. Pettit*, 19 Misc. 280, —, 44 N.Y.S. 256, 257 (Sup. Ct. 1897).

46. *Howard & Cook v. Grace*, 18 Minn. 398, 402 (1872).

47. *Ex parte Sheppard*, 43 Tex. Crim. 372, 66 S.W. 304 (1902).

Now, it would operate a great hardship if, under such circumstances, a witness is to be imprisoned indefinitely, when other witnesses who may have actually evaded process or have been in default as witnesses are brought before the court, and they are permitted to be enlarged on their personal security.

Id. at 374, 66 S.W. at 306.

48. *Ex parte Riddle*, 25 Okla. Crim. 25, 218 P. 894 (1923).

49. *Goodrich v. Warden*, 137 N.Y.S.2d 437, 438 (Sup. Ct. 1954).

keeping him in jail at the will of the District Attorney."⁵⁰ In determining whether a witness' bail is reasonable or excessive, courts have considered the location of his residence and his family roots, the source of his income and property status, and the condition of his health.⁵¹ Sometimes, courts affirming high bail amounts have emphasized that circumstances indicating that the witness is not completely innocent or uninvolved (such as shielding the accused or making false statements) will justify a heavier levy of bail.⁵²

D. *Witness Detention as a Subterfuge*

The material witness detention process has not always been used for its intended purpose—to secure live testimony for trial. Over the years prosecutors and police have sometimes invoked the power to confine criminal suspects as witnesses while gathering evidence against the witness-defendant.

*Wilson v. State*⁵³ provides a modern example. Police apprehended defendant as a murder suspect. After two days of questioning, the state obtained an order to hold him as a material witness. Six more days of confinement and questioning resulted in his confessing to a homicide. Only then did the state obtain a warrant charging him with murder. Although ruling improper the initial forty-eight hour detention, the Georgia Supreme Court held that defendant's confession was voluntary and admissible at trial.⁵⁴

The action of the Georgia court was not without precedent. Twenty-two years before in *People v. Perez*,⁵⁵ the New York Court of Appeals

50. *Id.*

51. See *United States v. Lloyd*, 26 F. Cas. 984 (S.D.N.Y. 1860) (No. 15,614); *O'Connell v. McElhiney*, 138 N.Y.S.2d 138 (Sup. Ct. 1954); *Goodrich v. Warden*, 137 N.Y.S.2d 437 (Sup. Ct. 1954).

52. See, e.g., *Ex parte Rankin*, 330 Mich. 91, 47 N.W.2d 28 (1951). Courts affirming the trial court's bail judgment often state that the amount must be "necessary and reasonable." *People v. Doe*, 283 A.D. 988, 989, 131 N.Y.S.2d 7, 8 (1954). Bail should be fixed sufficiently high to protect "the rights of the people . . . in their efforts to punish and eliminate crime[s]." *Weiner v. Collins*, 22 N.Y.S.2d 774, 775 (Sup. Ct.), *aff'd*, 260 A.D. 806, 22 N.Y.S.2d 775 (1940). A witness' undertaking also should "be large enough so that the sureties on his undertaking would see that the witness would appear" at the trial proceedings. *Ex parte Prall*, 89 Okla. Crim. 413, 415, 208 P.2d 960, 960 (1949). A witness' opportunity to give his testimony immediately could validate the size of the bail. *State v. McGouldrick*, 169 La. 187, 124 So. 823 (1929).

53. 229 Ga. 395, 191 S.E.2d 783 (1972).

54. *Id.* at 398, 191 S.E.2d at 784.

55. 300 N.Y. 208, 90 N.E.2d 40 (1949), *cert. denied*, 338 U.S. 952 (1950).

affirmed a robbery-murder conviction involving facts similar to *Wilson*. Thirteen detectives questioned defendant during a four-day period between his arrest and his commitment as a material witness. After being questioned for thirty-two hours of a thirty-six hour period, defendant confessed. The court found that because defendant at the time of his arrest had possession of a coat belonging to the murder victim, he had sufficient knowledge of the circumstances surrounding the murder to justify his commitment as a material witness.⁵⁶ The police could properly use this procedure because at the time of his commitment they "did not have sufficient information to arraign him upon a murder charge."⁵⁷

Similar circumstances again arose in New York when a murder suspect was initially held as a material witness in a 1962 case.⁵⁸ On his arraignment as a material witness, a federal judge cautioned petitioner that if he was a witness he should cooperate, but if he was a suspect he should not talk to anyone.⁵⁹ After sixty-two days of confinement and questioning, petitioner was discharged as a material witness, booked for homicide, and later convicted. The court found that he had been lawfully committed as a material witness, that as a witness he had not been denied his constitutional rights when questioned during his commitment in the absence of his attorney, and that his detention was not merely a "ruse to extract a confession from him."⁶⁰ On review, the United States Court of Appeals for the Second Circuit conceded that the material witness process opens up "extensive possibilities for abuse of personal liberty,"⁶¹ but affirmed the conviction.⁶²

The Second Circuit continued to uphold detention of New York suspects as witnesses when it affirmed the material witness detention and subsequent murder conviction of Edward Allen.⁶³ Although the court

56. *Id.* at 219, 90 N.E.2d at 46.

57. *Id.*

58. *Glinton v. Denno*, 200 F. Supp. 643 (S.D.N.Y.), *aff'd*, 309 F.2d 543 (2d Cir. 1962), *cert. denied*, 372 U.S. 938 (1963).

59. *Id.* at 644.

60. *Id.* at 646.

61. 309 F.2d at 544.

62. *Id.* at 545. Defendant tried once more to obtain habeas corpus relief, but was rebuffed when the appellate court held that defendant's continued detention after the discharge of the grand jury did not violate the fourth amendment. *Glinton v. Denno*, 339 F.2d 872 (2d Cir. 1964), *cert. denied*, 381 U.S. 929 (1965). According to the court, a mere technicality like the discharging of the grand jury cannot invalidate an otherwise proper witness commitment. *Id.* at 876.

63. *Allen v. La Vallee*, 411 F.2d 241 (2d Cir.), *cert. denied*, 396 U.S. 971 (1969).

of appeals observed that expansion of fourth and fifth amendment rights, together with stricter scrutiny of New York's material witness law, "may indicate that *Perez* would be decided differently today,"⁶⁴ it ruled that New York's procedure should not be held retroactively unconstitutional.⁶⁵

Police and prosecutors have not always been successful in upholding convictions based on evidence acquired through the use (and occasional abuse) of material witness procedures. Numerous decisions illustrate the reluctance of courts to certify detention of an accused person under the guise of a material witness statute. In *State v. Price*⁶⁶ police picked up defendant, interrogated him, and charged him as a material witness in a murder case. Unable to make \$10,000 bail, the police held defendant in the county jail until he was taken to his apartment in the company of police officers. There, the police conducted a warrantless search and seized certain items, which incriminated defendant. A New Jersey appellate court granted defendant's motion to suppress the seized evidence, noting that the true motive of the authorities was to hold defendant "to inquire into his possible criminality rather than as a material witness against another."⁶⁷ New Jersey's material witness law does not "extend to the detention of potential defendants under investigation" or to "possible suspects on the mere suspicion that they know something."⁶⁸ If no offender exists, no material witness can be held.

Oregon has been the locus of two important decisions invalidating witness "holds." In *State v. Lloyd*⁶⁹ an extremely intoxicated defendant attempted to enter a burning building. Police restrained him from entering the blaze and held him in jail as a "friendly drunk," a non-criminal offense. After questioning, defendant admitted his involvement in the burning. Discovery of deaths in the fire brought *Miranda* warnings, more questioning, and the changing of defendant's status from "detox" to "material witness." Additional questioning followed until police arrested and charged defendant after four days of confinement. In overturning his conviction, the appellate court found that de-

64. *Id.* at 244. See note 55 *supra* and accompanying text.

65. 411 F.2d at 244.

66. 108 N.J. Super. 272, 260 A.2d 877 (1970).

67. *Id.* at 281, 260 A.2d at 882.

68. *Id.* at 280-81, 260 A.2d at 882.

69. 22 Or. App. 254, 538 P.2d 1278 (1975).

fendant's detention as a material witness failed to comply strictly with statutory procedure. No one had been charged with a crime when defendant was first confined as a witness; nor had the commitment order originated with a magistrate or judge as required. Absent compliance with these statutory guidelines, "the state lack[ed] the power to infringe upon the rights of an individual by 'detaining' him as a material witness."⁷⁰

In 1978 *State v. McKendall*⁷¹ followed the *Lloyd* decision closely. Again, police failed to comply with certain provisions in Oregon's material witness law. The court placed the burden on the state to show by clear and convincing evidence that the taint from the illegal detention had dissipated by the time the incriminating statement was given.⁷²

E. *Constitutional Attacks*

Periodic attacks upon the constitutionality of material witness statutes have mounted over the years, some of them dating to 1872. The scope of the attacks vary, some aiming at a particular aspect of the witness statute, others broadly claiming the statute's unconstitutionality. An 1872 Minnesota case upheld the validity of witness incarceration, but only if certain vital principles were respected:

[T]he witness may be required to recognize in the discretion of the court, the discretion (or judgment) here spoken of must, as in all other like cases, be intended to be a sound legal discretion. The judgment of the court cannot be capriciously exercised. It cannot legally abuse its discretion, nor, indeed, is it to be presumed that it will. If, for instance, it would be unjust or oppressive, and against common law and common right, as it certainly would be . . . to commit such material witness in default of bail,

70. *Id.* at 276, 538 P.2d at 1289.

71. 36 Or. App. 187, 584 P.2d 316 (1978).

72. *Id.* at 192, 584 P.2d at 320. The court held that the state's giving of *Miranda* rights did not discharge its responsibility.

Other types of abuses have been alleged in other cases, but without uniform success in overturning convictions. In two cases defendants have argued that the court influenced the testimony of witnesses when it invoked its power to confine witnesses. That the court issued bench warrants for witnesses was not sufficient to void a defendant's conviction in *People v. Rogers*, 27 Ill. App. 3d 123, 327 N.E.2d 163 (1975). Nor did the appellate court in *Feutralle v. United States*, 209 F.2d 159 (5th Cir. 1954), find that the witness had been intimidated by the court's temporary custody order. The witness abandoned his hostile and evasive testimonial attitude and became extremely cooperative and helpful to the government after the court's order. In another case the court denied defendant's application to take the deposition of a confined material witness after the prosecution moved the witness from the county jail to a hotel. *State v. Anthoulis*, 62 Ohio App. 113, 23 N.E.2d 312, *appeal dismissed*, 135 Ohio St. 631, 22 N.E.2d 84 (1939).

without any proof that he had any intention of not appearing and testifying when duly subpoenaed, but who is too poor to render his recognizance of any value, or too fundless to be able to give bail, in what sense legal discretion, the court would be warranted in so doing; or what interest of the state requires the incarceration of such a person? Certainly none.⁷³

Substantive due process is a major focus in many decisions.⁷⁴ One ruling applied a balancing test including such factors as the “interests of society,” “enforcement of the criminal laws,” and the witness’ own welfare.⁷⁵ Other courts have applied a procedural due process analysis to require that “exact legal procedure” be followed before committing a material witness to prison,⁷⁶ especially a hearing and an opportunity to be heard before confinement⁷⁷ by the committing magistrate.⁷⁸ Although some states do so by legislation, one court by judicial fiat established a detained material witness’ right to representation.⁷⁹ The court ruled that legal representation is a fundamental right of every citizen, even a witness, and impediments to the free exercise of this right are “intolerable.”⁸⁰

More recent cases continue to reflect many of the judicial attitudes contained in earlier opinions—witness detention statutes are constitutional, but procedural correctness must be observed. *Yambo v. Jennings*⁸¹ found no constitutional infirmity in jailing a witness who had been afforded a prior hearing to contest the district attorney’s right to detain him.⁸² *United States v. Anfield*⁸³ eliminated a number of fifth amendment impediments to confinement and interrogation by ruling that the custody of a material witness “was not of the type requiring *Miranda* warnings.”⁸⁴

73. *Howard & Cook v. Grace*, 18 Minn. 398, 403-04 (1872). The court further observed that Minnesota’s material witness law was valid under the fourteenth amendment and the state’s constitution.

74. *See, e.g., Hurtado v. United States*, 410 U.S. 578 (1973); notes 85, 106 *infra*.

75. *Bolt v. Society*, 48 Misc. 175, —, 95 N.Y.S. 250, 251 (Sup. Ct. 1905).

76. *Commonwealth v. Moxitch*, 18 Northampton 151, 152, 2 Pa. D. & C. 31, 33 (1921).

77. *In re Lewellen*, 104 Mich. 318, 320, 62 N.W. 554, 554 (1895).

78. *Ex parte Shaw*, 61 Cal. 58, 59 (1882).

79. *In re Craig*, 20 Hawaii 447 (1911). On the federal approach to counsel in witness proceedings, see notes 204-05 *infra*. For a model statute containing a guarantee of counsel for witnesses, see Appendix B.

80. 20 Hawaii at 454.

81. 220 Pa. Super. 186, 286 A.2d 909 (1971).

82. *Id.* at 188, 286 A.2d at 910-11.

83. 539 F.2d 674 (9th Cir. 1976).

84. *Id.* at 677.

Just as lack of representation by counsel has been attacked as unconstitutional, so has the paucity of fees for detained witnesses. The United States Supreme Court in *Hurtado v. United States*⁸⁵ held that the pay provisions of the federal material witness laws, which limited detained witnesses to one dollar per day in fees while in confinement awaiting trial, was not a taking of property without just compensation under the fifth amendment.⁸⁶ Nor was the payment so low that it constituted involuntary servitude under the thirteenth amendment.⁸⁷ Neither was the statute's classification scheme, which paid twenty dollars per day to any witness attending trial but only one dollar to detained witnesses, a violation of the due process clause. The court refused to "pass upon the wisdom or ultimate fairness of the compensation" or decide "that a more just and humane system could not be devised."⁸⁸

Not all material witness laws, however, have been approved as constitutionally sound vehicles for detaining witnesses. The Second Circuit's opinion in *Allen v. La Vallee*⁸⁹ mentioned in dictum that the expansion of fourth and fifth amendment rights left little room for upholding New York's previous material witness statute.⁹⁰ In *In re Cochran*⁹¹ a federal district court recently ruled that Nebraska's material witness statute violated the federal equal protection and due process clauses.⁹² State authorities failed to comply with procedural due process in two respects: (1) no written notice of the allegations upon which the state relied had been provided to petitioners; and (2) no written statement of the evidence and reasons for the adverse decision had ever been supplied to them.⁹³ Failure to provide due notice forced petitioners to rely upon speculation and experiment to discover the appli-

85. 410 U.S. 578 (1973).

86. *Id.* at 589.

87. *Id.* at 589-90 n.11.

88. *Id.* at 591 (quoting *Dandridge v. Williams*, 397 U.S. 471 (1970)). For Congress' revisions of the federal pay provisions after *Hurtado*, see note 216 *infra*.

89. 411 F.2d 241 (2d Cir.), *cert. denied*, 396 U.S. 971 (1969).

90. *Id.* at 244. The New York legislature later revised this law. See note 182 *infra*.

In *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971), the Ninth Circuit avoided the constitutional issue, citing inadequate "briefing and argument" of the point. *Id.* at 941.

91. 434 F. Supp. 1207 (D. Neb. 1977). Two brothers, James and Norman Cochran, had been placed in custody by virtue of Nebraska's material witness statute. The federal court ordered their release from jail after a substantial stay "[b]ecause the entire custodial restraint of the petitioners has been at odds with the Constitution." *Id.* at 1216. See note 7 *supra* and accompanying text.

92. 434 F. Supp. at 1212, 1216.

93. *Id.* at 1216. As to the equal protection claim, the statute discriminated against married

cable procedures and standards in the state's material proceedings—"a situation yielding the most basic unfairness."⁹⁴

F. *The Fee Controversy*

Inequities in the material witness detention process do not necessarily end when the witness is finally released after testifying. In some instances the witness receives little or no compensation for loss of time. In one case a witness jailed for 297 days for failure to give a recognizance was denied all recovery, because the "cause in which she had been required to recognize was never brought to trial."⁹⁵ Because she never testified in the circuit court, she never was in the attendance of the court as required for compensation under the witness fee statute.⁹⁶

One of the more extreme instances in this century occurred in the Lindbergh kidnapping case. Although the state lodged him in a hotel rather than in civil prison, one witness had nothing to show for 892 days of lost time except the state's gratitude.⁹⁷

The material witness problems of the Cochran brothers in Nebraska were noted earlier.⁹⁸ A federal district court judge ordered their release from confinement, but warned them that there was no "constitutional right to monetary compensation for time spent in confinement as a material witness."⁹⁹ Still, the brothers sued for witness fees. In *Cochran v. County of Lincoln*,¹⁰⁰ decided in 1979, the Nebraska Supreme Court turned down their entire request for fees:

One who is retained in custody as a material witness pursuant to Ne-

women and minors by placing a \$100 ceiling on the amount of any recognizance that a married woman or minor could personally provide. *Id.* at 1212.

94. *Id.* at 1216.

95. *Sawyer v. Greene*, 91 Wis. 500, 501, 65 N.W. 181, 181 (1895).

96. *Id.* at 502-03, 65 N.W. at 181. *See generally* 21 YALE L.J. 327 (1912). Even innocent witnesses committed to jail by means of an invalid process have been denied all fees. One court placed the burden for challenging the validity of the witness' illegal 88-day detention completely on the witness. *Commonwealth v. Moxitch*, 18 Northampton 151, 2 Pa. D. & C. 31 (1921). *But cf.* *Kramfert v. Dauphin County*, 25 Pa. D. 153, 154 (1916) ("Whether the right of a witness to recover in a case of this kind depends on the regularity or validity of the process to which he is subjected is open to grave doubt."). Certain decisions have established that prison inmates are not entitled to witness fees regardless of the circumstances under which they must testify. *See, e.g., Meadows v. United States Marshal*, 434 F.2d 1007 (5th Cir. 1970); *Marchese v. United States*, 453 F.2d 1268 (Ct. Cl. 1972); *In re Napoli*, 85 Misc. 2d 752, 381 N.Y.S.2d 179 (Sup. Ct. 1976).

97. *In re Wendel*, 173 Misc. 819, 18 N.Y.S.2d 586 (Sup. Ct. 1940).

98. *See notes 7, 93 supra* and accompanying text.

99. *In re Cochran*, 434 F. Supp. 1207, 1215 (D. Neb. 1977).

100. 280 N.W.2d 897 (Neb. 1979).

braska's material witness law is not actually employed in attendance on the court during all the time that the individual is in custody. . . . [A] material witness held in custody is only actually employed in attendance on the court during that period of time in which trial of the matter for which the individual is being incarcerated is conducted.¹⁰¹

Despite its holding, the court admitted that "there is probably no payment adequate to compensate a material witness who must remain in custody solely due to his financial inability to post bond and secure his release."¹⁰²

Material witness fee statutes have not always been interpreted so narrowly. Some jurisdictions view the granting of fees to detained witnesses as a method to speed trials. One case noted that fee legislation should be liberally construed to encourage prosecutors "to shorten the detention by trying the case as soon as possible."¹⁰³ "The inability to give bail and consequent detention [are] the misfortune, rather than the fault, of the witness."¹⁰⁴ Another enlightened court declared that witness fee laws were intended to place a confined witness "as nearly as may be on the same footing as the ordinary witness, who is entitled to use for his own advantage such portion of his time as is not required for the service of the public."¹⁰⁵

As applied to pretrial detention, the federal witness fee statute was narrowly construed in *Hurtado v. United States*.¹⁰⁶ Although petitioners sought twenty dollars per day during their entire period of incarceration, the United States Supreme Court limited their recovery to one dollar per day for the weeks spent in jail before the trial began and twenty dollars per day while the trial was in progress.¹⁰⁷ According to the Court, a detained witness "is in the same position as a nonincarcerated witness who is summoned to appear on the first day of trial, but on arrival is told by the prosecutor that he is to hold himself ready to testify on a later day in the trial."¹⁰⁸

101. *Id.* at 900.

102. *Id.*

103. *Linsky v. County of Luzerne*, 101 Pa. Super. Ct. 42, 46 (1931).

104. *Robinson v. Chambers*, 94 Mich. 471, 472-73, 54 N.W. 176, 176 (1893) (per curiam); see *Higginson's Case*, 12 F. Cas. 132, 132 (D.C. Cir. 1802) (No. 6,471).

105. *Kirke v. Stafford County*, 76 N.H. 181, 183, 80 A. 1046, 1047 (1911). The awarding of fees to a detained witness does not deprive a criminal defendant of a fair trial, regardless of when they are paid. *People v. Hill*, 32 Mich. App. 404, 410, 188 N.W.2d 896, 899 (1971).

106. 410 U.S. 578 (1973).

107. *Id.* at 586.

108. *Id.* at 590. Since *Hurtado*, the federal statute has been revised. See note 216 *infra*. For

G. *The Alien Detention Problem*

When the witness detention statutes originated in the 1800's, their use in illegal alien cases was largely unforeseen. In some cases, for example, the government now holds Mexican aliens as witnesses against the person who arranged their illegal entry into the United States.¹⁰⁹

In cases in which alien witnesses might give testimony exonerating the alleged smuggler, a different question arises: can the government promptly deport smuggled aliens to their homelands before the defendant-smuggler's attorney has an opportunity to interview them?¹¹⁰ A key case in this area is *United States v. Mendez-Rodriguez*,¹¹¹ in which

additional cases and analysis on the witness fee problem, see Annot., 50 A.L.R.2d 1439 (1956). Statutes relating to witness fees are detailed in the next section of this article. See notes 162-70 *infra* and accompanying text.

109. A federal court's power to detain smuggled aliens pending trial of their smugglers has long been recognized. See, e.g., *In re Aliens*, 231 F. 335 (N.D.N.Y. 1916); Comment, *The Wetback as Material Witness: Pretrial Detention or Deposition*, 7 CAL. W.L. REV. 175 (1970).

110. Deprivation of the right to confront detained witnesses is not a problem unique to the 1970's. It has long been recognized "that witnesses do not belong to the state any more than they belong to the defense." *Atkins v. State*, 115 Ohio St. 542, 550, 155 N.E. 189, 191, *cert. denied*, 274 U.S. 720 (1927). For this reason, defense counsel should not be refused the right to interview a detained witness in private.

Generally speaking, a person under detention as a witness for the state should not in any sense be sequestered. His detention is merely for the purpose of insuring his presence at the trial. He is not charged with crime. He is an unfortunate victim of the necessity under which the state rests for securing the preservation of its evidence. Under ordinary circumstances, such persons should be subjected to no further disabilities or inconvenience than the exigencies of the occasion absolutely require. Neither should persons who desire to talk to him be subjected to limitations or embarrassment.

The witness should be placed as nearly as possible in the same condition as he would be if unrestrained. A witness who is not placed under bond, or who is so placed and given bail, is free to talk to any one he wishes. It is hard to see why the fact that the witness fails, or is unable, to give bond, should subject either the witness or any one else to unusual conditions in discussing facts concerning the trial in which it is understood that the person detained will be a witness for the prosecution. Certainly, if a witness who is laboring under no mental disability, and who is not peculiarly under the mental control or domination of the party who seeks the interview, can be sequestered by being put under a large bond, and can only be interviewed in the presence of the prosecuting attorney, the door is open to grave abuses which, in our opinion, are not contemplated by the necessary law which provides that persons deemed by the state to be material witnesses on its behalf may be detained unless reasonable security for their presence at the trial is provided.

State v. Susan, 152 Wash. 365, 372, 278 P. 149, 152 (1929). *But see* *Schweinberger v. Casey*, 171 Misc. 601, 11 N.Y.S.2d 960 (Sup. Ct. 1939); *Atkins v. State*, 115 Ohio St. 542, 155 N.E. 189, *cert. denied*, 274 U.S. 720 (1927). For additional cases and analysis, see Annot., 14 A.L.R.3d 652 (1967).

111. 450 F.2d 1 (9th Cir. 1971).

the United States Court of Appeals for the Ninth Circuit held that such action by the government deprives defendants of their fifth and sixth amendment rights.¹¹² As a direct result, many illegal aliens are being confined as material witnesses.¹¹³

Several inroads have been made on the *Mendez-Rodriguez* rule. The Ninth Circuit has conceded that "there may be some circumstances in which *Mendez-Rodriguez* will not apply."¹¹⁴ Further, a defendant who does not make an affirmative effort while preparing for trial to obtain the identity of alien witnesses, or to request that they be detained, cannot successfully claim denial of his constitutional rights when these aliens are deported before he interviews them.¹¹⁵ In addition, several courts, relying on the *Mendez* court's disinclination "to indulge in any speculation that the alien interviews would, or would not, have been fruitful to the defense,"¹¹⁶ have rejected attacks on convictions by arguing the improbability that the alien witness' testimony would have favored the defendant.¹¹⁷

There also has been a movement in the direction of allowing the trial court to exercise judicial discretion in determining whether all or some aliens should be detained.¹¹⁸ One court observed that such discretion is essential to bring human value considerations into play.¹¹⁹ As with

112. *Id.* at 5.

113. The Washington Post, Aug. 12, 1979, § A, at 7, col. 1.

114. United States v. Tsutagawa, 500 F.2d 420, 422 (9th Cir. 1974); see United States v. Martinez-Frausto, 463 F.2d 231 (9th Cir. 1972).

115. Uribe v. United States, 529 F.2d 742, 743 (5th Cir. 1976); United States v. Francisco-Romandia, 503 F.2d 1020, 1021 (9th Cir. 1974) (per curiam), cert. denied, 420 U.S. 910 (1975); United States v. Lomeli-Garnica, 495 F.2d 313, 314 (9th Cir. 1974); United States v. Romero, 469 F.2d 1078, 1079 (9th Cir. 1972) (per curiam); State v. Islas, 119 Ariz. 559, 560, 582 P.2d 649, 650-51 (1978).

116. 450 F.2d at 5.

117. See United States v. Orozco-Rico, 589 F.2d 433, 435 (9th Cir. 1978), cert. denied, 440 U.S. 967 (1979); United States v. Ballesteros-Acuna, 527 F.2d 928, 930 (9th Cir. 1975); United States v. Castellanos-Machorro, 512 F.2d 1181, 1183 (9th Cir. 1975); United States v. Mosca, 355 F. Supp. 267, 273 (E.D.N.Y. 1972). But see People v. Mejia, 57 Cal. App. 3d 574, 581, 129 Cal. Rptr. 192, 196 (1976). Cases denying relief to defendants include United States v. McQuillan, 507 F.2d 30 (9th Cir. 1974) (alien not a witness to crime for which defendant was charged); United States v. Moreno-Flores, 461 F.2d 1001 (9th Cir. 1972) (per curiam) (defendant cannot claim he thought all rather than just some aliens would be called as prosecution witnesses); *In re Jesus B.*, 75 Cal. App. 3d 444, 142 Cal. Rptr. 197 (1977) (prosecution not required to invoke material witness statute in state proceeding).

118. See United States v. Hart, 546 F.2d 798 (9th Cir. 1976), cert. denied, 429 U.S. 1120 (1977); United States v. Carrillo-Frausto, 500 F.2d 234 (9th Cir. 1974).

119. United States v. Carrillo-Frausto, 500 F.2d 234, 235 (9th Cir. 1974).

material witnesses generally, the illegal alien is treated in these cases "like a person accused of a noncapital crime."¹²⁰ Simple equity requires that a balancing test be applied in each case. Neither the government nor the defense should be allowed to impose "a substantial hardship for only a remote possibility of benefit to either of them."¹²¹

Of course, the court's discretion is not limitless. As the Ninth Circuit itself has pointed out, the *Mendez-Rodriguez* rule "prevents the government from determining who will be a helpful witness for the accused."¹²² The defendant has a right to formulate his defense without governmental interference with the witnesses.¹²³ When in doubt over the materiality of an alien's testimony, certain guidelines control. If the evidence discloses that the witness participated in the crime charged, or was a nonparticipating eyewitness from a sufficiently proximate vantage point to the offense, the alien "is a material witness and the defendant has demonstrated a reasonable possibility he could, if available, give evidence which would exonerate him."¹²⁴

The *Mendez-Rodriguez* problem is not unique to the Ninth Circuit. The Second Circuit seems to adhere to the *Mendez-Rodriguez* guidelines in examining cases for governmental fault in failing to retain a needed witness,¹²⁵ the Seventh Circuit appears to have gone slightly beyond *Mendez-Rodriguez*,¹²⁶ and the Fifth Circuit seems to have

120. *United States v. Verdusco-Macias*, 463 F.2d 105, 107 (9th Cir.), *cert. denied*, 409 U.S. 883 (1972).

121. *United States v. Lomeli-Garnica*, 495 F.2d 313, 314 (9th Cir. 1974). As a practical matter, taking an alien into custody when there is no apparent reason to distrust him after his past cooperation might well turn him into a very unhappy and uncooperative witness—a situation hardly supportive of our system of justice and contrary to the purpose of material witness laws. *See United States v. Hart*, 546 F.2d 798, 800 (9th Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977).

122. *United States v. Tsutagawa*, 500 F.2d 420, 423 (9th Cir. 1974). *See People v. Mejia*, 57 Cal. App. 3d 574, 581, 129 Cal. Rptr. 192, 196 (1976).

123. *United States v. Tsutagawa*, 500 F.2d 420, 423 (9th Cir. 1974). When aliens are confined, courts have approved parole and farm-out methods of retention. Illegal aliens thus can be kept in non-prison environments before trial by placing them in local farms where they can earn wages. *See United States v. Verdusco-Macias* 463 F.2d 105, 107 (9th Cir.), *cert. denied*, 409 U.S. 883 (1972); *United States v. Winnie Mae Mfg. Co.*, 451 F. Supp. 642, 650 (C.D. Cal. 1978).

124. *People v. Mejia*, 57 Cal. App. 3d 574, 580, 129 Cal. Rptr. 192, 196 (1976) (citing *Williams v. Superior Court*, 38 Cal. App. 3d 412, 423-24, 112 Cal. Rptr. 485, 492 (1974)).

125. *See Singleton v. Lefkowitz*, 583 F.2d 618, 623-24 (2d Cir. 1978), *cert. denied*, 440 U.S. 929 (1979).

126. *See United States v. Calzada*, 579 F.2d 1358, 1361-62 (7th Cir. 1978). To overturn a conviction, the court does not require that prosecutorial "bad faith" be shown in the disappearance of the material witness. Nor does the court require defendant to show prejudice to his case

avoided the issue.¹²⁷

H. *Suits for Money Damages*

Detained material witnesses have not always accepted their hardships without a fight. After release many have sued for damages. A theory sometimes employed for recovery of money damages is false imprisonment. Early in this century, such lawsuits met with little success. Courts typically found a judge's commitment order to be within his jurisdiction under the state's material witness law—a protected ministerial function, despite claimed irregularities in the proceedings.¹²⁸ Governmental immunity also served to protect municipal corporations from witness' claims that confinement in inadequate facilities damaged their health.¹²⁹

As constitutional theory advanced, civil actions by material witnesses became more frequent. In the 1940's courts began to approve actions by jailed witnesses for abuses in the detention process. One court refused to bar a detainee's recovery of damages for unlawful restraint, even though she had accepted a witness fee.¹³⁰ Another court specifically upheld plaintiff's complaint charging defendants with "malicious action in causing plaintiff to be held to bail as a witness."¹³¹ Whether "designated as malicious prosecution, malicious abuse of process, false imprisonment, or false arrest,"¹³² the action would lie.

In a 1977 damages action, plaintiff-witnesses brought suit under the Federal Civil Rights Act¹³³ against the public defender and state's attorney, claiming that defendants arranged for their arrest and incarceration without bond or a hearing.¹³⁴ The court dismissed the action, explaining that defendants had acted within the scope of their normal functions and, therefore, possessed qualified immunity for their acts.¹³⁵

arising from the government's violation of his right to compulsory process by deporting eyewitnesses to the crime with which he is charged.

127. *See* *Uribe v. United States*, 529 F.2d 742 (5th Cir. 1976).

128. On governmental immunity, see *Fawcett v. Linthecum*, 7 Ohio C.C. 141 (1893).

129. *See* *Watkins v. Freeholders of Atlantic Co.*, 73 N.J.L. 213, 62 A. 1134 (1906).

130. *Hadler v. Rhyner*, 244 Wis. 448, 12 N.W.2d 693 (1944).

131. *McGrath v. Keenan*, 24 N.J. Misc. 121, 122, 46 A.2d 725, 726 (Essex County C.P. 1946).

132. *Id.* at 123, 46 A.2d at 726.

133. 42 U.S.C. §§ 1983, 1985 (1976).

134. *Beaver v. Carey*, 426 F. Supp. 301 (N.D. Ill. 1977).

135. *Cf.* *Allison v. County of Ventura*, 68 Cal. App. 3d 689, 698, 137 Cal. Rptr. 542, 547 (1977) (arresting officer operates with qualified immunity subject to reasonable inspection of arrest war-

III. LEGISLATIVE DIRECTIONS: STATE LAWS

A. *Confining the Witness*

The detention of material witnesses has long been the object of legislative treatment. Nearly all states and the federal government have enacted provisions dealing with pretrial confinement of material witnesses. In every state except Indiana¹³⁶ and West Virginia,¹³⁷ a prospective witness can be brought before a judge on application of counsel, generally the prosecutor. Typically, the matter will be heard by a magistrate, who determines the importance of the witness to the case and gives the witness the option of posting some form of bail or recognizance, either personal or with sureties. If the witness must post bail but refuses or fails to do so, he can be confined until he has given his testimony or the case is dismissed. Several states provide detailed procedures, limitations, and safeguards for application of their material witness systems. Systems often do not become activated unless a certain type of offense is committed, usually a felony¹³⁸ or a major crime.¹³⁹

A critical stage in the material witness process is the arrest phase. Several states grant police officers broad authority to arrest material witnesses.¹⁴⁰ One state statutorily limits the power of arrest to instances in which police have reasonable grounds to believe that the person was present at a crime.¹⁴¹ Another state requires probable cause to believe that a person is a necessary and material witness and might be unavailable later for service of a subpoena.¹⁴² A warrant for the arrest of the

rant for patent irregularities). *But see* Garitt v. Sorenson, No. 2478 (E.D. Wash. Feb. 18, 1970) (damages of \$500 granted to witness held 36 days).

136. *See* IND. CODE ANN. §§ 35-1-9-3 to -4 (Burns 1979).

137. *See* W. VA. CODE § 62-1C-15 (1977).

138. *See* HAWAII REV. STAT. §§ 835-2(b)(3), -2(c)(2) (1976); IOWA CODE ANN. §§ 804.11, .23 (West 1979); MASS. ANN. LAWS ch. 276, § 49 (Michie/Law. Co-op 1968); NEB. REV. STAT. § 29-507 (1943); N.Y. CRIM. PROC. LAW §§ 620.20(2)(c), .20(3)(b) (McKinney 1971).

139. *See* FLA. STAT. ANN. § 902.15 (West 1973); N.J. STAT. ANN. § 2A:162-3 (West 1971).

140. *See* CONN. GEN. STAT. § 54-23 (1979); LA. CODE CRIM. PRO. art. 15, § 257 (West Supp. 1979); N.H. REV. STAT. ANN. § 597:22 (Supp. 1977); N.C. GEN. STAT. § 15A-803(g) (1978); OKLA. STAT. ANN. tit. 22, § 274 (West 1969); PA. R. CRIM. PROC. 4017. *See also* State v. Hand, 101 N.J. Super. 43, 56, 242 A.2d 888, 895 (1968) (recognizing common-law right to warrantless arrest of material witness to felony when witness "might be unavailable for service of subpoena").

141. *See* DEL. CODE ANN. tit. 11, § 1910 (1974).

142. *See* IOWA CODE ANN. § 804.11 (West 1979), *discussed in* J. YEAGER & R. CARLSON, CRIMINAL LAW AND PROCEDURE § 845 (1979).

material witness is not invariably required.¹⁴³

The right to search a witness incident to arrest is another important consideration. As declared in *State v. Hand*,¹⁴⁴ "Since a search of the person without a search warrant incident to an arrest is permitted for the protection of the police . . . it would not seem reasonable to prohibit a search of a person arrested as a material witness."¹⁴⁵

Most state laws either imply or briefly mention the necessity for a preliminary hearing on the witness' status in the case. New Hampshire specifically requires that the witness be brought before a superior court justice within twenty-four hours after arrest.¹⁴⁶ Oklahoma not only proscribes unnecessary delay before the witness is taken before a judge, but also mandates that the witness be advised of his constitutional rights, "including the reason he is being held in custody, his right to the aid of counsel in every stage of the proceedings, and of his right to be released from custody upon entering into a written undertaking."¹⁴⁷ Under Alaska law a witness properly committed to jail by a judge has the right to have his commitment reviewed by the judge forty-eight hours later.¹⁴⁸

In Massachusetts the jailer of a witness detained because of his inability to furnish sureties must notify the chief justice of the superior court, who in turn must order an inquiry by the district attorney into the importance of the witness' testimony and the necessity for his detention.¹⁴⁹ If the "public interest will not suffer by the release of the witness on his own recognizance," the chief justice can release him.¹⁵⁰

Eight states incorporate methods for release of material witnesses in their laws.¹⁵¹ Alternatives to incarceration include: (1) placing the wit-

143. See, e.g., IOWA CODE ANN. § 804.11 (West 1979); *State v. Hand*, 101 N.J. Super. 43, 242 A.2d 888 (1968). Some states, however, require police to go through a formal process by which a court must hold extensive hearings and find special circumstances before it can issue a material witness order authorizing the arrest and detention of a witness. HAWAII REV. STAT. §§ 835-1 to -5 (1976); N.Y. CRIM. PROC. LAW §§ 620.10-.50 (McKinney 1971); N.C. GEN. STAT. § 15A-803 (1978).

144. 101 N.J. Super. 43, 242 A.2d 888 (1968). See IOWA CODE ANN. § 804.18 (West 1979).

145. 101 N.J. Super. at 55, 242 A.2d at 894 (citing *State v. Mark*, 46 N.J. 262, 271-72, 216 A.2d 377 (1977)) (footnote omitted).

146. See N.H. REV. STAT. ANN. § 597:22 (Supp. 1977).

147. OKLA. STAT. ANN. tit. 22, § 719 (West Supp. 1979).

148. See ALASKA STAT. § 12.30.020(a), .020(f) (Supp. 1979).

149. MASS. ANN. LAWS ch. 276, § 51 (Michie/Law. Co-op 1968).

150. *Id.*

151. See ALASKA STAT. § 12.30.050 (1972); IOWA CODE ANN. §§ 804.23, 811.2 (West Supp. 1979); N.C. GEN. STAT. §§ 15A-803(e)(1), -534(a) (1978); N.D. R. CRIM. PROC. 46(e), 46(a)(1);

ness "in the custody of a designated person or organization agreeing to supervise him"; (2) placing restrictions on his travel, association, or place of abode during the period of release; (3) requiring the witness to return to custody after daylight hours on designated conditions;¹⁵² (4) requiring the execution of an appearance bond in a specified amount or a bail bond with sufficient surety; and (5) imposing "any other condition reasonably necessary to assure [the witness'] appearance as required."¹⁵³

One way to protect witnesses from lengthy detentions is to require that their depositions be taken as soon as possible after they are jailed. Twenty states authorize depositions for preserving testimony.¹⁵⁴ The possibility of deposition and release avoids excessive infringement of a witness' rights. Protective possibilities are further enhanced in those states which have statutorily limited the time after jailing within which a witness' deposition must be taken. Alaska allows only a "reasonable" time to take a deposition before the witness must be released,¹⁵⁵ and Colorado, Montana, and Wyoming allow the prosecutor "no longer than necessary" to depose the witness.¹⁵⁶ Other states prescribe specific day limits.¹⁵⁷

If a witness is forced to endure an extended period of confinement, a

S.C. CODE §§ 17-15-70, -10 (1976); S.D. COMP. LAWS ANN. §§ 23A-43-18, -3 (Spec. Supp. 1978); VA. CODE §§ 19.2-127, -123 (1975); WASH. SUPER. CT. CRIM. R. 6.13(a), 3.2 (Supp. 1975).

152. ALASKA STAT. § 12.30.020(b)(1) (1972).

153. IOWA CODE ANN. § 811.2(1)(e) (West 1979).

154. See ALASKA STAT. § 12.30.050 (1972); ARIZ. REV. STAT. ANN. § 13-4083(B) (1978); ARK. STAT. ANN. § 43-626 (1947); CAL. PENAL CODE § 882 (Deering 1971); COLO. CONST. art. II, § 17; FLA. STAT. ANN. § 902.17(3) (West 1973); IDAHO CODE § 19-824 (1979); KAN. STAT. § 22-2805 (1974); LA. CODE CRIM. PRO. ANN. art. 15, § 258 (West Supp. 1979); MASS. ANN. LAWS ch. 276, § 50 (Michie/Law. Co-op 1968); MONT. CONST. art. II, § 23, MONT. CODE ANN. § 46-11-601 (1979); NEV. REV. STAT. §§ 189.040(2)-.040(3) (1973); N.M. R. CRIM. P. DIST. CT. 25; N.D. R. CRIM. P. 46(e); OHIO R. CRIM. P. 15(a); S.D. COMP. LAWS ANN. § 23A-43-18 (Spec. Supp. 1978); UTAH CODE ANN. § 77-15-29 (1978); WASH. SUPER. CT. CRIM. R. 6.13(a) (Supp. 1975); WIS. STAT. ANN. §§ 969.01(3), 967.04(1) (West 1971); WYO. CONST. art. I, § 12, WYO. R. CRIM. P. 8(b). In addition, four states have enacted statutes specifically controlling the admissibility of such deposition at trial. ARIZ. REV. STAT. § 13-4083(b) (1978); ARK. STAT. ANN. § 43-627 (1947); LA. CODE CRIM. PRO. ANN. art. 15, § 259 (West Supp. 1979); NEV. REV. STAT. § 189.040(4) (1973).

155. See ALASKA STAT. § 12.30.050 (1972).

156. See COLO. CONST. art. II, § 17; MONT. CODE ANN. § 46-11-601(2) (1979); WYO. CONST. art. I, § 12.

157. See ARIZ. REV. STAT. §§ 13-4083(B), (C) (Spec. Supp. 1978) (three days); FLA. STAT. ANN. §§ 902.17(3), .17(4) (West 1973) (three days); N.M. R. CRIM. P. DIST. CT. 25 (five days); WIS. STAT. ANN. § 969.01(3) (West 1971) (fifteen days). Once the time limit is reached, the witness must be released without further excuse or delay, regardless of whether the witness' deposition has been taken. See also MD. CTS. & JUD. PROC. CODE ANN. §§ 9-203(e), -203(f) (1974)

number of state laws attempt to guarantee a minimum amount of safety and comfort. Seven states prohibit witnesses from being jailed with criminals or criminal suspects.¹⁵⁸ Delaware affords detained witnesses with special facilities and service.¹⁵⁹ Massachusetts provides the most comprehensive statutory plan for taking care of detained witnesses. The Commissioner of Corrections is empowered to make

rules relative to the diet, size of cells, amount of liberty and exercise, correspondence, visits and such other matters as he considers necessary regulating the treatment of witnesses held in jail as will secure their clear distinction and separation from other prisoners so far as possible, consistent with their safe custody and the prevention of tampering with their testimony.¹⁶⁰

Moreover, a police officer who allows a witness to be handcuffed to, confined with, or transported in a vehicle with an accused criminal is subject to a twenty-dollar fine.¹⁶¹

B. *Fee Legislation*

To protect a material witness from incurring an extreme financial burden during his detention, at least fourteen states have enacted provisions granting fees, but the size of the fees vary widely: 50¢ per day maximum (North Dakota),¹⁶² \$1.50 per day minimum, (Massachu-

(seven days subject to judicial extension, but no special mention of deposition); N.C. GEN. STAT. § 15A-803(c) (1978) (20 days, plus single five-day renewal, but no mention of deposition).

A special provision mandating that witnesses not be detained unreasonably long exists in fourteen states. Three of these states establish this prohibition by statute. *See* KAN. STAT. § 22-2805 (1974); NEV. REV. STAT. § 178.494(2) (1973); TENN. CODE ANN. § 40-1210 (Supp. 1979). Four others use a rule of criminal procedure. *See* DEL. CT. C.P.R. 46(b); KY. R. CRIM. P. 7.06; ME. R. CRIM. P. 46(b); R.I. SUPER. CT. CRIM. R. 46(b), DIST. CT. CRIM. R. 46(b). The remaining seven states protect witnesses by means of a constitutional provision against unreasonable detentions. *See* CAL. CONST. art. I, § 6; COLO. CONST. art. II, § 17; FLA. CONST. art. I, § 17; N.Y. CONST. art. I, § 5; N.D. CONST. art. I, § 6; S.C. CONST. art. 1, § 15.

158. *See* CAL. CONST. art. I, § 6; MASS. ANN. LAWS ch. 276, § 52 (Michie/Law. Co-op 1968); N.J. STAT. ANN. § 2A:163 (West 1971); N.D. CONST. art. I, § 6; OHIO REV. CODE ANN. § 2937.18 (Page 1975); OKLA. STAT. ANN. tit. 22, § 719 (West Supp. 1979); WYO. CONST. art. 1, § 12.

159. *See* DEL. CODE ANN. tit. 11, § 6526(b) (1974). In Washington the witness will get "food and lodging," WASH. REV. CODE ANN. § 10.52.040 (Supp. 1978), in New Jersey he can expect to be "comfortably lodged and provided for, and not further restricted of [his] liberty than is necessary for [his] detention," N.J. STAT. ANN. § 2A:162-3 (West 1971), and in New Hampshire he will receive the "net proceeds of his labor" while in jail, N.H. REV. STAT. ANN. § 619:23 (1974).

160. MASS. ANN. LAWS ch. 276, § 52 (Michie/Law. Co-op 1968).

161. *Id.* § 54.

162. N.D. CENT. CODE § 31-03-24 (1976).

setts),¹⁶³ \$2.00 per day (Connecticut),¹⁶⁴ \$3.00 per day (New York and Pennsylvania),¹⁶⁵ \$7.50 per day (Oregon),¹⁶⁶ \$10.00 per day (Maryland),¹⁶⁷ \$20.00 per day (Hawaii),¹⁶⁸ and \$25.00 per day (Ohio).¹⁶⁹ The remaining states do not specify an amount.¹⁷⁰

C. *Progressive Concepts*

Several jurisdictions have developed commendable legislation in the area of material witness detention.¹⁷¹ Florida permits a witness who is unable to give security for his appearance to apply to the court for a reduction in security.¹⁷² Arizona and Florida provide a procedure by which a magistrate, after examination of a witness on oath, can make a special finding that the witness is unable to give security.¹⁷³ Within three days from entry of the finding, the detained witness will be deposed in the presence of both the state and the criminal defendant.¹⁷⁴ At the completion of the examination the witness must be discharged.¹⁷⁵ The deposition is admissible in evidence at trial, although Florida requires the defendant's consent before the deposition can be admitted on behalf of the state.¹⁷⁶ If the detained witness is not conditionally examined within three days, both states require that he be discharged.¹⁷⁷

North Carolina uses a procedure under which it obtains the attendance of witnesses through a material witness order¹⁷⁸ issued by a judge when there are reasonable grounds to believe that the person whom the

163. MASS. ANN. LAWS ch. 276, § 30 (Michie/Law. Co-op 1968).

164. CONN. GEN. STAT. § 54-24 (1979) (plus legal fees as witness).

165. N.Y. CRIM. PROC. LAW § 620.80 (McKinney 1971); cf. Appendix A (New Jersey provisions).

166. OR. REV. STAT. § 136.615 (1977).

167. MD. CTS. & JUD. PROC. CODE ANN. § 9-203(h) (1974).

168. HAWAII REV. STAT. § 835-8 (1976).

169. OHIO REV. CODE ANN. § 2937.18 (Page 1975).

170. See FLA. STAT. ANN. § 902.17(5) (West 1973); IOWA CODE ANN. § 815.6 (West 1979); OKLA. STAT. ANN. tit. 22, § 719 (West Supp. 1979); WASH. REV. CODE ANN. § 10.52.040 (Supp. 1978).

171. See, e.g., ARIZ. REV. STAT. ANN. §§ 13-4081 to -4084 (1978); FLA. STAT. ANN. §§ 902.15, 17 (West 1973).

172. FLA. STAT. ANN. § 902.17(2) (West 1973).

173. ARIZ. REV. STAT. ANN. § 13-4083(B) (1978); FLA. STAT. ANN. § 902.17(3) (West 1973).

174. ARIZ. REV. STAT. ANN. § 13-4083(B) (1978); FLA. STAT. ANN. § 902.17(3) (West 1973).

175. ARIZ. REV. STAT. ANN. § 13-4083(B) (1978); FLA. STAT. ANN. § 902.17(3) (West 1973).

176. ARIZ. REV. STAT. ANN. § 13-4083(b) (1978); FLA. STAT. ANN. § 902.17(3) (West 1973).

177. ARIZ. REV. STAT. ANN. § 13-4083(c) (1978); FLA. STAT. ANN. § 902.17(4) (West 1973).

178. N.C. GEN. STAT. § 15A-803 (1978).

State or a defendant desires to call as a witness in a pending criminal proceeding possesses information material to the determination of the proceeding and may not be amenable or responsive to a subpoena at a time when his attendance will be sought.¹⁷⁹

Upon motion for a material witness order, the witness "must be given reasonable notice, opportunity to be heard and present evidence, and the right of representation by counsel at a hearing on the motion."¹⁸⁰ "The order must be based on findings of fact supporting its issuance."¹⁸¹

Hawaii and New York also base their witness detention systems on material witness orders.¹⁸² For an order to issue, there must be reasonable cause to believe that a person will not be "amenable or responsive to a subpoena at a time when his attendance will be sought."¹⁸³ An order also cannot issue unless either an indictment or a felony complaint has been filed, or a grand jury proceeding has been commenced.¹⁸⁴ "[T]he court must inform [the witness] of the nature and purpose of the proceeding, and that he is entitled to a prompt hearing upon the issue of whether he should be adjudged a material wit-

179. *Id.* § 15A-803(a).

180. *Id.* § 15A-803(d).

181. *Id.* The power to issue a material witness order is limited to superior court judges after the initiation of criminal proceedings, and to district court judges "only at the time that a defendant is bound over to superior court at a probable-cause hearing." *Id.* § 15A-803(b). The life of the order may vary, but it cannot exceed 20 days when a material witness is incarcerated. *Id.* § 15A-803(c). However, "upon review a superior court judge in his discretion may renew an order one or more times for periods not to exceed five days each." *Id.* A superior court judge also may modify or vacate an order "upon a showing of new or changed facts or circumstances by the witness, the State, or any defendant." *Id.* § 15A-803(f). A court issuing a material witness order may either (1) direct the release of the witness by choosing among a range of flexible methods of release, *id.* §§ 15A-534, -803(e)(1), or (2) detain the witness. *Id.* § 15A-803(e)(2).

182. *See* HAWAII REV. STAT. §§ 835-1 to -8 (1976); N.Y. CRIM. PROC. LAW §§ 620.10-.80 (McKinney 1971).

183. HAWAII REV. STAT. § 835-2(a)(2) (1976); N.Y. CRIM. PROC. LAW § 620.20.1(b) (McKinney 1971).

184. HAWAII REV. STAT. § 835-2(b) (1976); N.Y. CRIM. PROC. LAW § 620.20.2 (McKinney 1971). These circumstances limit the courts that can issue material orders, which in turn affects the time length of such orders. HAWAII REV. STAT. §§ 835-2(c), -2(d) (1976); N.Y. CRIM. PROC. LAW §§ 620.20.3, .4 (McKinney 1971). Upon written application to the appropriate court and proof of the "reasonable cause" requirement, the prospective witness may be compelled to appear by means of personal service of the order or, after being taken into custody and brought before the court, by a police officer. HAWAII REV. STAT. § 835-3 (1976); N.Y. CRIM. PROC. LAW § 620.30 (McKinney 1971).

ness.”¹⁸⁵ The witness is entitled to counsel and may be assigned a lawyer if financially unable to retain one.¹⁸⁶ At the hearing, the order applicant (often the prosecutor) “has the burden of proving by a preponderance of the evidence all facts essential to support a material witness order.”¹⁸⁷ The prospective witness can testify in his own behalf and call witnesses through use of the court’s subpoena power.¹⁸⁸ Hearsay evidence is admissible.¹⁸⁹ After the court determines that a material witness order is warranted, it may issue the order adjudging the prospective witness a material witness and fixing bail to secure his future attendance.¹⁹⁰ If bail is posted and approved by the court, the witness must be released; if bail is not posted or approved by the court, the witness must be committed to the sheriff’s custody.¹⁹¹ Finally, both states grant daily fees to confined witnesses, amounting to twenty dollars per day in Hawaii¹⁹² and three dollars per day in New York.¹⁹³

D. *Laws in Need of Reform*

Notwithstanding the legislative activity just noted, many state legislatures have remained dormant in reforming their material witness laws. Numerous states’ statutes contain little in the way of procedural or substantive protections for detained witnesses.¹⁹⁴ A review of those

185. HAWAII REV. STAT. § 835-4(a) (1976); N.Y. CRIM. PROC. LAW § 620.40.1 (McKinney 1971).

186. HAWAII REV. STAT. § 835-4(a) (1976); N.Y. CRIM. PROC. LAW § 620.40.1 (McKinney 1971).

187. HAWAII REV. STAT. § 835-5(a)(1) (1976); N.Y. CRIM. PROC. LAW § 620.50.1(a) (McKinney 1971).

188. HAWAII REV. STAT. § 835-5(a)(2) to -5(a)(3) (1976); N.Y. CRIM. PROC. LAW § 620.50.1(b)-1(c) (McKinney 1971).

189. HAWAII REV. STAT. § 835-5(a)(4) (1976); N.Y. CRIM. PROC. LAW § 620.50.1(d) (McKinney 1971).

190. HAWAII REV. STAT. § 835-5(b) (1976); N.Y. CRIM. PROC. LAW § 620.50.2 (McKinney 1971).

191. HAWAII REV. STAT. § 835-5(c) (1976); N.Y. CRIM. PROC. LAW § 620.50.3 (McKinney 1971). At any time upon application of the witness or the order applicant, the court may inquire “whether by reason of new or changed facts or circumstances the material witness order is no longer necessary or warranted, or, if it is, whether the original bail currently appears excessive.” HAWAII REV. STAT. § 835-6(a) (1976); N.Y. CRIM. PROC. LAW § 620.60.1 (McKinney 1971). The court may then enter a new order modifying the old order, if appropriate. HAWAII REV. STAT. § 835-6(a) (1976); N.Y. CRIM. PROC. LAW § 620.60.1 (McKinney 1971).

192. HAWAII REV. STAT. § 835-8 (1976).

193. N.Y. CRIM. PROC. LAW § 620.80 (McKinney 1971).

194. *See* ALA. CODE tit. 14, § 14-6-3(4), tit. 15, §§ 15-11-12 to -14 (1975); ILL. ANN. STAT. ch. 38, §§ 109-3(a), -3(d) (Smith-Hurd Supp. 1979); MICH. COMP. LAWS §§ 765.29, .30, 767.34 (MICH.

statutes which have persisted in unrevised form and which reflect scant attention to individual liberties suggests a certain pattern. After a criminal defendant has been arrested, each statute requires a material witness to enter into some form of recognizance¹⁹⁵ or bail. The witness is committed to jail on his refusal to enter into the required undertaking, although the term "refusal" is applied broadly to include witnesses who are unable to post the necessary security.¹⁹⁶

These state laws reflect an antiquated approach, affording few safeguards to witnesses. In each of these states, statutory provisions establish a quick, easy procedure for binding witnesses to judicial control and holding them in jail. The period of confinement is often open-ended. The state need make only minimal showings in procuring a witness' commitment, and the witness has no special statutory procedure at his command under the state's witness laws for obtaining his prompt release. Statutory reference to access to counsel is virtually nonexistent. Illinois and Michigan even grant coroners a broad power to jail witnesses during a murder inquest.¹⁹⁷ Such laws strictly delimit the only safeguard existing in these outmoded statutes, that of judicial oversight and discretion.

Legislators in the several jurisdictions adhering to these outdated witness laws will have to dust off rather old books to find the origins of their statutes. Many of these laws can be traced to territorial or original state legislation dating as far back as 1818 (Missouri),¹⁹⁸ 1827 (Ill-

STAT. ANN. §§ 28.916, .917, .974, .975 (1978)); MINN. STAT. ANN. §§ 625.10, 629.54, .55 (West 1947); MISS. CODE ANN. § 99-15-7 (1972); MO. REV. STAT. §§ 544.420-440, MO. SUP. CT. R. 23.08-.09 (1978); NEB. REV. STAT. §§ 29-507, -508 (1975); OR. REV. STAT. §§ 136.607, .609, .613 (1977); TENN. CODE ANN. §§ 40-1122 to -1127 (1975) (Tennessee also has a statute that allows a court to release a witness who has been detained unreasonably long. *Id.* § 40-1210 (Supp. 1979)); VT. STAT. ANN. tit. 13, § 6605 (1974). *See also* Appendix A.

195. *See* ALA. CODE tit. 15, § 15-11-12 (1975); MINN. STAT. ANN. §§ 625.10, 629.54 (West 1947); MO. REV. STAT. § 544.420 (1978); NEB. REV. STAT. § 29-507 (1975); OR. REV. STAT. §§ 136.607, .609(1) (1977); TENN. CODE ANN. §§ 40-1122 to -1124 (1975).

196. *See* ALA. CODE tit. 15, § 15-11-14 (1975); MINN. STAT. ANN. § 629.55 (West 1947); MO. REV. STAT. § 544.440 (1978); NEB. REV. STAT. § 29-508 (1975); OR. REV. STAT. § 136.613 (1977); TENN. CODE ANN. § 40-1126 (1975). Both the Alabama and Tennessee laws specifically provide that a witness may be jailed if he either refuses or *fails* to enter into the required undertaking. *See also* ILL. ANN. STAT. ch. 38, § 109-3(d) (Smith-Hurd Supp. 1979); MICH. COMP. LAWS § 767.35 (MICH. STAT. ANN. § 28.975 (1978)); MISS. CODE ANN. § 99-15-7 (1972); VT. STAT. ANN. tit. 13, § 6605 (1974). *See also* note 27 *supra* and accompanying text.

197. *See* ILL. ANN. STAT. ch. 31, §§ 17-18 (Smith-Hurd 1969); WIS. STAT. ANN. § 979.11 (West Supp. 1979). *See also* N.C. GEN. STAT. § 152-7(5) (1978).

198. *See* Mo. Territorial Laws ch. 223, § 4 (1818).

nois),¹⁹⁹ 1846 (Michigan),²⁰⁰ 1852 (Alabama),²⁰¹ 1857 (Mississippi),²⁰² 1858 (Minnesota and Tennessee),²⁰³ and 1864 (Oregon).²⁰⁴ Many of those relics remain unchanged since their original passage. Missouri's present statute, for example, is nearly identical to the 1818 territorial law from which it originated.²⁰⁵

IV. FEDERAL PATTERNS

A. *Federal Law and Practice*

As recently as 1978, Congress revised federal material witness procedures.²⁰⁶ The federal revisions incorporated several progressive aspects from various state laws into the federal material witness pattern. As a result, no single federal material witness statute governs the material witness process. Even the complex of laws and rules²⁰⁷ that bear on the problem leave gaps in coverage. None of the federal provisions, for example, authorizes arrest of material witnesses; instead, this power arises by implication.²⁰⁸

The federal material witness process begins upon the filing of an affidavit that a person is "material" in a criminal proceeding and a showing "that it may become impracticable to secure his presence by subpoena."²⁰⁹ Once the witness has been taken into custody, a judicial officer imposes conditions of release from a range of release alternatives,²¹⁰ among which is holding the witness to bail. A witness may not be detained for inability to comply with any condition of release as

199. See ILL. ANN. STAT. ch. 38, § 109-3(a), -3(d) (Smith-Hurd) (1970).

200. See MICH. STAT. ANN. §§ 28.916, .917, .974, .975 (1978).

201. See ALA. CODE tit. 15, § 15-11-12 to -14 (1975).

202. See MISS. CODE ANN. § 99-15-7 (1972).

203. See MINN. STAT. ANN. §§ 625.10, 629.54, .55 (West 1947); TENN. CODE ANN. §§ 40-1122 to -1127 (1975).

204. See OR. REV. STAT. §§ 136.607, .609, .613 (1973).

205. Compare MO. REV. STAT. §§ 544.420-.440 (1978) with Mo. Territorial Laws ch. 223, § 4 (1824).

206. See note 216 *infra*.

207. 18 U.S.C. §§ 3146, 3149 (1976); FED. R. CRIM. P. 15, 46.

208. See *Bacon v. United States*, 449 F.2d 933, 937 (9th Cir. 1971); *United States v. Feingold*, 416 F. Supp. 627, 628 (E.D.N.Y. 1976). See text accompanying notes 31-35 *supra*. For reference to a statutory arrest pattern, see note 142 *supra*.

209. 18 U.S.C. § 3149 (1976). See *id.* §§ 3146, 3149 (1976); FED. R. CRIM. P. 46(a).

210. Release alternatives include: (1) placing the witness "in the custody of a designated person or organization agreeing to supervise him"; (2) placing restrictions on his "travel, association, or place of abode . . . during the period of release"; (3) "requiring the execution of an appearance bond in a specified amount" or a bail bond with sufficient solvent sureties; (4) "requiring

long as his testimony can be adequately "secured by deposition, and further detention is not necessary to prevent a failure of justice."²¹¹ Provisions for the taking of depositions have been carefully detailed, including delay of a witness' release for a "reasonable period of time" to depose him.²¹² Supervision of detained witnesses comes under the court's jurisdiction, and the government's attorney must make biweekly reports to the court listing each witness (as well as each defendant) "who has been held in custody . . . in excess of ten days" and stating "the reasons why such witness should not be released with or without the taking of his deposition."²¹³

Since 1853 detained witnesses have been entitled to one dollar for every day spent in jail awaiting trial.²¹⁴ In 1973 the Supreme Court upheld the constitutionality of the statute over claims that the one dollar per day compensation violated both the fifth amendment guarantees of just compensation and due process and the thirteenth amendment prohibition against involuntary servitude.²¹⁵ On October 27, 1978, Congress approved an amendment raising detained witness fees to thirty dollars per day, the same amount received by an ordinary witness for daily attendance at court.²¹⁶ Congress considered that amount, which translates into an annual wage of \$7500, to be the minimal acceptable level of payment for each day of detention.²¹⁷ This amendment specifically excludes detained illegal aliens from recovering such fees while awaiting the prosecution of their smugglers.²¹⁸

that the person return to custody after specified hours"; and (5) imposing "any other condition deemed reasonably necessary to assurance appearance as required." 18 U.S.C. §§ 3146(a)(1)-(5) (1976).

211. *Id.* § 3149 (1976).

212. *Id.*; FED. R. CRIM. P. 15(a).

213. FED. R. CRIM. PROC. 46(g).

214. Act of Feb. 26, 1853, ch. 80, § 3, 10 Stat. 167 (1853) (amended 1978).

215. *Hurtado v. United States*, 410 U.S. 578 (1973). See notes 85-88, 106 *supra*.

216. 28 U.S.C.A. §§ 1821(b), (d)(4) (West Supp. 1979). This amount is in addition to a "subsistence" allowance for each confined witness.

217. As noted during congressional deliberations, "[P]resent statutes restrict the category of witnesses upon whom courts may impose the burdens of incarcerations but do not provide reasonable compensation to those upon whom the burdens fall." H.R. REP. NO. 95-1651, 95th Cong., 2d Sess. 5, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 4631, 4634. This amendment "would not only provide more reasonable compensation for the inconvenience and financial hardships which detention entails but would eliminate the peculiarities of the system of compensation which the Supreme Court mandated by its decision in *Hurtado*." *Id.*

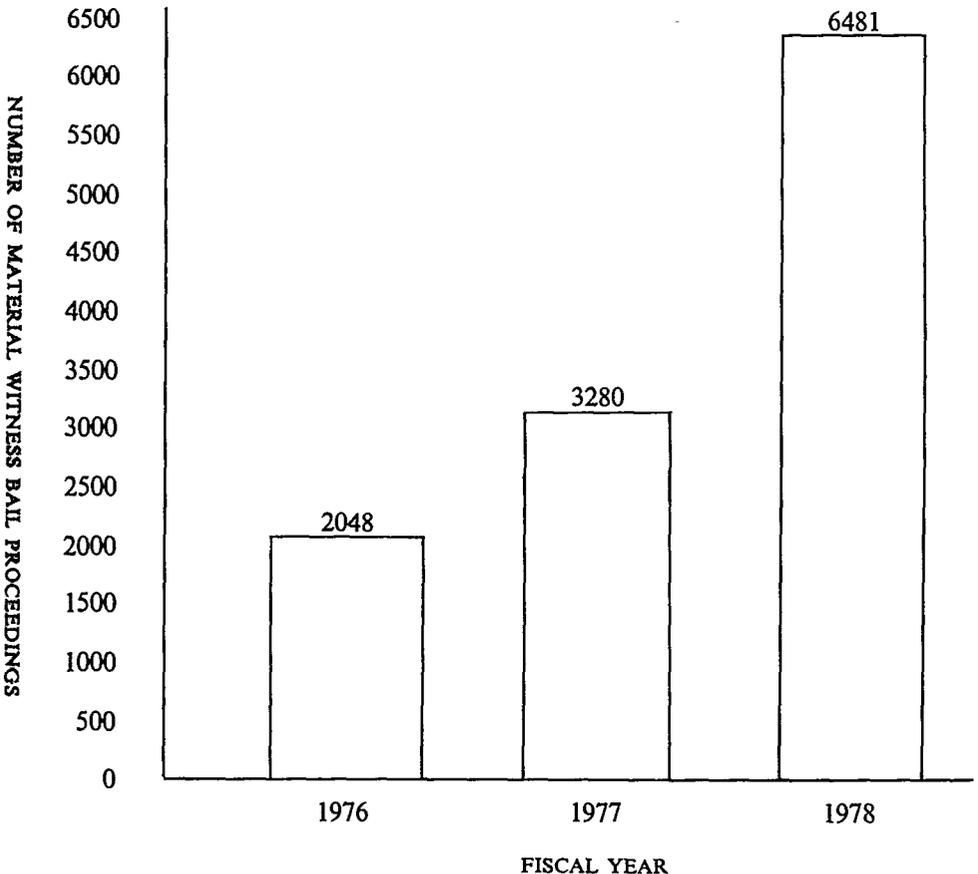
218. 28 U.S.C.A. § 1821(e) (West Supp. 1979). See H.R. REP. NO. 95-1651, 95th Cong., 2d Sess. 7, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 4631, 4634, 4636. See notes 111-16 *supra* and accompanying text.

B. Using the Laws: How Many Cases?

Statistical data relating to material witnesses in federal courts have recently begun to appear. One source, the Annual Reports of the Director of the United States Courts, reflects the dramatic upsurge in the use of material witness laws by federal authorities. Illustration No. 1 reflects the markedly increased flow of material witness proceedings in federal magistrate courts in recent years.²¹⁹

ILLUSTRATION NO. 1

**MATERIAL WITNESS BAIL PROCEEDINGS
HANDLED BY UNITED STATES MAGISTRATES
PURSUANT TO 28 U.S.C. § 636**



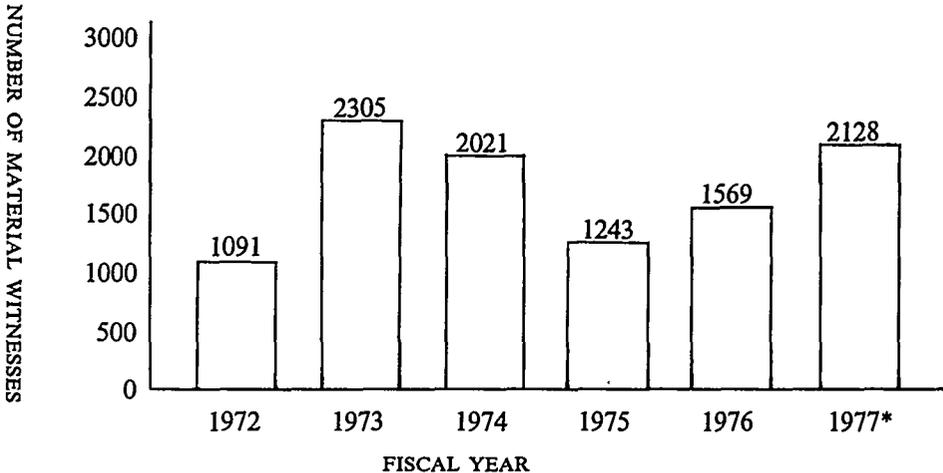
219. See [1978] ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 140 [hereinafter cited as

A breakdown of these statistics indicates that although material witness bail proceedings are more frequent in those areas burdened with illegal alien problems (like the Southwest), they are commonplace throughout the country.²²⁰

The Director of the Administrative Office of the United States Courts also has collected data on the representation of material witnesses by private lawyers. Illustration No. 2 depicts the number of material witnesses represented by private counsel from 1972 through 1976.²²¹

ILLUSTRATION NO. 2

NUMBER OF MATERIAL WITNESSES REPRESENTED BY PRIVATE ATTORNEYS IN FEDERAL COURT



* As of December 31, 1977. Complete figures unavailable beyond 1976.

At first glance, the preceding figures appear to be inconclusive. The sharp increase, then the drop in numbers of privately represented wit-

[1978] ADMIN. OFFICE REP.]; [1977] ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 292 [hereinafter cited as [1977] ADMIN. OFFICE REP.]; [1976] ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 423 [hereinafter cited as [1976] ADMIN. OFFICE REP.].

220. See [1978] ADMIN. OFFICE REP., *supra* note 219, at A-142 to -143; [1977] ADMIN. OFFICE REP., *supra* note 219, at 493-95; [1976] ADMIN. OFFICE REP., *supra* note 219, at 423-26.

221. [1977] ADMIN. OFFICE REP., *supra* note 219, at 540; [1976] ADMIN. OFFICE REP., *supra* note 219, at 465; [1975] ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 552 [hereinafter cited as [1975] ADMIN. OFFICE REP.]; [1974] ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 593 [hereinafter cited as [1974] ADMIN. OFFICE REP.]; [1973] ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 529 [hereinafter cited as [1973] ADMIN. OFFICE REP.]; [1972] ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 488 [hereinafter cited as [1972] ADMIN. OFFICE REP.].

nesses from 1973 through 1975 perhaps can be attributed to increased legal services representation of material witnesses, for which the Director has included no data. Throughout the country state and federal public defender programs continue to grow. A breakdown of these statistics again shows that the material witness problem is widespread across the country, particularly (albeit not exclusively) in those states which are a mecca for illegal aliens.²²² Identical results obtain from statistics on the amount of payments to private attorneys in material witness cases, as portrayed in Illustration No. 3.²²³

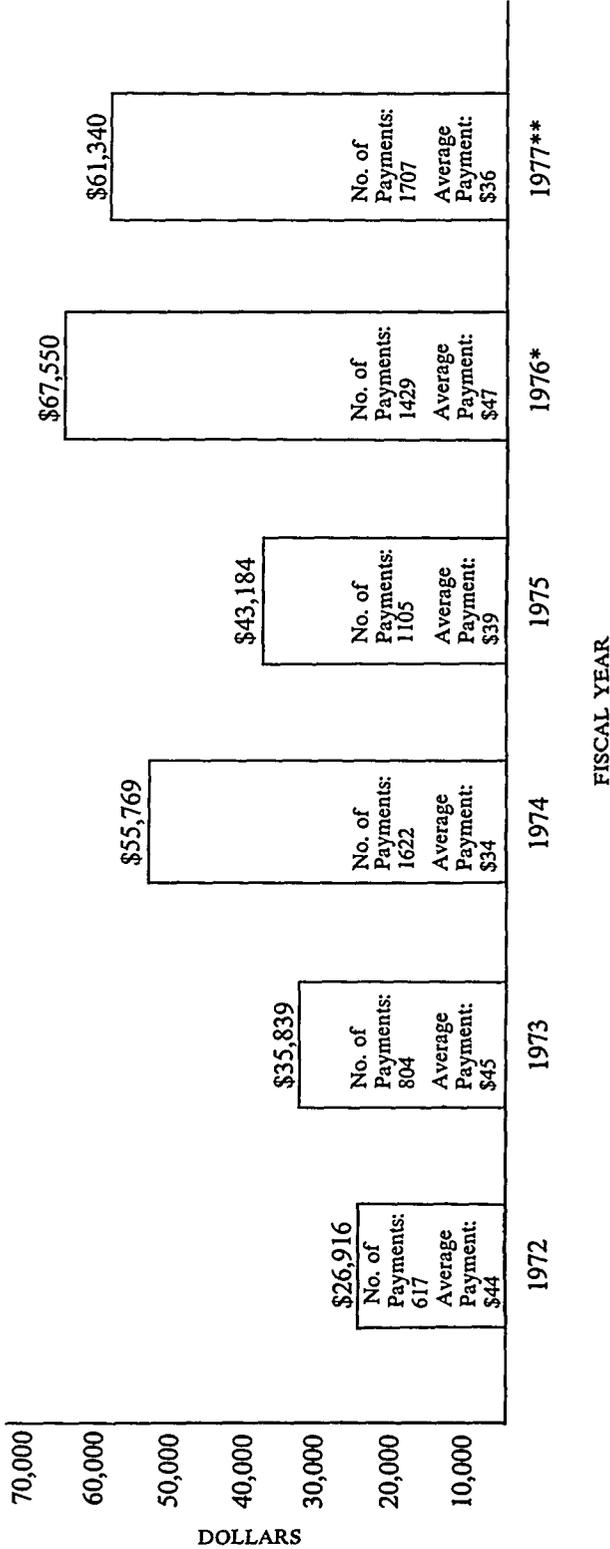
Witnesses are increasingly hailed before courts in bail proceedings. Because federal law is more consistent than state law in regularly providing counsel, representation of witnesses is an expanding expense item.²²⁴ Precise data on how many witnesses are jailed each year for inability to post bail is not centrally collected. The increasing magnitude of such jailings, however, is derivable from another source—cost figures on jailed witnesses. Witnesses receive a set fee for time spent in jail. Under the law applicable in 1976, 1977, and 1978, witnesses drew one dollar per day for each day of pretrial, pretestimony confinement. The fee paid to a witness who spent fifty days in jail waiting for the trial to start, for example, would amount to fifty dollars. Thus, identifying the dollar amounts paid witnesses for pretrial confinement in a

222. [1977] ADMIN. OFFICE REP., *supra* note 219, at 542-53; [1976] ADMIN. OFFICE REP., *supra* note 219, at 466-73; [1975] ADMIN. OFFICE REP., *supra* note 221, at 553-63; [1974] ADMIN. OFFICE REP., *supra* note 221, at 594-605; [1973] ADMIN. OFFICE REP., *supra* note 221, at 521-31; [1972] ADMIN. OFFICE REP., *supra* note 221, at 489-93.

223. [1977] ADMIN. OFFICE REP., *supra* note 219, at 540; [1976] ADMIN. OFFICE REP., *supra* note 219, at 465; [1975] ADMIN. OFFICE REP., *supra* note 221, at 552; [1974] ADMIN. OFFICE REP., *supra* note 221, at 593; [1973] ADMIN. OFFICE REP., *supra* note 221, at 520; [1972] ADMIN. OFFICE REP., *supra* note 221, at 488.

224. Other data collected by the Administrative Office Director substantiates the point. Each report contains tables of claims for compensation in excess of \$250 for extended or complex representation by appointed private attorneys. The first such statistic dealing with a material witness case occurred in 1973, when a claim was paid in the Federal District Court for the Western District of Missouri. [1973] ADMIN. OFFICE REP., *supra* note 221, at 551. The next claim did not arise until 1975, when attorney's fees of \$292.50 and \$567.50 were paid out of the Southern District of California, and \$300 issued from the Western District of Louisiana. [1975] ADMIN. OFFICE REP., *supra* note 221, at 586-87. In 1976 a single claim for \$630 was settled, [1976] ADMIN. OFFICE REP., *supra* note 219, at 487, and in the following year four claims were discharged, two out of the District of New Jersey for \$450 and \$1245 and two out of the Southern District of California for \$290 and \$324, [1977] ADMIN. OFFICE REP., *supra* note 219, at 577. Although these statistics are limited, they demonstrate that material witness proceedings are becoming more expensive. In 1978 more money was spent in jailing federal material witnesses than had been spent in the previous two years combined. See Illustration No. 4. The problem, however, is not only one of money. After translating these dollars into days spent in jail, the loss of time becomes apparent.

ILLUSTRATION NO. 3
PAYMENTS TO PRIVATE ATTORNEYS FOR
REPRESENTATION OF MATERIAL WITNESSES IN FEDERAL COURT



* Includes payments during the transition quarter (July 1 through September 30, 1976).
 ** As of December 31, 1977. Complete figures unavailable beyond 1976.

given year will provide an insight into the number of days logged in custody by jailed witnesses. Illustration No. 4 indicates the large number of days spent in confinement; Illustration No. 5 provides a breakdown of fees paid to detained witnesses in each federal district around the country.²²⁵ From these illustrations, nearly 200,000 witness-days were spent in jail in 1978.²²⁶ Apparently, more detention is planned (Illustration No. 6).²²⁷

225. The authors express particular thanks to the Department of Justice. Upon special request, the Department released data on the amount of detained witness fees paid during the fiscal years 1976-1978. These fees were paid at the rate of one dollar per day according to the federal witness fees statute then in effect. 28 U.S.C. § 1821 (1976) (amended 1978). For revisions in these provisions, see note 216 *supra* and accompanying text. These fees represent only the period of jail confinement before testifying. Letter to Ronald L. Carlson from Charles R. Neill, Director, Financial Management Staff, Office of Management and Finance, United States Department of Justice, May 18, 1979, on file with the Washington University Law Quarterly. Thereafter, the witness is entitled to twenty dollars per day for each day's attendance at court. See *Hurtado v. United States*, 410 U.S. 578 (1973); notes 85-88, 106, 215 *supra* and accompanying text.

226. The figures in Illustration No. 4 may have been enhanced by the alien witness problem. Often, witnesses are held at the request of the prosecution to convict the accused smuggler. Another aspect of this problem is discussed in detail in notes 111-116 *supra*. In just three counties in Arizona, for example, 540 illegal aliens were detained as witnesses in one year for a total of 23,520 days. MacNitt, *U.S. Will Test Rulings on Alien Witness Detention*, Tucson Citizen, Apr. 14, 1978, § A, at 3, col. 1. These jailings in Pima, Santa Cruz, and Cochise counties cost taxpayers \$500,000. Nine times out of ten the testimony of the detained witness was not needed because the smuggling defendant pled guilty. In numerous instances the detained alien spent much more time in jail than did the smugglers, because some smugglers made bail and received probation. *Id.*

One expert indicates that the average confinement of an alien witness is about 43 days. Telephone Interview by Mark Voelpel with Attorney Roger Wolf, Tucson, Arizona (March 2, 1979). In *United States v. Hernandez-Villa*, No. CR79-24 TUC-JAW (D. Ariz. 1979), Mr. Wolf was appointed to represent material witnesses and moved to have them deposed and released pursuant to 18 U.S.C. § 3503 (1976). The government resisted, urging that the witnesses should testify in person for the jury to see them. In addition, the government expressed concern regarding defendant's confrontation rights, citing *United States v. Provencio*, 554 F.2d 361 (9th Cir. 1977), and *United States v. Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971). On the confrontation point, see authorities cited note 232 *infra*.

The authors are not unaware of the difficulties imposed on the government by *Mendez-Rodriguez*. See note 111 *supra* and accompanying text. There has been some commendable softening of the rule. See *United States v. Lomeli-Garnica*, 495 F.2d 313 (9th Cir. 1974); cases cited notes 114-121 *supra* and accompanying text. In addition, government authorities indicate that depositions meet with less resistance from defense attorneys when videotape equipment is available. In Phoenix the installation of such equipment should improve the situation. See MacNitt *supra*. In other parts of the country, whether in cases dealing with alien witnesses or others, it would appear that liberal use of the commendable federal law on depositions, see notes 209-13 *supra* and accompanying text, might reduce the number of days witnesses are confined.

227. H.R. Rep. No. 95-1651, 95th Cong., 2d Sess. 9, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 4631, 4638. As revised, federal provisions grant witnesses thirty dollars per day for pretrial confinement. See note 216 *supra* and accompanying text. These provisions, however, specifically exclude detained alien witnesses from recovering such fees while awaiting the prosecution of their smugglers. See note 218 *supra* and accompanying text.

ILLUSTRATION NO. 4

**FEEs PAID TO DETAINED MATERIAL WITNESSES,
PURSUANT TO 28 U.S.C. § 1821 (1976), AT THE
RATE OF \$1.00 PER DAY OF CONFINEMENT
BEFORE TESTIFYING AT TRIAL**

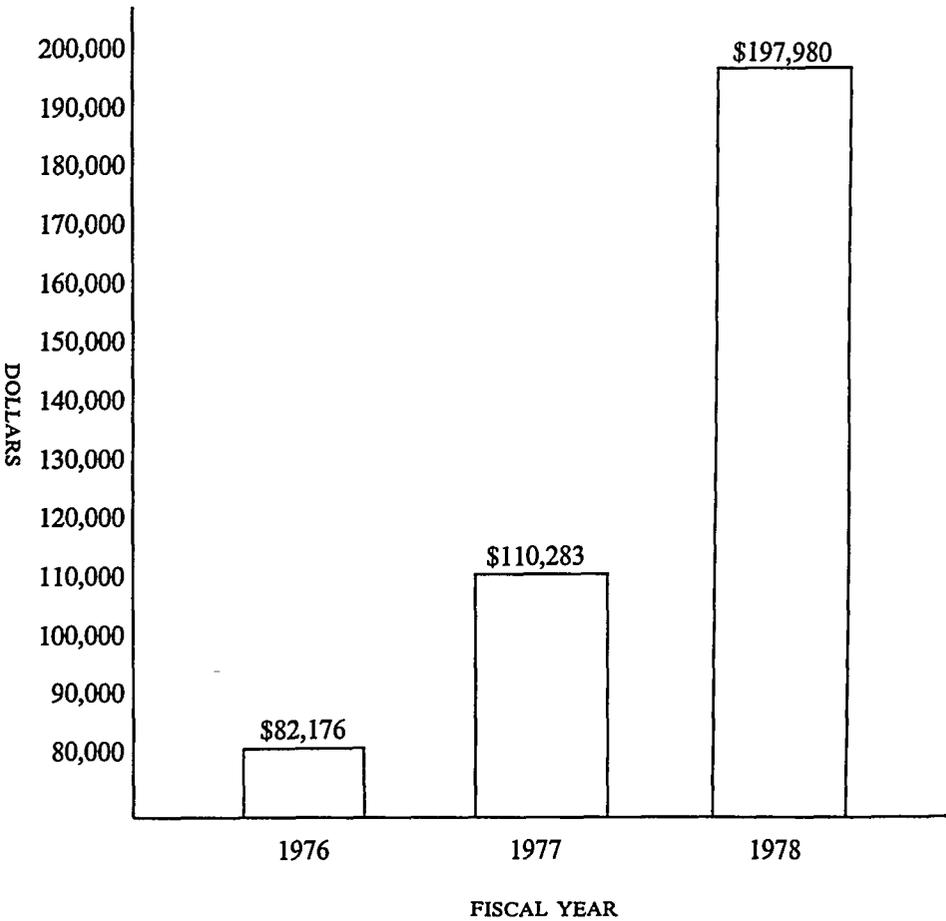
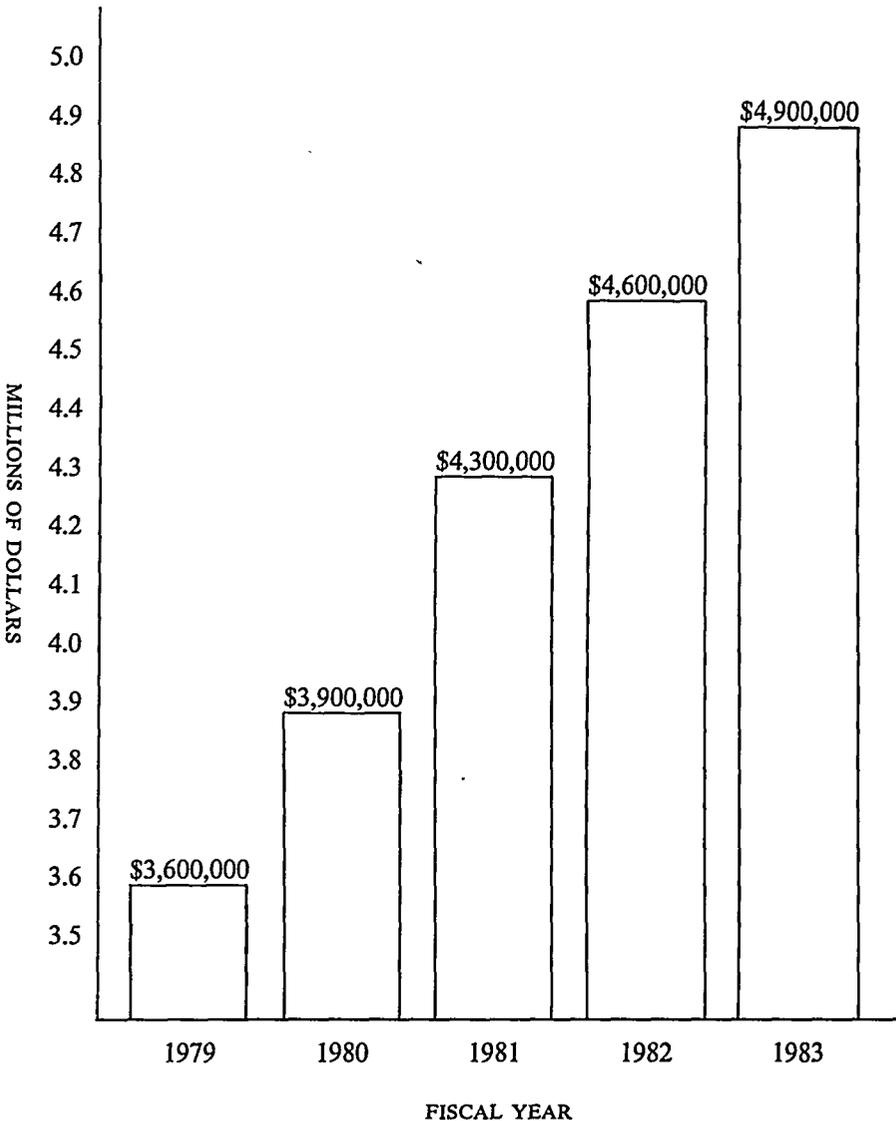


ILLUSTRATION NO. 5
DETAINED WITNESS FEES

DISTRICT	FY 1976	FY 1977	FY 1978
Arizona	\$19,619	\$ 29,006	\$33,770
Arkansas, Eastern	63	—	—
California, Central	3,787	3,796	3,001
California, Eastern	28	54	552
California, Southern	24,836	36,340	50,128
Florida, Middle	133	562	138
Florida, Southern	—	8	—
Georgia, Middle	29	—	—
Georgia, Southern	3	—	—
Idaho	—	83	4,272
Illinois, Northern	7	6	—
Indiana, Southern	1,229	—	—
Iowa, Southern	—	—	114
Kentucky, Eastern	16	—	—
Kentucky, Western	10	—	—
Louisiana, Middle	150	—	—
Maryland	7	—	—
Michigan, Eastern	45	—	—
Minnesota	4	—	—
Mississippi, Southern	—	22	88
Missouri, Eastern	—	15	50
Nebraska	—	—	4
Nevada	226	200	27
New Jersey	109	130	151
New Mexico	4,474	6,036	5,318
New York, Eastern	371	—	—
New York, Northern	—	90	—
New York, Southern	25	17	2
North Carolina, Middle	—	39	—
Oklahoma, Eastern	—	—	10
Oklahoma, Northern	155	351	550
Oregon	111	2	—
Pennsylvania, Eastern	1	—	—
Pennsylvania, Western	36	—	4,840
South Carolina	76	—	—
South Dakota	—	4	—
Tennessee	—	4	260
Texas, Eastern	81	—	—
Texas, Northern	—	—	11
Texas, Southern	12,329	16,259	38,905
Texas, Western	12,796	17,173	55,553
Utah	—	—	16
Washington, Eastern	1,420	—	—
West Virginia, Northern	—	5	—
Wyoming	—	9	—
Guam	—	72	220
Total	\$ 82,176	\$110,283	\$197,980

ILLUSTRATION NO. 6

**ESTIMATED FEES TO BE PAID DETAINED FEDERAL WITNESSES,
PURSUANT TO 28 U.S.C. § 1821 (1976) AS AMENDED IN 1978,
IN COMPENSATION FOR TIME SPENT IN CONFINEMENT
BEFORE TESTIFYING AT TRIAL**



Through the preceding statistics this article has sought to provide graphic illustrations of the scope of the material witness problem. All statistical indicators suggest that the material witness process is being used more today than ever before in this century. It is an expensive procedure. It exacts costs in terms of time allocated on magistrate court dockets, efforts by private and government attorneys, money spent by the federal government in attorney and witness fees, and time subtracted from the lives of detained witnesses. Moreover, these statistics depict only the federal side of material witness practice. No central data is available to describe comprehensively the situation in the various states. If such data were available, it would further reveal the imminent and widespread impact on courts and individuals of the practice of jailing material witnesses.

V. CONCLUSIONS AND RECOMMENDATIONS

Unless there is a need to hold the witness for another reason,²²⁸ extended detention simply to preserve his testimony for trial is unwarranted. At least with witnesses other than illegal aliens, there are significant provisions of law designed to secure the presence of witnesses at trial. Witnesses often will respond to a simple subpoena or other order to appear.²²⁹ In addition, one moving in interstate commerce to avoid giving testimony can be apprehended to insure his presence at trial.²³⁰

Even if the witness disappears and his live presence cannot be secured, nothing in the law prevents the use of meaningful substitutes for live testimony. Depositions provide one answer. For those attorneys

228. Such reasons might include protecting the witness from physical harm and affording the defendant an opportunity to interview the witness. See notes 111-16 *supra* and accompanying text.

229. Several studies of criminal defendants indicate that fears that people released on their own recognizance would not return are largely unjustified. See, e.g., Freed & Wald, *Bail in the United States: 1964*, in NATIONAL CONFERENCE ON BAIL & CRIMINAL JUSTICE 62 (1964) (people released on recognizance have high rate of return).

230. Interstate rendition of witnesses is assisted by the Uniform Act to Secure the Attendance of Witnesses. 11 U.L.A. 5 (1974). In addition, a federal warrant for unlawful flight to avoid testifying is possible. 18 U.S.C. § 1073 (1976). See Carlson, *supra* note 5, at 17. As noted earlier, see notes 226-27 *supra*, the illegal alien presents a special problem. Although the Federal Fugitive Felon Act might be used against an alien who leaves one state for another to avoid giving testimony, his return to a country like Mexico poses powerful difficulties. Extradition is reserved for severe crimes, and the practical problems of locating the fugitive alien witness are immense. Comment, *supra* note 109.

who want to insure that the jury has an opportunity to observe the witness' demeanor, video tape affords a solution. *United States v. Benfield*²³¹ suggests the correctness of using a properly prepared videotape deposition of an absent, unavailable witness.²³²

Witness detention laws have come under constitutional attack.²³³ Although such challenges have been largely rebuffed in the past, certain practices by state authorities under material witness statutes have been held unconstitutional.²³⁴ As legal scrutiny of material witness laws continues, challenges to various aspects of the incarceration process undoubtedly will increase. Denial of representation, confinement of witnesses with defendants, paucity of witness fees, lack of speedy appeal provisions, and detentions without maximum time limits all represent features of a practice virtually certain to be attacked.²³⁵ If

231. 593 F.2d 815 (8th Cir. 1979). Although the case barred trial use of a video-taped deposition, a key factor in the court's decision was defendant's physical absence from the room where the deposition was taken. Though emphasizing that right to confrontation requires cross-examination and a face-to-face meeting, the court noted: "[W]hen a witness is actually unavailable at trial his prior testimony may be admitted if sufficient indicia of reliability are present." *Id.* at 820 (collecting cases and citing FED. R. EVID. 804(a)). As observed by one student commentator:

The decision in *Benfield* is also important because the court expressly approved the use in criminal trials of video-taped depositions that comply with the terms of Rule 15 and allow the defendant to participate actively in the proceeding. Commentators generally agree that a jury is capable of satisfactorily viewing a deponent's demeanor through video tape, and the court's decision exhibits a willingness to accept this proposition.

1979 WASH. U.L.Q. 1106, 1119 (footnotes omitted).

232. On the propriety of using prior sworn testimony over claims of confrontation rights, see *Mancusi v. Stubbs*, 408 U.S. 204 (1972) (prior trial testimony of victim witness); *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976) (grand jury testimony of absent witness admissible), *cert. denied*, 431 U.S. 914 (1977). Other cases are collected at Carlson, *supra* note 5, at 19 n.65. On the use of video-taped material at trial, see Comment, *Videotape Depositions: An Alternative to the Incarceration of Alien Material Witness*, 5 CAL. W. INT'L L.J. 376, 391-97 (1975) (overcoming confrontation objections); Annot., 60 A.L.R.3d 333 (1974) (admissibility in criminal trial). See also Annot., 80 A.L.R.3d 1212 (1977) (closed-circuit television); Annot., 16 A.L.R. Fed. 969 (1973) (deposition by other than stenographic means).

233. See cases cited notes 89-94 *supra*. Unfortunately, *Hurtado v. United States*, 410 U.S. 578 (1973), failed to provide a broad constitutional test for material witness laws. Because *Hurtado* did not broadly attack the constitutionality of jailing witnesses, the Court confined its scrutiny to the pay provisions. See notes 85, 106 *supra* and accompanying text.

234. In *In re Cochran*, 434 F. Supp. 1207 (D. Neb. 1977), the court refused to declare Nebraska's material witness statutes unconstitutional. Emphasizing the basic unfairness when liberty is taken without adequate notice, however, the court ruled that "the entire custodial restraint of the petitioners has been at odds with the Constitution." *Id.* at 1216. See notes 7, 91, 98-99 *supra* and accompanying text.

235. On witness fees, see cases cited notes 95-108 *supra* and statutes cited notes 162-70 *supra*. As to the appeal problem, see 27 OKLA. L. REV. 297, 301 (1974). On unsegregated confinement, see note 4 *supra*. Courts have approved work-release programs for witnesses, allowing them to be

not unconstitutional, these aspects of current law most certainly are socially undesirable and legally unsound.

To assist in providing an appropriate solution, the authors have proposed a model statute, which appears in Appendix B to this article and incorporates certain safeguards not presently contained in numerous state laws. Provisions for the deposing of witnesses appear.²³⁶ So do sections on representation by counsel, provision of separate confinement, payment of witness fees, and right of speedy appeal.

Humane provision for witnesses who are arrested and incarcerated is essential to the American legal process. Inappropriate suppressions of liberty should not be tolerated by our courts in the future. Modern concepts of due process of law demand statutory reforms of material witness laws as well as responsible actions under them.

"farmed out." *United States v. Verduzco-Macias*, 463 F.2d 105 (9th Cir.), *cert. denied*, 409 U.S. 883 (1972); Comment *supra* note 109, at 186.

236. Some states already incorporate the deposition feature. See notes 154-57 *supra* and accompanying text. Other commentators have urged it. See, e.g., Comment, *supra* note 232; Comment, *supra* note 109, at 191; Comment, *Pretrial Detention of Witnesses*, 117 U. PA. L. REV. 700, 723 (1969); 40 NEB. L. REV. 503, 515 (1961). For the law on depositions, see references cited note 232 *supra*.

APPENDIX A

ALA. CODE §§ 15-11-12 to -14, 14-6-3 (1975). The court may confine prosecution witnesses, including minors and married women, in the county jail upon their failure to enter \$100 recognizance in any criminal case. The court may require a larger security when the prospective witness resides less than fifty miles from the place of examination and inside the state.

ALASKA STAT. §§ 12.30.020, .050-.060 (1972 & Supp. 1979). A judicial officer may subject material witnesses to the same conditions of release as criminal defendants: placement in the custody of a designated supervising person or organization; restrictions on travel, association, or place of residence; return to custody in the evenings; or execution of an appearance bond. The state may detain a witness unable to comply with a condition of release only for a reasonable time to take his deposition. A person wilfully failing to appear after release forfeits any security pledged for his release and is subject to either a \$1,000 fine, imprisonment for a year, or both.

ARIZ. REV. STAT. ANN. §§ 13-4081 to -4084 (1978). A magistrate may commit for a maximum of three days any witness unable to post the required security. During this period, the state or the defendant may conditionally examine the witness.

ARK. STAT. ANN. §§ 43-623 to -627 (1977). Although specific provisions for incarceration do not appear, a magistrate may require material witnesses for both the state and the defendant to appear and testify or forfeit not less than \$100. If the witness refuses to testify or if it appears that flight is imminent, the state or the defendant may examine the witness and have the resulting transcript admitted into evidence. The magistrate may reopen the preliminary hearing to hear and preserve the testimony of the witness.

CAL. CONST. art. I, § 6; CAL. PENAL CODE §§ 878-882 (Deering 1970 & Supp. 1979). The magistrate may require a material witness, including an infant or married woman, to enter a written undertaking to the effect that the witness will testify in court or forfeit \$500. The magistrate must commit to prison any witness who fails to comply. The magistrate may allow on behalf of the state a conditional examination of a material witness who is unable to meet security, but then must discharge him. The magistrate cannot confine the witness in any room with criminals nor unreasonably detain any witness.

COLO. CONST. art. II, § 17. The state may imprison witnesses unable to give security only as long as is necessary to take their deposition.

CONN. GEN. STAT. §§ 54-23 to -25 (1979). The clerk of any court may issue a warrant for the arrest of any witness upon receipt of a written complaint from any state attorney alleging that the witness is material and may disappear or otherwise fail to appear as a witness. The person serving the warrant must

bring the witness before a judge for the county from which the warrant issued as soon as is reasonably possible for the purpose of examination. The judge may require the witness to enter into a recognizance and may commit the witness for failure to do so. The state cannot confine witnesses with criminals, and must pay them regular witness fees plus two dollars per day during confinement.

DEL. CODE ANN. tit. 11, §§ 1910, 6526(b) (1974); CT. C.P.R. 46(b). A peace officer who has reasonable grounds to believe that a crime has been committed and that a person is a witness to the crime may ask that person for identification. If the witness refuses to identify himself, the officer may take him to a magistrate who may either commit the witness until he does identify himself or require him to furnish bond. When it appears that it may become impracticable to secure a material witness' presence by subpoena, the court or magistrate may commit the witness upon failure to give bail, but only for a reasonable length of time. The Department of Corrections shall provide special facilities and services that it deems fit and necessary for detained witnesses.

FLA. CONST. art. 1, § 17; FLA. STAT. ANN. §§ 902.15-.17 (West 1973). A magistrate must require a material witness to a crime punishable by death or life imprisonment to enter into a written recognizance to appear at trial or forfeit a sum fixed by the magistrate, and shall commit the witness for failure to comply. If a witness is unable to post security, the court may detain him for up to three days to allow the state or defendant to conditionally examine him. The state must pay witness fees for the period of commitment and cannot unreasonably detain the witness.

GA. CODE ANN. §§ 27-410 to -411 (1978). When a magistrate has committed the accused, the court may require witnesses to post bond. The sheriff sets bond in such reasonable amount as may be just and fair.

HAWAII REV. STAT. §§ 804-15 to -19, 835-1 to -8 (1976). When a magistrate has committed the defendant, he may require each material witness to enter into a recognizance in a sum fixed at the magistrate's discretion and may commit the witness for failure to do so. The court may levy a \$100 fine on persons not appearing to testify after entering into recognizance and may order the sheriff to arrest and hold them until they give their testimony or post satisfactory security. Alternatively, the court may issue a material witness order on one or more specified grounds after a formal hearing in which it finds reasonable cause to issue the order. The court may fix bail for a witness appearing under such an order and may commit the witness who fails to post such bail. The county must pay the witness \$20 per day during confinement.

IDAHO CODE ANN. §§ 19-820 to -824 (1979). The magistrate may require witnesses, including married women and infants, to enter an undertaking to appear at trial or forfeit \$500 or any additional amount that the magistrate

deems necessary. The magistrate may commit the witness if the security requirement is not met; however, if on examination it appears that the witness is unable to procure securities, he may be conditionally examined in the manner of a preliminary hearing and released, unless he was an accomplice in the crime charged.

ILL. ANN. STAT. ch. 38, §§ 109-3(a), (d) (Smith-Hurd Supp. 1979); ch. 31, §§ 17-18.1 (Smith-Hurd 1969). If an accused is held to answer, material witnesses for either the state or defendant may be required to enter into a written undertaking to appear at trial. Failure to enter into recognizance results in commitment; failure to appear following recognizance results in forfeiture plus criminal sanction. A coroner can also recognize a witness at an inquest and commit to jail those who refuse to enter into recognizance.

IND. CODE §§ 35-1-9-3 to -4 (1976). During a "continuance" in a homicide case, a justice may recognize witnesses in the same manner as prisoners are held to bail. There is apparently no specific provision spelling out a judicial power to commit a witness to insure appearance.

IOWA CODE ANN. §§ 804.11, .23, 811.2, 815.6 (West 1979). A law enforcement officer may arrest any person upon probable cause belief that the person is a necessary and material witness to a felony and might be unavailable for service of a subpoena. The officer must immediately take the witness before a magistrate, who may release him pursuant to the same conditions as those placed on the release of a criminal defendant: placement in the custody of a designated supervising person or organization; restrictions on travel, association, or place of residence; return to custody in the evenings; or execution of an appearance bond. If the witness is confined, the state must pay him witness fees.

KAN. STAT. § 22-2805 (1974). The court or magistrate may require material witnesses to post bond or to comply with other provisions to assure his appearance. Failure to comply may, after hearing, result in commitment. The court may order release after an "unreasonable length" of detention. The court may not detain a witness because of inability to comply with the conditions of release if deposing the witness is possible and if "further detention is not necessary to prevent a failure of justice."

KY. R. CRIM. P. 7.06. A court may require a material witness to give bail for appearance, commit him to custody in lieu thereof, and order his release if the court has detained him an unreasonable length of time.

LA. REV. STAT. ANN. §§ 15:257-:259 (West 1967 & Supp. 1979). The judge or committing magistrate may require a material witness to post bond and, if the witness fails to comply, may arrest and detain him "in the parish jail or in such suitable place as shall be designated by the court." A detained witness may demand the taking of his deposition after forty-eight hours notice to the accused, and shall then be discharged from custody. The deposition shall be

admissible at trial unless the court can procure the presence of the witness by subpoena.

ME. R. CRIM. P. 46(b). The court or magistrate may commit a material witness upon failure to give bail, but may order the witness released if detained an unreasonable length of time.

MD. CTS. & JUD. PROC. CODE ANN. § 9-203 (1974). In any criminal proceeding a magistrate must determine whether to detain a material witness or require him to post reasonable bond. Unless the state's attorney obtains the authority of the judge to detain the witness longer, the sheriff may not hold the witness for more than seven days for failure to post the required bond. The state must pay \$10 per day in addition to witness fees.

MASS. GEN. LAWS ANN. ch. 276, §§ 45-52, 54; ch. 277, § 70; ch. 262, § 30 (West 1968). If the state commits the defendant or admits him to bail, the court or justice shall bind material witnesses for the state, including minors, by recognizance or with sureties. The court may commit witnesses refusing to recognize in felony cases. In felony cases against a defendant not in custody, the court may hold a witness unable to furnish sureties for a reasonable time, pending apprehension of the defendant. With the consent of the defendant, a magistrate may take the deposition of a witness unable to furnish sureties. If the district attorney believes that the public interest will not suffer by the release of a witness unable to furnish sureties, he shall tell the chief justice who may order the witness discharged except if the witness is the prosecutor or an accomplice. The Commissioner of Correction must make rules concerning diet, size of cells, amount of liberty, correspondence, visits, and similar matters so as to distinguish and separate witnesses from other prisoners as much as possible consistent with their safety and testimony. Detained witnesses receive a minimum of \$1.50 per day in witness fees.

MICH. STAT. ANN. §§ 28.916-.917, .974-.975 (1978). A material witness unable to post bail must appear at a hearing before a court or circuit court commissioner, who can require the witness to recognize with sureties or be committed to jail.

MINN. STAT. ANN. §§ 625.10, 629.54-.55 (West 1947). When the magistrate has committed the accused, he may bind by recognizance, with or without sureties, all witnesses whom he deems material. He may commit witnesses for failure to recognize only in cases involving murder in the first degree, arson when human life has been destroyed, and cruel abuse of children. Persons committed shall receive such compensation during confinement as the court directs, not to exceed regular witness fees. The magistrate from whose order the defendant has appealed shall require witnesses necessary to support the complaint to recognize.

MISS. CODE ANN. § 99-15-7 (1972). A conservator of the peace may require

a witness to enter into a bond or recognizance and, in default thereof, commit the witness to jail.

MO. REV. STAT. §§ 544.420-.440 (1978); MO. SUP. CT. R. 23.08, .09. The magistrate may bind a material witness in a felony case, including infants and married women, by recognizance or bail bond and commit to prison a witness who refuses to comply. Any witness committed to prison may be released if deposed as provided by law.

MONT. CONST. art. II, § 23; MONT. REV. CODES ANN. §§ 46-11-601, -15-201 (1979). A judge may require any material witness to enter into a written undertaking and to provide additional sureties. A witness who fails to enter into a written undertaking may be committed to custody. A witness who is committed may be held no longer than is necessary to take his deposition.

NEB. REV. STAT. §§ 29-305, -507 to -508 (1975). A magistrate who is satisfied that any witness in a felony case, including married women and minors, will not appear and testify may require the witness to recognize with sufficient securities and commit to jail those who refuse to comply.

NEV. REV. STAT. §§ 178-494, 189.040 (1973). A magistrate may require material witnesses for the state to give bail. Upon failure to post bail, the magistrate may modify the bail requirement or commit the witness. The magistrate may order the release of a witness detained for an unreasonable period of time. The state may conditionally examine in the presence of the defendant a material witness committed for his inability to meet security requirements, and then must discharge the witness.

N.H. REV. STAT. ANN. §§ 597:22-:23, 619:23 (1974 & West Supp. 1979). A police officer may detain a necessary witness to a crime. The witness must be brought before a superior court justice within twenty-four hours of arrest. The justice must release the witness on recognizance or, upon failure to recognize, commit the witness to jail. A confined witness is entitled to the net proceeds of his labor.

N.J. STAT. ANN. §§ 2A:162-2 to -4 (West 1971). Material witnesses and persons declaring crimes against other persons may be required to recognize with sufficient surety if the crime is punishable by death or imprisonment in the state prison, and may be committed upon default. Persons committed may not be placed with those charged or convicted of a crime, but must be comfortably lodged and not restricted further than necessary for detention. A detained witness is entitled to fees of \$3 per day.

N.M. STAT. ANN. § 31-3-7 (1978); N.M. R. CRIM. P. DIST. CTS. 25. The court may order a material witness to give bail. The court may commit any witness who fails to comply with the order for a period not to exceed five days, within which time his deposition must be taken. The court may extend this time for no more than five additional days if necessary for the purpose of

taking a deposition. Only in capital or more serious felony cases may the court require surety.

N.Y. CONST. art. 1, § 5; N.Y. CRIM. PROC. LAW §§ 620.10-.80 (McKinney 1971). Detailed provisions apply to both state and defense witnesses in cases of indictable offenses. Upon a sworn application, a court may order a potential witness to appear or, if such order would be ineffectual, order the person's arrest. The person is entitled to a hearing and to the constitutional rights accorded a defendant charged with a felony, including appointed counsel if indigent. The court may fix bail if it determines that the person is a material witness who will not respond to a subpoena. The court may commit a witness if he fails to post bail. The court may vacate or modify its orders upon application of either party. A witness must be paid \$3 per day for each day of confinement. A witness cannot be unreasonably detained.

N.C. GEN. STAT. §§ 15A-521, -803, 152-7 (1978). A material witness for the state or the defendant may be detained or released subject to the same conditions as a criminal defendant. The court after reasonable notice must afford a witness a hearing, an opportunity to present evidence, and the right to counsel, including appointed counsel if indigent. The witness may be required to attend the hearing by subpoena or, if necessary, arrest. A judge may not incarcerate a material witness for a period longer than twenty days, but upon review a judge may extend the period for terms not to exceed five days. Coroners also may recognize material witnesses and jail those who default in giving recognizances.

N.D. CONST. art. I, § 6; N.D. CENT. CODE §§ 31-03-19 to -20, -24 (1974); N.D. R. CRIM. P. 46(e). A court may order a material witness for the prosecution to give an undertaking with or without sureties. A witness confined for his inability to furnish sureties may receive witness fees of fifty cents per day for the period of imprisonment. A witness unable to obtain sureties cannot be confined if his testimony "can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice." A witness cannot be unreasonably detained nor confined in any room where criminals are imprisoned.

OHIO REV. CODE ANN. §§ 2937.16-.18, 2941.48 (Page 1975); OHIO R. CRIM. P. 15(a). When an accused enters into a recognizance or is committed, the court may require a witness for the state, including a minor, to enter into a recognizance, with or without surety. The court may commit the witness for failure to comply. A committed witness may be held in jail, but may not be confined with prisoners charged or convicted of a crime; alternatively, he may be kept in "open" detention or committed to the custody of a suitable person or agency. A witness shall receive \$25 for each day of custody. The court must give priority to all proceedings in which a committed witness must ap-

pear. A committed witness may move to have his deposition taken and, once taken, may be discharged.

OKLA. STAT. ANN. tit. 22, §§ 270-275, 719 (West 1969 & Supp. 1979). A magistrate may require a material witness examined before him to enter into a written undertaking, with or without sureties, and must commit a material witness who refuses to comply. The court may require a witness who was released on his own undertaking to give sureties, upon a sworn application from the county attorney. The sheriff must bring a witness who is in custody before a district court judge without unnecessary delay to inform him of his constitutional rights, including his right to counsel. A witness must be confined separately from criminals and is entitled to witness fees.

OR. REV. STAT. §§ 136.607-615 (1977). A magistrate may require a witness to enter an undertaking, with or without sureties, and may commit a witness who fails to comply. A witness who is committed because of his inability to furnish bond shall receive compensation of \$7.50 per day.

R.I. SUPER. CT. R. CRIM. P. 46(b); R.I. DIST. CT. R. CRIM. P. 46(b). A court may require a material witness to give bail for his appearance and to remain in jail if unable to do so. A witness may obtain release if detained an unreasonable length of time.

S.C. CONST. art. 1, § 15; S.C. CODE §§ 17-15-70, -110, -140, -150 (1976). A judge may detain or release a material witness subject to the same conditions as a criminal defendant: execution of an appearance bond; release on recognizance; placement in the custody of a designated individual or organization; restrictions on travel, association, or place of abode; return to custody after specified hours; or any other conditions reasonably necessary to assure the witness' appearance. Court clerks are authorized to grant bail to a witness and to discharge a witness from custody. A witness may not be unreasonably detained.

S.D. CODIFIED LAWS ANN. §§ 23A-12-1, -43-18 (1979). The same conditions of release may be imposed on a material witness as imposed on a criminal defendant: placement in the custody of a designated person or organization; restrictions on travel, association, or place of abode; execution of an appearance or bail bond; return to custody after specified hours; or any other condition reasonably necessary to assure the witness' appearance. A material witness may not be detained if his testimony can be adequately secured by deposition and "further detention is not necessary to prevent a failure of justice." On written motion by the confined witness, the court may direct that the witness be deposed and thereafter discharged.

TENN. CODE ANN. §§ 40-1210 (Supp. 1979), 40-1122 to -1127 (1975), 18-403 to -405 (1955), 8-2510 (1973). The magistrate must take from each material witness examined by him a written undertaking to appear in the sum of \$250; a larger sum with sureties may be required if the magistrate has cause to be-

lieve that the witness will not appear. The magistrate may require married women and infants to procure sureties or they may be subpoenaed to appear immediately and testify. On failure to enter into an undertaking or give bail, the magistrate may order confinement. The court may order a witness' release if he has been detained for an unreasonable length of time. Jailers are allowed the same fees for keeping witnesses committed to jail as for keeping prisoners.

TEX. CRIM. PRO. CODE ANN. tit. 17.34-.38 (Vernon 1977); 24.14-.15, 24.23-.26 (1966). The court may require a witness for the state or defendant to give bail, and may commit the witness for failure or refusal to do so. If the witness is unable to give security upon such bail, the court must release him without security, and may accept a personal bond. In addition, a court clerk may issue an attachment for the appearance of a witness whom the defendant or state's counsel has good reason to believe is about to move out of the county.

UTAH CODE ANN. §§ 77-15-25 to -31, 78-24-11 (1978). The magistrate may require a witness to promise to appear, with or without sureties, or forfeit \$200, and must commit a witness who fails to comply. Witnesses, except accomplices, who are unable to meet the security requirement shall be examined and discharged. The magistrate may detain a witness only so long as the interests of justice require.

VT. STAT. ANN. tit. 13, §§ 6605, 7551 (1974). A witness may be ordered to enter into a recognizance with surety and may be committed to jail for refusal to comply.

VA. CODE ANN. §§ 19.2-127, -128, -135, -137, -152 (Michie 1975 & Supp. 1978). Although not clearly stated, a judge presumably may hold material witnesses, because he may apply the same conditions of release as for a criminal defendant: placement in the custody of a designated person or organization; restrictions on travel, association, or place of abode; execution of a bail bond or other recognizance; return to custody after specified hours; or any other condition reasonably necessary to assure the witness' appearance. Willful failure to appear if released is a misdemeanor.

WASH. REV. CODE ANN. § 10.52.040 (Supp. 1979); WASH. SUPER. CT. CRIM. R. 6.12(e), 6.13(a). A witness for the state or the defendant may be recognized with or without sureties. In default of recognizance, a hearing is required to determine whether the testimony is material and whether the witness is not likely to attend the trial. The witness is entitled to appointed counsel at the hearing. If detained, the witness receives daily fees plus regular witness fees for court appearance. The witness' deposition also may be taken, with possible release subject to the same conditions as for a criminal defendant: execution of an appearance bond or recognizance; placement in the custody of a designated individual or organization; restrictions on travel or associations; or other conditions reasonably necessary to assure his appearance.

W. VA. CODE § 62-1C-15 (1977). A witness on behalf of either the state or the defendant may be required to post bail. No specific statutory section appears to contain commitment procedures.

WIS. STAT. ANN. §§ 969.01(3), 967.04(1), 979.11 (West 1971 & Supp. 1979). A judge may require a material witness to give bail and may commit anyone who fails to post bail for a period not to exceed fifteen days, within which time his deposition shall be taken. In any case involving murder, manslaughter, or homicide by reckless conduct or battery, a coroner may recognize a witness and commit a witness who fails to recognize.

WYO. CONST. art. 1, § 12; WYO. STAT. ANN. §§ 7-8-118 to -121, 1-12-109 to -110 (1977); WYO. R. CRIM. P. 8(b), 8(f), 17(a). A court may require a material witness for the state or the defendant to give bail and may commit a material witness for failure to do so. Upon motion of the witness, the court may order that the witness' deposition be taken, after which the court may discharge him. The trial court exercises general supervision over the detention of witnesses. Upon application to a judge of the supreme court or district court, a witness may be discharged for illegal imprisonment. No witness can be detained longer than necessary to take his testimony or deposition, nor be confined in any room where criminals are imprisoned.

APPENDIX B

MATERIAL WITNESSES: MODEL STATUTE

SEC. —. NEW SECTION: RELEASE OF MATERIAL WITNESSES

A. DEPOSITION

No material witness shall be detained because of inability to post a bail bond if the testimony of such witness can be adequately secured by deposition, and further detention is not necessary to prevent a failure of justice. Release of the witness may be delayed for a reasonable period of time, not to exceed five days, until the deposition can be secured. Further extensions of the time limit may be had only by order of court in compelling circumstances, for good cause shown. At any such deposition all parties to the case shall be present, and shall have the right to examine the witness. The witness' testimony shall be preserved by stenographic record, tape recording, film, video tape, or a combination thereof, as directed by the court.

B. DETENTION

If it appears by affidavit that a person's testimony is material in any criminal proceeding, and if it is shown that it may become impracticable to secure that person's presence by subpoena, the person may be held as a witness and deposed as provided in Section A. Deposition shall be dispensed with and a witness shall be incarcerated beyond the period stipulated in Section A only in extraordinary cases in which continued confinement is essential to prevent a failure of justice.

C. HEARING AND BURDEN OF PROOF

Before confinement under either Section A or Section B, the witness shall be entitled to a hearing. The burden of proof shall be on the movant, whether the state or the defendant, seeking to restrict the witness' liberty. The court shall inform the witness of his right to counsel, and shall have authority to appoint counsel for the witness if the witness requests appointment of counsel.

D. SEPARATE CONFINEMENT

Any material witness who is detained shall be confined separately from persons accused or convicted of criminal offenses.

E. FEES TO MATERIAL WITNESSES

Persons confined as material witnesses shall, for each day of confinement, receive such fees as are set by the court. Except as the interests of justice

require, the witness shall be awarded, for each day of confinement, the same fee set by statute for ordinary witnesses who give testimony.

F. EXPEDITED APPEAL

Any detained witness may make application to reduce bail or to amend the court order authorizing the witness' confinement. An application shall be filed with the court having jurisdiction of appeals from any court that fixes bail for, or orders detention of, a witness. An application shall be set for prompt hearing on appeal, and in no event shall the appeal be heard later than five days from the time of the filing of the application.

