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The Rights of Defendants

The vast majority of criminal cases are settled by plea bargains. Because trials are expensive and time consuming, without plea bargaining our criminal justice system would probably grind to a halt. Kenneth Kipnis argues, however, that plea bargains may violate one's right not to incriminate oneself and that they rarely produce a just outcome.

Among our most important legal rights as citizens are those that protect us from arbitrary police conduct and from unjust treatment by the criminal justice system. Many people, however, view skeptically the rights of criminal defendants because they believe that those whom the police arrest are usually guilty as charged. In "Convicting the Innocent," James McCloskey challenges this belief, arguing that at least 10 percent of those convicted of serious crimes are completely innocent.

On the other hand, most people believe that the police are sometimes justified in employing morally or legally questionable means to solve or prevent crimes. Carl Klockars explores this dilemma, which he calls the Dirty Harry Problem.

The Fourth Amendment protects us from unreasonable searches and seizures, requiring that the police have probable cause before a warrant is issued. To enforce this right, the Supreme Court has held that illegally obtained evidence should be excluded from criminal trials. This is called the exclusionary rule, and in their essays, Malcolm Richard Wilkey and Stephen H. Sachs debate its wisdom. The Fifth Amendment provides that no one "shall be compelled in any criminal case to be a witness against himself," and the Sixth Amendment affords us the right to counsel, but specifying the exact nature and limits of these rights in real life situations is not always easy. In the controversial *Miranda, Williams,* and *Innis* cases, the Supreme Court has tried to spell out the exact procedural safeguards that the police must follow to respect these constitutional protections. In the later *Tobias* case, a federal court probed the question of when the actions of law enforcement officials constitute entrapment and thus violate a criminal defendant's rights.

Criminal Justice and the Negotiated Plea

Kenneth Kipnis

Most criminal cases are settled by negotiated pleas ("plea bargains"). In fact, our criminal justice system today depends on most defendants agreeing not to go to trial. Kenneth Kipnis, professor of philosophy at the University of Hawaii—Manoa, criticizes the institution of plea bargaining on the ground that it involves something comparable to duress and thus erodes our right to be free from compelled self-incrimination. Furthermore, innocent people may be forced to "cop a plea," and because even guilty individuals are not given the punishment they deserve, plea bargaining rarely, if ever, produces a just outcome.

In recent years it has become apparent to many that, in practice, the criminal justice system in the United States does not operate as we thought it did. The conviction secured through jury trial, so familiar in countless novels, films, and television programs, is beginning to be seen as the aberration it has become. What has replaced the jury's verdict is the negotiated plea. In these "plea bargains" the defendant agrees to plead guilty in exchange for discretionary consideration on the part of the state. Generally, this consideration amounts to some kind of assurance of a minimal sentence. . . . It is at present a commonplace that plea bargaining could not be eliminated without substantial alterations in our criminal justice system.

Plea bargaining involves negotiations between the defendant (through an attorney in the standard case) and the prosecutor as to the conditions under which the defendant will enter a guilty plea. Both sides have bargaining power in these negotiations. The prosecutor is ordinarily burdened with cases and does not have the wherewithal to bring more than a fraction of them to trial. Often there is not sufficient evidence to ensure a jury's conviction. Most important, the prosecutor is typically under administrative and political pressure to dispose of cases and to secure convictions as efficiently as possible. If the defendant exercises the constitutional right to a jury trial, the prosecutor must decide whether to drop the charges entirely or to expend scarce resources to bring the case to trial. Since neither prospect is attractive, prosecutors typically exercise their broad discretion to induce defendants to waive trial and to plead guilty.

From the defendant's point of view, such prosecutorial discretion has two aspects: it darkens the prospect of going to trial as it brightens the prospect of pleading guilty. Before negotiating, a prosecutor may improve his bargaining position by "overcharging" defendants or by developing a reputation for severity in the sentences he recommends to judges. Such steps greatly increase the punishment that the defendant must expect if convicted at trial. On the other hand, the state may offer to reduce or to drop some charges, or to recommend leniency to the judge if the defendant agrees to plead guilty. These steps minimize the punishment that will result from a guilty plea. Though the exercise of prosecutorial discretion to secure pleas of guilty may differ somewhat in certain jurisdictions and in particular cases, the broad outlines are as described.

Of course a defendant can always reject any offer of concessions and challenge the state to prove its case. A skilled defense attorney can do much to force the prosecutor to expend resources in bringing a case to trial. But the trial route is rarely taken by defendants. Apart from prosecutorial pressure, other factors may contribute to a defendant's willingness to plead guilty: feelings of guilt which may or may not be connected with the charged crime; the discomforts of the pretrial lockup as against the comparatively better facilities of a penitentiary; the costs of going to trial as against the often cheaper option of consenting to a plea; a willingness or unwillingness to lie; and the delays which are almost always present in awaiting trial, delays which the defendant may sit out in jail in a kind of preconviction imprisonment which may not be credited to a postconviction sentence. It is not surprising that the right to a trial by jury is rarely exercised. . . .

No deliberative body ever decided that we would have a system in which the disposition of criminal cases is typically the result of negotiations between the prosecutor and the defendant's attorney on the conditions under which the defendant would waive trial and plead guilty to a mutually acceptable charge. No legislature ever voted to adopt a procedure in which defendants who are convicted after trial typically receive sentences far greater than those received by defendants charged with similar offenses but pleading guilty. The practice of plea bargaining has evolved in the unregulated interstices of our criminal justice system. Its development has not gone unnoticed. There is now a substantial literature on the legality and propriety of plea bargaining. But though philosophers do not often treat issues arising in the area of criminal procedure, there are problems here that cry for our attention. In the preceding pages I have been concerned to sketch the institution of plea bargaining. In what follows I will raise some serious questions about it that should concern us. I will first discuss generally the intrinsic fairness of plea bargains and then, in the final section, I will examine critically the place of such bargains in the criminal justice system.

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As one goes through the literature on plea bargaining one gets the impression that market forces are at work in this unlikely context. The terms "bargain" and "negotiation" suggest this. One can see the law of supply and demand operating in that, other things being equal, if there are too many defendants who want to go to trial, prosecutors will have to concede more in order to get the guilty pleas that they need to clear their case load. And if the number of prosecutors and courts goes up, prosecutors will be able to concede less. Against this background it is not surprising to find one commentator noting: "In some places a 'going rate' is established under which a given charge will automatically be broken down to a given lesser offense with the recommendation of a given lesser sentence." Prosecutors, like retailers before them, have begun to appreciate the efficiency of the fixed-price approach.

The plea bargain in the economy of criminal justice has many of the important features of the contract in commercial transactions. In both institutions offers are made and accepted, entitlements are given up and obtained, and the notion of an exchange, ideally a fair one, is present to both parties. Indeed one detects something of the color of consumer protection law in a few of the decisions on plea bargaining. In *Bailey v. MacDougal* the court held that "a guilty plea cannot be accepted unless the defendant understands its consequences." And in *Santo Bello v. New York* the court secured a defendant's entitlement to a prosecutorial concession when a second prosecutor replaced the one who had made the promise. . . . Though plea bargains may not be seen as contracts by the parties, agreements like them are the stuff of contract case law. While I will not argue that plea bargains are contracts (or even that they should be treated as such), I do think it proper to look to contract law for help in evaluating the justice of such agreements.

The law of contracts serves to give legal effect to certain bargain-promises. In particular, it specifies conditions that must be satisfied by bargain-promises before the law will recognize and enforce them as contracts. As an example, we could look at that part of the law of contracts which treats duress. Where one party wrongfully compels another to consent to the terms of an agreement the resulting bargain has no legal effect. Dan B. Dobbs, a commentator on the law in this area, describes the elements of duress as follows: "The defendant's act must be wrongful in some attenuated sense: it must operate coercively upon the will of the plaintiff, judged subjectively, and the plaintiff must have no adequate remedy to avoid the coercion except to give in. . . . The earlier requirement that the coercion must have been the kind that would coerce a reasonable man, or even a brave one, is now generally dispensed with, and it is enough if it in fact coerced a spineless plaintiff." Coercion is not the same as fraud, nor is it confined to cases in which a defendant is physically compelled to assent. In Dobbs' words: "The victim of duress knows the facts but is forced by hard choices to act against his will." The paradigm case of duress is the agreement made at gunpoint. Facing a mortal threat, one readily agrees to hand over the cash. But despite such consent, the rules of duress work to void the effects of such agreements. There is no legal obligation to hand over the cash and, having given it over, entitlement to the money is not lost. The gunman has no legal right to retain possession even if he adheres to his end of the bargain and scraps his murderous plans.

Judges have long been required to see to it that guilty pleas are entered voluntarily. And one would expect that, if duress is present in the plea-bargaining situation, then, just as the handing over of cash to the gunman is void of legal effect (as far as entitlement to the money is concerned), so no legal consequences should flow from the plea of guilty which is the product of duress. However, Rule 11 of the Federal Rules of Criminal Procedure requires the court to insure that a plea of guilty (or nolo contendere) is voluntary by "addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or promises *apart from a plea agreement*" (emphasis added). In two important cases (*North Carolina v. Alford* and *Brady v. United States*) defendants agreed to plead guilty in order to avoid probable death sentences. Both accepted very long prison sentences. In both cases the Supreme Court decided that guilty pleas so entered were voluntary (though Brennan, Douglas, and Marshall dissented). In his dissent in *Alford*, Brennan writes: ". . . the facts set out in the majority opinion demonstrate that Alford was 'so gripped by fear of the death penalty' that his

decision to plead guilty was not voluntary but was that product of duress as much so as choice reflecting physical constraint.' " In footnote 2 of the *Alford* opinion, the Court sets out the defendant's testimony given at the time of the entry of his plea of guilty before the trial court. That testimony deserves examination: "I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all." The rule to be followed in such cases is set out in *Brady:* "A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfilled or unfillable promises), or perhaps by promises that are by their very nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)." Case law and the Federal Rules both hold that the standard exercise of prosecutorial discretion in order to secure a plea of guilty cannot be used to prove that such a plea is [in]voluntary. Even where the defendant enters a guilty plea in order to avert his death at the hands of the state, as in *Alford*, the Court has not seen involuntariness. Nevertheless, it may be true that some guilty pleas are involuntary in virtue of prosecutorial inducement considered proper by the Supreme Court.

Regarding the elements of duress, let us compare the gunman situation with an example of plea bargaining in order to examine the voluntariness of the latter. Albert W. Alschuler, author of one of the most thorough studies of plea bargaining, describes an actual case:

> San Francisco defense attorney Benjamin M. Davis recently represented a man charged with kidnapping and forcible rape. The defendant was innocent, Davis says, and after investigating the case Davis was confident of an acquittal. The prosecutor, who seems to have shared the defense attorney's opinion on this point, offered to permit a guilty plea to simple battery. Conviction on this charge would not have led to a greater sentence than thirty days' imprisonment, and there was every likelihood that the defendant would be granted probation. When Davis informed his client of this offer, he emphasized that conviction at trial seemed highly improbable.
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> The defendant's reply was simple: "I can't take the chance."

Both the gunman and the prosecutor require persons to make hard choices between a very certain smaller imposition and an uncertain greater imposition. In the gunman situation I must choose between the very certain loss of money and the difficult-to-assess probability that my assailant is willing and able to kill me if I resist. As a defendant I am forced to choose between a very certain smaller punishment and a substantially greater punishment with a difficult-to-assess probability. As the size of the certain smaller imposition comes down and as the magnitude and probability of the larger imposition increases, it becomes more and more reasonable to choose the former. This is what seems to be occurring in Alschuler's example: "Davis reports that he is uncomfortable when he permits innocent defendants to plead guilty; but in this case it would have been playing God to stand in the defendant's way. The attorney's assessment of the outcome at trial can always be wrong, and it is hard to tell a defendant that 'professional ethics' require a course that may ruin his life." Davis's client must decide whether to accept a very certain, very minor punishment or to chance a ruined life. Of course the gunman's victim can try to overpower his assailant and the defendant can attempt to clear himself at trial. But the same considerations that will drive reasonable people to give in to the gunman compel one to accept the prosecutor's offer. Applying the second and third elements of duress, one can see that, like the gunman's acts, the acts of the prosecutor can "operate coercively upon the will of the plaintiff, judged subjectively," and both the gunman's victim and the defendant may "have no adequate remedy to avoid the coercion except to give in." In both cases reasonable persons might well conclude (after considering the gunman's lethal weapon or the gas chamber) "I can't take the chance." A spineless person would not need to deliberate. . . .

One might argue that not all "hard choices" are examples of duress. A doctor could offer to sell vital treatment for a large sum. After the patient has been cured it will hardly do for her to claim that she has

been the victim of duress. The doctor may have forced the patient to choose between a certain financial loss and the risk of death. But surely doctors are not like gunmen.

Two important points need to be made in response to this objection. First, the doctor is not, one assumes, responsible for the diseased condition of the patient. The patient would be facing death even if she had never met the doctor. But this is not true in the case of the gunman, where both impositions are his work. And in this respect the prosecutor offering a plea bargain in a criminal case is like the gunman rather than like the doctor. For the state forces a choice between adverse consequences that it imposes. And, of course, one cannot say that in the defendant's wrongoing he has brought his dreadful dilemma upon himself. To do so would be to ignore the good reasons there are for the presumption of innocence in dispositive criminal proceedings.

Second, our laws do not prohibit doctors from applying their healing skills to maximize their own wealth. They are free to contract to perform services in return for a fee. But our laws do severely restrict the state in its prosecution of criminal defendants. Those who framed our constitution were well aware of the great potential for abuse that the criminal law affords. Much of the Constitution (especially the Bill of Rights) checks the activity of the state in this area. In particular, the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." If I am right in judging that defendants like Alford and Davis's client do not act freely in pleading guilty to the facts of their cases, that the forced choice of the prosecutor may be as coercive as the forced choice of the gunman, that a defendant may be compelled to speak against himself (or herself) by a prosecutor's discretion inducing him to plead guilty, then given the apparent constitutional prohibition of such compulsion, the prosecutor acts wrongfully in compelling such pleas. And in this manner it may be that the last element of duress, wrongfulness, can be established. But it is not my purpose here to establish the unconstitutionality of plea bargaining, for it is not necessary to reach to unconstitutionality to grasp the wrongfulness of that institution. One need only reflect upon what justice amounts to in our system of criminal law. This is the task I will take up in the final section of this paper.

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Not too long ago plea bargaining was an officially prohibited practice. Court procedures were followed to ensure that no concessions had been given to defendants in exchange for guilty pleas. But gradually it became widely known that these procedures had become charades of perjury, shysterism, and bad faith involving judges, prosecutors, defense attorneys and defendants. This was scandalous. But rather than cleaning up the practice in order to square it with the rules, the rules were changed in order to bring them in line with the practice. . . .

Without going deeply into detail, I believe that it can be asserted without controversy that the liberal-democratic approach to criminal justice—and in particular the American criminal justice system—is an institutionalization of two principles. The first principle refers to the intrinsic point of systems of criminal justice.

A. Those (and only those) individuals who are clearly guilty of certain serious specified wrongdoings deserve an officially administered punishment which is proportional to their wrongdoing. In the United States it is possible to see this principle underlying the activities of legislators specifying and grading wrongdoings which are serious enough to warrant criminalization and, further, determining the range of punishment appropriate to each offense: the activities of policemen and prosecutors bringing to trial those who are suspected of having committed such wrongdoings; the activities of jurors determining if defendants are guilty beyond a reasonable doubt; the activities of defense attorneys insuring that relevant facts in defendants' favor are brought out at trial; the activities of judges seeing to it that proceedings are fair and that those who are convicted receive the punishment they deserve; and the activities of probation officers, parole officers, and prison personnel executing the sentences of the courts. All of these people play a part in bringing the guilty to justice.

But in liberal-democratic societies not everything is done to accomplish this end. A second principle makes reference to the limits placed upon the power of the state to identify and punish the guilty.

B. Certain basic liberties shall not be violated in bringing the guilty to justice. This second principle

can be seen to underlie the constellation of constitutional checks on the activities of virtually every person playing a role in the administration of the criminal justice system.

Each of these principles is related to a distinctive type of injustice that can occur in the context of criminal law. An injustice can occur in the outcome of the criminal justice procedure. That is, an innocent defendant may be convicted and punished, or a guilty defendant may be acquitted or, if convicted, he or she may receive more or less punishment than is deserved. Because these injustices occur in the meting out of punishment to defendants who are being processed by the system, we can refer to them as internal injustices. They are violations of the first principle. On the other hand, there is a type of injustice which occurs when basic liberties are violated in the operation of the criminal justice system. It may be true that Star Chamber proceedings, torture, hostages, bills of attainder, dragnet arrests, unchecked searches, *ex post facto* laws, unlimited invasions of privacy, and an arsenal of other measures could be employed to bring more of the guilty to justice. But these steps lead to a dystopia where our most terrifying nightmares can come true. However we limit the activity of the criminal justice system in the interest of basic liberty, that limit can be overstepped. We can call such infringements upon basic liberties external injustices. They are violations of the second principle. If, for example, what I have suggested in the previous section is correct, then plea bargaining can bring about an external injustice with respect to a basic liberty secured by the Fifth Amendment. The remainder of this section will be concerned with internal injustice or violations of the first principle.

It is necessary to draw a further distinction between aberrational and systemic injustice. It may very well be that in the best criminal justice system that we are capable of devising human limitations will result in some aberrational injustice. Judges, jurors, lawyers, and legislators with the best of intentions may make errors in judgment that result in mistakes in the administration of punishment. But despite the knowledge that an unknown percentage of all dispositions of criminal cases are, to some extent, miscarriages of justice, it may still be reasonable to believe that a certain system of criminal justice is well calculated to avoid such results within the limits referred to by the second principle. We can refer to these incorrect outcomes of a sound system of criminal justice as instances of aberrational injustice. In contrast, instances of systemic injustice are those that result from structural flaws in the criminal justice system itself. Here incorrect outcomes in the operations of the system are not the result of human error. Rather, the system itself is not well calculated to avoid injustice. What would be instances of aberrational injustice in a sound system are not aberrations in an unsound system: they are a standard result.

> . . . [S]ystemic injustice in the context of criminal law is a much more serious matter than aberrational injustice. It should not be forgotten that the criminal sanction is the most severe imposition that the state can visit upon one of its citizens. While it is possible to tolerate occasional error in a sound system, systematic carelessness in the administration of punishment is negligence of the highest order.

With this framework in mind, let us look at a particular instance of plea bargaining recently described by a legal aid defense attorney. Ted Alston has been charged with armed robbery. Let us assume that persons who have committed armed robbery (in the way Alston is accused of having committed it) deserve five to seven years of prison. Alston's attorney sets out the options for him: "I told Alston it was possible, perhaps even probable, that if he went to trial he would be convicted and get a prison term of perhaps five to seven years. On the other hand, if he agreed to plead guilty to a low-grade felony, he would get a probationary sentence and not go to prison. The choice was his." Let us assume that Alston accepts the terms of the bargain and pleads guilty to a lesser offense. If Alston did commit the armed robbery, there is a violation of the first principle in that he receives far less punishment than he deserves. On the other hand, if Alston did not commit the armed robbery, there is still a violation of the first principle in that he is both convicted of and punished for a crime that he did not commit, a crime that no one seriously believes to be his distinctive wrongdoing. It is of course possible that while Alston did not commit the armed robbery, he did commit the lesser offense. But though justice would be done here, it would be an accident. Such a serendipitous result is a certain sign that what we have here is systemic injustice.

If we assume that legislatures approximate the correct range of punishment for each offense, that judges fairly sentence those who are convicted by juries, and that prosecutors reasonably charge defendants, then, barring accidents, justice will *never* be the outcome of the plea-bargaining procedure: the defendant who "cops a plea" will never receive the punishment which is deserved. Of course legislatures can set punishments too high, judges can oversentence those who are convicted by juries, and prosecutors can overcharge defendants. In these cases the guilty can receive the punishment they deserve through plea bargaining. But in these cases we compensate for one injustice by introducing others that unfairly jeopardize the innocent and those that demand trials.

In contrast to plea bargaining, the disposition of criminal cases by jury trial seems well calculated to avoid internal injustices even if these may sometimes occur. Where participants take their responsibilities seriously we have good reason to believe that the outcomes is just, even when this may not be so. In contrast, with plea bargaining we have no reason to believe that the outcome is just even when it is.

I think that the appeal that plea bargaining has is rooted in our attitude toward bargains in general. Where both parties are satisfied with the terms of an agreement, it is improper to interfere. Generally speaking, prosecutors and defendants are pleased with the advantages they gain by negotiating a plea. And courts, which gain as well, are reluctant to vacate negotiated pleas where only "proper" inducements have been applied and where promises have been understood and kept. Such judicial neutrality may be commendable where entitlements are being exchanged. But the criminal justice system is not such a context. Rather it is one in which persons are justly given, not what they have bargained for, but what they deserve, irrespective of their bargaining position.

To appreciate this, let us consider another context in which desert plays a familiar role; the assignment of grades in an academic setting. Imagine a "grade bargain" negotiated between a grade-conscious student and a harried instructor. A term paper has been submitted and, after glancing at the first page, the instructor says that if he were to read the paper carefully, applying his usually rigid standards, he would probably decide to give the paper a grade of D. But if the student were to waive his right to a careful reading and conscientious critique, the instructor would agree to a grade of B. The grade-point average being more important to him than either education or justice in grading, the student happily accepts the B, and the instructor enjoys a reduced workload.

One strains to imagine legislators and administrators commending the practice of grade bargaining because it permits more students to be processed by fewer instructors. Teachers can be freed from the burden of having to read and to criticize every paper. One struggles to envision academicians arguing for grade bargaining, suggesting that a quick assignment of a grade is a more effective influence on the behavior of students, urging that grade bargaining is necessary to the efficient functioning of the schools. There can be no doubt that students who have negotiated a grade are more likely to accept and to understand the verdict of the instructor. Moreover, in recognition of a student's help to the school (by waiving both the reading and the critique), it is proper for the instructor to be lenient. Finally, a quickly assigned grade enables the guidance personnel and the registrar to respond rapidly and appropriately to the student's situation.

What makes all of this laughable is what makes plea bargaining outrageous. For grades, like punishments, should be deserved. Justice in retribution, like justice in grading, does not require that the end result be acceptable to the parties. To reason that because the parties are satisfied the bargain should stand is to be seriously confused. For bargains are out of place in contexts where persons are to receive what they deserve. And the American courtroom, like the American classroom, should be such a context.

In this section, until now I have been attempting to show that plea bargaining is not well calculated to insure that those guilty of wrongdoing will receive the punishment they deserve. But a further point needs to be made. While the conviction of the innocent would be a problem in any system we might devise, it appears to be a greater problem under plea bargaining. With the jury system the guilt of the defendant must be established in an adversary proceeding and it must be established beyond a reasonable doubt to each of twelve jurors. This is very staunch protection against an aberrational

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