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## Reviving Escobedo

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# Reviving *Escobedo*

Janet Moore\*

*This Symposium Essay reflects on the fifty years that have passed since the Chicago Eight trial by highlighting a new development in criminal procedure that has drawn little scholarly attention: Judges are reviving the right of stationhouse access to defense counsel along lines previously envisaged in Escobedo v. Illinois. The Essay also offers fresh historical and theoretical perspective on the need for stationhouse counsel. First, the Essay draws on a series of events occurring during and after the Chicago Eight trial to illustrate the interrelationship of violence and silence in criminal legal systems, the distinctive coerciveness of custodial interrogation for low-income people and people of color, and the corresponding need for stationhouse counsel to enforce core criminal procedure rights. Second, the Essay frames judicial complicity in these phenomena as an exemplar of what Stuart Scheingold called the “myth of rights.” On one hand, judicial renegeing on rights renders them mythical because relying on their false promise can be delusional and dangerous. Yet as indicated by new efforts to reinvigorate stationhouse access to counsel, even weakened rights can retain enough hermeneutical power to inspire social movements, litigation, and incremental positive change.*

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#### INTRODUCTION

This Symposium Essay reflects on the half century that has passed since the Chicago Eight trial by examining judicial complicity in abusive exercises of government power via doctrines that weaken constitutional criminal procedure rights.<sup>1</sup> The example discussed here lies at the intersection of two doctrinal fields. The first limits the right to counsel, including for people who are subject to custodial interrogation. The second undermines protections against police use of force. Together, these doctrines imbue stationhouse interrogation with distinctive coercive power, particularly for low-income people and people of color.<sup>2</sup>

The analysis offers new historical, doctrinal, and theoretical perspective on that coercion. First, fresh context is provided by connecting a series of events that occurred during and after the Chicago Eight trial. This historical sketch illustrates the close relationship of violence and silence in criminal legal systems, and highlights defense counsel's critical law enforcement role during custodial interrogation. By enforcing rights to be free from police violence, counsel can vindicate other rights, including rights to silence and to pretrial release, which affect case investigation, plea bargaining, and sentencing.<sup>3</sup>

The Essay's second major contribution is to highlight recent efforts to promote stationhouse access to defense counsel. These efforts are intriguing, but have drawn little scholarly attention. Some interventions

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1. See, e.g., Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 441 (2018); Allegra M. McLeod, *Police Violence, Constitutional Complicity, and Another Vantage*, 2016 SUP. CT. REV. 157. For a related critique in the field of employment law, see SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* (2017).

2. Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 142 (2017); Andrew Guthrie Ferguson & Richard A. Leo, *The Miranda App: Metaphor and Machine*, 97 B.U. L. REV. 935, 937 & n.13 (2017).

3. See *infra* notes 142–144.

involve social movements, activist lawyers, and nonprofit policy reform organizations; in Chicago, such interventions have sparked judicial rulemaking aimed at securing early access to counsel. Other judges are interpreting international law and state constitutional provisions to the same end. All of these efforts are reviving the possibility of systematized early access that was once envisaged in *Escobedo v. Illinois*.<sup>4</sup>

*Escobedo* established a Sixth Amendment right to counsel during custodial interrogation.<sup>5</sup> The case quickly receded from judicial and scholarly discussion after *Miranda v. Arizona*<sup>6</sup> recognized a Fifth Amendment right to stationhouse counsel. *Escobedo*'s influence declined further as the Court narrowed the Sixth Amendment right to counsel in the early stages of criminal legal proceedings and discounted the importance of attorney-client relationships.<sup>7</sup>

This Essay argues that the emergence, recession, and reemergence of protections envisaged in *Escobedo* exemplifies what Stuart Scheingold calls the “myth of rights.”<sup>8</sup> As Scheingold explains, judicial renegeing on rights renders them mythical, in that relying on their false promise is delusional and sometimes dangerous. On the other hand, he argues that even degraded rights retain meaning and hermeneutical power, which in turn can inspire social movements, litigation, and incremental change—as well as corresponding backlash.

The Essay has four Parts. Part I draws on events surrounding the Chicago Eight trial to illustrate how police violence saturates the context within which custodial interrogation occurs, particularly for low-income people and people of color, making the physical presence of stationhouse counsel a necessary (if partial) antidote. Part II summarizes judicial diminution of related Fourth, Fifth, and Sixth Amendment rights governing police use of force and the right to counsel. Part III highlights lesser-known judicial enhancements of stationhouse access to counsel. Part IV anticipates and responds to objections for expanding such initiatives.

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4. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

5. *Id.* at 490–91. A week before deciding *Escobedo*, the Court incorporated the Fifth Amendment right to silence against the states. *Malloy v. Hogan*, 378 U.S. 1, 3 (1964). The Sixth Amendment right to counsel in felony cases was incorporated fifteen months earlier. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

6. *Miranda v. Arizona*, 384 U.S. 436 (1966).

7. See *infra* notes 138–141 and accompanying text.

8. STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* xviii–xix (Univ. of Mich. 2d ed. 2004) (1974).

I. VIOLENCE AND SILENCE:  
FROM THE COURTHOUSE TO THE STATIONHOUSE

“*Silence is power.*”<sup>9</sup>

“*Keep going until you get answers . . .*”<sup>10</sup>

The aphorisms above emerged from efforts of social movements and legal service providers to strengthen the position of suspects and defendants in the early phases of criminal legal processes. The aphorisms’ juxtaposition hints at the complex relationship between violence and silence in criminal legal systems. This Part analyzes that relationship by connecting a series of events that occurred during and after the Chicago Eight trial. The first incident involves the denial of Bobby Seale’s Sixth Amendment right to choose counsel during that trial. The second and third incidents involve killings of Black Panther Party for Self-Defense (BPP) members by police and by other Party members. The fourth involves efforts to redress decades of torture inflicted by Chicago police on low-income people and people of color. Scheingold’s myth of rights pervades these events.<sup>11</sup> People silence themselves and others. They offer, demand, and coerce communication. They invoke, enforce, evade, interpret, and break the law. Some do so as police, prosecutors, and defense lawyers; others, as activists, informants, and defendants; still others, as witnesses, jurors, and judges. Across events and roles, violence and threats of violence remain a reliable constant.

*A. Bobby Seale and the Right to Choose Counsel*

The courtroom drawings from the Chicago Eight trial have been described as “indelible.”<sup>12</sup> Some of these drawings depict the court-ordered use of force in silencing Bobby Seale, a cofounder of the BPP.<sup>13</sup>

9. FIRST DEF. LEGAL AID, <https://www.first-defense.org/> (last visited May 28, 2019).

10. “*The First 24*”—A Participatory Defense Action Tool, ALBERT COBARRUBIAS JUST. PROJECT (Mar. 8, 2016), <https://acjusticeproject.org/2016/03/08/the-first-24-a-participatory-defense-action-tool/> [hereinafter COBARRUBIAS, “*The First 24*”].

11. See generally SCHEINGOLD, *supra* note 8.

12. BRUCE A. RAGSDALE, THE CHICAGO SEVEN: 1960S RADICALISM IN THE FEDERAL COURTS 5 (2008), [https://upload.wikimedia.org/wikipedia/commons/7/71/The\\_Chicago\\_Seven\\_-\\_1960s\\_Radicalism\\_in\\_the\\_Federal\\_Courts.pdf](https://upload.wikimedia.org/wikipedia/commons/7/71/The_Chicago_Seven_-_1960s_Radicalism_in_the_Federal_Courts.pdf).

13. *Id.* at 48 (including a court sketch of Bobby Seale by Howard Brodie); Howard Brodie, [Bobby Seale Attempting to Write Notes on a Legal Pad While Bound and Gagged in the Courtroom During the Chicago Eight Conspiracy Trial in Chicago, Illinois] / Brodie ‘69 CBS, LIBR. CONGRESS, <https://www.loc.gov/item/2016653405/>; Garrett Albert Duncan, *Black Panther Party: American Organization*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Black-Panther-Party> (last visited May 28, 2019).



Photo courtesy of Howard Brodie's estate

In the first of these images, Seale attempts to take notes after being bound and gagged during his trial on federal riot and conspiracy charges in the wake of the 1968 Democratic National Convention.<sup>14</sup> Other images depict Seale's being double-gagged and wrestled from the courtroom by U.S. Marshals while still

bound to his chair.<sup>15</sup> The use of force escalated as Seale persisted in seeking to exercise his Sixth Amendment right to choose counsel or, in the alternative, to act *pro se* in his own defense by arguing motions, making statements to the jury, and cross examining witnesses.<sup>16</sup>

The judge cited Seale's disruptiveness as justifying three actions. The first action was using force in an attempt to silence Seale; the second was the mistrial and severance of his case from the cases of the remaining Chicago Seven; the third was Seale's summary imprisonment for more than four years on contempt charges.<sup>17</sup> Among the exchanges that the judge cited as "most flagrant" in justifying these outcomes,<sup>18</sup> the phrases "constitutional rights," "defend myself," and "not my lawyer" dominate Seale's speech. Seale made rarer but increasingly direct connections between the denial of his rights and racism and fascism on the part of the judge, prosecutors, and law enforcement.<sup>19</sup> Sometimes he called those

14. *United States v. Seale*, 461 F.2d 345, 349 (7th Cir. 1972); RAGSDALE, *supra* note 12, at 1–5.

15. Howard Brodie, *Seale / Brodie '69 CBS*, LIBR. CONGRESS, <https://www.loc.gov/item/2016652876/>; Howard Brodie, *Marshall [sic] Pressing Hand Against Seale to Shut Him Up (Caught This Glimpse Through Door to Holding Cell off Court) (Blood on Seale's Mouth) (Black Marshall) [sic] / Brodie '69*, LIBR. CONGRESS, <https://www.loc.gov/item/2016652868/>; *Chicago Seven Trial Defendants Indicted in Chicago IL March 20 1969 - Artwork by Howard Brodie in the Collection of the Library of Congress*, ILLUSTRATED COURTROOM (Mar. 19, 2016), <http://illustratedcourtroom.blogspot.com/2016/03/chicago-seven-trial-1969-defendants.html>.

16. *Seale*, 461 F.2d at 350–51, 356–61. For a critical analysis of judicial interpretation of the right to choose counsel, see Janet Moore, *The Antidemocratic Sixth Amendment*, 91 WASH. L. REV. 1705 (2016).

17. *Seale*, 461 F.2d at 374–89.

18. *Id.* at 374.

19. *Id.* at 379.

authority figures pigs.<sup>20</sup>

Seale's approach was consistent with the BPP's strategy of simultaneously acknowledging law's failures, rejecting law's authority, and invoking law's protections. A founding purpose of the Party was to shield Black people from police violence, through the use of responsive violence as necessary.<sup>21</sup> Seale and other BPP members expressly invoked constitutional and other legal rights in justifying their actions. They framed their activities as appropriate exercises of self-defense doctrines and the Second Amendment right to bear arms given the failures of due process, equal protection, and Fourth Amendment protections. One of Seale's contempt convictions involved his vociferous articulation of these principles in the courtroom.<sup>22</sup>

On appeal of those contempt convictions, the Seventh Circuit held that the trial judge erred in failing to conduct a proper hearing on Seale's invocation of his Sixth Amendment right to choose counsel.<sup>23</sup> The panel found four of the sixteen contempt convictions insufficient as a matter of law; two of those four dismissals involved references to systemic racism.<sup>24</sup> The panel vacated the remaining convictions because the trial judge imposed them summarily, then remanded for a jury trial.

In ordering a jury trial, the panel noted that jurors were better suited than federal judges to assess "language patterns and word choice [that] vary greatly between diverse social, ethnic, economic and political groups," as well as the fact that "words scarcely used by some persons may be every-day language to many people who appear in courts."<sup>25</sup> This judicial nod to the complex relationships among speech, silence, intersectional identity, and power underscores the many-layered meanings of both Seale's invocation of rights and the use of force in denying those rights. Part II.B explores more of those layers, and their implications for the exercise of agency by the key actors in the Chicago Eight courtroom drama.

### B. "Deeper Layers to the Story"

Eventually federal prosecutors dropped all charges against Seale.<sup>26</sup>

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20. *Id.*

21. David J. Garrow, *Picking Up the Books: The New Historiography of the Black Panther Party*, 35 *REVIEWS AM. HIST.* 650, 651 (2007).

22. *See Seale*, 461 F.2d at 379, 382.

23. *Id.* at 361.

24. *Id.* at 371.

25. *Id.* at 370–73.

26. *See Judge Dismisses Riot Charge Against Seale*, *BG NEWS* (Bowling Green State University, Ohio), Oct. 20, 1970, at 3, <https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=3506&context=bg-news> (incorporating

However, “there were deeper layers to the story.”<sup>27</sup> Each layer involves relationships between violence, silence, and criminal legal systems. The first layer involves the Anti-Riot Act, the federal statute under which the remaining seven of the Chicago Eight defendants were convicted after the trial judge severed Seale’s case.

The Act is sometimes called the “H. ‘Rap’ Brown” amendment. It was added to the 1968 Civil Rights Act to secure passage in the wake of Martin Luther King, Jr.’s assassination. The Act accommodated demands from officials who cast Black activists as outside agitators fomenting unrest and violence.<sup>28</sup> Those demands had deep historical roots in the enforcement of white supremacy in the United States.<sup>29</sup> The Chicago Eight challenged the Act as an unconstitutional effort to silence dissent. The Seventh Circuit rejected those arguments, but vacated the Chicago Seven convictions on other grounds.<sup>30</sup>

Yet another layer of the Chicago Eight story involves Seale’s invocation of his right to choose counsel. The trial judge denied a continuance motion that would have allowed Seale’s chosen attorney, Charles R. Garry, to undergo surgery before trial. The judge appointed activist lawyer William Kunstler in Garry’s place. However, Garry remained “in constant communication with Seale and advised him to . . . insist on his right to represent himself” instead of accepting Kunstler’s appointment.<sup>31</sup> Moreover, according to Garry, he and Seale had “expected the gagging and shackling long before it happened.”<sup>32</sup> They deliberately “forced the situation” to highlight Seale’s role as a Black

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Associated Press story); *Bobby Seale Testifies Quietly for Chicago Seven Defendants*, N.Y. TIMES (Nov. 6, 1973), <https://www.nytimes.com/1973/11/06/archives/bobby-seale-testifies-quietly-for-chicago-seven-defendants.html> (noting dismissal of contempt and conspiracy charges); Seth S. King, *Contempt Convictions Are Upset in Chicago 7 Conspiracy Trial*, N.Y. TIMES (May 12, 1972), <https://www.nytimes.com/1972/05/12/archives/contempt-convictions-are-upset-in-chicago-7-conspiracy-trial.html> (noting U.S. Attorney’s request for dismissal of conspiracy and riot charges).

27. Pnina Lahav, *Theater in the Courtroom: The Chicago Conspiracy Trial*, 16 L. & LITERATURE 381, 418 (2005).

28. Act of Apr. 11, 1968, Pub. L. No. 90-284, § 104, 82 Stat. 73, 75–77 (codified as amended at 18 U.S.C. §§ 2101–2102 (2012)); see also *House Passes Bill to Punish Persons Inciting Riots*, CONG. Q. ALMANAC, <https://library.cqpress.com/cqalmanac/document.php?id=cqal67-1312869> (last visited May 28, 2019) (discussing local police chiefs’ statements); Robert D. Goldstein, Blyew: *Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469, 522-524 & n.212 (1989) (providing historical context).

29. Goldstein, *supra* note 28, at 474–78, 524 n.212.

30. *United States v. Dellinger*, 472 F.2d 340, 409 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

31. Lahav, *supra* note 27, at 418 (quoting and citing LARRY SLOMAN, *STEAL THIS DREAM* 195, 197 (1998)).

32. *Id.*



man standing alone against a legal system corrupted by white supremacy.<sup>33</sup> These facts complicate the interplay of violence and silence in this federal criminal case. As one commentator noted, “Seale was not only a victim, but also an active manipulator” of the unfolding drama and of the judge who was the ostensible director of the action.<sup>34</sup>

Additional layers of this story involve the workings of violence and silence across what historians describe as fluid boundaries between collective resistance, counter-movements, and criminal activity.<sup>35</sup> One example involves juror intimidation during the Chicago Eight trial. Early in the proceedings, the families of two jurors received anonymous notes at their homes stating that Black Panthers were watching them. The judge alerted one juror to the note (of which she was previously unaware) and then, over a defense objection, excused her when she said she could no longer remain impartial in the face of the implied threat.<sup>36</sup> The second juror had already seen the note sent to her home, dismissed it as a “hoax,” and remained on the jury.<sup>37</sup> The judge then sequestered the jury for the duration of the trial, which took almost five months.<sup>38</sup>

Seale denied any Black Panther responsibility for the notes. His co-defendants joined him in accusing the government of orchestrating the notes to bias the jury against them.<sup>39</sup> The federal prosecutors derided these allegations, and dismissed defense demands for a hearing to investigate the source of the notes, as “totally frivolous [and] idiotic.”<sup>40</sup>

But the defendants’ allegations and demands were not outlandish. Anonymous, false communication was one of many activities the FBI used in seeking to “destroy the Black Panther Party” during the “sophisticated vigilante operation” known as COINTELPRO.<sup>41</sup>

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33. *Id.*

34. *Id.*

35. See Garrow, *supra* note 21, at 656–61 (detailing historical accounts); Jama Lazerow, *Getting Right with the Panthers*, 42 *REVIEWS AM. HIST.* 162, 166–67 (2014) (same).

36. *THE TALES OF HOFFMAN: FROM THE TRIAL OF THE CHICAGO 8/7 18–21* (Mark L. Levine, George C. McNamee & Daniel Greenberg eds., 1970) [hereinafter *TALES*].

37. *RAGSDALE*, *supra* note 12, at 5; *TALES*, *supra* note 36, at 21.

38. Mary Schmich, *The Chicago Seven Put Their Fate in Her Hands. One Juror’s Rarely Seen Trial Journals Reveal How That Changed Her Forever*, *CHI. TRIB.* (Aug. 17, 2018, 8:40 AM), <https://www.chicagotribune.com/news/columnists/schmich/ct-met-chicago-7-democratic-national-convention-mary-schmich-20180815-story.html>.

39. *United States v. Seale*, 461 F.2d 345, 379–80 (7th Cir. 1972); *TALES*, *supra* note 36, at 18–19.

40. *TALES*, *supra* note 36, at 19.

41. S. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS: BOOK III, S. DOC. NO. 94-755, at 3, 185–87 (1976) [hereinafter *CHURCH REPORT*] (discussing “COINTELPRO: The FBI’s Covert Action Programs Against American Citizens”).

Ironically, vigilantism also shattered the official silence around COINTELPRO when college professors led a break-in of an FBI office and sent copies of stolen documents to the press and members of Congress.<sup>42</sup> Subsequent investigations exposed FBI field directives that urged agents to generate and implement “imaginative and hard-hitting counterintelligence measures aimed at crippling the BPP.”<sup>43</sup> Agents responded by seeking to foment violence, to silence the Party and its members, and to sow distrust and dissension through strategies involving informants.<sup>44</sup> The latter strategies included embedding informants within the BPP as well as hanging “snitch jackets” on Party members, that is, falsely labeling them as informants.<sup>45</sup> As discussed in Part II.C, these strategies implicate additional layers of the deeply fraught relationship between violence and silence in criminal legal systems. The next layer involves homicides of BPP members at the hands of police and other BPP members.

### C. *The Hampton and Rackley Cases*

#### 1. The Hampton Case

Six weeks after the trial judge ordered Seale bound and gagged in a Chicago courtroom, Chicago police killed Illinois BPP Chairman Fred Hampton in his bed during a 4:30 a.m. raid.<sup>46</sup> The raid followed a series of increasingly violent encounters between Chicago police and local BPP members. A key player in the raid was William O’Neal, a paid FBI informant embedded in the local BPP chapter.<sup>47</sup>

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42. *Id.* at 3 n.1; Sam Roberts, *John Raines, 84, Who Evaded Capture in an F.B.I. Break-in, Dies*, N.Y. TIMES (Nov. 17, 2017), <https://www.nytimes.com/2017/11/17/obituaries/john-raines-84-who-evaded-capture-in-an-fbi-break-in-dies.html>.

43. CHURCH REPORT, *supra* note 41, at 22.

44. *Id.* at 185–223.

45. *See id.* at 8, 33–34, 46–49 (discussing use of the “snitch jacket” and embedded informant techniques).

46. *See Hampton v. Hanrahan*, 600 F.2d 600, 605 (7th Cir. 1979), *cert. granted in part, rev’d in part on other grounds*, 446 U.S. 754 (1980) (detailing BPP Chairman Fred Hampton’s death in the 4:30 a.m. raid); U.S. DIST. COURT, N. DIST. OF ILL., E. DIV., REPORT OF THE JANUARY 1970 GRAND JURY 1, 27–28 (1970), <https://ia801200.us.archive.org/18/items/Grand-Jury-Fred-Hampton-1970/Hampton.-1970-FGJ-Report.pdf> [hereinafter GRAND JURY REPORT] (stating timing of raid, reporting Hampton’s death, and providing details on police raid personnel and planning activities); Ron Dorfman, *The Fraternal Order of Policemen*, CHI. JOURNALISM REV., Dec. 1969, at 12 (providing contemporaneous reporting); *see also* Rosa Hannah, *Fred Hampton: An American Activist*, BLACK POWER AM. MEMORY (Apr. 18, 2017), <http://blackpower.web.unc.edu/2017/04/fred-hampton-american-activist/> (discussing Hampton’s homicide and citing *Fred Hampton*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Fred\\_Hampton](https://en.wikipedia.org/wiki/Fred_Hampton) (last visited May 28, 2019)).

47. *See Hampton*, 600 F.2d at 617 (stating BPP activities were monitored by O’Neal and stating that a bonus “was ‘justified’ on the grounds that the raid was based on information furnished by

Fourteen officers participated in the raid. Their ostensible aim was to serve a warrant and seize a cache of BPP guns. Seven officers were active



Photo courtesy of Chicago Sun Times

shooters. They used a machine gun, a sawed-off shotgun, and other weapons to fire an estimated ninety-nine rounds inside the apartment. One bullet was linked to the BPP occupants. The barrage killed Hampton and a second BPP leader, and it wounded other BPP members and a police officer.<sup>48</sup>

The local prosecutor had organized the raid in coordination with the FBI. He filed attempted murder charges against the surviving BPP members. He dismissed those charges after a federal grand jury obtained evidence that

contradicted officers' self-defense claims.<sup>49</sup> The grand jury concluded that the raid was "ill-conceived," and that subsequent internal police investigations were "so seriously deficient" as to suggest "purposeful malfeasance."<sup>50</sup> A citizens' commission convened by former U.S. Supreme Court Justice Arthur Goldberg, NAACP Chairman Roy Wilkins, and former U.S. Attorney General Ramsey Clark decried the "wildly excessive" use of force in the raid and the failure of all available "[s]ystems of justice—federal, state, and local . . . to do their duty to protect the lives and rights of citizens."<sup>51</sup>

A Cook County judge acquitted the prosecutors and officers of

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O'Neal"); CHURCH REPORT, *supra* note 41, at 223 ("The Bureau and Chicago Police both maintained paid informants in the BPP . . . used by Chicago police in planning raids against the Chicago BPP."); Ron Grossman, *Fatal Black Panther Raid in Chicago Set Off Sizable Aftershocks*, CHI. TRIB. (Dec. 4, 2014, 11:19 PM), <https://www.chicagotribune.com/news/history/ct-black-panther-raid-flashback-1207-20141206-story.html> (detailing O'Neal's involvement).

48. See *Hampton*, 600 F.2d at 605, 612 ("Two of the occupants, Fred Hampton and Mark Clark, died as a result of the gunfire and four others, Ronald Satchel, Blair Anderson, Brenda Harris, and Verlina Brewer, were wounded."); GRAND JURY REPORT, *supra* note 46, at 87–88 (detailing the bullets and shells recovered).

49. *Hampton*, 600 F.2d at 619–20; GRAND JURY REPORT, *supra* note 46, at 114.

50. GRAND JURY REPORT, *supra* note 46, at 117–23.

51. ROY WILKINS & RAMSEY CLARK, SEARCH AND DESTROY: A REPORT BY THE COMMISSION OF INQUIRY INTO THE BLACK PANTHERS AND THE POLICE viii–ix (1973); Arthur J. Goldberg & Roy Wilkins, *The Police vs. the Black Panthers*, CRISIS, Jan. 1970, at 23.

obstruction of justice charges.<sup>52</sup> The officers did not face federal criminal charges because survivors declined to testify before the grand jury.<sup>53</sup> Scheingold's myth of rights theory offers insight into the grand jury's disappointment over not hearing from the survivors.<sup>54</sup> On one hand, the grand jury attributed that silence to disruptive intent, surmising that "revolutionary groups simply do not want the legal system to work."<sup>55</sup> At the same time, the grand jury conceded that "the performance of agencies of law enforcement, in this case at least, gives some reasonable basis for public doubt of their efficiency or even of their credibility."<sup>56</sup>

Survivor doubts about system efficacy and legitimacy likely grew during the decade-long litigation of their civil rights suit. The trial alone took eighteen months, in part because defendants resisted discovery demands for information on FBI culpability.<sup>57</sup> The relationship between the trial judge and plaintiffs' counsel was turbulent and, as in the Chicago Eight trial, included counsel's summary convictions and jailing on contempt charges.<sup>58</sup> After the jury deadlocked, the trial judge granted a defense motion for a directed verdict based on insufficiency of the plaintiffs' evidence. The Seventh Circuit reversed, ordered reassignment of the case to a different judge, and suggested that the defense should be sanctioned for obstructing discovery.<sup>59</sup> After more wrangling, the survivors obtained a \$1.8 million settlement, paid in equal parts by the federal government, Cook County, and the City of Chicago.<sup>60</sup>

FBI informant William O'Neal was added as a defendant in the case after belated defense discovery revealed his role in the raid.<sup>61</sup> Several years after the case settled, O'Neal committed suicide by running into

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52. John Kifner, *Judge Acquits Hanrahan of Plot in '69 Chicago Raid on Panthers*, N.Y. TIMES (Oct. 26, 1972), <https://www.nytimes.com/1972/10/26/archives/judge-acquits-hanrahan-of-plot-in-69-chicago-raid-on-panthers-judge.html>.

53. *Hampton*, 600 F.2d at 620; GRAND JURY REPORT, *supra* note 46, at 126 ("The most concise conclusion is that, in this case, it is impossible to determine if there is probable cause to believe an individual's civil rights have been violated without the testimony and cooperation of that person. This cooperation has been denied to this Grand Jury.").

54. *See generally* SCHEINGOLD, *supra* note 8.

55. GRAND JURY REPORT, *supra* note 46, at 126.

56. *Id.*

57. *Hampton*, 600 F.2d at 639–42.

58. *See id.* at 644–48 (providing transcripts and analysis of contempt judgments).

59. *Id.* at 642, 648.

60. *See id.* at 619–20 (explaining the grand jury proceedings); Joanna L. Brown & Larry Green, *U.S. Agrees to Settle Black Panthers Lawsuit: Survivors of Bloody 1969 Raid by Chicago Police OK Tentative Accord on \$1.85 Million Payment*, L.A. TIMES, Oct. 24, 1982, at 1, reprint available at <http://jfk.hood.edu/Collection/Weisberg%20Subject%20Index%20Files/F%20Disk/FBI/FBI%20Chicago%20Field%20Office/Item%2007.pdf> (reporting settlement).

61. *See Hampton*, 600 F.2d at 606 (identifying O'Neal as an additional defendant).

traffic on the Eisenhower Expressway.<sup>62</sup> After years in a federal witness protection program, he had returned to Chicago and made several prior suicide attempts. He expressed regret about his role in Hampton's death, but FBI records implicated him in many other strategies aimed at disrupting and silencing the BPP: Sending false anonymous letters; "snitch jacking"; and orchestrating Hampton's arrest to block a televised speech.<sup>63</sup>

O'Neal also implicated himself in using physical force to extract information from BPP members. Some of the statements he made before his death indicate that he may have used methods similar to those applied in the torture-murder of BPP member Alex Rackley.<sup>64</sup>

## 2. The Rackley Case

Fred Hampton's killing was "still vivid" the following spring during pretrial hearings in a Connecticut capital murder case.<sup>65</sup> In that case, fourteen BPP members were accused of kidnapping, torturing, and killing Alex Rackley.<sup>66</sup> The case sheds light on the dismissal of Seale's federal charges: Authorities likely considered them superfluous because Seale was among the BPP members facing the death penalty for Rackley's murder.

There is no dispute that BPP members tortured and murdered Rackley because they suspected him of being an informant.<sup>67</sup> These suspicions arose amidst the confluence of two efforts. The first was Seale's effort to strengthen the BPP and its reputation, in part by purging members viewed as informants or otherwise disloyal or disruptive. The second was the FBI's effort to sow suspicion and conflict among BPP members through informant and "snitch jacket" operations.<sup>68</sup> Amid mounting internal strife

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62. Michael Ervin, *The Last Hours of William O'Neal*, CHI. READER (Jan. 25, 1990), <https://www.chicagoreader.com/chicago/the-last-hours-of-william-oneal/Content?oid=875101>.

63. See *Hampton*, 600 F.2d at 609–10 (detailing O'Neal's actions as an informant).

64. See JOSHUA BLOOM & WALDO E. MARTIN JR., *BLACK AGAINST EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY* 250–51 (2016); Ervin, *supra* note 62.

65. Lesley Oelsner, *Black Panthers Are Sent Back to Cells After Mistrial*, N.Y. TIMES (May 25, 1971), <https://www.nytimes.com/1971/05/25/archives/deadlock-by-jury-results-in-sealehuggins-mistrial-mistrial-declared.html>.

66. *Id.* (reporting details of the case).

67. *State v. McLucas*, 375 A.2d 1014, 1016 (Conn. 1977) (stating undisputed facts of torture and shooting); Paul Bass, *Black Panther Torture "Trial" Tape Surfaces*, NEW HAVEN INDEP. (Feb. 21, 2013, 6:42 PM), [https://www.newhavenindependent.org/index.php/archives/entry/rackley\\_trial\\_tape\\_surfaces/](https://www.newhavenindependent.org/index.php/archives/entry/rackley_trial_tape_surfaces/) (discussing taped interrogations); Bruce Weber, *Warren Kimbro, Ex-Panther Who Turned to Life of Service After Killing, Dies at 74*, N.Y. TIMES (Feb. 5, 2009), <https://www.nytimes.com/2009/02/05/nyregion/05kimbro.html> (reporting Rackley's torture and killing when accused of being an informant).

68. See CHURCH REPORT, *supra* note 41, at 22 (quoting FBI order to propose counterintelligence measures).

and distrust, BPP members in New Haven tortured Rackley over the course of several days, extracted a “confession” that he was working with law enforcement, drove him to a swamp, and shot him to death.<sup>69</sup>

A co-defendant who pled guilty to Rackley’s murder testified that he acted on Seale’s orders. Other witnesses, including Seale, described Seale’s presence near the location and time frame in which Rackley was tortured.<sup>70</sup> Seale denied any involvement, however, and the jury deadlocked. The judge then dismissed Seale’s charges, ruling that publicity about the case made it impossible to retry it before an unbiased jury.<sup>71</sup>

The Rackley and Hampton cases further complicate the relationship between violence and silence in criminal legal systems. Unchecked by counterbalancing criminal defense or civil rights expertise and untethered from meaningful judicial oversight, police and prosecutors exacerbated already deadly risks involving both the forcible extraction of information from BPP members and their forcible silencing. Those risks were presented by BPP members and police alike and were risks of which the FBI had ample reason to be aware.<sup>72</sup>

In Rackley’s case, BPP members used horrifying violence to force speech from, and then permanently silence, another Party member. Such BPP “discipline” aimed to expose and eliminate enemies whose masquerade as allies required strategic silence about their actual identities and purpose. The *Hampton* case illustrates how such masquerades facilitated horrifying state violence in silencing the BPP. The Hampton case also illustrates ways in which judges can assist or impede other government actors in building walls of silence to avoid accountability for their actions.

The latter theme pervades the next layer of events that have unfolded since the Chicago Eight trial. This layer involves police abuses so infamous as to draw condemnation from the United Nations, and to warrant creation of what may be the only commission in the world established specifically to investigate and redress government torture.<sup>73</sup>

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69. *McLucas*, 375 A.2d at 1016.

70. Lesley Oelsner, *Sams Says He Was Calm While Torturing Rackley*, N.Y. TIMES (Apr. 28, 1971), <https://www.nytimes.com/1971/04/28/archives/sams-says-he-was-calm-while-torturing-rackley.html>.

71. *McLucas*, 375 A.2d at 1016; Lesley Oelsner, *Charges Dropped in the Seale Case; ‘Publicity’ Cited*, N.Y. TIMES (May 26, 1971), <https://www.nytimes.com/1971/05/26/archives/charges-dropped-in-the-seale-case-publicity-cited-judge-finds-it.html>.

72. See CHURCH REPORT, *supra* note 41, at 48–49 (discussing risk of death for labeled informants).

73. See 775 ILL. COMP. STAT. 40/1–40/99 (2018) (establishing Illinois Torture Inquiry and Relief Commission); ZACHARY D. KAUFMAN, UNITED STATES LAW AND POLICY ON

#### D. Torture on the South Side

Although research indicates that Chicago police had a century-long history of using torture during custodial interrogation, the violence discussed in this subpart began in 1972—the same year that a Chicago judge acquitted the prosecutor and police of wrongdoing for the raid that killed Fred Hampton.<sup>74</sup> For the next twenty years, in police stations on

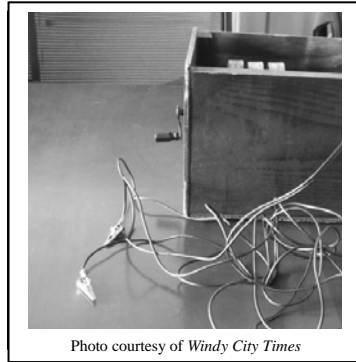


Photo courtesy of Windy City Times

Chicago's South and West sides, Chicago Police Commander Jon Burge and his "midnight crew" of officers, all of whom were white, coerced information from over 120 men, almost all of whom were Black, through physical and mental torture that included beatings, burnings, threatened executions, suffocation, and electric shocks with a hand-cranked generator that Burge called "the n\*\*\*\*r box."<sup>75</sup>

Officials ignored and covered up evidence of this systematic abuse. Judges denied (and affirmed the denials of) motions to suppress false confessions and for other forms of relief.<sup>76</sup> Other government leaders withheld internal investigative reports that corroborated allegations of abuse.<sup>77</sup> Victims were wrongfully

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TRANSITIONAL JUSTICE: PRINCIPLES, POLITICS, AND PRAGMATICS 28–29 (2016) (using Illinois's Commission as an example of a "truth commission"); Kim D. Chanbonpin, *Truth Stories: Credibility Determinations at the Illinois Torture Inquiry and Relief Commission*, 45 LOY. U. CHI. L.J. 1085, 1088 (2014) (discussing formation of the Commission to address police torture).

74. See ELIZABETH DALE, ROBERT NIXON AND POLICE TORTURE IN CHICAGO, 1871–1971 1 (2016). As Professor Dale explains, the history of police torture inflicted disproportionately on poor people and people of color in Chicago began at least a hundred years before the incidents discussed in this subpart. *Id.* at 2–27, 102–20.

75. Gretchen Rachel Hammond, *Reparations: The Long Battle for Police Torture Survivors*, WINDY CITY TIMES (June 17, 2015), <http://www.windycitymediagroup.com/lgbt/REPARATIONS-The-long-battle-for-police-torture-survivors/51850.html>. See also Andrew S. Baer, *Dignity Restoration and the Chicago Police Torture Reparations Ordinance*, 92 CHI.-KENT L. REV. 769, 770 (2017) ("Race played a critical role in the Burge scandal. Nearly all of the dozens of detectives involved were white; virtually all of the alleged victims were black." (footnote omitted)); Andrea J. Ritchie & Joey L. Mogul, *In the Shadows of the War on Terror: Persistent Police Brutality and Abuse of People of Color in the United States*, 1 DEPAUL J. SOC. JUST. 175, 184–89 (2008) (detailing racially motivated torture techniques used between 1972 and 1991); G. Flint Taylor, *The Long Path to Reparations for the Survivors of Chicago Police Torture*, 11 NW. J.L. & SOC. POL'Y 330, 330 (2016).

76. See, e.g., *In re Claim of Gerald Reed*, TIRC Claim No. 2011.030-R, at 3 (Ill. Torture Inq. & Relief Comm'n Mar. 19, 2014), <https://www2.illinois.gov/sites/tirc/Documents/REED%20amended%20determination%20without%20markup.pdf>.

77. *Id.* at 2.

convicted and sentenced to lengthy terms of imprisonment and death.<sup>78</sup> Attempts to recover damages through civil lawsuits repeatedly failed.<sup>79</sup>

After years of victim efforts, community organizing, and activist lawyering that framed the problem as an international human rights catastrophe, the walls of silence began to collapse.<sup>80</sup> The state legislature created the Illinois Torture Inquiry and Relief Commission.<sup>81</sup> The Commission is approving cases for judicial review despite concerns about high procedural barriers to relief, the Commission's limited authority, and inadequate resources.<sup>82</sup> By early 2019, Illinois had the second highest number of exonerations (296) among the fifty states, following only Texas.<sup>83</sup> Nearly 80 percent (235) of the Illinois exoneration cases were from Cook County.<sup>84</sup> Thus, more wrongful convictions have been detected and corrected in this single county than in the entire state of California.<sup>85</sup> In 2017 alone, Cook County was

78. See, e.g., Rob Warden, Bluhm Legal Clinic, Ctr. on Wrongful Convictions, *Aaron Patterson: A Tortured Path to Death Row*, NW. PRITZKER SCH. L., <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/aaron-patterson.html> (last visited May 28, 2019).

79. Taylor, *supra* note 75, at 332–33; *Jon Burge and Chicago's Legacy of Police Torture*, CHI. TRIB. (Sept. 19, 2018, 12:22 PM), <https://www.chicagotribune.com/news/ct-jon-burge-chicago-police-torture-timeline-20180919-htmlstory.html>.

80. See Aretina R. Hamilton & Kenneth Foote, *Police Torture in Chicago: Theorizing Violence and Social Justice in a Racialized City*, 108 ANNALS AM. ASS'N GEOGRAPHERS 399, 403 (2018) (“Wilson’s case is important not only because he won but because the information that surfaced between 1986 and 1996 (including anonymous tips coming from within the police department) led to the exposure of Burge and his colleagues.”); Taylor, *supra* note 75, at 330 (“This scandal . . . was slowly uncovered and exposed primarily by lawyers from the People’s Law Office (PLO), an investigative reporter from the *Chicago Reader*, and an anonymous police source . . . .” (footnotes omitted)).

81. 775 ILL. COMP. STAT. 40/1–40/99 (2018).

82. Chanbonpin, *supra* note 73, at 1104–05; *TIRC Decisions*, ILL. TORTURE INQUIRY & RELIEF COMMISSION, <https://www2.illinois.gov/sites/tirc/Pages/TIRCDecision.aspx> (documenting ninety-six cases decided as of May 28, 2019).

83. See Detailed View of State Exonerations Filtered by State, NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&SortField=ST&SortDir=Asc> (last visited May 28, 2019).

84. Compare Detailed View of State Exonerations in Illinois, NAT’L REGISTRY EXONERATIONS, [https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&SortField=County\\_x0020\\_of\\_x0020\\_Crime&SortDir=Asc&FilterField1=ST&FilterValue1=IL](https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&SortField=County_x0020_of_x0020_Crime&SortDir=Asc&FilterField1=ST&FilterValue1=IL) (displaying 295 exonerations for Illinois through May 2019), with Detailed View of State Exonerations in Cook County, NAT’L REGISTRY EXONERATIONS, [https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&SortField=County\\_x0020\\_of\\_x0020\\_Crime&SortDir=Asc&FilterField1=ST&FilterValue1=IL&FilterField2=County\\_x0020\\_of\\_x0020\\_Crime&FilterValue2=Cook](https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&SortField=County_x0020_of_x0020_Crime&SortDir=Asc&FilterField1=ST&FilterValue1=IL&FilterField2=County_x0020_of_x0020_Crime&FilterValue2=Cook) (showing 235 exonerations in Cook County. Thus, as of May 28, 2019, 79 percent (235/296) of the exonerations in Illinois originated in Cook County).

85. Compare Detailed View of State Exonerations in Cook County, *supra* note 84 (showing 235 exonerations in Cook County), with Detailed View of State Exonerations in California, NAT’L



responsible for almost half of the nation's 29 exonerations attributed to false confessions.<sup>86</sup> By the end of 2018, settlement payments to victims of Burge and his midnight crew had reached \$132 million, and the City had budgeted another \$5.5 million for additional reparations.<sup>87</sup>

Despite these developments, there is reason for circumspection about the possibility of sustainable reform. Empirical evidence shows that institutional cultures in criminal legal systems are recalcitrant in the face of reform efforts.<sup>88</sup> Thus, it is no surprise that Chicago's policing problem was bigger than Burge.<sup>89</sup> For example, by 2017, Chicago Police Detective Reynaldo Guevara had matched Burge's grim record for "securing the most convictions that later resulted in exonerations based on coerced confessions" through tactics that often involved physical abuse.<sup>90</sup> A separate police extortion racket plagued one of Chicago's low-income neighborhoods for years and led to another sixty-three convictions being vacated, with many more cases under investigation.<sup>91</sup>

In addition, a 2017 report by the Department of Justice identified training and internal investigation failures that created a pattern or practice in the use of force by Chicago police and "deeply eroded community trust."<sup>92</sup> That report responded in part to the killing of Laquan

REGISTRY EXONERATIONS, [https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&SortField=County\\_x0020\\_of\\_x0020\\_Crime&SortDir=Asc&FilterField1=ST&FilterValue1=CA](https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&SortField=County_x0020_of_x0020_Crime&SortDir=Asc&FilterField1=ST&FilterValue1=CA) (showing 194 exonerations in California as of May 28, 2019).

86. See NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2017 7 (2018), <https://www.law.umich.edu/special/exoneration/documents/exonerationsin2017.pdf> [hereinafter NAT'L REGISTRY 2017 EXONERATIONS] ("Just under half of these cases (13/29) occurred in Cook County . . .").

87. Baer, *supra* note 75, at 771 (describing costs and identifying \$5.5 million budgeted for additional reparations); Elvia Malagon, *4 Things: The Cost of Jon Burge's Police Torture Legacy*, CHI. TRIB. (Sept. 21, 2018, 5:00 PM), <https://www.chicagotribune.com/news/local/breaking/ct-met-four-things-jon-burge-torture-chicago-police-20180921-story.html> (stating \$132 million cost).

88. See ROBERT E. WORDEN & SARAH J. MCLEAN, MIRAGE OF POLICE REFORM: PROCEDURAL JUSTICE AND POLICE LEGITIMACY 29 (2017); see generally Jon B. Gould & Kenneth Sebastian Leon, *A Culture that Is Hard to Defend: Extralegal Factors in Federal Death Penalty Cases*, 107 J. CRIM. L. & CRIMINOLOGY 643 (2017) (discussing difficulties with reforming criminal legal systems).

89. See Chanbonpin, *supra* note 73, at 1089 (debunking "bad apples" myth).

90. NAT'L REGISTRY 2017 EXONERATIONS, *supra* note 86, at 7.

91. Christine Hauser, 'A Stain on the City': 63 People's Convictions Tossed in Chicago Police Scandal, N.Y. TIMES (Feb. 13, 2019), <https://www.nytimes.com/2019/02/13/us/chicago-exonerations-drug-sentences.html>.

92. Press Release, U.S. Dep't of Justice: Office of Pub. Affairs, Justice Department Announces Findings of Investigation into Chicago Police Department (Jan. 13, 2017) (internal quotation marks omitted) (quoting Principal Deputy Assistant Attorney General Vanita Gupta, head of Civil Rights Division), <https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-chicago-police-department>.

McDonald, but reflected a history extending to the Hampton case and beyond.<sup>93</sup> McDonald, a seventeen-year-old Black youth, was carrying a knife but moving away from police when Officer Jason Van Dyke shot him sixteen times. As in Hampton's case, officer justifications for the killing were contradicted by evidence that authorities sought to keep from the public.<sup>94</sup>

In the wake of these events, the Illinois Attorney General sued the City of Chicago to address police-related federal civil rights violations. The parties negotiated a reform-oriented consent agreement that awaits judicial approval as of this writing.<sup>95</sup> The consent agreement might be seen as a harbinger of change,<sup>96</sup> as might Van Dyke's convictions for McDonald's assault and murder, the prosecution of other officers for filing false reports in that case,<sup>97</sup> and Burge's conviction for obstructing justice during litigation over his own violence.<sup>98</sup>

On the other hand, Trump-era restrictions on DOJ initiation and oversight of police reform agreements,<sup>99</sup> and the same administration's explicit repudiation of the locally-crafted Chicago consent decree,<sup>100</sup>

93. See DALE, *supra* note 74, at 1–27, 102–20.

94. Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 631–35, 634 n.11.

95. Consent Decree, *Illinois v. City of Chicago*, 912 F.3d 979 (N.D. Ill. 2018) (No. 17-cv-6260), <http://chicagopoliceconsentdecree.org/wp-content/uploads/2018/09/Illinois-v.-Chicago-Final-Consent-Decree-with-signatures.pdf>; see also *Illinois v. City of Chicago*, No. 17-cv-6260, 2018 WL 3920816 (E.D. Ill. Aug. 16, 2018), *aff'd*, 2019 WL 74366 (7th Cir. 2019) (describing case history); *Chicago Police Consent Decree*, ILL. ATT'Y GEN., <http://chicagopoliceconsentdecree.org/consent-decree-and-input/> (last visited May 28, 2019) (describing submission of decree for judicial approval).

96. See generally Louise Westmarland & Michael Rowe, *Police Ethics and Integrity: Can a New Code Overturn the Blue Code?*, 28 POLICING & SOC'Y 854 (2018) (discussing the potential for improvement in police behavior through a new police code). But see WORDEN & MCLEAN, *supra* note 88 (discussing recalcitrance of institutional cultures in criminal legal systems in the face of reform efforts).

97. Megan Crepeau, Christy Gutowski & Jason Meisner, *Trial over Alleged Police Cover-Up of Laquan McDonald's Shooting Closes with Rhetorical Fireworks*, CHI. TRIB. (Dec. 6, 2018, 9:30 PM), <https://www.chicagotribune.com/news/local/breaking/ct-met-laquan-mcdonald-shooting-police-coverup-20181206-story.html>.

98. Jeremy Gorner, *Former Chicago Police Cmdr. Jon Burge Released from Home Confinement*, CHI. TRIB. (Feb. 13, 2015, 2:45 PM), <https://www.chicagotribune.com/news/chi-jon-burge-police-torture-released-20150213-story.html>.

99. Memorandum from the Attorney Gen. on Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities to Heads of Civil Litigating Components United States Attorneys (Nov. 7, 2018); Katie Benner, *Sessions, in Last-Minute Act, Sharply Limits Use of Consent Decrees to Curb Police Abuses*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/us/politics/sessions-limits-consent-decrees.html>.

100. United States' Statement of Interest Opposing Proposed Consent Decree, *Illinois v. City of Chicago*, 912 F.3d 979 (N.D. Ill. 2018) (No. 17-cv-6260), <https://www.justice.gov/opa/press-release/file/1100631/download>; Aamer Madhani, *Sessions: Chicago Police Consent Decree Plan*

evidence the latest instance of backlash in the long struggle to recalibrate relationships between violence and silence in criminal legal systems. The administration's regressive policies reinforce structural problems that allow patterns of violence and abuse to occur, that is, the sociocultural, spatial, and racialized power distributions that promote silence about, submission to, and stability of extant hierarchies.<sup>101</sup>

Scheingold's myth of rights framework accounts for these powerful forms of resistance to change, and highlights a salient cautionary tale from outside of Chicago.<sup>102</sup> During negotiations on the city-state consent decree, Chicago reformers pointed to Cincinnati's Collaborative Agreement (CA) as an exemplar for reducing police violence and promoting better police-community relationships.<sup>103</sup> The CA settled lawsuits involving abuses that included numerous killings of unarmed Black men by Cincinnati police. Early years of CA implementation under DOJ monitoring led to significant improvements in police hiring, training, and supervision as well as increased mutual accountability between police and community.<sup>104</sup>

However, backlash was also brewing. The City and the police union were parties to the CA, but a recent report by independent monitors states that the City has "unilaterally withdrawn" and is no longer engaged in the CA's signature commitment to community problem solving policing.<sup>105</sup> The police union also boycotted an attempt to "refresh" the collaborative process.<sup>106</sup> Some Cincinnati officers, like those in Chicago, raise concerns that scrutiny of their conduct encourages false abuse accusations, chills law enforcement, and encourages crime.<sup>107</sup> The

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'Colossal Mistake' Pushed By Lame-Duck Mayor, USA TODAY (Oct. 19, 2018, 3:32 PM), <https://www.usatoday.com/story/news/2018/10/19/jeff-sessions-chicago-police-department-homicide-consent-decree-rahm-emanuel/1694719002/>.

101. See Hamilton & Foote, *supra* note 80, at 404–08 (citing variables that lead to racialized power distribution).

102. SCHEINGOLD, *supra* note 8.

103. Collaborative Agreement, *In re Cincinnati Policing*, 209 F.R.D. 395 (S.D. Ohio 2002) (No. C-1-99-3170), <https://www.cincinnati-oh.gov/ccia/assets/File/Collaborative%20Agreement.pdf>; WORDEN & MCLEAN, *supra* note 88, at 181–92; Wyatt Cenac's *Problem Areas: Teacher Problems, Burial Problems, Collaborative Problems* (HBO television broadcast June 15, 2018); Curtis Black, *On Police Reform Deal with Feds, Chicago Can Learn from Cincinnati*, CHI. REP. (June 8, 2017), <https://www.chicagoreporter.com/on-police-reform-deal-with-feds-chicago-can-learn-from-cincinnati/>.

104. WORDEN & MCLEAN, *supra* note 88, at 181–92.

105. SAUL A. GREEN ET AL., PROGRESS REPORT: CITY OF CINCINNATI COLLABORATIVE AGREEMENT: THE STATUS OF COMMUNITY PROBLEM ORIENTED POLICING STRATEGY 1 (2018), <https://www.cincinnati-oh.gov/police/assets/File/Community%20Problem-Oriented%20Policing%20-%20Progress%20Report%20-%20Saul%20Green%20et%20al%201-04-18.pdf>.

106. *Id.* at 17.

107. See Cameron Knight, *1998 Was the Least Deadly Year in Cincinnati. What Can We Learn*

County prosecutor responded to such concerns by obtaining an injunction that eviscerated a core CA function. The injunction blocks the Citizen's Complaint Authority from interviewing police officers who are potential witnesses in criminal cases—including key witnesses in cases involving allegations of excessive use of force.<sup>108</sup>

If further evidence of institutional and individual resistance to reform were necessary, it is available in testimony from a Chicago police officer who appeared as a prosecution witness in the Laquan McDonald murder case. The officer testified to being “blackballed” by fellow officers as “a rat, a snitch and a traitor”<sup>109</sup> after contradicting fellow officers' version of events. The officer testified to moving from a patrol position to a desk job because the situation had become “a safety issue . . . . If I am on the street, I am on a call, I wouldn't know who to trust or if anybody would come to help me.”<sup>110</sup>

This testimony underscores the myth-of-rights theme that permeates this Part's historical sketch. Activists responded to law's failures by invoking other law, by rejecting law's authority, and by engaging in violent criminal conduct. Fierce government backlash likewise invoked the rule of law and broke it, including through violent crime. Informants and suspected informants navigated fluid and dangerous boundaries; cause lawyers worked both sides of the impasse; judges enabled and impeded efforts to build walls of silence around evidence of extralegal official violence.

In the end, a police officer who provided incriminating evidence against fellow officers distrusts them and fears that they create risks to personal safety. The arc of this brief and concededly episodic history demonstrates that such distrust and fear are even more well-founded for

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*From It?*, CINCINNATI ENQUIRER (Dec. 20, 2018, 9:27 AM), <https://www.cincinnati.com/story/news/crime/crime-and-courts/2018/12/20/homicide-rates-1998-safe-cincinnati-what-can-we-learn/2052912002/> (discussing statements of Cincinnati police union president Dan Hills); see also Kristine Phillips, *Dozens Claim a Chicago Detective Beat Them into Confessions. A Pattern of Abuse Or a Pattern of Lies?*, WASH. POST (June 9, 2018), [https://www.washingtonpost.com/news/post-nation/wp/2018/06/09/dozens-claim-a-chicago-detective-beat-them-into-confessions-a-pattern-of-abuse-or-a-pattern-of-lies/?utm\\_term=.0f3fd902a7dd](https://www.washingtonpost.com/news/post-nation/wp/2018/06/09/dozens-claim-a-chicago-detective-beat-them-into-confessions-a-pattern-of-abuse-or-a-pattern-of-lies/?utm_term=.0f3fd902a7dd) (describing rebuttals to accusations of abuse against the Chicago Police Department).

108. Cameron Knight, *Ruling: Citizens Complaint Authority Cannot Interview Officers During Criminal Cases*, CINCINNATI ENQUIRER (July 19, 2018, 2:47 PM), <https://www.cincinnati.com/story/news/crime/crime-and-courts/2018/07/19/ruling-complaint-authority-cannot-interview-officers-during-criminal-cases/801629002/>.

109. Christy Gutowski, Jason Meisner & Stacy St. Clair, *5 Takeaways from the Second Day of Testimony at the Trial of 3 Chicago Cops in Alleged Cover-Up of Laquan McDonald Shooting*, CHI. TRIB. (Nov. 28, 2018, 9:15 PM), <https://www.chicagotribune.com/news/laquan-mcdonald/ct-met-laquan-mcdonald-shooting-police-coverup-20181128-story.html>.

110. *Id.*

people who are subject to custodial interrogation. Part II explains how judges have contributed to these problems by crafting legal doctrines that undermine enforcement of key constitutional criminal procedure rights, including the right to be free from police violence and the right of stationhouse access to counsel.

## II. JUDICIAL RESTRICTIONS ON STATIONHOUSE ACCESS TO COUNSEL

More than fifty years after Bobby Seale cofounded the Black Panther Party for Self Defense,<sup>111</sup> there is broad acknowledgment of the Fourth Amendment's continued inability to prevent police violence and that such violence disproportionately harms low-income people and people of color. An example of this acknowledgment is Justice Sotomayor's dissenting opinion in *Utah v. Strieff*.<sup>112</sup> The opinion warns readers that "your body is subject to invasion while courts excuse the violation of your rights."<sup>113</sup>

The opinion is a bit misleading, however, in stating that courts "excuse" Fourth Amendment violations. Courts rarely find violations to excuse. Consent requirements are so low that courts consider "nearly everyone" free to leave a police stop or decline permission to search.<sup>114</sup> Another aspect of this "constitutional complicity"<sup>115</sup> is judicial deference to officer perceptions that their conduct was reasonable—a deference that enables discriminatory stops and seizures, invasive searches, and racialized police violence.<sup>116</sup>

Although words are inadequate to capture the full implications of the Court's rulings,<sup>117</sup> this Part focuses on one systemic impact: Weak enforcement of Fourth Amendment protections against the use of force by police exacerbates weak right-to-counsel guarantees under the Fifth and Sixth Amendments. The combination imbues custodial interrogation

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111. Garrow, *supra* note 21, at 651.

112. *Utah v. Strieff*, 136 S. Ct. 2056, 2064–71 (2016) (Sotomayor, J., dissenting).

113. *Id.* at 2070–71.

114. Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 511 (2015).

115. McLeod, *supra* note 1.

116. Akbar, *supra* note 1, at 441. *See also* Brandon Garrett & Seth Stoughton, 103 VA. L. REV. 211, 224 (2017) (describing standard as "subjective objectivity" (quoting Geoffrey P. Alpert & William C. Smith, *How Reasonable Is the Reasonable Man?: Police and Excessive Force*, 85 J. CRIM. L. & CRIMINOLOGY 481, 486 (1994))).

117. *See, e.g.*, Chao Xiong & Brandon Stahl, *Video: 'I Don't Want You to Get Shot,' Daughter Pleads to Mother Moments After Castile Shooting*, STARTRIBUNE (June 22, 2017, 5:56 AM), <http://www.startribune.com/video-i-don-t-want-you-to-get-shot-d-daughter-pleads-to-mother-moments-after-castile-shooting/429948923/> (conveying the reaction of a four-year-old witness to the police killing of Philando Castile, as she and her mother were confined in the back of a police cruiser).

with a coerciveness for which the presence of defense counsel is a necessary amelioration. The discussion below summarizes Supreme Court case law that restricts stationhouse access to counsel.

As might be predicted from Scheingold's myth of rights framework and the historical sketch offered in Part I, the Court has made numerous attempts "to civilize police interrogation in America."<sup>118</sup> In 1897, in *Bram v. United States*, the Court vacated a murder conviction and death sentence under the Fifth Amendment right to be free from compelled self-incrimination because the investigating detective stripped Bram naked and confronted him with incriminating evidence from a purported eyewitness.<sup>119</sup> Those acts, the Court held, violated the requirement that incriminating statements must be "free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight."<sup>120</sup> The Court reasoned that the detective's actions would have led Bram to believe that he had to respond out of fear that silence would be construed as guilt.<sup>121</sup>

It took nearly seventy years for the Court to incorporate *Bram's* Fifth Amendment protections against the states via the Fourteenth Amendment Due Process Clause.<sup>122</sup> During those decades, the Court was confronted with an increasingly politicized international embarrassment: lynching, and courtroom processes that constituted little more than judicially-sanctioned lynching, mainly of Black people in the south.<sup>123</sup> In a series of cases, the Court held that such tainted proceedings violated due process.

First, in *Moore v. Dempsey*, the Court reversed the denial of a habeas corpus petition filed by five of six Black men who presented abundant evidence that their murder convictions and death sentences were the result of "mob" pressure.<sup>124</sup> In fact, that pressure was neither spontaneous nor unruly. It was the result of systematic, well-organized, violent white opposition to Black tenant farmers and sharecroppers, who sought to unionize and had "hire[d] white lawyers to sue planters for peonage practices."<sup>125</sup>

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118. Albert W. Alschuler, *Miranda's Fourfold Failure*, 97 B.U. L. REV. 849, 849 (2017).

119. *Bram v. United States*, 168 U.S. 532, 539, 542–43 (1897). The purported eyewitness made the accusation after he was accused of committing the three ax murders. *Id.* at 536–37.

120. *See id.* at 542–43 (quoting 3 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 478 (6th ed. 1896)).

121. *Id.* at 542–43, 562–635.

122. *Malloy v. Hogan*, 378 U.S. 1, 3 (1964).

123. *See* Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1291–96 (2015).

124. *Moore v. Dempsey*, 261 U.S. 86, 87–88 (1923).

125. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND

Next, in *Powell v. Alabama*, the Court crafted a due process right to counsel in capital cases after the Communist Party and the NAACP battled to control the litigation and save the young men known as “the Scottsboro boys” (the Communists won).<sup>126</sup> Finally, in *Brown v. Mississippi*, the Court ruled that the Due Process Clause barred the admission into evidence of incriminating statements extracted from Black tenant farmers regarding the murder of a white landowner.<sup>127</sup> The circumstances presaged contemporary police torture tactics documented in Part I.D. Statements were obtained “in the exact form and contents as desired by the mob” of law enforcement-led whites, who inflicted whipping, mock lynching, and other violence so extreme that the lower court descriptions seem “more like pages torn from some medieval account.”<sup>128</sup>

About thirty years after deciding *Brown*, the Court turned to the Sixth Amendment as a tool for regulating police interrogations. In *Escobedo v. Illinois*, the Court held that the right to “Assistance of Counsel” is denied when a law enforcement investigation

has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent.<sup>129</sup>

Thus, in *Escobedo* the Court recognized that, even in the absence of formal charges, being detained and questioned by police as the prime suspect in a criminal case poses distinctive risks, the navigation of which requires the guidance of counsel.<sup>130</sup> The Court specifically acknowledged the detained individual’s need “to be advised by his lawyer

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THE STRUGGLE FOR RACIAL EQUALITY 98 (2004). Originally, twelve Black men were sentenced to death for the killing of whites in the ensuing violence; all were released within two years of the Court’s remand order in *Moore*. J. S. Waterman & E. E. Overton, *The Aftermath of Moore v. Dempsey*, 18 ST. LOUIS L. REV. 117, 118–19, 122–26 (1933). Notably, the first federal judge to consider the petition granted it, but then recused himself due to “his long years of residence in Phillips County.” *Id.* at 121–22. A substitute judge from Oklahoma then denied the writ. *Id.*

126. See Moore, Sandys, & Jayadev, *supra* note 16, at 1291–93 (discussing history of *Powell v. Alabama*, 287 U.S. 45 (1932)).

127. *Brown v. Mississippi*, 297 U.S. 278, 282, 287 (1936).

128. *Id.* at 281–82.

129. *Escobedo v. Illinois*, 378 U.S. 478, 490–91 (1964). A week before deciding *Escobedo*, the Court had incorporated the Fifth Amendment right to silence against the states. *Malloy v. Hogan*, 378 U.S. 1, 3 (1964). The Court had incorporated the Sixth Amendment right to counsel against the states fifteen months earlier. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

130. *Escobedo*, 378 U.S. at 488, 490–91.

of his privilege against self-incrimination.”<sup>131</sup> The Court also identified pre-indictment interrogation as a critical phase of the proceedings, that is, a phase when the presence of counsel is required, like post-indictment interrogation, arraignment, and preliminary hearings.<sup>132</sup>

Judge Goldberg wrote *Escobedo* at a time when social movements pressured courts to assure the equal and effective exercise of fundamental rights.<sup>133</sup> On the international stage, Communism was once again a real and immediate threat. Demonstrating capacities for fairness and equality in a non-communist system was therefore a high priority.<sup>134</sup> Nevertheless, two years after the Court anchored the right of early access to counsel in the Sixth Amendment, *Miranda v. Arizona* relegated it to an ancillary position supporting Fifth Amendment protections against involuntary self-incrimination.<sup>135</sup>

Thereafter, in what one commentator described as “a spectacularly chaotic farrago of opinions,” the Court imposed increasingly onerous conditions for invoking those protections.<sup>136</sup> There is broad if not universal agreement that, as a result of those limitations, “*Miranda* is bankrupt both intellectually and in terms of practical effect.”<sup>137</sup> Moreover, when the opportunity arose to restore the right of early attorney access to its Sixth Amendment roots, the Court feinted with a finely-parsed distinction between “attachment” of the Sixth Amendment right to counsel, which does not require the presence of counsel, and “critical stages,” which do.<sup>138</sup>

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131. *Id.* at 488 (emphasis added). A banner headline on *Time* magazine’s cover described *Escobedo* as “moving the Constitution into the Police Station.” *TIME* (Apr. 29, 1966), <http://content.time.com/time/covers/0,16641,19660429,00.html> [hereinafter *TIME COVER*] (I thank Lauryn Gouldin for this reference).

132. *Escobedo*, 378 U.S. at 487–88.

133. ARTHUR J. GOLDBERG, *EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT* 5–7 (1971).

134. MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 3–6, 11–14 (2000); see also BLOOM & MARTIN, *supra* note 64, at 390–95 (explaining relationships among the Black Panther Party, its conflict with the United States government, and Cold War politics).

135. *Miranda v. Arizona*, 384 U.S. 436, 478 (1966).

136. Alschuler, *supra* note 118, at 869 (internal quotation marks omitted) (quoting James J. Duane, *The Extraordinary Trajectory of Griffin v. California: The Aftermath of Playing Fifty Years of Scrabble with the Fifth Amendment*, 3 *STAN. J. CRIM. L. & POL’Y* 1, 10 n.52 (2015)). For summaries of those limitations, see Eve Brensike Primus, *Disentangling Miranda and Massiah: How to Revive the Sixth Amendment Right to Counsel as a Tool for Regulating Confession Law*, 97 *B.U. L. REV.* 1085, 1088 (2017), and David Rossman, *Resurrecting Miranda’s Right to Counsel*, 97 *B.U. L. REV.* 1129, 1129–30 (2017).

137. Rossman, *supra* note 136, at 1131; see also Alschuler, *supra* note 118, at 849–50 (noting and explaining *Miranda*’s foreseeable failures).

138. *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 198, 212 (2008).



The Court has also muddied Sixth Amendment right to counsel doctrine with permissive Fifth Amendment waiver rules, and with exacting demands for precision, clarity, and consistency in invocations of the right to counsel.<sup>139</sup> Such decisions detach Sixth Amendment analysis from its mooring in the attorney-client relationship, as Court rulings embody “a general apathy towards—if not outright disdain for—the real-world professional value of defense counsel during an interrogation.”<sup>140</sup> That disdain encompasses what *Escobedo* and common sense acknowledge: The crucial role of counsel in advising a client of all risks and benefits that could accompany any waiver of rights.<sup>141</sup>

These restrictions on stationhouse access to counsel cause significant harm. They unleash the specter of police violence discussed in Part I. They increase unnecessary detentions by interfering with pretrial release advocacy. Those detentions do more than infringe on liberty interests; they jeopardize jobs, housing, and child custody arrangements.<sup>142</sup> Detention also increases pressure to plead guilty, prevents participation in case investigation and presentation, and causes worse case outcomes (more convictions, longer sentences, and increased risk of recidivism).<sup>143</sup> All of these harms have equal protection implications because they are avoidable for people who can afford to hire counsel; thus, these doctrines disproportionately harm low-income people, who are disproportionately people of color.<sup>144</sup>

Restrictions on stationhouse access to counsel also create special risks for people with other vulnerabilities. Empirical research indicates that, with regard to rights waivers, “a significant percentage of suspects simply cannot comprehend the warnings or the rights they are intended to convey.”<sup>145</sup> One review of *Miranda* warnings found them to require a

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139. Primus, *supra* note 136, at 1088.

140. Brooks Holland, *A Relational Sixth Amendment During Interrogation*, 99 J. CRIM. L. & CRIMINOLOGY 381, 386 (2009).

141. *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964).

142. Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713 (2017).

143. *See id.* at 715–16 (discussing plea incentives); *id.* at 736 & tbl. 1 (illustrating and discussing differences in case outcomes depending on pretrial release status).

144. *See, e.g.*, NAT'L RESEARCH COUNCIL ET AL., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 56–64, 91–103, 233–58, 303–13 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) (discussing racial and socioeconomic disparities in U.S. criminal legal systems); Vesla M. Weaver, Jacob S. Hacker & Christopher Wildeman, *Detaining Democracy? Criminal Justice & American Civic Life*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 6, 7 (2014) (same).

145. D. Christopher Dearborn, “*You Have the Right to an Attorney,*” *but Not Right Now: Combating Miranda’s Failure by Advancing the Point of Attachment Under Article XII of the Massachusetts Declaration of Rights*, 44 SUFFOLK U. L. REV. 359, 374 (2011) (internal quotation marks omitted) (quoting Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519,

tenth-grade reading level, while the majority of those incarcerated read at the sixth-grade level or below.<sup>146</sup> These problems are worse for juveniles and for individuals suffering from mental disabilities or mental illness because they are particularly vulnerable to giving false confessions.<sup>147</sup> As one scholar noted, the resulting miscomprehension of *Miranda* warnings is “both literal (not understanding the meaning of the words) and abstract (not understanding the reasons why one might invoke these rights).”<sup>148</sup>

Unfortunately, police officers are trained to take advantage of these dynamics.<sup>149</sup> Because those training techniques presume that suspects will resist, interrogation is “stress-inducing by design—structured to promote a sense of isolation and increase the anxiety and despair associated with denial relative to confession.”<sup>150</sup> Again, the data bear out the distinctive problems that weak right-to-counsel doctrines create for vulnerable populations. For example, a 2010 study of DNA exonerations involving false confessions found that 43 percent of false confessors suffered from some form of mental disability.<sup>151</sup>

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1563 (2008)).

146. Richard Rogers et al., *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 L. & HUM. BEHAV. 124, 132, 134 (2008).

147. J.D.B. v. North Carolina, 564 U.S. 261, 269 (2011) (discussing vulnerability of juveniles); see also *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (same); *Atkins v. Virginia*, 536 U.S. 304, 318 n.24, 320–21 (2002) (discussing vulnerability of people with mental disability); Samson J. Schatz, Note, *Interrogated with Intellectual Disabilities: The Risks of False Confession*, 70 STAN. L. REV. 643 (2018) (same).

148. Lauren Rogal, *Protecting Persons with Mental Disabilities from Making False Confessions: The Americans with Disabilities Act as a Safeguard*, 47 N.M. L. REV. 64, 72 (2017) (footnotes omitted); see also Virginia G. Cooper & Patricia A. Zapf, *Psychiatric Patients' Comprehension of Miranda Rights*, 32 L. & HUM. BEHAV. 390, 398 (2008) (comparing comprehension of individuals with mental health issues and those without); Naomi E. S. Goldstein et al., *Waving Good-Bye to Waiver: A Developmental Argument Against Youths' Waiver of Miranda Rights*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 28–35 (2018) (discussing developmental limitations among juveniles that impair comprehension); Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1152–54 & tbls. 1–3, 1166 (1980) (discussing limitations in comprehension, particularly among younger juveniles).

149. See Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 L. & SOC'Y REV. 259, 266 (1996) (explaining how police interrogators have “refined their skills in human manipulation”); see also *Miranda v. Arizona*, 384 U.S. 436, 449–55 (1966) (discussing police interrogation tactics).

150. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 6 (2010).

151. See Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1064 (2010) (noting that 17 out of the 40 DNA exonerees in the study who falsely confessed had some form of mental disability); see also Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 971 (2004) (finding that at least 28 of 125 false confessions assessed were provided by individuals with an intellectual development disorder).

The risk of the foregoing harms is significant. Research indicates that the overwhelming majority of people who are subject to custodial interrogation as criminal suspects waive their Fifth Amendment right to counsel.<sup>152</sup> Those most likely to waive are those who lack the resources to hire counsel or sufficient experience with criminal legal systems to understand the importance of a lawyer's stationhouse assistance.<sup>153</sup> Thus, scholars routinely mourn the death of a meaningful right to counsel in that early stage of the proceedings.<sup>154</sup>

An anecdote illustrates how this gap between law's promise and real-world practice has become hegemonic, that is, so taken for granted as to be unnoticed.<sup>155</sup> The story returns us to Chicago. In the early winter of 2015, protesters reacted to media coverage indicating that police were "disappearing" detainees from across the city inside a West Side police station instead of allowing them access to counsel, family, and friends.<sup>156</sup> The hubbub "left many experienced criminal defense and civil rights attorneys scratching their heads"—not because the allegations were unfounded, but because the problem was not limited to a single site.<sup>157</sup> To the contrary, these attorneys explained, years after the Burge debacle, incommunicado detention remained system-wide and so ingrained that it was an everyday practice for police to "routinely play cat-and-mouse games with detainees and their right to legal representation at district stations and detective area headquarters all over the city."<sup>158</sup>

Once again, judges have been complicit in enabling such practices. In the early 2000's, attorneys for an organization called First Defense Legal Aid (FDLA) attempted to provide stationhouse representation across Chicago, but police routinely denied them permission to meet with clients and witnesses.<sup>159</sup> FDLA sued, claiming violations of the attorneys' First Amendment rights to associate with clients. The federal district court agreed and issued an injunction with scathing findings about police

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152. Alschuler, *supra* note 118, at 856 & n.32; Ferguson & Leo, *supra* note 2, at 947 & n.98.

153. See Alschuler, *supra* note 118, at 880 (noting that one study showed a vast majority of defendants who waived their rights had previously been convicted of crimes); Rossman, *supra* note 136, at 1133 (remarking that modern studies on *Miranda* rights show that about 80 percent of all suspects agree to talk without a lawyer).

154. Weisselberg, *supra* note 145, at 1521.

155. See Susan S. Silbey, *After Legal Consciousness*, 1 ANN. REV. L. & SOC. SCI. 323, 330–31 (2005) (discussing the concept of hegemony).

156. David Heinzmann & Jeremy Gerner, *Lawyers Wary of Claim About Chicago Police 'Black Site,' Say Abuse Citywide*, CHI. TRIB. (Feb. 28, 2015, 7:05 PM), <https://www.chicagotribune.com/ct-homan-square-chicago-police-met-20150227-story.html>.

157. *Id.*

158. *Id.*

159. *First Def. Legal Aid v. City of Chicago*, 225 F. Supp. 2d 870, 872–74 (N.D. Ill. 2002), *rev'd*, 319 F.3d 967, 973 (7th Cir. 2003).

conduct in Cook County stations.<sup>160</sup> The Seventh Circuit reversed. The panel held that there was no right to have police notify clients “that a lawyer is at the front desk, let alone a right to be escorted inside immediately and to engage in confidential consultations within the police station.”<sup>161</sup> Echoing *Moran v. Burbine*,<sup>162</sup> Judge Easterbrook emphasized that a “suspect in police custody does not have a constitutional right to be notified that his attorney is at the stationhouse.”<sup>163</sup> The opinion reasoned further that interrogation rooms are not public fora and that, even if they were, attorneys lack First Amendment-based access to clients in such settings.<sup>164</sup>

Responding to such widespread enabling of, and acquiescence in, restrictions on stationhouse access to counsel, one scholar stated that it is “not politically feasible to expect any jurisdiction to mandate the introduction of defense attorneys into the interrogation process without changing the incentives for attorneys to advise their clients to say absolutely nothing.”<sup>165</sup> That perspective reflects one aspect of Scheingold’s myth of rights theory, in which judicial renegeing on rights engenders their downward spiral. Part III offers a glimpse at the other side of the myth of rights: The continued capacity of even weakened rights to inspire social movements, litigation, and incremental positive change—specifically, through interventions that include bans on the uncounseled waiver of rights.

### III. JUDICIAL ENHANCEMENTS OF STATIONHOUSE ACCESS TO COUNSEL

Scholars and advocates have long urged that a ban on uncounseled waivers is the optimal solution to the diminution of the right to counsel in the wake of *Miranda*. They argue that stationhouse access to counsel is necessary to prevent abuses of power, to ensure that people understand the consequences of waiving their rights, and to efficiently identify and resolve other legal issues arising in each case.<sup>166</sup> This Part discusses the adoption of mandatory early-access rules along with other efforts to promote attorney-client relationships during custodial interrogation. After surveying rules from a range of jurisdictions, the analysis ends where it began—in the city of Chicago.

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160. *Id.* at 892.

161. *First Def. Legal Aid v. City of Chicago*, 319 F.3d 967, 973 (7th Cir. 2003).

162. *Moran v. Burbine*, 475 U.S. 412, 420 (1986).

163. *First Def. Legal Aid*, 319 F.3d at 967–68.

164. *Id.* at 971.

165. Rossman, *supra* note 136, at 1137.

166. See Alschuler, *supra* note 118, at 875 & n.121 (citing authorities).

### A. Banning Uncounseled Waivers

The ban on uncounseled waivers of rights by detainees is not wholly foreign to the United States. For example, California requires minors aged fifteen and under to consult with an attorney before waiving their right to remain silent or their right to counsel.<sup>167</sup> No request for counsel is required. Neither the minor nor the minor's parent can waive the consultation requirement, and statements made by the minor prior to consultation are generally inadmissible.<sup>168</sup>

Another example is embedded in the legislation that created the Illinois Torture Inquiry and Relief Commission. The statute requires claimants to waive their rights to be free from involuntary self-incrimination as a condition of having their cases heard.<sup>169</sup> Although there is some irony in requiring waivers from people from whom false confession have been extracted through torture, the statute creates a right to consult with counsel before entering the waiver and provides for appointment of counsel in cases of indigency.<sup>170</sup> Moreover, in a nod to the importance of attorney advice before entry of any waiver, the statute requires counsel's presence "at the signing" of the waiver agreement.<sup>171</sup>

A stronger ban on uncounseled waivers is inscribed in Article III of the Philippine Constitution,<sup>172</sup> but enforcement of that provision seems unlikely, particularly under the Duterte administration.<sup>173</sup> However, a far-reaching ban against uncounseled waivers is being implemented in the Netherlands.<sup>174</sup> The legislation and accompanying directives responded to a ruling by the Dutch Supreme Court, which in turn implemented a ruling from the European Court of Human Rights

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167. CAL. WELF. & INST. CODE § 625.6(a) (2017).

168. *Id.* § 625.6(a), (b).

169. 775 ILL. COMP. STAT. 40/40(b) (2018).

170. *Id.*

171. *Id.*

172. CONST. (1987), art. III, § 12, ¶ 1 (Phil.) (mandating that the right to counsel "cannot be waived except in writing and in the presence of counsel"); HECTOR S. DE LEON, TEXTBOOK ON THE PHILIPPINE CONSTITUTION 107–08 (2005), <http://anyflip.com/lwff/sjrm>.

173. Aurora Almendral, *Where 518 Inmates Sleep in Space for 170, and Gangs Hold It Together*, N.Y. TIMES (Jan. 7, 2019), <https://www.nytimes.com/2019/01/07/world/asia/philippines-manila-jail-overcrowding.html>.

174. Directive of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, 2013 O.J. (L 2013/48/EU); Wet van 17 november 2016, Stb. 2016, 475 [hereinafter Implementation Act] (implementing 2013 O.J. (L 2013/48/EU) in the Netherlands); Wet van 17 november 2016, Stb. 2016, 476 (amending the Netherlands's criminal code regarding access to legal counsel); Besluit van 26 januari 2017, Stb. 2017, 29 (establishing rules for police conduct in interrogations).

requiring early access to counsel.<sup>175</sup>

Those rulings imposed a higher burden of proof on prosecutors who seek to rely on waivers than is imposed under U.S. Supreme Court case law. The prosecution must present evidence that waivers are the product either of a defense attorney's advice on the consequences of waiver or of independent knowledge that allows people to foresee such consequences.<sup>176</sup> The Dutch legislation and directives also ban uncounseled waivers by vulnerable populations, such as juveniles and people with mental health issues, and by people facing prison sentences of twelve years or more.<sup>177</sup> Although consultations are limited to thirty minutes, implementation of these rules has nevertheless been a "turbulent and radical" change for participants in Dutch criminal legal systems.<sup>178</sup> Early evidence on implementation indicates that the shift to provision of stationhouse counsel has had mixed results.<sup>179</sup> Nevertheless, available data indicate that advice of counsel increases the exercise of rights against self-incrimination<sup>180</sup> and may be of particular help in addressing the needs of vulnerable populations.<sup>181</sup>

### B. *Indelible Rights Under Rankin*

Another development that has drawn little scholarly attention is the "indelible" right to counsel secured by the New York State Constitution.<sup>182</sup> Under this rule, counsel "enters" the case by communicating with police on the client's behalf; all police interrogation thereafter "is prohibited unless [the] defendant thereafter affirmatively

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175. Wendy Zeldin, *Netherlands: Two New Laws and Decree on Right of Access to a Lawyer*, LIBR. CONGRESS: GLOBAL LEGAL MONITOR (July 7, 2017), <http://www.loc.gov/law/foreign-news/article/netherlands-two-new-laws-and-decree-on-right-of-access-to-a-lawyer/>; see also Charles D. Weisselberg, *Exporting and Importing Miranda*, 97 B.U. L. REV. 1235, 1251–58, 1264–81 (2017).

176. *Pishchalnikov v. Russia*, App. No. 7025/04, 22, ¶ 76 (Eur. Ct. H.R. 2009).

177. Implementation Act, *supra* note 174, arts. 28b(1), 28c(2); JODIE BLACKSTOCK ET AL., *INSIDE POLICE CUSTODY: AN EMPIRICAL ACCOUNT OF SUSPECTS' RIGHTS IN FOUR JURISDICTIONS* 267–68 & n.46 (2014).

178. Paul Mevis & Joost Verbaan, *Legal Assistance and Police Interrogation: (Problematic Aspects of) Dutch Criminal Procedure in Relation to European Union and the Council of Europe*, 8 ERASMUS L. REV. 174, 175 (2014).

179. Weisselberg, *supra* note 175, at 1278–79 (citing BLACKSTOCK ET AL., *supra* note 177).

180. Willem-Jan Verhoeven, *The Complex Relationship Between Interrogation Techniques, Suspects Changing Their Statement and Legal Assistance: Evidence from a Dutch Sample of Police Interviews*, 28 POLICING & SOC'Y 308, 318–22, 325–28 (2018).

181. See Koen Geijssen et al., *The Interrogation of Vulnerable Suspects in the Netherlands: An Exploratory Study*, 9 INVESTIGATIVE INTERVIEWING: RES. & PRAC. 34, 46–47 (2018) ("[V]ulnerability increases the risk of inappropriate interrogation.").

182. *People v. Rankin*, 998 N.Y.S.2d 573 (Cty. Ct. 2014).

waives the right in the presence of the attorney.”<sup>183</sup> The detainee does not have to request counsel or even know that others have requested counsel on his or her behalf.<sup>184</sup> Under *Rankin*, it is also unnecessary for counsel to obtain a judicial order of appointment if the defendant is indigent.<sup>185</sup> The trial court in *Rankin* reasoned that concerns about disparate impact forbade the “poignant irony” of restricting the benefit of this constitutional rule to people who can afford to hire counsel.<sup>186</sup> Similar rules apply in Oregon,<sup>187</sup> while courts in Illinois,<sup>188</sup> Florida,<sup>189</sup> and Colorado<sup>190</sup> have either not considered the rule’s application to people who need public defense representation or have imposed more onerous requirements for establishment of the attorney-client relationship in that context.

### C. Duty Station Counsel

Another early-access approach involves duty station counsel. Three methods are dominant: “call-in” programs, “visiting” programs, and “embedded” programs.<sup>191</sup> In call-in programs, a legal aid provider is contacted to provide legal advice and assistance when a person exercises his or her right to early access to legal aid. Such programs are emerging in U.S. jurisdictions ranging from New York City<sup>192</sup> to Seattle.<sup>193</sup> In visiting programs, a legal aid provider regularly calls on a police station or detention facility to provide legal advice and assistance to detainees. In embedded programs, a legal aid provider is permanently located at police stations or other detention facilities so that legal advice and assistance are available at any time. In a variation on the latter approach, the Philadelphia Public Defender has embedded social workers for the

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183. *Id.* at 800 (citing *People v. Hobson*, 348 N.E.2d 894 (N.Y. 1976)); *see also* Adrienne Levy, Note, *Beyond Bing: The Arthur Rule Lives on as the Touchstone for the New York State Right to Counsel*, 35 CARDOZO L. REV. 831, 838 (2013) (citing the New York State Constitution).

184. *Rankin*, 998 N.Y.S.2d at 581.

185. *Id.* at 583–84.

186. *Id.* at 584–85.

187. *State v. Joslin*, 29 P.3d 1112, 1119–20 (Or. 2001) (holding that when a third party “purports to be speaking for” counsel secured for the detainee, police must cease interrogation or otherwise convey the legal advice to the detainee, unless officers do not subjectively believe or have an objectively reasonable basis to disbelieve that the third party is speaking for the lawyer).

188. *People v. Woods*, 787 N.E.2d 836 (Ill. App. Ct. 2003).

189. *Smith v. State*, 699 So. 2d 629 (Fla. 1997).

190. *People v. Page*, 907 P.2d 624 (Colo. App. 1995), *overruled on other grounds sub nom.* *People v. Muckle*, 107 P.3d 380 (Colo. 2005).

191. U.N. OFFICE ON DRUGS & CRIME, EARLY ACCESS TO LEGAL AID IN CRIMINAL JUSTICE PROCESSES: A HANDBOOK FOR POLICYMAKERS AND PRACTITIONERS 70–73 (2014).

192. Interview with Anthony Posada, N.Y. Legal Aid Servs. (Jan. 26, 2018); *About Us*, GOOD CALL, <https://goodcall.nyc/about-us> (last visited May 28, 2019).

193. Interview with Jonathan Rudd, King Cty. Dep’t of Pub. Def. (Jan. 10, 2018).

sole purpose of pretrial release investigation and advocacy.<sup>194</sup>

Some of these processes require law enforcement officers to notify the defense provider of the detainee's request for assistance, and some offer access to counsel without requiring indigency screening. However, as Hannah Quirk notes, these benefits in the United Kingdom are a double-edged sword; the detainee's silence may be used against him or her in court and counsel may be subject to examination regarding the nature and content of counsel's interactions with the detainee.<sup>195</sup> Nevertheless, these diverse efforts reflect a widely shared understanding of how critically important it is that people who are subjected to investigation and detention have access to defense counsel at the earliest stages of the criminal process.

#### *D. Representation and Judicial Intervention in Chicago*

As discussed in Part II, Chicago's First Defense Legal Aid program is an example of a visiting counsel program that aims to provide 24/7 early access. Although the Seventh Circuit aborted FDLA's efforts to make that access more meaningful, the organization has had significant systemic impact. Staff attorneys manage and advise volunteers who handle the organization's hotline.<sup>196</sup> Once a person reaches the bond stage, FDLA provides the case file to the public defender's office, which handles the case thereafter. According to FDLA director Eliza Solowiej, stationhouse counsel reduces costs by exposing holes in cases that are likely to fall apart later on.<sup>197</sup> FDLA supplements representation with public education and outreach, including billboards and know-your-rights cards proclaiming "silence is power."<sup>198</sup>

After losing the civil rights case in the Seventh Circuit, FDLA began gathering and presenting evidence about the harm caused by the absence of stationhouse counsel. Another nonprofit, Chicago Appleseed Fund for Justice, began presenting position papers and other forms of advocacy on the issue to state and local officials, with a specific focus on the denial of public defense counsel for detainees who could post bond.<sup>199</sup> This

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194. Interview with Mark Houldin, Office of the Phila. Pub. Def. (Jan. 10, 2018).

195. See HANNAH QUIRK, *THE RISE AND FALL OF THE RIGHT TO SILENCE* 5 (2017).

196. Kate Morrissey, *First Defense Legal Aid: Chicago Lawyers Give Free Counsel in Free Time*, MEDILL NEWS, <http://www.medillnews847.com/madeinchicago/fdla/index.html> (last visited May 28, 2019).

197. FIRST DEF. LEGAL AID, <https://www.first-defense.org/> (last visited May 28, 2019); Steve Schmadeke, *Arrestees to Get Access to Lawyers Free of Charge at Chicago Police Stations*, CHI. TRIB. (Mar. 14, 2017, 8:52 PM), <https://www.chicagotribune.com/news/local/breaking/ct-free-attorneys-police-custody-met-20170314-story.html>.

198. See Morrissey, *supra* note 196; cf. COBARRUBIAS, "The First 24", *supra* note 10.

199. *History*, CHI. APPLESEED FUND FOR JUST., <http://www.chicagoappleseed.org/about->



information was presented to Chief Judge Timothy Evans, who was transitioning from his role as the South Side alderman to local judge and, by the early 2000s, had become the first African American Chief Judge in Cook County.<sup>200</sup> This judicial circuit is the largest in Illinois, with 400 judges and almost 3000 employees.

Chief Judge Evans issued an administrative order to address the denial of counsel issue.<sup>201</sup> Results were positive, but problems remained.<sup>202</sup> In early 2017, Judge Evans issued another administrative order appointing the Cook County Public Defender as counsel for people who are detained at police stations and request counsel, with compliance occurring via in-person, on-site staff attorneys during the day and on-call volunteer lawyers after hours.<sup>203</sup> The express aim of this Stationhouse Representation Program was to “help individuals held in Chicago Police Department custody gain access to a free attorney in the police station” in order to “ensure that constitutional rights are protected from the earliest point of contact with the criminal justice system” by providing all detainees with “the opportunity to speak with an attorney before talking to anybody else.”<sup>204</sup>

The program provides service around the clock, seven days a week. Assistant Public Defenders are on call during business hours, and FDLA covers the remaining time period.<sup>205</sup> Requests for stationhouse

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us/history/ (last visited May 28, 2019); *Constitutional Issues*, CHI. APPLESEED FUND FOR JUST., <http://www.chicagoappleseed.org/criminal-justice/constitutional-issues/> (last visited May 28, 2019).

200. For Chief Judge Evans’s information, see *Timothy C. Evans*, COOK COUNTY GOV’T, <https://www.cookcountyil.gov/person/timothy-c-evans> (last visited May 28, 2019).

201. THE COLLABORATION FOR JUSTICE, EXECUTIVE SUMMARY: ENSURING THE PUBLIC DEFENSE OF INDIGENT CRIMINAL DEFENDANTS IN COOK COUNTY 2 (2015), <http://www.chicagoappleseed.org/wp-content/uploads/2015/08/2015-Executive-Summary-Indigent-Defense.pdf>.

202. THE COLLABORATION FOR JUSTICE, ENSURING THE PUBLIC DEFENSE OF INDIGENT CRIMINAL DEFENDANTS IN COOK COUNTY 1 (2015), <http://www.chicagoappleseed.org/wp-content/uploads/2015/08/Aug-2015-Indigent-Defense-1.pdf>.

203. Order No. 2017-01: Appointment of the Public Defender or Designee for Persons in Police Custody, Circuit Court of Cook County (Mar. 14, 2017); Kathleen Geier, *New Court Policy to Provide Public Defenders in Police Stations*, CHI. APPLESEED FUND FOR JUST. (Mar. 20, 2017), <https://www.chicagoappleseed.org/our-blog/new-court-policy-to-provide-public-defenders-in-police-stations/>; Schmadeke, *supra* note 197.

204. Press Release, Circuit Court of Cook Cty., Chief Judge Signs Order to Provide Free Lawyers for Arrestees in CPD Custody (Mar. 14, 2017), <http://www.cookcountycourt.org/MEDIA/ViewPressRelease/tabid/338/ArticleId/2540/Chief-Judge-signs-order-to-provide-free-lawyers-for-arrestees-in-CPD-custody.aspx>.

205. See CHI. APPLESEED FUND FOR JUSTICE, STATION-HOUSE REPRESENTATION IN CHICAGO AT SIX MONTHS: OUTCOMES, OBSTACLES, AND RECOMMENDATIONS 2 (2017) [hereinafter STATION-HOUSE REPRESENTATION]; AMY P. CAMPANELLI, LAW OFFICE OF THE COOK CTY. PUB. DEF., FY2015–FY2018 BUDGET AND OPERATIONS REPORT 16 [hereinafter BUDGET REPORT].

representation have increased since the program began.<sup>206</sup> The program has also been embraced by Cook County State's Attorney Kimberly Foxx, who stated that "[t]he legitimacy of the justice system depends on protecting the constitutional rights of people who come in contact with it. Today's announcement affirms the commitment of all the stakeholders in the justice system to ensuring that no one is denied their constitutional right to counsel."<sup>207</sup> Thus, Cook County, Illinois—home of the original *Escobedo* litigation—offers an example of the movement to revive *Escobedo*'s long-delayed promise.

#### IV. WHITHER STATIONHOUSE ACCESS TO COUNSEL?

The discussion in Part III invites a thought experiment on optimal methods for vindicating the right to stationhouse counsel. Assuming the continuation of carceral systems<sup>208</sup> and police interrogation within those systems,<sup>209</sup> the most robust model would extend the Dutch ban on uncounseled waivers to all cases—including misdemeanors, the outsized impact of which leading scholars rightly decry.<sup>210</sup> Weaker alternatives would require invocation of the right to counsel. To avoid regressing to *Miranda*'s unacceptable mean, however, the mandatory-invocation model should incorporate two rules discussed above. The first is the *Rankin* "indelible rights" rule, which prevents uncounseled waivers as soon as police learn of counsel's entry into a case. The second would be a modified Cook County approach, which would entail automatic appointment of the local public defense service provider to avoid delay in counsel's entry into the case. These modifications would transform the detainee's duty to invoke counsel into an opportunity to decline counsel. To be sure, declinations will occur. However, this model would minimize police pressure by formally establishing the attorney-client relationship at the earliest possible juncture and by maximizing opportunities for declinations to be fully informed and voluntary.

Two major criticisms are predictable. The first involves crime control. Courts and commentators have long worried that early access to counsel

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206. STATION-HOUSE REPRESENTATION, *supra* note 205, at 3; BUDGET REPORT, *supra* note 205, at 16 fig. 30.

207. See Press Release, Circuit Court of Cook Cty., *supra* note 204.

208. See generally MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015) (discussing resilience of the carceral state).

209. See Bernard Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L. & CRIMINOLOGY 21 (1961).

210. See, e.g., ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018); see also Heaton, Mayson & Stevenson, *supra* note 142 (discussing negative impacts of pretrial detention in misdemeanor cases).

interferes significantly with that goal, although the weight of the literature does not appear to support that hypothesis.<sup>211</sup> The emergence of stationhouse counsel programs may offer a set of natural experiments that researchers can exploit to test the crime control hypothesis more rigorously.

The larger concern is whether there will be any meaningful experiment to evaluate. Available data indicate that in Cook County, fewer than 2 percent of detainees had access to counsel within three days of detention; to enhance access, responsive legislation would require that police allow detainees three free telephone calls within an hour of their detention.<sup>212</sup> Yet even if police support speedy access to stationhouse counsel, weak constitutional regulations leave public defense systems overworked and underfunded.<sup>213</sup> It is not obvious that already swamped systems can provide meaningful stationhouse access even in the unlikely event that more stations open their doors to public defenders. Available data on early access programs also raise questions about the quality of the representation provided.<sup>214</sup> Moreover, as predicted by early researchers, broader access to defense counsel may alter little of the institutionalized case-processing that characterizes many criminal legal systems, as counsel are co-opted into the courtroom workgroup.<sup>215</sup>

The strongest rebuttal to these objections lies in the lessons to be drawn from Part I's historical sketch. As Justice Goldberg noted in *Escobedo*, "If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that

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211. See, e.g., Alschuler, *supra* note 118 (examining *Miranda*'s misunderstanding of the privilege against self-incrimination); Donald A. Dripps, *Miranda for the Next Fifty Years: Why the Fifth Amendment Should Go Fourth*, 97 B.U. L. REV. 893, 928–29 (2017).

212. Rachel Hinton, *County Officials Back Legislation to Make Sure Arrestees Get Their Phone Calls*, CHI. SUN TIMES (Jan. 29, 2019, 1:52 PM), <https://chicago.suntimes.com/2019/1/29/18363621/county-officials-back-legislation-to-make-sure-arrestees-get-their-phone-calls>; H.B. 1616, 101st Gen. Assemb. (Ill. 2019), <http://www.ilga.gov/legislation/BillStatus.asp?DocTypeID=HB&DocNum=1616&GAID=15&SessionID=108&LegID=116147> (proposing to amend Illinois's Code of Criminal Procedure). See also BLACKSTOCK ET AL., *supra* note 177, at 304–05 (discussing police strategies to discourage detainees' exercise of their rights to stationhouse counsel).

213. See, e.g., Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html> (describing case overloads in Lafayette, Louisiana public defense system).

214. See, e.g., BLACKSTOCK ET AL., *supra* note 177, at 304–307; QUIRK, *supra* note 195, at 88.

215. See Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 L. & SOC'Y REV. 15, 39 (1967) (describing the "monstrous appetite of courts for the cooptation of entire professional groups").

system.”<sup>216</sup> “Moving the Constitution into the Police Station”<sup>217</sup> through stationhouse counsel is a mode of law enforcement and a necessary, if partial, antidote to risks of police violence and intimidation.

#### CONCLUSION

This Essay’s reflection on the half-century that has passed since the Chicago Eight trial has identified opportunities to memorialize other events. Forty years have passed since the Seventh Circuit reinstated the civil rights lawsuit filed by survivors of the Chicago police raid that killed Fred Hampton.<sup>218</sup> Ten years have passed since the Illinois legislature created the state’s Torture Inquiry and Relief Commission.<sup>219</sup> Five years ago, protests erupted over the “disappearance” of detainees from a Chicago police building—to the bemusement of local attorneys, for whom police interference with client access was business as usual.<sup>220</sup>

Many of these events resulted in significant part from judicial failures to enforce the rights to be free from police violence and to obtain early access to counsel. Those failures illustrate one aspect of Stuart Scheingold’s myth of rights theory by showing how rights become false promises. However, other events discussed in this Essay illustrate the second aspect of Scheingold’s theory by showing how even weakened rights can retain sufficient meaning to inspire collective action and legal change. Will a future symposium celebrate the fifty-year anniversary of *Rankin*’s extending the right of stationhouse counsel to poor people?<sup>221</sup> Or will efforts to revive *Escobedo* die aborning? Only time—and the commitment of activists, lawyers, and judges to equal justice—will tell.

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216. *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964).

217. See TIME COVER, *supra* note 131.

218. *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), *rev’d on other grounds*, 446 U.S. 754 (1980).

219. *Mission and Procedure Statement*, ST. ILL. TORTURE INQUIRY & RELIEF COMMISSION, <https://www2.illinois.gov/sites/tirc/Pages/default.aspx> (last visited May 28, 2019).

220. Heinzmann & Gorner, *supra* note 156.

221. *People v. Rankin*, 998 N.Y.S.2d 573 (Cty. Ct. 2014).