NOTE

"SHADOWS" CAST BY JURY TRIAL RIGHTS ON FEDERAL PLEA BARGAINING OUTCOMES

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Introduction

Based on the images portrayed in television, movies, and books, the average person may believe that jury trials are the bedrock of our criminal justice system. But this understanding is starkly at odds with reality—plea bargains define our federal criminal justice system. Studies from the United States Department of Justice have found that more than 90% of adjudicated federal felony cases are resolved by plea bargain.[1] Absent unusual circumstances, most federal defendants will never see a jury.

Yet the right to a jury trial—protected by the Sixth Amendment and incorporated into the Fourteenth Amendment Due Process Clause[2]—is meant to serve as a primary source of protection against "oppression by the Government."[3] In *Alleyne v. United States*,[4] the Supreme Court lauded the "historic role of the jury as an intermediary between the State and criminal defendants."[5] This right "was from very early times insisted on by our ancestors in the parent country, as *the* great

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* Georgetown University Law Center, J.D. 2019, Azusa Pacific University, B.A. 2015. I would like to thank Professor Shon Hopwood for his helpful critiques, comments, and research assistance. I would also like to thank the editors and staff of the *American Criminal Law Review* for their hard work in helping prepare this Note for publication. Special thanks to my friends, family, and beautiful wife for their support in all of my endeavors.

1. Barbara Boyland et al., U.S. Dep't of Justice, The Prosecution of Felony Arrests, 1987 (1990) (finding that more than 90% of all federal felony cases are resolved by plea bargain); Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. Times (Mar. 22, 2012), https://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html (discussing DOJ study that found 96.4% of adjudicated federal criminal cases are resolved by plea bargain).

2. Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (incorporating the Sixth Amendment right to a jury trial into the Fourteenth Amendment Due Process Clause).

3. *Id.* at 155 ("A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.").

4. 570 U.S. 99 (2013).

5. *Id.* at 114; *see also* United States v. Gaudin, 515 U.S. 506, 510–11 (1995) ("This right was designed to guard against a spirit of oppression and tyranny on the part of rulers, and was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties." (internal quotation marks omitted) (quoting Joseph Story, Commentaries on the Constitution of the United States 541 n.2 (4th ed. 1873))); Williams v. Florida, 399 U.S. 78, 100 (1970) ("[T]he essential feature of a jury obviously lies in [its] interposition between the accused and his accuser.").

bulwark of their civil and political liberties."[6]

So what is, or what should be the role of jury rights in a justice system where the majority of defendants never exercise those rights? Judge Stephanos Bibas criticized theories of criminal procedure that emphasize the jury trial as being "decades out of date. . . . Our world is no longer one of trials, but of guilty pleas."[7] But criminal justice theories that focus on the jury trial continue to dedicate substantially more attention to "the unique and venerable role of the jury" or "its traditional and revered role as factfinder."[8] For example, a survey by Judge Bibas found that between 1991 and 2001, 633 articles were written about criminal petit juries, while only 62 were written about guilty pleas or plea bargaining.[9] A leading textbook dedicated to criminal procedure had eight times as many pages dedicated to jury trials than pages dedicated to plea bargaining.[10] Calls to directly regulate or apply constitutional procedure to plea bargaining have gone ignored and encountered resistance.[11]

One reason for this resistance, and a focus of this Note, is the theory that plea bargaining operates in the trial's "shadow."[12] This Note explains that a defendant's plea bargain process should correlate to what the defendant and government expect to occur at trial, with the defendant receiving a shorter sentence for accepting the bargain.[13] Robust jury trial rights *should* benefit plea bargaining defendants, because these rights make it more difficult for the government to obtain a conviction. The government has an incentive to avoid these additional trial challenges when it can. The more the government wants to avoid trial, the more the defendant can leverage his trial right to obtain a better plea bargain. But this is not the reality for the average federal defendant.

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6. *Gaudin*, 515 U.S. at 510–11 (emphasis added) (citation omitted).

7. Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1150 (2001).

8. *Id.* at 1149 (citations omitted).

9. *Id.*

10. *Id.*

11. *See generally* Rachel Broder, *Fair and Effective Administration of Justice: Amending Rule 11(c)(1) to Allow for Judicial Participation in Plea Negotiations*, 88 TEMP. L. REV. 357, 363–65 (2015) (discussing rationales invoked to prevent judges' involvement in the plea bargaining process); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1118 (2011) (noting that only recently has the Supreme Court begun to "move beyond its fixation upon the handful of cases that go to jury trials").

12. *See generally* Bibas, *Judicial Fact-Finding*, *supra* note 7, at 1185 ("Scholarship need not denigrate or ignore jury trials, particularly because plea bargaining happens in part in the shadow of expected trial outcomes."); Frank H. Easterbrook, *Plea Bargaining is a Shadow Market*, 51 DUQ. L. REV. 551, 551 (2013) ("Plea bargaining is a form of contract, and its regulation through the common-law process is fundamentally no different from the way courts treat other contracts. People bargain to advance their view of their interests.").

13. Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309 (1983). This Note will sometimes refer to a criminal defendant's shortened sentence, which results from their acceptance of a plea bargain, as a "discount."

In this Note, I argue that the spirit of the Sixth Amendment right to a jury trial has been lost for plea bargaining federal defendants in our "system of pleas."[14] But this does not have to be the case. A theory of criminal procedure focused on the right to a jury trial is not necessarily out of date. Robust jury trial rights could conceptually cast shadows on the plea bargaining process. This Note does not purport to have an answer to how the spirit and purpose of the Sixth Amendment right *should* apply to a system of pleas. It does, however, take an important first step by demonstrating the conflict between the spirit of the jury trial right and its application to plea bargaining.

Part One discusses the Sixth Amendment right to a jury trial and the law governing judicial fact-finding at sentencing. More specifically, it discusses the *Apprendi* line of cases from the Supreme Court. Part Two introduces the shadow of the trial model and outlines arguments of both proponents and critics of the model.[15] Part Three addresses the "shadows" cast by Sixth Amendment jury trial rights. I analyze how jury trial rights conceptually alter the costs and risks associated with trial, but conclude that the shadows from these rights have not been realized in practice. This Note concludes by finding that the "spirit" of the *Apprendi* cases has been effectively circumvented, so the majority of federal plea bargaining defendants do not benefit from these holdings.

I. SIXTH AMENDMENT LIMITS ON JUDICIAL FACT-FINDING IN THE SENTENCING CONTEXT

The Supreme Court has interpreted the jury trial right to require the government to prove, beyond a reasonable doubt, all relevant facts or elements that increase the sentence a judge *may* impose[16] and those that increase the statutory minimum a judge *must* impose.[17] The Court's holdings have attempted to reconcile two competing values. The first is that the defendant may be punished only when the facts necessary to impose a conviction and punishment are proven beyond a reasonable doubt to the jury.[18] Second, the defendant's punishment should be calibrated to the relevant circumstances of his offense, which were historically determined by the judge.[19] As such, *Apprendi* is a defining moment, lying at the intersection of the

14. Lafler v. Cooper, 566 U.S. 156, 170 (2012).

15. I refer to this model using the shorthand "shadow model."

16. *See* Blakely v. Washington, 542 U.S. 296 (2004); Apprendi v. New Jersey, 530 U.S. 466 (2000).

17. Alleyne v. United States, 570 U.S. 99, 103 (2013). Facts that are allocuted to in a plea agreement satisfy this burden, and the Court has treated those crimes to which a defendant pleads guilty and the facts allocated to as established under the Sixth Amendment standard.

18. Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 SUFFOLK U. L. REV. 1, 30 (2016); Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235, 263 (2009).

19. Benjamin J. Priester, *From Jones to Jones: Fifteen Years of Incoherence in the Constitutional Law of Sentencing Factfinding*, 47 U. TOL. L. REV. 413, 413 (2016) (calling the exercise of judicial fact-finding at sentencing a "ubiquitous practice in contemporary American criminal justice"); *see also* Johnson, *supra* note 18, at 4–5 (discussing arguments that greater judicial discretion at sentencing furthered offender rehabilitation).

Sixth Amendment jury trial right and rules for judicial-fact finding at sentencing.[20]

A. *Pre-*Apprendi*: The Court Struggles to Limit Judicial Discretion at Sentencing via the Element/Sentencing-Factor Distinction*

Before the *Apprendi* cases, sentencing regimes across the country were based largely on judicial discretion, where judges selected the appropriate punishment for offenders.[21] As Professor Priester explains, the Constitutional issue—what facts required a jury finding beyond a reasonable doubt and what facts a judge could appropriately use for sentencing purposes—"had been considered obvious[.]"[22] Judges were deemed competent to select individualized punishment for a defendant with whom they had interacted.[23] This model was largely based on the criminal justice system's focus on rehabilitation.[24] But in the 1970s, critics blamed these indeterminate sentencing systems for unwarranted sentencing disparities.[25]

In *In re Winship*, the Court announced the "elements" test, imposing new limits on judicial discretion at sentencing.[26] The Court reversed a trial judge's finding of delinquency and corresponding punishment, supported only by a preponderance of the evidence that a minor committed larceny.[27] The Court held that the Due Process Clause protects a defendant from conviction unless the government "pro[ves] beyond a reasonable doubt every fact necessary to constitute the crime with which [the defendant] is charged."[28] What was an element—and thus a fact necessary to constitute the crime charged—remained unclear. The Court similarly struggled to define "elements" in its subsequent holdings.

In *Mullaney v. Wilbur*,[29] the Court invalidated a state statute that circumvented the "elements" principle by requiring the defendant to prove the absence of presumed facts.[30] Maine's statute defined criminal homicide as a killing that is "unlawful—i.e., neither justifiable nor excusable" and "intentional."[31] The statutory scheme then provided different punishments for murder and manslaughter.[32] The trial court instructed the jury that while "malice aforethought is an essential and indispensable element of the crime of murder," if the prosecution could

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20. Nila Bala, *Judicial Fact-Finding in the Wake of* Alleyne, 39 N.Y.U. REV. L. & SOC. CHANGE 1, 4 (2015).

21. Priester, *supra* note 19, at 415; *see also, e.g.*, Mistretta v. United States, 488 U.S. 361, 363 (1989) (reviewing the history of judicial discretion in sentencing and discussing the wide variations in sentences before the Sentencing Guidelines); KATE SMITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9 (1998).

22. Priester, *supra* note 19, at 415.

23. *Id.* at 415–16.

24. Ngov, *supra* note 18, at 244.

25. *Id.*

26. 397 U.S. 358 (1970).

27. *Id.* at 359–61.

28. *Id.* at 364.

29. 421 U.S. 684 (1975).

30. *Id.* at 702, 704.

31. *Id.* at 685.

32. *Id.* at 686 n.3.

establish that "the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied."[33] Only if the defendant proved by a preponderance of the evidence that he had acted in the heat of passion could this implication be overcome.[34] The Court explained that permitting such a formulation would permit the state to "impose a life sentence for any felonious homicide—even one that traditionally might be considered involuntary manslaughter—unless the *defendant* was able to prove that his act was neither intentional nor criminally reckless."[35] Citing *In re Winship*, the Court reasoned that it was concerned with the "operation and effect of the law as applied and enforced by the State"[36] when determining whether a fact constituted an element.[37] Because malice aforethought was necessary for the crime of murder—which carried a greater punishment—it was an element. Thus, the Court held that Maine unconstitutionally shifted the burden of proof of an element to the defendant.[38]

The Court, however, retreated from its *Mullaney* reasoning in *Patterson v. New York*.[39] *Patterson* held that the state's criminal statute, which defined murder as intentional killing but permitted an affirmative defense of "extreme emotional disturbance," was constitutionally permissible.[40] The Court attempted to distinguish *Mullaney* by highlighting the different definitions of murder in the statutes,[41] but the statutes were functionally identical.[42] In both, the defendant was required to prove mitigation.[43] *Patterson* read *Mullaney* narrowly so as not to require a state to prove all facts that affect the degree of culpability or punishment.[44]

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33. *Id.* at 686.

34. *Id.*

35. *Id.* at 699.

36. *Id.* (citation omitted).

37. *Id.* ("*Winship* is concerned with substance rather than this kind of formalism.").

38. *Id.* at 701–02.

39. 432 U.S. 197, 201 (1977).

40. *Id.*

41. *Id.* at 200–01. The Court reasoned that the *Mullaney* statute had not removed "malice aforethought" from the definition of murder and presumed this fact against the defendant, while "nothing was presumed" against Patterson. *Id.* at 215–16.

42. As the dissent noted, even if the decision was consistent with the holding in *Mullaney* based on a strict statutory reading, *Mullaney* (and *Winship*) seemed to stand for a broader application. *Id.* at 223 (Powell, J., dissenting). The dissent continued by reasoning:

> "[A] standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." . . . Explaining *Mullaney*, the Court says today, in effect, that society demands full confidence before a Maine factfinder determines that heat of passion is missing—a demand so insistent that this Court invoked the Constitution to enforce it over the contrary decision by the State. But we are told that society is willing to tolerate far less confidence in New York's factual determination of precisely the same functional issue. One must ask what possibly could explain this difference in societal demands.

Id. at 223–24 (Powell, J., dissenting) (quoting *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J. concurring)).

43. *Id.* at 227 (Powell, J., dissenting).

44. *Id.* at 214–15 & n.15; Bibas, *Judicial Fact-Finding*, *supra* note 7, at 1105. The *Patterson* Court also reasoned that holding otherwise could discourage legislatures from passing progressive reforms like new

Not long after, the Court expanded *Patterson*. In *McMillan v. Pennsylvania*,[45] the Court applied principles from *Patterson* to a structured sentencing regime and held that facts triggering a mandatory minimum sentence were not elements of the offense.[46] Pennsylvania's statute required a judge to impose a prison sentence of at least five years if she found, by a preponderance of the evidence, that a defendant —"convicted of certain enumerated felonies"—"visibly possessed a firearm" during the commission of the offense.[47] The Court upheld the sentencing enhancement because the statute "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty, [but] operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available."[48] The Court also noted "[t]he statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense."[49] The Court also found that the statute did not circumvent the mandate of *Winship*, because the legislature "simply took one factor that has always been considered by sentencing courts to bear on punishment—the instrumentality used in committing a violent felony—and dictated the precise weight to be given that factor if the instrumentality is a firearm."[50] The concept that some factors have historically been considered by the judge at sentencing, and not by the jury at trial, provided another justification to avoid subjecting certain facts to the jury and its greater burden of proof.

In *Almendarez-Torres v. United States*, the Court used this justification to further limit the elements test, taking power from juries and giving more discretion to sentencing judges.[51] The Court held that the fact of a prior conviction was a sentencing factor that could be considered by a judge despite its absence from the initial charges brought by a prosecutor.[52] The majority put great weight on the nature of the factor and noted that recidivism is a traditional justification for judges to increase an offender's sentence.[53] Because a prior conviction was a sentencing factor historically considered by judges at sentencing, the Court held that it need

affirmative defenses, for fear of having to place an increased burden on the state to prove these sentences. 432 U.S. at 214–15 & n.15. This is discussed more *infra* notes 187–89, as Judge Bibas argues this is a "prescient forecast of what is likely to happen under the elements rule. Legislatures will draft broader criminal statutes and create more discretion at sentencing, undercutting fair warning to defendants and equal treatment." Bibas, *Judicial Fact-Finding*, *supra* note 7, at 1105 n. 50.

45. 477 U.S. 76 (1986).

46. *Id*. at 85–86.

47. *Id*. at 81.

48. *Id*. at 87–88.

49. *Id*. at 88. This phrase has come to be understood as circumstances where the enhancement for non-convicted conduct "outweighs the maximum exposure the defendant would have received based solely on the convicted offense." Ngov, *supra* note 18, at 238 n.14.

50. *McMillan*, 477 U.S. at 89–90.

51. 523 U.S. 224, 245–46 (1998).

52. *Id*. at 230.

53. *Id*. at 243.

not be included in the indictment to justify a greater sentence.[54]

Before *Apprendi*, whether a fact needed to be proven beyond a reasonable doubt depended primarily on whether that fact was an element or a sentencing factor. Only facts (1) that were presumed against the defendant, or (2) that were necessary to meet the statutory definition of the crime charged constituted elements.[55] Sentencing factors included all other relevant facts, even those that (1) constrained judicial discretion, but did not raise the maximum punishment or alter the crime's statutory definition, or (2) were historically considered by judges at sentencing, like the fact of a prior conviction or circumstances of the offense.[56]

B. *The* Apprendi *Cases: Shift in Focus to Effects and the Application of the Sixth Amendment to Sentencing Regimes*

1. *Apprendi*: Facts Justifying a Greater Sentence Require Proof to a Jury Beyond a Reasonable Doubt

Almendarez-Torres marks the height of the Court's jurisprudence drawing on the sentencing factor/element distinction. Subsequent cases, however, illustrate that the Court's focus shifted to the effect of a sentencing or statutory provision. Apart from the fact of a prior conviction, the Court's later holdings required that facts triggering a mandatory minimum or permitting a greater maximum sentence be justified by proof beyond a reasonable doubt.

In 2000, the Supreme Court decided *Apprendi v. New Jersey*, which held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[57] The defendant in *Apprendi*, upset by African-Americans moving into his neighborhood, fired several shots into his neighbors' home.[58] Apprendi pleaded guilty to two possession charges (one for firearms and the other for an antipersonnel bomb), and the remaining counts were dismissed. But the prosecution reserved the right to request an enhanced sentence under a hate crime statute.[59] Based on a finding that the defendant had acted with racial animus, the trial judge sentenced him to twelve years in prison, which exceeded the statutory maximum of ten years for the pleaded charges.[60]

The Court reversed, and reasoned that the "elusive distinction between 'elements' and 'sentencing factors'" did not matter because "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to

54. *Id.* at 239–40.
55. *See, e.g.*, *In re* Winship, 397 U.S. 358, 364 (1970); Patterson v. New York, 432 U.S. 197 (1977).
56. McMillan v. Pennsylvania, 477 U.S. 79, 89–90 (1986); *Almendarez-Torres*, 523 U.S. at 239–40.
57. 530 U.S. 466, 490 (2000).
58. *Id.* at 469.
59. *Id.* at 470.
60. *Id.* at 471.

a greater punishment than that authorized by the jury's guilty verdict?"[61] The majority emphasized that the exercise of judicial discretion is permissible when "imposing a judgment within the range prescribed by statute."[62] However, because Apprendi's sentence exceeded that which was authorized by a plea or jury verdict under the possession statutes, the sentence violated Apprendi's Sixth Amendment rights.[63]

In *Ring v. Arizona*,[64] the Court applied *Apprendi* to the capital context and made clear that facts justifying the imposition of a death sentence must also be found by a jury beyond a reasonable doubt.[65] The Arizona legislature permitted the death penalty only after a judge "conduct[ed] a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances."[66] After being convicted by a jury of felony, but not premeditated murder, Ring was sentenced to death by a judge based on separate findings at a sentencing hearing.[67] The Court reversed, and held that "[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[68] Here, "[b]ased solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment [Ring] could have received was life imprisonment[,]"[69] so the judge's imposition of the death penalty violated his Sixth Amendment right to a jury trial.[70]

2. *Blakely* and *Booker*: *Apprendi*'s Application in the Context of Sentencing Regimes

In the wake of *Apprendi* and *Ring*, commentators noted that the cases also appeared to unambiguously apply to sentencing regimes imposed by the legislature.[71] The Court made this principle explicit in its subsequent holdings.

In *Blakely v. Washington*,[72] the Court held that sentencing enhancements could not extend a defendant's sentence beyond the statutory range of the convicted

61. *Id.* at 494.
62. *Id.* at 481.
63. *Id.* at 497.
64. 536 U.S. 584 (2002).
65. *Id.* at 589.
66. *Id.* at 592 (citation omitted).
67. *Id.* at 594–95.
68. *Id.* at 589.
69. *Id.* at 597.
70. *Id.* at 609.
71. JOHN F. PFAFF, SENTENCING LAW AND POLICY 327–28 (2016); *see, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 544 (2002) (O'Connor, J., dissenting) ("The [majority's holding] thus would apply not only to schemes like New Jersey's, . . . but also to all determinate-sentencing schemes . . . (e.g., the federal Sentencing Guidelines)."); Kyron Huigens, *Solving the* Apprendi *Puzzle*, 90 GEO. L.J. 387, 389 (2002) (noting that *Apprendi* would ultimately result in "the Federal Sentencing Guidelines and many state sentencing schemes . . . be[ing] rendered unconstitutional").
72. 542 U.S. 296 (2004).

crime unless the enhancement was justified by proof beyond a reasonable doubt.[73] Blakely pleaded guilty to second-degree kidnapping, domestic violence, and several firearms counts and was eligible by statute for up to 53 months in prison.[74] The trial judge found by a preponderance of the evidence that the defendant acted with "deliberate cruelty," so he enhanced Blakely's sentence under the state sentencing regime, and imposed a sentence of 90 months.[75] The Court noted that because "[t]he judge . . . could not have imposed the exceptional . . . sentence solely on the basis of the facts admitted in the guilty plea," this ran afoul of the *Apprendi* rule.[76] The U.S. Sentencing Guidelines operate similarly to the provision in *Blakely*, so it was inevitable that the Court would be forced to address the federal provisions next.[77]

In *United States v. Booker*,[78] a majority of the Court applied the reasoning in *Blakely* to invalidate the Guidelines. The Guidelines were mandatory, requiring the judge to impose a sentence based on judicial findings proven by a preponderance of the evidence.[79] A majority of the Court held that the Sixth Amendment right to a jury trial applied to the Guidelines, so the imposition of mandatory enhancements, if they exceeded the statutory maximum authorized by the jury's findings, violated the Sixth Amendment.[80] Justices Stevens, Scalia, Souter, Thomas, and Ginsburg joined this opinion. Justices Breyer, O'Connor, Kennedy, and Rehnquist dissented, and reasoned that the Sixth Amendment was not offended by the mandatory Guidelines.

But a *different* majority of the Court—with Justice Ginsburg joining Justices Breyer, O'Connor, Kennedy, and Rehnquist—held that the proper remedy was to sever the provision making the Guidelines mandatory, and subject all sentences to a "reasonableness" standard of review.[81] I discuss this standard of review further below,[82] but the practical effect was that sentences within the statutory range could be "reasonable" based on facts found by a preponderance of the evidence.[83]

3. *Oregon v. Ice*: An Exception to *Apprendi* for Consecutive Sentences

In *Oregon v. Ice*,[84] the Court again retreated from the principles in *Apprendi* based on what it called "longstanding common-law practice" of judges at

73. *Id.* at 313.
74. *Id.* at 298.
75. *Id.*
76. *Id.* at 304.
77. PFAFF, *supra* note 71, at 344.
78. 543 U.S. 220, 226 (2005).
79. *Id.* at 226 (merits opinion).
80. *Id.* at 236–37.
81. *Id.* at 245, 262 (remedial opinion).
82. *See infra* Section I.C.
83. *See* Jones v. United States, 135 S. Ct. 8, 9 (2014) (Scalia, J., dissenting from the denial of certiorari).
84. 555 U.S. 160 (2008).

sentencing.[85] The Court held that "the decision to impose sentences consecutively is not within the jury function that 'extends down centuries into the common law.'"[86] Oregon's statute provided that "sentences [should] run concurrently unless the judge finds statutorily described facts."[87] While this would seem to be within the purview of *Blakely*, the Court upheld the statute because the sentence exceeded that which was otherwise authorized by the jury verdict.[88] Its reasoning was as follows:

> All agree that a scheme making consecutive sentences the rule, and concurrent sentences the exception, encounters no Sixth Amendment shoal. To hem in States by holding that they may not equally choose to make concurrent sentences the rule, and consecutive sentences the exception, would make scant sense.[89]

Scalia dissented, arguing that the Court ignored the "pains" they had taken to reject artificial limitations on facts subject to jury findings, and that there could be no doubt that "consecutive sentences are a 'greater punishment' than concurrent sentences."[90] Scalia argued that this case should have fallen squarely in the purview of the *Apprendi* rule.[91]

4. *Alleyne v. United States*: *Apprendi* Applied to Mandatory Minimums

In *Alleyne v. United States*,[92] the Court held that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury."[93] Alleyne was convicted by a jury, which found that he had used or carried a firearm in relation to a crime of violence, but did *not* find that the firearm was brandished.[94] This fact was significant because the statute listed a mandatory minimum of five years if he was found to be carrying a firearm, but seven years if he was found to be brandishing the firearm.[95] Despite the jury's findings, however, the district court imposed a seven-year sentence after separately finding that the firearm was brandished by a preponderance of the evidence at sentencing.[96] The district court reasoned that facts which raise the mandatory minimum can be found by a judge and

85. *Id.* at 167–68. *See* discussion *supra* notes 51–54 (describing the same type of reasoning used to carve out the exception in *Almendarez-Torres*).
86. *Id.* at 168 (quoting Apprendi v. New Jersey, 530 U.S. 466, 477 (2000)).
87. *Id.* at 165 (citing Ore. Rev. Stat. § 137.123(1) (2007).
88. *Id.* at 172.
89. *Id.* at 171.
90. *Id.* at 173–74 (Scalia, J., dissenting) (citing Apprendi v. New Jersey, 530 U.S. 466, 494 (2000)).
91. *Id.* at 175.
92. 570 U.S. 99 (2013).
93. *Id.* at 103.
94. *Id.* at 104.
95. *Id.*
96. *Id.* at 103–04.

not run afoul of *Apprendi*.[97] The Supreme Court reversed and held that this constituted impermissible judicial fact-finding of facts that "increase[] the prescribed range of penalties to which a criminal defendant is exposed."[98]

After *Alleyne*, the Court interpreted the Sixth Amendment to require proof beyond a reasonable doubt for any fact that subjected the defendant to a mandatory minimum punishment or greater maximum punishment.[99] This principle applied to sentencing regimes as well.[100] However, the Sixth Amendment standard of proof beyond a reasonable doubt did not apply to the fact of a prior conviction or the decision to impose consecutive sentences.[101]

C. *Appellate Review of Federal Sentences in a Post-*Booker *World*

The *Apprendi* cases also affected the scope of appellate review of sentencing. After *Booker* invalidated the provision of the federal Guidelines that made them mandatory, the Court struggled to define the contours of appellate review.[102] Appellate review of sentencing that is too strict has the potential to create de-facto elements. That is, when an appellate court holds that a sentence is reasonable only because of certain facts, those facts must be found by a jury.[103] The issues with defining the scope of appellate review while avoiding running into an additional *Booker* issue are outlined by Justice Scalia in his concurrence in *Rita v. United States*.[104]

In *Rita*, the Court held that appellate courts could presume that sentences within the Guidelines range were reasonable, but the presumption could not be binding.[105] The Court was careful to note that this presumption was unlike the "strong judicial deference of the kind that leads appeals courts to grant greater factfinding leeway to an expert agency than to a district judge," but the presumption did reflect a "double determination" because both the Sentencing Commission and district judge reached the same conclusion.[106] This "double determination" increases the likelihood that the imposed sentence is reasonable.[107]

Justice Scalia concurred, but went further. He found that nothing more than a mere appellate procedural rule was permissible under *Booker*, stating that "[i]f . . . some sentences cannot lawfully be imposed by a judge unless the judge finds

97. *Id.* at 104.

98. *Id.* at 111–12 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

99. *See, e.g.*, *id.* at 111–12.

100. *See, e.g.*, United States v. Booker, 543 U.S. 220, 226 (2005).

101. *See* Oregon v. Ice, 555 U.S. 160 (2008).

102. *See, e.g.*, Johnson, *supra* note 18, at 22 ("In the wake of *Booker*, it was not completely clear how the newly minted advisory Guidelines regime should operate."); Priester, *supra* note 19, at 425–26 (calling the Court's doctrine in this area "unstable").

103. *See* Gall v. United States, 552 U.S. 38, 49 (2007); Rita v. United States, 551 U.S. 338, 347 (2007).

104. 551 U.S. 338 (2007).

105. *Id.* at 347.

106. *Id.*

107. *Id.*

certain facts by a preponderance of the evidence," that fact-finding is functionally mandatory, which violates the Sixth Amendment requirement that the *jury* find all relevant facts.[108] Justice Souter dissented on this principle:

> [I]f sentencing judges attributed substantial gravitational pull to the now-discretionary Guidelines, if they treated the Guidelines result as persuasive or presumptively appropriate, the *Booker* remedy would in practical terms preserve the very feature of the Guidelines that threatened to trivialize the jury right.[109]

Stated differently, the concern is that the "voluntary" Guidelines will become mandatory through the operation of presumptions and rules applied on appellate review. This same principle would be featured in the Court's subsequent holding in *Gall v. United States* regarding appellate review of federal sentences.[110]

In *Gall*, the Court held that an appellate court's presumption of unreasonableness for a sentence outside the Guidelines would contravene the holding in *Booker* and violate the Sixth Amendment.[111] Gall was sentenced by the trial judge to 36 months of probation despite a Guidelines range of 30 to 37 months' imprisonment. The Court of Appeals for the Eighth Circuit reversed.[112] The Eighth Circuit reasoned that "a sentence outside of the Guideline range must be supported by a justification that 'is proportional to the extent of the difference between the advisory range and the sentence imposed.'"[113] The Supreme Court reversed and reasoned that:

> [W]hile the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.[114]

The Court held that an "exceptional circumstances requirement" or "rigid mathematical formulation"—i.e., "proportional review"—is "inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of sentencing decisions, whether inside or outside the Guidelines range."[115] The same concern outlined by Justices Scalia and Souter in *Rita* was present in the Court's reasoning: the Eighth Circuit's requirement had the potential to recreate a mandatory Guidelines scheme. Thus, the Court minimized the importance of the Guidelines calculation—which includes consideration of facts proven only by a

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108. *Id.* at 370 (Scalia, J., concurring in part and concurring in the judgment).
109. *Id.* at 390 (Souter, J., dissenting).
110. 552 U.S. 38 (2007).
111. *Id.* at 46.
112. *Id.* at 45.
113. *Id.* (internal quotation marks and citations omitted).
114. *Id.* at 41.
115. *Id.* at 49.

preponderance—when a judge believes that the corresponding sentence should not apply.

The Sixth Amendment requires that on appellate review of a federal sentence, a federal court of appeals must review the district court under a deferential abuse of discretion standard.[116] However, the court of appeals may apply a non-binding presumption of reasonableness to sentences within the Guidelines, which reflects that both the district court and Sentencing Commission reached the same conclusion. Moreover, a court of appeals may not presume that a sentence outside of the Guidelines range is unreasonable, nor may a court of appeals apply a proportional review requirement when sentences are outside of the Guidelines range.

The overarching issue of who decides the facts that justify a defendant's punishment remains contested among the members of the Court.[117] But, as the following sections demonstrate, the issue matters if the jury trial right is to affect the plea-bargaining process.

II. PLEA BARGAINING AS A PROCESS WITHIN THE SHADOW OF THE TRIAL

Proponents of plea bargaining argue that the process is the most efficient way to reach a "just" result. These advocates, like Judge Easterbrook, presume that a defendant's plea bargain will mostly reflect the substantive outcome that would have occurred at trial, minus some discount to the defendant's sentence.[118] In other words, plea bargaining takes place "in the shadow of the trial."[119] Under the shadow model, "a defendant pleads guilty if the offered sentence is less than or equal to his or her expected value of the trial."[120] The prosecutor offers a discount to the defendant's sentence to avoid additional costs of going to trial and the risk of an acquittal.[121] Thus, Judge Easterbrook argues, both parties win by avoiding trial.[122] The process promotes efficiency because the prosecutor can put her resources into other cases.[123]

The shadow model has significant normative appeal because plea bargaining need not be directly regulated if plea bargains are calibrated to what occurs at trial.[124] A significant premise underlying the shadow model is that when the costs and risks associated with trial change, the associated plea bargain reflects those

116. *See id.* at 41–52.

117. At the time this Note was completed, the petition in *Haymond v. United States*, 139 S. Ct. 2369 (2019), was still pending certiorari. While the implications of *Haymond* have not been factored into my analysis here, the case is illustrative of the ongoing debate on the Court.

118. Easterbrook, *supra* note 13, at 297.

119. Shawn D. Bushway, Allison D. Redlich & Robert J. Norris, *An Explicit Test of Plea Bargaining in the Shadow of the Trial*, 52 CRIMINOLOGY 723, 724 (2014).

120. *Id.*

121. Easterbrook, *supra* note 13, at 309.

122. *Id.*

123. *Id.*

124. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2466 (2004).

changes.[125] For example, when more robust procedural rights increase the costs and risks of trial for the government, the defendant receives a greater discount to his sentence.[126] The defendant leverages his procedural rights during negotiations with the government to obtain a more favorable sentence.[127] Thus, the greater procedural protections afforded to the defendant at trial cast "shadows" on his plea bargain.

Critics argue the shadow model is flawed because it assumes a rational actor,[128] thus failing to accurately account for external factors other than the merits of the case.[129] For example, William Stuntz argues that prosecutors may have a complicated "utility function."[130] While a civil plaintiff has an incentive to maximize their dollar reward, prosecutors may not value "extra" prison time like additional dollars.[131] The goals of a prosecutor may be influenced by external forces other than the law and the facts of the case, like the prosecutor's preferences and her department's priorities.[132] Stuntz concludes that the law "serves only to define [the prosecutor's] opportunities," but her goals and achieved results are determined by external forces.[133] Judge Bibas critiques the shadow model based on behaviorism.[134] He argues that "overconfidence, self-serving biases, framing, denial mechanisms, anchoring, discount rates, and risk preferences all skew bargains."[135]

If the jury is to function as an effective barrier between the defendant and the government in a system of guilty pleas, it must do so regardless of the parties' cognitive biases.[136] Strong jury trial rights should affect the cognitive biases of defendants, making them more willing to contest enhancements to their sentences that a jury would be required to find at trial.

When it is the jury who decides facts necessary for a defendant's punishment, the parties are forced to negotiate with the jury trial right in mind.

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125. *Id.*

126. *See* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992).

127. *Id.* ("Defendants have many procedural and substantive rights. By pleading guilty, they sell these rights to the prosecutor, receiving concessions they esteem more highly than the rights surrendered.").

128. *See* Bushway et al., *supra* note 119, at 724. This theory assumes that actors in the criminal justice system act rationally under the circumstances of the case.

129. *See* Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 124, at 2467–68 ("Recent scholarship on negotiation and behavior law and economics, however, undercuts this strong assumption of rationality."); PFAFF, *supra* note 71, at 461.

130. William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2554 (2004).

131. *Id.*

132. *Id.* A prosecutor's preferences may include what they perceive to be the proper sentence for the defendant or the importance to the prosecutor of achieving that sentence. *See id.* at 2554, 2567. The prosecutor may also act to preserve their reputation as a "tough" or "lenient" prosecutor, or act to comply with courthouse customs. *See id.* at 2554.

133. *Id.* at 2558.

134. Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 124, at 2467.

135. *Id.*

136. The shadow model's alleged shortcomings are not the focus of this Note, but I briefly mention the criticisms of the model here because my final conclusion accounts for these alleged shortcomings.

III. SHADOWS CAST BY SIXTH AMENDMENT JURY TRIAL RIGHTS

Sixth Amendment jury trial rights *should* cast shadows on the plea bargaining process, but this is not the reality for most federal defendants. The *Apprendi*-line of cases practically should have benefited plea bargaining defendants by increasing the costs and risks of trial for the government. After these holdings, judges are now free to reject government-proposed sentence enhancements that are supported only by a preponderance of the evidence.[137] Prosecutorial discretion to obtain mandatory enhancements, after proving them only by a preponderance of the evidence at sentencing, has been eliminated.[138] Now, federal prosecutors can only secure a sentence within the statutory range of a crime, with facts proven beyond a reasonable doubt.[139]

But while some federal defendants have benefitted from these developments, the vast majority do not. The breadth of the criminal code, with its overlapping provisions and variety of different sentencing ranges, grants prosecutors a menu of charges that *can* be proven to a jury beyond a reasonable doubt.[140] Prosecutors can threaten a variety of charges, corresponding sentence ranges, and Guidelines calculations to induce defendants to plead guilty. Even when voluntary, the Guidelines continue to influence the majority of sentences imposed by judges.[141]

Further, the broader principles that *Apprendi* and its progeny purported to stand for are applied more narrowly in practice. Defendants can be sentenced for uncharged or acquitted conduct proven only by a preponderance of the evidence, as long as the sentence remains within the statutory range.[142] This one-two-three punch effectively knocks out most benefits to plea bargaining defendants stemming from the shadows of jury trial rights. The shadows cast by the potential jury trial thus have minimal bearing on the ultimate plea bargain.

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137. *See, e.g.*, Gall v. United States, 552 U.S. 38, 39 (2007) (holding that a sentence falling outside the Guidelines range is subject to the same abuse of discretion standard of review as sentences falling within the Guidelines range); Booker v. United States, 543 U.S. 220, 262 (2005).

138. *Booker*, 543 U.S. at 245, 262.

139. Crimes to which a defendant pleads guilty are accepted as proven beyond a reasonable doubt. *See* Apprendi v. New Jersey, 530 U.S. 466, 491–92 (2000).

140. Julie O'Sullivan, *The Federal Criminal "Code" is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 654 (2006).

141. *See infra* Section III.B.ii. Further, as Professor Ngov explains:

> [B]ecause *Booker* requires consideration of the Guidelines, the maximum sentence is still set by the "advisory" Guidelines. . . . [J]udges may not impose any sentence, even if it is within the maximum of the U.S. Code, without first calculating the Guideline range. Aggravating and mitigating factors still operate to increase or decrease a defendant's sentence from one range to another. A deviation below or above the Guideline range requires a justification, much like before *Booker*. Therefore, the advisory Guidelines in effect set the maximum sentence and that sentence can be enhanced from one advisory range to another.

Ngov, *supra* note 18, at 265–66.

142. *See* Ngov, *supra* note 18, at 269–70.

Section A discusses where jury trial rights *do* cast shadows on federal plea bargaining, even if they are rarely realized in practice. These shadows are worth discussing to demonstrate that robust jury trial rights *could* play a role in facilitating plea bargaining outcomes that better reflect a hypothetical trial.[143]

Section B then turns to the reasons that jury trial rights have a *de minimis* effect on plea bargaining outcomes and the shadows cast by jury trial rights disappear in practice. I discuss the one-two-three punch referenced above, that (1) charge bargaining is too prominent, (2) the influence of the Guidelines is too significant, and (3) the preponderance standard at sentencing is still too alive for jury trial rights to affect the majority of federal defendants that plead guilty.

A. *Where Sixth Amendment Rights Successfully Cast Shadows on the Plea Bargaining Process*

The Former Deputy General Counsel of the United States Sentencing Commission acknowledged how the absence of judicial discretion at sentencing—in a pre-*Blakely*, pre-*Booker* regime under the mandatory Guidelines—meant minimized bargaining power for criminal defendants.[144] Jeffrey Standen reasoned that the Guidelines previously "curtailed judges' ability to constrain prosecutors" by supplying the parameters of plea bargaining.[145] In a mandatory Guidelines regime, the prosecutor's control over the charge was "effectively control of the sentence."[146] The result was that "[p]lea bargaining, traditionally understood as a process of bargaining over neutral sentencing outcomes, [was] a thing of the past."[147]

The Court's Sixth Amendment jury trial right holdings cast shadows on the plea bargaining process by changing the relative risks and costs associated with trial for both the government and the defendant. As the *Apprendi* cases enlarged the costs and risks of trial for the government, the defendant gained a greater ability to leverage his trial right in the plea bargaining process.[148] The *Apprendi* cases enlarged the government's costs by increasing its burden of proof and uncertainty as to the final sentence, while simultaneously decreasing the risk to the defendant of rejecting a plea bargain.[149] These shadows affect not only the procedural aspects, but also the parties' psychology during the bargaining process.[150]

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143. I argue as much in my conclusion. *See infra* Section IV.

144. *See* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1473–74 (1993).

145. *Id.* at 1475.

146. *Id.* at 1475–76.

147. *Id.* at 1476.

148. Nancy King & Susan Klein, Apprendi *and Plea Bargaining*, 54 STAN. L. REV. 295, 296–301 (2001).

149. *Id.*

150. Stephanos Bibas & Susan Klein, *The Sixth and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 792 (2008).

Defendants should gain increased bargaining power, and thus obtain more favorable "discounts" in their plea bargaining agreements, because Sixth Amendment jury trial rights increase the government's burden of proof.[151] The greater burden of proof increases the risks and costs involved for the government should it choose to go to trial. As Easterbrook explains:

> [T]he rational discount on the [government's offered prison sentence] becomes even steeper when we account for the prosecutor's incentives. Trials are costly, and they grow most costly as trial rights expand. By pleading out one case, the prosecutor frees resources to process other cases and thus perhaps increases the deterrent (and incapacitative) impact of his office. This further increases the size of a rational, not-intended-to-be-coercive discount.[152]

As previously discussed,[153] the shadow model assumes that prosecutors will seek to maximize resources to best serve their goals. Plea bargaining provides an opportunity to maximize resources in pursuit of those goals by avoiding trial.

A prosecutor must be able to prove any facts that would trigger a mandatory minimum or permit a greater statutory maximum.[154] Thus, the *Apprendi*-line of cases increases prosecutors' uncertainty regarding the final sentence while decreasing the risks to defendants who reject plea bargains. Raising the burden of proof for the facts that justify greater mandatory minimums or potential maximums means prosecutors must negotiate with the additional trial burden—and the anticipated result—in mind.[155] When negotiating a plea now, no longer can prosecutors force the defendant's hand by threatening to prove mandatory enhancements at sentencing by a preponderance of the evidence. Instead, federal judges have the discretion to reject the government's enhancements and sentence anywhere in the statutory range.[156]

Applying the sentencing Guidelines pre-*Booker* illustrates this conclusion. Defendants were unlikely to risk rejecting a plea bargain when mandatory sentencing enhancements would apply for facts the government proved by a preponderance. If prior to *Booker*, a federal prosecutor could force a judge to apply a mandatory enhancement, the corresponding risk to a defendant associated with *rejecting* a plea bargain was significant. If prosecutors failed to prove relevant conduct at trial to a jury, they had a second opportunity to introduce the same conduct

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151. *See* Alleyne v. United States, 570 U.S. 99, 111–12 (2013).

152. PFAFF, *supra* note 71, at 457 (quoting Frank. H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 308–20 (1983)).

153. *See supra* Section II.

154. *Alleyne*, 570 U.S. at 111–12 (holding the Sixth Amendment right to a jury trial requires facts triggering a mandatory minimum to be found by a jury beyond a reasonable doubt); Apprendi v. New Jersey, 530 U.S. 466, 491–92, 497 (2000) (reversing a defendant's sentence because the sentence exceeded the statutory maximum and the facts justifying the sentence were found by a judge by a preponderance of the evidence).

155. As discussed *infra* Section III.B., when Congress legislates a large sentencing range and judges choose to apply findings regardless of their voluntary nature, this shadow effect is ultimately distorted.

156. *See* Booker v. United States, 543 U.S. 220 (2005).

at sentencing, and judges would then impose the corresponding sentence under the mandatory Guidelines. But the defendants would then miss out on potential mitigating factors for cooperation and acceptance of responsibility on top of these mandatory enhancements.[157]

What is especially noteworthy in this hypothetical is that the potential jury trial plays little role in the defendant's consideration of his bargaining position. In fact, if enhancements are proven by a preponderance anyway, the jury trial right is a greater *detriment* to the defendant's plea bargaining position. *Booker* eliminates this result by permitting the judge to reject enhancements submitted by the government. Within the statutory range, a defendant retains the ability to contest any enhancements while still being able to potentially ask for these mitigating factors and avoid unnecessary exposure from the trial.[158]

Jury trial rights may also have ancillary effects on the parties' psychology during bargaining. For example, where prosecutors know they cannot obtain mandatory enhancements by a preponderance of the evidence, anchoring effects may be diminished at bargaining, forcing prosecutors to more carefully consider the applicable charges.[159] As Judges Bibas and Klein explain:

> [M]andatory Guidelines set mental anchors and starting points for bargaining, so that the default sentence seems to be a high number rather than zero. But when mandatory Guidelines become fuzzy rules-of-thumb, they may have less power as mental anchors. . . . Thus, the fuzzier mental anchor, the framing of zero as the starting point, overoptimism [of the defendant], and aversion to losses will all combine to stiffen defendants' spines.[160]

The prosecutor's psychology may change as well. A prosecutor can no longer claim that the Guidelines are inexorable, leaving more room for individualized price-setting.[161] Defendants who deal with bad-faith or obstinate negotiators can take their case to a judge, with whom the defendant has an increased ability to argue that their circumstances require a below-guidelines range.[162] And

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157. *See* U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 Commentary (2016) [hereinafter U.S.S.G.] (noting that except in rare circumstances "[t]his adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse").

158. Bala, *supra* note 20, at 33.

159. Bibas & Klein, *supra* note 150, at 792.

160. *Id*. at 791–92.

161. *Id*. at 792.

162. *Id*.; *see also* Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 695, 726–30 & n. 152–71 (2005) (collecting cases in which judges around the country sentenced well below the Guideline range, often to probation, based upon such factors as the defendant's physical or mental condition, family circumstances, rehabilitation efforts, ability to pay restitution, minimal role in the offense, employment history, the judge's disagreement with the Guidelines' choice of amount of loss rather than personal culpability in white-collar cases, the parsimony provision, the racial disparity stemming from the crack/powder ratio, and the government's refusal to bring a substantial assistance motion).

prosecutors who want to lower sentences anyway can now agree to acquiesce in defendants' motions for sentencing variances.[163]

B. *Why Shadows Cast by Jury Trial Rights are not Realized in Practice*

If *Booker* had required every enhancement to be proven beyond a reasonable doubt, prosecutors and defense attorneys would negotiate to mirror those trial outcomes.[164] But the shadows cast by jury trial rights on plea bargaining disappear because (1) the federal code is easily manipulated; (2) the Guidelines still significantly influence federal sentencing outcomes; and (3) within the statutory range, defendants may be sentenced for conduct proven only by a preponderance of the evidence.

1. The Federal Criminal Code Facilitates Manipulation of a Defendant's Sentencing Exposure

The prevalence of mandatory minimums, large sentencing ranges, and broad, often duplicative, coverage of conduct facilitate manipulation of defendants' sentencing exposure.[165] This manipulation occurs before a Guidelines calculation even takes place.

Thus, a prosecutor's charging decision can operate as either a carrot or a stick to a bargaining defendant. The potential for greater or lesser sentencing exposure authorized by statute may induce the defendant to accept a more favorable plea. In Professor Julie O'Sullivan's passionate criticism of the federal criminal code, she reasons that:

> The redundancy of the Code, to the extent it helps anyone, helps prosecutors. They have the ability to pick and choose among a smorgasbord of statutes that might apply to given criminal conduct. Some of the statutes will offer prosecutors important advantages over others—in terms of such matters as venue, proof, evidentiary admissibility, or sentencing impact. Often a prosecutor may choose a general statute over a statute that is more specifically tailored to a particular context—by choosing mail fraud or the general conspiracy statute, for example, rather than another statute that has more complicated proof

163. Bibas & Klein, *supra* note 150, at 793.

164. *See* Bibas, *Judicial Fact-Finding*, *supra* note 7, at 1157 ("Nonetheless, if the Court had done nothing but raise the standard of proof for enhancements, defendants would have been clear winners (setting aside possible legislative circumvention).").

165. I do not mean to imply any sort of malice in the actions of federal prosecutors when I describe "manipulation," though such conduct could potentially take place. Rather, I refer to the authority that federal prosecutors have in their charging decisions to control how a defendant may be sentenced. As Assistant United States Attorneys for the District of Columbia Mary Patrice Brown and Stevan E. Bunnell write, "[A]s a matter of constitutional and statutory law, the government does have almost unfettered leeway to decide in which cases to be tough or even seek the maximum penalty and in which ones to be lenient or perhaps not prosecute at all." Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1075 (2006).

> requirements. The effect of these choices is to give prosecutors substantially greater bargaining power vis-a-vis the defense.[166]

The federal code increases prosecutors' bargaining power in three ways. First, prosecutors may reduce a potential defendant's charge to a lesser-included offense contained in the statute, which carries a lesser sentence.[167] Second, prosecutors have the option of selecting from multiple provisions equally applicable to a defendant's conduct.[168] They thus can encourage the defendant to plead so as not to be charged with the offense carrying a greater sentence. Third, prosecutors can potentially "stack" charges by charging crimes that overlap with other crimes.[169]

Stacking deserves special consideration. Melissa Mitchell provides an example of how a prosecutor could manipulate potential charges through stacking to greatly increase a defendant's sentencing exposure:

> An offender is charged with one count of transporting hazardous waste in violation of [the Resource Conservation and Recovery Act]. He could also be charged with conspiring to transport hazardous waste and/or aiding or abetting in the transportation of hazardous waste. A one-count indictment, with some creative prosecutory accounting, has now become a three-count indictment with the various penalties attached.[170]

As Mitchell mentions, scholars have criticized this practice as a "harassing and coercive device . . . [with which prosecutors] will induce the defendant to plead guilty."[171]

Duplicative coverage does not necessarily prevent jury trial rights from affecting plea bargaining. Some overlap in the criminal code is generally useful because it may mirror culpability determinations.[172] Thus, plea negotiations involving duplicative coverage, like lesser-included offenses, would likewise be unobjectionable.[173] In such a scenario, the role of the jury as a barrier between the government

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166. O'Sullivan, *supra* note 140, at 654.

167. *See, e.g.*, 18 U.S.C. §§ 924(c), 924(c)(1)(A) (2018) (providing for punishment when using a firearm in a crime of violence or drug trafficking crime and sentencing a defendant to a mandatory minimum of five years). Alternatively, the prosecutor may choose to bring charges for brandishing or discharging a firearm, which carry greater sentences of seven or ten years, respectively. *Id.* § 924(c)(1)(A)(ii)–(iii). A prosecutor who has sufficient proof of brandishing or discharge may negotiate with the defendant to reduce the Section 924(c) charge to one of the provisions with lesser punishment.

168. O'Sullivan, *supra* note 140, at 646.

169. Melissa Mitchell, *Cleaning Out the Closet: Using Sunset Provisions to Clean up Cluttered Criminal Codes*, 54 EMORY L.J. 1671, 1687 (2005).

170. *Id.*

171. *Id.* at 1688.

172. *See, e.g.*, Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 908 (2005) ("Some degree of redundancy across crimes [specifically in the context of lesser-included offenses] is inevitable and objectionable.").

173. Stephen F. Smith observes that "[a]lthough these crimes overlap, they protect victim interests of differing weight, and the penal consequences of prosecuting a fatal beating as murder instead of assault, though dramatic, are justified by the fact that death resulted and by the defendant's seriously culpable state of mind in inflicting the beating." *Id.*

and the defendant[174] and as the "conscience of the community"[175] is served *even when* plea bargaining. Both parties must internalize how the jury would decide the case based on the charges brought. The resulting sentence would reflect some consideration of the defendant's moral culpability and would mirror the anticipated trial's result.

But the current degree of duplicative coverage in the federal code prevents realization of shadows cast by jury trial rights. Prosecutors can decide to charge a defendant under one of multiple equally applicable statutes, with vastly different applicable sentences.[176] These charges provide a foundation from which the prosecutor can increase the defendant's exposure under the Guidelines.[177]

2. The Guidelines Maintain Incredible Influence Over Judges' Sentencing Practices

While judges are now free to impose non-Guidelines sentences,[178] the likelihood of them doing so remains low. The U.S. Sentencing Commission's quarterly update—which analyzed the 50,929 cases sentenced on or after October 1, 2017 through June 30, 2018—demonstrates this phenomenon.[179] The report groups sentences into two broad categories: Sentences Under the Guidelines Manual ("Guidelines sentences") and Variances.[180] Guidelines sentences include "all cases in which the sentence imposed was within the applicable guideline range or, if outside the range, where the court indicated that one or more of the departure reasons in the [Guidelines] was a basis for the sentence."[181] Variance cases are those when a defendant's sentence was either above or below the Guideline range and the court cited no Guidelines-specified reason for imposing that sentence.[182] Almost 75% of

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174. *See* United States v. Gaudin, 515 U.S. 506, 510–11 (1995).

175. Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).

176. My discussion would appear incomplete if I did not address the administrative and bureaucratic checks on prosecutorial discretion contained *within* the executive branch. As Brown and Bunnell note, federal prosecutors must act based on guidance from the Department of Justice (which is now contained in the Justice Manual). *See* Brown & Bunnell, *supra* note 165, at 1076; *see also* U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-27.300 (2018), https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.001 (instructing federal prosecutors to "charge and pursue the most serious, readily provable offenses"). Moreover, office culture, training, supervision, and pressure from the public all may check or influence an individual prosecutor's discretion. *See* Brown & Bunnell, *supra* note 165, at 1079–84. But the focus of this Note is on the protection that defendants gain from the jury trial right. That the internal checks imposed by the executive branch may cure some harms like sentencing disparities or improper manipulation of charges does not affect the argument that the jury was meant to function as an *independent* source of protection against government oppression.

177. An example of this would be repeat offenders who are subject to increases in their sentence for their prior convictions. *See* U.S.S.G. § 4A1.1.

178. *See* Gall v. United States, 552 U.S. 38, 69–70 (2007); Booker v. United States, 543 U.S. 220, 261 (2005).

179. U.S. SENTENCING COMM'N, QUARTERLY DATA REPORT THROUGH JUNE 30, 2018 2 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_3rd_FY18.pdf.

180. *Id.* at intro.

181. *Id.*

182. *Id.*

federal sentences were Guidelines sentences, while only 25.1% of sentences were variance cases.[183]

In practice, this means that the vast majority of defendants will receive a greater sentence pursuant to the Guidelines, regardless of their non-binding nature. Thus, defense attorneys must still negotiate with Guidelines sentences in mind, knowing that a prosecutor's utilization of Guidelines arguments is statistically persuasive to sentencing judges.[184]

3. The Significance of "Relevant Conduct" Including Acquitted and Uncharged Conduct

The Guidelines minimize the shadow of jury trial rights because uncharged and acquitted conduct, proven only by a preponderance, may still be used to justify sentences under the Guidelines.

Notwithstanding the Sixth Amendment limits previously discussed, judges are still permitted to sentence a defendant more harshly for conduct not proven beyond a reasonable doubt to a jury at trial.[185] *Apprendi* permitted the judicial "exercise [of] discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute."[186] As Justice Scalia critically noted in his dissent from denial of certiorari in *Jones v. Unites States*, "the Courts of Appeals have uniformly taken [the Supreme Court's] continuing silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range."[187] This practice has continued to be called into question,[188] but the Court has yet to definitively end the practice. As long as a sentence falls within the range authorized by the statutory charge to which the defendant pleaded guilty, a judge may justify his sentence on the basis of conduct proven only by a preponderance of the evidence.[189]

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183. *Id*. at 11.

184. *See id*.

185. United States v. Watts, 519 U.S. 148, 157 (1997) (holding that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.").

186. Apprendi v. New Jersey, 530 U.S. 466, 481 (2000).

187. Jones v. United States, 135 S. Ct. 8, 9 (2014) (Scalia, J., dissenting from the denial of certiorari).

188. *See id*.; United States v. Bell, 808 F.3d 926, 927–28 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of reh'g en banc) ("Taken to its logical conclusion, the *Blakely* approach would require a jury to find beyond a reasonable doubt the conduct used to set or increase a defendant's sentence, at least in structured or guided-discretion sentencing regimes."); United States v. Sabillion-Umana, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) ("[The current regime] assumes that a district judge may either decrease or increase a defendant's sentence (within the statutorily authorized range) based on facts the judge finds without the aid of a jury or the defendant's consent. It is far from certain whether the Constitution allows at least the second half of that equation.").

189. *See* Ngov, *supra* note 18, at 270.

The current sentencing scheme not only permits, but instructs federal judges to consider all "relevant conduct" when imposing sentences.[190] The criminal code states that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense [that a federal judge] may receive and consider for the purpose of imposing an appropriate sentence."[191] In other words, the sentencing judge may consider *anything*—including the defendant's uncharged or acquitted conduct and criminal history—and impose a greater sentence after finding those relevant facts by a preponderance of the evidence. And the Sentencing Guidelines explicitly state that applicable "relevant conduct" for sentencing includes those acts "that were part of the same course of conduct or common scheme or plan as the offense of conviction" and may include "[c]onduct *that is not formally charged* or *is not an element of the offense* of conviction."[192]

Prosecutors benefit most from this regime. Prosecutors are more likely to have access to relevant information regarding sentence length,[193] and there are fewer barriers to introducing that information at sentencing. Prosecutors work with law enforcement agents, who may be able to obtain additional relevant information, even if only for the purpose of increasing sentences.[194] And the Supreme Court has not articulated a "consistent explanation for whether and when constitutional adjudication rights apply to sentencing proceedings."[195] For example, no hearsay bar applies.[196] These adjudication rights—rights meant to ensure that errors are resolved in a defendant's favor or that champion the defendant's autonomy—do not apply in sentencing.[197] This decreased procedural protection at sentencing favors the government. Prosecutors have increased capacity to support their

190. U.S.S.G. §1B1.3(a) (2016).

191. 18 U.S.C. § 3661 (2018).

192. U.S.S.G. § 1B1.3(a)(2) (emphasis added).

193. Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 244 (2005) ("[P]rosecutors are largely in control of sentencing facts.").

194. Jon O. Newman, *The New Commission's Opportunity*, 10 FED. SENT'G REP. 44, 44 (1997) ("The Commission's decision to require incremental punishment for every measurable aspect of offense conduct has . . . had the unfortunate consequence of shifting significant sentencing authority not merely to prosecutors but to law enforcement agents. . . . [T]he guidelines permit undercover drug enforcement agents to determine the ultimate punishment by shaping the conversation with a suspect concerning the extent of future deliveries.").

195. Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1774 (2003).

196. Ngov, *supra* note 18, at 239 ("Hearsay, double hearsay, and even triple hearsay is permissible [at sentencing] as long as there is an indicia of reliability." (internal quotation omitted)); *see also* United States v. York, 830 F.2d 885, 893 (8th Cir. 1987) (per curiam) ("Uncorroborated hearsay evidence and unprosecuted criminal activity are both proper topics for the court's consideration, as long as the defendant is afforded an opportunity to explain or rebut the evidence.").

197. *See* Ngov, *supra* note 18, at 239 ("Not only is the government excused from the rigors of proof beyond a reasonable doubt, but the government is also excused from the rules of evidence customarily attendant at trial."); *York*, 830 F.2d at 893 ("If the comments of the defendant and defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.").

Guidelines-based arguments and justify higher sentences when permitted by the underlying charges.

In some districts, defendants may be able to avoid extra punishment for other "relevant conduct" through plea agreements under Federal Rule of Criminal Procedure 11(c)(1)(C) ("Type C Agreements").[198] The rule requires the government and defendant to "agree that a specific sentence . . . is the appropriate disposition of the case."[199] If the federal judge chooses to accept the bargain, the agreed-upon terms set the defendant's sentence. Both the prosecution and defendant may find these agreements appealing.

Binding pleas remove uncertainty about the length of the sentence, which may promote bargaining when the defendant can be sentenced for "relevant conduct" outside of the plea. But this type of agreement may not be available to all federal defendants—the practice is controversial and not uniform across districts.[200] Type C agreements are disfavored by some judges because they believe that these agreements stifle the judiciary's traditional role at sentencing.[201] And probation offices that disfavor these agreements believe that prosecutors will artificially alter the record for conduct relevant to the offense.[202]

It is not necessary to set forth the arguments for and against type C agreements in detail here. It makes little practical difference, for purposes of the question presented in this Note, if the prosecutor or the probation office is the party introducing facts for "relevant conduct." When the judge considers facts not found by the jury to justify a defendant's punishment, the plea bargaining process is further removed from the shadow of the trial.

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198. *See* FED. R. CRIM. P. 11(c)(1)(C). Rule 11(c)(1)(C) provides in full:

> (1) *In General*. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:
>
> . . .
>
> (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

Id.

199. *Id.*

200. *See, e.g.*, United States v. Seidman, 483 F. Supp. 156, 158 (E.D. Wis. 1980) ("At the outset, the Court would note that it never will accept a [Type C] plea agreement. It is this Court's prerogative to determine the type of sentence that should be imposed upon a defendant for the offense of which he or she has been adjudged guilty."); *see also Probation Officers' Survey*, 8 FED. SENT'G REP. 305 (1996) (reporting that in 73% of districts, stipulated-sentence agreements are rare and occur in 5% or fewer of cases; in 11% of districts, they occur between one-quarter and one-half of cases; and in 7% of districts they occur in more than half of cases).

201. Joshua D. Asher, *Unbinding the Bound: Reframing the Availability of Sentencing Modifications for Offenders Who Entered into 11(c)(1)(C) Plea Agreements*, 111 COLUM. L. REV. 1004, 1021–22 (2011).

202. *Id.*

CONCLUSION

The spirit of *Apprendi* has been ignored and disregarded for plea bargaining defendants. Juries hardly serve as the "great bulwark of [bargaining defendants'] civil and political liberties"[203] because distorting factors prevent juries from serving their "essential feature . . . [as] interposition between the accused and his accuser."[204] The "spirit of *Apprendi*" and the Court's Sixth Amendment jury trial right holdings stand for broader principles than have been applied in practice.[205] To serve its purpose, even in a world of guilty pleas, the jury trial right must function as such a constraint on government discretion that the defendant would proceed cautiously before giving up such a protective right.

If taken to their logical conclusion, the Court's Sixth Amendment holdings in *Apprendi* and *Blakely* would require that *any fact* justifying a defendant's exposure to greater punishment be authorized by the jury or allocuted to in the plea agreement.[206] Indeed, the Court in *Apprendi* stated that "the relevant [Sixth Amendment] inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[207]

This is not the reality of our federal system. Defendants are sentenced for conduct which a jury did not find because judges remain generally willing to do so. And the manipulation of charges only aggravates manipulation of the Guidelines by federal prosecutors. Prosecutors, as a result, may not internalize costs associated with the jury trial right when they engage in plea bargaining.

Charge bargaining could hypothetically be an example of jury trial rights casting a shadow on the plea bargaining process, but it is problematic in real-world practice. Prosecutors can manipulate charges in order to introduce acquitted or uncharged conduct at trial, thus manipulating the charges in tandem with the Guidelines. When prosecutors manipulate charges in order to prove relevant conduct by a preponderance at sentencing, this is a circumvention of the jury trial right.

While the Court has focused on who decides enhancements, styling the battle as one between judges and juries, it has failed to recognize the importance of the prosecutor. The Sixth Amendment jury right and burden of proof are meant to also check the executive.[208] But the Court's failure to acknowledge the role of

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203. United States v. Gaudin, 515 U.S. 506, 510–11 (1995) (citation omitted).

204. Williams v. Florida, 399 U.S. 78, 100 (1970).

205. *See, e.g.*, Ngov, *supra* note 18, at 264 ("The effect of *Booker* is that courts may and do enhance a sentence under the advisory Guidelines. Courts still use the pre-*Booker* 'enhancement' terminology when they compute sentences under advisory Guidelines. As long as the Guidelines continue to impact sentencing, even in an advisory form, use of acquitted conduct raises Sixth Amendment concerns.").

206. United States v. Bell, 808 F.3d 926, 927–28 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of reh'g en banc).

207. Apprendi v. New Jersey, 530 U.S. 466, 494 (2000).

208. Ngov, *supra* note 18, at 275–78 (explaining structural purposes of the jury trial right).

prosecutorial discretion means that, in a world of pleas, the jury right has not evolved to constrain the executive. As Bierschbach and Bibas explain:

> Plea bargaining occurs early and out of sight, bypassing juries and excluding the views and evidence of other local community members, victims, and defendants that would normally emerge at trial. Where juries and judges were once able to make context-sensitive determinations about an offender's blame and need for punishment, they no longer can. Judges still formally sentence defendants, but judges who do not preside over trials have little evidence to inform their sentencing discretion, and their hands are often tied anyway by a combination of mandatory minima, guidelines, and prosecutors' charging decisions.[209]

The legislature contributes to this problem as Congress passes the statutes delegating discretion to prosecutors. Judge Bibas criticized stronger jury trial rights and *Apprendi*-based rules because of what he considered to be inevitable circumvention by the legislature.[210] He believes that Congress would circumvent stronger jury trial rights by simply raising statutory maxima and allowing sentencing judges to mitigate down.[211] Legislative circumvention is a relevant issue as the impact of duplicative coverage demonstrates.[212] But this argument does not contradict my conclusion—stronger jury trial rights *could* force the government to internalize the costs of trial and affect the plea bargaining process. So much so, Judge Bibas has argued, that the legislature would step in to try and reverse the effect.[213]

But the fact that more robust jury trial rights could lead to a response by the legislature is a separate issue. This Note demonstrates that the shadows of the Sixth Amendment jury trial right on the plea bargaining process have not been realized, but this does not have to be the case. Questions regarding how to restore the jury right to its revered place as a barrier between defendants and the government, and the desirability of this in light of legislative circumvention, are beyond the scope of this Note. But this Note takes important steps by demonstrating a conflict between the spirit of the jury trial right and its application to plea bargaining, and exploring why that conflict exists in practice.

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209. Richard A Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 404–05 (2013).

210. *Id*. at 418.

211. *Id*. at 418–19.

212. *See supra* Section III.B.i.

213. *See* Bierschbach & Bibas, *supra* note 209, at 418–19; Stephanos Bibas, Apprendi *and the Dynamics of Guilty Pleas*, 54 STAN. L. REV. 311, 315–17 (2001).