

FACT AND FICTION IN CONSTITUTIONAL CRIMINAL PROCEDURE

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ABSTRACT

This article empirically examines questions of rights knowledge and assertion in order to better understand the processes that contribute to people's assertions of their Fourth, Fifth, and Sixth Amendment rights. Using quantitative and qualitative results from survey data, we test some of the assumptions about rights knowledge and assertion that are embedded in existing U.S. Supreme Court opinions. Our findings suggest that not only do people, by and large, *not* know their rights, but that when they try to figure out which rights they possess, the current procedural regime leads them to perform even worse than chance. Rights knowledge is not correlated with demographic factors such as race, social class, or even prior experience as a subject of criminal investigation.

Furthermore, we find that a sense of personal efficacy in police-citizen interactions, specifically the willingness to assert rights, is positively correlated with social position. That is, people in higher social classes, and who have more cultural capital, are more willing to assert their rights than people in lower social classes, and who have less social capital. This finding challenges the framework of rights assertion as a purely rational decision-making process. By assuming that all citizens have the agency necessary to assert their rights, the Court ensconces inequality into criminal procedure doctrine, creating a regime which, in practice, gives some people greater access to their rights than others. Additionally, rights invocation during police-citizen encounters is a partial selection mechanism for determining who enters the criminal justice system in the first place. Our findings point to a hidden source of inequality in American criminal justice, suggesting new directions for research and policy.

I. INTRODUCTION: RIGHTS ON THE GROUND; RIGHTS IN COURT

When we talk about a person's "use" or "assertion" of a constitutional right in an interaction with the police, we are usually referring to a psychosocial process involving at least two components: (1) the person's knowledge or belief that he has the right, and (2) his willingness or agency to assert it.¹ At first blink, neither component seems particularly

¹ Depending on the situation, "asserting" a right may refer to a person's (a) exercising the right and (b) asserting that he is exercising it. For example, in *Salinas v. Texas*, which we will take up below, (a) and (b) are both necessary. But in a Fourth Amendment "free to leave" situation, a person can simply walk away; she need not announce that in doing so, she is exercising her Fourth Amendment rights. For our purposes here, we collapse (a) and (b), referring simply to "assertion"—by which we mean (a) and/or (b) as required for a

onerous or problematic. As Justice Kennedy asked semi-rhetorically during oral argument in *United States v. Drayton*²: “An American citizen has to protect his [own] rights once in a while... that’s a *bad thing*?”³

The Court has tended to assume, in *Drayton* and elsewhere, both implicitly and explicitly, that rights assertion is a rational process; a citizen who lacks knowledge of his basic constitutional rights has only himself to blame. And absent unconstitutional coercion, his decision about whether to assert a right he knows he possesses is a product of his own ratiocination.

Perhaps because the “use” of a right seems so simple and self-evident—and despite robust literatures in legal consciousness and constitutional criminal procedure—almost no work has examined the on-the-ground social realities of rights assertion in police-citizen interactions. These social realities are the foci of this article; specifically, we concentrate on two empirical questions. First, are people aware of the rights they might wish to use in encounters with the police? Second, are they willing and able to assert them if the need arises?

The Court regularly makes normative judgments about precisely these questions, as it did in 2013’s “sleeper case”⁴ of the year, *Salinas v. Texas*.⁵ Police suspected Genovevo Salinas of two murders and asked him to come to the station so they could take photographs and “clear” him as a suspect. Salinas went in voluntarily, was not Mirandized, and answered officers’ questions for about an hour. Following an inquiry about the murder weapon, however, he ceased talking. At trial, the prosecution introduced Salinas’s silence as evidence of his guilt, arguing that an innocent man would have either kept answering the police’s questions or protested about being asked questions about the murder weapon at all. The Court did not reach the issue of whether prosecutors’ use of pre-arrest silence as evidence of guilt violates the Fifth Amendment, however. Instead, the Court held that in any event, Salinas had no Fifth Amendment protection since he had said nothing to explicitly invoke his right to silence. In his opinion for the majority, Justice Alito wrote, “A suspect who stands mute has not done enough to put police on notice that he is relying on his

right to be recognized in a particular investigative context.

² 536 U.S. 194 (2002).

³ Transcript of Oral Argument at 34, lines 5-7, *United States v. Drayton*, 536 U.S. 194 (2002) (No. 01-631).

⁴ As christened by Orin Kerr on the popular legal blog, *The Volokh Conspiracy*. Orin Kerr, *Do You Have A Right to Remain Silent? Thoughts on the “Sleeper” Criminal Procedure Case of the Term*, *Salinas v. Texas*, *THE VOLOKH CONSPIRACY* (June 17, 2013, 8:11 PM), <http://www.volokh.com/2013/06/17/do-you-have-a-right-to-remain-silent-thoughts-on-the-sleeper-criminal-procedure-case-of-the-term-salinas-v-texas>.

⁵ 133 S.Ct. 2174 (2013).

Fifth Amendment privilege.”⁶

The *Salinas* majority did not engage with any questions related to what law and society scholars term “legal consciousness”—that is, how people subjectively understand and experience the law. The opinion omits discussion of how criminal procedure operates on the ground: Do people know their rights? Should we expect them to? Are any situations too legally complex to expect people to know their rights?⁷ The most unsettling aspect of *Salinas* is not necessarily the Court’s conclusion, but the unstated premises on which it rests. Two conclusions are possible: either the Court believed it was realistic for someone in *Salinas*’s position to have this level of rights knowledge, or the Court knew that this level of rights knowledge might be unrealistic, but found this unproblematic (or simply did not know and did not care).⁸

The dissent showed more interest in *Salinas*’s legal consciousness. Justice Breyer contemplated the encounter from a citizen’s point of view and clearly set out his assumptions:

The nature of the surroundings, the switch of topic, the particular question—all suggested that the right we have and generally know we have was at issue at the critical moment here. *Salinas*, not being represented by counsel, would not likely have used the precise words “Fifth Amendment” to invoke his rights because he would not likely have been aware of technical legal requirements, such as a need to identify the Fifth Amendment by name.⁹

Although Justice Breyer’s conclusions seem eminently reasonable, they are normative assertions—and it is unclear what they are founded upon. Common sense? The cultural ubiquity of the *Miranda* rights?

Periodically, the Court has lamented the dearth of research on which it can rely in assessing people’s use and understanding of their rights in interactions with the police.¹⁰ Six years before *Salinas* was handed down,

⁶ *Id.*

⁷ What non-lawyer, after all, would be able to ascertain from the Fifth Amendment’s text the notion that his silence *can* be used against him before he is Mirandized (unless he asserts it outright), but not *after* he is Mirandized?

⁸ Actually, a third conclusion is possible: that the *Salinas* Court did not contemplate the effects of a person’s level of rights knowledge, but this seems unlikely.

⁹ *Salinas*, 133 S.Ct. at 2190 (Breyer, J., dissenting).

¹⁰ The small handful of studies that have examined these issues have also called for more research, including presenting subjects with “more complicated scenarios,” and collecting more demographic information from respondents. See David K. Kessler, *Free to*

Justice Breyer made a comment during oral argument in *Brendlin v. California*¹¹ about the difficulty of assessing whether a person would have felt free to leave:

So what do we do if we don't know? I can follow my instinct. My instinct is he would feel he wasn't free because the [police's] red light's flashing. That's just one person's instinct. Or I could say, let's look for some studies. They could have asked people about this and there are none¹²

Indeed, he is correct; little or no existing research speaks to these kinds of questions. This article, then, begins to fill a large and important void in criminal procedure scholarship.

II. WHAT WE KNOW ABOUT HOW RIGHTS WORK

Despite the richness of the doctrinal scholarship in constitutional criminal procedure, surprisingly little is known about how Fourth, Fifth, and Sixth Amendment rights function in practice. Empirical studies of criminal procedure remain relatively rare, particularly compared to the mass of empirical work on crime and criminal justice institutions.¹³ The legal consciousness and rights consciousness literatures, usually situated within the law and society literature, are a useful starting point for theoretically-grounded empirical scholarship on constitutional criminal procedure, though to date, the vast majority of this literature has focused on civil law. The procedural justice work within psychology may offer some useful insights as well. In this section, we describe the state of the empirical literature on rights knowledge, assertion, and closely related questions, and then give a brief overview of how the work on legal consciousness and procedural justice might be useful going forward.

A. Rights Knowledge

Leave? An Empirical Look at the Fourth Amendment's Seizure Standard, 99 J. CRIM. L. & CRIMINOLOGY 51, 87 (2009). The instant article accomplishes both things.

¹¹ 551 U.S. 249 (2007).

¹² Transcript of Oral Argument at 43, *Brendlin v. California*, 551 U.S. 249 (2007) (No. 06-8120).

¹³ For an overview and discussion of this work, see Robert Weisberg, *Empirical Criminal Law Scholarship and the Shift to Institutions*, 65 STAN. L. REV. 1371 (2013).

Although the degree to which ignorance actually facilitates waivers of constitutional rights in the criminal procedure context remains unknown, a few studies have shed light on the topic. Richard Rogers et al. looked at rights knowledge with respect to *Miranda v. Arizona*.¹⁴ Most Americans think they know their *Miranda* rights,¹⁵ but it turns out that the *Miranda* warnings' ubiquity does not translate into practical knowledge about how rights operate. Using the "*Miranda* Rights Scale," Rogers et al. measured different groups' knowledge of various *Miranda*-related questions (e.g., the admissibility of retracted statements or "off-the-record" comments; whether the "right to an attorney" included the right to meet in private with that attorney; whether *Miranda* rights can be reasserted after they are waived).¹⁶ They concluded that people tend to have little knowledge of how these rights work in practice: "[Our] findings suggest most persons can recognize their basic rights to silence and legal counsel. However, the more critical question is whether they have an accurate *working* knowledge of their rights"¹⁷ (emphasis added). The handful of other studies examining rights knowledge in the criminal procedure context—for example, Austin Sarat's 1975 survey of 220 Wisconsin adults¹⁸—have reached similarly dismal conclusions about the degree to which people understand the rights they possess.

People make suppositions about which rights they hold based on a fairly predictable sort of "lay jurisprudence." They apply broad cultural memes about criminal procedure (e.g., "Everyone has a right to counsel if they're charged with a crime" or "Police need a warrant to do a search") to particular situations, which often (and unsurprisingly) leads them to erroneous conclusions.¹⁹ For example, if a person believes that every

¹⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁵ Richard Rogers, A Little Knowledge is a Dangerous Thing . . . Emerging *Miranda* Research and Professional Roles for Psychologists, 63 AM. PSYCHOLOGIST 776, 787 (2008).

¹⁶ For a thorough but concise description of the scale's development, see Richard Rogers et al., "*Everyone knows their Miranda rights*": *Implicit Assumptions and Countervailing Evidence*, 16 PSYCHOL. PUB. POL'Y & L. 300, 303-05 (2010).

¹⁷ *Id.* at 314.

¹⁸ Most of the empirical studies on point had been done shortly after the Warren Court's key criminal procedure cases were handed down. Austin Sarat, *Studying American Legal Culture*, 11 LAW & SOC'Y REV. 427, 479 (1977) (citing Austin Sarat, *Support for the Legal System: An Analysis of Knowledge, Attitudes, and Behavior*, 3 AM. POL. Q. 3 (1975)); see Steven L. Chanenson, *Get the Facts, Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches*, 71 TENN. L. REV. 399, 454 (2004), citing Ilya D. Lichtenberg, *Voluntary Consent of Obedience to Authority: An Inquiry into the 'Consensual' Police-Citizen Encounter* (Oct. 1999) (unpublished Ph.D. dissertation, Rutgers University).

¹⁹ Kathryn M. Young, *Rights Consciousness in Criminal Procedure: A Theoretical*

defendant has a right to counsel, he may assume that this applies even to misdemeanors that carry no jail time.²⁰ Or, if he believes that the police need a warrant to conduct a search, he may gather that this is true even in his car.²¹ Lay jurisprudence not only leads to errors; it leads to predictable ones, creating patterns that can render people vulnerable to exploitation.

While criminal procedure is not the only substantive area in which people hold legal misunderstandings,²² legal knowledge is especially important in criminal procedure, because in many situations, people have to assert a right at a given point in time or else it is waived. A person's understanding of the *Miranda* warning's implications, for example, has immediate consequences for the decisions she makes in her interactions with the police. For example, she might not ask, "What is going to happen to me now?" if she knew that her question constituted a willingness to speak to police without counsel.²³ Unlike *assertions* of the right to silence or counsel, *waivers* of these rights can take place unwittingly.²⁴

B. Rights Assertion

Although scholars have noted that normative questions in constitutional criminal procedure frequently hinge on empirical facts,²⁵ empirical work in criminal procedure, and particularly on rights assertion, has not been nearly as plentiful as in other areas of criminal justice.²⁶ Nor

and Empirical Inquiry, 12 SOC. CRIME, L. & DEVIANCE 67 (2009). Other research supports this conclusion as well. See, e.g. with respect to *Miranda*, Rogers, *supra* note 14.

²⁰ In fact, no right to counsel attaches to misdemeanors that do not carry jail time as a possible punishment. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367 (1979).

²¹ Not so, of course. *Carroll v. United States*, 267 US. 132 (1925). Lay jurisprudence is probably undergirded by another process as well: "In the absence of a clear understanding of the law, it would appear that people tend to assume it concurs with what they think it ought to be." Pascoe Pleasence & Nigel J. Balmer *Ignorance in Bliss: Modeling Knowledge of Rights in Marriage and Cohabitation*, 46 LAW & SOC'Y REV. 297, 323 (2012); see John Darley et al., *The Ex Ante Function of the Criminal Law* 35 LAW & SOC'Y REV. 165 (2001)

²² See, e.g., Pleasence & Balmer, *supra* note 22.

²³ *Oregon v. Bradshaw*, 42 U.S. 1039, 1043-44 (1983).

²⁴ See, e.g., *Salinas*, 133 S.Ct. at 2177 ("In any event, it is settled that forfeiture of the privilege against self-incrimination need not be knowing").

²⁵ For example, Janice Nadler has observed, "The question of whether a citizen feels free to terminate a police encounter depends crucially on certain empirical claims..." *No Need to Shout: Bus Sweeps and the Psychology of Coercion*. 200 Supreme Court Review, pages 153-222. (p. 155)

²⁶ See S.L. Chanenson, *Get the Facts, Jack! Empirical Research and the Changing Landscape of Consent Searches*, 71 Tennessee L. Rev.; Meares and Harcourt, *Forward: Transparent Adjudication and Social Science Research in Constitutional Criminal*

does the sociological literature on rights-claiming often delve into the criminal realm.²⁷ The few notable exceptions are worth describing in some detail.

In 2009, David K. Kessler published the results of an interview study that examined perceived freeness to leave.²⁸ Using a “man-on-the-street”-type interview design, Kessler approached Boston residents and asked whether they would feel free to leave if a police officer approached them on (1) a sidewalk or (2) on a bus and said, “I have a few questions to ask you.” Perhaps unsurprisingly, most people reported that they would *not* feel free to leave (a finding especially pronounced, in Kessler’s study, among women and people under age 25).²⁹ While the study has methodological shortcomings, the analyses are useful. Because Kessler looked at whether people knew a particular right and were willing to assert that same right, he was able to examine the effects of pre-existing knowledge of rights on a person’s reaction to an encounter with the police. He concluded that even though “freeness-to-leave” scores remained low across the board, a person’s knowledge of a right made her significantly more likely to predict that she would assert it in an encounter with the police.³⁰ People’s general unwillingness to terminate interactions with the police, Kessler concludes, calls into question the Court’s characterization of what a “reasonable” person’s interactions with the police really look like.

Alisa M. Smith et al. conducted a related study a few years later, also testing courts’ normative assumptions about consensual encounters in the Fourth Amendment context.³¹ Their experimental design was intended to approximate the interactions between citizens and police. Acting as

Procedure. 90 J. of Crim. Law & Criminology, 733-98 (2000). See also Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—and Three Answers*, U. of Illinois L. Rev. (2002).

²⁷ See, e.g., Engel & Munger; Morrill et al.; Brake and Grossman. Differences between civil and criminal law make it difficult to generalize across both kinds of cases about how rights assertion operates. For one, violations of rights in the criminal context are most likely to occur in the context of a criminal prosecution, (Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 *FORDHAM L. REV.* 1913-29, 1916) when the claimant is also a criminal defendant. Exclusion of evidence is the typical remedy sought; the claim of a rights violation is used as a shield, not as a sword. Other differences include timeliness of assertion (many Fourth, Fifth, and Sixth Amendment rights are waived if not raised *during* an interaction with police), and the availability of counsel in criminal trials (which may affect the likelihood that rights-claiming will occur).

²⁸ Kessler, *supra* at ____.

²⁹ Kessler, *supra* note 9.

³⁰ Kessler at p. 12.

³¹ Alisa M. Smith, Erik Dolgoff, and Dana Stewart Speer. *Testing Judicial Assumptions of the “Consensual” Encounter: An Experimental Study*, 14 *FLA. COASTAL L. REV.* 285 (2013).

confederates, four campus security guards stopped eighty-three passersby (singly and in groups), and asked them to identify themselves and explain their reasons for being on campus.³² Everyone stopped and complied with the requests. After each encounter, the researchers conducted a brief interview to better understand what the interaction had been like from the participant's point of view. The most noteworthy finding was that although most subjects viewed the encounter as consensual, most subjects also reported not having felt free to leave it (which, of course, challenges the idea that such encounters are "consensual" at all). Situational factors, such as the number of officers or whether the encounter occurred indoors or outdoors, had no effect on how people perceived the encounters. Unfortunately, the authors did not collect information about participants' socioeconomic status, but since all participants were recruited at a small private university, this factor probably did not vary greatly. The study also contained only sixteen nonwhite participants.³³

In general, the few previous empirical studies of constitutional criminal procedure³⁴ have focused specifically on one aspect of criminal procedure rather than on broader questions of rights assertion. Additionally, previous studies have rarely looked at the relationship between rights knowledge or assertion, on one hand, and demographic factors such as race, gender, or socioeconomic status on the other. And while ample studies exist describing the factors that affect government actors' decision-making at various stages of criminal investigation and adjudication, few examine the factors that affect the behaviors of an investigation's *subjects*. Perhaps a

³² This design, too, has its shortcomings—most notably, all of the encounters took place at a private college campus, where the public, presumably, had no right to be present. Depending on the school's policies, the subjects approached by the security guards may have been required to comply with the guards' request. Additionally, students on a college campus may have a different relationship with the police than with campus security guards, and a person's behavior at the private college she attends may be different from her behavior in public. Nonetheless, the design is impressive, given the difficulty of constructing an experiment that approximates encounters with police.

³³ Smith et al., p. 302.

³⁴ In addition to the studies described above, there have been a few others. For one, Rogers et al. have "explored the reasons expressed by pretrial defendants for exercising or waiving their *Miranda* rights. Such reasons suggested that many defendants had incomplete or inaccurate knowledge of their *Miranda* rights and other relevant data affecting their waiver decisions (e.g., not asking for counsel due to a lack of funds)." Rogers, R., Rogstad, J. E., Gillard, N. D., Drogin, E. Y., Blackwood, H. L., & Shuman, D. W. (2010). "Everyone knows their *Miranda* rights": Implicit assumptions and countervailing evidence. *Psychology, Public Policy, and Law*, 16(3), 300–318, p. 302, citing Rogers et al., *Knowing and Intelligent: A Study of Miranda Warnings in Mentally Disordered Defendants*, 31 *Law & Human Behavior* 401-18 (2007) and Rogers et al., *The Language of Miranda in American Jurisdictions: A Replication and Further Analysis*, 32 *Law & Human Behavior*, 124-36 (2008).

citizen's behavior is less outcome-predictive than the police's—but assuming that a person's Fourth, Fifth, and Sixth Amendment rights have any teeth, this should not necessarily be so.

C. Other Relevant Literatures

“Legal consciousness” typically describes how everyday actors think about, relate to, and act with regard to, the law. Formally, much of this work, including “rights consciousness” (the literature which looks more specifically at how people understand and employ various rights), is situated within sociology, anthropology, or law and society studies. This body of research theorizes the processes that form “commonsense understandings of the way the law works,”³⁵ and is especially concerned with differences between the law “on the books” and the law “on the ground.” Laura Beth Nielsen has written that “comprehending the most basic functions of rights requires the empirical study of rights consciousness and claiming behavior... This perspective... places the study of ordinary citizens’ understandings of rights, and what action they take based on that knowledge, at the forefront of an empirical research agenda.”³⁶ Paradigms described by Nielsen, Patricia Ewick, Susan Silbey, and others, suggest that there are patterns in how people relate to law,³⁷ and that these patterns derive in large part from their individual experiences and social locations.³⁸ Others, such as Rebecca Sandefur, have found that social experience, including socioeconomic status, “creat[es] dispositions that come to colour future behavior” regarding people’s use and understanding of the law.³⁹ In a variety of civil law contexts, people’s attitudes toward the justiciability of rights and legal problems appear to be influenced by their backgrounds.⁴⁰

³⁵ Laura Beth Nielsen, *License to Harass: Law, Hierarchy, and Offensive Public Speech*. Princeton University Press, 2004, p. 7.

³⁶ LAURA BETH NIELSEN, THEORETICAL AND EMPIRICAL STUDIES OF RIGHTS xi (Laura Beth Nielsen ed., 2007).

³⁷ See Patricia Ewick and Susan Silbey, *The Common Place of Law* (book). Identity and personal narrative are particularly key in shaping rights consciousness, and affects their self-perception as rights holders. See, e.g., F.W.(1996). Rights, remembrance, and the reconciliation of difference. *Law & Society Review*, 30(1), 7–53; MERRY, *supra* note 73 (regarding people’s identities as rights-holders); GILLIOM, *supra* note 113.

³⁸ Nielsen 2000. Laura Beth Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens and Street Harassment*. *Law & Society Review* 34(4), 1055-1090.

³⁹ Sandefur 2007, p. 131. For a more in-depth overview of rights consciousness in the context of criminal law and criminal procedure, see Young 2009, pages 68-73.

⁴⁰ Sandefur, R. L. (2007). The importance of doing nothing: Everyday problems and responses of inaction. In: P. Pleasence, A. Buck & N. J. Balmer (Eds), *Transforming lives: Law and social process* (pp. 116–136). London, England: HMSO.

Calvin Morrill et al. have found, for example, that race affects whether youth choose to take formal legal action in response to perceived harassment.⁴¹

Though typically not considered part of the legal consciousness literature, social psychological work on procedural justice is closely related,⁴² and sheds light on how people perceive law and legal actors. Procedural justice is the sense that an outcome was reached by just procedures—for example, that a judge treated the parties to a lawsuit fairly, or that all of the parties involved received a fair hearing. Most centrally, Tom Tyler and others have found that people care deeply about *how* the criminal justice system interacts with them. The effects of a negative substantive outcome are tempered by the perception that one has been treated fairly.⁴³ Conversely, a person's satisfaction with a positive outcome is reduced if she does not believe that it was reached through fair procedures.⁴⁴ This holds true in both civil and criminal cases.⁴⁵ If people believe they are treated fairly, they trust legal institutions more—from the police to the Supreme Court⁴⁶—and are both more likely to obey legal authorities and more likely to comply with the law.⁴⁷ Procedural justice work has also explored the correlation between trust in the police and various demographic factors (e.g., race), as well as the correlation between trust in the police and other kinds of involvement in the criminal justice system (e.g., willingness to serve as a witness).⁴⁸ These findings are

⁴¹ Morrill et al p. 684.

⁴² For a more detailed look at this relationship, see Kathryn M. Young, *Everyone Knows the Game: Legitimacy and Legal Consciousness in the Hawaiian Cockfight* (forthcoming in LAW & SOC. REV., 2014).

⁴³ We have an abiding concern that the procedural justice literature's occupation with people's experiential, process-driven satisfaction not only overvalues compliance, but opens a door to the use of process as palliative, easing a path to substantively unjust outcomes. See Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171 (2005); see also Craig Haney, *The Fourth Amendment and Symbolic Legality: Let Them Eat Due Process*, 15 LAW & HUM. BEHAV. 183 (1991).

⁴⁴ See, e.g., John Thibaut & Laurens Walker, A Theory of Procedure, 66 CAL. L. REV. 541 (1978); Tom Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51 (1984); Linda D. Molm et al., *In the Eye of the Beholder: Procedural Justice in Social Exchange*, 68 AM. SOC. REV. 128 (2003). This finding has been replicated many times in the literature, and appears to hold across contexts.

⁴⁵ For an example of procedural justice in the criminal justice context, see Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV 483 (1988).

⁴⁶ Tyler, *The Role of Perceived Injustice*, *supra* note 39, at 70.

⁴⁷ TOM TYLER, WHY PEOPLE OBEY THE LAW (2006).

⁴⁸ [note to editors: I can also add a cite for the two parenthetical examples in the preceding sentence; just let me know if you think this is necessary.] Curiously, though,

potentially problematic; procedural justice holds the potential to increase obedience to, and trust in, law. Our concern echoes those of Robert J. MacCoun, Craig Haney, and others who have pointed out procedural justice's potential for manipulating individuals into obedience, or at least dissuading them from questioning legal authority, by making them feel placated.⁴⁹

Little is known about whether the factors people associate with procedural fairness actually align with legal requirements. Procedural justice research has rarely focused on substantive constitutional criminal procedure, which has mostly remained the province of legal scholars' doctrinal analysis. Still, it has heavily influenced the policing literature, and has spurred critiques of "order-maintenance" policing, which critics argue has "negative implications for police legitimacy and crime control efforts via [its] potential to damage citizens' views of procedural justice."⁵⁰

One vein of legal scholarship that touches on what the first author has termed "procedural rights consciousness"⁵¹ is the work connecting poverty and privacy in the criminal context. Christopher Slobogin has documented manifold ways in which socioeconomic status matters in criminal procedure. He describes this pattern in several search and seizure contexts, characterizing it as the "poverty exception" to the Fourth Amendment⁵²: the inability of the poor to afford structural measures that

there has been little or no work on how well people's satisfaction with the law aligns with the law's substance. That is, do the legal provisions of due process align with the kinds of process that make people feel like the legal system is trustworthy? How is rights-claiming shaped by identity and experience in people's encounters with the police? Does a meaningful opportunity to exercise constitutional rights correlate with feelings of "satisfaction" about the criminal justice system? I have previously characterized this set of inquiries as "procedural rights consciousness." Although this line of work is related to the procedural justice literature, and may seem similar on the surface, since both are concerned with how people experience legal procedures, it is quite different in several respects. For one, procedural rights consciousness is theoretically rooted in legal consciousness's broad, identity-based perspective. Procedural rights consciousness is also less concerned with people's *obedience* to the law than with their willingness to employ it, making it more focused on self-efficacy than on compliance. Additionally, procedural rights consciousness is deeply concerned not with the relationship between the treatment people receive and their satisfaction with law, but with the relationship between the procedural law on the books and the on-the-ground realities of how procedure operates from the perspective of the people subject to it.

⁴⁹ See MacCoun, *supra* note 38; see also Haney, *supra* note 38.

⁵⁰ Jacinta M. Gau & Rod K. Brunson, *Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men's Perceptions of Police Legitimacy*, 27 JUST. Q. 255 (2010).

⁵¹ See Young 2009 at p. XX; as well as *supra* in this article.

⁵² Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391 (2003).

signify a “reasonable expectation of privacy”⁵³ and the forced surrender of privacy in order to receive benefits.⁵⁴ Michele Gilman also describes the disparate treatment poor people receive. They are disproportionately subjects of surveillance, on which their government benefits (such as welfare) are contingent. At the same time, the government benefits more commonly enjoyed by people who are not poor, such as tax breaks or farm subsidies, are not contingent upon the recipients’ surrender of privacy to the government.⁵⁵

III. METHODOLOGY

A. Survey Design and Sampling Procedures

The survey comprised three parts. Part One presented five short vignettes, each written in the second person point of view. Respondents were asked to put themselves in the shoes of someone who was innocent of any wrongdoing but would prefer to refuse a search or end an interaction with police. For example, the first vignette read:

(1) One day before you leave for work, an officer knocks on your door and says that there have been drug sales reported on your block. He says you don’t have to let him in, but that he’s checking the homes in the suspected area, and that it will only take 20 minutes. You are already late for an important meeting. You have nothing illegal in your house. Do you let the officer search?⁵⁶

⁵³ *Id.* at 400-01.

⁵⁴ *Id.* at 402-03; as Slobogin writes, “Those suspected of tax fraud get full Fourth Amendment protection; those suspected of welfare fraud get none.” *See also* Michele Gilman, *The Class Differential in Privacy Law*, 77 BROOKLYN L. REV. 1389 (2012); *Wyman v. James*, 400 U.S. 309 (1971). As Slobogin writes, “Those suspected of tax fraud get full Fourth Amendment protection; those suspected of welfare fraud get none.” *See also* Michele Gilman, *The Class Differential in Privacy Law*, 77 BROOKLYN L. REV. 1389 (2012).

⁵⁵ Gilman, *supra* note 30.

⁵⁶ The other rights assertion vignettes:

(2) The company you work for is being investigated, and a few people, including you and your boss, are arrested at work. The police take you to the station, read you your rights, and start asking questions. You’re 100 percent sure that you have not done anything wrong. You have the right to remain silent if you wish. Do you answer the police’s questions?

(3) A friend asks you if you’ll give one of her friends, Ben, a ride to work. You’ve never met Ben, but you agree. You pick Ben up, and a few

In each vignette, the reader was told that he had a specific right and was asked whether he would assert it. The purpose of disclosing the state of the law was to “control” for rights knowledge. That is, we wanted to examine people’s willingness to assert a right *irrespective* of their previous knowledge of that right.⁵⁷ At the conclusion of each vignette, the respondent was asked to indicate whether she would assert her right.⁵⁸ After each yes/no answer, the respondent was asked, “Why or why not?” and given space to explain her answer.

Though vignette studies are a common staple of social science research, they have the disadvantage of being based on hypothetical actions. Kessler’s work⁵⁹ suggests that people may overestimate the likelihood that they will assert their rights when the situation actually arises. Thus, the vignettes used here are probably a conservative estimate of people’s

minutes later, he slips something into his pocket that you are sure is marijuana. He looks at you and says, “It’s no big deal.” Distracted, you run a red light and are pulled over by a police officer, who asks you both to step out of the vehicle. Before Ben gets out, he tosses the marijuana under your seat. The officer writes you a ticket, then asks whether she can search your car. You know the drugs are under your seat, and you don’t trust Ben to tell the truth. You have the right to refuse. Do you let the officer search?

(4) You’re taking a bus trip with friends, and you’re using a duffel bag to carry your things. After an hour, the driver stops the bus and two policemen in uniforms get on. They announce that they want to conduct a search. To your surprise, one of the officers walks up to you and asks to look in your bag. You have some very embarrassing items inside, but nothing illegal. You don’t want your friends, or a bus full of strangers, to see what’s inside. You know you have the right to say no. Do you allow the cop to search your bag?

(5) One morning, police knock on your door and tell you that they are investigating a robbery that happened the night before. The same kind of car you own was seen driving away from the scene, and they are questioning a few people in the area who drive that kind of car. You were home alone all night, watching television. Do you ask for a lawyer before answering their questions?

⁵⁷ Vignettes were pre-tested for clarity, and the names used in the vignettes were pre-tested to make sure they were racially ambiguous. Each scenario also specified that in the hypothetical, the respondent herself had not participated in illegal activity. We did this so that actual criminality would not be a factor. For example, we did not want someone to answer that he would refuse to let the police search his home because he generally has marijuana lying around.

⁵⁸ To ensure that presentation did not affect our results, some questions were phrased in the negative—whether a respondent would allow police to search or not, whether he would refuse a search or not, etc.

⁵⁹ See Kessler, *supra* note 9; see also Morrill et al., *supra* note 35, at 686 (discussing the use of hypothetical questions in socio-legal research).

willingness to comply with police requests.⁶⁰ Additionally, insofar as the survey measures rights consciousness, as opposed to rates of assertion, people's prediction about whether they would assert their rights is useful in understanding the degree to which they perceive themselves as having agency in police-citizen encounters.

The second part of the survey was a ten-question rights knowledge inventory. Each was based on a Supreme Court case and asked about an issue of settled law in constitutional criminal procedure. For example, questions included:

- If you put your trash in sealed bags out on the curb for pickup, can the police come and look through it whenever they want?⁶¹
- Steve is charged with cruelty to animals, a misdemeanor in his state punishable by either fines or community service. Steve's case goes to trial in front of a jury, and Steve can't afford a lawyer. Does he have a right to have a lawyer provided?⁶²

The questions required some knowledge of rights but were not based on outlandish or improbable investigative scenarios.⁶³

Lastly,⁶⁴ respondents were asked to answer demographic questions about themselves, including race,⁶⁵ gender, prior searches or arrests by police, and level of education attained by his parents or guardians.⁶⁶

⁶⁰ Still, there is no reason to believe that this skewing would correlate with other variables, so differences between groups of respondents would likely hold.

⁶¹ *California v. Greenwood*, 486 U.S. 35 (1988).

⁶² *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367 (1979). Other cases on which questions were based: *Smith v. Maryland*, 442 U.S. 735 (1979); *United States v. Patane*, 542 U.S. 630 (2004); *New York v. Belton*, 453 U.S. 454 (1981); *Thornton v. United States*, 541 U.S. 615 (2004); *Kyllo v. United States*, 533 U.S. 27 (2001); *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Rakas v. Illinois*, 439 U.S. 128 (1978); *Moran v. Burbine*, 475 U.S. 412 (1986); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *United States v. Pollard*, 959 F.2d 1011, (D.C. Cir.), *cert. denied*, 506 U.S. 915 (1992). The text of all ten questions is available upon request.

⁶³ Parts 1 and 2 were put in the order listed above for several reasons. Most importantly, pre-testing showed that after completing the rights knowledge inventory, respondents sometimes referenced *that* section in responding to the rights assertion vignettes—e.g., “After answering those other questions, I realized I don't know my rights at all, so I'd better get a lawyer.” However, the reverse was not true; putting the rights assertion section first did not affect people's rights knowledge scores. We also ensured that none of the rights that people were told about in the rights assertion section (Part 1) could be construed as answering any of the rights knowledge questions (Part 2).

⁶⁴ This section came last for two reasons. For one, people tend to answer demographic

B. Sampling

Participants for the study were recruited from two locations: undergraduates from a well-regarded private research university in California ($n = 108$), and students at a community college ranked in the bottom quartile of California's two-year colleges⁶⁷ ($n = 247$). These two populations provided a sample that was diverse along several dimensions.⁶⁸ Additionally, these samples were chosen so that they could be compared against one another, in order to begin looking at the role of a particularly elusive factor in sociological research—"class consciousness" or "entitlement"—in how people use their rights. The community college students may face structural restrictions that, to varying degrees, we hypothesized may affect rights knowledge and assertion. Conversely, the private university students may have experienced certain privileges that impact their orientation to their rights. Written surveys were distributed at

questions the same way regardless of where they appear in a survey, so putting these questions last may have reduced the risk of survey fatigue. (On the other hand, it may have reduced the *rate* of response to these questions. See Robert Teclaw et al., *Demographic Question Placement: Effect on Item Response Rates and Means of a Veterans Health Administration Survey*, 27 J. BUS. & PSYCHOL. 281 (2012).) But more importantly, asking respondents about their race, then asking them questions about the criminal justice system, increases the likelihood of a race-based effect—just as asking people their gender before a math test results in poorer performance by women. See Claude M. Steele & Joshua Aronson, *Contending with a Stereotype: African-American Intellectual Test Performance and Stereotype Threat*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995); see also Steven J. Spencer et al., *Stereotype Threat and Women's Math Performance*, 35 J. EXPERIMENTAL & SOC. PSYCHOL. 4 (1999). Putting this section last likely increased the validity of Parts 1 and 2. (Perhaps it would be worth doing an altogether different study that examined people's willingness to assert their rights if race was made salient before scenarios were presented.)

⁶⁵ Respondents could choose multiple races, identify as mixed-race, or write in a race not listed. We believe this allowed people to more fully describe their identity, although as discussed, *infra*, we were ultimately not able to perform as fine-grained an analysis of racial effects as we would have liked.

⁶⁶ The survey allowed respondents to list up to four parents or guardians, and described the relationship in an open-ended response. Most of the time, guardians were listed as mother, father, stepmother, or stepfather, but a few respondents were raised by aunts, uncles, a sibling, a grandparent, etc.. The analysis that follows draws no distinction between these types of relations.

⁶⁷ How Does Your Community College Stack Up?, CNNMONEY, <http://money.cnn.com/pf/college/community-colleges> (last visited Sept. 26, 2013).

⁶⁸ As Harmon has noted, scholarship about police conduct tends to focus on conduct that ends up "at issue in criminal cases." Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 784 (2012). But since the majority of police-citizen interactions do not result in a criminal case, we sought to understand how people in general—not just suspects or criminal defendants—interact with police.

each site in a variety of introductory-level courses in the social science and humanities that filled general education requirements, including courses in psychology, economics, history, sociology, and political science.⁶⁹

IV. RESULTS

A. Sample Characteristics

Table 1 presents proportions (or means and standard deviations, where appropriate) for variables used in subsequent analyses, separated by sample—that is, by whether a respondent attended the university or the community college.⁷⁰ We use chi-square tests (and *t*-tests for paired means where appropriate) to examine differences between the university and community college students.

⁶⁹ Respondents received course credit for their participation.

⁷⁰ The number of observations vary because of missing data. While there is relatively little missing data on any one variable, omitting all participants with missing data on one or more variables ($N = 27$) results in a loss of approximately 7.6% of the data. Excluding these cases from all analyses results in substantially similar results. (Models available upon request.)

Table 1. Proportions, Means and Standard Deviations for Variables Used in Analyses

VARIABLES	University Sample	n	Community College Sample	n	Total Sample	n
Female	.64	107	.60	245	.61	352
Age	19.92***	107	22.04***	243	21.39	350
	(1.21)		(6.78)		(5.74)	
White	.50***	108	.17***	247	.27	355
Black	.11	108	.13	247	.12	355
Other or Mixed Race	.39***	108	.70***	247	.61	355
Hispanic	.08***	108	.53***	247	.39	355
Not a Citizen	.06*	107	.12*	245	.10	352
Searched or Arrested	.19***	108	.44***	239	.36	347
Parent/Guardian College Degree	.85***	105	.35***	228	.50	333
<i>Rights Knowledge</i>						
Total Correct	3.95	108	3.98	247	3.97	355
	(1.29)		(1.48)		(1.43)	
<i>Rights Assertion</i>						
Q1: Search Home	.80	108	.73	247	.75	355
Q2: Answer Questions	.62***	108	.41***	242	.47	350
Q3: Search Car	.85***	108	.58***	242	.67	350
Q4: Search Bag	.59***	104	.44***	240	.49	344
Q5: Ask for Lawyer	.50	107	.41	243	.43	350

Standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

As Table 1 shows, the university sample contained a significantly larger proportion of white respondents (.50 compared to .17)⁷¹ and of respondents who had at least one parent or guardian with a four-year college degree (.85 compared to .35).⁷² The community college sample was, on average, older than the university sample (the mean ages were 22.04

⁷¹ $\chi^2 (1, n = 355) = 41.47, p < .01$. We categorized respondents into the following racial groups: those who identified only as white or European-American, those who identified as black or African-American (regardless of whether this was the only group chosen), and those who fell into neither category. The sample size did not enable as fine-grained an analysis of race as would have been ideal, but we focused on blackness and whiteness because of the historical salience of these racial categories in the American criminal justice system. See, e.g., Tracey Maclin, "Black and Blue Encounters" *Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U.L. REV. 243 (1991) We chose to define "blackness" this way primarily because there were not enough respondents who self-identified *only* as black to allow us to look at that group separately, and also because black racial consciousness is not dependent on a person's identifying *solely* as black.

⁷² $\chi^2 (1, n = 333) = 72.22, p < .01$. The parent/guardian education variable shown here is a dichotomous variable that indicates whether at least one of the individuals a respondent listed as a parent or guardian holds a degree from a four-year college or university.

years and 19.92 years, respectively)⁷³ and contained a significantly larger proportion of respondents who self identified as “other or mixed race” (.70 compared to .39),⁷⁴ Hispanic (.53 compared to .08),⁷⁵ and non-U.S. citizen (.12 compared to .06).⁷⁶ Finally, the proportion of community college students who had been searched or arrested (.44) was significantly higher than the proportion of university students who had been searched or arrested (.19).⁷⁷

The figures under the titles “rights knowledge” and “rights assertion” in Table 1 show between-sample differences in responses to the survey questions.⁷⁸ On average, respondents from both samples fared worse than chance on the rights knowledge test. Out of a possible 10 points, the pooled sample mean is 3.97 (standard deviation = 1.43). No significant difference exists between the university students’ and community college students’ performance.⁷⁹

Rights assertion, however, was more prominent among university students. In response to all five rights assertion vignettes, respondents from the university sample were more likely to assert a right and respondents from the community college sample were more likely to comply with the police—a pattern which reached statistical significance in three out of five scenarios. These findings are especially noteworthy given that there was no significant difference between samples in terms of rights *knowledge*. In other words, the university students were more likely to assert their rights than the community college students. The two groups were equally knowledgeable about their rights, but respondents from the community college sample were more likely to comply⁸⁰ with the police.⁸¹

⁷³ SD = 6.78 for community college students and 1.21 for university students, $t(349) = 4.71, p < .01$.

⁷⁴ $\chi^2(1, n = 355) = 30.53, p < .01$.

⁷⁵ $\chi^2(1, n = 355) = 61.89, p < .01$.

⁷⁶ $\chi^2(1, n = 352) = 3.57, p < .10$.

⁷⁷ $\chi^2(1, n = 347) = 20.23, p < .01$.

⁷⁸ Even though it is not the order in which respondents answered the survey questions, we find it conceptually useful in this article to discuss the rights knowledge inventory before the rights assertion vignettes, since knowledge is, somewhat, a precursor to assertion.

⁷⁹ $t(354) = 0.19, p = .84$.

⁸⁰ At various points in this Article, for the sake of simplicity we liken rights assertion to noncompliance with police, and liken compliance with police to failure to assert a right. It is worth acknowledging, though, that the items within each pairing are not strictly speaking, synonymous. Nor are compliance and assertion quite opposites.

⁸¹ Precise results for the remaining four questions are as follows:

2. (police questioning about a work-related investigation): A significantly larger proportion of the university students compared to the community college students (.62 compared to .41) claimed they would exercise their right to remain silent and refuse to

B. Rights Knowledge

Table 2, Model 1, shows the effect of several factors on rights knowledge: sample (that is, whether the respondent was in the university sample or the community college sample), gender, age, race, ethnicity, citizenship, and prior search/arrest by police. We included these variables in the model based on the theoretical motivations already described, as well as on other researchers' findings that these variables are salient in the rights assertion and/or criminal procedure contexts.⁸² Drawing respondents from a prestigious private university and a low-performing community college, provided an additional measure of status. We intended this variable to serve as a proxy for what Pierre Bourdieu called "cultural capital"—that is, knowledge, skills, education and advantages that a person has which give them higher status. These are not subjects taught in schools. Rather, they are subjects learned, and values transmitted, through membership in a certain social class.⁸³ We argue that the university students in our sample will be more likely (compared to the community college students in our sample) to have acquired a mentality of entitlement and privilege that allows them to assert their rights, regardless of their individual rights knowledge.⁸⁴ In

answer the questions, $\chi^2 (1, n = 350) = 13.37, p < .01$.

3. (car search): A larger proportion of the university sample (.85) indicated they would exercise their right to refuse the search compared to the community college sample (.58), a statistically significant difference, $\chi^2 (1, n = 350) = 24.32, p < .01$.

4. (bus search): A larger and statistically significant proportion of the university students (.59) indicated they would refuse the search compared to the community college sample (.43), $\chi^2 (1, n = 344) = 6.10, p < .01$.

5. (asking for a lawyer at respondents' home): A larger proportion of the university sample (.50) said they would assert their right to a lawyer compared to the community college sample (.41). And, again, the difference in frequencies between the two samples is significant, $\chi^2 (1, n = 350) = 2.34, p < .10$.

⁸² See, e.g., Morrill et al., *supra* note 35.

⁸³ Pierre Bourdieu & Jean-Claude Passeron, *CULTURAL REPRODUCTION AND SOCIAL REPRODUCTION* (1973); Pierre Bourdieu, *THE FORMS OF CAPITAL* (1986). See also Paul DiMaggio & John Mohr, *Cultural Capital, Educational Attainment, and Marital Selection*, 90 AM. J. SOC. 1231 (1985); Paul DiMaggio, *Cultural Capital and School Success: The Impact of Status Culture Participation on the Grades of U.S. High School Students*, 47 AM. SOC. REV. 189 (1982).

⁸⁴ To be more specific, attendance at an elite university is not, in itself, the cultural capital to which we are referring. Rather, it is evidence of the cultural capital required to get there. While this cultural capital may be more common in individuals with high socioeconomic status, it is not their province alone. Someone with a working-class background who gets into an elite university has also figured out, developed, or acquired a certain amount of resources and skills to get there. A person's experiences at an elite university, of course, will develop a her cultural capital further.

Model 2, we introduced parental education, which has a precedent in social science for being used “as a proxy for material and knowledge-based resources in households because such resources have been demonstrated in previous research to influence legal mobilization and socialization.”⁸⁵

Because the two samples’ populations differed in a number of respects,⁸⁶ when we pooled the samples, we included a dummy variable to indicate which sample a respondent was from and examined the interaction between the sample and each of the variables of interest, including how the main coefficients for the demographic variables changed with the inclusion of the interaction terms. This ensured that in combining the samples, any significant effects were not simply due to between-sample differences. For the sake of parsimony, we fitted a maximal model, then simplified it by removing all non-significant interaction terms, leaving in main variables of interest. Using the same procedure, Model 2 assesses the effect of parental or guardian education on rights knowledge, controlling for the same demographic characteristics included in the first model.

⁸⁵ See Annette Lareau, *Invisible Inequality: Social Class and Childrearing in Black Families and White Families*, 67 AM. SOC. REV. 747 (2002); see also SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990).

⁸⁶ See Table 1 above.

Table 2. Rights Knowledge

VARIABLES	Model 1	Model 2
University	-0.255 (0.297)	-0.265 (0.302)
Female	-0.333* (0.194)	-0.336* (0.200)
Age	0.0187 (0.0135)	0.0192 (0.0138)
Black	0.156 (0.266)	0.123 (0.280)
Other or Mixed Race	0.120 (0.219)	0.188 (0.221)
Hispanic	0.132 (0.213)	0.0646 (0.232)
Not a Citizen	0.328 (0.249)	0.363 (0.260)
Searched or Arrested	0.149 (0.177)	0.198 (0.181)
University * Female	0.785** (0.336)	0.846** (0.342)
University * Hispanic	-1.238** (0.525)	-1.235** (0.528)
Parent/Guardian College Degree		0.00572 (0.187)
Constant	3.527*** (0.400)	3.479*** (0.433)
Observations	355	336
R-squared	0.045	0.053

Standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

Consistent with the patterns suggested in Table 1, few differences in people's knowledge of rights were based on demographic characteristics. As shown in Table 2, Model 1, race, parents' education, citizenship, age, and prior search or arrest did not correlate significantly with respondents' performance on the rights knowledge inventory.

Perhaps surprisingly, gender's effect was significant.⁸⁷ Women were less likely to know their rights than were men, a finding which did not change with the inclusion of parents' education in Model 2. Two interaction effects were also present: one between sample and gender, and the other between sample and Hispanic. While the main effect of being female was negative, the interaction between sample and female was positive.⁸⁸ In other

⁸⁷ $t = -1.71, p < .10$.

⁸⁸ $t = -2.45, p < .05$.

words, for community college students, being female was associated with lower rights knowledge scores, but for university students, being female was associated with higher rights knowledge scores. Also, although being Hispanic resulted in lower rights knowledge scores for university students,⁸⁹ it had no significant effect for community college students. We found no other significant main or interaction effects between the remaining demographic variables and rights knowledge.

Table 2, Model 2 shows the effect of parents' education on rights knowledge, controlling for the same variables included in Table 2, Model 1. Parents' education was not significant, nor was its interaction, and it did little to change the direction, significance, or magnitude of the other coefficients. The effects of gender, as well as the interaction effects described above, remained significant. We found no other significant main or interaction effects.

C. Rights Assertion

Recall that Table 1 showed that that being a university student, compared to being a community college student, was associated with a greater willingness to assert one's rights in response to all five vignettes. Table 3, which corresponds to Model 1 in Table 2, shows that this relationship largely held true net of gender, age, citizenship, race, rights knowledge, and previous arrests.⁹⁰

⁸⁹ $t = -1.24, p < .05$.

⁹⁰ We calculated Chronbach's alpha for the five vignettes, as well as various combinations of three and four vignettes. Values ranged from .29 to .42, indicating that a rights assertion scale based on these vignettes (i.e., adding up the number of "assertion" answers versus non-assertion answers) would be unreliable. Thus, we analyzed each vignette separately, as shown in Tables 3 and 4.

Table 3.

VARIABLES	Q1	Q2	Q3	Q4	Q5
Total Correct	-0.0927 (0.0915)	-0.0845 (0.0796)	-0.161* (0.0842)	-0.106 (0.0799)	-0.128 (0.0794)
University	0.715* (0.373)	1.075*** (0.293)	1.285*** (0.341)	0.570** (0.290)	0.380 (0.282)
Female	-0.333 (0.294)	-0.236 (0.253)	-0.176 (0.268)	-0.608** (0.253)	0.226 (0.248)
Age	-0.0310 (0.0211)	0.0356* (0.0201)	0.00382 (0.0202)	-0.0298 (0.0220)	0.0407** (0.0203)
Black	0.784 (0.512)	-0.528 (0.410)	0.258 (0.440)	0.480 (0.403)	-0.423 (0.400)
Other or Mixed Race	0.0517 (0.376)	0.216 (0.327)	0.156 (0.368)	-0.278 (0.328)	-0.154 (0.318)
Hispanic	0.242 (0.356)	0.0485 (0.305)	-0.264 (0.319)	0.380 (0.306)	0.0551 (0.299)
Not a Citizen	-1.013*** (0.377)	0.642* (0.372)	-0.488 (0.374)	-0.470 (0.379)	0.200 (0.365)
Searched or Arrested	0.500 (0.312)	-0.0182 (0.267)	0.0503 (0.275)	-0.206 (0.266)	-0.0745 (0.262)
University * Hispanic	-2.228*** (0.823)				
Constant	1.927*** (0.723)	-0.851 (0.651)	1.044 (0.675)	1.281* (0.682)	-0.744 (0.641)
Observations	355	350	351	346	350
Log Likelihood	-188.90	-229.69	-208.48	-228.60	-233.91

As Table 3 shows, across Vignettes 1, 2, 3, and 4, the relationship between being in the university sample and rights assertion was both significant and positive. That is, presence in the university sample increased a respondent's likelihood of indicating that she would assert her rights: refusing to let a police officer search her home ($p > .01$); asserting her right to silence in response to police questions ($p < .01$); refusing to let the police search her car ($p < .01$) or her bag ($p < .05$). For university students compared to community college students, the odds of refusing to allow the police to search her home were 2.04 to 1 (about twice as likely); the odds of refusing to answer police questions were 2.93 to 1⁹¹ (nearly three times greater); the odds of allowing one's car to be searched were 3.62 to 1⁹² (approximately 3.5 times greater); the odds of allowing one's bag to be

⁹¹ $\exp[1.075] = 2.93$.

⁹² $\exp[1.285] = 3.62$.

searched were 1.76 to 1⁹³, (1.76 times greater).

A handful of other variables in Table 3 were sporadically significant with regard to rights assertion. Non-citizen respondents were significantly less likely to refuse to a warrantless search of their home, as compared to citizens.⁹⁴ But in Vignette 2, which dealt with respondents' willingness to talk to the police about a work-related investigation, the opposite effect was present; non-citizens were significantly more likely to assert their right not to speak to police.

In the first vignette (the home search), there was a significant interaction between university sample and Hispanic ethnicity; Hispanic respondents were more likely to report they would allow the police to search their home, but that was only true for Hispanic respondents in the university sample ($p < .05$).

Age was significantly related to rights assertion for Vignettes 2 and 5, which were the two questions that dealt with *speaking* to the police, as opposed to agreeing to a search. Older people were significantly more likely to believe that they would assert their right to remain silent (Vignette 2; $p < .10$), as well as their right to ask for a lawyer before answering police questions (Vignette 5; $p < .05$).

Finally, in Vignette 4, women were significantly less likely to refuse a search of their bag ($p < .05$). Women were about 46% less likely, compared to men, to assert their rights in this vignette ($exp[-.608] = .54$).

Table 4 employs Model 2, introducing parents' education. As we suggested above, we used these two models to separate the effects of the two variables—that is, if university attendance matters, does it matter simply because of the differences in respondents' parents' education and correspondent disparate amounts of resources available, or is there an effect beyond this? We modeled the effect of having at least one parent or guardian with a college degree (and its interaction with which sample respondent was from, where significant) net of the demographic characteristics modeled in Table 3. Table 4 presents the logistic regression coefficients for these models.

⁹³ $exp[0.570] = 1.76$.

⁹⁴ To be exact, they were 64% less likely. $exp[-1.013] = .36$.

Table 4. Rights Assertion

VARIABLES	Q1	Q2	Q3	Q4	Q5
Total Correct	-0.0918 (0.0939)	-0.100 (0.0820)	-0.159* (0.0890)	-0.0717 (0.0822)	-0.158* (0.0827)
University	0.618 (0.383)	1.109*** (0.309)	1.104*** (0.359)	0.503* (0.305)	-0.278 (0.567)
Female	-0.269 (0.298)	-0.297 (0.259)	-0.188 (0.279)	-0.652** (0.260)	0.200 (0.256)
Age	-0.0298 (0.0214)	0.0365* (0.0205)	0.0173 (0.0212)	-0.0250 (0.0219)	0.0397* (0.0207)
Black	0.877 (0.547)	-0.560 (0.429)	0.615 (0.489)	0.546 (0.426)	-0.422 (0.421)
Other or Mixed Race	0.0437 (0.377)	0.188 (0.331)	0.0863 (0.379)	-0.375 (0.333)	-0.0857 (0.326)
Hispanic	0.319 (0.387)	-0.00436 (0.331)	0.198 (0.359)	0.548* (0.333)	-0.137 (0.332)
Not a Citizen	-0.948** (0.394)	0.606 (0.388)	-0.613 (0.398)	-0.302 (0.391)	0.0576 (0.390)
Searched or Arrested	0.452 (0.316)	0.00506 (0.273)	0.0412 (0.286)	-0.302 (0.273)	-0.0101 (0.270)
University * Hispanic	-2.224*** (0.831)				
Parent/Guardian College Degree	0.166 (0.318)	-0.0669 (0.281)	0.952*** (0.302)	0.181 (0.278)	-0.577* (0.322)
University * Parent/Guardian College Degree					1.090* (0.646)
Constant	1.773** (0.767)	-0.715 (0.694)	0.205 (0.727)	0.980 (0.712)	-0.374 (0.691)
Observations	336	332	332	327	331
Log Likelihood	-179.80	-217.38	-190.04	-215.81	-218.42

In Vignette 1, the addition of the parents' education variable, though not itself significant, reduced the significance and magnitude of the university coefficient, suggesting that university students' greater willingness to refuse a warrantless home search may be due to their more privileged background.

The parents' education variable was not significant in Vignette 2, either, and its addition had little effect on the significance or magnitude of the university variable, suggesting that—to the extent that parents' education is an effective proxy for social class—some other factor related to status was in operation.

In Vignette 3, parents' education was positive and significant ($p < .01$). Respondents who had at least one parent or guardian with a 4-year college degree were approximately 2.5 times more likely to assert their rights in this vignette than students who did not.⁹⁵ Note, however, that the effect of membership in the university sample remained positive and

⁹⁵ $\exp[0.952] = 2.59$.

significant—suggesting that differences in rights assertion between the two samples was *not* due to the underlying disparity in parental education.

In Vignette 4, parents' education was not significant, but this variable's addition reduced the significance and magnitude of the coefficient that corresponded with membership in the university sample. Whereas in Table 3, the odds of refusing a search of one's bag were 1.76 to 1 ($p < .05$) (with university students more likely than community college students to refuse) the odds became 1.20 to 1 ($p < .10$). Thus, university students may be more likely to assert their right to refuse a search of their bag because of their more privileged background, as measured by parents' education.

Finally, in Vignette 5, there was a significant main effect and a significant interaction effect for parents' education. Specifically, for community college students, the effect of having at least one parent or guardian with a four-year degree was *negatively* associated with rights assertion, but for university students, the effect of having at least one parent or guardian with a four-year degree was *positively* associated with rights assertion. The inclusion of parents' education resulted in few shifts of significance elsewhere in the model, none of which carried across multiple vignettes.⁹⁶

D. Reasons for Compliance or Assertion

As mentioned above, respondents were asked to explain their reasons for rights assertion or compliance in an open-ended written response. After indicating whether they would assert their rights or comply with the police's request, each participant was asked the open-ended question, "Why or why not?" We included this in order to see whether respondents' reasoning about rights assertion differed between the two samples.

We extracted the written responses to each vignette. Treating each vignette separately, we employed an open coding system using a modified grounded theory approach⁹⁷ and coding the data by hand. Also consistent with a grounded theory approach, we created no predetermined codes in advance of the coding process. A few response patterns emerged prominently for each vignette. Some patterns emerged in multiple vignettes. We then created a new variable for each theme + vignette combination.

⁹⁶ It is, perhaps, worth noting a few instances of marginal significance: in Vignette 1, black racial identity and membership in the university sample ($p = .11$ in both cases), and in Vignettes 2 and 3, non-citizenship ($p = .11$ and $p = .12$, respectively).

⁹⁷ See MONICA McDERMOTT, *WORKING CLASS WHITE* (2006) (providing a thorough and insightful discussion of this approach).

Each respondent was assigned a “1” if he mentioned a particular theme in his open-ended answer to the vignette and a “0” if he did not.⁹⁸ This is similar to the procedure followed by Rogers et al. in categorizing open-ended responses in order to understand people’s misconceptions about the *Miranda* warnings.⁹⁹

In order to ensure that differences between the two groups were not due to variations in the length of the explanations written, we calculated the average number of words used by the members of each sample in response to each vignette; no significant differences existed. For three questions, the community college students wrote slightly more on average; for the remaining two questions, the private college students wrote slightly more on average. Overall, the average amount written in response to each vignette by each group was nearly identical, with community college respondents writing an average of 14.8 words of explanation per vignette and university respondents writing an average of 14.6 words of explanation per vignette. While it is still theoretically possible that one sample was more effective in crafting explanations than the other, this did not appear to be the case.

We conducted chi-square tests to examine the most popular themes in order to see if there were significant differences between the university and community college respondents. Here, we report only the findings of theoretical interest.

In response to Vignette 1, most respondents indicated that they would assert their right to refuse a search of their home ($n = 273$; 76.9%). Thematically, answers to this question were all over the board, and almost no variation existed between the two populations. But one small theme among those who said that they would refuse the search was suspicion that the officer was not a real police officer and might be posing as one to gain entry ($n = 11$). Of the 11 respondents who cited this suspicion as a reason for refusal, all were from the community college sample; none were from

⁹⁸ In our opinion, constructing quantitative variables from qualitative responses should only be done in a limited situations. Coding open-ended field notes to create quantitative measures, for example, is not especially reliable, because there is a virtually unlimited field of data, and the researcher essentially generates the n . We were willing to construct variables from open-ended responses here, however, since the field comprised responses to specific survey questions. Additionally, the quantitative categories themselves were not imposed but generated from the data via an open-ended coding scheme. An alternative would have been to choose reasons ahead of time and have respondents rank or choose among them. While this approach has the advantage of neatness, it would have had the rather large disadvantage of imposing *our* suppositions about people’s assertions or non-assertions as the possible responses, rather than allowing respondents’ own reasoning to drive their answers. In a future project, when more is known about rights reasoning, the multiple-choice approach may make sense. But at this stage, we opted for a more expansive approach.

⁹⁹ Rogers et al., *supra* note 16.

the university sample—a statistically significant difference.¹⁰⁰

The most popular theme among respondents who indicated in response to Vignette 2 (being questioned about a possible workplace crime) that they would exercise their right to remain silent ($n = 164$) was **risk aversion**. We define this variety of explanation as non-compliance for a reason related to a desire to exercise caution—to be on the “safe side”—for example, to await further information even if they knew that they, themselves, had done nothing wrong ($n = 85$). A chi-square test of independence showed that the proportion of respondents from the university sample who cited risk aversion as a reason for remaining silent (.69) was significantly greater than the proportion of community college students who cited risk aversion as their reason for remaining silent (.41).¹⁰¹

One additional theme in the answers to Vignette 2 was a **desire to help the police** ($n = 26$). The proportion of university respondents who explained their compliance in terms of wanting to help the police (.27) was significantly greater than the proportion of community college respondents who explained their compliance in the same terms (.10).¹⁰²

In respondents’ answers to Vignette 3 (the car search scenario), one theme among compliant respondents’ ($n = 118$) answers was the **inevitability** of a search. That is, a respondent said she would acquiesce to the search because even if she did not, the police would search the car anyway ($n = 24$). None of the 16 compliant university respondents expressed concern that the search was inevitable, but 24 of the 102 community college respondents who said that they would consent to a search said they would do so because the search was inevitable. As the proportions suggest, this difference between the two populations of respondents is significant.¹⁰³ Inevitability also arose as a theme in the answers to Vignette 4 (search of respondent’s bag during a bus trip); eight respondents mentioned inevitability in their open-ended responses to the scenario.¹⁰⁴ Just as in the Vignette 3 answers, all respondents who

¹⁰⁰ $\chi^2(1, n = 273) = 5.64, p < .05$. Because the expected cell values were relatively small, we ran a Fisher’s exact test to check the validity of the chi-square value. The result was nearly identical, $p < .05$.

¹⁰¹ $\chi^2(1, n = 164) = 12.04, p < .001$. Risk aversion also emerged as a theme in the responses to Vignette 5, but in that instance, the difference between the two groups of respondents was not significant.

¹⁰² $\chi^2(1, n = 183) = 6.91, p < .01$.

¹⁰³ $\chi^2(1, n = 118) = 4.73, p < .05$. Because the expected cell values were relatively small in this case, we ran a Fisher’s exact test to check the validity of the chi-square value. The result was very similar, with a slightly higher p -value, but still $p < .05$.

¹⁰⁴ Unlike the answers to Vignette 3, however, inevitability was given by respondents irrespective of whether they indicated that they would allow the search. For this reason, we calculated the difference between the samples using all respondents ($n = 367$), regardless

mentioned inevitability came from the community college sample. The numbers hint at a pattern even though the statistical significance is marginal.¹⁰⁵

In Vignette 5, students were asked to imagine that an officer knocked on their door and told them that the police were investigating a recent robbery. A police officer wanted to question the respondent because the same kind of car the respondent owned had been seen driving from the scene. Respondents were then asked, “Do you ask for a lawyer before answering their questions?” Among those who complied (e.g., did not ask for a lawyer) ($n = 191$) the most popular rationale given was that they had **nothing to hide** ($n = 96$). The proportion of community college students (.54; 75 of 140) was greater than the proportion of university students (.41; 21 of 51) who complied because they had nothing to hide. A chi-square test yields a p -value of .13,¹⁰⁶ which suggests a trend, but does not amount to statistical significance.

A second theme that emerged in Vignette 5 among those who complied was that they wanted to **avoid looking guilty** ($n = 20$). A chi-square test of independence showed that the proportion of community college students who explained that they would comply so as not to look guilty was significantly smaller than the proportion of university students who explained their compliance in these terms.¹⁰⁷

V. DISCUSSION

A. Rights Knowledge

Dissenting in *Schnecko v. Bustamante*¹⁰⁸ forty years ago, Justice Brennan wrote, “It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence.”¹⁰⁹ Our findings suggest that expecting people to know how their rights apply in a particular encounter with police is unrealistic; moreover, the assumption that citizens *do* know their rights in most situations is incorrect.

of yes-or-no response to Vignette 4.

¹⁰⁵ $\chi^2 (1, n = 367) = 3.39, p < .1$. However, given the expected cell size in this calculation, a Fisher’s exact test is a more reliable measure, and suggests marginal significance ($p = .11$).

¹⁰⁶ $\chi^2 (1, n = 191) = 2.3 (p < .05)$.

¹⁰⁷ $\chi^2 (1, n = 182) = 2.63, p < .1 (p = .051)$.

¹⁰⁸ 412 U.S. 218 (1973).

¹⁰⁹ *Id.* at 227-28.

As shown in Table 2, the only significant correlate with rights knowledge was gender; women's scores on the rights knowledge quiz was significantly lower than men's scores, on average. This may be because men have more exposure to the criminal justice system and more likely to be arrested, and thus have more need to know their rights. However, if this were true, respondents who identified as black or African-American, and perhaps also those who identified as Hispanic or Latino, should have received significantly higher scores as well, since men in these racial groups are disproportionately subjects of police investigation. This, however, was not the case.¹¹⁰ Nor is it evident why being female is associated with lower rights knowledge scores for community college students, but higher rights knowledge scores from university students. Perhaps these findings are statistical noise, but they suggest a potential area for future research.

For the most part, though, as Table 2 shows, we found almost no correlation between rights knowledge and the demographic variables of interest. While a ten-question quiz is not a comprehensive assessment of people's knowledge of their Fourth, Fifth, and Sixth Amendment rights, it nonetheless indicates a pattern that accords with the handful of other studies that have looked at the relationship between status characteristics and rights knowledge.¹¹¹ A top-shelf education does not appear to correlate with greater rights knowledge, nor even does prior experience being searched or arrested by police.

This finding might be encouraging—since members of privileged groups do not have greater access to knowledge of their rights than members of non-privileged groups—were it not for dismal overall scores. People tended to score worse than chance, suggesting that not only do people not know about their rights, but they hold misconceptions that lead them to incorrect conclusions. As the first author has elaborated upon elsewhere,¹¹² the knowledge people *do* have appears to lead them astray. Understandably oblivious to the law's myriad exceptions and caveats, they often assume that general constitutional principles apply more broadly than they actually do.¹¹³ Rogers identified a similar dynamic with regard to the *Miranda* warnings. His work supports the conclusion that the small amount of information communicated by the warnings may lead people to draw incorrect conclusions about the warnings' meaning. Our results suggest that

¹¹⁰ In fact, being Hispanic actually results in *lower* rights knowledge scores, though only for respondents from the university sample.

¹¹¹ See, e.g., Rogers et al., *supra* note 16, which found that rights knowledge does not correlate significantly with education or intelligence. (The only relevant factor was verbal intelligence, which still accounted for less than 10% of the variance.)

¹¹² See Young, *supra* note 19.

¹¹³ *Id.* Rogers, *supra* note 14.

people are led astray with *or* without the *Miranda* warnings. There appears to be plenty of misinformation (or perhaps just insufficiently specific information) circulating about many areas of constitutional criminal procedure.¹¹⁴

In one sense, these findings are perhaps unsurprising. After all, even someone who had a copy of the Constitution in front of him during an encounter with the police would probably find it unhelpful. The Constitution's text does not specify *when* you get the "[a]ssistance of Counsel for [your] defence"¹¹⁵ or *which* searches are the "unreasonable" ones.¹¹⁶ Even if it makes sense to assume that citizens know the Bill of Rights and the *Miranda* warnings by heart, it does not make sense to assume that they pore over criminal procedure hornbooks in their spare time. And increasingly, the Court seems to expect nothing less. In *Salinas*, after all, the majority opinion did not even engage with the idea that to assert his Fifth Amendment right to silence, Salinas would have had to enter the encounter knowing a surprising amount of information. Specifically, to use his Fifth Amendment right as the Court suggests, he would have had to know that he (1) had a right to silence (2) which did not technically apply yet, since (3) he was not in custody and was technically "free to leave" (even though he was at a police station answering increasingly pointed questions), so (4) to assert his right to silence, he had to tell police something along the lines of, "I am asserting my Fifth Amendment right not to incriminate myself," and then (5) had to remain silent to avoid re-initiating contact with the police.

Expecting people to simply "know their rights" in situations like Salinas's belies either naïve idealism or hostility to the prospect of people actually *using* their rights. It is hard to avoid the conclusion that many police investigations must be built on the backs of people's entirely understandable ignorance of how their rights work in practice.

B. Rights Assertion and Reasons for Compliance or Assertion

People usually think of rights knowledge as a prerequisite to assertion. Indeed, as explained above, this is why we included rights information within each vignette—to test respondents' willingness to assert a right regardless of their preexisting awareness of it. A person with greater general rights knowledge would, we might expect, have a greater sense of his own agency or self-efficacy during interactions with the police.

¹¹⁴ This, of course, begs the question of whether warnings are an effective means of communicating people's rights to them, which we take up briefly later in this article.

¹¹⁵ U.S. CONST. amend. VI.

¹¹⁶ U.S. CONST. amend. IV.

Consequently, we might expect that this greater sense of agency or self-efficacy might lead him to assert his rights more readily in general. However, this did not bear out. As the row labeled “Total Correct” in Tables 3 and 4 shows, a general knowledge of rights (as measured by the rights knowledge test) had little or no correlation with a willingness to assert rights in the five scenarios presented. The only two times a correlation was present, it was not only marginally significant, but cut in the *opposite* direction from what agency-via-knowledge would predict.¹¹⁷ In both of those cases, greater rights knowledge was actually associated with *less* willingness to assert rights.¹¹⁸ This result was consistent with Kessler’s study, though Kessler looked at the effect of knowing a *particular* right, whereas our vignettes included an internal “control” for knowledge of the right in question, instead examining at the effect of rights knowledge in general. In neither case, though, does knowledge appear to translate into a willingness to assert one’s rights.

Given the salience of race in the criminal justice system, we also expected that race, particularly black or African-American identity, would figure prominently. Instead, we found no connection between a person’s race and her willingness to assert her rights. Of course, this does not mean that race is not a salient characteristic in police-citizen interactions; on the contrary, a vast amount of research has demonstrated that race is *extremely* salient. But interestingly, in testing rights assertion, we detected no racial effect. And in the open-ended responses to Vignettes 1 through 5, mentions of race were exceedingly rare; race only showed up explicitly in the answers of one respondent, a man from the university sample who explained that he strategically drops hints about his high social status so that the police will not bother him simply because he is a black man.¹¹⁹

It is also possible that race is hugely relevant, but that it cuts in different directions for different people—for example, making some black men reluctant to assert their rights and other black men eager to assert their rights. But assuming that the willingness to assert rights does not vary based on race, these data point to another reason to pay special attention to the role of race in criminal investigations. Despite their equal willingness to assert their rights, and despite their equal knowledge of their rights, a

¹¹⁷ See Table 4, row = *Total Correct*; columns = Q3; Q5.

¹¹⁸ Of course, other explanations for this phenomenon are possible. For example, perhaps people with a typical “law-and-order” attitude are both more likely to know their rights *and* more inclined to comply with police requests.

¹¹⁹ To be clear, we are not arguing that race was not on respondents’ minds when they were deciding whether to assert a right; we are merely observing that race made almost no explicit appearance in respondents’ explanations. The absence of race in the explanations could also simply indicate that people felt uncomfortable bringing up race in this context.

hugely disproportionate number of minority citizens, particularly black men, are subject to police searches. This at least suggests the possibility that even when certain groups *do* assert their rights, these assertions are not respected.¹²⁰

Prior search or arrest by the police also seems to have no effect on a person's willingness to assert her rights. Though this may seem surprising at first, it will shock few criminal defense practitioners, who are well-acquainted with the phenomenon of having a newly-released client swear he will not speak to the police again without a lawyer present—who then immediately speaks to the police the next time he is arrested. This is consistent with risk-preferring behavior; some people tend to think they can talk themselves out of trouble, despite ample precedent to the contrary. We discuss the relationship between risk aversion and rights assertion *infra*.

Indicia of status and social class appear to be the factors most highly correlated with a willingness to assert rights. Recall that we followed other researchers' lead, using parents' education as a proxy for social class.¹²¹ Additionally, we used the type of college attended as an indicator of "status" or cultural capital. Using two separate measures allowed us to look at social class and cultural capital (somewhat) separately. Though these ideas are closely related, and though there is certainly a relationship between them, they are not identical.¹²²

As Table 3 shows, presence in the university sample versus the community college sample correlated with rights assertion for four of the five vignettes. Moreover, in all four cases, the correlation was positive, suggesting that respondents from the university sample were significantly more likely to assert their rights than respondents from the community college sample. In Table 4, we introduced parents' education. If university attendance versus community college attendance was functioning solely as a proxy for social class in Table 3, we would expect that effect to be largely erased by the inclusion of parents' education in Table 4. However, this did not occur. University respondents remained significantly more likely than community college respondents to assert a right in more than half the vignettes—three out of five. At the same time, parents' education was also significant in two instances. In response to Vignette 3, having one parent

¹²⁰ Sandefur has observed that research "tells us much about what kinds of experiences people believe to be fair but rather less about which groups are more or less likely to encounter fair-feeling experiences."

¹²¹ Obviously, parents' education is not a perfect proxy for social class. After all, it treats a respondent with two parents who hold PhDs from Harvard identically to someone raised by a single parent with a four-year degree.

¹²² See, e.g., Annette Lareau, *Social Class Differences in Family-School Relationships: The Importance of Cultural Capital*, 60 SOC. EDUC. 73 (1987).. .

with a college degree is positively correlated to a respondent's willingness to assert her rights, regardless of which sample she was from. In response to vignette 5, having one parent with a college degree was positively correlated to the willingness to assert rights, though only for respondents from the university sample.¹²³

Given the work of Gilman, John Gilliom, Slobogin, and others, perhaps it is not surprising that factors like class, social status, and cultural capital correlate positively with a willingness to assert rights. This may be due in part to a greater sense of entitlement among privileged individuals. Taken together, our findings provide preliminary support for the idea that in general, social class and cultural capital may be powerful predictors of a person's willingness to assert her rights, and that this effect may be largely independent of other demographic factors. The only other variable that correlated significantly with responses to more than one vignette was age, with older respondents more likely to express willingness to assert a right—consistent with Kessler's finding as well.¹²⁴ This makes sense, assuming rights assertion is correlated with a sense of personal agency, since increased age is associated with a greater sense of emotional control over one's life,¹²⁵ as well as decreased distress in situations involving interpersonal conflict.¹²⁶ Older adults may make calmer, less fear-based decisions about rights assertion.

Though it has never been examined in the instant context, other work sheds light on the mechanisms through which social class and cultural capital may affect rights consciousness. One reason for this is that government oversight is a staple for many people in lower income brackets. As Gilliom argues, people subject to such oversight tend to view legal authorities as possessing a great deal of discretion over them, both formally and informally.¹²⁷ They may be more accustomed to seeing themselves as subjects of authority, and may consequently experience a lesser sense of personal agency and self-efficacy in police-citizen interactions. The open-ended responses to our vignettes support this interpretation. In response to two of the three vignettes related to search and seizure (Vignettes 3 and 4), some respondents mentioned "inevitability" in their justification; these

¹²³ For respondents from the community college sample, parents' education actually cuts in the opposite direction.

¹²⁴ Kessler.

¹²⁵ James J. Gross et al., *Emotion and Aging: Experience, Expression, and Control*, 12 *PSYCHOL. & AGING* 590 (1997).

¹²⁶ Susan Turk Charles & Laura L. Carstensen, *Unpleasant Situations Elicit Different Emotional Responses in Younger and Older Adults*, 23 *PSYCHOL. & AGING* 495 (2008).

¹²⁷ JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* (2001).

respondents said that no matter what they did, the police would search their property anyway. Here are a few representative samples:

- “If you say no, that [sic] ‘probable cause’ under suspicion of the officer. So, my best chance of minimal damage, is to tell the truth.”
- “There [sic] going to do it anyway.”
- “But more likely they will insist with the search and flip things around by saying Im [sic] a danger to the people on the bus.”
- “Usually officers don’t take no for an answer.”

Responses citing inevitability *only* came from community college respondents—the group with less cultural capital. Lower cultural capital may create the feeling that refusing an authority figure’s request is unwise or futile. In contrast, high-status individuals with more cultural capital may relate to authorities very differently, viewing themselves as (at minimum) social equals to a police officer, and viewing their individual rights as more central to the encounter. And since they are presumably accustomed to receiving respect from authority figures, it may simply not occur to them that an officer would disregard their assertion of a right. It is telling that none of the university respondents mentioned thinking that the police would conduct a search even if they attempted to assert their Fourth Amendment rights.

Annette Laureau’s research about the relationship between social class and individual interaction styles sheds some light on this process. Observing upper-middle-class parents’ and working class parents’ interactions with their children, Laureau concludes that the former are socialized to develop an “emerging sense of entitlement” that includes interacting with authorities as equals and questioning unsatisfactory treatment.¹²⁸ She argues that working-class children, on the other hand, are taught to defer to authorities and avoid protesting against unfair circumstances and negative outcomes.¹²⁹ Given that police are such an “acme incarnation of authority,”¹³⁰ this dynamic might be especially relevant to police-citizen interactions. Lower-status individuals may view police as occupying a higher status position than themselves, while higher status individuals might see police as equivalent, or even inferior, to their own social position. Additionally, high-status individuals may assume—

¹²⁸ Laureau, *Invisible Inequality*, *supra* note 73, at 749.

¹²⁹ *Id.*

¹³⁰ Young, *supra* note 19, at 85.

perhaps even subconsciously—that if an investigatory encounter “goes wrong,” they will have the resources to remedy the situation. It is not simply that a privileged person thinks, “If the police do not listen to me, I will call my father, a wealthy CEO who has the power to remedy the injustice,” but that his entire *orientation* to law is different as a result of the experiences and attitudes from which his legal consciousness has been constructed over a lifetime. A person’s willingness to employ the law, at least in the civil context, is closely related to how she understands law and legality more generally.¹³¹ Our social location and our experiences¹³² “creat[e] dispositions that come to colour future behaviour,”¹³³ powerfully shaping how we understand and relate to law.

The differences in respondents’ open-ended answers to the rights assertion vignettes also suggest disparate approaches to risk. The proportion of university respondents who mentioned risk aversion as a reason for asserting their rights was significantly higher than the proportion of community college respondents whose answers demonstrated risk-averse reasoning. University respondents’ risk-averse reasoning includes:

- “I may be coerced into implicating myself—I don’t trust the police to be straight forward [sic] with me.”
- “I would want a lawyer present to act as a buffer, regardless of the fact that I hadn’t done anything wrong.”
- “The police could use interrogation to procure a faulty response/incriminating reply.”
- “B/c I’m innocent and don’t want to slip out of anxiety.”
- “Unless I am 100% familiar w/ all the laws regarding the industry, I wouldn’t feel comfortable (afraid to self incriminate unknowingly).”

In contrast, the community college respondents tended to give reasons that were apparently unrelated to risk aversion:

- “Because I have rights and I don’t like being investigated.”

¹³¹ MERRY, *supra* note 73..

¹³² Laura Beth Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens and Street Harassment*. *Law & Society Review* 34(4), 1055-1090.

¹³³ Sandefur, 2007, p. 131; see also Engel and Munger’s work on legal consciousness and disability rights, 1996

- “If I’m 100% percent innocent, the matter does not regard me, or my self-interests.”
- “I would wait until my lawyer is present. This is my right. ‘I have the right to remain silent’...”
- “I will remain si[le]nt and use my rights which are given to me by the constitution because if I have not committed any wrong dueing [sic] I should not have to comply.”

It is possible that the community college respondents were motivated by risk aversion and simply did not articulate it, but given that the length of their responses did not differ from the university respondents’ and that their reasoning was not generally “simpler,” this seems unlikely. Note, too, that the university respondents did not express more affinity for police, or more trust in authority, than the community college respondents did. But a lack of trust in the police may manifest as inevitability (resulting in consent and compliance) among lower-status individuals, and as risk aversion (resulting in assertion and noncompliance) in the case of higher-status individuals.

A pattern of risk aversion also emerged in the responses to Vignette 5, this time among those who said they *would not* assert their rights. University respondents were significantly more likely than community college respondents to say that they would comply with the police so as not to give off the impression that they were guilty. This is similar to risk aversion; in both cases, the university respondents are figuring out how to “play it safe” with authority. Some representative responses included:

- “My cooperation shows I have nothing to hide.”
- “Because it seems suspicious if you ask for a lawyer.”
- “By answering the questions voluntarily I show I have nothing to hide plus, I can stop answering whenever I want to, I have control.”

Even when individuals with high social status comply with the police, they tend to express a sense of agency over their situation. They have multiple strategies for this; they may try to put themselves in the position of the officer, they may convey their own status or authority, or they may consciously manage the “self-image” they present to the officer. As Lareau and others have suggested, a crucial part of developing cultural capital is managing relationships with professionals and authority figures, which includes a significant amount of impression management. Based on

the evidence presented in this article, the patterns Lareau identifies appear to manifest in the context of criminal procedure as well.

Our results suggest that social class and cultural capital has a significant affect on which people assert their rights—and thus, on who enters the criminal justice system in the first place. These patterns point to a mechanism that contributes to the reproduction of social inequality in police-citizen interactions. Moreover, the mechanism is somewhat subtle and largely invisible, going undetected in large quantitative analyses that use government-collected data; nonetheless, our results suggest that it that may contribute fundamentally to the shape of the criminal justice system.

VI. IMPLICATIONS

A. Law and Policy

Assuming we want to people to know what their rights are, and assuming we want to minimize class-based or other differences in people's willingness or ability to assert them, we need to think about what kinds of structural changes would facilitate these outcomes.

One approach is to tell people about a right in any situation when the right becomes relevant. Instead of saying, "Pop the trunk; I am going to search your car," an officer would have to add something like, "And you have the right to refuse this search." A brief warning in a rights-salient situation would not be onerous for police officers. As the aftermaths of *Miranda v. Arizona* and *Dickerson v. U.S.* show, police departments can be nimble in incorporating new constitutional rulings when necessary. Developments in criminal procedure caselaw are regularly included in police officers' training, and a simple advisement that someone is free to leave, can refuse a search, or needs to announce that she is invoking her right to silence would be easy to administer. Nor does it seem likely that additional warnings would hinder police investigations or conviction rates. After all, when *Miranda* was originally handed down, the decision was hotly disputed for that very reason—then had virtually no effect on conviction rates, nor on the likelihood of obtaining confessions from suspects.¹³⁴

As we discussed above, however, the *Miranda* warnings themselves are not always helpful to a citizen trying to decide whether to assert a right. The warnings' inspecificity (perhaps combined with their ubiquity) leads

¹³⁴ Richard A. Leo & George C. Thomas, *The Effects of Miranda v. Arizona: "Embedded" in Our National Culture?*, 29 CRIME & JUST. 203 (2002).

people to misunderstand their legal rights, and can even lead to misinformed decisions about whether to speak, maintain silence, or assert the right to an attorney. “Police have developed multiple strategies to avoid, circumvent, nullify, or simply violate *Miranda* and its invocation rules,”¹³⁵ and the warnings themselves have been systematically exploited as an interrogation tool.¹³⁶ Nonetheless, the *Miranda* warnings’ shortcomings are not a problem inherent to warnings.

For warnings to be more effective, they must be short enough to be practical, simple enough to be comprehensible, and specific enough to be useful. Effective warnings might bring about at least two positive results. For one, police might be less willing to violate people’s rights if they believe citizens know that they have a right to refuse. For another, it might increase cultural knowledge and conventional wisdom about rights, spreading rights knowledge, increasing rights consciousness, and creating a sense of self-efficacy. At the very least, it is worth investigating whether the benefits of more comprehensive and specific warnings would outweigh the drawbacks.

An even simpler approach would be to reduce the importance of rights knowledge and assertion through the use of investigatory practices that reduce the likelihood of coercion. England, for example, not only mandates that interrogations be taped, but sets maximum time limits on interrogations¹³⁷ (which also reduces the likelihood of false confessions¹³⁸). In-car patrol cameras, small recording devices, and other technological advances also make it possible that in the not-too-distant future, all police-citizen encounters could conceivably be taped. Recording not only has the potential to increase police accountability and allow judges to review encounters when voluntariness is at issue, but would likely give citizens a greater sense of agency and self-efficacy. Consider the “inevitability” justifications that were given by community college respondents, but not university respondents, for their compliance with a search. These explanations were all rooted in the idea the police would not respect the respondent’s rights assertion. If the encounter were recorded, the officer would have more incentive to listen to a person he has stopped—and maybe even more importantly, the person stopped would *know* the encounter was

¹³⁵ *Id.*

¹³⁶ See *People v. Adams*, <http://caselaw.findlaw.com/mi-court-of-appeals/1086063.html>; RICHARD LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE*, Harvard University Press (2008).

¹³⁷ Christopher Slobogin, *Comparative Empiricism and Police Investigative Practices*, 37 N.C. J. INT’L L. & COM. REG. 321, 327 (2011).

¹³⁸ Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3 (2010).

being taped—that if he asserted a right, he would later have a means of proving so. This knowledge might give him a sense of assurance that would make him feel more entitled to use his rights in encounters with the police. This increased self-efficacy, in turn, could help remedy class and cultural capital disparities in people’s willingness to assert rights.

It may be worth thinking, too, about the relationship between people’s legal consciousness and various types of remedies. As Christopher Slobogin has argued, “The [exclusionary] rule’s dominance has probably also led to the atrophy of alternative remedies, meaning that innocent people have little recourse... well over half of those who are subject to searches and seizures outside the home are clean at the time of the search.”¹³⁹ Innocent people know that, barring a very egregious or abusive violation, they are still powerless if the police violate their rights. This background awareness has a few important effects. For one, it gives average, law-abiding citizens little incentive to think about their rights, because as they see it, their rights do not make much practical difference to an encounter’s outcome.

Practically speaking,¹ then, for many people “rights” only extend as far as the police are willing to recognize them. As many respondents wrote (in both the university and the community college groups), someone who commits no crimes never “needs” his rights. This sentiment casts rights violations as occurrences that prevent the government from investigating guilty people, *not* as occurrences for which non-guilty people can seek a remedy. This message—engrained in popular culture surrounding criminal justice—is that for innocent people, rights do not matter. Furthermore, the exclusionary rule’s role as practically the sole remedy for rights violations in the criminal procedure context skews the litigation of Fourth, Fifth, and Sixth Amendment rights. Nearly everyone who asserts a violation of one of these rights in court does so in the context of a motion to suppress evidence against her in a criminal case. This fact gives any proposed reforms related to these rights an unsavory flavor. They are so closely related to criminal defendants that many people think of them as “rights for criminals.”

Tracey Maclin has argued persuasively that due to the heavily racialized nature of interactions between black citizens and the police, courts should consider a person’s race in determining whether an encounter was coercive—treating a reasonable black person differently from a reasonable white one.¹⁴⁰ The instant article may seem to make a case for something similar along the lines of class (just as David Kessler, whose work suggests that age and gender affect whether a person feels “free to

¹³⁹ Slobogin, *Comparative Empiricism*, *supra* note 122, at 335.

¹⁴⁰ Maclin, *supra* note 60. Specifically, Maclin argues that courts should take race into account in their “totality of the circumstances” assessments. *Id.* at 268-69.

leave” a police encounter, argues that courts should adopt a “reasonable person of similar age” or “reasonable person of the same gender” standard).¹⁴¹ We do not necessarily advocate this approach. For one, a great many factors are salient in police-citizen interactions. We are not convinced it would be a productive use of courts’ time to evaluate the difference between a “reasonable” young, poor Asian man whose parents went to Yale, and a “reasonable,” elderly, wealthy Latina whose parents did not graduate from high school. It is not clear where this inquiry would end. Perhaps more importantly, it seems to take problematic patterns as a given, then try to compensate for them, rather than figure out how to change the patterns.

For the Constitution to protect the most vulnerable, we need measures to ensure that the most vulnerable are willing to assert their rights. Opposition to measures that would help people know and use their rights seems largely in the fear that if people know about them, they will actually *use* them. And investigations carried out on the backs of people’s ignorance are not investigations of which we should be proud.

B. Future Research

As said, we consider this study preliminary. Our research suggests several psychosocial patterns in how constitutional criminal procedure operates in practice, and it will be important for future research to examine these patterns in even greater detail. The present study has a few clear shortcomings that future work could remedy. For one, our sample size ($n = 367$) is too small to assess certain kinds of effects—for example, to look at racial differences at a more granular level. Additionally, the sample consists of people who are all in college, albeit at very different colleges, which leaves out people who have never attended college. If anything, our sample probably *dilutes* the effects of social class and cultural capital, since the distribution on these measures is narrower in our sample than in the general population. Still, a larger sample, and one more representative of the United States overall, would no doubt be ideal.

Since our results point to effects of social class and cultural capital, future survey instruments should examine these factors in greater detail. Income, wealth, occupation, parents’ occupation, residence in a particular zip code, home ownership, and other factors can be effective means of measuring various class effects. The relationship between these measures and other variables such as age and race could also be analyzed with a larger sample.

¹⁴¹ Kessler, *supra* note 9, at 85.

One of the ways this study differs from other recent studies about constitutional criminal procedure is that we take the subject as a whole rather than assessing just a part of it (e.g., *Miranda* or consent searches). While this was a deliberate choice, and we consider our approach to be a strength rather than a weakness, this broad approach precluded us from testing any one subject area exhaustively. Future studies can raise additional scenarios, or focus more narrowly on a particular sub-area of constitutional criminal procedure.

Additionally, it might be productive to look not just at the characteristics of the person whose rights are at issue, but at the characteristics of the rights themselves. That is, do the attributes of a particular right affect people's orientation to it? For example, we might consider whether a right applies nearly all the time (such as the right to be free from warrantless, suspicionless searches of one's home) or whether it is more situationally specific (such as the right to counsel). Or we might consider whether a right is more latent (with greater knowledge and/or action required to exercise the right) or manifest (with little or no knowledge and/or action required to exercise the right). We might also wonder about the difference between situations in which a person must exercise a right *and* announce he is asserting it (as in *Salinas v. Texas*) versus those in which he need only exercise it (such as walking away from an encounter with the police in which he is free to leave). Characteristics such as these may correlate with patterns of knowledge and assertion, pointing to areas where policy reform would be especially useful.¹⁴²

Recently, scholars have expressed skepticism about a rights-based approach to criminal procedure reform. Rachel Harmon has suggested that scholars look too frequently to constitutional law and courts to solve the problem of how to “regulate police authority to permit officers to enforce law while also protecting individual liberty and minimizing the social costs the police impose.”¹⁴³ Relatedly, Paul Butler has argued that focusing on *Gideon v. Wainwright*¹⁴⁴ has actually hindered reform and prevented broader, more productive scholarship and advocacy about how to improve the plight of the poor in the criminal justice system.¹⁴⁵ While these critiques merit serious consideration, we are concerned that they risk shifting focus

¹⁴² In an earlier piece, the first author set out a way to conceptualize rights along two axes: situational versus ubiquitous and latent versus manifest (Young, *supra* note 19, at 87.

¹⁴³ Harmon, *supra* note 57.

¹⁴⁴ 372 U.S. 335 (1963).

¹⁴⁵ Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 Yale L.J. 2176 (2013).

away from core constitutional principles that should be given teeth, not given up on.¹⁴⁶

VII. CONCLUSION

This article represents a significant step forward in our empirical understanding of constitutional criminal procedure, but more work is still needed. As it stands, we know a great deal more about which people enter the criminal justice system than we do about which factors determine who enters the system in the first place. Whether we look to the Constitution or to public policy to make sure that rights are enforced, we need to better understand the psychosocial mechanisms that affect how rights operate in practice.

At times, the Supreme Court's lack of engagement with on-the-ground questions about legal consciousness can give constitutional criminal procedure an unsettlingly Potemkin flavor. Cases like *Schneekloth v. Bustamonte*, *Oregon v. Bradshaw*, and *Salinas v. Texas* are noteworthy for the untested—and often unstated—normative premises on which they rest. If we are serious about rights, we need to rethink issues of knowledge and assertion so that people can *use* the rights they have. After all, a regime in which people have rights, but do not know when they apply and are not willing to use them, bears altogether too much resemblance to a regime in which these rights do not exist at all.

¹⁴⁶ Harmon, for example, writes, “Nor can constitutional rights set the agenda for policing reform. Constitutional rights, by their nature, take law enforcement interests into account *ex ante* and therefore are inevitably drafted to provide generous minimum standards for law enforcement conduct . . . The problem of policing instead requires an account of when law enforcement should harm individual interests for societal ends, given the risks to human dignity and the costs and benefits of law enforcement activity. Such an account necessarily goes beyond constitutional rights.” Harmon, *supra* note 57, at 816-17.