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# The Fiscal Savings of Accessing the Right to Legal Counsel Within Twenty-Four Hours of Arrest: Chicago and Cook County, 2013

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*The right to an attorney while in police custody is a central component of the Bill of Rights enshrined in the U.S. Constitution. Yet, in many jurisdictions, detainees are denied the expeditious means to acquire representation amid police questioning. This Article assesses the fiscal impact of denying and delaying individuals in custody their right to an attorney in Chicago and Cook County, where arrestees can be detained without a lawyer for a maximum of three days. Using data from the Survey of Inmates and published reports, the authors estimate the fiscal cost of preventing men and women from accessing their constitutional right to an attorney during the first twenty-four hours in detention. The costs are exorbitant. The authors find that Cook County could save between \$12.7 and \$43.9 million and eventually close approximately twenty-two jail units throughout the county. Social justice and other fiscal costs are discussed in detail.*

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### I. THE FISCAL AND SOCIAL IMPACTS OF INCARCERATION

The rapid rise in incarceration throughout the United States since 1980 has increased the fiscal cost to cities, counties, and states. As displayed by Figure 1, America has the highest incarceration rate in the world, surpassing all Western industrialized nations that espouse liberal, democratic values. Agencies are responsible for public safety and they often claim incarceration rates reflect increases in protection and apprehensions, but such reasoning falls short, as the percentage of cases cleared for property and violent crimes are 19% and 46.8%, respectively.<sup>1</sup>

Between 1985 and 2009, state expenditures on corrections rose by 700% to more than \$47 billion.<sup>2</sup> Illinois, for example, spent 5.2% of its general fund on state corrections in 2007.<sup>3</sup> The rise of the penal state is due to a host of changes in the criminal justice system: longer sentences, increasing inequality in surveillance, and growth in punishment for nonviolent offenses.<sup>4</sup> These policy shifts have converged to increase the fiscal cost of incarceration for municipalities as well.<sup>5</sup>

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1. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 2012, at tbl.25 (2013), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/25tabledatadecoverviewpdfs> [perma.cc/KMV2-MY7H].

2. Juliene James et al., *A View from the States: Evidence-Based Public Safety Legislation*, 102 J. CRIM. L. & CRIMINOLOGY 821, 822 (2012).

3. JENIFER WARREN, PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 (2008), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing\\_and\\_corrections/onein100pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/onein100pdf) [http://perma.cc/XWY9-LQB6].

4. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012); BECKY PETITT, *INVISIBLE MEN: MASS INCARCERATION AND THE MYTH OF BLACK PROGRESS* (2012); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006).

5. BRYAN L. SYKES, *FIRST DEFENSE LEGAL AID, COST SAVINGS TO COOK COUNTY WHEN ARRESTED PERSONS ACCESS THEIR RIGHT TO LEGAL DEFENSE WITHIN 24 HOURS 2* (2014), <http://>

The recent economic downturn, however, has caused legislators to reexamine expenditures and devise methods that will reduce fiscal costs, thereby filling budget deficits associated with increased unemployment, lower tax revenue, and growth in government spending. In 2011, Chicago was projected to have a 2014 budget deficit of \$790 million, which has subsequently been reduced to \$339 million through various “governmental reforms.”<sup>6</sup> The cost of corrections is an additional area of reform where local and state governments can rein in spending. This Article outlines one method Cook County can use to reduce expenditures and conserve resources. If all Cook County inmates had accessed legal representation within twenty-four hours of arrest, their jail stays would be significantly shorter, and the County would initially save between \$12.7 and \$43.9 million annually, eventually allowing for the closure of approximately twenty-two jail units throughout the Chicagoland area.

## II. THE RIGHT TO COUNSEL

The right to counsel conferred by *Miranda* and the right to counsel in court proceedings are separate rights; each materializes at different points in a criminal case and derives from independent amendments in the Bill of Rights.<sup>7</sup> Where the right to counsel *in police custody* is a Fifth Amendment entitlement to due process and against compelled self-incrimination, the right to counsel *in court proceedings* is based on the Sixth Amendment privilege to effective assistance of counsel.<sup>8</sup> As it stands, the Sixth Amendment right to appointed counsel for the indigent attaches after the Fifth Amendment right to counsel is invoked while in police custody, which can last days.<sup>9</sup> Even arrestees who can afford counsel or know how to access representation through a local *pro bono* service are without the ability to contact an attorney until the end of their time in custody because Illinois law allows local police to determine what constitutes “a reasonable amount of time.”<sup>10</sup>

The amount of time arrestees spend without access to counsel varies widely. While some inmates were charged and sent to Bond Court within twenty-four hours where Cook County Assistant Public Defenders are available, other custodial investigations can last forty-eight to seventy-two hours while suspects are held inside police stations without counsel.<sup>11</sup> Unless a judge grants an extension of the custodial investigation, an arrestee is either charged or released without charges within forty-eight to seventy-two hours after arrest. Cook County Assistant State’s Attorneys are on call twenty-four hours a day, seven days a week to approve charges

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condor.depaul.edu/bsykes1/Publications\_files/Cost\_savings\_report.pdf [http://perma.cc/ECC6-6CVX].

6. *Id.*

7. *See Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

8. *See generally* U.S. CONST. amends. V–VI.

9. *See generally id.* amends. V–VI.

10. JUNAID AFEF ET AL., ILL. CRIMINAL JUSTICE INFO. AUTH., POLICIES AND PROCEDURES OF THE ILLINOIS CRIMINAL JUSTICE SYSTEM 5 (2012).

11. SYKES, *supra* note 5, at 5.

based on the police report and on-site interviews with custodial suspects.<sup>12</sup> In contrast, the Law Office of the Cook County Public Defender does not represent any custodial suspects. In 2013, only 0.2% of arrestees had a defense lawyer at the police station.<sup>13</sup> This raises questions about access to legal representation for individuals in police custody.<sup>14</sup>

In Illinois, the right to defense counsel, though not to government-funded defense counsel for the indigent, starts the moment a person is under arrest. One is under arrest when a reasonable person in his or her position would not feel free to leave a police interaction.<sup>15</sup> Yet state-funded attorneys can only be appointed by a judge,<sup>16</sup> who is not present in police stations, thereby delaying representation for the indigent until his or her first court appearance.<sup>17</sup> Consequently, very few Cook County inmates access their right to counsel within the first twenty-four hours after arrest.<sup>18</sup>

The *Miranda* Court described the inefficacy of the right against compelled self-incrimination without access to counsel while in police custody.<sup>19</sup> Illinois state law is even more protective of the right to counsel in police custody in case law interpreting the Illinois constitution and statute.<sup>20</sup> The discordance between the timing and method of arrestees in accessing an attorney creates a wide gap in the

12. Katy Welter, Policy Brief: Early Criminal Case Assessment in Urban Jurisdictions (Aug. 2012), <http://chicagoappleseed.org/wp-content/uploads/2012/06/Early-Case-Assessment-Brief-Final.pdf> [http://perma.cc/L5JS-7ABY]; see also CHI. POLICE DEP'T, SPECIAL ORDER S06-03: FELONY REVIEW BY COOK COUNTY STATE'S ATTORNEY, at I.A. (2012), <http://www.chicagopolice.org/2013MayDirectives> (follow "Special Orders" hyperlink in sidebar under "Contents"; then follow "06 – Processing Persons" hyperlink; and follow "Felony Review by Cook County State's Attorney" hyperlink) [http://perma.cc/NEM3-FNSQ].

13. Press Release, Chi. Police Dep't, Legal Affairs Response to a FOIA request (Nov. 27, 2014) (on file with authors) [hereinafter Press Release, Chi. Police Dep't]; see also Kate Morrissey, *First Defense Legal Aid: Chicago Lawyers Give Free Counsel in Free Time*, MADE CHI., <http://www.medillnews847.com/madeinchicago/fdla/index.html> [http://perma.cc/U4JF-RZGW] (last visited Nov. 15, 2015) ("In 2014, only 0.3% of arrestees had lawyers come to see them while they were in custody. That means for every one thousand arrests, three arrestees had lawyers come to see them."); Jack Silverstein, *First Defense Legal Aid Strives to Make Third Line of Miranda Happen Immediately*, CHI. DAILY L. BULL. (May 13, 2015), <http://www.chicagolawbulletin.com/Archives/2015/05/13/FDLA-Miranda-Rights-05-13-15.aspx> [http://perma.cc/ZF9K-NJBJ] ("In 2013, the Chicago Police Department made 143,398 arrests, according to data that FDLA acquired from CPD via the Freedom of Information Act. Only 302 had an attorney at any point while they were in police custody, a total of 0.2 percent.")

14. See generally AFEET ET AL., *supra* note 10.

15. The Illinois criminal statute regarding the right to consult with an attorney states that Any person committed, imprisoned or restrained of his liberty for any cause whatever and whether or not such person is charged with an offense shall, except in cases of imminent danger of escape, be allowed to consult with any licensed attorney at law of this State whom such person may desire to see or consult, alone and in private at the place of custody, as many times and for such period each time as is reasonable.

725 ILL. COMP. STAT. ANN. 5/103-4 (West 2013).

16. *Id.*

17. *Id.* Appointed counsel is typically a Cook County Assistant Public Defender who works in the courtroom full time. SYKES, *supra* note 5, at 3.

18. SYKES, *supra* note 5, at 4.

19. See *Miranda v. Arizona*, 384 U.S. 436, 465–66 (1966).

20. *People v. McCauley*, 645 N.E.2d 923, 928–30 (Ill. 1994).

legal framework between when the right to counsel attaches and how counsel is actually accessed. This legal framework involves two issues: first, when and how a person restrained of his or her liberty can obtain and communicate with counsel; and second, how an advocate can be appointed to represent the indigent prior to a court appearance.

Figure 2 displays the overall flow chart of police-civilian interaction and the processing of arrestees through the life of a criminal case. During the first forty-eight hours after an arrest, police and prosecutors work to build their case against arrestees by accumulating evidence sufficient to charge them with a crime.<sup>21</sup> Prosecutorial discretion during this period of evidence gathering has been shown to produce racial disparities in the criminal justice system,<sup>22</sup> underscoring the importance of early access to an attorney, particularly for people of color and the poor. Yet during this stage of custodial interrogations and investigations, the Office of the Cook County Public Defender does not represent suspects in custody. Arrestees are not provided immediate access to a phone to call their attorney, legal aid, or a friend or family member for assistance in retaining counsel.<sup>23</sup> Arrestees can communicate via phone after a reasonable amount of time at the first place of custody.<sup>24</sup> Practically speaking, this could mean that arrestees in Chicago cannot use phones to call an attorney until the end of processing, when they are in lock up.

If a civilian suspect detained at a police station invokes his right to counsel by declining to answer questions and requesting legal representation, police must stop their interrogation unless or until the suspect reinitiates conversation.<sup>25</sup> Still, the arrestee continues to lack representation, is not given access to a phone, and is sometimes held for days without contact with anyone but police and prosecutors.<sup>26</sup> Arrestees may waive their right to counsel because there seems to be little possibility

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21. Welter, *supra* note 12, at 4.

22. See Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821 (2013).

23. 55 ILL. COMP. STAT. ANN. 5/3-4006 (West 2013); 725 ILL. COMP. STAT. ANN. 5/103-3 (West 2013).

24. See 725 ILL. COMP. STAT. ANN. 5/103-3 (stating that arrestees can communicate via phone after a reasonable amount of time at the first place of custody); see also Chloe Riley, *Chicago Police Department and Mayor's Office Question Plan to Provide Lawyer Contact Information for Arrestees*, HUFFPOST CHI. (Nov. 3, 2015, 5:12 PM), [http://www.huffingtonpost.com/chloe-riley/chicago-police-department\\_1\\_b\\_7963448.html](http://www.huffingtonpost.com/chloe-riley/chicago-police-department_1_b_7963448.html) [<http://perma.cc/8WTW-KWAN>]; Silverstein, *supra* note 13 ("Those first 24 hours after the arrest are crucial, FDLA contends, because access to a phone is often granted after the interrogation, leaving the suspect vulnerable to self-incrimination.").

25. *Edwards v. Arizona*, 451 U.S. 477 (1981). By contrast, Chicago police officers suspected of wrongdoing are never questioned without counsel. See Agreement Between Fraternal Order of Police Chicago Lodge No. 7 and the City of Chicago § 6.1(J), at 5 (July 1, 2007 to June 30, 2012) ("An officer under interrogation shall have the right to be represented by counsel of his or her own choice and to have that counsel present at all times during the interrogation, and/or at the request of the officer under interrogation, he or she shall have the right to be represented by a representative of the Lodge, who shall be either a police officer on leave to work for the Lodge or a retired police officer working for the Lodge. The interrogation shall be suspended for a reasonable time until representation can be obtained.").

26. See, e.g., *Edwards*, 451 U.S. at 479.

of retaining an attorney.<sup>27</sup> In these situations, arrestees often make statements to police that are used to charge, find probable cause, and convict the arrestee. The *McCauley* case describes how knowledge of one's right to an attorney, but not knowing one is physically present and immediately available for consultation, is counter to *Miranda's* intent.<sup>28</sup>

*A. The Right to Counsel as a Fifth Amendment Protection*

In Illinois, the right to counsel attaches as soon as one is "restrained of his or her liberty."<sup>29</sup> Under *Miranda*, the police do not necessarily have to inform an arrestee of this right immediately: it is only before a custodial interrogation that a suspect must be "Mirandized."<sup>30</sup> It is up to the individual to know and to invoke his or her rights at this time by asking: "Am I free to leave?" and "I will not talk, I want my lawyer."<sup>31</sup>

Generally, investigators have to obtain a suspect's knowing, voluntary, and intelligent waiver of *Miranda* rights only before conducting a *custodial interrogation* if any of the suspect's statements are to be later used as evidence against the suspect in court.<sup>32</sup> Speaking one word is considered to constitute such a waiver, while only a "clear and unequivocal" invocation of these rights prevents or stops the interrogation: "I will not talk, I want my lawyer."<sup>33</sup> An "interrogation" consists of any words or actions police know or should know could elicit an incriminating statement but is often done as a formal interview at the station.<sup>34</sup> "In custody" is defined as when a reasonable person in his or her particular position would not feel free to leave a police interaction.<sup>35</sup> An interrogation could happen at any point in the forty-eight to seventy-two hours of a suspect's detention.<sup>36</sup> This is the only scenario and point in time when CPD's custodial suspects must be read their rights.<sup>37</sup> Absent a custodial interrogation, they need not be read.<sup>38</sup>

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27. See, e.g., *People v. McCauley*, 645 N.E.2d 923, 928 (Ill. 1994) (finding waivers are invalid where suspects are not informed that an attorney is present and available).

28. *Id.* at 929.

29. 725 ILL. COMP. STAT. ANN. 5/103-4 (West 2012).

30. See Timothy P. O'Neill, *When Cops Ask Questions, State Law May Be Foil*, CHI. DAILY L. BULL. (April 9, 2003).

31. See, e.g., *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010); *Hübel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177 (2004); *Terry v. Ohio*, 392 U.S. 1 (1968); CHI. POLICE DEP'T, GEN. ORDER G04-03, INTERROGATIONS: FIELD AND CUSTODIAL (2014) <http://directives.chicagopolice.org/directives> (follow "General Orders" hyperlink in sidebar under "Contents"; then follow "04 – Preliminary Investigations" hyperlink; and follow "Interrogations: Field and Custodial" hyperlink) [<http://perma.cc/2J3Q-SYW3>].

32. See *Miranda v. Arizona*, 384 U.S. 436 (1966). However, the Supreme Court has made an exception to *Miranda* for situations in which police officers ask questions reasonably prompted by a concern for public safety. See *New York v. Quarles*, 467 U.S. 649, 655–56 (1984).

33. *Berghuis*, 560 U.S. at 379.

34. *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980).

35. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

36. See, e.g., *People v. Clayton*, 19 N.E.3d 1214, 1219 (Ill. App. Ct. 2014).

37. CHI. POLICE DEP'T, *supra* note 31.

38. *Id.*

Even when the rights are read, as *Miranda* predicted, obtaining a waiver from suspects at the police station is routine—about 80% of all U.S. arrestees waive their rights.<sup>39</sup> The Fifth Amendment rights to counsel and against self-incrimination are inextricably bound for a custodial suspect. Yet, under federal case law, the Fifth Amendment right against compelled self-incrimination can be knowingly waived, even if police withhold information that an attorney is available to consult with.<sup>40</sup> In Illinois, it cannot.<sup>41</sup>

Illinois law is more protective of a custodial suspect's rights than is required by the U.S. Constitution.<sup>42</sup> The Illinois state constitutional rights to due process and against self-incrimination, both including the right to counsel, mean that a waiver cannot be knowing if police withhold information or provide false information about a lawyer on site available to counsel a custodial suspect. The *McCauley* court decided that knowledge of a lawyer's actual presence affects an arrestee's invocation of the right to meet with one.<sup>43</sup> Awareness of a lawyer's presence is needed for an arrestee to make an informed decision as to whether or not he or she wants to waive his or her right to available counsel, so police in Illinois must inform him or her if a lawyer is present and available to consult.

Despite the ruling in *McCauley*, over 99% of Chicago arrestees remain alone with police and prosecutors, without an advocate, for the duration of the custodial investigation. Only 0.2% of people under arrest by the Chicago police had a lawyer at the station in 2013.<sup>44</sup> The issue of whether a waiver to counsel is voluntary when there is no way to access this right is, to our knowledge, untested. However, the *Miranda* Court's reasoning illuminates that the right against compelled self-incrimination is ineffectual unless, for example, he or she can telephone an attorney upon arrest. State law has long assured that public officials must not interfere with a custodial suspect's communication with his or her attorney.<sup>45</sup>

### B. *The Right to Appointed Counsel as a Sixth Amendment Protection*

In *Gideon v. Wainwright*, the Supreme Court compelled states to create an infrastructure for providing free legal defense to the indigent in court proceedings.<sup>46</sup> It reasoned that “fair trials . . . cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”<sup>47</sup> Before *Gideon*, an accused's youth, mental illness, or other vulnerable status was considered in

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39. See Richard A. Leo, *Criminal Law: Inside the Interrogation Room*, 86 J. CRIM L. & CRIMINOLOGY 266, 275 (1966); Timothy P. O'Neill, *Why Miranda Does Not Prevent Confessions: Some Lessons from Albert Camus, Arthur Miller and Oprah Winfrey*, 51 SYRACUSE L. REV. 863, 864 (2001).

40. Moran v. Burbine, 475 U.S. 412 (1986).

41. People v. McCauley, 645 N.E.2d 923 (Ill. 1994).

42. *Id.*

43. *McCauley*, 645 N.E.2d at 929–30.

44. Press Release, Chi. Police Dep't, *supra* note 13.

45. People v. McCauley, 645 N.E.2d 923.

46. *Gideon v. Wainwright*, 372 U.S. 335, 349–50 (1963).

47. *Id.* at 344.



deciding whether or not to appoint counsel.<sup>48</sup> Different from the Fifth Amendment right to counsel for custodial suspects, the right of an indigent defendant to appointed counsel in court proceedings is based on the Sixth Amendment right to an attorney.<sup>49</sup> The Sixth Amendment right attaches at critical stages of court proceedings, after someone is charged with a crime where more than a fine is at stake.<sup>50</sup> Illinois prescribes by statute how counsel can be appointed in Cook County.<sup>51</sup> The Cook County Public Defender is appointed as counsel when a judge determines the accused cannot afford to hire an attorney.<sup>52</sup>

### C. *Delaying Communication and Access to an Attorney*

People held in Chicago police stations can access free legal defense at any time if a third party knows of the arrest and alerts the nonprofit volunteer effort First Defense Legal Aid (FDLA).<sup>53</sup> Once retained by a third party for the arrestee, a FDLA volunteer attorney must then determine where the police are holding the client. The timing of when the attorney walks into the building where his or her client is being held is pivotal: should the attorney be delayed in or prevented from talking with the client in custody, statements made by the client after that time might be suppressed in later court proceedings<sup>54</sup> as long as the attorney was physically present and immediately available to consult.<sup>55</sup>

State legislation and police policy have codified this case law.<sup>56</sup> Per the Chicago Police Department Superintendent's General Order, police have to inform custodial suspects that a lawyer is there to see them.<sup>57</sup> The *McCauley* court stated that "[c]oncerning, in particular, the right to the presence of counsel during custodial interrogation, it is not sufficient for authorities to merely advise a suspect of a generalized right to an attorney."<sup>58</sup> Earlier, the court in *People v. Smith* decried the police tactic of incommunicado interrogation: denying the arrestee access to his or her attorney, not giving him or her the note, and/or not giving him or her the

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48. See *Moore v. Michigan*, 355 U.S. 155 (1957); *Massey v. Moore*, 348 U.S. 105 (1954).

49. *Gideon*, 372 U.S. at 335.

50. See *Rothgery v. Gillespie Cty., Tex.*, 554 U.S. 191, 199–200 (2008); *Massiah v. United States*, 377 U.S. 201, 205 (1964).

51. 55 ILL. COMP. STAT. ANN. 5/3-4006 (West 2013).

52. *Id.*

53. See *FDLA's Mission*, FIRST DEFENSE LEGAL AID, <http://www.first-defense.org/about> [<http://perma.cc/P2LH-RSR6>] (last visited Nov. 3, 2015); *24-Hr Hotline*, FIRST DEFENSE LEGAL AID, <http://www.first-defense.org/24-hour-hot-line/> [<http://perma.cc/P2LH-RSR6>] (last visited Nov. 3, 2015).

54. *People v. McCauley*, 645 N.E.2d 923 (Ill. 1994); *People v. Woods*, 787 N.E.2d 836, 841 (Ill. App. Ct. 2003).

55. *McCauley*, 645 N.E.2d at 929.

56. 725 ILL. COMP. STAT. ANN. 5/103-4 (West 2013).

57. CHI. POLICE DEP'T, GEN. ORDER G06-01-04, ARRESTEE AND IN-CUSTODY COMMUNICATIONS (2015), <http://directives.chicagopolice.org/directives/data/a7a56e4b-12cbe26-df812-ccb5f-527447d507470630.pdf> [<http://perma.cc/J2HM-363X>].

58. *McCauley*, 645 N.E.2d at 938.

phone.<sup>59</sup> Under state law, *Woods*, *Chapman*, *Smith*, and *McCauley* base the right to communicate with counsel while in police custody on both the rights to due process and against self-incrimination, and expand these protections for suspects in Illinois.<sup>60</sup>

Significantly, in *Smith* and *McCauley*, the court presumed that when arrestees ask for a lawyer the police give them the phone.<sup>61</sup> The police do not. When an arrestee invokes his or her rights, state and federal law require Chicago police to stop questioning unless or until the suspect reinitiates conversation.<sup>62</sup> Neither police nor prosecutors offer suspects the means to retain free legal defense during periods of detainment. While it is untested whether state law requires police to provide the phone before questioning or upon request of a person invoking their right to counsel, prosecutors' ethics are clearly implicated when they withhold information on how an accused could retain counsel and make certain that they have the opportunity to do so.<sup>63</sup> First Defense Legal Aid is almost exclusively deployed by a third party who happens to know of the arrest, not phoned from a police station by a custodial suspect prior to or during questioning.<sup>64</sup>

The right to make phone calls to communicate with family and attorneys within a reasonable time after arrest is established by Illinois statute,<sup>65</sup> and the Chicago Police Department policy adds the right to phone friends.<sup>66</sup> Yet, there are no legally prescribed definitions of what constitutes a "reasonable time" by the statute, Chicago Police Department policy, or Illinois case law. This issue is further complicated by custodial transfers. When an arrestee is transferred from one facility to another, the right to place a call within a reasonable time renews at subsequent facilities.<sup>67</sup> In practice, however, the "reasonable amount of time" may depend on the first place of custody itself. For instance, women arrested in police districts with no female lockup facilities are first held at the district station, and later they are transferred at least once before being processed, after which is when they have their first opportunity to make phone calls.<sup>68</sup> Further, Chicago police leadership impliedly conceded that its commanders were not in compliance with that statute by failing to post a notice of the rights to phone calls and legal representation in their facilities as of April 2015 and committed to moving into compliance.<sup>69</sup>

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59. *People v. Smith*, 442 N.E.2d 1325, 1330 (Ill. 1982).

60. ILL. CONST. art. I, § 2.

61. *See McCauley*, 645 N.E.2d at 927; *Smith*, 442 N.E.2d at 1327.

62. FIRST DEFENSE LEGAL AID, ANNUAL REPORT: FISCAL YEAR 2011 (2011), <http://www.first-defense.org/pdf/annualreport2011.pdf> [<https://web.archive.org/web/20150215122958/http://www.first-defense.org/pdf/annualreport2011.pdf>].

63. MODEL RULES OF PROF'L CONDUCT R. 3.8 (1980).

64. FIRST DEFENSE LEGAL AID, *supra* note 62.

65. 725 ILL. COMP. STAT. ANN. 5/103-3 (West 2012).

66. CHI. POLICE DEP'T, *supra* note 57, at 3.

67. 725 ILL. COMP. STAT. ANN. 5/103-3.

68. CHI. POLICE DEP'T, *supra* note 57, at 3.

69. *See* 725 ILL. COMP. STAT. ANN. 103-7; Riley, *supra* note 24 ("By state law, all Chicago police stations are required to post signs stating that arrestees have the right to a lawyer. But the signs are not

## III. PURPOSE OF THIS STUDY

This study examines the fiscal impact of providing access to an attorney within twenty-four hours of arrest. The first twenty-four hours after arrest is a critical period that can affect the outcome of a case; yet, relatively few arrestees are currently able to access this right. Research shows that legal representation, particularly at the bail stage, can make a significant difference in legal outcomes, jail costs, and perceptions of fairness in the system.<sup>70</sup> Colbert, Paternoster, and Bushway find that the objective benefits of legal representation at bail review include providing necessary facts to the court—the suspect’s case circumstances, community ties, financial hardships, and prior criminal justice experiences—which clarifies and verifies the accuracy of information presented by prosecutors.<sup>71</sup> Although public defenders are present at Bond Court, they have little time to gather or verify information that could help their clients. Having access to early defense counsel before Bond Court would be fair and would significantly reduce the number of pretrial days an arrestee spends behind bars, thereby reducing the costs of incarceration.<sup>72</sup> Early case assessments by prosecutors further reduces these costs by redistributing vital resources from weak or less significant cases—those cases which may result in dropped charges, acquittals, or sentence expiration (henceforth referred to as nonconvictions or dismissals)—to more serious crimes that require greater scrutiny.<sup>73</sup> For instance, Philadelphia observed a 12% reduction in bed days behind bars due to changes in their pretrial jail population, resulting in a fiscal savings of \$10 million dollars for the 2012 correctional budget and lower overtime payouts (around \$7.4 million within two years) for police.<sup>74</sup> This finding is

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required to provide resources, like a phone number or website, towards securing that lawyer. Getting a general nonprofit phone number on those signs was a major part of talks between First Defense, the mayor’s office and Chicago police. Ultimately, after months of discussion, the Chicago Police Department nixed the idea, saying it would be perceived as favoritism if any contact information was added. Instead, the department agreed to install new signs (the old ones hadn’t been updated in over 15 years) and potentially produce a pamphlet containing resources for arrestees, which might include advice on requesting counsel and phone numbers for various pro bono legal resources including First Defense, among other information.”); Silverstein, *supra* note 13 (“At a meeting April 23 that was attended by representatives of CPD, FDIA, the Cook County public defender’s office, the American Civil Liberties Union and the Chicago Coalition for Police Accountability, representatives of the police department agreed to conduct an internal audit by the end of May to ensure that the signs are visible. ‘We are moving to get into full compliance,’ said Chief Juan Rivera of CPD’s bureau of internal affairs. ‘We have discovered some signage that needs to be updated and other areas that need additional signage.’”).

70. Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1744 (2002).

71. *Id.* at 1743–44.

72. John P. Gross & Jerry J. Cox, *The Cost of Representation Compared to the Cost of Incarceration: How Defense Lawyers Reduce the Costs of Running the Criminal Justice System*, CHAMPION, Mar. 2013, at 22, 23.

73. See generally Welter, *supra* note 12.

74. LARRY EICHEL ET AL., PEW CHARITABLE TRUSTS, PHILADELPHIA’S LESS CROWDED, LESS COSTLY JAILS: TAKING STOCK OF A YEAR OF CHANGE AND THE CHALLENGES THAT REMAIN

consistent with other pretrial programs that include both diversion and access to defense counsel, with the latter increasing perceptions of fairness about the criminal justice and legal systems.<sup>75</sup>

This report quantifies one aspect of pretrial savings to Cook County: providing access to defense attorneys within twenty-four hours. To understand how the implementation of this policy would affect Cook County, this report begins by placing contemporary estimates and demographics of Cook County inmates within a historical context. In the sections that follow, the mean length of stay in jail is significantly reduced by providing arrestees with legal representation within twenty-four hours. Actual access to the already-existing right to counsel for arrestees is a viable solution in the interest of fiscal savings and perceptions justice.

### A. Data Sources and Description

Statistics for this report are drawn from multiple data sources. Jail counts and bookings for Cook County during 2009 (the latest year available) were obtained from the Illinois Criminal Justice Information Authority (ICJIA).<sup>76</sup> The ICJIA's Statistical Analysis Center hosts a searchable criminal justice and risk factors database that provides aggregate counts of inmates and social indicators by county and year, as reported by government agencies in Illinois.<sup>77</sup> Current jail counts for 2014 are published on the Cook County Sheriff's website.<sup>78</sup>

The Survey of Inmates in Local Jail for 2002 (the latest year available) was collected by the U.S. Census Bureau on behalf of the Bureau of Justice Statistics (BJS).<sup>79</sup> The Survey of Inmates includes detailed demographic, legal, and offense information; however, the Survey does not include questions on evidence or criminal justice discretion.<sup>80</sup> The Survey of Inmates is publicly available for download through the Inter-university Consortium for Political and Social Research (ICPSR) at the University of Michigan.<sup>81</sup> To distinguish Cook County inmates from those in other jails, the authors identified the weighting adjustment for Cook County (variable V2266) and flagged inmates who had weights of less than one under the assumption that as the largest jail system in the country, the Bureau of Justice Statistics and Census Bureau would down-weight the distribution for national representation. This assumption seems reasonable because the 2002 Survey

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(2011), <http://www.issueab.org/permalink/resource/13204> [<http://perma.cc/LAEN-JNTX>] (follow "Download now" hyperlink).

75. Colbert et al., *supra* note 70, at 1720.

76. *County Jail Bookings*, ILL. CRIM. JUST. INFO. AUTHORITY, <http://www.icjia.state.il.us/assets/datasets/130/xls/JailBookings.xls>.

77. *Id.*

78. COOK CTY. SHERIFF'S OFFICE, SHERIFF'S DAILY REPORT (2014), [http://www.cookcountysheriff.org/doc/doc\\_JailStatistics\\_PopulationCosts.html](http://www.cookcountysheriff.org/doc/doc_JailStatistics_PopulationCosts.html) [<http://perma.cc/8TEJ-QH89>] (follow "Jail Population Report 9/02/2014" hyperlink).

79. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTER-UNIV. CONSORTIUM FOR POLITICAL & SOC. RESEARCH, ICPSR 4359, SURVEY OF INMATES IN LOCAL JAILS, 2002 (2006).

80. *See id.* at 4–10.

81. *Id.* at 1.

of Inmates weights were derived from the total number inmates in local jails on June 30, 2001, even though the interviews were conducted between January and April 2002.<sup>82</sup> According to the ICJIA data (as shown in Figure 2), the average number of inmates in Cook County Jail on any given day in 2001 was 11,031, whereas the weighted average daily inmate count for Cook County in 2002 was 11,268 using the Survey of Inmate in Local Jails. Thus, identifying Cook County inmates based on this assumption seems valid given the approximate equivalence between the administrative totals and the survey weighted inmate counts for the six-month period prior to data collection. If the controlling offense occurred in the inmate's city of residence (variable V1046), the inmate was flagged as from Chicago. The combination of city of residence and Cook County Jail is used to indicate Chicago residents and offenders.

An alternative estimation strategy uses published aggregate inmate and arrestee counts and the mean length of stay for 2012, as reported by David Olson.<sup>83</sup> In his report of admissions, discharges, and the population of the Cook County jails, Olson shows the sociodemographic distribution of detainees and the offense type associated with their admission to the County Jail.<sup>84</sup> Consequently, the report and the data that it is based on do not indicate when detainees accessed counsel, which is an advantage of the Survey of Inmates data. However, the Olson report disaggregates jail exits by discharge type, percentage of discharges, and the mean number of days in jail.<sup>85</sup> We benchmarked the socioeconomic estimates (race, gender, age, etc.) from the Survey of Inmates to the administrative estimates presented in Olson.<sup>86</sup>

The cost of jailing an inmate per day is derived from two data sources. First, the Cook County Sheriff's website lists the costs of jailing an inmate per day at \$143.<sup>87</sup> However, it is unclear whether this figure represents the average or marginal cost.<sup>88</sup> Marginal costs in criminal justice studies represent "the amount of change in an agency's total operating costs when output (such as arrests, court filings, or jail days) changes because of changes to policies or programs,"<sup>89</sup> which allow for more effective cost-benefit assessments in public policy analyses. Because the \$143 cost

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82. See *id.* at 6.

83. DAVID E. OLSON & KOERT HUDDLE, AN EXAMINATION OF ADMISSIONS, DISCHARGES & THE POPULATION OF THE COOK COUNTY JAIL, 2012 (2013), [http://ecommons.luc.edu/cgi/viewcontent.cgi?article=1015&context=social\\_justice](http://ecommons.luc.edu/cgi/viewcontent.cgi?article=1015&context=social_justice) [<http://perma.cc/PX5P-NPLA>].

84. See *id.* at 3–4.

85. *Id.* at 5–6.

86. *Id.* at 3–4.

87. Mick Dumke, *The Latest Cook County Jail Fight*, CHI. READER (Jan. 21, 2014), <http://www.chicagoreader.com/chicago/cook-county-officials-fight-over-jail-crowding/Content?oid=12195364> [<http://perma.cc/Q6PM-VNN7>].

88. The marginal cost is the amount the total cost changes when a unit of output changes. CHRISTIAN HENRICHSON & SARAH GALGANO, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, A GUIDE TO CALCULATING JUSTICE-SYSTEM MARGINAL COSTS 4–5 (2013), <http://www.vera.org/sites/default/files/resources/downloads/marginal-costs-guide.pdf> [<http://perma.cc/Q9EH-GWWK>].

89. *Id.* at 5.

listed on the Cook County Sheriff's website may not be the true marginal cost (i.e., it could be the average cost), a secondary estimate is derived from the Illinois Sentencing Policy Advisory Council's (ISPAC) report on cost and outcomes for 2010 through 2012.<sup>90</sup> ISPAC finds that the marginal cost for spending one year in jail is \$15,256, or \$42 per day.<sup>91</sup> Thus, the Cook County Sheriff's estimate may represent the maximum (average) cost, while the ISPAC estimate represents the minimum (marginal) cost.

### B. Methodology

Sections C, D, and E of this Article rely on the Survey of Inmates in Local Jails to estimate the racial, educational, legal, and criminal justice interactions of inmates. Although these data were last collected in 2002, previous studies have linearly interpolated survey-weighted measures of socioeconomic status to produce population-weighted estimates of the racial and educational distribution of prison and jail inmates nationally for a variety of socioeconomic outcomes.<sup>92</sup> The methods and procedures of previous studies are used in this Article, but the analysis is restricted to Cook County. Any survey observations that are not recorded are assumed to be missing at random (MAR) and are imputed using the imputation by chained equations (ICE) procedure in Stata 13.

Section E of this Article assumes that obtaining a conviction is the primary motivation for criminal charging. To quantify the effect of legal representation within the first twenty-four hours after arrest, the authors fitted a binary response model (probit) to estimate the conditional probability that speaking to a lawyer immediately upon arrest results in a lower likelihood of conviction—or, alternatively, a higher likelihood of release through any means of discharge (bonding, sentence expiration, charge dismissal, or acquittal)—after accounting for socioeconomic factors, alleged offense, and type of counsel. Failure to secure a conviction may happen by any of the aforementioned processes.

The marginal effects from the conditional probability of being convicted are

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90. KATHRYN SALT MARSH, ILL. SENT'G POL'Y ADVISORY COUNCIL, SB1342, HOUSE AMENDMENTS (HA) 3 AND 5 SENTENCE ENHANCEMENTS FOR UNLAWFUL USE OF A WEAPON (UW) OFFENSES 720 ILCS 5/24-1.1, 5/24-1.6, AND 5/24-1.81: COST AND OUTCOMES FOR 2010–2012, at 1 (2013), [http://www.icja.state.il.us/spac/pdf/SB1342\\_HA\\_3\\_and\\_5\\_SPAC\\_Analysis.pdf](http://www.icja.state.il.us/spac/pdf/SB1342_HA_3_and_5_SPAC_Analysis.pdf) [<http://perma.cc/R524-LXHM>].

91. *Id.*

92. See, e.g., PETTIT, *supra* note 4, at 57–67; BECKY PETTIT ET AL., TECHNICAL REPORT ON REVISED POPULATION ESTIMATES AND NLSY 79 ANALYSIS TABLES FOR THE PEW PUBLIC SAFETY AND MOBILITY PROJECT (2009); WESTERN, *supra* note 4; Stephanie Ewert et al., *The Degree of Disadvantage: Incarceration and Inequality in Education*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 24 (2014); Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REVIEW 151 (2004); Bryan L. Sykes & Becky Pettit, *Mass Incarceration, Family Complexity, and the Reproduction of Childhood Disadvantage*, 654 ANNALS AM. ACAD. POL. & SOC. SCI. 127 (2014); Bruce Western & Becky Pettit, *Black-White Wage Inequality, Employment Rates, and Incarceration*, 111 AM. J. SOC. 553 (2005); Christopher Wildeman, *Parental Imprisonment, the Prison Boom, and the Concentration of Childhood Disadvantage*, 46 DEMOGRAPHY 265 (2009).

displayed in Table A1. Marginal effects represent changes in predicted probabilities for socioeconomic factors included in the probit model.<sup>93</sup> Estimates for this report focus on the difference in the probability of conviction if the inmate accessed the right to counsel within twenty-four hours (compared to more than a week later), holding all other socioeconomic factors at their mean value.

The following equations display two alternative methods for estimating the annual fiscal savings. Equation 1 uses information derived from the Survey of Inmates to show how the lower likelihood of conviction due to having counsel within twenty-four hours reduces the cost of jailing detainees through a reduction in the number of person-days behind bars.

### Equation 1

**Jail Savings** = (probability of conviction given early legal counsel) \* (daily cost per inmate) \* (daily count of inmates from Chicago) \* (avg. difference in number of days jailed)

The probability of conviction given early legal counsel, as reported in Table A1, reduces the total number of inmates under correctional supervision because they accessed a lawyer within twenty-four hours after arrest. Receiving an acquittal, dismissal, or having charges dropped also reduces the mean difference in the number of days jailed (compared to those who are convicted). The probability of conviction given legal representation (from Table A1) is used to calculate cost savings in Table 3A of Section E. This analysis assumes that the aggregate fiscal savings to Chicago is dependent on the joint effect of conviction probability, which takes into account whether legal counsel is accessed early, the cost of jailing each inmate per day, the number of inmates in jail on any day, and the average difference in the number of days an inmate is in jail when released earlier compared to when held longer. The number of inmates in jail from Chicago on any given day is the weighted count of the proportion of city respondents in the 2002 Survey of Inmates and the average daily number of inmates in Cook County jails in 2014 (taken from the Cook County Sheriff's website).

Equation 2 uses a different methodological strategy to empirically derive the annual fiscal savings. Drawing on information from the Olson report,<sup>94</sup> if an arrestee posts bond, the sentence expires, charges are dropped, or the prosecutor fails to secure a conviction, then the aggregate time behind bars for the relative distribution of each discharge, weighted by the marginal or average cost, constitutes the savings to Cook County.

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93. See J. SCOTT LONG, REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES 5 (1997); DANIEL A. POWERS & YU XIE, STATISTICAL METHODS FOR CATEGORICAL DATA ANALYSIS 77 (2000).

94. OLSON & HUDDLE, *supra* note 83, at 7–8.

### Equation 2

**Jail Savings** = (number arrestees by discharge type) \* (Percentage by discharge type) \* (daily cost per person) \* (number of days jailed by discharge type)

#### C. *Historical Trends and Demographic Characteristics of Cook County Inmates*

Figure 3 displays trends in jail counts for Cook County since the early 1980s. The Cook County jail is the largest jail in the country.<sup>95</sup> In 1981, there were almost 3900 inmates in Cook County jail.<sup>96</sup> By 2002, the number of men, women, and juveniles behind bars had more than tripled to approximately 13,600, and this number has steadily declined throughout the period.<sup>97</sup>

At the same time, the number of admissions into Cook County jail increased. In 1981, there were over 65,000 admissions.<sup>98</sup> The number of bookings declined in subsequent years but began a steep rise by the mid-1980s, reaching a zenith of over 123,000 admissions in 2001.<sup>99</sup> Recent years show a marked decline in admissions, with the number decreasing to roughly 85,000 in 2009.<sup>100</sup>

To estimate the fiscal savings for the county that are attributable to Chicago inmates, Table 1 displays the number and demographic characteristics of inmates in Cook County jail, disaggregated by residential location. The Cook County Sheriff website shows that there are approximately 9351 inmates in Cook County jail on any given day in 2014, of which almost 7600 are from the City of Chicago.<sup>101</sup> On average, inmates are approximately thirty-two years of age, 90% male, disproportionately African American, and most have less than a high school education.<sup>102</sup> One in twenty-five inmates is a juvenile.<sup>103</sup> Again, these demographic figures are approximately equal to estimates derived using administrative data, as reported in Table 1 of the Olson report.<sup>104</sup>

#### D. *Right to Counsel and Length of Jail Stay*

Table 2 reports statistics on the mean length of stay, conviction status, access to and frequency of legal representation, and controlling offenses (i.e., the longest sentence or the last sentence in a series of sentences to be served consecutively) with which inmates have been charged. At the time of the survey, Chicago residents spent, on average, 127 days in Cook County jail, while residents from other areas

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95. *Id.* at 1.

96. *County Jail Average Population*, ILL. CRIMINAL JUSTICE INFO. AUTHORITY, <http://www.icjia.state.il.us/assets/datasets/120/xls/JailADP.xls>.

97. *Id.*

98. *County Jail Bookings*, *supra* note 76.

99. *Id.*

100. *Id.*

101. COOK CTY. SHERIFF'S OFFICE, *supra* note 78.

102. *Id.*

103. *Id.*

104. OLSON & HUDDLE, *supra* note 83, at 4.



spent over two additional weeks behind bars (i.e., 144 days).<sup>105</sup> Roughly 18% of inmates had been convicted, and almost four out of five inmates were awaiting trial for a felony.<sup>106</sup> Consistent with previous scholarship, most inmates are charged with nonviolent offenses, with the largest share (38%) of inmates behind bars for drug offenses.<sup>107</sup>

Table 2 shows that while 97% of inmates report having a lawyer at some point in the life of their case, significant variation exists in both the type and timing of legal representation. Almost three out of four Chicago residents in Cook County jails report having a court-appointed lawyer.<sup>108</sup> However, only 26% access their right to an attorney within twenty-four hours of arrest, and a little over one-fifth discuss the charges with an attorney within a week of arrest.<sup>109</sup> The vast majority (53%) of inmates talk to a lawyer for the first time more than a week after arrest.<sup>110</sup> On average, inmates talked with their attorneys almost four times before pleading or heading to trial.<sup>111</sup> The frequency of attorney-client communication about criminal charges is important for providing particular details necessary for an adequate defense and for understanding how cases advance through the legal process, particularly for plea deals and judicial proceedings.

Figure 4 shows how access to early legal representation affects the mean length of time behind bars in cases that yield a conviction relative to cases that are dismissed, acquitted, or have charges dropped (i.e., not convicted). For arrestees who access legal counsel in less than twenty-four hours, those who are not convicted spend, on average, ten days in jail compared to 114 days for those who are convicted.<sup>112</sup> Among arrestees who obtain representation greater than twenty-four hours after arrest, those not convicted spend about 151 days, on average, behind bars while those with convictions spend almost 132 days in jail.<sup>113</sup>

To estimate the average number of days saved due to defense within twenty-four hours, the authors estimated the difference in days behind bars among arrestees who have and have not been convicted and who access counsel early versus those who obtain representation late, as displayed in Equation 3. The estimate is calculated as:

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105. See *infra* Table 2. This estimate is consistent with the average length of stay reported in the 2012 Illinois Department of Corrections report. ILL. DEP'T OF CORRECTIONS, FISCAL YEAR 2012 ANNUAL REPORT 50 (2013), <http://www2.illinois.gov/idoc/reportsandstatistics/documents/fy2012%20annual%20report.pdf> [<https://web.archive.org/web/20150912091208/http://www.illinois.gov/idoc/reportsandstatistics/Documents/FY2012%20Annual%20Report.pdf>]. For instance, the IL-DoC report shows that, accounting for time in jails, there is a 0.4 year (or 146 day) increase in the 2012 length of stay for Illinois inmates. See *id.*

106. See *infra* Table 2.

107. See *infra* Table 2; see also WESTERN, *supra* note 4, at 45–51.

108. See *infra* Table 2.

109. *Infra* Table 2.

110. *Infra* Table 2.

111. *Infra* Table 2.

112. See *infra* Figure 4.

113. *Infra* Figure 4. Conviction status includes pre-trial detention, pre-bail detention, and other periods before the adjudication of charged offenses.

### Equation 3

$$\begin{aligned}
 \text{Jail Days Diff} &= (\text{Not Convicted}_{LT24} - \text{Convicted}_{LT24}) - (\text{Not} \\
 &\text{Convicted}_{GT24} - \text{Convicted}_{GT24}) \\
 &= (10 - 114) - (151 - 132) \\
 &= (-104 - 19) \\
 &= -123 \text{ days}
 \end{aligned}$$

Because the mean number of days in jail for Cook County arrestees is 144 (as reported in Table 2),<sup>114</sup> this implies that, on average, an arrestee spends approximately 21 days behind bars (= 144 – 123). However, the overall jail days saved due to early legal representation is about 123 days after accounting for differences in judicial outcomes.<sup>115</sup>

#### E. *The Total Fiscal Savings of Early Legal Representation*

To quantify the total fiscal savings for the City, this Article begins by estimating savings if inmates accessed their legal right to counsel within the first twenty-four hours of being detained. Table 3A presents savings from corrections utilizing both marginal and average daily costs. The probability of a conviction, if the inmate has a lawyer within twenty-four hours, declines by 26.7 percentage points (see Table A1 for the multiple regression).<sup>116</sup> The cost of a jail stay in Cook County is either the marginal cost (\$42 per inmate per day) or the average costs (\$143 per inmate per day).<sup>117</sup> As reported in Table 1, there are 9351 inmates in Cook County Jail on any given day (on average), with a mean difference in length of stay of 123 days for inmates and arrestees who have and have not been convicted of a crime (as discussed in Equation 3 of Section D).<sup>118</sup> Following the methods outlined in Section B, the total savings to Cook County associated with having access to an attorney in jail within the first twenty-four hours is between \$12.8 million (using marginal costs) and \$43.9 million (using average costs).<sup>119</sup> This does not factor in inmates or arrestees who did not access counsel within twenty-four hours of arrest and were not charged with an offense.

An alternative approach to estimating the fiscal cost can be calculated using administrative data from the Olson report.<sup>120</sup> Because the administrative data do not include information on when arrestees access legal counsel, this alternative approach uses data on discharges that did not result in a prison or parole sentence. These data were taken from Table 3 of Olson's 2013 report that examined admissions, discharges, and the population of Cook County Jail in 2012.<sup>121</sup> The

114. See *infra* Table 2.

115. See *infra* Table 3A.

116. *Infra* Table 3A.

117. *Infra* Table 3A.

118. See *infra* Table 1, Table 3A.

119. See *infra* Table 3A.

120. OLSON & HUDDLE, *supra* note 83.

121. See *infra* Table 3B.

additional methodology presented in Table 3B shows discharge categories (column A) and the mean days in jail (column B) that are associated with the unnecessary and increased cost of incarceration for arrestees who posted bond, had expired sentences, charges dropped, or were not convicted. The percent discharged ranges from 0.5% among those not convicted to 32% among those who posted bond.

Because the total percentage of these categories are based on all arrestees, including those who were sentenced to prison or probation, the relative percentages need to be redistributed to constitute (or represent) the full population of discharges. Thus, column C represents the relative fraction of a discharge type (column A) to the overall proportion of nonadjudicated discharges (i.e., 56.4%). For instance, while 32% of arrestees posted bond, the denominator for that figure includes arrestees sentenced to prison or parole. To estimate the fraction that posted bond relative to those who were not sentenced to prison or parole requires the redistribution (or reweighting) of each category (as displayed in column C). As a result, the mean days in jail for each category is adjusted to reflect the average time spent behind bars for the population of arrestees who were not convicted or sentenced (as reported in column D). On average, those who had their charges dismissed spent approximately twenty-two days behind bars, which is close to the mean length of time (twenty-one days) estimated using the Survey of Inmates and was presented in Equation 3 of Section D. Moreover, both of these estimates are consistent with the length of time “between arrest and preliminary hearing, with a large number of defendants detained in jail before being processed and released.”<sup>122</sup>

Column E displays the number of arrestees discharged by category. The Olson report shows that 76,080 inmates were discharged in 2012.<sup>123</sup> Ultimately, following Equation 2 in Section D, the total marginal savings for discharges that do not result in prison or parole sentences saves Cook County almost \$12.7 million. However, using the average costs (\$143 per inmate per day) from the Cook County Sheriff’s website would result in a savings of \$43.2 million to the county.<sup>124</sup> However, these estimates do not differentiate between those arrestees who did and did not access early legal representation within twenty-four hours of arrest.

Nevertheless, the fiscal savings ranges in Tables 3A and 3B overlap considerably despite the methodology and data sources used to quantify Cook County reductions in incarceration costs. The reason these different methodologies and data show similar ranges is because the probability of having an attorney within twenty-four hours and the average difference in the number of days behind bars (Table 3A) produce a mathematical equivalence to releasing detainees who are not convicted, have their charges dropped, post bond, or have their sentence expire (Table 3B), which are the same measures included in the failure to convict outcome used in Table 3A. Thus, the savings can be viewed as releasing detainees sooner (as in Table 3B) or as a reduction in the likelihood of conviction if given access to legal

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122. Welter, *supra* note 12, at 1.

123. OLSON & HUDDLE, *supra* note 83, at 6.

124. See *infra* Table 3B.

counsel early (Table 3A), net of social background factors and alleged offenses (Table A1).

The benefit of using Table 3A is that the probability associated with early legal representation can be used to estimate other measures of cost savings. While the reduced marginal and average fiscal costs are one method for estimating the savings to Cook County, some policy makers and researchers contend that real decreases in operational costs are the result of spatial unit closures within divisions of the jail system.<sup>125</sup> Put simply, some believe that the fiscal savings are only realized when wings, blocks, stories, or PODS are closed, thereby reducing the electric, employment, and other operational costs associated with keeping those unit-spaces open.<sup>126</sup> Table 4 details how the 26.7% reduction in the likelihood of conviction if given access to an attorney within twenty-four hours (from Table A1) affects the average number of daily bed stays (or jail days) for each division. On average, Cook County could shut between one and six units of space, dependent on the division and its overall population. It is important to note, however, that it is unclear whether such units of space would ever close given that the inmate population could theoretically be redistributed to ensure that all wings, blocks, stories, or PODS remain open as a way to lessen congestion and to prevent future overcrowding in any particular division.

#### CONCLUSION

Failure to provide Cook County arrestees with immediate access to an attorney violates their constitutional rights and increases the likelihood of incarceration through the procurement of incriminating statements and evidence. Scholarship shows that incarceration disrupts social roles by preventing individuals from contributing economically or emotionally to their families and communities, which occurs when job prospects are limited and employment retention is prevented.<sup>127</sup> Employers in many states use the legal system to support their denial of jobs solely as a result of spending time in prison.<sup>128</sup> Furthermore, the stigma attached to an arrest or prison term, rather than criminal activities, damages more than employment opportunities; housing, voting, and educational attainment are limited due to previous criminal justice contact.<sup>129</sup> Thus, violations of an individual's civil

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125. SYKES, *supra* note 5, at 17.

126. *Id.*

127. Bruce Western et al., *The Labor Market Consequences of Incarceration*, 47 CRIME & DELINQ. 410 (2001); Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526 (2002).

128. Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, FED. PROBATION, Sept. 1996, at 10.

129. ALEXANDER, *supra* note 4; Shawn D. Bushway, *Labor Market Effects of Permitting Employer Access to Criminal History Records*, 20 J. CONTEMP. CRIM. JUST. 276 (2004); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003).

rights during detainment can have lasting consequences that extend not only to arrestees and inmates but also to their families and communities.<sup>130</sup>

This Article quantified the fiscal impact of such constitutional abridgements. Assuming there is only a shift in the timing and not the quality or type of representation, the total fiscal savings for Cook County would be between \$12.7 and \$43.9 million annually if arrestees had access to a defense attorney within twenty-four hours of arrest. When placed in a broader social context, the marginal fiscal savings to Cook County would fund the Veterans Assistance Commission General Fund and the Special Purpose Funds of the Health and Hospital System, the Assessor's Office, the County Clerk's Office, and the Sheriff's Office.<sup>131</sup> Alternatively, the marginal savings would account for 51.2% of the \$24.8 million projected fiscal revenue the Sheriff's Office is estimated to receive from fines and citations within the next year.<sup>132</sup>

In addition to the fiscal savings, access to counsel in the first twenty-four hours after arrest is in the interest of justice. There is a growing public awareness and concern for the moral and human rights implications of mass incarceration, wrongful convictions, false confessions, use of force, and police interrogation tactics and various other methods that overreach or extend beyond conventional investigative techniques.<sup>133</sup> For instance, such methods have been identified in *Crime, Corruption and Cover-ups in the Chicago Police Department*, which found that there is a legacy of corruption and a code of silence within the Chicago Police Department that serves to undermine public trust in law enforcement.<sup>134</sup> As a result, Chicago, has gained national notoriety as "The False Confession Capital" due to police interrogation methods.<sup>135</sup> An analysis of wrongful convictions since 1989 demonstrated that such mistakes cost taxpayers \$214 million in eighty-five Illinois cases.<sup>136</sup> In a supplemental analysis not contained here, the authors find that the City of Chicago could save between \$41.6 and \$51.7 million annually in settlement and legal fees associated with police misconduct and wrongful conviction cases.<sup>137</sup>

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130. See, e.g., Gwyneth Boswell, *Imprisoned Fathers: The Children's View*, 41 HOWARD J. CRIM. JUST. 14 (2002); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities and Prisoners*, 27 CRIME & JUST. 121 (1999); Christy A. Visher & Jeremy Travis, *Transitions from Prison to Community: Understanding Individual Pathways*, ANN. REV. SOC. 89 (2003).

131. 1 COOK CTY. BD. OF COMM'RS, ANNUAL APPROPRIATIONS BILL FY 2014, at 5 (2013), <http://www.cookcountyil.gov/wp-content/uploads/budget/2/2014/02/FY14-County-Budget-Volume-I.pdf> [<http://perma.cc/AX3P-LG3T>].

132. *Id.* at 29.

133. SYKES, *supra* note 5, at 18.

134. JOHN HAGEDORN ET AL., *CRIME, CORRUPTION AND COVER-UPS IN THE CHICAGO POLICE DEPARTMENT* 3 (2013).

135. *60 Minutes: Chicago: The False Confession Capital* (CBS television broadcast Dec. 9, 2012), <http://www.cbsnews.com/news/chicago-the-false-confession-capital/> [<http://perma.cc/7ZUD-YMQT>].

136. John Conroy & Rob Warden, *A Tale of Lives Lost, Tax Dollars Wasted and Justice Denied*, BETTER GOV. ASS'N (June 18, 2011), [http://www.bettergov.org/investigations/wrongful\\_convictions\\_1.aspx](http://www.bettergov.org/investigations/wrongful_convictions_1.aspx) [<http://perma.cc/HD7C-FBUQ>].

137. SYKES, *supra* note 5, at 18.

Indeed, a recent lawsuit alleges that violence by officers persists behind bars despite official attempts to rein in misconduct,<sup>138</sup> and a state appeals court has ruled that the Illinois Freedom of Information Act precludes the Chicago Police Department from concealing and shielding officer misconduct complaints.<sup>139</sup> Access to early legal counsel may serve as a deterrent to future misconduct if officers know that defense attorneys can meet with their clients, gather evidence and statements, and assess claims of brutality within twenty-four hours of arrest.

Moreover, immediate access to counsel would increase the tax base associated with employment. Arrestees who are jailed while awaiting a bond hearing are at increased risk of losing their jobs due to absence from work,<sup>140</sup> and the mark of a criminal record further erodes their housing options, wages, employment rates, and yearly earnings once convicted.<sup>141</sup> Each of these domains produces income taxes that increase fiscal budgets, and the loss of wages further reduces sales tax revenue for goods while harming communities in immeasurable ways.<sup>142</sup> Thus, access to early legal representation affords arrestees and the criminal justice system better outcomes like reduced incarceration costs, increased efficiency, greater perceptions of fairness, and a higher precision rate in the charging process. Ultimately, “defendants benefit, society benefits, and even the victims of crime benefit by having their complaints resolved quickly and accurately.”<sup>143</sup>

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138. Jason Meisner & Steve Schmadeke, *Lawsuit Accuses Cook County of Allowing ‘Sadistic Culture’ at Jail*, CHI. TRIBUNE (Feb. 27, 2014, 10:07 PM), <http://www.chicagotribune.com/news/local/breaking/chi-cook-county-jail-brutality-lawsuit-20140227-story.html> [<http://perma.cc/MM79-2JZU>].

139. *Court: City Must Make Police Misconduct Files Public*, CBS CHI. (Mar. 11, 2014, 2:12 PM), <http://chicago.cbslocal.com/2014/03/11/court-city-must-make-police-misconduct-files-public/> [<http://perma.cc/6B4J-LZG7>].

140. Colbert et al., *supra* note 70; Gross & Cox, *supra* note 72.

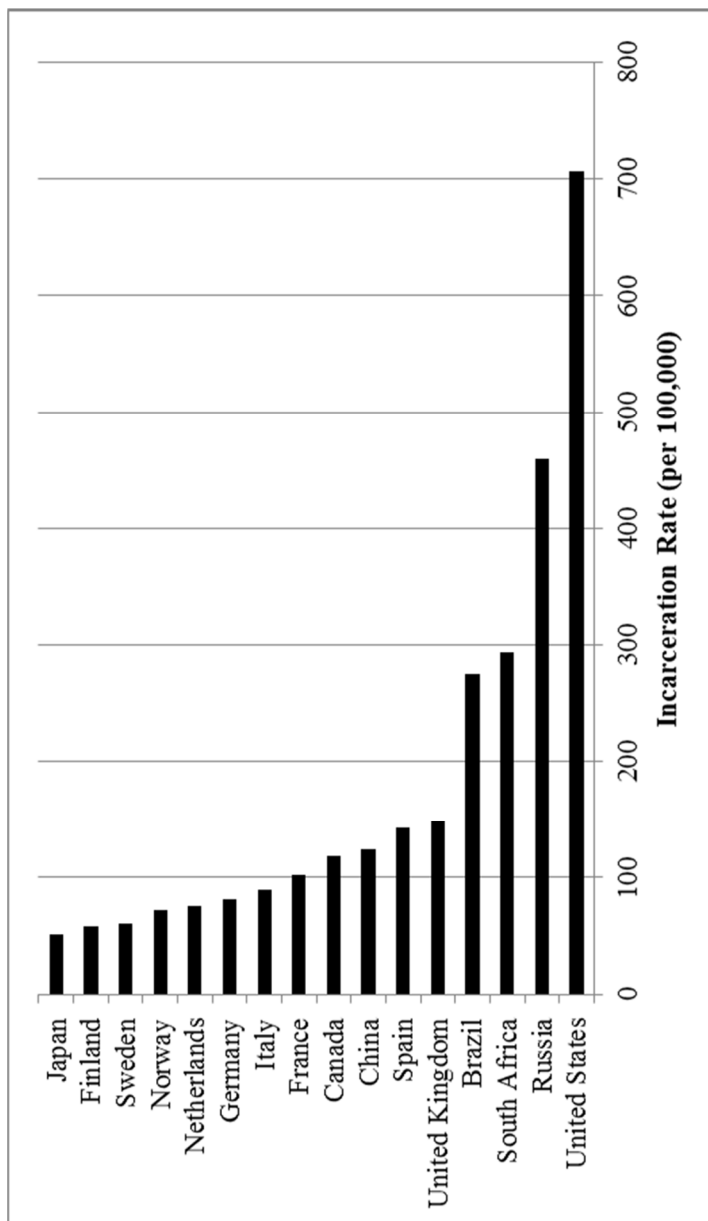
141. ALEXANDER, *supra* note 4; PETTIT, *supra* note 4; WESTERN, *supra* note 4; Pager, *supra* note 129; Pettit et al., *supra* note 92; Western & Pettit, *supra* note 92.

142. CHRISTIAN HENRICHSON & RUTH DELANEY, *THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS* (Jules Verdone ed., 2012).

143. Gross & Cox, *supra* note 72, at 24.

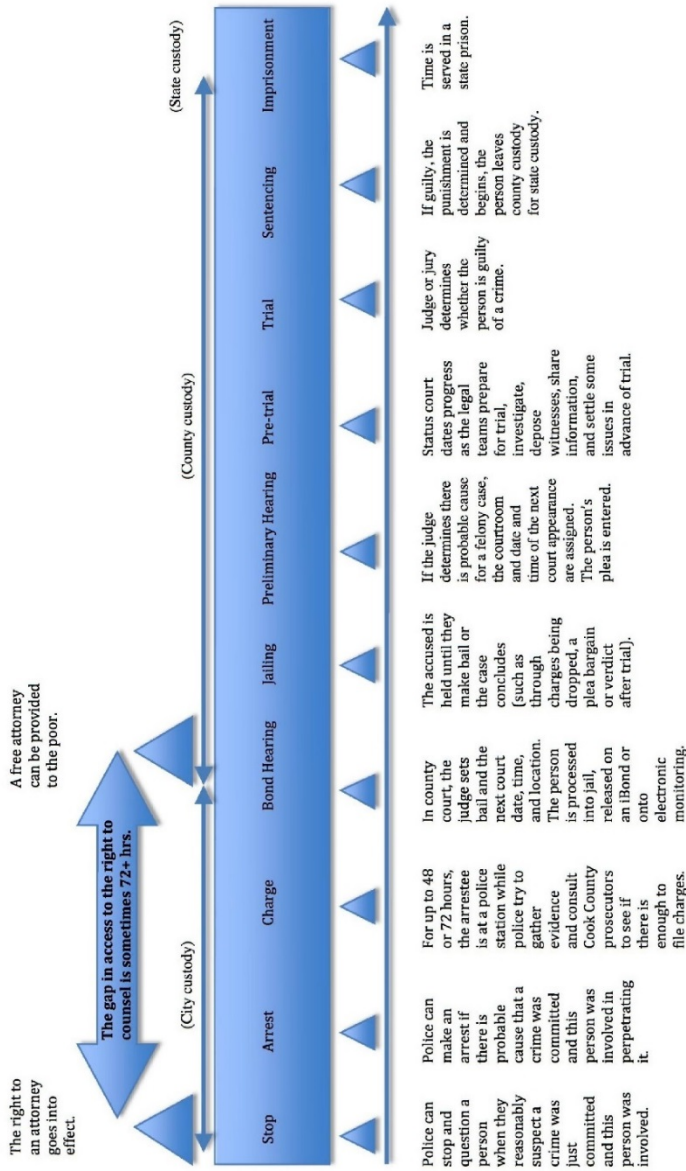
## APPENDIX

**Figure 1:**  
Incarceration Rates in Selected Nations, 2013<sup>144</sup>



144. ROY WALMSLEY, WORLD PRISON POPULATION LIST (10th ed. 2013), [http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl\\_10.pdf](http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf) [[https://web.archive.org/web/20150522101953/http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl\\_10.pdf](https://web.archive.org/web/20150522101953/http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf)].

**Figure 2:**  
Flow Chart of Police-Civilian Interaction<sup>145</sup>



145. SYKES, *supra* note 5, at 3.



**Figure 3:**  
The Inmate and Booking Count, Cook County Jail 1981–2009<sup>146</sup>

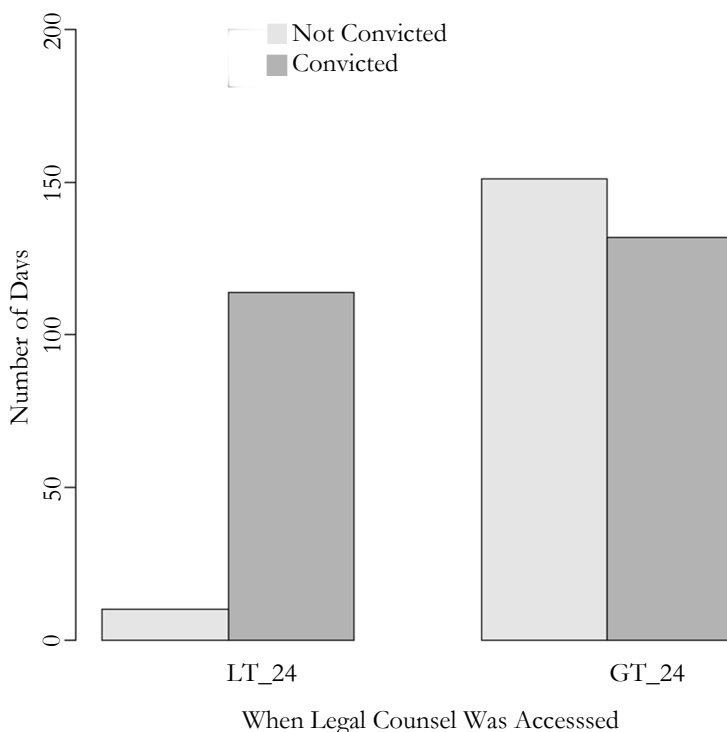


**Source:** Author's calculations from the Illinois Criminal Justice Information Authority (ICJIA) data.

**Note:** Estimates for bookings in 1981–84 and 2000–01 are linearly interpolated based on the rates of jail admissions within that calendar year.

146. *Id.* at 10.

**Figure 4:**  
The Mean Number of Days in Jail by Conviction Status and  
Hours to Access Legal Counsel<sup>147</sup>



**Source:** Author's calculations from the Survey of Inmates in Local Jails and the Cook County Sheriff's website. LT\_24 represents arrestees who accessed counsel less than twenty-four hours after arrest, while GT\_24 is for arrestees who spoke with a lawyer greater than twenty-four hours after charging.

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147. *Id.* at 14.

**Table 1:**  
Descriptive Statistics of Inmates in Local Jails by Residential Location<sup>148</sup>

	<b>Definition</b>	<b>Chicago</b>	<b>Cook County</b>
<b>Inmates</b>	Number of inmates	7555	9351
<b>Age</b>	Mean age of inmates (in continuous years)	32.7	31.9
<b>Juveniles</b>	Percent of inmates under the age of 18	3.8%	4.1%
<b>Male</b>	Percent of male inmates	90.4%	89.8%
<b>NH-White</b>	Percent of inmates who are non-Hispanic white	13.4%	14.5%
<b>NH-Black</b>	Percent of inmates who are non-Hispanic black	73.3%	69.6%
<b>Hispanic</b>	Percent of inmates who are Hispanic	11.0%	13.0%
<b>NH-Other</b>	Percent of inmates that are non-Hispanic other	2.3%	2.9%
<b>LT HS</b>	Percent with less than a high school education	54.7%	53.6%
<b>HS</b>	Percent with a high school diploma	36.0%	36.7%
<b>College</b>	Percent with some college attendance or more	9.3%	9.8%

**Source:** Authors' calculations from the Survey of Inmates in Local Jails and the Cook County Sheriff's website.

148. *Id.* at 11.

**Table 2:**  
Mean Length of Stay, Legal Characteristics, and Criminal Offenses<sup>149</sup>

	Definition	Chicago	Cook County
<b>Days in Jail</b>	Number of days in jail	126.6	143.8
<b>Convicted</b>	Whether the inmate was convicted (1=Yes, 0=No)	18.1%	19.6%
<b>Felony</b>	Whether the controlling offense is a felony (1=Yes, 0=No)	78.5%	80.4%
<b>Misdemeanor</b>	Whether the controlling offense is a misdemeanor (1=Yes, 0=No)	17.0%	17.9%
<b>Both</b>	Whether the controlling offense is a both a misdemeanor and a felony (1=Yes, 0=No)	1.7%	1.7%
<b>Violent</b>	Whether the controlling offense for arrest is violent crime (1=Yes, 0=No)	31.1%	30.6%
<b>Property</b>	Whether the controlling offense for arrest is property crime (1=Yes, 0=No)	21.7%	25.0%
<b>Drug</b>	Whether the controlling offense for arrest is drug crime (1=Yes, 0=No)	37.9%	34.3%
<b>Other</b>	Whether the controlling offense for arrest is public order or other crime (1=Yes, 0=No)	9.3%	10.1%
<b>Lawyer</b>	Whether the inmate had a lawyer (1=Yes, 0=No)	97.3%	97.0%
<b>Public Defender</b>	Whether the inmate's lawyer was assigned by court (1=Yes, 0=No)	74.4%	69.9%
<b>Lawyer w/in 24 Hours</b>	Whether the inmate talked to lawyer about charges within 24 hours of arrest (1=Yes, 0=No)	26.1%	28.9%
<b>Lawyer w/in 168 Hours</b>	Whether the inmate talked to lawyer about charges between 24 and 168 hours (1 week) of arrest (1=Yes, 0=No)	21.1%	18.8%
<b>Lawyer after 168 Hours</b>	Whether the inmate talked to lawyer about charges more than 1 week after arrest (1=Yes, 0=No)	52.8%	52.2%
<b>No. Legal Conferences</b>	Number of times inmate talked to lawyer about charges before plea/trial	3.76	3.87

**Source:** Authors' calculations from the 2002 Survey of Inmates in Local Jails.

149. *Id.* at 12.

Table 3A<sup>150</sup>

The Total Fiscal Savings of Early Legal Representation Using Inmate Counts, Cook County

Correctional (Jail) Savings						
Change in Probability (Lawyer win 24 hours) (A)	Marginal Costs for 1 year in Jail (B)	Daily Cost (Marginal) (C) = (B)/365	Daily Cost (Average) (D)	Avg. Daily Inmate Count (E)	Avg. Difference in the Number of Days Jailed w/Early Legal Access (F)	Total (High) (Avg. Cost) (H) = (A*E+F)
-0.267	\$15,256	\$42	\$143	9351	123	\$ 43,914,755
						\$ 12,827,695

Source: Authors' calculations the Survey of Inmates in Local Jails, the Cook County Sheriff's website, and the Illinois Sentencing Advisory Council (ISAPAC) report.

Table 3B<sup>151</sup>

Alternative Estimation Method of the Total Fiscal Savings of Early Legal Representation Using Discharges, Cook County

Correctional (Jail) Savings						
Percent Discharged (A)	Mean Days in Jail (B)	Redistributed Percent Discharged (C)	Rewighted Mean Days in Jail (D) = (B) * (C)	Number of Detainees Discharged * Percentage (E) = 76,080 * (A)	Total (Low) (Marginal Cost) (F) = \$42 * (D) * (E)	Total (High) (Avg. Cost) (H) = \$143 * (D) * (E)
Posted Bond 32.0%	13.4	56.7%	7.6	24346	\$ 7,774,016	\$ 26,468,674
Sentence Expired 8.0%	33.2	14.2%	4.7	6086	\$ 1,203,812	\$ 4,098,694
Charges Dropped 15.9%	25.6	28.2%	7.2	12097	\$ 3,666,696	\$ 12,484,227
Not Convicted 0.5%	279.8	0.9%	2.5	380	\$ 39,630	\$ 134,932
<b>Total 56.4%</b>	<b>12.4</b>	<b>100.0%</b>	<b>22.0</b>	<b>42909</b>	<b>\$ 12,684,155</b>	<b>\$ 43,186,527</b>

Source: Authors' calculations of published aggregate statistics on time served in the Cook County Jail during 2012 from Table 3 of Olson (2013: 7). Row totals for columns F and H are summed across rows to allow for differential weighting in the mean length of stay for each discharge.

150. *Id.* at 15.  
151. *Id.*

**Table 4:**  
Number of Spatial Unit Closures in Cook County Jail, by Division<sup>152</sup>

Division	Maximum Number of Inmates w/in Division (A)	Spatial Units (Wings, Blocks, Stories, or Core/PODS) (B)	Inmates Per Unit of Space (C) = (A/B)	Number of Units to Close due to Reduction in Inmates (D) = $(-.267 * A) / (C)$
Division I (Blocks)	1250	8	156	-2.1
Division II + III Annex	870	4	218	-1.1
Division III <sup>1</sup>				
Division IV	704	16	44	-4.3
Division V	992	24	41	-6.4
Division VI	992	24	41	-6.4
Division IX (3-story)	1056	3	352	-0.8
Division XI (Core + 4 PODS)	1536	5	307	-1.3

**Source:** Authors' calculations of Cook County Jails taken from the Cook County Sheriff website.

152. *Id.* at 17. Division III is an overflow building that houses minimum and medium security male detainees during population spikes at the jail.

**Table 5:**  
Marginal Effects Estimates from a Probit Model Predicting the  
Likelihood of Conviction<sup>153</sup>

	<b>Unit Change in Conviction Probability</b>
<b>Lawyer w/in 24 Hours</b>	-0.267 *
<b>Lawyer w/in 168 Hours</b>	-0.190 *
<b>Public Defender</b>	-0.206 *
<b>Felony</b>	0.181 *
<b>Violent</b>	-0.044 *
<b>Property</b>	-0.167 *
<b>Drug</b>	-0.308 *
<b>Force</b>	-0.025 *
<b>Age</b>	-0.002 *
<b>Male</b>	-0.200*
<b>NH-Black</b>	0.173 *
<b>Hispanic</b>	-0.016
<b>HS</b>	-0.092*
<b>College</b>	0.198 *

\*  $p < .05$

**Source:** Authors' calculations of the Survey of Inmates in Local Jails.

153. *Id.* at 12. Obtaining legal access after one week, having a lawyer who is not a public defender, misdemeanors, public order and other offenses, women, whites, and less than a high school diploma are the reference groups for this model.