

RIGHTS CONSCIOUSNESS IN CRIMINAL PROCEDURE: A THEORETICAL AND EMPIRICAL INQUIRY

Kathryne M. Young

ABSTRACT

This article's overarching purpose is to serve as an initial theoretical and empirical step in applying rights consciousness inquiry to the criminal procedure context. First, building on previous work within the legal consciousness and rights consciousness traditions, I discuss the ways in which attention to criminal procedure can inform our understanding of rights consciousness and enumerate differences between the way rights consciousness approaches civil law and the ways it might approach criminal law. Additionally, I suggest that understanding the relationship between people's subjective impressions of procedures and procedures' legal and moral validity offers a novel means of studying procedure that I term "procedural rights consciousness." In the second part of the article, I report results of two studies designed as first empirical steps in applying rights consciousness as the first part suggests. My findings indicate that not only do people lack knowledge about their rights in criminal investigations but they also think about these rights in patterned ways that reflect a method of understanding law characterized by

Access to Justice

Sociology of Crime, Law and Deviance, Volume 12, 67-95

Copyright © 2009 by Emerald Group Publishing Limited

All rights of reproduction in any form reserved

ISSN: 1521-6136/doi:10.1108/S1521-6136(2009)0000012007

“lay jurisprudence” reasoning, in which culturally prevalent “tenets” are applied to specific situations. This mechanism often leads people to erroneous conclusions about the rights they possess. The final part of the article sets out an agenda for further rights consciousness research.

INTRODUCTION

Rights consciousness research has spanned a plethora of substantive civil law areas, but has not been explored with respect to criminal law. This article’s overarching aim is to provide a first theoretical and empirical step in this direction. First, I assess the state of rights consciousness research and suggest ways in which this literature offers a novel, productive approach to understanding and theorizing the criminal justice system, and criminal procedure in particular. I then report results from two studies that investigate this approach and discuss the implications of the results for rights consciousness research more generally. Finally, I sketch an agenda for future theoretical and empirical work at the intersection of rights consciousness and criminal procedure.

RIGHTS CONSCIOUSNESS IN THE CRIMINAL LAW CONTEXT

The Legal and Rights Consciousness Traditions

In the past two decades, legal consciousness has transitioned from an emerging area of research to an established subfield within the sociology of law. Centrally, research in this tradition comprises at least two closely interwoven strands: people’s apprehension of the law and their willingness to mobilize it. Anthropological and sociological notions of law have been pivotal in theorizing the processes that form “commonsense understanding[s] of the way the law works” (Nielsen, 2004, p. 7). Legal consciousness is not a stagnant description of a person’s “psychological state[,] but an outcome of social processes through which meanings and identities are collectively reconstructed” (Somers & Roberts, 2008, p. 23, citing Merry, 1990, p. 247). The way people see the world – their core beliefs, hopes, understandings, and suppositions about the way it works – cannot be

separated from the way they see the law. Nor can law itself be disjoined from the social world.

Patricia Ewick and Susan Silbey (1998) have examined the fluidity of people's relationships to law, finding that orientations to law and legality vary with context. In *The Common Place of Law*, the authors identify three paradigms: people see themselves as "with the law," "before the law," or "against the law" (or some combination thereof), depending on situational factors. The same person who might orient "with the law" when evicting a non-paying tenant might orient "before the law" when she has to take a drug test for a government job. Relatedly, in her study of sexual harassment on public transit, Laura Beth Nielsen (2004) discovered four paradigms through which people understand the legality of harassing speech: "freedom of speech" (free speech is an American value that should be protected); "autonomy" (people should deal with harassment on their own); "impracticality" (the government cannot successfully control speech anyway); and "distrust of authority" (the government cannot be trusted to regulate speech fairly). Nielsen concludes that "people make connections from their past experiences – good or bad – which arise in part from the social positions they occupy – and that these experiences shape their understanding of the law" (Nielsen, 2000, p. 1087). The paradigms Nielsen describes, as well as those identified by Ewick and Silbey, suggest that there are systematic, and perhaps predictable, patterns in how people think about law and that, moreover, a person's orientation to law derives from her experiences and her social location (Nielsen, 2000).

People's willingness to use the law as a problem-solving tool is closely related to their understanding of law and legality (Merry, 1990). Social experience "creat[es] dispositions that come to colour future behaviour" and "affect[s] early, fundamental decisions about what options to explore and pursue," as well as whether people experience a problem as "justiciable" at all (Sandefur, 2007, p. 131; see also Engel and Munger's seminal work on legal consciousness and disability rights, 1996). Rebecca Sandefur (2007) has found, for example, that this mechanism contributes to socioeconomic differences in people's willingness to pursue legal solutions to their problems.

Sociological work on rights consciousness tends to be housed conceptually within the legal consciousness tradition and is the descendant of rights literatures in multiple disciplines. Stuart Scheingold's eminent work on the "myth of rights" has been particularly influential, reflecting a post-Civil-Rights-era (and post-Warren-Court-era) disaffection with rights litigation as a social reform tool. In Scheingold's view, rights-affirming

court decisions are not self-implementing political victories legal triumphs do not assure equality for the disenfranchised, and meaningful implementation of these decisions requires further political struggle (Scheingold, 1974). Also formative has been Lawrence Friedman's "The Idea of Right as a Social and Legal Concept." In it, Friedman (1971) defines "consciousness of right" as a person's tendency to take advantage of her own rights – a description which, to a large extent, still encapsulates the field.

As Somers and Roberts (2008) point out, the literature has sometimes focused on natural rights, but more often addresses citizenship rights, those that a country grants as a matter of law.¹ This tendency is likely due in part (as Somers and Roberts suggest) to the latter's measurability and may also be due to social scientists' reluctance to make a normative appraisal of natural rights – a phenomenon akin to one Sandefur describes regarding access to justice (2008).² Particularly as it has developed over the past two decades, work on rights consciousness has assumed manifold forms, comprising topics such as attitudes and beliefs about the way rights work, the relationship between social characteristics and people's ideas of rights, technical knowledge about legal rights, and types and frequency of rights-claiming behavior.

One vein of rights consciousness literature focuses on the importance of individual identity in defining and claiming rights. In their analysis of disabled Americans' life stories, David Engel and Frank Munger (1996) demonstrate the great importance of identity and personal narrative in shaping how, and whether, people understand themselves as rights-holders, how they orient themselves toward law, and how their conceptions of a right can affect their identities even when they do not assert the right (see also Merry, 1990 regarding people's identities as rights-holders; Gilliom, 2001).

One important, closely related body of rights consciousness work – and one which overlaps a great deal with access to justice scholarship – is rights mobilization. This literature acknowledges that rights "are not self-enforcing but rather must be realized by individuals ... [R]ights are constructs, and the processes by which individuals come to understand themselves as suffering a harm to which some right may provide remedy is important to empirically understand" (Nielsen, 2007, p. xiv). This includes examining how rights are, and are not, claimed. Drawing on Scheingold's insight that rights are not self-enforcing, Felstiner, Abel, and Sarat (1980) describe the rights-claiming process from a claimant's perspective: first, a person perceives an incident as injurious ("naming");

second, she attributes this injury to something, or someone, outside herself (“blaming”); third, she voices her grievance and requests a remedy (“claiming”). Researchers have found that social circumstances, particularly socioeconomic status, affect whether people perceive an incident as justiciable – a factor highly relevant to how, and whether, rights mobilization occurs (see, e.g., Sandefur, 2007).

Rights Consciousness and the Criminal Justice System

The procedural justice tradition within social psychology is probably the closest researchers have come to examining rights consciousness in the criminal realm. A key insight from this literature is that if a person believes she is treated fairly in a legal proceeding, her satisfaction with the proceeding’s outcome, good or bad, will be improved; conversely, negative assessments of procedural fairness lead to negative assessments of outcomes (see, e.g., Thibaut & Walker, 1978; Tyler, 1984; Molm, Peterson, & Takahashi, 2003). This finding has been replicated in many iterations and even with criminal defendants (Casper, Tyler, & Fisher, 1988). Procedural justice work has also examined people’s attitudes toward institutions. Tom Tyler and Kenneth Rasinski (1991) have found that agreement with Supreme Court decisions is not a crucial component of people’s attitudes toward the Court but that people who believe the Court uses fair decision-making procedures view it as more legitimate. Tyler (1984, p. 70) has also written extensively about the relationship between compliance and procedural justice, explaining that positive impressions of procedural fairness are a “key element in explaining support for legal authorities.”

Critics have pointed out that procedural justice work tends to focus on perceptions of fairness at the exclusion of outcome fairness. This may distract researchers from “seriously confronting persistent and large social inequalities” (MacCoun, 2005, p. 189, citing Haney, 1991) that “by normative criteria might be considered substantively unfair or biased” (MacCoun, 2005, p. 189). Similarly, focusing on subjective impressions of procedural fairness diverts attention from procedures’ substance. Just because a person believes she was treated fairly by police does not mean that her constitutional rights were upheld, nor that she was given a meaningful opportunity to exercise them.

Applied to criminal investigation and adjudication, rights consciousness offers a way to bridge the research gap between people’s satisfaction and

procedures' legality, drawing from the procedural justice literature while emphasizing substantive law and building on the insights of legal consciousness. For example: How well do subjects of government investigation understand their rights? How are these beliefs created, and what implications does this have for criminal justice? In encounters with police, are people more satisfied with procedures that they believe are mandated by law? When can people be manipulated to relinquish their rights? How is rights assertion shaped by identity and experience in the context of criminal investigation and adjudication? We might characterize the examination of these and related questions as "procedural rights consciousness."

Several key distinctions between criminal and civil law affect how rights consciousness might be applied to criminal procedure. The "naming-blaming-claiming" paradigm operates differently in the criminal context. Suppose a person's house is illegally searched by the police, without a warrant or probable cause, in violation of the Fourth Amendment to the United States Constitution. Any "claiming," first of all, is unlikely to happen unless the victim of the rights violation is accused of a crime. As Pamela S. Karlan (2007, p. 1916) points out, "law enforcement behavior that does not directly undergird criminal prosecutions – such as the harassment of innocent citizens or even the use of substantial physical force to arrest criminal suspects – is less likely to be litigated." Claims that arise from criminal prosecutions are generally used as shields and litigated as part of a defense strategy; the remedy sought is exclusion, not monetary compensation. Tort suits for the same constitutional violations are uncommon, and the few that are brought are rarely fruitful³ (Meltzer, 1988, pp. 283–284). Since defendants (or perhaps more accurately, defense attorneys) wouldn't seek exclusion if there was nothing harmful to exclude, constitutional claims of this type are usually brought when a claimant has done something illegal, morally questionable, or otherwise worth concealing from a jury. Thus, constitutional issues in criminal procedure tend to be litigated by an unusual set of claimants, and one especially unlikely to arouse public sympathy. This may color popular perceptions about these kinds of constitutional claims.

Of people whose constitutional rights are violated during criminal investigations, it is impossible to know how many become claimants. For one, violations that do not lead to evidence (e.g., illegal drug searches where no drugs are found) may go unrecorded. Even those that do culminate in criminal prosecutions often end in plea bargains before a constitutional

right is ever claimed. Nor do claimants generally include victims of illegal policing tactics that are intended to control people rather than investigate them – for example, verbal harassment. Thus, claimants may comprise just a small subset of those whose constitutional rights are violated during government investigation and adjudication.

Another major difference between criminal law and civil law situations is that in the former, it is often incumbent on an individual to assert a constitutional right during an interaction with police. Using a version of the example above, suppose a police officer knocks on a person's door and asks to conduct a warrantless search of her home. For her Fourth Amendment right to be preserved, she must assert it at this moment (by refusing the search) or during the search (by asking police to stop). She may not assert it retroactively. By contrast, in the civil context, such immediate assertions are rarely required. A victim of sexual harassment does not waive her right to bring a sexual harassment claim against her employer if she fails to protest *while* she is being harassed. Thus, rights knowledge may play a different role in criminal procedure than in civil law and is an important aspect of rights consciousness in the criminal context. (And individuals' knowledge, or lack of knowledge, may further narrow the subset of possible claimants.)

Additionally, the Sixth Amendment right to counsel applies in most types of criminal trials, but not in civil trials (*Lassiter v. Department of Social Services*, 1981). Availability of counsel may shape the claiming process. Since rights claimants in criminal cases generally have access to counsel, and since counsel is tasked with providing a defense to a particular crime, rights claims made in criminal cases may emerge less from a claimant's sense that she was "wronged" than as part of a trial strategy that includes minimizing the amount of inculpatory evidence the jury sees. This does not suggest that victims of rights violations in the criminal procedure context don't feel wronged or believe that they deserve compensation, but that there may be less correlation between rights claiming and a sense of victimhood in the criminal context than in the civil context.

In short, rights consciousness offers new and fertile ground for understanding criminal investigation and procedure. Conversely, drawing upon these areas of the law may deepen our understanding of rights consciousness. As is true in the civil realm, people's orientation to constitutional criminal procedure arises from fluid, dynamic processes between individuals' attitudes, beliefs, and identity, social inequalities, authorities' behavior, black-letter law, and the legal and social culture in which rights exist.

RIGHTS KNOWLEDGE AND LAY JURISPRUDENCE: A FIRST EMPIRICAL STEP

Motivation

[C]omprehending the most basic functions of rights requires the empirical study of rights consciousness and claiming behavior . . . This perspective, which is squarely within the law and society tradition, 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 . . . [This has] important implications for law's capacity to achieve social change and can lead to a better understanding of how rights can and should operate in a social and legal system.

Laura Beth Nielsen, 2007, p. xi

Little work has been done that probes the relationship between the judiciary's interpretation of constitutional criminal procedure and citizens' understanding of their criminal procedural rights. In some areas of law, we might consider a disjunction between legal rules and popular understanding problematic mostly at an abstract level. For example, the average American's suppositions about how law governs corporate transactions might be quite wrong, and such erroneous assumptions would be unfortunate in the sense that we might hope for some alignment between the law itself and people's understanding of the world in which they live.

In criminal law, however, such misalignment would be problematic in a couple of additional ways. For one, the Court's use of concepts such as "reasonable" and "voluntary" in its criminal procedure doctrine suggest reliance on popular understanding. The Court must make normative assessments how people see their social world, and these assessments can be tested empirically. If the Court says, for example, that a "reasonable" person will behave a particular way in an encounter with police, but empirical testing shows that very few people will actually behave that way, we would begin to question the doctrine – for example, the Court's ability to make normative assessments along these lines or the wisdom of hinging constitutional doctrine on these sorts of concepts.

Misalignment between criminal procedure doctrine and popular understanding is also problematic because of the crucial role that knowledge plays in police–citizen interactions. In solving justiciable civil legal problems, people are unlikely to cite their own ignorance of the law as a reason for not taking legal action and may lack a meaningful sense of what they know and do not know (Sandefur, 2007, p. 130). In the criminal procedure context, a dearth of knowledge has many implications. People who lack legal knowledge may unwittingly, and irrevocably, waive

constitutional rights – and they may not know that their own ignorance of their rights influences their decisions about how to interact with law enforcement. These interactions, in turn, have legal consequences. Research is needed to understand which rights people know, how people think about their rights, where these ideas come from, and what effects these beliefs have on people's actions.

The myriad rules that referee the United States' investigation and prosecution of its citizens for criminal acts are embodied largely in the Fourth, Fifth, and Sixth Amendments. Nearly all these protections have been held applicable to state governments through the Fourteenth Amendment. Absent a specific exception such as consent or exigency, a citizen must knowingly and voluntarily waive a right for the right to be relinquished.⁴ Obviously, people are unlikely to assert rights that they don't believe they possess. This logic underlies the warning requirement set out by the United States Supreme Court in *Miranda v. Arizona* (1966); a meaningful waiver of the right not to incriminate oneself requires that suspects are aware of the right in the first place. Informing citizens of their rights at the outset puts all subjects – theoretically, at least – on equal footing.

The Court, however, has not adopted an analogous view of knowledge with regard to Fourth Amendment searches and seizures. It has held that a person does not need to be informed of her right to refuse a search and that even if she consents under the erroneous belief that she was required to submit to a search, any evidence that the search uncovers will not necessarily be excluded.⁵ Thus, the onus is on a suspect to both *know* and *use* her Fourth Amendment rights. Justice Brennan's dissent in *Schneekloth v. Bustamonte* (1973, p. 277) criticized the Court for hinging its decision on the legal fiction of perfect knowledge: "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." Several scholars have echoed this view. Janice Nadler (2002, p. 213) writes that it "not a secret" that "the Court's Fourth Amendment consensual encounter doctrine is founded upon a legal fiction." Nadler points to Wayne LaFave's famous criminal procedure treatise, which begins discussion of Fourth Amendment waiver with reference to "[t]he so-called consent search" (Nadler, 2002, p. 213, citing LaFave, 1996, p. 4). Others have suggested that the absence of a meaningful knowledge requirement creates an incentive for police officers to keep citizens from knowing their rights (e.g., Cloud, 2007).

Criticism of the consent search doctrine is particularly poignant given the sheer number of these searches. It is difficult to know precisely how many

searches are based on consent alone, but estimates hover around 90% (Simmons, 2005, p. 773). Not only is it legal for police to knock on a citizen's door without suspicion and ask to search, but it yields widespread acquiescence (Burkoff, 2007; Chanenson, 2004). There may be a "normative impulse to submit to [state] power because police officers as enforcers of the law are presumptively right" (Lassiter, 2007, p. 1176). In some jurisdictions, consent searches are used regularly as a tool of law enforcement (Nadler, 2002, pp. 153–154), echoing other "preventative investigation" techniques (see Reiss, 1971).⁶

Less obviously, a lack of knowledge may affect how citizens use their Fifth and Sixth Amendment rights as well. For example, even after being Mirandized, a suspect may waive, or refuse to waive, her right to silence or counsel without understanding the legal consequences. She may not know, for example, that asking, "What is going to happen to me now?" counts as a willingness to speak to police without counsel (*Oregon v. Bradshaw*, 1983, pp. 1043–1044), or that non-Mirandized statements can be used to impeach her credibility at trial if she takes the stand (*Harris v. New York*, 1971).⁷

Despite the central role of rights knowledge in citizens' interactions with police, the degree to which ignorance actually facilitates waivers remains unknown. Only a tiny handful of empirical studies are on point, the majority of which were conducted within a decade of the Warren Court's seminal criminal procedure decisions. In Austin Sarat's 1975 survey of 220 Wisconsin adults, he found that "[l]ess than half know that an arrested person cannot be made to answer questions" and that "[o]ver 90% know that the police have to inform suspects of their rights" (Sarat, 1977, p. 479, citing Sarat, 1975). In an unpublished dissertation, Illya Lichtenberg found that of citizens who consented to a vehicle search following a traffic stop, "[m]ost were unaware of their legal right to refuse" (Chanenson, 2004, p. 454, citing Lichtenberg, 1999). However, Lichtenberg's conclusion was based on only 54 respondents – the small percentage who responded to solicitations. As Lichtenberg acknowledges, "this constitutes a relatively serious threat to validity" (Chanenson, 2004, p. 455, citing Lichtenberg, 1999).

In this section, I take two initial empirical steps in applying a rights consciousness framework to criminal procedure.

Data and Methods

Study 1 builds on the simple insight that in many situations, knowledge of a right is a precondition for its assertion. I ask how much knowledge people

have about their criminal procedural rights and discuss the implications of my findings. Study 2 is a smaller, qualitative study in which I ask how people understand, and answer questions about, their constitutional rights.

To begin examining what constitutional rights people believe they possess, I created a survey consisting in part of 10 scenarios that raise Fourth, Fifth, and Sixth Amendment questions. All are based squarely on Supreme Court cases decided between 1978 and 2004, and all (insofar as is possible in constitutional criminal procedure) are matters of settled law. In none of the scenarios are police or other government officials required to inform an individual of the rights he or she possesses.⁸ Questions and answers are listed in Appendix A. Three examples are listed below:

Q: Police suspect Julie is growing marijuana in her house. Growing marijuana indoors requires special lamps that give off a lot of heat. From the sidewalk, police use a “thermal imaging device” (a machine that measures heat waves) to look at the heat coming from Julie’s house. Are the officers allowed to do this without a warrant?

[The answer is no. Without a warrant, officers are not allowed to use specialized technology to see inside a person’s home; they may only use technology that is generally available to people, such as binoculars.]

Q: 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?

[The answer is no. The Sixth Amendment right to counsel applies in all felony cases, but does not apply in misdemeanor cases if the defendant could not face jail time for the offense.]

Q: If police question you in violation of your rights, and you tell them where you’ve hidden an object, then they find your fingerprints on the object, can the fingerprints be used against you?

[The answer is yes. If a suspect makes voluntary statements that lead police to physical evidence, the evidence is admissible even if *Miranda* was violated.]

Although some of the questions were tricky, none was particularly obscure, and all addressed situations reasonably likely to arise in the normal course of a police investigation. Nor is knowledge in these scenarios inconsequential. As discussed earlier, rights knowledge would enhance decision-making in these situations. In some scenarios, legal knowledge could affect the actions a person chooses to take. In others, it might simply afford a greater sense of control or agency.

The respondent population for Study 1 comprised 367 undergraduates: 258 from a public community college in Southern California and 109 from

a private four-year university in Northern California. Respondents were students in history, psychology, sociology, and political science courses at the community college and students in sociology and American studies courses at the private university. Classes were selected based on instructor willingness to distribute the survey.

Study 2 was designed to further probe how people answer questions about their rights. I used a convenience sample of 25 individuals, ranging in age from their early 20s to their early 70s, and ranging in level of formal education from a high school diploma (in several cases) to a Ph.D. (in two cases). Each respondent was given the same yes-or-no questions used in Study 1⁹ and was asked to explain the answers in an open-ended response. The content of responses was coded according to the method of reasoning used to answer a question.

Results

If respondents had no previous knowledge of the American legal system and guessed randomly, we would expect that about 50% (or 1,825) of the 3,650 answers given would be correct. If respondents had strong, or even moderate, knowledge of their rights, we would expect this number to be higher. Nearly all respondents were American citizens, and many reported prior exposure to the American criminal justice system: as jurors or suspects, through high school or college classes, or from friends or family members employed in law enforcement.

In Study 1, 1,461 of respondents' total answers were correct and 2,189 were incorrect. That is, respondents answered correctly about 1,461/3,650 (or 40%) of the time, and incorrectly about 2,189/3,650 (or 60%) of the time. For seven of the ten questions, fewer than half of respondents chose the correct answer. These figures are striking; not only did respondents not know how their constitutional rights applied in the scenarios, but their guesses were more likely to be wrong than right.¹⁰

In three of the scenarios, respondents' answers were extremely lopsided; more than 80% of respondents answered these three questions incorrectly (aside from these, the least evenly divided responses were 64.8% to 35.2% and 60.4% to 39.6%). In all three scenarios that received lopsided responses, respondents guessed that the law affords greater constitutional protection to criminal defendants than it actually does. Two of these questions dealt with Fourth Amendment rights: the legality of pen registries (police looking at the numbers a person has dialed from her home telephone) and the

ability to raise Fourth Amendment claims (whether illegally-seized evidence can be used in court against someone whose person or property wasn't the object of the search); one dealt with Sixth Amendment rights: the availability of counsel in different types of misdemeanor cases. In each situation, respondents believed that certain fundamental constitutional ideas (here, the right to privacy and the right to counsel) would apply in particular cases to protect defendants. The results suggest that people may tend to overestimate the power of rights to protect criminal defendants. See Appendix B for a breakdown of respondents' answers to each question.

The lines of reasoning that led to erroneous answers likely varied by question. The Sixth Amendment errors were probably due to overbreadth; people know about the right to counsel generally and assume that it applies in all situations. Since most respondents lack specialized legal knowledge, perhaps this is not surprising. The question about pen registries can be seen as a form of overbreadth, as well; people may have assumed that a privacy right exists, then applied it too broadly. But people's erroneous answers are more troubling here, since the Court's decision in that case hinged on the idea that even if the defendant had a subjective expectation of privacy in the phone numbers he dialed from home, his expectation was not reasonable under societal standards (*Smith v. Maryland*, 1979). Respondents' pattern of answers highlights a possible problem in the doctrine. It suggests that in actuality, even after almost 30 years of settled law to the contrary, people *do* have an expectation of privacy in pen registries. And we might take the ubiquity of this expectation as strong evidence of its reasonableness. This tension illustrates the usefulness of empirical inquiry in understanding the beliefs and assumptions that undergird constitutional criminal procedure.

Responses in Study 2 were coded according to the type of reasoning that respondents used to answer each item. We might imagine a wide range of ways in which people might think about, and answer questions about, their rights. For example, their ideas about the law might align with their beliefs about what the law *should* say – a possibility suggested by Darley, Carlsmith, and Robinson (2001), who found that people tend to assume that the substance of the criminal law in their own states matches their beliefs about what the law should be. If a similar mechanism is at work with regard to constitutional rights, we might expect people to explain their answers in terms of their own values (e.g., “citizens should have the right to refuse searches,” or “attorneys are important for trial”). Another possibility is that people could draw on their own

experiences. If so, we would expect them to analogize between those experiences and the scenarios presented in the hypotheticals (e.g., “When I was pulled over by a cop, the same thing happened, so I think the officer can search” or “my brother is a lawyer and he told me about this”). People’s likelihood of reasoning from this kind of analogy might depend on the extent of their previous contact with the criminal justice system. Alternatively, people could justify their responses by reasoning from a framework or ideology that reflects their overarching beliefs and understandings about governmental power (e.g., “Police seem to be able to do whatever they want, so I’m sure they can search the car” or “defense attorneys always find some way to get evidence thrown out, so I bet the letter won’t come in”).

The ways in which respondents actually explained their answers varied little, and one pattern was overwhelming: people tended to use a basic version of classic legal reasoning. They stated a broad legal principle (correct or not), then applied this rule to the facts in the scenario. Responses to the question about whether police need a warrant to measure heat emanating from a private home are illustrative. For example: “. . . I believe that the evidence provided by the device would be said to provide ‘probable cause;’” “Just because the cops are checking for heat is probably circumstantial. It wouldn’t be enough to search the house;” “I’d think that if officers are inquiring about something inside of the house, they would need a warrant . . .” Each response implicitly or (more often) explicitly invokes a principle that people believe is a legal “rule:” probable cause enables searches, circumstantial evidence cannot be used as justification for a search, and a warrant is necessary for police to gather evidence inside a home. As in this example, respondents’ assertions about the law were sometimes correct, and sometimes not.

Where respondents identified a correct legal rule, they sometimes misapplied it. For example, consider the third question in the previous section, which asks whether, if a *Miranda* violation leads police to physical evidence, the physical evidence can be used in court. Although none identified it by name, many respondents accurately explained the exclusionary rule’s underlying principle (evidence must be excluded if police obtain it as the result of a procedural violation), writing responses such as: “Although you’d think it should, I think that it can’t count because she didn’t know her rights,” and “Because her rights were not read to her, nothing is valid.” These respondents not only understood the reasoning behind exclusion, but correctly ascertained that the exclusionary rule would be a key doctrine at issue in this scenario. However, they applied the rule

as a blanket matter, leading them to believe that a defendant would benefit from it here.

Notably, most respondents stated at least a few fundamentals of criminal procedure correctly. We might guess that this would not be true in other major areas of law (e.g., property, patents, contracts) and that respondents' familiarity with criminal procedure is due in part to the disproportionate representation of criminal justice issues in various media outlets. As will be discussed in the following section, it is this very familiarity that may lead people to draw erroneous conclusions about their constitutional rights.

Discussion

These studies offer a starting point for expanding rights consciousness research to the criminal procedure context and for thinking about procedural rights consciousness more generally. This vein of work has the potential to yield further insight about people's understanding of rights, about the influence of factors such as social location and identity on this understanding, and about how and when rights are claimed and acted upon.

From these two studies alone, it is impossible to discern whence people derive the legal "rules" they draw upon to decide whether a right exists in a particular circumstance. The rules' content and application, however, was somewhat predictable. This style of pseudo-legal reasoning can be understood as a kind of "lay jurisprudence,"¹¹ in which the "doctrine" comprises widespread cultural ideas and assumptions about the Constitution and the criminal justice system. By and large, the "rules" respondents cited align with what we might suppose are shared, general beliefs about criminal procedure that are rooted in American civic culture. For example, in determining whether "Steve" was entitled to legal representation in his misdemeanor trial, respondents wrote: "It's a criminal case; as such, one is entitled to a legal defender," "Everyone has the right to a lawyer, I think this is in the *Miranda* warning," and "All defendants have the right to a public defender in criminal trials by jury." These three respondents answered incorrectly, but their justifications drew upon a simplified (or, we might say, idealized) version of the holding in *Gideon v. Wainwright* (1963).

The consistency of reasoning across questions suggests that lay jurisprudence is a mechanism through which people understand and make

decisions about their rights, drawing on a store of beliefs about the law and applying them to specific situations. These beliefs tend to reflect widespread ideas about the protection the Constitution affords. A lay jurisprudential approach to rights situations leads people to misunderstand the rights they possess. Put differently, when it comes to criminal procedure, a little knowledge can be a dangerous thing. This does not contradict the rights consciousness paradigms described by Nielsen and others, but rather builds on the literature's identification of systematic, and predictable, patterns in how people think about law.

In both studies, respondents were in greatest agreement when a question either evoked only one lay jurisprudential tenet, or evoked multiple, non-conflicting tenets. For example, in response to the question about the admissibility of physical evidence stemming from a *Miranda* violation, the only tenet readily available is the exclusionary rule principle. Respondents invoked this idea with near-unanimity, which led over 90% of them to answer incorrectly. The content of the open-ended responses in the second pilot study is consistent with this interpretation of the results. Typical responses included, "I think because it is a private place the police would have had no legal way of finding the letter," "It was obtained illegally so it can't count," and "The search was illegal and the letter was found in the illegal search." These responses reflect a lay jurisprudential approach. However, when lay jurisprudence reasoning could cut in two different directions, responses tended to be mixed. For example, the question about using a thermal imaging device to detect heat lamps evokes two popular tenets: (1) police need a warrant to search; (2) a "search" is a physical intrusion. Responses tended to align with one of these two ideas, and were divided accordingly.

Lay jurisprudential tenets were applied consistently across items as well. The survey contained two questions that dealt with potential violations of the Fifth Amendment's *Miranda* warning requirement. In one of these, a blanket application of the notion that *Miranda* violations mandate exclusion leads to a correct answer; in the other, it leads to an incorrect answer. Responses followed suit. This pattern was especially noteworthy with regard to the latter question, because respondents' answers followed lay jurisprudential reasoning even when respondents stated that they disagreed morally with the outcome to which their reasoning led. Representative responses include: "Although it seems like extremely bad practice, they read [the defendant] his rights and he decided to confess anyway," and "If the defendant does not ask to speak to an attorney and actively waives his rights he is screwed." This suggests that the mechanism Darley et al. describe with

regard to the penal code (people think that law's content aligns with their own beliefs) may operate differently with regard to people's orientation to constitutional rights in the criminal realm – or that it may operate differently in situations that raise questions about procedural rights rather than questions about substantive law.

Moreover, these results suggest that in deciding whether to invoke rights and how to interact with authorities, people's actions may often be based on erroneous beliefs. Laypeople can hardly be expected to have an encyclopedic knowledge of criminal procedure, but it appears that at least in some situations, citizens would be better off acting in complete ignorance of their procedural rights than trying to discern what rights they have. In the Fourth Amendment context, "consent" may be as much of a myth as Justice Brennan, Janice Nadler, and others have suggested. Assuming we consider it problematic for people to relinquish rights out of ignorance rather than conscious choice,¹² this finding lends support to legal and policy proposals designed to make waivers more meaningful, such as a Fourth Amendment warning requirement analogous to the *Miranda* warnings.¹³ In the Fifth and Sixth Amendment contexts, although the *Miranda* warnings give suspects a little information about the law, the warnings fall far short of ameliorating suspects' unfamiliarity. The warnings may have been adequate when *Miranda* was handed down in 1966, but more than four decades later, Fifth Amendment law is filled with clarifications, caveats, and exceptions. If we want to equip people with a meaningful opportunity to use their rights, the *Miranda* warnings may no longer go far enough. Indeed, the warnings may perpetuate the kind of lay jurisprudential tenets that can lead people to erroneous conclusions about how rights operate in particular situations and may lead people to assume that they know more than they actually do.

Finally, not only does lay jurisprudence lead people to err about the rights they possess, but it leads them to err in predictable ways. This finding underscores the concerns of MacCoun, Haney, and others regarding procedural justice research. Some law enforcement techniques already incorporate means of increasing compliance by making people feel more satisfied in police–citizen interactions. A meaningful opportunity to exercise constitutional rights may or may not correlate with these feelings of satisfaction. Thus, the ways people understand criminal procedure, and the assumptions they make about how the law works, may open the door to methods of policing designed to encourage waiver and render people vulnerable to manipulation and unwitting surrender of their rights.

AN AGENDA FOR FUTURE RESEARCH

The Relationship between Rights Consciousness and the Constitutional Landscape

Ideas and assumptions about social behavior are embedded throughout constitutional criminal procedure. Hinging the admissibility of evidence on “reasonableness” or “voluntariness,” for example, suggests some consensus about the types of behavior that are reasonable or voluntary. Normative assessments are necessarily at the crux of these determinations. Empirical inquiry can help produce “a clearer picture of the existing constitutional landscape” (Meares & Harcourt, 2000, p. 735) by testing the validity, effects, and implications of normative judgments that underpin criminal procedure doctrine.¹⁴ This kind of research has important implications for the understanding of rights consciousness more broadly – asking, for example, how people’s orientation to rights maps onto the legal landscape, and whether awareness of rights engenders a willingness to claim them.

Rights Consciousness and Social Location in Constitutional Criminal Procedure

One crucial question for future research is how rights consciousness, including rights knowledge and rights assertion, operates along demographic lines such as race, class, and gender. This builds on existing work such as Nielsen’s study of attitudes about street harassment, in which she found that paradigms for opposing the regulation of free speech varied by race and gender. For example, non-whites were more likely than whites to oppose regulation because they did not trust the government to regulate fairly.

Even if knowledge of rights is equally distributed among members of different socioeconomic levels, people may think about the justiciability of their rights in ways that are heavily influenced by their experiences and background (Sandefur, 2007; Engel & Munger, 1996). Annette Lareau’s work on how social class shapes individual interaction styles offers a possible starting point. Lareau suggests that upper-middle class parents’ interactions with their children differ from working class parents’. The former are socialized to interact with professionals, use institutions to their advantage, and voice requests for change when they are unsatisfied with treatment or outcomes they receive from authorities. In contrast, working class children are raised to be deferential and quiet around authorities and

are discouraged from protesting unsatisfactory treatment or outcomes (Lareau, 2002). This “emerging sense of entitlement” (Lareau, 2002, p. 749) in children of professionals may be particularly relevant to interactions between citizens and the police, since police are such an acme incarnation of authority. For example, low-status individuals may be more likely to view police as occupying a higher status position than themselves. If questioned by police, they may be more likely to act in a manner that police associate with guilt. In contrast, a high-status individual may view police either as equals, or even as occupying an inferior social position. As a result, high-status individuals may engage with police by instinctively using techniques that render them less vulnerable to intrusive investigative tactics.¹⁵

Demographic differences in rights assertions could also stem from disparate senses of fairness and agency, grounded in the kinds of social and financial resources available to different groups. In discussing subjective perceptions of fairness, Sandefur (2008, p. 341) points out that current 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.” For example, an affluent white woman may refuse consent to a warrantless search without worrying about police retribution. This willingness to assert rights may stem from an implicit, perhaps even unconscious, awareness of her own control; if the officer acts illegally, the affluent woman will hire a good lawyer to argue on her behalf. A working-class black man in the same situation may feel less at liberty to refuse. He may perceive – perhaps accurately, and perhaps even unconsciously – that if police misbehave, he will have little legal or social recourse. He may assume that his best bet is to consent, even if he would rather refuse. John Gilliom (2001) has described a regime of governmental oversight, regulation, and scrutiny of welfare recipients, whereby people learn through experience that regardless of official regulations, authorities’ discretion is virtually unfettered. Working-class people do not necessarily view law as more “prosecution-friendly,” but may see themselves as more subject to government regulation and as possessing fewer rights, because their past experiences with authority have been brusque, invasive, and characterized by a lack of opportunity for personal agency.

Rights Consciousness and Rights Characteristics

Finally, future research might probe differences in rights consciousness with respect to different types of procedural rights. For example, within the

universe of constitutional rights in criminal procedure, we might imagine at least two continuums. First, a right could be characterized as “latent” or “manifest” to varying degrees. The more latent a right is, the more incumbent it is upon the individual to assert the right – that is, exercise of a latent right is heavily dependent on a person’s knowledge, action, or both. For example, suppose police pull a person over and ask her to step out of the vehicle. They have no probable cause, but say, “We need to search your trunk, all right?” Although the search requires consent, the person may not know she has a right to refuse. In order for her to exercise her right, she not only must know (or believe, or suppose) she has the right, but must be willing to claim or assert it. As such, her Fourth Amendment right in this situation falls toward the “latent” end of the spectrum. A more “manifest” right, on the other hand, requires little of the individual; regardless of the individual’s action, the government must act in a way that acknowledges the right. The requirement that police read the *Miranda* rights and obtain a waiver before interrogating a person in custody is one example. The suspect need not enter the situation knowing she has a right to the *Miranda* warnings, nor does she need to request them. Such a rule would fall farther toward the “manifest” end of the spectrum. And, certainly, a procedural right might move from one place on this spectrum to another as the situation – and with it, the attendant law – changes.

On another spectrum, a right might range from “situational” to “ubiquitous.” The most situational rights only exist under particular conditions. The right to an attorney is closer to this end of the spectrum. It only applies to criminal defendants, only to those charged with certain categories of crimes, and only when formal adversarial charges are brought against a person. Conversely, a more ubiquitous right applies in a broader variety of circumstances. For example, physical abuse by the police is a constitutional violation regardless of whether a person is a criminal defendant, where she is located, or whether, at the time of the beating, she asserts her Fourteenth Amendment right to due process. Fig. 1 suggests one way to conceptualize these two spectrums.

Certainly, the exact placement of any individual right on the spectrums can be debated. “A” and “B” above are possible placements for the examples given in the previous paragraph. “C” and “D” suggest placements for the right to refuse a warrantless search of one’s home and the right to refuse a warrantless search of one’s car, respectively. The latter falls closer to the “situational” end of the spectrum because criminal procedure doctrine contains a wide variety of situations in which an officer may conduct a warrantless search of a car. For example, if a car is lawfully stopped, police

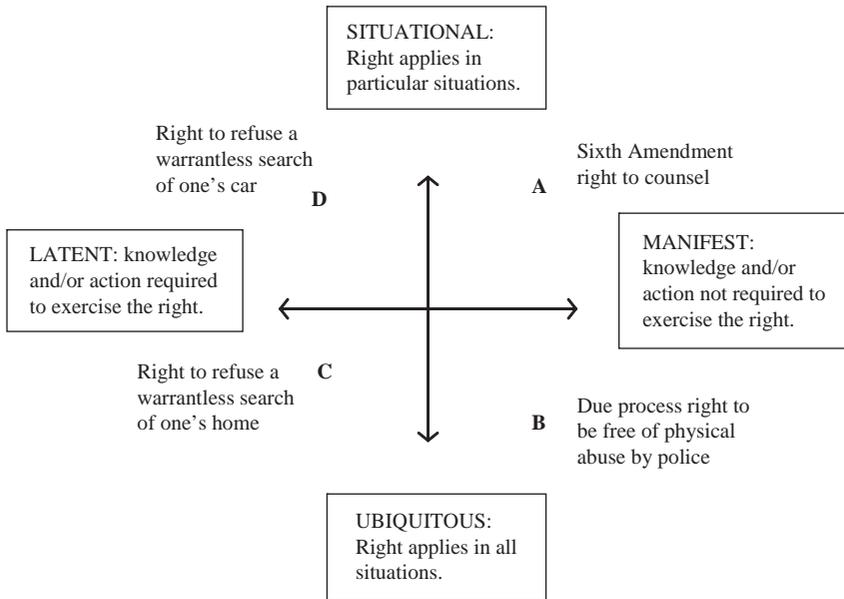


Fig. 1. Conceptual Spectrums for Constitutional Criminal Procedure Rights.

may always order the driver (*Pennsylvania v. Mimms*, 1977) and passengers (*Maryland v. Wilson*, 1997) out of the vehicle; if an arrest occurs, police may search the entire interior of the car, excepting the trunk and the engine compartments, and including any container, open or closed, regardless of size (*New York v. Belton*, 1981; *Thornton v. U.S.*, 2004). On the other hand, the rules for searches incident to arrest in suspects' homes are more restrictive. For example, closed containers outside the arrestee's "grabbable distance" cannot be opened simply because an arrest occurred (see *Chimel v. California*, 1969).

These spectrums are intended to be descriptive, not normative. Nor are they exhaustive. Rather, they represent just one way we might parse legal rules and doctrine in order to better understand rights consciousness in the criminal context. We might ask: How does rights knowledge map onto these continuums? Are more latent, and more situational, rights difficult to exercise compared to more manifest, ubiquitous ones? Do characteristics of a right affect how people orient themselves in relation to it? What measures can be taken to assure that people are given an opportunity to meaningfully assert their rights?

CONCLUSION

The discussion and studies above illustrate the fruitfulness of examining criminal procedure as an aspect of rights consciousness research. Legal consciousness – and rights consciousness in particular – offers a useful means of understanding constitutional criminal procedure rights, raising questions about the rights citizens believe they possess, how these ideas are formed, their willingness to assert rights, and how their relationship to government authority affects, and is affected by, these beliefs. Additionally, investigation into procedural rights consciousness offers a way to build on procedural justice work, probing the relationship between procedures' legal content, people's subjective impressions, and normative questions about the legality and morality of particular procedures.

The studies above also suggest that people's understanding of their criminal procedural rights in particular situations is a product of "lay jurisprudence," in which they reason from generalized notions about constitutional and criminal law. This phenomenon often causes them to draw erroneous conclusions about their rights, and these conclusions are likely to have appreciable consequences when people are the subjects of government investigation. Understanding this mechanism may further prevent abuses of state power and point to procedural reforms that would allow citizens to exercise their constitutional rights in more meaningful ways.

More research is needed to completely explore rights consciousness in the criminal realm, including how naming, blaming, and claiming operate differently in civil, versus criminal, law. Work on rights knowledge and rights assertion, particularly with respect to demographic factors, is also an important component of rights consciousness in the criminal law context and offers fertile ground for future empirical and theoretical work.

NOTES

1. As Somers and Roberts (2008) acknowledge in describing a "right to have rights," the division between human and citizenship rights is not a clean one. For example, even if we stipulate that a man has no natural right not to incriminate himself, we could still debate whether his natural rights are violated if he is denied this right on the basis of his race while it is granted to others in his country. That is, a state may not need to grant a particular right, but if it chooses to grant the right, it must do so evenhandedly. Furthermore, we might argue that if a state grants a right to its citizens, it assumes a corresponding responsibility to make a good faith effort to effectuate the right in a meaningful way.

2. Sandefur (2008, pp. 340–341) incisively observes that sociological work on access to justice struggles with an inherent tension. On the one hand, empirical work on “justice” requires, to some extent, a list of justice’s ingredients. On the other, such a list embodies a normative appraisal of the type for which social science may be ill-suited. In response, scholars have taken two approaches: either taking up equality as a working definition of justice – thus measuring behavior or outcomes (e.g., racial equality) against formal legal institutional standards, or skipping the question of substantive justice altogether and focusing instead on people’s subjective experiences (e.g., outcome satisfaction).

3. It is also worth noting that some incidents we might understand as constitutional “violations” are not technically “violations” at all. For example, if police ignore a suspect’s right not to incriminate herself, and they obtain inculpatory statements as a result, the Fifth Amendment is not actually violated until the statement is used against the defendant in court.

4. See, e.g., *Miranda v. Arizona* (1966) regarding the Fifth Amendment, *Schneckloth v. Bustamonte* (1973) regarding the Fourth Amendment, and *Edwards v. Arizona* (1981) regarding the Sixth Amendment.

5. Actual knowledge of one’s right to refuse a search is merely one factor in the “totality of the circumstances” that courts analyze to determine whether consent to the search was voluntary.

6. For more on how consent searches operate, see Steven L. Chanenson’s (1999) discussion of Illya D. Lichtenberg’s unpublished dissertation, “Voluntary Consent of Obedience to Authority: An Inquiry into the ‘Consensual’ Police-Citizen Encounter.” Lichtenberg studied consent searches stemming from highway traffic stops in Maryland and Ohio and found that of the 9,028 people who were asked for consent, 89.3% granted it.

7. Certainly, as a practical matter, informing a suspect of every applicable doctrinal nuance would be unfeasible, at least for policing in its current incarnation. But it is not unthinkable that police departments could have a “rights consultant” on hand for suspects who have questions about their rights but are otherwise willing to talk to police.

8. Some of the questions pose a hypothetical scenario and ask respondents whether police behavior was legal. Other questions are asked more directly: Are police allowed to do x?

9. Some questions used minor differences in phrasing, but the substance was unaltered.

10. It is important to note that the questions are a collection of difficult, but settled, non-peripheral constitutional questions, and were not intended as a representative sample of criminal procedure issues overall. For this reason, the results do not tell us that people are incorrect about 60% of the rights they possess, nor that they guess erroneously 60% of the time.

11. John Conley and William O’Barr (1990, pp. 44–45) have used this term to describe layperson reasoning in civil law problems.

12. This may seem obvious, but hinges on where the responsibility for rights knowledge rests. In oral argument in *United States v. Drayton* (2002), Justice Kennedy suggested that citizens should bear some responsibility to know their own rights, lest they assume the risk of missing an opportunity to exercise them: “An American citizen has to protect his rights once in a while . . . that’s a bad thing?”

Chief Justice Warren's opinion in *Miranda* exemplifies the opposite philosophy, in which the state bears responsibility for informing citizens in order to ensure they have an adequate opportunity to exercise their rights: "[A] warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time" (*Miranda v. Arizona*, 1966, p. 469 (emphasis added)).

13. The Supreme Court has consistently declined to extend *Miranda*'s rights knowledge reasoning to other areas – most notably Fourth Amendment searches and seizures (Reich, 2003) (see, e.g., *Florida v. Bostick*, 1991).

14. For example, Janice Nadler (2002, p. 155) has observed that "[t]he question of whether a citizen feels free to terminate a police encounter depends crucially on certain empirical claims, as does the question of whether a citizen's grant of permission to search is voluntary;" Steven L. Chanenson (2004, p. 455) has written that empirical research is needed "to fill the yawning hole in our knowledge about consent searches." For further discussion of the paucity of empirical research in constitutional criminal procedure, see also Merritt (1999); Chanenson (2004); Meares and Harcourt (2000).

15. And this, of course, may be compounded by any favorable treatment that high-status individuals already enjoy from police due to race, class, or other status markers.

16. The original survey included 11 questions. I removed one from the analysis: "If the police interrogate you without reading you your *Miranda* rights, then you confess, can the confession be used against you in trial?" This question is ambiguous and imprecise; the confession could not be used against a defendant in the prosecutor's case-in-chief, but could be used against a defendant for other purposes in trial, such as impeaching the defendant's credibility if she takes the stand.

ACKNOWLEDGMENTS

I am deeply indebted to Becky Sandefur for many useful conversations and for her insightful feedback on multiple drafts. Thanks also to Bob Weisberg for inspiration and helpful suggestions, to Taylor Young for her research assistance, and to the Stanford Criminal Justice Center and the Stanford Graduate Fellowship program for financial support. I presented an earlier draft of this chapter at the 2008 meeting of the Pacific Sociological Association in Portland, Oregon.

REFERENCES

- Burkoff, J. (2007). Search me? *Texas Tech Law Review*, 39, 1109–1141.
 Casper, J. D., Tyler, T., & Fisher, B. (1988). Procedural justice in felony cases. *Law and Society Review*, 22(3), 483–508.

- Chanenson, S. L. (2004). Get the facts, Jack! Empirical research and the changing constitutional landscape of consent searches. *Tennessee Law Review*, 71, 399–470.
- Cloud, M. (2007). Ignorance and democracy. *Texas Tech Law Review*, 39, 1143–1169.
- Conley, J. M., & O'Barr, W. (1990). *Rules versus relationships: The ethnography of legal discourse*. Chicago, IL: University of Chicago Press.
- Darley, J. M., Carlsmith, K. M., & Robinson, P. H. (2001). The ex ante function of the criminal law. *Law & Society Review*, 35(1), 165–190.
- Engel, D. M., & Munger, F. W. (1996). Rights, remembrance, and the reconciliation of difference. *Law and Society Review*, 30(1), 7–53.
- Ewick, P., & Silbey, S. S. (1998). *The common place of law: Stories from everyday life*. Chicago, IL: University of Chicago Press.
- Felstiner, W. L. F., Abel, R. L., & Sarat, A. (1980). The emergence and transformation of disputes: Naming, blaming, claiming. *Law and Society Review*, 15(3/4), 631–654.
- Friedman, L. M. (1971). The idea of right as a social and legal concept. *Journal of Social Issues*, 27, 189–198.
- Gilliom, J. (2001). *Overseers of the poor: Surveillance, resistance, and the limits of privacy*. Chicago, IL: University of Chicago Press.
- Haney, C. (1991). The fourth amendment and symbolic legality: Let them eat due process. *Law and Human Behavior*, 15(2), 183–204.
- Karlan, P. S. (2007). The paradoxical structure of constitutional litigation. *Fordham Law Review*, 75, 1913–1929.
- LaFave, W. R. (1996). *Search and seizure: A treatise on the fourth amendment* (§ 8.1) (3d ed.). St. Paul, MN: West.
- Lareau, A. (2002). Invisible inequality: Social class and childrearing in black families and white families. *American Sociological Review*, 67(5), 747–776.
- Lassiter, C. (2007). Consent to search by ignorant people. *Texas Tech Law Review*, 39, 1171–1194.
- Lichtenberg, I. D. (1999). Voluntary consent of obedience to authority: An inquiry into the 'consensual' police-citizen encounter. Unpublished dissertation.
- MacCoun, R. J. (2005). Voice, control, and belonging: The double-edged sword of procedural fairness. *Annual Review of Law and Social Science*, 1, 171–201.
- Meares, T. L., & Harcourt, B. E. (2000). Foreword: Transparent adjudication and social science research in constitutional criminal procedure. *Journal of Criminal Law and Criminology*, 90, 733–798.
- Meltzer, D. J. (1988). Deterring constitutional violations by law enforcement officials: Plaintiffs and defendants as private attorneys general. *Columbia Law Review*, 88, 247–328.
- Merritt, D. J. (1999). Constitutional fact and theory: A response to judge Posner. *Michigan Law Review*, 97, 1287–1295.
- Merry, S. E. (1990). *Getting justice and getting even: Legal consciousness among working class Americans*. Chicago, IL: University of Chicago Press.
- Molm, L. D., Peterson, G., & Takahashi, N. (2003). In the eye of the beholder: Procedural justice in social exchange. *American Sociological Review*, 68(1), 128–152.
- Nadler, J. (2002). No need to shout: Bus sweeps and the psychology of coercion. *Supreme Court Review*, 200, 153–222.
- Nielsen, L. B. (2000). Situating legal consciousness: Experiences and attitudes of ordinary citizens about law and street harassment. *Law and Society Review*, 34(4), 1055–1090.

- Nielsen, L. B. (2004). *License to harass: Law, hierarchy, and offensive public speech*. Princeton, NJ: Princeton University Press.
- Nielsen, L. B. (Ed.) (2007). *Theoretical and empirical studies of rights*. Burlington, VT: Ashgate Publishing Company.
- Reich, M. (2003). United States v. Drayton: The need for bright-line warnings during consensual bus searches. *Journal of Criminal Law and Criminology*, 93, 1057–1093.
- Reiss, A. J., Jr. (1971). *The police and the public*. New Haven, CT: Yale University Press.
- 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.
- Sandefur, R. L. (2008). Access to civil justice and race, class, and gender inequality. *Annual Review of Sociology*, 34, 339–358.
- Sarat, A. (1975). Support for the legal system: An analysis of knowledge, attitudes, and behavior. *American Politics Quarterly*, 3(1), 3–24.
- Sarat, A. (1977). Studying American legal culture: An assessment of survey evidence. *Law and Society Review*, 11(3), 427–488.
- Scheingold, S. (1974). *The politics of rights*. New Haven, CT: Yale University Press.
- Simmons, R. (2005). Not 'voluntary' but still reasonable: A new paradigm for understanding the consent searches doctrine. *Indiana Law Journal*, 80, 773–824.
- Somers, M. R., & Roberts, C. N. J. (2008). Toward a new sociology of rights: A genealogy of 'buried bodies' of citizenship and human rights. *Annual Review of Law and Social Science*, 4, 385–425.
- Thibaut, J., & Walker, L. (1978). A theory of procedure. *California Law Review*, 66(3), 541–566.
- Tyler, T. R. (1984). The role of perceived injustice in defendants' evaluations of their courtroom experience. *Law and Society Review*, 18(1), 51–74.
- Tyler, T. R., & Rasinski, K. (1991). Procedural justice, institutional legitimacy, and the acceptance of unpopular Supreme Court decisions: A reply to Gibson. *Law and Society Review*, 25(3), 621–630.

Cases Cited

- Argersinger v. Hamlin*, 407 U. S. 25 (1972).
- Bordenkircher v. Hayes*, 434 U.S. 357 (1978).
- California v. Greenwood*, 486 U.S. 35 (1988).
- Chimel v. California*, 395 U.S. 752 (1969).
- Edwards v. Arizona*, 451 U.S. 477 (1981).
- Florida v. Bostick*, 501 U.S. 429 (1991).
- Gideon v. Wainwright*, 372 U.S. 335 (1963).
- Harris v. New York*, 401 U.S. 222 (1971).
- Illinois v. Rodriguez*, 497 U.S. 177 (1990).
- Kyllo v. United States*, 533 U.S. 27 (2001).
- Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18 (1981).
- Maryland v. Wilson*, 519 U.S. 408 (1997).
- Miranda v. Arizona*, 384 U.S. 436 (1966).
- Moran v. Burbine*, 475 U.S. 412 (1986).
- New York v. Belton*, 453 U.S. 454 (1981).

Oregon v. Bradshaw, 462 U.S. 1039 (1983).
Pennsylvania v. Mimms, 434 U.S. 106 (1977).
Rakas v. Illinois, 439 U.S. 128 (1978).
Schneekloth v. Bustamonte, 412 U.S. 218 (1973).
Scott v. Illinois, 440 U.S. 367 (1979).
Smith v. Maryland, 442 U.S. 735, 744 (1979).
Thornton v. United States, 541 U.S. 615 (2004).
United States v. Drayton, 536 U.S. 194 (2002).
United States v. Patane, 542 U.S. 630 (2004).
United States v. Pollard, 959 F.2d 1011, (D.C. Cir.), cert. denied, 506 U.S. 915 (1992).

APPENDIX A. SURVEY QUESTIONS¹⁶

Q: 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?

A: Yes. No reasonable expectation of privacy exists in garbage that a person has put out for collection. *California v. Greenwood*.

Q: Without a warrant or any suspicion, are police allowed to look at the phone numbers you've dialed from your home?

A: Yes. People "voluntarily" give numerical information to the phone company every time they place a call, so they have no reasonable expectation of privacy in the numbers they dial. *Smith v. Maryland*.

Q: If police question you in violation of your rights, and you tell them where you've hidden an object, then they find your fingerprints on the object, can the fingerprints be used against you?

A: Yes. Failure to Mirandize a suspect does not require exclusion of physical evidence that are fruits of the unwarned statement. *U.S. v. Patane*.

Q: If the police arrest you in your car, can they search the car even if they don't have a warrant or any reason to search?

A: Yes. If the recent occupant of a car is arrested, cops can search inside the car. *Belton v. New York*. A search incident to arrest is okay even if the defendant is cuffed outside car and would not physically be able to reach inside. *Thornton v. U.S.*

Q: Police suspect Julie is growing marijuana in her house. Growing marijuana indoors requires special lamps that give off a lot of heat. From the sidewalk, police use a "thermal imaging device" (a machine that

measures heat waves) to look at the heat coming from Julie's house.
Are the officers allowed to do this without a warrant?

- A: No. Police may not use a device that is not in general public use to see details of a private home that would be unknowable without a physical intrusion. This is a Fourth Amendment search, presumptively unreasonable without a warrant. *Kyllo v. U.S.*
- Q: Eva is visiting her son, Bill. While Bill is at the grocery store, an officer knocks on the door. Eva opens it. The officer says he doesn't have a warrant, but wants to look around if it's okay with Eva. "I don't live here," Eva says. "I'm just visiting. But you can come in and take a quick look." The cop enters Bill's house, and looks briefly around each room. Is the cop doing anything illegal?
- A: Yes. Third party consent is valid only if police reasonably believe that the consenter had common authority over the premises. *Illinois v. Rodriguez.*
- Q: Police search Rhonda's home. They find a letter from Betty to Rhonda, in which Betty admits to selling drugs. Later, a judge decides that the search of Rhonda's house was illegal. Betty is charged with drug sales. Can the letter be used against Betty in trial?
- A: Yes. Only a defendant with a reasonable expectation of privacy in the illegally searched property has standing to challenge the search. *Rakas v. Illinois.*
- Q: 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?
- A: No. No right to counsel exists in misdemeanor charges not punishable by jail time. *Argersinger v. Hamlin; Scott v. Illinois.*
- Q: Larry is arrested. His lawyer, Sue, hears about it and calls the police. The police promise Sue they won't question Larry until Sue gets there. They also promise to tell Larry that Sue called. After hanging up, the police go back to Larry, read him his rights, and question him. They don't tell him about Sue's call. Larry confesses before Sue arrives. Did the police do anything illegal?
- A: No. Police deception is generally allowed unless it's so egregious that it makes the confession involuntary; the example does not rise to this level. *Moran v. Burbine.*

- Q:** Josh and his wife are arrested. The prosecutor offers Josh a deal, saying, “I’ll give you a choice. Plead guilty and I’ll drop the charges against your wife. Don’t plead guilty and I’ll charge you *and* your wife with everything I possibly can.” Is the prosecutor doing anything illegal?
- A:** No. Threatening to increase charges isn’t unconstitutionally coercive, *Bordenkircher v. Hayes*. Tying a plea to charges against a family member is presumably okay, too. *U.S. v. Pollard*.

APPENDIX B. STUDY 1: CORRECT VERSUS INCORRECT ANSWERS

Question Topic	Correct	Incorrect
Reasonable expectation of privacy in trash	209/365 (57.3%)	156/365 (42.7%)
Legality of pen registries	071/367 (19.3%)	296/367 (80.7%)
Physical fruits of Fifth Amendment violations	165/363 (45.5%)	198/363 (54.5%)
Search incident to arrest in car arrest situation	177/365 (48.5%)	188/365 (51.5%)
Warrantless use of thermal imaging devices	144/364 (39.6%)	220/364 (60.4%)
Third-party consent searches	237/366 (64.8%)	129/366 (35.2%)
Standing to raise Fourth Amendment claims	073/366 (19.9%)	293/366 (80.1%)
Right to counsel in misdemeanor trials	028/365 (7.7%)	337/365 (92.3%)
Police deception, no Fifth Amendment violation	172/363 (47.4%)	191/363 (52.6%)
Threats by prosecutor during plea negotiation	185/366 (50.5%)	181/366 (49.5%)
Total	1461/3650 (40%)	2189/3650 (60%)