How *Apprendi* Affects Institutional Allocations of Power

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At first glance, the Supreme Court's decision in *Apprendi v. New Jersey* 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. In federal cases, the Court implied, these facts must also be charged in indictments. *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.

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. 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. Ninety-one percent plead guilty. In the real
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.8
Judges have long been able to exercise broad discretion under

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
STATISTICS, U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1998, th.5.42, at 192
(noting that in 1998, of the 955,072 state felony defendants whose cases were resolved by plea
or verdict, 905,567 (94.9%) entered pleas of guilty or nolo contendere, 51,474 (5.2%) had
bench trials, and only 37,541 (3.9%) 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. 172, 172-179 (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 544
(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. 214, 247-48 (1949) (noting
traditions of fully determinate and indeterminate sentencing statutes); KATE STITH & JOSE A.
long history of wide sentencing discretion); BIBAS, supra note 4, at 1127-28 (collecting
additional historical sources).
indeterminate sentencing. In both England and colonial America, judges had the power to mitigate supposedly determine felony sentences and to aggravate or mitigate misdemeanor sentences.\(^9\)

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.\(^10\) 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.\(^11\) 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.\(^12\) 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.\(^13\) They require judges to increase or decrease the presumptive ranges by specified amounts if they find certain aggravating or mitigating facts.\(^14\) And they restrict or forbid adjustments based on other grounds.\(^15\)

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.\(^16\)

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9. *Approd, 530 U.S. at 480 & n.7 (collecting sources); Jones v. United States, 596 U.S. 297, 345 & n.7 (1999) (same); Ribos, *supra* note 4, at 1125-26 (collecting historical sources).
13. Id. at chs. 2 & 5, pt. A.
14. Id.
15. See id. at ch. 3 (setting forth sentencing adjustments); see also id. at § 5 (stating other grounds for departure).
16. Richard S. Ferro, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 41 Ref. U. L.J. 426, 427, 446 (2003) (explaining that seventeen states have guidelines and eight are considering enacting them, but also going on to discuss how these guidelines...
Appendi’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 dismantled two centuries of contrary tradition, would at least have been clear, consistent, and hard to circumvent. But no justice in Appendi 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."

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

Appendi’s impact is hard to fathom because legislatures can easily circumvent Appendi in two ways. First, they can simply raise maxima and return to broad, indeterminate sentencing ranges. This response would give judges more power, belaying Appendi’s suggestion that its rule would prevent judicial tyranny.

Second, legislatures can raise statutory maxima and then allow judges to lower these maxima by finding mitigating facts. In other words, Appendi applies only to aggravating but not mitigating facts. 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. Congress need only use a simple drafting trick to circumvent Appendi. 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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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 Friedman, plea bargaining’s triumph, 109 YALE L.J. 857, 1072 (2000); Adam H. Kuriland, providing a federal criminal defendant with a Unilateral Right to a Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(a), 16 U.C. DAVIS L. REV. 289, 321-23 & nn.39, 40, 42-43, & 45 (1993).
20. Appendi, 530 U.S. at 177.
21. Id. at 490 & n.13; id. at 501 (Thomas, J., concurring).
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. Nevertheless, it asserted that “structural democratic constraints” would stop legislatures from raising maximum sentences beyond what is “generally proportional to the crime.” That suggestion is implausible. Legislatures 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. 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. 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

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23. *Apprendi*, 530 U.S. at 480 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 1, at 1136-39.
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 16, at 4-5. Many states have similar sentencing commissions and guidelines systems. See Fein, supra note 16, at 427, 446 tbl.1 (stating that sentencing guidelines are currently used in seventeen states).
laws.27 The majority refused to express an opinion on this issue, noting that guidelines were not before the Court.28 I doubt that all five members of the

Appendi 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 Appendi is that guidelines will be able to create judicial enhancements in ways that statutes cannot. To take advantage of this loophole and get around Appendi, 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.29 On the contrary, legislatures do not meekly accept pro-defendant rulings, but instead often respond to and circumvent them.30 The political process is far more dynamic and fluid than the Court recognized, and its pro-defendant checks are few. In the long run, Appendi 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.31 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 Appendi, prosecutors will have much more power at the expense of judges.

First, Appendi 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,32 prosecutors can choose

27. Appendix, 530 U.S. at 523 n.11 (Thomas, J., concurring); Bickus, supra note 4, at 1148.

28. Appendix, 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. Appendix encourages a return to this unadulterated-discretion approach, as it limits determinate sentence enhancements but does not by its terms restrict indeterminate sentencing.

32. See Ashley 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 those 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. Even though, the individual defendants may benefit from this uneven justice, society loses strong interest in ensuring equality and checking these unannounced disparities.

Traditionally, the power to limit these disparities was entrusted to judges. They were able to check prosecutorial variations at the sentencing stage. 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 Appendix, 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. Again, the only limits on a

overlapping and related statutory offenses, [which has allowed] prosecutors to spin out a startling numerous number 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. 393, 398-99 (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 Appendix, 529 U.S. at 592 (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, 1B1.1 (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, 24660 (1949) (noting the high value given by judges to probation 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. Banzel, Note, The Probation Officer and the Federal Sentencing Guidelines: Strange Philological Bedfellows, 101 YALE L.J. 953, 954-55, 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.\(^{29}\) Apprendi poured fuel on that fire by fragmenting crimes, creating more minima and maxima and thus more ways to charge bargain.\(^{25}\) For example, the maximum federal sentence for carjacking is fifteen years, or twenty years if a victim suffers serious bodily injury, or life imprisonment (or death) if a victim dies.\(^{26}\) 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.\(^{27}\) 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.\(^{30}\) 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.\(^{31}\)

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\(^{29}\) See, e.g., O'Sullivan, supra note 10, at 1355 (noting prosecutors' power to affect sentence through their choice of applicable code sections).

\(^{25}\) 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).


\(^{27}\) 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.

\(^{30}\) Bibas, supra note 4, at 1155.

\(^{31}\) 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. 42

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.
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 in the first trial, a prosecutor would have a second chance to prove the enhancement at sentencing, by only a preponderance of the evidence. 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. 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

more costly to get, they are less realistic options, and prosecutors know it. Thus, the theoretical juridico-political fiction of less to moderate plea bargaining than Professor Herman supposes. Id. at 1158-60, 1162-63.


15. For a discussion of this phenomenon, see *infra* text accompanying notes 19-22.
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.