SIMPLICITY AS EQUALITY IN CRIMINAL PROCEDURE

I. INTRODUCTION

Justice Black once loftily claimed that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[1] In service of this principle, the Supreme Court recognized a constitutional right to publicly provided resources at trial and on appeal and crafted an intricate web of constitutional criminal procedure that initially appears to offer particular protection for poor defendants. Yet despite these judicial efforts, few would contend that a poor defendant is on equal footing with a rich one. Is Justice Black's definition of equal justice too narrow? Or does it represent an unattainable aspiration? Received wisdom is that ensuring a modicum of public resources and increasing procedural protections is the most the Court can do to promote equality. Additional resources cost too much money. Additional procedural protections cost too much justice. Requiring either flirts with legislative rather than judicial action.

This Note suggests that, despite its attempts to promote economic equality through criminal procedure, the Supreme Court has failed to account for a systemic source of inequality in criminal law: the complexity of the criminal process itself. The relative ability of wealthy defendants to exploit a broad range of technical procedures makes them less attractive to prosecutors, who, with limited resources but virtually unlimited discretion, are channeled away from wealthy defendants and toward poorer ones. Although complex procedural protections make convictions of any defendant more costly and less likely, they can be easily bypassed by plea bargaining and nullified by increased sentences. As a result, procedural complexity not only places the poor at a comparative disadvantage by providing procedural tools they are less equipped to employ, it may also place them in a worse absolute position by making them more likely to be charged with crimes that carry longer sentences.

This effect may be cyclical: In the face of severe sentences, the Court (which is concerned about substantive justice but loath to second-guess substantive punishment) adds to the complexity of procedural protections. This further encourages prosecutors to target the defendants least able to exploit them. And the higher costs and political process effects of complex procedures, in turn, encourage legislatures to increase substantive punishment. The system as a whole — a combination of complex procedures, prosecutors' rationing of limited

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[1] Griffin v. Illinois, 351 U.S. 12, 19 (1956).

resources, and politically rational legislatures — focuses an increasing amount of criminal punishment on the poor.

Better lawyers with greater resources will always provide an advantage in the criminal justice system. But unlike disparate wealth, the complexity of criminal procedure is not inevitable. In addition to focusing on whether individual defendants should be given greater resources or additional procedural protections, the Court (and legislatures) should consider the tendency of complex procedures to sort defendants according to wealth: the possibility that simplicity is equality.

The systemic effects of procedural complexity might be addressed in several ways. First, the Court could attempt to eliminate circumvention of its procedural protections, for example, by strengthening the standard for ineffective assistance of counsel or conducting substantive review of criminal sentences.[2] This Note holds these elements of the criminal process constant in order to focus on the underexplored benefits of procedural simplicity. Second, legislatures might be pushed to adopt measures that simplify statutory criminal procedure, such as altering Federal Rules to eliminate peremptory challenges[3] or increasing the role of the judge as trial manager. The real power of simplicity as equality, however, is that much of criminal procedure is uncontroversially within the judicial domain. Thus, the Supreme Court itself has the power to reduce the effects of economic inequality by simplifying criminal procedure.

The Court's ability can be separated into two subcategories: reducing the *breadth* of criminal procedure, and reducing the *technicality* of its protections. Decreasing the breadth of procedural protections, an approach suggested by Professor William Stuntz,[4] offers a dramatic approach to equalizing the prospects of criminal defendants, but it carries significant costs and risks. Eliminating large swaths of procedural protections is a type of leveling down: poor defendants, who are less likely to have taken advantage of the protection in the first place, would be made moderately worse off, while wealthy defendants, who would have used the protection to their benefit, would be made substantially worse off. This leveling down may trigger improvements in substantive criminal law (leveling up) as a wealthier segment of society

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[2] Professor William Stuntz suggests these solutions (as well as reduced procedural regulation) as possible responses to the many perverse effects of robust constitutional criminal procedure in *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 65–74 (1997) [hereinafter Stuntz, *Uneasy Relationship*]; and *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 29–38 (1996) [hereinafter Stuntz, *Civil-Criminal Line*].

[3] *Cf.* Miller-El v. Dretke, 125 S. Ct. 2317, 2340–44 (2005) (Breyer, J., concurring) (arguing that peremptory challenges will inevitably be influenced by discrimination and should therefore be eliminated); Batson v. Kentucky, 476 U.S. 79, 107–08 (1986) (Marshall, J., concurring) (same).

[4] *See* Stuntz, *Uneasy Relationship*, *supra* note 2, at 66.

is subject to its force. If this improvement occurs, the elimination of procedural breadth would be a type of leveling to the middle. However, the likelihood of such a dynamic presents an uncertain empirical question.

In contrast to reducing procedural breadth, eliminating procedural technicality offers a more feasible approach to reducing disparate wealth effects. Because processes can be made less technical while remaining protective, a reduction in technicality could diminish the effect of wealth in the criminal process without necessarily exposing criminal defendants to the harms targeted by criminal procedure.

Part II describes the Supreme Court's efforts to protect the poor through criminal procedure. Part III argues that the complexity of these procedural protections disadvantages poor criminal defendants, and explores two conceptually distinct avenues for reducing this effect. It suggests that those concerned with economic equality in criminal justice should give further consideration to reducing procedural breadth and immediate support to reducing procedural technicality. Part IV briefly applies this insight to demonstrate how understanding simplicity as equality can inform current debates. Part V concludes.

II. THE COURT'S EFFORTS: MINIMUM RESOURCES AND PROCEDURAL PROTECTIONS

In 1956, the Supreme Court announced the ambitious principle that poverty should not be a disadvantage in the criminal justice system.[5] It pursued this ideal directly by requiring the provision of resources to indigent defendants. The Court also created a broad set of constitu-

[5] *Griffin*, 351 U.S. at 19. Although a full defense of this principle is beyond the scope of this Note, it seems both widely accepted (at least as an aspiration) and theoretically defensible. The dissenters in *Griffin* rejected this premise. *See id.* at 28 (Burton, J., dissenting) ("Illinois is not bound to make the defendants economically equal before its bar of justice."); *id.* at 34 (Harlan, J., dissenting) ("The Court . . . holds that, at least in this area of criminal appeals, the Equal Protection Clause imposes on the States an affirmative duty to lift the handicaps flowing from differences in economic circumstances."). However, in later seeking to limit the equality mandate of *Griffin*, Justice Harlan ironically provided perhaps its strongest justification. In his opinion in *Boddie v. Connecticut*, 401 U.S. 371 (1971), which held that a person seeking a divorce was entitled to a waiver of court access fees, Justice Harlan based the right against economic disadvantage before the law on the presence of a state monopoly. *Id.* at 376–77 ("Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one."). Thus, although the state is not generally required to equalize the economic conditions of its citizens, it may not claim a monopoly over criminal trials, or divorce proceedings, and then disclaim responsibility for the impact of wealth in those processes. *See also* Maher v. Roe, 432 U.S. 464, 471 n.6 (1977) (noting that the logic of *Griffin* was "grounded in the criminal justice system, a governmental monopoly in which participation is compelled").

tional procedural protections in what might be understood as an attempt to promote the interests of poor defendants.

Like most statements of principle, however, the notion that poverty should play no role in criminal justice has bowed to practical realities. Because providing equal resources for every criminal defendant would require either an implausible subsidy for poor defendants or an intolerable restriction of autonomy for wealthy ones,[6] the Court has accepted a combination of publicly provided resources and robust procedural protections as a second-best alternative. Similarly, while many scholars contest the placement of particular doctrinal lines, most accept the premise that economic equality in criminal justice is shaped by a combination of procedural rights and publicly provided resources.[7] Thus, when it comes to equal treatment of poor defendants, the debate generally focuses on the extent of these subsidies and procedural protections in the trial context.

A. Minimum Resources

The Supreme Court has most directly addressed economic equality in criminal justice by requiring the provision of resources to indigent defendants. The first use of this approach came in 1956 when, relying on an amalgam of due process and equal protection principles, the Court required states to waive trial transcript fees for indigents pursuing an appeal.[8] In *Griffin v. Illinois*,[9] a state statute mandated that defendants pursuing a direct appeal provide the appellate court with a report of the trial proceedings — a task that often required access to a trial transcript.[10] The Supreme Court held that the Equal Protection and Due Process Clauses of the Fourteenth Amendment required that Illinois waive its normal transcript fee for those who could not afford

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[6] The Court could, in theory, restrict the resources that wealthy defendants could devote to their defense. In the extreme, one could imagine a rule barring private defense practice. Thus, any attorney wishing to practice criminal defense would have to join a public defender service, and defendants would be assigned (or perhaps choose) public defenders paid by the state. Whether or not such an approach could be justified theoretically, it would likely be perceived as an intolerable restriction of criminal defendants' autonomy, and it would almost certainly conflict with the Supreme Court's interpretation of the Sixth Amendment. *See* United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2561 (2006) ("[A]n element of [the right to counsel] is the right of a defendant who does not require appointed counsel to choose who will represent him." (citing Wheat v. United States, 486 U.S. 153, 159 (1988))).

[7] *See* Stuntz, *Uneasy Relationship*, *supra* note 2, at 3. An alternative viewpoint downplays the very necessity of economic equality, arguing that only a defendant's absolute position is morally relevant, and therefore, the strong protections provided to all defendants constitute procedural justice. *See* Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From* Brown *to* Miranda*,* Furman *and Beyond*, 54 VAND. L. REV. 359 (2001).

[8] *Griffin*, 351 U.S. at 19–20.

[9] 351 U.S. 12.

[10] *Id.* at 13–15.

it.[11] Although the transcript fee applied equally to both poor and wealthy defendants, and although Illinois was under no constitutional obligation to provide criminal appeals at all, the Court reasoned that once the state chose to offer appeals, it was required to do so in a way that did not functionally discriminate according to wealth.[12] Subsequently, in *Douglas v. California*,[13] the Court relied on *Griffin* to mandate the appointment of counsel for indigents on appeal.[14] The Court also employed similar reasoning to require the waiver of other fees[15] and to bar states from automatically imprisoning indigent defendants based on failure to pay a fine.[16]

In addition to recognizing an explicit, if ill-defined,[17] role for the Equal Protection Clause in the *Griffin-Douglas* line of cases, the Court has adverted to an overlap between equality and fundamental fairness in mandating the provision of resources for indigent defendants through the Due Process Clause. Most famously, the Court held in *Gideon v. Wainwright*[18] that indigent defendants have a right to be provided with trial counsel.[19] Although the decision relied formally on the Sixth Amendment right to counsel, as incorporated through the Due Process Clause of the Fourteenth Amendment, the Court treated

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[11] *Id.* at 19–20.

[12] *Id.* at 18. Perhaps because the Court did not speak in terms of "disproportionate impact" and "discriminatory purpose" until *Washington v. Davis*, 426 U.S. 229, 239 (1976), the Justices in *Griffin* sometimes appeared to describe the state's failure to waive a fee as an improper wealth-based classification. *See Griffin*, 351 U.S. at 23 (Frankfurter, J., concurring) ("[The state] cannot by force of its exactions draw a line which precludes convicted indigent persons . . . from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court . . . ."); *id.* at 35 (Harlan, J., dissenting) ("The Court finds in the operation of these requirements . . . an invidious classification between the 'rich' and the 'poor.' But . . . in other circumstances the resulting differentiation is not treated as an invidious classification by the State, even though discrimination against 'indigents' by name would be unconstitutional.").

[13] 372 U.S. 353 (1963).

[14] *Id.* at 355.

[15] *See* Mayer v. Chicago, 404 U.S. 189 (1971) (requiring waiver of trial transcript fee when needed to appeal a non-felony conviction); Roberts v. LaVallee, 389 U.S. 40 (1967) (requiring fee waiver for a preliminary hearing transcript to be used at trial); Smith v. Bennett, 365 U.S. 708 (1961) (requiring waiver of filing fee for habeas corpus petitions); Burns v. Ohio, 360 U.S. 252 (1959) (requiring waiver of filing fee for notice of appeal).

[16] *See* Bearden v. Georgia, 461 U.S. 660 (1983) (requiring consideration of alternative methods before revoking the probation of an indigent defendant who, through no fault of his own, cannot pay fine imposed as part of sentence); Tate v. Short, 401 U.S. 395 (1971) (barring the conversion of a fine-only conviction into a jail term solely because a defendant cannot immediately pay the fine); Williams v. Illinois, 399 U.S. 235 (1970) (barring the imprisonment beyond a statutory maximum solely because a defendant cannot pay a fine).

[17] For a discussion of the unusual interplay of the Equal Protection and Due Process Clauses in the *Griffin-Douglas* line of cases, see Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 480–83 (2002).

[18] 372 U.S. 335 (1963).

[19] *Id.* at 344.

equality as a component of fundamental fairness.[20] Similarly, the Court hinted at equality principles in holding that the Due Process Clause itself requires the provision of a psychiatrist when an indigent defendant's sanity at the time of the offense is likely to be a significant issue at trial.[21]

Treating equality as a component of due process has, perhaps ironically, also allowed the Court to limit the *Griffin-Douglas* principle and avoid a general requirement that all criminal defendants have equal resources in the criminal justice system. Thus, in *Ross v. Moffitt*,[22] the Court held that North Carolina was not required to appoint counsel for an indigent defendant pursuing a discretionary appeal to the state supreme court or certiorari review from the United States Supreme Court.[23] In so holding, the Court admitted that assistance of counsel would provide an advantage to a defendant seeking a discretionary appeal. But it emphasized that "there are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of this Court. The Fourteenth Amendment 'does not require absolute equality or precisely equal advantages,' nor does it require the state to 'equalize economic conditions.'"[24] Instead, the Court deemed principles of due process satisfied so long as the prior appellate record provided "meaningful" review without counsel.[25]

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[20] *Id.* ("From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.").

[21] *See* Ake v. Oklahoma, 470 U.S. 68, 76, 82 (1985) ("[A fair opportunity to present one's defense,] grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."). The Court has not addressed whether *Ake* requires the provision of other experts as well. *See* Caldwell v. Mississippi, 472 U.S. 320, 323 n.1 (1985) (declining to decide whether due process required the appointment of a criminal investigator, fingerprint expert, or ballistics expert). However, lower courts have held that *Ake* must apply whenever a defendant can show that an expert is necessary for his defense. *See, e.g.*, Little v. Armontrout, 835 F.2d 1240, 1243 (8th Cir. 1987) (finding "no principled way to distinguish between psychiatric and nonpsychiatric experts" in the context of *Ake*); Dubose v. State, 662 So. 2d 1189, 1197–99 (Ala. 1995) (requiring the provision of a DNA expert in a capital case).

[22] 417 U.S. 600 (1974).

[23] *Id.* at 612.

[24] *Id.* (citations omitted) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973); Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring)); *see also id.* at 616 ("The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.").

[25] *Id.* at 614–15.

Following *Ross*, the Court has occasionally tweaked the exact line at which an indigent defendant's resources are deemed adequate,[26] and scholars have argued for devoting greater resources to indigents.[27] However, these changes are often assumed to be the most that can be done to eliminate the advantages of wealth in the criminal justice system.

B. Procedural Protections

In addition to the substantive guarantee of resources at trial and on appeal, the Supreme Court has also created a broad set of procedural protections that might be understood as serving the interests of poor defendants. Although the criminal procedure "revolution" impacted all criminal defendants regardless of race or class, the constitutionalization of the trial process during the 1960s is commonly seen as motivated by a desire to protect poor black defendants against sham trials in state courts. Scholars often identify the racial prejudice underlying famous cases such as *Powell v. Alabama*[28] as the unnamed target of the Court's procedural innovations.[29] The disadvantages caused by pov-

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[26] *See* Halbert v. Michigan, 125 S. Ct. 2582, 2586 (2005) (requiring appointed counsel for defendants pursuing a first-tier discretionary appeal following a plea of guilty or nolo contendere); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (holding that neither the Equal Protection Clause nor the Due Process Clause require states to appoint counsel for indigent prisoners seeking post-conviction relief); *see also* Murray v. Giarratano, 492 U.S. 1, 10 (1989) (applying *Finley* in the death penalty context).

[27] *See, e.g.*, Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 291–98 (1997); Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 675–92 (1986); Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281, 286 (1991); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 338–39 (1995); Note, *Effectively Ineffective: The Failure of Courts To Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1733 (2005).

[28] 287 U.S. 45 (1932). *Powell* invalidated the convictions of seven young, poor, and likely innocent black men, who were charged with raping two white women in Alabama. The men, who went effectively unrepresented by counsel until the morning of trial, were sentenced to death following one-day trials. *Id.* at 49–50.

[29] *See* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48 (2000) ("[T]he linkage between the birth of modern criminal procedure and southern black defendants is no fortuity."); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1969) ("The Court's concern with criminal procedure can be understood only in the context of the struggle for civil rights."); Carol S. Steiker, *Introduction* to CRIMINAL PROCEDURE STORIES, at vii, viii (Carol S. Steiker ed., 2006) ("The most striking theme that emerges from the stories behind [criminal procedure] cases . . . is the intersection of the criminal procedure revolution and the struggle for racial equality . . . ."); Stuntz, *Uneasy Relationship*, *supra* note 2, at 5 ("The post-1960 constitutionalization of criminal procedure arose, in large part, out of the sense that the system was treating black suspects and defendants much worse than white ones.").

erty may have been another target.[30] Because race and poverty are unfortunately correlated, it is difficult to separate the specific causes of the Court's reforms.

Regardless of the Court's motivations, the layers of procedural protections produced by the criminal procedure revolution lend plausibility to the claim that America employs "the world's most expensive and procedurally complex criminal justice system."[31] Because these protections present obstacles to law enforcement that many believe are largely focused on poor (and black) suspects,[32] the Warren Court's criminal procedure seems to be a vindication of *Carolene Products*–style minority protection.[33] Criminal procedure is of course concerned with values beyond countermajoritarian fairness, such as privacy, accuracy of punishment, and efficient adjudication. Thus, procedural protections, like the provision of resources to indigents, are limited in their ability to eliminate the disadvantages of poverty. However, accepting these constraints, robust procedural protections along with minimum resources seem to be the best remaining response to economic inequality.

III. A SYSTEMIC ACCOUNT OF PROCEDURAL COMPLEXITY

The above analysis, with its focus on the formal, judicially created rules for the criminal process, misses an important source of economic inequality: the complexity of criminal procedure itself. Recognizing the perverse impact of complexity on economic equality, however, re-

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[30] *See* William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1288 (1999) (noting that the constitutionalization of the criminal process "had many causes, but none more important than a desire to level the playing field, a sense that the criminal justice system treated (mostly white) people with money much better than it treated (often black) people without"). Professor Michael Klarman further argues:

> [A] complete understanding of the criminal procedure revolution of the 1960s requires attention to changing social attitudes toward poverty. Eminent commentators such as Francis Allen, Yale Kamisar, and Herbert Packer all contemporaneously noted the connection between poverty concerns and developments in criminal procedure. That linkage is self-evident in cases such as *Gideon v. Wainwright* and *Douglas v. California* . . . .
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> Indeed, given the strong correlation between poverty and crime, it seems likely that the entire criminal procedure revolution was intertwined with changing popular attitudes toward poverty.

Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 63–64 (1996) (footnotes omitted).

[31] Samuel H. Pillsbury, *On Corruption and Possibility in L.A.*, 34 LOY. L.A. L. REV. 657, 660 (2001).

[32] Approximately eighty percent of criminal defendants receive appointed defense counsel. Stuntz, *Uneasy Relationship*, *supra* note 2, at 32.

[33] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 172–74 (1980) (arguing that the Warren Court's criminal procedure decisions were justified as protective of minorities, who are more likely to be prosecuted as criminal defendants); Stuntz, *Civil-Criminal Line*, *supra* note 2, at 21 ("If there is a consensus theory of why the Warren Court's criminal procedure decisions got it right, the *Carolene Products*–Ely argument is it.").

quires a systemic view of criminal justice. Criminal procedure regulates law enforcement and legislatures, yet these actors possess discretion beyond the reach of courts, which creates a complex response to simple procedural commands. As Professor Stuntz argues, the Supreme Court's narrow focus on criminal procedure is often circumvented by the pervasive influence of prosecutorial discretion and legislative adjustment of sentences.[34]

These insights, applied to the issue of overall procedural complexity, suggest that although individual procedural protections may promote economic equality, their contribution to the overall complexity of the trial process produces a countervailing cost to poor defendants. Because wealthy defendants are better able to exploit a complex procedural system, an increase in the breadth or technicality of procedures should lead prosecutors, at the margin, to prefer poor defendants. At the same time, broader and more complex procedural protections may lead legislatures to raise substantive sentences, both as compensation for the higher conviction costs, and because they are (falsely) reassured that only the guilty will be convicted. Moreover, the increased focus of prosecutors on the poor further diminishes the political check that would result if society's elites were equally threatened with the higher sentences. To the degree that higher sentences and increased prosecutorial focus on the poor lead judges to increase procedural complexity, these effects may be cyclical. The perverse effect of procedural protections should not be overdrawn: poor defendants may not be better off with no procedural protections. But in a system with famously low standards for effective representation of indigents, procedural complexity constitutes an important cost.

A. Complexity and Prosecutorial Discretion

Complex criminal procedures render the conviction of defendants who can exploit them both less likely and more costly.[35] Complexity in this context has two independent dimensions: the breadth of procedural protections throughout the trial process, and the technicality of individual doctrines. The breadth of procedural protections describes the number of tools a defendant may use to contest charges. The Court's decisions to regulate police violations of the Fourth and Fifth Amendments through the trial process in *Mapp v. Ohio*[36] and *Miranda*

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[34] Stuntz, *Uneasy Relationship*, *supra* note 2, at 27–31, 55–60; William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 792–96 (2006).

[35] *Cf.* Stuntz, *supra* note 34, at 782 (describing constitutional law as "a series of political taxes and subsidies, making some kinds of legislation and law enforcement more expensive and others cheaper").

[36] 367 U.S. 643 (1961).

v. Arizona[37] are the most prominent expansions of procedural breadth. By excluding otherwise probative evidence based on a finding of police misconduct, *Mapp* and *Miranda* make convictions less likely. They also raise the costs of litigation to defendants and the state, both because lawyers must spend extra time litigating these legal claims, and, perhaps more significantly, because they require the investigation and adjudication of additional factual issues.

The technicality of procedure describes the amount of skill, knowledge, and time needed to resolve an issue. *Miranda*'s bright-line proxy for compelled self-incrimination is less technical than an ad hoc analysis of compulsion. In contrast, the technicality of Fourth Amendment law has led Professor Akhil Amar to comment that "[w]arrants are not required — unless they are," and "[a]ll searches and seizures must be grounded in probable cause — but not on Tuesdays."[38] Another example of procedural technicality is double jeopardy doctrine, which Chief Justice Rehnquist described as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator,"[39] and which has posed a repeated analytical challenge for ambitious academics.[40] The Court's intricate rules devised specifically for death penalty cases lead to "the most conceptually complex and emotionally demanding litigation in the United States."[41]

Although technicality does not itself decrease conviction rates, it is likely to raise litigation costs by requiring additional research, briefing, and argument. In addition to requiring greater resources, procedural technicality requires (or at least rewards) greater skill and experience. Finally, although it is difficult to assess the risk aversion of criminal defendants as a class,[42] procedural technicality imposes a sub-

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[37] 384 U.S. 436 (1966).

[38] Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994).

[39] Albernaz v. United States, 450 U.S. 333, 343 (1981); *see also* Whalen v. United States, 445 U.S. 684, 702 (1980) (Rehnquist, J., dissenting) (referring to double jeopardy doctrine as a "Gordian knot").

[40] *See, e.g.*, Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807 (1997); Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. COLO. L. REV. 595 (2006); David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 705–13 (2006); George C. Thomas III, *Multiple Punishments for the Same Offense: The Analysis After* Missouri v. Hunter *or Don Quixote, the Sargasso Sea, and the Gordian Knot*, 62 WASH. U. L.Q. 79 (1984).

[41] Vick, *supra* note 27, at 336.

[42] *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2509–10 (2004) (describing wide variations in risk tolerance among different classes of defendants); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1948 (1992) (suggesting that innocent defendants are more risk averse than guilty defendants). A complete assessment of risk aversion would also need to account for the risk tolerance of prosecutors; only if a defendant is *more* risk averse than an opposing prosecutor would plea bargaining be distorted.

stantial risk premium[43] by increasing uncertainty as to their procedural advantages.

Two observations regarding technicality and breadth warrant further emphasis. First, the two dimensions are independent. For example, although *Miranda* decreased the technicality of self-incrimination claims, it increased the breadth of criminal procedure by placing additional conduct (uncompelled but unwarned interrogations) under constitutional regulation. Second, while only broader procedural protections provide criminal defendants with an opportunity to improve their odds, both increases in breadth and increases in technicality increase the cost of litigating a particular issue.

These two points reveal a third: because a defendant's ability to exploit criminal procedure depends on the resources and skill of his attorney, additional procedures have diminishing returns for indigent defendants. The average public defender in America's 100 largest counties handles over 530 cases annually.[44] Some public defenders handle up to 2000 cases per year.[45] In addition to employing too few attorneys, public defender offices can offer little compensation in recruiting legal talent. An average public defender may make around $40 per hour, and many states apply caps on compensation for indigent defense ranging from $265 to $3500 per case.[46] Although empirical analyses of the relative effectiveness of indigent defense are inherently difficult and inconclusive,[47] both common sense and anecdotal evi-

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[43] *See* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 83 (3d ed. 2003) (describing the costs of high risk).

[44] Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U. L. REV. 245, 249–50 & n.9 (2004) (citing CAROL J. DEFRANCES & MARIKA F.X. LITRAS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE SERVICES IN LARGE COUNTIES, 1999 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/idslc99.pdf) (calculating on the basis of 4,174,079 indigent defense cases in the 100 largest counties, of which 82% were handled by public defender agencies, which employ collectively 6364 assistant public defenders). *But see* John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1221 (1994) (noting that indigent defenders are able to spend minimal time on weak cases and allocate more of their time toward stronger cases).

[45] *See* Wallace & Carroll, *supra* note 44, at 250 (citing NO EXCEPTIONS, THE CASELOAD CRISIS (2003), *available at* www.noexceptions.org/pdf/june_pub.pdf).

[46] Stuntz, *Uneasy Relationship*, *supra* note 2, at 10–11 (noting that hourly wages are as low as $20 to $25 in some states and that, as a result of compensation caps, "a typical appointed defense lawyer faces something like the following pay scale: $30 or $40 an hour for the first twenty to thirty hours, and zero thereafter").

[47] Without a method to compare the relative strength of cases, assessments of lawyer effectiveness will inevitably be indeterminate. *Compare, e.g.*, Joyce S. Sterling, *Retained Counsel Versus the Public Defender: The Impact of Type of Counsel on Charge Bargaining*, *in* THE DEFENSE COUNSEL 151, 160–62 (William F. McDonald ed., 1983) (suggesting that private counsel provide advantages over appointed counsel), *with* Morris B. Hoffman et al., *An Empirical Study of Public Defender Effectiveness: Self-Selection by the "Marginally Indigent,"* 3 OHIO ST. J. CRIM. L. 223 (2005) (suggesting that appointed counsel in fact provide representation that is as effective as private counsel).

dence[48] suggest that lawyers with more time and staff — whether or not they are more skilled[49] — will be better able to navigate complex procedural systems. Poor defendants faced with a broader array of criminal procedures may be forced by resource constraints to raise fewer claims and litigate them less aggressively than wealthy defendants.[50] More technical procedures may force defendants to bring fewer claims still, and perhaps to see them litigated less skillfully, as each issue requires more time and ability to litigate.[51]

A systemic view of criminal defense makes the inability of indigent defendants to exploit complex procedures even clearer: if an already overtaxed public defender office of ten attorneys, handling 5000 cases a year, is presented with substantially broader and more technical procedures, it is unlikely that the cases handled by that office will, in the aggregate, be significantly more costly to its counterpart prosecutor's office. Therefore, the benefits of criminal procedure to poor defendants, and the cost of it to prosecutors, diminishes as the overall complexity of the criminal process grows. Because wealthy defendants can afford to litigate each additional claim aggressively, broader and more technical procedures widen the gap between wealthy and poor defendants. While poorer defendants will probably always be cheaper to prosecute, more complex procedural protections magnify this effect.

If every suspect went to trial, the inability of poor defendants to exploit procedure would be a purely relative harm. All defendants would benefit somewhat from procedural complexity, and a complaint about another defendant's greater advantage would be a weak one. But of course, not every suspect is charged, and few defendants are ever tried. Prosecutors choose to allocate scarce resources among a multitude of potential defendants, and do so with virtually unbridled discretion. They are free to choose among a host of applicable charges

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[48] *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836, 1841–43, 1849–57 (1994) (providing compelling anecdotes of the effects of inadequate appointed counsel).

[49] Although market forces would imply that more costly attorneys are better, criminal defense attorneys may maximize values other than salary by choosing to represent the indigent.

[50] *See* Stuntz, *Uneasy Relationship*, *supra* note 2, at 4 (noting in the context of procedural breadth that "[c]onstitutional criminal procedure raises the cost of prosecuting wealthier defendants by giving those defendants more issues to litigate").

[51] Increasing litigation costs may seem like a minor issue to an individual defendant facing a long prison term. However, the time-consuming nature of trial rights is likely important to prosecutors with limited resources and an excess of potential defendants. If prosecutors were indifferent to this cost, they would not extend plea agreements to defendants with weak cases. Further research might well approximate the value of particular procedural rights by attempting to quantify the degree to which plea bargains grow less generous with the exercise of each procedural right. Thus, if plea offers increase by an average of five percent after a defendant exercises his right to a competency hearing, the average value of a competency hearing could be seen, in one sense, as five percent of the expected sentence.

for any given conduct,[52] their decisions not to prosecute are unreviewable,[53] and they may not be forced by legislatures or courts to prosecute crimes.[54] Most importantly for present purposes, the bar for showing that a prosecutor has based a charging decision on impermissible criteria is high.[55] Thus, when a prosecutor is presented with more potential defendants than he has resources to prosecute, he is free to select the defendant he believes will be the least expensive to prosecute.

The likelihood of prosecutors preferring poorer defendants does not depend on their consciousness of such a preference. In fact, a prosecutor presented with two cases of equal strength may intuitively feel that the case against the poor defendant, represented by an overburdened public defender, is "stronger" and that the case against the wealthy defendant, represented by resourceful and aggressive retained counsel, is "weaker." In other words, a prosecutor may conceive of his charging decisions as based solely on the strength of a case, but nonetheless require a stronger case, measured objectively, before charging a wealthy defendant.

The effects of prosecutorial discretion add bite to the charge of procedural disadvantage. Even though complex procedures initially appear to benefit poor suspects, the tendency of procedural complexity to render the poor more attractive to prosecutors may in fact leave them worse off. At the very least, the channeling effect of procedural complexity on prosecutors constitutes a countervailing cost.

The absence of judicial review of charging decisions, the lack of robust data on uncharged crimes, and the difficulty of finding an objective measure for the strength of a case make it impossible to prove that procedural protections channel prosecutors toward poor defendants. Whether this channeling effect fully offsets, or merely reduces, the benefits of procedural protections is another difficult empirical question. Yet indirect evidence is striking enough that the burden of proof should be placed on those who would argue that the theoretical effect described above is insignificant.

B. The Legislative Response

Although it is difficult to predict the behavior of political actors, multiple models of legislative behavior suggest that the natural response to complex criminal procedure is an increase in the length of sentences. If legislators are rational regulators of crime with limited

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[52] *See* United States v. Batchelder, 442 U.S. 114, 124 (1979).
[53] *See* Leeke v. Timmerman, 454 U.S. 83, 86–87 (1981).
[54] *See* Peek v. Mitchell, 419 F.2d 575, 577 (6th Cir. 1970).
[55] *See* United States v. Armstrong, 517 U.S. 456, 465 (1996).

resources, they will offset increasing costs of prosecution by increasing sentences. If legislators maximize the preferences of the general public, complex procedures that appear to free criminals will make longer sentences more desirable. And if legislators respond to the interests of their powerful constituents, the tendency of complex procedures to make prosecutors focus on the poor will reduce the relevant opposition to greater sentences.

Faced with fixed resources and procedural protections that raise the average cost of convictions, a rational, Benthamite legislature would increase the length of punishment for any given infraction.[56] Thus, if rising prosecution costs render unfeasible a state's prior practice of convicting one hundred defendants per month, each of whom received ten-year sentences, the state could theoretically achieve the same deterrent effect by sentencing fifty defendants to twenty-year sentences. Such a simple calculus, which assumes rational, risk-neutral criminals and an indifference to the concentration of punishment on individuals, is of course overly stylized.[57] However, although the caveats to the Benthamite model may moderate its prescriptions, the mandate remains qualitatively the same: given fixed resources, increased enforcement costs warrant some degree of increased punishment.

A slightly more intuitive model of political behavior might be one in which legislators maximize their political fortunes by appealing to popular opinion. Under this populist model, if fighting crime is good politics, then complex procedural protections make increasing sentences great politics. Because complex procedural protections are often seen as benefiting guilty defendants, they feed the public's desire for legislators who will be "tough on crime."[58] Legislatures can most easily respond by raising sentences rather than by reforming criminal procedure itself because the Court has constitutionalized much of criminal procedure while refusing to consider the proportionality of most substantive punishment.[59] Legislators are also more likely to increase sentences than allocate additional resources to law enforcement because harsher sentences are relatively low-cost. Spending additional re-

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[56] *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., Methuen 1982) (1789); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

[57] *See* POLINSKY, *supra* note 43, at 79–90 (noting the potential costs of risk aversion); *see also* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997) (arguing that by increasing the perception of criminality, infrequent but severe punishments fail to preserve the norm being enforced).

[58] *See, e.g.*, JACK HARRISON POLLACK, EARL WARREN: THE JUDGE WHO CHANGED AMERICA 289 (1979) (describing President Nixon's "law and order" campaign as a reaction to the Supreme Court's criminal procedure cases).

[59] Stuntz, *supra* note 34, at 791–814.

sources on the apprehension or prosecution of criminal suspects (let alone for the defense of them) is generally less popular than spending those resources on education, health care, national defense, or lower taxes. On the other hand, although longer sentences will ultimately lead to increased prison costs, this expenditure is rarely attached to anti-crime legislation and can often be deferred in favor of overcrowded prisons. In addition to increasing support for fighting crime, complex criminal procedure also reduces concern that higher sentences might work an additional injustice on the innocent by creating the impression that wrongful convictions are extremely unlikely.[60]

A tendency to raise sentences as a reaction to complex criminal procedure is also suggested by a public choice model of legislative behavior. In such a model, politicians are motivated not solely by broad public opinion, but by the desire to maximize their personal interests, which will often involve serving powerful political constituencies.[61] Because complex procedural protections steer prosecutors toward poor defendants and away from wealthy ones, they diminish the check that politically powerful constituents might apply to legislators. Conversely, the poor, who are most harmed by an increase in sentences and prosecutorial focus, are less likely to vote, contribute to political campaigns, or travel in the same social circles as legislators.[62]

Whatever the cause, rising sentences dramatically undercut the value of procedural protections. Because the proper measure of a criminal suspect's welfare is his risk-adjusted expected sentence (the likelihood of conviction times the length of sentence), increased sentences can easily offset the cash value of procedural rights. This effect can most easily be seen in plea bargaining, which by its nature converts procedural rights into a reduction in sentence. Because the vast majority of defendants enter plea bargains,[63] procedural rights are of-

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[60] This confidence in the ability of criminal procedure to prevent false convictions is likely overstated due to the fact that a significant portion of criminal procedure is unrelated to innocence. Rather, the bulk of excluded evidence in criminal trials is likely eliminated in order to preserve the unrelated value of privacy, or the only loosely related norm against self-incrimination.

[61] *See, e.g.*, Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out the Baby*, 87 CORNELL L. REV. 309, 310 (2002). For a sophisticated analysis of legislative reactions to constitutional law, see Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005), and Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000).

[62] *See* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1724–25 (1999).

[63] Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1722 (2005) (book review) (noting that in 2002, 95.4% of federal charges were resolved by pleas); *see also* Blakely v. Washington, 542 U.S. 296, 337 (2004) (Breyer, J., dissenting) ("The Court can announce that the Constitution requires at least two jury trials for each criminal defendant — one for guilt, another for sentencing — but only because it knows full well that more than 90% of defendants will not go to trial even once, much less insist on two or more trials.").

ten useful only as a bargaining chip to reduce sentences. But this bargaining chip is worthless if those procedural rights lead the legislature to increase the very sentence being reduced.

As with prosecutorial discretion, it is not possible to prove this effect empirically. The extent to which the complexity of criminal procedure has contributed to the dramatic increase in sentences over the past several decades is unclear.[64] Even more uncertain is the proposition that simplifying today's criminal procedure would lead to the undoing of yesterday's sentencing increases. But again, the correlation between increasing procedural protections and increasing substantive punishments[65] should lead to skepticism of the Court's ability to use procedure to protect defendants from a legislative policy of aggressive punishment.

IV. ACHIEVING SIMPLICITY

Recognizing that complex procedural protections pose a hidden cost to poorer defendants reveals that the Court may have more ability to promote equal justice than is at first apparent. The Court's control over the breadth and technicality of criminal procedure translates into two potential responses: an ambitious approach that targets both technicality and breadth, or a modest one that focuses on reducing technicality. If it pursued the more ambitious response, the Court could simplify *and* diminish protections in order to reduce criminal procedure's tendency to channel prosecutors toward the poor and encourage harsher sentences. If it chose a more modest response, the Court could continue to craft procedural doctrine, but with a heightened preference for simplicity, so as to minimize the channeling effects of doctrinal technicality on prosecutors.

The ambitious response to simplicity as equality would support dramatic streamlining of constitutional criminal procedure. Reducing technicality may remove some complexity, but the least complex form of procedural protection is none. For example, although the *Miranda* rule is simpler to apply than an all-things-considered test, its prophylaxis is implicated by a greater number of cases; in truth, the *Miranda* rule does not replace an ad hoc approach, it adds a layer on top of it.[66]

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[64] *See* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 43–57 (2003) (describing the increase in sentences caused by guidelines sentencing, three-strikes laws, stronger rules for drug sentences, and the death penalty for teenage murderers).

[65] *See* Stuntz, *supra* note 34, at 803–04 (suggesting that harsher sentences were caused in part by the Warren Court's procedural revolution).

[66] If a defendant asserts that an alleged waiver of his *Miranda* rights was involuntary, the court must again examine factors such as the presence of prolonged or incommunicado detention. *See* North Carolina v. Butler, 441 U.S. 369, 373 (1979) (describing waiver of *Miranda* rights as

Thus, although erring on the side of simpler procedural protections may prevent further inequality through complexity, substantial reductions in procedural protections offer the most dramatic opportunity to promote equality through simplicity.

To some, the cost of eliminating procedural protections may intuitively seem greater than the cost of keeping them. Yet one may identify the lowest-hanging fruit for dramatic procedural simplification: the elimination of procedural protections that fail to promote exoneration of the innocent. As Professor Stuntz argues, criminal protections that serve goals other than separating the guilty from the innocent create substantial incentives for legislatures to pass harsher sentences yet fail to actually protect innocent defendants.[67] And the procedures that are least related to the question of guilt — the Fourth Amendment right against unreasonable search and seizure and *Miranda*'s right against compelled self-incrimination — also happen to be some of the most complex.

Pursuing these goals outside the criminal process, through civil remedies or administrative action,[68] would diminish the incentives for prosecutors to focus on the poor and for legislatures to increase sentences. It would also do little to harm poor, innocent defendants. Thus, the exclusionary rule cannot be justified as improving the position of poor, innocent defendants, but it ensures that prosecutors are more likely to charge them and more able to threaten them with severe sentences.

Similarly, although the Fifth Amendment appears to prevent false confessions, *Miranda*'s right against "compelled" testimony is in fact ill-suited to protect the innocent.[69] Rather than selecting for innocent suspects, *Miranda* protects those who are most savvy and experienced — criteria not positively correlated with innocence.[70] Moreover, once a suspect waives *Miranda*, the right provides no protection against the coercive interrogation practices criticized by the decision.[71] Thus, although *Miranda* does little to protect poor, innocent defendants, it en-

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"not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case").

67 Stuntz, *Uneasy Relationship*, *supra* note 2, at 45–49, 55–57.

68 *See* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363.

69 *See* Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 482 (1996) ("*Miranda* not only fails to do much about false confessions but, speaking more generally, may in fact positively harm innocent persons by making it more difficult to separate guilty defendants from innocent ones.").

70 William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975, 977 (2001).

71 Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions — and from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 540 (1998).

sures again that prosecutors are more likely to charge them, and more able to threaten them with severe sentences.

However, as alluded to above, a drastic reduction in procedural breadth would be strong medicine. It is not clear whether such a gambit would lead to a reduction in sentences, and it is not clear that any reduction in sentences and prosecutorial channeling effects would outweigh the costs to suspects of lost procedural protections. Fortunately, the technicality of criminal procedure may be addressed with less extreme measures. Rather than dramatically reducing procedural protections, the Court could consider equality as an additional factor in crafting procedural doctrine. Thus, simplicity as equality constitutes another argument for bright-line rules that rely on simple criteria rather than multifactor balancing tests. Complex tests that require extensive investigation or factual development would be particularly disfavored.

For example, circuit courts are currently split in their approaches to evidence that is obtained pursuant to an otherwise valid warrant when that warrant is itself based on illegally obtained evidence.[72] One approach simply applies the fruit of the poisonous tree doctrine, holding that evidence from the warranted search will be excluded whenever the warrant depended on illegally obtained evidence.[73] Another approach excludes evidence from the latter search only when the initial illegality was not "close enough to the line of validity."[74] Because the first approach only requires adjudication of the initial illegality while the second requires determinations of both illegality and what is "close enough" proximity to the line of validity, the notion of simplicity as equality would militate for adopting the first approach.

As a more familiar example, if simplicity promotes equality, *Miranda*'s requirement of clear prophylactic warnings appears preferable to the broad application of a totality-of-the-circumstances test for compelled self-incrimination.[75] Likewise, the Court's holding in *Hudson v. Michigan*[76] that violations of the knock and announce rule would not result in application of the exclusionary rule[77] may promote

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[72] *See* United States v. McClain, 444 F.3d 556, 564–66 (6th Cir. 2006).

[73] *See* United States v. McGough, 412 F.3d 1232, 1239–40 (11th Cir. 2005); United States v. Wanless, 882 F.2d 1459, 1466–67 (9th Cir. 1989).

[74] United States v. White, 890 F.2d 1413, 1419 (8th. Cir. 1989); *accord McClain*, 444 F.3d at 565; United States v. Fletcher, 91 F.3d 48, 51–52 (8th Cir. 1996); United States v. Thomas, 757 F.2d 1359, 1368 (2d Cir. 1985).

[75] However, the Court's shift to *Miranda*'s prophylactic regime may be seen as inferior, at least from the perspective of economic equality, when compared to the more bright-line rule advocated by the ACLU in *Miranda*, which would have required the presence of counsel at any interrogation following arrest. *See* Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 881 & n.74 (1981).

[76] 126 S. Ct. 2159 (2006).

[77] *Id.* at 2165.

equality through simplicity by eliminating the complex determinations of a reasonable wait time and exigency. Of course, as with any bright-line test, vigilance is required to ensure that frequent exceptions and qualifications do not undermine the simplicity of these rules.

V. CONCLUSION

Perhaps the strongest criticism of simplicity as equality is that it is too late to turn back. With criminal sentences already high, there is no guarantee that reducing procedural protections will be anything other than unilateral disarmament. This is an empirical question — and not one to be dismissed lightly. However, at the very least, courts should stop further "armament," and scholars should consider the effect described above.[78] As criminal procedure has grown more complex and robust, sentences in the United States have grown markedly more punitive, the rehabilitative model has receded from legal doctrine, and far more Americans have been incarcerated. Unless one believes that criminal punishment could not possibly grow harsher, it seems worth considering that complex criminal procedure is not helping as much as is conventionally believed, and is perhaps a source of the problem.

[78] One possibility would be studying the correlation between increases in procedural protections and increases in sentences. Although federal constitutional law would offer too small a sample, more robust data might be found by analyzing states that provide greater protections than the federal requirements. Another possibility would be a study of the amount of time prosecutors spend in prosecuting wealthy defendants versus poor defendants. Yet another approach might be a comparative analysis of countries worldwide along the metrics of procedural protections, prosecutorial discretion, and substantive sentences.