TWO CHEERS, NOT THREE, FOR SIXTH AMENDMENT ORIGINALISM

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This Essay makes three basic points.[1] First, originalism is a good approach where the soil supports it, but many criminal procedure cases, particularly recent cases before the Supreme Court, lack solid historical foundations.[2] The Court is trying to build too much of an edifice on quicksand. It is going to sink.

Second, defense lawyers should be careful what they wish for. Though many defense lawyers cheer certain originalist decisions, they would not like the whole package that would result from applying a consistent originalist philosophy. Justice Thomas might be willing to give us such a package,[3] but it does not appear, on balance, more favorable to defendants than our current system.

Third, although Professor Jeffrey Fisher rightly touches on the idea of bright-line rules,[4] there are a number of areas where originalism leads away from bright-line rules. Justice Scalia likes originalism; he also likes formalism.[5] In some cases, how-

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1. This Symposium Essay expands upon and extends themes that I originally explored in Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005).

2. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is one example. For my earlier critique of its historical moorings see Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1123–32 (2001). Professor Jeffrey Fisher, overconfident about *Apprendi*'s originalist footing, disagrees. *See* Jeffery L. Fisher, *Originalism as an Anchor for the Sixth Amendment*, 34 HARV. J.L. & PUB. POL'Y 53, 56–57 (2010).

3. *See, e.g.*, *Apprendi*, 530 U.S. at 499–523 (Thomas, J., concurring).

4. *See* Fisher, *supra* note 2, at 56–58.

5. *See, e.g.*, Antonin Scalia, *Symposium Essays on Originalism—Foreword*, 31 HARV. J.L. & PUB. POL'Y 871, 873 (2008) (discussing the future success of originalism and expressing hope that "the truth will prevail"); Antonin Scalia, *The Rule of Law as a*

ever, a judge must choose between the two. Sometimes originalism contradicts doctrines such as the exclusionary rule[6] even though, intuitively, modern formalists should embrace the exclusionary rule because it is clear, simple, and instructs police exactly what not to do.[7]

I. THE SIXTH AMENDMENT AND JURY CONTROL OF SENTENCING

First, let us focus on the jury trial and sentencing cases. The ground here is soft enough to be a quagmire. The text of the Sixth Amendment does not define a trial or a criminal prosecution.[8] Does it therefore include sentencing?

Eighteenth-century trials contained no sentencing phase.[9] There is some evidence that juries knew of the punishments for crimes—more so in England than America—but there was nothing like modern sentencing proceedings.[10] Professor Fisher concedes that many of the contentious issues in criminal litigation today, such as sentencing guidelines, lack solid historical foundations for originalist analysis.[11]

To return to trials as conducted in the colonial era, we would have to give juries the power to sentence openly. We would give

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Law of Rules, 56 U. CHI. L. REV. 1175, 1185 (1989) (arguing that bright-line rules are preferable to discretionary standards).

6. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 786 (1994) ("Supporters of the exclusionary rule cannot point to a single major statement from the Founding . . . supporting Fourth Amendment exclusion of evidence in a criminal trial. . . . [E]xclusion was so implausible that . . . . in the rare case in which the argument . . . was made, it received the back of the judicial hand."); Patrick Tinsley et al., *In Defense of Evidence and Against the Exclusionary Rule: A Libertarian Approach*, 32 S.U. L. REV. 63, 64 (2004) ("[F]or one hundred years after the passage of the Fourth Amendment, evidence of a defendant's guilt was never excluded just because it was obtained illegally.").

7. *See* Mapp v. Ohio, 367 U.S. 643, 649, 655 (1961) (holding that the exclusionary rule—which prevents the prosecution from admitting evidence at trial which was unconstitutionally acquired—applies to the States through the Fourteenth Amendment).

8. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

9. *See* Apprendi v. New Jersey, 530 U.S. 466, 478–81 (2000). Instead, juries would make a finding of guilt, and then a judge would ordinarily impose a sentence fixed by statute. *Id.* Judicial discretion in sentencing, when allowed, was restricted to "imposing [a] sentence *within statutory limits*." *Id.* at 481 (emphasis in original).

10. *See* Bibas, *supra* note 2, at 1124–25 n.204.

11. *See* Fisher, *supra* note 2, at 56.

judges a free hand in commenting on evidence and expressing their views about a defendant's guilt.[12] We would run criminal cases in an hour or less. Few, if any, defense lawyers would support these results.

Although the *Apprendi* line of cases advocates rules to constrain judges, a return to the eighteenth century would mean getting rid of jury instructions, in which judges define mens rea for the jury. Absent judicial instruction on mens rea, juries would just decide whether a defendant was bad or wicked,[13] which is probably not a very pro-defendant approach. I might be comfortable with it, but many of the newfound friends of originalism would not.

Would we abolish or loosen the rules of evidence? Would we let in past criminal records? During the colonial era, jurors could tell if a defendant had a prior felony conviction. A felon was branded on the thumb, so a jury readily knew whether the defendant was a bad person who did not deserve leniency.[14] Today, the Federal Rules of Evidence exclude most previous convictions and other bad acts from evidence.[15] Yet pro-defendant advocates want to have the icing of the originalism cake—that is, those parts that are good for defendants—while avoiding the other, less tasty parts that cut against their clients.

Likewise, simplifying jury instructions gives judges a much freer hand to voice their own views. Professor Fisher writes that one of the themes here is curbing the power of judges.[16] During the eighteenth century, however, judges had great latitude to comment on the evidence, to make their views known, and even to lean on juries, short of throwing them in prison.[17] Judges could suggest strongly to juries that there was only one

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12. *See infra* notes 17–18.

13. See, e.g., Martin R. Gardner, *The* Mens Rea *Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 663 (1993).

14. *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 64 (2002); *see also* HARRY ELMER BARNES, THE STORY OF PUNISHMENT: A RECORD OF MAN'S INHUMANITY TO MAN 62 (1930); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 40 (1993).

15. *See* FED. R. EVID. 404, 609.

16. *See* Fisher, *supra* note 2, at 55, 57.

17. *See, e.g.*, JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 112 (1949); FRIEDMAN, *supra* note 14, at 245–46; BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE": HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 268–69 n.94 (1991).

way to read the evidence.[18] Judges were not as timid then as they are today; the risk of reversal on appeal or habeas was mostly absent.[19] Furthermore, sentences were carried out immediately. In practice, judges had more authority in many ways.

Professor Fisher replies that we can secure the pro-defendant benefits of jury findings of certain facts without opening up the legal definition of mens rea, the admissibility of criminal records, and the like. One cannot, however, so easily separate these benefits from admitting evidence that is currently excluded. Professor Fisher theorizes that the jury is not there just to find facts, but more importantly to express the conscience of the community and to render full moral judgment about what a particular defendant deserves.[20] Such a full moral judgment requires the jury to see both sides of the picture at sentencing. It requires the prior criminal record. Giving the jury the power to make moral judgments is inconsistent with putting a thumb on the scale and keeping the jury from hearing evidence necessary for the full, balanced picture.

Finally, if we are going to be consistently originalist, we would need to make many more reforms as well. We would have to follow Justice Thomas's approach to its logical conclusion and abolish the exclusionary rules, thus sacrificing formalism for originalism.[21] We would also abolish plea-bargaining.[22] We would then have twenty-five times more trials[23]—an enormous practical problem. No one except Justice Thomas, and probably not even he, is willing to go that far.

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18. *See, e.g.*, WILLIAM E. NELSON, *MARBURY V. MADISON*: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 17 (2000) (noting an instance in 1741 where a judge instructed the jury that "the evidence from the prosecution's witnesses seemed 'so ample, so full, so clear and satisfactory' that [the jury] should convict the prisoner 'if [the jurors] have no particular reasons . . . to discredit them'").

19. *See* Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 658 (1948) (describing the limited role of federal habeas corpus in the eighteenth century).

20. *See* Fisher, *supra* note 2, at 55.

21. *See* Amar, *supra* note 6, at 786; Tinsley et al., *supra* note 6, at 65.

22. *See* Bibas, *supra* note 1, at 196–97 (arguing that plea bargaining subverts an unwaivable constitutional mandate of a jury trial in all criminal cases).

23. *See id.* at 197 ("[J]ury trials resolve fewer than four percent of criminal cases." (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at tbls.5.17, 5.46)).

On the Court, we currently have an odd situation where originalist criminal procedure cases flow from coalitions comprising the two committed originalists and several other, fair-weather originalist Justices. These latter Justices, however, are really motivated by an individual fairness interpretation that is more at home in the Due Process Clause.[24] The coalition fractures when the due process Justices will not consistently go as far as the die-hard originalists.[25] Bizarre cases result in which the Court will not follow a principle consistently. The Court will only go so far, but not far enough to prevent circumvention by plea-bargain.

For example, the Supreme Court found a way to uphold the federal sentencing guidelines in *United States v. Booker*[26] because Justice Breyer is committed to them—he was their architect[27]—and because he managed to convince Justice Ginsburg that the Guidelines are fair enough.[28] A few months earlier, however, the Court struck down state sentencing guidelines[29] that were widely recognized as being fair to defendants, less constricting, and giving less power to judges to augment sentences with relevant conduct.[30] When there is no consistent coalition of five originalists on the Supreme Court, we get a hash from the Court. Sometimes the Court gets involved selectively, but the

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24. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."); *see also* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

25. *See, e.g.*, Gall v. United States, 552 U.S. 38 (2007) (upholding appellate review of the substantive reasonableness of sentences against a Sixth Amendment challenge); Rita v. United States, 551 U.S. 338, 359 (2007) (same). Justice Scalia wrote a concurring opinion in *Gall* casting doubt on the compatibility of substantive reasonableness review and the Sixth Amendment. *Gall*, 552 U.S. at 60 (Scalia, J., concurring).

26. 543 U.S. 220, 264–65 (2005) (Breyer, J., remedial majority opinion).

27. See Frank O. Bowman III, *Debacle: How the Supreme Court has Mangled American Sentencing Law and How it Might Yet be Mended*, 77 U. CHI. L. REV. 367, 392 (2010); Nancy Gertner, Rita *Needs* Gall—*How to Make the Guidelines Advisory*, 85 DENV. U. L. REV. 63, 66–67 (2007).

28. *See Booker*, 543 U.S. at 264 (Breyer, J., remedial majority opinion) (noting that after the excision of its unconstitutional provisions, the Sentencing Guidelines still retained components through which it could accomplish its numerous objectives, including sentencing fairness).

29. Blakely v. Washington, 542 U.S. 296, 305, 313–14 (2004).

30. *See* Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1192 (2005).

nonoriginalist Justices will not agree to a coherent package of rules that would prevent circumvention.

II. THE CONFRONTATION CLAUSE

Regarding the domain of the Confrontation Clause,[31] I partially agree with Professor Fisher. We should follow historical precedents when the clear, central cases they were designed to deal with are at issue. Cases equivalent to the Sir Walter Raleigh trial,[32] where the government tries to railroad a defendant—especially a political defendant—and to circumvent proof in open court, are prime examples of cases against which the Confrontation Clause was historically designed to protect.[33] The prosecution should not be able to hide behind depositions or ex parte interviews by state officials.

This historical evidence, however, takes us only so far. How about 911 calls?[34] These calls did not exist in the Framing era. We can extrapolate some general ideas about 911 calls, but we have to make it up with, at best, some general guidance or principles.[35] No obvious bright-line rule emerges here.[36] How about the gentle questioning of a rape victim by a battered-women's advocate? Is that the same kind of "testimonial" evidence that

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31. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

32. *See* THE TRIAL OF SIR WALTER RALEIGH, KNT. AT WINCHESTER, FOR HIGH TREASON (1603), *reprinted in* 2 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1, 1–60 (T.B. Howell ed., 1809).

33. *See* Crawford v. Washington, 541 U.S. 36, 50 (2004) ("[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's . . . .").

34. In *Davis v. Washington*, 547 U.S. 813, 826–29 (2006), the Court held that a 911 call was nontestimonial because its principal purpose was to secure aid, and so admitting the call's contents into evidence did not violate the Confrontation Clause.

35. *See id.* at 822 (relying on whether a police officer's primary purpose during an interrogation was to respond to an emergency or to generate information that may be used in a criminal prosecution as the dispositive factor in deciding whether the statements generated by the interrogation were testimonial).

36. *Cf.* David A. Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 40 ("In many ways, the line between testimonial and nontestimonial hearsay remains indistinct but the Court has made reasonably clear that certain kinds of hearsay—casual remarks among friends, for example—are nontestimonial and therefore raise no constitutional problems . . . .").

the Framers dreaded? Not really. Ultimately, we might be able to extend some of the historical principles a little bit, but we have to be very cautious because today's issues do not involve the same set of considerations that concerned the Framers.

Also worth noting is that the rules of evidence and the way the courts approached confrontation were in flux in the eighteenth century.[37] Professor Fisher's approach, which he persuaded the Court to adopt in *Melendez-Diaz v. Massachusetts*,[38] thus freezes in place a snapshot of law that was changing in the late eighteenth century.

In some types of cases, Professor Fisher has a point. For example, we have had some scandals in America in which lab examiners have faked forensic tests.[39] Even though it is possible to rerun many of these tests, bright-line application of the Confrontation Clause provides another solution. The functionalist argument in this case confirms for us that the formalist or originalist reading is not ridiculous or disastrous. So formalism, functionalism, and originalism work together here.

Consider, however, a different example: coroners' autopsies and inquests. In a drug case, lab examiners usually perform tests and then testify within a year after the drug test was completed. Because murder does not have a statute of limitations, however, it may be ten or twenty years until an accused murderer is tried—long after the victim's autopsy was performed. By the time of trial, the coroner may be dead or otherwise unavailable. Even if the coroner is available, what is he going to do? Does the coroner have an independent memory of one specific autopsy out of the thousand he has done over the last ten or twenty years? No. At trial, he would just read his years-old autopsy report under the evidentiary fiction of present recollection refreshed.[40]

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37. *See* T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 502–04, 533–39 (1999); Sklansky, *supra* note 36, at 41–42.

38. 129 S. Ct. 2527, 2532 (2009) (holding that the Confrontation Clause bars admitting into evidence a lab examiner's report unless the prosecution makes the declarant available for cross-examination).

39. *See, e.g.*, *A Year of Scandals with Forensic Evidence*, WASH. POST, July 27, 2003, at A5; Eric Lichtblau, *Scientist Falsified DNA Reports*, N.Y. TIMES, May 19, 2004, at A21; Maurice Possley et al., *Scandal Touches Even Elite Labs: Flawed Work, Resistance to Scrutiny Seen Across U.S.*, CHI. TRIB., Oct. 21, 2004, at C1.

40. *See* FED. R. EVID. 612.

When questioned about the autopsy, he would say, "yes, in fact, I found this bullet three centimeters above the spleen."[41]

No solid historical evidence says that we must reach this result based on eighteenth-century precedent, and there are substantial policy and common sense reasons to believe that we should not. There are good reasons to think that the Framers would not have extended confrontation this far; they articulated a slogan about confrontation without fleshing out its outer limits.[42] So we should be very careful, particularly about turning confrontation into a bright-line rule where its boundaries traditionally have not been so clear.

Finally, originalism provides only a minimum, not a maximum. The rules of criminal procedure take care of updating many other safeguards to fit the modern landscape. If we want to look seriously at what it takes to confront complicated scientific and forensic evidence, the word in the Sixth Amendment is not cross-examine, it is "confront,"[43] which may be broader. What does it take to produce an effective cross-examination? Is support for forensic experts required? An originalist focus might distract from serving those originalist values in more modern ways.[44]

My bottom line is two cheers, not three, for originalism in criminal procedure. Originalism works pretty well in core cases like the Sir Walter Raleigh trial, but much of what we are litigating today is beyond those core cases, as Professor Fisher effectively concedes.[45] There are real dangers in taking what was an evolving rule and freezing it into a bright-line slogan that can be both over- and under-inclusive.

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41. Besides being largely unhelpful, cross-examination of medical experts may be unnecessary to avoid the miscarriages of justice against which the Confrontation Clause was designed to protect. *See* Sklansky, *supra* note 36, at 45–46.

42. *See id.* at 35–37.

43. U.S. CONST. amend. VI.

44. *See* Sklansky, *supra* note 36, at 50–57.

45. *See* Fisher, *supra* note 2, at 56, 59.