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TIMOTHY A. JOHNSON

Sentencing Organizations After *Booker*

ABSTRACT. In *United States v. Booker*, the Supreme Court held that courts violate individuals' right to a jury trial when they sentence individuals using judge-found facts in combination with mandatory sentencing guidelines. The Supreme Court, however, has never decided exactly when organizations are entitled to a criminal jury. Accordingly, *Booker*'s full implications for the organizational sentencing guidelines are not immediately clear. Nonetheless, a careful reading of the law suggests that organizations are entitled to a jury in at least most federal criminal cases and thus that *Booker*'s logic should apply to the organizational guidelines.

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INTRODUCTION

Roughly two hundred organizations are criminally sentenced in federal court each year.[1] Although the average sentence requires payment of several million dollars (roughly $4.5 million in 2005[2]), judges may order organizations to pay hundreds of millions of dollars in fines and restitution.[3] Judges have typically crafted these multi-million dollar sentences based on provisions of the U.S. Sentencing Guidelines pertaining to organizations (the "organizational guidelines"),[4] but the Supreme Court's most important sentencing decision in recent years has cast doubt on this process. In *United States v. Booker*, the Supreme Court held unconstitutional the requirement that judges treat the U.S. Sentencing Guidelines as mandatory when sentencing individuals.[5] The Court did not explicitly address the sentencing of organizations; however, a careful reading of the opinion leads to two conclusions about organizational sentencing.

First, *Booker*'s broad holding rendered the organizational guidelines, like the guidelines applicable to individuals (the "individual guidelines"), nonmandatory. The provision that made the guidelines mandatory, 18 U.S.C. § 3553, does not distinguish between the organizational guidelines and the individual guidelines,[6] and the *Booker* Court invalidated this provision, holding that the combination of judicial fact-finding and mandatory sentencing

1. *See* U.S. SENTENCING COMM'N, 2005 ANNUAL REPORT 34 (2006) [hereinafter 2005 ANNUAL REPORT] (listing 187 recorded organization sentences in fiscal year 2005). While only 130 organizations were sentenced in 2004, 200 were sentenced in 2003, and 252 in 2002. U.S. SENTENCING COMM'N, 2004 ANNUAL REPORT 44 (2006) [hereinafter 2004 ANNUAL REPORT]; U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 106 tbl.52 (2005) [hereinafter 2003 SOURCEBOOK]; U.S. SENTENCING COMM'N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 96 tbl.52 (2004) [hereinafter 2002 SOURCEBOOK]. All editions of the *Annual Report* and *Sourcebook of Federal Sentencing Statistics* can be found at U.S. Sentencing Comm'n, Annual Reports and Statistical Sourcebooks, http://www.ussc.gov/annrpts.htm (last visited Oct. 31, 2006).

2. *See, e.g.*, U.S. SENTENCING COMM'N, 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 124 tbl.52 (2006) [hereinafter 2005 SOURCEBOOK] (pre-*Booker* statistics); *id.* at 342 tbl.52 (post-*Booker* statistics).

3. *See, e.g.*, 2004 ANNUAL REPORT, *supra* note 1, at 53 (noting that the highest recorded organizational fine in fiscal year 2004 was $240 million).

4. U.S. SENTENCING GUIDELINES MANUAL ch. 8 (2005).

5. 543 U.S. 220, 245 (2005).

6. *See* 18 U.S.C. § 3553(a)-(b) (2000).

guidelines violated individual defendants' Sixth Amendment rights.[7] *Booker*'s statutory remedy thereby rendered *all* of the guidelines nonmandatory.

Second, in addition to sweeping the organizational guidelines under its statutory remedy, *Booker*'s constitutional reasoning applies to the organizational guidelines. This conclusion is not immediately obvious. After *Booker*, sentencing guidelines are unconstitutional if they direct a judge to find facts that increase the maximum guideline sentence that can be imposed on the defendant, thereby robbing him of his right to have those facts found by a jury.[8] Thus, if a defendant does not have the right to a jury trial, a judge can presumably sentence him based on mandatory guidelines without running afoul of the Sixth Amendment. Because of this wrinkle, one might expect that organizations can still be sentenced under mandatory guidelines—after all, it is not self-evident that organizations have jury rights.

Nevertheless, based on decisions from lower federal courts, organizations sentenced under the organizational guidelines—with the possible exception of large organizations facing relatively modest fines—are entitled to a jury trial.[9] Because *Booker*'s Sixth Amendment reasoning therefore will apply to the organizational guidelines in most cases, Congress cannot restore the guidelines to mandatory status by a quick statutory fix. Moreover, even if Congress could constitutionally reinstate the guidelines' mandatory status for those organizations that are not entitled to a jury trial, it would be unwise to do so as a policy matter: mandatory guidelines are unable to account for the wide variety of circumstances surrounding organizational crime and have proven unnecessary to fulfill the goals for which the guidelines were created.[10]

This Note proceeds in four parts. Part I introduces *Booker* and explains that *Booker* rendered the organizational guidelines nonmandatory. Part II discusses the organizational guidelines, including their origin and their operation. Part III considers the various approaches that courts have taken to determine the jury rights of organizations and finds that under current law, organizations are entitled to criminal jury trials in some but not all instances. Part IV concludes that after *Booker* the organizational guidelines neither can nor should be mandatory.

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7. 543 U.S. at 244-45, 249.

8. *Id.* at 244.

9. *See infra* text accompanying notes 193-201.

10. *See infra* Section IV.B.

I. *BOOKER* BASICS

Booker was the culmination of a series of Supreme Court cases on sentencing and jury rights, the most important of which were *Apprendi v. New Jersey*[11] and *Blakely v. Washington*.[12] In *Apprendi*, the criminal defendant challenged a hate crime statute that allowed a judge to increase the defendant's sentence above the statutory maximum based on the judge's own fact-finding.[13] The Supreme Court struck down the statute, holding that it violated the defendant's Sixth Amendment right to a jury trial and his Fourteenth Amendment right to due process.[14] The Sixth and Fourteenth Amendments, the Court reasoned, required that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[15] Because the hate crime statute violated this rule (later known as the "*Apprendi* rule"), it was unconstitutional.

Several years later, in *Blakely*, the Court used the *Apprendi* rule to strike down a system of state sentencing guidelines. Blakely had been sentenced under Washington's sentencing guidelines, which established a narrower range of sentences a judge could impose for each crime and also set forth aggravating factors that a judge, based on her own findings, could use to increase sentences.[16] The Court held that these judge-found aggravating factors violated the *Apprendi* rule and thus the Sixth Amendment.[17] In reaching this result, the Court ruled that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[18] Because the U.S. Sentencing Guidelines, like the Washington guidelines, used judge-found facts to increase sentences above those that could be imposed based on jury-found facts alone, *Blakely* hinted that the U.S. Sentencing Guidelines might also violate the Sixth Amendment.

What *Blakely* hinted, *Booker* confirmed. In *Booker*, the Court concluded that judges' use of the mandatory U.S. Sentencing Guidelines violated defendants'

11. 530 U.S. 466 (2000).
12. 542 U.S. 296 (2004).
13. 530 U.S. at 468-69.
14. *Id.* at 476-77, 497.
15. *Id.* at 490.
16. *Blakely*, 542 U.S. at 299-300.
17. *Id.* at 304-08.
18. *Id.* at 303.

Sixth Amendment rights.[19] After *Apprendi* and *Blakely*, the prosecution bore the burden of proving to a jury any fact (other than a prior conviction) that would increase the defendant's sentence beyond the statutory maximum.[20] Because the sentencing guidelines generally instructed *judges* to find facts themselves and to use those facts to impose higher sentences than could be imposed based on jury-found facts alone,[21] the *Booker* Court declared unconstitutional the combination of judicial fact-finding and mandatory sentencing guidelines.[22]

To remedy the guidelines' constitutional woes, the Court excised two statutory provisions: 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3742(e).[23] The latter provision set forth standards for review of sentences on appeal;[24] the former required judges to follow the guidelines' sentencing recommendation absent a special justification for departure.[25] Thus, the excision of § 3553(b)(1) means that judges are no longer bound to implement the guidelines.[26]

Because *Booker* involved the sentencing of an individual defendant, the question remains whether the Court's remedy extends to the organizational guidelines. The answer is plainly yes. Although the organizational guidelines were created separately and operate differently than the individual guidelines,[27] § 3553(b)(1) does not distinguish between the two. It refers only to "the sentencing guidelines."[28] Thus, when *Booker* declared § 3553(b)(1) invalid, all of the sentencing guidelines became nonmandatory. Furthermore, Justice Breyer emphasized that this result was not merely an accident of the statute, but also reflected the Court's refusal to leave in place a dual system of guidelines:

> [W]e do not see how it is possible to leave the Guidelines as binding in other cases. . . . [W]e believe that Congress would not have authorized a mandatory system in some cases and a nonmandatory system in others, given the administrative complexities that such a system would

19. 543 U.S. 220, 226-27 (2005).

20. *Id.* at 244. In addition, the Court acknowledged that an increase in sentence would be appropriate when the defendant had admitted to the facts supporting such an increase. *Id.*

21. *See infra* text accompanying notes 80-82.

22. 543 U.S. at 244.

23. *Id.* at 245, 259.

24. 18 U.S.C. § 3742(e) (2000).

25. 18 U.S.C.A. § 3553(b)(1) (West Supp. 2006).

26. *See Booker*, 543 U.S. at 259-60.

27. *See infra* Section II.C.

28. 18 U.S.C.A. § 3553(b)(1).

> create. Such a two-system proposal seems unlikely to further Congress' basic objective of promoting uniformity in sentencing.[29]

This language eliminates any remaining uncertainty about *Booker*'s applicability to the organizational guidelines.

Since *Booker*, courts seem simply to have taken this result for granted, treating organizational sentencing no differently than individual sentencing.[30] To date, only one federal court has expressly considered how *Booker* affected the organizational guidelines. In *United States v. Yang*, the Sixth Circuit first considered whether the corporation had a right to a jury trial, and it concluded that the $2 million fine at issue indicated that the charged crime was sufficiently "serious" to entitle the corporation to a jury trial.[31] The court then applied *Booker* to hold that the corporation had been denied a constitutional right when it was sentenced based on judge-found facts in combination with mandatory organizational guidelines.[32]

Of course, the statutory remedy in *Booker* made *Yang*'s analysis unnecessary; the guidelines were not mandatory regardless of whether the defendant was entitled to a jury trial. Nonetheless, the *Yang* analysis remains relevant to the larger assessment of post-*Booker* organizational sentencing. Although § 3553(b)(1) is excised for the time being, Congress could attempt to resurrect some version of it in the future,[33] in which case courts would be obliged to assess whether mandatory organizational guidelines violate defendant organizations' constitutional right to a jury trial. This Note aims to make that determination and to illustrate why the organizational guidelines should remain nonmandatory.

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29. *Booker*, 543 U.S. at 266-67.

30. *See* United States v. Patient Transfer Serv., Inc., 413 F.3d 734 (8th Cir. 2005); United States v. Gibson, 409 F.3d 325 (6th Cir. 2005).

31. 144 F. App'x 521, 523-24 (6th Cir. 2005); *see also infra* text accompanying notes 171-172. For further discussion of the role of a crime's "seriousness" in determining when a defendant has a right to a jury trial, see *infra* Subsection III.B.1.

32. *Yang*, 144 F. App'x at 524.

33. Indeed, Congress has already begun to consider legislation that may change the weight that judges must give the guidelines in sentencing determinations. *See, e.g.*, United States v. Booker*: One Year Later—Chaos or Status Quo?: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 23 (2006) [hereinafter Booker *Hearing*] (statement of William W. Mercer, United States Attorney for the District of Montana), *available at* http://www.judiciary.house.gov/media/pdfs/printers/109th/26647.pdf.

II. THE ORGANIZATIONAL SENTENCING GUIDELINES

Criminal prosecution and sentencing of organizations have changed greatly in the last century. One hundred years ago, it was unclear whether an organization could even be convicted of a crime. Until roughly twenty years ago, organizations were sentenced under the same standards as individuals. Then, fifteen years ago, the organizational guidelines became the benchmark for sentencing organizations. This Part traces these developments and describes how the U.S. Sentencing Guidelines have changed organizational sentencing.

A. Convicting Organizations of Crimes

Today, corporations and other organizations can be convicted of crimes based on their agents' conduct, but they have not always been so liable. Under the English common law, corporations could not be convicted of crimes,[34] and the same held true during the first hundred years of the United States' existence.[35] The primary rationale for exempting the corporation from criminal liability was its artificiality. As William Blackstone wrote, "[Its] existence being ideal, no man can apprehend or arrest it."[36] It was thought that a corporation had "no soul to be damned, and no body to be kicked."[37] As corporations began to grow in importance during the late nineteenth century, however, the law increasingly regarded them as real rather than artificial entities, and the government took a greater interest in regulating them.

The Supreme Court first upheld Congress's imposition of criminal penalties on corporations in *New York Central & Hudson River Railroad v. United States*[38] by extending the tort doctrine of respondeat superior—the

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34. *See* N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 492 (1909) ("Some of the earlier writers on common law held the law to be that a corporation could not commit a crime."); 1 WILLIAM BLACKSTONE, COMMENTARIES *464-65. *But see* Frederick Pollock, *Has the Common Law Received the Fiction Theory of Corporations?*, 27 LAW Q. REV. 219, 232 (1911) ("[T]here was no settled rule either way . . . .").

35. *See* Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 808-09 (1996) (describing how, in the mid-nineteenth century, states first began experimenting with corporate criminal liability).

36. 1 BLACKSTONE, *supra* note 34, at *465.

37. John C. Coffee, Jr., *"No Soul To Damn: No Body To Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981) (attributing this remark to Lord Chancellor Thurlow).

38. 212 U.S. 481.

theory that "the corporation may be held responsible for damages for the acts of its agent within the scope of his employment."[39] In the decades since, federal courts have refined *New York Central*'s standard of corporate vicarious liability into its current form and expanded it to apply to all organizations. Today, an organization may be held liable for crimes that its agent commits within the scope of his authority (or apparent authority) and with the intent to benefit the organization.[40] The "benefit" threshold is quite low: an agent intends to "benefit" his organization as long as he is at least partially motivated by the interests of the organization, even if his conduct harms the organization or contravenes its policies or explicit instruction.[41] Accordingly, an organization is legally responsible for many of its agents' crimes, even if the government declines to press charges against it.[42]

B. *The Statutory Background of the Organizational Guidelines*

The history of the organizational guidelines begins in 1984 with the passage of the Sentencing Reform Act.[43] The Reform Act had two independent effects on organizational sentencing. First, it created the United States Sentencing Commission,[44] which promulgated guidelines to direct federal sentencing and produced the organizational guidelines seven years after its creation.[45] Second, it created a new statutory system of organizational fines, increasing all criminal fines for organizations and distinguishing between individual and organizational penalties to a degree uncommon in earlier law.[46]

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39. *Id.* at 493.

40. *See* United States v. Automated Med. Lab., Inc., 770 F.2d 399, 406-08 (4th Cir. 1985); United States v. Cincotta, 689 F.2d 238, 241-42 (1st Cir. 1982); *see also* EUGENE M. PROPPER, CORPORATE FRAUD INVESTIGATIONS AND COMPLIANCE PROGRAMS 1 (2000) (explaining this liability standard).

41. *See* United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 970-71 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999); *see also* United States v. Basic Constr., 711 F.2d 570, 573 (4th Cir. 1983) (allowing for imputation when an employee acted for the benefit of the corporation, even if his conduct was against corporate policy or instructions).

42. For discussion of the exercise of this prosecutorial discretion, see *infra* text accompanying note 221.

43. Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified at 18 U.S.C. §§ 3551-3673 (2000) and 28 U.S.C. §§ 991-998 (2000)).

44. 28 U.S.C. §§ 991, 994-995.

45. U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON SENTENCING GUIDELINES FOR ORGANIZATIONS (1991), *available at* http://www.ussc.gov/corp/OrgGL83091.pdf [hereinafter SUPP. REPORT].

46. *See* 18 U.S.C. §§ 3551, 3553, 3571-3572.

This new regime of organizational fines sought to correct a system that was widely perceived as weak and unfair. Prior to the Reform Act, federal law usually applied the same fines—typically no more than a few thousand dollars—to all offenders, whether individuals, mom-and-pop firms, or major multinational corporations.[47] Accordingly, fines were low enough for large corporations to safely ignore them, giving them an incentive to commit crimes if doing so offered a chance of significant profit.[48] The Reform Act attempted to remove these incentives by significantly increasing the maximum fines that organizations faced.[49] For instance, prior to 1984, an organization faced a fine of no more than $1000 for each count of felony mail fraud.[50] After the passage of the Reform Act and related legislation, all felonies committed by organizations carried a potential fine of at least $500,000.[51] Mean fines more than doubled,[52] and eventually the total sanctions against firms—now averaging in the hundreds of thousands of dollars—became roughly equal to the monetary harm caused.[53]

The Reform Act also created the statutory framework upon which the Sentencing Commission eventually built the organizational guidelines. Under this framework, an "organization" is defined as any "person other than an individual,"[54] including "corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments . . . and non-profit organizations."[55] A court can sentence an

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47. *See* S. REP. NO. 98-225, at 103-05 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3286-88 (presenting a report of the Senate Judiciary Committee on the Comprehensive Crime Control Act of 1984, of which the Sentencing Reform Act was a part; describing the typical felony as punishable by "a maximum fine of only $5,000 or $10,000"; and providing various examples of low and inconsistent fines).

48. *See, e.g.*, *id.* at 106, *reprinted in* 1984 U.S.C.C.A.N. at 3289.

49. *See id.* at 104, *reprinted in* 1984 U.S.C.C.A.N. at 3287.

50. 18 U.S.C. § 1341 (2000).

51. Misdemeanors resulting in death could also be punished by fines up to $500,000. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 211, ch. C, 98 Stat. 1987, 1995-97 (codified at 18 U.S.C. § 3571 (2000)). The Reform Act set fines for individuals at no more than $250,000. *Id.*

52. Mean fines rose from $45,790 to $102,469, and mean total sanctions rose from $115,540 to $356,080. Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990*, 71 B.U. L. REV. 247, 257 tbl.3 (1991). These differences are statistically significant at the 95% confidence level. *Id.*

53. *See id.* at 257 ("The increase in median total sanction multiples [defined as the ratio of total sanctions to monetary harm] from 0.46 to 1.00 . . . is significant at the ninety percent level.").

54. 18 U.S.C. § 18 (2000).

55. U.S. SENTENCING GUIDELINES MANUAL § 8A1.1 cmt. 1 (2005).

organization to a fine or to probation; it can sanction the organization with forfeiture, restitution, or an order to notify victims; or it can combine any of these punishments.[56] Fines imposed on an organization may be no more than the greatest of: (1) the amount specified in the law setting forth the offense; (2) twice the gross gain to the organization; (3) twice the gross loss to its victims; and (4) $500,000 for a felony (or misdemeanor resulting in death), $200,000 for a class A misdemeanor, or $10,000 for a class B or C misdemeanor or lesser offense.[57] Thus, unless specially exempted,[58] every felony committed by an organization can be punished by a fine of at least $500,000, and the fine may be far greater depending on the type of offense and the amount of loss or gain it caused.[59]

Several statutory provisions taken together describe how courts must determine the appropriate sentence for an organization. The most important of these provisions is 18 U.S.C. § 3553(a), which sets forth a variety of relevant factors, such as "the nature and circumstances of the offense and the history and characteristics of the defendant,"[60] that judges must take into account during sentencing. Before *Booker*, because § 3553(b) required judges to impose a sentence within the guideline range unless they found an aggravating or mitigating factor "not adequately taken into consideration by the Sentencing Commission,"[61] judges sentencing organizations (and individuals) generally ignored § 3553(a)'s factors.[62] Since *Booker* weakened the guidelines' predominance by making them advisory, § 3553(a) has once again become integral to sentencing.[63]

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56. 18 U.S.C. § 3551(c). The same punishments, except for imprisonment and death, are prescribed for individuals.

57. *Id.* § 3571(c)-(d). Courts must not use measures of gain or loss to determine the sentence if doing so would "unduly complicate or prolong the sentencing process." *Id.* § 3571(d).

58. If a statute criminalizing an offense specifically exempts the offense from this standard, then the sentencing range in that statute is used. *Id.* § 3571(e).

59. For example, organizations can be fined up to $100 million for antitrust offenses even absent evidence of loss or gain. *See* 15 U.S.C.A. § 3(a) (West. Supp. 2006); *see also* United States v. Ming Hong, 242 F.3d 528 (4th Cir. 2001) (upholding the use of the § 3571 maximum in place of the maximum given in the statute setting forth the offense).

60. 18 U.S.C. § 3553(a)(1). This provision is applicable to organizations under § 3551(c). A related section contains a separate list of factors to be used when setting a fine. *Id.* § 3572.

61. *Id.* § 3553(b).

62. Judges generally adhered to this practice except when the guidelines did not fully apply. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.1 & cmt. (2005) (exempting certain types of crime—such as environmental crimes and violations of the food and drug laws—from the organizational guidelines' fine calculations but not from the other aspects of the guidelines).

63. 543 U.S. 220, 259-60 (2005).

C. *How Courts Use the Guidelines To Sentence Organizations*

At the same time that Congress was fine-tuning its statutory framework for sentencing organizations, the Sentencing Commission, which had published individual sentencing guidelines in 1987,[64] turned its attention to creating organizational sentencing guidelines. During the drafting process, the business community argued that the guidelines should be nonbinding "policy statements," rather than mandatory rules, because of the complexity of organizational sentencing and the absence of a sound empirical basis for setting the fine levels.[65] The Commission disagreed, asserting that mandatory guidelines were necessary to fulfill Congress's mandate of bringing greater certainty and consistency to all areas of sentencing.[66] Moreover, Commission members argued, the organizational guidelines gave judges broader sentencing ranges than did the individual guidelines, allowing judges sufficient flexibility to account for unusual or complex aspects of organizational sentencing.[67] Some Commission members also believed that only mandatory guidelines would encourage organizations to take institutional steps to prevent employee crime.[68] Thus, the organizational guidelines were mandatory when promulgated in 1991,[69] and they remained mandatory and largely unchanged until *Booker*.

Under these guidelines, a judge determines an organization's sentence by beginning with a "base fine," which is then adjusted using a "culpability score."[70] To calculate the base fine, a judge first looks to the offense level of the crime, as established by chapter two of the sentencing guidelines.[71] The judge then refers to the "Offense Level Fine Table" in chapter eight, which gives a corresponding fine for each offense level: an offense level of six, for instance, corresponds to a maximum $5000 fine, while a level thirty offense corresponds

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64. U.S. SENTENCING COMM'N, SENTENCING GUIDELINES AND POLICY STATEMENTS (1987).

65. Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205, 240-41 (1993).

66. *See* SUPP. REPORT, *supra* note 45, at 6-7; Nagel & Swenson, *supra* note 65, at 241-44.

67. *See* Nagel & Swenson, *supra* note 65, at 241-44.

68. *See id.* at 243-44; *see also* U.S. SENTENCING COMM'N, REPORT OF THE AD HOC ADVISORY GROUP ON THE ORGANIZATIONAL SENTENCING GUIDELINES 15 (2003) [hereinafter AD HOC REPORT], *available at* http://www.ussc.gov/corp/advgrprpt/AG_FINAL.pdf.

69. SUPP. REPORT, *supra* note 45, at 8.

70. *Id.* at 5-6.

71. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.3 (2005). The judge also groups multiple counts together in accordance with chapter three, part D.

to a maximum $10.5 million fine.[72] The judge then compares this amount with the organization's pecuniary gain from the offense and the loss caused by the offense.[73] The greatest of the three is the base fine.[74]

The culpability score is based, inter alia, on the organization's prior history, whether upper-level personnel tolerated or were involved in the crime, whether the organization cooperated with the government and accepted responsibility, and whether the organization had an "effective compliance and ethics program" designed to prevent employee wrongdoing.[75] An organization's culpability score in turn determines a minimum and maximum multiplier: the highest multiplier range (corresponding to the highest culpability score) is 2.00 to 4.00, and the lowest range is 0.05 to 0.20.[76] The judge multiplies the base fine by each of these multipliers, yielding a fine range.[77] The organizational guidelines, for example, would direct a judge to sentence an organization facing a base fine of $20,000 and with a culpability score of 5 (and a corresponding multiplier range of 1.00 to 2.00) to a fine between $20,000 and $40,000. The organizational guidelines also direct the judge to depart upward or downward from the recommended sentencing range in certain special circumstances, including when the organization would be unable to pay the fine imposed.[78] In addition to fines, the guidelines direct the judge to impose restitution, probation, disgorgement, and other remedies as required to compensate the organization's victims and to prevent a recurrence of the crime.[79]

Given the complexity of the organizational guidelines, judges generally require a great deal of information to apply them. Much of this information is

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72. *Id.* § 8C2.4(d).

73. *See infra* text accompanying notes 80-82.

74. U.S. SENTENCING GUIDELINES MANUAL § 8C2.4.

75. *Id.* § 8C2.5.

76. *Id.* § 8C2.6.

77. *Id.* § 8C2.7.

78. For example, a judge may depart downward if the defendant gave substantial assistance to the authorities, or she may depart upward if the defendant's crime risked death or posed a threat to national security, the environment, or the integrity of a market. *See id.* §§ 8C4.1-.5. A judge may also reduce a fine that would impair the organization's ability to make restitution to its victims or that would "substantially jeopardiz[e] the continued viability of the organization." *Id.* § 8C3.3. In addition, she may reduce the fine if an individual who "owns at least a 5 percent interest in the organization . . . has been fined in a federal criminal proceeding for the same offense conduct" (to avoid punishing the owner of a closely held firm twice for the same offense). *Id.* § 8C3.4.

79. *Id.* §§ 8B1.1-.3, 8C2.9, 8D1.1.

provided by the presentence report.[80] If the judge requires more information to impose a sentence, she can order further study of the defendant by a qualified consultant.[81] Judges can also gain the necessary information through the sentencing hearing.[82] Thus, the organizational guidelines, like the individual guidelines, rely heavily on judge-found facts in their operation.

D. Organizational Sentencing Statistics

The Commission publishes annual statistics of organizational sentences. Although these statistics are imperfect,[83] they provide a useful overview of how the guidelines have functioned.

From 1993[84] to 2005, at least 2411 organizations were sentenced in federal courts.[85] In fiscal year 2005[86]—a fairly typical year—187 organizations were sentenced.[87] (In comparison, 72,462 individuals were sentenced in federal court in 2005.[88]) More than 90% of these organizations pled guilty, and more than

80. *See* 18 U.S.C. § 3552 (2000); FED. R. CRIM. P. 32(c)-(d). A probation officer conducts the presentence investigation. After the investigation, he is required to submit a report containing a provisional calculation of the defendant's sentencing range under the guidelines and sufficient information for the judge to make the guidelines calculation herself. FED. R. CRIM. P. 32(c)-(d).

81. 18 U.S.C. § 3552(b).

82. *See* FED. R. CRIM P. 32(i). During the sentencing hearing, either party may object to the presentencing report and offer evidence to support or rebut such objections. *Id.* 32(i)(2).

83. *See* AD HOC REPORT, *supra* note 68, at 25; *see also* Cindy R. Alexander et al., *Evaluating Trends in Corporate Sentencing: How Reliable Are the U.S. Sentencing Commission's Data?*, 13 FED. SENT'G REP. 108 (2000) (describing how various omissions in the Commission's data may cause its statistics to misrepresent organizational sentencing).

84. The Commission did not begin publishing detailed organizational sentencing data until 1993. AD HOC REPORT, *supra* note 68, at 25 n.96.

85. *See id.* at 25 (noting that 1642 organizations were sentenced from 1993 to 2001); *see also* sources and figures cited *supra* note 1 (noting the number of organizations sentenced between 2002 and 2005). This figure probably omits a significant number of cases, including a disproportionate number of cases with high fines. *See* Alexander et al., *supra* note 83.

86. Fiscal year 2005 is the most recent year for which the Commission has published organizational data. *See* sources cited *supra* note 1. For the purposes of Commission data, a fiscal year runs from October 1 to September 30. 2005 SOURCEBOOK, *supra* note 2, at ii-vi.

87. 2005 SOURCEBOOK, *supra* note 2, at 124 tbl.52 (pre-*Booker* statistics); *id.* at 342 tbl.52 (post-*Booker* statistics).

88. 2005 ANNUAL REPORT, *supra* note 1, at 34.

30% had their sentences reduced because they were unable to pay.[89] Approximately 56.7% paid only a fine, 16.6% paid only restitution, 17.6% paid both, and 9% paid neither.[90] The mean fine imposed was roughly $4.86 million, and the median was over $80,000[91]—a huge increase over pre-guidelines fines, which averaged roughly $100,000.[92] Additionally, more than 60% of organizations were subject to some form of probation.[93]

Over 90% of sentenced organizations are commercial businesses,[94] the majority of which are small, closely held corporations.[95] In 2001, for instance, roughly 27.5% of organizations sentenced had 10 or fewer employees, 66.4% had 50 or fewer, 77.2% had 100 or fewer, and only 7.4% had 1000 or more.[96] Given that the vast majority of U.S. businesses have fewer than 1000 employees, this fact is unsurprising.[97] Small organizations may also be less able to conceal crimes or to avoid or defend against criminal charges.[98] Moreover, in small organizations criminal wrongdoing is less likely to go completely unobserved by upper-level personnel than in large corporations.

The guidelines' fine levels are not used in a significant number of cases. To begin with, the guidelines apply only to felonies and class A misdemeanors,[99] and the Commission has provided specific exemptions for certain types of

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89. 2005 SOURCEBOOK, *supra* note 2, at 125 tbl.53 (pre-*Booker* statistics); *id.* at 343 tbl.53 (post-*Booker* statistics).

90. *Id.* at 123 tbl.51 (pre-*Booker* statistics); *id.* at 341 tbl.51 (post-*Booker* statistics).

91. See sources cited *supra* note 87, excluding cases in which no fine was imposed because the organization lacked the ability to pay. These numbers may underestimate current fines. *See* Alexander et al., *supra* note 83, at 108.

92. Cohen, *supra* note 52, at 256-57.

93. 2005 SOURCEBOOK, *supra* note 2, at 125 tbl.53 (pre-*Booker* statistics); *id.* at 343 tbl.53 (post-*Booker* statistics).

94. Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 709-10 (2002). These numbers only cover sentencing through 2000 and are incomplete, as courts did not always report to the Commission the type of organization sentenced. *Id.*

95. AD HOC REPORT, *supra* note 68, at 26.

96. *Id.* The *2005 Sourcebook* does not specifically indicate the sizes of the sentenced organizations, although table 54's summary of culpability scores suggests that organizational size in 2005 followed the pattern of previous years. *See* 2005 SOURCEBOOK, *supra* note 2, at 126 tbl.54 (pre-*Booker* statistics); *id.* at 344 tbl.54 (post-*Booker* statistics).

97. AD HOC REPORT, *supra* note 68, at 26.

98. *See* Nicole Leeper Piquero & Jason L. Davis, *Extralegal Factors and the Sentencing of Organizational Defendants: An Examination of the Federal Sentencing Guidelines*, 32 J. CRIM. JUST. 643, 646 (2004).

99. U.S. SENTENCING GUIDELINES MANUAL § 1B1.9 (2005); SUPP. REPORT, *supra* note 45, at 7.

common crimes.[100] For instance, in 2005 more than one-quarter of organizational sentences were for environmental crimes,[101] an offense category excluded from the guidelines' fines.[102] Similarly, the three highest organizational fines of 2005 ($185 million, $160 million, and $84 million) were for antitrust offenses,[103] which are subject to their own modified fine calculation under the guidelines.[104] Fraud, however, is the most common organizational offense (constituting 27.8% of sentences in 2005),[105] and the guidelines' basic fine system does apply to fraud cases.[106]

In short, although every year the organizational guidelines are used to impose substantial fines on large corporations, such cases are exceptional. Instead, the typical defendant sentenced under the organizational guidelines is a small business that defrauded its customers or investors and now stands near the brink of bankruptcy.

III. AN ORGANIZATION'S RIGHT TO A CRIMINAL JURY TRIAL

When the Sentencing Commission created the organizational guidelines, it did not consider the constitutional rights of organizations.[107] In the wake of *Booker*, however, the Sixth Amendment rights of organizations may determine the future of the guidelines. Because *Booker*'s holding was tied directly to the defendant's Sixth Amendment right, Congress' ability to resurrect the guidelines to mandatory status depends upon whether organizations have any Sixth Amendment right to a jury trial.

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100. U.S. SENTENCING GUIDELINES MANUAL § 8C2.1.

101. 2005 SOURCEBOOK, *supra* note 2, at 123 tbl.51 (pre-*Booker* statistics); *id.* at 341 tbl.51 (post-*Booker* statistics); *see* Paula Desio, U.S. Sentencing Comm'n, An Overview of the Organizational Guidelines, http://www.ussc.gov/corp/ORGOVERVIEW.pdf (last visited Nov. 13, 2006) ("The most commonly occurring offenses (in order of decreasing frequency) are fraud, environmental waste discharge, tax offenses, antitrust offenses, and food and drug violations.").

102. U.S. SENTENCING GUIDELINES MANUAL § 8C2.1.

103. 2005 ANNUAL REPORT, *supra* note 1, at 43, 51.

104. U.S. SENTENCING GUIDELINES MANUAL § 2R1.1.

105. 2005 SOURCEBOOK, *supra* note 2, at 123 tbl.51 (pre-*Booker* statistics); *id.* at 341 tbl.51 (post-*Booker* statistics).

106. U.S. SENTENCING GUIDELINES MANUAL § 8C2.1.

107. *See, e.g.*, SUPP. REPORT, *supra* note 45, at 5-15 (lacking discussion of constitutional issues among the "Major Issues in Drafting Organizational Guidelines").

A. Do Organizations Possess Constitutional Rights?

When the Constitution was ratified, corporations and other organizations essentially had no constitutional rights. Over time, however, courts came to treat corporations more like individuals, not only making them subject to criminal liability,[108] but also extending to them some constitutional protections. Today, organizations enjoy many (but not all) of the same rights as individuals.

The common law was not sympathetic to corporate rights, and rights for other organizations were practically nonexistent. The corporation was merely a label that allowed a group of persons, contractually bound to one another and to the state via their charter, to organize more easily and to pass property and privileges more readily from generation to generation.[109] As a legal "person," the corporation possessed only the rights to own property, to sue and be sued, and to enter into contracts.[110] Otherwise, its legal capacity was limited.[111] This restricted view of corporate rights continued to dominate American law throughout most of the nineteenth century.[112] Not until the United States was industrializing and the corporation was growing in importance did courts begin to take corporate constitutional rights seriously.

Hale v. Henkel[113] was a milestone in the development of corporate rights. In *Hale*, the Court addressed whether a corporation possessed a Fourth Amendment right against unreasonable searches and seizures or a Fifth Amendment right against compelled self-incrimination. Interestingly, the Court treated these two inquiries very differently. It recognized a corporate right against unreasonable searches and seizures by a "pass-through" analysis, whereby the corporation assumed the rights of the individuals composing it.[114] With regard to the corporation's claimed right against self-incrimination, however, the Court held that "a corporation, vested with special privileges and franchises, may [not] refuse to show its hand when charged with an abuse of

108. *See supra* text accompanying notes 34-42.

109. *See* 1 BLACKSTONE, *supra* note 34, at *464 (stating that a corporation is "invisible, and existing only in the intendment and consideration of law").

110. *Id.* at *463.

111. *See id.* at *464.

112. *See, e.g.*, Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636, 642 (1819) (holding that a corporation is a "mere creature of the law . . . possess[ing] only those properties which the charter of its creation confers upon it" but that "[t]he corporation is the assignee of [its members' or creators'] rights [and] stands in their place").

113. 201 U.S. 43 (1906).

114. *Id.* at 76.

such privileges."[115] Thus, whereas numerous constitutional rights flowed from a corporation's owners to the corporation itself, the unique nature of the corporation—its ability to pool assets, act collectively, and perhaps conceal information—prevented the right against self-incrimination from so flowing.

In the century since *Hale*, the Court has continued to develop its jurisprudence of corporate constitutional rights and has expanded this jurisprudence to reach other types of organizations.[116] Rather than trace this entire history in detail, a brief outline of the major organizational rights as they stand today will suffice.[117] First, organizations are "persons" under the Fourteenth Amendment.[118] Accordingly, their rights to due process, just compensation, equal protection,[119] a civil jury trial,[120] protection against double jeopardy,[121] and protection from excessive fines[122] appear to be the same as those of any natural person. Second, although the Court has suggested that organizations generally enjoy the same freedoms of speech[123] and press[124] as individuals, this suggestion does not apply to campaign-related corporate

115. *Id.* at 75.

116. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 262 (1952) ("Long ago this Court recognized that the economic rights of an individual may depend for the effectiveness of their enforcement on rights in the group, even though not formally corporate, to which he belongs.").

117. For more extensive discussion of the constitutional rights of corporations and organizations, see Henning, *supra* note 35; Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990); and Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641 (1982).

118. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 780 n.15 (1978) ("It has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment."); Santa Clara County v. S. Pac. R.R., 118 U.S. 394 (1886).

119. *See Hale*, 201 U.S. at 76.

120. *See* Ross v. Bernhard, 396 U.S. 531, 542 (1970) (holding that stockholders in a derivative action had a right to a jury trial under the Seventh Amendment because "[t]he corporation, had it sued on its own behalf, would have been entitled to a jury's determination").

121. *Cf.* United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); Fong Foo v. United States, 369 U.S. 141, 143 (1962). The Court did not directly address the issue of double jeopardy in either case; it seemingly took for granted that corporations receive the same double jeopardy protection as individuals.

122. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) (recognizing that punitive damages imposed on a corporation may violate the Eighth Amendment's prohibition of "excessive fines").

123. *See Bellotti*, 435 U.S. at 784 ("We thus find no support . . . for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation . . . .").

124. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

speech, which Congress can regulate more freely than the political speech of individuals.[125] Third, organizations are protected against unreasonable searches and seizures, but not to the same extent as individuals because organizations are presumed to have lower expectations of privacy.[126] Finally, under the "collective entity rule," organizations generally have no protection whatsoever against compulsory self-incrimination.[127]

Although the Court has never fully synthesized its organizational rights jurisprudence, the following generalizations may be drawn. Organizations usually have the same constitutional rights as individuals. They may have a particular right because it is necessary to protect the rights of the individuals in the organization (the "pass-through" rationale)[128] or because giving the organization such a right protects something else of independent social or constitutional value (for example, the free flow of information safeguarded by the First Amendment).[129] There are, however, several exceptions.[130] First, organizations do not receive the protections of rights that are "purely personal," that is, rights "the 'historic function' of [which] has been limited to the protection of individuals."[131] This is a potential rationale behind limiting an organization's privacy rights. Second, organizations do not receive the protection of a right when granting such protection would significantly undermine the government's ability to enforce the law. This may be one reason that organizations lack a right against self-incrimination.[132] Third,

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125. *See* McConnell v. FEC, 540 U.S. 93, 205 (2003) ("We have repeatedly sustained legislation aimed at the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." (internal quotation marks omitted)).

126. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) ("[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy.").

127. *See* Braswell v. United States, 487 U.S. 99, 104-09 (1988) (describing the development of the collective entity rule).

128. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 262 (1952).

129. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) ("The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the law in question] abridges expression that the First Amendment was meant to protect.").

130. The Court has left itself room to create more exceptions as needed. *See id.* at 778 n.14 (noting that a particular guarantee may be "unavailable to corporations for some other reason").

131. *Id.* Whether the right is available to a corporation is determined by looking to the "nature, history, and purpose of the particular constitutional provision." *Id.*

132. *See* United States v. White, 322 U.S. 694, 700-01 (1944) ("[T]he power to compel the production of the records of any organization . . . arises out of the inherent and necessary organizations do not receive a right that would give them and their managers an unfair advantage over individuals. This principle is demonstrated by the Court's limitation of a corporation's right to campaign-related speech.[133]

Although this framework may encapsulate many of the Court's decisions, it can be difficult to apply. Thus, even a century after the Court's decision in *Hale*, the bounds of many organizational rights, including organizational jury rights, remain vague.

B. Does the Sixth Amendment Entitle Organizations to a Criminal Jury Trial?

As recently as 1994, the law was unclear as to whether organizations were ever entitled to a criminal jury trial. The Fourth and Sixth Circuits both had held, without explanation, that organizations were entitled to jury trials,[134] but the Supreme Court had never decided the question.[135] Then, in *International Union, United Mine Workers v. Bagwell*, the Supreme Court held that the defendant, a labor union, had the right to a criminal jury trial.[136] The Court, however, declined to create any test for precisely when organizations would be entitled to a jury.[137] This Section explores the Court's jurisprudence on jury rights and the lower courts' attempts to adapt it to organizations.

1. All Defendants Are Entitled to a Jury When Charged with a Serious Crime

Despite the Constitution's apparent guarantee of a jury right in every criminal case,[138] courts have long restricted the right to a jury trial to those

power of the federal and state governments to enforce their laws . . . ."); *see also* Henning, *supra* note 35, at 797 ("A corporate right to assert the privilege against self-incrimination could completely frustrate the criminal prosecution of corporate wrongdoing . . . .").

133. McConnell v. FEC, 540 U.S. 93, 205 (2003).

134. *See* United States v. Troxler Hosiery Co., 681 F.2d 934, 935 n.1 (4th Cir. 1982) ("A corporation does not have the same right not to incriminate itself as does a natural person, but it does enjoy the same rights as individuals to trial by jury."); United States v. R.L. Polk & Co., 438 F.2d 377, 379 (6th Cir. 1971) (acknowledging "the fundamental principle that corporations enjoy the same rights as individuals to trial by jury").

135. *See* Muniz v. Hoffman, 422 U.S. 454, 477 (1975) (declining to decide whether organizations are ever entitled to a criminal jury trial).

136. 512 U.S. 821, 837 n.5, 838 (1994).

137. *Id.* at 837 n.5.

138. U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

defendants accused of "serious" crimes.[139] The original ground for this distinction was the common law, which had allowed certain crimes to be tried by justices of the peace,[140] but this common law standard fell into disfavor by the early twentieth century. Instead, the Supreme Court began looking to "the severity of the [statutory maximum] penalty" for a crime to determine whether the crime was "serious."[141] The Court, however, failed to set any standard to guide this inquiry until 1966. In *Cheff v. Schnackenberg*,[142] the Court adopted the definition of "petty" crime then used in 18 U.S.C. § 1—"[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both"[143]—to hold that a defendant given a six-month sentence for criminal contempt was not entitled to a jury because the charged crime was not serious.[144]

Two years later, in *Duncan v. Louisiana*,[145] the Court abandoned its reliance on 18 U.S.C. § 1's definition of "petty." Although it did not settle "the exact location of the line between petty offenses and serious crimes," it held that a crime punishable by two years in prison was sufficiently serious to merit a jury trial.[146] In *Baldwin v. New York*,[147] the Court did draw the line, ruling that the "near-uniform judgment of the Nation" was that a defendant was entitled to a criminal jury trial when his potential sentence exceeded six months in prison.[148] This six-month rule remains the standard today,[149] although a

139. *See* Callan v. Wilson, 127 U.S. 540, 549 (1888) ("The third article of the Constitution provides for a jury in the trial of 'all crimes, except in cases of impeachment.' The word 'crime,' in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offences of a serious or atrocious character.").

140. *See id.* at 552-53.

141. District of Columbia v. Clawans, 300 U.S. 617, 625 (1937).

142. 384 U.S. 373 (1966).

143. 18 U.S.C. § 1 (1964) (current version at 18 U.S.C. §§ 19, 3571 (2000)).

144. *Cheff*, 384 U.S. at 379-80. In contempt cases, statutory law typically sets the maximum penalty. When there is no statutory maximum, the Supreme Court has held that a court should look to the penalty actually imposed in determining whether the charged offense was serious or petty. *See, e.g.*, Muniz v. Hoffman, 422 U.S. 454 (1975); Codispoti v. Pennsylvania, 418 U.S. 506, 511 (1974); Frank v. United States, 395 U.S. 147, 149 (1969); Bloom v. Illinois, 391 U.S. 194, 211 (1968); *Cheff*, 384 U.S. 373.

145. 391 U.S. 145 (1968).

146. *Id.* at 161.

147. 399 U.S. 66 (1970).

148. *Id.* at 72-73.

149. *See, e.g.*, *Codispoti*, 418 U.S. at 512 ("[O]ur decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six

defendant facing a statutory maximum sentence of six months or less may be entitled to a jury trial in certain instances.[150]

2. *When a Charge Against an Organization Is Serious*

This lack of clarity in establishing an individual's right to a jury trial complicates the task of discerning when organizations are entitled to a jury. Organizations, of course, are never subject to imprisonment—only fines, restitution, forfeiture, notice to victims, and probation.[151] Thus, courts cannot rely on the six-month rule to determine whether an organization has a right to a jury trial. Instead, courts must identify other criteria to determine whether the maximum statutory fine the organization faces is "serious."

Because the six-month rule was originally based on 18 U.S.C. § 1's definition of a petty offense, using § 1 might seem to be a good way to decide when offenses committed by organizations are petty.[152] The Court, however, rejected this option in *Muniz v. Hoffman*.[153] *Muniz* involved a 13,000-member labor union charged with criminal contempt and facing a $10,000 fine.[154] At the time, § 1 set the maximum fine for a petty offense at $500,[155] and the Court concluded that "it is not tenable to argue that the possibility of a $501 fine would be considered a serious risk to a large corporation or labor union."[156]

months are serious crimes and those carrying a sentence of six months or less are petty crimes.").

150. *See* Blanton v. City of N. Las Vegas, 489 U.S. 538, 542-43 (1989).

151. 18 U.S.C. § 3551(c) (2000).

152. An alternative to using the statutory definition of a petty crime would be to look to state practice. After all, the Court ultimately justified its six-month line for individual imprisonment on that basis, *see Baldwin*, 399 U.S. at 69-72, and the Court suggested in *Blanton*, 489 U.S. at 544-45, that state practice was relevant to determining when fines were serious. Unfortunately, this approach is a dead end. Not a single state appellate court has decided when organizations are entitled to a jury trial, and only one has seriously discussed the question. *See* Dep't of Hous. Pres. & Dev. v. Deka Realty Corp., 620 N.Y.S.2d 837, 843-46 (App. Div. 1995) (discussing several federal cases on organizational jury rights before concluding that the defendant corporation had waived any jury trial right it might have possessed).

153. 422 U.S. 454, 476-77 (1975).

154. *Id.* at 477. Courts usually look to the statutory maximum penalty to determine whether a crime is "serious." Because *Muniz* involved contempt charges, however, the Court instead used $10,000, the fine actually imposed. *See supra* note 144.

155. 18 U.S.C. § 1 (1964) (current version at 18 U.S.C. §§ 19, 3571 (2000)).

156. *Muniz*, 422 U.S. at 477.

Indeed, given the union's immense size and resources, even the $10,000 fine was not so serious as to require a jury trial.[157]

In addition to abandoning reliance on § 1, *Muniz* also suggested a subtle shift in the Court's approach to seriousness, at least for organizations. Prior to *Muniz*, a "serious" crime was one that society (as reflected by Congress) viewed as serious: a statutory maximum sentence of over six months simply indicated that society found the crime serious.[158] In *Muniz*, the Court viewed seriousness from the *defendant's* perspective rather than that of Congress or society: a crime was serious if the defendant could reasonably view the potential sentence as a serious deprivation.[159] Under the former approach, the identity and resources of a particular defendant are irrelevant. Under the latter approach, they may be decisive.

Ironically, the Court provided no guidance regarding the meaning of seriousness in *International Union, United Mine Workers v. Bagwell*,[160] the only case in which it has explicitly recognized an organization's Sixth Amendment right to a jury trial. Like *Muniz*, *Bagwell* involved contempt sanctions against a labor union.[161] The fines at issue in *Bagwell*, however, were considerably higher than the $10,000 at issue in *Muniz*: a penalty of over $64 million was initially levied and was later reduced to $52 million.[162] The Court recognized that this amount was serious, but it failed to give any guidance on how this determination should be made in future borderline cases: "We need not answer today the difficult question where the line between petty and serious contempt fines should be drawn, since a $52 million fine unquestionably is a serious contempt sanction."[163] Thus, *Bagwell* established that organizations have a right to a jury trial in at least some circumstances but gave no indication of how far this right extends.

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157. *Id.* After *Muniz*, Congress amended the definition of a "petty" crime to include all crimes with a potential fine of no more than $5000 for an individual or $10,000 for an organization. Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, § 8, 98 Stat. 3134, 3138 (codified as amended at 18 U.S.C. § 19). In one case, the Court suggested that it might use this amended definition to determine the petty/serious threshold. *Blanton*, 489 U.S. at 544-45.

158. *See, e.g.*, District of Columbia v. Clawans, 300 U.S. 617, 627-28 (1937) (discussing Congress's judgment of appropriateness in sentencing).

159. 422 U.S. at 477.

160. 512 U.S. 821 (1994).

161. *Id.* at 823.

162. *Id.* at 824, 837. Because *Bagwell* was a contempt case, the Court again looked to the fine imposed, rather than to the statutory maximum fine, to determine seriousness. *See supra* note 144.

163. *Bagwell*, 512 U.S. at 838 n.5.

Despite this uncertainty, the decision in *Bagwell* coincides with the Court's overall organizational rights jurisprudence. As discussed above, the Court has granted rights to organizations for two reasons: (1) to protect something of independent social or constitutional value, and (2) to protect the rights of individuals within organizations.[164] Granting organizations a right to a jury provides something of independent constitutional value: a general safeguard against government oppression.[165] In addition, granting jury rights to organizations may also be necessary to protect the rights of individuals, as criminal charges against an organization inevitably affect the individuals who own or participate in the organization.

C. *Possible Solutions to the Dilemma of Organizational Jury Rights*

In the absence of Supreme Court guidance, lower courts faced with determining when an organization is entitled to a jury trial have employed two tests: the case-by-case approach, which considers seriousness from the organization's perspective, and the bright-line approach, which considers seriousness from an objective standpoint. Although courts seem to favor the case-by-case approach, the bright-line approach may be superior: it is easier to apply and closely resembles the Court's six-month rule for deciding when individuals are entitled to a jury.

1. *The Case-by-Case Approach*

The leading example of the case-by-case approach is *United States v. Troxler Hosiery Co.*,[166] which held that the seriousness of the crime should be based in part on the defendant organization's assets. The Fourth Circuit invoked the Supreme Court's decision in *Muniz* that a $10,000 fine, although "serious" under the statute, was insufficient to trigger a right to a jury trial given that the defendant was a large union. The court read *Muniz* to require "that the right to a jury trial be gauged, somehow, according to the ratio of the fine imposed and the defendant's ability to pay."[167] Thus, it suggested that an organization has a right to a jury when the fine becomes "of such magnitude as to constitute a

164. *See supra* text accompanying notes 128-129.

165. Duncan v. Louisiana, 391 U.S. 145, 155 (1968) ("A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.").

166. 681 F.2d 934 (4th Cir. 1982). Although *Troxler Hosiery* concerned sentencing for contempt, the court's language suggests that the decision applies to organizational sentencing more broadly. *Id.*

167. *Id.* at 936 n.2.

serious deprivation" for the defendant.[168] To decide whether the threatened fine of $80,000 would impose a serious deprivation, the court looked at the steps the defendant (with a net worth of $540,000) would have to take to acquire the necessary cash, and it concluded that the fine was not so serious as to require a jury trial.[169]

Other courts have also adopted the case-by-case approach. Notably, in *United States v. NYNEX Corp.*, the District Court for the District of Columbia held that a potential $1 million fine was not serious enough to implicate the Sixth Amendment because "[s]uch a fine is simply not serious to a corporation of NYNEX's magnitude. A $1,000,000 fine would, for example, constitute one-tenth of one percent of NYNEX's average annual net income of over $1 billion."[170] Likewise, the Sixth Circuit in *United States v. Yang* considered the threatened fine in light of the organization's assets, liabilities, ownership structure, and net annual profit to determine whether the organization was entitled to a jury.[171] The court emphasized that the defendant was a closely held corporation and that the threatened $2 million fine would be more than twenty times its annual net profit. The high fine thus rendered the crime serious enough to entitle the corporation to a jury.[172]

The best argument for the case-by-case approach is the Supreme Court's decision in *Muniz*. Although *Muniz* does not explicitly endorse this approach, it implies that a judge must consider the nature and size of the defendant organization when determining whether the charged offense is serious.[173] This approach also has certain practical advantages. It better accounts for the great variety in organization size and type than would a predetermined petty/serious cut-off: for example, a $100,001 fine might be negligible for a large multinational but catastrophic for a mom-and-pop.[174] More prosaically, the case-by-case approach avoids the periodic need to adjust a fine threshold for inflation.[175]

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168. *Id.* at 937.

169. *Id.* at 937-38.

170. 781 F. Supp. 19, 27 (D.D.C. 1991).

171. 144 F. App'x 521, 523-24 (6th Cir. 2005); *see also supra* text accompanying notes 31-32 (summarizing *Yang*).

172. *Yang*, 144 F. App'x at 523-24.

173. 422 U.S. 454, 477 (1975) (reasoning that the "circumstances" of the organization may be relevant to whether it is entitled to a jury).

174. *See NYNEX*, 781 F. Supp. at 28 n.12 (criticizing the Second Circuit's $100,000 petty/serious line).

175. *See id.*

Yet this approach also has its problems. Its flexibility clashes with the Court's six-month bright-line approach to individual jury rights. It could also mire courts in complicated efforts to determine an organization's size and assets. And, perhaps most importantly, it could foster disparity among lower courts about an important constitutional right, thereby inviting unproductive litigation.

2. *The Bright-Line Approach*

The primary example of a bright-line approach to organizational jury rights is *United States v. Twentieth Century Fox Film Corp.*, in which the Second Circuit held that an organization is entitled to a jury trial whenever it faces a penalty exceeding $100,000.[176] For fines of $100,000 or less, the court indicated that it would "remain appropriate to consider whether the fine has such a significant financial impact upon a particular organization as to indicate that the punishment is for a serious offense, requiring a jury trial."[177] This system, the court argued,

> keeps faith with the core principle . . . that the substantiality of the . . . penalty determines the availability of the right to a jury. . . . [A] large fine is a punishment of significance, and at some point the amount of a fine indicates that an offense is serious, no matter how substantial the financial reserves of the contemnor.[178]

In other words, the Second Circuit reasoned that the seriousness of the organizational fine should be assessed objectively, not from the defendant's perspective.

When deciding upon the seriousness threshold, the court began with $500,000[179]—the lowest statutory maximum that an organization charged with a felony could face—and concluded that "some significant portion of this figure is the appropriate threshold for determining an organization's right to a jury trial."[180] It settled on $100,000.[181]

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176. 882 F.2d 656, 663 (2d Cir. 1989). Although the language of *Fox Film* applies generally, its holding is limited to criminal contempt cases. *Id.* at 661-65.

177. *Id.* at 665.

178. *Id.* at 664.

179. Under 18 U.S.C. § 3571 (2000), the statutory maximum fine for a felony committed by an organization is always $500,000 but may be higher.

180. *Fox Film*, 882 F.2d at 665.

181. *Id.*

The $100,000 threshold has an additional logic, though the court did not mention it in *Fox Film*. As discussed, an individual is entitled to a jury trial whenever he faces a possible sentence of more than six months.[182] Because the maximum prison sentence for any class of misdemeanor is one year,[183] the petty/serious cut-off for imprisonment is one-half of the maximum misdemeanor sentence. Notably, the baseline statutory maximum faced by an organization charged with a class A misdemeanor not resulting in death is $200,000.[184] Thus, *Fox Film*'s $100,000 line, like the six-month line, is half of the typical maximum misdemeanor sentence.

Fox Film's $100,000 bright-line approach, therefore, nicely parallels the court's six month bright-line rule, even if it does depart somewhat from *Muniz*'s focus on the impact of the fine on a particular defendant. It also relieves courts of the administrative burden of determining how "serious" the fine would be to the particular organization, at least for the large percentage of cases in which the potential fine is above $100,000.[185]

One potential disadvantage of the bright-line approach is that huge corporations facing what are only moderate fines compared to their net worth would always have a right to a jury trial, while smaller organizations would have to undergo the case-by-case analysis. This state of affairs, however, might not be as unjust as it may appear at first glance. A prominent corporation charged with criminal activity will often face damage to its reputation far more costly than any fine[186]: share prices drop, creditors become wary, and customers lose goodwill. Thus, a criminal charge may be "serious" even when the threatened fine would not be a blip in the corporation's balance book, as long as the alleged crime is significant enough to attract public attention. If this is so, a single bright-line standard that does not distinguish between large and small firms might be preferable. In addition, the bright-line approach would still provide for a factual inquiry into whether fines of $100,000 or less were serious in the particular case, allowing courts to account for the impact of such fines on more modest organizations.

In summary, neither approach to organizational jury rights is flawless. The case-by-case approach has greater support in the case law, but the bright-line

182. *See supra* text accompanying notes 142-150 (discussing the development of this six-month rule).

183. 18 U.S.C. § 3559(a)(6).

184. *Id.* § 3571(c)(5). As with a felony, this penalty can be increased to the maximum provided by the statute setting forth the offense, or to twice the gain or loss caused by the offense. *Id.*

185. The defendant always faces a potential fine above $100,000 when charged with a felony or class A misdemeanor. *Id.* § 3571.

186. *See* Cohen, *supra* note 52, at 279.

approach is easier for courts to administer and for businesses to understand, and it provides a more objective and consistent means of gauging the seriousness of a crime. For these reasons, the bright-line approach appears to be the better of the two, even if it has not seen much use in the courts.

IV. *BOOKER* AND THE FUTURE OF THE ORGANIZATIONAL GUIDELINES

This Part considers the full implications of *Booker* for the organizational guidelines and argues that the guidelines, in their current form, cannot and should not be made mandatory.

A. *Can the Organizational Guidelines Be Mandatory After* Booker*?*

Today, Congress and legal commentators are considering a variety of means by which to circumvent *Booker* and restore mandatory sentencing guidelines.[187] The two primary avenues for achieving such a restoration are judicial and legislative. Neither the courts nor Congress, however, will find an easy fix. Any attempt to make the guidelines mandatory again—consistent with *Booker*—would be at best highly impractical, and perhaps impossible.

When sentencing organizations, a judge might increase the weight she gives to the organizational guidelines, making them effectively mandatory. After all, judges still must take the guidelines into account when sentencing,[188] and some courts have declared that the sentencing guidelines should carry more weight than other sentencing factors.[189] A judge might suggest that making the guidelines "effectively mandatory" is appropriate because *Booker* addressed only individual defendants and because Congress sought to make the guidelines binding to the fullest extent that the Constitution permits.

This approach has two potential problems. First, as previously established, both *Booker*'s constitutional holding and its statutory remedy apply to the organizational guidelines. Second, applying the organizational guidelines as if they were mandatory likely violates congressional intent, at least as understood in *Booker*. Indeed, the Court emphasized that "a mandatory system in some

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187. *See, e.g.*, Booker *Hearing*, *supra* note 33 (statement of William W. Mercer).

188. *See* United States v. Booker, 543 U.S. 220, 264 (2005) ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.").

189. *See, e.g.*, United States v. Jiménez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006) (en banc).

cases and a nonmandatory system in others" would be inconsistent with congressional intent.[190]

Instead, one might argue that restoration of the guidelines to mandatory status could only properly occur by congressional statute. For example, Congress could reenact § 3553(b)(1) but limit its application to the organizational guidelines.[191] This approach, however, would not be constitutional because *Booker*'s reasoning applies to the organizational guidelines with the same force that it applies to the individual guidelines, at least in the vast majority of cases. When sentencing organizations, judges frequently find the facts—such as the loss caused by the crime and the level of involvement of upper-level personnel—that determine both the base fine and culpability score of the defendant, factors that ultimately determine the possible sentences.[192] If the organizational guidelines were mandatory, whenever the organization was entitled to a jury trial, judge-found facts could increase the potential sentence, in violation of the Constitution.

Under either the bright-line or the case-by-case approach, the vast majority of organizations sentenced under the guidelines *would* be entitled to a jury trial. *Fox Film*[193] holds that all organizations facing a potential fine of more than $100,000 are entitled to a jury. Yet every organization sentenced under the guidelines faces a potential fine above $100,000: the guidelines apply only to organizations convicted of a felony or class A misdemeanor,[194] who therefore face a statutory maximum fine of at least $200,000.[195] Thus, under the bright-line approach, every organization sentenced under the guidelines has a right to a jury, and mandatory application of the organizational guidelines would violate the organization's Sixth Amendment rights.[196]

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190. *Booker*, 543 U.S. at 266-67.

191. Congress might also restore the guidelines to mandatory status by altering them so that they would rely solely on facts found by juries (or admitted by the defendant in a plea agreement) rather than on facts found by judges, thereby providing defendants with their full right to a jury trial. The *Booker* majority, however, rejected such a system for individual defendants as "troubling," *id.* at 256, and "far more complex than Congress could have intended," *id.* at 254; *see id.* at 252-58.

192. *See supra* text accompanying notes 80-82.

193. United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 663 (2d Cir. 1989); *see also supra* text accompanying notes 176-184 (discussing *Fox Film* and the bright-line approach).

194. U.S. SENTENCING GUIDELINES MANUAL § 1B1.9 (2005); *see also supra* text accompanying note 99.

195. 18 U.S.C. § 3571(c)(5) (2000); *see also supra* text accompanying notes 57-58.

196. Although *Fox Film*'s $100,000 bright line is the only line proposed by a federal court, the bright line could perhaps be drawn at a higher level—say, $1 million. With a $1 million

The case-by-case approach is more amenable to mandatory organizational guidelines than the bright-line approach, but not by much. As discussed in *Muniz*, *Troxler Hosiery*, *NYNEX*, and *Yang*, this approach requires courts to make some comparison between the size of the potential fine and the organization's assets and ability to pay.[197] Thus, a court may deny a jury trial to an organization facing a significant fine when that fine is not "serious" because the defendant is a large, wealthy organization.[198] In reality, however, very few organizations sentenced under the guidelines have the financial resources of a corporation like NYNEX. The vast majority of sentenced organizations are small, closely held corporations with limited assets[199] and are often unable to pay the fine imposed.[200] Thus, even under the case-by-case approach, Congress could only constitutionally reinstate the guidelines' mandatory status for a small fraction of the organizations sentenced each year.[201]

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threshold, a significant fraction of defendants (perhaps a majority) would not automatically be entitled to a jury. If these defendants were then denied jury trials, Congress could perhaps reinstate mandatory organizational guidelines for a large fraction of defendants. No one, however, has seriously suggested such a harsh rule, given that it would leave many small firms facing a devastating fine without a right to a jury trial—almost certainly a Sixth Amendment violation. Accordingly, *Fox Film* proposed evaluating defendants below the bright line on a case-by-case basis, 882 F.2d at 665, a solution that any court using the bright-line rule would be sure to adopt. Setting the bright line high enough would simply cause the bright-line approach to break down into the case-by-case approach.

197. Muniz v. Hoffman, 422 U.S. 454, 477 (1975); United States v. Yang, 144 F. App'x 521 (6th Cir. 2005); United States v. Troxler Hosiery Co., 681 F.2d 934 (4th Cir. 1982); United States v. NYNEX Corp., 781 F. Supp. 19 (D.D.C. 1991); *see also supra* notes 166-175 and accompanying text (examining the case-by-case approach).

198. *See Muniz*, 422 U.S. at 477; *Yang*, 144 F. App'x 521; *Troxler Hosiery*, 681 F.2d 934; *NYNEX*, 781 F. Supp. 19.

199. AD HOC REPORT, *supra* note 68, at 26; *see also supra* text accompanying notes 94-98 (describing the characteristics of organizations sentenced under the guidelines).

200. In fiscal year 2005, for instance, over 30% of organizations had their sentences reduced because of an inability to pay. 2005 SOURCEBOOK, *supra* note 2, at 125 tbl.53 (pre-*Booker* statistics); *id.* at 343 tbl.53 (post-*Booker* statistics).

201. Even if Congress leaves the organizational guidelines in their present nonmandatory state, they still may run afoul of the Sixth Amendment. *See* Phillip C. Zane, Booker *Unbound: How the New Sixth Amendment Jurisprudence Affects Deterring and Punishing Major Financial Crimes and What To Do About It*, 17 FED. SENT'G REP. 263 (2005). Courts are authorized to sentence organizations convicted of a felony up to the greatest of: (1) the maximum fine in the statute setting forth the offense, (2) $500,000, and (3) twice the gain or loss caused by the crime. 18 U.S.C. § 3571(c)-(d) (2000). For especially harmful crimes, the fine recommended by the organizational guidelines often exceeds both $500,000 and the maximum in the statute setting forth the offense. *See* Zane, *supra*, at 264. Thus, for a court to impose this fine, it must first make the factual finding that the fine is no greater than twice the gain or loss caused by the crime, in violation of the *Apprendi* rule.

B. *Should the Organizational Guidelines Be Mandatory After* Booker?

Even if the organizational guidelines could be made mandatory again consistent with *Booker*'s holding, they should not be. First, the organizational guidelines' fine levels possess only the scantest legal, normative, empirical, or historical support. During the drafting process, the Commission used then-statutory maximums to set a few low and high base fines.[202] It then set the base fines for other offense levels by extrapolation, using what limited historical data it had[203] along with the sentencing patterns for individuals.[204] The Commission decided what factors should be considered in sentencing and what multiplier levels were appropriate using a combination of past data, practical insight, and informed judgment[205]—in other words, enlightened guesswork.

Moreover, recall that the Commission's concerns about its own ability to set appropriate fine levels led it to exclude certain offenses, such as environmental and food and drug crimes, from the guidelines' fine system entirely.[206] The same concerns would suggest that judges should maintain some freedom to depart from the guidelines' fines, especially given the variety and complexity of organizational cases. As an added benefit, allowing judges the flexibility to depart from the guidelines as necessary in particular cases would signal to the Commission which guideline provisions are in need of revision.[207]

Three basic arguments are offered for making the organizational guidelines binding—justifications very similar to those for making the individual guidelines mandatory. First, courts are too soft on white-collar and corporate crime, and mandatory guidelines are necessary to increase penalties and ensure

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202. For example, the Commission set the lowest base fine (offense level six and below) at $5000 because, absent any aggravating or mitigating factors, this baseline would yield a sentencing range of $5000 to $10,000, and $10,000 is the maximum fine that can be imposed for most class B misdemeanors. SUPP. REPORT, *supra* note 45, at 13.

203. *See id.* at 2; *see also* Cohen, *supra* note 52, at 253-64 (providing data on monetary sanctions for convicted organizations from 1984-1987, 1988, and 1990).

204. *See* SUPP. REPORT, *supra* note 45, at 7, 10, 13.

205. *Id.* at 10; Nagel & Swenson, *supra* note 65, at 225-26. For an especially harsh critique of the "arbitrary" nature of the organizational guidelines, see Jeffrey S. Parker, *Rules Without . . . : Some Critical Reflections on the Federal Corporate Sentencing Guidelines*, 71 WASH. U. L.Q. 397 (1993).

206. SUPP. REPORT, *supra* note 45, at 7-8; *see also supra* notes 100-101 and accompanying text.

207. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 cmt. background (2005) (providing the original introduction to the sentencing guidelines and describing departure as a means by which the guidelines should evolve).

that corporate criminals are appropriately punished. Second, mandatory guidelines are necessary to reduce disparity in sentencing. Third, mandatory guidelines are necessary to give organizations incentives to create compliance programs.[208] Each of these arguments is unconvincing.

Although organizational penalties have increased drastically since the organizational guidelines were introduced,[209] this increase cannot be exclusively attributed to the guidelines' binding character. Indeed, organizational sentencing levels had been increasing before the guidelines were adopted,[210] and the post-guidelines increase might have been caused by any number of factors, such as more harmful organizational crime, increased prosecution of white-collar crimes, or a greater willingness by judges to impose harsh sentences. Unfortunately, the data are too spotty to allow any strong conclusions,[211] and studies have reached different results. One study of data from 1987 through 1995 found that the guidelines had "no significant effect on the levels or structure of corporate monetary sanctions actually imposed, after controlling for the harm attributed to the offense."[212] In contrast, another study on publicly traded firms sentenced during roughly the same period concluded that, controlling for both crime severity and case type, the guidelines had significantly increased criminal fines.[213]

This second study also found, however, that while total sanctions had increased, the guidelines were not responsible for all of the increase.[214] This finding suggested two additional conclusions. First, other factors (for which the study had not controlled) might well have been driving the increase in sanctions: for example, judges might have been cooperating with the movement toward higher sanctions even when the guidelines' fines did not

208. *See supra* note 68 and accompanying text.

209. *See supra* text accompanying notes 91-92.

210. *See supra* text accompanying notes 52-53.

211. *See* AD HOC REPORT, *supra* note 68, at 25 ("The data [do] not provide an adequate basis for identifying trends because the sample sizes are generally small, the fine guidelines are not applicable in many cases, and the Commission does not receive data on every organizational case sentenced.").

212. Jeffrey S. Parker & Raymond A. Atkins, *Did the Corporate Sentencing Guidelines Matter? Some Preliminary Empirical Observations*, 42 J.L. & ECON. 423, 424 (1999).

213. Cindy R. Alexander et al., *Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms*, 42 J.L. & ECON. 393, 418 (1999) [hereinafter Alexander et al., *Criminal Sanctions*]; *see also* Cindy R. Alexander et al., *The Effect of Federal Sentencing Guidelines on Penalties for Public Corporations*, 12 FED. SENT'G REP. 20 (1999) (noting an apparent increase in organizational sentences).

214. Alexander et al., *Criminal Sanctions*, *supra* note 213, at 415.

apply.[215] Second, in cases in which guideline fines were mandatory, judges might have responded by decreasing non-fine sanctions. In other words, whenever the guidelines required a higher fine than a judge thought appropriate, he might compensate by reducing the required amount of restitution or other remedies.[216] Thus, the example that the organizational guidelines set, not their binding status, may have driven the increase.

Second, there is no indication that mandatory guidelines reduce organizational sentencing disparity. A recent study relying on data from 1991 to 2001 found a good deal of unexplained variance in organizational sentences, leading the authors to conclude that significant disparity haunted organizational sentencing even under the mandatory guidelines.[217] The authors were not able to determine whether the sentencing disparity was less than before the organizational guidelines were created—that is, whether the guidelines were of any use in decreasing disparity. Moreover, the apparent similarity between guideline and non-guideline organizational sentences[218] suggests that if there is disparity in organizational sentencing, mandatory guidelines do little to correct it. As noted, the total sanctions judges impose on convicted organizations are roughly in accordance with the organizational guidelines even when the guidelines' fine levels do not apply.[219] Thus, judges appear to reach roughly the same sentences regardless of whether the organizational guidelines are mandatory or advisory: if the guidelines do reduce disparity in sentencing, they need not be mandatory to accomplish this reduction.

Finally, mandatory organizational guidelines are not needed to induce organizations to create compliance programs. Since the organizational guidelines' creation, only three organizations have had their sentences reduced for compliance,[220] perhaps because the Department of Justice restricts prosecution largely to organizations without effective compliance programs.[221]

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215. *Id.*

216. *Id.* at 414-15.

217. *See* Piquero & Davis, *supra* note 98, at 652. The authors took into account a wide variety of legal and extralegal variables, including the relevant base fine, the organization's tolerance of misconduct, the size of the organization, prior misconduct, the organization's solvency, its ownership structure, and whether it had a compliance program. *See id.* at 646-50.

218. *See supra* text accompanying note 214.

219. Alexander et al., *Criminal Sanctions*, *supra* note 213, at 415; *see also supra* text accompanying notes 214-216.

220. AD HOC REPORT, *supra* note 68, at 26.

221. The Department of Justice (DOJ) has incorporated the guidelines' compliance standards into its *Principles of Federal Prosecution of Business Organizations*, used by the DOJ and U.S.

Corporate directors, therefore, adopt compliance programs primarily to prevent the government from prosecuting the corporation[222] and to prevent themselves from becoming civilly liable to their shareholders.[223] These incentives to maintain compliance programs do not evaporate with the shift to advisory guidelines.

Thus, the complexity of organizational crime and the artificiality of the organizational guidelines' fine levels counsel strongly in favor of allowing judges some flexibility in setting fines, and no convincing rationale exists for denying them such flexibility. Indeed, some evidence suggests that when judges are denied flexibility in setting organizational fines, they simply compensate by adjusting the non-fine sanctions, such as the amount of restitution required.[224] Congress, the Commission, and the courts should not go searching for ways to make the organizational guidelines mandatory again; they are best left advisory.

CONCLUSION

Booker severed and excised 18 U.S.C. § 3553(b)(1), the provision that made all of the sentencing guidelines mandatory. Its holding clearly applies to the organizational guidelines and therefore rendered them nonmandatory as well. After *Booker*, Congress, lower federal courts, and the Sentencing Commission cannot make the organizational guidelines, as currently drafted, mandatory again. The vast majority of organizations sentenced under the guidelines are small. The potential fines they face are large and, hence, serious. Most, if not all, of these organizations are entitled to a jury trial under the Sixth

Attorneys to decide whether or not to charge an organization with the crimes of its agents. Memorandum from Larry D. Thompson, Deputy Attorney Gen., to Heads of Dep't Components, U.S. Attorneys 3, 8-9, 10 & n.6, 11 (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/business_organizations.pdf.

222. *See* AD HOC REPORT, *supra* note 68, at 27 (identifying "lenient treatment under government policies" as the primary benefit of a compliance program).

223. Corporate directors who fail to create a compliance program may have breached their duty of care if the lack of a program leads to prosecution or a higher fine. This possibility was established by *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996). In *Caremark*, Chancellor Allen noted that the "Guidelines offer powerful incentives for corporations today to have in place compliance programs." *Id.* at 969. Directors who ignored these incentives would put their corporation at risk of high criminal fines and assorted other costs. Thus, Chancellor Allen concluded that a duty to create a compliance system is part of the duty of care. *Id.* at 970.

224. *See, e.g.*, Alexander et al., *Criminal Sanctions*, *supra* note 213, at 414-15; *see also supra* text accompanying notes 214-216.

Amendment, and *Booker* prohibits courts from sentencing them using mandatory guidelines together with judge-found facts.

Yet even if some sentenced organizations do not have a jury right, Congress and the courts should keep the organizational guidelines advisory. Organizational sentencing is complex and calls for judicial flexibility. The purposes of organizational sentencing are best served if judges can depart from the guidelines' recommendations when those recommendations would be inappropriate in the particular case. *Booker* provides courts with this pragmatic flexibility, and neither Congress nor the courts should eliminate it.