Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?

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ESSAY

Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?

STEPHANOS BIBAS*

ABSTRACT

In Crawford v. Washington, Justice Scalia’s majority opinion reinterpreted the Confrontation Clause to exclude otherwise reliable testimonial hearsay unless the defendant has been able to cross-examine it. In Blakely v. Washington, Justice Scalia’s majority opinion required that juries, not judges, find beyond a reasonable doubt all facts that trigger sentences above ordinary sentencing-guidelines ranges. Crawford and Blakely are prime case studies in the strengths, weaknesses, and influence of originalism and formalism in criminal procedure. Crawford succeeded because it cleared away muddled case law, laid a strong foundation in the historical record, and erected a simple, solid, workable rule. Blakely failed, in contrast, because the historical record is weak, the Court was unwilling to be radical enough, and its bright-line rule is inflexible and impractical. This Essay considers whether originalism and formalism are compatible, which methodology takes precedence, and how much they influence other members of the Court.

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Though commentators frequently caricature Supreme Court decisions as a battle between the left and right wings, this neat, politicized diagram has always been too crude. In 2004, the Court outdid itself in defying stereotypes. Justice Scalia, long the darling of tough-on-crime conservatives, authored two sweeping majority opinions that vindicated criminal defendants' rights: *Crawford v. Washington* reinterpreted the Sixth Amendment's Confrontation Clause to exclude reliable testimonial hearsay unless the defendant has been able to cross-examine it. *Blakely v. Washington* required that juries—not judges—find, beyond a reasonable doubt, all facts that trigger sentences above ordinary sentencing-guidelines ranges. In both cases, conservative Justice Thomas and liberal Justices Stevens, Souter, and Ginsburg joined Justice Scalia's opinions. And in both, the pragmatic swing Justice who supposedly controlled the Court, Justice O'Connor, disagreed sharply with Justice Scalia's reasoning and approach.

Justice Scalia has occasionally shown a libertarian, pro-defendant streak in the past, but *Crawford* and *Blakely* mark the triumph of his approach. In each case, Justice Scalia had advocated an originalist, formalist rethinking of that area of law years earlier. And, in each case, a majority of the Court eventually came around to his view. Even Justices Stevens, Souter, and Ginsburg, who are wedded to neither originalism nor formalism, embraced these principles in *Crawford* and *Blakely*. Why?

This Essay uses *Crawford* and *Blakely* as case studies to evaluate Justice Scalia's originalism and formalism in criminal procedure and their influence on the rest of the Supreme Court. Rather than surveying the vast literature on originalism and formalism, I will focus on Justice Scalia's own brands of each doctrine and how they have shaped two areas of criminal procedure. Part I

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3. See, e.g., Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2660-63 (2004) (Scalia, J., dissenting) (arguing that a United States citizen captured in Afghanistan could not be detained as an enemy combatant but had to be charged with a crime or released); Maryland v. Craig, 497 U.S. 836, 862, 869-70 (1990) (Scalia, J., dissenting) (arguing that videotaped testimony by child witnesses does not satisfy the Confrontation Clause's requirement of face-to-face confrontation in open court); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 680-87 (1989) (Scalia, J., dissenting) (arguing that the Fourth Amendment should forbid routine suspicionless urinalysis of employees).
briefly sets forth Justice Scalia’s versions of originalism and formalism and explains the main virtues and vices that he sees in them.

Parts II and III then critique *Crawford* and *Blakely* as exercises in originalism and formalism, illustrating the virtues and vices of using these approaches in criminal procedure. As Part II explains, *Crawford’s* originalism and formalism succeeded, in part, because pre-*Crawford* case law was an unprincipled, inconsistent, ad hoc, dismal failure. *Crawford* also had good soil in which to root its decision, because the Founding-era history clearly reveals the key purpose behind the Confrontation Clause. And while it will take time for common-law adjudication to map out *Crawford’s* contours, its broad outlines are clear, simple, and hard to evade.

Part III contends that *Blakely’s* originalism and formalism, though superficially appealing, were far more problematic than *Crawford’s*. *Blakely* performed a great service by asking deep questions about what is a crime and what deserves punishment, but it came at a very high price. Although pre-*Blakely* case law provided no bright line, other safeguards were available to protect defendants’ rights. The history on which *Blakely* rests is shifting sand, with evidence so thin that judges and scholars can easily disagree about its meaning. Moreover, the Court was ultimately unwilling to embrace a radical return to the eighteenth century by abolishing plea bargaining or judicial sentencing discretion. Because these other methods of evasion remain open, *Blakely’s* half of an originalist loaf may be unworkable and worse than none at all. *Blakely’s* bright-line rule is insensitive to the danger of evasion, the need for flexible experimentation, and concerns about practicality and equality. Ultimately, then, the substantive question at the heart of *Blakely* drowned amid the myriad procedural problems surrounding it.

Part IV considers how compatible originalism and formalism are and what happens if they conflict. In many areas of criminal procedure, the text and historical record reveal a bright-line rule, in which case originalism promotes formalism. But often the text and historical record are unclear or point to a multi-factor balancing test rather than a formalistic rule. This is true, for example, in search-and-seizure law, where courts invented a warrant requirement more rigid than the Fourth Amendment’s historic reasonableness standard. In *Crawford*, Justice Scalia suggested that originalism, not formalism, is the foundational principle. But in the *Blakely* line of cases, Justice Scalia reveals what I suspect are his true formalist colors; formalism, not originalism, was *Blakely’s* foundation. Indeed, at times Justice Scalia seems to embrace originalism precisely as a brand of formalism. To him, originalism is appealing as a bright-line way of resolving cases with a minimum of judicial discretion and unpredictability. But originalism cannot succeed in its aims when no majority of the Court consistently adheres to that approach. Nevertheless, originalism holds enough appeal that it often sways Justices who are not thoroughgoing originalists. Originalism, in short, is a powerful force in criminal procedure and often dovetails with formalism. But while formalism may drive Justice Scalia’s
criminal procedure jurisprudence, it has much less independent influence over other members of the Court.

This Essay concludes that both originalism and formalism deserve prominent places in criminal procedure. Their shortcomings, however, should temper adherence to either approach. Justice Scalia has done the Court a great service by giving renewed prominence to originalism and formalism. He has done a disservice in *Blakely*, however, by exalting formalism so far above humility, practicality, and plain old common sense. In short, originalism and formalism deserve two cheers, not three, in criminal procedure.

I. JUSTICE SCALIA’S VERSION OF ORIGINALISM AND FORMALISM

First, a few definitions are in order. Justice Scalia’s originalism rests upon the original meaning of the Constitution’s text. This inquiry is not a subjective quest for what particular Framers had in mind, but an objective understanding of what the words themselves meant at the time. In other words, Justice Scalia’s jurisprudence emphasizes original understanding, not original intent. Justice Scalia treats his originalism as a species of textualism, because he reads texts reasonably and naturally for all that they fairly contain. Sometimes, people can disagree about what the original meaning was or how to apply it to a particular situation, but “[o]ften—indeed, I dare say usually—[original meaning] is easy to discern and simple to apply.” Originalism also helps to preserve the separation of powers, by keeping courts from encroaching on the legislative role and democratic will.

Originalism likewise protects juries from judicial encroachment. The Founding generation trusted juries, and not judges, in part because King George III had pressured judges and used them to oppress the colonies. Thus, Article III and the Sixth Amendment guarantee criminal petit juries, the Fifth Amendment guarantees grand juries, and the Seventh Amendment guarantees civil juries. As Justice Scalia put it, the jury is “the spinal column of American democracy”—the only right that appears in both the body of the Constitution and the Bill of Rights. He has also cited with approval Blackstone’s description of the jury as

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6. *Id.*
7. *Id.* at 23.
8. *Id.* at 45.
9. *See id.* at 40–42.
10. *See THE DECLARATION OF INDEPENDENCE* para. 11 (U.S. 1776) (“He [the King] has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”).
11. U.S. CONST. art. III, amends. V, VI, VII.
"the grand bulwark of [the Englishman's] liberties." In the Declaration of Independence, he has noted, the colonists complained that King George III had been depriving them of jury trials. The Framers prized the jury as the representative, democratic lower house of the bicameral judiciary, a populist check on arbitrary judges. The Framers also analogized juries to mini-legislatures. As quasi-legislators, jurors apply law to facts ex post and inject needed flexibility into a rule-bound system. They thus check the inevitable overinclusiveness of legislation, as well as executive decisions to charge and prosecute. Originalism therefore seeks to protect the jury's role as a check on all three branches of government. While we normally speak of separating legislative, executive, and judicial powers, juries also play a role in the separation of powers (or checks and balances) in criminal procedure. By safeguarding juries against judicial encroachment, the Constitution protects juries' power to check judges, legislatures, and prosecutors.

Though many people criticize his approach as formalistic, Justice Scalia embraces formalism as the point of the rule of law. As he has put it: "Long live formalism. It is what makes a government a government of laws and not of men." In a famous essay, he praised "the rule of law as a law of rules." While generalizations are bound to impose costs because they are always over- or under-inclusive, the benefits of clear, categorical rules outweigh these costs. Clear, general rules, he has argued, promote predictability and equal treatment, reduce judicial arbitrariness, and foster judicial courage to make unpopular decisions. By adopting general rules, judges constrain their discretion and minimize the role of their own policy preferences. Juries, he has suggested, are better suited than judges to exercise discretion and determine reasonableness, because these inquiries are not reducible to judicially administrable rules. While not every constitutional provision embodies a clear rule, Justice Scalia's plain-meaning approach leads him to develop clear rules more often than other
Justices. 25 Thus, while originalism does not always lead to formalism, in Justice Scalia’s view the former tends to produce the latter. For example, the dictionary definitions of "seizure" and "curtilage" give more precise, formalistic content to the Fourth Amendment than does a multi-factor balancing test or a free-form inquiry into the value of privacy. 26 Judges can usually "give[] some precise, principled content" to even the vaguest text, to maximize the rule of law and minimize the rule of men. 27

Justice Scalia’s formalism stands in stark contrast to the pragmatism of his jurisprudential arch rival, Justice Breyer. In Justice Breyer’s “consequential[ist]” view, courts should look not only backward at text, history, and precedent, but also forward to the likely outcomes of various rulings. 28 In other words, courts need to be practical and flexible enough to adapt their rulings to reality and necessity. Put another way, Justice Breyer values judicial flexibility, which leaves judges wiggle room to apply general rules to particular cases in a manner that seems fair. This forward-looking approach trusts judges’ expertise and ability to forecast wise policy outcomes and to adjust the Constitution accordingly. It puts less faith in history and in particular legal texts, whose meaning may be indeterminate.

While Justice Scalia admits that flexibility is a countervailing value, he emphasizes the need for legislative rather than judicial flexibility. 29 Non-originalism, he notes, usually leads to even less legislative flexibility. Judges who stray from originalism and formalism tend to constrict the ambit of democratic government, whereas originalism usually preserves a larger role for elected legislatures. 30 In his view, legislatures—not judges—are primarily responsible for updating the law to fit changing times. Moreover, Justice Scalia puts more faith in the determinacy of legal sources than Justice Breyer does. The Constitution has a fixed, ascertainable meaning, and the job of judges is archaeology, not architecture: they must discover that meaning, not invent it. By this logic, “We the People . . . ordain[ed] and establish[ed] this Constitution,” and unelected judges have neither mandate nor competence to rewrite or change it. 31

In short, originalism and formalism promise legitimate, neutral sources of law; clear, predictable, and equal treatment; and checks and balances on judicial, legislative, and executive arbitrariness. Justice Scalia has acknowledged that text and history can occasionally be unclear, and rules can be overbroad and

25. Id. at 1183–84.
26. See id. at 1184.
27. Id. at 1182–83.
29. See Scalia, supra note 5, at 41–42 (equating flexibility with “the elimination of restrictions upon democratic government”).
30. See id.
inflexible. These minor costs, he has argued, are prices worth paying for a rule of law, not of men.

II. **Crawford’s Success**

In the decades leading up to *Crawford*, Confrontation Clause jurisprudence had become a shambles. Once the Court finally used the Fourteenth Amendment to incorporate the Confrontation Clause against the states in 1965, it groped for an approach to give the Clause content. Ultimately, it conflated and confused the Clause with nonconstitutional hearsay law, which had developed well after the Founding. In *Ohio v. Roberts*, the Court suggested that all hearsay raises a Confrontation Clause problem. “[T]he Confrontation Clause reflects a preference for face-to-face confrontation at trial,” but according to *Roberts* this “preference” was not absolute. To overcome this “preference,” the prosecution had to prove that the hearsay was reliable and, ordinarily, that the declarant was unavailable. Evidence was reliable enough to satisfy the Clause, *Roberts* held, if it either fell within a “firmly rooted hearsay exception” or bore “particularized guarantees of trustworthiness.”

*Roberts’* tests for reliability proved to be murky, subjective, inconsistent, and unworkable. Courts applied eight- or nine-factor balancing tests to determine reliability, and results depended on which factors individual judges chose to weight heavily. As *Crawford* later noted, courts interpreted the very same facts differently or accorded identical significance to opposite facts. For example, one court found a statement to be more reliable because the declarant

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33. See, e.g., Dutton v. Evans, 400 U.S. 74, 86 (1970) (suggesting that the Confrontation Clause and hearsay rules spring from the same sources, but declining to equate the two and confining discussion to the case before the Court); California v. Green, 399 U.S. 149, 155–56 (1970) (suggesting that while the Confrontation Clause and hearsay rules “are generally designed to protect similar values,” hearsay violations will not always violate the Confrontation Clause nor vice versa; upholding the admission of a witness’s prior inconsistent statements as substantive evidence, because the witness had previously testified in court and was subject to cross-examination).

34. See Ohio v. Roberts, 448 U.S. 56, 66 (1980) (endorsing the “truism that ‘hearsay rules and the Confrontation Clause are generally designed to protect similar values,’ and ‘stem from the same roots’” (internal citations omitted) (quoting Green, 399 U.S. at 155, and Dutton, 400 U.S. at 86)).

35. Id. at 63.

36. Id.; see id. at 64.

37. Id. at 65–66.

38. Id. at 66.


41. Id. (setting forth the contradictory examples listed here in the text).
was neither in custody nor a suspect. Another court, however, found a statement more reliable because the witness was in custody and charged with a crime, thereby making the statement more clearly against her penal interest. One court held that a statement was more reliable because the incriminating portion was detailed, while another court found a statement more reliable because the portion incriminating the defendant was "fleeting." And the Colorado Supreme Court found one statement more reliable because it was given immediately after the events described, and yet found another statement more reliable because two years had passed since the events. In short, as Crawford noted, Roberts invited inconsistency and unpredictability.

This jumbled case law about reliability had strayed far from the constitutional text and history. The text of the Sixth Amendment’s Confrontation Clause seems clear enough: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .” These words set forth a bright-line rule, not a balancing test. The text says nothing about policing the substantive reliability of evidence a jury may hear. Rather, juries may assess substantive reliability themselves, so long as the court first ensures adversarial procedure, namely confrontation of witnesses by defendants. The word “witnesses,” moreover, does not appear to mean any out-of-court declarant. It denotes those who make formal, recorded statements for, or in anticipation of, official proceedings.

Clear history confirms that the Clause’s purpose is to prohibit formal out-of-court testimony and to guarantee face-to-face confrontation and cross-examination. The English common-law tradition had relied on adversarial testing and cross-examination of live witnesses in open court to inform juries. In contrast, in the civil-law, inquisitorial system, officials examined witnesses before trial and introduced their statements at trial instead of using live testimony. At times, England adopted this pretrial examination procedure. In the notorious treason trial of Sir Walter Raleigh, the prosecution introduced a letter

45. Compare Farrell, 34 P.3d at 407 (statement given “immediately after” the events in question), with Stevens v. People, 29 P.3d 305, 316 (Colo. 2001) (statement given two years later).
46. See Crawford, 541 U.S. at 64–66.
47. Cf. Scalia, supra note 5, at 39 (criticizing the habit of building new cases exclusively on the logic of prior Supreme Court cases rather than the text, “with no regard for how far that logic, thus extended, has distanced us from the original text and understanding”).
48. U.S. Const. amend. VI.
49. See Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles 126 (1997); Scalia, supra note 5, at 43–44.
51. See id. at 130; Richard D. Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011, 1011 (1998).
and an unsworn out-of-court Privy Council examination of his alleged accomplice. Raleigh demanded that the judges bring his accuser into court, in the hopes that he would recant, and complained that he was being tried “by the Spanish Inquisition.”54 The court refused, the jury convicted, and Raleigh was condemned to die.55 In reaction to this and similar abuses, later English cases and statutes mandated face-to-face confrontation.56 The colonists agreed, decrying ex parte written evidence and insisting on cross-examination as the guarantor of truth.57 Courts allowed only limited exceptions for witnesses who simply could not testify in person and had previously been subject to cross-examination by the defendant.58 In short, the core purpose of the Confrontation Clause was to forbid inquisitorial criminal procedure based on ex parte written examinations.59

While the Clause ultimately promotes substantive reliability, it does so via a procedural guarantee of adversarial testing.60 This procedural path to reliability was designed to constrain judicial discretion because the Framers, mindful of past judicial abuses, distrusted judges. Thus, the Clause specifies a particular procedure for testing evidence in front of juries and does not allow judges to simply substitute another procedure that might appear more effective.61

The procedure chosen by Crawford, requiring cross-examination of all testimonial statements, may reach beyond core out-of-court inquisitorial interrogations. For example, gentle police questioning of a domestic-abuse or rape victim is not nearly as shocking nor as unreliable as the torture-induced depositions in Raleigh’s case. My point is not that the Clause is limited to the particular scenario that the Framers had in mind. Rather, that historical scenario illuminates the plain meaning of the text (exclusion of out-of-court testimony), which in turn is what governs today.

Crawford’s rule hinges on whether the evidence is “testimonial.”62 However,

53. See 4 WILLIAM HOLDSWORTH, HISTORY OF ENGLISH LAW 528–30 (3d ed. 1944); 9 id. at 216–17, 228.
56. Id. at 44–45.
57. Id. at 47–49; cf. 5 JOHN H. WIGMORE, EVIDENCE § 1367, at 32 (James H. Chadbourn ed., rev. ed. 1974) (famously describing cross-examination as “the greatest legal engine ever invented for the discovery of truth”).
58. Crawford, 541 U.S. at 45–47. The Crawford Court recognized that dying declarations might qualify as another exception, but it suggested that even if this exception survived it would be sui generis. Id. at 56 n.6.
59. Id. at 50.
60. Id. at 61–62.
61. Id. at 67–68.
62. In his concurrence, Chief Justice Rehnquist criticized the majority’s line between unsworn testimonial statements and nontestimonial statements because, at common law, only sworn testimony was admissible evidence. See Crawford, 541 U.S. at 69–71 (Rehnquist, C.J., concurring in the judgment). This argument, however, gives insufficient weight to the Raleigh case discussed supra. See
the Court did not define that term, leaving its development to the future. At a minimum, the concept includes prior testimony at preliminary hearings, before grand juries, at former trials, and in police interrogations. While the admissibility of other evidence, such as 911 calls, remains unsettled, Crawford at least provides a principle and a coherent inquiry for adjudicating Confrontation Clause disputes.

Crawford was a successful blend of originalism and formalism. The previous case law had been a mess, relying on indeterminate balancing tests and generating inconsistent results. It had allowed admission of evidence, such as accomplice confessions, that transgressed the historical purpose of the Clause. The case law had veered far from the Clause’s text and history, turning its absolute guarantee of confrontation and cross-examination into a mere “preference.” Crawford’s formalistic rule turns on simple, clear requirements of testimony, cross-examination, and unavailability, rather than ad hoc estimates of reliability. This formalistic rule is not only clear, but also rooted in the historical record, giving it objective legitimacy. It serves the historical goal of constraining judicial discretion and testing evidence before jurors’ eyes. And there is no easy way to evade the rule, because any evidence elicited in anticipation of trial probably becomes testimony subject to the rule.

Of course, this originalism came at the expense of stare decisis. Precedent merits respect when it leads to coherence, stability, and predictability. If a line of precedent proves to be inconsistent and incoherent, it loses many of these benefits and so deserves less respect. This inquiry requires difficult judgment calls. How far from history must precedent veer to lose its originalist mooring? How mushy must precedents be to lose the benefits of formalism? These

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text accompanying note 54. In that case, the trial court relied on unsworn testimonial statements to convict Raleigh without allowing him to cross-examine the declarants; the Confrontation Clause was designed to prevent such abuses in the future.

63. See Crawford, 541 U.S. at 67.
64. Compare, e.g., United States v. Hendricks, 395 F.3d 173, 184 (3d Cir. 2005) (holding that defendant’s record statements were not testimonial under Crawford), Herrera-Vega v. State, 888 So. 2d 66, 69 (Fla. Dist. Ct. App. 2004) (holding that defendant’s spontaneous statements to her mother were not testimonial under Crawford), People v. Mackey, 785 N.Y.S.2d 870, 874 (Crim. Ct. 2004) (holding that statements made to police were not testimonial under Crawford), and People v. Moscat, 777 N.Y.S.2d 875, 879 (City Crim. Ct. 2004) (holding that under Crawford a 911 call was not testimonial and therefore outside the scope of the Confrontation Clause), with Lopez v. State, 888 So. 2d 693, 693-700 (Fla. Dist. Ct. App. 2004) (holding that defendant’s pre-arrest statements to police were testimonial under Crawford), Snowden v. State, 846 A.2d 36, 47 (Md. Ct. Spec. App. 2004) (holding that a child’s statements to a social worker were testimonial under Crawford), People v. Cortez, 781 N.Y.S.2d 401, 415 (Sup. Ct. 2004) (holding that statements made to a 911 operator were testimonial under Crawford).

Though Chief Justice Rehnquist’s concurrence criticized the majority’s test for merely substituting one unclear test for another, see Crawford, 541 U.S. at 75-76 (Rehnquist, C.J., concurring in the judgment), the majority’s test at least provides a principle and touchstone. Whereas Roberts was inherently unpredictable and unstable, Crawford’s approach promises to yield more consistent results once common-law development fleshes out its contours. See id. at 68 n.10 (majority opinion).

questions have no easy answers, and even Justice Scalia recognizes stare
decis as "a pragmatic exception" to consistent originalism and formalism. In
Crawford, however, the Court decided, quite reasonably, that the case law was
irreparably broken and not just bent. It was time to do a thorough overhaul
rather than a tune-up, so stare decisis had to give way.

III. Blakely's Mess

Like Crawford, Blakely arrived after the law had become a muddle, which
made formalism and originalism appealing. By the late twentieth century, the
two halves of criminal trials were subject to widely disparate procedures. In
determining guilt or innocence, courts afforded defendants juries, proof beyond
a reasonable doubt, confrontation, cross-examination, and compulsory pro-
cess. These procedures safeguarded the common-law, adversarial testing of
the prosecution's case in open court, as discussed earlier. But few of these
rights applied at sentencing. In most states, the right to a jury trial ended after
the verdict of guilt. Sentencing judges relied on ex parte hearsay, hunches,
speculation, and their idiosyncratic temperaments to give sentences anywhere
between probation and life (or death). Judges did not have to find any facts,
give any reasons, or meet any particular standard of proof. Expert judges
supposedly needed this flexibility to tailor punishments to each offender's
personality, circumstances, and amenability to rehabilitation. In other words,
the job of the jury at trial was to make a backward-looking finding of historical
facts about blameworthiness. The job of the sentencing judge was to make a
forward-looking therapeutic diagnosis of an offender's rehabilitative prospects.
Sentencing embraced a medical model and viewed crime as a disease that
required therapeutic expertise to cure.

Beginning in the 1970s, reformers attacked the lawlessness of criminal
sentencing. In addition, many people lost faith in rehabilitation, and the
dominant penal philosophy shifted from forward-looking rehabilitation to back-

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67. Antonin Scalia, Response, in A MATTER OF INTERPRETATION, supra note 5, at 140.
69. See supra text accompanying notes 48-49.
71. See generally MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 12-49 (1972).
72. See generally id.
74. See, e.g., FRANKEL, supra note 71, at 5 ("The almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law."); see also Francis A. Allen, A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review, 70 IOWA L. REV. 311, 323 (1985) (noting that the "theory and practice of criminal sentencing were escalated to positions of primary concern in the 1970's").
ward-looking retribution.\textsuperscript{75} Sentencing reformers adopted more law-like rules to channel judicial discretion at sentencing. Sentencing came to turn not on therapeutic diagnoses, but on findings of historical fact. The older procedural framework, however, underlay these new rules: judges found these facts, they did not have to follow adversarial procedures in open court, and the prosecution’s burden of proof was at most a preponderance of the evidence.\textsuperscript{76}

In the 1980s, the Supreme Court upheld these relaxed procedures at sentencing but offered no clear rules or limits on this practice. For example, judges were permitted to find, by a preponderance of the evidence, facts that triggered mandatory-minimum sentences.\textsuperscript{77} The Court stressed the need to defer to the legislative will. It also stated that the sentencing enhancement in question did not create a new crime nor substitute for any existing crime. It left the door open, however, to regulate any sentence enhancement that amounted to “a tail which wags the dog of the substantive offense.”\textsuperscript{78} This impressionistic, subjective standard gave courts very little guidance about how much judicial fact-finding was too much.

In 2000, a bare majority of the Court superseded this subjective, multi-factor balancing test with a bright-line rule. \textit{Apprendi v. New Jersey} held that juries must find beyond a reasonable doubt all facts (except recidivism) that increase statutory maximum sentences.\textsuperscript{79} \textit{Blakely} and \textit{Booker} extended \textit{Apprendi} further, applying it to all facts that increase maximum sentences under sentencing guidelines.\textsuperscript{80} It is noteworthy that Justice Stevens wrote the merits majority opinions in \textit{Booker} and \textit{Apprendi}, while Justice Scalia wrote the majority opinion in \textit{Blakely}. In each case, more liberal Justices Stevens, Souter, and Ginsburg joined more conservative Justices Scalia and Thomas. The originalist and formalist reading of the Sixth Amendment dovetailed well enough with solicitude for criminal defendants’ due process rights to forge this unusual coalition.

\textit{Apprendi} and \textit{Blakely} rested on three basic arguments. First, the Founding generation attached great importance to jury trials.\textsuperscript{81} Second, adopting a bright-line rule prevents a slippery slope that would erode juries.\textsuperscript{82} And third, deffen-
dants need clear notice of the maximum penalties they face.\(^8^3\) The Court made the notice argument only in passing; its historical and slippery-slope arguments bore most of the weight.

These cases are admirable because they confronted fundamental issues of criminal law that had long lain dormant. What is a crime? Is it whatever the legislature labels a crime? And what facts trigger punishment? Must all facts that justify punishment be included in the crime definition itself? For too long, we have ignored the linkage of crime and punishment. At English common law, jury trials were about both liability and punishment, as juries manipulated their verdicts to calibrate punishments to crimes.\(^8^4\) As sentencing rules proliferated and were codified, sentencing judges decided more and more facts that might otherwise have been within the province of juries. Until \textit{Apprendi}, courts had never delineated what procedures were necessary at sentencing and what issues were reserved for juries. \textit{Apprendi} and \textit{Blakely} linked criminal procedure to substantive criminal law, as they tried to define crimes and the procedures needed to link punishments to crimes.

This line of cases tried to ground this definition of crimes and procedures in originalism and formalism. The Constitution guarantees juries as the finders of facts that justify conviction and thus punishment. Recent developments had eroded this role, steadily transferring more factual determinations from trial jury to sentencing judge. Indeed, many of the blameworthiness and grading issues that were once built into substantive criminal codes were now handled through sentencing rules.\(^8^5\) This judicial fact-finding during sentencing had circumvented not only juries, but also the rights to confrontation and proof of guilt beyond a reasonable doubt. \textit{Apprendi} and \textit{Blakely} promised to stop this erosion by requiring jury findings beyond a reasonable doubt of all facts that raise maximum sentences.

Both originalism and formalism, however, were shaky foundations for this rule. As for originalism, the text of the Sixth Amendment guarantees a right to trial by jury “in all criminal prosecutions.”\(^8^6\) Article III’s Jury Clause likewise guarantees juries for “The Trial of all Crimes.”\(^8^7\) Neither provision specifies whether the jury right extends beyond the verdict of guilt to sentencing procedures.

\(^8^3\) See \textit{Blakely}, 124 S. Ct. at 2540, 2542; \textit{Apprendi}, 530 U.S. at 478, 483 n.10.


\(^8^5\) See Gerard E. Lynch, \textit{The Sentencing Guidelines as a Not-So-Model Penal Code}, 7 Fed. SENTENCING REP. 112, 112-13 (1994) (conceptualizing the Federal Sentencing Guidelines as a back-end way to grade criminal offenses and punishments, thus compensating for Congress’s inability to simplify and rationalize the federal criminal code, but arguing that the Guidelines do not perform this task especially well).

\(^8^6\) U.S. Const. amend. VI.

\(^8^7\) U.S. Const. art. III.
The history of these clauses is no clearer. The particular issue of sentence enhancements neither arose nor was resolved in the eighteenth century.88 Criminal procedure was in flux at the time, and overt sentencing discretion was a new development that had not yet taken firm shape. The older tradition, up through the eighteenth century, had been that verdicts of guilt led directly to fixed felony sentences. While juries sometimes adjusted their verdicts to influence sentences, there was no separate sentencing phase.89 But in the late eighteenth century, penitentiaries began to replace capital and corporal punishment, and judges gained wide discretion to sentence defendants within broad ranges of years.90 No particular procedures guided or constrained this unilateral judicial discretion. Judges could base sentences upon any facts that they chose to find, under any standard of proof, or upon no facts at all.91 Criminal procedure, in short, was in flux. In some places, and for some crimes, there was no sentencing phase at all, while elsewhere judges were beginning to enjoy unchecked sentencing discretion. The Court, for its part, has repeatedly reaffirmed this long tradition of judicial discretion to find facts at sentencing and sentence within broad ranges.92

Instead of Founding-era history, the Apprendi Court relied on treatises written a century later, while Justice Thomas's concurrence relied on nonconstitutional cases from the mid- to late-nineteenth century.93 These sources are very weak evidence of the original understanding of the Constitution. At best, the Court is creatively translating an eighteenth-century guarantee at a high level of generality into radically different circumstances.94 At worst, the Court is stretching equivocal history to fit a novel proposition. Either way, the history is hardly an unequivocal, neutral oracle or firm foundation.

Moreover, the Court is unwilling to turn the clock back all the way. Article III of the Constitution mandates that "[t]he trial of all Crimes ... shall be by Jury,"95 giving citizen-jurors a non-waivable, structural check on judicial and prosecutorial overreaching. Unlike the Sixth Amendment, Article III is not phrased as a right belonging to the accused. It was meant to be a right of We the

88. See Jones v. United States, 526 U.S. 227, 244 (1999).
89. See Apprendi v. New Jersey, 530 U.S. 466, 476–80 (2000) (citing sources in support of this proposition); Jones, 526 U.S. at 244–45 & n.7 (same).
90. See, e.g., An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112, 112–19 (1790) (creating thirteen crimes with sentencing ranges from up to one year to up to seven years' imprisonment and one punishable by unlimited imprisonment and fines at the judge’s discretion, as well as six capital crimes); Lawrence M. Friedman, A History of American Law 281–83 (2d ed. 1985) (noting a trend away from capital punishment beginning in the late 1780s).
92. See United States v. Booker, 125 S. Ct. 738, 750 (2005) (Stevens, J., majority opinion on the merits); Apprendi, 530 U.S. at 481.
93. Apprendi, 530 U.S. at 476–78, 482 n.9, 490 n.15; id. at 500–23 (Thomas, J., concurring).
94. See Booker, 125 S. Ct. at 752 (Stevens, J., majority opinion on the merits) (describing the Court’s challenge as “preserving an ancient guarantee of trial by jury under a new set of circumstances”).
95. U.S. CONST. art. III, § 2, cl. 3.
People to administer justice, not simply a right of defendants to waive (or be coerced into waiving). Yet today, jury trials resolve fewer than four percent of criminal cases. Though plea bargaining subverts this constitutional mandate, no court is about to abolish it in the name of originalism, lest criminal trials overwhelm the justice system.

One might think that half an originalist loaf in *Apprendi* and *Blakely* is better than none at all. After all, even though the Court chose not to disturb plea bargaining, it at least appeared to shore up juries by limiting some forms of judicial sentencing discretion. Sometimes half a loaf is better than none, but in this case it is not. I have argued elsewhere that by grafting an eighteenth-century trial rule onto a twenty-first-century plea-bargaining landscape, the Court exacerbated some of plea bargaining’s flaws. *Apprendi* deprived many defendants of their right to a hearing, exacerbated charge bargaining, and further imbalanced plea-bargaining power in favor of prosecutors and against judges. Because the Court mandated one originalist rule at trial without forbidding circumvention via plea bargaining, it opened the door to unanticipated and perverse results. Likewise, the Court’s willingness to regulate guidelines sentencing, but not discretionary sentencing, may perversely push legislatures toward broader sentencing ranges, looser rules, and fewer checks on judges. In short, in the real world of the second best, a little bit of originalism may be worse than none at all because of its inconsistency.

The disappearance of juries undermines *Apprendi* and *Blakely*’s idealized eighteenth-century rule in yet another way. The eighteenth-century separation of powers is anachronistic in twenty-first century criminal procedure—there are hardly any juries left to protect. Rather than trying to separate the powers of juries and judges strictly, perhaps we should emphasize checks and balances among the remaining actors. If the real problem is prosecutorial dominance...
of charging and plea bargaining, perhaps we should give judges power to offset charging decisions at the sentencing stage. Moreover, collaboration among legislatures, prosecutors, public defenders, and judges can produce rules that are more equal and predictable than individual judges' or prosecutors' habits, yet more flexible and refined than mandatory-minimum legislation. This kind of collaborative experimentation is very different from strict separation of powers, and it simply does not fit within Justice Scalia's formalist model.

The formalism of Apprendi and its progeny was no more successful than the Court's originalism. Blakely and Booker's bright-line rule covers any fact that raises a defendant's maximum sentence, whether under a statute or a sentencing guideline. Though this bright-line formalism was supposed to prevent erosion of the jury-trial right, it is remarkably easy to evade. Legislatures can still undercut juries by raising maximum sentences, rephrasing aggravators as mitigators, or simply returning unfettered sentencing discretion to judges. Prosecutors can get around it by stacking multiple charges to raise the overall maximum consecutive sentence. The very clarity and clear edges of the bright-line rule point the way to evasion. As the dissenters observed, the Court's rule boils down to another drafting hoop through which legislatures must jump. Oddly, then, the Court felt it had to threaten additional unspecified regulation of any efforts to evade its bright-line rule. So even though the bright-line rule was intended to shore up jury trials, it will not suffice to prevent erosion of that right.

Even if this formalistic rule did work, it would come at a very high price. It may prejudice defendants at trial (by letting juries hear aggravating facts that would otherwise wait until sentencing) or else require complex and expensive bifurcation. It also unsettles tens of thousands of criminal sentences, flooding courts with appeals and habeas petitions. It creates many more opportunities for prosecutors to engage in charge bargaining, undercutting equal treatment. And Apprendi seriously skews the balance of plea-bargaining power in many

104. See Mistretta v. United States, 488 U.S. 361 (1989) (affirming the constitutionality of the United States Sentencing Commission, a legislatively created agency within the judicial branch, over a separation-of-powers dissent by Justice Scalia). Though the Federal Sentencing Guidelines are widely reviled, state guidelines that emerged from open, collaborative processes have been more successful and widely hailed. See, e.g., DALE PARENT, STRUCTURING CRIMINAL SENTENCES 203-04 (1988) (noting that Minnesota's guidelines emerged from an open "new model of guideline development" and have proven to be a "visible success")
105. See United States v. Booker, 125 S. Ct. 738, 756 (2005) (Stevens, J., opinion on the merits); Blakely, 124 S. Ct. at 2536-38.
106. For more detail on this point, see Bibas, supra note 98, at 1134-39.
107. See Apprendi, 530 U.S. at 539-43 (O'Connor, J., dissenting). But see id. at 544-49 (fearing that the majority's rule might be broader and thus radically disrupt sentencing law and practice).
108. See id. at 490 n.16 (majority opinion); Bibas, supra note 98, at 1136 n.265.
109. See Bibas, supra note 98, at 1143-44.
110. See id. at 1145-48.
111. See id. at 1168-70.
cases, giving prosecutors more power and sentencing judges less. This jury-trial right may, perversely, result in more prosecutorial leverage to extort waivers of jury trials.\footnote{112. See \textit{id.} at 1152-67.} The Court, captivated by an idealized vision of jury trials, failed to appreciate the magnitude of these real-world consequences. Indeed, the seminal case in this line, \textit{Apprendi}, did not mention plea bargains.\footnote{113. See \textit{id.} at 1148 & n.322.} The apparent neutrality and clarity of formalism may have blinded some Justices to these weighty, functional concerns.

In short, \textit{Apprendi}, \textit{Blakely}, and \textit{Booker} asked good questions but reached flawed answers. The definitions of crimes and their linkage with sentence lengths and procedures are of great importance. But the eighteenth century has no easy, concrete answer for this twenty-first-century question, because sentencing discretion was in flux. Even if there were a neat answer, the Court is not radical enough to abolish plea bargaining and judicial sentencing discretion to return us to a consistent originalist approach. In addition, the Court’s formalistic answer is too easy for legislatures and prosecutors to evade. More modest answers, such as heightened procedural protections during sentencing or bans on deceptive sentencing enhancements, would ultimately have been more workable and solidly grounded.\footnote{114. \textit{Id.} at 1174–83.} By stretching originalism and formalism beyond their limits, the Court over-reached and created an unworkable sentencing mess.

\section*{IV. Originalism Versus Formalism}

Up until now, I have discussed originalism and formalism in tandem, as if they were natural bedfellows. But do the two really belong together? As I have suggested earlier, the two methodologies not only spring from different sources, but sometimes come into conflict. Subpart A below explores the compatibility of these two approaches. Subpart B considers which of the two is really driving the Court. Though he relies heavily on originalism, at root Justice Scalia’s opinions rest more on formalism. Formalism, however, holds much less sway over other members of the Court, for whom originalism is the more powerful force.

\subsection*{A. Complementary or Clashing?}

One might be tempted to lump originalism and formalism together, in part because the same jurists, notably Justices Scalia and Thomas, tend to embrace both. Sometimes the two dovetail neatly. Where the text and historical record disclose a bright-line rule, the originalist approach leads one to a formalistic rule.\footnote{115. See supra text accompanying notes 18–27.} This is true, for example, of \textit{Crawford’s} approach to the Confrontation Clause. The text and history of the clause say nothing about judicial balancing of a statement’s reliability. They simply guarantee the right to confront and
cross-examine any adverse witness, a historical bright-line rule. The same is true of the Double Jeopardy Clause’s historical, bright-line limitation to criminal cases. The text of the Clause forbids twice placing a person in jeopardy of “life or limb” for the “same offence,” meaning criminal punishment for a criminal offense. Surrounding clauses of the Fifth Amendment guarantee the privilege against self-incrimination “in any criminal case” and grand jury indictments for any “capital, or otherwise infamous crime.” Finally, history confirms that the purpose of the double-jeopardy protection was limited to criminal punishments. Though the Supreme Court tried extending double-jeopardy protection to civil fines, this extension proved to be unworkable and hard to administer. Ultimately, the Court limited the Clause’s scope to criminal prosecutions, returning to a workable, clear, simple rule grounded in history.

Text and history, however, sometimes support a balancing test rather than a bright-line rule. A good example is the Fourth Amendment, which judges have interpreted to require warrants, probable cause, and the exclusionary rule. These bright-line rules are clear mandates that promise to guide and constrain police discretion. But when these rules proved to be rigid and overbroad, courts created a thicket of increasingly arcane exceptions to the warrant, probable cause, and exclusionary rules. As an originalist matter, however, the Fourth Amendment requires only that searches be reasonable, and reasonableness sounds much more like a multi-factor balancing test than a clear rule. Thus, one must distinguish originalism from formalism and, if the two clash, determine which should prevail.

B. AT ROOT, IS THE COURT ORIGINALIST OR FORMALIST?

Which of these two principles is ultimately driving the Court’s criminal procedure jurisprudence? The Court’s rhetoric on this point is mixed. In Crawford, Justice Scalia began his opinion for the Court with pages of historical and textual analysis. After discussing English and American colonial history, Justice Scalia concluded that the Clause was designed to prevent in-court use of ex parte out-of-court witness examinations. The history and text “do[] not suggest any open-ended exceptions from the confrontation requirement to be

116. See supra Part II.
117. U.S. Const. amend. V.
118. Id.
121. See Hudson, 522 U.S. at 98–99.
122. See Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 762–811, 816–19 (1994) (demonstrating that, as a textual and historical matter, the Fourth Amendment requires neither warrants, nor probable cause, nor the exclusionary rule, but only reasonableness, and that juries should assess reasonableness ex post as a matter of common sense; recognizing, however, that legislatures, judges, and administrative agencies may to help define reasonableness).
developed by the courts.... [They] admit[] only those exceptions established at
the time of the founding.\textsuperscript{124} Justice Scalia then criticized Roberts' "malleable
[reliability] standard"\textsuperscript{125} as "unpredictable [and] ... amorphous, if not entirely
subjective."\textsuperscript{126} This unpredictable standard afforded little safeguard against
clear violations of the Clause and produced inconsistent and contradictory
outcomes.\textsuperscript{127} Though this strand of argument is formalist, the Court ultimately
rested its decision on originalism: "The unpardonable vice of the Roberts test, however,
is not its unpredictability, but its demonstrated capacity to admit core
testimonial statements that the Confrontation Clause plainly meant to ex-
clude."\textsuperscript{128}

What is most impressive about Crawford is how its skillful blend of original-
ism and formalism persuaded seven members of the Court to throw out decades
of precedent. Crawford's formalism highlighted the inconsistent, unpredictable
muddle that had emerged from a hopelessly vague test. And Crawford's original
ism was a compelling account of the Confrontation Clause's purpose and how
ad hoc decisionmaking has drifted away from that aim. These powerful an-
coherent accounts persuaded even fair-weather originalists that originalism an
formalism worked well here. Even a functionalist can see the strong function:
value of originalism and formalism in this case, much as a utilitarian ce
sometimes see the value of following rules.\textsuperscript{129} Thus, liberal concern for crimin
defendants' rights dovetailed with conservative reverence for the Founding ar
distrust of government and balancing tests.

In the Apprendi-Blakely line of cases, however, originalism was not t

driving force. True, Apprendi cited much history in support of its jury-tr
right.\textsuperscript{130} But the same members of the Court admitted in Jones, the precursor
Apprendi, that no history squarely supported this rule: "[T]he scholarship
which we are aware does not show that a question exactly like this one was e
raised and resolved in the period before the Framing."\textsuperscript{131} As discussed,
eighteenth-century evidence does not address the sentencing phase, and
nineteenth-century evidence comes far too late to illuminate the Bill of Rights
Perhaps, as Booker argues, one can creatively "preserve[e] an ancient [jury-t

\textsuperscript{124} Id. at 54.
\textsuperscript{125} Id. at 60.
\textsuperscript{126} Id. at 63.
\textsuperscript{127} Id. at 63-64.
\textsuperscript{128} Id. at 63.
\textsuperscript{129} Cf. FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE
DECISION-MAKING IN LAW AND LIFE 99 (1991) (stating that "as long as the virtues of having rules
considered as part of the relevant circumstances of each act" they are "fully consistent v
act-utilitarianism outlook").
\textsuperscript{130} See Apprendi v. New Jersey, 530 U.S. 466, 477-83 (2000); id. at 501-18 (Thou
concurring).
\textsuperscript{131} Jones v. United States, 526 U.S. 227, 244 (1999).
\textsuperscript{132} See supra Part III.
guarantee under a new set of circumstances. But the gulf between having no sentencing phase and the modern sentencing mini-trial is so great that it is hard to see this novel rule as originalist. A radical originalist might have outlawed plea bargaining and mandated a return to fixed sentencing, or at least transferred all sentencing discretion to juries. However, even these solutions would have collided with the eighteenth-century sentencing flux; by 1791, judges were beginning to exercise broad discretion in imposing indeterminate sentences. But there is no neat, bright-line originalist approach to sentencing, and even if there were, a majority of the Court would not be willing to go so far. Because the Court was unwilling to divest judges of sentencing discretion, it could not really claim an originalist mandate for its rule.

Rather, the Apprendi-Blakely rule was motivated less by originalism than by formalism. *Apprendi* referred repeatedly to the fear of a slippery slope that would gradually erode the role of juries. Justice Scalia's concurrence in *Apprendi* rested explicitly on the need for a coherent bright line: "What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury does guarantee if, as they assert, it does not guarantee [jury findings of facts that raise maximum sentences]. They provide no coherent alternative." In *Blakely*, Justice Scalia reiterated the importance of a coherent bright line, justifying *Apprendi*’s rule by "the need to give intelligible content to the right of jury trial." Clarity not only constrains judges, but also gives prospective criminals fair warning of the maximum sentences they may face. Justice Scalia criticized the dissent for relying on a subjective, manipulable, incoherent balancing test. In a scathingly sarcastic footnote, he mocked *McMillan*’s tail-wags-the-dog standard as ridiculously objective and not moored in the Constitution. This attack highlights Justice

134. See *Bibas*, supra note 98, at 1125–26 & n.209 (noting that even at the time of the Founding, judges had broad sentencing discretion in misdemeanor cases, broad discretion to mitigate felony sentences, and broad discretion under some newer statutes that authorized wide ranges of imprisonment); see also Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 9 (1998) (“From the beginning of the Republic, federal judges were entrusted with sentencing discretion . . . permitting the sentencing judge to impose any term of imprisonment and fine up to the statutory maximum.”).
135. See *Apprendi*, 530 U.S. at 481–82 & n.9; see also supra Part III.
136. See *Apprendi*, 530 U.S. at 483–85 & n.11.
137. Id. at 498–99 (Scalia, J., concurring).
139. Id. at 2540, 2542.
140. See id. at 2537 n.6, 2539–40.
141. As Justice Scalia put it:
"a be sure, Justice BREYER and the other dissenters would forbid those increases of sentence that violate the constitutional principle that tail shall not wag dog. The source of this principle is entirely unclear. Its precise effect, if precise effect it has, is presumably to require that the ratio of sentencing-factor add-on to basic criminal sentence be no greater than the ratio of virtual vertebrae to body in the breed of canine with the longest tail. Or perhaps no greater
Scalia’s contempt for multi-factor balancing tests and his desire for formalism to constrain judges—or as he put it, “the rule of law as a law of rules.” Thus he cast the deciding vote, in *Harris*, to let judges find facts that trigger mandatory minimum sentences, in part because these minima are rules that constrain judicial discretion.

Indeed, Justice Scalia seems to embrace originalism precisely as a brand of formalism. He has suggested that originalism provides a clear, neutral, bright-line way to resolve cases clearly and with a minimum of judicial discretion. But, as *Booker* candidly acknowledged, there is no clear historical precedent to constrain the originalist inquiry here. Because there was no clear sentencing law at the time of the Founding, any originalist effort must be creative and complex. Thus originalism does not lead to formalism here, and forcing the history into a formalistic mold produced a rule that is neither historical nor workable.

In the end, originalism can be neither consistent nor thorough when a majority of the Justices are fair-weather originalists. The decision to follow originalism, then, is not automatic, but the result of balancing many considerations. But originalism has enough appeal that it occasionally sways Justices who are not consistent originalists. In *Atwater v. City of Lago Vista*, for example, Justice Souter wrote for the Court that police may make warrantless arrests for the misdemeanor of driving without a seatbelt. His decision relied heavily on eighteenth-century precedents, such as constables’ power to make warrantless arrests of negligent carriage drivers, and not primarily on policy considerations.

In other areas of criminal procedure, a majority of the Court breaks with Justice Scalia’s originalism and formalism where a balancing-test approach seems more just. In *Herrera v. Collins*, for example, a majority of the Court suggested that the Constitution might forbid executing actually innocent convicts under some circumstances, despite Justice Scalia’s disagreement. In *Harmelin v. Michigan*, a majority of the Court read the Eighth Amendment as requiring a proportionality balancing test for non-capital sentences, over Justice

than the average such ratio for all breeds. Or perhaps the median. Regrettably, *Apprendi* has prevented full development of this line of jurisprudence.

*Id.* at 2542 n.13.

142. See Scalia, *supra* note 20, at 1175.


144. See Scalia, *supra* note 5, at 45, 47.


147. See *id.* at 355.

Scalia’s contrary argument. And in Walton v. Arizona, Justice Scalia argued that the Eighth Amendment requires no individualized capital sentencing, but the Court ultimately ignored his originalist, bright-line argument.

In sum, originalism is a powerful force in criminal procedure, and it often leads to formalism. At times, however, originalism seems to be a cloak for formalism, invoked (as in Blakely) even where there is no solid, workable originalist answer. Perhaps as a result of this sleight of hand, while Justice Scalia’s originalist and formalist approach to criminal procedure periodically triumphs on the Court, it enjoys no consistent majority.

**CONCLUSION**

Originalism and formalism are powerful methodologies in criminal procedure, and with good reason. At its best, as in Crawford, Justice Scalia’s approach succeeds in its aims: it anchors criminal procedure in text and history, provides clear neutral starting points, and shores up separation of powers. By doing so, it also constrains judicial discretion, maximizes legislative flexibility, and protects juries. Thus, in appropriate cases, both originalism and formalism deserve prominent, if not dominant, places in criminal procedure. Perhaps I should call this Essay “Two Cheers for Originalism and Formalism” for just that reason. But at its worst, as in Blakely, Justice Scalia’s approach fails in these aims: it over-reads cryptic or muddled text and history, becomes rigid and unworkable, and thwarts checks and balances.

In the end, we are indebted to Justice Scalia for reinvigorating originalism and formalism, which deserve to flourish where firm constitutional soil will support their roots. Text, history, and precedent ought at least to be the starting points for constitutional inquiry, and often these starting points will lead to workable, bright-line rules. But we should also be wary of exalting these principles above all others, particularly where the textual and historical soil is absent or a morass. The other Justices do well to exercise prudent judgment in discerning when to temper Justice Scalia’s impractical excesses. When they do not do so, as in Blakely, formalism undercuts the old-fashioned judicial virtues of humility, practicality, and plain old common sense.

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149. 501 U.S. 957, 993 (1991) (plurality opinion) (Scalia, J., for himself and Rehnquist, C.J.) (rejecting any proportionality review under the Eighth Amendment); id. at 996 (Kennedy, J., joined by O’Connor and Souter, JJ., concurring in part and concurring in the judgment) (recognizing, in the controlling opinion, “a narrow proportionality principle”).

150. 497 U.S. 639, 671 (1990) (Scalia, J., concurring in part and concurring in the judgment) (rejecting the Woodson–Lockett–Eddings line of cases as inconsistent with the text and historical meaning of the Eighth Amendment).