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COMMENTARY
APPRENDI AND PLEA BARGAINING

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Apprendi and Plea Bargaining

by Nancy J. King^a & Susan R. Klein^b

In his article *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*,³ Professor Stephanos Bibas advances an arresting thesis. He argues that the Court's recent decision in *Apprendi v. New Jersey*⁴ backfires as an attempt to protect constitutional values. His primary claim is that the *Apprendi* elements rule⁵ will "hurt many of the defendants it purports to help by ... depriving defendants of sentencing hearings, the only hearings they are likely to have. By making important factual disputes elements of crimes, it forces defendants to surrender sentencing issues such as drug quantity when they plead guilty."⁶ Professor Bibas does admit that the elements rule has the countervailing benefit of a right to proof beyond a reasonable doubt of maximum-enhancing facts at trial. He claims nevertheless that prosecutors can easily circumvent this right by trying to prove an aggravating fact again at the sentencing hearing under a lower standard of proof,⁷ and that most defendants cannot afford to go to trial to take advantage of this right, because going to trial means losing points for acceptance of responsibility,⁸ and risking perjury,⁹ obstruction of justice,¹⁰ recidivism,¹¹ and other

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³ 110 Yale L. J. 101 (2001) (forthcoming).

⁴ 120 S.Ct. 2348 (2000).

⁵ Professor Bibas calls the rule in *Apprendi* "an academic proposal that the Supreme Court recently made into law." Bibas, *supra* note 1, at 101. To the contrary, *Apprendi* clarifies a rule that judges had considered to be law for nearly two centuries. The innovation was the relatively recent enactment of statutes that keyed statutory maximum sentences to judicial fact-finding at sentencing. See Nancy J. King & Susan R. Klein, *Essential Elements*, 54 Vand. L. Rev. 1467, 1473-76 (2001).

⁶ Bibas, *supra* note 1, at 103. "This is because a defendant who pleads guilty must allocute to every element of the offense. Because enhancements are now elements, defendants must allocute to them as well and are then estopped from relitigating the issues at sentencing." *Id.* at 156, n. 339.

⁷ *Id.* at 156.

⁸ *Id.* at 156, n. 341.

⁹ *Id.* at 158.

¹⁰ *Id.* at 157-58.

¹¹ *Id.* at 157.

enhancements under the Federal Sentencing Guidelines.¹² Thus, Professor Bibas concludes, the tragic consequence of *Apprendi*'s elements rule is that "it has strengthened [the prosecutor's] bargaining position,"¹³ and "defendants on the whole will be worse off."¹⁴

This argument is indeed startling; it is also dead wrong. First, the prosecutor's coercive power to force a guilty plea is not strengthened by *Apprendi*. Every prosecutorial bargaining chip mentioned by Professor Bibas existed pre-*Apprendi* exactly as it does post-*Apprendi*. Before *Apprendi* prosecutors using recidivism as a club could have insisted (and regularly did insist) that defendants admit aggravating facts as part of the plea or face additional time. When the prosecutor's threats of added time were not persuasive and the proof of aggravating fact weak, the defendant prior to *Apprendi* could refuse to admit to the aggravated fact, and plead guilty only to the offense without the aggravated fact. Nothing about *Apprendi* gives additional leverage to the prosecutor in this situation -- a defendant who prior to *Apprendi* decided to risk trial rather than face the aggravated sentence will make the same decision post-*Apprendi*. In fact, only one new bargaining chip is created by *Apprendi*, and the Court gives it unequivocally to the defendant. By raising the burden of proof, *Apprendi* makes it much more difficult for the prosecutor to prove aggravating facts that trigger longer sentences. If the prosecutor couldn't successfully convince the defendant to admit to the aggravating fact prior to *Apprendi*, his chances of successfully convincing the defendant to admit to it after *Apprendi* are lower not higher.

As for those who would have pursued a guilty plea prior to *Apprendi*, they are not "on the whole" worse off either. Consider the single example Professor Bibas offers to prove his thesis: Al, the "typical federal drug trafficker with one prior felony conviction,"¹⁵ whose dispute with the government concerns whether he is responsible for only the two kilos of cocaine found on his person, or for an additional forty kilos found on his co-conspirators. Professor Bibas reasons that pre-*Apprendi*, Al could plead guilty to the drug offense without a plea agreement,¹⁶ obtain his three-point reduction for acceptance of responsibility under the Guidelines, and argue about the additional forty kilos at sentencing. If he wins, his guideline range for only two kilos is 63-78 months, if he loses, he faces 121-151 for the forty-two kilos.¹⁷ After *Apprendi* all of this changes, according to Professor Bibas. Proof of five or more kilograms of cocaine triggers an

¹² *Id.* at 18.

¹³ *Id.* at 163-64.

¹⁴ *Id.* at 156. We address in this commentary the change, if any, in relative bargaining power between defendants and prosecutors as a result of the *Apprendi* decision. One could also argue that whether a defendant is advantaged or disadvantaged in plea bargaining is not a legitimate criteria by which to judge the propriety of any given rule of criminal law or procedure. For example, one response to Professor Bibas' claim that defendants are generally made worse off, is to point out that even if he is right and defendants now may have to risk recidivism or other enhancements in order to litigate guilt or innocence of aggravating factors, their prior ability to escape that risk was a fortuitous windfall to which they were not entitled.

¹⁵ *Id.* at 164.

¹⁶ Professor Bibas claims that some 25% defendants plead guilty without a plea agreement, though he gives no basis for this guess. We are inclined to think that the actual incidence of straight-up guilty pleas without agreements is much lower than 25%. One of us was a federal criminal prosecutor for the Department of Justice for four years and never saw one.

¹⁷ *Id.* at 164.

increased maximum sentence making drug quantity an element of a greater offense. But the greater offense also carries a mandatory minimum sentence of ten years. Al is forced to plead guilty to the greater offense involving five kilos or more and be sentenced to the mandatory minimum 120 months, Professor Bibas argues, because if he does not the prosecutor will file a prior felony enhancement, bringing Al's mandatory minimum sentence up to twenty years.¹⁸ Thus, Professor Bibas concludes, "[t]he elements rule has cost Al the opportunity to contest almost five years of his sentence."¹⁹

This analysis is based on two faulty premises about pre-*Apprendi* bargaining behavior. A prosecutor who knows Al is a prior offender and believes that Al is responsible for dealing forty-two kilos would not stand idly by and let him escape with a five-year sentence for two kilos. He is more likely to do precisely what the post-*Apprendi* prosecutor did in Professor Bibas' example - threaten Al with the prior conviction unless he enters into a plea agreement which includes an admission to all 42 kilos.²⁰ Every arrow Professor Bibas finds after *Apprendi* in the prosecutor's quiver to force allocution to an aggravating fact was already there. In addition to underestimating the extent to which prosecutors already used recidivism enhancements in bargaining, Professor Bibas underestimates how routinely admissions to drug amounts were included in plea agreements before *Apprendi*.²¹ Defendants who would have had to admit to drug quantity as part of their plea agreement before *Apprendi* are no worse off after the decision. For them, the door to the "second trial" on drug amount was already shut. True, we have no more empirical proof than Professor Bibas on these points, but we would wager that the pre-*Apprendi* Als of this world - that is, defendants who are prior offenders and who plead guilty to federal drug charges but

¹⁸ Professor Bibas also raises the specter of a schoolyard, perjury, or obstruction enhancement. Again, these enhancements were as readily available as bargaining chips pre-*Apprendi* as post.

¹⁹ *Id.* at 166.

²⁰ Professor Bibas claims in the text of his article that "most prosecutors reserve these enhancements for defendants who force them to go to a first trial." Bibas, *supra* note 1, at 157. However, the support for this proposition is his "understanding" of his own prior office's "unwritten policy" of only filing prior felony enhancements when the defendant refuses to plead guilty. *Id.* at n. 343. He then directly refutes this by noting precisely the opposite policy (filing prior felony enhancements in every case, regardless of plea) in another United States Attorney's Office where a friend of his works. The policy described by Professor Bibas of his former office would directly conflict with the official position of the Department of Justice, outlined in the Thornburg memo, which requires that prosecutors charge the most serious readily provable offense. *See also* U.S.A.M. 9-27.400 (Sept. 1997) ("charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons"). Regardless of what policy is actually followed in most districts, prosecutors can *threaten* to file the prior conviction if the defendant refuses to plead guilty to the higher amount.

²¹ *See, e.g.,* United States v. Harper, 246 F.3d 520 (6th Cir. 2001) (defendant stipulated to drug amount as part of guilty plea); United States v. Poulack, 2001 WL 15734 (8th Cir., Jan. 9, 2001) (same). *See also* articles collected in issue 8 of the Federal Sentencing Reporter (1996) (issue devoted to fact bargaining under the Guidelines); Fed. R. Crim. P. 11(e)(1)(c); USSG § 1B1.8(a) (presuming facts concerning the offense would be included in the plea agreement). Given that he underestimates the extent to which plea bargaining already controlled sentencing before *Apprendi* was decided, it is not surprising that Professor Bibas also overestimates the success of his proposed alternative. Professor Bibas argues that the Court should have rejected the elements rule and instead reinforced the right to a "second trial" at sentencing through the extension of discovery and confrontation rights. But shifting the trial of facts to sentencing will not insulate those facts from the bargaining process, as Professor Bibas seems to assume. One need not look past Professor Bibas' own comfortable turf, federal sentencing, to see the inevitable result of enhanced procedural protection at sentencing. Well before *Apprendi*, sentencing bargains and waivers to appeal sentences became common-place. Boost even further the procedures at sentencing, and even more of these revered "second trials" will take place by stipulation. Just as with the guilt phase, heightened procedure at this second trial raises the cost of the process for the government, creating an incentive to bargain around it.

manage to escape both prior offense enhancements and admissions of drug amounts in their plea agreements - are not so plentiful as Professor Bibas suggests.

Reliance on AI for proof that *Apprendi* hurts defendants is misleading in other ways. The fact is, for many defendants *Apprendi* is a powerful tool. Assume, for example, an alleged drug offender, Bill, with no prior convictions and against whom the prosecutor has solid evidence of two kilos, but weak evidence of forty more. After *Apprendi*, Bill's attorney could tell the judge that Bill stands ready to plead guilty to the charge involving two kilos, now a lesser included offense, but will plead not guilty to the higher offense involving five kilos or more. If the prosecutor insists on a trial of the higher offense, and Bill admits the two kilos challenging only the extra forty, and wins, he still gains his three-point reduction for acceptance of responsibility.²² Moreover, because the government must prove Bill's tie to five or more kilos beyond a reasonable doubt and provide the full array of procedural protections not afforded at sentencing (including the rules of evidence), Bill has a better chance of winning on the higher offense.²³ Sensible prosecutors will figure this out and not take Bill to trial on the higher offense in the first place, instead settling for a plea on the lesser offense.

Indeed, for proof that *Apprendi* can assist defendants even in federal drug cases we need not limit ourselves (as Professor Bibas does) to hypothetical cases. We include in a footnote just a sampling of actual decisions in which reviewing courts applying *Apprendi* have, often begrudgingly, chopped years, often ten years or more, off the sentences of defendants convicted of federal drug crimes.²⁴ These cases, with dozens more reported weekly, tell the real story.²⁵

²² Professor Bibas notes that AI would receive his three-point reduction where he pleads only to the 2 kilos and challenges the additional 40 at sentencing. Bibas, *supra* note 1, at 165-6, n. 370. Professor Bibas also concedes that a defendant "might be able to get credit for acceptance of responsibility" where the prosecutor allows him to plead guilty to the two kilos and go to trial on the additional 40. *Id.* at 167. In fact, a defendant such as Bill would gain the entire three-point reduction, regardless of whether the prosecutor offered a plea to the base offense. A defendant willing to plead guilty to the only crime he is eventually convicted of shows all of the response contemplated under U.S.C.G. § 3E1.1. See, e.g., *United States v. Guerrero-Cortez*, 110 F.3d 647, 653 - 656 (8th Cir. 1997) (trial court's refusal to grant three-point reduction for acceptance of responsibility clearly erroneous where defendant offered to plead guilty to drug offenses involving two kilograms of cocaine, prosecutor refused to accept plea unless defendant admitted involvement with five kilograms, and judge found defendant responsible at sentencing for only two kilograms); *United States v. McKinney*, 15 F.3d 849, 851-54 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 162 (1995) (defendant granted a reduction for acceptance of responsibility even though he had already been convicted at trial where district court thwarted defendant's attempts to plead guilty).

²³ It is true that, in Bill's particular case, even after an acquittal on the 40 kilos, the prosecutor can reargue the greater amount as relevant conduct at sentencing. *United States v. Watts*, 519 U.S. 148, 152-157 (1997) (per curiam); USSG §§ 1B1.3, 1B1.4 (1998). However, Bill is certainly in no worse a position than he was pre-*Apprendi*, even if he loses at sentencing. It has been suggested to us by Professor George Fisher that the defendant's chances of winning on the aggravating fact after *Apprendi* are actually lower than they were before the decision because the defendant has a better chance before a judge than a jury. To be sure conviction rates at bench trials are lower than the rates at jury trials for some federal crimes. However, we cannot agree that trial jurors – who are not permitted to hear government evidence excluded by the rules of evidence (see, e.g. the case of *Westmoreland*, described in note 23 *infra*), who are bound to reject an aggravating element for any reasonable doubt and permitted to reject it for any reason at all, and whose decisions to do so are unreviewable – would be *more* likely on average to find an aggravating element than a sentencing judge. A sentencing judge is privy to more of the government's proof, need only find the fact more likely than not, and must make sure his decision to reject an aggravating fact will hold up on appeal.

²⁴ See, e.g., *United States v. Murphy*, 109 F. Supp. 2d 1059 (D. Minn. 2000) (sentence was reduced from 300 months to 240 months, the statutory maximum for the unenhanced drug crime); *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000) (remand for a reduction from the ten years imposed to a sentence not to exceed the five-year statutory maximum for the unenhanced marijuana crime); *United States v. Lines*, 2001 WL 329546 (4th Cir. 2001) (unpublished) (sentence reduced from life imprisonment to forty years); *United States v. Westmoreland*, 240 F.3d 618 (7th Cir. 2001) (sentence reduced from life to forty

Even with the very high statutory maximum for the basic federal drug offense simpliciter, because *Apprendi* raises the price of proving the larger drug quantity for the prosecution, some defendants will succeed in contesting allegations of larger quantities and as a result secure convictions to lesser offenses through jury verdict or settlement. In fact, some felons convicted of drug offenses may have their felony sentences reduced to misdemeanors.²⁶ Even if the greater

years); *United States v. Ray*, ___ F.3d ___, 2001 WL 477092 (8th Cir. 5/8/01) (sentence reduced from 97 months to 60 months, the statutory maximum for the unenhanced marijuana crime); *United States v. Velasco-Heredia*, 2001 WL 492349 (9th Cir. 5/10/01) (60-month sentence reversed and case remanded for new trial or resentencing at 37 - 46 months). *United States v. McWaine*, 243 F.3d 871 (5th Cir. 2001) (life sentence reduced to twenty years); *United State v. Murray*, 2001 WL 118605 (6th Cir. 2001) (sentence reduced from twenty-five to twenty years); *United States v. Noble*, 246 F.3d 946 (7th Cir. 2001) (sentence remanded for a reduction from 360 months to no more than twenty years); *United States v. Thomas*, 2001 WL 290046 (5th Cir. 2001) (defendant Weekly's sentence remanded for reduction from life imprisonment to no more than twenty years); *United States v. Covington*, 2001 WL 302067 (6th Cir. 2001) (unpublished) (defendants sentences reduced from 210 months and 120 months respectively to five years each); *United States v. Yakle*, 242 F.3d 378 (8th Cir. 2001) (sentence reduced by twenty-two months); *United States v. Mauleon*, 2001 WL 263092 (9th Cir. 2001) (unpublished) (reducing sentence from 120 months to five years); *United States v. Fields*, 242 F.3d 393 (D.C. Cir. 2001) (reducing sentence from life plus 120 years to no more than thirty years); *United States v. Vigneau*, 2001 WL 273094 (1st Cir. 2001) (reducing sentence "well in excess of that maximum" to five years); *United States v. Von Meshack*, 225 F.3d 556 (5th Cir. 2000) (two life sentences vacated where statutory maximum was thirty years); *United States v. Lewis*, 230 F.3d 1335 (4th Cir. 2000) (unpublished) (121 months sentence exceeded statutory maximum of five years); *United States v. Henderson*, 105 F. Supp. 2d 523 (S.D. W.Va. 2000) (sentence of life reduced to 240 months); *United States v. Arredondo-Hernandez*, 246 F.3d 676 (9th Cir. 2000) (unpublished) (sentence reduced from 324 months to twenty years). These examples do not include the many defendants who were erroneously sentenced above the statutory maximum for the unenhanced drug offense, but who failed to overcome various barriers to collateral relief, including non-retroactivity. For a full discussion of the procedural impediments to correcting flawed judgments after *Apprendi*, see Nancy J. King & Susan R. Klein, *Après Apprendi*, 12 Fed. Sent. Rep. 331 (2000).

²⁵ Though the cases we collect here all involve trials or pleas occurring pre-*Apprendi*, the resulting lower sentences after successful *Apprendi* challenges are in many cases likely to be the same lower sentences the defendant would receive today as a result of the elements rule. Due to the rigors of harmless error and plain error analysis, relief in many of these cases turned upon doubts about whether the record reflected proof beyond a reasonable doubt of the contested aggravator. See King & Klein, *supra* note 22 (discussing review of *Apprendi* error under harmless error and plain error rules). For example, the judge in *Westmoreland*, *supra* n. 22, determined that the defendant was responsible for 8.5 kilograms of cocaine, triggering a maximum life penalty, based upon coconspirator hearsay statements inadmissible at trial under the Confrontation Clause. In reversing the sentence for plain error under *Apprendi*, the Seventh Circuit noted that “the only evidence of drug quantity presented to the jury would have been the approximately 550.9 grams of cocaine found in Westmoreland’s car—a quantity allowing for a sentence of five- to forty-years imprisonment.” *Id.* at 634. Thus, in a post-*Apprendi* world, Mr. Westmoreland would not have been convicted of the greater offense, and would have been benefitted by *Apprendi*’s elements rule to the tune of twenty years. Likewise, the trial judge in *Nordby*, *supra* note 22, found that the defendant possessed 1000 or more plants of marijuana, triggering an increased statutory maximum sentence of life imprisonment. However, the Ninth Circuit reversed for plain error because the defendant presented sufficient evidence at trial and at sentencing (that he was not responsible for most of the growing, that he withdrew from the conspiracy in 1993, that the amount grown by co-conspirators was not foreseeable by him, and that “guerilla gardeners” were growing on his land) such that the jury would not have found this higher amount beyond a reasonable doubt. *Id.* at 1060. Thus, in a post-*Apprendi* world, the prosecutor would have failed to convict of the aggravated offense, and the trial judge would have been limited to a five-year sentence. In other cases cited *supra* in note 22, the jury would not have found the aggravating fact beyond a reasonable doubt, and the sentencing judge would be limited by the correspondingly lower statutory maximum for the unenhanced crime. See, e.g., *United States v. Fields*, 242 F.3d 393, 395 (“The indictment specified quantities of drugs alleged to be involved in Counts 1 and 3, but the verdict form asked only that the jury find ‘detectable amount[s]’ of marijuana, crack cocaine, and phencyclidine (‘PCP’) in order to find defendants guilty. Therefore, it cannot be found that the jury’s convictions on those counts were based on any specific factual findings as to drug quantity. It was only in connection with Count 2 (Continuing Criminal Enterprise) that the verdict form required specific findings that defendants distributed 1.5 kilograms or more of crack cocaine and 3,000 kilograms or more of marijuana, and the jury deadlocked on these issues.”); *United States v. Noble*, 246 F.3d 946 (7th Cir. 2001) (sentence ten years above statutory maximum for unenhanced drug offense was plain error under *Apprendi* because proof of drug quantity, while sufficient for a judicial finding at sentencing by a preponderance of evidence, was not sufficiently strong that a rational jury would have found at trial beyond a reasonable doubt that the defendants distributed one thousand kilograms or more of marijuana or its equivalent).

²⁶ See, e.g., 21 U.S.C. § 841(b)(1)(D) (increasing maximum sentence from one to five years based upon quantity of marijuana); 21 U.S.C. § 844(a) (increasing maximum penalty for simple possession from one to twenty years if substance

drug amount could later be established at sentencing, judges will not be able to impose a sentence above the statutory maximum for the offense of conviction.²⁷

Moreover, by focusing only on Al and his hypothetical case, Professor Bibas appears to be afflicted with a serious case of federal drug myopia. *Apprendi* is not limited to federal drug prosecutions. Forty percent of federal offenders are convicted of drug-related offenses; sixty percent are sentenced for other crimes.²⁸ Most federal crimes do not have a twenty-year maximum absent proof of aggravating facts. Many federal statutes increase a penalty from a misdemeanor to a three-, five-, or twenty-year felony based upon an aggravating fact such as value of property, nature of the item possessed, the mental state of the defendant, and injury to the victim.²⁹ Regardless of what the prosecutor attempts at sentencing, a federal defendant is much better off after *Apprendi* if he succeeds in challenging the aggravator. Equally dramatically, many federal statutes increase a relatively low sentence of three or five years to higher sentences of ten years, twenty years, or even the death penalty, based upon aggravators such as injury or death to the victim, the value of the bribe or item stolen, use of a weapon, the effect on the soundness of a financial institution, and the vulnerability of the victim.³⁰ After

contains cocaine base, from one to three years if substance possessed is flunitrazepam); *United States v. Lowe*, 2000 WL 1768673 (S.D.W.Va. 2000) (conspiracy to distribute marijuana conviction under 21 U.S.C. § 864 subject to maximum one-year penalty rather than five years requested by prosecutor, as jury did not find that marijuana was distributed for remuneration or that it was more than small amount).

²⁷ See U.S.S.G. § 5G1.1 (noting that relevant conduct cannot be used to increase penalty beyond statutory maximum).

²⁸ U.S. Sentencing Commission, 1998 Datafile, USSCFY98.

²⁹ See, e.g., 18 U.S.C. § 216 (increasing statutory maximum penalty from one to five years based upon bribe or gratuity occurring willfully); 18 U.S.C. § 510 (increasing maximum penalty from one to 10 years based upon checks forged having face value exceeding \$1,000); 18 U.S.C. § 661 (increasing statutory maximum penalty from one to five years based upon value of property stolen within special maritime jurisdiction); 18 U.S.C. § 1033 (increasing statutory maximum penalty from one to five years based upon value of information obtained by computer fraud); 18 U.S.C. § 1791(b) (increasing statutory maximum penalty from six months to five, ten, or twenty years based upon nature of prohibited item possessed by federal inmate); 18 U.S.C. § 43(b) (increasing sentence from one year to life imprisonment based upon bodily injury during crime of animal enterprise terrorism); 18 U.S.C. § 247 (increasing maximum sentence from one year to the death penalty based upon finding of serious bodily injury or death occurring during damage to religious property offense); 18 U.S.C. § 111(a)(2) (increasing maximum sentence from one to three years based upon seriousness of assault upon federal officer).

³⁰ See, e.g., 18 U.S.C. § 34 (increasing sentence to life imprisonment or death penalty where crime results in death of any person; 1994 amendment struck requirement that jury direct this sentence); 18 U.S.C. § 111(b) (increasing three-year statutory maximum sentence to ten years based on use of a deadly weapon or injury to the federal officer); 18 U.S.C. § 201(b)(2) (bribery; increasing fine to three times the monetary equivalent of the thing of value); 18 U.S.C. § 248 (b) (increasing maximum sentence from three to ten years or life imprisonment based upon serious bodily injury or death during course of violation of freedom of access to clinic entrances act); 18 U.S.C. § 521 (increasing maximum sentence by additional ten years if federal felony offense was committed while participating in or to promote a criminal street gang); 18 U.S.C. § 653 (increasing fine to amount of public funds embezzled); 18 U.S.C. § 1033 (increasing maximum sentence from ten to fifteen years based upon jeopardizing the soundness of an insurer); 18 U.S.C. §§ 1341 and 1343 (mail and wire fraud; increasing maximum sentence from five to thirty years based upon violation affecting a financial institution); 18 U.S.C. § 1363 (increasing maximum sentence from five to twenty years based upon the building being a dwelling or a life being placed in jeopardy); 18 U.S.C. § 1503(b) (increasing maximum penalty for influencing juror or obstructing justice from ten to twenty years based upon the attempted killing of a petit juror, and to the death penalty based upon killing a petit juror); 18 U.S.C. § 1958(a) (increasing maximum penalty for commission of murder-for-hire from ten years to life imprisonment if death results); 18 U.S.C. § 1959 (increasing maximum penalty for violent crime in aid of racketeering activities from three years to death penalty based upon use of weapon, injury to victim, death of victim); 18 U.S.C. § 2261 (increasing maximum sentence for interstate stalking from three years to life based on injury to victim); 18 U.S.C. § 2262(b) (increasing penalties for interstate violation of protective order from five to ten years if serious bodily injury to the victims result, twenty years if permanent disfigurement results, or life imprisonment if the victim dies); 18 U.S.C. § 2326 (increasing maximum fraud sentence by additional five years based upon telemarketing, and additional ten years

Apprendi, federal defendants actually innocent of these aggravating elements are in a significantly better position, because if they prevail at trial and are convicted of only the lesser offense nothing the prosecutor can prove at sentencing can raise the sentence above the statutory maximum for that lesser offense.³¹ Again, actual federal defendants convicted of non-drug related offenses have received significant sentencing reductions after *Apprendi*.³² Many of these defendants were unwilling to plead guilty to the aggravating fact even before *Apprendi*'s elements rule. They will certainly not do so afterwards.

By focusing on federal drug offenders, Professor Bibas also overlooks the vast majority of those who will be affected by *Apprendi*: felons prosecuted in state courts. There are about 1 million felony filings per year on the state level versus about 30,000 felony filings per year in federal district court.³³ In many of these states prosecutors lack the degree of leverage provided in the federal system by higher sentence ceilings, mandatory guidelines, and relaxed procedures

based upon victimizing at least ten persons over age fifty-five); 18 U.S.C. § 2332(b)(c) (increasing maximum sentence for acts of terrorism transcending national boundaries from ten to twenty-five years based on damage to property, thirty years based on serious bodily injury, thirty-five years for maiming, life imprisonment for kidnapping, and the death sentence for killing); 31 U.S.C. § 5324 (increasing maximum sentence from five to ten years based on violation of the bank secrecy act as part of a pattern); 8 U.S.C. § 1324(b) (increasing penalty from five years to death based upon commercial gain and injury); 18 U.S.C. § 1201 (increasing statutory maximum penalty from life imprisonment to death penalty if death results); 18 U.S.C. § 1512(i) (increasing statutory maximum from ten years to the maximum penalty for the offense charged in the proceeding hindered if the proceeding involved a criminal case); 21 U.S.C. § 848(e) (increasing statutory maximum penalty from life imprisonment to death penalty if defendant engaged in a continuing criminal enterprise intentionally kills another or to avoid apprehension intentionally kills a law enforcement officer); 31 U.S.C. § 5322 (increasing statutory maximum penalty from five to ten years based upon violation of currency reporting requirements while violating another law or as part of a pattern of illegal activity); 7 U.S.C. § 2024(b) (increasing statutory maximum penalty from five to twenty years based upon unauthorized use of food stamps having face value in excess of \$5,000).

³¹ The sole possible exception to our claim, and it is a significant exception, is the potential for federal district judges in cases involving multiple counts to impose consecutive sentences rather than allowing related sentences to run concurrently, as would ordinarily be the case pursuant to the grouping provisions of the Federal Sentencing Guidelines. Appellate courts have split over whether the ability of the trial court to “stack” sentences in this way provides a basis for upholding a sentence that would otherwise violate *Apprendi*. Compare *United States v. Sturgis*, 2001 WL 9604 (8th Cir. 2001) (upholding sentence reasoning that trial judge could have imposed sentence above statutory maximum on one count by running multiple counts consecutively rather than concurrently); *United States v. White*, 240 F.3d 127, 135 (2d Cir. 2001) (same); *United States v. Parolin*, 239 F.3d 922 (7th Cir. 2001) (enhancing mail fraud sentence to 194 months based upon vulnerable victim and crime committed while on release ordinarily must be reduced to five-year statutory maximum after *Apprendi*, sentence saved by stacking sentence for interstate transportation of stolen property with ten-year statutory maximum) with *United States v. Jones*, 2000 WL 1854077 (10th Cir. 2000) (cannot rely on consecutive sentencing to avoid *Apprendi*). Compare also *State v. Gambrel*, 2001 WL 85793 (Ohio App. 2001) (*Apprendi* does not limit ability to impose consecutive sentences) with *People v. Harden*, 318 Ill. App. 3d 425 (2000) (sentences may not be stacked, contrary to statute requiring that sentences ordinarily run concurrently, to avoid the consequences of *Apprendi*). In any case, defendants who receive consecutive sentences equivalent to the sentence they would have received before *Apprendi* are in no worse position than they were before *Apprendi*.

³² See, e.g., *United States v. Pavelcik*, 232 F.3d 898 (9th Cir.) (unpublished) (five-year consecutive enhancement under 18 U.S.C. § 2326 for fraud involving telemarketing vacated, sentence reduced from nine years three months to fifty-one months); *United States v. Chestaro*, 197 F.3d 600 (2d Cir. 1999) (relying on *Jones v. United States*, 18 U.S.C. § 111(b), enhancing penalty from one or three years to ten years based upon injury, constitutes an element that must be found by the jury); *United States v. Tinsley*, 238 F.3d 418 (4th Cir. 2000) (unpublished) (sentence for murder for hire vacated and remanded in light of *Apprendi*); see also *United States v. King*, 2001 WL 363673 (9th Cir. 2001) (71-month sentence for mail fraud, above five-year statutory maximum, remanded for resentencing and determination as to applicability of *Apprendi*); *United States v. Confredo*, 242 F.3d 368 (2d Cir. 2001) (unpublished) (*Apprendi* may require a “while on release” enhancement to be submitted to a jury, sentence vacated and remanded).

³³ In 1996, 47,146 criminal cases were filed in the federal courts, of which slightly over two-thirds were felonies. By contrast, in 1996, almost 998,000 felonies were filed in the 50 states. See Norman Abrams & Sara Sun Beale, *Federal Criminal Law and Its Enforcement* 13 (West 2000).

for recidivism enhancements. Let us examine just a sampling of state statutes where *Apprendi* is making a big difference - all favorable to the defense. District attorneys in Alabama, California, Florida, Illinois, Minnesota, New Jersey, New York, North Dakota, and North Carolina can no longer boost sentences by waiting until sentencing to prove by a mere preponderance of facts such as sexual motivation,³⁴ exceptional brutality,³⁵ future dangerousness,³⁶ vulnerability of the victim,³⁷ proximity to a school,³⁸ racial animus,³⁹ serious bodily injury,⁴⁰ or the use of a firearm.⁴¹ Many of these facts are not particularly easy to establish beyond a reasonable doubt. Recognizing this, courts have already reduced numerous sentences, some by as much as half.⁴² A credible threat by a defendant to contest an aggravating element may indeed produce a plea, but to the *lesser* offense, not to the aggravated one, as Professor Bibas would have us believe. Prior to *Apprendi*, it may have made sense for a defendant guilty of the single offense but innocent of the aggravator to plead guilty and try to head off the longer sentence at sentencing. After *Apprendi*, innocent defendants will be in a much better position to demand concessions. Divorced from the unique attributes of Al's position (a prior offender facing federal drug charges from a prosecutor who won't use prior convictions as leverage or insist on admissions to

³⁴ See, e.g., *State v. Grossman*, 622 N.W.2d 394 (Minn. App. 2001) (decrease sentence from forty to thirty years because jury did not find that the crime was motivated by sexual impulse); *Grant v. Florida*, 2001 WL 261646 (Fla. App. 1 Dist.) (judicial finding of sexual contact will not allow 85 months sentence, as this is above the statutory maximum for the unenhanced crime).

³⁵ See, e.g., *State v. Lucas*, 2001 WL 286422 (Ill App. 1st Dist. 2001) (extended term of 120 years for attempted murder and aggravated assault based upon brutality reduced to eighty years); *People v. Nitz*, 2001337197 (Ill. App. 5 Dist. 2001) (life sentence for murder enhanced for exceptional brutality reduced to sixty years).

³⁶ See, e.g., *State v. Wilder*, 2001 WL 314664 (Ill App. 1st Dist. 2001) (extended term of sixty years for murder to protect public from further criminal conduct reduced to forty-five years); *Clark v. State*, 621 N.W.2d 576 (N.D. 2001) (five-year consecutive enhancement for "especially dangerous" offender must go to the jury, sentence reduced from fifteen to ten years).

³⁷ See, e.g., *People v. Chanthaloth*, 743 N.E.2d 1043 (Ill. App. 2 Dist.) (extended term of forty years for brutality and elderly and physically handicapped victim reduced to thirty years); *People v. Coulter*, 2001 WL 314769 (Ill. App. 6 Dist.) (life sentence for murder of police officer ordinarily reduced to forty years, but defendant's sentence valid because *Apprendi* is not retroactive on collateral appeal).

³⁸ See, e.g., *Sanders v. State*, 2001 WL 221437 (Ala. Crim. App. 2001) (two consecutive five-year enhancements for commission of crime near school and housing project should be charged in indictment and submitted to a jury, but this defendant is not entitled to retroactive application of *Apprendi* on collateral review).

³⁹ See, e.g., *Apprendi v. New Jersey*, 531 U.S. 466 (2000) (racial-bias enhancement potentially doubling ten-year maximum sentence, defendant's actual 12 year sentence vacated); Brennan Schurr, Associated Press, "Sentence Cut after Court Reverses hate-Crimes Ruling," *The Record*, Northern New Jersey, July 21, 2000, at A06 (reporting that Judge Rushdon H. Ridgway reduced sentence to seven years as prosecutors only "showed by a preponderance of the evidence that Apprendi's act was racially motivated").

⁴⁰ See, e.g., *People v. Burns*, 2001 WL 304090 (Ill App. 1 Dist. 2001) (fifty-year sentence enhanced for serious bodily injury reduced to forty years).

⁴¹ See, e.g., *State v. Guice*, 541 S.E.2d 474 (N.C. App.) (sentence of 116 months enhanced for use of firearm exceeded statutory maximum for kidnapping, reduced by five years); *State v. Shoats*, 2001 WL 267054 (N.J. Sup. A.D.) (application of No Early Release Act, requiring that defendant serve 85% of his sentence and be subjected to automatic five-year probation after sentence served, cannot be imposed unless the jury finds beyond a reasonable doubt that the defendant used a weapon); *Dillard v. Roe*, 2001 WL 289969 (9th Cir. 2001) (ten-year consecutive enhancement for a defendant who "personally used a firearm" was an element, sentence reduced from thirty-five to twenty-five years); *People v. Rhodes*, 2001 WL 254258 (N.Y.A.D. 1 Dept. 2001) (five-year consecutive enhancement for display of weapon must go to jury, but no remand because the jury necessarily found the enhancing fact as part of the other two charges).

⁴² See cases cited in notes 32-39 *supra*.

sentence enhancements) Professor Bibas' statement that defendants "must now surrender hearings on these issues with their guilty pleas, because they plead guilty to every element of the offense"⁴³ is about as persuasive as saying that an alleged rapist who lacked *mens rea* must plead guilty rather than contesting his mental state.

Admittedly, there is a category of cases where defendants might, in fact, be “hurt” by *Apprendi*. But for this to happen, all of the following must be true: First, the prosecutor must have had a trump card such as a prior conviction which for some reason he was unwilling or unable to use to leverage an admission to the aggravating feature as part of a plea agreement. Second, the prosecutor must perceive the price of trial on the aggravator to be so costly after *Apprendi* that he will now wield this threat to try to avoid that trial, even though he would not have done so before *Apprendi*. Third, the prosecutor and the defendant must both believe they could win on the aggravator at sentencing before a judge, so much so that they don’t perceive it in their best interest to include a stipulation as to that aggravator. Finally, the prosecutor’s evidence of the aggravator would have to be weak enough to actually lose on this issue. We suspect that the quantity of cases in which all of these stars align is not large.⁴⁴

Professor Bibas also fails to convince when he criticizes *Apprendi* because it “chops up crimes and creates more statutory maxima, which permits more arbitrariness.”⁴⁵ The arbitrariness results when prosecutors take advantage of the opportunity to charge some defendants with lesser, some with higher offenses, thus binding judicial discretion where before there was just one charging option. For Professor Bibas, “charge bargaining threatens to undermine equal treatment.” Our objection to this point is two-fold. It is not obvious to us that the choices of prosecutors and juries in selecting among available charges are significantly more arbitrary than those of judges in selecting sentences within broad penalty ranges.⁴⁶ The striking trend of

⁴³ Bibas, *supra* note 1, at 162.

⁴⁴ There is another reason we believe that the number of defendants actually disadvantaged by *Apprendi* is small. After *Apprendi* there is a method of litigating a maximum-enhancing aggravator that is almost as “cheap” to the prosecution as the sentencing hearing, that would allow defendants and prosecutors to replicate, quite closely, the pre-*Apprendi* world. If a prosecutor after *Apprendi* is concerned about the cost of litigating the aggravating fact as an element, and the defendant wants to obtain the advantages that would flow from pleading guilty, the two sides can agree to a bench trial, on stipulated facts, except for the aggravating factor. Cf. *United States v. Guerrero-Cortez*, 110 F.3d 647, 653 - 656 (8th Cir. 1997). The main difference between this process and a plea-plus-sentencing hearing would be the burden of proof by which the prosecutor must establish the aggravating fact. It is, in a sense, a partial guilty plea, a plea to the lesser offense, with trial on only the aggravating feature. See also *United States v. Velasco-Heredia*, 2001 WL 492349 (9th Cir. 2001) (citing to *Jones v. United States v. 526 U.S. 277* (1999), district judge, “in an admirable display of attention and caution, allowed Velasco-Heredia to withdraw his guilty plea in order to better preserve his argument for appeal. The parties proceeded with a bench trial and submitted stipulated facts” whereby defendant admitted to 17 kilos of marijuana but contested the 285 kilos which would trigger the enhanced sentence).

⁴⁵ Bibas *supra* note 1.

⁴⁶ Curiously, Professor Bibas later raises as a bad thing the specter of judicial discretion, when he argues why too much process in sentencing is a problem. *Id.* at 183. This claim is inconsistent with his mission of enhancing judicial discretion by depriving prosecutors of the trump cards they can use in charging to set sentences. Later, he bemoans the demise of legislative control over judges when claiming (erroneously) that *Apprendi* will limit (community-inspired) sentence rules enacted by legislatures but not those (undemocratic) sentence rules created by an unelected sentencing commission. Not only is this concern with democracy in sentencing inconsistent with his vision of judicial hegemony over sentencing, it is a misreading of *Apprendi*. Legislatures after *Apprendi* remain in the driver’s seat, free to control judicial discretion to set sentences within statutory maxima as they please, to designate juries as sentencers, to abolish sentencing commissions, or (within constitutional limits) raise sentence maxima so high that *Apprendi*’s elements rule is never triggered.

legislation limiting judicial discretion in the last forty years,⁴⁷ has, after all, been motivated at least in part by the belief that judges were discriminating among defendants unfairly.⁴⁸ This debatable claim, aside, however, Professor Bibas' lament about prosecutorial power has little to do with *Apprendi*. To meaningfully limit charge bargaining, as Professor Bibas would have us do, we would have to abandon graded offenses, a great many of which have existed for centuries. Aggravating elements that separate greater and lesser offenses have long provided prosecutors and jurors the ability to distinguish the bad from the worse.⁴⁹ The number of offenses already graded by aggravating elements prior to *Apprendi* dwarfs the limited number of criminal statutes whose sentence enhancements the *Apprendi* decision has transformed into aggravating elements. Even before the adoption of the Bill of Rights, state legislatures began calibrating penalty to culpability by carving up what were once single offenses into different degrees or levels of seriousness.⁵⁰ The grading of criminal offenses was seen then, as now, as essential for advancing the principles of utility and desert. As all first-year law students learn, grading of offenses is designed to advance utilitarian goals by creating incentives for offenders to avoid escalating their criminality, and to maintain proportionality between penalty and offense.⁵¹ *Apprendi* did not establish this nation's preference for legislatures to select which features distinguish greater and lesser offenses. *Apprendi* merely applied that norm, recognizing that whenever a legislature has bothered to key its maximum sentences to particular aggravating facts, those facts should continue to be treated as elements.

⁴⁷ See generally Wayne La Fave, Jerold H. Israel & Nancy J. King, 5 Criminal Procedure at 734-35 § 26.3(b) (2d ed. 2000).

⁴⁸ Our most recent sentencing reforms have been designed precisely to limit the opportunities for discrimination and inequality presented by unguided judicial discretion. See LaFave, Israel & King, *supra* note 45; *Apprendi*, 120 S.Ct at 2397 (Breyer, J. dissenting). Even if one resolves this debate about fairness in favor of judges, the argument that graded offenses increase prosecutorial power is far from new. Professor Bibas joins a chorus of protests against the shift of power to prosecutors occasioned by legislated limits on judicial discretion. See, e.g., Susan R. Klein, *Double Jeopardy's Demise*, 99 Cal. L. Rev. 1001 (2000) (arguing for judicially imposed limits on legislative and prosecutorial charging and sentencing discretion through the double jeopardy clause); Elizabeth T. Lear, "Criminal Law: Contemplating the Successive Prosecution Phenomenon in the Federal System," 85 J. Crim. L. & Criminology 625 (1995) (suggesting that congress impose statutory limits on prosecutors); Kate Stith and Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 141 (1999) (noting that "the exercise of broad prosecutorial authority over sentencing *within a system that severely limits the sentencing discretion of federal judges* means that the power of prosecutors is not subject to the traditional checks and balances that help prevent abuse of that power.") (emphasis in original); Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for 'Fixed' and 'Presumptive Sentencing,'* 126 U. Pa. L. Rev. 550 (1978).

⁴⁹ See George Fisher, *Plea Bargaining's Triumph*, 109 Yale L. J. 857 (2000).

⁵⁰ See King & Klein, *supra* note 3, at note 136-42 (describing movement to terms of imprisonment in late 1700s). This shift came first, of course, with statutes dividing murder into degrees. See also *id.* at nn. 14-16; 22-24 (describing graded offenses of the early nineteenth century).

⁵¹ See, e.g., Ronald J. Testritto, *Founding the Criminal Law* (2000). As one article noted recently, in assessing the "best" and "worst" criminal codes of every American jurisdiction, a general "grading structure" for offenses is considered "critical."

A grading scheme with only a few categories essentially delegates most of the grading task to the sentencing judge ... which undercuts uniformity in application and increases the potential for abuse of discretion. ... [A] system of grading categories can be said to have its own practical value, for it forces the legislature to consider the relative seriousness of an offense vis-a-vis other offenses [T]he code should recognize all appropriate aggravating and mitigating conditions when specifying different "degrees" of an offense

Paul H. Robinson, Michael T. Cahill, and Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 Nw. U. L. Rev. 1, 51-59 (2000).

Our final points concern Professor Bibas' claims about the effects of *Apprendi* on notice and prejudice to the defendant. Continuing on his quest to blame the perfectly sensible decision in *Apprendi* for much of what he dislikes about criminal procedure generally, Professor Bibas declares that *Apprendi* is "not tailored to give defendants notice they need before they plead guilty, namely notice of maximum sentences they face."⁵² To be sure, it's conceivable that a defendant or attorney could draw the wrong inference from a charging document about the maximum sentence at stake, but defendants and their attorneys are much more likely to get that sentence maximum right *after* the *Apprendi* decision than they were before *Apprendi*. Aggravating features triggering higher sentences were not even considered elements that must be included in the charge before *Apprendi*. What the decision does not do is ensure notice of prior offender status and its consequent penalties, because the Court (for the time being) left *Almendarez-Torres*⁵³ standing. Of course, this means not that the Court should have *rejected* the elements rule in *Apprendi*, as Professor Bibas argues, but that it should have *extended* it to prior offenses as well.

We doubt that Professor Bibas would welcome this logical extension of his own argument about notice, however, because making prior offenses elements would in his view unduly prejudice those defendants who did go to trial. For Professor Bibas, allowing aggravating features to become elements is "disastrous"⁵⁴ because of the supposed effect on the jury. (It is curious that he trots out the jury for this single point, given his disdain for scholars who continue to consider the jury trial a relevant feature of the criminal justice system.) What he overlooks is that defendants have been weathering this "disaster" for centuries. We have lived for two centuries in a world where many aggravating facts (although not always prior offense status) went to the jury, and that tradition is embedded in graded offenses in every state. The claim of today's Alan that "I didn't deal, but if I did it was less than 50 grams," is no more prejudicial than the claim of yesterday's Alex that "I did not steal, but if I did it was less than \$50."⁵⁵ Unfortunately for Professor Bibas, the Constitution does not protect defendants from the consequences of inconsistent defenses.

In Professor Bibas' "World of Guilty Pleas," the Constitution is rewritten. The jury is pointless. A judge would provide process that is better than the process jury trials could provide; legislatures would enact only generic, ungraded offense definitions, leaving no toe-holds for prosecutors to differentiate among offenders, a task better left to judges.⁵⁶ To be sure, others before him have argued that we have stuffed so much procedure into the jury trial process that

⁵² [pin cite]

⁵³ 523 U.S. 224 (1998).

⁵⁴ Bibas, *supra* note 1, at 154.

⁵⁵ King & Klein, *supra* note 3, at 1472, 1475 nn.14 & 22 (collecting early cases and statute where value treated as element).

⁵⁶ Professor Bibas recognizes that *Apprendi* is easily evaded by legislatures, and that there may be a need to control such legislative action. He adopts our suggestion to require that any fact that raises a misdemeanor to a felony be considered an element. While we are pleased that he agrees with us on this point, we would go much further. See King & Klein, *supra* note 3.

we have made it unattainable for either defense or prosecution.⁵⁷ But these grumpy refrains are generally directed at resurrecting the jury trial in some form; they do not approach the startling proposals advanced by Professor Bibas, who seeks it seems to close the casket lid on Article III and the Sixth Amendment, starting with overruling *Apprendi*. Surely there are many steps courts and lawmakers could take to promote community input, combat arbitrariness, provide more accuracy and notice, and reduce coercion in our criminal justice system. But to abandon the decision in *Apprendi* would be to run in the opposite direction.

⁵⁷ See, e.g., John Langbein, *Torture and Plea Bargaining*, 46 U. Chi. L. Rev. 3, 11 (1978); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 874 (1994). See also William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1 (1997).