Preface: Reclaiming Criminal Procedure

Jeffrey L Fisher, Stanford Law School
Thirty-Eighth
Annual Review of Criminal Procedure
2009

Preface: Reclaiming Criminal Procedure

JEFFREY L. FISHER
Preface: Reclaiming Criminal Procedure

JEFFREY L. FISHER

If you grabbed a person off the street, handed her a copy of the Constitution, and asked her to define the field of criminal procedure, she likely would not think the task was too difficult. After all, one of the original ten amendments, the Sixth Amendment, begins with the phrase: “In all criminal prosecutions, the accused shall enjoy the right[s] to . . .” Furthermore, the Amendment is quite short. It recites only seven basic rights: (1) the right to a speedy trial; (2) the right to a public trial; (3) the right to trial by jury; (4) the right “to be informed of the nature and cause of the accusation”; (5) the right to be confronted with the prosecution’s witnesses; (6) the right to compulsory process; and (7) the right to counsel.2

Our person off the street might also notice two other criminal procedure rights lurking in the Fifth Amendment: the right against self-incrimination and the protection against double jeopardy.3 Our person might further contend that the Fourth and Eighth Amendments relate to criminal procedure, insofar as they regulate the bookends of the criminal justice system: police investigations4 and criminal sentences.5 And our person may reasonably expect various components of nonconstitutional law to be relevant to the field. But the person would surely expect that any volume—any casebook or treatise—entitled “criminal procedure” would cover the seven core rights enumerated in the Sixth Amendment.

She would be wrong. Until very recently, criminal procedure casebooks and treatises typically have not even mentioned one of the seven core Sixth Amendment rights: the right to confrontation.6 And when such books have mentioned this right, they have done so as a quick aside or as a concern relating to some other procedural issue.7 Even today, no casebook contains any explanation of the general meaning or importance of the constitutional requirement that the accused be confronted at trial with the witnesses against him.8 That project is left to books, and to law school classes, covering the field of evidence—

1. U.S. Const. amend. VI.
2. Id.
3. U.S. Const. amend. V.
4. See U.S. Const. amend IV.
5. See U.S. Const. amend VIII.
7. See, e.g., Ronald J. Allen et al., Comprehensive Criminal Procedure 1269 (1st ed. 2001); Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 17.2(b), at 765–69 (2d ed. 1992) (discussing confrontation only in the context of joinder and severance of co-defendants’ trials).
8. See infra notes 34–40 and accompanying text.
specifically, in sections of such books describing the rule against hearsay.9

One may not think this is cause for concern. So long as some set of legal textbooks, law school classes, and legal scholars pays attention to a given topic, one might maintain that there is no reason to worry about its falling into decrepitude. Nor, one might contend, should there even be much apprehension that the topic might be misunderstood.

I believe, however, that categorizing something as a criminal procedure right does matter. In fact, it matters a great deal. Rules of criminal procedure are specifically designed to address the powerful hydraulics of criminal cases. Such cases, which pit powerful public safety concerns against individual liberty, need a set of hard and fast rules both sides know must be followed. While other fields of law can afford to follow broadly stated and flexible standards, such standards will and become ineffectual in the cauldron of criminal litigation. Faced with the urgencies of injured victims and potentially dangerous defendants, courts buckle in the name of the “truth seeking process” to prosecutorial requests to allow deviations from typical procedures—even though the very reason the Constitution insists on certain procedures is that the Framers considered them essential to generating dependable results in criminal cases.

Recent developments concerning the right to confrontation vividly illustrate the point. For a generation leading up to 2004, the Supreme Court instructed that the Confrontation Clause did little more than replicate hearsay law’s generalized, flexible, reliability-based approach to out-of-court statements.10 As a result, the Clause had little bite. In Crawford v. Washington, the Supreme Court replaced its hearsay-based approach to the Confrontation Clause with a categorical rule that “testimonial” hearsay is inadmissible against criminal defendants absent the declarant’s unavailability and a prior opportunity for cross-examination.11 Yet Crawford is still greatly misunderstood. Both courts and commentators continue to struggle five years after the opinion’s announcement to determine what kinds of out-of-court statements are testimonial. More fundamentally, they continue to struggle to understand why they are even asking that question.

The key to making sense of Crawford is to appreciate that the decision turned the right to confrontation from an evidentiary principle back into a criminal procedure right. As the Court ultimately put it, the Confrontation Clause “commands ... that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.”12

This way of conceptualizing a constitutional right is unique to criminal

10. See infra notes 14–26 and accompanying text.
12. Id. at 61 (emphasis added).
procedure. Instead of regulating outcomes, criminal procedure, as the name suggests, demands processes. Instead of setting forth the broad goal of guaranteeing fair trials, criminal procedure mandates particular means for achieving that goal. It insists that a specific set of basic processes be respected in every case.

In this Essay, I hope to demonstrate the value—the importance—of this approach. I begin by describing the persisting view that the right to confrontation is evidentiary in nature. I then explain how Crawford's testimonial principle comes into focus once one treats it as a criminal procedure right. Finally, I survey a few other criminal procedure provisions that recently have experienced encroachment from other fields. And I attempt to evoke some broader insights concerning the nature of criminal procedure and why it is critical—to borrow a phrase—that publications like this one "preserve, protect, and defend" the Constitution's panoply of criminal procedure rights as such.

I. CONFRONTATION AS EVIDENTIARY LAW

It is the oldest of adages that hard cases make bad law. But so it was in 1970, when the Supreme Court, shortly after holding that the Confrontation Clause applied against the states,\textsuperscript{13} considered \textit{Dutton v. Evans}.\textsuperscript{14} The case involved a prosecution for murder.\textsuperscript{15} Among the truckload of evidence the state sought to introduce against Evans was a statement that his alleged accomplice supposedly made to a cellmate following his preliminary hearing, which implicated Evans in the crime.\textsuperscript{16} The state argued, and the Georgia courts agreed, that the statement was admissible pursuant to an unusual state statute creating an exception to the rule against hearsay for statements made during the concealment phase of a conspiracy.\textsuperscript{17} (Never mind that the statement, by purportedly admitting involvement in the murder, did the opposite of concealing the conspiracy.)

This unusual state law, and the Georgia courts' surprising application of it, gave rise to the question in federal habeas corpus proceedings whether the state's use of the statement without Evans being able to cross-examine his alleged accomplice at trial violated the Confrontation Clause. Evans argued that the Confrontation Clause required exceptions to the hearsay rule to be well-founded and "cogent" and that "the hearsay exception applied by Georgia [was] constitutionally invalid because it [did] not identically conform to the hearsay exception applicable to conspiracy trials in the federal courts."\textsuperscript{18}

Instead of challenging the premise of Evans's argument—that the Confrontation Clause regulates state hearsay law—the Supreme Court rejected the argument on its own terms. Accepting the notion that "the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots," a plurality reasoned that Evans's right to confrontation had been respected principally because his accomplice's statement bore sufficient "indicia

\textsuperscript{14} 400 U.S. 74 (1970).
\textsuperscript{15} Id. at 76.
\textsuperscript{16} Id. at 77-78.
\textsuperscript{17} Id. at 78 (citing \textit{Ga. Code Ann.}, § 38-306 (1954)).
\textsuperscript{18} Id. at 80.
of reliability. 19 Two other Justices concurred in this result but based on the nearly opposite intuition that the cellmate’s account of his supposed conversation with Evans’s alleged accomplice was so incredible that it must not have advanced the prosecution’s case. 20 Faced with these crosscurrents, Justice Harlan simply threw up his hands and adopted Wigmore’s view that the Confrontation Clause applied only to witnesses who testify in court, leaving the admissibility of all out-of-court statements entirely to the law of evidence. 21

Ten years later, in Ohio v. Roberts, a majority of the Court adopted and formalized the Dutton plurality’s reliability-based approach to the Confrontation Clause. 22 The Court declared:

[When a hearsay declarant is not present for cross-examination at trial, . . . his statement is admissible only if it bears adequate “indicia of reliability.” Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. 23

Thus, instead of holding that the hearsay at issue—a witness’s prior testimony at a preliminary hearing—was admissible simply because the witness, now unavailable, was previously subjected to the process of cross-examination, the Roberts Court reasoned that the prior testimony was admissible because it was reliable. 24

Roberts so explicitly conflated the right to confrontation with the rule against hearsay that criminal procedure scholars can easily be forgiven for abdicating any responsibility for tending to the right to those working in the field of evidence. 25 Indeed, in the twenty-four years following Roberts, the conflation of the right to confrontation and the rule against hearsay became so complete in courts across the country that the prevailing effect was, as Wigmore’s treatise on evidence advocated, that the Confrontation Clause essentially left the regulation of all out-of-court statements to the law of hearsay. 26

One would have thought, however, that Crawford would have changed all of this—or at least that it would have spurred criminal procedure scholars to

19. Id. at 86, 89.
20. Id. at 91 (Blackmun, J., concurring).
21. Id. at 94 (Harlan, J., concurring in the result) (citing Wigmore on Evidence § 1397, at 131 (3d ed. 1940)).
23. Id.
24. Id. at 67–73.
25. See supra notes 6–8 and accompanying text.
reclaim the right to confrontation as their own. Crawford held that "[w]here testimonial statements are involved," the Confrontation Clause does not "leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" Instead, the Clause imposes freestanding, "procedural" perquisites for testimonial evidence. Those prerequisites do not "evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." Nevertheless, the evidentiary approach to the right to confrontation persists. Evidence casebooks and treatises continue to devote large sections—usually entire chapters—to the right to confrontation. Evidence scholars continue to dominate symposia concerning the meaning and import of Crawford, the case is even described in the "Evidence Stories" instead of the "Criminal Procedure Stories" volume of Foundation Press’s series describing back stories of each field’s most influential cases. And courts continue to frame confrontation disputes fundamentally as issues concerning the admissibility of evidence. At the same time, criminal procedure casebooks continue, more often than not, to entirely omit the subject of confrontation from their pages. One leading

28. Id.
29. Id. at 56 n.7.
30. See supra note 9; see also ROGER C. PARK ET AL., EVIDENCE LAW: A STUDENT’S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS §§ 7.66--68, at 399--408 (2d ed. 2004); 5 JACk B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 802.05 (Joseph M. McLaughlin ed., 2d ed. 1998, rev. 2009).
casebook does this, in fact, while claiming that it "covers all problems of
criminal investigation and adjudication" and that it "gives special treatment to
some of the more active areas of criminal procedure in the past four years."{35}

Equally, if not more, troubling is how some current criminal procedure
casebooks that do mention the right to confrontation present the subject. One
casebook prefaches its excerpt from Crawford by stating that the case regulates
the prosecution's ability "to introduce [an unavailable] witness's prior state-
ments into evidence."{36} This is a distinctly evidence-based approach to confron-
tation. That is, it takes a hearsay declarant's absence as a given and frames the
"problem" at issue as whether the witness's out-of-court statements are admis-
sible.{37} Another casebook is even more explicit on this score, starting from the
proposition that "[f]or the most part, the law of evidence dictates when state-
ments made by unavailable witnesses will be admitted at trial."{38} It frames the
right to confrontation as merely adding a "constitutional component" to that law
when a defendant's accuser is not available to testify at trial.{39} Another case-
book simply reprints an excerpt from Crawford while failing to offer any
guidance respecting the role or importance of the right to confrontation.{40}

II. CONFRONTATION AS CRIMINAL PROCEDURE

Am I just being persnicketty here? Surely it is acceptable for evidence
professors to teach and write about confrontation. After all, that law is inter-
twined, even after Crawford, to some degree with the law of hearsay. For
example, Crawford itself reaffirms that the Confrontation Clause "does not bar
the use of testimonial statements [at trial] for purposes other than establishing
the truth of the matter asserted."{41} And both the right to confrontation and the
rule against hearsay are rooted in part in belief in the importance of cross-
examination.{42} So it would not be fair to suggest—and I do not—that the field
of evidence should abandon the Confrontation Clause.

Nor do I want to come down too hard on the passages in criminal procedure
casebooks that introduce (or fail to introduce) Crawford. Such passages are not
generally designed to define a subject or definitively to encapsulate its purpose.
Rather, introductory passages are typically meant merely to situate readers,
giving them some idea of how the material that follows fits into broader themes

{35} Saltzburg & Capra, supra note 34, at v (emphasis added).
{36} James B. Haddad et al., Criminal Procedure 1530 (7th ed. 2008).
{37} See id.
{38} Marc L. Miller & Ronald F. Wright, Criminal Procedures: Cases, Statutes, and
Executive Materials 1343 (3d ed. 2007).
{39} Id.
{40} Yale Kamisar et al., Modern Criminal Procedure: Cases, Comments and Questions
"not for truth exception" to Crawford, see generally Jeffrey L. Fisher, The Truth About
{42} Compare Crawford, 541 U.S. at 61 (Confrontation Clause commands that testimony be
"test[ed] in the crucible of cross-examination"), with Wigmore on Evidence, supra note 21. See
also California v. Green, 399 U.S. 149, 153 (1970) ("While it may be readily conceded that
hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is
quite a different thing to suggest that the overlap is complete . . . . ")
and problems in the book. But that orientating role of introductions brings me back to my point. If criminal procedure casebooks frame the right to confrontation as dealing with an essentially evidentiary question, then that is how readers are likely to perceive the right. And, of course, if criminal procedure casebooks omit the subject entirely, leaving it solely to the field of evidence, readers are sure to perceive the right to confrontation as an evidentiary subject.

I think that is a problem. A criminal procedure issue is different than an evidentiary issue. Criminal procedure issues involve, well, procedure. That is, they concern the means by which a criminal case should be investigated or prosecuted. In other words, criminal procedure involves how prosecutorial evidence should be created and presented, not simply whether evidence that already exists should be admissible. Thus, any application of a criminal procedure doctrine must start by identifying what procedure should (or should not) be followed; only after that ideal or prohibition is identified should a lawyer or court determine whether any evidence that exists must be excluded from trial to protect the integrity of the constitutionally dictated way of doing things.

In the realm of confrontation, the Sixth Amendment sets forth the basic condition the prosecution must follow in presenting its witnesses’ testimony: “[T]he accused shall enjoy the right ... to be confronted with the witnesses against him.” This means, generally speaking, that the prosecution must present its witnesses’ testimony under oath, face-to-face with the defendant, in the presence of the trier of fact, and subject to cross-examination. In order to protect the integrity of this confrontation requirement, the Clause must preclude the prosecution from introducing certain out-of-court statements. Specifically, where “testimonial” evidence is at issue, the Confrontation Clause forbids the prosecution from introducing the evidence against the defendant unless the witness is unavailable and the core requirement of confrontation has already been satisfied—that is, the defendant had a prior opportunity for cross-examination.

Put another way, Crawford operates as an exclusionary rule (a tool of criminal procedure) rather than an admissibility rule (a tool of evidence law). An exclusionary rule forbids the introduction of evidence when necessary to protect the integrity of a constitutionally prescribed process for collecting or

43. U.S. Const. amend. VI.
44. See Maryland v. Craig, 497 U.S. 836, 845–46 (1990). One criminal procedure casebook usefully frames the right to confrontation in its outline as the “right to require the state to produce witnesses at trial.” Joshua Dressler & George C. Thomas III, Criminal Procedure: Principles, Policies and Perspectives 1157 (3d ed. 2006). The casebook, however, does not elaborate on the import of this framing.
45. Crawford, 541 U.S. at 68.
46. The Court in Crawford’s sequel, Davis v. Washington, actually referred to the Confrontation Clause at one point as an “exclusionary rule.” 547 U.S. 813, 826 (2006). In addition, Robert Mosteller has written an article entitled Confrontation at Criminal Procedure: Crawford’s Birth Did Not Require That Roberts Had To Die, 13 J.L. & Pol’y 685 (2007). But this article, as the title suggests, focuses on nontestimonial statements and argues that it would be consistent with other criminal procedure doctrines to allow the Confrontation Clause to regulate out-of-court statements beyond its “core” concern for testimonial evidence. See id. at 701–12. I disagree. I think the key to defending Crawford’s exclusionary rule is that all of the statements it bars from trial impact the core of the confrontation right.
presenting evidence, while an admissibility rule prevents the introduction of evidence because of some inherent defect in the evidence itself. The Fifth Amendment’s Self-Incrimination Clause, universally viewed as a criminal procedure right, is a classic exclusionary rule. The Clause sets forth the conditions for presenting testimony from the accused. It excludes coerced or non-Mirandized statements because they threaten to undermine the concept that defendants may decide for themselves whether to testify in their own cases, not necessarily because such statements are inherently unreliable.

While the distinction between an exclusionary rule and an admissibility rule might seem clear enough in the context of the Fifth Amendment (or the Fourth Amendment), I understand that it appears quite subtle in the context of confrontation. The procedure that Crawford aims to protect—the ideal of live, face-to-face testimony subject to cross-examination—is itself to some degree derived from the perceived deficiency in a certain type of evidence. And, unlike the Fourth and Fifth Amendments’ exclusionary rules, the Confrontation Clause’s exclusionary rule has little to do with deterring police or prosecutorial misconduct. Nevertheless, there is a fundamental difference between asking whether introducing an out-of-court statement against the accused would unduly compromise the requirement that the government prosecute cases through live testimony, and simply making the evidentiary inquiry whether the statement is so reliable that cross-examination would be unlikely to bear fruit—or even asking the evidence-style question whether the statement so closely resembles in-court testimony that the statement should be inadmissible.

Take the current controversy over whether accusatory statements children make in “risk assessment interviews”—that is, interviews that social workers conduct (often at hospitals) to determine whether a child has been physically abused—are testimonial. One group of courts holds that such statements are testimonial because social workers conduct such interviews in large part to trigger or to aid police investigations and potential prosecutions. Another group of courts holds that such statements are nontestimonial because the primary purpose of the interviews is to secure child welfare and because the

---

47. Crawford, 541 U.S. at 49 ("Wwritten evidence . . . [is] almost useless; it must frequently be taken ex parte, and but very seldom leads to the proper discovery of truth." (quoting R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787)); id. at 61–62 (quoting William Blackstone and Sir Matthew Hale to the same effect).

48. See Davis, 547 U.S. at 832 n.6; Jeffrey L. Fisher, What Happened—and What is Happening—to the Confrontation Clause, 15 J.L. & Pol’y 587, 613–14 (2007). It might be said that the Confrontation Clause deter police and prosecutorial misconduct in the sense that it removes one possible incentive for manipulating or strong-arming witnesses into making extrajudicial statements that incriminate the accused. One might also argue that the Clause deters police and prosecutors from being derelict in their duty to make witnesses available for trial. See generally Motes v. United States, 178 U.S. 458 (1900). But the point remains that, generally speaking, police and prosecutors do nothing wrong by collecting out-of-court testimonial statements, and nothing about the Confrontation Clause is designed to deter such actions.

interviewers and interviewees do not intend to create evidence for trial. The reality, of course, is that risk assessment interviews serve both investigatory and social welfare purposes, and it is practically impossible to say which of these inextricably intertwined goals predominates.

Understanding Crawford as an exclusionary rule provides a way beyond this impasse. Instead of simply asking whether an interview resembles in-court testimony in terms of its appearance or the participants' motives, the exclusionary rule approach requires us to ask whether a criminal justice system in which the government is able to prosecute child abuse cases by means of introducing risk assessment interviews in place of victim testimony would be acceptable. Viewed through that lens, the interviews provide an uncomfortably accessible substitute for in-court testimony. They are conducted by trained professionals who are trying to determine whether activity that is criminal in nature has occurred. And in most if not all states, state law requires the interviewers to report accusations of abuse to the police. If the government could gather such statements and present them to the jury in place of live testimony, then the Confrontation Clause's requirement that accusers testify in court, face-to-face with the defendant and subject to cross-examination would be fatally undermined. Our system of live testimony could be replaced with a different system of creating testimony and delivering it to the jury.

Notwithstanding the prefatory assumption in evidence casebooks (and also in current criminal procedure casebooks) that confrontation issues arise only when a witness is unavailable to testify, it is critical to keep in mind that the Confrontation Clause permits the government to introduce nontestimonial hearsay even if a witness is available. Thus, in asking whether an out-of-court statement is testimonial, we must ask whether introducing that statement in lieu of an available witness's live testimony would undermine the defendant's right to a system of live testimony subject to cross-examination. Indeed, we must assume that if the type of extrajudicial statement is deemed nontestimonial, the prosecutors will irregularly use such statements at trial instead of putting available witnesses on the stand; they also likely will encourage the creation of such statements to any extent they can.

50. See Seely v. United States, 530 F.3d 1082, 1092 (8th Cir. 2008).
52. See supra notes 9, 36–40 and accompanying text.
53. See supra notes 9, 36–40 and accompanying text.
54. See supra notes 9, 36–40 and accompanying text.
55. As soon as Crawford was announced, for example, prosecutors began advising law enforcement agencies to "develop protocols for identifying and recording excited utterances" in "government-directed interview(s)." Wendy Murphy, New Strategies for Effective Child Abuse Prosecutions After Crawford, 23 A.B.A. J. 129, 131 (2004); see also Wendy N. Davis, Hearsay,
testimony is often easier to gather and, because it is ex parte, is more dependable. I do not mean by these observations to impugn the integrity of prosecutors; to the contrary, they should do everything they legitimately can to best present their cases. I simply mean to emphasize that the testimonial/nontestimonial distinction has systematic consequences that go far beyond the problem of unavailable witnesses.

This reality is also an essential overlay to Crawford's instructions to inquire whether a statement was produced "with an eye toward trial" or otherwise "to establish or prove past events potentially relevant to later criminal prosecution." The purpose of these inquiries is not so much to discern whether the participants in the interview or conversation at issue were thinking at that moment about a potential trial as it is to detect whether exempting this kind of statement from Crawford's exclusionary rule would allow the government systematically to use such ex parte statements as a substitute for live testimony at trial. While the government would never be able to create or depend on a system of trial by "casual remark to an acquaintance," or even to a family member, it could most certainly develop a system of trial by risk assessment interview. Such a system would defeat the Confrontation Clause's dictates of openness, direct observation of witnesses, and adversarial testing.

In short, courts applying Crawford must always bear in mind that the right to confrontation is an element of criminal procedure, governing how testimony against the accused shall be given. By focusing too myopically on the evidence-style question whether a particular out-of-court statement resembles in-court testimony (much less on the now-irrelevant question whether it is reliable), courts risk ignoring the Confrontation Clause's broader function: ensuring a criminal justice system in which the prosecution must prove its case through live witnesses, who testify before the trier of fact, face-to-face with the defendant, and subject to the crucible of cross-examination. Above all, the integrity of that procedure must be protected.

III. OTHER AREAS OF ENCRYPMENT

Although the threat to criminal procedure's dominion is probably the most acute with respect to the Confrontation Clause, other criminal procedure rights have been subject recently to encroachment from other fields. I will quickly discuss three such rights here: (1) the right to jury trial; (2) the right to counsel; and (3) the right to be free from unreasonable searches or seizures. As with the

Gone Tomorrow?, A.B.A. J., Sept. 2004, at 22, 24 (After Crawford was announced, prosecutors' offices "immediate[ly]") began "instructing officers to take notes of the victim's demeanor at the scene—such as 'she was screaming, she was crying'—to prove that the statement was an excited utterance and not the product of an interrogation."). Similarly, many states, such as Massachusetts, have developed a practice of introducing forensic reports in place of live testimony from lab analysts in order to "simplify proof." Commonwealth v. Johnson, 589 N.E.2d 328, 330 (Mass. App. Ct. 1992), by avoiding "the inconvenience of having the analyst called as a witness in each case." Commonwealth v. Verde, 827 N.E.2d 701, 704 n.1 (Mass. 2005). The Court is currently considering the constitutionality of that practice under Crawford in Melendez-Diaz v. Massachusetts, No. 07-591 (argued Nov. 10, 2008).
57. Davis, 547 U.S. at 822.
58. Crawford, 541 U.S. at 51.
right to confrontation, we must protect and nurture the criminal procedure conceptions of these rights.

A. THE RIGHT TO JURY TRIAL AS ADMINISTRATIVE LAW

Much attention has been paid to the Supreme Court’s recent reinvigoration of the Sixth Amendment right to jury trial in the context of sentencing guidelines, capital punishment, and other determinate sentencing systems. The way many commentators tell the story, the Court has decided to bring various procedural protections into the context of sentencing. That conception is basically right, but it fails to make explicit what the Court has done: the Court has reconceived the sentencing stage of criminal trials from a purely administrative process to one that is rightfully part of criminal procedure.

As Douglas Berman has explained, sentencing, until recently, was conceived procedurally as a form of administrative decisionmaking in which sentencing experts, aided by complete information about offenders, and possessing unfettered discretion, were expected to craft individualized sentences almost like a doctor or social worker exercising clinical judgment. Some criminal procedure casebooks ignored the subject—if not purposely leaving the matter to administrative law, then not deeming it part of criminal procedure either. Even after the federal government and many states adopted sentencing guidelines and other types of hierarchies with mitigating and aggravating factors aimed at restricting judicial discretion, the Supreme Court initially continued to view sentencing through an administrative lens. In the Court’s (as in Congress’s and state legislatures’) view, judges were better qualified than juries to sort relevant from irrelevant factors and to determine whether offenders were truly deserving of especially harsh punishment.

This purely administrative conception of sentencing—as Justice Scalia put it, this “bureaucratic realm of perfect equity”—overlooked the reality that sentencing is a part of criminal procedure. It culminates the government’s action of depriving a person of liberty. As such, a federal or state statute should not be able to avoid the protections of the Sixth Amendment (particularly the jury trial right) by labeling an important factual matter as a “sentencing enhancement” instead of an element of a crime, any more than it should be able to avoid the Confrontation Clause by declaring that a type of evidence falls within some hearsay exception.

62. See HALL ET AL., supra note 6, at 1135-41 (limiting its discussion of sentencing to states that provided for juries to select sentences).
63. See Berman, supra note 61, at 15-16.
64. See, e.g., Blakely, 542 U.S. at 346-47 (2004) (Breyer, J., dissenting) (explaining that the Federal Sentencing Guidelines are “highly complex” and “written for application by an experienced trial judge”); see also id. at 332-36 (elaborating on the concern over including the jury in the fact-finding process related to sentencing).
66. See supra notes 11-12 and accompanying text (describing the Confrontation Clause’s
The Court’s new rule that subjects any fact (other than a prior conviction) that exposes a defendant to increased punishment to the jury trial requirement can be seen as an effort at policing that potential for manipulation (whether intended or not) of the right to jury trial. The rule aims to give content to perhaps the most basic of all criminal procedure rights: the right to have the jury find all of the elements necessary to convict the defendant of the prosecution’s charges. If the government wishes to punish someone for murder instead of manslaughter, it must first persuade a jury that the defendant has malice aforethought; if it wishes to punish someone for armed robbery instead of robbery, it must first persuade a jury that the defendant used a gun in the crime. Once a jury makes such a finding, the judge acquires the authority to decide whether to impose such punishment. So, too, with any other aggravating fact that exposes a defendant to increased punishment. If the government wishes to punish someone for committing a crime in any unusually blameworthy way, it must prove it to a jury. No amount of administrative efficiency or expertise can justify denying the jury its integral role as a “gatekeeper” or “circuitbreaker” in the procedure the government must follow to deprive people of their liberty (and even sometimes their lives).

B. THE RIGHT TO COUNSEL AS GENERIC DUE PROCESS LAW

In a less dramatic holding a few Terms ago, the Supreme Court made clear that the right to select (nonappointed) counsel must also be treated as a criminal procedure right. In United States v. Gonzalez-Lopez, a trial court had refused, without legitimate justification, to allow the defendant to be represented by the counsel of his choice. The government urged the Court to hold—consistent with an earlier Seventh Circuit decision—that unjustified refusals to allow defendants to be represented by counsel of their choice do not violate the Sixth Amendment unless the defendants can show that their substitute counsel’s performances prejudiced them somehow. In other words, the government argued that defendants cannot make out a violation of their right to counsel of choice unless they can prove in general due process terms that they did not

67. Apprendi, 530 U.S. at 490 ("[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." (alteration in original) (quoting id. at 533 (Stevens, J., concurring))).
68. As Kate Stith has put it (in a criminal procedure volume no less!), "What Apprendi, Blakely, and Bowker I hold is that neither a state legislature nor Congress can achieve an end-run around the rights the Constitution guarantees [i]n all criminal prosecutions," in the words of the Sixth Amendment, by simply moving part of the 'prosecution' from the trial phase to the sentencing phase." Kate Stith, United States v. Mistretta: The Constitution and the Sentencing Guidelines, in CRIMINAL PROCEDURE STORIES 455, 487 (Carol S. Steiker ed., 2006).
69. See, e.g., United States v. Gaudin, 515 U.S. 506, 510–11 (1995) (recounting historical pedigree of "[t]he Constitution giving a criminal defendant the right to demand that a jury find him guilty of all of the elements of the crime with which he is charged").
74. See Rodriguez v. Chandler, 382 F.3d 670, 674 (7th Cir. 2004).
75. Gonzalez-Lopez, 548 U.S. at 144–45.
receive a fair trial.\footnote{76} Thankfully, the Court—albeit through a bare majority—rejected this argument. Explicitly analogizing to Crawford's overruling of the Roberts framework, the Court explained that "the Sixth Amendment right to counsel of choice . . . commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes is best."\footnote{77} Once a trial court denies this right, "no additional showing of prejudice is required to make the violation 'complete.'"\footnote{78}

The distinctive nature of criminal procedure is the key to this holding. Unlike the Due Process Clause, which applies equally across civil and criminal cases, the Sixth Amendment enumerates a handful of specific rules that must be followed in criminal cases. If courts are given the ability to excuse the government’s failures to abide by those specific requirements, the pressure of particular prosecutions is bound to result in a weakening of those requirements. The purpose of the Sixth Amendment is to remove the possibility of—the temptation toward—watering down such indispensable procedural rights.\footnote{79}

C. THE FOURTH AMENDMENT AS TORT LAW

Notwithstanding the Court’s appreciation of the necessity of protecting the integrity of specifically enumerated criminal procedure rights in the context of the Sixth Amendment rights discussed above, the Court took a step backwards this year with respect to the Fourth Amendment in Herring v. United States.\footnote{80} There, the Court ruled that police negligence that results in an unconstitutional arrest and search does not necessarily trigger the Fourth Amendment’s exclusionary rule.\footnote{81} The Court began by strangely emphasizing that the Fourth Amendment “contains no provision expressly precluding the use of evidence obtained in violation of its commands.”\footnote{82} (The same could be said, of course, of every provision of the Fifth and Sixth Amendments too.) “To trigger the exclusionary rule,” the Court then held for the first time, police conduct must be not simply unconstitutional but “sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system”—often, letting guilty defendants go free.\footnote{83}

\footnote{76} Id. at 145.
\footnote{77} Id. at 146.
\footnote{78} Id.
\footnote{79} See Crawford v. Washington, 541 U.S. 36, 67-68 (2004) (noting that the Sixth Amendment is intended to “secure[] . . . constraint on judicial discretion” and that “[b]y replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to [the Framers’] design”); Blakely v. Washington, 542 U.S. 296, 308 (2004) (“[T]he very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.”).
\footnote{80} 129 S. Ct. 695 (2009).
\footnote{81} Id. at 699 (quoting Arizona v. Evans, 514 U.S. 1, 10 (1995)).
\footnote{82} Id. at 702; see also id. at 701 (describing cost to judicial system). This latter requirement—that law enforcement be not just culpable, but “sufficiently” culpable, to warrant exclusion—is new. Each previous case in which the Court had declined to apply the exclusionary rule involved law enforcement conduct that either (1) was completely free of culpability, the errors being caused by judicial or legislative actors, see Evans, 514 U.S. 1, 4 (judicial clerk); Illinois v. Klug, 480 U.S. 440, 459-51 (1987) (legislature); United States v. Leon, 468 U.S. 897, 926 (1984) (magistrate);
This language of deterrence and culpability bespeaks of torts. More specifically, distinguishing ordinary negligence from recklessness and intentional misconduct, and targeting the latter on deterrence grounds, echoes the rhetoric of punitive damages. When defendants act merely negligently, tort law limits plaintiffs to recovering only compensatory damages. But plaintiffs may recover punitive damages (money over and above that necessary to make them whole) when defendants act recklessly or intentionally violate plaintiffs' rights. The *Herring* opinion similarly seems to treat exclusion of evidence as a windfall and to suggest that criminal defendants are entitled to outsized remedy only when they can prove that law enforcement acted more than negligently.

The Court would do well in future cases to pull back from this suggestion. In requiring something more than "merely" illegal conduct on the part of police in order to trigger the Fourth Amendment's exclusionary rule, the *Herring* Court ignored the criminal procedure underpinnings of the prohibition against warrantless or otherwise unreasonable searches and seizures. The Fourth Amendment does not require that law enforcement realize the wrongfulness of its actions. Rather, it simply requires the police to do things a certain way. Generally speaking, it requires officers to obtain valid warrants before arresting or searching people on suspicion of criminal conduct.

The right this constitutional provision afforded to defendants should not be subject to a variable remedy. As Justice Holmes wrote for a unanimous Court nearly a century ago, "the essence of a provision forbidding the acquisition of evidence in a certain way is that [if] evidence so acquired...shall not be used at all." So conceived, there is nothing radical about the Fourth Amendment's exclusionary rule. It does not deliver windfalls. It does not impose undue costs on society. It merely erases the governmental gains from "forbidden" behavior by returning the government to the position it occupied before it engaged in wrongful conduct. Anything less would not protect the integrity of the right to be free from unreasonable searches or seizures.

**Conclusion**

Each legal field brings a root policy perspective and set of organizing principles to the problems it addresses. Criminal procedure addresses the subject of the government bringing its power to bear against individuals and seeking to curtail their liberty (and, occasionally, to extinguish their lives). It regulates the way that the government may investigate cases and the methods by which the prosecution may prove them at trial. And because such cases present high stakes not just for defendants but often for society as well, criminal procedure enumerates a handful of specific rules that must always be respected, instead of simply ordaining broad standards and leaving the rest to prosecutors and courts.

---

84. See *Herring*, 129 S. Ct. at 703.
87. *Id.* at 391-92.

We reconceptualize these rules at our peril. Criminal procedure encapsulates a distinctive vision of fairness and justice—one uniquely sensitive to the cauldron of emotions that often envelopes investigations and prosecutions. Other fields of law no doubt have much to offer criminal procedure in doing its work. After all, no legal field operates in a vacuum or with an entirely distinct set of issues. But we must do everything we can to nourish publications like this, which attend to criminal procedure from the perspective of criminal procedure. While that notion might sound rather basic, recent history shows all too well that safeguards for the accused can morph into other types of less protective doctrines if not properly treated as part of this field of constitutional, procedural law.