

# DISPROPORTIONATE IMPACT: AN IMPETUS TO RAISE THE STANDARD OF PROOF AT SENTENCING

ANTHONY LoMONACO\*

*It is well-known that in a criminal trial, the prosecution must prove culpability beyond a reasonable doubt. But during the subsequent sentencing phase, the standard of proof is much lower: a preponderance of the evidence. This relatively low standard can lead to a problem known as “disproportionate impact.” Disproportionate impact occurs when evidence of additional criminal activity is introduced during the sentencing phase and becomes more determinative of the defendant’s punishment than the actual crime of conviction. Such evidence can subject criminal defendants to significantly more punishment without the safeguards available at a criminal trial, and it may include uncharged and acquitted crimes. In response to this issue, some circuit courts fashioned an exception to the preponderance rule, raising the standard of proof to the clear and convincing standard to protect the due process rights of criminal defendants. However, use of this exception was curtailed in all circuits but the Ninth when the Supreme Court rendered the Sentencing Guidelines advisory in 2005. This Note analyzes the lopsided circuit split surrounding the disproportionate impact exception and challenges the notion that the exception is no longer necessary because the Guidelines have become advisory.*

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## INTRODUCTION

In 2012, Kevin St. Hill pleaded guilty to distributing less than one gram of oxycodone.<sup>1</sup> Based on the facts to which he pleaded guilty, he would have been subject to a maximum of eight months imprisonment under the Federal Sentencing Guidelines.<sup>2</sup> But during St. Hill's sentencing hearing, the prosecution introduced evidence that he had sold slightly over seventy-seven grams of additional oxycodone as well as several grams of cocaine, conduct which subjected him to an additional six to eight years in prison.<sup>3</sup> St. Hill could have been separately charged with those offenses, but that would have required proof beyond a reasonable doubt to a jury of his peers.<sup>4</sup> Instead, the government opted to prove those additional crimes at his sentencing hearing, during which the standard of proof was only a preponderance of the evidence.<sup>5</sup>

*St. Hill* illustrates a questionable workaround in federal sentencing procedure.<sup>6</sup> Prosecutors will charge criminal defendants with relatively minor offenses under a lower standard of proof in order to obtain a conviction, only to introduce evidence of more serious offenses during the sentencing phase to significantly increase the term of imprisonment.<sup>7</sup> This practice is troubling because evidence intro-

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<sup>1</sup> United States v. St. Hill, 768 F.3d 33, 40 (Torruella, J., concurring) (1st Cir. 2014), *mandate recalled, opinion vacated*, No. 13-2097, 2016 WL 8540306 (1st Cir. Feb. 22, 2016) (vacating the circuit court decision, but reaffirming the district court decision).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* (noting that the district court ultimately sentenced St. Hill to eighty-four months in prison).

<sup>4</sup> See *id.* at 40 (Torruella, J., concurring) (“[I]f the government wishes to punish a defendant for certain alleged criminal conduct, then that conduct should be charged in an indictment.”).

<sup>5</sup> *Id.* at 41.

<sup>6</sup> In the First Circuit, Judge Torruella has written a separate opinion in at least four cases to express his distaste for this trend. See United States v. Magee, 834 F.3d 30, 38 (1st Cir. 2016) (Torruella, J., concurring) (“I write separately to note my continuing disagreement with the government’s practice of charging relatively minor crimes, while using section 1B1.3(a) of the Sentencing Guidelines . . . to argue for significantly enhanced terms of imprisonment.”); United States v. Alejandro-Montañez, 778 F.3d 352, 362–63 (1st Cir. 2015) (Torruella, J., concurring); United States v. McDonald, 804 F.3d 497, 506 (1st Cir. 2015) (Torruella, J., concurring); *St. Hill*, 768 F.3d at 39 (Torruella, J., concurring); see also Gerald Leonard & Christine Dieter, *Punishment Without Conviction: Controlling the Use of Unconvicted Conduct in Federal Sentencing*, 17 BERKELEY J. CRIM. L. 260, 263 & n.14 (2012) (citing several articles arguing that acquitted conduct should be “entirely off-limits at sentencing (or very nearly so)” and arguing that unconvicted conduct is the larger problem).

<sup>7</sup> See Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 292 (1992) (observing this procedural “shortcut” through which the prosecution may punish the defendant for additional offenses that they might not have been able to prove beyond a reasonable doubt).

duced during the sentencing phase must only be proven to a judge by a preponderance of the evidence, not to a jury beyond a reasonable doubt.<sup>8</sup> A lower evidentiary standard is more prone to error and raises concerns about whether the defendant's due process rights are being circumvented.<sup>9</sup>

When conduct proven at a sentencing hearing accounts for more of the sentence than the crime of conviction, some courts consider that conduct as having a "disproportionate impact"<sup>10</sup> or acting as a "tail wagging the dog" of the substantive offense.<sup>11</sup> In *St. Hill's* case, six of the seven years to which he was sentenced were attributable to facts proven at his sentencing hearing, making him subject to an additional six to eight years of imprisonment over the original eight months.<sup>12</sup> When a sentencing hearing operates in this way, the evidence with the most significance seems subject to the lesser procedural protections.<sup>13</sup>

Disproportionate impact is by no means a new problem, as courts first began to encounter it in the 1990s with the advent of the Federal Sentencing Guidelines. The Guidelines provided transparency to sentencing decisions and mandated consideration of uncharged and acquitted conduct in sentencing.<sup>14</sup> Soon, instances in which uncharged and acquitted conduct had a disproportionate impact on the defendant's sentence came to the attention of the appellate courts.<sup>15</sup> One safeguard proposed in response was devised by the Third Circuit in

<sup>8</sup> See *infra* notes 69–71 and accompanying text (describing the standard of proof at sentencing).

<sup>9</sup> See, e.g., *St. Hill*, 768 F.3d at 41 (Torruella, J., concurring) ("The practice of arguing for higher sentences based on uncharged and untried 'relevant conduct' for, at best, tangentially related narcotics transactions seems like an end-run around the[] basic constitutional guarantees afforded to all criminal defendants.").

<sup>10</sup> See, e.g., *United States v. Hymas*, 780 F.3d 1285, 1290 (9th Cir. 2015) (reciting a six-factor test to guide the determination of whether conduct introduced at sentencing has had a "disproportionate impact").

<sup>11</sup> E.g., *St. Hill*, 768 F.3d at 40 (Torruella, J., concurring); see also *United States v. Fisher*, 502 F.3d 293, 312 (3d Cir. 2007) (Rendell, J., concurring) (additional citation omitted).

<sup>12</sup> *St. Hill*, 768 F.3d at 40 (Torruella, J., concurring).

<sup>13</sup> See *United States v. Lombard*, 72 F.3d 170, 179–80 (1st Cir. 1995) (observing that, while the defendant was brought into federal court on a firearms charge, it was a murder found at sentencing under the preponderance standard that resulted in a life sentence).

<sup>14</sup> See *infra* notes 78–84 and accompanying text.

<sup>15</sup> See, e.g., *United States v. Kikumura*, 918 F.2d 1084, 1100 (3d Cir. 1990) (noting a possible increase in sentence from thirty months to thirty years), *overruled by* *United States v. Fisher*, 502 F.3d 293, 305 (3d Cir. 2007); *United States v. Restrepo*, 946 F.2d 654, 664 (9th Cir. 1991) (en banc) (Norris, J., dissenting) (discussing an increase from a sentencing range of 27–33 months to 41–51 months), *abrogated by* *United States v. Jordan*, 256 F.3d 922 (9th Cir. 2001).

*United States v. Kikumura*.<sup>16</sup> In that case, the defendant's possible sentence had been increased from thirty months to thirty years<sup>17</sup> for conduct that could have been charged separately as attempted murder.<sup>18</sup> The court held that in cases with such dramatic increases, the clear and convincing standard of proof<sup>19</sup> should be required.<sup>20</sup> Raising the standard of proof in such cases is herein referred to as the disproportionate impact exception. The Ninth Circuit eventually adopted the exception,<sup>21</sup> and several other circuits voiced support for the exception in cases, like *Kikumura*, where additional evidence of the defendant's conduct that was introduced at sentencing resulted in extreme increases.<sup>22</sup>

Despite gaining some traction in the 1990s and early 2000s, use of the disproportionate impact exception was curtailed in 2005 when the Supreme Court rendered the Federal Sentencing Guidelines advisory, rather than mandatory, in *United States v. Booker*.<sup>23</sup> Although the Court itself did not mention standards of proof at sentencing in *Booker*, the shift to advisory guidelines prompted the Third Circuit to overrule *Kikumura*<sup>24</sup> and four other circuits to disavow its use.<sup>25</sup> These courts reasoned that the exception was unnecessary because the advisory nature of the Guidelines had eliminated its due process rationale and because sentencing judges now had more discretion to avoid harsh sentencing outcomes.<sup>26</sup> The Ninth Circuit alone reasoned that the advisory nature of the Guidelines was irrelevant, and it has con-

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<sup>16</sup> 918 F.2d 1084.

<sup>17</sup> *Id.* at 1100.

<sup>18</sup> *Id.* at 1120 (Rosenn, J., concurring) (“Kikumura should have been charged and tried for [attempted murder].”).

<sup>19</sup> The clear and convincing standard is an intermediate standard, more stringent than the preponderance of the evidence standard, but less so than the beyond a reasonable doubt standard. In one survey of federal judges, the preponderance standard was quantified as requiring just over 50% certainty, the clear and convincing standard anywhere from 60% to 75%, and the reasonable doubt standard anywhere from 76% to 95%. *United States v. Fatico*, 458 F. Supp. 388, 410 (E.D.N.Y. 1978). See also *infra* note 202 for more statistics on the different standards of proof.

<sup>20</sup> *Kikumura*, 918 F.2d at 1101.

<sup>21</sup> See *United States v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999) (vacating a sentence on the basis of disproportionate impact for the first time).

<sup>22</sup> See *infra* note 75 (citing cases from the Fourth, Fifth, Seventh, Eighth, Tenth, and D.C. Circuits entertaining this possibility).

<sup>23</sup> 543 U.S. 220, 245 (2005).

<sup>24</sup> See *United States v. Fisher*, 502 F.3d 293, 305 (3d Cir. 2007) (overruling *Kikumura*).

<sup>25</sup> See *infra* notes 136–55 and accompanying text (describing the reasoning provided by these circuits).

<sup>26</sup> See *id.*

tinued to apply the disproportionate impact exception into the present.<sup>27</sup>

Over ten years after *Booker*, it seems that many courts overstated the significance of the change from mandatory to advisory Guidelines as it relates to the disproportionate impact exception. Use of the Guidelines to calculate a range of appropriate sentences is still mandatory as a procedural matter.<sup>28</sup> Judges have discretion to issue sentences that fall outside this range, but despite this discretion, many judges continue to abide by the Guidelines.<sup>29</sup> Significantly, the Guidelines still provide transparency and continue to reveal disproportionate impact issues despite their advisory nature.<sup>30</sup> Therefore, the disproportionate impact exception should still be employed in cases where collateral criminal conduct plays a greater role in the ultimate sentence than the actual crime of conviction. This would help prevent erroneous losses of liberty<sup>31</sup> and protect criminal defendants' due process interest in an appropriate standard of proof at sentencing.<sup>32</sup>

This Note is the first to explore the circuit split on the disproportionate impact exception before and after *Booker*.<sup>33</sup> It proceeds in three Parts. First, it describes the Federal Sentencing Guidelines and how they revealed the disproportionate impact problem. Second, it analyzes the *Booker* decision and the effect it had on both the circuit

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<sup>27</sup> See, e.g., *United States v. Staten*, 466 F.3d 708, 720 (9th Cir. 2006) (upholding use of the exception after *Booker* as a matter of policy and due process).

<sup>28</sup> See *infra* notes 166–67 and accompanying text (explaining that judges must begin their sentencing analysis by properly calculating the Guidelines range).

<sup>29</sup> See *infra* notes 168–82 and accompanying text (describing a few reasons why judges continue to abide by the Guidelines and providing statistics from the Sentencing Commission).

<sup>30</sup> See *infra* notes 163–64, 183–85 and accompanying text (citing commentators and judges that have taken notice of disproportionate impact after *Booker*).

<sup>31</sup> See *infra* notes 194–202 and accompanying text (discussing the shortcomings of the preponderance standard in disproportionate impact cases).

<sup>32</sup> See *infra* notes 215–26 and accompanying text (describing a post-*Booker* due process rationale for the disproportionate impact exception).

<sup>33</sup> The most in-depth treatment of the split available can be found in an article published in 1992. See generally Judy Clarke, *The Need for a Higher Burden of Proof for Factfinding Under the Guidelines*, 4 FED. SENT'G REP. 300 (1992) (arguing against the preponderance standard at sentencing). Other authors have also discussed heightened standards of proof at sentencing in general, but not the split in particular. See generally, e.g., Richard Hussein, Comment, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof*, 57 U. CHI. L. REV. 1387 (1990) (arguing for a clear and convincing evidence standard at sentencing across the board); W. Crews Lott, Comment, *Balancing Burdens of Proof and Relevant Conduct: At What Point Is Due Process Violated*, 45 BAYLOR L. REV. 877 (1993) (concluding that the preponderance standard is unconstitutional when the majority of a sentence is attributable to “relevant conduct”).

split and actual use of the Guidelines. Finally, it provides policy and legal reasons to explain why the exception should still be adopted by the courts as a procedural safeguard in disproportionate impact cases.

## I

### SENTENCING THEORY AND THE FEDERAL SENTENCING GUIDELINES

This Part provides a brief history of the Federal Sentencing Guidelines and how they uncovered the disproportionate impact problem. Before the Guidelines were promulgated, judges had enormous discretion and defendants did not have access to meaningful appellate review of sentencing decisions. Critics of that system called for more transparency and predictability, which ultimately resulted in the Sentencing Reform Act of 1984 that created the Guidelines. Section I.B illustrates how the Guidelines operate in practice, particularly how facts found at sentencing hearings lead to sentence increases. Section I.C discusses what factors under the Guidelines led to disproportionate impact problems and prompted the creation of the disproportionate impact exception.

#### A. *Sentencing Theory and the Pre-Guidelines Era*

Sentencing regimes fall on a spectrum between two types of theoretical systems: “real-offense sentencing” and “charge-offense sentencing.” In a real-offense system, judges have broad discretion and may use a wide range of information to individualize sentences within a relatively large statutory range.<sup>34</sup> Conversely, in a charge-offense system, judges adhere to a specific sentence provided by the legislature with little to no discretion to individualize sentences.<sup>35</sup> Each system has strengths and weaknesses. While real-offense sentencing provides for greater substantive justice by allowing judges to differentiate between ordinary and severe violations of the law, charge-offense sentencing guarantees greater procedural justice by reining in judicial discretion and reducing unpredictability and arbitrariness in sentencing.<sup>36</sup>

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<sup>34</sup> See David Yellen, *Reforming the Federal Sentencing Guidelines’ Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267, 268–69 (2005) (defining real-offense sentencing).

<sup>35</sup> See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 9 (1988) (noting that under charge-offense sentencing, the judge would “simply look to the criminal statute . . . and read off the punishment provided”).

<sup>36</sup> See *id.* at 8–12 (describing the trade-off of substantive and procedural justice between the two systems).

Before promulgation of the Sentencing Guidelines, federal sentencing embraced the real-offense sentencing theory.<sup>37</sup> Judges had virtually unfettered discretion to issue sentences anywhere within large sentencing ranges and unilaterally decided which facts mattered and how much weight to give them.<sup>38</sup> Furthermore, those sentences were generally not subject to appeal.<sup>39</sup> This discretion allowed judges to differentiate between serious and ordinary violations of the same crimes.<sup>40</sup> But it also gave rise to issues and calls for reform.

One major issue was that vast discretion led to unpredictable and arbitrary sentencing decisions. One federal judge, commenting on the abundance of discretion, recalled that “some federal judges regularly sentenced defendants to the maximum terms provided by law, and tacked sentences consecutively, on hunch and whim.”<sup>41</sup> Relatedly, this discretion led to disparities in sentences among similarly situated defendants.<sup>42</sup> For example, one study conducted in the Second Circuit showed that the same defendant might be sentenced to three years by one judge and twenty years by another for the exact same crime.<sup>43</sup> The system also received criticism for being too lenient, as some were concerned that broad discretion to impose light sentences could endanger public safety.<sup>44</sup> Similarly, the unpredictability of parole was

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<sup>37</sup> See *Koon v. United States*, 518 U.S. 81, 96 (1996) (“Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal.”); Carissa Byrne Hessick & F. Andrew Hessick, *Procedural Rights at Sentencing*, 90 NOTRE DAME L. REV. 187, 190–92 (2014) (“Further limiting appellate review in the federal system was the fact that sentencing courts were not required to provide the reasons for the sentences that they imposed.”).

<sup>38</sup> See Hessick & Hessick, *supra* note 37, at 190–92 (“[J]udges often considered a wide range of factors including the defendant’s criminal history, employment history, family ties, educational level, military service, charitable activities, and age; harm caused by the criminal act; and the defendant’s motive.”). Judges could not, however, rely on patently false information or unconstitutional factors such as the defendant’s race, gender, or religion. *Id.* at 190.

<sup>39</sup> See Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 419 (2010) (“In the pre-SRA world, federal judges enjoyed virtually unchecked authority to impose sentences anywhere within the minimum and maximum sentences associated with the crime(s) of conviction.”).

<sup>40</sup> See Hessick & Hessick, *supra* note 37, at 191–92 (“Discretionary systems not only conferred on judges the flexibility to account for factual differences among offenders, they also gave judges the authority to decide what sorts of differences ought to matter, and how much they ought to matter.”).

<sup>41</sup> *United States v. Masters*, 978 F.2d 281, 286 (7th Cir. 1992).

<sup>42</sup> Hessick & Hessick, *supra* note 37, at 191.

<sup>43</sup> *Id.* at 192 (pointing to the “widely reported sentencing experiment”).

<sup>44</sup> See Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker*, 89 N.Y.U. L. REV. 1268, 1280–81 (2014) (discussing critics of the pre-Guidelines sentencing system).

criticized, as a defendant sentenced to twelve years could be released in four.<sup>45</sup>

Many were also concerned about the lack of transparency that accompanied sentencing decisions. For example, some commentators were concerned that some judges factored race and class into their sentencing decisions.<sup>46</sup> Although technically unconstitutional, use of race or class was nearly impossible to monitor because judges were not required to articulate their sentencing rationale on the record.<sup>47</sup>

In 1984, Congress addressed these criticisms through passage of the Sentencing Reform Act (SRA).<sup>48</sup> The SRA abolished parole, provided for a formal appeals process, and created the Sentencing Commission to promulgate the Federal Sentencing Guidelines.<sup>49</sup> This new sentencing system was essentially a hybrid of a real-offense and charge-offense sentencing: It retained elements of real-offense sentencing by requiring judges to gather as much individualized information about defendants as possible,<sup>50</sup> but also incorporated elements of charge-offense sentencing by dictating how much weight that information should be given in the ultimate sentence.<sup>51</sup> The Guidelines also created a new sense of transparency, allowing litigants and appellate judges to analyze and weigh the merits of a particular sentence after it had been imposed.

### B. *The Federal Sentencing Guidelines*

In practice, the Sentencing Guidelines operate through the use of a grid.<sup>52</sup> The grid is composed of an “offense level” ranging from one to forty-three on the Y-axis, and a “criminal history category” ranging from one to six on the X-axis.<sup>53</sup> The offense level is determined by facts relating to how the crime was committed and other “relevant conduct,” including unconvicted criminal conduct that bears a relation

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<sup>45</sup> See Breyer, *supra* note 35, at 4 (noting that the unpredictability of parole was also a criticism that prompted the sentencing reform).

<sup>46</sup> Hessick & Hessick, *supra* note 37, at 192.

<sup>47</sup> *Id.* at 191.

<sup>48</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2017 (codified as amended in scattered sections of 18 and 28 U.S.C.).

<sup>49</sup> Breyer, *supra* note 35, at 4–6.

<sup>50</sup> See Bowman, *supra* note 39, at 422 (describing how judges must find “virtually every type of fact potentially relevant to the imposition of a criminal sentence” to calculate the Guidelines range).

<sup>51</sup> See Breyer, *supra* note 35, at 11–12 (describing both the “real-offense” and “charge-offense” elements of the Commission’s system).

<sup>52</sup> See U.S. SENTENCING GUIDELINES MANUAL § 5A (U.S. SENTENCING COMM’N 2015) (providing the “Sentencing Table”) (A free version of the manual is available at <http://www.usss.gov/guidelines/guidelines-archive/2015-guidelines-manual>).

<sup>53</sup> See *id.*

to the offense of conviction.<sup>54</sup> The criminal history category is based on prior convictions and prison sentences.<sup>55</sup>

As the offense level increases, the sentencing range increases; for example, level one will result in a sentence of no more than six months, while level forty-three results in life.<sup>56</sup> The criminal history category works the same way, increasing the sentence as the category moves from one to six.<sup>57</sup> Once both the offense level and criminal history category have been determined, the applicable sentencing range is found where the two values intersect on the grid. Guidelines ranges typically span a few months, and fall within the ranges provided by the U.S. Code, which can span decades.<sup>58</sup> Because the Guidelines ranges are much shorter than the ranges provided by the U.S. Code, they limit judicial discretion.

To better understand how an offense level is calculated, consider the example of a defendant convicted of larceny. First, the “base offense level” is derived from the crime of conviction;<sup>59</sup> for larceny, it would be six.<sup>60</sup> The base offense level is then increased or decreased pursuant to “relevant conduct” enhancements, which account for aggravating or mitigating factors.<sup>61</sup> For example, if the amount stolen were more than \$40,000, the offense level would increase from six to twelve; if it were more than \$1,500,000, it would increase from six to twenty-two.<sup>62</sup> In this way, relevant conduct enhancements allow judicial fact finding to have a measurable impact on sentencing. While a jury might have found that the defendant only stole \$40,000, if the judge finds at sentencing that the defendant actually stole more than

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<sup>54</sup> Bowman, *supra* note 39, at 424; *see also* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (defining relevant conduct).

<sup>55</sup> *See* U.S. SENTENCING GUIDELINES MANUAL § 4A (outlining how to compute criminal history scores).

<sup>56</sup> *Id.* § 5A.

<sup>57</sup> *Id.*

<sup>58</sup> *See, e.g., infra* note 68 and accompanying text (discussing ranges for certain firearm violations).

<sup>59</sup> *See* Breyer, *supra* note 35, at 6–7 (outlining the steps for calculating the Guidelines sentence).

<sup>60</sup> U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a)(2). The base offense level is also higher for more serious crimes; thus, for crimes involving theft that have a statutory maximum of twenty years or more, § 2B1.1(a)(1) would apply, which provides for a base offense level of seven. *Id.* § 2B1.1(a)(1).

<sup>61</sup> *See* Breyer, *supra* note 35, at 6–7 (outlining the steps for calculating the Guidelines sentence).

<sup>62</sup> U.S. SENTENCING GUIDELINES MANUAL § 2B.1.1(b)(1)(D), (I).

\$1,500,000, he will be sentenced to several more years of imprisonment.<sup>63</sup>

Another type of enhancement, known as a “cross reference,” can have an even more dramatic impact on the defendant’s sentence. Cross references switch out the offense level of the crime of conviction for that of a more serious crime, even when that crime is found by only a preponderance of the evidence.<sup>64</sup> For example, if a defendant is convicted of unlawful possession of a firearm by a jury, the base offense level might be as low as six.<sup>65</sup> But if the judge finds that the defendant used that firearm in connection with a murder, the cross reference would raise the base offense level to forty-three, as if the defendant had been convicted of murder.<sup>66</sup> In effect, a judge-found murder can result in a life sentence even though it was not proven to a jury beyond a reasonable doubt.<sup>67</sup> Of course, if the upper limit of the statutory range for the offense of conviction is ten years, then a murder finding cannot result in a life sentence. But for some crimes, like certain firearm violations, the U.S. Code provides for a range that spans decades, creating this possibility.<sup>68</sup>

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<sup>63</sup> For example, the sentencing range would increase from ten to sixteen months to forty-one to fifty-one months for a defendant with a criminal history level of III. *See id.* § 5A.

<sup>64</sup> *See generally* Mark P. Rankin & Rachel R. May, *Traps for the Unwary: Cross References and Sentencing Guidelines*, CHAMPION, Sept.–Oct. 2006, at 52, 52–54, <https://www.nacdl.org/champion.aspx?id=918> (describing various cross references provided in the Guidelines).

<sup>65</sup> *See* U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(8) (providing for a base offense level of six if the defendant was convicted under 18 U.S.C. § 922(c)).

<sup>66</sup> *See id.* §§ 2K2.1(c), 2A1.1(a) (providing for the firearm cross references and the base offense level for murder, respectively).

<sup>67</sup> *See, e.g.*, *United States v. Lombard*, 72 F.3d 170, 174 (1st Cir. 1995) (discussing how the defendant’s sentence for a firearm conviction was raised to life after the application of a murder cross reference).

<sup>68</sup> *See, e.g.*, 18 U.S.C. § 924(c)(1)(B)(ii) (2012) (providing a sentence of not fewer than thirty years in the case of possession of a machine gun or a firearm equipped with a silencer during a crime of violence or drug-trafficking crime); *id.* § 924(e)(1) (providing a sentence of not fewer than fifteen years in the case of a person who violates 18 U.S.C. § 922(g), felony possession of a firearm, with three prior convictions); *see also* U.S. SENTENCING COMM’N, LIFE SENTENCES IN THE FEDERAL SYSTEM 1 & 20 nn.4–6 (2015), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226\\_Life\\_Sentences.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf) (listing federal statutes that authorize a life sentence).

### C. *The Guidelines Reveal the Disproportionate Impact Problem*

By the 1990s, the preponderance standard had become the norm for fact finding during sentencing.<sup>69</sup> This norm had been established by a pre-Guidelines Supreme Court decision, *McMillan v. Pennsylvania*,<sup>70</sup> which held that the use of the preponderance standard at sentencing generally satisfies due process.<sup>71</sup> But after promulgation of the Sentencing Guidelines, the Third and Ninth Circuit carved out the disproportionate impact exception in cases where use of the preponderance standard seemed unjust, requiring use of the clear and convincing standard instead.<sup>72</sup> They noted that *McMillan* seemed to contemplate an exception to the preponderance rule in cases where a fact found at sentencing becomes “a tail which wags the dog of the substantive offense.”<sup>73</sup> Six other circuits, while never actually vacating a sentence on the basis of disproportionate impact,<sup>74</sup> recognized that a heightened standard of proof might be necessary in

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<sup>69</sup> See *United States v. Restrepo*, 946 F.2d 654, 655–56 (9th Cir. 1991) (en banc) (noting that almost all circuits have approved of the preponderance standard at sentencing and listing cases in support), *abrogated by* *United States v. Jordan*, 256 F.3d 922 (9th Cir. 2001).

<sup>70</sup> 477 U.S. 79 (1986).

<sup>71</sup> *Id.* at 83–84, 91.

<sup>72</sup> See *United States v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999); *United States v. Kikumura*, 918 F.2d 1084, 1100–02 (3d Cir. 1990) (stating that “legal rules—even rules that function perfectly well in familiar contexts when stated in categorical terms—cannot always be applied in extreme situations”), *overruled by* *United States v. Fisher*, 502 F.3d 293, 305 (3d Cir. 2007).

<sup>73</sup> *Kikumura*, 918 F.2d at 1100–01 (quoting *McMillan*, 477 U.S. at 88) (noting that the case at issue was “perhaps the most dramatic example imaginable”); *accord Restrepo*, 946 F.2d at 659 (“The Supreme Court did recognize in *McMillan* that there may be an exception to the general rule that the preponderance standard satisfies due process when a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction.”).

<sup>74</sup> See *United States v. Grubbs*, 585 F.3d 793, 801 n.3 (4th Cir. 2009) (noting that the Third and Ninth Circuits were the only ones to actually hold that the clear and convincing standard was required in cases of disproportionate impact).

extreme cases.<sup>75</sup> Only the Sixth Circuit rejected the exception outright.<sup>76</sup>

The disproportionate impact exception was typically invoked when two factors were present. First, a sentencing factor found by a preponderance had led to a large increase in the defendant's sentence, generally many times what the defendant would have received based on facts found at trial alone.<sup>77</sup> Second, the sentencing factor was based on uncharged or acquitted criminal conduct.<sup>78</sup> The Ninth Circuit eventually articulated a six-factor test, which examines whether (i) the increase in the number of offense levels is less than or equal to four, (ii) the length of the enhanced sentence more than doubles the length of the sentence in a case where the defendant would have otherwise

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<sup>75</sup> See, e.g., *United States v. Espinoza*, 67 F. App'x 555, 561 (10th Cir. 2003) (entertaining the possibility of a heightened standard in exceptional circumstances); *United States v. Montgomery*, 262 F.3d 233, 249–50 (4th Cir. 2001) (same); *United States v. Mergerson*, 4 F.3d 337, 344 (5th Cir. 1993) (same); *United States v. Lam Kwong-Wah*, 966 F.2d 682, 688 (D.C. Cir. 1992) (same); *United States v. Townley*, 929 F.2d 365, 370 (8th Cir. 1991) (same); *United States v. Schuster*, 948 F.2d 313, 315 (7th Cir. 1991) (same). The First and Second Circuits also recognized the issue of disproportionate impact, but devised a different solution under which a sentencing judge could depart downward from the Guidelines range when a sentencing factor had such an impact. See, e.g., *United States v. Cordoba-Murgas*, 233 F.3d 704, 709–10 (2d Cir. 2000) (remanding the case so the sentencing judge could exercise discretion to depart downward); *United States v. Lombard*, 72 F.3d 170, 185, 187 (1st Cir. 1995) (same).

<sup>76</sup> See, e.g., *United States v. Mayle*, 334 F.3d 552, 557 (6th Cir. 2003) (“Although the case before us undeniably presents one of those exceptional situations where the sentencing factor has a disproportionate effect on the sentence relative to the offense of conviction, this Circuit has previously rejected the invitation to adopt a higher standard of proof . . . .”); *United States v. Graham*, 275 F.3d 490, 517 n.19 (6th Cir. 2001) (“We do not believe that a higher standard of proof is required simply because the enhancement would significantly increase the defendant's sentence.”).

<sup>77</sup> See, e.g., *Kikumura*, 918 F.2d at 1102 (noting that the sentencing factor led to a “twelve-fold” increase in the defendant's sentence). Increases as low as four years, which tripled the original sentence, have triggered the exception, but generally courts required more extreme increases to invoke the exception. Compare *United States v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999) (vacating defendant's sentence and requiring use of the clear and convincing standard where the sentencing factor increased the range from twenty-four to thirty months to sixty-three to seventy-eight months), with *United States v. Mack*, 229 F.3d 226, 232–33 (3d Cir. 2000) (declining to require the clear and convincing standard for an enhancement resulting in a potential sentence increase of ninety-two months), and *United States v. DeLaurentis*, 47 F. App'x 170, 173 (3d Cir. 2002) (declining to require the clear and convincing standard for enhancements resulting in a ten-level offense level increase).

<sup>78</sup> See, e.g., *United States v. Mezas de Jesus*, 217 F.3d 638, 639–40 (9th Cir. 2000) (emphasizing that the factor which disproportionately increased the sentence was an uncharged kidnapping). But see *United States v. Jordan*, 256 F.3d 922, 928 (9th Cir. 2001) (focusing on the magnitude of increase due to factors which were not independent crimes); *United States v. Bertoli*, 40 F.3d 1384, 1409–11 (3d Cir. 1994) (requiring the clear and convincing standard based solely on the magnitude of increase from the fine for the crime of conviction).

received a relatively short sentence, (iii) the facts offered in support of the enhancement create new offenses requiring separate punishment, (iv) the increase in sentence is based on the extent of a conspiracy, (v) the enhanced sentence falls within the maximum sentence for the crime alleged in the indictment, and (vi) the increase was based on uncharged or acquitted conduct rather than the offense of conviction.<sup>79</sup>

Before the Guidelines were promulgated, it would have been nearly impossible for appellate judges to take notice of these factors. But because the SRA required circuit courts to analyze which factors made up the sentence on appeal,<sup>80</sup> it became apparent when they were present. Generally, disproportionate impact issues arose through either the mandatory Guidelines' enhancements or judicial departures from the prescribed ranges that were permitted by the Guidelines in certain circumstances. First, since use of the Guidelines was mandatory, sentencing judges were generally bound to apply Guidelines enhancements that were triggered by factual findings at the sentencing hearing.<sup>81</sup> For example, consider *United States v. Lombard*.<sup>82</sup> In that case, the defendant had been convicted of firearms possession.<sup>83</sup> Although the firearms charge alone would have produced a sentence of no more than 327 months, the sentencing judge found by a preponderance that the defendant had committed murder with the firearm.<sup>84</sup> Once the judge had made this finding, it triggered a cross reference provision and he had little choice under the Guidelines but to raise the defendant's sentence to life.<sup>85</sup>

As a less extreme example, take *United States v. Mobley*.<sup>86</sup> That case involved a defendant convicted of unlawful possession of a firearm.<sup>87</sup> During the sentencing hearing, the trial judge found that the firearm was stolen, which triggered an enhancement under the

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<sup>79</sup> *United States v. Valensia*, 222 F.3d 1173, 1182 (9th Cir. 2000), *vacated*, 532 U.S. 901 (2001) (remanding for reconsideration in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

<sup>80</sup> See *supra* notes 48–51 and accompanying text (describing the SRA).

<sup>81</sup> See *United States v. Booker*, 543 U.S. 220, 233 (2005) (“The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges.”).

<sup>82</sup> 72 F.3d 170 (1st Cir. 1995).

<sup>83</sup> See *id.* at 172 (stating that Lombard was convicted “on federal firearms and other charges arising out of [two] murders”).

<sup>84</sup> *Id.* at 175 & n.6 (“Treating the murders as ‘another offense,’ and finding by a preponderance of the evidence that the defendant had committed that other offense, the court applied section 2X1.1, which directed the defendant’s BOL to be set at ‘[t]he base offense level from the guideline for the object offense.’” (quoting U.S. SENTENCING GUIDELINES MANUAL § 2X1.1(a) (U.S. SENTENCING COMM’N 1990) (amended 2015))).

<sup>85</sup> *Id.* at 182.

<sup>86</sup> 956 F.2d 450 (3d Cir. 1992).

<sup>87</sup> *Id.* at 451.

Guidelines and forced him to increase the defendant's sentence by the same amount of imprisonment as would have resulted from an actual conviction for the crime of possession of a stolen firearm.<sup>88</sup> In a dissenting opinion, Judge Mansmann observed that this had essentially relieved the government of its burden to prove scienter and meet a higher standard of proof.<sup>89</sup> She criticized the enhancement as providing "a convenient detour around fundamental constitutional protections afforded an accused before conviction such that the government may seek the same punishment unfettered by the constraints of producing admissible evidence and proving its case beyond a reasonable doubt."<sup>90</sup>

The foregoing examples illustrate how the Guidelines themselves created disproportionate impact problems through mandatory enhancements. But disproportionate impact also arose as a matter of judicial discretion. The Guidelines gave judges some discretion to "depart" where "there exist[ed] an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission."<sup>91</sup> This discretion was utilized in the first case to apply the clear and convincing standard, *United States v. Kikumura*.<sup>92</sup> In *Kikumura*, the district court found that a defendant convicted for unlawful possession of explosives had attempted murder.<sup>93</sup> The judge departed from the Guidelines maximum of thirty months, deciding instead to sentence the defendant to thirty years.<sup>94</sup> By adding twenty-seven-and-a-half years of imprisonment, the discretionary departure seemed to punish the defendant more for the findings at sentencing than the actual crime of conviction.<sup>95</sup> "[I]t seems evident that the Government and the sentencing judge did not con-

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<sup>88</sup> *Id.* at 460 (Mansmann, J., dissenting).

<sup>89</sup> *See id.* at 464 ("Mobley's . . . sentence . . . present[s] the 'specter' of 'restructuring' crimes into sentencing factors, as demonstrated by the government's choice to either charge Mobley with a [firearms] violation . . . or to pursue an equivalent guideline sentencing range by invoking the guideline § 2K2.1(b)(2) enhancement, which was not subject to a scienter requirement.")

<sup>90</sup> *Id.* at 461.

<sup>91</sup> *See* Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 46 (2000) (quoting 18 U.S.C. § 3553(b) (1994) (current version at 18 U.S.C. § 3553(b)(1) (2012)) (discussing the use of departures).

<sup>92</sup> *See* *United States v. Kikumura*, 918 F.2d 1084, 1097–98 (3d Cir. 1990) (describing the increase in sentence for unlawful possession of explosives attributed to, among other factors, a finding of intent to kill at sentencing), *overruled by* *United States v. Fisher*, 502 F.3d 293, 305 (3d Cir. 2007).

<sup>93</sup> *Id.* at 1097.

<sup>94</sup> *Id.* at 1100.

<sup>95</sup> *See id.* at 1120 (Rosenn, J., concurring) (noting this "strategy" made the government's burden of proof much lighter).

sider Kikumura's attempt to kill as collateral but *primary*," Judge Rosenn wrote in concurrence.<sup>96</sup> "In such a case, Kikumura should have been charged and tried for that offense."<sup>97</sup>

In *Kikumura* and cases like it, the Guidelines did not force judges to disproportionately increase a sentence based on other crimes proven by a preponderance, but simply made it apparent that such an increase had occurred. Before the Guidelines were in use, this had been practically impossible to detect. But the Guidelines assigned specific weight to sentencing factors and provided for formal appellate review.<sup>98</sup> This allowed appellate judges to consider how each sentencing factor influenced the sentence and whether facts found at sentencing had contributed more to the sentence than facts found at trial or to which the defendant pleaded guilty.

Once disproportionate impact was detected, judges emphasized that the procedural safeguards at sentencing hearings provided criminal defendants with far less protection than full-blown trials.<sup>99</sup> Fewer procedural safeguards seemed appropriate for routine sentencing hearings, but not for sentencing hearings that accounted for the majority of the time added to the defendant's sentence.<sup>100</sup> As one court observed, when a sentencing factor accounts for most of the sentence, use of the preponderance standard "attaches, in effect, the lesser procedural protections to the issue that would naturally be viewed as having the greater significance."<sup>101</sup>

Other judges noted that this unfairness was compounded by the defendant's relative lack of resources. Judge Norris of the Ninth Circuit explained that the government often has more financial resources, greater access to expert testimony, and greater ability to input facts into the presentence reports that supply facts for the sentencing determination.<sup>102</sup> In his view, this resource disparity made "the preponderance of evidence standard generate even more errors—errors that fall primarily on the side of deprivations of liberty for individuals."<sup>103</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> See *supra* notes 48–51 and accompanying text (describing the SRA).

<sup>99</sup> See, e.g., *Kikumura*, 918 F.2d at 1099–100 (illustrating the dichotomy between the procedural protections provided at trial and at a sentencing hearing).

<sup>100</sup> See *id.* at 1100 (contrasting "run-of-the-mill sentencing cases" with "extreme situations").

<sup>101</sup> *United States v. Lombard*, 72 F.3d 170, 177 (1st Cir. 1995).

<sup>102</sup> See *United States v. Restrepo*, 946 F.2d 654, 675 (9th Cir. 1991) (Norris, J., dissenting) ("[P]resentence reports often rely excessively on the prosecutor's files for their information, and hearsay evidence in presentence reports or from confidential informants is difficult and costly to rebut." (citation omitted)), *abrogated by* *United States v. Jordan*, 256 F.3d 922 (9th Cir. 2001).

<sup>103</sup> *Id.*

Ultimately, these considerations combined to justify raising the standard of proof at sentencing to clear and convincing when disproportionate impact became apparent.

## II

### POST-BOOKER: THE “ADVISORY” GUIDELINES AND DISPROPORTIONATE IMPACT

As originally enacted, the Sentencing Guidelines were mandatory and sentencing judges were generally bound to sentence within the applicable range.<sup>104</sup> Failure to properly calculate and sentence within the Guidelines range would be grounds to vacate the sentence on appeal.<sup>105</sup> But after less than two decades of use, the Supreme Court eventually held that the mandatory Guidelines were unconstitutional in *United States v. Booker*.<sup>106</sup> Although *Booker* did not discuss standards of proof during sentencing, several circuit courts saw the decision as grounds to reverse course on the disproportionate impact exception, reasoning that the now-advisory nature of the Guidelines had eliminated the legal and policy rationales for it.<sup>107</sup>

This Part looks at what *Booker* changed within the federal sentencing system and what it did not change. Section II.A explains the *Booker* decision itself. Section II.B analyzes the circuit split as it now stands, with the Ninth Circuit alone upholding the disproportionate impact exception. Finally, Section II.C argues that the Guidelines, despite their advisory nature, remain central to federal sentencing. It shows that the Guidelines still exert a substantial influence on—and in many cases, control—sentencing determinations. Because *Booker* left much of the sentencing system intact, the disproportionate impact problem has remained largely intact as well.

#### A. *Booker and the Advisory Guidelines*

The *Booker* decision that rendered the Guidelines advisory came about as the result of two earlier sentencing decisions, *Apprendi v. New Jersey*<sup>108</sup> and *Blakely v. Washington*.<sup>109</sup> In *Apprendi*, the Court reiterated that, under the Fifth Amendment’s Due Process Clause and

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<sup>104</sup> See *United States v. Booker*, 543 U.S. 220, 233 (2005) (“The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges.”).

<sup>105</sup> See *id.* at 235 (noting that the sentencing judge would have been reversed if he did not impose a sentence within the Guidelines range).

<sup>106</sup> See *id.* at 245 (holding that “the Sixth Amendment requires juries, not judges, to find facts relevant to sentencing”).

<sup>107</sup> See *infra* notes 136–55.

<sup>108</sup> 530 U.S. 466 (2000).

<sup>109</sup> 542 U.S. 296 (2004).

the Sixth Amendment's notice and jury trial guarantees, judge-found facts may not increase statutory maximums provided by legislatures.<sup>110</sup> Although *Apprendi* did not involve sentencing guidelines,<sup>111</sup> its effect on them was borne out a few years later in *Blakely*. *Blakely* involved the constitutionality of Washington's sentencing guidelines, which were very similar to the Federal Sentencing Guidelines.<sup>112</sup> The issue was whether the rule laid down in *Apprendi* had been violated when a judge-found fact had increased the defendant's sentence beyond the guideline-range maximum.<sup>113</sup>

The defendant in *Blakely* had been convicted of second-degree kidnapping and faced a maximum sentence of fifty-three months under Washington's sentencing guidelines.<sup>114</sup> However, the judge found that Blakely acted with "deliberate cruelty" and departed from that range to sentence him to ninety months.<sup>115</sup> Ruling on the constitutionality of this departure under *Apprendi*, the Supreme Court held that the mandatory guideline maximum of fifty-three months should be treated as the statutory maximum, as opposed to the ten-year maximum for second-degree felonies.<sup>116</sup> Thus, the defendant's Sixth Amendment right had been violated because his sentence was increased beyond the guideline maximum by a fact not submitted to a jury or found beyond a reasonable doubt.<sup>117</sup> *Blakely*'s holding immediately raised questions about the constitutionality of the Federal Sentencing Guidelines,<sup>118</sup> which the Court addressed just a year later in *Booker*.

*Booker* presented an issue almost identical to that in *Blakely*. The defendant had been convicted of possession of crack with intent to distribute,<sup>119</sup> and his Guidelines range would have been 210 to 262 months using his criminal history and jury-found facts alone.<sup>120</sup> At the sentencing hearing, the district judge found that the defendant had

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<sup>110</sup> *Apprendi*, 530 U.S. at 476.

<sup>111</sup> *Id.* (noting that this case involved a state statute).

<sup>112</sup> *See Blakely*, 542 U.S. at 305 (discussing the challenge to the state's sentencing scheme).

<sup>113</sup> *Id.* at 300–01, 303.

<sup>114</sup> *Id.* at 299–300.

<sup>115</sup> *Id.* at 300–01.

<sup>116</sup> *See id.* at 303–05 ("The 'maximum sentence' is no more 10 years here than it was 20 years in *Apprendi* . . .").

<sup>117</sup> *See id.* at 305 (invalidating *Blakely*'s sentence because the State's sentencing procedure did not comply with the Sixth Amendment).

<sup>118</sup> *See Bowman*, *supra* note 39, at 429 (commenting on the confusion in the federal courts after *Blakely* and how "all recognized that the Federal Sentencing Guidelines seemed to violate the new *Blakely* rule").

<sup>119</sup> *United States v. Booker*, 543 U.S. 220, 227 (2005).

<sup>120</sup> *Id.*

possessed a larger quantity of drugs than the amount for which he was convicted at trial, which raised Booker's range from 360 months to life.<sup>121</sup>

In a dual-majority opinion,<sup>122</sup> the Court held that the Guidelines violated the Sixth Amendment.<sup>123</sup> Justice Stevens, writing for the majority in the "constitutional opinion," reasoned that *Blakely's* holding demanded the same result in *Booker*.<sup>124</sup> Since sentencing within the Guidelines range was mandatory, any fact that increased that range had to be submitted to a jury and proven beyond a reasonable doubt.<sup>125</sup> Because Booker's range had been increased based on the additional quantity of drugs found by the judge at sentencing, the Guidelines enhancement had violated his Sixth Amendment rights.<sup>126</sup>

After the Court's constitutional holding, it was clear that the mandatory Guidelines could not operate in a constitutionally permissible way.<sup>127</sup> But the Court did not do away with the Guidelines completely. Instead, it excised portions of the law to allow them to function constitutionally. Writing for a separate majority in the "remedial opinion," Justice Breyer excised the two statutory provisions,<sup>128</sup> 18 U.S.C. §§ 3553(b)(1) and 3742(e), which made the Guidelines mandatory and provided standards of appeal based on the mandatory nature of the Guidelines, respectively.<sup>129</sup>

This excision created today's "advisory" sentencing regime. Sentencing judges must still begin their analysis by calculating the Guidelines range.<sup>130</sup> However, after considering the range suggested by the Guidelines, they may decide to depart based on six additional

<sup>121</sup> *Id.*

<sup>122</sup> Justice Stevens wrote the "constitutional opinion," which held that the Guidelines were unconstitutional, while Justice Breyer wrote the "remedial opinion," which addressed how to rectify the constitutional violation. *See id.* at 226–27, 244–45 (explaining that there are two separate majority opinions).

<sup>123</sup> *Id.* at 244–45. *Booker* also did not mention the Fifth Amendment. *See id.* at 226 (stating that the issue revolves around the Sixth Amendment).

<sup>124</sup> *See id.* at 235 ("There is no relevant distinction between the sentence imposed pursuant to the Washington statutes in *Blakely* and the sentence imposed pursuant to the Federal Sentencing Guidelines in these cases.").

<sup>125</sup> *See id.* at 235, 244 (noting that "Booker's case illustrates the mandatory nature of the Guidelines").

<sup>126</sup> *See id.* at 235, 245.

<sup>127</sup> *See id.* at 246–47 ("[T]oday's constitutional holding means that it is no longer possible to maintain the judicial factfinding that Congress thought would underpin the mandatory Guidelines system . . .").

<sup>128</sup> *See id.* at 258–59 ("Indeed, we must retain those portions of the Act that are (1) constitutionally valid, (2) capable of 'functioning independently,' and (3) consistent with Congress's basic objectives in enacting the statute." (citations omitted)).

<sup>129</sup> *See id.* at 259 (describing the excised portions).

<sup>130</sup> *See id.* at 259–60; *see also* 18 U.S.C. § 3553(a)(4) (2012) (requiring judges to consider the Guidelines range).

“§ 3553(a) factors.”<sup>131</sup> These include, for example, “the need to avoid unwarranted sentencing disparities” and the need “to impose sentences that reflect the seriousness of the offense.”<sup>132</sup> Departures based on the § 3553(a) factors are known today as “variances.”<sup>133</sup> Sentencing judges must also continue to adequately explain their sentence for “meaningful appellate review,”<sup>134</sup> and appellate courts now review sentences for “reasonableness” using the Guidelines range and the § 3553(a) factors as guidance.<sup>135</sup>

*Booker* itself did not involve standards of proof or even the Fifth Amendment’s Due Process Clause. But it did grant sentencing judges more discretion by loosening the hold of the Sentencing Guidelines and providing new grounds for departure from them. This change prompted many courts to rethink the process due at sentencing and revise their opinions on the disproportionate impact exception, as the next section demonstrates.

### B. *Post-Booker: The Lopsided Circuit Split over the Exception*

In the years following *Booker*, the Fourth,<sup>136</sup> Seventh,<sup>137</sup> and Eighth<sup>138</sup> Circuits withdrew their nominal support for the disproportionate impact exception, the Third Circuit overruled *Kikumura*,<sup>139</sup> and the Sixth Circuit reaffirmed its original rejection under a post-*Booker* rationale.<sup>140</sup> The Ninth Circuit was the only court to issue an opinion in favor of the exception.<sup>141</sup> The Fifth and Tenth Circuits, although continuing to “leave the door open” to a heightened stan-

<sup>131</sup> 18 U.S.C. § 3553(a) (listing the Guidelines as the fourth of seven factors).

<sup>132</sup> See *Booker*, 543 U.S. at 259–60 (describing the seven § 3553(a) factors).

<sup>133</sup> See *Peugh v. United States*, 133 S. Ct. 2072, 2080 (2013) (describing variances).

<sup>134</sup> *Gall v. United States*, 552 U.S. 38, 50 (2007).

<sup>135</sup> See *Booker*, 543 U.S. at 261–62 (“Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.”).

<sup>136</sup> *United States v. Grubbs*, 585 F.3d 793, 802 (4th Cir. 2009) (“We are thus persuaded that after *Booker*, the due process clause does not require the district court to find uncharged conduct by a heightened standard of proof . . .”).

<sup>137</sup> *United States v. Reuter*, 463 F.3d 792, 793 (7th Cir. 2006) (“The debate [on the exception] has, we believe, been rendered academic by *United States v. Booker* . . .”).

<sup>138</sup> *United States v. Villareal-Amarillas*, 562 F.3d 892, 895 (8th Cir. 2009) (“We now join three other circuits in concluding that, even if valid when the Guidelines were mandatory, [the exception] did not survive the Supreme Court’s recent decision[ ] in *United States v. Booker* . . .”).

<sup>139</sup> *United States v. Fisher*, 502 F.3d 293, 306 (3d Cir. 2007) (“After *Booker* . . . it is clear that sentencing on facts found by a preponderance of the evidence does not infringe upon a defendant’s rights, whether those rights are derived from the Guidelines or the Constitution.”).

<sup>140</sup> See *United States v. Brika*, 487 F.3d 450, 461 (6th Cir. 2007) (“Today, while we reaffirm those precedents [rejecting *Kikumura*], we reformulate them in *Booker* terms.”).

<sup>141</sup> See, e.g., *United States v. Hymas*, 780 F.3d 1285, 1293 (9th Cir. 2015) (vacating part of a sentence and remanding for use of a heightened standard of proof at sentencing).

dard of proof, have never actually required it or given the issue more than a few sentences of treatment.<sup>142</sup>

The circuits that disavowed the exception held that the now-advisory nature of the Guidelines had eliminated both the legal and policy rationale for the exception.<sup>143</sup> As a legal matter, the circuits stated that the exception's due process basis had been rooted solely in the defendant's expectation interest in a Guidelines sentence, which the legislature had bestowed.<sup>144</sup> However, now that the Guidelines were no longer mandatory, defendants no longer had a justified expectation to be sentenced within the Guidelines, which dissolved the due process basis for the exception.<sup>145</sup> The circuits also opined that merely advisory sentencing enhancements cannot lead to "disproportionate" increases.<sup>146</sup> The relevant range for the "proportionality" inquiry should now be the statutory range provided by the U.S. Code, not a Guidelines range with no legal force.<sup>147</sup> Therefore, no matter how much a sentence had been increased during the sentencing phase, "a reasonable sentence which does not exceed the maximum prescribed by the Code cannot possibly be 'disproportionate to the offense of conviction.'" <sup>148</sup>

The circuits also viewed abandonment of the exception as a sound policy decision. *Booker* allowed sentencing judges to freely depart downward in cases where enhancements increased the defendant's sentence to an unreasonable degree.<sup>149</sup> Therefore, if a sen-

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<sup>142</sup> See, e.g., *United States v. Redifer*, 631 F. App'x 548, 563 (10th Cir. 2015) ("Although we have left open the possibility that extraordinary circumstances might justify the use of a more demanding standard at sentencing than a preponderance of the evidence, we have never applied such an enhanced standard of proof."); *United States v. Simpson*, 741 F.3d 539, 559 (5th Cir. 2014) ("Though we have continued to leave this door open, we have never actually required a heightened burden for factual determinations at sentencing.").

<sup>143</sup> See, e.g., *United States v. Grubbs*, 585 F.3d 793, 801 (4th Cir. 2009) ("Whatever theoretical validity may have attached to the *McMillan* exception to a preponderance of the evidence sentencing standard, the Supreme Court's decision in *Booker* and subsequent cases applying *Booker* have nullified its viability."); *Fisher*, 502 F.3d at 306 ("The critical distinction here is the advisory nature of the Guidelines . . .").

<sup>144</sup> See, e.g., *Brika*, 487 F.3d at 461 (stating that any due process rationale under *Kikumura* is irrelevant now that defendants no longer have a reasonable expectation to be sentenced within the Guidelines range); *Fisher*, 502 F.3d at 306 (quoting *Brika* and concurring with the Sixth Circuit's reasoning).

<sup>145</sup> *Fisher*, 502 F.3d at 306 (quoting *Brika*, 487 F.3d at 461–62).

<sup>146</sup> See, e.g., *id.* at 308 (opining that the advisory nature of the Guidelines makes it "a logical impossibility for 'the tail to wag the dog'"); see also *Grubbs*, 585 F.3d at 802 (echoing this view).

<sup>147</sup> See *id.* at 307 ("After *Booker*, 'the offense of conviction' is defined by the United States Code . . .").

<sup>148</sup> *Id.*

<sup>149</sup> See *United States v. Reuter*, 463 F.3d 792, 793 (7th Cir. 2006) (noting that sentencing judges were now "liberated" by the post-*Booker* sentencing regime).

tencing judge perceived that the defendant was subject to an unfair sentence increase based almost entirely on evidence proven by a preponderance, she would be free to depart downward under *Booker*.<sup>150</sup> And if the sentencing judge refused to do so, the defendant could appeal the sentence as unreasonable rather than argue that a higher standard of proof should have been applied.<sup>151</sup>

Some circuits also added that the exception had been rarely used and thus seemed to be a waste of resources. Judge Posner pointed out that his circuit had never actually vacated a sentence for disproportionate impact and that even the Third Circuit rarely did so.<sup>152</sup> The reason for this was that most courts set a high bar for how “extreme” an increase had to be to warrant a heightened standard of proof.<sup>153</sup> Now that district judges had more discretion to avoid the injustice of disproportionate impact, a standard-of-proof exception would serve only to unnecessarily “add epicycles to an already complex set of (merely) advisory guidelines by multiplying standards of proof.”<sup>154</sup> Echoing this sentiment, the Eighth Circuit opined that continuing to imply the exception’s availability would needlessly “prompt[ ] defense counsel to continue to raise the issue on appeal” even though it was never successful.<sup>155</sup>

Despite these criticisms, the Ninth Circuit upheld the exception in *United States v. Staten*.<sup>156</sup> The court explained that defendants, even

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<sup>150</sup> See *Fisher*, 502 F.3d at 308 (“If, after calculating the appropriate Guidelines, a district judge finds that the imposition of a within-Guidelines sentence would visit an injustice upon the defendant pursuant to 18 U.S.C. § 3553(a), it is incumbent upon the judge to say so, and sentence below the Guidelines range.”); *Reuter*, 463 F.3d at 793 (“A judge might reasonably conclude that a sentence based almost entirely on evidence that satisfied only the normal civil standard of proof would be unlikely to promote respect for the law or provide just punishment for the offense of conviction.”).

<sup>151</sup> See, e.g., *Grubbs*, 585 F.3d at 802–03 (agreeing with the Sixth Circuit that “challenges to ‘large enhancements . . . should be viewed through the lens of *Booker* reasonableness rather than that of due process’” (quoting *United States v. Brika*, 487 F.3d 450, 462 (6th Cir. 2007))).

<sup>152</sup> *Reuter*, 463 F.3d at 793.

<sup>153</sup> See, e.g., *United States v. Masters*, 978 F.2d 281, 287 (7th Cir. 1992) (distinguishing *Kikumura* by noting that the departure in the case at issue was less extreme). In contrast, the Ninth Circuit seems to use a lower threshold than even the Third Circuit. Compare *United States v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999) (vacating defendant’s sentence and requiring use of the clear and convincing standard where the sentencing factor resulted in a potential increase of up to fifty-four months), with *United States v. DeLaurentis*, 47 F. App’x 170, 173 (3d Cir. 2002) (declining to require the clear and convincing standard for enhancements resulting in an offense level increase of ten), and *United States v. Mack*, 229 F.3d 226, 234–35 (3d Cir. 2000) (declining to require the clear and convincing standard for an enhancement resulting in a potential sentence increase of ninety-two months).

<sup>154</sup> *Reuter*, 463 F.3d at 793.

<sup>155</sup> *United States v. Villareal-Amarillas*, 562 F.3d 892, 896 (8th Cir. 2009).

<sup>156</sup> 466 F.3d 708, 720 (9th Cir. 2006).

without an expectation interest in a Guidelines sentence, continue to enjoy protectable due process interest in fair sentencing; otherwise, “no standard of proof whatever” would be required.<sup>157</sup> It also implied that the advisory nature of the Guidelines did not affect the propriety of the exception because the Guidelines still showed the actual effect sentencing factors had on the sentence.<sup>158</sup> Therefore, “because . . . facts found by the district court may still have an *actual* disproportionate impact on the sentence ultimately imposed, the due process concerns which animated our adoption of the clear and convincing standard in such limited instances have not evaporated.”<sup>159</sup> Finally, the court highlighted that in *Kikumura*, the first case to require a heightened standard of proof, the mandatory nature of the Guidelines was not a factor since the increase had been based on an entirely discretionary departure.<sup>160</sup>

The Ninth Circuit’s opinion stands apart from the others in downplaying the significance of the advisory nature of the Guidelines on the disproportionate impact exception. It seems to contemplate that from a realist perspective, *Booker* did not change all that much. The next part examines the state of the Guidelines after *Booker*, concluding that the post-*Booker* landscape in many ways resembles the pre-*Booker* one.

### C. *Disproportionate Impact Post-Booker*

Despite being advisory, the post-*Booker* sentencing regime looks fairly similar to the mandatory regime. The Guidelines still create transparency,<sup>161</sup> and the specific weight assigned to sentencing factors is still substantially influential—and in many cases, completely controls.<sup>162</sup> Relevant conduct enhancements thus continue to raise dispro-

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<sup>157</sup> See *id.* at 720 (“[O]ur prior clear and convincing evidence sentencing case law . . . focused on the *actual* effect a given fact had on the sentence . . . not on whether the district court was *required* to give a fact it found the effect it did.”).

<sup>158</sup> *Id.* at 719–20.

<sup>159</sup> *Id.* at 720.

<sup>160</sup> *Id.* at 719.

<sup>161</sup> For example, in the Fourth Circuit’s decision disavowing the heightened standard of proof post-*Booker*, it was able to identify which sentencing factors had increased the sentence and to what extent they had done so. See, e.g., *United States v. Grubbs*, 585 F.3d 793, 797–98 (4th Cir. 2009) (comparing a range with an enhancement of 151–188 months to a range with an enhancement of 210–262 months).

<sup>162</sup> Cf. *Bowman*, *supra* note 39, at 468 (“The Guidelines, though advisory, remain in effect, requiring judges make the same factual findings and the same determinations of Guidelines ranges as always . . . [T]he fact-driven Guidelines rules continue to determine the sentence for six out of ten federal defendants.”).

portionate impact problems just as they did before.<sup>163</sup> One commentator, lamenting the persistence of disproportionate impact, stated that “cross references still found within the now ostensibly advisory Sentencing Guidelines still embody . . . [an] ‘absurd result,’ and the government still too often utilizes this mechanism to prosecute defendants for nonviolent crimes, and then punish them for uncharged violent ones.”<sup>164</sup> Another commentator argued that *Booker* did not eliminate the “tail-wags-dog problem” and created the “worst of all worlds—a complex system of fact-dependent rules, which in truth heavily influence outcomes, but in which judges are cavalier because the rules have no formal legal force.”<sup>165</sup>

One reason that the Guidelines continue to have such a central role in sentencing is that their use is still mandatory in a procedural sense. Judges must begin their analysis by properly calculating and considering the Guidelines.<sup>166</sup> Failure to do so is still grounds to vacate the sentence.<sup>167</sup> Another reason is that the appeals process seems to favor within-Guidelines sentences. For example, six circuits to date presume that sentences within the Guidelines range are reasonable.<sup>168</sup> This not only limits the ability of defendants to challenge a within-Guidelines sentence on appeal, but also encourages judges to issue within-Guidelines sentences to avoid reversal.<sup>169</sup>

Importantly, even when judges do not issue within-Guidelines sentences, the Guidelines range influences the ultimate sentence because the Guidelines act as a benchmark.<sup>170</sup> The tendency to use the

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<sup>163</sup> See Leonard & Dieter, *supra* note 6, at 262 n.13 (noting, in the context of unconvicted conduct enhancements, that the Guidelines “still exercise substantial control over federal sentencing and, for our purposes, remain nearly as important as when they were formally binding” (citation omitted)); Rankin & May, *supra* note 64, at 52 (noting that cross references continue to operate in a substantially similar way post-*Booker*).

<sup>164</sup> Rankin & May, *supra* note 64, at 52.

<sup>165</sup> Bowman, *supra* note 39, at 469.

<sup>166</sup> United States v. Booker, 543 U.S. 220, 259 (2005); see also 18 U.S.C. § 3553(a)(4) (2012) (requiring judges to consider the Guidelines).

<sup>167</sup> See, e.g., United States v. Dougherty, 754 F.3d 1353, 1359 (11th Cir. 2014) (vacating sentences due to improper calculation of the Guidelines range).

<sup>168</sup> See Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 550 n.364 (2015) (listing the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits and citing cases).

<sup>169</sup> See Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 30 (2008) (“[I]n practice the presumption no doubt creates a substantive bias for district courts to render within-Guidelines sentences by making such sentences more likely to be affirmed than sentences outside the Guidelines.”).

<sup>170</sup> See, e.g., United States v. Hymas, 780 F.3d 1285, 1292 (9th Cir. 2015) (holding that failure to use the clear and convincing standard was not harmless error because a fact increasing the range would not have been found, and thus “the district court’s analysis for the extent of the variance was not based on the correct range”).

Guidelines range as a benchmark is known as “anchoring”<sup>171</sup> and studies have shown that sentencing ranges can have an anchoring effect.<sup>172</sup> The anchoring effect may be present even when judges ultimately sentence defendants outside the range. As a concrete example of this phenomenon, consider *United States v. Stanley*.<sup>173</sup> In that case, a district judge had erroneously calculated a Guidelines range of 207–228 months and varied upward to impose a sentence of 428 months.<sup>174</sup> After the first sentence was vacated and the range was properly recalculated to 166–177 months, the judge again varied upward but to an ultimate sentence of only 360 months.<sup>175</sup> Theoretically, the judge could have varied upward to the original 428 months under *Booker*, but use of a lower Guidelines range seemed to have “anchored” the sentence, reducing it by more than five years.<sup>176</sup> Evidence suggests that this anchoring effect is weaker on newer judges who did not use the Guidelines when they were mandatory,<sup>177</sup> but sentencing trends illustrate that the Guidelines generally exert a controlling influence. This is reflected by data released by the Sentencing Commission.

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<sup>171</sup> See, e.g., Jelani Jefferson Exum, *The More Things Change: A Psychological Case Against Allowing the Federal Sentencing Guidelines to Stay the Same in Light of Gall, Kimbrough, and New Understandings of Reasonableness Review*, 58 CATH. U. L. REV. 115, 122–26 (2008) (discussing the psychological effects of anchoring on sentencing judges); see also *United States v. Jones*, 762 F. Supp. 2d 270, 284–85 (D. Mass. 2010) (citing cases and scholarship discussing the anchoring effect on judges).

<sup>172</sup> Cf. Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCHOL. 1535, 1547 (2001) (finding that “an initial sentencing demand heavily influences the final sentence that is given by the judge[.]” even when the demand is from someone with no legal experience); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 794 (2001) (concluding that sentencing guidelines might provide judges with neutral anchors that reduce the influence of biased and irrelevant anchors).

<sup>173</sup> 644 F. App’x 935 (11th Cir. 2016).

<sup>174</sup> *United States v. Dougherty*, 754 F.3d 1353, 1357, 1364 (11th Cir. 2014) (vacating defendant’s original sentence). The case in which Stanley’s sentence was originally vacated had a different name, *Dougherty*, because Stanley originally appealed with codefendants. *Id.* at 1364 (vacating the sentences of Lee Dougherty and Dylan Stanley).

<sup>175</sup> *Stanley*, 644 F. App’x at 937.

<sup>176</sup> Some judges will in fact vary upward to the original sentence. In a similar case involving a sentence that was vacated due to improper enhancement, the district court varied upward and imposed the same sentence. See *United States v. Rosales-Bruno*, 789 F.3d 1249, 1251 (11th Cir. 2015). The dissent, however, suggested that the “uncanny resemblance” of the two sentences was a result of anchoring to the *original range*, stating: “I have little doubt that if the Guidelines had been correctly calculated the first time around, Rosales-Bruno would have been sentenced [within the correctly calculated range].” *Id.* at 1280 (Wilson, J., dissenting).

<sup>177</sup> See Yang, *supra* note 44, at 1277 (“Judges who have no prior experience sentencing under the mandatory Guidelines regime are more likely to depart from the Guidelines-recommended range than their pre-*Booker* counterparts, suggesting that newer judges are less anchored to the Guidelines.”).

In 2015, ten years after *Booker*, 47.3% of federal defendants were sentenced according to the predetermined range prescribed by the Guidelines.<sup>178</sup> In five circuits, this figure is over 50%.<sup>179</sup> Moreover, while the total percentage of within-Guidelines sentences has dropped 23.6 percentage points from 70.9% right before *Booker*,<sup>180</sup> 5.2% of this 23.6% drop is attributable to an increase of government sponsored departures.<sup>181</sup> Because such departures depend on the government's willingness to make a motion for them rather than post-*Booker* judicial discretion,<sup>182</sup> it is likely that *Booker* led to only an 18.4% drop in within-Guidelines sentences overall. Seemingly, *Booker* left much of the pre-*Booker* regime intact, as the Guidelines retain a heavy influence over federal sentencing.

### III

#### ARGUING IN FAVOR OF THE DISPROPORTIONATE IMPACT EXCEPTION

Part III of this Note suggests that the circuit courts that rejected the disproportionate impact exception in the wake of the *Booker* decision were too quick to do so. Those courts overstated the significance of *Booker* as it relates to the standard of proof at sentencing; the post-*Booker* sentencing regime resembles the pre-*Booker* regime in many ways and brought along its concomitant problems. Therefore, as a matter of policy and due process, the disproportionate impact exception should be employed in cases where facts found at sentencing become a tail wagging the dog of the substantive offense. This Part is split into two sections. First, Section III.A examines the disproportionate impact exception from a policy perspective, concluding that

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<sup>178</sup> U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET: FIRST CIRCUIT 11 tbl.8 (2015) [hereinafter U.S. SENTENCING COMM'N 2015], <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2015/1c15.pdf> (reflecting 68,270 cases nationally, 32,262 of which were sentenced within Guidelines range).

<sup>179</sup> See *id.* at 12–17 tbl.9 (illustrating an above-50% rate for the First, Fourth, Fifth, Tenth, and Eleventh Circuits).

<sup>180</sup> U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET: FIRST CIRCUIT 13 tbl.8 (2005) [hereinafter U.S. SENTENCING COMM'N 2005], <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2005/1c05.pdf>.

<sup>181</sup> Compare U.S. SENTENCING COMM'N 2015 at 11 tbl.8 (illustrating that 29.3% of sentences nationwide were government sponsored departures), with U.S. SENTENCING COMM'N 2005 at 13 tbl.8 (reflecting a combination of “substantial assistance departures” and “government initiated departures” for a total of 24.1%).

<sup>182</sup> See U.S. SENTENCING GUIDELINES MANUAL §§ 5K1.1, 5K3.1 (U.S. SENTENCING COMM'N 2015) (providing for a downward departure for substantial assistance upon the Government's motion and “pursuant to an early disposition program” upon the Government's motion, respectively).

raising the standard of proof to clear and convincing is still justified by the persistence of the disproportionate impact problem and the lack of procedural safeguards at sentencing to guard against it. Second, Section III.B offers a legal basis for the disproportionate impact exception. In particular, this subsection notes that the exception is rooted in the defendant's general due process interest in a fair sentencing, which survives *Booker*, not solely her expectancy interest in a Guidelines sentence. This subsection also rebuts the notion that because the Guidelines have no legal force, they cannot create disproportionate impact problems.

### A. *The Effectiveness and Efficiency of Raising the Standard of Proof*

In the post-*Booker* world, sentencing hearings can still be abused as an alternative avenue for punishment of uncharged and acquitted crimes. Several judges, even outside of the Ninth Circuit, have commented on this phenomenon.<sup>183</sup> For example, Judge Torruella of the First Circuit wrote recently in a concurrence:

All too often, prosecutors charge individuals with relatively minor crimes, carrying correspondingly short sentences, but then use section 1B1.3(a) of the Sentencing Guidelines . . . to argue for significantly enhanced terms of imprisonment under the guise of “relevant conduct”—other crimes that have not been charged (or, if charged, have led to an acquittal) and have not been proven beyond a reasonable doubt.<sup>184</sup>

Judge Torruella has written separate opinions in at least three other recent cases<sup>185</sup> to express his distaste for this trend.

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<sup>183</sup> See, e.g., *United States v. Fisher*, 502 F.3d 293, 311–13 (3d Cir. 2007) (Rendell, J., concurring) (arguing that due process rights are still implicated when “facts found by a judge . . . concerning a separate, uncharged crime result in a dramatic increase in the sentence”); *United States v. Grier*, 475 F.3d 556, 609–10 (3d Cir. 2007) (McKee, J., dissenting) (objecting to a sentence increase based on an “uncharged” crime); *United States v. Wendelsdorf*, 423 F. Supp. 2d 927, 938 (N.D. Iowa 2006) (rejecting the government’s attempt to use the sentencing hearing “to get a second bite at the apple”).

<sup>184</sup> *United States v. St. Hill*, 768 F.3d 33, 39 (1st Cir. 2014) (Torruella, J., concurring), *mandate recalled, opinion vacated*, No. 13-2097, 2016 WL 8540306 (1st Cir. Feb. 22, 2016).

<sup>185</sup> See *United States v. Magee*, 834 F.3d 30, 38 (1st Cir. 2016) (Torruella, J., concurring) (“I write separately to note my continuing disagreement with the government’s practice of charging relatively minor crimes, while using section 1B1.3(a) of the Sentencing Guidelines . . . to argue for significantly enhanced terms of imprisonment.”); *United States v. Alejandro-Montañez*, 778 F.3d 352, 362–63 (1st Cir. 2015) (Torruella, J., concurring) (“I join the court’s opinion but write separately to note my continued disagreement with the current state of the law regarding certain sentencing enhancements.”); *United States v. McDonald*, 804 F.3d 497, 505–06 (1st Cir. 2015) (Torruella, J., concurring) (“Despite our precedent, I find this general practice troubling as it routinely results in significant sentence increases based on uncharged, untried, and unpled to behavior.”).

Of course, district courts now have greater discretion to depart downward in such cases. But recall that this addresses only part of the problem; as demonstrated by *Kikumura* and cases like it,<sup>186</sup> district courts are sometimes indifferent to disproportionate impact. And because judges must necessarily use the Guidelines as a starting point, there is a greater chance that they may become anchored to the Guidelines range,<sup>187</sup> which factors in uncharged and acquitted conduct even when the Guidelines lead to disproportionately large increases. Judges may ultimately decline to give such conduct the weight specified in disproportionate impact cases, but they need not. In contrast, a higher standard of proof would *require* judges to screen out more evidence, placing a higher burden on the government and preventing some evidence from factoring into the sentencing decision in the first place.<sup>188</sup> And although standards of proof are subjective to some extent,<sup>189</sup> appellate review allows the circuit courts to regulate the standard of proof and reverse cases in which it has not been met, preventing sentencing judges from engaging in a completely discretionary analysis.<sup>190</sup>

Although some judges have opined that reasonableness review alone would be an adequate safeguard,<sup>191</sup> there is reason to doubt the effectiveness of that route. In practice, “sentences that increase the guideline by a factor of double, triple, or even quadruple have been upheld.”<sup>192</sup> Part of the problem is that if a particular fact is found, it

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<sup>186</sup> As a second example, consider *United States v. Lombard*, 72 F.3d 170 (1st Cir. 1995). The First Circuit thought the sentencing judge was “troubled” because he felt that he had no choice but to increase the defendants’ sentence to life, so it remanded with an invitation for the judge to depart downward. *Id.* at 172. Notwithstanding this newly granted discretion, the district court reinstated the original life sentence. *United States v. Lombard*, 102 F.3d 1, 1 (1st Cir. 1996). The Third Circuit expressed a similar sentiment in *United States v. Vincent*, 337 F. App’x 250, 253 (3d Cir. 2009), noting that it was “unfortunate” that the district court stated the defendant’s prior conduct was “very significant, even more significant than the crime of conviction.”

<sup>187</sup> See *infra* notes 171–76 and accompanying text (describing the anchoring effect).

<sup>188</sup> See *infra* note 202 (describing two surveys of federal judges quantifying the clear and convincing standard as between 60% and 75%, and 75%, respectively).

<sup>189</sup> As Professor Berger puts it, standards of proof “invite[] a good deal of subjectivity and inconsistency” because “individual judges vary considerably in their estimate of the probabilities.” Margaret A. Berger, *Rethinking the Applicability of Evidentiary Rules at Sentencing: Of Relevant Conduct and Hearsay and the Need for an Infield Fly Rule*, 5 FED. SENT’G REP. 96, 98 (1992). Professor Berger argues instead for a categorical rule barring the admissibility of certain evidence at sentencing. *Id.*

<sup>190</sup> See, e.g., *United States v. Townley*, 929 F.2d 365, 369–70 (8th Cir. 1991) (holding that the district court erred when it found that evidence met the clear and convincing standard of proof and reversing).

<sup>191</sup> See *supra* note 151 and accompanying text.

<sup>192</sup> Nila Bala, *Judicial Fact-Finding in the Wake of Alleyne*, 39 N.Y.U. REV. L. & SOC. CHANGE 1, 35–37 (2015) (discussing the lack of a uniform definition for reasonableness).

becomes part of the appellate record and will help justify the reasonableness of the sentence, especially in the circuits that have a presumption of reasonableness.<sup>193</sup> A heightened standard of proof could help prevent uncertain facts from becoming part of the record and being used to justify reasonableness.

While disproportionate impact issues persist, the lack of procedural protections during sentencing persists as well, making the preponderance standard particularly prone to error. The preponderance standard, which requires the factfinder to be just over fifty percent sure that a fact is true, allocates the risk of an erroneous finding nearly evenly between the government and the defendant.<sup>194</sup> This standard is usually adequate at sentencing because guilt has already been established<sup>195</sup> and the sentencing judge needs as much information as possible to issue an appropriate sentence.<sup>196</sup>

But in disproportionate impact cases, the cost of error can be years of wrongful imprisonment. This risk is compounded by the lack of procedural safeguards. Apart from a lower standard of proof, the Federal Rules of Evidence do not apply during sentencing,<sup>197</sup> meaning that hearsay is generally admissible,<sup>198</sup> and the defendant does not have a constitutional right to confront opposing witnesses, as she would during a criminal trial.<sup>199</sup> Moreover, the government often has

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<sup>193</sup> See Bowman, *supra* note 39, at 452 (“[T]he district court must find such a fact for it to become part of the appellate record and thus a proper consideration in reasonableness review.”); see also Peugh v. United States, 133 S. Ct. 2072, 2080 (2013) (“We have indicated that ‘a district court’s decision to vary from the advisory Guidelines may attract greatest respect when’ it is based on the particular facts of a case.” (quoting Kimbrough v. United States, 552 U.S. 85, 109 (2007))).

<sup>194</sup> See Addington v. Texas, 441 U.S. 418, 423 (1979) (explaining that the preponderance standard spreads the risk evenly).

<sup>195</sup> See McMillan v. Pennsylvania, 477 U.S. 79, 92 n.8 (1986) (stating that once convicted, a defendant has been “deprived of his liberty to the extent that the State may confine him.” (quoting Meachum v. Fano, 427 U.S. 215, 224 (1976))).

<sup>196</sup> See Williams v. New York, 337 U.S. 241, 247 (1949) (explaining that sentencing judges must ensure that the punishment “fit[s] the offender and not merely the crime”); Shaakirrah R. Sanders, *Making the Right Call for Confrontation at Felony Sentencing*, 47 U. MICH. J.L. REFORM 791, 807 (2014) (discussing the development of a separate sentencing procedure based on the need for judges to consider “the nature of the offense and the unique circumstances of the individual”); see also United States v. Kikumura, 918 F.2d 1084, 1100 (3d Cir. 1990) (noting how a higher degree of care is warranted for the initial determination of guilt), *overruled by* United States v. Fisher, 502 F.3d 293, 305 (3d Cir. 2007).

<sup>197</sup> FED. R. EVID. 1101(d)(3) (providing that the rules are not applicable to sentencing).

<sup>198</sup> See, e.g., United States v. Marshall, 910 F.2d 1241, 1244 (5th Cir. 1990) (holding that reliable hearsay is admissible at sentencing).

<sup>199</sup> See Sopen B. Shah, *Guidelines for Guidelines: Implications of the Confrontation Clause’s Revival for Federal Sentencing*, 48 J. MARSHALL L. REV. 1039, 1046 (2015) (noting that the circuit courts are currently unanimous in holding that the Confrontation Clause does not apply to noncapital sentencing).

more financial resources, greater access to expert testimony, and greater ability to input facts into the presentence reports that supply facts for the sentencing determination.<sup>200</sup> Now that the Guidelines are advisory, it is no less true that these disparities, in tandem with the low preponderance standard, generate errors that result in the loss of liberty for the defendant.<sup>201</sup> Raising the standard of proof would help curb this risk by placing an additional check on the quality of facts that are factored into the sentencing decision.<sup>202</sup>

The adoption of a heightened standard would also serve a more symbolic goal: reflecting societal views about the gravity of depriving individuals of their liberty. In a Supreme Court case adopting the clear and convincing standard for involuntary commitment to psychiatric treatment, Chief Justice Burger responded to the argument that there is a negligible difference between a preponderance standard and the clear and convincing standard.<sup>203</sup> He explained that “adopting a ‘standard of proof is more than an empty semantic exercise.’ In cases involving individual rights, whether criminal or civil, ‘[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.’”<sup>204</sup> In his disproportionate impact opinion, Judge Posner arguably lent credence to this view. He stated that a judge may conclude that “a sentence based almost entirely on evidence that satisfied only the normal civil standard of proof would be unlikely to promote respect for the law or provide just punishment for the offense of con-

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<sup>200</sup> See Paul D. Hazlehurst, *A Federal Public Defender's Perspective*, 62 *FED. LAW.* 50, 56 (2015) (“The fact is that government’s power within the federal criminal justice system is crushing. . . . The government has huge resources to investigate and prosecute cases.”); see also *United States v. Restrepo*, 946 F.2d 654, 675 (9th Cir. 1991) (Norris, J., dissenting) (“[P]resentence reports often rely excessively on the prosecutor’s files for their information, and hearsay evidence in presentence reports or from confidential informants is difficult and costly to rebut.” (citation omitted)), *abrogated by* *United States v. Jordan*, 256 F.3d 922 (9th Cir. 2001).

<sup>201</sup> See *Restrepo*, 946 F.2d at 675 (noting that this resource disparity makes “the preponderance of evidence standard generate even more errors—errors that fall primarily on the side of deprivations of liberty for individuals”).

<sup>202</sup> See Hessick & Hessick, *supra* note 37, at 209 (“A heightened standard of proof increases the burden on the government to produce reliable sentencing evidence, thus reducing the risk that the judge’s conclusions are incorrect.”). The clear and convincing standard, by some quantified as requiring around 75% certainty, errs in favor of the defendant. See *United States v. Fatico*, 458 F. Supp. 388, 410 (E.D.N.Y. 1978) (describing a survey of ten federal judges who quantified the standard anywhere between 60% to 75%); C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 *VAND. L. REV.* 1293, 1328 (1982) (describing a survey of 172 federal judges in which the median value placed on the clear and convincing standard was 75%).

<sup>203</sup> *Addington v. Texas*, 441 U.S. 418, 424–25 (1979).

<sup>204</sup> *Id.* at 425 (alteration in original) (citation omitted) (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part)).

viction.”<sup>205</sup> The adoption of a heightened standard of proof in disproportionate impact cases would not only improve the accuracy of high stakes sentencing determinations, but would also show that society treats deprivations of liberty seriously.<sup>206</sup>

This view also minimizes the significance of the rarity of the exception’s use,<sup>207</sup> since inapplicability of the exception in most cases is no reason to abandon it in the cases that need it most. As one Third Circuit judge argued in response to this criticism, “[i]t should be of no moment” that the court usually finds the exception not applicable because “[t]he few defendants who have benefited from the minimal due process protection . . . surely are grateful that courts have not yet abandoned entirely the Fifth Amendment at sentencing.”<sup>208</sup> Also consider that while there are a limited number of opinions in which the Ninth and Third Circuits have actually vacated sentencing decisions, the number of cases in which the district court judges have applied the clear and convincing standard on their own accord is likely higher because they observe appellate court rulings.<sup>209</sup>

It is true that the disproportionate impact exception would not exclude consideration of acquitted or uncharged conduct altogether. Nonetheless, it would still help prevent such conduct from forming the basis of a sentence in cases where the proof is not strong. It may also be easier to implement, as rules that categorically excluded entire categories of evidence, like uncharged or acquitted conduct, have already been struck down by the Supreme Court.<sup>210</sup> As the next section seeks to demonstrate, despite the lopsided split, a legal argument for the disproportionate impact exception that is consistent with Supreme Court precedent can still be advanced.

<sup>205</sup> *United States v. Reuter*, 463 F.3d 792, 793 (7th Cir. 2006).

<sup>206</sup> *See Hessick & Hessick, supra* note 37, at 208 (discussing the risk of delegitimization posed by a low standard of proof at sentencing).

<sup>207</sup> *See Reuter*, 463 F.3d at 793 (noting that the court usually goes “on to find that the tail had not wagged the dog in the case before it”).

<sup>208</sup> *United States v. Grier*, 475 F.3d 556, 582 (3d Cir. 2007) (Ambro, J., concurring).

<sup>209</sup> *See, e.g., United States v. Jackson*, 308 F. App’x 194, 195 (9th Cir. 2009) (noting that the district court applied the clear and convincing standard on its own accord); *United States v. Tsai*, 954 F.2d 155, 164 n.12 (3d Cir. 1992) (same); *United States v. Bethea*, 834 F. Supp. 659, 664 (D.N.J. 1992) (applying the clear and convincing standard on its own accord).

<sup>210</sup> *See, e.g., United States v. Watts*, 519 U.S. 148, 149 (1997) (per curiam) (allowing consideration of acquitted conduct); 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, 36–37 (2016) (advocating for a categorical rule against consideration of acquitted conduct, but noting the difficulty of its implementation in the face of Supreme Court precedent).

### B. *The Post-Booker Legal Basis for the Exception*

The courts that disavowed the disproportionate impact exception held that *Booker* eliminated the exception's due process basis because defendants no longer have a reasonable expectation to be sentenced within the Guidelines range.<sup>211</sup> This garners support from a recent Supreme Court decision holding that defendants do not have a right to advance notice of variances from the Guidelines range.<sup>212</sup> Writing for the majority in *Irizarry v. United States*, Justice Stevens explained that “[a]ny expectation subject to due process protection . . . that a criminal defendant would receive a sentence within the presumptively applicable Guidelines range did not survive . . . *Booker*, which invalidated the mandatory features of the Guidelines.”<sup>213</sup>

But even in light of *Irizarry*'s declaration that the Guidelines no longer provide an expectancy interest subject to due process protections, one of the two due process rationales originally articulated for the exception remains intact. The expectation rationale was not adopted by the Ninth Circuit and was not clearly articulated by the Third;<sup>214</sup> indeed, it seems this rationale was emphasized most in the very opinions dismissing its applicability.<sup>215</sup> The second, surviving rationale, which was adopted at least by the Ninth Circuit, was based on the defendant's general interest in fair sentencing.<sup>216</sup> As explained by the Ninth Circuit in its first opinion on the subject: “Even before the Guidelines were enacted, a convicted criminal had a protected

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<sup>211</sup> See *supra* notes 136–55 and accompanying text.

<sup>212</sup> See *Irizarry v. United States*, 553 U.S. 708, 713–14 (2008) (rejecting the right to advance notice of a variance from the Guidelines range because the Guidelines are advisory and a within-Guidelines sentence is no longer subject to due process protections).

<sup>213</sup> *Id.* at 713 (citation omitted).

<sup>214</sup> In *United States v. Kikumura*, the Third Circuit ultimately declined to decide whether due process was implicated. 918 F.2d 1084, 1102 (3d Cir. 1990) (basing its decision on section 3553(b)'s command that judges “find” facts to justify a departure and reserving judgment in regards to the due process clause), *overruled by* *United States v. Fisher*, 502 F.3d 293, 305 (3d Cir. 2007). In *United States v. Mobley*, the Third Circuit adopted a due process rationale, stating that “a defendant has a liberty interest in the correct application of the Guidelines within statutory limits” and that sentences may not be fashioned to “circumvent the Due Process Clause.” 956 F.2d 450, 455, 458 (3d Cir. 1992). However, the *Mobley* majority never cited an expectancy interest in a within-Guidelines sentence. See *id.* at 451–59.

<sup>215</sup> See *Fisher*, 502 F.3d at 306 (quoting *United States v. Brika*, 487 F.3d 450, 461 (6th Cir. 2007)); see also *supra* note 145 and accompanying text.

<sup>216</sup> See *United States v. Mezas de Jesus*, 217 F.3d 638, 642 (9th Cir. 2000) (“Because ‘due process protects a defendant’s interest in fair sentencing. [sic]’ we review the district court’s application of the standard of proof at sentencing for harmless error beyond a reasonable doubt.” (citations omitted) (quoting *United States v. Restrepo*, 946 F.2d 654, 659 (9th Cir. 1991), *abrogated by* *United States v. Jordan*, 256 F.3d 922 (9th Cir. 2001))); *Restrepo*, 946 F.2d at 657 & n.5 (explaining that defendants had a liberty interest in a fair sentencing before the Guidelines were promulgated).

interest at sentencing.”<sup>217</sup> The Guidelines had simply made that interest more protectable by identifying sentencing factors, giving them predetermined weight, and giving defendants the ability to appeal sentencing findings.<sup>218</sup> Thus, the Guidelines had enabled judges to perceive disproportionate impact and impose a higher standard of proof to protect the defendant from an unfair lack of procedural protection in such cases.<sup>219</sup>

This legal basis remains valid today. Both the Supreme Court and lower courts recognize a general due process interest during sentencing.<sup>220</sup> This recognition has led to safeguards such as the right to counsel and the right not to be sentenced based on false or unreliable information.<sup>221</sup> Moreover, all of the circuit courts vacate sentences as a matter of due process when the facts on which they are based do not meet the preponderance standard.<sup>222</sup> This represents a rejection of the historical practice of sentencing without any standard of proof at all<sup>223</sup> and demonstrates that due process entitles a defendant to an appropriate standard of proof at sentencing; “otherwise, no standard of proof whatever would be necessary.”<sup>224</sup> Since due process is a flexible

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<sup>217</sup> See *Restrepo*, 946 F.2d at 657–59 (explaining that the Supreme Court has recognized that due process protects the defendant’s interest in fair sentencing); see also *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion) (“[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause.”).

<sup>218</sup> See *Restrepo*, 946 F.2d at 658–59 (stating that “[t]he Guidelines have made the defendant’s interest in a fair sentence more defined and protectable”).

<sup>219</sup> See *id.* at 659–60 (flagging the Supreme Court’s recognition “that there may be an exception to the general rule that the preponderance standard satisfies due process when a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction”).

<sup>220</sup> See, e.g., *Gardner*, 430 U.S. at 358 (“[T]he sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause.”); *United States v. Pless*, 982 F.2d 1118, 1127 (7th Cir. 1992) (“Due process entitles defendants to fair sentencing procedures . . .”).

<sup>221</sup> See, e.g., *Mempa v. Rhay*, 389 U.S. 128, 137 (1967) (holding that defendants have a due process right to counsel during sentencing); *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (holding that defendants have a due process right not to be sentenced based on false information); see also U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. (U.S. SENTENCING COMM’N 2015) (citing cases holding that evidence introduced at sentencing must be reliable).

<sup>222</sup> See, e.g., *United States v. Arroyo-Jaimes*, 608 F. App’x 843, 849–50 (11th Cir. 2015) (vacating a sentence because the evidence did not meet the preponderance standard, and thus violated due process); *United States v. England*, 555 F.3d 616, 622–23 (7th Cir. 2009) (vacating a sentence because enhancement based on a judicial finding of attempted murder was not supported by a preponderance of the evidence, and thus violated due process); *United States v. Berry*, 553 F.3d 273, 286 (3d Cir. 2009) (vacating sentences based on unreliable arrest records as a violation of due process).

<sup>223</sup> *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986).

<sup>224</sup> *United States v. Staten*, 466 F.3d 708, 720 (9th Cir. 2006).

concept, its protections should adjust to the particular situation.<sup>225</sup> When a sentencing factor stands to dramatically increase a defendant's sentence, it is not unreasonable to suggest that the defendant has more liberty at stake in the sentencing hearing and therefore should be afforded additional protection.<sup>226</sup>

Some courts also challenged the notion of looking at the Guidelines range as a measure of disproportionate impact post-*Booker*. They held that so long as the sentence was imposed within the statutory range for the crime of conviction, it could not be disproportionate to a range prescribed by a set of Guidelines that were merely advisory.<sup>227</sup> This criticism rests on the notion that the Guidelines have no legal force.<sup>228</sup> To the contrary, the Supreme Court has recently afforded the Guidelines range some legal force in a recent case involving the Ex Post Facto Clause. In *Peugh v. United States*,<sup>229</sup> the defendant's sentencing range had been calculated using a new version of the Guidelines, which produced a higher range than that produced by the older version—the version in effect at the time of his offense.<sup>230</sup> The Court held that use of the newer version violated the Ex Post Facto Clause because the erroneous use of a higher range created “a sufficient risk of a higher sentence.”<sup>231</sup> Much of the Court's opinion emphasized aspects of the Guidelines that remain mandatory,<sup>232</sup> such as calculation of the Guidelines range, which “is

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<sup>225</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972))).

<sup>226</sup> See *Codispoti v. Pennsylvania*, 418 U.S. 506, 513–17 (1974) (distinguishing between the process due for imprisonment of less than six months and that due for imprisonment of more than six months, and requiring a jury trial for the latter); see also William W. Berry III, *Procedural Proportionality*, 22 GEO. MASON L. REV. 259, 262 (2015) (arguing that the minimal procedures required at sentencing in non-capital cases should increase based on the severity of the deprivation of liberty); Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 152 (2015) (“It seems reasonable to presume that with a greater deprivation of liberty at issue [due to the length of detention in immigration situations.] there might be a stronger due process argument for more stringent procedural safeguards.”); Carol S. Steiker & Jordan M. Steiker, *Miller v. Alabama: Is Death (Still) Different?*, 11 OHIO ST. J. CRIM. L. 37, 52 (2013) (“Moreover, even within the category of deprivations of ‘liberty,’ the inherent sliding scale of the Due Process Clause renders plausible the claim that some heightened procedures may be called for at the very top of the ‘liberty’ scale . . .”).

<sup>227</sup> See *supra* notes 146–48 and accompanying text.

<sup>228</sup> See *supra* notes 143–45 and accompanying text.

<sup>229</sup> 133 S. Ct. 2072 (2013).

<sup>230</sup> *Id.* at 2078–79.

<sup>231</sup> *Id.* at 2084.

<sup>232</sup> See *id.* at 2085–86 (rejecting the government's argument that the Guidelines lack sufficient legal force and detailing how they achieve “‘binding legal effect’ through a set of procedural rules and standards for appellate review that, in combination, encourage[] district courts to sentence within the guidelines”).

intended to, and usually does, exert a controlling influence on the sentence that the court will impose.”<sup>233</sup>

Although *Peugh* did not involve the Due Process Clause, the Court’s decision is notable because it represents an acknowledgement by the Court that a higher range creates a significant likelihood of a higher sentence. Because the Guidelines range continues to bear such a close relationship to the ultimate sentence, a range based primarily on conduct other than the crime of conviction, for all practical purposes, still has a disproportionate impact.<sup>234</sup> The judge may remedy this by departing downward on her own accord, but if instead she decides to impose such a sentence, it should make no difference that she could have theoretically departed from the Guidelines range.<sup>235</sup> In reality, the sentence will still be based primarily on conduct other than the crime of conviction.

Finally, it is worth addressing the argument made by some circuits that the disproportionate impact exception should be discontinued because it was based on a mistaken interpretation of *McMillan*’s “tail wagging the dog” metaphor, which these circuits claim actually refers to a sentencing factor that increases the sentence beyond the statutory maximum.<sup>236</sup> First, even if the tail-wagging metaphor did not refer to disproportionate impact arising under the Guidelines, neither *McMillan* nor subsequent cases preclude use of a heightened standard of proof. *McMillan* upheld the use of the preponderance standard during sentencing by the Pennsylvania courts; it did not strike down the use of the clear and convincing standard.<sup>237</sup> Nor have Supreme Court cases since precluded use of the clear and convincing standard for sentencing purposes. In *United States v. Watts*, for example, the Court took note of the heightened proof split among the

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<sup>233</sup> *Id.* at 2085.

<sup>234</sup> See *United States v. Fisher*, 502 F.3d 293, 311 (3d Cir. 2007) (Rendell, J., concurring) (disagreeing with the majority’s assertion that it is impossible for a sentence to be disproportionately based on criminal conduct outside of the crime of conviction post-*Booker*).

<sup>235</sup> See *United States v. Staten*, 466 F.3d 708, 720 (9th Cir. 2006) (holding that disproportionate impact should focus on the actual increase in the defendant’s sentence).

<sup>236</sup> *United States v. Villareal-Amarillas*, 562 F.3d 892, 897 (8th Cir. 2009); *United States v. Graham*, 275 F.3d 490, 517 n.19 (6th Cir. 2001); see also *Blakely v. Washington*, 542 U.S. 296, 307–08 (2004) (citing the *McMillan* exception).

<sup>237</sup> See *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986) (concluding that the preponderance standard satisfied due process “in this case”); cf. *United States v. Wendelsdorf*, 423 F. Supp. 2d 927, 935 (N.D. Iowa 2006) (noting that *United States v. Watts*, 519 U.S. 148 (1997), which is based on *McMillan*, allows courts to use the preponderance standard, but does not demand it in all cases).

circuit courts, but ultimately declined to take issue with it.<sup>238</sup> *Booker* itself made no mention of due process and said nothing explicit about higher standards of proof at sentencing.<sup>239</sup>

Second, it is arguable that the tail-wagging metaphor should not be confined to one specific meaning to the exclusion of other reasonable interpretations. The metaphor is used in numerous legal contexts to describe situations where a relatively minor factor governs a more important one.<sup>240</sup> Justice Rehnquist may not have been specifically referring to disproportionate impact under the Guidelines, which makes sense because the Sentencing Guidelines had not been promulgated when he wrote the opinion.<sup>241</sup> But the meaning behind the metaphor aptly describes the disproportionate impact problem that has since become apparent, where judge-found facts appear to have a greater effect on the sentencing outcome than the actual crime of conviction. Thus, it is unsurprising that some judges, even outside the Ninth Circuit, continue to reference the metaphor as shorthand for the disproportionate impact problem.<sup>242</sup>

## CONCLUSION

*Booker* ushered in a new era of sentencing by rendering the Guidelines advisory and by giving sentencing judges more discretion. Though *Booker* itself made no mention of standards of proof or due process, this change prompted many courts to reject the notion of increasing the standard of proof at sentencing to avoid the possibility of disproportionate impact. But time has shown that the new federal sentencing system is far from a return to the pre-Guidelines era. The

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<sup>238</sup> See *Watts*, 519 U.S. at 156–57, 156 n.2 (1997) (observing the split, but stating that “[t]he cases before us today do present such exceptional circumstances, and we therefore do not address the issue”).

<sup>239</sup> See *United States v. Booker*, 543 U.S. 220, 245 (2005) (describing the issue in the case as pertaining to the Sixth Amendment alone); Bowman, *supra* note 39, at 465–66 (highlighting the Court’s “failure[ ]” to include a due process analysis in *Booker*).

<sup>240</sup> See, e.g., *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 688 (2010) (referring to the NLRB’s expansive interpretation of a statutory provision as creating a tail wagging the dog); *Teague v. Lane*, 489 U.S. 288, 327 (1989) (Brennan, J., dissenting) (referring to the practice of blindly deciding like cases alike instead of confronting constitutional issues as allowing the tail to wag the dog in a case regarding habeas relief); see also *Tail Wagging the Dog*, *the*, DICTIONARY.COM, <http://www.dictionary.com/browse/tail-wagging-the-dog—the?s=TS> (last visited July 19, 2017) (“A small or unimportant factor or element governing an important one; a reversal of the proper roles.”).

<sup>241</sup> *McMillan* was decided in 1986, 477 U.S. at 79, whereas the Guidelines became effective in 1987. See Breyer, *supra* note 35, at 1.

<sup>242</sup> See, e.g., *United States v. St. Hill*, 768 F.3d 33, 40 (1st Cir. 2014) (Torruella, J., concurring) (citing the tail-wagging metaphor in a disproportionate impact case), *mandate recalled, opinion vacated*, No. 13-2097, 2016 WL 8540306 (1st Cir. Feb. 22, 2016); *United States v. Fisher*, 502 F.3d 293, 311 (3d Cir. 2009) (Rendell, J., concurring) (same).

Guidelines system still provides enough transparency to detect—and in some cases produces itself—sentences that are based more on uncharged conduct than the actual crime of conviction. As disproportionate impact issues continue to manifest in the post-*Booker* system, more circuit courts should reconsider the propriety of raising the standard of proof, which would mark greater respect for due process rights and ultimately lead to a more just sentencing system.