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# How *Apprendi* Affects Institutional Allocations of Power

Stephanos Bibas

At first glance, the Supreme Court's decision in *Apprendi v. New Jersey*<sup>1</sup> looks like the triumph of criminal juries over sentencing judges. *Apprendi* held that any fact (except recidivism) that increases a defendant's statutory maximum sentence must be proved to a jury beyond a reasonable doubt.<sup>2</sup> In federal cases, the Court implied, these facts must also be charged in indictments.<sup>3</sup> *Apprendi*'s rule seems to favor both defendants and juries. It gives defendants notice, caps judicial sentence enhancements, and protects juries from judicial encroachment. Thus, most commentators endorse *Apprendi*'s rule as a vindication of juries and defendants' constitutional rights.<sup>4</sup>

These commentators are mistaken on both counts. In a previous article, I explained how *Apprendi* hurts many defendants by undermining many procedural values, such as the due process opportunity to be heard at sentencing.<sup>5</sup> This Article goes on to explore *Apprendi*'s impact on the institutional allocation of power in the criminal justice system. The Court and commentators are anachronistic in focusing exclusively on juries, as today juries play a minuscule role in criminal justice. Fewer than four percent of adjudicated felony defendants enjoy jury trials, and only five percent have bench trials.<sup>6</sup> Ninety-one percent plead guilty.<sup>7</sup> In the real

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1. 530 U.S. 466 (2000).

2. *Id.* at 490, 496. For the background leading up to *Apprendi* and an explanation of its reasoning, see Jeffrey Standen, *The End of the Era of Sentencing Guidelines: Apprendi v. New Jersey*, 87 IOWA L. REV. 775, 779-80 (2002).

3. *Apprendi*, 530 U.S. at 476.

4. See Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1099 n.3 (2001) (citing articles by Susan Herman, Nancy King & Susan Klein, Mark Knoll & Richard Singer, Benjamin Priester, Benjamin Rosenberg, and various student notes, all of which advocate or defend a rule similar to the rule adopted in *Apprendi*).

5. *Id.* at 1151-74.

6. See STAT. DIV., ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY SEPTEMBER 30, 2000, tbl.D-4 (noting that between October 1999 and

world of guilty pleas, plea bargaining has largely supplanted jury trials. The real tug of war is not between juries and judges, as there are few juries left, but among prosecutors, legislatures, and judges. *Apprendi* portends big changes in these institutional allocations of power, changes on which the Court did not focus because of its anachronistic preoccupation with the jury.

This Article considers the changes *Apprendi* is likely to cause in the powers and actions of legislatures, judges, prosecutors, and sentencing commissions. Part I explores how legislatures may evade *Apprendi* either by exploiting its loopholes or by delegating even more power to judges and sentencing commissions. Part II focuses on prosecutorial power, demonstrating how *Apprendi* has unwittingly strengthened the hands of prosecutors at the expense of judicial control.

### I. LEGISLATIVE POWER, EVASION, AND DELEGATION

*Apprendi* purports to limit legislative power to enact judicial sentencing enhancements. As this part shows, however, *Apprendi* leaves open many loopholes. Legislatures may be able to evade *Apprendi* either by redrafting sentencing enhancements using different terminology or by delegating even more power to judges and sentencing commissions. In other words, as this part contends, though *Apprendi* purports to limit both legislative and judicial power, it does so in an unclear way that may invite legislative evasion or over-delegation.

Legislatures have long had the power to fix determinate punishments for particular crimes or to set broad indeterminate sentencing ranges.<sup>8</sup> Judges have long been able to exercise broad discretion under

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September 2000, of the 68,079 federal criminal cases disposed of by plea or trial, 63,863 (93.8%) defendants pleaded guilty, 1235 (1.8%) were convicted or acquitted after bench trials, and only 2981 (4.4%) were convicted or acquitted after jury trials); BUREAU OF JUSTICE STAT., U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1998, tbl.5.42, at 432 (noting that in 1996, of the 997,972 state felony defendants whose cases were resolved by plea or verdict, 905,957 (90.8%) entered pleas of guilty or *nolo contendere*, 51,474 (5.5%) had bench trials, and only 37,541 (3.8%) had jury trials); Bibas, *supra* note 4, at 1150 n.330 (aggregating these raw numbers to arrive at the combined statistics set forth in the text, and noting that these figures exclude cases in which the prosecution was dropped, dismissed, or otherwise terminated before verdict; also noting that while the federal numbers lump together felony and misdemeanor cases, the overall felony percentages are probably about the same).

7. *Supra* note 6 (collecting sources).

8. See, e.g., An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112, 112-19 (1790) (creating thirteen crimes with sentencing ranges from up to one year to up to seven years' imprisonment and one punishable by unlimited imprisonment, but also creating six crimes for which the prescribed punishment was death); *Apprendi*, 530 U.S. at 5-11 (O'Connor, J., dissenting) (noting that majority did not dispute Congress's traditional leeway to prescribe broad penalty ranges); *Williams v. New York*, 337 U.S. 241, 247-48 (1949) (noting traditions of fully determinate and indeterminate sentencing statutes); KATE SMITH & JOSÉ A. CAMBRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9 (1998) (noting long history of wide sentencing discretion); Bibas, *supra* note 4, at 1124-27 (collecting additional historical sources).

indeterminate sentencing. In both England and colonial America, judges had the power to mitigate supposedly determinate felony sentences and to aggravate or mitigate misdemeanor sentences.<sup>9</sup>

Judges, however, were able to abuse the broad discretion inherent in indeterminate sentencing in a number of ways. Commentators worried that racial biases, prosecutorial favoritism, judicial idiosyncrasies, and regional variations could skew sentences.<sup>10</sup> Congress could have fixed this problem by abolishing indeterminate sentencing entirely, but instead it took two less drastic steps. First, it passed sentencing-enhancement statutes to guide judges' exercise of discretion.<sup>11</sup> These statutes altered statutory minima and maxima based on findings of particular facts that Congress thought important, while still leaving judges discretion within the adjusted ranges.

Second, Congress established the United States Sentencing Commission, which promulgated the Federal Sentencing Guidelines.<sup>12</sup> The Sentencing Guidelines tried to create a hybrid system. Instead of giving judges total discretion or none at all, the Guidelines allow some discretion but cabin it. They provide for presumptive sentencing ranges based on offenders' criminal histories and the severity of the offenses.<sup>13</sup> They require judges to increase or decrease the presumptive ranges by specified amounts if they find certain aggravating or mitigating facts.<sup>14</sup> And they restrict or forbid adjustments based on other grounds.<sup>15</sup>

Though particular facets of the Guidelines aroused opposition, the basic idea of guiding discretion was a promising way of reducing unwarranted disparities. Thus, these federal reforms have sparked imitation. Half of all states either have sentencing guidelines in place or are considering enacting them.<sup>16</sup>

9. *Appendi*, 530 U.S. at 480 & n.7 (collecting sources); *Jones v. United States*, 526 U.S. 227, 245 & n.7 (1999) (same); *Bibas*, *supra* note 4, at 1125-26 (collecting historical sources).

10. *See, e.g.*, MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 61 (1973) (stating that judges are both variable and imperfect); Stephen G. Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 *HOFSTRA L. REV.* 1, 4-5 (1988) (explaining compromises that led to the creation of the Guidelines); Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 *NW. U.L. REV.* 1342, 1346-47, 1400-14 (1997) (citing additional sources).

11. *See, e.g.*, 18 U.S.C. § 2419 (1994 & Supp. 1995) (providing for varying maximum penalties for carjacking depending on whether a victim suffered death or serious bodily injury); 21 U.S.C. § 841(b)(1)(A)-(C) (1995) (setting forth varying minimum and maximum penalties for narcotics trafficking based on the quantity of drugs involved).

12. U.S. SENTENCING GUIDELINES MANUAL (2000).

13. *Id.* at chs. 2 & 5, pt. A.

14. *Id.*

15. *See id.* at ch. 3 (setting forth sentencing adjustments); *see also id.* at § 5k2 (stating other grounds for departure).

16. Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 *ST. LOUIS U. L.J.* 425, 427, 446 (b), 4 (2000) (explaining that seventeen states have guidelines and eight are considering enacting them, but also going on to discuss how these guidelines

*Apprendi's* impact on legislative power to guide judges is odd, to say the least. The Court could have invalidated all indeterminate and partially determinate judicial sentencing, forcing that power into the hands of juries and legislatures. This radical approach, though it would have disrupted and disclaimed two centuries of contrary tradition, would at least have been clear, consistent, and hard to circumvent. But no Justice in *Apprendi* proposed going so far. Alternatively, the Court could have recognized that the greater power embraces the lesser. In other words, because legislatures can fix fully determinate sentences, they can take the less drastic step of guiding discretion through enhancements and guidelines. The four dissenting Justices embraced this approach, as they wanted to defer to legislative judgments about how to structure crimes and penalties.<sup>17</sup>

Instead of choosing either extreme, *Apprendi* adopted an unsatisfactory middle approach. It held that legislatures may not enact judicial sentence enhancements that aggravate maximum sentences.<sup>18</sup> If legislatures pass enhancement laws, then juries, not judges, will have to decide these issues.<sup>19</sup>

*Apprendi's* impact is hard to fathom because legislatures can easily circumvent *Apprendi* in two ways. First, they can simply raise maxima and return to broad, indeterminate sentencing ranges. This response would give judges more power, belying *Apprendi's* suggestion that its rule would prevent judicial tyranny.<sup>20</sup>

Second, legislatures can raise statutory maxima and then allow judges to lower these maxima by finding mitigating facts. In other words, *Apprendi* applies only to aggravating but not mitigating facts.<sup>21</sup> This formalistic distinction has no bite because legislatures can easily turn aggravators into mitigators. For example, the federal carjacking statute provides for a fifteen-year maximum, with enhancements to twenty-five years or life (or death) if a victim suffered serious bodily injury or death.<sup>22</sup> Congress need only use a simple drafting trick to circumvent *Apprendi*. All it has to do is to raise the maximum sentence for carjacking to life. It can then provide that if no victim dies the maximum drops to twenty-five years, and if no victim is

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schemes vary).

17. *Apprendi v. New Jersey*, 530 U.S. 466, 514-47 (2000) (O'Connor, J., dissenting); *id.* at 555-66 (Breyer, J., dissenting).

18. *See id.* at 494 (discussing whether defendants may face greater punishment).

19. *Id.* I set aside here the possibility of bench trials, in which trial judges exercise the powers normally exercised by juries. In the federal and a majority of state systems, a bench trial requires not only the consent of the defendant, but also the consent of the prosecutor (and, in some states, consent of the trial judge as well). George Fisher, *Plus Bargaining's Triumph*, 109 YALE L.J. 857, 1072 (2000); Adam H. Kurland, *Prosecuting a Federal Criminal Defendant with a Unilateral Right to a Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. DAVIS L. REV. 309, 321-23 & nn.39, 40, 42-43, & 45 (1993).

20. *Apprendi*, 530 U.S. at 477.

21. *Id.* at 490 & n.13; *id.* at 501 (Thomas, J., concurring).

22. 18 U.S.C. § 2119 (1994 & Supp. V 1999).

seriously injured the maximum drops to fifteen. Under this statute, the lack of injury is a mitigating rather than an aggravating fact, which means that sentencing judges can find these facts free from *Apprendi*'s strictures.

The majority recognized that legislatures could "hypothetically" evade its rule by raising statutory maxima.<sup>23</sup> Nonetheless, it asserted that "structural democratic constraints" would stop legislatures from raising maximum sentences beyond what is "generally proportional to the crime."<sup>24</sup> That suggestion is implausible. Legislators gain political points by raising maximum sentences, which makes them look tough on crime. They will likely jump at the chance to appeal to voters by circumventing *Apprendi*.

If *Apprendi*'s holding is really so narrow, it is arbitrary and ultimately pointless. The Court has invalidated thousands of criminal sentences to punish legislatures for not jumping through the right drafting hoops, while paving the way for legislatures to get back to the same result. For *Apprendi* to have teeth, it would have to reach all facts that affect the actual punishment imposed.<sup>25</sup> It would have to regulate findings of drug quantity, how much money a victim lost, how violent a robber was, how high-ranking a gang member was, and countless other sentencing facts. Such an approach would invalidate classic indeterminate judicial sentencing as well as judicial sentencing guidelines. It would force legislatures to fix rigid sentences ahead of time and leave no room for judicial tailoring.

In addition to hindering legislative enhancements, *Apprendi* poses large problems for sentencing guidelines. If *Apprendi* does not limit guidelines, unelected sentencing commissions can mandate that aggravating facts trigger sentence enhancements, though legislatures cannot do the very same thing.<sup>26</sup> But how can an unelected creature of the legislature exercise power that the legislature cannot? That approach would turn the traditional bias against delegation of power on its head.

If instead *Apprendi* limits guidelines, its practical effects will be enormous. Justice Thomas suggested, correctly, that guidelines are no different from legislative enhancements because they operate in practice as

23. *Apprendi*, 530 U.S. at 490 n.16.

24. *Id.* The Court never explained what it meant by "structural democratic constraints," though commentators have attempted to do so. For an exploration and critique of this faith in "structural democratic constraints," see Bibas, *supra* note 4, at 1136-39.

25. *Apprendi*, 530 U.S. at 543-44 (O'Connor, J., dissenting).

26. Congress passed the Sentencing Reform Act of 1984 both to ensure that actual sentences served tracked those imposed and to reduce unjustified sentencing disparities, such as those based on the defendant's race, sex, and region. To remedy this problem, Congress created the United States Sentencing Commission, which comprised seven members (including three federal judges) appointed by the President and confirmed by the Senate, and instructed it to write sentencing guidelines by 1987. These guidelines were to take effect in six months unless Congress passed another law to the contrary. Breyer, *supra* note 10, at 4-5. Many states have similar sentencing commissions and guidelines systems. See Frase, *supra* note 16, at 427, 446 tbl.1 (stating that sentencing guidelines are currently used in seventeen states).

laws.<sup>27</sup> The majority refused to express an opinion on this issue, noting that guidelines were not before the Court.<sup>28</sup> I doubt that all five members of the *Apprendi* majority will extend this rule to its logical, earth-shaking conclusion and apply it to millions of guidelines sentences. The upshot of this artificial limit on *Apprendi* is that guidelines will be able to create judicial enhancements in ways that statutes cannot. To take advantage of this loophole and get around *Apprendi*, legislatures may well delegate even more power.

In sum, the Court did not pay enough attention to the likely legislative responses to its rule. It assumed that unspecified "structural democratic constraints" would cause legislatures to shy away from tough-on-crime measures, though there is no evidence that they do.<sup>29</sup> On the contrary, legislatures do not meekly accept pro-defendant rulings, but instead often respond to and circumvent them.<sup>30</sup> The political process is far more dynamic and fluid than the Court recognized, and its pro-defendant checks are few. In the long run, *Apprendi* probably will not hobble legislatures much. To the extent that it does, however, legislatures will lose power, delegating more discretion to unelected sentencing commissions or judges and imposing fewer checks and less oversight on these bodies.<sup>31</sup> Either way, the winners will not be populist juries but undemocratic bodies—hardly a result that the Framers intended or the Constitution requires.

## II. JUDGES VERSUS PROSECUTORS

This potential shift of power from legislatures to unelected officials is a cause for concern. But the more serious shift in institutional power will likely occur from judges to prosecutors. To the extent that legislatures do not exercise their power to circumvent *Apprendi*, prosecutors will have much more power at the expense of judges.

First, *Apprendi* increases prosecutors' power to charge bargain. Prosecutors have always had the power to choose what offenses to charge. If the legislature enacts only one drug crime, prosecutors have little choice in charging. If instead statutes create multiple overlapping drug crimes with varying minima and maxima, as is common today,<sup>32</sup> prosecutors can choose

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27. *Apprendi*, 530 U.S. at 523 n.11 (Thomas, J., concurring); Bibas, *supra* note 4, at 11-18.

28. *Apprendi*, 530 U.S. at 497 n.21.

29. *Id.* at 490 n.16; Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1488-92, 1546 app. A (2001) (cataloguing repeated instances in which courts left legislatures leeway to adopt pro-prosecution rules and noting that many legislatures in fact did so).

30. King & Klein, *supra* note 29, at 1488-92, 1546 app. A.

31. Of course, judges used to have this power under classic indeterminate sentencing. *Apprendi* encourages a return to this unfettered-discretion approach, as it limits determinate sentence enhancements but does not by its terms restrict indeterminate sentencing.

32. See *Ashe v. Swenson*, 397 U.S. 436, 445 n.10 (1970) (bemoaning the move from a few distinct categories of offenses at common law to the recent "extraordinary proliferation of

which crimes to charge. They will charge some defendants with the harshest crimes possible and will insist that these defendants plead to serious charges. Prosecutors will charge others with less serious crimes and may acquiesce in guilty pleas to lesser charges. These plea and charging decisions may reflect racial bias, the quality and connections of defense counsel, the prosecutor's temperament, and regional variations, in addition to merits-based considerations.<sup>33</sup> Even though the individual defendants may benefit from this uneven leeway, society has a strong interest in ensuring equality and checking these unwarranted disparities.

Traditionally, the power to limit these disparities was entrusted to judges. They were able to check prosecutorial variations at the sentencing stage.<sup>34</sup> Indeterminate sentencing gave judges latitude to gauge the seriousness of offenses in deciding how harshly to sentence. For example, a prosecutor might require defendant *A* to plead to three different fraud charges, while allowing identical co-defendant *B* to plead to only one. Before *Apprendi*, judges had discretion to check these discrepancies by considering the underlying facts in imposing a fair sentence, subject only to the statutory minimum and maximum. The Federal Sentencing Guidelines make this power explicit by basing sentencing on the relevant conduct found by judges in light of probation officers' independent investigations, not simply on prosecutors' unilateral charging decisions.<sup>35</sup> Again, the only limits on a

overlapping and related statutory offenses, [which has allowed] prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction"); Susan R. Klein & Katherine P. Chiarello, *Successive Prosecutions and Compound Criminal Statutes: A Functional Test*, 77 TEX. L. REV. 333, 358-60 (1998) (criticizing the "drastic" growth of "thousands" of overlapping criminal statutes, which has given prosecutors too much charging leeway).

33. *Supra* note 10 and accompanying text and sources cited therein.

34. *See Apprendi*, 530 U.S. at 562 (Breyer, J., dissenting) (noting that, traditionally, legislatures define crimes and general sentencing ranges while judges "choose a sentence within that range on the basis of relevant offender conduct").

35. U.S. SENTENCING GUIDELINES MANUAL, §§ 1B1.3, 1B1.4 (1998). In other words, the sentence is based not solely on the offense of charge and conviction (such as possession of three rocks of crack cocaine at the particular time and place charged in the indictment), but also on all acts forming part of the same course of conduct (such as possession of five hundred additional rocks of crack cocaine at a stash house at a different place and time). *Id.* § 1B1.3(a)(2).

Probation officers play a key role in illuminating sentencing decisions by bringing the true facts to light. Even before the Federal Sentencing Guidelines, probation officers investigated defendants' backgrounds, circumstances, and characters in order to ensure that judges had complete pictures of defendants when sentencing them. *See Williams v. New York*, 337 U.S. 241, 249-50 (1949) (noting the high value given by judges to probation workers' reports). Under the Guidelines, probation officers continue to play an important role as independent investigators, though they now focus on discovering those factors relevant to Guidelines sentencing. *See Sharon M. Bunzel, Note, The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933, 934-35, 957-63 (1995) (arguing that the probation officer is not the proper guardian of the Federal Sentencing Guidelines). This information provides an objective check on prosecutors' potentially arbitrary charging



judge's power to pierce a collusive charge bargain were the statutory minimum and maximum of the offense charged.

Even before *Apprendi*, prosecutors used statutory minima and maxima to charge bargain where multiple offenses overlapped.<sup>36</sup> *Apprendi* poured fuel on that fire by fragmenting crimes, creating more minima and maxima and thus more ways to charge bargain.<sup>37</sup> For example, the maximum federal sentence for carjacking is fifteen years, or twenty-five years if a victim suffers serious bodily injury, or life imprisonment (or death) if a victim dies.<sup>38</sup> Courts used to interpret this statute as a single crime plus two sentence-enhancement provisions. But now, under the *Apprendi* rule, each enhancement is an element of a distinct offense.<sup>39</sup> In other words, what used to be a single crime is now three separate crimes.

Prosecutors now have more power to exploit these varying minima and maxima as bargaining chips. They can do so by charging one favored defendant with the lowest grade of a crime (subject to the lowest minimum and maximum) while charging an identical defendant with a higher grade. If a minimum or maximum applies, the judge's hands are tied regardless of the true seriousness of the offense. Prosecutors thus have more power to use collusive charge bargains to set sentence levels unilaterally, and judges have less power to check them.

A second way that *Apprendi* shifts power from judges to prosecutors is by making it harder for defendants to get hearings on sentence enhancements. In theory, *Apprendi* strengthens defendants' right to a hearing by guaranteeing them jury findings beyond a reasonable doubt on enhancements. In practice, however, the benefits of pleading guilty are so massive that few defendants can afford to go to trial to exercise this right. Those who plead guilty to every element get sentence reductions of thirty-five percent or more.<sup>40</sup> Defendants used to be able to plead guilty to unenhanced crimes, getting all of these benefits of pleading guilty while reserving the right to contest enhancements at sentencing. This judicial hearing operated as a check on prosecutorial charging decisions.<sup>41</sup>

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decisions, allowing judges to sentence defendants based on their actual wrongdoing.

36. See, e.g., O'Sullivan, *supra* note 10, at 1355 (noting prosecutors' power to affect sentence through their choice of applicable code sections).

37. See Bibas, *supra* note 4, at 1168-70 (demonstrating the effects of *Apprendi* in current sentencing); see also Jacqueline E. Ross, *Unanticipated Consequences of Turning Sentencing Factors into Elements: The Apprendi Debate*, 12 FED. SENTENCING REP. 197, 200 (2000) (predicting this consequence before the Court handed down *Apprendi*).

38. 18 U.S.C. § 2119 (1994 & Supp. V 1999).

39. See *Jones v. United States*, 526 U.S. 227, 231-32 (1999) (reversing a lower-court ruling to the contrary and construing the statute as making the sentencing enhancement an element). *Jones* was handed down one year before *Apprendi*, which built upon *Jones* and turned its rule of statutory construction into a firm rule of constitutional law.

40. Bibas, *supra* note 4, at 1153.

41. True, few defendants in fact insisted on these hearings. Most reached plea bargains.

By making sentence enhancements into elements of offenses, *Apprendi* shifts the adjudication of these enhancements from the sentencing stage to the guilt stage of the trial. Defendants have lost the right to hearings on these issues at sentencing. This right was valuable because defendants could reap both the benefits of pleading guilty and hearings on enhancements. In return for losing these rights, defendants have received the theoretical right to trial by jury. But this is a worthless paper right. Defendants cannot afford to exercise this right because if they go to trial they will lose the benefits of pleading guilty and may suffer much harsher sentences.<sup>42</sup>

The result of turning enhancements into elements is that defendants now face much more pressure to forgo hearings on enhancements, and prosecutors know it. Now that few defendants can realistically insist on enhancement hearings, judges have less power to check prosecutors. Hearings, being much less realistic prospects, will cast much weaker shadows over the bargains that prosecutors drive. Prosecutors can thus charge more aggressively and drive harder plea bargains, secure in the knowledge that most defendants will agree to plead rather than risk going to trial.<sup>43</sup> In sum,

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agreeing on issues that they would otherwise have disputed at sentencing. Nonetheless, prosecutors knew that defendants could insist on hearings if they did not receive reasonable bargains. This knowledge forced prosecutors to strike reasonable plea bargains in the shadow of this sentencing right. The prospect of a judicial check restrained prosecutorial charging and bargaining. *Id.* at 1159-60; Stephanos Bibas, *Apprendi and the Dynamics of Guilty Pleas*, 54 STAN. L. REV. 311, 312-13 (2001) (developing this point in more detail).

42. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1, cmt. nn.2-3 (1998) (stating that the acceptance of responsibility reduction ordinarily applies to defendants who plead guilty but does not apply to defendants who deny elements of factual guilt at trial). Susan Klein and Nancy King suggest that judges would not interpret this language to penalize defendants who plead guilty to base offenses and go to trial only to contest enhanced offenses. Nancy J. King & Susan R. Klein, *Apprendi and Plea Bargaining*, 54 STAN. L. REV. 295, 296 (2001). This argument contradicts the plain language of the Guidelines notes, though it is possible that judges will stretch this language or the Commission will amend this language as Professors King and Klein suggest. Even if the Commission does amend this commentary, judges will still likely exercise their discretion within guideline ranges to penalize defendants who burden them with trials. Defendants will still wind up being worse off than if they had pleaded guilty. Bibas, *Apprendi and the Dynamics of Guilty Pleas*, *supra* note 41, at 311-12 & n.5.

43. This is the fundamental problem with Professor Susan Herman's argument elsewhere in this symposium. Professor Herman argues that, even though few defendants in fact go to trial, trial outcomes still regulate plea bargaining by casting strong shadows over them. Susan N. Herman, *Applying Apprendi to the Federal Sentencing Guidelines: You Say You Want a Revolution?*, 87 IOWA L. REV. 615 (2002). The trouble with this argument is that it ignores certain structural impediments to going to trial, such as the massive discounts for pleading guilty to every element of the offense. Bibas, *supra* note 4, at 1153-54, 1158-65 (developing this point in more detail and setting forth a hypothetical example to illustrate how it might work in practice). It used to be that defendants could realistically threaten to plead guilty without plea agreements, thus reaping the discounts for pleading guilty, while still enjoying sentencing hearings on enhancement issues. *Id.* at 1153-54, 1160-61. This realistic prospect of sentencing hearings tempered plea bargains. But now that enhancements are elements, defendants must either allocate to these elements in their guilty pleas, thereby sacrificing hearings on them, or sacrifice the massive benefits of pleading guilty in order to get these hearings. Because hearings are now

prosecutors have more power and judges less.

While the reasonable-doubt standard operates as a new check on prosecutors, in practice this standard will not limit prosecutors in most cases. Suppose that a prosecutor could not prove an enhancement beyond a reasonable doubt at trial. A trial conviction on the base offense and acquittal on the enhanced offense would set only the statutory minimum and maximum. The sentencing hearing would determine where within this broad range the ultimate sentence would fall. So, even if the jury acquitted the defendant of the enhancement at the first trial, a prosecutor would have a second chance to prove the enhancement at sentencing, by only a preponderance of the evidence.<sup>44</sup> The only constraint on this use of relevant conduct to raise a sentence is the statutory maximum. So, in areas where maxima are already high, such as narcotics, *Apprendi* is not much of a check. Legislatures can easily circumvent this problem by raising statutory maxima.<sup>45</sup> Prosecutors can effectively do the same thing by charging the same incident in multiple counts, then asking for consecutive sentences that aggregate to what the enhanced sentence would have been. Many defendants, therefore, will derive no benefit at all from *Apprendi*.

The bottom line is that many defendants will find it harder to secure hearings. They used to be able to enjoy sentencing hearings while simultaneously gaining the benefits of pleading guilty, but now they must sacrifice the former to enjoy the latter. Our system relies on hearings to provide independent judicial checks on prosecutorial decisions. With fewer sentencing hearings, judges will cast even weaker shadows over plea bargains. *Apprendi*, however, failed to consider this problem. By framing the issue anachronistically as one of juries versus judges, the Court missed the more salient competition between judges and prosecutors in the real world of guilty pleas.

### III. CONCLUSION

In *Apprendi*, the Court did not simply reach the wrong answer; it asked the wrong question. Its anachronistic focus on juries blinded the Court to the real institutional competition among legislatures, sentencing commissions, judges, and prosecutors. In a world where jury trials are an endangered species and will remain so for the foreseeable future, it is folly to make rules solely for juries while ignoring the impact on other

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more costly to get, they are less realistic options, and prosecutors know it. Thus, the theoretical jury-trial right will do much less to moderate plea bargaining than Professor Heiman supposes. *Id.* at 1158-60, 1162-65.

44. *United States v. Watts*, 519 U.S. 148, 152-57 (1997) (per curiam); *Wine v. United States*, 515 U.S. 389, 397-98, 402-04 (1995). For an explanation of how prosecutors, even after they have failed to prove enhancements at trial, can try to use them again at sentencing, see *Palco*, *supra* note 4, at 1156-57.

45. For a discussion of this phenomenon, see *supra* text accompanying notes 20-22.

institutions, such as legislatures and prosecutors.

Academics must start reframing criminal procedure scholarship to look at the institutional competition of other actors. What can we do to check the unilateral charging power of prosecutors? Can we introduce any judicial oversight of the low-visibility process of plea bargaining? To what extent do plea bargains reflect estimates of what judges and juries would do, now that it is so hard to get a judicial or jury hearing? How can judicial sentencing offset prosecutorial charging? What are the relative merits of legislative and bureaucratic guidance of judicial sentencing versus no guidance at all? And how well does the new, supposedly independent role of probation officers serve in practice to keep prosecutors honest and judges consistent?

These institutional questions are not framed in the traditional language of eighteenth-century constitutional rights. Nonetheless, in the twenty-first century, they have a profound effect on constitutional values such as the due process opportunity to be heard. It is time to look beyond the mythical world of juries to see how other institutions do and should do justice in the real world of guilty pleas.