THE CONTEMPORARY AMERICAN PHILOSOPHER Kenneth Kipnis examines the issue of whether the idea and practice of plea-bargaining or negotiated pleas are consistent with the tenets of the administration of justice in a criminal justice system. A plea bargain involves a situation where a defendant waives a right to jury trial, and in exchange, agrees to plead guilty to a specified crime, which allows for a discretionary consideration by a prosecutor or judge. This procedure is called plea-bargaining because it involves a process of negotiation and bargain between a prosecutor and a defendant through an attorney, and both parties are said to have bargaining power. This may be brought about when the prosecutor has a number of cases and limited resources, and wants to dispose of some cases easily and quickly, or if the prosecutor does not have sufficient evidence to win conviction in a jury trial. If the defendant decides to go to trial, the prosecutor may be forced to drop the charges or expend limited resources. To increase his bargaining power, the prosecutor may charge a defendant for crimes more serious than he would otherwise. And in agreeing to plead guilty, the defendant may be promised a more lenient sentence than he would otherwise get if found guilty in a formal trial. Usually, a number of factors may be considered by the defendant to necessitate a negotiated guilty plea.

Kipnis argues that the statistics regarding negotiated pleas seem to indicate on the face of it that both the prosecutors and defendants gain something from the process. However, he raises a number of problems about how just or fair the system of plea-bargaining is. The process seems to short-circuit the normal trial process, which is instituted to have some checks and balances to guarantee the rights of defendants. The normal deliberative procedure of trial is avoided and this process of plea bargain is, in some sense, not a legal process because it was never adopted in law. It is for the most part unregulated. It raises questions about justice with respect to treating like cases alike because defendants for the same crime who go through normal trials may be sentenced much more harshly than those who plead guilty. It raises questions about the fairness of the bargain process because usually it
does not operate in a fair-market situation. But the idea of bargain seems to suggest falsely that there is a fair-market situation where people can equally engage in contract transactions. Since plea-bargain agreements seem to mirror contract situations with respect to keeping agreements and promises, Kipnis argues that contract law may offer ways by which plea bargains may be evaluated.

In using contract law to evaluate plea bargains, Kipnis argues that a contract situation must not involve coercion on the part of one party and that both parties must be satisfied with the agreement. Is this condition satisfied in the case of plea-bargaining? Kipnis argues that there are elements of duress or moral threat in the sense that the defendant is forced to make hard choices and the situation may make a reasonable person feel coerced; there is usually no appropriate remedy for the feeling of duress. Usually, judges have to make sure that the guilty plea is entered by a defendant voluntarily by addressing the defendant in open court, otherwise the agreement is not enforceable. However, Kipnis argues that the effort by the prosecutor to induce a guilty plea may amount to duress and coercion such that the defendant may be said not to have acted voluntarily. A close look at case laws and prosecutorial practices will indicate that there are elements of duress and coercion in many cases of plea bargain, in spite of the fact that the defendant is always free to reject the terms of the contract. The perceived risks and consequences of rejecting a plea are coercive enough to make a defendant accept a bargain that may be unfair. This duress cannot be eliminated by the provision of a counsel for the defendant and hence the inherent injustice of the system of plea bargains is not eliminated.

Kipnis argues that one may object to his point about duress by saying that not all cases where one is required to make hard choices may involve duress. However, the bargain situation involves duress and the fact that the defendant brought the situation on himself by his actions does not excuse the duress. This situation is well-appreciated; hence there is an acceptable and fair legal procedure that presumes innocence until proven guilty, and it places the burden of proof on the prosecutor. In plea bargains, the fundamental fairness of the criminal justice system that forbids one from self-incrimination is undercut. Kipnis argues that his point is not to establish the unconstitutionality of plea bargain, because one can establish that it is morally wrong independent of the constitutional provisions. The interesting thing is that the moral intuitions which guide one to see the moral wrongness of plea bargains may be a motivation for adopting legal procedures that do
not allow for or try to avoid plea bargains. The liberal democratic approach to criminal justice, which is seen in the American criminal justice system, seeks to institutionalize some fundamental moral principles of justice. One such principle requires that in order for a person to be punished by a legitimate authority, the person must be clearly found guilty by a determined procedure; the punishment must be proportional to the wrong. There are instituted fair procedures in trial. Another principle is that the process of bringing the guilty to justice must not violate some basic liberties of an individual. There are limitations on both the nature of allowable evidence in trials and the process of gathering evidence. Plea bargains seem to violate the liberty of an individual which requires that he should not implicate himself. Although there may be injustices that are internal to the system, plea bargain is not such an injustice because it is not accepted as a legal procedure; the accepted legal procedures are ways to avoid such internal injustices.

As you read Kipnis, consider and reflect on the following questions: What is the nature of plea bargain? What are the plausible circumstances that may lead to plea-bargaining? What are the advantages of plea bargains? Do these advantages justify the practice? Why is the process of plea-bargaining unfair and unjust? Does it involve duress? In what way is a formal procedure of trial an attempt to avoid the injustice of plea bargain?

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. The well-publicized convictions of Spiro Agnew and Clifford Irving were secured through such plea bargains. In 1974 in New York City, 80 percent of all felony cases were settled as misdemeanors through plea bargains. Only 2 percent of all felony arrests resulted in a trial. It is at present a common-
place 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.

If one examines the statistics published annually by the Administrative Office of the U. S. Courts, one can appreciate both the size of the concessions gained by agreeing to plead guilty and (what is the same thing) the size of the additional burdens imposed upon those convicted without so agreeing. According to the 1970 report, among all convicted defendants, those pleading guilty at arraignment received average sentences of probation and/or under one year of imprisonment. Those going to a jury trial received average sentences of three to four years in prison. If one looks just at those convicted of Marijuana Tax Act violations with no prior record, one finds that those pleading guilty at arraignment received average sentences of probation and/or six months or less of imprisonment while those going to trial received average sentences more than eight times as severe: four to five years in prison. Among all Marijuana Tax Act convictions, defendants pleading guilty at the outset had a 76 percent chance of being let off without imprisonment, while those who had gone to trial had only an 11 percent chance. These last two sets of figures do not reflect advantages gained by charge reduction, nor do they reflect advantages gained by electing a bench trial as opposed to a jury trial. What these figures do suggest is that the sentences given to convicted defendants who have exercised their constitutional right to trial are many times as severe as the sentence given to those who do not.

In United States v. Wiley, Chief Judge Campbell laid to rest any tendency to conjecture that these discrepancies in sentences might have explanations not involving plea bargains.

. . . I believe, and it is generally accepted by trial judges throughout the United States, that it is entirely proper and logical to grant some defendants some degree of leniency in exchange for a plea of guilty. If then, a trial judge grants leniency in exchange for a plea of guilty, it follows, as the reverse side of the same coin, that he must necessarily forego leniency, generally speaking, where the defendant stands trial and is found guilty.

. . . I might make general reference to a “standing policy” not to consider probation where a defendant stands trial even though I do not in fact strictly adhere to such a policy.

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.

I

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.11 “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,12 the court held that “a guilty plea cannot be accepted unless the defendant understands its consequences.” And in Santo Bello v. New York,13 the court secured a defendant’s entitlement to a prosecutorial concession when a second prosecutor replaced the one who had made the promise. Rule 11 of the Federal Rules of Criminal Procedure (effective August 1, 1975) requires that “if a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or nolo contendere in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed, the court shall require the disclosure of the agreement in open court at the time the plea is offered.” These procedures all have analogues in contract law. Though plea bargains may not be seen as contracts by the parties, agree-
ments 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 sen-
tences. 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 opin-
ion 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 discon-
tinue improper harassment), misrepresentation (including unfilled or unfill-
able 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 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 con-
sidered 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 repre-
sented 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.

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.

That prosecutors could exercise such duress apparently seemed plain to the authors of the *Restatement of Contracts*. Their summarization of the law of contracts, adopted in 1932 by the American Law Institute, contained the following: “A threat of criminal prosecution . . . ordinarily is a threat of imprisonment and also . . . a threat of bringing disgrace upon the accused. Threats of this sort may be of such compelling force that acts done under their influence are coerced, and the better foundation there is for the prosecution, the greater is the coercion.” While it is always true that even in the most
desperate circumstances persons are free to reject the terms offered and risk the consequences, as Morris Raphael Cohen put it: “such choice is surely the very opposite of what men value as freedom.”

Indeed if one had to choose between being in the position of Davis’s client and facing a fair-minded gunman, I think that it would be reasonable to prefer the latter. While the law permits one to recover money upon advertising to the forced choice of the gunman, it does not permit one to retract a guilty plea upon advertising to the forced choice of the prosecutor. This is the impact of Brady and Rule 11.

Note that the duress is not eliminated by providing defendants with counsel. While a good attorney may get better concessions and may help in the evaluation of options, in the end the defendant will still have to decide whether to settle for the smaller penalty or to risk a much heavier sentence. One does not eliminate the injustice in the gunman situation by providing victims with better advice.

Nor does it help matters to insure that promises of prosecutorial concessions are kept. The gunman who violates his part of the bargain—murdering his victims after they give over their money—has compounded his wrongdoing. Reputations for righteousness are not established by honoring such bargains.

Nor is it legitimate to distinguish the prosecutor from the gunman by saying that, while the gunman is threatening harm unless you hand over the cash, the prosecutor is merely promising benefits if you enter a guilty plea. For, in the proper context, threats and promises may be intertranslatable. Brandishing his pistol, the holdup man may promise to leave me unharmed if I hand over the cash. Similarly, the prosecutor may threaten to “throw the book” at me if I do not plead guilty to a lesser charge. In the proper context, one may be compelled to act by either form of words.

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 crimi-
nal 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 wrongdoing 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.

II

Not too long ago plea bargaining was an officially prohibited practice. Court procedures were followed to ensue 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. There was a time when it apparently seemed plain that the old rules were the right rules. One finds in the Restatement of Contracts:\textsuperscript{19} “. . . even if the accused is guilty and the process valid, so that as
against the State the imprisonment is lawful, it is a wrongful means of induc-
ing the accused to enter into a transaction. To overcome the will of another
for the prosecutor’s advantage is an abuse of the criminal law which was
made for another purpose” (emphasis added). The authors of the Restate-
ment do not tell us what they were thinking when they spoke of the purpose
of the criminal law. Nonetheless it is instructive to conjecture and to inquire
along the lines suggested by the Restatement.

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 pun-
ishment which is proportional to their wrongdoing.

In the United States it is possible to see this principle underlying the activi-
ties 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 con-
victed 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 constitu-
tional 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 out-
come 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.
This distinction has an analogy in the area of quality control. Two vials of antibiotic may be equally contaminated. But depending upon the process used to produce each, the contamination may be aberrational or systemic. The first sample may come from a factory where every conceivable step is taken to insure that such contamination will not take place. The second vial may come from a company which uses a cheap manufacturing process offering no protection against contamination. There is an element of tragedy if death results when all possible precautions have been taken: there just are limits to human capability at our present level of understanding. But where vital precautions are dropped in the name of expediency, the contamination that results is much more serious if only because we knew it would take place and we knew what could be done to prevent it. While we have every reason to believe that the first sample is pure, we have no reason to believe that the second sample is uncontaminated. Indeed, one cannot call the latter contamination accidental as one can in the first case. It would be more correct to call it an accident if contamination did not take place in the total absence of precaution.

Likewise, systemic 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.

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 outcome 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.

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 a 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. And in a study of 724 defendants who had pleaded guilty, only 13.1 percent admitted guilt to an interviewer, while 51.6 percent asserted their innocence.21 This leaves only the factual basis for the plea to serve as the foundation for conviction. 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.22 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.

ENDNOTES


3 Often the judge will play an important role in these discussions, being called upon, for example, to indicate a willingness to go along with a bargain involving a reduction in sentence. A crowded calendar will make the bench an interested party.

4 In California, for example, armed robbers are technically guilty of kidnapping if they point a gun at their victim and tell him to back up. Thus, beyond the charge of armed robbery, they may face a charge of kidnapping which will be dropped upon entry of a guilty plea (see Albert W. Alschuler, “The Prosecutor’s Role in Plea Bargaining,” University of Chicago Law Review 36 [Fall 1968]: 88).


7 Ibid., pp. 57, 59.

8 Ibid., pp. 57, 65.

9 Ibid., p. 60.


11 Rosett, p. 71.

12 392 F. 2d 155 (1968).


16 Alschuler, p. 61.

17 American Law Institute, Restatement of Contracts (Saint Paul, 1933), p. 652.

American Law Institute, p. 652.


Blumberg, p. 91.

John Langbein has suggested that we look to the German legal system to see how this might be done. See his “Controlling Prosecutorial Discretion in Germany,” *University of Chicago Law Review* 41 (Spring 1974): 439.