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"LEGALLY MAGIC" WORDS: AN EMPIRICAL STUDY OF THE ACCESSIBILITY OF FIFTH AMENDMENT RIGHTS

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ABSTRACT—Fifth Amendment case law (including *Miranda v. Arizona*) requires that individuals assert their right to counsel or silence using "explicit," "clear," and "unambiguous" statements—or, as some dissenting judges have lamented, using "legally magic" words. Through a survey of 1,718 members of the U.S. public, we investigate what ordinary people believe it takes to assert the right to counsel and the right to silence. We then compare their perceptions against prevailing legal standards governing invocation.

With respect to the right to counsel, the survey results indicate that members of the public have a uniformly lower threshold for invocation than do courts. Statements that courts have deemed too ambiguous (e.g., "I'll be honest with you, I'm scared to say anything without talking to a lawyer.") are perceived by a large majority of survey respondents as invoking the right to counsel. With respect to the right to silence, the survey results suggest that people overwhelmingly believe that remaining silent for several hours constitutes invocation of the right to silence and expect that their silence cannot be used against them—including in situations where, in fact, it can be. Across an array of fact patterns and demographic subgroups, respondents consistently set the bar for invoking Fifth Amendment rights lower than courts.

The stark disconnect between what the public takes as sufficient to invoke these rights and what courts hold as sufficient suggests that the rights to counsel and silence are largely inaccessible to ordinary people. Notably, standard *Miranda* warnings do not include instructions regarding how one must speak in order to invoke those rights. We conclude that when courts set the threshold for invocation above where the average citizen believes it to be, they effectively place key procedural rights out of reach.

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INTRODUCTION

In police–citizen interactions, the right to counsel and the right to remain silent must be claimed by the person seeking their protection—and

they must be claimed in a particular way.[1] To invoke the right to counsel, a person subject to custodial interrogation must request a lawyer "unambiguously."[2] Although the individual "need not 'speak with the discrimination of an Oxford don,' he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."[3] In practice, this requirement has led to the expectation that people in custody will announce their wishes in "direct and assertive" ways, unqualified by hedges (e.g., "I guess"), conditional phrases (e.g., "If you want this recorded, I want a lawyer present"), questions (e.g., "Do you mind if . . . ?"), modal verbs (e.g., "might"; "could"), or other forms of softening language.[4] Accordingly, courts have found that statements such as "I think it'd probably be a good idea for me to get an attorney,"[5] "I'll be honest with you, I'm scared to say anything without talking to a lawyer,"[6] "[I'd] probably like to have an attorney present,"[7] and "[c]ould I call my lawyer?"[8] are not invocations of the right to counsel.

With respect to the right to remain silent, the Supreme Court insists that an "accused who wants to invoke his or her right to remain silent" must "do so unambiguously."[9] Remaining silent—even for hours before ever uttering a word—is not sufficient.[10] Instead, people must affirmatively speak up to invoke the right to silence.

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[1] We speak here of the right to counsel under *Miranda v. Arizona*, not the Sixth Amendment right to counsel. *See infra* Section I.A (summarizing scholarship on invoking the right to counsel).

[2] Davis v. United States, 512 U.S. 452, 459 (1994).

[3] *Id.* (citation omitted) (quoting *Davis*, 512 U.S. at 476 (Souter, J., concurring in the judgment)).

[4] Richard A. Leo, *The Sound of Silence:* Miranda *Waivers, Selective Literalism, and Social Context*, *in* SPEAKING OF LANGUAGE AND LAW: CONVERSATIONS ON THE WORK OF PETER TIERSMA 255, 256 (Lawrence M. Solan, Janet Ainsworth & Roger W. Shuy eds., 2015); *see also* Taylor J. Smith, Note, *Linguistic Estoppel: A Custodial Interrogation Subject's Reliance on Traditional Language Customs when Facing Unknown Expectations for Legally Efficacious Speech*, 46 BYU L. REV. 1675, 1678–79, 1705 (2021) (quoting United States v. Mohr, 772 F.3d 1143 (8th Cir. 2014) (holding that the conditional phrase "If you want this recorded, I want a lawyer present" was insufficient to invoke right to counsel)); Mary Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under* Miranda, 17 WM. & MARY BILL RTS. J. 773, 787–802 (2009) (listing eight categories of statements that have been found too ambiguous to invoke *Miranda* rights).

[5] People v. Bacon, 240 P.3d 204, 220 (Cal. 2010).

[6] Midkiff v. Commonwealth, 462 S.E.2d 112, 115 (Va. 1995).

[7] Daniel v. State, 644 P.2d 172, 174 (Wyo. 1982).

[8] Dormire v. Wilkinson, 249 F.3d 801, 805 (8th Cir. 2001).

[9] Berghuis v. Thompkins, 560 U.S. 370, 381 (2010).

[10] Of course, if an accused and Mirandized person sits silently forever, that silence cannot be used against them. *See* Doyle v. Ohio, 426 U.S. 610, 617–19 (1976). Per the Supreme Court's decision in *Berghuis*, however, police are permitted to continue questioning a suspect indefinitely who has not invoked, and the Court has yet to articulate any limit on the duration of such questioning. 560 U.S. at 388.

In both contexts, the prevailing invocation standards require people to use "legally magic words" to assert their rights—words that, according to some critics, "no actual person other than a lawyer would ever utter."[11] This state of affairs raises the prospect that even when people understand *Miranda* warnings, their beliefs about how to assert their rights may not align with what courts demand.

In this Article, we compare prevailing legal standards governing invocation with what ordinary members of the public think is required to invoke the right to counsel and the right to silence. Using fact patterns from canonical Fifth Amendment cases, we probe survey respondents' beliefs about what, precisely, a person must say or do to invoke these rights. We then explore how perceptions vary based on respondents' sociodemographic characteristics, including race, gender, age, education, and prior experience with law enforcement.

While there is undoubtedly some truth to the claim that popular media has burned the *Miranda* warnings into our collective minds,[12] ample research demonstrates that many members of the public do not know their rights,[13] and that those who do often fail to appreciate "how their rights apply in a particular encounter with police."[14] Furthermore, several commentators have observed that, regardless of whether people know their rights, police–citizen interactions are profoundly influenced by unequal power relations, by the implicit threat of police violence, and by speech and language differences across subcommunities—all of which may be affected by socioeconomic status, cultural capital, age, and race.[15]

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[11] David Aram Kaiser & Paul Lufkin, *Deconstructing* Davis v. United States*: Intention and Meaning in Ambiguous Requests for Counsel*, 32 HASTINGS CONST. L.Q. 737, 758 (2005). On the notion of magic words, see *Berghuis*, 560 U.S. at 409–10 (2010) (Sotomayor, J., dissenting), and *Salinas v. Texas*, 570 U.S. 178, 203 (2013) (Breyer, J., dissenting).

[12] *See* Akhil Reed Amar, *OK, All Together Now: 'You Have the Right to . . . ,'* L.A. TIMES (Dec. 12, 1999, 12:00 AM), https://www.latimes.com/archives/la-xpm-1999-dec-12-op-43041-story.html [https://perma.cc/4FE5-DM9B].

[13] *See infra* Section I.C.

[14] Kathryne M. Young & Christin L. Munsch, *Fact and Fiction in Constitutional Criminal Procedure*, 66 S.C. L. REV. 445, 472 (2014) (describing a study of people's sense of agency in asserting Fourth, Fifth, and Sixth Amendment rights).

[15] *See generally* DEVON W. CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT (2022) (providing a race-based critique of the Supreme Court's Fourth Amendment jurisprudence); PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017) (describing how social institutions, including police forces, oppress and harm Black men); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017) (discussing how police violence against Black people arises out of, and is permitted by, courts' interpretation of the Fourth Amendment); Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 GEO. L.J. 923 (2023) (discussing the ways in which Fourth Amendment

Unlike prior *Miranda* research, which has focused on what people believe their rights *are*, the present research investigates what people believe about how to *invoke* legal rights. This often-overlooked distinction between knowing rights and knowing the technical requirements to assert them is significant, and often determines whether a statement is admissible in court.

A. The Relevance of Public Perceptions

Investigating what members of the public believe about invocation is worthwhile for several reasons. First, if people's intuitions are systematically out of step with the standards set by courts, then the core procedural rights to which they are entitled are effectively placed out of their reach by esoteric standards. Further, placing rights out of reach disproportionately burdens members of historically marginalized groups who have frequent contact with police and risks further entrenchment of inequities already endemic to the criminal legal system.

Second, a survey can provide evidence about prevailing descriptive norms of language usage and communication. This evidence, collected from a wide swath of the public, can inform judges' analyses about whether a given utterance (or silence) is reasonably understood as an invocation of *Miranda* rights (or of Fifth Amendment rights more generally).[16] Moreover, survey data can provide insight into whether different demographic subgroups subscribe to different language usages, as several scholars have posited.[17]

Third, what the public believes to be sufficient for invocation matters legally. The standard for invocation is whether a "reasonable police officer" believes that the person is invoking their *Miranda* rights.[18] Although the Supreme Court has not addressed the question of whether the "reasonable officer" standard differs meaningfully from a "reasonable listener" standard,

litigation strategies often ignore discussions of race); Cynthia Lee, *Probable Cause with Teeth*, 88 GEO. WASH. L. REV. 269 (2020) (arguing for an enhanced probable cause standard, in part on the grounds that it will lessen racial discrimination); I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653 (2018) (questioning the Supreme Court's conception of how citizens interact with the police); Tracey Maclin, "*Black and Blue Encounters" - Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 271–72 (1991) ("Many black males, especially black teenagers, still view police officers as oppressors and part of a system designed to keep them in their place."); Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513, 1529 (2018) (positing that innovations in case law protecting juveniles will not go far enough in protecting the rights of Black youth).

[16] *See* Tracey Maclin, *The Right to Silence v. the Fifth Amendment*, 2016 U. CHI. LEGAL F. 255, 293 ("Popular understandings of the privilege are relevant to the Court's determination of the Fifth Amendment's protective scope.").

[17] *See infra* Section I.C.

[18] Davis v. United States, 512 U.S. 452, 459 (1994).

lower courts often "analyze a suspect's words to be 'understood as *ordinary people* would understand them.'"[19] Several courts have noted that a reasonable officer is one with "ordinary hearing abilities who has taken steps to ensure that clear communication can occur" and "is attentive to the suspect's answers to questions."[20] As the Supreme Court of Georgia noted, "whatever the proper definition of a 'reasonable police officer' might be, that phrase must contemplate interrogators who are not actively seeking to interrupt and/or ignore the suspect's assertion of rights."[21]

Thus, existing case law seems not to treat officers as members of a distinct linguistic community. It is therefore relevant to learn what words or actions ordinary members of the public believe are sufficient to invoke. If most ordinary people would easily recognize a given utterance as an attempt to invoke one's rights, it stands to reason that reasonable officers would easily recognize it too. Survey evidence can inform the inquiry into what a reasonable listener would understand from the speaker's utterance, given prevailing linguistic conventions and the social context.

As Part II details, our survey reveals that ordinary people generally have a lower threshold for invocation than do courts. Ordinary people overwhelmingly believe that staying silent for several hours successfully invokes the right to silence and expect that such silence cannot be cited as evidence of guilt. When it comes to asking for a lawyer, ordinary people seem unperturbed by conditional statements, questions, hedges, or softened language; they do not regard such linguistic markers as generating ambiguity as to whether the speaker wishes to speak with a lawyer. Nor do these language mechanisms diminish, in their eyes, the officers' obligation to cease questioning. These results hold true across a wide range of demographic subgroups: with striking uniformity and in situations that courts have deemed insufficiently unambiguous and unequivocal, large majorities of survey respondents think suspects have made themselves perfectly clear.

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[19] United States v. Cowette, 88 F.4th 95, 100 (1st Cir. 2023) (emphasis added) (quoting Connecticut v. Barrett, 479 U.S. 523, 529 (1987)); *accord* Jones v. Cromwell, 75 F.4th 722, 726 (7th Cir. 2023) (specifying that the relevant question is whether a "suspect's words alone are ambiguous as understood by ordinary people" and warning against "disregard of the [statement's] ordinary meaning"); Sessoms v. Grounds, 776 F.3d 615, 628 (9th Cir. 2015) ("As the Supreme Court has recognized, requests for counsel are to be 'understood *as ordinary people* would understand them.'" (quoting *Barrett*, 479 U.S. at 529)); *see* Isa Chakarian, *Earning the Right to Remain Silent After* Berghuis v. Thompkins, 15 CUNY L. REV. 81, 97 (2011); Susan F. Mandiberg, *Reasonable Officers vs. Reasonable Lay Persons in the Supreme Court's* Miranda *and Fourth Amendment Cases*, 14 LEWIS & CLARK L. REV. 1481, 1502 (2010).

[20] State v. Chavarria-Cruz, 784 N.W.2d 355, 363 (Minn. 2010).

[21] Green v. State, 570 S.E.2d 207, 210 n.10 (Ga. 2002).

B. How Empirical Evidence Matters

To some, the notion that the current legal standards governing invocation are out of step with ordinary intuition and everyday language usage may seem exceedingly obvious. Others might argue that courts make rights inaccessible as a feature, not a bug, of criminal procedure law.[22] We nonetheless see value in collecting these data for two key reasons.

First, courts routinely cite empirical evidence (or the lack thereof) when analyzing how ordinary people might perceive interactions with police.[23] For example, judges have relied on empirical studies to determine when ordinary people believe they are free to leave an encounter with police,[24] understand they can refuse a consent-search request without being forced to comply,[25]

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[22] *See generally* Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016) (describing how certain Supreme Court cases have encouraged discriminatory policing practices). *But see* Smith, *supra* note 4, at 1703 (arguing that "[o]ne possible reason for this disconnect is that the law is choosing to be an obstinate conversation partner" by uncooperatively ignoring "communicative intent of the suspect," although "less cynical" interpretations are available).

[23] *See, e.g.*, Rachel E. Barkow, *Justice Sotomayor and Criminal Justice in the Real World*, 123 YALE L.J.F. 409, 411 (2014) (reflecting on Justice Sonia Sotomayor's knowledge of how the criminal justice system functions, including her "attention to empirical studies"); J.D.B. v. North Carolina, 564 U.S. 261, 269 (2011) (noting empirical studies demonstrating the greater likelihood of false confessions during juvenile interrogations); Perry v. New Hampshire, 565 U.S. 228, 264 (2012) (Sotomayor, J., dissenting) (citing empirical evidence demonstrating the fallibility of eyewitness identifications); Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000) (referencing the lack of "empirical studies dealing with inferences drawn from suspicious behavior" that a court might use to assess the propriety of police conduct); Roper v. Simmons, 543 U.S. 551, 569 (2005) (acknowledging sociological studies showing a lack of maturity and an underdeveloped sense of responsibility in juveniles); *see also* State v. Purcell, 203 A.3d 542, 550 (Conn. 2019) (citing to an influential article on gender dynamics in police interrogations: Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259 (1993)); Commonwealth v. Clarke, 960 N.E.2d 306, 319 (Mass. 2012) (same); State v. Meade, 963 P.2d 656, 662 n.4 (Or. 1998) (Durham, J., dissenting) (same).

[24] *See, e.g.*, United States v. Maynard, 615 F.3d 544, 552 (D.C. Cir. 2010) (citing David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51 (2009)); Commonwealth v. Lyles, 97 A.3d 298, 309 n.2 (Pa. 2014) (Saylor, J., dissenting) (same); State v. Backstrand, 313 P.3d 1084, 1098 n.16 (Or. 2013); State v. Harrington, 222 P.3d 92, 96 n.4 (Wash. 2009) (same); *see also* United States v. Knights, 989 F.3d 1281, 1295 (11th Cir.), *cert. denied*, 142 S. Ct. 709 (2021) ("[S]tudies suggest that Black and white individuals do not equally feel 'free to leave' citizen-police encounters.").

[25] *See, e.g.*, State v. Turnquest, 827 S.E.2d 865, 878 n.13 (Ga. 2019) (citing Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962 (2019) (reporting results of laboratory studies investigating the psychology of compliance in response to intrusive search requests)); State v. Hauge, 973 N.W.2d 453, 487 n.169 (Iowa 2022) (Appel, J., dissenting) (same); State v. Diego, 169 N.E.3d 113, 122 n.2 (Ind. 2021) (Goff, J., dissenting) (same); United States v. Meadows, No 6:21-cr-27-rew-hai, 2021 WL 4782259, at *9 n.4 (E.D. Ky. Oct. 13, 2021) (same); People v. Tacardon, 521 P.3d 563, 582 (Cal. 2022) (Liu, J., dissenting) (same).

and think they have a "reasonable expectation of privacy."[26] Courts have a track record of citing empirical studies even on points that may seem obvious or commonsensical, such as the idea that some innocent people flee the police simply because they are afraid of the police.[27]

While it is true that some courts have at times ignored empirical findings,[28] we find ample evidence that courts do engage with this kind of data.[29] Indeed, judges at times seem to expect litigants to marshal empirical evidence, even on matters that might seem intuitive. For example, at oral argument in *Brendlin v. California*, a case examining when people feel free to walk away from the police, Justice Stephen Breyer questioned why the respondents in the case, the State of California, had not presented empirical evidence regarding "what would a person reasonably think" about whether an individual is free to leave during a traffic stop.[30] "My instinct is he would feel he wasn't free because the red light's flashing," Justice Breyer said, but cautioned against relying on the instincts of the Justices: "Or I could say, well, you're the State of California, you're the ones able to get the studies;

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[26] *See, e.g.*, Carpenter v. United States, 585 U.S. 296, 393 (2018) (Gorsuch, J., dissenting) (citing Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 732, 740–42 (1993)); Brandin v. State, 669 So. 2d 280, 282 n.2 (Fla. Dist. Ct. App. 1996) (same).

[27] *See, e.g.*, Commonwealth v. Warren, 58 N.E.3d 333, 342 (Mass. 2016) (citing a Boston Police Department study of field interrogation and observations); Miles v. United States, 181 A.3d 633, 641 n.14 (D.C. 2018) (citing, among others, a D.C. Police Complaints Board study); Dozier v. United States, 220 A.3d 933, 944 & n.13 (D.C. 2019) (citing another D.C. police data report).

[28] Perhaps the most famous example is Justice Lewis Powell's majority opinion in *McCleskey v. Kemp*, which directly rejected statistical evidence demonstrating that the death penalty was implemented in a racially discriminatory manner. 481 U.S. 279, 297 (1987).

[29] *See, e.g.*, Utah v. Strieff, 579 U.S. 232, 250 (2016) (Sotomayor, J., dissenting) (citing a report finding that among Ferguson's population of 21,000 residents, 16,000 people had outstanding warrants against them); *Warren*, 58 N.E.3d at 342 (citing a Boston Police Department report documenting a pattern of racial profiling of Black men); *Miles*, 181 A.3d at 641–42 (referencing a *New York Times* review of police-involved shootings involving a disproportionate number of young Black men); *Dozier*, 220 A.3d at 944 (citing police statistics showing that 86% of nonvehicle stops involve African Americans, although African Americans make up only 46% of D.C. residents). *See generally* Paul S. Appelbaum, *The Empirical Jurisprudence of the United States Supreme Court*, 13 AM. J.L. & MED. 335 (1987) (describing the Supreme Court's reaction to empirical studies); Christopher Slobogin, *The Use of Statistics in Criminal Cases: An Introduction*, 37 BEHAV. SCI. & L. (2019) (summarizing how lawyers use (and do not use) statistics in their work); Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 775 (1993) (proposing that courts consult empirical evidence about societal views); Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—and Three Answers*, 2002 U. ILL. L. REV. 851 (discussing the importance of empiricism in the creation and interpretation of criminal law and procedure).

[30] Transcript of Oral Argument at 43, Brendlin v. California, 551 U.S. 249 (2007) (No. 06-8120) (Breyer, J.).

you could tell some of those professors, you know, to stop thinking about whatever they're thinking about and go ask a few practical questions."[31]

This project seeks to do just what Justice Breyer called for: collect data that can help courts answer the "practical question" of what ordinary people think counts as an invocation of the rights to counsel and to silence. These findings will be especially relevant for trial court judges, who routinely must parse defendants' language and behavior to determine whether they have asserted their rights in a sufficiently unambiguous manner.

Second, and more broadly, empirical evidence is valuable because it forces transparency about the often-invisible normative or ideological values at work in criminal procedure cases.[32] Like previous commentators, "[w]e are not so naïve or idealistic to think that increased attention to empirical evidence will guarantee *right* answers in criminal procedure cases," but we hope that "empirical evidence will produce a *clearer* picture of the existing constitutional landscape and spotlight the normative judgments at the heart of criminal procedure cases."[33] Our results can lay bare the disconnect between legal standards and public perceptions, enabling us to question why the disconnect has remained unaddressed in the law.[34] This query is

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[31] *Id.* Justice Breyer is not the only Justice to opine on the role of empirical evidence about public perceptions. Discussing what counts as a "reasonable expectation of privacy" for Fourth Amendment purposes, Justice Neil Gorsuch observed that if the test is "empirical," "politically insulated judges," who are "armed with only the attorneys' briefs, a few law clerks, and their own idiosyncratic experiences . . . are hardly the representative group you'd expect (or want) to be making empirical judgments for hundreds of millions of people. Unsurprisingly, . . . judicial judgments often fail to reflect public views." *Carpenter*, 585 U.S. at 392–93 (Gorsuch, J., dissenting).

[32] *See* Peter M. Tiersma & Lawrence M. Solan, *Cops and Robbers: Selective Literalism in American Criminal Law*, 38 LAW & SOC'Y REV. 229, 247 (2004) ("It is hard to avoid the impression that courts are significantly more likely to take pragmatic information into account when it benefits the government, and less so when it helps the accused.").

[33] Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 735 (2000). *See generally* BERNARD E. HARCOURT, LANGUAGE OF THE GUN: YOUTH, CRIME, AND PUBLIC POLICY xi (2006) ("Rather than use the research to *draw* law and policy inferences, use the research to expose the assumptions about human behavior that . . . underlie the law and policy proposals.").

[34] Our project joins a burgeoning group of scholars whose research documents the disconnect between legal standards and public perception. *See, e.g.*, Bernard Chao, Catherine Durso, Ian Farrell & Christopher Robertson, *Why Courts Fail to Protect Privacy: Race, Age, Bias, and Technology*, 106 CALIF. L. REV. 263 (2018) (exploring the disconnect between public perception and judicial understanding of reasonable expectations of privacy); Slobogin & Schumacher, *supra* note 29 (discussing the discrepancy between lay and judicial notions of what constitutes a search or seizure); Lauren E. Clatch, *Interrogating* Miranda*'s Custody Requirement*, 103 N.C. L. REV. (forthcoming Dec. 2024) (analyzing the disconnect between courts and the public regarding what counts as "custody" for purposes of triggering *Miranda* warnings); Young & Munsch, *supra* note 14, at 472 (suggesting that public expectations of waiver are inconsistent with how rights are applied); *see also, e.g.*, Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of*

especially important with respect to criminal procedure doctrines that focus on what a person says or does as evidence of their intentions. From the free-to-leave test for determining seizures to consent searches, the same questions arise: Does the law account for how ordinary people speak and act when interacting with the police? If not, why not?

This Article proceeds in three parts. Part I provides a broad overview of the invocation doctrine, including salient criticisms of the current standard. Part II describes our study methodology and findings. Part III draws out the implications of our results, including those for other areas of criminal procedure where the law expects people to act or speak in a certain way to assert their desires.

I. THE LAW OF INVOCATION: DOCTRINE AND CRITIQUES

Miranda requires that those subject to custodial police interrogations be informed of their right to remain silent and their right to counsel. In announcing this rule, *Miranda* decidedly prioritized "Fifth Amendment values over the interests of law enforcement obtaining incriminating statements."[35] The Fifth Amendment right against self-incrimination, the Court explained, is a "noble principle" based on the "individual's substantive right . . . 'to a private enclave where he may lead a private life.'"[36] The right, interpreted as the right to remain silent,[37] is considered "the hallmark of our democracy."[38]

Since *Miranda*, jurists and commentators have taken aim at the decision, either for going too far in creating rights where there are none,[39] or for not going far enough in protecting people from coercive police techniques.[40] While scholars have long debated the merits of *Miranda*

Legitimacy and Moral Credibility, 47 WAKE FOREST L. REV. 211, 223 (2012) (explaining how in the context of the "reasonable man," the "Court has done almost no work to determine whether its conceptions of the reasonable layperson dovetail with what people actually find fair in a given context").

[35] Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 121 (1998).

[36] Miranda v. Arizona, 384 U.S. 436, 460 (1966) (quoting United States v. Grunewald, 233 F.2d 556, 579, 581–82 (1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)).

[37] *Id.* at 467.

[38] *Id.* at 460 (quoting *Grunewald*, 233 F.2d at 579, 581–82 (Frank, J., dissenting)). *But see* Salinas v. Texas, 570 U.S. 178, 189 (2013) ("[P]opular misconceptions notwithstanding, the Fifth Amendment guarantees that no one may be 'compelled in any criminal case to be a witness against himself'; it does not establish an unqualified 'right to remain silent.'").

[39] *See* Vega v. Tekoh, 597 U.S. 134, 149 n.5 (2022) ("Whether this Court has the authority to create constitutionally based prophylactic rules that bind both federal and state courts has been the subject of debate among jurists and commentators.").

[40] Several scholars have critiqued how *Miranda* has been interpreted and implemented. *See, e.g.*, Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda,

jurisprudence, this Part focuses on the critique of one particular aspect of the doctrine: the legal standards for invoking the right to counsel and the right to silence.

A. The Right to Counsel

The right to counsel under the Sixth Amendment generally applies only once judicial proceedings have begun (as opposed to at the point of custodial interrogation and/or arrest).[41] In *Miranda*, however, the Court created an exception under the Fifth Amendment: people could have access to counsel during custodial interrogations. The right to counsel under *Miranda* is a prophylactic rule. The Supreme Court has recently clarified that there is no *constitutional* right to counsel at this stage.[42] (This stands in contrast to the right to silence, which courts implicitly recognize as existing apart from *Miranda* and which can be invoked any time a person is interacting with police.)[43]

1. Legal Standard for Invoking the Right to Counsel

As *Edwards v. Arizona* announced, questioning must stop if an accused person subject to custodial interrogation requests a lawyer.[44] This "bright line rule" is triggered only if the individual articulates his desire for a lawyer in a manner that is unambiguous and unequivocal.[45]

In *Davis v. United States*, the defendant initially waived his rights under *Miranda* and was questioned.[46] Ninety minutes into the questioning, the

100 HARV. L. REV. 1826, 1827 (1987) (referencing personal experience as an illustration of *Miranda*'s defective implementation); Maclin, *supra* note 16, at 260 ("[T]he 'right to remain silent' that most Americans think they possess does not exist."); Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1527–29 (2008) (specifying four mistaken factual assumptions on which *Miranda* relies); Yale Kamisar, *The Rise, Decline, and Fall (?) of* Miranda, 87 WASH. L. REV. 965, 984 (2012) (referring to the recent "*stealth* overruling" of *Miranda* (citing Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1 (2010)); Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1021 (2001) ("American police have taken the advantage in *Miranda*.").

[41] *See* Rothgery v. Gillespie Cnty., 554 U.S. 191, 198 (2008).

[42] *See Vega*, 597 U.S. at 149–50 (acknowledging that a violation of *Miranda* does not necessarily constitute a violation of the Constitution).

[43] *See, e.g.*, People v. Tom, 331 P.3d 303, 312 (Cal. 2014) (contemplating the separate existence of the right, but qualifying that right by requiring affirmative invocation); *Salinas*, 570 U.S. at 185 (finding no violation of the right to silence when the defendant was not in custody). As noted *infra* note 87 and accompanying text, circuits are split on whether prosecutors can rely on pre-arrest silence in their case in chief.

[44] Edwards v. Arizona, 451 U.S. 477, 484–85 (1981). In *Edwards*, the defendant said, "I want an attorney before making a deal," which the Court found sufficient to invoke the right to counsel. *Id.* at 479, 487.

[45] Davis v. United States, 512 U.S. 452, 459 (1994).

[46] *Id.* at 454–55.

defendant said, "[m]aybe I should talk to a lawyer."[47] The questioner attempted to clarify, and the defendant responded, "[n]o, I'm not asking for a lawyer. . . . I don't want a lawyer," at which point the questioning continued.[48] The Court, with Justice Sandra Day O'Connor writing, held that the speaker had not invoked his right to counsel. As she explained, if the accused person's request for a lawyer "is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel," the questioner may ignore the reference and proceed with questioning.[49] The Court elected not to require that police seek clarification when an accused person makes an ambiguous or equivocal statement.[50]

Notably, the *Davis* majority opinion acknowledged that requiring the invocation to be "clear and unambiguous" might "disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present."[51] The concurrence likewise expressed concern that people accused of crimes—who may be "woefully ignorant," "intimidated," or "lack . . . a confident command of the English language"—seemed like an "odd group to single out for the Court's demand of heightened linguistic care."[52] The majority nonetheless concluded that the *Miranda* warnings provide sufficient protection. Given the educative value of the warnings themselves, the *Davis* Court remained committed to the unambiguous rule for purposes of "clarity and ease of application."[53]

2. Critiques of the Right-to-Counsel Invocation Doctrine

Since *Davis*, several judges have argued that the doctrine "exalt[s] form over substance."[54] Although courts often claim that people "need not rely on talismanic phrases or 'any special combination of words'"[55] to invoke their rights, critics note that in practice, "all too many judges read requests for counsel the same way they would read a deed or promissory note: they expect

[47] *Id.* at 455.

[48] *Id.*

[49] *Id.* at 459.

[50] *Id.* at 461 (noting that while it will often be "good police practice" for interviewing officers to clarify whether the accused person wants an attorney, the Court "decline[s] to adopt a rule requiring officers to ask clarifying questions").

[51] *Id.* at 460.

[52] *Id.* at 469 (Souter, J., concurring) (quoting Miranda v. Arizona, 384 U.S. 436, 468 (1966)).

[53] *Id.* at 461.

[54] *See, e.g.*, People v. Tom, 331 P.3d 303, 332 (Cal. 2014) (Liu, J., dissenting) (quoting Escobedo v. Illinois, 378 U.S. 478, 486 (1964)).

[55] State v. Piatnitsky, 282 P.3d 1184, 1194 (Wash. Ct. App. 2012) (quoting Bradley v. Meachum, 918 F.2d 338, 342 (2d Cir. 1990)), *aff'd*, 325 P.3d 167 (Wash. 2014).

that suspects during interrogation will speak the way that lawyers write."[56] The typical linguistic analysis in invocation cases resembles "hyper-literal readings"[57] of utterances by people in custody, which "fails to take pragmatic information and social context into account."[58] These pragmatic and contextual considerations bear crucially upon what the utterance *means*.[59] For example, if we read "do you mind if I have my lawyer with me?" literally, it is a question, but in context it is clearly a polite and deferential way of asserting the right to an attorney.[60] Attorneys David Kaiser and Paul Lufkin have noted that "in ordinary life," statements that the Court has deemed equivocal (such as "[m]aybe I should talk to a lawyer") are "perfectly clear."[61] Indeed, when "viewed in terms of actual linguistic practice, [such equivocal statements] may . . . simply reflect the way ordinary people are inclined to express requests, particularly requests directed to persons in authority."[62] Thus, the law of invocation seems to be prizing "not clarity of expression but, rather, *bluntness*."[63]

Given these concerns, it is perhaps unsurprising that several commentators have considered the ways in which various demographic subgroups may be disadvantaged by the "clear and unambiguous" legal standard. For instance, law professor Yale Kamisar has suggested that "women and members of a number of minority racial and ethnic groups are far more likely than other groups to avoid strong, assertive means of expression and to use indirect and hedged speech."[64] Similarly, Professor Janet Ainsworth's research reveals the ways in which legal doctrines governing police–citizen interactions "favor[] linguistic behavior more typical of men than of women," thus revealing a "hidden bias" in an otherwise gender-neutral doctrine.[65] Her work challenges the notion that people "naturally do and should use direct and unqualified ways of

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[56] Tiersma & Solan, *supra* note 32, at 250.

[57] Janet Ainsworth, *'You Have the Right to Remain Silent . . .' but Only If You Ask for It Just So: The Role of Linguistic Ideology in American Police Interrogation Law*, 15 INT'L J. SPEECH, LANGUAGE & L. 1, 11 (2008).

[58] Leo, *supra* note 4, at 257.

[59] *See* Kaiser & Lufkin, *supra* note 11, at 758 (referencing linguistic analyses in Tiersma & Solan, *supra* note 32, which show that equivocation is often misinterpreted).

[60] *See* Smith, *supra* note 4, at 1713 (illustrating how courts often "ignore[] the lay-language ideology that allows for requests formed as questions").

[61] Kaiser & Lufkin, *supra* note 11, at 758.

[62] *Id.*

[63] *Id.*

[64] Kamisar, *supra* note 40, at 996 (citing Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259 (1993)).

[65] Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 262 (1993).

speaking."[66] This raises the concern that "the failure to give legal effect to indirect modes of speaking has negative repercussions for many groups in society who share similar speech characteristics."[67] In addition to speech characteristics, other factors such as stress and unequal power relations—including those influenced by socioeconomic status, cultural capital, and racial animus—all undermine the assumption that people have the "agency necessary to assert their rights."[68]

These factors may explain why it has become more difficult for courts to find proper invocations of the right to counsel and easier for them to find waivers. A study of 391 cases decided after *Davis* found that courts held that the defendant unambiguously invoked the right to counsel approximately 19% of the time.[69] The study also revealed that courts often reach inconsistent outcomes even when the invocation language is similar or identical.[70] These results reflect a legal standard for invocation that is difficult to meet and may "depend more on the whim of the particular judge hearing the case than on the precise request made by the suspect."[71]

B. The Right to Silence

According to the Supreme Court, there is technically no right to remain silent: "the Fifth Amendment guarantees that no one may be 'compelled in any criminal case to be a witness against himself'; it does not establish an unqualified 'right to remain silent.'"[72] Still, the Fifth Amendment privilege against self-incrimination is often described as the "right to remain silent"—including in standard *Miranda* warnings.

As with the right to counsel, the right to silence must be invoked "unambiguously."[73] Indeed, the Supreme Court has seen "no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to

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[66] *Id.* at 261.

[67] *Id.* at 264.

[68] Young & Munsch, *supra* note 14, at 446; *see also* Kyle C. Scherr & Stephanie Madon, *You Have the Right to Understand: The Deleterious Effect of Stress on Suspects' Ability to Comprehend* Miranda, 36 LAW & HUM. BEHAV. 275, 278–79 (2012) (analyzing the effect of stress on *Miranda* comprehension); Kyle C. Scherr & Stephanie Madon, *"Go Ahead and Sign": An Experimental Examination of* Miranda *Waivers and Comprehension*, 37 LAW & HUM. BEHAV. 208, 212–14 (2013) (examining how trivializing the importance of the *Miranda* rights affects waiver rates).

[69] Marcy Strauss, *Understanding* Davis v. United States, 40 LOY. L.A. L. REV. 1011, 1055 (2007).

[70] *Id.* at 1013.

[71] *Id.*

[72] Salinas v. Texas, 570 U.S. 178, 189 (2013).

[73] Berghuis v. Thompkins, 560 U.S. 370, 381 (2010).

counsel."[74] The invocation standard for the right to silence varies depending on whether *Miranda* applies. Individuals who are not in custody, or who are not being questioned, do not fall within *Miranda*'s ambit. Accordingly, we discuss the invocation standards in these different contexts separately.

1. Legal Standard for Invoking the Right to Silence Where Miranda *Applies*

For people subject to custodial interrogation, *Miranda* made clear that if a suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[75] Indeed, according to *Miranda*, a waiver of the right to silence could "not be presumed simply from the silence of the accused after warnings are given."[76] In the years after *Miranda*, however, subsequent rulings made it much more difficult for people to invoke their right to silence and much easier for the government to establish a waiver. This is most clearly reflected in the Court's 2010 decision in *Berghuis v. Thompkins*, a case in which the defendant was Mirandized and said nearly nothing as the police questioned him for two hours and forty-five minutes.[77] After this prolonged, one-sided interrogation, the defendant finally made an inculpatory remark.[78]

The Court found that by finally speaking, the defendant had effectuated an implied waiver of his right to remain silent. Most strikingly, the Court determined that staying silent in the face of questioning—even for hours—was too ambiguous to constitute an invocation of the right to silence:

> Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his "right to cut off questioning." Here he did neither, so he did not invoke his right to remain silent.[79]

The majority reasoned that a standard requiring an "unambiguous invocation" of the right to silence (apparently meaning an affirmative statement from the suspect) would be easier to implement than one that took sustained silence to mean invocation.[80] According to the majority, a "requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that 'avoid[s] difficulties of proof and . . . provide[s]

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[74] *Id.*; *see* Davis v. United States, 512 U.S. 452, 458–59 (1994).

[75] Miranda v. Arizona, 384 U.S. 436, 473–74 (1966).

[76] *Id.* at 475.

[77] *Berghuis*, 560 U.S. at 375–76.

[78] *Id.* at 376.

[79] *Id*. at 382 (citations omitted) (quoting Michigan v. Mosley, 423 U.S. 96, 103 (1975)).

[80] *Id.* at 381.

guidance to officers' on how to proceed in the face of ambiguity."[81] The Court was likely concerned with "the need for effective law enforcement"[82] and feared that requiring officers to cease questioning in response to prolonged silence would impose "an unacceptable hindrance to effective law enforcement."[83]

2. *Legal Standard for Invoking the Right to Silence in "Pre-*Miranda*" or "Non-*Miranda*" Contexts*

The requirement that people speak up to stay silent is arguably even stricter in non-*Miranda* contexts, where people are subject to police questioning but are not in custody or, conversely, are in custody but are not being questioned.[84] In these contexts, the law demands that people affirmatively speak if they wish to prevent their silence from being used against them in a criminal prosecution.[85] In other words, in situations where *Miranda* warnings need not be given (because the suspect is either not in custody or not subject to interrogation), the law insists that remaining silent (even indefinitely) does not invoke the right to silence under the Fifth Amendment, and that an explicit invocation is needed.[86] As the Court has explained, "regardless of whether prosecutors seek to use silence or a confession that follows, the logic of *Berghuis* applies with equal force: A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege."[87] This is arguably a higher bar than in contexts where *Miranda* applies, where silence itself cannot be

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[81] *Id.* (alterations in original) (quoting Davis v. United States, 512 U.S. 452, 458–59 (1994)).

[82] *Davis*, 512 U.S. at 461 ("In considering how a suspect must invoke the right to counsel, we must consider the other side of the *Miranda* equation: the need for effective law enforcement.").

[83] State v. Piatnitsky, 282 P.3d 1184, 1193 (Wash. Ct. App. 2012) (citing *Davis*, 512 U.S. at 461), *aff'd*, 325 P.3d 167 (Wash. 2014).

[84] *Miranda* warnings are only required when a person is subject to custodial interrogation. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[85] *See, e.g.*, People v. Tom, 331 P.3d 303, 314 (Cal. 2014) (involving an accused person in custody but not subject to interrogation); Salinas v. Texas, 570 U.S. 178, 181, 191 (2013) (involving an accused person subject to interrogation but not in custody).

[86] *See Salinas*, 570 U.S. at 188.

[87] *Id.* To be clear, the Supreme Court has never explicitly held that there is a noncustodial or non-interrogation right to silence. In both *Salinas* and *Tom*, the courts based their holdings on the fact that even if there is a right to pre-arrest silence, neither defendant expressly invoked it, as required by *Berghuis*. Lower courts are also split on the question of whether post-arrest silence can be used at trial. *See, e.g.*, United States v. Frazier, 408 F.3d 1102, 1109–11 (8th Cir. 2005) (allowing use of post-arrest silence as evidence of guilt); United States v. Wilchcombe, 838 F.3d 1179, 1189–91 (11th Cir. 2016) (same); United States v. Love, 767 F.2d 1052, 1063 (4th Cir. 1985) (same). *But see, e.g.*, State v. Lovejoy, 89 A.3d 1066, 1075 (Me. 2014) (holding that the prosecutor's use of defendant's failure to speak to police violated Fifth Amendment); Commonwealth v. Molina, 104 A.3d 430, 452–53 (Pa. 2014) (same); State v. Horwitz, 191 So. 3d 429, 442 (Fla. 2016) (same, but under provisions of the Florida Constitution). For a case noting this split and collecting cases, see *United States v. Okatan*, 728 F.3d 111, 117 (2d Cir. 2013).

introduced as incriminating evidence, regardless of whether the desire to remain silent is expressly articulated.[88]

Two cases illustrate this rule as it applies in non-*Miranda* contexts: *Salinas v. Texas*,[89] a U.S. Supreme Court case, and *People v. Tom*,[90] a case decided by the Supreme Court of California. In *Salinas*, the defendant was questioned by the police, but he was not in custody. The defendant answered many of the officer's questions, but when asked about a gun that may have been used in the crime, he stayed silent and looked down.[91] The Court held that the government was permitted to argue to the jury that Salinas's silence was indicative of guilt, reasoning that "[a] suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege."[92] The privilege, the Court explained, is not "self-executing."[93] Instead, the "burden . . . to make a timely assertion" of the privilege rests on the accused person.[94] Silence, the majority explained, is "insolubly ambiguous."[95]

The California Supreme Court's decision in *Tom* offers another example. In *Tom*, the defendant was in custody but was not subject to questioning. He had just been arrested for a hit-and-run in which two children died. Shortly after the accident, Mr. Tom was placed in the back of a police car, where he said nothing. His silence—specifically, his failure to inquire about the well-being of the victims—was introduced as evidence of guilt.[96] The district attorney argued that it was "particularly offensive" that the defendant "never, ever asked, hey, how are the people in the other car doing?"[97]

Per the majority, the "threshold inquiry" in determining the scope of the right against self-incrimination "is whether a reasonable police officer in the circumstances would understand that the defendant had invoked the privilege either at or prior to the silence at issue."[98] Remaining silent is too ambiguous: "[i]f an ambiguous act, omission, or statement could require police to end

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[88] *See generally* Ian C. Kerr, Note, *Beyond* Salinas v. Texas*: Why an Express Invocation Requirement Should Not Apply to Postarrest Silence*, 116 COLUM. L. REV. 489, 507–12 (2016) (discussing the conflicting stances that courts have taken on the status of post-arrest silence).

[89] 570 U.S. at 181.

[90] 331 P.3d at 305.

[91] *Salinas*, 570 U.S. at 182.

[92] *Id.* at 186, 188.

[93] *Id.* at 181 (quoting Minnesota v. Murphy, 465 U.S. 420, 425 (1984)).

[94] *Id.* at 189 (quoting Garner v. United States, 424 U.S. 648, 655 (1976)).

[95] *Id.* (quoting Doyle v. Ohio, 426 U.S. 610, 617 (1976)).

[96] People v. Tom, 331 P.3d 303, 307–09 (Cal. 2014).

[97] *Id.*

[98] *Id.* at 314 (citing Davis v. United States, 512 U.S. 452, 459 (1994)).

the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequences of suppression 'if they guess wrong.'"[99] Moreover, the court reasoned, to recognize silence as constituting invocation would conflict with the Supreme Court's holding in *Berghuis*.[100]

3. Critiques of the Right-to-Silence Invocation Doctrine

The requirement that people "unambiguously invoke their right to remain silent" is "counterintuitive[]"—requiring people to speak up to remain silent.[101] As Justice Sotomayor observed in her dissent in *Berghuis*, this requirement "turns *Miranda* upside down."[102]

In the words of Justice Breyer, dissenting in *Salinas*, this formalism amounts to a requirement that individuals utter the correct "legally magic" words before they can access their rights.[103] Breyer argued that the hallmark of invocation is not any particular talismanic phrase, but what *meaning* the person's behavior and words convey in the particular context: "Again, it is not any explicit statement but, instead, the defendant's deeds (silence) and circumstances (receipt of the warnings) that tie together silence and constitutional right."[104]

Dissenting in *Tom*, Justice Goodwin H. Liu observed that the majority opinion failed to answer precisely how Mr. Tom should have invoked his Fifth Amendment privilege:

> Was he required to approach an officer on his own initiative and blurt out, "I don't want to talk"? Would it have been enough for Tom to say just that, without mentioning the Fifth Amendment or otherwise indicating he didn't want to incriminate himself? And if so, how would that have been materially different from simply remaining silent?[105]

The dissents in all three cases—*Berghuis*, *Salinas*, and *Tom*—reflect a persistent concern that people are being expected to utter specific "magic words." Notably, the *Miranda* warnings themselves provide "no hint that a

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[99] *Id.* at 312 (quoting Berghuis v. Thompkins, 560 U.S. 370, 382 (2015)).

[100] *See Salinas*, 570 U.S. at 188 ("If the extended custodial silence in [*Berghuis*] did not invoke the privilege, then surely the momentary silence in this case did not do so either.").

[101] *Berghuis*, 560 U.S. at 412 (Sotomayor, J., dissenting).

[102] *Id.*

[103] *Salinas*, 570 U.S. at 202–03 (Breyer, J., dissenting) (questioning whether the majority's "expressly invoke" requirement "really mean[s] that the suspect must use the exact words 'Fifth Amendment,'" and further "how [] an individual who is not a lawyer [can] know that these particular words are legally magic?").

[104] *Id.* at 196.

[105] People v. Tom, 331 P.3d 303, 324 (Cal. 2014) (Liu, J., dissenting).

suspect should use those magic words" to claim their right to silence.[106] As a result, people may fail to invoke such rights simply because they are not "aware of [the] technical legal requirements" courts have imposed.[107] Scholars have raised similar concerns,[108] as have a handful of lower courts.[109]

C. Prior Empirical Research

The existing literature evinces a significant problem with the *Miranda* decision: it "rested upon an untested, unverified, and unproven assumption . . . that [warnings] work."[110] As law professor Chuck Weisselberg explains, when *Miranda* was decided, there existed "no empirical basis for the justices' faith that a program of warnings and waivers could counter" police coercion and "serve as a 'fully effective means' of protecting suspects' Fifth Amendment privilege."[111] Baked into the *Miranda* decision was the assumption that *Miranda* warnings would work, and yet "[t]he Court could cite to no manuals or studies on this point, for there were none."[112]

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[106] *Berghuis*, 560 U.S. at 409–10 (Sotomayor, J., dissenting) ("The Court suggests Thompkins could have employed the 'simple, unambiguous' means of saying 'he wanted to remain silent' or 'did not want to talk with the police.' But the *Miranda* warnings give no hint that a suspect should use those magic words, and there is little reason to believe police—who have ample incentives to avoid invocation—will provide such guidance.").

[107] *Salinas*, 570 U.S. at 202 (Breyer, J., dissenting).

[108] *See, e.g.*, Maclin, *supra* note 16, at 293 ("*Salinas* was wrongly decided because many persons, relying on what they perceive to be their constitutional right, would respond to police interrogation exactly the way Salinas responded—by remaining silent."); Albert W. Alschuler, Miranda*'s Fourfold Failure*, 97 B.U. L. REV. 849, 866 (2017) (noting that the *Salinas* decision "favored suspects who had attended law school while demanding an incantation few nonlawyer suspects would think of providing"); Brandon L. Garrett, *Remaining Silent After* Salinas, 80 U. CHI. L. REV. DIALOGUE 116, 124 (2013) (arguing that *Salinas* creates a special danger for innocent suspects); Kit Kinports, *The Supreme Court's Love-Hate Relationship with* Miranda, 101 J. CRIM. L. & CRIMINOLOGY 375, 409 (2011) ("The second step of [*Berghuis*'s] invocation analysis was an implicit one: the Court silently assumed that *Davis* applies in cases where suspects did not initially waive their [*Miranda*] rights."); Laurent Sacharoff, Miranda, Berghuis, *and the Ambiguous Right to Cut Off Police Questioning*, 43 N. KY. L. REV. 389, 390 (2016) (discussing how the warnings fail to inform people on how to cut off questioning); Wayne D. Holly, *Ambiguous Invocations of the Right to Remain Silent: A Post-*Davis *Analysis and Proposal*, 29 SETON HALL L. REV. 558, 576 (1998) ("[S]uspects who remain mute in response to *Miranda* warnings . . . may simply believe that they are exercising the right to silence, about which they were just informed, without realizing their obligation to invoke affirmatively the right prior to exercising it.").

[109] *See* State v. Costillo, 475 P.3d 803, 809 (N.M. Ct. App. 2020) (describing the "lose-lose" scenario in which a suspect either risks self-incrimination by answering questions from law enforcement or opens the door to argument at trial that the defendant's silence is evidence of guilt); State v. Horwitz, 191 So. 3d 429, 440–41 (Fla. 2016) (quoting *Salinas*, 570 U.S. at 193–94 (Breyer, J., dissenting).

[110] Morgan Cloud, George B. Shepherd, Alison Nodvin Barkoff & Justin V. Shur, *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 517 (2002).

[111] Weisselberg, *supra* note 40, at 1527 (Miranda v. Arizona, 384 U.S. 436, 479 (1966)).

[112] *Id.*

Empirical work conducted since the *Miranda* decision generally supports the proposition that *Miranda* warnings are ineffective at educating people about their rights.[113] This is especially true among juveniles[114] and adults with certain cognitive and intellectual disabilities.[115] Even for the average adult, *Miranda* warnings can be difficult to understand. Two studies assessing hundreds of *Miranda* waiver forms found that they were written at a reading level of anywhere from third grade to tenth grade.[116]

Moreover, some studies suggest that people who have poor comprehension of *Miranda* warnings are more likely to give false confessions.[117] In light of these findings, a group of professors from the

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[113] Richard Rogers, Jill E. Rogstad, Nathan D. Gillard, Hayley L. Blackwood, Eric Y. Drogin & Daniel W. Shuman, *"Everyone Knows Their* Miranda *Rights": Implicit Assumptions and Countervailing Evidence*, 16 PSYCH., PUB. POL'Y, & L. 300, 314 (2010) (finding "pronounced discrepancies between what the public believes it knows and what it actually knows" about *Miranda* rights).

[114] *See, e.g.*, Kristin Henning & Rebba Omer, *Vulnerable and Valued: Protecting Youth from the Perils of Custodial Interrogation*, 52 ARIZ. STATE L.J. 883, 897–99 (2020) (collecting empirical studies); Jodi L. Viljoen, Patricia A. Zapf & Ronald Roesch, *Adjudicative Competence and Comprehension of* Miranda *Rights in Adolescent Defendants: A Comparison of Legal Standards*, 25 BEHAV. SCIS. & L. 1, 14–17 (2007) (arguing that juveniles have high rates of deficits in their understanding of *Miranda* rights); Darby B. Winningham, Richard Rogers & Eric Y. Drogin, Miranda *Misconceptions of Criminal Detainees: Differences Based on Age Groups and Prior Arrests*, 17 INT'L J. FORENSIC MENTAL HEALTH 13 (2018) (finding greater misconceptions about *Miranda* among juvenile detainees than among adult detainees); BARRY C. FELD, KIDS, COPS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM 7–8 (2013) (summarizing three decades of research by developmental psychologists finding "that young and mid-adolescents do *not* possess the competence of adults to exercise *Miranda*"); Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1136 1157 (1980) ("[J]uveniles younger than fifteen manifest significantly poorer comprehension than adults of comparable intelligence."). *See generally* THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981) (showing that *Miranda* warnings are largely ineffective at protecting juveniles).

[115] *See, e.g.*, Richard Rogers, Kimberly S. Harrison, Lisa L. Hazelwood & Kenneth W. Sewell, *Knowing and Intelligent: A Study of* Miranda *Warnings in Mentally Disordered Defendants*, 31 LAW & HUM. BEHAV. 401, 415 (2007) (finding that people with some disabilities had trouble understanding *Miranda* warnings); Virginia G. Cooper & Patricia A. Zapf, *Psychiatric Patients' Comprehension of* Miranda *Rights*, 32 LAW & HUM. BEHAV. 390, 397–401 (2008) (finding that psychiatric symptoms were negatively correlated with *Miranda* comprehension); Michael J. O'Connell, William Garmoe & Naomi E. Sevin Goldstein, Miranda *Comprehension in Adults with Mental Retardation and the Effects of Feedback Style on Suggestibility*, 29 LAW & HUM. BEHAV. 359, 365–68 (2005) (finding that participants with mental disabilities had more difficulty understanding *Miranda* rights).

[116] Rogers et al., *supra* note 115, at 185; Richard Rogers, Lisa L. Hazelwood, Kenneth W. Sewell, Kimberly S. Harrison, & Daniel W. Shuman, *The Language of* Miranda *Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUM. BEHAV. 124, 129 (2008).

[117] *See* Isabel C.H. Clare & Gisli H. Gudjonsson, *The Vulnerability of Suspects with Intellectual Disabilities During Police Interviews: A Review and Experimental Study of Decision-Making*, 8 MENTAL HANDICAP RSCH. 110, 122 (1995); Naomi E. Sevin Goldstein, Lois Oberlander Condie, Rachel Kalbeitzer, Douglas Osman & Jessica L. Geier, *Juvenile Offenders'* Miranda *Rights Comprehension and Self-Reported Likelihood of Offering False Confessions*, 10 ASSESSMENT 359, 365 (2003). Likewise,

American Psychology-Law Society have called for a spate of reforms to overhaul police questioning tactics. These reforms include limiting the duration of interrogations and mandating that all interrogations be videorecorded.[118]

Until now, the vast majority of *Miranda* comprehension research has focused on what the public believes their rights *are*. Comparatively little work has examined what the public understands about *how to invoke* their rights. This distinction matters. The Supreme Court has stated that "'virtually every schoolboy is familiar with the concept, if not the language,' of the Fifth Amendment."[119] As Justice Breyer explained in his dissent in *Salinas*, "[t]his Court has recognized repeatedly that many, indeed most, Americans are aware that they have a constitutional right not to incriminate themselves by answering questions posed by the police during an interrogation conducted in order to figure out the perpetrator of a crime."[120] But, Justice Breyer emphasized, this "right we have and generally *know* we have" is distinct from awareness of the "technical legal requirements [for invocation], such as a need to identify the Fifth Amendment by name."[121]

The present study seeks to fill a gap in the empirical literature by asking what ordinary people believe about *how to invoke* their *Miranda* rights and how their responses compare to the actual, current invocation standards.

II. EVALUATING THE ACCESSIBILITY OF RIGHTS

A. Method

After conducting an in-person pilot survey with 317 respondents during a public street fair in Ann Arbor, Michigan, we ran a survey experiment with 1,718 U.S.-based adults recruited through the survey firm Lucid Academic.[122] The study was pre-registered, meaning that the size of the

other research has examined how factors such as custody, isolation, interrogation time, and police manipulation tactics (such as the presentation of false evidence and implied promises) are often correlated with proven false confessions. *See* Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo & Allison D. Redlich, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 16–19 (2010).

[118] *See* Kassin et al., *supra* note 117, at 25–27, 28.

[119] Salinas v. Texas, 570 U.S. 178, 189 (2013) (quoting Michigan v. Tucker, 417 U.S. 433, 439 (1974)).

[120] *Id.* at 201 (Breyer, J., dissenting).

[121] *Id.* at 201–02.

[122] Lucid is an online marketplace that recruits participants and matches them to surveys based on researcher-provided eligibility criteria. LUCID, https://luc.id/academic-solutions/page/3/?et_blog [https://perma.cc/XXC7-NTCA]. For more information on Lucid Academic, see Kyle Peyton, Gregory A. Huber, & Alexander Coppock, *The Generalizability of Online Experiments Conducted During the*

sample, the planned statistical analyses, and the exclusion criteria were pre-committed to in advance of data collection.[123] As preregistered, we excluded participants who failed an attention check or who wrote gibberish in response to any open-ended questions.[124] We set our target sample as 1,600 individuals, matched approximately to the U.S. Census in age, race, gender, and education; after applying exclusions and with Lucid overrecruiting to account for exclusions, our final sample was 1,718 adults.[125] Table 1 reports the sociodemographic characteristics of the final sample.

TABLE 1: SAMPLE CHARACTERISTICS

		Number	**Percentage**
	Full Sample	1716	100%
Gender	Female	858	50%
	Male	853	50%
	Other gender identity	7	0%
Age	18–24 years	82	5%
	25–34 years	231	13%
	35–44 years	317	18%
	45–54 years	267	16%
	55–64 years	303	18%
	65+ years	517	30%

COVID-19 Pandemic, 9 J. EXPERIMENTAL POL. SCI. 379, 381–82 (2022). This study was submitted to the University of Michigan Institutional Review Board and determined to be exempt, protocol # HUM00216857. *See* E-mail from Univ. of Mich. Institutional Rev. Bd. to authors (July 12, 2024, 7:41 PM) (on file with *Northwestern University Law Review*).

[123] Roseanna Sommers & Kate Weisburd, '*Legally Magic Words Study – Lucid Sample' (AsPredicted #117115)*, ASPREDICTED (Dec. 19, 2022, 11:22 AM), https://aspredicted.org/zpkq-58sn.pdf [https://perma.cc/A8PA-PPGA]. Preregistration helps ensure that exploratory analyses are not presented as confirmatory and that results are not biased by questionable research practices. *See* Joseph P. Simmons, Leif D. Nelson & Uri Simonsohn, *False-Positive Psychology: Undisclosed Flexibility in Data Collection and Analysis Allows Presenting Anything as Significant*, 22 PSYCH. SCI. 1359, 1362, 1364–65 (2011).

[124] An example of an attention check is "dog is to puppy as cat is to ___." Furthermore, participants were permitted to take the survey only if they completed a CAPTCHA. In addition, Lucid imposes its own prescreening methods to ensure high-quality responses from unique survey-takers. The data cleaning process can be reproduced via the replication materials posted publicly on the Open Science Framework. *See* Roseanna Sommers & Kate Weisburd, *Legally Magic Words – Replication Code for OSF.Rmd*, OSFHOME (June 19, 2024), https://osf.io/hy87p [https://perma.cc/ZAW8-Z5RW].

[125] We selected Lucid's "Census Representation" option, which set quotas based on age, gender, race, ethnicity, geographic location, education level, and income level.

Race / Ethnicity	White / Caucasian	1343	78%
	Black / African American	200	12%
	Hispanic, Latino/a, or Latinx	74	4%
	Asian / Asian American	34	2%
	American Indian or Alaska Native	24	1%
	Pacific Islander	4	0%
	Some other race	33	2%
Education	Less than high school	35	2%
	High school or equivalent	330	19%
	Vocational / technical school	140	8%
	Some college	380	22%
	College graduate	453	26%
	Master's degree	289	17%
	Doctoral degree	30	2%
	Professional degree	55	3%
Household Income	Under $10,000	91	6%
	$10,000–$14,999	64	4%
	$15,000–$24,999	119	7%
	$25,000–$34,999	122	7%
	$35,000–$49,999	181	11%
	$50,000–$74,999	269	16%
	$75,000–$99,999	267	16%
	$100,000–$149,999	322	20%
	$150,000–$199,999	117	7%
	$200,000+	86	5%
Experience with Police	Have you been pulled over by the police while driving a motor vehicle, NOT including any driving violations captured by camera and ticketed by mail?	759	44% (Yes)

	Have you been riding in a motor vehicle that was pulled over by police while someone else was driving?	745	44% (Yes)
	Have you ever been stopped by the police while standing, walking, or sitting in a public place or sitting in a parked vehicle?	404	24% (Yes)
Legal Training	Have you ever been to law school, worked in a legal field, or received legal training?	119	7% (Yes)
Type of Community	Rural	419	24%
	Urban	532	31%
	Suburban	765	45%

B. Survey Instrument[126]

Our survey contained four blocks of questions. Participants completed all four blocks in a fixed order.

Block 1 assessed respondents' perceptions of the right to silence in a non-*Miranda* scenario. These scenarios were based loosely on the facts in *Tom* and *Salinas*, respectively. Block 2 assessed perceptions of the right to silence in a scenario involving a person in custody who says nothing while being interrogated by police. This scenario was based loosely on *Berghuis*. Block 3 assessed respondents' perceptions of the right to counsel in response to a scenario in which a person asks for a lawyer in a manner that is either clear (strong), ambiguous (medium), or equivocal (weak). Block 4 assessed respondents' perceptions of whether 14 different statements uttered by a Mirandized person qualify as invocations of the *Miranda* rights. These statements were taken from real cases, allowing us to compare respondents' intuitions against court rulings. Further methodological details about each block, including randomized elements, are available online.[127]

Blocks 2–4 of the survey asked respondents to react to police interactions in which *Miranda* applies because the fictitious suspect was subject to custodial interrogation. Accordingly, in those parts of the survey,

[126] The full text of the survey can be viewed on the Open Science Framework. Roseanna Sommers, *Survey questions* - Miranda_*Rights_-_nat_rep_Dec_17_2022.docx*, OSFHOME (last updated July 20, 2024), https://osf.io/fvmu9 [https://perma.cc/9Y7C-YJF6].

[127] Roseanna Sommers, *Legally Magic Words*, OSFHOME (last updated Oct. 25, 2024, 4:34 PM), https://osf.io/e6bf4/ [https://perma.cc/4F3F-2UJW].

we presented respondents with the *Miranda* warnings so that they would have access to the same amount of legal information that a real interrogee would have in those situations. But for Block 1, which involved "non-*Miranda* scenarios" (i.e., situations in which police would not be required to Mirandize individuals), we sought to measure respondents' beliefs before we said anything about the rights to silence or counsel. Thus, participants moved through Block 1 without receiving any information about the law other than a generic reminder to "keep in mind that people have rights while being questioned by police or in police custody (meaning they are prevented from leaving). People can choose to invoke (use) those rights." It was not until Blocks 2–4 that respondents were presented with the *Miranda* warnings.[128]

*1. Block 1: Right to Silence in a Non-*Miranda *Scenario*

The purpose of Block 1 was to examine the public's beliefs about the right to silence during interactions with police in which *Miranda* does not (yet) apply. In particular, we wanted to understand what proportion of the U.S. adult population believes that in such a situation, (1) a person who has not spoken has invoked their right to silence; such that (2) they do not have to answer questions from police; (3) their silence cannot be used against them at a later time; and (4) when given a specific example of how their silence might be used against them by a prosecuting attorney, respondents regard such usage as legally prohibited.

Participants were randomly assigned to read one of two scenarios, one based on *Salinas*, and one based on *Tom*. The purpose of this randomization was to avoid order effects while testing two different types of pre-*Miranda* scenarios: one in which a person is not in custody while being questioned by police, and the other in which a person is in custody but not being questioned.[129] The two scenarios are described below.

> *Salinas* Scenario: Daniel[130] witnesses a robbery on the street. The victim's backpack was taken. The victim feels shaken, but he is otherwise unharmed. The victim cannot identify who took his backpack. Daniel believes he saw the alleged robber, but Daniel doesn't want to get involved. The police arrive at the scene and one officer asks Daniel for his name and

[128] Of course, many respondents likely came to the survey with some preexisting familiarity with the *Miranda* warnings, but this possibility did not pose a problem for Block 1 because many individuals who encounter the police in real-life non-*Miranda* contexts already have some familiarity with the *Miranda* warnings.

[129] If participants were exposed to both scenarios, their answers to the second scenario could be biased by their exposure to the first. This concern about "order effects" is especially acute here because the scenarios are so similar. *See Order Effect*, APA DICTIONARY OF PSYCH. (Apr. 19, 2018), https://dictionary.apa.org/order-effect [https://perma.cc/8YHC-7QBJ].

[130] The name and gender of the individual were randomly varied. For all outcome measures, findings did not differ by character name or gender.

address. Daniel answers. The officer then asks Daniel what he knows. Daniel does not answer and looks at his feet. For the next few minutes, the police continue to ask questions. Daniel continues to say nothing in response. The officer is not blocking Daniel's way or restraining him.

After reading this scenario, respondents selected True or False (forced binary choice) in response to four questions. Each question was presented on a separate webpage, with no ability to return to a previous page.

(1) Daniel is required to answer the police officer's questions.
(2) By saying nothing, Daniel has exercised his right to remain silent.
(3) Daniel's silence on the day of the robbery can be used against him in court at a later time.
(4) Based on information the police have, Daniel is arrested for being part of the robbery. Daniel is now on trial and maintains his innocence. In the prosecutor's closing argument, she says to the jury: "Daniel remained silent when the police questioned him, which suggests he is guilty. An innocent person would have offered to help the police and would have answered their questions." It is legal for the prosecutor to argue that Daniel's silence was evidence of his guilt.

Tom Scenario: Michael[131] is arrested for an alleged robbery. Police place Michael in the back of a police car and drive to the station. The drive takes approximately 20 minutes. During the drive, the police ask no questions, and Michael says nothing.

Participants answered True or False in response to three questions:[132]

(1) By saying nothing, Michael has exercised his right to remain silent.
(2) Michael's silence on the day of the robbery can be used against him in court at a later time. Michael's silence in the police car can be used against him in court at a later time.
(3) Fast forward to Michael's trial. Imagine that when the prosecutor is arguing that Michael is guilty, he says Michael's silence in the police car shows that Michael was uncaring and indifferent toward the robbery victim. The prosecutor argues that an innocent person would have asked if the victim was okay. It is legal for the prosecutor to argue that Michael's silence was evidence of his indifference toward the well-being of the victim.

As previously noted, in both *Tom* and *Salinas*, the courts determined that neither Mr. Tom nor Mr. Salinas had invoked their right to silence, and that it was permissible for prosecutors to introduce their silence as evidence

[131] The name and gender of the individual were randomly varied.

[132] We eliminated the question asking about the right not to answer questions because this scenario did not involve questioning by police.

against them at trial. Thus, if the current invocation standards were intuitive to ordinary people, we would expect respondents to report that it was false that the individual had exercised his right to remain silent, that it was true his silence could be used against him, and that it is legal for prosecutors to introduce the silence as evidence.[133] If, on the other hand, a majority of participants answered incorrectly, it would suggest that the current invocation standards are counterintuitive to ordinary people.

Block 1 Results: People's Understanding of What Silence Means

Most participants (66%) correctly surmised that when not in custody, Daniel (in the *Salinas* scenario) was not required to answer the officer's questions.[134] But participants generally overstated how much Daniel's silence would protect him. A majority (86%) perceived, incorrectly, that he had already invoked his right to silence, and most thought that his silence could not be used against him in the abstract (60%) or in response to a concrete scenario (63%), even though it can be.

The same held true in the *Tom* scenarios, in which Michael was in custody but was not being interrogated. Most participants (85%) incorrectly thought that Michael had invoked his right to silence by staying silent.[135] They further believed that his silence could not be used against him (80%)[136] and that prosecutors would be prohibited from introducing his silence as evidence of his guilt (67%), although that is not in fact the law.

Furthermore, we find that in nearly every demographic subgroup examined, a clear majority of respondents judged that the right to silence has been invoked. The Block 1 results are disaggregated by participants' self-reported gender, age, race and ethnicity, education, household income, prior encounters with police, legal training, and residence type. We focus our discussion on racial and gender differences, which have received the most scholarly attention in the literature on invocations.[137]

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[133] Participants would also be correct if they answered that Daniel was not required to answer the police officer's questions.

[134] *See* Tables A1–A2.

[135] The figure among white respondents was 83%; it was 90% among nonwhite respondents, a significant difference, $p = .021$ (Fisher's exact test).

[136] The figure among white respondents was 83%; it was 70% among nonwhite respondents, a significant difference, $p < .001$ (Fisher's exact test). It was 83% among respondents living in rural and suburban areas, while it was 73% among those living in urban areas ($p = .002$).

[137] *See, e.g.*, Ainsworth, *supra* note 65, at 292–315 (describing gender dynamics in police interrogations); Kamisar, *supra* note 40, at 996 (describing how the Supreme Court's weakening of *Miranda* protections over time may have racial and gendered effects); Strauss, *supra* note 69, at 1056 ("[T]here is some evidence to support the theory that women and minorities often phrase requests for counsel in ways that the courts interpret as ambiguous."); Capers, *supra* note 15, at 696 ("[Racial

In response to the *Salinas* scenario, white respondents were *more* likely than nonwhite respondents to assert that Daniel's silence could not be used against him in court at a later time (62% vs. 52%), but they were *less* likely to think a prosecutor would be barred from introducing Daniel's silence as evidence of his guilt (61% vs. 70%). Interestingly, although nonwhite respondents were more likely to report, accurately, that Daniel's silence could be used against him, they were also more likely to report, inaccurately, that Daniel was required to answer questions from the police (40% of nonwhite respondents vs. 33% of white respondents). This latter result is consistent with prior literature suggesting that people of color feel more pressured by police and feel less free to disregard police questioning.[138] Perhaps this orientation leads them to be less overconfident about when a suspect's behavior will count legally as an invocation—although, as we will see, they are still plenty overconfident. And they are not consistently less overconfident than white respondents.[139]

The *Tom* scenario, for its part, yielded some racial differences, but they were not robust: white participants were *less* likely than nonwhite participants to say that Michael had exercised his right to silence (83% vs. 90%), but they were *more* likely to believe that his silence could not be used against him at a later time (83% vs. 70%). No racial differences emerged in beliefs about whether a prosecutor could introduce Michael's silence as evidence of his indifference toward the victim's well-being (33% vs. 33%).

Male respondents were significantly less likely than female respondents to think that the individual in *Salinas*, Daniel, exercised his right to remain silent, but the difference was between a large majority and an even larger majority (83% vs. 89%). No gender differences were observed in any responses to the *Tom* scenario.

To summarize, no consistent race or gender differences emerged in response to the pre-*Miranda* scenarios. In particular, we find no evidence that people of color are more likely to see their legal expectations undermined by legal reality; rather, white respondents were often more likely to assert, erroneously, that a defendant's silence could not be used against him. Most

minorities] must perform what I will term "citizenship work"—being extra deferential, acquiescing to demands, relinquishing citizenship rights."); *see also, e.g.*, *supra* note 15 and accompanying text (listing additional articles considering race in the context of *Miranda* rights).

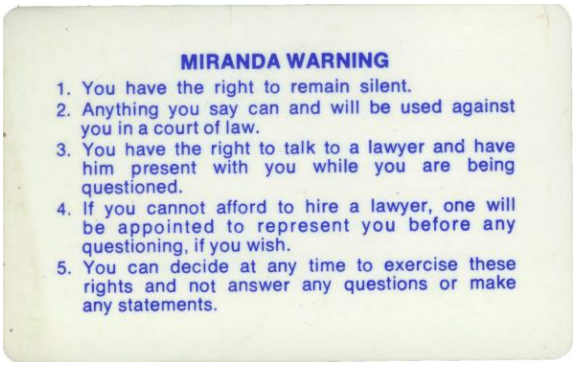
[138] We also find that participants who live in urban areas were more likely to say that Daniel was required to answer the police questions (46% of urban vs. 28% of suburban vs. 30% of rural). *See* Table A1. Although this survey item—which probes whether people in public feel required to answer police questioning after they witness a crime—pertains to what people believe their rights *are* (rather than how to invoke them), and thus is not the main focus of the present research, it nonetheless illuminates why some people who wish to remain silent fail to do so in ways the law recognizes.

[139] *See* Table A1.

striking, participants' responses evince a marked uniformity across gender, race, and other sociodemographic categories.[140]

2. Block 2: Right to Silence in a Miranda *Scenario*

The purpose of Block 2 was to examine the public's beliefs about a Mirandized person who stays silent in response to police questioning. This scenario was based on *Berghuis*. Here, participants were provided with the *Miranda* warnings so that they would have access to the same legal instruction that the individual in the situation would have received.

> *Berghuis* Scenario: Thomas[141] is arrested for an alleged robbery in which he drove the getaway car. Thomas is now sitting in a jail cell. The police provide him with the following card:
>
> 
>
>
> The police ask Thomas to read the last sentence on the list (#5) out loud, which he does. The police then read the other sentences out loud to him. Assured that Thomas understands the warnings, the police begin asking him questions. Thomas does not answer. Two hours pass and the police continue to ask questions, and Thomas continues to say nothing.

Participants selected True or False in response to two questions:

(1) The way Thomas has acted thus far demonstrates that he wishes to remain silent.
(2) At this point, by saying nothing, Thomas has invoked his right to remain silent.

The Supreme Court's opinion in *Berghuis* indicated that staying silent for two hours is not enough to invoke the right to silence.[142] Accordingly, if a majority of respondents believe the scenario demonstrates that Thomas wishes to remain silent, it suggests that prevailing social and linguistic norms

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[140] *See* Table A2.

[141] The name and gender of the individual were randomly varied.

[142] *See supra* Section I.B.

dictate that Thomas has conveyed his desire not to speak and his wish to remain silent. This would further suggest that the Court's insistence that such silence is too ambiguous to communicate clearly to officers the individual's wish to remain silent is out of step with the public's interpretation of the facts.

Block 2 Results: Right to Silence in a Miranda *Scenario*

We found that 94% of participants believe that the way Thomas acted thus far demonstrated that he wished to remain silent, and that 85% of respondents incorrectly believe he had invoked his right to silence by staying silent for two hours.[143]

The results were robust across sociodemographic categories: Although white and nonwhite respondents differed significantly in their belief that Thomas's actions demonstrated he wished to remain silent, the rate was 95% for white participants and 91% for nonwhite participants, an overwhelming majority in both subgroups. No other race or gender differences in response to the *Berghuis* scenario were observed.

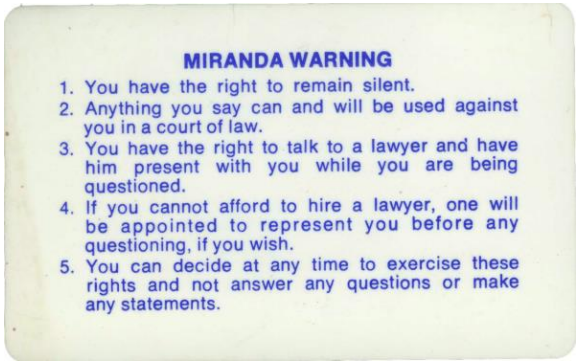
In summary, the findings from Blocks 1 and 2 indicate that while members of the public seem to grasp that the right to silence means they are not compelled to speak, they find it counterintuitive that the law requires an explicit statement to trigger the right to silence. In particular, they overwhelmingly believe that staying silent for up to two hours can invoke the right to silence and that doing so ensures their silence would not be used against them in future proceedings. Participants' responses were largely uniform across sociodemographic subgroups.

3. Block 3: "Clearly" Invoking the Right to Counsel

The purpose of Block 3 was to examine what members of the public believe amounts to clearly asking for a lawyer. In this Block, participants evaluate a scenario in which a Mirandized person asks for a lawyer, either unambiguously or using language that courts have deemed too equivocal to constitute an invocation. We randomly assigned participants to evaluate one of three statements: the individual "tells the officer he wants to talk to a lawyer" (Strong); the individual says, "I think it'd probably be a good idea for me to get an attorney" (Medium); or the individual says, "I'm not sure if I should get a lawyer" (Weak).

[143] *See* Table A3.

Right-to-Counsel Scenario: John[144] has just been arrested for an alleged car theft. He is sitting in a jail cell. The police give him the following card:



Please keep in mind that by law, if someone asks for a lawyer, the police must either provide them with a lawyer or stop the questioning until a lawyer is present.
The police ask John if he understands his rights. John says he understands his rights. The police then start asking John questions. After ten minutes of staying silent, John . . .

Strong: . . . tells the officer that he wants to talk to a lawyer.
Medium: . . . tells the officer, "I think it'd probably be a good idea for me to get an attorney."
Weak: . . . tells the officer, "I'm not sure if I should get a lawyer."

Participants then selected True or False in response to two questions:

(1) At this point, John has invoked his right to counsel.
(2) At this point, the police must stop questioning John. (Assume no lawyer is available at the jail.)

The purpose of these questions was to discover, first, whether participants distinguish between the Strong, Medium, and Weak versions of the invocation. We were particularly interested in the comparison between Strong and Medium conditions because existing case law dictates that the Strong statement invokes the right to counsel whereas the Medium one does not.

Second, we wanted to see whether participants set their threshold for invocation at the same place the law currently does. Courts have determined that the Medium and Weak utterances, without more, do not constitute invocations of the right to counsel, whereas the Strong utterance

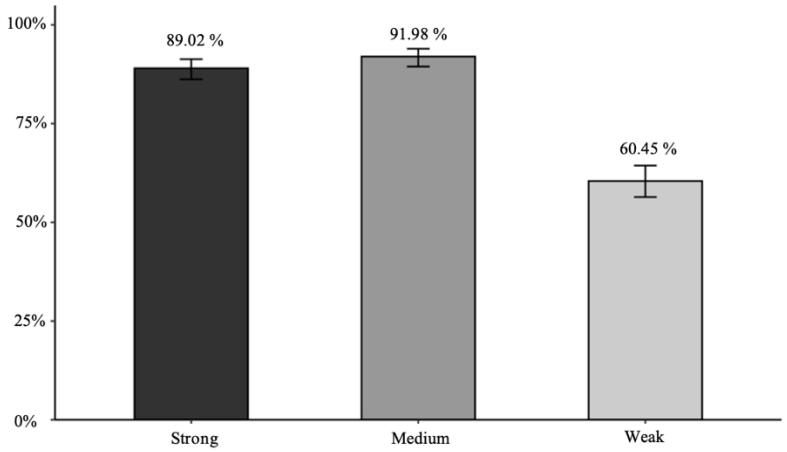
[144] The name and gender of the individual were randomly varied. As described earlier, no significant differences were observed based on this manipulation.

unambiguously does.[145] If participants set the threshold for invocation at a different place from courts, it would suggest that the courts are demanding a level of clarity that is out of step with prevailing linguistic norms, resulting in a bar that is higher than where participants expect it to be.

Block 3 Results: The Public's Perception of Strong, Medium, and Weak Language to Invoke Right to Counsel

Did the clarity of the invocation affect participants' judgments of whether John had invoked his right to counsel and whether the police must stop questioning?[146] Yes, but the clarity—or lack thereof—did not matter as much to participants' judgments as it tends to matter in the law. In all three conditions—whether John spoke clearly, with a medium amount of clarity, or highly equivocally—a majority of participants thought he had invoked his right to counsel such that the police were required to stop questioning him.

FIGURE 1: PERCENTAGE OF RESPONDENTS ANSWERING "TRUE" TO "JOHN HAS INVOKED HIS RIGHT TO COUNSEL"

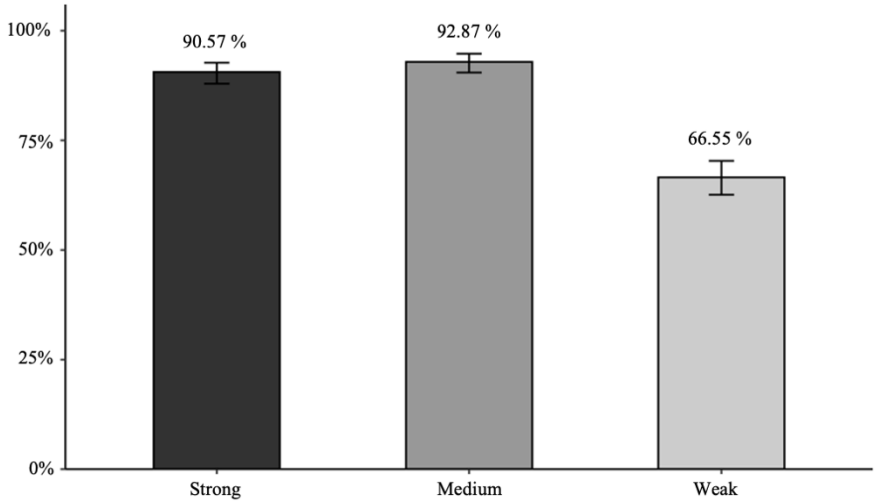


Note. Error bars represent 95% confidence intervals calculated using the Wilson score interval method for binomial proportions.

[145] *See, e.g.*, Sessoms v. Grounds, 776 F.3d 615, 628 (9th Cir. 2015) (holding that the Strong version of invocation was an unambiguous invocation of the right to counsel); People v. Bacon, 240 P.3d 204, 220–21 (Cal. 2010) (holding that the Medium version of invocation was ambiguous); Hernandez v. State, No. 04-01-00271-CR, 2002 WL 461374, at *3 (Tex. App. Mar. 27, 2002) (holding that the Weak version of invocation, where the defendant states, "I might want to talk to my lawyer first," was not an invocation of the right to counsel).

[146] *See* Tables A4–A7.

FIGURE 2: PERCENTAGE OF RESPONDENTS ANSWERING "TRUE" TO "THE POLICE MUST STOP QUESTIONING JOHN"



Note. Error bars represent 95% confidence intervals calculated using the Wilson score interval method for binomial proportions.

We focus, first, on the comparison between the Strong and Medium conditions. Case law suggests a sharp distinction between a person who straightforwardly tells the officer he wants to speak to a lawyer and one who says, "I think it'd probably be a good idea for me to get an attorney." The court in *People v. Bacon* held that the hedged latter statement was not an invocation.[147] Respondents, however, appear not to perceive the hedged statement in the Medium condition as any different from an unambiguous, explicit invocation in the Strong condition.[148]

We now turn to the most equivocal statement: "I'm not sure if I should get a lawyer." Remarkably, most participants in the Weak condition (62%) thought this utterance constituted an invocation and that the police were required to cease questioning (68%).

[147] 240 P.3d at 220.

[148] We fit a binary logistic regression model to investigate the relationship between the utterance (Strong, Medium, or Weak) and the likelihood a participant would deem the utterance to constitute an invocation. There was no statistically significant difference between the Strong and Medium conditions (OR = 1.41, 95% CI = [.95, 2.12], p = .09) at the conventional level (α = .05) in terms of whether people thought John had invoked the right to counsel or whether the police must stop questioning him (OR = 1.36, 95% CI = [.89, 2.09], p = .16). If anything, participants were slightly *more* likely to find invocation in response to the Medium statement.

Laypeople do not dispute the doctrinal position that expressing uncertainty ("I'm not sure if I should") introduces ambiguity, as the gap between the Weak condition and the other two conditions demonstrates. But they set a lower threshold for triggering the legal right than courts typically have. Whereas existing precedent would treat the Medium and Weak statements as insufficient to invoke the right to counsel, respondents largely regard both the Medium and Weak statements as triggering the right to counsel.

Did perceptions vary based on respondents' sociodemographic characteristics? White respondents were more inclined than nonwhite respondents to say that the police must stop questioning John.[149] The racial gap was significant in the Strong condition (93% of white respondents found invocation vs. 82% of nonwhite respondents) and in the Medium condition (94% vs. 87%), but disappeared (and indeed, reversed) for the Weak statement (66% vs. 68%).[150] It is interesting to note that among the nonwhite respondents, only 82% thought that the police must stop questioning when told that John straightforwardly "t[old] the officer that he want[ed] to talk to a lawyer," while a slightly *higher* percentage of participants (87%) thought the police must stop questioning in response to the Medium statement, "I think it'd probably be a good idea for me to get an attorney." This difference between the Strong and Medium conditions is not statistically significant, but it does raise the question of whether nonwhite individuals believe that police behavior is truly constrained by the most straightforward invocations of the right to counsel.[151]

Men were more likely than women to perceive invocation (83% vs. 78%) and to expect that police must cease further questioning (84% vs. 83%). No significant interaction between condition and gender was observed, indicating that the gender gap did not differ significantly by condition. As with white individuals, men were, if anything, more likely to overstate John's rights. Thus, the results do not support the contention that women and nonwhite individuals are more likely to misunderstand the law or that men and white individuals are more likely to see their intuitions ratified by law.

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[149] Overall, 85% of white respondents versus 79% of nonwhite respondents thought the police were required to stop questioning, and 81% versus 78% thought that John had invoked his right to counsel.

[150] A logistic regression model examining the relationship between condition and race (white vs. nonwhite) predicting the probability of finding an invocation reveals a significant interaction between race and condition. Calculating the difference in log odds between white and nonwhite respondents by condition, we find that the racial gap is statistically significant in the Strong condition ($p < 0.001$) and Medium condition ($p = 0.011$), but not in the Weak condition ($p = 0.65$).

[151] Examining nonwhite individuals and calculating the difference in log odds between the conditions, we see no significant difference between the Strong and Medium conditions ($p = .74$).

As before, the results notably lack major differences across race, gender, or other sociodemographic characteristics.[152] Instead, it seems that male, female, white, and nonwhite respondents alike draw no significant distinction between the Strong and Medium statements (contrary to the law), and in all subgroups, a majority perceive the Weak statement to be an invocation (contrary to the law).

4. Block 4: Assessing Utterances

The purpose of Block 4 was to investigate how members of the public regard various utterances that courts have determined do and do not count as unambiguously invoking one's *Miranda* rights. Participants evaluated a series of 14 statements that were drawn from real cases, and that were designed to run the gamut of utterances that courts have examined. For example, "Can I get a lawyer?" has been held to constitute a successful invocation.[153] By contrast, "I plead the Fifth Commandment" has been held not to invoke the speaker's *Miranda* rights.[154] The 14 statements were presented one at a time in random order.

Based on our pilot study, we surmised that ordinary people may apply criteria that differ in systematic ways from the criteria applied by courts, which have tended to treat linguistic hedges and questions as generating ambiguity. Thus, we sought to test a range of statements that would allow us to see whether laypeople have their own implicit theory of invocation, with its own set of criteria, which may differ from the theory embraced by courts.

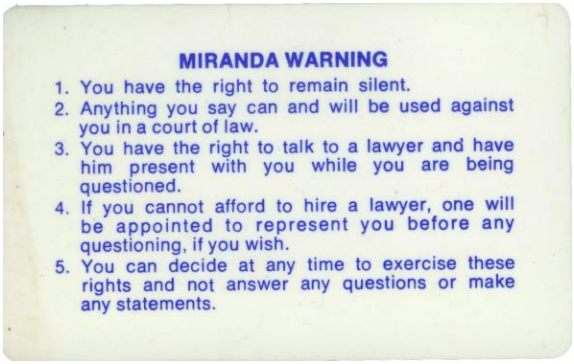
We also wondered whether participants might feel differently about a statement if they were asked to judge whether the person was invoking their *Miranda* rights according to prevailing social and linguistic conventions as opposed to predicting whether the law recognizes the utterance as legally triggering these rights. Thus, we randomly assigned participants to focus on either the legal consequence of the utterance ("Legal" condition) or on what

[152] Several variables—(1) legal training, (2) urban versus nonurban residency, (3) prior encounters with police, and (4) college education—each interacted significantly with condition. Respondents who self-reported having been to law school, working in a legal field, and/or receiving legal training were more likely to assert (incorrectly) that John had invoked his rights in the Weak condition. They were more likely to assert (again, incorrectly) that in the Strong condition, police were permitted to continue questioning John after he straightforwardly stated he wanted a lawyer. Respondents from urban areas were more likely than those from nonurban areas to believe the Weak statement was an invocation. Among participants who reported a prior encounter with the police, 90% thought the Strong condition was an invocation, while 97% thought the Medium condition was an invocation—exactly the opposite of the law's stance. All other subgroups examined drew no significant distinction between the Strong and Medium conditions. Thus, we observe no demographic subgroup that ratifies the legal stance that telling the police you want a lawyer (as in the Strong condition) is legally different from saying "I think it'd probably be a good idea for me to get an attorney" (as in the Medium condition).

[153] State v. Dumas, 750 A.2d 420, 425 (R.I. 2000).

[154] United States v. Dawes, 495 F. App'x 117, 119–20 (2d Cir. 2012).

the utterance shows the person is trying to convey with their words ("Social" condition).

> Instructions: A man, Charles, is in police custody, and the police have provided him with the *Miranda* warnings.
>
> 
>
>
> A police officer is questioning Charles about a crime that he is suspected of committing. Each sentence is something that Charles says to the officer. The question we'd like you to focus on is . . .
>
> > Social: . . . whether the statement shows Charles is trying to invoke his *Miranda* rights.
> > Legal: . . . whether the statement counts legally as invoking Charles's *Miranda* rights.

After each statement, participants chose between two answer choices.

> Social:
>
> - "This statement **shows** Charles is trying to invoke his *Miranda* rights."
> - "This statement **does not show** Charles is trying to invoke his *Miranda* rights."

These two answer choices were designed to place the focus on determining what Charles was trying to do with his words.

> Legal:
>
> - "Legally, this statement **counts** as invoking Charles's *Miranda* rights."
> - "Legally, this statement **does not count** as invoking Charles's *Miranda* rights."

These two answer options were designed to place the emphasis on whether Charles's utterances qualify under current law as triggering his *Miranda* rights.

This randomization scheme allowed us to see whether the social (vs. legal) questions elicited divergent responses from participants, although we did not expect lay intuitions to differ much based on the two framings.

Block 4 Results: The Public's Assessment of Words or Actions that Reflect Invocation

TABLE 2: SURVEY-TAKERS' ASSESSMENTS OF FOURTEEN PUTATIVE INVOCATIONS

	Statement	Court finds invocation	Percentage finding invocation (Legal)	Percentage finding invocation (Social)
1	"I'd rather talk to an attorney first before I do that." (Said in reference to providing a written statement to the police.)[155]	Yes	89%	91%
2	"I think I would rather have an attorney here to speak for me."[156]	Yes	87%	91%**
3	"Can I get a lawyer?"[157]	Yes	83%	89%***
4	"I'll be honest with you, I'm scared to say anything without talking to a lawyer."[158]	No	75%	83%***
5	"I think I probably should change my mind about the lawyer now . . . . I think I need some advice here."[159]	No	77%	77%
6	"I think it'd probably be a good idea for me to get an attorney."[160]	No	81%	86%**
7	"I'd rather have my attorney here if you're going to talk stuff like that."[161]	No	87%	90%
8	"Maybe I should talk to a lawyer."[162]	No	72%	82%***

[155] United States v. Martin, 664 F.3d 684, 688–89 (7th Cir. 2011).
[156] McDaniel v. Commonwealth, 518 S.E.2d 851, 853 (Va. Ct. App. 1999).
[157] *Dumas*, 750 A.2d at 425.
[158] Midkiff v. Commonwealth, 462 S.E.2d 112, 115–16 (Va. 1995).
[159] People v. Shamblin, 186 Cal. Rptr. 3d 257, 273 (Ct. App. 2015).
[160] People v. Bacon, 240 P.3d 204, 220 (Cal. 2010).
[161] State v. Mills, No. CA96-11-098, 1997 WL 727653, at *7 (Ohio Ct. App. Nov. 24, 1997).
[162] Davis v. United States, 512 U.S. 452, 462 (1994).

9	"I don't want to talk about this no more."[163]	Yes	63%	70%***
10	"I think it's about time for me to stop talking."[164]	No	67%	76%***
11	"I ain't saying nothing."[165]	Yes	65%	74%***
12	"I don't want to talk to you."[166]	Yes	60%	72%***
13	"I ain't talking no more and we can leave it at that."[167]	No	66%	72%**
14	"I plead the fifth commandment."[168]	No	55%	63%*

Note. Asterisks indicate that responses to the legal versus social versions of the survey question differ significantly. * $p < .05$; ** $p < .01$; *** $p < .001$. Gray shading indicates that the statement mentions "lawyer" or "attorney."

As Table 2 shows, most participants thought that each of the 14 statements constituted an invocation of *Miranda* rights.[169] This held true whether participants were asked to focus on the legal status of the statement or, alternatively, to focus on how clearly the statement demonstrates Charles's desire to assert his rights.

Did perceptions vary based on respondents' sociodemographic characteristics?[170] We find that white[171] and male[172] respondents were generally more likely to think the statements constituted invocation.[173] But

[163] Mayberry v. State, No. 04-12-00704-CR, 2013 WL 6672488, at *3 (Tex. App. Dec. 18, 2013).

[164] People v. Stitely, 108 P.3d 182, 196 (Cal. 2005).

[165] State v. Morrisey, 214 P.3d 708, 722 (Mont. 2009).

[166] United States v. DeMarce, 564 F.3d 989, 994 (8th Cir. 2009); *see also* People v. Mallet, No. 1-19-2506, 2022 WL 1908093, at *2 (Ill. App. Ct. June 3, 2022).

[167] People v. Thomas, 150 Cal. Rptr. 3d 361, 375 (Ct. App. 2012).

[168] United States v. Dawes, 495 F. App'x 117, 120 (2d Cir. 2012).

[169] For none of the statements did the 95% confidence interval (CI) include 50%, indicating that a clear majority thought the statement was an invocation. *See* Table A8 (reporting Wilson confidence intervals).

[170] *See* Tables A8–A10.

[171] White respondents (n = 1343) on average thought 10.85 statements of the 14 were invocations; nonwhite respondents (n = 375) on average thought 10.21 were invocations.

[172] Male respondents (n = 853) on average thought 10.82 statements of the 14 were invocations; female respondents (n = 858) on average thought 10.60 were invocations.

[173] The one exception was "I plead the fifth commandment." For this statement, women and nonwhite participants were more likely to find an invocation (the racial difference was not statistically significant, however).

even for female and nonwhite respondents, large majorities thought all 14 statements counted as invocations.[174]

We turn now to our preregistered hypothesis that participants perceive invocations more readily in response to statements that mention the word "lawyer" or "attorney." When we categorize the 14 statements into two classes based on whether or not the utterance mentions a lawyer or attorney, we find a marked difference in how often participants perceive an invocation. Participants answered "true" 83.67% of the time, on average, in response to the lawyer-mentioning class of statements and 66.90% of the time, on average, in response to the other class of statements, a significant difference.[175]

This result suggests that, roughly speaking, respondents regard a statement mentioning a "lawyer" or "attorney" as particularly clearly invoking *Miranda* rights, even if the statement otherwise contains hedges or softening language (e.g., "I think it'd probably be a good idea for me to get an attorney"). We take this as a sign that members of the public believe in formalistic or "magic" words, but their magic words differ from those used by courts. Respondents' formalistic trigger words are "lawyer" or "attorney" (simpliciter). By contrast, courts look for declarative statements unmodified by hedges, questions, conditional phrases, or equivocation.[176]

We also note that participants were overall more inclined to regard a statement as an invocation when asked to evaluate its social meaning than when asked to predict its legal consequence. For 11 of the 14 statements, the two conditions diverged significantly, with a greater percentage of respondents thinking the statement showed Charles was *trying to invoke* his *Miranda* rights than thinking the statement *legally effectuated* the right. This result suggests that people may expect the law to impose a slightly higher threshold, or to require somewhat more formality, than ordinary linguistic usage would demand. But the key word here is *slightly*: participants generally expected the law to recognize all 14 statements as invoking rights. The lowest-rated statement was "I plead the fifth commandment," which 55% thought legally effectuated the *Miranda* rights, but even here the 95%

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[174] *See* Tables A8–A10.

[175] For each participant, we calculated how many times (out of 8) they answered "true" to the survey items mentioning "lawyer" and how many times (out of 6) they answered "true" to the survey items not mentioning "lawyer," and investigated whether, within subjects, scores differed significantly between the two kinds of questions, $t_{\text{paired}}(1717) = 20.35$, $p < .001$, mean difference = .17, 95% CI [0.15, 0.18].

[176] Ainsworth, *supra* note 65, at 302 ("Courts . . . have in practice required that a purported assertion of the right to counsel be direct and unambiguous before according it legal effect."); Strauss, *supra* note 4, at 787–88 (listing different categories of statements held to be ambiguous, such as hedges and questions); Smith, *supra* note 4, at 1695 (discussing the exacting level of clarity required by court when exercising *Miranda* rights).

confidence interval for participants in the Legal condition does not include 50%, indicating that a majority of participants thought this statement counted legally as triggering *Miranda* rights.[177] Thus, even if people are *less* confident that the law (as opposed to social norms) will recognize a statement as an invocation, they still largely expect it will—and this holds true for numerous statements that courts have deemed hopelessly ambiguous.

C. Summary of Findings

Survey respondents generally reported a lower threshold for invocation than prevailing legal standards contemplate. With respect to the right to silence, participants generally understood that people are not legally required to answer questions by police, but they misunderstood what was required to invoke the right to remain silent. In particular, in the two non-*Miranda* contexts (Block 1), a majority of respondents erroneously believed that an individual's silence constituted invocation and that the suspects' silence could not be used against them in court. Furthermore, in the context of a suspect that had been Mirandized (Block 2), a majority erroneously believed that the right to silence was invoked by staying silent in the face of two hours of police questioning. Although the *Berghuis* majority reasoned that such silence is too ambiguous to communicate clearly to officers that the individual is intending to invoke his right to silence, survey respondents overwhelmingly concluded that such silence shows both that the person wishes to remain silent, and that the person has invoked his right to silence.

With respect to the right to counsel, participants again evinced a lower threshold for recognizing an utterance as an invocation (Block 3). Participants seemed unperturbed by "hedges" such as "I think it'd probably be a good idea for me to . . . ." Instead, they regarded this "hedged" statement as equivalent to a scenario in which a Mirandized individual straightforwardly tells the police he wants a lawyer. Over 90% of participants thought this "medium" statement constituted invocation such that police would need to cease questioning.

Moreover, well over half of participants thought that a highly equivocal statement ("I'm not sure if I should get a lawyer") invoked the right to counsel such that the police would be required to cease questioning. This result underscores how out of step prevailing legal standards are with ordinary views of invocation: laypeople think that mentioning one *might* want a lawyer (even if the utterer expresses uncertainty) is enough to trigger the legal obligation to provide a lawyer and/or cease questioning.

[177] For participants in the Legal condition, the rate was 54.88%, 95% CI [51.54, 58.18].

A survey of 14 different utterances (Block 4) reveals that solid majorities of respondents judged each utterance to be an invocation. This result was obtained even though 8 of the utterances were drawn from cases in which a court concluded that the statement was insufficient to constitute an invocation. The closest participants came to agreeing that a statement was *not* an invocation was the statement "I plead the Fifth Commandment." Yet a majority (55% of respondents) still believed that statement legally counted as an invocation, and 63% thought it showed the individual was trying to invoke his *Miranda* rights.

The results from Block 4 further establish that ordinary people are particularly affected by whether the speaker mentions the word "lawyer" (or "attorney"). It seems that, for laypeople, this operates as the "magic word" that triggers an obligation to cease questioning and/or provide a lawyer. Thus, the survey findings reveal not just a disconnect between courts and ordinary people in their expectations of what is required to invoke rights, but also suggest a related conclusion: ordinary people have a cogent alternative theory of invocation. Stated differently, survey participants were not simply confounded by the law's formalism; rather, they embraced their own flavor of formalism, in which the word "lawyer" (or "attorney") functioned as the magic word triggering invocation.

The relative uniformity across demographic subgroups is striking, especially in light of previous work documenting divergent responses to police along racial and other demographic lines. For example, whether people feel free to leave a police interaction or to decline a request for a consent search varies based on, and is constructed through, race, disability, and other demographic differences.[178] While we do observe some demographic differences on specific response items (as described earlier), none are robust across any measures.[179] This result illustrates how far the law of invocation has strayed from common sense: we find not that members of the public disagree among themselves and courts side with some and not others, but that the legal system is out of step with a strong social consensus.

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[178] *See, e.g.*, Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 984 (2002) (discussing the racialized nature of the free-to-leave test); Maclin, *supra* note 15, at 250 ("[T]he dynamics surrounding an encounter between a police officer and a black male are quite different from those that surround an encounter between an officer and the so-called average, reasonable person."); Jamelia Morgan, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489, 518 (2022) (noting that cognitive disabilities can influence how people interpret police commands and that such considerations "would seem to fit well into the totality of the circumstances test"); Capers, *supra* note 15, at 655 (discussing the underlying message in *Miranda* cases regarding what it means to be a good citizen in the eyes of the justice system).

[179] *See* Tables A1–A10. Future research might examine how *police officers' responses* to different attempts at invocation (such as strong, medium or weak statements) might vary based on the utterer's demographic characteristics as well as those of the officer(s).

D. Limitations

We highlight three noteworthy limitations of our study. First, the list of 14 statements presented to respondents is not a random sample of utterances by interrogees, nor is it a random sample drawn from a corpus of judicial opinions. Our goal in selecting the statements was to test a range of possibilities without subjecting survey-takers to a barrage of items that would tax their energy and focus. We selected these 14 statements because they offered a range of the types of utterances that courts have and have not found to constitute invocations. Still, it is telling that all 14 were seen by a majority of participants as constituting an invocation.

Second, the survey presented the 14 statements in isolation; requiring participants to read full transcripts placing each utterance in conversational context would have been too cumbersome. The same limitation applies to Blocks 1–3: these scenarios presented respondents with key information (e.g., "Two hours pass[,] the police continue to ask questions, and Thomas continues to say nothing."), but did not provide the full, detailed factual record that might have been available to a judge applying the totality-of-the-circumstances test.[180] As a result, it is possible that when considered in the context of the broader conversations in which they were uttered, participants' responses would be altered.

A final limitation is that this research asks ordinary members of the public to judge whether given utterances (or silence) constitute invocations; it does not measure what utterances participants themselves actually make when interacting with police. Thus, it remains for future research to investigate whether people of different backgrounds tend to speak or act in different ways, as prior research has posited,[181] and how their speech and behavior stack up against the "unequivocal" standard imposed by the law.

III. IMPLICATIONS AND FUTURE DIRECTIONS

A. Rights out of Reach

In *Davis*, the Supreme Court announced that people need not speak like an "Oxford don" to invoke their right to counsel. Since then, courts have insisted that there are "*no* magic words that a defendant must use in order to

[180] *See, e.g.*, United States v. Mills, 122 F.3d 346, 350 (7th Cir. 1997) (holding that in determining whether the defendant effectively invoked his *Miranda* rights, the trial court must ask: "Under the totality of the circumstances, what was the message that [the defendant] wished to convey?").

[181] *See* Ainsworth, *supra* note 65, at 302; Ainsworth, *supra* note 57, at 7; Alexa Young, Note, *When Is a Request a Request?: Inadequate Constitutional Protections for Women in Police Interrogations*, 51 FLA. L. REV. 143, 144 (1999).

invoke his *Miranda* rights."[182] Yet the present doctrine fails to accommodate the way most ordinary people speak and communicate. The clarity and consistency of the survey results underscore the extent to which current legal standards are based on faulty assumptions that demand "unnatural directness" from speakers.[183] By requiring a manner of invocation that is counterintuitive to most members of the public, courts have placed the right to silence and right to counsel out of reach of ordinary people.

We thus concur with linguists Peter Tiersma and Larry Solan, who write:

> The right to counsel . . . is not just constitutional window-dressing. If these rights are to have the effect that they were meant to have, they must not be denied by overly literalistic judges. Courts are clearly capable of considering pragmatic information when it benefits the government to do so, as when evaluating threats or deciding that "Does the trunk open?" constitutes a request to search. Yet too often they ignore such information when it would give substance to the rights of a criminal defendant. This selective literalism not only has practical consequences, but it devalues the constitutional protections that all of us hold dear.[184]

Some have held out hope that the *Miranda* warnings would help ensure that police interrogators recognize ordinary people's attempts to access their rights.[185] Yet participants in our study were given the *Miranda* warnings, and still they failed to appreciate when individuals were asserting their rights in ways that courts recognize. The standard *Miranda* warnings thus appear insufficient to bridge the gap between ordinary speech and the law's hyper-literalism.

The burdens of this gap are not distributed equally. People who have the most frequent contact with police are the ones most acutely affected by legal standards that place rights out of reach.[186] The current invocation standards, if left unchecked, may come to facilitate what law professor

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[182] United States v. White, 53 F. Supp. 3d 1101, 1110 (N.D. Ind. 2014) (emphasis added) (finding that the defendant did not unambiguously invoke his *Miranda* rights); *see also* Taylor v. State, 291 So. 3d 14, 32 (Miss. Ct. App. 2019) (McCarty, J., concurring in part and dissenting in part) ("[W]e should not pretend there is some set of precise magic words to invoke the rights under the Constitution."); United States v. Newland, No. 09-CR-71-JD, 2010 WL 2629504, at *5 (N.D. Ind. June 25, 2010) (holding that the defendant did not unambiguously invoke his right to remain silent and that there are "no magic words" that a defendant must use to invoke).

[183] Tiersma & Solan, *supra* note 32, at 255.

[184] *Id*. at 259–60.

[185] *See* Miranda v. Arizona, 384 U.S. 436, 468 (1966) ("[T]he warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.").

[186] *But see* William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975, 977 (2001) (arguing that individuals with more experience in the criminal justice system are more savvy when it comes to invoking their rights).

Khiara Bridges terms "informal disenfranchisement," which refers to the "process by which a group that has been formally bestowed with a right is stripped of that very right by techniques that the Court has held to be consistent with the Constitution."[187] In light of who police stop, question, and arrest, this disenfranchisement disproportionately burdens members of historically marginalized groups and further entrenches race, class, and gender inequities in the criminal justice system.[188]

B. Encouraging Gamesmanship

By insisting on an esoteric and counterintuitive standard for invocation, courts invite police to play a kind of cat-and-mouse game. Officers may continue questioning a suspect despite fully understanding that he wishes to remain silent (or to be represented by an attorney), so long as the suspect fails to assert his rights using the type of explicit, unmitigated syntactic imperative that courts recognize as "unequivocal." Because the doctrine prioritizes form over substance, it invites officers to ignore the plain-as-day desires of those who are not savvy enough to realize they must say the magic words.[189]

Lamentably, officers have no obligation to ask clarifying questions when a person suspected of a crime makes an ambiguous or equivocal statement regarding the invocation of rights.[190] Indeed, courts make clear that "requiring officers to cease interrogation where a suspect makes a statement that *might* be an invocation of his or her rights would create an unacceptable hindrance to effective law enforcement."[191] Yet, as Justice Sotomayor explained in her *Berghuis* dissent, "our system of justice is not

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[187] KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 13 (2017).

[188] *See* Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 737 (2020); ELIZABETH HINTON, LESHAE HENDERSON & CINDY REED, VERA INST. OF JUST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 7 (May 2018), https://www.issuelab.org/resources/30758/30758.pdf [https://perma.cc/C4GC-JBBP].

[189] *See, e.g.*, Kaiser & Lufkin, *supra* note 11, at 748 (arguing that the invocation standard announced in *Davis* "allows the actual intentions of the actual speaker to be ignored, in favor of what those words *could* be construed to mean by some other speaker, in some other context").

[190] *See* Davis v. United States, 512 U.S. 452, 461–62 (1994); Berghuis v. Thompkins, 560 U.S. 374, 381 (2010).

[191] State v. Piatnitsky, 282 P.3d 1184, 1193–94 (Wash. Ct. App. 2012) (citing *Davis*, 512 U.S. at 461), *aff'd*, 325 P.3d 167 (Wash. 2014).

founded on a fear that a suspect will exercise his rights," and if it is, "there is something very wrong" with our system.[192]

More generally, the larger problem with the *Miranda* framework is that it incentivizes police to try to get away with whatever interrogation tactics they can within the confines of the law (e.g., pretending not to understand that the person is asking for a lawyer), rather than genuinely treating people with respect and dignity. If, as the Supreme Court has said, the "fundamental purpose" of *Miranda* is to "giv[e] the *defendant* the power to exert some control over the course of the interrogation," so that "the suspect is free to exercise *his own volition* in deciding whether or not to make a statement to the authorities,"[193] then the invocation standard must prioritize "determining the accused's wishes"[194]—their *actual* wishes—as conveyed by their words and deeds considered in context, not as excavated by a "hyper-literal parsing"[195] of their statements.

C. A Gap that Demands Justification

We believe that our results exposing the discrepancies between current legal standards and everyday speech practices demand an explicit justification.[196] Why should police officers be permitted to ignore conversational norms generally recognized by wide swaths of the public—indeed, majorities of every demographic subgroup surveyed in our study? As noted earlier, we have found no doctrinal support for the idea that the "reasonable officer" standard differs meaningfully from a "reasonable listener" standard.[197] For our part, we see no obvious or compelling reason why police would constitute a separate linguistic community from the rest of the public. We likewise see no police "expertise" justification for maintaining a hyper-literal standard for invocation.[198] Thus, we agree with

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[192] 560 U.S. at 410 (Sotomayor, J., dissenting) (quoting Moran v. Burbine, 475 U.S. 412, 458 (1986) (Stevens, J., dissenting)).

[193] Connecticut v. Barrett, 479 U.S. 523, 528 (1987) (first quoting *Moran*, 475 U.S. at 426; and then quoting Oregon v. Elstad, 470 U.S. 298, 308 (1985)).

[194] *Piatnitsky*, 282 P.3d at 1196.

[195] Ainsworth, *supra* note 57, at 1.

[196] We join others in calling for courts to differentiate interpretative choices from factual assertions. *See, e.g.*, Meares & Harcourt, *supra* note 33, at 735 ("Judicial decisions that address the relevant social science and empirical data are more transparent in that they expressly articulate the grounds for factual assertions and, as a result, more clearly reflect the interpretive choices involved in criminal procedure decision-making.").

[197] *See* Chakarian, *supra* note 19, at 97; Mandiberg, *supra* note 19, at 1502.

[198] *See* Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 1999 (2017) ("[T]he promise of police expertise expanded over the course of the twentieth century to invade increasingly questionable sites of the judicial system — bolstering not only the police's discretion in

critics of the *Davis* decision who write, "[i]t is a contradiction for a listener to say to a speaker: 'I understand, from what you have just said, that you actually want to have a lawyer present; however, what you have said does not count as request for counsel, because you have not clearly articulated the request.'"[199]

So, why are courts content to conclude that statements like "I think it'd probably be a good idea for me to get an attorney"[200] are "ambiguous" and that silence is "insolubly ambiguous"[201] to the "reasonable police officer," when it seems crystal clear to our survey-takers? One possibility is that the current legal standard is more straightforward for courts and police to administer. If this is the rationale, it should be argued for explicitly, as some might contest that the "clear and unambiguous" standard is easier for courts to administer, or that the instrumental rationale of administrability justifies the embrace of an esoteric standard that is counterintuitive to ordinary speakers.[202] As law professor Tracey Meares has argued, such "empiricism" can "improve[] the transparency of the system or enable[] individuals to better hold criminal justice system actors more accountable."[203]

To be sure, there is generally no requirement for congruence between the law and public perception of the law. We do not expect nonlawyers to know, for example, that evidence derived from a Fourth Amendment violation is generally subject to the exclusionary rule. Likewise, in substantive criminal law, ignorance of the law is no excuse.[204] Yet the Fifth Amendment is different. Much of Fifth Amendment jurisprudence is concerned with ensuring that when someone decides to waive their rights, their actions reflect "an uncoerced choice and the requisite level of

enforcing the law, but also the scope of the criminal law itself."); *see also* Leo, *supra* note 4, at 255, 256 ("[T]he court requires a hyper-literal assertion of the right to counsel when a suspect seeks to invoke it to cut off police interrogation, . . . while it allows the speech style of police to be indirect or implied.").

[199] Kaiser & Lufkin, *supra* note 11, at 758. These authors note the "theoretical contradiction" inherent in the *Davis* Court's willingness to "ignore the intent of a speaker in favor of some purportedly 'objective' standard of meaning" because, as linguists have shown, "[t]o find any sort of meaning whatsoever in an utterance, every interpreter implicitly provides a context and a hypothetical speaker's intent." *Id.* at 756.

[200] People v. Bacon, 240 P.3d 204, 220 (Cal. 2010) ("Because defendant's statement contains several ambiguous qualifying words ('I think,' 'probably,' and 'it'd'), we do not consider defendant's statement to be sufficiently clear in and of itself.").

[201] Salinas v. Texas, 570 U.S. 178, 179 (2013).

[202] *Cf.* Kaiser & Lufkin, *supra* note 11, at 767 (arguing that "courts can and should" administer a nonformalistic standard that "includes a consideration of the speaker's intention" by simply "apply[ing] normal interpretive methods" to "determin[e] the meaning of a criminal suspect's purportedly 'ambiguous' invocation of the right to counsel").

[203] Meares, *supra* note 29, at 866.

[204] *See* MODEL PENAL CODE § 2.04 (AM. L. INST. 1985) (providing that a "mistake of law" defense is only valid in limited circumstances).

comprehension."[205] The key inquiry in any *Miranda* analysis, therefore, is whether the suspect's "right to cut off questioning" was "scrupulously honored."[206] Empirical evidence, such as the results of this study, might assist courts in figuring out what should count as invocation and whether the person's desires were "scrupulously honored."

D. Reforms and the Future of Miranda

It is impossible to discuss legal and policy reforms without acknowledging *Miranda*'s uncertain future, most recently reflected in the Supreme Court's 2022 decision in *Vega v. Tekoh*, in which the Court concluded that a violation of *Miranda* cannot be the basis for a § 1983 lawsuit.[207] The *Vega* decision embodies a longstanding debate: is *Miranda* a court-created rule (the position of the majority) or "secured by the Constitution" (the position of the dissent)?[208] Although *Vega* did not overrule *Miranda*, it signaled a willingness on the part of at least some Justices to reconsider *Miranda*.[209]

We note that even if *Miranda* were to be overruled one day, the right against self-incrimination would remain, as would—crucially—the need to determine whether someone has invoked their Fifth Amendment privilege. Setting *Miranda* aside, in roughly half of federal circuits and state supreme courts, a person's silence in the face of police questioning cannot be used by prosecutors in their case in chief.[210] Likewise, once the Sixth Amendment right to counsel attaches, courts must determine if and when someone waives

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[205] Moran v. Burbine, 475 U.S. 412, 421 (1986).

[206] Miranda v. Arizona, 384 U.S. 436, 474, 479 (1966).

[207] 597 U.S. 134, 149–50 (2022).

[208] *See id.* at 143 (collecting cases that describe *Miranda* as "prophylactic"). *But see* Jenkins v. Anderson, 447 U.S. 231, 247 n.1 (1980) (Marshall, J., dissenting) ("The furnishing of the *Miranda* warnings does not create the right to remain silent; that right is conferred by the Constitution."); Tracey Maclin, *The Prophylactic Fifth Amendment*, 97 B.U. L. REV. 1047, 1052 (2017) (describing how Supreme Court decisions have transformed the Self-Incrimination Clause of the Fifth Amendment "from a substantive right to a judge-made prophylactic rule").

[209] *See Vega*, 597 U.S. at 149 n.5 ("Whether this Court has the authority to create constitutionally based prophylactic rules that bind both federal and state courts has been the subject of debate among jurists and commentators."); *see also* Eve Brensike Primus, *The State(s) of Confession Law in a Post-*Miranda *World*, 115 J. CRIM. L. & CRIMINOLOGY (forthcoming 2025) (manuscript at 6) (on file with *Northwestern University Law Review*) (arguing for state-level reforms in police procedure given the "Supreme Court's systematic abandonment of constitutional limits in [the] field").

[210] *See, e.g.*, Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989) (holding that a defendant's silence during questioning could not be used by prosecutors); United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017–18 (7th Cir. 1987) (same); United States v. Velarde-Gomez, 269 F.3d 1023, 1029 (9th Cir. 2001) (same); United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991) (same); United States v. Moore, 104 F.3d 377, 385 (D.C. Cir. 1997) (same).

their right to counsel, and what it takes for a represented defendant to ask for their lawyer to be present for police interrogations.[211]

Understanding ordinary intuitions about what counts as invocation is also relevant to analyzing the voluntariness of a statement to the police under the due process clauses of the Fifth and Fourteenth Amendments.[212] For example, the fact that most people think that remaining silent in the face of two hours of questioning counts as invoking the right to silence could remain relevant for determining if a subsequent statement was made voluntarily. In short, even if *Miranda* were to be overruled, the question of what counts as an invocation remains salient.[213]

To date, many reform efforts directed at improving *Miranda* warnings have focused on vulnerable groups (e.g., children)[214]—or transparency measures, such as video recording all interrogations.[215] For example, more than half of states now require that police record at least some custodial interrogations.[216] But such measures may be of limited effectiveness. For example, recording interrogations preserves what was said, but often the dispute in a *Miranda* case is not about what precisely was said, but how those words should be interpreted.[217] While recording interrogations may offer

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[211] *See* Montejo v. Louisiana, 556 U.S. 778, 786–87 (2009). While the Court made clear that a represented defendant's waiver of *Miranda* rights constitutes Sixth Amendment waiver as well, the Court did not address what a defendant must say or do to request their lawyer to be present. For critiques of this "duty to declare" Sixth Amendment interests, see Janet Moore, *The Antidemocratic Sixth Amendment*, 91 WASH. L. REV. 1705, 1749 (2016), and Wayne A. Logan, *The Case for Greater Transparency in Sixth Amendment Right to Pretrial Counsel Warnings*, 52 TEX. TECH. L. REV. 23, 25 (2019).

[212] *See* Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 23 (2015).

[213] *See id.* at 7.

[214] In some jurisdictions, the law requires that young people consult with a lawyer and/or their parents before waiving their *Miranda* rights. *See, e.g.*, 705 ILL. COMP. STAT. 405/5-170 (2024) (requiring that minors under 15 years old must be represented by counsel throughout the entire custodial interrogation); N.M. STAT. ANN. § 32A-2-14 (2024) (prohibiting confessions or admissions from being used against a child under 13 and creating a rebuttable presumption that confessions made by 13- or 14-year-olds are inadmissible); CAL. WELF. & INST. CODE § 625.6 (West 2024) (providing for a nonwaivable right for minors to consult with counsel prior to a custodial interrogation). In 2021, Senator Cory Booker introduced the Protecting *Miranda* Rights for Kids Act, which provides that a minor who is subject to custodial interrogation may waive their Fifth Amendment rights to silence and counsel only after speaking with their attorney. S. 2498, 117th Cong. (2021). *But see* Samantha Buckingham, *Abolishing Juvenile Interrogation*, 101 N.C. L. REV. 1015, 1062 (2023) (arguing that no amount of reform can fix juvenile interrogations).

[215] *See, e.g.*, D.C. CODE §§ 5-116.01–5-116.03 (2024) (requiring electronic recording of interrogations involving crimes of violence); 725 ILL. COMP. STAT. 5/103-2.1(b) (providing that statements made in custodial interrogations for certain felonies are presumably inadmissible unless an electronic recording is made).

[216] Primus, *supra* note 212, at 52.

[217] *See* Strauss, *supra* note 69, at 1013.

other significant benefits, addressing the disconnect identified in our study is not one of them.

Limiting reforms to vulnerable groups may also prove inadequate. As our study findings show, large majorities of highly educated, wealthy adults are also mistaken about invocation law. This suggests that the problem is widespread. One need look no further than the headline of a 2023 *New York Times* op-ed: "*Alec Baldwin Didn't Have to Talk to the Police. Neither Do You*."[218] Many people—including famous, powerful, middle-aged, educated white men who can afford lawyers—find *Miranda* rights confusing.[219]

Finally, some suggested reforms focus on modifying *Miranda* warnings such that they specifically instruct individuals on how to invoke their rights[220] or encourage greater dialogue and efforts at clarification between police and suspects.[221] Indeed, some states require police to seek clarification if a suspect's request for counsel is ambiguous.[222] Other states require that waivers to the right to counsel be explicit.[223] As Professor Eve Primus has explored, state-level reform efforts have shown promise, and our findings support other states' following suit. Of course, future empirical work will need to examine the effect of such reforms. There is a danger that tweaking the warnings in minor ways could simply reassure stakeholders and placate judges while having minimal psychological effect.[224]

CONCLUSION

The empirical findings presented in this Article make transparent a reality that courts and advocates must contend with: people's core procedural rights are being clawed back through case law interpreting the invocation

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[218] Farhad Manjoo, *Alec Baldwin Didn't Have to Talk to the Police. Neither Do You*, N.Y. TIMES (Jan. 25, 2023), https://www.nytimes.com/2023/01/25/opinion/alec-baldwin-rust-5th-amendment.html [https://perma.cc/L84W-W56F].

[219] Of course, singling out children may be the only reform that is politically feasible, at least initially.

[220] *See* Andrew Guthrie Ferguson & Richard A. Leo, *The* Miranda *App: Metaphor and Machine*, 97 B.U. L. REV. 935, 959, 968 (2017) (discussing a cellphone application that would "provide the 'magic words' to invoke silence or counsel, so debates over ambiguous invocations would be reduced"); Devika Singh, Miranda*: The Magic Words to Invoke One's Rights*, 53 AM. CRIM. L. REV. ONLINE 37, 39–40 (2016) (suggesting that the warnings be revised to include instructions on how to invoke one's rights).

[221] Andrew Guthrie Ferguson, *The Dialogue Approach to* Miranda *Warnings and Waiver*, 49 AM. CRIM. L. REV. 1437, 1439 (2012).

[222] *See* Primus, *supra* note 209, at 19 n.116 (collecting examples).

[223] *See id.* at 19–20.

[224] *See* Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 2010 (2019) (finding that notifying people of their right to refuse a consent-based search does little to alter how likely they are to consent or how free they feel to withhold consent).

standards to be unduly esoteric and formalistic.[225] One potential conclusion from the study findings is that courts are purposefully trying to make rights inaccessible, either as a way to undermine *Miranda* without overruling it or because they are hesitant to overturn convictions by finding a *Miranda* violation.[226] Cynics might conclude, then, that empirical data will not change how courts, especially appellate courts, evaluate invocation.

But if we are to take the *Miranda* decision at its word, it stands to reason that legal doctrine should adapt to better recognize what people are trying to say or do with respect to their rights to silence and counsel. Take, for example, the 1994 decision in *Davis v. United States*, in which Justice O'Connor opined that *Miranda* warnings themselves serve as the primary method to ensure suspects knew how to invoke their rights. In his concurrence, Justice David H. Souter agreed with Justice O'Connor but added that "experience" will tell if warnings alone are "up to the job" of protecting rights.[227] Both Justices seemed open to the possibility that experience might suggest a different outcome—and the results from the survey suggest just such a need: the current warning regime is not up for the job of protecting rights. Likewise, cases like *Salinas* and *Tom* might have also come out differently had empirical evidence suggested that the majority's reasoning rested on incorrect assumptions.

To propose that courts look to empirical evidence in determining how people behave is hardly a novel concept. This is especially true in the context of doctrines that focus on a person's choice—such as evaluating consent or whether someone feels free to leave. It is in this area that empirical evidence is needed, but there is little of it, with a few notable exceptions.[228]

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[225] *See, e.g.*, Meares & Harcourt, *supra* note 33, at 733.

[226] *See, e.g.*, Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEO. L.J. 1543, 1547 (2015) (reporting on results of a study showing that decision-makers may reason toward "their desired outcome ostensibly within the stated parameters of the law"); Chao et al., *supra* note 34, at 298–300 (discussing a bias toward upholding convictions in the Fourth Amendment context); Jeffrey A. Segal, Avani Mehta Sood & Benjamin Woodson, *The "Murder Scene Exception"—Myth or Reality? Empirically Testing the Influence of Crime Severity in Federal Search-and-Seizure Cases*, 105 VA. L. REV. 543, 572 (2019) (drawing on empirical research to show that in the context of the exclusionary rule, "judges were more likely to uphold the admission of challenged evidence in cases involving more serious crimes").

[227] Davis v. United States, 512 U.S. 452, 476 (1994) (Souter, J., concurring in the judgment).

[228] *See, e.g.*, David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51 (2009) (examining the Fourth Amendment through an empirical lens); Sommers & Bohns, *supra* note 224 (reporting results of laboratory studies investigating the psychology of compliance in response to intrusive search requests); Young & Munsch, *supra* note 14 (describing study of people's sense of agency in asserting Fourth, Fifth, and Sixth Amendment rights); Clatch, *supra* note 34 (analyzing the disconnect between courts and the public regarding what counts as "custody" for purposes of triggering *Miranda* warnings).

While it may be reasonable to question the extent to which courts rely on data, empirical evidence can play a role in how courts interpret behavior when it comes to evaluating someone's choices.[229] To be sure, what counts as empirical evidence and how that evidence may change over time raise challenging questions. Likewise, requiring litigants to present statistical evidence to prove a claim—say of discrimination—can create undue legal burdens that reinforce systemic inequity.[230] Yet these questions should not stop courts from taking seriously empirical evidence which suggests that basic assumptions embedded in constitutional law are, in fact, incorrect.

[229] *See generally* Slobogin, *supra* note 29 (summarizing how lawyers use (and do not use) statistics in their work).

[230] *See* State v. Sum, 511 P.3d 92, 104 (Wash. 2011) (en banc) ("[R]equiring an allegedly seized person to produce statistics showing precisely how their race and ethnicity should be factored into the seizure analysis would artificially raise their burden, while unjustly ignoring the 'pain, suffering, and distrust that statistics fail to capture.'" (citing TASK FORCE 2.0, RACE AND WASHINGTON'S CRIMINAL JUSTICE SYSTEM: 2021 REPORT TO THE WASHINGTON SUPREME COURT 6 (2021), https://digitalcommons.law.seattleu.edu/korematsu_center/116/ [https://perma.cc/DM5G-B53X])).

ONLINE APPENDIX

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