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JAILING THE INNOCENT: THE PLIGHT OF THE MATERIAL WITNESS

Ronald L. Carlson*

Unknown to many lawyers, American legal history is marred with numerous recorded episodes of extended imprisonment of innocent American citizens. Frequently guiltless of any offense, these citizens are held because they happen to be witnesses to a crime and are financially unable to post a bond to insure their appearance to testify at the trial of the person accused of committing it. Not simply a feature of law from a bygone era, these incidents of imprisonment continue to arise today. Occasionally, a situation occurs wherein the man accused of the crime is released on bail and spends his time before trial free, while the witness to the affair languishes in jail for weeks or months until the defendant's case is reached in court. It is incongruous that in an era of American justice so centrally concerned with the rights of accused persons, including the salutary effort to insure adequate representation and protection of the liberties of the accused, no similar thrust has been generated on behalf of the innocent witness to the crime. This article seeks to explore the current status of the "material witness" laws and to analyze the necessity for and constitutionality of such provisions.

I. Current Law

Almost every state has a law which permits jailing of the bystander witness.[1] The key issue is whether the witness is "material" to the

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[1] For collected statutes, see the Appendix to this article, p. 20 *infra*. *See also* Comfort v. Kittle, 81 Iowa 179, 181-82, 46 N.W. 988, 989 (1890):

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case of the prosecution. Generally, no provision is made to afford the witness counsel to test this issue.[2] An instance is reported wherein appointment of counsel was effected by a committing court to help several confined witnesses explore the legality of their restraint, only to have the prosecution attack the appointment itself as outside the authority of the court.[3] For these reasons, most incarcerated witnesses have in the past appeared at their hearings without representation. There are even a few older authorities which permitted the witness to be incarcerated without the benefit of any hearing at all.[4]

Further, there is generally no maximum limit set on the length of time a material witness may be held. This is in sharp contrast to the various provisions which assure the person accused of the crime a right to speedy trial. Many jurisdictions deny a witness the right to any compensation for the weeks or months he spends in jail waiting to testify. This usually includes denial of the minimal three or four dollar per day statutory witness fee, because the incarcerated witness

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> The power to require persons, without accusation of wrong and without a hearing, to give even their own pledge for their appearance as witnesses, is surely an extraordinary power, and still more extraordinary when security may be required and imprisonment imposed for a failure to give it. The power to bind witnesses by recognizance to appear and give evidence has long since been conferred upon courts and judges by the statutes of many, if not all, of the states.

Federal practice was orginally controlled by statute, 28 U.S.C. § 659, which was supplanted by FED. R. CRIM. P. 46(b). Rule 46 plus the material witness section of the Bail Reform Act of 1966 govern incarceration of federal witnesses today. 18 U.S.C.A. § 3149 (Supp. 1969).

[2] Hearings on S. 1357, Subcommittee on Constitutional Rights, United States Senate Judiciary Committee, 89th Cong., 1st Sess. 304 (1965). *See also* People *ex rel.* Van Der Beek v. McCloskey, 18 App. Div. 2d 205, 238 N.Y.S.2d 676 (1963) (no constitutional duty on part of the court to inquire whether witness desires counsel); People *ex rel.* Fusco (Galgano) v. Ryan, 204 Misc. 861, 124 N.Y.S.2d 690 (1953) (right to counsel arises only when witness requests same); 40 NEBR. L. REV. 503, 507 (1961). A witness is deemed material when he has knowledge of facts closely connected with the crime or the accused, and whose testimony is important to the state or defendant in a pending criminal proceeding. *See* Hearings, *supra,* at 302.

[3] Application of Camancho was an Iowa case which involved the question of free counsel as a side issue. The county attorney attacked as void the municipal court's appointment of counsel for four carnival workers who had observed a homicide. Without reaching the counsel issue, the district court denied relief under the petition for habeas corpus filed on behalf of the witnesses. The Iowa Supreme Court also denied relief in a summary order dated July 8, 1964. The witnesses were detained some six weeks in the county jail. They were released when the person accused of the homicide changed his plea to guilty on the day set for the start of his trial, obviating the need for testimony by any of the witnesses. Each had previously cooperated with the authorities and had given the police signed accounts of what they had seen at the time of the crime.

[4] *E.g., In re* Petrie, 40 P. 118 (Kan. Ct. App. 1895).

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is not considered to be "in attendance upon the court" while in jail. Finally, perhaps the most egregious denial of fundamental liberties exists in the absence of provisions for prompt appellate review of a witness' detention. Generally, no right to a special, speedy appeal is set forth in the material witness statutes.[5] According a prompt appeal to such persons is especially critical. When the correctness of a trial court's denial of the witness' liberty reaches the argument stage in an ordinary appeal to the reviewing court, such appellate argument takes place after time-consuming preparation of the appeal record and briefs, and the entire case may be rendered moot by the completion of the trial below for which the witness was being held.

Lack of awareness by the bench and bar accounts significantly for the shoddy treatment accorded the material witness under our laws. A recent survey indicates large ignorance on the part of legislators, lawyers, and judges of the problems discussed above, and even of the very existence of laws which permit bystander witnesses to be jailed.[6] Occasionally, an especially aggravated case in a particular city or state will arouse some public interest. In recent months the imprisonment of a witness to the Tennessee slaying of Dr. Martin Luther King, Jr., received nation-wide newspaper coverage.[7] Except for sporadic outbursts of publicity, however, the problem has gone largely unnoticed, and the various material witness provisions remain substantially unchanged since their enactment many years ago.

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[5] Hearings, *supra* note 2, at 305; 40 NEBR. L. REV. 503, 508 (1961). Petition for writ of habeas corpus is one of the most frequently employed procedural vehicles for attacking imprisonment of these witnesses. *See* People *ex rel.* Richards v. Warden, 277 App. Div. 87, 98 N.Y.S.2d 173 (1950).

See also 7 CATHOLIC U. L. REV. 37, 40 (1958) respecting the problem of compensation. New York law allows the witness a maximum of three dollars per day for each day of actual detention. N.Y. CODE CRIM. PROC. § 618-b (1968).

[6] Hearings, *supra* note 2, at 300-302. New standards recently promulgated relating to trial by jury do not appear to accord attention to the subject problem. *See* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY §§ 3.2, 4.1, tent. draft (1968).

[7] Charles Q. Stephens allegedly observed the perpetrator of the homicide hurrying down the stairs of a Memphis rooming house shortly after fatal shots were fired from that location. Time, September 13, 1968, at 70. On July 22, 1968, Stephens was committed as a material witness to the county jail by a Tennessee criminal court judge. Thereafter the witness filed an extensive petition for habeas corpus, alleging denial of equal protection of the laws, and also that he was entitled to release upon his own written recognizance as opposed to posting a surety bond. The Circuit Court of Shelby County, Tennessee, ordered discharge of Stephens on August 21, 1968.

In terms of cases which have reached the United States Supreme Court, that tribunal appears to have touched upon the material witness problem in Stein v. New York, 346 U.S. 156, 184 (1953), and Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 617 (1929).

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One sovereign which might be expected to have recently examined the instant problem is the federal government. It has been previously indicated that the material witness is incarcerated upon failure to post bail. In 1966, the Congress of the United States enacted the Bail Reform Act, prescribing bail procedures for federal courts. A provision dedicated to the material witness appears in this legislation.[8] Prior federal practice operated under the provision of the Federal Rules of Criminal Procedure which authorized detention of material witnesses. Bail was frequently set in an amount beyond the financial means of the witness, thus insuring incarceration.[9] The Bail Reform Act of 1966 suggests a substantial change in the material witness procedures, superseding the Federal Rules to the extent they are inconsistent.[10] The new provision appears to treat the witness like an accused and favors release on recognizance over the requirement of bail, although provision for detention of the witness is retained if such is necessary to prevent a failure of justice. The effect of the new law, which emphasizes the rights of the witness as opposed to the convenience of the prosecution, was summarized by one commentator:

> The statute, 18 USC § 3149, provides that '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.' Treating a material witness like an accused under the Bail Reform Act—which favors release and not detention—obviously defeats the original purpose of material witness proceedings which was to obtain *protective custody* of the witness pending trial. Whether or not the draftsmen intended to nullify the practical benefit to the prosecution from such proceedings, their result is a salutary one, because of the potential for abuse inherent in former practice.
>
> Bail for a witness under former practice was almost invariably set in an amount beyond his resources in order to insure his detention pending trial. . . . Observers have pointed to the anomaly and unfairness of the material-witness procedures which results in jailing an innocent party while permitting the defendant to remain at large on bail pending trial.[11]

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[8] 18 U.S.C.A. § 3149 (1969):

> 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.

See HANDBOOK ON CRIMINAL PROCEDURE IN THE UNITED STATES DISTRICT COURT 17-18 (West 1967); Note, 53 IOWA L. REV. 169, 184 (1967). Provisions of the federal act relating to criminal defendants have been recently construed. Sellers v. United States, 89 S. Ct. 36 (1968).

[9] 8 J. MOORE, FEDERAL PRACTICE ¶ 46.11 (2d ed. 1968).

[10] *Id.*

[11] *Id.* Voluntary commitment by the witness for his own self-protection is not

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Although the new federal law does not eliminate the possibility that witnesses to federal crimes will be deprived of their freedom, it does signal a shift in emphasis and contains significant provisions designed to restrict pre-trial incarceration of material witnesses. Glimmerings of reform have also appeared in connection with certain state witness-confinement laws.[12]

A. The Iowa Approach

In felony cases, the Iowa Code contains provisions which authorize the committing magistrate to order incarceration of material witnesses.[13] The magistrate's right to commit witnesses arises when the magistrate has reason to believe that a witness examined at preliminary hearing will not appear in district court and testify against the accused. The magistrate can require the witness to enter into a written undertaking, with sureties, in such sum as the magistrate deems proper to assure the witness' later trial appearance. "If a witness required to enter into an undertaking to appear and testify, either with or without sureties, refuses compliance with the order . . . the magistrate must commit him. . . ."[14]

Since the statute provides that a witness is to be committed when he refuses to post bail, it might seem that the indigent material witness could argue that he never declined to comply with the statute, and therefore should not be imprisoned. His failure to post bail is due solely to his poverty, and not to any obstinate refusal on his part. However, it has been held that the cooperative but financially destitute witness falls into the same category as one with funds who simply

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within the scope of this article, and poses none of the problems of coerced confinement treated herein. Apart from the employment of the statutes to guarantee the presence of a material witness at trial, another use of these laws may be to detain a suspected offender as a material witness until a field investigation is complete, then charge him with an offense, thereby delaying the prompt arraignment which would have been necessary had the person been originally arrested for the crime itself. *See* People v. Clayton, 28 App. Div. 2d 543, 279 N.Y.S.2d 605 (1967) (confession of witness ruled inadmissible); People *ex rel.* Van Der Beek v. McCloskey, 18 App. Div. 2d 205, 238 N.Y.S.2d 676 (1963); Note, 5 SYRACUSE L. REV. 213 (1954); New York Times Magazine, November 10, 1968, at 129.

An incidental problem is raised in view of new criminal interrogation safeguards. Do the police need to give *Miranda* warnings to persons questioned in custody as material witnesses? *See* United States *ex rel.* Caserino v. Denno, 259 F. Supp. 784, 792 (S.D.N.Y. 1966) (disapproving use of incriminating statements); United States v. Denno, 339 F.2d 872 (2nd Cir. 1964) (upholding introduction of witness interrogation fruits pre-*Miranda*).

[12] 18 MO. L. REV. 38, 45-46 (1953); 117 U. PA. L. REV. 700, 702, 713 (1969).

[13] *See* IOWA CODE §§ 761.21, 761.22, 761.24 (1966).

[14] IOWA CODE § 761.24 (1966).

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refuses to post bond.[15] Both may be deprived of their freedom under the Iowa law. No alteration of the above procedure appears to have been effected under the changes in Iowa bail procedure enacted by the 1967 legislature.[16]

Iowa provisions are not untypical. Like the statutes in many states, no provision is set forth authorizing appointment of counsel for the witness. The witness may be held until legally discharged, and no limit is placed on the term of confinement. Although commitment orders of magistrates have been taken to the district court for review in habeas corpus, there is no specific provision for prompt review of the district court's action by the state supreme court. Case law has established that the witness is not entitled to any witness fees for the time spent in jail. One Iowa decision denies compensation to a witness deprived of his freedom for 95 days.[17] In addition, if the confinement of a witness with important testimony is deemed essential to the trial process, one would think that the right to request confinement of a witness should be available to both the accused and the prosecution. However, the terms of the statute appear to make clear that the right to commit witnesses extends only to *state* witnesses in Iowa.[18]

The Iowa law appears to be an apt object for reform, suggestions for which are dealt with hereafter. In examining the operation of the Iowa statute, however, one extremely important case should be considered. This decision, often overlooked, significantly delimits judicial authority to originally prescribe confinement of witnesses under the Iowa law. In *Comfort v. Kittle*[19] the Iowa Supreme Court

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[15] Markwell v. Warren County, 53 Iowa 422, 423, 5 N.W. 570, 571 (1880): "But counsel say that he could not give the security, and failed to obey the order because of his inability to comply therewith; this may be true. But the magistrate's decision must be presumed to have been legally and regularly made . . . ." *See also* Koessler, *Arrest As Material Witness*, 69 CASE & COM. 28 (Mr.-Apr. 1964).

[16] *See* IOWA CODE ANN. § 763.16-.18 (Supp. 1969).

[17] Markwell v. Warren County, 53 Iowa 422, 5 N.W. 570 (1880).

[18] IOWA CODE § 761.21 (1966) authorizes the magistrate to take a written undertaking from any material witness examined on the part of the state. Some other jurisdictions, by statute or court decision, extend the right to apply for witness recognizances to the defense as well as the prosecution. *See, e.g.*, ARK. STAT. ANN. §§ 43-624-627 (1947); W. VA. CODE ANN. § 62-1C-15.

[19] 81 Iowa 179, 46 N.W. 988 (1890). Perhaps one reason the decision's rationale is not more frequently employed is because of difficulty in locating this citation. It does not appear collected under the material witness section of the code annotated.

There appears to be a split of authority on the question of whether district courts possess inherent power to order confinement of witnesses in advance of trial, absent statutory authority. In accord with the Iowa view that no such authority exists, see State v. Hand, 101 N.J. 43, 242 A.2d 888 (1968); 20 WASH. &

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held that the witness incarceration statutes may be used by magistrates alone. District judges, under this authority, have no power to order confinement of material witnesses. The court in the *Kittle* case pointed to the general rule that absent specific statutory provision there was no common law right to confine witnesses—and the Iowa legislature had seen fit to confer this right on committing magistrates alone. It would therefore appear that if the prosecution indicted the defendant without a preliminary hearing, or if preliminary hearing was successfully waived by the accused, a material witness could not be confined in Iowa. The *Kittle* decision requires a preliminary hearing in which the state must produce every witness sought to be held or placed under bond in order for subsequent incarceration of the witness to legally occur.[20]

B. Particular Cases

Before discussing the constitutionality of the material witness laws, it is perhaps wise to consider the scope of the suppression of freedom involved, a point illustrated by the length of confinement material witnesses have incurred.

LEE L. REV. 164 (1963). *Contra,* State v. Buchanan, 175 So.2d 803 (Fla. 1965); Crosby v. Potts, 8 Ga. App. 463, 69 S.E. 582 (1910). *See also* 51 IOWA L. REV. 164, 172 (1965).

[20] However, research indicates that the statutory procedure may not be observed in every case. In connection with State v. Austin, Linn County District Court, Criminal Number 18909 (1961), two witnesses to a homicide were committed for failure to post the $25,000 bond set by the municipal judge. Bail was later reduced to $5,000. The records in the case indicate that the accused waived preliminary hearing on August 23, 1961. The commitment order for the witnesses preceded the preliminary hearing date, that order being made when county attorney's office filed an application reciting belief that the witnesses were material and would not appear for trial of the case. No hearing on this issue appears in the record.

Comfort v. Kittle, 81 Iowa 179, 184-85, 46 N.W. 988, 990 (1890), speaks to the question of which court has authority to commit witnesses, and the proceeding wherein this may be done:

> Sections 4248 to 4251 of the Code do authorize magistrates, on holding the defendants to answer in the district court on preliminary examination, to take from each material witness examined by him, on the part of the state, a written undertaking for his appearance in the district court, and, if satisfied that the witness will not fulfill his undertaking, to require him to enter into it with sureties, and, in case of refusal, to commit him until he comply or be legally discharged. These provisions are expressly limited to preliminary examination before magistrates. If it was intended thereby to confer the same authority upon district judges, in cases of change of venue, there would be no necessity for the provision contained in section 4385 as to witnesses. These provisions being expressly limited to preliminary examinations before magistrates, we are not at liberty to engraft them upon the other statute, even though there are good reasons why district courts and judges should possess the same authority . . . . In the opinion of a majority of the court such authority in the district

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Markwell v. Warren County[21] is an Iowa case wherein a witness to a murder was unable to post the bond set by the justice of the peace and was confined in the county jail for 95 days. The witness later filed a civil petition seeking recovery in the amount of the statutory $1.25 per day witness fee but was denied relief because he was not deemed "in attendance upon the court" while in jail. In Utah, a 1955 decision ruled that a witness incarcerated for six months had not been held an unreasonable time, and again compensation was denied for the 178 days the witness spent in jail.[22] However, the witness was paid the regular six dollar witness fee for the day he spent in court testifying. Not all states deny compensation to detained witnesses, however. In one reported case, a witness who was detained eight months for failure to post bond was awarded the sum of one dollar per day for each day of the eight month period.[23] This latter approach, allowing any compensation at all, appears to represent the minority view on payments of fees.[24]

Confinement does not always extend to the lengths reported above. However, a period of incarceration extending two months or longer is not rare in these cases, and reported decisions are legion bearing testimony to the lengthy confinements suffered by witnesses to crimes.[25] The situation is further complicated by a general lack of separate detention facilities for the witnesses. Statutes usually contemplate the confinement of these persons unsegregated from the general jail population.

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courts and judges may not be inferred from the statutes in respect to preliminary examinations, nor from the necessities of the case, and hence that the learned district judge acted without authority in requiring the petitioner to furnish sureties, and in ordering his arrest and detention upon failure so to do.

[21] 53 Iowa 422, 5 N.W. 570 (1880). "It cannot be claimed that defendant was in attendance upon the court while in jail." *Id.* at 423, 5 N.W. at 571.

[22] Barber v. Moss, 3 Utah 2d 268, 282 P.2d 838 (1955).

[23] Hall v. Somerset County, 82 Md. 618, 34 A. 771 (1896).

[24] *See* Barber v. Moss, 3 Utah 2d 268, 269, 282 P.2d 838, 839 (1955); Note, 5 UTAH L. REV. 119 (1956) (casting some doubt on the majority-minority analysis); 21 YALE L.J. 327 (1912); Annot., 50 A.L.R.2d 1439 (1956).

[25] In addition to cases cited in the text, see, *e.g.*, *In re* Singer, 134 Cal. App. 547, 285 P.2d 955 (1955) (minor taken from home of parents and held 14 days); State *ex rel.* Gebhardt v. Buchanan, 175 So. 2d 803 (Fla. 1965) (eight months); People *ex rel.* Gross v. Sheriff of City of New York, 277 App. Div. 546, 101 N.Y.S.2d 271 (1950) (confined as witness 77 days); People *ex rel.* Rao v. Adams, 296 N.Y., 231, 72 N.E.2d 170 (1947) (92 days). *See also In re* Grzyeskowiak, 267 Mich. 697, 255 N.W. 359 (1934); *In re* Prestigiacomo, 234 App. Div. 300, 255 N.Y.S. 289 (1932); 40 NEBR. L. REV. 503 (1961). Recommendations for the prompt discharge of detained witnesses appeared in the American Law Institute's Code of Criminal Procedure. *See* ALI, CODE CRIM. PROC. §§ 57-58 (1930); L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL, 128-29 (1947).

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Extended confinements, unsegregated facilities, and failure to compensate witnesses during confinement, even to the extent of the minimal per diem witness fee, impart a most undesirable emphasis to the law in this area. Existing statutes seem designed to discourage witnesses with relevant information from coming forward. In an era when citizens are urged to "get involved" and assist the administration of justice by volunteering helpful information to clear up crimes, existence of the witness laws appears counter-productive. The witness from another state who observes a crime and advances important information with respect thereto stands a good chance of being locked up for a significant period of time if he lacks private resources to post bail. The anomalous situation created under such laws was summarized in a decision of the Maryland Court of Appeals:

> For an honest, law-abiding, but poor and friendless individual to be confined in a common jail, and there forcibly made the companion of criminals and of the depraved, merely because he is unable, through no fault of his own, to find security for his appearance as a witness in behalf of the commonwealth, is bad enough; but when, in addition to this, by that very confinement, he is deprived of pursuing his avocation, and then is refused compensation as a witness except for the few days he may be actually within the courtroom while the trial is in progress, his situation is made immeasurably worse. He is subjected to the same treatment that a criminal is, though confessedly not guilty, or even accused of crime; and he is deprived of his liberty and his means of livelihood, and denied compensation as a witness, though charged with no transgression of the law.[26]

What has been termed "one of the worst cases of abuse under all the material witness laws" is described in *Quince v. State*,[27] a 1962 Rhode Island decision. There, migrant farm workers observed a homicide and were arrested as material witnesses. They were placed in an adult correctional institution, confined with convicted offenders, and required to wear prison garb during the 158 days of their incarceration.[28] Denied access to persons outside the penitentiary for three months, the workers filed petitions for habeas corpus when they were ultimately accorded such access. The petitions were successful; and the "prisoners" were ordered discharged. In summariz-

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[26] Hall v. Somerset County, 82 Md. 618, 621-22, 34 A. 771, 773 (1896). Some states do require that witnesses held in custody be separated from the general jail population. *See* People *ex rel.* Nuccio v. Eighth Dist. Prison Warden, 182 Misc. 654, 45 N.Y.S.2d 230 (1943) (house of detention of witnesses); CAL. CONST. art. I, § 6; N. J. STAT. ANN. §§ 2A:162-3 (1953). The need to improve the treatment of jurors and witnesses generally is highlighted in the President's 1967 Crime Commission Report. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 90-91 (1967).

[27] 94 R.I. 200, 179 A.2d 485 (1962). *See also* the preceding decision in this case wherein initial relief was granted. Quince v. Langlois, 88 R.I. 438, 149 A.2d 349 (1959).

[28] Quince v. State, 94 R.I. 200, 202, 179 A.2d 485, 486 (1962).

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ing the affair, the Supreme Court of Rhode Island made this pointed observation: "To the innocent even a momentary deprivation of liberty is intolerable: 158 days is an outrage. Confinement of the plaintiff for so long a period among criminals and forcing him to wear prison garb added the grossest insult to injury."[29]

II. Constitutional Considerations

Has the United States Supreme Court spoken on the constitutionality of the witness laws? Two references appear in the cases, one comment reflecting upon witness confinement by the federal government and the second referring to incarceration by the states. In *Barry v. United States ex rel. Cunningham,*[30] decided in 1929, the Court stated that when a federal judge under 28 U.S.C. § 659 is satisfiled that

> . . . any person is a competent and necessary witness in a criminal proceeding . . . such person may be confined until removed for the purpose of giving his testimony, or until he gives the recognizance required by said judge. The constitutionality of this statute apparently has never been doubted.[31]

In 1954, Mr. Justice Jackson, writing the opinion for the Court in *Stein v. New York,*[32] added this dictum: "The duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness."[33]

In very recent years, have the requirements of due process of law become more refined and exacting than they were at the time of either of the decisional observations noted above? Many observers of the Court would say indeed they have, and recent developments in this area now cast a cloud on the "never doubted" thesis of constitutionality urged in *Barry.* First, it is to be noted that confined witnesses are deprived of their liberty as well as their property, the latter in the form of loss of job income, during the period of imprisonment.[34] That the witness laws interfere with these constitutionally guaranteed rights is unquestioned, and the due process issue turns on whether such interference is necessary or justified, especially in view of present day techniques for evidence preservation. If a waiver from the

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[29] *Id.* at 205, 179 A.2d at 487. *See also* 20 Wash. & Lee L. Rev. 164 (1963).

[30] 279 U.S. 597 (1929).

[31] *Id.* at 617.

[32] 346 U.S. 156 (1953).

[33] *Id.* at 184.

[34] Although unable to provide the cash or security necessary to make a several thousand dollar bond, the witness nonetheless may be gainfully employed at the time he is imprisoned. *See, e.g.,* Quince v. State, 94 R.I. 200, 202, 179 A.2d 485, 486 (1962).

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accused is obtained, a deposition can preserve the witness' testimony for use should he not appear at the trial.[35] In obtaining trial testimony from witnesses, the Supreme Court has directed trial courts to employ the least possible power to secure such evidence, with coercive imprisonment a last-resort measure.[36] However, many witness detention laws move immediately to the sanction of incarceration where bail is not posted, allowing no resort to other alternate steps to secure the witness' testimony for trial. It is little wonder that one commentator concludes ". . . . to this day the United States Supreme Court has not yet had an opportunity to squarely decide this constitutional problem by way of holding, and it seems not so certain that if presented with such a case it will reach the same conclusion as in that dictum" [which approved constitutionality in *Barry v. United States,* quoted above].[37]

In addition to these due process concerns, additional arguments can be made that the witness statutes violate the equal protection clause of the United States Constitution's fourteenth amendment and perhaps the fifth amendment's prohibition against taking private property for public use without just compensation.[38] In the criminal law field, new

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[35] *See* note 65 *infra,* and accompanying text.

Collation of statistics respecting the return rate of witnesses released under a promise to appear has not been located in any of the material witness writings cited in this article. However, one viable source for assessing the prospects for return of such witnesses might be the figures relating to the incidence of voluntary return of criminal defendants released on their own recognizance. Several projects have studied this situation, one of the most noted being the Manhattan Bail Project wherein 3,505 accused persons were released on recognizance. Over ninety-eight percent returned to court at the time specified. This compared with a return rate of about 97 percent for persons released on bail. . . . AND JUSTICE FOR ALL 16-17 (Ford Foundation 1967). *See also* PROCEEDINGS, JUSTICE CONFERENCE ON BAIL AND REMANDS IN CUSTODY 8 (1966) (indicating 1,146 criminal defendants were released on recognizance under the Des Moines, Iowa, bail project, 1964, and 1,131 voluntarily returned to court when required). Along with the high percent of return which is a striking feature of these surveys, it should be observed that these release projects dealt with accused persons. Their stake in fleeing the jurisdiction appears considerably higher than with the witness, who does not face the risk of post-trial incarceration after he gives his testimony.

[36] *See* Shillitani v. United States, 384 U.S. 364, 371 (1966).

[37] Koessler, *Arrest As Material Witness,* 69 CASE & COM. 28, 30 (Mr.-Apr. 1964). *See also* Hearing, *supra* note 2, at 306; 40 NEBR. L. REV. 503, 509 (1961). An early New York case treating the constitutional question found the state law unconstitutional. People *ex rel.* Maloney v. Sheriff of Kings County, 117 Misc. 421, 192 N.Y.S. 553 (1921). This authority was subsequently overruled. *See* People *ex rel.* Bruno v. Maudlin, 123 Misc. 906, 206 N.Y.S. 523 (1924).

[38] While the issue may not be completely clear-cut at this time, it does appear that this fifth amendment guarantee binds the states. *See* Annot., *What Provisions of the Federal Constitution's Bill of Rights are Applicable to the States,* 18

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equal protection decisions strike hard at denying rights or freedoms to indigent persons which are enjoyed by other citizens solely because of the latter's wealth.[39] If a wealthy witness to a crime can obtain freedom under the statutes by posting bail, is it right to imprison the poor witness because he lacks funds?[40] Some jurisdictions seek to avoid such constitutional questions by declaring these and similar proceedings to be civil matters. Other authorities take the position that hearings to incarcerate witnesses are criminal adjudications.[41] Any dispute along these lines appears academic under current Supreme Court cases. Both *Smith v. Bennett*[42] and *Long v. District Court*[43] make the point that where personal liberty of the citizen is at stake, constitutionally protected rights may not be suppressed by virtue of any state labeling the particular proceeding as a "civil matter."

Should these confinement statutes pass new constitutional tests likely to be posed,[44] it is certain that the old witness laws cannot be

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L. ed. 2d 1388, 1406 (1968). In Chicago, B & Q R. Co. v. Chicago, 166 U.S. 226 (1897), it was held that compensation for property taken for public use is an essential element of due process of law under the Fourteenth Amendment and applicable to state action. The eminent domain clause has been interpreted as providing protection for interests in intangible personal property as well as interests in real property. 50 IOWA L. REV. 872, 874-75 (1965). One case, Dillon v. United States, 230 F. Supp. 487 (D. Ore. 1964), held that requiring representation in an appointed criminal case constituted a taking of property within the Fifth Amendment which entitles the attorney to just compensation. *See also* Hall v. Washington County, 2 Greene 473 (1850). However, the *Dillon* decision was reversed on appeal. United States v. Dillon, 346 F.2d 633 (9th Cir. 1965).

[39] Roberts v. La Vallee, 389 U.S. 40 (1967); Long v. District Court, 385 U.S. 192 (1966); Douglas v. California, 372 U.S. 353 (1963); Lane v. Brown, 372 U.S. 477 (1963); Draper v. Washington, 372 U.S. 487 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Bandy v. United States, 364 U.S. 477 (1960). *See also* Williams v. Rhodes, 393 U.S. 23 (1968).

[40] "Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?" Bandy v. United States, 364 U.S. 477 (1960).

[41] *See* State v. Hand, 104 N.J. 43, 55 n.3, 242 A.2d 883, 894 n.3 (1968). *Compare* People *ex rel.* Fusco (Galgano) v. Ryan, 204 Misc. 861, 871, 124 N.Y.S.2d 690, 700-701 (1953); People v. Doe, 261 App. Div. 504, 26 N.Y.S.2d 458 (1941).

[42] 365 U.S. 708 (1961).

[43] 385 U.S. 192 (1966).

[44] Many cases make the point that the state has the right to impose hardship upon the citizen, but such hardship can be perpetrated only where a strong interest of the state requires imposition. State v. Buchanan, 175 So. 2d 803, 806 (Fla. 1965) lists numerous situations wherein persons must leave jobs or otherwise undergo inconvenience to assist in the administration of justice, *e.g.*, jurors may be compelled to lay down their private enterprises for a time, parties to suits are required to submit to physical examinations. But there appear to be no viable methods to avoid these necessary inconveniences. Critics of the wit-

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applied without fresh incorporation of specific constitutional guarantees, notably appointment of counsel for indigent witnesses. As a result of Supreme Court decisions in *In re Gault*[45] and *Specht v. Patterson*[46] it would appear incumbent upon a committing court to advise the witness as to his right to counsel. In both of these instances, the person facing confinement was not classed as a criminal defendant. In *Specht,* the involved hearing was termed a civil proceeding (commitment under the Colorado sex offender statute).[47] Without dissent the opinion ordained that the commitment proceedings "whether denominated civil or criminal are subject to the Equal Protection Clause of the Fourteenth Amendment . . . and to the Due Process Clause." The Court ruled the Colorado commitment procedure violative of due process because of the absence of procedural safeguards such as the representation of counsel at the commitment hearing. And *In re Gault* demonstrates that where the right to counsel applies, such right requires notification from the trial court that if counsel cannot be retained, one will be appointed by the court.[48]

The New York decision in *People v. Ryan*[49] ably summarizes the role of counsel in witness commitment hearings and provides a thumb-

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ness laws urge that it is precisely because the state's needs do not require the extended imprisonment of an innocent bystander that the witness statutes lose out in the due process balancing. See the alternates to lengthy confinement suggested in notes 61 and 63 *infra,* and accompanying text.

The constitutional inquiry to this point has questioned the government's right to *detain* witnesses. A second level of concern goes to the constitutional right of a law enforcement officer to *arrest* a citizen as a material witness in the first instance. The law of arrest in most states does not include provisions and guidelines for effecting arrests of witnesses. *E.g.,* IOWA CODE § 755.4 (1966). While it is believed that arrests of material witnesses are constitutional even without specific statutory authorization, particular code treatment of the area may be advisable to avert any problems. *See* State v. Hand, 101 N.J. 43, 242 A.2d 888 (1968), a case approving warrantless arrest of the material witness and stating that when the arrest is well founded, incidental search may be had of the witness placed in custody.

[45] 387 U.S. 1 (1967).

[46] 386 U.S. 605 (1967).

[47] Specht v. Patterson, 18 L. ed. 2d 1470, 1471 (Briefs of Counsel). *See* Fahr, *Iowa's New Sexual Psychopath Law,* 41 IOWA L. REV. 523, 554 (1956): "They [sex psychopath statutes] are uniformly held non-criminal, despite the fact the persons they operate on consider them punitive in nature." *See also In re* Gault, 387 U.S. 1, 49-50 (1967) (applying constitutional guarantees to juvenile proceedings because "To hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings.").

[48] 387 U.S. 1, 41 (1967).

[49] 204 Misc. 861, 124 N.Y.S.2d 690, 697-98 (1953):

> There can be no doubt that in a proceeding under Section 618-b—as in any other justiciable controversy—the lawyer as advocate can be of valu-

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nail survey of guideline criteria for the setting of bail in such cases. New York's material witness statute has proved the most prolific source of state litigation in the material witness field, and several New York cases have treated the question of right to counsel. The *Ryan* case adverted to above involved two detained witnesses, Michael Galgano and Anthony Galgano. The following colloquy took place at the commitment hearing:

> "Michael Galgano [one of the relators]: I am innocent of the thing. I wasn't even there.
> "The Court: What bail do the People ask?
> "Mr. Altschuler [the Assistant District Attorney]: The People ask $50,000.00 bail and 48 hours notice.
> "Michael Galgano: Your Honor, I think it is no more than right I should have a lawyer.
> "The Court: Have you a lawyer?
> "Michael Galgano: Yes, sir.

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able professional service in the legal protection of his client's rights. For example, he may seek to show, in a proper case, that there is in fact no pending grand jury inquiry or hearing, People *ex rel.* Nuccio v. Warden, Eighth District Prison, 182 Misc. 654, 45 N.Y.S.2d 230, as distinguished from an investigation being conducted in the district attorney's office, People *ex rel.* La Tempa v. Hughes, 182 Misc. 1078, 50 N.Y.S.2d 433—that is, he may seek to show that there is no criminal action or proceeding pending as required by the statute. Matter of Prestigiacomo, 234 App. Div. 300, 255 N.Y.S. 289. Or, in opposition to the affidavit of the assistant district attorney to the effect that his client was present when the acts now under investigation were committed, and thus a necessary or material witness, he may seek to submit convincing proof that the witness was elsewhere. Untermeyer, J., dissenting in People v. Doe [Re Bernoff], 261 App. Div. 504, 512, 26 N.Y.S.2d 458, 463. Or, far from a likelihood that his client will not appear to testify when required, he may seek to establish by overwhelming evidence that the client will be available as a witness at the trial. Untermeyer, J., dissenting in People v. Doe [Re Bernoff], 261 App. Div. 504, 512, 26 N.Y.S.2d 458, 463, *supra.* Or, he may seek to present facts as to the appropriate amount of the bail to be fixed —for, while the "bailing court has a large discretion," "it is a judicial, not a pure or unfettered discretion. The case calls for a fact determination, not a mere fiat." People *ex rel.* Lobell v. McDonnell, 296 N.Y. 109, 111, 71 N.E.2d 423, 425. The "reasonableness of bail in any case depends upon examination of the particular record." People *ex rel.* Rao v. Adams, 296 N.Y. 231, 234, 72 N.E.2d 170, 171. The factual matters to be taken into account include, among other things, the seriousness of the crime under investigation; the penalty which may be imposed; the character, background and criminal records, if any, of the prospective witness; his pecuniary and social condition and general reputation; his relationship to others against whom he may be called to testify; the probability of the willing appearance of the witness or the possibility of flight to avoid giving testimony; the difficulty if not impossibility of procuring his return if he does leave the State. People *ex rel.* Rothensies v. Searles, 229 App. Div. 603, 604, 243 N.Y.S. 15, 17. Or, the attorney may seek to show that the witness has been detained for an unreasonable time, N.Y. Const. Art. I, Sec. 5; and the County Judge, retaining control of the situation by the form of his order, may at any time instigate an inquiry as to the detention. People v. Doe [Re Bernoff], 261 App. Div. 504, 507, 26 N.Y.S.2d 458, 462.

Continuing use is made of the New York witness law. For example, figures indicate that 38 witnesses were exposed to confinement under the statute in New York county in 1967 and 41 witnesses were so confined in 1968.

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"The Court: Yes, well, you can have your lawyer see you in Bronx County Jail to which you will be committed."
And, *after the order of commitment* and bail was read into the record, the Court said to Michael Galgano:
"You will be permitted to phone your lawyer from the Bronx County Jail."
And at to Anthony Galgano (at another time and in a separate proceeding).
"The Court: Have you anything you wish to say, Mr. Galgano?
"Anthony Galgano: No."[50]

Neither witness was informed that he might have an attorney represent him. The question was thus raised as to whether such advice was necessary. Relying upon *Betts v Brady,*[51] the *Ryan* decision ruled that court inquiry as to counsel was unnecessary. Habeas corpus relief was granted as to Michael Galgano. He was given a new hearing with counsel present because he had asked for representation. The other witness was denied such relief because he had not requested counsel at the commitment hearing, and the opinion declared that the trial court was under no constitutional or statutory duty to proffer sixth amendment advice. Although this ruling was reaffirmed in 1963, it would appear superseded today. *Betts v. Brady,* buttress precedent for the *Ryan* result, was overruled in *Gideon v. Wainwright,*[52] and the *Gault* and *Specht v. Patterson*[53] decisions by the United States Supreme Court portend a change in the New York rule. As summarized in *State v. Scheetz,*[54] a 1969 Iowa decision, it is axiomatic that where liberty is to be restrained there must be due process of law. Due process in this context is then summarized with this selection from *Specht v. Patterson:*

Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed. . . .[55]

III. Arguments for Incarceration: Proposals for Reform

With the concerns previously articulated respecting the constitutionality of the witness detention laws, certain arguments which have been advanced in favor of these statutes should be stated in the interest of a balanced presentation. Some of the courts approving detention of witnesses have urged that if witnesses without funds were exempt from imprisonment until trial, there would be nothing

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[50] 124 N.Y.S.2d 690, 695 (1953) (emphasis supplied).
[51] 316 U.S. 455 (1942).
[52] 372 U.S. 335 (1963).
[53] 386 U.S. 605 (1967). *See* 117 U. Pa. L. Rev. 700, 729 (1969).
[54] 166 N.W.2d 874, 887 (Iowa 1969).
[55] *Id.* at 889.

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to insure the attendance of the witness when required.[56] The practice of confinement has been justified on the ground that the duty to disclose knowledge of crime rests upon all citizens.[57] Prosecutorial comment has been received indicating that resort to federal legislation to assist in the situation of the non-appearing witness (federal warrant for unlawful flight to avoid testifying) may not always be successful because of the legislation's definition of "witness flight."[58] Finally, problems arise respecting the introduction at trial of transcripts of witness testimony taken at preliminary hearings or in deposition form, in light of recent Supreme Court interpretations of the right of the accused to be confronted by the witnesses against him.[59] These contentions merit analysis.

First, the efficient administration of justice does indeed require the presentation of relevant testimony in criminal trials.

> Adequate functioning of governmental processes, whether legislative or judicial, requires the production of all evidence material to the issue at hand. The absent recusant witness has thus always presented a significant problem in statecraft and the mobility of the modern individual has served to intensify the problem and to challenge its solution.[60]

However, many commentators urge that witness confinement laws meet this problem with massive overkill in a day when viable alternatives to imprisonment are available to the states:

> First, there are laws presently in effect (other than the material witness statutes) which more than adequately insure the presence of material witnesses in any criminal proceeding in which they are ordered to appear. In-State witnesses are subject to the judicial and police powers of the State. Second, a violation of the court's direct order to appear on a given date subjects one to serious criminal penalties for contempt of court. Out-of-State witnesses in 90 percent of the States are subject to the Uniform Act to secure the attendance of witnesses. And every person in the United States and its territories is subject to the Federal Fugitive Felon Act, which makes it a Federal offense to flee any jurisdiction to avoid giving testimony in a criminal proceeding.

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[56] 40 NEBR. L. REV. 503, 514 (1961), citing Crosby v. Potts, 8 Ga. 463, 69 S.E. 582 (1910), and Note, 43 HARV. L. REV. 121 (1930).

[57] Hearings, *supra* note 2, at 306.

[58] 18 U.S.C. § 1073 (1961). This statute makes it a crime punishable by imprisonment for up to five years should a person travel in interstate commerce to avoid giving testimony in a criminal proceeding. The witness is taken back to the state of the original crime for trial under this law. The problem raised by one prosecutor in a letter to the author of this article is the question of whether a witness who returns to his state of residence after observing a crime in another state has "fled" the latter state under the terms of the federal law. With appropriate facts the matter appears provable under the statute, although no definitive holding has been discovered on the point. Construction of the federal law is treated in Hemans v. United States, 163 F.2d 228, 240 (6th Cir. 1947).

[59] *See* Barber v. Page, 390 U.S. 719 (1968).

[60] Note, 43 HARV. L. REV. 121 (1930).

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> It is submitted, then, that the combination of these rights of the States and the Federal Government and the sanctions for violations of them secure to every State and the Federal Government the maximum authority necessary to compel the appearance of any material witness in any criminal proceeding and the maximum authority presently consistent with the due process clauses of the 5th and 14th amendments.[61]

To the contention that the witness laws are justified under the concept that every citizen has a duty to testify, it must be observed that the confinement statutes frequently operate before there is any breach of the witness' legal duty. A witness is jailed on the suspicion that he will not perform when required. "We might compare the divorced husband who is ordered to pay alimony. He may certainly be jailed for failing to perform that duty, but jailing him on the suspicion that he will default sometime in the future would be repugnant to our sense of justice."[62]

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[61] Hearings, *supra* note 2, at 306. *See* 40 NEBR. L. REV. 503, 514 (1961):

> Courts generally have reasoned that if the witness without funds was exempt from imprisonment until trial there would be nothing to insure his attendance when required. Certainly, this is a problem deserving attention. It was more troblesome, however, before the wide-spread enactment of the reciprocal witness statutes, and of the Federal statute making it a crime to travel in interstate commerce to avoid giving testimony. To be sure, however, there is still the problem of locating the witness who absconds and doubtless there always will be. But a proper use of the above statutes in combination with other needed statutes enacting severe penal sanctions for violation of the witness' duty to testify would appear to be a more satisfactory answer than preventing a violation of that duty by jailing the witness beforehand.

The Uniform Act to Secure the Attendance of Witnesses is discussed in 7 CATH. L. REV. 37, 46 (1958); 18 Mo. L. REV. 38, 48 (1953); 19 N.C.L. REV. 391 (1941); 43 HARV. L. REV. 121 (1929); 85 U. PA. L. REV. 717 (1937). A recent New Jersey opinion observes that 45 states have adopted the Uniform Act. State v. Hand, 104 N.J. 43, 242 A.2d 888, 894 (1968) ("As of 1965, Alabama, Georgia, Hawaii, Iowa, and Michigan had not adopted the act."). The 1967 edition of the Uniform Laws Annotated likewise omits Iowa from inclusion among the adopting states. 9 U.L.A. 50 (Supp. 1967). However, the 1968 Commissioner's Handbook lists Iowa as having adopted the law. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 293, 380 (1968). A recent news story indicates that a witness residing in Iowa avoided testifying in another state because Iowa "is not a member of the compact providing the exchange of witnesses in major cases." Des Moines Register, January 24, 1969, at 10, col. 5. *See also* IOWA CODE § 781.14 (1966) (Attendance of witnesses outside state); § 781.7 (Disobedience of witness to subpoena); § 622.76 (Civil liability for failure to testify); § 665.4 (Punishment for contempt).

Most of the witness laws date to a much earlier time in American history when a witness traveling to another state thereby effectively cut off contact with the state of trial. They predate not only the Uniform Act to Secure the Attendance of Witnesses but also modern methods of police communication and transportation. For example, California's statute was enacted in 1872. CAL. PENAL CODE § 881 (Deering 1969). In Iowa, the law dates to 1851. IOWA CODE § 761.24 (1966).

[62] 40 NEBRASKA L. REV. 503, 513 (1961).

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In view of the above considerations, it is appropriate to question whether there can be any happy compromise between the citizen's constitutional right to liberty and the prosecutor's desire to retain important evidence. One possible solution is the deposition procedure suggested by the American Law Institute Code of Criminal Procedure.[63] The material witness unable to post bond could be detained for a minimal period of days until his deposition was taken. Problems inherent in the trial use of a preliminary hearing transcript, such as the defense objection that the motive and approach to defense cross-examination at preliminary hearing differs from that employed with trial testimony, would be obviated. The deposition would be prepared specifically for use at trial. This ALI proposal was advanced several years ago. Under any statute implementing this idea today, the defendant should be represented by counsel and afforded an opportunity to interpose objections and fully cross-examine the witnesses. Existing deposition statutes generally do not contemplate efforts to secure advance approval from the accused to the introduction upon trial of such a deposition. Constitutional problems in the prosecution's use of the deposition (should the witness prove to be unavailable) could be blunted by obtaining a judicially supervised consent thereto from the accused, and waiver of physical presence of the witness at trial. The prospects for obtaining such waiver would appear likely in many cases,[64] and even if not obtained, significant authority appears

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[63] ALI CODE CRIM. PROC. § 58 (1930). It is to be noted that the Code distinguishes between indigent and merely recalcitrant witnesses, according the limited detention treatment solely to the indigent witness.

In 51 IOWA L. REV. 164, 172 (1965), suggestion is made to establish a deposition procedure along the lines suggested above: "It would seem that in a situation in which the witness is honestly unable to attend trial, a written deposition could be taken from him . . . . However, if the failure of the witness to guarantee attendance at trial were intentional, the protective measure of commitment could be invoked to assure his presence."

The federal Bail Reform Act of 1966 contains salutary emphasis on the deposition alternative to incarceration for material witnesses. 18 U.S.C. § 3149. *See* 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 766 (1969). Depositions in federal cases are treated in FED. R. CRIM. P. 12. California provides for a deposition procedure if the witness is unable to procure sureties. CALIF. PENAL CODE § 882 (Deering 1969).

Should Iowa move to a limited confinement statute, consideration should be given to provision of a special penalty for witness non-appearance, with significant sanction in the federal pattern. *See* 18 U.S.C. § 3150. Current passages of Iowa law relating to the taking of depositions include IOWA CODE §§ 769.19-.22, 761.8-.10 (1966).

[64] Many defense counsel take the view that a transcript generally has less impact with the jury than the witness testifying in person and will often recommend waiver for this reason. Precisely on this account many prosecutors urge that they

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for the introduction of this form by proof when the witness cannot be found.[65]

IV. Conclusion

New Supreme Court decisions in the due process and right to counsel fields make urgent the need to re-examine our laws permitting governmental confinement of material witnesses.[66] As presently written, many of these statutes are of questionable constitutional validity. Frequently harsh and oppressive in character, these laws in numerous jurisdictions do not seek to achieve a middle ground between freedom of the witness and open-ended confinement in the case of indigents for an indeterminant length of time. Confinements have frequently extended to lengthy periods, an unfortunate fact developed earlier in this article. That similar suppressions of liberty will not be tolerated by our courts in the future appears inevitable under the new concept of due process of law.

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require physical retention of the witness. However, the diminished jury effect of a transcript in those cases where a witness becomes unavailable appears to be a reasonable compromise between the competing interests.

[65] It is to be noted that the United States Supreme Court has never invalidated the trial use of a preliminary hearing transcript where the accused had counsel at the preliminary hearing and the prosecution established that the witness was unavailable. *See* Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965); Britton v. Maryland, 298 F. Supp. 641 (D. Md. 1969); *In re* Bishop, 443 P.2d 768, 772 (Okla. Crim. App. 1968). For cases approving the use of a transcript of prior testimony in criminal trials, see United States v. Allen, 409 F.2d 611 (10th Cir. 1969); People v. Daboul, 44 Cal. Rptr. 744 (1965); People v. Hunley, 313 Mich. 688, 21 N.W.2d 923 (1946); C. McCormick, Law of Evidence 482 (ed. 1954); 1 F. Wharton, Criminal Evidence § 259 (12th ed. 1955). *But see* Note, 47 Tex. L. Rev. 331 (1969). All cases relied upon as authority in this area which predate the *Barber* and *Pointer* cases should be checked against the latter decisions to make certain the precedent accords with current guidelines.

[66] Abolition of the witness laws is urged in Hearings, *supra* note 2, at 307. If retained, sweeping reforms are suggested:

> At the initial hearing the burden should be on the movant, whether it is the State or the defendant, to prove the witness' materiality. Personal recognizance should always be accepted in cases where the principle offense is a misdemeanor and, as often as possible, where it is a felony. (The already established and nascent bail projects could be of considerable assistance in this area.) Where the witness' personal recognizance is not acceptable to the court the amount of bail should be determined according to those standards most favorable to the material witness and a material witness should be given far greater benefit of the judicial doubt than one accused of a crime.
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> Where there exists a serious doubt that the witness will appear when ordered so that high bail and detention would follow under the present system, the State and the defendant should be required to take the witness' deposition (perhaps on film) after which he would be released.
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> The least defense against unwarranted detention would be to require that the movant prove, by a relatively heavy burden (something more than 'reasonable cause to believe') that the witness intends to absent

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In Iowa, it would appear that the witness confinement statute must be severely overhauled if it is to be retained. The recent Iowa Supreme Court decision in *State v. Sheetz*[67] indicates that due process of law guarantees must be observed when liberty is restrained. Such due process guarantees include the right to representation by counsel. There is every likelihood that this guarantee will be required in proceedings to confine material witnesses when an appropriate case comes before the Iowa Supreme Court. Amendment of our witness laws should make the right to appointed counsel clear, and compensation should be awarded witnesses confined for lengthy periods.[68] While some authority exists in Iowa to permit interim achievement of these results through judicial fiat,[69] comprehensive statutory revision appears ultimately preferable. In accomplishing such revision, serious consideration should be accorded the proposal advanced herein to preserve the witness' testimony through deposition. Some authorities feel that it is no longer possible to draft a witness confinement law which will satisfy constitutional requirements. Certainly one which reasonably limits the permitted term of confinement stands a stronger chance of achieving due process approval than our current law.

APPENDIX

The following is a brief description of the statutory provisions pertaining to the commitment of material witnesses currently in existence in each of the states:
1. ALA. CODE tit. 15, §§ 145-149 (1958): Prosecution witnesses, including minors and married women, may be committed upon their failure to enter $100 recognizance. A larger security may be required when the prospective witnesses reside more than fifty miles from the place of examination or outside the state.

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himself from the jurisdiction if released. Certainly no other ground should be accepted as a reason for detention. Such a change might serve to alleviate at least some of the worse abuses (such as detention for the purpose of investigation) under the present system.

Where detention is permitted for any reason, no material witness should ever be committed for any length of time to the same facilities, surroundings, or routine as convicted criminals. If he is, he is being punished at least equally with the convicts around him, and perhaps more, for he has done nothing for which he deserves punishment. Also, whenever detention is required, reasonably short maximum periods should be established and reasonable compensation paid for the entire period.

[67] 166 N.W.2d 874, (Iowa 1969). *See* note 54, *supra*, and accompanying text.

[68] Under current law witnesses who testify in court are paid three dollars per day. Petit jurors are compensated in the amount five dollars for each day's service in a court of record. IOWA CODE §§ 607.15, 622.69 (1966).

[69] *See* Ferguson v. Pottawattamie County, 224 Iowa 516, 278 N.W. 223 (1938); Hall v. Washington County, 2 G. Greene 473 (1850). *See also* United States v. Dillon, 346 F.2d 633, 638 n. 3 (1965). *But see* Markwell v. Warren County, 53 Iowa 422, 5 N.W. 570 (1880), with respect to the compensation problem. In this connection see note 17, *supra*, and accompanying text. *See also* United Development Corp. v. State Highway Dept., 133 N.W.2d 439 (N.D. 1965); Annot., 50 A.L.R. 2d 1439 (1956).

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2. ALASKA STAT. §§ 12.50.090-.100 (1962): Material witnesses are required to enter into an undertaking in the amount of $100 or be committed until they do so.
3. ARIZ. REV. STAT. ANN. §§ 13-1841 to -1844 (1956): The magistrate may commit witnesses who fail to meet the amount fixed for an undertaking. Material witnesses thus committed must be conditionally examined within three days after the order is entered.
4. ARK. STAT. ANN. §§ 43-623 to -627 (1964): Although statutory provisions apparently do not appear to specifically provide for incarceration, material witnesses for both the state and defendant may be recognized (required to appear and testify or forfeit $100). If the witness refuses to testify or it appears that flight is imminent, he may be examined and cross-examined and the resulting transcript admitted into evidence. The preliminary hearing may be reopened for the purpose of examination and cross-examination of such a witness.
5. CAL. PENAL. CODE tit. 3, §§ 878-882 (West Supp. 1956): Material witnesses, including infants and married women, who fail to enter an undertaking for $500 may be committed. If the material witness is unable to meet security, he may be conditionally examined and then discharged. Depositions may be taken in all cases except in homicide cases or cases in which the witness is an accomplice.
6. COLO. REV. STAT. ANN. 39-6-8 to -11 (1963): The judge may order the witness to appear before him when, in the opinion of either the state or the defendant, the witness's testimony should be secured for trial. Witnesses who fail to appear may be committed. If the witness appears he may either have his deposition taken at the first appearance before the magistrate, or post $500 which will be forfeited if he does not appear later to have his deposition taken. The deposition is admissible at trial unless in the opinion of the court the witness's personal appearance could be secured.
7. CONN. GEN. STAT. ANN. §§ 54-23 to -25 (1960): 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 arrested person is to be brought before a judge for the particular county as soon as is reasonably possible for examination. The witness may be required to recognize and be committed for failure to do so. Those committed are not to be confined with criminals, and they are to receive the regular witness fees of two dollars per day during confinement.
8. DEL. CODE ANN. tit. 11, §§ 2102-2103 (Supp. 1968): Previous provisions allowing witnesses to be recognized and committed for failure to meet the terms of the recognizance were repealed without indication of replacement as part of a legislative reform of Delaware's bail system.
9. FLA. STAT. ANN. §§ 923.9-.10 (1944): Provisions allow the justice of the peace of each county to require recognizance of material witnesses for the state and to commit such witnesses to the common jail of the county for not entering into such recognizance.
10. GA. CODE ANN. §§ 27-410 to -411 (1953): When a defendant is committed, the court may require witnesses for the state, or other witnesses, to post bond. The amount of the bonds are set by the sheriff in such reasonable amount as may be just and fair.
11. HAWAII REV. LAWS §§ 709-15 to -19 (1968): If an accused is held for trial, the magistrate may cause each of the material witnesses who has been examined to enter into recognizance in a sum fixed at magistrate's discretion or be committed for failure to do so. Persons not appearing to testify after entering into recognizance may be arrested, fined up to $100, and held until they give their testimony or are otherwise discharged by the court.

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12. IDAHO CODE ANN. §§ 19-820 to -824 (1948): Witnesses, including married women and infants, may be required to enter an undertaking for trial or forfeit $500; additional security may be required as deemed necessary. If the security requirement is not met, the witness may be committed, examination proceeding forthwith as if at the preliminary hearing.

13. ILL. REV. STAT. ch. 38, § 109-3 (1967): 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. Recognizance for a minor or married woman shall not exceed fifty dollars.

14. IND. ANN. STAT. §§ 9-720, 9-1601 (1956): Witness on behalf of either the state or defendant may be recognized with or without security in a criminal prosecution. There is apparently no specific provision spelling out a right to commitment to ensure appearance.

15. IOWA CODE §§ 761.21-.24, 762.47 (1966): Witnesses, including minors and married women, may be required to enter undertaking to appear or forfeit $100, additional security required when magistrate has reason to believe witness will not appear. Failure to meet security results in commitment. Where an appeal is taken, witnesses may also be required to enter into an undertaking.

16. KAN. GEN. STAT. ANN. §§ 62-623 to -628 (1964): When an accused is held to answer, the magistrate may also require witnesses which he deems material for both the state and the defendant to enter into recognizance with or without sureties to appear and testify. Failure to enter into recognizance results in commitment to prison with provisions for release on bail.

17. KY. REV. STAT. ANN. § 421.130 (1962): Statutory provisions for commitment of material witnesses before trial are not completely clear. Witnesses who evade or refuse to recognize a valid service of a subpoena may be arrested, detained in custody, or released upon bond.

18. LA. REV. STAT. ANN. §§ 15:257-259 (1966): Material witnesses may be required to post bond or be committed to prison for failure to do so. Depositions may be taken of the material witnesses committed to prison and shall be admissible at trial unless the presence of the witness may be procured by service of subpoena.

19. ME. REV. STAT. ANN. tit. 15 § 1311 (1965) (repealed): A traditional statute which was repealed in 1965 without indication of replacement.

20. MD. ANN. CODE art. 35 § 20A (1957): In any criminal proceedings, a witness may be brought before a magistrate who must determine whether the witness should be held and what reasonable bond shall be required. Witnesses cannot be held for more than seven days for failure to post the required bond without the authority to do so by the judge.

21. MASS. GEN. LAWS ANN. ch. 276, §§ 45-52 (1959): If an accused is held, the court or justice may bind material witnesses, including minors, for the state by recognizance with or without sureties. Witnesses refusing to recognize may be committed to jail. If the defendant consents, witnesses unable to procure sureties may have their depositions taken and be discharged from jail except in felony cases, cases in which the witness is the prosecutor or an accomplice, or cases in which the public interest would suffer.

22. MICH. COMP. LAWS § 767.35 (1968): Following a mandatory hearing with the right to be heard, persons deemed to be material witnesses by the court or circuit court commissioner may be required to furnish bail and may be committed for failure to meet bail.

23. MINN. STAT. ANN. §§ 629.54-.55 (1947): When an accused is held, the magistrate

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may bind by recognizance, with or without sureties, all witnesses whom he deems material. Witnesses may be committed for failure to recognize only in cases involving murder in the first degree, arson where human life has been destroyed, and cruel abuse of children. Persons committed shall receive such compensation during confinement as the court directs not exceeding the regular witness fees.

24. MISS. CODE ANN. §§ 1696, 1888 (1956): Statutory provisions allow commitment to prison only after persons subpoenaed as witnesses fail to appear or refuse to give evidence. Commitment continues without bail until the witness agrees to be sworn or affirmed and give his evidence.

25. MO. REV. STAT. §§ 544.420-.440 (1959): The magistrate may bind all material witnesses including infants and married women, by recognizance and commit to prison those who refuse to comply.

26. MONT. REV. CODES ANN. § 95-1204 (1968): Material witnesses for the state or defendant may be required to enter into a written undertaking plus additional sureties and may be committed to custody for failure to do so. Witnesses who are committed may be held no longer than is necessary to take their depositions.

27. NEB. REV. STAT. §§ 29-305, 29-507 to -508 (1943): A magistrate who is satisfied that any witness in a felony case, including married women and minors, will not appear and testify may require him to recognize with sufficient securities and commit to jail those who refuse to comply.

28. NEV. REV. STAT. §§ 178.494, 189.040 (1967): The 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 to custody. Material witnesses who are committed for their inability to meet security requirements are to be conditionally examined forthwith in the presence of the defendant and discharged.

29. N. H. REV. STAT. ANN. §§ 597:22-23 (1955): Necessary witnesses may be committed to jail for failure to enter recognizance.

30. N. J. STAT. ANN. §§ 2A:162-2 to 162-3 (1953): Material witnesses and persons declaring crimes against the accused may be bailed. Such persons may be committed upon default only if the crime is punishable by death or imprisonment in the state prison. Persons committed may not be placed with those charged or convicted of a crime.

31. N. M. STAT. ANN. §§ 41-12-10 to -11 (1964): The court may require any state witness in a criminal case to furnish written recognizance whenever the ends of justice demand, but only witnesses in a murder case may be required to furnish sureties on any such bond. A witness may be attached for failure to appear but statutes apparently do not provide for commitment of material witnesses before trial.

32. N. Y. CODE CRIM. PROC. §§ 215-219, 618-b (1958): If a material witness examined by a magistrate refuses to enter an undertaking to appear and testify, with or without sureties, the magistrate must commit him to prison. State witnesses may be conditionally examined before a magistrate with the right of the defendant to be present with state appointed counsel if necessary.

33. N. C. GEN. STAT. §§ 15-96 to -97, 15-128 (1965): Any witness may be required to post recognizance with or without sureties, and be committed to prison for failure to comply.

34. N. D. CENT. CODE §§ 31-03-19 to -24 (1960): Witnesses may be required to enter an undertaking and may be committed for failure to comply. If the witness is confined because he is unable to provide additional security, the magistrate, justice, or judge shall make an order finding this fact and the witness must be discharged within three days. A deposition with both parties present may be

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taken during confinement and admitted into evidence. Witnesses so confined may be compensated at the rate of fifty cents per day.

35. OHIO REV. CODE ANN. §§ 2937.16-.18 (Page 1954): Such witnesses as the judge or magistrate finds necessary may be required to enter into recognizance and be committed upon failure to comply. Committed witnesses are not confined with prisoners charged with crime and are allowed normal witness fees for each day of confinement.

36. OKLA. STAT. ANN. tit. 22 §§ 270-275 (1969): The magistrate may require material witnesses examined before him to enter into a written undertaking with or without sureties and must commit those who refuse to comply. Witnesses released on their own undertaking may later be required to give sureties upon sworn application from the county attorney.

37. ORE. REV. STAT. §§ 139.150-.180 (1965): Witnesses may be required to enter an undertaking with or without sureties and may be committed for failure to comply. Witnesses who are committed receive compensation at the rate of seven dollars and fifty cents per day.

38. PA. STAT. ANN. tit. 19, §§ 652-653, Rule 4014 of the Rules of Criminal Procedure (tit. 19, appendix) (Supp. 1969): Material witnesses may be required to post bail and must be committed upon failure to do so. Witnesses who are detained may receive compensation at the rate of three dollars per day.

39. R. I. GEN. LAWS ANN. §§ 12-13-12 to -15 (1956): The district court may bind witnesses which it deems material by recognizance, with or without surety, and commit to the adult correctional institutions those who fail to comply.

40. S. C. CODE ANN. §§ 17-301, 17-309 (1962): Material witnesses may be committed for failure to enter recognizance, but the clerk of court may grant bail to witnesses so detained. Witnesses who fail to appear and testify under such recognizance may be arrested and detained without right to bail as guilty of a misdemeanor.

41. S. D. CODE §§ 34.1410-.1412 (Supp. 1969): The magistrate may require a written undertaking, with or without sureties, of each of the material witnesses, including infants and married women, examined before him. Those failing to comply may be committed to jail.

42. TENN. CODE ANN. §§ 40-1122 to -1127 (1955): The magistrate must take from each material witness examined by him a written undertaking to appear in the sum of $250, and a larger sum with sureties may be required when he has cause to believe the witness will not appear. On failure to comply, confinement is authorized.

43. TEX. CODE CRIM. PROC. art. 17.37, 24.24-.25 (1966): Material witnesses may be bailed or released without security or on their own bond. If the witness is unable to meet the required security, he may be committed.

44. UTAH CODE ANN. §§ 77-15-25 to -31 (1953): Witnesses may be required to promise to appear, with or without sureties, or forfeit two hundred dollars. Witnesses, except accomplices, who are unable to meet the security requirement shall be examined.

45. VT. STAT. ANN. tit. 13 § 7551 (1959): Witnesses may be recognized in cases involving a criminal offense.

46. VA. CODE ANN. § 19.1-106 (1960): Material witnesses may be recognized with or without sureties.

47. WASH. REV. CODE ANN. § 10.15.160 (1961): Witnesses who are unable to furnish recognizance may have their depositions taken.

48. W. VA. CODE ANN. § 62-1C-15 (1966): Witnesses on behalf of either the state or defendant may be bailed.

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49. WIS. STAT. ANN. § 954.20 (1958): Material witnesses who are unable to meet bail requirements may be committed.
50. WYO. STAT. ANN. §§ 7-174 to -177 (1957): Witnesses may be committed for failure to furnish recognizance. In addition, Art. 1, § 12, of the Wyoming constitution provides that no witness in a criminal case may be detained any longer than is necessary to take his deposition, nor confined to a room where criminals are kept.

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