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The Neglected History of Criminal Procedure, 1850-1940

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The Neglected History of Criminal Procedure, 1850-1940

Wesley MacNeil Oliver^a

Abstract

Originalism has focused the attention of courts and academics on Framing Era history to interpret constitutional limits on police conduct. Previously unexplored sources reveal, however, that Framing Era limits on officers were expressly abandoned as professional police forces were created in the mid-nineteenth century and charged with aggressively investigating and preventing crime. The modern scheme of judicially supervised police investigations was then implemented after corruption and scandals of the 1920s. The development of modern criminal procedure has a rich historical background, but it has almost nothing to do with the events of the Framing Era.

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Introduction

In considering constitutional limits on police investigations, courts and commentators rely on only a small part of the relevant history. No doubt driven by the rising influence of originalism, historical inquiries focus on Framing Era rules limiting constables and watchmen. There are, however, vast differences between eighteenth century and twenty-first century police practices, and vast differences in society's goals in regulating them. For example, professional police departments did not exist in the eighteenth century, and framing era constables did not investigate crimes. To understand the evolution of American policing, and to understand the origins of our contemporary rules of criminal procedure, it is vitally important to understand what happened between 1790 and the Warren Court.

This article analyses the development of American criminal procedure between the 1850s and the 1930s. During this critical period, which has been almost entirely neglected in the legal literature, the common-law rules prevalent in the Framing Era were replaced with rules that gave a remarkable degree of autonomy to police officers and police departments. To some extent the scholarly neglect of this period is hardly surprising, because the traditional sources for understanding legal rules are of little help. Courts had a relatively small role in shaping criminal procedure, and were overshadowed by police commissions, mayors, legislators, governors, and newspapers. This article relies on these non-traditional, and often difficult to locate, sources to document the evolution of criminal procedure in this period. It focuses on the creation, and subsequent regulation, of the New York Police Department, because records of this department are, as archival materials go, relatively accessible.

Unearthing this long-unexplored history of criminal procedure reveals that the Framing-Era common law system of police regulation was expressly rejected in mid-nineteenth century. Modern police departments, charged with aggressively investigating and preventing crime, were created over strenuous objections that they would undermine common-law limits on police conduct. By the end of the nineteenth century, large and powerful police departments, the likes of which the Framers could not have imagined, were essentially self-regulated. The modern scheme of criminal procedure, which requires judges to supervise many aspects of police investigations, was developed as scandals and corruption of the early twentieth century undermined the public's faith in self-regulated police forces. These new limits on police sought to constrain officers, not restore the common law prohibition on police investigations. Contemporary rules of criminal procedure therefore have their origins in an express rejection of early common law rules, followed by a series of reforms specifically designed to regulate modern police forces.

The first part of this article describes the familiar history of Framing Era criminal procedure, under which police officers had little institutional power and were subject to strict legal limits. The second part describes the rise of police authority. In New York, the focus of this study, the first professional police department was created in 1845. The creation of this department was delayed by concerns about civil liberties. Broad powers of search and arrest were slowly and reluctantly accepted. By the end of the nineteenth century, the discretion entrusted to police officers was so complete that police

commissioners, legislators, and even judges instructed officers to exercise violence against the criminal element, in interrogation rooms and on the street. Police reformers of the late nineteenth century convinced the public that if corruption could be eliminated from police departments, officers could be entrusted to exercise extraordinary discretion, including near-lethal violence.

The third part then pinpoints the origins of the modern scheme of criminal procedure. The broad powers possessed by early-twentieth-century officers depended on a public faith in the judgment and professionalism of the police force. Prohibition undermined that faith. A strong public sentiment in favor of limits on virtually all investigatory methods – searches, arrests, interrogations, wiretapping – followed revelations of corruption and overzealous enforcement of the hated liquor laws. As corruption proved intractable during Prohibition, and even honest enforcement became something to be feared, the public called out for judicial supervision of the police powers that had developed over the past seventy years. Public sentiment in favor of judicial supervision of police would linger well after liquor enforcement was no longer an issue.

The history of American criminal procedure therefore turns on the rise of professional police forces, and the intentional curtailment of their powers in the early twentieth century. Framing Era common law rules play at best a marginal role in this story. Analysis of the history of the most critical time period in this development is provided here for the first time. The system of judicially supervised police-initiated, and police-conducted, investigations was developed over the course of the forgotten nineteenth and early-twentieth centuries. There is a rich historical context to the development of modern criminal procedure, but it is not found in the Framing Era.

I. Heavily-Regulated “Petty Officers” (1641-1845)

Eighteenth century rules of criminal procedure regulated systems of policing too weak to protect modern society with rules that, by themselves, would cripple and unleash modern law enforcement.¹ In conjunction with social and practical limits to produce a

¹ The use of common law rules in the Supreme Court’s criminal procedure jurisprudence is typically thought to justify rules giving police greater powers. *See e.g.*, Thomas Y. Davies, *The Fictional Character of Law and Order Originalism: A Case Study of the Distortions and Evasions of Framing Era Arrest Doctrine in Atwater v. Lago Vista*, 37 Wake Forest L. Rev. 239, 239 (2002). [hereinafter Davies, *Law and Order Originalism*] Though those justices typically regarded as more conservative certainly tend to cite to Framing Era rules more often than those typically identified as moderate or liberal, centrist and left-leaning members have also used history as a starting point in their analysis. *See e.g.*, *Atwater v. Lago Vista*, 532 U.S. 318, 326 (2001) (Souter, J.) (“the first step here is to assess [the] claim that peace officers’ authority to make warrantless arrests for misdemeanors was restricted at common law”); *Tennessee v. Garner*, 471 U.S. 1, 23 (1985) (O’Connor, J., dissenting) (objecting to court’s dismissal of the “venerable common law rule authorizing the use of deadly force to apprehend a fleeing felon.”); *Steagald v. United States*, 451 U.S. 204, 217 (1981) (“The common law may, within limits, be instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable.”); *Payton v. New York*, 445 U.S. 573, 591 (1980) (“An examination of the common-law understanding of an officer’s authority to arrest sheds light on the obviously relevant, if not entirely dispositive consideration of what the Framers might have thought.”). Sometimes history has been used by more conservative member of the Court to support positions typically regarded to be liberal. Chief Justice Rehnquist used history to justify the Court’s refusal to overrule *Miranda*. *See Dickerson v. United States*, 530 U.S. 428, 433 (2000) (“observing that “[t]he roots of the [Miranda] test were developed in the common law.”). *But see* William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975 (2001) (suggesting that those favoring vigorous limits on police

system of police incapable of engaging in investigations, eighteenth century rules ensured that police possessed as little discretion and power as possible.² Some police practices were very heavily regulated. Police in most cases, for instance, were only able to arrest suspects after a victim charged that the suspect had committed a crime. Other practices were completely unregulated by common law. While magistrates were required to inform the suspect that he had the right to remain silent and that anything he said could be used against him, there were no restrictions on police interrogations during the Framing Era.³ Police were practically forbidden to interrogate by a combination of custom, lack of manpower, and absence of incentive.⁴

Officers in the Framing Era had very little authority to act without a magistrate's authorization.⁵ Officers under common law doctrines were permitted to arrest a suspect if they had a warrant, witnessed the suspect commit a crime, or had probable cause to believe the suspect had committed a felony where one had been committed in fact.⁶ Practically, an officer would be unlikely to arrest on mere probable cause, for he would be liable for false arrest if no crime had actually occurred. A victim's complaint alone ensured that he would not be sued. Beginning in the early nineteenth century, those complaints could be made directly to the officer. They were permitted to make an arrest

interrogation ought to be opposed to *Miranda*, while those against such limits ought to be indifferent to, or in favor, of *Miranda*).

² Thomas Y. Davies, *Farther and Farther from the Original Fourth Amendment: The Recharacterization of the Right Against Self-Incrimination as a Trial Right in Chavez v. Martinez*, 70 TENN. L. REV. 987, 1004 (2003) ("The constable had neither a duty nor the authority to investigate the possibility of uncharged crimes; in fact, in the absence of a warrant, the constable had little more arrest authority than any other person."); JAMES F. RICHARDSON, *THE NEW YORK POLICE: COLONIAL TIMES TO 1901*, at 17-18 (1970) (describing similar powers by New York constables in early nineteenth century); H.B. Simpson, *The Office of Constable*, 10 ENG. HIST. REV. 625, 635-36 (1895) (distinguishing the role of modern police from constables who were "regarded merely as police officer[s] attendant on the justices [of the peace] and other ministers of the crown.").

³ See Wesley MacNeil Oliver, *Magistrates' Examinations, Police Interrogations, and Miranda-Like Rules in the Nineteenth Century*, 81 TUL. L. REV. 777, 796 (2007). An extreme version of the originalist view of limits on police investigations was offered by Justice Hugo Black in *Katz v. United States*, 389 U.S. 347 (1967). As the Fourth Amendment made no mention of wiretapping, Black concluded that it was not limited by the Constitution. *Id.* at 365-67 (Black, J., dissenting).

⁴ One example of this custom is demonstrated in William Shakespeare's *Much Ado About Nothing*. The bumbling constable, Dogberry, performs an incompetent interrogation after insisting that it is the magistrate who is supposed to do it. WILLIAM SHAKESPEARE, *MUCH ADO ABOUT NOTHING*, ACT IV SCENE 2 in *THE YALE SHAKESPEARE* 240-41 (Barnes & Noble 1993); O. HOOD PHILLIPS, *SHAKESPEARE AND THE LAWYERS* 67-68 (1972) (describing Dogberry's incompetent examination).

⁵ See J.M. Beattie, *Early Detection: The Bow-Street Runners in Late Eighteenth-Century London*, in CLIVE EMSLEY & HAIA SHPAYER-MAKOV, *POLICE DETECTIVES IN HISTORY, 1750-1950*, at 15 (2006) (observing that "there were severe limits as to the help victims of crime could expect to receive from [constables]."); Thomas Y. Davies, *Farther and Farther from the Original Fourth Amendment: The Recharacterization of the Right Against Self-Incrimination as a Trial Right in Chavez v. Martinez*, 70 TENN. L. REV. 987, 1004 (2003) ("The constable had neither a duty nor the authority to investigate the possibility of uncharged crimes; in fact, in the absence of a warrant, the constable had little more arrest authority than any other person."); ELAINE A. REYNOLDS, *BEFORE THE BOBBIES: THE NIGHT WATCH AND POLICE REFORM IN METROPOLITAN LONDON, 1720-1830* (1998).

⁶ See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 651-52 (1999). [hereinafter Davies, *Original Fourth Amendment*]

if they acted on the complaint of a private citizen that a crime had occurred and had probable cause to believe that the suspect was the offending party.⁷

Officers were also permitted to arrest suspects for crimes they witnessed, but they were unlikely to rely on this justification.⁸ There were real disincentives for eighteenth century officers to obtain a vantage point that would have allowed them to observe or solve crimes, and from acting on those things they observed. Watchmen were theoretically supposed to patrol the streets of the city at regular intervals, but the reality was that they often shirked their duties and, not infrequently, were found sleeping.⁹ An arrest required a night-watchman to present the suspect to a magistrate the following morning.¹⁰ Watchmen were not primarily employed as law enforcement officers. Almost without exception they had other jobs. In many cases, watchmen were recruited in a manner similar to a military draft and given only meager compensation for the few nights a week they were required to keep watch.¹¹ Appearances before magistrates required time away from officers' day jobs – their primary source of income.¹²

Much like night-watchmen, members of the constabulary were unlikely to investigate crime, except in those very rare cases involving a reward.¹³ The very limited exceptions to the warrant requirement in seventeenth century New York reveal that an officer was to act on his own only in cases of minor yet open and very obvious crimes. While colonial statutes observe that a warrant was generally required for a constable to arrest an offender, constables were specifically empowered to arrest those “overtaken with Drink, Swearing, Sabbath breaking, or night walkers” they personally observed.¹⁴ Rape, robbery, larceny, or other serious crimes were not among the representative examples. The offenses enumerated could be observed by an officer's mere presence on a well-traveled street. He would not be required to patrol back alleys, or question passersby about the source of their chattels, to unearth more serious, and less obvious, crimes.

Officers were required to possess warrants to arrest suspects, unless of course an exception applied, or to perform searches; officers were not, however, as a practical matter, able to obtain the warrants themselves. An application for a search or arrest warrant required an oath that a crime had in fact occurred, something that a victim could easily swear on the basis of the injury he suffered, an assault or missing good for instance.¹⁵ An officer could not, in most cases, swear that a crime had occurred.¹⁶ And

⁷ *Id.* at 635-36; see also Horace Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 673 (1923-24) (tracing history of American and English powers of warrantless arrest).

⁸ Davies, *Original Fourth Amendment*, *supra* note 6, at 644.

⁹ JAMES F. RICHARDSON, *THE NEW YORK TIMES TO 1901*, at 3-22 (1970) (describing early policing in New York City).

¹⁰ See 3 I.N.P. STOKES, *THE ICONOGRAPHY OF MANHATTAN ISLAND* 642-44 (1998).

¹¹ GEORGE WILLIAM EDWARDS, *NEW YORK AS AN EIGHTEENTH CENTURY MUNICIPALITY 1731-1776*, at 323 (1917) (observing that “[s]erving on this watch or securing a substitute was undoubtedly an onerous task for the poor New Yorkers.”).

¹² STOKES, *supra* note 10, at 643-44.

¹³ EDWIN G. BURROWS & MIKE WALLACE, *GOTHAM: A HISTORY OF NEW YORK CITY TO 1898*, at 637; See also *City Bank v. Bangs*, 2 Edw. Ch. 95, 6 N.Y. Ch. Ann. 323 (1833) (establishing standard for when New York City officers could accept rewards).

¹⁴ See JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776)*, at 388 (1970).

¹⁵ See Davies, *Law and Order Originalism*, *supra* note 1, at 370.

those who could obtain warrants had no need of officers as part of the application process. Applicants for warrants were merely required to allege that they had probable cause to believe a particular person was guilty of an offense or that evidence of the crime could be recovered in a particular place.¹⁷ They did not need an officer's testimony to provide the magistrate facts supporting their suspicions. Applicants were merely required to swear that probable cause existed; they were not required to provide the magistrate with supporting facts.¹⁸ Once the victim made his complaint, the magistrate issued a warrant to the constable directing him to retrieve a particular person or search in a specified place for a certain item. Certainly the victim could have, in many cases, used the assistance of an officer in determining who to seek a warrant against, but the criminal justice system did not expect the officer's participation until a warrant was issued – and without a reward, he was unwilling to freely give his assistance.¹⁹

While magistrates could, and frequently did, call on constables to discover and collect physical evidence, they did not entrust constables with the job of interrogating suspects. After an arrest, an officer took the suspect before a magistrate, who examined the witnesses against the suspect, as well as the suspect himself, to determine whether there was probable cause to support his detention.²⁰ Officers were certainly not expected to question suspects, and some authorities from the Framing Era contended that their questioning of suspects was completely forbidden.²¹ Victims shared the role of modern

¹⁶ There were some crimes for which officers were the most likely to be able to swear that a crime had occurred – the crime of being a common drunk would be just such an example, a crime for which prosecutions certainly occurred. GOEBEL & NAUGHTON, *supra* note 14, at 388; Joan Petersilia, *Probation in the United States*, 23 CRIME & JUST. 149, 155 (1997) (describing first example of probation in the nation being Jonathan Augustus' posting of surety in case of Boston man charged with public drunkenness in 1841). The relative rarity of prosecutions for such victimless crimes, at least those that occurred behind closed doors, is illustrated by the mid-nineteenth century perception that Prohibition was America's first serious foray into the prosecution of victimless crimes. *See e.g.*, STATE OF MAINE, ACTS AND RESOLVES PASSED BY THE THIRTEENTH LEGISLATURE OF THE STATE OF MAINE A.D. 1850, at 298 (Augusta, William T. Johnson 1850) (message of Maine Governor John Dana vetoing first prohibitory law in the country that allowed searches to discover liquor).

¹⁷ *See* Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 17-45 (2007) (contending that magistrates in the Framing Era did not require applicants for warrants to provide facts supporting their suspicions); WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING*, 602-1791, at 754, 757 (2009); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. Rev. 925, 944 n.112 (1997). *But see* Davies, *Original Fourth Amendment*, *supra* note 6, at 654 n.297.

¹⁸ Victims certainly had some accountability in this process. Early authorities concluded that victims were strictly liable if their allegations were incorrect. *Entick v. Carrington*, 95 Eng. Rep. 807, 818 (K.B. 1765). By the mid-nineteenth century, victims were required to prove that the applicant acted without probable cause. *Burns v. Erben*, 40 N.Y. (1 Hand) 463, 466 (1869) (in action for malicious prosecution, "the burden was upon the plaintiff to show a want of probable cause.").

¹⁹ *See* Beattie, *supra* note 5, at 15.

²⁰ GEORGE C. EDWARDS, *A TREATISE ON THE POWERS AND DUTIES OF JUSTICES OF THE PEACE AND TOWN OFFICERS, IN THE STATE OF NEW YORK UNDER THE REVISED STATUTES 206-09* (Bath, N.Y., David Rumsey 1830); 1 JOHN H. COLBY, *A PRACTICAL TREATISE UPON THE CRIMINAL LAW AND PRACTICE OF THE STATE OF NEW YORK 191-95* (Albany, Weare C. Little 1868).

²¹ *See* 1 S. MARCH PHILLIPPS & ANDREW AMOS, *TREATISE ON THE LAW OF EVIDENCE 387* (Boston, Elisha G. Hammond 1839) ("A confession, obtained without threat or promise has been received, notwithstanding it was elicited by a police officer.") Phillips and Amos noted, however, that there were English authorities to the contrary of this proposition. *Id.* (citing *Rex v. Wilson* (1817) 7 Holt 596, 171 Eng. Rep. 353, 353). *See also* Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court's*

detective with magistrates. Victims obtained enough information to satisfy themselves that probable cause existed to seek a warrant.²² After the suspect's arrest, magistrates, not constables, conducted the interrogation.

This system left no opportunity and no incentive for police officers to investigate crimes. Their investigations could not have been used to justify a search or an arrest. Once the search or arrest occurred, the evidence necessary to prove the case was generally established.²³ Cases involving search warrants almost exclusively involved stolen goods, and the discovery of the missing items ended the need for any further investigation.²⁴ When a suspect was arrested, he was brought before a magistrate who heard from the victim's witnesses and interrogated the suspect to determine whether there was an adequate foundation to go forward. The victim had a great incentive to have all his necessary witnesses at this hearing. If the magistrate dismissed the action against the defendant, the complainant faced a potential suit for malicious prosecution.²⁵ In rare (and typically high-value theft) cases, victims offered rewards for discovering the identity of culprits, which gave police an incentive to investigate, but these cases were far from common.²⁶ The need for those of means to offer rewards highlights the fact that police were not generally performing this task.

Surely there were colonial era objections to investigatory practices that led to limits in the Bill of Rights, but none of them were related to ordinary law enforcement officers. These complaints pertained to the enforcement of import and revenue laws. There were necessarily different rules that applied to customs officers. There were no victims of import violations, so no one could swear that he had suffered the injury associated with this crime. No one, that is, could swear that a crime had in fact occurred.²⁷ The very restrictive, victim-driven system used to authorize searches in the

Voluntariness Doctrine in Historical Perspective, 67 WASH. U. L.Q. 59, 103-04 (noting mid-nineteenth English cases forbidding interrogation by officers).

²² See Arcila, *supra* note 17, at 25-36.

²³ In the case of stolen goods, recovery of the goods on the person or premises of the defendant provided the proof. See J.M. Beattie, *Sir John Fielding and Public Justice: The Bow Street Magistrates' Court, 1754-1780*, 25 LAW & HIST. REV. 61, 78 (2007) ("Direct evidence of . . . possession [of stolen property], established by searches of the defendant's person or lodgings, was obviously difficult to explain away."). In other cases, the magistrate's examination often provided the evidence necessary for a conviction. LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 35 (1968) (observing that magistrate's interrogations were "quite inquisitional").

²⁴ Statutory provisions in a few states began to give officers in ordinary criminal cases the right to search for items other than stolen goods. See MASS. REV. STAT. part IV, ch. 142, § 2 (1836) (search warrant may be issued to discover counterfeit coins, pornography and lottery tickets); MAINE. REV. STAT., tit. 12, chap. 160, §§ 18 (1841) (search allowed for house of ill fame); *id.* at 20 (search permitted to discover pornography); *id.* at 30 (search permitted to discover gambling house). Gradually, searches for items other than stolen goods were seeping into the ordinary criminal justice system. See A. OAKEY HALL, *A REVIEW OF THE WEBSTER CASE BY A MEMBER OF THE NEW-YORK BAR* 25 (New York, J.S. Redfield 1850) (describing search warrant for prisoner's house to discover clothes matching the description of those eyewitnesses described him to be wearing at the time of a murder).

²⁵ See Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law,"* 77 MISS. L. J. 1, 182 n.575 (2007). [hereinafter Davies, *Arrest Standards*]

²⁶ BURROWS & WALLACE, *supra* note 13, at 636-37.

²⁷ See Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law,"* 77 MISS. L. J. 1, 118 (2007) (observing that John Adams, the primary drafter of the Massachusetts Constitution, doubtlessly

ordinary law enforcement system could not be required for customs searches.²⁸ The colonial era scheme that drew the ire of colonists in Massachusetts in particular, however, imposed no meaningful restrictions on officers at all.²⁹ General warrants issued to customs officers allowed them to search wherever they suspected they might find violations, and afforded them immunity from liability for baseless or fruitless searches.³⁰ There were special concerns with conferring this sort of authority on customs officers. Unlike ordinary law enforcement officers, they had a real incentive to discover violations. Ordinary officers, in rare cases, received rewards for solving crimes; customs officers received a portion of the forfeiture or fine resulting from violations they discovered.³¹

While there are substantial disagreements over what the Framers meant to prevent with the Fourth Amendment, it is universally agreed that they meant to prevent those hated general warrants.³² It is not at all clear, however, precisely what aspects of searches by general warrants the Framers found to be objectionable.³³ The First Congress required customs officers to obtain warrants specifically describing the place to be searched and things to be seized, but did not require magistrates to review the facts the officer relied upon to conclude evidence of a violation could be discovered.³⁴ This scheme eliminated the immunity officers had enjoyed under general warrants for baseless or fruitless searches, allowing an officer, like a victim in an eighteenth century criminal case to be sued for trespass. An officer's conclusion that probable cause existed remained sufficient, however, to conduct the search. Much like victims in ordinary

recognized that the Virginia Constitution's requirements for a search warrant could not be satisfied for customs searches, as no victim could swear that a crime had occurred) [hereinafter Davies, *Warrantless Arrest Standards*].

²⁸ Davies, *Original Fourth Amendment*, *supra* note 6, at 676 n.349 (noting that crime "in fact" requirement was much more difficult to satisfy than probable cause because someone had to actually be able to conclude that a crime had occurred, while probable cause required only a certain degree of certainty that a crime had actually occurred).

²⁹ See, e.g. Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 10-16 (1994) (describing the colonial controversy over the Writs of Assistance in Massachusetts).

³⁰ See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 778 (1994) (describing immunity conferred by general warrant).

³¹ Awarding a percentage of the government's bounty was a fairly common procedure in the eighteenth century. Customs officers, as well as postmen, tax collectors, and even naval officers received a piece of the action. Jerry Mashaw, *Recovering American Administrative Law*, 115 YALE L. J. 1256, 1314-15 (2006). Naval officers received the greatest percentage – half the value of any enemy vessel they captured, the entire value if the captured vessel had greater firepower. *Id.*

³² See, e.g., George C. Thomas, III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1464 (2005) ("the Fourth Amendment was aimed principally at general warrants"); Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 990 n.94 (listing sources concluding same).

³³ The Virginia state constitution of 1776 provided a very detailed description of the evils associated with general warrants. A provision in the constitution stated "[t]hat general warrants, whereby any officer . . . may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted." Davies, *Warrantless Arrest Standards*, *supra* note 51, at 99 (quoting EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY*, app. at 172 (1979)). No other eighteenth century sources appear to identify the lack of a factual predicate for a complainant as an evil associated with the general warrant.

³⁴ CUDDIHY, *supra* note 17, at 757.

crimes, an officer's oath that there was probable cause became sufficient in this scheme, but unlike a crime victim, the officer obviously could not swear that a crime had occurred. The Third Congress, to the contrary, required magistrates to review the facts officers provided under oath and determine whether there was probable cause to believe that evidence of a revenue violation could be discovered in the location identified before issuing a warrant.³⁵ This scheme required an independent decision-maker to evaluate whether there was an adequate basis for conducting a search to determine whether a victimless revenue offense had occurred. Under either scheme, however, customs officers had unique powers – they alone were entitled to seek warrants and were given, by statute, authority to engage in warrantless searches under some circumstances.

These broad powers were unique to customs officers until the mid-nineteenth century. Ordinary officers had very little authority to act without a warrant and, for most crimes, could not seek a warrant. As Thomas Davies has observed, there is no reason to conclude that the Framers intended to dismantle the parallel systems of enforcement.³⁶ The two systems would in fact remain in place well into the nineteenth century. Proposals to give ordinary law enforcement officers the searching power of customs officers, first offered by advocates of Prohibition, came sixty years after the Bill of Rights and were met with great opposition.³⁷ Customs officers were unique in the Framing Era. Until the mid-nineteenth century, the law conferred far less discretion upon, and gave far fewer incentives to, ordinary law enforcement officers.

Common law rules acted, when necessary, to preserve a two-track system that effectively prevented ordinary officers from engaging in investigations of any sort, leaving this task to victims or, in the case of homicides, coroner's juries. This goal of the eighteenth century regulatory scheme would be called into question with the creation of professional police forces in the mid-nineteenth century and completely abandoned by the early twentieth century.

II. Essentially Unregulated Powerful and Corrupt Police (1845-1921)

From 1845 to 1921, the scheme of police regulation known to the Framers was completely turned on its head. The Framing Era goal of limiting the authority of officers was all but completely abandoned. Professional police forces were created in a handful of American cities with military-style hierarchies, staffed with career officers who had incentives to aggressively investigate crime.³⁸ Law enforcement had become a career, and one that paid better-than-average wages.³⁹ Ferreting out criminals led to retention

³⁵ *Id.*

³⁶ Davies, *Law and Order Originalism*, *supra* note 1, at 371 (“There is no indication in the historical record that the language of the Fourth Amendment was understood to alter the settled common-law standards or criminal arrest or search warrants.”)

³⁷ Governor Seymour's Message, *NEW YORK TIMES*, May 2, 1852, at 3. Seymour also claimed that the proposed state law must comply with the Fourth Amendment to the United States Constitution. The argument that state law must comply with the Bill of Rights would be commonly made throughout the late-nineteenth and early-twentieth century, not just in the Fourth Amendment context, notwithstanding controlling authority from the United States Supreme Court to the contrary. See Jason Mazzone, *The Bill of Rights in Early State Courts*, 92 *MINN. L. REV.* 1, 23-55 (2007). See also, *The New Liquor Law*, *KENNEBEC JOURNAL*, Aug. 23, 1849, at 3.

³⁸ DAVID R. JOHNSON, *POLICING THE URBAN UNDERWORLD: THE IMPACT OF CRIME ON THE DEVELOPMENT OF THE AMERICAN POLICE 1800-1877*, at 9 (1979).

³⁹ RICHARDSON, *supra* note 9, at 173.

and promotion. The legal rules that had prevented aggressive policing were also eliminated between 1850 and 1920. Officers gained the authority to arrest without a warrant and began to seek warrants to search and arrest. Officers started interrogating suspects and detaining material witnesses, and were given the authority to wiretap without seeking prior judicial authorization.

There were very few checks on these new investigatory powers until Prohibition. By the end of the nineteenth century, juries alone determined whether the confessions presented to them were voluntarily extracted. Rare tort suits and highly political internal disciplinary proceedings were the only mechanisms limiting arrests and physical searches. An early version of the exclusionary rule was cabined to the very specific concern that led to its creation – liquor searches based on improper warrants.⁴⁰

A variety of new, largely unchecked powers to ferret out crime do not, by themselves, necessarily reveal a new social goal of conferring near-absolute authority on police officers. These new officers were, however, also given broad discretion to use violence when necessary – and even when it was not. In the early years of the Progressive Era, officers were given a very public mandate to torture suspects in interrogation rooms and inflict unnecessary violence upon suspected criminals on the streets. Progressives, exemplified by Teddy Roosevelt, convincingly made the case that honest police officers could be trusted to determine the appropriate use of potentially lethal force. Corruption, not power, was the fear of the Progressive Era.⁴¹

A. Steady Increase in Investigatory Powers

Politicians and judges over the course of the nineteenth and early-twentieth century, doubtlessly taking their cues from the public, grew ever more comfortable with the new powers police were exercising to discover evidence.⁴² The eighteenth century's utter unwillingness to assign the duty of investigation to officers was overcome gradually but dramatically. New powers of search and arrest did not immediately accompany the creation of the New York Municipal Police Force, but were soon accepted as necessary to accomplish the goal of nineteenth-century Prohibition.⁴³ As police began conducting interrogations, they initially reported giving suspects the same warnings about the right to silence and counsel that magistrates were required to provide; by 1875 they were brazenly refusing to provide the warnings, by the mid-1880s they were torturing confessions out of suspects.⁴⁴ By the 1880s, the police department had developed a

⁴⁰ In Maine, where the exclusionary rule originated, the rule was very quickly cabined to cases involving faulty search warrants in liquor warrant cases. *See* State v. McCann, 61 Me. 116 (1873) and discussion *infra* at note 273. New York appears to have considered the exclusionary rule in cases involving warrantless searches during Prohibition. *See* discussion at *infra* note 272-73.

⁴¹ Judge William J. Gaynor criticized Progressive reformers for his characterization of their belief that society could “be reformed and made better . . . instead of being debased, by the policeman’s club and axe.” William J. Gaynor, *Lawlessness of the Police in New York*, 176 NORTH AMERICAN REV. 19, 25-26 (Jan. 1903).

⁴² Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communication Privacy*, 60 STAN. L. REV. 553 584-85, 590 (2007).

⁴³ For more full discussion of this topic, *see* Wesley MacNeil Oliver, *The Reluctant Acceptance of Police-Initiated Warrant Applications and Warrantless Arrests*. (under submission)

⁴⁴ For more full discussion of this topic, *see* Wesley MacNeil Oliver, *Magistrates’ Examinations, Police Interrogations and Miranda-Like Warnings in the Nineteenth Century*, 81 TUL. L. REV. 777 (2007).

powerful lobby in the legislature which it used to modify the state's law on material witness detention.⁴⁵ Finally, in the early twentieth century, when the department's wiretapping practices were revealed, the Commissioner of Police successfully asserted that he required no authorization to eavesdrop so long as the intrusion was conducted with the good faith intent to investigate crime.⁴⁶

Fears of standing armies that had delayed efforts to establish a professional police force in the City of New York quite naturally did not dissipate with an act from the legislature authorizing the creation of such a force in 1844.⁴⁷ The young department lacked the trust of the public to successfully advocate an arrest standard that permitted officers to arrest on mere probable cause to believe a suspect had committed a felony.⁴⁸ Common law arrest standards most often required an officer to wait for a suspect's complaint to arrest a suspect, inhibiting the ability of officers to quickly respond to developing situations and prevent crime from occurring in the first place.⁴⁹ English authorities had recognized the probable cause arrest standard since 1827, but despite the rule's appearance in the first handbook for New York officers in 1846, New York law would not embrace the rule for more than another decade.⁵⁰

The new officers also acquired the ability to seek warrants based on information they learned through their investigations. A search standard unmoored from the requirement of a victim's complaint appears to have been more the product of efforts at Prohibition in the nineteenth century than accommodation of the interests of law enforcement.⁵¹ New York's state-wide prohibition law, adopted in 1855, necessarily required a mechanism to search for liquor that did not depend on a victim's complaint.⁵² Applications for all search warrants, except those to discover customs and revenue violations, previously required a victim's oath that a crime had actually occurred.⁵³ Prohibition, however, introduced nineteenth-century New Yorkers to a frequently committed victimless crime. If searches were to be permitted to enforce New York's prohibitory law, there had to be a mechanism to obtain a search warrant that did not depend on a victim's complaint. The specific needs of Prohibition enforcement, not a generic law enforcement interest, thus introduced a standard for searches that could be

⁴⁵ For more full discussion of this topic, see Wesley MacNeil Oliver, *The Rise and Fall of Material Witness Detentions in Nineteenth Century New York*, 1 N.Y.U. J.L. & Liberty 727 (2005).

⁴⁶ For more full discussion of this topic, see Wesley MacNeil Oliver, *Wiretapping and the Apex of Police Discretion*. (under submission)

⁴⁷ See BURROWS & WALLACE, *supra* note 13, at 636.

⁴⁸ See also OLIVER L. BARBOUR, A TREATISE ON THE CRIMINAL LAW OF THE STATE OF NEW YORK 543 (Albany, Goulds, Banks 2d ed. 1852). The 1829 decision in *Holley v. Mix*, 3 Wend. 350 (N.Y. 1829) was sometimes cited for the proposition that probable cause is enough for an officer to arrest for a felony, but as Davies has asserted, this was the first American decision to accept the "on charge" justification. Davies, *Original Fourth Amendment*, *supra*, note 6, at 636-37.

⁴⁹ CITY OF NEW YORK, RULES AND REGULATIONS FOR THE GOVERNMENT OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK 34 (1848).

⁵⁰ *Burns v. Erben*, 24 N.Y. Super. Ct. 555, 26 How. Pr. 273 (1864).

⁵¹ See Oliver, *Reluctant Acceptance*, *supra* note 43.

⁵² See DOCUMENTARY HISTORY OF THE MAINE LAW 18-19 (New York, Hall & Brother 1855) (providing verbatim copy of search and seizure section of New York's nineteenth century prohibitory law).

⁵³ Davies, *Law and Order Originalism*, *supra* note 1, at 370 n.448 (noting that James Madison used probable cause as the Fourth Amendment standard, as he recognized the standard would govern customs searches, while the common law rule for search warrants required a complainant to swear that a crime had in fact occurred).

satisfied by an officer's investigation rather than a victim's oath. A few years later, an intermediate appellate court in New York accepted the probable cause arrest standard, obliquely referring to the legislature's acceptance of probable cause as sufficient to search for liquor.⁵⁴ Then in the 1880s, police raids of gambling and prostitution houses became common to discover evidence of these victimless crimes.⁵⁵ Police violence and arbitrary arrests in the late nineteenth century, however, caused the legislature to restore the common law restrictions on warrantless arrests.⁵⁶

There was no similar reluctance to accept police interrogation. Perhaps gradually testing the waters of the public's tolerance, police techniques grew increasingly bold. While no laws throughout the early nineteenth prevented police interrogations, they do not appear to have occurred, at least not frequently, until after the creation of the Municipal Police Force. Magistrates alone conducted interrogations until the mid-nineteenth century.⁵⁷ New York statutes, dating back to 1829, required magistrates to inform suspects of their right to remain silent in interrogations, to inform them that anything they said could be used against them, and to provide them an opportunity to have counsel present during the interrogation.⁵⁸ No similar warnings were expressly required when interrogations were conducted by officers. As police began to conduct interrogations, they initially provided suspects with the same warnings that magistrates would have given them.⁵⁹ By 1875, police were no longer providing these warnings, somewhat brazenly asserting that the statute relating to interrogation protocol only described duties of magistrates.⁶⁰ The statute was never modified to require warnings of

⁵⁴ *Burns*, 26 How. at 277.

⁵⁵ See *People ex rel. Eakins v. Roosevelt*, 16 A.D. 364, 44 N.Y.S. 1003 (1897) (referring to statute from the 1880s permitting police captains to seek warrants to search suspected houses of ill repute). Often, however, complaints would be filed by private societies who investigated vice in the City. See e.g., TIMOTHY J. GILFOYLE, *CITY OF EROS: NEW YORK CITY, PROSTITUTION, AND THE COMMERCIALIZATION OF SEX* 176-77 (1992) (describing investigations of Anthony Comstock of the Society for the Suppression of Vice and Charles Parkhurst of the Society for the Prevention of Crime).

⁵⁶ N.Y. CODE CRIM. PRO. § 177 (1881). This provision remarkably remained a part of New York law until the mid-twentieth century, though it appears that there were not many lawsuits filed for false arrest. It seems that there were impediments to civil actions by those wronged by the police that have yet to be explained. There were also fewer lawsuits for material witness detentions than one might expect. See Carolyn B. Ramsey, *In the Sweat Box: A Historical Perspective on the Detention of Material Witnesses*, 6 OHIO ST. J. CRIM. L. 681, 703 (2009).

⁵⁷ See J.M. Beattie, *Sir John Fielding and Public Justice: The Bow Street Magistrates' Court*, 25 L. & HIST. REV. 61, 67 (2007) (describing English practice). As late as 1855, the New York Legislature seemed unaware that police interrogations would become routine. In the proposed Code of Criminal Procedure, a confession "made under the influence of fear produced by threats" was inadmissible "whether [given] on the course of judicial proceedings or to a private person." SELECT COMMITTEE ON CODE OF CRIMINAL PROCEDURE, REPORT, DOCUMENTS OF THE NEW YORK STATE ASSEMBLY No. 150, 225, § 449 (1855).

⁵⁸ N.Y. CODE CRIM. PRO. §§ 13-15 (1829). New York's statutes had, for a much longer time, required magistrates to warn suspects about their right to remain silent. See Act of April 12, 1813, ch. 55, 1813 N.Y. Laws 507, Act of Mar. 24, 1801, ch. 70, 1801 N.Y. Laws 302, Act of Jan. 30, 1787, ch. 8, 1787 N.Y. Laws 12. The requirement that the magistrate provide the defendant with an opportunity to have counsel present during the questioning was new with the revised statutes of 1829.

⁵⁹ REPORT ON JOINT COMMITTEE ON POLICE MATTERS IN THE CITY AND COUNTY OF NEW-YORK, AND COUNTY OF KINGS, N.Y. SENATE REP. NO. 97, at 75-76 (1856).

⁶⁰ GEORGE W. WALLING, *RECOLLECTIONS OF A NEW YORK CHIEF OF POLICE* 223 (1887) (recognizing that not promptly presenting defendant to magistrate had been contrary to the law but was

police and, the following decade, the New York Court of Appeals revamped the procedures used to determine the voluntariness of confessions to effectively admit a statement whenever an officer denied coercive techniques.⁶¹

From the mid-1840s to the mid-1880s the New York Police Department had gone from a fledgling organization in which the public lacked trust to having influence over the lawmakers who regulated it. The absence of any resistance to the new interrogation techniques is certainly one piece of evidence of this fact.⁶² Another is the successful request the Municipal Police made to the New York Legislature to eliminate the statutory power to detain material witnesses.⁶³ On its face, this seems an odd request. If the police did not want material witnesses detained, the solution was simple. They did not have to arrest the witness and bring them before magistrates. The power to detain witnesses was a useful tool that the police asked the legislature to eliminate. Police used material witness detentions to hold uncooperative witnesses, provide better housing for cooperating suspects, and hold suspects that they lacked sufficient evidence to charge.⁶⁴ The material witness provision had, however, been a public relations nightmare for the police. The public had begun to perceive, with some legitimate foundation, that perfectly innocent eyewitnesses were being held. Eyewitnesses became afraid to talk to police for fear of incarceration.⁶⁵ A very public renunciation of the law was a means of regaining the public's cooperation in investigations. Though legal reform and immigrant advocacy groups had lobbied for a change in the law for decades, the law was repealed after the request from the New York Police Department.⁶⁶ Officers had gone from servants of magistrates to members of a department whose views the legislature sought and followed.

The high-water mark of the New York Police Department's successful assertion of its authority came just before Prohibition destroyed the public's ever-increasing willingness to accept essentially unchecked investigatory techniques. The Police Department had been secretly conducting wiretap operations since 1895, using the evidence overheard to aid in further investigations, never revealing that telephone conversations had been overheard.⁶⁷ This secret program was exposed in 1916 after Mayor John Purroy Mitchel instructed his Police Commissioner to intercept the telephone calls of a number of Catholic priests whom he alleged were misusing public funds provided to orphanages.⁶⁸ Despite the fact state law punished wiretapping as a felony, Commissioner Arthur Woods claimed that interception of telephone communications by

justifiable as necessary to solve the case); *Superintendent Walling: His Trial Before the Police Board*, N.Y. TIMES, Mar. 13, 1875, at 10 (asserting that officers were not required to provide the same warnings that New York statutes required of magistrates).

⁶¹ See discussion *infra* at notes 157-193 and accompanying text.

⁶² In fact, a legislative committee investigating the police in 1876 became aware of the fact that officers were questioning suspects without giving them the warnings magistrates were required to give, yet took no action to require such warnings, and suggested that restrictions on magistrates be lifted. N.Y. ASSEMB. SELECT COMMITTEE APPOINTED BY THE ASSEMB. TO INVESTIGATE THE CAUSES OF THE INCREASE IN CRIME IN THE CITY OF N.Y., REP. NO. 106, at 39 (1876).

⁶³ METRO. POLICE REP. 8, ASSEMB. DOC. 20 (1868).

⁶⁴ See Ramsey, *supra* note 56, at 693.

⁶⁵ *A Legal Outrage*, HARPER'S WEEKLY, Mar. 26, 1881.

⁶⁶ *German Legal Aid Society*, New York Times, Nov. 20, 1869, at 1.

⁶⁷ See *Berger v. New York*, 388 U.S. 41, 46 (1967) (making reference to New York wiretapping scandal of 1916).

⁶⁸ EDWIN R. LEWINSON, JOHN PURROY MITCHEL: BOY MAYOR OF NEW YORK 170-89 (1965).

police officers was lawful so long as it was conducted in a good faith effort to investigate crime.⁶⁹ He argued that the police could be entrusted to determine whom to tap, and when, as they had never (or at least very rarely) in the history of the program intercepted the communication of an innocent person.⁷⁰ The police could be trusted to identify the criminal element.⁷¹ Criminal actions brought against the members of the mayor's administration were dismissed on the grounds that each was acting in a good faith effort to investigate crime.⁷²

No real reforms followed this controversy that dominated the headlines of the city's papers for weeks. Two proposals were offered in the legislature of 1917; one required judicial authorization for a wiretap, the other merely required approval of a district attorney. Neither became law.⁷³ Even with the state government leaving wiretapping unregulated, city officials promised only internal supervision over the practice, something Police Commissioner Arthur Woods assured the public was already occurring when the scandal broke.⁷⁴ Mayor-elect John F. Hylan, who attacked Mitchel's wiretapping and defeated him in the 1917 mayoral election, assured the public just before

⁶⁹ NEW YORK STATE LEGISLATURE, JOINT COMMITTEE ON INVESTIGATION OF PUBLIC SERVICE COMMISSIONS: WIRETAPPING IN NEW YORK CITY 109-10 (photo reprint Arno Press 1974) (1916). Woods was also able to rely on the lack of clarity in the regulation of wiretapping, as statutes drafted to cover telegraph interception had been amended to merely add the word "telephone." 1895 N.Y. Laws ch. 727, § 1. The original New York statute forbid telegraph operators to send messages that were either criminal in themselves or furthered a crime. New York Penal Laws § 641 (1881). The telephone company was obviously given no opportunity to review the messages they were sending over telephone lines. The duty of telegraph companies to produce messages helpful to the government when asked was well established by 1916. See Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communication Privacy*, 60 STAN. L. REV. 553, 578-79 (2007) (describing Congressional investigation of 1876 presidential election and civil and criminal law suits in which telegrams were subpoenaed). For a very enjoyable account of the contested election of 1876, which led Congress to subpoena 30,000 telegrams from Western Union, see ROY MORRIS, *FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN AND THE STOLEN ELECTION OF 1876* (2003).

⁷⁰ *Id.*

⁷¹ See WILBUR R. MILLER, *COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON, 1830-1870*, at 80 (1973). J. Edgar Hoover would make similar claims at the federal level beginning in the 1930s, asserting that the FBI was employing "scientific" methods of investigation. See JOHN EDGAR HOOVER, *SCIENTIFIC METHODS OF CRIME DETECTION IN THE JUDICIAL PROCESS* (U.S. Dept. of Justice 1936).

⁷² *Acquit Kingsbury for Wiretapping*, NEW YORK TIMES, May 25, 1917, at 20. Privacy expectations in early-twentieth century telephone conversations were diminished as party-lines were common and operators could, and frequently did listen in. Harold Hinton, *Practical Telephony, Part II*, POPULAR MECHANICS 753, 755 (May 1913). Due to modern technological developments, it is fairly easy to tap a telephone today. See Thomas F. O'Neil III, Kevin P. Gallagher & Jonathon L. Nevett, *Detours on the Information Superhighway: The Erosion of Evidentiary Privileges in Cyberspace and Beyond*, 1997 STAN. TECH. L. REV. 3, 4 (1997). Magazines directed at telephone hackers actually list where handsets, which enable the user to intercept calls, can be purchased. *Id.*

⁷³ See N.Y. Senate Bill No. 569 (Feb. 15, 1917) (Sen. Burlingame's proposal to require a district attorney's authorization for a wiretap); N.Y. Sen. Bill No. 1144 (Mar. 15, 1917) (Sen. Towner's proposal to require judicial authorization for a wiretap).

⁷⁴ Woods assured the public that he, as police commissioner, was approving all wiretapping. NEW YORK STATE LEGISLATURE, JOINT COMMITTEE ON INVESTIGATIONS OF PUBLIC SERVICE COMMISSIONS: WIRETAPPING IN NEW YORK CITY 120 (1916).

his inauguration only that the District Attorney's office would approve any further wiretapping.⁷⁵

The courts similarly did nothing to regulate wiretapping. With the advent of Prohibition in 1920 – and the state's version of the prohibitory law in 1921 – trial and appellate courts began to reconsider New York's long-standing rejection of the exclusionary rule.⁷⁶ The fear of electronic searches, unlike the fear of physical searches for liquor four years later, did not prompt New York courts to regulate wiretapping.⁷⁷ In the years preceding Prohibition, New Yorkers had grown very accustomed to police exercising their discretion to investigate crime.

The public's acceptance of the new police powers was not limited to investigatory methods that intruded upon the privacy and liberty of citizens. So great was the public's deference to the New York Police Department in the early-twentieth century that the police were instructed to administer violence when necessary to obtain a confession or even when simply encountering members of the "criminal element" on the street.

B. Police Commissioners Encouraged Police Violence on the Streets

Organized police violence began in New York as a defensive response to street gangs that attacked officers. In the early years of the police force, strong-armed squads were established to respond to violence, and perceived threats of violence, from gangs by attacking the gangs.⁷⁸ The emerging culture of violence in the department then began to pose a threat to law-abiding citizens who crossed paths with the wrong officer. Progressive reformers by the late-nineteenth century, however, were successfully making the case that the all-too-frequent clubbings of innocent persons were the product of a corrupt system that failed to internally discipline officers.⁷⁹ These reformers were able to make the case that the honest and efficient officer's power to deal with the criminal element should not be limited.⁸⁰ Occasional efforts to allow police use of clubs only when necessary to make an arrest or protect the officer were, however, rejected as being too pro-criminal.⁸¹ By the early-twentieth century, an officer's use of his club to punish

⁷⁵ See *No Wide-Open City*, Hylan Announces, NEW YORK TIMES, Dec. 6, 1917, at 8. Hylan retained this position after he was sworn in. See Richard Barry, *Hylan on Police: Mayor's First Interview – Why Enright Was Chosen – No Lifting of "the Lid," No Wiretapping, End of Merit Marks*, NEW YORK TIMES, Feb. 3, 1918, at 54. Certainly Mayor Mitchel's use of wiretapping against Catholic priests contributed to his downfall. See *City Hall Phones Tapped, Walker's Aide Charges; Mayor's Rivals Scoff At It*, Oct. 2, 1929, at 1 (observing that "[w]iretapping by the police department in Mayor Mitchel's administration formed the subject of campaign talk against his reelection and contributed to his defeat."). Hylan's requirement that the district attorney's office approve wiretapping suggested that it was not self-regulation that he was objecting to, but the adequacy of the process of self-regulation under Mayor Mitchel.

⁷⁶ See discussion *infra* note 269-275 and accompanying text.

⁷⁷ See *People v. McDonald*, 35 N.Y.Crim. R. 546 (1917).

⁷⁸ See MARILYNN JOHNSON, *STREET JUSTICE: A HISTORY OF VIOLENCE IN NEW YORK CITY 15* (2003); MIKE DASH, *SATAN'S CIRCUS: MURDER, VICE, POLICE CORRUPTION AND NEW YORK'S TRIAL OF THE CENTURY 123* (2008) (describing origins of strong arm squads).

⁷⁹ *Id.* at 87-113.

⁸⁰ *Id.* at 87.

⁸¹ JOHNSON, *supra* note 78, at 15-16. William J. Stuntz makes an interesting observation regarding the regulation of police in his article: *The Substantive Origins of Criminal Procedure*. In it, he describes how the laws regulating police deal largely with what they may see or hear, rather than the level of force they may use. William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L. J. 393, 446

and intimidate those he identified as being part of the “criminal element” was not only accepted, it was publicly encouraged.

The New York Municipal Police Department had been formed in 1845 precisely because the system of constables and night-watchmen that preceded it lacked the power and organization to maintain order.⁸² Another way of viewing this is that the constables lacked the power to present a serious threat of brutality. The violent tendencies in the newly created police force can be traced to the earliest efforts by officers to establish their authority on the streets.⁸³ Street gangs that had effectively governed the city’s streets prior to the creation of the modern police force were not thrilled with the creation of the new department. They frequently attacked officers, prompting Captain George Walling, who would later become the Superintendent of the entire department, to form strong-armed squads to neutralize the threat.⁸⁴ Members of these squads were armed with locust wood clubs that were reported to be capable of cracking a man’s skull. Their task was not to investigate crime. Their marching orders were to go into the city’s toughest neighborhoods and “beat senseless” known gang members.⁸⁵ The “success” of the strong-armed squads led to the eighteen-inch locust wood club becoming standard equipment for all New York City officers.⁸⁶

The culture of violence created by these strong-armed squads was difficult to control. The use of a hard-wood club, frequently against the skull of a New Yorker, was the most frequently alleged abuse in the early decades of the police department.⁸⁷ Victims of clubbings – at least those who filed complaints and or became the subject of

(1995) [hereinafter Stuntz, *Substantive Origins*.] Their composure in the interrogation room is highly regulated, while their demeanor on patrol is left largely untouched. *Id.*

⁸² There is substantial agreement that nineteenth century riots produced modern police forces. See Robert Libman & Michael Polin, *Perspectives on Policing in Nineteenth Century America*, 2 SOC. SCI. HIST. 346 (1978) (reviewing scholarship on the creation of early police forces). See ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880*, at 119 (1989) (“Between 1837 and 1850, as the determination of the judiciary to intensify state prosecution and the punishment of rioters grew, support for expanding and improving the city’s police force increased.”); SAMUEL WALKER, *A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM* (1977) (contending that modern police forces were developed as a “consequence of an unprecedented wave of civil disorder that swept the nation between the 1830s and the 1870s.”); JOHNSON, *POLICING THE URBAN UNDERWORLD*, *supra* note 38, at 9 (same). *But see* ERIC MONKKONEN, *POLICE IN URBAN AMERICA, 1860-1920*, at 56 (1981) (contending that cities seized the opportunity to create a mechanism of social control, but were not motivated by any particular events); EDWIN G. BURROWS & MIKE WALLACE, *GOHAM: A HISTORY OF NEW YORK CITY TO 1898*, at 637-38 (1999) (attributing willingness of New Yorkers to finally accept a new police force to a brutal unsolved murder); AMY GILMAN SREBNICK, *THE MYSTERIOUS DEATH OF MARY ROGERS: SEX AND CULTURE IN NINETEENTH-CENTURY NEW YORK* 87 (1997) (same).

⁸³ HERBERT ASBURY, *THE GANGS OF NEW YORK: AN INFORMAL HISTORY OF THE UNDERWORLD* 95-96 (2008).

⁸⁴ JOHNSON, *supra* note 78, at 15.

⁸⁵ *Id.* at 15. The danger posed by those locust clubs is not to be understated. A surgeon attending to the victims of clubbing in the New York Draft riots found that none of the 21 victims of a policeman’s club he encountered could be saved. J.T. HEADLEY, *THE GREAT RIOTS OF NEW YORK 1712 TO 1873*, at 98-102 (1873) (this is an uncommonly well-written nineteenth century account). See also DAVID M. BARNES, *THE DRAFT RIOTS IN NEW YORK, JULY, 1863*, at 13 (1863), IVER BERNSTEIN, *THE NEW YORK CITY DRAFT RIOTS: THEIR SIGNIFICANCE FOR AMERICAN SOCIETY AND POLITICS IN THE AGE OF THE CIVIL WAR* 38 (1991).

⁸⁶ JOHNSON, *supra* note 78, at 15-16. See also RICHARDSON, *supra* note 2, at 68.

⁸⁷ JOHNSON, *supra* note 78, at 15-16.

newspaper articles – were generally engaged in very minor offenses or none at all. Marilyn Johnson has conducted a review of all of the incidents of police misconduct reported in the press from the creation of the New York Municipal Police Force in 1845 until the turn of the twentieth century. She concluded that most often clubbings resulted from minor incidents rather than attempts to apprehend serious offenders. Battered persons arrested during this era were frequently charged only with resisting arrest, which strongly suggests that they were guilty of no crime at the time of the assault.⁸⁸

Even though sensational accounts of police violence became regular features in the city’s papers, the proposed remedies rarely included restrictions on the use of violence by police.⁸⁹ For decades, there were no successful efforts to define the circumstances under which a policeman could use his club. In the latter half of the nineteenth century, reforms to prevent police abuses were aimed at perfecting the officer, not limiting his actions. Nineteenth century Progressive reformers saw a link between police brutality and corruption. In their view, if officers were not influenced by improper pecuniary or political motives, they could be entrusted to determine when, and how much, force was necessary.⁹⁰

Corruption was certainly not a difficult storyline to sell in New York in the second half of the nineteenth century. Long before Tammany Hall sachem William M. “Boss” Tweed and his cronies were convicted of bilking the city out of millions of dollars in the construction of a new courthouse, the city’s newspapers had alleged mismanagement and graft in the municipal government.⁹¹ The cartoons of Thomas Nast long depicted the city being under the corrupt control of the Tiger, a metaphor universally used by enemies of the Tammany Society to describe the Democratic machine.⁹²

Reformers were, however, able to rely on more than a general culture of corruption in their efforts to blame police violence on dishonesty in the administration of government. Corruption within the police department was widespread and well-known. Illegal payoffs began even with an officer’s induction into the force. In order to obtain a position with the New York City Police Department in the latter half of the nineteenth century, the would-be officer would be required to pay a minimum of \$300 to a politically connected party official, approximately three-months salary.⁹³ Salary alone, at least for ordinary patrolmen, may not have necessarily suggested that the opportunity for graft motivated every decision to join the force. Police officers during this era were better paid than most laborers with similar skill sets, so it is conceivable that aspiring officers would have been willing to make an initial investment in what could become a

⁸⁸ *Id.* at 252, 254.

⁸⁹ At least one reporter made a career focusing only on police misconduct. See LINCOLN STEFFANS, *THE AUTOBIOGRAPHY OF LINCOLN STEFFANS* (1931).

⁹⁰ See generally, JOHNSON, *supra* note 78, at 87-113.

⁹¹ LEO HERSHKOWITZ, *TWEED’S NEW YORK: ANOTHER LOOK* 207-33 (1977); KENNETH D. ACKERMAN, *BOSS TWEED: THE RISE AND FALL OF THE CORRUPT POLICE WHO CONCEIVED THE SOUL OF MODERN NEW YORK* 268 (2005).

⁹² See MORTON KELLER, *THE ART AND POLITICS OF THOMAS NAST* (1968). So great was Nast’s influence that Abraham Lincoln said of him, “Thomas Nast has been our best recruiting sergeant.” WILLIAM ALBIG, *PUBLIC OPINION* 419 (2007).

⁹³ EDMUND MORRIS, *THE RISE OF THEODORE ROOSEVELT* 499-500 (2001)

lifelong occupation.⁹⁴ It is, however, harder to attribute a motive of public service to hopeful police captains. Each candidate was expected to pay \$10,000 for his appointment, which well exceeded his annual salary.⁹⁵ This information alone, which was long suspected and confirmed by a legislative investigation in 1895, was by itself enough to lead to an inference of widespread extortion by the police department.⁹⁶

Police captains were expected to ensure that saloonkeepers, gamblers, brothel owners, as well as legitimate businessmen adequately contributed to the appropriate political campaigns.⁹⁷ Perpetrators of vice crimes were obviously expected to pay to avoid prosecution, but legitimate businessmen also had an interest in breaking certain city ordinances. Loading and unloading goods blocked city streets and sidewalks. Police would allow this necessary practice if they were adequately compensated.⁹⁸ Beat officers and their superiors received their parts of these bribes.⁹⁹ By the end of the nineteenth century, police bribery (or extortion) was so widely known that estimations of illegal contributions to the police force were listed in guidebooks to the city, which listed other facts such as the length of the Brooklyn Bridge.¹⁰⁰

According to Progressive reformers, this culture of corruption allowed improper police violence to flourish by insulating officers from internal discipline. Officers who used their power to pursue personal vendettas rather than punish criminals were safe in this system. Punishment for police misconduct depended entirely on political actors.¹⁰¹ When a citizen complained that he had suffered an abuse at the hands of an officer – or that an officer had been derelict in his duty – a trial was conducted by the Police Board.¹⁰² The board was comprised of half Democrats and half Republicans for most of the second half of the century with a majority vote being required to sanction an officer.¹⁰³ Though the city administration was Democratic for the majority of the second half of the nineteenth century, police corruption knew no party lines. Tammany Hall

⁹⁴ *Id.* See also Jerald Elliot Levine, *Police, Parties, and Polity: The Bureaucratization, Unionization, and Professionalization of the New York City Police 1870-1917*, at 18, 26 (1917) (Ph.D. dissertation, Univ. of Wisconsin).

⁹⁵ *Id.* Police captains received an average annual salary of \$2750. WARREN SLOAT, *A BATTLE FOR THE SOUL OF NEW YORK: TAMMANY HALL, POLICE CORRUPTION, VICE AND REVEREND CHARLES PARKHURST'S CRUSADE AGAINST THEM, 1892-1895*, at 324 (2002).

⁹⁶ See generally JACK M. DERASMO, *THE LEXOW INVESTIGATION, 1894-1895: "SATAN'S INVISIBLE WORLD DISPLAYED"* (1971); Jay S. Berman, *The Taming of the Tiger: The Lexow Committee Investigation of Tammany Hall and the Police Department of the City of New York*, 3 *POLICING* 55, 62 (1980); ARTHUR MEIER SCHLESINGER, *THE RISE OF THE CITY, 1878-1898*, at 115-16 (1971) (describing Lexow investigation).

⁹⁷ Levine, *supra* note 94, at 37.

⁹⁸ *Id.* at 7

⁹⁹ *Id.*

¹⁰⁰ MORRIS, *supra* note 113 at 500-501. In 1880, major cities paid policemen an average of \$900 a year. CRAIG D. UCHIDA, *THE DEVELOPMENT OF THE AMERICAN POLICE: AN HISTORICAL OVERVIEW*, 12 (2004). This was a reasonably high salary in comparison to other occupations at the time. *Id.*

¹⁰¹ Levine, *supra* note 94, at 104.

¹⁰² Police trials were quite the common event. MIKE DASH, *SATAN'S CIRCUS: MURDER, VICE, POLICE CORRUPTION AND NEW YORK'S TRIAL OF THE CENTURY*, 17 (2008). After 1889, there were an estimated 1,000 trials every year in New York, with only around 4,000 policemen belonging to the force. *Id.* Officers found guilty of an offense faced fines, suspension, or even termination, depending on the level of misconduct. *Id.*

¹⁰³ Levine, *supra* note 94, at 57.

reached an agreement with Customs House Republicans, the opposing political machine, to divide up the patronage the force provided.¹⁰⁴ Officers who delivered payments to their superiors were practically assured of retention and even promotion, regardless of their transgressions. Well-connected officers had no reason to restrain their rage when dealing with the public and dereliction of duty was the norm rather than the exception.¹⁰⁵

One officer of this period, Capt. Alexander “Clubber” Williams, came to symbolize the problems with the police force.¹⁰⁶ Starting off his career as a patrolman, he worked his way up the patronage-driven system to captain. His reputation for violence was well-known, not only engaging in it himself, but creating a culture of violence in the department. He bragged of instructing his men “not to spare the locusts on the heads of their prisoners.”¹⁰⁷ Williams was attributed with saying, “There is more law in the end of a nightstick than in a decision of the Supreme Court.”¹⁰⁸ His reputation for graft equaled his reputation for violence. When he was transferred to the Twenty-Ninth Precinct, an entertainment district with upscale restaurants, hotels and theaters that was also rife with brothels, taverns, and gambling houses, Williams stated, “I have had chuck for a long time and now I am going to eat tenderloin.”¹⁰⁹ He was referring to the considerably greater potential to extort bribes from the unlawful, but profitable, businesses that abounded in this portion of the city.¹¹⁰ Because he was able to control street crime, he won the support of Republican businessmen in the precinct and could count on support from the Customs House machine.¹¹¹ Charges against him for excessive force were frequently made but never sustained by the politically divided police board.¹¹²

For the majority of reform-minded policymakers in the late-nineteenth century, Clubber Williams’ acts of brutality were symptoms of the disease, not the illness itself. If Williams was the representative example of police corruption in the 1890s, Frank Moss typified the police reformers who sought to end his career, and the careers of his corrupt colleagues. During his varied and distinguished career, Moss served as a Police Commissioner, an Assistant District Attorney in Manhattan, and, while in private practice, he represented an association of African American New Yorkers who complained of racially directed police violence following a turn-of-the-century riot.¹¹³ Moss researched all of the departmental trials of police officers for misconduct from

¹⁰⁴ *Id.* at 54.

¹⁰⁵ *Id.* at 104.

¹⁰⁶ A number of reporters covered the violence and corruption of New York City police officers in the late-nineteenth century, and Clubber Williams was universally recognized among them as the most notorious perpetrator of each. *See e.g.*, LINCOLN STEFFANS, *THE AUTOBIOGRAPHY OF LINCOLN STEFFANS* 208 (2005) (describing his impression of Williams).

¹⁰⁷ Levine, *supra* note 94, at 108.

¹⁰⁸ HERBERT ASBURY, *THE GANGS OF NEW YORK: AN INFORMAL HISTORY OF THE UNDERWORLD* 219 (2008) (observing that charges for misconduct were brought against Williams eighteen times during his tenure as an officer).

¹⁰⁹ JOHNSON, *supra* note 78, at 42; SLOAT, *supra* note 95, at 119-20.

¹¹⁰ Williams purportedly owned a 53-foot yacht and had homes in both New York and Connecticut. Uchida, *supra* note 120, at 14-15. With a salary of \$3000 a year, it is doubtful that he purchased these extravagances with hard-earned money. SLOAT, *supra* note 100, at 119-20.

¹¹¹ Levine, *supra* note 94, at 110.

¹¹² Johnson, *supra* note 78, at 43-45. William Devery, New York’s Chief of Police from 1898 to 1901, also engaged in his fair share of corrupt activities. UCHIDA, *supra* note 100, at 14. He looked after illegal gambling and prize fighting to protect the personal interests of Tim Sullivan, a close friend. *Id.*

¹¹³ JOHNSON, *supra* note 78, at 63-68.

1891 to 1894.¹¹⁴ In a book he authored with Rev. Charles Parkhurst, the first President of the Society for the Prevention of Crime, he described the connection between corruption and brutality.¹¹⁵ They alleged that the poor quality of police recruits, and the lenient treatment these officers received when faced with complaints of brutality, itself demonstrated the corrupt influence of machine politics.¹¹⁶

The appointment of Teddy Roosevelt as a Police Commissioner in 1895 provided Progressive reformers like Moss an opportunity to implement the good-government, anti-corruption reforms they believed to be a panacea for all the ills of the police department.¹¹⁷ Roosevelt increased departmental discipline, dismissing and severely sanctioning officers who neglected their duty or abused their powers, and implemented stricter recruiting standards.¹¹⁸ Most controversially, he demanded strict enforcement of New York's blue laws, which required all establishments serving alcohol to close on Sundays. In a world of six-day work-weeks, Sundays were the busiest days for New York's bars and taverns.¹¹⁹ His enforcement of the blue laws was, not surprisingly, wildly unpopular with saloon owners and patrons alike. Roosevelt himself was no temperance man, but insisted that these laws be enforced absolutely to eliminate the possibility that officers accept payment for ignoring violations.¹²⁰

To ensure that patrolmen were not shirking their duties, Roosevelt routinely patrolled the streets himself, discovering officers sleeping on duty or drinking in taverns.¹²¹ There was great public faith that the new commissioner was properly focused on improving the internal discipline in the force. An article in the *Brooklyn Times* observed that officers were being much more cautious in their use of force as no officer would want his nightstick "to collide with the head of the ubiquitous Theodore."¹²² The article captures what appears to have been the contemporary mood that police brutality was the product of thoughtless, impetuous officers, rather than calculated violence

¹¹⁴ *Id* at 52.

¹¹⁵ FRANK MOSS & C. H. PARKHURST, *THE AMERICAN METROPOLIS* 237-39 (1897).

¹¹⁶ *See* Johnson, *supra* note 78, at 52.

¹¹⁷ *See generally*, JAY STUART BERMAN, *POLICE ADMINISTRATION AND PROGRESSIVE REFORM: THEODORE ROOSEVELT AS POLICE COMMISSIONER OF NEW YORK* (1987).

¹¹⁸ MORRIS, *supra* note 93, at 497; JOHNSON, *supra* note 78, at 56.

¹¹⁹ JOSEPH P. THOMPSON (ed.), *MEMOIR OF DAVID HALE, LATE EDITOR OF THE JOURNAL OF COMMERCE: WITH SELECTIONS FROM HIS MISCELLANEOUS WRITINGS* 407 (1850) (noting that Sunday is the most popular day for grog shops in New York and speculating that the cause may be that working men were typically paid on Saturday night); JOEL MOKYR, *THE ECONOMICS OF THE INDUSTRIAL REVOLUTION* 84 (1985) (observing that six-day work week was common in the nineteenth century); A.S. Northcote, *American Life Through English Spectacles*, 34 *THE NINETEENTH CENTURY* 476, 484 (1893) (observing that the Saturday half-holiday was just beginning to be observed in 1893).

¹²⁰ Roosevelt claimed that he was no more strict in his enforcement of the blue laws than anyone else, only that his enforcement had been honest and shown no regard for class. "The only difference was that there was no protected class. Everybody was arrested alike, and I took especial pains to see that there was no discrimination, and that the big men with political influence were treated like everyone else." THEODORE ROOSEVELT, *THE ROUGH RIDERS: AN AUTOBIOGRAPHY* 447 (2004).

¹²¹ MORRIS, *supra* note 93, at 508-10.

¹²² *Id* at 509.

against criminal suspects. At least the brutality that the public found objectionable was viewed in this way.¹²³

While Roosevelt's police reforms captured the spirit of the majority of progressives of his generation, there were reformers who held different views about the problems with the police and the sort of reforms that were necessary. One such person sat on the Police Board with Roosevelt. Thomas Byrnes, like Roosevelt, strongly advocated a police bureaucracy free from the influence of political machines, but on some of the details of police reform they diverged.¹²⁴ Superintendent Byrnes was inspired by the example of the club-free Chicago Police Force at the Columbian Exposition in 1829.¹²⁵ He was not, however, so bold as to advocate disarming New York officers. Instead, he proposed that they carry less dangerous weapons, fourteen-inch nightsticks rather than the eighteen-inch locust clubs they typically carried. He further proposed that these weapons could be used only in self-defense. To prevent an atmosphere of violence from provoking either citizens or police, he finally proposed that officers be required to use their whistles to call for backup rather than relying on the custom of rapping nightsticks on the sidewalk. The Police Board adopted these reforms in 1892, but they only briefly remained in place.¹²⁶ (The subsequent discovery of Byrnes' corruption during the Lexow Commission's investigation would, however, seriously undermine his reputation as a reformer.¹²⁷)

Roosevelt, like most Progressive reformers of the late-nineteenth century, was not in favor of limiting the use of the club to cases of self-defense, or restricting the officer's discretion in how to apply force. He successfully opposed Byrnes' anti-clubbing rules and strongly advocated the use of forceful tactics against the criminal element.¹²⁸ Roosevelt's view on the use of police force could have been described by the unforgettable phrase he used to express part of his foreign policy as president, "Speak softly, but carry a big stick."¹²⁹ As Margaret Johnson described the philosophy of late-nineteenth and early-twentieth century reformers, "police violence was only a problem if used against innocent civilians . . . when directed against hardened criminals, rough tactics were [regarded as] essential to efficient and effective law enforcement."¹³⁰

His unwavering commitment to enforcing the Sunday closing laws prompted a political backlash that brought Roosevelt's time on the Police Board to a close less than a year after it began.¹³¹ His style of reform – that strictly enforced police discipline but permitted officers extraordinary discretion in their dealings with criminal suspects – was responsive to the cries for police reform throughout the late-nineteenth century and would

¹²³ JOHNSON, *supra* note 78, at 18 ("New Yorkers filed numerous complaints of brutality after 1865, and the press began to publicize these cases from a perspective that was pointedly critical of police.").

¹²⁴ *Id.* at 88-89.

¹²⁵ *Id.* at 89.

¹²⁶ *Id.*

¹²⁷ *Id.* at 87-89.

¹²⁸ *Id.* at 88.

¹²⁹ See e.g., ROBERT DALLEK, THE AMERICAN STYLE OF FOREIGN POLICY: CULTURAL POLITICS AND FOREIGN AFFAIRS 35 (1983).

¹³⁰ JOHNSON, *supra* note 78, at 121 (referring to "reformers like [Police Commissioner Lewis J.] Valentine").

¹³¹ See MORRIS, *supra* note 93, at 512-21.

be the model for police regulation well into the twentieth century.¹³² A willingness to tolerate, even expand, broad police powers in the face of abuses was certainly not limited to Roosevelt, or even to those involved in the administration of the New York Police Department. Even as citizens were complaining about a distressing pattern of arbitrary arrests of law-abiding citizens, the lower house of the New York Assembly passed a bill permitting the arrest of any known criminals seen congregating together on public streets.¹³³

There were some glimmers of modern limits on police discretion prior to Prohibition, but these early proposals to impose constraints on police were largely unsuccessful. One of these efforts had come from Republican Police Superintendent Thomas Byrne with his short-lived constraint on the use of night-sticks. By the twentieth century, some Democratic politicians were coming to realize that directly addressing police brutality was not without appeal to their working-class constituents who provided the backbone of their support.¹³⁴ New York Assemblyman “Big Tim” Sullivan, a corrupt cog in the Tammany machine, introduced a bill in 1909 to prevent police officers from using blackjacks, brass knuckles, and other unconventional weapons.¹³⁵ His bill was defeated by those who asserted that the proposal was meant to protect gangsters supporting Tammany and that officers should not be deprived of whatever weapons, literal or figurative, were necessary to do battle with the criminal element.¹³⁶

The same year, Tammany Democrat William J. Gaynor was elected mayor by tapping into popular resentment of police brutality.¹³⁷ As a judge, Gaynor had been one of the most vehement critics of police abuses.¹³⁸ As mayor, he attempted to institute mechanisms to curb excessive force by police officers. He first considered re-instituting Byrnes’ anti-clubbing rules, but opted instead to provide a more streamlined mechanism

¹³² Marilynn Johnson has described how the connection of brutality and corruption warped reform efforts. JOHNSON, *supra* note 78, at 87. See also Valentine, Lewis J., NIGHT STICK: THE AUTOBIOGRAPHY OF LEWIS J. VALENTINE (1947); JOHNSON, *supra* note 78, at 121 (“Like his Progressive Era predecessor, Arthur Woods, Valentine promoted anticorruption efforts in the department in tandem with tough policing of criminals.”).

¹³³ See TIMOTHY J. GILFOYLE, A PICKPOCKET’S TALE: THE UNDERWORLD OF NINETEENTH-CENTURY NEW-YORK 252 (2006) [hereinafter: GILFOYLE, PICKPOCKET’S TALE.]

¹³⁴ JOHNSON, *supra* note 78, at 99.

¹³⁵ *Id* at 96; ANDY LOGAN, AGAINST THE EVIDENCE: THE BECKER-LEVENTHAL AFFAIR 55-56 (1970) (describing Sullivan’s involvement with gambling houses and street gangs); GILFOYLE, *supra* note 133, at 252 (explaining that Sullivan opposed the new arrest law in 1889).

¹³⁶ JOHNSON, *supra* note 78, at 96. “Big Tim” Sullivan had long been attacked for his effort to limit the discretion of police. Police Superintendent Thomas Byrnes publicly denounced him in the New York Legislature for his association with gangsters. Daniel Czitrom, *Underworlds and Underdogs: Big Tim Sullivan and Metropolitan Politics in New York 1889-1913*, 78 J. AM. HIST. 536, 541 (1991). The irony in this is that Thomas Byrnes’ corruption would soon thereafter be revealed by the Lexow Commission’s investigation and Teddy Roosevelt would oust him from the Police Board. JOHNSON, *supra* note 78, at 88. Sullivan came to a less-than-auspicious end. His body was found on the train tracks in Yonkers for revealing what he knew about the murder of Herman Rosenthal, for which police Lt. Charles Becker went to his death in the electric chair. LOGAN, *supra* note 135, at 17.

¹³⁷ *Id* at 99; LATELY THOMAS, THE MAYOR WHO MASTERED NEW YORK: THE LIFE AND OPINIONS OF WILLIAM J. GAYNOR 254-56 (1969).

¹³⁸ Allen Steinberg, *Narratives of Crime, Historical Interpretation and the Course of Human Events: The Becker Case and American Progressivism*, in AMY GILMAN SREBNICK & RENÉ LÉVY (EDS.), CRIME AND CULTURE: AN HISTORICAL PERSPECTIVE 68-70 (2005) (observing Gaynor’s widely publicized opinions on police brutality because of lawlessness of police).

for victims of clubbing to complain about their treatment.¹³⁹ Gaynor's General Order Number Seven required the captain of a station house, or the lieutenant in charge, to transmit a report of all claims of assault made during their shift to police headquarters.¹⁴⁰ With the centralized collection of complaints, the mayor's office was better able to engage in oversight, resulting in a much larger number of charges against officers and dismissals from the force.¹⁴¹ The mayor also required officers to issue citations rather than arrest offenders for minor offenses to prevent arbitrary arrests and forbid officers to use violence against peaceful protestors and abolished strong-armed squads, groups specially assigned to deal roughly with gang criminals.¹⁴²

The first few months of Mayor Gaynor's new limits on the police were accompanied by a perception that crime had drastically increased in the city.¹⁴³ Grand jury investigations began to look into the rise in crime at the insistence of groups interested in police reform in the nineteenth century, including Charles Whitehurst and his Society for the Prevention of Crime, as well as a coalition of Republicans and anti-Tammany Democrats.¹⁴⁴ Frank Moss, the former reform-minded Police Commissioner and civil rights attorney, an assistant district attorney in Manhattan in 1909, led the investigation on the island.¹⁴⁵ Nineteenth century Progressive reformers had demonstrated concern about brutality, but they disapproved of Gaynor's method of treating the symptom rather than the disease.¹⁴⁶ Moss' grand jury made no inquiry into official violence but instead questioned Mayor Gaynor, who appeared as a witness, about the wisdom of hampering the ability of the police to deal with criminals.¹⁴⁷ The grand jury's final report concluded that "city policemen should have a freer use of their clubs without having to worry about vengeful charges by criminals and the expense and uncertainty of trials on charges."¹⁴⁸

Following the backlash from his efforts to rein in the use of police violence, Gaynor's administration brought charges against officers for brutality in a dramatically smaller percentage of cases.¹⁴⁹ In 1911, he made yet another concession to the variety of anti-crime groups that were allying against him. He re-established a new strong-armed

¹³⁹ JOHNSON, *supra* note 78, at 100-02.

¹⁴⁰ *Id.* at 101.

¹⁴¹ *Id.* at 101.

¹⁴² *Id.* at 101-02.

¹⁴³ Arthur W. Towne, *Mayor Gaynor's Police Policy and the "Crime Wave" in New York City*, 2 J. AM. INST. CRIM. L. & CRIMINOLOGY 375 (1912) (describing complaints of a crime wave during Gaynor's administration, particularly those made by Magistrate Corrigan, as overstated).

¹⁴⁴ JOHNSON, *supra* note 78, at 104.

¹⁴⁵ *Id.*

¹⁴⁶ In a description of the police commissioner appointed by John Purroy Mitchel who followed Gaynor to the mayor's office, the weekly magazine, *The Outlook*, contended that "Mayor Gaynor's anti-clubbing order, intended to promote peace and order, encouraged both brutality and disorder." *Arthur Woods: Police Commissioner*, THE OUTLOOK, 827, 827 (April 18, 1914). Though the author of this piece is not identified, Theodore Roosevelt is identified as a contributing editor. *Id.* at 821. Doubtlessly, Roosevelt would have felt a kindred spirit with Woods. Both were Harvard men, *id.* at 827, and both believed that police had to be entrusted with the use of physical force against the criminal element. JOHNSON, *supra* note 78, at 100-07.

¹⁴⁷ *Id.* at 104-05.

¹⁴⁸ *Id.* at 105.

¹⁴⁹ *Id.* at 106.

squad led by Lt. Charles Becker.¹⁵⁰ Gaynor's retreat from his anti-brutality measures cannot be overstated. There was no one in early-twentieth century New York more committed to curbing police brutality.¹⁵¹ As a judge, he had vehemently attacked official violence and had made this issue a centerpiece of his mayoral campaign.¹⁵² Even this articulate and beloved public servant, whose funeral would draw a larger crowd than Abraham Lincoln's, was unable to overcome his opposition's claim that unchecked violence was an indispensable part of fighting crime.¹⁵³ Gaynor's attempts to overcome his soft-on-crime image were ultimately unsuccessful in preserving his political standing. As he gave officers increasingly greater discretion, the number of complaints of brutality and incidents of corruption increased. In the most high-profile example, Lt. Charles Becker was accused, convicted and ultimately executed for the murder of the proprietor of a gambling house who accused Becker of extorting money from him.¹⁵⁴ Ironically, the very problem that had brought him to the mayor's office grew worse during his administration.

Gaynor's legacy was sadly to make his own career-long goal of anti-brutality measures seem inconsistent with the discretion police officers must possess to effectively combat crime. Not surprisingly, no subsequent New York mayors prior to Prohibition would take up Gaynor's failed cause. Not surprisingly, there were no hints of limits on police discretion in his immediate successor's administration. John Purroy Mitchel, followed Gaynor to the mayor's office on the Fusion Ticket made up of groups opposed to Tammany Hall. Mitchel himself had risen to power as an opponent of corruption.¹⁵⁵ Mitchel's view of the police was very much in line with nineteenth-century reformers who saw no problem with police violence, even if unnecessary to effectuate an arrest or preserve the life of the officer or others, so long as it was directed against the proper persons. As Marilyn Johnson describes, under Mitchel's administration "use of nightsticks and revolvers were encouraged, and brutality complaints by real or suspected criminals were ignored."¹⁵⁶

C. Courts Encouraged Police Violence in Interrogation Rooms

In the Progressive Era, courts, no less than police commissioners or politicians, were willing to permit officers discretion to engage in violence against suspected criminals. Prior to the adoption of a general exclusionary rule, confession cases provided

¹⁵⁰ *Id.* at 106-07.

¹⁵¹ See MIKE DASH, *SATAN'S CIRCUS: MURDER, VICE, POLICE CORRUPTION AND NEW YORK'S TRIAL OF THE CENTURY* 197 (2007);

¹⁵² THOMAS, *supra* note 137, at 261.

¹⁵³ *Id.* at 494.

¹⁵⁴ See LOGAN, *supra* note 135; JONATHAN ROOT, *ONE NIGHT IN JULY: THE TRUE STORY OF THE BECKER-LEVENTHAL MURDER CASE* (1961).

¹⁵⁵ JOHN PURROY MITCHEL: *BOY MAYOR OF NEW YORK* 34 (1965).

¹⁵⁶ JOHNSON, *supra* note 78, at 109. Lewis J. Valentine, the Police Commissioner under Mayor Fiorello LaGuardia, told his men when he saw a well-dressed, un-bruised, suspect in a lineup that a man should not be brought in so clean, that officers should "muss up" those they arrested. See LEWIS J. VALENTINE, *NIGHT STICK: THE AUTOBIOGRAPHY OF LEWIS J. VALENTINE* 260 (1947); JAMES LARDNER, *NYPD: A CITY AND ITS POLICE* 233 (2001).

courts their primary opportunity to consider the legality of police tactics.¹⁵⁷ Beginning in the 1880s, the New York judiciary became at least willfully blind to, if not complicitous in, violent interrogation methods that would come to be known as the third-degree.¹⁵⁸

The problems with the inherently coercive nature of secret interrogations were increasingly being recognized in the late-nineteenth century as interrogations became more common and their methods became more questionable.¹⁵⁹ As police began to interrogate, they appear to have initially played on the pressures and fears inherent in the process of a custodial interrogation, rather than use of physical coercion.¹⁶⁰ A case decided in Tennessee almost poetically recounted the types of concerns that were being heard around the country as police interrogations became common.

Evidence of confessions is liable to a thousand abuses. They are generally made by persons under arrest, in great agitation and distress, when every ray of hope is eagerly caught at, and frequently under the delusion, though not expressed, that the merits of a disclosure will be productive of personal safety – in want of advisers, deserted by the world, in chains and degradation, their spirits sunk, fear predominant, hope fluttering around, purposes and views momentarily changing, a thousand plans alternating, a soul tortured with anguish, and difficulties gathering into a multitude. How uncertain must be the things which are uttered in such a storm of passion.¹⁶¹

There was no hint in that opinion of the Tennessee Supreme Court in 1865 that actual brutality, or threats of brutality were commonplace. There is similarly no evidence that routine third-degree began in New York until the 1880s. The first allegation of routine abuses in police interrogation involved the failure of officers to provide warnings of their right to silence and counsel and their failure to promptly present suspects before magistrates in 1875.¹⁶²

Just as torture was becoming commonplace in New York, the judiciary began to allow juries to determine whether a confession was voluntarily given if there was any

¹⁵⁷ Trial and appellate courts in New York recognized the exclusionary rule during Prohibition. See Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1 (1996).

¹⁵⁸ It appears that police were using the term “third degree” as early as the late-nineteenth century. See Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in the United States*, in G. DANIEL LASSITER (ed.), INTERROGATIONS, CONFESSIONS AND ENTRAPMENT 52 (2004).

¹⁵⁹ *Id.* at 124-25. See also Leo, *supra* note 158, at 52 (while “one finds scattered anecdotes and references to the third degree throughout [the second half of the nineteenth century], it is difficult to discern any clear pattern until the final decades of the nineteenth century.”); GILFOYLE, PICKPOCKET’S TALE, *supra* note 133, at 249 (describing career of Byrnes). The character of Inspector Blake in the radio drama, *The Shadow*, was based on Byrnes. Leroy Panek, *The Origins of the American Detective Story* 56 (2006). *But see*, JOHNSON, *supra* note 38, at 23 (describing an isolated incident of police using force to obtain a confession in the 1840s).

¹⁶⁰ Police slowly increased the amount of coercion used in the interrogation. Initially, they began to use trickery and deceit. See Chapter Three, *The Quiet Transition from Public Examinations by Magistrates to Secret Un-Counseled Interrogations by Police*.

¹⁶¹ *McGlothin v. State*, 42 Tenn. 223, 229 (1865).

¹⁶² See Chapter Three, *The Quiet Transition from Public Examinations by Magistrates to Secret Un-Counseled Interrogations by Police*.

conflict in the evidence. In 1882, a New York appellate court recognized that the trial court had a duty to determine the admissibility of the statement as “[t]here was no conflict of evidence concerning the language used [by interrogators] before the statements of the prisoner were made.”¹⁶³ The court did not describe any facts that might raise an inference that the confession was involuntarily obtained, merely noting that it was voluntarily obtained without any threats or promises being made.¹⁶⁴ The court continued in *dicta* to observe that the trial court must assess the voluntariness of the confession “even when the evidence is conflicting.”¹⁶⁵

This was the first New York case to hold that a jury was to decide the question of voluntariness. Modern law certainly assumes that judges are considerably better than juries at excluding involuntary statements when the confession details a serious crime and social science experiments support the law’s intuition.¹⁶⁶ Throughout history, there have been a variety of factors that have made judges better suited to evaluate the circumstances that led to a confession. Judges have an institutional perspective that jurors lack. Legal training, possessed by at least some percentage of the nineteenth-century New York judiciary, instills a respect for evidentiary rules, even when those rules result in the acquittal of likely guilty suspects.¹⁶⁷ Late-nineteenth century judges would have had a unique advantage over juries. They were beginning to see bandages and bruised defendants complaining of police brutality. Jurors, who obviously sat in only one case, would have been more easily able to attribute a single defendant’s bruises to prior injuries and resolve the credibility contest in favor of the officer who denied any brutality. Late-nineteenth century judges had access to information that corroborated the existence of an emerging practice.

Just as information about the violent interrogation methods of Inspector Byrnes’ detectives was emerging, a New York appellate court reversed the long-standing rule reiterated in *Willett*. For perfectly understandable reasons, the court announced the rule change in a case that did not involve a potentially tortured confession – a case in which the court held a confession inadmissible despite a minimal inducement from interrogators. The case, *People v. Kurtz*, involved a burglary investigation jointly conducted by members of the Rensselaer County District Attorney’s Office and the Pinkerton Detective Agency.¹⁶⁸ Prosecutors arrested the suspect in Florida and transported him by train back to New York. His wife was not permitted to accompany them on the train. The prosecutors isolated him from other passengers as they traveled. When the officers arrived at the train station in New York, they took him off the back of

¹⁶³ *Willett v. People*, 27 Hun. 469, 474 (N.Y. 3d Dep’t 1882). New York procedure continued to submit the issue of voluntariness to the jury, if there was a conflict in the testimony, until the United States Supreme Court held that this procedure violated due process. *Jackson v. Denno*, 378 U.S. 368 (1964) (holding that asking jury to consider both voluntariness and guilt unduly focuses voluntariness solely on the issue of the confession’s reliability).

¹⁶⁴ *Willett*, 27 Hun. at 374.

¹⁶⁵ *Id.*

¹⁶⁶ See Andrew Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PENN. L. REV. 1251, 1321-22 (2005) (noting that empirical studies reveal that judges can disregard the substance of inadmissible confessions).

¹⁶⁷ See James M. Braden, *Conspiracy*, 24 AM. CRIM. L. REV. 459, 472 (1987) (quoting *United States v. Martorano*, 561 F.2d 406 (1st Cir. 1977)) (observing that trial judges are more likely to recognize the weaknesses in testimony because of their legal training).

¹⁶⁸ 42 Hun. 335 (N.Y. 1886).

the train, avoiding entering the train depot to ensure that the suspect would not have contact with his attorney who was waiting inside for the party. Pinkerton detectives joined the party at the Troy Police station to be part of the interrogation. The suspect asked one of them “[w]hat benefit [he was] going to get out of the thing.” The detective told him that “the only benefit . . . was the benefit that any State witness would get.”¹⁶⁹

The court held the statement the suspect subsequently gave to be inadmissible even though the court recognized that there was no proof that any threats had been made before or during the interrogation.¹⁷⁰ The suspect had only been given reason to believe he would receive a vague benefit, a sort of benefit that, according to the detective, seemingly anyone who confessed would receive. Under the terms of the Code of Criminal Procedure of 1881, a confession was involuntary only if it was the product of “fear produced by threats” or was “made upon a stipulation of the district attorney’s office that he not be prosecuted therefor.”¹⁷¹ This confession did not come close to satisfying the first criteria. The majority nevertheless held that the Pinkerton agent’s comments “induced [the defendant] to make his confession” and must be excluded, as it was made in the presence of a district attorney.¹⁷² As the dissenting judge observed, the Code of Criminal Procedure had expressly limited the voluntariness doctrine to exclude only those statements produced by fear from threats, unless an agreement not to prosecute was made by a district attorney.¹⁷³ The majority was invoking a rule far more protective of criminals than the legislature intended. The majority even observed that “a confession obtained contrary to [the voluntariness rule] must be rejected, *even though it be true.*”¹⁷⁴ Previous decisions of the court had reasoned that the voluntariness rule was intended to guard against false confessions, and tactics that did not undermine reliability were acceptable.¹⁷⁵

The bulk of the court’s opinion, and certainly its holding, appeared extremely concerned about interrogation practices at a time when third-degree tactics were just starting to become public. Of course the defendant in *Kurtz* had suffered nothing even approximating the tactics associated with the third degree. The very close judicial scrutiny of interrogations demonstrated in *Kurtz*, therefore, seems out of synch with the

¹⁶⁹ *Id.* at 339-40.

¹⁷⁰ *Id.* at 338.

¹⁷¹ The Commissioner on Pleading and Practice had proposed this standard in their Proposed Code of 1849, 1850, and 1855. See SELECT COMMITTEE ON CODE OF CRIMINAL PROCEDURE, REPORT, DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW YORK, No. 150, 225, § 449 (1855) (excluding confession, “when made under the influence of fear produced by threats”). In 1849, clearly there was little thought that police officers would be extracting confessions, as the drafters of the Code of Criminal Procedure refer to two possible categories, those made “in the course of a judicial proceeding” and those given “to a private person.” *Id.* The voluntariness rule, originally adopted by English courts, had forbidden the admission of a confession that was the product of a “threat or promise of any kind.” See Richard A. Leo, Steven A. Drizin, Peter J. Neufeld, Bradley R. Hall & Amy Vatner, *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WISC. L. REV. 479, 485-86 (2006).

¹⁷² *Id.* at 338.

¹⁷³ *Id.* at 346 (Landon, J., dissenting). Judge Landon observed that the voluntariness rule announced in the Code of Criminal Procedure was a departure from the century-old voluntariness standard that excluded confessions that were the product of threats or inducements of any kind, but recognized that the legislature had the prerogative to modify the law in this way. *Id.*

¹⁷⁴ *Id.* at 344 (emphasis in original).

¹⁷⁵ See MILLER, *supra* note 71, at 78.

reality of police practices in interrogation rooms. The Pinkerton-aided investigation was very different than most late-nineteenth century interrogations in another important way. The Pinkerton detective admitted that he had told the suspect he would get some sort of benefit from confessing, however vague that promised benefit might have been. Police officers who engaged in considerably more offensive tactics were not so forthcoming and the court's opinion recognized a different set of procedures when there was uncertainty about what occurred in the interrogation room.

In *dicta*, the court in *Kurtz* considered how a court should respond to a conflict in testimony about the circumstances of an interrogation. The court concluded that as factual disputes were typically given to juries, conflicting accounts about interrogation methods should similarly be given to a jury.

Whether threats or promises induced the confession may sometimes be a question of fact, depending, perhaps, on conflicting evidence. The court must decide preliminarily. But it is reasonable that then the question of fact, *if there be any doubt*, should be submitted to the jury.¹⁷⁶

In a series of cases after *Willett* and *Kurtz*, the New York Court of Appeals would reaffirm this principle and allow the admission of questionable confessions even in cases in which the allegations against the police were extreme and credible.¹⁷⁷ And when the police – as they often did – denied that they applied coercive measures, New York courts for decades unflinchingly referred the confession to the jury with instructions to disregard

¹⁷⁶ *Id.* at 345 (emphasis in original). New York was certainly not alone in trusting juries. See *Indian Fred v. State*, 282 Pac. 930, 934 (Ariz. 1929) (“In most jurisdictions, if there is a conflict of evidence on the question, and the court is not satisfied that the confession is voluntary, it should submit it to the jury, with instructions to disregard it if, upon all the evidence, they believe it to be involuntary.”); *Irby v. State*, 20 S.E. 218 (1894) (trial court is to make determination of voluntariness after hearing testimony of officer who heard the confession, if the statement is admitted then defendant may testify to his account and jury is to determine voluntariness); *State v. Storms*, 85 N.W. 610, 611 (Iowa 1901) (“where there is a conflict of evidence, and the court is left in doubt on the question, the inquiry [on whether the confession is voluntary] should be left to the jury”); *Sparks v. State*, 29 S.W. 264, 265 (1895) (“And while... [cite from p. 50 of ALR]”); *People v. Meyers*, 88 P.2d 212 (Cal. App. 3d Dist. 1939) (get and cite) – and then cite *Ziang Sun Wan v. United States*, 289 Fed 908, aff’d 263 U.S. 693 (1923). But see *Com. v. Culver*, 126 Mass. 464 (1879) (recognizing but rejecting practice of giving juries issue of voluntariness whenever there is a conflict in the evidence relating to the confession, holding that judge must determine that confession is admissible before jury can hear it); *State v. Priest*, 103 A. 359 (Me. 1918) (“Whether in a given case the alleged confession is voluntary or involuntary is a question of fact to be determined by the presiding judge After its admission by the presiding judge, its weight is for the jury depending on all the circumstances under which it was obtained...”); *State v. Rogers*, 99 S.C. 504 (1914) (“A confession is not admissible unless it is voluntary and the question whether it is voluntary must be determined in the first instance by the presiding judge...”); See also H. Rockwell, *Voluntariness of Confessions Admitted by Court as Question of for Jury*, 85 A.L.R. 870 (1933); T.C. Williams, *Voluntariness of Confessions Admitted by Court as Question for Jury*, 170 A.L.R. 567 (1947).

¹⁷⁷ See *People v. Cassidy*, 133 N.Y. 612, 613, 10 N.Y. Crim. R. 182, 30 N.E. 1003 (N.Y. 1892) (jury properly heard confession as Inspector Byrnes of the New York Police Department testified that the confession was voluntary while defendant testified he confessed “under the influence of fear produced by threats”); *People v. White*, 176 N.Y. (14 Bendell) 331, 348-49, 68 N.E. 630 (N.Y. 1903) (court does not sanction deception in interrogation, but trial court properly directed issue of voluntariness to jury); *People v. Kennedy*, 54 N.E. 51, 13 E. H. Smith 346, 359 (N.Y. 1899); *People v. Rogers*, 192 N.Y. 331, 348 (N.Y. 1908); *People v. Randazzio*, 194 N.Y. 147, 156, 87 N.E. 112 (1909).

it if it found the statement was produced “under the influence of fear produced by threats.”¹⁷⁸

Even when the Court of Appeals recognized that there was uncontested evidence of police brutality in confessions, courts left the jury the task of evaluating whether the statement was produced by the physical force. In *People v. Trybus*, a detective admitted to illegally detaining a suspect in his office, grabbing him by the neck and shoving him into a radiator.¹⁷⁹ Affirming the trial court’s decision to admit the subsequent statement, the court held that it was for the jury, not the trial judge, to evaluate the voluntariness of the statement. While the court did find that “laying hands on [an unlawfully detained,] helpless man . . . deserve[d] the severest sanction,” exclusion of the confession was not the appropriate one.¹⁸⁰

The question is not . . . whether the detective struck defendant or held him illegally in custody. Neither of these facts, *per se*, makes the reception of the statements in evidence illegal as a matter of law, although they are properly considered by the jury in determining the voluntariness of the statements.¹⁸¹

The Court of Appeals was not, however, consistent in deferring to juries – it was, however, consistent in taking steps to ensure that the police would not lose the fruits of their interrogation. By the turn of the twentieth century, trial judges were allowed to resolve conflicts in testimony about the circumstances surrounding a confession, so long as they found in favor of the police. The Court of Appeals in 1900 affirmed a conviction in which a trial judge instructed a jury that the defendant’s confession was voluntary and must be considered, even though the facts of the case seemed to raise a question of fact. A man suspected of stealing from a church’s “poor box” and shooting the officer responding to the incident was brought into custody with “no marks of violence or rough treatment.”¹⁸² He was then taken back to the church to be identified by a witness. As officers took him through the street and back to the station, he was beaten by a crowd wielding sticks and canes, leaving him bruised and bloodied. He subsequently confessed to the theft and murder. The trial judge concluded, as a matter of law, that his confession was admissible, not even providing the jury an opportunity to consider whether the defendant was laboring under a fear that the officers who allowed him to be beaten would inflict more violence upon him or allow others to do so.¹⁸³

In cases around the turn of the century, the court frequently held out the theoretical possibility that if undisputed evidence demonstrated the involuntariness of a confession, the jury would not be permitted to hear it.¹⁸⁴ During this period, however, the

¹⁷⁸ Code of Crim. Pro. § 395 (1881). See also *People v. Kennedy*, 159 N.Y. 346, 361-62; *People v. Randozzio*, 194 N.Y. 159 (1909); *People v. Trybus*, 219 N.Y. 18, 22 (1916).

¹⁷⁹ 219 N.Y. 18, 21 (1916).

¹⁸⁰ *Id.* at 22

¹⁸¹ 219 N.Y. at 22.

¹⁸² *People v. Meyer*, 16 E.H. Smith 357, 359-60, 363-64, 56 N.E. 758 (N.Y. 1900).

¹⁸³ *Id.*

¹⁸⁴ See *People v. Cassidy*, 133 N.Y. 612, 613, 10 N.Y. Crim. R. 182, 30 N.E. 1003 (N.Y. 1892); *People v. White*, 176 N.Y. (14 Bendell) 331, 348-49, 68 N.E. 630 (N.Y. 1903); *People v. Kennedy*, 54 N.E.

court at least once recognized that there was no rule permitting a jury-out hearing on the circumstances surrounding a defendant's confession.¹⁸⁵

Even in those cases in which the officer's denials seemed patently unbelievable, the denial of torture was sufficient to create a conflict in the evidence. In *People v. Doran*, for instance, the defendant claimed that the police had beaten him into giving a confession, but his testimony was contradicted by a number of witnesses who claimed they neither witnessed nor rendered a beating or saw any signs that the defendant had been assaulted.¹⁸⁶ The evidence at trial also established, however, that the defendant had denied his guilt throughout prolonged interrogations but confessed after having been left alone with a police interrogator in a gymnasium for five minutes.¹⁸⁷ The interrogating officer, who denied beating the defendant, admitted donning a boxing glove during the brief encounter.¹⁸⁸ The Court of Appeals held that the question of whether the confession was "made under the influence of fear produced by threats" was a question for the jury.

Here was an issue of fact. Who was to decide it? The jury. They heard all the testimony, and the court left it to them to say, after a very full and complete charge, whether or not the confession was voluntarily made, and instructed them that if they concluded that it was not voluntary but had been obtained under the influence of fear produced by threats, they should throw it out of the case altogether and disregard it.¹⁸⁹

Judge Lehman, joined by Chief Judge Benjamin Cardozo in dissent, made the obvious observation that the confession followed shortly on the heels of the officer donning the glove.¹⁹⁰

The New York judiciary came to share the Progressives' faith in the police. In the mid-nineteenth century, it had reluctantly accepted a new arrest standard that gave officers authority to act on information learned.¹⁹¹ The courts had relaxed the application of the confessions rule over the early years of the new police force, emboldening officers to ignore the warnings magistrates had been required to provide suspects before interrogating them.¹⁹² As it became undeniable that police were methodically torturing confessions out of suspects, the Court of Appeals washed its hands of interrogations.¹⁹³

51, 13 E. H. Smith 346, 359 (N.Y. 1899); *People v. Rogers*, 192 N.Y. 331, 348 (N.Y. 1908); *People v. Randazzo*, 194 N.Y. 147, 156, 87 N.E. 112 (1909).

¹⁸⁵ *People v. Brasch*, 193 N.Y. 46, 54, 85 N.E. 809 (1908). *But see* *People v. White*, 176 N.Y. 331, 349 (N.Y. 1903) ("It is proper . . . to allow a preliminary examination by the defendant's counsel to test its competency before it is received.") *People v. Rogers*, 192 N.Y. 331, 345, 22 N.Y. Crim. R. 376, 85 N.E. 135 (N.Y. 1908) (a defendant was, however, permitted to have a judge inquire into the circumstances of a written confession before it was read to the jury); *People v. Fox*, 121 N.Y. 449, 453 (N.Y. 1890).

¹⁸⁶ 246 N.Y. 409, 421-22 (1927).

¹⁸⁷ *Id.* at 431.

¹⁸⁸ *Id.* at 423.

¹⁸⁹ *Id.* at 416.

¹⁹⁰ *Doran*, 246 N.Y. 409, 431 (1927).

¹⁹¹ *See* Oliver, *Reluctant Acceptance*, *supra* note 43.

¹⁹² *See* Oliver, *Magistrates' Examinations*, *supra* note 44.

¹⁹³ *See e.g.*, B. OGDEN CHISHOLM & HASTINGS H. HART, *METHODS OF OBTAINING CONFESSIONS AND INFORMATION FROM PERSON ACCUSED OF CRIME* (New York: Russell Sage Foundation 1921). Laurence Benner has described, "[b]y the Prohibition era, the privilege [against self-incrimination] had yielded to the perceived necessities of law enforcement to such a great extent that a confession was considered involuntary only if the pressure exerted was so great that it created a fair risk that the confession

The Progressives who advocated broad police power were under no delusion that law enforcement officers were perfect, but had faith in their perfectability. By eliminating the corrupting influence of politicians, Progressives believed the police department would possess the appropriate discretion to properly exercise its essentially unlimited powers against the criminal element. The Framing Era's goal of completely preventing ordinary police officers from exercising discretion had been replaced with the goals of eliminating corruption while absolutely empowering officers. The gloves had been taken off the officers. New York judges, legislators, police commissioners and mayors were willing to allow police not just the discretion to initiate investigations, but to inflict violence, either in an effort to solve crimes or simply to inflict pain upon the criminal element.

III. Judicially Supervised Modern Police (1921-present)

The broad and essentially unchecked investigatory powers conferred on police officers during the Progressive Era did not survive Prohibition. The modern notion was that police ought to be allowed to initiate and conduct investigations, but that those investigatory powers should be checked by an independent judiciary, emerged during Prohibition.¹⁹⁴ The Progressive Era's faith in the perfectability of police was undermined by rampant corruption and excesses in honest enforcement. Renewed fear of police combined with new investigative powers to produce rules of criminal procedure that are familiar to twenty-first century lawyers. While the premature end of Prohibition in New York staved off the growing movement for adoption of the exclusionary rule and restrictions on wiretapping, the state's rules of criminal procedure were modified during the 1920s to curb third-degree practices.¹⁹⁵

As bootleggers became racketeers, high-profile mob prosecutor Thomas Dewey began an aggressive campaign against organized crime's infiltration of labor unions.¹⁹⁶ His aggressive or indiscriminate investigative tactics, depending on one's perspective, raised the concerns of organized labor. The State Federation of Labor thus proposed two provisions to the New York State Constitutional Convention of 1938, one to require judicial authorization of wiretapping, the other to exclude illegally obtained evidence.¹⁹⁷ The acceptance of the first and, perhaps more significantly, the narrow defeat of the

was false." Laurence Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 159 (1988).

¹⁹⁴ See Leo, *supra* note 158, at 51 (contrasting nineteenth century police controlled by political machines with modern police controlled by an independent judiciary).

¹⁹⁵ Congress enacted the Communications Act in 1934 that neither addressed wiretapping on its face, nor was wiretapping discussed in the legislative history of the act. Communications Act of 1934, Pub. L. No. 416, § 605, 48 Stat. 1064. The Supreme Court interpreted this act, however, to require the exclusion of communications obtained through a wiretap, *United States v. Nardone*, 302 U.S. 379 (1937), and two years later, held that any derivative evidence discovered as a result of the wiretap must be excluded as well. *United States v. Nardone*, 307 U.S. 614 (1939). See Neal Katyal & Richard Caplan, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1023, 1035-46 (2008).

¹⁹⁶ James B. Jacobs and Ellen Peters, *Labor Racketeering: The Mafia and the Unions*, 30 CRIME & JUST. 229, 232-33 (2003).

¹⁹⁷ STATE OF NEW YORK, REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 578, 602 (1938); WILLIAM E. NELSON, *THE LEGAL REFORMATION: LAW, POLITICS AND IDEOLOGY IN NEW YORK 1920-1980*, at 125-27 (2001).

second revealed a public willingness to accept even the most controversial mechanisms on police that could not have been imagined in the Progressive Era. It was no longer political suicide to advocate substantial limits on police officers, or in the case of Dewey, prosecutors.

A. Rampant Corruption and Police Excesses Undermined Myth of Police Perfectability

The Progressive Era's willingness to confer extraordinary powers on police officers was based on a faith that the civil liberties of innocent persons was best protected by a police force, free of corruption, staffed with the most qualified applicants. Reforms improving internal accountability and reducing outside political influence were believed to be capable of improving the efficiency of the police department and directing its violent tendencies toward the criminal element alone. Corruption during Prohibition, however, proved intractable and the methods of honest enforcement too extreme to be tolerated. The focus therefore returned to a restriction on police powers. Frequent searches during Prohibition prompted calls for judicial supervision of police searches through the mechanism of the exclusionary rule. Wiretapping by Prohibition agents raised new concerns about this investigative method. The premature end of Prohibition enforcement in New York, however, tabled concerns about these law enforcement methods until the New York Constitutional Convention of 1938 created a forum for reconsidering the fundamental limits on government.

The early days of Prohibition brought out the worst in law enforcement. The Volstead Act, prohibiting the manufacture, transportation or sale of alcohol, went into effect January 17, 1920.¹⁹⁸ The meager force of 200 federal Prohibition agents would have been an insufficient force to rid the Empire State of liquor if they had indeed been Uncle Sam's finest.¹⁹⁹ Instead, these new officers were patronage appointees, poorly qualified and ill-trained for the task assigned them. In the performance of their duties, they were reckless and corrupt.²⁰⁰ Bars that they raided were frequently smashed up. Prohibition agents accepted bribes to allow bars to stay open, one agent even opened a speakeasy in Greenwich Village.²⁰¹ A federal grand jury in Brooklyn concluded that "[a]lmost without exception the agents are not men of the type of intelligence and character to be charged with this difficult and important duty."²⁰²

While the public had seen, and generally approved of, extraordinary increases in police discretion over the seven decades leading up to Prohibition, the public had not witnessed anything approximating the dragnet liquor searches that began in 1920. The

¹⁹⁸ National Prohibition Act, ch. 85, 41 Stat. 305 (Comp. Stat. Ann. 1923). The Volstead Act stated that it would take effect one year after the ratification of the Eighteenth Amendment, which occurred on January 16, 1919. Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 4 (2006) (observing that "[n]ational prohibition enforcement was understaffed, with agents who were underpaid and unprofessional.").

¹⁹⁹ *Id.* at 27; MICHAEL A. LERNER, DRY MANHATTAN: PROHIBITION IN NEW YORK CITY 71 (2007) (observing that in less than a year the supervisor of the New York office of the Bureau of Prohibition fired 47 of his 200 agents for incompetence).

²⁰⁰ *Id.* at 66-71; See MILLER, *supra* note 71, at 78 ("Once Prohibition descended upon the country, police corruption became much more extensive.").

²⁰¹ LERNER, *supra* note 199, at 70.

²⁰² *Id.* at 71.

Progressive Era's lack of police regulation had instilled a sense that there were few limits on officers. For the first few months of Prohibition there was little doubt that officers had the discretion to investigate potential violations of the new state and federal laws prohibiting alcohol possession. An Assistant United States Attorney handling Prohibition cases in New York City observed that

For a time after the Volstead act went into effect ... few persons, even among lawyers, conceived the idea of questioning any Federal Government agent's right to search for and seize contraband liquor as he felt inclined or as his suspicions directed. The agents themselves, and many of their superiors, felt secure in their right to do so as Government officials.²⁰³

As Prohibition continued, challenges to warrantless liquor searches became frequent. Defendants in federal courts began to move to dismiss prosecutions on the grounds that alcohol discovered in a warrantless search was inadmissible under the relatively new federal exclusionary rule, which prohibited the use of unconstitutionally obtained evidence.²⁰⁴ Search and seizure laws became something of an obsession for New Yorkers.²⁰⁵ Newspaper columns criticized and defended police practices, frequently making references to court decisions, sometimes including a citation to the volume and page of the reporter where the case could be found.²⁰⁶

For obvious reason, the New York Police Department wanted no part of Prohibition enforcement. The department had done much to rid itself of politically connected, but wholly unqualified, officers.²⁰⁷ Mere association with the Prohibition agents would be damaging to the department's reputation. Additionally, enforcing the Volstead Act would divert resources from more serious crimes. Under political pressure from the Anti-Saloon League, the NYPD agreed to assist federal agents by sharing information about bootlegging and enforcing obvious violations of the law.²⁰⁸ This agreement that effectively kept the city's police on sidelines would not last. With little dent in the city's alcohol consumption, the Anti-Saloon League successfully lobbied the legislature to pass a state version of the Volstead Act in 1921.²⁰⁹ More important than the criminal penalty under the new Mullen-Gage Act was Governor Nathan Miller's very public instruction to New York Police Commissioner Richard Enright to enforce the law, noting ominously that the police department, "with the right head would prevent what is now a public disgrace in the city of New York."²¹⁰

²⁰³ Victor House, *Search and Seizure Limits Under the Prohibition Act*, NEW YORK TIMES, Feb. 11, 1923 at X14.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *See, e.g., Unreasonable Searches and Seizures*, NEW YORK TIMES, Jan. 19, 1923, at 16.

²⁰⁷ *See* Levine, *supra* note 94, at 102-384 (describing attempts by police to establish bureaucracy independent from political control).

²⁰⁸ LERNER, *supra* note 199, at 76-77.

²⁰⁹ 1921 N.Y. Laws 155.

²¹⁰ LERNER, *supra* note 199, at 77.

Recognizing his very clear marching orders, Commissioner Enright began aggressively enforcing the law.²¹¹ Within a week, 400 people had been arrested for Mullen-Gage violations and over a million dollars worth of liquor had been seized.²¹² Mayor Hylan's office was flooded with complaints about police raids and improper searches, causing the mayor's previously well-known support for Prohibition to falter. The corporation counsel's office issued an opinion stating that the city would not defend officers accused of engaging in illegal searches in the enforcement of Mullen-Gage.²¹³

Mullen-Gage created the same public relations nightmare for the New York Police Department that the Volstead Act had created for federal Prohibition agents. Police corruption, bad during late-nineteenth and early-twentieth century, grew considerably worse as Prohibition greatly enhanced opportunities for graft.²¹⁴ City Magistrate Joseph Corrigan concluded in 1923 that the effort to enforce Prohibition had "debauched the police force of this city and caused an orgy of graft, perjury and corruption."²¹⁵ Of course it was not just the enforcement practices that were objectionable, the goal of ridding the City of liquor was also despised. Commissioner Enright concluded that the law had caused substantial damage to the reputation of the police and that "if a serious attempt were made to enforce [Prohibition], the effect on public sentiment would be to everlastingly damn those responsible for the attempt."²¹⁶

The honest enforcement of the law was as problematic as police corruption. Trial judges became so outraged by searches for alcohol that they refused to allow the discovery of the alcohol to be used against defendants – and, in many cases, they ordered the return of the seized alcohol.²¹⁷ One court observed that efforts to exclude the fruits of warrantless searches and seizures were being "earnestly prosecuted in almost every proceeding relating to intoxicants which comes before the courts of original jurisdiction."²¹⁸ These decisions were issued despite controlling precedent from the state's highest court holding relevant evidence admissible regardless of how it was

²¹¹ *Id.* at 77-78.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ See MICHAEL WOODIWISS, CRIMES, CRUSADES AND CORRUPTION: PROHIBITIONS IN THE UNITED STATES, 1900-1987, at 10-16 (1988).

²¹⁵ LERNER, *supra* note 199, at 83. Corrigan was certainly not a bleeding heart. He had opposed Mayor Gaynor's anti-clubbing initiatives. JOHNSON, *supra* note 78, at 103.

²¹⁶ LERNER, *supra* note 199, at 80.

²¹⁷ Pitler, *supra* note 157, at 51. Most of the cases involved liquor cases and the exclusion of evidence obtained by a flawed warrant, a mechanism that had survived since the mid-nineteenth century, created when state prohibitory laws first allowed searches for liquor. This early version of the exclusionary rule had been cabined to excluding the fruits of improper search warrants for liquor and was oddly held, in the nineteenth century, not to require the exclusion of the fruits of an improper warrantless search. *State v. McCann*, 61 Me. 116 (1873). New York cases during national prohibition began to expand the remedy to include the fruits of all illegal searches, though obviously in the early 1920s, liquor cases were the most frequent. See *People v. Jakira*, 118 Misc. 303, 193 N.Y.S. 306 (Gen. Sessions N.Y. County 1922) (prosecution for carrying unlicensed weapon dismissed and pistol returned after warrantless seizure); *People v. Kinney*, 185 N.Y.S. 645 (Supreme Court, Erie County 1920) (revolver returned when officer acted under a void search warrant for opium and found a weapon).

²¹⁸ *State v. One Hudson Cabriolet Automobile*, 116 Misc. 399, 401, 190 N.Y.S. 481, 482 (Saratoga County Ct. 1921). See also *People v. 728 Bottles of Intoxicating Liquors*, 116 Misc. 252, 254, 190 N.Y.S. 477, 479 (Saratoga County 1921) (observing that powers of officers to search for liquor without a warrant is being hotly debated in New York County).

obtained.²¹⁹ New York City Magistrate Corrigan observed in 1922 that, “[r]aid after raid is being brought into these courts despite the fact that magistrates have been declaring them illegal. The police are running roughshod over the rights of the people.”²²⁰ Popular objection to police tactics was as acute as the judiciary’s. Grand juries refused to indict Mullen-Gage violators in cases involving objectionable searches.²²¹

In September 1921, the police commissioner was subpoenaed to appear before a Bronx Grand Jury to answer charges that his officers had been engaging in unlawful searches.²²² Grand juries in New York City had a history of addressing social issues well beyond the investigation of individual crimes.²²³ The investigation began by investigating what conceivably could have been a series of crimes. The grand jurors questioned the Commissioner about the legality of such searches in light of an opinion from New York City’s Corporation Counsel John P. O’Brien, concluding officers needed a warrant to conduct searches for liquor.²²⁴ The Commissioner claimed that warrantless searches were indispensably necessary to enforce the state’s prohibitory law that Governor Miller had instructed the Commissioner, and all other law enforcement officials in New York, to enforce. In his speech at a dinner honoring the Chairman of the State Motion Picture Censorship Commission, Miller responded that his order to enforce federal and state law did not include an implicit willingness to tolerate warrantless searches of homes.²²⁵ He accused the police commissioner of attempting “to enforce an obnoxious law in such a manner to make it more obnoxious.”²²⁶

The grand jurors sided with the Commissioner and his men but against the searches they had conducted. They concluded that these searches were necessary to enforce Mullen-Gage, but they pled for the repeal of the law, as it apparently required searches that were otherwise illegal and, in the minds of the grand jurors, not justified by the goal.²²⁷ These grand jurors were certainly not alone in their objection to the state law, and within two years the state’s prohibitory law was no more. New Yorkers opposed to Prohibition enforcement had argued that the state should not be assisting in the federal effort, and that the state should adopt the federal exclusionary rule that excluded the fruits of illegally obtained evidence.²²⁸ In a number of state courts – and one state legislature – this rule was adopted.²²⁹ New Yorkers would later give very serious consideration to the exclusionary rule; they would first go to the polls to elect politicians willing to repeal Mullen-Gage and refuse to assist in the enforcement of the Volstead Act.

²¹⁹ *People v. Adams*, 176 N.Y. 351 (1903).

²²⁰ JOHNSON, *supra* note 78, at 116.

²²¹ LERNER, *supra* note 199, at 89.

²²² *Grand Jury Calls Enright to Explain*, *New York Times*, Sept. 10, 1921, at 4.

²²³ *See Oliver, Material Witness Detention*, *supra* note 45, at 755, 779. *See generally* RICHARD D. YOUNGER, *THE PEOPLE’S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941* (1963).

²²⁴ *Governor to Blame, Enright Tells Jury*, *New York Times*, Sept. 17, 1921, at 19. LERNER, *supra* note 199, at 78-79.

²²⁵ *Governor Attacks Enright for Method of Dry Enforcement*, *NEW YORK TIMES*, Sept. 30, 1921, at 1.

²²⁶ *Id.*

²²⁷ *Bronx Grand Jury Urges Repeal of State Dry Law*, *NEW YORK TIMES*, Oct. 15, 1921, at 1.

²²⁸ *Single Jeopardy*, *NEW YORK TIMES*, May 5, 1925 at 20.

²²⁹ *See* discussion at note 239 *infra* and accompanying text.

Al Smith's election as governor in 1923 was the beginning of the end of Prohibition enforcement in New York.²³⁰ In signing the repeal of Mullen-Gage, he observed that New York had never had an obligation to assist in the enforcement of national Prohibition, that New York's efforts at assistance had failed, and that the duty of enforcement now rested exclusively with the federal government, where he said it had belonged all along.²³¹ Nathan Miller had, of course, threatened Commissioner Enright that his job might depend on his enforcement of Mullen-Gage. Al Smith held a very different view of the appropriate role of the duty of local authorities and a very different view of Prohibition itself. Smith's anti-Prohibition plank in the presidential campaign of 1928 would make him a political icon for generations to come.²³² No Commissioner of Police could have believed that he was required to assist the federal government in enforcing the Volstead Act to stay in the good graces of Governor Al Smith.²³³

Even though the federal prohibitory law remained on the books, repealing the state's prohibitory law had a dramatic effect on enforcement. If a prosecution was to occur, it had to be in federal court. Federal courts in New York (and certainly elsewhere) were flooded with Prohibition cases. Even before the repeal of Mullen-Gage, United States District Judge Learned Hand openly opposed Prohibition as being responsible for flooding the system with defendants, transforming federal courts into low-level criminal courts.²³⁴ Without assistance from state officers, federal courts had more cases than they could handle. Frustration with the enforcement of the federal law led the New York District Attorney's Association to call, unsuccessfully, for the enactment of another state prohibitory law.²³⁵

Even after the repeal of Mullen-Gage, New York City Mayor Hylan directed his police commissioner to engage in an aggressive campaign against the forbidden alcohol in cooperation with the Prohibition bureau.²³⁶ New Yorkers again went to the polls in 1925 to get the City out of the business of Prohibition enforcement. The man they elected, Jimmy Walker, who became known as the "Night Club Mayor" as he was known to frequent the very types of Manhattan establishments Prohibition agents spent the mid-1920s padlocking.²³⁷ With the NYPD no longer participating in the federal effort, and no state or local laws forbidding alcohol, the immediate concern that prompted proposals for

²³⁰ ROBERT A. SLAYTON, *EMPIRE STATESMAN: THE RISE AND REDEMPTION OF AL SMITH* 125-39 (2001).

²³¹ LERNER, *supra* note 199, at 94. Post, *supra* note 198, at 33.

²³² Every year, the Al Smith Dinner pays tribute to the former New York Governor and is forum for some of the best comedy (intentionally) performed by politicians. In 2008, both presidential candidates spoke at the dinner. Barack Obama quipped that while he never knew Smith, "from everything Senator McCain has told me, the two of them had a great time together before Prohibition." See Prime Buzz, <http://primebuzz.kcstar.com/?q=node/15091> (last visited Aug. 12, 2009).

²³³ See LERNER, *supra* note 199, at 248 (observing that Prohibition officials in the final months of the Coolidge Administration staged raids in New York City in 1928 to embarrass Al Smith in his presidential contest against Herbert Hoover).

²³⁴ *Id.* at 86.

²³⁵ See *Ask Smith to Back New State 'Dry' Bill*, Mar. 1, 1924, at 15 (prosecutors asked Gov. Smith to support a new prohibitory law because Prohibition was being flouted in part because federal courts were unable to handle all these cases).

²³⁶ See LERNER, *supra* note 199, at 164.

²³⁷ See HERBERT MITGANG, *ONCE UPON A TIME IN NEW YORK: JIMMY WALKER, FRANKLIN ROOSEVELT, AND THE LAST GREAT BATTLE OF THE JAZZ AGE* 31 (2000) (the United States Attorney for the Southern District of New York quipped that Walker "would make a first-class inspector of nightclubs.").

adoption of the exclusionary rule no longer existed.²³⁸ Prohibition in New York had prompted concerns about unrestricted police power that would linger long after Prohibition practically ended with the election of Jimmy Walker – and even after it formally ended with the repeal of the Eighteenth Amendment.

Prohibition in New York raised substantial concerns about police powers, but with the end of Prohibition enforcement in New York, the specific uses of those powers that had concerned New Yorkers were no longer an issue. In many states including New York, there were calls for judicial supervision of police searches as Prohibition dramatically increased the number of searches police were conducting.²³⁹ The rule obviously gave courts supervision over the searches police were conducting. Even though the Supreme Court has recognized an early version of the exclusionary rule since 1886, no state, including New York, gave the rule any consideration until Prohibition.²⁴⁰

²³⁸ There can be no doubt that the lawful searches and seizures that occurred during Prohibition played a substantial role in Prohibition's fall in New York. One letter to the editor in the *New York Times* urged readers to vote for Franklin D. Roosevelt in 1928, as the "election of Attorney General Ottinger as Governor of New York would mean the enactment of a State enforcement prohibition law similar to the Mullen-Gage law." Such a law, the writer offered, was objectionable because it "would encourage unlawful searches and seizures by State and municipal police" as New York courts "allow property unlawfully taken to be used as evidence." Keron F. Dwyer, *State Dry Enforcement*, *NEW YORK TIMES*, Oct. 29, 1928, at 22.

²³⁹ See Note, *Judicial Control of Search and Seizure*, 58 *YALE L. J.* 144, 150 (1948) ("With the advent of prohibition . . . the illegal search cases came thick and fast, the [exclusionary rule] grew and developed limitations and nearly half the states adopted it in one form or another."); Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 *TEX. L. REV.* 191, 195-198 (1981) (describing legislative adoption of exclusionary rule in Texas in 1925).

Zechariah Chafee in 1922 attributed the adoption of the exclusionary rule in the 1920s as "the effect of Supreme Court decisions upon state court . . . beginning to be felt." Zechariah Chafee, *The Progress of the Law, 1919-1922 Evidence*, 35 *HARV. L. REV.* 673, 696 (1922). Chafee did not consider that an objection to Prohibition, or a perceived need to get control over its enforcement, rather than pressure to conform state and federal doctrine explains the state decisions. This is particularly remarkable given that each of the state cases Chafee cited involved liquor searches. *Id.* at 696 n.251-52. Surely state courts did not overturn their decisions adopting the exclusionary rule with the repeal of federal and state prohibitory laws, so the goal of regulating police transcended liquor enforcement. See Allen, *supra* note 1 at 250 (arguing that exclusionary rule was not merely a Prohibition-era remedy whose usefulness expired with the Twenty First Amendment). But the timing of the adoption of the rule in several states makes the role Prohibition played in awakening state courts to the need to regulate police searches difficult to deny. Certainly there were a few states between Prohibition and *Mapp* that adopted the exclusionary rule. See Roger J. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 *DUKE L. J.* 319, 321-22 (Chief Justice of California Supreme Court explaining his decision to reverse his 1942 decision rejecting the exclusionary rule). The overwhelming majority of jurisdictions to adopt the exclusionary rule did so, however, during Prohibition.

Chafee was not the last to pay little attention to the context in which state courts adopted the exclusionary rule. Even though acceptance of the rule in the states was one of the Supreme Court's reasons for requiring all states to exclude unlawfully obtained physical evidence in *Mapp v. Ohio*, 367 U.S. 643, 645-46 (1961), the development of the exclusionary rule in the states has largely been ignored. Scholars have spent a great deal of time examining the federal development of the exclusionary rule in the late-nineteenth and early twentieth century.

²⁴⁰ Thomas Dewey suggested that the federal government was able to adopt this rule because the federal government was not responsible for the overwhelming bulk of law enforcement.

It is argued by the people who want this amendment adopted that in the Federal courts evidence obtained irregularly can not be used in court but must be given

Trial and intermediate courts in New York began to exclude illegally obtained evidence in the early 1920s, notwithstanding controlling authority from the state's highest court rejecting the exclusionary rule. In 1904, the Court of Appeals held in *People v. Adams* that evidence was admissible no matter how it was obtained, rejecting the rule that was beginning to be developed in federal and state courts.²⁴¹ The United States Supreme Court in *Boyd v. United States* in 1886 forbid the government to use records it had subpoenaed demonstrating that an importer had not paid duties on goods, holding that the forced production of the records was an unreasonable seizure.²⁴² In several state courts, including New York, courts in the mid-nineteenth century began excluding alcohol discovered with defective warrants, but had not expanded the principle to unlawful warrantless searches for items other than alcohol.²⁴³ As police searches grew much more frequent, and search and seizure practices came under increased scrutiny, New York trial and appellate courts began to reject the conclusions of the *Adams* case.²⁴⁴

Complaints seeking warrants in liquor cases came to be treated like indictments and were subject to the same sort of remedy for defects.²⁴⁵ When a complaint (or

back to the criminal. They say if this law is good enough for the Federal courts, it is good enough for New York State. They skip lightly over the fact that the duty to protect people from all of the ordinary crimes rests on the State, not the Federal government. The Federal government has no general police powers, and therefore has neither the duty nor the power to protect our people from murder, arson, or any of the other common crimes that occur on the streets of every community in the State. That duty is placed squarely on the police and the prosecutors of the State, whose hands these people wish to tie.

1 State of New York, Revised Record of the Constitutional Convention 371 (1938).

In a very real sense, the federal exclusionary rule had no effect on the security of average Americans from improper police intrusions. In 1908, the organization that became the Federal Bureau of Investigation had only 34 agents, but grew to 579 by 1920. ATHAN G. THEOHARIS, TONY G. POVEDA, SUSAN ROSENFELD & GID POWERS, *THE FBI: A COMPREHENSIVE REFERENCE GUIDE* 6 (1999). This number might actually be slightly higher than one would expect, but obviously this number was insufficient to engage in any substantial work in the states, and the bureau was not handling ordinary street crimes.

²⁴¹ *People v. Adams*, 176 N.Y. 351 (1903).

²⁴² 116 U.S. 616, 633 (1886).

²⁴³ See *State v. Twenty-Five Packages of Liquor*, 38 Vt. 387 (1866) (recognizing that forfeiture action could be quashed for failure to have a sufficiently particular search warrant); *Fisher v. McGirr*, 1 Gray 1 (Mass. 1854) (action for value of seized liquor permitted on the basis of an insufficient search warrant).

²⁴⁴ *Liquor Searches Limited By Court*, New York Times, Sept. 17, 1922, at 44.

²⁴⁵ See *People v. Toynbee*, 2 Parker Crim. Rep. 329, 11 How. Pr. 289 (N.Y. Gen. Term 1855) (“The complaint is a substitute for an indictment . . . and requires at least as much particularity. . .”). This practice was certainly not limited to New York. It seems to have originated in Maine, where the nation's first state-wide prohibitory law was passed in 1846 and the nation's first warrant to search for liquor was authorized by the legislature of 1851. *State v. Staples*, 37 Me. 228 (1854) (dismissing conviction for violating prohibitory law for defective search warrant); *State v. Spirituous Liquors*, 39 Me. 262 (1855) (returning liquor seized under defective search warrant); BENJAMIN KINGSBURY, JR., *THE JUSTICE OF THE PEACE: DESIGNED TO BE A GUIDE TO JUSTICES OF THE PEACE FOR THE STATE OF MAINE* 298 (Portland, Sanborn & Carter 1859) (including form for search warrant in liquor cases that required affiant to state the basis of his suspicion). Maine also first announced that this principle would not be extended to require exclusion of evidence based on a warrantless search. *State v. McCann*, 61 Me. 116 (1873). See also FRANK L. BYRNE, *PROPHET OF PROHIBITION: NEAL DOW AND HIS CRUSADE* 37-46 (1969) (describing passage of prohibitory laws in Maine).

affidavit in support of a search warrant for liquor) was held to be invalid, courts dismissed the actions that flowed from them.²⁴⁶ This effectively created a version of the exclusionary rule for liquor cases initiated with a search warrant, but oddly not for liquor cases initiated by warrantless searches, no matter how egregious the officer's action. As Prohibition brought about questionable searches with increased frequency, trial and intermediate appellate courts in New York began to expand the remedy beyond liquor and warrant cases.²⁴⁷ The lower courts in New York joined the trend of courts in other states to exclude illegally obtained evidence.

By the time the New York Court of Appeals reconsidered the exclusionary rule in *People v. Defore* in 1926, it was apparent that a state-version of the exclusionary rule would have no deterrent effect on the misconduct Prohibition produced. The repeal of the Mullen-Gage Law had ensured that there could be no Prohibition cases in state court. Then-Judge Cardozo's famous opinion observed that if the rule was adopted "the criminal [would] go free because the constable blundered."²⁴⁸ The very term "constable" evoked images of a long-outdated model of police, not twentieth century officers whose powers far exceeded their eighteenth century counterparts.²⁴⁹ The rampant liquor searches by twentieth-century police were more aggressive than anything eighteenth century Americans would have expected from constables.²⁵⁰ The end of state enforcement in New York tabled the immediate cause that led New Yorkers to fear the

²⁴⁶ See *In re Huff*, 136 A.D. 120 N.Y.S. 1070 (4th Dept. 1910) (recognizing that action against forfeited liquor can be dismissed and the liquor returned if the search warrant for its discovery is invalid); *Foley v. One Hundred & Eighty Bottles of Liquor*, 204 N.Y. 623 (1912) (affirming denial of motion to dismiss on this ground). The seizures in each of those cases were conducted under a 1908 law, which provided for the forfeiture of liquor kept in violation of the law. The Appellate Division of the New York Supreme Court recognized that warrants to search for liquor were consistent with the Fourth Amendment of the United States Constitution. *Clement v. Two Barrels of Whisky and Divers Other Liquors*, 136 A.D. 291, 120 N.Y.S. 1044 (1910). This is yet another example of state courts concluding that states are required to comply with the federal Bill of Rights. See discussion at *supra* note 37.

²⁴⁷ See *People v. Jakira*, 118 Misc. 303, 193 N.Y.S. 306 (1922) (revolver discovered in warrantless search).

²⁴⁸ *People v. Defore*, 242 N.Y. 13, 21 (1926).

²⁴⁹ Two of the best writers ever to sit on the United States Supreme Court poetically described the role of police to justify the rules of criminal procedure they were announcing. Robert Jackson, in announcing a decision requiring officers to obtain a warrant before searching, described officers in 1948 as "engage[ing] in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948). By contrast, Cardozo seemed to ignore the new role, and new potential for abuse, police officers presented in early-twentieth century society. Richard Posner regarded Cardozo's use of the "slightly archaic" term constable to be "inspired" as it made the sentence more memorable and, by summoning up images of officers from a Gilbert and Sullivan play, made their abuses of power "seem trivial, almost comical." RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 56 (1993). Police abuses in the 1920s were, however, neither trivial nor comical. Cardozo's own court was turning a blind eye to tortured confessions during this era and the threat of rampant search and seizure abuses in New York had only been recently abated by the repeal of the Mullen-Gage Act.

²⁵⁰ See *Amendment and Constitution*, *New York Times*, Aug. 20, 1921, at 5 (observing "interesting official habit of searching without warrant suitcases, automobiles and hip pockets"); *Unreasonable Searches and Seizures*, *New York Times*, Jan. 19, 1923, at 16 ("Some may suspect that an eighteenth century bailiff was more tender to the constitutional rights of the individual than the present-day detective, and that the eighteenth century individual had more constitutional rights and was safer in their enjoyment than his descendants.").

new aggressiveness of police.²⁵¹ The potential for police abuse that Prohibition had created would give the exclusionary rule remarkable popular traction elsewhere, but New Yorkers had opted for a more direct remedy. They had gone to the polls and gotten New York out of the business of enforcing Prohibition.

Claiming, quite correctly, that the lack of state legislation on the issue allowed federal law to be flouted, the New York District Attorney's Association insisted on the reinstatement of a state prohibitory law. In some ways, however, lack of state Prohibition enforcement turned out to be a blessing in disguise for New York prosecutors. After Prohibition, police excesses in search and seizure led many state courts to adopt the decades-old rule in federal court preventing the prosecution from using illegally obtained evidence.²⁵² The New York Court of Appeals' rejection of the exclusionary rule had preceded Prohibition – and a number of states were recognizing the need for judicial control over police searches.²⁵³ No state court had embraced the exclusionary rule prior to Prohibition and within a couple of years of the passage of the Volstead Act, a number of state courts adopted the rule.²⁵⁴ Before the repeal of Mullen-Gage, a number of trial

²⁵¹ See Keron L. Dwyer, *State Dry Enforcement*, NEW YORK TIMES, Oct. 29, 1928, at 22 (arguing against passage of new state prohibitory law because of fear of unreasonable searches and seizures that would follow). Pitler observed that “Between 1923 and 1937, there was little New York search and seizure jurisprudence. In contrast, because of the exclusionary rule, the federal courts were a fount of considerable search and seizure doctrine.” Pitler, *supra* note 157, at 55. This is of course explained by the repeal of Mullen-Gage in 1923. New York trial and appellate courts were developing search and seizure law between 1921 and 1923, as courts for the enforcement of Prohibition made New York courts, as it made the courts of other states, reconsider the exclusionary rule. *Id.*

One of earliest critics of federal efforts to enforce Prohibition was Senator A. Owsley Stanley of Kentucky who introduced a proposal to specifically require warrants for all searches by officers. Stanley used the Cardozo description of officers as ‘constables,’ but unlike Cardozo, Stanley used the description to justify greater judicial oversight over the officers. He argued that “[i]n all the history of American and English jurisprudence no constable was ever given any discretion except to arrest for a misdemeanor committed in his presence or to apprehend of felon.” A. Owsley Stanley, *Search and Seizure: Senator Stanley Attacks Constitutionality of New Prohibition Act*, NEW YORK TIMES, Jan. 8, 1922, at 88. Constables, he argued, “are not chosen because of their discretion, but because of their vigor and fearlessness.” *Id.* Notwithstanding Stanley’s vigorous advocacy, the Volstead Act, however, never required officers to search, unless the search was of a home. See D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 267 (2006) (offering unique treatment of the home under the Volstead Act as an example of the unique legal status of the home).

²⁵² See Francis A. Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 250 (1961) (describing adoption of exclusionary rule, largely by state courts, during Prohibition); Dawson, *supra* note 239, (describing adoption of exclusionary rule by Texas Legislature in 1925). Most accounts of the history of the exclusionary rule look exclusively at federal court decisions and, more specifically, at decisions of the United States Supreme Court. See e.g., Luke M. Milligan, *The Source-Centric Framework to the Exclusionary Rule*, 28 CARDOZO L. REV. 2739 (2007) (looking at Justice Holmes’ opinion in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) to explain modern exclusionary rule); Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 263-67 (1998) (describing development of the exclusionary rule).

²⁵³ Robert Pitler suggests that there was nothing new in Judge Cardozo’s famous *Defore* decision. *Defore* was, however, far from a foregone conclusion given the adoption of the exclusionary rule in other states. Pitler, *supra* note 157, at 52-54.

²⁵⁴ See discussion at note 239 *supra*.

and intermediate appellate courts in New York had excluded the fruits of unlawful searches.²⁵⁵

Electronic, as well as physical searches became a national issue during Prohibition. New Yorkers alone had been confronted with a wiretapping controversy prior to Prohibition and had more or less accepted the police assurance that the professionalism, expertise and experience of officers ensured that the wires of innocent persons would not be tapped.²⁵⁶ The New York Police Department was not receiving this sort of deference in the wake of Prohibition, but wiretapping by the New York Police Department during Prohibition did not excite popular passions. If the department was using this device to detect bootleggers, it was quiet about it. The wiretap controversy of 1916 revealed that this evidence was used only indirectly, so the method may have been used to obtain evidence in Mullen-Gage cases, but, if so, no one was the wiser.

The federal government was not nearly so quiet about its use of wiretapping, when a group of rogue officers violated Department of Justice prohibitions on wiretapping and recorded the telephone conversations of suspected bootlegger Roy Olmstead.²⁵⁷ Federal prosecutors in Seattle introduced 775 pages of transcripts providing verbatim transcriptions of five months of his telephone conversations.²⁵⁸ *Olmstead* was the first major federal case involving wiretapping,²⁵⁹ and when the Supreme Court announced the practice to be beyond Fourth Amendment protection, respect for the law enforcement officers who would conduct the tapping could not have been much lower.²⁶⁰

Wiretapping during Prohibition became an issue in New York with the Supreme Court's 1928 decision in *Olmstead v. United States*, which concluded that the federal Constitution imposed no limits on the interception of telephone calls.²⁶¹ With the State of New York, as a practical matter, not involved in Prohibition enforcement, there was no immediate motivation to press for state limits on the practice. The efforts to limit wiretapping that occurred in the wake of *Olmstead* were quite logically directed at

²⁵⁵ Pitler, *supra* note 157, at 12-21. See also LERNER, *supra* note 21 at 89. When he was a judge, William Gaynor had refused to convict defendants whenever police misconduct had been involved in the case. STEINBERG, *supra* note 82, at 68-70. The United States Supreme Court, in modern times has rejected excluding evidence based on even the egregious conduct of officers if the circumstances satisfy one of the exceptions to the exclusionary rule. See *United States v. Payner*, 447 U.S. 727 (1980) (FBI enlisted assistance of private female detective who lured banker from the Bahamas to her apartment in Miami for a weekend rendez-vous, allowing agents to enter and copy his customers records while the couple was at dinner).

²⁵⁶ See more full discussion at Oliver, *Wiretapping*, *supra* note 46.

²⁵⁷ See also Orin Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 844 (2004).

²⁵⁸ *United States v. Olmstead*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

²⁵⁹ Kerr, *supra* note 257, at 843.

²⁶⁰ In 1929, not long after being elected President, President Herbert Hoover appointed the Wickersham Commission to explore the underlying causes of illegal activity and suggest an effective government reaction. It was assumed that the focus would be on Prohibition. The Commission, however, considered a host of police tactics that had no direct relation to Prohibition. See Stuntz, *Substantive Origins*, *supra* note 81, at 435 n.180. See also JAMES D. CALDER, *THE ORIGINS AND DEVELOPMENT OF FEDERAL CRIME CONTROL POLICY: HERBERT HOOVER'S INITIATIVES 77-102* (1993) (describing range of topics addressed by Wickersham Commission well beyond the "the most contentious issue addressed by the commission").

²⁶¹ It was not until the 1967 case of *Katz v. United States* that the Supreme Court identified a Fourth Amendment reasonable expectation of privacy in telephone calls. O'Neil, *supra* note 72, at 12.

Congress rather than the state legislature as federal agents alone were eavesdropping to discover bootlegging.

Several members of Congress, including the very outspoken Prohibition opponent Fiorella LaGuardia, narrowly lost an effort to forbid wiretapping as a condition of approving the budget for Prohibition enforcement.²⁶² The *Olmstead* decision was condemned in the New York press.²⁶³ For as much as wiretapping had become a controversial (or simply despised) practice in the wake of *Olmstead*, there was no immediate need for a modification of state law. New York officials were not engaged in physical or electronic searches for liquor, the most hated goal of the snooping.

Prohibition had changed the wiretapping issue substantially. The federal government's defense of wiretapping was not nearly as bold as New York Police Commissioner Arthur Woods' defense of the practice had been in 1916.²⁶⁴ Far from defending the legality of wiretapping, J. Edgar Hoover assured the public that the FBI was not engaging in wiretapping – the Prohibition Bureau alone justified use of this tactic.²⁶⁵ New Yorkers were nevertheless outraged by the use of federal wiretapping, perhaps especially because it was used to discover liquor trafficking, and directed their reform efforts at the federal government that admitted to tapping for this purpose.

Congressman Fiorello LaGuardia was among the chief critics of this use of wiretapping, unsuccessfully attempting in 1931 to prevent the Prohibition Bureau from using the practice as a condition of reauthorizing its budget.²⁶⁶ Quite logically, there was no immediate effort to impose a limit on state or city officials' use of wiretapping in the wake of *Olmstead*. The Prohibition Bureau had sparked the public concern and the immediate efforts to limit wiretapping were therefore directed at the Bureau. The concern about the indiscriminate use of this practice that Prohibition agents had demonstrated would, however, linger. As Robert Post has described, the decision in *Olmstead* “raised issues of law enforcement that were of general applicability” even though “at the federal level the use wiretapping was associated almost exclusively with the enforcement of Prohibition.”²⁶⁷ When the New York Constitutional Convention met in 1938, wiretapping, then used by New York officials to investigate organized crime's infiltration into labor unions, would be subjected to limits.²⁶⁸

B. New York Judiciary Restored Limits on Interrogations

The end of Prohibition enforcement did not curb efforts to limit third-degree tactics. The end of Prohibition enforcement did not reinstate the public's faith in the police, it merely stalled concerns about investigatory tactics that were used primarily to

²⁶² The effort to prevent wiretapping in Prohibition cases as part of the Prohibition Department's budget failed to pass in Congress in 1931, but succeeded in 1933. See Katyal & Caplan, *supra* note 195, at 1035 (citing 74 Cong. Rec. 2901, 2906 (1931); Brief for United States at 27, *Nardone v. United States*, 302 U.S. 379 (1937) (No. 190)).

²⁶³ See *Government Lawbreaking*, NEW YORK TIMES, June 6, 1928, at 24.

²⁶⁴ NEW YORK STATE LEGISLATURE, JOINT COMMITTEE ON INVESTIGATION OF PUBLIC SERVICE COMMISSIONS: WIRETAPPING IN NEW YORK CITY 109-10 (photo reprint Arno Press 1974) (1916).

²⁶⁵ Katyal & Caplan, *supra* note 195, at 1036.

²⁶⁶ See Yale Kamisar, *Public Safety v. Individual Liberties: Some “Facts” and “Theories,”* 53 J. CRIM. L. CRIMINOLOGY AND POLICE SCI. 171, 176 (1962); 74 CONG. REC. 2903 (1931) (LaGuardia objecting to wiretapping by Prohibition Bureau in appropriations hearing).

²⁶⁷ Post, *supra* note 198, at 141-42.

²⁶⁸ See discussion at *infra* note 354-359 and accompanying text.

investigate liquor violations. Third-degree practices, however, were seldom used, or necessary, in bootlegging cases. Physical evidence would have been sufficient in many cases and officers were far more likely to extort bribes than confessions out of bootleggers. The end of Prohibition therefore did nothing to abate concerns about the interrogation practices that had become the subject of intense criticism during Prohibition.

Rough interrogation practices had been permitted, even encouraged, by New York courts for decades. It is hardly surprising that third-degree tactics emerged during the Progressive Era. Officers were encouraged to deal violently with suspected criminals on the street, even when violence was unnecessary to apprehend a suspect or protect the officer. Third-degree tactics at least held out the prospect of a direct utilitarian benefit – a confession, maybe even an accurate one.²⁶⁹ Allowing this type of violence required either tremendous callousness or extraordinary faith that police were very rarely, if ever, torturing innocent people. Continued callousness in the face of increasing public concern about third-degree tactics, if not an actual rise in the number of tortured confessions, would have undermined public faith in the courts. And faith in the ability of law enforcement officers simply could not be sustained during Prohibition.²⁷⁰

Juries in the 1920s began acquitting suspects who appeared to have been the victims of third-degree tactics, just as they acquitted defendants in liquor cases who had suffered unreasonable searches. The media of the time helped to make potential jurors sensitive to an issue that they, like judges of an earlier era, could well have been willing to turn a blind eye. Newspapers, books and even films of the late 1920s and early 1930s frequently detailed the horrors of police interrogation.²⁷¹ Public attention to the issue meant that juries, already sensitive to the issue in the early 1920s, placed more pressure on the New York Police Department to refrain from third-degree tactics than one might intuit. Acquittals became so frequent that Magistrate Joseph Corrigan, who had opposed Mayor Gaynor's anti-clubbing effort, ordered a grand jury investigation into interrogation methods.²⁷² Prohibition had not caused him to go soft, rather Prohibition demonstrated to him that limits had to be placed on police violence for officers to maintain sufficient public confidence to secure convictions.²⁷³ Corrigan himself stated in an interview in 1930 that third-degree tactics impaired the public's faith in police officers and prevented the conviction of the guilty.²⁷⁴ Judge Franklin Taylor of Brooklyn in 1922 similarly ordered a grand jury investigation of interrogation practices after juries acquitted two defendants in his court.²⁷⁵

²⁶⁹ Even the most vehement advocates of the rights of the accused have shown themselves willing to tolerate torturing suspects if the information the suspects are believed to possess is sufficiently valuable. See ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 131-65 (2003) (advocating torture warrant against "ticking bomb terrorist.").

²⁷⁰ Marilynn Johnson claims that the effects of Prohibition were even more direct. She claims that the increased corruption during Prohibition – stemming from greater bootleggers' ability to garner greater profits than early criminal gangs – allowed them to pay off judges, making the need for compelling evidence of guilt greater. JOHNSON, *supra* note 78, at 125.

²⁷¹ *Id.* at 124.

²⁷² *Id.* at 129-30.

²⁷³ *Id.*

²⁷⁴ *Id.* at 130

²⁷⁵ *Id.* at 129.

A variety of groups criticized interrogation techniques in the 1920s, but of them the Bar Association of the City of New York appears to have had the most direct influence.²⁷⁶ The Association had taken an interest in improving the declining reputation of the criminal defense bar.²⁷⁷ Shortly before Prohibition, a group of former district attorneys in the bar association formed an organization of attorneys to represent the criminally accused in a professional and thorough manner. These attorneys began collecting examples of violent interrogation methods but did not openly challenge police practices in individual cases, but instead used their influence to have bar associations push for reforms.²⁷⁸

In 1928, the bar association issued a report critical of the judiciary for leaving the issue of a confession's voluntariness to a jury if there was any dispute about whether brutal techniques had been used.²⁷⁹ There may have been no clearer sign that tolerance of police discretion had ended. The occasional voices calling for constraints on police discretion during the Progressive Era had been Democrats. The New York City Bar Association was a Republican bastion in the first half of the twentieth century.²⁸⁰ Recognition of the virtue of police constraints had expanded well beyond the corrupt halls of Tammany and was now also embraced by those most likely to regard police violence as a virtue in the Progressive Era. Contemporaneous with the bar association's report, the New York Court of Appeals issued the first in a series of decisions that would require trial courts to decide the issue of confession's voluntariness if anything corroborated the defendant's claim of abuse.

The same year the Bar Association released its report, the Court of Appeals reversed itself and imposed on trial judges the duty of determining whether a defendant had been subject to torture in the interrogation. In *People v. Weiner*, the court held that when evidence corroborated a defendant's claim that he had been beaten by police, a trial court was not permitted to hear the confession.²⁸¹ As in *Doran*, in which the court one year earlier concluded that juries resolved conflicts in evidence, the defendant in *Weiner* claimed the confession was beaten out of him and the officers who interrogated him denied the beating.²⁸² The court nevertheless found that there was no question in the evidence. The defendant claimed to have complained of the beating to two prosecutors,

²⁷⁶ See RICHARD A. LEO, POLICE INTERROGATIONS AND AMERICAN JUSTICE 72 (2008) (observing that by the 1930s, police leaders and social reformers had both come to oppose third-degree tactics, at least publicly).

²⁷⁷ As police had acquired greater discretion during the Gilded Age and Progressive Era, the reputation of lawyers, at least criminal defense lawyers, had suffered. The best and brightest lawyers had represented criminal defendants in the colonial and federal era. James Otis and John Adams had represented criminal defendants in colonial Massachusetts; in New York, Alexander Hamilton and Aaron Burr had been co-counsel for the defense in a murder case. See RON CHERNOW, ALEXANDER HAMILTON 603-06 (2004) (describing the Levi Weeks trial in 1799).

²⁷⁸ JOHNSON, *supra* note 78, at 126.

²⁷⁹ The New York City Bar Association blamed the Code of Criminal Procedure for allowing the third degree to flourish, observing that the Code only excluded confessions that were the product of threats. *Id.* at 124. Of course, the third degree involved violence and the threat of more violence if the suspect did not confess.

²⁸⁰ See MARY M. STOLBERG, FIGHTING ORGANIZED CRIME: POLITICS, JUSTICE AND THE LEGACY OF THOMAS E. DEWEY 15 (1995).

²⁸¹ 248 N.Y. 118, 121 (1928).

²⁸² *Id.*

one of whom admitted that the defendant had a red mark on his right cheek and red spots on his shirt and tie.²⁸³ A jailor also testified that Weiner's nose was swollen and that there was a mark on his right cheek.²⁸⁴ Modifying the rule it announced in *Doran* slightly, and the application of the rule drastically, the court held that "[o]nly where a fair question of fact is presented should the jury be permitted to determine whether the confession is voluntary."²⁸⁵ Unlike the *Doran* case a year earlier, in which the officer admitted the defendant's confession only after the officer put a boxing glove on his hand, the court in *Weiner* held that the evidence of coercion was clear in this case.

If the defendant's claim of torture was uncorroborated, the Court of Appeals still regarded the issue as a question for the jury to resolve. *Weiner* represents a sea-change because an officer's mere denial of an assault was no longer sufficient to get a confession to a jury. Two years later, the court again reversed a trial court's decision to allow a jury to determine the voluntariness of a confession.²⁸⁶ The defendant's claim that he was beaten was corroborated by a warden's testimony that the defendant had a black eye and an examining doctor's testimony that the defendant had black and blue marks on various parts of his body.

Prohibition had changed policymakers' – and the public's – view on tactics that had long been used. On a national level, the Wickersham Commission's Report in 1931 would reveal the connection between Prohibition and the emerging intolerance of third-degree tactics. The Commission had been created by President Herbert Hoover to look into the state of lawlessness that had accompanied Prohibition, including the abuses perpetrated by police.²⁸⁷ The most discussed aspect of that report examined interrogation tactics, though much of the evidence in the report had been previously published in newspapers and appellate reports and detailed abuses pre-dating Prohibition.²⁸⁸ The report on interrogation was not significant because it revealed unknown practices.²⁸⁹ Its importance was in the new attitude it reflected toward, and national attention it brought to, long-recognized techniques – a new attitude brought about by the culture of lawlessness Prohibition created.²⁹⁰ The new attitude, however, did not begin with the Wickersham Commission. The lawlessness of Prohibition had already led many state

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *People v. Barbato*, 254 N.Y. 170, 177, 172 N.E. 458, 461 (1930).

²⁸⁷ See *Full Text of Hoover's Speech Accepting Party's Nomination for the Presidency*, New York Times, Aug. 12, 1928, at 2. See also discussion at note 260 *supra*.

²⁸⁸ See discussion at note 260 *supra*.

²⁸⁹ See Steven Penney, *The Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 336 n.144 (1998) ("The prevalence of the third degree was well known even prior to the publication of the Wickersham Report.").

²⁹⁰ By the time the Supreme Court began to place limits on state interrogation practices in *Brown v. Mississippi*, 297 U.S. 278 (1936), there was widespread agreement that third-degree tactics were illegitimate. LEO, *supra* note 276, at 72. And, as Michael Klarman has demonstrated, the decision did little to change the interrogation practices, particularly when police were dealing with African American suspects in the south, which seemed to be the Court's concern in *Brown* and other state criminal procedure decisions of the early-twentieth century. Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 82 (2000).

courts to require greater judicial supervision of police interrogations.²⁹¹ The New York judiciary's changed position was particularly profound. The personnel of the Progressive Era Court of Appeals had stopped just short of personally issuing rubber hoses.

C. Calls for Exclusionary Rule and Limits on Wiretapping After Prohibition

New York rewrote its state constitution in 1938, necessarily requiring a consideration of the fundamental limits on the investigatory powers of government. In this setting, the latent concerns about police power – tabled as the end of Prohibition enforcement tables the acute threat of unreasonable police conduct – re-emerged. A measure to require judicial authorization of wiretapping was added to the New York State Constitution and a provision to include the exclusionary rule was narrowly defeated. The support these measures enjoyed is particularly surprising in light of the spread of organized crime into legitimate businesses at the end of Prohibition. New Yorkers were justifiably worried about the rise of organized crime in the 1930s. Mob prosecutors, and Thomas E. Dewey in particular, had managed to demonstrate little more discretion in investigating labor unions than police officers of the previous decade demonstrated in conducting liquor searches. When labor groups proposed these amendments to the State Constitutional Convention, they found receptive delegates. The reckless and abusive tactics of federal and local officers during Prohibition had shifted the public's sentiment so substantially that a limit on police that potentially threatened to free the obviously guilty received popular support.

In many ways, it is very surprising that the labor interests were able to garner the support they received. Organized crime became much more of a public concern in the 1930s.²⁹² With the end of Prohibition, criminal organizations (often too large to really be called gangs any longer) had a lot of dangerous men in their employ with no obvious product to push – at least no product with the broad appeal of alcohol.²⁹³ Gambling had long been a mainstay of gangsters and would remain so.²⁹⁴ Criminal organizations used

²⁹¹ *Id.* at 83 (observing that by the early 1930s, use of third-degree tactic was on the decline). The United States Supreme Court first held that a statement extracted using third-degree tactics would be inadmissible during Prohibition, but not in a case involving bootlegging. *See Ziang Sung Won v. United States*, 266 U.S. 1, 14-17 (1924) (murder case); Post, *supra* note 198, at 160 n.537. There would be no reason why the federal government would be investigating murders, in the limited circumstance where it had jurisdiction, more frequently during Prohibition. The fact that the Court chose to place limits on interrogation practices used in federal cases during Prohibition is yet another piece of evidence that Prohibition undermined the faith in police and prompted greater supervision of police, even when they were engaging in matters unrelated to liquor enforcement.

²⁹² *See* N.Y. ASSEMB. SELECT COMMITTEE APPOINTED BY THE ASSEMB. TO INVESTIGATE THE CAUSES OF THE INCREASE IN CRIME IN THE CITY OF N.Y., *supra* note 62.

²⁹³ SELWYN RAAB, *FIVE FAMILIES: THE RISE, DECLINE, AND RESURGENCE OF AMERICA'S MOST POWERFUL MAFIA EMPIRES* 37 (2005) (observing that "Prohibition had enriched [the mafia families of New York] so handsomely that they had sufficient startup money and muscle to bankroll new rackets and crimes or to simply take over existing ones from rival ethnic Irish and Jewish gangsters."); EDWARD BEHR, *PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA* 239 (1996) ("Prohibition was not the end of organized crime in America but only its beginning.").

²⁹⁴ Much of the scholarship on organized crime has focused on Italian and Jewish gangsters. An interesting take on a different ethnic group was recently written by Jeffrey McIllwain. JEFFREY SCOTT MCILLWAIN, *ORGANIZING CRIME IN CHINATOWN: RACE AND RACKETEERING IN NEW YORK CITY, 1890-1910* (2004). Like most gangsters prior to Prohibition, a big focus for the Chinese was gambling. *Id.* at 67-79.

an attribute they uniquely possessed to infiltrate other businesses – brute force and the threat of force. During and even well before Prohibition, criminal gangs had sold violence.²⁹⁵

Controlling labor organizations soon became the goal of organized crime. “Trade associations” began to develop, even before the end of Prohibition, which businessmen were obligated to join for “protection.”²⁹⁶ Criminal organizations had also begun infiltrating existing organizations, labor unions being an obvious target as many labor organizations had demonstrated a willingness to make deals with the devil.²⁹⁷ Labor and management had each found muscle worth the purchase price. In the Garment Workers’ Strike of 1926, for instance, each side had retained the services of subsidiaries of Arnold Rothstein’s organization.²⁹⁸ In 1930, three years before the repeal of Prohibition shifted the focus of organized crime toward extorting money from legitimate businesses, Manhattan District Attorney Thomas C.T. Crain made racketeering a top priority of his office.²⁹⁹ Crain was wholly unsuccessful in his efforts and the Twenty-First Amendment compounded the problem he had been unable to address.³⁰⁰ When New

²⁹⁵ HERBERT ASBURY, *THE GANGS OF NEW YORK: AN INFORMAL HISTORY OF THE UNDERWORLD* 211 (Penguin Putnam 1998) (observing that mid-nineteenth century gangs charged for specific acts of violence). Mike McGloin, one of the thugs of the late-nineteenth century had a menu of violence, describing the services he would render and the prices he would charge. It is reproduced below:

Punching	\$2
Both eyes blacked	4
Nose and jaw broke	15
Jacked out (knocked out with a blackjack)	15
Ear chewed off	15
Leg or arm broke	19
Shot in leg	25
Stab	25
Doing the big job	100 and up

Id.

²⁹⁶ See JAMES B. JACOBS, COLEEN FRIEL & ROBERT RADDICK, *GOthAM UNBOUND: HOW NEW YORK CITY WAS LIBERATED FROM THE GRIP OF ORGANIZED CRIME* 41 (2001) (describing protection rackets dating back to the 1920s).

²⁹⁷ JOHN HUTCHINSON, *THE IMPERFECT UNION: A HISTORY OF CORRUPTION IN AMERICAN TRADE UNIONS* 81-88 (1970).

²⁹⁸ See BENJAMIN STROLBERG, *TAILOR’S PROGRESS: THE STORY OF A FAMOUS UNION AND THE MEN WHO MADE IT* 138 (1944) (describing Rothstein’s intervention in both sides of the strike). Rothstein was the first of a number of high-profile leaders of organized crime in New York in the late 1920s and 1930s who would become a part of American folklore. The characters Nathan Detroit in Damon Runyon’s *Guys and Dolls* and Meyer Wolfsheim in F. Scott Fitzgerald’s *The Great Gatsby* were based on Arnold Rothstein. RACHEL RUBIN, *JEWISH GANGSTERS OF MODERN LITERATURE* 6-7 (2000); NICK TOSCHAS, *KING OF THE JEWS: THE GREATEST MOB STORY EVER TOLD* 290 (2006). Rothstein was widely rumored to have fixed the World Series of 1919, for which the character based on him in the *The Great Gatsby* is credited. See WILLIAM A. COOK, *THE 1919 WORLD SERIES: WHAT REALLY HAPPENED?* (2001); DAVID PIETRUSZA, *ROTHSTEIN: THE LIFE, TIMES AND MURDER OF THE CRIMINAL GENIUS WHO FIXED THE 1919 WORLD SERIES* (2004). Turn-of-the-century mobsters became such a part of popular culture that *Playboy* magazine in the 1970s did a series of articles on the colorful history of organized crime in America. See RICHARD HAMMER, *PLAYBOY’S ILLUSTRATED HISTORY OF ORGANIZED CRIME* (1975) (compiling the nine articles). The author can honestly say he read these particular copies of the magazine for the articles.

²⁹⁹ *Id.* at 167.

³⁰⁰ *Id.*

Yorkers regained the right to lawfully consume alcohol, they found themselves occupying a world in which the mob controlled not only gambling and prostitution, but also fish markets and produce stands.³⁰¹

The New York mayor's race of 1933 focused the City's attention on the issue of organized crime. Unlike Chicago, New York had not experienced headline-making prosecutions of organized crime figures in the 1920s.³⁰² During that decade in New York, by contrast, there were no similar concerted (or successful) efforts to go after the organizations that Prohibition created.³⁰³ Not surprisingly, the lack of prosecution became a political issue. In his second attempt to become New York's mayor in 1929, Fiorella LaGuardia alleged that the Tammany-controlled Manhattan District Attorney's Office had allegiances with the mob that led them to ignore the 1926 murder of Arnold Rothstein, a gangster credited with first incorporating the organizational principles of legitimate business into criminal conspiracies.³⁰⁴ Though unsuccessful twice before, LaGuardia launched another campaign for mayor in 1933 after Mayor Jimmy Walker, whose mob connections were well-known, resigned in the wake of allegations of corruption.³⁰⁵ In the 1933 campaign, LaGuardia repeated his allegations that the District Attorney's Office was entangled with organized crime, again offering as proof the failure to prosecute anyone in the Rothstein murder.³⁰⁶

With LaGuardia's election, there was a clear mandate to go after organized crime.³⁰⁷ The New York District Attorney's Office, headed by William C. Dodge, a Democrat, began an effort to investigate racketeering activities.³⁰⁸ Several missteps by the prosecution in a number of these cases undermined the grand jurors' confidence in the District Attorney's Office. There was a sense that the District Attorney's Office was not giving its full attention to the issue that LaGuardia's campaign had brought to light. Dodge's prosecutors did a poor job presenting a number of cases. Dodge himself once stated that "racketeering is no serious crime to combat."³⁰⁹ Leaks revealed names of the witnesses providing helpful information. Despite the termination of ten prosecutors believed to have been involved in the leaks, business leaders, fearing retaliation, refused to appear before the grand jury when called to testify about efforts by the mob to extort

³⁰¹ See THOMAS KESSNER, *FIORIELLO LA GUARDIA AND THE MAKING OF MODERN NEW YORK* 362 (1989) (describing Mayor LaGuardia's war on organized crime's infiltration of artichoke markets); WALTER CHAMBERS, *LABOR UNIONS AND THE PUBLIC* 228 (1936) (same); JACOBS, *supra* note 311 at 41 (describing mob infiltration of fish markets).

³⁰² See LAURENCE BERGREEN, *CAPONE: THE MAN AND THE ERA* 322 (1996) (noting that newspapers all over the country regarded Capone as a national problem).

³⁰³ See RAAB, *supra* note 293, at 41 (observing that "law enforcement efforts against [the New York crime families] were at best haphazard.").

³⁰⁴ STOLBERG, *supra* note 280, at 7.

³⁰⁵ *Id.* at 44-47; GERALD LEINWALD, *MACKARELS IN THE MOONLIGHT: FOUR CORRUPT AMERICAN MAYORS* 165 (2004); HERBERT MITGANG, *ONCE UPON A TIME IN NEW YORK: JIMMY WALKER, FRANKLIN ROOSEVELT AND THE LAST GREAT BATTLE OF THE JAZZ AGE* 259 (2000); GEORGE WALSH, *GENTLEMAN JIMMY WALKER: MAYOR OF THE JAZZ AGE* 293 (1974).

³⁰⁶ KESSNER, *supra* note 301, at 362.

³⁰⁷ See HENRY PAUL JEFFERS, *THE NAPOLEON OF NEW YORK: MAYOR FIORELLO LA GUARDIA* 161 (2002) (observing that LaGuardia could not be seen making a patronage appointment with the police commissioner given the new mayor's allegation of the previous mayor's complicity with organized crime).

³⁰⁸ STOLBERG, *supra* note 280, at 50-51.

³⁰⁹ *Id.* at 51.

payment.³¹⁰ Disgusted with the inability of the District Attorney's Office to present a case, the jurors drafted a letter to New York Governor Herbert Lehman requesting the appointment of a special prosecutor to deal only with issues of organized crime.³¹¹ The man Lehman ultimately chose, Thomas E. Dewey, would take an issue that obviously interested the public to capture newspaper headlines for years and propel his political aspirations, almost to the White House.³¹²

Dewey's ambition and intense distrust of labor unions would evoke fears of honest and corrupt labor leaders alike. Though Dewey, as an Assistant United States Attorney, had successfully prosecuted Arnold Rothstein's former protégé, bootlegger "Waxy" Gordon, for tax evasion in a very high-profile trial in 1933, he was still a young and relatively obscure lawyer when Lehman assigned him to be a special prosecutor.³¹³ Governor Lehman had wished to fill the position with one of four more experienced Republican lawyers. Among the group was Dewey's former boss, United States Attorney George Medalie, who saw promise in Dewey to be the future of the Republican Party.³¹⁴ Medalie convinced the others on Lehman's short list to step aside so that Dewey would be given the appointment.³¹⁵ Lehman agreed to the appointment even though one of his advisors thought his appointment a "serious mistake" because Dewey was "unscrupulously ambitious" and more interested in publicity than ferreting out organized crime.³¹⁶

For the next few years, the publicity certainly came – and for the first couple of years, there were no major controversies with unions. Dewey kept a high-profile, setting up his office on the fourteenth floor of the Woolworth Building, one of New York's most fashionable business addresses and, until the completion of the Empire State Building, New York's tallest building.³¹⁷ Once his office staff was in place, Dewey delivered a radio address, carried by the City's three largest radio stations, announcing that his efforts would be focused on organized crime, official corruption and racketeering, which he defined as a pattern of extorting money from legitimate businesses.³¹⁸

The antagonistic relationship with organized labor began with his subpoena for the records of the International Brotherhood of Electrical Workers in 1937, which was accompanied by a press release accusing the union of racketeering and murder.³¹⁹ Dewey's headline-grabbing, and unsubstantiated, allegation gave honest and corrupt labor organizations pause for concern. A variety of unions responded with angry

³¹⁰ *Id.*

³¹¹ See ALLAN NEVINS, HERBERT H. LEHMAN AND HIS ERA 179-80 (1963).

³¹² The famous *Chicago Tribune* headline captures only a glimpse of how close Thomas Dewey came to becoming president. At forty-two, he narrowly lost the election when Franklin D. Roosevelt won his fourth term in office. DAVID MCCULLOUGH, TRUMAN 332 (1992). In his better-known run against Harry Truman in 1948, not a single polling organization had predicted Dewey to lose – most had predicted a landslide in his favor. *Id.* at 710, 714.

³¹³ See STOLBERG, *supra* note 280, at 74.

³¹⁴ *Id.* at 67-68; NEVINS, *supra* note 311, at 181.

³¹⁵ *Id.* at 181.

³¹⁶ STOLBERG, *supra* note 280, at 63-64.

³¹⁷ *Id.* at 86. See also SARAH BRADFORD LANDAU & CARL W. CONdit, RISE OF THE NEW YORK SKYSCRAPER 1865-1913, at 388-92 (1999) (describing opulence of the Woolworth Building).

³¹⁸ STOLBERG, *supra* note 280, at 89; RUPERT HUGHES, ATTORNEY FOR THE PEOPLE: THE STORY OF T.E. DEWEY 65-66 (1940) (providing verbatim transcription of radio address).

³¹⁹ STOLBERG, *supra* note 280, at 169.

complaints to Mayor LaGuardia asserting that Dewey was attempting to portray all organized labor as engaged in racketeering.³²⁰ The relationship between organized labor and the New York Police Department had been acrimonious since the late-nineteenth century.³²¹ Previously, however, the police had been interested in the activities of unions so that threats to order could be thwarted.³²² Thomas Dewey was not merely looking to break up strikes that created inconvenience, and possibly violence, on the streets. He viewed labor unions, not without some justification, as target-rich environments in his war on racketeering activity in the City.³²³ Despite his best efforts to convince labor leaders that he had no problem with legitimate labor organizations, his high-profile raids on union offices, propensity to seek media attention, and prosecutions of labor leaders left honest, as well as corrupt, labor officials fearful of him and his high-profile tactics.³²⁴

When the New York Constitutional Convention of 1938 was convened, organized labor supported two provisions, one to prohibit wiretapping by authorities without prior judicial authorization, the other to exclude unlawfully obtained evidence in any type of judicial or administration proceeding.³²⁵ John Dunnigan, who introduced the proposal, observed that the President of the State Federation of Labor asked him to present the proposals.³²⁶ The interest of labor groups was obvious.³²⁷ From their perspective, Dewey had declared war on them.³²⁸ Constraints on wiretapping and physical searches would at least have limited his ability to pry into their affairs and discover a basis for making criminal allegations, whether the allegations were legitimate or not.³²⁹

³²⁰ *Id.*

³²¹ See LISA KELLER, TRIUMPH OF ORDER: DEMOCRACY AND PUBLIC SPACE IN NEW YORK AND LONDON 188 (2009) (describing origins of antagonism between police and labor unions).

³²² See WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 98-127 (1991) (describing antagonistic relationship between police, sometimes private police deputized by courts, and labor).

³²³ STOLBERG, *supra* note 280, at 168-70.

³²⁴ Unlike Mayor Fiorella LaGuardia, who was very much in favor of ferreting out the ties of organized crime to labor, Dewey lacked credibility when he claimed he was genuinely solicitous of labor's best interest. LaGuardia's was one of organized labor's biggest supporters in Congress. Dewey, a staunch Republican who never held elected office before becoming New York's District Attorney in 1938, had no such background to assuage his critics. See THOMAS EDMUND DEWEY, TWENTY AGAINST THE UNDERWORLD 415 (1974) (noting that LaGuardia was more trusted by the labor interests).

³²⁵ STATE OF NEW YORK, REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 367 (1938); NELSON, *supra* note 197, at 125 (observing that the question about whether to include the exclusionary rule in the state constitution was the most passionately debated issue in the convention).

³²⁶ See STATE OF NEW YORK, *supra* note 325, at 90

³²⁷ William Nelson has written that nothing "fully captures . . . why organized labor and its urban immigrant members deemed an exclusionary rule of such 'great importance' that they vowed to 'press for . . . its passage.'" NELSON, *supra* note 197, at 126 (citations omitted). The fear of Dewey's prosecutorial methods seem to have fueled the concern. Pitler describes the failure of the exclusionary rule as part of the "Dewey Factor." Pitler, *supra* note **Error! Bookmark not defined.**, at 64-74. It seems very likely, however, that the exclusionary rule would have never been proposed before the Convention had it not been for Dewey.

³²⁸ Unions feared that Dewey's investigations would seriously undermine the right to strike they had gained in the Norris LaGuardia Act of 1932 by allowing the inspection of all of a union's records on a claim that the union was engaged in racketeering. STOLBERG, *supra* note 280, at 168.

³²⁹ Stolberg, *supra* note 280, at 222 (observing that union leaders supported wiretapping limits out of concern that law enforcement officers had abused wiretaps).

The wiretapping proposal was widely supported, but the exclusionary rule broke down largely along party lines.³³⁰ The Democratic Party's support for organized labor explains some of the support for these proposals, though it certainly does not explain it all. Reform-Democratic Governor Lehman, a strong supporter of labor, backed the proposal, but so did seven Republicans.³³¹ Other pro-labor politicians, like Fiorella LaGuardia, opposed the provisions.³³² Certainly Thomas Dewey's implication that supporters of these provisions supported organized crime can not be sustained.³³³

Surely organized crime had more influence in the 1930s than it did in the late 1800s, but efforts to limit police by those with ties to nineteenth century gangs had proven transparent. Big Tim Sullivan's bill to prevent police from carrying blackjacks, brass knuckles and other particularly dangerous non-lethal weapons had failed miserably.³³⁴ Even Mayor Gaynor's honest efforts to prevent violence had been thwarted.³³⁵ Delegates could not have supported provisions that limited the ability of law enforcement to deal with the rising issue of organized crime, and potentially liberated those discovered to be guilty, unless the public supported limits on police power.

The Progressive Era's tolerance of near-absolute police discretion had come to an end. During Prohibition, New York courts began to monitor the interrogation practices police were using. Trial and appellate courts began to exclude illegally obtained evidence as a rash of questionable searches accompanied Prohibition enforcement – a practice the Court of Appeals ended only after the immediate concern of Prohibition enforcement ended. The New York Constitutional Convention then revealed substantial public support for judicial supervision over police investigations. The final version of the 1938 Constitution included a warrant requirement for wiretapping and nearly included the most controversial rule of criminal procedure in the twentieth century, the exclusionary rule.

Conclusion

Modern criminal procedure requires courts to supervise police-initiated and police-conducted investigations. To understand the constitutional limits on these investigations, courts often look to the common law rules that governed constables and watchmen in the eighteenth century – at the time the Framers drafted the provisions that govern modern police. These eighteenth century rules, however, regulated a very different sort of police force and sought to achieve a very limited role for the officer in the criminal justice system.

Eighteenth century common law rules worked in conjunction with practical limits on early American police to ensure that officers, “petty officers” as James Otis described them, would have as little discretion as possible. As a practical matter, this meant that they lacked the incentive, social standing, and/or legal authority to engage in the “competitive enterprise of ferreting out crime.” With the creation of modern police forces in the mid-nineteenth century, officers began to conduct investigations. Courts

³³⁰ Pitler, *supra* note 157, at 85.

³³¹ *Id.* at 94 n.357 (observing votes on the provision by party).

³³² STOLBERG, *supra* note 280, at 222.

³³³ STATE OF NEW YORK, *supra* note 325, at 370, 373-74. Delegate Francis Martin was even more explicit in linking proponents of the provisions to organized crime. *Id.* at 497-500.

³³⁴ JOHNSON, *supra* note 78, at 96.

³³⁵ See discussion *supra* at notes 137-154 and accompanying text.

and legislatures gradually became more comfortable with granting officers more discretion. By the end of the nineteenth century, police discretion was so thoroughly accepted that police violence was implicitly authorized by courts and openly and explicitly authorized by police commissioners. Just before Prohibition, the acceptance of police authority reached its apex as New York Police Commissioner Arthur Woods defended the NYPD's wiretapping program on the grounds that he and his officers could be trusted to tap only the guilty. By the early-twentieth century, the Framing Era's all-but-absolute constraint on police discretion had been replaced by a faith in the police to self-regulate.

Prohibition brought the Progressive Era's laissez-faire attitude toward police regulation to an end. Arthur Woods' defense of wiretapping, that represented the high-water mark of police authority, relied on a faith in police that Prohibition undermined. Judicial regulation of police-initiated physical searches and seizures, wiretapping and interrogation soon followed the botched effort to enforce the Volstead Act, and, in New York, the Mullen Gage Act. The modern scheme of criminal procedure, that seeks to constrain not eliminate police discretion, is the progeny of the Roaring '20s, not the 1760s. Yet courts look to Framing Era concerns about general warrants and writs of assistance, not Prohibition enforcement, to understand the evils the Constitution is to prevent.

Consideration of Framing Era rules incorporates into our modern decisions the judgment of men who were regulating very different police forces and attempting to achieve very different goals. Sometimes relying on common law decisions will produce results that are far too restrictive of modern law enforcement as Framing Era judges sought to eliminate officer discretion. At other times, Framing Era rules will produce results that inadequately constrain modern police as, somewhat obviously, there was no need to restrict actions beyond the institutional, social, or technological capacity of an officer. Framing Era rules, that is, may produce results consistent with modern society's conception of an appropriate balance between liberty and police power, but only by coincidence.

The often overlooked history of the police from the mid-nineteenth through Prohibition reveals our lack of connection with the rules that effectively prevented police investigation. The common law scheme of police regulation was completely abandoned by the end of the Progressive Era. Far from being "petty officers," in whose hands no discretion should vest, beginning in the second half of the nineteenth century, police officers were entrusted with powers unimaginable even to magistrates of the eighteenth century. They were permitted to determine when physical force was appropriate in an examination and were given the power to determine who should be wiretapped. Modern criminal procedure, beginning in the 1920s, attempted to constrain this new system, rather than restore the common law past. The excesses of liquor enforcement, not colonial customs searches, explain modern police regulation. Far from rejecting the usefulness of history, this analysis attaches a rich, and more relevant, historical context to the modern rules of criminal procedure.