

Closing the gap

**Advances in youth access to
counsel at arrest**

Fair Trials is a global criminal justice watchdog, campaigning for fairness, equality, and justice in criminal legal systems. Operating in the European Union, the United Kingdom, the United States and Latin America, the organization seeks to expose deficiencies in criminal processes and highlight advances. In pursuit of that mission and drawing upon its international perspective, in 2020, Fair Trials published *Station House Counsel*, a report that documented the many ways in which immediate access to counsel promotes justice, establishes trust between law enforcement and the communities they serve, and improves transparency, legitimacy, and outcomes.

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Executive Summary

In law and practice, there exists in the United States a gaping chasm between the right to have counsel when one is arrested and the reality of procuring access to counsel in practice. This gap can vary from hours to days or even weeks, depending upon the law and practices of different localities. Therefore, while police are obligated by the historic *Miranda* decision to advise a person of their right to remain silent and have counsel provided, whether the individual exercises that right is a decision that must be made long before there will be an opportunity to consult with an attorney. That decision must also be made and maintained in a situation of extreme stress following arrest, most often without the opportunity to speak to anyone besides the arresting officers.

Not surprisingly, many do not exercise their right of silence. The inevitably coercive nature of police custody often induces people to provide authorities with self-incriminating information, even if that information is incomplete or false. Wrongful conviction is now a well-documented hallmark of the American legal system and false confession is a major contributor.

The problem is particularly acute among youth. Young people lack the societal power, experience, and cognitive maturity to adequately weigh the risks and benefits of waiving constitutional rights and to assert those rights in the high-pressure situation of arrest. Evidence shows clearly that youth are far more likely to waive the right to remain silent and make statements to police that are unreliable or inaccurate.

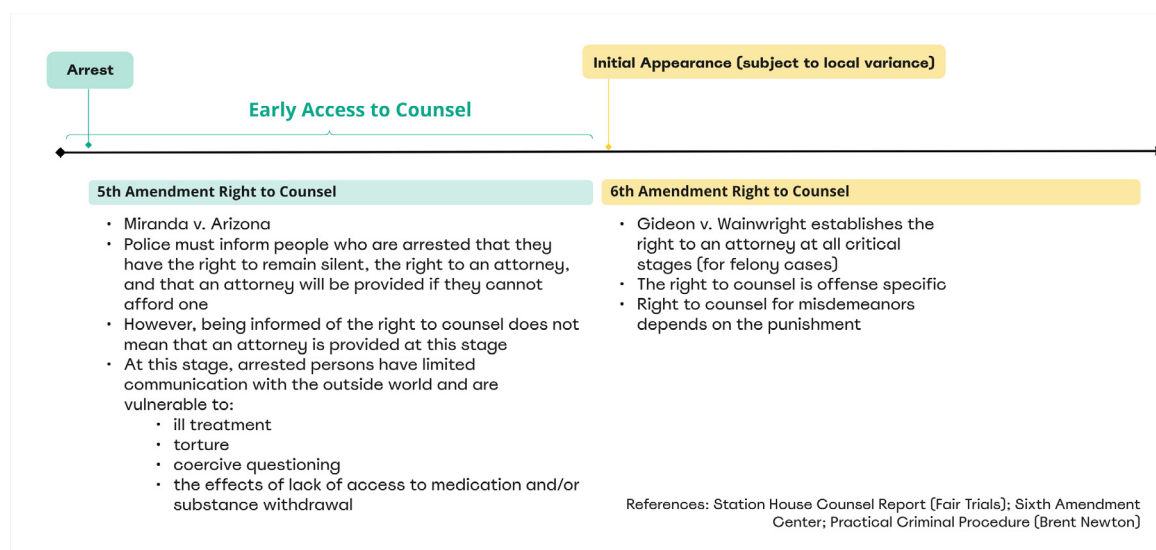
Outside the United States, in countries around the world, youth who are arrested have immediate access to counsel upon arrest, prior to, and during interrogation. In nations including the United Kingdom, additional safeguards are offered during custody, including independent social workers or “appropriate adults.” The United States, on the other hand, until very recently has persisted in treating youth in the same way as adults in the ways they are arrested and questioned by police.

However, the movement to provide early access to counsel to children has now taken root in the United States. It is still in its early stages, with only a handful of jurisdictions enacting the necessary legislation to make it a reality, and wide variations in how and when access is provided.

This report provides a snapshot of where this national movement stands as of September 2022. It should be noted that, in addition to the legislation studied in this report, states are also introducing a raft of ancillary legislation that extends arrest and custody rights to children, including bills banning the use of deception in police questioning of youth, and others that offer increased access to communication to attorneys and family members but do not go so far as to guarantee access to counsel. This report is limited to laws that ensure that a youth actually consults with a lawyer prior to interrogation.

Legal context

The report provides a primer on the right to counsel including an explanation of the interplay between the Fifth and Sixth Amendments which gives rise to the access to counsel gap.



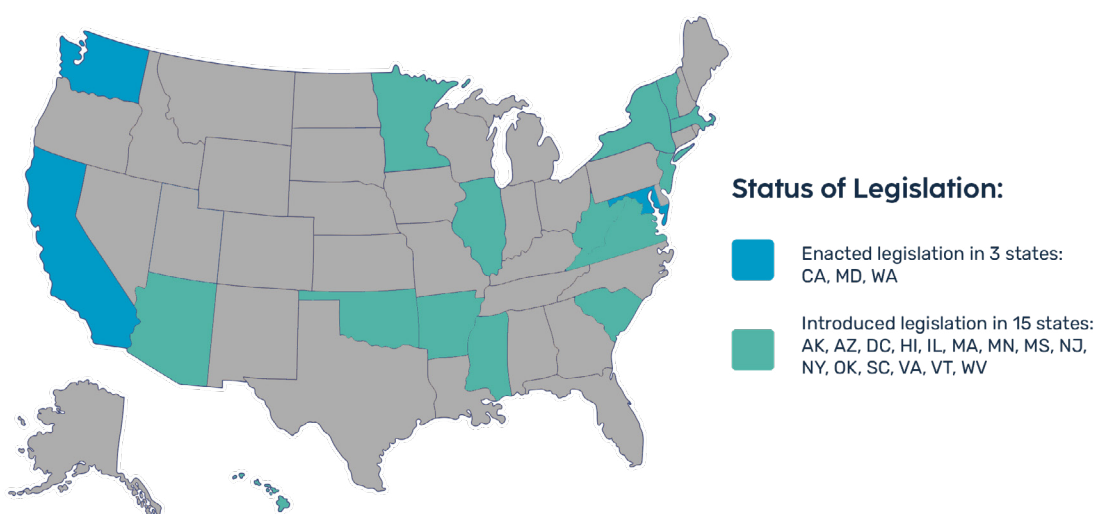
Special considerations relating to youth

This section provides an explication of the science and the experiential data that demonstrates the unique vulnerability of youth, which provides the rationale for the pressing necessity to address the access to counsel gap for the young.

Legislative state of play

Eighteen states have pursued *Miranda* legislation for youth;¹ three of those states have enacted legislation directed at providing early access to counsel for youth: California (SB 395² and SB 203³), Washington (H 1140)⁴ and Maryland (SB 53).⁵

A full database of both introduced and enacted legislation, tagged with searchable features of each bill, is available at: <https://airtable.com/shrnNXWFx36wic76D>.



¹ Fair Trials, Early Access to Counsel Legislative Database, available at <https://airtable.com/shrnNXWFx36wic76D>.

² S.B. 395, 2017 Leg. Reg. Sess., (Cal. 2017), available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB395.

³ S.B. 203, 2020 Leg. Reg. Sess., (Cal. 2020), available at <https://legiscan.com/CA/text/SB203/2019>.

⁴ H.B. 1140, 67th Leg. Reg. Sess., (Wash. 2021), available at <https://legiscan.com/WA/text/HB1140/2021>.

⁵ Child Interrogation Protection Act, S.B. 53, 444th Gen. Assemb., Reg. Sess., (Md. 2022), available at <https://legiscan.com/MD/text/SB53/id/2573731>.

The elements of reform

The report provides an analysis of how various legislative approaches seek to close the access to counsel gap:

Age thresholds

There is a range in the upper age limit to which the right to early access to counsel applies. This section explores that range, which spans the gamut from 14 to 17 years old, and includes amorphous definitions, such as “juvenile” and “child.”

Age ranges

Age threshold	Legislation
17	<ul style="list-style-type: none"> – <i>Under 18</i>: WA H 1140; DC B 24-0306; IL SB 1825; NJ S 269 – <i>17 and below</i>: VT H 593; CA SB 203; NY S 2800-b
15	<ul style="list-style-type: none"> – <i>Below 16</i>: HI HB 419; AK SB 500; OK HB 3524 – <i>15 and below</i>: CA SB 395; MS HB 480
14	<ul style="list-style-type: none"> – <i>Under 15</i>: AZ SB 1303
“juvenile”	<ul style="list-style-type: none"> – SC S 53; MA S 90; NJ S 269
“child”	<ul style="list-style-type: none"> – WV HB 3204; VA HB 746*; MD SB 53

Please note: When initially proposed, the text of VA HB 746 included a feature that guaranteed an attorney consultation prior to interrogation. However, this feature was deleted from the final text and is not included in the enacted legislation.⁶

Parental notification

Proposals require varying degrees of parental notification along with attorney notification prior to interrogation. Some require specification notification as to the location of the child and the nature of the charges, while some only require general notification; and some require actual notification and some only an attempt to notify.

Advisement of rights

Miranda sets the floor for what advice or rights must be provided following a custodial arrest, but various proposals rise above that floor to enhance the likelihood that a vulnerable accused youth will understand those rights, including the use of signage and developmentally appropriate language to reflect the unique cognitive state of youth

⁶ H.B. 746, 2020 Gen. Assemb., (Va. 2020), available at <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP0480>. (The final bill that was passed did not include access to counsel. However, when initially proposed, the bill included an attorney consultation prior to interrogation. This is the link for the original bill).

Communication with family members and or/attorney

Various proposals seek to address the reality that most jurisdictions do not specifically guarantee the right to communicate with a parent, guardian, or attorney prior to interrogation.

Electronic recordings utilized

Long before the movement to provide early access to counsel there has been progress in requiring the recordation of the entirety of an interrogation to contextualize and assess the voluntariness and reliability of a statement. This trend is reflected in proposals to expand early access to counsel for youth to ensure that there is a record of the circumstances that may have preceded an incriminating statement.

Waivers and admissibility

State legislation varies in the strength of their enforcement mechanisms for the right to counsel for youth – some prohibit any waiver of attorney consult, while some allow for waiver. Some make explicit the exclusion of statements taken in violation of the law, while others leave room for judicial discretion.

Key features of early access to counsel legislation

Key features	Legislation
Parental notification	MD SB 53; MN HF 2749; NY SB 2800-B; VT H 593
Communication with family members	HI H 419; OK HB 3524; VA HB 746*; WV H 3204
Consultation with an attorney (pre-interrogation)	AK SB 500; AZ SB 1303; CA SB 203; CA SB 395; DC B 24-0306; HI HB 419; IL SB 1825; MA S 90; MD SB 53; MN HF 2749; MS HB 480; NJ S 269; NY SB 2800-B; OK HB 3524; SC S 53; VA HB 746*; VT H 593; WA H 1140; WV HB 3204
Rules governing admissibility of evidence	AK SB 500; AZ SB 1303; CA SB 203; CA SB 395; DC B 24-0306; HI HB 419; IL SB 1825; MA S 90; MD SB 53; MN HF 2749; MS HB 480; NY SB 2800-b; OK HB 3524; SC S 53; VA HB 746*; VT H 593; WA H 1140; WV HB 3204
Cannot waive consult with an attorney	AK SB 500; CA SB 395; CA SB 203; IL SB 1825; MA S 90; MD SB 53; MN HF 2749; MS HB 480; NJ S 269; NY 2800-b; WA H 1140
Advisement of rights (signage, scripts, appropriate language, etc.)	CA SB 203; DC B 24-0306; IL SB 1825
Data collection	AZ SB 1303; WA H 1140

Key features	Legislation
Electronic recording utilized	AZ SB 1303; IL SB 1825; MA S 90; MD SB 53; OK HB 3524; VT H 593

Please note, legislation is current through September 2022. A legislative database that includes the name of each bill, the status, excerpts of the legislation, and key features can be accessed via <https://airtable.com/shrnNXWFx36wic76D>. Links to each bill are also included at this website. When initially proposed, the text of VA HB 746 included a feature that guaranteed an attorney consultation prior to interrogation. However, this feature was deleted from the final text and is not included in the enacted legislation.⁷

Representation models

What is the most effective modality for providing a legal consultation prior to interrogation? The report looks at various modalities including phone, video conference or in-person, and looks at the trade-offs in terms of the nature and quality of the consultation and the ability to provide for a client's needs and protect their legal, medical, and emotional interests.

International approaches

In seeking to close the access to counsel gap, the United States is not writing on a blank slate. Drawing upon Fair Trials' global perspective, the report highlights comparative models from around the world to demonstrate how nations spanning the globe from the UK to Africa and from the European Union to Asia have taken bold steps to provide access to legal counsel at arrest. It also references the recently published *Principles on Effective Interviewing for Investigations and Information Gathering*, (known as the "Mendez Principles,") which establish interrogation benchmarks based upon international law and scientific principles and mandate the unwaivable presence of an attorney for any child interviewed as a suspect.

By cataloguing in-depth the various features of introduced and adopted bills, we hope to provide a resource for state advocates and lawmakers seeking to join the growing movement toward expanding right of youth to access counsel upon arrest, and to encourage the strongest possible safeguards and most effective legislation.

⁷ H.B. 746, 2020 Gen. Assemb., (Va. 2020), available at <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP0480>. (The final bill that was passed did not include access to counsel. However, when initially proposed, the bill included an attorney consultation prior to interrogation. This is the link for the original bill).

Introduction

Fair Trials and NORC at the University of Chicago have undertaken a multiyear study, funded by Arnold Ventures, of the implementation of California Senate Bills 395 and 203, which require that youth be advised by an attorney before they decide whether to waive their right to silence. Fair Trials is a human rights organization and global criminal watchdog. NORC is a nonpartisan and objective research organization based at the University of Chicago.

This project seeks to analyze implementation efforts in California while also supporting efforts to expand early access to counsel for youth across the United States. In tracking and analyzing impacts for youth, this report reflects the current state of reform efforts which is exclusively focused on early access to counsel for youth.

Towards that aim, this landscape scan offers a snapshot of the status of early access to counsel legislation, policy, and practice in the United States. The information presented in this report is current through September 2022. It also contextualizes recent state-level reforms within wider international movements to secure access to counsel post-arrest, prior to, and during interrogation.

Primer: the right to counsel

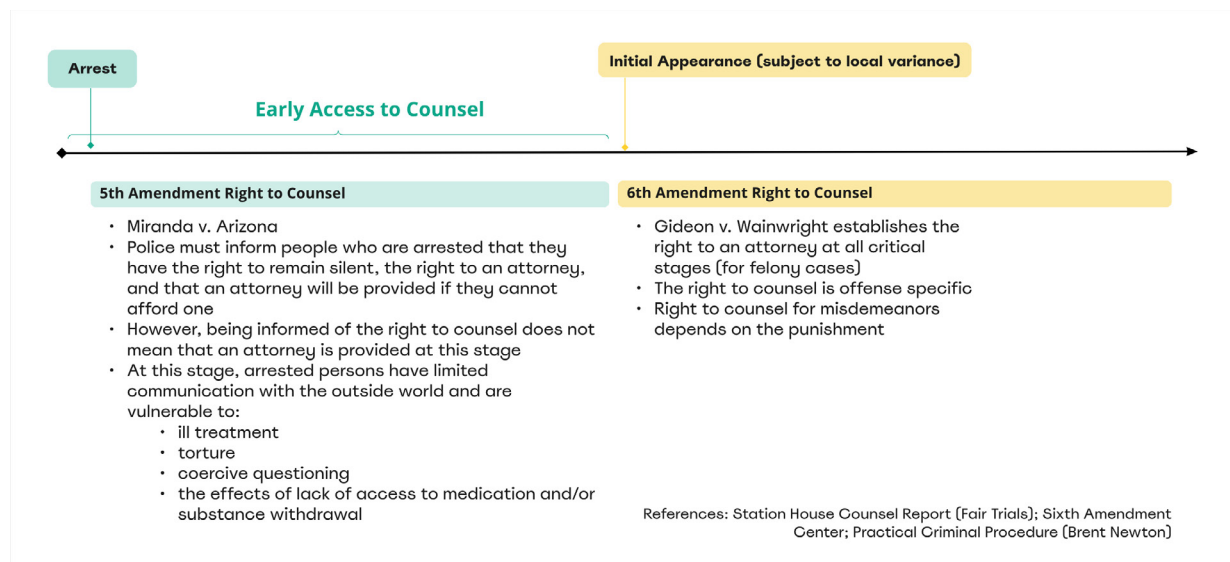
Despite the prominence of *Miranda* rights in popular culture, the actual scope of access to counsel is not well understood by most Americans.⁸ The mechanics of when, how, and where the right to counsel attaches is widely misunderstood as being more expansive than it is in practice. Furthermore, these rights are triggered during an acute crisis, that is, in the moments following arrest. Practically speaking, understanding the right to counsel is an experiential education that people who are arrested are left to navigate alone.

The common understanding of the right to counsel, confirmed by the text of the *Miranda* warning itself, is that an attorney will be provided for those who cannot afford to hire one. A person who has not been through the experience of being arrested and detained may therefore expect that if they invoke the right to counsel, that counsel will be afforded to them following invocation.

However, this is generally not the case in practice. The right to counsel has two iterations, spanning both the 5th Amendment and the 6th Amendment. The gap in protection for the right to counsel in the 5th Amendment context as opposed to the 6th Amendment context helps to explain why counsel is rarely present in the arrest context, even when a person who is arrested demands access to counsel.

⁸ Ronald Steiner, Rebecca Bauer, & Rohit Talwar, The Rise and Fall of the *Miranda* Warnings in Popular Culture, 59 Clev. St. L. Rev. 219 (2011), available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol59/iss2/4>.

Figure 1: The fifth and sixth amendment right to counsel



The typical understanding of the right to counsel – when an attorney appears in a court case to represent their client—is predicated on the 6th Amendment. Under the 6th Amendment protection, which is enshrined in *Gideon v. Wainwright*, the Supreme Court explicitly states that “the Sixth Amendment’s guarantee of counsel is a fundamental right essential to a fair trial.”⁹ In short, this guarantees that an attorney will be provided to anyone who is unable to afford one and that the attorney will represent their client at all critical phases of legal proceedings – those connected with a trial. In this analysis, legal representation thus begins at the earliest at an initial court hearing. However, the initial court hearing is too late in that it leaves the person who has been arrested to navigate the “black hole [...] that happens between arrest and when you get to meet a lawyer”¹⁰ – alone. This formalistic understanding of when the 6th Amendment right to counsel begins also obscures the extent to which many legal processes, including warrants, searches, charging, and detention, have already begun before an arrested person appears in court and meets a lawyer for the first time.

The 5th Amendment right to counsel, on the other hand, was addressed in 1966 in the famed *Miranda v. Arizona*¹¹ case, which held that additional preventative procedural rights were necessary in order to assist people in custody to assert their rights in the inherently coercive environment of custodial detention. That decision required what is now known as the “*Miranda* warning,” which reminds suspects in police custody of their rights to silence, to counsel, and to protection from self-incrimination, and also makes inadmissible any statements taken in contravention of this principle unless the person under arrest makes a voluntary, knowing, and intelligent waiver of those rights. If the person under arrest indicates in any way that they wish to remain silent or to speak to a lawyer, all efforts at interrogation must cease until access to a lawyer – provided by the state, in the case of indigency – is provided.

Whether an individual invokes their *Miranda* right to counsel during an interrogation or decides to waive it, as the system currently operates he or she is unlikely to meet their appointed attorney prior

⁹ *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

¹⁰ Premal Dharia, Webinar: “Station House Counsel – Shifting the Balance of Power between Citizen and State,” Fair Trials, (9:20 – 9:54 timestamp) available at <https://www.youtube.com/watch?v=1DawLeqqGU4>.

¹¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

to a first court appearance, which can occur hours, days, or longer after the arrest.¹² This delay in practical access to counsel,¹³ once invoked, is due to a confluence of factors including lack of clarity in statute, lack of administrative ability to appoint counsel prior to court, lack of sufficient funding for indigent defense, and logistical hurdles, including the potential for undetected conflicts for defense counsel.¹⁴ This complex of logistical, administrative, and statutory challenges means that, in practice, people with the resources to retain counsel independently are often able to access counsel at some point in the post-arrest, pre-court period during which interrogation is most likely, while people with fewer resources cannot.¹⁵ This unequal situation defies the spirit of *Miranda*, in which Justice Warren wrote, “[d]enial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in [*Gideon v. Wainwright*].”¹⁶ As a result of these barriers to access to counsel upon arrest, the vast majority of people who are arrested in the United States are still held in a situation of incommunicado detention in the interim period between arrest and their first court hearing – the very practice *Miranda* sought to end.¹⁷ Too often, people fall through the cracks in the legal system, with some waiting weeks to months before speaking to an attorney.¹⁸

When an attorney is assigned for the first time at the initial hearing or later, meaningful opportunities for legal intervention on behalf of people who are arrested have passed. The interim period between an arrest and an initial hearing is a critical time period in which a person accused of a crime must navigate the system alone, exposed to isolation and the possibility of ill treatment, coercion, and possibly abuse.¹⁹ A detained individual may also face disruptions in medication and lack of access to medical care.²⁰ They may also be subject to poor conditions of confinement in police custody with no effective oversight.²¹ Even a short period of detention in police custody can trigger crises in employment, schooling, childcare, and other care responsibilities.²² The interim period between arrest and an initial hearing is a period in which, in addition to conducting questioning, the state frames charges and recommendations for pre-trial detention without providing the defense with the same opportunity to intervene.²³ When lawyers are able to access people in the early hours post-

¹² *Frequently Asked Questions (FAQs)*, The Public Defender Service, available at [https://www.pdsdc.org/need-legal-advice/frequently-asked-questions-\(faqs\)](https://www.pdsdc.org/need-legal-advice/frequently-asked-questions-(faqs)); Premal Dharia, Webinar: “Station House Counsel - Shifting the Balance of Power between Citizen and State,” Fair Trials, (8:46 – 9:12 timestamp), available at <https://www.youtube.com/watch?v=1DawLeqqGU4>, (“The way that our court system is structured is really grounded in counsel, [...] sort of activating or attaching at the first judicial proceeding [...] starting to represent people when [...] court starts, when they make their first appearance in court.”).

¹³ *Station House Counsel: Shifting the Balance of Power Between Citizen and State*, Fair Trials, 5 (Oct. 2020), available at <https://www.fairtrials.org/articles/publications/station-house-counsel/>.

¹⁴ Shubhangi Deoras, Norman Lefstein, & American Bar Association. *Gideon’s broken promise: America’s continuing quest for equal justice: a report on the American Bar Association’s hearings on the right to counsel in criminal proceedings*. Chicago, IL: American Bar Association, iv-v, 7-28 (2004), available at <https://www.in.gov/publicdefender/files/ABAGideonsBrokenPromise.pdf>.

¹⁵ *Our Issues*, Equal Justice Under the Law, available at <https://equaljusticeunderlaw.org/overview>.

¹⁶ *Miranda v. Arizona*, 384 U.S. 436, 472-473 (1966).

¹⁷ Deoras, *supra* n. 7 at 22-23

¹⁸ *Id.*

¹⁹ *The Mendez Principles*, para. 67, available at https://www.apr.ch/sites/default/files/publications/apr_PoEI_EN_11.pdf.

²⁰ Keri Blakinger, *Prisons Have a Health Care Issue – And It Starts at the Top, Critics Say*, The Marshall Project (April 7, 2022), available at <https://www.themarshallproject.org/2021/07/01/prisons-have-a-health-care-issue-and-it-starts-at-the-top-critics-say>

²¹ Katherine Rohde, Taylor Ross & Caitlin Kim, *Reforming Health Care for Patients in Prison*, The Regulatory Review, (Feb. 12, 2022), available at <https://www.theregreview.org/2022/02/12/saturday-seminar-reforming-health-care-patients-prison/>.

²² Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stanford L. Rev., 711, 713 (2017), available at <https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/02/69-Stan-L-Rev-711.pdf>.

²³ Angela Davis, *The American Prosecutor – Power, Discretion, and Misconduct*, Criminal Law Commons, 24, 27 (2008), available at <https://core.ac.uk/download/pdf/327252881.pdf>.

arrest and prior to interrogation they may be able to do more than prevent unlawful questioning but can also protect other fundamental rights, communicate directly with police and prosecutors, and begin to mount a defense. Furthermore, ensuring early access to counsel can increase transparency by opening the process of arrest and police detention to the independent oversight of appointed defense attorneys and the community. This in turn provides law enforcement with the opportunity to establish greater trust with both people who are arrested, and the communities from which they come – thus improving public safety outcomes, transparency, and legitimacy.

The 2020 report by Fair Trials, **Station House Counsel**, illustrates the importance of having early and immediate access to an attorney. The findings of the report highlight the critical function of early access to counsel, stating:

Lawyers in police station[s] defend the rights of their clients at the time they are most vulnerable. Through confidential and private meetings, they can:

- Make sure their clients understand their rights – in particular, the right to remain silent. Although the police have the obligation to notify individuals of these rights, lawyers are best placed to explain their rights to individuals who have been arrested and the consequences of waiving them;
- Gather information from their client, which may help them secure a pre-trial release;
- Investigate arrest and detention conditions and treatment by the police and detect and challenge abuses;
- Assess their client's fitness for the interrogation and identify medical, mental health and cognitive or linguistic differences that may impact investigation and interrogation;
- Assist clients to arrange childcare coverage and to contact employers, family members etc.;
- Explain what is likely to happen during the court process and why; and,
- Advocate for immediate discharge from unlawful arrest, encourage diversion from prosecution and help people who are arrested access services, family and community resources"²⁴

Despite the existence of the *Miranda* warning, the legacy of *Miranda* remains unfulfilled. The theoretical exclusion of statements taken without a *Miranda* warning is not a sufficient regulatory tool on its own to ensure the elimination of incommunicado detention and coerced statements. Too often people waive their rights to silence and to counsel under pressure from police and without practical access to a lawyer. Beyond protection of these rights, early access to counsel can also advance important public safety, community health, and decarceral goals.

Access to counsel for youth

Four years after the Supreme Court enshrined the right to counsel in *Gideon v. Wainwright*, the Supreme Court added additional protections for youth. In 1967, *In re Gault*²⁵ established the constitutional right for youth to have an attorney present during court proceedings.²⁶ Unfortunately, neither legislation nor case law have kept pace with the alarming

²⁴ *Station House Counsel: Shifting the Balance of Power Between Citizen and State*, Fair Trials, 5 (Oct. 2020), available at <https://www.fairtrials.org/articles/publications/station-house-counsel/>.

²⁵ *In re Gault*, 387 U.S. 1 (1967).

²⁶ *Youth Interrogations & Access to Counsel*, Juvenile Law Center, available at <https://jlc.org/issues/access-counsel>.

statistics about the vulnerability of youth to abuses of state power in the penal system, especially in relation to the perilous hours post-arrest and during interrogation.

In response to the growing recognition that procedural guidelines developed for adults are insufficient to protect the rights of youth, legislatures are beginning to codify additional safeguards for youth who are arrested while explicitly noting their unique developmental and cognitive considerations.

An excerpt from the Jeff Adachi Youth Rights Ordinance, a 2019 San Francisco city ordinance²⁷ that paved the way for California SB 395 and SB 203, expands on the interplay between Miranda Rights and youth brain development:

“Developmental and neurological sciences suggest that the brain’s cognitive function continues to develop through young adulthood. Youths aged 16 and 17 generally have not yet formed the mental capacity, on their own, to understand [Miranda] rights. Youths aged 16 and 17 also often lack the experience and maturity to understand [Miranda] rights. The Flesch-Kincaid readability test, which is one of the most widely used tools for assessing readability of written materials, indicates that to understand [Miranda] rights, a person must have at least a twelfth-grade reading comprehension level. Most 16-and 17- year-olds are in the tenth and eleventh-grade, and many lack a twelfth grade reading comprehension level.

*An extensive body of literature demonstrates that juveniles are more suggestible than adults, may easily be influenced by questioning from authority figures, and may provide inaccurate reports when questioned in a leading, repeated, and suggestive fashion. (In *J.D.B. v. North Carolina*, 131 U.S. 2394 (2012)). Recent research has shown that more than one-third (35%) of proven false confessions were obtained from suspects under the age of 18. (Drizen & Leo, *The Problem of False Confessions in the Post-DNA World* (2004) 82 N.C.L. Rev. 891, 902, 944-945. fn 5. The leading study of 125 proven false confession cases, cited by the Supreme Court in *Corley v. U.S.*, 129 U.S. 1558 (2009) and *J.D.B. v. North Carolina* 131 U.S. 2394 (2012), found that 63% of false confessors were under the age of 25, and 32% were under the age of 18. In another respected study of 340 exonerations that have taken place since 1989 (Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95. J. Crim. L. & Criminology 523-52(2005)), researchers found that juveniles under the age of 18 were three times as likely to falsely confess as adults; a full 42% of juvenile exonerees had falsely confessed, compared to only 13% of wrongfully convicted adults [sic] In another study, an examination of 103 wrongful convictions of factually innocent teenagers and children found that a false confession contributed to 31.1% of the juvenile cases studied, as compared against only 17.8% of adult wrongful convictions. (Joshua A. Tepfer, Laura H. Nirider, & Lynda Tricarico, *Arresting Development: Convictions of Innocent Youth*, 64 Rutgers L. Rev. 887, 904 (2010).”*

As reflected in the research cited in the Jeff Adachi Act, youth are in an especially perilous position in the immediate hours post arrest and during interrogation due to the interplay between comprehension of their *Miranda* rights and their cognitive development.²⁸ At a minimum, early access to counsel for youth would serve as a guardrail for youth given their unique developmental circumstances. As the Juvenile Law Center explains,

²⁷ The Jeff Adachi Youth Rights Ordinance, S.F. Cal., Code ch. 96C(d) (2019), available at <https://sfbos.org/sites/default/files/o0041-19.pdf>.

²⁸ *Id.*

research on adolescent development and neuroscience explains why youth are uniquely vulnerable to coercive interrogation tactics and why they waive their Miranda rights at such high rates. Teenagers prioritize short-term benefits over long-term consequences and are especially prone to comply with the requests of authority figures like police. During adolescence, the reward-seeking part of the brain is highly active, while the frontal lobe, which governs measured decision-making, is still developing.²⁹

As a result of their still-developing cognition, youth are more likely to waive the right to counsel and the right to silence and to make statements to police that are unreliable or inaccurate.³⁰ Despite this scientific evidence, youth continue to be treated like adults with no adaptation in the procedural rights or the substance or delivery of the *Miranda* warning to account for their limited ability to process this information and to assert their rights as unaccompanied youth in the face of adult police officers with the full force of the law behind them.

Although the research on youth cognition is compelling as to the specific urgency of special *Miranda* protections for youth, statistics like those cited in the Jeff Adachi Act do not speak exclusively to vulnerabilities experienced by young people yet apply also to many adults. For example, literacy rates of adults who are arrested are similarly low as in the youth population, with as many as 75% of adults who are detained being identified as lacking literacy.³¹ Therefore, the extent to which enhanced *Miranda* rights can be shown to improve outcomes and experiences for arrested youth may also be applicable to many adults who are arrested.³² Early access to counsel ensures safeguards are in place to protect constitutional rights; consequently, negative outcomes, such as wrongful convictions, are avoided. Reasons for exonerations of adults and youth are also broadly similar. The National Registry of Exonerations has documented 3,105 exonerations since 1989, which accounts for over 27,080 years spent behind bars for those wrongfully convicted.³³ The same five factors are documented as the leading causes of wrongful convictions for both adults and youth: mistaken witness ID, perjury or false accusation, false confession, false or misleading forensic evidence, and official misconduct.³⁴ Therefore, early access to counsel at the point of interrogation not only protects clients from factors that can lead to wrongful convictions, but also has a downstream effect that ensures robust safeguards throughout the entire criminal process.

Legislative initiatives in the United States

In order to address the gaps in practical protection of 5th and 6th Amendment rights in the decades following the *Gideon*, *Miranda*, and *In re Gault* decisions, states have undertaken legislative initiatives to bolster *Miranda* rights. Given that *Miranda* rights are understood as a prophylactic, not a substantive right, states can legislate above the minimum guidelines. Further, the 5th and 6th Amendment rights can be understood as a floor, not a ceiling, in which legislation can rise above the threshold set by federal case law.

Best conceptualized as a spectrum, some early access to counsel legislation offers additional protection, though minimal, while other legislation is robust and offers expanded protection for

²⁹ *Youth Interrogations & Access to Counsel*, Juvenile Law Center, available at <https://jlc.org/issues/access-counsel>.

³⁰ The Jeff Adachi Youth Rights Ordinance, *supra* n. 25.

³¹ Michael Sainato, *US Prison System Plagued by High Illiteracy Rates*, The Observer, (July 18, 2017), available at <https://observer.com/2017/07/prison-illiteracy-criminal-justice-reform/>.

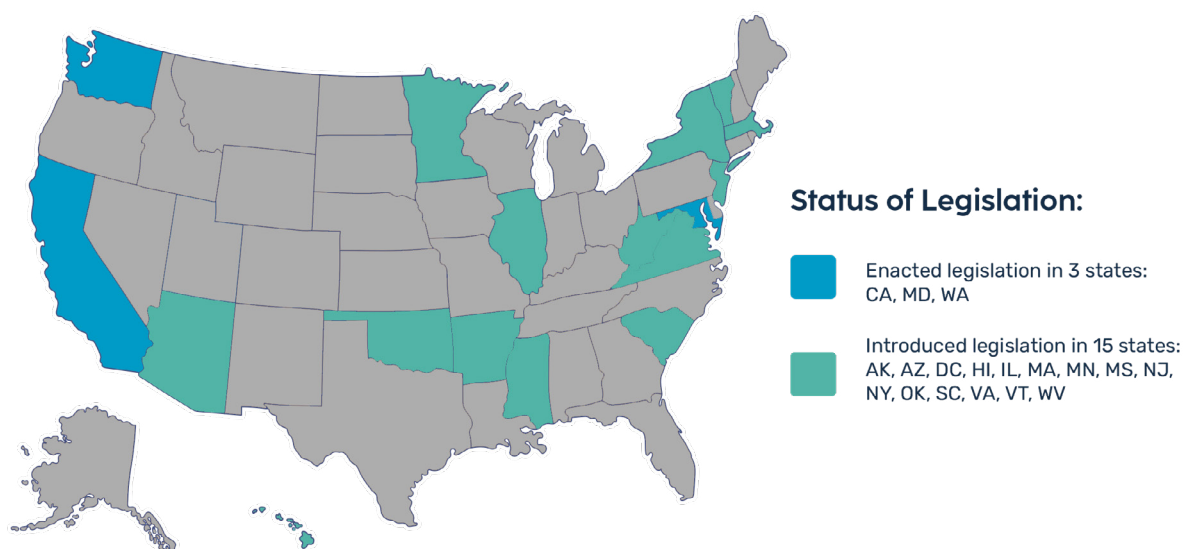
³² *Id.*

³³ National Registry of Exonerations, available at <https://www.law.umich.edu/special/exoneration/Pages/about.aspx>.

³⁴ *Id.*

individuals who are arrested. Eighteen states have pursued *Miranda* legislation for youth;³⁵ three of those states have enacted legislation directed at providing early access to counsel for youth: California (SB 395³⁶ and SB 203³⁷), Washington (H 1140),³⁸ and Maryland (SB 53).³⁹ See Figure 2 below.

Figure 2: Status map



In the following pages, we discuss key features of early access to counsel legislation across states, including age thresholds, parental notification, time limits, communication with family members, audio visual recordings, admissibility of evidence, consultations with an attorney, waivers, advisal of rights, data collection, and consent to search.

Table 1: Key features of early access to counsel legislation

Key features	Legislation
Parental notification	MD SB 53; MN HF 2749; NY SB 2800-C; VT H 593
Communication with family members	HI H 419; OK HB 3524; VA HB 746*; WV H 3204
Consultation with an attorney (pre-interrogation)	AK SB 500; AZ SB 1303; CA SB 203; CA SB 395; DC B 24-0306; HI HB 419; IL SB 1825; MA S 90; MD SB 53; MN HF 2749; MS HB 480; NJ S 269; NY SB 2800-C; OK HB 3524; SC S 53; VA HB 746*; VT H 593; WA H 1140; WV HB 3204

³⁵ Fair Trials, Early Access to Counsel Legislative Database, available at <https://airtable.com/shrnNXWFx36wic76D>.

³⁶ S.B. 395, 2017 Leg. Reg. Sess., (Cal. 2017), available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB395.

³⁷ S.B. 203, 2020 Leg. Reg. Sess., (Cal. 2020), available at <https://legiscan.com/CA/text/SB203/2019>.

³⁸ H.B. 1140, 67th Leg. Reg. Sess., (Wash. 2021), available at <https://legiscan.com/WA/text/HB1140/2021>.

³⁹ Child Interrogation Protection Act, S.B. 53, 444th Gen. Assemb., Reg. Sess., (Md. 2022), available at <https://legiscan.com/MD/text/SB53/id/2573731>.

Key features	Legislation
Rules governing admissibility of evidence	AK SB 500; AZ SB 1303; CA SB 203; CA SB 395; DC B 24-0306; HI HB 419; IL SB 1825; MA S 90; MD SB 53; MN HF 2749; MS HB 480; NY SB 2800-b; OK HB 3524; SC S 53; VA HB 746*; VT H 593; WA H 1140; WV HB 3204
Cannot waive consult with an attorney	AK SB 500; CA SB 395; CA SB 203; IL SB 1825; MA S 90; MD SB 53; MN HF 2749; MS HB 480; NJ S 269; NY 2800-C; WA H 1140
Advisement of rights (signage, scripts, appropriate language, etc.)	CA SB 203; DC B 24-0306; IL SB 1825
Data collection	AZ SB 1303; WA H 1140
Electronic recording utilized	AZ SB 1303; IL SB 1825; MA S 90; MD SB 53; OK HB 3524; VT H 593

Please note: legislation is current through September 2022. A legislative database that includes the name of each bill, the status, excerpts of the legislation, and key features can be accessed via <https://airtable.com/shrnNXWFx36wic76D>. Links to each bill are also included at this website. When initially proposed, the text of VA HB 746 included a feature that guaranteed an attorney consultation prior to interrogation. However, this feature was deleted from the final text and is not included in the enacted legislation.⁴⁰

Age thresholds

Legislatures have introduced or passed early access to counsel bills that apply to youth in a variety of states. However, the age threshold at which early access to counsel protections apply varies across states.

For example, legislation in Washington (H 1140) establish the age threshold at 17 years old and below.⁴¹ Other states, such as Arizona (SB 1303) proposed that early access to counsel legislation protect those below 15 years old.⁴² Even within the same state, the age threshold has evolved. For example, in California, the age limit was raised to include older youth as *Miranda* efforts progressed from SB 395⁴³ (15 years old and younger) to SB 203⁴⁴ (17 years old and younger). The table below includes both enacted and introduced legislation that illustrates the range of age thresholds that have been considered.

⁴⁰ H.B. 746, 2020 Gen. Assemb., (Va. 2020), available at <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP0480>. (The final bill that was passed did not include access to counsel. However, when initially proposed, the bill included an attorney consultation prior to interrogation. This is the link for the original bill).

⁴¹ H.B. 1140, 67th Leg., Reg. Sess., (Wash. 2021), available at <https://legiscan.com/WA/text/HB1140/2021>.

⁴² S.B. 1303, 55th Leg., 2nd Reg. Sess., (Ariz. 2022), available at <https://www.azleg.gov/legtext/55leg/2r/bills/sb1303p.pdf>.

⁴³ S.B. 395, 2017 Leg., Reg. Sess., (Cal. 2017), available at https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=20170180SB395.

⁴⁴ S.B. 203, 2020 Leg., Reg. Sess., (Cal. 2020), available at <https://legiscan.com/CA/text/SB203/2019>.

Table 2: Age ranges

Age threshold	Legislation
17	<i>Under 18:</i> WA H 1140; DC B 24-0306; IL SB 1825; NJ 269 <i>17 and below:</i> VT H 593; CA SB 203; NY S 2800-B
15	<i>Below 16:</i> HI HB 419; AK SB 500; OK HB 3524 <i>15 and below:</i> CA SB 395; MS HB 480
14	<i>Under 15:</i> AZ SB 1303
"juvenile"	SC S 53; MA S 90; NJ S 269
"child"	WV HB 3204; VA HB 746*; MD SB 53

Please note: Legislation is current through September 2022. Links to each bill can be found on the legislative database via <https://airtable.com/shrnNXWFx36wic76D>. When initially proposed, the text of VA HB 746 included a feature that guaranteed an attorney consultation prior to interrogation. However, this feature was deleted from the final text and is not included in the enacted legislation.⁴⁵

Parental notification

Some states also explicitly provide for parental notification in addition to notifying an attorney prior to interrogation. Parental notification ranges from a general notice that their child has been taken into custody to a specific notice that includes details such as their current location, what charges he or she may face, and their child's rights.

For example, Minnesota's Bill HF 2749 requires reasonable effort be made to notify a parent or guardian; it specifies that "a peace officer shall make every reasonable effort to notify the parent, guardian, or custodian of the child that: a) an officer intends to initiate a custodial interrogation and b) the child will consult with an attorney before the interrogation."⁴⁶ However, the bill allows the interrogation to commence if "the officer is unable to contact the parent [...] and additional attempts would unreasonably delay the interrogation."⁴⁷

Maryland defines parental notification in SB 53 as the "actual notice to the child's parents, guardian, or custodian; requiring the notice to include the child's location, the reason for the custody action or charge, and instructions on how to make in-person contact"⁴⁸ New York's Bill NY S2800 proposes that parental notification be given at the earliest opportunity which is before the youth is transported

⁴⁵ H.B. 746, 2020 Gen. Assemb., (Va. 2020), available at <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP0480>. (The final bill that was passed did not include access to counsel. However, when initially proposed, the bill included an attorney consultation prior to interrogation. This is the link for the original bill).

⁴⁶ H.F. 2749, 92nd Leg. (Minn. 2022), available at https://www.revisor.mn.gov/bills/text.php?number=HF2749&session=ls92&version=list&session_number=0&session_year=2022&keyword_type=all&keyword=interrogation&format=pdf.

⁴⁷ *Id.*

⁴⁸ Child Interrogation Protection Act, S.B. 53, 444th Gen. Assemb., Reg. Sess., (Md. 2022), available at <https://legiscan.com/MD/text/SB53/id/2573731>.

to the station: “If an officer takes such child into custody [...] before transporting the child to the police station house, notify the parent or other person legally responsible for the child’s care.”⁴⁹

Advisement of rights

Miranda rights are the bedrock of this cadre of legislation. Some states have risen above the standard *Miranda* advisal of rights by including creative features in their legislation, such as signage requirements, sample scripts, and developmentally appropriate language.

Reflecting the unique cognitive stage of youth, many states have instructed law enforcement to use developmentally appropriate language. Referencing Supreme Court jurisprudence, California’s enacted SB 203 clearly frames the need to use accessible and easily understood advisal of rights. An excerpt of SB 203 reads:

Developmental and neurological science concludes that the process of brain development continues into adulthood, and that the human brain undergoes significant changes throughout adolescence and well into young adulthood [...]. Children are generally more vulnerable to outside influences than adults and have limited understandings of the criminal justice system and the roles of institutional actors within it.”⁵⁰

Lastly, DC’s Youth Rights Amendment Act of 2021 does not include a script but does offer guidance on the manner in which the advisal of rights should be administered, noting a minor should be “advised by a law enforcement officer in a developmentally appropriate manner using plain and simple language delivered in a calm demeanor.”⁵¹

Communication with family members and or/attorney

Despite the common belief that once arrested a person has the right to a phone call to a loved one beyond the right to access counsel, most jurisdictions do not specifically guarantee the right to communication with family or others. International human rights law specifies that both the right to communicate with family and the right to access counsel are independently protected, particularly in the case of youth.⁵²

Some of the bills included in this document address directly the right to communicate with family. Some allow the arrested youth to communicate with a parent “or” an attorney. By contrast, other bills offer communication with both the guardian “and” an attorney. Virginia Bill HB 746 proposed clear language to guarantee the most protection to a youth, stating: “prior to the custodial interrogation of a child, the child *shall* (emphasis added) (i) consult with legal counsel in person, by telephone, or by video conference and (ii) have contact with his parent, guardian, legal custodial, or other person standing in loco parentis in person, by telephone, or by video conference.”⁵³

⁴⁹ S2800C, 2021 Leg. Reg. Sess., (N.Y. 2021), available at <https://www.nysenate.gov/legislation/bills/2021/S2800>.

⁵⁰ S.B. 203, 2020 Leg. Reg. Sess., (Cal. 2020), available at <https://legiscan.com/CA/text/SB203/2019>.

⁵¹ Youth Rights Amendment Act of 2021, B24-0306, Committee on the Judiciary & Public Safety, (D.C. 2021), available at <https://lirms.dccouncil.us/downloads/LIMS/47384/Introduction/B24-0306-Introduction.pdf>.

⁵² Samantha Black, *International Law Right to Timely and Confidential Access to Counsel Report*, Lawyers’ Right Watch Canada, (Jan. 23, 2017), available at <https://www.lrwc.org/wp-content/uploads/2017/01/LRWC.Right-to-Counsel-Memo.Part-I-22.01.17.pdf>; Art. 37(d) and 40(2)(b)(ii) of the CRC; Committee on the Rights of the Child, CRC/C/GC/10, General Comment No. 10 (2007), Children’s rights in juvenile justice, (April 25 2007), paras. 49–50; UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, (Dec. 23, 201), Article 17(d), available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-all-persons-enforced>.

⁵³ H.B. 746, 2020 Gen. Assemb., (Va. 2020), available at <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP0480>. (The final bill that was passed did not include access to counsel. However, when initially proposed, the bill included an attorney consultation prior to interrogation. This is the link for the original bill proposed).

Though the bill that was ultimately enacted removed this language, the initial proposal would have required that the child speak to an attorney and a parent before the interrogation begins.⁵⁴

Electronic recordings utilized

Currently, thirty states and the District of Columbia mandate some types of custodial interrogations be recorded.⁵⁵ This trend is also reflected in some of the *Miranda* bills for youth highlighted here. Best practices recommend that the entire interrogation, not just a statement, be recorded.⁵⁶ Having a recording of the interrogation not only deters coercion or ill treatment but can also be used by advocates to exonerate those wrongfully accused.⁵⁷ However, early access to counsel legislation varies among states in terms of what is required to be recorded; some bills only require that the statement be recorded while other bills stipulate that the entire interrogation is recorded.

Arizona's SB 1303, requires recordings when a statement is made by the youth: "any oral, written or sign language statement that is made by a juvenile during an interrogation of a juvenile who is in the custody of a law enforcement officer or law enforcement agency shall be electronically recorded in its entirety and shall remain substantially accurate and not intentionally altered."⁵⁸ The bill also mandates that recordings cannot be destroyed or altered until the final disposition of the case.⁵⁹

Massachusetts Bill S 90 not only requires recording of the entire interrogation, including the *Miranda* rights, but prohibits waiving the recording: "the requirement that the custodial interrogation be audio and video recorded may not be waived by the juvenile or by any person on the juvenile's behalf."⁶⁰ Additionally, the bill stipulates that the recording is "automatically discoverable and shall be preserved until the criminal case is finally disposed of after appeal."⁶¹

Waivers and admissibility

Protections on the ability to waive (voluntarily dismiss certain rights) is a critical element in early access to counsel legislative initiatives for youth given that youth who are arrested lack the cognitive ability to fully understand legal jargon or grasp the weight of what rights they are waiving or retaining. Studies have shown that youth waive their *Miranda* rights ninety percent of the time, a rate higher than adults.⁶² As such, some states have included language regarding waivers in their legislation.

Within early access to counsel legislation, the ability to waive certain rights is bifurcated between waiver prohibition and safeguards on waiver. Ten states embed waiver prohibitions within their

⁵⁴ *Id.*

⁵⁵ *False Confessions & Recording of Custodial Interrogations*, Innocence Project, available at <https://innocenceproject.org/false-confessions-recording-interrogations/>.

⁵⁶ *Recording Interrogations*, National Association of Criminal Defense Lawyers, available at <https://www.nacdl.org/Landing/RecordingInterrogations>.

⁵⁷ *False Confessions & Recording of Custodial Interrogations*, Innocence Project, available at <https://innocenceproject.org/false-confessions-recording-interrogations/>.

⁵⁸ S.B. 1303, 55th Leg. 2nd Reg. Sess., (Ariz. 2022), available at <https://www.azleg.gov/legtext/55leg/2r/bills/sb1303p.pdf>.

⁵⁹ *Id.*

⁶⁰ S. 90, 192nd Gen. Ct., (Mass. 2022), available at <https://malegislature.gov/Bills/192/S90>.

⁶¹ *Id.*

⁶² Lorelei Laird, *Police Routinely Read Juveniles Their Miranda Rights, But Do Kids Really Understand Them?*, (Aug. 2016), available at https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/august-2016/police-routinely-read-juveniles-their-miranda-rights--but-do-kid/; Ward, S. F. (Host). (2016, May 23). How well do people actually know their Miranda rights? (No. 87) [Audio podcast transcript], in *Asked and Answered*. ABA Journal, available at https://www.abajournal.com/news/article/podcast_monthly_episode_75, (statistics vary but it is estimated that adults waive their Miranda rights between 80 to 93-95% of the time).

legislation,⁶³ such as Maryland,⁶⁴ New York,⁶⁵ Minnesota,⁶⁶ Washington,⁶⁷ and Massachusetts,⁶⁸ who propose legislation that prohibits youth to waive their right to consult with a lawyer. When not prohibited, waivers are often framed in legislation using the constitutional safeguard of ensuring that a waiver is made knowingly, intelligently, and voluntarily. For example, DC's bill would allow a youth to waive their right to remain silent only through their attorney and only if it is done knowingly, intelligently, and voluntarily.⁶⁹ More experience and research is needed to identify the effectiveness of these safeguards on waiver as opposed to waiver prohibition.

Non-legislative efforts

It is important to note that not all efforts to expand early access to counsel require state level legislation to advance. Absent a clear legislative framework, pilot projects and community-based initiatives demonstrate that impressive impacts are possible.

For example, a pilot project in Travis County, Texas was recently launched to provide counsel for adults immediately after arrest.⁷⁰ Challenges with regard to securing an adequate number of jail staff required the project to end; however, benefits of providing early access to counsel were noted during the short amount of time that the effort was implemented.⁷¹ For example, the program staff reporting diverting cases from the system because of their ability to meet with their clients at an earlier point in time: "people accused of nonviolent crimes weren't hauled off to the county's Del Valle jail. In one case, a defendant was erroneously charged with a felony. If an attorney had not been there, [...] the defendant would not have been let out on personal bond."⁷²

Representation models

General consultations

Most legislation does not specify the modality of a legal consultation prior to interrogation by law enforcement. In California, SB 395⁷³ and SB 203⁷⁴ allow for a consultation to be conducted in person, on the phone, or via video conference. More research is needed to understand what mode of representation (in person, phone, or video) is being used in practice and the implications on the quality and effectiveness of representation. The legislative initiatives represent a variety of models that range from in-person consultations to virtual consultations.

⁶³ Fair Trials, Early Access to Counsel Legislative Database, available at <https://airtable.com/shrnNXWFx36wic76D>.

⁶⁴ Child Interrogation Protection Act, S.B. 53, 444th Gen. Assemb., Reg. Sess., (Md. 2022), available at <https://legiscan.com/MD/text/SB53/id/2573731>.

⁶⁵ S2800C, 2021 Leg. Reg. Sess., (N.Y. 2021), available at <https://www.nysenate.gov/legislation/bills/2021/S2800>.

⁶⁶ H.F. 2749, 92nd Leg. (Minn. 2022), available at https://www.revisor.mn.gov/bills/text.php?number=HF2749&session=ls92&version=list&session_number=0&session_year=2022&keyword_type=all&keyword=interrogation&format=pdf.

⁶⁷ H.B. 1140, 67th Leg. Reg. Sess., (Wash. 2021), available at <https://legiscan.com/WA/text/HB1140/2021>.

⁶⁸ S. 90, 192nd Gen. Ct., (Mass. 2022), available at <https://malegislature.gov/Bills/192/S90>.

⁶⁹ Youth Rights Amendment Act of 2021, B24-0306, Committee on the Judiciary & Public Safety, (D.C. 2021), available at <https://lms.dccouncil.us/downloads/LIMS/47384/Introduction/B24-0306-Introduction.pdf>.

⁷⁰ Andrew Weber, *Travis County launched a program to provide lawyers at the county jail. It lasted nine days*, KUT 90.5 (April 26, 2022), available at <https://www.kut.org/crime-justice/2022-04-26/travis-county-launched-a-program-to-provide-lawyers-at-the-county-jail-it-lived-nine-days>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ S.B. 395, 2017 Leg. Reg. Sess., (Cal. 2017), available at https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB395

⁷⁴ S.B. 203, 2020 Leg. Reg. Sess., (Cal. 2020), available at <https://legiscan.com/CA/text/SB203/2019>.

A lack of clarity regarding the role of the lawyer extends beyond the medium of representation into the substance of legal representation provided. Public defense providers in some counties, for example, understand the type of counsel provided to be a discrete type of “*Miranda* counsel” that does not create a full lawyer-client relationship; that is, it is designed only to *ensure* that youth understand their 5th Amendment rights. This understanding of the scope of counsel at the stage of arrest and interrogation has some benefits; for example, it avoids conflicts of interests for lawyers that may be difficult to identify at this early stage in proceedings and allows lawyers to provide counsel for multiple people accused of crimes.

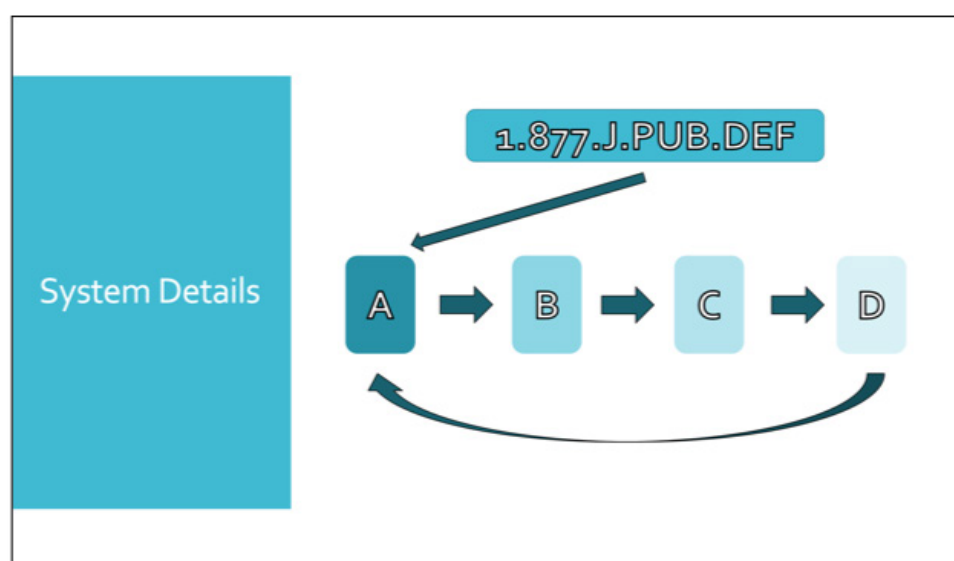
Other public defender services, on the other hand, understand themselves to be providing an early representation service that does create a full lawyer-client relationship that is continuous with later 6th Amendment representation. This type of representation model may result in more measurable outcomes in relation to, for example, bail hearings, charging, diversion, and case outcomes. However, it may also require greater resourcing of public defense systems and earlier conflict vetting.

It is worth noting the legislation detailed here only provides access to counsel in situations where police intend to interrogate youth or adults. This is likely a minority of cases, and no post-arrest representation is offered to youth who are arrested but whom police do not intend to interrogate.

Telephonic consultations

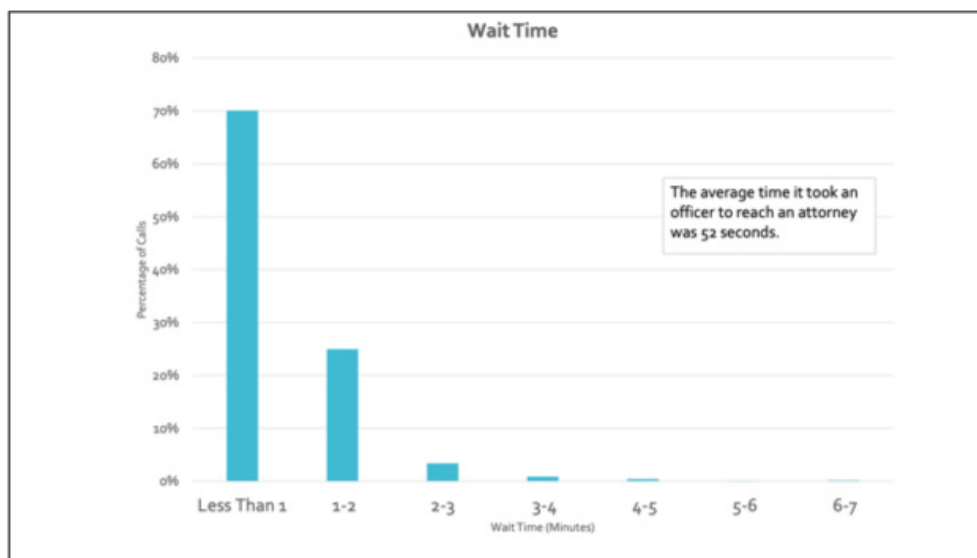
A popular model is telephonic consultations that utilize a hotline number. Upon arrest, a police officer will contact the public defender’s office to facilitate a legal consultation. Washington has developed a highly efficient hotline method that utilizes a tiered on-call phone system. As opposed to California, which provides *Miranda* counsel on a county level in-line with indigent defense services, Washington’s “*Miranda* phone” is managed by the Washington State Office of Public Defense and provides centralized telephonic advice for calls throughout the state. Their statewide model utilizes a phone tree with four contract attorneys on-call at a time, with the first call directed at attorney A. If that attorney is not able to answer the call, the call is then sent to attorney B, and so on. Notably, 70% of all calls are answered in less than a minute with the average wait time being 52 seconds.⁷⁵

Figure 3: Phone tree illustration



⁷⁵ Liz Mustin, Washington State Office of Public Defense, statistical data shared during the Network For Early Access Convening, (June 2022). Slides used with permission.

Table 3: service levels - average wait time



In-person consultations

Each jurisdiction in California has the flexibility to decide which delivery model is best to facilitate a legal consultation in their county. Virtual consultations, which have been further used during the COVID pandemic, have demonstrated impact. A widening “justice gap” threatens to exacerbate inequalities and further impede access to justice.⁷⁶ When possible, having an attorney present with their client while in police custody may be ideal.

In person representation also facilitates larger policy goals in relation to welfare in detention, confidentiality, and direct advocacy by defenders with police and prosecutors.⁷⁷ Instead of waiting days to speak with an attorney, having early access to counsel ensures another layer of accountability, allowing the attorney to advocate for their client’s constitutional rights and welfare. For example, an attorney can immediately advocate if their client has not received medical care, has been wrongfully detained, or is eligible for a diversion program. The assistance of an attorney at this stage can also facilitate law enforcement’s access to information about the incident, meeting key law enforcement and public safety objectives as well as safeguarding the rights of the arrested person.

International approaches

As counties, jurisdictions, and states across the United States dive into the work of expanding early access to counsel, comparative models from around the world offer insight and best practices for providing access to legal counsel at arrest. In the international community, the growing number of countries that provide early access to counsel offer case studies in approaches and implementation.

⁷⁶ Pathfinders for Peaceful, Just and Inclusive Societies, *Justice in a Pandemic- Briefing One: Justice for All and the Public Health Emergency*, Center on Int’l Cooperation, 4 (2020), available at <https://cic.nyu.edu/sites/default/files/justice-for-all-and-the-public-health-emergency.pdf>.

⁷⁷ *Station House Counsel: Shifting the Balance of Power Between Citizen and State*, Fair Trials, 4-5 (Oct. 2020), available at <https://www.fairtrials.org/articles/publications/station-house-counsel/>.

In Malawi, the early access to counsel model takes the form of a paralegal program called the Paralegal Advisory Service Institute. Responding to a dearth of attorneys in Malawi, this innovative model mobilizes paralegals to fill the gap by ensuring “first legal aid access to arrestees and pretrial detainees at police stations, courts and prisons.”⁷⁸ Notably, prisons have police stations and have welcomed the presence of paralegals. Since the program was founded in 2000, the program has grown to reach 84% of the prison population, including youth in the criminal justice system;⁷⁹ the paralegal model directly combats the overcrowding issues and pretrial detention issues.⁸⁰ Galvanized by its success in Malawi, the Paralegal Advisory Service Institute has exported its paralegal model by establishing programs in Benin, Kenya, Uganda, Sierra Leone, Liberia, Bangladesh, and South Sudan.⁸¹

Six years ago, Law Number 5 was adopted by the Parliament in Tunisia. Law No. 5 is an early access to counsel law that is triggered from the onset of detention.⁸² Advocates have reported the same benefits in Tunisia as elsewhere; chief among them that having an attorney present during interrogation is a critical deterrent for misconduct. As documented by Human Rights Watch, in the absence of an attorney arrested persons “signed their confessions under threats of violence, intimidation, or slaps, rather than voluntarily.”⁸³ Presently, implementation is limited to pilots in select police stations in Tunis.

In the United Kingdom (UK), a torture scandal was the catalyst for early access to counsel.⁸⁴ The Police and Criminal Evidence Act of 1984 (known as PACE) has provided early access to counsel for arrested persons in the UK and Wales for almost four decades. However, this right was established only after protracted torture scandals involving Irish Republican Army (IRA) suspects in police custody during the conflict.⁸⁵ As Fair Trials’ *Station House Counsel* report highlights: “UK Law was changed to give suspects in police custody a right to consult a solicitor privately and free of charge at any time. Detailed Codes of Practice require the police to: repeatedly inform detainee of this right; prohibit anything which could deter the exercise of the right; and facilitate access to a lawyer.”⁸⁶

In the case of children, the law of England and Wales provides for additional safeguards.⁸⁷ It provides a youth-friendly written and visual note of advice detailing a young person’s rights in custody and mandates the presence not only of a lawyer but also of a family member or appropriate adult in any interrogation.⁸⁸

The European Union (EU) offers a compelling case study for broad-scale regional reform. Until 2016, access to counsel was understood only as a trial right in EU law, as in the 6th Amendment right to counsel in the United States. And yet, in recent years, EU member

⁷⁸ Kersty McCourt, *How Malawi Put Access to Justice on the UN’s Agenda* Open Society Justice Initiative (May 22, 2012), available at <https://www.justiceinitiative.org/voices/how-malawi-put-access-justice-un-s-agenda>.

⁷⁹ *Paralegal Advisory Service Institute (Malawi)*, NAMATI, text available at <https://namati.org/network/organization/paralegal-advisory-service-institute/>.

⁸⁰ *Id.*, (“After a few years we were able to demonstrate clear results. The number of pretrial detainees as a proportion of all prisoners declined from 60 percent to around 20 percent – and has remained at this lower level for the last few years.”).

⁸¹ *Id.*

⁸² *You Say You Want a Lawyer?: Tunisia’s New Law on Detention and in Practice*, Human Rights Watch (June 1, 2019), available at <https://www.hrw.org/report/2018/06/01/you-say-you-want-lawyer/tunisias-new-law-detention-paper-and-practice>.

⁸³ *Id.*

⁸⁴ *Station House Counsel: Shifting the Balance of Power Between Citizen and State*, Fair Trials, 7 (Oct. 2020) available at <https://www.fairtrials.org/articles/publications/station-house-counsel/>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ The Police and Criminal Evidence Act (PACE) (1984), available at <https://www.legislation.gov.uk/ukpga/1984/60/section/66>.

⁸⁸ *Id.*

states have undergone a sea change that provides for early access to counsel immediately following arrest, in police custody prior to and during interrogation. A bundle of six EU wide Directives were passed by the European Parliament between 2010 and 2016 to protect those interfacing with the legal system.⁸⁹ The six EU Directives include:

1. The Directive on the right to interpretation and translation
2. The Directive on the right to information
3. The Directive on the right of access to a lawyer
4. The Directive on the right to legal aid
5. The Directive on the presumption of innocence
6. The Directive on children's rights

Known as the "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings," this constellation of procedural rights seeks to restore the balance of power between the accused and the prosecutor, attempting to make the process less coercive and more transparent.⁹⁰ These Directives have concrete impacts for arrested persons navigating the system given that they act as concrete safeguards designed to ensure a fair trial.⁹¹ Of these six, Directive 2013/48/EU is the Directive explicitly focused on the right of access to a lawyer and was established in 2016.⁹²

Under EU law, an attorney can be accessed very early in the process, including:

- Before they are questioned by the police or another law enforcement or judicial authority
- Without undue delay after deprivation of liberty
- Where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before the court

In short, **European Directive 2013/48/EU** has provided for the clear enforceable right to access to counsel in police custody for twenty-seven member countries of the EU; what advocates in the United States are attempting to do state by state.⁹³ Across the EU, member states are entitled to implement this practice using different models according to national law. Given that this Directive was implemented in 2016, the Directive not only offers experiences from the six years of experience but provides case studies from the 27-member state models. Implementation across the 27-member states has not been without its challenges, and robust procedural protections can always be improved upon. However, this early access to counsel framework collectively raises the bar for all stakeholders – arrested persons, defense attorneys, prosecutors, and law enforcement.

Changes in access to early access to counsel across Europe were also catalyzed by an arrest of a 17-year-old in Turkey. *Salduz v. Turkey* ushered in legislation that "led to a revolution in police station access to counsel, which became mandatory across Europe in 2016."⁹⁴

⁸⁹ *Trial Waiver Systems: A guide for policy makers*, Fair Trials, 3-4 (Jan. 2022), available at <https://www.fairtrials.org/app/uploads/2022/01/TWSE-policy-guide-final.pdf>.

⁹⁰ *Id.*

⁹¹ European Commission, *Report From the Commission to the European Parliament and the Council*, 1, available at https://ec.europa.eu/info/sites/default/files/implementation_report_on_the_eu_directive_on_access_to_a_lawyer.pdf.

⁹² Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1, available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:294:0001:0012:EN:PDF>.

⁹³ *Id.*

⁹⁴ *Station House Counsel: Shifting the Balance of Power Between Citizen and State*, Fair Trials, 7 (Oct. 2020) available at <https://www.fairtrials.org/articles/publications/station-house-counsel/>.

One example of implementation of the Directives is Belgium. Early access to counsel is ensured through prompt, confidential, and thorough consultation with an attorney,⁹⁵ facilitated by an app which connects on-call contract legal aid lawyers to arrested people in precincts across the country. While at first police and defenders alike were hostile to the new law, implementation has proven benefits such as acceptance by law enforcement and defense counsel alike. Therefore, the practice is now embedded within the law enforcement system and defense practice.

In general, the infrastructure is different in Europe given that counsel is provided through a legal aid network of private defense attorneys, not organized public defenders.⁹⁶ Similar to the United States, however, individuals are entitled to legal aid.⁹⁷ However, unlike the United States, early access to counsel in Europe was established for consultations generally to be conducted in person, not through telephonic hotlines or video calls.

There is also emerging consensus on best practices for interrogation techniques that comply with international law. Referred to as the “Mendez Principles,” the Principles on Effective Interviewing for Investigations and Information Gathering is the definitive authority on interrogation practices governed by international human rights law and scientific evidence of effective interview techniques and human memory.⁹⁸ The Mendez Principles offer six core principles that are the culmination of four years of research with over eighty experts from over forty countries.⁹⁹ The detailed guidelines draw upon a myriad of specialized fields, including human rights, criminology, psychology, intelligence, military, national security, criminal investigations, law enforcement, and interviewing.¹⁰⁰ Most importantly, the Mendez Principles mandates the unwaivable presence of an attorney for any child that is being interviewed as a suspect along with the presence of a family member and a separate independent adult advocate where certain vulnerabilities are present (as is the practice, for example, in the UK).¹⁰¹

Conclusion

The movement for early access to counsel is at an inflection point in the United States. The origins of reform efforts are as diverse as the models being implemented. Access to counsel has been achieved through various routes. These range from judicial oversight after police misconduct, local city ordinances paving the way for statewide legislation, as in San Francisco and California’s SB 395 and SB 203, and statewide legislative initiatives, as in Utah.

Momentum continues to build as communities navigate creative solutions to ensure rights will be protected at every stage of the legal process. As initiatives continue to gain traction, practitioners can look to other states while also turning to the international community for examples of legislation and implementation.

The litany of domestic and international practices constitutes a floor, not a ceiling, of best practices that advocates can adopt in their local jurisdictions, including:

- Prohibiting the waiver of an attorney consultation

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 8–9.

⁹⁸ Mendez Principles, available at <https://interviewingprinciples.com/>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at para 95.

- Facilitating communication with both parents and an attorney
- Providing specific, not general, parental notification that includes details, such as where the arrest occurred, where their child is being transported, and what charge(s) he or she face
- A/V recording of the entire interrogation, not just the statement
- Utilizing an advisal of rights script that employs developmentally appropriate language
- Visible signage in the police station with the advisal of rights
- Treating youth as children at least until age 18
- Early assignment of counsel to ensure the fullest possible representation
- Include other critical junctures in criminal procedure in the investigation phase, including search and seizures

The same framework that ensures rights are protected through early access to counsel benefits both youth and adult populations. Thus, in addressing the needs of youth, advocates may also be laying the framework and gaining capacity to provide similar services to adults in time. Our hope is that this report demonstrates the unique mix of models being implemented to pave the way for this essential and urgent practice to become routine and universal.

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