

*Putting a Check on Police Violence:*

The Legal Services Market, Section 1983, Torture, Abusive Detention Practices, and the Chicago Police

Department from 1954 to 1967

By

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**Abstract**

This paper explores the conception, rise, and initial implementation of a legal strategy which sought to fashion civil liability into a tool for reforming the Chicago Police Department (CPD) from the mid 1950s to 1967. Operating under a certain notion of the legal services market, a group of lawyers, working in close concert with the Illinois Division of the American Civil Liberties Union (ACLU), theorized that with the correct imposition of civil liability on police misconduct and brutality, they could weaponize civil suits into a means of forcing the CPD to crack down on abusive and harmful police behavior. Drawing from contemporary thought on how civil liability could shape municipal conduct, they reasoned that this imposition, brought about by plaintiffs sue the City of Chicago directly and expanding the conduct officers could be sued for, could be used to harness the legal services market to cause the number of successful civil suits to become commensurate with the prevalence of abusive police practices. Amidst a culture of impunity and widespread police misconduct within the CPD, they thought the total cost of the resulting civil suits would compel the City to enact reforms to combat such practices and the culture of impunity within the Chicago Police Department. This paper examines the attempt to carry out this legal strategy in the federal civil court system from the early 1950s to the end of Superintendent O.W. Wilson's tenure in 1967, with a specific focus on police torture and abusive detention practices. I argue that while this may have been a novel strategy, it was ultimately unsuccessful in changing broader departmental policy and priorities. Altogether this is the story of a failed attempt to weaponize civil lawsuits to curb police misconduct and abuse. A close examination of this legal strategy and the assumptions underlying it offers insight into the utility of civil liability to rectify and prevent civil rights abuses by the police.

## I. Introduction

On September 13<sup>th</sup>, 1958 around 1:30 a.m., Ozie Brize, a black Chicagoan, had just finished his shift as a busboy at William Tell Restaurant in the North Austin neighborhood. Chicago police detectives William Byrne, Salvadore Conzoneri and James Healy approached him.<sup>1</sup> According to the officers, what happened next was a routine arrest where all proper protocol was followed: they arrested Brize, brought him to two police stations, charged him with disorderly conduct and resisting arrest, and released him in the evening that same day.<sup>2</sup>

According to Brize, it went quite differently. He claimed the officers asked him about the murder of Judith Mae Anderson, a white woman. Despite him stating he had not known her, they brought him to the Chicago Avenue Police station. After more questioning there, the officers told him they knew he killed Anderson and that they were going to take him to another station where he would confess, or they would “beat [him] up” and make him “tell them everything they wanted to know.” Brize responded by threatening to sue if they “laid a hand” on him, but undeterred, they brought him to the Central Police Station. They took him to a small room and demanded he sign a piece of paper, which they claimed said he killed Anderson – the officers did not actually let him see what the paper said. When Brize refused, the officers moved him to another small room, handcuffed him to a chair, put a paper bag over his head, and began punching him in the head, stomach, back and chest while demanding he confess, saying he would be “glad to sign any confession they wanted” after they were through with him.<sup>3</sup>

Eventually Brize passed out and fell to the floor, only to have one officer stomp on his face. When he regained consciousness the officers again demanded he sign the confession. Brize

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<sup>1</sup> Deposition of Ozie Brize, *Brize v. City of Chicago*, No. 59C770, 1959 National Archives at Chicago (N.D. Ill. Sep. 21, 1959), 9-35. (The deposition was mistakenly filed under the docket number 58C1712 and found in the wrong case file. I notified an archivist when I noticed the mistake.)

<sup>2</sup> Answer, *Brize v. City of Chicago*, No. 59C770, 1959 National Archives at Chicago (N.D. Ill. Sep. 21, 1959), 2.

<sup>3</sup> Deposition of Ozie Brize, *Brize v. City of Chicago*, 12 -17, 21.

refused again and the officers finally relented and put him in jail under the name of James Morris.<sup>4</sup> After Brize spent around sixteen hours in custody, the officers eventually charged him with disorderly conduct and resisting arrest and released him around 6:00 pm that evening on \$12 bail. While he was later acquitted of the charges in municipal court, the consequences of the abuse he experienced lingered. The day after his arrest, in the first of a series of visits, Brize saw his doctor who determined he had a concussion and prescribed him some medicine for his pain.<sup>5</sup>

We only know of this story because it was told in a federal civil lawsuit filed in 1959 against those three officers and the City of Chicago. The lawsuit was filed under a then rarely used section of a Reconstruction-era civil rights law originally passed to fight, among other things, law enforcement complicity with the Ku Klux Klan (KKK).<sup>6</sup> This section, now commonly referred to as §1983 for its place in the U.S. Code, introduced federal civil liability against individuals who, acting under the color of law – acting under authority of the law, though not necessarily in accordance with it – deprived others of their federal rights. The allegations contained within the lawsuit, while shocking, were not anomalous. This lawsuit was just one of fifteen filed against Chicago Police Department (CPD) officers that year. Together those lawsuits, many of which contained allegations similar to Brize's, represented a crucial step in a legal strategy developed to curb the entrenched problem of police violence and prevent anything like Brize's alleged experience from ever happening again.

In essence, this strategy, the brainchild of Chicagoland attorneys Charles Liebman, Donald Page Moore, Ernst Liebman, and Charles Pressman, along with countless others in the

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<sup>4</sup> It is unclear why they did this. None of the sources I used mentioned this as a common practice.

<sup>5</sup> Deposition of Ozie Brize, *Brize v. City of Chicago*, 26-38.

<sup>6</sup> Allen W. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction*, [1st ed.] (New York: Harper & Row, 1971), 383-398; Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876*, *Linden Studies in Legal History* (Dobbs Ferry, N.Y: Oceana Publications, 1985), 49-79.

Illinois Division of the ACLU, sought to weaponize the cost of civil lawsuits to force changes in police behavior.<sup>7</sup> Operating under a certain idea of how the legal services market worked, they imagined if they created the right conditions by, among other things, letting plaintiffs sue Chicago directly and broadening the conduct officers could be held liable for, then they could incentivize the legal services industry to make it easier for misconduct victims to successfully file civil lawsuits against the City and officers involved. This would be accomplished by demonstrating the profitability of these police lawsuits to the legal industry at large, thus “stimulat[ing] the rest of the Bar into bringing similar actions whenever merited.”<sup>8</sup> This would create a marketplace of sorts which would ensure successful civil suits would proliferate as long as police misconduct persisted.<sup>9</sup> Since City Hall had already been giving off the impression since 1955 that “the city can be bankrupt by these [civil] suits shortly,” Liebman and company had good reason to think that a deluge of lawsuits would become an untenable financial burden and future liability.<sup>10</sup> Drawing directly from contemporary ideas on how large municipalities responded to civil liability, they imagined the volume of suits would help serve as a means of “making indifferent city governments responsive to their duties.” Chief among them was the duty to protect their residents from arbitrary violence and terror at the hands of the police.<sup>11</sup> Ultimately, by hitting the City in its wallet, they hoped this strategy would succeed where decades of other attempts had not.

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<sup>7</sup> It is unknown if Charles and Ernst Liebman were related.

<sup>8</sup> F. Raymond Marks, Jr. “Letter to James D. Reynolds,” Dec. 24, 1954, American Civil Liberties Union. Illinois Division. Records, Box 569, Folder 7, Special Collections Research Center, University of Chicago Library.

<sup>9</sup> The use of the term market and marketplace is wholly my own, not their terminology.

<sup>10</sup> “Ask \$20,000 Limit in Cop Lawsuits,” 1955. American Civil Liberties Union. Illinois Division. Records, Box 569, Folder 6, Special Collections Research Center, University of Chicago Library. Also, Liebman and company is just the shorthand I use to refer to them. It does not denote any sort of business or official partnership.

<sup>11</sup> Leon Green, “Freedom of Litigation-Municipal Liability for Torts,” *Illinois Law Review* 38 (1944): 377, quoted in Brief for Petitioners, *Monroe, et al. v. Pape, et al.*, No. 39, 1960 WL 63600 (U.S. Aug. 25, 1960), 29.

To make all this happen, the lawyers first had to enable plaintiffs to sue Chicago directly and broaden what officers could be held liable for in court. They fought this battle on two main fronts: in Illinois state court and federal court. This paper focuses on the story of federal court. In 1950 decades of legal precedent had narrowly construed the federal rights protected by §1983 and made it hard to file successful lawsuits, but Liebman and company sought to revive §1983 by broadening the conduct officers could be held liable for and introducing municipal liability to let plaintiffs sue the City of Chicago directly. Ultimately they hoped these changes would make the federal courts a viable option for misconduct victims and create the legal marketplace for police suits, which they theorized would force a top-down effort inside the CPD to change officer behavior. These efforts came to a head in 1961 with the Supreme Court case of *Monroe v. Pape*. There the team of lawyers were ultimately successful in loosening the standards of liability required for police misconduct victims to sue in federal civil court; however, they failed at securing municipal liability.

Specifically focusing on torture and other abusive detention practices, this paper argues that while *Monroe* did increase the number of successful federal civil suits, Liebman and company's bigger dream for the federal civil suits was a failure. Lengthy trials, judicial reticence to grapple with credible allegations of torture, and the resulting relatively small awards and settlements made the lawsuits a subpar compensatory mechanism at best for plaintiffs and a poor financial choice for their lawyers. Meanwhile, in the years after 1961 until the end of CPD Superintendent O.W. Wilson's tenure in 1967, the uptick in successful cases failed to provide the incentive for the City to meaningfully change departmental policy or practices on detention. In that time period, Liebman and company's plan, as manifested through §1983, failed to make

good on its vision of guaranteeing the Fourteenth Amendment's promise of freedom from wanton police violence for all Chicagoans, especially for Chicago's black and brown residents.

This paper focuses on the story of a very particular strategy of legal activism predicated on certain assumptions about the legal services market and broader civil court system. The strategy sought to solve, among other things, the problem of police torture and abusive detention practices with the help of the federal civil courts and Chicago's legal industry. Beyond the particularities of Chicago in the 50s and 60s, this story gets at the much larger question about whether civil liability can be used as more than a compensatory tool in regard to harmful and abusive government practices. Liebman and company, and the ideas they drew from, believed that when the government systematically abused the rights of its citizens, civil liability, and more broadly the legal services market, could serve as more than just a means of compensation, and instead also work to drive top-down institutional change to prevent future harm. This belief broadly rests on the crucial assumptions that civil courts truly can provide fair trials and compensation to victims, lawyers can be financially incentivized to take those cases, and that governments would choose to respond to the cost of tortious behavior by actually eliminating the tortious behavior.<sup>12</sup>

In the specific case of Liebman and company, while they viewed as flawed the CPD, City Hall, the civil court system, and all the other cogs in the machinery of the justice system which either perpetrated or were complicit in abusive detention practices, they ultimately thought these institutions were salvageable. Liebman and company believed that the problem with police conduct could be fixed from within if only the CPD's leaders had the will to actually force change. There was no need for mass turnover in the department or purging the rank and file. Indeed, for all the strategy's emphasis on suing individual officers who committed misconduct,

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<sup>12</sup> Tortious meaning an action that constitutes a tort. In other words, action that brings harms to someone.



Liebman and company did not actually want individual officers to pay civil suit costs. They thought with enough impetus from top officials, most officers already within the CPD could be made to change. So, the solution was just a matter of forcing a change in the top officials' priorities. Here in imagining the role the legal services industry would take, they made their next crucial assumption that Chicagoland lawyers would be financially incentivized to take these police lawsuits. For lawyers to take on these police lawsuits not as pro-bono work, but to make money, the lawsuits would need to be financially worth their while. This means cases would need to be consistently winnable, have large median payouts, and relatively quick resolution times. This was not true in the early 1950s, but Liebman and company thought they could eventually make it true. Moreover, even if these conditions were met and the lawsuits were putting a financial strain on the City, they needed to assume that City Hall, and thus the CPD, actually would muster the internal will to change and that this would change the average officer's behavior.

Liebman and company were prepared to make all these assumptions because they shared a degree of faith in the salvageability of the various parts of the legal system, a belief that these cases could be made profitable to lawyers, and the idea that City leaders would respond to costly behavior by eliminating the costly behavior, not turning to other tactics or just ignoring the cost outright. Thus, they thought with the right top-down changes, forced by the cost of civil suits, the CPD could be fixed precisely because of their belief that the police as an institution could be reformed. In the case of the CPD and the heinous practices used against the detained, the strategy and the assumptions underlying it failed to bear fruit. Still, when examining how Liebman and company's ideas actually played out, it is crucial to keep an eye on what went wrong with those

underlying assumptions and what that might mean for any strategy that would seek to use civil liability as a tool to protect and prevent abuses of state power.

This paper proceeds in three main sections. The first section provides a history of torture and other abusive detention practices in Chicago up until the mid 1950s to show the full extent of the problem. It also discusses the Supreme Court's response to legal challenges of abusive detention and how the Court came out against uncontested claims of abusive detention practices but declined to grapple with contested claims of torture, essentially leaving the door open for those practices to continue unabated in the shadows. The second section examines the origins and implementation of Liebman and company's plan to use §1983 litigation to harness the legal services market to deal with the problem of police misconduct and brutality up through Monroe. The third and final section explores how and why §1983 litigation failed to work as hoped in relation to police detention practices.

## **Historiography**

This work falls primarily in conversation with historian Elizabeth Dale's *Robert Nixon and Police Torture in Chicago, 1871–1971* and with historian Simon Balto's *Occupied Territory: Policing Black Chicago from Red Summer to Black Power*. While noting its indebtedness to Dale and Balto, this paper also departs from theirs in a number of significant ways. Dale has a broad focus on police torture throughout Chicago's history; however, her primary focus is on those claims that received press coverage. This has the effect of primarily centering her story on allegations of torture made in well-covered criminal cases and the occasional civil suit with press coverage. In contrast, many of the cases I examine received no coverage in the press and often all parties involved faded from the historical record once the case was over. For example, Ozie Brize's story only appears in the court records from his 1959 case; I

found no press coverage of the lawsuit, Brize, or any of the officers involved. Accordingly, this paper examines a different set of people than Dale. By and large, it considers lawsuits filed by people who had either been released by the police with no charges filed against them, won their case if they had charges filed against them, or were convicted of misdemeanors or other minor crimes. My intervention sheds light on the more everyday occurrences of torture and abusive detention practices which eluded media coverage.

Balto's *Occupied Territory* deals broadly with the history of the CPD and Chicago's black communities from the 1920s to the 1970s, and while my intervention fits into part of the story in the 50s and 60s, it has a slightly different, narrower focus. *Occupied Territory* examines the persistently fraught and strained relationship between Chicago's black communities and the police in a variety of settings from City Hall to home porches. This paper, by contrast, is more narrowly focused on police interactions with detained persons. My work does engage with numerous cases like Ozie Brize's, which reflect the same consistent patterns of racially motivated anti-black violence and discrimination illuminated by *Occupied Territory* more broadly. However, it diverges from Balto's work by expanding its scope beyond just black Chicagoans. My work also engages with racially motivated anti-Puerto Rican violence and violence against the detained in general.

This paper contributes to legal scholarship by providing an analysis of the immediate implications of *Monroe* in Chicago during the immediate aftermath of the Supreme Court's decision. While much attention has been given to *Monroe v. Pape* as a pivotal Supreme Court case in the development of modern §1983 jurisprudence and federal civil rights litigation, little

attention has been paid to its immediate effect in Chicago.<sup>13</sup> My intervention fleshes out this scholarship by examining just that.

## Methodology and Sources

In this paper I engage with disputed claims of torture and other coercive and abusive detention practices primarily through §1983 federal civil suits filed against CPD officers or Chicago itself filed in the Eastern Division of the United States District Court for the Northern District of Illinois. Since it was not feasible to read through every case file, I identified the §1983 lawsuits by exhaustively examining all the docket sheets from 1956 to 1968 and selecting potential cases where the stated basis of action was for civil rights, police brutality/misconduct, or the defendant was represented by the City's Corporation Counsel. For all potential cases, I read their case file to verify they were actually relevant lawsuits. It is possible that relevant cases where the corporation counsel did not represent the defendant and the basis of action was not clear were missed; however, it was City policy to defend officers in suits filed against them, so this is highly unlikely.<sup>14</sup> Overall it is possible the true number of cases was slightly undercounted, but the cases gathered represent at least a lower bound. In case documents the race of persons involved is not always explicitly stated but is sometimes revealed in related press coverage. For press coverage, historical databases of the *Chicago Tribune*, *Chicago Defender*, and *Chicago Sun-Times* were used.

It is important to understand what these civil suits reveal and what they do not. There is absolutely no reason to suspect the number of suits in a given year is a good proxy for the total

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<sup>13</sup> See Alan W. Clarke, "The Ku Klux Klan Act and the Civil Rights Revolution: How Civil Rights Litigation Came to Regulate Police and Correctional Officer Misconduct," *Scholar: St. Mary's Law Review on Minority Issues* 7, no. 2 (2005 2004): 151–82; Theodore Eisenberg, "Section 1983: Doctrinal Foundations and an Empirical Study," *Cornell Law Review* 67, no. 3 (March 1982): 482–556; Katherine Macfarlane, "Accelerated Civil Rights Settlements In the Shadow of Section 1983," *Utah Law Review* 2018, no. 3 (2017): 639–70; Theodore Eisenberg, *Civil Rights Legislation: Cases and Materials*, 2nd ed. (Charlottesville, Va.: Michie Co., 1987), 86–88.

<sup>14</sup> Melvin Landeu, memorandum, March 2, 1953, American Civil Liberties Union. Illinois Division. Records, Box 569, Folder 6, Special Collections Research Center, University of Chicago Library.

prevalence of abusive detention practices. Just filing these lawsuits usually required access to legal representation, and since §1983 cases were typically hard to win, even after 1961, and often took years to resolve, that likely meant they were not a viable option for the poor and marginalized who simultaneously bore the brunt of those abusive police practices.<sup>15</sup> Further, I limited my examination to just cases in federal court; most victims also had a cause of action in Illinois state court and many probably chose to sue there instead. Thus, allegations in the cases should be viewed as likely just the tip of a much larger and potentially immeasurable iceberg of incidents amidst a work culture in the CPD that refused to vigorously condemn, punish, and eliminate the behavior.

### **Engaging with the Unspeakable: CPD's Abusive Practices Behind Closed Doors**

Substantively this paper engages with disputed claims of CPD torture and other abusive detention practices like Ozie Brize's. In general dealing with abusive detention practices and the police in the U.S. is a difficult, thorny subject. Interested parties must grapple with both the fact that as a rule, police departments "tend to destroy or conceal their records," and when it comes to torture, it is hard to definitively prove what did or did not happen in rooms like that in the Central Police Station.<sup>16</sup> Nevertheless, an absence of absolute proof does not overrule our ability to make probabilistic guesses about what happened. I make an effort to present both the officers' and the alleged victims' sides of the story, yet I do not maintain a presumption of neutrality simply for the sake of "being impartial;" when victims present credible claims of torture (substantiated through medical records, numerous instances similar claims against the accused

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<sup>15</sup> Some plaintiffs, typically incarcerated persons, did file pro se lawsuits but these suits were rarely ever successful. For example, see *Holland v. Anderson*, No. 57C1012, N.D. Ill., 1959; *Thomas v. Wilson*, No. 64C325, N.D. Ill., 1964.

<sup>16</sup> Alfred W. McCoy, *Policing America's Empire: The United States, the Philippines, and the Rise of the Surveillance State*, New Perspectives in Southeast Asian Studies (Madison, Wis: University of Wisconsin Press, 2009), 12, quoted in Elizabeth Dale, *Robert Nixon and Police Torture in Chicago, 1871-1971* (DeKalb, IL: NIU Press, 2016), 2.

officers, etc.) I weigh them accordingly. Even when there is no conclusive evidence supporting either side, given the CPD's long and dark history of lying about what really happens to detained persons in their custody we must give serious weight to allegations like Brize's.<sup>17</sup> When reading these allegations, it is crucial to keep in mind the sentiment behind Supreme Court Justice William Douglas's remark in his concurring opinion in the case *United States vs Carignan*: "what happens behind doors that are opened and closed at the sole discretion of the police is a black chapter in the history of every country – the free as well as the despotic, the modern as well as the ancient."<sup>18</sup>

## II. "The third degree is thoroughly at home in Chicago": CPD Detention Practices

By the time Ozie Brize filed his lawsuit Chicagoans had been making claims similar to his for almost as long as the Chicago Police Department (CPD) itself had been around.<sup>19</sup> Brize's experience may have been on the extreme end of the spectrum, but his claims of suffering psychological and physical torture at the hands of the CPD and its officers were not unique to those officers, that police station or even that year or decade; instead it was just one manifestation of a consistent pattern of brutal and horrific police violence committed against detained persons for unjust and illegal ends throughout the nineteenth, twentieth, and twenty-first centuries; this violence was not borne equally by all of Chicago's residents either. The violence was split unevenly along both the axes of race, class, and perceived nationality, with Chicago's poor, black, brown, and otherwise marginalized residents experiencing the worst of the violence. The average experience of violence for a white professional versus a Puerto Rican laborer versus

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<sup>17</sup> For a comprehensive history see: Dale, *Robert Nixon and Police Torture in Chicago, 1871-1971*; Flint Taylor, *The Torture Machine: Racism and Police Violence in Chicago*, 2019. For contemporaneous examination see: National Commission on Law Observance and Enforcement, "Report on Lawlessness in Law Enforcement Note," U.S. Wickersham Commission Reports, June 25, 1931; Aaron M. Kohn, *The Kohn Report: Crime and Politics in Chicago*. (New York: Arno Press, 1974); American Civil Liberties Union., *Secret Detention by the Chicago Police; a Report*. (Glencoe, Ill.: Free Press, 1959);

<sup>18</sup> *United States vs Carignan*, 342 U.S. 36, 46 (concurring)

<sup>19</sup> For a comprehensive history refer back to footnote 15. ~

a black professional were all different to a degree because of those varying factors.<sup>20</sup> The one constant to this violence was the fact it was done not by private persons, but by officers cloaked in the authority of state power. The officers acting under the color of law who committed acts of psychological and physical torture and violence did so not in self-defense, but to turn themselves into judge and jury, deciding guilt and punishment behind closed doors and forcing countless people into signing confessions, regardless of their actual guilt. The actual forms of violence and abuse against the detained did change slightly with the times. However, the use of torture and other coercive detention practices, effectively co-signed by indifferent at best leadership within the CPD and City Hall, has remained an all too persistent problem throughout Chicago's history.

Generations of activists, lawyers, judges, legislators and concerned residents have acknowledged the extent of this behavior and have been continually grappling with how to deal with this problem since at least 1874, when Illinois outlawed the use of violence or imprisonment to compel confessions.<sup>21</sup> Although this may have been the first attempt to eradicate the problem in Chicago, it was certainly not the last. In Illinois and Chicago there were local campaigns to end these practices almost every decade from the late 1800s onward. By the mid 1950s these efforts included laws and legislation banning abusive practices, public movements to shame the CPD, frequent rebukes and sanctions from individual judges, and more. At the national level, in 1936, the Supreme Court at least nominally recognized that torture and coercion in the service of compelling confessions made a mockery of the Fourteenth Amendment's guarantee that no "state

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<sup>20</sup> For an example see the case of Emil Reck, a cognitively disabled black teenager with no prior criminal record who was arrested and detained for almost 4 days straight in 1936 before "confessing" to a murder and being sentenced to 199 years in prison. Allegations at his trial that he had been tortured and coerced into confession, along with evidence of extreme injuries sustained while in police custody, were ignored. His conviction was eventually vacated in 1961 after the Supreme Court ruled Reck's Fourteenth Amendment right to due process was violated by the state. *Reck vs Pate*, 367 U.S. 433 (1961).

<sup>21</sup> American Civil Liberties Union., *Secret Detention by the Chicago Police*, 12.

deprive any person of life, liberty, or property, without due process of law.”<sup>22</sup> Despite all this the practice persisted over time, only occasionally changing its form and victims.

Examining over four hundred allegations of torture and coercion lodged against the CPD from 1871 to 1971, Dale identified three main themes in officer tactics used on the detained: deprivation, physical abuse, and psychological coercion. Deprivation tactics typically entailed actions like isolating the accused in cells and denying them food, water, and sleep. This was most commonly manifested by the tactic of holding the detained incommunicado, essentially arresting them and not allowing them any contact with the outside world. The act of arresting individuals without their loved ones’ knowledge had the effect of essentially making them vanish for as long as they were held, as nobody but the police would know where they were or how to contact them. In those cases, the police could hold the detained for as long as they wanted. There was no way for a lawyer or anyone else to secure their release with a writ of *habeus corpus* because no one else knew they were there. Despite the various denials from CPD leadership across time, it was not uncommon for officers to hold the detained incommunicado for days on end. The physical abuse varied the most throughout the twentieth century, ranging from sweat boxing or “sweating” (placing someone in a small, often windowless room which usually had poor ventilation and could get incredibly hot or cold.) to electrocution to beatings with fists or objects to stringing suspects up by their wrists. However, all manifestations were linked by a deliberate intention to inflict physical pain and trauma on the detained. Psychological coercion, often entailed subjecting the detained to frequent interrogations over the course of hours or days and making threats against them or their loved ones.<sup>23</sup> It is crucial to emphasize that even the most “benign” of these tactics took a heavy toll when used over the course of hours, days, or

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<sup>22</sup> *Brown v. Mississippi*, 297 U.S. 278 (1936); U.S. Constitution, amend. 14, sec. 1.

<sup>23</sup> Dale, *Robert Nixon and Police Torture in Chicago, 1871-1971*, 5-9.



even weeks, especially since the threat of violence or even death always credibly lurked beneath the surface.

All three of these tactics were frequently used in conjunction to make the detained person's life so unbearable that they would comply with police demands. Typically, the demands were that a confession to be signed or information on a crime, but officers occasionally used them to get people to agree to not complain or speak about prior officer behavior as well. These tactics were also sometimes used just to inflict punishment and pain for a variety of reasons. The most common reasons were because the officers thought the detained was guilty or because of racial prejudice, but there were likely countless other inexplicable reasons as well.

Throughout history the CPD's leadership have frequently taken contradictory stances on the use of torture and coercive tactics. Leadership has maintained that officers do not use coercive tactics or torture and those that do are merely a few bad apples, while simultaneously arguing that oversight and inquiry into what happens to the detained behind closed police station doors hampers their ability to fight crime. This has often meant CPD leadership has tended to ignore the problem outright and resisted outside attempts to reform officer behavior. This is not to leave out other complicit parties. The Mayor's Office and the City Council as a whole has also consistently demonstrated an unwillingness to force the CPD to change. The State's Attorney's office has also frequently demonstrated no problem overlooking or even actively encouraging incredibly questionable detention conditions when accepting evidence for cases and investigations.

### **Jon Burge: Chicago's Most Infamous Police Torturer**

In the twenty-first century the discussion on police torture and abusive detention practices in Chicago frequently centers on Jon Burge. Burge was an officer who worked in, and later

commanded, Area 2, a police district on the South Side from 1972 to 1986.<sup>24</sup> There he led a group of officers – sometimes known as the “Midnight Crew” – who have been accused of using torture to elicit confessions by over 192 men, all of who were black.<sup>25</sup> The officers were accused of using tactics like “Russian roulette with pistols and shotguns, burning suspects on radiators, suffocation with typewriter covers, beatings with phone books and electric shocks to the ears, nose, fingers, and testicles” to induce confessions.<sup>26</sup> The first allegation against Burge date back to the early seventies soon after he joined the CPD, although the first one to receive serious attention in the press was Andrew Wilson’s. In 1982 Wilson and his brother were beaten, suffocated, and electrocuted by Burge and other officers until they “confessed” to the murder of two police officers. Wilson filed a §1983 suit against Burge, the City, and other officers involved in federal court for \$10 million in damages stemming from his torture. Echoing many of the lawsuits in this paper, Wilson alleged a widespread custom of police abusing detained persons in their custody.<sup>27</sup>

Wilson eventually lost his first lawsuit, but that was just the beginning of a flood of suits related to Burge torture. An internal CPD report later determined Burge and other officers engaged in “systematic torture,” with the knowledge of their superiors and a report from a special prosecutor identified hundreds of allegations of assault and other heinous acts. It is estimated the City of Chicago has already paid more than \$100 million dollars in settlements stemming from civil cases related to Burge. In 2015 the City Council finally passed an ordinance apologizing to Burge’s victims and establishing reparations for his victims with “credible”

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<sup>24</sup> “Burge to head bomb and arson unit”. Chicago Sun-Times, August 14, 1986.

<sup>25</sup> “The Police Torture Scandals: A Who's Who,” Chicago Reader, June 15, 2006.4

<sup>26</sup> “The Chicago police used appalling military interrogation tactics for decades,” The Guardian, Feb. 19, 2015.

<sup>27</sup> “Jon Burge, alleged ringleader of police torture in Chicago, dies at 70,” Washington Post, Sept. 20, 2018; John Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture*, 1st ed (New York: Knopf, 2000), 60-87.

claims.<sup>28</sup> Burge was eventually fired in 1993 for torturing Andrew Wilson, but he was still allowed to keep his pension. In 2010 he was convicted of perjury and obstruction of justice stemming from a civil suit against him, and he was later sentenced to four and a half years in prison, but those were the only criminal penalties he ever faced. Meanwhile many of the other officers involved and the prosecutors in the State's Attorney's office informed of the torture, including future mayor Richard M. Daley, never faced any consequences.<sup>29</sup>

Many people have found it tempting to write Burge off as failure of individuals. Best exemplified by federal judge Joan Lefkow's comment at his sentencing hearing: "How I wish there had not been such a dismal failure of leadership in the (police) department that it came to this, ... If others, such as the United States attorney and the (Cook County) state's attorney, had given heed long ago, so much pain could have been avoided."<sup>30</sup> In the words of the journalist John Conroy, who covered the Burge scandal and subsequently wrote a book about it, Burge "was a guy failed by his supervisors."<sup>31</sup> This line of thinking goes: if only the individuals who had the power to stop Burge had actually done so, his reign of terror could have been avoided. This notion incorrectly writes Burge off as a perverse victim at best, and a bad apple at worst, and portrays the torture as a result of a temporary lapse in institutional judgements and safeguards, downplaying the complicity of the entire system. Devoid of historical context the Burge saga seems like a shocking, but ultimately one-off and isolated failure within the CPD, instead of an indictment of the entire institution. However, the historical record, both within this

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<sup>28</sup> Dale, *Robert Nixon and Police Torture in Chicago, 1871-1971*, 1-2.

<sup>29</sup> "Jon Burge and Chicago's legacy of police torture," Chicago Tribune, Sept. 19, 2018. Accessed January 13, 2020. <https://www.chicagotribune.com/news/ct-jon-burge-chicago-police-torture-timeline-20180919-htmlstory.html>; "Jon Burge, alleged ringleader of police torture in Chicago, dies at 70," Washington Post.

<sup>30</sup> "Burge Given 4 ½ Years in prison," Chicago Tribune, Jan. 21, 2011.

<sup>31</sup> Dale, *Robert Nixon and Police Torture in Chicago, 1871-1971*, 1.

paper and outside of it, reveals Burge was just one manifestation of a much larger problem with much, much deeper roots.

### **Before the Midnight Crew: Abusive Police Detention Tactics pre-Burge**

The first consistent claims that the CPD was using torture and other abusive detention appeared between 1875 and 1885, as the CPD was being re-organized, expanded, and modernized at the behest of business interests in response to the perceived threat of labor activism. Officers frequently, and sometimes openly, held suspects for crimes incommunicado and sweat boxed them for long periods of time to get information and solve crimes. In custody, aside from being sweated, the detained were often sleep deprived and assaulted, frequently leaving custody with all manner of injuries. CPD officials would occasionally admit to using these tactics, especially extended detention, but vehemently denied they were barbaric or cruel in any way, instead defending them as vital investigative tools. Most accounts from the nineteenth century are from the press, which typically only described these tactics as being used on white men accused of murder; but that in no way means they were the only victims. There are occasional reports of black Chicagoans suffering similar fates and the lack of accounts is probably not for lack of occurrence, but rather reflective of silence in the archives. Despite the relative non-secrecy before the twentieth century these tactics got little sustained public pushback, and even then it was typically only directed at private detective agencies who used them, not the police.<sup>32</sup>

At the turn of the twentieth century there was a brief burst of public opposition against the practice when the ordeal of Oscar Thompson gained public notoriety. Thompson, a white murder suspect, claimed officers at the Hyde Park Station brutally interrogated him over the

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<sup>32</sup>Dale, *Robert Nixon and Police Torture in Chicago, 1871-1971*, 5-11.

course of several days, denying him sleep and bringing him to the brink of madness. This sparked a multitude of condemnations from former and current judges, as well as concerned residents; the *Chicago Tribune* even explicitly denounced sweat boxing as a form of torture. In response, the Police Commissioner assured the public that recent claims could not be further from the truth, and even though suspects might be detained for long periods of time they were always well kept for and interrogated under civil circumstances.<sup>33</sup> Eventually the anger faded with no substantial reform being taken. As the first decade of the twentieth century progressed little changed about the substance of the allegations, although a new term did begin to appear. People began to talk of officers using “the third degree,” a catchall term, which grew to encompass all manner of abusive tactics from holding the detained incommunicado to physical assault to sleep deprivation and more. At the same time police denial grew more comprehensive; by 1912 in response to an editorial in the *Journal of Criminal Law* condemning the CPD for the use of the third degree, the CPD claimed it did not use it at all.<sup>34</sup>

Throughout the 1920s it continued to be more of the same, with the occasional burst of public outrage against the CPD over detained persons dying under suspicious circumstances or leaving custody with horrific injuries; but still, no substantial overhauls of department practices were undertaken. Typically, individual complaints against officers went ignored and even when there was an investigation officers rarely faced consequences. There was some judicial pushback against the third degree from individual judges by refusing to accept confessions that appeared to have been obtained by the third degree and transferring detained persons to the custody of Cook County jail to keep them away from the police. But there was no sustained institutional response from the Cook County Court system. Starting in the 1920s the Illinois Supreme Court also began

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<sup>33</sup> Dale, *Robert Nixon and Police Torture in Chicago, 1871-1971*, 11-3.

<sup>34</sup> Dale, *Robert Nixon and Police Torture in Chicago, 1871-1971*, 12-20.

handing down a series of decisions denouncing obtaining confessions via the third degree and barring said confessions' use in trials. Yet despite these legal developments and other public movements against the third degree it appeared to have little effect on its prevalence. By this point the CPD's standard response to allegations was also set. They would simultaneously deny they used the third degree, while also maintaining oversight into their practices would hinder their ability to fight crime.<sup>35</sup>

The continued use of the third degree was by no means particular to Chicago. This is best encapsulated by the findings of the National Commission on Law Observance and Enforcement, commonly referred to as the Wickersham Commission for its chair former attorney general George Wickersham. Convened at the request of President Hoover to study law enforcement practices in the US, this commission dedicated a whole report on *Lawlessness in Law Enforcement*. One of the central focuses of the report was on the nationwide use of the third degree, which the commission identified as being both "widespread" and "secret and illegal" for violating a variety of "fundamental rights." The commission claimed that "courts give no approval to any of these practices" and "convictions of crime based upon these confessions of guilt secured by such methods are very generally set aside," yet the practice persisted. The report identified a variety of tactics from holding the detained incommunicado to beating and assaulting them and more. In the report the commission devoted 15 pages to Chicago alone, noting "the third degree is thoroughly at home in Chicago." There "illegal detention and detention *incommunicado* are said to be common," with officers frequently detaining persons and holding them for days without access to the outside world. While keeping people detained "violence is

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<sup>35</sup> Dale, *Robert Nixon and Police Torture in Chicago, 1871-1971*, 21-7.

regarded as general and prevailing.”<sup>36</sup> Foreshadowing some of Burge’s tactics by almost half a century, the report went on to note:

The methods described as in use in Chicago include the application of rubber hose to the back or the pit of the stomach, kicks in the shins, beating the shins with a club, blows struck with a telephone book on the side of the victim's head. The Chicago telephone book is a heavy one and a swinging blow with it may stun a man without leaving a mark. (The use of this practice is described by a responsible eyewitness of more than one occurrence.) Other methods stated to be used are suspending a prisoner upside down by hand- cuffs or manacles and the administration of tear gas.<sup>37</sup>

Nevertheless, the commission expressed the optimistic statement that “violence against suspects ... is said to be diminishing.” These views were in line with many experts at the time who thought the increased popularity of “scientific methods” like laboratory examinations would obviate the need for the third degree to obtain information. In 1929 before the Commission’s report, the acting Police Commissioner John Alcock claimed to oppose the third degree and vowed to bring a new humanitarian leadership to the CPD. Once, after around 2,000 people were arrested and crowded into police lockups without warrants on suspicion of gang activity Alcock issued an order directing “greater care” when making arrests.<sup>38</sup> Yet all the same, he denounced the Wickersham Commission’s report upon its release and denied anything like the allegations contained within happened in Chicago.<sup>39</sup> Within the context of this contradictory statement both denying the third degree was practiced and yet vowing to be more humane in the treatment of the detained – why would this be necessary if the third degree was not in use? – it is no surprise that allegations of torture and coercion continued unabated.

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<sup>36</sup> “Report on Lawlessness in Law Enforcement,” 3-4, 125-7.

<sup>37</sup> “Report on Lawlessness in Law Enforcement,” 126.

<sup>38</sup> “Report on Lawlessness in Law Enforcement,” 125-7.

<sup>39</sup> Dale, *Robert Nixon and Police Torture in Chicago, 1871-1971*, 24-7.

**“The rack and torture chamber may not be substituted for the witness stand:” Abusive Detention Practices and the Federal Courts**

Then in Kemper County, Mississippi in 1934 a pivotal national moment occurred. After the murder of white planter Raymond Stuart, police officers arrested black sharecroppers Ed Brown, Yank Ellington, and Henry Shields as suspects. The officers then brutally tortured them by, among other things, whipping two of the men and hanging one from a tree until all three men confessed to the murder in the exact manner their torturers wanted. At their trial their confessions were the only evidence offered and one officer involved admitted to whipping two of the men, but the jury still found them guilty. The men appealed their case to the Supreme Court which, in the landmark 1936 case of *Brown v. Mississippi*, held that “convictions of murder which rest solely upon confessions shown to have been extorted by officers of the State by torture of the accused are void under the due process clause of the Fourteenth Amendment.” Stating “the rack and torture chamber may not be substituted for the witness stand,” the decision theoretically dealt a major blow to the use of the third degree as the Supreme Court’s decision applied to both state and federal courts.<sup>40</sup> That is because, in theory, any confessions obtained via the third degree would be considered void, thus making it harder to prosecute those cases.

This certainly seemed like a ruling to celebrate for opponents of the third degree, and both the *Chicago Tribune* and *Defender* devoted extensive coverage to the ruling.<sup>41</sup> Now in addition to the Illinois Supreme Court coming out against torture the U.S. Supreme Court had as well. However, despite the high hopes after the ruling the use of the third degree was not stamped out, it only changed form. New jurisprudence established that open torture freely

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<sup>40</sup> *Brown* 297 U.S. at 285-6.

<sup>41</sup> Dale, *Robert Nixon and Police Torture in Chicago, 1871-1971*, 26-7.



admitted by officers was unacceptable, but “invisible” torture that left no permanent marks and which officers denied in court was acceptable.

In 1940 in *Chambers v. Florida*, the first case since *Brown* dealing with contested torture claims, the Court began to establish an extremely uncritical approach to contested torture claims. In *Chambers*, a white man was robbed and murdered, and the local police detained somewhere between 30 and 40 black men for questioning and examination for about a week. At the end of this ordeal several defendants ‘voluntarily confessed’ to murder and they were put on trial. Later at trial, the defendants all alleged they had been psychologically and *physically* tortured into making those confessions, but the defendant Chambers was still sentenced to death. However, unlike in *Brown*, the law enforcement officers involved denied using torture. In response to these contested claims of torture, the Court decided to sidestep the “sharp conflict upon the issue of physical violence and mistreatment” altogether. Instead they declared “the undisputed facts” that the defendants were detained and held without a warrant and subject to days of questioning “showed that compulsion was applied.” Thus, although the Court declared it “must determine independently whether petitioners’ confessions” were compelled “by review of the facts upon which the issue necessarily turns,” it simultaneously declined to determine whether or not the defendants had been physically tortured. Instead, in the first of many such decisions, they focused on uncontested facts about the detention, which indicated psychological compulsion to confess and declined to grapple with the question of physical torture.<sup>42</sup>

They continued building on this logic as well: in 1942 in *Ward v. Texas* another black man, William Ward, accused of murder was arrested by local law enforcement and detained for several days while being continuously questioned and transported from one town to another until he finally ‘confessed.’ Ward also alleged that officers beat, whipped, and burned him to secure a

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<sup>42</sup> *Chambers v. Florida*, 309 U.S. 227-35 (1940).

confession, but the officers involved denied all allegations except for one, who admitted to slapping Ward once. At trial the jury still convicted him. Upon review the Supreme Court voided his confession on the grounds he was held incommunicado for a long time and the conditions of his detainment likely created psychological pressure to confess.<sup>43</sup> In doing so they again side-stepped dealing with the contested allegations of physical abuse, instead settling on undisputed evidence on non-physical abuse. Continuing this in 1944 in *Ashcraft v. Tennessee* the Court was confronted with a case where law enforcement held the defendants incommunicado for 36 hours and allegedly tortured them as well. The Court held the confessions were coerced, but only because the plaintiff Ashcraft was detained and questioned for 36 hours straight. In regard to the claims of physical torture, the Court again threw up its hands and declared “as to what happened in the fifth-floor jail room during this thirty-six-hour secret examination, the testimony follows the usual pattern, and is in hopeless conflict.”<sup>44</sup> The “usual pattern” being the detained person alleging the officers tortured them and the officers denying it. This was just one more example of the Court setting a precedent of effectively refusing to engage with allegations of torture and abusive detention practices when there was even the slightest dispute over what happened.

Even in the face of more than testimonial evidence the Court continued to sidestep grappling with allegations of physical torture and abuse. One of the most pointed examples was the 1953 case of *Stein v. New York*. There three men suspected of murder were detained by local law enforcement and eventually two men “confessed” to the crime. However, the prison doctor who saw them the day after their arraignment noted bruises on all three men, as well as one with a broken rib. Later at trial the two men claimed the confessions had been physically tortured out of them, introducing the prison doctor’s report as evidence to corroborate their statement as

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<sup>43</sup> Ward v. Texas, 316 U.S. 547 (1942).

<sup>44</sup> Ashcraft v. Tennessee, 322 U.S. 143, 148-51 (1944)

well. Still, the jury decided there was no foul play and the confessions were voluntary, using them as evidence to sentence the three men to death. Deciding that the uncontested facts about their detainment did not constitute psychological coercion and again refusing to confront the contested claims of physical torture, the Court upheld the use of the confession and the determination as voluntary. Despite the evidence of violence, the Court instead declared:

Thus, police testimony was consistent and unshaken that no violence or threats were used, that the accused were given food at mealtimes and, with the exceptions we have stated, were allowed to sleep at night.

The defendants' contentions as to physical violence rest entirely on circumstantial evidence. They would be utterly without support except for inferences, which they urge, from the admitted fact that, when first physically examined the day after arraignment, they showed certain bruises and injuries which could have been sustained from violent "third-degree" methods. On the morning of June 9, they were examined by the prison physician. Cooper had been in custody at the barracks between three and four days, Stein three days, and Wissner two days. Testimony by the prison doctor who examined them predicated mainly on the notes he made at that time was that Wissner had a broken rib and various bruises and abrasions on the side, legs, stomach and buttocks; Cooper had bruises on the chest, stomach, right arm, and both buttocks; Stein had a bruise on his right arm. Counsel for the petitioners, who examined them on the 9th and 10th of June, testified that then injuries sustained by each were more extensive than those described in the doctor's testimony.<sup>45</sup>

Evidently even the injuries the men sustained after being in police custody were not enough evidence to make a determination of whether or not torture occurred. This case was perhaps the most pointed example of how the Supreme Court almost categorically refused to deal with contested claims of abusive detention practices. By creating such high standards for determining when physical torture was used this meant in practice the Supreme Court almost categorically refused to deal with contested torture claims. Implicit in this was a refusal to acknowledge the dynamics behind torture and abusive detention practices, namely that by definition the only people who knew what happened behind those closed police interrogation doors were the officers in the room and the detained. It is no stretch of the imagination that officers understood this dynamic and continued to use torture and simply denied doing so in the courtroom, knowing they would face virtually no scrutiny for doing so. By refusing to confront the uneven power

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<sup>45</sup> Stein v. New York, 346 U.S. 156, 168-70 (1953).

dynamics inherent in these interrogations, often only compounded by the extra dimension of race, the Supreme Court provided tacit acceptance of these tactics, even while sanctioning psychological coercion.

### **The Changing Same: CPD Practices after *Brown***

These Supreme Court decisions had the predictable effect of changing how torture and other abusive detention practices were committed after 1936. These changes were especially pronounced in terms of what happened to the alleged victims and who they were. The physical violence increasingly became “invisible” violence, which did not leave lasting marks after a few days. Torture allegations more frequently included actions like being struck on the kidneys and stomach, struck across the face with a blackjack (night stick), slapped in the face, or having the wind knocked out of them. Perhaps the most gruesome allegation was the use of a tactic known as “hanging him up”: the practice of handcuffing the detained with their hands behind them, looping a rope through the handcuffs and over a door and lifting the person up until their toes barely touched the floor. This would apparently leave no mark if the person’s wrists were bandaged ahead of time.<sup>46</sup> This meant when the victim was brought before a judge or doctor it was easier for the officers to maintain deniability. The alleged victims were also increasingly the most marginalized and vulnerable Chicagoans who had little credibility in a courtroom against a police officer. In Chicago this increasingly meant black and brown, poor, and cognitively disabled people who often had no knowledge of their rights, little access to legal representation, and few means of protecting themselves.<sup>47</sup> There was a particularly deadly combination for Chicago’s poor black communities as the CPD’s growing turn to more punitive, aggressive, and

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<sup>46</sup> American Civil Liberties Union., *Secret Detention by the Chicago Police*, 11-5; Donald Page Moore, Letter to Thomas B. Morgan, April 21, 1958, American Civil Liberties Union. Illinois Division. Records, Box 569, Folder 7, Special Collections Research Center, University of Chicago Library.

<sup>47</sup> Dale, *Robert Nixon and Police Torture in Chicago, 1871-1971*, 102-7.

frequent policing of black neighborhoods effectively encouraged officers to make as many arrests as possible, ensuring that black Chicagoans had a much higher chance of being detained and abused by the police.<sup>48</sup> For stations like Chicago's Fifth Police Station, nicknamed "the Slaughter House" by the Illinois Division for its violence, located inside the overwhelmingly black Fifth District they routinely turned into houses of horror.<sup>49</sup> As the torture and abuse changed after *Brown* the response of the broader legal system remained the same: virtually blanket indifference; countless people inside and outside of court continued to allege they faced torture and abuse inside police stations, but judges, juries, and prosecutors generally continued to turn a blind eye.

The one potential bright spot was by the 1950s the Supreme Court, Illinois law, and CPD policy - in theory at least - were in agreement that incommunicado detention for extended periods of time was unacceptable. This all stemmed from the same understanding that, even absent any other physical or psychological abuse, being detained in police custody with no definite release in sight has the capacity to inflict tremendous psychological trauma. The power dynamics meant that officers could credibly threaten to detain someone for as long as they wanted and that was rightfully recognized as an extreme cause for concern. Indeed, one crucial reason both the U.S. Constitution and Illinois Constitution guarantee the right of habeus corpus in all but the most extreme circumstances is exactly to prevent the police from indefinitely detaining someone without charging them.<sup>50</sup>

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<sup>48</sup> Simon Balto, *Occupied Territory: Policing Black Chicago from Red Summer to Black Power*, Justice, Power, and Politics (Chapel Hill: University of North Carolina Press, 2019), 123-30.

<sup>49</sup> Index Card on Fifth District Police Station, American Civil Liberties Union. Illinois Division. Records, Box 508, Folder 5, Special Collections Research Center, University of Chicago Library.

<sup>50</sup> U.S. Constitution, art. 1, sec. 9, cl. 2; Ill. Constitution, art. 1, sec. 9. Habeus corpus, Latin for produce the body, is a legal procedure wherein someone jailed or detained can petition to be brought before a court to challenge an unlawful detention. If the court determines their detention is unlawful they can be ordered released.

The Supreme Court maintained its stance of voiding information obtained from extended incommunicado detention and Illinois Law mandated that:

It shall be the duty of every sheriff, coroner, constable and every marshal, policeman, or other officer of any incorporated city, town or village, having the power of a sheriff or constable, when any criminal offense or breach of the peace is committed or attempted in his presence, forthwith to apprehend the offender and bring him before some justice of the peace, to be dealt with according to law; to suppress all riots and unlawful assemblies, and to keep the peace, and without delay to serve and execute all warrants, writs, precepts and other process to him lawfully directed.<sup>51</sup>

The standards were even stronger in Chicago where state law mandated that in Cook County “any person so arrested shall have the right to be brought immediately before the Municipal Court in the District in which he is arrested, or if there be no judge then in attendance upon such court, before the Municipal Court in any other district at which there may be then a judge in attendance, to be dealt with by such court according to law.”<sup>52</sup> The CPD even had its own watered-down regulations on its book in the 50s dictating a similar goal:

In case of an arrest with or without a warrant, the offender shall be brought before a judge of the municipal court as speedily as possible, as an officer becomes a trespasser if he delays longer than the necessity of the case compels. This, however, does not apply when the offender is well-known criminal who is held pending investigation; but in such cases, however, complaint shall be filed within twenty-four hours, if possible, and continuance applied for.<sup>53</sup>

There is the notable difference in the CPD regulations making an exception for a “well-known criminal” and using looser language in general, but still the spirit also dictates that officers should have brought arrested and detained people to a magistrate as quickly as possible. This should have made it crystal clear that holding the detained incommunicado for extensive periods of time was an unacceptable police practice. In theory there was a strict, standard procedure CPD officers were supposed to follow upon arrest. They were supposed to bring the

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<sup>51</sup> Illinois Revised Statutes, Ch. 38, Sec. 655 quoted in Complaint, *Guzik v. O'Connor*, No. 56C334, 1956 National Archives at Chicago (N.D. Ill. Feb. 17, 1956), 2.

<sup>52</sup> Illinois Revised Statutes, Ch 37. Sec. 406 quoted in Complaint, *Guzik v. O'Connor*, 4.

<sup>53</sup> Excerpts from rules and regulations of the Police Department of the City of Chicago, *Wakat v. Harlib*, No. 56C36, 1956 National Archives at Chicago (N.D. Ill. Sept. 24, 1957).

arrested to the station, “book” them, and then either release them on bail or bring them before a magistrate to be charged. “Booked” here meant that the officer wrote down what the detained person was being charged with, set their bail (if applicable) and decide which branch of the municipal court the detained person would be taken to (if applicable).<sup>54</sup> This was all supposed to be done to avoid incommunicado detention, as before someone was booked they were effectively being held incommunicado.

In reality these rules were barely even treated as guidelines from the Police Commissioner on down. Timothy O'Connor, Commissioner from 1950 to 1960, openly displayed flagrant disregard for the rules and underlying principles surrounding incommunicado detention. In the summer of 1952, the CPD announced to the press that all persons arrested on suspicion of pickpocketing or “confidence game” would be detained incommunicado;<sup>55</sup> In a 1953 report O'Connor flat out stated "My policy has always been that while it may be illegal, and I have received some complaint from civil-liberates group relative to orders to pick up some criminals, simply because they are criminals, I still think they should be picked up and locked up on every occasion possible."<sup>56</sup> Later in 1954, despite being publicly rebuked by a municipal judge for detaining a man for more than 10 hours with no evidence, O'Connor told the *Tribune* “we will continue functioning as we have in the past.”<sup>57</sup> This was all despite the fact that Illinois’ laws on the rights of the detained had been in place for at least twenty years and both the Illinois and U.S. Supreme had declared incommunicado detention unconstitutional.

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<sup>54</sup> American Civil Liberties Union., *Secret Detention by the Chicago Police*, 24-5.

<sup>55</sup> Charles Liebman, Letter to Timothy O'Connor, July 2, 1952, American Civil Liberties Union. Illinois Division. Records, Box 569 Folder 7, Special Collections Research Center, University of Chicago Library.

<sup>56</sup> Aaron M. Kohn, *The Kohn Report: Crime and Politics in Chicago*. (New York: Arno Press, 1974), 87 quoted in American Civil Liberties Union., *Secret Detention by the Chicago Police*, 19.

<sup>57</sup> *Chicago Daily News*, May 1, 1957, p. 24 quoted in American Civil Liberties Union., *Secret Detention by the Chicago Police*, 20.

With this attitude coming from the top it is no surprise that incommunicado detention flourished throughout the 50s. As Liebman, Moore, and the Illinois Division would later document, extended illegal police detention was rampant. It was common for police to arrest someone “for investigation,” meaning they had no actual evidence of that person committing a crime, but they would detain them anyways on the hopes that something turned up. This all happened with virtually no oversight, as CPD supervisors either encouraged the behavior or looked the other way, and no one in City Hall, the State’s Attorney’s office, or the Cook County Court established systemic oversight.

The prevalence of this behavior was not lost on everyone, however. In 1957, after a controversy in which a man was held for over 90 hours incommunicado in police custody without being charged, the Illinois State Legislature attempted to clarify the laws surrounding detention. A proposed bill would change the requirement from arrested persons must be brought “without unnecessary delay” before a magistrate to arrested persons must be brought “forthwith.” The bill passed the assembly, but Governor Stratton vetoed it after lobbying by CPD Commissioner O’Connor and State’s Attorney Adamowski, who claimed that instances like the 90-hour detention were rare and passing it would help “only the criminal element.”<sup>58</sup> Again, the CPD exhibited its familiar contradictory attitude, claiming they did not employ third degree tactics while resisting oversight and reform. In this context there is little surprise legislators would try to pass this bill over the veto, as O’Connor’s own comments over the years provided ample evidence no one in the CPD was taking the requirements to avoid extended detention seriously. This is to say nothing of the more extreme violence committed against the detained which also continued to flourish in the shadows as well.

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<sup>58</sup> American Civil Liberties Union., *Secret Detention by the Chicago Police*, 20-3.



### **III. “You’ve been harassing the noble Chicago Police force again:” Liebman and Company Attempt to make change**

It is within this context in the mid 1950s that we begin to focus on the Illinois Division of the ACLU and its concerted effort to end illegal extended detention and abusive detention practices in general. The Police and Criminal Law Committee, led by attorney and publisher Charles Liebman, had been fighting against these practices for some time.<sup>59</sup> Liebman and his committee had already spent years constantly writing to and lobbying the commissioner to rectify, civil liberties violations which came to their attention. It is unclear how frequently the department responded to the letters, but their volume led one man to write to the Illinois Division: “you’ve been harassing the noble Chicago Police force again, for which I’m grateful; they need it.”<sup>60</sup>

One of the committee’s most important contributions was an attempt to quantify, to a degree, the extent of the problem of illegal detention. In 1956 Liebman’s committee began a study of the practice, led by Donald Page Moore, then a staff attorney from 1956-58. In the study they sampled 2038 criminal and quasi-criminal cases from 1956 filed in municipal court. Each case was supposed to be accompanied by an arrest slip detailing when the accused was arrested and when they were booked. According to the law, the gap between those times should have been minimal; however, in reality it was often hours or even days. Aside from the fact that a third of the slips did not contain any booking times at all, some of the slips with a booking time detailed disturbingly long detentions: 50 percent of detained persons charged in felony court had been held without being booked for more than 17 hours, and 97 people were held for two days or

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<sup>59</sup> Letter to Jim Hurlbut, American Civil Liberties Union. Illinois Division. Records, Box 569 Folder 7, Special Collections Research Center, University of Chicago Library.

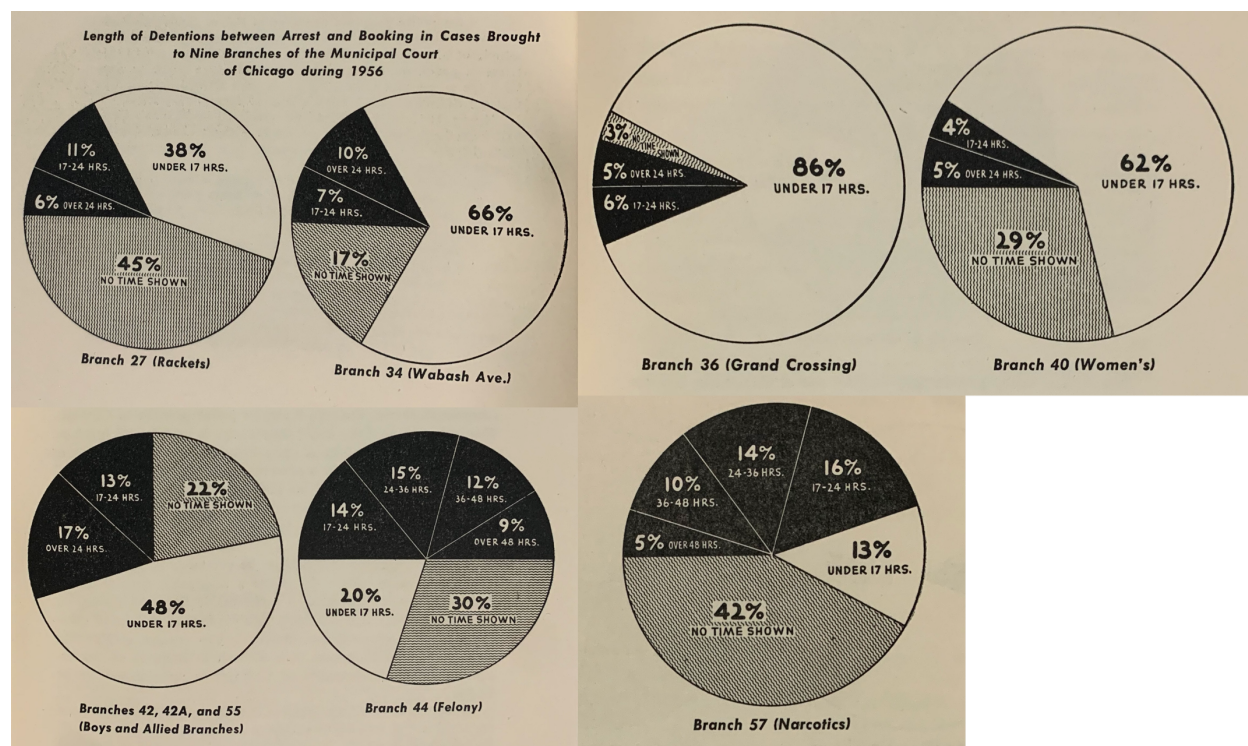
<sup>60</sup> John W. Coursell, Letter, October 4, 1959, American Civil Liberties Union. Illinois Division. Records, Box 569 Folder 7, Special Collections Research Center, University of Chicago Library.

more before being booked. The distribution of time between booking and arrest was not evenly distributed between the various municipal courts or police departments either. The Detective Bureau failed to record a booking time on virtually all of their slips, and as figure two demonstrates, at least half of the felony court times were longer than 17 hours. This data was made even more alarming by the fact that these were *official* arrest and booking times recorded. It was commonplace for officers to arrest and detain people well-before they officially logged them as arrested. So, while it is high-impossible to know the true times of the arrests and bookings, there is strong reason to suspect the ACLU's numbers were highly deflated.<sup>61</sup>

<b>ACLU Detention Time Survey, Nine Municipal Court Branches, 1956</b> <b>Basic Totals and Computations</b>											
Branch of Court	No. 1956 Cases Filed	Sample Size		Time Unknown	< 17 Hours	≥ 17 Hours	≥ 24 Hours	≥ 36 Hours	≥ 48 Hours	≥ 60 Hours	≥ 72 Hours
27	22,100	341	observed no.	154	128	59	22	10	3	1	0
			% of sample	45.16	37.54	17.30	6.45	2.93	.88	.29	.00
			proj. total	9,981	8,296	3,824	1,426	648	194	65	—
34	5,954	163	observed no.	27	108	28	16	7	4	4	3
			% of sample	16.56	66.26	17.18	9.82	4.29	2.45	2.45	1.84
			proj. total	986	3,945	1,023	584	256	146	146	110
36	5,370	79	observed no.	2	68	9	4	1	0	0	0
			% of sample	2.53	86.08	11.39	5.06	1.27	.00	.00	.00
			proj. total	136	4,622	612	272	68	—	—	—
40	10,939	185	observed no.	53	115	17	9	4	0	0	0
			% of sample	28.65	62.16	9.19	4.86	2.16	.00	.00	.00
			proj. total	3,134	6,800	1,005	532	237	—	—	—
42,42A,55	15,397	342	observed no.	76	163	103	59	21	9	4	1
			% of sample	22.22	47.66	30.12	17.25	6.14	2.63	1.17	.29
			proj. total	3,422	7,338	4,637	2,656	945	405	180	45
44	7,246	334	observed no.	101	66	167	121	71	31	15	8
			% of sample	30.24	19.76	50.00	36.23	21.26	9.28	4.49	2.40
			proj. total	2,191	1,432	3,623	2,625	1,540	673	325	174
57	12,325	242	observed no.	102	31	109	71	37	11	2	1
			% of sample	42.15	12.81	45.04	29.34	15.29	4.55	.83	.41
			proj. total	5,195	1,579	5,551	3,616	1,884	560	102	51
Over-all for nine branches	79,331		(weighted)								
			% of sample proj. total	31.57 25,044	42.87 34,012	25.56 20,275	14.76 11,712	7.03 5,578	2.49 1,978	1.03 818	.48 379

**Figure 1.** Table of observed detention times for sampled cases along with projected totals for all arrests in 1956. American Civil Liberties Union., *Secret Detention by the Chicago Police*, 36.

<sup>61</sup> American Civil Liberties Union., *Secret Detention by the Chicago Police*, 20-8.



**Figure 2.** Length of Detentions between Arrest and Booking in Cases Brought to Nine Branches of the Municipal Court of Chicago during 1956. American Civil Liberties Union., *Secret Detention by the Chicago Police*, 26-8.

If the ACLU's study was representative of all arrests that year, and there is sound reason to believe it was, then as Figure 1's projected totals demonstrate, the extent of illegal detention was staggering. This detention was just the tip of the iceberg as well. Those detained were typically held incommunicado in the time between being arrested and booked putting them at the mercy of the officers holding them. That is to say nothing of what other abuses they might endure in officer custody, whether it be physical violence or the psychological effect of extended questioning and sleep deprivation for potentially days on end.

This study was just one example of Liebman and company's knowledge of the widespread extent of abusive police detention practices and the severity of the problem. The Illinois Division had already long been lobbying City Hall to improve police practices and their *Secret Detention* report was just one continuation of this. By 1958 they had already secured a

campaign pledge from Major Richard J. Daley that the police would be required to promptly book and bring to court arrested persons and that disciplinary proceedings would be required when the officers did not follow those requirements.<sup>62</sup> However, they were also well aware of how hollow promises from City Hall could ring. Just like countless activists, legislators, lawyers, and judges before them, Charles Liebman, his committee, and all the other lawyers involved kept running into the same problem of City Hall inaction, and thus complicity, and acceptance and approval from the top of CPD's leadership on down. As the *Secret Detention* report demonstrated, the third degree and torture were still persistent problems even after decades of attempts to stamp them out. How then could they stop this pervasive lawlessness among law enforcement? Even before *Secret Detention* was published they were already setting their sights on a new strategy, inadvertently drawing from a parallel dilemma in the U.S.'s past.

### **An Act to (fail to) enforce the Provisions of the Fourteenth Amendment: The Historic Roots of §1983**

Almost 90 years earlier the Forty-Second U.S. Congress was dealing with a similar problem: how could they protect new freedmen and their white allies from violence aided and abetted by local law enforcement? Only a few years after the end of the Civil War in 1865, the Ku Klux Klan, the Democratic party, and other white supremacists had begun engaging in mass campaigns of racial terrorism in an attempt to again subordinate the new freedmen on the basis of race. One of their tactics of choice was pure violence and terror; perpetrators frequently committed acts of murder, torture, beatings, lynching, rape and all other forms of violence with impunity against blacks and their white allies. These acts were frequently aided by Southern white law enforcement in local and state government through both action, like actively

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<sup>62</sup> American Civil Liberties Union., *Secret Detention by the Chicago Police*, 33-4.

participating as Klansmen, and inaction, like refusing to bring perpetrators to justice.<sup>63</sup> Just like the officers made a mockery of the detained's due process rights, these race-based massacres, murders, and other forms of violence similarly made a mockery of the attempts to guarantee the full rights of citizenship to freedmen supposedly guaranteed through the various Civil Rights Acts of the 1860s and the Thirteenth, Fourteenth, and Fifteenth Amendments.

Congress responded to the issue by passing a series of laws in 1870 and 1871, which provided a battery of criminal and civil penalties, often backed up by the power of the U.S. Army, to jail and fine those who deprived citizens of their rights into submission.<sup>64</sup> Among these bills was one titled *An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other purposes*. Later known as the Enforcement Act of 1871, Section 1 of this act stated:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.<sup>65</sup>

Essentially, the law sought to use civil liability as a deterrent against local and state officials abusing their powers by making their abuse of power too expensive to continue or commit in the first place. However, as the 1870s wore on, a series of cases rendered many of the laws with criminal provisions toothless, as the Supreme Court's flavor of federalism held that the federal government had no place prosecuting individuals for violating civil rights.<sup>66</sup> Although

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<sup>63</sup> Robert J. Kaczorowski, "Federal Enforcement of Civil Rights During the First Reconstruction," *Fordham Urban Law Journal* 23, no. 1 (1995): 155–8.

<sup>64</sup> Trelease, *White Terror*, 383-398; Kaczorowski, *The Politics of Judicial Interpretation*, 49-79.

<sup>65</sup> *Civil action for deprivation of rights*, U.S. Code 42 §1983.

<sup>66</sup> Kaczorowski, *The Politics of Judicial Interpretation*, 199-227.

initially used several times, §1983 fell by the wayside as Southern white supremacists murdered their way back into power and the nation entered what historian Rayford Logan called “the nadir of American race relations” after Reconstruction. Between 1871 and 1920, the law was only successfully used twenty-one times and by 1950 it had been rendered practically inert.<sup>67</sup>

**“The opportunity offered through civil actions for making indifferent city governments responsive to their duties is staggering:” Creating the theory behind the strategy**

In the mid-1950s, despite the difficulty in successfully invoking it, Liebman and company began to formulate a new strategy for fighting illegal detention practices that involved §1983. They wanted to use the Chicagoland legal industry to turn civil lawsuits into a financial tool to compel the City to change its behavior. It was already technically possible to sue police officers for misconduct in Illinois or federal civil court. Illinois law provided grounds to sue for false arrest, imprisonment, and brutality and in theory, §1983 could provide a cause of action for some instances; however, the dominant interpretation of the federal rights protected by §1983 before 1961 meant that federal suits were rarely successful, so suits were typically filed in state court where plaintiffs occasionally won.<sup>68</sup> However, under Illinois law, in state cases, plaintiffs could not sue municipalities themselves; instead, they had to sue officers directly. If the plaintiffs won, then the officers would have to pay them and then, as long as their conduct was not “malicious,” the municipality that employed them would reimburse them for the judgment.<sup>69</sup> In practice, the City would frequently drag its feet on this, often resulting in successful plaintiffs

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<sup>67</sup> Federal Judicial Center, *Monroe v. Pape*, <https://www.fjc.gov/history/timeline/monroe-v-pape>, (accessed January 20, 2020)

<sup>68</sup> To the best of my knowledge there are no comprehensive statistics on how often plaintiffs were successful in state court. The difficulty in answering this question is further compounded by the fact that many of the state court records from that time period have been destroyed.

<sup>69</sup> Ill. Rev. Stat. 1953, Chapter 24, paragraphs 1-15 quoted in Brief in Support of Motion to Strike the Complaint in a Supplemental Proceeding in Aid of a Judgement Against the City of Chicago, *Carpenter v. Brooks*, No. 55C946, 1955 National Archives at Chicago (N.D. Ill. Aug. 6, 1964), 1-5.

needing to take the City to court again when the officer they won against could not pay the judgment and the City refused to pay.<sup>70</sup>

Despite their chicanery, City leaders claimed that the cost of civil suits stemming from police misconduct had been a major cause for concern for the City's coffers. In the early 1950s documented settlements and awards ranged anywhere from several hundred dollars to \$40,000. In 1955, Corporation Counsel John C. Melaniphy told the City Council "We're getting judgments as high as \$200,000 against policemen," and "something has to be done" since "the city can be bankrupt by these suits shortly."<sup>71</sup> Those statements should be taken with a grain of salt, especially the claim of a \$200,000 judgment. While the ACLU identified \$156,000 worth of judgements against CPD officers from May 1957 to January of 1958, City records showed the City actually paid only \$35,016 in 1957 and \$28,000 in 1958 related to civil suit damages - the discrepancy between the two numbers was because of the City's aforementioned chicanery in actually paying judgement costs.<sup>72</sup> Still either number was just a small drop in the bucket compared to the CPD's annual allocations of over \$59 million a year at that point, a number which only grew in the future.<sup>73</sup> However, in an ominous sign of what was to come, Melaniphy's proposed solution to the cost of civil suits was not to get the CPD to force changes in the officer behavior leading to the suits, but to limit the amount the City would reimburse officers per civil case to \$20,000. Melaniphy's efforts failed, but they reflected a pervasive attitude among City

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<sup>70</sup> *Chicago Daily News*, "Tells How City Wiggles Out Of Paying Damages for Cops," March 6, 1959, American Civil Liberties Union. Illinois Division. Records, Box 569, Folder 6, Special Collections Research Center, University of Chicago Library.

<sup>71</sup> "Ask \$20,000 Limit in Cop Lawsuits," Box 569 Folder 6.

<sup>72</sup> "Tells How City Wiggles Out Of Paying Damages for Cops," Box 569 Folder 6; ACLU Illinois Division, News Release, June 17, 1958, American Civil Liberties Union. Illinois Division. Records, Box 569, Folder 6, Special Collections Research Center, University of Chicago Library.

<sup>73</sup> Chicago Police Department, "Chicago Police Department Annual Report" 1958, American Civil Liberties Union. Illinois Division. Records, Box 523, Folder 4, Special Collections Research Center, University of Chicago Library.



government leaders who identified the cost of civil suits as a problem but did not see actually changing officer behavior as a solution.

Regardless of Melaniphy's failed solution, comments like his on the financial threat from just the suits in 1955 gave Liebman and company good reason to think the cost of civil suits could easily be made into a major financial liability that the City would notice. Per City Council ordinance, the Law Department was required to produce and submit a report each month to the Council of all the lawsuits and administrative actions where the City had to pay money.<sup>74</sup> So City Hall and the alderman, at least in theory, were constantly aware of the lawsuits' cost to the City. Thus, if the number of lawsuits became commensurate with the prevalence of police violence and misconduct then Liebman and company had good reason to expect that costs to the City would snowball rapidly. Just the shocking frequency of *documented* illegal detention uncovered in the Illinois Division's 1956 study alone bears this out. If you assume their projection that over 20,000 people were arrested and detained incommunicado for at least 17 hours and then assume that 10,000 of these people would successfully file lawsuits against the officers involved for an average judgement of \$500 (worth approximately \$4,400 in 2020), then suddenly the City would be on the hook for \$5 million dollars (worth approximately \$44 million in 2020). Further, these hypothetical lawsuits would only be for illegal detention *documented* in arrest slips. It is likely that number would be even higher when including other forms of abuse not documented through arrest slips, making the total cost even higher. This hypothetical figure of over \$5 million would suddenly represent more than eight percent of the CPD's allocations, triple the City's average annual expenditure on *all* civil suits, and a huge headache for City Hall and the CPD leaders.<sup>75</sup>

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<sup>74</sup> Copies of these monthly reports are still kept by the City Clerk's office. Unfortunately, my request for a decade of these records was rejected for being too burdensome, and the outbreak of COVID-19 prevented the fulfillment of a request for a year of said records. As such, they could not be factored into my analysis.

<sup>75</sup> Brief for Petitioners, Monroe, et al. v. Pape, et al, 40-1.



Liebman and company cared so much about the prospect of creating a massive financial liability stemming from civil suits explicitly tied to the prevalence of police misconduct because they thought this would drive positive top-down reform. They came to this conclusion by drawing from already circulating ideas in legal scholarship about how the proper imposition of civil liability on municipalities for tortious conduct by its employees would deter future tortious conduct. In this theory proper imposition meant that whenever an employee of a municipality engaged in tortious conduct, it should be possible for the victim to sue either the employee or the municipality and, upon winning, collect payment from the municipality. This setup would ensure that victims would sue, and the municipality would have to pay for the tortious conduct of its employees. Eventually the cost of the behavior would force municipal leaders to crack down on it, either because of public anger over rising costs or fear of said anger.<sup>76</sup> To make this more specific to the problem of the CPD, civil lawsuits would price police misconduct and brutality, and as long as it remained widespread, the price for the City would be too high. This logic was most clearly distilled in a passage from one of the Illinois Division's own publications:

Imposition of municipal liability applies deterrent pressures at the only level where they can be truly effective-the level of policy decision and command. If the City must pay for the wrongful acts of its agents, the public will quickly know of it. The resultant pressures will be reflected in the policy decisions and command performance of those who govern the City and rule its police department. Disciplinary controls will be exercised at the top-the level where it really counts in a modern big city police department which more nearly resembles a large business corporation than it does an old fashioned town constabulary. Things will change. Not only will past injustice be redressed, but, far more important, future injustice will be prevented.<sup>77</sup>

Baked into this logic were the crucial assumptions that the cost could reach a threshold high enough for the City to actually care about stopping it, and that upon caring, the City actually could and would deal with the underlying problematic police behavior, as opposed to just cutting

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<sup>76</sup> See Caleb Foote, "Tort Remedies for Police Violations of Individual Rights," *Minnesota Law Review* 39, no. 5 (April 1955): 493–516; Edgar Fuller and A. James Casner, "Municipal Tort Liability in Operation," *Harvard Law Review* 54, no. 3 (January 1941): 437–62; Green, "Freedom of Litigation-Municipal Liability for Torts;" Frederick F. Blachly and Miriam E. Oatman, "Approaches to Government Liability in Tort: A Comparative Survey," *Law and Contemporary Problems* 9, no. 2 (1942): 181–213.

<sup>77</sup> Brief for Petitioners, *Monroe, et al. v. Pape, et al*, 28.

spending elsewhere. The assumption that the top officials in City Hall and the CPD would respond by seeking to change officer behavior and that they could was based on their underlying views on the ultimate salvageability of the institution of the police. They just thought it needed the right policy changes and “disciplinary controls” to fix it. Outside of this legal strategy they strongly advocated for much higher officer pay, more training, and stronger regulations and rules.<sup>78</sup> Even for civil suits they wanted the City, not individual officers to pay. The solutions they imagined to the problem did not require firing all – or even most – current officers and starting with a new slate, but instead required just top-down changes.

Although it is taken as a given not worth mentioning, Liebman and company’s understanding of the role of civil liability in preventing police misconduct almost entirely rests on a crucial intermediary assumption about a causal link between civil liability and successful lawsuits. Civil liability, defined as being potentially responsible in civil court for actions or behavior that damage someone or their property, does not actually lead to a victorious lawsuit with damages by itself. It seems almost preposterous to say out loud but just because an officer *could* be held civilly liable for brutalizing a potential plaintiff does not automatically mean the plaintiff will file and win a civil lawsuit against the officer and win a monetary judgement. For the officer’s civil liability to turn into a cost to their employer there needs to be a victory in court for the plaintiff and all the supporting steps to make that happen. Liebman and company and the scholars they drew from thought civil liability would automatically translate to costs because they effectively believed in the existence of a market for legal services whose dynamics transformed civil liability into victorious lawsuits. The actual terminology of markets here is entirely my own, but the underlying ideas are theirs. In this marketplace, the proper imposition of civil liability means that police misconduct creates potential plaintiffs from victims. The lawyers,

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<sup>78</sup> American Civil Liberties Union., *Secret Detention by the Chicago Police*, 30-4.

seeing the future payment tied to their victorious lawsuit, then take these plaintiffs' as clients, whereupon receiving a fair trial, they emerge victorious. The plaintiff wins their compensation, the lawyer earns their fees, the City receives a financial penalty, and the logic of the market saves the day. As long as officers continued to engage in brutality and misconduct, they would continue to supply the legal marketplace with customers, who would in turn draw lawyers who would keep turning the officers' conduct into a cost to the City until the City was forced to make the officers stop. This also had the added benefit of providing compensation to the victims of misconduct, which, while it would be ideal that they were never brutalized by the police to begin with, was better than nothing. With this understanding of the dynamics of the legal services industry taken as a given, it suddenly seems logical that the proper imposition of civil liability would automatically lead to victorious lawsuits.

This idea of the legal services industry in turn rests on two crucial assumptions: access to quality, affordable legal services and a fair legal venue. Without either one of these, plaintiffs could not file lawsuits or win, making the officer's civil liability mean nothing tangible to the City. Liebman and company and the scholars they drew from necessarily took these two requirements as somewhat of a given in the legal services marketplace, which allowed them to reason the proper imposition of civil liability implied successful lawsuits. However, as would soon become apparent after *Monroe*, these two assumptions were absolutely not givens. For a well to do white Chicagoan with money to spend on lawyer's fees who was brutalized by the police, it seems like a fair assumption that they could easily turn civil liability into a victorious lawsuit. However, for a poor black Chicagoan with a prior criminal conviction, both assumptions go out the window. When it comes to the problem of police violence, where the latter, not the former Chicagoan would be more likely to be the victim, the link between civil liability and

victorious lawsuits is much less of a given. However, as salient as these concerns might seem in retrospect, they did not seem to register with Liebman and company or the scholars they drew from.

Indeed, they thought with the right tweaks to the system they could properly impose civil liability on police misconduct and brutality and set the wheels of the legal services market in action to change the City's priorities. All they needed to do was win the right legal victories in court and provide a little jumpstart in the way of police lawsuits. They explicitly confirmed as much in 1954. After seeing an article in the newspaper about two private attorneys who were representing a man in a lawsuit alleging CPD officers detained and beat him, a staff attorney from the Illinois Division sent an unsolicited letter to the lawyers offering words of praise. Discussing their recent "initiative" of bringing "actions against the Chicago Police Department and other local police departments, wherever the facts of the situation merit such action," he commended them for working on a similar suit. He expressed happiness that the Illinois Division's hope that their "initiative in such suits would stimulate the rest of the Bar into bringing similar actions whenever merited" appeared to be bearing out.<sup>79</sup> It is clear they hoped to harness the legal services market to "give municipalities incentive to restrain police lawlessness."<sup>80</sup>

### **Putting the plan into action**

Still, they had much work to do to make their vision a reality. The first step was establishing the proper conditions in court and convincing the average lawyer that these cases would be worth their while to take. To do this Liebman and company embarked on a campaign of strategically filing lawsuits to challenge the status quo in the courtroom. Alongside filing

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<sup>79</sup> F. Raymond Marks, Jr. "Letter to James D. Reynolds," Box 569, Folder 7.

<sup>80</sup> "Proposed Outline of Amicus Brief in Molitor Case," Oct. 22, American Civil Liberties Union. Illinois Division. Records, Box 569, Folder 6, Special Collections Research Center, University of Chicago Library.

these lawsuits, they also sought out press coverage, hoping that lawyers would pay attention if they ended up winning.

One crucial part of this was introducing municipal liability, in essence the ability to sue a municipal government like the City of Chicago as if they were a person in civil court. It was still an open question whether or not this was permitted under §1983, as it all hinged on whether or not the language of “every person” included municipalities as well. By the 1950s, traditional notions of sovereign immunity had led courts to interpret §1983 as precluding municipal liability, meaning if an officer, acting under the color of law, beat someone detained in their custody, then the victim could sue the officer, but not the City as well. However, Liebman and company believed that if Chicago could be directly sued, then this would both increase the amount plaintiffs could win in suits and avoid the problem of the City trying to wiggle out of payments. This would be a win for the plaintiffs and their lawyers and Liebman and company’s larger goals for the lawsuits. Liebman and company actually fought the battle to introduce municipal liability in Illinois state court as well, although this paper is only focused on the story in federal court.

Aside from the issue of municipal liability, in federal court the lawyers also had to contend with the question of what the “rights, privileges, or immunities secured by the Constitution and laws” part of §1983 meant. Decades of federal jurisprudence had construed “rights, privileges, or immunities secured by the Constitution and laws” to mean a very narrow class of rights. Although there was some disagreement among the federal circuits, this was generally understood to not include assault, false arrest, or imprisonment at the hands of police officers. This meant potential plaintiffs only had a viable cause of action under §1983 in the most extreme of cases as most §1983 lawsuits failed for lack of standing, not because of the veracity

of the plaintiffs' allegations. For example, in the case of *Stift v. Lynch* where a man alleged he was detained and beaten in police custody, the presiding judge decided the claim, even if true, was not a valid cause of action under §1983 and dismissed it for lack of standing.<sup>81</sup> Similarly, in the case *Swanson v. McGuire*, a man alleged he was also arrested and beaten in police custody only to have his case initially dismissed for lack of standing.<sup>82</sup> Even on the rare occasion that a case was not dismissed outright it was hard to win.

The two notable exceptions before 1961 were *Wakat v. Harlib* and *Carpenter v. Brooks*. In the *Wakat* case Leslie George Wakat was a former machinist who was detained on suspicion of burglary and tortured in police custody. He was first arrested and detained for three days, released at the order of a judge and then arrested and detained again for six more days upon finally 'confessing' to the burglary. He was subsequently hospitalized for broken bones and extreme bruises, yet still convicted in criminal court. Wakat sued the officers involved for \$300,000 under §1983 and eventually won a \$15,000 verdict against the officers involved.<sup>83</sup> In *Carpenter*, a black woman Augusta Carpenter sued several officers for brutally arresting her and holding her incommunicado for "many hours" and eventually won a jury trial with a \$15,000 verdict against one officer and \$2,500 against another.<sup>84</sup> In a tragic omen of what was to come, even though the sergeant in charge, Peter Harlib, was found guilty of beating the confession out of Wakat and later lying about matters related to the case, he was never disciplined and remained on the force. The other officers found guilty in *Wakat* and *Carpenter* were likely never disciplined as well. To add insult to injury, the officers and the City in *Carpenter* dragged their feet on paying and Brooks had to sue them again in 1964 to collect on the judgement she was

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<sup>81</sup> *Stift v. Lynch*, 7 Cir., 267 F.2d 237.

<sup>82</sup> Memorandum and Order, *Swanson v. McGuire*, No. 57C1164, 1957 National Archives at Chicago (N.D. Ill. Nov. 3, 1960),

<sup>83</sup> American Civil Liberties Union., *Secret Detention by the Chicago Police*, 14-7.

<sup>84</sup> Verdict, *Carpenter v. Brooks*, No. 55C946, 1955 National Archives at Chicago (N.D. Ill. Jan. 24, 1958),

owed.<sup>85</sup> In a small glimmer of hope for Liebman and company's plans on "stimulating the Bar," both of these cases received publicity for their large awards, Carpenter in particular.<sup>86</sup>

*Wakat* and *Carpenter* aside, despite this daunting litigation landscape, Charles Liebman, Donald Page Moore, Ernst Liebman, and Charles Pressman had a plan to change that. Charles Liebman first appeared as the attorney of record in a §1983 case in 1956 in *Guzik v. O'Connor*. There he represented Jack Guzik, and later his wife Rose Guzik after his death, against several CPD officers in a lawsuit for \$50,000. Guzik alleged that officers illegally arrested him without cause and detained him several times over the course of four years, culminating in an arrest where they brought him to an abandoned building and forced him to climb up and down several flights of stairs despite his warnings that it would exacerbate a heart problem. Guzik died shortly after being released, which his wife blamed on his time in police custody.<sup>87</sup> The officers involved denied everything besides the fact that he was arrested.<sup>88</sup> Liebman was able to successfully fend off the City's motion to dismiss for lack of standing and bring the case to trial, but he lost after the judge directed the jury to return a verdict of not guilty.<sup>89</sup> In *Guzik*, Liebman did not try to sue the City of Chicago as well, but that was soon to change. *Guzik* was the first in a series of lawsuits filed against CPD officers and Chicago that pursued a dual strategy of trying to push the courts to expand the interpretation of rights protected by §1983 and introduce federal liability against municipalities under §1983.

Moore and Ernst Liebman joined in what would be the first of many more suits next in 1958 with the filing of *Moorelander v. Tassone*. Announced in the *Chicago Daily Tribune* with

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<sup>85</sup> Complaint in a Supplemental Proceeding in Aid of a Judgement, *Carpenter v. Brooks*, No. 55C946, 1955 National Archives at Chicago (N.D. Ill. July 14, 1964), 1-5.

<sup>86</sup> "WINS DAMAGES OF \$15,000 FROM 5 CHICAGO COPS," *Chicago Daily Tribune*, Jun. 1, 1957; "May Set Record In Damage Suit," *Chicago Defender*, Feb. 8, 1958.

<sup>87</sup> Complaint, *Guzik v. O'Connor*.

<sup>88</sup> Answer of the Defendants, *Guzik v. O'Connor*, No. 56C334, 1956 National Archives at Chicago (N.D. Ill. Jan. 29, 1957), 2.

<sup>89</sup> Docket Sheet, *Guzik v. O'Connor*, No. 56C334, 1956 National Archives at Chicago (N.D. Ill. Feb. 17, 1956).

the headline “SUIT ACCUSES EX-POLICEMAN, SEEKS \$750,000,” the suit was filed against ex-officer Frank F. Tassone, two unknown officers, and the City of Chicago.<sup>90</sup> In the case, police officers had arrested the plaintiff Moorelander, allegedly brutally beat him during arrest, brought him to the Maxwell Street Police Station, allegedly beat him to the point of unconsciousness for no discernable reason, detained him for two days without access to a doctor for his injuries, and then finally released him after bringing him to municipal court and having him charged with driving with an open bottle of whiskey.<sup>91</sup> Moorelander later went to see a doctor who then documented numerous injuries. The officers involved admitting to detaining Moorelander for two days but denied everything else, remaining conspicuously silent on the question of where Moorelander’s injuries came from.<sup>92</sup> Predictably the City immediately filed to dismiss the suit on the grounds that Chicago itself was immune under §1983, and even if Moorelander’s allegations were true, none of his rights protected by §1983 were infringed upon.

In their voluminous thirty-three-page brief opposing the motion to dismiss, Moore and Liebman previewed a version of their argument grounded in a certain historical reading of the purpose of §1983 that they would later present before the Supreme Court. Regarding municipal liability, they argued the historical context of §1983 established that it was clearly passed to protect citizens’ Fourteenth Amendment rights from abuses of state power. To that end, protecting municipalities from liability would “frustrate the purpose of the Civil Rights Act,” since municipal liability was a tool of protecting citizen’s rights. Here they drew directly from the scholarship on the function of municipal liability, citing a law professor’s work:

Government is important not only to provide financially responsible defendants, but primarily so that the deterrent will be effective where it is needed ~ at the level where police policy is made. If cities are responsible for torts committed by officers who are known to be vicious and ill tempered or

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<sup>90</sup> “SUIT ACCUSES EX-POLICEMAN, SEEKS \$750,000,” *Chicago Daily Tribune*, Apr. 18, 1958.

<sup>91</sup> Complaint, *Moorelander v. Tassone*, No. 58C689, 1958 National Archives at Chicago (N.D. Ill. Apr. 17, 1958), 2-4.

<sup>92</sup> Answer, *Moorelander v. Tassone*, No. 58C689, 1958 National Archives at Chicago (N.D. Ill. Mar. 23, 1959), 2-4.



dangerously insane or chronically alcoholic, the liability is likely to discourage the retention of such officers and compel a better police force. Most illegal arrests and searches probably arise within the scope of everyday police activity, a fact recognized by cities which allow the city attorney to defend officers sued for false imprisonment. Where the officer makes an illegal arrest under the orders of his superiors, while this may not excuse him, evidence of the fact will be admissible in mitigation of damages. However justifiable this may be as an act of justice to the defendant, it should be irrelevant to the plaintiff's cause of action and illustrates the desirability of enforcing the sanction at the policymaking level. Furthermore, some police illegality is an inevitable concomitant of law enforcement. The expense should be borne by the state, which can spread the loss where actual monetary damage results and which is in the position to control and minimize the risk.<sup>93</sup>

Effectively, Liebman and company wanted to convince the court that municipal liability was crucial to preventing police misconduct and thus protecting citizen's Fourteenth Amendment rights. So, since §1983 was established with the purpose of protecting those rights, it should include municipal liability as well. Still, the judge was unconvinced, and the City of Chicago was quickly dismissed as a defendant in 1959.

Concurrent with Moorelander, in 1958 Liebman and Moore, along with Charles Pressman, also filed *Cedeno v. Lichtenstein*, similarly announcing the lawsuit and its three million dollar demand to the press.<sup>94</sup> The argument and strategy the lawyers used in the case was virtually the same as Moorelander, however this case was important for a different reason. In *Cedeno* CPD officers arrested Jose Cedeno and fourteen other Puerto Rican men within the vicinity of the Racine Avenue Police Station, allegedly beat, assaulted, and subjected them to racial slurs, and detained them incommunicado for approximately twenty-four hours before taking them to municipal court and falsely charging them with disorderly conduct.<sup>95</sup> An untitled memorandum in the case file, likely from the plaintiff's attorneys, described it as "something like a Puerto Rican pogrom [which] took place on that night." It is unclear why, but police officers in

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<sup>93</sup> Foote, "Tort Remedies for Police Violations of Individual Rights," 514 quoted in Plaintiff Brief in Opposition to the Motion To Dismiss, *Moorelander v. Tassone*, No. 58C689, 1958 National Archives at Chicago (N.D. Ill. Jul. 15, 1958), 31.

<sup>94</sup> "Seek Probe Of Puerto Ricans Here," *Daily Defender*, Sep 22, 1958.

<sup>95</sup> Complaint, *Cedeno et al. v. Lichtenstein et al.*, No. 58C1712, 1958 National Archives at Chicago (N.D. Ill. Sep. 17, 1958); Findings of Fact and Conclusions of Law, *Cedeno et al. v. Lichtenstein et al.*, No. 58C1712, 1958 National Archives at Chicago (N.D. Ill. Apr. 29, 1963)

the area were allegedly given a directive to arrest all Puerto Rican males in the area.<sup>96</sup> Some of the officers appeared to have executed the command with zeal. One of the plaintiffs, Jose Vasquez, said in a deposition that before arresting him, one officer called him a “dirty Puerto Rican” and told him to go back to where he came from.<sup>97</sup> Other plaintiffs said that officers subjected them to racial slurs and violence at the Racine Avenue Station as well. Indeed, in the plaintiff’s complaint, it alleged that this behavior was part of established racist practice within the CPD to harass and humiliate Chicago’s Puerto Rican community.<sup>98</sup> This was just one of several lawsuits before 1959 documenting how racism within the CPD combined with abusive detention practices to form a deadly cocktail for Chicago’s non-white residents. In *Exclusa v. Krejci*, three more Puerto Rican men claimed officers arrested them and repeatedly assaulted them while subjecting them to racial slurs in police custody.<sup>99</sup> In *Holland v. Anderson*, a black Chicagoan filed a pro-se lawsuit from prison alleging that officers had arrested and assaulted him for being in a white part of the North Side.<sup>100</sup>

These cases are important for highlighting the heightened stakes for Chicago’s non-white communities of dealing with police violence against the detained. Indeed, the potential promise of these lawsuits was not lost on the plaintiffs either. In the untitled memo in the case file of Cedeno, the plaintiffs told the memo’s author they were fighting so hard in the case because “they want[ed] to make sure that what happened to them will not happen again in Chicago.”<sup>101</sup> They were likely not the only plaintiffs who felt that way either. There certainly would have

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<sup>96</sup> Memorandum, Cedeno et al. v. Lichtenstein et al., No. 58C1712, 1958 National Archives at Chicago (N.D. Ill. Oct. 12, 1962).

<sup>97</sup> Deposition of Jose A. Vasquez, Cedeno et al. v. Lichtenstein et al., No. 58C1712, 1958 National Archives at Chicago (N.D. Ill. Jul. 23, 1959), 10-3.

<sup>98</sup> Complaint, Cedeno et al. v. Lichtenstein et al.

<sup>99</sup> Amended Complaint, Exclusa et al. v. Krejci et al. No. 58C1932, 1958 National Archives at Chicago (N.D. Ill. Feb. 13, 1959) 1-6.

<sup>100</sup> Amended Complaint, Holland v. Logan et al. No. 57C1012, 1957 National Archives at Chicago (N.D. Ill. Sep. 5, 1959).

<sup>101</sup> Memorandum, Cedeno et al. v. Lichtenstein et al., 6.

been something fitting if, after almost a century, §1983 did finally live up to its promise of preventing white supremacist violence. In the end, none of Cedeno, Exclusa, or Holland would become the pivotal §1983 case, although the one that did was in many ways quite fitting. In 1959 Moore and Liebman filed four more lawsuits.<sup>102</sup> Of those, the most consequential was *Monroe v. Pape*, a case centered on the arrest of James Monroe, a black Chicagoan.

### **Monroe v. Pape: The Watershed Moment**

On October 29th, 1958 in the early hours of the morning, thirteen Chicago police officers had broken into the apartment of James Monroe and his family without a warrant; the officers were there to arrest Monroe and search for shirts in connection with a murder investigation. The officers, led by famous detective Frank Pape, had been working on the murder of a white insurance agent, Peter Saisi, whose wife, Mary Saisi, had claimed he was murdered by two black men after a botched robbery.<sup>103</sup> Earlier on the 28th Mary Saisi had identified a photo of James Monroe, a black man, as one of the alleged killers. Immediately after, Detective Pape decided to raid the apartment without bothering to secure a warrant and gathered officers for the early morning raid.<sup>104</sup>

According to the officers nothing other than a “very routine arrest” occurred.<sup>105</sup> According to the Monroes, Pape and two other officers woke James and his wife Flossie up at gunpoint by shining flashlights in their faces. The officers then forced James into the living room naked, where Pape “repeatedly hit, struck, and jabbed a flashlight into [his] stomach” while referring to him as “nigger” and “black-boy.” Flossie was later brought out with only a bed sheet

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<sup>102</sup> They were the following: *Monroe vs. Pape*, No. 59C329; *Hardwick vs Hurlery*, No. 59C569; *Baumgarten vs Klimawicz*, No. 59C570; *Durham vs Nash*, No. 59C700.

<sup>103</sup> It later came out that Peter Saisi had in fact been murdered by Mary Saisi’s lover in a plot to collect the life insurance policy on him.

<sup>104</sup> Myriam Gilles, “Police, Race and Crime in 1950s Chicago: *Monroe v. Pape* as Legal Noir,” *Jacob Burns Institute for Advanced Legal Studies*, 2007, 57–8.

<sup>105</sup> Gilles, “Police, Race and Crime in 1950s Chicago: *Monroe v. Pape* as Legal Noir,” 58.

to cover herself, as officers ransacked their bedroom in search of shirts allegedly stolen from Saisi's corpse. Other officers then forced their children out of their bedrooms and into the living room, shoving three children onto the floor in the process. Later the officers gave James some clothes, cuffed him and brought him to the Central Police Station, the same one Ozie Brize had been brought to about a month earlier.<sup>106</sup>

At the station the officers claimed they held him for a few hours, during which time Monroe made no requests of them, and then released him. Monroe claimed the police held him for more than ten hours incommunicado and denied his requests to contact his family or a lawyer. Instead, the officers intermittently questioned him about the murder and forced him to stand in multiple line-ups. When he asked what he was being held for, he was merely told "open charges." Eventually after Mary Saisi's case fell apart, the officers released Monroe and never filed any charges against him.<sup>107</sup>

Announced in the *Chicago Defender* with the headline "City, 13 Cops Hit By \$570,000 Suit," Monroe's lawsuit named Pape, twelve other officers, and the City of Chicago as defendants, charging them with violating his rights by breaking and entering and arresting him without a warrant and then detaining him without officially charging him with a crime.<sup>108</sup> Again, the City's lawyers argued Chicago was immune from liability under §1983 and the officers had not violated any of Monroe's federal rights. The judge was convinced, and the case was eventually dismissed. Unlike before, perhaps sensing the potential of the case, Moore and Liebman appealed the decision to the Seventh Circuit Court of Appeals, only to have the district court's opinion upheld. They appealed again to the Supreme Court and in March of 1960 the

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<sup>106</sup> Complaint, *Monroe et al. v. Pape et al.* No. 59C329, 1959 National Archives at Chicago (N.D. Ill. Mar. 2, 1959), 8-12.

<sup>107</sup> Complaint, *Monroe et al. v. Pape et al.*, 13-5.

<sup>108</sup> "City, 13 Cops Hit By \$570,000 Suit," *Chicago Defender*, Mar. 14, 1959.

Supreme Court granted certiorari and agreed to hear the case.<sup>109</sup> While *Monroe* had been winding its way through the courts, the CPD was rocked by a major scandal which would have major implications for the post-*Monroe* world.

### **A New Sheriff in Town: O.W. Wilson takes over the Force after the Summerdale Scandal**

In January of 1960 Chicago was treated to shocking headlines that the state's attorney's office had uncovered a major police burglary ring operating inside the Summerdale Police District.<sup>110</sup> The Chicago police had already long had a reputation for corruption and scandal, but the Summerdale Scandal was so public and embarrassing for Mayor Daley's administration that it forced him to make major changes in the department's leadership.<sup>111</sup> At the time O'Connor was still in charge as commissioner, but he was seen by many as being a lackey of the Daley administration.<sup>112</sup> This was now too much of a liability for Daley, who was forced to agree with a plan to find a new leader for the CPD by forming a headhunting commission. The commission first hired O.W. Wilson, a well-respected criminologist, as a consultant to help their efforts but they later decided to offer him the job.<sup>113</sup> He agreed after receiving assurances from Daley that he would have the independence to reform the department, and he was installed as Superintendent later in March.<sup>114</sup>

In many ways, Wilson was a stark departure from his predecessor O'Connor. Before arriving in Chicago, he was among the forefront of a wave of criminologists who argued that

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<sup>109</sup> Docket Sheet, *Monroe et al. v. Pape et al.* No. 59C329, 1959 National Archives at Chicago (N.D. Ill. Mar. 2, 1959).

<sup>110</sup> "How 8 Cops Helped Theif Loot Stores," *Chicago Daily Tribune*, January 16, 1960.

<sup>111</sup> According to the *Chicago Tribune* there was a common joke told at the time about Chicago cops and corruption. "A Chicago motorist was halted by a police squad on a boulevard late at night. As a policeman strode from the squadrol toward the citizen, the latter cranked down a window of his car and asked 'what's it to be – a ticket or a stickup?'" See "Cops Turn Burglars! City Horrified," *Chicago Daily Tribune*, February 12, 1960.

<sup>112</sup> Balto, *Occupied Territory*, 145-6.

<sup>113</sup> JUDGE ORDERS FREEING OF REPORT ON CRIME: A Nonpolitical Police Board, *Chicago Daily Tribune* (1923-1963); Jan 27, 1960; ProQuest Historical Newspapers: Chicago Tribune pg. 1

<sup>114</sup> The position was renamed from Commissioner to Superintendent to get around residency requirements. Balto, *Occupied Territory*, 154-5.

police departments needed to be professionalized and modernized.<sup>115</sup> Wilson strongly emphasized that since police officers have a tremendous amount of power and discretion in their interactions with residents then it was imperative that they were competent professionals who followed the law and could earn the trust of the community.<sup>116</sup> His arrival, along with Daley's promise of independence, meant he would certainly have the power to try to reform and remake the department into his definition of a professional, modern police force befitting a city like Chicago. For those concerned about the CPD's abusive detention practices it was unclear how much he would change those. Unlike O'Connor, he had not advocated for the flagrant disregard of the law and legal rights of the arrested and detained. In fact, he had expressed support for the notion that police should respect the rights of all they interacted with. In a 1950 article in the *Journal of Criminal Law and Criminology* he praised the British police for supposedly doing just that.

Their present popularity has been fairly earned by the police themselves through adherence to three principles: (a) The primary police purpose is service to the people, not their control; (b) integrity and fairness are essential in all relations with citizens, and (c) the police must have a scrupulous regard for the inalienable rights of every citizen."

British justice (and American justice, too, since it had its origin in British judicial institutions and proceedings) seems based on the principle that it is better that 99 guilty persons should be freed than that one innocent person should be unjustly punished. The consequent miscarriages of justice sometimes prove galling to the inexperienced policeman, but maturity persuades him of the wisdom of a judicial system that hinders somewhat the most efficient operation but stands as a foundation stone for the best police service.<sup>117</sup>

He even wrote in another article that police services should be considered "unsatisfactory" when "the civil rights of individuals are disregarded. The consequences may run the gamut from indifference and discourtesy to sadistic brutality on the part of the police."<sup>118</sup> This was certainly reason for cautious optimism that Wilson would try to change the institutional culture

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<sup>115</sup> Balto, *Occupied Territory*, 154-5.

<sup>116</sup> O. W. Wilson, "Problems in Police Personnel Administration," *The Journal of Criminal Law, Criminology, and Police Science* 43, no. 6 (March 1953): 840-2.

<sup>117</sup> O. W. Wilson, "The British Police," *The Journal of Criminal Law and Criminology* 40, no. 5 (1950): 638.

<sup>118</sup> O. W. Wilson, "Can the State Help City Police Departments?," *The Journal of Criminal Law and Criminology*, 45, no. 1 (May 1954): 102-3.

surrounding arrest and detention practices. This could potentially go a long way towards curbing all sorts of violence and abuse from incommunicado detention to torture. However, his broader views on civil liberties and police powers already gave potential cause for alarm. Although he did say citizen's rights should be respected, he was also a strong advocate for expanding police powers to arrest and detain, and he was hostile towards civil liberties when they encroached on the police. All told, if Liebman and company's plan was going to work out it would now hinge on whether Wilson could be made to care about the problem of police detention practices.

Thanks to his terms for assuming the role of superintendent, he had tremendous sway over the department, more than most of his predecessors. So as long as he was in charge, he would play a major role.

Sensing the importance of the moment, almost immediately after Wilson's appointment, the Illinois Division began lobbying Wilson to take a tough stance against officer's flagrant disregard for the rights of the detained.<sup>119</sup> It soon became apparent that Wilson and the Illinois Division were in agreement that there was something wrong with the status quo on police detention practices in Chicago, but they disagreed on what the problem was. For Wilson the problem was not officers' disregard for the law and the routine abuses committed against the detained; instead it was that officers did not have enough legal powers. Within the first few months of his term, he made this crystal clear when he published the not so subtly titled article "Police Arrest Privileges in a Free Society: A Plea for Modernization" in the *Journal of Criminal Law and Criminology*. He argued that "restrictions on arrest privileges hamper the police" and that the police were being held back by, among other things, "antiquated rules governing the questioning and detaining of suspects." In his reading, these "antiquated rules" actually infringed

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<sup>119</sup> "Letter to O.W. Wilson", February 24, 1955. American Civil Liberties Union. Illinois Division. Records, Box 569, Folder 7, Special Collections Research Center, University of Chicago Library.

on citizen's rights by hampering the police's ability to fight crime and thus keep them safe. His solution to this problem was "legalizing common police practices, already legal in some jurisdictions," such as being able to detain someone under investigation "for a period of two hours, without placing him under arrest," being able "to release an arrested person without bringing him before a magistrate," and being "authorized to hold an arrested person before bringing him before a magistrate for at least 24 hours, excluding days when courts are not in session."<sup>120</sup>

These recommendations are incredibly revealing. First among them is Wilson's inadvertent admission that many police officers already used these practices despite their illegality in some jurisdictions. Notwithstanding the fact Chicago was one of those jurisdictions where those police practices named were illegal, Wilson painted a very rosy picture of what those tactics would look like in action:

These privileges do not threaten the lives or health of the innocent; the inconvenience of two hours of detention short of arrest is experienced only by the innocent person who inadvertently or by poor judgment is found in a situation that arouses police suspicion and which the suspect is unable or unwilling to explain on the spot. In view of the present jeopardy to public security, such inconvenience seems a small price to pay for the privilege of living securely and peacefully.<sup>121</sup>

In the face of stories those in *Cedeno*, *Moorelander*, and *Monroe* alongside the results of *Secret Detention*, this assertion seems incredulous. If it was already a routine practice for officers to illegally detain and abuse people, sometimes on the flimsiest of pretexts, why would legalizing this detention for two hours change anything? If anything, it would only shield officers from liability for breaking the law. Wilson obliquely indicated some awareness of this, but was unconcerned:

The police must accept some blame for lack of public confidence in the means they use to achieve their purpose. Police abuse of their authority must be eliminated, not by withdrawing essential

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<sup>120</sup> O. W. Wilson, "Police Arrest Privileges in a Free Society: A Plea for Modernization," *The Journal of Criminal Law, Criminology, and Police Science* 51, no. 4 (November 1960): 399-400.

<sup>121</sup> Wilson, "Police Arrest Privileges in a Free Society," 400.



authority or by freeing the guilty criminal, but by raising police standards to a level of trustworthiness and by some action which will penalize the community that employs an officer who abuses his privileges.<sup>122</sup>

For Wilson, the issue of police practices and police powers were separate ones. The fact that police already abused their powers was an issue of administration. Thus, the solution to the abuse of power was not to take away those powers, but to institute “safeguards against abuse of authority by the overzealous policeman,” with the caveat that “safeguards that weaken law enforcement or free the guilty are socially undesirable.”<sup>123</sup>

Interestingly, within this context, Wilson displayed mixed feelings towards the role civil liability could play. He claimed that “civil suits for damages filed against the individual officer have not proved adequately effective in preventing police abuse of authority”; tipping his hand towards his future approach to lawsuits, he argued even if that kind of civil suit was effective, they would be inappropriate because they would “emasculate vigorous police action” and weaken law enforcement. He did seem to show measured approval for civil misconduct suits filed directly against municipalities. Immediately after disparaging civil suits against officers, he chose to mention a proposal from the California State Bar for “A new kind of civil action, or better, a summary type of proceeding, for a substantial money judgment in favor of the wronged individual, whether innocent or guilty, and against the political subdivision whose enforcement officers violated that person's rights.” Drawing from the same legal scholars that Liebman and Moore were drawing from, he then justified it with a statement from law professor Edward Barrett that:

Legislative action along these general lines gives promise of providing a more adequate solution than the exclusionary rule at a smaller social cost.... The remedy would be available to the innocent as well as the guilty, for the illegal arrest as well as the illegal search. The courts would have frequent opportunities for ruling on the legality of police action, for enunciating and developing the governing law. If in any community a substantial number of such actions become successful, the financial

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<sup>122</sup> Wilson, “Police Arrest Privileges in a Free Society,” 400.

<sup>123</sup> Wilson, “Police Arrest Privileges in a Free Society,” 398-9.

pressure on the police to conform more closely to judicial standards would doubtless follow. Finally, if a careful line is drawn between those situations where increased personal liability should be placed upon the individual policeman (basically those involving serious and intentional violations of law) and those where he should be immunized and sole liability placed upon the governmental agency, interference with the efficient functioning of law enforcement would be minimized."<sup>124</sup>

All in all, Wilson's statements provided reason for cautious optimism. While he did support vastly expanded police powers, he also seemed to be against the more heinous detention practices like extended incommunicado detention and physical torture. It was a cause for concern that on a basic level he did not see anything wrong with giving police near total power over the detained without external safeguards. But in theory it seemed like with the right prodding Wilson would attempt to stamp out the worst of the CPD's detention practices.

### **The Supreme Court Hears the Case: the Monroe Ruling**

By the fall of 1960, as Wilson was beginning his first major push to reform the CPD, Moore, Liebman, and Liebman, joined by attorneys Morris L. Ernst and John W. Rogers were preparing their case for the Supreme Court. This moment had been years in the making and now the lawyers finally had their chance. The stakes were enormous. If they could convince the Supreme Court that the officers violated Monroe's rights protected by §1983, then they would vastly expand the number of police misconduct victims who could successfully sue. Monroe's experience included multiple components of the average experience with abusive detention practices: brutality during arrest, arrest without a warrant, and incommunicado detention without access to a lawyer or formal charges being filed against him. If Monroe had standing, then so would the plaintiffs in Cedeno, Moorelander, and countless more future lawsuits. If they could also convince the Supreme Court that Chicago was not immune from liability under §1983, then this would further boost the prospects for future plaintiffs, hopefully leading to higher judgments that were actually paid to the plaintiffs and their attorneys.

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<sup>124</sup> Wilson, "Police Arrest Privileges in a Free Society," 400.

When the Supreme Court heard the case in November of that year, the lawyers presented similar lines of reasoning as their prior cases. In terms of Monroe's federal rights, they argued the officers' conduct violated Monroe's Fourteenth Amendment rights of due process, and thus, he had standing under §1983. For municipal liability, they made the same argument grounded in historical context that §1983 was passed to help protect Fourteenth Amendment rights from abuses of state power, whether through action or inaction. Drawing on the same legal scholarship as in *Moorelander* and *Cedeno*, as well as publications from the Illinois Division, they argued that municipal liability was a crucial part of combating and preventing these abuses of state power so the law should be read to include municipal liability.<sup>125</sup>

After hearing the arguments in 1961 the Supreme Court handed down a partial victory in an eight-one decision. The Supreme Court considered three main questions in the majority opinion: whether or not the officers' conduct violated Monroe's federal rights, whether or not an official was actually acting under color of law when their action was technically illegal, and whether Chicago was immune from liability. They ruled on the second question, not really addressed directly by Monroe's lawyers, because the City had essentially tried to argue that because warrantless search and seizure was illegal under Illinois state law, the officers were actually not acting under color of law. Still the Court ruled the first two questions in Monroe's favor. The Court ruled that the officers' warrantless search and seizure violated Monroe's federal rights and the legislative history of §1983 clearly established that state officials were still acting under color of law when their abuses in office were technically illegal. However, the Court was unconvinced by the arguments on municipal liability and ruled in Chicago's favor<sup>126</sup> This

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<sup>125</sup> Brief for Petitioners, *Monroe, et al. v. Pape, et al.*

<sup>126</sup> *Monroe v. Pape*, 365 U.S. 167 (1961).

decision was eventually reversed in 1978 in *Monell v. Department of Social Services*, but it was too late to be immediately relevant.<sup>127</sup>

*Monroe* represented a partial victory for Liebman and company. The Supreme Court's ruling would make it possible to file more lawsuits, but it was not everything they hoped for. Besides the obvious failure to secure municipal liability, the Supreme Court's decision left several open questions. The ruling in *Monroe* declared warrantless search and seizure protected by §1983, but it did not directly address detention like *Monroe's* case. It was still a potential point of contention whether §1983 protected against incommunicado detention or police violence inflicted without a clear intent to coerce a confession. Further, the failure to secure municipal liability could drastically complicate their plans to harness the legal services market if future §1983 lawsuits were not profitable.

Still the ruling was important. The Supreme Court's decision in 1961 revived §1983 in particular as a tool at the disposal of citizens deprived of their constitutional rights in federal civil court. In terms of the volume of lawsuits, 1961 was undeniably a turning point. In 1961 a staff survey by the U.S. Commission on Civil Rights found a total of 42 §1983 suits alleging police brutality nationwide.<sup>128</sup> By 1964 there were over 25 cases filed against the CPD alone, and from 2008 to 2018 there was an average of over 200 cases a year filed against the CPD. Nationwide by 2000 over 50,000 §1983 had been filed. In the present day, §1983 lawsuits have become commonplace, and their cost to municipal and state government can reach millions.<sup>129</sup> The expanded interpretation of §1983 along with cases like *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* which expanded law enforcement officer's potential exposure to

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<sup>127</sup> *Monell v. Department of Soc. Svcs.*, 436 U.S. 658 (1978).

<sup>128</sup> Interestingly 17 of these were in the federal district containing Chicago. See U.S. Commission on Civil Rights, "Justice," 1961 Commission on Civil Rights Report, June 25, 1961, 69.

<sup>129</sup> Data compiled by author from "Judgement and Settlement Payment Requests" 2008-18, City of Chicago (official website), accessed May 22, 2019, <https://www.chicago.gov/city/en/depts/dol.html>.

civil liability have even led some Supreme Court justices to reason civil liability can now deter certain types of police lawlessness. For example, the late Supreme Court justice Antonin Scalia argued it served as an “effective deterrent” against violations of the “knock-and-announce” rule for police searches and William Rehnquist also argued that “The threat of litigation and liability will adequately” would adequately deter law enforcement from violating Fourth Amendment rights.<sup>130</sup> Indeed, in this light it would seem easy to place Monroe among a series of other Warren Court decisions throughout the 1960s which expanded the rights of those tangled up in the criminal justice system.

#### **IV. “Such an officer ... need not fear the threat of a lawsuit”: §1983 Misses the Mark**

Despite the grander implications, in the six or so remaining years of Wilson’s tenure after the ruling in Monroe, §1983 suits remained virtually a complete non-factor in influencing police detention practices within the CPD. For the individual suits, even when officers were found guilty, it often had little effect on their careers, and the lawsuits had virtually no effect on the CPD’s official policies. The question of measuring the true prevalence of abusive detention practices was almost impossible to answer. I have not encountered any comprehensive studies like the Secret Detention report for this period, and there are no good proxies to use either. However, just relying on the allegations contained in the §1983 lawsuits alone is enough to determine that abusive detention practices remained alive and well enough during this time period to be included in over one hundred §1983 lawsuits.

The question of what effect §1983 suits had on the individual officers named in them was a difficult one to answer. Since disciplinary records and other relevant paperwork were not publicly available, it was impossible for me to directly figure out when officers were disciplined or fired in connection with a lawsuit. The only metric I could rely on was press coverage either

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<sup>130</sup> 547 U. S. 1, 11 (2006); *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 69-71 (2001).

indicating an officer was disciplined in connection with a lawsuit or unrelated press coverage indicating an officer was still on the force after a lawsuit's resolution. This method admittedly has a lot of pitfalls and probably misses the majority of cases like Ozie Brize's where there was no press coverage. Still, based on Wilson's attitude towards police lawsuits and the press coverage when officers were disciplined, I decided that for the lawsuits I examined in depth, when there was no coverage of an involved officer being disciplined, I would count that officer as still remaining on the force. This assumption can be somewhat bolstered by the fact that an ACLU study on §1983 suits in 1967 found that in eighteen cases where the plaintiff was successful, none of the officers who were found guilty were disciplined whatsoever.<sup>131</sup> Given what will soon be discussed about Wilson, there is little reason to suspect these examples were anomalies.

The dismissive view Wilson expressed towards civil suits against individual officers in that 1960 article was effectively a blueprint for how he would treat §1983 suits during his tenure. What happened after the Supreme Court ruled on Monroe's case was a perfect microcosm of that. After the ruling in 1961, Monroe's case was reinstated, and it eventually went to trial. In 1962, an all-white jury found in favor of Monroe and against five of the officers, returning a judgement of \$11,000 in damages. The judge presiding over the case later reduced the damages to \$8,000 but denied the officers' motion for a new trial and upheld the verdict. This number was only a fraction of the more than half a million Monroe had sought in the initial complaint but it was victory nonetheless.<sup>132</sup> After almost four years, the Monroes finally had their day in court, and the jury affirmed that Pape and four other officers had violated their rights with their conduct. The verdict could not undo the humiliation and terror the Monroes had to endure, but it

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<sup>131</sup> "Materials for Workshop 2: Self-Policing; Internal Controls," 1967 American Civil Liberties Union. Illinois Division. Records, Box 569, Folder 1, Special Collections Research Center, University of Chicago Library.

<sup>132</sup> Docket Sheet, Monroe et al. v. Pape et al.

could compensate them and compensate them it did. The \$8,000 award, worth approximately \$67,000 today, was more than fifteen times Monroe's annual income and significantly higher than the average cost per lawsuit to the City at the time.<sup>133</sup> Doubly promising, the verdict received widespread attention in the headlines. If most §1983 cases ended like Monroe, then Liebman and company's plan to mobilize the legal services market would be in good standing.<sup>134</sup>

After the verdict, if the lawsuit worked like Liebman and company hoped it would, then the City Hall and the top officials in the CPD would notice the lawsuit and the relatively high verdict, and wanting to make sure this did not become a regular occurrence, they would appropriately discipline the officers involved in the case. This would in turn send a message to other officers on the force that such behavior was unacceptable. Indeed, with Wilson and his reforms, this did seem like a distinct possibility. Soon after taking over in 1960, Wilson had tried to reform the department's disciplinary procedures. Although he was vehemently against any outside oversight, he did see the need to do away with the CPD's administrative culture which sought to "to cover up, to excuse, to deal with these recalcitrant [officers] in a manner dissimilar to the manner in which the offender should be dealt with were he a private citizen." By his own admission when these officers stayed on the force, unpunished, "the public reaches the conclusion that the police condone the act." To that end he set up a new body, the Internal Investigations Division (IID) to deal with police misconduct and corruption. The IID was met with tremendous resistance from rank and file officers, who loathed even the patina of oversight into their behaviors.<sup>135</sup>

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<sup>133</sup> In 1959 the City Law Department reported an average payment of \$1,657 per case filed against it, although this figure was for all lawsuits, not just police lawsuits. There is strong reason to suspect that in 1963 the average payment per case was probably in a similar range. See Brief for Petitioners, *Monroe, et al. v. Pape, et al.*, 41.

<sup>134</sup> "PAPE SUIT JURY IS OUT IN CIVIL RIGHTS CASE," *Chicago Daily Tribune*, December 4, 1962; "Order Pape, 4 Others to pay \$13,000," *Chicago Daily Defender*, December 5, 1962;

<sup>135</sup> Balto, *Occupied Territory*, 167-70.

Perhaps fearful of punishment from the new IID, Captain Frank Pape, the lead officer in Monroe, had taken a leave of absence after the Supreme Court's ruling in 1961 to work security at a racetrack. However, as he perhaps soon learned, in reality the IID was much more underwhelming. For all intents and purposes, the IID was little more than "an eyewash operation not vitally concerned with changing improper police behavior or serving the public interest." Its investigations were incredibly ineffective and did little to meaningfully discipline officer misconduct. Investigations from the Illinois Division and the University of Chicago based Center for Studies in Criminal Justice concluded it was highly ineffective. Wilson seemed to be aware of these shortcomings as well, although he remained loath to give oversight to anyone outside the force.<sup>136</sup>

Thus, in 1964, after having his name splashed across the headlines when news of the verdict came out in '63, he quit his job at the racetrack and told the press he was thinking of returning to the CPD.<sup>137</sup> Upon catching wind of these rumors, the ACLU wrote to Wilson and implored him that if Pape returned to the force, he should be disciplined for his role in Monroe.<sup>138</sup> They warned that reinstating Pape without disciplining him would effectively amount to endorsing his behavior, especially after he was found guilty in a court. Their pleas fell on deaf ears and in 1965 he was reinstated, with his only "punishment" being he had to go through the police academy again to learn the new department rules.<sup>139</sup> His reinstatement was met with protest from many, especially in Chicago's black community His reinstatement was met with

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<sup>136</sup> Balto, *Occupied Territory*, 168-171.

<sup>137</sup> "Pape May Return to Police Force", August 3, 1964. American Civil Liberties Union. Illinois Division. Records, Box 543, Folder 8, Special Collections Research Center, University of Chicago Library.

<sup>138</sup> Letter to O.W. Wilson from Franklin S. Pollak, November 13, 1964. American Civil Liberties Union. Illinois Division. Records, Box 543, Folder 8, Special Collections Research Center, University of Chicago Library.

<sup>139</sup> "Captain Pape Returns to Duty with Police," *Chicago Tribune*, May 4, 1965.



protest from many, especially in Chicago's black community.<sup>140</sup> This represented a direct failure of Liebman and company's hopes for §1983 suits. Case outcomes like Monroe were supposed to provide incentive for top-down policy changes and at the very least disciplining or firing of the guilty officers. Yet, in this instance the case prompted neither. Unfortunately, in terms of officers being disciplined, Monroe represented the norm.

Perhaps in keeping with his distrust of outside oversight, Wilson had a dismissive attitude towards the lawsuits. He publicly assured officers that they would have nothing to fear from lawsuits, publicly stating in a 1963 newsletter once:

“I will always support the police officer who, in the performance of his assigned tasks, exercises what he believes to be his legal authority in a reasonable manner. Such an officer need not fear complaints filed against him. He need not fear the threat of a lawsuit. The department and the city will defend the officer against any action brought against him and, by statute, will assume liability for any damages which might be assessed. The only difficulty which an officer can incur is if he intentionally exercises his authority improperly or resorts to procedures which he knows to be in violation of departmental regulations. Anyone can make an occasional error. This is human. But a well intentioned and well trained officer has nothing to fear.”<sup>141</sup>

This view only folded into his broader complaints against the judiciary for infringing on police powers. As the Warren Court handed down decisions expanding the rights of the accused in the criminal justice system, Wilson protested them at every turn.<sup>142</sup> Wilson was decidedly less concerned with the problem of disciplining officers for their abusive detention practices.

### **“I don’t want to hear this civil rights mess”**

This lack of accountability had deadly consequences for those Chicagoans unfortunate enough to interact with officers like Bray, and under Wilson's policies this increasingly meant Chicago's non-white residents. While Wilson was not outwardly racist in his public conduct, his policies had deeply racist impacts. Wilson was a vocal proponent of “aggressive preventative

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<sup>140</sup> Complaint, *Turner v. Chicago*, No. 63C775, 1963 National Archives at Chicago (N.D. Ill. May 2, 1963); Order *Turner v. Chicago*, No. 63C775, 1963 National Archives at Chicago (N.D. Ill. Jan 25, 1965)

<sup>141</sup> O.W. Wilson, “Pax 501 newsletter,” Feb. 5, 1963 American Civil Liberties Union. Illinois Division. Records, Box 572, Folder 1, Special Collections Research Center, University of Chicago Library.

<sup>142</sup> Balto, *Occupied Territory*, 157-60.

patrol,” a method where police would patrol “high crime” areas and prevent crime before it happened. In practice this meant more police patrols and policing in non-white neighborhoods which drove up arrests and crime statistics for those areas, bringing more and more non-white Chicagoans in contact with the police detention machine.<sup>143</sup> Once in police custody, these non-white Chicagoans faced the added threat of racial violence along with the already pre-existing risks of detention. This threat of racial violence was no small one either. For some perspective, a mid-1960s study on police attitudes towards the community found that of 510 white police officers interviewed, 72 percent displayed attitudes the researchers characterized as “highly prejudiced, extremely anti-Negro” or “prejudiced, anti-Negro.”<sup>144</sup>

As Wilson’s policies increasingly over-policed black neighborhoods in particular, those residents also had to deal with what seemed to be a rising tide of police violence and brutality. Even before Martin Luther King Jr. arrived in Chicago, black Chicagoans protested against how the police seemed to be able to commit acts of violence with impunity.<sup>145</sup> The §1983 suits bear this out in their allegations as well. For example, in *Hutsona v. Egan*, Decosta Hutsona, a black man, was allegedly subjected to police violence in their custody because of his race. Hutsona and a friend had gone to a bar in a white neighborhood only to be told by the bartender that “He didn’t serve no niggers.” Hutsona complained to an officer in the bar only to be told he would have to come into the Eleventh Street Police Station to make a complaint. Hutsona went into the police station to make his complaint only to have the station captain tell him he was lying and “I don’t want to hear this civil rights mess.” The captain then had Hutsona arrested and detained him incommunicado for over a day. During this time some officers pressured him to sign a slip of paper, although just like with Brize they refused to let him see what it said. After he refused,

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<sup>143</sup> Balto, *Occupied Territory*, 154-7.

<sup>144</sup> Balto, *Occupied Territory*, 169-75.

<sup>145</sup> Balto, *Occupied Territory*, 168-175, 180-2.

they took him to a room and proceeded to assault him, and afterwards, they threw him back into his cell. After his release Hutsona had to go to the Hospital where he saw a doctor for his injuries.<sup>146</sup> Hutsona's case was ultimately never resolved. The docket sheet lists the case as being reinstated on November 5th, 1965, but no further actions were taken. None of the officers involved appear to have been disciplined.

### **The Court Looks Away: The District Courts Failure to Contend with Torture**

Even if Hutsona had ended up being successful in his suit, he likely would have only been compensated for being held incommunicado. The judges on the federal district court covering Chicago, following decades of Supreme Court jurisprudence, generally refused to confront allegations of torture while meting out small punishments for tamer, psychologically coercive tactics. Take the case of Ozie Brize from the beginning. The officers in that case were all found guilty, but the judgment awarded was only \$600. This likely reflected a determination from the judge that Brize's extended detention merited damages but his more serious claims did not.

For a deeper examination of what this judicial philosophy meant, consider the case of *Durham v. Nash*. This case, another one of Liebman and Moore's from 1959, directly reflected how judges sidestepped torture claims. After seeing him in an improperly parked car, CPD officer Ronald Nash arrested Richard Durham and brought him to the Eighth Police District for questioning. At the station, where Durham alleges he was held for 25 ½ hours incommunicado, Nash called in his partner Victor Vrdolyak to help him question Durham. They allegedly brought him into a room and proceeded to interrogate and assault him, demanding he confess to various alleged crimes. Durham was eventually released when his family hired a lawyer who filed a

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<sup>146</sup> Deposition of Decosta Hutsona, *Hutsona v. Egan*, No. 62C1023, 1962 National Archives at Chicago (N.D. Ill. May 2, 1964), 39-56.

petition for habeas corpus, at which point Durham was officially booked and charged with “disorderly conduct, resisting arrest, and driving without a driver's license” and released.<sup>147</sup> In the course of the case, Moore and Liebman deposed Dr. John Wall, a doctor who examined Durham the same day he was released from custody. In his deposition, Dr. Wall noted during his examination that Durham had “bruises on the right ear and over the right mastoid bone; swelling of the ear; bruises of the right shoulder, two in by two inches in diameter; bruises of the right elbow, four inches by three inches in diameter; bruises of the left chest wall; bruises of both knees and the right elbow.” Durham told Dr. Wall the injuries came from being beaten and pistol-whipped while in police custody.<sup>148</sup>

Eventually the case ended up on trial before a jury in 1962, only for them to fail to reach a verdict. After the presiding judge Richard B. Austin declared a mistrial, the parties agreed to waive trial by jury and have Judge Austin render the verdict. Ultimately, the court found only Nash guilty “on the basis of the delay in booking this defendant and on that basis only... this delay justifies the Court in entering a finding of guilty heretofore entered.”<sup>149</sup> Durham was awarded a judgment of \$1,250 against Nash, and Vrdolyak was found not guilty. In rendering its verdict, the court declined to grapple with the credible allegations that Durham had suffered bodily harm, instead choosing to focus on the extended detention period. Indeed, although the court at the time was perhaps not aware, Nash had already had a history of questionable interactions with residents. In 1958, the Illinois Division had asked CPD Commissioner O'Connor to investigate Nash and his unidentified partner (likely Vrdolyak) for allegedly

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<sup>147</sup> Deposition of Ronald Nash, *Durham v. Nash*, 59C770, 1959 National Archives at Chicago (N.D. Ill. Sep. 21, 1959), 9-35.

<sup>148</sup> Deposition of Dr. John C. Wall, *Durham v. Nash*, 59C770, 1959 National Archives at Chicago (N.D. Ill. Apr. 28, 1960), 9-12.

<sup>149</sup> Excerpt of the Proceedings, *Durham v. Nash*, 59C770, 1959 National Archives at Chicago (N.D. Ill. Jun. 18, 1960), 18.

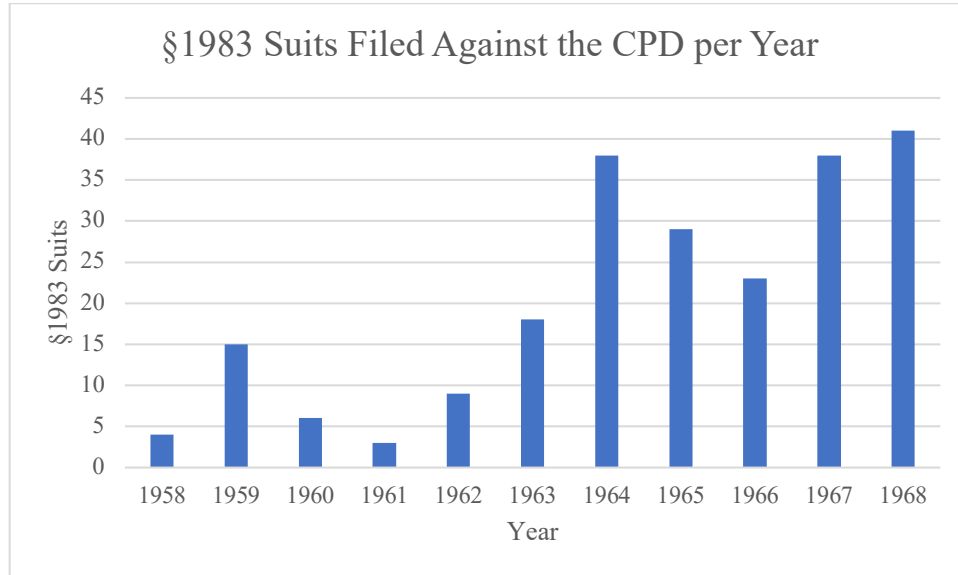
detaining and using force on two boys ages 15 and 16 in an attempt to get them to confess to crimes they did not commit. Despite these events, both Nash and Vrdolyak's careers were relatively unharmed. Nash rose through the ranks, becoming one of the youngest men to be promoted to Captain in 1962, the same year he was found guilty in the suit against him, and he later won several medals throughout his career. Vrdolyak meanwhile eventually rose to the rank of deputy superintendent in the 1970s and later became an alderman for the 10th Ward. While the incident with Durham occurred under the leadership of O'Connor, the discipline under Wilson was virtually the same. In Wilson's mind, it was not a relevant consideration that what the average officer "believes to be his legal authority" was clearly out of sync with what the law actually said.<sup>150</sup>

This was perhaps the clearest example of how the judicial forces at work since Ashcraft came together to limit the potency of these lawsuits. If Durham's claims had been evaluated more favorably in light of the corroborating evidence from his doctor and the past allegations against Nash, he might have been awarded more than \$1,500.

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<sup>150</sup> "Ask O'Connor to Probe Charges." 1958. *Chicago? Daily Defender (Daily Edition) (1956-1960)*, Oct 14, 1. <https://search.proquest.com/docview/493760288?accountid=14657>.

## The Marketplace Fails to Materialize



**Figure 3.** Graph of Annual §1983 Suits per Year

Data compiled by author

The small verdicts in cases like Durham's were but one of several failed assumptions that made Liebman and company's desired legal market fail to develop. By the Illinois Division's own admission in 1967, a variety of factors came together to make §1983 into a virtual non-factor with the CPD. As previously mentioned, the Illinois Division undertook a study where they examined 35 §1983 suits filed against the CPD between 1960 and 1967. In this deep dive they examined the total time the lawsuit took from filing to resolution, the average verdict, the success rate, and some descriptive information on the plaintiffs. What they found was essentially the opposite of the conditions Liebman and company's legal marketplace needed to make §1983 suits into an effective police misconduct and brutality deterrent. The average case took more than 500 days to resolve, plaintiffs won their case on average only half the time, and when they did they won ~\$3,570 on average. These numbers masked a stark division, however. A few jury trials with white plaintiffs constituted more than a third of the total judgements for all plaintiffs. In contrast, non-white plaintiffs, who made up the majority of plaintiffs where the race could be identified, had much lower success rates and a lower average judgement total. Further these non-

white plaintiffs were more like to have a prior criminal record, which was almost always used to discredit them in court. All this, combined with the lengthy duration of the cases led the report to conclude these suits were an especially bad option for plaintiffs who were poor who probably could not afford to pay a lawyer for more than a year while waiting for a verdict.<sup>151</sup>

Liebman and company had taken it as a given that the proper imposition of civil liability and publicity would spur successful lawsuits thanks to the legal services market. However, their underlying assumptions about how this operated market imploded spectacularly for the plaintiffs with a criminal record and who were poor and non-white. These plaintiffs did not have ready access to legal representation, nor were they guaranteed a fair trial. Instead “those factors act[ed] as a significant obstacle to the bringing of an action.” Thus, when those same types of plaintiffs were over-represented among the victims of abusive policing practices Liebman and company’s theories fell apart. The lawsuits were not profitable or winnable enough to get lawyers to want to take them or for victims to want to sue and so their plan largely failed. These facts led the authors of the study to conclude something similar:

Section 1983 can serve as a deterrent to police brutality only if it poses a very real threat to police officers who are likely to use force excessively or recklessly. The paucity of suits (Chicago has a 10,000 man police department) brought under section 1983 indicates that the threat the statute carries is more theoretical than real. Section 1983’s potential deterrent power has been whittled away by legal and social obstacles both to the initiating of suits and to their successful conclusion. It is a poorly suited to the deterrence of police brutality.<sup>152</sup>

Liebman and company’s grand plan it seemed had failed, at least for then. The lawsuits had missed their mark and the allegations of CPD officers using abusive detention practices continued unabated. In fact, in some ways the worst was still yet to come.

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<sup>151</sup> “Materials for Workshop 2: Self-Policing; Internal Controls,” Box 569, Folder 1, 18-29.

<sup>152</sup> “Materials for Workshop 2: Self-Policing; Internal Controls,” Box 569, Folder 1, 18-29.

## V. Conclusion

This is the part of the story where the reader might be expecting a happy ending, or at least a glimmer of hope. I unfortunately do not have that. After O.W. Wilson stepped down, Daley lackey James B. Conlisk took over the CPD, and “corruption, violence, and unabashed racism from the white rank and file exploded again.”<sup>153</sup> Three years after that, Jon Burge joined the police force, and two years later he was assigned to Area 2. For the likely hundreds of black men who Burge and those under him tortured, the failure of Liebman and company’s plan loomed large. Of course, they were not the only ones trying to stop abusive detention practices, but the question of why their plan failed remains a crucial one to ask.

There are countless reasons that can be pointed to for the failure of their plan. It could have been because the federal civil courts did not give victims a fair trial. It could have been because Wilson was just too unshakeable a figure for any number of lawsuits to influence. It could have been because the legal system was fundamentally designed to serve the wealthy, not advance social justice.

It is important to consider all these potential reasons because we still live with their plan’s legacy to this day. In the past decade alone, the City of Chicago has spent millions of dollars a year on §1983 suits filed against the CPD for seemingly little results. In 2017, after a two-year long investigation of the CPD, the Department of Justice (DOJ) released a scathing report on the conduct of CPD officers. An investigation into the role of civil suits found over the seven-year period from 2009-2015 the disciplinary bodies overseeing officers recommended discipline in less than 4 percent of investigations stemming from lawsuits with settlements or judgements. Just as in 1967, there was a clear failure to connect successful suits against officers with virtually any internal discipline or punishment whatsoever. In a report on risk management,

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<sup>153</sup> Balto, *Occupied Territory*, 238.



the City's own Office of Inspector General found that "because the City does not analyze trends, including trends in police misconduct, or take action on the basis of such analysis, the City 'spends tens of millions of dollars annually to pay claims.'" Despite reports like this, the City has taken virtually no comprehensive steps to deal with the underlying issue of police conduct. In an echo of 1950s Corporation Counsel John Melaniphy's proposed solution, the City's most recent solution was a new policy instituted in 2010 of aggressively litigating misconduct cases it might have previously settled. While this did appear to reduce the number of successful suits filed against the City, it did not decrease the total payouts from police misconduct cases. Further, it did nothing to address the police misconduct and brutality which was the underlying cause of the costs.<sup>154</sup>

The constant cost with little change creates another crucial issue. How does the City pay for the ever-growing cost? This question is outside of the scope of this paper, but it remains a crucial consideration. When the City diverts money that could have been spent bettering communities and turns to regressive means of funding judgements and settlements, the very same poor residents who disproportionately face police violence can suddenly find themselves continually footing the bill as well. This is not to say that the City should stop paying in these lawsuits. They are still a valuable compensatory tool for people who have been hurt by police action. Instead the cost should emphasize the urgent need for an answer to the question of why CPD leadership and City Hall continues to fail to tackle the issue of police misconduct and brutality, despite the high human and monetary cost, and the urgent need for a solution.

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<sup>154</sup> United States Department of Justice, "Investigation of the Chicago Police Department" (United States Department of Justice, January 13, 2017), 23, 65-6.

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