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## ARTICLES

# CONCEPTUALIZATIONS OF LEGALESE IN THE COURSE OF DUE PROCESS, FROM ARREST TO PLEA BARGAIN: THE PERSPECTIVES OF DISADVANTAGED OFFENDERS

SHIV NARAYAN PERSAUD\*

## INTRODUCTION

“Equal protection” and “due process of law” are constitutional guarantees tenaciously embraced by all Americans.<sup>1</sup> While numerous studies focused on how these guarantees play out in the lives of offenders, few sought to examine these guarantees from the standpoint of offenders,<sup>2</sup> particularly those from disadvantaged socio-economic backgrounds.<sup>3</sup>

Guaranteed under the Fourteenth Amendment of the U.S. Constitution, the Equal Protection Clause makes clear, in part, that, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

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1. “Americans believe that people should be entitled to a series of hearings and other procedural steps in which their guilt is proven, before they should be subjected to punishments such as the loss of liberty through incarceration.” GEORGE COLE & CHRISTOPHER SMITH, *CRIMINAL JUSTICE IN AMERICA* 230-31 (5th ed. 2008).

2. See JEFFREY ROSS & STEPHEN RICHARDS, *CONVICT CRIMINOLOGY* 349 (Wadsworth 2003). In recent years, a group of Criminologists began in earnest to focus their efforts on examining the criminal justice system from within, from the perspectives of people who experienced life behind bars. Identifying themselves as Convict Criminologists, these scholars argued that those claiming to be experts in criminal justice have had “little or no firsthand experience with how human beings experience the criminal justice system [and] simply do not comprehend the profound impact imprisonment has on many individuals.” As a result, a truly informed understanding of how the legal processes actually play out in the lives of people is yet to be fully realized. *Id.*

3. As used in this paper, “disadvantaged socio-economic” background refers to the poor whose income falls below 200 percent of the Federal poverty guidelines. The term is used synonymously with the term “indigent.”

law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>4</sup>

This Constitutional guarantee of equal protection afforded to citizens under the Fourteenth Amendment prohibits States from denying or depriving any person protection for any reason, whether as a result of their race, class, age, gender, religion, national origin, disability, etc.<sup>5</sup> It also provides for the right to “due process of law,” a right also guaranteed under the Fifth Amendment.<sup>6</sup>

The U.S. Constitution actually contains two due process of law clauses. The Fifth Amendment reads, “No person shall . . . be deprived of life, liberty, or property without due process of law . . . .” Due to an early Supreme Court ruling which held that the Bill of Rights restricts only the actions of the national government, a second due process clause was included in the Fourteenth Amendment which was adopted shortly after the Civil War. That amendment reads, “nor shall any State deprive any person of life, liberty, or property without due process of law. . . .” There was widespread belief that another due process clause was needed to protect the newly freed slaves from vindictive actions at the hands of southern state governments.<sup>7</sup>

It seems clear that the Constitutional guarantee of “due process of law” is not only a function of the national government, but that of states and local governments as well.<sup>8</sup> National and state governments, in the promulgation and implementation of policies, must take every precaution not to deprive anyone of life, liberty or property.<sup>9</sup>

Due process . . . does not restrict the State to any particular mode of procedure. It protects against the exercise of arbitrary governmental power and guarantees equal and impartial dispensation of law accord-

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4. U.S. CONST. amend. XIV, § 1.

5. See JAMES CALVI & SUSAN COLEMAN, *AMERICAN LAW AND LEGAL SYSTEMS* 150-51 (4th ed. 2000) (arguing that the Equal Protection Clause “was designed to prevent discrimination against the newly freed slaves,” and later expanded by the Supreme Court, through a series of rulings to include such things as race).

6. See U.S. CONST. amend. V.

7. CALVI, *supra* note 5, at 146-59.

8. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982).

9. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982) (citations omitted) (“In 1883, [the Supreme Court] affirmed the essential dichotomy set forth in [the Fourteenth] Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, ‘however discriminatory or wrongful,’ against which the Fourteenth Amendment offers no shield. [Later, the Court went on to state that c]areful adherence to the ‘state action’ requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order . . . . First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.”).

ing to the settled course of judicial proceedings or in accordance with fundamental principles of distributive justice.<sup>10</sup>

The right to due process guaranteed through the Fifth Amendment also provides citizens protection against “self-incrimination.”<sup>11</sup> Specifically, the Amendment states that, “No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.”<sup>12</sup> In short, a person should not be forced or pressured into providing self incriminating information.<sup>13</sup> If such a situation occurs, then this would constitute a violation of a person’s Fifth Amendment right.

[The Supreme Court has stated that] the accusatorial system has become a fundamental part of the fabric of our society and, hence, is enforceable against the States . . . . [T]he guarantees of the First Amendment . . . the prohibition of unreasonable searches and seizures of the Fourth Amendment . . . and the right to counsel guaranteed by the Sixth Amendment . . . are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment. In the coerced confession cases, involving the policies of the privilege itself, there has been no suggestion that a confession might be considered coerced if used in a federal but not a state tribunal. The Court thus has rejected the notion that the Fourteenth Amendment applies to the States only a ‘watered-down, subjective version of the individual . . . . What is accorded is a privilege of refusing to incriminate one’s self, and the feared prosecution may be by either federal or state authorities . . . . It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused’s silence in either a federal or state proceeding is justified.<sup>14</sup>

Given that “equal protection” and “due process” are fundamentally constituted in the very fabric of Americans’ daily existence, how do these guaranteed rights play out in the lives of the disadvantaged offenders, especially as they unfold in the course of arrest to plea bargain? In addition, considering that these constitutional rights are

10. *Green v. State*, 247 A.2d 117, 121 (Me. 1968)

11. U.S. CONST. amend. V.

12. *Id.*

13. *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177, 189-90 (2004) (“To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled . . . . [T]o be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information’ . . . . The Fifth Amendment [further] prohibits only compelled testimony that is incriminating [with a real and appreciable apprehension by the] ‘witness [who] reasonably believes [that the disclosure] could be used in a criminal prosecution or could lead to other evidence that might be so used.’”) (citations omitted).

14. *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964).

interwoven into the very core of the American Criminal Justice System, how do they translate into and take on meanings in a complex array of legal dictums? And how comprehensible is the legal language to disadvantaged offenders?

To have some insight into the comprehensibility of the legal language relating to equal protection and due process, this paper will focus on some pertinent terms and phrases commonly used by law enforcement officers and the courts, in the course of arrest to plea bargain, to assess whether they are clearly understood by disadvantaged offenders.

### DISADVANTAGED OFFENDERS AND THE JUSTICE SYSTEM

Comparatively speaking, disadvantaged individuals are arrested and imprisoned at a higher rate and with greater regularity than the non-disadvantaged.<sup>15</sup> Many of these disadvantaged offenders grew out of the Juvenile Justice system that has served as a protection mechanism for the economically privileged.<sup>16</sup>

The juvenile justice system has too long been a disposal unit for children of the poor. The lack of social justice for the poor and minority groups is a grave indictment of our society. At the same time that heavy-handed ministrations of the state have harshly processed the poor, the justice system has worked very hard at saving the 'saved' – the middle class youths who have committed minor offenses.<sup>17</sup>

Armed with empirical information,<sup>18</sup> criminal justice scholars and public advocacy groups alike cite arrest rates and the lack of legal rep-

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15. See RAYMOND MICHALOWSKI, *SOCIAL CLASS, CRIME, AND JUSTICE IN INVESTIGATING DIFFERENCE* 56-73 (2d ed. 2008).

16. Because many states have expanded their juvenile codes, more juveniles have found themselves in adult courts through waivers. See KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE* 184-185 (Pine Forge Press 2000).

The rate of incarceration of lower-class and minority citizens is indeed greater than their higher rates of offending would justify . . . . The fact that such a high percentage of young African American men are behind bars must be understood in terms of what these young men cannot be doing. They cannot be earning a living, attending school, parenting their children, or supporting their partners . . . . [W]e also must wonder whether this experience might not further alienate this group and prevent them from identifying with the society that sent them there.

TODD R. CLEAR ET AL., *AMERICAN CORRECTIONS* 485, 490 (8th ed. 2009).

17. CLEMENS BARTOLLAS & STUART J. MILLER, *JUVENILE JUSTICE IN AMERICA* 536 (4th ed. 2005); see generally JEFFREY REIMAN, *THE RICH GET RICHER AND THE POOR GET PRISON* (8th ed. 2007) (citing numerous studies to show that the poor are arrested, charged and prosecuted at a higher rate than the rich; and that African Americans are arrested, charged, prosecuted and convicted at a higher rate than whites); see also BRIAN J. SMITH, *THE SIGNIFICANCE OF RACE, IN INVESTIGATING DIFFERENCE* 111 (2d ed. 2008).

18. THOMAS P. BONCZAR, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001* 1 (2003), <http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf>. ("About 1 in 3 black males, 1 in 6 Hispanic males, and 1 in 17 white males are expected to go to prison during their lifetime, if current incarceration rates remain unchanged.").

resentation among the principal reasons for the disproportionate number of disadvantaged individuals in the prison system.<sup>19</sup> Rarely assessed as a critical factor in this overrepresentation is the offenders' lack of knowledge and understanding of the language governing the legal system.<sup>20</sup> Although affected by the legal expressions and terminologies associated with "equal protection" and "due process" as they unfold in the course of arrest to adjudication, many disadvantaged offenders seldom disclose their lack of knowledge and understanding of these expressions and terminologies.<sup>21</sup> Most often, they remain lost in the jungle of legalese because they are either discouraged that the system will not take the time to help them understand or believe that the more questions asked only slows down the process of getting them out of the system.<sup>22</sup>

#### CLEAR AND UNDERSTANDABLE LANGUAGE OF LAW

The violation of a suspect's rights to due process has received considerable attention from the Supreme Court.<sup>23</sup> Because of this, states have promulgated policies to safeguard the rights of suspects from the time of arrest onward.<sup>24</sup> Presumably, the legal procedures governing the course of arrest to plea bargain are articulated in a language understandable to the common person.

The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsi-

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19. See BARTOLLAS, *supra* note 17; see generally MATTHEW B. ROBINSON, JUSTICE BLIND? IDEALS AND REALITIES OF AMERICAN CRIMINAL JUSTICE 5-6 (Prentice Hall 3d ed. 2009) (2002) (exploring general injustices in the American criminal justice system).

20. Criminologists and other social scientists regularly make references, or call attention, to the low level of education among disadvantaged prisoners, especially African Americans. Few, however, have focused their analysis on the offenders' actual understanding of the legal language as it applies to them.

21. See ROBINSON, *supra* note 19; see also REIMAN, *supra* note 17.

22. While serving as an assistant public defender and assistant state attorney, I came face to face with many clients who had a lack of understanding of the most basic concepts, especially their fundamental rights and the legal consequences of their actions. The vast majority of individuals whom I represented as a defense attorney often nodded or verbally indicated that they understood the legal process as it was being explained to them. Even though many completed high school, they spoke in sentences replete with colloquial expressions, and seldom made known their lack of understanding of the legal system.

23. *Bartkus v. Illinois*, 359 U.S. 121, 128 (1959) ("Decisions under the Due Process Clause require close and perceptive inquiry into fundamental principles of our society. The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and envired by the best safeguards for disinterestedness and detachment.").

24. *Davis v. Strack*, 270 F.3d 111, 123 (2d Cir. 2001) ("Once states have promulgated laws to define criminal conduct, however, federal due process protects a defendant from conviction unless he is shown in a fair proceeding to have violated those laws.").

ble for conduct which he could not reasonably understand to be proscribed.<sup>25</sup>

In a later decision, the Court further clarified the potential consequences of laws that are not clear by stating that:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing a fair warning. *Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to police [officers], judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.* Third, but related, where a vague statute “abut(s) upon sensitive areas of basic First Amendment freedoms,” it “operates to inhibit the exercise of (those) freedoms.” Uncertain meanings inevitably lead citizens to “steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.”<sup>26</sup>

These “potential consequences” have a tremendous impact on persons of common intelligence and understanding. The language of the law, therefore, plays a critical role in the delineation of unacceptable conduct, proper law-enforcement standards and the fair dispensation of justice. Worded in terms and phrases that a person of ordinary intelligence finds difficult to understand, laws can result in the miscarriage of justice.<sup>27</sup>

In determining whether a statute is unconstitutionally vague on the facts at hand, [the courts] apply a two-part test. First, the statute must provide adequate notice of the proscribed conduct. Second, the statute must not lend itself to arbitrary enforcement. A penal statute is void if it does not sufficiently define a criminal offense so that ordinary people can understand what conduct is prohibited. *This inquiry looks at what a person of “common intelligence” would “reasonably”*

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25. United States v. Harris, 347 U.S. 612, 617 (1954).

26. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (emphasis added and citations omitted).

27. See ANNA LUKEMEYER, HELPING CHILDREN LEFT BEHIND 59-86 (John Yinger ed., Mass. Inst. of Tech. Press 2004). “Ordinary intelligence” and “common intelligence” are elusive phrases which, by themselves, can be characterized as vague. Definitions of ordinary or common intelligence could range from people with no formal schooling to someone who is a high school dropout. For the purpose of this paper, these terms are used in reference to disadvantaged adults whose level of education is at or below high school. It is arguable that someone with a high school education would not be considered a person of “common or ordinary intelligence.” However among disadvantaged groups, the acquisition of high school education is not a reliable indicator of one’s comprehension level. Courts over the years have found that the education level of children of disadvantaged backgrounds lags behind those of the affluent. *Id.*

*understand the statute to proscribe, not what the particular defendant understood the statute to mean.*<sup>28</sup>

The concern over vagueness of laws and terms associated with them then begs the question: Are the legal terms and phrases inherent in, or associated with the application of the law truly so clear that they can be grasped by someone of ordinary intelligence? The answer to this question is not simple, given the wide array and varying complexities of terms and phrases used in the construction and implementation of laws. Since it is almost impossible to evaluate the vagueness in all laws, this study seeks to take one small, but important, step in assessing disadvantaged offenders' understanding of some of the basic legal terms and phrases used in the course of due process.<sup>29</sup>

#### COMING FACE TO FACE WITH DISADVANTAGED OFFENDERS' LACK OF UNDERSTANDING

My initial awareness of disadvantaged offenders' lack of understanding with legalese came about during my tenure as an assistant public defender in Leon County Florida.<sup>30</sup> Knowing that clients relied on me for the best possible defense, I took great pains in reviewing their case files and conducting repeated interviews with them. Though tedious, the process of fact-finding became my preoccupation. Within weeks of reviewing cases, interviewing and re-interviewing clients, a distinct pattern of clients' misapprehension of their rights and due process became evident. Initially, I felt that it was their way of "playing the con-game" or denying their guilt. Probing further, I soon discovered that a vast majority of my disadvantaged clients did not understand some of their basic rights and became frustrated with many of the legal concepts and phrases I thought to be simple.<sup>31</sup>

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28. *United States v. Washam*, 312 F.3d 926, 930 (8th Cir. 2002) (emphasis added and citations omitted).

29. JAMES ANTHONY WHITSON, *CONSTITUTION AND CURRICULUM* 240 (Falmer Press 1991). An understanding of the legal system and due process by disadvantaged offenders continues to be a problematic issue for law enforcement and the courts. Examined primarily by social scientists, this issue has yet to capture the interest of legal scholars, many of whom have arguably relied on "experts" from outside the legal field when confronted with poorly educated or undereducated clients. *Id.*

30. While employed as an assistant public defender in Leon County, Florida, I represented indigent suspects, the majority of whom were young minority males with limited formal education who had difficulty understanding the charges against them. Afterwards, as an assistant state attorney in Seminole County, Florida, I began to have a better understanding of the depth of indigent defendants' difficulty with procedural due process and the legal terminology associated with the system.

31. For example, a client charged with assault and battery insisted that he "didn't done no such thing," when he picked up his girlfriend and carried her out of the house during an argument because he wanted to avoid hurting her. "How can that be assault and battery when I ain't hit her?" he asked repeatedly. In another case, the client believed that lightly slapping his girlfriend while she was crying was not battery and had trouble understanding why he couldn't see



For example, Damon (pseudonym), a repeat drug offender vehemently denied that he ever had drugs in his possession. The police, he claimed, were out to “get him” because he drove a nice car.<sup>32</sup> After several hours of frustrating interviews, I discovered that Damon understood “drug possession” to mean that the drug must be on his person, and that the small quantity of drugs the cops found in his car could not truly be drug possession.<sup>33</sup> As he insisted, “How can drugs in my car be drug possession; my momma’s hat is in my car, is that hat my possession? No, that’s my momma’s hat.”<sup>34</sup> Then, there was Eric; arrested for a violation of probation and assault on a police officer. He insisted that the “charge be dropped” because “he accidentally touched the cop” when he jerked his head to let his dreadlocks fall backwards.<sup>35</sup>

In almost all of the instances of wrongdoing which demonstrated a misapprehension of legal concepts, the disadvantaged offenders expressed confusion over their arrests or charges against them. Questioning them on whether they understood their rights often brought forth responses such as, “What rights?” or “What you mean by rights?” or “I know my rights, I ain’t got none.”<sup>36</sup>

Given my rudimentary knowledge of disadvantaged offenders misapprehension of legal terms and concepts and the paucity of information on the subject, I felt it would be beneficial to undertake an empirical investigation, albeit limited in nature, in an attempt to have some understanding of the pervasiveness of the problem. To this end, I decided to inquire from disadvantaged African American offend-

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her, as there was a no-contact provision on his bond, and they were getting married that weekend.

32. I met Damon while working as an assistant public defender in Leon County. He claimed that he was targeted by the police because he drove a Ford Expedition with expensive rims.

33. The police found a small quantity of marijuana in the glove compartment of Damon’s car. He claimed that since the drugs were not found on him, the police had no right to arrest him for drug possession. He insisted that he knew nothing of the marijuana and that anyone could have left it in his car since he gave rides to anyone who asked.

34. Damon argued that his mother often left her hat in his car, and that he cannot claim his mother’s hat as his, because it is not. The marijuana, he argued, was not his, so why should he claim it.

35. While on probation Eric was seen driving back and forth behind a store where his friend worked. Stopped by the police on suspicion, he was arrested for violating probation. When the arresting officer tried to handcuff him, he jerked his head backwards hitting the officer in the face. He claimed that he jerked his head backwards because his dreadlocks were rubbing against his eyes.

36. Working as an assistant public defender, I always explained to disadvantaged clients their rights and asked if they understood them. Most regularly, clients responded with such questions as, “What rights?” or “What do you mean by rights?” While a few were quick to inform me that they knew their rights by stating that they didn’t have any. As Eric said to me, “I know my rights; I ain’t got none.”

ers<sup>37</sup> their understanding of the *Miranda* Rights<sup>38</sup> and follow-up with a few regularly used legal concepts.

### METHODOLOGY

This study utilizes a mixed method approach involving library and internet research, followed by a short survey and in-depth face to face interviews with participant offenders.<sup>39</sup>

*Participants:* From a convenient sample<sup>40</sup> of thirty-nine disadvantaged male African American offenders, twenty-four were randomly selected<sup>41</sup> to participate in this study. Ranging between ages 19 and 30,<sup>42</sup> the selected participants either served time in jail, prison or both.<sup>43</sup> All have committed crimes in different parts of the State of Florida<sup>44</sup> for which they plea bargained; and all received legal gui-

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37. For the purposes of this study, disadvantaged African American offenders refer to individuals between ages 19 through 30 whose income is below 200 percent of the Federal poverty guidelines and whose formal education is at or below the high school level. In the criminal justice system, being a disadvantaged offender is often characterized as being of indigent status. Disadvantaged as used in this paper incorporates the definition of indigent including a person's low level of education. The reason for the incorporation of educational level and income into the definition of disadvantaged is because these two characteristics, for the most part, are highly correlated. "The problems of lower-class culture are particularly acute for racial minorities and ethnic minorities who have income level significantly below that of whites and an unemployment rate almost twice as high. In the inner cities, more than half of all black men do not finish high school." LARRY SIEGAL, *THE ESSENTIALS OF CRIMINAL JUSTICE* 63-65 (6th ed. 2009). "Most convicted offenders sentenced to a term of imprisonment are poor, uneducated and underemployed." ROBINSON, *supra* note 19, at 281. In today's society, a high school education alone does not adequately prepare a person to successfully compete in the globally expanding labor market. See JEANNE BALLANTINE AND FLOYD HAMMACK, *THE SOCIOLOGY OF EDUCATION* 446 (6th ed. 2009) (noting that because the labor market is increasingly demanding, a college education is a necessity with a Master's degree increasingly becoming a requirement for employment).

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

39. The term "participants" refers to African American offenders from whom information was collected for this study.

40. See DONALD H. MCBURNEY & THERESA L. WHITE, *RESEARCH METHODS* 248 (Wadsworth 6th ed. 2003) (noting that a convenience sample is commonly defined as a non-random sample, one that is chosen for practical reasons).

41. Participant offenders included in this study were selected through a random process in which they were identified by the numbers 1 through 39. Placing the numbers in a paper bag, 24 were randomly pulled, thereby giving everyone in the group an equal and independent chance of being selected. Data gathering took place from June through early August 2008, primarily Fridays, Saturdays, and some Sundays.

42. See BONCZAR, *supra* note 18. See also PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2004 11 (2005), available at [www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf) (last visited Nov. 2008) ("An estimated 13% of black males in their late twenties [were] in prison or jail in 2004."). The reason for the selection of participants between ages 19-30 was due to the fact that incarceration data indicate that African American males over age 18 are four to five times more likely to be incarcerated than Caucasians, and are also more likely to be incarcerated before they are age 30.

43. Most of the participants served time in jail ranging from one month to under a year. A few served time in prison ranging from 18 months to three and a half years.

44. The majority of participants lived and had committed criminal offenses in the southern region of Florida. The rest were from North and Central Florida.

dance or representation from public defenders or pro-bono attorneys. None of the participants acquired an education beyond the high school level.<sup>45</sup>

*Selection Procedure:* Participants included in this study followed a two-step selection approach. First, three offenders known to a friend of the author agreed to participate. They assisted in identifying and soliciting the participation of others. Using the snow-ball sampling method,<sup>46</sup> a group of thirty-three offenders were identified and contacted.<sup>47</sup> Out of this total, thirty-one agreed to voluntarily participate in the study. Second, the thirty-one volunteers were screened through short interviews to ensure that they were: (i) between the ages of nineteen and thirty, and that they did not possess an education beyond the high school level;<sup>48</sup> (ii) arrested and read their *Miranda* Rights; and (iii) represented by a public defender or pro bono attorney at least once and plea bargained the charges against them.

By way of the screening method outlined above, twenty-four individuals were identified as having met the selection criteria for participation in this study. These individuals were then interviewed at some length about their experiences with the criminal justice system.

*Interview Questions:* To develop interview questions and investigate the conceptualizations of legalese from the perspective of offenders of disadvantaged backgrounds, plea bargain forms used in Leon, Orange, Broward and Dade Counties in Florida were selected.<sup>49</sup> After reviewing these forms, a list of words and phrases was created and cross-referenced to identify terms that appear on all of the forms. A few words and phrases commonly used in the process of plea bargaining were added to the list. Constructing a list of terms and phrases in this fashion facilitated a pre-test in which participant offenders were asked to identify the terms, which they heard in relation to their own case.<sup>50</sup> From the feedback provided by offenders, an interview guide contain-

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45. *Nine* participants readily admitted that they dropped out of high school. None acquired an education beyond high school.

46. See RANJIT KUMAR, RESEARCH METHODOLOGY: A STEP-BY-STEP GUIDE FOR BEGINNERS 179 (Sage Publications 2d ed. 2005) (explaining that snow-ball sampling is a selection process using people who are connected to one another).

47. For this study, the three known offenders were asked to identify others who would be willing to participate in the study, and they, in turn, were asked to identify others.

48. Three individuals were excluded because they had some college education.

49. Since the participant offenders committed crimes in Leon, Orange, Broward, and Dade counties, the plea bargain forms from these counties were reviewed to identify and select words and phrases commonly used.

50. Pre-testing the original list was done in order to validate the terms and phrases selected for use in this study.

ing both open and close-ended questions<sup>51</sup> was developed to solicit feedback from the voluntary participants.<sup>52</sup>

*Interview Process:* Interviews were voluntary and conducted with individual offenders over a two month period. Interview methodology followed the structured, semi-structured and unstructured approaches.<sup>53</sup> Each interview lasted between one and two hours. Often, interviews ended with a discussion between two or three participants. On these occasions, informal discussion provided insight into an offender's understanding or misunderstanding of the legal process. In a few instances, a quasi-focus group interview approach<sup>54</sup> was used to gather follow-up information from three or four individuals at a time.

### EMERGENCE OF *MIRANDA* IN EQUAL PROTECTION AND DUE PROCESS

For Americans, the *Miranda* Rights emerged from the judicial system to become the first step in ensuring that the individual, as a citizen of the United States, understands that he or she is entitled to the constitutional rights of equal protection and due process.<sup>55</sup> After *Miranda*, the term "*Miranda* Rights" or "*Miranda* Warnings" (used interchangeably), has become the mainstay verbal warning prior to a custodial police interrogation.<sup>56</sup> However, *Miranda* did not become a mainstay without challenges. In 1968, two years after the Court's ruling in *Miranda*, Congress enacted a statute, which attempted to super-

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51. See MCBURNEY & WHITE, *supra* note 40 (noting that open ended questions refer to those that allow respondents to provide complete answers in their own words without any restrictions from the researcher). Close-ended questions, commonly referred to as fixed choice questions limited the respondents to selecting from a list of responses. *Id.*

52. All of the participants were informed about the study and its purpose before they agreed to voluntarily participate.

53. See generally BRUCE L. BERG, *QUALITATIVE RESEARCH METHODS FOR THE SOCIAL SCIENCES* 69-72 (Allyn & Bacon 4th ed. 2001) Interviews with respondents followed the structured (standardized), unstructured (un-standardized) and semi-structured (semi-standardized) approaches in order to ensure the reliability and validity of the information collected. The structured form with standardized questions was utilized to collect specific information, while the semi-structure was used to ask a question and probe for information beyond the answers provided, and the unstructured simply allowed respondents to "just talk" about their experiences with the legal system. *Id.*

54. See *id.* Discussions were coordinated with *three or four* respondents in which the researcher primarily listened to the discussions of respondents while observing their interactions. Sometimes, the researcher participated in the discussions as a way to guide the discourse.

55. See generally *Dickerson v. United States*, 530 U.S. 428, 432-35 (2000) (historical account of the law governing the admission of confessions). See also *Miranda v. Arizona*, 384 U.S. 436 (1966) (establishing the rights discussed herein).

56. See *Dickerson*, 530 U.S. at 434-35 (explaining that admissibility in evidence of any statement given during a custodial interrogation of a suspect would depend on whether police provided the suspect with *Miranda* warnings). See also *Miranda*, 384 U.S. 436.

sede *Miranda* and institute “voluntary confessions” as admissible evidence.<sup>57</sup> This attempt failed.

In upholding *Miranda*, Chief Justice Rehnquist stated, “We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves.”<sup>58</sup> In so holding, the Court noted that “*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”<sup>59</sup> The *Miranda* Court concluded that the individual rights ought to be guaranteed and that individual freedom should not be deprived.<sup>60</sup> In summary, the Court’s ruling in *Miranda* sought to protect the individual from self-incrimination and forced interrogation thereby ensuring that he or she would not be deprived of their civil liberties without due process of law.<sup>61</sup>

While established in part to safeguard a suspect’s Fifth and Fourteenth Amendment rights and privileges, the Supreme Court sought it wise not to be too prescriptive and thereby did not insist on a standardized wording of the *Miranda* Rights.<sup>62</sup> Instead, the Court offered the guidelines to be adopted by law enforcement in the articulation of *Miranda*.

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it – the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator’s imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury. Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.<sup>63</sup>

57. *Dickerson*, 530 U.S. at 435.

58. *Id.* at 432.

59. *Id.* at 443.

60. See generally *Miranda*, 384 U.S. at 459-60 (“Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty . . . . We cannot depart from this noble heritage.”).

61. *Dickerson*, 530 U.S. at 478-79.

62. *Miranda*, 384 U.S. at 490 (“Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.”).

63. *Id.* at 467-68.

In offering these guidelines, the Court sought to preserve the rights of a person in custody, and that these rights should not be violated by law enforcement officers seeking evidence against him or her.<sup>64</sup> “The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.”<sup>65</sup>

[I]t is clear that prior to any custodial interrogation, law enforcement officers are required to administer the *Miranda* warnings to the person about to be questioned. The formula should be as easy as  $1 + 1 = 2$ ; that is, “custody” + “interrogation” = the requirement that *Miranda* warnings be given . . . . For law enforcement, the desired, ultimate result is the acquisition of a valid confession, fully admissible at trial. In order for that to occur, officers are at all times required to scrupulously honor each of the rights contained within the *Miranda* warnings.<sup>66</sup>

Heeding the Court’s decision and recommendation, law enforcement agencies sought to construct warnings in order to fulfill the requirements of *Miranda* and to make them comprehensible to the average citizen without compromising the rights therein.<sup>67</sup>

#### SIGNIFICANCE OF *MIRANDA* IN EQUAL PROTECTION AND DUE PROCESS

The significance of *Miranda* within the constitutional realm of equal protection and due process can be found in a series of Court rulings dealing with questions regarding the violation of suspects’ rights against self-incrimination.<sup>68</sup> Despite its significance, the fact remains that not everyone questioned by the police while in custody must be “Mirandized.”<sup>69</sup>

64. *See id.*

65. *Id.* at 444.

66. *See* LARRY E. HOLTZ, *CONTEMPORARY CRIMINAL PROCEDURE* 646 (7th ed. 2001).

67. A cursory review of randomly selected *Miranda* rights from various states indicates a wide array of wordings used by law enforcement agencies across the nation, all seeking to simplify the rights in order to make them clear to the ordinary individual. “[T]he Supreme Court has never indicated that *Miranda* requires any precise formulation of the warnings given criminal defendants. ‘*Miranda* itself indicates that no talismanic incantation is required to satisfy its strictures.’ Instead, the inquiry for reviewing courts is to determine whether the warnings reasonably convey to a suspect his rights as required by *Miranda*.” *Brown v. Crosby*, 249 F. Supp.2d 1285, 1305 (S.D.Fla., 2003) (citations omitted).

68. *See generally* *United States v. Patane*, 542 U.S. 630 (2004) (citations omitted) (holding, in part, that the officers’ failure to give *Miranda* warnings in conjunction with restraining-order arrest did not require suppression of weapon at firearms trial, since weapon was recovered based on defendant’s voluntary statement that he possessed it).

69. *Thompson v. Keohane*, 516 U.S. 99, 107 (1995) (citations omitted) (“The Court defined ‘custodial interrogation’ as ‘questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.’”).

[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.<sup>70</sup>

While the Court made clear the importance of a suspect's rights as stipulated in *Miranda*, and when it should be administered, violations do occur.<sup>71</sup>

When violated, these rights can be of serious consequence to the Nation, States or Municipalities as in the form of failed convictions, miscarriage of justice, or stern admonitions from the courts.<sup>72</sup> For example, if a serial killer or child molester gains his release because of the violation of his *Miranda* Rights, he could be free to travel else-

70. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

71. *Id.* See *Lynum v. Illinois*, 372 U.S. 528, 534 (1963) (confession of defendant to cannabis charge was deemed forced where police threatened to cut off financial aid for defendant's children unless she cooperated); see also *Henry v. Kernan*, 197 F.3d 1021 (9th Cir. 1999) (interrogation of defendant on murder charge after an unanswered request for counsel was deemed psychologically coercive where after several hours, the statements amounted incoherent ramblings); see also *United States v. Anderson*, 929 F.2d 96 (2d Cir. 1991) (explaining that, although trickery is not per se prohibited in obtaining a confession, a post-*Miranda* statement is deemed forced where the police require that the defendant choose between cooperating or speaking to an attorney).

72. See *Miranda*, 384 U.S. at 492; see also *Missouri v. Seibert*, 542 U.S. 600 (2004) (holding that a second confession to murder obtained mid-interrogation after *Miranda* may not have been voluntary and should have been suppressed); *United States v. Nichols*, 438 F.3d 437, 443 (4th Cir. 2006) (citations omitted) ("We believe that in most cases, the exclusion of evidence obtained in violation of *Miranda* from the government's case-in-chief at trial will provide ample deterrence against police misconduct. For example, as a result of the *Miranda-Edwards* violations here, the Government was required to dismiss two of the three charges against [Defendant-Appellee] – including a firearm charge that carried a mandatory minimum sentence of five years imprisonment, required to be served consecutively to any other sentence."); *United States v. Moss*, 217 F.3d 426, 433 (6th Cir. 2000) (Gilman J., concurring) ("Ordering that a serious drug indictment be dismissed with prejudice solely because of a procedural violation is highly unpalatable. [The] enforcement of the rules established in *Miranda* and in search and seizure cases sometimes requires the exclusion of critical evidence for the prosecution—because there is no other adequate means of deterring unacceptable governmental behavior . . .").

The *Miranda* rule is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself. The *Miranda* Court implicitly acknowledged as much when it indicated that procedures other than the warnings dictated by the Court's opinion might satisfy constitutional concerns, and what was implicit in the *Miranda* opinion itself has been made explicit in our subsequent cases. Like all prophylactic rules, the *Miranda* rule 'overprotects' the value at stake. In the name of efficient judicial administration of the Fifth Amendment guarantee and the need to create institutional respect for Fifth Amendment values, it sacrifices society's interest in uncovering evidence of crime and punishing those who violate its laws.

*Duckworth v. Eagan*, 492 U.S. 195, 209-10 (1989) (O'Connor J., concurring) (citations omitted); see also *Fare v. Michael C.*, 442 U.S. 707, 729 (1979) (noting that the Court has previously "admonished that 'the greatest care must be taken to assure that [a minor's] admission was voluntary'").

where including out of the state where he committed the crime, thereby providing him opportunities to once more commit such heinous acts.<sup>73</sup> In contrast, if an individual, not cognizant of or lacking the ability to clearly understand his rights to due process, confesses to a crime he did not commit, he is likely to be found guilty and imprisoned for a prolonged period.<sup>74</sup>

Given the importance of *Miranda* in the course of due process and in upholding the rights of suspects, I decided to gather information from disadvantaged African American offenders to assess their understanding and experience of *Miranda*. Three major reasons guided this focus on disadvantaged African American offenders:

- (i) Disadvantaged African American offenders constitute an over-represented group within the prison population.<sup>75</sup>

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73. WENDY MURPHY, AND JUSTICE FOR SOME: AN EXPOSE OF THE LAWYERS AND JUDGES WHO LET DANGEROUS CRIMINALS GO FREE 235 (2007) (“Just as wrapping child pornography in the flag demeans the First Amendment, using technical *Miranda* violations to insist that murder charges be dismissed does not track with the intent of the Fifth Amendment, and it diminishes the seriousness of other more extreme violations of constitutional rights. But this is exactly what some defense attorneys were clamoring for in early 2006 when the judge in Florida handling the prosecution of John Couey for the brutal rape and murder of little Jessica Lunsford threw out Couey’s confession on the grounds it was obtained in violation of his *Miranda* rights. The simplest way to state the legal issue is that the confession was excluded because the police did not stop questioning the suspect after he indicated that he wanted a lawyer . . . . Some defense attorneys actually argued that not only should self-incriminating statements obtained incorrectly be suppressed, which is entirely appropriate, but a confessed child murderer should get a total pass to teach the cops a lesson and protect liberty for all of us.”).

74. IRVING B. WEINER ET AL., 11 HANDBOOK OF PSYCHOLOGY 349 (2003) (citations omitted) (“For several reasons, it is difficult to reliably measure the rate of false confessions. Defendants may claim to have given an untrue confession to avoid responsibility for their criminal acts. The ‘proof’ of a false confession is typically established by physical evidence of innocence (e.g., DNA testing) in the presence of a confession or by the subsequent arrest of another person who admits committing the same crime (with accompanying physical evidence to support the new confession). The lack of a ‘clearinghouse’ for gathering such information makes accurate data impossible . . . . [Several studies, however,] provide case examples of false confessions by innocent individuals, some of which resulted in executions for crimes they did not commit.”); see also *Michigan v. Kirschke*, an unpublished opinion per curiam of the Court of Appeals, decided July 8, 2008 (Docket No. 277853) where the defendant was sentenced to 25-40 years imprisonment, and stated afterward he did not understand his *Miranda* rights which was admittedly understood at the time of his confession to armed robbery, could not argue the contrary on appeal.

75. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2005 8 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf> (“At year end 2005, black males (547,200) outnumbered white males (459,700) and Hispanic males (279,000) among inmates with a sentence of more than 1 year. About 40% of all male inmates sentenced to more than 1 year were black.”); see also WILLIAM J. SABOL & HEATHER COUTURE, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2007 7 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf> (“[As of 2007, black males ages 30 to 34 had the highest custody incarceration rate of any race, age, or gender group. Of the 2.3 million inmates in custody, 2.1 million were men and 208,300 were women . . . . Black males represented the largest percentage (35.4%) of inmates held in custody, followed by white males (32.9%) and Hispanic males (17.9%).”).



- (ii) Researchers have long argued that the rights of disadvantaged African Americans are violated more often than that of Caucasians.<sup>76</sup>
- (iii) Crime data reveal that disadvantaged individuals within the prison system possess very low levels of education.<sup>77</sup>

#### DISADVANTAGED OFFENDERS UNDERSTANDINGS OF *MIRANDA* RIGHTS

As a first step in the data collection process, respondents<sup>78</sup> were screened to ascertain whether the police had administered the *Miranda* Rights to them on at least one occasion. This screening took the form of a question in which respondents were asked the number of times the police read them the *Miranda* Rights since they became adults.<sup>79</sup> Table 1 below captures the number of respondents and the number of times law enforcement officers read them their rights.

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76. See generally KENNETH MEEKS, *DRIVING WHILE BLACK* (2000) (chronicling how law enforcement officers regularly use racial profiling to stop, question and search and even arrest blacks in violation of due process); Cf. ROBINSON, *supra* note 19, at 182, 191 (“In fact, there is evidence of racial profiling in some places at some times.”) Citing the Bureau of Justice Statistics for year 2006, Robinson notes that Blacks and Hispanics were more likely than whites “to experience use of force during contact with police” where force was used. *Id.* The issue has not been resolved. In contrast to Meeks, some Criminologists have disputed evidence of racial profiling by law enforcement officers. *Id.*

77. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, *EDUCATION AND CORRECTIONAL POPULATIONS 1-6* (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf> (“About 41% of inmates in the Nation’s State and Federal prisons and local jails in 1997 and 31% of probationers had not completed high school or its equivalent. In comparison, 18% of the general population age 18 or older had not finished the 12th grade . . . . Minority State inmates were generally less educated than their white peers. About 44% of black State prison inmates and 53% of Hispanic inmates had not graduated from high school or received a GED compared to 27% of whites in State prisons . . . . Minorities were less likely than whites to have attended college or some other institution of higher learning. About 1 in 10 blacks and 1 in 13 Hispanics had studied beyond high school compared to 1 in 7 whites. Minorities were also less likely than whites to have earned a high school diploma or a GED: 26% of blacks and 17% of Hispanics, compared to 30% of whites, had a high school diploma; 30% of blacks and Hispanics passed the GED compared to 43% of whites.”). Low level of education is strongly correlated with problems of comprehension, which in all likelihood, negatively impacts one’s understanding of legal language. *Id.*

78. The term “Respondents” refers to disadvantaged African American offenders who participated in this study. Offenders agreed to participate only after they were promised that their responses would be held in confidence and anonymity was assured.

79. Nine respondents disclosed voluntarily that they were arrested as juveniles. The number of times they were read the *Miranda* Rights as juveniles is not included in this study. Respondents were asked if they were arrested after their eighteenth birthday and to give the exact number of times the police read them their rights during these arrests.

TABLE 1  
RESPONDENTS AND THE NUMBER OF TIMES THE  
POLICE READ THEM THEIR RIGHTS

NUMBER OF RESPONDENTS	TIMES EACH MIRANDIZED
3	1
14	2
4	3
3	3+
<b>TOTAL</b>	<b>24</b>

According to the Court's decision in *Miranda*, certain procedural safeguards must be taken to inform accused persons of their rights.<sup>80</sup> As the Court stated, "Prior to any questioning, the person must be warned that he has the right to remain silent, that the statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney."<sup>81</sup> Aware of the Court's decision, respondents were asked if they knew that, when taken into custody, the police were supposed to inform them of their rights before questioning them.<sup>82</sup> Fifteen respondents declared that they were unaware that their rights must be read to them *before* being questioned by the police when in custody.<sup>83</sup> Some indicated that the police asked them a few simple questions which they answered because they thought this was the "right thing to do," or because they "didn't think anything of it," or they "didn't feel the questions [to be] serious."<sup>84</sup> Seven acknowledged that they became aware of the seriousness of such questions afterwards, while in jail or prison.<sup>85</sup>

80. See *Miranda*, 384 U.S. at 444.

81. *Id.* at 444 (emphasis added).

82. *Id.* at 444-45. Participant offenders in this study were asked a series of questions which appear in the appendix of this paper. See app. questions 1-33.

83. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008). As a follow-up to appendix question 11, participant offenders were asked if they knew that when taken into custody, the police were supposed to inform them of their rights before questioning. The majority responded that they were not aware of the procedure. The nine who said they were aware that their rights must be read to them before being questioned acknowledged that they had multiple arrests and or served two to seven years altogether in jails or prisons where they learned "a lot" about the legal system. These offenders range in age from 25 to 30. *Id.*

84. *Id.* Respondents gave the following as examples of simple questions asked by the police: (a) Were you home last night around 10 o'clock?; (b) What kind of car do you drive?; (c) What is the color of your car?; (d) Where do you live?; and (e) How often do you see (name of acquaintance)? (f) When last were you in the Miami/Tampa/Orlando area?. *Id.*

85. *Id.* One respondent said that he learned from a prison inmate that when police ask you, "Where do you live?" they are trying to find out "if you live close to the scene of the crime," especially if "you been to prison before." *Id.*

Inquiring into the point in time of their arrest when the police read them their rights elicited the following responses reported in Table 2:

TABLE 2  
POINT IN TIME POLICE READ RESPONDENTS THE  
*MIRANDA* RIGHTS

RESPONSES	NUMBER OF RESPONDENTS
I don't remember	2
What difference does it make?	3
After handcuffed and put in patrol car	12
At the police station	3
After I refused to give them more information	4
<b>TOTAL</b>	<b>24</b>

A follow-up question to the above revealed that all the respondents have some awareness of their *Miranda* rights, for they all mentioned *the right to remain silent* and *the right to an attorney* when they were asked to identify their rights.<sup>86</sup> However, when asked to explain when they first became aware of these rights, they provided varied responses, with the majority stating that they “don’t remember,” were “not sure,” or that they “forgot when.”<sup>87</sup> A few went beyond answering the question by reciting the Rights from start to end.<sup>88</sup>

### THE RIGHT TO REMAIN SILENT

The protection against self-incrimination provided through the Fifth Amendment is perhaps one of the most important guarantees extended to suspects coming into contact with the criminal justice system.<sup>89</sup> More commonly known through the *Miranda* Warnings as the

86. *Id.* All of the respondents said they became aware of these rights over time, over the course of more than one arrest, or by talking to their “hommies” (friends) or members of their families who served time in jail or prison.

87. *Id.* Several respondents said they were first read their rights years ago when they became juvenile offenders. Almost all of these respondents stated that “because they were “so young/small” they didn’t understand much of “anything” in reference to their arrests and charges. *Id.*

88. *Id.* Four offenders who spent time in both jail and prison recited the *Miranda* Warnings and disclosed that they were read their rights “quite a few” times and therefore remember it “by heart.” *Id.*

89. See *Michigan v. Tucker*, 417 U.S. 433, 455 n.2 (1974) (Brennan, J., concurring) (citations omitted) (“The privilege against self-incrimination ‘registers an important advance in the development of our liberty – one of the great landmarks in man’s struggle to make himself civilized.’ It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our

*right to remain silent*, the privilege against self-incrimination serves to safeguard a suspect from admitting to or confessing to a crime.<sup>90</sup>

Given the significance of this right and the Court's declaration that "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him,"<sup>91</sup> respondents were asked how many of them remained silent when the police read them their rights.

Of the twenty-four offenders, thirteen said they did not say anything to the police, three said they don't remember, and eight said that they "talked back."<sup>92</sup> The primary reason they gave for not saying anything is that their parents or grandparents, especially mothers and grandmothers, impressed upon them not to say anything to the police if they ever were arrested.<sup>93</sup> Some added that they also learned not to speak to the police from other friends in the streets and the neighborhood.<sup>94</sup> This aspect of street-neighborhood learning is perhaps best captured in the words of one respondent who said, "In my hood, most of the people I know been in jail, some in jail, or got families in jail."<sup>95</sup> Several echoed the same or similar sentiments in the course of their interviews.<sup>96</sup>

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preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'")

90. *Id.*

91. *Bruton v. United States*, 391 U.S. 123, 139 (1968) (White, J., dissenting).

92. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008); see app., question 14. The eight Participant Offenders 1; 5; 8; 13; 17; 19; 21 and 24 who claimed they "talked back", to the police said they did so because they were innocent. They explained that they tried to tell the police that they did not do anything wrong and saw no reasons for being stopped.

93. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008). Coming primarily from single parent families within low income communities with high crime rates and regular law enforcement intervention, respondents' parents and guardians regularly inculcated in them the necessity to be cautious of the streets and the police. *Id.*

94. *Id.* Growing up in disadvantaged communities that are patrolled frequently by law enforcement officers, participant offenders claimed that they learned at an early age from their neighborhood friends and acquaintances not to trust or say anything to the police. *Id.*

95. Interview with Participant Offender 8, in Leon County, Fla. (June-Aug. 2008). This interviewee's remark is supported in Robinson's observation that "[t]he criminal justice system disproportionately arrests, convicts, and punishes poor people and people of color." See ROBINSON, *supra* note 19, at 419.

96. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008). Similar to the remark made by Participant Offender 8, 23 participant offenders noted in the course of their interviews that they have either a friend, brother, sister, parent, uncle, aunt, neighbor or someone they know, who are/were in jail or served time in jail or prison. *Id.*

In following up on the eight disadvantaged offenders who said they did not remain silent, all of them insisted that they “talked back” to the police because they were “innocent” of any wrong doing.<sup>97</sup> They argued that it was necessary to question “why the police stopped” or “tried to harass” them when they “did no wrong,” or “done do no wrong.”<sup>98</sup> Although interviewed separately, all eight expressed the conviction that had they not said anything, “the police will make up things” to take them to jail.<sup>99</sup> When asked to elaborate, they all disclosed that they had prior arrest(s) and, as a result, had little trust for law enforcement officers.<sup>100</sup>

To acquire an understanding of how ex-offenders interpret *the right to remain silent*, each was asked to explain what the phrase meant to them. Without probing, twenty-two provided answers with almost the identical phrase, “Don’t say nothing [*sic*] to the police.”<sup>101</sup> After some probing, only six elaborated on their answers that whatever they say to the police could be used against them in court.<sup>102</sup>

Given that the *right to remain silent* offers them protection *against self-incrimination*,<sup>103</sup> (i.e., confessing to a crime) respondents were asked whether they understood the connection between these two principles. All expressed varying degrees of confusion or doubt regarding the connection between *the right to remain silent* and *protection against self-incrimination*.<sup>104</sup> Those who disclosed that the police read them their rights once or twice were more vocal in expressing their confusion with the phrase *protection against self-incrimination* with a few asking angrily, “How [can] the right to remain silent protect you/me from self-incrimination?” or “What the [expletive deleted] is self-incrimination anyway?”<sup>105</sup>

97. *Id.* Respondents insisted that if they have done “no wrong,” why can’t they “say so” to the police, and that this indicates “black people are judged guilty,” before being “proved innocent.” *Id.*

98. *Id.* (information gathered from interviews with participant offenders in relation to app. question 14).

99. *Id.* All eight Participant Offenders said that because they had prior arrests or were still on probation, they had to explain their innocence because the police will find reasons to re-arrest them or ask that their probation be revoked. *Id.*

100. *Id.* Respondents argued that a “black man” with prior arrest(s), especially for drugs, will always be suspected of wrongdoing by law enforcement officers who are constantly trying to extract information from them. *Id.*

101. *Id.* Two Participant Offenders, 8 and 21, who said they talked back to the police did not answer app. question 16. *Id.*

102. *Id.* All six of these respondents served prison and jail sentences and that some things they said “came up in court.” *Id.*

103. *See* U.S. CONST. amend. V.

104. *See* app. question 17. Asked individually if the right to remain silent has anything to do with protection against self incrimination, all of the participant offenders said they were not sure or did not know. *Id.*

105. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008). “What the . . . is self-incrimination anyway?” was first asked by Participant Offender 20. In

Although expressed in various ways, their complaints can be summed up in the phrase repeated by a few, "If you keep your mouth shut you in trouble, if you open up your mouth you in trouble [or more trouble]."<sup>106</sup> In the course of the interviews, a total of thirteen respondents disclosed voluntarily that they did not even know what *self-incrimination* meant.<sup>107</sup>

While everyone noted that they learned not to say anything to the police, seventeen acknowledged that they did not quite understand the phrase *can and will be held against you in a court of law*.<sup>108</sup> The following summary helps to illustrate the confusion over the phrase, *the right to remain silent*.<sup>109</sup>

One respondent explained that he had a fight with his girlfriend in which she hit him several times and came "after" him with a knife. He "wrestled" her (pulled her arm behind her back), took away the knife, and pushed her away from him in order to get out of the house. He then called the police. They came, asked his name and arrested him. After placing the handcuffs on him, they put him in the back of the police car and went to talk to his girlfriend. They returned to the car, read him his rights, and asked him what happened. He explained what took place. He claimed that since he "didn't do anything wrong" and was advised if he told the truth, he would not be charged. Instead, not only was he charged, the prosecutor used some of the same information he provided to the police against him in court, particularly the part where he held her hand behind her back to take away the knife and then pushing her away so he could get out of the house. Even though his girlfriend testified on his behalf, he was convicted. He explained that he never thought that telling the truth would be considered "self-incrimination" and used against him in court.<sup>110</sup>

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group discussions several offenders responded in similar ways. *Id.* (participant offenders' responses to follow-up on app. question 17).

106. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008) (interview responses from Participant Offenders 1: 13: 18: & 19).

107. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008); see app. questions 13, 16-19. Given a copy of the *Miranda* Rights to read, the majority of respondents read it without stumbling. Almost all, however, struggled to explain the meaning of it. All the participant offenders identified the right to remain silent and the right to an attorney as their rights. However, they could not provide reasons for being silent, and questioned why they should remain silent if they were telling the truth. They were also unsure whether the right to an attorney meant that they had to hire their own lawyer or that they would have a court appointed lawyer. *Id.*

108. *Id.* See app. question 18. See also *Miranda*, 384 U.S. at 469 ("The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it.")

109. *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966) ("[I]f a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent.")

110. Information provided by Participant Offender 8, quoted in Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008).

Throughout the interview process, many respondents expressed confusion between the “right to remain silent,” and “telling the truth,” with several claiming that “telling the truth,” should have spared them from being “arrested” or “charged.”<sup>111</sup>

*Custodial Interrogation:* The right to remain silent inherent in *Miranda* is intrinsically intertwined with the practice of *custodial interrogation*.<sup>112</sup> To assess respondents understanding of this concept, focus was first made on the word custody and then interrogation.<sup>113</sup> According to the Court,

A suspect is . . . “in custody” for *Miranda* purposes when placed under formal arrest or when a reasonable person in the suspect’s position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest. The reasonable person through whom we view the situation must be neutral to the environment and to the purposes of the investigation—that is, neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances.<sup>114</sup>

Using the Court’s definition, respondents were asked if they could explain at what point in time they felt they were taken into custody. Their responses can be seen in Table 3 below.

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111. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008) (in group discussion ranging between three to eight offenders). Almost all argued why a person should be arrested and charged if he is telling the truth. And all of the offenders refused to accept that “truth” is determined by the courts, claiming that police and prosecutors “make-up” things to gain convictions. *Id.*

112. See *Oregon v. Elstad*, 470 U.S. 298, 371 (1985) (Stevens, J., dissenting); *Yarborough v. Alvarado*, 541 U.S. 652, 661 (2004) (“*Miranda* itself held that preinterrogation warnings are required in the context of custodial interrogations given ‘the compulsion inherent in custodial surroundings.’”); see also *Davis v. United States*, 512 U.S. 452, 460 (1994) (“[T]he primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves.”).

113. See app. question 25 (a)-(c).

114. *United States v. Bengivenga*, 845 F.2d 593, 596 (5th Cir. 1988).

TABLE 3  
RESPONDENTS INTERPRETATION OF POINT IN  
TIME TAKEN INTO CUSTODY

RESPONSES	# OF RESPONDENTS
When the police cuffed me/put the cuffs on <sup>115</sup>	5
When the police read me my rights <sup>116</sup>	7
When they put me in the police car <sup>117</sup>	7
When they took me to the police station <sup>118</sup>	5
<b>TOTAL</b>	<b>24</b>

Implicit in the above responses is that respondents understood custody to mean being “under the control of the police,” in some form.<sup>119</sup> In conducting further inquiry into their understanding of custody, all of the respondents equated arrest with custody using the terms interchangeably during their conversations. To verify that respondents were using arrest and custody interchangeably, they were asked to explain what the words meant to them. Without offering an explanation, almost all asked, “What’s the difference?”<sup>120</sup>

While respondents seem to have some understanding of custody, they explained interrogation as being some form of threat or use of force. Custodial interrogation is defined as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”<sup>121</sup> In explaining what the words meant to them, they all gave various

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115. These five respondents said the police handcuffed them without reading them the *Miranda* Rights.

116. These seven respondents explained that the police read them their rights while placing the handcuffs on them.

117. These seven reported that the police handcuffed them, put them in the police car and then left to search the area or talk to people. Two of these respondents said that when the police returned to the car, they read them their rights.

118. These five respondents said they were read their rights after they were taken to the police station.

119. See Participant offenders’ responses to app. question 25 (a) and question 26. In group discussions, all of the participant offenders argued that that once they were cuffed by the police, they were in police custody. *Id.* See also *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (“[I]n custody’ for purposes of receiving of *Miranda* protection, the ultimate inquiry is simply whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.”).

120. See app. question 26. This question was first asked individually and again during group interviews. In the group interviews, whenever a single participant offender asked, “What’s the difference?” all the others would chime in with, “Yeah! What’s the difference?” Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008).

121. *Miranda*, 384 U.S. at 444.



versions of intimidation.<sup>122</sup> Twelve mimicked how the police intimidated them by “threatening” them with “more jail time,” “screaming in [their] faces” and “pushing [or] jerking” them while still “cuffed.”<sup>123</sup> The rest said the police “did everything” to make them talk but left them alone when they refused to say anything.<sup>124</sup>

Probing into what they meant by “did everything” eleven respondents explained that police “threatened” them with such statements as:

- (i) Your friend [accomplice] already told us what happened; you can save yourself if you tell us what really happened;
- (ii) We have enough on you to put you away a long time;
- (iii) If you tell us the truth, we will see what we can do to reduce your time/charges;
- (iv) We are not interested in you; just give us the name of the big guy and we will let you go, and
- (v) It will be a long time before you see another Thanksgiving or Christmas.<sup>125</sup>

Examined closely, the responses provided by the offenders point to some form of “coercive custodial interrogation.”<sup>126</sup> The definition of custodial interrogation, when applied to the responses gathered, raises some interesting questions with regard to “coercive custodial interrogation.”<sup>127</sup>

122. Interview with Participant Offenders 1-24, in Leon County, Florida (June-Aug. 2008). In their individual responses to app. question 25 (c), all of the participant offenders said that they were either intimidated, threatened or harassed by the police. *Id.*

123. Responses to app. question 25(c) obtained from participant offenders through individual interviews.

124. *Id.*

125. *Id.* (responses provided by Participant Offenders 3, 4, 10, 12 and 19 respectively).

126. *Roberts v. United States*, 445 U.S. 552, 560-61 (1980) (citations omitted) (“Although *Miranda*’s requirement of specific warnings creates a limited exception to the rule that the privilege must be claimed, the exception does not apply outside the context of the inherently coercive custodial interrogations for which it was designed. The warnings protect persons who, exposed to such interrogation without the assistance of counsel, otherwise might be unable to make a free and informed choice to remain silent.”); *see also Minnesota v. Murphy*, 465 U.S. 420, 430 (1984). The common usage of “custody” is any situation in which a reasonable individual would feel a restraint on his or her movement such that he or she would not feel free to leave. *Id.*

127. *Miranda*, 384 U.S. at 454-56 (citations omitted) (“The interrogators sometimes are instructed to induce a confession out of trickery . . . [and] the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals . . . . [G]iven this background, [the *Miranda* Court was concerned] primarily with this interrogation atmosphere and the evils it can bring.”); *Patane*, 542 U.S. at 645-46 (“*Miranda* rested on insight into the inherently coercive character of custodial interrogation and the inherently difficult exercise of assessing the voluntariness of any confession resulting from it. Unless the police give the prescribed warnings meant to counter the coercive atmosphere, a custodial confession is inadmissible, there being no need for the previous time-consuming and difficult enquiry into voluntariness. That inducement to forestall involuntary statements and troublesome issues of fact can only atrophy if we turn around and recognize an evidentiary benefit when an unwarned statement leads investigators to tangible evidence. There is, of course, a price for excluding evidence, but the Fifth Amendment is worth a price, and in the absence of a very good reason, the logic of

For example, did the police tactic, “Your friend made a statement against you,” suggest that the police already acquired information and that the offender should accept responsibility for the crime?<sup>128</sup> And, does the statement, “We have enough to put you away for a long time,” serve to pressure the offender into confessing?<sup>129</sup> Furthermore, do the statements, “If you tell us the truth we will see what we can do to reduce your time,” and “Just give us the name of the big guy and we will let you go,” constitute psychological ploys? Using the information provided by respondents to answer the questions raised above, it is difficult to conclude whether or not the police actions amounted to trickery or “coercive custodial interrogation.”<sup>130</sup>

The verification of coercive custodial interrogation necessitates an assessment of the totality of circumstances, including the actual transcripts of police questioning, the conditions under, and stage at which, the questioning occurred, as well as the stage at which counsel was requested, granted and/or denied.<sup>131</sup> When informed of all of these, almost all of the respondents expressed some form of disgust or irritability.<sup>132</sup> In their minds two points seem clear: (i) the police tried to “force them to talk before” they were charged, and (ii) they were questioned “before they had a lawyer,” and therefore they were “wrongfully questioned [interrogated]” by the police.<sup>133</sup>

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*Miranda* should be followed: a *Miranda* violation raises a presumption of coercion . . . and the Fifth Amendment privilege against compelled self-incrimination extends to the exclusion of derivative evidence . . .”).

128. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008). Participant Offender 3 felt that the police were trying to pressure him into accepting responsibility for the crime when they said to him his friend told them what occurred. In group discussions, almost all the other offenders agreed with the explanation of Participant Offender 3. *Id.*

129. *Orozco v. Texas*, 394 U.S. 324, 328-29 (1969) (White, J., dissenting) (citations omitted) (“The opinion of the Court in *Miranda* was devoted in large part to an elaborate discussion of the subtle forms of psychological pressure which could be brought to bear when an accused person is interrogated at length in unfamiliar surroundings. The ‘salient features’ of the cases decided in *Miranda* were ‘incommunicado interrogation of individuals in a police-dominated atmosphere.’ The danger was that in such circumstances the confidence of the prisoner could be eroded by techniques such as successive interrogations by police acting out friendly or unfriendly roles. These techniques are best developed in ‘isolation and unfamiliar surroundings,’ And they take time: ‘the major qualities an interrogator should possess are patience and perseverance.’ The techniques of an extended period of isolation, repeated interrogation, cajolery, and trickery often enough produced admissions which were actually coerced in the traditional sense so that new safeguards were deemed essential.”).

130. *Id.*

131. See HOLTZ, *supra* note 66, at 654.

132. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008) (groups ranging from three to eight offenders).

133. *Id.* Most respondents argued that being approached by a police who carries a gun, stick and tazer already poses a threat to them. Others referred to being handcuffed as a “significant loss of freedom” and being approached by more than one policeman as a “dangerous situation,” referring to it as the “Rodney King drama.” *Id.*

Since all of the offenders who claimed wrongful interrogation by the police completed their experience with the justice system by means of a plea-bargain, the issue of “coercive custodial interrogation” was never challenged or called into question.<sup>134</sup>

### THE RIGHT TO AN ATTORNEY

The Right to Counsel embraced in the *Miranda* Warning is grounded in the Sixth Amendment, which provides for the accused in criminal prosecutions to “have the Assistance of Counsel for his defence.”<sup>135</sup> This right to an attorney is also said to be implicit in the Fifth Amendment right against self-incrimination.

Although the Fifth Amendment privilege against self-incrimination does not expressly provide for the right to counsel, courts construe that right as implicitly existing in the Fifth-Amendment setting as a “preventive measure” that protects an accused from self-incrimination. The correlative right to counsel found in the *Miranda* warnings is said to be necessary “to make the process of police interrogation conform to the dictates of the [Fifth Amendment] privilege.”<sup>136</sup>

The attorney’s presence when proceedings are initiated serves an important function in protecting the defendant’s rights, including ensuring that these rights are not violated by the State.<sup>137</sup> In light of this, respondents were questioned whether they knew that they “have the right to an attorney.”<sup>138</sup> All twenty-four respondents answered “yes.”<sup>139</sup> However, when asked if they knew at what point in time of their arrest they could request to have an attorney present, thirteen said they were “not sure” or “not really sure,” eight said when they “go before a judge,” and three said after they “give a statement” to

134. *Id.* Interview information gathered from participant offenders indicated that they pled guilty in order to obtain lighter sentences or to prevent being sent to jail or prison. Most said they did so because they had previous convictions which placed them at risk of being found guilty and sent back to jail or prison. *Id.*

135. U.S. CONST. amend. VI.

136. See HOLTZ, *supra* note 66, at 703.

137. *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1971) (citations omitted) (“[I]t has been firmly established that a person’s Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him . . . . The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the ‘criminal prosecutions’ to which alone the explicit guarantees of the Sixth Amendment are applicable.”).

138. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008); see app. questions 13 and 19. As a follow-up question all participant offenders were asked individually if they knew they have the right to an attorney. *Id.*

139. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008).

the police.<sup>140</sup> As a follow-up, respondents were asked this question: "Suppose you agree to make a statement and start talking to the police, can you stop at anytime and ask to have a lawyer present?"<sup>141</sup> To this question, six respondents said "no" while nine stated they were "not sure."<sup>142</sup> These fifteen respondents were also unsure whether the police are required to cease questioning them if they asked for an attorney during the course of being questioned.<sup>143</sup> The responses provided above clearly point to the issue of "knowledge and understanding" of their rights. In *Miranda* the court declared, "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and have him present during any subsequent questioning."<sup>144</sup> Questioned as to what point in time they first met with an attorney, nineteen said when they first "went to court" or "went before the judge,"<sup>145</sup> while the remainder stated they "don't really remember."<sup>146</sup>

In the previous section of this paper, it was noted that *eight* respondents declared that they "talked back" to the police. Of these, five said that had they known they could ask for a "lawyer" at any time during questioning, they would have done so.<sup>147</sup>

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140. *Alston v. Redman*, 34 F.3d 1237, 1246 (3d Cir. 1994) ("[T]o be effective, a request for *Miranda* counsel must be made within 'the context of custodial interrogation' and no sooner."); see also Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008) (majority of participant offenders saying that they met with an attorney after the court appointed one for them).

141. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008); see app. question 21.

142. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008). The fifteen Participant Offenders who responded "no" or "not sure" to the question indicated they had two to three arrests for which they pled guilty or received suspended sentences, and they first met with an attorney after the court appointed one for them. *Id.*

143. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008); see also app. question 22. All fifteen expressed surprise when told that they could stop questioning at any time during an interrogation and ask to have an attorney, with some saying, "that's news to me," or things would have been different "if I knewed [*sic*] that." In probing for answers to the question participant offenders were asked if the police were supposed to stop questioning them if they asked to have an attorney present. The fifteen Participant Offenders who answered "no" or "not sure" to appendix question 21, again expressed uncertainty. *Id.*

144. *Miranda*, 384 U.S. at 474.

145. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008); see app. question 23. Except for Participant Offenders 5, 10, 12, 20 and 22, the majority of respondents disclosed that they were assigned public defenders afterward or just before they appeared in front of a judge. *Id.*

146. Interview with Participant Offenders 5, 10, 12, 20 and 22, in Leon County, Fla. (June-Aug. 2008). Five respondents who had arrest-records as juveniles and into their early twenties said they always met with attorneys but could not recall at what point in time. They did know from their more recent arrests that the court appointed them attorneys when they went before a judge. *Id.*

147. Interview with Participant Offenders 1, 13, 17, 21 and 24, in Leon County, Fla. (June-Aug. 2008).

While it is difficult to validate whether or not respondents would have asked for an attorney, had they known that they could have requested to have one present at any time during their questioning, their responses engender the issue of knowledge and understanding of their rights. A person's knowledge and understanding of his right to counsel is critical to his defense and should be granted before the person is brought to trial.<sup>148</sup>

#### WAIVER

The significance of waiver, in relation to *Miranda* and in plea bargaining, cannot be underplayed. Ever since the Court's ruling that a suspect may waive his *Miranda* Rights,<sup>149</sup> the waiver seems to have taken on its own unique version of sanctity. Much utilized by law enforcement officers, waivers play crucial roles in the lives of offenders.<sup>150</sup>

Given the use and significance of waivers within the legal system, respondents were asked to explain what the term meant to them.<sup>151</sup> Initially, most of them seemed confused; but in the course of their interviews, *eleven* said, "give up your rights."<sup>152</sup> Three joked that they "plead the fifth," while others provided answers ranging from "I don't know" or "not sure" to "talk to the police."<sup>153</sup>

Asked if they ever waived their rights, nine responded "yes" and explained that they gave up their rights either because the police promised to "let them go"<sup>154</sup> or "see what they can do,"<sup>155</sup> if they made a statement. Four added that they regretted their decisions. In explaining why they regretted their decisions, they provided answers all of which directed anger toward the police, such as, "the police used

148. *Rothgery v. Texas*, 128 S.Ct. 2578, 2591 (2008) ("[The attachment of the right to counsel] occurs when the government has used the judicial machinery to signal a commitment to prosecute . . . . Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings; what makes a stage critical is what shows the need for counsel's presence. Thus, counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.").

149. *See Miranda*, 384 U.S. at 444.

150. *See id.*

151. *See app. question 25(n).*

152. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008). Eleven Participant Offenders, ranging between ages 25 and 30, stated that they had several arrests and spent time in jail, prison or both. They waived their rights because they did not believe that they had rights. *Id.*

153. *Id.* Participant Offenders 3, 10, and 15 said they pled the Fifth. *Id.*

154. *Id.* (participant Offenders 1, 3 and 5 explaining that they thought that "let them go," meant they would not be charged but found out later that such was not the case).

155. *Id.* (asking Participant Offenders 4, 8, 13, 17, 19, and 21 to explain what the phrase "see what they can do," meant, respondents said that the police promised to talk to the prosecutor to reduce the charge).

it against me,” . . . “the police lied about what I said/told them,” . . . “the cops tricked me,”<sup>156</sup> . . . [and] “you can’t trust the police/cops.”<sup>157</sup>

In a sort of contradictory claim, four respondents volunteered that they provided “written statements” to the police and argued that since they “didn’t speak/talk to the police” they “didn’t think” they gave up their rights.<sup>158</sup> They learned later when they went before a judge that their “signed statement” meant they gave up their rights.<sup>159</sup> When questioned as to why they provided written statements to the police, they all gave similar answers that “the police promised” to let them go if they “write down what happened” and “sign it.” They did, and were “let . . . go.”<sup>160</sup>

With regard to the voluntary waiver of rights, a court may take a number of factors into consideration such as a defendant’s education, intelligence and proper advisement of rights, among others in deliberating a case and delivering a sentence.<sup>161</sup> Informed of such consideration, respondents were then asked for their feedback.<sup>162</sup> Invariably, the request for feedback drew laughter followed by comments such as: “Who do you think the judge would believe, me or the cops?” “The judge don’t care how dumb you are. I seen some real dumb [expletive deleted] people go to prison,” “Which judge will believe a dumb [expletive deleted] do not know his [expletive deleted] rights,” and “No judge I know would think you dumb if can make money pushing drugs.”<sup>163</sup>

### GUILTY, NOT GUILTY, OR NO CONTEST (NOLO CONTENDERE)

Arrested and charged with a crime, a defendant is required to formally answer to the charge(s) against him in the court of law.<sup>164</sup> The formal answer, commonly referred to as a plea, revolves around ac-

156. *Id.* As a form of trickery, the police promised to speak with the prosecutor to reduce the charge. As a former assistant state attorney, it has been my experience that law enforcement may not legally bind such an agreement without pre-delegated authority on a case-by-case basis. Responses provided by Participant Offenders 3, 5 and 13. *Id.*

157. *Id.* The angry responses directed toward the police is because respondents felt “betrayed” since the “police did not keep their word” in asking for leniency. Response provided by Participant Offender 8, who said that the police promised to ask for leniency if he made a statement to them. The police then used his statement against him in court. *Id.*

158. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008) (responses provided by Participant Offenders 1, 8, 13 and 19).

159. *Id.* At the time of the interview, respondents continued to claim that they did not give up their rights and that they simply wrote down “a few things” so they could be released. *Id.*

160. *Id.*

161. See *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065 (11th Cir. 1986).

162. Interview with Participant Offenders 1, 4, 8, 13, 19, 22 and 24, in Leon County, Fla. (June-Aug. 2008) (group interview with participant offenders, all of whom had multiple arrests).

163. *Id.*

164. See WILLIAM CLARK & WILLIAM MIKELL, *HANDBOOK OF CRIMINAL PROCEDURE* 421-25 (2d ed. 1918).

ceptance or denial of guilt.<sup>165</sup> Customarily, defendants are asked to enter a plea of guilty, not guilty, or no contest to the charges brought against them.<sup>166</sup>

*Guilty and Not Guilty:* Overall, respondent offenders had little difficulty in explaining the “guilty plea” as admitting to committing the offenses for which they were charged and the “not guilty plea,” as claiming that they did not commit the offenses as charged.<sup>167</sup> So as not to evoke respondents’ sensitivities, respondents were not asked whether they were guilty or not guilty of the crimes for which they were charged.<sup>168</sup>

*No Contest:* In attempts to explain the “no contest plea,” some misunderstanding on the part of respondents became evident. Nine indicated that they were unsure of the meaning while fifteen explained that a “no contest plea” meant that they did not accept guilt or innocence to the charges or offense.<sup>169</sup> Upon further query, it became clear that all fifteen respondents who correctly defined “no contest” felt that “no judgment was made against them” as a result of their “no contest plea.”<sup>170</sup> When asked why they felt that “no judgment was made against them,” some said because they “did not serve time” in jail or prison, while others said, “because [they] served thirty days” or “three months in prison,” and/ or were “put on probation.”<sup>171</sup> When asked whether they knew that a ‘no contest plea’ meant that they were placed under or subjected to the same consequences as a “guilty

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165. *See id.*

166. *See id.*

167. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008); *see* app. question 25 (d), (e).

168. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008). The research literature cautions against the use of sensitive questions which regularly serve to evoke anger in respondents and cause them to withdraw from participating in the study.

169. *Id.*; *see* app. question 25 (f). The nine Participant Offenders who were unsure of the meaning of “no contest plea” had between two to three arrests and explained that their attorneys instructed them how to plead. The fifteen Participant Offenders who explained the phrase meant that they did not accept guilt or innocence to the charges explained that after going to court several times and “serving time,” they became more familiar with the phrase. They all associated their no contest plea with serving little or no time or being placed on probation. And, when informed that the legal consequences of a no contest plea are the same as a guilty plea, they all expressed disbelief or doubt. *Id.*

170. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008).

171. *Id.*

plea,"<sup>172</sup> several appeared shocked, with the majority expressing doubt.<sup>173</sup>

### MISDEMEANOR AND FELONY

A criminal charge brought against a suspect is usually classified as a misdemeanor or felony according to the severity of the crime committed.<sup>174</sup> Considered less serious than a felony, a misdemeanor customarily carries a penalty of a fine or incarceration in a local confinement facility for a period usually less than a year,<sup>175</sup> while a felony, considered to be of a more serious nature, carries a penalty of imprisonment or death (capital felony).<sup>176</sup> A suspect found guilty of felony is placed in state or federal prison for a period of a year or more.<sup>177</sup>

In questioning respondents regarding a misdemeanor and felony, their responses suggested that they understood the difference between the two types of charges. Eleven, however, stressed that they "didn't know" the difference the first time they were arrested, while a few others were unsure when they became aware of the difference between a misdemeanor and a felony.<sup>178</sup> They all claimed they learned the difference over time, after repeated arrests or repeated imprisonment.<sup>179</sup>

Interestingly, thirteen respondents admitted to having "juvenile records", six of whom acknowledged that they became aware that their charges were more serious<sup>180</sup> than the previous ones because they were not allowed to go free, "put on probation" or had to "come up with bond money" in order to be released.<sup>181</sup> Six of the twenty-four

172. See generally *Vinson v. State*, 345 So. 2d 711, 715 (Fla. 1977); *Allen v. State*, 474 S.W.2d 480, 482 (Tex. Crim. App. 1972); *People v. Robinson*, 65 Cal.Rptr.2d 406, 409 (Ca. App. 3d 1997); *State v. Nelson*, 819 A.2d 905, 907 (Conn. App. 2003); *Clauson v. Commonwealth*, 511 S.E.2d 449, 454 (Va. App. 1999); *State ex rel. Warren v. Schwarz*, 579 N.W.2d 698, 706 (Wis. 1998); *Burch v. State*, 738 P.2d 157, 158 (Okla. App. 1987) (noting that in many states, a plea of *nolo contendere* or guilty has the same legal effect or consequence).

173. See Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008).

174. See CLARK & MIKELL, *supra* note 164; see also *United States v. LaBonte*, 520 U.S. 751, 774-75 (1997).

175. See *Baldwin v. New York*, 399 U.S. 66, 70 (1970).

176. See *Boyde v. California*, 494 U.S. 370, 400 n.5 (1990) (Marshall, J., dissenting).

177. *Baldwin*, 399 U.S. at 70 ("States . . . distinguish . . . between misdemeanors and felonies in determining such things as whether confinement shall be in county or regional jails, rather than state prison.").

178. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008).

179. *Id.* Throughout the interviews, respondents who served time in prison demonstrated that they have a better grasp of the legal terms and phrases. *Id.*

180. Interview with Participant Offenders 1, 4, 8, 13, 19, 24, in Leon County, Fla. (June-Aug. 2008) (showing that what was discovered was not that the charges were "more serious" but that, in the majority of cases, respondents violated probation in addition to the charges against them, thereby adding to their penalties).

181. Interview with Participant Offenders 1, 4, 8, 9, 13, 19, 24, in Leon County, Fla. (June-Aug. 2008) (revealing that Participant Offenders 1, 4, 13 and 24 said they knew their charges



respondents who served over a year in jail said if they knew the consequences of a felony, they would have steered clear of “drugs.”<sup>182</sup>

### PROBATION AND PAROLE

Probation and parole, two closely related legal terms, govern offenders’ release with prescribed sets of conditions.<sup>183</sup> Probation, granted by a court, is usually given to a person in lieu of confinement or imprisonment, while parole, granted by a paroling authority or board, is usually extended to someone after a period of confinement.<sup>184</sup> To determine ex-offenders’ understanding of probation and parole, inquiry was made into whether they heard these terms before.<sup>185</sup> All twenty-four respondents said that they had heard the terms and acknowledged to having served probation on more than one occasion.<sup>186</sup>

Despite their awareness of the terms probation and parole, offenders experienced difficulties in explaining the differences between the two concepts.<sup>187</sup> During the course of several days of interviews, it became apparent that respondents view probation as behavioral misconduct, which they deem to be “small time”<sup>188</sup> or tied to “not so serious crime,” and parole as actions of a more “serious” nature.<sup>189</sup>

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were more serious because they were not placed on probation; participant Offenders 8 and 19 said they had to secure bond money in order to be released).

182. Interview with Participant Offenders 1, 3, 4, 13, 19, 22, in Leon County, Fla. (June-Aug. 2008). These offenders were charged with possession of crack cocaine for which they received prison time. See FLA. STAT. §§ 893.13, 893.135 (2008).

183. *Samson v. California*, 547 U.S. 843, 860 (2006) (“A parolee, like a probationer, is set free in the world subject to restrictions intended to facilitate supervision and guard against anti-social behavior. As with probation, ‘the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements.’ . . . Certainly, parole differs from probation insofar as parole is ‘meted out in addition to, not in lieu of, incarceration.’ . . . And, certainly, parolees typically will have committed more serious crimes-ones warranting a prior term of imprisonment-than probationers. The latter distinction, perhaps, would support the conclusion that a State has a stronger interest in supervising parolees than it does in supervising probationers. . . . [T]here is no constitutional difference between probation and parole for purposes of the [F]ourth [A]mendment.”).

184. *Id.*

185. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008) (as a screening question to app. question 32, participant offenders were asked if they heard the terms “probation and parole” before).

186. *Id.*

187. *Id.*

188. Interview with Participant Offenders 1, 2, 3, 5, 7, 8, 14, 19, in Leon County, Fla. (June-Aug. 2008) (respondents considering such offenses as fighting and smoking marijuana as “small time” crimes).

189. Interview with Participant Offenders 1, 4, 8, 10, 13, 15, 19, 24, in Leon County, Fla. (June-Aug.2008) (respondents referring to car-jacking and selling drugs as serious offenses).

*Parolees:* Of the total number of respondents, seven<sup>190</sup> identified themselves as parolees.<sup>191</sup> Although aware of the terms probation and parole, paroled offenders used the word “probation” instead of “parole” throughout their conversations, to describe their conditions of release. They also used the term “probation officer” instead of “parole officer” as the person who has legal supervisory authority over them.<sup>192</sup> Asked to explain why they referred to their parole officers as probation officers, parolees either exclaimed, “what’s the difference?” or “what’s the big deal?” Probing into these responses revealed that parolees harbor varying degrees of resentment and mistrust for probation and parole officers.<sup>193</sup> The shared conviction is that probation and parole officers are officials of the criminal justice system who are not interested in their rehabilitation but in “looking” for excuses to keep them “locked up.”<sup>194</sup> In explaining to respondents that parole is tied to a criminal sentence while probation is not, the responses remained fairly the same. Only one parolee made a distinction between probation and parole. Expressing his understanding with anger in his voice, he said,

The police can pick me up for something I didn’t do just to put me back in prison. They did it before, and they waited three months to prove I didn’t do it.<sup>195</sup> Parole didn’t do me no good because I didn’t have much [prison] time left anyway. This never happened when I serve probation . . . . When I broke [violated] probation, they extended my time [conditional freedom] but did not throw me in jail, but when they [the police] say I broke parole, they cut [reduced] my time [conditional release].<sup>196</sup>

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190. Interview with Participant Offenders 1, 4, 13, 15, 17, 19, 21, in Leon County, Fla. (June-Aug. 2008) (stating that four Participant Offenders: 1, 4, 13 and 19, served time in prison for drug possession, two: 17 and 21 for stealing and one: 15 for assault).

191. Interview with Participant Offenders 1, 4, 13, 15, 17, 19, 21, in Leon County, Fla. (June-Aug. 2008). At the time of their interviews, four respondents: 1, 13, 15 and 17, had successfully completed the conditions of their parole while three 4, 19, and 21 were still serving parole. As used here, the term “parolee” refers to individuals who have already completed their conditions as well as those who were still out on parole.

192. Interview with Participant Offenders 1, 4, 19, 21, in Leon County, Fla. (June-Aug. 2008) (despite being on parole, four respondents: 1, 4, 19 and 21 continued to refer to their parole officers as probation officers and when asked why they all said they are “not big time” criminals).

193. *Id.* All seven parolees used expletives to describe their parole officer.

194. *Id.*

195. Interview with Participant Offender 8, in Leon County, Fla. (June-Aug. 2008). This respondent was initially stopped for jay walking. When asked for identification, he presented his driver’s license to the police who, after a quick verification check, arrested the respondent for “false identification.” Because he was on parole, he was charged with parole violation as well as false identification. He was released after three months when police found that someone else had used his identification information when arrested for committing a crime in Miami. *Id.*

196. *Id.* Charged with a misdemeanor, the respondent received one year probation, which he violated. As a result, he received eighteen months probation with stricter conditions. On an-

In a follow-up interview with this offender, he pointed out that he, as well as most of his “homeboys” [friends], detested confinement in jail or prison and that “breaking” parole “put you back in jail” quicker than “breaking probation.”<sup>197</sup>

*Probationers:* Of the seventeen respondents who received probation, eleven candidly admitted their lack of understanding of “parole” as the difference between the length of the sentence and the amount of time served in jail or prison. They also acknowledged confusion over the fact that violating parole could result in serving the entire sentence imposed by the court.<sup>198</sup> And when informed that parole violation could result in serving additional time, the majority responded with doubt.<sup>199</sup>

### ADJUDICATION WITHHELD AND SUSPENDED SENTENCE

Adjudication withheld and suspended sentence are two legal concepts that presented a greater degree of difficulty for respondents to explain.<sup>200</sup> To highlight the various responses, these concepts will be discussed separately.

*Adjudication Withheld:* Acknowledging that they heard the term “adjudication withheld” before, all of the respondents displayed uneasiness or indifference when asked to explain what the concepts meant to them.<sup>201</sup> After much probing and encouragement the following explanations were provided:

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other occasion, while out on parole, the respondent was arrested for violating parole and had to serve out the length of his sentence. *Id.*

197. *Id.*

198. *Id.* Six of the seven parolee Participant Offenders: 1, 4, 13, 15, 17 and 19 received time off for good behavior during the time of parole. However, many were angry that the time credited for good behavior was not subtracted from the remainder of their sentence when they violated parole, thereby causing them to serve a longer sentence. Unfortunately for many indigent defendants, these issues are not properly addressed during their proceedings. *Id.*

199. *Id.* Four of the seven parolee Participant Offenders 1, 4, 13 and 17 Respondents stated that they did not “know nothing [sic] what [they were] talking about,” in reference to parole violation. *Id.*

200. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008); see app. question 25(k), (l) (in comparison to “guilty and not guilty,” or “probation and parole”).

201. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008) (discussing with Participant Offenders 3, 6, 11, 16 and 18; some stood up then sat again, some stared out in the distance while others uttered something meaningless and ended up repeating, “that’s not it.”) Participant Offender 20 said, “I’m not sure, but I’m not stupid.” *Id.*

TABLE 4  
RESPONDENTS' EXPLANATIONS OF  
ADJUDICATION WITHHELD

EXPLANATIONS OF ADJUDICATION WITHHELD	NUMBER OF RESPONDENTS
The judge didn't make a decision/pass judgment	6
The judge threw out the case	3
The judge dismissed the case	5
The judge didn't find the person guilty	4
Don't know [the meaning]	4
(Did not provide an answer)	2
<b>TOTAL</b>	<b>24</b>

The varied responses presented in the above table help to illustrate respondents' lack of understanding of adjudication withheld.<sup>202</sup> As the data show, twelve respondents felt in the withholding of adjudication, the case was either "thrown out," dismissed, or the person found not guilty.<sup>203</sup> As such, they argued that all "charges are dropped" and that there is "no criminal record."<sup>204</sup> And, in following up with the six respondents who said the judge "didn't make a decision" or "pass judgment," none accepted that the withholding of judgment is tied to specified conditions of behavior and that the case could be reopened for violating the conditions.<sup>205</sup>

202. *Id.*; see app. question 25(k). Adjudication Withheld is defined under deferred judgment as, "A judgment placing a convicted defendant on probation, the successful completion of which will prevent entry of the underlying judgment of conviction." BLACK'S LAW DICTIONARY 859 (8th ed. 2004); *Raulerson v. State*, 763 So. 2d 285, 290 (Fla. 2000). ("Pursuant to [Florida's] statutory scheme, a defendant who has adjudication of guilt withheld and successfully completes the term of probation imposed 'is not a convicted person.'"); *State v. Gazda*, 257 So. 2d 242, 243-44 (Fla. 1971). ("[T]he term 'conviction' means determination of guilty by verdict of the jury or by plea of guilty, and does not require adjudication by the court. It is important to distinguish a 'judgment of conviction' which is defective unless it contains an adjudication of guilt. A judgment of conviction is a necessary prerequisite to a valid sentence . . . [A judgment of conviction] does not necessarily include an adjudication, whereas [a conviction] does.")

203. *Id.* (response to appendix question 25(k), three Participant Offenders 2, 5, and 11 stating that the judge threw out the case, five, 7, 9, 16, 18 and 23 stating that the judge dismissed the case, and four 12: 15: 17 and 22 stating that the judge found the person not guilty).

204. *Id.* Many defendants in my experience have confused a withhold of adjudication with a sealed record of criminal history. *Id.*

205. *Id.* (responses provided by Participant Offenders 1, 3, 6, 10, 14, 20. ); *Raulerson*, 763 So. 2d at 290. ("[I]f probation is revoked, the defendant must be adjudicated guilty of the charged offense . . . Applying [Florida's] statutory scheme to the issue at hand, it becomes apparent that there are two possible alternatives when one charged with a violation of [probation] has [had] adjudication of guilt withheld . . . either the term of probation will be successfully completed, in which event the defendant will not have been convicted at all; or probation will be revoked, in which case the defendant must be adjudicated guilty . . .").

*Suspended sentence:* Although respondents did not express the same types of uneasiness or indifferences when asked to explain in their own words what a suspended sentence meant to them, a look at their responses in the table below indicates some degree of confusion.

TABLE 5  
RESPONDENTS' EXPLANATIONS OF SUSPENDED SENTENCE

EXPLANATIONS OF SUSPENDED SENTENCE	NUMBER OF RESPONDENTS
The case was suspended/dismissed	5
The judge dropped all charges	6
The judge sentenced you, then changed his mind	2
The judge put you on probation and make you pay court cost	4
Not guilty	4
Don't know [the meaning]	2
(Did not provide an answer)	1
<b>TOTAL</b>	<b>24</b>

The responses presented in Table 5 indicate offenders' explanations regarding the meanings of suspended sentence.<sup>206</sup> In discussing their answers and explaining to them what the concept meant, fourteen respondents admitted that they guessed the meanings in order not to "look dumb [or] stupid."<sup>207</sup> They admitted that since they either received or know of a friend who received a suspended sentence, they should be able to "at least guess" what the term meant.<sup>208</sup> Twenty-two respondents claimed that they knew that both "adjudication withheld" and 'suspended sentence' had something to do with "not serving jail time" or "not going to jail" and as such, used their own their own experiences or explanations provided by friends to "come up" with or "think" of a meaning.<sup>209</sup>

206. A suspended sentence is defined as, "A sentence postponed so that the defendant is not required to serve time unless he or she commits another crime or violates some other court-imposed condition. A suspended sentence, in effect, is a form of probation." BLACK'S LAW DICTIONARY 1394 (8th ed. 2004).

207. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008). The phrase "look dumb" was used by Participant Offenders 1, 4 and 8; the phrase "look stupid," was used by Participant Offenders 5 and 14. These phrases were used by the majority of respondent offenders during group interviews. *Id.*

208. *Id.* (responses provided by Participant Offenders 4, 8 and 14).

209. *Id.* Of the twenty-four Participant Offenders, 13 and 24 openly admitted that they did not know the meanings of *adjudication withheld* or *suspended sentence*, and made no effort in trying to explain the phrases. *Id.*

## PLEA BARGAIN

Once approved by the U.S. Supreme Court,<sup>210</sup> plea bargaining evolved to be an integral part of prosecutorial negotiations.<sup>211</sup> Commonly used on behalf of defendants to secure prosecutorial concessions,<sup>212</sup> such as a lesser charge and/or reduced sentence in exchange for an offender's guilty plea, plea bargaining is viewed by many suspects as a viable option to avoid severe sentences.<sup>213</sup>

To assess disadvantaged ex-offenders' understanding of plea bargaining, respondents were asked whether they had used this option and why.<sup>214</sup> Thirteen said they plea bargained at least once, while eleven said they did so more than once. In explaining why they plea bargained, they provided the varied answers presented in the table below:

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210. *Santobello v. New York*, 404 U.S. 257, 262 (1971) ("This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.").

211. G. NICHOLAS HERMAN, *PLEA BARGAINING* 1 (1997) ("Approximately 90% of all criminal cases are resolved through plea bargaining.").

212. *Moore v. Czerniak*, 534 F.3d 1128, 1193 (9th Cir. 2008) ("Prosecutorial charging and plea bargaining decisions are particularly ill-suited for broad judicial oversight. In the first place, they involve exercises of judgment and discretion that are often difficult to articulate in a manner suitable for judicial evaluation. Such decisions are normally made as a result of careful professional judgment as to the strength of the evidence, the availability of resources, the visibility of the crime and the likely deterrent effect on the particular defendant and others similarly situated. Even were it able to collect, understand and balance all of these factors, a court would find it nearly impossible to lay down guidelines to be followed by prosecutors in future cases.").

213. *Santobello*, 404 U.S. at 261 ("Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned."); see *Brady v. United States*, 397 U.S. 742, 751-52 (1970).

214. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008); see app. question 25(m). As a screening question to appendix question 25(m), Participant Offenders were asked if they ever plea bargained and why. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008).

TABLE 6  
RESPONDENTS REASONS FOR PLEA BARGAINING

REASONS FOR PLEA BARGAIN	NUMBER OF RESPONDENTS
Did not want to go to jail	7
To get a lesser sentence	5
Did not want to go back to jail	5
To reduce charges	4
To reduce charges and get a lesser sentence	3
<b>TOTAL</b>	<b>24</b>

In interview discussions with respondents, they all declared that they simply followed the advice of their attorneys the first time they plea bargained.<sup>215</sup> Asked why they did, twenty-two said because they were “afraid to go to jail,” or that they were told by their attorneys that they would be “sent to jail” or “prison,” or that being “ex-cons [they] don’t stand a chance” of not “going back to jail.”<sup>216</sup> With regard to the response of being ex-cons who do not stand a chance, respondents said they were “picked up” for being with the wrong group or being “in the wrong place” and felt that, as a result, they would be sent back to jail/ prison for violating probation or parole hence their plea to a “lesser charge.”<sup>217</sup>

Some may argue that no one would enter a guilty plea for a crime he or she did not commit, but a person living in conditions of poverty who is charged with a minor crime and refuses to plead guilty will only guarantee himself or herself a longer stay in jail awaiting a hearing - often longer than the likely sentence to be imposed upon conviction through a guilty plea.<sup>218</sup>

215. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008). Twenty-one Participant Offenders said they were represented by public defenders while three 1; 4 and 19, said they had pro-bono attorneys. In group interviews, all twenty-four said they plea bargained because they were advised by their attorneys to do so. *Id.* See ROBINSON, *supra* note 19, at 223 (“Since the poor are by definition, indigent, they are more likely to be served by public attorneys.”).

216. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008). Participant Offenders 16 and 23 did not provide a response while some who served time in prison, Participant Offenders 1, 4, 19, 21 and 24 said they pleaded because they were “not going back to jail.” *Id.*

217. *Id.* (responses provided by Participant Offenders 1, 4, 19, 21 and 24).

218. ROBINSON, *supra* note 19, at 219 (citations omitted); see Robert D. Miller, Symposium, *An Interdisciplinary Examination of Coercion, Exploitation, and the Law: III. Coerced Confinement and Treatment: The Continuum of Coercion: Constitutional and Clinical Considerations in the Treatment of Mentally Disordered Persons*, 74 DENV. U. L. REV. 1169, 1185 (1997) (discussing forced evaluation and treatment in the criminal justice system).

Nine who admitted to serving time in jail more than once and four who served time in prison said they regretted their plea bargain the first time.<sup>219</sup> In explaining their regrets, they all alleged that their guilty plea made them targets of subsequent arrests and confinement, something they did not know the first time they pleaded.<sup>220</sup> And, had they known this to be the case, they would have fought “the charges,” instead of pleading.<sup>221</sup>

Of the thirteen respondents who expressed regrets for plea bargaining, seven appeared distraught about their future.<sup>222</sup> Ranging from ages twenty-seven through thirty, they commented repeatedly on their delinquent past and questioned their future.<sup>223</sup> They no longer saw the streets as a way of life, an alternative to schooling or working at a supermarket or department store.<sup>224</sup> As a twenty-nine year old repeated offender expressed:

Sometimes, I don't know what I am going to do anymore. Just when I try to get my life together, the cops pick me up 'cause I look like somebody, so they say. And when they run my record, they see all

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219. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008). Four Participant Offenders; 1, 4, 19 and 21; who served time in both jail and prison, were most vocal in expressing regret for plea bargaining. *Id.*; see also MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS 2 (2004), <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc04.pdf> (“In 2004 an estimated 1,078,920 persons were convicted of a felony in State courts, a vast majority (95%) of whom pleaded guilty. The 1.1 million persons were convicted and sentenced for about 1.5 million felony offenses during 2004.”); see also PATRICK A. LANGAN & ROBYN L. COHEN, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE COURT SENTENCING OF CONVICTED FELONS 41 (1992), <http://www.ojp.usdoj.gov/bjs/pub/pdf/njrp92.pdf>. In a previous report, the government noted that “[p]lea bargains, in which the defendant agrees to plead guilty in exchange for dropped or reduced charges or in exchange for a reduced sentence, is a common practice in the criminal justice system. The proportion of those who pleaded guilty as part of a plea bargain is not known.” See COHEN, *supra*.

220. ROBINSON, *supra* note 19, at 13; see also Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008). Respondents' regrets appear consistent with the claim that, “When crimes are committed nearby, especially when they fit the *modus operandi* (M.O.) of a known offender out on parole, he or she is automatically considered a likely suspect.” Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008).

221. *Id.*

222. FLA. CONST. art. VI, § 4(a) (1968) (“No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.”); *Johnson v. Governor of State of Florida*, 405 F.3d 1214, 1216-17 n.1, 3 (11th Cir. 2005) (“A felon who has completed his sentence may apply for clemency to have his civil rights restored . . . Under Florida’s Rules of Executive Clemency, however, the right to vote can still be granted to felons who cannot afford to pay restitution . . . The Clemency Board is made up of the Governor of Florida and members of the Cabinet. The Clemency Board has the power to restore the civil rights of convicted felons, including the right to vote.”); see Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008). In the end, a felon who is stripped of his civil rights or a person with a criminal record normally has difficulties finding gainful employment. Participant Offenders 1, 3, 4, 8, 19, 21 and 27 who appeared distraught about the future ranged between ages 27 to 30. *Id.*

223. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008).

224. *Id.*



these charges, since I was small, and they haul me in . . . I try to stay straight but they don't give me a chance. I am just angry 'cause I plead so many times just 'cause I didn't want no jail time . . . and now I have all this record . . . for what . . . for nothing. When I look at my young hommies today, they don't know, they just don't know . . . they don't got [sic] no future?<sup>225</sup>

The above comments fit the pattern of regret expressed by most of the older respondents.<sup>226</sup> At an earlier age, they all saw plea bargaining as a way to receive reduced sentences or prevent confinement. But as they grew older and took retrospective glances at their lives, they began to question not only their decisions to plea bargain but also the "fairness" in this method of dispensing justice.<sup>227</sup>

The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.<sup>228</sup>

In the haste to dispense justice through plea bargaining, the Court may have left the door open for misuse that serve to negatively impact young lives and foster hopelessness that fuels the cycle of criminality.<sup>229</sup>

## CONCLUSION

On a daily basis, defense attorneys and prosecutors negotiate and dispose of hundreds of cases in the United States by way of the plea bargaining process. The process in which an accused agrees to plead guilty to a lesser charge, a reduced sentence, or both affects the lives of a vast number of suspects, the majority of whom are poor, typically minorities, who possess little formal education.<sup>230</sup> The plea, negotiated primarily between defense attorneys and prosecutors, results in suspects giving up rights guaranteed under the Constitution, such as equal protection and due process of law.<sup>231</sup>

For disadvantaged groups in general, African Americans in particular, these rights are not relinquished suddenly at the plea bargain

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225. Interview with Participant Offender 19, in Leon County, Fla. (June-Aug. 2008).

226. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008) Older respondents refer to those between ages 27 and 30.

227. *Id.*

228. *Santobello*, 404 U.S. at 260.

229. ROBINSON, *supra* note 19, at 219-20.

230. *Id.*

231. *Id.*

stage; they begin to gradually erode from the time of arrest.<sup>232</sup> As shown in this study, for disadvantaged African Americans, the erosion of these rights provided under equal protection and due process of law result from a lack of understanding over the course of criminal proceedings from *Miranda* to the plea bargaining phase.<sup>233</sup> Couched in legal terms and phrases, these rights manifest themselves in a wide array of interlocking policies and procedures confusing to the person of common intelligence.

For example, disadvantaged African American suspects who participated in this study knew that they should not say anything to law enforcement officers (right to remain silent) but did not understand how it relates to self-incrimination.<sup>234</sup> Similarly, while they were told they have the right to an attorney, they expressed confusion whether they should have asked for one and at what point.<sup>235</sup> In addition, the majority did not understand the concept of waiver and the consequences of waiving their rights.<sup>236</sup> Finally, in agreeing to plea bargain, they were not fully cognizant that it could mean accepting guilt with specified conditions that could lead to graver consequences if these conditions were not met.<sup>237</sup>

Overall, the respondents in this study indicated that they acquired their knowledge of equal protection and due process rights incre-

232. *Id.*

233. *Id.* “Not surprisingly, plea bargaining results in a bias against poor clients, who are typically minorities, as well as the uneducated, who may not even know what is being done to them in the criminal justice process.” COLE, *supra* note 1, at 243-44.

234. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008). Asked individually if the right to remain silent has anything to do with protection against self-incrimination, all of the participant offenders said they were not sure or did not know. Participant Offender 20 asked, “What the \_\_\_ is self-incrimination anyway?” See app. question 17.

235. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008); see app. questions 13, 16, 19 & 21. Given a copy of the *Miranda* rights to read, the majority of respondents read it without stumbling. Almost all, however, struggled to explain the meaning of it. All the participant offenders identified the right to remain silent and the right to an attorney as their rights. However, they could not provide reasons for being silent, and questioned why they should remain silent if they were telling the truth. They were also unsure whether the right to an attorney meant that they had to hire their own lawyer or that they would have a court appointed lawyer. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008).

236. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008); see app. question 25(n). The angry responses directed toward the police happened because the participant offenders felt “betrayed” since “the police did not keep their word” in asking for leniency. Response by Participant Offender 8: “You can’t trust the police/cops.” Participant Offender 8 stated that the police promised to ask for leniency if he made a statement to them, but instead used his statement against him in court. Interview with Participant Offenders 8, in Leon County, Fla. (June-Aug 2008).

237. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008); see app. question 25(m). Four of the twenty-four participant offenders, who served time in both jail and prison were most vocal in expressing regret for plea bargaining. Interview with Participant Offenders 1-24 in Leon County, Fla. (June-Aug 2008).

mentally, over the course of three or four arrests.<sup>238</sup> They noted that during their first encounters with the police they did not understand the process.<sup>239</sup> Several also admitted that their understanding was still very limited.<sup>240</sup> One area in which most of the respondents expressed initial difficulty in understanding was in having an accomplice testify against them.<sup>241</sup> As many expressed, ‘He [the witness] planned the ‘whole thing’ yet he ‘got no [jail] time.’”<sup>242</sup>

Acknowledging that their first encounters with the criminal justice system came while they were still juveniles, the majority explained that they felt they understood the process by the time they became adults.<sup>243</sup> This perception, they said, ultimately proved incorrect as, with each new arrest, the penalties became harsher, and obtaining release became increasingly difficult.<sup>244</sup> Many claimed that, as adults, the police began to “trump up” additional charges against them just to “make them serve time.”<sup>245</sup> “How can this be right?” several of them

238. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008); see app. question 11. One respondent said that he learned from a prison inmate that when the police ask you, “Where do you live?” they are trying to find out “if you live close to the scene of the crime,” especially if “you been to prison before.” All of the respondents said they became aware of these rights over time, over the course of more than one arrest or by talking to their “homies” (friends) or members of their families who served time in jail or prison. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug. 2008).

239. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008); see app. question 5. Several respondents said they were first read their rights years ago when they became juvenile offenders. Almost all of these respondents stated that “because they were “so young/small” they didn’t understand much of “anything.” Four offenders who spent time in both jail and prison recited the *Miranda* Warnings and disclosed that they were read their rights “quite a few” times and therefore remember it “by heart.” Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008).

240. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008) (responses of Participant Offenders 2, 7, 9, 16, 18 & 23).

241. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008); see app., Group Discussion (group discussions during which participant offenders verbally lashed out against accomplices who testified against them, often referring to them in derogatory terms filled with expletives).

242. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008) (responses of Participant Offenders 1, 8, 19, 21 & 24).

243. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008); see app. question 5 (where nine respondents disclosed voluntarily that they were arrested as juveniles). By the end of the study, the vast majority of participant offenders disclosed that they had juvenile records. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008).

244. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008); see app. Group Discussion (where almost all of the participant offenders talked about the difficulties in securing their release as their arrest record grew). Those who did not, Participant Offenders 16, 18 & 23, were all 20 years old. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008).

245. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008); see app. Group Discussion (responses provided by Participant Offenders 4, 8 & 19 at group discussion while others voiced agreement).

asked.<sup>246</sup> One ex-convict who spent over seven years in correctional facilities, jails, and prisons seemed to sum-up the situation best when he said,

Most of the guys, I know, learn about the court system over time, going back to prison again and again. What they never learn is the consequences that come after, the difficulties, the problems that come later in life. It's good to plead, "I will take six months," or "Cut it down to eighteen [months] and I will sign," or, "If I can get out before Christmas, I will go for it [prosecutor's offer of jail time]." Then, when they turn 29-30, they have nowhere to go, no jobs, no money, no car, no life, no nothing. By then it's too late. For me it's too late, and I am only 29. My gran-momma used to warn me about it [going to prison] but I didn't care then. Everyone I know my age was in trouble, or been to jail or prison. I was a "juvie" [juvenile offender]. I didn't know what was happening to me then. I served time [in jail and prison]. Still, I don't understand a lot of things, and all the words they [prosecutors and judges] use make me look like a hardened criminal. All I want to do is to get my life straight . . . but the cops won't let me . . . picking me up for even crossing the street [jaywalking].<sup>247</sup>

Although this study is of limited scope, it does point to a crucial issue affecting disadvantaged suspects; the fundamental issue of a defendant's adequate understanding of his or her rights. Given the growing overpopulation of poorly educated African Americans in jails and prisons today, it is perhaps time to expand the boundaries of the debate so as to develop a more comprehensive understanding of the issue of the language of the law from the standpoint of the person of common intelligence.

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246. Interview with Participant Offenders 1-24, in Leon County, Fla. (June-Aug 2008).

247. *Id.*

APPENDIX (INTERVIEW QUESTIONS)

**A person who is arrested, questioned, and charged by the police is entitled to certain rights. He is expected to understand these rights, the processing steps he is going through, the charges against him, and the language (words and phrases) used throughout the process. I am interested in finding out whether or not you understood these things starting from the point of your arrest to plea bargain, only if you were arrested and charged with a crime after your eighteenth birthday.**

**I would like for you to take part in my study. If you do take part, your identity would not be disclosed, and the information you provide to me would be kept confidential and used only for my study and possibly a journal article. You do not have to participate in this study if you do not want to do so. If you decide to participate and want to change your mind afterwards, you can quit talking to me at any time you so desire.**

1. How old are you (*DOB*)? \_\_\_\_\_
2. What is the highest grade you completed in school?  
Under 7 7th 8th 9th 10th 11th 12th
3. What is your yearly income? \$ \_\_\_\_\_
4. Since your eighteenth birthday, how many times were you arrested by the police? (Number of arrests). \_\_\_\_\_
5. Did the police ever read you your (Miranda) rights? \_\_\_\_\_
6. Have you ever served time in:
  - a. Jail \_\_\_\_\_
  - b. Prison \_\_\_\_\_
  - c. Both jail and prison \_\_\_\_\_
7. How long (months or years) have you served in prison? \_\_\_\_\_

**I would now like to ask you some questions and talk with you about your (Miranda) rights. Please DO NOT feel that you have to make up an answer or an explanation. If you do not have an answer just let me know and we will go on to the next question.**

8. What type of crime were you charged with when the police first read you your (Miranda) rights?
9. How many times in all did the police ever read you your (Miranda) rights?
10. At what point in time during your arrest did the police read you your rights?
11. When do you think the police are supposed to read you your (Miranda) rights?
12. When was the first time you became aware of your (Miranda) rights?
13. What would you say are Miranda rights?

14. Did you say anything to the police when they first arrested you? Please explain why (or why not).
15. [If respondent talked to the police]. What did you say to the police?
16. Please explain what *the right to remain silent* means to you.
17. Do you think the *right to remain silent* has anything to do with *protection against self incrimination*? Please explain your answer.
18. What do you think, *can and will be held against you in the court of law* means?
19. Please explain what *the right to an attorney* means to you.
20. At what point in time of your arrest do you think you can ask the police to have an attorney present?
21. Suppose you agree to make a statement and start talking to the police, can you stop at any time and ask to have a lawyer present?
22. Suppose you ask for an attorney while the police are questioning you, what should the police do?
23. At what point in time during your arrest did you meet with an attorney for the first time?
24. Did you ever waive (give up) your (Miranda) rights? Explain why.

**I am now going to mention some words and phrases and would like for you to tell me which ones you have heard before. I would also like for you to explain them if you can and then discuss each one with you. If you do not know the meaning of a word or phrase, just let me know and we will go on to the next one.**

25. Explain to me, if you could, the meaning of the following words?
  - a. Custody
  - b. Interrogation
  - c. Custodial Interrogation
  - d. Guilty
  - e. Not Guilty
  - f. No Contest
  - g. Misdemeanor
  - h. Felony
  - i. Probation
  - j. Parole
  - k. Adjudication withheld
  - l. Suspended sentence
  - m. Plea bargain
  - n. Waiver

**If, in the course of the interview the following issues are not addressed, ask respondents the questions below and probe for answers whenever necessary.**

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26. At what point in time during your arrest would you say that the police, *took you into custody*?
27. Do you think there is a difference between *arrest* and *custody*? Please explain your answer.
28. When a person voluntarily waives his rights, the court is supposed to consider the person's level of *education, intelligence* and *proper advisement of rights* before making a decision on his case.
  - a. Do you think this is true?
  - b. Why do you think this is (or not) true?
29. How many times have you pled *guilty*? Please explain why.
30. How many times have you pled *not guilty*? Please explain.
31. Do you think there is a difference between a *felony* and a *misdemeanor*? Please explain.
32. Do you think there is a difference between *probation* and *parole*? Please explain.
33. Please explain to me in some detail about one or more of your arrest(s) from the time the police arrived to the time you plea bargained.