

# STATION HOUSE COUNSEL: SHIFTING THE BALANCE OF POWER BETWEEN CITIZEN AND STATE

# 01



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## INTRODUCTION

For people who have been arrested, the immediate hours spent in police custody are a time of extreme vulnerability. As recent documentaries, including *Making a Murderer* and *When They See Us* have exposed, most people in police custody in the US have limited, if any, communication with the outside world, at a time when ill-treatment, coercive questioning, and other rights violations are most likely to occur, and when criminal proceedings are set into motion.

Arrested people in the US are almost never able to access counsel until, at the earliest, the first court hearing. Until then, they are subject to the unchecked power of the police. By the time an arrested person accesses counsel, key decisions about charge, detention, diversion and dismissal have already been made by authorities, and the machinery of the criminal legal system has already irrevocably begun to grind.

As this brief shows, involving defense lawyers earlier can not only provide oversight over arrest, custody and detention but can also have a transformative effect on the entire criminal legal system. Early access to counsel has the potential to disrupt the machinery of criminalization, mass incarceration, and police control.

*In 2014, only 3 out of every 1,000 arrestees in Chicago had an attorney at any point while in police custody. When individuals in custody attempt to invoke their legal rights to counsel, they report facing hostility from police.<sup>1</sup>*

## 03



## THE PROBLEM: HOW THE US IS FAILING PEOPLE WHO ARE VULNERABLE TO POLICE POWER

US citizens' right to counsel is protected under the US Constitution, but the interpretation of the right to counsel has failed to reach the stage of early police custody. The 6th Amendment right to counsel does not apply until later in the process, usually the first court hearing. The 5th Amendment (derived from the *Miranda v Arizona* decision<sup>2</sup>) has been interpreted only to mean that police must inform an arrested person of their right to a lawyer and their right to silence – not to actually provide a lawyer. An arrested person must assert the right to silence with no legal assistance. In practice, few people are able to maintain the right to silence without counsel.

# 80%

At least 80% of arrested people waive their right to a lawyer and to silence in the face of police pressure.<sup>8</sup>

Although there are guidelines recommending that a person has access to counsel as soon as is practical after they are taken into custody,<sup>3</sup> in most parts of the United States this is far from the reality.<sup>4</sup> An American Bar Association report from 2004 describes many instances of individuals waiting in jail for several months without access to a lawyer.<sup>5</sup> In one particularly egregious case, a woman was in jail for over a year without once speaking to a lawyer or appearing in court.<sup>6</sup> Some states have adopted their own laws that guarantee access to counsel within a certain period of time.<sup>7</sup> In no jurisdiction in the US are defendants regularly able to access counsel prior to arraignment (sometimes days after arrest).

## 04

Legal counsel in police stations is needed to protect the right to silence and prevent serious rights abuses, including physical brutality, unlawful arrest, coercive interrogation and denial of medical attention and basic physical needs. Without a lawyer present, these violations are unlikely to ever be remedied.

90%

Around 90% of juveniles, waive their Miranda rights.<sup>9</sup>

But early access to counsel does more than protect defendants from potential abuses – with early access, lawyer can help to divert unworthy cases from ever entering the system.

By the time defendants see a lawyer in court, key decisions have already been made in relation to charging and bail – decisions which will be determinative for many defendants who may be coerced to plead guilty to avoid pre-trial detention, overcharging and long sentences.

Lawyers in police custody can identify unlawful or abusive arrests, cases worthy of diversion or cases that should never be prosecuted at all, acting as a powerful agent for liberation, who can challenge the otherwise inexorable march of mass incarceration.

*The Registration of Exonerations has documented that 12% of exonerations arise from false confessions – including 37% of juvenile exonerations and 70% of exonerations of people with mental illness and/or developmental disabilities.<sup>10</sup> A key role for lawyers in police custody is to identify these vulnerabilities and ensure that these individuals are able to withstand police coercion.*

## WHAT DO LAWYERS DO IN POLICE STATIONS?

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

- make sure their client understands their rights – in particular, the right to remain silent. Although the police have the obligation to notify these rights, lawyers are best placed to explain their rights to suspects, and the consequences of waiving them;
- gather information from their client, which may help them secure a pre-trial release;
- find out about detention conditions and treatment by the police and detect and challenge abuses;
- assess their client's fitness for the interrogation; and
- explain what is likely to happen during the process and why.

If an interrogation goes ahead, a lawyer's principal role is to be a check on police coercion. Lawyers can ask to privately advise their client, they can facilitate communication between the police and their client, ask for questions be clarified or rephrased, and flag the need for an interpreter. They can read and check the written records of the interrogation and correct mistakes. If procedural rights are not respected by the police, a lawyer can ask for their observations to be recorded on the interrogation transcript for later legal challenge. For example, if the transcript does not reflect the person's actual responses, the person is inebriated during the interrogation, an interpreter should have been present or the police used coercive techniques.

Lawyers can also start to advocate for their clients' rights with police and prosecutors much earlier in the process. They can make arguments about the propriety of the arrest and any charges that are being considered. They can also, encourage law enforcement not to seek pre-trial detention, to argue for diversion or other non-criminal disposition, and demand sufficient disclosure to be able to make arguments about these early decisions. They also start to build a rapport with their client, which is crucial for effective defense but virtually impossible if you first meet on the doorsteps of the court.

## HOW STATION COUNSEL COULD BE TRANSFORMATIVE

The transformative effect of early access to counsel goes beyond protecting individuals at a time of vulnerability. Interventions that hold the police to account can have a significant impact both downstream (on the way cases are charged and plead) and upstream (on patterns of arrest), potentially leading to decarceration. Lawyers in police custody can create systematic change to a number of criminal justice outcomes, by:

- Challenging unlawful and abusive arrests, including those that do not lead to criminal charges, discouraging police from unnecessary street contact.
- Reducing prosecutions and jail admissions by encouraging police and prosecutors to drop clearly unworthy cases.
- Identifying the vulnerabilities of arrested people and promoting diversion and treatment opportunities.
- Identifying incidence and patterns of police misconduct and ill treatment of arrested people.
- Improving communication channels and trust between police, community (including victims and witnesses), defenders and prosecutors.
- Capacitating defense lawyers to prepare more comprehensively for arraignment, pre-trial detention and plea negotiations – reducing wait times and administrative hurdles.
- Improving access to medical care and other essential needs of detained people.

## 07



## POLICE STATION ACCESS TO COUNSEL IN EUROPE

In many countries in Europe, people have the right of access to a lawyer, free of charge, prior to and during interrogation, 24 hours a day.

### United Kingdom

Following a number of scandals involving police torture of IRA suspects in British custody during the Irish sectarian conflict of the 1980s, 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 detainees of this right; prohibit anything which could deter exercise of the right; and facilitate access to a lawyer. This right applies throughout police detention and a suspect has a right to have a lawyer present during interrogation. Where these rights are violated, evidence that is obtained by the police during interview will be inadmissible in criminal proceedings in most circumstances.

### European Union

Access to a lawyer in a police station became a right across Europe as a result of a seminal case in 2009, involving a 17 year-old boy in Turkey who was suspected of participating in an unlawful demonstration. It was decided that his conviction, based on a confession given without access to a lawyer, was unfair. This case and subsequent European legislation, led to a revolution in police station access to counsel, which became mandatory across Europe in 2016.

In Belgium, for example, suspects now have the right to confidential communication with a lawyer in police custody before the police interview and to a lawyer being present throughout the police interview. There is a new duty scheme in place for the prompt notification, appointment and payment of lawyers who attend clients in police custody. Many different models have been created across Europe, creating a wealth of learning for the US. Fair Trials is working to ensure that the legal right to access a lawyer in police custody is being implemented across Europe.

## HOW DOES ACCESS TO COUNSEL WORK IN PRACTICE?

Police station lawyer systems are in place in many parts of the world and can help US jurisdictions understand how police station lawyer access might be designed. While the principles behind access to a lawyer are the same, there is no perfect system. US jurisdictions have an opportunity to learn from other jurisdictions to develop a system that works for them.

### How are lawyers contacted?

In some systems, a third-party contractor runs a dedicated line that connects arrested people with on-call lawyers (often through police intermediaries). In others, a bar association plays this role through an online platform. In Belgium the appointment of lawyers is made via an online platform that connects police stations with lawyers.

### How long before they get to police station?

Most jurisdictions require that a lawyer who is contacted and on-call must arrive at the police station within a short period of time, usually two hours. Interrogation may not take place until then. Where there may be a delay in a lawyer arriving at the police station in person, a telephone consultation may be held as an initial step. Since COVID-19, some jurisdictions have adopted this practice so that lawyers advise their clients and participate in interrogations via videolink.

### Which lawyers do this?

Public defender offices as such do not exist in most of Europe, but private lawyers take on legal aid cases in a coordinated system. Suspects can normally either choose their own nominated lawyer or the on-call lawyer from a scheduled list. Either way, the lawyer's services are provided free of charge and paid for by the state. On-call lawyers are often required to meet certain quality requirements as well as meeting ongoing key performance indicators and quality measures.

# 09

## How are they paid?

Police station legal advisers are often paid a fixed fee by the State. In England and Wales, the remuneration is around \$45 for telephone advice and \$250 for in-person attendance.

## Do they have an ongoing role in the case?

Sometimes they can help a law firm get a case and the fees for any subsequent trial, which is why there is competition for duty solicitor slots even though the fees are low.

## WHAT WOULD ACCESS TO COUNSEL LOOK LIKE IN THE US?

There are few examples of true police station access to counsel programs in the USA, but some attempts have been made. The most prominent example is Cook County/Chicago, where lack of access to counsel in police custody has been persistently problematic, despite being prioritized in the 2019 consent decree developed in response to the US Department of Justice's finding that Chicago police engaged in a pattern or practice of excessive force and racial bias.<sup>11</sup> Even with a special police station representation unit (unique in the country) and a legal obligation to facilitate lawyer access, only 2% of arrested people in Chicago get access to a lawyer, because police have failed to provide arrested people with legally-mandated phone calls to counsel.

Beyond Chicago, efforts are being made in some jurisdictions to expand police station access to counsel for children. In San Francisco, the Jeff Adachi Ordinance, enacted in 2018, provides children with access to counsel before interrogation.<sup>12</sup> Similar legislation is being considered in New York State.<sup>13</sup> However, these limited experiments have not resulted in increased practical access to lawyers for people in custody.

The experience of Chicago suggests that at least in some jurisdictions, the "on call" system used in the UK and most of Europe may not work in the US, given the recalcitrance of many police cultures. We need to experiment to assess which models will be most effective at disrupting abusive and carceral police and legal cultures.

# 10

The existence of organized public defender offices (absent in most of Europe and the UK) creates the possibility of innovative models of police station access, for example the 24/7 presence of public defenders in police precincts. As jurisdictions experiment with different access models, some key elements should be included:

- accountability for police who fail or refuse to facilitate access to counsel;
- presumption of inadmissibility of statements obtained outside the presence of counsel;
- codification and implementation of broader custody rights and record keeping on procedural safeguards, including concrete timeframes for provision of rights including phone calls, access to medical care, sanitation, food and water, etc.
- data collection on take up, effectiveness and impact of station house lawyers on upstream and downstream outcomes;
- fee structures and attendance regimes for police station lawyers that protect their independence from police; and
- training of defense lawyers, police and prosecutors on the role of lawyers in police custody.

*A study by First Defense Legal Aid in Chicago, which works to improve access to counsel during the first 24 hours following arrest, found that providing earlier access to counsel for arrested people in police custody in Cook County could create fiscal savings of between \$12 and \$43 million, largely in reduced jail time.<sup>14</sup>*

## POSSIBLE CHALLENGES

Global experience offers important lessons for US jurisdictions on the potential challenges to implementing police station access to counsel:

- **Independence of police station lawyers:** Lawyers who spend a lot of time in proximity to police, may find it challenging to retain sufficient independence from police interests and to be seen as independent by communities. Care should be taken to ensure that the system for appointing counsel, rotating lawyers in and out of police custody and community engagement enables robust defense.
- **Conflicts:** Some indigent defense systems may find it challenging to identify potential conflicts of interest between co-defendants at the early stage of police custody. A system for identifying and managing conflicts should be developed.
- **Police facilitation of counsel:** Most European systems rely on police initiating the request for counsel and informing arrested people of this right. The experience in Chicago suggests this may not be effective in some US contexts. Despite the fact that it is a Class 3 felony for police to fail to observe the right to counsel in Illinois, police regularly obstruct this right in practice in Cook County. These violations, among others, are the subject of an ongoing consent decree based on DOJ findings.<sup>15</sup> Therefore, it may be necessary, to ensure defense counsel are present and have access to people in police custody continuously, or else to appoint independent third parties to facilitate access.
- **Waivers of the right to counsel by arrested people:** Even where the right to counsel in police custody is well-established, many arrested people continue to waive their right to a lawyer.<sup>16</sup> Procedural safeguards are needed to ensure that waivers are knowing and voluntary.
- **Compensation for counsel:** Because police station-based legal work may be more arduous, and may occur during nights and weekends, compensation for lawyers should be sufficient to ensure they are not disincentivized from providing high quality representation. In ongoing efforts to divert funding from abusive police forces to community investment, provision for defense rights in police custody should be a priority for municipalities.

## CONCLUSION

It is time for US jurisdictions to learn from the experience of countless global jurisdictions that have rebalanced the relationship between police and citizens. We must ensure that in the vulnerable moments after arrest, people's rights are safeguarded and that there is oversight of police behaviour, by the advocacy of a defense lawyer. The police can no longer be permitted to operate in the shadows. There must be accountability at all stages of criminal legal proceedings, and Americans' Constitutional right to counsel must be fully implemented.

### About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards. For the past 20 years, Fair Trials has worked to develop and implement improved procedural rights standards for criminal defendants across Europe and around the world. Fair Trials is uniquely placed to lead this work, given its experience working with jurisdictions in the EU to implement programs providing access to a lawyer upon arrest, in the police station. For more information, please contact Rebecca Shaeffer, Legal Director of Fair Trials (Americas), at [rebecca.shaeffer@fairtrials.net](mailto:rebecca.shaeffer@fairtrials.net).

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