

ONE STEP FURTHER FOR PROTECTION:
WHY OREGON SHOULD ADOPT ADDITIONAL REQUIREMENTS
FOR THE APPOINTMENT OF COUNSEL TO YOUTHS ACCUSED
OF CRIME

by
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Current procedures for interrogating and investigating youths accused of crime do not provide sufficient protection for youths and their rights. Oregon should follow the example of other states that have adopted greater protections for youths—beyond what the Constitution currently requires. Specifically, Oregon should enact legislation that would provide counsel to youths who are (1) detained and being investigated based on probable cause of criminal activity; (2) undergoing custodial interrogation; and (3) in possession of property law enforcement wishes to search. This consultation with counsel should not be waivable. Such a law would counteract the harmful effects of disparate treatment and false confessions which are prevalent in the youth justice system.

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INTRODUCTION

Oregon should enact further protection for youths' right to counsel while youths are being investigated in any criminal process. Current scholarship on social science and adolescent development indicates that the prevalent youth justice procedures for interrogating and investigating youths accused of crime inadequately protects the youths and their rights. Because youths retain constitutional rights to counsel and due process, and a general right to protection, and because youths are more at risk during law enforcement interrogation, Oregon should provide counsel to youths by phone, video call, or in person when the youth is (1) detained and being investigated based on probable cause of involvement in criminal activity; (2) undergoing custodial interrogation; or (3) when law enforcement wishes to search any property in the youth's possession. This consultation should not be waivable. In effect, this law would require that when any of the above three situations are triggered, the officer must tell the youth that they have the right to counsel and that they must talk to counsel before proceeding with the investigation.¹ The officer would then provide a meeting with defense counsel by phone, video conference, or in person.

Enacting legislation now towards these policies is a step to eradicate the paternalism, racism,² and engendered vilification of youths permeating our country's history in youth justice adjudications.³ These harms are even greater against communities of color, immigrants, LGBTQ+ youths, and other systematically

¹ Whether this new law contrives a right to counsel prior to the advent of adversarial criminal proceedings or whether counsel in these circumstances amounts to "critical stages" of a criminal prosecution are constitutional questions outside the scope of this Note. See *Coleman v. Alabama*, 399 U.S. 1, 7 (1970).

² CLINTON LACEY, NAT'L CHILD TRAUMATIC STRESS NETWORK, RACIAL DISPARITIES AND THE JUVENILE JUSTICE SYSTEM: A LEGACY OF TRAUMA (2013), https://www.nctsn.org/sites/default/files/resources/racial_disparities_and_juvenile_justice_system_legacy_of_trauma.pdf.

³ COMM. ON ASSESSING JUV. JUST. REFORM, COMM. ON LAW & JUST. & DIV. OF BEHAV. & SOC. SCIS. & EDUC., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 35–41 (Richard J. Bonnie, Robert L. Johnson, Betty M. Chemers & Julie A. Schuck eds., 2013).

disenfranchised people because of the disparate impacts of our criminal justice system. Oregon should push youth justice reform further and provide counsel to youths prior to formal questioning and searches.

Part I will survey Oregon's current laws governing youths' right to counsel and rights during law enforcement interrogation. It will also survey other jurisdictions to compare Oregon's current laws to other states' laws. Part II explains why Oregon should enact stronger protections for youth counsel in the criminal justice system. It will highlight the importance of the right to counsel for youths and why it matters that Oregon provide counsel to youths at an earlier point in criminal investigations. Part III will explore counterarguments against the proposition outlined in Part II and will provide brief responses to these arguments.

I. THE LEGAL CONTOURS OF OREGON'S LAWS GOVERNING INTERROGATION PROCEDURE FOR YOUTHS ACCUSED OF CRIME AND COMPARISONS TO OTHER JURISDICTIONS

As guaranteed by the Due Process Clause of the Constitution and declared by the Supreme Court in *In re Gault*, all youths accused of crime in America are constitutionally guaranteed due process and representation by counsel.⁴ Youths accused of crime retain many of the same constitutional rights as adult defendants,⁵ including *Miranda* warnings. The *Miranda* Court held that any accused absolutely must receive warnings that they have the right to remain silent, the right to counsel regardless of whether the person can afford counsel, and that anything they say can and will be used against them in a court of law, prior to any custodial interrogation.⁶

⁴ *In re Gault*, 387 U.S. 1, 41 (1967) (“We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the child and his parents must be notified of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.”). The *Gault* Court mainly opined that Mrs. Gault, not her son, had not waived Gault’s right to counsel. *Id.* at 42. The analysis flowed from whether the *parent* had waived the child’s constitutional right, not whether the child waived his right. This is problematic because it removes child autonomy when that child is entitled to the right in question.

⁵ See generally *id.* See *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults are protected by the Constitution and possess constitutional rights.”); Jessica K. Heldman, *Transforming the Culture of Youth Justice in the Wake of Youth Prison Closures*, 26 LEWIS & CLARK L. REV. 1, 13–14 (2022). However, unlike adults, youths do not enjoy the right to a jury trial. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

⁶ *Miranda v. Arizona*, 384 U.S. 436, 469, 471–72 (1966) (“More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.”).

J.D.B v. North Carolina held that a child's age must be considered in the *Miranda* analysis because youths are more susceptible to coercion by law enforcement.⁷

In the wake of *J.D.B.*, *In re Gault*, and *Miranda*, states enacted variances and enhancements to protect youths' constitutional rights to counsel, due process, and *Miranda* warnings. Each state provides unique protections for youths in their jurisdictions.⁸ This Note specifically focuses on the current protection of youths' constitutional rights in Oregon.

A. Oregon's Laws Governing Protections for Youths Undergoing Custodial Interrogation

Section 419C.200 of the Oregon Revised Statutes, which codified House Bill 2616 from the 2017 Oregon Legislature, governs the appointment of counsel to youths accused of crime in Oregon.⁹ The critical parts of the statute provide that a court must provide counsel to a youth in the youth justice system at *all stages* of the proceeding, including probation.¹⁰ Additionally, the court may not accept a waiver of the right to counsel unless (1) the youth is at least 16 years old; (2) the youth has been advised of their right to counsel from an attorney "appointed by the court or retained on behalf of the youth"; (3) the youth and that same counsel sign a waiver, and (4) the court holds a formal hearing where the court ensures that the waiver was made "knowingly, intelligently, and voluntarily."¹¹ Oregon also requires that law enforcement officers record certain interrogations of youths.¹²

In July of 2021,¹³ Oregon passed further protection for youths accused of crime: during a custodial interview, law enforcement may not "intentionally use[] information known by the officer to be false to elicit [an incriminatory] statement."¹⁴ Challenges to responses based on false material facts may still be admissible if the state can prove with clear and convincing evidence that the youth's statement

⁷ *J.D.B. v. North Carolina*, 564 U.S. 261, 277 (2011).

⁸ For the differences between state youth justice systems, see *State Profiles*, NAT'L JUV. DEF. CTR., <https://njdc.info/practice-policy-resources/state-profiles/> (last visited July 11, 2022) (click on an individual state to see its youth justice related statutes, court rules, and other policies).

⁹ OR. REV. STAT. § 419C.200 (2021).

¹⁰ *Id.* § 419C.200(1)(a) (emphasis added). "All stages of the proceeding" includes appellate matters. *In re J.T.-B.*, 476 P.3d 538, 539 (Or. Ct. App. 2020).

¹¹ OR. REV. STAT. § 419C.200(2)(a).

¹² *Id.* § 133.402; *Oregon House OKs Requiring Recording of Juvenile Questioning*, KTVZ (Apr. 25, 2019, 7:10 PM), <https://ktvz.com/news/2019/04/25/oregon-house-oks-requiring-recording-of-juvenile-questioning/>.

¹³ *Oregon Deception Bill Is Signed into Law, Banning Police from Lying to Youth During Interrogations*, INNOCENCE PROJECT (July 14, 2021), <https://innocenceproject.org/deception-bill-passes-oregon-legislature-banning-police-from-lying-to-youth-during-interrogations/>.

¹⁴ S.B. 418, 81st Leg. Assemb., Reg. Sess. (Or. 2021).

was voluntary and not in response to the false statement.¹⁵

Oregon's progress in passing House Bill 2616 and Senate Bill 418 is laudable. Youth are more protected in criminal custodial interrogations now than they were just five years ago. However, a survey of other jurisdictions reveals that Oregon could be, and should be, doing more.

B. Other Jurisdictional Approaches to Counsel Appointment for Youths

Today, jurisdictions across the country push for modification of youths' right to counsel by expanding the requirements of *Miranda*.¹⁶ For example, in Washington State, the legislature recently enacted new legislation which appoints counsel for every youth prior to law enforcement questioning.¹⁷ For youths accused of crime, Washington State now requires that youth be provided "access to attorneys" through the Office of Public defense, for example, in situations in which *Miranda* warnings are triggered, such as when an officer wishes to perform an "evidentiary search of the juvenile or the juvenile's property," or if the officer detains and questions the youth under "probable cause of involvement in criminal activity," by either phone, video call, or in-person meeting.¹⁸ This consultation is not waivable.¹⁹ Any violation of this law results in suppression of any evidence obtained in the course of that violation.²⁰ Exceptions to the new rule are allowed when three factors are met: (1) "the information sought is necessary to protect an individual's life from an imminent threat"; (2) any delay of that information would affect the prevention of the imminent threat; and (3) any questioning that derives from factors one and two is limited to only the information necessary to protect from the imminent threat.²¹

Youth justice reform policy supports Washington's new mandatory meeting with counsel. When passing this new law, the constituents within the legislature focused on the unique circumstances of youths:

The need for counsel at the time of police interactions with juveniles is urgent in light of adolescent development, youth's limited understanding of their rights and the consequences of waiving their rights, and youth prioritization

¹⁵ *Id.*

¹⁶ See, e.g., H.B. 1140, 67th Leg., Reg. Sess. § 1, 3(1)(g) (Wash. 2021); KATRINA JACKSON & ALEXIS MAYER, DC JUST. LAB & GEORGETOWN JUV. JUST. INITIATIVE, DEMANDING A MORE MATURE MIRANDA FOR KIDS 4 (2020), <https://www.law.georgetown.edu/wp-content/uploads/2020/10/MoreMatureMiranda-1.pdf>.

¹⁷ Wash. H.B. 1140 § 1(1)(a) (pertaining to custodial interrogation).

¹⁸ WASH. REV. CODE §§ 2.70.020(1)(g), 13.40.740(1) (2022); H.B. 1140 §§ 1, 3(1)(g).

¹⁹ WASH. REV. CODE § 13.40.740(2).

²⁰ *Id.* § 13.40.140(8); H. COMM. ON C.R. & JUDICIARY, H.B. REP.: HB 1140, 67th Leg., Reg. Sess., at 4 (Wash. 2021).

²¹ H.R. C.R. & JUDICIARY COMM., BILL ANALYSIS, H.B. 1140, 67th Leg., Reg. Sess., at 4 (Wash. 2021).

of short-term consequences over long-term consequences. . . . Children are vulnerable to being pressured into making false confessions, acting against their interests, and making statements they believe law enforcement want to hear. . . . Earlier access to counsel will help children protect their rights and obtain help for additional services if needed.²²

The comments made in the legislative report provide policy reasoning for the new non-waivable procedure.²³ Washington's new procedure is rooted in and justified by evidence that children have a limited ability to know and understand their legal rights because of their psychological and social development.²⁴

Substantially similar enactments exist in California,²⁵ and New York.²⁶ In California, the law mandates, "Prior to a custodial interrogation, and before the waiver of any Miranda rights, a youth 17 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference. The consultation may not be waived."²⁷ Like Washington, California's law provides an exception for "imminent threat," and indicates that statements obtained when the officer fails to follow this law may be inadmissible.²⁸ When passing the California bill, State Senator Steven Bradford stated that "[y]oung people must know their rights, and they must not be alone when they're being interrogated."²⁹ New York's law indicates that questioning may not occur until "the child has consulted with legal counsel in person, by telephone, or by video conference. This consultation may not be waived."³⁰ Again, any statements obtained in violation of this order are suppressible.³¹ Notably, the New York and California laws differ from the Washington law in one key respect: Washington covers more than situations than just those which trigger *Mi-*

²² H.B. REP.: H.B. 1140, at 5.

²³ *See id.*

²⁴ *See id.*; JACKSON & MAYER, *supra* note 16, at 1–2 ("Because children's cognitive abilities are still developing, most children cannot meaningfully understand their *Miranda* rights.")

²⁵ CAL. WELF. & INST. CODE § 625.6 (West 2021).

²⁶ Maura Keating, Jennifer Ruiz & Melissa J. Friedman, *Committee Report: Legislation to Protect Children During Custodial Police Interrogation*, N.Y.C. BAR (June 8, 2021), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/protecting-children-during-custodial-police-interrogation>.

²⁷ CAL. WELF. & INST. CODE § 625.6(a).

²⁸ *Id.* § 625.6(c).

²⁹ Edwin Chavez, *CA SB 203 Extends Miranda Rights Protection*, SAN QUENTIN NEWS (Feb. 25, 2021), <https://sanquentinnews.com/ca-sb-203-extends-miranda-rights-protection/> (quoting Jeremy Loudonback, *California Bill Seeks Strengthened Miranda Rights for Minors*, IMPRINT (Aug. 5, 2020, 10:45 PM), <https://imprintnews.org/justice/juvenile-justice-2/california-bill-seeks-strengthened-miranda-rights-for-minors/46324>).

³⁰ S.B. 2800B, 2021–2022 Leg., Reg. Sess., § 8(b) (N.Y. 2021) (referred to Codes Comm., Mar. 9, 2022). This law applies to New York's Family Court Act.

³¹ *Id.* § 10.

randa. Washington's law explicitly covers evidentiary searches and any other questioning which occurs during detention under probable cause of a crime.³² California and New York do not cover these same situations with the plain text of the statutes.

Washington, California, and New York³³ spearhead legal operations to protect youths' rights. In contrast, states such as Nevada,³⁴ Louisiana,³⁵ and Idaho,³⁶ exemplify jurisdictions which do not provide expansive rights to youths accused of crime.³⁷ Most states, such as these, do not require appointment of counsel to youths accused of crime prior to law enforcement questioning.³⁸

In essence, these jurisdictions appoint counsel to youths at all stages of criminal proceedings and allow waiver in certain circumstances.³⁹ While the statutory language between these statutes differs, the essential legal provisions do not. These jurisdictions mandate the appointment of counsel to youths after commencement of legal proceedings, allow for waiver in certain circumstances, and generally provide that the child must be informed of their right to counsel at the outset of the legal proceedings.⁴⁰ These protections are not enough.

C. Comparing Oregon's Protections to Those Provided by Other States

Oregon's protections of youths prior to and during custodial interrogations are more analogous to those jurisdictions that fail to proactively provide counsel.⁴¹ In Oregon, like Nevada, Louisiana, and Idaho, the youth's right to counsel does not

³² WASH. REV. CODE § 13.40.740(1) (2022).

³³ See, e.g., *New Law Puts Washington at Forefront in Protecting Youth Rights*, ACLU WASH. (Apr. 19, 2021), <https://www.aclu-wa.org/news/new-law-puts-washington-forefront-protecting-youth-rights%E2%80%AF>; *California: New Law Protects Children in Police Custody*, HUM. RTS. WATCH (Sept. 30, 2020, 8:00 PM), <https://www.hrw.org/news/2020/09/30/california-new-law-protects-children-police-custody>; Megan Conn, *Videotaped Interrogations and Fee Waivers: New York Expands Juvenile Justice Reforms*, IMPRINT (Dec. 15, 2020; 11:11 AM), <https://imprintnews.org/justice/new-york-law-reforms-interrogations-fees-juvenile-justice/50252>.

³⁴ NEV. REV. STAT. § 62D.030 (2021).

³⁵ LA. CHILD. CODE ANN. art. 809(A) (2021).

³⁶ IDAHO CODE § 20-514(1)–(2), (4) (2021).

³⁷ These jurisdictions were selected at random by the author. Based on review of many state provisions, the author believes that Nevada, Idaho, and Arizona provide a representative sample of states that have not enacted similar provisions to those enacted by Washington, California, New York, and Oregon.

³⁸ See generally *State Profiles*, *supra* note 8. See Victoria Mckenzie, *Many States Still Deny Juveniles Access to Counsel, 50 Years After Gault Ruling, Report Finds*, JUV. JUST. INFO. EXCH. (May 18, 2017), <https://jjie.org/2017/05/18/many-states-still-deny-juveniles-access-to-counsel-50-years-after-gault-ruling-report-finds/>.

³⁹ NEV. REV. STAT. § 62D.030(1)–(4); LA. CHILD. CODE ANN. art. 810(A)–(B), (D); IDAHO CODE § 20-514(1)–(2), (4)–(5).

⁴⁰ E.g., LA. CHILD. CODE ANN. art. 855(B) (2021).

⁴¹ See *supra* Section I.A.

attach *until after the petition is filed by the state*.⁴² In these states, counsel for youths accused of crime is mandatory at all stages of the criminal case, but formal counsel representation does not attach until after the state initiates criminal proceedings against the youth.⁴³ While *Miranda* warnings do allow youths to contact counsel, that privilege may still be voluntarily waived. Oregon does not extend waiver protections until after the state has commenced criminal proceedings because counsel is not required when *Miranda* warnings are triggered.⁴⁴

Compared to Washington, California, and New York, Oregon, like many states in the United States, fails in one clear area: it does not require a consultation with counsel prior to detention investigations under probable cause of a crime, searches, or custodial interrogations. This must change.

II. THE CASE FOR EXPANSION OF YOUTHS' RIGHT TO COUNSEL IN OREGON

Oregon should adopt a statutory provision that requires law enforcement to provide youths access to defense counsel via phone, video call, or in-person meeting prior to law enforcement questioning when (1) police detain and question on probable cause that the youth is involved in criminal activity; (2) when police conduct an evidentiary search; and (3) when *Miranda* warnings are triggered prior to a custodial interrogation. Legislative action is critical for protecting youths in our criminal justice system. Mandatory appointment of defense counsel will counteract the inherent dangers present in our youth justice system, such as the higher likelihood of false confession,⁴⁵ and better protect youths and their due process rights.⁴⁶

Moreover, just three years ago, Oregon claimed the second-highest incarceration rate of youths in the country.⁴⁷ Oregon's history of youth incarceration demonstrates this state's trend of unreasonably castigating youths accused of crime.⁴⁸ This

⁴² OR. REV. STAT. § 419C.200(1)(a) (2021) (prefacing the requirement of counsel for youth with “[w]hen a petition is filed [in juvenile court jurisdiction]”).

⁴³ See, e.g., *State v. Davis*, 256 P.3d 1075, 1096 (Or. 2011).

⁴⁴ OR. REV. STAT. § 419C.200(1)(a), (2)(a).

⁴⁵ Emily Haney-Caron, Naomi E.S. Goldstein & Constance Mesiarik, *Self-Perceived Likelihood of False Confession: A Comparison of Justice-Involved Juveniles and Adults*, 45 CRIM. JUST. & BEHAV. 1955, 1968–73 (2018). In Oregon, 23 convictions have been exonerated since 1989. NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (filter by state to see Oregon convictions) (last visited July 11, 2022). Four of the 23 exonerations were for youths aged 18 and under on the date of the reported crime, roughly 17% of the exonerations. *Id.*

⁴⁶ See *infra* Section II.A.

⁴⁷ Casey Leins, *Oregon Reforms Its Juvenile Justice System*, U.S. NEWS (July 23, 2019), <https://www.usnews.com/news/best-states/articles/2019-07-23/oregon-reforms-its-juvenile-justice-system>.

⁴⁸ This castigation has largely come as a product of Measure 11, passed in 1994, to crack down on youths allegedly accused of crimes. See Elizabeth Hilliard, *A Life Without: Juveniles*

historical perspective holds grave significance in legislative action moving forward. Oregon must take steps to remedy past practices which unjustly affected youths in Oregon and to protect youths more carefully.

A. *Why Counsel for Youths Accused of Crime Matters*

Both scientifically and legally, youths are unique and distinct from adult defendants.⁴⁹ These differences logically support a different application of the right to counsel where youths receive counsel regardless of whether they have invoked their right to counsel. To protect the rights of youths accused of crime, including their right to due process,⁵⁰ their right to protection,⁵¹ and their right against self-incrimination,⁵² youths accused of crime need counsel prior to any questioning performed by law enforcement when *Miranda* warnings are triggered.

Fundamental problems exist within our criminal justice system which result in harm to youths accused of crime. Any situation where youths could potentially be accused of crimes implicates the following facts which may result in a failure to protect youths and their rights: (1) police retain large discretion over how and when to investigate, search, and interrogate youths; (2) scientific adolescent development indicates that youths are more susceptible to false confessions and may lack the ability to fully understand the implications of whole-hearted cooperation with the police; and (3) youths who identify with and belong to systematically disenfranchised groups are disparately impacted by the criminal justice system. Providing counsel to youths when either *Miranda* warnings are triggered, or when an evidentiary search occurs, could alleviate some of these problems.

Spending Their Lives in Oregon's Prisons and the Need for Change Following Miller and Graham, 20 LEWIS & CLARK L. REV. 333, 349 (2016). For an analysis of the application of Measure 11, see CRIM. JUST. COMM'N., LONGITUDINAL STUDY OF THE APPLICATION OF MEASURE 11 AND MANDATORY MINIMUMS IN OREGON (2011), <https://media.oregonlive.com/pacific-northwest-news/other/Measure%2011%20Analysis%20030911.pdf>.

⁴⁹ See Naomi E. S. Goldstein, Emily Haney-Caron, Marsha Levick & Danielle Whiteman, *Waving Good-Bye to Waiver: A Developmental Argument Against Youths' Waiver of Miranda Rights*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 61 (2018).

⁵⁰ *In re Gault*, 387 U.S. 1, 56–57 (1967).

⁵¹ The children's right to protection is not explicit in neither American nor Oregon jurisprudence. Some type of implicit understanding exists in the legal field where courts and legislatures acknowledge the general social interest in protecting children in our society. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678, 707 (1977) (Powell, J., concurring in part); *Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (holding that youth and adult proceedings are fundamentally different because the state has "a *parens patriae* interest in preserving and promoting the welfare of the child"). For the purposes of this Note, the author assumes that children and youth have a general legal right to protection under our laws.

⁵² U.S. CONST. amend. V.

1. *Discretion of Law Enforcement*

As the primary authority to respond and handle situations with youths involved with criminal activity, law enforcement holds an immense position of power over youths by embodying legal authority and presenting as the adult figure involved in the situation. This gatekeeping authority provides great discretion to law enforcement.⁵³ Not only do police retain discretion over gatekeeping, but they also hold sole authority over interrogation tactics when questioning youths.⁵⁴ Despite this great discretion, little research exists to explain how police–youth interactions play out in real life.⁵⁵ Like access to opiate pain killers, which can provide a necessary function to alleviate pain but can also be incredibly abused, discretion allows law enforcement latitude to act in a manner beneficial to the youth being investigated for criminal activity or in a way that causes the youth harm.

Law enforcement governs how, when, and where the youth enters the youth justice system because law enforcement are often youths' first interaction with a party to the criminal justice system.⁵⁶ When law enforcement contacts a youth who may be accused of a crime or who is suspected of criminal activity, that interaction is usually involuntary on the part of the youth.⁵⁷ Officers use their “knowledge, skills, and judgment” to determine the best course of action with a youth who may be involved in criminal activity.⁵⁸ The officer's determination results in either a warning, a referral to community services, or an arrest.⁵⁹ Perhaps most importantly, aside from the new law in Oregon that forbids material falsehoods in investigations,⁶⁰ no set guidelines govern investigative interrogation.⁶¹ As the Multnomah Bar Association handbook for youths indicates, simply a “bad attitude” could cause law enforcement to exercise their judgment and change whether an officer is likely to believe a youth.⁶²

⁵³ See generally DEV. SERVS. GRP., OFF. OF JUV. JUST. & DELINQ. PREVENTION, INTERACTIONS BETWEEN YOUTH AND LAW ENFORCEMENT (2018), <https://www.ojjdp.gov/mpg/litreviews/Interactions-Youth-Law-Enforcement.pdf> (analyzing factors which influence youths' attitudes towards police and when such factors begin to influence youth-police interactions).

⁵⁴ Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL'Y. 395, 432–50 (2013) (discussing interrogation tactics used and how they affect youths' responses while being questioned).

⁵⁵ DEV. SERVS. GRP., *supra* note 53, at 1–2.

⁵⁶ *Id.* at 6.

⁵⁷ *Id.* at 2.

⁵⁸ *Id.* at 7.

⁵⁹ *Id.*

⁶⁰ OR. REV. STAT. ANN. § 133.403 (West 2022).

⁶¹ DEV. SERVS. GRP., *supra* note 53, at 7.

⁶² MULTNOMAH BAR ASS'N., YOUTH FACES THE LAW: A JUVENILE RIGHTS HANDBOOK 29 (11th ed. 2011), <https://oregonlawhelp.org/files/CCDACC15-944D-570E-7F1F-7BBF3DEC0>

Given the involuntariness on the part of the youth and the discretion of the officer to determine the initial entrance of the youth into the justice system,⁶³ policy change and oversight in law enforcement offices is not enough to protect the youth and their rights.⁶⁴ Instead, the potential for law enforcement to abuse their discretion during investigations and interrogations supports providing counsel to youths whenever circumstances support probable cause of criminal activity, which results in questioning or an evidentiary search, and when *Miranda* warnings are triggered.

2. *Social and Psychological Studies Indicate Youth Are at Heightened Risk*

The differences between adolescent and adult brains revealed by brain science indicate that youths must be granted greater protections.⁶⁵ Research reveals that youths have difficulty understanding their legal rights in the same capacity as adults.⁶⁶ As many as 94% of youths between ages 12 and 19 fail to fully understand their *Miranda* rights.⁶⁷ Youths also fail to make decisions based on rational decision-making; instead, rewards and emotions govern their choices, especially when the situation is “emotionally laden.”⁶⁸ Consequently, youth are particularly at risk to make false confessions and to fail to fully understand their rights.

Adolescent brain development demonstrates that youths lack the capacity to fully make rational decisions in emotional or stressful situations and may lack the capacity to understand their legal rights. The cognitive control and emotion regulation neural systems and pubescent hormones, which develop differently in each youth, influence a youth’s ability to make decisions based on the world around them.⁶⁹ On the basis of this brain science:

The American Academy on Child and Adolescent Psychiatry “believes that juveniles should have an attorney present during questioning by police or other law enforcement agencies” and that “when interviewing juvenile suspects, police should use terms and concepts appropriate to the individual’s

018/attachments/219B4EAA-CFBE-441B-88F7-59EE6165A708/juvrights-handbook.pdf.

⁶³ *Id.* at 6–7.

⁶⁴ Policy change and implementation of in-office procedures, which work to ensure questioning is based on the youth’s developmental immaturity, do exist. Goldstein et al., *supra* note 49, at 45–47. These advances of internal policy are laudable and useful.

⁶⁵ See Elizabeth Cauffman & Laurence Steinberg, *Emerging Findings from Research on Adolescent Development and Juvenile Justice*, 7 VICTIMS & OFFENDERS 428 (2012).

⁶⁶ Goldstein et al., *supra* note 49, at 47–48; see Haney-Caron et al., *supra* note 45, at 1972.

⁶⁷ Keating et al., *supra* note 26.

⁶⁸ Kerstin Konrad, Christine Firk & Peter J. Uhlhaas, *Brain Development During Adolescence: Neuroscientific Insights into this Developmental Period*, 110 DEUTSCHES ÄRZTEBLATT INT’L 425, 428 (2013).

⁶⁹ Goldstein et al., *supra* note 49, at 22; EVELINE A. CRONE, THE ADOLESCENT BRAIN: CHANGES IN LEARNING, DECISION-MAKING AND SOCIAL RELATIONS 3–5 (2017).

developmental level. Any written material should also be geared to the person's grade level and cognitive capacity. In general, it is not sufficient to simply read or recite information to a juvenile."⁷⁰

Given the vulnerability of youth in the youth justice system, even the heightened protections enacted by the legislatures regarding specialized procedures are inadequate to ensure protection of youths' rights.⁷¹

3. *Recognition of Unique Circumstances and Disparate Impact of Criminal Prosecution of Youths*

Youth belonging to communities of color suffer disproportionate harm and disproportionate representation in our youth justice system.⁷² According to the statistics presented from Oregon Youth Authority, Oregon's youth justice agency, Oregon exhibits disproportionate representation of African American, Asian, Hispanic, and Native American youths.⁷³ In Portland, the "police arrest Black people at a per capita rate 4.3 times higher than white people."⁷⁴ Disproportionate impact exists in other states as well. New York specifically acknowledged that Black and Latina/o youth are most affected by criminal interrogation procedure.⁷⁵ Not only are arrest rates, conviction rates, and detention rates disproportionate, but African Americans are disproportionately convicted of major crimes, as well as disproportionately wrongfully convicted of crimes.⁷⁶

⁷⁰ Goldstein et al., *supra* note 49, at 45 (quoting *Interviewing and Interrogating Juvenile Suspects*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (Mar. 7, 2013), https://www.aacap.org/aacap/policy_statements/2013/Interviewing_and_Interrogating_Juvenile_Suspects.aspx).

⁷¹ *See id.* at 47–61.

⁷² Kristin Henning & Rebba Omer, *Vulnerable and Valued: Protecting Youth from the Perils of Custodial Interrogation*, 52 ARIZ. ST. L. J. 883, 885, 902 (2020).

⁷³ OR. YOUTH AUTH., OYA QUICK FACTS, (2020), <https://www.oregon.gov/oya/Publications/QuickFacts-Jan2020.pdf>. I chose the statistics from OYA from January 2020 rather than 2021 or 2022 because of the COVID-19 pandemic. The COVID-19 pandemic has likely affected both the prosecutorial rate of youths and the incarceration rate. FAIR & JUST PROSECUTION, COVID-19 AND THE CRIMINAL JUSTICE SYSTEM: YOUTH JUSTICE ISSUES, CHALLENGES, AND RECOMMENDED REFORMS (2020), https://fairandjustprosecution.org/wp-content/uploads/2020/08/FJP_Brief_Covid_YouthJustice.pdf.

⁷⁴ Jonathan Levinson, *Portland Has 5th Worst Arrest Disparities in the Nation, According to Compiled Data*, OPB (Feb. 7, 2021, 9:23 AM), <https://www.opb.org/article/2021/02/07/portland-has-5th-worst-arrest-disparities-in-the-nation-according-to-data/>.

⁷⁵ *See, e.g.*, Keating et al., *supra* note 26 ("The [Juvenile Justice Committee and the Children and the Law Committee] recognize that youth affected by current police interrogation practices are overwhelmingly Black or Latinx."); *see also id.* ("Young people who have contact with the criminal legal system are disproportionately poor, Black and Latinx, more likely to have a developmental disability, a mental health condition, and be disconnected from school.").

⁷⁶ SAMUEL R. GROSS, MAURICE POSSLEY & KLARA STEPHENS, NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES (2017), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf.

Even less research has investigated how the youth justice system affects the LGBTQ+ and immigrant communities.⁷⁷ Comparatively, LGBTQ+ youth represent a higher percentage of youths involved in the justice system than the percentage of those same identifying individuals in the general population.⁷⁸ Within the immigration system, youths suffer even greater consequences when committing criminal activity, such as being charged with presence in the United States without permission.⁷⁹

Systematically disenfranchised communities suffer greater consequences at the hands of the youth justice system. As demonstrated by these statistics, Oregon must be aware of the disparate impact of the justice system for which it writes laws. To best protect everyone involved, including youths of color, Oregon should enact more stringent requirements for counsel appointment so these youths can have a better understanding of their rights.

4. *Why Legislative Enactment Will Partially Solve These Problems*

The three problems identified above—law enforcement discretion, scientific evidence that youths lack the same capacity as adults, and disparate impact in the youth justice system—may be partially remedied by the proposed legislative enactment. Providing a mandatory conversation with defense counsel prior to any situation where the officer will seek to establish the youth's criminal culpability necessarily negates these problems by providing a prophylactic measure to ensure the youth understands their rights.

The consultation with counsel, which is not waivable, would ensure that a trained defense attorney explained the youth's rights to the youth in question. By doing so, the youth is guaranteed to better understand *Miranda* rights and the legal implications of talking to law enforcement. Where a youth still chooses to waive their rights, even after the conversation with the attorney, law enforcement may still question the youth. However, with this proactive measure, the youth will more fully comprehend how the criminal investigative process works. It may take some of the pressure off the youth to either confess everything to law enforcement, or tell the police what they think the police want to hear, simply because law enforcement presents as an authority figure. At-risk youth within systematically disenfranchised classes will have an added layer of protection that cannot be waived. These steps

⁷⁷ For examples of research in these areas, see Angela Irvine & Aisha Canfield, *The Overrepresentation of Lesbian, Gay, Bisexual, Questioning, Gender Nonconforming and Transgender Youth Within the Child Welfare to Juvenile Justice Crossover Population*, 24 AM. U. J. GENDER, SOC. POL'Y. & L. 243 (2016); Elizabeth M. Frankel, *Detention and Deportation with Inadequate Due Process: The Devastating Consequences of Juvenile Involvement with Law Enforcement for Immigrant Youth*, 3 DUKE F. FOR L. & SOC. CHANGE 63 (2011).

⁷⁸ Irvine & Canfield, *supra* note 77, at 244.

⁷⁹ Frankel, *supra* note 77, at 65.

forward are critical to ensuring equality, fairness, and positive outcomes in the Oregon youth justice system.

B. Rights and Precedent Allow for Appointment of Counsel to Youths Prior to Any Questioning

Miranda, in its barest form, fails to protect youths, even when age is taken into account for purposes of *Miranda* analysis,⁸⁰ because it fails to fully accommodate the basic problems in youth justice listed above.⁸¹ Jurisprudence supports granting counsel to youths when a youth is either (1) undergoing an evidentiary search of items within the youth's possession; (2) detained under probable cause of involvement in criminal activity; or (3) before any circumstances that would trigger a *Miranda* warning.

The Supreme Court is building stronger constitutional protections for youths.⁸² The floor established by the Supreme Court for *Miranda* warnings in youth justice was derived from *Miranda* itself, as well as *In re Gault* and *J.D.B. v. North Carolina*.⁸³ These three cases establish that youths must be provided *Miranda* warnings and due process in accordance with the Constitution,⁸⁴ and that a youth's age must be considered within a totality-of-circumstances test for whether a custodial interrogation has occurred under the *Miranda* definition.⁸⁵

Dicta within *J.D.B.* suggests that youths should be granted extra, specialized protections to ensure proper compliance with due process under *Miranda*. *J.D.B.* reiterated the following: youths suffer heightened risk of pressure and coercion in police questioning.⁸⁶ Age and maturity influence how children "understand the world around them," and this fact must be considered when constructing legal analysis under *Miranda*.⁸⁷ Simply analyzing the context in which the youth is questioned, such as being questioned in a school room, is not enough because it neglects to account for the *identity* of the person in question.⁸⁸ Any argument that the *J.D.B.*

⁸⁰ *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011).

⁸¹ *Supra* Section II.A.

⁸² *See, e.g.*, *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (holding that sentencing youths to life without parole violates the Eighth Amendment); *Roper v. Simmons*, 543 U.S. 551, 570–71 (2005) (holding that the Eighth and Fourteenth Amendments prohibit sentencing youths to the death penalty).

⁸³ *See supra* text accompanying notes 4–6.

⁸⁴ *In re Gault*, 387 U.S. 1, 41, 44, 57 (1967).

⁸⁵ *J.D.B.*, 564 U.S. at 265, 277 ("Reviewing the question *de novo* today, we hold that so long as the child's age was known to the officer at the time of the police questioning . . . [i]ts inclusion in the custody analysis is consistent with the objective nature of that test.").

⁸⁶ *Id.* at 269.

⁸⁷ *Id.* at 272–74.

⁸⁸ *Id.* at 276.

holding did not create a bright-line rule which might make it too difficult to implement was rejected because a brightline rule would “simply ‘enable the police to circumvent the constraints on custodial interrogations established by *Miranda*.’”⁸⁹

Little recent case law exists in Oregon which applies youths’ constitutional *Miranda* and due process rights to cases in the youth justice system. In *State v. K.A.M.*, the Supreme Court of Oregon declined to answer whether a youth’s age is properly analyzed as part of the reasonableness inquiry about whether a youth is considered “stopped” under the Oregon Constitution.⁹⁰ However, the Court implied that *J.D.B.* precedent supports a rule where youth’s age should be analyzed in legal analysis under the proper case.⁹¹ Youth in Oregon retain the right to silence and once that right is invoked, law enforcement must wait a reasonable amount of time and issue new *Miranda* warnings before further interrogation.⁹²

Some cases in *Miranda* jurisprudence undermine the assertion that youths’ unique situations allow for extra protections of their constitutional rights. The general rules for *Miranda* warnings often have harsh consequences in the youth justice context. The Supreme Court held that an explicit invocation of the *Miranda* right to remain silent is required in *Berghuis v. Thompkins*.⁹³ In its reasoning, the Court announced that the defendant did not invoke his right to remain silent by implication even though he did not say anything during the entire interrogation, except for a simple “yes” to a single question at the end of the interrogation.⁹⁴ This holding now requires that *Miranda* waivers be express, explicit, and affirmative on the part of defendants, including youths accused of crime.⁹⁵ Mere silence will not invoke the right.

The Court has specifically applied similar explicit *Miranda* requirements to youths. For example, in *Fare v. Michael C.*, the Supreme Court ruled that a youth’s request to see his probation officer during a custodial interrogation was not an invocation of that youth’s Fifth Amendment right to counsel. When law enforcement asked the youth if he wanted to waive his right to an attorney, the youth responded “[c]an I have my probation officer here?”⁹⁶ After the officer denied the youth’s request to have his probation officer present, the youth then relayed incriminating

⁸⁹ *Id.* at 280 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 441 (1984)).

⁹⁰ *State v. K.A.M.*, 401 P.3d 774, 776–77 (Or. 2017).

⁹¹ *Id.*

⁹² *State ex rel. Juv. Dep’t v. Thai/Schmolling*, 908 P.2d 844, 847 (Or. Ct. App. 1995).

⁹³ *Berghuis v. Thompkins*, 560 U.S. 370, 381–82, 388–89 (2010) (“In sum, a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent . . .”).

⁹⁴ *Id.* at 376, 386.

⁹⁵ *Id.* at 381–82, 386.

⁹⁶ *Fare v. Michael C.*, 442 U.S. 707, 710 (1979).

facts which were later used in a successful conviction against the youth.⁹⁷ Because the probation officer could not provide the same legal assistance as an attorney under the Fifth Amendment,⁹⁸ and because expanding the invocation of counsel to probation officers could allow states to further expand the holding of *Miranda* to general state officers,⁹⁹ the Court declined to hold that a youth's request to have the probation officer invoked the right to counsel.¹⁰⁰ The *Fare* Court attempted to reassure the nation that a totality-of-circumstances test would ensure that youths facing criminal charges everywhere could only ever voluntarily waive their rights.¹⁰¹

J.D.B. supports enacting legislation which requires officers to provide a meeting with defense counsel which a youth cannot waive because it emphasizes that a youth's age must be considered for purposes of legal analysis. *J.D.B.* establishes a legal floor which already highlights the need to take extra care in *Miranda* analysis of youths because of the heightened risk of coercion and misunderstanding. As the *J.D.B.* Court stated, the *identity* of the person being questioned, as a youth, is critical to whether a youth understands and knows their rights.¹⁰² Enacting this legislation would account for youths who hold the immutable identity of youth. This new rule, like the *J.D.B.* requirement that age must be analyzed in *Miranda* custodial and waiver inquiries, will help ensure that law enforcement acts as *Miranda* warnings proscribe.

Oregon's limited case law supports enacting this legislation. Even though the Oregon Supreme Court refused to analyze whether age should be considered under the jurisprudence of the search and seizure amendment, the Court did hint that such a consideration would be proper in the right case.¹⁰³ Youth in Oregon generally retain the same *Miranda* rights as adults. The application of *Miranda* warnings to youths is not enough to protect Oregon rules, and the legislature should exercise its power to enact further protection than those provided by Oregon courts.

The harsh effect of the rules from cases like *Berghuis* and *Fare* should be counteracted by the legislature with the recommended law. The explicit requirement in *Berghuis*, that youths must explicitly say they do not want to talk and wish to exercise their right to remain silent, rather than simply remaining silent, is difficult to understand for laypeople who are adults, let alone youths. With the Court's recognition in *J.D.B.* that children lack the same rational decision-making capacities to

⁹⁷ *Id.* at 711.

⁹⁸ *Id.* at 722.

⁹⁹ *Id.* at 723.

¹⁰⁰ *Id.* at 724.

¹⁰¹ See *id.* at 724–27. Empirical evidence demonstrates that the Supreme Court's reasoning was flawed, defective, and wholly inaccurate. *Supra* Section II.A.

¹⁰² *J.D.B. v. North Carolina*, 564 U.S. 261, 276–77 (2011).

¹⁰³ *State v. K.A.M.*, 401 P.3d 774, 776–77 (Or. 2017).

understand the world around them,¹⁰⁴ *Berghuis* becomes deeply troubling. How are youths supposed to know that saying nothing, rather than affirmatively saying they wish to be silent, will not invoke their rights? The proposal for legislation would allow the attorney to explain this concept to the youth before law enforcement questions the child. Similar concerns arise from *Fare* where a youth's request to speak with a probation officer did not trigger *Miranda*. Logically, a youth may assume that asking for their probation officer with whom they had built a relationship may be analogous to asking for their attorney. A preemptive warning will ameliorate some of the harm from *Fare*. If a youth was required to talk to an attorney prior to any custodial interrogations or detention with questioning under probable cause of criminal activity, the attorney could explain that a youth must specifically request counsel—not just any adult in the youth justice system such as a probation officer—to invoke their right to counsel.

III. POTENTIAL PROBLEMS WITH THE MANDATORY MEETING BETWEEN COUNSEL AND YOUTHS ACCUSED OF CRIME AND RESPONSES TO THOSE CHALLENGES

A. *Interference with the Investigation of Crime*

The main concern with the proposed legislation is that it will interfere with law enforcement's ability to investigate the crime. If youths are fully informed about their rights prior to the situations that would trigger a mandatory meeting with counsel as outlined above,¹⁰⁵ the youths may be less inclined to cooperate with law enforcement. It also might interrupt the flow of investigation for the alleged crime. In particular, the officer may be concerned that they cannot question the youth if the investigation occurs when a public defender is not immediately available for the mandatory meeting at the time the officer wishes to question the youth. While these concerns are valid, they should not prohibit enactment of this law for three reasons: (1) a police officer may still interview a youth if the circumstances do not amount to detention under probable cause; (2) the youth still may choose to waive their rights after the mandatory meeting with counsel; and (3) enhanced protection for youths is a legitimate interest which should not be set aside simply because it might be difficult to implement.

To remedy law enforcement's potential objection that this proposed law will interfere in circumstances which present imminent danger to the public or to the youths themselves, Oregon's new law should provide exceptions, like those provided in Washington, which allow for questioning without the mandatory meeting with

¹⁰⁴ *J.D.B.*, 564 U.S. at 273.

¹⁰⁵ *Supra* Part II.

counsel.¹⁰⁶ These exceptions must account for any situation in which law enforcement, as informed by the totality of their training and experience, believes there may be an immediate threat of danger to self or other people. In these cases, the law will account for ways in which law enforcement may address dangerous and threatening situations by obtaining needed information without providing the mandatory meeting with counsel. This Note recommends the adoption of an imminent threat exception, but also recommends limiting that exception to only the information necessary to protect either the community or an individual from that threat. Once the police have received the information needed or the questioning begins to focus less on an immediate threat and more on the substance of the criminal activity, the meeting with counsel must occur for the youth.

B. Limitations Based on Restricted Funding and Access in our Criminal Justice System

Another main concern may stem from lack of funding. The critical question about funding asks where the burden of cost will be placed to implement this plan. Arguably, forcing a phone call, video call, or in-person meeting places a low financial burden on law enforcement. The financial cost for law enforcement is low because this law only requires a short amount of the officer's time before the officer questions or searches the youth. The meeting with counsel would likely last no longer than half an hour. Rather, the financial burden will likely be greatest on public defenders because it will require an additional duty for the attorneys and will require an attorney to be on call to respond to these needs.

Public defenders are funded under Section 419C.206 of the Oregon Revised Statutes,¹⁰⁷ which directs readers to Section 135.055.¹⁰⁸ Public defenders are already underpaid, overworked, and lack sufficient funding.¹⁰⁹ This Note supports the legislature providing additional funding to allow public defender's offices to hire more attorneys for youths so counsel may be on call when law enforcement needs them. While the legislature should provide more funding for public defenders to better serve the criminal and youth justice systems, even if there is no change in funding, the lack of additional funding should not prohibit enactment of the law.

¹⁰⁶ See H. COMM. C.R. & JUDICIARY, HOUSE BILL REPORT: H.B. 1140, 67th Leg., Reg. Sess., at 4 (Wash. 2021).

¹⁰⁷ OR. REV. STAT. § 419C.206 (2021).

¹⁰⁸ OR. REV. STAT. § 135.055(1) (2021).

¹⁰⁹ Tatiana Parafiniuk-Talesnick, 'Justice Isn't Being Served for Anyone,' REGISTER-GUARD, <https://www.registerguard.com/story/news/2020/08/31/clogged-courts-in-oregon-could-lead-to-civil-rights-crisis/5617011002/> (Sept. 3, 2020, 12:33 PM).

CONCLUSION

Oregon should adopt a legislative provision providing youths a mandatory meeting with defense counsel via phone, video, or in-person contact. During the meeting, defense counsel should advise the youth of their rights and the legal implications of the search or interrogation about to occur, and provide other basic information about the youth justice system. In enacting this new law, the Oregon legislature will preemptively counteract the inherent harms to youths and their rights, such as law enforcement discretion, false confessions, and disparate treatment.