

# Suspects' opportunities to claim their legal rights in police investigative interviews

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# Suspects' opportunities to claim their legal rights in police investigative interviews

*Aafke Diepeveen, Jan Svennevig and Paweł Urbanik*

## **Abstract**

*When interviewed by the police, suspects are to be informed that they have the right to remain silent and the right to obtain the assistance of a defence counsel. This article presents a conversation analytic study of how it is established in interaction whether a suspect wants to go through with the interview or end it by invoking his legal rights. The data is a corpus of audio recordings of authentic police interviews conducted in Norway. First, we present a quantitative measure of how often suspects are asked explicit questions about whether they want to exercise their right to silence and/or to legal counsel. Second, we investigate variation in the design of such questions, concentrating specifically on expressions involving a preference for one response option over the other. Third, we discuss formulations used while presenting the rights that may legitimise or inhibit a free and independent decision. The results show that suspects are often not asked to take a stance on their rights, and when they are, such questions often involve a bias towards waiving their rights. And although some officers explicitly inform the suspects that they are free to choose whatever option they like, others provide information about the interview that either presupposes willingness to talk or presents the option of waiving one's rights as preferable to invoking them. These findings have important implications for the safeguarding of suspects' rights and form the basis for recommendations to the police about how to give suspects the opportunity to take a stance on their legal rights.*

KEYWORDS: COMMUNICATION OF RIGHTS, POLICE INVESTIGATIVE INTERVIEW, RIGHT TO SILENCE, CONVERSATION ANALYSIS, QUESTION DESIGN, PREFERENCE ORGANISATION

## Introduction

In many jurisdictions, police officers are obliged to inform suspects about their fundamental rights, such as the right to silence and to defence counsel, in the initial phase of the investigative interview. If an interviewing officer fails to 'caution' the suspect, the latter's statement can be rejected as evidence by the court. This is to protect suspects against self-incrimination before they begin giving a statement or answering any questions related to the allegation. However, these rights can be presented in different ways, investigators paying more or less attention to the reliable and conscientious communication of them (Nakane 2007; Rock 2007; Urbanik and Pavlenko 2021). As a result, suspects may not only fail to understand their rights (e.g., Haworth 2006; Pavlenko 2008), but they may also be unsuccessful when trying to invoke them (e.g., Ainsworth 2008; Mason 2013). In Norway, official regulations do not state explicitly that investigators should ask suspects to take a stance on these issues or at what point of the interview suspects may claim their rights. Consequently, investigators may or may not ask suspects to decide whether they want to give a statement and/or whether they want to call a lawyer. Furthermore, even if investigators do ask explicit questions about the suspect's decision in this matter, a crucial issue is how they formulate these questions and to what extent their design reveals a preference for one answer over the other and thus constrains the suspect's opportunity and right to decide freely.

In the current study, we look closely at the police practices of providing opportunities for suspects to claim their legal rights. More specifically, we examine whether suspects are explicitly asked to take a stance on their legal rights. We then investigate how such questions are designed and what type of response they invite. In the analysis, we also take into account other practices and wordings used in the communication of rights that may legitimise or inhibit a free and independent decision from suspects. The study has two goals. First, it seeks to find out how often and in what ways suspects are given an opportunity to decide whether they want to exercise their legal rights, and to what extent police practices may constrain their decisions. Second, by referring to the Norwegian law and procedural regulations, we aim to provide recommendations regarding investigative practices and procedural guidelines for police investigators in Norway or other jurisdictions where this may be of relevance.

## Communication of rights and decision-making

In most countries in the world, the right to silence and the right to defence counsel are guaranteed by international and national laws and regulations. However, if these rights are to have a practical value, it is essential that they are respected by the authorities and communicated effectively, so that the suspect understands them and knows how and when to invoke them. The latter is not always the case in the setting of police interviews, where many features of the terminology and the procedures are unfamiliar to laypeople. In fact, numerous studies, ranging from those in psycholinguistics (e.g., Pavlenko, Hepford and Jarvis 2019; Rogers, Harrison, Shuman, Sewell and Hazelwood 2007; Rogers, Rogstad, Gillard, Drogin, Blackwood and Shuman 2010; Rogers, Rogstad, Steadham and Drogin 2011) to sociolinguistics (e.g., Berk-Seligson 2009; Eades 2010; Rock 2007), have demonstrated that suspects may not understand their rights or may not be given the opportunity to freely decide whether they want to exercise them.

One reason may be the language of cautions. Several studies have shown that suspects

do not always understand the content of the communicated rights (Berk-Seligson 2002; Pavlenko 2008; Pavlenko et al. 2019; Rogers et al. 2007; Rogers et al. 2011; Shuy 1998) even though it is well-popularised in their culture, as in the case of the Miranda rights in the USA (Rogers et al. 2010). Furthermore, even if suspects understand the wordings, it is not always clear what invoking a right means and what consequences it has for them and their case. Cautions do not guide suspects to all procedural details about the effects of exercising or waiving a right. For instance, Rogers et al. (2010) have demonstrated that over one third of defendants in the USA may not know that the right to silence is continuous and may be invoked later in the interview even if it was waived at the beginning. This illustrates that the communication of rights is in advance burdened with at least some indeterminacy and deficiency, which may hinder the suspect from making an unconstrained decision on what to do with the information he receives.

On top of that, the understanding of cautions may be either facilitated or hampered by interviewing practices. Making suspects familiar with their rights is a highly formalised event, and, despite its interactional character, the space for 'allowable contributions' (Levinson 1979) from the suspect is limited and contingent on how the investigator manages this part of the police interview. Numerous studies have demonstrated that police officers complicate or play down the significance of the rights when presenting them (Berk-Seligson 2009; Cotterill 2000; Leo 1996, 2008; Pavlenko 2008; Rock 2007). They may also actively try to persuade suspects to waive their rights by reformulating the wordings or ordering the caution components in a way that makes invoking the rights seem less beneficial (Cotterill 2000; Rock 2007; Russell 2000; Shuy 1998). Finally, investigators may treat the whole procedure as a pure formality and avoid engaging in further explanation or even offering an understanding check if these routines are not obligatory (Rock 2007: 205; Urbanik and Pavlenko 2021). Such practices are not only consequential for the decisions suspects make, but they also reveal how differently suspects may be treated, thus putting the rule of law at risk.

While there is a significant body of research on the ways investigators communicate legal rights, there has been much less systematic focus on to what degree and how they elicit decision-making. Asking a question that invites the suspect to take a stance on the presented rights, that is, whether they want to give a statement and whether they want to obtain legal advice and assistance, is one such practice. There is, however, little knowledge about whether investigators use such questions when this is not legally imposed and how they formulate them. This practice is of particular importance because it formally gets the suspects to decide whether they want to answer questions and give a statement and whether they want to call a lawyer. Rock (2016) argues that such questions may serve as 'tick-box consent talk' that downplays the importance of gaining consent and treats the whole procedure solely as a formal requirement. On the other hand, for police officers such practices reduce potential ambiguity and officially manifest conformity to the procedural rules. For the suspects, the appearance of a stance-taking question is a moment to make a decision based on what they have just learnt, including the allegation and their rights, and on how and when the question is asked. In other words, it is a point at which a number of situated details, including lexical selection, grammatical design and sequential positioning, may play a crucial role in the interpretation of the question and in responding to it (cf. Pavlenko 2017; Rock 2016).

## Communicating rights in police interviews in Norway

The Norwegian model for police investigative interviews, called KREATIV, is based on the British PEACE method (Fahsing and Rachlew 2009).<sup>1</sup> It involves gathering information from suspects by giving them an opportunity to talk freely and then confronting their version of events with the facts to which investigators have access. The model both describes the interview's different phases, as well as setting out a set of principles that should be adhered to in the interview. It emphasises the significance of respectful communication and rapport-building from the very beginning of an interview. Therefore, one of its procedural steps is the phase called 'Contact Establishing and Introduction', where suspects must be informed about their rights and obligations and other legal and procedural rules of investigation. It is also at this point that investigators have to discern whether they can conduct the interview, that is, whether the suspect wants to invoke or waive his rights.

The communication of rights is based on paragraphs in the *Straffeprosessloven* (Criminal Procedure Act [CPA], 1981) and the *Påtaleinstruksen* (Prosecution Instructions [PI], 1985). The caution is not scripted, but previous analysis of our interview data shows that, when presenting suspects with their rights, police officers tend to recite the wordings of these paragraphs (Urbanik and Pavlenko 2021). Thus, when presenting the rights, they frequently use verbatim quotes such as that the suspect 'has no obligation to give a statement' (Nor. *har ingen plikt til å forklare seg*, PI § 8-1, first paragraph) and that he 'has the right to be assisted by a defence counsel of his choice at each stage of the investigation' (Nor. *har rett til å la seg bistå av forsvarer etter eget valg på ethvert trinn av saken*, PI § 8-1, second paragraph). According to additional regulations, the suspect must not only be informed about his rights, but the investigator should ensure that they are communicated in an understandable way and that the suspect has understood them correctly (Riksadvokaten 2016; cf. Bjercknes and Fahsing 2018). However, the legal documents do not state explicitly that the suspect needs to be asked whether he wants to exercise his rights. The relevant legal provisions merely imply that a police officer needs to establish whether a suspect 'is willing to give a statement' (Nor. *er villig til å forklare seg*), as it is only then that the suspect is supposed to be 'encouraged to tell the truth' (Nor. *oppfordres han til å forklare seg sannferdig*, CPA § 232; PI § 8-2). However, in the professional literature used in police training and in instructions for investigators it is stated that the suspect should be 'asked whether he is willing [Nor. *villig*] to give a statement' (Bjercknes and Williksen 2015: 363; Skjæret 2016: 6), alternatively whether he 'wishes [Nor. *ønsker*] to give a statement to the police' (Bjercknes and Fahsing 2018: 220). Even so, this is only stated in very general terms and does not provide concrete guidance on how and when officers should do this. Nor are they consistently guided in how to find out whether the suspect wants to call a lawyer. In the professional literature and procedural instructions, there are diverging recommendations on this issue. Some sources prescribe unconditionally asking about the suspect's wish for a defence counsel (Bjercknes and Williksen 2015: 305), while others do not mention it explicitly (Bjercknes and Fahsing 2018) or at all (Skjæret 2016: 5).

The above overview of the legal and procedural basis of communicated rights demonstrates that instructions guiding Norwegian police officers on investigative procedures provide only general information and usually rely on the exact wordings in the law. They do not state how the investigator should ascertain whether a suspect wants to invoke or waive his rights. As we will show in the analysis below, this lack of a more specific

guidance has consequences for the police's practices of getting the suspects to take a stance on their rights.

## Questions as social actions

Questions are social actions that seek information or confirmation from the interlocutor. In Norwegian, as in English, they are most prototypically realised by sentences with interrogative syntax (subject/verb inversion) or by the use of question words. However, they may also take many other linguistic forms. The main criterion is that they initiate a sequence of turns (an adjacency pair) in which the interlocutor is made accountable for providing some piece of information in the response. In the cases we are investigating here, the questions concern whether a suspect wants to claim his rights. As such, they do not only concern information or knowledge (epistemic matters) but also the distribution of rights and obligations (deontic matters). By answering 'yes' to a question about whether the suspect wants a lawyer present, he is not just informing the officer about his wishes, he is simultaneously claiming his legal rights. The officers may orient to such rights and obligations in the design of the question by using formats conventionally associated with requests (to waive one's rights) or offers (to claim one's rights). Requests and offers mainly differ in who is presented as the beneficiary – the one possibly gaining something – of the proposed action, requests presenting the speaker as the beneficiary and offers presenting the recipient as the beneficiary (Clayman and Heritage 2014).

Requests and offers typically differ in format (Couper-Kuhlen 2014). One prototypical format for making requests is asking about the ability or willingness of the recipient to perform some action, typically 'can you X' or 'will you X'. The question format orients to potential contingencies or obstacles to performing the action and thereby offers the interlocutor the option of declining (Curl and Drew 2008). Offers are instead typically implemented by questions concerning the recipient's needs and desires, such as 'do you want/need X?', or a conditional clause in which the speaker takes on the obligation to perform some action, e.g., 'if you want, I can/will do X' (Curl 2006).

Different social actions involve various degrees of response bias, or preference for one response option over the other (Sacks 1987). The conversation analytic concept of preference is not a psychological one but a structural one, describing how different social actions make a certain type of response normatively expectable. Polar ('yes/no') questions that are purely information-seeking do not necessarily imply a preference for either a 'yes' or a 'no' (Robinson 2020a). Requests and offers, by contrast, imply a clear preference for acceptance or agreement as a response (Schegloff 2007; Kendrick and Torreira 2015).

In addition to the structural features of the initiating social action, the context contributes to determining the preference for one response option over the other (Pomerantz and Heritage 2012). The institutional context of the police interview as such involves a general preference for suspects to cooperate. The suspect's answers to questions about invoking legal rights have consequences for progressivity: it is preferable for the accomplishment and success of the investigative interview that a suspect waives his legal rights and agrees to talk to the police and gives a statement. Below, we distinguish between questions addressing the right to remain silent and those concerning the right to defence counsel. In terms of institutional preference and progressivity, the outcome of answers to these questions may be different: a positive response may either constitute a waiver or the invoking of a right, depending on which right it concerns and on the design of the question.

Producing a preferred response may be done quickly and easily by merely producing a positive response token, such as 'yes'. Producing a dispreferred response, by contrast, involves more interactional work. The actual disagreeing or rejecting response is generally delayed by pauses, hesitation or particles, it is usually hedged or downgraded, and it is often accompanied by explanations or excuses that account for the negative response (Pomerantz 1984). This means that alternative ways of formulating questions about invoking one's rights have important consequences for the suspects' opportunities to claim their rights freely and independently. In the following, we analyse how questions about rights are formulated and which preferences they imply.

## Data and methods

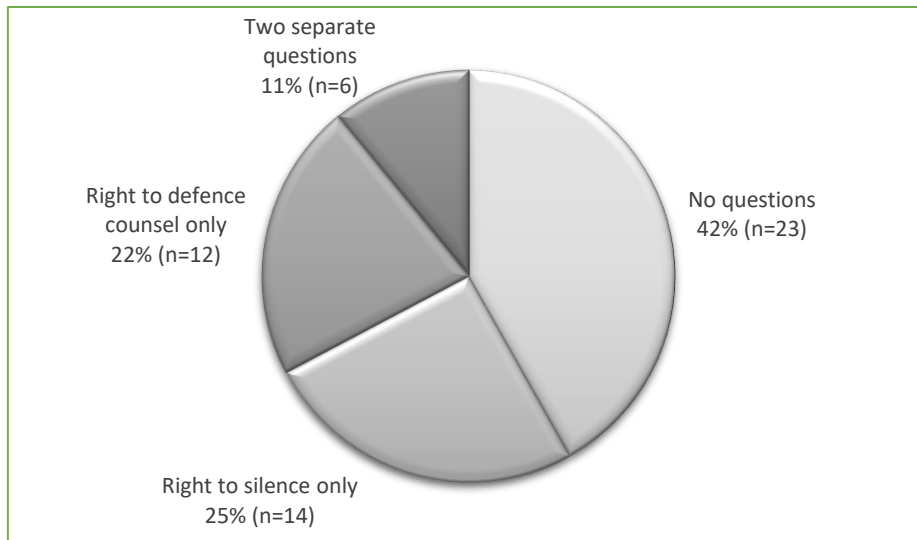
The data set consists of 55 audio and video recordings of investigative interviews with suspects, conducted in the Oslo Police District between 2016 and 2020. The data come from the project 'Communicating Rights in Police Investigative Interviews' at the Centre for Multilingualism in Society across the Lifespan, University of Oslo. Access to the recordings has been granted by permission of the Director of Public Prosecutions (Riksadvokaten), the Norwegian Centre for Research Data (NSD), the Data Protection Officer (Personvernombudet) at the University of Oslo, and Oslo Police District (Oslo politidistrikt). The suspects are juveniles and adults questioned in relation to offences of different types and gravity. The interviewees include both native speakers and speakers of Norwegian as a second language. For the purpose of this study, we do not explore further any differences at the level of age, gender and language background, or differences related to the type and gravity of the offence or other contextual factors. Rather than focusing on the potential role of sociological variables in the design of questions, our interest here lies in the design of questions in the sequential organisation of the interview's introductory phase.

The study employs conversation analysis as a method. This approach explores the significance of both the linguistic composition and the sequential position of talk units in the organisation of interaction (Schegloff 1995). Thus, when analysing the introductory phase of the interviews, we pay particular attention to how the investigators construct their questions and other formulations oriented towards the suspects' stance-taking and at what point this happens. The identification of the units of analysis is preceded by a detailed transcription and investigation of the introductory phase in each interview. The transcriptions of excerpts provided in the article follow conventions developed by Jefferson (2004, see Appendix).

## Distribution of questions

Asking explicit questions requiring suspects to take a stance on their legal rights is the most explicit way in which police officers may invite them to make a decision. As a first step in the analysis, we start by mapping out the distribution of questions across the 55 interviews in the data set (see Figure 1).

Figure 1: Frequency distribution of questions in the data set (n = 55).



As shown in Figure 1, in only one out of nine interviews on average are suspects asked explicitly to take a stance as to both whether they want to give a statement and whether they want to obtain the assistance of a defence counsel. In 26 cases, the interviewing police officer asks just one question, inviting the suspect to make a decision either on his right to remain silent (14 cases) or on his right to obtain legal counsel (12 cases). The final 23 interviews do not contain any explicit questions to the suspect about exercising his legal rights. However, it should be noted that in some cases the absence of a question can be explained by contextual factors. In nine interviews, a defence counsel was already in the room, so that asking about the wish for legal assistance is not relevant. Out of those nine cases, three do include a question concerning the right to silence, whereas in six of them no questions were asked at all. Finally, in one interview the suspect claims his right to defence counsel, making it clear that he will not give a statement, thus a question addressing the right to silence becomes redundant. This is actually the only case of a suspect invoking his legal rights rather than agreeing to go through with the interview.

## Question design

In just over half of the interviews in the data set, suspects are asked either one or several questions explicitly inviting them to take a stance on their legal rights. In this section, we investigate such questions more closely, concentrating specifically on whether they involve preference for one response option over the other. We start with questions concerning the right to remain silent and then proceed to questions about legal assistance.

### The right to remain silent

In about a third (20 out of 55) of all the interviews in the dataset, suspects are asked an explicit question on whether they want to give a statement to the police. There is variation in the design of these questions, yet most of them are remarkably similar. Table 1 provides an overview of the most common question designs in the dataset.



Table 1: Variation and frequency of questions addressing the right to silence

Question type	Question design	n = 20
Willingness question	Er du villig til å forklare deg? Are you willing to give a statement?	14
	Mitt spørsmål er om du er villig til å forklare deg. My question is whether you are willing to give a statement.	
	Er det sånn at du er villig til å forklare deg? Is it so that you are willing to give a statement?	
Volition question	Ønsker du å forklare deg? Do you wish/want to give a statement?	5
	Spørsmålet er om du har lyst til å forklare deg. The question is whether you feel like giving a statement.	
Other	Går det fint for deg at vi prater sammen nå? Is it okay for you that we talk now?	1

As shown here, investigators design their questions in several different ways. Importantly, this variation reveals two predominant patterns. The first and most common type of questions ask the suspect whether he is ‘willing’ (Nor. villig) to give a statement, whereas a second common type is a volition question inquiring whether the suspect ‘wishes’ (Nor. ønsker) to do so. To be sure, the way in which these questions are realised shows further variation in, for example, the use of question frames such as ‘the question is’ and interrogative clefts like ‘is it so that’. Analysis of such variation is beyond the scope of this article but is a relevant topic for further research. The examples below illustrate how these two patterns function interactionally with respect to response preference.

The first example illustrates the most common question format for asking suspects to take a stance on their right to silence, which is used in 14 out of 20 instances. Extract (1) starts at the end of the introductory phase of the interview, after the police officer has informed the suspect about his legal rights.

Extract (1)

1	P	e: men- men før vi begynner så::
		uh but- but before we begin
2		(0.5)
3		e:: er du villig til å forklare deg i dag?=-

		uh are you willing to give a statement today?
4	S	=↑ja ↑ja= yes yes
5	P	=[ja, ] yes,
6	S	[↑ja/↑jæ] (vil-) e: yes (want-) uh
7		(0.4)
8	P	det er bra.= that's good.

The design of the question in line 3 makes relevant a yes/no answer, with a preference for the former. Questions about the recipient's willingness constitute a common format for requests and cast the speaker in the role of beneficiary (Clayman and Heritage 2014: 57). Asking whether the other is 'willing' to cooperate creates a strong preference for 'yes' as a response (cf. Sikveland and Stokoe 2016). Using this type of question shifts the focus away from the question's actual topic or aim (to establish whether the suspect wants to give a statement) and onto the suspect's attitude of cooperativeness. It is inherent in the institutional context of the police interview that cooperating with the police is generally preferred; the use of this attitudinal adjective here further strengthens this preference by explicitly addressing the suspect's 'willingness' to be interviewed.

The use of this particular wording in questions about the right to remain silent is not coincidental: there is clear resemblance to the official wordings in the law (Criminal Procedure Act § 232; Prosecution Instructions § 8-2), professional literature (e.g., Bjerknes and Fahsing 2018) as well as the police's interview manuals (cf. Bjerknes and Williksen 2015), which all contain this same phrase about suspects being 'willing to give a statement' (Nor. villig til å forklare seg). The observation that in 14 out of 20 instances in our data police officers design this question using wordings from legal and procedural texts suggests that such official wordings are important and consequential for interviewing practice.

The suspect's response in line 4 aligns with the expectation and preference displayed in the police officer's question, confirming his willingness to give a statement. It is produced in a preferred format, without any delay, hedging or accounts. Rather than a single positive response, it is a multiplied 'yes'. Such 'multiple sayings' have been found to express a stance that the prior speaker has 'persisted unnecessarily in the prior course of action and should properly halt [the] course of action' (Stivers 2004: 260). In this context, this amounts to expressing a view that the question was unnecessary or that the answer is obvious. The police officer subsequently produces a positive evaluation of this decision ('that's good') in her receipt of the answer (line 8), which displays an orientation to the suspect's choice as the preferred alternative. Such positive assessment of the suspect's decision further demonstrates an underlying preference for waiving one's rights and agreeing to give a statement.

Extract (2) exemplifies the use of another type of explicit question, variations of which we find in five interviews in the data set. The police officer here has told the suspect that she has one question to ask him, but that she will inform him of his legal rights first:

Extract 2

1	P	.hH e: å det er jo det at=e: eh (.) du ikke har no plikt .hH uh and that is that uh uh you do not have any obligation
2		til å forklare deg for politiet? to give a statement to the police
3		(0.8)
4	S	↓mhm, mhm
5		(0.4)
6	P	men ønsker du å svare på det spørsmålet jeg har? but do you wish to answer this question I have
7		(1.2)
8	S	.hH ja: jeg vil gjerne hjelpe (hva-) deg med den saken .hH yes I would like to help (wha-) you with that case
9		(så: om) så je:g vil (0.3) .h at (det) skal (væ-) ta en beslutning (so if) so I want (0.3) that (there) will (be-) take a decision
10		(man ta en) beslutning i denne saken (det som) (take a) decision in this case (what is)
11		(0.9)
12	S	(så her kan jeg) (.) jeg (skal) jo svare på det (du sier.) (so here I can) (.) I (will) answer to what (you're saying)
13		(0.3)
14	P	↓ja. yes

The question in line 6 requires the suspect to respond and take a stance. It enquires about the interlocutor's 'wishes', a format conventionally used to make offers. In response, the suspect does not merely state his decision ('yes', line 8), but adds that he wants to 'help with the case' (8) and 'can answer' (12) in order for the police to be able to 'make a decision in the case' (9–10). This shows that the suspect orients to the police officer as the beneficiary, whom he wants to 'help', and with that, that this is not a traditional, unambiguous offer, but rather it functions as a request that involves a preference for acceptance. The suspect's expanded response in lines 8–12 is also interesting in the sense that this type of explicit expression of commitment is a conventional (and normative) form of a positive response to requests for future action (Lindström 2017). As such, the suspect seems to orient to an underlying directive intention, perhaps evoked by the general institutional preference for going through with the interview. The example here thus shows us that questions inquiring what the suspect 'wishes' to do rather than whether he 'is willing' to do something involve a weaker preference for a positive response as they do not build on psychological factors such as cooperation (cf. Extract (1)); the suspect's response, however, does reveal that, despite its format as an offer, the question is treated as a request in which the police are cast as the beneficiary.

The examples discussed above illustrate how explicit questions invite and require suspects to take a stance as to whether they want to give a statement or exercise their right to remain silent and terminate the interview. The majority of these questions include the attitudinal adjective 'willing' and thereby involve a clear preference for providing a 'yes' answer, thus steering the suspects towards waiving their rights. The questions formulated with 'wish' take on characteristics of the format of an offer and thereby involve a weaker preference for agreement, but in context the suspects still treat them as requests rather

than offers, probably due to a general institutional preference for agreeing to speak to the police.

#### The right to legal assistance

When interviewed by the police, suspects are also informed of their right to obtain assistance from a defence counsel. In 18 out of 55 interviews (33%) in the data set, police officers ask an explicit question requiring the suspect to take an active stance on this right. In 9 interviews (16%), a lawyer is already present, which makes this question irrelevant. In the remaining 28 interviews (51%), suspects are not asked to make a decision. Table 2 presents an overview of question designs concerning legal assistance in the data.

Table 2: Variation and frequency of questions addressing the right to defence counsel

Question type	Question design	n = 18
Positive volition question	Vil du ha en forsvarer? Do you want to have a defence counsel?	8
	Ønsker du en forsvarer? Do you wish (to have) a defence counsel?	
Positive question with a negative polarity item	Er du villig til å forklare deg uten forsvarer? Are you willing to give a statement without a defence counsel?	7
	Ønsker du å forklare deg uten forsvarer? Do you wish to give a statement without a defence counsel?	
	Er det greit for deg å forklare deg uten forsvarer (eller)? Is it fine for you to give a statement without defence counsel (or)?	
Negative declarative	Spørsmålet til deg er om du er komfortabel med å ta det avhøret uten å ha en forsvarer her nå? The question is whether you are comfortable doing this interview without having a defence counsel here now?	2
	Dere ønsker ikke å ha forsvarer (...) eller? You do <b>not want</b> to have a defence counsel (...) or?  Du har en forsvarer fra før men ønsker ikke å ha med han i dag? You have an attorney from the last time but you do <b>not</b> wish to bring him along	

	today?	
Wh-question	Du sa i stad at du ikke ville ha med din forsvarer. Hvordan stiller du deg til det nå? You said earlier that you did not want to bring along your defence counsel. What is your stand on this now?	1

As shown here, the investigators design their questions in several different ways. Importantly, this variation reveals two predominant patterns. The first one consists in constructing positive volition questions with verbs like ‘wish’ (Nor. ønske) or ‘want’ (Nor. vil), while the second one makes use of positive questions (of different types) with the negative polarity item ‘without’ (Nor. uten). We also found two examples of negative declaratives asking the suspect whether he ‘does not wish’ (Nor. ønsker ikke) to have a lawyer: these are offers formatted as a negative declarative, involving preference for a ‘no’ answer (Robinson 2020b; Heritage 2010). Again, as shown in Table 2, there is further variation in question design, but for this study we limit our analysis to the two most common patterns, asking how these function interactionally with respect to response preference.

Extract (3) shows how a police officer invites the suspect to take a stance by asking an explicit volition question. There are seven other examples in the data set of a similar question, yet this extract shows the only case in which the suspect accepts the offer to call in both an interpreter and a lawyer, and consequently the interview stops. The sequence in Extract (3) starts after the police officer has informed the suspect about his rights and the nature of the case in which he has been identified as a suspect.

#### Extract (3)

1	P	e: å så: e spør jeg deg, (v-) #e# er det sånn, uh and then uh I ask you (w-) uh is it so
2		trenger du tolk do you need an interpreter
3		når vi: tar det avhøret her? when we take this interview here
4		(0.6)
5	S	tolk ja. interpreter yes
6	P	du trenger tolk. you need an interpreter
7	S	ja.= yes
8	P	=åkej. (0.3) vil du ha advokat (.) til stede?= okay (0.3) do you want to have a lawyer (.) present=
9	S	=(adv-) =(lawy-)
10		(0.3)
11	P	du vil ha tolk og advokat. you want to have an interpreter and a lawyer.
12	S	j[a.] yes

13	P	[å ]kej.
		okay
14		(0.3)
15	P	da:: (.) tolker jeg det slik at du er ikke villig
		then I take it so that you are not willing
16		til å la deg avhøre her og nå
		to be interviewed here and now
17		e::: onsdag ((DATE TIME))
		uh wednesday ((DATE TIME))
18	S	ja.
		yes
19	P	åkej. (0.3) det er greit. (.) da: trykker jeg bare på stopp.
		okay (0.3) that is fine (.) then I just press stop

In line 8, the police officer asks an explicit question requiring the suspect to take a stance as to whether he wants to obtain the assistance of a defence counsel. The question constitutes an enquiry into the suspect's wishes and thus conforms to a standard format for offers ('do you want X?'). Also, the import of the question qualifies it as an offer, as what is enquired about is a right that is in the interest of the suspect, treating him as the beneficiary of the action. This normally makes acceptance the preferred response, and we can see here that the suspect produces an acceptance in a preferred format, without any delay, hedging or accounts. It is not quite clear what the response actually is, but it may be heard as the start of a repetition of the word 'lawyer' (Nor. advokat). In any case, the police officer treats it as an affirmative answer by displaying this interpretation in an understanding check (line 11), and the suspect confirms it in line 12. Note that the police officer in this case does not produce a positive assessment (as in Extract (1) above) but merely an acknowledgment token displaying acceptance ('okay'). Also, the assessment at the closing of the whole sequence (line 19) is a low-grade positive assessment token (greit 'fine'), which is in contrast to the high-grade assessment tokens (such as 'brilliant') that are conventionally used for sequence closing in institutional encounters (Antaki, Houtkoop-Steenstra and Rapley 2000). The police officer thus seems to orient to this response as less preferred.

After the first 'okay', the police officer produces a formulation of gist (Heritage and Watson 1980) in lines 15–17, displaying her interpretation of what the participants have now agreed on. In doing so, she translates the suspect's answers to her questions into their legal meaning and implications. Interestingly, she interprets the response as a case of 'willingness' to be interviewed, even though this was not the actual wording of her question. This clearly demonstrates that the investigator directly orients to the relevant provisions in the Criminal Procedure Act and the Prosecution Instructions by using the official phrasing that is written there. Consequently, she concludes the interview by registering formally that the outcome of this conversation is that the suspect decides to exercise his legal rights and chooses not to give a statement.

The next excerpt is an example of an explicit question concerning legal assistance formed with a negative polarity item, namely 'without' (Nor. uten).

#### Extract (4)

1	P	e: å du har åsså rett til å la deg bistå
		uh and you also have the right to be assisted
2		(0.5)

3		av forsvarer?
		by defence counsel
4		(0.8)
5		åsså under avhør.
		also during interrogation
6		(3.6)
7	P	e: går det greit for >deg å for<klare deg
		uh is it fine for you to give a statement
8		uten forsva↑rer el[lær?]
		without defence counsel or
9	S	[ja.]
		yes
10	P	ja?
		yes
11		(2.1)
12	P	å:: så=s- (.) kal du::=e gjøres kjent for=e:
		and then you s- (.) hall be informed of uhm

As compared to the question analysed above, this question inverts the polarity by asking whether it is okay for the suspect to give a statement without a defence counsel. The import of the question qualifies as a request in that it invites the suspect to waive his rights in the interest of the speaker, who is thereby the beneficiary of the action. As it additionally constitutes a question about the recipient's willingness to do something, it conforms to a conventional format for requests and thus implies a clear preference for acceptance. The final particle eller ('or') in line 8 may serve to slightly reduce this preference, as it opens the way for disagreement as an alternative response (Lindström 1999). Yet, the suspect can be seen to orient to the preference for acceptance by producing his response in a preferred format, that is, directly, minimally and without delay – in fact, in overlap with the police officer's final eller (line 9).

The two examples have shown how the two most common practices of asking suspects to make a decision differ significantly in terms of preference. Positive volition questions are used as offers to take a stance on the right to defence counsel, working in favour of the suspect and against the institutional preference for interview continuation. Positive questions with negative polarity items (as well as negative questions) do quite the opposite by indicating a preference for continuing the interview without defence counsel.

In this section we have demonstrated how variation in question design may affect the suspect's opportunity to take a free and independent stance on his legal rights. We have shown that in most cases investigators design questions in a way that constrains this opportunity. Such biased questions take the form of willingness questions or questions with negative polarity items. We have also shown that positive volition questions work differently with regard to the two rights. In the case of the right to silence, they imply a preference for accepting to continue the interview ('do you want to give a statement'), and thus for the suspects to waive their right, whereas in the case of the right to defence counsel, they work in favour of invoking the right ('do you want a lawyer'), and thus against the institutional preference for going through with the interview.

### Legitimising and inhibiting stance-taking

Above we have focused on question design in cases where an explicit question is asked. But

beyond the question itself, as well as in the many cases where no questions are asked, the suspects' opportunities to take a stance freely and independently may be influenced by phrasings police officers use while informing them about their rights. The way they present information may indirectly legitimise suspects' taking a stance on the matter or, inversely, discourage it. We will here review some recurrent practices that may legitimise or inhibit stance-taking. One practice that legitimises active stance-taking is to underline the suspect's right to make a free and independent decision (Extract (5)). Practices that work in the opposite direction, that is, discouraging the suspect to make a choice, are of two main kinds. First, we find wordings that refer to the forthcoming interview as an unconditional fact, thereby presupposing that the suspect will agree to give a statement (Extract (6)). Second, we find those that present the options in a way that is biased in favour of waiving one's rights (Extract (7)).

Extract (5) shows the use of words and phrases that legitimise active stance-taking by underlining the suspect's right to make a free and independent decision.

#### Extract (5)

1	P	å så::: >har du in<gen: plikt til å forklare deg
		and uhm you do not have any obligation to give a statement
2		for politiet det er frivillig.
		to the police that is voluntary.
3		(1.8)
4	S	[(tinting)]
		(*)
5	P	[åke:] du har ingen,
		okay you do not have any,
6		(0.3)
7	S	m.
		hm
8		(.)
9	P	plikt til å forklare deg e: nå: til avhør
		obligation to give a statement uh now in interrogation
10	S	↓m: =
		hmhm
11	P	-det er frivillig. du velger selv
		it is voluntary you choose yourself
12		om du vil=e: forklare deg for politiet
		if you want uh to give a statement to the police
13		(0.3)
14	S	↓m: :
		hmhm

The sequence here contains elements that legitimise active stance-taking by the suspect. The right to remain silent is repeated in a series of reformulations (giving a statement is 'no obligation'; it is 'voluntary'; it is at one's 'own choice'). This adds emphasis and ascribes importance to this specific piece of information. Importantly, these reformulations change the focus from the negative formulation in the law of something the suspect does not have (an obligation) to a positive formulation of something he does have (a choice). This extract thus offers an example of how police officers may present information to suspects in a way that clearly asserts the legitimacy of claiming one's rights, although leaving it up to the



suspect to take the initiative to do so. The police officer does, however, leave little room for the suspect to take a turn to announce his decision and does not wait for the suspect to elaborate on his minimal contributions (lines 7, 10 and 14) and an inaudible response (line 4). And the suspect does not claim his rights here or later in the interview. While we would argue that the police officer in Extract (5) thus in one way legitimises active stance-taking, this is not evidently sufficient as a way of eliciting a decision from the suspect.

By contrast, a practice that may discourage suspects from claiming their rights is talking about the forthcoming interview as an established fact and not as something yet to be decided. Extract (6) starts from the end of the rights communication phase, in which the police officer has stated the suspect's legal rights directly quoting from the law without reformulating, leaving breaks or asking questions. She then informs him about the procedure for the interview, before the participants move on to the suspect's statement.

#### Extract 6

1	P	.hh e:m: du skal få lov til å gi din:=e .hh um you shall get to give your uh-
2		(0.3) f- først kan du begynne å forklare ditt (0.3) f- first you can start to explain your
3		(0.9)
4		forhold; (0.3) til ((NAVN))? relation (.) to ((NAME))?
5		(0.3)
6	S	jeg:=e I uh
7	P	e s:å etterpå så kan du få lov til uh then afterwards you can get to
8		å komme med din frie forklaring; come with your free statement
9		(.)
10	S	[jeg ( )] I ( )
11	P	[rundt dette] her; regarding this here
12		(0.3)
13	S	m. m
14		(0.4)
15	P	å så kommer jeg til å stille noen °spørsmål°. and then I am going to ask some questions
16	S	j:a, yes
17		(0.5)
18	P	.hh er det noe du lurere på; .hh is there anything you are wondering about
19		(0.4)
20	S	n:eps. nope
21	P	næ. (.) har du noen spørsmål rundt rettighetene dine; no (.) do you have any questions regarding your rights
22		(.)

23	S	nei:
		no
24		(0.3)
25	P	nei.
		no
26		(0.5)
27	P	*så får du bare begynne når du er klar.*
		then you can just begin when you are ready

The police officer here gives instructions to the suspect on what will happen next: what he will be allowed to do ('you shall get to'; 'you can start to'; 'you can get to'), and what she herself will be doing ('I am going to'). These phrases presuppose that the interview will take place, not recognising that if the suspect chooses to exercise his right to remain silent, this plan will not actually be executed. Note how the suspect's attempts at taking the turn in lines 6 and 10 are ignored and overruled by the police officer, who holds the floor and does not leave room for any response. The questions in lines 18 and 21 do give the suspect the opportunity to make a contribution. However, the questions only concern his understanding of the rights and not his stance or decision on exercising them. Consequently, the suspect's opportunities to claim his legal rights are constrained by the officer taking for granted his willingness to give a statement. In line 27, the officer then instructs the suspect to begin his statement, and, with that, treats the introductory phase as concluded and the suspect's legal rights as waived.

Another practice discouraging suspects from choosing to claim their rights is presenting one of the options as more advantageous than and preferable to the other, as illustrated in Extract (7).

#### Extract (7)

1	P	så har man ingen forklaringsplikt til politiet.
		and one does not have any obligation to speak to the police
		(0.7)
2		e: men=e hvis du ønsker ↓det så: ønsker jeg jo å lytte på deg
		uh but if you want to then I want to listen to you
3		å høre di:n versjon av sak:en sånn at=e du får .h e:: sagt
		and hear your version of the case, so that you get to say
4		hvordan du har opplevd det hele å: belyst=e: det fra din side.
		how you have experienced it all and elucidate it from your side
5		(0.8)
6	P	m:. (0.5) er det sånn at du ønsker å forklare deg her i dag?
		hmm (0.5) is it so that you wish to give a statement here today

The suspect is here informed that giving a statement will give him the opportunity to tell his side of the story and make a case for himself, suggesting that not doing so will deprive him of such opportunity. The investigator does not mention possible reasons for or advantages of refraining from giving a statement, so that not doing so is portrayed as less preferable. This explicitly discourages the suspect from claiming his rights.

In conclusion, police officers may influence suspects' opportunities to take a free and independent stance on their rights by presenting information in ways that either legitimise or inhibit the suspects' active stance-taking or exercising of their rights. Even when the

police officers do not ask a direct question, they may legitimise active stance-taking by underlining that the suspect has a right to choose. By contrast, even when asking explicit questions, they may discourage suspects from exercising their rights by presupposing their willingness to proceed with the interview and by presenting the option of waiving their rights as preferable.

## Discussion and conclusions

The purpose of this study was to examine suspects' opportunities to freely and independently take a stance on exercising their legal rights in police investigative interviews. We found that in the majority of interviews (58%) in the data set, police officers asked one or more explicit questions that invite the suspects to decide whether they want to exercise their right to silence and/or their right to defence counsel. However, in only 11% of the interviews were suspects asked two separate questions inviting them to take a stance on each of the rights. In all other cases we saw police officers asking one question inviting a decision on either the right to remain silent (25%) or the right to legal assistance (22%), or no questions at all (42%).

We found that, when used, questions are usually designed in a way that involves a preference for one response option over the other. First, where police officers ask suspects explicit questions inviting them to make a decision on whether or not they want to give a statement, these are in all cases designed with a preference for waiving this right and going through with the interview. In its strongest version, this preference is mainly manifested by the use of the attitudinal adjective 'willing', which frames the issue as a question about being cooperative. The other common way to design this question, enquiring about the suspect's 'wish' to give a statement, involves a weaker preference, but we find suspects' responses to show that it may nonetheless function as a request rather than as an offer. Furthermore, since both volition and willingness questions about giving a statement are formatted positively, invoking the right and declining to give a statement would require a 'no' answer. Due to a general dispreference for rejection, it will require more interactional effort for the suspect to give such an answer. Consequently, the design of these questions implies a clear preference for a positive response and thus a waiver of the right to remain silent.

Second, explicit questions inviting suspects to take a stance as to whether they want to exercise their right to defence counsel showed more variation in terms of their design and response preference. One common question type using a polar interrogative ('do you want a lawyer') conforms to a conventional format for offering and presents the suspect as the beneficiary, and thereby involves a preference for accepting the offer and using one's legal right to defence counsel. Interestingly, this is a practice that works against the institutional preference for conducting the interview because a positive response would halt the progress of the event. A second type of question does the opposite: The use of negative polarity items (such as 'without' in 'is it okay for you to do this without a lawyer') displays a preference for a 'yes' response and thereby steers towards waiving one's right and thus continuing the interview. In sum, in order to invoke his right to defence counsel, the suspect needs to respond with a 'no' answer to a question with a negative polarity item (which is dispreferred) but with a 'yes' answer to a volition question (which is a preferred answer). Thereby, the choice of one question format over the other has important consequences for suspects' opportunity to claim their rights freely and independently.

Beyond the use of questions, suspects' opportunities to take a stance are also influenced by phrasings that police officers use while informing suspects about their rights. On the one hand, police officers may underline the suspect's right to make a decision and thereby legitimise active stance-taking. This may be done by reformulating the right to silence from a non-obligation to do something to a right to choose to do something, and orienting the suspect towards independent decision-making. On the other hand, there are practices that work in the opposite direction, that is, discouraging the suspect from making a choice. First, when police officers refer to the upcoming interview procedure as an unconditional fact, as a plan rather than a contingent course of action, they presuppose that the suspect will agree to give a statement. Second, interviewing officers may present the different options in a way that is tilted in favour of giving a statement and doing so without a defence counsel, by for example specifying the advantages of this alternative over claiming one's legal rights.

Taken together, these results show a lack of procedural consistency in the Norwegian investigators' practices of providing suspects with opportunities to decide on their legal rights. As we have demonstrated, in most cases these opportunities are limited, either because suspects are not asked to take a stance on their rights (both or at least one of them) or because they are asked to do so in a way that may steer their response towards an institutionally preferred outcome, which is the continuation of the interview. In fact, the majority of questions asked involve a bias towards waiving one's rights, thereby influencing and restraining suspects' freedom of choice. And although some officers explicitly inform the suspects that they are free to choose whatever option they like, others provide information about the interview that either presupposes willingness to talk or presents the option of waiving one's rights as preferable to claiming them.

Our findings add two important aspects to previous research on the communication of legal rights. First, not asking suspects to make a decision on their rights is yet another way of downplaying legal rights' significance and treating this whole introductory phase as a pure formality. Thus, although such questions may indeed serve to automatise consent (Rock 2016), their absence may result in suspects' not even being oriented towards it. For interviewing investigators and other practitioners, this may be difficult to observe or be aware of. It may seem as though suspects are given the opportunity to take a stance just by virtue of them being informed of their right to do so, and the absence of a response may then be interpreted as a waiver of legal rights. As Ainsworth (2008) points out, suspects may want to invoke their right to remain silent or their right to defence counsel but not have the vocabulary to do so; and police officers may assume that if a suspect does not want to give a statement, he will at his own initiative announce that. Second, question design and the employment of other consent-eliciting practices may be consequential for suspects' decisions. This confirms previous observations that the use of certain wordings may tilt the suspect in favour of waiving his rights as a more beneficial choice (e.g., Pavlenko 2008; Rock 2007). Additionally, our analysis reveals that interviewing officers often use wordings that stay very close to the official text found in the law, for example when referring to the suspects' 'willingness' to be interviewed. This shows that the problem of limited opportunities for suspects to claim their rights in police interviews is partly rooted in the Norwegian procedures and regulations.

### Implications for professionals

Our analysis has demonstrated that the variation in terms of both procedural conduct

(asking vs not asking a question) and question design (willingness vs volition questions) is connected to the legal regulations that investigators rely on in the first phase of the interview. The routine of asking suspects to make a decision on their rights is not officially prescribed as obligatory in Norway, which seems to explain why in more than two out of five cases in our data suspects are not given an explicit opportunity to do so. When not being asked, suspects do not in any of those cases announce a decision on their rights at their own initiative. Thus, our recommendation for lawmakers is that future changes in the law or procedural regulations concerning police interviews should include the practice of asking suspects whether they want to give a statement and whether they want to have a lawyer present. This would secure the inclusion of such questions in the communication of rights. Until then, it is crucial that police interview instructors emphasise that this practice should be an inherent part of the presentation of each right.

However, as we have shown in the analysis, apart from asking suspects to take a stance on their rights, it is equally important to avoid formulating the question in a way that reveals which response is the preferred one. This happens when the investigator designs the question as an attitudinal construction of the type 'are you willing to give a statement?' (Nor. *er du villig til å forklare deg?*), which mirrors the wordings used in the Norwegian law (the Criminal Procedure Act and the Prosecution Instructions) but biases the answer towards acceptance. For the right to defence counsel, questions with negative polarity items pose a similar risk. A solution is to use positive and less biased interrogatives that refer to the suspect's volition (e.g., 'do you want X?'). Such practices are much more likely to be effective if they are employed consistently so that every suspect will be given an opportunity to take a stance on his rights. In addition, we have shown that other practices in formulating the rights themselves may legitimise or inhibit stance-taking. Based on an understanding that language choices produce bias, we argue that practices crucial for securing an effective communication of rights must be further standardised through both regulations and training.

To conclude, we suggest several recommendations for communicating rights in investigative interviews. In doing so, we refer to and build upon recommendations formulated by the Communication of Rights Group (2016) specifically for communicating rights to non-native speakers. Importantly, these suggest that legal rights should be formulated in plain, standardised language, that the different rights should be communicated individually, and that suspects' understanding of their rights should be checked, not by using yes/no questions, but by asking suspects to explain in their own words their understanding of each right and of the risks of waiving it. Our analysis has touched upon some of the same topics, while also pointing at further problematic practices related to the use and design of questions following the communication of rights, as well as to certain ways of communicating them that may inhibit stance-taking by suspects. Based on these findings, we would recommend the following:

1. Always ask the suspect to make a decision on waiving or claiming the legal rights that you have presented to him.
2. Ask separate questions after presenting each right and having checked that it has been understood.
3. Avoid asking questions about the suspect's 'willingness' to give a statement.
4. Avoid asking questions with negative polarity items (e.g., 'without') or negated questions (e.g., 'you don't want X?').

5. Use questions that ask the suspect what he wants (as opposed to what he is 'able' or 'willing' to do).
6. While informing the suspect about his rights, present the different options (waiving or claiming rights) as even alternatives without favouring one or the other.
7. When informing about the interview procedure, do not presume that the suspect wants to go through with the interview.

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#### Note

1. KREATIV is an acronym for *Kommunikasjon, Rettssikkerhet, Etikk og empati, Aktiv bevisstgjøring, Tillit gjennom åpenhet, Informasjon, Vitenskapelig forankring* (Communication, Rule of law, Ethics and empathy, Active awareness, Trust through openness, Information, Valid scientific foundation).

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## Appendix: Transcription key

Symbol	Description
(.)	A micropause – a pause of no significant length.
(0.7)	A timed pause – long enough to indicate a time, in seconds.
[ ]	Square brackets show where speech overlaps.
>word<	Arrows showing that the pace of speech has quickened.
<word>	Arrows showing that the pace of the speech has slowed down.

word-	A dash indicating a cut-off, typically a glottal stop in phonetic terms.
(word)	Unclear/uncertain word or section; no plausible candidate if empty.
*word (* )	Non-existing word Untranslatable
<u>underlining</u>	Denotes a raise in volume or emphasis.
↑word	Rise in intonation
↓word	Drop in intonation
	Markers of final pitch direction at TCU boundary:
.	Final falling intonation
,	Slight rising/continuing intonation
¿	Medium (falling-)rising intonation (a dip and a rise)
?	Sharp rising intonation
°word°	Degree sign indicates syllables or words distinctly quieter than surrounding speech by the same speaker
CAPITALS	Louder or shouted words.
=	Placed at the end of one turn and the start of the next, indicating that there was no pause between them (latching).
:::	Colons indicate a stretched sound: the more colons, the longer the sound stretch.
.hhh	Inbreath. Duration indicated with fewer or more letters.
hhh	Outbreath. Duration indicated with fewer or more letters.
#	Hash sign indicates creaky voice.