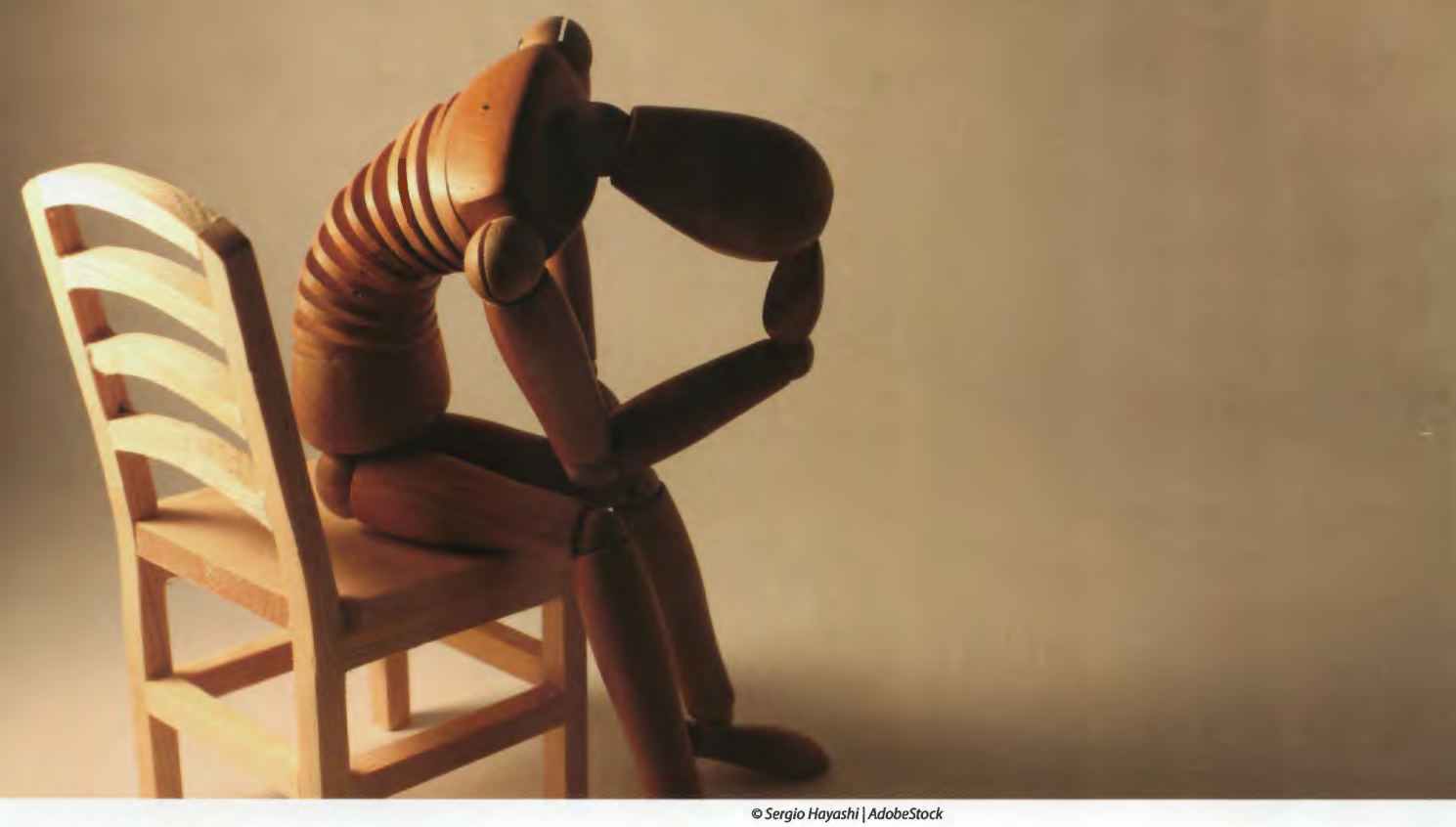

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Anatomy of a Plea

We had been in court since 9:30 a.m., and at 12:30 p.m. my client was asleep. We were "on for trial" today. I had emphasized to him the importance of being on time, always, but especially on "trial days." My DWI client was not a resident of the county that was prosecuting him. He had been up since at least 6:00 a.m. to take the bus to the train to the subway to the courthouse. This was the 13th appearance that he had made since his arrest the previous year. It was a long way from being his last.[1]

Guilty pleas are the foundation of the criminal justice system. Indeed, there are moments when it seems like the entire apparatus of the criminal justice system from arrest to arraignment to grand jury to pretrial hearings to trials is no more than a spectacle of horrors designed to convince those persons charged with crimes to permanently and irreversibly admit them.

Fewer Trials

In 2018, the National Association of Criminal Defense Lawyers ("NACDL") issued a comprehensive report identifying many of the reasons for the decline of trials and prevalence of pleas in the federal criminal justice system.[2] NACDL identified many of the causes for the diminishment in federal criminal trials, most prominent among them mandatory minimum sentences, the Sentencing Guidelines, and cultural norms among judges to enforce the "trial penalty," all of which push defendants towards pleading guilty. The "trial penalty" refers to the substantial difference between the sentence proposed in a plea offer prior to trial versus the sentence a defendant receives after trial. The report proposed solutions, such as the elimination of mandatory minimums, changes to the Guidelines to reduce the trial penalty, and a commitment on the part of the institutional participants (judges, prosecutors, and defense attorneys) to protect fundamental constitutional rights, most importantly the right to be found guilty of a crime only by proof of each element beyond a reasonable doubt.[3] The conclusions of this report have been echoed in the press, describing the decrease in the numbers of criminal trials in both state and federal court.[4] According to a recent article in the *Atlantic*, "The vast majority of felony convictions are now the result of plea bargains — some 94 percent at the state level, and some 97 percent at the federal level. Estimates for misdemeanor convictions run even higher."[5]

Trials provide an important check on the police and prosecutorial functions. By holding police and prosecutors to their proof, and at a standard of beyond a reasonable doubt, criminal defendants provide a real public good, regardless of their own guilt or innocence. New scientific methods of proving guilt are offered, debated, considered, excluded or admitted into evidence, and accepted or rejected as reliable by juries. Police officers are compelled to appear, testify under oath, subject themselves to cross-examination, and have their credibility weighed by judges and juries. Prosecutors attempting novel theories of criminality must satisfy grand juries and judges of the factual and legal basis of such,

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and ultimately prove them to skeptical juries. That such defendants provide these significant social benefits at such great cost to themselves, *even if they are acquitted*, is a widely ignored fact when discussing the decline in trials.[6] As Judge Gleeson wrote in the introduction to the NACDL report: "[A] system without a critical mass of trials cannot deliver on our constitutional promises."

The usual suspects identified for the decline in trials, and the major focus of the NACDL report, are draconian sentencing laws, including guidelines sentencing regimes both state and federal and the transfer of power in sentencing decisions from judges to prosecutors, that result from high mandatory minimum sentences. Because criminal defendants almost invariably receive substantially higher sentences post-trial than if they were to plead guilty prior to trial, harsher sentences would reasonably be expected to result in more plea bargains, and the disappearance of trials is routinely ascribed to such substantially increased sentences.[7]

Taking a Plea

But trials are diminishing at all levels, for both felonies and misdemeanors, and in both federal and state courts. While the trial penalty and other factors identified in the NACDL report are no doubt substantial ones, they are not the only ones. Defendants in criminal cases frequently take pleas and admit guilt, even in cases where they are actually innocent and even in cases in which the consequences that they would face after trial are unlikely to be more severe than the consequences that they will suffer as a result of taking a plea.[8] Such outcomes seem to directly contradict the classic decision-making narratives based on rational choice and expected utility.

Recent research in the arenas of psychology, economics, and public policy point to the underlying reasons for such pleas. Simply put, a holistic review of the real-life costs to defendants facing criminal charges of continuing to fight those charges, particularly in those cases, which are the substantial majority, where only fines, probationary sentences or relatively short periods of incarceration are at issue, provides a better explanation of the incentives to plea. In such cases, the transaction costs, even for indigent persons with appointed counsel (a factor that in itself plays into plea bargaining assessments) may outweigh the factors considered in "standard" risk-reward calculation premised solely on risk-weighted assessments of various negative outcomes, such as a jail sentence, as weighed probabilistically against various positive outcomes, such as an acquittal.

In sum, limited resources dedicated to the institutions working towards criminal justice in general, taken in combination with the associated diminishment of credibility of those institutions, has created a feedback loop in which defendants are compelled to take pleas by, among other things, laws requiring their personal appearance in courts. This system of manufactured pleas creates its own momentum. Other defendants, seeing the litany of pleas all around them with little or no attention paid to the facts of specific cases, and feeling the weight placed on them by prosecutors, judges and even their own defense counsel, see their best alternative as a plea bargain. They view this as the best alternative even if they are innocent and even if the sentence obtained as a result of the plea bargain is little or no better than if they had been convicted following trial.

> *"I don't think I can take this much longer," my client said to me. The assigned assistant district attorney was answering "ready at 2:15." In this jurisdiction, where the best speedy trial protections depend on lack of prosecutorial readiness, the answer of "ready" by the prosecution was supposed to be a sign that the end was approaching. The prosecutor was saying his witnesses were available and that he would be able to start trial that afternoon.*
>
> *The prosecution only had two days left because of all its delays. I confidently told my client that we would either try the case "in the next couple of days" or the case would have to be dismissed. I called my out-of-state expert to let her know we would need her the next day.*
>
> *"I will see you at 2:15."*

Innocent people will plead guilty to crimes that they did not commit. The willingness of volunteers who were designated "mock innocent" to plead guilty has been well-established in experiments,[9] although it should be noted that they plead guilty at lower rates than those volunteers designated as "mock guilty."[10] Real-world examples of innocent persons who have pled guilty to protect others or for other directly functional reasons have been explored in the literature.[11] But the reasons, systematically, innocent persons plead guilty to crimes largely run in parallel to the reasons that they make false confessions.[12]

Appearing in Court

Under the Anglo-American system of criminal justice, a defendant in a criminal case not only has the right,[13] but, in most jurisdictions, also the obligation, to appear in person every time his case is before the court. Both of these, the right and the obligation, are closely tied to the presumption of bail in the United States, whereby every defendant is either incarcerated or subject to some conditions applicable to his release. For incarcerated defendants, "being produced" by the state to attend a court appearance is vital to protecting their constitutional rights. Defendants who are "out" — because bail has been posted, because they have been released on a form of pretrial supervision, or simply because they have been released "on recognizance" — are still subject to conditions of release, one of which is that they attend every scheduled court appearance.

While personal appearance by an incarcerated defendant can be and often is "waived" by defense counsel (presumably with the permission of the client) or "excused" for an out defendant by a court to allow that person to attend to medical or other personal obligations, the default rule in many jurisdictions is that defendants must appear in court whether they are incarcerated or at liberty. And for defendants on release, failing to make a court appearance, or even showing up late to one, can have dire consequences. Judges can and generally do issues bench warrants, revoke release or forfeit bail, and, upon the missing defendants' return to court, either order defendants to be incarcerated under higher bail conditions or remand them, holding them without possibility of bail. Not only does the defendant suffer immediate loss of liberty, but also, because many criminal justice records track when bench warrants issue, the defendant will face the history associated with this bench warrant every time a release decision is being contemplated by a court in the future. A "history of bench warrants" is often a major factor in determining whether to release or hold a defendant.

This mandate for "out" defendants to appear has important ramifications with regards to obtaining guilty pleas.

First, it is important to recognize that in the large urban centers that process hundreds of thousands of arrests per year, going to and appearing at court is a substantial commitment of time and resources. Defendants often must travel significant distances even to get to court, as defendants may not reside in the county in which they are being prosecuted. Moreover, defendants, particularly the vast majority of them who are represented by public defenders, must not only appear first thing in the morning but also wait for the court, the prosecution and, last but not least, their own attorney to be physically present before their case can be called. That such requirements play an important role in coercing outcomes in these cases has been noted by the Civil Rights Division of the U.S. Department of Justice.[14]

Indeed, over time, such practices used by courts and prosecutors to obtain guilty pleas come to closely resemble those used by police to obtain confessions. One key factor is that defendants are isolated. While family and friends may show up for an arraignment or another early appearance in a case, out defendants in criminal cases virtually always make their later appearances alone, often spending entire eight-hour (or longer) days in highly policed, hostile environments. Anyone who has been charged in a criminal courtroom will likely recall repeated pronouncements concerning cellphone use, headwear, and eating and drinking. "In" defendants are even more isolated, and face even longer days, that frequently begin before dawn and end long after sunset as they are transported from jails to attend the two- to three-minute long court appearances at which they are constitutionally entitled to be present. Removing people from their social matrix and holding them in places that constantly remind them of the power of the state over their lives deprive them of allies and serves to enforce the inclination to yield to the authority of the state.[15]

> **"Representative government and trial by jury are the heart and lungs of liberty."**
> **— John Adams**

Exhaustion and hopelessness similarly work to wear down the criminal defendant throughout the pretrial process. While criminal defendants awaiting trial are not exposed to the same type of relentless pressure and intense confinement as subjects of police interrogation,[16] defendants are faced with months and often years of a psychologically taxing pretrial process.[17] Looking over yet another packed courtroom, yet another missing public defender, yet another prosecutor who has "lost the file" requiring the case to be adjourned weeks or months into the future has a nontrivial effect on decision-making. Simply put, by not only extending the process but undermining any confidence that the process will lead to a just outcome, these malfunctioning criminal justice systems encourage guilty pleas, particularly from those defendants who are innocent or have potentially persuasive defenses at trial.[18]

Finally, as is the case with confessions, pleas are frequently sold to defendants as the best alternative to an otherwise intractable situation. Just as police officers make promises of leniency or immunity from prosecution in exchange for a confession,[19] so too do prosecutors either in open court "on the record" or in the courthouse hallway offer an escape route. Faced with the prospect of continuing to indefinitely "fight their case" within the confines of a system in which they have little confidence, such plea offers may genuinely seem like bargains, even if they involve substantial fines, criminal records or even possible imprisonment, compared to the alternative.

Three months had passed since I had assured my client that the case would have to go to trial or be dismissed in the "next couple of days."

"It's not your fault," he said in the hallway, squeezing my shoulder. "I know you wanted to try the case." He shook his head. "But I just can't. I can't keep coming back."

The prosecutor had not, in fact, been ready on that day three months earlier. But when he filed a "certificate of readiness" the following day, the court honored it and "stopped the clock." And that was all my client could take.

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YOU NEVER STAND ALONE

When I spoke to him a year later, he had no regrets. The ignition interlock device that was installed on his car was much less intrusive than he expected. Once he had taken the plea, Connecticut had restored his driving privileges, at least for the purposes of getting to and from work. While he was not happy with the fines or the fact that he had a criminal record, and he was frankly shocked at the effect his plea had on his insurance rates, he had no regrets about taking the plea.

As Justice Goldberg observed over 50 years ago, "a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."[20] So too with plea bargains. While they offer advantages to every participant in the criminal justice system, including judges and public defenders who avoid the expense and time required for trial, jurors who do not have to sit and consider the evidence, police and prosecutors who obtain their desired outcome, and even defendants, who may do better with regards to their case and their life as a whole, there can be no question that there is a real cost to society. With less and less scrutiny paid to the actions of police and prosecutors, the distance between "probable cause" for arrest and "proof beyond a reasonable doubt" for conviction gets narrower and narrower. Any system that treats an arrest as equivalent with guilt of the underlying offense moves inexorably toward not being a system of criminal justice at all.

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Solutions

What solutions are there? As already noted, one simple step is to allow "out" defendants to appear telephonically, or not at all, for most of their court appearances. While this will not remove all the strain associated with "fighting a case," particularly the emotional strain of facing the prospect of conviction and incarceration, it would certainly make it more practical for defendants facing criminal charges to fight them. Another partial solution that is already being embraced in many courts is pretrial diversion. By reducing the number of cases in the system, and disposing of them without criminal consequences, the court system should have additional resources to deploy to those cases that can and should be tried.

It is this lack of resources that drives many of the pleas that are taken. Lack of judges to try cases, lack of public defenders to defend them, and even prosecutors to weigh and evaluate cases, all lead to an unhealthy reliance on the probable cause for an arrest as sufficient to determine guilt. Ultimately, a "just" system of criminal justice is not cheap, but protecting the life and liberty of its citizens, and maintaining an effective check on police power, are fundamental to protecting democracy.

There is considerable reason for hope in this area. As one example, the New York State Legislature in April 2019 passed into law sweeping criminal justice reforms. Among the many changes, the legislature mandated much broader discovery for defendants in criminal cases, giving them more and earlier access to records of investigatory agencies, witness statements, and more. The new laws also provide for stricter protocols for prosecutors trying to "stop the clock" on speedy trial protections, preventing prosecutors from answering "ready" before complying with discovery requirements and requiring judicial inquiry into statements of prosecutorial readiness. The law effectively reverses the presumption of detention for most crimes. Police must issue desk appearance tickets (which allow defendants to voluntarily appear for even their first court appearance) and judges must permit release without monetary conditions for most defendants, excluding only those charged with the most serious felonies and certain other, mostly sexually motivated, offenses.

And it is not just New York. With the passage of the federal FIRST STEP Act in December 2018 with broad bipartisan support, it seems like the tide has finally turned toward substantial criminal justice reform, with efforts being made nationwide for state legislatures to take "first steps" of their own. NACDL is playing a prominent role in these efforts, with its Trial Penalty Recommendation Task Force continuing its work to achieve the goals set out in the report.

Conclusion

Jury verdicts, and the trials that deliver them, are a vital check on police and prosecutorial power. In the memorable words of John Adams, "[r]epresentative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds."[21] America needs more judicial control over sentences, more consideration of the experiences of persons charged with crimes, better and more transparent rules governing discovery, and speedy trial protections with teeth. These reforms will restore the vital protections to the country that trials provide.

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Notes

1. This client is a composite based on a number of different clients I have represented both as a public defender and in private practice.

2. National Association of Criminal Defense Lawyers & Foundation for Criminal Justice, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It (2018), *available at* www.nacdl.org/trialpenaltyreport. *See also "The Tyranny of the Trial Penalty"* and related articles, 31(4-5) Federal Sentencing Reporter (April/June 2019).

3. The Trial Penalty (*supra* note 2) follows a 2013 report focusing on federal pleas in drug cases. Human Rights Watch, An Offer You Can't Refuse: How US Federal Prosecutors

FORCE DRUG DEFENDANTS TO PLEAD GUILTY (2013), *available at* https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead.

4. See Robert Anello & Richard Albert, *The Vanishing Federal Criminal Trial* [hereinafter *Vanishing Trial*], 260 (71) N.Y.L.J., Oct. 11, 2018.

5. Emily Yoffe, *Innocence Is Irrelevant*, THE ATLANTIC (Sept. 2017), *available at* https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171.

6. "A comparison of sentences imposed after trial as a result of a guilty verdict to sentences imposed in cases where a defendant pleads guilty demonstrates that in every category of crime, defendants who go to trial are penalized via a higher sentence." See *Vanishing Trial* at 2 (discussing U.S. Sentencing Commission 2016 Report).

7. See *Vanishing Trial* at 2 ("The harshness of the guidelines and its provisions that incentivize defendants to plead contribute to this pressure. Defendants recognize that a prosecutor's threat of exponentially higher sentences to defendants considering trial have merit, especially in the white collar context, because the formulaic calculations set forth in the guidelines can result in sentences that are out of proportion to the defendant's culpability.").

8. A similar diminishment in the number of civil trials, state and federal, has also been noted and has similar causes, as explained in more detail below. See Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131 (2018), *available at* https://ir.lawnet.fordham.edu/flr/vol86/iss5/3.

9. Kenneth S. Bordens, *The Effects of Likelihood of Conviction, Threatened Punishment, and Assumed Role on Mock Plea Bargaining Decisions*, 5 BASIC & APPLIED SOC. PSYCHOL. 59, 71 (1984); W. Larry Gregory et al., *Social Psychology and Plea Bargaining: Applications, Methodology, and Theory*, 36 J. PERSONALITY & SOC. PSYCHOL. 1521, 1528 (1978).

10. See *id.*; *see also* Avishalom Tor et al., *Fairness and the Willingness to Accept Plea Bargain Offers*, 7 J. EMPIRICAL LEGAL STUD. 97, 106 (2010).

11. *See, e.g.*, *Innocence Is Irrelevant*, *supra* note 5.

12. It is important to distinguish between what can be referred to as the "truly innocent" and the "factually innocent." As to the former, "true innocence" or for that matter "true guilt" is simply beyond the province of any justice system. The discussion below defines "innocence" as factual innocence, *viz.*, that a reasonable person in the position of the defendant would believe that the prosecuting authority lacks the evidence to prove any of the charges against the defendant by proof beyond a reasonable doubt.

13. See *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); FED. R. CRIM. P. 43.

14. *See* U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 44 (2015) (noting one of barriers to fair resolution of municipal code violations was "requiring in-person appearance to resolve most municipal charges"). The report also notes the carelessness with which cases were calendared, with police officers routinely writing summonses that had the wrong time or date on them or both, *id.* at 46; the indifference with which members of the public's attempts to clear warrants or appear to answer summonses were frequently received, *id.* at 47; and the court's frequently vigorous opposition to any attempts to litigate the merits of the underlying summonses, *id.* at 43-44. While the Ferguson, Missouri, court system may be exceptional, other systems operate similarly.

15. R.A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. AM. ACAD. PSYCHIATRY LAW 332, 335 (2009) (noting that, in interrogations, "[t]he custodial environment and physical confinement are intended to isolate and disempower the suspect[.]"

16. *Id.* at 335 (noting that many suspects are "worn down" and "fatigued" as a preliminary step in a coerced confession).

17. The toll taken by an extended delay in pretrial proceedings can be extraordinary, even fatal. The story of Kalief Browder, who spent almost three years in custody awaiting trial, with two of them in solitary confinement before his case was ultimately dismissed, is a cautionary tale. Mr. Browder never recovered from this experience, and he committed suicide a little more than a year after he was released from jail. *See* Jennifer Gonnerman, *Kalief Browder, 1993-2015* (NEW YORKER, June 7, 2015), *available at* https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015.

18. Such effects on the outcomes would be expected, as with false confessions, to disproportionately affect at-risk populations, such as juveniles and the mentally ill. *See* Viviana Alvarez-Toro & Cesar A. Lopez-Morales, *Revisiting the False Confession Problem*, 46(1) J. AM. ACAD. PSYCHIATRY LAW ONLINE 34-44 (March 2018) (noting greater likelihood of these populations to give false confessions). And, indeed, this seems to be the case. See Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62(4) RUTGERS L. REV. 943 (2010).

19. Police officers are not "prohibited from inducing a confession with an honest promise of leniency." *Sprosty v. Buchler*, 79 F.3d 635, 646 (7th Cir. 1996), although false promises may render a confession involuntary, *see id.*

20. *Escobedo v. Illinois*, 378 U.S. 478, 488–489 (1964) (internal citations omitted).

21. THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 55 (C. Bradley Thompson ed., 2000) (quoted in THE TRIAL PENALTY, *supra* note 2, at 5). ■

About the Author

Andrew St. Laurent has been a partner at Harris, St. Laurent and Chaudhry LLP since 2009 and was a Staff Attorney at the Legal Aid Society's Manhattan Criminal Defense Practice from 2004 to 2009. He has written and commented extensively on the need for improvements in the criminal justice system.

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