conviction. But under plea bargaining the foundation for conviction need only include a factual basis for the plea (in the opinion of the judge) and the guilty plea itself. Considering the coercive nature of the circumstances surrounding the plea, it would be a mistake to attach much reliability to it. Indeed, as we have seen in *Alford*, guilty pleas are acceptable even when accompanied by a denial of guilt.... Now it is one thing to show to a judge that there are facts which support a plea of guilty and quite another to prove to twelve jurors in an adversary proceeding guilt beyond a reasonable doubt. Plea bargaining substantially erodes the standards for guilt and it is reasonable to assume that the sloppier we are in establishing guilt, the more likely it is that innocent persons will be convicted. So apart from having no reason whatever to believe that the guilty are receiving the punishment they deserve, we have far less reason to believe that the convicted are guilty in the first place than we would after a trial.

In its coercion of criminal defendants, in its abandonment of desert as the measure of punishment, and in its relaxation of the standards for conviction, plea bargaining falls short of the justice we expect of our legal system. I have no doubt that substantial changes will have to be made if the institution of plea bargaining is to be obliterated or even removed from its central position in the criminal justice system. No doubt we need more courts and more prosecutors. Perhaps ways can be found to streamline the jury trial procedure without sacrificing its virtues. Certainly it would help to decriminalize the host of victimless crimes—drunkenness and other drug offenses, illicit sex, gambling, and so on—in order to free resources for dealing with more serious wrongdoings. And perhaps crime itself can be reduced if we begin to attack seriously those social and economic injustices that have for too long sent their victims to our prisons in disproportionate numbers. In any case, if we are to expect our citizenry to respect the law, we must take care to insure that our legal institutions are worthy of that respect. I have tried to show that plea bargaining is not worthy, that we must seek a better way. Bargain justice does not become us.

REVIEW AND DISCUSSION QUESTIONS

1. Is it fair that defendants who plead guilty are given more lenient sentences than those who are found guilty by trial?
2. Do prosecutor and defendant have equal bargaining weight in plea negotiations? Does plea bargaining involve duress or just a "hard choice"? If duress, is there something unfair about this duress? Is Kipnis's analogy between plea bargaining and a gunman demanding one's wallet an accurate comparison? Or is plea bargaining more like a doctor offering to sell a vital treatment or an auto mechanic offering to assist a stranded motorist for a large sum?
3. What two principles does our criminal justice system institutionalize, and how is each related to a distinctive type of injustice? What is the difference between aberrational and systemic injustice? On what grounds does Kipnis argue that plea bargaining involves systemic injustice? Do you agree?
4. Is Kipnis right when he claims that prosecutors act unjustly by not assuming that the person is innocent? Explain.

Convicting the Innocent

James McCloskey

Most people assume that it is very rare for an innocent person to be convicted of a crime and that such a miscarriage of justice would be an isolated aberration in an otherwise sound system. James McCloskey of Centurion Ministries in Princeton, New Jersey, argues to the contrary. He estimates that at least 10

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Arthur R. Shaw, — Readings in the philosophy of law — 4th Ed.

percent of those convicted of serious and violent crimes are completely innocent, and in this essay he examines seven major causes of wrongful convictions.

On most occasions when it has been discovered that the wrong person was convicted for another's crime, the local law enforcement community, if it has commented at all, has assured the public that such instances are indeed rare and isolated aberrations of a criminal justice system that bats nearly 1,000 percent in convicting the guilty and acquitting the innocent. And this view is shared, I think, not only by the vast majority of the public but also by almost all of the professionals (lawyers and judges) whose work comes together to produce the results.

I realize that I am a voice crying in the wilderness, but I believe that the innocent are convicted far more frequently than the public cares to believe, and far more frequently than those who operate the system dare to believe. An innocent person in prison, in my view, is about as rare as a pigeon in the park. The primary purpose of this article is to delineate why and how I have come to believe that this phenomenon of the "convicted innocent" is so alarmingly widespread in the United States. Although no one has any real idea of what proportion it has reached, it is my perception that at least 10 percent of those convicted of serious and violent crimes are completely innocent. Those whose business it is to convict or to defend would more than likely concede to such mistakes occurring in only 1 percent of cases, if that. Regardless of where the reader places his estimate, these percentages, when converted into absolute numbers, tell us that thousands and even tens of thousands of innocent people languish in prisons across the nation.

Allow me to outline briefly the ground of experience on which I stand and speak. For the past eight years I have been working full time on behalf of the innocent in prison. To date, the nonprofit organization I founded to do this work has freed and vindicated three innocent lifers in New Jersey. Another, on Texas's death row, has been declared "innocent" by a specially appointed evidentiary hearing judge, who has recommended a new trial to Texas's highest court. Currently we are working on ten cases across the country (New Jersey, Pennsylvania, Virginia, Louisiana, Texas, and California). We have received well over 1,000 requests for assistance and have developed extensive files on more than 500 of these requests, which come to us daily from every state of the nation from those who have been convicted, or from their advocates, proclaiming their innocence. We serve as active advisors on many of those cases.

Besides being innocent and serving life or death sentences, our beneficiaries have lost their legal appeals. Their freedom can be secured only by developing new evidence sufficient to earn a retrial. This new evidence must materially demonstrate either that the person is not guilty or that the key state witnesses lied in critical areas of their testimony. We are not lawyers. We are concerned only with whether the person is in fact completely not guilty in that he or she had nothing whatsoever to do with the crime. When we enter the case it is usually five to fifteen years after the conviction. Our sole focus is to reexamine the factual foundation of the conviction—to conduct an exhaustive investigation of the cast of characters and the circumstances in the case, however long that might take. . . .

APPELLATE RELIEF FOR THE CONVICTED INNOCENT

As all lawyers and jurists know, but most lay people do not, innocence or guilt is irrelevant when seeking redress in the appellate courts. As the noted attorney F. Lee Bailey observed, "Appellate courts have only one function, and that is to correct legal mistakes of a serious nature made by a judge at a lower level. Should a jury have erred by believing a lying witness, or by drawing an attractive but misleading inference, there is nothing to appeal." So, if the imprisoned innocent person is unable to persuade the appellate judges of any legal errors at trial, and generally he cannot, even though he suffered the ultimate trial error, he has no recourse. Nothing can be done legally to free him unless new evidence somehow surfaces that impeaches the validity of the conviction. Commonly, the incarcerated innocent are rubber-stamped into oblivion throughout the

appeals process, both at the state and at the federal level. . . .

Once he is convicted, no one in whose hands his life is placed (his lawyer and the appellate judges) either believes him or is concerned about his innocence or guilt. It is no longer an issue of relevance. The only question remaining that is important or material is whether he "legally" received a fair trial, not whether the trial yielded a result that was factually accurate. Appellate attorneys are not expected to, nor do they have the time, inclination, and resources to, initiate an investigation designed to unearth new evidence that goes to the question of a false conviction. Such an effort is simply beyond the scope of their thinking and beyond the realm of their professional responsibility. It is a rare attorney indeed who would dare go before any American appellate court and attempt to win a retrial for his client based on his innocence. That's like asking an actor in a Shakespearian tragedy to go on stage and pretend it's a comedy. It is simply not done.

CAUSES OF WRONGFUL CONVICTION

But enough of this post-conviction appellate talk. That's putting the cart before the horse. Let's return to the trial and discuss those elements that commonly combine to convict the innocent. Let me state at the outset that each of these ingredients is systemic and not peculiar to one part of the country or one type of case. We see these elements as constant themes or patterns informing the cases that cross our desks. They are the seeds that sow wrongful convictions. After one has reflected on them individually and as a whole, it becomes readily apparent, I think, how easy it is and how real the potential is in every courthouse in America for wrongful convictions to take place.

(A) Presumption of Guilt

The first factor I would like to consider is the "presumption-of-innocence" principle. Although we would all like to believe that a defendant is truly considered innocent by those who represent and judge him, this is just not so. Once accusations have matured through the system to the point at which the accused is actually brought to trial, is it not the tendency of human nature to suspect deep down or even believe that the defendant probably did it? Most people are inclined to believe that where there is smoke, there is fire. This applies to professional and lay people alike albeit for different reasons perhaps.

The innate inclinations of the average American law-abiding citizen whose jury experience is that person's first exposure to the criminal justice system is to think that law enforcement people have earnestly investigated the case and surely would not bring someone to trial unless they had bonafide evidence against the person. That is a strong barrier and a heavy burden for the defense to overcome. And how about judges and defense lawyers? These professionals, like members of any profession, have a natural tendency to become somewhat cynical and callous with time. After all, isn't it true that the great majority of the defendants who have paraded before them in the past have been guilty? Why should this case be any different? As far as defense attorneys are concerned, if they really believe in their clients' innocence, why is that in so many instances they are quick to urge them to take a plea for a lesser sentence than they would get with a trial conviction? So, by the time a person is in the trial docket, the system (including the media) has already tarnished him with its multitude of prejudices, which of course, would all be denied by those who entertain such prejudices.

(B) Perjury by Police

Another reason for widespread perversions of justice is the pervasiveness of perjury. The recent District Attorney of Philadelphia once said, "In almost any factual hearing or trial, someone is committing perjury: and if we investigate all of those things, literally we would be doing nothing but prosecuting perjury cases." If he is guilty, the defendant and his supporters would lie to save his skin and keep him from going to prison. That is assumed and even expected by the jury and the judge. But what would surprise and even shock most jury members is the extent to which police officers lie on the stand to reinforce the prosecution and not jeopardize their own standing within their own particular law enforcement community. The words of one twenty-five-year veteran senior officer of a northern New Jersey police force still ring in my ears: "They [the defense]

lie, so we [police] lie. I don't know one of my fellow officers who hasn't lied under oath." Not too long ago a prominent New York judge, when asked if perjury by police was a problem, responded, "Oh, sure, cops often lie on the stand."

(C) False Witnesses for the Prosecution

What is more, not only do law officers frequently lie, but the primary witnesses for the prosecution often commit perjury for the state, and do so under the subtle guidance of the prosecutor. Inveterately, common criminals who are in deep trouble themselves with the same prosecutor's office or local police authority are employed as star state witnesses. In exchange for their false testimony, their own charges are dismissed, or they are given non-custodial or greatly reduced prison sentences. In other words a secret deal is struck whereby the witness is paid for his fabricated testimony with that most precious of all commodities—freedom!

Such witnesses are usually brought forward by the state to say either that the defendant confessed the crime to them or that they saw the defendant near the crime scene shortly before it happened, or they saw him flee the scene of the crime as it was occurring. If I have seen one, I have seen a hundred "jailhouse confessions" spring open the prison doors for the witness who will tell a jury on behalf of the state that the defendant confessed the crime to him while they shared the same cell or tier. When the state needs important help, it goes to its bullpen, the local county jail, and brings in one of the many ace relievers housed there to put out the fire. As several of these "jailhouse priests" have told me, "It's a matter of survival: either I go away or he [the defendant] goes away, and I'm not goin'." Jailhouse confessions are a total perversion of the truthseeking process. Amazingly enough, they are a highly effective prosecutorial means to a conviction. Part and parcel of a jailhouse confession is the witness lying to the jury when he assures them that he expects nothing in return for his testimony, that he is willing to swallow whatever pill he must for his own crimes.

(D) Prosecutorial Misconduct

The right decision by a jury depends largely on prosecutorial integrity and proper use of prosecutorial power. If law enforcement officers, in their zeal to win and convict, manipulate or intimidate witnesses into false testimony, or suppress evidence that impeaches the prosecution's own witnesses or even goes to the defendant's innocence, then the chances of an accurate jury verdict are greatly diminished. Sadly, we see this far too often. It is frightening how easily people respond to pressure or threats of trouble by the authorities of the law. Our insecurities and fears as well as our desires to please those who can punish us allow all of us to be far more malleable than we like to think.

Few of us have the inner strength we think we have to resist such overreaching by the law. This applies to mainline citizenry as well as to those living on the margins. However, the underclasses are particularly vulnerable and susceptible to police pressure because they are powerless; and both they and the police know it. A few examples will illustrate.

In 1981 three white high school janitors were threatened by the Texas Rangers into testifying that they had seen Clarence Brandley, their black custodial supervisor, walking into the restroom area of the high school where the victim had entered only minutes before she had disappeared. Brandley was convicted and sentenced to death based on the inferential testimony that since he was the last person seen near her, then he must have killed her. Eight years later Brandley was exonerated by the judge who conducted his evidentiary hearing when one of these janitors came forward and told how they had lied in implicating Brandley because of coercion by the investigating law officer.

On the eve of the Rene Santana trial in Newark, New Jersey, which was a year and a half after the crime, the prosecutors produced a surprise "eyewitness" who said he saw Mr. Santana flee the scene of the crime. A decade later that same witness visited Mr. Santana at New Jersey's Rahway State Prison and asked for his forgiveness after admitting to him that he had concocted the "eyewitness" testimony in response to intense pressure from the prosecutor's investigator. Since this "eyewitness" was from Trujillo's Dominican Republic police state, his innate fear of the police made him vulnerable to such police coercion.

Or how about the Wingo case in white, rural northwestern Louisiana? Wingo's common-law wife came forward on the eve of his execution and admitted that she had lied at his trial five years earlier

because the deputy sheriff had threatened to put her in jail and forever separate her from her children unless she regurgitated at trial what he wanted her to say.

And in the Terry McCracken case in the suburbs of Philadelphia, a fellow high school student of the caucasian McCracken testified that he saw McCracken flee the convenience store moments after a customer was shot to death during the course of a robbery. The teenager was induced to manufacture this false eyewitness account after three visits to the police station. Among the evidence that vindicates McCracken are the confessions by the real robber/killers. So, you see, it not only can happen anywhere, it does happen everywhere; and it does happen to all different people, regardless of race and background.

Another common trait of wrongful convictions is the prosecutor's habit of suppressing or withholding evidence which he is obliged to provide to the defendant in the interests of justice and fairness. Clarence Darrow was right when he said, "A courtroom is not a place where truth and innocence inevitably triumph; it is only an arena where contending lawyers fight not for justice but to win." And so many times this hidden information is not only "favorable" to the defendant but it clears him. In Philadelphia's Miguel Rivera case the district attorney withheld the fact that two shopkeepers had seen the defendant outside their shop when the art museum murder was actually in progress. And in the Gordon Marsh case near Baltimore, Maryland, the state failed to tell the defendant that its main witness against him was in jail when she said she saw him running from the murder scene. One has to wonder what the primary objective of prosecutors is. Is it to convict, regardless of the factual truth, or is it to pursue justice?

The prosecution is the "house" in the criminal justice system's game of poker. The cards are his, and he deals them. He decides whom and what to charge for crimes, and if there will be a trial or whether a plea is acceptable. He dominates. Unfortunately, his power is virtually unchecked because he is practically immune from punishment for offenses, no matter how flagrant or miscreant. According to many state and federal courts, prosecutorial misbehavior occurs with "disturbing frequency." When the "house" cheats, the innocent lose. . . .

It is human nature to resist any information that indicates that we have made a grievous mistake. This is particularly true of prosecutors when presented with new evidence that impeaches a conviction and goes to the innocence of a person convicted by their office at a prior time, whether it occurred four months or forty years before. Not only are they coldly unresponsive to such indications but they quickly act to suppress or stamp them out. New evidence usually comes in the form of a state witness who, plagued with a guilty conscience, admits that he lied at the trial; or from a person completely new to the case who comes forward with his exculpatory knowledge. Without exception, in my experience, the prosecutor's office will treat that person with total contempt in its usually successful attempt to force the person to retreat into silence. If that doesn't work, it will dismiss such testimony as somehow undeserving of any credibility and blithely ignore it. This prosecutorial impishness reminds me of a little boy holding his hands to his ears on hearing an unpleasant sound.

The Joyce Ann Brown case is a poignant illustration of this kind of prosecutorial posturing. One year after Joyce's 1980 conviction for being one of two black women who had robbed a Dallas, Texas furrier and killed one of the proprietors, the admitted shooter was captured and pleaded guilty while accepting a life sentence. She also told her attorney that the district attorney had convicted the wrong woman (Joyce Brown) as her partner in the crime. She had never known or even heard of that Joyce Brown. With the district attorney fighting her with all of his might, Joyce sits in prison to this day trying to win a retrial as we try to develop new evidence on her behalf.

(E) Shoddy Police Work

The police work of investigating crimes, when done correctly and thoroughly, is indeed a noble profession. Law and order are essential to a cohesive and just society. Because police work is fraught with so many different kinds of pressures, it is rather easy for an investigation to go awry. The high volume of violent crime plagues every urban police department. Skilled detectives are few, and their caseloads are overwhelming. The "burnout" syndrome is a well-documented reality within police ranks. Interdepartmental politics and the bureaucracy stifle ini-

tiative and energy. The pressure to "solve" a case is intensely felt by the line detective and comes both from his superiors and the community and from his own ambitious need for recognition and advancement. If today's climate of "burn or bury" them puts more pressure on the detective to resolve, it also gives him more license to do so by whatever means.

Too often, as a result of the above factors, police officers take the easy way out. Once they come to suspect someone as the culprit, and this often occurs early within the investigation and is based on rather flimsy circumstantial information, then the investigation blindly focuses in on that adopted "target." Crucial pieces of evidence are overlooked and disregarded. Some witnesses are not interviewed who should be, while others are seduced or coerced into telling the police what they want to hear. Evidence or information that does not fit the suspect or the prevailing theory of the crime is dismissed as not material or is changed to implicate the suspect. Good old-fashioned legwork is replaced by expediency and shortcuts. Coercive confessions are extracted and solid leads are ignored.

Before too long, momentum has gathered, and the "project" now is to put it on the suspect. Any information that points to the suspect, no matter how spuriously secured, is somehow obtained: and anything that points away from him is ridiculed and twisted into nothingness. The task is made much easier if the suspect has a police record because he should be "taken off the streets" anyhow. That kind of person is not only a prime suspect but also a prime scapegoat. An example of this is Clarence Brandley, who was mentioned earlier. He was arrested in late August four days after the crime and on the weekend before school was to begin. The high school where the rape and murder took place was flooded with telephone calls by scared parents who refused to send their children to school until the murderer was caught. The arrest of Brandley calmed the community, and school started as scheduled. It was after Brandley's arrest that the investigation then spent five hundred hours building the case against him.

(F) Incompetent Defense Counsel

The wrongly convicted invariably find themselves between the rock of police/prosecutorial misconduct and the hard place of an incompetent and irresponsible defense attorney. While the correct decision by a jury hinges on a fair prosecution, it also depends on dedicated and skilled defendant lawyering. And there is such a paucity of the latter. Not only are there very few highly competent defense lawyers but there are very few criminal defense lawyers, period. They are rapidly becoming an extinct species.

The current Attorney General of New Jersey not too long ago told the New Jersey State Bar Association that finding quality private defense attorneys "may be the most crying need that we have." He also told this same assemblage that unless there is an adequate number of well-trained private defense lawyers, there will be little hope for justice. Of the 30,000 lawyers in New Jersey, the number of those doing primarily criminal defense work is only in the hundreds. At this same conference the First Assistant Attorney General pointed out that 85 percent of New Jersey's criminal cases are handled by the public defender system: and he wondered if there would be a private defense bar [in the future].

This means, of course, that 85 percent of those charged with a crime cannot afford an attorney, so they are forced to use the public defender system. As competent as New Jersey's full-time salaried public defenders generally are, their resources (budget and people) are vastly inadequate and are dwarfed by those of their adversaries (the local prosecutor's office). Moreover, they are so overwhelmed by the sheer volume of caseload that no defender can give quality attention to any one of his cases, let alone all of them. So, in response to this shortage, public defender cases are farmed out to "pooled" attorneys, who are paid a pittance relative to what they earn from other clients who retain them privately.

The experience of these pooled attorneys in criminal matters is often limited and scanty. In addition, they do not bring to their new-found indigent client the desired level of heart and enthusiasm for their cases. All of these conditions leave the defendant with an attorney somewhat lacking in will, effort, resources, and experience. Thus, the defendant goes to trial with two strikes against him.

What we have discovered as a common theme among those whose cases we have studied from all over the country is that their trial attorney, whether from the public domain or privately retained, undertakes his work with an appalling lack of assiduity. Communication with the defendant is almost non-

existent. When it does take place, it is carried on in a hurried, callous, and dismissive manner. Attempts at discovery are made perfunctorily. Prosecutors are not pressed for this material. Investigation is shallow and narrow, if conducted at all. Preparation meets minimal standards. And advocacy at trial is weak. Cross-examination is superficial and tentative.

Physical evidence is left untested, and forensic experts are not called to rebut whatever scientific evidence the state introduces through its criminalists. I cannot help thinking of the Nate Walker case, where, at Nate's 1976 trial for rape and kidnapping, the doctor who examined the victim the night of her ordeal testified that he found semen in her vaginal cavity. Walker's privately retained attorney had no questions for the doctor when it came time for cross-examination, nor did he even ask anyone to test the vaginal semen for blood type. Twelve years later, that test was performed at our request, and Walker was exonerated and immediately freed. . . .

(G) Nature of Convicting Evidence

The unschooled public largely and erroneously believes that convictions are mostly obtained through the use of one form of tangible evidence or another. This naive impression is shaped by watching too many TV shows like Perry Mason or Matlock. The reality is that in most criminal trials the verdict more often than not hinges on whose witnesses—the state's or defendant's—the jury chooses to believe. It boils down to a matter of credibility. There is no "smoking gun" scientific evidence that clearly points to the defendant. This puts an extremely heavy burden on the jury. It must somehow ferret out and piece together the truth from substantially inconsistent and contradictory testimony between and within each side. The jury is forced to make one subjective call after another in deciding whom to believe and what inferences to draw from conflicting statements.

For example, how can a jury accept a victim's positive identification at trial of the defendant as her assailant when she had previously described her attacker in physical terms that were very different from the actual physical characteristics of the defendant, or when the defense has presented documented information that precludes the defendant from being the assaulter? Several cases come to mind. Boy was convicted of robbing a convenience store in Georgia. The clerk initially told the police that since she was 5 feet 3 inches, was standing on a 3-inch platform, and had direct eye contact with the robber, he must have been about 5 feet 6 inches tall. Boy is 6 feet 5 inches tall. Four teenage girls identified Russell Burton as their rapist on a particular day in Arkansas. Burton introduced evidence that on that day his penis was badly blistered from an operation two days before for removal of a wart. And a Virginia woman was certain that Edward Honaker was her rapist even though her rapist had left semen within her, and Honaker had had a vasectomy well in advance of the assault.

Criminal prosecutions that primarily or exclusively depend on the victim's identification of the defendant as the perpetrator must be viewed with some skepticism unless solid corroborating evidence is also introduced. Traumatized by a crime as it occurs, the victim frequently is looking but not seeing. Victims are extremely vulnerable and can easily be led by the police, through unduly suggestive techniques, into identifying a particular person. The victim in Nate Walker's case, for example, was with her abductor/rapist for two and a half hours with ample opportunity to clearly view him. She told the jury without hesitation eighteen months later that "he's the man." Nate had an ironclad alibi. The jury struggled for several days but in the end came in with a guilty verdict. An mentioned earlier, he was scientifically vindicated twelve years later.

When juries are confronted with a choice between a victim's ringing declaration that "that's the man" and solid evidence that "it couldn't be him," they usually cast their lot with the victim. I suggest that this can be a very dangerous tendency and practice. And this is particularly so when identification crosses racial lines, that is, when a white victim says it was that black person. Future jurors should be aware that identifications can be very unreliable forms of evidence.

Another type of evidence that can be misleading and even confusing to jurors is that offered by laboratory scientists. Results of laboratory tests that are presented by the forensic scientists are not always what they appear to be, although they strongly influence jury decisions. A recent New York Times article pointed out that there is a "growing concern about the professionalism and impartiality of the laboratory scientists whose testimony in court can

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often mean conviction or acquittal." This article went on to say that the work of forensic technicians in police crime laboratories is plagued by uneven training and questionable objectivity.

We share this mounting concern because we see instance after instance where the prosecutor's crime laboratory experts cross the line from science to advocacy. They exaggerate the results of their analysis of hairs, fibers, blood, or semen in such a manner that it is absolutely devastating to the defendant. To put the defendants at a further disadvantage, the defense attorneys do not educate themselves in the forensic science in question, and therefore conduct a weak cross-examination. Also, in many cases, the defense does not call in its own forensic experts, whose testimony in numerous instances could severely damage the state's scientific analysis.

One case profoundly reflects this common cause of numerous unjust convictions. Roger Coleman sits on Virginia's death row today primarily because the Commonwealth's Bureau of Forensic Science expert testified that the two foreign pubic hairs found on the murdered victim were "consistent" with Mr. Coleman's, and that it was "unlikely" that these hairs came from someone other than Mr. Coleman. The defense offered nothing in rebuttal, so this testimony stood unchallenged. In a post-conviction hearing Mr. Coleman's new lawyer introduced the testimony of a forensic hair specialist who had twenty-five years of experience with the F.B.I. He testified that "it is improper to conclude that it is likely that hairs came from a particular person simply because they are consistent with that person's hair because hairs belonging to different people are often consistent with each other, especially pubic hairs."

Another problem that we continually observe within the realm of forensic evidence is the phenomenon of lost and untested physical evidence. Often, especially in cases up to the early 1980s, the specimens that have the potential to exclude the defendant have not been tested and eventually get misplaced. At best this is gross negligence on the part of both the police technician and the defense attorney in not ensuring that the tests be done.

CONCLUSION

... My contention is that at least 10 percent of those convicted for serious, violent crimes are incorrectly convicted because some combination of the trial infirmities described in this article results in mistaken jury determinations.

Everyone will agree that the system is not perfect, but the real question is this: To what extent do its imperfections prevail? I contend that for all the reasons detailed above the system is a far leakier cistern than any among us has ever imagined. Untold numbers of innocents have tumbled into the dark pit of prison. Some of them have eventually gained their freedom, but a majority remain buried in prison, completely forsaken and forgotten by the outside world.

REVIEW AND DISCUSSION QUESTIONS

1. What leads McCloskey to say that "innocence or guilt is irrelevant when seeking redress in the appellate courts"?
2. McCloskey identifies the following as causes of wrongful convictions: presumption of guilt, perjury by police, false witnesses for the prosecution, prosecutorial misconduct, shoddy police work, incompetent defense counsel, and the nature of conflicting evidence. Assess what he has to say about each of these factors. Which do you think are the most important?
3. Are you persuaded by McCloskey that many innocent people are wrongfully convicted? If he is right, why is the contrary so widely believed?
4. What can be done to reduce or eliminate wrongful convictions? Which of the causes identified by McCloskey could be most easily corrected? Which would be the most difficult to remedy?
5. Assume that McCloskey is correct about the number of wrongful convictions. What implications does this have for our adversary system? Is that system one of the causes of wrongful convictions, or is it part of the solution to that problem?