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## Justice Kennedy's Sixth Amendment Pragmatism

Stephanos Bibas\*

### I. INTRODUCTION

In three separate areas of criminal procedure—sentence enhancements, the admissibility of hearsay, and the regulation of defense counsel's responsibilities—the Supreme Court has recognized major new pro-defendant doctrines in the new millennium. In each area, the Court has grounded its new doctrine in a different clause of the Sixth Amendment. And in each, Justice Scalia has forcefully advocated an originalist, formalist approach.

In contrast, Justice Kennedy has been a notable voice of pragmatism in these debates, focusing not on bygone analogies to the eighteenth century but on a hard-headed appreciation of the twenty-first. He has opposed the Court's radical overhaul of the Jury Trial Clause in the *Apprendi/Blakely* line of cases.<sup>1</sup> He joined the Court's new approach to the Confrontation Clause in *Crawford v. Washington*,<sup>2</sup> but has increasingly sought to rein in extensions of that approach.<sup>3</sup> And he has largely supported broader readings of the Assistance of Counsel Clause in defining defense counsel's duties to investigate and advise on collateral consequences and plea bargaining.<sup>4</sup> In each of these areas, Justice Kennedy has shown sensitivity to criminal practice today, prevailing professional norms, and practical constraints, as befits a Justice who came to the bench with many years of private-practice experience. While Justice Kennedy frequently votes with Justice Scalia in many other areas of criminal procedure, in interpreting the Sixth Amendment, his practical approach aligns him more closely with Justices Alito, Sotomayor, and especially Breyer. His touchstone is not a bright-line rule derived from history, but a flexible approach that is workable today. Notwithstanding the press's assumptions about him as a swing Justice,<sup>5</sup> his approach is remarkably consistent and principled.

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1. *Blakely v. Washington*, 542 U.S. 296, 326–28 (2004) (Kennedy, J., dissenting); *Apprendi v. New Jersey*, 530 U.S. 466, 523–54 (2000) (O'Connor, J., joined by Rehnquist, C.J. and Kennedy & Breyer, JJ., dissenting).

2. 541 U.S. 36 (2004).

3. See, e.g., *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2726 (2011) (Kennedy, J., dissenting) (explaining *Crawford's* rationale); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 (2009).

4. See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

5. See, e.g., Adam Liptak, *Justices Facing Weighty Ruling and New Dynamic*, N.Y. TIMES, Sept. 30,

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This symposium Article unfolds in four parts, each of which explores one important theme of Justice Kennedy's Sixth Amendment jurisprudence. Part II explores the role that history plays in his opinions. Justice Kennedy is a moderate originalist, looking to history where it works but adapting it to modern realities, especially to new circumstances and new problems. Part III focuses on his common-law incrementalism and flexibility, in contrast to some other Justices' rigid formalism. Part IV explains Justice Kennedy's structural approach to the Constitution as fostering dialogue among branches and levels of government. He emphasizes federalism and checks and balances, not a strict separation of powers. Part V then underscores the importance of practicality and common sense in leavening theoretical abstractions. He looks closely at the purposes of laws, their effects, the lessons of expertise, and the existence of alternative solutions. This Article concludes that, in interpreting the Sixth Amendment, Justice Kennedy is fundamentally a practical lawyer, applying the humble wisdom born of experience rather than the rigid extremes that flow from a quest for theoretical purity.

## II. JUDICIOUS USE OF HISTORY

Justice Kennedy understands that history is a useful tool but not an omnipotent one. His Sixth Amendment jurisprudence is one of moderate originalism where it works. He looks to history as a practical lawyer, valuing it as a guide to the contours and limits of a given principle. He credits history most where its lessons still carry weight today. His measured approach to the Confrontation Clause bespeaks his concerns for both history and practicality. But often there is no relevant history, and Justice Kennedy rightly resists extending historical rules far beyond their historical foundations. Finally, Justice Kennedy repeatedly acknowledges and grapples with new problems, instead of hypothesizing faux-historical answers to them. History, he sees, does not provide neat, repackaged answers to all modern questions.

### *A. Moderate Originalism*

Justice Kennedy respects the historical backdrop against which the Framers drafted and the United States adopted the Sixth Amendment. He joined Justice Scalia's majority opinion in *Crawford*, which swept away a muddled balancing test for Confrontation Clause violations.<sup>6</sup> The primary pillar of *Crawford*'s reasoning was historical.<sup>7</sup> The Sixth Amendment grew out of a reaction to the trial of Sir Walter Raleigh and the Crown's substitution of ex parte interrogations

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2012, at A1.

6. *Crawford*, 541 U.S. at 60–69 (overruling in relevant part *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), which had authorized admission of out-of-court statements by unavailable declarants where the statements “fall within a firmly rooted hearsay exception” or bear “particularized guarantees of trustworthiness”).

7. *See id.* at 43–56.

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for live testimony and cross-examination.<sup>8</sup> Trials at common law, unlike Continental civil-law systems, depended on live confrontation in open court, so that the jury could decide the witness's credibility for itself.<sup>9</sup>

This historical account rests on a powerful functional insight: when judges admit the fruit of out-of-court interrogations, they substitute their own judgments of reliability for those of the jury.<sup>10</sup> *Crawford* also works as a best-evidence rule, preventing the government from engineering abusive interrogations to substitute for live testimony and cross-examination.<sup>11</sup> And, as the majority opinion stressed, the “malleable [reliability] standard” had become “unpredictable [and] amorphous, if not entirely subjective.”<sup>12</sup> It produced inconsistent and contradictory outcomes and so offered little safeguard against clear violations of the Confrontation Clause.<sup>13</sup> Given the inconsistency, the older balancing-test approach merited little deference under *stare decisis* and required an overhaul.<sup>14</sup> Thus, originalist and practical considerations dovetailed in *Crawford*, illustrating how originalism can lead to consistent, practical results.

*B. The Absence of Relevant History*

Faithfulness to history, however, requires appreciating the practical differences between the present and the past. Justice Kennedy dissented from Justice Scalia's majority opinion extending *Crawford* to govern laboratory analysts' reports.<sup>15</sup> In doing so, Justice Kennedy highlighted that the Court was not interpreting the historical Confrontation Clause, but “expand[ing]” it by applying it to laboratory analysts.<sup>16</sup> He understands that past historical episodes cannot be stretched to answer every present problem.

Fidelity to history also requires acknowledging history's limits. There may be no history relevant to a particular issue, or there may be competing historical analogues. Justice Kennedy sees that lab reports are a new, twentieth-century phenomenon. If there were any historical analogue, he argued, it was a document custodian's authentication of a copy, which historically was admissible without live testimony.<sup>17</sup> He has also noted that laboratory tests and reports in no way

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8. *Id.*

9. *Id.* at 43.

10. *See id.* at 56 (“[Historical sources] suggest that [cross-examination] was dispositive, and not merely one of several ways to establish reliability.”).

11. *See Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2726 (2011) (Kennedy, J., dissenting) (explaining *Crawford*'s rationale).

12. *Crawford*, 541 U.S. at 60, 63.

13. *Id.* at 63–64.

14. *Id.* at 68.

15. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 330–63 (2009) (Kennedy, J., dissenting).

16. *Id.* at 345.

17. *Id.* at 356–57.

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resemble the systematic, extrajudicial examinations that sent Sir Walter Raleigh to his death<sup>18</sup> based on “unreliable, untested statements.”<sup>19</sup>

History's limitations similarly hold true in the *Apprendi* line of cases, which extended the Jury Trial Clause to guarantee that juries find facts that raise maximum sentences.<sup>20</sup> Writing for the Court, Justice Kennedy limited *Apprendi*'s rule to facts that raise maximum, not minimum, sentences.<sup>21</sup> A key link in his reasoning was that while facts that raised maximum sentences were historically viewed as elements to be found by juries, there was no such historical practice for facts that triggered minimum sentences.<sup>22</sup>

#### C. Acknowledging New Problems

Finally, Justice Kennedy candidly recognizes new problems that one cannot resolve by mechanically applying originalism. The drafters of the Confrontation Clause could not have foreseen the new challenges posed by lab analysts' reports, as Justice Kennedy twice stressed in dissent.<sup>23</sup> In sharp contrast, Justice Scalia's majority opinion analogized laboratory reports to the accusations introduced against Sir Walter Raleigh, brushing aside Justice Kennedy's distinctions between historical fact witnesses and scientific expert witnesses.<sup>24</sup>

The drafters of the Jury Trial Clause, who knew nothing of modern sentencing hearings, could not have addressed mandatory minimum sentences or structured sentencing guidelines, as Justice Kennedy suggested in his *Harris* majority opinion and *Blakely* dissent.<sup>25</sup> In contrast, Justice Scalia's majority opinion in *Blakely* cited “the control that the Framers intended” juries to have over sentencing without acknowledging the novelty of sentencing hearings and guidelines.<sup>26</sup>

Most strikingly, the drafters of the Assistance of Counsel Clause lived in a world without plea bargains. They could not have foreseen that public prosecutors and defense counsel would come to dominate the criminal process

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18. *Id.* at 344–47.

19. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2726 (2011) (Kennedy, J., dissenting).

20. *See Apprendi v. New Jersey*, 530 U.S. 466, 497 (2000).

21. *Harris v. United States*, 536 U.S. 545, 568–69 (2002). *Apprendi*'s historical assertions were themselves on shaky historical ground, as Justice Kennedy noted in joining Justice O'Connor's dissent. *See Apprendi*, 530 U.S. at 525–29 (O'Connor, J., joined by Rehnquist, C.J. and Kennedy & Breyer, JJ., dissenting); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1123–32 (2001) [hereafter Bibas, *Judicial Fact-Finding*]; Jonathan Mitchell, *Apprendi's Domain*, 2006 SUP. CT. REV. 297, 330–42 (2006).

22. *Harris*, 536 U.S. at 560–61.

23. *Melendez-Diaz*, 557 U.S. 345–47 (Kennedy, J., dissenting); *Bullcoming*, 131 S. Ct. at 2726–27 (Kennedy, J., dissenting).

24. *Melendez-Diaz*, 557 U.S. at 315–17.

25. *See Blakely v. Washington*, 542 U.S. 296, 323 (2004) (O'Connor, J., joined by Rehnquist, C.J., and Kennedy & Breyer, JJ., dissenting); *id.* at 328 (Kennedy, J., dissenting); *Harris*, 536 U.S. at 560–61.

26. *Blakely*, 542 U.S. at 306.

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and dispose of ninety-five percent of criminal cases through plea bargaining.<sup>27</sup> In response, Justice Scalia lamented plea bargaining as a “necessary evil” and would have confined defense counsel’s responsibility to criminal trials and sentences.<sup>28</sup> Justice Kennedy, in stark contrast, recognized the right to effective counsel during plea bargaining precisely because plea bargaining has become the landscape of modern criminal justice:

The State’s contentions [that the Constitution guarantees only a full and fair trial] are neither illogical nor without some persuasive force, yet they do not suffice to overcome a simple reality. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours “is for the most part a system of pleas, not a system of trials,” it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. “To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.” In today’s criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.<sup>29</sup>

For the same reason, Justice Kennedy joined Justice Stevens’ majority opinion in *Padilla v. Kentucky*, recognizing the right to effective advice about the possible consequence of deportation.<sup>30</sup> *Padilla* rightly noted that plea bargains resolve most criminal cases and that defendants need their lawyers’ help to weigh their pros and cons.<sup>31</sup> And, dissenting in *Melendez-Diaz v. Massachusetts*, Justice Kennedy pointed out that extending *Crawford* would mean giving defendants a new plea-bargaining chip that would usually result in lower sentences instead of vigorous cross-examination at trial.<sup>32</sup>

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27. See generally STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 3–6, 15–20 (2012).

28. *Lafler v. Cooper*, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting); see also *Padilla v. Kentucky*, 130 S. Ct. 1473, 1494–96 (2010) (Scalia, J., dissenting).

29. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (Kennedy, J., majority opinion) (alterations in original) (citations omitted) (quoting *Lafler*, 132 S. Ct. at 1388 and Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

30. 130 S. Ct. at 1486.

31. See *id.* at 1484–86.

32. 557 U.S. 305, 354–55 (2009) (Kennedy, J., dissenting).

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III. COMMON-LAW INCREMENTALISM AND FLEXIBILITY

A second notable feature of Justice Kennedy's Sixth Amendment jurisprudence is his common-law sensibility. That sense is manifest in his respect for settled practices and precedents. It also appears in his humility and concern for the disruptive effect of new decisions. And it leads him to favor flexibility and incrementalism and eschew rigid formalism.

A. *Concern for Settled Practice and Precedent*

Throughout his Sixth Amendment opinions, Justice Kennedy has repeatedly adverted to how actors in the criminal justice system in fact do their jobs. His Confrontation Clause dissents have explored how lab analysts receive and test various specimens, interpret results, prepare reports, establish chains of custody, and testify by reading their notes.<sup>33</sup> His opinions endorsing sentence enhancements consistently canvas a range of state sentencing practices.<sup>34</sup> And, in recognizing a right to effective counsel during plea bargaining, he noted that its contours would be guided by ABA and state performance standards adopted over the past three decades.<sup>35</sup>

Justice Kennedy's concern likewise extends to settled precedent. Stare decisis is an important safeguard of tradition and predictability. Thus, Justice Kennedy has emphasized how the *Apprendi* line of cases represents a break with practice and precedent.<sup>36</sup> In dissent, he noted that the majority's hostility to judicial sentence enhancements was at odds with the Court's earlier decisions upholding judicial consideration of recidivism and judicial capital sentencing.<sup>37</sup> And, writing for the Court, he limited *Apprendi*'s reach by reaffirming the Court's precedent authorizing judges to find facts that trigger minimum sentences.<sup>38</sup> Justice Kennedy's respect for precedent has led him to acquiesce in precedent with which he originally disagreed.<sup>39</sup> Thus, as just noted, in dissent he feared that an expansive reading of the Sixth Amendment would imperil judicial

33. *Id.* at 330–47; *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2723–27 (2011).

34. *See* *Cunningham v. California*, 549 U.S. 270, 295–97 (2007) (Kennedy, J., dissenting) (addressing California's distinction between offense-based and offender-based sentence enhancements); *Harris v. United States*, 536 U.S. 545, 559–60, 567–68 (2002) (Kennedy, J., majority opinion) (canvassing federal and state statutes authorizing mandatory minimum sentences triggered by various sentencing factors and the absence of any settled practice to the contrary); *Jones v. United States*, 526 U.S. 227, 257 (1999) (Kennedy, J., dissenting) (noting that “common [state] practice discloses widespread reliance on victim-impact factors for sentencing purposes”); *see also* *Blakely v. Washington*, 542 U.S. 296, 326–28 (2004) (Kennedy, J., dissenting).

35. *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (Kennedy, J., majority opinion).

36. *See, e.g., Jones*, 526 U.S. at 270–72 (Kennedy, J., dissenting).

37. *See id.* (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 246 (1998) and *Walton v. Arizona*, 497 U.S. 639, 648 (1990), *overruled by* *Ring v. Arizona*, 536 U.S. 584, 589 (2002)).

38. *Harris*, 536 U.S. at 556–68 (reaffirming *McMillan v. Pennsylvania*, 477 U.S. 79, 87–90 (1986)).

39. *Compare Jones*, 526 U.S. at 270–72 (Kennedy, J., dissenting), *with Ring*, 536 U.S. at 589 (Ginsburg, J., majority opinion, joined by Stevens, Scalia, Kennedy, Souter & Thomas, JJ.).

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capital sentencing.<sup>40</sup> Nevertheless, once the Court embraced that reading in *Apprendi*, he bowed to that precedent, joining the majority's application of *Apprendi* to judicial capital sentencing.<sup>41</sup>

Justice Kennedy's respect for precedent carries over to the Confrontation and Assistance of Counsel Clauses as well. He has twice emphasized that extending *Crawford* to lab analysts would overturn ninety years of contrary precedent from thirty-five states and six federal circuits.<sup>42</sup> And in opposing the constitutionalization of what documents a defense lawyer must review before trial, Justice Kennedy criticized the majority's approach as "a radical departure from *Strickland* and its progeny."<sup>43</sup> His more innovative Sixth Amendment rulings have come on issues not governed by binding precedent, where he has addressed new questions about defense counsel's responsibilities in plea bargaining.<sup>44</sup>

### B. Humility and Disruption

In interpreting the various clauses of the Sixth Amendment, Justice Kennedy has called upon his colleagues to remain humble and aware of their own limitations. Dissenting in the precursor to *Apprendi*, he criticized the majority for needlessly reaching out in a routine statutory-construction case to flag constitutional questions and reopen settled issues.<sup>45</sup> In one of his Confrontation Clause dissents, he assailed how "confidently" the majority "disregard[ed] a century of jurisprudence."<sup>46</sup> In another Confrontation Clause dissent, he underscored the Court's own institutional limitations. As he put it, "this Court lacks the experience and day-to-day familiarity with the trial process to suit it well to assume the role of national tribunal for rules of evidence."<sup>47</sup> That institutional humility is the flip side of relying on precedents and standards previously generated by state and federal legislatures, lower courts, and bar authorities.

Just as he hesitates to overturn precedents and legislation, Justice Kennedy is cautious about intruding upon lawyers' considered judgments.<sup>48</sup> Courts must hesitate, he argues, to "restrict the wide latitude counsel must have in making

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40. See *Jones*, 526 U.S. at 270–72.

41. *Ring*, 536 U.S. at 589 (Ginsburg, J., majority opinion, joined by Stevens, Scalia, Kennedy, Souter & Thomas, JJ.) (overruling *Walton*, 497 U.S. 639, in part).

42. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 330, 349–52 (2009) (Kennedy, J., dissenting).

43. *Rompilla v. Beard*, 545 U.S. 374, 399 (2005) (Kennedy, J., dissenting).

44. See *Missouri v. Frye*, 132 S. Ct. 1399 (2012) (Kennedy, J., majority opinion); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) (Kennedy, J., majority opinion); *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (Stevens, J., joined by Kennedy, Ginsburg, Breyer & Sotomayor, JJ., majority opinion).

45. *Jones*, 526 U.S. at 254, 265–68, 270 (Kennedy, J., dissenting).

46. *Melendez-Diaz*, 557 U.S. at 330 (Kennedy, J., dissenting).

47. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2727 (2011) (Kennedy, J., dissenting).

48. See *Rompilla*, 545 U.S. at 400–03 (Kennedy, J., dissenting).

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tactical decisions,” so defense counsel can triage their limited resources.<sup>49</sup> Most notably, in interpreting effective assistance of counsel, his opinion for the Court took the Ninth Circuit to task for “accord[ing] scant deference to counsel’s judgment.”<sup>50</sup> “Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks.”<sup>51</sup> Appellate review must guard against hindsight bias, lack of familiarity with the particular prosecutor and judge, and lack of a trial record.<sup>52</sup> Thus, he reasoned, “judicial caution” is “imperative” and habeas courts’ role is limited to policing “manifest deficiency” by defense counsel.<sup>53</sup>

Judicial intervention, he stresses, often comes at the high cost of disrupting expectations and finality as well as settled practices.<sup>54</sup> The majority’s expansion of the Confrontation Clause imposes an “as-yet-undefined set of rules,” leaving states to “guess what future rules this Court will distill from the sparse constitutional text.”<sup>55</sup> He has also emphasized that a broad reading of *Apprendi* would disrupt expectations and cast doubt on settled practices as well as already-final sentences.<sup>56</sup> “We are left to guess whether [various sentence-enhancement statutes] might be in jeopardy,” because the precursor to *Apprendi* “raises more questions than the Court acknowledges.”<sup>57</sup>

#### C. For Flexibility, Against Rigidity and Formalism

The common-law method calls for flexibility and experimentation. Thus, in the *Apprendi* line of cases, Justice Kennedy has strongly favored leaving legislatures and sentencing commissions the flexibility to experiment with a range of solutions to modern sentencing problems.<sup>58</sup> He favors “[c]ase-by-case judicial [sentencing] determinations” that legislatures can then distill and codify, followed by further “incremental judicial interpretation” that embodies common-law flexibility and caution.<sup>59</sup> And he has opposed adopting any “particular set of detailed rules” governing defense attorneys’ duty to review particular records, as

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49. *Id.* at 400.

50. *Premo v. Moore*, 131 S. Ct. 733, 740 (2011).

51. *Id.* at 741.

52. *See id.* at 741–42.

53. *Id.* at 741.

54. *See id.*

55. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 331 (2009) (Kennedy, J., dissenting); *accord* *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2727 (2011) (Kennedy, J., dissenting).

56. *Cunningham v. California*, 549 U.S. 270, 296 (2007) (Kennedy, J., dissenting); *Harris v. United States*, 536 U.S. 545, 568 (2002) (Kennedy, J., majority opinion); *Jones v. United States*, 526 U.S. 227, 254, 271 (1999) (Kennedy, J., dissenting).

57. *Jones*, 526 U.S. at 268 (Kennedy, J., dissenting).

58. *See Cunningham*, 549 U.S. at 295–96 (Kennedy, J., dissenting); *Blakely v. Washington*, 542 U.S. 296, 326–27 (2004) (Kennedy, J., dissenting).

59. *Blakely*, 542 U.S. at 326–27 (Kennedy, J., dissenting).

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counsel need “independence” and “wide latitude . . . in making tactical decisions.”<sup>60</sup>

The flip side of Justice Kennedy’s support for flexibility is his opposition to rigidity and formalism. He opposed “a *per se* rule requiring counsel in every case to review the records of prior convictions” as a “rigid requirement” and a “radical departure” from precedent.<sup>61</sup> His dissents frequently criticize the majority’s “wooden formalism,”<sup>62</sup> its “formalistic and wooden rules,”<sup>63</sup> and its “wooden, unyielding insistence” on extending *Apprendi*.<sup>64</sup> Formalism is not just wooden, but iron: “The iron logic of which the Court is so enamored would seem to require in-court testimony from each human link in the chain of custody.”<sup>65</sup> Other jurists might embrace “iron logic” as an aspiration or compliment, but to Justice Kennedy, it is a cold, inhuman epithet.<sup>66</sup>

Formalism’s basic problem, Justice Kennedy sees, is that it reifies and freezes rules, heedless of their costs or the underlying values served. Thus, he has been one of the staunchest opponents of the *Apprendi* line of cases, which adopted a formalistic but easy-to-evade rule against letting judges find facts triggering sentence enhancements.<sup>67</sup> As he observed in dissent, “[n]o constitutional values are served by so formalistic an approach, while its constitutional costs in statutes struck down . . . are real.”<sup>68</sup> One would imagine that formalism would at least make the law easier to predict. But when formalistic rules are “divorced from any guidance from history, precedent, or common sense,” one can only guess how far the Court will take them, so they do not even guarantee predictability.<sup>69</sup>

## IV. FOSTERING EXPERIMENTATION AND DIALOGUE

Flexibility and incremental improvements go hand-in-hand with experimentation and dialogue. As Justice Kennedy understands, a range of legal actors need freedom to experiment and improve rules over time. Thus, at the national level, he emphasizes the need for checks and balances, rather than a strict separation of powers, to foster interbranch dialogue. That same vision

60. *Rompilla v. Beard*, 545 U.S. 374, 399–400 (2005) (Kennedy, J., dissenting) (quoting *Strickland v. Washington*, 466 U.S. 668, 688–89 (1984)) (internal quotation marks omitted).

61. *Id.* at 399–400; *accord id.* at 400, 404 (criticizing “a rigid, *per se* obligation that binds counsel in every case and finds little support in our precedents” as little different from “a bright-line rule” and a “rigid requirement[ ]”).

62. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2727 (2011) (Kennedy, J., dissenting).

63. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 330 (2009) (Kennedy, J., dissenting).

64. *Cunningham v. California*, 549 U.S. 270, 295 (2007) (Kennedy, J., dissenting).

65. *Melendez-Diaz*, 557 U.S. at 336 (Kennedy, J., dissenting).

66. *See id.*

67. *See Blakely v. Washington*, 542 U.S. 296, 326–28 (2004) (Kennedy, J., dissenting); *Apprendi v. New Jersey*, 530 U.S. 466, 523–54 (2000) (O’Connor, J., joined by Rehnquist, C.J. and Kennedy & Breyer, JJ., dissenting).

68. *Jones v. United States*, 526 U.S. 227, 267 (1999) (Kennedy, J., dissenting).

69. *Melendez-Diaz*, 557 U.S. at 337 (Kennedy, J., dissenting).

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applies to the states, as federalism allows each state to innovate and serve as a laboratory of experimentation. Thus, he opposes Sixth Amendment formalism in large part because it would shut down various branches' and states' fruitful interplay.

#### A. *At the National Level: Checks and Balances*

In interpreting the Sixth Amendment, Justice Kennedy insists that judges must not usurp legislatures' leading role. In opposing the *Apprendi* doctrine, he has stressed that legislatures, not courts, enjoy the constitutional prerogative to define crimes.<sup>70</sup> Courts should not micromanage how legislators do their jobs by, for example, "chastising Congress for failing to use the approved phrasing."<sup>71</sup> Legislatures may entrust sentencing judges with finding a wide range of sentencing factors. Though *Apprendi* "set[s] the outer limits of a sentence" by defining a crime's elements, within the sentencing range "the political system may channel judicial discretion—and rely upon judicial expertise."<sup>72</sup> Legislators and voters have relied upon this flexibility, so courts should hesitate to unsettle this practice.<sup>73</sup> Though Justice Kennedy has spoken out against mandatory minimum sentences as "unwise,"<sup>74</sup> he has pointedly declined to write that policy view into the Constitution. After acknowledging criticisms of mandatory minima, his opinion for the Court held that the Constitution permits judicial findings to trigger them, "leav[ing] the other questions to Congress, the States, and the democratic processes."<sup>75</sup>

Deference to legislatures promotes interbranch dialogue: an ongoing conversation among legislatures, courts, and other actors. Though he joined the principal dissent in *Blakely*, Justice Kennedy also dissented separately to underscore how the majority's rule thwarted that dialogue.<sup>76</sup> He stressed the "fundamental principle under our constitutional system that different branches of government 'converse with each other . . . .'"<sup>77</sup> Quoting Justice Jackson's separation-of-powers analysis in the *Steel Seizure Case*, Justice Kennedy emphasized that the Constitution structures branches that are interdependent, not just insulated.<sup>78</sup> Legislatures and judges should constantly cooperate, as legislatures codify patterns of individual adjudications, judges in turn interpret

70. See *Jones*, 526 U.S. at 270 (Kennedy, J., dissenting).

71. *Id.* at 267.

72. *Harris v. United States*, 536 U.S. 545, 567 (2002) (Kennedy, J., majority opinion).

73. *Id.* at 567–68.

74. Anthony M. Kennedy, Assoc. Justice, U.S. Sup. Ct., Speech at the American Bar Association Annual Meeting 4 (Aug. 9, 2003) (transcript on file with the *McGeorge Law Review*).

75. *Harris*, 536 U.S. at 568–69.

76. See *Blakely v. Washington*, 542 U.S. 296, 326–28 (2004) (Kennedy, J., dissenting).

77. *Id.* at 326 (quoting *Mistretta v. United States*, 488 U.S. 361, 408 (1989)).

78. *Id.* (quoting *Mistretta*, 488 U.S. at 381 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring))).

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and refine legislation, and so on.<sup>79</sup> “Sentencing guidelines are a prime example of this collaborative process,” which “is basic constitutional theory in action.”<sup>80</sup>

Collaboration is not only intrinsically valuable as part of the democratic process, but it also helps the law to grow. As Justice Kennedy put it in his *Blakely* dissent, “[t]his recurring dialogue . . . [is] an essential source for the elaboration and the evolution of the law.”<sup>81</sup> Judges, probation officers, and legislatures must cooperate on an ongoing basis to improve structured sentencing.<sup>82</sup>

One of Justice Kennedy’s key insights is that different actors have different strengths. As a former litigator, he has great respect for jury service. Thus, in a jury-selection case, he objected that race-based peremptory challenges violate jurors’ right to serve and participate in administering the law.<sup>83</sup> But jurors’ short-term service is both a strength and a weakness. Because individual jurors serve for only short periods, they lack the breadth, expertise, commitment, and ability to develop standards over time.<sup>84</sup> Other criminal justice actors compensate for those deficiencies. Judges, probation officers, and prison officials have the broad, long-term, professional outlook needed to develop sentencing standards. These professionals must work together, engaging in ongoing conversations about sentencing reform under the direction and oversight of legislatures.<sup>85</sup> Legislatures should remain free to draw upon both their own “collective wisdom” and judicial expertise while simultaneously channeling and limiting judicial discretion, instead of having to delegate everything or nothing to judges.<sup>86</sup> A rope is much stronger when it comprises many different strands; none of the rope’s strands runs the whole length, but each contributes a distinctive strength to the whole.

*B. In the States: Federalism and Experimentation*

The same logic calls for even greater deference to state criminal-justice practices. Invoking Justice Brandeis’s famous metaphor, Justice Kennedy explained that states have an interest in “serv[ing] as laboratories for innovation and experiment.”<sup>87</sup> By stark contrast, the Court in *Blakely* destroyed democratic legislatures’ reforms, rejecting “the accumulated wisdom and experience of the

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79. *Id.* at 326–27.

80. *Id.* at 327.

81. *Id.*

82. *See* *Cunningham v. California*, 549 U.S. 270, 295–97 (2007) (Kennedy, J., dissenting).

83. *Powers v. Ohio*, 499 U.S. 400, 406–10 (1991).

84. *See* *Cunningham*, 549 U.S. at 295–97 (Kennedy, J., dissenting).

85. *See id.*

86. *See* *Blakely v. Washington*, 542 U.S. 296, 327 (2004) (Kennedy, J., dissenting); *Harris v. United States*, 536 U.S. 545, 559, 567 (2002) (Kennedy, J., majority opinion).

87. *Blakely*, 542 U.S. at 327 (Kennedy, J., dissenting) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

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Judicial Branch,” and ordered states to discard the ideas, experience, and reforms they had carefully developed.<sup>88</sup>

Deference to states also undergirds Justice Kennedy's Confrontation Clause dissents. He objected that “[t]he Court dictates to the States, as a matter of constitutional law, an as-yet-undefined set of rules” without offering much guidance, leaving states to guess what future mandates lie in store.<sup>89</sup> States need flexibility to develop the rules of evidence as they assess new scientific tests and pressing problems such as statements by battered women who are later killed by their abusers.<sup>90</sup> Yet the Court's Sixth Amendment formalism has frozen in place the rigid, primitive slogans of colonial hearsay law, hobbling state reforms.<sup>91</sup>

In contrast, when states have already converged on a particular solution, Justice Kennedy is more comfortable drawing upon it as the fruit of collective experience. Thus, in recognizing a right to effective counsel during plea bargaining, he specifically noted that state and federal bar associations and courts had already specified defense attorneys' plea-bargaining obligations.<sup>92</sup> Likewise, Justice Kennedy joined the majority opinion in *Padilla*, which emphasized “[t]he weight of prevailing professional norms,” both federal and state, that require defense lawyers to warn non-citizens of the risk of deportation.<sup>93</sup>

## V. PRACTICALITY AND COMMON SENSE

As befits a practical lawyer's approach, Justice Kennedy's Sixth Amendment jurisprudence is not abstract and rigid, but rather practical and common-sensical. He frequently adverts to the point or purpose of a particular law or clause, declining to extend meaningless formalism for formalism's sake.<sup>94</sup> He also defers to the reasonable professional judgments and expertise of judges, legislatures, and other sentencing professionals—not just juries.<sup>95</sup> He is sensitive to the limited time, money, and resources that require these professionals to perform triage and make delicate tactical tradeoffs.<sup>96</sup> He cares a great deal about the practical effects of various rulings, especially those that confer windfalls or impose pointless

88. *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 412 (1989)) (internal quotation marks omitted).

89. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 331 (2009) (Kennedy, J., dissenting).

90. *See Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2725, 2727 (2011) (Kennedy, J., dissenting).

91. *Id.* at 2727 (citing David A. Sklansky, *Hearsay's Last Hurrah*, 2009 S. CT. REV. 1, 5–6, 36).

92. *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (Kennedy, J., majority opinion).

93. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010).

94. *See, e.g., Bullcoming*, 131 S. Ct. at 2726 (Kennedy, J., dissenting) (discussing the purpose of the Confrontation Clause).

95. *See, e.g., Premo v. Moore*, 131 S. Ct. 733, 741–43 (2011) (Kennedy, J., majority opinion) (showing deference to attorneys weighing the pros and cons of plea bargains).

96. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 403 (2005) (Kennedy, J., dissenting) (rejecting a requirement that defense attorneys read each document in connection with a defendant's prior convictions).

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costs.<sup>97</sup> Finally, he repeatedly discusses alternative remedies to minimize the costs and disruption caused by new rulings.<sup>98</sup>

*A. The Relevance of Purpose*

Justice Kennedy's touchstone is the purpose served by a particular clause. His Confrontation Clause dissents have repeatedly sought to limit *Crawford* to cases where the government is effectively substituting out-of-court interrogation for in-court confrontation.<sup>99</sup> Confrontation of fact witnesses serves both to impress upon them the gravity of their testimony and to limit the influence of ex parte government interrogations. In open court, witnesses may refine or recant their accounts, and they are free of the one-sided pressures of the interrogation room.<sup>100</sup> But "[i]t is difficult to perceive how the Court's holding [applying *Crawford* to lab analysts' reports] will advance the purposes of the Confrontation Clause."<sup>101</sup> As a practical matter, lab analysts differ from fact witnesses in multiple ways. They report near-contemporaneous observations of tests, observe neither the defendant nor the crime, and respond to scientific protocols rather than interrogation.<sup>102</sup> Challenges to their testimony usually turn not on credibility, perception, or bias, but on methodology and chain of custody, facts that can easily be challenged in other ways. "The Confrontation Clause is simply not needed for these matters. Where, as here, the defendant does not even dispute the accuracy of the analyst's work, confrontation adds nothing."<sup>103</sup>

Justice Kennedy's focus on purpose extends to guaranteeing effective counsel as well. In dissent, he opposed a bright-line requirement that defense lawyers review the entire case file of all prior convictions.<sup>104</sup> Investigation is good, but it is a means to an end: "[E]ach new requirement risks distracting attorneys from the real objective of providing vigorous advocacy as dictated by the facts and circumstances in the particular case."<sup>105</sup> Defense attorneys must exercise independent tactical judgment in pursuing that goal in a variety of ways, particularly given their limited time and resources.<sup>106</sup>

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97. See, e.g., *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 355 (2009) (Kennedy, J., dissenting) (worrying that the majority's holding will create a bargaining opportunity for defendants).

98. See, e.g., *Bullcoming*, 131 S. Ct. at 2726–27 (Kennedy, J., dissenting) (suggesting an alternative to the majority rule).

99. *Id.* at 2726.

100. *Melendez-Diaz*, 557 U.S. at 338–39 (Kennedy, J., dissenting).

101. *Id.*

102. *Id.* at 343–47.

103. *Id.* at 340.

104. *Rompilla v. Beard*, 545 U.S. 374, 396 (2005) (Kennedy, J., dissenting).

105. *Id.* at 402.

106. *Id.* at 400–01, 403.

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### B. Deference to Professional Judgment and Expertise

In that vein, Justice Kennedy understands that professionals need wide but not limitless latitude. Thus, dissenting from the requirement that defense lawyers review all case files, he emphasized that defense counsel make “sound strategic calculation[s]” to forego certain investigations and lines of argument in lieu of others.<sup>107</sup> The Constitution does not guarantee a scorched-earth defense that leaves no stone unturned. Indeed, state ethical rules may require defense lawyers to conduct such triage.<sup>108</sup> He has likewise emphasized that competent lawyers must delicately weigh the risks of striking a plea bargain versus proceeding to trial, and courts must not second-guess their judgments in hindsight.<sup>109</sup> That is particularly true because a defense attorney is a repeat player who may have a sense of how particular prosecutors and trial courts are likely to respond, and habeas courts have a very limited role in policing only “manifest deficiency in light of information then available to counsel.”<sup>110</sup>

When defense lawyers’ performance falls outside that wide latitude, however, reviewing courts must enforce the most basic professional standards of criminal practice. Defense attorneys must, for instance, meet the minimal standard of communicating formal plea offers from prosecutors to their clients.<sup>111</sup> Federal and state bar authorities and courts have adopted that standard over the past three decades, and it is not too much to expect lawyers to live up to that basic obligation.<sup>112</sup>

The same respect for expertise informs Justice Kennedy’s deference to sentencing reforms. He has repeatedly advocated leaving plenty of room for legislatures, judges, and other policymakers to develop and refine sentencing rules in light of evolving experience. Sentencing guidelines exemplify interbranch collaboration, in which legislatures draw upon the “accumulated wisdom and experience of the Judicial Branch . . . on a matter uniquely within the ken of judges.”<sup>113</sup> “Judges and sentencing officials have a broad view and long-term commitment to correctional systems” and should be encouraged to keep refining sentencing systems under legislative guidance, instead of leaving everything to juries.<sup>114</sup> He lamented that the *Apprendi* line of cases appeared to have been driven by “a faintly disguised distrust of judges.”<sup>115</sup>

Respect for professional expertise also informs Justice Kennedy’s Confrontation Clause dissents. In opposing the extension of *Crawford* to

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107. *Id.* at 401.

108. *See id.* at 404.

109. *See Premo v. Moore*, 131 S. Ct. 733, 741–43 (2011) (Kennedy, J., majority opinion).

110. *Id.* at 741.

111. *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (Kennedy, J., majority opinion).

112. *See id.*

113. *Blakely v. Washington*, 542 U.S. 296, 327 (2004) (Kennedy, J., dissenting) (quoting *Mistretta v. United States*, 484 U.S. 361, 412 (1989)) (internal quotation marks omitted).

114. *Cunningham v. California*, 549 U.S. 270, 295–96 (2007) (Kennedy, J., dissenting).

115. *Blakely*, 542 U.S. at 327 (Kennedy, J., dissenting).

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laboratory analysts' reports, he stressed the "scientific and professional norms and oversight" to which analysts are subject, which differentiate their testimony and the means of challenging it from that of fact witnesses.<sup>116</sup>

*C. Limited Time and Resources*

Another practical constraint that Justice Kennedy acknowledges is that time and money are limited. Defense attorneys are overburdened and must carefully husband their limited time and attention for the most meritorious issues. Thus, he rejected the notion that defense lawyers must read every document in the case file of every prior conviction, for such a requirement would siphon resources away from other important tasks.<sup>117</sup>

Resource constraints likewise counsel against extending the Confrontation Clause to scientific reports. Trial courts are slow and overburdened, and analysts must now fly around the state or country, waiting for hours or days before testifying in hundreds of cases each year, even though many defendants plead out at the last minute.<sup>118</sup>

*D. Practical Effects*

Moreover, Justice Kennedy is acutely sensitive to rulings that will do little good or cause harm. The Court's Confrontation Clause rulings, he has charged, are "formalistic and pointless,"<sup>119</sup> as they require lab analysts to testify even though they will simply "read aloud notes made months ago."<sup>120</sup> Similarly, he has criticized the *Apprendi* doctrine as disruptive, formalistic, and devoid of countervailing practical benefits, because Congress can easily draft around formalistic rules.<sup>121</sup>

Such pointless rulings do little to protect the innocent; instead, they confer windfalls on the guilty. For example, the *Crawford* rule may exclude statements by abused women about the abusers who later murdered them, regardless of the statements' reliability.<sup>122</sup> The rule may also exclude autopsies conducted by

116. See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2727 (2011) (Kennedy, J., dissenting); see also *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 345–46 (2009) (Kennedy, J., dissenting).

117. See *Rompilla v. Beard*, 545 U.S. 374, 403 (2005) (Kennedy, J., dissenting).

118. *Melendez-Diaz*, 557 U.S. at 340–42 (Kennedy, J., dissenting).

119. *Id.* at 338.

120. *Id.* at 342.

121. See *Cunningham v. California*, 549 U.S. 270, 294–97 (2007) (Kennedy, J., dissenting) (worrying that the "wooden, unyielding" *Apprendi* doctrine was causing "systemic disruption" and inflicting "collateral, widespread harm to the criminal justice system and the corrections process"); *Blakely v. Washington*, 542 U.S. 296, 326 (2004) (Kennedy, J., dissenting) (agreeing that the majority did "considerable damage to our laws and to the administration of the criminal justice system"); *Jones v. United States*, 526 U.S. 227, 267 (1999) (Kennedy, J., dissenting) (complaining that the majority was apparently "chastising Congress for failing to use the approved phrasing in expressing its intent . . . . No constitutional values are served by so formalistic an approach, while its constitutional costs in statutes struck down or, as today, misconstrued, are real.").

122. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2727 (2011) (Kennedy, J., dissenting) (citing *Giles v.*

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coroners who died before trial, which effectively creates “a statute of limitations for murder.”<sup>123</sup> In practice, the confrontation right will not expose inaccuracies in lab analysts’ methodologies and results. Instead, it will become a plea-bargaining chip, which defendants will exchange for more lenient sentences.<sup>124</sup> “Guilty defendants will go free, on the most technical grounds, . . . adding nothing to the truth-finding process,” simply because an analyst was sick or unable to make it to court in time.<sup>125</sup>

Justice Kennedy is especially attuned to the practical problems plaguing twenty-first-century criminal justice. Court dockets are clogged and slow, as mentioned above. In addition, legislatures and sentencing commissions must work with judges to guide judicial discretion and reduce sentence disparities.<sup>126</sup> And his opinions have repeatedly depicted plea bargaining as a complex, uncertain, opaque, yet prevalent process of trading leniency for finality. Judges, he has noted, must defer to lawyers’ careful, tactical judgments while still policing basic professional norms in plea negotiations.<sup>127</sup> Particularly because plea bargaining is so prevalent, Justice Kennedy has expressed concern about letting extraneous factors influence bargained-for sentences.<sup>128</sup>

#### E. Alternative Remedies

Justice Kennedy’s opinions frequently evince his concern that poorly chosen rules may impede better rules or reforms. Instead of formalistic rules that preempt further debate, Justice Kennedy has suggested a variety of alternative remedies that could solve many of the same problems. Rather than requiring the prosecution to call every lab analyst to the witness stand, defendants could be free to call them whenever they wished to challenge the accuracy of the analysts’ results.<sup>129</sup> Governments could implement other safeguards to regulate laboratory analysis, such as having independent agencies perform routine tests en masse, following scientific protocols subject to oversight, issuing result-blind reports, and giving defendants rights to retest evidence for free.<sup>130</sup>

As for plea bargaining, Justice Kennedy’s opinions have regulated the process while encouraging safeguards to prevent surprise and fabricated claims.

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California, 554 U.S. 353, 402–03 (2008)).

123. *Melendez-Diaz*, 557 U.S. at 335 (Kennedy, J., dissenting) (quoting Carolyn Zabrycki, Comment, *Toward a Definition of “Testimonial”: How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 CAL. L. REV. 1093, 1115 (2008)).

124. *Id.* at 355.

125. *Id.* at 342–43.

126. *See Cunningham*, 549 U.S. at 295–96 (Kennedy, J., dissenting); *Blakely*, 542 U.S. at 327 (Kennedy, J., dissenting).

127. *See Missouri v. Frye*, 132 S. Ct. 1399, 1407–08 (2012) (Kennedy, J., majority opinion); *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (Kennedy, J., majority opinion); *Premo v. Moore*, 131 S. Ct. 733, 741 (2011) (Kennedy, J., majority opinion).

128. *See Lafler*, 132 S. Ct. at 1387; *Melendez-Diaz*, 557 U.S. at 354–55 (Kennedy, J., dissenting).

129. *See Melendez-Diaz*, 557 U.S. at 340–41 (Kennedy, J., dissenting).

130. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2727 (2011) (Kennedy, J., dissenting).

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Courts could require making plea agreements in writing, placing them on the record, and subjecting them to judicial colloquy.<sup>131</sup> Reviewing courts can experiment with a range of possible remedies and take into account a defendant's expressed willingness to plead.<sup>132</sup> Finally, Justice Kennedy has suggested limiting *Apprendi* to offense facts, leaving judges free to impose enhancements based on offender facts such as recidivism, remorse, cooperation, and criminal history.<sup>133</sup>

## VI. CONCLUSION

Journalists and academics sometimes mischaracterize Justice Kennedy as unprincipled because they fail to discern his consistent underlying approach. At root, Justice Kennedy is not an ideologue, eager to drive a pure theory over a cliff. He is a seasoned, practical lawyer, one who respects the wisdom of the bench, bar, and legislatures, not to mention precedent and settled practices. In interpreting the Sixth Amendment, Justice Kennedy takes care to conserve the wisdom immanent in the legal craft while reforming its excesses and outliers. That humble approach is a welcome counterpoint to other Justices' abstract Sixth Amendment formalism. His approach lends stability to the law, counterbalancing others' zealous theoretical purity with practicality and common sense.

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131. *Missouri*, 132 S. Ct. at 1408–09 (Kennedy, J., majority opinion).

132. *Lafler*, 132 S. Ct. at 1389 (Kennedy, J., majority opinion).

133. *Cunningham v. California*, 549 U.S. 270, 294–97 (2007) (Kennedy, J., dissenting).